BEFORE THE PRE-TRIAL JUDGE

KOSOVO SPECIALIST CHAMBERS

Case No.:	KSC-BC-2020-04
Before:	Judge Nicolas Guillou, Pre-Trial Judge
Registrar:	Dr Fidelma Donlon, Registrar
Date:	24 September 2021
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THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Defence Reply to the Prosecution Response to the Preliminary Motion of Pjetër Shala Challenging the Jurisdiction of the KSC

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I. INTRODUCTION

1. The Defence for Mr Pjetër Shala presents its submissions in reply to the Prosecution response to its Preliminary Motion Challenging the Jurisdiction of the Kosovo Specialist Chambers.[1]

2. The Reply is limited to addressing the submissions made in the Response.[2] The Defence maintains the arguments presented in its preliminary motion and opposes every submission made in the Response unless it is otherwise specifically indicated.

II. SUBMISSIONS

A. THE CHALLENGE TO THE LAWFULNESS OF THE KSC'S ESTABLISHMENT IS A JURISDICTIONAL CHALLENGE

3. As a preliminary matter, the SPO argues that challenges to the legality of the KSC do not constitute jurisdictional challenges within the meaning of Rule 97(1)(a).[3] However, the lawfulness of the establishment of the KSC is a necessary pre-condition to the KSC exercising jurisdiction and, as such, falls to be considered under Rule 97(1)(a) as a jurisdictional challenge. A finding to the contrary would, in the words of the ICTY Appeals Chamber in the *Tadić* case:

> "fall foul of a modern vision of the administration of justice" as it essentially concerns "an assessment of the legal capability […] to try his case. […] The plea

[1] KSC-BC-2020-04, Prosecution Response to Shala Defence Preliminary Motion Challenging the Jurisdiction of the KSC, 6 September 2021 ("Response"). All further references to filings concern Case No. KSC-BC-2020-04 unless otherwise indicated.
[2] See Rule 76 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules").
[3] Response, para. 2.

> based on the invalidity of constitution […] goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit […] This issue is a preliminary to and conditions all other aspects of jurisdiction."[4]

4. The SPO fails to put forward any convincing reason as to why the Judge should interpret this provision in a restrictive manner. It relies in this respect on the Judge's ruling in *Thaçi* that challenges to the legality of the KSC do not constitute jurisdictional challenges.[5]

5. However, the authorities relied on for the purposes of this ruling are inapposite.[6] In *Nzirorera*, the ICTR Appeals Chamber held that the Defence challenge to the ICTR's "continued exercise of power" to prosecute in 2004 was not a jurisdictional challenge within the confines of revised ICTR Rule 72(D)(iv).[7] The Defence had not challenged the lawfulness of the ICTR establishment. The ICTY Appeals Chamber decision in the *Tolimir* case, concerned Tolimir's challenge to the legality of his arrest and had nothing to do with the establishment of the ICTY.[8] The ICTY Trial Chamber in *Karadžić* explicitly observed that "[t]here is no doubt that the Motion, being a challenge to the very establishment and the existence of the Tribunal, is a challenge going to its jurisdiction".[9] In this respect, the Chamber relied on the above-mentioned decision in *Tadić*.[10] Karadžić's motion could not be considered "a 'preliminary motion', as defined by Rule 72, since it [did] not

[4] *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras. 6, 12.
[5] KSC-BC-2020-06, *Prosecutor v. Thaçi et al.,* F00450, Decision on Motions challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused, 31 August 2021 ("*Thaçi* Decision on Motions Challenging the Legality and Alleged Violations of Constitutional Rights"), para. 54.
[6] *Thaçi* Decision on Motions Challenging the Legality and Alleged Violations of Constitutional Rights, n. 73.
[7] ICTR-98-44-AR72, *Joseph Nzirorera v. The Prosecutor*, Decision Pursuant to Rule 72(E) of the Rules of Procedure and Evidence on Validity of Appeal of Joseph Nzirorera Regarding Chapter VII of the Chapter of the United Nations, 10 June 2004 ("*Nzirorera* Decision"), paras. 4, 9.
[8] IT-05-88/2-AR72.2, *Prosecutor v. Zdravko Tolimir*, Decision on Zdravko Tolimir's Appeal Against the Decision on Submissions of the Accused Concerning Legality of Arrest, 12 March 2009, paras. 11, 12.
[9] IT-95-5/18-T, *Prosecutor v. Karadžić,* Decision on the Accused's Motion Challenging the Legal Validity and Legitimacy of the Tribunal, 7 December 2009 ("*Karadžić* Decision"), para. 7.
[10] *Karadžić* Decision, n. 14.

concern any of the issues listed in Rule 72(D)."[11] A plain reading of that provision shows that it differs fundamentally from Rule 97(1)(a).

6. Lastly, the STL Appeals Chamber decision on the Defence Challenges to Jurisdiction and Legality of the Tribunal found the submissions as to the legality of the STL inadmissible under the narrow confines of Rule 90 of the STL Rules. The text of the latter is significantly different to that of Rule 97(1)(a).

7. In *Nzirorera*, the ICTR Appeals Chamber noted that the revised version of ICTR Rule 72 was adopted "at a time when interlocutory appeals purporting to challenge the jurisdiction of the Tribunal on grounds other than those listed in Rule 72(D) had arisen in both Tribunals, including in the *Tadić* case."[12] This is not the case in the present circumstances where the lawfulness of the establishment of the KSC and the compatibility of the Law with the Constitution have not been definitively determined.

8. Whether the Defence challenge to the lawfulness of the establishment of the KSC is considered a preliminary motion challenging its jurisdiction is not a pedantic question. If it is not considered a jurisdictional challenge, the Defence cannot appeal it as of right. This can result in prejudice. Mr Shala is entitled to a thorough consideration of this matter.

B. THE KSC CONSTITUTE AN 'EXTRAORDINARY COURT' AND LACK OBJECTIVE IMPARTIALITY

9. In support of its argument that the KSC were lawfully established, the SPO relies on the Decision of the Kosovo Constitutional Court ("KCC") of 15 April 2015.[13] However, the latter only concerned the then proposed

[11] *Karadžić* Decision, para. 8.
[12] *Nzirorera* Decision, para. 10.
[13] Response, para. 3 and references made therein.

Amendment no. 24 to the Constitution. While the KCC envisaged that a law would be adopted, it has plainly not reviewed Law No. 05/L-53 ("Law") that established the KSC.

10. Article 103(7) of the Kosovo Constitution is clear. It allows specialized courts and prohibits in all circumstances the establishment of extraordinary courts. The KCC considered that a specialized court:

> "remains within the existing framework of the judicial system of the Republic of Kosovo and operates in compliance with its principles. Unlike a specialized court, an 'extraordinary court' would be placed outside the structure of the existing court system and would operate without reference to the existing systems."[14]

11. The KCC in reviewing the constitutionality of the proposed amendment that would enable the establishment of the KSC relied extensively on the ECtHR judgment in *Fruni v. Slovakia*.[15] In that judgment, the ECtHR emphasized that in assessing whether a tribunal could be considered independent and established by law "its task is not to review the relevant domestic law and practice in *abstracto*" but "to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention."[16]

12. A review of the application of the establishment framework and operation of the KSC pursuant to the Law demonstrates how in practice the KSC are placed outside the structure of the existing court system and operate on the basis of their own rules of procedure without adequate reference to the Kosovo legal order, fitting as such to the KCC's definition of an 'extraordinary court'.

[14] KCC judgment of 15 April 2015, para. 43.
[15] KCC judgment of 15 April 2015, paras. 47, 48.
[16] ECtHR, *Fruni v. Slovakia*, 8014/07, 21 June 2011 ("*Fruni* Judgement"), para. 133.

13. The Law establishes an extraordinary legal framework, which goes beyond the ordinary domestic law regime in the various ways discussed in the Motion. The KSC Judges have no formal institutional connection with the domestic judiciary and prosecution service. The KSC procedure does not follow the Kosovo Code of Criminal Procedure and offers weaker procedural guarantees for the rights of an accused. For instance, the procedural guarantees made available to an accused under Articles 242, 244 and 245 of the Kosovo Code of Criminal Procedure are not available to accused before the KSC, while the equivalent provisions of the Law provide for a significantly weaker protection.[17] The SPO has openly conceded that the Kosovo Criminal Procedure Code (and its procedural guarantees) are irrelevant when it comes to KSC proceedings and must be set aside as the Law operates as *lex specialis*.[18] The '*lex specialis'* applied in this extraordinary legal framework results in unacceptable lack of clarity as to the applicable law and fails to meet the requirements of accessibility and foreseeability as explained in the Motion. The purported primacy of the KSC over other Kosovo courts deviates from the Kosovo Constitution and the overriding principle of legality. The KSC were established to deal with a limited number of cases, all judges are international and appointed by procedures that deviate from those provided in the Constitution and domestic legal order; Kosovo Albanians are entirely excluded from consideration as

[17] *See* the Defence submissions on the fairness of the indictment confirmation procedure set out in F00055, Corrected Version of 'Preliminary Motion by the Defence of Pjetër Shala challenging the Form of the Indictment, paras. 11, 12. See also F00070, Prosecution Response to the SHALA Defence's Corrected Version of the Preliminary Motion Challenging the Form of the Indictment, 6 September 2021, para. 13 in which the SPO states that "[t]he Defence's reference to the Kosovo Criminal Procedure code ('KCPC') are inapposite" as "[t]he Law operates as *lex specialis*."

[18] F00070, Prosecution Response to the SHALA Defence's Corrected Version of the Preliminary Motion Challenging the Form of the Indictment, 6 September 2021, para. 13 in which the SPO states that "[t]he Defence's reference to the Kosovo Criminal Procedure code ('KCPC') are inapposite" as "[t]he Law operates as *lex specialis*."

judges or members of staff by virtue of an unlawful discriminatory policy on grounds of ethnicity that lacks legitimate justification.

14. One of principal considerations for the ECtHR in *Fruni* was whether a court "presents an appearance of independence".[19] In this respect, it was considered that "what is at stake is the confidence which such tribunals in a democratic society must inspire in the public, and, above all, the parties to the proceedings."[20] In *Gudmundur*, the ECtHR interpreted the requirement to be "established by law" to be reflected in the need for courts to have "the legitimacy required in a democratic society to resolve legal disputes".[21]

15. The process of appointing judges is recognised as an inherent feature of the "establishment by law" requirement.[22] The relevant domestic law provisions include the prohibition of discrimination on grounds of ethnicity. In particular, Article 7 of the Constitution provides that the constitutional order is based on the principle of equality and non-discrimination. Article 22 renders the ECHR and its Protocols directly applicable in the Republic of Kosovo, including, not only Article 14 of the ECHR, but also Protocol no. 12, the self-standing prohibition of discrimination. Contrary to the SPO's misleading submission,[23] the ECHR and its Protocol No. 12 prohibit discrimination, including on grounds of ethnicity, as such.[24] The SPO's cursory submissions on this point,[25] do not even attempt to address the fundamental problem with the lack of

[19] *Fruni* Judgement, para. 141.
[20] *Fruni* Judgement, para. 141.
[21] ECtHR, *Gudmundur Andri Astradsson v. Iceland*, 1 December 2020 ("*Gudmundur* Judgment"), para. 211.
[22] *Gudmundur* Judgment, para. 226.
[23] Response, n. 42.
[24] *See, e.g.* ECtHR, *Sejdic and Finci v. Bosnia and Herzegovina*, 22 December 2009, para. 53.
[25] Response, paras. 11, 12.

legitimacy due to the discriminatory exclusion of Kosovo Albanians from the composition of the KSC as a domestic court. This is not because of the employment rights either of the Accused or others or because of an alleged lack of impartiality of international judges (all being arguments that the Defence did not make).[26] The absence of Kosovo Albanian judges and staff constitutes racial discrimination imposed by an administrative practice directed at them for the very reason that they belong to this category of persons. Such practice deprives the KSC from legitimacy and undermines confidence as to the objective impartiality of its Judges and staff. Both these values are protected by Article 6 of the ECHR. As the SPO acknowledges[27] the Defence is not challenging the subjective impartiality of a particular judge. It is challenging the legitimacy of a system that encompasses a policy that constitutes racial discrimination. How can the people of Kosovo in general and the Accused in this case in particular have faith that the KSC proceedings will be fair when as a matter of policy all Kosovo Albanians are excluded from the composition of the KSC? How can the KSC be considered a properly constituted Kosovo court when all Kosovo Albanians are excluded from employment or involvement with it? "Racial discrimination is a particularly egregious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction."[28] The SPO fails to provide *any* justification for this exclusion. In any event, generalised concerns about the security situation in Kosovo cannot justify this blanket ban.[29]

[26] The SPO misconstrues the Defence submissions on the exclusion of Kosovo Albanians from any involvement with the KSC. *See* Response, paras. 12, 14.
[27] Response, para. 13.
[28] ECtHR, *Sejdic and Finci v. Bosnia and Herzegovina*, GC, 22 December 2009, para. 43.
[29] Response, para. 7.

16. Contrary to the SPO submissions,[30] the mere fact that the KSC were established and operate by virtue of a constitutional amendment and the Law in itself does not suffice to conclude that they are independent and established by law in accordance with Article 6 of the ECHR. The ECtHR requires that for the requirement "to be established by law", the "law" is to be interpreted to include "not only legislation providing for the establishment and competence of judicial organs, but also any other provision of domestic law which, if breached, would render […] the examination of a case irregular."[31] A proper assessment in this respect requires a "systematic" enquiry as to "whether the alleged irregularity in a given case was of such gravity as to undermine the aforementioned fundamental principles".[32] The above-mentioned irregularities as developed in the Motion meet the requisite threshold of gravity.

C. CIL IS NOT DIRECTLY APPLICABLE TO THE KSC

17. The Supreme Court of Kosovo has held that "the constitutional principle of legality presupposes that criminal offences and punishments must be provided for in specific domestic legislation."[33]

18. Articles 3 and 12 of the Law violate Article 7 of the ECHR and the corresponding Constitutional guarantees to the extent that they purport to introduce within the Kosovo legal order offences derived from CIL that are not otherwise incorporated in the internal legal order.[34]

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[30] Response, para. 6.
[31] *Gudmundur* Judgment, para. 212.
[32] *Gudmundur* Judgment, para. 234.
[33] *See* Supreme Court of Kosovo (UNMIK), *Case against Veselin Bešović*, AP-KZ no. 80/2004, 7 September 2004, p. 18.
[34] Article 33 of the Kosovo Constitution; Article 27 of the 1992 FRY Constitution; Articles 181 and 210 of the SFRY 1974 Constitution that, according to the Supreme Court of Kosovo (UNMIK) applied at the

19. To the extent that the SPO is suggesting that the necessary incorporation of CIL occurred by the enactment of the Law itself,[35] it is evident that the Law adopted in 2015 cannot constitute a lawful basis for prosecuting offences that were allegedly committed in 1999. Article 33 of the Kosovo Constitution does not assist the Prosecution in this respect: Article 33(1) should be interpreted in accordance with Article 7 of the ECHR. It cannot be allowed to permit the retrospective criminalization of conduct as that would breach Article 7 of the ECHR. In any event, Article 33 did not apply at the time relevant for the events set out in the Indictment.

20. Contrary to the SPO's submission,[36] the fact that the enactment of the Law purports to give effect to Kosovo's international obligations does not attribute to the Law an irrebuttable presumption of lawfulness. The Law could still be in violation of the Constitution or other international obligations and, in fact, does violate Articles 6 and 7 of the ECHR for the reasons set out in the Motion and Reply.

21. The SPO's reliance on *Kononov* to argue that the Law and Article 33 of the Kosovo Constitution are consistent with Article 7 of the ECHR is inapposite: *Kononov* concerned events in 1944 when the applicant and his Red Partisan unit attacked and killed civilians and persons placed *hors de combat*. The ECtHR held that:

> "having regard to the subject matter of the case and the reliance on the laws and customs of war as applied before and during the Second World War, the Court considers it relevant to observe that the *travaux préparatoires* to the Convention indicate that the purpose of the second paragraph of Article 7 was to specify that

time. *See* Supreme Court of Kosovo (UNMIK), *Case against Veselin Bešović*, AP-KZ no. 80/2004, 7 September 2004 ("*Bešović* Judgement"), pp. 18, 19.

[35] Response, paras. 16, 17. *See also* Response, para. 19.

[36] Response, para. 16.

> Article 7 did not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish, *inter alia*, war crimes."[37]

The second paragraph of Article 7 concerns the validity of prosecutions after the Second World War in respect of the crimes committed *during* that war. It cannot be applied to events occurring in 1999. Contrary to the SPO's submissions, the ECtHR has repeatedly confirmed that "the drafters of the Convention did not intend to allow for any general exception to the rule of non-retroactivity."[38]

22. The SPO's reliance on *Simsić* is also inapposite. Simsić was convicted of the crime against humanity of persecution within the context of a widespread and systematic attack against the Bosniac civilian population through the underlying crimes of murders, incarceration, torture, enforced disappearances and rapes. The ECtHR found that the impugned acts were "flagrantly unlawful", "evidently" constituted a crime against humanity under international law at the time of their commission, and that "even the most cursory reflection by the applicant" would have made their unlawful nature apparent.[39] In these specific circumstances and given the particularities of the framework in Bosnia and Herzegovina, the ECtHR accepted the lawfulness of *Simsić*'s conviction even though the domestic law at the time the relevant offences were committed did not penalize them. This was because of the evident unlawfulness of his conduct that could not be doubted. However, the evident unlawfulness of persecution committed as part of a widespread and systematic attack against a civilian population through murders, incarceration, torture, enforced disappearances and rapes is fundamentally different from the controversial concepts of liability

[37] ECtHR, *Kononov v. Latvia*, 17 May 2010, para. 186.
[38] See, e.g. ECtHR, *Maktouf and Damjanovic v. Bosnia and Herzegovina*, 18 July 2013, para. 72.
[39] ECtHR, *Simsic v. Bosnia and Herzegovina*, paras. 23, 24.

under a JCE and the war crime of "arbitrary detention" in NIAC under CIL.[40] They both fail to satisfy the high threshold of "flagrant unlawfulness" required under the ECtHR.[41] Neither formed part of domestic or international law at the relevant time nor were they in any sense accessible and foreseeable to the Accused.

23. Due to the fundamental importance of this issue which has the potential to undermine the fairness of the proceedings in an irreversible manner, the Defence respectfully requests the Pre-Trial Judge to refer the matter for adjudication by the Specialist Chamber of the Constitutional Court under Article 49(4) of the Law. Specifically, the Defence considers that the compatibility with Article 7 of the ECHR and corresponding Constitutional guarantees of Articles 3(2) and 12 of the Law and the purported application by the SPO in this case of Article 33(1) of the Kosovo Constitution needs to be promptly reviewed, at the present stage of the proceedings and not following exhaustion of all available legal remedies.[42] This is to enable this trial to proceed on a proper basis.

24. In any event, in case of doubt as to the applicable law, it is clear that the provisions most favourable to the Accused must apply.[43]

25. The KSC has clearly held that at the time relevant to the Indictment Articles 181 and 210 of the 1974 SFRY Constitution did not allow the direct application of CIL.[44] The authorities relied upon by the Prosecution which

[40] *See* Motion, para. 60.
[41] *See also Streletz, Kessler and Krenz v. Germany*, 22 March 2001, para. 87 (finding that the GDR's border-policing policy "*flagrantly* infringes human rights").
[42] Article 33 of the Kosovo Constitution; Article 27 of the 1992 FRY Constitution; Articles 181 and 210 of the SFRY 1974 Constitution that, according to the Supreme Court of Kosovo (UNMIK) applied at the time. *See* Supreme Court of Kosovo (UNMIK), *Case against Veselin Bešović*, AP-KZ no. 80/2004, 7 September 2004, pp. 18, 19.
[43] ECtHR, GC, *Scoppola v. Italy (no. 2)*, 17 September 2009, para. 109.
[44] *Bešović* Judgement, p. 18.

were issued by lower courts cannot be interpreted to overrule a Supreme Court judgment.[45]

1. The Law cannot enable prosecutions on the basis of CIL retrospectively

26. The SPO argues that the Law retrospectively incorporates CIL "as at the relevant time" and therefore gives CIL direct effect before the KSC.[46] It relies heavily on the Pre-Trial Judge's dismissal of the preliminary motions challenging the KSC's jurisdiction in the *Thaçi at al.* case.

27. Taking the SPO's argument at its strongest (without by any means accepting it), Article 3(2)(d) of the Law and Article 19(2) of the Constitution would allow direct effect of "legally binding norms". Article 3(2)(d) of the Law provides that the KSC shall adjudicate and function in accordance with the listed sources of law; Article 19(2) attributes superiority of "legally binding norms" over the laws of the Republic of Kosovo. However, as the Defence has argued in the Motion neither the offence of "arbitrary detention" in NIAC nor liability under a JCE were "legally binding norms" or otherwise formed part of CIL at the time relevant to the Indictment. To the extent that Article 12 of the Law purports to allow the prosecution of offences prescribed in CIL which were not incorporated within the Kosovo legal system applicable at the time the offences were allegedly committed it is in breach of Article 7 of the ECHR. Strasbourg case law has accepted such prosecutions provided that certain guarantees as to the fairness of the proceedings and the principle of legality are present: crucially, in cases involving "flagrant" and "evident" unlawfulness.[47] These are not present in the circumstances of this case.

[45] Response, n. 66 and authorities referred to therein.
[46] Response, para. 19.
[47] *See above*, para. 22.

28. The authority of the Kosovar legislature to enact the Law does not make the Law compatible with the fundamental rights guaranteed by the principle of legality.[48] The suggestion that Article 7 of the ECHR allows, as a matter of principle, the validity of prosecutions based on CIL of offences that did not form part of a domestic legal system is misleading. The ECtHR has insisted on thorough assessment of the particular circumstances of each case. The suggestion that there is no violation of Article 7 of the ECHR as no issue of retroactivity arises when the legislator is transposing into domestic law crimes that were already binding according to international law ignores the wide spectrum of the protection offered by Article 7. The latter goes beyond a mere assessment of whether an offence existed in international law at the time of the alleged events; it has additional requirements of accessibility, foreseeability and, generally, the quality of the law in question which must be assessed in the particular context. The latter includes a subjective assessment of the understanding of the legal framework by a particular accused.

29. The suggestion that relevant judgments by the Supreme Court of Kosovo ("SCK") or the Kosovo Court of Appeals, including in cases involving alleged co-perpetrators of Mr Shala, are irrelevant in assessing the applicable legislative framework is, with respect, flawed.[49] It also illustrates how the KSC are encouraged to operate without reference to the Kosovo legal order.[50] The SPO fails to present accurately what these authorities stand for.[51] In *Besović* the SCK applied the principle of *lex mitior* as it was required to do. It held that, although the promulgation of the FRY 1992 Constitution rendered ICL a constituent part of the national legal

[48] Response, para. 21.
[49] Response, para. 22.
[50] See above para. 10.
[51] Response, para. 22 ("Cited cases like *Besović* provide that international treaties cannot be directly applied unless the provisions of international law correspond to domestic law.")

system, this did not affect the prosecution of war crimes in Kosovo as Article 142 CL FRY, which should be applied as more favourable to the accused, defined war crimes as violations of relevant ratified treaties.[52] Well-established ECtHR case law provides that:

> "Article 7 § 1 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law."[53]

It presupposes a comparison between the law applicable at the material time and the law in force at the time the proceedings are initiated and requires application of the law more favourable to the accused.

30. The uncertainty as to the applicable law at the relevant time and the existence or not of the crime of arbitrary detention and JCE liability is complex, it involves thorough examination of multiple Constitutional provisions and guarantees of fundamental rights, various criminal codes that applied in Kosovo at different timeframes, a complicated analysis of jurisprudence both of the domestic courts as well as of the ECtHR. It is evident that these questions will only be answered after protracted litigation before the KSC. It is also evident that the accessibility and foreseeability of the law as to the offence of arbitrary detention and JCE is far from clear, it is uncertain, it fails to meet the standard of "flagrant unlawfulness". The reference to Article 7(2) of the ECHR in Article 12 of the Law aggravates the legitimate confusion as to the applicable law. The fairness of these proceedings requires definitive clarification of these matters. The Defence requests the Pre-Trial Judge to exercise his discretion

[52] *Besović* judgment, p. 19.
[53] *Scoppola v. Italy* (no. 2), para. 109.

and refer the matter for adjudication by the Specialist Chamber of the Constitutional Court.

2. The Application of CIL as basis for criminal proceedings related to events in 1999 was neither accessible nor foreseeable

31. The SPO's cursory submission that the application of CIL in this context meets the ECHR requirements for accessibility and foreseeability must be rejected.[54]

32. The fact that various international instruments provide that war crimes, in general, constitute offences under CIL[55] does not mean that the Accused could have expected the application of the multiple assumptions made by the SPO that form the basis of these proceedings and specifically as to the offence of arbitrary detention in NIAC and the application of JCE liability. These proceedings are based on the assumptions that in 1999 CIL provided for the war crime of "arbitrary detention", that CIL was directly applicable in Kosovo at the time without incorporation into the national legal order, that, in May and June 1999, CIL provided for the mode of liability of JCE (despite the fact that the ICTY Appeals Chamber's relevant findings in *Tadic* were made a month later).

33. The general suggestion that the SFRY Code included war crimes[56] does not assist the SPO to demonstrate that the SFRY Code included the war crime of arbitrary detention in NIAC in 1999. The SPO's incomplete reading of *Bešović* is plainly inapposite.[57]

34. At paragraph 28 of its Response, the SPO maintains that the Accused cannot suggest that he was oblivious to the fact that committing *violent*

[54] Response, para. 24.
[55] Response, para. 25.
[56] Response, para. 26.
[57] *Contrast* Response, n. 93 with Motion, paras. 12, 16, 17, 49.

crimes during the war could lead to prosecution. The Defence agrees with the Prosecution that the subjective understanding of Mr Shala as to the legal implications of his conduct at the relevant time is relevant in this assessment. However, the SPO misconstrues the Motion: the Defence is challenging the KSC's jurisdiction over the *specific* war crime of arbitrary detention in NIAC and the *specific* mode of liability of JCE. It is evident that "a cursory assessment of his conduct" with respect to these specific matters, which have nothing to do with violent behaviour as such, in the absence of legal advice, in the light of the complex legislative framework in the former Yugoslavia and the context of the Kosovo war, would not "reveal" the alleged wrongfulness of Mr Shala's conduct. As to the law on JCE liability specifically, it is telling that the UK Supreme Court considered it "highly controversial and a continuing source of difficulty for trial judges."[58] A layman's cursory reflection of his conduct in these circumstances would not be of much assistance.

D. THE KSC DO NOT HAVE JURISDICTION OVER THE CRIME OF ARBITRARY DETENTION IN NIAC

1. The Prohibition Against Arbitrary Detention in NIAC is not included in Article 14(1)(c) of the Law and Common Article 3

35. A plain reading of this provision confirms the above. The SPO's position that Article 14(1)(c) of the Law sets out a non-exhaustive list of prohibited act is refuted by its explicit text, which differs from that of paragraphs (b) and (d) of Article 14(1). This cannot be interpreted as an inadvertent omission; it reflects the deliberate choice of the legislative drafter that, in the context of establishing offences, should be given the appropriate weight.

[58] *Jogee v. The Queen* [2016] UKSC 8; *Ruddock v. the Queen* [2016] UKPC 7 ("*Jogee*"), para. 81.

36. Article 14(a)(c) explicitly refers to Common Article 3 to the Geneva Conventions, which prohibits in clear and exhaustive terms the specific acts referred to in paragraphs (1)(a)-(1)(b). These are identical to the acts listed in Article 14(1)(c). The latter provision cannot reasonably be interpreted as non-exhaustive given the direct reference and identical content of the specific acts listed therein. The contrary would violate the principle of legality and legal certainty that is paramount to the fairness of criminal proceedings.

37. The Defence does not dispute that arbitrary detention is a violation of a fundamental right. It challenges the SPO's position that Article 14(1) of the Law establishes the offence of "arbitrary detention" in NIAC that applies to the time-frame relevant to the Indictment. The Prosecution's vague assertion that this is the case as the purpose of Common Article 3 is to uphold and protect the inherent human dignity of the individual[59] does not sufficiently demonstrate its submissions.

2. The Prohibition Against Arbitrary Detention in NIAC was Not Part of CIL

38. Neither the limited examples relied upon by the Prosecution nor its observation that arbitrary detention is not permitted demonstrate its position.[60]

3. Criminal Liability for Arbitrary Detention was Neither Accessible nor Foreseeable to the Accused

39. The requirements of accessibility and foreseeability concern the particular offence with which an accused is charged. Article 142 of the SFRY did not contain the specific offence with which Mr Shala has been charged.

[59] Response, paras. 31, 32.
[60] Response, paras. 34, 35, 36.

E. THE KSC DO NOT HAVE JURISDICTION OVER THE MODE OF LIABILITY OF JCE

40. Modes of liability are subject to the same constitutional prohibition of retroactivity; a finding to the contrary would allow criminalizing conduct that would not have been a crime.

1. JCE was Not Provided for in the Statutory Framework of the KSC

41. The Defence refers the Pre-Trial Judge to paragraphs 29 to 32 of its Motion. Assuming that the drafters were aware how the Statutes of other international criminal tribunals have been interpreted[61] (but not deterred by the controversies in the relevant judicial and extra-judicial opinions and academic discourse), does not justify construing a clear statutory provision in an impermissibly broad manner.

42. The SPO's generalised and, to some extent, questionable arguments of policy fail to show that JCE is included in Article 16(1)(a) of the Law.[62]

2. The Mode of Liability of JCE Did Not Form Part of CIL in 1999

43. The SPO's reliance on precedent from May 2016 does not assist its argument that JCE formed part of CIL in 1999.[63]

44. The SPO's cursory argument dismissing the relevance of the Rome Statute for assessing whether JCE formed part of CIL does not adequately respond to the Defence submissions on this matter.

45. Generally, the Defence agrees with the SPO's acceptance that an accused's assistance in or contribution to the execution of the common purpose is "the

[61] Response, para. 50.
[62] Response, paras. 51, 52.
[63] Response, para. 54.

foundational requirement of JCE".[64] This is precisely what is lacking and renders JCE III liability unfair for crimes falling outside the scope of the common purpose.

46. The Defence is not suggesting that academic writings or extra-judicial opinions should overturn settled jurisprudence. The Defence referred to such writings to demonstrate the controversial application of JCE liability, which has played a central part in the case law of international criminal tribunals and merits revisiting, particularly in the present context where the KSC is not bound – as the SPO acknowledges-[65] by such prior jurisprudence.

47. As to the impact of *Jogee* on assessing the foundation of JCE in CIL, the SPO suggestion that the MICT Appeals Chamber has considered "the issue in full" is misleading. What was considered was Karadžić's argument that there were cogent reasons for the Appeals Chamber to depart from the *mens rea* standard under JCE III because of the reversal of the analogous standard in the English law of complicity.[66] The Appeals Chamber found that Karadžić failed to demonstrate cogent reasons for departing from binding jurisprudence. Its reasoning is not binding on the KSC.

48. The Defence does not ignore the fact that *Jogee* concerned accessorial liability. However, as Lord Hughes and Lord Toulson observed the expression "joint enterprise" is not a legal term of art; in practice it is used in a variety of situations to include both principals and accessories.[67] The Defence invited the Judge to take into consideration the errors of logic and incompatibility with basic principles of fairness that led to the seminal turn

[64] Response, para. 61.
[65] Response, para. 60.
[66] *Karadžić* Appeal Judgement, para. 425.
[67] *Jogee*, para. 81.

as to the *mens rea* standard in English law.[68] Evidently the considerations of the UK Supreme Court and Judicial Committee of the Privy Council on this matter are relevant in assessing the status of the three forms of JCE in CIL given their persuasive influence for a number of common law jurisdictions, including the jurisdictions bound by the Privy Council.[69] This is not undermined by the fact that, to date, a few jurisdictions have declined to follow *Jogee*.[70] Lastly, the reasoning and concerns expressed in *Jogee* are even more pertinent when assessing liability as a principal perpetrator.

III. RELIEF REQUESTED

49. In light of the above, the Defence respectfully requests the Judge to:

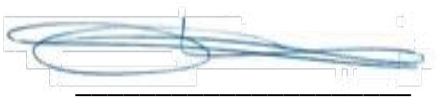
(i) grant the Motion;

(ii) exercise his discretion and refer the matters identified in this Reply to the SCCC as the Accused is entitled to a clear and definitive statement of the relevant law prior to the opening of the Prosecution's case;

(iii) allow the Defence to develop the submissions presented in the Motion and Reply in an oral hearing.

[68] Motion, para. 40.
[69] This is important as the ICTY Appeals Chamber observed that "international criminal rules on common purpose are substantially rooted in, and to a large extent reflect, the position taken by many States of the world in their national legal systems […] Customary rules on this matter are discernible on the basis of various elements: chiefly case law […]". *Tadić* Appeal Judgement, paras. 193, 194.
[70] The SPO misconstrues the Defence submissions when it states that the Defence "falsely" claims that the English law was the only support found by the ICTY Appeals Chamber in determining the *mens rea* standard for JCE III. Contrary to the SPO arguments, the Defence noted that "the only support that the ICTY Appeals Chamber had in *Tadić* for treating foreseeability as a legal requirement for the 'extended' crimes stems from domestic jurisprudence, including important common law authorities reversed in *Jogee*." Motion, para. 40; *Tadić* Appeals Judgement, para. 204.

Respectfully submitted,



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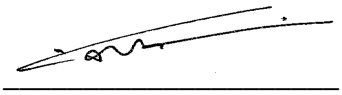

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Friday, 24th September 2021

The Hague, the Netherlands

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