Case No.:	**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
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THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Defence Reply to Prosecution Reponse to Appeal against 'Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers'

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I. INTRODUCTION

1. The Defence for Mr Pjetër Shala ('*Defence*') hereby replies to the Prosecution's response to the Appeal against the '*Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers*'.[1]

2. While this Reply is limited to the issues raised in the Response, the Defence maintains its original submissions in full and rejects all submissions made by the Prosecution in their entirety.

II. SUBMISSIONS

A. CIL cannot be attributed unqualified superiority, particularly where this violates fundamental rights of the Accused

3. At the outset, the Defence invites the Appeals Chamber to address its grounds of appeal as presented and not as interpreted by the SPO.[2] The application of customary international law ('*CIL*') in the manner set out in the Impugned Decision is incorrect for multiple reasons, each of which engages different fundamental rights of the Accused and has been developed in separate grounds of appeal.[3]

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[1] KSC-BC-2020-04/IA002, F00008, Prosecution response to Defence appeal against the 'Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers' with public Annex 1, 29 November 2021 ('*Response*'); KSC-BC-2020-04/IA002, F00003, Defence Appeal against Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 9 November 2021 ('*Appeal*'), paras. 4, 7-24; KSC-BC-2020-04, F00088, Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 18 October 2021 ('*Impugned Decision*'). All further references to filings in this Motion concern Case No. KSC-BC-2020-04 unless otherwise indicated. The Defence requests an extension of the applicable word limit by 1,210 words. The extension is required given the importance of the matters at stake.

[2] *See, generally,* Response and specifically Response, para. 9 (*referring to* a 'preliminary matter').

[3] Appeal, paras. 4, 7-24.

4. The Law constitutes indeed domestic legislation, which, as such, cannot be interpreted in a vacuum, as the SPO suggests, but as part and parcel of the Kosovo legal order.[4] It must be interpreted consistently with Constitutional guarantees as to the fairness of the proceedings as well as guarantees that are binding by virtue of international human rights instruments.[5]

5. The lack of clarity as to the applicable law breaches the standards as to the '*quality of law*' required under Article 7 ECHR and 33 of the Constitution in terms of the accessibility, foreseeability and precision that are required for a legislative framework to constitute a proper foundation of criminal proceedings.

6. As set out in the Appeal,[6] at the time material to the Indictment against Mr Shala the constitution that was in force in Kosovo was the 1974 SFRY Constitution.[7] Article 181 of the 1974 SFRY Constitution provided that '*[n]o one shall be punished for any act, which before its commission was not defined as a punishable offence by law or a legal provision based on law, or for which no penalty was*

[4] Response, para. 10.
[5] *See also* Kosovo Constitution, Article 53.
[6] Appeal, para. 10. *See also* F00054, Preliminary Motion of the Defence of Pjeter Shala to Challenge the Jurisdiction of the KSC, 12 July 2021, para. 12 (where the Defence explicitly argued that at the time of commission of the relevant offences the 1974 SFRY Constitution applied which required criminal offences to be set out in a domestic statute and relied in this respect on Supreme Court of Kosovo (UNMIK), Case against Veselin Bešović, AP-KZ no. 80/2004, 7 September 2004 which declared the 1974 SFRY Constitution appliable because of the principle of legality and specifically the principle that 'subsequent provisions can only be applied if more favourable to the accused.' See Supreme Court of Kosovo (UNMIK), Case against Veselin Bešović, AP-KZ no. 80/2004, 7 September 2004, pp. 18, 19. The Defence notes that this highlights that it properly argued the applicability and violation of Article 7 ECHR by the fact that the Pre-Trial Judge failed to apply the correct legislative framework to the circumstances of this case. The Pre-Trial Judge erred in dismissing the Defence submissions on grounds that they were not properly raised and failed to provide adequate reasoning in this respect which constitutes an additional error of law in the Impugned Decision.
[7] Supreme Court of Kosovo (UNMIK), Case against Latif Gashi et al., AP-KZ no. 139/2004, 21 July 2005, pp. 6, 12; Supreme Court of Kosovo (UNMIK), Case against Veselin Bešović, AP-KZ no. 80/2004, 7 September 2004, pp. 18, 19.

envisaged. Criminal offences and criminal sanctions may only be determined by statutes.'

7. The Supreme Court of Kosovo held in non-equivocal terms that '*the constitutional principle of legality presupposes that criminal offences and punishments must be provided for in specific legislation*.'[8] The Supreme Court also held that '*taking into account that the SFRY provisions are* prima facie *dispositive in criminal matters pursuant to Regulation No. 1999/24, and that subsequent provisions can be applied only if more favourable to the accused, in practice the conduct set out in article 142 of the Criminal Law of FRY constitutes a war crime only if it constitutes a violation of the relevant ratified treaties. Any developments in international humanitarian customary law to support war crimes prosecutions instead of prosecution for ordinary crimes cannot be considered as applicable in the domestic courts of Kosovo in so far as the implementation of Article 142 CL FRY is concerned; the guarantees contained in Art. 210 SFRY Constitution are to be applied, as they are more favourable to the accused. Therefore in the application of Article 142 CL FRY it would not be legitimate to resort to international customary law in such areas as primarily defining prohibiting conduct, defining the basis of individual criminal responsibility and punishment*.'[9]

8. The above extracts are not submissions made by the Defence. They are extracts from authorities that are binding for the SC. Yet, the SPO and the Pre-Trial Judge in his Impugned Decision fail to attribute the slightest significance to them. The SPO simply responds that *'[t]he Law constitutes domestic legislation*' and '*the Law gives CIL direct application before the KSC*.'[10] However, whether the purported effects of the Law, or any law for that matter, are legally valid is a question to be answered by judicial review; judicial review that needs to

[8] Supreme Court of Kosovo (UNMIK), Case against Veselin Bešović, AP-KZ no. 80/2004, 7 September 2004, pp. 18, 19.
[9] Supreme Court of Kosovo (UNMIK), Case against Veselin Bešović, AP-KZ no. 80/2004, 7 September 2004, pp. 18, 19.
[10] *See, e.g.*, Response, paras. 10, 11.

address the compatibility of the provisions of the Law with the relevant Constitutional and international guarantees. This is what the Pre-Trial Judge failed to do.

9. Had he engaged in a proper analysis of the Defence submissions, he would have to acknowledge the different legal regimes engaged and the lack of clarity, accessibility and foreseeability of the applicable law as a result. He would also have to acknowledge that, given the various legal regimes that could apply, fairness requires (i.e. there is no scope for discretion) that the regime most favourable to the accused be applied. The Pre-Trial Judge's lack of acknowledgement of the unclear legislative framework and failure to apply the provisions most favourable to the Accused breach Article 7 ECHR and Article 33 of the Constitution.

10. The SPO's submission that '*there is no retroactive application of the law*' and that the principle of 'lex mitior *is not implicated*' is false. The essence of this appeal is that Mr Shala is being prosecuted for crimes penalised in Kosovo in 2015 and allegedly committed in 1999. This is an evident retroactive application of the law. As a retroactive application of the law that forms the basis of Mr Shala's prosecution, it constitutes an interference with the rights of Mr Shala under Article 7 ECHR. This interference must be justified. The SPO fails to show that it is so justified (it even denies the prosecution's retroactive character).

11. The SPO attempt to deny the fact that there were different legal regimes potentially applicable is logically unsound. The SPO's reasoning is based on the false premise (α) that '*the KSC is bound to apply CIL*'. This is false for the reasons set out above. The SPO then concedes that (β) the '*CIL crimes at issue were incorporated into Kosovo's domestic framework for the first time by virtue of the Law*'. This is indeed an important acknowledgment that confirms the evident retroactive nature of Mr Shala's prosecution. The SPO also concedes that (γ)

'*the CIL crimes could not have been previously charged under the Criminal Code of the Socialist Federal Republic of Yugoslavia*.' This is where logically the prosecution for the so-called '*CIL crimes*' should come to an end given that, at the time of the alleged commission of the crimes in the Indictment, the SFRY Criminal Code was the applicable legislative framework. Nonetheless, on the basis of these three premises (α, β, and γ) the SPO concludes that (δ) '*therefore, there are no sets of binding changed law for* lex mitior *comparison purposes*.' Its conclusion (δ) is a fallacy that simply cannot be deduced from the premises it is purportedly based. It is a fallacy that needs to be corrected by the Appeals Chamber. The existence of different regimes is acknowledged in the SPO's subsequent concession that '*the KSC framework presents a new and self-contained regime*.' Regardless of how the different relevant regimes are named, new or old, SFRY or SC, the Appeals Chamber needs to assess the evident retroactive character of these proceedings and whether their continuation is compatible with the rights of Mr Shala under Article 7 of the ECHR.[11]

12. The Pre-Trial Judge failed to engage with the retroactivity of these proceedings; he relies on the Law that purportedly allows such retroactivity. He did not consider the principle that the framework most favourable to an accused must be applied. He did not acknowledge the contradictory legislative framework that fails to comply with the requirements of accessibility, precision, and foreseeability. He failed to address the inconsistency in the various provisions of the Law as well as the hierarchy of laws to be applied within Kosovo's legal order.[12] His errors warrant appellate intervention.

[11] The Defence properly raised this argument before the Pre-Trial Judge (*see, e.g.*, F00054, Preliminary Motion of the Defence of Pjetër Shala to Challenge the Jurisdiction of the KSC, 12 July 2021, paras. 4, 12, 14, 18; F00084, Defence Reply to the Prosecution Response to the Preliminary Motion of Pjetër Shala Challenging the Jurisdiction of the KSC, 24 September 2021, paras. 29, 30) and reiterates that the Pre-Trial Judge's dismissal of the Defence submissions without providing sufficient reasoning was an error of law that warrants appellate intervention (*see* Appeal, para. 15).
[12] Motion, paras. 5-7; Appeal, paras. 8, 10.

13. The SPO's general reliance on Articles 19(2), 22 and 33(1) of the Constitution, along with Articles 3(2) and 12 of the Law, in the abstract does not address the Defence submissions as to the violation of the '*quality of law*' requirements under Article 7 and of the principle requiring application of the framework most favourable to the Accused.

14. At paragraph 12 of its Response, the SPO mischaracterises ECHR case law. The Grand Chamber of the ECtHR did not issue a *carte blanche* allowing prosecutions for conduct occurring prior to the incorporation of CIL offences into the domestic legal order. Indeed the SPO's submissions fail to place ECtHR authorities in their proper context and acknowledge the importance attributed by the ECtHR to a thorough assessment of the circumstances of each case. Equally, the SPO incorrectly suggests that the ECtHR has found the enactment of retroactive legislative provisions similar to the Law '*in many national jurisdictions*' compatible with the ECHR.[13] A plain review of the two authorities cited (*Kononov* and *Korbely*) demonstrates the untenable nature of the SPO's submission.

15. The SPO's reliance on the drafters' intent equally fails to justify the legal validity of the law; the intent to prosecute CIL crimes committed in Kosovo between 1998-2000 does not render the Law valid. The validity of the latter depends on its compatibility with the Constitution and international human rights guarantees. This is the essence of judicial review.

16. At paragraph 14 of its Response, the SPO invites the Appeals Chamber to summarily dismiss the Defence submissions alleging an error of law either because the Pre-Trial Judge failed to consider essential submissions raised before him or because he failed to provide a reasoned decision and address

[13] Response, para. 12.

them. The SPO fails to appreciate that such errors constitute errors of law that enable appellate review of the merits of unfairly dismissed submissions.[14]

17. The Pre-Trial Judge found that '*categorising a court of law as domestic, international, hybrid, or otherwise, is not dispositive of the applicable law*'.[15] Contrary to the submissions of the SPO, the Defence has elaborated the significance of this finding in demonstrating the lack of certainty as to the applicable law due to the character of the SC.[16] It is exactly the categorisation of the SC as a domestic (and not an international or hybrid) court that determines the hierarchy of sources of law applicable by the SC and the superiority of the Constitution of Kosovo over incompatible rules of law. The view that such categorisation is *not* dispositive of the applicable law attempts to justify what is not justifiable and is indicative of the lack of clarity as to important aspects of the SC's framework. Importantly, the denial of the link between the categorisation of the court and the applicable law is indicative of the uncertainty as to the law to be applied by the SC and supports the Defence's submission that the '*quality*' of the law applied does not satisfy the prescribed standards and that the Pre-Trial Judge's assessment has been '*impermissibly teleological*'. [17]

B. Mr Shala's prosecution violates the principle of non-retroactivity and violates Article 7 ECHR and Article 33 Kosovo Constitution

18. The Pre-Trial Judge erred in failing to acknowledge the retroactive application of the Law that forms the basis of the charges against Mr Shala.[18]

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[14] *See, e.g.*, MICT, MICT-13-55-A, *Prosecutor v. Radovan Karadžić*, 20 March 2019, para. 15; ICTY, IT-03-69-A, *Prosecutor v. Stanišić & Simatović*, 9 December 2015, para. 78; ICTY, IT-08-91-A, *Prosecutor v. Mico Stanišić and Stojan Zupljanin*, 30 June 2016, para. 142.
[15] Impugned Decision para. 82; Appeal, para. 8.
[16] Response, para. 17.
[17] Appeal, para. 8.
[18] Impugned Decision, paras. 85-88.

19. The fact that Article 12 of the Law purports to render CIL applicable as at the time of the alleged offences does not change the fact that it purports to do it retroactively. The SPO's circular argument that '*as the charges are based solely on international law, CIL at the time of the commission of the crimes applies*' demonstrates the pragmatic defect in its reasoning, which was adopted by the Pre-Trial Judge in his Impugned Decision. The reason for concern is exactly that the charges against Mr Shala are not based on any offence which was recognised as such in the statute books of Kosovo at the material time.

20. In addition, contrary to what the SPO suggests, Article 33 of the Kosovo Constitution cannot be interpreted in a legal vacuum but needs to be construed in line with Article 7 of the ECHR. Article 53 of the Constitution guarantees that the human rights and fundamental freedoms guaranteed in the Kosovo Constitution must be interpreted consistently with the case law of the ECtHR.

21. It is well-settled case law of that Court, that the rights guaranteed under Article 7 are non derogable: no derogation is permitted in times of war or public emergencies. Article 7 of the Convention guarantees a number of related principles: (i) for a criminal provision to be compatible with this provision it must be sufficiently precise and clear; (ii) the retrospective application of criminal law to an accused's disadvantage is prohibited; (iii) only the law can define a crime and prescribe a penalty; and (iv) the criminal law cannot be construed extensively to an accused's detriment.[19] The SPO's submission that '*it is settled by the ECtHR Grand Chamber*' that '*prosecutions pursuant to statutes such as the Law are permissible for conduct criminalised under CIL prior to their*

[19] See, generally, ECtHR, *Kokkinakis v. Greece*, no. 14307/88, para. 52.

promulgation' is innacurate.[20] The SPO relies on the ECtHR judgments in *Kononov* and *Korbely*. None of them lend support to its erroneous claim.[21]

22. First, the ECtHR requires compatibility with Article 7 to be assessed by examining whether there is 'a sufficiently clear and contemporary legal basis for the specific war crimes'.[22] Its case law – as argued above- does not issue a *carte blanche* generally to prosecutions for conduct criminalised under CIL without domestic incorporation. A review of the Court's case law referred to in the Defence submissions demonstrates that the Court has engaged in painstaking and meticulous assessment of the particular circumstances at stake to determine whether a prosecution violates the guarantees provided for in Article 7. The Pre-Trial Judge's failure to assess the interference with Mr Shala's rights in this respect constitutes in itself a procedural violation of Article 7 of the Convention that needs to be remedied on appeal. The lack of clarity in the relevant framework as well as its lack of accessibility and foreseeability result in a substantive violation of Mr Shala's rights.

23. Second, Article 7 of the ECHR imposes an unconditional prohibition of the retrospective application of criminal law where that is to an accused's

[20] Response, para. 23 *referring to* Response, n. 19.
[21] Kononov's conviction was entered under section 68(3) of the Latvian Criminal Code which differs fundamentally to the provisions of the Law which are at stake in Mr Shala's prosecution. Specifically, Section 68(3) provided that '[a]ny person found guilty of a war crime as defined in the relevant legal conventions, that is to say violations of the laws and customs of war through murder, torture, pillaging from the civil population in an occupied territory or from hostages or prisoners of war, the deportation of such people or their subjection to forced labour, or the unjustified destruction of towns and installations shall be liable to life imprisonment or to imprisonment for between three and fifteen years.' *See* ECtHR, *Kononov v. Latvia*, no. 36376/04, 17 May 2010. It therefore concerned specific war crimes as defined in the relevant legal conventions. On the other hand, Korbely's conviction '*was based exclusively on international law*'. *See* ECtHR, *Korbely v. Hungary*, no. 9174/02, 19 September 2008, para. 74. The ECtHR therefore had to consider whether it was sufficiently accessible and foreseeable to Korbely that the act in respect of which he was convicted would be qualified as a crime against humanity at the material time. It concluded that he could not have foreseen that his acts constituted a crime against humanity under international law and there was a violation of Article 7. *See* ECtHR, *Korbely v. Hungary*, no. 9174/02, 19 September 2008, para. 95.
[22] *See, e.g.*, ECtHR, *Kononov v. Latvia*, 17 Mary 2010, para. 214.

disadvantage.[23] Yet the retrospective application of criminal law to Mr Shala's disadvantage is exactly the foundation of his prosecution. At the time material to the Indictment, the SFRY Constitution applied which required domestic incorporation of criminal provisions. The Pre-Trial Judge's reliance on the Law instead, to Mr Shala's clear disadvantage, constitutes an additional substantive violation of Article 7 of the ECHR.

24. Third, contrary to the SPO's submissions, the ECtHR has repeatedly confirmed that '*the drafters of the Convention did not allow for any general exception to the rule of non-retroactivity*'.[24] ECtHR case law requires acknowledging that prosecution on the basis of international law without domestic incorporation is only allowed in respect of '*flagrantly unlawful*' conduct, the criminal nature of which is 'evidently' accessible and foreseeable to an accused.[25] Liability under a JCE (especially its third form) and the crime of arbitrary detention in NIAC fail to meet the threshold of '*flagrant unlawfulness*'.[26]

25. Fourth, the relevant legislative framework has been applied extensively to Mr Shala's detriment.[27]

26. However, even if the relevant applicable law is deemed to be directly derived from CIL, the SPO fails to consider the constitutionality issues of Article 12, specifically its incompatibility with Article 7 of the ECHR as well as Article 53

[23] *See* Appeal, para. 14 *referring to* ECtHR, *Del Rio Prada v. Spain*, no. 42750/09 (GC), 21 October 2013, para. 116. *See also Kokkinakis v. Greece*, para. 52; *Vasiliauskas v. Lithuania* [GC] paras. 165, 166.
[24] See, e.g. ECtHR, *Maktouf and Damjanovic v. Bosnia and Herzegovina*, 18 July 2013, para. 72.
[25] ECtHR, *Streletz, Kessler and Krenz v. Germany*, nos. 34044/96, 35532/97, 44801/98, 22 March 2001, paras. 85, 87; ECtHR, *K.H.W. v Germany* [GC], no. 37201/97, para. 75 ; ECtHR, *Polednova v. the Czech Republic*, no. 2615/10, 21 June 2011 (dec.); ECtHR, *Simsic v. Bosnia and Herzegovina*, paras. 23, 24.
[26] The SPO misleadingly suggests that the Defence is raising these objections as to the charge of torture. See Response, n. 54. As made clear in the Defence submissions (see for instance Appeal, para. 19) the Defence is objecting to the KSC's jurisdiction and lawfulness of Mr Shala's prosecution under the mode of liability of JCE and the crime of arbitrary detention in NIAC.
[27] Appeal, para. 12. Motion, paras. 16, fn. 35, 28, 32. *See also Parmak and Bakir v. Turkey, 22429/07 and 25195/07, 3 March 2020,* para. 64 and references cited therein.

of the Constitution, resulting from the lack of clarity of the applicable legal regime.

C. Liability under the first and third form of a JCE is not included in Article 16(1)(a) of the Law

27. The SPO fails to address the Defence submissions challenging the incorrect interpretation and application Article 16(1)(a) of the Law by the Pre-Trial Judge.[28]

28. The SPO does not specify how *'[t]he [Impugned] Decision provides sufficient reasoning and expressly confirms that Article 16(1)(a) must be interpreted within the context of the KSC's legal framework.'*[29]. Neither does it attempt to address the multiple layers in the Defence arguments concerning the inappropriate reliance of the Pre-Trial Judge on CIL, the controversial nature of JCE and the crucial flaws with regard to the requirements of 'quality of law' under the ECHR and the Kosovo Constitution.

29. Instead, the SPO repeats the Pre-Trial Judge' s findings, acknowledging JCE as a form of commission because of how *'virtually identical statutory provisions of other courts'* have been interpreted.[30] This is despite the fact that the Law was enacted in 2015, by which time its drafters were aware of the controversial jurisprudence on this form of liability and the requirement for clarity and explicit specification in penal provisions. The lack of explicit inclusion of JCE liability in the Law demonstrates the drafters' deliberate choice and confirms that the Law does not include liability under a JCE.

30. The above interpretation is indeed required by Article 7 of the ECHR and Articles 33 and 53 of the Constitution that do not permit criminal law to be

[28] Appeal, para. 20.
[29] Response, para. 30.
[30] Response, para. 30.

construed extensively to an accused's detriment. The Law cannot be interpreted in a manner that allows prosecutions under modes of liability that did not form part of the domestic law at the time of the alleged offences.

31. The Defence reiterates that liability under a JCE was neither sufficiently foreseeable nor accessible to the Accused at the material time.[31]

D. Arbitrary Detention in a NIAC does not fall within the scope of the SC's jurisdiction

32. The SPO fails to demonstrate why its proposed interpretation of Article 14(1)(c) to extent the jurisdiction of the SC over war crimes under CIL beyond those expressly listed '*does not implicate the principle of legal certainty*'.[32] It also fails to justify why it is fair for the Pre-Trial Judge to depart from binding precedent of the Kosovo Supreme Court that quashed charges for arbitrary detention in NIAC.[33]

33. The SPO fails to consider the simple fact that, at the time material to the Indictment, arbitrary detention in a NIAC was neither criminalised nor considered a violation of Common Article 3. Any attempt of expanding the domestic law provisions in force at the material time under the principle of humane treatment is unfounded, violates the principle of legality, and fails to comply with the requisite standard of accessibility and foreseeability.

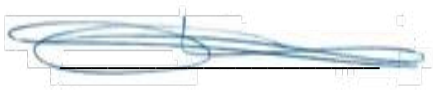
34. The SPO's submission that such accessibility and foreseeability to the Accused was given '*in view of the criminalisation of arbitrary deprivation of liberty in the former Yugoslavia and beyond, and the condemnation of such conduct by the UN in*

[31] Motion, paras. 17, 44, 45.
[32] Response, para. 44.
[33] Supreme Court of Kosovo (UNMIK), *Case against Latif Gashi et al.*, AP-KZ no. 139/2004, 21 July 2005, p. 12.

relation to the conflicts in the former Yugoslavia' is abstract, general and unfounded. This is confirmed not only on the basis of the apparent lack of state practice and *opinio juris* on the matter but also considering the exclusion of direct applicability of CIL in the Kosovo Constitution. This is reinforced by the Kosovo Supreme Court's interpretation of the term "illegal arrest and detention" of Article 142 of the SFRY Criminal Code as well as its finding that arbitrary detention in NIAC was not proscribed by Common Article 3.[34]

III. CONCLUSION

35. In light of the above, the Defence respectfully invites the Appeals Chamber to grant the Appeal on all grounds.



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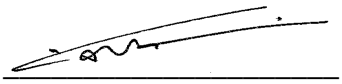

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[34] Motion, paras. 49-50.