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SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In:	**KSC-BC-2020-04**
	Specialist Prosecutor v. Pjetër Shala
Before:	**Pre-Trial Judge**
	Judge Nicolas Guillou
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Prosecutor
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Prosecution Response to Shala Defence Preliminary Motion Challenging the Jurisdiction of the KSC

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I. INTRODUCTION

1. The Kosovo Specialist Chambers ('KSC') is a constitutional judicial body, is properly established by law, and is independent and impartial. The Law[1] applies customary international law ('CIL') at the time of the crimes, in full conformity with constitutional and human rights principles. This CIL was accessible and foreseeable to the Accused, including in respect of joint criminal enterprise ('JCE') and arbitrary detention. The KSC has jurisdiction over all charges in the Indictment[2] and the Defence Motion[3] should be rejected in full.

2. As a preliminary matter, and as recently affirmed by the Pre-Trial Judge ('PTJ'), challenges to the legality of the KSC[4] do not constitute jurisdictional challenges within the meaning of Rule 97(1)(a).[5]

II. SUBMISSIONS

A. THE KSC IS NOT AN EXTRAORDINARY COURT, AND IS LAWFULLY ESTABLISHED, INDEPENDENT AND IMPARTIAL

[1] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').
[2] Submission of Further Lesser Redacted Version of Confirmed Indictment with Confidential Annex 1, KSC-BC-2020-04/F00038, 25 May 2021, confidential ('Indictment').
[3] Preliminary Motion of the Defence of Pjetër Shala to Challenge the Jurisdiction of the KSC, KSC-BC-2020-04/F00054, 12 July 2021, Public ('Motion').
[4] Motion, KSC-BC-2020-04/F00054, paras 5-15.
[5] Decision on Motions Challenging the Legality of the SC and the SPO and Alleging Violations of Certain Constitutional Rights of the Accused, KSC-BC-2020-06/F00450, 31 August 2021, Public ('Case 6 Legality Decision'), para.54. *See similarly* Special Tribunal for Lebanon ('STL'), *Prosecutor v Ayyash*, STL-11-01/PT/TC, Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, 27 July 2012, paras 28-29.

3. As the Kosovo Constitutional Court ('KCC') had previously found,[6] and the PTJ has recently affirmed,[7] the KSC is established by law, is an independent and impartial specialised court, and does not constitute an extraordinary court within the meaning of Article 103(7) of the Constitution. The Motion, which largely draws from and 'endorses' submissions made by defence teams in the *Thaçi et al.* case,[8] raises no new issues or basis for altering those findings, and should be dismissed accordingly. As outlined below, the KSC (i) is embedded within the Kosovo justice system; (ii) is based upon law; and (iii) is necessary.[9]

4. First, as envisaged in the Exchange of Letters[10] and Article 162 of the Constitution, the KSC constitute specialist chambers created, at all levels, within the Kosovo justice system.[11] The KSC is bound to function in accordance with, *inter alia*, the Constitution and the rights and freedoms therein.[12] Through its judgments

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[6] Constitutional Court of the Republic of Kosovo, Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433/DO-318, Judgment in Case No. K026/15, 15 April 2015 ('KCC Judgment'), paras 42-53.

[7] Case 6 Legality Decision, KSC-BC-2020-06/F00450, paras 88, 99-111, 115; Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/F00412, 22 July 2021, Public ('Case 6 Jurisdiction Decision'), para.98.

[8] Motion, KSC-BC-2020-04/F00054, Section II(A).

[9] The KCC identified three criteria, being that: (i) the court 'remain within the existing framework of the judicial system' of Kosovo and operate in compliance with its principles, in the sense of its structure, scope of jurisdiction and method of functioning being in compliance with the rights set out in Chapters II and III of the Constitution; (ii) the court be 'based upon law', interpreted consistent with the 'established by law' requirements of Art.6(1) of the European Convention on Human Rights ('ECHR'); and (iii) there be a necessity for its establishment. KCC Judgment, para.45. *See also* Case 6 Legality Decision, KSC-BC-2020-06/F00450, para.86.

[10] Law No.04-L-274 on Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo, 23 April 2014, ('Exchange of Letters'). The Exchange of Letters itself does not have internal page numbering, the SPO has used the pdf page number in the version of Law No.04/L-274 on the KSC's website. Exchange of Letters, pp.8-9.

[11] Law, Arts 1(2), 3(1), 24; KCC Judgment, para.46.

[12] Constitution, Art.162(2); Law, Art.3(2).

rendered on 26 April 2017, [13] 28 June 2017,[14] and 22 May 2020,[15] the SCCC has declared the current version of the Rules to meet these standards. In light of these factors, the functioning of the KSC is within the framework of the Kosovo justice system.[16]

5. Second, as previously affirmed by the KCC,[17] the KSC is established by law in accordance with Article 31 of the Constitution and Article 6(1) of the European Convention on Human Rights ('ECHR'). In so finding the KCC gave particular attention to the fact that, consistent with Article 162(1) of the Constitution,[18] the KSC would be established through the adoption of a specific law by the Assembly regulating its organisation, functioning and jurisdiction.[19] The Law was duly adopted on 3 August 2015.

6. Article 6(1) of the ECHR does not require that the legislature set out in detail each and every detail of the functioning of a court so long as a framework for judicial organisation is established by law.[20] The KSC is established and operates on the basis of Article 162 of the Constitution and the Law. As such, and as found by the PTJ, the KSC is 'unequivocally based in law.'[21]

7. Third, as set out in Article 1 of both the Constitution and the Law, the KSC is necessary to the fulfilment of Kosovo's international obligations in relation to the CoE

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[13] KSC-CC-PR-2017-01/F00004.
[14] KSC-CC-PR-2017-03/F00006/COR.
[15] KSC-CC-PR-2020-09/F00006.
[16] KCC Judgment, paras 57-59.
[17] KCC Judgment, paras 46-49, 54.
[18] Art.162(1) of the Constitution was specifically considered by the KCC and found to be constitutional. KCC Judgment, paras 23, 46, 71-72.
[19] KCC Judgment, paras 46-49; Case 6 Legality Decision, KSC-BC-2020-06/F00450, paras 86-87.
[20] Case 6 Legality Decision, KSC-BC-2020-06/F00450, para.87 citing ECommHR, *Zand v. Austria*, 7360/76, 12 October 1978, para.69.
[21] Case 6 Legality Decision, KSC-BC-2020-06/F00450, para.88.

Report.[22] As the SCCC has stated, the '*raison d'être* of the [KSC and SPO] and hence their legal regime is to realise […] the respective fundamental rights and freedoms' in relation to the CoE Report allegations.[23] The legal regime governing the KSC, including its distinct features as a specialised court, arose in a context where impediments to discovery of the truth in relation to those allegations had been identified. These impediments included the reluctance of witnesses to testify, the concern that alleged preparators were in, or close to, positions of power, and possible connections between organised crime and politics.[24] As such, the KSC is necessary to provide secure, independent, impartial, fair and efficient criminal proceedings.[25]

8. The Defence arguments adopting or elaborating those of the Veseli and Selimi defence concerning the nature of the KSC and its applicable law[26] do not cast doubt on these findings regarding the KSC's status under Article 103(7) of the Constitution and should be rejected.

9. At the time of declaring the KSC compatible with Article 103(7) of the Constitution, the KCC clearly envisaged that a specific law would be adopted by the legislature to regulate the organisation, functioning and jurisdiction of the KSC.[27]

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[22] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report: Inhumane treatment of people and illicit trafficking in human organs in Kosovo, Doc.12462, 7 January 2011 ('CoE Report').
[23] Judgment on the Referral of Proposed Amendments to the Constitution of Kosovo, KSC-CC-2020-11/F00015, 26 November 2020, para.56.
[24] KSC-CC-2020-11/F00015, para.54; KCC Judgment, paras 50-53.
[25] KSC-CC-2020-11/F00015, paras 55, 68; Law, Art.1. *See also* Exchange of Letters, pp.8-10 (in particular, requiring an environment 'conducive to the proper administration of justice').
[26] Motion, KSC-BC-2020-04/F00054, paras 7, 10, including arguments incorporated by reference. The submissions on the substantive applicable law, including the application of CIL and the principle of legality, are addressed in the following section.
[27] Case 6 Legality Decision, KSC-BC-2020-06/F00450, para.86. *See also* Art.162(1) of the Constitution expressly states that the '*organisation, functioning and jurisdiction* of the [KSC] and [SPO] shall be regulated on the basis of this Article *and by a specific law*' (emphasis added); Art.1(1) of the Law (directly reflecting, and basing itself upon, this constitutional provision). The Exchange of Letters, which was before the KCC at the time of its judgment, expressly provides, *inter alia*, that the KSC and SPO 'will be

Moreover, the specific features of the Law which the Defence raise as warranting reconsideration of the KSC's status were already before the KCC at the time of its judgment,[28] namely that the KSC would: (i) be internationally staffed;[29] (ii) operate pursuant to its own statute and rules of procedure and evidence;[30] (iii) have a specialised jurisdiction relating to the CoE Report;[31] and (iv) have a distinct regime for the selection and appointment of judges.[32] As such, none of the submissions call that prior finding into question. Nonetheless, should the PTJ consider it necessary to reassess any of these elements the submissions still fail for the reasons outlined below.

10. First, with respect to jurisdictional scope,[33] the KSC was established to address crimes relating to the CoE Report,[34] with subject matter jurisdiction over a wide range of war crimes and crimes against humanity,[35] and a temporal jurisdiction spanning from 1 January 1998-31 December 2000.[36] Its jurisdiction is not confined to a single case (or even necessarily a small number of cases), nor is it confined to a specific crime, a single perpetrator or even a certain category of perpetrators.[37] As the PTJ has previously held, the KSC's jurisdiction encompasses a multiplicity of crimes and

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governed by *their own statute* and rules of procedure and evidence' (emphasis added). Exchange of Letters, p.9.

[28] Case 6 Legality Decision, KSC-BC-2020-06/F00450, para.87. See also KCC Judgment, paras 25-26, 32 (noting a fulsome set of comments addressing similar issues to do with the degree of connection to the Kosovo judicial system and the manner of appointment of Judges, which were also before the KCC at the relevant time).

[29] Exchange of Letters, p.9. *Contra* Motion, KSC-BC-2020-04/F00054, paras 7, 10-11.

[30] Constitution, Art.162(1); Exchange of Letters, p.9. *Contra* Motion, KSC-BC-2020-04/F00054, paras 7, 12-13.

[31] Constitution, Art.162(1). *Contra* Motion, KSC-BC-2020-04/F00054, para.7; *see also* Motion, KSC-BC-2020-04/F00054, para.8.

[32] Constitution, Art.162(10); Exchange of Letters, p.9. *Contra* Motion, KSC-BC-2020-04/F00054, paras 7, 9-11.

[33] Motion, KSC-BC-2020-04/F00054, para.7 (point (i)).

[34] Constitution, Art.162(1); Law, Art.6(1).

[35] Law, Arts 13-15.

[36] Law, Art.7.

[37] Law, Art.9. In contrast to, for example, those courts and tribunals whose statutes provide for prosecution of those bearing the 'greatest responsibility' for certain crimes (*see* SCSL Statute, Art.1).

categories of perpetrators and the KSC 'cannot therefore be said to constitute an extraordinary court by virtue of any singularity of purpose.'[38]

11. Second, the submissions addressing international staff and judiciary and related appointment procedures,[39] do not impact the KSC's status or its independence and impartiality under Article 6(1) of the ECHR.[40]

12. As an initial matter, with respect to the select paragraphs of the SELIMI Motion which have been endorsed by the Defence,[41] both the Motion and the original Selimi Defence submissions are unclear and underdeveloped, failing to identify, *inter alia* (i) the persons whose rights are purportedly at issue, (ii) the rights under the ECHR the alleged discrimination relates to,[42] and (ii) how any such discrimination impacts the KSC's exercise of jurisdiction over the Accused. To the extent the Motion alleges violations of the rights of others,[43] the Defence has no standing, and to the extent it

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[38] Case 6 Legality Decision, KSC-BC-2020-06/F00450, para.114.
[39] Motion, KSC-BC-2020-04/F00054, paras 7 (point (ii)), 10-11.
[40] The Motion does not clearly frame the submissions *but see* Case 6 Legality Decision, KSC-BC-2020-06/F00450, fn.148 (addressing the framing of the Veseli Defence submissions which the Defence in this case has endorsed and replicated) and fn.175 (indicating the Pre-Trial Judge's understanding of the Selimi Defence submissions, following additional attempted clarifications provided in the Selimi Defence reply, KSC-BC-2020-06/F00307). However, the Motion does not itself expressly endorse or incorporate the Selimi reply, and the legal basis and rights allegedly at issue in the Motion remain unclear.
[41] Motion, KSC-BC-2020-04/F00054, paras 10-11 (endorsing paragraphs 2, 5, 9, 12-20 and references made therein of KSC-BC-2020-06/F00219 ('SELIMI Motion')).
[42] The ECHR does not prohibit discrimination as such, rather it prohibits discrimination *in the enjoyment of the other rights and freedoms set forth in it* (ECtHR, *Carson and Others v. the United Kingdom* [GC], 42184/05, 16 March 2010, para.63). Although repeated references are made in the SELIMI Motion to 'employment', there is no right to employment guaranteed by the ECHR and the Defence has failed to otherwise identify how the particular discrimination alleged is connected to any of the rights and freedoms protected by the ECHR.
[43] Motion, KSC-BC-2020-04/F00054, para.10 ('…the exclusion of Kosovo Albanians from any employment or any involvement with the KSC…is in breach of the principle of equality and non-discrimination guaranteed by the Kosovo Constitution and Article 14 of the ECHR'; '…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'), fn.24 (citing the employment regime section of the KSC website with directions for

alleges employment discrimination in respect of the Accused himself such submissions are hypothetical and irrelevant.[44] To the extent the submissions are directed towards the KSC's status under Article 6(1) of the ECHR[45] they are addressed in the following paragraphs, and are equally without merit.

13. No argument has been made by the Defence concerning the lack of subjective impartiality of any judge. Moreover, an examination of the comprehensive KSC governing framework in light of the requirements of independence and objective impartiality[46] reveals that a strong presumption of impartiality and independence attaches.[47] That presumption arises from, *inter alia*, the fact that (i) it is a pre-requisite to selection that KSC Judges are persons of 'high moral character, impartiality and integrity';[48] (ii) all Judges are required to be independent in the performance of their functions,[49] and may not seek or accept instructions from any government or any other source;[50] (iii) a comprehensive framework governs, *inter alia*, the appointment, term, dismissal and functioning of KSC Judges;[51] and (iv) the KSC is bound to adjudicate and function in accordance with the Constitution and international human rights

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potential applicants to consider related to eligible nationalities), fn.25 (highlighting the employment of national judges and national staff members at other courts).

[44] As found in *Thaçi et al.*, any argument by the Defence that the KSC's hiring practices are discriminatory as they exclude Kosovo Albanians cannot be the subject of an Art.14 discrimination claim as the Accused is not seeking employment at the KSC and is therefore not directly affected by the measure complained of. Case 6 Legality Decision, KSC-BC-2020-06/F00450, fn. 215 and references made therein.

[45] Motion, KSC-BC-2020-04/F00054, paras 9 (referring to establishment by law), 11 (referring to the 'establishment and lawfulness' of the KSC and to Art.5 of the ECHR).

[46] As noted by the PTJ in *Thaçi et al.*, independence and objective impartiality are closely linked and must be considered together. In such an assessment of a court or tribunal, consideration may be given to the manner of appointment of its members, the duration of their term of office, the existence of guarantees against outside pressure, and whether there is an appearance of independence. Case 6 Legality Decision, KSC-BC-2020-06/F00450, para.100.

[47] Case 6 Legality Decision, KSC-BC-2020-06/F00450, para.101.

[48] Law, Art.27(1).

[49] Law, Arts 27(1) and 31(1).

[50] Law, Art.27(1).

[51] Law, Arts 27-28, 30(3), 31(4), 33.

law.[52] The PTJ has previously held that the manner of appointment (and other conditions of service) of judges does not call into question the independence and impartiality of the KSC and that the appointment mechanism in fact functions to safeguard the independence and impartiality of the KSC.[53] The Defence submissions do not disturb this finding.

14. If the Defence is claiming that international judges lack independence or impartiality,[54] the submission is unsubstantiated. As has been recognised in *Thaçi et al.*, international staffing does not call into question the independence and impartiality of the KSC and the Defence challenges should be dismissed.[55]

15. Finally, with respect to the submissions on primacy,[56] the legal framework governing the KSC requires adherence to the Constitution, the Law, and international human rights law.[57] The KSC's primacy over other courts in Kosovo, within its area of jurisdiction,[58] does not affect that framework[59] and is consistent with the KSC's status as a specialised court with a specific scope of jurisdiction.

B. CIL IS APPLICABLE AT THE KSC

16. On the basis of its assertion that the KSC is established as a domestic court of Kosovo and that the Law purports to use CIL to 'create offenses' in the 'internal legal

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[52] Constitution, Art.162(2); Law, Art.3(2).
[53] Case 6 Legality Decision, KSC-BC-2020-06/F00450, para.102. *See also* paras 103-107.
[54] Motion, KSC-BC-2020-04/F00054, paras 7 (referring to staff and judges being international), 9 (noting generically that the guarantee in Art.6(1) covers the issue of the composition of a bench in which one or more judges may participate in an irregular manner related to the independence and impartiality of the judge); SELIMI Motion, KSC-BC-2020-06/F00219, para 19 (referring generically to upholding fairness in the court's employment policy).
[55] Case 6 Legality Decision, KSC-BC-2020-06/F00450, para.110.
[56] Motion, KSC-BC-2020-04/F00054, para.7 (point (iii)).
[57] Law, Art.3(2).
[58] Law, Art.10(1).
[59] Case 6 Legality Decision, KSC-BC-2020-06/F00450, para.101.

order' of Kosovo,[60] the Defence claims that the KSC cannot exercise jurisdiction over CIL crimes without breaching the legality principle enshrined in Article 7 of the ECHR and Article 33 of the Kosovo Constitution.[61] This argument fundamentally misstates the legal framework of the KSC, including the Law itself, and ignores that the Kosovo legislature selected the applicable law in the course of establishing a specialised court within the meaning of Article 103(7) of the Constitution, in fulfilment of Kosovo's international obligations.[62] In light of this fact, and the plain language of *inter alia* Articles 3(2)(d) and 12 of the Law, there is no inconsistency, lack of clarity or issue of precision, accessibility or foreseeability which would call into question the position of CIL, which is and remains the primary source of law in accordance with the Constitution and the Law.[63]

17. Article 162 of the Constitution and the Law, including Articles 1 and 12-15, regulate the applicable law and the subject-matter jurisdiction of the KSC, including for war crimes and crimes against humanity committed during the temporal jurisdiction of the KSC. In affirming the constitutionality of Article 162 of the Constitution, the KCC considered, *inter alia,* that the scope of the KSC's jurisdiction must comply with the rights provided by Chapters II and III of the Constitution.[64] This includes Article 33(1) of the Constitution, which provides that persons may not be charged or punished for any act which did not constitute a penal offence under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law. Article 33(1) is consistent with Article 7 of the ECHR and Article 15

[60] Motion, KSC-BC-2020-04/F00054, paras 5, 16.
[61] Motion, KSC-BC-2020-04/F00054, para.17.
[62] *See* paras 3-15; KCC Judgment, paras 37, 39.
[63] *Contra* Motion, KSC-BC-2020-04/F00054, para.12-19.
[64] KCC Judgment, paras 45, 57, 59-60.

of the ICCPR, which permit persons to be held responsible for criminal offences under either national or international law, including CIL,[65] at the time they were committed.

18. With reference to Article 33(1) of the Constitution, Kosovo courts have entered war crimes convictions when such crimes were recognised in CIL at the time they were committed.[66] The ECtHR, applying Article 7 of the ECHR, has similarly confirmed that prosecutions and convictions for crimes under CIL – even when not criminalised under domestic law at the relevant time – do not *per se* violate the principle of legality, provided such crimes have a sufficiently clear legal basis in CIL and were accessible and foreseeable to the Accused.[67] The crimes and modes charged in the instant case are those defined in CIL during the KSC's temporal jurisdiction and they were accessible and foreseeable to the Accused.

1. The Law Confers Jurisdiction to Prosecute CIL at the Time

19. The Defence arguments that CIL cannot be applied without domestic incorporation in the form of a domestic statutory provision must fail.[68] The Law constitutes domestic legislation granting the KSC jurisdiction over the CIL crimes and

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[65] *See, for example*, ECtHR (Grand Chamber), *Kononov v. Latvia*, 36376/04, Judgment, 17 May 2010, paras 186, 213, 227, 237, 244.

[66] *See, for example,* Kosovo, Court of Appeals, *Prosecutor v. X.K.*, Case No.648/16, Judgment, 22 June 2017, paras II.2.1.12 (finding that the war crimes at issue were introduced to 'Kosovo's domestic legal order only after the war in Kosovo was over'), II.2.1.13-II.2.1.15 (considering that Art.33(1) of the Constitution, which conforms with Art.7 of the ECHR, permits prosecution and punishment of acts that at the time they were committed were recognised as genocide, war crimes, and crimes against humanity according to international law), II.2.1.16 (finding that, as a consequence of Art.33(1) of the Constitution, subsequent pieces of legislation, i.e. both the Provisional Code and Criminal Code of Kosovo should also be analysed for the legal classification of the relevant crimes). *See also* Kosovo, Court of Appeals, *Prosecutor v. J.D. et al.*, PAKR Nr.455/15, Judgment, 15 September 2016, p.49 (considering Art.33(1) of the Constitution, Art.7 of the ECHR and Art.15 of the ICCPR, the Panel concluded 'the criminal liability for the war crimes committed in 1998 in Kosovo is in accordance with the law'); Kosovo, Basic Court of Mitrovica, *Prosecutor v. A.D. et al.*, P.58/14, Verdict, 27 May 2015, para.250.

[67] *Egs* ECtHR, *Kononov v. Latvia*, 36376/04, Judgment, 17 May 2010, paras 196, 199; ECtHR, *Šimšić v. Bosnia and Herzegovina*, 51552/10, Decision, 10 April 2012, paras 20, 22-25.

[68] Motion, KSC-BC-2020-04/F00054, para.16.

modes of liability, as at the relevant timeframe. Consequently, the Law gives CIL direct effect before the KSC.

20. The significance of the Law has been recognised in *Thaçi et al.*, as the PTJ clarified that the applicable law does not rest on the results of an exercise in categorising a court of law.[69] Rather, the adoption of the Law by the Kosovar legislature in line with the mandates of the Kosovo Constitution, clearly reveals the applicable law and its legal basis.[70] As a result of the limitation on the application of domestic law, as stipulated in Article 12 of the Law, the SFRY Constitution and SFRY Criminal Code, do not operate to limit the jurisdiction of the KSC.[71] The Defence arguments are thus misplaced, where, as here, the Law has, through domestic legislation, directly applied CIL at the relevant time.[72]

21. The PTJ found that the requirements of Article 7 of the ECHR and Article 15 of the ICCPR, as reflected in Article 33(1) of the Constitution, are respected in light of the authority of the Kosovar legislature to enact the Law,[73] specifically the authority to:

> …lawfully adopt domestic legislation explicitly providing for international crimes already existing under customary international law at the material time. In so doing, the legislator can allow – or even mandate – prosecution for conduct that took place before the penalisation was introduced in domestic written law. In such cases, there is actually no issue of retroactivity: the legislator is simply transposing (into its own domestic written legislation) crimes that were already part of the legal

[69] Case 6 Jurisdiction Decision, KSC-BC-2020-06/F00412, para.98.
[70] Case 6 Jurisdiction Decision, KSC-BC-2020-06/F00412, para.98.
[71] Case 6 Jurisdiction Decision, KSC-BC-2020-06/F00412, para.99; *Contra* Motion, KSC-BC-2020-04/F00054, para.16. Constitution, Art.19(1) is not relevant as it relates to international agreements, which are not akin to a domestic law enacted by the legislature. The relevance of Art.55 of the Constitution, also cited, is unclear, however the Defence fails to note that compliance with Art.55 is taken into account by Art.2 of the Law. The citation to Kosovo Supreme Court decision in *Prosecutor v. Gj. K.*, AP-KZ No. 353/2009, is inapposite as it concerns offenses under the Geneva Conventions being incorporated into Kosovo law by SFRY Criminal Code, Art.142 before the adoption of the Law.
[72] *Contra* Motion, KSC-BC-2020-04/F00054, paras 16-17.
[73] Case 6 Jurisdiction Decision, KSC-BC-2020-06/F00412, para.101.

> order, and that were binding on individuals, according to international law, at the time of the alleged commission of the charged crimes.[74]

22. In light of the Law's adoption, the cases relied upon by the Defence to argue that the SFRY statutory scheme did not permit the domestic application of CIL to establish offences are inapposite. Cited cases like *Besović* provide that international treaties cannot be directly applied unless the provisions of international law correspond to domestic law.[75] This reasoning does not undermine application of CIL before the KSC.[76] The drafters specified which CIL crimes could be prosecuted in the Law, and in doing so crafted a domestic law allowing for the direct application of CIL.

23. There is no violation of the principle of legality based on the adoption of the Law. The compatibility of the Law with the Constitution, in applying CIL as at the time of the commission of the crimes in question, has been explained above.[77] The reference to Article 7(2) of the ECHR in Article 12 is not the basis for the applicability of CIL and is not presented as an exception to the principle of non-retroactive application of criminal law to the detriment of the Accused.[78] The reference has no bearing of the issue at hand. Article 7(1) and (2) of the ECHR must be read concordantly with each,[79] and Article 7 of the ECHR as a whole must be applied before

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[74] Case 6 Jurisdiction Decision, KSC-BC-2020-06/F00412, para.101.
[75] Supreme Court of Kosovo, *Prosecutor v. Besović*, AP-KZ No.80/2004, Verdict, 7 September 2004, pp.18-19.
[76] *Contra* Motion, KSC-BC-2020-04/F00054, paras 16-17, 49. The cases of *Latif Gashi* and *XH.K* (Motion, KSC-BC-2020-04/F00054, paras 49-50) are similarly inapposite in this particular context given that they were decided outside of the framework of Art.162 of the Constitution and of the Law, granting jurisdiction over CIL.
[77] *See* paras 17, 18, 21.
[78] *Contra* Motion, KSC-BC-2020-04/F00054, para.13.
[79] ECtHR (Grand Chamber), *Maktouf and Damjanović v. Bosnia and Herzegovina*, 2312/08 and 34179/08, Judgment, 18 July 2013, para.72.

the KSC, together with Article 33(1) of the Constitution, taking cognisance of the full principle of non-retroactivity as reflected in applicable human rights provisions.[80]

2. The Law Applies CIL which was Accessible and Foreseeable to the Accused at the Time

24. While the Defence have failed to make a developed argument against the foreseeability and accessibility of the relevant CIL to the Accused,[81] for a multitude of reasons it is certain that the CIL applicable to the crimes charged meets the requirements for accessibility and foreseeability to the Accused.[82]

25. Various international instruments made it perfectly clear that war crimes were criminal under CIL, including the following instruments which criminalised war crimes: the IMT Charter,[83] Control Council Law 10,[84] and the ICTY Statute.[85] In the Nuremberg Principles, the International Law Commission stated in 1950 that 'the fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law'.[86] The ICC Statute criminalising the same

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[80] Case 6 Jurisdiction Decision, KSC-BC-2020-06/F00412, para.94.
[81] In para.12 of the Motion, the Defence suggests that because the Law deviates from the Constitution and criminal laws of Kosovo and prescribes in Art.3(2)(d) that the KSC shall apply CIL, uncertainty has been created, resulting in a breach of the constitution and the ECHR, related to, *inter alia,* accessibility and foreseeability.
[82] *See e.g.* ECtHR (Grand Chamber), *Korbely v. Hungary*, 9174/02, Judgment, 19 September 2008, para.70.
[83] Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, 82 UNTS 279, ('IMT Charter'), Art.6 (adhered to by Federal Republic of Yugoslavia as of 29 September 1945).
[84] Control Council Law Nr. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, published in the Official Gazette of the Control Council for Germany, No. 3 (31 January 1946), pp. 50-55, ('CCL10'), Art.II.
[85] ICTY Statute, Art.3, 25 May 1993.
[86] Principle II of International Law Commission, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal, 1950.

offences was finalised in July 1998.[87] Given that the ICTY could exercise jurisdiction over war crimes and crimes against humanity in Kosovo during the charged timeframe, it is unreasonable that the Accused could not foresee that he may be subject to prosecution for any such crimes.

26. Domestic prohibitions in the SFRY Code also mirror the underlying acts charged under CIL, with Article 142 of the SFRY Code (governing a 'war crime against the civilian population')[88] being the most prominent example.[89] Further, the SFRY ratified treaties relevant to the crimes charged, including Additional Protocol II of the Geneva Conventions[90] and the Torture Convention.[91] The SFRY also ratified the treaty confirming that no statute of limitations exists for war crimes or crimes against humanity.[92]

27. In the face of all this information, most of which was available decades before the charged timeframe, it was clearly accessible to the Accused that the charges in the Indictment constituted crimes at the time of their commission.[93]

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[87] ICC Statute, Art.8, 17 July 1998.
[88] Art.142 SFRY Criminal Code includes, for example, killing, torture, inhuman treatment and illegal arrests and detention.
[89] Domestic provisions criminalising acts like murder are further examples, although these are not qualified as international crimes.
[90] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, 8 June 1977 (ratified by SFRY with effect from 11 December 1979).
[91] Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984 (ratified by SFRY 10 September 1991).
[92] Art.1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 UNTS 73, 26 November 1968 (ratified by SFRY on 9 June 1970).
[93] *In accord with* Kosovo, District Court of Pec/Peja, *Prosecutor v. Besović*, C/P 136/2001, Verdict, 26 June 2003, para.454 ('Common Article 3 and Additional Protocols I and II are binding on Kosovo by virtue of the treaty obligations of the SFRY and FRY and UNMIK Regulation 1999/24, as amended by 2000/59. These instruments prohibit acts that are also punished in Kosovo law. The acts listed in the international treaties and international law, such as murder, taking hostages, pillage, degrading treatment and rape constitute offences both under international law and the national law of Kosovo. So nobody who

28. As concerns foreseeability, it must be stressed that the crimes charged in the Indictment all concern flagrant human rights violations.[94] It is simply untenable to suggest that the Accused was not aware that committing violent crimes during war could lead to a war crimes prosecution. Even the most cursory assessment of his conduct would reveal the wrongfulness of such actions.

29. The gravity of the crimes charged and the Accused's direct role in them, the post-World War II general legal framework, the ICTY's jurisdiction over CIL in Kosovo at the time, and domestic equivalents to the crimes charged all contribute to establishing the foreseeability of being prosecuted for war crimes under CIL.

C. ARBITRARY DETENTION IS PROPERLY CHARGED AS A WAR CRIME WITHIN THE KSC'S JURISDICTION

30. Contrary to Defence arguments,[95] the PTJ correctly found that arbitrary detention in a non-international armed conflict ('NIAC') was prohibited under CIL[96] and that the KSC may exercise jurisdiction over this crime pursuant to Articles 14(1)(c) and 12 of the Law.[97] The Defence submissions merely replicate challenges which the PTJ has recently considered in the context of the *Thaçi et al.* case, and nothing in them warrant reconsideration of that finding. Accordingly, the challenge to count one should be dismissed.

1. The Prohibition against Arbitrary Detention is included in Article 14(1)(c) of the Law

commits or is party to one more of those offences can claim in good faith that he/she was not aware of the prohibition.').

[94] *See* ECtHR (Grand Chamber), *Kononov v. Latvia*, 36376/04, Judgment, 17 May 2010, paras 236-39.

[95] Motion, KSC-BC-2020-04/F00054, paras 46-60.

[96] The Defence submissions in paras 48-50 of the Motion are fully addressed by the previous section establishing the applicability of CIL pursuant to the Constitution and the Law.

[97] Confirmation Decision, KSC-BC-2020-04/F00007, paras 27-28.

31. Article 14(1) of the Law elaborates on crimes which are war crimes under CIL and subsection (c) thereof grants the KSC jurisdiction over serious violations of Common Article 3 of the 1949 Geneva Conventions.[98] Common Article 3, which requires humane treatment of persons taking no active part in hostilities, is a rule of CIL containing a non-exhaustive list of prohibited acts.[99] As found by the ICTY, the purpose of Common Article 3 'is to uphold and protect the inherent human dignity of the individual', and its general proscription is against inhumane treatment.[100]

32. While the prohibition against arbitrary detention is not listed explicitly in Article 14 of the Law, this is not required. The fundamental guarantee against arbitrary detention is non-derogable,[101] and respect for fundamental and non-derogable rights is a necessary component of the prohibition against inhumane treatment enshrined in Common Article 3.[102] As noted both by the Kosovo Supreme

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[98] Common Article 3, para.1 ('Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.'). The requirement of humane treatment is the fundamental principle underlying Common Article 3 and the four Geneva Conventions. See Commentary to the First Geneva Convention, 1952, ('Commentary of 1952'), p.52; ICRC, Commentary to the First Geneva Convention, 2016, ('Commentary of 2016'), paras 550-551; ICRC, Commentary to the Second Geneva Convention, 2017, ('Commentary of 2017'), paras 572-573; ICRC, Commentary to the Third Geneva Convention, 1960, p.38; ICRC, Commentary to the Fourth Geneva Convention, 1958, ('Commentary of 1958'), p.38.

[99] For the customary status of Common Article 3 *see e.g.* ICTY, *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para.98. For the non-exhaustive character of the list of crimes in Article 3 *see e.g.* ICRC, Commentary of 1952, pp.53-54; ICRC, Commentary of 1958, pp.38-39.

[100] ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-T, Judgment, para.49. *See* also para.51 ('[t]he general proscription in common Article 3 is against inhuman treatment').

[101] HRC, CCPR General Comment No. 35, Art.9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, para.66 ('[t]he fundamental guarantee against arbitrary detention is non-derogable, […]').

[102] Commentary of 1952, p.48 (Common Article 3 'ensures the rules of humanity which are recognized as essential by civilized nations'); Commentary on Additional Protocol II, 1987, paras 4521, 4523 (humane treatment 'covers all the rights of the individual, that is, the rights and qualities which are inseparable from the human being by the very fact of his existence and his mental and physical

Court,[103] and the ICRC, 'common Article 3 of the Geneva Conventions, as well as both Additional Protocols I and II, require that all civilians and persons hors de combat be treated humanely (see Rule 87), whereas arbitrary deprivation of liberty is not compatible with this requirement'.[104]

33. Article 14(1)(c) uses the word 'including' before listing certain prohibited acts. The plain and literal interpretation of this word indicates a non-exhaustive list of prohibited conduct.[105] That the wording employed in Article 14 is not identical as between subsections does not change the character of the word 'including', in particular since the other formulations are similarly open-ended and denote the non-exhaustive character of the acts listed. There is no violation of legality as the KSC will not be found to have jurisdiction over a crime unless it existed under CIL at the relevant time.[106] The PTJ should confirm his prior holdings[107] that Article 14 of the Law, read in conjunction with the relevant provisions on CIL found in the Law, provides a sound legal basis to exercise jurisdiction over war crimes under CIL, including arbitrary detention.

2. The Prohibition against Arbitrary Detention in NIACs is part of CIL

powers'). The Defence acknowledge that humane treatment is a requirement in NIAC. Motion, KSC-BC-2020-04/F00054, para.58.

[103] Supreme Court of Kosovo, *L. Gashi et al.*, Plm. Kzz. 18/2016, Judgment, 13 May 2016, para.58 ('[d]uring the armed conflict, the civilians shall be treated humanely, whereas arbitrary deprivation of liberty and beating is not compatible with this requirement.').

[104] ICRC CIL Study, Rule 99. The requirement of humane treatment is a rule of CIL, applicable to international and non-international armed conflicts. ICRC CIL Study, Rule 87.

[105] *See* Case 6 Jurisdiction Decision, KSC-BC-2020-06/F00412, paras 144-145.

[106] *Contra* Motion, KSC-BC-2020-04/F00054, para.51.

[107] Confirmation Decision, KSC-BC-2020-04/F00007, para.23; Case 6 Jurisdiction Decision, KSC-BC-2020-06/F00412, paras 143-146.

34. Both the ICRC and the Inter-American Commission on Human Rights found that the prohibition against arbitrary detention in NIACs is part of CIL.[108] The customary status of this prohibition is based both on state practice[109] and international humanitarian and human rights law.[110] Indeed, there is nothing anywhere in international law or state practice that permits detention other than on a lawful basis.[111]

35. Contrary to Defence submissions criticising the PTJ's consideration of, and the content of the ICRC's CIL Study,[112] in affirming the customary status of the prohibition in the context of NIACs, the ICRC CIL Study cited a variety of both national and international sources, which evidence state practice and *opinio juris.* These consist of 19 national laws, four military manuals, three UN Security Council Resolutions, two

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[108] ICRC, Customary International Humanitarian Law, Volume I: Rules, 2005 (reprinted with corrections 2009), Rule 99, p.347 ('the prohibition of arbitrary deprivation of liberty in non-international armed conflicts is established by State practice in the form of military manuals, national legislation, and official statements, as well as on the basis of international human rights law'); Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Colombia, 26 February 1999, para.300 (considering in the context of an internal armed conflict that 'detentions by paramilitary groups may be considered to constitute arbitrary deprivations of liberty, in violation of international humanitarian law').

[109] ICRC, Customary International Humanitarian Law, Volume I: Rules, 2005 (reprinted with corrections 2009), Rule 99, pp.346-348.

[110] ICRC, Customary International Humanitarian Law, Volume I: Rules, 2005 (reprinted with corrections 2009), Rule 99, pp.344, 347-352. *See also* Universal Declaration of Human Rights, 10 December 1948, Art.9; International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966, Art.9; European Convention on Human Rights, 4 November 1950, Art.5; American Convention on Human Rights, 22 November 1969, Art.7; Supreme Court of Kosovo, *L. Gashi et al.*, Plm. Kzz. 18/2016, Judgment, 13 May 2016, para.57 ('international humanitarian law and human rights law strictly prevents detention unless there are clearly established needs, in particular security needs, and provides certain conditions and procedures to prevent disappearance and to supervise the continued need for detention').

[111] ICRC CIL Study, Rule 99, p.347 ('[n]o official contrary practice was found with respect to either international or non-international armed conflicts. Alleged cases of unlawful deprivation of liberty have been condemned').

[112] Motion, KSC-BC-2020-04/F00054, para.55.

UN General Assembly Resolutions, and three UN Commission on Human Rights Resolutions.[113] Of the 19 cited national laws, only one was enacted after 31 December 2000.[114] All four of the military manual provisions cited were adopted prior to 1998 and have since remained unchanged.[115] Three of the UN Security Council Resolutions,[116] one of the UN General Assembly Resolutions,[117] and two of the UN Commission on Human Rights Resolutions,[118] were adopted before 1998, with a third adopted on 22 April 1998.[119]

36. Of particular note, two of the UN Security Council Resolutions, as well as a UN General Assembly Resolution and statement of the UN Commission on Human Rights, focused on the grave violations of IHL in the former Yugoslavia, including by referring explicitly to a pattern of unlawful or arbitrary detention by the parties to the conflict.[120] These statements and resolutions evidence the practice of international organisations, and thus may support the existence of a rule of CIL.[121]

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[113] ICRC, Customary International Humanitarian Law, Volume I: Rules, 2005 (reprinted with corrections 2009), Rule 99, pp.347-352.
[114] Niger added criminal code amendment prohibiting deprivation of liberty in 2003.
[115] Namely, those of Australia, Croatia, Germany, and South Africa.
[116] UNSC, S/RES/1019, 9 November 1995, preamble; UNSC, S/RES/1034, 21 December 1995, preamble and para.2; UNSC, S/RES/1072, 30 August 1996, preamble.
[117] UNGA, A/RES/50/193, 22 December 1995, preamble (expressing concern of reports about unlawful detention in Bosnia and Herzegovina, Croatia, and the SFRY).
[118] UN Commission on Human Rights, E/CN.4/1996/71, 23 April 1996, para.1 (condemning detentions in Bosnia and Herzegovina, Croatia and the FRY); UN Commission on Human Rights, E/CN.4/1996/73, 23 April 1996, § 15 (condemning arbitrary detention by all parties in Sudan).
[119] UN Commission on Human Rights, E/CN.4/1998/75, 22 April 1998, para.5 (calling on the LRA to release abducted children).
[120] UNSC, S/RES/1019, 9 November 1995, preamble; UNSC, S/RES/1034, 21 December 1995, preamble and para.2; UNGA, A/RES/50/193, 22 December 1995, preamble; UN Commission on Human Rights, E/CN.4/1996/71, 23 April 1996, para.1.
[121] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970),* I.C.J. Reports 1971 (p.16), Advisory Opinion, 21 June 1971, para.22.

37. The materials cited above show ample state practice pre-dating the Indictment period. Further, as the PTJ found in his decision confirming the existence of a customary rule criminalising arbitrary detention as a war crime in NIAC from no later than 1998, evidence of practice that post-dates the Indictment period can be relevant to show the continued development of a rule of CIL, in that no contrary practice has replaced the rule of CIL and/or to demonstrate the intent of states to adhere to a pre-existing rule of CIL.[122]

38. With respect to the Defence's argument against the use of 'written materials' by the ICRC instead of 'operational practice', it suffices to say that military manuals, national laws, and resolutions of international organisations are appropriate sources to assess state practice in international humanitarian law.[123]

39. Further, the standard for humane treatment applies equally across international humanitarian law,[124] and arbitrary detention is well-established as conduct which violates the principle of humane treatment.[125]

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[122] Case 6 Jurisdiction Decision, KSC-BC-2020-06/F00412, para.158.
[123] Motion, KSC-BC-2020-04/F00054, para.57. *See e.g.* the list of sources for the formation of custom provided by the ICRC, which includes military manuals and resolutions of international organisations, at www.ihl-databases.icrc.org/customary-ihl/eng/docs/src. *See also* UNGA, Report of the International Law Commission, Sixty-eight session (2 May-10 June and 4 July-12 August 2016), A/71/10, p.101 for the significance of international organisations resolutions in the investigation of CIL.
[124] Commentary of 2017, para.1422 ('[g]iven that it is based on the fundamental concept of human dignity, the standard of humane treatment is the same for all categories of protected persons and applies equally in international and non-international armed conflict'); ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, 16 November 1998, para.543 ('acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment').
[125] As a grave breach: Commentary of 2016, paras 2977-2978 (describing inhuman treatment as the 'umbrella' under which all of the grave breaches fall; unlawful confinement of civilians is a grave breach pursuant to Art.147 of the Fourth Geneva Convention); ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, 16 November 1998, para.543 (similarly describing grave breaches as falling under the umbrella of inhuman treatment). See also ICTY, *Prosecutor v. Blaškić*, IT-9514-T, Judgment, 3 March 2000, para.154. As crimes against humanity: Art.13(1)(j) ('other inhumane acts') indicates that the other enumerated crimes against humanity, including imprisonment (Art.13(1)(e)), are also inhuman. See

40. Finally, the fair trial rights guaranteed in Common Article 3(1)(d)[126] are necessarily incompatible with the possibility of permitting arbitrary detention in a non-international armed conflict. It would be pointless to oblige a party to the conflict to respect the fair trial rights of a detainee if, at the same time, that party is free to by-pass that requirement by carrying out detentions without any legal basis or basic procedural guarantees.[127] Hence, the prohibition of arbitrary detention as a threshold matter is implicit in Common Article 3.

3. Arbitrary Detention is a Serious Violation of Common Article 3

41. Arbitrary detention is a serious violation of Common Article 3 within the meaning of Article 14(1)(c) of the Law. The prohibition against this crime aims in fact to protect, primarily, the fundamental rights to life, liberty and security of the person.[128] It also protects other human rights, for instance those concerning physical integrity, which the practice of arbitrary detention has historically endangered.[129] Arbitrary detention creates or increases the risk of torture and other ill-treatment.[130]

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also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),S/25704, 3 May 1993, para. 48 ('Crimes against humanity refer to inhumane acts of a very serious nature').

[126] *See also* Art.14(1)(c)(iv) and Art.2(2) and 6 of Additional Protocol II.

[127] *See, similarly*, General Comment No.35, para.14 ('[t]he regime must not amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections'). *See also* ECCC, *Nuon and Samphan*, 002/19-09-2007/ECCC/TC, Case 002/02 Judgment, 16 November 2018 ('Case 002/02 Trial Judgment'), para.2584 ('[t]he arbitrary arrests, the systematic failure to inform and sufficiently particularise the charges levelled against prisoners that allegedly caused their detention, the prolonged detention without access to procedural safeguards or any ability to challenge their detention all demonstrates the flagrant, deliberate and continuous denial of due process rights that constitutes arbitrary detention contrary to international law').

[128] HRC, CCPR General Comment No. 35, Art.9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, paras 2, 55.

[129] HRC, CCPR General Comment No. 35, Art.9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, paras 2, 33, 56, 58.

[130] HRC, CCPR General Comment No. 35, Art.9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, paras 34, 56, 58.

42. The Defence submissions confuse applicable regimes by seemingly confining humane treatment to the narrow question of detention conditions.[131] As the PTJ has previously set out, arbitrary detention is a form of inhumane treatment and the prohibition against it may be implicated in two distinct ways, the first being where detention occurs without any legal basis and the second being where it occurs in the absence of basic guarantees afforded under international law.[132]

4. Criminal Responsibility for Arbitrary Detention was Accessible and Foreseeable to the Accused[133]

43. The prohibition of arbitrary detention was fully accessible and foreseeable to the Accused, including on the basis of existence of laws prohibiting arbitrary detention applicable in the countries of the former Yugoslavia, as well as statements of international bodies such as the UN condemning such conduct, noted above.

44. Article 142 of the SFRY Code prohibited illegal arrests and detentions as war crimes, contributing to the foreseeability by the Accused of prosecution for these crimes. No differentiation or restriction was applied vis-à-vis the nature of the armed conflict. The criminal codes of the former republics of the SFRY also contain war crime provisions with essentially the same text as Article 142.[134]

D. JCE IS AN APPLICABLE MODE OF LIABILITY

[131] Motion, KSC-BC-2020-04/F00054, para.54.
[132] Case 6 Jurisdiction Decision, KSC-BC-2020-06/F00412, paras 151-156.
[133] Defence submissions going to jurisdiction on the basis of incorporation into domestic law (Motion, KSC-BC-2020-04/F00054, para.60) are addressed in the section on CIL.
[134] Slovenia, Penal Code, 1994, Art.374(1); Republic of North Macedonia, Criminal Code, 1996, Art.404(1); Croatia, Criminal Code, 1997, Art.158(1); Federation of Bosnia and Herzegovina, Criminal Code, 1998, Art.154(1); Republika Srpska, Criminal Code, 2000, Art.433(1).

45. Under the legal framework of the KSC, criminal responsibility attaches to perpetrators who made, with the requisite intent, a significant contribution to the implementation of a common criminal purpose. That these persons, sometimes termed 'members' or 'co-perpetrators', may be found liable for the crimes physically carried out by them or by others is rooted in CIL and is known as 'joint criminal enterprise' (JCE).[135]

46. The PTJ correctly identified the requirements for individual responsibility pursuant to JCE liability.[136] The pertinent categories, as explained by the ICTY Appeals Chamber are:

- JCE I, where all participants, acting pursuant to a common purpose, possess the same criminal intention to effectuate that purpose;[137]
- JCE III, where participants have agreed on a common purpose involving the perpetration of crime(s) and are liable for criminal acts which, while outside the common purpose, are nevertheless a natural and foreseeable consequence of effectuating that common purpose.[138]

47. To find an accused responsible for his participation in a JCE, the following must be established: (i) the existence of a plurality of persons who act pursuant to a common purpose;[139] (ii) the existence of a common plan, design, or purpose which amounts to

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[135] It has also been described as acting 'jointly', in 'concert', and pursuant to a common design, purpose, and/or plan.
[136] Confirmation Decision, KSC-BC-2020-04/F00007, paras 66-76.
[137] ICTY, Appeals Chamber, *Prosecutor v. Tadić*, IT-94-1-A Judgement, 15 July 1999 (*Tadić* AJ), paras 196-201 (as confirmed in ICTY, Appeals Chamber, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A Judgement, 28 February 2005 ('*Kvočka et al.* AJ'), para.82 and ICTY, Appeals Chamber, *Prosecutor v. Vasiljević*, IT-98-32-A Judgement, 25 February 2004 ('*Vasiljević* AJ'), para.97).
[138] *Tadić* AJ, para.204. *See* ICTY, Trial Chamber, *Prosecutor v. Krajišnik,* IT-00-39-T Judgement, 27 September 2006 ('*Krajišnik* TJ'), para.882.
[139] *Tadić* AJ, para.227.

or involves the commission of a crime provided for in relevant law;[140] and (iii) the participation of the accused in furthering the common design or purpose.[141]

1. JCE Exists in the Statutory Framework of the KSC

48. The Law, which establishes and regulates the jurisdiction of the KSC, specifies that individuals subject to its jurisdiction shall be held responsible on the basis of their individual criminal responsibility,[142] as delineated in Article 16. Article 16(1)(a) states that 'a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of such a crime shall be individually responsible for the crime'.[143] Liability pursuant to JCE is a form of commission found in Article 16(1)(a).

49. Article 16(1)(a) is virtually identical to the equivalent provisions setting out modes of liability at the ICTY, ICTR, International Residual Mechanism for Criminal Tribunals ('IRMCT'), SCSL and the ECCC.[144] At the time the Law was adopted in 2015, each of those courts had consistently and repeatedly found that 'commission' within

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[140] *Tadić* AJ, para.227.

[141] *Tadić* AJ, para.227 (*as confirmed in* ICTY, Appeals Chamber, *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, 3 April 2007 ('*Brđanin* AJ'), paras 364, 430; ICTY, Appeals Chamber, *Prosecutor v. Stakić*, IT-97-24-A, Judgement, 22 March 2006, para.64; *Kvočka et al.* AJ, para.81; *Vasiljević* AJ, para.100; ICTY, Appeals Chamber, *Prosecutor v. Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para.31).

[142] *Contra* Motion, KSC-BC-2020-04/F00054, para.24 suggesting that JCE is equivalent to assigning responsibility on the basis of ethnicity, community or organization.

[143] Law, Art.16(1).

[144] The relevant provisions of the Statutes of the KSC, ICTY, ICTR, International Residual Mechanism for Criminal Tribunals ('IRMCT'), and Special Court for Sierra Leone ('SCSL') are identical; there are two minor, non-pertinent differences with Art.29 of the Law on Extraordinary Chambers in the Courts of Cambodia ('ECCC') in that the Statutes of the KSC, ICTY, ICTR and SCSL (i) include the word "otherwise" before aiding and abetting; and (ii) the mode of liability of commission is listed before aiding and abetting. *See* ICTY Statute, Art.7(1); ICTR Statute, Art.6(1); SCSL Statute, Art.6(1); ECCC Law, Art.29. The IRMCT Statute was adopted on 22 December 2010 by Security Council Resolution 1966. Art.1 states that '[t]he Mechanism shall continue the material, territorial, temporal and personal jurisdiction of the ICTY and ICTR as set out in Art.1 to 8 of the ICTY Statute and Art.1 to 7 of the ICTR Statute'. Unless otherwise specified, references herein to the ICTY Statute refer as well to the ICTR and IRMCT Statutes.

the meaning of their statutes encompasses individual criminal responsibility for persons who contribute to the commission of crimes carried out jointly, that is, by a group of persons acting pursuant to a common criminal purpose or JCE.[145]

50. The drafters of the Law were free to frame the applicable modes of liability for the KSC in any way that they wanted. In choosing to adopt identical language from the statutes of those courts, and in full awareness of how those statutes have been consistently interpreted, there can be no question that the drafters intended JCE to apply. In fact, in the circumstances, had the drafters wanted to *exclude* it, they should have modified the language of Article 16(1)(a) so as to employ different terms from those found in the ICTY Statute.[146] They did not do so. As such, 'commission' within the meaning of Article 16(1)(a) must be read to encompass JCE liability.[147]

(a) The context, object and purpose of the Law further supports application of JCE

51. The Law recognises that the KSC and SPO shall exist to, *inter alia*, 'ensure secure, independent, impartial, fair and efficient criminal proceedings'.[148] To meet

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[145] *Tadić* AJ, para.190; ICTY, Appeals Chamber, *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, 'Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*', 21 May 2003 ('*Ojdanic* JCE Decision'), para.20; ECCC, Trial Chamber, *Co-Prosecutors v. Kaing Guek Eav* alias *Duch*, 001/18-07-2007/ECCC/TC Judgement, 26 July 2010 ('*Duch* TJ'), para.511; ECCC, PTC, 002/19-09-2007-ECCC/OCIJ (PTC38) 'Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)', 20 May 2010, ('PTC Decision on JCE'), para.49; ECCC, Trial Chamber, 0002/19-09-2007/ECCC/TC 'Decision on the Applicability of Joint Criminal Enterprise', 12 September 2011 ('ECCC TC JCE Decision') paras 15, 22; ICTR, Appeals Chamber, *Prosecutor v. Ntakirutimana and Ntakirutimana, ICTR-96-10-A* and *ICTR-96-17-A* Judgement, 13 December 2004 ('*Ntakirutimana* AJ'), paras 461-484; SCSL, Trial Chamber II, *Prosecutor v. Brima et al.*, SCSL-04-16-T 'Decision on Defence Motions for Judgment of Acquittal pursuant to Rule 98', 31 March 2006 ('*Brima et al*. Decision on Judgment of Acquittal'), paras 308-326.

[146] *Contra* Motion, KSC-BC-2020-4/F00054, para.31. *See also Ojdanić* JCE Decision, paras 18-19 (addressing arguments regarding the need for JCE to be expressly or exhaustively enumerated in the Statute).

[147] *Tadić* AJ, para.190; *Ojdanić* JCE Decision, paras 18-21; *Duch* TJ, 26 July 2010, para.511; PTC Decision on JCE, para.49; ECCC TC JCE Decision, paras 15, 22; *Ntakirutimana* AJ, paras 461-484; *Brima et al*. Decision on Judgment of Acquittal, paras 308-326.

[148] Law, Art.1.

these standards, the KSC necessarily has the remit to try *all* those whose alleged crimes fall within its jurisdiction, whether they acted alone or together with others. The seriousness of the crimes within the KSC's jurisdiction under Articles 13 and 14, and the explicit rejection of purported bars to prosecution in Articles 16(2), 16(3), and 16(4), reveal that the Law, as drafted and adopted by the Assembly of Kosovo, must operate to reach all perpetrators.[149]

52. Due to their nature and scale, many crimes perpetrated in a period of unrest and war are committed not solely as the result of the 'criminal propensity of single individuals', but rather are carried out by groups of individuals acting together in pursuance of a common criminal design.[150] Certain members may act as physical perpetrators, while others may make other significant contributions and 'the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts'.[151] To hold liable only the person who carries out the criminal act itself would disregard the role of those who made it possible for the physical perpetrator to carry out the crime.[152] The KSC should affirm that its Law, in

[149] The ICTY Appeals Chamber in *Tadić*, conducting a similar assessment with respect of the object and purpose of the ICTY Statute, also concluded that it must apply *to all those* who participated in the commission of the crimes in question, including '[w]hoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose'. *Tadić* AJ, paras 186, 190; Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993 ('Report of the Secretary-General').

[150] *Tadić* AJ, para. 191; PTC Decision on JCE, para.55; SCSL, Appeals Chamber, *Prosecutor v. Taylor,* SCSL-03-01-A Judgment, 26 September 2013, para.383.

[151] *Tadić* AJ, para. 191.

[152] *Tadić* AJ, para.192; ICTR, Trial Chamber, *Prosecutor v. Karemera et al*., ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Nzirorera, Karemera, Rwamakuba and Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 11 May 2004 ('*Karemera* Decision on Preliminary Motions'), para.36; ICTR, Appeals Chamber, *Prosecutor v. Rwamakuba,* ICTR-98-44-AR72.4 'Decision on Interlocutory Appeal regarding Application of Joint Criminal Enterprise to the Crime of Genocide', 22 October 2004 ('*Rwamakuba* JCE Decision'), para.29.

particular Article 16(1)(a), extends to all who participate in the commission of the enumerated crimes, subject to fulfilment of the other jurisdictional requirements.[153]

(b) The remaining Defence arguments on the status of JCE as an applicable mode are without merit

53. The remaining defence submissions concerning the wording and application of Article 16(1)(a) in the Law do not advance the argument. A determination that JCE is a form of commission liability is not a creative or 'extensively construed' interpretation of the Law.[154] Commission liability must be interpreted to encompass JCE in accordance with consistent practice as outlined above, and with CIL,[155] and must then be applied in a manner consistent with applicable human rights principles and the Constitution.[156]

54. Similarly, the Defence arguments that JCE should not be found applicable because it was not part of Kosovo or FRY law[157] ignore the applicable law regime concerning CIL, as explained above. It also ignores the fact that JCE liability has been applied in Kosovo courts adjudicating the commission of war crimes committed during the same period as the crimes charged in the Indictment. The Supreme Court of Kosovo has upheld JCE as a mode of liability, holding that JCE (i) is firmly established in CIL, (ii) exists in three forms, and (iii) has been illuminated in decisions of the ICTY.[158] Defendants tried in Kosovo courts are thus subject to prosecution for war crimes on the basis of JCE liability.

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[153] *E.g.* Law, Art.6-9.
[154] *Contra* Motion, KSC-BC-2020-04/F00054, para.32.
[155] *See* Case 6 Jurisdiction Decision, KSC-BC-2020-06/F00412, paras 176-178.
[156] Law, Art.3, 12; Constitution, Art.19, 22 and 33.
[157] Motion, KSC-BC-2020-04/F00054, paras 25-29.
[158] *See e.g. See e.g.* Kosovo, Supreme Court of Kosovo, *L.G. et al.*, Judgement, Case PLm. Kzz. 18/2016, 13 May 2016, paras 69-74 (concurring with first Supreme Court Decision in the same case, noted herein,

2. JCE, in all forms, formed part of CIL at all times relevant to the Indictment

55. For JCE to be applicable to the Accused, it must have existed in CIL at the relevant time, and have been foreseeable and accessible to the Accused. JCE, in all of its forms, satisfies these conditions. The Defence, apart from stating that *Tadić* was wrongly decided by the ICTY Appeals Chamber,[159] declines to explain how the weight of authorities, relied on in *Tadić* and noted in subsequent decisions of similarly situated courts, can lead to any conclusion other than the one reached — that JCE formed part of CIL at the relevant time. An examination of the CIL status of JCE,[160] as

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and holding that JCE liability exists in three forms and may be applied, as done by lower courts, to the accused in cases of unlawful detention and mistreatment); Kosovo, Supreme Court, *L.G. et al.*, Judgement AP.-KZ. 89/2010, 26 January 2011, paras 114-115 (holding that JCE is firmly established in CIL and exists in three forms); Kosovo, Supreme Court, *E.K. et al.*, Judgement, 7 August 2014, Case No. PA II 3/2014, para.xlii (adopting the law on JCE set out by the lower court and holding that 'ICTY jurisprudence is a legitimate source of precedent for cases prosecuted within the Republic of Kosovo, and any other part of the Former Yugoslavia, and finds that it is entirely appropriate and justified to refer to jurisprudence of the ICTY in dealing with cases of War Crimes at the domestic level. In that respect the Court finds it appropriate to note that the responsibility of a person for war crimes and other internationally recognized crimes is based on individual criminal responsibility. However the individual criminal responsibility may take the form of both commission of a crime in person, and by participation in a group committing crimes. Joint criminal enterprise is one of the possible ways of perpetration.') referring to Kosovo, Court of Appeals, *E.K. et al.*, Judgement, 30 January 2014, Case No. PAKR 271/13, paras 36-40 (holding that 'this form of criminal liability [JCE] is applicable in the Kosovo jurisdiction for the criminal offence of War Crimes Against the Civilian Population. As referred to by the ICTY it is a form of criminal liability established in international criminal law' which may also be inferred from domestic law).

[159] Motion, KSC-BC-2020-04/F00054, para.35.

[160] Besides select arguments made in the Motion addressed in paras 62-64 and noting that there was insufficient state practice and *opinio juris* (Motion, KSC-BC-2020-04/F00054, para.35), the Defence has not specifically identified or challenged the sources of law underpinning *Tadić* and later cases, noting only that Shala could not have anticipated that he would be accused of a crime 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' (Motion, KSC-BC-2020-04/F00054, para.45). In light of this broad and undeveloped statement about the CIL status of JCE, the SPO has provided succinct submissions on the foundations and existence of JCE in CIL. If the PTJ considers that additional submissions on the CIL status of JCE are needed to respond to the Defence challenge, the SPO requests the opportunity to supplement these submissions in writing.

briefly set out below, reveals that the Defence arguments against the CIL status of JCE are entirely without merit.

(a) The sources of law and analysis in *Tadić*, including statutes and jurisprudence from post-WWII trials, show that JCE liability is found in CIL

56. The statutes and jurisprudence from the post-WWII trials represent the efforts of a multitude of countries to lawfully ensure the 'just and prompt trial and punishment' of war criminals[161] in various locations: in Europe, the International Military Tribunal[162] and other courts[163] were established pursuant to international agreements and their foundational documents, including the IMT Charter[164] and Control Council Law No.10 ('CCL10')[165] were enacted containing the governing law. Both the IMT Charter and CCL10 contain provisions which outline criminal liability for participation in a common purpose, plan or enterprise.[166] As drafted and as

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[161] IMT Charter, Art.1.
[162] The IMT was established by agreement between the Allied Powers with the following countries expressing adherence to the agreement: Yugoslavia, Greece, Denmark, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay *See United States of America v. Goering et al.*, International Military Tribunal, Judgement, 1 October 1946, in *Trial of the Major War Criminals* (Vol. I, 1947) ('IMT Judgement' or '*Goering et al.*'), p.171.
[163] Military courts composed of members from the U.S., UK, Canada and Australia, as well as German courts, adjudicated cases prosecuting war criminals, other than those dealt with at the IMT. *See* PTC Decision on JCE, para.57, fn.164.
[164] IMT Charter, p.1 ('The Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of the Soviet Socialist Republics acting in the interests of all the United Nations and by their representatives duly authorized thereto have concluded this Agreement').
[165] CCL10 was enacted by legislative act, jointly passed by the four occupying powers (the United States, the Soviet Union, France and Great Britain), reflecting international agreement among the occupying powers as to the law applicable to international crimes and the jurisdiction of the military courts charged with adjudicating these cases. *See* PTC Decision on JCE, para.57. Courts applying CCL10 were also to follow the IMT Charter and jurisprudence of the IMT. CCL10; PTC Decision on JCE, para.57, fn.164.
[166] Art.6 of the IMT Charter provides that persons: 'participating in the formulation or the execution of a common plan or conspiracy to commit [crimes against peace, war crimes, or crimes against humanity] are responsible for all acts performed by any persons in execution of such plan'. IMT Charter, Art.6.

applied, the language of the IMT Charter, attributing liability for 'all acts performed by any persons in execution of such plan' and of CCL10, providing liability for persons 'connected with plans or enterprises involving the commission of a crime' encompasses responsibility for not only crimes falling within the common plan (JCE I), but also for other crimes committed in the execution of the plan or connected to the plan (JCE III). Further, the relevant provisions of the IMT Charter and CCL10 explicitly include perpetrators who bore liability for their contributions to the commission of crimes, in whatever form those contributions were made, not solely on the basis of physically committing the *actus reus* of a crime.[167] Not only do these instruments reflect pre-existing international law, in existence through custom and convention, they also represent a 'highly significant contribution to written international law.'[168]

57. Contrary to the Defence's unsubstantiated assertion that the post-WWII cases were 'inconclusive' as to the application of a mode of liability based on participation in a common purpose, plan or design,[169] the ICTY Appeals Chamber in *Tadić*, and numerous other benches of similarly-situated courts,[170] have determined that the post-

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Art.II(2) of CCL10 provides that '[a]ny person…is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission'.

[167] ECCC, Supreme Court Chamber, *Co-Prosecutors v. Nuon Chea and Khieu Samphân*, 002/19-09-2007-ECCC/SC, Appeal Judgement, 23 November 2016 ('SCC AJ'), para.788.

[168] IMT Judgement, p.218.

[169] Motion, KSC-BC-2020-04/F00054, para.45. That these cases do not use the terms 'joint criminal enterprise' or 'significant contribution to the implementation of the common purpose' is not determinative, as these terms are modern phrases adopted to express the principles arising from the post-WWII caselaw. SCC AJ, para.779.

[170] Two of the cases cited in full in the following footnote ('*Justice*' and '*RuSHA*') were not considered in *Tadić*, however, the ECCC PTC and the ICTY and ICTR Appeals Chamber have found them to be valid illustrations of the state of CIL in respect of JCE. *See* PTC Decision on JCE, paras 65-68; *Rwamakuba* JCE Decision, paras 14-31; *Brđanin* AJ, paras 394, 404; *Prosecutor v. Milutinovic*, IT-05-87-PT, Separate Opinion of Judge Bonomy, 22 March 2006 ('Bonomy Separate Opinion') annexed to ICTY, Trial Chamber, *Prosecutor v. Milutinovic et al.*, IT-05-87-PT 'Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration', 22 March 2006 ('*Ojdanić* Co-Perpetration Decision'), paras 15-26; ICTY, Appeals Chamber, *Prosecutor v. Krajišnik*, IT-00-39-A, 17 March 2009 ('*Krajišnik* AJ'), para.659.

WWII cases reveal that accused persons were tried based on their actions taken as part of a common design, purpose or plan, with others, including in instances in which it was proven that an accused intended the commission of crimes as part of that plan or design.[171] Other trials revealed liability based on the same *actus reus* requirements, but extending to crimes outside the common plan which were considered a foreseeable consequence of it.[172]

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[171] The cases contained in the following non-exhaustive list, which have various fact patterns and relate to accused persons with varying positions and types of contributions, relate to a mode of liability akin to the modern term JCE I: (i) *United States v. Alstoetter et al.*, U.S. Military Tribunal, Judgement, 3-4 December 1947, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (Vol. III, 1951) Indictment (*'Justice'*); (ii) *United States v. Greifelt et al.*, U.S. Military Tribunal, Judgement, 10 March 1948, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (Vol. IV-V, 1951) (*'RuSHA'*); (iii) *United States of America v. Goering et al.*, International Military Tribunal, Judgement, 1 October 1946, in *Trial of the Major War Criminals* (Vol. I, 1947) ('IMT Judgement'); (iv) *United States of America v. Ohlendorf et al*., 1947, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (United States Government Printing Office, Vol. IV, 1951) (*'Einsatzgruppen'*); (v) *Trial of Sandrock et al.*, British Military Court for the Trial of War Criminals, Almelo, Holland, 24th-26th November 1945, in *UNWCC* (Vol. I) (*'Almelo'*); (vi) *Holzer et al.*, Canadian Military Court, 25 March-6 April 1946, in *Record of Proceedings at Aurich, Germany* (Vol. I) (*'Holzer et al.'*); (vii) *Trial of Gustav Alfred Jepsen et al.*, Proceedings of a War Crimes Trial held at Luneberg, Germany 13-23 August 1946, Judgement, 24 August 1946 *('Jepsen'*); (viii) *Trial of Franz Schonfeld et al.*, British Military Court, Essen, June 11th-June 26th 1946, in *UNWCC* (Vol. XI) (*'Schonfeld'*); (ix) *Trial of Feurstein and others,* Proceedings of a War Crimes Trial held at Hamburg, Germany, 4-24 August 1948 (*'Ponzano'*); (x) *United States v Hans Ulrich and Merkle*, Case No. 000-50-2-17, 7708 War Crimes 78 79 80 Group – European Command, Review and Recommendation, 12 June 1947 (*'Ulrich'*); *United States v Hans Wuelfert et al,* Case No. 000-50-2-72, 7708 War Crimes Group – European Command, Review and Recommendation, 19 September 1947 (*'Wuelfert et al.'*).

[172] The cases contained in the following non-exhaustive list, which have various fact patterns and relate to accused persons with varying positions and types of contributions, relate to a mode of liability akin to the modern term JCE III: (i) *United States v. Kurt Goebell et al.*, Case No. 12-489, Review and Recommendations, 1 August 1947, (*'Borkum Island'*), (www.legal-tools.org/doc/aeb036/pdf/); (ii) *United States v. Hartgen et al.*, Case No. 12-1497, United States Military Commission, Review and Recommendation, 29 September 1945 (*'Rüsselsheim'*); (iii) *Queen v. Ikeda*, Case No. 72A/1947, Judgement, 8 September 1948 (*'Ikeda'*); (iv) *Prosecutor v. Kumakichi Ishiyama et al.*, Australian Military Court, 8-9 April 1946, p.5 (*'Ishiyama'*) (www.legal-tools.org/doc/c9884d/); (v) *Trial of Erich Heyer et al.*, British Military Court for the Trial of War Criminals, Essen, 18-19 and 21-22 December 1945, in *UNWCC* (Vol. I) (*'Essen Lynching'*); (vi) *United States of America v. Tashiro et al.*, Review of the Staff Judge Advocate, 7 January 1949 (*'Tashiro'*). In addition, *Tadić* considered the case of D'Ottavio and others, tried before an Italian court in 1947. *D'Ottavio et al.*, Italian Court of Cassation, Criminal Section I, Judgement no. 270 of 12 March 1947, *Journal of International Criminal Justice* 5 (2007) (*'D'Ottavio),* pp.232-234. The case features international elements (the victims were foreign prisoners of war) and may thus qualify as state practice

58. The legal principles applied and jurisprudence from the post-WWII trials have been widely recognised as forming part of CIL. As but two examples, in December 1946, the General Assembly unanimously adopted a resolution affirming the legal principles in the IMT Charter and IMT Judgement and specified that those principles should be included in the future code of offenses against the peace and security of mankind.[173] In 2010, in considering whether JCE formed part of CIL in the 1970s, the ECCC PTC found:

> the case law from the above-mentioned military tribunals offer an authoritative interpretation of their constitutive instruments and can be relied upon to determine the state of CIL with respect to the existence of JCE as a form of criminal responsibility [...].[174]

59. Finally, all relevant[175] similarly situated courts have found that JCE is a mode of liability in CIL. The ICTR, SCSL and STL have each consistently concluded that JCE, in all of its forms, was a mode of liability in existence at the time of the crimes in question.[176] All three chambers of the ECCC and the Co-Investigative Judges have

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relevant to the identification of a rule of CIL, including with respect to modes of liability. *See* SCC AJ, para.805. In addition, Italy's extensive involvement in World War II and its occupation by Nazi-Fascist forces between 1943 and 1945 caused it to be extensively involved with the investigation and trial of a high number of war crimes, (*see e.g.* F. Focardi, Giustizia e ragion di Stato – La punizione dei criminali di Guerra Tedeschi in Italia, in Storicamente, December 2006, pp.492-497). This is a relevant circumstance because, when assessing the generality of state practice with respect to the formation of custom, the practice of states that are particularly faced with certain questions of law may be given particular consideration, *see* United Nations, Report of the International Law Commission, Sixty-Eighth Session (2 May-10 June and 4 July-12 August 2016), A/71/10, p.76 - Text of the draft conclusions on identification of CIL adopted by the Commission, Conclusion 8, p.85. *See also* ICJ, *Jurisdictional Immunities of the States (Germany v. Italy: Greece intervening),* Judgment, 3 February 2012, ICJ Reports 2012, p.123, para.55; ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands),* Judgment, 20 February 1969, *ICJ* Reports 1969, p.43, para.74; Case 6 Jurisdiction Decision, KSC-BC-2020-06/F00412, para.186.

[173] UN General Assembly Resolution 95 (I), Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal, 11 December 1946.

[174] PTC Decision on JCE, para.60.

[175] Due to the unique nature of the Rome Statute, the ICC's jurisprudence on modes of liability is not relevant.

[176] *Ntakirutimana* AJ, para. 468; *Karemera* Decision on Preliminary Motions, paras 25, 38; *Rwamakuba* JCE Decision, para.14; STL, STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism,

recognised the existence of JCE I.[177] Moreover, JCE III specifically has been affirmed by the ICTY,[178] the ICTR,[179] the IRMCT,[180] the SCSL,[181] the STL,[182] and other international or internationalised tribunals.[183] Indeed, in addition to the extensive sources outlined above, these courts and tribunals have identified and relied upon numerous other cases and materials in which further elements supportive of JCE III liability are to be found.[184]

60. In *Thaçi et al.*, the PTJ has already found a clear and sufficient basis to conclude that JCE I and JCE III were part of CIL at the relevant period.[185] The Defence relies almost exclusively on ECCC jurisprudence to argue against the customary status of JCE III.[186] However, this challenge should be dismissed as the ECCC decisions are not binding on the KSC and the Defence have failed to argue against the extensive body

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Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 ('STL Decision on Applicable Law'), para.236, fn.354; *Brima et al*. Decision on Judgment of Acquittal, paras 308-311.

[177] ECCC, OCIJ, 002/19-09-2007-ECCC-OCIJ 'Decision on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise', 8 December 2009, para.23; *Duch* TJ, paras. 511-512; ECCC TC JCE Decision, paras. 15, 22; PTC Decision on JCE, para.69; SCC AJ, para.807.

[178] *See e.g. Prosecutor v. Prlić et al.*, IT-04-74-A, Judgement – Volume II, 29 November 2017, para.590; *Kvočka et al.* AJ, paras 81-83, 86.

[179] *See e.g.* ICTR, *Prosecutor v. Karemera and Ngirumpatse,* ICTR-98-44-A, Judgement, 29 September 2014, ('*Karemera and Ngirumpatse* AJ'), paras 623, 627, 629.

[180] *See e.g.* IRMICT, Appeals Chamber, *Prosecutor v. Karadžić*, MICT-13-55-A, Judgement, 20 March 2019 ('*Karadžić* AJ'), para.433.

[181] *Brima et al*. Decision on Judgment of Acquittal, paras 308-326 and *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgment, 22 February 2008, para.84.

[182] STL Decision on Applicable Law, paras 239-247.

[183] Extraordinary African Chambers, Trial Chamber, *Ministere Public v. Hissene Habré* Judgment, 30 May 2016 ('*Habré* TJ'), para.1885.

[184] For example, see JCE III sources cited in STL Decision on Applicable Law, fn.355.

[185] *See e.g.* Case 6 Jurisdiction Decision, KSC-BC-2020-06/F00412, paras 183, 185-186. The consistent jurisprudence of contemporary international tribunals may be taken into account pursuant to Law, Art.3(3).

[186] Motion, KSC-BC-2020-04/F00054, paras 36-37.

of law, including that relied on by other courts, which demonstrates that JCE, in all of its forms, forms part of CIL.[187]

61. The Defence attempt to paint JCE III as a guise for introducing 'guilt by association' or 'strict liability.'[188] This argument fails because it does not acknowledge a foundational requirement of JCE: that there must be participation by the accused, which may take the form of assistance in or contribution to, the execution of the common purpose.[189] The Accused is charged not for membership in a joint criminal enterprise, but for the part he played in carrying it out, which needs to be at least 'significant'.[190] Under JCE III, a JCE member is being held liable for the foreseeable consequences of a criminal purpose involving grave crimes, which s/he intentionally participated in and significantly contributed to.[191] The 'additional crime' that an accused could be responsible for under JCE III is nothing more than the 'outgrowth' of previously agreed or planned criminal conduct for which each JCE member is

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[187] To the extent that the Defence rely on the ECCC's jurisprudence concluding that the post-WWII caselaw related to JCE III is insufficient evidence of consistent state practice or *opinio juris*, the amount of practice required for the formation of custom varies depending on the nature of the rule in question. In areas of widespread, routine engagement in international law, such as diplomatic relations, state practice must be widely exhibited, while for rules on matters in which fewer states engage, a lesser amount of practice suffices. *See* Report of the International Law Commission, Sixty-eighth session (2 May-10 June and 4 July-12 August 2016), A/71/10, p.76 - Text of the draft conclusions on identification of CIL adopted by the Commission, Conclusion 3: 'In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.'); Report of the International Law Commission, sixty-eighth session (2 May-10 June and 4 July-12 August 2016), A/71/10, p.76 - Text of the draft conclusions on identification of CIL adopted by the Commission, Conclusion 8, p.94, para.3. Concerning modes of liability, state practice is reflected in prosecutions, which may be relatively scarce—however, the ECCC has recognised that a paucity of prosecutions cannot be found to disprove the existence of state practice under international law. ECCC, Supreme Court Chamber, *Co-Prosecutors v. Kaing Guek Eav* alias *'DUCH'*, Appeal Judgement, 3 February 2012 ('*Duch* AJ'), para.93.

[188] Motion, KSC-BC-2020-04/F00054, para.24.

[189] *Vasiljević* AJ, para.100; *Brđanin* AJ, para.424.

[190] *Brđanin* AJ, para.430.

[191] *See* also paras 45-47; *Also contra* Motion, KSC-BC-2020-04/F0054, para.24 (no requirement for an essential contribution).

already responsible.[192] As such, it only arises where a perpetrator who already had criminal intent, and had made a significant contribution, could and did foresee the possibility of an additional crime and willingly took that risk.[193]

(b) The remaining Defence submissions about JCE fail to call into doubt the CIL status of JCE and its applicability before the KSC

62. There is no requirement that a source of law be codified in a statute or treaty to be valid, particularly, as here, where the governing law of the KSC specifically incorporates CIL.[194] The Defence argument alleging that the provisions of the Rome Statute weaken the CIL status of JCE ignores the fact that the governing law of the ICC is fundamentally different than the KSC, as Article 21 of the ICC Statute firmly places CIL as a secondary source behind the ICC's statutory sources.[195] Equally, it is well-established that neither the writings of academics including former judges, nor studies concerning domestic practice are capable of overturning settled jurisprudence.[196] The

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[192] STL Decision on Applicable Law, para.243.
[193] STL Decision on Applicable Law, paras 243, 245.
[194] *Contra* Motion, KSC-BC-2020-04/F00054, para.39. Customary law may be represented in unwritten law and practice. *Ojdanić* JCE Decision, para.41; *Duch* TJ , ECCC, paras 290, 26 July 2010.
[195] *Contra* Motion, KSC-BC-2020-04/F00054, para.39. These include the Rome Statute, the Elements of Crimes and the Rules of Procedure and Evidence.
[196] *Contra* Motion, KSC-BC-2020-04/F00054, paras 39, 42, fn.56. *See* ICTY, Appeals Chamber, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A Judgement, 30 June 2016, paras 598, 974, 975; ICTY, Appeals Chamber, *Prosecutor v. Popović et al*., IT-05-88-A, Judgement, 30 January 2015, paras 1437-1443, 1674; ICTY, Appeals Chamber, *Prosecutor v. Đorđević*, IT-05-87/1-A, Judgement, 27 January 2014 ('*Đorđević* AJ'), paras 33, 38, 39, 50-53, 83; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001 ('*Celebici* AJ'), para.24. Art.38(1) of the Statute of the ICJ, which is regarded as CIL, enumerates, *inter alia*: 'the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rule of law'. *See Đorđević* AJ, para.33; ICTY, Trial Chamber, *Prosecutor v. Kupreškić et al.,* IT-95-16-T, Judgement, 14 January 2000, para.540; *Delalić* TJ, para.414; ICTY, Trial Chamber, *Prosecutor v. Furundžija*, IT-05-17/1-T Judgement, 10 December 1998, para.227; ICTY, Appeals Chamber, *Prosecutor v. Aleksovski*, IT-95-14/1-T 'Declaration of Judge Hunt', 24 March 2000, para.2, ICTY, Appeals Chamber, *Prosecutor v. Erdemović*, IT-96-22-A 'Joint Separate Opinion of Judge McDonald and Judge Vohrah' 7 October 1997, para.43. *See also* ICTY, Appeals Chamber, *Prosecutor v. Krstić*, IT-98-33-A Judgement, 19 April 2004, para.11, fn 20.

argument concerning special intent crimes lacks a request for relief and is inapplicable to these proceedings, as no special intent crime has been charged under JCE III.[197]

63. The *Jogee* decision does not affect the CIL status of JCE and does not invalidate JCE liability at the KSC or any other jurisdiction applying CIL.[198] This was authoritatively determined by the IRMCT, which considered the issue in full.[199] While *Jogee* represented a change in the law in the England and Wales, this applies to England, Wales, and the jurisdictions bound by the jurisprudence of the Privy Council. It has not been followed by other common law jurisdictions.[200]

64. Further, in suggesting that *Jogee* bears on JCE liability, the Defence ignores that it is not directly on point.[201] While JCE, as articulated in *Tadić* and subsequent ICTY Appeals Chamber decisions, is a form of commission liability applicable to perpetrators, *Jogee* concerns English accomplice or accessorial liability. Other common law jurisdictions, in declining to follow *Jogee,* confirmed that it concerns domestic accomplice liability in England and Wales.[202] The Defence misstate the role of English domestic law in JCE jurisprudence, falsely claiming that it represents the 'only support' found by the ICTY Appeals Chamber in determining the *mens rea* standard for JCE III.[203] *Jogee* in fact confirms the analysis made in 1999 in *Tadić* – that there is a lack of a consistent domestic law approach to common purpose liability. This further

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[197] *Contra* Motion, KSC-BC-2020-04/F00054, para.38.
[198] *Contra* Motion, KSC-BC-2020-04/F00054, para.40-41.
[199] *Contra* Motion, KSC-BC-2020-04/F00054, para.41; *Karadžić* AJ, paras 422-437.
[200] *See e.g.* Court of Final Appeal of the Hong Kong Special Administrative Region, *HKSAR v. Chan Kam-shing* [2016] HKCFA 87 ('*Chan Kam-shing*'), paras. 32, 33, 40, 58, 60, 62, 71, 98; High Court of Australia, *Miller v. The Queen, Smith v. The Queen, Presley v. The Director of Public Prosecutions* [2016] HCA 30 ('*Miller*'), para.43.
[201] *Contra* Motion, KSC-BC-2020-04/F00054, para.40. *See also Karadžić* AJ, para.434.
[202] *Miller*, paras.3-50, 131-148; *Chan Kam-shing*, paras 58-105.
[203] *Contra* Motion, KSC-BC-2020-04/F00054, para.40.

reduces any value that *Jogee* could have on the application of international criminal law.

3. JCE liability was foreseeable and accessible to the Accused

65. JCE liability was sufficiently foreseeable and accessible at the relevant time to warrant its application the Accused.[204] There is no dispute as to the accuracy of the caselaw on foreseeability noted by the Defence,[205] however, it bears emphasising that compliance with *nullum crimen sine lege* must be assessed in the particular context of violations of international law. Requiring uniform, precise definitions of all elements to find that they constituted crimes or modes ignores the fact that international criminal law, by its nature, has developed progressively and that customary law, is, by definition, elastic and not static.[206] Various and sundry sources of law may put an accused on notice that conduct could result in punishment. As explained in one post-WWII case:

> [l]aw does, in fact, come into being as the result of formal written enactment and thus we have codes, treaties, conventions, and the like, but it may also develop effectively through custom and usage and through the application of common law. The latter methods are no less binding than the former.[207]

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[204] *Contra* Motion, KSC-BC-2020-04/F00054, para.45.
[205] Motion, KSC-BC-2020-04/F00054, para.44. In *Vasiliauskas v. Lithuania,* there was an Art.7 violation where an international crime, genocide, was retroactively prosecuted using definitions broader than those under CIL, as the domestic statute included protections for a group not included in the CIL definition for the crime. *See* ECtHR (Grand Chamber), *Vasiliauskas v. Lithuania*, 35343/05, Judgment, 20 October 2015, paras 165-66, 178, 181, 185-86, 191.
[206] *See e.g. United States of America v. List et al.,* Military Tribunal V, Case 7, Judgement, 19 February 1948, p.1230 in Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No.10, Volume X, p.1241; *Holzer et. al.*, p.336; *Justice,* Judgment, p.966 (noting that 'international law is not the product of statute. Its content is not static. The absence from the world of any governmental body authorised to enact substantive rules of international law has not prevented the progressive development of that law. After the manner of the English common law it has grown to meet the exigencies of changing conditions'.).
[207] *Einsatzgruppen*, p.458.

66. The definition of accessibility noted by the Defence, adopted by the ICTY and ECCC, takes into account the specificity of international law.[208] As for accessibility, both courts held that 'in the case of an international tribunal such as this, accessibility does not exclude reliance being placed on a law which is based on custom...'.[209] Customary law may be represented in unwritten law and practice and may still be sufficient to determine whether the principle of legality has been abridged.[210]

67. The vast body of law arising after WWII, recounted in *Tadić* and subsequent cases, and found in other sources such as manuals for war crimes trials,[211] made JCE liability foreseeable to the Accused.

68. The foreseeability of JCE to the Accused is further reinforced by strikingly similar provisions of the SFRY Code in force in Kosovo at the relevant time. Such domestic law from the time of the commission of crimes can help establish that the Accused could reasonably have known that 'the offence in question or the offence committed in the way charged in the indictment was prohibited and punishable'.[212] Articles 22 and 26 of the SFRY Criminal Code, cited by the Defence, largely mirror the elements of JCE I, a fact that has been recognised by the courts of Kosovo and the

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[208] Motion, KSC-BC-2020-04/F00054, para.44. *Duch* TJ, para.31; PTC Decision on JCE, para.45 citing *Ojdanić* JCE Decision, paras 37-43.
[209] *Duch* TJ, para.31; PTC Decision on JCE, para.45 citing *Ojdanić* JCE Decision, paras 37-39.
[210] *Ojdanić* JCE Decision, para.41; *Duch* TJ, ECCC, para.290, 26 July 2010.
[211] For example, the 1946 U.S. War Crimes Trial Manual, which included specific references to the principles underlying JCE III, was applied in post-WWII international jurisprudence. It sets out the law with relevant citations to immediate post-WW II jurisprudence, including *Rüsselsheim,* and outlined the following principle: 'All who join in a common design to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, are responsible for a homicide committed by one of them while acting in pursuance of or in furtherance of the common design, although not specifically contemplated by the parties, or even forbidden by defendant, or although the actual perpetrator is not identified.' War Crimes Trial Manual, Section 410, 15 July 1946, p.305.
[212] *Ojdanić* JCE Decision, para.40; PTC Decision on JCE, para.45.

ICTY, respectively.[213] In addition, Articles 11 and 13 of the SFRY Criminal Code, concerning *mens rea*, include criminal liability for both a person intending the commission of a crime, but also for the situation in which 'he is conscious that a prohibited consequence might result from his act or omission and consents to its occurring.'[214] Persons in Kosovo could thus be held criminally liable for crimes that they did not intend, but which were merely a possible or foreseeable outcome of their conduct. These provisions, coupled with Article 22 or 26 of the SFRY Criminal Code, have been found by Kosovo courts to mirror the elements of JCE III.[215] Moreover, it cannot be accepted that a person from Kosovo, part of the former Yugoslavia, in 1998-1999, during the time of investigations and prosecutions by the ICTY, could be unable to foresee that committing crimes could result in prosecution for war crimes including through the use of modes accepted in CIL. The requirements of foreseeability and accessibility are met and the Defence's attempt to escape from this fact by characterising JCE as a 'judicially constructed rule' has been roundly rejected.[216]

III. RELIEF REQUESTED

69. For the foregoing reasons, the Motion should be rejected.

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[213] In respect of Art.22, see Basic Court of Mitrovica, Judgment, 12 September 2013, No. 14/2013, p.37; Court of Appeals of Kosovo, Judgment, 11 September 2013, PAKR 966/2012, para.74; Court of Appeals of Kosovo, Judgment, 30 January 2014, PAKR 271/2013, paras 36-39; Supreme Court of Kosovo, Judgment, 7 August 2014, PAII 3/2014, paras C 5 xli.-xii. In respect of Art.26 see Supreme Court of Kosovo, Judgment, 10 April 2009, Ap.-Kz No 371/2008, p.14-16, 63-64; *Ojdanić* JCE Decision, para.40 (noting the striking similiarity between Art.26 and JCE).

[214] SFRY Criminal Code, Art.13.

[215] Supreme Court of Kosovo, Judgment, 29 May 2012, Ap-Kz 67/2011, p.7-9. As noted in *Thaći et al.*, that some courts took a different view does not mean that Art. 11, 13 did not provide for a *mens rea* standard which mirrors both JCE I and JCE III. Case 6 Jurisdiction Decision, KSC-BC-2020-06/F00412, para.200.

[216] *See e.g. Krajišnik* AJ, para.655 (holding that 'because JCE does not go beyond the Statute and forms part of custom as explained below, JCE counsel's claim that the Judges 'created' this form of liability fails). *Contra* Motion, KSC-BC-2020-04/F00054, para.45.

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Jack Smith

Specialist Prosecutor

Monday, 6 September 2021
At The Hague, the Netherlands.