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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Veseli Defence Reply to

Prosecution Response to the Preliminary Motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC (Customary International Law)

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I. INTRODUCTION.

1. The SPO has responded to the Defence motion challenging jurisdiction by arguing that the domestic legislation creating the KSC gives direct effect to customary international law (CIL) for events alleged during the 1998-2000 non-international armed conflict (NIAC) in Kosovo without addressing the fundamental constitutional incompatibilities raised by the Defence and, for this reason, should be set aside. The Defence also incorporates and adopts its submission in paragraphs 2 to 32 of its reply to the SPO response on Joint Criminal Enterprise.[1]

2. The Defence's arguments stem from the inevitable fact that Mr Veseli is being charged, before a purely domestic court, in violation of the non-retroactivity principle (a non-derogable constitutional right) with crimes that did not exist under the domestic law in Kosovo in 1998-1999.

3. In 1998-1999, Kosovo was part of Serbia. The highest Court in the successor State, the Constitutional Court of Serbia (CCS), the authority for applying the Constitution and Criminal Code of the SFRY, the applicable law at the time, has recently given definitive legal guidance concerning the scope of the criminal law applicable to alleged war crimes in Kosovo at the time of the conflict and the Constitutional prohibition on holding an accused person guilty of a crime under international law that did not form part of the domestic law applicable to Kosovo at the time of the conflict. The legal situation considered by the Serbian Constitutional Court is indistinguishable from the legal situation facing the KSC in the present challenge. In a judgment delivered at the end of last year,[2] the CCS ruled that for crimes connected to the conflict in Kosovo:

[1] Veseli Defence Reply to the Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE)
[2] Constitutional Court of Serbia, Judgment no. Uz-11470/2017, 10 January 2020, published in the Official Gazette of RS, no. 127/2020.

a. The only source of criminal liability to try an accused was the domestic criminal law applicable to Kosovo in 1998-1999. The domestic (Serbian) criminal law applicable to Kosovo at the time did not include either (a) crimes against humanity or (b) command responsibility.

b. The criminal court lacked the necessary jurisdiction to try an accused Serbian official charged, based on command responsibility for crimes against humanity.

c. Since the applicable law and constitutional guarantees, in that case, are the same as applies to the facts of the present case, the decision of the CCS must form a (if not *the*) central part of the KSC's analysis of this challenge.

d. If this binding decision of the CCS is a correct application of the law (and there is no right of appeal against the ruling), then it follows *a fortiori* that the KSC has no jurisdiction to entertain charges against Mr Veseli alleging command responsibility and the commission of crimes against humanity for events in 1998-1999.

e. There obviously cannot be a different legal regime applicable to Serbian and Albanian protagonists alleged to have committed crimes during the very same conflict. However, the implications go very much further than that.

f. The principle laid down by the Serbian Criminal Court applies equally to certain substantive offences alleged (e.g. arbitrary detention), which was not a criminal offence under domestic law at the time of the conflict.

g. The only forms of inchoate or secondary participation recognized in the applicable domestic law at the time were incitements to commit crimes, aiding

and abetting, and attempt to commit a crime in the case an offence that had begun but was not completed.

4. It is, with respect, inconceivable that the KSC, a municipal court of Kosovo, should approach the retrospective reliance on international law as a source of criminal liability less favourably towards those accused of conflict-related crimes in Kosovo than the Serbian Constitutional Court has done in respect of crimes committed in the same conflict at the same time and in the same place.

5. Assuming the decision of the CCS judgment sets out the applicable law, then it necessarily follows that the KSC has jurisdiction to try Mr Veseli *only* in respect of any substantive offences alleged against him that constituted criminal acts under domestic law at the time they were committed. It also follows that the KSC's jurisdiction is limited to specific allegations that Mr Veseli either committed a specified crime personally or otherwise aided and abetted the particular crime, according to the law on aiding and abetting as it was appliable to Kosovo at the time of the events.

6. Modes of participation are also subject to the prohibition on retrospectivity since they have the effect of criminalising conduct that would not have previously been a crime in national law. As the Serbian Supreme Court rightly recognised in relation to command responsibility, the retrospective introduction of a mode of liability would be unconstitutional because of the principle of legality.

7. The CCS clearly did not consider that Article 7(2) of the ECHR amounted to a permanent derogation from Article 7(1) so that a person who is accused in a domestic criminal prosecution of war crimes in the Kosovo conflict could be tried based on international criminal liability in apparent breach of Article 7(1). The Court could not have ruled as it did if this was the case. As Mr Veseli has previously pointed out, Article 7(2) was no more than a transitional provision. The SPO's reliance on Article 7(2) as being a permanent derogation from Article 7(1) in connection with crimes

under international law is absurd. There is *no such thing* as a permanent derogation under the ECHR. All derogations must be strictly justified under Article 15 and formally notified to the Council of Europe, be proportionate and time-limited. However, certain rights including the prohibition on the retrospective application of the criminal law in Article 7(1) can never be derogated from, not even *during* an ongoing war or public emergency. It is absurd for the SPO to suggest that Article 7(2) amounts to an unending derogation from the core right guaranteed by Article 7(1).

8. The CCS applied the principle of the FRY constitution, applicable to Kosovo at the time, that expressly prohibited reliance on international law as a source of criminal liability unless a particular offence or mode of liability was directly incorporated into domestic law at the time, through the adoption by Parliament of domestic criminal legislation. The same is true of the law applicable in Kosovo at the time.

9. The Defence submits that:

a) The judgement no.Uz-11470/2017 is binding

10. This decision on the state of the criminal and constitutional law applicable in Kosovo in 1998-1999 is final and binding. The Judge is required to follow the judgment of a competent Constitutional Court on the interpretation and application of the criminal and constitutional law of the SFRY because the CCS has the ultimate (unappealable) jurisdiction to determine the meaning of the law applicable to Kosovo at the time since it was at that time a part of the SFRY. Serbia has been recognised by the ICJ as the successor State of the SFRY as regards its international obligations. It follows that since Kosovo was part of the SFRY at the time, the Constitutional Court with primary jurisdiction to rule on the applicable domestic law at the time of the conflict is the Constitutional Court of Serbia. There would need to be overwhelmingly

cogent reasons for the KSC to adopt a different approach, less favourable to the (Albanian) accused.

11. This CCS judgement is also binding as regards its finding that the SFRY Constitution prohibited reliance on international law as the sole basis for establishing criminal responsibility. At the time of the incidents, JCE, command responsibility and crimes against humanity were not part of the domestic law of the SFRY.

b) Any departure from the judgement no.Uz-11470/2017 would be a violation of the principles of legality, taken alone and in conjunction with the guarantee of equality before the law

12. Since Article 7 and Article 14 of the ECHR both form part of the Constitution of Kosovo by direct incorporation, it follows that an unjustifiable difference of treatment in the delivery of the right guaranteed by Article 7(1) as between two domestic criminal jurisdictions that emerged from the same disintegrating State would be a violation of the ECHR and thus of the Constitution of Kosovo.

13. Therefore, if the KSC departs from the clear approach of the CCS so as to treat Albanian members of the KLA less favorably (in terms of the retrospective application of international criminal law) than Serbian officials, who were their protagonists, have been treated in a different successor State, this would violate the Kosovo Constitution directly. This is not merely to draw a comparison between the way two different States operate their criminal law in respect of people accused of crimes committed during the same armed conflict. The comparison here is between the way two successor States have assumed (or declined) jurisdiction to try offences that occurred during a conflict that took place on the territory of the former federal State (the SFRY) before those States came into existence.

14. The difference in treatment that needs to be justified derives from the fact that all protagonists were subject to the same domestic law at the time the offences were alleged to have occurred. The nexus of the two comparator groups could not be closer. There would need to be an overwhelmingly compelling justification for a difference in treatment that had the effect of treating one group as immune from prosecution for offences that did not form part of domestic law at the time, whilst at the same time allowing international criminal law to be applied retrospectively to the other group.

15. Such a distinction would violate the basic constitutional guarantees of equality before the law (Article 24 of the Kosovo Constitution) as well as anti-discrimination guarantees (Article 14 of the ECHR in conjunction with Articles 5, 6 and 7).

c. CIL does not have direct effect and is not applicable for criminalising conduct

16. The SPO made the following arguments in their response which the Defence summarizes and replies to below:

a) The SPO contends that the KSC's jurisdiction is constitutional because of the clear intent of the drafters of the law to confer jurisdiction over crimes against humanity and war crimes.[3] The Defence submits that the intent of the drafters is not a substitute for providing a sound constitutional basis, which cannot be accomplished here. The Law, including international law, is subject to the primacy of the Constitution. 'International obligations' and the necessity[4] to prosecute allegations contained in the *Marty Report* cannot violate non-derogable and constitutionally protected human rights. The Defence's constitutional

[3] Response, paras 2-4.
[4] On "necessity" see the Reply to the SPO Response on the Defence Preliminary Motion challenging the jurisdiction of the KSC on the basis of violations of the Constitution.

arguments are laid out clearly in its Challenge to Jurisdiction[5] and are left largely unaddressed by the SPO. Moreover, according to the expert opinion of the main drafters of the Constitution, Professor Hajredin Kuçi (*President of the Constitutional Commission*) and Professor Arsim Bajrami (*Lead drafter of the relevant provisions concerning the relationship between domestic law and international, as well as the provisions relating to the fundamental rights and liberties*) ("Kuçi & Bajrami Expert Opinion"), a) international treaties and CIL do not have direct effect in criminal matters; and b) in any case Article 33(4) of the Constitution operates as *lex specialis* 'to any legal norm that determines the legal punishment for a certain criminal conduct'.[6]

b) The SPO misinterprets the domestic case-law it cites and ignores decisions from higher domestic courts which directly refute their position. These cases do not advance the SPO's argument.

c) The SPO next cites the *Simsic* and *Kononov* decisions to contend that Article 7(2) *permits* prosecutions under CIL even when the acts were not criminalized by the domestic law at the relevant time provided the crimes have a "clear basis in CIL" and were accessible and foreseeable to the accused. The cases cited by the SPO do not support their argument but rather give the freedom to states to choose whether to give direct effect to international law or not in their domestic Constitution and legislations. The choice has already been explicitly made by the Kosovo Constitution, and the cases the SPO relies upon do not allow a court to disregard a basic principle of legality.

d) The SPO turns to cases from the Extraordinary Chambers of the Court of Cambodia (ECCC) to support the position that CIL has direct effect on

[6] Annex 1, Expert Opinion of Prof. Dr. Hajredin Kuçi and Prof. Dr. Arsim Bajrami. pp. 2-4.

domestic legislation. In relying on ECCC case law, the SPO ignores the fact that unlike the Kosovar Constitution, the Cambodian Constitution does not explicitly prohibit the direct effect of CIL. The Kosovar Constitution explicitly prohibits the incorporation of CIL in the absence of corresponding domestic legislation. This point of distinction is never addressed by the SPO but is highly relevant.

e) Instead, the SPO argues that the ECCC case law is "highly relevant" to the KSC because the court was established through similar mechanisms as the KSC. The SPO's argument here again fails because there is critical distinction between the KSC and the ECCC - the ECCC is set up as a court *separate* from the Cambodian court structure rather than subordinate to it. As such, where the Cambodian court is free to operate outside the Cambodian Constitution and look solely to the treaty and the Law that created the court to establish its jurisdiction, the KSC is a different court operating within a different framework altogether from the ECCC. It is a purely domestic court that is bound by Kosovo's Constitution.

f) The SPO contends that CIL can be retroactively applicable where it is foreseeable to the accused. The argument and the case law is not relevant to a domestic court such as the KSC where the Constitution explicitly excludes CIL and is the primary source of law.

i) The Constitution and the Constitutional Court did not grant the KSC jurisdiction to directly apply CIL[7]

17. The Defence submits the challenge to the jurisdiction of the KSC revolves around constitutional issues and not the intent of the drafters. The saving clause

[7] Response, Section A.

contained in Article 33(1) of the Kosovo Constitution mirrors Article 7(2) of the ECHR which, according to settled practice of the ECtHR,[8] is now obsolete and cannot constitute an exception to the principle of non-retroactivity.[9] This is further confirmed by the SPO's own cited case-law.[10]

ii) No Kosovo domestic court has ever entered convictions for international crimes not already criminalised under domestic law[11]

18. The SPO argues that the courts of Kosovo have, on three occasions, entered war crimes convictions when such crimes were recognized in CIL at the time they were committed.[12] However, in these instances, the SPO relies on overturned law and, for this reason alone, its arguments should be set aside.

19. In fact, no Kosovo court has ever applied CIL as a direct source of law to criminalise conduct, let alone done so on the basis of Article 33(1) of the Constitution. As previously explained by the Defence, no Kosovar, Croatian, or Serbian court has ever charged or tried any person with crimes against humanity for events that occurred during the '90s,[13] notwithstanding the fact that all these countries have successively introduced such crimes into their domestic criminal law.

20. The three cases cited by the SPO fail to support the arguments advanced by the SPO. The justification, in all of them, for the retroactive application of successive domestic laws was founded on the now discredited assumption that Article 7(2) of the

[8] Consistent with Article 53 of the Constitution, the case-law of the ECtHR is binding upon Kosovo courts.
[9] Motion, para. 71, See also, *Maktouf and Damjanović v. Bosnia and Herzegovina*, para. 72.
[10] Prosecutor v. J.D. et al., PAKR Nr.455/15, Judgement, 15 September 2016, page 48 (last paragraph); Prosecutor v. X.K., Case No.648/16, Judgement, 22 June 2017, para. 2.1.15-2.1.16; Prosecutor v. A.D. et al., P.58/14, Judgement, 27 May 2015, paras 208-210.
[11] Response, para. 5. & 41.
[12] Response, paras 5 &41.
[13] Motion, paras 82-85.

ECHR represents an exception to the principle of legality.[14] Moreover, these three cases constitute judgments of lower courts, each overruled by the Supreme Court.

21. The authoritative case-law on the issue was decided by Kosovo's Supreme Court in *Besovic, Vuckovic* and *Kolasinac*, and no successive Supreme Court has since, repudiated those findings. To the contrary, the three cases cited by the Prosecution explicitly confirm the argument of the Defence, namely that international crimes can only be tried through domestic legislation.

22. In *Prosecutor v. A.D. et al*, the Court specifically stated that "[i]nternational humanitarian law does not provide for sanctions for the acts that this law prohibits and recommends that they be penalized by domestic legislation. The action committed by the accused consisted of elements of the prohibited serious violation of international humanitarian law that had to be classified by the application of domestic law."[15]

23. In both *Prosecutor v. XK* and in *Prosecutor v. A.D. et al*, the issue at stake concerned the legal characterisation of an *existing* offence (war crimes) in domestic legislation, not the direct application of CIL.[16] The SPO's quote 'that the war crimes at issue were introduced to 'Kosovo's domestic legal order only after the war in Kosovo was over' relates to the modification of the terminology of the existing offence of war crimes by the 2003 Provisional Criminal Code and the 2012 Criminal Code.[17]

[14] Prosecutor v. J.D. et al., PAKR Nr.455/15, Judgement, 15 September 2016, page 48 (last paragraph); Prosecutor v. X.K., Case No.648/16, Judgement, 22 June 2017, para. 2.1.15-2.1.16; Prosecutor v. A.D. et al., P.58/14, Judgement, 27 May 2015, paras 208-210.
[15] Prosecutor v. A.D. et al., P.58/14, Judgement, 27 May 2015 (Drenica 1), paras 204.
[16] Response, para. 5.
[17] Prosecutor v. X.K., Case No.648/16, Judgment, 22 June 2017, page 12. (2. – 2.1.1).

24. In any event, in *Prosecutor v. J.D. et al*, the Court of Appeals specifically rejected identical reasoning provided by the same judge rapporteur in *Prosecutor v. XK* and in *Prosecutor v. A.D. et al*.[18] The reference to Article 33(1) of the Constitution was made to justify the application of a more lenient successive law.[19] With respect to the actual attempt by the Prosecution to directly introduce JCE liability, the Panel rejected it unequivocally, by holding that JCE 'is not one of the modes of criminal liability set in any of the applicable codes' and that '[e]ven if it were applicable, foreseen in the law, in Kosovo […] it could never be called upon only now as its requirements are less explicit or demanding than the ones necessary for the classic co-perpetration, this to say that it would be to the detriment of the defendants'.[20]

iii) References to Simsic and Kononov are inaccurate[21]

25. The SPO relies on *Simsic* and *Konovoc* to contend that the "ECHR, has confirmed that prosecutions and convictions for crimes under CIL – even when not criminalized under domestic law at the relevant time – do not per se violate the principle of legality."[22] As discussed above, Article 7(2) of the ECHR may not be interpreted, however, so as to permit an exception to the principle of legality when both domestic law and international law apply.[23]

iv) The comparison with the ECCC Chambers is misplaced and irrelevant[24]

[18] Prosecutor v. J.D. et al., PAKR Nr.455/15, Judgement, 15 September 2016, page 46 ('The Panel contests the Trial Panel's conclusion presented in paragraphs 252 –256, that individual civilians were not covered by protection of Article 142 of the CCSFR') (referring to the trial judgment in Prosecutor v. JD. et al, Case no P938/13, 27 May 2015)
[19] Prosecutor v. J.D. et al., PAKR Nr.455/15, Judgement, 15 September 2016, page 48 (Thus, this Panel finds the application of the recent CCRK as the most favorable').
[20] Prosecutor v. J.D. et al., PAKR Nr.455/15, Judgement, 15 September 2016, page 45.
[21] Response, para. 3; 5.
[22] Response, para. 5
[23] Supra, para. 20; F00223, paras 26,
[24] Response, paras 6-7.

26. As distinguished from the Kosovo Constitution, the principle of legality does not have constitutional status in the Constitution of Cambodia. The Cambodian Constitutional Council specifically noted that the principle of non-retroactivity is not mentioned in the Cambodian Constitution and, accordingly, does not have constitutional status.[25] Kosovo, unlike Cambodia, decided not to allow such direct effect, with good reason and in compliance with its obligations under international human rights law and due process requirements. This is further confirmed by the Kuçi & Bajrami Expert Opinion.[26]

27. Furthermore, contrary to the SPO's submission,[27] the ECCC was not established pursuant to domestic legislation, but rather "by a joint agreement between the Royal Government of Cambodia and the United Nations".[28] The ECCC therefore functions 'separately from the Cambodian court structure',[29] in stark contrast with the KSC.[30] While the Judge will need to decide the present challenge by looking at the principle of legality enshrined in the Kosovar Constitution,[31] the ECCC, being a treaty-based court, assessed the principle of legality by looking explicitly at its founding Agreement and the corresponding ECCC law only.[32] Furthermore, the Agreement establishing the ECCC, specifically provides for the direct application of both treaty law and CIL.[33] Finally, the Cambodian Constitution, unlike the Kosovo Constitution, does not prohibit the establishment of special or extraordinary courts.[34]

[25] Constitutional Council, Decision No. 040/002/2001, 12 February 2001., page 2.
[26] Annex 1, pp. 3-4.
[27] Response, para. 5.
[28] ECCC, Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, para. 213.
[29] Ibid, para. 131.
[30] Law on the KSC, Articles 1(2); 3(1).
[31] Law on the KSC, Article 3(2)(a).
[32] ECCC, Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, para. 222; 225.
[33] Agreement between the United Nations and Cambodia, 6 June 2003. The Law on the ECCC simply incorporated said agreement, in accordance with Article 47 bis new of the Law.
[34] See F00224.

***v) Lex mitior* is relevant whether or not international law is applicable**[35]

28. The SPO's position concerning *lex mitior* is only relevant if the Pre-Trial Judge should find that the Constitution permits the direct effect of CIL, a position which Defence rejects.

29. The SPO submits that since the Law and CIL are one and the same, the principle of *lex mitior* is not, as a result, engaged by the Law. This position seems to ignore completely Article 33 of the Constitution which directly requires the KSC to engage in an assessment of which law is more favourable to the accused.

30. The claim that the present Indictment charges only on the basis of CIL is irrelevant because the Law provides, at the very least, for concurrent jurisdiction of international law and domestic law. The plain terms of Article 12 and 15(1) clearly indicate the concurrent application by the Law of both CIL, as well as the relevant Kosovo domestic criminal law provisions in respect to the offences that allegedly occurred at the time specified in the Indictment.

31. The SPO's reliance on ICTY case-law is inappropriate. The ICTY was bound only by its Statute and international law. Unlike the KSC, the ICTY was not bound by domestic law.[36] The Defence refers the Judge to the plain text of Article 12 of the Law, Article 3(2)(a) of the Law and most importantly at the Constitution and Article 16 thereof.

32. The principle of *lex mitior*, it should be stressed, is not confined to the comparison of penalties.[37] *Damjanovic v Bosnia* the principle is applicable both to

[35] Response, paras 26-35..
[36] F00224, para. 17.
[37] Response, paras 32-35.

substantive crimes *and* applicable modes of liability[38] and is binding on the KSC.[39] This case effectively invalidates all the instances where the Law seeks to afford primacy to CIL vis-à-vis Kosovo domestic law in spite of the plain language of the Kosovar Constitution.[40]

33. Ignoring *Damjanovic,* however, the SPO relies on *Simsic* to argue that *lex mitior* is not applicable.[41] *Simsic*, however, was convicted for crimes against humanity where no corresponding domestic criminal law existed at the time. Accordingly, the principle of *lex mitior* could not apply.

34. Even if the SPO's interpretation of Article 33(1) of the Constitution were upheld, this exception relates only to the introduction of new domestic legislation which was not foreseen as a crime at the time of the events, and not to the non-applicability of a more lenient provision when more laws apply.[42] The Defence already explained in its Motion that the exception provided by in Article 33(1) is nothing more than the corresponding equivalent to Article 7(2) ECHR.

35. Finally, the SPO misinterprets ECtHR precedent.[43] The ECtHR[44] has consistently held that the temporal application of Article 7(2) was limited to post-WWII cases and that 'the drafters of the Convention did not intend to allow for any general exception to the rule of non-retroactivity'.[45]

[38] Constitutional Court of Bosnia & Herzegovina, Case no AP-556/12, (Sefik Alic), 4 July 2014, para. 52 ('The Constitutional Court further notes that the Court of BiH […] while assessing which law was more favorable to the appellant, has also considered [in addition to sentencing] the definition of the concept of co-perpetration' (emphasis added))
[39] Art 53 Constitution.
[40] Article 12; 15(1); 15(1)(c) and 44(2)(c) of the Law.
[41] Response, para. 32.

[43] Response, para.34.
[44] Response, para. 5
[45] *Damjanovic,* para.72.

A. Command Responsibility

36. The Defence clearly set out its arguments[46] that the KSC must apply its own national laws with respect to command responsibility. However, in the event that CIL does have direct effect (which is disputed) then the KSC is, notwithstanding, obliged to apply the *lex mitior* principle in deciding which law to apply. Furthermore, before reaching a conclusion on the applicable law, the Judge must, as a logical step, review the concept of command responsibility in both domestic and CIL and investigate possible successive developments in both laws.[47]

37. The Judge did not analyse the CIL status of command responsibility. As opposed to his analysis of the allegations of 'enforced disappearance'[48] and 'arbitrary detention',[49] the Judge simply listed the elements of the command responsibility as if they were codified in a statute.[50]

38. Considering that the domestic principle of legality is stricter than the international principle of legality cited by the SPO,[51] it is incumbent upon the Judge to ascertain the 'modern' status of command responsibility in CIL and to compare it to any domestic law on command responsibility, thereby determining which is more beneficial to the accused.

39. The ICTY authorities cited by the SPO must be treated with caution. These decisions were rendered following a change in the ICTY procedure narrowing the scope of preliminary motions on jurisdictional matters.[52] The KSC, as an embryonic

[46] Motion, para. 120; 124.
[47] *Scoppola v. Italy (No. 2)*, Grand Chamber, App no. 10249/03, paras 108-109.
[48] Confirmation Decision, footnotes 114-128.
[49] Confirmation Decision, paras 33-38.
[50] Confirmation Decision, paras 118-122.
[51] Response, paras 43.
[52] See JCE Reply, paras 49-50.

special domestic court, is dealing with jurisdictional challenges for the first time. To dismiss the Defence's arguments on jurisdiction as mere academic niceties deprives them of the critical thought that they deserve.

40. Even looking to the ICTY case-law, the *Hadzihasanovic* Decision on Jurisdiction is the relevant authority.[53] In that early decision, the Trial Chamber analyzed in great detail not only the status of command responsibility in NIAC, but also issues which the SPO calls as 'contours of the mode of liability'.[54] Finally, in assessing the customary status of command responsibility in NIACs, the Trial Chamber did not simply investigate whether it had a basis in CIL, but examined the developments of the doctrine of command responsibility over time including, prior to the creation of the ICTY, during the creation of the ICTY and its case-law, and successive developments.[55]

B. Illegal/Arbitrary Arrest and Detention

i) Arbitrary detention is not included in Article 14(1)(c) of the Law

41. The SPO's short response[56] that Article 14(1)(c) provides a non-exhaustive list of prohibited acts has no basis and is contradicted by the plain reading of the text.[57] The SPO provides no explanation why the paragraphs preceding and following Article 14(1)(c) suggest that the list is not exhaustive by employing the qualifier "including, but not limited to".[58] The Albanian version of the law (the only

[53] Prosecutor v. Hadzihasanovic, Case no IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002.
[54] Response, para, 45.
[55] Prosecutor v. Hadzihasanovic, Case no IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002., pages 23-67.
[56] Response para 51.
[57] Motion, paras 136-137.
[58] *Chapeau* of Article 14(1)(b) and Article 14(1)(d) of the Law.

authoritative one) is correctly translated and reads, '**by** including the following acts'.[59] Such language supports the Defence argument that the list of prohibited conduct is, indeed, exhaustive. This is further confirmed by the commentary to Article 8(2)(c) of the Rome Statute which inspired the drafting of Article 14(1)(c) of the Law.[60]

42. While failing to provide any reason to look past the plain reading of Article 14(1)(c) of the Law, the SPO bases its argument on an interpretation of Common Article 3. However, the authorities cited by the SPO do not support its submission.[61] The *Alekskovski* Judgment does not deal with the 'legality of the detention', but rather the 'inhumane conditions' caused by the detention. Contrary to the submission of the SPO, the Chamber in *Alekskovski* explicitly recognised the importance of contextual circumstances. Ultimately, the Chamber found that despite the fact that the detention conditions were poor, the accused was not guilty of the charge of inhuman treatment, considering the context of the conflict.[62]

43. With respect to General Comment no. 35 (Article 9 ICCPR)[63], the Defence notes that: a) the SPO misquotes[64] the Human Rights Committee, which clearly stated that Article 9 is, in fact, derogable;[65] b) it relates to a different body of law;[66] c) it does not

[59] Albanian version: ("duke [*by*] i përfshirë [*including*] veprat [*acts*] në vijim [*the following*]"). Notably, the English version of the Law contains another flagrant mistake in translation by entirely adding the word "any" (which does not exist in the Albanian version) prior to "following".
[60] Triffterer, Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Ed, (Hart, 2016), p. 569 ("The fact that the chapeau of article 8 para. 2 (c) of the Statute uses the term 'namely' indicates that the list of crimes in (i)–(iv) is exhaustive. Otherwise the use of the words 'in particular' would have been appropriate" […])
[61] Response, para. 49.
[62] Reference judgment. Note that the Chamber was assessing the conduct of regular armies, (held to higher standard) rather than non-state actors as the case of the KLA during 1998-1999.
[63] Response, para. 49.
[64] Response, para. 49 ("The fundamental guarantee against arbitrary detention is non-derogable")
[65] Human Rights Committee, CCPR General Comment No. 35, CCPR/C/GC/35, 16 December 2014, para. 65. ("Article 9 is not included in the list of non-derogable rights of article 4, paragraph 2, of the Covenant, but there are limits on States parties' power to derogate")
[66] See also, para. 64 GC 35 ("Security detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary").

attempt to interpret Common Article 3; and d) it was adopted more than a decade after the alleged events took place.[67]

44. Finally, in *Gashi*,[68] the Court was not required to decide whether detention *simpliciter* comprised a crime with CIL status, but rather whether **detention and beatings** could be considered 'inhumane treatment'.[69]

ii) Arbitrary detention did not have CIL status by 1998

45. The Defence notes that the SPO challenged neither the basic premise that detention is an inherent aspect of non-international armed conflict[70] nor the self-evident fact that Common Article 3 is silent on what, if any, procedural safeguards must be followed by the relevant stakeholders.[71]

46. The first time that the ICRC suggested that IHL prohibits arbitrary detention was in 2005, seven years after the alleged events. In so doing, the ICRC itself acknowledged a fundamental issue connected to the implementation of such 'prohibition', namely the paucity of IHL rules as to what amounted to 'arbitrary detention'. This is the reason why the ICRC issued in 2005 (seven years after the event) institutional guidelines[72], based on law and policy,[73] and meant 'to be implemented in

[67] General Comment 35, adopted in 2014, replaces General Comment 8, which was adopted in 1982. The latter is a one-page document which does not relate to cases of armed conflict. General 29 (Derogations During a State of Emergency) was adopted in 2001.
[68] Response, para. 50.
[69] *Gashi et al.*, Plm. Kzz. 18/2016, Judgment, 13 May 2016, paras 58-59.
[70] Motion, para. 139.
[71] ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts (2019), p. 55, ICRC, has acknowledged the lack of clarity on legal norms regarding detention in NIAC ("The complex realities outlined above pose legal challenges at different levels, many of which are yet to be resolved")
[72] Jelena Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence', 87 ICRC Review 375 (2005).
[73] Internment in Armed Conflict: Basic Rules and Challenges, ICRC Opinion Paper, November 2014, p 8.

a manner that takes into account the specific circumstances at hand'.[74] This means that until 2005, not even a preliminary general study on the matter existed, let alone the CIL norm on which the SPO tries to charge in relation to events occurred in 1998.

47. Turning to the 2005 ICRC Study, the SPO claims, without citing any source, that 'of the 19 cited national laws, only one was enacted after 31 December 2000'.[75] The Defence has examined the sources provided by the ICRC and found that, contrary to what the SPO alleges, only 8 states have enacted legislation prior to 1998 which is the relevant threshold.[76] Moreover, not 1, but 5 of those legislations were enacted after 2000.[77] Therefore, it is clear that as of 1998, there was no general State practice which deemed arbitrary detention a crime under CIL.

48. The ILC has clarified under Conclusion 8 of the Draft Conclusions on the Identification of CIL (2018) that, "[t]he relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent."[78] Clearly, these criteria are not fulfilled in the present situation.

49. As the International Court of Justice has noted in the North Sea Continental Shelf cases, State practice must be "extensive", "virtually uniform" and "settled". The Defence observes that the extremely small number of States that had enacted legislation in 1998 defining arbitrary detention in NIAC as a crime indicates that there was no such "settled" State practice at the time period relevant to this case.

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[74] Ibid. p.8.
[75] Response, para. 53.
[76] Croatia (1997) (with some reserves as it is essentially art 142 CC FRY); Ethiopia (1957) – Illegal detention in 'concentration camps'; Nicaragua (1996) (simply provides that 'any person has the right to individual liberty); Paraguay (1997); Poland (1997); Portugal (1996) (with the caveat 'prolonged and unjustified restriction of liberty of the 'civilian population'); Slovenia (1994); Spain (1995); and possibly Yugoslavia (1976)
[77] Reference.
[78] Draft conclusions on identification of customary international law, Conclusion 8, and related commentary. ('In each case, however, the practice should be of such a character as to make it possible to discern a virtually uniform usage').

50. The above argument is equally valid with regard to those resolutions of the UN General Assembly or the UN Human Rights Commission relied on by the SPO.[79] Such statements of international organisations were all adopted 2 or 3 years prior to the events, which at best can suggest a *statu nascendi opinio juris* rather than an established CIL rule.

51. In any event, as the ICL has made clear, 'a resolution adopted by an international organisation or at an intergovernmental conference cannot, of itself, create a rule of CIL.[80]

iii) **Arbitrary Detention is not a serious violation of Common Article 3**

52. The SPO does not cite any authority to support its contention that arbitrary detention amounts to a "serious" violation of Common Article 3.[81] ICTY case-law and commentators contradict the SPO submissions.

53. The *Limaj* case is particularly relevant to the present case. There ICTY prosecutors argued, similarly, that "unlawful seizure", "unlawful detention for prolonged periods" and "interrogation" of civilians at the Llapushnik/Lapusnik prison camp amounted to a "serious" violation of Common Article 3.[82] The Chamber quickly dismissed the charges:

> The Chamber has come to the conclusion that, at least in the circumstances of this case, these acts in and of themselves do not amount to a serious

[79] Response, para. 53.
[80] Draft conclusions on identification of customary international law, Conclusion 12 and related commentary, pp. 147-148. ("Like treaties, resolutions cannot be a substitute for the task of ascertaining whether there is in fact a general practice that is accepted as law")
[81] Response, para. 57. The SPO simply repeats references to General Comments 35 to which the Defence has replied above at para. 43.
[82] See also Indictment, pp. 7-8.

> attack on human dignity within the meaning of cruel treatment under Article 3 of this Statute. Count 2 must therefore also be dismissed.[83]

54. While the ICTY Chamber in *Limaj* could not pronounce on the concept of 'arbitrary detention' (considering that the charge was included under 'cruel treatment' violation of Article 3), the Defence notes the particular relevance of that case in light of the facts of the present case.[84] Moreover, the Defence can rely on the *Trifterer & Ambos Commentary to the Rome Statute*, which explicitly considers non-serious violations of Common Article 3, the Commentary specifically lists 'imprisonment without adequate judicial guarantees,'.[85]

iv) Arbitrary detention in domestic law

55. Considering that the 1974 Constitution recognised only treaties (while excluding the direct application of CIL) the relevant provision on 'illegal arrest' contained in Article 142 CC SRFY could not apply to Common Article 3. In accordance with the principle of legality, no such conduct was proscribed by the text of Common Article 3. This reasoning was adopted by the Supreme Court of Kosovo in *Prosecutor v Gjelosh Krasniqi*, as mentioned by the Defence in its Motion.[86]

C. Enforced disappearance

56. The SPO failed to respond a number of Defence arguments as set out below, namely:

i) that the UN Working Group on Enforced of Involuntary Disappearances, despite being established in 1981 and having an inherent institutional interest in

[83] Prosecutor v. Limaj, Case no. IT-03-66-T, Judgement, 30 November 2005, para. 232.
[84] Indictment, para. 62.
[85] Triffterer, Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Ed, (Hart, 2016), p. 547 (para. 878)
[86] Motion, para. 51.

the matter, decided to declare on the CIL status of enforced disappearance only in 2009.

ii) that, to date, no international criminal court or tribunal has ever entered a conviction, or even started any investigation against a person suspected of having committed 'enforced disappearance' as a crime against humanity.

iii) that 'enforced disappearance' was not recognized as a crime against humanity by the statutes of the ICTY, ICTR, ECCC and SCSL, whose temporal jurisdiction, at least regarding the ICTY, ICTR and SCSL was considerably closer to the one relevant to the KSC.[87] In his Report on the establishment of the ICTY, the UN Secretary-General stressed that due to the international principle of legality, the tribunal should only apply rules of international humanitarian law which are, beyond any doubt, recognized under CIL.[88]

iv) that the SPO could not show how many states criminalized 'enforced disappearance' before 1998 and most importantly, how many criminalised 'enforced disappearance' as a crime against humanity by 1998.

v) The SPO failed to provide a single definition of enforced disappearance as crime against humanity provided by an international legal instrument. It further, ignored a crucial finding of the 2004 PACE report, namely the absence (as of 2004) of a universally accepted definition of enforced disappearance.[89]

[87] Indeed, all these legal instruments were drafted with the involvement of the UN Office of Legal Affairs, which can hardly be considered as lacking in international law expertise.
[88] Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), para. 34.
[89] CoE Parliamentary Assembly, Report on Enforced Disappearance, Doc. 10679, para 45. See, also, Pace Resolution 1463 (2005), para. 8.

vi) The fact that during the drafting of the Rome Statute there was 'considerable initial opposition to including [enforced disappearance] and 'considerable controversy over its definition' is undisputable.[90]

57. Finally, the SPO failed to note that as of 2005, there was no definition of 'enforced disappearance' 'wide enough, also, to cover non-state actors'.[91]

Conclusion

58. In light of the above, the Defence respectfully requests the Judge to grant its Motion.

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[90] Triffterer, Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Ed, (Hart, 2016), p. 229; See also, A/CONF.183/13 (Vol.11) Summary records of the plenary meeting sand of the meetings of the Committee of the Whole, p. 147 (para. 23); p.148 (para. 47); p. 150 (para. 91); p. 152 (para. 125); p. 154 (para. 177); p.156 (para. 17).
[91] PACE Recommendation 1719 (2005), para. 2.1.