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

In:	**KSC-BC-2020-04**
	Specialist Prosecutor v. Pjetër Shala
Before:	**Court of Appeals Panel**
	Judge Michèle Picard
	Judge Emilio Gatti
	Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Prosecutor
Date:	29 November 2021
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Prosecution response to Defence appeal against the 'Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers'

with public Annex 1

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I. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') hereby responds to the Defence Appeal challenging the jurisdiction of the Specialist Chambers ('KSC').[1] The submissions made in the Appeal are deficient in both form and substance and fail to satisfy the standard of review. The Decision[2] should be upheld, and the Appeal rejected in full.

II. PROCEDURAL HISTORY

2. On 12 July 2021, the Accused filed a preliminary motion seeking to dismiss the charges in this case due to lack of jurisdiction, and raising challenges to the legality of the KSC.[3] The SPO responded on 6 September 2021,[4] and the Accused replied on 24 September 2021.[5]

3. On 18 October 2021, the Pre-Trial Judge issued the Decision, rejecting the Defence Motion.

4. On 27 October 2021, the Defence requested an extension of ten days to appeal the Decision.[6] On 28 October 2021, the Panel granted the Defence request,[7] and on 8 November 2021, the Defence filed the Appeal.

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[1] Defence Appeal Against Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, KSC-BC-2020-04/IA002/F00003, 9 November 2021, Public ('Appeal').
[2] Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, KSC-BC-2020-04/F00088, 18 October 2021 ('Decision').
[3] Preliminary Motion of the Defence of Pjetër Shala to Challenge the Jurisdiction of the KSC, KSC-BC-2020-04/F00054, 12 July 2021 ('Motion').
[4] Prosecution Response to Shala Defence Preliminary Motion Challenging the Jurisdiction of the KSC, KSC-BC-2020-04/F00071, 6 September 2021 ('Response to Preliminary Motion').
[5] Defence Reply to the Prosecution Response to the Preliminary Motion of Pjetër Shala Challenging the Jurisdiction of the KSC, KSC-BC-2020-04/F00084, Public, 24 September 2021 ('Reply').
[6] Defence Request for an Extension of Time to Appeal 'Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers,' KSC-BC-2020-04/F00096, 27 October 2021, para.3.
[7] Decision on Shala's Request for Variation of Time Limit, KSC-BC-2020-04/IA002/F00002, 28 October 2021, para.5.

5. On 15 November 2021, the SPO requested a ten-day extension to file its response to the Appeal.[8] On 16 November 2021, the Defence requested a five-day extension for the filing of its reply brief.[9] On 17 November 2021, the Panel granted the SPO and Defence requests, and set the deadlines for the SPO response and Defence reply for 29 November 2021 and 9 December 2021, respectively.[10]

III. STANDARD OF REVIEW

6. Alleging an error of law requires identifying the alleged error, presenting arguments in support of the claim, and explaining how the error invalidates the decision.[11] An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.[12]

7. An error of fact can only be found if no reasonable trier of fact could have made the impugned finding.[13] In determining whether a finding was reasonable, the Panel will not lightly overturn findings of fact made by a lower level panel.[14]

8. Finding an abuse of discretion requires that the Decision was so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.[15]

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[8] Prosecution request for extension of time limit, KSC-BC-2020-04/IA002/F00005, 15 November 2021, para.3.
[9] Defence Response to Prosecution Request for Extension of Time Limit, KSC-BC-2020-04/IA002/F00006, 16 November 2021, paras 1-2.
[10] Decision on the Parties' Requests for Variation of Time Limits, KSC-BC-2020-04/IA002/F00007, 17 November 2021, para.5.
[11] Decision on Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F0005, 9 December 2020, ('*Gucati* Appeals Decision'), KSC-BC-2020-07/IA001/F00005, para.12.
[12] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.12.
[13] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.13.
[14] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.13.
[15] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.14.

IV. SUBMISSIONS

A. THE LAW GIVES CIL DIRECT APPLICATION BEFORE THE KSC (GROUND 1)

9. As a preliminary matter, it should be noted that, as with its submissions before the Pre-Trial Judge, the Defence submissions regarding the applicability of customary international law ('CIL'), joint criminal enterprise ('JCE'), and arbitrary detention contain considerable overlap.[16] Consistent with the approach taken by the Pre-Trial Judge, the SPO will address questions regarding CIL in the present section, whereas the Defence's arguments specific to retroactivity, JCE, and arbitrary detention will be addressed in the corresponding sections below.

10. The Law[17] constitutes domestic legislation granting the KSC jurisdiction over customary international law ('CIL') crimes, as at the relevant timeframe. Consequently, the Law gives CIL direct application before the KSC.

11. Importantly, pursuant to the applicable framework, including Articles 19(2), 22, and 33(1) of the Constitution and Articles 3(2) and 12 of the Law, the KSC applies CIL as at the time the crimes were committed. As such, there is no retroactive application of the law because it is the law at the time the crimes were committed which applies.[18]

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[16] Decision, KSC-BC-2020-04/F00088, para.80. *See for example* Appeal, KSC-BC-2020-04/IA002/F00003, paras 20, 22 (repeating arguments regarding the application of CIL).
[17] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').
[18] *Lex mitior* is not implicated, *contra* Appeal, KSC-BC-2020-04/IA002/F00003, para.12, fn.21, as the KSC is bound to apply CIL and the CIL crimes at issue were incorporated into Kosovo's domestic framework for the first time by virtue of the Law – they could not previously have been charged under the Criminal Code of the Socialist Federal Republic of Yugoslavia, 1976 ('SFRY Code'). There are therefore no sets of binding changed law for *lex mitior* comparison purposes. Rather, the KSC framework presents a new and self-contained regime. Moreover, the Decision correctly concluded that the Defence waived this and related arguments by failing to raise it until the reply brief. *See* Decision, KSC-BC-2020-04/F00088, para.81 (dismissing this argument *in limine*).

12. This framework, as recognised by the Pre-Trial Judge – is clear, coherent, and logical. It is in full conformity with the Constitution, Article 7 of the European Convention on Human Rights ('ECHR'), and Article 15 of the International Covenant on Civil and Political Rights ('ICCPR'). Many national jurisdictions incorporate CIL offences into the domestic order through a rule of reference like the Law, and it is settled by the European Court of Human Rights ('ECtHR') Grand Chamber that prosecutions pursuant to such laws are permissible for conduct criminalised under CIL prior to their promulgation.[19] The Law plainly reflects the legislative intent to prosecute serious CIL crimes committed in Kosovo between 1998-2000.[20]

13. The Defence arguments against this framework depend on disregarding straightforward statutory language, citing authorities out of context, and mischaracterising both the Decision and the standard of review.

14. With respect to this latter point, the Defence repeatedly – and often incorrectly – argues that the Pre-Trial Judge failed to consider or address certain of its legal submissions.[21] All such arguments should be summarily dismissed. Errors of law are subject to a full *de novo* review – the Panel's inquiry for an error of law is solely whether

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

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

[21] *See, e.g.*, Appeal, KSC-BC-2020-04/IA002/F00003, paras 8 ('failed to address'); 9 ('fails to consider'); 10 ('without taking into consideration'; 'did not even attempt to reconcile'); 11 ('failed to address'); 12 ('fails to acknowledge'; 'failed to address'; '[h]ad the Pre-Trial Judge considered…'). Such claims are not limited to the portions of the Appeal relating to CIL. *See, e.g.*, Appeal, KSC-BC-2020-04/IA002/F00003, paras 15 ('fails to consider'; 'failed to . . . assess[]'); 16 ('failed to address and provide sufficient reasons'); 20 ('declin[ed] to consider'); 21 ('declin[ed] to consider'); 22 ('failed to consider'; 'failure to consider'); 23 ('failed to address').

or not the correct legal standard was articulated.[22] There is no requirement for a lower panel to reason purely legal considerations in the same way as factual findings or discretionary decisions, where the Panel must know which evidence/factors were relied upon in order to evaluate the lower panel's determination. If the law was stated correctly, it must be confirmed.

15. The Defence claims that the Decision granted 'unqualified' superiority to CIL over national law[23] and that 'this finding violates Article 16 of the Constitution, which guarantees the primacy of the Kosovo Constitution in the internal legal order.'[24] But this mischaracterises the Decision. In fact, the Pre-Trial Judge recognised the appropriate role of the Constitution[25] and expressly acknowledged that it is the Constitution itself – and Article 19(2) in particular – that gives CIL superiority over domestic laws.[26]

16. The Defence erroneously claims that 'explicit Constitutional provisions' preclude giving CIL precedence over domestic law.[27] But the relevant Constitutional provisions say no such thing. Article 16(1) of the Constitution provides that the Constitution is 'the highest legal act of the Republic of Kosovo' and that '[l]aws and other legal acts shall be in accordance with this Constitution.'[28] Article 19(2) of the Constitution provides that '[r]atified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo.'[29]

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[22] Article 46(4); *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, paras 4-13.
[23] Appeal, KSC-BC-2020-04/IA002/F00003, para.7.
[24] Appeal, KSC-BC-2020-04/IA002/F00003, para.8.
[25] Decision, KSC-BC-2020-04/F00088, paras 65(a); 77 (the KSC must function 'in accordance with, *inter alia*, the Constitution, the Law as the *lex specialis*, and international human rights law'); and 82 (the Law is 'subject to the principles and safeguards provided in the Constitution').
[26] Decision, KSC-BC-2020-04/F00088, para. 65(a), (d).
[27] Appeal, KSC-BC-2020-04/IA002/F00003, para.8.
[28] Article 16(1).
[29] Article 19(2). *See also* Article 16(3) ('The Republic of Kosovo shall respect international law.').

Consistent with this constitutional scheme,[30] the Decision correctly articulated the role of CIL in proceedings before the KSC.[31]

17. The Defence also contends[32] that the Pre-Trial Judge erred in holding that the categorisation of a court of law as domestic, international, hybrid, or otherwise 'is not dispositive of the applicable law.'[33] Specifically, the Defence argues, without elaboration, that this somehow creates 'uncertainty' as to the law to be applied and thus undermines the 'quality of the law.'[34] In fact, the opposite is true: the applicable law remains the same regardless of how the Defence characterises the KSC. None of the cases cited by the Defence[35] support a contrary result. Indeed, in *Jorgic v. Germany*, the ECtHR found that there had been no violation of Article 7 of the ECHR despite conflicting views from contemporaneous legal observers.[36] The ECtHR held that, at the time the crimes were committed, 'the applicant, if need be with the assistance of a lawyer, could reasonably have foreseen that he risked being charged with and convicted of genocide for the acts he committed in 1992.'[37] By this standard, the

[30] *Contra* Appeal, KSC-BC-2020-04/IA002/F00003, para.8.
[31] Decision, KSC-BC-2020-04/F00088, paras 98, 82-87. *See also* Article 3(4) of the Law; Decision on Appeal Against 'Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi, KSC-BC-2018-01/IA001/F00005, 1 October 2021, ('*Lajçi* Appeal Decision'), para. 16.
[32] Appeal, KSC-BC-2020-04/IA002/F00003, para.8.
[33] Decision, KSC-BC-2020-04/F00088, para.82 (citing Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/F00412, 22 July 2021, ('Decision on Case 6 Jurisdiction Motions') paras 98, 98, 99, 101, 102 and, *mutatis mutandis*, *Lajçi* Appeal Decision, KSC-BC-2018-01IA001/F00005, 1 October 2021, public, para.16).
[34] Appeal, KSC-BC-2020-04/IA002/F00003, para.8. Similarly, the Defence fails to explain how the resolution of this issue will affect 'the weight attributed to how the ICTY, ICTR and MICT Statutes have been interpreted.'
[35] Appeal, KSC-BC-2020-04/IA002/F00003, para.9.
[36] ECtHr, *Jorgic v. Germany*, no. 74613/01, 12 July 2007, paras. 109-114 ('*Jorgic v. Germany*').
[37] *Jorgic v. Germany*, para.113.

Accused could plainly have foreseen the possibility of facing charges under CIL. The remaining cases are inapposite.[38]

18. Finally, the Defence questions the impartiality of the Pre-Trial Judge and claims that his interpretation is 'impermissibly teleological' and 'appears aimed to ensure' that the Indictment is upheld.[39] However, the Defence provides no support for these allegations, and they should be summarily rejected.

19. Accordingly, no error is identified in the Pre-Trial Judge's conclusion that CIL applies to proceedings before the KSC.[40]

B. THE KSC SCHEME IS FULLY COMPATIBLE WITH THE NON-RETROACTIVITY PRINCIPLE (GROUND 2)

20. As noted above, the Decision correctly held that no retroactivity issue arises from the domestic adoption of crimes already existing under CIL at the relevant time.[41]

21. The Pre-Trial Judge correctly identified Article 12 as the reference point for the applicable law at the KSC.[42] This provision leaves no ambiguity[43] regarding the role of

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[38] *See* ECtHR, *Gregacevic v. Croatia*, no. 58331/09, 10 October 2012, para.29 (defendant was not given adequate time and facilities to prepare defence); *Negulaescu v. Romania*, no.11230/12, 31 May 2021, paras. 39-42, (applicant's conviction for minor offence was based on decisive evidence from an absent witness); *S.W. v. United Kingdom*, no. 20166/92, 22 November 1995, para.47 (involving changing legal principles relating to marital immunity against prosecution for rape); *G.I.E.M. S.R.L. a.o. v. Italy*, nos. 1828/06 and 2 others, paras. 251-262 (considering whether a criminal sanction had been imposed without establishing personal criminal liability, and concluding that it had not).
[39] Appeal, KSC-BC-2020-04/IA002/F00003, para.9.
[40] Portions of the Defence's retroactivity challenges are raised in the context of Ground 1. *See* Appeal, KSC-BC-2020-04/IA002/F00003, paras 11-12. For clarity, the SPO addresses these arguments below, together with its response to the broader retroactivity arguments made in Ground 2.
[41] Decision, KSC-BC-2020-04/F00088, para.85.
[42] Decision, KSC-BC-2020-04/F00088, para.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….').
[43] *Contra* Appeal, KSC-BC-2020-04/IA002/F00003, para.12.

CIL at the KSC and the fact that the KSC applies CIL 'as applicable at the time the crimes were committed.'[44] The Accused is charged solely with war crimes pursuant to Articles 14 and 16. No crimes are charged pursuant to Article 15, which concerns the substantive criminal laws in force under Kosovo law at the relevant time. Accordingly, as the charges are based solely on international law, CIL at the time of the commission of the crime applies.[45]

22. The KSC must function in accordance with the Constitution,[46] and the KSC's application of CIL is in conformity with relevant non-retroactivity protections in the Constitution.[47] Article 33(1) of the Constitution makes an explicit exception for 'acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law,' which includes the CIL war crimes charged here. This provision from Article 33(1) of the Constitution is consistent with the express language in Article 19(2) of the Constitution that 'legally binding norms of international law have superiority over the laws of the Republic of Kosovo.'

23. The fact that the Kosovo legislature understood the crimes and modes of liability in Articles 14 and 16 as 'legally binding norms of international law' is clear from the plain language of Article 12 and from Article 3(2)(d)'s cross-reference to Article 19(2) of the Constitution. Moreover, noting that the rights and freedoms in the Constitution, including Article 33, are to be interpreted consistent with the jurisprudence of the ECtHR,[48] it is settled by the ECtHR Grand Chamber that this approach is compliant with that framework, and that prosecutions pursuant to

[44] Article 12.
[45] Article 12.
[46] Article 3(2)(a).
[47] *Contra* Appeal, para.12.
[48] Constitution, Article 53.

statutes such as the Law are permissible for conduct criminalised under CIL prior to their promulgation.[49]

24. Although the Defence disputes the Pre-Trial Judge's application of two ECtHR cases,[50] the Pre-Trial Judge correctly relied on these decisions[51] and rejected the Defence's invitation to read in an additional 'flagrantly unlawful' requirement.[52] Indeed, none of the additional cases cited by the Defence[53] stand for the proposition that unlawful conduct must be flagrantly unlawful to comport with Article 7 of the ECHR.[54] Accordingly, the Decision correctly concluded that 'in view of the post-World War II general legal framework, the ongoing ICTY prosecutions at the material time, the relevant international treaties ratified by the SFRY, and the prohibitions set out in the SFRY Criminal Code (some of which mirror the crimes charged) . . . , 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.'[55] The Defence's citation to *Del Río Prada*[56] is readily distinguishable. That case involved domestic sentencing provisions, and at the relevant time 'there was no indication of any perceptible line of case-law development' that could have alerted the applicant to her potential sentencing exposure.[57] By contrast, the Decision correctly held that the

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[49] *See* fn.19 above.
[50] Appeal, KSC-BC-2020-04/IA002/F00003, paras 16, 18.
[51] Decision, KSC-BC-2020-04/F00088, para.86 (citing ECtHR, *Vasilauskas v. Lithuania*, no.35343/05, Judgment, 20 October 2015, para.166 ('*Vasilauskas*')); and ECtHr, *Šimšić v. Bosnia and Herzegovina*, no.51552/10, Decision, 10 April 2012, paras 22-25 ('*Šimšić*')).
[52] Decision, KSC-BC-2020-04/F00088, para.86.
[53] Appeal, KSC-BC-2020-04/IA002/F00003, para.16, fn.27.
[54] In any event, the alleged conduct of the Accused – including, *inter alia*, cruel treatment and torture – was flagrantly and self-evidently unlawful at the time it is alleged to have occurred.
[55] Decision, KSC-BC-2020-04/F00088, para.88 (citations omitted). *See also* Decision, KSC-BC-2020-04/F00088, paras 92-96 (noting the consistent jurisprudence of the contemporary international tribunals and the accessibility and foreseeability of JCE at the time of the charged conduct).
[56] Appeal, KSC-BC-2020-04/IA002/F00003, para.14 (citing ECtHR, *Del Rio Prada v. Spain*, no.42750/09 (GC), 21 October 2013 ('*Del Río Prada*')).
[57] *Del Río Prada*, para.117.

potential for criminal liability under CIL was accessible and foreseeable to the Accused. The Defence's reliance on ECtHR, *Korbely* is similarly unavailing, as that case turned on the ECtHR's substantive judgment that the victim was not a non-combatant.[58] In any event, the Decision properly found that the Defence's argument on this point was waived, as it was raised in the first instance on reply.[59]

25. With respect to the Defence's reliance on the SFRY Constitution,[60] it is not among the authorities listed in Article 3, and the KSC does not function in accordance with that instrument.[61] As such, legal proceedings conducted under UNMIK Regulation 1999/24 – which applied the principle of legality as set forth in the SFRY Constitution – have no bearing on the present inquiry.[62]

26. The drafters of the Law clearly understood the principle of legality in the Constitution to supersede that of the SFRY Constitution. The Kosovo Constitutional Court necessarily reached the same conclusion, finding the constitutional amendment to establish the KSC constitutional so long as the scope of the KSC's jurisdiction complies with the rights provided by Chapters II and III of the Constitution (which includes Article 33 of the Constitution).[63] Moreover, these determinations are

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[58] *Korbely*, 18 September 2008, paras 94-95, Moreover, the Decision correctly found that the Defence's argument on this point was waived, as it was raised in the first instance on Reply. Decision, KSC-BC-2020-04/F00088, para.81.
[59] Decision, KSC-BC-2020-04/F00088, para.81.
[60] 1974 Constitution of the Socialist Federal Republic of Yugoslavia ('SFRY' and 'SFRY Constitution'). Appeal, KSC-BC-2020-04/IA002/F00003, paras 10-11.
[61] Decision, KSC-BC-2020-04/F00088, paras 82-83.
[62] *See* Kosovo, Supreme Court, *Latif Gashi et al.*, AP-KZ no. 139/2004, Decision, 21 July 2005, pp.5-8, *in reference to* Article 1.1 of UNMIK Regulation no.1999/24 on the Law Applicable in Kosovo, UNMIK/REG/1999/24, 12 December 1999 (as amended by regulation 2000/59) ('UNMIK Regulation 1999/24') ('*Gashi et al.*'); Kosovo, Supreme Court, *Veselin Besovic*, AP-KZ no. 80/2004, 7 September 2004, pages 18-19 ('*Besovic*'). *See also* Decision, KSC-BC-2020-04/F00088, para.83 (distinguishing *Besovic* on this basis).
[63] Constitutional Court of the Republic of Kosovo, Case No.K026/15, Judgement – Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the

consistent with Article 7 of the ECHR,[64] which only extends to substantive law such as crimes, modes of liability, and penalties[65] and Article 33 of the Constitution does not define substantive offenses or the penalties for them.[66]

27. Finally, the Pre-Trial Judge correctly found Article 12 to be in conformity with human rights law.[67] Article 12 makes explicit reference to both Article 7(2) of the ECHR and Article 15(2) of the ICCPR. The Pre-Trial Judge did not err in reading all of Article 7 of the ECHR into the provision,[68] noting that the KSC is required to function in accordance with international human rights law[69] and Article 7(2) must be read concordantly with Article 7(1) of the ECHR.[70] The Decision correctly applied relevant ECtHR jurisprudence holding that no violation of Article 7(1) obtains provided that a conviction was based on either conventional international law or CIL as applicable at the time.[71]

28. Accordingly, no error is identified in the Pre-Trial Judge's conclusion that the application of CIL at the KSC does not offend the principle of non-retroactivity as stated in the Constitution or international human rights law.

Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433/DO-318, 15 April 2015, paras 45, 57, 59-60.

[64] *Contra* Appeal, KSC-BC-2020-04/IA002/F00003, para.14 (contending that Article 7 imposes an 'unconditional prohibition' against retrospective application of criminal law).

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

[66] Constitution, Article 33 (expressly addressing 'penal offences' and punishments).

[67] Decision, KSC-BC-2020-04/F00088, para.85.

[68] *Contra* Appeal, KSC-BC-2020-04/IA002/F00003, para.12.

[69] Article 3(2)(e). *See also* Constitution, Article 22.

[70] ECtHR, Grand Chamber, *Maktouf and Damjanović v. Bosnia and Herzegovina*, 2312/08 and 34179/08, Judgment, 18 July 2013, para.72.

[71] Decision, KSC-BC-2020-04/F00088, para.86 (citing *Vasilauskas* and *Šimšić*).

C. JCE I AND III ARE FOUND IN ARTICLE 16(1)(A) OF THE LAW (GROUND 3)

29. The Decision correctly finds that JCE, under the first and third forms of liability, is a form of commission recognised in Article 16(1)(a) of the Law.[72] The conclusory Defence arguments challenging this finding[73] misrepresent the Decision[74] and fail to demonstrate any error.

30. The Decision provides sufficient reasoning and expressly confirms that Article 16(1)(a) must be interpreted within the context of the KSC's legal framework.[75] The Decision does not suggest that *any* CIL mode would be applicable, rather that JCE, which is a form of commission, is applicable because of, *inter alia*, the legal framework of the KSC and the specific language of Article 16(a)(1).[76] The Pre-Trial Judge further explained that 'commission' can be understood by assessing the interpretation of virtually identical statutory provisions of other courts.[77] This is consistent with Article 3(3) of the Law and is appropriate, as the enumerated courts also apply CIL modes of liability to war crimes, according to their statutes.

31. The Pre-Trial Judge's interpretation of Article 16(1)(a) should be affirmed. In 2015, when the Law was adopted, five courts – interpreting virtually identical language – had consistently determined that JCE is a form of commission, a

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[72] *See* Decision, KSC-BC-2020-04/F00088, paras 90-97.
[73] Appeal, KSC-BC-2020-04/IA002/F00003, paras 20-22.
[74] The Pre-Trial Judge considered Defence arguments on the basis of JCE III in CIL, including relating to the ECCC and U.K. (*contra.* Appeal, KSC-BC-2020-04/IA002/F00003, paras 21-22; *see* Decision, KSC-BC-2020-04/F00088, para.93). The Decision also specifically addressed the question of accessibility and foreseeability (*contra.* Appeal, KSC-BC-2020-04/IA002/F00003, para.20 (erroneously implying that this element was somehow 'taken for granted'); *see* Decision, KSC-BC-2020-04/F00088, para.95). Such arguments should be summarily rejected (see para.14 above).
[75] Decision, KSC-BC-2020-04/F00088, para.91.
[76] Decision, KSC-BC-2020-04/F00088, para.91. *See also* Response to Preliminary Motion, KSC-BC-2020-04/F00071, paras 48-50.
[77] Decision, KSC-BC-2020-04/F00088, para.91.

statutorily-prescribed means of incurring individual criminal responsibility for war crimes and crimes against humanity.[78]

32. Like the ICTY Statute and other similar statutes, the Law was not enacted in a void. It therefore must be interpreted with consideration of its context, object and purpose.[79] Article 1, the Scope and Purpose of the Law, states that the court shall exist to, *inter alia*, 'ensure secure, independent, impartial, fair and efficient criminal proceedings'.[80] Fulfilling the Law's purpose requires applying it to those responsible for the crimes within the KSC's jurisdiction, whether they acted alone or together with others.[81] This was an animating concern for the drafters of the Council of Europe Report, who expressed concern about the gravity of crimes and the commission of crimes by those participating in a group.[82] The Law was designed to, and does, include JCE as a mode of liability for precisely these circumstances.

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[78] ICTY, Appeals Chamber, *Prosecutor v. Tadić*, IT-94-1-A Judgement, 15 July 1999 ('*Tadić*'), para.190; ICTY, Appeals Chamber, *Prosecutor v. Milutinović et al.*, IT-99-37-AR72 'Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*', 21 May 2003 ('*Ojdanić*'), para.20; ECCC, Trial Chamber, *Co-Prosecutors v. Kaing Guek Eav* alias *Duch*, 001/18-07-2007/ECCC/TC Judgement, 26 July 2010 ('*Duch*'), para. 511; ECCC, PTC, 002/19-09-2007-ECCC/OCIJ (PTC38) 'Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)', 20 May 2010 ('PTC Decision on JCE'), para.49; ECCC, Trial Chamber, 0002/19-09-2007/ECCC/TC 'Decision on the Applicability of Joint Criminal Enterprise', 12 September 2011 ('ECCC TC JCE Decision') paras 15, 22; ICTR, Appeals Chamber, *Prosecutor v. Ntakirutimana and Ntakirutimana, ICTR-96-10-A* and *ICTR-96-17-A* Judgement, 13 December 2004, paras 461-484; SCSL, Trial Chamber II, *Prosecutor v. Brima et al.*, SCSL-04-16-T 'Decision on Defence Motions for Judgment of Acquittal pursuant to Rule 98', 31 March 2006 ('*Brima*'), paras 308-326.

[79] Response to Preliminary Motion, KSC-BC-2020-04/F00071, paras 51-52.

[80] Article 1.

[81] *See, e.g.*, Articles 13-14 (jurisdiction for war crimes and crimes against humanity), Article 16(a)(b-d) (noting and dispensing with any impediment to prosecution based on official position, order by a government or superior, or based on the acts of subordinates).

[82] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report: Inhumane treatment of people and illicit trafficking in human organs in Kosovo, Doc.12462, 7 January 2011 ('Council of Europe Report') Executive Summary, Draft Resolution, para.14, paras 7, 69, 169-174, 176. *See also* Article 1; Law No. 04/L-274 on Ratification of the International Agreement Between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo, 23 April 2014.

33. The inclusion of JCE as a mode of liability has been found to reflect the reality of many crimes committed during a period of conflict or unrest. Courts adjudicating the same and related substantive crimes have consistently found that these crimes are frequently perpetrated by groups of individuals acting together in pursuance of a common criminal design, and not solely based on the criminal proclivity of an individual.[83] Some participants may be physical perpetrators, and those who are not may be found to have also made contributions of the same or similar moral gravity.[84] The modes of liability appropriate in such settings support accountability for those whose significant contributions make possible the physical perpetration of crimes.[85]

34. Prosecution of all persons who committed violations of Article 14 is consistent with the plain language, context, object and purpose of the Law, and reflects the nature of the crimes committed during periods of conflict or unrest. The text of Article 16(1)(a), interpreted in light of these factors, includes responsibility for all perpetrators who contribute to the commission of crimes carried out jointly, by a group of persons acting pursuant to a common criminal purpose or JCE.[86]

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[83] *Tadić*, para.191; PTC Decision on JCE, para.55; SCSL, Appeals Chamber, *Prosecutor v. Taylor*, SCSL-03-01A Judgment, 26 September 2013, para.383.
[8484] *Tadić*, para. 191.
[8585] *Tadić*, para.192; ICTR, Trial Chamber, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Nzirorera, Karemera, Rwamakuba and Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 11 May 2004, para.36; ICTR, Appeals Chamber, *Prosecutor v. Rwamakuba*, ICTR-98-44-AR72.4 'Decision on Interlocutory Appeal regarding Application of Joint Criminal Enterprise to the Crime of Genocide', 22 October 2004 ('*Rwamakuba*'), para.29.
[86] *See similarly Tadić*, paras 186, 190 (the Appeals Chamber concluded that the jurisdiction conferred in the Statute must apply *to all those* who participated in the commission of the crimes in question, including '[w]hoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose'); Report of the Secretary-General Pursuant to Paragraph 2 of Security council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993 ('Report of the Secretary-General').

1. JCE III Has CIL Status and is Applicable at the KSC

35. The Pre-Trial Judge correctly found that JCE III (along with JCE I) was part of CIL during the temporal jurisdiction of the KSC and that JCE III is compatible with the principle of individual culpability.[87] The Defence fail to explain how the weight of authorities relied on by the Pre-Trial Judge can lead to any conclusion other than the one reached — that JCE formed part of CIL at the relevant time. An examination of the CIL status of JCE, as previously conducted by the Pre-Trial Judge, and as briefly set out below,[88] confirms this finding.

36. The roots of modern JCE liability extend to no later than the waning days of WWII, when many nations acting jointly adopted a legal framework for future prosecutions of grave crimes.[89] The establishment of the IMT, the adoption of its Charter ('IMT Charter'), and the adoption of Control Council Law No.10 ('CCL10'),

[87] Decision, KSC-BC-2020-04/F00088, paras 92-93. *Contra* Appeal, KSC-BC-2020-04/IA002/F00003, paras 20-22. The Pre-Trial Judge was also correct to decline to consider certain Defence arguments on the grounds that Torture, the only charged offence that requires a specific intent, is not charged pursuant to JCE III. Decision, para.93.
[88] The Defence's failure to provide arguments in support of its claim of alleged error prejudices the SPO's ability to meaningfully respond in a focused manner.
[89] *See also* Response to Preliminary Motion, KSC-BC-2020-04/F00071, 6 September 2021, paras 56-58.

all accomplished pursuant to the agreements of various states,[90] provided the 'machinery for the actual application of international law theretofore existing'.[91]

37. The IMT Charter and CCL10 contain provisions for criminal liability for participation in a common purpose, plan or enterprise.[92] The language of the IMT Charter, applies not only to crimes falling within the common plan (JCE I), but also for other crimes committed in the execution of the plan or connected to the plan (JCE III). Further, as has been established before other appellate chambers, the IMT Charter and CCL10, as well the pleadings and decisions from the cases tried pursuant to those instruments, have much in common with the modern elements of JCE, but do not always employ language that 'fit[s] neatly' into each of the three categories of JCE.

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[90] The IMT was established by agreement between the Allied Powers with the following countries expressing adherence to the agreement: Yugoslavia, Greece, Denmark, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay *See United States of America v. Goering et al.*, International Military Tribunal, Judgement, 1 October 1946, in *Trial of the Major War Criminals* (Vol. I, 1947) ('IMT Judgement'), p.171. The IMT Charter was adopted in August 1945. Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945 ('IMT Charter'), p.1 ('The Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of the Soviet Socialist Republics acting in the interests of all the United Nations and by their representatives duly authorized thereto have concluded this Agreement'). CCL10 was enacted by legislative act, jointly passed by the four occupying powers (United States, Soviet Union, France and Great Britain), reflecting international agreement as to the law applicable to international crimes and the jurisdiction of the military courts charged with adjudicating these cases. *See* PTC Decision on JCE, para.57. Courts applying CCL10 tried 'next level' war criminals, other than those tried at the IMT, were also to follow the IMT Charter and jurisprudence of the IMT. CCL10; PTC Decision on JCE, para.57, fn.164.

[91] *United States of America v. Ohlendorf et al*., 1947, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (United States Government Printing Office, Vol. IV, 1951) ('*Einsatzgruppen*'), p.459. *See* SPO Response JCE, paras 34-36.

[92] Article 6 of the IMT Charter provides that persons: 'participating in the formulation or the execution of a common plan or conspiracy to commit [crimes against peace, war crimes, or crimes against humanity] are responsible *for all acts performed by any persons* in execution of such plan'. IMT Charter, Article 6 (emphasis added). Article II(2) of CCL10 provides that '[a]ny person…is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was *connected with plans or enterprises involving its commission*'. CCL10, Article II(2) (emphasis added).

Modes of liability or their constitutive elements are not described with the same methodology and terminology of modern international courts.[93] This, however, is not necessary under the principle of legality, which only requires that an accused be able to appreciate that his or her conduct is criminal in the sense generally understood, without reference to any specific provision.[94]

38. It remains apparent that these laws and post-WWII casesproceed upon the principle that when two or more persons act together to further a common criminal purpose, offenses perpetrated by any of them may entail the criminal liability of all the members of the group.[95] The ICTY Appeals Chamber in *Tadić,* and numerous other benches of similarly-situated courts,[96] have determined that the post-WWII cases reveal that accused persons were tried based on their actions taken as part of a common design, purpose or plan, with others, including in instances in which it was proven that an accused intended the commission of crimes as part of that plan or design.[97] Other trials revealed liability based on the same *actus reus* requirements, but

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[93] *See Rwamakuba*, para.24.
[94] ICTY, Appeals Chamber, *Prosecutor v. Hadžihasanović et al*., IT-01-47-AR72 'Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility', 16 July 2003, para.34.
[95] *See Tadić,* para.195.
[96] Two of the cases cited in full in the following footnote ('*Justice'* and *'RuSHA'*) were not considered in *Tadić,* however, the ECCC PTC and the ICTY and ICTR Appeals Chamber have found them to be valid illustrations of the state of CIL in respect of JCE. *See* PTC Decision on JCE, paras 65-68; *Rwamakuba*, paras 14-31; *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, 3 April 2007 ('*Brđanin*'), paras 394, 404; *Prosecutor v. Milutinovic*, IT-05-87-PT, Separate Opinion of Judge Bonomy, 22 March 2006 ('Bonomy Separate Opinion') annexed to ICTY, Trial Chamber, *Prosecutor v. Milutinovic et al.*, IT-05-87-PT 'Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration', 22 March 2006, paras 15-26; ICTY, Appeals Chamber, *Prosecutor v. Krajišnik*, IT-00-39-A, 17 March 2009, para.659.
[97] The cases contained in the following non-exhaustive list, which have various fact patterns and relate to accused persons with varying positions and types of contributions, relate to a mode of liability akin to the modern term JCE I: (i) *United States v. Alstoetter et al.,* U.S. Military Tribunal, Judgement, 3-4 December 1947, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (Vol. III, 1951) Indictment ('*Justice'*); (ii) *United States v. Greifelt et al.,* U.S. Military Tribunal, Judgement, 10 March 1948, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (Vol. IV-V, 1951) (*'RuSHA');* (iii) IMT Judgement, 1 October 1946; (iv) *Einsatzgruppen*; (v) *Trial of Sandrock et al.,* British Military Court for the Trial of War Criminals, Almelo, Holland, 24th-26th November 1945, in *UNWCC* (Vol. I); (vi) *Holzer et al.,* Canadian Military Court, 25 March-6 April

extending to crimes outside the common plan which were considered a foreseeable consequence of it.[98]

39. The doctrine of JCE III, which was systematised in *Tadić* and grounded the existence of this mode at the time of the crimes forming the subject of that case, has been further recognised by the modern international (or internationalised) courts applying CIL with comparable governing laws to those of the KSC. JCE III specifically

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1946, in *Record of Proceedings at Aurich, Germany* (Vol. I); (vii) *Trial of Gustav Alfred Jepsen et al.*, Proceedings of a War Crimes Trial held at Luneberg, Germany 13-23 August 1946, Judgement, 24 August 1946; (viii) *Trial of Franz Schonfeld et al.*, British Military Court, Essen, June 11th-June 26th 1946, in *UNWCC* (Vol. XI); (ix) *United States v Hans Ulrich and Merkle*, Case No. 000-50-2-17, 7708 War Crimes 78 79 80 Group – European Command, Review and Recommendation, 12 June 1947; (x) *United States v Hans Wuelfert et al*, Case No. 000-50-2-72, 7708 War Crimes Group – European Command, Review and Recommendation, 19 September 1947.

[98] The cases contained in the following non-exhaustive list, which have various fact patterns and relate to accused persons with varying positions and types of contributions, relate to a mode of liability akin to the modern term JCE III: (i) *United States v. Kurt Goebell et al.*, Case No. 12-489, Review and Recommendations, 1 August 1947; (ii) *United States v. Hartgen et al.*, Case No. 12-1497, United States Military Commission, Review and Recommendation, 29 September 1945 ('*Rüsselsheim*'); (iii) *Queen v. Ikeda*, Case No. 72A/1947, Judgement, 8 September 1948; (iv) *Prosecutor v. Kumakichi Ishiyama et al.*, Australian Military Court, 8-9 April 1946, p.5; (v) *Trial of Erich Heyer et al.*, British Military Court for the Trial of War Criminals, Essen, 18-19 and 21-22 December 1945, in *UNWCC* (Vol. I); (vi) *United States of America v. Tashiro et al.*, Review of the Staff Judge Advocate, 7 January 1949. In addition, *Tadić* considered the case of D'Ottavio and others, tried before an Italian court in 1947. *D'Ottavio et al.*, Italian Court of Cassation, Criminal Section I, Judgement no. 270 of 12 March 1947, *Journal of International Criminal Justice* 5 (2007), pp.232-234. The case features international elements (the victims were foreign prisoners of war) and may thus qualify as state practice relevant to the identification of a rule of CIL, including with respect to modes of liability. *See* ECCC, Supreme Court Chamber, *Co-Prosecutors v. Nuon Chea and Khieu Samphân*, 002/19-09/2007-ECCC/SC, Appeal Judgement, 23 November 2016 ('SCC AJ'), para.805. In addition, Italy's extensive involvement in WWII and its occupation by Nazi-Fascist forces between 1943 and 1945 caused it to be extensively involved with the investigation and trial of a high number of war crimes (*see e.g.* F. Focardi, Giustizia e ragion di Stato – La punizione dei criminali di Guerra Tedeschi in Italia, in Storicamente, December 2006, pp.492-497). This is a relevant circumstance because, when assessing the generality of state practice with respect to the formation of custom, the practice of states that are particularly faced with certain questions of law may be given particular consideration, *see* United Nations, Report of the International Law Commission, Sixty-Eighth Session (2 May-10 June and 4 July-12 August 2016), A/71/10, p.76 - Text of the draft conclusions on identification of CIL adopted by the Commission, Conclusion 8, p.85. *See also* ICJ, *Jurisdictional Immunities of the States (Germany v. Italy: Greece intervening),* Judgment, 3 February 2012, ICJ Reports 2012, p.123, para.55; ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands),* Judgment, 20 February 1969, *ICJ* Reports 1969, p.43, para.74; Decision on Case 6 Jurisdiction Motions, KSC-BC-2020-06/F00412, para.186.

has been affirmed by the ICTY,[99] the ICTR,[100] the IRMCT,[101] the SCSL,[102] the STL,[103] and other international or internationalised tribunals.[104] All three chambers of the ECCC and the Co-Investigative Judges have recognised the existence of JCE I and II in CIL.[105] Such widespread recognition of a principle in CIL underscores the acceptance and subsequent application of the principles underlying this mode of liability, which were enumerated in the WWII-era and which have continued to be found applicable for trials across a broad array of actors, conflicts and legal systems.

40. The Defence's argument regarding the compatibility of JCE III with the principle of individual culpability[106] also fails, because it does not acknowledge a foundational requirement of JCE: that there must be participation by the accused, which may take the form of assistance in or contribution to, the execution of the common purpose.[107] The Accused is charged not for membership in a joint criminal enterprise, but for the part he played in carrying it out, which needs to be at least 'significant'.[108] Under JCE III, a JCE member is being held liable for the foreseeable consequences of a criminal purpose involving grave crimes, which s/he intentionally

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[99] *See e.g. Prosecutor v. Prlić et al.*, IT-04-74-A, Judgement – Volume II, 29 November 2017, para.590; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A Judgement, 28 February 2005, paras 81-83, 86.
[100] *See e.g.* ICTR, *Prosecutor v. Karemera and Ngirumpatse*, ICTR-98-44-A, Judgement, 29 September 2014, paras 623, 627, 629.
[101] *See e.g.* IRMCT, Appeals Chamber, *Prosecutor v. Karadžić*, MICT-13-55-A, Judgement, 20 March 2019, para.433.
[102] *Brima*., paras 308-326; *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgment, 22 February 2008, para.84.
[103] STL, STL-11-01/I, Interlocutory Decision on the Applicable Law, 16 February 2011 ('STL Decision on Applicable Law'), paras 239-247.
[104] Extraordinary African Chambers, Trial Chamber, *Ministere Public v. Hissene Habré*, Judgment, 30 May 2016, para.1885.
[105] ECCC, OCIJ, 002/19-09-2007-ECCC-OCIJ 'Decision on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise', 8 December 2009, para.23; *Duch*, paras. 511-512; ECCC TC JCE Decision, paras. 15, 22; PTC Decision on JCE, para.69; SCC AJ, para.807.
[106] Appeal, KSC-BC-2020-04/IA002/F00003, para.22.
[107] *Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, 25 February 2004, para.100; *Brđanin*, para.424.
[108] *Brđanin*, para.430.

participated in and significantly contributed to.[109] The 'additional crime' that an accused could be responsible for under JCE III is nothing more than the 'outgrowth' of previously agreed or planned criminal conduct for which each JCE member is *already* responsible.[110] As such, it only arises where a perpetrator who already had criminal intent, and had made a significant contribution, could and did foresee the possibility of an additional crime and willingly took that risk.[111]

41. JCE liability was also sufficiently foreseeable and accessible at the relevant time to warrant its application the Accused.[112] The vast body of law arising after WWII, recounted in *Tadić* and subsequent cases, and found in other sources such as manuals for war crimes trials,[113] made JCE liability foreseeable to the Accused. This is further reinforced by strikingly similar provisions of the SFRY Code in force in Kosovo at the relevant time, a fact that has been recognised by the courts of Kosovo and the ICTY, respectively.[114] Persons in Kosovo could also be held criminally liable for crimes that they did not intend, but which were merely a possible or foreseeable outcome of their

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[109] *Contra* Appeal, KSC-BC-2020-04/IA002/F00003, para.22 (no requirement for a significant contribution).
[110] STL Decision on Applicable Law, para.243.
[111] STL Decision on Applicable Law, paras 243, 245.
[112] *Contra* Appeal, KSC-BC-2020-04/IA002/F00003, para.20.
[113] For example, the 1946 U.S. War Crimes Trial Manual, which included specific references to the principles underlying JCE III, was applied in post-WWII international jurisprudence. It sets out the law with relevant citations to immediate post-WW II jurisprudence, including Rüsselsheim, and outlines the following principle: 'All who join in a common design to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, are responsible for a homicide committed by one of them while acting in pursuance of or in furtherance of the common design, although not specifically contemplated by the parties, or even forbidden by defendant, or although the actual perpetrator is not identified.' War Crimes Trial Manual, Section 410, 15 July 1946, p.305.
[114] In respect of Art.22, see Basic Court of Mitrovica, Judgment, 12 September 2013, No. 14/2013, p.37; Court of Appeals of Kosovo, Judgment, 11 September 2013, PAKR 966/2012, para.74; Court of Appeals of Kosovo, Judgment, 30 January 2014, PAKR 271/2013, paras 36-39; Supreme Court of Kosovo, Judgment, 7 August 2014, PAII 3/2014, paras C 5 xli.-xii. In respect of Art.26 see Supreme Court of Kosovo, Judgment, 10 April 2009, Ap.-Kz No 371/2008, p.14-16, 63-64; *Ojdanić*, para.40 (noting the striking similiarity between Article 26 and JCE).

conduct.[115] Moreover, it cannot be accepted that a person from Kosovo, part of the former Yugoslavia, in 1998-1999, during the time of investigations and prosecutions by the ICTY, could be unable to foresee that committing crimes could result in prosecution for war crimes including through the use of modes accepted in CIL.

42. Accordingly, the Pre-Trial Judge's findings in respect of JCE are correct and the Defence fails to demonstrate error.

D. THE KSC HAS JURISDICTION OVER ARBITRARY DETENTION (GROUND 4)

43. The Defence makes a bald assertion that the Pre-Trial Judge's finding on arbitrary detention was 'manifestly unreasonable',[116] but does not present relevant arguments in support of its claim nor specify what particular aspects of the Decision it challenges. The submissions are cursory and conclusory to a degree which is patently inadequate. The Appeal should be dismissed on this basis alone. However, Ground 4 also fails on its merits.

44. In the Decision, the Pre-Trial Judge concluded that Article 14 provides a sound legal basis to exercise jurisdiction over war crimes under CIL, including beyond those expressly listed.[117] The use of non-exhaustive ('including') language in Article 14(1)(c) plainly supports the legislative intent that the KSC have jurisdiction over war crimes

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[115] Articles 11 and 13 of the SFRY Criminal Code; Supreme Court of Kosovo, Judgment, 29 May 2012, Ap-Kz 67/2011, p.7-9. That some courts took a different view does not mean that Articles 11 and 13 of the SFY Criminal Code did not in fact provide for a *mens rea* standard which mirrors JCE I and JCE III.
[116] Appeal, KSC-BC-2020-04/IA002/F00003, para.23. Reasonableness is not the relevant standard for an alleged error of law. Arguments that Defence submissions on arbitrary detention were not addressed in the Decision or that the Decision was inadequately reasoned (Appeal, KSC-BC-2020-04/IA002/F00003, para.23) should similarly be dismissed noting that (i) the Defence fails to identify the submissions it claims were not considered, (ii) the Decision in fact specifically cites to and considers Defence submissions in every paragraph of its reasoning on arbitrary detention (Decision, KSC-BC-2020-04/F00088, paras 98-102), and (iii) in respect of an alleged error of law, the relevant inquiry is simply whether the Decision stated the law correctly (see para.14 above).
[117] Decision, KSC-BC-2020-04/F00088, para.99.

under CIL beyond those expressly listed.[118] Contrary to Defence submissions,[119] this does not implicate the principle of legal certainty given that (i) the scope of the provision is still circumscribed to serious violations of Common Article 3,[120] and (ii) any such offence must, in conformity with Articles 3(2)(d) and 12, have existed under CIL at the time it was committed.[121]

45. Relying on diverse sources and evidence of CIL, the Pre-Trial Judge correctly found that arbitrary detention – namely, deprivation of liberty without a legal basis or without fundamental safeguards – is incompatible with the requirement of humane treatment and constitutes a serious violation of international humanitarian law, including Common Article 3.[122] The purpose of Common Article 3 'is to uphold and protect the inherent human dignity of the individual' and its general proscription is against inhumane treatment.[123]

46. The principle of humane treatment applies equally across international humanitarian law[124] and arbitrary detention is well-established as conduct which violates this principle.[125] Indeed, the fundamental guarantee against arbitrary

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[118] Decision, KSC-BC-2020-04/F00088, para.99.
[119] Appeal, KSC-BC-2020-04/IA002/F00003, para.23.
[120] Decision, KSC-BC-2020-04/F00088, para.100.
[121] Decision, KSC-BC-2020-04/F00088, para.99. *See also* Response to Preliminary Motion, KSC-BC-2020-04/F00071, paras 30-44.
[122] Decision, KSC-BC-2020-04/F00088, para.100.
[123] ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-T, Judgment, 25 June 1999, para.49. *See* also para.51 ('[t]he general proscription in common Article 3 is against inhuman treatment').
[124] Commentary of 2017, para.1422 ('[g]iven that it is based on the fundamental concept of human dignity, the standard of humane treatment is the same for all categories of protected persons and applies equally in international and non-international armed conflict'); ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, 16 November 1998 ('*Delalić*'), para.543 ('acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment').
[125] As a grave breach: Commentary of 2016, paras 2977-2978 (inhuman treatment is the 'umbrella' under which all of the grave breaches fall; unlawful confinement of civilians is a grave breach pursuant to Article 147 of the Fourth Geneva Convention); *Delalić*, 16 November 1998, para.543 (grave breaches fall under the umbrella of inhuman treatment). *See also* ICTY, *Prosecutor v. Blaškić*, IT-95-14-T, Judgment, 3

detention is recognised in CIL[126] and non-derogable.[127] Arbitrary detention also violates and threatens other fundamental rights, including life, liberty, and security.[128] Respect for fundamental and non-derogable rights is a necessary component of the prohibition of inhumane treatment enshrined in Common Article 3.[129]

47. Moreover, the fair trial rights guaranteed in Common Article 3(1)(d)[130] are necessarily incompatible with the possibility of permitting arbitrary detention in non-international armed conflicts ('NIACs'). It would be pointless to oblige a party to the conflict to respect the fair trial rights of a detainee if, at the same time, that party is free to by-pass that requirement by carrying out detentions without any legal basis or

March 2000, para.154. As a crime against humanity: Article 13(1)(j) ('other inhumane acts') indicates that the other enumerated crimes against humanity, including imprisonment (Article 13(1)(e)), are also inhuman. *See also* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, para.48 ('Crimes against humanity refer to inhumane acts of a very serious nature'); Kosovo, Supreme Court, *Latif Gashi et al.*, Plm. Kzz. 18/2016, Judgment, 13 May 2016, para.58 ('[d]uring the armed conflict, the civilians shall be treated humanely, whereas arbitrary deprivation of liberty and beating is not compatible with this requirement.'); ICRC, Customary International Humanitarian Law, Volume I: Rules, Jean-Marie Henckaerts and Louise Doswald-Beck, 2005 (reprinted with corrections in 2009) ('ICRC CIL Study'), Rule 99, p.344 ('common Article 3 of the Geneva Conventions, as well as both Additional Protocols I and II, require that all civilians and persons *hors de combat* be treated humanely (see Rule 87), whereas arbitrary deprivation of liberty is not compatible with this requirement').

[126] ICRC CIL Study, Rule 99, p.344. *See also* Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Columbia, 26 February 1999, Chapter IV, para.300 (considering in the context of an internal armed conflict that 'detentions by paramilitary groups may be considered to constitute arbitrary deprivations of liberty, in violation of international humanitarian law').

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

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

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

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

basic procedural guarantees.[131] The prohibition of arbitrary detention as a threshold matter is therefore implicit in Common Article 3.

48. In addition, in light of state practice and *opinio juris*, the Pre-Trial Judge correctly found that, during the time period relevant to the charges in this case, a customary rule existed that criminalised arbitrary detention as a war crime in NIACs and was accessible and foreseeable to the Accused.[132]

49. Arbitrary detention is a serious[133] violation of the rule of humane treatment in Common Article 3. Serious violations of this rule entail individual criminal responsibility under CIL. Accordingly, the crime of arbitrary detention falls within the jurisdiction of the KSC under Article 14(1)(c).

50. The Decision correctly concluded 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.[134] Indeed, Article 142 of the SFRY Code specified that the acts proscribed therein, including illegal arrests and detentions, were criminalised insofar as they constituted

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[131] *See, similarly*, General Comment No.35, para.14 ('[t]he regime must not amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections'). *See also* ECCC, *Case against Nuon and Khieu*, 002/19-09-2007/ECCC/TC, Case 002/02 Judgment, 16 November 2018, para.2584 ('[t]he arbitrary arrests, the systematic failure to inform and sufficiently particularise the charges levelled against prisoners that allegedly caused their detention, the prolonged detention without access to procedural safeguards or any ability to challenge their detention all demonstrates the flagrant, deliberate and continuous denial of due process rights that constitutes arbitrary detention contrary to international law').
[132] Decision, KSC-BC-2020-04/F00088, para.101.
[133] Decision, KSC-BC-2020-04/F00088, para.100.
[134] Decision, KSC-BC-2020-04/F00088, para.102.

a violation of 'rules of international law effective at the time of war'.[135] As demonstrated above, arbitrary detention, which is incompatible with the requirement of humane treatment, constitutes a serious violation of Common Article 3 recognised in CIL and is therefore within the scope of acts criminalised in NIACs under Article 142 of the SFRY Code.[136]

51. Moreover, the United Nations ('UN') condemnations cited by the Pre-Trial Judge[137] constitute evidence that, in the context of NIACs, the prohibition of arbitrary detention was recognised under CIL, in particular as a serious violation of the requirement of humane treatment. As set out above, such serious violations fall within the scope of prohibited acts under Common Article 3 and, in turn, entail individual criminal responsibility.

52. Nothing in the Defence's conclusory statements in the Appeal supports a contrary result.

V. RELIEF REQUESTED

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

Word Count: 8967

[135] *See also* Article 12, stating that the substantive criminal law of Kosovo applies insofar as it complies with CIL.
[136] *See* Decision, KSC-BC-2020-04/F00088, para.88, fn.195.
[137] Decision, KSC-BC-2020-04/F00088, para.102.

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Jack Smith

Specialist Prosecutor

Monday, 29 November 2021
At The Hague, the Netherlands.