



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

File number: KSC-CC-2026-32

Before: The Specialist Chamber of the Constitutional Court

Judge Vidar Stensland, Presiding

Judge Roumen Nenkov

Judge Piotr Hofmański

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Classification: Public

**Judgment on the Referral of Pjetër Shala Concerning Fundamental Rights
Guaranteed by Articles 30, 31, and 33 of the Kosovo Constitution, Articles 6 and 7
of the European Convention on Human Rights and Articles 14, 15, and 26 of the
International Covenant on Civil and Political Rights**

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The Specialist Chamber of the Constitutional Court

Composed of

Vidar Stensland, Presiding Judge

Roumen Nenkov, Judge

Piotr Hofmański, Judge

Having deliberated remotely delivers the following Judgment

I. PROCEDURE

A. REFERRAL

1. On 24 March 2026, Mr Pjetër Shala (“Applicant”) filed a request to the Specialist Chamber of the Constitutional Court (“Chamber”), seeking an extension of the time limit to lodge a referral before the Chamber.¹
2. On 25 March 2026, the President of the Specialist Chambers (“SC”) assigned the above Panel pursuant to Article 33(3) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”).²
3. On 31 March 2026, the Chamber extended the time limit for the Applicant to make a referral to 1 June 2026.³
4. On 1 June 2026, the Applicant made his referral pursuant to Article 113(7) of the Constitution of the Republic of Kosovo (“Constitution”) and Article 49(3) of the Law, as well as Rules 4(c) and 20(1) of the Rules of Procedure for the Specialist Chamber of

¹ KSC-CC-2026-32, F00001, Defence request for an extension of time to file a referral to the Constitutional Court, public, 24 March 2026.

² KSC-CC-2026-32, F00002/COR, Corrected version of decision assigning judges to a Constitutional Court Panel, public, 30 March 2026 (the original filed on 25 March 2026). As regards the venue of the proceedings, see KSC-CC-2019-06, F00001, Invocation of change of venue for referrals made pursuant to Article 49 of the Law, public, 18 January 2019; F00002, Decision on the location of proceedings before the Specialist Chamber of the Constitutional Court, public, 22 January 2019.

³ KSC-CC-2026-32, F00003, Decision on Pjetër Shala’s request for an extension of time to file a referral to the Constitutional Court, public, 31 March 2026, para. 6 and Disposition.

the Constitutional Court (“SCCC Rules” and “Referral”, respectively).⁴ The Applicant was represented by Mr Jean-Louis Gillisen and Mr Hédi Aouini.

5. In the Referral, the Applicant complained about violations of his fundamental rights guaranteed under Articles 24, 30, 31, and 33 of the Constitution, Articles 6 and 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR” or “Convention”), and Articles 14, 15, and 26 of the International Covenant on Civil and Political Rights (“ICCPR”) in relation to criminal proceedings against him, which took place before the SC.⁵

6. On 5 June 2026, in accordance with Article 20 of the Law and Rule 5 of the SCCC Rules, the Chamber decided that the official language of the present proceedings shall be English, with official translation or interpretation provided by the Registry into the two other official languages of the SC, namely Albanian and Serbian.⁶ Among other things, the Chamber likewise found it appropriate to grant the Specialist Prosecutor’s Office’s (“SPO”) request to file submissions in response to the Referral,⁷ and decided that the Applicant, should he wish to do so, may also file submissions in reply to the SPO.⁸

7. On 18 June 2026, following a request submitted by Mr Simon Laws and Ms Maria Radziejowska, the Victims’ Counsel representing the victims admitted to participate in the criminal proceedings against the Applicant before the SC,⁹ the Chamber found it appropriate to exceptionally allow Victims’ Counsel to file submissions in relation

⁴ KSC-CC-2026-32, F00004/RED, Public redacted version of referral to the Constitutional Court Panel concerning the violation of Mr Shala’s fundamental rights guaranteed by Articles 30, 31 and 33 of the Kosovo Constitution, Articles 6 and 7 of the ECHR and Articles 14, 15, and 26 of the ICCPR, public, 9 June 2026 (the original filed on 1 June 2026).

⁵ Referral, paras 1, 9-10, 13, 15-47.

⁶ KSC-CC-2026-32, F00006, Decision on the working language and further proceedings, public, 5 June 2026 (“Decision on the working language and further proceedings”), para. 6 and Disposition, para. 1.

⁷ KSC-CC-2026-32, F00005, Prosecution request for authorisation to make submissions in relation to referral KSC-CC-2026-32/F00004, public, 4 June 2026.

⁸ Decision on the working language and further proceedings, paras 7-8 and Disposition, paras 2-4.

⁹ KSC-CC-2026-32, F00008, Victims’ Counsel’s request for authorisation to make submissions in relation to referral KSC-CC-2026-32/F00004, public, 17 June 2026.

to only one of the complaints raised in the Referral, entitled “Complaint 5: Errors in Sentencing”, and decided that the Applicant, should he wish to do so, may also file submissions in reply to Victims’ Counsel.¹⁰

B. WRITTEN SUBMISSIONS

8. On 26 June 2026, Victims’ Counsel and the SPO filed their submissions on the Referral.¹¹

9. On 10 July 2026, the Applicant filed his submissions in reply to the SPO and Victims’ Counsel.¹²

C. EXAMINATION OF THE REFERRAL

10. The Chamber now turns to the examination of the Referral, based on the Referral and the written submissions of the SPO, the Victims’ Counsel, and the Applicant. This judgment refers to the facts of the case and the aforementioned submissions insofar as relevant for the Chamber’s assessment of the Referral.

II. THE FACTS

A. INDICTMENT, ARREST, AND TRANSFER TO THE SC

11. On 14 February 2020, the SPO submitted an indictment against the Applicant, charging him with four counts of war crimes under Article 14(1)(c) of the Law, namely arbitrary detention, cruel treatment, torture, and murder committed in the context of and associated with a non-international armed conflict (“NIAC”) in Kosovo between the Kosovo Liberation Army (“KLA”) and forces of the Federal Republic of Yugoslavia

¹⁰ KSC-CC-2026-32, F00009, Decision on Victims’ Counsel’s request for authorisation to make submissions in relation to referral KSC-CC-2026-32/F00004, public, 18 June 2026, paras 9-10 and Disposition, paras 1-3.

¹¹ KSC-CC-2026-32, F00010, Victims’ Counsel’s submissions in relation to referral KSC-CC-2026-32/F00004, public, 26 June 2026 (“Victims’ Counsel submissions”); F00011, Prosecution submissions on referral of Pjetër Shala (KSC-CC-2026-32/F00004), public, 26 June 2026, with Annex 1, public (“SPO submissions”).

¹² KSC-CC-2026-32, F00012, Defence reply to the Prosecution and Victims’ Counsel’s submissions in relation to referral KSC-CC-2026-32-F00004, public, 10 July 2026 (“Applicant submissions”).

and the Republic of Serbia (“FRY” and “Serbia”, respectively), including units of the Yugoslav Army, police and other units of the Ministry of Internal Affairs, as well as other groups fighting on behalf of the FRY and Serbia.¹³ These crimes were allegedly committed between approximately 17 May 1999 and 5 June 1999, against at least nine victims, all of whom were FRY citizens and persons taking no active part in hostilities, at the locations of a former metal works factory in Kukës, Republic of Albania (“Kukës Metal Factory”), used by the KLA for a variety of military purposes, but also serving as a detention and interrogation site.¹⁴ Regarding the Applicant’s individual criminal responsibility pursuant to Article 16(1)(a) of the Law, the SPO pleaded (i) commission, namely physical commission for arbitrary detention, cruel treatment and torture, and participation in a joint criminal enterprise (“JCE”) in its basic form for all the crimes charged and, in the alternative, in its extended form for the charge of murder; and/or (ii) aiding and abetting for all the crimes charged.¹⁵ The SPO maintained that, aside from the Applicant, other members of the JCE included Mr Sabit Geci (“Sabit Geci”), Mr Xhemshit Krasniqi (“Xhemshit Krasniqi”), KLA soldiers nicknamed “Bedri” and “Van Damme”, as well as certain other KLA soldiers, police, and guards present at the Kukës Metal Factory.¹⁶

12. On 28 February 2020, the pre-trial judge issued an order requesting the SPO to, *inter alia*, (i) prepare a revised indictment providing more specificity and clarity with respect to the charges; and (ii) file separate submissions regarding the SC’s jurisdiction over the war crime of arbitrary detention under Article 14(1)(c) of the Law, as pleaded in the indictment, or under Article 142 of the Criminal Code of the Socialist Federal

¹³ KSC-BC-2020-04, F00002/RED/A01, Public redacted version of ‘Indictment’, dated 14 February 2020, public, 26 April 2021 (the original filed on 14 February 2020) (“Indictment”), paras 5, 15-22.

¹⁴ Indictment, paras 3-5, 7, 15-16.

¹⁵ Indictment, paras 7-9, 12-14.

¹⁶ Indictment, para. 10.

Republic of Yugoslavia (“SFRY Criminal Code”) as incorporated in Article 15(1)(a) of the Law, including its legal elements.¹⁷

13. On 18 March 2020, the SPO filed the revised indictment,¹⁸ and also made separate submissions with regard to the war crime of arbitrary detention under Article 14(1)(c) of the Law.¹⁹

14. On 12 June 2020, the pre-trial judge confirmed the indictment.²⁰ In this regard, the pre-trial judge found, *inter alia*, that there was a well-grounded suspicion that the Applicant, as a member of a JCE in its basic form, whereby several perpetrators act on the basis of a common criminal plan (“JCE I”)²¹ and, in the alternative, in its extended form, whereby a participant may incur criminal responsibility for crimes that, though not encompassed by the common plan, were nevertheless a natural and foreseeable consequence of its realisation (“JCE III”),²² had committed the alleged crimes within the meaning of Article 16(1)(a) of the Law,²³ which states that:

Article 16 **Individual Criminal Responsibility**

1. For crimes in Articles 13-14:
 - a. a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of such a crime shall be individually responsible for the crime.

¹⁷ KSC-BC-2020-04, F00003, Order to the Specialist Prosecutor pursuant to Rule 86(4) of the Rules, public, 28 February 2020, para. 21(c)-(d).

¹⁸ KSC-BC-2020-04, F00004/RED/A01, Public redacted version of “Indictment”, dated 18 March 2020, public, 26 April 2021 (the original filed 18 March 2020).

¹⁹ KSC-BC-2020-04, F00004/RED, Public version of ‘Submission of revised Indictment for confirmation and related requests’, filing KSC-BC-2020-04/F00004 dated 18 March 2020, public, 26 April 2021 (the original filed on 18 March 2020), paras 9-22, with Annex 1, public.

²⁰ KSC-BC-2020-04, F00007/RED, Public redacted version of the decision on the confirmation of the indictment against Pjetër Shala, public, 6 May 2021 (the original issued on 12 June 2020) (“Confirmation decision”), paras 93, 101, 106, 111, 140(a).

²¹ Confirmation decision, para. 66.

²² Confirmation decision, para. 66.

²³ Confirmation decision, paras 120, 124.

15. The pre-trial judge also found that arbitrary detention is not explicitly set out in Article 14(1)(c) of the Law,²⁴ which provides that:

Article 14
War Crimes under International Law

1. For the purposes of this Law, under customary international law during the temporal jurisdiction of the [SC], war crimes means:

[...]

c. In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, including any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages;
- (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.

16. However, he observed that the provision does not limit the crimes falling under the jurisdiction of the SC to those expressly enumerated therein.²⁵ The pre-trial judge considered that, in order to exercise jurisdiction over a war crime that is not listed in Article 14(1)(c) of the Law, such a crime must constitute a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 (“Common Article 3” and “Geneva Conventions”), and have been prohibited under customary international law (“CIL”) at the time of its commission, in accordance with Articles 3(2)(d) and 12 of the Law.²⁶ In his view, both conditions were met, as arbitrary detention is not compatible with and violates the requirement of humane treatment of all persons placed *hors de combat*, including by detention, as enshrined in Common Article 3,²⁷ and is prohibited

²⁴ Confirmation decision, para. 23.

²⁵ Confirmation decision, para. 23.

²⁶ Confirmation decision, para. 23.

²⁷ Confirmation decision, paras 24-25, 27.

by CIL in both international and non-international armed conflicts.²⁸ The pre-trial judge also held that the applicable law was sufficiently clear and foreseeable for an individual to understand that depriving a person of liberty in an arbitrary manner might give rise to individual criminal responsibility, and concluded that the SC may exercise jurisdiction over arbitrary detention as a war crime under Article 14(1)(c) of the Law, read together with Article 12.²⁹

17. On the same date, the pre-trial judge issued an arrest warrant and transfer order for the Applicant.³⁰

18. On 19 June 2020, the SPO submitted the confirmed indictment.³¹

19. On 16 March 2021, with the cooperation of the competent Belgian authorities, the Applicant was arrested in the Kingdom of Belgium ("Belgium").³² He was transferred to the SC Detention Facilities in The Hague on 15 April 2021.³³

20. On 19 April 2021, during his initial appearance before the pre-trial judge,³⁴ the Applicant pleaded not guilty to all the crimes charged.³⁵

²⁸ Confirmation decision, paras 26-27.

²⁹ Confirmations decision, paras 27-28.

³⁰ KSC-BC-2020-04, F00008/A01/RED, Public redacted version of arrest warrant for Mr Pjetër Shala, public, 15 April 2021 (the original issued on 12 June 2020); F00008/A02/RED, Public redacted version of order for transfer to detention facilities of the Specialist Chambers, public, 15 April 2021 (the original issued on 12 June 2020).

³¹ KSC-BC-2020-04, F00010/A01, Indictment, strictly confidential and *ex parte*, 19 June 2020. A confidential, lesser redacted version and a public redacted version of the confirmed indictment were filed on 31 March 2021, F00016/A01 and F00016/A02.

³² KSC-BC-2020-04, F00013, Notification of arrest of Pjetër Shala pursuant to Rule 55(4), public, 16 March 2021, para. 5.

³³ KSC-BC-2020-04, F00019/RED, Public redacted version of 'Notification of reception in the detention facilities of the Specialist Chambers and conditional assignment of counsel', filing F00019 dated 15 April 2021, public, 26 April 2021 (the original filed on 15 April 2021), para. 2.

³⁴ KSC-BC-2020-04, F00020, Decision setting the date for the initial appearance of Pjetër Shala and related matters, public, 15 April 2021, para. 22(a).

³⁵ KSC-BC-2020-04, Transcript, public, 19 April 2021, p. 11, lines 9-11.

B. PRELIMINARY MOTION CHALLENGING THE JURISDICTION OF THE SC

21. On 12 July 2021, the Applicant submitted a preliminary motion challenging the jurisdiction of the SC.³⁶ Among other things, the Applicant argued that the SC lacked jurisdiction over the mode of liability of JCE and the war crime of arbitrary detention in a NIAC.³⁷

22. On 18 October 2021, the pre-trial judge rejected the preliminary motion in its entirety.³⁸

1. Joint criminal enterprise

23. The Applicant argued that the SC does not have jurisdiction to apply JCE as a mode of liability.³⁹ In particular, he claimed that JCE was not part of Kosovo law or the law of the FRY at the time of the alleged crimes.⁴⁰ The Applicant also contended that there is no legal basis for this mode of liability under the Law given, in particular, that Article 16(1)(a) thereof does not include JCE as a form of liability.⁴¹ Likewise, he maintained that JCE in general, and JCE III in particular, did not form part of CIL in 1999.⁴² Therefore, according to the Applicant, the doctrine of JCE could not be applied consistently with the principle of *nullum crimen sine lege*.⁴³ He likewise submitted that, at the material time, the application of JCE as a mode of liability was neither accessible nor foreseeable to him.⁴⁴

³⁶ KSC-BC-2020-4, F00054, Preliminary motion of the Defence of Pjetër Shala to challenge the jurisdiction of the KSC, public, 12 July 2021 (“Preliminary motion on jurisdiction”).

³⁷ Preliminary motion, paras 3-4, 21, 47.

³⁸ KSC-BC-2020-04, F00088, Decision on motion challenging the establishment and jurisdiction of the Specialist Chambers, public, 18 October 2021 (“Decision on jurisdiction”), para. 104.

³⁹ Preliminary motion on jurisdiction, paras 3, 21.

⁴⁰ Preliminary motion on jurisdiction, paras 21, 25-28.

⁴¹ Preliminary motion on jurisdiction, paras 21, 29-32. See also KSC-BC-2020-04, F00084, Defence reply to the Prosecution response to the preliminary motion of Pjetër Shala challenging the jurisdiction of the KSC, public, 24 September 2021 (“Preliminary motion on jurisdiction reply”), paras 41-42.

⁴² Preliminary motion on jurisdiction, paras 21, 33-43. See also Preliminary motion on jurisdiction reply, paras 43-48.

⁴³ Preliminary motion on jurisdiction, paras 4, 45. See also Preliminary motion on jurisdiction reply, para. 40.

⁴⁴ Preliminary motion on jurisdiction, paras 21, 44-45.

24. The pre-trial judge held that the SC have jurisdiction to apply JCE as a mode of liability, rejecting the Applicant's preliminary motion in that respect.⁴⁵ At the outset, the pre-trial judge concluded that, because Article 16(1) of the Law – unlike the second and third paragraph of that provision – does not expressly incorporate provisions of Kosovo law, the applicable modes of liability in relation to crimes under Articles 13-14 of the Law are those forming part of CIL at the time of their alleged commission.⁴⁶

25. Recalling his previous findings in proceedings concerning other accused before the SC, the pre-trial judge further determined that Article 16(1) of the Law, including as to the understanding to be given to the term "commission", must be interpreted in accordance with CIL.⁴⁷ In reaching that conclusion, he relied on the fact that (i) CIL has primacy over Kosovo law at the SC, and other provisions of Kosovo law apply only where expressly incorporated and applied by the Law and consistent with CIL; (ii) Articles 13-14 of the Law designate CIL as the applicable law with respect to war crimes and crimes against humanity during the temporal jurisdiction of the SC; and (iii) the terminology employed by Article 16(1) of the Law mirrors the corresponding provisions in the statutes of both the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR", collectively "*ad hoc* tribunals"), which applied modes of liability under CIL.⁴⁸

26. Furthermore, having regard to the jurisprudence of the *ad hoc* tribunals, as well as other international or hybrid courts and tribunals in accordance with Article 3(3) of the Law, the pre-trial judge found that there were no persuasive reasons to depart from their settled findings that JCE I and JCE III were established in CIL at the time of the alleged crimes in 1999.⁴⁹

⁴⁵ Decision on jurisdiction, paras 90-95, 97.

⁴⁶ Decision on jurisdiction, para. 90.

⁴⁷ See Decision on jurisdiction, para. 91, referring to KSC-BC-2020-06, F00412, Decision on motions challenging the jurisdiction of the Specialist Chambers, public, 22 July 2021 ("*Thaçi et al.* decision on jurisdiction"), para. 177.

⁴⁸ Decision on jurisdiction, para. 91; *Thaçi et al.* decision on jurisdiction, para. 177.

⁴⁹ Decision on jurisdiction, paras 92-93; *Thaçi et al.* decision on jurisdiction, paras 181-190.

27. Lastly in this regard, the pre-trial judge concluded that both JCE I and JCE III were accessible and foreseeable to the Applicant at the material time.⁵⁰ In so finding, he recalled that (i) the first ICTY judgment noting liability for participation in a JCE was the trial judgment of December 1998 in the case of *Prosecutor v. Anto Furundžija* (“*Furundžija*”); (ii) the general legal framework relating to JCE developed after World War II (“WW II”); and (iii) Articles 22 and 26 of the SFRY Criminal Code, which was applicable in Kosovo at the material time, effectively mirrored the concept of common purpose liability.⁵¹ Taken together with his finding that JCE formed part of CIL in 1999, the pre-trial judge held that said considerations demonstrated that the commission of crimes on the basis of JCE was plainly unlawful at the relevant time.⁵²

2. Arbitrary detention

28. The Applicant maintained that the SC does not have jurisdiction over arbitrary detention as a war crime in a NIAC.⁵³ In this connection, he contended that arbitrary detention was not criminalised under Kosovo law at the material time.⁵⁴ The Applicant likewise claimed that Article 14(1)(c) of the Law does not list arbitrary detention as a war crime in a NIAC and that said list is exhaustive,⁵⁵ further arguing that arbitrary detention does not amount to a serious violation of Common Article 3.⁵⁶ Moreover, he argued that arbitrary detention was not prohibited under CIL in 1999.⁵⁷ Therefore, the Applicant submitted that the principle of *nullum crimen sine lege* precluded the SC from retroactively applying criminal liability for the war crime of arbitrary detention in a NIAC.⁵⁸ He also argued that, considering the uncertainties surrounding the notion of

⁵⁰ Decision on jurisdiction, para. 95.

⁵¹ Decision on jurisdiction, para. 95; *Thaçi et al.* decision on jurisdiction, paras 194-200.

⁵² Decision on jurisdiction, para. 95.

⁵³ Preliminary motion on jurisdiction, paras 3, 47.

⁵⁴ Preliminary motion on jurisdiction, paras 47-50.

⁵⁵ Preliminary motion on jurisdiction, paras 47, 51. See also Preliminary motion on jurisdiction reply, paras 35-37.

⁵⁶ Preliminary motion on jurisdiction, paras 47, 52-54.

⁵⁷ Preliminary motion on jurisdiction, paras 47, 55-59.

⁵⁸ Preliminary motion on jurisdiction, paras 4, 51.

arbitrariness of detention, it was not reasonably foreseeable that he could be charged with this crime.⁵⁹

29. The pre-trial judge held that the SC have jurisdiction over arbitrary detention as a war crime in a NIAC, rejecting the Applicant's preliminary motion in this regard.⁶⁰ He began by finding that, since the SC applies CIL in the first instance, and Kosovo law only insofar as it is expressly incorporated into the Law and consistent with CIL, whether arbitrary detention constituted a war crime in a NIAC during the temporal jurisdiction of the SC fell to be assessed against CIL.⁶¹

30. Consistent with his previous findings in another case before the SC, the pre-trial judge further held that the formulations employed in Article 14(1)(a) and (c), like those in Article 14(1)(b) and (d), have a similar, non-exhaustive meaning, and that Common Article 3 is likewise non-exhaustive, as its *chapeau* makes clear that it lays down only minimum guarantees.⁶² Accordingly, the pre-trial judge concluded that the war crimes falling within the jurisdiction of the SC are not confined to those expressly enumerated in Article 14 of the Law provided that, in line with Articles 3(2)(d) and 12 of the Law, they existed under CIL at the time of their alleged commission.⁶³

31. Additionally, the pre-trial judge determined that arbitrary detention amounts to a serious violation of Common Article 3.⁶⁴ In so doing he found that, in the context of detention by a non-State actor in a NIAC, arbitrary detention consists of a deprivation of liberty either without a valid legal basis or in breach of basic procedural guarantees arising from the requirement of humane treatment under Common Article 3, and that

⁵⁹ Preliminary motion on jurisdiction, paras 47, 60. See also Preliminary motion on jurisdiction reply, para. 39.

⁶⁰ Decision on jurisdiction, paras 98-103.

⁶¹ Decision on jurisdiction, para. 98.

⁶² See Decision on jurisdiction, para. 99, referring to *Thaçi et al.* decision on jurisdiction, para. 144.

⁶³ Decision on jurisdiction, para. 99; *Thaçi et al.* decision on jurisdiction, para. 145.

⁶⁴ Decision on jurisdiction, para. 100; *Thaçi et al.* decision on jurisdiction, para. 156.

this characterisation is firmly rooted in the terms of Common Article 3, which forms part of CIL in its entirety.⁶⁵

32. The pre-trial judge also reaffirmed previous findings that arbitrary detention in a NIAC formed part of CIL at the time of the alleged crimes.⁶⁶ In this regard, he relied on State practice and *opinio juris*, including national legislation and States' positions expressed via international organisations.⁶⁷ The pre-trial judge further reiterated that the International Committee of the Red Cross Customary International Humanitarian Law Study ("ICRC" and "Customary IHL Study") served as an authoritative reference for identifying State practice, which he assessed independently, in conjunction with other relevant materials.⁶⁸

33. As a last point in this respect, the pre-trial judge found that it was accessible and foreseeable to the Applicant, at the relevant time, that involvement in acts of arbitrary detention could give rise to individual criminal responsibility.⁶⁹ To that end, he relied on the criminalisation of arbitrary deprivation of liberty in the former Yugoslavia (and beyond), and the condemnation of such conduct by the United Nations ("UN") with respect to conflicts in the region.⁷⁰ In the pre-trial judge's view, these considerations, taken together with the finding that arbitrary detention in a NIAC was part of CIL at the material time, demonstrated that such acts were plainly unlawful.⁷¹

⁶⁵ Decision on jurisdiction, para. 100; *Thaçi et al.* decision on jurisdiction, paras 149-155.

⁶⁶ Decision on jurisdiction, para. 101; *Thaçi et al.* decision on jurisdiction, para. 166.

⁶⁷ Decision on jurisdiction, para. 101; *Thaçi et al.* decision on jurisdiction, paras 159-164.

⁶⁸ Decision on jurisdiction, para. 101; *Thaçi et al.* decision on jurisdiction, para. 157.

⁶⁹ Decision on jurisdiction, para. 102; *Thaçi et al.* decision on jurisdiction, para. 165.

⁷⁰ Decision on jurisdiction, para. 102; *Thaçi et al.* decision on jurisdiction, para. 165.

⁷¹ Decision on jurisdiction, para. 102.

C. INTERLOCUTORY APPEAL AGAINST THE DECISION ON THE PRELIMINARY MOTION CHALLENGING THE JURISDICTION OF THE SC

34. On 9 November 2021, the Applicant filed an interlocutory appeal against the pre-trial judge's decision on the preliminary motion.⁷² The Applicant challenged, *inter alia*, the pre-trial judge's findings as to the SC's jurisdiction over JCE as a mode of liability and the war crime of arbitrary detention in a NIAC.⁷³

35. On 11 February 2022, a panel of the Court of Appeals Chamber denied his appeal in entirety.⁷⁴

1. Joint criminal enterprise

36. Among other things, the Applicant contented that the pre-trial judge had erred in determining that liability under JCE I and JCE III is included in Article 16(1)(a) of the Law, and that the manner in which the pre-trial judge interpreted and applied this provision violated his fundamental rights under Article 7 of the ECHR and equivalent provisions of the Constitution.⁷⁵ According to the Applicant, the pre-trial judge also erred in finding that liability under JCE I and JCE III was accessible and foreseeable to him at the time the alleged crimes were committed.⁷⁶ Likewise, he submitted that the pre-trial judge had erred in concluding that JCE, and particularly JCE III, was firmly established in CIL at the relevant time.⁷⁷

⁷² KSC-BC-2020-04, IA002/F00003, Defence appeal against decision on motion challenging the establishment and jurisdiction of the Specialist Chambers, public, 9 November 2021 ("Preliminary motion on jurisdiction appeal").

⁷³ Preliminary motion on jurisdiction appeal, paras 2, 4(iii)-(iv), 20-25.

⁷⁴ KSC-BC-2020-04, IA002/F00010, Decision on Pjetër Shala's appeal against decision on motion challenging the establishment and jurisdiction of the Specialist Chambers, public, 11 February 2022 ("Appeal decision on jurisdiction"), para. 48.

⁷⁵ Preliminary motion on jurisdiction appeal, paras 4(iii), 20, 22. See also KSC-BC-2020-04, IA002/F00009, Defence reply to Prosecution response to appeal against 'Decision on motion challenging the establishment and jurisdiction of the Specialist Chambers', public, 9 December 2021 ("Preliminary motion on jurisdiction appeal reply"), paras 29-30.

⁷⁶ Preliminary motion on jurisdiction appeal, paras 20, 22. See also Preliminary motion on jurisdiction appeal reply, para. 31.

⁷⁷ Preliminary motion on jurisdiction appeal, paras 21-22.

37. The appeals panel agreed with the pre-trial judge's conclusion that Article 16(1) of the Law must be interpreted in accordance with CIL as applicable at the time of the alleged crimes, and recalled its earlier findings in another case before the SC, namely that it was satisfied that the Law provides for JCE as a form of criminal liability.⁷⁸ In this regard, it highlighted that it had consistently relied on the jurisprudence of other criminal courts, including the ICTY and the ICTR, to interpret the Law where it lacked statutory elaboration, and recalled that said courts had typically applied JCE as a form of commission under CIL.⁷⁹

38. Furthermore, the appeals panel confirmed the pre-trial judge's finding that JCE I and JCE III were accessible and foreseeable to the Applicant at the relevant time.⁸⁰ It recalled, in this connection, its previous conclusion to the effect that both forms of JCE were accessible and foreseeable to the accused in other proceedings before the SC at the material time.⁸¹

39. Lastly, the appeals panel reiterated its earlier findings that both JCE I and JCE III constituted modes of liability under CIL at the time of the alleged crimes and found no error in the pre-trial judge's assessment of the relevant authorities in this regard.⁸² It therefore dismissed this ground of appeal.⁸³

2. Arbitrary detention

40. The Applicant contended, in particular, that the pre-trial judge made an error of law in concluding that arbitrary detention in a NIAC falls within the scope of the SC's jurisdiction.⁸⁴ In this regard, he maintained that the pre-trial judge's interpretation of

⁷⁸ See Appeal decision on jurisdiction, para. 35, referring to KSC-BC-2020-06, IA009/F00030, Decision on appeals against "Decision on motions challenging the jurisdiction of the Specialist Chamber", public, 23 December 2021 ("*Thaçi et al.* appeal decision on jurisdiction"), paras 136-138, 140.

⁷⁹ Appeal decision on jurisdiction, para. 35; *Thaçi et al.* appeal decision on jurisdiction, paras 136-138.

⁸⁰ Appeal decision on jurisdiction, para. 36.

⁸¹ Appeal decision on jurisdiction, para. 36; *Thaçi et al.* appeal decision on jurisdiction, paras 211-214, 218-224.

⁸² Appeal decision on jurisdiction, para. 37; *Thaçi et al.* appeal decision on jurisdiction, paras 153, 169, 172, 187, 190-193, 196.

⁸³ Appeal decision on jurisdiction, para. 40.

⁸⁴ Preliminary motion on jurisdiction appeal, paras 4(iv), 23.

Article 14(1)(c) of the Law in a non-exhaustive manner violated the principle of legal certainty.⁸⁵ Moreover, the Applicant submitted that the pre-trial judge's finding that the war crime of arbitrary detention in a NIAC was sufficiently foreseeable to him at the material time was manifestly unreasonable and inadequately reasoned.⁸⁶

41. The appeals panel agreed with the pre-trial judge's finding that the wording of Article 14(1)(c) of the Law demonstrates that the list of war crimes contained therein is non-exhaustive.⁸⁷ It further concluded that this interpretation does not violate the principle of legal certainty, since any act falling within the jurisdiction of the SC must have existed under CIL during their temporal jurisdiction, and constituted a serious violation of Common Article 3.⁸⁸ According to the appeals panel, arbitrary detention satisfied those requirements.⁸⁹

42. Likewise, the appeals panel upheld the pre-trial judge's conclusion that the war crime of arbitrary detention in a NIAC was sufficiently accessible and foreseeable to the Applicant at the material time, and recalled its previous findings to the same effect vis-à-vis other accused before the SC.⁹⁰ Lastly, it held that the Applicant had failed to substantiate his claim that this finding was manifestly unreasonable or inadequately reasoned, and ultimately dismissed this ground of appeal.⁹¹

⁸⁵ Preliminary motion on jurisdiction appeal, para. 23. See also Preliminary motion on jurisdiction appeal reply, paras 32-33.

⁸⁶ Preliminary motion on jurisdiction appeal, para. 23. See also preliminary motion on jurisdiction appeal reply, paras 33-34.

⁸⁷ See Appeal decision on jurisdiction, para. 44, referring to *Thaçi et al.* appeal decision on jurisdiction, para. 87.

⁸⁸ Appeal decision on jurisdiction, para. 44.

⁸⁹ Appeal decision on jurisdiction, paras 45-46; *Thaçi et al.* appeal decision on jurisdiction, paras 95-97.

⁹⁰ Appeal decision on jurisdiction, para. 46; *Thaçi et al.* appeal decision on jurisdiction, paras 106-109, 111.

⁹¹ Appeal decision on jurisdiction, paras 46-47.

D. PRELIMINARY MOTION CHALLENGING THE FORM OF THE INDICTMENT

43. On 13 July 2021, the Applicant filed a preliminary motion challenging the form of the confirmed indictment.⁹² Among other things, the Applicant contended that the confirmed indictment was defective due to its vague and non-exhaustive language, and a lack of specificity with regard to some of the material facts and elements of the crimes pleaded, including the identity of the members of the alleged JCE, as well as the identity and number of the alleged victims.⁹³

44. On 18 October 2021, the pre-trial judge granted, in part, the Applicant's motion, ordering the SPO to amend the indictment in order to provide the required level of specificity and clarity regarding the Applicant's personal participation in some of the incidents referred to therein, and rejected the remainder thereof.⁹⁴

1. Identity of JCE members

45. The Applicant maintained that, having regard to the scale of the alleged JCE and underlying events, as well as his alleged proximity to the physical commission of the charged crimes, the language used in the confirmed indictment to identify the alleged JCE members was impermissibly vague.⁹⁵

46. While taking into account the small size of the alleged JCE, the fact that the events underlying the charges were easily distinguishable, as well as the Applicant's alleged proximity to the crimes, the pre-trial judge concluded that the membership of the alleged JCE had been pleaded with sufficient specificity.⁹⁶ In particular, he noted that the confirmed indictment identified five JCE members, including the Applicant,

⁹² KSC-BC-2020-04, F00055/COR/RED, Public redacted version of 'Preliminary motion by the defence of Pjetër Shala challenging the form of the indictment', public, 9 September 2021 (the original filed on 13 July 2021) ("Preliminary motion on form of indictment").

⁹³ Preliminary motion on form of indictment, paras 31-32, 39-41, 56.

⁹⁴ KSC-BC-2020-04, F00089/RED, Public redacted version of decision on motion challenging the form of indictment, public, 18 October 2021 (the original issued on the same day) ("Decision on form of indictment"), paras 69, 73, 75, 117, 118(a)-(c).

⁹⁵ Preliminary motion on form of indictment, paras 39-41, 56.

⁹⁶ Decision on form of indictment, paras 55-57.

and considered that, although some of the alleged JCE members were identified by category rather than by name, the indictment made clear reference to three discrete categories of individuals (i.e. “certain other KLA soldiers, police, and guards”), and specified the geographical scope of the JCE by locating those individuals at the Kukës Metal Factory during the relevant time frame.⁹⁷

2. Identity and number of victims

47. The Applicant also challenged the lack of specific information on the status of the alleged victims, arguing that the SPO should have provided more information in the confirmed indictment on their background, status, and relationship with the forces engaged in the conflict.⁹⁸

48. The pre-trial judge dismissed the Applicant’s arguments and concluded that the confirmed indictment, read as a whole, provided sufficient information regarding the number and identity of the alleged victims.⁹⁹ In this connection, he considered that the identification of victims as a group or by reference to their approximate number was sufficient, and held that the particulars concerning the time period and location of the purported crimes, as well as other details pertaining to the alleged victims and crime site provided further clarity as to their identity.¹⁰⁰ Lastly, the pre-trial judge was of the view that any additional information regarding the composition or background of that group or category and their status was an evidentiary matter to be developed at trial.¹⁰¹

⁹⁷ Decision on form of indictment, paras 55-56.

⁹⁸ Preliminary motion on form of indictment, paras 31-32. See also KSC-BC-2020-04, F00083, Defence reply to the Prosecution Response to the preliminary motion of Pjetër Shala challenging the form of the indictment, public, 24 September 2021, para. 16.

⁹⁹ Decision on form of indictment, paras 103, 109.

¹⁰⁰ Decision on form of indictment, paras 103, 109.

¹⁰¹ Decision on form of indictment, paras 103, 109.

E. CORRECTED INDICTMENT

49. On 1 November 2021, following the pre-trial judge's order in this regard,¹⁰² the SPO submitted the corrected indictment.¹⁰³

F. INTERLOCUTORY APPEAL AGAINST THE DECISION ON THE PRELIMINARY MOTION CHALLENGING THE FORM OF THE INDICTMENT

50. On 17 December 2021, after the pre-trial judge granted, in part, his request and certified two issues for appeal,¹⁰⁴ the Applicant filed an interlocutory appeal against the pre-trial judge's decision on the preliminary motion challenging the form of the indictment.¹⁰⁵ He claimed that the pre-trial judge had erred in his assessment of the particularity of the confirmed indictment as regards (i) the identity of the members of the alleged JCE and (ii) the alleged victims.¹⁰⁶

51. On 22 February 2022, the appeals panel denied his appeal in entirety.¹⁰⁷

1. Identity of JCE members

52. The Applicant contended that the lack of information regarding the number and identity of JCE members beyond those specifically identified rendered the confirmed indictment defective, and that the language used to describe the other members of the alleged JCE was impermissibly vague.¹⁰⁸ He further argued that, in light of his alleged

¹⁰² See above, para. 44.

¹⁰³ KSC-BC-2020-04, F00098/A01, Corrected indictment, confidential, 1 November 2021 ("Corrected indictment"). A public redacted version of the corrected indictment was filed on 16 November 2021, F00107/A01.

¹⁰⁴ KSC-BC-2020-04, F00116, Decision on application for leave to appeal "Decision on motion challenging the form of the indictment", public, 29 November 2021, paras 26, 31(a)-(b).

¹⁰⁵ KSC-BC-2020-04, IA004/F00004, Defence appeal with leave against the 'Decision on motion challenging the form of indictment', public, 17 December 2021 ("Preliminary motion on form of indictment appeal").

¹⁰⁶ Preliminary motion on form of indictment appeal, paras 2, 13-25, 26-34.

¹⁰⁷ KSC-BC-2020-04, IA004/F00008, Decision on Pjetër Shala's appeal against decision on motion challenging the form of indictment, public, 22 February 2022 ("Appeal decision on form of indictment"), para. 34.

¹⁰⁸ Preliminary motion on form of indictment appeal, paras 16, 19-20, 24. See also KSC-BC-2020-04, IA004/F00007, Defence reply to Prosecution response to appeal against 'Decision on motion challenging the form of indictment', public, 17 January 2022 ("Preliminary motion on form of indictment appeal reply"), paras 5-6.

proximity to the criminal conduct and the limited scale of the alleged crimes, the pre-trial judge should have applied a more rigorous standard in terms of specificity,¹⁰⁹ and submitted that this lack of specificity was incompatible with the SPO's obligation to provide sufficient notice of the charges against him, impairing his ability to prepare a meaningful defence.¹¹⁰

53. The appeals panel dismissed these arguments and concluded that the confirmed indictment provided sufficient specificity regarding the alleged JCE members.¹¹¹ More specifically, it found that, while a higher degree of specificity was required given the Applicant's proximity to the underlying crimes and the limited scope of the case, the confirmed indictment sufficiently identified the unnamed JCE members by reference to three categories of individuals, and further circumscribed them by their presence at the Kukës Metal Factory during a very specific time frame.¹¹² Furthermore, the appeals panel determined that the language used to describe the alleged members of the JCE was not impermissibly vague, and that the level of detail provided in the confirmed indictment was sufficient to allow the Applicant to understand the factual allegations underpinning the charges against him.¹¹³

2. Identity and number of victims

54. The Applicant pointed to certain paragraphs in the confirmed indictment which, in his opinion, failed to specify the number or identity of the victims of some of the alleged crimes.¹¹⁴ He further submitted that, given the limited nature and scale of the allegations, the identification of the victims only as a group or by reference to their

¹⁰⁹ Preliminary motion on form of indictment appeal, paras 17-20. See also Preliminary motion on form of indictment appeal reply, para. 3.

¹¹⁰ Preliminary motion on form of indictment appeal, paras 24-25. See also Preliminary motion on form of indictment appeal reply, paras 4-6.

¹¹¹ Appeal decision on form of indictment, paras 16-21.

¹¹² Appeal decision on form of indictment, paras 16-18.

¹¹³ Appeal decision on form of indictment, paras 18, 20.

¹¹⁴ Preliminary motion on form of indictment appeal, paras 26, 29. See also Preliminary motion on form of indictment appeal reply, paras 9-10.

approximate number was insufficient, depriving him of adequate notice of the case against him.¹¹⁵

55. The appeals panel concluded that the confirmed indictment provided sufficient specificity regarding the identity and number of the alleged victims, and dismissed the Applicant's arguments.¹¹⁶ In particular, although it recalled that a higher degree of specificity was required in light of the Applicant's alleged proximity to the events and the limited scope of the case, the appeals panel found that the confirmed indictment sufficiently identified the victims by reference to the group of persons detained at the Kukës Metal Factory during the relevant time frame, their approximate number, as well as further particulars, including the identity of several victims by name.¹¹⁷ It also determined that, considered together with the particulars concerning the narrow time and location of the alleged crimes, the information in the confirmed indictment was sufficiently specific to provide the Applicant with adequate notice in that respect.¹¹⁸ Notwithstanding, the appeals panel stressed that, should the SPO be in a position to provide the identity of the unnamed victims, it should do so.¹¹⁹

G. REFERRAL TO THE CHAMBER CONCERNING THE CRIMINAL CHARGES

56. On 14 April 2022, the Applicant made a referral to the Chamber in accordance with Article 113(7) of the Constitution and Article 49(3) of the Law, claiming a breach of the principles of legality and non-retroactivity under Article 33 of the Constitution and Article 7 of the Convention.¹²⁰ Among other things, he claimed that neither JCE as a mode of liability nor the war crime of arbitrary detention in a NIAC formed part of

¹¹⁵ Preliminary motion on form of indictment appeal, para. 27. See also Preliminary motion on form of indictment appeal reply, para. 11.

¹¹⁶ Appeal decision on form of indictment, paras 26-30, 33.

¹¹⁷ Appeal decision on form of indictment, paras 26-28.

¹¹⁸ Appeal decision on form of indictment, para. 29.

¹¹⁹ Appeal decision on form of indictment, paras 26, 29.

¹²⁰ KSC-CC-2022-16, F00001, Referral to the Constitutional Court Panel concerning the violation of Mr Shala's fundamental rights guaranteed by Article 33 of the Kosovo Constitution and Article 7 of the European Convention on Human Rights, public, 14 April 2022 ("*P. Shala* referral concerning criminal charges"), paras 1-3, 10-15.

CIL at the time of the alleged crimes and, as such, it was not accessible or foreseeable to him that he could be held criminally liable on that basis.¹²¹

57. On 6 July 2022, the Chamber issued its decision on the referral, dismissing it in its entirety.¹²² Notably, it held that, since at that stage of the proceedings the Applicant had not been found guilty of the crimes in question and could thereby not claim to be a victim of the alleged violations under Article 33 of the Constitution and Article 7 of the ECHR, the referral was premature.¹²³

58. At the same time, the Chamber noted the fundamental importance of one of the questions raised by the Applicant for the functioning of the SC, namely whether, as a matter of general principle, the direct application of CIL in relation to JCE as a mode of liability and the war crime of arbitrary detention in a NIAC, as well as the primacy attributed to CIL was unconstitutional.¹²⁴ It therefore found it appropriate to address it, while nevertheless being mindful that the criminal proceedings were pending, and without prejudice to the determination of the relevant legal and factual issues by the criminal chambers, or to any future determination by the Chamber of the complaints, if any, concerning an alleged violation of Article 33 of the Constitution and Article 7 of the Convention, should the Applicant be found guilty of the charges.¹²⁵

59. The Chamber's assessment determined that the SC's direct application of CIL to war crimes and crimes against humanity, including modes of liability, to establish an individual's guilt, was compatible with the Constitution, insofar as such application was in accordance with Article 33(1) of the Constitution and Article 7 of the ECHR.¹²⁶ As a result, it found that, at that stage of the proceedings, there was no appearance of

¹²¹ *P. Shala referral concerning criminal charges*, paras 51-63, 67-75.

¹²² KSC-CC-2022-16, F00004, Decision on the referral of Pjetër Shala to the Constitutional Court Panel concerning fundamental rights guaranteed by Article 33 of the Kosovo Constitution and Article 7 of the European Convention on Human Rights, public, 6 July 2022 ("*Decision on P. Shala referral concerning criminal charges*"), Disposition, para. 2.

¹²³ *Decision on P. Shala referral concerning criminal charges*, paras 46-50.

¹²⁴ *Decision on P. Shala referral concerning criminal charges*, para. 53.

¹²⁵ *Decision on P. Shala referral concerning criminal charges*, paras 53-56.

¹²⁶ *Decision on P. Shala referral concerning criminal charges*, paras 68-69.

a violation of the Applicant's fundamental rights, and further declared that part of the referral inadmissible pursuant to Rule 14(f) of the SCCC Rules.¹²⁷ It also observed that, whether JCE as a mode of liability and the war crime of arbitrary detention in a NIAC were provided for in CIL and were accessible and foreseeable at the material time was a matter for the criminal chambers to determine, in accordance with their respective competence.¹²⁸

H. TRIAL PROCEEDINGS

60. On 21 September 2022, concluding that all necessary procedural steps had been taken to consider the Applicant's case file complete, the pre-trial judge transmitted it to a trial panel.¹²⁹

61. The trial commenced on 21 February 2023 and closed on 17 April 2024.¹³⁰ During the trial proceedings, the trial panel received evidence from a total of 33 witnesses: 17 called by the SPO, 14 by the Applicant, and two by Victims' Counsel.¹³¹ It considered, *inter alia*, oral evidence of *viva voce* witnesses, written statements of witnesses and the Applicant, as well as documentary evidence and expert testimonies and/or reports.¹³²

62. On 16 July 2024, the trial panel delivered its judgment, whereby it found that, in the context of a non-international armed conflict between the KLA and Serbian armed forces, the Applicant was guilty of having committed, as part of a JCE I pursuant to Article 16(1)(a) of the Law, the war crime of arbitrary detention under Article 14(1)(c) of the Law, the war crime of torture under Article 14(1)(c)(i) of the Law, and the war crime of murder under Article 14(1)(c)(i), with arbitrary detention and torture being committed against at least 18 persons between approximately 17 May 1999 and 5 June

¹²⁷ *Decision on P. Shala referral concerning criminal charges*, paras 72-73.

¹²⁸ *Decision on P. Shala referral concerning criminal charges*, para. 70.

¹²⁹ KSC-BC-2020-04, F00284, Decision transmitting the case file to Trial Panel I, public, 21 September 2022, paras 8, 10.

¹³⁰ KSC-BC-2020-04, F00847/RED, Public redacted version of trial judgment and sentence, public, 24 September 2024, (the original issued on 16 July 2024) ("Trial judgment"), paras 6, 12.

¹³¹ Trial judgment, paras 6-9.

¹³² Trial judgment, para. 77.

1999, and murder against one person, on or about 5 June 1999, all at the Kukës Metal Factory.¹³³ As regards the charge of cruel treatment as a war crime, the trial panel held that it was “fully consumed” by the charge of the war crime of torture and, as such, it found the Applicant not guilty on that count.¹³⁴ He was sentenced to a single sentence of 18 years of imprisonment, with credit for time served.¹³⁵

63. On 29 November 2024, the trial panel rendered an order against the Applicant, awarding reparations to eight victims participating in the proceedings.¹³⁶

1. Passage of time

64. Among other things, at trial, the Applicant maintained that the delay of almost 25 years in bringing the charges against him had been “extreme and unjustified” and that, in consequence, he had been deprived of a reasonable opportunity to conduct proper investigations and defend himself, as documents had been lost, and witnesses in his favour had died or become unavailable or unwilling to testify.¹³⁷

65. The trial panel, however, was of the view that the central issue of the Applicant’s argument was not the passage of time, but whether the evidence submitted in the case was sufficient to establish his individual criminal responsibility.¹³⁸ In this regard, the trial panel observed that the SC’s legal framework provides a set of solid safeguards against unlawful or unfair prosecutions and convictions, including: (i) the testing of evidence in court through the questioning of witnesses before professional judges; (ii) litigation on the admissibility and probative value of testimonial and documentary evidence; (iii) judicial assessment of evidence against a standard of *beyond reasonable doubt*; and (iv) the availability of remedies prescribed for under the Law, of appellate

¹³³ Trial judgment, paras 1037-1039, 1124.

¹³⁴ Trial judgment, paras 964, 1124.

¹³⁵ Trial judgment, paras 1120-1123.

¹³⁶ KSC-BC-2020-04, F00866/RED, Public redacted version of reparation order against Pjetër Shala, public, 23 December 2024 (the original issued on 29 November 2024), para. 239(a)-(f).

¹³⁷ KSC-BC-2020-04, F00821/RED3, Public redacted version of defence final trial brief, public, 19 December 2024 (the original filed on 26 March 2024) (“Trial brief”), paras 288, 312-313.

¹³⁸ Trial judgment, para. 34.

and other review.¹³⁹ It further noted that, where witnesses were unavailable, the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”) provided alternative avenues to introduce evidence other than live testimony and that, in any event, pursuant to Rule 140(4) of the Rules, a conviction may not be based solely or to a decisive extent on the statement of a witness whom the Applicant did not have an opportunity to examine.¹⁴⁰ The trial panel likewise recalled that, irrespective of how any given piece of evidence is introduced into the trial record, it remains subject to the applicable safeguards.¹⁴¹ In this respect, it concluded that the passage of time and the possible deterioration of the quality of the evidence do not, by themselves, render the proceedings unfair, but are matters that may be taken into account when assessing the reliability, probative value and, ultimately, the weight of the evidence.¹⁴²

2. Prior statements

66. In motions submitted on 20 September 2022, shortly before transmission of the case file to the trial panel,¹⁴³ and on 24 November 2022, in response to a request made by the SPO,¹⁴⁴ the Applicant opposed the admission into evidence of prior statements obtained from him by the ICTY in 2005 and 2007 (“2005 and 2007 ICTY Statements”) and by the Belgian Federal Judicial Police in 2016 and 2019 (“2016 Belgian Statement” and “2019 Belgian Statement”, collectively “2016 and 2019 Belgian Statements”).¹⁴⁵ In this regard, he argued, *inter alia*, that the statements were obtained in violation of his

¹³⁹ Trial judgment, para. 34.

¹⁴⁰ Trial judgment, para. 52.

¹⁴¹ Trial judgment, para. 52.

¹⁴² Trial judgment, para. 52.

¹⁴³ KSC-BC-2020-04, F00281/RED, Public redacted version of motion to exclude evidence from the case file to be transmitted to the trial panel, public, 18 January 2023 (the original filed on 20 September 2022) (“Motion to exclude statements”).

¹⁴⁴ KSC-BC-2020-04, F00358/RED, Public redacted version of defence response to Prosecution motion for admission of accused’s statements, public, 18 January 2023 (the original filed on 24 November 2022) (“Response to SPO motion for admission of statements”). See also KSC-BC-2020-04, F00334/RED, Public redacted version of ‘Prosecution motion for admission of accused’s statements’, public, 18 January 2023 (the original filed on 1 November 2022).

¹⁴⁵ Motion to exclude statements, paras 1, 41, 48-49, 52, 53; Response to SPO motion for admission of statements, paras 2-3, 13-14, 76, 88-89, 91.

rights as a suspect, including his right of access to a lawyer, in the absence of a valid waiver of that right.¹⁴⁶

67. On 6 December 2022, the trial panel issued a decision whereby it admitted into evidence the 2005 and 2007 ICTY Statements and, concluding that the 2016 and 2019 Belgian statements were “not inadmissible”, and could therefore be considered by it in accordance with Rule 139(1) of the Rules, it deferred ruling on their admissibility pending a decision on the submission and admissibility of non-oral evidence.¹⁴⁷

68. At the outset, the trial panel observed that the statements at issue were obtained during interviews conducted by investigators of the ICTY under the latter’s Statute and Rules of Procedure and Evidence, and the Belgian Federal Judicial Police under domestic law, with the 2019 Belgian Statement having been collected at the request of, and with the participation of the SPO.¹⁴⁸ Since the statements had not been collected under the Law and the Rules, the trial panel proceeded to examine whether they had been obtained in violation of international human rights standards,¹⁴⁹ as provided for in Rule 138(2) of the Rules, which states that:

Rule 138

Admissibility of evidence

[...]

(2) Evidence obtained by means of a violation of the Law or the Rules or standards of international human rights law shall be inadmissible if:

- (a) the violation casts substantial doubt on the reliability of the evidence; or
- (b) the admission of the evidence would be antithetical to or would seriously damage the integrity of the proceedings.

69. Having regard to European Court of Human Rights (“ECtHR”) case law, the trial panel outlined the international human rights standards against which it assessed the

¹⁴⁶ Motion to exclude statements, paras 3, 14-41; Response to SPO motion for admission of statements, paras 12, 18-56.

¹⁴⁷ KSC-BC-2020-04, F00364/COR/RED, Public redacted version of corrected version of decision concerning prior statements given by Pjetër Shala, public, 26 January 2023 (the original issued on 6 December 2022) (“Decision on prior statements”), paras 52, 80, 110, 114(b)-(c).

¹⁴⁸ Decision on prior statements, para. 23 and footnote 26.

¹⁴⁹ Decision on prior statements, para. 23.

circumstances in which each of the statements was obtained.¹⁵⁰ In respect of the 2005 and 2007 ICTY Statements, the trial panel concluded that the Applicant had been fully informed of his rights as a suspect, including the right of access to a lawyer, and that he had voluntarily, and in an unequivocal, knowing and intelligent manner, waived that right, doing so expressly in the former case and implicitly in the latter.¹⁵¹ On this basis, and pursuant to Article 37(1) of the Law, which provides that assigned panels shall determine the admissibility of evidence collected prior to the establishment of the SC, including by the ICTY, the trial panel admitted the aforesaid statements into evidence.¹⁵²

70. The trial panel then proceeded to consider the circumstances in which the 2016 Belgian Statement was obtained¹⁵³ and, on the basis of, *inter alia*, the summons and the declaration of rights which the Applicant received before the interview, held that he had been sufficiently informed of his rights as a suspect, including his right of access to a lawyer,¹⁵⁴ having waived said right voluntarily, and in an unequivocal, knowing and intelligent manner, doing so implicitly, through his conduct.¹⁵⁵ With regard to the Applicant's argument that at the time of the interview, Belgian law only provided for the right to consult a lawyer *prior* to an interview with the police, but not for a lawyer to be present *during* the interview,¹⁵⁶ the trial panel held "that overall [the Applicant] was not barred from access to a lawyer",¹⁵⁷ and concluded that he had been afforded the opportunity to seek legal advice before attending the interview.¹⁵⁸ Furthermore, in

¹⁵⁰ Decision on prior statements, paras 24-27.

¹⁵¹ Decision on prior statements, paras 32-39, 42-50.

¹⁵² Decision on prior statements, paras 18, 51-52.

¹⁵³ Decision on prior statements, paras 58-66.

¹⁵⁴ Decision on prior statements, paras 70, 73; see also para. 58, referring to 101752-101763-ET RED, p. 101760. In particular, the 2016 summons from the Belgian Judicial Police conveyed to the Applicant, *inter alia*, that "[p]rior to this first interview regarding the above acts, you have the right to a confidential consultation with an attorney of your own choosing" (emphasis added).

¹⁵⁵ Decision on prior statements, paras 71-76.

¹⁵⁶ Motion to exclude statements, paras 32-33; Response to SPO motion for admission of statements, paras 26, 29, 53-54.

¹⁵⁷ Decision on prior statements, para. 77.

¹⁵⁸ Decision on prior statements, para. 77.

view of the circumstances in which the 2019 Belgian Statement was obtained,¹⁵⁹ it held that the Applicant had been adequately informed of his rights as a suspect, including his right to legal assistance,¹⁶⁰ and that he had voluntarily, in an unequivocal, knowing and intelligent manner, and implicitly, through his conduct, waived said right.¹⁶¹ As such, the trial panel concluded that the 2016 and 2019 Belgian Statements were “not inadmissible” under Rule 138(2), and could therefore be considered by it pursuant to Rule 139(1) of the Rules, and indicated that it would render in due course a decision on the submission and admissibility of non-oral evidence.¹⁶²

71. On 13 February 2023, following the trial panel’s partial grant of the Applicant’s request to appeal its decision on his prior statements and certification of three issues for appeal,¹⁶³ the Applicant filed an interlocutory appeal to that effect.¹⁶⁴ Among other things, he claimed that the trial panel had erred in fact and in law by considering that he had been sufficiently informed of his right of access to a lawyer with respect to each of the interviews in which the 2005 and 2007 ICTY Statements and the 2016 and 2019 Belgian Statements were collected, and that he had validly waived that right.¹⁶⁵

72. On 17 March 2023, the trial panel issued a framework decision on the submission and admissibility of non-oral evidence, wherein it set out its general approach on the matter, that is, to defer standard considerations of admissibility to the judgment stage

¹⁵⁹ Decision on prior statements, paras 81-94.

¹⁶⁰ Decision on prior statements, paras 100-101; see also para. 83, referring to 101752-101763-ET, pp. 101758-101759. In particular, the 2019 summons from the Belgian Judicial Police conveyed to the Applicant, *inter alia*, that “before the interview about the aforementioned acts you have the right to a confidential consultation with an attorney of your choosing or an attorney assigned to you” and “[y]ou also have the right to be accompanied by your attorney and to have him assist you during your interview”. The trial panel also noted in this regard “that, by that time, the 2019 Belgian law provided for the assistance of a lawyer during an interview” (see Decision on prior statements, footnote 164).

¹⁶¹ Decision on prior statements, paras 102-108.

¹⁶² Decision on prior statements, paras 80, 110.

¹⁶³ KSC-BC-2020-04, F00401, Decision on request for leave to appeal the decision concerning prior statements given by Pjetër Shala, public, 24 January 2023, paras 30, 43, 60, 73(a).

¹⁶⁴ KSC-BC-2020-04, IA006/F00004, Defence appeal against the “Decision concerning prior statements given by Pjetër Shala”, 13 February 2023 (“Appeal against decision on prior statements”).

¹⁶⁵ Appeal against decision on prior statements, paras 16-42. See also KSC-BC-2020-04, IA006/F00006, Defence reply to Prosecution response to appeal against “Decision concerning prior statements given by Pjetër Shala”, public, 6 March 2023, paras 2, 12-17.

and render discrete decisions on admissibility only in specific circumstances.¹⁶⁶ The trial panel did not, however, address the question of the admissibility of the 2016 and 2019 Belgian Statements.¹⁶⁷

73. On 5 May 2023, the appeals panel issued its decision on the interlocutory appeal concerning the Applicant's prior statements, granting it in part in connection with the 2016 Belgian Statement and denying it in all other respects.¹⁶⁸ In particular, the appeals panel found that the trial panel had erred by concluding that, overall, the Applicant had not been barred from access to a lawyer during the 2016 interview in Belgium.¹⁶⁹ It noted that, at the material time, the right to consult a lawyer was provided only *prior* to, and not also *during* police interviews, and found that this was contrary to relevant ECtHR case law according to which the right of access to a lawyer also encompasses the right to be assisted by one as from, and *during*, the first police interrogation of a suspect.¹⁷⁰ Accordingly, the appeals panel held that, since the Applicant had not been informed of his right to legal assistance *during* the police interview, and this right was not available to him, he could not have validly waived it,¹⁷¹ and concluded that such a procedural failure violated international human rights standards under Rule 138(2) of the Rules.¹⁷² However, holding that the violation was "limited", and in the absence of any indicia of unreliability or possible damage to the integrity of the proceedings as contemplated by Rule 138(2)(a)-(b) of the Rules, the appeals panel upheld the trial panel's decision to consider that the 2016 Belgian Statement was "not inadmissible" pursuant to that rule.¹⁷³ It also affirmed the trial panel's finding concerning the 2019

¹⁶⁶ KSC-BC-2020-02, F00461, Decision on the submission and admissibility of non-oral evidence, public, 17 March 2023 ("Decision on non-oral evidence"), paras 9-36.

¹⁶⁷ Decision on non-oral evidence.

¹⁶⁸ KSC-BC-2020-04, IA006/F00007, Decision on Shala's appeal against decision concerning prior statements, public, 5 May 2023 ("Appeal decision on prior statements"), para. 109.

¹⁶⁹ Appeal decision on prior statements, para. 75.

¹⁷⁰ Appeal decision on prior statements, paras 73-75.

¹⁷¹ Appeal decision on prior statements, para. 76.

¹⁷² Appeal decision on prior statements, para. 78.

¹⁷³ Appeal decision on prior statements, paras 79-81, 109.

Belgian Statement, as well as the admission into evidence of the 2005 and 2007 ICTY Statements.¹⁷⁴

74. After the appeals panel's ruling, the Applicant applied for reconsideration of the trial panel's decision regarding the 2016 Belgian Statement,¹⁷⁵ which was rejected in an oral ruling on 6 June 2023.¹⁷⁶ The Applicant also lodged a referral with the Chamber complaining about a violation of his human rights under Articles 31, 32, and 54 of the Constitution and Articles 6 and 13 of the Convention as a result of the finding that the 2016 Belgian Statement was "not inadmissible" and the subsequent refusal of the trial panel to reconsider it,¹⁷⁷ which was deemed premature and dismissed accordingly on 29 August 2023.¹⁷⁸

75. Likewise, at the judgment stage, the Applicant reasserted that the 2005 and 2007 ICTY Statements, and the 2016 and 2019 Belgian Statements, were taken in violation of his right to a fair trial, and maintained that they should be excluded from the trial panel's deliberation for the purpose of the judgment.¹⁷⁹ Notwithstanding, noting that the matter had been extensively litigated both before it and panels of other chambers of the SC, the trial panel held that the Applicant was attempting to litigate the matter anew, and dismissed it without entertaining it further.¹⁸⁰

¹⁷⁴ Appeal decision on prior statements, paras 40-69, 82-96, 109.

¹⁷⁵ KSC-BC-2020-04, F00515, Defence request for reconsideration of the "Decision concerning prior statements given by Pjetër Shala", 18 May 2023, public. See also KSC-BC-2020-04, F00520, Decision on the Defence request for an expedited ruling on its request for reconsideration of the "Decision concerning prior statements given by Pjetër Shala", 23 May 2023, public.

¹⁷⁶ KSC-BC-2020-04, Transcript, 6 June 2023, public, p. 1938, line 14 to p. 1939, line 25.

¹⁷⁷ KSC-CC-2023-21, F00001, Referral to the Constitutional Court Panel Concerning the Violation of Mr Shala's Fundamental Rights Guaranteed by Articles 31, 32 and 54 of the Kosovo Constitution and Articles 6 and 13 of the European Convention on Human Rights, public, 11 July 2023, paras 1-3, 25-37, 39.

¹⁷⁸ KSC-CC-2023-21, F00006, Decision on the referral of Pjetër Shala to the Constitutional Court Panel concerning the violation of Mr Shala's fundamental rights guaranteed by Articles 31, 32, and 54 of the Kosovo Constitution and Articles 6 and 13 of the European Convention on Human Rights, public, 29 August 2023 ("*Decision on P. Shala referral concerning admissibility of prior statements*"), paras 23, 29 and Disposition, para. 2.

¹⁷⁹ Trial brief, paras 302-310; See also KSC-BC-2020-04, Transcript, public, 17 April 2024 ("Closing statements – 17 April 2024"), p. 4290, line 13 to p. 4293, line 22.

¹⁸⁰ Trial judgment, paras 49-50.

76. The Applicant also maintained that the trial panel's approach to the admission of evidence, as set out in its framework decision on the submission and admissibility of non-oral evidence, violated his right to know with certainty the evidence against him and to have an effective opportunity to respond to it.¹⁸¹ The trial panel, however, held that, if the Applicant considered the approach adopted to be detrimental to his fair trial rights, he could or should have sought reconsideration of, or leave to appeal the decision.¹⁸² Further finding that the Applicant's arguments had been previously raised and addressed by it in the context of the framework decision, it dismissed his challenge accordingly.¹⁸³

3. Principle of legality

77. At trial, the Applicant reiterated his argument that the war crime of arbitrary detention in a NIAC did not constitute a criminal offence under the applicable law in Kosovo at the time of the charges, and that his prosecution on that basis breached the principle of legality and his rights under Articles 6 and 7 of the ECHR.¹⁸⁴ Likewise, he maintained that it would be contrary to the principle of legality to convict him under JCE, as this mode of liability (i) did not exist under the laws in force in Kosovo at the relevant time, (ii) is specifically excluded from the Law; (iii) was not established under CIL in 1999, and (iv) given his "insignificant position" within the KLA and "minimal education", was not accessible or foreseeable to him.¹⁸⁵

78. The trial panel noted that the Applicant had already raised these arguments in his preliminary motion on jurisdiction and the subsequent interlocutory appeal, and confirmed that it agreed with the findings of the pre-trial judge and appeals panel in this regard, including that both the war crime of arbitrary detention in a NIAC and

¹⁸¹ Trial brief, paras 331-343.

¹⁸² Trial judgment, para. 64.

¹⁸³ Trial judgment, paras 64-65.

¹⁸⁴ Trial brief, para. 28. See also KSC-BC-2020-04, Transcript, public, 16 April 2024, p. 4269, line 1 to p. 4273, line 5.

¹⁸⁵ Trial brief, paras 266-274. See also Closing statements – 17 April 2024, p. 4285, line 12 to p. 4287, line 10.

JCE as a mode of liability were established in CIL at the time when the crimes were committed, and were accessible and foreseeable to the Applicant.¹⁸⁶ Finding that the Applicant was attempting to re-litigate matters that had already been settled in the case law of the SC, the trial panel declined to further address his submissions on JCE.¹⁸⁷

4. Notice of charges

79. The Applicant also submitted that the SPO had impermissibly changed its case during trial on a number of key issues, including on (i) the number and identity of the alleged victims, as well as (ii) the identity of alleged JCE members “Bedri” and “Van Damme”, which remained unknown.¹⁸⁸ According to the Applicant, said changes had impacted his ability to conduct investigations and prepare an effective defence.¹⁸⁹

80. The trial panel succinctly addressed these arguments and dismissed them.¹⁹⁰ In particular, it found that the alleged inconsistencies between the confirmed indictment and the subsequent submissions made by the SPO were “largely unsubstantiated and inaccurate”.¹⁹¹ The trial panel also noted that other documents and submissions from the SPO during trial “must be seen under the light of pursuing its case”, as pleaded in the confirmed indictment, which was the only authoritative document setting out the scope of the case, and indicated that, in its judgment, it had adhered to the charges as set out in the confirmed indictment.¹⁹² Lastly in this regard, the trial panel found that the Applicant had failed to demonstrate how his investigations and preparations for trial had been impacted by the alleged changes.¹⁹³

¹⁸⁶ Trial judgment, paras 934-935, 996. See also above, paras 23-33, 36-42.

¹⁸⁷ Trial judgment, para. 997.

¹⁸⁸ Trial brief, para. 275.

¹⁸⁹ Trial brief, para. 275.

¹⁹⁰ Trial judgment, paras 24-28.

¹⁹¹ Trial judgment, paras 24-25.

¹⁹² Trial judgment, para. 26.

¹⁹³ Trial judgment, para. 27.

5. Sentencing

81. As regards sentencing, and with reference to the SC's sentencing framework for international crimes, as set out in Article 44(2) of the Law, the Applicant argued, *inter alia*, that in determining any potential sentence to be imposed, the trial panel should be guided by sentencing decisions in cases concerning comparable crimes committed in similar circumstances, and should refer to domestic sentencing practice relating to sentencing ranges.¹⁹⁴ In this respect, he cited the cases of *Sabit Geci et al.* and *Xhemshit Krasniqi*, concerning two members of the same JCE who were convicted in Kosovo for crimes committed at the Kukës Metal Factory during the same period as that covered by the confirmed indictment, being sentenced to 15 and eight years of imprisonment, respectively.¹⁹⁵ He further submitted that, unlike the two individuals in question, he had not held a command position at the Kukës Metal Factory, and contended that any sentence imposed by the trial panel should reflect the lesser role attributed to him in the confirmed indictment.¹⁹⁶

82. The trial panel took note of both the *Sabit Geci et al.* and *Xhemshit Krasniqi* cases, and observed that they pertained to crimes committed at the Kukës Metal Factory in 1999 by members of the same JCE as in the case before it.¹⁹⁷ However, it emphasised that the sentencing practices of other courts, whether international or domestic, were not binding upon it, and found that in reaching its determination, it had to take into account a variety of case-specific factors, in particular, the convicted person's conduct, his or her individual circumstances, and mitigating and/or aggravating circumstances, if any.¹⁹⁸

¹⁹⁴ Trial brief, paras 372, 374.

¹⁹⁵ Trial brief, paras 375-377.

¹⁹⁶ Trial brief, paras 378-379.

¹⁹⁷ Trial judgment, para. 1070.

¹⁹⁸ Trial judgment, para. 1070.

I. APPEAL PROCEEDINGS

83. On 30 September 2024, after the appeals panel granted, in part, the Applicant's request for an extension of time to file his notice of appeal against the trial judgment, as well as a further order by the appeals panel to file an amended notice of appeal,¹⁹⁹ the Applicant filed his appeal against the trial judgment, raising fourteen (14) grounds of appeal.²⁰⁰ He requested the appeals panel to: (i) quash the convictions entered by the trial panel; and/or (ii) remit the case for retrial; and/or (iii) impose, if necessary, an appropriate sentence.²⁰¹

84. On 14 July 2025, the appeals panel issued its judgment whereby, among other things, it granted, in part, some of the Applicant's grounds of appeal, and reversed, in part, the Applicant's convictions for the war crime of arbitrary detention and torture insofar as they relied on the arbitrary detention of two individuals and the torture of five others.²⁰² The appeals panel dismissed the appeal in all other aspects, and affirmed the remainder of his convictions for the war crimes of arbitrary detention, torture, and murder, but set aside the sentences imposed with respect to the war crimes of torture and murder, imposing a revised sentence of 13 years of imprisonment, with credit for time served.²⁰³

¹⁹⁹ KSC-CA-2024-03, F00006, Decision on Defence motion for variation of time limit to file notice of appeal, public, 24 July 2024, para. 13; F00015, Decision on SPO request for order to Shala to refile the notice of appeal, public, 18 September 2024, para. 16.

²⁰⁰ KSC-CA-2024-03, F00017/COR/RED, Public redacted version of corrected version of revised Defence notice of appeal, public, 31 October 2024 (the original filed on 30 September 2024) ("Notice of appeal"), para. 1.

²⁰¹ Notice of appeal, para. 35. See also KSC-CA-2024-03, F00029/COR/RED2, Public redacted version of corrected version of defence appeal brief, public, 13 January 2025 (the original filed on 25 November 2024) ("Appeal brief"), paras 3, 272; F00043/COR/RED, Public redacted version of corrected version of defence reply brief, public, 26 March 2025 (the original filed on 4 February 2025) ("Appeal reply brief"), para. 49.

²⁰² KSC-CA-2024-03, F00069/RED, Public redacted version of appeal judgment, public, 14 July 2025 ("Appeal judgment"), para. 938, with Annex 1, public.

²⁰³ Appeal judgment, para. 938.

1. Passage of time

85. On appeal, the Applicant submitted that the trial panel had erred by failing to acknowledge the impact of the passage of time between the events charged and his trial on his ability to defend himself.²⁰⁴ He reiterated his argument that the lapse of time had deprived him of an effective opportunity to conduct proper investigations, and further claimed that the trial panel had instead used the passage of time to his detriment when assessing inconsistencies in the evidence of some SPO witnesses.²⁰⁵

86. The appeals panel, however, found that the Applicant had failed to demonstrate how the passage of time had fatally jeopardised his ability to prepare his defence, and observed that he had equally failed to identify any specific investigative opportunities that had been lost.²⁰⁶ Recognising that the trial panel had considered the time elapsed between the crimes charged and the Applicant's prosecution, it agreed that the SC's legal framework sets out solid safeguards against unlawful or unfair prosecutions and convictions, and that the passage of time does not in itself render proceedings unfair, but is a factor to be considered in assessing the reliability, probative value, and weight of the evidence.²⁰⁷ The appeals panel further noted that, in assessing the impact of the passage of time on the relevant witnesses' evidence, the trial panel had also considered (i) whether the inconsistencies in the evidence concerned marginal details or essential aspects of their testimony, (ii) the existence of other relevant factors, as well as (iii) the overall demeanour of the witnesses.²⁰⁸ It therefore held that the Applicant was merely disagreeing with the trial panel's findings, and failed to identify any specific error in the manner in which the trial panel exercised its discretion in assessing the witnesses' evidence.²⁰⁹

²⁰⁴ Notice of appeal, para. 19; Appeal brief, paras 186, 189.

²⁰⁵ Appeal brief, paras 188-191.

²⁰⁶ Appeal judgment, para. 90.

²⁰⁷ Appeal judgment, paras 91-92. See also above, para. 65.

²⁰⁸ Appeal judgment, para. 93.

²⁰⁹ Appeal judgment, para. 93.

87. Accordingly, the appeals panel found that the Applicant had not demonstrated any error in the trial panel's assessment of the impact of the passage of time on his ability to defend himself, dismissing the ground of appeal.²¹⁰

2. Prior statements

88. The Applicant reiterated his claim that the 2005 and 2007 ICTY Statements and the 2016 and 2019 Belgian Statements had been provided without the benefit of legal assistance either prior to or during the interviews, pointing out that the appeals panel had previously found a violation of his right of access to a lawyer in connection to the 2016 Belgian Statement.²¹¹ Furthermore, he submitted that the trial panel nevertheless admitted into evidence the 2016 and 2019 Belgian Statements when the trial judgment was rendered and, though it “carefully avoided openly relying” on the 2016 Belgian Statement in its findings, it heavily relied on all the other statements for its verdict, thus breaching his right to a fair trial.²¹² In this regard, the Applicant argued that, under the “doctrine of the fruit of the poisonous tree” – which he claimed had been endorsed by the ECtHR – evidence obtained unlawfully cannot be admitted at trial, as it taints the fairness of the entire proceedings.²¹³ According to the Applicant, even admitting that only the 2016 Belgian Statement was obtained in violation of his rights, the doctrine of the fruit of the poisonous tree also precluded the use of the 2019 Belgian Statement, as it had been shaped by the previous statement and therefore tainted by the prior breach of his right to legal assistance.²¹⁴ He maintained that the trial panel should not have admitted or relied upon any of his prior statements.²¹⁵

²¹⁰ Appeal judgment, para. 94.

²¹¹ Notice of appeal, para. 2; Appeal brief, paras 5-6. See also KSC-CA-2024-03, Transcript, public, 15 May 2025 (“Appeal hearing – 15 May 2025”), p. 27, lines 9-18.

²¹² Appeal brief, paras 4, 6-8, 11, 15; Appeal reply brief, para. 2. See also Appeal hearing – 15 May 2025, p. 27, line 18, to p. 30, line 4.

²¹³ Appeal brief, paras 9-13; Appeal reply brief, para. 3. See also Appeal hearing – 15 May 2025, p. 31, line 9, to p. 32, line 6.

²¹⁴ Appeal brief, para. 14; Appeal reply brief, para. 3. See also Appeal hearing – 15 May 2025, p. 31, lines 9-22.

²¹⁵ Appeal brief, paras 14-15; Appeal reply brief, para. 2.

89. Among other things, the Applicant also contended that he was prejudiced by the lack of certainty as to the evidentiary record, namely the trial panel's failure to rule on whether to admit or not into evidence the 2016 and 2019 Belgian Statements before the delivery of the trial judgment.²¹⁶ In particular, he claimed that, in not knowing whether this evidence would be admitted or not at trial, he was deprived of the possibility to comment on the merits of the incriminating statements, and his ability to prepare and present his defence was impacted as a result.²¹⁷

90. In addition, the Applicant submitted that the language used by the trial panel in its assessment of some of the prior statements, stating that they did not "discredit" or "cast doubt" on the SPO's evidence, shows that the trial panel had shifted the burden of proof to the Applicant to disprove the findings concerning his presence at the Kukës Metal Factory during the time frame of the charges and his participation in mistreating detainees.²¹⁸

91. With regard to the admission into evidence of, and/or reliance on the Applicant's prior statements, the appeals panel held that the Applicant had failed to demonstrate an error in the trial panel's findings, and therefore dismissed this ground of appeal.²¹⁹ More specifically, as regards the 2005 and 2007 ICTY Statements, it was not persuaded that a panel's reliance on evidence properly admitted at trial could, in itself, amount to of a violation of the Applicant's fair trial rights, and concluded that he had failed to demonstrate that this matter warrants appellate review.²²⁰ Turning to the 2016 Belgian Statement, the appeals panel concurred with the trial panel's finding that the matter of the statement's admissibility had been extensively litigated at trial.²²¹ It also noted

²¹⁶ Notice of appeal, para. 3; Appeal brief, paras 26, 28-30; Appeal reply brief, para. 6. See also Appeal hearing – 15 May 2025, p. 27, line 18, to p. 28, line 21.

²¹⁷ Notice of appeal, para. 3; Appeal brief, paras 26, 28, 30. See also Appeal hearing – 15 May 2025, p. 37, lines 8-13.

²¹⁸ Notice of appeal, para. 16; Appeal brief, paras 165-167; Appeal reply brief, para. 24. See also Appeal hearing – 15 May 2025, p. 30, line 16 to p. 31, line 8.

²¹⁹ Appeal judgment, para. 121.

²²⁰ Appeal judgment, paras 109-110.

²²¹ Appeal judgment, paras 111-112.

that the trial panel, in the trial judgment, had not relied on the 2016 Belgian Statement for any of its findings.²²² Regarding the doctrine of the fruit of the poisonous tree, the appeals panel held that the ECtHR jurisprudence invoked by the Applicant pertained to whether incriminating evidence stemming from irregular police interrogation at the pre-trial stage could be employed to support a conviction at trial, and concluded that it was inapplicable in the circumstances of the case, as the 2016 Belgian Statement had not been used to support any of the trial panel's findings and therefore did not affect the overall fairness of the proceedings.²²³ Lastly on this matter, as regards the existence of a "tree and fruit relation" between the 2016 Belgian Statement and the 2019 Belgian Statement, the appeals panel observed that the two statements were taken three years apart and that the former statement had not been used in a prejudicial manner or even presented for comparison when the latter statement was collected.²²⁴ Recalling earlier findings that this statement had not been taken in violation of the Applicant's right of access to a lawyer,²²⁵ the appeals panel further observed that the trial panel assessed the credibility of the 2019 Belgian Statement and treated it with caution, relying on it only to the extent that it was corroborated by other evidence to, *inter alia*, establish the Applicant's membership in the KLA, his presence at the Kukës Metal Factory during the relevant time, or in determining that he had shown no remorse or empathy for the victims.²²⁶

92. As regards the alleged lack of clarity of the evidentiary record, the appeals panel observed, as a preliminary matter, that whereas the Applicant could have challenged at trial the finding that the 2016 and 2019 Belgian Statements were "not inadmissible", including by seeking reconsideration of, or leave to appeal the framework decision on the submission and admissibility of evidence, since the statements were only admitted with the delivery of the trial judgment, the appeal was the first opportunity that the

²²² Appeal judgment, para. 113.

²²³ Appeal judgment, paras 114-115.

²²⁴ Appeal judgment, para. 116.

²²⁵ Appeal judgment, para. 117. See also above, paras 70, 73.

²²⁶ Appeal judgment, paras 118-119.

Applicant had had to argue that he had been prejudiced by the implementation of the trial panel's decisions.²²⁷ Therefore, it decided to address this ground.²²⁸ In this regard, the appeals panel found, *inter alia*, that the trial panel's reference to the 2016 and 2019 Belgian Statements as "not inadmissible" was not straightforward, showing a lack of clarity as to its exact position regarding the status of these statements.²²⁹ In particular, it held that, although neither the Law nor the Rules require an immediate ruling by trial panels on issues of admissibility, postponing it to a later stage in the proceedings may have detrimental effects in terms of fairness to the parties.²³⁰ The appeals panel thus considered that, in light of the incriminating nature of the statements, and since the parties had expressly requested it do so, the trial panel had erred by failing to rule on the admissibility of the 2016 and 2019 Belgian Statements.²³¹ Still, finding that the Applicant had failed to demonstrate that he had been prejudiced by being deprived of the possibility to comment on the statements, or that his ability to defend himself had been impaired, the appeals panel dismissed this ground of appeal.²³²

93. As regards the question of the burden of proof, the appeals panel found that, while the trial panel's language stating that some of the Applicant's prior statements did not "discredit" or "cast doubt" on the SPO's evidence was not appropriate, it did not, as such, entail that it misapplied the burden of proof.²³³ More specifically, it held that the trial panel's careful assessment of the available evidence, as well as its accurate reference to the appropriate burden of proof elsewhere in the trial judgment, showed that it had not shifted the burden of proof to the Applicant as regards his presence at the Kukës Metal Factory during the time frame of the charges and his participation in

²²⁷ Appeal judgment, paras 134-137.

²²⁸ Appeal judgment, para. 137.

²²⁹ Appeal judgment, para. 145.

²³⁰ Appeal judgment, para. 146.

²³¹ Appeal judgment, para. 147.

²³² Appeal judgment, paras 150-151.

²³³ Appeal judgment, paras 156-159.

mistreating detainees.²³⁴ Accordingly, the appeals panel dismissed this ground of the Applicant's appeal.²³⁵

3. Principle of legality

94. The Applicant also challenged his conviction under JCE and for the war crime of arbitrary detention in a NIAC, arguing that this violated the principle of legality under Article 33 of the Constitution, Article 7 of the Convention, and Article 15 of the ICCPR.²³⁶ Among his arguments, he reiterated, *inter alia*, that JCE as a mode of liability and arbitrary detention as a war crime in a NIAC were not established under CIL in 1999, and that it had neither been accessible nor foreseeable to him that said conduct, including the mode of liability, constituted crimes at the time.²³⁷ The Applicant added that the trial panel had failed to take into account his limited education and lack of a high-ranking position within the KLA, which prevented him from anticipating that he could be charged under JCE, as well as the fact that the KLA's lack of organisation and capacity in 1999 prevented its members at the Kukës Metal Factory from foreseeing and ensuring respect of detention rules and procedural safeguards, as required by the trial panel.²³⁸

95. The appeals panel recalled that it had previously addressed and dismissed such challenges in its interlocutory appeal decision regarding the Applicant's preliminary motion on jurisdiction, and upheld its findings in this regard.²³⁹ Out of fairness to the Applicant and in the interests of justice, the appeals panel nevertheless addressed his additional arguments regarding the foreseeability of JCE and arbitrary detention.²⁴⁰ With respect to the former, it held that the Applicant's education and status had been

²³⁴ Appeal judgment, para. 159.

²³⁵ Appeal judgment, para. 160.

²³⁶ Notice of appeal, para. 4; Appeal brief, paras 31-55; Appeal reply brief, paras 8-10.

²³⁷ Notice of appeal, para. 4; Appeal brief, paras 31, 39-40, 42, 45, 47, 49-55; Appeal reply brief, paras 9-10.

²³⁸ Appeal brief, paras 45, 52-54.

²³⁹ Appeal judgment, paras 174-176. See also above, paras 37, 41.

²⁴⁰ Appeal judgment, para. 177.

only one of multiple factors to be considered and, as regards the latter, it emphasised that it was contradicted by adjudicated facts, the evidence on the record, including the Applicant's prior statements, and the trial panel's findings, accordingly dismissing his arguments.²⁴¹

96. As such, the appeals panel found that the Applicant failed to demonstrate that the trial panel had erred in law and violated the principle of legality in finding that JCE and the war crime of arbitrary detention in a NIAC were criminalised under the applicable law in Kosovo in 1999, and that their criminalisation was accessible and foreseeable to the Applicant at the relevant time, dismissing this ground of appeal.²⁴²

4. Notice of charges

97. Before the appeals panel, the Applicant further submitted that the trial panel had erred in law by convicting him for the arbitrary detention and torture of 18 individuals while he had been charged with respect to nine individuals, and based on a defective indictment that lacked particulars as to the members of the JCE and the identity of the victims.²⁴³ As regards the number of victims, he maintained that he had been convicted for crimes which were not charged in the confirmed indictment, and that he had not been put on notice that he was charged with committing crimes against 18 persons.²⁴⁴ The Applicant argued that, given the nature of the charges, the scale of the case, and his proximity to the crimes he was convicted for, each of the victims should have been identified in the confirmed indictment.²⁴⁵ He further maintained that the trial panel should have either ordered the amendment of the confirmed indictment to include additional victims, or excluded the evidence.²⁴⁶

²⁴¹ Appeal judgment, paras 177-178.

²⁴² Appeal judgment, para. 181.

²⁴³ Notice of appeal, paras 5, 7; Appeal brief, paras 56, 59-65, 67-77; Appeal reply brief, paras 11-12, 14. See also Appeal hearing – 15 May 2025, p. 37, line 22 to p. 39, line 10.

²⁴⁴ Appeal brief, paras 70, 75-76; Appeal reply brief, para. 14. See also Appeal hearing – 15 May 2025, p. 38, lines 2-18.

²⁴⁵ Appeal brief, para. 72; Appeal reply brief, para. 14.

²⁴⁶ Appeal brief, para. 74.

98. As to the alleged lack of sufficient particulars with respect to the identity of the victims and the JCE members, the Applicant submitted that, although the confirmed indictment had mentioned “at least nine persons” as victims of arbitrary detention, it did not identify a single victim.²⁴⁷ He stressed that the limited nature and scale of the allegations in the case, and the fact that the SPO had known the identity of the victims at the time the charges were filed, warranted the inclusion of such information in the indictment.²⁴⁸ Likewise, he submitted that, despite not having been mentioned in the confirmed indictment or alleged by the SPO, the trial panel determined that Mr Fatmir Limaj (“Fatmir Limaj”), Mr Osman Kryeziu (“Osman Kryeziu”), as well as Mr Sokol Dobruna (“Sokol Dobruna”) were members of the JCE.²⁴⁹ He further argued that the scale of the case and his proximity to the crimes did not justify the vagueness of the confirmed indictment on this point, in particular when the missing information had been known to the SPO at the time of charging.²⁵⁰ The Applicant argued that these defects had deprived him of an effective opportunity to conduct investigations in time, challenge the SPO case, and prepare and present his defence, thus violating his fair trial rights, in particular to have adequate notice of the charges against him.²⁵¹ Lastly on this point, he maintained that defects in the confirmed indictment with respect to the identity of the JCE members and victims were not cured.²⁵²

99. Mindful of its previous findings that the confirmed indictment had adequately pleaded the identity and number of the alleged victims, the appeals panel nevertheless observed that, prior to the start of the trial, the SPO had in fact been in possession of information indicating that the allegations of arbitrary detention, cruel treatment, and torture concerned at least 18 persons.²⁵³ Thus, in light of the limited scope of the case,

²⁴⁷ Appeal brief, para. 63.

²⁴⁸ Appeal brief, paras 62, 64; Appeal reply brief, para. 11.

²⁴⁹ Appeal brief, para. 61; Appeal reply brief, para. 12. See also Appeal hearing – 15 May 2025, p. 38, line 19 to p. 39, line 3.

²⁵⁰ Appeal brief, para. 60.

²⁵¹ Appeal brief, paras 60-61, 65, 69. See also Appeal hearing – 15 May 2025, p. 39, lines 4-10.

²⁵² Appeal brief, para. 68; Appeal reply brief, para. 12.

²⁵³ Appeal judgment, para. 192. See also above, para. 55.

it concluded that the reference to “at least nine persons” in the confirmed indictment had been insufficiently specific and that, as a result, the trial panel had erred in failing to engage with the Applicant’s claim and to find that the indictment was defective on this point.²⁵⁴ However, noting that the addition of nine victims did not amount to a new charge or lead to a radical transformation of the SPO’s case,²⁵⁵ the appeals panel determined that this defect had been cured by the information provided in the SPO’s pre-trial brief and subsequent submissions, which consistently referred to “at least 18 persons”.²⁵⁶ Accordingly, it was satisfied that the Applicant had been provided timely and clear notice that he was charged with respect to 18 victims and, in this light, it also determined that he was able to prepare a meaningful defence against the allegations, and dismissed his appeal on this ground.²⁵⁷

100. As to the identity of the alleged victims, the appeals panel noted, at the outset, that its previous finding that the confirmed indictment had adequately pleaded the number and identity concerned the nine victims specifically referred to therein, and not the additional victims.²⁵⁸ Thus, for the same reasons as those set out in relation to the number of the alleged victims, the appeals panel concluded that the trial panel had erred in failing to engage with this claim, and to find that the confirmed indictment was defective on this point.²⁵⁹ Notwithstanding, in light of the information provided by the SPO in its pre-trial brief, whereby it identified 16 of the 18 victims and provided particulars concerning the remaining two, the appeals panel found that the defect had been cured, and that the Applicant had been adequately put on notice in that regard.²⁶⁰

101. In relation to the identity of the JCE members, the appeals panel initially clarified that the trial panel had not named Sokol Dobruna as a JCE member, and noted that,

²⁵⁴ Appeal judgment, paras 190, 192-193, 200.

²⁵⁵ Appeal judgment, paras 195-196.

²⁵⁶ Appeal judgment, paras 197, 199-200.

²⁵⁷ Appeal judgment, paras 197-200.

²⁵⁸ Appeal judgment, para. 229. See also above, para. 55.

²⁵⁹ Appeal judgment, paras 228-231, 235.

²⁶⁰ Appeal judgment, paras 232-235.

in any event, the trial panel's findings regarding him had not played any decisive role in its conclusion as to the Applicant's criminal responsibility and his convictions.²⁶¹ It then observed that, while the trial panel identified them as JCE members, Fatmir Limaj and Osman Kryeziu had not been mentioned in the confirmed indictment.²⁶² Recalling its previous finding that the confirmed indictment provided sufficient specificity as to the alleged JCE members, the appeals panel found that the Applicant had been placed on unambiguous notice that the charged JCE included additional individuals beyond those expressly named in the indictment, and that Fatmir Limaj and Osman Kryeziu fell within the category of "certain other KLA soldiers, police and guards", as referred to therein.²⁶³ In this regard, it also considered that the Applicant had failed to substantiate his claim that the identity of the JCE members was known to the SPO at the time of charging, and concluded that the trial panel had not erred in identifying Fatmir Limaj and Osman Kryeziu as additional named members of the JCE, since this constituted an evidentiary matter that the trial panel had been entitled to address.²⁶⁴

102. Having concluded that the confirmed indictment was not defective, and that, as such, it did not need to address the Applicant's arguments on the alleged prejudice resulting from an uncured defect in the indictment,²⁶⁵ the appeals panel nevertheless observed that the evidence presented at trial had made clear that Fatmir Limaj and Osman Kryeziu were present at the Kukës Metal Factory at the material time, and that the Applicant had thus been able to account for their presence in preparing his defence.²⁶⁶ For these reasons, it held that the Applicant had failed to substantiate his claim of prejudice and to show how his defence strategy would have differed had the two JCE members been named in the indictment.²⁶⁷ Lastly in this regard, the appeals

²⁶¹ Appeal judgment, para. 210.

²⁶² Appeal judgment, para. 211.

²⁶³ Appeal judgment, paras 213-215. See also above, para. 53.

²⁶⁴ Appeal judgment, paras 216-217.

²⁶⁵ Appeal judgment, paras 215, 218.

²⁶⁶ Appeal judgment, paras 219-222.

²⁶⁷ Appeal judgment, paras 219, 223.

panel noted that the trial panel's findings with respect to Fatmir Limaj and Osman Kryeziu were in any event relatively limited, and did not play any decisive role for its conclusion regarding the Applicant's criminal responsibility and convictions.²⁶⁸ Thus, the appeals panel rejected the Applicant's allegations as to the alleged lack of notice of victims' particulars and the identity of JCE members, and dismissed the appeal on these grounds.²⁶⁹

5. Sentencing

103. With respect to the sentence imposed on him, the Applicant submitted, *inter alia*, that the trial panel had failed "to ensure equality", abusing its discretion in imposing a sentence that was unreasonably disproportionate when compared to similar cases.²⁷⁰ In this regard, the Applicant referred, in particular to the *Sabit Geci et al.* and *Xhemshit Krasniqi* cases, concerning individuals who, he claimed, had greater responsibility for the indicted crimes on account of their commanding roles at the Kukës Metal Factory, yet received lower sentences than the Applicant.²⁷¹ He also claimed that the trial panel had erred in failing to provide a reasoned opinion as to why it chose to significantly depart from those sentences.²⁷²

104. In addition, at the appeal hearing, the Applicant alleged a breach of the principle of legality enshrined in Article 7 of the Convention as a result of the trial panel's failure to impose a sentence that was provided for by law at the time of commission of the crimes, and an alleged lack of foreseeability in that respect.²⁷³

105. As to the trial panel's alleged failure "to ensure equality" before the law and to provide a reasoned opinion in that connection, the appeals panel recalled that the trial

²⁶⁸ Appeal judgment, para. 224.

²⁶⁹ Appeal judgment, paras 225, 235-236.

²⁷⁰ Notice of appeal, para. 32; Appeal brief, paras 261, 263; Appeal reply brief, paras 46-48. See also Appeal hearing – 15 May 2025, p. 69, line 21 to p. 73, line 16.

²⁷¹ Appeal brief, paras 262, 264-265; Appeal reply brief, paras 46-47. See also Appeal hearing – 15 May 2025, p. 70, line 7 to p. 71, line 18.

²⁷² Appeal brief, para. 262. See also Appeal hearing – 15 May 2025, p. 72, lines 6-11.

²⁷³ Appeal hearing – 15 May 2025, p. 66, line 11 to p. 67, line 19; KSC-CA-2024-03, Transcript, public, 16 May 2025, p. 181, lines 2-14.

panel had held that sentencing practices of other courts are not binding on the SC and, agreeing with this finding, noted that the trial panel had thereby provided a reasoned opinion.²⁷⁴ It therefore found that the Applicant had failed to substantiate his claim, and dismissed this argument.²⁷⁵ Still, acknowledging that the Applicant had referred specifically to the *Sabit Geci et al.* and *Xhemshit Krasniqi* cases, including a number of other cases, it proceeded to examine the individual circumstances of these cases.²⁷⁶ As a result of this analysis, while entirely mindful of the trial panel's broad discretion in sentencing, and taking into account all relevant factors and individual circumstances in the Applicant's case, it found a disparity between the sentence imposed on him and the other sentences examined, and found that the trial panel had ventured outside of its discretionary bounds by imposing on him sentences which were out of reasonable proportion to comparable cases.²⁷⁷ Accordingly, the appeals panel granted, in part, the Applicant's appeal on this ground.²⁷⁸

106. Concerning the argument that the sentence imposed on him had emanated from a sentencing regime introduced retrospectively by the Law in breach of the principle of legality, the appeals panel noted that the Applicant had not raised this argument in either the notice of appeal nor in his appeal brief, but only during the appeal hearing, and found that it had not been raised in a timely manner.²⁷⁹ Still, it indicated that the applicable sentences under the Law for crimes prosecuted before the SC do not violate the *nulla poene sine lege* principle, on the basis that an individual must have been aware that the crimes for which he or she was indicted were the most serious violations of international humanitarian law, punishable by the most severe penalties since at least the tribunals established after WW II and dismissed this argument accordingly.²⁸⁰

²⁷⁴ Appeal judgment, para. 92. See also above, para. 82.

²⁷⁵ Appeal judgment, para. 921.

²⁷⁶ Appeal judgment, paras 921, 925-931.

²⁷⁷ Appeal judgment, para. 933.

²⁷⁸ Appeal judgment, para. 933.

²⁷⁹ Appeal judgment, para. 867.

²⁸⁰ Appeal judgment, para. 897.

J. REQUEST FOR PROTECTION OF LEGALITY

107. On 14 October 2025, the Applicant filed a request for protection of legality before a Supreme Court panel requesting, *inter alia*, that it: (i) vacate the convictions entered against him; (ii) remit the case for retrial before a newly constituted trial panel so as to remedy the identified violations; or, in the alternative (iii) grant any such other relief as it may consider appropriate to ensure the protection of legality and integrity of the proceedings.²⁸¹

108. On 9 March 2026, the Supreme Court panel issued its decision on the request for protection of legality, dismissing it in its entirety.²⁸²

1. Passage of time

109. Before the Supreme Court panel, the Applicant reiterated his argument that the passage of time between the events underlying the charges and his trial had led to the deterioration or loss of evidence and impaired his ability to obtain evidence that could contradict the SPO's account, thereby irretrievably compromising the fairness of the proceedings.²⁸³ He also added that, contrary to the appeals panel's assessment, he had identified, in the course of the proceedings, specific instances in which investigative opportunities had been lost, including through the destruction of archival documents and the deterioration of potential witnesses' recollection, notably that of Mr Ruzhdi Saramati ("Ruzhdi Saramati").²⁸⁴ Lastly, the Applicant contended that, given the lapse of time, particular caution should have been exercised in the assessment of evidence at trial, including by not requiring him to carry the burden of proof.²⁸⁵

²⁸¹ KSC-SC-2025-06, PL001/F00001/RED, Public redacted version of Defence request for protection of legality, public, 21 November 2025 (the original filed on 14 October 2025) ("Request for protection of legality"), para. 79; PL001/F00007, Defence reply to Prosecution and Victims' Counsel responses to the Defence request for protection of legality, public, 16 January 2026 ("Reply to responses to protection of legality"), para. 16.

²⁸² KSC-SC-2020-06, PL001/F00008, Decision on the Defence request for protection of legality, public, 9 March 2026 ("Decision on protection of legality"), para. 178(a).

²⁸³ Request for protection of legality, paras 5-8; Reply to responses to protection of legality, para. 2.

²⁸⁴ Request for protection of legality, para. 9.

²⁸⁵ Request for protection of legality, paras 10-13; Reply to responses to protection of legality, para. 3.

110. The Supreme Court panel initially observed that, other than generally referring to a violation of the fairness of the proceedings, the Applicant had failed to specify the legal basis underpinning this ground, as required by Article 48(7)(b) of the Law and the applicable standards of review.²⁸⁶ Nevertheless, it decided, on an exceptional basis, to consider its merits.²⁸⁷ The Supreme Court panel recalled that the assessment of the fairness of the proceedings would turn on, *inter alia*, the reliability, probative value and weight of the evidence, noting that the trial and appeals panels had highlighted the existence of a wide variety of safeguards concerning the evaluation of the evidence presented at trial, as well as the manner in which those safeguards had been applied in the Applicant's case, considering the time that had lapsed since the commission of the crimes.²⁸⁸ It thus held that the Applicant's general contention that the passage of time had undermined the fairness of the proceedings was without substance.²⁸⁹ The Supreme Court panel further noted that the Applicant had only identified one specific investigative opportunity that he had been deprived of exploring, namely examining Ruzhdi Saramati as a witness for the defence, but failed to explain what impact, if any, it could have had on his case, or to argue that the absence of his testimony was "fatal" to the proceedings.²⁹⁰

111. Therefore, the Supreme Court panel concluded that the Applicant had failed to demonstrate that the trial panel's assessment of the evidence, as upheld by the appeals panel, gave rise to a violation of his right to a fair trial, and dismissed this ground.²⁹¹

2. Prior statements

112. The Applicant again complained that the trial panel admitted and relied upon the 2005 and 2007 ICTY Statements and the 2016 and 2019 Belgian Statements despite the fact that he had been questioned as a suspect without the benefit of legal assistance

²⁸⁶ Decision on protection of legality, paras 32-34.

²⁸⁷ Decision on protection of legality, para. 35.

²⁸⁸ Decision on protection of legality, paras 37-38.

²⁸⁹ Decision on protection of legality, paras 37-38.

²⁹⁰ Decision on protection of legality, para. 39.

²⁹¹ Decision on protection of legality, para. 40.

either prior to or during the interviews.²⁹² Among other things, he maintained that the appeals panel had erred in finding that the doctrine of the fruit of the poisonous tree was not applicable in the circumstances of the case merely because the 2016 Belgian Statements were not specifically referenced in the trial panel's reasoning, in particular considering that the appeals panel had previously recognised the Applicant's right to legal assistance was violated in relation thereto.²⁹³ He likewise continued to claim that the 2019 Belgian Statement had been tainted by the earlier violation, and stressed that all his prior statements formed part of the evidentiary record, or were available for consideration, and that the trial panel had decisively relied on them in support of core findings.²⁹⁴ The Applicant also reiterated that the trial panel's assessment of his prior statements, as evidenced by its language, reversed the burden of proof with regard to his presence at the Kukës Metal Factory during the time frame of the charges and his participation in mistreating detainees.²⁹⁵ Lastly, he pointed out that the admission of the 2016 and 2019 Belgian Statements was ruled upon only in the trial judgment, and that the appeals panel had recognised the detrimental effect of that uncertainty.²⁹⁶ The Applicant thus alleged a violation of his right to a fair trial under, *inter alia*, Article 6 of the Convention, and a substantial violation of the procedures.²⁹⁷

113. At the outset, the Supreme Court panel observed that, since the Applicant had failed to identify a substantial violation of the procedures contained in the Law or the Rules, it could dismiss this ground as inadmissible.²⁹⁸ Still, it decided to exceptionally consider the merits thereof.²⁹⁹ In this regard, it noted that the Applicant's submissions conflated various issues, including "the burden of proof, drawing adverse inferences,

²⁹² Request for protection of legality, paras 14-15, 19, 25.

²⁹³ Request for protection of legality, paras 16-17.

²⁹⁴ Request for protection of legality, paras 15-21.

²⁹⁵ Request for protection of legality, paras 21-24.

²⁹⁶ Request for protection of legality, para. 25.

²⁹⁷ Request for protection of legality, paras 15, 19, 25; Reply to responses to protection of legality, para. 5.

²⁹⁸ Decision on protection of legality, paras 50-51.

²⁹⁹ Decision on protection of legality, para. 51.

and the general rules on admissibility”,³⁰⁰ and that his arguments regarding the 2005 and 2007 ICTY Statements and the 2016 and 2019 Belgian Statements were concerned, “in essence”, with the alleged errors committed by the trial panel in its admission and use of the statements, in violation of his right to a fair trial.³⁰¹

114. Recalling the appeals panel’s findings in relation to the 2016 Belgian Statement, the Supreme Court panel held that the Applicant had neither established a substantial violation of the procedures arising from its admission into evidence nor shown how the alleged violation had materially affected any judicial finding.³⁰² It also noted, *inter alia*, that the ECtHR case law invoked by the Applicant did not support his argument that the admission of the 2016 Belgian Statement, without reliance on it, would render the proceedings unfair.³⁰³ As regards the 2019 Belgian Statement, it observed that the appeals panel had addressed in detail the Applicant’s arguments, and agreed with its findings.³⁰⁴ Further noting that the Applicant had not substantively engaged with the appeals panel’s findings or demonstrated any error in its findings with respect to the 2016 and 2019 Belgian Statements, the Supreme Court panel dismissed his arguments in this regard.³⁰⁵

115. Turning to the 2005 and 2007 ICTY Statements, the Supreme Court panel recalled the appeals panel’s findings in the decision on the Applicant’s interlocutory appeal on the same matter, and indicated that the Applicant had not referred to this decision, nor provided any arguments as to how either the trial panel or the appeals panel had substantially violated the procedures in this respect.³⁰⁶ Therefore, it also dismissed the

³⁰⁰ Decision on protection of legality, para. 52.

³⁰¹ Decision on protection of legality, para. 53.

³⁰² Decision on protection of legality, paras 54-57. See also above, para. 91.

³⁰³ Decision on protection of legality, para. 58.

³⁰⁴ Decision on protection of legality, para. 59.

³⁰⁵ Decision on protection of legality, para. 60.

³⁰⁶ Decision on protection of legality, paras 61-62. See also above, paras 69, 73.

Applicant's arguments regarding the 2005 and 2007 ICTY Statements and, as such, the entirety of the Applicant's ground.³⁰⁷

3. Principle of legality

116. Continuing to allege a breach of the principle of legality, as set out in Article 33 of the Constitution, Article 7 of the ECHR, and Article 15 of the ICCPR, the Applicant argued, *inter alia*, that neither JCE as a mode of liability nor the war crime of arbitrary detention in a NIAC were criminalised under Kosovo law or CIL at the relevant time, and the law, as applied by the trial panel and further upheld by the appeals panel was not foreseeable to him.³⁰⁸ He claimed that this amounted to a violation of the criminal law contained within the Law.³⁰⁹

117. Having found the Applicant's ground admissible,³¹⁰ the Supreme Court panel clarified, at the outset, that with respect to JCE as a mode of liability, it would limit its analysis to JCE I, which was the mode of liability under which the Applicant had been convicted by the trial panel.³¹¹ It then recalled the appeals panel's previous findings in this regard, and endorsed them.³¹² Further, in light of the jurisprudence of the *ad hoc* tribunals pursuant to Article 3(3) of the Law, the Supreme Court panel held that JCE I was firmly established as a mode of liability under CIL at the material time.³¹³ As to whether the criminalisation thereof was foreseeable to the Applicant, it recalled the findings of the appeals panel, with which it concurred, and added that foreseeability is assessed on an objective basis, and that the absence of an official position or limited education cannot, by themselves, exclude criminal liability where the applicable law was sufficiently accessible and foreseeable at the relevant time.³¹⁴

³⁰⁷ Decision on protection of legality, para. 62.

³⁰⁸ Request for protection of legality, paras 27-29, 51, 54; Reply to responses to protection of legality, para. 7.

³⁰⁹ Request for protection of legality, para. 30.

³¹⁰ Decision on protection of legality, paras 71-72, 123-124.

³¹¹ Decision on protection of legality, para. 74.

³¹² Decision on protection of legality, para. 75. See also above, paras 37, 95.

³¹³ Decision on protection of legality, paras 75, 77-78, 80.

³¹⁴ Decision on protection of legality, paras 79-80. See also above, paras 38, 95.

118. As regards arbitrary detention, the Supreme Court panel noted that the appeals panel had addressed the question of whether it formed part of CIL in 1999 on a variety of occasions, and following a comprehensive analysis thereof.³¹⁵ Bearing in mind that the Applicant had not substantively engaged with the decisions and judgments issued by the appeals panel in this regard, and after a careful examination of its findings, the Supreme Court panel was ultimately satisfied that the war crime of arbitrary detention in a NIAC was established under CIL at the material time, and that the criminalisation thereof was likewise foreseeable.³¹⁶ Accordingly, the Supreme Court panel dismissed the entirety of the Applicant's ground.³¹⁷

4. Notice of charges

119. The Applicant restated his position that the trial panel had erred in law when it convicted him for the arbitrary detention and torture of 18 individuals while he had been charged with respect to nine individuals, and pursuant to a defective indictment that lacked particulars as to the members of the JCE and the identity of the victims.³¹⁸ He further submitted that the appeals panel had acknowledged the lack of specificity as regards the number and identity of the victims, and claimed that these defects were not cured during the proceedings, and that they had deprived him of adequate notice of the charges and a genuine opportunity to investigate and respond thereto, in breach of Article 30 of the Constitution and Article 6 of the Law.³¹⁹ Additionally, he argued that the appeals panel had erred in law in finding that the conviction for crimes in respect of nine additional victims did not amount to a conviction for a new charge, or a radical transformation of the SPO's case against him.³²⁰ According to the Applicant, this constituted a substantial violation of the procedures enshrined in the Law.³²¹

³¹⁵ Decision on protection of legality, paras 125-127. See also above, paras 41-42, 95.

³¹⁶ Decision on protection of legality, para. 128.

³¹⁷ Decision on protection of legality, paras 81, 129.

³¹⁸ Request for protection of legality, paras 31-34; Reply to responses to protection of legality, para. 9.

³¹⁹ Request for protection of legality, paras 31-32, 35-37.

³²⁰ Request for protection of legality, para. 35.

³²¹ Request for protection of legality, para. 37.

120. At the outset, the Supreme Court panel clarified that, although the Applicant had not indicated a specific procedure under the Law that had been violated, but had only referred to Article 30 of the Constitution and Article 6 of the ECHR, it understood his submissions as potentially invoking Article 6(3)(a) of the ECHR and, in consequence, Article 21(4)(a) of the Law, concerning the right to be notified of the charges against him.³²² On that basis, it proceeded to consider the merits of this ground.³²³

121. In this regard, the Supreme Court panel recalled the appeals panel's extensive analysis and findings that the defects concerning the number and identity of victims had been cured, and that the confirmed indictment provided sufficient specificity as to the identity of the alleged JCE members, and expressed its agreement therewith.³²⁴ Noting that the Applicant had not engaged with any of these findings or pointed out any error in the appeals panel's assessment, the Supreme Court panel held that he had failed to demonstrate a violation of his fair trial rights, and accordingly dismissed this ground.³²⁵

5. Sentencing

122. Lastly, the Applicant also alleged errors in sentencing, arguing, *inter alia*, that the trial and appeals panels violated Article 7 of the ECHR.³²⁶ He contended, in particular, that the applicable law on sentencing at the material time had been the SFRY Criminal Code, which prescribed a sentencing range of five to 15 years of imprisonment, and that by treating this range as a mere factor to be taken into account rather than the applicable law, the trial and appeals panels contravened the principle of legality.³²⁷ In the his view, since the Law, and in particular Article 44(2) thereof, entered into force

³²² Decision on protection of legality, paras 87-88.

³²³ Decision on protection of legality, para. 88.

³²⁴ Decision on protection of legality, paras 89-90, 92. See also above, paras 99-102.

³²⁵ Decision on protection of legality, paras 89, 91-93.

³²⁶ Request for protection of legality, para. 74; Reply to responses to protection of legality, para. 9.

³²⁷ Request for protection of legality, para. 74; Reply to responses to protection of legality, para. 9.

16 years after the events charged, it could not lawfully influence the determination of the applicable sentencing framework.³²⁸

123. While the Supreme Court panel initially observed that the Applicant had again failed to specify whether there has been a substantial violation of the procedures or of the criminal law, it nevertheless proceeded to address this ground on the merits.³²⁹ In this connection, it recalled the findings of this Chamber in its judgment on the referral of Mr Salih Mustafa (*"Mustafa judgment on the principle of lex mitior"*), to the effect that, based on a plain reading of Article 44(2) of the Law, the criminal chambers are bound to consider, but not to apply, the sentencing ranges provided under Kosovo law.³³⁰ In addition, the Supreme Court panel observed that the Applicant had not argued that the SFRY Criminal Code provided for a more lenient sentencing range, or that either the trial panel or the appeals panel had erred in their application of Article 44(2) of the Law.³³¹ It further held that, in any event, the sentence imposed on the Applicant fell within the sentencing range he had deemed applicable, and that he had provided no arguments suggesting that the trial and appeals panels had abused their discretion.³³² Accordingly, the Supreme Court panel also dismissed this ground.³³³

III. ALLEGED VIOLATIONS

124. The Applicant complained that the criminal chambers had failed to consider the impact of the passage of time between the crimes charged and his trial on the fairness of the proceedings, thereby violating his right to a fair trial under Article 31(2) of the Constitution and Article 6(1) of the Convention.³³⁴

³²⁸ Request for protection of legality, para. 74.

³²⁹ Decision on protection of legality, paras 172-173.

³³⁰ Decision on protection of legality, para. 174. See also KSC-CC-2024-27, F00011, Judgment on the referral of Salih Mustafa concerning fundamental rights guaranteed by Articles 31 and 33 of the Kosovo Constitution and Articles 6 and 7 of the European Convention on Human Rights, public, 17 April 2025 (*"Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior"*), paras 113, 115.

³³¹ Decision on protection of legality, para. 175.

³³² Decision on protection of legality, para. 175.

³³³ Decision on protection of legality, para. 176.

³³⁴ Referral, paras 15-22; Applicant submissions, paras 2-7.

125. Likewise, the Applicant claimed that the admission and reliance upon his 2005 and 2007 ICTY Statements and his 2016 and 2019 Belgian Statements at trial, although he had been questioned as a suspect without the benefit of legal assistance, amounted to a breach of his right to a fair trial as guaranteed by Article 31(2) of the Constitution and Article 6(1) of the ECHR.³³⁵

126. The Applicant also alleged that, as JCE as a mode of liability was not prescribed by law or sufficiently accessible and foreseeable to him in 1999, his conviction on that basis violated the principle of legality as enshrined in Article 33(1) of the Constitution, Article 7(1) of the Convention, and Article 15(1) of the ICCPR.³³⁶

127. In addition, the Applicant complained that his conviction for the war crime of arbitrary detention in a NIAC equally breached the principle of legality as guaranteed by Article 33(1) of the Constitution, Article 7(1) of the Convention, and Article 15(1) of the ICCPR, arguing that the offence was neither prescribed by law, nor sufficiently accessible and foreseeable to him at the material time.³³⁷

128. Moreover, the Applicant claimed that the confirmed indictment did not provide sufficient particulars regarding the identity of the JCE members and the number and identity of the victims, thus depriving him of an effective notice of the charges against him, and a genuine opportunity to respond to them and organise his defence, in breach of Article 30(1) of the Constitution and Article 6(3) of the ECHR.³³⁸

129. The Applicant further alleged that, in applying the sentencing framework under the Law, which had entered into force 16 years after the commission of the crimes for which he was convicted, instead of the sentencing framework prescribed by the SFRY Criminal Code applicable at the material time, the criminal chambers had violated the

³³⁵ Referral, paras 23-31; Applicant submissions, paras 9-15.

³³⁶ Referral, paras 32-35, 38; Applicant submissions, paras 16-18.

³³⁷ Referral, paras 32-33, 36-38; Applicant submissions, paras 16-17, 19.

³³⁸ Referral, paras 39-42; Applicant submissions, paras 20-23.

principle of legality under Article 33(2) and (4) of the Constitution and Article 7(1) of the Convention.³³⁹

130. Lastly, the Applicant complained that the sentence imposed on him violated the principle of equality before the law as enshrined in Article 24(1) of the Constitution and Articles 14(1) and 26 of the ICCPR, in particular given the disproportionality of his sentence compared to those imposed in similar and related cases.³⁴⁰

IV. JURISDICTION

131. The Chamber observes that the Applicant filed the Referral under Article 113(7) of the Constitution and raised complaints in connection with the criminal proceedings against him, which took place before the SC. The Referral therefore relates 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 Referral.

V. SCOPE OF REVIEW

132. The Chamber recalls, at the outset, its supervisory function as regards the work of the SC and the SPO insofar as fundamental rights and freedoms guaranteed by the Constitution are concerned.³⁴¹ Pursuant to Article 49(1) of the Law, the Chamber shall be the final authority on the interpretation of the Constitution as it relates to the subject matter jurisdiction and work of the SC and the SPO.

133. With respect to the fundamental rights and freedoms guaranteed by Chapter II of the Constitution, the Chamber is mindful that, by virtue of Article 22(2) and (3) of

³³⁹ Referral, paras 43-44, 46; Applicant submissions, para. 23.

³⁴⁰ Referral, paras 43, 45-46.

³⁴¹ See, similarly, *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 57; KSC-CC-2024-28, F00003, *Judgment on the Referral of Haxhi Shala to the Specialist Chamber of the Constitutional Court*, public, 6 March 2025 ("*Judgment on H. Shala referral concerning detention*"), para. 28; KSC-CC-2023-22, F00011, *Judgment on the referral by Nasim Haradinaj to the Specialist Chamber of the Constitutional Court*, public, 31 May 2024 ("*Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*"), para. 65; KSC-CC-2019-05, F00012, *Decision on the referral of Mahir Hasani concerning prosecution order of 20 December 2018*, public, 20 February 2019 ("*Decision on M. Hasani referral concerning SPO order*"), para. 24.

the Constitution, the guarantees set forth in the ECHR and the ICCPR apply at the constitutional level.³⁴² Indeed, as held by the Kosovo Constitutional Court, the rights and freedoms guaranteed by the international instruments enumerated 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 [therein]”.³⁴³ The Chamber recalls that the Applicant’s complaints relate to Articles 24, 30, 31, and 33 of the Constitution, Articles 6 and 7 of the Convention, as well as Article 14, 15, and 26 of the ICCPR and that, accordingly, the Referral falls to be considered under said provisions.³⁴⁴

134. Concerning the assessment of the Referral, the Chamber notes that, pursuant to Article 53 of the Constitution, human rights and fundamental freedoms guaranteed by the Constitution “shall be interpreted consistent with the court decisions of the [ECtHR]”. Further, the Kosovo Constitutional Court has consistently recognised the application of Article 53 of the Constitution in its review of constitutional referrals.³⁴⁵ It has also stated that “the Constitutional Court *is bound* to interpret human rights and fundamental freedoms consistent with the court decisions of the [ECtHR]”.³⁴⁶ In that

³⁴² See, similarly, KSC-CC-2022-13, F00010; KSC-CC-2022-14, F00009, 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, public, 13 June 2022 (“*Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*”), para. 34, with further references to case law.

³⁴³ 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.

³⁴⁴ See, similarly, *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, paras 34-35.

³⁴⁵ See, for example, Kosovo, Constitutional Court, *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), para. 37; *Constitutional review of decision Pn II no. 1/17 of the Supreme Court of Kosovo of 30 January 2017 related to the decision Pml no. 300/16 of the Supreme Court of 12 December 2016*, KI 62/17, Judgment, 29 May 2018 (11 June 2018), para. 43; *Request for constitutional review of judgment Pml no. 225/2017 of the Supreme Court of 18 December 2017*, KI 34/18, Resolution on inadmissibility, 23 May 2018 (11 June 2018), para. 41.

³⁴⁶ Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 181/15 of the Supreme Court of the Republic of Kosovo of 6 November 2015*, KI 43/16, Resolution on inadmissibility, 14 April 2016 (16 May 2016), para. 50 (emphasis added).

light, and given Articles 22(2) and 53 of the Constitution, this Chamber has particular regard to the jurisprudence of the ECtHR in its review of the Referral.³⁴⁷

135. Lastly, the Chamber recalls that its task, under Article 113(7) of the Constitution and Article 49(1) and (3) of the Law, is to assess whether the irregularities complained of by the Applicant violated his individual rights and freedoms guaranteed by the Constitution.³⁴⁸ Accordingly, the Chamber does not decide on the Applicant's guilt or innocence.³⁴⁹ Likewise, it is not the Chamber's role to decide whether the findings of the criminal chambers were correct in terms of facts or law.³⁵⁰ Otherwise, it would be acting as an appeal chamber, which would be to disregard the limits imposed on its jurisdiction pursuant to Articles 113 and 162(3) of the Constitution.³⁵¹

136. The Chamber may only question such findings where they are flagrantly and manifestly arbitrary, in a manner that gives rise in itself to a violation of fundamental

³⁴⁷ See, similarly, *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 59; *Judgment on H. Shala referral concerning detention*, para. 30; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 67; *Decision on M. Hasani referral concerning SPO order*, para. 26.

³⁴⁸ See, for example, Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 19/2022 of the Supreme Court of 15 February 2022*, KI 74/22, Judgment, 7 November 2023 (5 December 2023), para. 72. See, similarly, *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 60; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 68; KSC-CC-2022-15, F00010, *Decision on the referral of Hashim Thaçi concerning the right to an independent and impartial tribunal established by law and to a reasoned opinion*, public, 13 June 2022 ("*Decision on H. Thaçi referral concerning jurisdictional challenge*"), para. 41.

³⁴⁹ See, for example, Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 224/220 of the Supreme Court of Kosovo of 17 September 2020*, KI 31/21, Resolution on inadmissibility, 5 May 2021 (21 May 2021), para. 35. See, similarly, *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 60; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 68; *Decision on H. Thaçi referral concerning jurisdictional challenge*, para. 41.

³⁵⁰ See, for example, Kosovo, Constitutional Court, KI 31/21, cited above, paras 35-36. See, similarly, *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 60; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 68; 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, 12 June 2020 (original issued on 22 April 2020) ("*Decision concerning single judge decision*"), para. 36.

³⁵¹ See, for example, Kosovo, Constitutional Court, *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. 87. See, similarly, *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 60; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 68; *Decision concerning single judge decision*, para. 36. See also ECtHR, *Kemmache v. France* (no. 3), no. 17621/91, 24 November 1994, para. 44.

rights and freedoms guaranteed by the Constitution.³⁵² For instance, but not limited to, this may occur in situations of manifest errors of assessment that no reasonable court could have ever made,³⁵³ unreasonable conclusions regarding the facts that are so striking and palpable on the face of it that a court's findings could be seen as grossly arbitrary,³⁵⁴ or manifestly erroneous interpretation and application of the relevant law or reasoning that has no legal foundation or is so palpably incorrect that it may be construed as grossly arbitrary or as amounting to a denial of justice.³⁵⁵

VI. ADMISSIBILITY

137. At the outset, the Chamber must ascertain whether the various complaints raised by the Applicant are admissible.³⁵⁶ This follows from Article 113(1) of the Constitution, which stipulates that the Chamber decides only on matters “referred to [it] in a legal manner by authorised parties”.³⁵⁷ Likewise, pursuant to Rule 15(1) of the SCCC Rules,

³⁵² See, for example, Kosovo, Constitutional Court, KI 37/18, cited above, para. 41. See, similarly, *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 61; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 69; *Decision concerning single judge decision*, para. 36. See also ECtHR, *De Tommaso v. Italy* [GC], no. 43395/09, 23 February 2017, para. 170.

³⁵³ ECtHR, *Dulaurans v. France*, no. 34553/97, 21 March 2000, paras 33-39. See also ECtHR, *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, 5 February 2015, para. 62.

³⁵⁴ ECtHR, *Khamidov v. Russia*, no. 72118/08, 15 November 2007, paras 170-175.

³⁵⁵ ECtHR, *Anđelković v. Serbia*, no. 1401/08, 9 April 2013, paras 24-29; *Bochan v. Ukraine (no. 2)* [GC], cited above, paras 60-65.

³⁵⁶ See, similarly, *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 62; *Judgment on H. Shala referral concerning detention*, para. 31; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 70; *Decision on P. Shala referral concerning admissibility of prior statements*, para. 19; *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, para. 36.

³⁵⁷ See, for example, 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), paras 68-69; *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), paras 30-31. See, similarly, *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 62; *Judgment on H. Shala referral concerning detention*, para. 31; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 70; *Decision on P. Shala referral concerning admissibility of prior statements*, para. 19; KSC-CC-2022-19, F00004/RED, Public redacted version of the decision on the referral of Pjetër Shala concerning fundamental rights guaranteed by Articles 31 and 32 of the Kosovo Constitution and Articles 6 and 13 of the European Convention on Human Rights, public, 15 December 2022 (“*Decision on P. Shala referral concerning disqualification request*”), para. 14.

the Chamber shall decide on “the admissibility and/or the merits of a referral made under Article 49 of the Law”. The foregoing provisions provide for the Chamber’s responsibility to first determine, *ex officio*, whether the Referral is admissible or not.³⁵⁸

138. The Chamber therefore turns to the question of admissibility in light of certain admissibility requirements provided for in the Constitution, the Law, and the SCCC Rules, which arise in the present proceedings. Considering that the Applicant raised several complaints in the Referral, the admissibility for each complaint is examined separately.

A. ALLEGED VIOLATION OF ARTICLE 31(2) OF THE CONSTITUTION AND ARTICLE 6(1) OF THE ECHR (PASSAGE OF TIME)

1. Submissions

139. The Applicant submitted that the 24-year lapse between the events charged and his trial violated his right to a fair trial guaranteed by Article 31(2) of the Constitution and Article 6(1) of the ECHR.³⁵⁹ In particular, he claimed that the passage of time had affected the reliability and probative value of evidence, and that evidence had been lost or degraded, witnesses had become unavailable, and investigative opportunities had been missed.³⁶⁰ In addition, the Applicant referred to the unavailability of Ruzhdi Saramati, whose evidence, he argued, might have contradicted the SPO’s account, and alleged an infringement of the principle of legality of arms in this regard.³⁶¹ He further asserted that the criminal chambers had failed to adequately consider the impact of

³⁵⁸ See, similarly, *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 62; *Judgment on H. Shala referral concerning detention*, para. 31; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 70; *Decision on P. Shala referral concerning admissibility of prior statements*, para. 19; *Decision on P. Shala referral concerning disqualification request*, para. 14; *Decision on H. Thaçi referral concerning jurisdictional challenge*, para. 43.

³⁵⁹ Referral, para. 15.

³⁶⁰ Referral, paras 15-16, 19.

³⁶¹ Referral, paras 17-18.

the passage of time on the fairness of the proceedings, and had instead relied on it to excuse deficiencies in the SPO's evidence.³⁶²

140. In response, the SPO maintained that the Applicant had failed to substantiate his allegations or demonstrate any concrete, as opposed to speculative, prejudice arising from the passage of time.³⁶³ It argued that the passage of time did not, in itself, render the proceedings unfair, and that the criminal chambers had properly considered it in light of the safeguards available at the SC against unlawful or unfair prosecutions and convictions.³⁶⁴ As such, the SPO averred that the Applicant had failed to demonstrate any flagrant or manifest arbitrariness in the criminal chambers' findings, or a breach of his constitutional rights.³⁶⁵

141. The Applicant replied that the prejudice to his defence arose precisely from his inability to know what evidence or investigative opportunities had been lost over the course of 24 years, and that asking him to identify material that could no longer be reconstructed imposed an evidentiary burden that was inconsistent with the principle of equality of arms.³⁶⁶ He further argued that his complaint could not be characterised as speculative, as he had identified Ruzhdi Saramati as a key witness whose evidence he was unable to obtain, and clarified that his challenge was never limited to a single witness, but concerned the cumulative impact that the passage of time had had on his overall ability to conduct investigations.³⁶⁷ Likewise, the Applicant contended that the mere existence of safeguards against unlawful or unfair prosecutions and convictions at the SC did not obviate the need to assess whether they had effectively remedied the prejudice arising from the passage of time, and asserted that the criminal chambers'

³⁶² Referral, paras 20-22.

³⁶³ SPO submissions, paras 2, 6.

³⁶⁴ SPO submissions, paras 4, 7.

³⁶⁵ SPO submissions, paras 3, 8.

³⁶⁶ Applicant submissions, para. 4.

³⁶⁷ Applicant submissions, para. 6.

failure to undertake such an assessment amounted to a breach of his right to a fair trial under Article 31(2) of the Constitution and Article 6(1) of the Convention.³⁶⁸

2. Chamber's assessment

142. As the Chamber understands them, the allegations raised under this complaint are twofold. On the one hand, the Applicant argued that the passage of time impaired his ability to investigate and obtain evidence, including as a result of the unavailability of a specific witness and, in this regard, also alleged an infringement of the principle of equality of arms.³⁶⁹ On the other hand, he asserted that the passage of time affected the reliability and probative value of the evidence, and that the criminal chambers had failed to consider its impact on the fairness of the proceedings, instead relying on it to excuse evidentiary deficiencies.³⁷⁰ Taken together, these allegations seem to reflect the broader contention that the passage of time rendered the proceedings unfair, contrary to the requirements of Article 31(2) of the Constitution and Article 6(1) of the ECHR.³⁷¹

143. However, the Applicant appears to have failed to raise some of these arguments before the Supreme Court panel. Thus, the question arises whether he has exhausted the available legal remedies in relation to those aspects of his complaint. The Chamber recalls in this respect that, pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules, an individual may make a referral to the Chamber only after exhausting all effective remedies provided for by law against the alleged violation. This is meant to afford the relevant authorities the opportunity to prevent or put right the alleged violations of the Constitution and/or the ECHR.³⁷²

³⁶⁸ Applicant submissions, paras 2-3, 5, 7.

³⁶⁹ Referral, paras 16-19.

³⁷⁰ Referral, paras 15, 20-21.

³⁷¹ Referral, para. 22.

³⁷² See, for example, Kosovo, Constitutional Court, *Constitutional review of decision [KPK/no. 475/2022] on proposal of Mr Blerim Isufaj for the position of the Chief State Prosecutor of 6 April 2022 of Kosovo Prosecutorial Council and decision [KPK/no. 474/2022] on rejection of the Report of 6 April 2022 of the Review Commission of the Kosovo Prosecutorial Council*, KI 57/22 and KI 79/22, Resolution on inadmissibility, 4 July 2022 (25 July 2022), para. 70; ECtHR, *Gherghina v. Romania* (dec.) [GC], no. 42219/07, 9 July 2015, paras 83-84.

144. Indeed, the Chamber notes that, before the Supreme Court panel, the Applicant complained, in general terms, that the passage of time between the events underlying the charges and his trial had resulted in the deterioration or loss of evidence, including witness testimony from Ruzhdi Saramati, thereby impairing his ability to investigate and obtain evidence in support of his defence, and compromising the fairness of the proceedings.³⁷³ In addition, he contended that, owing to the passage of time, particular caution should have been exercised in the assessment of evidence at trial, including by not requiring him to carry the burden of proof.³⁷⁴ However, the Applicant did not allege an infringement of the principle of equality of arms, nor did he argue that the passage of time had affected the reliability and probative value of the evidence, or that the trial panel had used it to excuse evidentiary deficiencies.

145. The Chamber observes that, whereas the Applicant was not necessarily required to rely on the provisions of the Constitution or the Convention,³⁷⁵ to properly exhaust remedies, he should have complained, expressly or in substance, about a violation of the Constitution and/or the Convention, in a manner which left no doubt that the same complaint which was submitted to the Chamber had indeed been previously raised before the relevant authorities, namely the Supreme Court panel in the instant case.³⁷⁶ This means that the Applicant should have raised legal arguments to the same or like effect on the basis of the applicable law, in order to give the Supreme Court panel the

See also *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 70; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 80, with further references to case law.

³⁷³ Request for protection of legality, paras 5-9; Reply to responses to protection of legality, para. 2.

³⁷⁴ Request for protection of legality, paras 10-13; Reply to responses to protection of legality, para. 3.

³⁷⁵ See, for example, ECtHR, *Vučković and Others v. Serbia* (preliminary objection) [GC], no. 17153/11, 25 March 2014, paras 72, 79, 81-82.

³⁷⁶ See, for example, ECtHR, *Farzaliyev v. Azerbaijan*, no. 29620/07, 28 May 2020, para. 55; *Nicklinson and Lamb v. the United Kingdom* (dec.), nos 2478/15 and 1787/15, 23 June 2015, para. 90; *Merot d.o.o and Storitve Tir d.o.o v. Croatia* (dec.), nos 29426/08 and 29737/08, 10 December 2013, para. 36; Kosovo, Constitutional Court, KI 119/17, cited above, paras 72-73. See also *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 72; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 83.

opportunity to redress the alleged breach.³⁷⁷ For the Chamber, this requires taking into account both the facts, as well as the Applicant's legal arguments.³⁷⁸

146. Thus, the Chamber is of the view that the aspects of this complaint identified in paragraph 144 above have not been presented, either explicitly or in substance, before the Supreme Court panel, despite the Applicant having clearly had an opportunity to do so.³⁷⁹ It follows that they must be rejected as inadmissible for failure to exhaust the available legal remedies pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules.

147. In light of the foregoing, what remains before the Chamber is the allegation that the passage of time resulted in the deterioration or loss of evidence, thereby affecting the Applicant's ability to investigate and obtain evidence in his defence and, in turn, rendering the proceedings unfair.³⁸⁰ The Chamber observes that, while the Applicant had failed to comply with the admissibility requirements under Article 48(7)(b) of the Law and the applicable standards of review before the Supreme Court panel, the latter nevertheless addressed this ground on the merits.³⁸¹ As such, he may be said to have observed the exhaustion rule under Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules in this regard.³⁸² However, the Chamber recalls that, pursuant to Rule 14(f) of the SCCC Rules, it may still declare a referral, or certain parts thereof, inadmissible for reasons related to the examination of the merits.

³⁷⁷ See, for example, ECtHR, *Novak v. Croatia* (dec.), no. 20737/15, 16 March 2021, para. 24. See also *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 72; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 84.

³⁷⁸ ECtHR, *Radomilja and Others v. Croatia* [GC], nos 37685/10 and 22768/12, 20 March 2018, para. 117; *Novak v. Croatia* (dec.), cited above, para. 24. See also *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 72; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 84.

³⁷⁹ See above, paras 109-111.

³⁸⁰ See above, paras 109, 139, 141, 144, and references therein.

³⁸¹ See above, paras 110-111.

³⁸² See, for example, ECtHR, *Savickis and Others v. Latvia* [GC], no. 49270/11, 9 June 2022, para. 140. See, similarly, *Judgment on H. Shala referral concerning detention*, para. 32. See also *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 85, with further references to case law.

Specifically, a referral, or a particular complaint therein, may be deemed inadmissible if it does not give rise to the appearance of a violation of a constitutional right.³⁸³

148. At this juncture, the Chamber reiterates that its role is limited to verifying the criminal chambers' compliance with human rights obligations under the Constitution and does not extend to determining whether their findings were correct as a matter of fact or law, unless and insofar they are flagrantly and manifestly arbitrary, infringing those rights.³⁸⁴ Thus, in relation to Articles 30 and 31 of the Constitution and Article 6 of the Convention, the Chamber's sole task is to examine complaints alleging that the criminal chambers failed to observe specific procedural safeguards laid down in those provisions, or that the conduct of the proceedings as a whole failed to guarantee the right to a fair hearing.³⁸⁵

149. The Chamber notes that, while the Applicant referred to his inability to "conduct proper investigations", "obtain statements" from a particular witness³⁸⁶ or "present an effective defence",³⁸⁷ he neither cited nor made any substantial arguments that could be understood as alleging a breach of the specific procedural safeguards laid down in Articles 30(3) and 31(4) of the Constitution and Article 6(3)(b) and (d) of the ECHR. In the circumstances, and having regard to the manner in which these allegations were formulated, the Chamber will examine them only from the perspective of the overall fairness of the proceedings.

150. Further to the above, the Chamber notes that, other than citing Ruzhdi Saramati without, however, explaining the relevance of such possible testimony to the subject matter of the accusations against him,³⁸⁸ the Applicant did not identify any particular

³⁸³ See, similarly, *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 87; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 105.

³⁸⁴ See above, paras 135-136, with further references to case law.

³⁸⁵ See, for example, ECtHR, *Kavala v. Türkiye (no. 2)* [GC], no. 2170/24, 25 August 2026, para. 199.

³⁸⁶ Referral, para. 18.

³⁸⁷ Applicant submissions, para. 2.

³⁸⁸ Cf. ECtHR, *Murtazaliyeva v. Russia* [GC], no. 36658/05, 18 December 2018, paras 160-161.

instance in which he was unable to adduce other evidence in support of his case. His sweeping contentions that the alleged prejudice resulting from the passage of time “is not limited to identifiable missing evidence but extends to information and avenues of investigation that can no longer be discovered or reconstructed”,³⁸⁹ or his additional clarifications that the “complaint was never limited to a single witness but concerned the cumulative impact of the passage of time on [his] ability to investigate the case as a whole”³⁹⁰ are general and speculative and cannot, in themselves, call into question the fairness of the proceedings.

151. On the contrary, having carefully examined the record of the case, the Chamber notes that the evidence adduced at trial was discussed in adversarial proceedings, and that the Applicant was able to put forward all the arguments he considered necessary to defend his interests and present evidence in his favour. Indeed, the Applicant was afforded the opportunity to call and have examined 14 witnesses through either oral or written testimony, an almost equivalent number to those called by the SPO, as well as to present other evidence and arguments in his favour.³⁹¹ In particular, he was able to give his own version of the facts.³⁹² Furthermore, the Applicant raised his objections regarding the passage of time at every stage of the proceedings, which were addressed by the criminal chambers, with detailed reasons given for their decisions.³⁹³

152. Likewise, the Chamber observes that, in its judgment, the trial panel outlined at length the evidentiary principles on which it based its findings,³⁹⁴ gave ample reasons for both its factual and legal findings,³⁹⁵ and ultimately found the evidence sufficient to prove the Applicant’s guilt beyond reasonable doubt.³⁹⁶ In any event, the Chamber emphasises that, under the invoked provisions, it is not called upon to determine the

³⁸⁹ Referral, para. 19.

³⁹⁰ Applicant submissions, para. 6.

³⁹¹ See above, para. 61, and references therein.

³⁹² See, similarly, ECtHR, *Papon v. France (no. 2)* (dec.), no. 54210/00, 15 November 2001, p. 26.

³⁹³ See above, paras 64-65, 85-87, 109-111, and references therein.

³⁹⁴ Trial judgment, Section V.

³⁹⁵ Trial judgment, Section VI and Section VII.

³⁹⁶ Trial judgment, paras 74, 1037-1039.

probative value or sufficiency of the evidence for a particular outcome, but to examine whether the overall fairness of the proceedings was ensured in light of the applicable procedural and institutional safeguards, and the fundamental principles inherent in the right to a fair trial.³⁹⁷ For the reasons outlined in the foregoing paragraphs, and in the absence of evidence to the contrary, the Chamber considers that the proceedings, taken as a whole, were fair and not arbitrary.

153. Accordingly, the Chamber does not detect any appearance of a violation of the Applicant's right to a fair trial under Article 31(2) of the Constitution and Article 6(1) of the Convention arising from the passage of time. It thus follows that this specific part of the complaint must be declared inadmissible in accordance with Rule 14(f) of the SCCC Rules.

B. ALLEGED VIOLATION OF ARTICLE 31(2) OF THE CONSTITUTION AND ARTICLE 6(1) OF THE ECHR (PRIOR STATEMENTS)

1. Submissions

154. The Applicant maintained that the trial panel's admission of and reliance on his 2005 and 2007 ICTY Statements and his 2016 and 2019 Belgian Statements, made by him without legal assistance, violated his right to a fair trial, including his privilege against self-incrimination under Article 31(2) of the Constitution and Article 6(1) of the Convention.³⁹⁸ In particular, he complained that, despite having determined that the 2016 Belgian Statement was obtained in breach of his right of access to a lawyer, the appeals panel allowed it to remain available for consideration, and contended that, under the doctrine of the fruit of the poisonous tree, as developed in the jurisprudence of the ECtHR, the 2019 Belgian Statement was tainted by the breach of his rights in connection with the 2016 Belgian Statement.³⁹⁹ The Applicant further alleged that his

³⁹⁷ See, for example, ECtHR, *Ayetullah v. Turkey*, nos 29084/07 and 1191/08, 29 October 2020, paras 124, 194.

³⁹⁸ Referral, paras 23-24, 27, 31.

³⁹⁹ Referral, para. 26.

prior statements, including the 2016 Belgian Statement, formed part of the evidentiary record and, even if not expressly referred to, remained available for the trial panel's consideration.⁴⁰⁰ He also contended that the trial panel had heavily relied on the 2005 and 2007 ICTY Statements and the 2019 Belgian Statement in reaching incriminating findings that were decisive to the outcome of the proceedings, and that the trial panel had shifted the burden of proof to him, by requiring him to discredit or cast doubt on the SPO's evidence.⁴⁰¹ Lastly, he claimed that determining the admissibility of the 2016 and 2019 Belgian Statements only in the context of the trial judgment deprived him of an effective opportunity to respond to the merits thereof.⁴⁰²

155. The SPO responded that the complaint was inadmissible for failure to exhaust all legal remedies, as the Supreme Court panel had dismissed the Applicant's claims concerning his prior statements owing to his failure to substantively engage with the relevant appellate findings.⁴⁰³ Likewise, it contended that, rather than identifying any unreasonable conclusion by the criminal chambers that would warrant the Chamber's consideration, the Applicant was seeking a further appeal, which was another ground for inadmissibility.⁴⁰⁴ The SPO also submitted that, contrary to the Applicant's claims, the 2005 and 2007 ICTY Statements and the 2019 Belgian Statement had been obtained after he had been informed of and waived his right to legal assistance and could thus be relied upon and that, although the appeals panel had found a violation of his right to legal assistance in relation to the 2016 Belgian Statement, it nevertheless ruled that it could have been relied on without causing unfairness.⁴⁰⁵ Still, it maintained that the trial panel had not relied on that statement for any of its findings, and argued that the Applicant was conflating two distinct concepts, namely, the admission of evidence at

⁴⁰⁰ Referral, para. 27.

⁴⁰¹ Referral, paras 27-29.

⁴⁰² Referral, para. 30.

⁴⁰³ SPO submissions, para. 9.

⁴⁰⁴ SPO submissions, para. 10.

⁴⁰⁵ SPO submissions, paras 12-13.

trial and a panel's reliance thereon.⁴⁰⁶ The SPO also pointed out that the Applicant's allegations of a reversal of the burden of proof and prejudice arising from the manner in which the 2016 and 2019 Belgian Statements were admitted into evidence had been comprehensively examined and rejected by the criminal chambers, and should also be dismissed by the Chamber.⁴⁰⁷

156. In reply, the Applicant contended that the complaint was admissible and well-founded, arguing that the substance of his constitutional grievances had been raised throughout the proceedings and addressed by the Supreme Court panel, such that all legal remedies had been exhausted.⁴⁰⁸ He also reiterated his argument that statements obtained in breach of his right to legal assistance could not remain in the evidentiary record without impacting the fairness of the proceedings, and maintained that, since the 2016 Belgian Statement was admitted into evidence and remained available for the trial panel's consideration, it formed part of the deliberative process underpinning his conviction.⁴⁰⁹ Lastly, he restated his allegation that the language employed by the trial panel demonstrated that his statements had been assessed in terms of their ability to undermine the SPO's case, thereby shifting the burden of proof.⁴¹⁰

2. Chamber's assessment

157. At the outset, the Chamber observes that the Applicant advanced several claims under the same complaint, which, taken together, appear to concern the broader issue of the administration of evidence at trial. In particular, he maintained that the 2005 and 2007 ICTY Statements and the 2016 and 2019 Belgian Statements were obtained in breach of his right of legal assistance,⁴¹¹ and that his right to a fair trial as guaranteed under Article 31(2) of the Constitution and Article 6(1) of the Convention was thereby undermined on three grounds: (i) the admission of the statements at trial and reliance

⁴⁰⁶ SPO submissions, para. 14

⁴⁰⁷ SPO submissions, para. 15.

⁴⁰⁸ Applicant submissions, paras 9-10.

⁴⁰⁹ Applicant submissions, paras 11-14.

⁴¹⁰ Applicant submissions, para. 15.

⁴¹¹ Referral, paras 23, 25-27. See also Applicant submissions, para. 13.

upon them for the conviction,⁴¹² (ii) the assessment thereof, which allegedly shifted the burden of proof,⁴¹³ and (iii) the determination of the admissibility of the 2016 and 2019 Belgian Statements as part of the trial judgment rather than at the time of their submission.⁴¹⁴

158. The Chamber further notes that, whereas the Supreme Court panel held that the Applicant had failed to comply with the admissibility requirements in relation to this ground, it nevertheless decided to exceptionally consider it on the merits.⁴¹⁵ However, in doing so, the Supreme Court panel did not address all the arguments advanced by the Applicant. In particular, after noting that the Applicant had “conflate[d] multiple distinct issues”, the Supreme Court panel proceeded to consider what it apparently regarded as the “essence” of the Applicant’s ground, that is, his claims concerning the admission and use at trial of the 2005 and 2007 ICTY Statements, as well as the 2016 and 2019 Belgian Statements.⁴¹⁶ Having carefully reviewed the Supreme Court panel’s decision, the Chamber observes that the Applicant’s allegations regarding the shifting of the burden of proof and the alleged prejudice resulting from the determination of the admissibility of the 2016 and 2019 Belgian Statements only in the trial judgment⁴¹⁷ were not addressed.

159. Further to the above, the Chamber recalls that, in accordance with Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules, an individual may make a referral to the Chamber only after exhausting all the effective remedies provided for by law against the alleged violation. It also notes that, in line with ECtHR case law, the exhaustion rule cannot be held against an Applicant if, in spite of the latter’s failure to comply with the formal requirements and/or time-limits

⁴¹² Referral, paras 23-28, 31.

⁴¹³ Referral, para. 29. See also Applicant submissions, para. 15.

⁴¹⁴ Referral, para. 30.

⁴¹⁵ See above, para. 113.

⁴¹⁶ Decision on protection of legality, paras 52-53; see also paras 54-63. See also above, para. 113.

⁴¹⁷ Request for protection of legality, paras 21-25.

prescribed by law, the relevant authority has nevertheless examined the substance of the exact claim that he or she is bringing before the Chamber.⁴¹⁸

160. Turning to the present case, the Chamber observes that the Supreme Court panel expressly indicated that it considered the Applicant to have failed to comply with the admissibility requirements under the Law and the applicable standards of review, but elected, exceptionally, to address the merits of his ground, limiting its examination to what it identified as the essence thereof. Accordingly, the Chamber considers that the Applicant may only be regarded as having exhausted the available legal remedies in relation to the first aspect of his complaint concerning the admission and use at trial of the 2005 and 2007 ICTY Statements and the 2016 and 2019 Belgian Statements.⁴¹⁹ It follows that his additional allegations regarding the reversal of the burden of proof and the circumstances in which the 2016 and 2019 Belgian Statements were admitted into evidence must be declared inadmissible for failure to exhaust the available legal remedies pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules.

161. Before examining the claim in respect of which it found the remedies exhausted, the Chamber reiterates that, pursuant to Rule 14(f) of the SCCC Rules, it may declare a referral, or specific parts thereof, inadmissible for reasons related to the examination of the merits, namely, where no appearance of a violation of a constitutional right can be detected.

162. In this regard, the Chamber also bears in mind that the statements at issue were obtained during interviews conducted by investigators of the ICTY under the latter's Statute and Rules of Procedure and Evidence and the Belgian Federal Judicial Police under Belgian law,⁴²⁰ and that its jurisdiction in relation to the Referral is limited to

⁴¹⁸ ECtHR, *Savickis and Others v. Latvia* [GC], cited above, para. 140, with further references to case law. See, similarly, *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 85, with further references to case law. See also above, para. 147.

⁴¹⁹ Cf. ECtHR, *Kaya v. Germany* (dec.), no. 31753/02, 11 May 2006, p. 8.

⁴²⁰ See above, para. 68, and references therein.

alleged violations *by* the SC or the SPO of the Applicant's rights and freedoms under the Constitution.⁴²¹ Thus, the Chamber finds that it may only examine this complaint from the perspective of the general test of fairness in the administration of evidence under Article 31(2) of the Constitution and Article 6(1) of the Convention, as outlined in the following paragraph, rather than the test developed with respect to the right of legal assistance as a particular aspect of the right to a fair trial under Articles 30(5) and 31(2) of the Constitution and Article 6(1) and (3)(c) of the ECHR.⁴²² In any event, the Chamber observes that the Applicant's complaint relates to the admissibility and use at trial of statements obtained in breach of the right to legal assistance, and not to that right as such.

163. At this juncture, the Chamber recalls that, while Article 31(2) of the Constitution and Article 6(1) of the Convention guarantee the right to a fair trial, neither lays down any rules on the admissibility of evidence as such, this being, in the context of the SC, primarily a matter for regulation under the Law and the Rules. It does not fall to the Chamber to determine, as a matter of principle, whether particular types of evidence, such as unlawfully obtained evidence, may be admissible. Rather, its task under the provisions invoked by the Applicant is to examine the fairness of the proceedings as a whole, including the way in which the evidence was obtained and used, its quality – namely whether the circumstances in which it was taken cast doubt on its reliability or accuracy – and whether the rights of the defence were properly ensured in respect of that evidence, in particular whether an applicant was afforded an opportunity to challenge the evidence and oppose its use, and the manner in which such objections were dealt with by the criminal chambers. This may also entail an examination of the unlawfulness in question, and where a violation of another constitutional right is at issue, the nature of the breach found.⁴²³ In this regard, the Chamber is further mindful

⁴²¹ See above, para. 131.

⁴²² See, for example, ECtHR, *Beuze v. Belgium* [GC], no. 71409/10, 9 November 2018, paras 119-150.

⁴²³ See, for example, ECtHR, *Dragojević v. Croatia*, no. 68955/11, 15 January 2015, paras 127-129; *Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006, paras 94-96.

that, pursuant to the case law of the ECtHR, the admission of statements obtained as a result of ill-treatment will automatically render the proceedings as a whole unfair,⁴²⁴ but that the use of evidence obtained in breach of, *inter alia*, defence rights or the right to privacy does not, in itself, run counter to the requirement of fairness where fair-trial safeguards have otherwise been observed.⁴²⁵

164. Further to the above, the Chamber observes that, apart from referring to the 2005 and 2007 ICTY Statements in the context of his broader allegation that all of his prior statements were obtained unlawfully, in violation of his right to legal assistance, and that their admission and use at trial undermined the fairness of the proceedings,⁴²⁶ the Applicant advanced no additional arguments specific to them. He did not appear to challenge their reliability or accuracy, limiting his objection to their formal admission and use at trial.

165. Against this background, the Chamber recalls that the trial panel admitted the 2005 and 2007 ICTY Statements into evidence,⁴²⁷ and observes that the Applicant had numerous opportunities to challenge their admission and object to their use at every stage of the criminal proceedings.⁴²⁸ The criminal chambers examined his arguments in substance and comprehensively addressed his objections.⁴²⁹ More specifically, the trial panel found that the Applicant had been adequately informed of his rights as a suspect and had validly waived his right of access to a lawyer in relation to the 2005 and 2007 ICTY Statements,⁴³⁰ a finding that was subsequently upheld by the appeals and Supreme Court panels.⁴³¹ The Applicant did not advance any basis to question it,

⁴²⁴ ECtHR, *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010, paras 165-166, with further references to case law.

⁴²⁵ See, for example, ECtHR, *Stephens v. Malta* (no. 3), no. 35989/14, 14 January 2020, paras 66-67, with further references to case law; see also paras 68-78. In the context of the SC's legal framework, compare Rule 138(2) with Rule 138(3) of the Rules.

⁴²⁶ Referral, paras 23-24, 27-28, 31.

⁴²⁷ See above, paras 67, 69.

⁴²⁸ See above, paras 66, 71, 74-75, 88, 112.

⁴²⁹ See above, paras 67, 69, 73, 75, 91, 115, and references therein.

⁴³⁰ See above, para. 69, and references therein.

⁴³¹ See above, paras 73, 91, 115, and references therein.

and the Chamber sees no reason to adopt a different position.⁴³² His lack of success at each step does not detract from the fact that he had an effective opportunity to oppose the admissibility and use of the statements.⁴³³ In any event, the Chamber notes that the 2005 and 2007 ICTY Statements were not decisive, as the Applicant's conviction was based on a substantial body of evidence, of which those statements were only a part.⁴³⁴ Given these safeguards, the Chamber considers that the admission and use at trial of the 2005 and 2007 ICTY Statements was not such as to render the proceedings unfair.⁴³⁵

166. Regarding the 2016 Belgian Statement, the Chamber observes that the crux of the Applicant's allegation is that, despite a finding that it was obtained in violation of his right to legal assistance, it was nevertheless allowed to remain part of the evidentiary record at trial, and was considered by the trial panel in its deliberative process.⁴³⁶ In this regard, too, the Applicant did not expressly dispute the reliability or accuracy of that statement, but merely objected to its formal admission into evidence, and alleged that it was in fact used at trial.

167. The Chamber recalls that, in the context of an interlocutory appeal, the appeals panel found that the 2016 Belgian Statement was obtained in violation of international human rights standards under Rule 138(2) of the Rules, as the Applicant had not been informed of the right to legal assistance *during* the police interview, which right was not available to him, and could not therefore have validly waived it.⁴³⁷ However, since it did not find any indicia of unreliability or prejudice to the proceedings pursuant to the alternative conditions set out in Rule 138(2)(a)-(b) of the Rules, the appeals panel confirmed the trial panel's decision to consider the 2016 Belgian Statement as "not

⁴³² See, similarly, ECtHR, *Arapi v. Albania* (dec.), no. 27656/07, 7 July 2015, para. 77.

⁴³³ See, similarly, ECtHR, *Khan v. the United Kingdom*, no. 35394/97, 12 May 2000, para. 38. See also Kosovo, Constitutional Court, *Constitutional review of Judgment Pml. No. 107/19 of the Supreme Court of 14 May 2019*, KI 176/19, Resolution on Inadmissibility, 10 June 2020 (24 July 2020), paras 33-36.

⁴³⁴ See above, para. 61, and references therein.

⁴³⁵ See, similarly, ECtHR, *Szilagyi v. Romania* (dec.), no. 30164/04, 17 December 2013, para. 31. See also Kosovo, Constitutional Court, *Constitutional review of judgment [Pml. no. 703/2023] of 17 July 2024 of the Supreme Court of Kosovo*, KI 18/25, Judgment, 3 July 2025, paras 77-79, 81.

⁴³⁶ Referral, paras 25, 27.

⁴³⁷ See above, para. 73, and references therein. See also above, footnotes 154 and 160.

inadmissible”.⁴³⁸ In this respect, the Chamber is further mindful, as noted above, that, in principle, the admission and use of evidence obtained in breach of defence rights, such as the right of access to a lawyer, will not automatically render the proceedings unfair.⁴³⁹ Indeed, those guarantees are not an end in themselves, but specific aspects of the right to a fair trial, whose intrinsic goal is to ensure the overall fairness of the criminal proceedings; this is the context in which they must be interpreted.⁴⁴⁰

168. In light of the above, the Chamber observes that, as with the 2005 and 2007 ICTY Statements, the Applicant challenged the admission into evidence of the 2016 Belgian Statement on multiple occasions,⁴⁴¹ and considers that his objections were adequately addressed by the criminal chambers, which set out in detail the reasons underlying their decisions.⁴⁴² The Applicant advanced no argument demonstrating arbitrariness or manifest unreasonableness in relation to these findings, and the Chamber likewise finds no basis to question them.⁴⁴³

169. Furthermore, the Chamber notes that, although the 2016 Belgian Statement was found “not inadmissible”, and could thus be considered by the trial panel,⁴⁴⁴ and the trial judgment indicated that the evidence available for consideration had included, *inter alia*, “four written statements of the [Applicant]”,⁴⁴⁵ a careful examination of the judgment shows that the trial panel did not rely on the 2016 Belgian Statement for any of its findings.⁴⁴⁶ Therefore, it had no bearing on the Applicant’s conviction,⁴⁴⁷ which, as previously emphasised, was supported by ample evidentiary material.⁴⁴⁸ In these

⁴³⁸ See above, para. 73, and references therein.

⁴³⁹ See above, para. 163.

⁴⁴⁰ ECtHR, *Beuze v. Belgium* [GC], cited above, paras 120-122, 144, 147, 149, with further references to case law.

⁴⁴¹ See above, paras 66, 71, 74-75, 88, 112.

⁴⁴² See above, paras 67, 70, 73, 75, 91, 114, and references therein.

⁴⁴³ See above, para. 165, with further references to case law.

⁴⁴⁴ See above, paras 67, 73, and references therein.

⁴⁴⁵ Trial judgment, para. 77 (emphasis added).

⁴⁴⁶ See also Appeal judgment, para. 113.

⁴⁴⁷ See, *mutatis mutandis*, ECtHR, *Arapi v. Albania* (dec.), cited above, paras 78, 82, 84.

⁴⁴⁸ See above, para. 165.

circumstances, the Chamber is satisfied that the mere admission of the 2016 Belgian Statement at trial, without it having been relied upon for the conviction, cannot be said to have prejudiced the fairness of the proceedings.

170. The considerations set out in relation to the 2005 and 2007 ICTY Statements and the 2016 Belgian Statement apply equally to the 2019 Belgian Statement. In particular, the Chamber is mindful that the Applicant availed himself of multiple opportunities to oppose the admission into evidence and use at trial of the 2019 Belgian Statement,⁴⁴⁹ and that the criminal chambers duly addressed his challenges, providing reasons for their decisions.⁴⁵⁰ Likewise, the Chamber observes that the 2019 Belgian Statement was not decisive for the conviction, which was otherwise based on a vast body of evidence, and that it was relied upon by the trial panel only to the extent that it was corroborated by other evidence to support certain findings which mainly related to the Applicant's membership in the KLA, his presence at the Kukës Metal Factory during the relevant time, or his lack of remorse or empathy for the victims.⁴⁵¹

171. As regards the Applicant's allegation that, under the doctrine of the fruit of the poisonous tree, the breach of his right to legal assistance in relation to the 2016 Belgian Statement tainted the legitimacy of the admission of the 2019 Belgian Statement,⁴⁵² the Chamber finds that there is no basis, either in the ECtHR case law relied upon in the Referral⁴⁵³ or otherwise, for such a conclusion. Whereas a "poisonous tree" and "fruit" relationship may arise where evidence stemming from irregular police interrogation at the pre-trial stage is subsequently used to support a conviction at trial,⁴⁵⁴ no such relationship can be discerned between a statement found to have been given in breach of procedural safeguards concerning the right of access to a lawyer⁴⁵⁵ and a subsequent

⁴⁴⁹ See above, paras 66, 71, 74-75, 88, 112.

⁴⁵⁰ See above, paras 67, 70, 73, 75, 91, 114, and references therein.

⁴⁵¹ Trial judgment, paras 77, 286-287, 289, 292-293, 338-340, 853-873, 898-899, 1117.

⁴⁵² Referral, para. 26.

⁴⁵³ Referral, footnote 29.

⁴⁵⁴ To give but one example from the cases cited by the Applicant in the Referral, see ECtHR, *Panovits v. Cyprus*, no. 4268/04, 11 December 2008, paras 64-77, 80-86.

⁴⁵⁵ See above, para. 73, and references therein.

statement, taken three years later, in relation to which the Applicant was deemed to have validly waived the right to legal assistance.⁴⁵⁶

172. In addition, the Chamber is mindful that the trial panel examined at length the circumstances in which the 2019 Belgian Statement was taken, and concluded that the Applicant had been adequately informed of his rights as a suspect, including his right of access to a lawyer, and that he had validly waived that right.⁴⁵⁷ It also bears in mind that this finding was upheld by both the appeals and Supreme Court panels.⁴⁵⁸ And, while it is not entirely clear to the Chamber what the Applicant means by describing the 2019 Belgian Statement as being “negatively tainted”,⁴⁵⁹ the Chamber sees no basis to question its reliability or accuracy in the absence of any indicia that it was not given freely or that the Applicant was unaware of his rights as a suspect at the time of the interview.⁴⁶⁰ Having examined the safeguards surrounding the admissibility and use at trial of the 2019 Belgian Statement, the Chamber considers that the Applicant’s right to a fair trial was not thereby impaired.⁴⁶¹

173. In light of the foregoing, the Chamber finds no appearance of a violation of the Applicant’s right to a fair trial under Article 31(2) of the Constitution and Article 6(1) of the Convention arising from the admission and, where applicable, use at trial of the 2005 and 2007 ICTY Statements and the 2016 and 2019 Belgian Statements. Therefore, this part of the complaint must be declared inadmissible pursuant to Rule 14(f) of the SCCC Rules.

⁴⁵⁶ See above, paras 70, 73, 91, 114, and references therein.

⁴⁵⁷ See above, para. 70, and references therein.

⁴⁵⁸ See above, paras 73, 91, 114, and references therein.

⁴⁵⁹ Referral, para. 26.

⁴⁶⁰ Cf. ECtHR, *Ibrahim and Others v. the United Kingdom* [GC], nos 50541/08, 50571/08, 50573/08, and 40351/09, 13 September 2016, paras 285-287, 306.

⁴⁶¹ See above, para. 165, and references therein.

C. ALLEGED VIOLATION OF ARTICLE 33(1) OF THE CONSTITUTION, ARTICLE 7(1) OF THE ECHR, AND ARTICLE 15(1) OF THE ICCPR

1. Submissions

174. The Applicant maintained that, having filed a request for protection of legality, which was dismissed in its entirety by the Supreme Court panel, he had exhausted all effective legal remedies provided for by law in relation to the alleged violations.⁴⁶² He also claimed that the Referral had been validly made within the applicable two-month time limit, as extended by the Chamber for an additional three weeks, following the final ruling in his case, namely the Supreme Court panel's decision on protection of legality of 9 March 2026.⁴⁶³ Lastly, the Applicant maintained that he was a direct victim of the alleged violations.⁴⁶⁴

175. The SPO responded that the Applicant's allegations of a violation of the principle of legality in relation to his conviction pursuant to JCE as a mode of liability, and for the war crime of arbitrary detention in a NIAC, were "unsubstantiated" and "bare and conclusory".⁴⁶⁵

176. In reply, the Applicant provided clarifications to his earlier submissions on the alleged breach of the principle of legality.⁴⁶⁶

2. Chamber's assessment

177. In the Chamber's view these complaints fulfil the admissibility criteria provided for in the Constitution, the Law, and the SCCC Rules. While stated in relatively concise terms, the Chamber considers that the Applicant's claims are nevertheless sufficiently clear to enable it to ascertain their nature and scope and address their substance. As

⁴⁶² Referral, paras 10-11.

⁴⁶³ Referral, para. 10.

⁴⁶⁴ Referral, paras 12-13.

⁴⁶⁵ SPO submissions, paras 20, 22.

⁴⁶⁶ Applicant submissions, paras 16-19.

no other grounds for inadmissibility can be established, the Chamber finds that they must be declared admissible and examined on the merits.

178. Accordingly, the submissions made in this regard by the Applicant and the SPO are summarised below, in the relevant sections of this judgment.⁴⁶⁷

D. ALLEGED VIOLATION OF ARTICLE 30(1) OF THE CONSTITUTION AND ARTICLE 6(3) OF THE ECHR

1. Submissions

179. The Applicant submitted that, as a result of a defective indictment that failed to provide sufficient particulars as to the identity of the JCE members and the number and identity of the victims, he had not been afforded effective notice of the charges against him and a genuine opportunity to investigate and respond to them, in breach of Article 30(1) of the Constitution and Article 6(3) of the Convention.⁴⁶⁸ He averred that the lack of sufficient detail as to the identity of the JCE members was particularly problematic in light of the limited scope of the case and the SPO's knowledge of the relevant names, and maintained that the trial panel had impermissibly expanded the SPO's case by finding that Osman Kryeziu and Fatmir Limaj were members of the JCE, although neither had been identified as such by the SPO.⁴⁶⁹ In this connection, the Applicant contended that, had he known that Osman Kryeziu, who had been an SPO witness since the beginning of the proceedings, would be considered a JCE member, he could have made informed decisions regarding his evidence, including to challenge its admission.⁴⁷⁰ As regards the number and identity of the victims, he alleged that the appeals and Supreme Court panels had erred in finding that the defects identified in this respect in the confirmed indictment had been remedied.⁴⁷¹

⁴⁶⁷ See below, paras 212-214, 243-245.

⁴⁶⁸ Referral, paras 39, 42.

⁴⁶⁹ Referral, para. 40.

⁴⁷⁰ Referral, para. 40.

⁴⁷¹ Referral, para. 41.

180. In response, the SPO maintained that the complaint was inadmissible pursuant to Rule 14(f) of the SCCC Rules, as the Applicant merely disagreed with the findings of the criminal chambers on this matter without identifying any flagrantly arbitrary or manifestly unreasonable conclusions, and instead sought a further appeal, outside the scope of the Chamber's review.⁴⁷²

181. The Applicant replied that the complaint raised a constitutional issue – namely whether the Applicant had adequate notice of the factual basis of the charges against him – rather than a challenge to the merits of the criminal chambers' findings.⁴⁷³ In this regard, he reiterated his position that he had not received detailed and timely notice of the identity of the JCE members and the number and identity of the victims, which deprived him from meaningfully investigating and preparing his defence at the stage where it mattered the most.⁴⁷⁴

2. Chamber's assessment

182. The Chamber notes that, although the Applicant did not satisfy the admissibility requirements in relation to this ground either, the Supreme Court panel nevertheless examined it in on the merits.⁴⁷⁵ Therefore, he may be considered to have exhausted the available legal remedies pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules in this regard.⁴⁷⁶ However, the Chamber recalls that, under Rule 14(f) of the SCCC Rules, it may declare a referral, or particular parts thereof, inadmissible for reasons related to the examination of the merits, that is, where there is no appearance of a violation of a constitutional right.

183. Turning to the complaint at hand, the Chamber observes, at the outset, that the Applicant's reference to the ECHR provision, namely Article 6(3) thereof, appears to be incomplete, as he does not identify the specific procedural safeguard relied upon.

⁴⁷² SPO submissions, paras 24-27.

⁴⁷³ Applicant submissions, para. 20.

⁴⁷⁴ Applicant submissions, paras 21-22.

⁴⁷⁵ See above, para. 120.

⁴⁷⁶ See also above, paras 147, 159-160, and references therein.

However, having regard to the Applicant's allegations that the confirmed indictment was "defective" and "failed to provide sufficient particulars" in relation to the identity of the members of the JCE and the number and identity of victims and that, as such, he "was deprived of [an] effective notice of the charges against him and a genuine opportunity to investigate and respond to them",⁴⁷⁷ as well as his further clarifications in response to the SPO's submissions,⁴⁷⁸ the Chamber understands this complaint as relating to his right to be informed promptly and in detail of the nature and cause of the charges against him, and to have adequate time and facilities for the preparation of his defence. Thus, on the basis of the factual allegations raised by the Applicant, the Chamber, as the master of characterisation to be given in law to the facts of the case before it, considers that this complaint should be examined under Article 30(1) and (3) of the Constitution and Article 6(3)(a)-(b) of the Convention.⁴⁷⁹

184. The Chamber notes that, as articulated in the jurisprudence of the ECtHR, special attention must be paid to the notification of the charges, the particulars of the offence playing a crucial role in the criminal process, as it is from the moment of their service that the accused person is formally put on notice of the factual and legal basis of the charges.⁴⁸⁰ As a necessary requirement to ensure that the criminal proceedings are fair, an accused person must be made aware "promptly" and "in detail" of the cause of the accusation, namely the material facts alleged against them which form the basis of the accusation, as well as the nature of the charge, that is, the legal qualification given to those facts.⁴⁸¹ While the level of detail required under Article 30(1) of the Constitution

⁴⁷⁷ Referral, paras 39, 42.

⁴⁷⁸ Applicant submissions, paras 20-22.

⁴⁷⁹ See, for example, ECtHR, *Radomilja v. Croatia*, cited above, paras 110-126; 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. See, similarly, *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 88; *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, para. 35.

⁴⁸⁰ See, for example, ECtHR, *Pélissier and Sassi v. France*, no. 25444/94, 25 March 1999, para. 51; *Kamasinski v. Austria*, no. 9783/82, 19 February 1989, para. 79.

⁴⁸¹ See, for example, ECtHR, *Mattoccia v. Italy*, no. 23969/94, 25 July 2000, para. 59; *Pélissier and Sassi v. France*, cited above, paras 51-52.

and Article 6(3)(a) of the ECHR will vary according to the particular circumstances of each case, an accused person must at any rate be provided with sufficient information as is necessary to fully understand the extent of the charges against them, with a view to preparing an adequate defence. Accordingly, the adequacy of the information must be examined by reference to Article 30(3) of the Constitution and Article 6(3)(b) of the Convention, which recognise for every accused person the right to have adequate time and facilities for preparing their defence, and in light of broader entitlement to a fair hearing under Article 31(2) of the Constitution and Article 6(1) of the ECHR.⁴⁸² Lastly, the Chamber notes that the information to be provided under these provisions need not necessarily mention the evidence on which the accusation is based.⁴⁸³

185. Having regard to the above, the Chamber recalls that the confirmed indictment put the Applicant on notice that he was charged with four counts of war crimes, *inter alia* committed through participation in a JCE (namely, JCE I for all the crimes charged and, alternatively, JCE III for the charge of murder) which, aside from the Applicant, allegedly included Sabit Geci, Xhemshit Krasniqi, KLA soldiers nicknamed “Bedri” and “Van Damme”, as well as certain other KLA soldiers, police, and guards present at the Kukës Metal Factory between approximately 17 May 1999 and 5 June 1999.⁴⁸⁴ The war crimes of arbitrary detention, cruel treatment, and torture were said to have been committed in relation to “at least nine persons” detained at that location during the relevant period, five of whom were identified by name and another by reference to certain particulars.⁴⁸⁵ The record of the case further shows that, both in its pre-trial brief and its opening statements, the SPO expressly referred to the arbitrary detention and mistreatment of at least 18 individuals between approximately 17 May 1999 and

⁴⁸² See, for example, ECtHR, *Mattoccia v. Italy*, cited above, para. 60.

⁴⁸³ See, for example, ECtHR, *Previti v. Italy* (dec.), no. 45291/06, 8 December 2009, para. 204.

⁴⁸⁴ Corrected indictment, paras 8-10. See also above, para. 11.

⁴⁸⁵ Corrected indictment, paras 14, 18-24, 26. See also above, para. 11.

5 June 1999, at the Kukës Metal Factory.⁴⁸⁶ In the same vein, the Chamber is mindful that, in its pre-trial brief, the SPO also provided the full identity of 16 of the 18 alleged victims, and identified the other two as “two women from Gjakova”.⁴⁸⁷

186. Likewise, the Chamber observes that, in its judgment, the trial panel concluded, on the basis of the evidence before it, that the members of the JCE (more specifically, JCE I), included Xhemshit Krasniqi, Sabit Geci, the Applicant, Osman Kryeziu, KLA members nicknamed “Bedri” and “Van Damme”, Fatmir Limaj, (other) members of the KLA Military Police and other KLA members.⁴⁸⁸ It also found the Applicant guilty for having committed, as part of that JCE, the war crimes of arbitrary detention and torture against “at least [18] persons”, 16 of whom were identified by name and the remaining two by reference to other particulars, between approximately 17 May 1999 and 5 June 1999, at the Kukës Metal Factory.⁴⁸⁹

187. In the Chamber’s view, the information referred to in paragraph 185 above was sufficient for the purposes of Article 30(1) of the Constitution and Article 6(3)(a) of the Convention, as it was such as to enable the Applicant to fully understand the charges against him and to prepare his defence adequately.⁴⁹⁰

188. Concerning the members of the JCE, whereas the confirmed indictment did not mention Osman Kryeziu and Fatmir Limaj as such, the Chamber is satisfied that the Applicant was unambiguously put on notice, through the language of the indictment, that the charged JCE comprised additional members to those specifically mentioned

⁴⁸⁶ KSC-BC-2020-04, F00135/A01/RED, Public redacted version of ‘Prosecution pre-trial brief’, dated 28 January 2022, KSC-BC-2020-04/F00135/A01, public, 14 April 2023 (the original strictly confidential and *ex parte* version filed on 28 January 2022, reclassified as confidential on 8 February 2023) (“SPO pre-trial brief”), paras 1, 30, 42. A confidential redacted version was filed on 31 January 2022, F00136/A01, and a lesser redacted version of the confidential redacted version on 8 February 2022, F00139/A01. See also KSC-BC-2020-04, Transcript, public, 21 February 2023, p. 511, lines 6-9.

⁴⁸⁷ SPO pre-trial brief, para. 30.

⁴⁸⁸ Trial judgment, paras 1003-1004; see also paras 351-353, 357, 433-437, 491, 529-530, 552-555, 689-691, 706, and references therein.

⁴⁸⁹ Trial judgment, paras 587, 1037-1038.

⁴⁹⁰ See, similarly, ECtHR, *Sampech v. Italy* (dec.), no. 55546/09, 19 May 2015, paras 108-109; *Previti v. Italy* (dec.), no. 4529/06, 8 December 2009, paras 206-207.

therein. Indeed, paying heed to the trial panel's factual findings in this respect,⁴⁹¹ the Chamber considers that both Osman Kryeziu and Fatmir Limaj plainly fall within the category of "certain other KLA soldiers, police, and guards", as used in the confirmed indictment.⁴⁹² For the Chamber, the identification of Osman Kryeziu and Fatmir Limaj as members of the JCE does not amount to a modification of the cause or nature of the charges, but merely to a specification thereof. In any event, the Chamber notes that, in accordance with the case law of the ECtHR, the factual details of the charges may be clarified and specified during the criminal proceedings, on the basis of the evidence adduced at trial and brought to the accused's attention.⁴⁹³

189. Turning to the number and identity of victims, the Chamber recalls that, in the appeal judgment, the appeals panel held, contrary to its previous assessment,⁴⁹⁴ that the confirmed indictment had in fact been defective on these points.⁴⁹⁵ In particular, it held that, as the SPO had been in possession, prior to the commencement of the trial, of information indicating that the allegations of arbitrary detention, cruel treatment, and torture concerned at least 18 individuals, and had also been aware of the identity of most of these additional victims, it should have provided greater specificity in the confirmed indictment.⁴⁹⁶ The appeals panel nevertheless found that these defects had been cured by the information provided by the SPO in, *inter alia*, its pre-trial brief.⁴⁹⁷

190. Indeed, the Chamber is likewise mindful that, in accordance with the case law of the ECtHR, the details concerning the charges may be ascertainable not only from the indictment, but also from other documents prepared by the prosecution in the case, or from materials made available to the defence during the proceedings.⁴⁹⁸ Moreover,

⁴⁹¹ See above, footnote 488.

⁴⁹² Corrected indictment, paras 8, 10.

⁴⁹³ ECtHR, *Pereira Cruz and Others v. Portugal*, nos 56396/12, 52757/13, 57186/13, and 68115/13, 26 June 2018, para. 198, with further references to case law.

⁴⁹⁴ See above, para. 55, and references therein.

⁴⁹⁵ See above, paras 99-100, and references therein.

⁴⁹⁶ See above, paras 99-100, and references therein.

⁴⁹⁷ See above, paras 99-100, and references therein.

⁴⁹⁸ See, for example, ECtHR, *Previti v. Italy* (dec.), cited above, para. 208.

the ECtHR has acknowledged that it cannot be excluded that certain details, including the identity of some victims, may remain unclear even at the conclusion of the criminal proceedings, in particular where the nature of the offences charged may make their clarification exceptionally difficult.⁴⁹⁹

191. Further to the above, the Chamber observes that the SPO provided information regarding the number and identity of victims in its pre-trial brief, where it stated that the allegations of arbitrary detention, cruel treatment, and torture related to at least 18 persons, identified 16 out of the 18 alleged victims, and provided particulars with respect the remaining two victims.⁵⁰⁰ It further indicated the number of victims in its opening statements.⁵⁰¹ Thus, the Applicant had been well aware of these details since at least 31 January 2022,⁵⁰² namely more than a year before the commencement of the trial.⁵⁰³ In these circumstances, the Chamber is satisfied that the information provided in the SPO's pre-trial brief was sufficiently prompt and detailed to allow the Applicant to understand the charges and to prepare a meaningful defence against the accusation that he had been involved in the arbitrary detention, cruel treatment, and torture of at least 18 persons, most of whose identities had also been provided to him.

192. In light of the above, the Chamber finds that this complaint does not reveal any appearance of a violation of the Applicant's fair trial rights under Article 30(1) and (3) of the Constitution and Article 6(3)(a)-(b) of the Convention. Thus, the complaint must be declared inadmissible pursuant to Rule 14(f) of the SCCC Rules.

⁴⁹⁹ ECtHR, *Sampech v. Italy* (dec.), cited above, para. 110.

⁵⁰⁰ See above, para. 185, and references therein.

⁵⁰¹ See above, para. 185, and references therein.

⁵⁰² See above, footnote 486.

⁵⁰³ See above, para. 61.

E. ALLEGED VIOLATION OF ARTICLES 24(1) AND 33(2) AND (4) OF THE CONSTITUTION, ARTICLE 7(1) OF THE ECHR, AND ARTICLES 14(1) AND 26 OF THE ICCPR

1. Submissions

193. The Applicant submitted that the treatment of the sentencing framework under the 1976 SFRY Criminal Code as a mere factor to be taken into account rather than as a mandatory sentencing range constituted a breach of the principle of legality under Article 33(2) and (4) of the Constitution and Article 7(1) of the Convention, as well as a violation of the principle of equality before the law under Article 24(1) of the Constitution and Articles 14 and 26 of the ICCPR.⁵⁰⁴ In particular, he contended that the SFRY Criminal Code – which prescribed a sentencing range of five to 15 years of imprisonment – was the applicable law in 1999 and, as such, should have been applied in determining his sentence.⁵⁰⁵ According to the Applicant, the sentencing framework provided under the Law, which provided for life imprisonment and entered into force 16 years after the commission of the crimes for which he was found guilty, could not lawfully be considered applicable.⁵⁰⁶ In addition, he argued that, by giving insufficient weight to the sentences handed down in the comparable and related *Sabit Geci et al.* and *Xhemshit Krasniqi* cases, the trial panel had failed to ensure equality before the law and, given their commanding roles and greater involvement in the crimes committed at the Kukës Metal Factory, imposed a disproportionate sentence.⁵⁰⁷

194. The SPO responded that the Applicant's allegation of a violation of the principle of equality before the law comprised two prongs: first, the treatment of the sentencing range in the SFRY Criminal Code as a factor to be considered rather than a mandatory range and, second, the length of his sentence compared with those received by Sabit Geci and Xhemshit Krasniqi.⁵⁰⁸ It maintained that both prongs were inadmissible for

⁵⁰⁴ Referral, paras 43, 46.

⁵⁰⁵ Referral, paras 43-44.

⁵⁰⁶ Referral, paras 44, 46.

⁵⁰⁷ Referral, para. 45.

⁵⁰⁸ SPO submissions, para. 29.

failure to exhaust legal remedies under Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules, arguing in this regard the Applicant had not properly raised them before either the Supreme Court panel or the appeals panel.⁵⁰⁹ The SPO likewise claimed that, in any event, the first prong was undeveloped and unclear, while the second one amounted to a disagreement with the outcome of the proceedings, such that any further examination of the manner in which the Law and the Rules were interpreted and applied by the criminal chambers would exceed the Chamber's competence.⁵¹⁰ In relation to the Applicant's claim that the application of the sentencing framework prescribed in the Law breached the principle of legality, the SPO submitted that it was inadmissible and without merit.⁵¹¹ It contended that the Applicant had neither engaged with the Supreme Court panel's determination in this regard, nor identified any aspect of the criminal chambers' analysis that was arbitrary or manifestly unreasonable and would require further scrutiny by the Chamber.⁵¹² In addition, the SPO relied on the *Mustafa judgment on the principle of lex mitior* to argue that the sentencing range under the SFRY Criminal Code was not binding on the SC under Article 44(2) of the Law, but a factor to be taken into account, and pointed out that the Applicant's complaint ignored the Chamber's analysis on this matter.⁵¹³

195. Similarly, Victims' Counsel submitted that the Applicant had raised two alleged violations of his rights with respect to the sentence imposed on him: first, a purported breach of the principle of legality and, second, an alleged violation of the principle of equality before the law.⁵¹⁴ In relation to the former, Victims' Counsel averred that the Applicant's complaint failed to account for Article 162(1) of the Constitution, which provides that the SC and the SPO function in accordance with the Law, as well as the Chamber's previous findings in this regard, as set out in the *Mustafa judgment on the*

⁵⁰⁹ SPO submissions, paras 29-30.

⁵¹⁰ SPO submissions, para. 31.

⁵¹¹ SPO submissions, para. 32.

⁵¹² SPO submissions, paras 32, 34.

⁵¹³ SPO submissions, paras 33-34.

⁵¹⁴ Victims' Counsel submissions, para. 12.

principle of lex mitior.⁵¹⁵ Victims' Counsel also argued that, since an analogous claim had already been adjudicated by the Chamber, the Applicant's legality complaint was inadmissible pursuant to Rule 14(b) of the SCCC Rules.⁵¹⁶ In connection with the latter allegation, Victims' Counsel maintained that, since it had not been raised before the Supreme Court panel, it should be rejected as inadmissible owing to the Applicant's failure to exhaust the available legal remedies in accordance with Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules.⁵¹⁷ Victims' Counsel added that, in any event, the *Sabit Geci et al.* and *Xhemshit Krasniqi* cases were not comparable, as they were adjudicated under a different legal framework and not by the SC, and did not involve convictions for murder in relation to the events at the Kukës Metal Factory.⁵¹⁸

196. The Applicant replied that, as opposed to the SPO's assertions, he had engaged with the Supreme Court panel's findings by directly challenging its acceptance of the interpretation of the contemporary sentencing law as a discretionary factor rather than the governing sentencing range.⁵¹⁹ Likewise, he maintained that his complaint about inequality before the law was closely bound to his legality claim, and argued that they should not be artificially separated for the purposes of the exhaustion requirement.⁵²⁰ Lastly, the Applicant submitted that the Chamber's prior findings on Article 44(2) of the Law did not automatically render his complaint inadmissible, and contended that the Chamber remained competent to reconsider the approach adopted in the *Mustafa judgment on the principle of lex mitior*.⁵²¹

⁵¹⁵ Victims' Counsel submissions, paras 13-18.

⁵¹⁶ Victims' Counsel submissions, para. 19, 23.

⁵¹⁷ Victims' Counsel submissions, para. 21.

⁵¹⁸ Victims' Counsel submissions, para. 22.

⁵¹⁹ Applicant submissions, para. 23.

⁵²⁰ Applicant submissions, para. 24.

⁵²¹ Applicant submissions, para. 25.

2. Chamber's assessment

197. As a preliminary matter, the Chamber notes that, here too, the Applicant appears to have conflated multiple claims within the same complaint.⁵²² More specifically, he challenged the applicability of the sentencing framework provided for in the Law, as opposed to the sentencing range under the SFRY Criminal Code of 1976, and alleged in this respect violations of the principle of legality under Article 33(2) and (4) of the Constitution and Article 7(1) of the ECHR, as well as the principle of equality before the law pursuant to Article 24(1) of the Constitution and Articles 14(1) and 26 of the ICCPR.⁵²³ Additionally, he alleged that the sentence imposed on him failed to ensure equality before the law, and was disproportionate in comparison with the sentences given in the *Sabit Geci et al.* and *Xhemshit Krasniqi* cases.⁵²⁴

198. The Chamber observes, however, that not all of these claims were raised before the Supreme Court panel. Indeed, the Applicant argued that the SFRY Criminal Code was the applicable law in 1999 and should, as such, have been applied in determining his sentence, and also asserted that the Law, having entered into force 16 years after the commission of the crimes, could not lawfully influence the applicable sentencing framework in his case.⁵²⁵ But no arguments, whether factual or legal, to the effect that this violated the principle of equality before the law, or that the sentence imposed on him was disproportionate compared with the sentences in the cases of *Sabit Geci et al.* and *Xhemshit Krasniqi*, were brought before the Supreme Court panel. Despite having been clearly in a position to do so,⁵²⁶ the Applicant failed to provide the Supreme Court panel with the chance to address, and thereby prevent or correct, these allegations.⁵²⁷

199. It follows that the Applicant's claims under Article 24(1) of the Constitution and Articles 14 and 26 of the ICCPR must be declared inadmissible, as the available legal

⁵²² See, similarly, above, paras 142, 157.

⁵²³ Referral, paras 43-44, 46.

⁵²⁴ Referral, para. 45.

⁵²⁵ Request for protection of legality, para. 74.

⁵²⁶ See above, paras 122-123.

⁵²⁷ See above, paras 143, 145, 159, with further references to case law.

remedies were not exhausted in accordance with Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules.

200. As to the allegations that were raised in the Applicant's request for protection of legality, as identified in paragraph 198 above, the Chamber is mindful that, while the Supreme Court panel observed that the Applicant had failed to identify a substantial violation of the procedures or the criminal law set out in the Law and the Rules, it still addressed the substance of his ground.⁵²⁸ Accordingly, the Chamber finds that he may be deemed to have complied with the exhaustion requirement under Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules in this regard.⁵²⁹ Notwithstanding, the Chamber reiterates that, in accordance with Rule 14(f) of the SCCC Rules, it may declare a referral, or parts thereof, inadmissible for reasons related to the examination of the merits, namely, if it cannot detect an appearance of a violation of a constitutional right.

201. Turning to the complaint, the Chamber notes that the Applicant maintained a violation of Article 33(2) and (4) of the Constitution and Article 7(1) of the Convention. In particular, he argued that the applicable law at the time the crimes were committed was the SFRY Criminal Code, which prescribed a sentencing range of five to 15 years of imprisonment for war crimes. The Applicant further claimed that the Law, which entered into force 16 years after the commission of the crimes and also prescribed life imprisonment, could not lawfully be considered the applicable sentencing framework in his case.⁵³⁰ Although not expressly stated, the Chamber understands, in light of the Applicant's factual allegations and the cited legal provisions, that he in effect alleges that a penalty was applied retrospectively to his disadvantage.

202. Further to the above, the Chamber recalls that Article 33 of the Constitution and Article 7 of the ECHR require a legal basis for the imposition of a penalty. This entails

⁵²⁸ See above, para. 123.

⁵²⁹ See above, paras 147, 159-160, 182, and reference therein.

⁵³⁰ Referral, paras 43-44, 46.

that, at the time of commission, there must have been a legal provision in force which made that act punishable, and that the sentence imposed must not exceed the limits prescribed by that provision.⁵³¹ Likewise, the cited provisions guarantee the principle of non-retroactivity of more stringent criminal laws, which extends both to the rules defining the offence,⁵³² and to those setting the penalties imposed.⁵³³

203. At this juncture, the Chamber notes that the Applicant was convicted by the SC pursuant to Article 14(1)(c) of the Law, which defines war crimes under CIL, and not under any other Kosovo laws. CIL, however, does not prescribe any specific sanctions for war crimes.⁵³⁴ In this connection, Article 44 of the Law, insofar as relevant, reads as follows:

1. The [SC] may impose upon a convicted person imprisonment up to a maximum term of life-long imprisonment.
2. In considering the punishment to be imposed on a person adjudged guilty of an international crime under this Law, the [SC] shall take into account,
 - a. the sentencing range for the crime provided under Kosovo Law at the time of commission,
 - b. any subsequent more lenient sentencing range for the crime provided in Kosovo Law, and
 - c. Article 7(2) of the [Convention] and Article 15(2) of the [ICCPR] as incorporated and protected by Article 22(2), 22(3) and 33(1) of the [Constitution], and the extent to which the punishment of any act or omission which was criminal according to general principles of law recognised by civilised nations would be prejudiced by the application of paragraph 2(a) and (b).

[...]

204. Against this background, the Chamber is compelled to recall its findings in the *Mustafa judgment on the principle of lex mitior*, namely that: (i) the SC and the SPO are governed by their own autonomous legal framework; (ii) Article 44(2) of the Law, and

⁵³¹ See, for example, ECtHR, *Del Río Prada v. Spain* [GC], no. 42750/09, 21 October 2013, paras 78-80. See, similarly, *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 106, with further references to case law.

⁵³² See, for example, ECtHR, *Vasiliauskas v. Lithuania* [GC], no. 35343/05, 20 October 2015, paras 165-166.

⁵³³ See, for example, ECtHR, *Gurguchiani v. Spain*, no. 16012/06, 15 December 2009, paras 32-44. See, similarly *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 107.

⁵³⁴ See, similarly, *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 114.

in particular sub-paragraphs (a) and (b) thereof do not impose on the SC an obligation to apply either the contemporaneous sentencing range or any other subsequent more lenient range for the crime provided under Kosovo laws, but only to take these ranges into account in the determination of the punishment to be imposed on a person found guilty of an international crime; (iii) the fundamental rights and freedoms guaranteed in Chapter II of the Constitution apply in relation to the autonomous legal framework of the SC and the SPO, rather than other Kosovo laws that are not binding upon them; and (iv) the only law that *must* be applied to the sentencing of persons convicted of an international crime under Article 14(1)(c) is the Law.⁵³⁵

205. Accordingly, the Applicant's complaint rests on a premise that does not arise in the present case. The Law, as the applicable legal framework governing the sentencing of persons convicted of an international crime under Article 14(1)(c) cannot, as such, be seen as having been applied retrospectively to the Applicant's disadvantage. And, although the Applicant no longer alleged a lack of foreseeability in this connection, as he did before the appeals panel,⁵³⁶ the Chamber briefly observes that it concurs with the appeals panel, which, relying on ICTY case law, held that the sentences applicable under the Law to international crimes prosecuted before the SC do not contravene the principle of *nulla poena sine lege*, as an accused must have been aware that such crimes constituted the most serious violations of international humanitarian law, punishable by the most severe penalties since at least the tribunals established after WW II.⁵³⁷ In addition, the Chamber is mindful that, when the crimes in this case were committed, the Statute of the ICTY, which provided for a sentencing regime comparable to that set forth under Article 44 of the Law,⁵³⁸ had already been in force for roughly six years,

⁵³⁵ *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, paras 109-120.

⁵³⁶ See above, para. 104, and references therein.

⁵³⁷ Appeal judgment, para. 897, with further references to case law. See, for example, ICTY, *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Judgement, 29 July 2004, para. 681.

⁵³⁸ See, similarly, *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 117 and footnote 290.

having been adopted on 25 May 1993.⁵³⁹ It applied to international crimes committed in the territory of the former Yugoslavia, including Kosovo, since 1991.⁵⁴⁰ Thus, in the Chamber's view, the Applicant could not reasonably have maintained that, at the time the crimes were committed, namely between approximately 17 May 1999 and 5 June 1999, he could not have foreseen being subject to such a sentencing regime if charged and convicted for war crimes under CIL.

206. On the basis of the foregoing, the Chamber finds no appearance of a violation of the principle of non-retroactivity of more stringent criminal laws under Article 33(2) and (4) of the Constitution and Article 7(1) of the Convention. Thus, this part of the complaint must be declared inadmissible pursuant to Rule 14(f) of the SCCC Rules.

F. CONCLUSION

207. In light of the above, the Chamber finds that the Applicant's complaint under Article 31(2) of the Constitution and Article 6(1) of the ECHR concerning the passage of time must be declared inadmissible, in part for non-exhaustion of remedies under Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules, and in part because it does not reveal an appearance of a violation of the Applicant's constitutional rights pursuant to Rule 14(f) of the SCCC Rules.

208. Likewise, the Chamber finds that the Applicant's complaint under Article 31(2) of the Constitution and Article 6(1) of the Convention regarding his prior statements must be declared inadmissible, partly for failure to exhaust remedies in accordance with Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules, and partly on the basis that, pursuant to Rule 14(f) of the SCCC Rules, it does not reveal an appearance of a violation of the Applicant's constitutional rights.

209. As regards the Applicant's complaints under Article 33(1) of the Constitution, Article 7(1) of the ECHR, and Article 15(1) of the ICCPR in relation to his conviction

⁵³⁹ UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, Resolution 827 (25 May 1993) UN Doc S/RES/827 ("ICTY Statute").

⁵⁴⁰ ICTY Statute, Article 1.

pursuant to JCE as a mode of liability, and for the war crime of arbitrary detention in a NIAC, the Chamber finds that they are admissible and must therefore be examined on the merits.

210. Moreover, the Chamber finds that the Applicant's complaint under Article 30(1) and (3) of the Constitution and Article 6(3)(a)-(b) of the Convention pertaining to the notification of the charges must be declared inadmissible pursuant to Rule 14(f) of the SCCC Rules, as no appearance of a violation of the Applicant's constitutional rights arises therefrom.

211. Lastly, the Chamber finds that the Applicant's complaint under Article 24(1) of the Constitution and Articles 14 and 26 of the ICCPR with respect to the principle of equality before the law must be declared inadmissible for failure to exhaust remedies under Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules. The complaint concerning the principle of non-retroactivity of more stringent criminal laws under Article 33(2) and (4) of the Constitution and Article 7(1) of the ECHR must also be declared inadmissible pursuant to Rule 14(f) of the Rules, as it discloses no appearance of a violation of the Applicant's constitutional rights.

VII. MERITS

A. ALLEGED VIOLATION OF ARTICLE 33(1) OF THE CONSTITUTION, ARTICLE 7(1) OF THE ECHR, AND ARTICLE 15(1) OF THE ICCPR (JOINT CRIMINAL ENTERPRISE)

1. Submissions

212. The Applicant claimed that his conviction based on JCE liability contravened the principle of legality, as guaranteed by Article 33(1) of the Constitution, Article 7(1) of the Convention, and Article 15(1) of the ICCPR.⁵⁴¹ He maintained that the principle of *nullum crimen sine lege* prohibits the retroactive application of criminal law, including modes of liability, and claimed that JCE liability did not form part of Kosovo law or

⁵⁴¹ Referral, paras 32, 38.

CIL in 1999 and was thus neither accessible nor foreseeable to him.⁵⁴² In particular, the Applicant argued that the trial panel had failed to respect this principle by interpreting Article 16(1)(a) of the Law to include JCE liability despite the absence of any specific reference to that mode of liability, rather than adopting the reading most favourable to him.⁵⁴³ He further contended that the finding in the appeals judgment in *Prosecutor v. Duško Tadić* ("*Tadić*") that JCE formed part of CIL post-dated the events in his case, and that in light of his limited education and lack of senior role within the KLA, such liability was neither accessible nor foreseeable to him.⁵⁴⁴ Moreover, he alleged that JCE extended his criminal liability for the murder of the victims, despite the trial panel's finding that their deaths had been caused by the acts and omissions of others.⁵⁴⁵

213. In response, the SPO pointed out that the legality of JCE I and its applicability to crimes committed in Kosovo during 1998 and 1999 had been carefully examined and consistently upheld in the jurisprudence of the SC.⁵⁴⁶ Moreover, it maintained that the Applicant had failed to engage with that jurisprudence or substantiate his claim that the application of JCE I to his conduct was unlawful, and submitted that his reliance on the timing of the *Tadić* appeals judgment did not undermine those findings since, in light of the post-WW II legal framework, JCE I was part of CIL and foreseeable to the Applicant.⁵⁴⁷ It therefore submitted that the complaint should be rejected.⁵⁴⁸

214. The Applicant replied that prior findings by SC panels that JCE I formed part of CIL in 1999 did not resolve the specific issue of whether the application of JCE I to his conduct was accessible and foreseeable at the material time, particularly given that

⁵⁴² Referral, para. 33.

⁵⁴³ Referral, para. 34.

⁵⁴⁴ Referral, para. 34.

⁵⁴⁵ Referral, para. 35.

⁵⁴⁶ SPO submissions, paras 18-19.

⁵⁴⁷ SPO submissions, paras 20-21.

⁵⁴⁸ SPO submissions, para. 23.

the doctrine was first articulated in the *Tadić* appeals judgment, which post-dated the charged events.⁵⁴⁹

2. Chamber's assessment

215. The Applicant complained that the criminal chambers construed Article 16(1) of the Law to his detriment by interpreting it as including JCE liability, and that JCE, as a mode of liability, did not have a legal basis in international law at the time when the crimes for which he was convicted were committed.⁵⁵⁰ He likewise maintained that, in light of his limited education and lack of a senior role within the KLA, such liability was neither accessible nor foreseeable to him.⁵⁵¹ The Applicant relied on Article 33(1) of the Constitution, Article 7(1) of the Convention, and Article 15(1) of the ICCPR.⁵⁵²

216. At the outset, the Chamber recalls Article 33 of the Constitution, relevant parts of which read as follows:

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 crime against humanity according to international law.
[...]

217. The Chamber further notes that Article 7 of the Convention, in its relevant parts, similarly provides that:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
[...]

218. Likewise, the Chamber observes that Article 15 of the ICCPR, insofar as relevant, reads as follows:

⁵⁴⁹ Applicant submissions, paras 16, 18.

⁵⁵⁰ Referral, paras 33-34.

⁵⁵¹ Referral, para. 34.

⁵⁵² Referral, paras 32, 38.

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. [...]
[...]

219. These provisions are not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage; they also embody, more generally, the principle that only the law can define a crime and prescribe a penalty and the principle that the criminal law must not be extensively construed to the detriment of an accused, for instance by analogy.⁵⁵³ It follows that offences and their penalties must be clearly defined in law, whether national or international, a requirement which is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and with informed legal advice, what acts and omissions will give rise to criminal liability.⁵⁵⁴ According to ECtHR case law, when speaking of "law", the aforementioned provisions refer to a concept which encompasses written as well as unwritten law, and implies qualitative requirements, notably those of accessibility and foreseeability.⁵⁵⁵

220. As regards accessibility, the Chamber must verify whether the criminal law on which a conviction was based was sufficiently accessible to an applicant, that is to say,

⁵⁵³ See, for example, 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. 79; ECtHR, *Kafkaris v. Cyprus* [GC], no. 21906/04, 12 February 2008, para. 138; *Cantoni v. France* [GC], no. 17862/91, 15 November 1996, para. 29. See, similarly, *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 106; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 136.

⁵⁵⁴ See, for example, Kosovo, Constitutional Court, KI 11/21, cited above, para. 79; ECtHR, *Vasiliauskas v. Lithuania* [GC], cited above, para. 154. See, similarly, *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 106; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 137. See also UN Human Rights Committee, *Garzón v. Spain*, Communication no. 2844/2016 (13 July 2021) UN Doc CCPR/C/132/D/2844/2016, para. 5.14, with further references.

⁵⁵⁵ See, for example, Kosovo, Constitutional Court, KI 11/21, cited above, para. 80; ECtHR, *Korbely v. Hungary* [GC], no. 9174/02, 19 September 2008, para. 70. See, similarly, *Judgment on S. Mustafa referral concerning fair trial rights and the principle of lex mitior*, para. 106.

whether it had been made public.⁵⁵⁶ The Chamber must likewise examine whether the criminal law was foreseeable as to its effects, namely, whether it was formulated with sufficient precision to enable the person concerned to regulate his or her conduct and – if need be, with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.⁵⁵⁷ The scope of the concept of foreseeability depends, in particular, on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed.⁵⁵⁸

221. The Chamber further reiterates that, however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation, the role of which is to elucidate any remaining doubtful aspects and adapt to changing circumstances.⁵⁵⁹ As the Chamber has previously emphasised, the provisions relied upon by the Applicant 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.⁵⁶⁰

222. Likewise, the Chamber recalls that, while it is not its role to substitute itself for the criminal chambers as regards the interpretation of the applicable law, its powers of review must be greater when the right itself, as is at issue here, requires that there

⁵⁵⁶ See, for example, ECtHR, *G. v. France*, no. 15312/89, 27 September 1995, para. 25.

⁵⁵⁷ See, for example, ECtHR, *Djavit An v. Turkey*, no. 20652/92, 20 February 2003, para. 65.

⁵⁵⁸ See, for example, ECtHR, *Vasiliauskas v. Lithuania* [GC], cited above, para. 157.

⁵⁵⁹ See, for example, 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), para. 155; ECtHR, *Vasiliauskas v. Lithuania* [GC], cited above, para. 155, with further references to case law. See, similarly, *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 138; *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, para. 77.

⁵⁶⁰ See, similarly, *Decision on P. Shala referral concerning criminal charges*, para. 68; *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, para. 77. See also, for example, Kosovo Constitutional Court, KI 01/19, cited above, para. 156; ECtHR, *Kononov v. Latvia* [GC], no. 36376/04, 17 May 2010, para. 185.

was a legal basis for a conviction and sentence.⁵⁶¹ As such, the Chamber must examine whether there was a contemporaneous legal basis for the Applicant's conviction and, in particular, it must satisfy itself that the result reached by the criminal chambers was compatible with Article 33(1) of the Constitution, Article 7(1) of the Convention, and Article 15(1) of the ICCPR, even if there were differences between the legal approach and reasoning of this Chamber and the relevant decisions by the criminal chambers.⁵⁶² Such an examination does not, however, extend to ruling on the Applicant's criminal responsibility, which is primarily a matter for assessment by the criminal chambers. Instead, the Chamber's function is to consider, from the standpoint of the aforesaid provisions, whether the Applicant's acts, at the time of their commission, constituted offences that were defined with sufficient accessibility and foreseeability by domestic or international law.⁵⁶³

223. Turning to the complaint, the Chamber observes that the Applicant's conviction for war crimes was based on Articles 14(1)(c) and 14(1)(c)(i) of the Law, in conjunction with Article 16(1)(a) thereof.⁵⁶⁴ As previously noted, Article 14 of the Law defines war crimes with reference to CIL.⁵⁶⁵ Crimes against humanity are similarly defined under CIL pursuant to Article 13 of the Law. Article 16(1)(a) of the Law establishes that, for the crimes in Articles 13 and 14 of the Law, a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of such a crime shall be individually responsible for the crime.⁵⁶⁶

224. The Chamber further notes that, under Article 3(2)(a) and (d) of the Law, the SC shall adjudicate and function in accordance with, *inter alia*, the Constitution and CIL,

⁵⁶¹ See, for example, Kosovo, Constitutional Court, KI 11/21, cited above, para. 81; ECtHR, *Vasiliauskas v. Lithuania* [GC], cited above, paras 160-161. See, similarly, *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, paras 97-98, 139-140.

⁵⁶² See, for example, Kosovo, Constitutional Court, KI 11/21, cited above, para. 83; ECtHR, *Kononov v. Latvia* [GC], cited above, para. 198. See, similarly, *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 140.

⁵⁶³ See, for example, ECtHR, *Korbely v. Hungary* [GC], cited above, para. 73.

⁵⁶⁴ See above, para. 62, and references therein.

⁵⁶⁵ See above, para. 203; see also above, para. 15.

⁵⁶⁶ See also above, para. 14.

with the latter enjoying superiority over domestic laws pursuant to Article 19(2) of the Constitution. In this regard, the Chamber has previously found, including in relation to a referral made by the Applicant, that the norms of CIL relevant to war crimes and crimes against humanity, as well as related modes of liability, are directly applicable in proceedings before the SC pursuant to Article 3(2)(a) and (d) of the Law, unless they are incompatible with the Constitution, notably Article 33(1) thereof, and Article 7 of the Convention, as interpreted by the ECtHR in its case law.⁵⁶⁷ In that context, it also held that the reference to “international law” in the cited provisions includes CIL.⁵⁶⁸ The Applicant does not dispute these findings.⁵⁶⁹

225. Accordingly, as the Applicant’s conviction for war crimes was primarily based on international law, in particular CIL, it must, in the Chamber’s view, be examined chiefly from that perspective.⁵⁷⁰ Further observing that the Applicant’s conviction was based on JCE I only,⁵⁷¹ the Chamber also clarifies, at the outset, that its assessment of the complaint is thereby necessarily confined to JCE I.⁵⁷²

226. The Chamber recalls that the Applicant complained, in essence, that he had been the victim of a retrospective application of the criminal law. Accordingly, its main task under Article 33(1) of the Constitution, Article 7(1) of the ECHR, and Article 15(1) of the ICCPR is to examine, first, whether, having regard to the state of international law between 17 May 1999 and 5 June 1999, there was a sufficiently established legal basis for the Applicant’s conviction for war crimes based on his participation pursuant to JCE I as a mode of liability; and second, whether, at that time, the law defining JCE I

⁵⁶⁷ *Decision on P. Shala referral concerning criminal charges*, paras 61-63, 68-69, 73; *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, paras 70-72, 73-78, 81. See also above, para. 59.

⁵⁶⁸ *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, para. 75, with further references to case law.

⁵⁶⁹ Applicant submissions, para. 17 and footnote 25.

⁵⁷⁰ See, *mutatis mutandis*, ECtHR, *Milanković v. Croatia*, no. 33351/20, 20 January 2022, paras 52-53.

⁵⁷¹ See above, para. 62, and references therein.

⁵⁷² See also *Decision on protection of legality*, para. 74.

was sufficiently accessible and it was foreseeable to him that such participation would give rise to criminal liability.⁵⁷³

227. In this regard, the Chamber notes that the ECtHR has held that the Convention cannot be interpreted in a vacuum but should, to the extent possible, be interpreted in harmony with other rules of international law.⁵⁷⁴

228. The Chamber further observes that both the Statute of the ICTY and the Statute of the ICTR employed, in the provisions regulating modes of liability, nearly identical language to that of the Law.⁵⁷⁵ For instance, Article 7 of the ICTY Statute, in its relevant parts, reads as follows:

Article 7
Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
[...]

229. According to Article 3(3) of the Law, in determining CIL at the time the crimes were committed, SC judges may be assisted by sources of international law, including subsidiary sources, such as the jurisprudence from the international *ad hoc* tribunals, the International Criminal Court and other criminal courts. In the proceedings against the Applicant, the criminal chambers relied, *inter alia*, on the consistent jurisprudence of the *ad hoc* tribunals and other international or hybrid courts and tribunals in finding that JCE I was established in CIL in 1999.⁵⁷⁶

230. As also recognised by the criminal chambers,⁵⁷⁷ the Chamber notes that JCE as a mode of liability was first systematised by the ICTY in the *Tadić* appeals judgment of

⁵⁷³ See, *mutatis mutandis*, ECtHR, *Milanković v. Croatia*, cited above, para. 51; *Kononov v. Latvia* [GC], cited above, para. 187.

⁵⁷⁴ See, for example, ECtHR, *Hassan v. the United Kingdom*, no. 29750/09, 20 January 2022, para. 77.

⁵⁷⁵ See ICTY Statute, Article 7(1); UN Security Council, *Statute of the International Criminal Tribunal for Rwanda*, Resolution 955 (8 November 1994) UN Doc S/RES/955, Article 6(1).

⁵⁷⁶ See above, paras 26, 39, 78, 95, 117, and references therein.

⁵⁷⁷ *Thaçi et al.* decision on jurisdiction, paras 184-185, as referred to in Decision on jurisdiction, para. 92.

1999, which also set out its three forms.⁵⁷⁸ Specifically, in *Tadić*, the ICTY found, based on an analysis of WW II-related jurisprudence and a number of international treaties, that JCE as a mode of liability “is firmly established in [CIL]” and was upheld, albeit implicitly, in its Statute, as a form of commission.⁵⁷⁹ According to the appeals chamber, the Statute of the ICTY did not exclude

those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable [...].⁵⁸⁰

231. With respect to JCE I in particular, the ICTY determined that it applies where all participants in the common criminal plan share the same intent to commit a crime,⁵⁸¹ clarifying that its objective elements comprise: (i) a plurality of persons; (ii) a common plan, design or purpose which amounts to or involves the commission of a crime; and (iii) the participation of the accused in furthering the common purpose,⁵⁸² whereas the requisite subjective element is the shared intent to commit the crime.⁵⁸³ These findings were firmly rooted in post-WW II jurisprudence relating to common enterprise/design liability,⁵⁸⁴ a fact that was similarly noted by the criminal chambers.⁵⁸⁵

232. This understanding has been consistently confirmed not only by the ICTY in its later case law, but also by the ICTR, the Special Court for Sierra Leone, the Special Tribunal for Lebanon, the Extraordinary Chambers in the Courts of Cambodia, and the International Residual Mechanism for Criminal Tribunals.⁵⁸⁶ Notably, the Kosovo

⁵⁷⁸ ICTY, *Prosecutor v. Duško Tadić*, IT-94-1-A, Judgement, 15 July 1999, paras 185-229.

⁵⁷⁹ *Tadić*, paras 190, 194, 197-213, 220-222, 226. See also ICTY Statute, Article 7(1).

⁵⁸⁰ *Tadić*, para. 190.

⁵⁸¹ *Tadić*, paras 196, 220.

⁵⁸² *Tadić*, paras 196, 227.

⁵⁸³ *Tadić*, paras 196, 228.

⁵⁸⁴ *Tadić*, paras 197-201.

⁵⁸⁵ *Thaçi et al.* decision on jurisdiction, para. 185, as referred to in Decision on jurisdiction, para. 92.

⁵⁸⁶ See *Thaçi et al.* decision on jurisdiction, para. 185, with further references to case law. To give but a few examples, see ICTY, *Prosecutor v. Milorad Krnojelac*, IT-97-25-A, Judgement, 17 September 2003,

Supreme Court has also held, in several cases involving events contemporaneous with those at issue here, that JCE liability was “firmly established” in CIL.⁵⁸⁷

233. The Chamber sees no reason to depart from these findings and emphasises that it is not its role to establish authoritatively the state of international law at the time.⁵⁸⁸

234. Nevertheless, the Chamber does not overlook the Applicant’s argument that the articulation of the JCE doctrine in the *Tadić* appeal judgment post-dated the crimes in the present case, albeit by approximately two months. The Chamber notes, however, that in *Tadić*, the ICTY found that JCE I was already an established mode of liability in CIL *tempore criminis*, which, in that case, was 1992.⁵⁸⁹ Thus, *Tadić* did not create, but clarified and systematised an already existing mode of liability.⁵⁹⁰ Indeed, as already stated, Article 33(1) of the Constitution, Article 7(1) of the ECHR, and Article 15(1) of the ICCPR cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation, provided that the resultant development is consistent with the essence of the offence and could have reasonably been foreseen.⁵⁹¹ This applies equally to the development of national and international law.⁵⁹²

235. The Chamber is also mindful that, as pointed out by the criminal chambers, the ICTY had already taken note of JCE liability in December 1998, in the *Furundžija* trial

para. 29; ICTR, *Prosecutor v. Gérard Ntakirutimana and Elizaphan Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgment, 13 December 2004, paras 463-465; SCSL, *Prosecutor v. Alex Tamba Brima et al.*, SCSL-04-16-T, Judgment, 20 June 2007, para. 61; STL, STL-11-01/I, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, 16 February 2011, para. 256; ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC, Judgment, paras 504-510; IRMCT, *Prosecutor v. Radovan Karadžić*, MICT-13-55-A, Judgment, 20 March 2019, para. 435.

⁵⁸⁷ See, for example, Kosovo, Supreme Court, *L. G. et al.*, Plm Kzz no. 18/2016, Judgment, 13 May 2016, para. 69; *L. G. et al.*, APKZ no. 89/2010, Judgment, 26 January 2011, paras 114-115; *S.K. et al.*, Ap.-Kz no. 371/2008, Judgment, 10 April 2009, pp. 14-16, 63-64.

⁵⁸⁸ See, *mutatis mutandis*, ECtHR, *Milanković v. Croatia*, cited above, para. 58; *Korbely v. Hungary* [GC], cited above, para. 78.

⁵⁸⁹ *Tadić*, para. 230.

⁵⁹⁰ See, *mutatis mutandis*, ECtHR, *Milanković v. Croatia*, cited above, para. 59.

⁵⁹¹ See above, para. 221, with further references to case law.

⁵⁹² ECtHR, *Milanković v. Croatia*, cited above, para. 59.

judgment.⁵⁹³ This further confirms that *Tadić* was not the first occasion on which JCE liability was acknowledged by an international criminal tribunal. More importantly, the Chamber emphasises that, both in *Furundžija* and in *Tadić*, the ICTY's observations and findings concerning JCE as a mode of liability were based on pre-existing WW II-related jurisprudence. Therefore, the articulation of JCE in *Tadić* must be understood in the context of an already existing body of jurisprudence, rather than introducing an entirely new mode of criminal liability.

236. While it is true that JCE liability is not expressly referred to in Article 16(1)(a) of the Law, the Chamber observes that neither was the doctrine expressly mentioned in the Statutes of the ICTY or ICTR. Still, the *ad hoc* tribunals repeatedly held that the word "committed" referred to in the relevant provisions also includes a form of co-perpetration called JCE.⁵⁹⁴ As clarified above, the ICTY and ICTR, as well as all other international or hybrid courts and tribunals that followed, did not thereby create a new mode of liability, but rather recognised and applied, within the scope of the term "committed", an already existing mode of liability under CIL. Therefore, the Chamber considers that, in interpreting Article 16(1)(a) of the Law as also including JCE I as a form of commission,⁵⁹⁵ the criminal chambers did not extensively construe the Law to the Applicant's detriment, but gave effect to a mode of liability that was established in CIL *tempore criminis* and, as such, had a sufficiently clear legal basis in international law between 17 May 1999 and 5 June 1999.

237. As regards accessibility and foreseeability, in addition to the principles outlined in paragraph 220 above, the Chamber notes that, in a relatively recent case concerning an applicant's conviction for war crimes perpetrated in the territory of Croatia in the early 1990s based on command responsibility, the ECtHR endorsed the position of the

⁵⁹³ ICTY, *Prosecutor v. Anto Furundžija*, IT-95-17/1, Judgement, 10 December 1998, paras 210-216, 249. See also Decision on jurisdiction, para. 95.

⁵⁹⁴ See, for example, ICTY, *Prosecutor v. Mitar Vasiljević*, IT-98-32-A, Judgment, 25 February 2004, para. 102; ICTR, *Prosecutor v. Gérard Ntakirutimana and Elizaphan Ntakirutimana*, cited above, para. 462.

⁵⁹⁵ Decision on jurisdiction, para. 91. See also Appeal decision on jurisdiction, para. 35.

ICTY concerning the accessibility and foreseeability of criminal liability based on CIL. More specifically, the ECtHR affirmed that, in cases such as this, foreseeability means that the accused must be able to appreciate that his conduct is criminal in the sense generally understood, without reference to any specific provision, while accessibility does not exclude reliance being placed on a law which is based on custom.⁵⁹⁶

238. In this connection, the question before the Chamber is not whether the Applicant actually knew that JCE I was an established mode of liability in CIL *tempore criminis* or could identify its precise contours. Rather, the Chamber must examine, objectively, whether the relevant legal framework was sufficiently accessible to the Applicant, and whether the application of JCE I as a mode of liability to his conduct was reasonably foreseeable in the circumstances.

239. For the purpose of the requirement of accessibility, the Chamber recalls its above finding that, in *Tadić*, the ICTY merely articulated already existing CIL regarding JCE I as a mode of liability. In this regard, the Chamber further reiterates that it may also consider the accessibility of the definition of a crime in light of the applicable CIL.⁵⁹⁷ In any event, the Chamber notes that much of the WW II-related case law supporting the ICTY's JCE I findings in *Tadić* had been published and was therefore accessible,⁵⁹⁸ including to the Applicant, for several decades before the commission of the crimes underlying his conviction.⁵⁹⁹ The fact that it had not been formally published in the former Yugoslavia, of which Kosovo was part of at that time, is not decisive.⁶⁰⁰ The

⁵⁹⁶ ECtHR, *Milanković v. Croatia*, cited above, paras 62-63, referring to ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-AR72, *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, 16 July 2003, para. 34. See also ECtHR, *Vasiliauskas v. Lithuania* [GC], cited above, para. 167-168; *Kononov v. Latvia* [GC], cited above, paras 234-239, 244.

⁵⁹⁷ See above, para. 237. See also ECtHR, *Kononov v. Latvia* [GC], cited above, paras 234-239, 244.

⁵⁹⁸ See, for example, ECtHR, *G. v. France*, cited above, para. 25.

⁵⁹⁹ See *Tadić*, paras 197-200 and corresponding footnotes. For example, the Chamber notes that the cases of *Georg Otto Sandrock et al.* and *Franz Schonfeld et al.* were published in the *UN War Crimes Commission – Law Reports of Trials of War Criminals*, volumes I and XI, respectively, between 1947 and 1949. Likewise, the *Otto Ohlendorf et al.* case was published in 1951, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, US Government Printing Office, volume IV.

⁶⁰⁰ ECtHR, *Kononov v. Latvia* [GC], cited above, para. 237.

Chamber is thus satisfied that JCE I, as a mode of liability already recognised under CIL at the material time, was sufficiently accessible to the Applicant.

240. With respect to the requirement of foreseeability, the Chamber notes that, where a conviction is based exclusively on international law, it must assess the foreseeability of the conviction in light of the international law standards applicable at the material time, including CIL.⁶⁰¹ The Chamber is mindful in this regard that the Applicant was found to be a member of a JCE which shared a common purpose to arbitrarily detain, interrogate, torture, and murder detainees who were perceived to collaborate with, be associated with, or sympathise with the Serbian authorities or were deemed not to be sufficiently supportive of the KLA effort, at the Kukës Metal Factory.⁶⁰² Moreover, he was found to have significantly contributed to the crimes for which he was convicted by, *inter alia*, physically committing and participating in the arbitrary detention and severe and brutal mistreatment of detainees,⁶⁰³ and to have shared the intent to commit the war crimes of arbitrary detention, torture, and murder with the other members of the JCE.⁶⁰⁴ Therefore, the Applicant's conduct fell squarely within the core of JCE I as established in CIL at the material time.⁶⁰⁵

241. Furthermore, the Chamber also takes note of the severity and flagrant unlawful nature of the war crimes committed by the identified JCE in this case. Having regard to the nature of those crimes and the Applicant's significant contribution thereto, the Chamber considers that even the most cursory reflection would have indicated to him that, at the very least, his participation in such conduct risked engaging his individual criminal responsibility for the crimes committed pursuant to the common purpose he shared with the other members of the JCE, irrespective of his alleged limited education or lack of a senior role within the KLA.⁶⁰⁶

⁶⁰¹ See, for example, ECtHR, *Kononov v. Latvia* [GC], cited above, paras 207-227.

⁶⁰² Trial judgment, paras 1003-1024.

⁶⁰³ Trial judgment, paras 1025-1028.

⁶⁰⁴ Trial judgment, paras 1029-1030.

⁶⁰⁵ See above, paras 230-232, and references therein.

⁶⁰⁶ See, *mutatis mutandis*, ECtHR, *Milanković v. Croatia*, cited above, para. 64.

242. The foregoing considerations lead the Chamber to conclude that the Applicant's conviction for war crimes on the basis of JCE I as a mode of liability had a sufficiently clear legal basis in international law between 17 May 1999 and 5 June 1999, and that the applicable legal framework was sufficiently accessible to him, and its application to his conduct was foreseeable.

B. ALLEGED VIOLATION OF ARTICLE 33(1) OF THE CONSTITUTION, ARTICLE 7(1) OF THE ECHR, AND ARTICLE 15(1) OF THE ICCPR (ARBITRARY DETENTION)

1. Submissions

243. The Applicant alleged that his conviction for the war crime of arbitrary detention in a NIAC was in breach of the principle of legality as guaranteed by Article 33(1) of the Constitution, Article 7(1) of the Convention, and Article 15(1) of the ICCPR.⁶⁰⁷ In particular, he argued that Article 14(1)(c) of the Law enumerates an exhaustive list of specific acts that constitute war crimes in a NIAC, and that arbitrary detention is not included therein, further claiming that at the relevant time there was no settled State practice or *opinio juris* establishing arbitrary detention as a war crime in a NIAC under CIL.⁶⁰⁸ According to the Applicant, the expansive interpretation of Article 14(1)(c) of the Law amounted to retroactive criminalisation.⁶⁰⁹ He maintained that no reasonable tribunal could have found that, in 1999, the war crime of arbitrary detention in a NIAC formed part of the applicable law in Kosovo and was defined with sufficient clarity to satisfy the requirements of accessibility and foreseeability pursuant to Article 7 of the ECHR.⁶¹⁰

244. The SPO responded that the criminalisation of arbitrary detention as a war crime in a NIAC had been carefully considered and consistently reaffirmed by the criminal chambers in multiple cases before the SC.⁶¹¹ Arguing that the Applicant's submissions

⁶⁰⁷ Referral, paras 32, 38.

⁶⁰⁸ Referral, para. 36.

⁶⁰⁹ Referral, para. 36.

⁶¹⁰ Referral, paras 33, 37.

⁶¹¹ SPO submissions, para. 22

in this regard were bare and conclusory and provided no basis for reconsidering those findings, the SPO maintained that the complaint should be rejected.⁶¹²

245. In reply, the Applicant submitted that, while the SC jurisprudence referred to by the SPO had found that arbitrary detention in a NIAC was criminalised under CIL in 1999, it did not adequately address the question whether individual criminal liability for such conduct was accessible and foreseeable to the Applicant at the time.⁶¹³

2. Chamber's assessment

246. The Applicant complained that the interpretation given to Article 14(1)(c) of the Law by the criminal chambers as including the war crime of arbitrary detention in a NIAC amounted to a retrospective application of the criminal law.⁶¹⁴ He maintained in this regard that the war crime of arbitrary detention in a NIAC did not have a legal basis in international law in 1999, and was neither accessible nor foreseeable to him.⁶¹⁵ The Applicant relied on Article 33(1) of the Constitution, Article 7(1) of the ECHR, and Article 15(1) of the ICCPR.⁶¹⁶

247. The invoked provisions and the relevant principles emerging from the case law of the ECtHR were outlined and summarised above, at paragraphs 216-222, 227, 234, *in fine*, and 237.

248. The Chamber begins by recalling that the Applicant's conviction for arbitrary detention as a war crime in a NIAC was based on Article 14(1)(c) of the Law.⁶¹⁷ Said provision defines war crimes with reference to CIL, as previously noted.⁶¹⁸ Thus, the Chamber is of the view that the present complaint must be examined chiefly from the perspective of international law.⁶¹⁹

⁶¹² SPO submissions, para. 23.

⁶¹³ Applicant submissions, paras 16, 19.

⁶¹⁴ Referral, para. 36.

⁶¹⁵ Referral, paras 33, 36-37.

⁶¹⁶ Referral, paras 32, 38.

⁶¹⁷ See above, para. 62, and references therein.

⁶¹⁸ See above, paras 203, 223; see also above, para. 15.

⁶¹⁹ See, *mutatis mutandis*, ECtHR, *Kononov v. Latvia* [GC], cited above, para. 196. See also above, para. 225.

249. In light of the above, the Chamber considers that its main task in relation to the complaint is to examine, first, whether, having regard to the state of international law between 17 May 1999 and 5 June 1999, there was a sufficiently clear legal basis for the Applicant's conviction for arbitrary detention as a war crime in a NIAC; and, second, whether the offence was defined with sufficient accessibility and foreseeability so that the Applicant could have known at the material time what acts and omissions would make him criminally liable for such a crime and regulated his conduct accordingly.⁶²⁰

250. The Chamber notes, at the outset, the trial panel's legal findings in relation to the war crime of arbitrary detention in a NIAC within the meaning of Article 14(1)(c) of the Law, namely that such a crime "is committed through an act or omission resulting in depriving a person who is not taking an active part in hostilities of his or her liberty without legal basis or without complying with basic procedural safeguards".⁶²¹ The latter were found to encompass, in particular, the obligation to (i) inform any person deprived of his or her liberty of the reasons for such deprivation; (ii) bring any such person promptly before a judge or other competent authority; and (iii) provide them with an opportunity to challenge the lawfulness of their detention.⁶²²

251. Further to the above, the Chamber recalls that the trial panel established that the individuals detained at the Kukës Metal Factory were not, at any point during their detention, provided with "the basic guarantees that shall be afforded to any person deprived of his or her liberty pursuant to international humanitarian law",⁶²³ and that the Applicant had intentionally participated in depriving the detained individuals of their liberty, knowing that no basic procedural guarantees were afforded to them for the duration of their respective detentions.⁶²⁴

⁶²⁰ See, for example, ECtHR, *Vasiliauskas v. Lithuania* [GC], cited above, para. 162; *Kononov v. Latvia* [GC], cited above, para. 187. See also above, para. 226.

⁶²¹ Trial judgment, para. 936; see also paras 937-943.

⁶²² Trial judgment, para. 938.

⁶²³ Trial judgment, para. 946; see also paras 947-948.

⁶²⁴ Trial judgment, paras 951-956; see also para. 944.

252. The Chamber further observes that the criminal chambers had earlier held in this regard, *inter alia*, that arbitrary detention amounts to a serious violation of Common Article 3, and that it constituted a war crime in a NIAC under CIL *tempore criminis*.⁶²⁵ In particular, they found that detention becomes arbitrary and constitutes a serious violation of Common Article 3 when the principle of humane treatment is violated, irrespective of whether there is a legal basis to detain, and that this is firmly rooted in the terms of Common Article 3, which forms part of CIL.⁶²⁶ They also relied on State practice and *opinio juris* – comprising national legislation and the positions of States as expressed through international organisations – to determine the existence of a rule of CIL criminalising arbitrary detention in a NIAC at the material time.⁶²⁷

253. In this connection, the Chamber recalls Common Article 3, which, in its relevant parts, reads as follows:

Article 3 - Conflicts not of an international character

[...]

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

[...]

254. The Chamber further notes that, in Rule 87 of its Customary IHL Study, entitled “Civilians and persons *hors de combat* must be treated humanely”, the ICRC concluded, based on extensive material,⁶²⁸ that “State practice establishes this rule as a norm of [CIL] applicable in both international and non-international armed conflicts”.⁶²⁹

⁶²⁵ See above, paras 16, 31-32, 41, and references therein.

⁶²⁶ Decision on jurisdiction, para. 100; Appeal decision on jurisdiction, para. 45. See also *Thaçi et al.* decision on jurisdiction, paras 149-156; *Thaçi et al.* appeal decision on jurisdiction, paras 95-97.

⁶²⁷ Decision on jurisdiction, para. 101; Appeal decision on jurisdiction, para. 46. See also *Thaçi et al.* decision on jurisdiction, paras 159-164; *Thaçi et al.* appeal decision on jurisdiction, paras 106-109.

⁶²⁸ Henckaerts, J.-M. and Doswald-Beck, L. (eds), *Customary International Humanitarian Law, Volume II: Practice* (ICRC / Cambridge University Press 2005) (“ICRC, Customary IHL Study, vol. II”), pp. 1986-2024.

⁶²⁹ Henckaerts, J.-M. and Doswald-Beck, L. (eds), *Customary International Humanitarian Law, Volume I: Rules* (ICRC / Cambridge University Press 2005) (“ICRC, Customary IHL Study, vol. I”), p. 306.

255. In this regard, the Chamber likewise takes note of the finding of the International Court of Justice in its 1986 judgment in *Nicaragua v. United States of America*, whereby it concluded that the rules of Common Article 3 reflect “elementary considerations of humanity” applicable under CIL to any armed conflict, whether of an international or non-international character.⁶³⁰

256. Notably, the prohibition of arbitrary detention can be regarded as falling within the scope of Common Article 3. This view finds support in Rule 99 of the Customary IHL Study, in which the ICRC, having considered a substantial body of practice,⁶³¹ reached the conclusion that:

Rule 99. Arbitrary deprivation of liberty is prohibited.

[...] State practice establishes this rule as a norm of [CIL] applicable in both international and non-international armed conflicts. It should be noted that [Common Article 3], as well as both Additional Protocols I and II, require that all civilians and persons *hors de combat* be treated humanely [...], whereas arbitrary deprivation of liberty is not compatible with this requirement [...].⁶³²

257. In this context, the ICRC’s Customary IHL Study also identified the following as procedures required to prevent arbitrary detention of liberty, namely the obligation to (i) inform a person who is arrested of the reasons for arrest; (ii) bring that person promptly before a judge; and (iii) provide them with an opportunity to challenge the lawfulness of their detention.⁶³³

258. While the Chamber acknowledges that the ICRC’s Customary IHL Study is not in itself an expression of CIL, it nevertheless considers, like the criminal chambers,⁶³⁴ and as also held by the International Law Commission, that “publications of the ICRC may assist in identifying the relevant practice” and contribute to “the determination

⁶³⁰ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14, para. 218. See also ICTY, *Prosecutor v. Duško Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 98, 102.

⁶³¹ ICRC, Customary IHL Study, vol. II, pp. 2328-2344.

⁶³² ICRC, Customary IHL Study, vol. I, p. 344; see also pp. 347-352.

⁶³³ ICRC, Customary IHL Study, vol. I, pp. 349-352.

⁶³⁴ Decision on jurisdiction, para. 101. See also *Thaçi et al.* decision on jurisdiction, para. 157.

of [CIL]’’.⁶³⁵ In this respect, the Chamber notes that the ECtHR has also relied on the ICRC’s Customary IHL Study and other ICRC publications as authoritative references in determining the relevant CIL.⁶³⁶

259. At this juncture, the Chamber reiterates its finding in paragraph 233 above that its role is not to seek to establish authoritatively the state of international law between 17 May 1999 and 5 June 1999 regarding the war crime of arbitrary detention in a NIAC, but to determine whether the Applicant’s conviction for that offence had a sufficiently clear legal basis in CIL at the material time.

260. For the Chamber, there is no reason to doubt that the same rules determined by the ICRC in its 2005 Customary IHL Study were not applicable between 17 May 1999 and 5 June 1999.⁶³⁷ Indeed, the Chamber pays heed to the fact that much of the practice the ICRC relied upon for the purpose of its conclusions in Rule 99 of the Customary IHL Study pre-dated the commission of the crime at issue. In particular, the Chamber observes that a number of States had criminalised arbitrary detention as a war crime in non-international armed conflicts as well before 1999.⁶³⁸ Notably, Article 142 of the SFRY Criminal Code of 1976 also criminalised illegal arrests and detention without distinguishing between international and non-international armed conflicts.⁶³⁹ With regard to the practice of international organisations, the Chamber notes, in particular, that the UN Security Council, in two successive resolutions adopted in 1995, expressed its grave concern at and condemned violations of international humanitarian law and human rights in Bosnia and Herzegovina, including evidence of a consistent pattern

⁶³⁵ ILC, *Draft Conclusions on Identification of Customary International Law*, UN Doc A/73/10 (10 August 2018), Commentary to Conclusion 4, para. 9, p. 132.

⁶³⁶ See, for example, ECtHR, *Milanković v. Croatia*, cited above, paras 35-36; *Korbely v. Hungary* [GC], cited above, paras 51, 90.

⁶³⁷ See, *mutatis mutandis*, ECtHR, *Korbely v. Hungary* [GC], cited above, para. 90.

⁶³⁸ See, for example, ICRC, Customary IHL Study, vol. II, para. 2554 (Argentina, 1998), para. 2562 (Belgium, 1993), para. 2563 (Bosnia and Herzegovina, 1998), para. 2565 (Bulgaria, 1968), para. 2572 (Democratic Republic of the Congo, 1972), para. 2576 (Croatia, 1997), para. 2579 (Ethiopia, 1957), para. 2598 (Nicaragua, 1996), para. 2605 (Paraguay, 1997), para. 2606 (Poland, 1997), para. 2607 (Portugal, 1996), para. 2608 (Romania, 1968), para. 2611 (Slovenia, 1994), para. 2613 (Spain, 1995), para. 2615 (Sweden, 1962), para. 2616 (Tajikistan, 1998), para. 2623 (Yemen, 1998).

⁶³⁹ ICRC, Customary IHL Study, vol. II, para. 2624.

of arbitrary detentions by all parties to the conflict,⁶⁴⁰ and that in a resolution adopted in the same year regarding the situation of human rights in Bosnia and Herzegovina, Croatia, and the FRY, the UN General Assembly equally expressed grave concern in relation to violations of human rights and international humanitarian law, including “unlawful detention”.⁶⁴¹

261. Moreover, the Chamber considers it significant that the unlawful confinement of a civilian was explicitly included as a “grave” breach of the Geneva Conventions in Article 2(g) of the ICTY Statute, and observes in this regard that the ICTY has found that, in the context of a non-international armed conflict, detention or confinement of civilians is unlawful in two circumstances, namely (i) when a civilian is detained in contravention of Article 42 of the Fourth Geneva Convention, i.e. if it is not absolutely necessary on security grounds, and (ii) where the procedural safeguards required by Article 43 of the Fourth Geneva Convention are not complied with, even where there initial detention may have been justified.⁶⁴² The material elements identified by the ICTY in the context of an international armed conflict are substantially the same as those identified by the criminal chambers for the war crime of arbitrary detention in a NIAC.⁶⁴³ Considering that the values protected and the consequences for the victims are the same, the Chamber is of the view that there are no cogent reasons why the prohibition of arbitrary detention would not equally apply in a NIAC.⁶⁴⁴

262. In light of the foregoing, the Chamber finds that, by 17 May 1999, there was a sufficiently clear legal basis under CIL for the Applicant’s conviction and punishment for the war crime of arbitrary detention in a NIAC. In particular, the Chamber notes

⁶⁴⁰ ICRC, Customary IHL Study, vol. II, para. 2692; UN Security Council, Resolution 1019 (9 November 1995) UN Doc S/RES/1019, preamble; Resolution 1034 (21 December 1995) UN Doc S/RES/1034, preamble and para. 2.

⁶⁴¹ ICRC, Customary IHL Study, vol. II, para. 2633; UN General Assembly, Resolution 50/193 (22 December 1995) UN Doc A/RES/50/193, preamble.

⁶⁴² See, for example, ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgment, 20 February 2001, para. 322; *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, 16 November 1998, paras 563-582.

⁶⁴³ See above, para 250-251, and references therein. See also Decision on jurisdiction, para. 100.

⁶⁴⁴ See, *mutatis mutandis*, ECtHR, *Milanković v. Croatia*, cited above, para. 60.

that the failure to provide the persons detained at the Kukës Metal Factory with basic procedural safeguards rendered their detention arbitrary, in breach of the principle of humane treatment, and that this amounted to a serious violation of Common Article 3. Therefore, in the Chamber's view, the Applicant could be held individually criminally responsible under Article 14(1)(c) of the Law.

263. The Chamber now turns to consider whether the qualification of the impugned conduct as the war crime of arbitrary detention in a NIAC, based as it was on CIL, could be considered sufficiently accessible and foreseeable to the Applicant between 17 May 1999 and 5 June 1999.

264. As regards the requirement of accessibility, the Chamber recalls that it does not exclude reliance being placed on a law which is based on custom.⁶⁴⁵ In this respect, the Chamber notes that the ICRC's determination in Rule 99 of its Customary IHL Study that the arbitrary deprivation of liberty was prohibited in both international and non-international armed conflicts relied on extensive practice which comprised, *inter alia*, national legislation in force at the material time criminalising arbitrary deprivation of liberty throughout the former Yugoslavia, including as applicable in Kosovo, as well as UN practice condemning such conduct in the region in 1995.⁶⁴⁶ In addition, since the criminal chambers found that arbitrary detention amounted to a serious breach of Common Article 3, the Chamber also takes into account that the Geneva Conventions were ratified by the former Yugoslavia, of which Kosovo was part of, on 21 April 1950, and came into effect on 21 October 1950. Their full text in official translation was published in the *Official Gazette of the Federal People's Republic of Yugoslavia (Službeni list FNRJ, No. 24/50)* on 15 September of the same year. Thus, the Chamber is satisfied that the international practice informing the prohibition of arbitrary detention under CIL, as well as the Geneva Conventions, were sufficiently accessible to the Applicant.⁶⁴⁷

⁶⁴⁵ See above, para. 237, with further references to case law.

⁶⁴⁶ See above, para. 260, and references therein.

⁶⁴⁷ See, *mutatis mutandis*, ECtHR, *Vasiliauskas v. Lithuania* [GC], cited above, paras 167-168; *Korbely v. Hungary* [GC], cited above, paras 74-75.

265. In connection to the requirement of foreseeability, the Chamber recalls that the Applicant was convicted, *inter alia*, for having intentionally participated in depriving the individuals detained at the Kukës Metal Factory of their liberty, knowing that no basic procedural guarantees were afforded to them throughout their detention.⁶⁴⁸ In the Chamber's view, the Applicant's conduct fell squarely within the contours of the war crime of arbitrary detention in a NIAC, as established in CIL by 17 May 1999.⁶⁴⁹ Moreover, although cognisant that it must assess the foreseeability of the Applicant's in light of the CIL applicable at the material time,⁶⁵⁰ the Chamber cannot ignore that Article 142 of the SFRY Criminal Code of 1976, which was also applicable in Kosovo at that time, criminalised illegal arrests and detention without distinguishing between international and non-international armed conflicts.⁶⁵¹

266. Lastly in this regard, the Chamber recalls that Common Article 3 reflects certain minimum mandatory rules applicable in a NIAC, including the requirement that all civilians and persons *hors de combat* be treated humanely, and that arbitrary detention violates this requirement.⁶⁵² As a member of the KLA during the NIAC between the latter and Serbian forces,⁶⁵³ the Applicant was an addressee of these minimum rules. Thus, the Chamber considers that even the most cursory reflection by the Applicant could have indicated to him that, at the very least, the impugned conduct risked being counter to Common Article 3 and, notably, risked constituting a war crime for which he could be held individually criminally responsible.⁶⁵⁴

267. In light of the above considerations, the Chamber concludes that the Applicant's conviction for the war crime of arbitrary detention in a NIAC had a sufficiently clear

⁶⁴⁸ See above, para. 251, and references therein.

⁶⁴⁹ See above, paras 253-262, and references therein; see also para. 240. Cf. ECtHR, *Korbely v. Hungary* [GC], cited above, paras 77-95.

⁶⁵⁰ See also above, para. 240.

⁶⁵¹ See above, para. 260.

⁶⁵² See above, paras 253-257, and references therein.

⁶⁵³ Trial judgment, paras 292-294, 919-921.

⁶⁵⁴ See, *mutatis mutandis*, ECtHR, *Kononov v. Latvia* [GC], cited above, para. 238.

basis in international law between 17 May 1999 and 5 June 1999, and that it constituted an offence defined with sufficient accessibility and foreseeability under CIL.

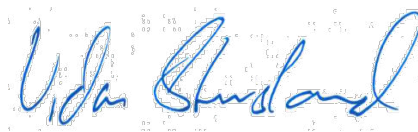
C. CONCLUSION

268. Accordingly, the Chamber finds that the Applicant's conviction for war crimes based on JCE I as a mode of liability and his conviction for arbitrary detention as a war crime in a NIAC did not constitute a violation of Article 33(1) of the Constitution, Article 7(1) of the ECHR, and Article 15(1) of the ICCPR.

FOR THESE REASONS,

The Specialist Chamber of the Constitutional Court, deciding on the Referral made by Mr Pjetër Shala, unanimously,

1. *Declares* the complaints under Article 33(1) of the Constitution, Article 7(1) of the ECHR, and Article 15(1) of the ICCPR admissible;
2. *Dismisses* the remainder of the Referral as inadmissible; and
3. *Holds* that there has been no violation of Article 33(1) of the Constitution, Article 7(1) of the ECHR, and Article 15(1) of the ICCPR.



Judge Vidar Stensland
Presiding Judge

Done in English on Friday, 23 October 2026
At The Hague, the Netherlands