KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

File number:	**KSC-CC-2022-13** **KSC-CC-2022-14**
Before:	**The Specialist Chamber of the Constitutional Court** Judge Vidar Stensland, Presiding Judge Roumen Nenkov Judge Romina Incutti
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File name:	Referral by Jakup Krasniqi to the Constitutional Court Panel Concerning the Legality of Charging Joint Criminal Enterprise Referral by Kadri Veseli to the Constitutional Court Panel Concerning Decision of the Appeals Panel on Challenges to the Jurisdiction of the Specialist Chambers
Classification:	Public

Decision on the Referral of Jakup Krasniqi Concerning the Legality of Charging Joint Criminal Enterprise and the Referral of Kadri Veseli Concerning Decision of the Appeals Panel on Challenges to the Jurisdiction of the Specialist Chambers

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Applicants

Jakup Krasniqi

Kadri Veseli

Hashim Thaçi

Specialist Prosecutor

Jack Smith

The Specialist Chamber of the Constitutional Court

Composed of

Vidar Stensland, Presiding Judge
Roumen Nenkov, Judge
Romina Incutti, Judge

Having deliberated remotely delivers the following Decision

I. PROCEDURE

A. REFERRALS

1. On 28 February 2022, Mr Jakup Krasniqi and Mr Kadri Veseli (the "Applicants") lodged with the Specialist Chamber of the Constitutional Court (the "Chamber")[1] referrals under Article 113(7) of the Constitution of the Republic of Kosovo (the "Constitution") and Article 49(3) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (the "Law").[2] Mr Krasniqi (the "first Applicant") was represented by Ms Venkateswari Alagendra and Mr Aidan Ellis, and Mr Veseli (the "second Applicant") was represented by Mr Ben Emmerson and Mr Andrew Strong.

2. In their respective referrals, the Applicants complained about violations of their fundamental rights in relation to the criminal proceedings against them, taking place before the Specialist Chambers (the "SC"). In particular, they submitted that their

[1] With regard to the assignment of the Constitutional Court Panel under Article 33(3) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), see KSC-CC-2022-13, F00002, Decision to assign judges to a Constitutional Court Panel, public, 1 March 2022; KSC-CC-2022-14, F00002, Decision to assign judges to a Constitutional Court Panel, public, 1 March 2022.
[2] KSC-CC-2022-13, F00001, Krasniqi Defence referral to the Constitutional Court Panel on the legality of charging joint criminal enterprise, public, 28 February 2022 ("first Applicant's referral"), with Annex 1, public; KSC-CC-2022-14, F00001, Constitutional referral by Kadri Veseli against "Decision on appeals against 'Decision on motions challenging the jurisdiction of the Specialist Chambers'", public, 28 February 2022 ("second Applicant's referral"), with Annex 1, public.

prosecution based on certain charges violated their fundamental rights under Article 33 of the Constitution and Article 7 of the European Convention on Human Rights (the "Convention"). The second Applicant also complained that there had been a violation of his rights as guaranteed by Articles 19, 24 and 55 of the Constitution, Article 14 of the Convention, and Articles 15 and 26 of the International Covenant on Civil and Political Rights (the "ICCPR").[3]

B. JOINDERS

3. On 10 March 2022, Mr Hashim Thaçi, who also had lodged a referral with the Chamber,[4] filed two joinders, one to the referral of the first Applicant, and the other to the referral of the second Applicant.[5] In the joinders, Mr Thaçi stated that he "agrees with the submissions presented in [the two referrals] […]", and that he "[…] joins [the two referrals], and supports the request for relief set out therein".[6]

C. WRITTEN SUBMISSIONS

4. On 30 March and 8 April 2022, the SPO and the Applicants filed their written submissions regarding the referrals,[7] addressing questions put to them by the

[3] Mr Krasniqi's Referral, paras 1-2, 16, 76; see KSC-CC-2022-13, F00005, Decision on further submissions, public, 15 March 2022, para. 3. Mr Veseli's Referral, paras 7, 19, 22, 24, 31, 33, 48, 64, 66, 70-72, 88, 91; see KSC-CC-2022-14, F00005, Decision on further submissions, public, 15 March 2022, paras 3-5.

[4] KSC-CC-2022-15, F00001, Referral to the Constitutional Court Panel on the violation of Mr Thaçi's fundamental rights to an independent and impartial tribunal established by law, and to a reasoned opinion, public, 28 February 2022.

[5] KSC-CC-2022-13, F00003, Thaçi's joinder to the Krasniqi Defence referral to the Constitutional Court Panel on the legality of charging joint criminal enterprise, public, 10 March 2022 ("Joinder to the first Applicant's referral"); KSC-CC-2022-14, F00003, Thaçi's joinder to the constitutional referral by Kadri Veseli against "Decision on appeals against 'Decision on motions challenging the jurisdiction of the Specialist Chambers'", public, 10 March 2022 ("Joinder to the second Applicant's referral").

[6] Joinder to the first Applicant's referral, paras 3, 5; Joinder to the second Applicant's referral, paras 3-4.

[7] KSC-CC-2022-13, F00006, Prosecution response to Decision on further submissions in relation to Krasniqi referral (KSC-CC-2022-13/F00005), public, 30 March 2022, with Annex 1, public ("SPO's submissions regarding the first Applicant's referral"); KSC-CC-2022-14, F00006, Prosecution response to Decision on further submissions in relation to Veseli referral (KSC-CC-2022-14/F00005), public,

Chamber pursuant to Rule 15(2) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court (the "Rules").[8]

D. EXAMINATION OF THE REFERRALS

5. Given the similarity of the Applicants' referrals, the Chamber, in the interests of procedural efficiency, decides to examine them jointly pursuant to Rule 15(6) of the Rules.

6. The Chamber turns to the examination of the referrals, based on the referrals and the aforementioned written submissions of the SPO and the Applicants. The Chamber refers to the facts of the case and the submissions of the SPO and the Applicants insofar as relevant for the Chamber's assessment of the referrals.

II. THE FACTS

A. INDICTMENT

7. On 26 October 2020, the pre-trial judge confirmed an indictment against the Applicants, charging them with war crimes and crimes against humanity, allegedly committed between at least March 1998 and September 1999 in Kosovo and areas of northern Albania.[9] The charges, amongst others, included arbitrary detention as a war

30 March 2022, with Annex 1, public ("SPO's submissions regarding the second Applicant's referral"); KSC-CC-2022-13, F00009, Krasniqi Defence further submissions in relation to the referral to the Constitutional Court Panel on the legality of charging joint criminal enterprise, public, 8 April 2022 ("first Applicant's submissions"); KSC-CC-2022-14, F00008, Veseli Defence submissions to Decision on further submissions in relation to Veseli referral (KSC-CC-2022-14-F00005), public, 8 April 2022, with Annex 1, public ("second Applicant's submissions").

[8] KSC-CC-2022-13, F00005, Decision on further submissions, public, 15 March 2022; KSC-CC-2022-14, F00005, Decision on further submissions, public, 15 March 2022. As regards the extension of the time limit for the Applicants to file their submissions, see KSC-CC-2022-13, F00008, Decision on the time limit for the submissions by the Applicant, public, 1 April 2022; KSC-CC-2022-14, F00007, Decision on the time limit for the submissions by the Applicant, public, 1 April 2022.

[9] KSC-BC-2020-06, F00026/RED, Public redacted version of decision on the confirmation of the indictment against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, public, 26 October 2020 (the public redacted version was filed on 30 November 2020) ("Confirmation

crime and enforced disappearance of persons, allegedly committed through the Applicants' participation in a joint criminal enterprise (the "JCE"), in its basic and extended forms.[10]

1. Customary International Law

8. As regards customary international law (the "CIL"), the pre-trial judge ruled that, pursuant to Article 3(2)(d) and (3), and Article 12 of the Law, the SC applied CIL in force at the time the alleged crimes had been committed.[11]

2. Arbitrary Detention and Enforced Disappearance

9. As regards the crime of enforced disappearance of persons, the pre-trial judge found that it was explicitly set out in Article 13(1)(i) of the Law, as a crime against humanity under CIL.[12] As regards arbitrary detention, the pre-trial judge stated that it was not explicitly set out in Article 14(1)(c) as a war crime under CIL.[13] However, it had existed under CIL at the relevant time. Hence, the SC could exercise jurisdiction in respect of arbitrary detention as a war crime, within the meaning of Article 14(1)(c) of the Law.[14]

3. Joint Criminal Enterprise

10. The pre-trial judge referred to Article 16(1)(a) of the Law, which provides for "committing" as one of the modes of individual criminal responsibility.[15] He then found that there was a well-grounded suspicion that the Applicants, as members of a

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decision"), paras 15, 39, 41-42, 127, 129. A further confirmed amended indictment was filed on 29 April 2022, see KSC-BC-2020-06, F00789/A05, public redacted version of amended Indictment, public, 29 April 2022.

[10] Confirmation decision, paras 15, 104, 138, 231, 418, 436, 451, 474-475, 478, 521(a), see also paras 105-115, 139-230, 419-435, 439-440, 452-463, 468-473, 476-477.

[11] Confirmation decision, para. 22.

[12] Confirmation decision, paras 23-24, see also paras 418, 436.

[13] Confirmation decision, para. 33.

[14] Confirmation decision, paras 33, 37-38, see also paras 93-97.

[15] Confirmation decision, para. 25.

JCE, in its basic form, and, in the alternative, its extended form,[16] had committed the alleged crimes, within the meaning of Article 16(1)(a) of the Law.[17]

11. Following the pre-trial judge's confirmation of the charges, the SPO, on 30 October 2020, submitted the confirmed indictment.[18] On 4 November 2021, the SPO submitted a corrected indictment, and, on 3 September 2021, it submitted a further corrected confirmed indictment.[19]

B. THE APPLICANTS' CHALLENGES TO THE SC'S JURISDICTION

12. On 15 March 2021, the Applicants filed before the pre-trial judge preliminary motions challenging the SC's jurisdiction to adjudicate the charges against them.[20] In particular, they argued, *inter alia*, that the SC had no jurisdiction in respect of JCE.[21] The second Applicant also claimed that the SC had no jurisdiction in respect of arbitrary detention and enforced disappearance.[22] He argued that these charges, also insofar as based on CIL, were outside the SC's jurisdiction.[23] On 22 July 2021, the pre-

[16] Confirmation decision, para. 478.
[17] Confirmation decision, para. 474.
[18] KSC-BC-2020-06, F00034/A01, Annex 1 to submission of confirmed indictment, strictly confidential and *ex parte*.
[19] KSC-BC-2020-06, F00045/RED, Public redacted version of 'Submission of corrected and public redacted versions of confirmed indictment and related requests', filing KSC-BC-2020-06/F00045 dated 4 November 2020, public, 18 November 2020 (the original filed on 4 November 2020); F00455/RED, 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, public, 8 September 2021, with Annex 1, public (the original filed on 3 September 2021); F00647/RED, Prosecution submission of lesser redacted versions of indictment and Rule 86(3)(b) outline, public, 28 January 2022, with Annexes 1-2, confidential (the original filed on 17 January 2022).
[20] First Applicant's referral, para. 9, referring to KSC-BC-2020-06, F00220, Krasniqi Defence preliminary motion on jurisdiction, public, 15 March 2021, with Annex 1, public ("first Applicant's preliminary motion"); second Applicant's referral, paras 17, 65, 74, referring to KSC-BC-2020-06, F00223, Preliminary motion of the defence of Kadri Veseli to challenge the jurisdiction of the KSC, public, 15 March 2021 ("second Applicant's preliminary motion").
[21] First Applicant's preliminary motion, paras 1, 70; second Applicant's preliminary motion, paras 33-34, 39(b), 54, 91-92, 163(b).
[22] Second Applicant's preliminary motion, paras 37-38, 39(b), 54, 131, 163(b).
[23] Second Applicant's preliminary motion, paras 31, 37, 39(b), 40, 53, 91, 163(b).

trial judge dismissed the Applicants' preliminary motions.[24] On 27 August 2021, the Applicants appealed against the pre-trial judge's decision.[25]

1. Customary International Law

13. The second Applicant maintained that, at the time of the alleged crimes, the applicable law had been the 1974 Constitution of the Socialist Federal Republic of Yugoslavia (the "SFRY Constitution"), next to the 1976 Criminal Code of the SFRY ("SFRY Criminal Code").[26] The SFRY Constitution, under its Articles 181 and 210, prohibited the direct application of CIL. Moreover, also under Articles 19(1) and 55 of the Kosovo Constitution, CIL did not have direct effect.[27] He also argued that the pre-trial judge had assessed this issue by reference to Article 7 of the Convention only. However, Article 7 could not determine the applicability of CIL in the internal legal order, overriding the prohibition on the direct application of CIL contained in the SFRY Constitution and the Kosovo Constitution.[28]

14. Further, the second Applicant maintained that the SC's jurisdiction was limited to the conduct criminalised under the SFRY Criminal Code, which was applicable in 1998. The SC could apply provisions of ratified international agreements only if they had a corresponding provision in the SFRY Criminal Code, or if they were more lenient to the accused than the domestic criminal law. Even if the SC could apply CIL, its application violated the principle of *lex mitior* under Article 33 of the Constitution

[24] KSC-BC-2020-06, F00412, Decision on motions challenging the jurisdiction of the Specialist Chambers, public, 22 July 2021 ("Pre-trial judge's decision"), para. 214.
[25] KSC-BC-2020-06, IA009, F00013, Krasniqi Defence appeal against decision on motions challenging the jurisdiction of the Specialist Chambers, public, 27 August 2021 ("first Applicant's appeal"), with Annex 1, public; KSC-BC-2020-06, IA009, F00010, Veseli Defence appeal against decision on motions challenging the jurisdiction of the Specialist Chambers, public, 27 August 2021 ("second Applicant's appeal"), with Annexes 1-5, public.
[26] Second Applicant's appeal, paras 3-5; second Applicant's preliminary motion, para. 7.
[27] Second Applicant's appeal, paras 4, 20, 23, 25; second Applicant's preliminary motion, paras 7, 12, 43, 46.
[28] Second Applicant's appeal, paras 26, 31-34, 39.

and Article 7 of the Convention insofar as there were other legal provisions more lenient to the accused, such as on the modes of liability.[29]

15. In this connection, the second Applicant referred to the case law of the Serbian courts finding that the constitutional framework applicable in 1998 did not allow for the direct effect of CIL, and that the SFRY Criminal Code applied.[30] It followed that an individual prosecuted in Serbia for an identical conduct could not be tried based on CIL. However, a different legal regime applied to the second Applicant only due to be being prosecuted by the SPO before the SC. This led to an unjustified difference in the application of the principle of legality under the SFRY Constitution, the Kosovo Constitution, the Convention, and the ICCPR, in breach of the right to equality before the law and prohibition of discrimination under Article 24 of the Constitution, Article 14 of the Convention, and Article 26 ICCPR.[31]

2. Arbitrary Detention and Enforced Disappearance

16. The second Applicant maintained that the charges against him were unconstitutional insofar as they were based on prohibitions under the Law, including Articles 13 and 14 of the Law, or under CIL with no counterpart in the SFRY Criminal Code applicable in 1998.[32] As regards arbitrary detention in particular, the second Applicant argued that it was not listed as a war crime in a non-international armed conflict (the "NIAC") in Article 14(1)(c) of the Law, which contained an exhaustive list of prohibited conduct.[33] In any event, arbitrary detention in a NIAC and enforced

[29] Second Applicant's appeal, paras 3, 20(b), 37, 58-59, 61, 64-65, 72, 80-82; second Applicant's preliminary motion, paras 32, 40(a), 41, 44-47, 49, 51-55, 64-67, 69, 76.
[30] Second Applicant's appeal, paras 39, 43(a), referring to Serbia, Constitutional Court, case no. Už-11470/2017, Judgment, published in the Official Gazette of the Republic of Serbia, no. 127/2020; see KSC-BC-2020-06, F00342, Veseli Defence response to Prosecution sur-reply, public, 4 June 2021, paras 2-5.
[31] Second Applicant's appeal, paras 43, 47-48, 51-54.
[32] Second Applicant's appeal, paras 3, 9, 14, 37; see second Applicant's preliminary motion, paras 20-21, 37.
[33] Second Applicant's appeal, paras 89, 91; see second Applicant's preliminary motion, paras 132, 135-137.

disappearance of persons had not constituted crimes under CIL in 1998.[34] Such charges against him were thus in breach of Article 33(1) of the Constitution and Article 7 of the Convention.[35]

3. Joint Criminal Enterprise

17. The second Applicant argued that the charges against him were unconstitutional insofar as based on modes of liability under the Law, including its Article 16, or under CIL with no counterpart in the SFRY Criminal Code applicable in 1998.[36] As regards JCE in particular, the second Applicant also argued that the Law did not provide for this mode of liability.[37] Also the first Applicant maintained that JCE did not fall within "committing" in Article 16(1)(a) of the Law, as otherwise it would amount to an expansive reading of a criminal statute to his detriment. In any event, JCE extended form could not fall within the meaning of "committed".[38]

18. Furthermore, the first Applicant argued that JCE liability had not been foreseeable and accessible to him in 1998, and that its extended form had not been part of CIL at that time.[39] Similarly, the second Applicant argued that the pre-trial judge had not adequately assessed the CIL status of the JCE extended form.[40] The pre-trial judge had also failed to consider subsequent developments as regards this mode of liability and determine a norm more lenient to the accused.[41]

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[34] Second Applicant's appeal, paras 101-115; second Applicant's preliminary motion, paras 38, 131, 144-147, 150, 158.
[35] Second Applicant's appeal, paras 7, 34; second Applicant's preliminary motion, paras 3, 5, 40(b), 57-59, 134, 136-137.
[36] Second Applicant's appeal, paras 3, 9, 14, 37; second Applicant's preliminary motion, paras 33, 91.
[37] Second Applicant's appeal, para. 72; second Applicant's preliminary motion, paras 33, 91, 94-95.
[38] First Applicant's appeal, paras 4(3), 69, 77; first Applicant's preliminary motion, paras 1, 14, 17-23, 70.
[39] First Applicant's appeal, paras 4(1),(2), 12, 54-61, 66-68; see first Applicant's preliminary motion, paras 1, 14, 24, 27-28, 39, 43, 49-50, 54, 70.
[40] Second Applicant's appeal, para. 85; second Applicant's preliminary motion, paras 33, 105.
[41] Second Applicant's appeal, para. 87; second Applicant's preliminary motion, paras 34, 115.

C. DISMISSAL OF THE APPLICANTS' CHALLENGES

19. On 23 December 2021, the Court of Appeals panel denied the Applicants' challenges to the SC's jurisdiction.[42]

1. Customary International Law

20. As regards the question of whether the Constitution prohibited the application of CIL, the appeals panel noted that Article 19(2) of the Constitution referred to "legally binding norms of international law". The appeals panel also considered that Article 19(1) of the Constitution adhered to the principle that CIL was binding on all states. Hence, there was no requirement of a corresponding provision under domestic law at the time of the alleged crimes. This was compatible with Article 7 of the Convention. It followed from the case law of the European Court of Human Rights (the "ECtHR") that a person could be found guilty for a conduct that had been criminalised under international law at the relevant time and had only later been included in domestic written legislation.[43]

21. As regards the SFRY Constitution, the appeals panel noted that, under the heading "Basic Principles", it pledged to respect "generally accepted rules of international law", which included CIL, and to fulfil its international commitments vis-à-vis international organisations to which the SFRY was affiliated.[44] Furthermore, at least some of the alleged crimes concerned a period when the 1992 Constitution of the Federal Republic of Yugoslavia (the "FRY Constitution") had been in force.

[42] KSC-BC-2020-06, IA009, F00030, Decision on appeals against "Decision on motions challenging the jurisdiction of the Specialist Chambers", public, 23 December 2021 ("Appeals decision").
[43] Appeals decision, paras 23-24, referring to ECtHR, *Penart v. Estonia* (dec.), no. 14685/04, 24 January 2006, p. 10; *Šimšić v. Bosnia and Herzegovina* (dec.), no. 51552/10, 10 April 2012, paras 23-25; *Kononov v. Latvia* [GC], no. 36376/04, ECHR 2010, paras 237-244. See also Appeals decision, para. 37. In his decision, the pre-trial judge had found that no issue arose under Article 33 of the Constitution, Article 7 of the Convention, or Article 15 ICCPR. In fact, pursuant to those provisions, the legislator could adopt the law setting out the crimes that had existed under CIL at the relevant time, even if, at that time, they had not been penalised in domestic statutes. See Pre-trial judge's decision, para. 101.
[44] Appeals decision, para. 25.

According to the FRY Constitution, CIL became a constituent part of the national legal system.[45] In any event, the Constitution had superseded any constitution previously applicable in the territory of Kosovo, in view of its Article 145(2).[46]

22. Insofar as the second Applicant raised the issue of *lex mitior* under Article 33 of the Constitution and Article 7 of the Convention (see paragraph 14 above), the appeals panel recalled that an automatic right of appeal was confined to challenges to the SC's jurisdiction. The appeals panel deemed that this was not a jurisdictional issue and thus refused to address it.[47]

23. Insofar as the second Applicant referred to the case law of the Serbian courts (see paragraph 15 above), the appeals panel held that it related to a different legal framework than the one applicable to the SC.[48] Furthermore, the duty to ensure equality before the law and prohibition of discrimination concerned the treatment of individuals within the same jurisdiction. The accused before the SC, one the one hand, and before the Serbian courts, on the other hand, were tried in different jurisdictions. Hence, the case law of the Serbian courts was irrelevant.[49]

2. Arbitrary Detention and Enforced Disappearance

24. As regards Article 14(1)(c) of the Law, the appeals panel upheld the pre-trial judge's finding that it contained a non-exhaustive list of prohibited conduct and hence the SC's jurisdiction was not limited to the acts expressly enumerated in that provision.[50] The appeals panel also agreed that a CIL rule had existed criminalising the war crime of arbitrary detention in NIAC,[51] as well as the crime against humanity

[45] Appeals decision, para. 25.
[46] Appeals decision, paras 26-27.
[47] Appeals decision, paras 52, 54, 57-59.
[48] Appeals decision, paras 28, 44.
[49] Appeals decision, para. 45.
[50] Appeals decision, para. 87; see Pre-trial judge's decision, paras 144-146.
[51] Appeals decision, para. 111; see Pre-trial judge's decision, para. 166.

of enforced disappearance.[52] However, the specific contours of arbitrary detention were to be addressed at trial.[53]

3. Joint Criminal Enterprise

25. The appeals panel found that "commission" in Article 16(1) of the Law must be interpreted in accordance with CIL as applicable at the relevant time.[54] The appeals panel held that Article 16(1) provided for JCE as a form of criminal liability.[55] Furthermore, the JCE basic and extended forms had existed under CIL at the time the alleged crimes had been committed,[56] and they had been foreseeable and accessible to the accused at that time.[57]

26. As JCE was clearly defined in law as required by Article 33(1) of the Constitution and Article 7(1) of the Convention, the appeals panel dismissed the first Applicant's argument on expansive reading of a criminal statute to the detriment of the accused.[58]

III. ALLEGED VIOLATIONS

27. The first Applicant complained before the Chamber that basic and extended JCE forms were not prescribed by Article 16(1)(a) of the Law, and that, during the indictment period, the extended form of JCE had not been part of CIL and had not been accessible or foreseeable to him.[59] Hence, by charging him with JCE, the SPO had violated his fundamental right under Article 33(1) of the Constitution and Article 7(1)

[52] Appeals decision, para. 126; see Pre-trial judge's decision, paras 172, 174.
[53] Appeals decision, para. 100.
[54] Appeals decision, para. 138; see Pre-trial judge's decision, para. 177.
[55] Appeals decision, paras 135-143.
[56] Appeals decision, paras 172, 186, 196; see Pre-trial judge's decision, para. 190. As regards the customary nature of the basic form of JCE, this issue had been raised on appeal only by Mr Thaçi, see Appeals decision, para. 162.
[57] Appeals decision, para. 224.
[58] Appeals decision, para. 142.
[59] First Applicant's referral, paras 2, 76.

of the Convention.[60]

28. The second Applicant complained that, based on the Law adopted in 2015, he had been charged with crimes under CIL, and that such direct application of CIL breached his rights under: (i) Article 19 of the Constitution, which the second Applicant argued, excluded, as a matter of general principle, the possibility to apply crimes under CIL;[61] (ii) Article 33(1) of the Constitution, Article 7 of Convention, and Article 15 ICCPR, prohibiting retroactive application of the criminal law; [62] and (iii) in combination with Article 7 of the Convention, – Article 24 of the Constitution, Article 14 of the Convention, and Article 26 ICCPR.[63] The second Applicant requested the Chamber to declare the provisions of the Law that provide for the direct application of CIL as unconstitutional. [64]

29. The second Applicant also complained that his prosecution based on JCE and/or arbitrary detention had breached his fundamental rights under Articles 33 and 55 of the Constitution, as the Law did not provide for JCE or arbitrary detention.[65]

30. Further, the second Applicant complained that his prosecution based on JCE extended form, arbitrary detention, and/or enforced disappearance breached the *nullum crimen sine lege* principle under Article 33 of the Constitution, Article 7 of the Convention, and Article 15 ICCPR, as they had not constituted crimes under CIL in 1998.[66]

[60] First Applicant's referral, paras 1-2, 16, 76.
[61] Second Applicant's referral, paras 7(a), 19, 22, 31(a), 91(a).
[62] Second Applicant's referral, paras 7(b), 33, 48(a), 91(b).
[63] Second Applicant's referral, paras 7(c), 64(a), 91(c).
[64] Second Applicant's referral, paras 24, 31(b), 48(b), 64(b), 91(d).
[65] Second Applicant's referral, paras 7(d), 66, 70-72, 91(e).
[66] Second Applicant's referral, paras 7(e), 88, 91(f).

IV. JURISDICTION

31. The Chamber recalls that the Applicants filed their referrals under Article 113(7) of the Constitution. The Chamber also observes that, in their respective referrals, the Applicants raised several complaints in relation to the proceedings against them taking place before the SC. In particular, that their prosecution based on certain charges violated their fundamental rights as guaranteed by the Constitution. The referrals, therefore, relate to the SC and the SPO, as required by Article 162(3) of the Constitution and Articles 3(1) and 49(2) of the Law. It follows that the Chamber has jurisdiction to rule on the referrals.

V. ADMISSIBILITY

A. CONSTITUTIONAL RIGHT AT ISSUE

32. At the outset, the Chamber observes that the Applicants complained that their prosecution based on certain charges violated their fundamental rights as guaranteed by the Constitution. In particular, they essentially complained that the respective offences and modes of individual criminal responsibility: (i) were based on an inapplicable source of law, namely, CIL; (ii) were not provided for in the Law; or (iii) had not constituted crimes under CIL during the indictment period (see paragraphs 27-30 above).

33. In that regard, the Applicants relied on Article 33 of the Constitution, Article 7 of the Convention, and Article 15 ICCPR. The second Applicant also alleged violation of Article 24 of the Constitution, Article 14 of the Convention, and Article 26 ICCPR, in combination with Article 7 of the Convention, as well as of Articles 19 and 55 of the Constitution (see paragraphs 27-30 above).

34. The Chamber observes that the Applicants' complaints primarily raise an issue under Article 33 of the Constitution. Insofar as the Applicants relied also on Article 7

of the Convention and Article 15 ICCPR, respectively, the Chamber recalls that, by virtue of Article 22(2) and (3) of the Constitution, those guarantees apply at the constitutional level.[67] The Kosovo Constitutional Court has reiterated that the rights and freedoms guaranteed by these international instruments in Article 22 of the Constitution "have the status of norms of constitutional rank and are an integral part of the Constitution, in the same way as all other provisions contained in the Constitution".[68]

35. In that light, the Chamber, being the master of characterisation to be given in law to the facts of the case before it,[69] finds that the referrals fall to be considered under Article 33 of the Constitution, Article 7 of the Convention, and Article 15 ICCPR.

36. However, before the Chamber can examine the referrals on the merits, it must first ascertain whether they are admissible.[70] The Chamber thus turns to the assessment of certain admissibility requirements provided for in the Constitution, the Law, and the Rules, which arise in the present proceedings.

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[67] See KSC-CC-2020-08, F00020/RED, Public redacted version of decision on the referral of [REDACTED] further to a decision of the Single Judge, public, 20 April 2020 ("*Decision concerning a decision of the single judge*"), para. 61; KSC-CC-2019-07, F00013, Decision on the referral of Driton Lajci concerning interview procedure by the Specialist Prosecutor's Office, public, 13 January 2020 *("Decision on the referral of Driton Lajci"*), para. 14. As regards the incorporation of the Convention and its Protocols into the law of Kosovo at the constitutional level, see Kosovo, Constitutional Court, *Ćemailj Kurtiši and the Municipal Assembly of Prizren*, KO 01/09, Judgment, 27 January 2010 (18 March 2010), para. 40.

[68] Kosovo, Constitutional Court, *Constitutional review of judgments [A.A.U.ZH. no. 20/2019 of 30 October 2019; and A.A.U.ZH. no. 21/2019, of 5 November 2019] of the Supreme Court of the Republic of Kosovo*, KI 207/19, Judgment, 10 December 2020 (5 January 2021), para. 111.

[69] *Decision on the referral of Driton Lajci*, para. 15. See ECtHR, *Logachova and Others v. Ukraine*, nos 4510/05 and 3 others, 10 December 2009, para. 10; *Margaretić v. Croatia*, no. 16115/13, 5 June 2014, para. 75. See Kosovo, Constitutional Court, *Constitutional review of the judgment of the Supreme Court of the Republic of Kosovo, Rev. 308/2007, dated 10 June 2010*, KI 120/10, Judgment, 29 January 2013 (8 March 2013), para. 50.

[70] See *Decision concerning a decision of the single judge*, para. 37. See also Kosovo, Constitutional Court, *Constitutional review of decision Ae no. 287/18 of the Court of Appeals of 27 May 2019 and decision I.EK. no. 330/2019 of the Basic Court in Prishtina, Department for Commercial Matters, of 1 August 2019*, KI 195/19, Judgment, 5 May 2021 (31 May 2021), para. 68; *Constitutional review of decision Pml no. 313/2018 of the Supreme Court of 10 December 2018*, KI 12/19, Resolution on inadmissibility, 10 April 2019 (3 May 2019), para. 30; *Constitutional review of judgment Pml no. 41/2017 of the Supreme Court of the Republic of Kosovo of 3 July 2017*, KI 119/17, Resolution on inadmissibility, 3 April 2019 (3 May 2019), para. 35.

B. WHETHER THE APPLICANTS' COMPLAINTS ARE PREMATURE

37. The Chamber recalls that, pursuant to Article 113(7) of the Constitution and Article 49(3) of the Law, individuals are authorised to refer to the Chamber "alleged violations […] of their individual rights and freedoms guaranteed by the Constitution […]". Rule 14(f) of the Rules provides that a referral shall be inadmissible if nothing in the referral gives rise to the appearance of a violation of a constitutional right.

38. As noted above, the Applicants alleged that certain charges against them breached Article 33 of the Constitution, Article 7 of the Convention, and Article 15 ICCPR. At the same time, the criminal proceedings against the Applicants are pending and the charges at issue are yet to be decided. Hence, the first question that arises is whether the Applicants' complaints, at this stage of the criminal proceedings, are premature, and more specifically, whether the Applicants may claim to be victims of the alleged violations.

1. Whether the Applicants may Claim to be Victims

(a) The Submissions

39. The Applicants submitted that they became victims of the alleged violations upon being charged. In this regard, they emphasised that Article 33(1) of the Constitution referred to "charged or punished", and thus its application was not contingent on conviction.[71] The Applicants also submitted that Article 33(1) provided for a higher protection than Article 7 of the Convention and Article 15 ICCPR and that it was the Chamber's role to enforce it.[72] Furthermore, the second Applicant claimed that, in *Varvara v. Italy*, the ECtHR had adopted a wide interpretation of Article 7 of the Convention by stating that "[…] Article 7 […] should be construed and applied

[71] First Applicant's submissions, para. 14; second Applicant's submissions, paras 6, 8-9, 11, 13.
[72] First Applicant's submissions, paras 14-15; second Applicant's submissions, para. 14.

[…] in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment […]".[73] Similarly, the first Applicant referred to cases where the ECtHR had stated that principle, including *Vasiliauskas v. Lithuania* [GC] and *Kononov v. Latvia* [GC],[74] and argued that Article 7 applied also to the stage of prosecution.[75] Further, the first Applicant submitted that also the Kosovo Constitutional Court had stated the aforementioned principle in case no. KI 11/21.[76]

40. The SPO submitted that the Applicants had not been found guilty, and, hence, their referrals were premature.[77] In particular, the SPO argued that the *nullum crimen sine lege* principle in Article 33(1) of the Constitution and Article 7(1) of the Convention protected an individual against being "held guilty" for a conduct that had not constituted a criminal offence at the time it had been committed. The SPO pointed out that Article 33(1) of the Constitution used a different language, in particular that an individual could not be "charged or punished". In this respect, the SPO argued that Article 33(1) of the Constitution had to be applied in connection with Article 7(1) of the Convention and, pursuant to Article 53 of the Constitution, consistent with the ECtHR case law. As the ECtHR had held, *inter alia*, in *Piskorski v. Poland* and the European Commission of Human Rights (the "EComHR") in *Lukanov v. Bulgaria*, where an individual had not been "held guilty" of a criminal offence, he or she could not be regarded as a victim of an alleged violation of Article 7 of the Convention.[78]

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[73] Second Applicant's submissions, paras 16-17, referring, *inter alia*, to ECtHR, *Varvara v. Italy*, no. 17475/09, 29 October 2013, para. 52.
[74] First Applicant's submissions, para. 17, referring, *inter alia*, to ECtHR, *Vasiliauskas v. Lithuania* [GC], no. 35343/05, ECHR 2015, para. 153, and *Kononov v. Latvia* [GC], cited above, para. 185.
[75] First Applicant's submissions, para. 18.
[76] First Applicant's submissions, para. 18, referring to Kosovo, Constitutional Court, *Request for constitutional review of judgment Pml no. 325/2020 of the Supreme Court of 16 December 2020*, KI 11/21, Resolution on inadmissibility, 25 March 2021 (31 May 2021), para. 78 (with further ECtHR case law references).
[77] SPO's submissions regarding the first Applicant's referral, paras 2, 28. SPO's submissions regarding the second Applicant's referral, paras 2, 26.
[78] SPO's submissions regarding the first Applicant's referral, paras 2, 22-28, referring, *inter alia*, to ECtHR, *Piskorski v. Poland* (dec.), no. 80959/17, 22 October 2019, para. 61 and EComHR, *Lukanov v. Bulgaria*, no. 21915/93, Commission decision, 12 January 1995, Decisions and Reports 80-A, p. 108. SPO's

Insofar as the second Applicant relied also on Article 15 ICCPR, the SPO submitted that the language of Article 15(1) ICCPR was identical to that of Article 7(1) of the Convention.[79]

(b) The Chamber's Assessment

41. The Chamber first recalls that the Applicants complained that they had been "charged" in breach of Article 33 of the Constitution, Article 7 of the Convention, and Article 15 ICCPR. Hence, a question arises whether the Constitution contains a guarantee not to be "charged" with a criminal offence on account of a conduct that did not constitute a criminal offence under the law at the time it was committed.

42. In this respect, the Chamber observes that Article 33(1) of the Constitution in English, in its relevant part, reads that "[n]o one shall be *charged* or punished […]" (emphasis added).[80] Similarly, Article 33(1) in Albanian states that "[n]o one shall be *charged* or convicted […]" (emphasis added; translated from Albanian).[81] At the same time, Article 33(1) in Serbian states that "[n]o one shall be *found guilty* or punished […]" (emphasis added; translated from Serbian).[82]

43. It therefore emerges that Article 33(1) of the Constitution is phrased in a different manner in Albanian and Serbian. For the purposes of the referrals, the important difference is that the text in Albanian refers to "charged" and the text in Serbian – "found guilty". The Applicants have not been "found guilty" of the criminal offences

submissions regarding the second Applicant's referral, paras 2, 20-26, referring, *inter alia*, to the same two rulings.

[79] SPO's submissions regarding the second Applicant's referral, para. 20.

[80] The text in English as published in the Official Gazette of Kosovo on 9 April 2008, at <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702> accessed 11 April 2022.

[81] In Albanian: *"Askush nuk mund të akuzohet ose të dënohet […]."* The text in Albanian as published in the Official Gazette of Kosovo on 9 April 2008, at <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702> accessed 11 April 2022.

[82] In Serbian: *"Niko se ne može proglasiti krivim ili kazniti […]"* The text in Serbian as published in the Official Gazette of Kosovo on 9 April 2008, at <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702> accessed 11 April 2022.

at issue. Hence, they may or may not be entitled, at this stage of the criminal proceedings, to claim to be victims of the alleged violation of Article 33(1) of the Constitution depending on whether Article 33(1) refers to "charged" or "found guilty".

44. As regards the difference between the texts in Albanian and Serbian, the Chamber notes that, pursuant to Article 5(1) of the Constitution, both Albanian and Serbian are the official languages in Kosovo. Hence, both texts of Article 33(1) of the Constitution are equally authoritative.[83] It follows that the Chamber must turn to other methods of constitutional interpretation to determine whether Article 33(1) provides for the guarantee not to be "charged" or "found guilty" for a conduct that did not constitute a criminal offence under the law at the time it was committed. While applying other methods of interpretation, the Chamber must be cautious so as not to create a new constitutional norm but elucidate the content of an existing norm.[84]

45. The Chamber observes that the Kosovo Constitutional Court has interpreted constitutional provisions on fundamental rights and freedoms: (i) consistent with the ECtHR case law, pursuant to Article 53 of the Constitution (see, for example, cases nos KI 207/19, KI 195/19, KI 12/19, and KI 41/12);[85] and (ii) in the light of or in a complementary manner with the corresponding Convention provision (see, for example, cases nos KI 12/19 and KO 01/09).[86] In this respect, the Chamber notes that the Kosovo Constitutional Court has acknowledged that each norm of the

[83] See also Article 5(4) of the Law No. 02/L-37 on the Use of Languages, 1 March 2007, which provides that all laws adopted by the Assembly of Kosovo shall be issued and published in the official languages, and that the official language versions are equally authoritative. At <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2440> accessed 11 April 2022.
[84] See Kosovo, Constitutional Court, *Constitutional review of certain articles of Law No. 06/L-048 on Independent Oversight Board for Civil Service in Kosovo*, KO 171/18, Judgment, 25 April 2019 (20 May 2019), para. 94.
[85] Kosovo, Constitutional Court, KI 207/19, Judgment, 10 December 2020 (5 January 2021), para. 109; KI 195/19, cited above, para. 94 *in fine*; KI 12/19, cited above, para. 38; *Gëzim and Makfire Kastrati against Municipal Court in Prishtina and Kosovo Judicial Council*, KI 41/12, Judgment, 25 January 2013 (26 February 2013), para. 58.
[86] Kosovo, Constitutional Court, KI 12/19, cited above, para. 40; KO 01/09, cited above, para. 40.

Constitution must be interpreted in connection with its other norms and not in isolation, and no constitutional norm can be interpreted mechanically (see case no. KO 72/20).[87]

46. As was noted above, Article 7 of the Convention and Article 15 ICCPR have the status of norms of constitutional rank and are an integral part of the Constitution (see paragraph 34 above). Therefore, Article 33(1) of the Constitution must be read in connection with these provisions. In this regard, the Chamber observes that both Article 7(1) of the Convention and Article 15(1) ICCPR provide that "[n]o one shall be *held guilty* […]" (emphasis added). These provisions, unlike Article 33(1) of the Constitution in Albanian, do not refer to "charged". Hence, reading Article 33 of the Constitution in the light of Article 7 of the Convention and Article 15 ICCPR suggests that Article 33(1) of the Constitution refers to "held guilty". Similarly, Article 11(2) of the Universal Declaration of Human Rights (the "UDHR") refers to "held guilty".[88]

47. In this regard, the Chamber observes that, indeed, as was also submitted by the first Applicant (see paragraph 39 *in fine* above), the Kosovo Constitutional Court, in case no. KI 11/21, applied Article 33 of the Constitution in connection with Article 7 of the Convention. Referring to *Korbely v. Hungary* [GC], the Constitutional Court also stated the well-established principle in the ECtHR case law that "[…] Article 7 [of the Convention] […] should be construed and applied […] in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment […]".[89] However, the Chamber observes that, in *Korbely v. Hungary* [GC], the ECtHR had examined the alleged violation of Article 7 of the Convention where the applicant in

[87] Kosovo, Constitutional Court, *Constitutional review of Decree No. 24/2020 of the President of the Republic of Kosovo of 30 April 2020*, KO 72/20, Judgment, 28 May 2020 (1 June 2020), para. 346.
[88] In case no. KI 15/19, the Kosovo Constitutional Court considered Article 33 of the Constitution and Article 7 of the Convention also in conjunction with Article 11 UDHR, see Kosovo, Constitutional Court, *Constitutional review of judgment NJN no. 157/2017 of the Basic Court in Prishtina of 13 April 2018*, KI 15/19, Resolution on inadmissibility, 23 September 2020 (28 October 2020), paras 70-71, 74, 79.
[89] Kosovo, Constitutional Court, KI 11/21, cited above, para. 78, referring to ECtHR, *Korbely v. Hungary* [GC], no. 9174/02, ECHR 2008, para. 69.

that case had been convicted.[90] Furthermore, the Kosovo Constitutional Court then went on to find that its function, from the viewpoint of Article 33 of the Constitution and Article 7 of the Convention, was to consider whether the offence for which the applicant had been "convicted" had constituted an offence defined with sufficient accessibility and foreseeability, amongst others.[91] Also other case law of the Kosovo Constitutional Court suggests that the Court was prepared to discuss certain aspects of Article 33 in substance only where the applicant before the Constitutional Court had already been convicted in the earlier proceedings against him or her (see cases nos KI 01/19 and KI 37/18;[92] see also case no. KI 15/19 (as regards punishment)).[93]

48. Furthermore, as it follows from the earlier considerations, the ECtHR case law has a significant role in interpretation of the Constitution provisions on fundamental rights and freedoms (see paragraph 45 above). Therefore, the Chamber turns to the ECtHR case law on Article 7 of the Convention. The Chamber observes that, indeed, in *Lukanov v. Bulgaria*, the EComHR ruled that, prior to termination of the criminal proceedings and having been found guilty, an individual could not claim to be a victim of an alleged violation of Article 7.[94] Similarly, in the case of *Tess v. Latvia*, the ECtHR held that Article 7(1) of the Convention was aimed at a person who had been held guilty and not at an accused person against whom criminal proceedings were

[90] ECtHR, *Korbely v. Hungary* [GC], cited above, paras 54, 73-74, 76.
[91] Kosovo, Constitutional Court, KI 11/21, cited above, para. 83, see also paras 72-93. The Court also stated that, pursuant to Article 33(1) of the Constitution, no one could be "found guilty" of an offence which had not been punishable by law at the relevant time, see ibid., para. 75.
[92] Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 242/2017 of the Supreme Court of Kosovo of 30 April 2018*, KI 01/19, Resolution on inadmissibility, 2 September 2020 (1 October 2020), paras 82-86, 154-166; *Request for constitutional review of judgment Pml no. 225/2017 of the Supreme Court of 18 December 2017*, KI 37/18, Resolution on inadmissibility, 30 May 2018 (11 June 2018), paras 55-58. See also Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 247/2017 of the Supreme Court of Kosovo of 6 February 2018*, KI 95/18, Resolution on inadmissibility, 27 May 2019 (19 August 2019), paras 11-15, 37-40.
[93] Kosovo, Constitutional Court, KI 15/19, cited above, paras 70-79.
[94] EComHR, *Lukanov v. Bulgaria*, cited above, p. 108; see also EComHR, *Klamecki v. Poland*, no. 31583/96, Commission decision, 20 October 1997, para. 4 (Law part of the decision); *Tomasi v. France*, no. 13853/88, Commission decision, 10 March 1989.

pending.[95] In this regard, the Chamber notes that the Applicants argued that the ECtHR had affirmed that an individual could invoke Article 7 of the Convention also in respect of the stage of prosecution, prior to finding of any guilt (see paragraph 39 above). The Chamber observes that, in all the cases that the Applicants relied upon in support of that contention, the ECtHR had examined the alleged violation of Article 7 of the Convention in the circumstances where the applicant had been convicted.[96] Therefore, the Chamber is not persuaded that in those cases the ECtHR departed from its aforementioned approach to Article 7 of the Convention, in that it can be invoked once the individual concerned has been found guilty.

49. It follows that Article 33(1) of the Constitution, as interpreted consistent with the ECtHR case law, should be read as referring to not to be "held guilty". In relation to the application of the ECtHR case law, the Chamber also observes that the Kosovo Constitutional Court has held that, under Article 53 of the Constitution, it is *obliged* to interpret the fundamental rights and freedoms guaranteed by the Constitution consistent with the ECtHR case law,[97] and, furthermore, that it is a *constitutional obligation*.[98] Moreover, even if there were a conflict between the two, the human rights standards as set out in the ECtHR case law prevail.[99]

50. At the same time, the Chamber notes that, indeed, as was also pointed out by the Applicants, a question arises whether the aforementioned approach applies in the

[95] ECtHR, *Tess v. Latvia* (dec.), no. 34854/02, 12 December 2002; see also *Piskorski v. Poland* (dec.), cited above, para. 61; *Hanuliak and Others* (dec.), no. 63859/00, 18 September 2007, para. 3 (Law part of the decision).
[96] See ECtHR, *Vasiliauskas v. Lithuania* [GC], cited above, paras 114, 121, 162; *Del Río Prada v. Spain* [GC], no. 42750/09, ECHR 2013, paras 56, 80; *S.W. v. the United Kingdom*, 22 November 1995, Series A no. 335-B, paras 28, 32, 47; *Seychell v. Malta*, no. 43328/14, 28 August 2018, para. 41; *Camilleri v. Malta*, no. 42931/10, 22 January 2013, paras 22, 40; *Kononov v. Latvia* [GC], cited above, paras 143, 187.
[97] Kosovo, Constitutional Court, KI 195/19, cited above, para. 94 *in fine*; KI 12/19, cited above, para. 38; KI 119/17, cited above, para. 44.
[98] Kosovo, Constitutional Court, KI 41/12, cited above, para. 58; *Request for constitutional review of the judgment of the Supreme Court of Kosovo, Pml no. 91/2013, of 21 June 2013*, KI 116/13, Resolution on inadmissibility, 22 October 2013 (16 December 2013), para. 26.
[99] Kosovo, Constitutional Court, KI 207/19, cited above, para. 109.

same manner where, as in the present case, a Constitution provision in one of the official languages appears, on its face, to be broader than a corresponding Convention provision, as interpreted by the ECtHR.

51. In this regard, the Chamber notes that, in case no. KI 12/19, the Kosovo Constitutional Court interpreted a different Constitution provision, Article 31. In particular, from the reasoning of the Constitutional Court, it emerges that the Court considered that paragraph (2) of Article 31 referred to the right to a fair trial "as to any criminal charges".[100] It is noteworthy that, in order to interpret the phrase "as to any criminal charges", the Constitutional Court referred to the respective Convention provision, namely, Article 6(1) and the case law of the ECtHR, and, in that light, found that the phrase had to be understood to mean "as to any criminal charges *brought against the [a]pplicant* [before the Constitutional Court]" (emphasis added).[101]

52. Without addressing the question of whether, indeed, the phrasing of Article 31(2) of the Constitution could be considered broader than that of Article 6(1) of the Convention,[102] the Chamber notes, as a matter of principle, the approach of the Kosovo Constitutional Court. In particular, it emerges that, where the Court considered a more general phrase in a Constitution provision, it determined its scope in the light of the respective Convention provision and with due regard to the ECtHR case law, pursuant to Article 53 of the Constitution.

53. In view of the foregoing, and given that Article 33(1) of the Constitution in the other official language refers to a guarantee not to be "found guilty", the Chamber is

[100] Kosovo, Constitutional Court, KI 12/19, cited above, paras 36, 40, 44.
[101] Kosovo, Constitutional Court, KI 12/19, cited above, paras 36-40, 44-45, 49, referring, *inter alia*, to ECtHR, *Rékási v. Hungary* (dec.), no. 31506/96, 25 November 1996. For the same approach by the Kosovo Constitutional Court, see *Constitutional review of judgment Pa/1 no. 1160/2017 of the Court of Appeals of 18 December 2017*, KI 52/18, Resolution on inadmissibility, 16 January 2019 (21 February 2019), paras 40-42, 47-49, 53.
[102] The Chambers observes that, while the text of Article 31(2) of the Constitution in English refers to "any criminal charges", the Albanian and Serbian versions of Article 31(2) of the Constitution refer to "any criminal charges against him/her".

not persuaded that Article 33(1) of the Constitution may be read as containing a guarantee not to be "charged".[103] As was noted above, also Article 7 of the Convention, as interpreted by the ECtHR, and Article 15 ICCPR contain no such guarantee. It follows that the Applicants' complaints are premature. The Applicants may not, at this stage of the criminal proceedings, claim to be victims of the alleged violations of Article 33 of the Constitution, Article 7 of the Convention, or Article 15 ICCPR.

54. The Chamber, however, notes that its above finding as regards Article 33 of the Constitution does not imply that, as a matter of general principle, a constitutional provision cannot afford a greater protection than the Convention. The Chamber arrived at its conclusion in the specific circumstances, where Article 33(1) of the Constitution in one of the official languages refers to a guarantee not to be "found guilty" and in the other official language – not to be "charged", and the Chamber could not find support that Article 33 provided for the latter, in view of the practice of the Kosovo Constitutional Court, also in relation to application of Article 53 of the Constitution.

2. Conclusion

55. The Chamber, therefore, finds that, in view of its considerations as regards the victim status of the Applicants the referrals, at this stage of the proceedings, are premature and, as such, they also do not give rise to the appearance of the violations of the Applicants rights under Article 33(1) of the Constitution, Article 7 of the Convention, and Article 15 ICCPR. Consequently, the referrals must be declared

[103] It is noted that also a commentary to Article 33(1) of the Kosovo Constitution does not suggest that it provides for the guarantee not to be "charged", see Hasani, E., Čukalović, I., Commentary: the Constitution of the Republic of Kosovo (First Edition), GIZ 2013, pp. 112-123 (the title translated from Albanian).

inadmissible pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 14(f) of the Rules.

56. While the Chamber finds that the referrals must be dismissed for the aforementioned reasons, it recalls that, pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the Rules, an individual may make a referral to the Chamber after exhaustion of all effective remedies provided for by law against the alleged violation. In this connection, the Chamber notes that according to Article 47 of the Law, a Supreme Court panel of the SC shall, in certain specifically enumerated instances, hear appeals against a judgment of a Court of Appeals panel and that Article 48(6),(7) of the Law provides that, in case of a final judgment, a protection of legality request may be filed to a Supreme Court panel of the SC with regard to, *inter alia*, violations of the criminal law.[104] It therefore emerges that this is one of the remedies that would need to be considered for the purposes of the requirement of exhaustion with respect to the alleged violations of Article 33(1) of the Constitution and Article 7 of the Convention.[105] Given, however, that the referrals are premature, the Chamber considers that it does not need to rule on the requirement of exhaustion at this point in time.

[104] The Chamber notes the Applicants submissions in relation to the exhaustion of remedies, see first Applicant's referral, paras 9, 11-13, 17; first Applicant's submissions, paras 2, 25-27, 30, 33-34, 36; second Applicant's referral, paras 8, 13, 17, 65, 74; second Applicant's submissions, paras 4, 18-19, 21-27. See also SPO's submissions regarding the first Applicant's referral, paras 2, 12-19, referring, *inter alia*, to *Decision on the referral of Driton Lajci*, para. 24, and Kosovo, Constitutional Court, *Malush Sopa, Sedat Kuqi, Fazli Morina, Rrahman Kabashi and Liman Gashi*, KI 08/11, Resolution on inadmissibility, 23 November 2011 (24 April 2012), paras 46-48; SPO's submissions regarding the second Applicant's referral, paras 2, 8-17, referring, *inter alia*, to the same two rulings.

[105] See Kosovo, Constitutional Court, KI 01/19, cited above, paras 31-41, 82-85, 91-93; KI 95/18, cited above, paras 3, 12-17, 22; *Constitutional review of judgment Pml no. 63/2018 of the Supreme Court of the Republic of Kosovo of 4 June 2018*, KI 155/18, Resolution on inadmissibility, 25 September 2019 (21 October 2019), paras 4, 20-25, 29, 36-39, 45-52; See also Kosovo, Constitutional Court, *Constitutional review of Judgment Pml no. 141/2018 of the Supreme Court of the Republic of Kosovo of 2 July 2018 and decision P no. 571/13 of the Basic Court in Prishtina of 2 February 2018*, KI 158/18, Resolution on inadmissibility, 12 April 2019 (23 April 2019), paras 40-41.

57. As regards the Applicants' arguments concerning the length of the criminal proceedings, the Chamber notes that the Applicants have not raised complaints in that respect under Article 31(2) of the Constitution and Article 6(1) of the Convention. Similarly, the second Applicant has not raised a complaint as regards the length of his pre-trial detention under Article 29(2) of the Constitution and Article 5(3) of the Convention.[106] While the assessment of the victim status and exhaustion of remedies with regard to such complaints would require different considerations, they have no bearing on the assessment of the complaints raised in the present case.

58. At the same time, the Chamber observes that the second Applicant's referral raises an important fundamental question concerning the SC's legal framework. In particular, the second Applicant submitted that, as a matter of general principle, direct application by the SC of CIL as to certain offences, including modes of individual criminal responsibility, was contrary to the Constitution. Given the fundamental nature of this issue in the functioning of the SC, the Chamber deems it appropriate to address it. However, given that the criminal proceedings against the Applicants are pending and the referrals are therefore premature, the Chamber must be cautious so as not to encroach, at this stage, upon the role of the other panels of the SC in determining the issues of law and fact relevant to the criminal case before them.

C. WHETHER THERE IS AN APPEARANCE OF A VIOLATION ON ACCOUNT OF DIRECT APPLICATION OF CIL BY THE SC

1. Scope of Assessment

59. As noted above, and given that the criminal proceedings against the second Applicant are pending, the Chamber must first recall that it is the task of the other panels of the SC, to assess, in accordance with their respective competence, the facts

[106] See, *mutates mutandis*, ECtHR, *Bouglame v. Belgium* (dec.), no. 16147/07, 2 March 2010.

and evidence, as well as to interpret and apply the legal provisions relevant to the case before them.[107] As it follows from the Chamber's earlier practice, once the competent panels of the SC have had an opportunity to examine these issues, the Chamber may assess their findings insofar as the fundamental rights and freedoms guaranteed by the Constitution are concerned.[108] In addition and as mentioned, the Chamber notes that the question of whether the direct application by the SC of CIL as regards war crimes and crimes against humanity, including related modes of liability, is of central and fundamental constitutional importance within the legal framework of the SC.

60. In that light, the Chamber finds it possible, at this stage of the proceedings, to reflect only on a more general question of whether the direct application by the SC of CIL as regards war crimes and crimes against humanity, including related modes of liability, gives rise to the appearance of a violation of the Constitution, pursuant to Rule 14(f) of the Rules.

61. At the same time, the Chamber must emphasise that its assessment is without any prejudice to any future determination of the complaints, if any, which the Applicants might bring before the Chamber as regards the alleged violation of Article 33 of the Constitution and Article 7 of the Convention in relation to determination of their liability specifically, if, indeed, there would be such a determination.

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[107] See Kosovo, Constitutional Court, *Constitutional review of 16 decisions of the Supreme Court of Kosovo rendered between 26 March and 12 April 2018*, KI 96/18 et al., Resolution on inadmissibility, 30 January 2019 (19 February 2019), para. 51; KI 37/18, cited above, para. 39; *Constitutional review of decision PA-II-KZ-II-7/15 of the Supreme Court of Kosovo of 26 November 2015*, KI 15/16, Resolution on inadmissibility, 16 March 2016 (5 April 2016), para. 40; *Request for constitutional review of judgment Pml-Kzz no. 170/2014 of the Supreme Court of Kosovo of 19 February 2015*, KI 38/15, Resolution on inadmissibility, 11 September 2015 (2 November 2015), para. 30.

[108] *Decision concerning a decision of the single judge*, para. 36. See ECtHR, *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, ECHR 2007-I, para. 89. See Kosovo, Constitutional Court, KI 37/18, cited above, paras 41-43; *Constitutional review of Judgment of Supreme Court in Pkl no. 45/12 dated 18 June 2012*, KI 85/12 and KI 86/12, Resolution on inadmissibility, 21 January 2013 (22 January 2013), para. 28.

2. The Submissions

62. The second Applicant submitted that the direct application of crimes under CIL was contrary to Article 19 of the Constitution as it provided for the direct effect of specific provisions of international agreements only. Even if the "legally binding norms of international law" in Article 19(2) included CIL, Article 19(1) prohibited its direct effect.[109] The second Applicant also argued that the direct application of CIL breached the prohibition on retroactive application of the criminal law under Article 33(1) of the Constitution, Article 7 of the Convention, and Article 15 ICCPR. For the SC to comply with those provisions, it had to apply the laws in force at the time the alleged crimes had been committed, namely, the SFRY Criminal Code, and the SFRY Constitution, which prohibited the application of CIL. Further, the second Applicant argued that CIL was inapplicable as the word "law" in Article 33(1) of the Constitution, based on which an individual could be prosecuted, referred to the laws adopted by the Kosovo Assembly, like in Article 55 of the Constitution.[110]

63. The SPO submitted that Article 19(1) of the Constitution contained no general prohibition on the direct effect of international law. Furthermore, any such interpretation would be inconsistent with Article 19(2), which gave superiority to "legally binding norms of international law", which included CIL, over the laws of Kosovo. The SPO also argued that Article 33(1) of the Constitution provided for prosecutions of crimes under "international law", and, as held by the ECtHR in relation to Article 7 of the Convention, this allowed prosecutions for conduct criminalised under CIL at the relevant time. Hence, the Law could incorporate the crimes under CIL.[111]

[109] Second Applicant's referral, paras 7(a), 15, 19, 22, 28, 31.
[110] Second Applicant's referral, paras 7(b), 39-40, 44, 46, 48. See second Applicant's submissions, paras 30-34, 38, 41.
[111] SPO's submissions regarding the second Applicant's referral, paras 29-31, 37.

3. The Chamber's Assessment

(a) Whether Article 19 of the Constitution Provides for the Application of CIL

64. At the outset, the Chamber observes that the Court of Appeals panel held that "Article 19(1) of the Constitution" adheres to the principle that CIL is binding on states, as it is a combination of an established, widespread and consistent practice on their part, and *opinio juris*, namely, belief that the respective practice is obligatory.[112] Further, the appeals panel held that there was no contradiction between "customary international law" in Articles 3(2)(d) and 12 of the Law, on the one hand, and "legally binding norms of international law" in Article 19(2) of the Constitution, on the other hand.[113]

65. The Chamber notes that the reasoning of the Court of Appeals panel may suggest that Article 19(1) of the Constitution refers to CIL. However, Article 19(1) does not refer to CIL, but to "ratified international agreements". The appeals panel might have intended to say that Article 19, as such, or, perhaps, its paragraph (2) in particular adheres to the binding nature of CIL on the states. In any event, the Chamber notes that the question of a binding nature of CIL on a state as a matter of public international law is a different question from the direct application of CIL in the internal legal system of a state.

66. The issue to be examined here is whether Article 19 of the Constitution provides for the direct application of CIL in the internal legal system of Kosovo. As it follows from Article 3(4) of the Law, the provisions of Kosovo law that have been expressly incorporated into the Law form the SC's own autonomous legal framework.[114] One such provision is Article 19 of the Constitution, as Article 3(2)(a),(d) of the Law

[112] Appeals decision, para. 23.
[113] Appeals decision, para. 24.
[114] The Chamber has previously established that the SC and the SPO are governed by their own autonomous legal framework, see KSC-CC-2020-11, F00015, Judgment on the referral of proposed amendments to the Constitution of Kosovo, public, 26 November 2020, paras 56-58, 62-63.

provides that the SC shall adjudicate and function in accordance with the Constitution, and in accordance with CIL "as given superiority over domestic laws by Article 19(2) of the Constitution". Therefore, in order to determine whether, as a matter of general principle, the SC may directly apply criminal offences under CIL, the Chamber needs to ascertain whether the direct application of CIL is envisaged by the Constitution.

67. In answering the specific question of whether Article 19 of the Constitution provides for the direct application of CIL, the Chamber recalls its earlier finding that it must interpret a constitutional provision not in isolation but in connection with other constitutional provisions (see paragraph 45 above). However, before doing so, the Chamber finds it appropriate to, first, recall that Article 19 of the Constitution reads as follows:

> **Article 19 [Applicability of International Law]**
>
> 1. International agreements ratified by the Republic of Kosovo become part of the internal legal system after their publication in the Official Gazette of the Republic of Kosovo. They are directly applied except for cases when they are not self-applicable and the application requires the promulgation of a law.
>
> 2. Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo.

68. The Chamber notes that Article 19 is entitled "Applicability of International Law". As the title suggests, Article 19 is not limited to the issue of applicability of ratified international agreements, but concerns also other sources of international law. In that vein, paragraph (2) refers to legally binding norms of international law.[115] As this reference is in addition to ratified international agreements, it follows that legally binding norms of international law are norms derived from a source of international law other than international treaties. For the purposes of the present review, one such

[115] The Chamber notes that Article 19(2) of the Constitution in Serbian refers to "legally binding principles of international law". In Serbian: *"[…] obavezna načela međunarodnog prava […]"*. The text in Serbian as published in the Official Gazette of Kosovo on 9 April 2008, at <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702> accessed 11 April 2022.

source, undoubtedly, is CIL.[116] It follows that legally binding norms of international law in Article 19(2) include CIL.

69. As to the manner in which CIL applies in the Kosovo domestic legal system, the Chamber notes that Article 19 of the Constitution does not expressly provide for the direct application of legally binding norms of international law, unlike for certain norms of ratified international agreements. At the same time, though, paragraph (2) of Article 19 states that legally binding norms of international law, like ratified international agreements, "have superiority over the laws of the Republic of Kosovo". In this respect, the Chamber notes that the legislation of Kosovo applies directly. Hence, in order to ensure that, in such application of the domestic legislation, the respective legally binding norm of international law takes precedence, as envisaged by Article 19(2), there should be a possibility to apply such a norm directly.

70. At the same time, for the purposes of the present discussion, the Chamber does not need to determine whether, under Article 19 of the Constitution, any norm of CIL applies directly in the internal legal system of Kosovo.[117] The question before the Chamber is more limited, as it concerns the norms of CIL relevant to the offences at issue, in particular as regards war crimes and crimes against humanity, including related modes of liability. In order to ascertain whether the SC may apply directly such norms of CIL to establish criminal responsibility, the Chamber must assess what standards determine their direct application in the specific area.

[116] See Article 38 of the Statute of the International Court of Justice, which reflects the formally recognised sources of international law.
[117] The Chamber notes the practice of Kosovo courts in another area than that before the Chamber in the instant case. In particular, Kosovo courts in a case concerning a request for a person's extradition considered whether Kosovo had succeeded to a treaty put forward as the basis for the extradition. In this specific context, the Supreme Court of Kosovo found that some norms in the area of succession of states to international treaties reflected CIL and, hence, referred to them. In that case, the Supreme Court of Kosovo also stated that "supremacy of international law and agreements in Kosovo is envisaged by Article 19 Paragraph 2 of the Constitution […]". See Kosovo, Supreme Court, Pn-Kr-386/2010, Ruling, 7 September 2010, pp. 4, 6.

71. In this regard, the Chamber notes that, in cases nos KO 45/18 and KO 95/13, the Kosovo Constitutional Court acknowledged that, under Article 19 of the Constitution, self-executing provisions of ratified international agreements were superior to the legislation of Kosovo, but that they remained inferior to the Constitution. As regards the direct application of such provisions of ratified international agreements, the Court held that their application remained *subject to the Constitution*.[118] As Article 19(2) refers to superiority of both ratified international agreements and legally binding norms of international law, the same considerations of the Constitutional Court should apply to the application of CIL, namely that the application of CIL is subject to the Constitution.

72. In order to identify the relevant Constitution standards in the present case, the Chamber recalls that the question before it is whether, as a matter of general principle, the SC may apply norms of CIL as regards war crimes and crimes against humanity, including related modes of liability, in order to establish the guilt of the second Applicant, as the case may be. It follows that the application of such norms of CIL is subject to Article 33 of the Constitution, which provides for the guarantees as to the legal basis on which a court may find an individual guilty of a criminal offence. The Chamber thus turns to these standards.

(b) Whether the Direct Application of CIL is Compatible with Article 33 of the Constitution

73. The Chamber first recalls its earlier findings that "charged" in Article 33(1) of the Constitution in Albanian should be read as "held guilty" (see paragraph 53 above).

[118] Kosovo, Constitutional Court, *Constitutional review of Law No. 06/L-060 on Ratification of the Agreement on the State Border between the Republic of Kosovo and Montenegro*, KO 45/18, Judgment, 18 April 2018 (30 April 2018), para. 65; *Constitutional review of the Law, No. 04/L-199, on Ratification of the First International Agreement of Principles Governing the Normalisation of Relations between the Republic of Kosovo and the Republic of Serbia and the Implementation Plan of this agreement*, KO 95/13, Judgment, 2 September 2013 (9 September 2013), para. 52.

With that in mind, the Chamber notes that Article 33 of the Constitution in English reads as follows:

> **Article 33 [The Principle of Legality and Proportionality in Criminal Cases]**
>
> 1. 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.
>
> 2. No punishment for a criminal act shall exceed the penalty provided by law at the time the criminal act was committed.
>
> 3. The degree of punishment cannot be disproportional to the criminal offense.
>
> 4. Punishments shall be administered in accordance with the law in force at the time a criminal act was committed, unless the penalties in a subsequent applicable law are more favourable to the perpetrator.

74. The Chamber observes that Article 33(1) of the Constitution expressly provides for a possibility to find an individual guilty for an act that, at the time it was committed, constituted a war crime or a crime against humanity "under international law". The same follows from Article 7 of the Convention and Article 15 ICCPR, which refer to an act or omission that constituted a criminal offence "under international law" at the time it was committed. In this connection, the Chamber notes that Article 33(2), (3) and (4) of the Constitution provide for the guarantees as regards punishments. Therefore, the relevant provision for the specific question before the Chamber on criminal offences under CIL is Article 33(1) of the Constitution.

75. In order to ascertain whether the SC may apply a norm of CIL as part of "international law" in Article 33(1) of the Constitution, the Chamber refers to the ECtHR case law (as regards the relevance of the ECtHR case law in interpretation of a constitutional provision, see paragraphs 45, 49 above). The Chamber observes that, in *Kononov v. Latvia* [GC] and, more recently, in *Milanković v. Croatia*, the ECtHR held that "international law" in Article 7(1) of the Convention referred also to CIL.[119]

[119] ECtHR, *Kononov v. Latvia* [GC], cited above, paras 186, 213, 227, 237, 244; *Milanković v. Croatia*, no. 33351/20, 20 January 2022, paras 52-66.

Furthermore, as the ECtHR held in *Kononov v. Latvia* [GC], international laws and customs of war could be "sufficient, of themselves, to found individual criminal responsibility".[120]

76. At the same time, it follows from the ECtHR case law that, to comply with Article 33(1) of the Constitution and Article 7 of the Convention, a norm of CIL applied in criminal proceedings must form a sufficiently clear basis to hold an individual guilty. The said provisions require that the conduct for which an individual is held guilty constituted, at the time when it was committed, an offence defined with sufficient accessibility and foreseeability by CIL. This follows from the requirement that the respective offence be clearly defined in CIL that meets the qualitative requirements of accessibility and foreseeability.[121]

77. As regards the foreseeability, it should be noted that the ECtHR has held that it entails an element of judicial interpretation, as there will always be a need for elucidation of doubtful points. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.[122]

78. It follows that the direct application by the SC of war crimes and crimes against humanity, including related modes of liability, under CIL to establish an individual's guilt is compatible with the Constitution, provided that such application is in accordance with Article 33(1) of the Constitution and Article 7 of the Convention, as

[120] ECtHR, *Kononov v. Latvia* [GC], cited above, para. 237.
[121] ECtHR, *Vasiliauskas v. Lithuania* [GC], cited above, paras 154, 162, stating, *inter alia*, that "an offence must be clearly defined in the law, be it national or international […]"; see also *Kononov v. Latvia* [GC], cited above, paras 185, 187; *Korbely v. Hungary* [GC], cited above, paras 70, 73.
[122] ECtHR, *Kononov v. Latvia* [GC], cited above, para. 185; for a joint assessment of the accessibility and foreseeability of the definition of war crimes in the light of international laws and customs of war, which had not appeared in any official publication, see paras 234-244; *Korbely v. Hungary* [GC], cited above, para. 71; *Vasiliauskas v. Lithuania* [GC], cited above, paras 155-157.

interpreted by the ECtHR in its case law.

79. In this respect, the Chamber notes that this discussion does not intend to specify in an exhaustive manner all applicable requirements under Article 33(1) of the Constitution and Article 7 of the Convention, including as regards the application of more favourable CIL, if any, formed after the respective offence had allegedly been committed. As underlined above, the Chamber's assessment deals with a more general question of whether, as a matter of general principle, it is compatible with the Constitution for the SC to apply directly war crimes and crimes against humanity under CIL to establish an individual's guilt.

80. The Chamber observes that the Applicants also complained that, during the indictment period, certain criminal offences and related forms of liability had not constituted crimes under CIL, or that they had not been accessible or foreseeable to them (see paragraphs 27, 30, 32 above). In this regard, the Chamber notes that the question of whether, at the material time, the specific alleged conduct had amounted to crimes under CIL and the related issues raised by the Applicants are matters to be first determined in the course of the criminal proceedings. The same applies to the question of whether certain specific crimes are also contained in the Law. In this regard, the Chamber recalls that it is in the first place for the other panels of the SC to determine, in accordance with their respective competence, the issues of law and fact relevant to the case before them.

4. Conclusion

81. In view of the foregoing, the Chamber finds that the second Applicant's referral reveals no appearance of a violation under Articles 19 and 33(1) of the Constitution, Article 7 of the Convention, and Article 15 ICCPR as regards the question that, as a matter of general principle, it is not incompatible with the Constitution for the SC to apply directly war crimes and crimes against humanity under CIL, including related

forms of individual criminal responsibility. This is provided that such application complies with the requirements of Article 33(1) of the Constitution and Article 7 of the Convention. It follows that this part of the second Applicant's referral must, at this stage of the proceedings, be declared inadmissible pursuant to Rule 14(f) of the Rules.

VI. JOINDERS

82. The Chamber notes that, on 10 March 2022, Mr Thaçi filed two joinders, one to the first Applicant's referral and the other to the second Applicant's referral. The Chamber observes that Mr Thaçi did not file the joinders in his case before the Chamber, KSC-CC-2022-15, in the way to supplement his referral, but in the cases of the Applicants. In the joinders, Mr Thaçi stated that he "agrees with the submissions presented in [the two referrals] […]", and that he "[…] joins [the two referrals], and supports the request for relief set out therein" (see paragraph 3 above). In this regard, the Chamber, first, observes that neither the Law nor the Rules provide for a possibility to "join" a referral lodged by another person. Insofar as Rule 15(6) of the Rules states that the Chamber may order "the joinder […] of referrals", it gives the Chamber a possibility to examine several referrals jointly.

83. The Chamber observes that, by filing the joinders, Mr Thaçi might have wished to raise on his own behalf the alleged violations as argued by the Applicants. In this regard, it should be recalled that, pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1) of the Rules, individuals are authorised to refer to the Chamber violations of "their individual rights and freedoms" as guaranteed by the Constitution. Further, Article 58(1)(d),(e) of the Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers, KSC-BD-15, provides that a referral shall set out: (i) a statement of the alleged violations of the individual rights and freedoms guaranteed by the Constitution; and (ii) a statement confirming the

compliance with the requirement of exhaustion of remedies and the time limit for making the referral.

84. However, in the present case, Mr Thaçi did not specify the alleged violations of his own fundamental rights and freedoms guaranteed by the Constitution or other elements pursuant to the aforementioned Practice Direction. Insofar as Mr Thaçi might have wished to embrace the complaints and arguments submitted by the Applicants, the same issues of admissibility as discussed in this decision above would arise. Hence, in any event, they would be inadmissible for the same reasons as stated in this decision earlier. It follows that the joinders must be dismissed.

VII. REQUESTS REGARDING VENUE AND HEARING

85. In his referral, the second Applicant requested the Chamber to: (i) refrain from invoking a change in venue to the Host State; and (ii) to schedule an oral hearing.[123]

86. As regards the change in venue, the Chamber recalls that, pursuant to Article 3(8)(c) of the Law, for reasons of the proper administration of justice or security, the Presiding Judge of the Chamber may, at his or her discretion, invoke a change in venue to the Host State. Pursuant to Article 3(8)(d) of the Law, in the event of an invocation of a change in venue to the Host State, the President shall issue an administrative decision relocating the proceedings, or any part or phase thereof, to the Host State.

87. On 18 January 2019, the Presiding Judge of the Chamber, pursuant to Article 3(8)(c) of the Law, invoked a change in venue to the Host State in respect of all proceedings arising from referrals made to the Chamber pursuant to Article 49 of the Law, unless otherwise decided. The Presiding Judge considered that this was required

[123] Second Applicant's referral, paras 89-90.

for the proper administration of justice.[124] On 22 January 2019, the President set the venue for all future proceedings before the Chamber, unless otherwise decided, to the Host State.[125] The Chamber finds that, for the reasons of the proper administration of justice, its earlier invocation of change in venue to the Host State remains in place in respect of the present referrals.

88. As regards the second Applicant's request to schedule an oral hearing, the Chamber recalls that, pursuant to Rule 15(4) of the Rules, after the expiry of the time limits for the filing of the written submissions, the Chamber shall decide on the basis of the written submissions, unless a hearing is in the interests of the proper administration of justice. The Chamber considers that it could decide the referrals based on the written submissions and that no hearing was required.

89. In view of the foregoing, the second Applicant's requests as regards the change in venue and an oral hearing must be dismissed.

FOR THESE REASONS,

The Specialist Chamber of the Constitutional Court, unanimously,

1. *Joins* the examination of Mr Jakup Krasniqi's referral and Mr Kadri Veseli's referral;

2. *Declares* the referrals of Mr Jakup Krasniqi and Mr Kadri Veseli inadmissible;

[124] KSC-CC-2019-06, F00001, Invocation of change of venue for referrals made pursuant to Article 49 of the Law, public, 18 January 2019.
[125] KSC-CC-2019-06, F00002, Decision on the location of proceedings before the Specialist Chamber of the Constitutional Court, public, 22 January 2019.

3. *Dismisses* the joinders filed by Mr Hashim Thaçi to the referrals of Mr Jakup Krasniqi and Mr Kadri Veseli; and

4. *Dismisses* Mr Kadri Veseli's requests not to invoke a change in venue to the Host State and to schedule an oral hearing.

Vidar Stensland
Presiding Judge

Done in English on Monday, 13 June 2022
At The Hague, the Netherlands