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KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In:	**KSC-BC-2020-04**
	The Prosecutor v. Pjetër Shala
Before:	**Pre-Trial Judge**
	Judge Nicolas Guillou
Registrar:	Dr Fidelma Donlon
Date:	18 October 2021
Language:	English
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Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers

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THE PRE-TRIAL JUDGE,[1] pursuant to Articles 22, 33(1), 103(7) and 162(1) of the Constitution of Kosovo ("Constitution"), Articles 3(2), 12, 14(1)(c), 16(1)(a), and 39(1) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 97 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 19 June 2020, further to a decision by the Pre-Trial Judge ("Confirmation Decision"),[2] the Specialist Prosecutor submitted the Confirmed Indictment.[3]

2. On 16 March 2021, further to a decision and an arrest warrant issued by the Pre-Trial Judge,[4] Pjetër Shala ("Mr Shala" or "Accused") was arrested in the Kingdom of Belgium ("Belgium").[5]

3. On 15 April 2021, upon conclusion of the judicial proceedings in Belgium, Mr Shala was transferred to the detention facilities of the Specialist Chambers ("SC") in the Hague, the Netherlands.[6]

[1] KSC-BC-2020-04, F00001, President, *Decision Assigning a Pre-Trial Judge*, 14 February 2020, public.
[2] KSC-BC-2020-04, F00007, Pre-Trial Judge, *Decision on the Confirmation of the Indictment against Pjetër Shala*, 12 June 2020, strictly confidential and *ex parte.* A confidential redacted version and a public redacted version were issued on 6 May 2021, F00007/CONF/RED and F00007/RED.
[3] KSC-BC-2020-04, F00010, Specialist Prosecutor, *Submission of Confirmed Indictment*, 19 June 2020, public, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential. A confidential, lesser redacted version and a public, further redacted version of the Confirmed Indictment were submitted on 31 March 2021, F00016/A01 and F00016/A02.
[4] KSC-BC-2020-04, F00008, Pre-Trial Judge, *Decision on Request for Arrest Warrant and Transfer Order,* 12 June 2020, confidential. A public redacted version was issued on 6 May 2021, F00008/RED. F00008/A01, Pre-Trial Judge, *Arrest Warrant for Mr Pjetër Shala,* 12 June 2020, strictly confidential and *ex parte.* A public redacted version was issued on 15 April 2021, F00008/A01/RED.
[5] KSC-BC-2020-04, F00013, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 16 March 2021, public.
[6] KSC-BC-2020-04, F00019, Registrar, *Notification of Reception of Pjetër Shala in the Detention Facilities of the Specialist Chambers and Conditional Assignment of Counsel*, 15 April 2021, confidential, para. 2, with Annexes 1-2, confidential. A public redacted version was issued on 26 April 2021, F00019/RED.

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4. On 12 July 2021, further to an oral order varying the applicable time limits,[7] the Defence for Mr Shala ("Defence") filed a preliminary motion challenging the jurisdiction of the SC ("Defence Motion").[8]

5. On 6 September 2021, further to a decision additionally varying the applicable time limits ("5 July 2021 Decision") and a decision varying the applicable word limit,[9] the Specialist Prosecutor's Office ("SPO") responded ("Response").[10]

6. On 24 September 2021, further to the 5 July 2021 Decision and an oral order varying the applicable word limit,[11] the Defence replied ("Reply").[12]

II. SUBMISSIONS

7. The Defence submits that: (i) the SC has been established as a domestic court in violation of both the Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"); and (ii) lacks jurisdiction over the mode of liability of Joint Criminal Enterprise ("JCE") and the war crime of arbitrary detention in non-international armed conflict ("NIAC").[13] On this basis, it requests the Pre-Trial Judge to: (i) review the corresponding findings in the Confirmation Decision; (ii) dismiss the charges against Mr Shala relying on JCE and arbitrary detention; and (iii) order the SPO to amend the Confirmed Indictment accordingly.[14]

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[7] KSC-BC-2020-04, Transcript, 21 June 2021, p. 62, lines 12-19, public.
[8] KSC-BC-2020-04, F00054, Specialist Counsel, *Preliminary Motion of the Defence of Pjetër Shala to Challenge the Jurisdiction of the KSC*, 12 July 2021, public.
[9] KSC-BC-2020-04, F00052, Pre-Trial Judge, *Decision on Request to Vary a Time Limit*, 5 July 2021, public; F00067, Pre-Trial Judge, *Decision on SPO Request for Extension of Word Limit*, 3 September 2021, public.
[10] KSC-BC-2020-04, F00071, Specialist Prosecutor, *Prosecution Response to Shala Defence Preliminary Motion Challenging the Jurisdiction of the KSC,* 6 September 2021, public.
[11] KSC-BC-2020-04, Transcript, 23 September 2021, p. 101, line 19 – p. 102, line 7, public.
[12] KSC-BC-2020-04, F00084, Specialist Counsel, *Defence Reply to the Prosecution Response to the Preliminary Motion of Pjetër Shala Challenging the Jurisdiction of the KSC,* 24 September 2021, public. Whereas the Reply exceeds the varied word limit by 15 words, the Pre-Trial Judge decides to accept it in the interests of judicial efficiency.
[13] Defence Motion, paras 2-3.
[14] Defence Motion, para. 61.

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8. The SPO responds, in summary, that: (i) the SC is a constitutional judicial body, properly established by law, and independent and impartial; (ii) the Law applies CIL at the time of the crimes, in full conformity with constitutional and human rights principles; and (iii) this CIL was accessible and foreseeable to the Accused, including in respect of JCE and arbitrary detention.[15] On this basis, the SPO requests the Pre-Trial Judge to reject the Defence Motion.[16]

9. In its Reply, the Defence maintains the arguments presented in the Defence Motion and opposes every submission made in the Response unless it is otherwise specifically indicated.[17] It reiterates its request to grant the Defence Motion.[18] The Defence additionally requests permission to develop the submissions presented in the Defence Motion and Reply during an oral hearing.[19]

A. Establishment of the Specialist Chambers

1. Defence Motion

10. The Defence endorses the arguments made by the Defence of Kadri Veseli that the SC, which constitutes a domestic court and can be distinguished from international and hybrid tribunals, is *de facto* an extraordinary court and that, as a consequence, its establishment violates Article 103(7) of the Constitution.[20] In the view of the Defence, the following features establish its extraordinary nature.

11. First, the Defence submits that the Law specifies that the aim of the SC is to ensure independent, impartial, fair and efficient criminal proceedings in the limited number

[15] Response, para. 1.
[16] Response, paras 1, 69.
[17] Reply, para. 2.
[18] Reply, para. 49.
[19] Reply, para. 49.
[20] Defence Motion, paras 5-7 *referring to* KSC-BC-2020-06, F00223, Specialist Counsel, *Preliminary Motion of the Defence of Kadri Veseli to Challenge Jurisdiction on the Basis of Violations of the Constitution*, 15 March 2021, public.

of cases arising from the allegations of grave transboundary and international crimes made in the Report of Dick Marty for the Council of Europe Parliamentary Assembly ("Council of Europe Report").[21]

12. Second, in connection with its assertion that all judges, prosecutors, and staff of the SC are international, the Defence endorses the arguments put forth by the Defence of Rexhep Selimi that the structure and composition of the SC constitutes a flagrant contradiction with the proper establishment of the SC as a Kosovo domestic court given the exclusion of Kosovo Albanians from employment or any involvement with the SC in breach of the principle of equality and non-discrimination guaranteed by Article 7 of the Constitution and Articles 6 and 14 of the ECHR.[22]

13. Third, according to the Defence, the Law purports to attribute primacy to the SC over all other courts in Kosovo and has been interpreted in a manner that substantially deviates from the Constitution and other substantive Kosovo criminal laws.[23] It avers that Article 3(2)(d) of the Law, which provides that the SC shall adjudicate and function in accordance with customary international law ("CIL"), is unconstitutional.[24] The Defence submits that the Kosovo Supreme Court has held that, at the time relevant to the Confirmed Indictment, the 1974 Constitution of the Socialist Federal Republic of Yugoslavia ("SFRY" and "SFRY Constitution") applied, which required criminal offences to be set out in a domestic statute.[25] In its view, the inconsistency and lack of clarity as to the applicable law violates the requirements of the "quality of the law" guaranteed by Article 33 of the Constitution and Article 7(1) of the ECHR.[26] The Defence further maintains that Article 12 of the Law is unconstitutional to the extent that it purports to grant primacy to CIL over the

[21] Defence Motion, paras 2, 7, 8.
[22] Defence Motion, paras 2, 7, 9-11 *referring to* KSC-BC-2020-06, F00219, Specialist Counsel, *Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction – Discrimination*, 15 March 2021, public.
[23] Defence Motion, paras 2, 7, 12.
[24] Defence Motion, para. 12.
[25] Defence Motion, para. 12.
[26] Defence Motion, para. 12.

substantive criminal law of Kosovo.[27] The Defence asserts in this regard that the misguided reference to Article 7(2) of the ECHR in Article 12 of the Law does not allow qualifying the principle of legality and the rule of retroactivity as Article 7(2) of the ECHR, as interpreted by European Court of Human Rights ("ECtHR"), was a time-limited clarification intended to ensure the validity of prosecutions for war crimes committed during World War II and cannot be applied to subsequent conflicts.[28]

14. Lastly, the Defence contends that the Law has been interpreted in a manner that breaches the overriding principle of legality that is guaranteed in the Constitution of Kosovo and the ECHR.[29] It specifically argues that Article 14(1)(c) of the Law refers to CIL in connection with the term war crimes, whereas the application of CIL needs to be done in accordance with the principle of legality.[30]

2. Response

15. The SPO avers that challenges to the legality of the SC do not constitute jurisdictional challenges within the meaning of Rule 97(1)(a) of the Rules.[31]

16. In addition, in its view, as the Kosovo Constitutional Court had previously found and the Pre-Trial Judge has recently affirmed in Case KSC-BC-2020-06, the SC is established by law, is an independent and impartial specialised court, and does not constitute an extraordinary court within the meaning of Article 103(7) of the Constitution.[32] The SPO adds that, at the time of declaring the SC compatible with Article 103(7) of the Constitution, the Kosovo Constitutional Court clearly envisaged that a specific law would be adopted by the legislature to regulate the organisation, functioning and jurisdiction of the SC, including the specific features of the Law which

[27] Defence Motion, paras 2, 13.
[28] Defence Motion, paras 13-14.
[29] Defence Motion, paras 2, 7.
[30] Defence Motion, para. 15.
[31] Response, para. 2.
[32] Response, paras 3-7.

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the Defence raises as warranting reconsideration of the SC's status.[33] The SPO argues that the Defence Motion raises no new issues or basis for altering those findings.[34]

17. The SPO further asserts that, should the Pre-Trial Judge consider it necessary to reassess any of these elements, the Defence's submissions still fail.[35] First, with respect to jurisdictional scope, the SPO avers that the SC's jurisdiction is not confined to a single case (or even necessarily a small number of cases), nor is it confined to a specific crime, a single perpetrator or even a certain category of perpetrators.[36] Second, as to international staff and judiciary, the SPO argues that, to the extent it is alleged that the rights of others have been violated, the Defence has no standing and, to the extent it alleges employment discrimination in respect of the Accused himself, such submissions are hypothetical and irrelevant.[37] Furthermore, according to the SPO, to the extent that the aforementioned submissions are directed towards the SC's status under Article 6(1) of the ECHR, they are equally without merit as the governing framework reveals that there is a strong presumption of impartiality and independence regarding the Judges and, if the Defence is claiming that international judges lack independence or impartiality, the submission is unsubstantiated.[38] Lastly, in respect of primacy, the SPO contends that the legal framework governing the SC requires adherence to the Constitution, the Law, and international human rights law, and the SC's primacy over other courts in Kosovo does not affect that framework and is consistent with the SC's status as a specialised court.[39]

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[33] Response, para. 9.
[34] Response, paras 3, 8, 9.
[35] Response, para. 9.
[36] Response, para. 10.
[37] Response, para. 12.
[38] Response, paras 11, 13-14.
[39] Response, para. 15.

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3. Reply

18. In the view of the Defence, the lawfulness of the establishment of the SC is a necessary pre-condition to the SC exercising jurisdiction and, as such, falls to be considered under Rule 97(1)(a) of the Rules.[40] It adds that the authorities relied on by the Pre-Trial Judge in finding, in Case KSC-BC-2020-06, that challenges to the legality of the SC do not constitute jurisdictional challenges are inapposite as two precedents did not concern the establishment of a court and two other precedents were adopted pursuant to provisions differing fundamentally from Rule 97(1)(a) of the Rules.[41]

19. The Defence submits that the decision of the Kosovo Constitutional Court of 15 April 2015 concerned Amendment No. 24 to the Constitution and not the Law.[42] According to the Defence, the establishment framework and operation of the SC pursuant to the Law demonstrates that the SC is placed outside the structure of the existing court system and operates on the basis of its own rules of procedure without adequate reference to the Kosovo legal order.[43] It specifically avers that: (i) the SC Judges have no formal institutional connection with the domestic judiciary and prosecution service; (ii) the SC procedure does not follow the Kosovo Code of Criminal Procedure and offers weaker procedural guarantees; (iii) the operation of the Law as the *lex specialis* results in unacceptable lack of clarity as to the applicable law and fails to meet the requirements of accessibility and foreseeability; (iv) the purported primacy of the SC deviates from the Constitution and the overriding principle of legality; (v) the SC were established to deal with a limited number of cases; (vi) all Judges are international and appointed by procedures that deviate from those provided in the Constitution and domestic legal order; and (vii) Kosovo Albanians are entirely excluded from consideration as Judges or members of staff.[44]

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[40] Reply, paras 3, 8.
[41] Reply, paras 4-7.
[42] Reply, para. 9.
[43] Reply, para. 12.
[44] Reply, para. 13.

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20. The Defence maintains that, contrary to the SPO's cursory submissions, its argument regarding the exclusion of Kosovo Albanians does not concern the employment rights either of the Accused or others, nor an alleged lack of impartiality of international Judges.[45] It asserts that this practice constitutes racial discrimination, which deprives the SC from legitimacy and undermines confidence as to the objective impartiality of its Judges and staff.[46] The Defence adds that generalised concerns about the security situation in Kosovo cannot justify this blanket ban.[47]

21. It further contends that, contrary to the SPO's submissions, the mere fact that the SC was established and operates by virtue of a constitutional amendment and the Law in itself does not suffice to conclude that it is independent and established by law.[48] In its view, the latter reference to "law" includes any provision of domestic law which, if breached, would render the examination of a case irregular.[49]

B. Customary International Law

1. Defence Motion

22. According to the Defence, within the legal order of Kosovo, international law, including norms related to criminal matters, do not have direct effect and cannot be directly applied by Kosovo courts unless they satisfy the duality test.[50] The Defence submits that neither the Constitution nor the SFRY Constitution allow Kosovo courts, including the SC, to enforce criminal prohibitions deriving from CIL without domestic incorporation in the form of a domestic statutory provision.[51]

[45] Reply, para. 15.
[46] Reply, para. 15.
[47] Reply, para. 15.
[48] Reply, para. 16.
[49] Reply, para. 16.
[50] Defence Motion, para. 16.
[51] Defence Motion, para. 16.

23. In its view, Article 3(2)(d) of the Law, which seems to derive support from Article 19(2) of the Constitution, erroneously equates the incorporation of international law into domestic law with its direct applicability.[52] It adds that, in any event, this provision must be interpreted consistently with the principle of legality under Article 7 of the ECHR and Article 33 of the Constitution in accordance with the jurisprudence of the Kosovo Supreme Court.[53]

24. The Defence avers that the Pre-Trial Judge should assess whether a specific CIL norm satisfies the duality test, which was not done in the Confirmation Decision, to determine whether the SC has jurisdiction over JCE and arbitrary detention.[54]

2. Response

25. According to the SPO, the Defence's claim that the SC cannot exercise jurisdiction over CIL crimes fundamentally misstates the legal framework of the SC and ignores that the Kosovo legislature selected the applicable law in the course of establishing a specialised court within the meaning of Article 103(7) of the Constitution.[55] In its view, 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 as the drafters specified which CIL crimes could be prosecuted in the Law and, in doing so, crafted a domestic law allowing for the direct application of CIL.[56] The SPO adds that, in affirming the constitutionality of Article 162 of the Constitution, the Kosovo Constitutional Court considered, *inter alia*, that the scope of the SC's jurisdiction must comply with the rights provided by Chapters II and III of the Constitution, including Article 33(1) of the Constitution, which is consistent with Article 7 of the ECHR.[57] In

[52] Defence Motion, para. 17.
[53] Defence Motion, para. 17.
[54] Defence Motion, paras 18-19.
[55] Response, paras 16, 19-21.
[56] Response, paras 19, 22.
[57] Response, paras 17, 21.

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addition, the SPO asserts that, with reference to Article 33(1) of the Constitution, Kosovo courts have entered war crimes convictions when such crimes were recognised in CIL at the time that they were committed and that the ECtHR has similarly confirmed that convictions for crimes under CIL – even when not criminalised under domestic law– do not *per se* violate the principle of legality.[58] Lastly, the SPO contends that the reference to Article 7(2) of the ECHR in Article 12 of the Law is not the basis for the applicability of CIL as Article 7 of the ECHR as a whole must be applied together with Article 33(1) of the Constitution.[59]

26. Moreover, the SPO submits that the CIL applicable to the crimes charged meets the requirements for accessibility and foreseeability to the Accused, on the basis that: (i) various international instruments adopted after World War II made it clear that war crimes were criminal under CIL; (ii) the ICTY could exercise jurisdiction over war crimes and crimes against humanity in Kosovo during the charged timeframe; (iii) domestic prohibitions in the SFRY Criminal Code mirror the underlying acts charged under CIL; (iv) the SFRY ratified treaties relevant to the crimes charged; and (v) the crimes charged all concern flagrant human rights violations.[60]

3. Reply

27. The Defence replies that the Law, which was adopted in 2015, cannot constitute a lawful basis for prosecuting offences that were allegedly committed in 1999.[61] According to the Defence, even taking the SPO's argument at its strongest, neither arbitrary detention in NIAC nor JCE liability were legally binding norms or otherwise formed part of CIL at the time relevant to the Confirmed Indictment.[62]

[58] Response, para. 18.
[59] Response, para. 23.
[60] Response, paras 24-29.
[61] Reply, paras 19, 26.
[62] Reply, para. 27.

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28. It adds that Article 33 of the Constitution does not assist the SPO as this provision should be interpreted in accordance with Article 7 of the ECHR, which disallows the retrospective criminalisation of conduct, and it, in any event, did not apply at the time relevant to the Confirmed Indictment.[63] The Defence similarly asserts that, 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.[64] Furthermore, in the view of the Defence, the SPO's reliance on two ECtHR cases is inapposite as one case concerns the validity of prosecutions after World War II in respect of the crimes committed during that war, which cannot be applied to events in 1999, and the other case concerns evidently unlawful conduct, which is fundamentally different from the controversial concepts of JCE liability and the war crime of arbitrary detention in NIAC.[65]

29. In addition, the Defence maintains that the suggestion that there is no issue of retroactivity 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 of the ECHR, which includes the requirements of accessibility, foreseeability and, generally, the quality of the law in question which must be assessed in the particular context.[66]

30. Furthermore, the Defence avers that, in suggesting that relevant judgments by the Kosovo Supreme Court or the Kosovo Court of Appeals, including in cases involving alleged co-perpetrators of Mr Shala, are irrelevant, the SPO fails to present

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[63] Reply, paras 19, 27.
[64] Reply, para. 27.
[65] Reply, paras 21-22.
[66] Reply, para. 28.

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accurately what these authorities stand for.[67] In the view of the Defence, the Kosovo Supreme Court correctly applied the principle of *lex mitior*.[68]

31. Moreover, the Defence is of the view that the fact that various international instruments provide that war crimes, in general, constitute offences under CIL 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.[69] It adds that the general suggestion that the SFRY Criminal Code included war crimes does not assist the SPO to demonstrate that this code included the war crime of arbitrary detention in NIAC in 1999.[70] Lastly, the Defence argues that it is evident that a cursory assessment of Mr Shala's conduct with respect to the specific matters of arbitrary detention in NIAC and JCE, 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.[71]

32. The Defence further requests the Pre-Trial Judge to refer the matter for adjudication by the Specialist Chamber of the Kosovo Constitutional Court under Article 49(4) of the Law due to the fundamental importance of this issue.[72]

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[67] Reply, para. 29.
[68] Reply, paras 24, 29.
[69] Reply, para. 32.
[70] Reply, para. 33.
[71] Reply, para. 34.
[72] Reply, paras 23, 30, 49(ii).

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C. JOINT CRIMINAL ENTERPRISE

1. Defence Motion

33. The Defence submits that the SC does not have jurisdiction to apply JCE as a mode of liability.[73] It, in particular, challenges the use of JCE III as it considers that it entails an obvious conflict with the principle of culpability.[74]

34. First, according to the Defence, JCE was not part of Kosovo law or the law of the Federal Republic of Yugoslavia ("FRY") at the time of the alleged offences.[75] It avers that Articles 22, 25(1) and 26 of the SFRY Criminal Code provided for the classic notion of co-perpetration and cannot be equated to JCE.[76] The Defence also invokes jurisprudence of the Kosovo Court of Appeals regarding JCE.[77]

35. Second, the Defence avers that no legal basis for JCE can be found in the Law.[78] It argues that Article 16(1)(a) of the Law does not include JCE as a form of liability, which must be seen as a deliberate choice given that the Law was enacted 15 years after the decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") finding that JCE forms part of CIL in the case of the Prosecutor v. Duško Tadić ("Tadić"), 13 years after the Rome Statute entered into force and explicitly rejected JCE, and 5 years after the rejection of JCE III by the Extraordinary Chambers in the Courts of Cambodia ("ECCC").[79] The Defence also argues that interpreting the word "committing" in Article 16(1)(a) of the Law so as to include JCE and, in particular, JCE III would be to the detriment of the Accused in breach of Article 7(1) of the ECHR and Article 33 of the Constitution.[80]

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[73] Defence Motion, paras 3, 21.
[74] Defence Motion, paras 4, 24.
[75] Defence Motion, paras 21, 25.
[76] Defence Motion, paras 26-27.
[77] Defence Motion, para. 28.
[78] Defence Motion, paras 21, 29.
[79] Defence Motion, paras 30-31.
[80] Defence Motion, para. 32.

36. Third, the Defence contends that, even if the Pre-Trial Judge were to decide that CIL has direct effect before the SC, JCE, in general, and JCE III, in particular, was not established in CIL in 1999.[81] In the view of the Defence, the ICTY Appeals Chamber in Tadić erred in finding that JCE forms part of CIL as there was insufficient evidence of both *opinio juris* and state practice to support that finding.[82] The Defence further contends that, even if the Pre-Trial Judge considers that JCE in general is part of CIL, this finding cannot extend to JCE III.[83] In this regard, the Defence relies on the jurisprudence of the ECCC finding that, at the time the alleged crimes within the jurisdiction of the ECCC had been committed, there was insufficient evidence of consistent State practice or *opinio juris* to conclude that JCE III was part of CIL.[84] The Defence also recalls that the Special Tribunal for Lebanon ("STL") and the Special Court for Sierra Leone ("SCSL") have held that JCE III liability does not extend to specific intent crimes.[85] The Defence adds that there is not a single international criminal law treaty specifically defining JCE III as a mode of liability and that the Rome Statute is a strong indicator that an overwhelming majority of States rejected JCE as a mode of liability.[86] In addition, the Defence recalls that the UK Supreme Court has reversed its case-law on joint enterprise liability, which was relied upon by the ICTY Appeals Chamber in Tadić, and found that the English common law never recognized an "extended" common purpose doctrine.[87] Lastly, the Defence refers to certain academic publications discussing the controversial status of JCE III.[88]

37. Fourth, the Defence avers that, on the basis of the findings of the ECtHR, the application of JCE was not sufficiently foreseeable and accessible to Mr Shala as the Tadić Appeal Judgment was rendered on 15 July 1999, a month after the alleged JCE

[81] Defence Motion, paras 4, 21, 33, 43.
[82] Defence Motion, para. 35.
[83] Defence Motion, para. 36.
[84] Defence Motion, paras 36-37.
[85] Defence Motion, para. 38.
[86] Defence Motion, para. 39.
[87] Defence Motion, para. 40.
[88] Defence Motion, paras 24, 39, 42.

in which Mr Shala was involved had come to an end, and the criminal law in Kosovo does not include liability under any form of JCE.[89] It submits that this applies with even more force to the fact that Mr Shala is charged with murder under JCE III.[90]

38. The Defence is also of the view that relying on JCE is not only unlawful but also inadequate given the circumstances of Mr Shala's case and, in particular, the fact that he is charged with direct perpetration of the crimes pleaded in the Confirmed Indictment and his insignificant position in the Kosovo Liberation Army.[91]

2. Response

39. According to the SPO, criminal liability pursuant to JCE is a form of commission found in Article 16(1)(a) of the Law.[92] It avers that this provision is virtually identical to the equivalent provisions setting out modes of liability at the ICTY, International Criminal Tribunal for Rwanda ("ICTR"), International Residual Mechanism for Criminal Tribunals ("IRMCT"), SCSL and the ECCC.[93] The SPO adds that, at the time the Law was adopted in 2015, each of those courts had consistently and repeatedly found that "commission" encompasses JCE and, in choosing to adopt identical language, there can be no question that the drafters of the Law intended JCE to apply.[94] Furthermore, the SPO asserts that the seriousness of the crimes within the SC's jurisdiction under Articles 13 and 14 of the Law, and the explicit rejection of purported bars to prosecution in Articles 16(2), 16(3), and 16(4) of the Law, reveal that the Law must operate to reach all perpetrators.[95] The SPO also submits that the Defence incorrectly asserts that a determination that JCE is a form of commission liability is a

[89] Defence Motion, paras 21, 44-45.
[90] Defence Motion, para. 45.
[91] Defence Motion, para. 23.
[92] Response, para. 48.
[93] Response, para. 49.
[94] Response, para. 50.
[95] Response, paras 51-52.

creative or "extensively construed" interpretation of the Law seeing as commission liability must be interpreted to encompass JCE in accordance with consistent practice and CIL, and must then be applied in a manner consistent with applicable human rights principles and the Constitution.[96] It is also of the view that the Defence's arguments that JCE was not part of Kosovo or FRY law ignore the applicable law regime concerning CIL and ignores the fact that JCE liability has been applied in Kosovo courts adjudicating the commission of war crimes committed during the same period as the crimes charged in the Confirmed Indictment.[97]

40. Moreover, the SPO argues that the Defence's arguments against the CIL status of JCE, in all its forms, are entirely without merit.[98] According to the SPO, the language of the International Military Tribunal Charter ("IMT Charter") and of Control Council Law No. 10 ("CCL10") encompasses responsibility for crimes falling within the common plan (JCE I), other crimes committed in the execution of the plan or connected to the plan (JCE III), and explicitly includes perpetrators who bore liability for their contributions to the commission of crimes, in whatever form those contributions were made.[99] The SPO adds that, contrary to the Defence's unsubstantiated assertion, the ICTY Appeals Chamber in Tadić, and numerous other benches of similarly-situated courts, have determined that the post-World War II cases reveal that accused persons were tried based on their actions taken as part of a common design, purpose or plan, with others.[100] In the view of the SPO, the legal principles applied and jurisprudence from the post-World War II trials have been widely recognised as forming part of CIL.[101] The SPO also contends that all relevant similarly situated courts have found that JCE is a mode of liability in CIL, as did the

[96] Response, para. 53.
[97] Response, para. 54.
[98] Response, para. 55.
[99] Response, para. 56.
[100] Response, para. 57.
[101] Response, para. 58.

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Pre-Trial Judge in Case KSC-BC-2020-06.[102] Furthermore, the SPO avers that the Defence's attempt to paint JCE III as a guise for introducing "guilt by association" or "strict liability" fails because it does not acknowledge that there must be participation by the accused and JCE III liability only arises where a perpetrator, who already had criminal intent, could and did foresee the possibility of an additional crime and willingly took that risk.[103] The SPO additionally asserts that: (i) there is no requirement that a source of law be codified in a statute or treaty to be valid; (ii) the governing law of the International Criminal Court ("ICC") is fundamentally different than the SC; (iii) neither the writings of academics nor studies concerning domestic practice are capable of overturning settled jurisprudence; (iv) the argument concerning special intent crimes is inapplicable as no special intent crime has been charged under JCE III; and (v) the UK Supreme Court Decision does not affect the CIL status of JCE, as already determined by the IRMCT, and concerns accomplice or accessorial liability in England and Wales.[104]

41. Lastly, the SPO contends that JCE liability was sufficiently foreseeable and accessible at the relevant time to warrant its application the Accused.[105] In the view of the SPO, requiring uniform, precise definitions of all elements to find that they constituted crimes or modes of liability ignores the fact that international criminal law has developed progressively and that CIL is elastic and not static.[106] The SPO adds that the ICTY and ECCC have held that, in the case of an international tribunal, accessibility does not exclude reliance being placed on a law which is based on custom.[107] It asserts that, on the basis of the vast body of law arising after World War II,

[102] Response, paras 59-60.
[103] Response, para. 61.
[104] Response, paras 62-64.
[105] Response, para. 65.
[106] Response, para. 65.
[107] Response, para. 66.

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the similar provisions of the SFRY Criminal Code, and the investigations and prosecutions by the ICTY, JCE liability was foreseeable to the Accused.[108]

3. Reply

42. According to the Defence, assuming that the drafters were aware how the statutes of other international criminal tribunals have been interpreted does not justify construing a clear statutory provision in an impermissibly broad manner.[109]

43. Moreover, the Defence asserts that the SPO's reliance on a precedent from May 2016 does not assist its argument that JCE formed part of CIL in 1999.[110] It also submits that the SPO's cursory argument dismissing the relevance of the Rome Statute does not adequately respond to the Defence submissions on this matter.[111]

44. Furthermore, the Defence clarifies that it is not suggesting that academic writings or extra-judicial opinions should overturn settled jurisprudence but that it referred to such writings to demonstrate the controversial application of JCE liability.[112]

45. The Defence also avers that the suggestion that the IRMCT Appeals Chamber has considered the judgment of the UK Supreme Court is misleading as it only considered the 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.[113] Lastly, the Defence specifies that it invites the Pre-Trial Judge to take into consideration the errors of logic and incompatibility with basic principles of fairness that led to the seminal turn as to the mens rea standard in English law, which is relevant in assessing the status of the three forms of JCE in CIL.[114]

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[108] Response, paras 67-68.
[109] Reply, para. 41.
[110] Reply, para. 43.
[111] Reply, para. 44.
[112] Reply, para. 46.
[113] Reply, para. 47.
[114] Reply, para. 48.

D. ARBITRARY DETENTION

1. Defence Motion

46. According to the Defence, the SC does not have jurisdiction over arbitrary detention as a war crime in NIAC.[115]

47. First, the Defence contends that arbitrary detention was not criminal in the domestic law of Kosovo at the material time.[116] It submits that the Kosovo Supreme Court has held that the reference to "illegal arrest and detention" in Article 142 of the SFRY Criminal Code cannot be interpreted so as to include arbitrary detention in NIAC as this was not a criminal offence under any of the applicable treaties.[117] The Defence adds that, in accordance with the principle of legality, no such conduct was proscribed by the text of Common Article 3 to the 1949 Geneva Conventions ("Common Article 3").[118] Furthermore, the Defence asserts that, after the Basic Court of Mitrovica had convicted one of Mr Shala's alleged co-perpetrators on the basis of Article 142 of the SFRY Criminal Code, the Kosovo Court of Appeals reclassified the charge of illegal detention as "coercion", finally rejected it due to the expiration of statutory limitation, and further held that this provision did not criminalize acts which did not cause grave bodily injuries or serious damage to the victims' health.[119]

48. Second, the Defence submits that Article 14(1)(c) of the Law does not list arbitrary detention as a war crime in NIAC.[120] It contends that the exhaustiveness of this list is clear from the different qualifier used in Article 14(1)(b) of the Law, which specifically refers to "including, but not limited to, any of the following acts".[121] In its view, the

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[115] Defence Motion, paras 3, 4, 47.
[116] Defence Motion, paras 4, 48-49.
[117] Defence Motion, para. 49.
[118] Defence Motion, para. 49.
[119] Defence Motion, para. 50.
[120] Defence Motion, paras 47, 51.
[121] Defence Motion, para. 51.

Pre-Trial Judge's conclusion that the SC's jurisdiction is not limited to the crimes expressly enumerated in Article 14(1)(c) of the Law goes beyond the clear text of the provision and against the principle of legality, as enshrined in Article 33(1) of the Constitution and Article 7 of the ECHR.[122]

49. Third, in the submission of the Defence, arbitrary detention is not a serious violation of Common Article 3.[123] It avers that there is no agreement among States or leading scholars as to what amounts to arbitrary detention in the context of NIAC and, as reflected in the International Committee of the Red Cross' Customary International Humanitarian Law Study ("ICRC", "IHL" and "ICRC CIHL Study"), it is commonly accepted that deprivation of liberty is an inevitable but lawful occurrence in armed conflicts.[124] The Defence argues that the Pre-Trial Judge's finding in the Confirmation Decision that every instance of detention without legal basis or adequate procedural guarantees in NIAC amounts to inhumane treatment conflates arbitrary detention with inhumane treatment.[125] In this regard, the Defence asserts that, as reflected in Articles 3 and 5 of the ECHR and related ECtHR jurisprudence, one can be arbitrarily deprived of his liberty and still be detained in humane conditions.[126]

50. Fourth, the Defence avers that arbitrary detention was not prohibited in CIL in 1999.[127] It argues that the ICRC CIHL Study, on which the Pre-Trial Judge almost exclusively relied, is an aspirational statement of principle not supported by any other compelling source of international law.[128] The Defence is of the view that: (i) the first time that the ICRC suggested that IHL prohibits arbitrary detention was in 2005; (ii) it is unclear whether the criminalisation of arbitrary deprivation of liberty contained in the domestic legislation of approximately 60 States that the ICRC CIHL Study relies

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[122] Defence Motion, para. 51.
[123] Defence Motion, paras 47, 52.
[124] Defence Motion, para. 53.
[125] Defence Motion, para. 54.
[126] Defence Motion, para. 54.
[127] Defence Motion, paras 47, 58-59.
[128] Defence Motion, para. 55.

on is valid for both categories of armed conflict; and (iii) many of the criminal codes referred to in the ICRC CIHL Study were adopted after 1999.[129] The Defence also contends that the State practice cited in the ICRC CIHL Study, which concerns a relative minority of United Nations ("UN") Member States, is insufficient to meet the "extensive and virtually uniform" standard required to demonstrate a rule of CIL.[130] Moreover, according to the Defence, it puts too much emphasis on written materials, as opposed to actual operational practice by States during armed conflict.[131]

51. Lastly, the Defence contends that, with the uncertainties surrounding the notion of arbitrariness of detention and in the absence of any domestic or international rule prohibiting arbitrary deprivation in NIAC at the relevant time, Mr Shala could not have foreseen that he could be charged with this crime.[132]

2. Response

52. The SPO argues that the Defence submissions regarding arbitrary detention replicate challenges which the Pre-Trial Jude has recently considered in the context of the Case KSC-BC-2020-06 and do not warrant reconsideration of that finding.[133]

53. According to the SPO, while the prohibition against arbitrary detention is not listed explicitly in Article 14 of the Law, this is not required as the fundamental guarantee against arbitrary detention is non-derogable, and respect for fundamental and non-derogable rights is a necessary component of the prohibition against inhumane treatment enshrined in Common Article 3.[134] The SPO adds that Article 14(1)(c) of the Law uses the word "including" and the plain and literal interpretation

[129] Defence Motion, para. 56.
[130] Defence Motion, para. 57.
[131] Defence Motion, para. 57.
[132] Defence Motion, paras 47, 60.
[133] Response, para. 30.
[134] Response, para. 32.

of this word indicates a non-exhaustive list of prohibited conduct.[135] In the view of the SPO, that the wording employed in Article 14 of the Law is not identical between subsections does not change the character of the word "including", in particular since the other formulations similarly denote the non-exhaustive character of the acts listed.[136] Moreover, the SPO submits that there is no violation of legality as the SC only has jurisdiction over a crime if it existed under CIL at the relevant time.[137]

54. The SPO further avers that the prohibition against arbitrary detention in NIAC is part of CIL.[138] It submits that the ICRC CIL Study cited a variety of both national and international sources, which evidence state practice and *opinio juris.*[139] The SPO adds that evidence of practice that post-dates the Confirmed Indictment period can be relevant to show the continued development of a rule of CIL.[140] Further, in the view of the SPO, the standard for humane treatment applies equally across IHL, and arbitrary detention is well-established as conduct violating the principle of humane treatment.[141] The SPO also contends that the fair trial rights guaranteed in Common Article 3(1)(d) are incompatible with permitting arbitrary detention in a NIAC.[142]

55. In addition, the SPO asserts that arbitrary detention is a serious violation of Common Article 3 and aims to protect, primarily, the fundamental rights to life, liberty and security of the person as well as other human rights.[143] The SPO also submits that the Defence submissions on arbitrary detention with inhumane treatment confuse applicable regimes by seemingly confining humane treatment to the narrow question of detention conditions.[144]

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[135] Response, para. 33.
[136] Response, para. 33.
[137] Response, para. 33.
[138] Response, para. 34.
[139] Response, paras 35-37.
[140] Response, para. 37.
[141] Response, para. 39.
[142] Response, para. 40.
[143] Response, para. 41.
[144] Response, para. 42.

56. Lastly, in the submission of the SPO, the prohibition of arbitrary detention was fully accessible and foreseeable to the Accused, including on the basis of existence of laws prohibiting arbitrary detention applicable in the countries of the former Yugoslavia, as well as statements of international bodies such as the UN.[145]

3. Reply

57. The Defence maintains that the SPO's position that Article 14(1)(c) of the Law sets out a non-exhaustive list of prohibited acts is refuted by its explicit text, which differs from that of paragraphs (b) and (d) of this provision.[146] It adds that this cannot be interpreted as an inadvertent omission.[147] In the Defence's view, Article 14(1)(c) of the Law cannot reasonably be interpreted as non-exhaustive given the direct reference and identical content of the specific acts listed therein.[148]

58. The Defence also submits that neither the limited examples relied upon by the SPO nor its observation that arbitrary detention is not permitted demonstrate its position.[149] Lastly, the Defence contends that Article 142 of the SFRY Criminal Code did not contain the specific offence with which Mr Shala has been charged.[150]

III. APPLICABLE LAW

A. Preliminary Motions

59. Pursuant to Article 39(1) of the Law, the Pre-Trial Judge shall have the power to review an indictment, rule on any preliminary motions, including challenges to the

[145] Response, paras 35-36, 43-44.
[146] Reply, para. 35.
[147] Reply, para. 35.
[148] Reply, para. 36.
[149] Reply, para. 38.
[150] Reply, para. 39.

indictment and jurisdiction, and make any necessary orders or decisions to ensure the case is prepared properly and expeditiously for trial.

60. Pursuant to Rule 97(1) of the Rules, the Accused may file preliminary motions, which challenge the jurisdiction of the SC, allege defects in the form of the indictment and seek the severance of indictments pursuant to Rule 89(2).

B. ESTABLISHMENT OF THE SPECIALIST CHAMBERS

61. Pursuant to Article 103(7) of the Constitution, specialised courts may be established by law when necessary, but no extraordinary court may ever be created.

62. Pursuant to Article 162(1) of the Constitution, to comply with its international obligations in relation to the Council of Europe Report, Kosovo may establish SC and a SPO within the justice system of Kosovo. The organisation, functioning and jurisdiction of the SC and SPO shall be regulated by this Article and by a specific law.

C. CUSTOMARY INTERNATIONAL LAW

63. Pursuant to Article 22 of the Constitution, human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:

> […]
>
> (2) ECHR and its Protocols;
>
> (3) International Covenant on Civil and Political Rights and its Protocols ("ICCPR");
>
> […].

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64. Pursuant to Article 33(1) of the Constitution, no one shall be charged or punished for any act which did not constitute a penal offence under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law.

65. Pursuant to Article 3(2) of the Law, the SC shall adjudicate and function in accordance with,

a. the Constitution of the Republic of Kosovo,

b. this Law as the *lex specialis*,

c. other provisions of Kosovo law as expressly incorporated and applied by this Law,

d. CIL, as given superiority over domestic laws by Article 19(2) of the Constitution, and

e. international human rights law which sets criminal justice standards including the ECHR and the ICCPR, as given superiority over domestic laws by Article 22 of the Constitution.

66. Pursuant to Article 12 of the Law, the SC shall apply CIL and the substantive criminal law of Kosovo insofar as it is in compliance with CIL, both as applicable at the time the crimes were committed, in accordance with Article 7(2) of the ECHR and Article 15(2) of the ICCPR, as incorporated and protected by Articles 19(2), 22(2), 22(3) and 33(1) of the Constitution.

D. Joint Criminal Enterprise

67. Pursuant to Article 16(1)(a) of the Law, for crimes in Articles 13-14 of the Law, a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of such a crime shall be individually responsible for the crime.

E. ARBITRARY DETENTION

68. Pursuant to Article 14(1)(c) of the Law, for the purposes of this Law, under CIL during the temporal jurisdiction of the SC, war crimes means: […] in the case of a NIAC, serious violations of Common Article 3, including any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause […].

IV. DISCUSSION

A. PRELIMINARY MATTERS

1. Nature of the Defence Motion

69. Before all else, it is necessary to determine the nature of the Defence Motion. Article 39(1) of the Law stipulates that the Pre-Trial Judge can rule on *any* preliminary motions, including but not limited to challenges to the indictment and jurisdiction. Rule 97(1) and (3) of the Rules provides further specificity on the regime applicable to the most usual preliminary motions, namely to distinguish those preliminary motions where an appeal lies as of right (i.e. those challenging the jurisdiction of the SC) from those requiring certification before an appeal is granted. Rule 97(1)(a) of the Rules does not define jurisdictional challenges. However, Articles 6 through 9 of the Law set out the traditional bases for jurisdiction: subject-matter, temporal, territorial, and personal. Challenges related to the establishment of the SC and the SPO or alleged violations of the Accused's constitutional rights do not fit into these four traditional categories of jurisdiction. While in some instances it has been found that a challenge

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to jurisdiction could encompass broader questions of an institution's legality,[151] in other instances jurisdiction has been much more narrowly defined.[152]

70. As to the Defence's submission regarding the authorities invoked in support of the preceding determination,[153] the Pre-Trial Judge recalls that this determination arises, first and foremost, out of the plain meaning of the terms of Rule 97(1)(a) of the Rules, interpreted in their context – in particular, Articles 6 to 9 of the Law, which set out the traditional basis for jurisdiction. The aforementioned authorities demonstrate that, while it has been recognised that a challenge to jurisdiction could encompass broader questions of an institution's legality in some instances, jurisdiction has been more narrowly defined in other instances. Thus, these authorities do not establish, in and of themselves, that jurisdictional challenges necessarily exclude questions pertaining to the SC's establishment under the SC's legal framework. They rather lend support to the aforementioned interpretation of Rule 97(1)(a) of the Rules on the basis of the general proposition that jurisdiction is not an unbridled concept in international criminal law. The Defence's submissions are, therefore, rejected.

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[151] ICTY, *Prosecutor v. Tadić*, IT-94-1, Appeals Chamber, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* ("*Tadić* Interlocutory Appeal Decision"), 2 October 1995, para. 6; ICTR, *Prosecutor v. Kanyabashi*, ICTR-96-15-T, Trial Chamber, Decision on the Defence Motion on Jurisdiction, 18 June 1997, para. 6.

[152] It is noted that narrower concept of jurisdiction at the ICTY and ICTR followed an amendment of the Rules which defined jurisdictional challenges. ICTR, *Nzirorera v. The Prosecutor*, ICTR-98-44-AR72, Appeals Chamber, *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 Charter of the United Nations*, 10 June 2004, paras 9-10; ICTY, *Prosecutor v. Tolimir*, Appeals Chamber, IT-05-88/2-AR72.2, *Decision on Zdravko Tolimir's Appeal Against the Decision on Submissions of the Accused Concerning Legality of Arrest*, 12 March 2009, public, paras 11-12; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, *Decision on the Accused's Motion Challenging the Legal Validity and Legitimacy of the Tribunal*, 7 December 2009, public, para. 8; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/FT/AC/AR90.1, Appeals Chamber, *Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal"*, 24 October 2012, para. 18. In relation to rights violations falling outside the scope of jurisdictional challenge, *see* ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-722, Appeals Chamber, *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006*, 14 December 2006, public, paras 21-22, 24.

[153] Reply, paras 5-7.

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71. It follows that, to the extent that it challenges the establishment of the SC and/or alleges that the Accused's constitutional rights have been violated, the Defence Motion does not raise questions of jurisdiction as these submissions do not fall within the plain meaning of Articles 6 through 9 of the Law and, therefore, do not constitute jurisdictional challenges.[154] However, the Pre-Trial Judge will address these submissions pursuant to his power under Article 39(1) of the Law.[155] Accordingly, in the ensuing sections, the Pre-Trial Judge will address the Defence Motion, first, under Article 39(1) of the Law insofar as it challenges the establishment of the SC and/or alleges that the Accused's constitutional rights have been violated and, second, under Rule 97(1)(a) of the Rules to the extent that it challenges the jurisdiction of the SC within the meaning of Articles 6-9 of the Law.

2. Oral Hearing

72. It is recalled that, under the legal framework of the SC, oral hearings are strictly necessary in certain instances,[156] while they may be conducted as a matter of discretion in other instances.[157] As to the matters arising from the Defence Motion, an oral hearing is not mandatory under the Law and the Rules.

73. The Pre-Trial Judge observes that the Defence has not provided specific reasons demonstrating why an oral hearing is required. In addition, as set out above, the Defence has been granted an extension of time to submit the Defence Motion and an

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[154] *See also* KSC-BC-2020-06, F00450, Pre-Trial Judge, *Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused* ("Thaçi et al. Legality Decision"), 31 August 2021, public, para. 54.
[155] *See also* Thaçi et al. Legality Decision, para. 55.
[156] *For instance* Article 41(5) of the Law; Rule 92 of the Rules (initial appearances); Rule 96 of the Rules (status conferences).
[157] *For instance* Rule 95(2)(d) of the Rules; *see also* KSC-BC-2020-06, F00178, Pre-Trial Judge, *Decision on Kadri Veseli's Application for Interim Release*, 22 January 2021, public, para. 62; F00150, Pre-Trial Judge, *Decision on the Conduct of Detention Review and Varying the Deadline for Preliminary Motions*, 16 December 2020, public, para. 18.

extension of the word limit for its Reply.[158] It has, therefore, been afforded ample opportunity to present its submissions. Moreover, having considered the Parties' extensive submissions, the Pre-Trial Judge is of the view that he has sufficient information to rule on the Defence Motion and that additional oral arguments are neither necessary nor conducive to the expeditious adjudication of the matters at issue. Accordingly, the Pre-Trial Judge rejects the Defence's request.

B. Establishment of the Specialist Chambers

74. To begin with, the Pre-Trial Judge observes that the Defence's submission that the procedure governing the proceedings of the SC offers weaker procedural guarantees compared to the Kosovo Code of Criminal Procedure has been raised for the first time in the Reply.[159] Pursuant to Rule 76 of the Rules, only a reply or parts thereof addressing new issues arising from the response shall be considered. Therefore, this submission is dismissed *in limine.*

75. As to the argument that the SC was set up to deal with a limited number of cases,[160] the Pre-Trial Judge observes that the SC was established to address crimes relating to the Council of Europe Report, as envisaged by Article 162 of the Constitution, and that, pursuant to Articles 6-7 and 13-15 of the Law, it has jurisdiction over a wide range of war crimes and crimes against humanity, which relate to the Council of Europe Report, committed from 1 January 1998 until 31 December 2000. As has been previously determined, it follows that, even though the jurisdiction of the SC is not open ended, it is nevertheless general and abstract enough to accommodate a multiplicity of crimes and categories of perpetrators within its jurisdictional limits.[161] The Defence's argument is, accordingly, rejected.

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[158] *See* paras 4 and 6 above.
[159] Reply, para. 13.
[160] Defence Motion, paras 2, 7, 8; Reply, para. 13.
[161] *See also* Thaçi et al. Legality Decision, para. 114.

76. In relation to the Defence's claims concerning international staffing,[162] the Pre-Trial Judge notes that this matter was already before the Kosovo Constitutional Court when it concluded that the SC is established in law under Article 6(1) of the ECHR. In particular, the Kosovo Constitutional Court held that the establishment of the SC is necessary to comply with Kosovo's international obligations stemming from the Council of Europe Report, which were incorporated into Kosovo's legal framework by means of Law No. 04/L-274.[163] The latter law ratifies the international agreement achieved through the exchange of instruments between Kosovo and the European Union. This international agreement stipulates, *inter alia,* that the specialist court envisaged to conduct any trial and appellate proceedings arising from the investigation by the Special Investigative Task Force will be staffed with and operated by international staff only.[164] In addition, the Pre-Trial Judge has previously determined that the SC is independent and impartial.[165] Most pertinently, the Pre-Trial Judge has considered that, in view of the comprehensive framework governing the SC, including the Constitution, the Law as the *lex specialis* and international human rights law, it cannot be said that the SC operates outside the legal framework in Kosovo.[166] Furthermore, in relation to the appointment of Judges, it was held that Article 28 of the Law clearly sets out the relevant regime.[167] It was further found that it has not been specifically demonstrated how the lack of Kosovo Albanians within the ranks of the judiciary affects any of these considerations.[168] Lastly, in respect of the Defence's assertion that the international staffing of the SC undermines its legitimacy

[162] Defence Motion, paras 2, 7, 9-11; Reply, paras 13-16.
[163] *See also* Thaçi et al. Legality Decision, paras 86-88; Constitutional Court, *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*, K026/15, 15 April 2015, paras 50-51.
[164] Law No. 04/L-274, Annex.
[165] Thaçi et al. Legality Decision, paras 100-110.
[166] *See* Thaçi et al. Legality Decision, para. 101.
[167] *See* Thaçi et al. Legality Decision, para. 102; *see also* paras 103-109.
[168] *See* Thaçi et al. Legality Decision, para. 110.

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in Kosovo, the Pre-Trial Judge considers that the Defence fails to raise a legal issue.[169] It follows that the Defence's submission must be rejected.

77. With regard to the Defence's contention that the Law purports to attribute primacy to the SC over all other courts in Kosovo,[170] it has already been considered that the SC is bound by the comprehensive legal framework governing its proceedings and that the fact that it has primacy over other courts in Kosovo does not affect this analysis given that it must function in accordance with, *inter alia,* the Constitution, the Law as the *lex specialis,* and international human rights law.[171] Therefore, the Defence's contention must be set aside. In connection with the Defence's related assertion that the Law deviates from the Constitution and other substantive criminal laws in that Articles 3(2)(d) and 12 of the Law grant primacy to CIL,[172] the Pre-Trial Judge, as will be further detailed below,[173] has previously found that: (i) the legislator, in adopting the Law as the primary instrument governing SC proceedings, merely transposed crimes that were already part of the legal order and that were binding on individuals under international law into written domestic legislation; (ii) the law is not applied retroactively in these circumstances; and (iii) the application of CIL was accessible and foreseeable at the relevant time.[174] The Defence's claim that the Law is unconstitutional insofar as it grants primacy to CIL fails for the same reasons.

78. Lastly, the Pre-Trial Judge considers that the Defence's contention that, notwithstanding the reference to CIL in Article 14(1)(c) of the Law, the application of CIL both in terms of the elements of charged offences as well as modes of liability needs to be done in accordance with Article 33 of the Constitution is

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[169] *Similarly* Thaçi et al. Legality Decision, para. 110.
[170] Defence Motion, paras 2, 7, 12; Reply, para. 13.
[171] *See* Thaçi et al. Legality Decision, para. 101.
[172] Defence Motion, paras 12-14; Reply, para. 13.
[173] *See* paras 82-87 below.
[174] *See* KSC-BC-2020-06, F00412, Pre-Trial Judge, *Decision on Motions Challenging the Jurisdiction of the Specialist Chambers* ("Thaçi et al. Jurisdiction Decision"), 22 July 2021, public, paras 88-104.

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unsubstantiated.[175] The Defence does not specify which charged offences and modes of liability would fall short of the principle of legality and how such charged offences and modes of liability would specifically fail to comply with the applicable standards. As such, this argument is rejected. In any event, the Defence's specific arguments in respect of CIL, JCE and arbitrary detention, including in respect of the application of the principle of legality, will be addressed in the ensuing sections.[176]

79. In view of the preceding findings, the Pre-Trial Judge rejects the Defence Motion insofar it is submitted that the SC is a *de facto* extraordinary court.

C. JURISDICTION OF THE SPECIALIST CHAMBERS

1. Customary International Law

80. At the outset, the Pre-Trial Judge observes that the Defence's submissions regarding the applicability of CIL, JCE and arbitrary detention overlap in certain instances.[177] However, in view of the fact that the Defence Motion and the Reply devote distinct sections to these questions notwithstanding this overlap, the Pre-Trial Judge understands that the Defence is separately challenging, on the one hand, the applicability of CIL and, on the other hand, the SC's jurisdiction over arbitrary detention and JCE.[178] Accordingly, the Pre-Trial Judge will first address the former question in the present section, whereas the Defence's arguments regarding JCE and arbitrary detention will be taken up in the ensuing sections.

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[175] Defence Motion, paras 7, 15.
[176] *See* paras 80-103 below.
[177] *See for instance* Defence Motion, para. 19 ("The Pre-Trial Judge is called for the first time in this case to examine the applicability of CIL in Kosovo's legal order, which is essential in order to assess whether the SC has jurisdiction over the mode of liability of JCE and the crime of arbitrary detention […]"); Reply, paras 27 ("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"), 34 ("However, the SPO misconstrues the Motion: the Defence is challenging the SC's jurisdiction over the *specific* war crime of arbitrary detention in NIAC and the *specific* mode of liability of JCE" [emphasis in original]).
[178] Defence Motion, paras 16-18, 20-45, 46-60; Reply, paras 17-34, 35-39, 40-48.

81. Turning to the Defence's submissions, the Pre-Trial Judge observes that the argument regarding the application of the law most favourable to the Accused and the request for a referral to the Specialist Chamber of the Kosovo Constitutional Court have been raised for the first time in the Reply.[179] Pursuant to Rule 76 of the Rules, only a reply or parts thereof addressing new issues arising from the response shall be considered. Accordingly, this argument and request are dismissed *in limine.*

82. As to the Defence's submission that the SC is prevented from exercising jurisdiction over crimes under CIL unless these crimes have been incorporated into the domestic law applicable at the time when the alleged crimes would have been committed,[180] the Pre-Trial Judge recalls that: (i) the Law, while subject to the principles and safeguards provided in the Constitution, is the principal legal text governing the mandate and functioning of the SC as reflected in Article 3(2) of the Law; (ii) the applicable law defined by the legislator for the SC comprises, first, CIL and, second, Kosovo law only insofar as it is expressly incorporated in the Law and complies with CIL; and (iii) categorising a court of law as domestic, international, hybrid, or otherwise, is not dispositive of the applicable law.[181] On this basis, it has been concluded, *inter alia*, that neither the SFRY Constitution nor the SFRY Criminal Code limit the jurisdiction of the SC in the manner suggested by the Defence.[182]

83. In addition, the Kosovo Supreme Court decision invoked by the Defence, which stipulates that criminal offences and punishments must be provided for in specific domestic legislation, is distinguishable. This precedent arose out of the legal regime defined by UNMIK Regulation 1999/24, which provides, *inter alia*, that the applicable law in force on 22 March 1989 results in the *prima facie* reference to the principle of

[179] Reply, paras 23, 24, 29, 30.
[180] Defence Motion, paras 12, 16, 17; Reply, paras 17, 19, 25-27.
[181] *See* Thaçi et al. Jurisdiction Decision, paras 89, 98, 99, 101, 102; *see also, mutatis mutandis,* KSC-BC-2018-01, IA001/F00005, Court of Appeals, *Decision on Appeal Against "Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi"* (*Lajçi* Appeal Decision), 1 October 2021, public, para. 16.
[182] *See* Thaçi et al. Jurisdiction Decision, para. 99.

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legality as established in the SFRY Constitution.[183] On the contrary, the Law, as the primary framework governing SC proceedings, specifically provides for the application of CIL. The Defence does not otherwise substantiate its argument in a manner requiring the Pre-Trial Judge to revisit the aforementioned findings.

84. As a result, the Pre-Trial Judge confirms that the SC shall apply CIL and, other than the Law itself, no other piece of domestic legislation is applicable before the SC, unless it is incorporated in the Law and complies with CIL. Therefore, the Defence's submission is, for the reasons specified above, rejected.

85. With regard to the Defence's contention that Article 3(2)(d) of the Law must be interpreted consistently with the principle of legality,[184] it has been previously determined that the references to Article 7(2) of the ECHR and Article 15(2) of the ICCPR in Article 12 of the Law are to be read as encompassing the totality of Article 7 of the ECHR and Article 15 of the ICCPR by virtue of Article 3(2)(a) and (e) of the Law and Articles 22 and 33 of the Constitution.[185] It has also been held that, in adopting domestic legislation explicitly providing for international crimes already existing under CIL at the material time, the legislator can allow – or even mandate – prosecution for conduct that took place before the penalisation was introduced in domestic written law without any issue of retroactivity arising.[186] In claiming that this finding ignores the wide spectrum of the protection offered by Article 7 of the ECHR,[187] the Defence misapprehends that, as will also be set out below, the issues of accessibility and foreseeability have been addressed separately.[188]

86. The above finding is also consistent with Article 7(1) of the ECHR. The ECtHR has found that the reference to a criminal offence under international law entails that

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[183] Kosovo, Supreme Court, *Veselin Bešović v. Prosecutor*, AP-KZ NO.80/2004, 7 September 2004, p. 18.
[184] Defence Motion, paras 7, 12-14, 17; Reply, paras 18-22, 28.
[185] *See* Thaçi et al. Jurisdiction Decision, paras 93-95.
[186] *See* Thaçi et al. Jurisdiction Decision, para. 101.
[187] Reply, para. 28.
[188] *See also* Thaçi et al. Jurisdiction Decision, paras 103-104.

no violation of Article 7(1) of the ECHR ensues if a conviction is based on domestic legal provisions that were not in force when the offence was committed, provided that the conviction was based on either conventional international law or CIL as applicable at that time.[189] It is particularly noteworthy that the ECtHR applied this principle in relation to a conviction pronounced on the basis of domestic legislation adopted in 2003 for an offence under international law committed during the conflict in the former Yugoslavia in 1992.[190] In this regard, the Pre-Trial Judge further finds that the Defence's argument that the ECtHR has limited the application of Article 7(1) of the ECHR to flagrantly unlawful conduct is misguided. While the ECtHR referred to the flagrantly unlawful nature of the conduct in question in connection with the issue of foreseeability,[191] it stopped short from finding that Article 7(1) of the ECHR is, in general, restricted to such conduct. Indeed, the unqualified reference to a criminal offence under international law excludes such a restrictive interpretation.

87. Therefore, the Defence's argument is rejected insofar as it is argued that Article 3(2)(d) of the Law is not in keeping with the principle of legality.

88. Lastly, in view of the post-World War II general legal framework,[192] the ongoing ICTY prosecutions at the material time,[193] the relevant international treaties ratified by the SFRY,[194] and the prohibitions set out in the SFRY Criminal Code (some of which

[189] *See* ECtHR, *Vasiliauskas v. Lithuania*, no. 35343/05, Judgment, 20 October 2015, para. 166.
[190] ECtHR, *Šimšić v. Bosnia and Herzegovina* ("*Šimšić v. Bosnia and Herzegovina*"), no. 51552/10, Decision, 10 April 2012, paras 22-25.
[191] ECtHR, *Šimšić v. Bosnia and Herzegovina*, para. 24.
[192] IMT Charter (acceded to by the SFRY on 29 September 1945), Article 6; CCL10, Article II; International Law Commission, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal, 1950, Principle II.
[193] According to the records available on the ICTY website, cases were ongoing against a few dozen persons at the time of the charges set forth in the Confirmed Indictment.
[194] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, 8 June 1977; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 UNTS 73, 26 November 1968; Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984.

mirror the crimes charged),[195] the Pre-Trial Judge finds that, at the relevant time, it was accessible and foreseeable to the Accused that involvement in conduct amounting to crimes under CIL may give rise to individual criminal responsibility.

89. In conclusion, the Pre-Trial Judge rejects the Defence Motion insofar as it is submitted that CIL has no direct effect in SC proceedings.

2. Joint Criminal Enterprise

90. As regards the Defence's assertion that JCE was not part of the domestic law applicable at the time of the alleged crimes,[196] the Pre-Trial Judge recalls his findings that: (i) the SC shall apply, first, CIL and, second, Kosovo law only insofar as it is expressly incorporated in the Law and complies with CIL;[197] and (ii) Article 16(1) of the Law does not expressly incorporate provisions of Kosovo law in contrast to the second and third paragraphs of the same provision.[198] It follows that, in relation to the crimes under Articles 13-14 of the Law, the SC may only apply modes of liability that were part of CIL at the time when the alleged crimes were committed.[199] Given that the decisions of the Kosovo Court of Appeals regarding JCE[200] were adopted pursuant to a distinct legal framework not based on the Law, these decisions are not relevant to the present determination. The Defence's arguments are, for these reasons, rejected.

91. In relation to the Defence's submission that no legal basis for JCE can be found in the Law,[201] the Pre-Trial Judge has previously found that Article 16(1) of the Law, including the understanding given to "commission", must be interpreted in accordance with CIL as applicable at the time when the alleged crimes were

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[195] Article 142 SFRY Criminal Code includes, for example, killing, torture, inhumane treatment, and illegal arrests and detention.
[196] Defence Motion, paras 3-4, 21, 25-28; Reply, para. 22.
[197] *See* paras 82-87 above; *see also, mutatis mutandis, Lajçi* Appeal Decision, para. 16.
[198] *See* Thaçi et al. Jurisdiction Decision, para. 178.
[199] *See* Thaçi et al. Jurisdiction Decision, para. 179.
[200] Defence Motion, para. 28.
[201] Defence Motion, paras 21, 29-32; Reply, paras 41-42.

committed considering that: (i) the SC applies, first, CIL and, second, Kosovo law only insofar as it is expressly incorporated in the Law and complies with CIL; (ii) Articles 13-14 of the Law specifically refer to CIL as the applicable law for crimes against humanity and war crimes during the temporal jurisdiction of the SC; and (iii) the terminology employed in Article 16(1)(a) of the Law is virtually identical to the provisions regulating modes of liability in the statutes of the ICTY and ICTR, both of which applied modes of liability under CIL.[202] This further means that, as JCE was well-established in international criminal law at the time when the Law was adopted, the inclusion of a nearly identical definition of the modes of liability in the Law does not demonstrate that, as claimed by the Defence,[203] the drafters sought to exclude JCE. It rather lends support to the proposition that they, in fact, specifically intended to include this mode of liability. This interpretation is grounded in the text of Article 16(1) of the Law, interpreted in its context, and the applicable CIL. It cannot, therefore, be maintained that it contravenes Article 33 of the Constitution and Article 7(1) of the ECHR.[204] Accordingly, the Defence's arguments are rejected.

92. With regard to the Defence's submission that JCE, in general, was not established in CIL in 1999,[205] the Pre-Trial Judge has previously specified that, taking into consideration the consistent jurisprudence of the contemporary international tribunals on the basis of Article 3(3) of the Law, there are no persuasive reasons to depart from the finding that JCE I is established in CIL.[206] The Defence invokes a publication by a former ICTY Judge,[207] but such a publication is, in and of itself, insufficient to revisit the settled jurisprudence of international tribunals.[208] The Defence fails to otherwise substantiate its submission and it is, thus, rejected.

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[202] *See* Thaçi et al. Jurisdiction Decision, para. 177.
[203] Defence Motion, para. 31.
[204] Defence Motion, para. 32.
[205] Defence Motion, paras 3-4, 21, 33-35, 43; Reply, paras 43-44.
[206] *See* Thaçi et al. Jurisdiction Decision, paras 181-185, 187.
[207] Defence Motion, para. 35, footnote 56; Reply, para. 46.
[208] *See also* Thaçi et al. Jurisdiction Decision, para. 188.

93. Similarly, the majority of the Defence's arguments in support of its submission that JCE III does not amount to CIL[209] have been previously considered and rejected. Specifically, it has been held that: (i) there are no persuasive reasons to depart from the jurisprudence of various international and internationalised courts and tribunals that JCE III forms part of CIL on the basis of the jurisprudence of the ECCC; (ii) the approach reflected in the ICC Statute has no bearing on the question whether JCE III is part of CIL as the States in question did not seek to codify CIL when adopting the Rome Statute; (iii) the publications of (former) judges and academics advocating for various developments in the law or advancing their own personal opinions are insufficient to revisit the settled jurisprudence of international tribunals; and (iv) the jurisprudence of the UK Supreme Court reversing its case-law on joint enterprise liability concerns a domestic offence charged under a domestic form of accessory liability and does not affect the determination of CIL in relation to international crimes.[210] As to the Defence's reference to the STL and SCSL jurisprudence concerning the application of JCE III to crimes requiring specific intent, the Pre-Trial Judge considers that, in the circumstances of the present case, these arguments do not need to be addressed. The reason is that Mr Shala is not charged with torture, the only alleged crime requiring special intent, pursuant to JCE III.[211] Therefore, the Defence's submissions must be set aside.

94. In addition, the Defence's contention that JCE III entails an obvious conflict with the principle of individual culpability[212] is not, as previously determined, entirely jurisdictional in nature.[213] In any event, the Pre-Trial Judge recalls that it has been

[209] Defence Motion, paras 3-4, 21, 36-42; Reply, paras 47-48.
[210] *See* Thaçi et al. Jurisdiction Decision, paras 186-188.
[211] Confirmed Indictment, paras 8-9, alleging that Mr Shala shared the intent for the commission of the charged crimes (arbitrary detention, cruel treatment, torture, and murder) with other members of the JCE and, alternatively, that it was foreseeable to him that the crime of murder might be perpetrated by one or more members of the JCE, or by persons used by any member of the JCE to carry out crimes involved in the common purpose, and that he willingly took that risk.
[212] Defence Motion, para. 24; Reply, para. 45.
[213] *See* Thaçi et al. Jurisdiction Decision, paras 202-203.

found that it is the intentional participation in and significant contribution to the common purpose that, together with the requirements that it must have been foreseeable to this person that the deviatory crime might be perpetrated in carrying out the common purpose and that the Accused willingly took such a risk, leads to liability pursuant to JCE III.[214] The Defence's argument is, thus, without merit.

95. In respect of the accessibility and foreseeability of JCE,[215] it is recalled that: (i) the first ICTY judgment to take note of liability for participation in a JCE was the trial judgment of December 1998 in the case of the Prosecutor v. Anto Furundžija; (ii) the general legal framework relating to JCE developed after World War II; and (iii) Articles 22 and 26 of the SFRY Criminal Code mirror the concept of common purpose liability.[216] These considerations do not involve any assumptions and, together with the finding that JCE was established in CIL at the relevant time, demonstrate that committing crimes on the basis of a JCE is plainly unlawful.[217] In light of the foregoing, the Pre-Trial Judge finds that both JCE I and JCE III were foreseeable and accessible to the Accused at the time the alleged crimes were committed. Accordingly, the Defence's submissions are rejected.

96. Lastly, the Pre-Trial Judge observes that the Defence asserts that relying on JCE is not only unlawful but also inadequate as Mr Shala is charged with having directly perpetrated the crimes contained in the Confirmed Indictment.[218] Whether or not an individual should be charged on the basis of a particular mode of liability is an assessment to be made by the Specialist Prosecutor in the exercise of his discretion.[219] It is the task of the Judges of the Trial Panel to determine whether the evidence sustains a conviction on the basis of that mode of liability. As such, this assertion does

[214] *See* Thaçi et al. Jurisdiction Decision, para. 206.
[215] Defence Motion, paras 44-45.
[216] *See* Thaçi et al. Jurisdiction Decision, paras 194-200.
[217] Reply, paras 22, 27, 32, 34.
[218] Defence Motion, para. 23.
[219] *See also* KSC-BC-2020-04, F00003, Pre-Trial Judge, *Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules*, 28 February 2020, public, para. 10.

not amount to a jurisdictional challenge. To the extent that the Defence is asserting that JCE can only be relied upon to address the responsibility of leaders as a matter of law, the Pre-Trial Judge considers that arguments regarding the constituent elements of a mode of liability are also not jurisdictional in nature.[220] In any event, the Pre-Trial Judge finds that there is no legal impediment in applying JCE liability to persons not occupying leadership positions. The objective elements of JCE – a plurality of persons, a common plan, design, or purpose amounting to or involving the commission of a crime provided for in the Law, and the participation of the accused in furthering the common plan, design or purpose – do not reflect any such limitation. In addition, the ICTY Appeals Chamber has explicitly confirmed that JCE has been applied to cases in which JCE members were (among) the principal perpetrators and to cases of a relatively small scale.[221] The Defence's arguments are, for these reasons, rejected.

97. In light of the foregoing, the Defence Motion, insofar as it is argued that the SC does not have jurisdiction over JCE, is rejected.

3. Arbitrary Detention

98. As to the Defence's contention regarding the status of the crime of arbitrary detention under the applicable domestic law,[222] the Pre-Trial Judge recalls his findings that, when adjudicating crimes under Article 13 and 14 of the Law allegedly committed during its temporal jurisdiction, the SC shall apply, first, CIL and, second, Kosovo law only insofar as it is expressly incorporated in the Law and complies with CIL.[223] This means that whether or not arbitrary detention constituted a war crime in NIAC during the temporal scope of the Confirmed Indictment will be assessed against CIL. For this reason, the Defence's submissions are rejected.

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[220] *Similarly* Thaçi et al. Jurisdiction Decision, para. 175.
[221] ICTY, *Prosecutor v. Brđanin*, IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, paras 406, 425.
[222] Defence Motion, paras 3-4, 48-50.
[223] *See* paras 82-87 above; *see also, mutatis mutandis, Lajçi* Appeal Decision, para. 16.

99. With regard to the Defence's assertion that arbitrary detention is not included in Article 14(1)(c) of the Law,[224] the Pre-Trial Judge recalls that it has already been determined that the formulations used in, on the one hand, paragraphs (1)(a) and (c) and, on the other hand, paragraphs (1)(b) and (d) of this provision have a similar non-exhaustive meaning.[225] In addition, contrary to the Defence's assertion,[226] Common Article 3 is not exhaustive seeing as its *chapeau* stipulates that each Party to the conflict shall apply, *as a minimum*, the ensuing provisions. This entails that the war crimes falling within the SC jurisdiction are not necessarily confined to those expressly enumerated in Article 14 of the Law provided that, in conformity with Articles 3(2)(d) and 12 of the Law, such a crime existed under CIL when it was allegedly committed.[227] Therefore, the Defence's submission must be rejected.

100. In addition, it is recalled that, contrary to the Defence's arguments,[228] it has been found that arbitrary detention amounts to a serious violation of Common Article 3.[229] More specifically, in the context of detention by a non-State actor in a NIAC, arbitrary detention entails deprivation of liberty: (i) without a valid legal basis – given the absence of a basis to detain in either conventional IHL or customary IHL relating to NIAC; or (ii) in contravention of basic procedural guarantees – in light of the broad scope of the requirement of humane treatment under Common Article 3.[230] In the view of the Pre-Trial Judge, the finding that, in these specific circumstances, arbitrary detention amounts to a serious violation of Common Article 3 is firmly rooted in the terms of this provision, which amounts to CIL in its entirety.[231] As a result, the Defence's reference to ongoing discussions on different aspects of deprivation of

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[224] Defence Motion, paras 3-4, 47, 51; Reply, paras 35-36.
[225] *See* Thaçi et al. Jurisdiction Decision, para. 144.
[226] Reply, para. 36.
[227] *See also* Thaçi et al. Jurisdiction Decision, para. 145.
[228] Defence Motion, paras 3-4, 47, 52-54.
[229] *See* Thaçi et al. Jurisdiction Decision, para. 156.
[230] *See* Thaçi et al. Jurisdiction Decision, paras 149-155.
[231] *See for instance* ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, I.C.J. Reports 1986 (p. 14), Judgment, 27 June 1986, para. 218; *Tadić* Interlocutory Appeal Decision, para. 98.

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liberty in NIAC does not affect these findings.[232] Similarly, the Defence's contention that deprivation of liberty constitutes, in principle, a lawful occurrence under IHL[233] does not, without more, negate the possibility of detention becoming arbitrary in certain circumstances. The Pre-Trial Judge further considers that the Defence's argument that the Confirmation Decision conflates arbitrary detention and inhumane treatment[234] is misguided. The conditions of detention constitute a separate matter potentially pertaining to or amounting to other crimes within the jurisdiction of the SC.[235] The Defence's arguments are, therefore, set aside.

101. In relation to the Defence's submission that arbitrary detention was not prohibited under CIL in 1999,[236] the Pre-Trial Judge has already detailed the State practice and *opinio juris* – comprising national legislation and the expression of sovereign positions through international organisations – that, either with explicit reference to NIAC or without distinguishing between the type of armed conflict at issue, establish a rule of CIL criminalising arbitrary detention in NIAC.[237] In this regard, it was also explained that, contrary to the Defence's argument that the Pre-Trial Judge relied almost exclusively on the ICRC CIHL Study,[238] the ICRC does not, in and of itself, generate or crystallise State practice but that, together with other actors, the ICRC is an authoritative reference for State practice, which the Pre-Trial Judge is entitled to independently review.[239] In this regard, the Defence's contention that the ICRC CIHL Study places too much emphasis on written materials[240] is based on a source that does not raise this objection specifically in connection with arbitrary

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[232] Defence Motion, para. 53.
[233] Defence Motion, para. 53.
[234] Defence Motion, para. 54.
[235] In the Confirmed Indictment, it is alleged that, as a result of the conditions in which certain persons were detained during the relevant time frame, Mr Shala incurs liability for the war crimes of cruel treatment and/or torture; *see* Confirmed Indictment, paras 18, 26.
[236] Defence Motion, paras 3-4, 47, 55-59; Reply, para. 38.
[237] *See* Thaçi et al. Jurisdiction Decision, paras 159-164.
[238] Defence Motion, para. 55.
[239] *See* Thaçi et al. Jurisdiction Decision, para. 157.
[240] Defence Motion, para. 57 and footnote 96.

detention and, in any event, the Pre-Trial Judge has, on the basis of the accepted methodology for determining a rule of CIL, independently confirmed that a rule of CIL criminalising arbitrary detention exists. In addition, insofar as the Defence asserts that certain criminal codes referred to in the ICRC CIHL Study were adopted after 1999, it has already been considered that reliance on such sources can be acceptable in some cases as a subsidiary means to demonstrate the continuing development of (as opposed to contrary practice to) an already existing rule of CIL at the relevant time.[241] Accordingly, the Defence's submissions are rejected.

102. Lastly, the Pre-Trial Judge considers that, in view of the criminalisation of arbitrary deprivation of liberty in the former Yugoslavia (and beyond) and the condemnation of such conduct by the UN in relation to the conflicts in the former Yugoslavia, it was accessible and foreseeable to the Accused, at the relevant time, that involvement in acts of arbitrary detention might give rise to individual criminal responsibility.[242] Contrary to the Defence's submissions,[243] these findings are not based on either an assumption or a general reference to war crimes in the SFRY Criminal Code. Furthermore, together with the determination that arbitrary detention was established in CIL at the relevant time, these findings further demonstrate that acts of arbitrary detention were plainly unlawful at the relevant time. It follows that the Defence's arguments fail.

103. In conclusion, the Pre-Trial Judge rejects the Defence Motion insofar as it is argued that the SC does not have jurisdiction over arbitrary detention as a war crime in NIAC pursuant to Article 14(1)(c) of the Law.

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[241] *See* Thaçi et al. Jurisdiction Decision, para. 158.
[242] *Similarly* Thaçi et al. Jurisdiction Decision, para. 165.
[243] Defence Motion, para. 60; Reply, paras 32, 33, 39.

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V. DISPOSITION

104. For the above-mentioned reasons, the Pre-Trial Judge hereby:

(a) **REJECTS** the Defence Motion insofar as it challenges the establishment of the SC and/or alleges that the Accused's constitutional rights have been violated on the basis of Article 39(1) of the Law; and

(b) **REJECTS** the Defence Motion insofar as it challenges the jurisdiction of the SC on the basis of Rule 97(1)(a) of the Rules.

Judge Nicolas Guillou

Pre-Trial Judge

Dated this Monday, 18 October 2021

At the Hague, the Netherlands.