Case No.:	**KSC-BC-2020-04**
	Specialist Prosecutor v. Pjetër Shala
Before:	**Pre-Trial Judge**
	Judge Nicolas Guillou,
Registrar:	Dr Fidelma Donlon, Registrar
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THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Preliminary Motion of the Defence of Pjetër Shala to Challenge the Jurisdiction of the KSC

Specialist Prosecutor's Office:
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I. INTRODUCTION

1. The Defence for Mr Pjetër Shala ("Defence") files this Motion challenging the jurisdiction of the KSC pursuant to Article 39(1) of the Law[1] and Rule 97(1)(a) of the Rules.[2]

2. The KSC have been established as a domestic court of Kosovo in violation of both the Kosovo Constitution and the European Convention on Human Rights ("ECHR").[3] The Law specifies that the aim of the KSC and the SPO is to ensure independent, impartial, fair and efficient criminal proceedings in the limited number of cases arising from the allegations of grave trans-boundary and international crimes made in the Report of Mr Dick Marty for the Council of Europe Parliamentary Assembly.[4] All of the Judges on the Roster of Judges for the KSC and specialist prosecutors are international and have no formal institutional connection with the domestic judiciary and prosecution service. The Law purports to grant primacy to the KSC over all other courts in Kosovo and it has been interpreted in a manner that substantially deviates from the Constitution of Kosovo and the domestic Code of Criminal Procedure and breaches the overriding principle of legality that is guaranteed therein.

3. The Specialist Prosecutor in the Indictment and the Pre-Trial Judge in his Decision on Confirmation of the Indictment extended the jurisdiction of the KSC *ultra vires*.[5] The KSC does not have jurisdiction over: (a) the mode of

[1] Law No. 05/L-053 on the Specialist Chambers and Specialist Prosecutor's Office ("Law").
[2] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules" and "KSC", respectively).
[3] Article 22 of the Kosovo Constitution; Article 3(2)(a) and Article 3(2)(e) of the Law and.
[4] Doc. 12462, Inhuman treatment of people and illicit trafficking in human organs in Kosovo, Dick Marty, 7 January 2011; Article 1 of the Law.
[5] KSC-BC-2020-04, F000038, Submission of Further Lesser Redacted Version of Confirmed Indictment with confidential Annex 1, 25 May 2021 (confidential) ("Confirmed Indictment"); KSC-BC-2020-04, F00007, Pre-Trial Judge, Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Pjetër Shala, 12 June 2020 (confidential) ("Confirmation Decision"). All further references to filings in this Motion concern Case No. KSC-BC-2020-04 unless otherwise indicated.

liability of joint criminal enterprise ("JCE"); and (b) the crime of arbitrary detention in a Non-International Armed Conflict ("NIAC").

4. The Defence relies in this respect on recognized principles of international human rights law, especially the principle of *nullum crimen sine lege*, which prohibit the KSC from retroactively applying substantive criminal law, including modes of liability that were not applicable or binding in Kosovo at the time the alleged offences were committed.[6] The only crimes and forms of liability for which Mr Shala could be lawfully charged with are those which were part of the applicable law in Kosovo at the material time. As argued below, at the material time liability under a JCE or the war crime of arbitrary detention in NIAC were not part of the Kosovo legal order or otherwise applicable or binding in Kosovo as an established principle of customary international law.

II. SUBMISSIONS

A. Constitutionality and legality of the establishment of the KSC

5. The KSC constitute a domestic court. They were established through an amendment to the Kosovo Constitution enacted by the Kosovo Assembly as part of the Kosovo justice system.[7] The "Specialist Chambers [are] attached to each level of the court system in Kosovo".[8] They were established through a law adopted by the Kosovo Assembly, which had to be in accordance with the

[6] Article 33 of the Kosovo Constitution, Article 7 of the ECHR, Article 15 of the International Covenant on Civil and Political Rights ("ICCPR").
[7] Article 1(2) of the Law.
[8] Article 3(1) of the Law.

Kosovo Constitution, which in the domestic legal order is considered superior to any other source of law, including international law.[9]

6. The KSC can be clearly distinguished from international tribunals, which were created either by Security Council resolutions, i.e. the International Criminal Tribunal for the former Yugoslavia ("ICTY")[10] and the International Criminal Tribunal for Rwanda ("ICTR")[11], or by a treaty (which entered into force upon domestic ratification by a particular number of State Parties) like the International Criminal Court ("ICC").[12] It can also be distinguished from hybrid tribunals, such as the Extraordinary Chambers in the Courts of Cambodia ("ECCC")[13], the Special Tribunal for Lebanon ("STL")[14] and the Special Court for Sierra Leone ("SCSL")[15], which were created by Agreement with the UN.

7. The Defence endorses the challenge to the establishment of the KSC presented by the Defence team of Kadri Veseli and submits that the KSC is *de facto* an extraordinary court, as opposed to a specialised one, and that as a result, its establishment violates Article 103(7) of the Constitution.[16] Its extraordinary nature is manifested by the fact that: (i) the KSC was set up to deal with a limited number of cases;[17] (ii) all judges, prosecutors, and staff of the KSC are

[9] Article 16 and Article 19(2) of the Constitution. *See also* Amendment No. 24 to the Constitution of the Republic of Kosovo, No. 05 -D 139, 3 August 2015 which added the amended Article 162 to the Kosovo Constitution.
[10] S/RES/827 (1993) 25 May 1993.
[11] S/RES/955 (1994) 8 November 1994.
[12] Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998.
[13] Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003.
[14] Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon Beirut, 29 January 2007.
[15] Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone, 12 April 2002.
[16] See KSC0BC-2020-06, *Specialist Prosecutor v. Hashim Thaci et al*., Preliminary Motion of the Defence of Kadri Veseli to Challenge Jurisdiction on the basis of violations of the Constitution, 15 March 2021.
[17] *See* Article 1 of the Law; Venice Commission, Opinion No. 896/2017, 9 October 2017, paras. 23-24.

international and their appointment deviates from the general appointment procedures set out in the Constitution and the domestic legal order;[18] and (iii) the Law purports to attribute "primacy" to the KSC over all other courts in Kosovo and has been interpreted by the Specialised Prosecutor and Judicial Panels of the KSC in a manner that substantially deviates from the Constitution of Kosovo, the domestic Code of Criminal Procedure, the applicable Law on Courts, Law No. 03/l-199 , and the substantive Kosovo criminal laws;[19] (iv) the Law has been interpreted in a manner that breaches the overriding principle of legality that is guaranteed in the Constitution of Kosovo and the ECHR.[20]

8. The Law specifies that the aim of the KSC and the SPO is to ensure independent, impartial, fair and efficient criminal proceedings in the *limited* number of cases arising from the allegations of grave transboundary and international crimes made in the Report of Mr Dick Marty for the Council of Europe Parliamentary Assembly.[21]

9. Article 6 of the ECHR requires a court or tribunal to be "established by law". This reflects the principle of the rule of law that requires firm regulation of the organisation of the establishment of tribunals and courts to avoid undue discretion given to the executive branch of government.[22] The term "established by law" does not merely cover the issue of the legal basis for the existence of the relevant tribunal but also covers the specific "composition of the bench in each case and any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case

[18] *See* Opinion No. 896/2017, para. 29 and Article 104 of the Constitution.
[19] *See* Opinion No. 896/2017, para. 25; Article 10(1) and (3) of the Law.
[20] *See, e.g.*, Confirmation Decision, paras. 66-76.
[21] Doc. 12462, Inhuman treatment of people and illicit trafficking in human organs in Kosovo, Dick Marty, 7 January 2011; Article 1 of the Law.
[22] ECtHR, *Lavents v. Latvia*, no. 58422/00, Judgement, 28 November 2002, para. 114.

irregular, including, in particular, provisions concerning the independence and impartiality of the members of the court concerned".[23]

10. The Defence endorses the submissions made by the Selimi Defence that the manner in which the structure and composition of the KSC is organised constitutes a 'flagrant contradiction' with the proper establishment of the KSC as a Kosovo domestic court.[24] As the Selimi Defence team argues the exclusion of Kosovo Albanians from employment or any involvement with the KSC not only undermines the legitimacy of the KSC but is in breach of the principle of equality and non-discrimination guaranteed by the Kosovo Constitution and Article 14 of the ECHR. This exclusion seems to extend to members of the Kosovo Judiciary as evidenced by the fact that no Judge from Kosovo is included in the KSC's roster of Judges or is otherwise serving as member of the compositions of the KSC.[25]

11. The exclusion of Kosovo Albanians from any proper involvement with the operation of the KSC highlights a fundamental defect in the establishment and lawfulness of the KSC, which were set up as a domestic court. This discriminatory practice on ethnicity grounds is not founded in law and has no legitimate justification.[26] It renders the establishment of the KSC in breach of

[23] ECtHR, *Biagioli v. San Marino* (dec.), 8162/13, 8 July 2014, paras. 72-74; ECtHR, *Pasquini v. San Marino*, 50956/16, 2 May 2019, paras. 100-101.
[24] KSC-BC-2020-06, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction-Discrimination, 15 March 2021, paras. 2, 5, 9, 12-20 and references made therein. *See*, in particular, the reference in the employment regime section on the KSC website that states that "employment at Kosovo Specialist Chambers and Specialist Prosecutor's Office is ONLY open to nationals of the EU member states and contributing third states (Canada, Norway, Switzerland, Turkey and the United States of America)" which excludes Kosovo.
[25] This stands in contrast with the situation at the ICTY, the ICTR and the UN MICT, employment at which was done in accordance with UN employment rules and regulations that included the principle of non-discrimination and other internationalised courts like the ECCC, the STL and the Special Court for Sierra Leone which included national judges and national members of staff.
[26] ECtHR, S*ejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009, paras. 42-44; ECtHR, *Timishev v. Russia*, nos. 55762/00 and 55974/00, ECHR 2005-XII, paras. 54-59.

the principle of equality and non-discrimination guaranteed by Article 7 of the Kosovo Constitution and Article 6 read in conjunction with Article 14 of the ECHR.[27]

12. The Law deviates substantially from the Constitution of Kosovo and other substantive Kosovo criminal laws. Article 3(2)(d) of the Law provides that the KSC shall adjudicate and function in accordance with customary international law ("CIL") and that the latter is to be given superiority over domestic laws by virtue of Article 19(2) of the Constitution. However, the Kosovo Supreme Court has held that at the material time (1999) the 1974 SFRY Constitution applied, which required criminal offences to be set out in a domestic statute.[28] The Kosovo Supreme Court has also held that Articles 210 and 181 of the 1974 SFRY Constitution made CIL inapplicable to events alleged to have occurred in 1999.[29] The inconsistency and lack of clarity as to the applicable law violates the requirements of the "quality of the law"; the accessibility, foreseeability and precision requirements of Article 33 of the Kosovo Constitution interpreted in accordance with Article 7(1) of the ECHR. Accordingly, Article 3(2)(d) of the Law is unconstitutional.

13. To the extent that Article 12 of the Law purports to grant primacy to CIL over the substantive criminal law of Kosovo it is unconstitutional. The misguided reference in Article 12 to Article 7(2) of the ECHR does not allow qualifying the principle of legality and the rule of retroactivity.

[27] See *mutatis mutandis* ECtHR, *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV, paras. 184-186; *Sejdić and Finci v. Bosnia and Herzegovina*, paras. 11, 45-50.
[28] Supreme Court of Kosovo (UNMIK), *Case against Latif Gashi et al.*, AP-KZ no. 139/2004, 21 July 2005, pp. 6, 12.
[29] Supreme Court of Kosovo (UNMIK), *Case against Latif Gashi et al.*, AP-KZ no. 139/2004, 21 July 2005, pp. 6, 12; Supreme Court of Kosovo (UNMIK), *Case against Veselin Bešović*, AP-KZ no. 80/2004, 7 September 2004, pp. 18, 19.

14. Article 7(1) of the ECHR contains the general rule of non-retroactivity in criminal law. The European Court of Human Rights ("ECtHR") has repeatedly held that only law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) from which it follows that an offence must be clearly defined in the law, be it national or international.[30] Article 7(2) of the ECHR, as interpreted by ECtHR, was a time-limited clarification intended to ensure the validity of prosecutions for war crimes committed during the Second World War after the Second World War and does not constitute a general exception to the rule of retroactivity.[31] As such, it cannot be applied to conflicts that occurred since the Second World War.[32]

15. As to the KSC's subject-matter jurisdiction over war crimes under international law, Article 14(1)(c) of the Law provides that "under customary international law during the temporal jurisdiction of the Specialist Chambers" the term "war crimes" in the context of a NIAC means "serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, including any of the following acts committed against persons taking no active part in the hostilities, including … those placed *hors de combat* by sickness, wounds, detention or any other cause …". However, the application of CIL by the KSC both in terms of the elements of charged offences as well as modes of liability needs to be done in accordance with Article 33 of the Kosovo Constitution, which guarantees the principle of legality in criminal law.

B. The Applicability of CIL Related to Criminal Law in the Kosovo Legal Order

16. Within the legal order of Kosovo, international law, including norms related to criminal matters, do not have direct effect and cannot be directly applied by

[30] ECtHR, *Vasiliauskas v. Lithuania* [GC], no. 35343/05, 20 October 2015, para. 154.
[31] *Vasiliauskas v. Lithuania*, paras. 187-190; ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, 13 July 2013, para. 72; ECtHR, *Kononov v. Latvia* [GC], para. 186.
[32] *Ibid.*

Kosovo Courts unless they satisfy the duality test.[33] Neither the Constitution of Kosovo nor the 1974 Constitution of the Socialist Federal Republic of Yugoslavia ("SFRY Constitution")[34], which was applicable at the material time the charged offences were allegedly committed,[35] allow Kosovo courts, including the KSC, to enforce criminal prohibitions deriving from CIL without domestic incorporation in the form of a domestic statutory provision ("the duality test"). Article 181 of the SFRY Constitution provided that "Criminal offences and criminal law sanctions may only be established by statute". International treaties and CIL cannot create offences in the internal legal order of Kosovo without a statutory enactment giving them domestic effect. This should be contrasted with the situation at hybrid or international courts which can apply CIL directly.[36]

17. In contradiction to the relevant provisions of the Constitution and the principle of legality in criminal matters, Article 3(2)(d) of the Law provides that the KSC shall adjudicate and function in accordance with CIL "as given superiority over domestic laws by Article 19(2) of the Constitution". This provision that seems to derive support by Article 19(2) of the Constitution erroneously equates the incorporation of international law into domestic law with its direct applicability. In any event, Article 3(2)(d) needs to be interpreted consistently

[33] *See* Article 19(1) of the Constitution which limits the direct effect only to ratified international agreements of a "self-applicable" nature and Article 55 of the Constitution requiring that fundamental rights and freedoms guaranteed by the Constitution may only be limited by law. *See also* Supreme Court (EULEX), *Case against Gj.K.*, AP-KZ no. 353/2009, 14 June 2011, pp. 8-9.
[34] The relationship between the principle of legality in criminal matters and the principle of direct applicability of international law in the internal legal order did not change with the 1992 FRY Constitution (see Article 16 and Article 27 of the FRY Constitution).
[35] *See* Article 1 of the UNMIK regulation 1999/24 on the Law Applicable in Kosovo (as amended by 2000/59) ("UNMIK Regulation") which established the legal framework relevant to crimes committed during the Kosovo War, holding that the law in force in Kosovo on 22 March 1989 was the law applicable, unless the later criminal law was more favourable to the defendant. *See also* Supreme Court of Kosovo (EULEX), *Case against Bešović*, AP-KZ no. 80/2004, 7 September 2004, p. 18.
[36] ICTY, *Prosecutor v. Tadic,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 94.

with the principle of legality which is guaranteed by Article 7 of the ECHR and Article 33 of the Kosovo Constitution. This view also is supported by the Supreme Court of Kosovo, which unambiguously held that "criminal offences and punishments must be provided for in specific domestic legislation".[37] According to its case-law concerning the application of CIL, the constitutional 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, requiring as such a domestic statutory provision to establish a criminal offence.[38] In this connection, the ECtHR has previously held that lack of clarity arising out of the discrepancy within the domestic law violated the accessibility, foreseeability and precision requirements of Article 7(1) of the ECHR.[39]

18. The Defence submits that in the absence of provisions allowing for direct applicability, the Pre-Trial Judge should consider if and under what circumstances CIL applies in the national legal system of Kosovo. He should specifically assess whether a specific CIL norm satisfies the duality test in that there was a corresponding domestic provision at the time of the incidents alleged in the Indictment that can be directly applied to define the basis of individual criminal responsibility and punishment.

19. The Defence cannot discern any such assessment in the Confirmation Decision which was issued *ex parte* without considering any submissions by Mr Shala. The Pre-Trial Judge is called for the first time in this case to examine the applicability of CIL in Kosovo's legal order, which is essential in order to assess whether the KSC has jurisdiction over the mode of liability of JCE and the crime

[37] Supreme Court of Kosovo (EULEX), *Case against Bešović*, AP-KZ no. 80/2004, 7 September 2004, p. 18.
[38] *Ibid*., pp. 18-19.
[39] *Vasiliauskas v. Lithuania*, paras. 154, 185, 186.

of arbitrary detention which were relied upon by the Prosecution in the Indictment.

C. Joint Criminal Enterprise

20. Mr Shala has been accused of committing the crimes set out in Counts 1-4 of the Indictment through his alleged participation in a JCE between approximately 17 May and 5 June 1999. The SPO pleads that Mr Shala shared the intent for the commission of the crimes set out in counts 1-4 and, in the alternative, Mr Shala could foresee that murder might be perpetrated by other JCE members or tools and willingly took that risk.[40]

21. The Defence submits that the KSC do not have jurisdiction to apply JCE as a mode of liability because at the material time: (i) JCE did not form part of the Kosovo domestic criminal law or the law of the FRY; (ii) was not recognised in the Law; (iii) did not form part of CIL in 1999; and (iv) Mr Shala could not foresee in 1999 that he may be committing a crime through his participation in a JCE.

22. The Defence seeks that the Indictment be revised so that it no longer relies on JCE as a mode of liability.

23. Given the circumstances of Mr Shala's case and, in particular, the fact that he is charged with direct perpetration of the crimes pleaded in the Indictment and his insignificant position within the Kosovo Liberation Army ("KLA"),[41] relying on a JCE as a mode of liability is not only unlawful but also inadequate.

[40] Indictment, para. 9.
[41] Indictment, para. 2 ("**SHALA** was a member of the [KLA]"); ERN 074117-074129-ET RED, Federal Judicial Police Brussels District, Supplementary Proces-Verbal 002157/2016, 14 January 2016 (074123).

It goes against the SPO's acknowledgment that the notion of a JCE is "an appropriate and fair form of liability to address *the responsibility of leaders*".[42]

24. The Defence challenges in particular the SPO's purported use of the controversial third form of JCE ("JCE III") in the Indictment, which entails an obvious conflict with the principle of culpability. JCE III allows an accused to be convicted of an international crime he neither intended, nor made any kind of essential contribution to its commission, thereby "endanger[ing] the principle of individual and culpable responsibility by introducing a form of collective liability, or guilt by association".[43] The conflict of JCE III with the principle of culpability is fundamental, as JCE III abolishes in effect the core principle of co-perpetration, namely voluntary participation in a previously agreed plan.[44] Under count 4 of the Indictment Mr Shala is charged with a murder that he did not physically commit,[45] but also did not intend. The SPO does not even specify whether Mr Shala was allegedly present during the alleged commission of the charged murder. As Judge Ambos aptly put it JCEIII "introduces a form of strict liability".[46] This particular charge, which is based exclusively on Mr Shala's alleged membership in a group defies the commitment expressed by the President of the KSC that "the Specialist Chambers will only hold accountable persons for crimes they committed individually, and will not hold accountable any ethnic group, community or organisation".[47]

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[42] KSC-BC-2020-06, F00263, Specialist Prosecutor, Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise (JCE), 23 April 2021, para. 6.
[43] S. Manacorda and C. Meloni, 'Indirect Perpetration Versus Joint Criminal Enterprise Concurring Approaches in the Practice of International Criminal Law, 9 JICJ (2011) 159, at 166.
[44] K. Ambos, 'Joint Criminal Enterprise and Command Responsibility', 5 JICJ (2007), pp. 159-183.
[45] *See* Indictment, para. 30 (in which the SPO specifies that Mr Shala is charged with "physically" committing the crimes of arbitrary detention, cruel treatment, and torture but not murder).
[46] *Ibid.*, p. 174.
[47] Op-ed by President Trendafilova to Kosovo daily Koha Ditore on 25 February 2020, Kosovo Specialist Chambers: Communicating International Justice from Afar, available at: https://www.scp-ks.org/sites/default/files/public/content/2020feb25_op-ed-koha-en.pdf.

i. JCE was not part of Kosovo law or the law of the FRY in 1999

25. In light of the status of the KSC as a fully domestic court within the Kosovo court system, the Pre-Trial Judge must make a proper enquiry into Kosovo domestic law in order to identify the modes of liability over which the KSC has jurisdiction. The domestic law seems to recognise commission liability involving at least two individuals, but this form of liability, as explained below, refers to a very different notion of co-perpetration that does not amount to a JCE. The latter mode of liability was not part of the substantive criminal law of Kosovo at the time of the alleged offences.

26. Article 22 of the Criminal Code of the SFRY, as applicable in Kosovo in 1999, provided that "[i]f several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act". Article 25(1) of the same Code provided that "the co-perpetrator shall be criminally responsible within the limits set by his own intention or negligence, and the inciter and the aider – within the limits of their own intention". Lastly, Article 26 provided that "[a]nybody creating or making use of an organization, gang, cabal, group or any other association for the purpose of committing criminal acts is criminally responsible for all criminal acts resulting from the criminal design of these associations and shall be punished as if he himself has committed them, irrespective of whether and in what manner he himself directly participated in the commission of any of those acts".

27. None of these provisions provides for a mode of liability which can be equated to JCE under the domestic law which applied in Kosovo in 1999 and provided for the "classic" notion of co-perpetration.[48] Article 25(1) of the SFRY Criminal

[48] Kosovo, Basic Court of Mitrovicë/Mitrovica (EULEX), *Case against XH. K*, P 184/2015, Judgment, 8 August 2016, paras 82-88; Kosovo, Court of Appeals (EULEX), *Case against XH. K*, PAKR 648/16, 22 June 2017, p. 10.

Code limited liability as co-perpetrator by expressly requiring a *mens rea* standard of intention or negligence and excluding as such the doctrine of JCE III. Article 26 of the Code made no reference at all to the foreseeability standard and implied a narrower degree of control over the organisation than the one required by the doctrine of JCE.

28. The analysis above shows that a person could be held liable under the JCE doctrine as established by international criminal tribunals but not under the doctrine of co-perpetration as applicable in Kosovo at the material time. This potential for expansion of criminal liability under the doctrine of JCE was confirmed by the Kosovo Court of Appeals, which upheld the reasoning of the Basic Court of Mitrovica in Case No. P 184/2015 that: "finding the Defendant's co-perpetration in a murder at which he was not present proven on the sole basis of his *dolus eventualis* ", i.e. JCE III, would "violate the legality principle" as it would "stretch the meaning of co-perpetration beyond the boundaries set by Article 22" of the 1976 SFRY Criminal Code.[49] In another case before the Kosovo Court of Appeals, the Panel found that JCE was "not one of the modes of criminal liability set in any of the applicable codes" and that even if it were applicable, foreseen in the law, applying JCE in Kosovo would be to the detriment of the defendants as the requirements for JCE III were "less explicit or demanding than the ones necessary for classic co-perpetration".[50]

ii. JCE does not fall within Article 16(1)(a) of the Law

29. The Defence submits that the KSC must apply the national laws of Kosovo as referred to above which do not refer to JCE as a mode of liability. Nor can any legal basis for JCE be found in the Law. The Pre-Trial Judge's application of JCE

[49] *Ibid*.
[50] Kosovo, Court of Appeals (EULEX), *Case against J.D. et el.*, PAKR Nr. 455/15, Judgment, 15 September 2016, p. 45.

as a form of "commission" under Article 16 of the Law needs to be revisited in light of the explicit provisions of the domestic law in Kosovo.

30. Article 16(1)(a) of the Law provides for individual criminal responsibility for "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of crimes within the KSC's jurisdiction. The language is clear and does not include JCE as a form of liability.

31. Given the fact that the Law was enacted almost 15 years after the Appeals Chamber's judgment in the case of *Tadić*,[51] 13 years after the Rome Statute entered into force that explicitly rejected the form of liability of a JCE,[52] and 5 years since the rejection of JCE III by the ECCC,[53] the lack of an explicit reference to the mode of liability under a JCE from the Law must be seen as a deliberate decision of the legislator to omit this controversial mode of liability from the jurisdiction of the KSC.

32. Furthermore, Article 7 of the ECHR requires that "the criminal law must not be extensively construed to an accused's detriment, for instance by analogy".[54] JCE III imputes responsibility to an accused for a crime that was not part of a criminal plan, which he did not intend and cannot fall within any natural meaning of the word "committed". Pushing the interpretation of the word "committing" in Article 16(1)(a) so to include JCE, and, in particular, JCE III,

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[51] ICTY, Prosecutor *v. Tadić*, IT-94-1-A, Appeals Chamber, *Judgement*, 15 July 1999.
[52] ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, *Decision on the Confirmation of Charges*, 29 January 2007, paras. 326-339; ICC, *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-717, Pre-Trial Chamber I, *Decision on the Confirmation of Charges*, 30 September 2008, para. 480.
[53] ECCC, *Co-Prosecutors v. Ieng Sary et al.*, 002/19-09-2007-ECCC/OCIJ (PTC38), Pre-Trial Chamber, *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)*, 20 May 2010 ("ECCC Pre-Trial Chamber Decision"); *Co-Prosecutors v. Ieng Sary et al.*, 002/19-09-2007/ECCC/TC, Trial Chamber, *Decision on the Applicability of Joint Criminal Enterprise* ("ECCC Trial Chamber Decision"), 12 September 2011.
[54] ECtHR, *Kokkinakis v. Greece*, no. 14307/88, 25 May 1993, para. 52; *Vasiliauskas v. Lithuania*, para. 154.

would stretch the language of Article 16(1)(a) beyond breaking point, to the detriment of the Accused, and would be in breach of Article 7(1) of the ECHR and Article 33 of the Constitution.

iii. JCE was not part of CIL in 1999

33. The Defence reiterates that CIL establishing individual criminal liability is not directly applicable in Kosovo courts, including the KSC. Alternatively, even if the Pre-Trial Judge were to decide that CIL has direct effect in criminal matters at the KSC, the Defence contends that JCE, in general, and JCE III, in particular, was not established in CIL in 1999 and could not generate liability for offences committed at that time.

34. The Pre-Trial Judge in his Confirmation Decision accepted JCE as a given and referred to the findings in *Tadić* without any independent assessment of the status of CIL in 1999.[55] The Defence submits that the Pre-Trial Judge should have assessed the relevant state practice and *opinio juris* related to JCE liability since its establishment and make a finding whether JCE had reached the status of CIL in 1999, and if so, in what form and with what scope.

35. The Defence submits that the Appeals Chamber of the ICTY erred in finding JCE as part of CIL in the case of *Tadić*, as there was insufficient evidence of both *opinio juris* and state practice to support that finding.[56] Custom is derived from the practice of States. It requires both a "settled practice" and "a belief that this practice is rendered obligatory by the existence of a rule of law requiring it".[57]

[55] Confirmation Decision, paras. 66-76.
[56] *See, for instance,* Mohamed Shahabuddeen, 'Judicial Creativity and Joint Criminal Enterprise', in Shane Darcy and Joseph Powderly, *Judicial Creativity at the International Criminal Tribunals*, (OUP 2010), pp. 202-203. Judge Mohammed Shahabuddeen, one of the Judges of the ICTY Appeals Chamber who was in favour of applying the notion of JCE in *Tadić* later admitted that JCE, which has roots in common law, cannot claim the status of CIL.
[57] ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, para. 77.

36. Alternatively, even if the Pre-Trial Judge considers that JCE in general is part of CIL, this finding cannot extend to JCE III. The ECCC Pre-Trial Chamber rigorously analysed the cases relied upon by the *Tadić* Appeals Chamber to justify JCE III and unambiguously concluded that: "they do not provide sufficient evidence of consistent state practice or opinio juris at the time [the crimes in Cambodia were committed and that] JCE III was not recognized as a form of responsibility applicable to violations of international humanitarian law".[58] While recognising that both *Borkum Island* and *Essen Lynching* may be relevant to JCE III, in the "absence of a reasoned judgement in these cases, one cannot be certain of the basis of liability actually retained by the military courts". Having considered the other Italian cases relied upon by the *Tadić* Appeals Chamber, "in which domestic courts applied domestic law, [the Pre-Trial Chamber held that they] do not amount to international case law and the Pre-Trial Chamber does not consider them as proper precedents for the purpose of determining the status of customary law in this area".[59] In light of these findings, the Pre-Trial Chamber held that "the principle of legality requires the ECCC to refrain from relying on the extended form of JCE in its proceedings".[60]

37. The issue of inapplicability of JCE III was subsequently raised before the Supreme Court Chamber, which upheld the Pre-Trial Chamber's analysis of the jurisprudence of the *ad hoc* tribunals regarding the notion of JCE III and its conclusion that the decisions upon which the ICTY Appeals Chamber relied in *Tadić* when finding that JCE III was part of CIL did not constitute a "sufficiently firm basis" for such a finding. In respect of other cases referred to by the Co-Prosecutors which were not addressed in *Tadić* or in the Pre-Trial Chamber Decision on JCE, the Supreme Court Chamber came to the same conclusion;

[58] ECCC Pre-Trial Chamber Decision, para. 77.
[59] *Ibid*., para. 82.
[60] *Ibid*., para. 87.

namely that they do not "support the existence under customary international law of criminal liability for crimes in which the *actus reus* was not carried out by the accused and that were not covered by the common purpose."[61] The position adopted by the ECCC with regards to JCE III, which is supported by detailed judicial reasoning, is correct and ought to be followed by the KSC.

38. The STL Appeals Chamber, presided by Judge Cassesse who also participated in the ICTY Appeals Chamber composition in *Tadić*, declined to apply JCE III to specific intent crimes such as terrorism.[62] It noted that this was to avoid the legal anomaly that "a person could be convicted as a (co)perpetrator for a *dolus specialis* crime without possessing the requisite *dolus specialis*."[63] This position has been followed by the Special Court for Sierra Leone, which held that JCE III liability does not extend to specific intent crimes.[64]

39. In addition, there is not a single international criminal law treaty specifically defining JCE III as a mode of criminal responsibility, which demonstrates that JCE III does not enjoy recognition in CIL. The 1998 Rome Statute is a very strong indicator that an overwhelming majority of States rejected JCE as a mode of liability and opted for requiring knowledge rather than foreseeability for individual criminal liability.[65] As Judge Ambos commented "JCE II and III constitute new and autonomous (systemic) concepts of imputation without an explicit basis in written international criminal law."[66] The Max Planck Institute for Foreign and International Criminal Law carried out a survey of the

[61] ECCC, *Case of Nuon Chea and Khieu Saphan*, Supreme Court, Chamber, *Appeal Judgement*, 23 November 2016 ("ECCC Appeal Judgement"), para. 793.
[62] STL, STL-11-01/1, Appeals Chamber, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, 16 February 2011 ("STL Decision"), para. 238.
[63] *Ibid*., para. 248.
[64] SCSL, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T, *Trial Judgement*, 18 May 2012, para. 468.
[65] Article 25(3)(d) of the Rome Statute. See also K. Ambos, 'Joint Criminal Enterprise and Command Responsibility', pp. 172, 173 ("JCE II and III are not included in Article 25(3)(d)").
[66] K. Ambos, 'Joint Criminal Enterprise and Command Responsibility', p. 173.

domestic practice of 40 states regarding participation in criminal offences. The study concluded that there was a "high degree of variance among the legal systems studied" and that more States applied co-perpetration than JCE.[67]

40. Moreover, the errors of logic and incompatibility with basic principles of fairness that are inherent in the form of liability under JCE III were unequivocally confirmed when the UK Supreme Court reversed 30-years of case-law on joint enterprise liability, which was relied upon by the ICTY Appeals Chamber in *Tadić* and found that the English common law never recognized an "extended" common purpose doctrine.[68] The UK Supreme Court in its seminal judgment in *R v. Jogee; Ruddock v. The Queen* held that foresight should not be treated as an element of *mens rea* for the purpose of establishing liability for extended crimes committed outside the execution of a common principal purpose. Instead it was relevant as evidence from which it might be possible to draw an inference of intent to assist or encourage.[69] The significance of this for the purpose of determining the applicable law on liability is that the only support that the ICTY Appeals Chamber had in *Tadić* for treating foreseeability as a legal requirement for the "extended" crimes stems from domestic jurisprudence, including important common law authorities reversed in *Jogee* as erroneously treating foresight as a legal element.

41. While the Appeals Chamber of the Mechanism, could not address this problem due to the requirements of legal certainty and adherence to precedent,[70] it is of

[67] Sieber, U., Koch, H. G., and Simon, J. M., Office of the Prosecutor Project Coordination, 'Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks', Expert Opinion, Commissioned by the United Nations – ICTY, 2006, Introduction, p. 3; Part 1, p. 16.
[68] *Jogee v. The Queen* [2016] UKSC 8; *Ruddock v. the Queen* [2016] UKPC 7, paras. 2, 3.
[69] *Ibid*.
[70] MICT, *Prosecutor v. Karadžić*, MICT-13-55-A, Appeals Chamber, *Judgement*, 20 March 2019, para. 433.

utmost importance for the legitimacy and credibility of the KSC to apply the correct standard when it comes to modes of liability.

42. The controversial status of JCE III is well known.[71] Judge Ambos observed in 2007 that "JCE I is the only category of JCE that can be considered, without difficulty, as 'commission' within the meaning of Article 7(1) of the ICTY Statute and as 'co-perpetration' within the meaning of Article 25(3)(a) of the ICC Statute."[72] He correctly identifies the error of logic in the analysis in *Tadić* in blurring principal and accessorial liability: "if one takes the objective distinction of the Appeals Chamber literally, an aider and abettor would do more than a co-perpetrator: the aider and abettor carries out substantial acts 'specifically directed' to assist in the perpetration of the (main) crime, while the co-perpetrator must only perform acts (of any kind) that in some way are directed to the furthering of the common plan or purpose."[73]

43. Having regard to the above, the Defence submits that any claim regarding the CIL status of the doctrine of JCE, in general, and JCE III, in particular, at the time of the events alleged in the Indictment, needs to be rejected as incorrect and unsubstantiated.

iv. The application of the doctrine of JCE was not foreseeable to the Accused

44. As explained by the ECCC Pre-Trial Chamber, foreseeability means that an accused "must be able to appreciate that the conduct is criminal in the sense of generally understood, without reference to any specific provision".[74] The

[71] See, e.g., A. Cassese, The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise, JICJ 5 (2007), 109-133; K. Gustafson, The Requirement of an 'Express Agreement' for Joint Criminal Enterprise Liability, JICJ 5 (2007), 134-158; J. Ohlin, Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise, JICJ 5 (2007), 69-90; ICTY, IT-99-36-A, Brdanin Decision on Interlocutory Appeal, 19 March 2004, Separate Opinion of Judge Shahabuddeen.
[72] K. Ambos, 'Joint Criminal Enterprise and Command Responsibility', pp. 170, 171.
[73] *Ibid*., p. 171.
[74] ECCC Pre-Trial Chamber Decision, para. 45.

ECtHR has held that criminal law must be accessible and foreseeable in the sense that the Accused can know (with the benefit of legal advice if necessary) what acts will amount to crimes.[75] In *Vasiliauskas v. Lithuania*, the ECtHR found that the international law on genocide was accessible because it was codified in the 1948 Genocide Convention, but that the applicant's rights had been violated because it was not foreseeable that his conduct would have been found to fall within the scope of definition of genocide.[76]

45. The principle of *nullum crimen sine lege* applies also to forms of liability.[77] In the context of the KSC, it must be demonstrated that JCE as a mode of liability was part of binding and applicable law in Kosovo at the time of the alleged crimes, as well as sufficiently foreseeable and accessible to the Accused. This was clearly not the case at the material time, which in this case is the time span of three weeks from 17 May to 5 June of 1999. Importantly, the *Tadić* Appeal Judgment was rendered on 15 July 1999, a month after the alleged JCE in which Mr Shala was involved had come to an end. As argued above, the domestic criminal law in Kosovo does not include liability under any form of JCE. Mr Shala could not have anticipated that he would be accused of a crime he did not intend on the basis of a judicially constructed rule of CIL inferred from a small number of post-World War II cases which were inaccessible and inconclusive as to the application of this form of liability. This applies with even more force to the fact that he is effectively charged under JCE III with murder.

D. Arbitrary Detention

46. Mr Shala has been charged with the war crime of arbitrary detention (Count 1) under Article 14(1)(c) of the Law. In the Confirmation Decision, the Pre-Trial

[75] ECtHR, *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, 28 June 2018, para. 242; ECtHR, *Jorgic v. Germany*, no. 74613/01, 12 July 2007, paras. 109-113.
[76] *Vasiliauskas v. Lithuania*, paras. 148, 170-186.
[77] ICTY, *Prosecutor v. Milutinovic et al.*, Case No. IT-99-37-AR72, Appeals Chamber, *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction — Joint Criminal Enterprise*, 21 May 2003, paras. 37-38.

Judge held 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 CIL at the time of its commission, in conformity with Articles 3(2)(d) and 12 of the Law".[78] After a brief analysis, in which he relied heavily on the ICRC 2005 Customary International Humanitarian Law Study,[79] he concluded that both requirements were met and that the KSC may exercise jurisdiction over this war crime.[80]

47. The Defence submits that the KSC does not have jurisdiction over arbitrary detention as a war crime in NIAC because arbitrary detention: (i) was not criminal in the domestic law of Kosovo at the material time; (ii) was not included in the Law; (iii) does not amount to a serious violation of Common Article 3 to the 1949 Geneva Conventions; (iv) was not prohibited under CIL at the time of the incidents alleged in the Indictment; and (v) was not foreseeable to the Accused.

i. Arbitrary detention as a war crime was not an offence in domestic law

48. In the absence of direct applicability of CIL in criminal matters in Kosovo, the correct approach of the Pre-Trial Judge would be to begin the assessment of KSC's jurisdiction over the war crime of arbitrary detention by considering whether any domestic law provisions that were in force in 1999 rendered arbitrary detention in NIAC a war crime.

49. The SFRY Criminal Code provided in Article 142 that the "unlawful bringing in concentration camps and other illegal arrests and detention" was prohibited as a war crime. However, the Kosovo Supreme Court held that "the conduct

[78] Confirmation Decision, para. 23.
[79] Henckaerts J.-M., Doswald-Beck L., *Customary International Humanitarian Law* ("ICRC Study"), Vol. I (Rules), Rule 99, p. 344.
[80] Confirmation Decision, paras. 27-28.

set out in Article 142 CL FRY constitutes a war crime pursuant to that Article only if … at the same time [it] constitutes a violation of international law effective at the relevant time…. [I]n 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 … cannot be considered as applicable in the domestic courts of Kosovo in so far as the implementation of Article 142 CL FRY is concerned…Therefore, in the application of Article 142 CL FRY it would not be legitimate to resort to international customary law."[81] The Supreme Court also held that the applicable Constitution with regard to events which were alleged to have occurred in 1999 was the 1974 SFRY Constitution.[82] Articles 210 and 181 of the 1974 SFRY Constitution made CIL inapplicable to events alleged to have occurred in 1999.[83] Considering that the 1974 Constitution excluded the direct applicability of CIL, the reference to "illegal arrest and detention" in Article 142 of the SFRY Criminal Code cannot be interpreted so as to include arbitrary detention in NIAC, as this was not a criminal offence under any of the applicable treaties. Moreover, in accordance with the principle of legality, no such conduct was proscribed by the text of Common Article 3.

50. This interpretation is in accordance with domestic jurisprudence on the war crime of illegal detention, which is particularly relevant in the case of Mr Shala since it concerns the case against one of his alleged co-perpetrators.[84] In the case of *X.K*, the accused was charged and convicted before the Basic Court of Mitrovica of illegal detention as war crime under Article 142 of the SFRY

[81] Supreme Court of Kosovo (UNMIK), *Case against Veselin Bešović*, AP-KZ no. 80/2004, 7 September 2004, p. 19.
[82] Supreme Court of Kosovo (UNMIK), *Case against Latif Gashi et al.*, AP-KZ no. 139/2004, 21 July 2005, pp. 6, 12.
[83] *Ibid.*, pp. 6, 12.
[84] Confirmation Decision, para. 133, n. 262.

Criminal Code. The Basic Court held that Mr X.K. "as a member of the KLA, in co-perpetration with S.G. and other KLA members, arrested and illegally detained … and other unknown civilians in such center for a prolonged period of time, in K. (north of Albania) during April, May and through mid-June of 1999".[85] The Court of Appeals reclassified the charge of illegal detention as "coercion" and finally rejected it due to the expiration of statutory limitation. It also held that Article 142 of the SFRY Criminal Code, as amended on 30 August 1990, did not criminalize acts which did not cause grave bodily injuries or serious damage to the victims' health. It was clearly found that "[u]nlawful detention of individual civilians is not penalized as a War crime against individual persons under any of the applicable statutes".[86]

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

51. Article 14(1)(c) enumerates a list of specific acts which should be considered as war crimes in NIAC. It does not list arbitrary detention as a war crime in NIAC. The exhaustiveness of this list is clear from the different qualifier used in the immediately preceding paragraph of the Law, Article 14(1)(b) where the legislator specifically provided "including, *but not limited to*, any of the following acts". The Pre-Trial Judge's interpretation of the provision, according to which the KSC's jurisdiction is not only limited to the crimes expressly enumerated therein,[87] goes beyond the clear text of the provision (*in claris non fit interpretatio*) and against the principle of legality, as enshrined in Article 33(1) of the Kosovo Constitution and Article 7 of the ECHR.

[85] Kosovo, Basic Court of Mitrovicë/Mitrovica (EULEX), *Case against XH. K*, P 184/2015, Judgment, 8 August 2016.
[86] Kosovo, Court of Appeals (EULEX), *Case against XH. K*, PAKR 648/16, 22 June 2017, p. 18.
[87] Confirmation Decision, para. 23.

iii. Arbitrary detention is not a serious violation of Common Article 3 to the 1949 Geneva Conventions

52. According to the Pre-Trial Judge, "[d]eprivation of liberty without a legal basis or in violation of basic safeguards is not compatible with and violates the requirement of humane treatment of all persons placed *hors de combat*, including by detention, as enshrined in Common Article 3".[88] The Pre-Trial Judge did not provide any arguments as to why he considers that the arbitrary detention constitutes a *serious violation* of Common Article 3.[89]

53. There is no agreement among States or leading scholars as to what amounts to arbitrary detention in the context of NIAC.[90] In addition, it is commonly accepted that deprivation of liberty is an inevitable but lawful occurrence in armed conflicts.[91] The ICRC Study acknowledges that detention of civilians will not be considered arbitrary under international humanitarian law and human rights law if based on security imperatives.[92]

54. The SPO and Pre-Trial Judge support their position that arbitrary detention constitutes a serious violation of Common Article 3 by finding that every instance of detention without legal basis or adequate procedural guarantees in NIAC amounts to inhumane treatment.[93] Such an absolute approach lacks any nuance and conflates arbitrary detention with inhumane treatment. It is well

[88] *Ibid.*, para. 25.
[89] *Ibid.*, para. 27.
[90] ICRC, Detention in non-international armed conflict - Meeting of all States, 27-29 April 2015, 30 April 2015.
[91] 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 AJIL, pp. 55–56.
[92] ICRC Study, Vol. I, p. 344.
[93] *See* Triffterer, Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Ed, (Hart, 2016), p. 547 (para. 878) which specifically lists "imprisonment without adequate judicial guarantees" as a non-serious violation of Common Article 3.

established that one can be arbitrarily deprived of his liberty and still be detained in conditions which are humane.[94] Under the ECHR, the question of arbitrary detention is examined under Article 5 of the Convention, while complaints for inhumane treatment fall to be examined under Article 3. There is a clear distinction between the rights protected with those provisions, the first protects liberty, while the second protects individual's physical integrity.

iv. Arbitrary detention was not prohibited in CIL in 1999

55. The Pre-Trial Judge relies almost exclusively on Rule 99 of the ICRC Customary International Humanitarian Law Study in support of his finding confirming the charge of arbitrary detention against Mr Shala. However, as shown below, the ICRC Study is an aspirational statement of principle not supported by any other compelling source of international law.

56. As of 1999 there was no settled State practice which deemed arbitrary detention a crime under CIL.[95] The first time that the ICRC suggested the international humanitarian law prohibits arbitrary detention was in 2005, six years after the alleged events. Until 2005 not even a preliminary general study on the matter existed, let alone a norm of CIL. Among the approximately 60 States that the ICRC Study relies on as having some national legislation touching on the matter, it is unclear whether the criminalisation of arbitrary deprivation of liberty contained therein is valid for both categories of armed conflict. Moreover, many of the criminal codes referred to in the Study were adopted after 1999, which is the relevant threshold in this case.

57. The State practice cited in the Study is insufficient to meet the "extensive and virtually uniform" standard generally required to demonstrate the existence of

[94] ECtHR, *Khlaifa and Others v. Italy* [GC], no. 16483/1215 December 2016; ECtHR, *Kosenko v. Russia*, nos. 15669/13 and 76140/13, 17 March 2020.
[95] *North Sea Continental Shelf cases*; State practice must be "extensive", "virtually uniform" and "settled".

a customary rule. Even if all the States that had enacted any legislation on the matter were taken into account, they would still represent only a relative minority of UN Member States. Moreover, the Study puts too much emphasis on written materials, such as military manuals, as opposed to actual operational practice by States during armed conflict.[96]

58. As it stands, international humanitarian law does not impose specific obligations on non-State armed groups concerning detention in NIAC beyond the general requirement to ensure "humane treatment" of a person once detained. The fact of depriving a person of liberty in the context of a non-international armed conflict is not, *per se*, a criminal offence. The KSC has no jurisdiction to try Mr Shala for the mere act of detaining a civilian on allegedly arbitrary grounds.

59. Had the Pre-Trial Judge attempted to establish the existence of a CIL rule himself, as the law requires, he would have been bound to conclude that no such rule on arbitrary detention existed at the time of the events relevant to the Indictment. The Defence therefore submits that the KSC has no jurisdiction over this crime.

v. Arbitrary detention was not foreseeable to the Accused

60. The KSC may have jurisdiction only 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. With the number of uncertainties surrounding the notion of arbitrariness when it comes to detention and in the absence of any

[96] 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 (2007), p. 445.

domestic or international rule prohibiting arbitrary deprivation in NIAC at the time relevant for the Indictment, Mr Shala could not have foreseen that he could be charged with it.

III. RELIEF REQUESTED

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

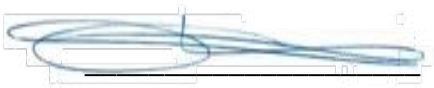
a) Review his findings in the Decision on the Confirmation of Indictment;

b) Confirm that the KSC lack jurisdiction over liability under a JCE and dismiss the charges against Mr Shala that rely on that mode of liability;

c) Confirm that the KSC lack jurisdiction over arbitrary detention as a war crime in a non-international armed conflict and dismiss this charge;

d) Order the SPO to amend the Indictment accordingly.

Respectfully submitted,



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