In:	**KSC-BC-2020-06** **Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**
Before:	**Pre-Trial Judge** Judge Nicolas Guillou
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Kadri Veseli
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Preliminary motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC

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Table of Contents

I. INTRODUCTION

1. Pursuant to Rule 97(1)(a), the Defence of Mr Veseli ("Defence") files this Motion challenging the jurisdiction of the KSC.[1]

2. The Defence submits that the SPO (in framing the Indictment) and the Pre-Trial Judge (in his Decision on Confirmation of the Indictment) have lost sight of the fact that the KSC is not an international criminal court, applying international criminal law. It is a domestic court of Kosovo, bound by the Kosovo Constitution (a constraint that does not apply to an international criminal court). Under the Kosovo legal order, the provisions of the Constitution are superior to any other source of law, including international law.[2]

3. The central provision of the Constitution that determine the substance of the criminal law regime applicable to the actions of the accused during the 1988-99 conflict in Kosovo is Article 33 of the Constitution,[3] read in conjunction with Article 7 of the European Convention on Human Rights ("ECHR"),[4] as

[1] The Defence of Mr Veseli also adopts the submissions of the Defence of Mr Thaci, to the extent that they are not inconsistent with the arguments raised in this submission.
[2] Article 16(1): "The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution".
[3] Article 33(1): "No one shall be charged or punished for any act which did not constitute a penal offense *under law* at the time it was committed, except acts that *at the time they were committed* constituted genocide, war crimes or crimes against humanity according to international law; (2) No punishment for a criminal act shall exceed the penalty provided by law *at the time the criminal act was committed*; ... (4) Punishments shall be administered in accordance with the law in force at the time a criminal act was committed, unless the penalties in a subsequent applicable law are more favorable to the perpetrator".
[4] Article 7 of the ECHR (entitled "No Punishment without Law") provides: (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; (2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

interpreted by the European Court of Human Rights ("ECtHR")[5].

4. The ECtHR has held that the travaux *preparatoires* to the Convention establish that Article 7(2) of the ECHR (the saving clause for generally recognised rules of customary international law) was a time-limited provision intended to cover only the prosecution of war criminals who committed offences during the Second World War, which cannot be applied to conflicts occurring since the Second World war.[6] This important principle of the Strasbourg case law appears to have been overlooked by those who framed the KSC law, by the SPO in framing the Indictment and by the Pre-Trial Judge in his Decision.

5. Article 7 of the ECHR (as interpreted by the ECtHR) not only governs the application of Article 33 of the Constitution (see Article 21,[7] Article 22,[8] and Article 53[9] of the Constitution) but also takes precedence over any incompatible rule of law, including any incompatible rule of international law.[10] It is binding on the KSC,[11] such that it is unlawful for the KSC to act incompatibly with the ECtHR's interpretation of Article 7 of the ECHR.[12]

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[5] Article 53 of the Constitution of Kosovo provides: "Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".
[6] *Maktouf and Damjanović v. Bosnia and Herzegovina*, Grand Chamber, Application nos. 2312/08 and 34179/08, 13 July 2013.
[7] Article 21 provides that human rights and fundamental freedoms are "inalienable and inviolable" and must be respected by "everyone".
[8] Article 22 provides: "Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, *are directly applicable* in the Republic of Kosovo and, *in the case of conflict, have priority over provisions of laws and other acts of public institutions*: ... (2) European Convention on Human Rights and Fundamental Freedoms and its Protocols"(...).
[9] See footnote 5 above.
[10] See Article 22, footnote 8 above.
[11] Article 16(3): "Every person and entity in the Republic of Kosovo is subject to the provisions of the Constitution." This provision plainly includes the KSC.
[12] See Article 22, footnote 8 above.

6. Accordingly, the KSC has no jurisdiction to try the accused for any offence that did not constitute a criminal offence, under national or international law, at the time it was committed (1998-99), as that principle has been interpreted and applied in the decisions of the ECtHR.

A. Domestic Law Applicable in 1998-1999

7. The applicable domestic law at the time of the acts alleged in the present Indictment was the SFRY Constitution and the SFRY Criminal Code. The SFRY Constitution did not permit the domestic application of customary international humanitarian law to establish criminal offences, except to the extent that it was consistent with domestic legislation enacted to give effect to Yugoslavia's international obligations. Article 181 of the SFRY Constitution provided:

> "181. No one shall be punished for any act which before its commission was not defined as a punishable offence by Statute or legal provision based on statute (...) Criminal offences and criminal law sanctions may only be established by statute."

> "208. Statutes and other regulations and enactments shall be promulgated before coming into force."

8. As regards the principles of non-retroactivity of the criminal law to the detriment of the accused, Article 3 of the SFRY Criminal Code provided that: "No punishment of other criminal sanction may be imposed on anyone for an act which, prior to being committed was not defined by law [i.e. by statute] as a criminal act, and for which a punishment has not been prescribed by statute."

9. Articles 141 to 156 of the SFRY Criminal Code defined and circumscribed the domestic law implementation of the Geneva Conventions, the Genocide

Convention and the Nuremberg Principles outlined by the International Law Commission in 1950.

10. The SFRY Criminal Code prohibited the commission of genocide and the war crimes in Articles 141 to 144 of the code, but it did not incorporate Nuremberg Principle VII, outlined by the International Law Commission in 1950, concerning complicity in war crimes and crimes against humanity.

11. Instead, it provided, in Article 15 of the Criminal Code, for an offence of "organising a group and instigating the commission of genocide and war crimes". This offence specifically limited secondary criminal liability to those who organised or joint a group "*for the purpose of* committing criminal acts referred to in Articles 141 to 144" or who "*calls on or instigates* the commission of criminal acts referred to in Article 141 to 144". These offences require that the accused has the same specific intent as the alleged perpetrator.

12. Where a conviction is exclusively based on an international treaty ratified by the respondent State, the ECtHR will verify whether that treaty has been incorporated into domestic law.[13] As noted above, Articles 181 and 208 prohibited the creation of criminal offences, except through a domestic statute duly promulgated. Neither an international treaty nor customary international law could create offences in the domestic legal order without a statutory enactment giving them domestic effect. In the present context, the statutory regime spelt out in the SFRY Criminal Code, as *lex specialis*, took precedence over a supposed rule of customary international law.

[13] *Korbely v. Hungary* [GC], no 9174/02, 19 September 2008.

13. As regards subsequent changes in the law, Article 4 of the SFRY Criminal Code (under the heading "Mandatory application of a less severe criminal law") provided: "4(1). The law that was in power at the time when a criminal act was committed shall be applied to the person who has committed the criminal act. (2). If the law has been altered on or more times after the criminal act was committed, the law which is less severe in relation to the offender shall be applied."

B. The Framework established by the current Constitution of Kosovo

14. In determining the scope of its jurisdiction, the KSC is bound by Article 16(1) and (3),[14] Article 19(1)[15] and (2),[16] Article 21,[17] Article 22,[18]Article 33,[19] Article 53,[20] Article 55(1) [21] and (5), [22] Article 56, [23] and Article 102(3) of the Kosovo Constitution.

15. In addition, the KSC is bound by Article 7 of the European Convention on Human Rights, which is directly incorporated into the Constitution by Article 22,[24] and made "directly applicable" (thereby acquiring a special status, which

[14] Article 16(3): See footnote 2 and 3 above
[15] Article 19(1): "International agreements ratified by the Republic of Kosovo become part of the internal legal system... [and] are directly applied, *except for cases when they are not self-applicable and the application requires the promulgation of a law*".
[16] Article 19(2) "Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo".
[17] Article 21 see 7 above.
[18] Article 22: See 8 above.
[19] Article 33: See see footnote 3 above.
[20] Article 53: See footnote 5 above.
[21] Article 55(1): "Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law".
[22] Article 55(5): "The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right".
[23] Article 56: "Derogation of the fundamental rights and freedoms protected by this Constitution may only occur following the declaration of a State of Emergency as provided by this Constitution and only to the extent necessary under the relevant circumstances; (2) Derogation of the fundamental rights and freedoms guaranteed by [Article 33] of this Constitution shall not be permitted under any circumstances".
[24] Article 22: See footnote 8 above.

gives it primacy over laws giving effect to other international treaties or customary international law norms).[25] Moreover, the rights guaranteed, including the non-retrospectivity rule in Article 7, must be applied in conformity with the jurisprudence of the European Court of Human Rights.[26]

16. For the purposes of the present jurisdictional challenge, the most relevant provisions of the Constitution (which must be read in harmony with one another) are:

i. Article 16(1): "The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution". This provision has the effect of rendering unconstitutional and unenforceable any provisions of law (including the Law governing the KSC) that are incompatible with the Constitution.

ii. Article 19(1): "International agreements ratified by the Republic of Kosovo become part of the internal legal system (...) [and] are directly applied, *except for cases when they are not self-applicable, and the application requires the promulgation of a law*". The exchange of letters by which Kosovo agreed to establish the KSC was not "self-applicable". It required the adoption of a Law defining the competence and jurisdiction of the KSC. However, since the Law has the status of any other Law passed by the Kosovo Assembly, it takes effect subject to (and to the extent that it is compatible with) the provisions of the Constitution (Article 16(1)), including the non-retroactivity principle (Article 33 of the Constitution and Article 7 of the ECHR) as interpreted by the ECtHR (Article 53).

[25] Article 22: See footnote 8 above.
[26] Article 53(1): See footnote 5 above.

iii. Article 19(2): "Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo". Note that international agreements have priority over domestic *laws*, but not over the *provisions of the Constitution*: Article 16(1) and Article 22 (as regards the application of Article 7 ECHR). The paramount law applicable to the non-retrospectivity of the criminal law to the detriment of the accused is the Constitution (Article 33), interpreted in harmony with Article 7 of the ECHR as that provision has been applied in the case-law of the ECtHR (Articles 22 and 53 of the Constitution).

iv. Article 21: provides that human rights and fundamental freedoms are "inalienable and inviolable" and must be respected by "everyone". This provision obviously applies to the KSC, and the substance of the rights guaranteed are to be interpreted in accordance with the jurisprudence of the European Court of Human Rights: Article 53.

v. Article 22: "Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution *are directly applicable* in the Republic of Kosovo and, *in the case of conflict, have priority over provisions of laws and other acts of public institutions*: (...) (2) European Convention on Human Rights and Fundamental Freedoms and its Protocols." It follows that the KSC law must be interpreted and applied in a manner consistent with Article 7 ECHR as interpreted by the ECtHR (Article 22, read with Article 16(1) and Article 53 of the Constitution). Accordingly, any provisions of the KSC Law that are inconsistent with the case-law of the ECtHR must be disapplied. It also follows that the KSC, as an institution, is bound to

"act" in accordance with Article 7 ECHR, as interpreted by the ECtHR, and that any "acts" (including the confirmation of an Indictment) that are inconsistent with Article 7, as interpreted by the ECtHR, are void and of no legal effect.

vi. Article 33(1): "No one shall be charged or punished for any act which did not constitute a penal offence *under law* at the time it was committed, except acts that *at the time they were committed* constituted genocide, war crimes or crimes against humanity according to international law; (2) No punishment for a criminal act shall exceed the penalty provided by law *at the time the criminal act was committed*; (...) (4) Punishments shall be administered in accordance with the law in force at the time a criminal act was committed unless the penalties in a subsequent applicable law are more favourable to the perpetrator". This provision is modelled on Article 7 ECHR and is to be interpreted and applied in accordance with the jurisprudence of the European Court of Human Rights (see Article 53 of the Constitution). Since the ECtHR has held that the savings clause in Article 7(2) was applicable only to crimes committed during the Second World War and has no continuing application to conflicts occurring since then, it follows that the equivalent savings clause in Article 33(1) is equally inapplicable. The concept of "international law" in Article 7 extends to customary international law offences, providing they were clearly recognised as such at the time of acts alleged and were given effect in domestic law. The concept of "law" also incorporates the Convention tests of accessibility, foreseeability and legal certainty. The KSC may therefore only take jurisdiction over substantive offences that were unambiguously recognised as such *at the time of the events that are the subject of the Indictment*, that were defined with sufficient clarity and specificity to meet the Convention's "quality of law" test, and that were

incorporated into the domestic legal order. The provisions of Articles 181 and 208 of the SFRY Constitution provided that criminal liability could *only* be created by Statute, and Articles 141 to 145 of the SFRY Criminal Code has circumscribed the extent to which treaty-based and customary international humanitarian law rules were incorporated into the national legal order.

vii. Article 53: "Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistently with the court decisions of the European Court of Human Rights". This provision is crucial to the present jurisdiction challenge because the Grand Chamber of the European Court of Human Rights has ruled definitively that the savings clause in Article 7(2) of the ECHR cannot be applied to any war crimes prosecutions not directly concerned with the events of the Second World War.[27] Accordingly, as regards the conflict in issue in the present proceedings, the Prosecution must establish that the conduct alleged was either (a) clearly an offence under the SFRY Criminal Code applicable at the time; or (b) clearly and unambiguously an offence recognised as a customary international law crime at the time of the conflict (and incorporated into the domestic law of Yugoslavia applicable to Kosovo). In the event that both tests are met, the KSC must apply the test most favourable to the accused.

viii. Article 55(1): "Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law". The term "law" in this context incorporates the guarantees of Article 7(1) ECHR as interpreted in accordance with Article 22 (Article 7 has priority over inconsistent laws);

[27] *Maktouf and Damjanović v. Bosnia and Herzegovina*, Grand Chamber, Application nos. 2312/08 and 34179/08, 13 July 2013.

and Article 55 (Article 7(2) is inapplicable to the 1998-1999 conflict in Kosovo).

ix. Article 55(5): "The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right". The essence of the right guaranteed by Article 7 ECHR (as interpreted and applied by the European Court of Human Rights) and Articles 33(1)(2) and (4) of the Constitution (which must also be interpreted consistently with the decision of the ECtHR (Article 53) is that the accused may not be tried for an offence that was not a clearly recognised crime, under national (or incorporated international) law, at the time it was committed; and may not be subjected to a heavier penalty than the penalty applicable at the time the offence was committed (but may have the benefit of a subsequent change in penalty that is favourable to the accused).

x. Article 56: "Derogation of the fundamental rights and freedoms protected by this Constitution may only occur following the declaration of a State of Emergency as provided by this Constitution and only to the extent necessary under the relevant circumstances; (2) Derogation of the fundamental rights and freedoms guaranteed by [Article 33] of this Constitution shall not be permitted under any circumstances". This provision mirrors Article 15 of the ECHR. Article 33 of the Constitution (the prohibition on retrospective application of the criminal law to the detriment of the accused) is to be interpreted and applied in accordance with the decisions of the ECtHR on Article 7 of the ECHR: see Article 53 of the Constitution. It follows that (a) the provisions of Article 33 of the Constitution and Article 7(1) ECHR may not be disapplied "under any circumstances", whilst the provisions of Article 7(2) are inapplicable and

incapable of providing a legal basis for the KSC's claimed jurisdiction to invoke customary international law retrospectively.

xi. Lastly, Article 102(3) provides that all courts (including the KSC) shall adjudicate based on the Constitution and the Law.

C. Unconstitutional applications of the KSC Law

17. Article 3(2)(d) of the Law allows the KSC to adjudicate and function with "customary international law as given superiority over domestic laws by Article 19(2) of the Constitution." Article 12 of the Law purports to give primacy to customary international law over the provisions of domestic law as it stood in 1998-1999. It does so in misplaced reliance on the moribund provisions of Article 7(2) of the ECHR, a position that (in light of Article 53 and the decision of the ECtHR in *Maktouf and Damjanović v. Bosnia and Herzegovina*, Grand Chamber, Application nos. 2312/08 and 34179/08, 13 July 2013), is plainly unconstitutional).

18. In *Vasiliauskas v Lithuania*, Grand Chamber, Application no. 35343/05, 20 October 2005, the ECtHR identified a lack of clarity arising out of the discrepancy within the domestic law, namely the Criminal Code and the Genocide Convention, and held that this violated the accessibility, foreseeability and precision requirements of Article 7(1). The same principle applies to the approach taken in Article 12 of the KSC Law.

19. Since the SFRY Constitution and the SFRY Criminal Code required criminal offences to be set out in a domestic statute in order to have legal effect. Since Articles 145 of the SFRY Criminal Code prescribed the precise requirement of secondary participation in genocide, war crimes and crimes against humanity, it follows that Article 12 of the Law is unconstitutional since it violates Article 33

of the Constitution, as interpreted and applied in light of the ECtHR decisions on Article 7 of the ECHR.

20. Article 13 of the Law is unconstitutional insofar as it purports to define crimes against humanity as including, in the context of a NIAC, "imprisonment" and "enforced disappearance", neither of which were crimes under domestic or international law at the time of the events alleged in the Indictment.

21. Article 14(1)(a)(vii) is unconstitutional insofar as it purports to define "unlawful confinement" as a war crime in the context of a NIAC.

22. Article 16(1)(c) is unconstitutional insofar as it imposes criminal liability under principles of command responsibility that extend beyond Article 145 of the SFRY Criminal Code since this violates Article 33(1) of the Kosovo Constitution interpreted in conformity with the case-law of the ECtHR under Article 7 of the ECHR (in accordance with Article 55 of the Constitution of Kosovo).

23. In addition, Article 15(1)(c) of the Law violates Article 33 of the Constitution and Article 7 of the ECHR in denying the temporal application of more lenient laws successive to the commission of the alleged crime. Article 15(1)(c) provides only for the application of more lenient laws in force *prior to* the alleged commission of the offence. In prohibiting the application of laws more favourable to the accused that were enacted after the events concerned, it violates Article 33(4) of the Kosovo Constitution. This is because Article 4(2) of the SFRY Criminal Code, applicable at the time, imposed a mandatory requirement that the accused had to be given the benefit of the more lenient regime, including where the more favourable law was enacted subsequent to the commission of the crime.

24. For the same reasons, Article 44(1) (on the maximum term of life imprisonment) and Article 44(2)(c) (on sentencing) of the Law violate the non-derogable Article 33(4) of the Constitution and Article 7 of the ECHR since they deny the temporal application of more lenient laws successive to the commission of the alleged crime.

25. Generally, the Law justifies its "primacy of customary international law" approach by reference to Article 7(2) of the ECHR, and implicitly, by reference to the supremacy of international law over domestic laws as referenced in Article 3(2)(d) of the Law and Article 19(2) of the Constitution. Both arguments are erroneous.

26. As noted above, the application of Article 7(2) is nowadays obsolete.[28] It was a temporary measure, not meant to provide for a general exception to the rule of non-retroactivity. This is why the ECtHR (and the Commission before it) has always held that the two paragraphs of Article 7 "constitute a united system and must be the subject of a concordant interpretation'".[29]

27. By contrast, reliance by the Law specifically on Article 7(2) of the ECHR both in its Articles 12 and 44(2)(c) acts as a means to exclude the application of the principle of *favour rei* as long as "the alleged conduct had been criminal under the general principles of law recognised by civilised nations". This attempt to create "the primacy of customary international law" over domestic laws in effect seeks to prohibit the application of the *lex mitior* principle by virtue of the exception found in Article 7(2) of the ECHR. However, it is a clearly flawed interpretation of Article 7(2) of the ECHR.

[28] ECHR Research Division, 'Article 7: The "quality of law" requirements and the principle of (non-)retrospectiveness of the criminal law under Article 7 of the Convention, page 37.
[29] *Tess v. Latvia, App no. 34854/02, 12 December 2012.*

28. In view of the above, Articles 12, 13, 15(1)(c), 16(1)(c), 44 (1), and 44(2)(c) of the Law violate a constitutional norm, which is the highest law of the land, and, as long as the Kosovo legal order is concerned, superior to international law.[30] Moreover, the ECHR, along with other international human rights conventions, are explicitly incorporated by the Constitution in its Article 22, thereby acquiring a special status, which gives it primacy over other international treaties or customary international law norms.

29. Even if it was the case that both domestic and customary international law (as it currently stands) apply (which it is not), the Pre-Trial Judge's determination is in flagrant disregard of the principle of *jus de non evocando*, whereby no domestic or international law can bar the application of the substantive criminal law which was in force at the time of the events.

30. Unlike the ICTY, which operated primarily based on international law, the KSC operates primarily based on Kosovo's domestic law. As a result, unlike the ICTY, the KSC is bound by both constitutional principles and human rights principles and cannot simply choose to disregard national law.

D. Summary of Defence Submissions

1. The KSC does not have jurisdiction to apply customary international law

31. Both the 1974 SRFY Constitution and the current Constitution of Kosovo[31] do not recognise the direct effect of international law norms in criminal matters. While the 1974 SRFY Constitution explicitly prohibits the direct effect of customary

[30] Article 16 of the Constitution ('The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution').
[31] Constitution, UNMIK Regulation 1999/24, as well as the 1974 SFRY Constitution

international law, the current Constitution requires that (i) criminal laws be introduced by statute, and that (ii) criminal offences must be adjudicated based on the law in effect at the time of the events. Both of these requirements, which operate as *lex specialis,* therefore have primacy over the general norm allowing for the incorporation of ratified treaties and norms of customary international law in the domestic legal system. As a result, and consistent with the settled jurisprudence of other Kosovo courts,[32] the Defence submits that the KSC only has jurisdiction to try persons based on the ratified international treaties or alleged customary principles of customary international humanitarian law incorporated in the Yugoslav domestic system by statute at the time of the incidents alleged in the Indictment. This means Articles 141 to 154 of the SFRY Criminal Code (and especially, as regards secondary participation, Article 145).

32. In the alternative, the Defence submits that, even if customary international law were to have direct effect in respect to criminal matters (which it does not), the KSC, like any other domestic court, must apply its domestic laws first in line with the principle of *lex mitior* (or *favor rei*) relating to legal provisions, modes of liability, and sentencing,[33] and refer to international law only on a subsidiary basis. Where concurrent jurisdiction exists, the Pre-Trial Judge must conduct a case-by-case analysis to apply the law which is most favourable to the accused.

2. The KSC does not have jurisdiction to apply Joint Criminal Enterprise as a mode of liability

33. Joint Criminal Enterprise (JCE) as a mode of liability is neither explicitly recognised in the KSC Law nor Kosovo's domestic law. The Defence submits that even if the Pre-Trial Judge was to decide that customary international law has direct effect in criminal matters at the KSC, there is considerable evidence to

[32] See infra, paras 49-52.
[33] The *lex mitior* (or *favor rei*) principle is valid for legal provisions, modes of liability, and sentencing.

suggest that JCE III was not sufficiently established in customary international law in 1998-1999 to generate liability for incidents alleged to have occurred at the time.

34. In the alternative, even if JCE III was established as a mode of liability under customary international law at the time of the incidents, the Defence submits that there is good authority to indicate that, at the time of consideration by the KSC, customary international law has evolved by explicitly rejecting JCE III as a mode of liability in favour of a more objective-based theory of co-perpetration.

3. The KSC does not have the jurisdiction to apply Command Responsibility

35. The Defence submits that the KSC must apply its own national laws and that as a result, the KSC does not have jurisdiction to enforce command responsibility because the domestic law applicable during the armed conflict did not recognise command responsibility as a mode of liability.

36. Even if the Pre-Trial Judge was to declare that customary international law has a direct effect in criminal matters, the Defence submits that the Pre-Trial Judge must focus on whether both international and domestic law apply with regards to command responsibility, and if so, which law is more favourable to the accused.

4. The KSC does not have the jurisdiction to try alleged incidents of i) unlawful detention as a war crime; and ii) enforced disappearance as a crime against humanity

37. The Defence submits that the KSC must apply its own national laws and that as a result, the KSC does not have jurisdiction to try alleged incidents of unlawful detention as a war crime and enforced disappearance as a crime against

humanity because these crimes are neither explicitly recognised in the KSC Law nor Kosovo's domestic law.

38. Even if the Pre-Trial Judge was to declare that customary international law has a direct effect in criminal matters, the Defence submits that these crimes were not sufficiently established under customary international law at the time of the incidents alleged in the Indictment.

39. For these reasons, considered separately or cumulatively, the Defence requests the Pre-Trial Judge to:

a) Review his findings in the Decision on the Confirmation of Indictment (the Decision);

b) Dismiss the charges based exclusively on customary international law instead of the ratified international treaties incorporated in the Yugoslav domestic system at the time of the incidents alleged in the Indictment in line with Article 181 and 208 of the SFRY Constitution, and Article 145 of the 1974 Criminal Code of the Former Socialist Federal Republic of Yugoslavia (for lack of jurisdiction) including those relating to:

i) Joint criminal enterprise;
ii) Command responsibility;
iii) Unlawful detention as a war crime; and
iv) Enforced disappearance as a crime against humanity.

c) Order the SPO to amend the Indictment accordingly.

II. THE KSC DOES NOT HAVE JURISDICTION OVER CUSTOMARY INTERNATIONAL LAW

40. The Defence submits that customary international law cannot be used as a source criminalising conduct because:

a) Customary international law does not have direct effect and cannot be directly applied by Kosovo Courts unless there exists a corresponding criminal prohibition in the domestic legal order (the duality test); and

b) Even if Articles 13, 14 and 16(1) of the Law are considered as importing customary international law into the domestic legal system in Kosovo, it violates the principle of legality enshrined in the non-derogable Article 33(4) of the Constitution and in Article 7 of the ECHR which has superior force to any other rule of law, including customary international law;

A. The inapplicability of Customary International Law as a source criminalising conduct

1. Customary international law does not have a direct effect

41. The Defence submits that neither the current Constitution of Kosovo nor the 1974 Constitution of the SFRY (which should be the relevant constitutional principles applied in this case in light of the principle of *nullum crimen sine lege,* according to which crimes should be judged based on the law applicable at the time of the events), allow Kosovo Courts to enforce customary international law unless there is a domestic statutory provision that corresponds in terms of its substance.

42. Under Article 102(3) of the Constitution, all courts shall adjudicate based on the Constitution and the Law. Article 3(2)(d) of the Law allows the KSC to adjudicate and function with "customary international law as given superiority over

domestic laws by Article 19(2) of the Constitution." The Defence submits that this conflates the notions of "incorporation" of international law into domestic law with that of "direct effect".

43. Unlike in common law systems, in the continental tradition and most importantly in Kosovo, "the incorporation of international law is considered as the first step, with direct effect being an ensuing, secondary question".[34] In that sense, a treaty provision (or a rule of customary international law) purporting to establish a criminal offence can form part of the domestic legal order without being directly applicable by the domestic courts if it has not been incorporated into domestic law by statute. As a result, the Constitution of the Republic of Kosovo neither allows international treaties, nor customary international law to have a direct effect on criminal law matters. At least two constitutional provisions can be recalled in support of this conclusion:

a) A textual reading of Article 19(1) of the Constitution limits the direct effect only to those ratified international agreements of a "self-executing" nature. For a treaty to be self-executing, it needs to be (i) sufficiently specific and (ii) create rights for individuals. Criminal prohibitions deriving from customary international law are not directly applicable by domestic courts, including the KSC;

[34] European Commission for Democracy Through Law (Venice Commission), CDL-AD(2014)036, Report On The Implementation Of International Human Rights Treaties In Domestic Law and the Role Of Courts, 8 December 2014, paras. 29-30; André Nollkaemper, 'The Duality of Direct Effect of International Law, 25 EJIL (2014) 105, at 115. ('the mere fact that a rule of international law has been made part of 'the law of the land' is not sufficient for it to be applied on the same footing as domestic law. Something more is needed – this 'something more' being the conditions of direct effect (notably specificity and individual rights'); On the difference between 'direct applicability' and 'direct effect' *see* also, Jörg Gerkrath, 'Chapter 6 – Direct Effect in Germany and France; A Constitutional Comparison', in J.M. Prinssen and A.A.M. Schrauwen (eds), *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (2002), pp. 131-132.

b) Article 55 of the Constitution operates as *lex specialis* vis-à-vis Article 19 of the Constitution in requiring that any limitation of the fundamental rights and freedoms guaranteed by this Constitution (such as the right to liberty) may only be limited by law.

2. Customary International Law is not directly applicable unless it satisfies the duality test

44. The Defence submits that in the absence of provisions allowing for direct effect (as discussed above), the Pre-Trial Judge must first be satisfied that the customary international law norm satisfies the duality test in that there was a corresponding domestic provision at the time of the incidents alleged in the Indictment before it can be directly applied to define the basis of individual criminal responsibility and punishment.

45. When compared to the present Constitution of Kosovo, the 1974 Constitution of the SFRY, which should be the relevant constitutional principles applied in this case in light of the principle of *nullum crimen sine lege (*according to which crimes should be judged based on the law applicable at the time of the events) was even more strict when it came to the application of international law in the domestic legal system.

46. The 1974 SFRY Constitution specifically required (i) that criminal offences and criminal sanctions be determined by statute (Article 181) and that (ii) only ratified treaties can be considered part of the legal system (Article 210).

47. The principle of legality (that crimes must be specified in domestic legislation) operates as a *lex specialis* to the application of internationally ratified treaties meaning that a specific law overrides general legal principles. Therefore, the

direct application of international norms is not allowed unless the international law provisions correspond to the domestic law in terms of their content. This created the so-called 'duality test' in UNMIK case-law.

48. The prohibition of the direct applicability of international humanitarian law was explicitly outlined by the Supreme Court of Kosovo when it reviewed district court decisions, inspired from the case-law of the ICTY, that incorrectly found that (i) pursuant to the 1974 SFRY Constitution and the 1992 FRY Constitution, ratified treaties had a direct effect, including in the field of criminal law; and that (ii) by virtue of the 1992 FRY Constitution, customary international law was also directly applicable to criminal proceedings.[35]

49. The Supreme Court of Kosovo rejected this view and held that:

> In paras, 428-441 of the verdict, the District Court appears to have accepted that pursuant to the 1974 SFRY Constitution, Article 210, and FRY Constitution of 1992, Article 16, treaties which are ratified are self-executing and directly applicable by the courts, including in the field of criminal law. The District Court goes on to say that by virtue of Article 16 of the FRY Constitution also generally accepted rules of international law [customary law] are applicable to criminal proceedings.
>
> In making this statement, the District Court overlooked two aspects of the applicability of the legal regime as defined by UNMIK Regulation 1999/24.
>
> Firstly, the applicability of the regime as of 22 March 1989 in Kosovo recognises only one derogation: in any individual criminal proceedings, any subsequent

[35] See, District Court Of Peja C/P 136/2001 26 June 2003, paras 428-441 (accepting JCE as well as the application of customary international law by virtue of Article 16 of the 1992 FRY constitution).

law to the law of the SFRY before 23 March 1989 will be dispositive of the issue if it is more lenient to the accused. Secondly, the applicable law in force on 22 March 1989 results in the *prima facie* reference to the constitutional principle of legality as established in two articles of the SFRY 1974 Constitution:

> Art. 181: "No one shall be punished for any act, which before its commission was not defined as a punishable offence by law or a legal provision based on law, or for which no penalty was envisaged. Criminal offences and criminal sanctions may only be determined by statutes".
>
> Art. 210: "International treaties shall be applied as of the day they enter into force unless otherwise specified by the instrument of ratification or by an agreement of the competent bodies. International treaties, which have been promulgated shall be directly applied by the courts".

Accordingly, the constitutional principle of legality presupposes that criminal offences and punishments must be provided for in specific domestic legislation. The principle of legality in criminal matters laid down by Art. 181 SFRY Constitution does constitute *lex specialis* in relation to Art. 210. As a result, international treaties, which have been ratified and promulgated, are a constituent part of the internal legal order; however, direct application of international treaty law is not allowed in domestic criminal proceedings unless the provisions of international law do correspond with the domestic criminal law in terms of their contents.

The 1992 FRY Constitution did not change the fundamental relationship between the principle of legality in criminal matters and the principle of direct applicability of international law in the internal legal order, as *lex specialis*

derogating provisions of a general nature:

> Art. 16: "[1] The Federal Republic of Yugoslavia shall fulfil in good faith the obligations contained in international treaties to which it is a contracting party. [2] International treaties which have been ratified and promulgated in conformity with the present Constitution and generally accepted rules of international law shall be a constituent part of the international legal order.
>
> Art. 27: "No one may be punished for an act which did not constitute a penal offence under law or by law at the time it was committed, nor may punishment be inflicted which was not envisaged for the offence in question. Criminal offences and criminal sanctions shall be determined by statute".

Notably, after the promulgation of the FRY 1992 Constitution, international customary law became a constituent part of the national legal system, in addition to ratified international treaties. This, however, could not have an impact on the prosecution of war crimes in UN-administered Kosovo since conduct set out in Article 142 CL FRY constitutes a war crime pursuant to that Article only if it at the same time constitutes a violation of international law effective at the relevant time. Hence, taking into account that the SFRY provisions are *prima facie* dispositive in criminal matters pursuant to Regulation No. 1999/24, and that subsequent provisions can be applied only if more favourable to the accused, in practice the conduct set out in Article 142 of the Criminal Law of FRY constitutes a war crime only if it constitutes a violation of the relevant ratified treaties. Any developments in international humanitarian customary law to support war crimes prosecutions instead of prosecution for ordinary crimes cannot be considered as applicable in the domestic courts of Kosovo in so far as the

implementation of Article 142 CL FRY is concerned; the guarantees contained in Art. 210 SFRY Constitution are to be applied, as they are more favourable to the accused.

Therefore, in the application of Article 142 CL FRY, it would not be legitimate to resort to international customary law in such an area as primarily defining prohibited conduct, defining the basis of individual criminal responsibility and punishment. International custom, as well as the jurisprudence of international tribunals, can, however, be used for the purpose of lending assistance to the interpretation of the concrete prohibitions contained in Article 142 CL FRY and relevant international treaties applicable in times of war, armed conflict or occupation. This was, for example, correctly done by the District Court in relation to the notion of "torture".[36] The Supreme Court adopted the same reasoning in *Prosecutor v. Vuckovic*.[37]

50. In *Prosecutor v. Kolasinac,* the District Court had adopted command responsibility as a mode of liability, recognised by Article 86 of API to the Geneva Conventions because the SFRY had ratified that protocol. The Supreme Court was unequivocal:

> "The Supreme Court reiterates that in the legal framework of Kosovo, the customary status of norms contained in the Geneva Conventions and their Additional Protocols are irrelevant in so far as they relate to the question of the applicability of these norms in the domestic legal system – their binding

[36] Supreme Court of Kosovo (UNMIK), Case no. AP-KZNO.80/2004, *Prosecutor v. Besovic*, 7 September 2004, pp. 18-19.
[37] Supreme Court of Kosovo (UNMIK), Case no. AP –Kz. No. 186/03, Prosecutor v. Vuckovic, 15 July 2004, pp. 23-24.

force results from treaties ratified by Yugoslavia."[38]

51. Following this string of judgments from the Supreme Court, the lower courts started to adopt the 'duality test'. For example, in *Prosecutor v Gjelosh Krasniqi*, the District Court of Peja found that, although 'illegal arrest' was specifically proscribed by Article 142 SFRY CC, no prohibition of that conduct could be found in the Geneva Conventions and in APII.[39] The judgment was then affirmed by the Supreme Court in 2011.[40] Other cases of courts applying the duality test are *Prosecutor v. Gani Gashi*;[41] *Prosecutor v. Cvetkovic*;[42] *Prosecutor v. E.K. and H.K*;[43] and *Prosecutor v. O.I, D.D. et al*.[44]

52. According to the settled case-law of the Supreme Court, it follows that (i) any successive law post-1998 could only be applied if favourable to the accused; and that (ii) in any case, the principle of legality in criminal matters operates as *lex specialis* with regard to the principle of direct applicability of international law in the internal legal order. A domestic statutory provision is required to create a criminal offence.

53. In light of the above, the Defence submits that customary international norms cannot be applied by the KSC to create individual criminal responsibility and punishment unless: a) the provisions of international law correspond to the domestic criminal law in terms of their contents, or b) as an exception if international law is more lenient to the accused than domestic criminal law.

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[38] Supreme Court of Kosovo (UNMIK), Case no. AP–KZ230/2003, Prosecutor v. Kolasinac, 5 August 2004, page 44.
[39] District Court of Peja, Prosecutor v. Gjelosh Krasniqi, P.nr. 67/09, 29.04.2009, page 93.
[40] Supreme Court (EULEX), Prosecutor v. Gj.K., case Ap-Kz no. 353/2009, 14 June 2011. (on the discussion of the duality test *re* pillaging *see*, pp 8-9).
[41] District Court of Pristina, Prosecutor v. Gani Gashi, P. No. P.23/08, 3 March 2009 page 20.
[42] District Court of Peja, Prosecutor v. Vukmir Cvetkovic, P.nr. 285/10, 9 November 2010 page 14.
[43] District Court of Prizren, Prosecutor v. E.K. and H.M., P. no. 134/11, 2 August 2011, page 35.
[44] Basic Court of Mitrovice, Prosecutor v. O.I., D.D., et al, Case no. P98/14, 30 March 2016, paras 271-281.

54. As a result, a review of the domestic law at the time of the incidents indicates that JCE, command responsibility, illegal or arbitrary arrest and detention and enforced disappearance that were charged in the Indictment on the basis of customary international law norms are *ultra vires* the jurisdiction of the KSC.

55. It follows that the Pre-Trial Judge was obliged to conduct an assessment of each individual charge to determine (a) which customary international law norms relied on as a basis for the Indictment had a corresponding norm in the Yugoslav domestic legal order at the time of the incidents alleged and (b) in case of conflict or divergence between the two, to determine which of the alternative legal frameworks was more lenient to the Accused, and apply that framework. The same principle would apply to sentencing. These are basic principles of international criminal law.

56. The Pre-Trial Judge should also have analysed the settled case-law of the Constitutional Court of Kosovo (and its application by the UNMIK and EULEX courts). A consideration of this case law would have demonstrated clearly the error of the SPO's approach to the Indictment, which seeks to rely on supposed norms of customary international law, as they are said to exist today, and to give these norms priority, to the detriment of the accused, over the criminal law that was applicable to their actions in 1998-99. In so doing, the SPO ignored the non-derogable provisions of Article 33(4) of the Kosovo Constitution and Article 7 of the ECHR; and he also ignored the manner in which the interactions of these legal norms had been definitively resolved by the Constitutional Court of Kosovo, whose decisions are binding on the Pre-Trial Judge.

B. The application of customary international law violates Article 33(4) of the Constitution

57. The Defence submits that even if the Pre-Trial Judge considers that a textual interpretation of Article 13 of the Law (Crimes against Humanity), Article 14 (War Crimes), and Article 16 (Modes of Liability) refer to the customary international law at the time, or that the Law itself is a transposition of international norms into the domestic legal system (thus satisfying the constitutional requirement that any criminal prohibition must be specified in a domestic statute), this result would still amount to a violation of the non-derogable Article 33(4) of the Constitution because these Articles attempt to substitute themselves for the law applicable at the relevant time (1976 Criminal Code of the SFRY). Since these provisions are unconstitutional in this respect, and since they violate the principle that protected human rights (including Article 33 of the Constitution and Article 7 of the ECHR) take precedence over any other law, it necessarily follows that these provisions are to be disapplied to the extent that they are inconsistent with the Constitution.

58. These provisions of the KSC Law purport to introduce new criminal provisions successive to the law applicable at the time, as well as the 2003 Provisional Criminal Code and the 2012 Criminal Code. In both cases, the principle of legality enshrined in the non-derogable Article 33(4) of the Constitution[45] and in Article 7 ECHR requires that the crimes alleged in the Indictment be judged solely on the basis of the law applicable at the time of the events, "unless the penalties in a subsequent applicable law are more favourable to the perpetrator."

[45] It should be noted that according to Article 56 of the Constitution, the rights and freedoms guaranteed by, inter alia, Article 33 of the Constitution, cannot be derogated under any circumstance. Article 56(2): Derogation of the fundamental rights and freedoms guaranteed by Articles 23, 24, 25, 27, 28, 29, 31, 33, 34, 37 and 38 of this Constitution shall not be permitted under any circumstances.

59. Therefore, the Defence submits that in order for the Law on the KSC to be applied in accordance with Article 33(4) of the Constitution, and Article 7 of the ECHR, the KSC must apply the substantive criminal law at the time of the events alleged in the Indictment.

C. Erroneous legal basis for justifying the primacy of customary international law

60. Even if the Pre-Trial Judge was right to accept that customary international law applies in the Kosovo domestic system (which would conflict with the clear provisions of the Constitution), the Defence submits that Article 12 (which gives primacy to the application of international law over Kosovo substantive criminal law), Article 15(1)(c) (that prohibits the application of lenient successive law), Article 16(1) (on the mode of liability), Article 44(1) (on the maximum term of life imprisonment) and Article 44(2)(c) (on sentencing) of the Law violate the non-derogable Article 33 of the Constitution and the Article 7 of the ECHR, and are accordingly unenforceable. The KSC is bound by Article 33 of the Constitution and Article 7 of the ECHR and accordingly lacks jurisdiction to try offences that would be incompatible with these provisions of the Constitution.

1. Article 12 of the Law

61. Article 12 of the Law provides that:

> The Specialist Chambers shall apply customary international law and the substantive criminal law of Kosovo ***insofar as it is in compliance with customary international law***, both as applicable at the time the crimes were committed, ***in accordance with Article 7(2)*** of the European Convention of Human Rights and Fundamental Freedoms and Article 15(2) of the International

Covenant on Civil and Political Rights, as incorporated and protected by Articles 19(2), 22(2), 22(3) and 33(1) of the Constitution.

62. Even if we were to accept the proposition that customary international law applies in the Kosovo domestic system, the wording '*insofar as it is in compliance with customary international law*' purports to prevent the KSC from applying Kosovo law where a conflict exists between customary international law and Kosovo law.

63. The question at this point is not whether customary international law should apply or not; rather, it is whether the domestic substantive criminal law, which in itself is implementing public international law rules deliberately incorporated into the legal framework, is barred from being applied as a primary source of law for a domestic court such as the KSC, the more so if the domestic law is more favourable to the accused.

64. As a result, the Defence submits that Article 12 of the Law is in breach of fundamental principles of constitutional and human rights law, which (i) forbid the retroactivity of more stringent laws, while at the same time (ii) require the application of more lenient laws (*favour rei*) both retroactively and successive to the commission of the offence.[46] In case of a conflict between customary international law and domestic law, the Pre-Trial Judge must conduct a case-by-case analysis to determine the more lenient norms to be applied to the Accused.

[46] *Scoppola v. Italy (No. 2)*, Grand Chamber, App no. 10249/03, paras 108-109; *Parmak and Bakır v. Turkey*, App. nos. 22429/07 and 25195/07, 3 March 2020, para. 64. (That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, ***the courts must apply the law whose provisions are most favourable to the defendant***).

2. Article 15(1)(c) of the Law

65. Article 15(1)(c) of the Law violates the Constitution and the ECHR in denying the temporal application of more lenient laws successive to the commission of the alleged crime. Article 15(1)(c) provides only for the application of more lenient laws prior to the alleged commission of the offence while forbidding the application of lenient laws successive to the alleged commission of the offence, and as a result, it violates Article 33(4) of the Constitution.

3. Article 44(1) and 44 (2) (c) of the Law

66. Article 44(1) and Article 44(2)(c) of the Law violate the Constitution and the ECHR in denying the temporal application of more lenient laws successive to the commission of the alleged crime.

67. Article 44(1)[47] of the Law (punishment up to life sentence) violates Article 33(4) of the Constitution insofar as it provides for a maximum sentence of life imprisonment. No court in Kosov has ever put in doubt the application of the *lex mitior* principle with respect to sentencing. The settled case law accepts that the principle must be applied in *concreto*, taking into considerations each case. Thus, in determining the relevant sentences, Kosovo courts have looked at the criminal code applicable in Kosovo, having regard both to the penalty applicable at the time of the events and to any subsequent changes that produce a result that, in substance, is more favourable to the accused.

68. Considering that the 1974 CC SFRY imposed a maximum of a death sentence or in alternative a sentence of 20 years imprisonment; and that the 1992 CC FRY

[47] 'The Specialist Chambers may impose upon a convicted person imprisonment up to a maximum term of life-long imprisonment'.

imposed a maximum of 15 years of imprisonment for crimes of a general nature; the settled case law correctly interpreted that Kosovo courts could apply a maximum sentence of 20 years imprisonment for the most serious crimes (since death penalty was abolished) and 15 years with regard to less serious crimes (not involving murder). Taking into consideration the application of the law at the time, in conjunction with more successive criminal laws favourable to the accused, the maximum sentence would be respectively 20 years (in regard to the most serious war crimes) and 5-15 years (concerning less serious crimes).

69. Article 44(2)(c) of the Law also violates Article 33(4) of the Constitution insofar as it limits the application of more lenient sentences found in domestic law to "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)."

70. As noted above, the Law justifies its 'primacy of customary international law' approach by reference to Article 7(2) of the ECHR, and implicitly, by reference to the supremacy of international law over domestic laws as referenced in Article 3(2)(d) of the Law and Article 19(2) of the Constitution. Both arguments are erroneous.

71. In and of its own, the application of Article 7(2) is nowadays obsolete.[48] As the ECtHR (and the Commission before it) has consistently held, the purpose of Article 7(2) of the ECHR was to specifically confirm, in 'the wholly exceptional circumstances at the end of the Second World War',[49] the legality of prosecutions with regard to crimes occurred during that war. It was a temporary measure, not

[48] ECHR Research Division, 'Article 7: The "quality of law" requirements and the principle of (non-)retrospectiveness of the criminal law under Article 7 of the Convention, page 37.
[49] *Touvier v. France, App no. 29420/95, 13 January 1997*, p. 161.

meant to provide for a general exception to the rule of non-retroactivity. This is why the ECtHR (and the Commission before it) has always held that the two paragraphs of Article 7 'constitute a united system and must be the subject of a concordant interpretation'.[50]

72. By contrast, reliance by the Law specifically on Article 7(2) of the ECHR both in its Articles 12 and 44(2)(c) acts as a means to exclude the application of the principle of *favour rei* as long as 'the alleged conduct had been criminal under the general principles of law recognised by civilised nations'. This attempt to create 'the primacy of customary international law' over domestic laws in effect seeks to prohibit the application of the *lex mitior* principle by virtue of the exception found in Article 7(2) of the ECHR. However, it is a clearly flawed interpretation of Article 7(2) of the ECHR.

73. The ECtHR has specifically rejected this position in *Maktouf and Damjanović v. Bosnia and Herzegovina*.[51] In that case, the applicant had been convicted for events that occurred in 1993 on the basis of the BiH Criminal Code of 2003. Since the wording of the 2003 war crime provision mirrored that of the previous Criminal Code of 1976, the issue was not whether the conduct constituted a criminal act at the time of the events but rather which Code was more lenient with regards to the minimum sentence. The Government claimed 'that Article 7(2) of the Convention provided an exception to the rule of non-retroactivity of crimes and punishments set out in Article 7(1). In other words, if an act was criminal at the time when it was committed both under "the general principles of law recognised by civilised nations" and under national law, then a penalty even heavier than that which was applicable under national law might be imposed'.[52]

[50] *Tess v. Latvia, App no. 34854/02, 12 December 2012.*
[51] *Maktouf and Damjanović v. Bosnia and Herzegovina*, Grand Chamber, Application nos. 2312/08 and 34179/08, 13 July 2013.
[52] Ibid, para. 62.

74. The Court rejected the Government's position. It held that:

> "Furthermore, the Court is unable to agree with the Government's argument that if an act was criminal under "the general principles of law recognised by civilised nations" within the meaning of Article 7 § 2 of the Convention at the time when it was committed, then the rule of non-retroactivity of crimes and punishments did not apply. This argument is inconsistent with the *travaux préparatoires,* which imply that Article 7 § 1 can be considered to contain the general rule of non-retroactivity and that Article 7 § 2 is only a contextual clarification of the liability limb of that rule, included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during that war (see Kononov, cited above, § 186). It is thus clear that the drafters of the Convention did not intend to allow for any general exception to the rule of non-retroactivity. Indeed, the Court has held in a number of cases that the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner."[53]

75. In view of the above, Articles 12, 15(1)(c), 44 (1) and 44(2)(c) of the Law violate a constitutional norm, which is the highest law of the land, and, as long as the Kosovo legal order is concerned, superior to international law.[54] Moreover, the ECHR, along with other international human rights conventions, are explicitly incorporated by the Constitution in its Article 22, thereby acquiring a special status, which gives it primacy over other international treaties or customary international law norms.

[53] Ibid, para. 72.
[54] Article 16 of the Constitution ('The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution').

76. The Defence submits that as a domestic court, the KSC should first apply domestic law and only then consider customary international law, to determine whether it would lead to a result that is more lenient to the accused.

77. This approach is consistent with the previous case-law of hybrid tribunals. In its 2011 Interlocutory Decision on the Applicable Law with regard to the applicable modes of liability, the Appeals Chamber of the STL held that the Judge must '(i) evaluate on a case-by-case basis whether there is any actual conflict between the application of Lebanese law and that of international criminal law; (ii) if there is no conflict, then Lebanese law should apply; and (iii) if there is a conflict, then the body of law that would lead to a result more favourable to the accused should apply'.[55]

D. The application of customary international law in other jurisdictions

78. As a general rule, public international law does not prescribe how states should interact with international law in their internal legal orders. This is because the two legal orders operate at different levels. As a result, the principle of legality may be different, whether one considers it from an international perspective or from a domestic one.

79. The non-retroactivity principle under international law requires at least that a) the act must have been criminal under international law at the time of the act; and b) that when multiple applicable laws are available, the law more lenient to the accused must be applied. For example, in *Šimšić v. Bosnia and Herzegovina*,[56] the applicant complained about his 2007 conviction for crimes against humanity with regard to acts that had taken place in 1992. The ECtHR did not consider this

[55] STL Decision on Jurisdiction, para. 211.
[56] ECtHR, *Šimšić v. Bosnia and Herzegovina*, Application no. 51552/10, Decision, 10 April 2012.

to be a violation of Article 7 ECHR since crimes against humanity already constituted a criminal offence under international law at that time. However, in *Maktouf and Damjanović v. Bosnia and Herzegovina*[57] (see the discussion above in para 56), the conduct (a war crime) was already a criminal offence under domestic law. The Court thus found a violation of Article 7 ECHR, based on the principle that retroactive application of criminal law is prohibited, except when in favour of the accused.

80. Except for these two conditions, "in general international law, there is no problem with a state limiting its authority to prosecute crime. There is no general obligation to exercise jurisdiction in every conceivable case".[58] The domestic principle of legality can thus be "more strict" since "neither state practice nor *opinio juris* prohibits states from applying constitutional or statutory implementations of principles of legality stronger than those applying in international law".[59]

81. An examination of states which follow the same approach as Kosovo demonstrates that the retroactive application of criminal law is prohibited, except when in favour of the accused.

a) Serbia

82. The Serbian legislation is essentially the same as Kosovo concerning the events that occurred in 1998-1999. Serbia has a very strict standard for the principle of legality, consistent with the case-law of the Supreme Court of Kosovo, which requires that criminal offences be first introduced by statute in the domestic legal

[57] *Maktouf and Damjanović v. Bosnia and Herzegovina*, Grand Chamber, Application nos. 2312/08 and 34179/08, 13 July 2013.
[58] Kenneth Gallant, *The Principle of Legality in International and Comparative Criminal Law*, (CUP 2010), page 398.
[59] Ibid.

order and that the maximum sentence is the one more lenient for the accused. This explains why Serbian courts have never charged any person with crimes against humanity for the conflict that occurred in 1998-1999. In addition, (and again consistent with the case-law of the Kosovo Supreme Court), Serbian courts can only impose a maximum sentence of twenty years of imprisonment for that period. The Serbian authorities provided this official explanation to the UN Committee on Enforced Disappearances:

> "In terms of trials for criminal offences committed during armed conflicts in the territory of the former Yugoslavia, the Court shall not apply the Criminal Code but the Criminal Law of the Federal Republic of Yugoslavia (FRY) as amended in 1996 because the maximum duration of imprisonment is 20 years. As the Law does not contain specific provisions referring to the criminal offence "Crime against humanity", so far, the Court has never had cases in which a criminal offence was qualified as a crime against humanity. Similarly, no crime against humanity and international law referred to in chapter XVI of the Criminal Law of the FRY stipulates enforced disappearance as an act of commission. Moreover, enforced disappearance is not mentioned in international treaties that were in force at the time of the commission of war crimes in the territory of the former Yugoslavia, whose application the Criminal Law of the FRY refers to.[60]

b) Croatia

83. Just like Kosovo and Serbia, Croatia did not recognise the concept of "command responsibility" as a separate mode of liability under its domestic law. However, in *Prosecutor v. Strunjas*,[61] the Croatian Supreme Court considered that certain

[60] Committee on Enforced Disappearances, Serbia Report, Doc no. CED/C/SRB/1, 29 January 2014, para. 14.
[61] RH v. Milan Strunjas. Supreme Court I-Kz 588/02-9, 17 October 2002.

provisions of the criminal code could be interpreted as a "failure" or "omission" of the superior to act, in conjunction with Article 86 and 87 of API. What needs to be stressed in this case is that the Croatian Supreme Court did not allow the broad concept of command responsibility as developed by IHL to be adopted as an independent source for modes of liability. Croatia did not give direct effect to customary international law, even with regard to cases referred by the ICTY. In its decision to refer the *Prosecutor v Ademi and Norac*[62] case to the Croatian authorities, the Referral Bench first stressed it was not up to the Referral Bench to decide the applicable law should the case be referred to Croatia.[63] Indeed, it was up to the Croatian authorities to decide the applicable law (which in that case was the national law). This is telling for the present case since it shows how the ICTY understood that domestic courts operate on the basis of their laws and cannot be "ordered" to apply international law. The Referral Bench thus only looked at whether Croatian courts had the required legal framework in place to prosecute the accused and, if so, whether appropriate punishment would be provided.

84. The Referral Bench considered in detail the Croatian legislation and noted that "there is a difference in terminology relating to command responsibility between the 1993 FCSC and the law applied in this Tribunal". The Bench accepted the possibility that, while the Croatian legislation would cover most of the field covered by Article 7(3) of the Statute, there was a possibility that

> "[W]here a commander did not know that an offence was, or was about to be, committed by persons under his command, but had "reason to know", inactivity by the commander may not entail criminal liability of the

[62] ICTY, Prosecutor v. Ademi and Norac, Case no. IT-04-78-PT, Decision For Referral To The Authorities Of The Republic Of Croatia Pursuant To Rule 11bis', 14 September 2005.
[63] Ibid, para. 32.

commander under the 1993 FCSC in every situation in which Article 7(3) would provide for criminal liability, because the intent requirements differ."[64]

85. Despite such differences, the Referral Bench concluded that referral should not be excluded, and it would be for the Croatian courts to determine the applicable law.[65] Eventually, the case was referred to Croatian courts, which proceeded to prosecute the case on the basis of domestic law, in the form of commission by omission.[66] As in *Strunjas*, the Croatian courts remained loyal to the principle of legality and limited themselves in the application of domestic laws while denying the direct application of customary international law as a primary source criminalising conduct or establishing modes of liability.

c) France

86. In the *Aussaresses*[67] case, the *Cour de Cassation* followed a strict application of the non-retroactivity rule. Mr Aussares was a retired French General, who in 2001 admitted having tortured and killed Algerian prisoners in Algeria between 1955 and 1957, while he was an intelligence officer in the service of the French army. The Court declined to prosecute Mr Aussaresses on the basis of crimes against humanity since the crime could not be applied before the date of entry into force of such crime in the domestic statutory regime, on 1 March 1994. The Court accepted that crimes against humanity were already an international crime under customary international law. However, that was not enough to trump the principle of legality. According to the French Court, customary international law

[64] Ibid, para. 41.
[65] Ibid, para. 46.
[66] Supreme Court of Croatia, Case no. I Kž 1008/08-13, 18 November 2009.
[67] Cour de Cassation, Chambre criminelle, du 17 juin 2003, 02-80.719.

'cannot make up for the absence of an incriminating text, under the qualification of crimes against humanity'.[68]

d) The Netherlands

87. The host state is one of the States most open to international law and which considers it often superior to domestic laws. Yet, to Dutch courts, this does not mean that the principle of legality can be derogated from by the retroactive application of an international norm. In the *Bouterse*[69] case, the Dutch Supreme Court stated that the defendant could not be prosecuted for the crime of torture because the alleged conduct was committed in 1982, while the Torture Convention entered into force in 1987 and the relevant Implementation Act in 1989. The Court also explained that, while treaties may prevail over domestic laws, unwritten international law, such as customary international law, did not have the same status and could not, therefore, be applied to the case at hand.[70]

e) Italy

88. Italy is another state which grappled in the same way as the Netherlands with regard to the crime of torture. While Italy had ratified the Torture Convention since 1989, its courts could not apply the crime of torture – to evident cases of torture[71] – until a criminal offence to that effect was introduced by way of domestic legislation in 2017.[72]

[68] Ibid. ('Qu'enfin, la coutume internationale ne saurait pallier l'absence de texte incriminant, sous la qualification de crimes contre l'humanité').
[69] LJN: AB1471, Hoge Raad , 00749/01 CW 2323.
[70] Ibid, paras. 4.4-4.6.
[71] See for example, ECHR, Cestaro v. Italy, Case no. 6884/11, 7 April 2015.
[72] Law No. 110, 12 July 2017.

f) The United Kingdom

89. In the well-known *Pinochet*[73] case, the UK House of Lords required that the national law implementing the Torture Convention be in effect at the time of the act alleged before extradition for torture could be allowed.

g) Australia

90. In the *Nulyarimma*[74] case, the Federal Court of Australia held that genocide as an international crime was not part of Australian law. While the court accepted the *ius cogens* status of genocide, it made sure to distinguish its application in the domestic legal order. According to Wilcox J.:

> "It is one thing to say Australia has an international legal obligation to prosecute or extradite a genocide suspect found within its territory, and that the Commonwealth Parliament may legislate to ensure that obligation is fulfilled; it is another thing to say that, without legislation to that effect, such a person may be put on trial for genocide before an Australian court. If this were the position, it would lead to the curious result that an international obligation incurred pursuant to customary law has greater domestic consequences than an obligation incurred, expressly and voluntarily, by Australia signing and ratifying an international convention.[75]

[73] Regina v. Bartle and the Commissioner of Police for the Metropolis and others EX Parte Pinochet.
[74] Australia, Federal Court, Nulyarimma v Thompson, [1999] FCA 11, 1 September 1999.
[75] Ibid, para. 20.

III. THE KSC HAS NO JURISDICTION OVER JCE

91. The Defence submits that the KSC must apply its own national laws as argued above, but that in the alternative, there is no legal basis for JCE in the KSC Law.

92. The Defence further submits that in any event, even if the drafters had specifically mentioned JCE, it would not have sufficed for a finding that such a mode of liability existed under customary international law at the time.

93. In addition, the Defence submits that the Pre-Trial Judge must conduct a case-by-case analysis to determine which mode of liability, between those found in customary international law, or those found in national law, is most beneficial to the accused.[76]

A. No legal basis for JCE in KSC's Legal Framework

94. The Defence submits that the Pre-Trial Judge made no effort in explaining his finding regarding the application of JCE as a form of "commission" under Article 16 of the Law but simply explained the elements and types of JCE, identified in *Tadic* as if commenting on the provisions of a statute.

95. However, JCE is not referred to anywhere in the Law as a mode of liability. If the domestic legislators intended to make use of such doctrine, they would certainly have specified it explicitly in the Law. Article 16 of the Law is taken verbatim from Article 7 of the ICTY Statute, and by 2015, the drafters of the KSC were aware of the case-law of the ICTY. The Defence submits that the fact that they did not specifically incorporate JCE established conclusively that it is outside the scope of the KSC Law. Article 33 of the Constitution and Article 7 of the ECHR

[76] STL Decision on Jurisdiction, para 211.

prohibit expansive interpretations of criminal statutes in order to introduce forms of criminal liability that are not expressly set out.

96. At the very least, the silence in the Law as to the modes of liability means that JCE (i) is not the predetermined mode of liability in international law; and (ii) that it is incumbent for the Pre-Trial Judge (and eventually a Panel) to enquire anew into the status of customary international law at the time of the events alleged in the Indictment, and make a finding whether JCE had reached the status of customary international law during 1998-1999, and if so, in what form and scope. It will be particularly difficult to do this since the recognition of a customary international rule requires virtual uniformity in State practice and (as can be seen from Article 145 of the SFRY Criminal Code – the *lex specialis* spelt out in the applicable domestic legislation – which expressly limits the liability of secondary parties to a much narrower category of cases (of specific intent) than the expansive doctrine of JCE that was erroneously stated by the ICTY in *Tadic*, and subsequent rulings.

97. The Defence submits that, in light of the above, there is a need for the Pre-Trial Judge to investigate whether JCE had a clear basis in customary international law from 1998 to 1999. The Pre-Trial Judge is encouraged in this respect to look into the case-law of the ICTY, ICTR, ICC, ECCC, STL and other domestic courts as persuasive authority, and he must make a determination of his own of the relevant *state practice* and *opinio juris*. Along with the writings of eminent jurists, the case-law of other international and domestic criminal courts is not a source of law *per se*, but simply a subsidiary means for the determination of the rules of law – a matter for independent determination by the KSC, looking at the matter

afresh, according to the settled legal principles that govern the recognition of a rule of customary international law.[77]

B. No sufficient basis to conclude that JCE III is part of customary international law

98. The Defence submits that, as the Pre-Trial Chamber of the ECCC concluded in Case 002,[78] there is no basis to conclude that JCE III forms part of customary international law. Instead of blindly adopting the findings of the *Tadic*[79] Appeals Chamber, the Pre-Trial Chamber of the ECCC proceeded with its own assessment of the post-WWII case-law, as well as the other authorities referred to by the *Tadic* Appeal Chamber.

99. While the Pre-Trial Chamber of the ECCC found sufficient authority to conclude that JCE I and JCE II were recognised in customary international law during 1975-1979,[80] with regard to JCE III, it found that the authorities relied upon in *Tadic* did not provide "sufficient evidence of consistent state practice or *opinio juris* at the time relevant" to Case 002.[81]

100. The Pre-Trial Chamber started its analysis with the often-cited *Borkum Island*[82] and *Essen Lynching*[83] cases. The facts of those cases are well known and will not be repeated here. What must be stressed is that the *Tadic* Appeals Chamber made such an important finding in the absence of reasoned judgments in those cases.

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[77] Statute of the ICJ, Article 38(1)(d).
[78] ECCC, Co-Prosecutors v NUON Chea et al., 002/19-09-2007-ECCC/OCIJ, D97/15/9, Decision on the Appeals of the Co-Investigative Judges' on Joint Criminal Enterprise (JCE), 20 May 2010
[79] ICTY, Prosecutor v Tadic, Case no IT-94-1-A, Appeals Chamber, Judgement, paras 195-227.
[80] Ibid, para. 69.
[81] Ibid, para. 77.
[82] United States v. Haesiker, Case No. 12-489-1, 16 October 1947.
[83] UN War Crimes Commission, Law Reports of Trials of War Criminals, Case No 8, Trial of Erich Heyer and Six Others, British Military Court of the Trial of War Criminals, Essen, 18-19 and 21-22 December 1945, Vol. 1 (1949), page 88.

In both cases, the *Tadic* Appeals Chamber "assumed" that the Court had agreed with the prosecution and proceeded to draw an inference which was not the only possible one based on the available evidence.[84]

101. Likewise, the Pre-Trial Chamber of the ECCC declined to give any weight to the post-WWII Italian cases since all those cases were dealt with on the basis of national criminal law, as opposed to international law.[85]

102. Finally, the Pre-Trial Chamber of the ECCC considered whether JCE III had a basis under the general principles of law, i.e. whether JCE III was rooted in the legislation and case-law of a large majority of States. The Pre-Trial Chamber noted that even in the *Tadic* case, the Court had conceded that making reference to a number of national legislative definitions would not be enough to claim that JCE III was a general principle of law recognised by civilised nations. In order to make that claim, most, if not all, countries must have adopted the same notion of JCE. As a result, the Pre-Trial Chamber considered it unnecessary to further assess whether a majority of countries had accepted JCE III by the time of its decision since, even if that was the case, JCE III would not have been foreseeable to the accused during 1975-1979, and was therefore in breach of the principle of *nullum crimen nulla poena sine lege*.[86]

103. Even though the ICTY Appeals Chamber in *Dordevic* misinterpreted this last finding of the ECCC Pre-Trial Chamber and claimed that the "ECCC did not determine whether or not the third category of joint criminal enterprise liability was a part of customary international law",[87] it failed to take into account the

[84] Ibid, para. 79-81.
[85] Ibid, para. 82.
[86] Ibid, para. 87.
[87] ICTY, Prosecutor v Dordevic, Case no IT-05-87/1-A, Appeals Chamber, Judgement, 27 January 2014, para. 50.

confirmation of this finding by the ECCC Trial Chamber the following year (2011). The Trial Chamber of the ECCC not only confirmed the finding of the Pre-Trial Chamber, but it also found that the additional cases relied upon by the STL in its 2011 Interlocutory Decision on the Applicable Law "did not support a conclusion as to the existence of JCE III in general international law between 1975 and 1979".[88] In this ruling, the Trial Chamber conducted its own analysis of several national legislations on whether JCE III was accepted as a general principle of law and found "considerable divergence of approach between various national jurisdictions".[89]

104. In 2016, the ECCC Supreme Court gave the final confirmation on JCE III:

> "[T]he Supreme Court notes with approval the Pre-Trial Chamber Decision on JCE (D97/15/9), in which he Pre-Trial Chamber analysed in detail the jurisprudence of the ad hoc tribunals regarding the notion of JCE III and concluded that the decisions upon which the ICTY Appeals Chamber relied in *Tadić* when finding that JCE III was part of customary international law did not constitute a "sufficiently firm basis" for such a finding."[90]

105. The Defence submits that the position of the ECCC with regards to JCE III is correct and ought to be followed by the KSC. Considering that no relevant state practice or *opinio juris* has emerged since 1979 to back any claim regarding the customary international law status of the JCE III doctrine, the Defence submits

[88] ECCC, Co-Prosecutors v. Nuon Chea et al, Case No. 002/19-09-2007/ECCCITC, Trial Chamber, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, para. 32.
[89] ECCC, Co-Prosecutors v. Nuon Chea et al, Case No. 002/19-09-2007/ECCCITC, Trial Chamber, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, para. 37.
[90] ECCC, Co-Prosecutors v. Nuon Chea et al, Case No. 002/19-09-2007/ECCC/SC, Appeal Judgment, 23 November 2016, para. 791.

that, at the time of the events alleged in the Indictment, there was no sufficient basis to conclude that JCE III was part of customary international law.

C. JCE III does not attach to specific intent crimes

106. JCE III is a form of aiding and abetting. Applied to facts, it is difficult to differentiate JCE III from aiding and abetting, considering that according to ICTY case-law, JCE III liability can be attached by simply lending non-criminal, non-substantial, and non-significant contribution to the common plan. In theory, the difference would lie in the subjective mental element (or state of knowledge) of the perpetrator (knowledge v. *dolus eventualis*). However, the reasoning is circular since, according to the Pre-Trial Judge in the present case, an inference of *mens rea* is, itself, capable of being drawn from "knowledge of how the JCE is implemented"; "awareness of the criminal background"; "knowledge of personal motives of JCE members"; or "knowledge of the activities of the perpetrators".[91]

107. Except for the ICTY, no other international criminal court has endorsed the view that the application of JCE III could go as far as to attach to crimes that require specific intent, such as genocide or persecution as a crime against humanity. To do otherwise would mean to accept that an accused would commit a crime that requires *dolus specialis* by simply proving *dolus eventualis* which is not only illogical but also without basis in law. In other words, if a person accused on the basis of JCE III did not have to share the intent of the physical perpetrator, how could he be convicted for specifically intending to reach the result in question?

108. It is notable that this distinction brings the argument back to the applicable provisions of Article 145 of the SFRY Criminal Code, which require the

[91] Confirmation Decision, para. 115.

secondary party to share the *dolus specialis* of the perpetrator. Indeed, it requires that the secondary part organised (or participated in a group that was organised) "*for the purpose*" of committing the criminal acts alleged.

109. The Appeals Chamber of the STL understood how far JCE III had gone in breaching the principle of legality and held that "the better approach under international criminal law is not to allow convictions under JCE III for special intent crimes like terrorism".[92] It then eventually decided to consider such cases as a form of aiding and abetting instead of a form of commission.[93]

110. Further, the SCSL Trial Chamber in the *Charles Taylor* case fully endorsed the departure from the ICTY case-law, and held that the accused "may not be held liable under the third form of JCE for specific intent crimes such as terrorism".[94]

111. Unfortunately, when the development in the law of the international criminal tribunals was raised before the ICTY in *Dordevic*, the ICTY Appeals Chamber adopted the same loosely argued reasoning as in *Tadic*, namely that (i) it was not required to demonstrate that JCE III allows for every possible combination between crime and modes of liability[95]; that (ii) the *Essen Lynching* and *Borkum Island* cases were simply "illustrative" of the existence of JCE III under customary international law[96]; (iii) that the jurisprudence of the STL is not binding on the ICTY; and that (iv) several accused had already been convicted of specific intent

[92] STL Decision on Jurisdiction, paras 248-249.; see also, Antonio Cassese, 'The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise', 5 International Journal of Criminal Justice (2007), 109-133.
[93] Ibid, para. 249.
[94] SCSL, Prosecutor v Charles Taylor, Case no. SCSL-03-01-T, Trial Chamber II, Judgement, 18 May 2012, para. 468.
[95] ICTY, Prosecutor v Dordevic, Case no. IT-05-87/1-A, Appeals Chamber, Judgment, para. 81. The same line of reasoning was repeated in the Karadzic Appeals Chamber judgment, with the addition of the discussion on the *Jogee* case, see *Prosecutor v. Karadžić*, MICT-13-55-A, Appeals Judgement, 29 March 2019, paras. 422-37.
[96] Ibid, para. 82.

crimes pursuant to JCE III, adding that such precedents should "not to be lightly dismissed by the Appeals Chamber simply because another tribunal has decided the matter differently".[97]

112. The last of these arguments is a pure policy position, based on considerations of administrative convenience, internal consistency of ICTY jurisprudence, and finality. It was adopted to prevent the re-litigation of previous cases where defendants had been convicted on the basis of JCE III for special intent crimes.

113. When the *Stakic* Trial Chamber, composed of civil law judges, attempted to depart from the doctrine of the JCE toward a more objective theory based on co-perpetration, the Appeals Chamber quickly intervened and stated, without any analysis whatsoever, that co-perpetration did not "have support in customary international law or in the settled jurisprudence of this Tribunal".[98] As in *Dordevic*, the Appeals Chamber was clear that its decision was based on considerations of policy and administrative convenience:

> "The introduction of new modes of liability into the jurisprudence of the Tribunal may generate uncertainty, if not confusion, in the determination of the law by parties to cases before the Tribunal, as well as in the application of the law by Trial Chambers. To avoid such uncertainty and ensure respect for the values of consistency and coherence in the application of the law, the Appeals Chamber must intervene to assess whether the mode of liability applied by the Trial Chamber is consistent with the jurisprudence of this Tribunal."[99]

[97] Ibid, para. 83.
[98] ICTY, Prosecutor v Stakic, Case no IT-97-24-A, Appeals Chamber, Judgement, 22 March 2006, para. 62.
[99] Ibid, para. 59.

114. The KSC is required to consider this issue afresh, in light of the different approaches taken to this question by the various international and hybrid criminal tribunals. Based on the jurisprudence of other international criminal courts and tribunals, it is for the KSC to decide (with sufficient reasoning to explain its decision) which aspects of the ICTY jurisprudence fully reflect customary international law. The considerations of finality and administrative policy, which animated the approach of the ICTY Appeals Chamber, in declining to reconsider its previous caselaw for fear of generating a flood of appeals, has no application to the KSC. The issue must be decided by the KSC for itself, and it is respectfully submitted that on this issue, the approach of the ECCC, the STL and the STSL accurately reflect the correct legal position. There are no countervailing considerations of consistency or finality which would justify adhering to such an obviously flawed interpretation of the principles of secondary participation under international criminal law.

D. JCE III's existence is subject to evolution and to the principle of *lex mitior*

115. Even if JCE III could be said to have existed in customary international law during the time of the events alleged in the Indictment, the Defence submits that such a finding would be insufficient in itself to ground KSC jurisdiction. The KSC would also need to consider subsequent legal developments which produce a result that is substantively more favourable to the accused. If such developments are identified, then the more lenient regime must be applied.

116. Customary international law is not static. For example, it is undisputed that the death penalty was accepted in customary international law and adopted by the courts in the post-WWII cases, which allegedly form the basis of the *Tadic* ruling on JCE. If customary law was treated as settled in the post-WWII cases, one would reach the absurd and illogical conclusion that, as long as the death penalty

was prescribed under customary international law, then the KSC could apply it retroactively even if it has been abolished under domestic law. This is exactly the same logic used by Article 44 of the Law in respect to the life sentence under international law, despite the fact that under Kosovo law, the maximum sentence would have been 20 years of imprisonment.

117. The 1998 Rome Statute is a very strong indicator that whatever the status of JCE in customary international law, an overwhelming majority number of States concurred in rejecting the "subjective" basis of JCE as a mode of liability, in favour of a more objective-based concept of co-perpetration. The ICC judges have been explicit in embracing a theory of co-perpetration while rejecting the use of the JCE.[100]

118. A further reason why the legal framework of the ICC needs to be given more weight than the ICTY relates to the fact that the KSC framework concerning subject-matter jurisdiction is based verbatim on the ICC Statute Articles 7 and 8, respectively, on crimes against humanity and war crimes. The same ought to hold good for the theory of co-perpetration adopted under the ICC Statute and legal practice and reflected in the Kosovo Courts.

119. Finally, the very concept of JCE is based on the evolving law of secondary participation in common law jurisdictions (and mostly on English law). The English law of joint enterprise applicable at the time of the *Tadic* and *Djordevic* judgments of the ICTY crumbled when the UK Supreme Court reversed its previous case-law in *Jogee*[101] and held that foresight could not be considered as discharging the required *mens rea* for joint enterprise, and could only be relevant

[100] *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, 29 January 2007, paras. 329-38. Prosecutor v. Ngudjolo, ICC-01/04-02/12-4, Judgment pursuant to Article 74 of the Statute – Concurring Opinion of Judge Christine Van den Wyngaert, 20 December 2012, paras. 15-16.
[101] R v Jogee [2016] UKSC 8.

to the extent that it was evidence from which it might be possible to draw an inference of active *intent to assist or encourage*, which is the proper mental element for establishing secondary liability.

IV. THE KSC HAS NO JURISDICTION OVER COMMAND RESPONSIBILITY

120. The Defence submits that the KSC must apply its own national laws. However, even if customary law had a direct effect in establishing a criminal offence (which it does not), the Pre-Trial Judge would still be obliged to consider whether international law or domestic law produces a result substantially more favourable to the accused and to apply the more lenient regime.

121. The domestic law applicable during the armed conflict with Serbian forces did not recognise command responsibility as a mode of liability similar to that encompassed by Articles 86 and 87 of Additional Protocol I to the Geneva Conventions. Instead, Article 30 of the SFRY Criminal Code provides that:

> (1) A criminal act may be committed by a positive act or by an omission.
>
> (2) A criminal act is committed by omission if the offender abstained from performing an act which he was obligated to perform.

122. Thus, the question arises whether commission by omission can be attached to war crimes under Article 142 of the SFRY Criminal Code. The answer is that it cannot apply to offences specified in Article 142. As the Supreme Court clearly explained in *Kolasinac*:

> "A superior's failure to report or discipline subordinates for committing war crimes may constitute an omission that is criminalised, but that crime of non-reporting or non-disciplining does not under domestic criminal

> law result in the superior's being guilty of those war crimes. A *mens rea* in case of negligence ("should have known") cannot result in criminal liability under Article 142 because Article 11 only allows negligence to be the basis for criminal liability if the crime explicitly allows liability due to negligence, and Article 142 does not refer to negligence."[102]

123. The Court also drew attention to the issue of the "causality" of the omission, by which the offence should be a direct consequence of the omission. The domestic standard laid down by Articles 142 and 145 of the SFRY Criminal Code establishes a significantly higher threshold for criminal liability than the ICTY case-law, considering that, for article 142 offences, the evidence "must prove that the failure of the superior to act resulted in the occurrence of the criminal act of war crimes as a consequence of that omission".[103]

124. Even if we accept the customary international law status of command responsibility, the Pre-Trial Judge must still conduct an analysis of (i) the scope of command responsibility in customary international law; and whether any evolution of the doctrine has occurred; and (ii) whether the customary international law concept of command responsibility is more beneficial to the accused compared to the domestic law applicable at the time of the offences, and must apply the more lenient regime of criminal liability.

125. With regard to the scope of application of the doctrine of command responsibility, the Pre-Trial Judge has selectively identified certain elements from the case law of the international criminal tribunals which are beneficial to

[102] Supreme Court of Kosovo (UNMIK), Case no. AP–KZ230/2003, Prosecutor v. Kolasinac, 5 August 2004, page 33.
[103] Ibid, page 33.

the SPO, and operate to the detriment of the accused. For example, the Pre-Trial Judge refers in his Decision on the Confirmation of the Indictment only to the ICTY case-law (which has been consistently criticised in legal doctrine)[104] while completely failing to refer to either the Rome Statute (considering that Articles 13 and 14 are taken verbatim from it) or its case-law, especially with regard to the latest appeals judgment in the *Bemba* case.[105]

126. As noted in the discussion concerning JCE, the difference between the case-law developed by the ICTY and the codification reflected in the Rome Statute is a strong indicator that state practice and *opinio juris* may have diverged (provided the interpretation of customary international law by the ICTY case-law is correct) towards a concept which is more in line with the principle of legality.

127. The Pre-Trial Judge refers to the text of Article 16 of the Law in claiming that "there is no requirement of causality between the superior's failure to prevent and the occurrence of the crime".[106] Yet, a textual reading of Article 28 of the Rome Statute makes it clear that the crime must have been committed "*as a result o*f his or her failure to exercise control," which obviously includes a causality requirement. Moreover, as already pointed out, the domestic law of Kosovo is unambiguous on this point: *Kolasinac*, Constitutional Court of Kosovo, 5 August 2004.[107]

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[104] Darryl Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution', 13 Melbourne Journal of International Law (2012) 1; Kai Ambos, 'Joint Criminal Enterprise and Command Responsibility' 5 Journal of International Criminal Justice, (2007) 159.
[105] Bemba Appeal Judgment, Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison, ICC-01/05-01/08-3636-Anx2, para. 33.
[106] Decision on the Confirmation of the Indictment, para. 118.
[107] Supreme Court of Kosovo (UNMIK), Case no. AP–KZ230/2003, Prosecutor v. Kolasinac, 5 August 2004,

128. The Pre-Trial Judge also failed to engage with other important elements of the crime, such as "knowledge". In their separate opinion to the *Bemba* Appeal Judgment, Judges Van den Wyngaert and Morrison correctly point that "knowing" and "having reason to know" are completely different notions. Military commanders, especially those high in command, cannot possibly act as a "policeman" and control the behaviour of thousands of troops under their command. This is especially true in cases such as the present where (a) the military formation lacks the conventional command structure of a professional army, and consists instead of a volunteer force, made up of civilians participating in hostilities from time to time, and subject to a horizontal, rather than a vertical, command structure; and (b) the supposed "high commander" operates from a remote location.

129. Both the Rome Statute and the ICTY case-law emphasise that the relationship of superior-subordinate is premised on a relationship of "effective control". As the ICC pointed out in *Bemba*, it is "impossible for senior commanders to control hundreds or thousands of individual troops effectively".[108] Thus command responsibility would comport with the principle of culpability only if "commanders [especially unit commanders] can only be held accountable for the crimes of those they are commanding directly and whose conduct they can actually monitor."[109]

130. The Defence, therefore, submits that it was incumbent on the Pre-Trial Judge to conduct a detailed consideration of these issues before he could properly reach a conclusion as to which body of law (domestic or international) is applicable to this indictment. In so doing, he was bound to act in accordance with the principle of *nullum crimen nulla poena sine lege*, as reflected in Article 33 of the Constitution

[108] Bemba Appeal Judgment, Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison, ICC-01/05-01/08-3636-Anx2, para. 33.
[109] Ibid, para. 33.

and Article 7 of the ECHR as interpreted by the ECtHR. He was also obliged to go on to consider which body of law produced a result substantively more favourable to the accused and to apply the more lenient regime.

V. THE KSC HAS NO JURISDICTION OVER ILLEGAL OR ARBITRARY ARREST AND DETENTION

A. Illegal or arbitrary arrest or detention violates the principle of legality

131. The Defence submits that the SPO charges for the war crime of arbitrary detention under Article 14(1)(c) have no basis in the Law. Nor was arbitrary detention in the context of a non-international armed conflict a serious violation of Common Article 3 to the 1949 Geneva Conventions prohibited under customary international humanitarian law (CIHL) at the period of the Indictment. As a result, the KSC has no jurisdiction over such crimes.

132. First, Article 14(1)(c) does not explicitly list arbitrary detention as a war crime in non-international armed conflict (NIAC). Second, unlike the system of grave breaches to the Geneva Conventions, Common Article 3 to the 1949 Geneva Conventions does not specifically criminalise conduct during a NIAC but aims at ensuring protection for different categories of persons. Finally, customary international humanitarian law, at the time of the events alleged in the Indictment, did not prohibit arbitrary detention in a NIAC.

133. Despite the aspirational and unduly expansive position taken by the ICRC in its 2005 Customary International Humanitarian Law Study (ICRC Study), [110] consultations conducted by the ICRC with States 10 years later show that there is no agreement among States concerning what amounts to arbitrary detention

[110] ICRC Study, Rule 99, Vol. I (Rules), p. 344.

in the context of a NIAC, except perhaps that the conditions of detention should be as humane as possible.[111]

134. An expansion of criminal charges by analogy without a clear and strong basis in law, domestic or international, as done by the Pre-Trial Judge, is a clear violation of the principle of legality, enshrined in Article 33(1) of the Kosovo Constitution and Article 7 of the ECHR as interpreted by the ECtHR.

B. Article 14(1)(c) does not explicitly list arbitrary detention as a war crime

135. While this provision does not explicitly list arbitrary detention as a war crime in non-international armed conflict [112] according to the Pre-Trial Judge, the provision does not limit the crimes falling under KSC jurisdiction to those expressly enumerated therein.

136. This finding goes against the very language of Article 14(1)(c), which does not allow such expansion, indicating an exhaustive list by stating "including *any* of the following acts". If the legislator wanted the list of crimes under Article 14(1)(c) to be non-exhaustive, it would have included the same language as in Article 14(1)(b), where it provides "including, *but not limited to*, any of the following acts". Extending the list of crimes without an explicit legal basis in the Law is a clear violation of the principle of legality, as enshrined in Article 33(1) of the Kosovo Constitution.

137. Moreover, such expansive interpretation of a criminal statute is incompatible with the principle of legality, enshrined in Article 33(1) of the Kosovo

[111] ICRC, Detention in non-international armed conflict - Meeting of all States, 27-29 April 2015, 30 April 2015
[112] Decision on the confirmation of the charges, para. 33.

Constitution and Article 7 of the ECHR as interpreted by the ECtHR, and is therefore unconstitutional and of no legal effect.

C. Arbitrary detention as a violation of Common Article 3 to the 1949 Geneva Conventions

138. The Pre-Trial Judge has found that in order to exercise jurisdiction over a war crime that is not listed in Article 14(1)(c)(i)-(iv) of the Law, such crime must: (i) constitute a serious violation of Common Article 3; and (ii) be prohibited by customary international law at the time of its commission, in conformity with Articles 3(2)(d) and 12 of the Law. The Pre-Trial Judge relies heavily on Rule 99 of the ICRC Customary International Humanitarian Law Study (2005 ICRC Study) to substantiate the charge under count three.

139. First, and generally, it is commonly accepted that deprivation of liberty is an inevitable and lawful occurrence in armed conflict, including in non-international armed conflicts.[113] *Opinio juris* strongly suggests that "there is nothing that prevents the arbitrary detention of civilians altogether"[114].

140. Even if arbitrary detention were a crime justiciable by the KSC, which it is not, there is no general agreement on what is to be considered arbitrary. Even the ICRC Study acknowledges that detention of civilians will not be arbitrary if it is based on security imperatives: "international humanitarian law and human rights law aim to prevent arbitrary detention by specifying the grounds for detention based on needs, *in particular, security needs*".[115] As the consultation

[113] Knut Dormann, Detention in Non-International Armed Conflicts, in International Law Studies (US Naval College), Vol. 88, p. 349. See also Robert Barnsby, Yes We Can: The Authority to Detain as Customary International Law' (2009) 202 Military Law Review, p. 69; Ryan Goodman, 'The Detention of Civilians in Armed Conflict' (2009) 103 American Journal of International Law, pp. 55–56.
[114] Laura Lopez, 'Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts', (1994) 69 NYU Law Review, p. 935.
[115] ICRC Study, Vol. I, p. 344.

process conducted by the ICRC with States in the period 2012-2015 shows, there are no common legal standards when it comes to regulating detention in non-international armed conflicts.[116]

141. As it stands, IHL does not impose specific obligations on non-State armed groups concerning detention in a NIAC beyond the general requirement to ensure "humane treatment" of a person once detained. What amounts to humane treatment in the context of a NIAC is context-specific and depends on the resources available to the armed group. However, the fact of depriving a person of their liberty in the context of a NIAC is not, *per se*, a criminal offence under IHL.

142. This does not, of course, exclude individual criminal liability for the perpetrator of acts amounting to murder, torture or ill-treatment of a person detained. But the KSC has no jurisdiction whatsoever to try any accused for the mere act of detaining a civilian on allegedly arbitrary grounds. Accordingly, such conduct cannot form the basis of an allegation of a JCE or command responsibility.

D. Methodology and legal interpretation adopted by the Pre-Trial Judge

143. As the US has pointed out in an official reply to the 2005 ICRC Study, while appreciating its importance, the State practice cited is insufficiently dense to meet the "extensive and virtually uniform" standard generally required to demonstrate the existence of a customary rule.[117] Moreover, the ICRC Study places too much emphasis on written materials, such as military manuals and

[116] ICRC, Detention in non-international armed conflict - Meeting of all States, 27-29 April 2015, 30 April 2015

[117] See John B. Bellinger, III and William J. Haynes II*, A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law, International Review of the Red Cross Vol. 89 No. 866, pp. 443- 471, at 444-445.

other guidelines published by States, as opposed to actual operational practice by States during armed conflict.[118] Accordingly, it cannot be regarded as a source of law in itself, and the Pre-Trial Judge's unquestioning reliance on its aspirational statements of principle, in the absence of other compelling sources of international law, was misplaced and amounted to an error of law.

144. Contrary to the finding of the Pre-Trial Judge,[119] there is no extensive State practice concerning the arbitrary deprivation of liberty in NIACs. His statement to this effect is entirely unsupported by authority and is legally incorrect. Although the ICRC Study blithely asserted that more than 70 States criminalised unlawful deprivation of liberty during armed conflict,[120] a closer inspection of the references provided in the ICRC study reveals that they do not support the proposition set out in the ICRC commentary.[121]

145. More importantly, the "extensive and virtually uniform" standard that is required to demonstrate the existence of a customary rule is clearly not met when more than two-thirds of the UN Member States did not include such a prohibition in 2005 when the ICRC Study was completed. Among the approximately 60 States that had some national legislation touching on the matter, it is entirely unclear from the information provided by the ICRC whether the criminalisation covers NIACs as well as IACs. Moreover, many of the criminal codes were adopted after 1999. It follows that the Pre-Trial Judge's reliance on the ICRC commentary as the basis for introducing a new crime not

[118] John B. Bellinger, III and William J. Haynes II*, A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law, International Review of the Red Cross Vol. 89 No. 866, p. 445.
[119] Decision on the confirmation of the charges, para. 35 and footnotes 42 and 43.
[120] ICRC Study, Vol. I, p. 347, with references to paras. 2554–2625 of Vol II on Practice.
[121] There are three references to Australia (2556-2558), two to Canada (2568-2569), two to Kenya (2585-2586), two to New Zealand (2596-2597), two to Nicaragua (2598-2599), two to Paraguay (2604-2605), two to Spain (2612-2613), and two to the UK (2619-2620). While concerning national legislation for 8 States, these are counted as 17 references.

authorised by Article 14(1)(c)(i)-(iv) of the Law was a serious error to the detriment of the accused.

146. The correct approach would have been to begin with a consideration of the applicable provisions of the SFRY Criminal Code, which provided at Article 142 that "unlawful bringing in concentration camps and other illegal arrests and detention" is a war crime. However, this is a clear reference to such criminalisation as part of the grave breaches of the Geneva Conventions system, which do not encompass detention of civilians during a NIAC, such as those that occurred within the SFRY.[122] In this context, it is noteworthy that the Office of the Prosecution (OTP) at the ICTY did not charge any of the accused with arbitrary detention in the cases *Prosecutor v. Limaj et al.* and the *Prosecutor v. Haradinaj et al.*, despite that the fact that these cases involved six KLA commanders and soldiers allegedly responsible for the detention and ill-treatment of civilians. Some of these incidents are relied upon by the SPO in the present Indictment.

147. To summarise, many of the national references in the ICRC Study point to the prohibition on unlawful confinement as part of the grave breaches system of the Geneva Conventions,[123] which is applicable to international armed conflicts but not to NIAC's. Accordingly, they provide no support whatsoever for the proposition that customary international humanitarian law recognised arbitrary detention as a war crime in a NIAC. Moreover, many of the criminal codes referred to are dated later than 1999, and there is no basis for inferring that the criminalisation of arbitrary deprivation of liberty contained therein is valid for

[122] Article 142(1), as cited in the ICRC Study, Vol II, p. 2337, para. 2624 is taken from the amended code of the FRY, not the applicable criminal code of the SFRY that was in force throughout the territory at the time of the 1998-99 conflict in Kosovo.
[123] GC IV, Article 147.

both categories of armed conflict. In any event, the States that had enacted such legislation were a relative minority of UN Member States, such that the sources cited cannot conceivably justify the conclusion that arbitrary detention in a NIAC is a rule of customary international law, much less that it was a rule of customary international law in 1998-99. Indeed, if it had been, the ICRC commentary would have been in a position to cite the sources of law establishing this rule as "extensive and virtually uniform", which it plainly does not.

148. More generally, the ICRC commentary itself is regarded with scepticism by many States, precisely because, in important respects, it amounts to a statement of aspirations rather than law. These serious flaws call into question the ICRC Study's conclusions on Rule 99 being applicable to NIACs, and in any event, undermine the claim that this rule was adequately established at the period of the Indictment as customary international law applicable to NIACs.

149. The Pre-Trial Judge was, therefore, wrong to rely on the ICRC commentary as a short-cut to establishing the existence of a customary law rule. Had he conducted this exercise himself, as the law requires, he would have reviewed international State practice and *opinion juris* in order to determine whether the interpretation he adopted had received international acceptance that was "extensive and virtually uniform" in 1998-99. Had he done this, he would have been bound to conclude that no such rule existed at the time of the events with which this Indictment is concerned.

150. Based on the foregoing, the finding of the Pre-Trial Judge that arbitrary detention constitutes a serious violation of Common Article 3 and was prohibited by customary international law at the time of the commission of the crimes alleged in the Indictment is not supported by the Law, nor by a sufficiently critical examination of the other legal sources cited. For these reasons, the Defence

submits that the KSC may not exercise jurisdiction over this war crime under Article 14(1)(c) in combination with Article 12 of the Law, either as a substantive offence or as the basis for a charge based on an alleged JCE or command responsibility.

VI. THE KSC HAS NO JURISDICTION OVER ENFORCED DISAPPEARANCE

151. In his Decision on the Confirmation of the Indictment, the Pre-Trial Judge states in footnote 114 that 'The crime of enforced disappearance as a crime against humanity has been recognised in various legal instruments'. However, the majority of the instruments he cites have been enacted following the events which are alleged in the Indictment.

152. Indeed, only two relevant "international" legal instruments existed before 1998-1999, namely: (i) The 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance; and (ii) The 1994 Inter-American Convention on the Forced Disappearance of Persons. While the first instrument is a non-binding resolution of the UN General Assembly, the second is of a regional nature, thus utterly unsuitable to be considered as evidence of a general customary norm criminalising enforced disappearance.

153. No international criminal court has yet prosecuted "enforced disappearance" as a crime against humanity. All the cases cited by the Pre-Trial Judge refer to human rights proceedings which are substantially different from international criminal proceedings since the defendant in those cases is the respondent state and not an individual. Likewise, references to ECCC or ICTY case-law are similarly misplaced since neither of those Statutes considers "enforced disappearance" as a separate crime, but only as potentially a residual offence under "other inhumane acts". In addition, the Special Court for Sierra Leone

(crimes that occurred since 1996), which was set up in 2002, did not include "enforced disappearance" in its Statute, thus indicating that the drafters did not consider enforced disappearance to be a separate crime against humanity.

154. Enforced disappearance was first incorporated in a binding international instrument in 1998, in the Rome Statute. However, the Rome Statute did not incorporate an already existing customary international law rule on enforced disappearances. Indeed, the *travaux preparatoires* show considerable debate from delegates on whether enforced disappearances should have been included as a separate crime under crimes against humanity.

155. The ILC 1996 Draft Code of Crimes against the Peace and Security of Mankind explained in unequivocal terms that:

> "[F]orced disappearance was *not included as a crime against humanity* in the previous instruments. Although this type of criminal conduct is a relatively recent phenomenon, the Code proposes its inclusion as a crime against humanity because of its extreme cruelty and gravity".

156. The view that enforced disappearances did not have customary international law status in 1998 is also supported by *opinio juris*. Antonio Cassese, former President of the ICTY, explicitly stated that:

> "It may be noted that with respect to this crime, the ICC Statute has not codified existing customary law but contributed to the crystallisation of a nascent rule, evolved primarily out of treaty law."[124]

[124] Antonio Cassese, International Criminal Law, p. 80, 2003 Edition – the same wording is found in the 2013 edition.

157. As recently as 2005, according to the Council of Europe Parliamentary Assembly, "few states had made all acts of enforced disappearance criminal offences under domestic law"[125] , and no universally recognised definition of enforced disappearance existed.[126]

158. It follows that neither the "accessibility" nor the "foreseeability" requirements of the principle of legality could have been met when the events that are the subject of the Indictment occurred. Even with the benefit of legal advice, the accused could not have possibly known that the offence existed or what the definition of the crime was. That is because, on a proper construction of the international law sources, no such offence existed at the time of the 1998-99 conflict.

159. The Pre-Trial Judge's finding that "under customary law as applicable at the relevant time, there is no need to demonstrate or even presume the special intention of the perpetrator to remove the victim from the protection of the law" is also flawed. Indeed, the authorities cited by the Pre-Trial Judge in support of this conclusion, all refer to (i) documents successive to the "relevant time"which (ii) complain that the ICC standard is too high,[127] or (iii) recommend how a "future" definition of enforced disappearance should be introduced or constructed.[128]

160. As for the 2010 UN Working Group on Enforced of Involuntary Disappearances Report Addendum, it simply explains the *modus operandi* of the Working Group, which does not decide on criminal liability nor state responsibility. It

[125] CoE Parliamentary Assembly, Report on Enforced Disappearance, Doc. 10679, para. 42.
[126]Ibid, para. 45.
[127] Commission on Human Rights, E/CN.4/2002/71, Report submitted by Mr. Manfred Nowak, 8 January 2002, para. 69.
[128] Council of Europe, Parliamentary Assembly, Resolution 1463 (2005), 3 October 2005, para.10.1.2.

recommended the future lowering of the standard of proof "with the aim of construing the definition of the offence in a way that is most conducive to the protection from enforced disappearance".[129] Again, this amounts to a recognition that the supposed offence was not, at the time of the events covered by the Indictment, an applicable principle of customary international law. And even if it was, Article 4 of the SFRY constitution requires the application of the regime most favourable to the accused, and Article 142 of the SFRY Criminal Code did not include enforced disappearance as a justiciable criminal offence.

161. In any event, it is unclear which of the document cited by the Pre-Trial Judge backs the statement that enforced disappearance (i) existed under customary international law at the time of the events that are the subject of the Indictment; and (ii) that the cited *mens rea* related to international criminal law cases, as opposed to proceedings before human right bodies. The sources cited simply do not support the Pre-Trial Judge's conclusions.

162. Finally, it should be noted that the first time the UN Working Group on Enforced or Involuntary Disappearances claimed customary international law status of the definition of enforced disappearance was 21 December 2009.[130] This is fully consistent with the Defence submission that it did not form part of customary international law at the time of the events that are the subject of the Indictment.

[129] 2010 WGEID Report Addendum, para. 31.
[130] General comment 8 Enforced disappearances as a crime against humanity, 21 December 2009 (14. The Working Group is thus convinced that the definition given by Article 7(1) of the Statute of the International Criminal Court now reflects customary international law and can thus be used to interpret and apply the provisions of the Declaration).

VIII. CONCLUSION

163. These reasons, considered separately or cumulatively, the Defence requests the Pre-Trial Judge to:

a) Review his findings in the Decision on the Confirmation of Indictment (the Decision);

b) Dismiss the charges based exclusively on customary international law instead of the ratified international treaties incorporated in the Yugoslav domestic system at the time of the incidents alleged in the Indictment in line with Articles 142 and 145 of the 1974 SFRY Criminal Code for lack of jurisdiction, including those relating to:

i) Joint Criminal Enterprise;
ii) command responsibility;
iii) unlawful detention as a war crime; and
iv) enforced disappearance as a crime against humanity; and

c) Order the SPO to amend the Indictment accordingly.

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