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

In:	**KSC-BC-2020-06** **Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**
Before:	**Court of Appeals Panel** Judge Michèle Picard Judge Emilio Gatti Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Prosecutor
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Prosecution response to Veseli Defence appeal against the 'Decision on Motions challenging the jurisdiction of the Specialist Chambers'

with public annexes 1-3

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I. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') hereby responds to the Appeal challenging the jurisdiction of the Specialist Chambers.[1] The Appeal should be rejected as the Defence fails to show that the Decision[2] contains any error requiring reversal. The Decision correctly confirmed the applicability of CIL before the Kosovo Specialist Chambers ('KSC') and the jurisdiction of the KSC over joint criminal enterprise ('JCE'), in all forms,[3] arbitrary detention, and enforced disappearance.

2. The submissions made in the Appeal are deficient in both form and substance and fail to satisfy the standard of review.[4] While they could be dismissed on this basis alone, as set out below, they also fail on their merits.

II. PROCEDURAL BACKGROUND

3. On 26 October 2020, the Pre-Trial Judge ('PTJ') confirmed a ten-count indictment against the Accused, which charged him with crimes against humanity and war crimes.[5]

4. On 15 March 2021,[6] the Defence filed its Preliminary Motion on Jurisdiction,[7] which was followed by the SPO Responses on 23 April 2021,[8] the Defence Replies on

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[1] VESELI Defence Appeal against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/IA009/F00010, 27 August 2021 ('Appeal'). Annexes 1-3 to this response includes the authorities referenced herein (including hyperlinks and one excerpt) that were not among the authorities annexed to the Appeal.

[2] Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/F00412, 22 July 2021 ('Decision').

[3] In this response, the forms of JCE addressed are referred to as JCE I and JCE III, consistent with the definition in the Decision. *See* Decision, KSC-BC-2020-06/F00412, fn.365.

[4] Such deficiencies are identified throughout this response where relevant.

[5] Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026, 26 October 2020, Strictly Confidential and *Ex Parte* ('Confirmation Decision'). The public version was notified on 30 November 2020 (KSC-BC-2020-06/F00026/RED).

[6] The history most relevant to the Appeal is set out here. The Decision sets out in detail the full procedural history, including all parties' submissions. *See* Decision, KSC-BC-2020-06/F00412, Section I.

[7] Preliminary motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC, KSC-BC-2020-06/F00223, 15 March 2021 ('Preliminary Motion').

[8] Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE), KSC-BC-2020-06/F00263, 23 April 2021 ('JCE Response'); Prosecution Response to Preliminary

17 May 2021,[9] the Prosecution Sur-reply on 1 June 2021,[10] and the Further Defence Submissions on 4 June 2021.[11]

5. On 22 July 2021, the PTJ rendered the Decision, rejecting the Preliminary Motion.

6. On 28 July 2021, the Court of Appeals Panel ('Panel') granted the parties' requests for an extension of the time limit to file their respective appeals against the Decision and responses to any such appeals.[12]

7. On 27 August 2021, the Defence filed the Appeal.

III. STANDARD OF REVIEW

8. The Court of Appeals applies *mutatis mutandis* the standard of review provided for appeals against judgements under Article 46(1) of the Law to interlocutory appeals.[13] Appeals may be filed alleging an error on a question of law invalidating the judgement, an error fact, or an abuse of discretion.

9. Alleging an error of law requires identifying the alleged error, presenting arguments in support of the claim, and explaining how the error invalidates the decision.[14] An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.[15]

Motion concerning Applicability of Customary International Law, KSC-BC-2020-06/F00262, 23 April 2021 ('CIL Response'; with the JCE Response, 'SPO Responses').

[9] Veseli Defence Reply to the Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE), KSC-BC-2020-06/F00310, 17 May 2021 ('Veseli JCE Reply'); Veseli Defence Reply to Prosecution Response to Preliminary Motion of Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC (Customary International Law), KSC-BC-2020-06/F00311, 17 May 2021 ('Veseli CIL Reply'; together with the Veseli JCE Reply, 'Defence Replies').

[10] Prosecution Sur-Reply, KSC-BC-2020-06/F00333, 1 June 2021 ('Prosecution Sur-reply').

[11] Veseli Defence Response to Prosecution Sur-Reply, KSC-BC-2020-06/F00342, 28 May 2021 ('Further Defence Submissions').

[12] Decision on Requests for Variation of Time Limits, KSC-BC-2020-06/IA009/F00005, 28 July 2021. The Panel also granted the parties' requests for variations of the word limits for any appeals of the Decision and related responses. *See also* Decision on Requests for Variation of Word Limits, KSC-BC-2020-06/IA009/F00009, 19 August 2021; Decision on Request for Variation of Word Limits, KSC-BC-2020-06/IA009/F00017, 24 September 2021.

[13] Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, ('*Gucati* Appeals Decision'), para.10.

[14] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.12.

[15] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.12.

10. An error of fact can only be found if no reasonable trier of fact could have made the impugned finding.[16] In determining whether a finding was reasonable, the Panel will not lightly overturn findings of fact made by a lower level panel.[17]

11. Finding an abuse of discretion requires that the Decision was so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.[18]

IV. SUBMISSIONS

A. APPLICABILITY OF CIL (GROUNDS 1-8)

12. The Law constitutes domestic legislation granting the KSC jurisdiction over CIL crimes, as at the relevant timeframe. Consequently, the Law gives CIL direct application before the KSC.

13. Importantly, pursuant to the applicable framework, including Articles 19(2), 22, and 33(1) of the Constitution and Articles 3 and 12 of the Law, the KSC applies CIL as at the time the crimes were committed. As such, there is no retroactive application of the law because it is the law at the time the crimes were committed which applies.

14. *Lex mitior* is also not implicated as the KSC is bound to apply CIL and the CIL crimes provided for in the Law were incorporated into Kosovo's domestic framework for the first time by virtue of the Law – they could not previously have been charged as such under the SFRY Code.[19] There are therefore no sets of binding changed law for *lex mitior* comparison purposes; rather, the KSC framework presents a new and self-contained regime.

15. This framework – as recognised by the PTJ – is clear, coherent, and logical. It is in full conformity with the Constitution, Article 7 of the European Convention on Human Rights ('ECHR'), and Article 15 of the International Covenant on Civil and Political Rights ('ICCPR'). Many national jurisdictions incorporate CIL offences into

[16] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.13.
[17] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.13.
[18] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.14.
[19] Criminal Code of the Socialist Federal Republic of Yugoslavia, 1976 ('SFRY Code').

the domestic order through a rule of reference like the Law and it is settled by the ECtHR Grand Chamber that prosecutions pursuant to such laws are permissible for conduct criminalised under CIL prior to their promulgation.[20] The Law plainly reflects the intent of the legislator to prosecute serious CIL crimes committed in Kosovo between 1998-2000.[21]

16. The Defence arguments against this framework depend on disregarding straightforward statutory language, citing authorities out of context, and misrepresenting the standard of review.

17. On this last point, all arguments that the PTJ failed to consider legal submissions raised by the Defence should be summarily dismissed.[22] Errors of law are subject to a full *de novo* review – the Panel's inquiry for an error of law is solely whether or not the correct legal standard was articulated.[23] There is no requirement for a lower panel to reason purely legal considerations in the same way as factual findings or discretionary decisions, where the Panel must know which evidence/factors were relied upon in order to evaluate the lower panel's determination. If the law was stated correctly, it must be confirmed.

1. Article 12 is fully compatible with the non-retroactivity principle

18. This section covers Ground 1 and the first half of Ground 2 of the Appeal.

19. The PTJ correctly identified Article 12 as the central reference point for the applicable law at the KSC.[24] The provision leaves no ambiguity of the centrality of CIL at the KSC.

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[20] Examples include Latvia (European Court of Human Rights ('ECtHR'), Grand Chamber, *Kononov v. Latvia*, 36376/04, Judgment, 17 May 2010) and Hungary (ECtHR, Grand Chamber, *Korbely v. Hungary*, 9174/02, Judgment, 19 September 2008, though finding a violation in how this law was applied in the specific case).

[21] *See* ECtHR, *Ould Dah v. France*, 13113/03, Admissibility Decision, 17 March 2009, p.17 (in the context of torture: 'the absolute necessity of prohibiting torture and prosecuting anyone who violates that universal rule, and the exercise by a signatory State of the universal jurisdiction provided for in the United Nations Convention against Torture, would be deprived of their very essence if States could exercise only their jurisdictional competence and not apply their legislation').

[22] Appeal, KSC-BC-2020-06/IA009/F00010, paras 16, 21, 40, 61.

[23] Article 46(4); *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, paras 4-13.

[24] Decision, KSC-BC-2020-06/F00412, para.91.

20. The Indictment charges the Accused solely with crimes against humanity and war crimes pursuant to Articles 13-14 and 16. No crimes are charged pursuant to Article 15, which concerns the substantive criminal laws in force under Kosovo law at the relevant time. As the charges are based solely on international law, consistent with Article 12, CIL at the time of the commission of the crimes applies.

21. The KSC must function in accordance with the Constitution[25] and the KSC's application of CIL is in conformity with relevant non-retroactivity protections in the Constitution.[26] Article 33(1) of the Constitution makes an explicit exception for 'acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law.' As all crimes charged are CIL war crimes and crimes against humanity, the exception under this constitutional provision applies. This reading of Article 33(1) of the Constitution is also consistent with Article 19(2) of the Constitution, which provides that 'legally binding norms of international law have superiority over the laws of the Republic of Kosovo.'

22. That the Kosovo legislator understood the crimes and modes of liability in Articles 13-14 and 16 as 'legally binding norms of international law' is clear. This phrase in Article 19(2) of the Constitution creates no uncertainty in the application of CIL, noting that it is the plain language in Article 12 that confers the primacy of CIL before the KSC. The cross-reference to Article 19(2) of the Constitution in Article 3(2)(d) of the Law, as read with Article 12, leaves no ambiguity. Moreover, noting that the rights and freedoms in the Constitution, including Article 33, are to be interpreted consistent with the jurisprudence of the ECtHR,[27] it is settled by the ECtHR Grand Chamber that this approach is compliant with that framework, and that prosecutions pursuant to statutes such as the Law are permissible for conduct criminalised under CIL prior to their promulgation.[28]

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[25] Article 3(2)(a).
[26] *Contra* Appeal, KSC-BC-2020-06/IA009/F00010, paras 17-23.
[27] Constitution, Article 53.
[28] Examples include Latvia (European Court of Human Rights ('ECtHR'), Grand Chamber, *Kononov v. Latvia*, 36376/04, Judgment, 17 May 2010) and Hungary (ECtHR, Grand Chamber, *Korbely v. Hungary*,

23. Unlike the Constitution, Article 181 of the SFRY Constitution[29] provided that no one could be punished for any act which before its commission was not defined by statute, without providing an express exception for CIL crimes.[30] However, the SFRY Constitution is not listed in Article 3 and the KSC does not function in accordance with the principle of legality – or other rights and principles – set out in that instrument.[31] As such, legal proceedings conducted under UNMIK Regulation 1999/24 – which applied the principle of legality in the SFRY Constitution – have no bearing on the present inquiry.[32]

24. The drafters of the Law clearly understood the principle of legality in the Constitution to supersede that of the SFRY Constitution. The Kosovo Constitutional Court necessarily reached the same conclusion, finding the constitutional amendment to establish the KSC constitutional so long as the scope of the KSC's jurisdiction complies with the rights provided by Chapters II and III of the Constitution (of which Article 33 of the Constitution is part).[33] Moreover, these determinations are consistent with Article 7 of the ECHR, which only extends to substantive law such as crimes, modes of liability, and penalties.[34] Article 33, which the Defence seeks to disregard in

9174/02, Judgment, 19 September 2008, though finding a violation in how this law was applied in the specific case).

[29] Socialist Federal Republic of Yugoslavia Constitution, 1974 ('SFRY Constitution').

[30] SFRY Constitution, Article 181 (in relevant part: '[n]o one shall be punished for any act which before its commission was not defined as a punishable offence by statute or a legal provision based on statute, or for which no penalty vas threatened. Criminal offences and criminal-law sanctions may only be established by statute. Sanctions for criminal offences shall be imposed by the competent court in proceedings regulated by statute').

[31] Decision, KSC-BC-2020-06/F00412, para.99. *Contra* Appeal, KSC-BC-2020-06/IA009/F00010, para.20(a).

[32] *See* Annex 3: Kosovo, Supreme Court, *L. Gashi et al.*, AP-KZ No. 139/2004, Decision, 21 July 2005, pp.5-8, *in reference to* Article 1.1 of UNMIK Regulation no.1999/24 on the Law Applicable in Kosovo, UNMIK/REG/1999/24, 12 December 1999 (as amended by regulation 2000/59) ('UNMIK Regulation 1999/24').

[33] Constitutional Court of the Republic of Kosovo, Case No.K026/15, Judgement - 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, 15 April 2015, paras 45, 57, 59-60.

[34] ECtHR, Grand Chamber, *Scoppola v. Italy (no. 2)*, 10249/03, Judgment, 17 September 2009, para.110.

reliance upon Article 7 of the ECHR, of the Constitution does not define substantive offences or the penalties for them.[35]

25. The Defence refers to a 'duality test', claiming that it is only constitutional to make findings for international crimes when they have domestic analogues.[36] All cases cited for this proposition concern the application of Article 142 of the SFRY Code. This is a domestic provision which requires: (i) the commission of one of the enumerated acts specified in the provision; and (ii) that these acts were in violation of rules of international law effective at the time of war. This indeed reflects a duality test, because Article 142 of the SFRY Code requires both a domestic law violation and an overlapping international law violation. However, Article 12 is not constructed in the same way, and no authority is presented for the proposition that the duality test is a general pre-requisite to the application of international law in Kosovo. Moreover, the Law incorporates CIL crimes into domestic law in a manner which renders the necessity for any such assessment redundant.

26. Finally, the PTJ correctly found Article 12 to be in conformity with human rights law. Article 12 makes explicit reference to both Article 7(2) of the ECHR and Article 15(2) of the ICCPR. The PTJ did not err in reading all of Article 7 of the ECHR into the provision,[37] noting that the KSC is required to function in accordance with international human rights law[38] and Article 7(2) must be read concordantly with Article 7(1) of the ECHR.[39]

27. No error is identified in the PTJ's conclusion that CIL applies at the KSC without offending the principle of non-retroactivity as stated in the Constitution or international human rights law.

[35] Constitution, Article 33 (expressly addressing 'penal offences' and punishments).
[36] *See* Appeal, KSC-BC-2020-06/IA009/F00010, para.20(b).
[37] *Contra* Appeal, KSC-BC-2020-06/IA009/F00010, paras 24-28.
[38] Article 3(2)(e). *See also* Constitution, Article 22.
[39] ECtHR, Grand Chamber, *Maktouf and Damjanović v. Bosnia and Herzegovina*, 2312/08 and 34179/08, Judgment, 18 July 2013, para.72.

2. The Law confers jurisdiction to prosecute CIL crimes during the charged timeframe

28. This section covers the second half of Ground 2 of the Appeal, as well as Grounds 3-4.

29. The domestic law necessary to apply CIL at the KSC is the Law itself.[40] The fact there was no human rights law obligation to pass this law is irrelevant.[41] Defence arguments and authorities that domestic legislation is required in order to give direct effect to CIL are likewise immaterial – there is such a law in this instance and, noting the previous sub-section, it need not have been promulgated at the time of the charged crimes.[42]

30. It bears emphasis that the Accused was bound by the CIL prohibitions charged in this case at the time the crimes were committed. They were crimes under international law. There is no retroactive application of the law in this respect; all that has changed is that these crimes were transposed into the domestic legal order by virtue of the Law.[43] Defence arguments that it is not possible to unlock a jurisdictional avenue to try such crimes are meritless.[44] Not only does Article 33(1) of the Constitution expressly envision this possibility, the International Military Tribunal, ICTY, ICTR, ECCC, and SCSL are all obvious examples of courts created to prosecute CIL offences committed in the past. All did so without offending the non-retroactivity principle because the offences within their jurisdiction fell under CIL at the time of their commission.[45]

31. In particular, ECCC chambers have previously addressed and categorically rejected submissions similar to those raised on appeal, considering, amongst other

[40] Decision, KSC-BC-2020-06/F00412, para.98.
[41] *Contra* Appeal, KSC-BC-2020-06/IA009/F00010, paras 14, 29-34.
[42] *Contra* Appeal, KSC-BC-2020-06/IA009/F00010, paras 14, 35-37, 41.
[43] Decision, KSC-BC-2020-06/F00412, para.101.
[44] Appeal, KSC-BC-2020-06/IA009/F00010, paras 33-34.
[45] *See, generally,* ECtHR, Grand Chamber, *Kononov v. Latvia*, 36376/04, Judgment, 17 May 2010, Joint Concurring Opinion of Judges Rozakis, Tulkens, Spielmann, and Jebens, para.6 ('no one can speak of retrospective application of substantive law, when a person is convicted, even belatedly, on the basis of rules existing at the time of the commission of the act').

factors, that: (i) where national law did not incorporate an international crime at the relevant time, a court may rely on international law without violating the principle of legality;[46] and (ii) whether international law is directly applicable in domestic law generally is irrelevant where the legislator, in the specific law establishing the court, granted jurisdiction over crimes defined in international law and determined that such definition was directly applicable.[47] These considerations apply equally to the way the principle of legality is defined in the Constitution.[48]

32. 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.[49] In *Kolasinac*, the Kosovo Supreme Court acknowledged that Kosovo could prosecute a CIL mode of liability, namely command responsibility, for crimes pre-dating its codification:

> The Supreme Court notes that the PCCP Article 129 has now provided a Kosovo statutory basis for criminal liability based on omissions and command or superior liability, which can be applied to future crimes. The legislator however chose not to introduce this provision with a retroactive effect, *although such retroactivity was not forbidden under art. 7 ECHR*.[50]

33. This possibility advanced in *Kolasinac* is exactly what the Law does when permitting the prosecution of CIL offences from 1998-2000. The drafters specified which CIL crimes could be prosecuted in the Law and in doing so, they crafted a domestic law allowing for the direct application of CIL.

34. The Defence relies on *Kolasinac* for the exact opposite proposition, failing to appreciate that its considerations concerning Article 142 of the SFRY Code are clearly

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[46] ECCC, *Case against Nuon and Khieu*, 002/19-09-2007/ECCC/TC, Case 002/01 Judgement, 7 August 2014, para.18; ECCC, *Case against Nuon et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, para.213. *See also* ECCC, *Case against Kaing*, 001/18-07-2007/ECCC/SC, Appeal Judgement, 3 February 2012, para.99 and fn.188.

[47] ECCC, *Case against Nuon and Khieu*, 002/19-09-2007/ECCC/TC, Case 002/01 Judgement, 7 August 2014, para.18; ECCC, *Case against Nuon et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, paras 208, 212-213 ('the characterization of the Cambodian legal system as monist or dualist has no bearing on the validity of the law applicable before the ECCC').

[48] Appeal, KSC-BC-2020-06/IA009/F00010, para.32.

[49] Appeal, KSC-BC-2020-06/IA009/F00010, paras 56-57.

[50] *Kolasinac*, AP–KZ 230/2003, Decision, p.33, fn.72 (emphasis added).

distinguishable. *Kolasinac*, no differently from the also cited *Besović* case, provides that international treaties cannot be directly applied unless the provisions of international law correspond to domestic law in the context of crimes under Article 142 of the SFRY Code.[51] The Serbian Constitutional Court case heavily relied upon is a re-articulation of the same principles,[52] also considering the application of command responsibility to charges falling under Article 142 of the SFRY Code. The Serbian Constitutional Court found that it was not possible to directly apply command responsibility in Serbia because the domestic code provision allowing for the application of command responsibility post-dated the offence and was not specified as applying with retroactive effect.[53]

35. Both the Kosovo Supreme Court and Serbian Constitutional Court found that command responsibility in newer domestic code provisions could not be applied unless its provisions met the elements of the applicable domestic law at the time (namely that of the SFRY Code).[54] But Article 142 of the SFRY Code is not applying then-existing CIL as such. There is also no indication the legislator intended the provision to apply retroactively. The Law, in contrast, clearly allows for prosecution of crimes from 1998-2000 through incorporating CIL from that time,[55] distinguishing these cases for the reason identified in *Kolasinac* itself.

36. The PTJ was entirely correct to emphasise that the application of legal principles in other national jurisdictions is not binding on the KSC.[56] Serbian courts cannot bind how Kosovo courts apply their law and it is incorrect for the Accused to claim otherwise.[57] But the above also demonstrates that, even if the Defence's authority is

[51] Kosovo, Supreme Court, *Prosecutor v. Kolasinac*, AP–KZ 230/2003, Decision, 5 August 2004, pp.21-22, 33. *See also* Kosovo, Supreme Court, *Prosecutor v. Besović*, AP-KZ No.80/2004, Verdict, 7 September 2004, pp.18-19.
[52] Appeal, KSC-BC-2020-06/IA009/F00010, paras 8, 38-40, *relying on* Decision of the Serbian Constitutional Court, No.Už-11470/2017, 2020 (KSC-BC-2020-06/IA009/F00010/A02).
[53] *See* KSC-BC-2020-06/F00310/A02, pp.13-14.
[54] *Kolasinac*, AP–KZ 230/2003, Decision, pp.33-35.
[55] Articles 7 and 12.
[56] Decision, KSC-BC-2020-06/F00412, para.100 (claiming that if it is not binding, it is at least highly authoritative).
[57] Appeal, KSC-BC-2020-06/IA009/F00010, para.40.

analysed on its own terms, there is no disparate treatment in the way the law is interpreted in Serbia versus Kosovo.[58] Both the Serbian and Kosovo caselaw on this point are equally distinguishable because of the jurisdictional grant Kosovo provided when creating the KSC. Ethnicity is not motivating the inquiry – there is nothing to suggest either Kosovo or Serbia is using ethnicity to apply the same law differently. The laws themselves are simply different and no issue of equality before the law can be said to arise.

37. The PTJ articulated the correct legal standard in relation to these points, and no error is identified.

3. *Lex mitior* is not implicated

38. This section covers Grounds 5-8 of the Appeal.

39. Preliminarily, the Defence challenges the *lex mitior* findings of the PTJ as a jurisdictional challenge[59] even though the PTJ expressly declared this not to be a jurisdictional issue.[60] The Defence identifies no basis for not having sought leave to appeal and this ground could be dismissed on this basis alone. Even if the Defence had standing, this error has no material effect on the Decision because the PTJ nevertheless pronounced himself on *lex mitior*.[61] To the extent the Defence argues in Ground 5 that the PTJ failed to provide legal reasoning as an error of law, these arguments should likewise be summarily dismissed.[62]

40. The *lex mitior* principle relied upon at length by the Defence is inapposite in the present circumstances.[63] *Lex mitior* provides that, in the event of a change in the law, the more lenient law shall be applied to the Accused.[64] However, first, both sets of laws must be binding upon the court in order for *lex mitior* to be relevant.[65] By the plain

[58] *Contra* Appeal, KSC-BC-2020-06/IA009/F00010, paras 9-10, 42-55.
[59] Appeal, KSC-BC-2020-06/IA009/F00010, paras 67-71.
[60] Decision, KSC-BC-2020-06/F00412, para.106.
[61] Decision, KSC-BC-2020-06/F00412, paras 105-06.
[62] *See* para.17 above.
[63] *Contra* Appeal, KSC-BC-2020-06/IA009/F00010, paras 58-62.
[64] ECtHR, Grand Chamber, *Scoppola v. Italy (no. 2)*, 10249/03, Judgment, 17 September 2009, para.109.
[65] ICTY, *Prosecutor v. Nikolić*, IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005, para.81.

terms of Article 12, only CIL is binding upon the KSC for the crimes charged. This basis alone rendered the *lex mitior* principle inapplicable.

41. Further, in the present instance, because the international law applied by the KSC is CIL during the charged timeframe,[66] the Law does not 'change' the substantive law applicable to these crimes.[67] There is no equivalent provision in the SFRY Code to the CIL offences in the Law, such as to allow for a *lex mitior* comparison.[68] In this regard, Defence assertions that domestic modes of liability can be applied to Articles 13-14 and are within the scope of Article 16(1)[69] are contrary to the clear and plain language of Article 16, including when considered in light of Articles 3 and 12.[70] Article 16 specifically delineates the modes of liability applicable to crimes under Articles 13-15. Article 16(1) refers to Articles 13-14 and, consistent therewith, identifies modes of liability recognised under CIL. Article 16(1) makes no reference to Kosovo law, which, pursuant to Article 3(2)(c) and 4 of the Law, does not apply unless expressly incorporated. Pursuant to Article 16(2)-(3), domestic modes of liability only apply to crimes under Article 15.

42. In analysing cases from Bosnia and Herzegovina implicating Article 142 of the SFRY Code, the ECtHR distinguished between imposing penalties for crimes falling under CIL which were subsequently criminalised under domestic law (where *lex mitior* was found not to apply) and imposing penalties for crimes falling equally under Article 142 of the SFRY Code and a later domestic law (where *lex mitior* was found to apply).[71] The present case falls under the first situation. Article 142 of the SFRY Code

[66] Article 12.
[67] *See* ECtHR, Grand Chamber, *Scoppola v. Italy (no. 2)*, 10249/03, Judgment, 17 September 2009, para.110.
[68] *Contra* Appeal, KSC-BC-2020-06/IA009/F00010, paras 63-66, 72-82.
[69] Appeal, KSC-BC-2020-06/IA009/F00010, paras 74-77.
[70] *See also* paras 19-22 above.
[71] *Compare* ECtHR, *Šimšić v. Bosnia and Herzegovina*, 51552/10, Decision, 10 April 2012, paras 23, 25 (finding no Article 7 violation), *with* ECtHR, Grand Chamber, *Maktouf and Damjanović v. Bosnia and Herzegovina*, 2312/08 and 34179/08, Judgment, 18 July 2013, paras 55, 67-76 (finding an Article 7 violation, and explicitly distinguishing the finding in *Šimšić*).

codified certain war crimes in Kosovo's domestic law, but did not incorporate CIL as is done in Articles 12-14 and 16.[72]

43. Similar considerations apply in relation to the applicable penalties in Article 44 of the Law and Article 142 of the SFRY Code,[73] read with Article 33(2) and (4) of the Constitution. As the Law exclusively concerns war crimes and crimes against humanity as defined under CIL, no conflicting sentencing regime in Kosovo can be globally understood to apply.[74]

44. The PTJ correctly found that *lex mitior* is not implicated by the jurisdictional challenges ruled upon, and no error in that finding is identified.

B. THE DECISION REFLECTS DUE CONSIDERATION OF THE ISSUES RELATED TO THE CIL STATUS OF JCE, INCLUDING JCE III (GROUND 9)

45. Ground 9 is deficient in both form and substance, and fails to satisfy the standard of review in so far as it: (i) misrepresents the Decision;[75] (ii) fails to provide any substantiation for generalised claims;[76] (iii) makes irrelevant and entirely speculative

[72] *See, generally,* Annex 2: Ferdinandusse, Direct Application of International Criminal Law in National Courts (TMC Asser, 2006), p.7 (describing the distinction between 'incorporation' and 'transformation' of international law in national courts).
[73] *Contra* Appeal, KSC-BC-2020-06/IA009/F00010, para.66, fn.48.
[74] In this regard, *see* Kosovo, Supreme Court, *Prosecutor v. J.D. et al*., PA II 11/2016, Judgement, 3 July 2017, para.55; ECtHR, Grand Chamber, *Maktouf and Damjanović v. Bosnia and Herzegovina*, 2312/08 and 34179/08, Judgment, 18 July 2013, Concurring Opinion of Judges Albuquerque and Vučinić, para.8 (with emphasis added: '[t]he finding of *lex mitior* under Article 7 § 1 of the ECHR also implies a global comparison of the punitive regime under each of the penal laws applicable to the offender's case (the global method of comparison). *The judge cannot undertake a rule-by-rule comparison (differentiated method of comparison), picking the most favourable rule of each of the compared penal laws*. Two reasons are traditionally given for this global method of comparison: firstly, each punitive regime has its own rationale, and the judge cannot upset that rationale by mixing different rules from different successive penal laws; secondly, the judge cannot exceed the legislature's function and create a new *ad hoc* punitive regime composed of a miscellany of rules deriving from different successive penal laws. Hence, Article 7 § 1 of the ECHR presupposes a concrete and global finding of *lex mitior*').
[75] Appeal, KSC-BC-2020-06/IA009/F00010, paras 83-87.
[76] Appeal, KSC-BC-2020-06/IA009/F00010, para.85.

assertions;[77] (iv) misapplies the Law,[78] and (v) misapprehends the relevant standard.[79] It should be rejected accordingly.[80]

46. As a preliminary matter, it is noted that the Defence has not appealed the correctness of the PTJ's decision on the CIL status of JCE III, instead merely arguing that the PTJ failed to adequately reason his finding or consider Defence submissions. These claims are inaccurate. Having explicitly considered the sufficiency of the basis upon which they rest,[81] the Decision correctly considers, and endorses, clear and consistent jurisprudence finding that JCE III forms – and, at the time of the charges, formed – part of CIL.[82] Pursuant to Article 3(3), and as acknowledged by the Defence,[83] such jurisprudence is an appropriate source of international law.

47. In conducting a *de novo* assessment, there was no requirement for the PTJ to replicate in the Decision prior reasoning with which he agrees. The authorities, their basis, and the PTJ's consideration of them is clearly set out. Equally clear is the PTJ's consideration of Defence submissions,[84] the majority of which, as noted in the Decision, merely repeat challenges which had been considered and adjudicated in prior jurisprudence.[85]

48. For example, the PTJ explored the laws forming the statutory foundation of the post-World War II ('WWII') prosecutions for war crimes and crimes against humanity and concluded in respect of the IMT Charter and CCL10 that they 'clearly provide for

[77] Appeal, KSC-BC-2020-06/IA009/F00010, para.86.
[78] Appeal, KSC-BC-2020-06/IA009/F00010, para.87.
[79] Appeal, KSC-BC-2020-06/IA009/F00010, para.85.
[80] *See* Section III and para.17 above. *See also Specialist Prosecutor v. Haradinaj and Gucati*, KSC-BC-2020-07/IA004/F00007, Decision on Defence Appeals Against Decision on Preliminary Motions, 23 June 2021, paras 14-17 (identifying the formal requirements for appeal and deficiencies warranting summary dismissal).
[81] Decision, KSC-BC-2020-06/F00412, para.186.
[82] Decision, KSC-BC-2020-06/F00412, paras 181-190.
[83] Appeal, KSC-BC-2020-06/IA009/F00010, para.84.
[84] Decision, KSC-BC-2020-06/F00412, paras 183-189.
[85] Decision, KSC-BC-2020-06/F00412, para.184 (in respect of JCE I). *See also* JCE Response, KSC-BC-2020-06/F00263, paras 106-107.

criminal liability for participation in a common plan or enterprise.'[86] By their terms, these instruments encompass 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).[87] The Decision thus rejected Defence arguments to the contrary and further clarified that Defence submissions on the *post facto* status of these laws were without merit, noting some of the many sources which make plain that these statutes reflect pre-existing law.[88]

49. Turning to relevant post-WWII caselaw, in endorsing the analysis and findings of other courts, the Decision expressly finds that the jurisprudence underlying them provides a 'clear and sufficient' basis for the existence of JCE III as part of CIL.[89] The analysis in the Decision included an explicit consideration of the elements of state practice and *opinio juris*.[90] The Decision also expressly addresses Defence submissions.[91] Faced with clear, settled, and elaborated sources of law and prior

[86] Decision, KSC-BC-2020-06/F00412, para.183, including fn.385. *Contra* Appeal, KSC-BC-2020-06/IA009/F00010, para.61. Article 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'. *See* 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 ('IMT Charter'), Article 6 (emphasis added). Article 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*'. *See* Control Council Law Nr. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945 ('CCL10'), Article II(2) (emphasis added). It is a requirement for all categories of JCE that there be participation in a common plan or enterprise. *See* ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999 ('*Tadić* Appeal Judgment'), para.227.

[87] *See* IMT Charter, Art.6; CCL10, Art.II(2). Further, as noted by the PTJ, seminal documents related to the adoption of these laws show that liability was expected to attach for members of a common plan or design for each offense committed and that the crimes committed, which were the subject of prosecution pursuant to the IMT Charter and CCL10, included those which were the 'natural and probable consequence' of the criminal enterprise. *See* Decision, KSC-BC-2020-06/F00412, para.183 and cites at fn.384.

[88] Decision, KSC-BC-2020-06/F00412, para.183.

[89] Decision, KSC-BC-2020-06/F00412, para.186.

[90] Decision, KSC-BC-2020-06/F00412, para.186.

[91] Decision, KSC-BC-2020-06/F00412, para.186. In addition to the examples listed showing the PTJ addressed Defence challenges to the support for JCE III, paras 187-189, 202-208 address Defence submissions against JCE, including JCE III. The PTJ discussed the Defence arguments against finding that JCE was foreseeable and accessible to the Accused at paras 191, 193-200.

analysis and jurisprudence on the matter, there was no error in the PTJ assessing whether or not Defence challenges raised previously unconsidered arguments or were otherwise meritorious to a degree that would warrant departure.[92] As outlined above, it is apparent that the Decision's endorsement of the authorities in question reflected independent consideration of their sufficiency. As such, the Defence's speculative and hypothetical submissions regarding numerical comparisons are irrelevant.

50. The Defence generically states that it raised a number of points that were not adequately considered, without identifying these points or explaining how an alleged failure to consider them resulted in an error capable of invalidating the Decision.[93] The party challenging a decision on appeal is required to identify the alleged errors or matters that were not considered by the judge in the impugned decision.[94] Having failed to do so, the Defence submissions should be summarily dismissed.

51. The Defence arguments about the Rome Statute are also without merit. First, the Decision expressly engages with the Rome Statute's impact – if any – on the CIL status and applicability of JCE.[95] The Decision correctly notes, in particular, that as a treaty-based system, rather than a codification of CIL, the Rome Statute cannot be determinative of such status. Second, contrary to Defence submissions,[96] the Decision does not treat JCE as 'frozen in time' in 1998; the Decision makes express findings regarding its CIL status both at the present time and at the time of the charges,[97] including specifically engaging with the Defence's submissions regarding *lex mitior*.[98] In failing to acknowledge this – and in fact basing its appeal on a claim that the Decision had failed to address the argument – the Defence blatantly misrepresents the

[92] *Contra* Appeal, KSC-BC-2020-06/IA009/F00010, para.84.
[93] Appeal, KSC-BC-2020-06/IA009/F00010, para.85.
[94] *See, for example,* Decision on Appeal Against "First Decision on Victims' Participation", KSC-BC-2020-06/IA005/F00008, 16 July 2021, para.19; ICTY, *Prosecutor v. Kvočka et al.*, Judgement, IT-98-30/1-A, 28 February 2005, para.25. *See also* KSC, Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Provisional Release, KSC-BC-2020-04/IA001/F00005/RED, 20 August 2021, para.29.
[95] Decision, KSC-BC-2020-06/F00412, para.187.
[96] Appeal, KSC-BC-2020-06/IA009/F00010, para.87.
[97] Decision, KSC-BC-2020-06/F00412, para.190.
[98] Decision, KSC-BC-2020-06/F00412, para.205.

Decision, and the submissions should again be summarily dismissed. In any event, for the reasons previously addressed,[99] and as identified in the Decision,[100] no *lex mitior* comparison exercise arises. Defence attempts to present the development of 'co-perpetration' before the ICC as a 'change' to subsisting JCE liability are unavailing.

C. THE KSC HAVE JURISDICTION OVER ARBITRARY DETENTION (GROUNDS 10-13)

52. Grounds 10-13, relating to arbitrary detention, are deficient in both form and substance and fail to satisfy the standard of review insofar as they: (i) repeat submissions unsuccessful before the PTJ, arguing solely on appeal that the PTJ failed to consider such submissions;[101] (ii) do not identify or reference the findings challenged;[102] and (iii) otherwise do not demonstrate – let alone attempt to demonstrate – any error capable of invalidating the PTJ's conclusion that the KSC have jurisdiction over arbitrary detention under Article 14(1)(c).[103] Such submissions should be summarily dismissed.[104] In any event, Grounds 10-13 also fail on their merits.

1. Article 14(1)(c) is non-exhaustive (Ground 10)

53. In the Decision, the PTJ, *inter alia*: (i) verified the English, Albanian, and Serbian versions of Article 14(1)(c) and found that 'they all similarly and consistently employ an open-ended formulation'; and (ii) concluded that Article 14 provides a sound legal basis to exercise jurisdiction over war crimes under CIL, including beyond those expressly listed.[105]

54. Other than general submissions about which version prevails in case of hypothetical discrepancies[106] and unsubstantiated assertions concerning the plain

[99] *See* Section IV(A)(3) above.
[100] Decision, KSC-BC-2020-06/F00412, para.205.
[101] *See*, *for example,* Appeal, KSC-BC-2020-06/IA009/F00010, paras 90, 97, 99, 109.
[102] *See*, *for example,* Appeal, KSC-BC-2020-06/IA009/F00010, paras 88-91.
[103] *See* paras 54-55, 60-64, 66-68 below.
[104] *See* Section III and paras 17, 45, 50 above.
[105] Decision, KSC-BC-2020-06/F00412, paras 144-146. *See also* Confirmation Decision, KSC-BC-2020-06/F00026, para.33.
[106] Appeal, KSC-BC-2020-06/IA009/F00010, para.88.

meaning of the text,[107] the Defence does not attempt to demonstrate any actual discrepancy in the different language versions Article 14(1)(c) or other error in the relevant part of the Decision.[108]

55. Further, contrary to Defence submissions,[109] the PTJ, having considered the plain language of the Law and CIL,[110] was not required to address the language of Article 8(2)(c) of the Rome Statute.[111] In any event, rather than supporting the Defence position, use of non-exhaustive language in Article 14(1)(c) ('including') – instead of the exhaustive language of Article 8(2)(c) of the Rome Statute ('namely') – demonstrates the legislator's intent that, consistent with the plain language of Article 14(1)(c), CIL, and Common Article 3,[112] the KSC have jurisdiction over war crimes under CIL beyond those expressly listed.

2. Arbitrary detention is a serious violation of Common Article 3 (Grounds 11-12)

56. Relying on diverse sources and evidence of CIL, the PTJ correctly found that arbitrary detention – namely, deprivation of liberty without a legal basis or without fundamental safeguards – is incompatible with the requirement of humane treatment and constitutes a serious violation of international humanitarian law, including Common Article 3.[113]

57. Common Article 3 provides, *inter alia*, that persons taking no active part in hostilities shall, in all circumstances, be treated humanely.[114] This protection, also

[107] Appeal, KSC-BC-2020-06/IA009/F00010, para.89.
[108] Appeal, KSC-BC-2020-06/IA009/F00010, paras 88-89.
[109] Appeal, KSC-BC-2020-06/IA009/F00010, paras 89-90.
[110] *See* Decision, KSC-BC-2020-06/F00412, paras 88-89, 154.
[111] *See* Article 3(2)-(3).
[112] Article 3 common to the Geneva Conventions of 1949 ('Common Article 3'). The requirement of humane treatment in Common Article 3 reflects CIL and is broader than the prohibitions expressly listed, which serve as examples of conduct that are indisputably in violation of the provision. *See* Decision, KSC-BC-2020-06/F00412, para.154 and the sources cited therein; Confirmation Decision, KSC-BC-2020-06/F00026, para.34 and the sources cited therein. *See also* CIL Response, KSC-BC-2020-06/F00262, paras 49-51; paras 56-59 below.
[113] Decision, KSC-BC-2020-06/F00412, paras 148-156. *See also* Confirmation Decision, KSC-BC-2020-06/F00026, paras 33-38; CIL Response, KSC-BC-2020-06/F00262, paras 49-50, 57.
[114] 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,

stipulated in Article 4(1) of Additional Protocol II,[115] must be enforced by all parties to the armed conflict and must be afforded to all detained persons, irrespective of the reason for deprivation of liberty.[116] 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.[117]

58. The principle of humane treatment applies equally across international humanitarian law[118] and arbitrary detention is well-established as conduct which violates this principle.[119] Indeed, the fundamental guarantee against arbitrary

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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, 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, p.38.

[115] ICRC, Commentary on Additional Protocol II, 1987, paras 4509-4512 (Articles 4-6 of Additional Protocol II constitute a minimum standard of protection which anyone can claim at any time); ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, paras 609-610 (concerning the customary status of Article 4 of Additional Protocol II). *See also* ICTY, *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ('*Tadić* Jurisdiction Decision'), para.117 ('Many provisions of [Additional Protocol II] can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles').

[116] Decision, KSC-BC-2020-06/F00412, para.150; Confirmation Decision, KSC-BC-2020-06/F00026, para.34 and the sources cited in fn.38.

[117] ICTY, *Prosecutor v. Aleksovski,* IT-95-14/1-T, Judgment, 25 June 1999, para.49. *See* also para.51 ('[t]he general proscription in common Article 3 is against inhuman treatment').

[118] 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').

[119] 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 Article 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-95-14-T, Judgment, 3 March 2000, para.154. As a crime against humanity: Article 13(1)(j) ('other inhumane acts') indicates that the other enumerated crimes against humanity, including imprisonment (Article 13(1)(e)), are also inhuman. *See 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' (emphasis added)); Kosovo, Supreme Court, *L. Gashi et al.*, Plm. Kzz. 18/2016, Judgment, 13 May 2016,

detention is recognised in CIL[120] and non-derogable.[121] Arbitrary detention also violates and threatens other fundamental rights, including life, liberty, and security.[122] Respect for fundamental and non-derogable rights is a necessary component of the prohibition of inhumane treatment enshrined in Common Article 3.[123]

59. Moreover, the fair trial rights guaranteed in Common Article 3(1)(d)[124] are necessarily incompatible with the possibility of permitting arbitrary detention in non-international armed conflicts ('NIACs'). As previously submitted,[125] 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.[126] The prohibition of arbitrary detention as a threshold matter is therefore implicit in Common Article 3.

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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.'); ICRC, Customary International Humanitarian Law, Volume I: Rules, Jean-Marie Henckaerts and Louise Doswald-Beck, 2005 (reprinted with corrections in 2009) ('ICRC CIL Study'), Rule 99, p.344 ('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').

[120] ICRC CIL Study, Rule 99, p.344. *See also* Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Columbia, 26 February 1999, Chapter IV, 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').

[121] Human Rights Committee, CCPR General Comment No. 35, Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014 ('General Comment No.35'), para.66.

[122] *See* General Comment No.35, paras 2, 55. Arbitrary detention historically endangers physical integrity. *See* General Comment No.35, paras 2, 33, 56, 58.

[123] ICRC, Commentary to the First Geneva Convention, 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 powers').

[124] *See also* Article 14(1)(c)(iv); Articles 2(2) and 6 of Additional Protocol II.

[125] CIL Response, KSC-BC-2020-06/F00262, para.56.

[126] *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, *Case against Nuon and Khieu*, 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').

60. The Defence does not argue on appeal that arbitrary detention is compatible with the requirement of humane treatment. Rather, it takes issue with the PTJ's considerations as to the legal bases of detention[127] and applicable safeguards[128] in NIACs. These submissions – the only ones made under Counts 11-12 – go to the elements[129] and contours of the crime and amount to substantive arguments as to what conduct satisfies such elements in this case.[130] These issues are properly advanced and considered in the course of the trial; they are incapable of demonstrating any error that would invalidate the PTJ's finding that arbitrary detention amounts to a serious violation of Common Article 3, thereby falling within the jurisdiction of the KSC.[131] On this basis alone, they should be dismissed.

61. For example, Defence submissions in support of Ground 11 are inadequate insofar as they exclusively concern one source relied upon by the PTJ in relation to the authority of armed groups to detain in NIACs.[132] In any event, regardless of their

[127] Appeal, KSC-BC-2020-06/IA009/F00010, paras 92-96.
[128] Appeal, KSC-BC-2020-06/IA009/F00010, paras 97-99.
[129] Arbitrary detention, consistent with the elements of the corresponding crime against humanity (imprisonment) and war crime (unlawful confinement), consists of an act or omission resulting in deprivation of liberty without due process of law, namely, without legal basis or without complying with basic procedural safeguards. *See* Confirmation Decision, KSC-BC-2020-06/F00026, para.93.
[130] Whether deprivation of liberty is arbitrary or illegal depends on the circumstances of the case. A wide variety of circumstances have been found to constitute arbitrary detention including, *inter alia*, where there is no legal basis or the legal basis is not understandable, accessible, retroactive or not applied in a consistent and predictable way to everyone equally, the detention is not based on a reasonable or genuine suspicion, the detention continues after the legal basis ceases to exist, or the detention is not in accordance with the procedures established by law. *See, for example*, ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Judgment, 29 November 2017, paras 471-472; ICTY, *Prosecutor v. Krajišnik*, IT-00-39-T, Judgment, 27 September 2006, para.753; General Comment No. 35, paras 11, 17, 22-23, 43-44; Case 002/02 Trial Judgement, paras 692-693, 2579-2580, 2584; HRC, Report of the Working Group on Arbitrary Detention, A/HRC/22/44, 24 December 2012, Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under CIL, paras 62-63; UN OHCHR, Fact Sheet No. 26, The Working Group on Arbitrary Detention, May 2000; ICC, Situation in the Republic of Burundi, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, paras 68, 89.
[131] *See, similarly*, ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-AR72.1, Decision on Tolimir's "Interlocutory Appeal against the Decision of the Trial Chamber on the Part of the Second Preliminary Motion Concerning the Jurisdiction of the Tribunal", 25 February 2009, para.10; ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal against Decision on Several Motions Challenging Jurisdiction, 6 June 2007, paras 15, 18.
[132] Appeal, KSC-BC-2020-06/IA009/F00010, paras 92-94.

merits, such submissions do not address or identify any error in the PTJ's ultimate finding, in particular and fundamentally, that arbitrary detention is incompatible with the requirement of humane treatment and constitutes a serious violation of Common Article 3,[133] which the Defence purports to be challenging.

62. Likewise, in its selective arguments concerning applicable procedural guarantees under Ground 12, the Defence ignores the sources cited by the PTJ,[134] in particular, the ICRC CIL Study.[135] On the basis of a broad range of, *inter alia*, human rights instruments and agreements and decisions of human rights bodies, this study identifies basic procedural safeguards applicable to all detentions and without which a detention is necessarily arbitrary and incompatible with humane treatment, in particular: (i) the obligation to inform an arrested persons of the reasons for arrest; (ii) the obligation to bring a person arrested on a criminal charge promptly before a judge or other competent authority; and (iii) the obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention.[136]

63. Defence submissions fail to acknowledge that – while the procedures and rules concerning detention are not as detailed in NIACs, as in international armed conflicts[137] – the safeguards enumerated by the PTJ are the basic requirements that apply in all circumstances and at all times.[138] Indeed, they have been recognised as

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[133] Decision, KSC-BC-2020-06/F00412, paras 155-156. *See also* para.150 (and the sources cited in fns 297-300):

> […] anyone falling in the hands of the opposing party is entitled to certain (substantive and procedural) minimum guarantees, in accordance with Common Article 3 and Articles 4-6 of Additional Protocol II as reflected under customary international law. These guarantees, which have an absolute character, must be enforced by all parties to a non-international armed conflict (including armed groups) and must be afforded to all persons whose liberty has been restricted, regardless of whether there is a legal basis to detain or intern them and of the reason(s) to do so. [footnotes omitted].

[134] Appeal, KSC-BC-2020-06/IA009/F00010, paras 97-98. The Defence also alleges error in light of the PTJ's failure to engage with an authority it cited in its submissions at first instance. However, as set out above, this fails to demonstrate any error invalidating the relevant part of the Decision and should be summarily dismissed. *See* Appeal, KSC-BC-2020-06/IA009/F00010, para.99.

[135] Decision, KSC-BC-2020-06/F00412, para.154, fn.315; Confirmation Decision, KSC-BC-2020-06/F00026, para.95, fn.173, *referring also to* Additional Protocol II, Article 6.

[136] ICRC CIL Study, pp.349-352. *See also* Decision, KSC-BC-2020-06/F00412, para.154.

[137] *See* Appeal, KSC-BC-2020-06/IA009/F00010, paras 97-98.

[138] *See also* fn.133 above.

indispensable requirements to give effect to the non-derogable and customary prohibition of arbitrary detention.[139] Further, such basic guarantees are also recognised as fundamental fair trial rights and violations thereof are implicit in the scope of Common Article 3.[140]

64. The Appeal therefore fails to identify, let alone substantiate, any error in the PTJ's finding that arbitrary detention constitutes a serious violation of Common Article 3.

3. Arbitrary detention was a crime under CIL by 1998 (Ground 13)

65. In light of state practice and *opinio juris*, the PTJ correctly found that, during the time period relevant to the charges in this case, a customary rule existed that criminalised arbitrary detention as a war crime in NIACs and was accessible and foreseeable to the Accused.[141]

66. Arbitrary detention is a serious[142] violation of the rule of humane treatment in Common Article 3. Serious violations of this rule entail individual criminal responsibility under CIL.[143] Accordingly, the crime of arbitrary detention falls within the jurisdiction of the KSC under Article 14(1)(c). Defence submissions concerning certain state practice and *opinio juris* reviewed in the Decision do not detract from the crime's status under CIL. Such submissions are in any event misconceived.

67. First, Article 142 of the SFRY Code specified that the acts proscribed therein, including illegal arrests and detentions, are criminalised insofar as they constitute a violation of 'rules of international law effective at the time of war'.[144] As demonstrated above and contrary to Defence submissions,[145] arbitrary detention, which is incompatible with the requirement of humane treatment, constitutes a serious

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[139] ICRC CIL Study, pp.349-352 and the sources cited therein. *See also* the sources cited in fn.130 above.
[140] *See also* para.59 above.
[141] Decision, KSC-BC-2020-06/F00412, para.166.
[142] For the reasons set out in paras 56-59 above, it constitutes a breach of fundamental human rights and necessarily involves grave consequences for the victims. *See Tadić* Jurisdiction Decision, paras 90, 94.
[143] *Tadić* Jurisdiction Decision, para.134.
[144] *See also* Article 12, which states the applicability of the substantive criminal law of Kosovo insofar as it complies with CIL.
[145] Appeal, KSC-BC-2020-06/IA009/F00010, paras 103-105.

violation of Common Article 3 recognised in CIL and is therefore within the scope of acts criminalised in NIACs under Article 142 of the SFRY Code, as well other codes using similar language.[146]

68. Moreover, Defence submissions that the United Nations ('UN') resolutions relied upon by the PTJ do not expressly recognise arbitrary detention as criminal miss the point.[147] Such resolutions constitute evidence that, in the context of NIACs, the prohibition of arbitrary detention was recognised under CIL, in particular as a serious violation of the requirement of humane treatment. As set out above, such serious violations fall within the scope of prohibited acts under Common Article 3 and, in turn, entail individual criminal responsibility.

D. THE KSC HAVE JURISDICTION OVER ENFORCED DISAPPEARANCE (GROUND 14)

69. Defence submissions in support of Ground 14 are deficient in form and substance: they are completely unsourced and selectively (and in some cases inaccurately[148]) repeat arguments unsuccessful before the PTJ, submitting on appeal only that he failed to consider them.[149] On these bases, the Defence submissions should be summarily dismissed.[150] They also fail on their merits.

70. Relying on extensive evidence of state practice and *opinio juris*, which spanned decades, the PTJ correctly found that enforced disappearance was a crime against humanity under CIL during the time period relevant to the charges.[151]

71. The PTJ expressly addressed and dismissed the selective submissions repeated in the Appeal, including claims that only two international instruments acknowledged enforced disappearance as a crime against humanity before 1998.[152] The PTJ considered that 'the selective approach by the Defence fails to recognise the

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[146] *See* Decision, KSC-BC-2020-06/F00412, paras 160-161.
[147] Appeal, KSC-BC-2020-06/IA009/F00010, paras 107-108.
[148] *See, for example,* para.73 below.
[149] Appeal, KSC-BC-2020-06/IA009/F00010, paras 110-115.
[150] *See* Section III and paras 17, 45, 50, 52 above.
[151] Decision, KSC-BC-2020-06/F00412, paras 167-174. *See also* CIL Response, KSC-BC-2020-06/F00262, paras 61-79.
[152] Appeal, KSC-BC-2020-06/IA009/F00010, paras 110-111.

manifestation of State practice and *opinio juris* over decades, and how such practice mutually reinforces each other in determining the existence of a customary rule at the time of the alleged crimes'.[153] Defence submissions do not detract from – let alone acknowledge – this finding.

72. Further, the selective Defence submissions also fail when considered in isolation. For example, in relation to the International Law Commission ('ILC') Draft Code of Crimes Against the Peace and Security of Mankind ('Draft Code'), Defence submissions[154] ignore both: (i) the PTJ's consideration of the matter, in particular, that the 1996 Draft Code included enforced disappearance as a crime against humanity;[155] and (ii) the fact that, in 1991, the ILC acknowledged that criminal conduct amounting to 'a practice of systematic disappearances of persons […] deserved to be specifically mentioned' in the Draft Code.[156]

73. Finally, the SPO was unable to locate the 2012 statement of the UN Working Group on Enforced or Involuntary Disappearances referred to in the Appeal.[157] However, assuming that the Defence is in fact referring to the 2009 General Comment,[158] which featured in the Defence submissions before the PTJ,[159] its submissions are misleading.[160] The 2009 General Comment, which acknowledged the

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[153] Decision, KSC-BC-2020-06/F00412, para.168. *See also* CIL Response, KSC-BC-2020-06/F00262, paras 62 ('A cumulative consideration of consistent state practice and *opinio juris* from at least 1946, as well as the persistent absence of contrary practice or objection, demonstrate that, by 1998, enforced disappearance was a crime against humanity under CIL'), 63-78 (setting out in detail evidence of relevant practice and *opinio juris*).

[154] Appeal, KSC-BC-2020-06/IA009/F00010, para.112.

[155] Decision, KSC-BC-2020-06/F00412, para.169.

[156] ILC, Yearbook of the International Law Commission 1991, Volume II, Part Two, Report of the Commission to the General Assembly on the work of its forty-third session, A/46/10, p.104. *See also* CIL Response, KSC-BC-2020-06/F00262, para.70, fn.161.

[157] Appeal, KSC-BC-2020-06/IA009/F00010, para.114.

[158] Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/13/31, 21 December 2009, para.39: General comments on enforced disappearance as a crime against humanity ('2009 General Comment').

[159] Preliminary Motion, KSC-BC-2020-06/F00223, para.162 (claiming that the UN Working Group on Enforced or Involuntary Disappearances claimed customary status for enforced disappearance for the first time in the 2009 General Comment).

[160] CIL Response, KSC-BC-2020-06/F00262, fn.175.

pre-existing status of enforced disappearance as a crime against humanity,[161] addressed the contextual elements of crimes against humanity under CIL.[162]

74. The Defence therefore fails to identify any error in the PTJ's conclusion that enforced disappearance of persons was a crime against humanity under CIL during the time period relevant to the charges.

V. RELIEF REQUESTED

75. For the foregoing reasons, the Appeal should be rejected in its entirety.

Word count: 9691

Jack Smith

Specialist Prosecutor

Thursday, 30 September 2021

At The Hague, the Netherlands.

[161] 2009 General Comment, paras 1-6.
[162] 2009 General Comment, paras 7-15.