In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**President of the Kosovo Specialist Chambers**
	Judge Ekaterina Trendafilova
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Kadri Veseli
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Veseli Defence Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers

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I. INTRODUCTION

1. Pursuant to Article 32 of the Constitution of the Republic of Kosovo ("Constitution" or "Constitution of Kosovo"), Article 45(2) of Law No.05/L-053 'On Specialist Chambers and Specialist Prosecutor's Office' ("The Law" or "KSC Law") and Rule 97(3) of the Rules of Procedure and Evidence ("Rules"), the Defence of Mr. Kadri Veseli ("Defence") hereby submits its appeal against the Decision on Motions Challenging the Jurisdiction of the Specialist Chambers ("Impugned Decision").[1]

2. The Defence's appeal stems from a simple proposition. In 1998, at the time of the conduct which gives rise to the allegations in the Indictment, the Federal Republic of Yugoslavia ("FRY") was one, federated State.

3. People within the jurisdiction of the FRY were subject to one criminal law, as set out in the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia (the "SFRY Code"). This law did not establish criminal liability for many of the substantive offences or modes of participation charged in the Indictment.

4. Irrespective of their ethnicity, nationality or place of residence, a person who was accused of a criminal offence benefitted from certain safeguards under the Constitution in force at the time, the 1974 SFRY Constitution. Of particular significance in the present context, this Constitution:

   a. expressly prohibits the direct application of Customary International Law ("CIL"); and

   b. entrenches the principles of legality and equality before the law without

[1] F00412, Pre-Trial Judge, 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers', 22 July 2021 ("Impugned Decision")

discrimination.

These safeguards were consistent with rights and protections provided for under applicable international human rights law ("IHRL").

5. These rights belonged to Mr. Veseli as they did to everyone else within the jurisdiction of the FRY in 1998. Any action by the State, whether through the executive, legislature or judiciary, which denied him the full protection of these rights was unlawful and therefore invalid.

6. This situation continued unaffected by the break-up of the FRY. The same people continued to benefit from the same accrued rights and Serbia, as the continuator State to the FRY, and Kosovo and Montenegro, as successor States to the FRY, continued to be bound by the corresponding obligations. This is correct as a matter of public international law as well as domestic, constitutional law.

7. Nevertheless, Mr Veseli now stands accused on the basis of legislation introduced in Kosovo in 2015 which purports to give direct effect to CIL and is interpreted by the KSC to criminalise conduct which was not (and could not be) so criminalised under the law applicable in the FRY in 1998. The Defence maintains that this is a violation of the principle of legality under the Constitution as well as corresponding protections under applicable IHRL. In this appeal, the Defence submits that the Pre-Trial Judge ("PTJ") failed, without providing reasons, to address the Defence's submissions on the Constitution leading him to make a material error of law relating to the applicability of CIL. This in turn invalidates the entire Impugned Decision.

8. Further, the prosecution of Mr Veseli takes place in circumstances where the Serbian Constitutional Court ("SCC"), the apex court of Serbia (not just another successor State to the FRY but the continuator State viz-a-viz Kosovo with

decisive authority for interpreting the SFRY Constitution), has already ruled on the central issues in contention in the Defence's jurisdictional challenge. The SCC correctly determined that domestic legislation purporting to give direct effect to CIL violated the applicable constitutional safeguards. What is more, there is a corresponding judgment from the Court of Appeals of Montenegro to similar effect.

9. It follows that former citizens of the FRY who now reside on the territory of Serbia or Montenegro properly benefit from the principle of legality under the Constitution and IHRL. Mr Veseli, his co-accused and anyone else prosecuted at the KSC, (all of whom, in practice, are ethnic Albanians of Kosovar nationality), are not so protected and can be prosecuted on the basis of crimes and modes of liability which were alien to the law applicable in the FRY at the time and introduced into the domestic legal order some seventeen years after the relevant conduct allegedly took place. As a consequence of the approach taken by the KSC and upheld by the PTJ in the Impugned Decision, a Serb and a Kosovar national of Albanian descent, accused of exactly the same conduct, in the same place, during the same conflict are subject to different legal regimes such that one might commit no offence at all while the other is liable for the most heinous crimes known to mankind and faces life imprisonment. Such a stark difference in treatment, the Defence submits, is a violation of the principle of equality under the law without discrimination under the Constitution and applicable IHRL. These submissions were, without reason, disregarded by the PTJ, leading him to make a material error of law which also invalidates the Impugned Decision.

10. Further, unless there is a compelling justification in terms of proportionality and necessity, such a difference in treatment amounts to discrimination in the enjoyment of Mr Veseli's rights under Article 7 of the European Convention on

Human Rights ("ECHR"), in violation of Article 14. The Respondent State, which in present circumstances acts through the SPO and the KSC, bears the burden of justifying such a difference in treatment. Despite being put on notice to do so by the Defence in this jurisdictional challenge, neither the SPO nor the PTJ has sought to provide any such justification whatsoever, nor even to engage in the issue. In this appeal, the Defence submits that this amounts to another, material error of law which invalidates the Impugned Decision. Further, this discriminatory approach threatens to create a distorted impression of history and presents a grave challenge to the validity of the KSC as an institution which, with respect, the Appeals Court Panel must now address.

11. Even if the Defence is wrong in its primary argument, the Defence also submits that the PTJ made a series of material errors of law in dismissing its alternative submissions on the basis of *lex mitior* and the scope of criminal prohibitions under CIL applicable in 1998. Whether taken separately or collectively, each of these errors has the effect of invalidating the Impugned Decision.

II. STANDARD OF REVIEW

12. The Defence recalls that the Court of Appeals Panel has previously applied *mutatis mutandis* to interlocutory appeals the standard of review provided for appeals against judgments under Article 46(1) of the Law[2]. Article 46(1) provides the following grounds of appeal:

a. *"an error on a question of law invalidating the judgement;*

b. *an error of fact which has occasioned a miscarriage of justice; or*

c. *an error in sentencing."*

13. Further, it recalls the Court of Appeals Panel rulings that:

a. *"an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision."*[3]; and

b. "*as part of their obligation to ensure the fairness of the proceedings pursuant to Article 31 of the Constitution, a Panel, including a Panel consisting of a Pre-Trial Judge, must indicate with sufficient clarity the grounds upon which decisions taken are based*".[4]

[2] KSC-BC-2020-07/IA004/F00007 'Decision on the Defence Appeals Against Decision on Preliminary Motions, paragraphs 8 – 11.
[3] KSC-BC-2020-07/IA004/F00007 'Decision on the Defence Appeals Against Decision on Preliminary Motions, paragraph 14.
[4] F00004, Specialist Chamber of the Constitutional Court, Judgement on the Referral of the Rules, 26 April 2017, para. 143; 115. See also, Kosovo Constitutional Court, Cases no. KI99/14 and KI100/14, Judgment, 8 July 2014, paragraph 86.

III. GROUNDS OF APPEAL

A. GROUNDS RELATING TO THE APPLICABILITY OF CUSTOMARY INTERNATIONAL LAW (PRIMARY ARGUMENT)

14. It is the Defence's primary argument that, pursuant to the Constitution of Kosovo, CIL applies before the KSC only insofar as it was reflected in a duly promulgated provision of domestic law in force at the time of the relevant conduct, (i.e. the SFRY Criminal Code). This position is unaffected by the introduction of the KSC Law in 2015. Insofar as the charges against Mr Veseli rest on prohibitions or modes of liability derived from CIL with no counterpart in the applicable domestic law, the case against him is unconstitutional, a violation of his rights under applicable IHRL and outwith the jurisdiction of the KSC.

15. In the Impugned Decision, the PTJ dismisses these arguments, concluding, inter alia, that:

a. *"there is actually no issue of retroactivity"*[5]; *and*

b. *"the SC shall apply at all times customary international law"*.[6]

16. The Defence submits that these conclusions rest on various material errors of law, as set out in the grounds of appeal below, which invalidate the Impugned Decision. In various respects, the PTJ also fails to address the substance of the Defence's submissions or adequately to give reasons for dismissing them. It is submitted that this is a denial of justice[7] and a ground for appeal in and of itself. In any event, it leads the PTJ to make further material errors of law affecting the validity of the Impugned Decision.

[5] Paragraph 101.
[6] Paragraph 102.
[7] ECtHR, Moreira Ferreira v. Portugal (No. 2), [GC], Judgment, 11 July 2017, paragraph 84.

Ground 1: The PTJ made a material error of law in finding that Article 12 of the Law establishes the applicability of CIL and its primacy over domestic law

17. Article 16(1) of the Constitution of Kosovo provides that:

"The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution."

18. As such, it establishes the primacy of the Constitution in the Kosovar legal order and renders invalid any provisions of domestic law, including the KSC Law, that are incompatible with it.[8] The Defence recalls the finding of the Kosovo Constitutional Court that:

> *when a matter is prescribed by the Constitution, it cannot be amended, undermined, or transformed through an act with the lower legal power as the law. Based on the supremacy of the constitutional norm, […] all other legal acts should be in compliance with it*.[9]

19. The relationship between domestic and international law is primarily regulated by the Constitution, in particular Articles 19, 55 and 33. As set out in the Motion this is the appropriate starting point for any assessment of the applicability or primacy of CIL before the KSC.

20. In summary, the Defence submitted that:

a. **Criminal prohibitions deriving from CIL do not have direct effect in Kosovar law** (Article 19(1) and 55 of the Constitution of Kosovo and Articles 181 and 210 of the 1974 SFRY Constitution);[10]

b. **Only criminal prohibitions deriving from international law which satisfy the duality test (i.e. which have a corresponding provision under domestic law applicable at the time of the alleged incidents) can define**

[8] Motion, paragraph 16(i); Constitutional Court, Case No. KO 43/19, Judgment, 27 June 2019, paragraphs 68 -69.
[9] Constitutional Court, Case No. KO 43/19, Judgment, 27 June 2019, paragraph 69.
[10] Motion, paragraphs 41 – 43.

the basis for individual criminal responsibility and punishment.[11] Since the events alleged in the Indictment occurred in 1998, the "international law" component of the duality test includes only ratified international agreements; and

c. This is reflected in the settled case law of the Supreme Court of Kosovo.[12]

21. These submissions were not addressed by the PTJ in the Impugned Decision. It is submitted that this failure to provide reasoning amounts to a denial of justice and a ground of appeal in and of itself. Accordingly, the Defence incorporates paragraphs 41 – 56 of the Motion by reference and respectfully requests that the Court of Appeals Panel gives them due consideration in determining this Ground of Appeal.

22. Further, it is submitted that the failure adequately to consider the position under the Constitution led the PTJ to make a material error of law in relation to the purported applicability and primacy of CIL. Rather than consider the position under the Constitution as set out by the Defence, the PTJ adopts a teleological approach, reasoning that CIL applies and takes precedence over domestic law because this is what the Kosovar legislator provides for in the KSC Law, in particular Articles 3(2)(d), 3(4) and 12[13].

23. This ignores the Defence's central contention. The KSC Law is subject to the Constitution. The Constitution, as confirmed by the Kosovo Constitutional Court, "*cannot be amended, undermined, or transformed*" through the KSC Law. Insofar as the KSC Law purports to give direct effect to CIL to criminalise conduct which was not (and could not be) so criminalised under the domestic law applicable at the time, it is unconstitutional and therefore, by operation of

[11] Motion, paragraphs 44 – 48.
[12] Motion, paragraphs 48 – 56.
[13] Impugned Decision, paragraphs 89 – 91.

Articles 16(1) 19(1), 55(1) and 33(4) of the Constitution, invalid. On this basis, by relying solely on a textual analysis of the "plain language" of Article 12 to determine the question of the correct applicable law[14] and declining to consider its interaction with the Constitution, the PTJ made a material error of law which invalidates the Impugned Decision.

Ground 2: The PTJ made a material error of law in his interpretation of Article 12 KSC Law and Article 7(2) ECHR and consequent determination that CIL is a permissible criminalising source

24. At paragraph 94 of the Impugned Decision, the PTJ holds, inter alia, that:

> *[…] The Pre-Trial Judge considers, in this regard, the reference to Article 7(2)ECHR [in Article 12 of the Law] does not bar the SC from relying on customary international law as a source criminalising a specific conduct, as the whole provision of Article 7 ECHR, as well as the entirety of the Convention, are anyway applicable before the SC, by virtue of Article 22 of the Constitution. Thus, the reference to Article 7(2) ECHR in Article 12 of the Law is to be read, more appropriately, as encompassing the totality of Article 7 ECHR, i.e. the whole construct of the principle of non-retroactivity properly understood under that provision and, by implication, under Article 33(1) of the Constitution (which mirrors Article 7 ECHR). […] From the foregoing, it follows that the SC shall always apply the entirety of Article 7 ECHR when assessing the legality principle, and that customary international law may therefore be considered a permissible criminalising source. […].*

25. As a preliminary point, the Defence's primary submissions on the principle of legality are based on Articles 19 and 55 of the Constitution, not, as the PTJ suggests, Article 7(2) ECHR[15].

26. In any event, the Defence considers that the PTJ's ruling on the relationship between Article 12 of the KSC Law and Article 7(2) ECHR rests on several material errors of law, as set out below.

27. First, in relation to the PTJ's finding that the appropriate reading of Article 12 of the KSC Law "encompasses the totality of Article 7", the PTJ impermissibly

[14] Impugned Decision, paragraph 91.
[15] Motion, paragraphs 40 – 56.

reads words into the legislation. In drafting Article 12, the legislator elected to refer not to Article 7 but specifically to Article 7(2). The Defence maintains its position that this election rests on a misplaced reliance on the moribund provisions of Article 7(2)[16]. The consequence of this is that the reference to Article 7(2) in Article 12 is unconstitutional and therefore invalid. It is not for the PTJ to seek to rectify this by reading words into the legislation.

28. Second, the PTJ sustains his interpretation of the interplay between Article 12 of the Law, the Constitution and the applicable human rights instruments on the basis that it is *"the only interpretation that reconciles all the provisions at stake by giving them an "effet utile", thus making sense of the (national and international) legal order in which the SC are placed"*.[17] The doctrine of "effet utile" has no direct application as a basis for statutory interpretation in Kosovar law and is alien to the rules of public international law relevant to the interpretation of the ICCPR and ECHR, namely those contained in the Vienna Convention on the Law of Treaties. Accordingly, it is impermissible as a basis for interpreting the relevant legal provisions and the PTJ made a material error of law in employing it to "make sense" of the legal order

29. Third, in any event, even if the words "Art 7(2)" are interpreted "coherently" so as to actually mean something else, this leaves unaddressed the Defence's submissions that Art 7(1) is, properly construed in light of jurisprudence of the European Court of Human Rights (ECtHR), permissive.[18] It neither obliges States to accept the direct effect of CIL in their internal legal orders, nor does it operate as a substitute for constitutional rules that regulate the relationship between domestic and international law by requiring that the relevant crimes be established by either domestic or international law. This is clear from the

[16] Motion, paragraph 17.
[17] Impugned Decision, paragraph 96.
[18] Motion, paragraph 79 – 90.

ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

30. To the extent that there remains any doubt that this interpretation of Art 7 is correct, it is further confirmed by a reading of the relevant *travaux preparatoires*. In light of concerns raised by Sweden that Article 7 might be interpreted to give primacy to international law, the statement of reasons, incorporated in the Report of the Committee of Experts, states (emphasis added):

> *"b)* ***That the Convention does not compel Member States to apply, as a criminal measure, a rule of international law which is not incorporated in the national law***.[19]

31. As set out in relation to Ground 1, the framers of both the SFRY and Kosovo Constitutions elected to prohibit the direct application of CIL. Given its correct meaning, Article 7 does not affect or override this election.

32. Fourth, properly construed in light of Article 53 ECHR, Article 7(1) provides a minimum standard of protection against the retroactive application of the criminal law. It is open to States to adopt a higher standard of protection under their domestic law (for example by requiring that an international criminal law offence be criminalised under a duly promulgated piece of domestic legislation) and nothing in the Convention operates to prevent a State from doing so. However, the PTJ's interpretation of "the whole construct of the principle of retroactivity" directly and impermissibly undermines the higher

[19] Preparatory Work on Article 7 of the European Convention of Human Rights, DH 57(6), 21 May 1957, at p. 6. (p. 12 pdf document). See also, Preparatory Work on Article 7, CHD (70) 10, 13 April 1970, at p. 8, (p. 16 pdf document); W.A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) at p. 332 (citing Amendments to Article 2, paragraphs 3, 5, and 6 of the Recommendation of the Consultative Assembly proposed by the Swedish expert, Doc. A 777, III *TP* 184).

standard of protection offered to the accused under the applicable domestic law[20].

33. As a consequence of each of these errors, the PTJ's conclusion that CIL is, by virtue of the KSC Law alone, a "permissible criminalising source", compatible with the principle of non-retroactivity, is incorrect and should be overturned.

34. The Defence maintains that the Constitution does not recognise CIL, or treaty crimes as such.[21] There is no such thing as "unlocking a jurisdiction", as the SPO contends and the PTJ implicitly accepts. Otherwise, should Articles 13 and 14 of the Law be considered as constituting domestic criminal provisions amending existing criminal law pertaining to war crimes (instead of referring to CIL crimes), the Defence maintains its position that prosecution on the basis of rules of CIL, cannot retroactively substitute, or operate in parallel with, the existing legislation in force at the time of the material events, in violation of the principle of legality under Article 33 of the Constitution and applicable IHRL.

Ground 3: The PTJ makes a material error of law in dismissing the Defence's position that the SFRY Constitution and Criminal Code limit the jurisdiction of the KSC and in dismissing the jurisprudence of the Serbian Constitutional Court in this regard

35. At paragraph 99 of the Impugned Decision, the PTJ holds that (emphasis added):

> *As discussed above, the applicable law chosen by the Kosovar legislator for the SC comprises, first, customary international law and, second, domestic Kosovo law only insofar as it is expressly incorporated in the Law, as stipulated by Article 3(2)(c) and (4) of the Law. The domestic law referred to in the Law may apply directly to crimes under Article 15 of the Law and may apply to international crimes under Article 13*

[20] The PTJ's reliance may have been valid in respect of Bosnia or Cambodia. Neither country has specific provisions relating to the principle of legality in their constitutions. Consequently, the principle of legality in these states concerns exclusively the international principle of legality set out in Art 7 ECHR or Art 15 ICCPR.

[21] For instance, a State cannot prosecute an individual domestically, by simply ratifying the Rome Statute.

> *and 14 of the Law only insofar as it is in compliance with customary international law, as stipulated by Article 12 of the Law.* ***This, in turn, means that the SFRY Constitution and the SFRY Criminal Code do not limit the jurisdiction of the SC in the manner suggested by the Defence.*** *Thus, for the purposes of the proceedings before the SC, customary international law is and remains the primary source of law in accordance with the Constitution and the Law.*

36. For the reasons set out under Ground 1, the Defence's position is that the PTJ erred in finding that the correct applicable law is CIL and that domestic law applies only insofar as it is expressly incorporated in the Law and consistent with CIL. On the basis of the PTJ's own reasoning in paragraph 99, it therefore follows that the PTJ also erred in dismissing the relevance of the SFRY Constitution and Criminal Code to the jurisdiction of the KSC. The Defence maintains that this was the applicable law in force at the relevant time.

37. Under Article 6 of the Law, the KSC's jurisdiction is limited, *ratione materiae*, to the crimes set out in Articles 12 – 16 of the Law. However, as set out above, when introducing the KSC Law, the legislator was obliged to act in accordance with the Constitution. To the extent that the conduct criminalised under Articles 12 – 16 was not also subject to duly promulgated criminal sanctions under the SFRY Criminal Code applicable in 1998, these provisions of the Law are unconstitutional and therefore invalid. It follows that the KSC's jurisdiction is limited to conduct which was criminalised under the SFRY Criminal Code applicable in 1998.

38. The PTJ also erred in dismissing the applicability and relevance of the SCC judgment on the basis that this was merely a judicial precedent from another jurisdiction. Serbia is, of course, not just any other jurisdiction. It is the successor State to the SFRY and the continuator State to the FRY vis-à-vis Kosovo. The SCC is therefore the apex court with ultimate authority for

determining issues under the applicable law and its judgments are binding on the KSC.[22]

39. The Defence repeats that, in Case no Uz-11470/2017,[23] the SCC considered issues of direct relevance to the Defence's jurisdictional challenge[24]. In particular, it considered: whether the constitutional framework applicable in 1998 allowed for the direct effect of CIL; and whether subsequent domestic legislation seeking to provide such direct effect (legislation which was, as set out in the Defence's response to the Sur-Reply[25], substantively similar to Article 12 of the KSC Law) was compatible with the constitutional prohibition of retroactive application of the criminal law[26]. Consistent with the Defence's position, the SCC ruled that the applicable constitutional framework did not allow for direct effect of CIL in 1998; and that subsequent legislation purporting to give such direct effect was unconstitutional and therefore invalid. The Defence maintains that the legal situation considered by the Serbian

[22] While the practice of other SFRY successor states, like Croatia, Slovenia, Bosnia and Northern Macedonia may be relevant from a comparative perspective, it is submitted that the SCC, due to Serbia's status as continuator state vis-à-vis Kosovo and Montenegro, has ultimate authority in the interpretation of the 1974 SFRY Constitution as well as the 1992 FRY Constitution and other laws in force from 1988-1999 (to the extent they are more lenient to the accused). The Defence notes that, of all the SFRY successor states, only Bosnia has so far retroactively applied domestic law in respect of war crimes and crimes against humanity. However, considering that the Bosnian constitution does not provide for a "domestic principle of legality", Bosnian courts have not been required to engage in any interpretation of the 1974 SFRY Constitution, and instead justified their approach exclusively on the basis of Article 7 ECHR (*see*, BiH Constitutional Court, *Šefik Alić v. BiH*, Case no. AP-556/12, 4 July 2014, paragraph 43).
[22] Response to Sur-Reply.
[23] Annex 1-2 to F00310, Veseli Defence Reply to the Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE), 17 May 2021, ("JCE Reply") (Annex 2 hereto).
[24] F00342, Veseli Defence Response to Prosecution Sur-Reply, 4 June 2021, paras 2-5.
[25] Response to Sur-Reply, paragraphs 2 – 5.
[26] Law on Organisation and Competence of Government Authorities in War Crimes Proceedings ("Serbian War Crimes Law"), (Official Gazette of the Republic of Serbia No 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009), (official translation by the Serbian Ministry of Justice, available at https://www.mpravde.gov.rs/en/tekst/1701/criminal-matter.php.

Constitutional Court in this case was indistinguishable from the legal situation facing the KSC in the present appeal.

40. On this basis, even if the SCC judgment is not binding on the KSC (which the Defence maintains that it is), it is at least highly authoritative in relation to the central issues in contention in this challenge. Either way, the PTJ's refusal to do any more than note the judgment before dismissing its relevance on the basis that it was a judgment from "another jurisdiction" amounts to a material error in and of itself. It is further submitted that this led the PTJ to sustain his legally erroneous conclusions that CIL has direct effect; and that there is no issue of retroactivity in the present case. In both respects, these errors invalidate the Impugned Decision. The Court of Appeals Panel is therefore invited to give due consideration to the SCC judgment in determining the issues before it in this appeal.

41. Finally, the Defence submits that the PTJ should have also considered the interpretation of the SFRY Constitution followed by other states forming part of the FRY at the time. In *Bukovica,* the Montenegrin Court of Appeals remained loyal to the strict principle of legality enshrined in the constitution[27] and rejected the proposition that the accused could be prosecuted for crimes against humanity not previously criminalised by the criminal code in force at the time of the alleged events.[28]

[27] Appellate Court of Montenegro, case Kž-S 1/2012, Judgment, 22 March 2012 ("Bukovica case"). (Annex 3).

[28] While the Appellate Court had to engage with a more complicated issue, namely whether the alleged events were covered by the 1974 SFRY (which recognised only treaties) or the 1992 FRY Constitution (which recognised CIL), the present case is straightforward, as the 1992 FRY Constitution will be applied only to the extent that is more lenient to the Accused.

Ground 4: The PTJ fails adequately to address the Defence's submissions on discrimination and equality before the law

42. In the Reply and Response to the Sur-Reply, the Defence set out in detail the grounds on which it considers that the difference in treatment in the delivery of the principle of legality in the present case violates the principle of equality before the law and amounts to unlawful discrimination.[29]

43. By way of summary, the Defence submits that:

a. The judgment of the SCC in Case no Uz-11470/2017 confirms that a person on Serbian territory accused of conduct identical to that which forms the basis of the allegations against Mr. Veseli in the Indictment would be tried according to the domestic law in force at the relevant time, i.e. the SFRY Criminal Code. In practice, this means that Mr. Veseli's Serbian counterpart could not be charged for a crime against humanity, the war crime of arbitrary detention or on the basis of joint criminal enterprise ("JCE") or command responsibility in relation to conduct in Kosovo in 1998. To do so would violate the principle of legality enshrined in the SFRY Constitution and reflected in applicable IHRL.

b. If the Impugned Decision stands, a different legal regime will apply to those tried at the KSC with the consequence that Mr Veseli and other protagonists within the KSC's jurisdiction would be criminally liable for precisely the same conduct, carried out in the same place and at the same time as their Serb counterparts. Such protagonists are, in practice, exclusively ethnic Albanians of Kosovar nationality.

c. It is the Defence's position that this amounts to an unjustifiable difference in treatment in the delivery of the principle of legality, guaranteed under

[29] Reply paragraphs 3 – 15; Response to Sur-Reply paragraphs 2 – 12.

the SFRY Constitution, the Constitution of Kosovo, ECHR and ICCPR. This in turn amounts to unlawful discrimination and a violation of the principle of equality before the law guaranteed by the Constitution and applicable IHRL.

44. The PTJ dismisses this submission in just one paragraph[30], on the basis that:

> *[…] it is wholly conceivable that different jurisdictions, including jurisdictions originating from the same predecessor entity, prosecute persons allegedly responsible for crimes [sic] occurred during the same armed conflict, pursuant to different laws, in the exercise of their authority to enact and implement the laws they deem appropriate.*

45. The Defence submits that this is a material error in the law for the reasons set out below.

46. The PTJ fails entirely to address the significance of the fact that Kosovo and Serbia emerged from the fragmentation of a single State. Effectively, he treats Serbia as if it was any other jurisdiction. As set out in relation to Ground 3 above, this is evidently not the case. At the relevant time, there was one federal State and its citizens were subject to the same criminal law and protected by the same rights and safeguards under the Constitution and applicable IHRL, most significantly the principle of legality.

47. The Defence submits that these rights and safeguards belong to the people who were subject to the jurisdiction of the FRY in 1998, irrespective of their ethnicity, place of residence or the nationality they acquired subsequent to the break-up of the FRY. In its General Comment No. 26 on the Continuity of Obligations, the Human Rights Committee confirms this position in relation to the ICCPR (emphasis added):

> ***The rights enshrined in the Covenant belong to the people living in the territory of the State party****. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection*

[30] Impugned Decision, paragraph 100.

> *of the rights under the Covenant,* ***such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant***.[31]

48. This is an authoritative interpretation of the continuity of rights and obligations under the ICCPR which, for the reasons set out below, is consequential in and of itself. However, the principle also holds true as a matter of general public international law. Successor States automatically succeed to their predecessor's rights and obligations under a multilateral human rights treaty. This imposes both prospective and retrospective obligations, meaning that the State must take steps to respect and ensure the accrued rights of people within its jurisdiction[32]. As reflected in the Separate Opinion of Judge Weeramantry in the Bosnian Genocide Case (in the context of the Genocide Convention):[33]

> *Without automatic succession to such a Convention, we would have a situation where the worldwide system of human rights protections continually generates gaps in the most vital part of its framework, which open up and close, depending on the break-up of the old political authorities and the emergence of the new. The international legal system cannot condone a principle by which the subjects of these States live in state of continuing uncertainty regarding the most fundamental of their human rights protections.*

49. The Defence submits that this was true for the protections afforded under the Genocide Convention under consideration in the Bosnian Genocide Case; and that it is equally true for the non-derogable principles of legality and equality before the law without discrimination relevant to this appeal. Further, there is no reason and no justifiable basis to distinguish the continuing nature of

[31] CCPR/C/21/Rev.1/Add.8/Rev.1, General Comment 26, paragraph 4
[32] See, inter alia, Art 34 1978 Vienna Convention on State Succession in Respect of Treaties (to which the SFRY was a signatory): Serbia's failure to restrict the retrospective application of the Genocide Convention by purporting to accede to it with a reservation in 2001 and the international condemnation thereof; M. Kamminga, "State Succession in Respect of Human Rights Treaties", (1996) 7 European Journal of International Law (1996) with references to doctrine and state practice on this point.
[33] https://www.icj-cij.org/public/files/case-related/91/091-19960711-JUD-01-05-EN.pdf.

protections afforded under IHRL from the corresponding protections afforded under domestic constitutional law.

50. With respect to the ICCPR specifically, the SFRY ratified the Convention in 1971 meaning that people under the jurisdiction of the FRY in 1998 benefitted from the rights thereunder, including the prohibition of retroactive application of the criminal law under Article 15, and equality before the Law without discrimination, under Article 26. It follows that the protection afforded by these rights devolved with territory and continues to belong to the same people subsequent to the break-up of the FRY and irrespective of their subsequent nationality or place of residence.

51. The corollary is that the successor States to the SFRY remain responsible as a matter of international law for the corresponding obligations. As a matter of general public international law, this is the case for both Serbia and, as a successor to Serbia, Kosovo. With respect to Kosovo, although not technically necessary, this was confirmed in its declaration of independence:

> *9. We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part, including the Vienna Conventions on diplomatic and consular relations. […]*[34]

52. Accordingly, Kosovo inherits the obligation to respect and ensure to all individuals within its territory and subject to its jurisdiction the accrued rights under the ICCPR and pursuant to the relevant constitutional safeguards.

53. If, however, the Impugned Decision is allowed to stand, people within the territory of Kosovo and subject to the jurisdiction of the KSC (who are predominantly, if not exclusively of Albanian ethnicity and Kosovar nationality) will be denied the same protection against retroactive application

[34] Assembly, Declaration of Independence, 17 February 2008.

of the criminal law under Article 15 and the benefit of the principle of legality under the Constitution which is afforded to their Serb counterparts. This amounts to a violation of the right to equality before the law without discrimination under Article 26 ICCPR and under Article 24 of the Constitution of Kosovo.

54. Further, the Defence repeats its submissions that such a difference in treatment requires a compelling justification in order not to violate the prohibition of discrimination under Article 14 ECHR.[35] The burden to provide such justification rests with the Respondent State[36]. Despite being put on notice by the Defence and the obligation upon them to do so, neither the SPO nor the PTJ has even attempted to justify the difference in treatment. In and of itself, this amounts to a material error of law which invalidates the Impugned Decision.

55. As Article 22 of the Constitution of Kosovo provides for the direct application[37] and primacy of the ECHR and ICCPR over other sources of domestic law, including the KSC Law, it is submitted that the KSC is obliged to give effect to Articles 15 and 26 ICCPR and Articles 7 and 14 ECHR in order to ensure that people within its jurisdiction are afforded the same protection against retroactive application of the criminal law as their Serb counterparts. The consequence is that the KSC is obliged under the Constitution to apply a standard of criminal liability in relation to the 1998 conflict in Kosovo which is no less favourable to the accused than the standard applied in Serbia.

56. By extension to this submission, the Defence also notes the failure to uphold the principle of equality before the law without discrimination and unjustified difference in treatment vis-à-vis other people tried in the Kosovo courts in

[35] Reply, paragraph 14.
[36] ECtHR, Timishev v. Russia, Apps. No 55762/00 55974/00, Judgment, 13 December 2005, para. 57.
[37] The Defence recalls that, pursuant to Article 22 of the Constitution of Kosovo, direct effect is permitted under the Constitution only with respect to human rights treaties.

relation to the same conflict. When the prosecution and the lower courts attempted to try Kosovo Serbs such as Mr. Besovic or Mr. Vuckovic, on the basis of CIL (despite formally charging the accused on the basis of a domestic criminal law provision), the Supreme Court of Kosovo rightly held:

> *[I]n the application of Article 142 CL FRY, it would not be legitimate to resort to international customary law in such an area as primarily defining prohibited conduct, defining the basis of individual criminal responsibility and punishment.*[38]

57. Likewise, when a district court applied the doctrine of command responsibility as a mode of liability against Mr Kolasinac, despite that command responsibility was not recognised as such by the SFRY Criminal Code, the Supreme Court of Kosovo held:

> *A mens rea in case of negligence ("should have known") cannot result in criminal liability under Article 142 because Article 11 only allows negligence to be the basis for criminal liability if the crime explicitly allows liability due to negligence, and Article 142 does not refer to negligence.*[39]

B. GROUNDS OF APPEAL RELATING TO THE UNCONSTITUTIONAL PRIMACY GRANTED TO CUSTOMARY INTERNATIONAL LAW (ALTERNATIVE ARGUMENT)[40]

Ground 5: The PTJ failed to provide reasoning to justify the primacy of CIL over domestic law

58. In the alternative, the Defence submitted that: even if both CIL and domestic law were to apply, there is still no legal basis for the KSC Law to give preference to CIL over domestic law.[41]

59. The drafters of the KSC Law attempted to give primacy to CIL by reference to Article 7(2) of the ECHR.[42] The Defence submitted, based on settled ECtHR case-law,[43] that Article 7(2) is now obsolete and cannot operate as an exception

[38] Motion, paragraph 49.
[39] Motion, paragraph 122.
[40] Impugned Decision, Section IV(A)(4) and (2).
[41] Motion, paragraphs 60 – 77.
[42] Motion, paragraphs 25, 62, 70, 72
[43] Motion, paragraphs 73-74.

to the principle of *lex mitior*. It followed that Articles 12, 15(1)(c), 16(1), and Article 44(2)(c) of the KSC Law violate Article 33 of the Constitution and Article 7(1) of the ECHR insofar that they bar the application of the principle of *lex mitior* when more than one applicable law, mode of liability, or sentence is possible.

60. However, while the PTJ agreed with the Defence's interpretation of Article 7(2)[44], he failed to engage with the above and rejected the Defence's submissions in relation to *lex mitior* in the following terms (emphasis added):

> *However, the Pre-Trial Judge observes that the* ***issue of the applicability of such principle is not jurisdictional in nature****. It concerns, rather, the proper identification, in case of conflict, of which law should be resorted to by a panel as the more favourable to the Accused.* ***Moreover, this does not have a direct bearing on the issues dealt with in this litigation, as the only subsequent, applicable source of law that can be assessed to find a more favourable law, if any, is customary international law, to the extent that it would evolve to the benefit of the Accused****.*[45]

61. The Defence submits that the PTJ failed to provide reasoning in relation to a crucial submission of the Defence, namely that the purported primacy of CIL over domestic law in Article 12 of the Law, is unjustified and bars the application of the principle of *lex mitior* protected by Article 7(1) of the ECHR, in the event that the domestic law is more favourable to the accused.

62. In addition, the Defence submits that this conclusion rests on material errors of law as set out in the grounds below. These errors have the effect of invalidating the PTJ's finding on *lex mitior* and therefore the Impugned Decision. If the Defence is correct on this point, the KSC will have jurisdiction to apply CIL and domestic law, equally; and when choosing which law to apply, it will follow the *lex mitior* principle set out in Article 7(1) of the ECHR.

[44] Impugned Decision, paragraph 93.
[45] Impugned Decision, paragraph 106.

Ground 6: The PTJ made a material error of law in concluding that the principle of *lex mitior* applies only to CIL

63. The Defence submits that the PTJ made a material error of law in determining that the only subsequent applicable source of law that can be assessed to find a more favourable law, if any, is CIL.

64. First, by considering that *lex mitior* applies to changes in CIL only, the PTJ fails to address the fact that the 2015 KSC Law (which provides jurisdiction to the KSC to apply CIL) is, in and of itself, domestic law, just like the 1976 SFRY Criminal Code (as well as successive criminal codes). The 2015 KSC Law added certain penal provisions in addition to the existing ones regulating the same conduct.[46] If the case was to go before the ECtHR, the Court would not focus on whether the KSC would apply CIL or domestic law. Following the correct approach to Article 7(1) ECHR, the KSC should first consider whether the substantive law in the 2015 KSC Law is less favourable to the accused than the previous 1976 substantive law regulating war crimes, modes of liability, and sentencing. To the extent that it was less favourable, the primacy accorded to CIL in Article 12 of the KSC Law, would be in violation of Article 7(1).

65. Second, the *lex mitior* principle in Article 7(1) is automatically triggered when more than one applicable law is available. The SPO and the PTJ have previously both acknowledged the applicability of the 1976 SFRY Criminal Code.[47] While Article 7(1) of the ECHR is permissive in requiring that an offence be proscribed by at least domestic or international law (primary argument), it leaves no choice

[46] It is irrelevant whether these new domestic provisions (articles 13 and 14) refer to already existing crimes under CIL. It is only through this new 2015 legislation that "a jurisdictional avenue" has been "unlocked". In other words, CIL gains formal validity in the Kosovo legal order only through domestic law (Law No.05/L-053).
[47] F00010, Order to the Specialist Prosecutor pursuant to Rule 86(4) of the Rules, 2 July 2020, paragraphs 25-26.

when both domestic and international law are applicable: only the *lex mitior* shall be applied.

66. Third, in addressing the issue of applicable law and retroactivity, the PTJ adopted a conciliatory approach to the interpretation of Article 7(2) of the ECHR in Article 12 of the KSC Law, finding that Article 7 should be interpreted in its entirety. According to such a "conciliatory interpretation", there would be no legal basis upon which to found the primacy of CIL over domestic law.[48]

Ground 7: the PTJ made a material error of law in finding that the applicability of *lex mitior* is not jurisdictional in nature

67. The Defence submits that the PTJ made a material error of law when finding that the issue is not jurisdictional.[49]

68. First, the only authority cited[50] by the PTJ is inapposite to the issue in contention and instead, supports the Defence's position. Unlike the KSC, the ICTY was not bound by domestic law.[51] Accordingly, the position of the two tribunals is materially different considering that Articles 3(2)(a) and 12 of the KSC Law formally bind the KSC to apply both CIL and domestic law, irrespective of whether the primacy of CIL over domestic law was confirmed.

69. Second, the applicability of *lex mitior* is a jurisdictional matter, simply because it relates to the violation of a constitutional norm. Unlike international courts, the KSC does not operate on the basis of *Kompetenz-Kompetenz*. Its jurisdiction is based upon a law, which in turn is based on the Constitution and IHRL. It

[48] Moreover, the conciliatory interpretation of the PTJ is inconsistent with the reference to Article 7(2) of the ECHR in Article 44 of the Law. There is no doubt that the purpose of the drafters was to bar the application of the *lex mitior* in sentencing. If applied to this specific case, the PTJ's interpretation would reach the illogical conclusion that Article 7(1) of the ECHR would, at the same time, mandate, and bar the application of the *lex mitior* principle.
[49] Impugned Decision, paragraph 106.
[50] Impugned Decision, footnote 214.
[51] CIL Reply, paragraph 3; Prosecutor v. Nikolić, IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005, paras 81-85.

follows that, any provision of the KSC Law which violates the Constitution, necessarily impacts the KSC's jurisdiction to operate on the basis of said provision.

70. Third, the determination of the *lex mitior* issue governs, inter alia, which criminal offences are within the subject matter jurisdiction of the KSC under Article 6. If the Defence is correct on *lex mitior*, the KSC has no jurisdiction over the offences charged in the Indictment save for those which existed under the domestic law applicable at the time. Accordingly, the issue is one which is not only relevant to but determinative of the subject matter jurisdiction of the KSC and must be addressed at a preliminary stage in the proceedings, particularly in circumstances where the accused remains in custody. The PTJ's unreasoned finding to the contrary amounts to a material error of law and the relevant part of the Impugned Decision is invalidated

71. Finally, the Defence notes that other courts have specifically considered the applicability of *lex mitior* during jurisdictional proceedings.[52]

C. GROUNDS OF APPEAL RELATING TO THE EXISTENCE OF JCE IN CUSTOMARY INTERNATIONAL LAW (ALTERNATIVE ARGUMENT) PRIOR TO 1998

Ground 8: The PTJ made a material error of law in failing to apply the mode of liability more lenient to the accused[53]

72. In its submissions, the Defence argued that JCE is not included in the KSC Law and that, even if it were (provided that CIL had direct effect in Kosovo), the PTJ was still required to i) assess the present status of JCE in CIL and ii) conduct a

[52] STL, Interlocutory Decision on the Applicable Law, 16 February 2011. Unlike the PTJ, the STL Pre-Trial Judge raised such jurisdictional issues *proprio motu*. The PTJ should have done the same and referred the case to the Constitutional Court.
[53] Impugned Decision, paragraphs 176-179.

comparative analysis in order to determine which mode of liability is more lenient to the accused in application of the *lex mitior* principle.[54]

73. The PTJ erred in concluding that the specificity of the modes of liability listed in Article 16(1) of the Law and the lack of reference to "Kosovo criminal law" means that the Kosovo law was not applicable "*in the interpretation of the autonomous regime of Article 16(1) of the Law*".[55] Further, the PTJ erred in concluding that, in *"relation to crimes under Articles 13-14 of the Law, the SC may only apply modes of liability that were part of CIL at the time the alleged crimes were committed*".[56] These conclusions are erroneous for the reasons set out below.

74. First, there is no logical basis or legal authority to support the view that the modes of liability listed in Article 16(1)(a) of the Law are "self-contained"[57] and apply exclusively to the crimes under Articles 13 - 14 of the Law. The fact that Article 16 of the Law does not mention prior Kosovo legislation does not mean that modes of liability such as "planning, instigating, ordering, committing and aiding and abetting" are not present in the 1976 Criminal Code,[58] or that they are exclusive to international crimes based in CIL.

75. In this respect, the Defence notes that the PTJ accepted the similarity between the two sets of modes of liability but found that the 1976 SFRY Criminal Code provided "for a structurally different system of liability"[59] without substantiating what such different system consisted of. Having considered the relevant provisions identified above, the Defence submits that no such structural difference exists, which could make it impossible for the modes of

[54] Motion, paragraph 93.
[55] Impugned Decision, paragraph 178.
[56] Impugned Decision, paragraph 179.
[57] Impugned Decision, paragraph 177.
[58] All the modes of liability listed in Article 16(1) of the Law are included in the 1976 SFRY Criminal Code: Planning (Article 18(3); Instigating (Articles 23; 145, 152); Ordering (Article 142); Committing (Article 142; 22); Aiding and abetting (articles 24-25).
[59] Impugned Decision, paragraph 178.

liability prescribed by 1976 SFRY Criminal Code to apply to the crimes listed in Articles 13 – 14 of the KSC Law.

76. Indeed, the Defence submits that all the modes of liability listed in Article 16(1)(a) are common to almost every domestic legal system. As for commission, the difference does not lie in the mode of liability itself, but in the interpretation given to such a neutral term by the ICTY. Just because a specific provision is taken *verbatim* from the ICTY, it does not necessarily mean that the KSC is bound to follow their interpretation of that term.

77. Moreover, the PTJ's finding is irrational insofar as requiring that international crimes can only be prosecuted on the basis of "international" modes of liability. This is inconsistent with the significant number of States[60] wherein their domestic legislation prescribes domestic law modes of participation in international crimes, instead of "JCE" or any other mode of liability used by international courts. The Kosovo legal system is no different and has successfully prosecuted war crimes without the need of incorporating international modes of liability.

78. Second, considering that, even in the present, unconstitutional configuration of Article 12 of the Law, war crimes may be prosecuted both on the basis of Article 14 as well as the 1976 SFRY Criminal Code, then it necessarily follows that the modes of liability contained in the 1976 SFRY Criminal Code may also apply to Article 14 of the KSC Law. In addition, no issue of compliance with CIL arises considering that the PTJ himself has previously accepted that Article 142 of the SFRY Criminal Code "*incorporates by reference the international law applicable*

[60] See for example, s.55 of the UK International Criminal Court Act 2001.

during armed conflict",[61] thus the 1976 SFRY Criminal Code and Article 14 contain essentially the same prohibited conduct.

79. Third, there is an internal contradiction in the PTJ's reasoning. In relation to the foreseeability of JCE with regard to domestic modes of liability, he finds that Article 22 SFRY Criminal Code "*was found to mirror the elements of JCE I*"[62] and that "*when coupled with Article 22 or 26 of the SFRY Criminal Code, these provisions mirror the elements of JCE III*".[63] If this interpretation is correct, it would follow, contrary to the PTJ's conclusion, that the SFRY modes of liability provide for a very similar and structurally compatible system of liability with the modes of liability listed in Article 16(1) of the Law. It follows that the PTJ erred in law in concluding that "*provisions of Kosovo criminal substantive law regulating modes of liability are not applicable in the interpretation of the autonomous regime of Article 16(1) of the Law*".[64]

80. Finally, and perhaps most importantly, it is irrelevant whether any difference (even a "structural" one) exists between crimes or modes of liability, since the Constitution has already prescribed that *lex mitior* rules shall regulate the choice of the applicable law in cases when a successive law (the 2015 KSC Law) adds or changes the relevant law applicable at the time of the material events (the 1976 SFRY Criminal Code). In this regard, the Defence notes that the crimes listed in Article 13 and 14 of the Law are, ultimately, domestic law provisions (whether or not they refer to CIL rules or "unlock" jurisdiction). In other words, the ultimate legal authority to criminalize a certain behaviour is provided by a

[61] KSC-BC-2020-06/F00010, PTJ, Order to the Specialist Prosecutor pursuant to Rule 86(4) of the Rules, 2 July 2020, paragraphs 25-26.
[62] Impugned Decision, paragraph 197; 199.
[63] Impugned Decision, paragraph 200.
[64] Impugned Decision, paragraph 178.

provision of a domestic law enacted by the Assembly of the Republic of Kosovo.

81. It follows that the question that the PTJ should have first posed was whether the modes of liability contained in Article 15 of the Law may apply to the relevant crimes. As the answer (in view of the above paragraph) is undoubtedly affirmative, the PTJ was thereafter required to assess, whether any differences existed between the modes of liability prescribed by the 2015 KSC Law vis-à-vis those prescribed by the 1976 SFRY Criminal Code, including other successive criminal codes, and ultimately applied the mode of liability which is more lenient to the accused.

82. By simply declaring the existence of a difference between the modes of liability listed in Article 16(1)(a) compared to the ones listed in the previous laws in Kosovo, the PTJ made a material error of law in failing to consider the application of the more lenient law, in violation of Article 33 of the Constitution and Article 7 of the ECHR.

Ground 9: The PTJ made a material error of law in failing adequately to investigate the CIL status of JCE III

83. First, the PTJ erred in law in finding the following:

> *In light of Article 3(3) of the Law, the PTJ may take in consideration this consistent jurisprudence and shall address the above questions only to the extent of ascertaining whether the Defence has presented persuasive reasons warranting different legal findings on the matter at hand.*[65]

84. While Article 3(3) of the KSC Law gives the judges the option to rely, for the purpose of the identification of CIL at the time crimes were committed, on any source of international law, "including subsidiary sources such as the jurisprudence from the international ad hoc tribunals, the International

[65] Impugned Decision, paragraph 181; 186.

Criminal Court and other criminal courts", it appears that the PTJ places undue weight on the case law of the international courts. In this context, he also unduly places a burden on the defence to present "*reasons warranting different findings on the matter at hand*".[66] Article 3(3) does not allow the PTJ to avoid his duty to determine the CIL applicable at the time of the material events. The Defence has no burden to discharge, other than to assist,[67] if it so wishes, the PTJ and direct him to any authority it deems relevant for the purposes of determining the status of CIL in 1998. It is the PTJ, therefore, who is required to provide reasons for his decision.

85. The Defence raised a number of points in its submissions challenging the customary status of JCE III at the relevant time. It is submitted that the PTJ did not give adequate consideration to these points and failed, as was his duty, to investigate anew the relevance of post-WWII cases. Instead, the PTJ reduced the question of the accuracy on the existence of CIL into a game of numbers, apparently basing his decision, at least in part, on the fact that: "*all but one international tribunal have interpreted state practice and opinio juris in the same way*".[68]

86. Had the Pre-Trial Chamber of the ECCC done the same, the issue of whether JCE III was established under CIL would have been summarily dismissed, considering that, at the material time, the consensus among international tribunals concerning the CIL status of JCE III was absolute.[69] Likewise, had the late Judge Cassese not regretted his decision on the attachment of JCE III to

[66] Impugned Decision, paragraph 181.
[67] Motion, paragraph 114.
[68] Impugned Decision, paragraph 186.
[69] ECCC, Co-Prosecutors v NUON Chea et al., 002/19-09-2007-ECCC/OCIJ, D97/15/9, Decision on the Appeals of the Co-Investigative Judges' on Joint Criminal Enterprise (JCE), 20 May 2010.

specific intent crimes,[70] the Special Tribunal for Lebanon would noy have followed suit; and neither would the Special Court for Sierra Leone.

87. Second, the PTJ failed to address the Defence's submissions[71] that the existence or otherwise of JCE III under CIL was not frozen in time in 1998. To the extent that there is a subsequent change in the law which is to the benefit of the accused, such benefit must, because of the *lex mitior* principle, be adopted to the benefit of the accused. The Defence maintains its submissions that the adoption by the 160 States participating in the Rome Conference of modes of liability which excluded JCE III evidences a departure from existing CIL. Consequently, in 2021 there exists two "international" modes of liability sufficiently based under CIL. The Appeals Chamber Panel is therefore invited to remedy the failure of the PTJ and determine which of these modes of liability is more lenient to the Accused.[72]

D. GROUNDS OF APPEAL RELATING TO THE EXISTENCE OF ARBITRARY/ILLEGAL DETENTION IN CUSTOMARY INTERNATIONAL LAW PRIOR TO 1998

Ground 10: The PTJ made a material error of law in finding that Article 14(1)(c) of the Law provides for a non-exhaustive list of prohibited conducts

88. As a preliminary point, the Defence submits that Article 162(9) of the Constitution relates to the official languages of the KSC (as an institution), and not to the KSC Law (as a legal basis for creating such institution). The KSC Law is subject to the Constitution, which specifies that Albanian and Serbian are official languages. Therefore, in case of linguistic discrepancies between two

[70] A. Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', 5 JICJ 109-133 (2007).
[71] Motion paragraphs 115-119, 117; JCE Reply, paragraph 38.
[72] The Defence also reminds that the final determination on mode of liability will be made after the most lenient international mode of liability will be compared with the most lenient domestic mode of liability.

equally authentic texts, "the version most favourable to the Accused should be upheld."[73]

89. The PTJ's finding that the formulation of Article 14(1)(c), ("by including the following acts") refers to a non-exhaustive list, similar to paragraphs (b) and (d) of the Law ("including, but not limited to, any of the following acts") is clearly contradicted by the plain meaning of the text, as well as by the legal text it was taken from, namely Article 8(2)(c) of the Rome Statute.

90. The Defence notes that the PTJ neglected to discuss the submission of the Defence in relation to the Rome Statute, including the authoritative view that both Article 8(2)(c) and (e) of the Rome Statute (dealing with crimes in NIAC) contain closed, exhaustive lists of crimes.[74]

91. Accordingly, the Appeals Chamber is invited to set aside the finding of the PTJ and declare that Article 14(1)(c) of the Law does not provide any legal basis to prosecute the Accused on the basis of illegal/arbitrary detention during NIAC.

Ground 11: The PTJ made a material error of law in finding that arbitrary detention is a serious violation of IHL

92. Relying on the UK Supreme Court Serdar Mohamed case, the PTJ found that "*any* form of deprivation of liberty in non-international armed conflict was arbitrary under IHL".[75] The Defence submits that this was a material error of law for the following reasons:

[73] Prosecutor v. Karemera, case ICTR-98-44-T, Decision on the Defence Motion pursuant to Rule 72, 25 April 2001, paragraph 8
[74] 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 paragraph 2 (c) of the Statute uses the term "namely" indicates that the list of crimes in (i)–(iv) is exhaustive)
[75] Impugned Decision, paragraph 152.

93. First, the majority of UK Supreme Court focused on a narrow issue and did not express a concluded view on whether CIL sanctioned detention in NIACs.[76] The PTJ therefore misinterprets the judgment by relying on the dissenting speech of Lord Reed.[77] In any event, even if the majority had adopted Lord Reed's view, it does not necessarily follow that, just because IHL does not explicitly provide for authorisation to detain, that it necessarily prohibits it.[78]

94. Second, the judgment of a domestic court, still less a dissenting opinion, is not a source of international law and therefore, under Article 3(3) of the Law, it is not a basis upon which the Court should place decisive weight in determining the content of the relevant rules of CIL.

95. Third, the PTJ fails to mention the position taken by the ICRC, despite relying on its Study extensively throughout the Impugned Decision in relation to other issues in which it supports the expansive position adopted by the PTJ. In the context of detention in a NIAC, the ICRC has consistently held that detention is a legal occurrence during NIAC and that both customary and treaty IHL contain an inherent power to intern and provide a legal basis for internment in NIAC.[79] This is not determinative however it is a relevant data point in determining the contents of CIL and its omission by the PTJ is conspicuous.

96. Fourth, the justification that "the principle of equality of belligerents cannot be stretched so as to provide an equal authority to the armed group to detain persons of their liberty" is illogical. The equality of the belligerent is the only incentive of non-state actors to abide by IHL. Moreover, it would lead to the

[76] UK Supreme Court, Serdar Mohammed v Ministry of Defence [2017] UKSC 2, paragraphs 4, 113, 148, 224.
[77] UK Supreme Court, Serdar Mohammed v Ministry of Defence [2017] UKSC 2, paragraph 275.
[78] Ryan Goodman, Authorization versus Regulation of Detention in Non-International Armed Conflicts, 91 Int'l Studies 155, at 158.
[79] ICRC, Internment in armed conflict: Basic rules and challenges, 25 November 2014, p. 7.

perverse consequence that non-state actors are authorised under IHL to kill, but not to detain.

Ground 12: The PTJ made a material error of law in concluding that CIL at the time of the events required a clear set of basic guarantees

97. The PTJ erred by concluding that CIL at the relevant time prescribed the basic guarantees in relation to persons in the hands of a belligerent listed in paragraph 154 of the Impugned Decision. This list is based on institutional guidelines, themselves based on law and policy.[80] It was published by the ICRC for the first time in 2005 in order to respond to the "paucity" of IHL rules as to what amounted to arbitrary detention.[81] This was not declaratory of CIL when it was published in 2005; still less at the relevant time, some seven years prior to that.

98. Indeed, even presently there is no settled definition of what amounts to "arbitrary detention". The 2020 Commentary states that:

> *At the time of writing, however, the question of which standards and safeguards are required in non-international armed conflict to prevent arbitrariness is still subject to debate and needs further clarification, in part linked to unresolved issues on the interplay between international humanitarian law and international human rights law.*[82]

99. Finally, the Defence notes that the PTJ also failed to engage with the authority provided by the Defence according to which the only example of non-serious violation of Common Article 3 would be imprisonment without adequate judicial guarantees.[83]

[80] ICRC, Internment in armed conflict: Basic rules and challenges, 25 November 2014, p. 8; ICRC, GC III 2020 Commentary Common Article 3, paragraph 760.
[81] CIL Reply, paragraph 46.
[82] ICRC, GC III, 2020 Commentary, Common Article 3, paragraph 756.
[83] CIL Reply, paragraph 54.

Ground 13: The PTJ made a material error of law in finding that arbitrary detention was criminalized under CIL rules of IHL during 1998[84]

100. The PTJ concluded, on the basis of state practice and *opinio juris* purportedly evidenced by domestic legislation and a handful of resolutions from UN bodies, that, by 1998, a CIL rule existed which criminalised illegal/arbitrary detention in a NIAC.[85]

101. The Defence submits that the PTJ relied on a very limited sample of domestic legislation (from 14 States in total) to prove the existence of a "virtually uniform" practice, accepted as binding. Despite this, the Defence submits that even the few pieces of domestic legislation relied on by the PTJ fail to support the conclusion that states criminalised illegal/arbitrary detention in NIACs before 1998. The PTJ's analysis relies on a flawed interpretation of provisions that criminalised unlawful detention under IACs, rather than NIACs. The Defence therefore submits that it sees no evidence of any State that in 1998 criminalised illegal or arbitrary detention in a NIAC or considered it to be a serious violation of Common Article 3.

102. Likewise, the Defence submits that the reliance on a handful of resolutions by international organisations during the 1990s is misplaced, as further set out below.

103. The Defence notes that the PTJ placed considerable weight on the formulation of Article 142 of the SFRY Criminal Code to prove that, like Article 142, most national legislations did not differentiate between illegal detention in the context of an IAC as opposed to a NIAC. However, such an interpretation is flawed, because it does not take into consideration that, due to the double criminality test, Article 142 applied to violations specifically referred to by the

[84] Impugned Decision, paragraphs 157-166.
[85] Impugned Decision, paragraph 160-162; 162–164.

Geneva Conventions. While Article 147 GCIV (applicable in IACs) specifically lists unlawful detention as a grave violation of IHL, Common Article 3 is silent on the issue. Therefore, Article 142 can criminalise unlawful detention only as a violation of IHL in IACs, but not as a serious violation of Common Article 3.[86] It follows that while crimes such as murder may have applied in the context of both IACs and NIACs, illegal detention could apply only in the context of an IAC. The point is clearly explained by Lazerevic, an authority relied upon by the Kosovo courts and ICTY (emphasis added):

> *War crime against civilian population can also be performed in the conditions of civil war, i. e. when it is a non-international armed conflict. In that case, however, according to the 1949 Geneva Convention and Protocol II, the regulations of international war law are applied in limited scope, i. e. the ban of only some of the activities stated in this Article is stipulated. The ban includes the attacks against the life and physical integrity, in particular murder in all forms, injuries, torture and causing suffering, inhumane treatment, humiliating and diminishing treatment, taking hostages, deprivation of the right to a correct and impartial trial, rape, forced prostitution etc. Other activities from this Article, which are not included in the mentioned convention and the supplementary protocol, could not, in case of a civil war, be qualified as a war crime, but, probably, as another criminal act from the federal or republic legislation.*[87]

104. This view has been confirmed by the Supreme Court of Kosovo in *Gjelosh Krasniqi*[88] as well as in *Kolasinac*.[89]

105. The same is the case for the national legislations of Slovenia, Northern Macedonia, and Croatia, considering the PTJ correctly noted that the criminal codes of the former Yugoslav states reproduce "*essentially the same text as Article 142 SFRY Criminal Code*".[90] Likewise, The same reasoning as to Article 142 SFRY

[86] The Defence also notes CIL could not apply to violations of international law in Article 142 since only ratified international treaties were considered international law by the SFRY, *see Besovic*, pp 18-19.
[87] Ljubisa Lazarevic, *Commentary of the Criminal Code of FRY 1995*, 5th Edition "Savremena Administracija" Belgrade, p. 216. (Annex 4).
[88] CIL Reply, paragraph 55; Motion, paragraph 51 ("although 'illegal arrest' was specifically proscribed by Article 142 SFRY CC, no prohibition of that conduct could be found in the Geneva Conventions and in APII")
[89] Supreme Court of Kosovo, Prosecutor v. Kolasinac, AP – KZ 230 /2003, p. 14, fn. 1.
[90] Impugned Decision, paragraph 160.

Criminal Code can be attached to the states listed in footnote 330 of the Impugned Decision, considering, as the PTJ states, that "*some of them actually used the same the wording as the criminal codes of the countries of the former Yugoslavia*".[91]

106. As to other national legislation outside the SFRY which did not differentiate between IACs and NIACs,[92] the Defence notes that the text of the relevant legislative provisions is taken verbatim from Article 147 GCIV, which was applicable only in IACs. It can be inferred that these states also sought to refer exclusively to unlawful detention in the context of IACs.[93]

107. By way of further evidence in support of the existence of a criminal prohibition under CIL, at paragraph 162 of the Impugned Decision, the PTJ refers to five resolutions from UN bodies:

a. one General Assembly Resolution on "The Situation of Human Rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia" which condemns a list of human rights violations, including arbitrary detention. There is no doubt that arbitrary detention is a human rights violation. However, this is irrelevant to the existence of a norm of customary international humanitarian law applicable

[91] Impugned Decision, paragraph 161. For instance, the Commentary to the Article 124 of the Polish Criminal Code clarifies that the relevant provision refers to the right of fair trial, rather than unlawful detention, see Wróbel Włodzimierz (red.), Zoll Andrzej (red.), Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117-211a. (Annex 5). It should be noted that, similar to Article 142 SFRY CC, Poland follows the dual criminality rule, see letter from Poland to UN OLA (DOALOS) on Polish legislation with regard to piracy (a wrongful act needs to be in violation of Polish internal law as well as international law)

[92] Impugned Decision, paragraph 161.

[93] See, for instance, Article 358(d) of the 1968 Criminal Code of Romania, which follows exactly the same wording as Article 147 GCIV (POW) and reproduced in Article 8(2)(a)(vii) of the Rome Statute (Unlawful deportation or transfer or unlawful confinement) and Article 440(4)(a) of the current CC which penalises unlawful detention as a crime under IAC only (removed from 440(1)(e); Likewise, the Belgian 2003 Amendment of the legislation concerning international crimes wherein Article 136(c)(9) adopts a formulation which clearly refers to illegal detention in IAC (Unlawful deportation, transfer or displacement, unlawful confinement of civilians), similar to Article 8(2)(a)(vii) of the Rome Statute.

in the context of a NIAC, still less as evidence of the existence of a criminal prohibition under CIL;

b. one Commission on Human Rights Resolution on the "Situation of human rights" in the former Yugoslavia which again cites arbitrary detention amongst a list of human rights violations. For the same reason as the General Assembly Resolution, this is irrelevant;

c. two UN Security Council Resolutions expressing concern with regard to the grave violations of IHL in Bosnia-Herzegovina, Croatia and the SFRY during the 1990s, including by referring to the consistent pattern of unlawful or arbitrary detention by all parties to the conflict. Unlike the foregoing two resolutions, these resolutions do refer to international humanitarian law. However, they say nothing about individual criminal liability for such a violation taking place in the context of a NIAC. In any event, at the time of these Resolutions, there was no consensus amongst States that the relevant conflicts were in fact NIACs; and

d. a Commission on Human Rights Resolution from Sudan which refers to arbitrary detention in the context of "violations of human rights and humanitarian law". Again, there is no mention of individual criminal liability attaching to such a violation.

108. The Defence submits that this evidence is clearly irrelevant to the existence of a criminal prohibition against arbitrary detention in the context of a NIAC, particularly given the high threshold which should properly be applied in ascertaining a norm of CIL which might form the basis for a criminal conviction.[94] The PTJ made an error of law in relying on it and therefore the conclusion that it was "accessible and foreseeable to the Accused, at the

[94] ILC Draft Conclusions on the Formation of CIL, Conclusion 12(6).

relevant time, that involvement in acts of arbitrary deprivation of liberty might give rise to individual criminal responsibility" is flawed and should be set aside.

109. Finally, the PTJ fails to note the significance of the fact that arbitrary / illegal detention is omitted from both Articles 8(2)(c) and 8(2)(e) of the Rome Statute.

E. GROUNDS OF APPEAL RELATING TO THE EXISTENCE OF ENFORCED DISAPPEARANCE AS A CRIME AGAINST HUMANITY IN 1998

Ground 14: The PTJ made a material error of law in determining the enforced disappearance amounted to a crime against humanity in 1998

110. The Defence reiterates that this issue should not be conflated with the purported status of enforced disappearance under IHRL. In this regard, the Defence notes that PTJ could not indicate any international instrument (binding or not) which dealt with enforced disappearance as a crime against humanity except for the two instruments already referred to by the Defence in its Motion.

111. Despite citing the domestic legislation of multiple jurisdictions, the PTJ failed to refer to a single piece of legislation prior to 1998 which had criminalised enforced disappearance as a crime against humanity (as opposed to a common crime).

112. The PTJ failed to engage with the 1996 ILC commentary that: "this type of criminal conduct is a relatively recent phenomenon".[95] It is unlikely that, from this baseline, enforced disappearance achieved full CIL status in under two years.

113. As regards the practice of international tribunals, the Defence respectfully submits that it is the PTJ who was selective in failing to respond to the Defence

[95] Motion, paragraph 155.

submissions as to why the statutes of the ICTY, ICTR, ECCC and SCSL, all drafted by the UN Office of Legal Affairs whose expertise in CIL is undisputed, decided not to include enforced disappearance as a crime under CIL.

114. Finally, the PTJ failed to explain why the UN Working Group on Enforced Involuntary Disappearances, as the body most interested with the respect to the crime of enforced disappearance decided only in 2012 to declare its CIL status.

115. For the foregoing reasons, the Defence submits that the PTJ erred in finding that enforced disappearance constituted a crime against humanity under CIL in 1998. This error is material and invalidates the relevant part of the Impugned Decision.

IV. REQUEST FOR ORAL HEARING

116. The Defence respectfully requests the Panel to schedule an oral hearing for considering the present Appeal and submits that this is warranted given the utmost importance of the matter; the complexity of the constitutional and international law issues to be considered; as well as any questions that the Panel might consider posing to the parties. The Defence notes that oral hearings during appeals relating to jurisdictional challenges are common among *ad-hoc* courts and tribunals.[96]

[96] See, Prosecutor v. Tadic, Case no. Case No IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 26; STL, Prosecutor v. Ayyash et al., STL-11-01, Scheduling Order on Interlocutory Appeals, 27 August 2012; paragraph 4; SCSL, Prosecutor v. Kallon et al, Case No. SCSL-2004-14-PT, Appeals Chamber, Decision on Constitutionality and Lack of Jurisdiction, 13 March 2014, paragraph 7.

V. CONCLUSION

117. For the reasons set out above, the Defence submits that the PTJ made numerous material errors of law which, taken individually and / or cumulatively, invalidate the Impugned Decision. The Impugned Decision should be set aside and the Panel of the Court of Appeals Chamber should find that the KSC has no jurisdiction save to the extent that the conduct alleged in the Indictment corresponds with a substantive offence and mode of liability which existed under the SFRY Criminal Code in force in 1998. The SPO should be ordered to amend the Indictment accordingly.

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