PUBLIC
23/12/2021 09:18:00

KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In:	**KSC-BC-2020-06**
Before:	**A Panel of the Court of Appeals Chamber** Judge Michèle Picard Judge Emilio Gatti Judge Nina Jørgensen
Registrar:	Fidelma Donlon
Date:	23 December 2021
Original language:	English
Classification:	**Public**

Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers"

Specialist Prosecutor's Office:
Jack Smith

Counsel for Victims:
Simon Laws

Counsel for Hashim Thaçi:
Gregory Kehoe

Counsel for Kadri Veseli:
Ben Emmerson

Counsel for Rexhep Selimi:
David Young

Counsel for Jakup Krasniqi:
Venkateswari Alagendra

Table of Contents

I. BACKGROUND 2
II. STANDARD OF REVIEW 6
III. DISCUSSION 6
A. Preliminary Matters 6
B. Alleged Errors Regarding Applicability of Customary International Law 7
1. Whether CIL is Directly Applicable in the Kosovo Legal Framework and has Primacy over Domestic Law (Thaçi Ground B1 in part; Veseli Grounds 1, 3 and 6 in part; Selimi Grounds A1-A2) 7
(a) Submissions of the Parties 8
(b) Assessment of the Court of Appeals Panel 10
2. Whether Applying CIL Pursuant to Article 12 of the Law is Compatible with the Principle of Non-Retroactivity (Veseli Ground 2; Selimi Ground A3) 15
(a) Submissions of the Parties 15
(b) Assessment of the Court of Appeals Panel 17
3. Whether the Application of CIL at the Specialist Chambers Violates the Principles of Non-Discrimination and Equality Before the Law (Veseli Ground 4) 20
(a) Submissions of the Parties 20
(b) Assessment of the Court of Appeals Panel 21
4. Whether the Principle of *Lex Mitior* is Jurisdictional in Nature and Applies to CIL (Veseli Grounds 5 and 7 and, in part, Grounds 6, 8 and 9) 22
(a) Submissions of the Parties 23
(b) Assessment of the Court of Appeals Panel 24
C. Alleged Errors Regarding Council of Europe Report 28
1. Whether the Council of Europe Report Limits the Jurisdiction of the Specialist Chambers (Thaçi Grounds A1-A2; Krasniqi Ground 4) 28
(a) Submissions of the Parties 28
(b) Assessment of the Court of Appeals Panel 31
2. Whether the Crimes Charged in the Indictment Relate to the Council of Europe Report (Thaçi Ground A3; Krasniqi Ground 5) 37
(a) Submissions of the Parties 37
(b) Assessment of the Court of Appeals Panel 39
D. Alleged Errors Regarding Subject-Matter Jurisdiction 46

1. Arbitrary Detention (Veseli Grounds 10-13) 46
(a) Whether Arbitrary Detention Is Included in Article 14 of the Law (Veseli Ground 10) 46
(i) Submissions of the Parties 46
(ii) Assessment of the Court of Appeals Panel 47
(b) Whether Arbitrary Detention in a Non-International Armed Conflict is a Serious Violation of Common Article 3 (Veseli Grounds 11-12) 48
(i) Submissions of the Parties 48
(ii) Assessment of the Court of Appeals Panel 50
(c) Whether Arbitrary Detention in a Non-International Armed Conflict existed as a War Crime in CIL During the Temporal Jurisdiction of the Specialist Chambers (Veseli Ground 13) 56
(i) Submissions of the Parties 56
(ii) Assessment of the Court of Appeals Panel 58
2. Enforced Disappearance 61
(a) Whether Enforced Disappearance as a Crime Against Humanity Existed in CIL During the Temporal Jurisdiction of the Specialist Chambers (Veseli Ground 14) 61
(i) Submission of the Parties 61
(ii) Assessment of the Court of Appeals Panel 63
E. Alleged Errors Regarding Joint Criminal Enterprise 68
1. Whether JCE Can Be Implied from Article 16(1)(a) of the Law (Thaçi Ground B-B.1 in part; Veseli Ground 8 in part; Selimi Ground B; Krasniqi Ground 3) 68
(a) Submissions of the Parties 68
(b) Assessment of the Court of Appeals Panel 70
2. Whether JCE I and JCE III Were Part of CIL at the Time of the Charged Crimes (Thaçi Ground B2-B3; Veseli Ground 9; Selimi Ground C; Krasniqi Ground 1) 76
(a) Whether the Pre-Trial Judge Erred by Failing to Independently Investigate the CIL Status of JCE (Thaçi Ground B2; Veseli Ground 9 in part; Selimi Ground C1; Krasniqi Ground 1 in part) 76
(i) Submissions of the Parties 76
(ii) Assessment of the Court of Appeals Panel 79
(b) Whether JCE I Was Part of CIL at the Time of the Charged Crimes (Thaçi Ground B3) 83
(i) Submissions of the Parties 83

(ii) Assessment of the Court of Appeals Panel 85
(c) Whether JCE III Was Part of CIL at the Time of the Charged Crimes (Veseli Ground 9 in part; Selimi Ground C2; Krasniqi Ground 1 in part) 89
(i) Submissions of the Parties 90
(ii) Assessment of the Court of Appeals Panel 95
(d) Whether JCE III is Compatible with the Principle of Non-Retroactivity (Selimi Ground C3) 100
(i) Submissions of the Parties 100
(ii) Assessment of the Court of Appeals Panel 101
3. Whether JCE Was Foreseeable and Accessible to the Accused (Thaçi Ground B4; Krasniqi Ground 2) 102
(a) Submissions of the Parties 102
(b) Assessment of the Court of Appeals Panel 106
4. Whether the Applicability of JCE III to Special Intent Crimes Is a Jurisdictional Challenge (SPO Ground 1) 113
(a) Submissions of the Parties 113
(b) Assessment of the Court of Appeals Panel 114
IV. DISPOSITION 117

THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers ("Court of Appeals Panel", "Appeals Panel" or "Panel", and "Specialist Chambers", respectively)[1] acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 169 of the Rules of Procedure and Evidence ("Rules") is seised of five appeals filed on 27 August 2021 by Hashim Thaçi ("Thaçi"),[2] Kadri Veseli ("Veseli"),[3] Rexhep Selimi ("Selimi"),[4] Jakup Krasniqi ("Krasniqi")[5] (collectively, "the Accused" or "the Defence") and the Specialist Prosecutor's Office ("SPO")[6] (collectively, "Appeals"), against the "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers" ("Impugned Decision").[7] On 30 September 2021, the SPO filed its responses to the Accused's Appeals (collectively, "SPO Responses").[8] On the same day, Veseli responded to the

[1] F00015, Decision Assigning a Court of Appeals Panel, 30 August 2021.
[2] F00012, Thaçi Defence Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 27 August 2021 ("Thaçi Appeal").
[3] F00010, Veseli Defence Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 27 August 2021 ("Veseli Appeal").
[4] F00011, Selimi Defence Appeal against the "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 27 August 2021 ("Selimi Appeal").
[5] F00013, Krasniqi Defence Appeal Against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 27 August 2021 ("Krasniqi Appeal").
[6] F00014, Prosecution Appeal against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers' pursuant to Rule 97(3), 27 August 2021 ("SPO Appeal").
[7] F00412, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021 ("Impugned Decision"). On 28 July 2021, the Court of Appeals Panel extended the deadline for the Parties' appellate submissions concerning the Impugned Decision, such that their appeals would be filed by 27 August 2021, their responses by 30 September 2021, and their replies, if any, by 18 October 2021. See F00004, Decision Assigning a Court of Appeals Panel to Consider Requests Regarding Time Limits, 27 July 2021; F00005, Decision on Requests for Variation of Time Limits, 28 July 2021 ("Decision on Requests for Variation of Time Limits"), para. 8. On 19 August 2021 and on 24 September 2021, the Appeals Panel granted an extension of the word limit by 4,000 words each for the Defence Appeals and SPO Responses. See F00008, Decision Assigning a Court of Appeals Panel to Consider Requests Regarding Word Limit, 17 August 2021; F00009, Decision on Requests for Variation of Word Limits, 19 August 2021 ("Decision on Defence Requests for Variation of Word Limits"), para. 7; F00017, Decision on Request for Variation of Word Limits, 24 September 2021, para. 7.
[8] F00021/COR, Corrected Version of Prosecution response to Thaçi Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers (IA009-F00021 dated 30 September 2021), 15 October 2021 (uncorrected version filed on 30 September 2021) ("SPO Response to Thaçi Appeal"); F00020, Prosecution response to Veseli Defence appeal against the 'Decision on Motions challenging the jurisdiction of the Specialist Chambers', 30 September 2021 ("SPO Response to Veseli Appeal"); F00022, Prosecution response on JCE to Selimi Defence appeal against the 'Decision on Motions challenging the jurisdiction of the Specialist Chambers', 30 September 2021 ("SPO Response to Selimi

SPO Appeal.[9] On 18 October 2021, the Accused replied to the SPO Responses[10] and the SPO replied to the Veseli Response to SPO Appeal.[11]

I. BACKGROUND

1. On 26 October 2020, the Pre-Trial Judge confirmed the indictment against Thaçi, Veseli, Selimi and Krasniqi.[12] On 30 October 2020, the SPO submitted the confirmed indictment.[13] On 3 September 2021, the SPO submitted the operative indictment ("Indictment").[14]

Appeal"); F00019, Prosecution response to Krasniqi Defence appeal against the 'Decision on Motions challenging the jurisdiction of the Specialist Chambers', 30 September 2021 ("SPO Response to Krasniqi Appeal").

[9] F00018, Veseli Defence Response to SPO Appeal against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers' ("Veseli Response to SPO Appeal"), 30 September 2021.

[10] F00025, Thaçi Defence Reply to 'Prosecution response to Thaçi Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers', 18 October 2021 ("Thaçi Reply"); F00026, Veseli Defence Reply to SPO Response (KSC-BC-2020-06/IA009/F00020), 18 October 2021 ("Veseli Reply"); F00029, Selimi Defence reply to Prosecution response on JCE to Selimi Defence appeal against the 'Decision on Motions challenging the Jurisdiction of the Specialist Chambers', 18 October 2021 ("Selimi Reply"); F00027, Krasniqi Defence Reply to Prosecution Response to Krasniqi Defence Appeal Against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers', 18 October 2021 ("Krasniqi Reply"). On 14 October 2021, the Court of Appeals Panel granted Selimi an extension of the word limit by 1,400 words for his reply. See F00024, Decision on Selimi's Request for Variation of Word Limit, 14 October 2021 ("Decision on Selimi's Request for Variation of Word Limit"), para. 8.

[11] F00028, Prosecution Reply to Veseli Response to IA009/F00014, 18 October 2021 ("SPO Reply").

[12] F00026/RED, Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 30 November 2020 (strictly confidential and *ex parte* version filed on 26 October 2020) ("Confirmation Decision").

[13] F00034/A01, Indictment, 30 October 2020 (strictly confidential and *ex parte*); F00045/A03, Further redacted Indictment, 4 November 2020 (strictly confidential and *ex parte*, reclassified as public on 5 November 2020).

[14] F00455/RED/A01, Public Redacted Version of 'Indictment', KSC-BC-2020-06/F00455/A01, dated 3 September 2021, 8 September 2021 (strictly confidential and *ex parte* version filed on 3 September 2021).

2. The Accused were arrested on 4 and 5 November 2020,[15] pursuant to arrest warrants.[16]

3. On 10 February 2021, Selimi filed a preliminary motion challenging the jurisdiction of the Specialist Chambers in relation to joint criminal enterprise ("JCE").[17]

4. On 12 March 2021, Thaçi filed a preliminary motion challenging the jurisdiction of the Specialist Chambers in relation to, *inter alia*, JCE and the charges against him, on the basis that these charges fail to address the central allegations of the report on "Inhuman treatment of people and illicit trafficking in human organs in Kosovo", issued by the Parliamentary Assembly of the Council of Europe ("Council of Europe Report" or "Report").[18]

5. On 15 March 2021, Veseli filed a preliminary motion challenging the jurisdiction of the Specialist Chambers in relation to the applicability of customary international law ("CIL"), JCE, command responsibility, illegal or arbitrary arrest and

[15] F00044, Notification of Arrest of Jakup Krasniqi Pursuant to Rule 55(4), 4 November 2020 (strictly confidential and *ex parte*, reclassified as public on 20 November 2020), para. 4; F00049, Notification of Arrest of Rexhep Selimi Pursuant to Rule 55(4), 5 November 2020 (strictly confidential and *ex parte*, reclassified as public on 20 November 2020), para. 4; F00050, Notification of Arrest of Kadri Veseli Pursuant to Rule 55(4), 5 November 2020 (strictly confidential and *ex parte*, reclassified as public on 20 November 2020), para. 4; F00051, Notification of Arrest of Hashim Thaçi Pursuant to Rule 55(4), 5 November 2020 (strictly confidential and *ex parte*, reclassified as public on 20 November 2020), para. 4.
[16] F00027/A01/RED, Public Redacted Version of Arrest Warrant for Hashim Thaçi, 5 November 2020 (strictly confidential and *ex parte* version filed on 26 October 2020); F00027/A03/RED, Public Redacted Version of Arrest Warrant for Kadri Veseli, 5 November 2020 (strictly confidential and *ex parte* version filed on 26 October 2020); F00027/A05/RED, Public Redacted Version of Arrest Warrant for Rexhep Selimi, 5 November 2020 (strictly confidential and *ex parte* version filed on 26 October 2020); F00027/A07/COR/RED, Public Redacted Version of Corrected Version of Arrest Warrant for Jakup Krasniqi, 5 November 2020 (uncorrected strictly confidential and *ex parte* version filed on 26 October 2020).
[17] F00198, Selimi Defence Challenge to Jurisdiction – Joint Criminal Enterprise, 10 February 2021 ("Selimi Jurisdiction Motion (JCE)").
[18] F00216, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, 12 March 2021 ("Thaçi Jurisdiction Motion"), referring to Council of Europe, Parliamentary Assembly, Inhuman treatment of people and illicit trafficking in human organs in Kosovo, Doc. 12462, 7 January 2011.

detention, and enforced disappearance.[19] Veseli also adopted Thaçi's arguments to the extent that they were not inconsistent with his own jurisdiction motion.[20]

6. That same day, Selimi filed a preliminary motion challenging the jurisdiction of the Specialist Chambers in relation to the structure and composition of the Specialist Chambers' and SPO's employed personnel, in which he also further supported arguments raised in the Thaçi Jurisdiction Motion in relation to the Council of Europe Report.[21]

7. Also on 15 March 2021, Krasniqi filed a preliminary motion challenging the jurisdiction of the Specialist Chambers in relation to JCE and most of the charged crimes, on the basis that these crimes do not relate to the Council of Europe Report.[22] Krasniqi further adopted the challenges raised by the other Accused, insofar as they were not inconsistent with his own jurisdiction motion.[23]

8. On 23 April 2021, the SPO filed three responses to the Accused's jurisdiction motions concerning respectively, and *inter alia*: (i) the Council of Europe Report;[24] (ii) the applicability of CIL;[25] and (iii) the applicability of JCE.[26]

[19] F00223, Preliminary motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC, 15 March 2021 ("Veseli Jurisdiction Motion").
[20] Veseli Jurisdiction Motion, fn. 1.
[21] F00219, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction – Discrimination, 15 March 2021 ("Selimi Jurisdiction Motion (Discrimination)").
[22] F00220, Krasniqi Defence Preliminary Motion on Jurisdiction, 15 March 2021 ("Krasniqi Jurisdiction Motion").
[23] Krasniqi Jurisdiction Motion, para. 3.
[24] F00259, Prosecution response to preliminary motions concerning Council of Europe Report, investigation deadline, and temporal mandate, 23 April 2021.
[25] F00262, Prosecution response to preliminary motion concerning applicability of customary international law, 23 April 2021.
[26] F00263, Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise (JCE), 23 April 2021 ("SPO JCE Response").

9. On 14 and 17 May 2021, the Accused replied to the SPO's responses.[27] On 1 June 2021, the SPO submitted a sur-reply to the Veseli CIL Reply, to which Veseli responded on 7 June 2021.[28]

10. On 22 July 2021, the Pre-Trial Judge issued the Impugned Decision, rejecting the Thaçi Jurisdiction Motion insofar as it challenged the jurisdiction of the Specialist Chambers in relation to JCE and the charges against Thaçi on the basis that these charges exceed the Council of Europe Report, the Selimi Jurisdiction Motion (JCE), and the Krasniqi Jurisdiction Motion.[29] The Pre-Trial Judge granted the Veseli Jurisdiction Motion insofar as it challenged the application of JCE III liability to special intent crimes, and rejected it in all other respects.[30] Consequently, the Pre-Trial Judge granted in part the Veseli Jurisdiction Motion and ordered the SPO to file an amended indictment excluding JCE III liability for the special intent crimes.[31]

[27] F00304, Thaçi Defence Reply to "Prosecution response to preliminary motions concerning Council of Europe Report, investigation deadline, and temporal mandate", 14 May 2021 ("Thaçi CoE Report Reply"); F00306, Thaçi Defence Reply to "Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise (JCE)", 14 May 2021; F00310, Veseli Defence Reply to the Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE), 17 May 2021; F00311, Veseli Defence Reply to Prosecution Response to the Preliminary Motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC (Customary International Law), 17 May 2021 ("Veseli CIL Reply"); F00301, Selimi Defence Reply to SPO Response to Defence Challenge to Jurisdiction – Joint Criminal Enterprise, 14 May 2021 ("Selimi JCE Reply"); F00299, Krasniqi Defence Reply to Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigation Deadline, and Temporal Mandate, 14 May 2021; F00302, Krasniqi Defence Reply to Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE), 14 May 2021 ("Krasniqi JCE Reply").

[28] F00333, Prosecution sur-reply, 1 June 2021; F00342, Veseli Defence Response to Prosecution Sur-Reply, 7 June 2021 ("Veseli Response to SPO CIL Sur-Reply").

[29] Impugned Decision, para. 214. The Impugned Decision also rejected Selimi's arguments raised in the Selimi Jurisdiction Motion (Discrimination) with respect to the Council of Europe Report. See Impugned Decision, paras 112, 115, 129, 134, 136, 138.

[30] Impugned Decision, paras 176-209, 214.

[31] Impugned Decision, paras 208-209, 214.

II. STANDARD OF REVIEW

11. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.[32]

III. DISCUSSION

A. PRELIMINARY MATTERS

12. Veseli requests that the Appeals Panel schedule an oral hearing and argues that it is warranted given the importance of the matter, the complexity of the issues and so that any questions the Panel may have could be put to the Parties.[33] He submits that oral hearings for appeals relating to jurisdictional challenges are common among international criminal courts and tribunals.[34]

13. The Panel recalls that, pursuant to Rule 170(3) of the Rules, interlocutory appeals shall be determined on the basis of written submissions, unless otherwise decided by the Court of Appeals Panel.[35] The granting of an oral hearing is therefore a matter for the sole discretion of the Appeals Panel.[36] The Panel also notes that Veseli is the only appellant to have made such a request. In addition, the Panel does not find

---

[32] KSC-BC-2020-07, F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati* Appeal Decision"), paras 4-14. See also e.g. F00008/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, 27 October 2021 (confidential version filed on 27 October 2021) ("*Thaçi* Appeal Decision on Review of Detention"), para. 6.

[33] Veseli Appeal, para. 116. See also Veseli Reply, para. 50.

[34] Veseli Appeal, para. 116, referring to ICTY, *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Appeal Decision on Jurisdiction"), para. 26; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR90.1, Scheduling Order on Interlocutory Appeals, 27 August 2012, para. 4; SCSL, *Prosecutor v. Kallon et al.*, SCSL-2004-14-AR72E, Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004, para. 7.

[35] By contrast, the Rules provide that motions to present additional evidence before the Court of Appeals Panel "may" be decided solely on the basis of written submissions. See Rule 181(4) of the Rules.

[36] See e.g. ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, para. 9; ICC, *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-271, Decision on the "Request for an Oral Hearing Pursuant to Rule 156(3)", 17 August 2011, para. 10; ICC, *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-421, Decision on the "Request to Make Oral Submissions on Jurisdiction under Rule 156(3)", 1 May 2012 ("*Muthaura et al.* Decision"), para. 10.

that the instances referred to by Veseli demonstrate a "common" practice among international criminal tribunals of holding oral hearings for appeals on jurisdictional challenges;[37] on the contrary, there are numerous examples of the opposite approach being taken.[38]

14. The Panel has already granted the Parties extensions of word and time limits, to allow them to make detailed and meaningful written submissions on the significant and complex issues raised in the Impugned Decision.[39]

15. In light of the substantial extensions granted to all of the appellants with regard to their jurisdictional challenges on appeal, the Panel is satisfied that they have had ample opportunity to make full submissions. The Panel considers that it has been provided with sufficiently detailed written submissions to enable it to reach an informed decision on this basis. Consequently, the Panel does not consider that an oral hearing is necessary in the present circumstances and dismisses Veseli's request.

B. ALLEGED ERRORS REGARDING APPLICABILITY OF CUSTOMARY INTERNATIONAL LAW

1. Whether CIL is Directly Applicable in the Kosovo Legal Framework and has Primacy over Domestic Law (Thaçi Ground B1 in part; Veseli Grounds 1, 3 and 6 in part; Selimi Grounds A1-A2)

16. At the outset, the Court of Appeals Panel considers that part of Ground B1 presented by Thaçi, Grounds 1, 3 and part of 6 presented by Veseli, as well as Grounds A1 and A2 presented by Selimi substantially overlap to the extent that they all allege errors committed by the Pre-Trial Judge in finding that CIL is directly

[37] See Veseli Appeal, para. 116 and references cited therein.
[38] See e.g. ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84bis-AR73.1, Decision on Request for Oral Argument, 16 March 2011, pp. 1-2, fn. 8; *Muthaura et al.* Decision, paras 10-13.
[39] See Decision on Requests for Variation of Time Limits, paras 5-6, 8 (varying the time limit to file the appeals against the Impugned Decision to 27 August 2021, the responses to 30 September 2021, and the replies to 18 October 2021); Decision on Defence Requests for Variation of Word Limits, paras 5, 7 (authorising an extension of 4,000 words to each Accused for their appeals against the Impugned Decision); Decision on Selimi's Request for Variation of Word Limit, paras 4-6, 8 (authorising an extension of 1,400 words to each Accused for their replies).

applicable to the Specialist Chambers and has primacy over domestic law; therefore, these grounds will be considered together.

(a) Submissions of the Parties

17. Thaçi argues that the Pre-Trial Judge failed to consider that the Specialist Chambers are constrained by a specific legal framework where CIL is not incorporated *en bloc*.[40] According to Thaçi, Article 19(2) of the Constitution of Kosovo only refers to international treaties and *jus cogens*, whereas the Pre-Trial Judge did not explain whether relevant parts of CIL were ratified international treaties or represented binding norms of international law.[41]

18. Veseli submits that the Pre-Trial Judge erred in law by finding that Article 12 of the Law establishes the direct applicability and primacy of CIL.[42] In his view, according to both the Constitution of Kosovo and the 1974 Constitution of the Socialist Federal Republic of Yugoslavia ("SFRY" and "1974 SFRY Constitution"), criminal prohibitions foreseen in CIL do not have direct effect in Kosovo, unless they satisfy a duality test, which requires a corresponding provision under domestic law, as confirmed by the Kosovo Supreme Court.[43] According to Veseli, the Pre-Trial Judge did not address these submissions, ignored the primacy of the Constitution over domestic law, and provided no legal basis for the primacy of CIL in Kosovo.[44] Veseli further argues that the Pre-Trial Judge erred in law in dismissing the relevance of the 1974 SFRY Constitution and of the 1976 SFRY Criminal Code, and of a decision of the Serbian Constitutional Court which did not allow for direct effect of CIL in 1998,

[40] Thaçi Appeal, paras 51, 54. See also Thaçi Reply, para. 12.
[41] Thaçi Appeal, paras 55-57, 59; Thaçi Reply, paras 12-13.
[42] Veseli Appeal, paras 17-23, 35-41, 66. See also Veseli Appeal, paras 30-31, 58.
[43] Veseli Appeal, paras 14, 20, referring to Veseli Jurisdiction Motion, paras 41-56. See also Veseli Appeal, paras 23, 31.
[44] Veseli Appeal, paras 21-23, 66.

thereby rendering the conduct criminalised under Articles 12 to 16 of the Law unconstitutional.[45]

19. Selimi submits that the Pre-Trial Judge erred in law by presuming the direct applicability and superiority of CIL from Article 3(2)(d) of the Law while ignoring Selimi's argument regarding the conflict between this Article and the definition of international law in Article 19(2) of the Constitution of Kosovo as "ratified international agreements and legally binding norms of international law".[46] He also argues that the Pre-Trial Judge abused his discretion by not giving weight to a decision of the Kosovo Supreme Court finding that the 1974 SFRY Constitution made CIL inapplicable to events alleged to have occurred in 1998 and 1999.[47] Selimi further argues that he is entitled to legal certainty in the judicial system of Kosovo.[48]

20. The SPO responds that the Law gives direct application to CIL before the Specialist Chambers and that all charges are based solely on international law consistent with Article 12 of the Law.[49] According to the SPO, this complies with Articles 19(2) and 33(1) of the Constitution of Kosovo and jurisprudence of the European Court of Human Rights ("ECtHR") that allows prosecutions for conduct criminalised under CIL prior to the promulgation of statutes such as the Law.[50] The SPO also argues that the 1974 SFRY Constitution is not among the sources of law at the Specialist Chambers and that the decisions of Serbian courts are not binding for Kosovo.[51] Moreover, the SPO responds that Veseli provides no authority in support of

[45] Veseli Appeal, paras 36-40. See also Veseli Reply, paras 10-12, 19-20.
[46] Selimi Appeal, paras 11, 18-22. See also Selimi Appeal, paras 10, 12-17, 23; Krasniqi Appeal, para. 71.
[47] Selimi Appeal, paras 24-28, 30.
[48] Selimi Appeal, para. 29.
[49] SPO Response to Veseli Appeal, paras 12, 19-20; SPO Response to Selimi Appeal, paras 16, 23. See also SPO Response to Thaçi Appeal, para. 36; SPO Response to Veseli Appeal, para. 30.
[50] SPO Response to Veseli Appeal, paras 21-22; SPO Response to Selimi Appeal, paras 24-25.
[51] SPO Response to Veseli Appeal, paras 23, 36; SPO Response to Selimi Appeal, para. 26.

his claim that a duality test is a general pre-requisite for the application of international law in Kosovo.[52]

21. Veseli replies that Article 19(1) of the Constitution of Kosovo requires that international law be part of the integral legal system and self-executing to have direct effect.[53] This conclusion is, according to him, reinforced by the protection of the constitutional rights afforded by Articles 22 and 55 of the Constitution of Kosovo.[54] He further argues that the 1974 SFRY Constitution is applicable through Article 33 of the Constitution of Kosovo and that the duality test is a corollary of the principle of legality.[55]

(b) Assessment of the Court of Appeals Panel

22. The Pre-Trial Judge held that the centrality of CIL as the source of reference for the Specialist Chambers is confirmed not only by the plain language of Article 12 of the Law, but also in Articles 3(2)(d), 3(3), 13 and 14 of the Law.[56] While the Court of Appeals Panel agrees with this finding, it nevertheless notes that the Pre-Trial Judge did not address arguments regarding the compliance of this aspect of the Law with the Constitution of Kosovo, despite being required to carry out such an examination.[57]

23. The Panel recalls that, according to Article 19(2) of the Constitution of Kosovo: "Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo".[58] Thaçi and Selimi

[52] SPO Response to Veseli Appeal, para. 25.
[53] Veseli Reply, paras 4, 28.
[54] Veseli Reply, paras 4, 29.
[55] Veseli Reply, para. 32. See also Veseli Reply, paras 31, 34.
[56] Impugned Decision, para. 91. See Article 12 of the Law (which foresees that the substantive criminal law of Kosovo shall apply only "insofar as it is in compliance with customary international law").
[57] Article 16(1) of the Constitution of Kosovo; Article 3(2)(a) of the Law; Kosovo, Constitutional Court, *Constitutional review of Law No. 06/L-145 on the Duties, Responsibilities and Competences of the State Delegation of the Republic of Kosovo in the Dialogue Process with Serbia*, KO/43/19, Judgment, 27 June 2019, paras 68-69.
[58] See also Article 16(3) of the Constitution of Kosovo, which foresees that Kosovo "shall respect international law".

essentially equate the term "legally binding norms of international law" with *jus cogens*,[59] while Veseli argues that only international treaties under Article 19(1) of the Constitution of Kosovo and customary international legal norms satisfying the duality test can define individual criminal responsibility and punishment.[60] The Court of Appeals Panel recalls that CIL is the combination of an established, widespread and consistent practice on the part of the states and *opinio juris*, which is the belief that this practice is rendered obligatory by the existence of a rule of law requiring it.[61] As such, CIL is binding on all states.[62] Article 19(1) of the Constitution of Kosovo, therefore, adheres to this principle.

24. Consequently, the Court of Appeals Panel finds no contradiction between the language of the Law, which in Articles 3(2)(d) and 12 refers to "customary international law", and that of the Constitution of Kosovo, which in Article 19(2) uses the term "legally binding norms of international law".[63] Further, in light of the above,

[59] See Thaçi Appeal, para. 55; Selimi Appeal, paras 18-20, 22.
[60] Veseli Appeal, paras 20-21. Veseli incorporates by way of reference arguments he had made before the Pre-Trial Judge in his preliminary motion. See Veseli Jurisdiction Motion, paras 41-56. This approach has been deemed improper as lacking the necessary substantiation. See KSC-BC-2020-07, F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021 ("*Gucati and Haradinaj* Appeal Decision on Preliminary Motions"), para. 65. In this instance, however, the Panel will consider these arguments in light of the fundamental importance of the issues raised by Veseli and the fact that, at least, a summary of these arguments is included in his Appeal.
[61] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986 (p. 14), Judgment, 27 June 1986 ("Nicaragua Military and Paramilitary Activities Case"), paras 183, 188, 207; ICJ, *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ Reports 1985 (p. 13), Judgment, 3 June 1985, para. 27; ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark/the Netherlands)*, ICJ Reports 1969 (p. 3), Judgment, 20 February 1969 ("North Sea Continental Shelf Cases"), paras 76-77. See also Impugned Decision, para. 182.
[62] See Article 38(1)(b) of the Statute of the International Court of Justice ("ICJ"). See also North Sea Continental Shelf Cases, para. 63 (wherein the ICJ held, *inter alia*, that customary law rules must, by their very nature, have equal force for all members of the international community); Nicaragua Military and Paramilitary Activities Case, para. 188; Henckaerts, J.-M., "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict", (2005) 87(857) *International Review of the Red Cross* <https://www.icrc.org/en/doc/assets/files/other/icrc_002_0860.pdf>, p. 197.
[63] The ICTY held, at a time prior to the crimes alleged in the present case, that, in fact, "most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character". See ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić et al.* Trial Judgement"), para. 520. See also *Tadić* Appeal Decision on Jurisdiction, para. 143.

the Panel does not consider that there is any legal basis for a requirement of a corresponding provision under domestic law applicable at the time of the alleged crimes.[64] These conclusions are also consistent with ECtHR jurisprudence which found no violation of Article 7 of the European Convention on Human Rights ("ECHR") in cases of convictions by domestic courts for conduct that was criminalised only in international law at the time of its commission and was later included in domestic written legislation that served as the legal basis for these convictions.[65]

25. With respect to the recognition of CIL in the 1974 SFRY Constitution, the Court of Appeals Panel acknowledges that the principle of legality included therein provides that an act must have been foreseen as a punishable offense "by statute or a legal provision based on a statute" and that criminal offenses "may only be established by statute".[66] Nevertheless, the Panel notes that the 1974 SFRY Constitution, under the heading "Basic Principles", pledges to respect "generally accepted rules of international law", which would include CIL, as well as to fulfil its international commitments vis-à-vis international organisations to which the SFRY was affiliated, which included the ECtHR.[67] The Panel also recalls its finding that CIL is binding on

---

In determining the CIL applicable at the time of the alleged crimes, Judges may be assisted by subsidiary sources of law, including the jurisprudence of the *ad hoc* tribunals. See Article 3(3) of the Law; ECtHR, *Vasiliauskas v. Lithuania*, no. 35343/05, Judgment, 20 October 2015 ("*Vasiliauskas v. Lithuania* Judgment"), para. 177.

[64] See ECCC, *Ieng Sary et al*., 002/19-09-2007-ECCC/OCIJ, Decision on Ieng Sary's Appeal against the Closing Order, 11 April 2011 ("*Ieng Sary* Appeal Decision"), para. 213 (wherein the Pre-Trial Chamber held that "[a]s the international principle of legality does not require that international crimes and modes of liability be implemented by domestic statutes in order for violators to be found guilty, the characterisation of the Cambodian legal system as monist or dualist has no bearing on the validity of the law applicable before the ECCC"). See also Article 33(1) of the Constitution of Kosovo.

[65] ECtHR, *Penart v. Estonia*, no. 14685/04, Decision, 24 January 2006, p. 10 (wherein the ECtHR held that there is no violation of Article 7 of the ECHR, even if the acts of the applicant could have been regarded as lawful under the Soviet law applicable at the time of the acts, since they were found to constitute crimes against humanity under international law at the time of their commission by the courts of Estonia after it regained its independence); ECtHR, *Šimšić v. Bosnia and Herzegovina*, no. 51552/10, Decision, 10 April 2012, paras 23-25; ECtHR, *Kononov v. Latvia*, no. 36376/04, Judgment, 17 May 2010 ("*Kononov v. Latvia* Judgment"), paras 237-244.

[66] 1974 SFRY Constitution, Article 181.

[67] See 1974 SFRY Constitution, Basic Principle VII: "In its international relations the [SFRY] shall adhere to the principles of the United Nations Charter, *fulfil its international commitments and take an active part in the activities of the international organizations to which it is affiliated* […] In order to carry these principles

all states.[68] The Panel further takes note of the fact that, at least, some of the alleged crimes in the present case concern a period when the 1992 Constitution of the Federal Republic of Yugoslavia ("FRY") was in force, according to which CIL became a constituent part of the national legal system,[69] and that the 1974 SFRY Constitution became applicable retroactively because of the special circumstances at the time.[70]

26. Moreover, the Constitution of Kosovo explicitly states that any "legislation applicable on the date of the entry into force of th[e] Constitution shall [only] continue to apply to the extent it is in conformity with th[e] Constitution until repealed, superseded or amended in accordance with [it]".[71] In the view of the Panel, it is clear that the Constitution of Kosovo superseded any constitution previously applicable in the territory of Kosovo and that the Specialist Chambers are only bound to uphold the protections enshrined in it.[72] The Panel, therefore, agrees with the Pre-Trial Judge's decision not to apply the 1974 SFRY Constitution.[73] Having found that CIL has primacy over domestic legislation, and considering that this is in line with the Constitution of Kosovo,[74] the Panel also finds no error in the Pre-Trial Judge's

into effect the [SFRY] shall strive: […] for *respect of generally accepted rules of international law* […]" (emphasis added).

[68] See above, para. 23.

[69] Kosovo, Supreme Court, *Besović*, AP-KZ 80/2004, Judgment, 7 September 2004 ("Kosovo Supreme Court Judgment of 7 September 2004"), pp. 18-19; Kosovo, Supreme Court, *Kolasinac*, AP–KZ 139/2003, Judgment, 5 August 2004 ("Kosovo Supreme Court Judgment of 5 August 2004"), p. 23.

[70] See UNMIK, Regulation 1999/24, UNMIK/REG/1999/24, 12 December 1999 ("UNMIK Regulation 1999/24"), Article 1.1.This Regulation was adopted on 12 December 1999, but was considered to have entered into force as of 10 June 1999. See UNMIK Regulation 1999/24, Articles 1.4, 3. See also UNMIK, Regulation 2000/59, UNMIK/REG/2000/59, 27 October 2000, Article 1.4.

[71] See Article 145(2) of the Constitution of Kosovo.

[72] See Article 162(2) of the Constitution of Kosovo; Article 3(2) of the Law. See also Article 21(2) of the Constitution of Kosovo. Similarly, Article 1(1) of the 2019 Criminal Code of Kosovo provides that: "[c]riminal offenses and criminal sanctions are foreseen only for those actions that infringe and violate the freedoms, human rights and other rights and social values guaranteed and protected *by the Constitution of the Republic of Kosovo and international law* […]." (emphasis added).

[73] See Impugned Decision, para. 99.

[74] See above, paras 23-24. See also Impugned Decision, paras 98-102.

conclusion that the 1976 SFRY Criminal Code does not limit the jurisdiction of the Specialist Chambers.[75]

27. Regarding the decisions of the Kosovo Supreme Court referred to by Veseli and Selimi,[76] the Court of Appeals Panel notes that they discuss the application of CIL in light of the 1974 SFRY Constitution within the specific "legal regime as defined by UNMIK Regulation 1999/24".[77] The Panel notes that since these decisions pre-date the adoption of the Constitution of Kosovo in 2008, they concern a different constitutional framework. The Panel considers that the 1974 SFRY Constitution is not binding on the Specialist Chambers. The findings of these decisions are, therefore, irrelevant for the Specialist Chambers.

28. Regarding the Serbian Constitutional Court Judgment referred to by Veseli,[78] the Court of Appeals Panel notes that the Pre-Trial Judge held that the Specialist Chambers are not bound to follow judicial precedents from other jurisdictions.[79] In any event, this judgment relates to a different legal framework than the one applicable at the Specialist Chambers[80] and, therefore, the Pre-Trial Judge's conclusion regarding its irrelevance was correct.

29. In light of the above, the Court of Appeals Panel finds that the Pre-Trial Judge's failure to consider the arguments raised by Thaçi, Veseli and Selimi regarding the

[75] This is consistent with the limited application of the 1976 SFRY Criminal Code "subject to Article 12 of the Law". See Article 15(1) of the Law.
[76] See Veseli Appeal, paras 20, 56-57, referring to Kosovo Supreme Court Judgment of 7 September 2004; Kosovo Supreme Court Judgment of 5 August 2004; Selimi Appeal, paras 27-30, referring to Kosovo, Supreme Court, *Gashi et al.*, AP-KZ 139/2004, Judgment, 21 July 2005 ("Kosovo Supreme Court Judgment of 21 July 2005"), pp. 5-8.
[77] See Kosovo Supreme Court Judgment of 7 September 2004, pp. 18-19; Kosovo Supreme Court Judgment of 5 August 2004, pp. 21-23, 33, 35. See also Kosovo Supreme Court Judgment of 21 July 2005, p. 8.
[78] See Veseli Appeal, paras 39-40, referring to Serbia, Constitutional Court, *G.M. et al.*, Už-11470/2017, Judgment, 1 October 2020 ("Serbian Constitutional Court Judgment") provided in F00310/A02, Annex 2 to "Veseli Defence Reply to the Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE)", 17 May 2021. See also Veseli Appeal, para. 41.
[79] Impugned Decision, para. 100.
[80] See Serbian Constitutional Court Judgment, p. 14.

compliance of the Law with the Constitution of Kosovo, as far as the direct applicability of CIL to the Specialist Chambers is concerned, would not have changed his overall conclusion in that regard. The Court of Appeals Panel also concludes that the Pre-Trial Judge did not err in finding that CIL has primacy over domestic legislation and, therefore, it dismisses Thaçi's Ground B1 in part, Veseli's Grounds 1, 3 and 6 in part, and Selimi's Grounds A1 and A2.

2. Whether Applying CIL Pursuant to Article 12 of the Law is Compatible with the Principle of Non-Retroactivity (Veseli Ground 2; Selimi Ground A3)

30. The Court of Appeals Panel considers that Ground 2 presented by Veseli and Ground A3 presented by Selimi substantially overlap, as they both relate to the perceived violation of the principle of non-retroactivity by the application of CIL; therefore, these grounds will be considered together.

(a) Submissions of the Parties

31. Veseli submits that the Pre-Trial Judge erred in law by finding that Article 7 of the ECHR applies in its entirety to Article 12 of the Law and by using the "*effet utile*" principle to interpret the Law.[81] In Veseli's view, the domestic standard of non-retroactivity in Kosovo is higher than that foreseen in Article 7(1) of the ECHR, which only provides a minimum of protection and cannot substitute constitutional rules regulating the relationship between international and domestic law.[82]

32. Selimi similarly submits that the Pre-Trial Judge erred in law in finding that the direct applicability of CIL does not violate the principle of non-retroactivity, since Article 7(1) of the ECHR does not in and of itself establish the legitimacy of relying on CIL as a criminalising source.[83] According to Selimi, the Pre-Trial Judge's finding that the Kosovo legislator had authority to adopt domestic legislation providing for

[81] Veseli Appeal, paras 26-30.
[82] Veseli Appeal, paras 32-34. See also Veseli Appeal, para. 41.
[83] Selimi Appeal, paras 31-35.

international crimes already existing under CIL is called into question because jurisprudence of the Kosovo Supreme Court fetters such authority.[84]

33. The SPO responds that the applicable CIL is that existing at the time of commission of the alleged crimes and, therefore, the Pre-Trial Judge correctly found that Article 12 of the Law is consistent with the Constitution of Kosovo, as well as with Article 7 of the ECHR, Article 15 of the International Covenant on Civil and Political Rights ("ICCPR") and ECtHR case law.[85] In this regard, the SPO submits that the Kosovo Supreme Court acknowledged that Kosovo could prosecute a mode of liability foreseen in CIL for crimes pre-dating its codification.[86] The SPO also points to the exception of genocide, war crimes and crimes against humanity provided in Article 33(1) of the Constitution of Kosovo.[87]

34. Veseli replies that for the exception of Article 33(1) of the Constitution of Kosovo to apply, CIL must first have direct effect.[88] He further argues that the circumstances of the case before the Kosovo Supreme Court on which the SPO relies in support of its claims were different.[89] Moreover, Veseli replies that Article 7(2) of the ECHR cannot override the protection against retroactive application of the law provided by Article 7(1) of the ECHR and Article 33(1) of the Constitution of Kosovo.[90] According to him, there is no evidence that this was the intention of the Kosovo Parliament.[91]

[84] Selimi Appeal, paras 36-39.
[85] SPO Response to Veseli Appeal, paras 13, 15, 24, 26-27, 29-31; SPO Response to Selimi Appeal, paras 17-18, 27-29, 31-34.
[86] SPO Response to Veseli Appeal, paras 32-35.
[87] SPO Response to Veseli Appeal, para. 21; SPO Response to Selimi Appeal, para. 24.
[88] Veseli Reply, para. 24. See also Veseli Reply, paras 5, 8, 25-27.
[89] Veseli Reply, para. 36.
[90] Veseli Reply, paras 4, 7. See also Veseli Appeal, para. 25.
[91] Veseli Reply, para. 6.

(b) Assessment of the Court of Appeals Panel

35. The Pre-Trial Judge found Article 12 of the Law to be consistent with Article 7 of the ECHR, Article 15 of the ICCPR, as well as Article 33(1) of the Constitution of Kosovo.[92] The Court of Appeals Panel recalls that Article 7(1) of the ECHR, which is almost identical to Article 15(1) of the ICCPR, recognises the principle of legality by providing *inter alia* that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed". A contextual clarification to this principle is provided in Articles 7(2) of the ECHR and 15(2) of the ICCPR stating that "[it] shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

36. Veseli alleges an error of law on the part of the Pre-Trial Judge in finding that Article 7 of the ECHR and Article 15 of the ICCPR apply in their entirety to Article 12 of the Law, since reference therein is specifically made only to the second paragraphs of the Articles.[93] The Panel, however, agrees with the Pre-Trial Judge that, in light of Article 22 of the Constitution of Kosovo, the ECHR and the ICCPR guide the interpretation of human rights and fundamental freedoms guaranteed by the Constitution, including the principle of legality. Therefore, the Panel sees no error in the Pre-Trial Judge's finding that Article 7 of the ECHR and Article 15 of the ICCPR apply in their entirety to Article 12 of the Law as well.[94] Indeed, the ECtHR has held that the two paragraphs of Article 7 of the ECHR are interlinked and are to be interpreted in a concordant manner.[95]

[92] Impugned Decision, paras 94-95, 101.
[93] See Veseli Appeal, paras 26-27, 29.
[94] See Impugned Decision, paras 94-95. See also Article 53 of the Constitution of Kosovo.
[95] ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina*, nos. 2312/08 and 34179/08, Judgment, 18 July 2013 ("*Maktouf and Damjanović* Judgment"), para. 72.

37. It is well-accepted that the term "law" in Article 7(1) of the ECHR comprises both written and unwritten law.[96] Moreover, as noted above, the ECtHR found no violation of Article 7 of the ECHR in situations where the conduct was prohibited only in international law at the time of its commission and the legal basis for conviction was domestic written legislation adopted at a later stage.[97] Veseli and Selimi argue that this does not prevent states from adopting a stricter standard,[98] however, Kosovo has not chosen to adopt a stricter standard. According to Article 33(1) of the Constitution of Kosovo, the principle of legality is upheld, similarly to Article 7(1) of the ECHR, when the fact that the act constituted a criminal offense was foreseen under "law". The Panel also notes that the same Article of the Constitution of Kosovo states that acts which constituted genocide, war crimes or crimes against humanity "according to international law" at the time of their commission are punishable.[99]

38. The Court of Appeals Panel agrees with Veseli that the exception in Article 7(2) of the ECHR to the principle of non-retroactivity as defined in the ECHR was introduced to ensure the validity of the judgments of the Nuremberg Tribunal,[100] and that this exception should be limited.[101] In the present case, there is, however, no issue of retroactivity. As the Pre-Trial Judge noted, the subject-matter jurisdiction of the

[96] *Kononov v. Latvia* Judgment, para. 185; ECtHR, *Korbely v. Hungary*, no. 9174/02, Judgment, 19 September 2008 ("*Korbely v. Hungary* Judgment"), para. 70. See also *Ieng Sary* Appeal Decision, para. 213 (wherein the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") held that the international principle of legality allows for criminal liability over crimes that were either national or international in nature at the time they were committed).
[97] See above, para. 24, fn. 65.
[98] Veseli Appeal, paras 29-32, referring, *inter alia*, to European Commission of Human Rights, Preparatory Work on Article 7 of the European Convention on Human Rights, 21 May 1957 ("ECHR *travaux préparatoires*"), p. 6; Selimi Appeal, paras 31, 35.
[99] Core international crimes being part of CIL, as opposed to generally "international law", would in any event be binding. See above, para. 23.
[100] ECHR *travaux préparatoires*, pp. 4-5, 7, 10.
[101] ECHR *travaux préparatoires*, p. 10 (wherein the Committee of Experts on Human Rights reported that the principle enshrined in Article 7 of the ECHR "did not affect laws which, *under the very exceptional circumstances* at the end of the second world war, were passed in order to suppress war crimes, treason and collaboration with the enemy" (emphasis added)); *Maktouf and Damjanović* Judgment, para. 72. The principle of legality belongs to the non-derogable rights. See Article 56(2) of the Constitution of Kosovo; Article 15(2) of the ECHR; Article 4(2) of the ICCPR.

Specialist Chambers is delineated by CIL which applied at the time of the commission of the alleged crimes, prior to the promulgation of the Law.[102] For the same reason, there is no issue of limitation to the principle of non-retroactivity under Article 55 of the Constitution.[103]

39. The Panel further notes that "general principles of law recognised by civilised nations" is a different source of law from CIL.[104] At the time of the adoption of the ECHR, CIL had not fully developed. Since the general principles of law recognised by civilised nations are not binding on the Specialist Chambers, the Panel views the reference to Article 7(2) of the ECHR and to Article 15(2) of the ICCPR in Article 12 of the Law as emphasising the special nature of core international crimes, which were only recently reflected in domestic written legislation.[105] The essence of this is similarly echoed in Article 33(1) of the Constitution of Kosovo, which is also referenced in Article 12 of the Law and provides that "[n]o one shall be charged or punished for any act which did not constitute a penal offense 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" (emphasis added).[106] The Panel finds that this language would be without purpose if it was not intended to cover cases prior to the introduction of these crimes in written domestic legislation in Kosovo.[107] For this interpretation, there is no need to resort to the principle of *effet utile*.

[102] Articles 12, 13(1), 14(1) of the Law. See also Article 6(1) of the Law; Impugned Decision, para. 101.
[103] In any event, the term "law" in Article 55 of the Constitution of Kosovo should be interpreted in light of the entirety of the Constitution which includes CIL as well. In this regard, human rights and fundamental freedoms guaranteed by the Constitution of Kosovo shall be interpreted consistently with the court decisions of the ECtHR. See Article 53 of the Constitution of Kosovo.
[104] See ICJ Statute, Article 38(1)(b), (c).
[105] The United Nations ("UN") Secretary General in his annotation to the ICCPR noted the argument that paragraph 2 of Article 15 of the ICCPR was considered by some as superfluous because the term "generally recognized principles of law" is already included in "international law" mentioned in the first paragraph of the Article. See ECHR *travaux préparatoires*, Annex, p. 16.
[106] The ECCC also included an exception for international crimes in their formulation of the principle of legality in national law. See *Ieng Sary* Appeal Decision, para. 214.
[107] International crimes were first explicitly included in Chapter XIV of the 2003 Provisional Criminal Code of Kosovo. See also Kosovo Supreme Court Judgment of 5 August 2004, p. 33, fn. 72 (wherein the

40. In view of the above, the Panel finds that Article 12 of the Law is fully in compliance with the principle of legality under international human rights law and the Constitution of Kosovo and that the reference in it to Articles 7(2) of the ECHR and 15(2) of the ICCPR does not render it unconstitutional. The Court of Appeals Panel accordingly dismisses Veseli's Ground 2 and Selimi's Grounds A3.

3. Whether the Application of CIL at the Specialist Chambers Violates the Principles of Non-Discrimination and Equality Before the Law (Veseli Ground 4)

(a) Submissions of the Parties

41. Veseli submits that the Pre-Trial Judge erred by ignoring his argument that Kosovo and Serbia emerged from the fragmentation of a single State.[108] He contends that it is, therefore, relevant that the Serbian Constitutional Court found that CIL is inapplicable with respect to conduct in Kosovo in 1998.[109] Veseli argues that, in light of this, treating him differently from his Serbian counterparts would violate the principle of equality before the law under Article 26 of the ICCPR and Article 24 of the Constitution of Kosovo.[110]

42. The SPO responds that there is no issue of discrimination, since the applicable laws in Kosovo and Serbia are different.[111]

43. Veseli replies that there is no convincing justification for the difference in treatment and that Kosovo courts trying war crimes cases have done so on the basis of the 1976 SFRY Criminal Code.[112]

Supreme Court of Kosovo acknowledged that retroactivity in relation to such crimes was not forbidden under Article 7 of the ECHR).

[108] Veseli Appeal, paras 44, 46-48, 50-52.

[109] Veseli Appeal, para. 43. See also Veseli Appeal, paras 56-57.

[110] Veseli Appeal, paras 42-43, 49-50, 53-55.

[111] SPO Response to Veseli Appeal, para. 36.

[112] Veseli Reply, paras 2, 13-16. See also Veseli Reply, paras 17-20.

(b) Assessment of the Court of Appeals Panel

44. The Panel notes that the Pre-Trial Judge, having found that it is "wholly conceivable" that different jurisdictions, including jurisdictions originating from the same predecessor entity, can prosecute persons for crimes during the same armed conflict, pursuant to different laws,[113] did not specifically engage with Veseli's arguments alleging discrimination and violation of the principle of equality before the law.[114] The Court of Appeals Panel recalls its earlier finding endorsing the Pre-Trial Judge's conclusion that the Specialist Chambers are not bound to follow judicial precedents from other jurisdictions.[115] Veseli bases his arguments on his understanding that Serbian counterparts could not be charged for crimes against humanity and the war crime of arbitrary detention, or on the basis of JCE or command responsibility, in relation to conduct in Kosovo in 1998, in combination with Kosovo's obligation to continue Serbia's rights and obligations under the ICCPR.[116]

45. The Panel notes that the protection enshrined in both the ICCPR[117] and the Constitution of Kosovo concerns the treatment of individuals within the same national jurisdiction. In this regard, the Panel notes that the ICCPR obligates each state party "to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant", including the rights to non-discrimination and equality before the law, "without distinction".[118] In this case, accused before the Specialist Chambers, on the one hand, and accused before Serbian courts, on the other hand, are tried on the basis of different laws before courts of

[113] Impugned Decision, para. 100.
[114] See Veseli CIL Reply, paras 3-15; Veseli Response to SPO CIL Sur-Reply, paras 2-12, referred to at Veseli Appeal, para. 42, fn. 29.
[115] See above, para. 28.
[116] Veseli Appeal, paras 43-52.
[117] The ICCPR applies directly to Kosovo. See Article 22(3) of the Constitution of Kosovo.
[118] See Article 2(1) of the ICCPR (emphasis added); UN Human Rights Committee, CCPR, General Comment No. 18: Non-discrimination, 10 November 1989, para. 1. See also Articles 1, 14 of the ECHR.

different national jurisdictions. The continuity of a State's obligation to protect the rights enshrined in the ICCPR in case of succession does not alter this conclusion.

46. With respect to the treatment of accused before the Specialist Chambers in comparison to accused before other Kosovo courts, the Panel notes that Veseli raises this argument for the first time in his Appeal.[119] The Panel considers that the fact that it was not raised in the first instance would be sufficient to summarily dismiss it.[120] In any event, Veseli does not identify any ground of discrimination. The Specialist Chambers were established to try war crimes and crimes against humanity falling under the jurisdictional parameters set forth under Articles 6 to 9 of the Law and which relate to the Council of Europe Report.[121] As such, any difference in treatment between accused before the Specialist Chambers and other Kosovo courts is objectively and reasonably justified and therefore, does not constitute discrimination.[122]

47. Therefore, the Panel finds that even if the Pre-Trial Judge had specifically assessed the potential impact of his findings on the principles of non-discrimination and equality before the law, this would not have changed his overall conclusion regarding the applicability and supremacy of CIL. The Court of Appeals Panel accordingly dismisses Veseli's Ground 4.

4. Whether the Principle of *Lex Mitior* is Jurisdictional in Nature and Applies to CIL (Veseli Grounds 5 and 7 and, in part, Grounds 6, 8-9)

48. Grounds 5 and 7 and part of Grounds 6, 8 and 9 of Veseli's Appeal relate to the application of the principle of *lex mitior*; therefore, these grounds will be considered together.

---

[119] See Veseli Appeal, paras 56-57; Veseli Reply, paras 17-20.
[120] See *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 15.
[121] Articles 1(2), 6(1) of the Law; Article 162(1) of the Constitution of Kosovo. See also below, paras 66-67, 71.
[122] See ECtHR, *Molla Sali v. Greece*, no. 20452/14, Judgment, 19 December 2018, para. 135.

(a) Submissions of the Parties

49. Veseli submits that the Pre-Trial Judge erred in law in finding that the applicability of the principle of *lex mitior* is not jurisdictional in nature, since it relates to the violation of a constitutional norm and to the subject-matter jurisdiction of the Specialist Chambers.[123] Veseli argues that the existence of CIL is not frozen in time and that if it changed in the meantime, the *lex mitior* principle should apply.[124] Moreover, Veseli submits that the Pre-Trial Judge failed to engage with his argument that Article 7(2) of the ECHR is obsolete and cannot operate as an exception to the principle of *lex mitior* by giving primacy to CIL.[125] He further submits that the Pre-Trial Judge erred in law by concluding that the principle of *lex mitior* only applies to CIL, since the principle automatically applies when there is more than one applicable law and, therefore, in this case, the Law needs to be compared with the 1976 SFRY Criminal Code regarding war crimes, modes of liability and sentencing.[126] He argues that by failing to engage in this comparison, the Pre-Trial Judge violated the Constitution of Kosovo and the ECHR.[127] According to Veseli, whether any difference exists between the modes of liability under Article 16(1)(a) of the Law and those in the 1976 SFRY Criminal Code is irrelevant for the purpose of the application of the principle.[128]

50. The SPO responds that Veseli's arguments should be dismissed because the Pre-Trial Judge's findings on the principle of *lex mitior* do not amount to a jurisdictional issue.[129] Even if Veseli had standing, he has not identified, according to the SPO, an error that has a material effect on the Impugned Decision.[130] The SPO also

[123] Veseli Appeal, paras 67-71; Veseli Reply, para. 37.
[124] Veseli Appeal, para. 87. See also Veseli Reply, para. 42 (wherein Veseli contends that failing to investigate whether a change in law has occurred violates the rule against retrospective application of the criminal law).
[125] Veseli Appeal, paras 59-61. See also Veseli Reply, para. 30.
[126] Veseli Appeal, paras 64-65, 72, 81-82. See also Veseli Reply, paras 38-39.
[127] Veseli Appeal, paras 81-82.
[128] Veseli Appeal, para. 80.
[129] SPO Response to Veseli Appeal, paras 39, 44.
[130] SPO Response to Veseli Appeal, para. 39.

argues that Veseli misrepresents the Impugned Decision by failing to acknowledge that the Pre-Trial Judge engaged with his arguments about CIL and the applicability of the principle of *lex mitior*.[131] Whereas the principle of *lex mitior* requires that more than one law be applicable, the SPO submits that: (i) only CIL is, pursuant to Article 12 of the Law, binding for the crimes charged; (ii) there is no equivalent provision in the 1976 SFRY Criminal Code for these crimes; and (iii) Article 16(1)(a) of the Law does not refer to Kosovo law, which applies only when specifically incorporated.[132] This framework is, according to the SPO, consistent with the Constitution of Kosovo, the ECHR and other international instruments.[133]

51. With respect to sentencing, the SPO responds that the ECtHR found that the principle of *lex mitior* did not apply with respect to penalties for crimes under CIL which were subsequently criminalised under domestic law and that no conflicting sentencing regime applies in Kosovo, since the Law concerns exclusively war crimes and crimes against humanity as defined under CIL.[134]

(b) Assessment of the Court of Appeals Panel

52. At the outset, the Panel finds that parties' automatic right of appeal is confined to challenges to jurisdiction. In this regard, the Panel has the power to determine whether or not an issue is truly jurisdictional.[135]

53. In the Impugned Decision, the Pre-Trial Judge found that the issue of the applicability of the principle of *lex mitior* is not jurisdictional in nature. It concerns, rather, the proper identification, in case of conflict, of which law should be resorted to by a panel as the more favourable to the Accused.[136] Moreover, the Pre-Trial Judge

[131] SPO Response to Veseli Appeal, para. 51, referring to Veseli Appeal, para. 87.
[132] SPO Response to Veseli Appeal, paras 14, 40-41.
[133] SPO Response to Veseli Appeal, paras 14-15.
[134] SPO Response to Veseli Appeal, paras 42-43.
[135] ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Six Preliminary Motions Challenging Jurisdiction, 28 April 2009 ("*Karadžić* Decision on Jurisdiction Challenges"), para. 81.
[136] Impugned Decision, para. 106.

found that this does not have a direct bearing on the issues dealt with in the present litigation, as the only subsequent, applicable source of law that can be assessed to find a more favourable law, if any, is CIL, to the extent that it would evolve to the benefit of the Accused.[137]

54. The Court of Appeals Panel recalls that, according to a combined reading of Articles 6 to 9 of the Law and Rule 97(1)(a) of the Rules, a challenge to the jurisdiction of the Specialist Chambers pertains to the personal, territorial, temporal or subject-matter jurisdiction of the Specialist Chambers.[138] The Panel has already, in the context of prior decisions, relied on the jurisprudence of other courts and notably the jurisprudence of the *ad hoc* tribunals as guidance to interpret its own legal framework.[139]

55. The Panel finds that the jurisprudence of the International Criminal Tribunal for the former Yugoslavia ("ICTY") is particularly relevant to the present case, because Rule 72(D) of the ICTY Rules of Procedure and Evidence ("ICTY Rules") limits jurisdictional challenges to comparable sub-categories listed under that rule. In that regard, the Panel notes Veseli's argument that the ICTY jurisprudence is inapposite to the issue in contention because, unlike the Specialist Chambers, the ICTY was not bound by domestic law.[140] While the Panel acknowledges that the ICTY and the Specialist Chambers are governed by different statutory frameworks as it concerns the

[137] Impugned Decision, para. 106.
[138] See KSC-BC-2020-07, F00005, Decision on the Admissibility of Appeal and Joinder Against Decision on Preliminary Motions, 12 May 2021 ("*Gucati and Haradinaj* Appeal Decision on Admissibility"), para. 14; *Gucati* Appeal Decision, para. 17.
[139] See e.g. *Gucati* Appeal Decision, paras 9-11, 50; F00005/RED, Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release, 30 April 2021 (confidential version filed on 30 April 2021) ("*Krasniqi* Appeal Decision on Interim Release"), para. 17.
[140] Veseli Appeal, para. 68.

applicable sources of law,[141] this factor does not preclude reliance on ICTY jurisprudence when determining whether any challenge is truly jurisdictional.

56. The Panel notes that in support of his finding that the issue of the applicability of the principle of *lex mitior* is not jurisdictional in nature, the Pre-Trial Judge relied on the jurisprudence of the ICTY Appeals Chamber in the *Prosecutor v. Nikolić* case according to which*:*

> The Appeals Chamber notes that the question of the applicability of the principle is not one of jurisdiction, but rather one of whether differing criminal laws are relevant and applicable to the law governing the […] consideration of the International Tribunal.[142]

57. The Panel agrees with the determination of the Pre-Trial Judge on this matter. The Court of Appeals Panel notes that:

> The principle of *lex mitior* is understood to mean that, if the law relevant to the offence of the accused has been amended, the less severe law should be applied. It is an inherent element of this principle that the relevant law must be binding upon the court. Accused persons can only benefit from the more lenient sentence if the law is binding, since they only have a protected legal position when the sentencing range must be applied to them. The principle of *lex mitior* is thus only applicable if a law that binds the International Tribunal concerned is subsequently changed to a more favourable law by which the International Tribunal is also obliged to abide.[143]

---

[141] Article 3(2)(a) of the Law expressly refers to the Constitution of Kosovo as one of the sources of law in accordance with which the Specialist Chambers shall adjudicate and function, while the ICTY Statute does not contain a corresponding provision.

[142] See Impugned Decision, para. 106, fn. 214, referring to ICTY, *Prosecutor v. Nikolić*, IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005 ("*Nikolić* Appeal Judgement on Sentencing"), para. 80.

[143] *Nikolić* Appeal Judgement on Sentencing, para. 81. See also ECtHR, *Jidic v. Romania*, no. 45776/16, Judgment, 18 June 2020, para. 80, referring to ECtHR, *Scoppola v. Italy*, no. 10249/03, Judgment, 17 September 2009, para. 109 (where the ECtHR held that Article 7 of the ECHR also guarantees the principle of retroactivity of the more lenient criminal laws, in that "where there are differences between the criminal law in force at the time of the commission of an offence and subsequent criminal laws

58. The Panel further notes that according to Veseli, the applicability of *lex mitior* is a jurisdictional matter, "simply" because it relates to the violation of a constitutional norm.[144] In addition, Veseli argues that the determination of the *lex mitior* issue governs, *inter alia*, which criminal offences are within the subject-matter jurisdiction of the Specialist Chambers under Article 6 of the Law.[145] The Panel however recalls its prior findings that CIL has primacy over domestic legislation and that this is in line with the Constitution of Kosovo.[146] The Panel further recalls that, as held by the Appeals Chamber of the International Criminal Court ("ICC"), the principle of *lex mitior* concerns *conduct* giving rise to criminal responsibility,[147] rather than criminal responsibility as such and therefore falls outside the scope of a decision on motions challenging jurisdiction under Rule 97 of the Rules.

59. Accordingly, the Panel concludes that Veseli fails to demonstrate that the Pre-Trial Judge erred in finding that the issue of the applicability of the principle of *lex mitior* is not jurisdictional in nature. The Panel will therefore not address Veseli's substantive submissions on the principle of *lex mitior*. The Court of Appeals Panel accordingly dismisses Veseli's Grounds 5 and 7 and part of his Grounds 6, 8 and 9.

enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant").

[144] Veseli Appeal, para. 69.

[145] Veseli Appeal, para. 70.

[146] See above, paras 23-24, 29.

[147] See ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-2024, Judgment on the Appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang Against the Decision of Trial Chamber V(A) of 19 August 2015 Entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", 12 February 2016, para. 70.

C. ALLEGED ERRORS REGARDING COUNCIL OF EUROPE REPORT

1. Whether the Council of Europe Report Limits the Jurisdiction of the Specialist Chambers (Thaçi Grounds A1-A2; Krasniqi Ground 4)

(a) Submissions of the Parties

60. Thaçi submits that according to the Kosovo Constitutional Court, the necessity requirement for the Specialist Chambers to constitute an authorised "specialised court" with a "specifically defined scope of jurisdiction" under Article 103(7) of the Constitution of Kosovo derives from the need for Kosovo to comply with its international obligations stemming from the Council of Europe Report.[148] In Thaçi's view, the Kosovo Constitutional Court confirmed that the Council of Europe Report is the *raison d'être* of the Specialist Chambers and that the "specific crimes" mentioned therein are the ones setting the boundaries of the Specialist Chambers' subject-matter jurisdiction, not the broad range of crimes incorporated under Articles 12 to 16 of the Law.[149] He submits that as a result, the Pre-Trial Judge erred in circumventing the Kosovo Constitutional Court Judgment and in finding that the reference to the "number of highly specific criminal allegations" outlined in the Report in fact "does not exclude" allegations arising from the Report "exceeding" allegations of organ trafficking and inhumane treatment in detention centres in Albania.[150] For Thaçi, stretching the jurisdiction of the Specialist Chambers as was done in the Impugned Decision would lead the Specialist Chambers to lose their specialised nature and to become an extraordinary court prohibited by Article 103(7) of the Constitution of Kosovo.[151]

---

[148] See Thaçi Appeal, paras 13-15, referring to Kosovo, 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*, KO 26/15, Judgment, 15 April 2015 ("Kosovo Constitutional Court Judgment"), paras 43, 45, 50-51, 53. See also Thaçi Appeal, paras 20, 22; Thaçi Reply, paras 2-3, 9.
[149] Thaçi Appeal, paras 16-18, 20. See also Thaçi Reply, paras 2-3, 5.
[150] Thaçi Appeal, paras 19, 21. See also Thaçi Appeal, paras 20, 22; Thaçi Reply, paras 2-3.
[151] Thaçi Appeal, paras 21-23.

61. Thaçi further submits that the Pre-Trial Judge erred in expanding the jurisdiction of the Specialist Chambers and in his interpretation of the term "in relation to" mentioned in Article 162(1) of the Constitution of Kosovo and the similar language in Articles 1(2) and 6(1) of the Law, since these provisions limit its scope to allegations that are contained in the Report *and* have been investigated by the Special Investigative Task Force ("SITF").[152] For Thaçi, the limitation under Article 1(2) of the Law is not only jurisdictional but also delineates the scope and purpose of the Specialist Chambers and of the Law as a whole.[153]

62. Krasniqi submits that the jurisdiction of the Specialist Chambers is strictly limited to the allegations contained in the Council of Europe Report which Kosovo has an international obligation to investigate and prosecute, and that the Pre-Trial Judge erred in law in finding that the charges must only be "sufficiently connected" to the Report.[154] He contends that the Kosovo Constitutional Court Judgment, in interpreting the necessity requirement under Article 103(7) of the Constitution of Kosovo, confined the scope of the Specialist Chambers' jurisdiction to the "highly specific criminal allegations" of the Report.[155] According to him, the Pre-Trial Judge erred in interpreting this reference as merely a "general description" and in finding that this did not exclude allegations exceeding organ trafficking and inhumane treatment in detention centres in Albania.[156] Krasniqi also submits that Article 162(1) of the Constitution of Kosovo further confirms that any broader jurisdiction would be *ultra vires*.[157] He finally claims that there was no factual necessity pursuant to

[152] Thaçi Appeal, paras 24-27, 29, 32. See also Thaçi Appeal, paras 31, 33; Thaçi Reply, para. 8. Thaçi submits that while the Rome Statute proclaims that the state parties are establishing a permanent court "with jurisdiction over the most serious crimes of concern to the international community as a whole", the ICC cannot exercise jurisdiction over all such crimes because of various jurisdictional filters. See Thaçi Appeal, para. 28.
[153] Thaçi Appeal, para. 31; Thaçi Reply, para. 8.
[154] Krasniqi Appeal, paras 78-87; Krasniqi Reply, paras 19-21, 25.
[155] Krasniqi Appeal, paras 78-82, referring to Kosovo Constitutional Court Judgment, paras 50-51, 53, 71. See also Krasniqi Reply, paras 19-20.
[156] Krasniqi Appeal, paras 81-82, referring to Impugned Decision, para. 118. See also Krasniqi Appeal, para. 87.
[157] Krasniqi Appeal, para. 83. See also Krasniqi Appeal, paras 79, 85.

Article 103(7) of the Constitution of Kosovo to establish a specialised court with jurisdiction over offences committed as early as March 1998 and at locations in Kosovo, given that such crimes are or have already been investigated and prosecuted by the ICTY or in Kosovo proceedings.[158]

63. The SPO responds that the Specialist Chambers' jurisdiction is compatible with Article 103(7) of the Constitution of Kosovo and that the Defence misinterprets the Kosovo Constitutional Court Judgment. According to the SPO, the Kosovo Constitutional Court was not required to, and did not, pronounce upon the jurisdiction of the Specialist Chambers but rather confirmed that its establishment was "necessary" within the meaning of Article 103(7) of the Constitution of Kosovo.[159] The SPO further argues that the Pre-Trial Judge did not err in finding that the charged crimes must only "relate to" the Report and required a "sufficient connection" to it.[160] In the SPO's view, this is reflected in the plain language of Article 162(1) of the Constitution of Kosovo and Article 6(1) of the Law.[161] The SPO submits that because the jurisdictional provisions of the Law were drafted in full knowledge of and with reference to the Report, the Defence's discordant interpretation must be rejected.[162] According to the SPO, the Specialist Chambers' jurisdiction is not confined to the "highly specific criminal allegations" or "case studies" within the Council of Europe Report.[163] In that regard, the SPO submits that the Exchange of Letters with the European Union as well as the Kosovo Constitutional Court Judgment further confirmed that Kosovo's international obligations are broader and connected to the establishment of the Specialist Chambers rather than the "obligation to investigate"

[158] Krasniqi Appeal, para. 86. See also Krasniqi Reply, paras 21, 25.
[159] SPO Response to Thaçi Appeal, paras 12-18; SPO Response to Krasniqi Appeal, paras 74-75.
[160] SPO Response to Thaçi Appeal, para. 24; SPO Response to Krasniqi Appeal, paras 71-72, 76-78.
[161] SPO Response to Thaçi Appeal, paras 14, 19, 21; SPO Response to Krasniqi Appeal, paras 70-71.
[162] SPO Response to Thaçi Appeal, paras 20-21; SPO Response to Krasniqi Appeal, para. 91. See also SPO Response to Krasniqi Appeal, paras 71, 74.
[163] SPO Response to Thaçi Appeal, paras 14-18, 25; SPO Response to Krasniqi Appeal, paras 71, 77. See also SPO Response to Krasniqi Appeal, para. 92.

the crimes mentioned in the Report.[164] The SPO further contends that the Defence's reliance on Article 1(2) of the Law is erroneous and that this provision cannot serve to impose limits on the Specialist Chambers' jurisdiction.[165]

64. Thaçi replies that the crimes alleged in the Indictment have previously been investigated and/or prosecuted in Kosovo or before the ICTY.[166]

65. Krasniqi replies that the Constitution of Kosovo and the Kosovo Constitutional Court Judgment refute the SPO's interpretation and confirm that the international obligations which made it necessary to create the Specialist Chambers arise from the Report, not the Exchange of Letters.[167]

(b) Assessment of the Court of Appeals Panel

66. Turning first to the question whether the Pre-Trial Judge erred in finding that the jurisdiction of the Specialist Chambers is not limited to the allegations contained in the Report, the Panel notes that when referring to the Council of Europe Report, Article 162(1) of the Constitution of Kosovo uses the term "in relation to"[168] and Article 6(1) of the Law uses the term "relate to".[169] The Panel agrees with the Pre-Trial Judge that it is appropriate to revert to the ordinary meaning of these formulations.[170] In that sense, while the Pre-Trial Judge found that the charges brought against an

[164] SPO Response to Krasniqi Appeal, paras 72-77, referring to 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 ("Exchange of Letters").
[165] SPO Response to Thaçi Appeal, paras 22-23.
[166] Thaçi Reply, para. 7.
[167] Krasniqi Reply, paras 19-21.
[168] Article 162(1) of the Constitution of Kosovo provides:

> To comply with its international obligations in relation to the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011, the Republic of Kosovo may establish Specialist Chambers and a Specialist Prosecutor's Office within the justice system of Kosovo. The organisation, functioning and jurisdiction of the Specialist Chambers and Specialist Prosecutor's Office shall be regulated by this Article and by a specific law.

[169] Article 6(1) of the Law states that "[t]he Specialist Chambers shall have jurisdiction over crimes set out in Articles 12-16 which relate to the Council of Europe Assembly Report".
[170] See Impugned Decision, paras 107-108.

individual under the legal framework and jurisdictional parameters of the Specialist Chambers must be "sufficiently connected" to the Report,[171] the Appeals Panel is of the view that a mere "relation" between these charges and the Report would suffice to meet the jurisdictional requirement under Article 6(1) of the Law. The Panel is also satisfied that, read in combination, the jurisdictional provisions of the Law, under Articles 6 to 9, define the scope of the Specialist Chambers' jurisdiction, which is broader than the majority of the allegations in the Report. The Panel considers that Thaçi and Krasniqi have failed to provide any justification for departing from the plain meaning of these provisions. This does not mean, however, that the Specialist Chambers can exercise jurisdiction over any crime committed between 1998 and 2000 in Albania or Kosovo, since such crimes would still need to fall within the various jurisdictional parameters set forth under Articles 6 to 9 and 17 of the Law, meet the required threshold(s) under Articles 13 and 14 of the Law, and be related to the Council of Europe Report.[172]

67. The Panel considers that if the intention behind the creation of the Specialist Chambers was to limit their jurisdiction to the specific allegations of organ trafficking and inhumane treatment in detention centres in Albania that form the focus of the Report, this would have been unequivocally reflected in the wording of the provisions of the Law dealing with the Specialist Chambers' jurisdiction.[173] It is clear that none of the provisions under Articles 6 to 9 of the Law narrow the Specialist Chambers' jurisdiction only to acts committed from the summer of 1999 onwards, to acts committed in Albania or with a cross-border element, and/or to offences of inhumane treatment and organ trafficking.[174] That this is not the case and that Articles 6 to 9 of

[171] See Impugned Decision, para. 111.
[172] The same principles apply, *inter alia*, for the ICC: while Article 5 of the Rome Statute states that the ICC has jurisdiction over "the most serious crimes of concern to the international community as a whole", such crimes would still need to meet the various thresholds of the different jurisdictional parameters provided under Articles 6 to 8, 11 to 13, 15*bis* and 15*ter* of the Rome Statute. See Thaçi Appeal, para. 28.
[173] See Amendment No. 24 to the Constitution of Kosovo, Article 162, 05-D-139, 3 August 2015.
[174] See Impugned Decision, para. 110.

the Law are broader in scope, while the Law was adopted in full knowledge of the Report, can only demonstrate the deliberate intention of the Assembly of Kosovo not to confine the Specialist Chambers' jurisdiction to these allegations. In addition, and as the Pre-Trial Judge stressed,[175] the Panel recalls that the Law was adopted after the SITF publicly announced that its investigations were not confined to allegations of organ trafficking and inhumane treatment in detention centres in Albania.[176] The Panel is not persuaded by Thaçi's assertion that this undermines the Pre-Trial Judge's position, but finds that it rather confirms that if the drafters of the Law had intended to restrict the jurisdiction of the Specialist Chambers in light of this public statement, they would have done so expressly in the Law.[177]

68. Turning next to the question of the compatibility of the Specialist Chambers' jurisdiction with Article 103(7) of the Constitution of Kosovo, the Court of Appeals Panel recalls that this provision states that "[s]pecialized courts may be established by law when necessary, but no extraordinary court may ever be created". The Panel notes that the Kosovo Constitutional Court found that the Specialist Chambers were in compliance with the requirements of Article 103(7) of the Constitution of Kosovo, *inter alia*, because of their "specifically defined scope of jurisdiction" and since their

[175] Impugned Decision, paras 113, 121.
[176] UN Security Council, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, S/2014/558, 1 August 2014 ("UNMIK Report"), Annex II, Statement dated 29 July 2014 of the Chief Prosecutor of the Special Investigative Task Force, pp. 18-19 (mentioning that the investigations conducted by the SITF showed that "certain KLA elements intentionally targeted the minority populations with acts of persecution that included unlawful killings, abductions, enforced disappearances, illegal detentions in camps *in Kosovo* and Albania, sexual violence, other forms of inhumane treatment, the forced displacement of individuals from their homes and communities, and the desecration and destruction of churches and other religious sites", that "certain KLA elements engaged in a sustained campaign of violence and intimidation *in 1998* and 1999 directed at Kosovo Albanian political opponents", and that the allegations contained in reports from the Organization for Security and Cooperation in Europe ("OSCE") and Human Rights Watch in Kosovo "*as well*" as those in the Council of Europe Report have been subjected to prosecutorial review in the context of a Kosovo-wide criminal investigation) (emphasis added). See also SITF, *Factsheet* (where the SITF indicated that it would conduct a "thorough criminal investigation […] look[ing] at the whole range of crimes in the [Council of Europe] Report").
[177] Contra Thaçi Appeal, para. 32.

establishment was a requirement for the Republic of Kosovo to comply with its international obligations stemming from the Council of Europe Report.[178]

69. The Panel observes that the subject-matter of the referral to the Kosovo Constitutional Court was to determine whether Amendment No. 24 to the Constitution of Kosovo, and therefore new Article 162, diminished any of the rights and freedoms guaranteed by Chapters II and III of the Constitution of Kosovo.[179] The scope of the Kosovo Constitutional Court's assessment was thus limited to satisfying itself that the constitutional amendment leading to the establishment of the Specialist Chambers did not diminish these guarantees, and that the Specialist Chambers were within the framework of the justice system of Kosovo, in conformity with Article 103(7) of the Constitution of Kosovo. The Kosovo Constitutional Court was indeed satisfied that none of the relevant guarantees was diminished and limited itself to this assessment.[180] The Panel is therefore not persuaded by the Defence's argument that the Kosovo Constitutional Court pronounced itself on the jurisdiction of the Specialist Chambers nor that it confined the Specialist Chambers' jurisdiction to these specific allegations in referring to the fact that the Council of Europe Report "outlines a number of highly specific criminal allegations and recommends them for investigation and prosecution".[181] In that sense, the Panel shares the Pre-Trial Judge's view that this reference was nothing more than a "general description" of the Report, thereby not excluding from the Specialist Chambers' jurisdiction broader allegations exceeding organ trafficking and inhumane treatment allegedly committed in detention centres in Albania.[182]

[178] Kosovo Constitutional Court Judgment, paras 43, 50-51, 53-54.
[179] Kosovo Constitutional Court Judgment, para. 2, referring to Article 113(9) of the Constitution of Kosovo. See also Kosovo Constitutional Court Judgment, para. 22.
[180] See e.g. Kosovo Constitutional Court Judgment, paras 57-59, 71-72, 104-105, and disposition, p. 18.
[181] Kosovo Constitutional Court Judgment, para. 51.
[182] See Impugned Decision, para. 118. Contra Thaçi Appeal, para. 19; Krasniqi Appeal, para. 81.

70. Similarly, the Panel finds that the fact that the Specialist Chambers were established as a result of Kosovo's international obligations "stemming from" the Council of Europe Report does not limit their jurisdiction in the manner suggested by the Defence. The Panel recalls that these international obligations arise out of the Exchange of Letters and were incorporated into the legal framework of Kosovo by way of Law No. 04/L-274.[183] While they relate to the Council of Europe Report, these obligations are broader than the mere obligation to investigate the allegations contained therein in that they are also connected to the establishment of the Specialist Chambers as "a requirement for the Republic of Kosovo"[184] and the need to provide secure, independent, impartial, fair and efficient criminal proceedings for crimes relating to the Report.[185] In this regard, the Panel considers it noteworthy that immediately following the publication of the Council of Europe Report, the Parliamentary Assembly of the Council of Europe adopted a Resolution calling for "follow-up investigations" to be conducted by EULEX or international judicial bodies mandated to do so regarding "all criminal acts linked to the conflict in Kosovo" and asking Kosovo to "cooperate" with regard to these "follow-up investigations".[186]

---

[183] See Kosovo Constitutional Court Judgment, paras 37-38, 51; Exchange of Letters, pp. 8-10 (PDF pagination). See also Impugned Decision, para. 98.

[184] See Kosovo Constitutional Court Judgment, paras 39, 50; Exchange of Letters, pp. 8-9 (PDF pagination) (mentioning an obligation in respect of "*any* proceedings" resulting from SITF's investigations) (emphasis added).

[185] See Article 1(2) of the Law, providing that:

> Specialist Chambers within the Kosovo justice system and the Specialist Prosecutor's Office are necessary to fulfil the international obligations undertaken in Law No. 04/L-274, to guarantee the protection of the fundamental rights and freedoms enshrined in the Constitution of the Republic of Kosovo, and to ensure secure, independent, impartial, fair and efficient criminal proceedings in relation to allegations of grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo, which relate to those reported in the Council of Europe [Report] and which have been the subject of criminal investigation by the [SITF].

See also Exchange of Letters, p. 8 (PDF pagination) (mentioning the need to provide "an environment conducive to the proper administration of justice"); KSC-CC-2020-11, F00015, Judgment on the Referral of Proposed Amendments to the Constitution of Kosovo, 26 November 2020, para. 55 (recalling that the Exchange of Letters "envisaged the establishment of the Specialist Chambers and the SPO to ensure the proper administration of justice in relation to proceedings arising out of the SITF investigations").

[186] See Council of Europe Parliamentary Assembly, Resolution 1782(2011), Investigation of allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo, 25 January 2011, paras 19.1.1, 19.6. See also Council of Europe Report, Section B, paras 169-174.

71. Furthermore, the Court of Appeals Panel considers that the fact that the contours of the Specialist Chambers' jurisdiction are delineated by Articles 6 to 9 of the Law rather than by the specific allegations contained in the Report does not have the effect of removing their "specialised" character within the meaning of Article 103(7) of the Constitution of Kosovo. The Panel disagrees with Krasniqi's argument that the necessity for the Specialist Chambers' establishment under Article 103(7) of the Constitution would be lost if they had jurisdiction over crimes committed in Kosovo and as early as March 1998 because this would overlap with crimes already prosecuted by the ICTY or in national proceedings in Kosovo.[187] Indeed, if any crimes charged were already the subject of proceedings before the ICTY or in Kosovo, the principle of *non bis in idem* as provided by Article 17 of the Law would be applicable and would ensure that the Specialist Chambers would have no jurisdiction over the persons already tried for such crimes. Any such situation would thus be addressed by that provision, which further indicates that the Law foresaw a possible overlap between the jurisdiction of the Specialist Chambers and that of the ICTY and courts in Kosovo.[188]

72. Finally, as to whether Article 1(2) of the Law can be interpreted as limiting the Specialist Chambers' jurisdiction, the Panel observes that Article 1 of the Law, under the chapter labelled "general provisions", is titled "the scope and purpose of the *Law*" (emphasis added). By contrast, Articles 6 to 10 of the Law, under the chapter labelled "jurisdiction and applicable law", directly address the jurisdiction of the Specialist Chambers. Consequently, the Panel finds that Article 1(2) of the Law is not jurisdictional in nature and considers that Thaçi and Krasniqi have failed to show that

[187] See Krasniqi Appeal, para. 86.
[188] See Impugned Decision, para. 117. While Article 34 of the Constitution of Kosovo generally mentions the fact that no one shall be tried more than once for the same criminal act, it is noteworthy that Article 17 of the Law specially mentions that principle with respect to the ICTY and Kosovo courts.

it was erroneous for the Pre-Trial Judge to find that Article 1(2) of the Law does not impose a jurisdictional limitation.[189]

73. In light of the above, the Court of Appeals Panel concludes that the Pre-Trial Judge did not err in finding that the Council of Europe Report does not limit the jurisdiction of the Specialist Chambers and that the charges in the Indictment must only be related to the Report.[190] Thaçi's Grounds A1-A2 and Krasniqi's Ground 4 are therefore dismissed.

2. Whether the Crimes Charged in the Indictment Relate to the Council of Europe Report (Thaçi Ground A3; Krasniqi Ground 5)

(a) Submissions of the Parties

74. Thaçi submits that the crimes charged in the Indictment exceed the subject-matter jurisdiction of the Specialist Chambers.[191] He argues that the Pre-Trial Judge misinterpreted the Council of Europe Report with regard to the Specialist Chambers' geographical and temporal parameters in finding that the Report was about more than allegations of post-war organ-trafficking and inhumane treatment in Albania, and rather about international crimes during the conflict in Kosovo.[192] According to Thaçi, it was not open to the Pre-Trial Judge to reach this finding given that the detention centres identified in the "highly specific criminal allegations" of the Report are all in Albania and the allegations occurred "for the most part" from the summer of 1999 onwards.[193] He finally argues that the Pre-Trial Judge failed to provide

[189] See Impugned Decision, para. 120. In any event, both Articles 1(2) and 6(1) of the Law simply require that the proceedings before the Specialist Chambers must relate to the Council of Europe Report.
[190] See Impugned Decision, paras 107-112, 139.
[191] Thaçi Reply, para. 11.
[192] Thaçi Appeal, paras 34-41, 44; Thaçi Reply, paras 4, 10-11. See also Thaçi Appeal, para. 30, where Thaçi contends that the Pre-Trial Judge erred in failing to determine whether the counts in the Indictment are "correlated" to the Report as per the standard he established.
[193] Thaçi Appeal, paras 36, 39. See also Thaçi Appeal, paras 37-38, 40-41, 44.

a reasoned opinion in completely ignoring the Thaçi CoE Report Reply in the Impugned Decision and the arguments it set forth.[194]

75. Krasniqi submits that even assuming the Pre-Trial Judge was correct in finding that only a sufficient connection between the charges and the Report was required, he erred in finding that this was the case for the crimes alleged in the Indictment.[195] He argues that there is a "mismatch" between the temporal and geographic scope of the Report and the Indictment; while the Report focuses on crimes committed after April 1999 in Albania or with a cross-border element, the Indictment focuses on crimes committed between March 1998 and September 1999 in 42 detention locations, only two of which are in Albania.[196] According to Krasniqi, the Pre-Trial Judge erred in cherry-picking from the Report and in relying on selective paragraphs from the background section to establish that the Report refers to crimes committed in Kosovo in 1998.[197] He submits that such allegations are not sufficiently connected to the Report because there is only an incidental or tangential link.[198]

76. The SPO responds that the Pre-Trial Judge correctly found that the charges in the Indictment relate to the Council of Europe Report.[199] It submits that the Defence's approach to divide the Report among background sections and specific allegations and to limit its geographic and temporal scope is "disingenuous" and "misguided".[200] Such an approach, in the SPO's view, disregards broader references in the Report or even its title and the fact that the Report should be considered as a whole.[201] According

[194] Thaçi Appeal, paras 42-43, referring to Thaçi CoE Report Reply, paras 19-20. See also Thaçi Appeal, paras 40-41.
[195] Krasniqi Appeal, paras 88-96.
[196] Krasniqi Appeal, paras 88-95, referring to detention locations in Cahan and Kukës. See also Krasniqi Reply, paras 22-24.
[197] Krasniqi Appeal, paras 91-93.
[198] Krasniqi Appeal, paras 94-96.
[199] SPO Response to Thaçi Appeal, para. 24; SPO Response to Krasniqi Appeal, paras 79-93. See also SPO Response to Thaçi Appeal, para. 25.
[200] SPO Response to Krasniqi Appeal, paras 81, 87.
[201] SPO Response to Thaçi Appeal, paras 25-26, 28, 31; SPO Response to Krasniqi Appeal, paras 81, 87-89.

to the SPO, the "case studies" outlined by the Defence are only illustrative, non-exhaustive examples.[202] In the SPO's view, factors such as alleged perpetrators, victims, locations, timeframes, *modus operandi*, nature of the conduct, intent behind the conduct, and the context in which it occurred, confirm that the allegations of the Report, which describe an "interconnected pattern" of closely related criminal conduct, directly reflect the charges in the Indictment.[203] Finally, the SPO contends that Thaçi's claim that the Pre-Trial Judge failed to consider the Thaçi CoE Report Reply is incorrect.[204]

77. Both Thaçi and Krasniqi challenge in reply the SPO's position that the highly specific criminal allegations highlighted in the Report are only "case studies" illustrative of a broader phenomenon while they are all located in Albania and all date from after April 1999.[205]

(b) Assessment of the Court of Appeals Panel

78. At the outset, the Panel observes that the focus of the Report is undeniably on specific allegations of organ-trafficking and inhumane treatment taking place in Kosovo Liberation Army ("KLA")-run detention facilities in Albania or in connection with Albania and for the most part from the summer of 1999.[206] This is in fact acknowledged by the Pre-Trial Judge in the Impugned Decision.[207] That being said, the Panel observes that despite that focus, the Report is broader in scope and not limited to these allegations only.[208] The Panel further recalls its previous finding that

[202] SPO Response to Krasniqi Appeal, para. 92. See also SPO Response to Thaçi Appeal, paras 16, 25; SPO Response to Krasniqi Appeal, paras 71, 88.
[203] SPO Response to Thaçi Appeal, para. 29; SPO Response to Krasniqi Appeal, paras 80, 82-88, 90, 93.
[204] SPO Response to Thaçi Appeal, paras 27-28, referring to Impugned Decision, para. 135.
[205] Thaçi Reply, para. 4; Krasniqi Reply, para. 24.
[206] See e.g. Council of Europe Report, p. 1, Section B, paras 4, 16, 19, 93, 101-114, 129-130, 132, 156-158; Council of Europe Report, Section A, paras 3, 12.
[207] See e.g. Impugned Decision, paras 108 (fn. 219), 110-111, 130, 132, 134-135.
[208] See e.g. Council of Europe Report, Section A, paras 19.5.1, 19.5.3 (where the Assembly invited the Albanian authorities and the Kosovo administration to cooperate in order "to find out the truth about crimes committed in Kosovo" and to start investigations to find "the whole truth about secret detention centres where inhuman treatment was inflicted" (without mentioning the locations of these detention

the Pre-Trial Judge did not err in finding that the subject-matter, temporal and geographical scope of the Report does not limit the jurisdiction of the Specialist Chambers and that the charges must only be related to the Report.[209] The Panel must therefore now determine whether the Pre-Trial Judge erred in finding that the charges in the Indictment relate to the Council of Europe Report.

79. As to the geographical scope of the Report, the Panel notes that it contains in some instances references to broader allegations of crimes committed in Kosovo rather than in Albania or in connection with Albania.[210] The Panel agrees with the Defence that these references are quite limited, and mostly relate to background sections or general calls to authorities in the Draft Resolution section of the Report to cooperate and investigate crimes committed in the region.

80. However, the Panel considers that the fact that certain allegations are addressed in detail in the Report does not mean that the scope of the Report's enquiry is restricted to these acts. That the allegations forming the subject of a more detailed elaboration in the Report are labelled as "case studies"[211] demonstrates that these are only examples and are not intended to constitute an exhaustive list of crimes allegedly committed. The Panel agrees with the Pre-Trial Judge that the Report needs to be assessed as a whole and that the highly specific allegations mentioned therein should not be considered in isolation from the events in Kosovo, as these allegations form part of the same armed conflict and attack against the civilian population in Kosovo.[212] As a result, the Panel finds that the fact that the charges in the Indictment concern different

centres or limiting them to Albania only), specifying that the investigation had to be "extended" (as opposed to limited) to allegations of "organ trafficking").

[209] See above, paras 66-73.

[210] See e.g. Council of Europe Report, Section A, paras 19.4.2, 19.5.1, 19.5.3; Council of Europe Report, Section B, paras 72, 85, 87 referred to at Impugned Decision, para. 133. Notably, the title of the Report is "Inhuman treatment of people and illicit trafficking in human organs *in Kosovo*" (emphasis added).

[211] See e.g. Council of Europe Report, Section B, paras 115-128, 141-152, 159-167.

[212] See Impugned Decision, para. 132.

locations, mostly within Kosovo, does not necessarily entail that they cannot be considered as relating to the Report.[213]

81. As to the alleged failure of the Pre-Trial Judge to consider the Thaçi CoE Report Reply, the Panel notes that, as the SPO points out and Thaçi acknowledges,[214] the Impugned Decision in fact expressly refers to the Thaçi CoE Report Reply and summarises Thaçi's submissions made in this filing,[215] including his argument related to the interpretation of the term "for the most part" used in the Report.[216] The Panel finds that a combined reading, in the Impugned Decision, of the summary of Thaçi's submissions and of the Pre-Trial Judge's reasoning shows that the Pre-Trial Judge was mindful of and considered the Thaçi CoE Report Reply when making his findings.[217] The Panel further recalls that, while a panel must provide reasoning in support of its findings on the substantive considerations relevant for a decision, it is not required to articulate every step of its reasoning and to discuss each submission.[218]

82. In any event, with respect to its temporal scope, the Panel is satisfied that a plain reading of the Report confirms that it is not solely limited to acts that occurred from the summer of 1999 onwards – even though it mainly focuses on crimes allegedly committed during that time frame.[219] Consequently, the Panel finds that the fact that the charges in the Indictment concern crimes allegedly committed between March 1998 and September 1999 does not prevent a conclusion that they are related to

[213] See Impugned Decision, para. 111.
[214] See SPO Response to Thaçi Appeal, para. 27; Thaçi Appeal, para. 42.
[215] See Impugned Decision, paras 41-44.
[216] Impugned Decision, para. 44, referring to Thaçi CoE Report Reply, paras 19-21.
[217] See Impugned Decision, para. 135.
[218] See e.g. F00005, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, 30 April 2021 ("*Veseli* Appeal Decision on Interim Release"), para. 72; ICTY, *Prosecutor v. Mladić*, IT-09-92-AR73.6, Decision on Interlocutory Appeal Against Decision on Defence Motion for a Fair Trial and the Presumption of Innocence, 27 February 2017, para. 25, citing ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, 14 December 2015, para. 105.
[219] See Impugned Decision, paras 135-136. See also above, paras 66-67, 73.

the Report, especially since they are encompassed within the temporal jurisdiction of the Specialist Chambers, from 1998 to 2000.[220]

83. The Panel finds that a careful comparison of the allegations mentioned in the Report and the charges in the Indictment shows that they share a number of crucial common features, including: (i) the alleged perpetrators (as members of the KLA);[221] (ii) the alleged victims (as persons of Albanian ethnicity perceived as collaborating with Serb authorities and persons of Serbian, Roma, or other ethnicities);[222] (iii) the

[220] See Impugned Decision, para. 111.

[221] *Compare* Council of Europe Report, Section B, paras 5 (mention of crimes committed by KLA, including top KLA leaders), 7 (mention of crimes committed by top KLA leaders), 58 (mention of Thaçi as head of Drenica group), 67-68 (mention of Thaçi and members of the Drenica group, including Kadri Veseli, involved in criminal activity), 72 (mention of Haliti, Veseli, Syla and Limaj, alongside Thaçi and other members of his inner circle, having ordered or personally overseen assassinations, detentions, beatings and interrogations in various parts of Kosovo and Albania between 1998 and 2000), 98 (mention of civilians held captive in detention centres on Albanian territory, in the hands of members and affiliates of the KLA), 101-104 (mention of Veseli as driving force of detaining those suspected as collaborators), 114 (mention of KLA operatives aligned with Drenica group under the direction of Thaçi and acting in concert with Veseli), 129-130 (mention of KLA members and affiliates as perpetrators of detentions and abductions) *with* allegations contained in the Confirmation Decision, paras 452 (mention of the Accused and other KLA members as JCE members), 455 (mention of Thaçi as KLA member), 460 (mention of Veseli as KLA member), 464 (mention of Selimi as KLA member), 468 (mention of Krasniqi as KLA member), 484 (mention of Thaçi's superior status as KLA member), 492 (mention of Veseli's superior status as KLA member), 499 (mention of Selimi's superior status as KLA member), 506 (mention of Krasniqi's superior status as KLA member) *and with* allegations contained in the Indictment, paras 2 (mention of Thaçi as KLA member), 3 (mention of Veseli as KLA member), 8 (mention of Selimi as KLA member), 11 (mention of Krasniqi as KLA member), 35 (mentioning as JCE members: Azem Syla, Lahi Brahimaj, Fatmir Limaj, Sylejman Selimi, Rrustem Mustafa, Shukri Buja, Latif Gashi and Sabit Geci, as well as certain other KLA and Provisional Government of Kosovo ("PGoK") political and military leaders, including other General Staff members; PGoK ministers and deputy ministers; KLA zone commanders, deputy zone commanders, and other members of zone command staffs; brigade and unit commanders; commanders and members of the KLA and PGoK police and intelligence services; and other KLA soldiers and PGoK officials), 37 (mention of JCE members holding key roles in KLA), 53 (mention of the Accused as superiors and highest-ranking officials in KLA). See also Impugned Decision, paras 111, 140-141.

[222] *Compare* Council of Europe Report, Section B, paras 4 (mention of numerous crimes committed both against Serbs who had stayed in the region and against Kosovo Albanians suspected of having been "traitors" or "collaborators"), 88 (mentioning, as targets, those perceived as collaborators, including ethnic Albanians, Roma and other minorities, or those who fell victim to internal rivalries within the KLA), 103 (mention of KLA implementing a "policy" where everyone suspected of collaborating with the Serbs would be subject to "interrogation"), 111 (mention of ethnic Albanians suspected of being collaborators/traitors as victims), 139 (mention of ethnic origin as a target) *with* allegations contained in the Confirmation Decision, paras 124 (mentioning, as target of a widespread and systematic attack, civilian population of opponents in Kosovo and areas of northern Albania, including those who were or were perceived to have been: (i) collaborating or associating with FRY forces or officials or state

alleged locations (various locations throughout Kosovo and some parts of northern Albania);[223] (iv) the alleged time frame (from 1998 until after the summer of 1999);[224] (v) the alleged *modus operandi* (an organised, consistent "pattern" of violence by KLA

institutions; or (ii) otherwise not supporting the aims or means of the KLA and later of the PGoK, including persons associated with the Democratic League of Kosovo ("LDK") and persons of Serb, Roma, and other ethnicities), 126 (mentioning that those perceived as opponents of the KLA included: (i) the Serbian, Roma and Ashkali populations; (ii) Catholics; (iii) civilians allegedly collaborating with Serb authorities or allegedly interacting with Serbs; (iv) Albanians affiliated with or supporting the LDK or other parties perceived as anti-KLA; (v) Albanians not having joined or not supporting the KLA; and (vi) individuals with contemporaneous or previous employment perceived as anti-KLA) *and with* allegations contained in the Indictment, paras 32 (mentioning as "opponents" persons who were or were perceived to have been: (a) collaborating or associating with FRY forces or officials or state institutions; or (b) otherwise not supporting the aims or means of the KLA and later the PGoK, including persons associated with the LDK) and persons of Serb, Roma, and other ethnicities), 36 (mention of opponents declared "traitors" or "collaborators"). See also Impugned Decision, paras 111, 140-141.

[223] *Compare* Council of Europe Report, Section B, paras 72 (mention of assassinations, detentions, beatings and interrogations in various parts of Kosovo and Albania between 1998 and 2000), 74 (mention of KLA detention facilities in Albania), 87 (mention of KLA units deployed in Kosovo fuelled by vengeance against anyone perceived as oppressor of Kosovo Albanians), 105 (mention of KLA detention facilities in Albania doubling as military bases), 108 (mention of KLA detention facilities in Albania for prisoners of war), 130 (mention of secret detentions in Albania), 144 (mention of ethnic Serb captives abducted from Kosovo and brought into Albania) *with* allegations contained in the Confirmation Decision, paras 15 (mention of crimes committed in Kosovo and areas of northern Albania), 41-42 (territorial jurisdiction: crimes in Kosovo and Albania), 125 (mention of a campaign of acts of violence and mistreatment against hundreds of civilians throughout Kosovo and Albania amounting to a widespread and systematic attack), 129 (mention of a widespread and systematic attack unfolding in Kosovo and northern Albania) *and with* allegations contained in the Indictment, paras 16 (mention of the existence of a widespread and systematic attack in Kosovo and northern Albania), 57 (persecution in Kosovo and northern Albania), 59 (arbitrary detentions in Kosovo and northern Albania), 136 (murders in Kosovo and northern Albania), 171 (enforced disappearances in Kosovo and northern Albania), Schedules A-B (crime sites in Albania and Kosovo). See also Impugned Decision, paras 111, 140-141.

[224] *Compare* Council of Europe Report, Section B, paras 4 (mention of acts for the most part from the summer of 1999 onwards), 56 (mention of KLA group as controlling criminal enterprises in Albania beginning at the latest in 1998), 72 (mention of assassinations, detentions, beatings and interrogations in various parts of Kosovo and Albania between 1998 and 2000), 102 (mention of KLA detention centres in Albania between April and June 1999), 129 (mentioning that after 12 June 1999 Kosovo Albanians continued to detain people) *with* allegations contained in the Confirmation Decision, paras 15 (defining indictment period as the period from at least March 1998 through September 1999), 39 (mentioning that crimes committed during the timeframe fall within the temporal jurisdiction of the Specialist Chambers), 125 (mention of a campaign of acts of violence and mistreatment against hundreds of civilians throughout Kosovo and Albania amounting to a widespread and systematic attack), 129 (mention of the existence of a widespread and systematic attack during that timeframe), 137 (mention of the existence of non-international armed conflict from March 1998 until at least 16 September 1999), 453 (mention of the timeframe of the JCE) *and with* allegations contained in the Indictment, paras 16 (mention of the existence of a widespread and systematic attack during that timeframe), 32 (mention of the timeframe of the JCE). See also Impugned Decision, paras 111, 140-141.

members targeting those perceived as traitors or opponents);[225] (vi) the alleged nature of the conduct (alleged acts amounting to various crimes falling within Articles 13 and 14 of the Law);[226] (vii) the alleged intent behind the conduct (acts perpetrated against individuals perceived as traitors or opponents, with a view to gaining and exercising control over Kosovo in its entirety);[227] and (viii) the alleged context of the conduct

[225] *Compare* Council of Europe Report, Section B, paras 4 (mention of numerous crimes committed both against Serbs who had stayed in the region and against Kosovo Albanians suspected of having been "traitors" or "collaborators"), 88 (mention, as targets, of Serbs or those perceived as collaborators, including ethnic Albanians, Roma and other minorities), 89 (mention of abuses by KLA members widespread enough to constitute a pattern), 90 (mention of abuses as seemingly coordinated and as part of overarching strategy from the leadership), 98 (mention of detention facilities as part of a well-established, coordinated network controlled by KLA commanders with civilians held captives) *with* allegations contained in the Confirmation Decision, paras 128 (mention of acts of violence in an organised manner and following consistent pattern: organised and non-accidental targeting pattern of those perceived as opponents, detained at KLA headquarters or bases and transferred to multiple detention locations; multiple layers of organised conduct and consistent pattern of violence and mistreatment demonstrate a systematic attack), 454 (mention of a pattern of crimes committed in the locations under Counts 1-10), 476 (mention of a pattern of intimidations, detentions, mistreatment and killings of opponents) *and with* allegations contained in the Indictment, paras 17 (mention of crimes following a consistent pattern, which impacted the victims' wider families and communities, and were intended to serve as a warning and to exert pressure on the targeted population as a whole, deterring opposition to, and enforcing absolute unity behind, the KLA/PGoK), 57 (mention of a campaign of persecution against opponents, persecutory acts demonstrative of a wider campaign of persecution against opponents implemented throughout Kosovo, before, during, and after the indictment period). See also Impugned Decision, paras 111, 140-141.

[226] *Compare* Council of Europe Report, p. 1 (mention of war crimes committed against Serbs and Kosovo Albanians, allegations of inhuman treatment), Section B, paras 7-8 (mention of war crimes by KLA), 72 (mention of Haliti, Veseli, Syla and Limaj, alongside Thaçi and other members of his inner circle, having ordered or personally overseen assassinations, detentions, beatings and interrogations in various parts of Kosovo and Albania between 1998 and 2000), 101 (mention of KLA detentions in wartime appearing to meet the threshold for war crimes), 121 (mention of inhuman treatment), 128 (mention of KLA members charged with war crimes against civilian population including killings, torture, inhuman treatment, beatings in domestic/EULEX trials), 137 (mention of victims of enforced disappearance), 174 (mention of allegations of KLA involvement in detention, torture and murder in Albania) *with* allegations contained in the Confirmation Decision, paras 32 (mention of crimes against humanity and war crimes pleaded under Articles 13 and 14 of the Law falling under the subject-matter jurisdiction of the Specialist Chambers), 454 (mentioning that the common purpose JCE involved commission of crimes charged under Counts 1-10), 521(a) (confirming charges under Counts 1-10 against the Accused for crimes against humanity and war crimes under Articles 13 and 14 of the Law) *and with* allegations contained in the Indictment, paras 32 (mention that the common purpose encompassed the crimes under Counts 1-10), 57 (mention of persecution), 59 (mention of arbitrary detention), 94 (mention of cruel treatment and other inhumane acts), 135 (mention of torture), 136 (mention of murder), 171 (mention of enforced disappearance), 173 (mention of statement of crimes). See also Impugned Decision, paras 111, 140-141.

[227] *Compare* Council of Europe Report, Section B, paras 4 (mention of KLA having effective control over an expansive territorial area, encompassing Kosovo as well as some of the border regions in the north

(alleged acts committed in the context of a widespread and systematic attack against the civilian population and during a non-international armed conflict in Kosovo).[228]

84. Based on the foregoing, and in particular on the connection and similar characteristics between the charges in the Indictment and the allegations arising from the Council of Europe Report, the Court of Appeals Panel considers that the Pre-Trial Judge did not err when reaching the conclusion that the charges in the Indictment relate to the Report.[229] Thaçi's Ground A3 and Krasniqi's Ground 5 are accordingly dismissed.

---

of Albania, and numerous crimes committed both against Serbs who had stayed in the region and against Kosovo Albanians suspected of having been "traitors" or "collaborators"), 87 (mention of KLA units deployed in Kosovo for "securing the territory" but fuelled with anger against those who contributed to oppressing ethnic Albanians), 88 (mention, as targets, of Serbs or those perceived as collaborators), 101 (mention of an organised criminal enterprise of post-conflict detentions by KLA members) *with* allegations contained in the Confirmation Decision, para. 453 (mentioning the common purpose to gain and exercise control over all of Kosovo by means including unlawfully intimidating, mistreating, committing violence against and removing persons who were perceived to have been opponents) *and with* allegations contained in the Indictment, para. 32 (mentioning the common purpose to gain and exercise control over all of Kosovo by means including unlawfully intimidating, mistreating, committing violence against, and removing those deemed to be opponents). See also Impugned Decision, paras 111, 140-141.

[228] *Compare* Council of Europe Report, Section B, paras 4 (mention of numerous crimes committed both against Serbs who had stayed in the region and against Kosovo Albanians suspected of having been "traitors" or "collaborators"), 29 (mention of Kosovo conflict), 89 (mention of abuses by KLA members widespread enough to constitute a pattern), 90 (mention of abuses as seemingly coordinated and as part of overarching strategy from the leadership), 103 (mention of KLA implementing a "policy" where everyone suspected of collaborating with the Serbs would be subject to "interrogation") *with* allegations contained in the Confirmation Decision, paras 125 (mention of a campaign of acts of violence and mistreatment against hundreds of civilians throughout Kosovo and Albania amounting to a widespread and systematic attack), 129 (mention of the existence of a widespread and systematic attack as contextual element for crimes against humanity), 131 (mention of armed violence between Serbian and KLA forces in Kosovo), 137 (mention of the existence of a non-international armed conflict between Serbian and KLA forces) *and with* allegations contained in the Indictment, paras 16 (mention of the existence of a widespread or systematic attack during that timeframe), 17 (mention of charged acts and omissions committed as part of the widespread or systematic attack), 18 (mention of the existence of an armed conflict between KLA, forces of FRY and of Republic of Serbia), 31 (mention of crimes committed in the context of an armed conflict between FRY and KLA forces). See also Impugned Decision, paras 111, 140-141.

[229] See Impugned Decision, paras 139-142.

D. ALLEGED ERRORS REGARDING SUBJECT-MATTER JURISDICTION

1. Arbitrary Detention (Veseli Grounds 10-13)

(a) Whether Arbitrary Detention Is Included in Article 14 of the Law (Veseli Ground 10)

(i) Submissions of the Parties

85. Veseli submits that arbitrary detention cannot be included in Article 14 of the Law and that the Pre-Trial Judge erred in finding that the formulation "including any of the following acts" in Article 14(1)(c) of the Law refers to a non-exhaustive list, similar to the formulation "including but not limited to, any of the following acts" in Article 14(1)(b) and (d) of the Law.[230] Veseli further argues that the Pre-Trial Judge failed to discuss his submissions that Article 8(2)(c) of the Rome Statute, from which the text of Article 14(1)(c) of the Law was allegedly taken, contains an exhaustive list.[231] Veseli also contends that because Albanian and Serbian are official languages pursuant to the Constitution of Kosovo, in case of linguistic discrepancies "the version most favourable to the Accused should be upheld".[232]

86. The SPO responds that Veseli fails to demonstrate any discrepancy between the different language versions of Article 14(1)(c) of the Law or any other relevant error in the Impugned Decision.[233] It further submits that the Pre-Trial Judge was not required to address Article 8(2)(c) of the Rome Statute given that he already considered the plain language of the Law.[234] In any event, the SPO argues that a comparison between the exhaustive language of Article 8(2)(c) of the Rome Statute and the non-exhaustive language of Article 14(1)(c) of the Law rather confirms the

[230] Veseli Appeal, para. 89. See also Veseli Appeal, para. 91; Veseli Reply, para. 43.
[231] Veseli Appeal, paras 89-90.
[232] Veseli Appeal, para. 88.
[233] SPO Response to Veseli Appeal, para. 54.
[234] SPO Response to Veseli Appeal, para. 55.

intent of the legislators not to limit the Specialist Chambers' jurisdiction over war crimes under CIL to those expressly listed.[235]

(ii) Assessment of the Court of Appeals Panel

87. The Panel observes that arbitrary detention is not expressly mentioned in the list of acts provided under Article 14(1)(c) of the Law. However, the Panel agrees with the Pre-Trial Judge that the formulation "including any of the following acts" means that the list is non-exhaustive and that the Specialist Chambers' jurisdiction is not limited to those acts expressly enumerated under Article 14(1)(c) of the Law.[236] The Panel further recalls that the Pre-Trial Judge fully addressed Veseli's allegation of language discrepancy between different versions of Article 14(1)(c) of the Law, and, upon verification, found that no such discrepancy existed and that all three versions consistently employed an open-ended formulation.[237] The Panel finds that Veseli fails to point to any actual discrepancy among the different language versions and to articulate any error in the Pre-Trial Judge's conclusion in that regard. Likewise, the Panel finds that Veseli fails to substantiate his submission that the Pre-Trial Judge erred in finding that the formulations in Article 14(1)(c) of the Law on the one hand, and in Article 14(1)(b) and (d) of the Law on the other hand, although different, had a similar non-exhaustive meaning.[238] His submission is therefore dismissed.

88. In addition, given the difference of wording between Article 8(2)(c) and (e) of the Rome Statute ("namely, any of the following acts"), and Article 14(1)(c) of the Law ("including any of the following acts"), it is clear on its face, by reading these provisions side by side, that Veseli's proposed analogy has no merit.[239] The Panel

[235] SPO Response to Veseli Appeal, para. 55.
[236] Impugned Decision, para. 145. See also Confirmation Decision, para. 33.
[237] Impugned Decision, para. 144. As per Article 162(9) of the Constitution of Kosovo, Albanian, Serbian and English are the official languages of the Specialist Chambers, therefore all three versions of Article 14(1)(c) of the Law are authoritative.
[238] Impugned Decision, para. 144.
[239] See Veseli Appeal, para. 90; Veseli CIL Reply, para. 41.

therefore finds that it was within the Pre-Trial Judge's discretion not to engage with this argument in the Impugned Decision.

89. As a result, the Panel finds that the Pre-Trial Judge did not err in finding that the Specialist Chambers have jurisdiction over arbitrary detention as a war crime committed in a non-international armed conflict, if such crime existed under CIL during their temporal jurisdiction and constitutes a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 ("Common Article 3").[240] Veseli's Ground 10 is therefore dismissed.

(b) Whether Arbitrary Detention in a Non-International Armed Conflict is a Serious Violation of Common Article 3 (Veseli Grounds 11-12)

(i) Submissions of the Parties

90. Veseli contends that the Pre-Trial Judge erred in finding that arbitrary detention in non-international armed conflict is a serious violation of international humanitarian law ("IHL").[241] He first challenges the Pre-Trial Judge's finding that "any form of deprivation of liberty" in a non-international armed conflict was arbitrary under IHL on the grounds that: (i) the fact that IHL does not explicitly provide for authorisation to detain in a non-international armed conflict does not necessarily mean it is prohibited;[242] (ii) the authority relied upon by the Pre-Trial Judge is neither conclusive nor a decisive source;[243] (iii) the Pre-Trial Judge failed to consider the position of the International Committee of the Red Cross ("ICRC") that both CIL and IHL contain an inherent legal power to detain and intern during non-international armed conflicts;[244] and (iv) the Pre-Trial Judge's reasoning based on the principle of the equality of belligerents is illogical.[245]

[240] See Impugned Decision, para. 145. See also Confirmation Decision, para. 33.
[241] Veseli Appeal, paras 92-96.
[242] Veseli Appeal, paras 92-93.
[243] Veseli Appeal, paras 92-94, referring to Impugned Decision, para. 152. See also Veseli Reply, para. 44.
[244] Veseli Appeal, para. 95; Veseli Reply, para. 44.
[245] Veseli Appeal, para. 96. See Impugned Decision, para. 152.

91. Veseli further submits that the Pre-Trial Judge erred in finding that CIL at the time of the events required a set of basic guarantees in respect of persons in the hands of a belligerent, arguing that this list, merely based on institutional guidelines issued by the ICRC in 2005, was not declaratory of CIL then or at the relevant time of the charges.[246] He also contends that there is still no settled definition in CIL of what amounts to "arbitrary detention".[247] Veseli finally claims that the Pre-Trial Judge failed to engage with the authority he provided according to which imprisonment without adequate judicial guarantees would be a non-serious violation of Common Article 3.[248]

92. The SPO responds that arbitrary detention constitutes a serious violation of IHL, including Common Article 3, because it violates the principle of humane treatment which applies equally across all of IHL.[249] It further contends that the guarantee against arbitrary detention is recognised in CIL as non-derogable including in non-international armed conflicts.[250]

93. The SPO argues that the Defence's submissions related to the legal bases of detention and applicable safeguards go to the "elements and contours" of the crime – which requires a case-by-case determination at trial – and as such cannot demonstrate any error invalidating the Pre-Trial Judge's ultimate finding that arbitrary detention is incompatible with the principle of humane treatment and constitutes a serious violation of Common Article 3.[251] With regard to the applicable procedural guarantees

[246] Veseli Appeal, para. 97, referring to Impugned Decision, para. 154. See also Veseli Reply, para. 44.
[247] Veseli Appeal, para. 98.
[248] Veseli Appeal, para. 99, referring to Veseli CIL Reply, para. 54, referring to Zimmermann, A. and Geiss, R., "Article 8 para. 2 (c)–(f) and para. 3: War crimes committed in an armed conflict not of an international character", in Triffterer, O. and Ambos, K. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, C.H.Beck, Hart, Nomos 2016 (Third Edition), p. 547, marginal number ("mn.") 878. See also Zimmermann, A. and Geiss, R., "Paras. 2 (c)–(f) and 3: War crimes committed in an armed conflict not of an international character", in Ambos, K. (ed.), *The Rome Statute of the International Criminal Court: Article-by-Article Commentary*, C.H.Beck, Hart, Nomos 2021 (Fourth Edition) ("Zimmermann and Geiss, *Article 8*"), p. 638, mn. 892.
[249] SPO Response to Veseli Appeal, paras 56-59, 63.
[250] SPO Response to Veseli Appeal, paras 58-59.
[251] SPO Response to Veseli Appeal, paras 60-61, 64.

in particular, the SPO submits that Veseli ignored the sources relied upon by the Pre-Trial Judge, especially the ICRC Customary IHL Study, which, on the basis of a broad range of sources, identifies basic procedural guidelines applicable to all detentions in international and non-international armed conflicts without which detention would be incompatible with humane treatment.[252]

(ii) Assessment of the Court of Appeals Panel

94. The Panel recalls that the Pre-Trial Judge 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 IHL including of Common Article 3.[253] In his assessment, the Pre-Trial Judge identified two situations in which the deprivation of liberty in the context of a non-international armed conflict may violate IHL and become arbitrary: (i) when someone is detained without a valid legal basis or (ii) when a detained person is not provided with minimum guarantees afforded by IHL.[254] With regard to the first situation, the Pre-Trial Judge found that because at the time of the alleged crimes in the Indictment neither conventional IHL nor customary IHL provided a legal basis for deprivation of liberty in non-international armed conflicts, "*any* form of deprivation of liberty in non-international armed conflict was arbitrary under IHL".[255] As to the second situation, the Pre-Trial Judge found that, regardless of whether there is a legal basis to detain or intern, detention becomes arbitrary when

[252] SPO Response to Veseli Appeal, para. 62, referring, *inter alia*, to Impugned Decision, para. 154, fn. 315 and Henckaerts, J.-M. and Doswald-Beck, L., International Committee of the Red Cross, Customary International Humanitarian Law, 2005 ("ICRC Customary IHL Study"), Volume I: Rules, pp. 349-352. See also SPO Response to Veseli Appeal, para. 63.
[253] Impugned Decision, paras 154-156. See also Impugned Decision, para. 151; Confirmation Decision, para. 35.
[254] Impugned Decision, para. 151. The Pre-Trial Judge found that the same logic is followed in the context of international armed conflicts. See Impugned Decision, para. 151, fn. 303, referring, *inter alia*, to ICTY, *Prosecutor v. Delalić et al*., IT-96-21-A, Judgement, 20 February 2001 ("*Delalić et al*. Appeal Judgement"), para. 322.
[255] Impugned Decision, para. 152 (emphasis in the original), referring to United Kingdom, Supreme Court, *Al-Waheed and Mohammed v. Ministry of Defence*, [2017] UKSC 2, Judgment, 17 January 2017 ("*Al Waheed and Mohammed* Judgment"), paras 12, 234-276.

the principle of humane treatment and the minimum guarantees it encompasses are violated.[256] He considered that the failure to provide these basic guarantees to anyone detained, including persons placed *hors de combat*, renders detention arbitrary and constitutes a serious violation of IHL and Common Article 3 because it is incompatible with the requirement of humane treatment.[257]

95. The Panel will first turn to address Veseli's submissions regarding the legal bases of detention and the Pre-Trial Judge's finding that any form of deprivation of liberty in non-international armed conflict was arbitrary under IHL.[258] At the outset, the Panel agrees with the Defence that the fact that IHL does not explicitly provide for authorisation to detain in a non-international armed conflict does not necessarily mean that such conduct is prohibited.[259] As such, the Panel is of the view that this would not render *any* form of deprivation of liberty arbitrary under IHL.[260] In addition, and as acknowledged by the Pre-Trial Judge,[261] there might be other sources besides IHL that could provide for such legal basis.

96. In any event, the Panel notes that the Pre-Trial Judge's determination that arbitrary detention constitutes a serious IHL violation, including of Common Article 3, is rather and, most importantly, based on the requirement of humane treatment.[262] The Panel recalls that the rules set out in Common Article 3 have been

[256] Impugned Decision, paras 150, 153-155. The principle of humane treatment is enshrined in Common Article 3 and Articles 4-6 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977 as well as reflected as a norm in CIL applicable in both international and non-international armed conflicts.
[257] Impugned Decision, para. 155. See also Impugned Decision, paras 151, 153.
[258] See Veseli Appeal, paras 92-96, referring to Impugned Decision, para. 152.
[259] Veseli Appeal, para. 93. See Goodman, R., "Authorization versus Regulation of Detention in Non-International Armed Conflicts" (2015) *91 International Law Studies 155*, p. 158; Hill-Cawthorne, L. and Akande, D., "Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?" (7 May 2014), *EJIL: Talk!* <https://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/> accessed 22 December 2021.
[260] See Impugned Decision, para. 152 (emphasis in the original).
[261] See Impugned Decision, para. 152.
[262] See Impugned Decision, paras 151, 153-156.

found to reflect "elementary considerations of humanity" in all armed conflicts[263] and to be the "quintessence" of the humanitarian principles upon which the Geneva Conventions in their entirety are based.[264] The ICRC has considered the principle of humane treatment to be the "substantive core" and "central axis" of Common Article 3.[265] Because the prohibitions expressly listed under the four sub-paragraphs of Common Article 3(1) directly derive from that principle, they are merely specific examples of conduct that is indisputably in violation of the humane treatment obligation, which encompasses a broader category of prohibited acts beyond those listed.[266] The Panel further notes that the jurisprudence of international and internationalised tribunals has also interpreted broadly what kind of prohibited acts can constitute serious violations under Common Article 3, beyond those specifically listed under sub-paragraphs (1)(a) to (d).[267]

---

[263] See Nicaragua Military and Paramilitary Activities Case, para. 218. See also *Tadić* Appeal Decision on Jurisdiction, para. 102; *Delalić et al*. Appeal Judgement, para. 140; ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-T, Judgement, 25 June 1999 ("*Aleksovski* Trial Judgement"), para. 50.

[264] See *Delalić et al*. Appeal Judgement, para. 143.

[265] ICRC Commentary, Geneva Convention (III) Relative to the Treatment of Prisoners of War, 2020 ("2020 ICRC Commentary GCIII"), Common Article 3, paras 588-589. See also *Aleksovski* Trial Judgement, paras 49, 51.

[266] 2020 ICRC Commentary GCIII, Common Article 3, paras 584, 588-589; *Aleksovski* Trial Judgement, paras 49, 52.

[267] See e.g. ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, para. 597 (finding that forced labour, by compelling protected persons to help prepare or form military operations and installations against their own forces, constitutes cruel treatment as a serious violation of Common Article 3); ICTY, *Prosecutor v. Delalić et al*., IT-96-21-T, Judgement, 16 November 1998, para. 1119 (finding that the maintenance of an atmosphere of terror, by itself and *a fortiori*, together with the deprivation of adequate food, water, sleeping and toilet facilities and medical care, constitutes cruel treatment as a serious violation of Common Article 3); ICTR, *Prosecutor v. Bagosora et al*., ICTR-98-41-T, Judgement and Sentence, 18 December 2008, para. 2254 (finding Bagosora guilty of outrages upon personal dignity as a serious violation of Common Article 3 for rapes); SCSL, *Prosecutor v. Taylor*, SCSL-03-01-T, Judgement, 18 May 2012 ("*Taylor* Trial Judgement"), para. 432 (finding that "sexual slavery, including the abduction of women and girls as 'bush wives', a conjugal form of sexual slavery" constitutes outrage upon personal dignity as a serious violation of Common Article 3). It is also noteworthy that while these types of conduct are not expressly mentioned in Common Article 3, the Statutes of the ICTR and the Special Court for Sierra Leone ("SCSL") list rape, enforced prostitution and any form of indecent assault as outrages upon personal dignity under Common Article 3 (see ICTR Statute, Article 4(e); SCSL Statute, Article 3(e)), and that the Rome Statute lists as distinct war crimes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation "and any other form of sexual violence *also constituting a serious violation of article 3 common to the four Geneva Conventions*" (see Rome Statute, Article 8(2)(e)(vi) (emphasis added)).

97. Therefore, and regardless of the (initial) legality of detention, the Panel agrees that detention becomes arbitrary and constitutes a serious violation of Common Article 3 when the principle of humane treatment is violated.[268] In that regard, the Panel recalls that the ICTY Appeals Chamber has held, for the purposes of Article 3 of the ICTY Statute, that acts constitute serious violations of the laws and customs of war if they, *inter alia*, constitute a breach of a rule protecting important values and if the breach involves grave consequences for the victim.[269] It is well established that violations of Common Article 3 satisfy that threshold.[270] Consequently, the Panel finds that for the purpose of the present Decision, it is unnecessary to engage further with the question whether the Pre-Trial Judge erred in reaching the conclusion that any deprivation of liberty in a non-international armed conflict is arbitrary under IHL. Irrespective of whether there is a legal basis to detain, the obligation to abide by the requirements of humane treatment remains. Therefore, any error in the Pre-Trial Judge's reasoning relating to the legal bases of detention would fall short of invalidating his overall conclusion that arbitrary deprivation of liberty constitutes a serious violation of IHL, including of Common Article 3.[271] As a result, the Panel does

[268] Impugned Decision, paras 151, 153-156. See ICRC Customary IHL Study (Vol. I (Rules)), Rule 99, p. 344; 2020 ICRC Commentary GCIII, Common Article 3, para. 765; ICRC Commentary on APII, 1987, Article 5, paras 4565-4570. See also ICRC Customary IHL Study (Vol. I (Rules)), Rule 87, p. 306; 2020 ICRC Commentary GCIII, Common Article 3, paras 588-589; *Aleksovski* Trial Judgement, para. 49.
[269] *Tadić* Appeal Decision on Jurisdiction, para. 94.
[270] *Tadić* Appeal Decision on Jurisdiction, paras 94,134; ICTY, *Prosecutor v. Kunarac et al*., IT-96-23 and IT-96-23/1-A, Judgement, 12 June 2002, para. 68; ICTY, *Prosecutor v. Đorđević*, IT-05-87/1-T, Public Judgement with Confidential Annex, 23 February 2011, para. 1529. See also Zimmermann and Geiss, *Article 8*, p. 638, mns. 891-892.
[271] This is in fact the position taken by the majority of the United Kingdom Supreme Court in the case where the Pre-Trial Judge relied on the dissenting opinion of Lord Reed: while Lord Reed concluded that no such authority to detain existed under CIL, the majority decided that it was "unnecessary to express a concluded view" on the existence of a legal right in CIL to detain members of opposing armed forces in a non-international armed conflict. The majority found a lack of international consensus on the limits of the right to detain in non-international armed conflicts and considered that in the present case authority to detain was conferred implicitly by the relevant Security Council resolutions. See *Al Waheed and Mohammed* Judgment, paras 14-16, 275-276.

not need to address Veseli's remaining arguments on whether detention can be legal during non-international armed conflicts.[272]

98. Furthermore, the Panel finds merit in the SPO's position[273] that the question of the legal basis of detention would amount to substantive arguments relating to the contours or elements of the crime, falling as such outside the scope of jurisdictional issues within the meaning of Rule 97(1)(a) of the Rules. These are challenges which can be properly advanced and argued during the course of trial.[274]

99. Turning next to the basic guarantees to which persons deprived of their liberty are entitled, the Panel notes that Veseli takes issue with the Pre-Trial Judge's reliance on some ICRC institutional guidelines issued in 2005 and notably argues that such document is not declaratory of CIL.[275] The Panel finds that Veseli's submissions are misleading for the following reasons. First, Veseli focuses on that document in isolation while ignoring the fact that the Pre-Trial Judge, in recalling the set of minimum safeguards prescribed under IHL to persons deprived of their liberty that apply in all circumstances, in fact relied mostly and more importantly on the ICRC Customary IHL Study, which in turn refers to various IHL sources of a CIL nature.[276] Second, that the ICRC Guidelines are not in themselves declaratory of CIL is not only undisputed, but also irrelevant. They do nothing more than provide an "overview of

[272] See Veseli Appeal, paras 93-96; Veseli Reply, para. 44.
[273] See SPO Response to Veseli Appeal, para. 60.
[274] See *Gucati and Haradinaj* Appeal Decision on Admissibility, para. 14; *Gucati* Appeal Decision, para. 17. See also ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-AR72.1, Decision on Tolimir's "Interlocutory Appeal Against the Decision of the Trial Chamber on the Part of the Second Preliminary Motion Concerning the Jurisdiction of the Tribunal", 25 February 2009 ("*Tolimir* Appeal Decision"), para. 10; ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, 6 June 2007 ("*Gotovina* Appeal Decision"), paras 15, 18.
[275] See Veseli Appeal, para. 97; Veseli Reply, para. 44, referring to Pejic, J., "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", (2005) 87 *International Review of the Red Cross* 376 ("ICRC Guidelines"), cited at Impugned Decision, para. 154, fn. 311.
[276] See Impugned Decision, para. 154, fn. 315, referring to ICRC Customary IHL Study (Vol. I (Rules)), Rule 99, pp. 349-350. See also Impugned Decision, para. 157.

the various legal sources" – of a CIL nature – that set the basis for such guarantees.[277] As a result, the Panel is satisfied that the Pre-Trial Judge did not err in concluding that there exists a set of basic, minimum guarantees, stemming from IHL that are of a CIL nature and must be afforded to any person detained, regardless of the legality of their detention and of the international or non-international nature of the armed conflict, the violation of which constitutes a serious violation of Common Article 3.[278]

100. The Panel further considers that, for the same reasons as above,[279] it is not necessary, for the purposes of the present Decision, to engage in defining the elements of arbitrary detention. The Panel is of the view that the determination of the contours of the offence of arbitrary detention would fall outside the ambit of challenges to the subject-matter jurisdiction of the Specialist Chambers within the meaning of Rule 97(1)(a) of the Rules. Indeed, they constitute challenges concerning the contours of a substantive crime, which do not qualify as jurisdictional issues, and, as such, are rather matters to be addressed at trial.[280] In any event, the Panel does not consider that the authority relied upon by Veseli supports his contention that there is "no settled definition" of what amounts to arbitrary detention.[281]

101. Finally, as to Veseli's argument that the Pre-Trial Judge failed to engage with the authority he provided which considers imprisonment without adequate judicial guarantees as a non-serious violation of Common Article 3, the Panel notes that Veseli

[277] See ICRC, Internment in armed conflict: Basic rules and challenges, Opinion Paper, November 2014, fn. 48.
[278] Impugned Decision, paras 150-151, 154-155. See 2020 ICRC Commentary GCIII, Common Article 3, paras 588-589, 756, 765; ICRC Customary IHL Study (Vol. I (Rules)), Rule 99, pp. 349-352 and sources cited therein. See also ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.9, Decision on Appeal from Denial of Judgement of Acquittal for Hostage-Taking, 11 December 2012, para. 18 (where the ICTY Appeals Chamber confirmed that one of the fundamental purposes of Common Article 3 is to provide minimum and absolute protections to detained individuals, whether combatants or not).
[279] See above, para. 98.
[280] See *Gucati and Haradinaj* Appeal Decision on Admissibility, para. 14; *Gucati* Appeal Decision, para. 17; *Tolimir* Appeal Decision, para. 10; *Gotovina* Appeal Decision, paras 15, 18.
[281] See contra Veseli Appeal, para. 98, referring to 2020 ICRC Commentary GCIII, Common Article 3, para. 756.

misrepresents this authority which in fact conditioned that finding to a "short term" imprisonment and rather confirmed that any act in breach of a rule protecting important values would qualify as a serious violation of Common Article 3.[282] As a result, while the Pre-Trial Judge failed to address this argument, the Panel is of the view that it would not have affected his overall conclusion.

102. The Panel observes that besides these allegations, Veseli does not identify any error in the Pre-Trial Judge's ultimate finding that arbitrary detention is incompatible with the requirement of humane treatment and constitutes as such a serious violation of Common Article 3. As a result, the Court of Appeals Panel upholds the Pre-Trial Judge's findings[283] and dismisses Veseli's Grounds 11 and 12.

(c) Whether Arbitrary Detention in a Non-International Armed Conflict existed as a War Crime in CIL During the Temporal Jurisdiction of the Specialist Chambers (Veseli Ground 13)

(i) Submissions of the Parties

103. Veseli submits that the Pre-Trial Judge erred in finding that arbitrary detention in a non-international armed conflict was criminalised under CIL in 1998.[284] He argues that because the few domestic legislation the Pre-Trial Judge relies upon in fact only criminalise unlawful detention in international armed conflicts, the Pre-Trial Judge's attempt to demonstrate consistent state practice is flawed and there is no evidence that any state criminalised this conduct in a non-international armed conflict in 1998.[285] Notably, in Veseli's view, the Pre-Trial Judge's interpretation of Article 142 of the 1976 SFRY Criminal Code is flawed because, due to the "double criminality test" –

[282] The authors referred to the "*singular* passing of a *short term (!)* imprisonment without adequate judicial guarantees" as the only possible example of a non-serious violation of Common Article 3. See Zimmermann and Geiss, *Article 8*, p. 638, mn. 892 (emphasis added). Contra Veseli Appeal, para. 99; Veseli CIL Reply, para. 46.
[283] Impugned Decision, paras 155-156. See also ICRC Customary IHL Study (Vol. I (Rules)), Rule 87, p. 306 and Rule 99, p. 344.
[284] Veseli Appeal, paras 100-108. See also Veseli Reply, para. 45.
[285] Veseli Appeal, para. 101; Veseli Reply, para. 45.

according to which criminal prohibitions under CIL can only be binding if they have a corresponding provision under domestic law – this article can in fact only criminalise unlawful detention in the context of an international armed conflict but not as a serious violation of Common Article 3.[286] This has been confirmed, according to Veseli, by the Supreme Court of Kosovo.[287] He argues that the same applies to the legislation of some former Yugoslav countries as well as other national legislation outside the SFRY, whose relevant provisions either use the same wording as criminal codes of former Yugoslav countries or are taken verbatim from Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("GCIV"), only applicable in international armed conflicts.[288]

104. Furthermore, Veseli contends that the Pre-Trial Judge's reliance on a handful of resolutions from UN entities in order to support the existence of a criminal prohibition under CIL is equally misplaced because such resolutions either only recognise arbitrary detention as a mere human rights violation, or fail to mention any individual criminal liability that would attach to such a violation in the context of a non-international armed conflict.[289] Veseli finally argues that the Pre-Trial Judge failed to note the significance of the absence of such criminalisation from Article 8(2)(c) and (e) of the Rome Statute.[290]

105. The SPO responds that because arbitrary detention is a serious violation of the rule of humane treatment under Common Article 3, it entails individual criminal responsibility and falls within the jurisdiction of the Specialist Chambers pursuant to Article 14(1)(c) of the Law.[291] In the SPO's view, Veseli's submissions regarding state

[286] Veseli Appeal, para. 103. See also F00010/A04, Annex 4 to Veseli Defence Appeal Against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 27 August 2021.
[287] Veseli Appeal, paras 103-104, referring, *inter alia*, to Kosovo Supreme Court Judgment of 7 September 2004; Kosovo Supreme Court Judgment of 5 August 2004; Kosovo, District Court of Peja/Peć, *Krasniqi*, P.nr. 67/09, 29 April 2009. See also Veseli Jurisdiction Motion, para. 51; Veseli CIL Reply, para. 55.
[288] Veseli Appeal, paras 105-106, referring to Impugned Decision, paras 160, 161, fn. 330.
[289] Veseli Appeal, paras 102, 107-108.
[290] Veseli Appeal, para. 109.
[291] SPO Response to Veseli Appeal, para. 66.

practice and *opinio juris* are misconceived and do not detract from the status of arbitrary detention under CIL.[292] In particular, the SPO submits that arbitrary detention is within the scope of acts criminalised in non-international armed conflicts under Article 142 of the 1976 SFRY Criminal Code and other codes relying on similar language.[293] Furthermore, the SPO contends that the UN resolutions constitute evidence that, in the context of non-international armed conflicts, the prohibition of arbitrary detention was recognised under CIL, notably as a serious violation of the principle of humane treatment.[294] According to the SPO, because such serious violations fall within the scope of prohibited acts under Common Article 3, they in turn entail individual criminal responsibility.[295]

(ii) Assessment of the Court of Appeals Panel

106. The Panel will first address the alleged lack of state practice supporting the criminalisation of arbitrary detention in a non-international armed conflict in 1998. While the Panel observes that, contrary to Veseli's contention,[296] by 1998, a number of states had criminalised arbitrary detention as a distinct war crime in non-international armed conflicts as well,[297] it nevertheless agrees that the relevant state practice at that time was rather limited.[298] However, in light of the other factors mentioned below,[299] the Panel finds that this alone would not be sufficient to detract from the CIL status of the offence in a non-international armed conflict or to demonstrate that the Pre-Trial

[292] SPO Response to Veseli Appeal, para. 66. See also SPO Response to Veseli Appeal, para. 65.
[293] SPO Response to Veseli Appeal, para. 67.
[294] SPO Response to Veseli Appeal, para. 68.
[295] SPO Response to Veseli Appeal, para. 68.
[296] Veseli Appeal, para. 101.
[297] See ICRC Customary IHL Study (Vol. II (Practice)), Rule 99, paras 2554 (Argentina, from 1998), 2562 (Belgium), 2563 (Bosnia and Herzegovina, from 1998), 2565 (Bulgaria, from 1998), 2572 (Democratic Republic of the Congo), 2576 (Croatia), 2579 (Ethiopia), 2598 (Nicaragua), 2605 (Paraguay), 2606 (Poland), 2607 (Portugal), 2608 (Romania), 2611 (Slovenia), 2613 (Spain), 2615 (Sweden), 2616 (Tajikistan, from 1998), 2623 (Yemen, from 1998), 2624 (Yugoslavia). See also ICRC Customary IHL Study (Vol. I (Rules)), Rule 99, p. 347; Impugned Decision, fns 323-330; Confirmation Decision, fn. 42.
[298] See ICRC Customary IHL Study, (Vol. II (Practice)), Rule 99, pp. 2331-2337.
[299] See below, para. 108.

Judge erred in concluding that such conduct was criminalised.[300] The Panel also concurs with the Pre-Trial Judge that subsequent state practice post-dating 1998 can be relevant to show continuing development as opposed to contrary practice.[301] Therefore, that some of the domestic legislation cited by the Pre-Trial Judge only criminalised such conduct in a non-international armed conflict in the years immediately following the timeframe relevant to the Indictment still bears some relevance as evidence of consistent state practice.[302]

107. Turning next to Veseli's arguments related to Article 142 of the 1976 SFRY Criminal Code and the "dual criminality test", the Panel recalls that, for reasons explained elsewhere in the present Decision, these arguments are inapposite with respect to the applicability of rules of CIL within the framework of the Specialist Chambers.[303] In any event, in the Panel's view, a plain reading of Article 142 of the 1976 SFRY Criminal Code and of the corresponding provisions of other criminal legislation from countries of the former Yugoslavia shows that these provisions provided at the time for the express criminalisation of illegal arrest as a war crime without distinguishing between non-international and international armed conflicts.[304]

108. Finally, the Panel considers that the Pre-Trial Judge did not err in relying upon *inter alia*, a number of UN resolutions in support of his overall conclusion as to the CIL

[300] Impugned Decision, para. 166. While the relevant practice must be general, meaning that it must be sufficiently widespread and representative, universal participation is not required. See UN General Assembly, Report of the International Law Commission, Seventieth Session, Draft conclusions on identification of customary international law, with commentaries, 2018, A/73/10 ("ILC Draft Conclusions"), Conclusion 8(1), Commentary (3).
[301] See Impugned Decision, para. 158.
[302] See ICRC Customary IHL Study (Vol. II (Practice)), Rule 99, paras 2555 (Armenia, 2003), 2563 (Republika Srpska, 2000), 2566 (Burundi, 2001), 2580 (Georgia, 1999), 2593 (Moldova, 2002), 2600 (Niger, 2003), referred to in Confirmation Decision, fn. 42 and Impugned Decision, fns 327, 329, 331-332.
[303] See above, paras 22-29, 37.
[304] See 1976 SFRY Criminal Code, Article 142; Slovenia, Penal Code (1994), Article 374(1); Republic of North Macedonia, Criminal Code (1996), Article 404(1); Croatia, Criminal Code (1997), Article 158(1); Federation of Bosnia and Herzegovina, Criminal Code (1998), Article 154(1). See also Impugned Decision, para. 160.

status of the prohibition of arbitrary detention.[305] While the Panel notes that such resolutions do not expressly mention the criminalisation of arbitrary detention as a distinct crime in non-international armed conflicts, the Panel nevertheless finds that they confirm that, prior to 1998, arbitrary or unlawful detention was already widely condemned and recognised as constituting a serious violation of IHL, including in non-international armed conflicts,[306] and that such violation could trigger consequences in terms of criminal responsibility.[307]

109. The Panel finds that these resolutions provide further evidence, constitutive of *opinio juris*, that it was established at the time of the alleged crimes that arbitrary

[305] See Impugned Decision, para. 162.

[306] See UN Commission on Human Rights, Situation of Human Rights in the Sudan, E/CN.4/RES/1996/73, 23 April 1996, para. 15 ("call[ing] upon all parties to the hostilities to respect fully the applicable provisions of international humanitarian law including article 3 common to the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 1977 […] and to protect all civilians […] from violations of human rights and humanitarian law, including […] arbitrary detention" in the Sudan), referred to at Impugned Decision, fns 336-337.

[307] See UN Security Council, Resolution 1019 (1995), S/RES/1019, 9 November 1995 (expressing grave concern with regard to "grave violations of international humanitarian law and of human rights" in Bosnia and Herzegovina, "including reports of […] unlawful detention", and demanding the "investigat[ion] [of] all reports of such violations so that those responsible in respect of such acts be judged and punished"), referred to at Impugned Decision, fn. 334; UN Security Council, Resolution 1034 (1995), S/RES/1034, 21 December 1995 (condemning "in the strongest possible terms the violations of international humanitarian law and of human rights" in some areas of Bosnia and Herzegovina "showing a consistent pattern of […] arbitrary detentions" and "reiterat[ing] that all those who commit violations of international humanitarian law will be held individually responsible in respect of such acts"), referred to at Impugned Decision, fn. 334; UN General Assembly, Resolution 50/193 (1996) A/RES/50/193, 11 March 1996 (recalling that the Security Council "established an international tribunal for the prosecution of persons responsible for [serious violations of international humanitarian law]", expressing its grave concern at reports of "grave violations of international humanitarian law and of human rights […] including reports of […] unlawful detention" in some areas of Bosnia and Herzegovina, "condemn[ing] all violations of human rights and international humanitarian law by the parties to the conflict", and mentioning that political and military leaders "bear primary responsibility for most of those violations and that persons who commit such acts will be held personally responsible and accountable"), referred to at Impugned Decision, fn. 335; UN Commission on Human Rights, Situation of human rights in the Republic of Bosnia and Herzegovina, the State of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro), E/CN.4/RES/1996/71, 23 April 1996 (expressing its grave concern at reports of "grave and massive violations of international humanitarian law and of human rights […] including reports of […] unlawful detention" and condemning "in the strongest terms all violations of human rights and international humanitarian law […] in particular massive and systematic violations, including […] detentions" and reaffirming that "all persons who plan, commit or authorize such acts will be held personally responsible and accountable"), referred to at Impugned Decision, fn. 335.

detention was considered to be a serious violation of the principle of humane treatment. Since the requirement of humane treatment is enshrined in Common Article 3 and arbitrary detention is incompatible with this principle,[308] it follows that arbitrary detention entails criminal responsibility.[309] The Panel therefore finds that Veseli has failed to show any error in the Pre-Trial Judge's finding that arbitrary detention was criminally prohibited under CIL in the context of a non-international armed conflict.[310]

110. Finally, the Panel observes that while Veseli argues that the Pre-Trial Judge "fail[ed] to note the significance" of the fact that arbitrary detention is not listed under Article 8(2)(c) and (e) of the Rome Statute,[311] he is raising this argument for the first time on appeal. Consequently, this submission warrants summary dismissal.[312]

111. In view of the foregoing, the Appeals Panel finds that the Pre-Trial Judge did not err in finding that, during the time relevant to the charges in the Indictment, a CIL rule existed criminalising arbitrary detention as a war crime in a non-international armed conflict. Veseli's Ground 13 is therefore dismissed.

2. Enforced Disappearance

(a) Whether Enforced Disappearance as a Crime Against Humanity Existed in CIL During the Temporal Jurisdiction of the Specialist Chambers (Veseli Ground 14)

(i) Submission of the Parties

112. Veseli submits that the Pre-Trial Judge erred in law in finding that enforced disappearance as a crime against humanity was part of CIL in 1998 and stresses that this needs to be distinguished from the status of enforced disappearance under

[308] See above, paras 96-97, 99, 102.
[309] See ICRC Customary IHL Study (Vol. I (Rules)), Rule 87, p. 306 and Rule 99, p. 344.
[310] See Impugned Decision, para. 166.
[311] See Veseli Appeal, para. 109.
[312] See e.g. *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 15.

international human rights law.[313] Veseli argues that the Pre-Trial Judge: (i) could only point to two international instruments envisaging enforced disappearance as a crime against humanity, namely the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance and the 1994 Inter-American Convention on Forced Disappearance of Persons;[314] (ii) failed to refer to domestic legislation criminalising enforced disappearance as a crime against humanity prior to 1998, with the exception of the French legislation;[315] (iii) only referred to non-binding documents;[316] (iv) failed to address the statement of the International Law Commission ("ILC") in its Draft Code of Crimes Against the Peace and Security of Mankind ("ILC 1996 Draft Code") that it was "a relatively recent phenomenon";[317] (v) failed to engage with Veseli's submissions about why statutes of international tribunals, such as the ICTY, the International Criminal Tribunal for Rwanda ("ICTR"), the ECCC and the SCSL, decided not to include enforced disappearance as a crime under CIL;[318] and (vi) failed to provide an explanation as to why it was only in 2012 that the UN Working Group on Enforced or Involuntary Disappearances declared the CIL status of the crime of enforced disappearance.[319]

113. The SPO responds that the submissions of the Defence should be rejected as unsourced, selective and merely repeating arguments that were unsuccessful before the Pre-Trial Judge.[320] With regard to Veseli's submission that only two international instruments considered enforced disappearance as a crime against humanity before 1998, the SPO submits that the Pre-Trial Judge already found that the Defence's "selective approach" had ignored the manifestation of state practice and *opinio juris*

[313] Veseli Appeal, paras 110-115.
[314] Veseli Appeal, para. 110.
[315] Veseli Appeal, para. 111; Veseli Reply, para. 46. See also F00026/A02, Annex 2 to Veseli Defence Reply to SPO Response (KSC-BC-2020-06/IA009/F00020), 18 October 2021 ("Annex 2 to Veseli Reply").
[316] Veseli Reply, para. 47.
[317] Veseli Appeal, para. 112.
[318] Veseli Appeal, para. 113.
[319] Veseli Appeal, para. 114.
[320] SPO Response to Veseli Appeal, para. 69.

during decades and how crucial such practice is "in determining the existence of a customary rule at the time of the alleged crimes."[321]

114. Furthermore, the SPO argues that the Defence's submissions relating to the ILC 1996 Draft Code ignore the Pre-Trial Judge's consideration of the matter and the fact that the ILC acknowledged in 1991 that the practice of systematic disappearances "deserved to be specifically mentioned" in the ILC 1996 Draft Code.[322] The SPO finally argues that contrary to Veseli's assertion, the UN Working Group on Enforced or Involuntary Disappearances, in its 2009 General Comment, actually acknowledged "the pre-existing status" of enforced disappearance as a crime against humanity.[323]

115. Veseli replies that the ILC made clear in Article 13 of the ILC 1996 Draft Code that not all crimes mentioned therein had CIL status.[324] He further claims that nowhere does the 2009 General Comment acknowledge the pre-existing status of enforced disappearance under CIL.[325]

(ii) Assessment of the Court of Appeals Panel

116. At the outset, the Panel notes that when examining the status of enforced disappearance under CIL, the Pre-Trial Judge properly focused on the criminalisation of enforced disappearance as a crime against humanity, thereby distinguishing the recognition of this conduct as a human rights violation.[326]

[321] SPO Response to Veseli Appeal, para. 71, referring to Impugned Decision, para. 168.
[322] SPO Response to Veseli Appeal, para. 72.
[323] SPO Response to Veseli Appeal, para. 73. The SPO indicates that while Veseli mentions a 2012 statement of the UN Working Group, he is in fact referring to the Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/13/31, 21 December 2009, para. 39: General Comments on Enforced Disappearances as a Crime Against Humanity ("2009 General Comment"). See SPO Response to Veseli Appeal, para. 73.
[324] Veseli Reply, para. 48.
[325] Veseli Reply, para. 49.
[326] See Impugned Decision, paras 168-174.

117. The Panel notes that Veseli now on appeal repeats almost verbatim the arguments he previously made before the Pre-Trial Judge.[327] The Panel finds that Veseli merely disagrees with the Pre-Trial Judge and fails to articulate any clear error committed by the Pre-Trial Judge when addressing such arguments. Such arguments should thus be summarily dismissed.[328]

118. In any event, the Panel finds Veseli's approach selective and as such misleading, because he focuses in isolation on the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance and the 1994 Inter-American Convention on Forced Disappearance of Persons, while ignoring a number of other sources relied upon by the Pre-Trial Judge, including regional instruments and state practice that supported the same position, namely that enforced disappearance was prohibited as a crime prior to 1998.[329]

119. The Panel finds that whether these two instruments are binding is of limited relevance in terms of establishing a CIL norm. It recalls, in that regard, that CIL may be expressed not only in binding instruments, but also in non-binding ones. Indeed, UN General Assembly resolutions, regional conventions and other non-binding instruments, such as diplomatic conferences, press releases or official legal advisers' opinions, have been identified among the instruments constituting evidence of CIL.[330] The Panel therefore dismisses Veseli's submission in that respect.

120. Turning next to the domestic legislation relied upon by the Pre-Trial Judge, the Panel notes that while Veseli is correct that it mostly criminalises enforced disappearance as a domestic crime prior to 1998 and not as a crime against

[327] *Compare* Veseli Jurisdiction Motion, paras 152-153, 155; Veseli CIL Reply, para. 56 *with* Veseli Appeal, paras 110, 112-114. See Impugned Decision, paras 168-169.
[328] See e.g. F00005/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021 (confidential version filed on 30 April 2021), para. 60.
[329] See Impugned Decision, paras 168-170, 172 and authorities cited therein.
[330] UN General Assembly, Resolution 73/203 (2018), A/RES/73/203, 11 January 2019, Annex, Conclusions 6(2), 10(2), 11-12. See also Crawford, J., *Brownlie's Principles of Public International Law* (Eighth Edition), Oxford University Press 2013 ("Crawford, *Brownlie's Principles*"), p. 24.

humanity,[331] the Panel, nevertheless, observes that the Pre-Trial Judge did not state otherwise.[332] In addition, the Panel considers that this still evidences consistent state practice and willingness to criminalise such conduct well before 1998, as opposed to recognising this conduct as a mere human rights violation. The Panel further agrees with the Pre-Trial Judge that the inclusion of enforced disappearance as a crime against humanity in the Rome Statute adopted in 1998, and its subsequent criminalisation in a greater number of domestic systems that ensued, show the continuing acceptance from states of its binding proscription and may be taken into consideration to demonstrate the CIL status of enforced disappearance.[333]

121. As to the ILC 1996 Draft Code, the Panel finds that the fact that the ILC did not include enforced disappearance in the 1991 version of the Draft Code or that it found in 1996 that it was "a relatively recent phenomenon" is irrelevant, given that such conduct was in any event included and codified as a crime against humanity in the 1996 version of the ILC Draft Code.[334] The Panel shares the Pre-Trial Judge's view that this is consistent with the establishment, by 1998, of the CIL status of that offence.[335]

122. The Panel finds that Veseli's contention that it is "unlikely" that enforced disappearance "achieved full CIL status in under two years" is entirely unsupported.[336] The Panel is mindful that while for a norm to be considered CIL, the passage of time may evidence the generality and consistency of a practice, there is no minimum duration requirement under international law.[337] As a result, the Panel is

[331] See Annex 2 to Veseli Reply. In the list provided by the Pre-Trial Judge, only the French Criminal Code and the 1997 Penal Code of El Salvador criminalised enforced disappearance as a crime against humanity before 1998. However, the latter entered into force in 1998. See Impugned Decision, fn. 342.
[332] See Impugned Decision, para. 169.
[333] See Impugned Decision, para. 171.
[334] ILC, Yearbook of the International Law Commission 1996, Volume II, Part Two, Report of the Commission to the General Assembly on the Work of its Forty-eighth Session, A/51/10 ("ILC 1996 Report"), pp. 47, 50. Contra Veseli Appeal, para. 112.
[335] See Impugned Decision, para. 169.
[336] See Veseli Appeal, para. 112.
[337] See e.g. Crawford, *Brownlie's Principles*, p. 24. This has been confirmed by the International Court of Justice in the North Sea Continental Shelf Cases, where it held that the passage of only a short period

not persuaded that a "minimum" period was required so that enforced disappearance as a crime against humanity could achieve "full" status under CIL since its inclusion in the ILC 1996 Draft Code. Indeed, its inclusion in the 1996 Draft Code could be said to have marked the crystallisation of a previously emergent customary norm.

123. In addition, and contrary to Veseli's assertion,[338] the Panel does not consider that Article 13 of the ILC 1996 Draft Code means that the crimes listed therein lack CIL status.[339] This provision merely reiterates the well-established principle of non-retroactivity for acts committed prior to its entry into force, and in fact specifies that it does not preclude prosecutions, on different legal grounds, such as under CIL, of acts previously committed.[340] The Panel finds that this does not detract from the CIL status of the offence of enforced disappearance, at a minimum, from that time and is irrelevant to the criminal acts charged in the Indictment, which are alleged to have occurred afterwards.

124. The Panel furthermore considers that the fact that enforced disappearance was not expressly criminalised as a distinct offence in the statutes of the ICTY, the ICTR, the ECCC and the SCSL should not be taken as evidence that the offence lacks CIL status.[341] The Panel finds that Veseli's comparison is misplaced as the temporal jurisdiction of these international and internationalised tribunals vary and mostly span from prior to 1998.[342] In addition, because these statutes are tailored to the alleged crimes committed during the respective conflicts they address, that a specific crime

---

of time is not necessarily a bar to the formation of a new rule of CIL as long as there is extensive and virtually uniform state practice. See North Sea Continental Shelf Cases, para. 74.

[338] Veseli Reply, para. 48.

[339] See ILC 1996 Report, pp. 38-39, paras 4-5.

[340] Article 13 of the ILC 1996 Draft Code provides that: "1. No one shall be convicted under the present Code for acts committed before its entry into force; 2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law."

[341] See Veseli Appeal, para. 113.

[342] ICTY Statute, Article 8 (from 1 January 1991); ICTR Statute, Article 1 (from 1 January to 31 December 1994); SCSL Statute, Article 1 (from 30 November 1996); ECCC, Law on the Establishment of the Extraordinary Chambers, Article 2 new (from 17 April 1975 to 6 January 1979).

has been left out is not necessarily proof of the lack of CIL nature of that crime.[343] In any event, the Panel recalls that the jurisprudence of these tribunals has recognised that acts of enforced disappearance could still constitute crimes against humanity under the category of "other inhumane acts".[344]

125. Finally, it is not evident to the Panel that the UN Working Group on Enforced or Involuntary Disappearances "claimed" CIL status for the crime of enforced disappearance "for the first time" in 2009.[345] The Panel notes that in its 2009 General Comment, the UN Working Group on Enforced or Involuntary Disappearances rather addressed the definition of the contextual elements of crimes against humanity under CIL as these relate to enforced disappearance in the 1992 Declaration for the Protection of All Persons from Enforced Disappearances while it accepts the status of enforced disappearance as a crime against humanity in that declaration.[346] The Panel finds that, at a minimum, this confirms that enforced disappearance as a crime against humanity was certainly recognised as such by 1992.[347]

126. In light of the foregoing, the Court of Appeals Panel considers that Veseli has failed to show that the Pre-Trial Judge erred in finding that the crime against humanity of enforced disappearance had the status of CIL at the time of the offences charged in the Indictment. Veseli's Ground 14 is therefore dismissed.

---

[343] For instance, the SCSL Statute did not include the crime of genocide as there was no evidence that genocide was committed during the conflict in Sierra Leone.
[344] ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgement, 2 November 2001, para. 208; *Kupreškić et al.* Trial Judgement, para. 566; SCSL, *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgement, 22 February 2008 ("*Brima et al.* Appeal Judgement"), paras 184-185; ECCC, *Case against Nuon and Khieu*, 002/19-09-2007-ECCC/SC, Appeal Judgement, 23 November 2016 ("ECCC Case 002 Supreme Court Appeal Judgement"), para. 589; ECCC, *Case against Nuon and Khieu*, 002/19-09-2007/ECCC/TC, Case 002/01 Judgement, 7 August 2014, paras 441-448.
[345] Veseli Appeal, para. 114. See also Veseli Jurisdiction Motion, para. 162.
[346] See 2009 General Comment, preamble, paras 5-9.
[347] In its 2009 General Comment, the UN Working Group on Enforced or Involuntary Disappearances also refers to a 1983 resolution of the General Assembly of the Organisation of American States describing enforced disappearances as a crime against humanity, and seems to endorse that statement. See 2009 General Comment, para. 1.

E. ALLEGED ERRORS REGARDING JOINT CRIMINAL ENTERPRISE

1. Whether JCE Can Be Implied from Article 16(1)(a) of the Law (Thaçi Grounds B-B.1 in part; Veseli Ground 8 in part; Selimi Ground B; Krasniqi Ground 3)

127. The Court of Appeals Panel considers that part of Grounds B and B1 presented by Thaçi, part of Ground 8 presented by Veseli, Ground B presented by Selimi, as well as Ground 3 presented by Krasniqi substantially overlap in that they all allege that the Pre-Trial Judge erred in finding that JCE could be implied from Article 16(1)(a) of the Law; therefore these grounds will be considered together.

(a) Submissions of the Parties

128. All four Accused submit that the Pre-Trial Judge erred in finding that JCE could be implied from "committed" referred to in Article 16(1)(a) of the Law and rather argue that there is no statutory basis on which to apply JCE as a mode of liability.[348] The Accused also argue that Article 16(1)(a) of the Law was framed "exhaustively" and that the lack of reference to JCE within the wording of this provision must be regarded as evidence of the drafters' intention to exclude it.[349] Selimi argues that the flaws in the Pre-Trial Judge's reasoning are apparent when his extrapolation of JCE from Article 16(1)(a) of the Law is contrasted with the unambiguous and detailed description of superior responsibility under Article 16(1)(c) of the Law.[350]

129. The Accused further submit that the Pre-Trial Judge erred in relying on the similarly worded provisions of the ICTY/ICTR Statutes to support his view that Article 16(1)(a) of the Law must be interpreted to contemplate JCE as a mode of liability.[351] To the contrary, they argue that the lack of reference to JCE in Article 16(1)(a) of the Law, despite all the controversy raised since the inclusion of JCE

[348] Thaçi Appeal, paras 2(iv), 51-59; Veseli Appeal, paras 72-82; Selimi Appeal, paras 8(ii), 40-49; Krasniqi Appeal, paras 4(3), 69-77. See also Thaçi Reply, paras 12-14, 23; Krasniqi Reply, paras 2, 16-18.
[349] Thaçi Appeal, paras 45-46, 52, 67; Veseli Appeal, para. 73; Selimi Appeal, paras 43-47; Krasniqi Appeal, paras 69-72. See also Krasniqi Reply, paras 16-18.
[350] Selimi Appeal, paras 45-46.
[351] Thaçi Appeal, paras 46, 48-49; Selimi Appeal, paras 43-47.

as a form of commission before international courts and tribunals, is significant.[352] Veseli adds that the interpretation adopted by the ICTY has no binding effect on the Specialist Chambers.[353] He further argues that the Pre-Trial Judge erred in requiring that international crimes be prosecuted on the basis of "international" modes of liability only, such as JCE.[354]

130. Krasniqi contends that the Pre-Trial Judge should not have relied on CIL and that Article 16(1)(a) of the Law should have been interpreted instead according to the natural meaning of its terms as *lex specialis*.[355] According to Krasniqi, since JCE is not set out as a mode of responsibility under Article 16(1)(a) of the Law, the Specialist Chambers cannot apply it regardless of whether it forms part of CIL.[356]

131. Krasniqi further submits that the principle of legality as well as the presumption of innocence, both enshrined in the Constitution of Kosovo, prevent an interpretation of modes of responsibility that would incorporate JCE into the reading of Article 16(1)(a) of the Law and be detrimental to the Accused.[357] Finally, according to Krasniqi, the word "committed" cannot be construed so broadly that it encompasses JCE III because JCE III is not a form of commission.[358]

132. The SPO responds that the Impugned Decision correctly considered identical articles on individual criminal responsibility in the Statutes of other courts and rightly found that all forms of JCE are a form of commission recognised in Article 16(1)(a) of the Law. The Defence arguments challenging this finding fail to demonstrate,

[352] Thaçi Appeal, paras 46-47, 52, 67; Selimi Appeal, paras 43-47; Krasniqi Appeal, paras 72, 75.
[353] Veseli Appeal, para. 76.
[354] Veseli Appeal, para. 77.
[355] Krasniqi Appeal, para. 69.
[356] Krasniqi Appeal, paras 70-72.
[357] Krasniqi Appeal, para. 73; Krasniqi Reply, paras 16-18.
[358] Krasniqi Appeal, paras 74-77. See also Krasniqi Reply, para. 18.

according to the SPO, an error of law and instead repeat submissions already considered and rejected by the Pre-Trial Judge.[359]

133. The SPO argues that the Law must be interpreted in accordance with its purpose which is to be applied to those bearing responsibility for the crimes within the jurisdiction of the Specialist Chambers, whether they acted alone or with others. This, in the SPO's view, was an "animating concern" of the drafters of the Council of Europe Report.[360] The SPO further submits that the modes of responsibility under Article 16(1) of the Law refer specifically to Articles 13 and 14 of the Law, which list crimes under CIL, and therefore, should be interpreted consistently with CIL.[361]

134. In reply to the SPO's response that JCE III is a recognised form of commission,[362] Krasniqi argues that the SPO mischaracterises the Defence's position.[363]

(b) Assessment of the Court of Appeals Panel

135. In the Impugned Decision, the Pre-Trial Judge recalled that pursuant to Article 16(1)(a) of the Law, for crimes in Articles 13 and 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.[364] The Pre-Trial Judge found that Article 16(1) of the Law provides for a self-contained, autonomous regime for modes of liability in respect of crimes under Articles 13 and 14 of the Law.[365] To support his conclusion that "commission" must be

[359] SPO Response to Thaçi Appeal, paras 33-41; SPO Response to Selimi Appeal, paras 35-41; SPO Response to Krasniqi Appeal, paras 10-15. See also SPO Response to Veseli Appeal, para. 41.
[360] SPO Response to Thaçi Appeal, para. 39; SPO Response to Selimi Appeal, para. 39; SPO Response to Krasniqi Appeal, para. 13.
[361] SPO Response to Thaçi Appeal, paras 35-36; SPO Response to Veseli Appeal, para. 20; SPO Response to Selimi Appeal, para. 23.
[362] SPO Response to Krasniqi Appeal, para. 12.
[363] Krasniqi Reply, para. 18. Krasniqi explains that it is not his position that "commission" is meant to encompass only physical perpetrators but that it cannot encompass JCE III as "in JCE III, the crime can only be said to be 'committed' by the direct perpetrator".
[364] Impugned Decision, para. 86.
[365] Impugned Decision, para. 177.

interpreted in accordance with CIL as applicable at the time the alleged crimes were committed, the Pre-Trial Judge considered several factors and notably that the terminology employed in Article 16(1)(a) of the Law is virtually identical to those regulating modes of liability in the Statutes of the ICTY and ICTR.[366]

136. Starting with the absence of explicit reference to JCE in the wording of Article 16(1)(a) of the Law, the Panel disagrees with the Defence that this, as such, should be interpreted as a deliberate intention of the drafters of the Law to exclude JCE from the applicable modes of liability before the Specialist Chambers. Pursuant to Article 3(3) of the Law, the Judges may be guided by the jurisprudence of the *ad hoc* tribunals. In the context of prior decisions, the Panel has relied on the jurisprudence of other courts, including the ICTY and the ICTR, to address instances where the Law lacked statutory elaboration on specific issues.[367] The Panel is of the view that such jurisprudence can be of guidance in the present case.

137. In this regard, the Panel underlines that the Law, like the Statutes of the ICTY and the ICTR, is not and does not purport to be, unlike for instance the Rome Statute,[368] a meticulously detailed code providing explicitly for every possible scenario and every solution thereto. It sets out in rather general terms the jurisdictional framework within which the Specialist Chambers have been mandated to operate.[369]

138. The Panel recalls that it has upheld elsewhere in this Decision the Pre-Trial Judge's findings that Articles 3(2)(d) and 12 to 14 of the Law allow the Specialist Chambers to apply CIL and that CIL has primacy over Kosovo substantive criminal

[366] Impugned Decision, paras 177-179.
[367] See e.g. *Gucati* Appeal Decision, paras 9-14; F00005/RED, Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, 30 April 2021 (confidential version filed on 30 April 2021), paras 25-32. See also below, paras 152-153, 155.
[368] See ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008, para. 508 and references cited therein.
[369] See similarly, ICTY, *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction —*Joint Criminal Enterprise*, 21 May 2003 ("*Ojdanić* Appeal Decision"), para. 18.

law, which applies only as expressly incorporated in the Law and insofar as it is in compliance with CIL.[370] The Panel notes that while the doctrine of JCE is not referred to in the Statute or the Rules of Procedure and Evidence of the International Residual Mechanism for Criminal Tribunals ("IRMCT") and the *ad hoc* tribunals, it has been generally applied to the core crimes of these courts as a form of commission on the basis of CIL.[371] In that regard, the Panel notes that Article 16(1) of the Law reflects almost verbatim the wording of Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute on individual criminal responsibility.[372] Considering this, the Panel upholds the Pre-Trial Judge's finding that Article 16(1) of the Law, including the term "commission", must be interpreted in accordance with CIL as applicable at the time the alleged crimes were perpetrated.[373]

139. Moreover, the Panel notes that it can be guided in its interpretation of the Law by considering the ordinary meaning of the terms used and the object and purpose of the Law, according to general principles of interpretation.[374] In this respect, as notably

[370] See above, paras 22-24, 29.
[371] See IRMCT, *Prosecutor v. Turinabo et al*., MICT-18-116-PT, Decision on Prosecution Appeal Against Decision on Challenges to Jurisdiction, 28 June 2019, para. 10; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, 30 January 2015 ("*Popović et al.* Appeal Judgement"), para. 1672; *Ojdanić* Appeal Decision, paras 20, 31; ICTR, *Prosecutor v. Munyakazi*, ICTR-97-36A-A, Judgement, 28 September 2011, paras 160, 163; *Brima et al.* Appeal Judgement, paras 73-80. The Panel notes that the jurisprudence has refrained from characterising JCE as principal liability when the physical perpetrators did not belong to the JCE, however, this is of limited scope and, therefore, of limited relevance. See ECCC Case 002 Supreme Court Appeal Judgement, para. 778, referring to ICTY, *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement"), fn. 891.
[372] See also SCSL Statute, Article 6(1). Similarly, Article 16(3) of the Law is almost verbatim to Article 7(3) of the ICTY Statute, Article 6(3) of the ICTR Statute and Article 6(3) of the SCSL Statute.
[373] Impugned Decision, para. 177.
[374] See KSC-CC-PR-2017-01, F00004, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 26 April 2017, para. 13 (according to which the court's review was guided by the "actual language of the text", unless "manifestly contrary to the tenor of the Constitution"). See also UN, Vienna Convention on the Law of Treaties, 23 May 1969, Treaty Series, Vol. 1155, Article 31(1). While the Law is legally a very different instrument from an international treaty, the Panel can be guided in the interpretation of the Law by Article 31(1) of the Vienna Convention on the Law of Treaties, which reflects CIL commanding an interpretation "in good faith in accordance with the ordinary meaning to be given to the terms […] in their context and in the light of its object and purpose". See *Tadić* Appeal Judgement, para. 282; STL,

reflected in the Council of Europe Report and in the Law, the Specialist Chambers were created to adjudicate alleged crimes commenced or committed in Kosovo between 1 January 1998 and 31 December 2000 by individuals whether they acted alone or jointly.[375] In the Panel's view, it would be inconsistent for the drafters of the Law to deliberately exclude from the jurisdiction of the Specialist Chambers one of the grounds upon which the Court was created, namely to ensure that persons acting jointly with others could be prosecuted.[376] Concluding otherwise would lead to an unreasonable interpretation of Article 16(1) of the Law. Therefore, and contrary to Krasniqi's argument,[377] the Panel is of the view that based on the ordinary meaning of Article 16(1)(a) of the Law as *lex specialis*, JCE is subsumed under the term "committed".

140. The Panel further notes that according to Veseli, the Pre-Trial Judge erred in requiring that international crimes be prosecuted on the basis of "international" modes of liability, such as JCE, only.[378] The Impugned Decision does not contain such a finding. The Panel understands that Veseli might be referring to the Pre-Trial Judge's observation that Article 16(1) of the Law, in contrast with its paragraphs (2) and (3), does not expressly incorporate provisions otherwise included in the criminal laws of Kosovo and his subsequent finding that, in relation to crimes under Articles 13 and 14 of the Law, the Specialist Chambers may only apply modes of liability that were part

Prosecutor v. Ayyash et al., STL-11-01/PT/PTJ, Fourth Decision on Victims' Participation in the Proceedings, 2 May 2013, para. 12.

[375] Articles 6, 7 and 8 of the Law; Article 16(1)(b)-(d) of the Law. See also Article 1 of the Law stating that the court shall exist to *inter alia*, "ensure secure, independent, impartial, fair and efficient criminal proceedings". See further Council of Europe Report, Section B, paras 68-75, 169-174, 176. See also above, paras 66-67, 72.

[376] See ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement"), paras 189-191 (wherein the ICTY Appeals Chamber concluded that JCE is included in the scope of "commission" on the basis of the object and purpose of the ICTY Statute and the collective nature of the crimes).

[377] Krasniqi Appeal, paras 69-72.

[378] Veseli Appeal, para. 77. See also Veseli Appeal, paras 74-76, 81.

of CIL at the time the alleged crimes were committed.[379] The Panel identifies no error in this finding.

141. The Panel further finds no contradiction in the Pre-Trial Judge's finding that some modes of liability contained in the 1976 SFRY Criminal Code resemble JCE I and JCE III[380] on the one hand, and his findings on the other hand, that "provisions of Kosovo criminal substantive law regulating modes of liability [which provide for a structurally different system of liability] are not applicable in the interpretation of the autonomous regime of Article 16(1) of the Law".[381] The Pre-Trial Judge's finding concerning the resemblance of JCE with modes of liability in the 1976 SFRY Criminal Code relates only to the question of whether JCE was accessible and foreseeable to the Accused at the time of the alleged acts. As the 1976 SFRY Criminal Code is not binding on the Specialist Chambers,[382] this finding does not affect the Pre-Trial Judge's conclusion regarding the modes of liability under Article 16(1) of the Law.

142. The Panel turns to Krasniqi's arguments that the principle of legality as well as the presumption of innocence prevent an interpretation of modes of responsibility that would include JCE in Article 16(1)(a) of the Law to the detriment of the Accused.[383] The Panel finds Krasniqi's assertion unpersuasive. As underlined by the Pre-Trial Judge, the principle of legality, as enshrined in Article 7(1) of the ECHR and Article 33(1) of the Constitution of Kosovo, embodies, among others, the requirement that a crime must be clearly defined in law.[384] The Panel recalls that the principle of legality requires that the criminal law must always provide individuals with sufficient notice of what is criminal behaviour and what is not.[385] The Panel has already

[379] Impugned Decision, paras 178-179.
[380] Impugned Decision, paras 197-200. Contra Veseli Appeal, para. 79. See also below, paras 220, 222-223.
[381] Impugned Decision, para. 178. Contra Veseli Appeal, para. 79.
[382] See above, para. 26.
[383] Krasniqi Appeal, para. 73; Krasniqi Reply, paras 16-18.
[384] See Impugned Decision, para. 193 and references cited therein.
[385] See e.g. ICTY, *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgement, 17 January 2005, para. 625. See also *Ojdanić* Appeal Decision, para. 10.

established that it is satisfied that the Law provides for JCE as a form of criminal liability[386] and will examine in a further section whether JCE I and JCE III were part of CIL at the relevant time.[387] The Panel will also examine in a further section whether the Pre-Trial Judge erred in finding that JCE was foreseeable and accessible to the Accused.[388] Therefore, Krasniqi's argument is dismissed. As for the presumption of innocence, the alleged criminal liability of the Accused will be debated in the course of the trial and assessed by the Judges in due time. This issue is, therefore, not jurisdictional in nature.[389]

143. Finally, the Panel notes that Krasniqi submits that the word "commission" cannot be interpreted so broadly that it encompasses JCE III because the crime can only be said to be "committed" by the direct perpetrator.[390] In support of his submission, Krasniqi relies on an *Amicus Curiae* Brief on JCE before the Pre-Trial Chamber of the ECCC in the *Duch* case.[391] The position adopted in this brief is that JCE III cannot be considered as a form of "co-perpetration" but only as a form of "aiding and abetting" the criminal enterprise.[392] The Panel considers that while different views may be taken as to the characterisation of JCE III as a form of principal or accessorial liability, this debate is of limited relevance to the central jurisdictional issue.[393] Accordingly, the Panel finds no cogent reason to depart from the interpretation of "commission" in CIL with respect to core international crimes.

[386] See above, paras 135-141. See also below, para. 144.
[387] See below, paras 162-172 (with respect to JCE I) and 186-196 (with respect to JCE III).
[388] See below, paras 211-224.
[389] See *Gucati* Appeal Decision, para. 17.
[390] Krasniqi Appeal, paras 74-77. See also Krasniqi Reply, para. 18.
[391] See Krasniqi Reply, para. 18, fn. 38, referring to ECCC, *Co-Prosecutors v. Kaing Guek Eav alias "Duch"*, 001/18-07-2007- ECCC/OCIJ (PTC02), Amicus Brief for the Pre-Trial Chamber on Joint Criminal Enterprise from Professor Kai Ambos, 27 October 2008 ("*Amicus Curiae* Brief on JCE"), paras 2-3. See also Krasniqi Appeal, para. 74, referring to Ambos, K., "Joint Criminal Enterprise and Command Responsibility" 5 (2007) *Journal of International Criminal Justice* 159, pp. 168-169.
[392] *Amicus Curiae* Brief on JCE, paras 2-3.
[393] See ECCC Case 002 Supreme Court Appeal Judgement, para. 778. See also above, fn. 371.

144. In light of the foregoing, the Court of Appeals Panel finds that the Defence has not demonstrated that the Pre-Trial Judge committed an error of law in finding that JCE can be implied from Article 16(1)(a) of the Law. The Court of Appeals Panel therefore dismisses Thaçi's Grounds B-B.1 in part, Veseli's Ground 8 in part, Selimi's Ground B and Krasniqi's Ground 3.

2. Whether JCE I and JCE III Were Part of CIL at the Time of the Charged Crimes (Thaçi Grounds B2-B3; Veseli Ground 9; Selimi Ground C; Krasniqi Ground 1)

(a) Whether the Pre-Trial Judge Erred by Failing to Independently Investigate the CIL Status of JCE (Thaçi Ground B2; Veseli Ground 9 in part; Selimi Ground C1; Krasniqi Ground 1 in part)

145. The Court of Appeals Panel considers that Ground B2 presented by Thaçi, Ground 9 presented by Veseli, Ground C1 presented by Selimi, as well as part of Ground 1 presented by Krasniqi substantially overlap to the extent that they all allege errors committed by the Pre-Trial Judge in failing to conduct an independent review of the cases on which the CIL status of JCE was based and to consider arguments raised by the Defence in this regard; therefore, these grounds will be considered together.

(i) Submissions of the Parties

146. All four Accused submit that the Pre-Trial Judge failed to provide reasoning and to consider and/or give appropriate weight to Defence submissions challenging whether JCE, particularly JCE III, formed part of CIL.[394] While they accept that Article 3(3) of the Law allows the Pre-Trial Judge to take into consideration the jurisprudence of the *ad hoc* tribunals for the identification of CIL,[395] they argue that the Pre-Trial Judge unduly relied on it.[396] In particular, Thaçi argues that the Pre-Trial

[394] Thaçi Appeal, paras 50, 61, 67, 79-80; Thaçi Reply, paras 15-16; Veseli Appeal, para. 85; Selimi Appeal, paras 51-53, 58; Selimi Reply, paras 3-4; Krasniqi Appeal, paras 13, 16. See also Krasniqi Reply, para. 10.
[395] Thaçi Appeal, para. 62; Veseli Appeal, para. 84; Selimi Appeal, paras 51, 78; Krasniqi Appeal, para. 15.
[396] Thaçi Appeal, paras 50, 61-62, 67; Thaçi Reply, para. 15; Veseli Appeal, para. 84.

Judge erroneously grounded this reliance on Article 3(3) of the Law, which only recognises the jurisprudence of the *ad hoc* tribunals as a subsidiary source of law, ignoring the fact that the Specialist Chambers are a domestic court with a "significantly different" legal framework than that of the *ad hoc* tribunals.[397] Krasniqi similarly argues that the case law of the *ad hoc* tribunals is a subsidiary source of law to which Article 3(3) of the Law gives no greater weight than that of other courts.[398]

147. Furthermore, Veseli and Krasniqi submit that the Pre-Trial Judge was under an obligation to investigate anew post-World War II jurisprudence.[399] Thaçi argues that the Pre-Trial Judge should have analysed all available evidence to determine whether CIL existed, as the ECCC and the Extraordinary African Chambers had done.[400] Selimi submits that the Pre-Trial Judge erroneously adopted a "quantity over quality" approach, rather than performing his own analysis of the jurisprudence or identifying errors in the divergent opinion of the ECCC with respect to JCE III.[401] He also argues that the Pre-Trial Judge's refusal to take into account multiple sources of consistent and well-reasoned authority which challenge the foundation of a supposed customary rule is so unreasonable that it amounts to an abuse of discretion.[402]

148. With respect to the Pre-Trial Judge's finding that the Defence has not presented novel persuasive reasons that would warrant different legal findings on the issue,[403] Thaçi submits that it is insufficient and incorrect,[404] while Veseli and Krasniqi submit that the Pre-Trial Judge thereby unduly placed a burden on the Defence.[405]

---

[397] Thaçi Appeal, paras 51, 62, 67; Thaçi Reply, para. 15. See also Thaçi Appeal, para. 63.
[398] Krasniqi Appeal, para. 15.
[399] Veseli Appeal, paras 85-86; Krasniqi Appeal, paras 13, 16.
[400] Thaçi Appeal, paras 63-65. See also Veseli Appeal, para. 86.
[401] Selimi Appeal, paras 54-58; Selimi Reply, paras 5-6, 44-46. See also Selimi Appeal, paras 44-45; Selimi Reply, paras 7-9.
[402] Selimi Appeal, para. 78.
[403] See Impugned Decision, paras 181, 185.
[404] Thaçi Appeal, paras 61, 66.
[405] Veseli Appeal, para. 84; Krasniqi Appeal, paras 13-14.

149. The SPO responds that Thaçi, Selimi and Krasniqi have not demonstrated any error or abuse of discretion.[406] With respect to the Veseli Appeal, the SPO submits that it should be rejected because he: (i) misrepresents the Impugned Decision; (ii) fails to provide any substantiation for generalised claims; (iii) makes irrelevant and speculative assertions; (iv) misapplies the Law; and (v) misapprehends the relevant standard.[407]

150. According to the SPO, the Impugned Decision is not based solely on the Pre-Trial Judge's assessment of the conclusions of other courts, but rather the Pre-Trial Judge was faced with clear, settled and elaborated sources of law and jurisprudence in respect of JCE I and III.[408] The SPO argues that, accordingly, the Pre-Trial Judge committed no error in assessing whether the Defence's challenges raised arguments that were previously unconsidered or were otherwise meritorious to a degree warranting departure.[409] The SPO further submits that there was no requirement that the Pre-Trial Judge replicate reasoning with which he agrees,[410] and that he had discretion in how to approach the legal issues before him and how to structure the Impugned Decision.[411]

151. The SPO also argues that, contrary to the Defence arguments, the Pre-Trial Judge did conduct an analysis of the status of JCE III in CIL, including an analysis of underlying sources of law and the Defence criticism thereof.[412] In the SPO's view, the

[406] SPO Response to Thaçi Appeal, para. 42; SPO Response to Selimi Appeal, para. 42; SPO Response to Krasniqi Appeal, para. 16.
[407] SPO Response to Veseli Appeal, para. 45. See also SPO Response to Veseli Appeal, para. 50, referring to Veseli Appeal, para. 85.
[408] SPO Response to Thaçi Appeal, paras 43-46; SPO Response to Veseli Appeal, paras 47-49; SPO Response to Selimi Appeal, paras 43-46; SPO Response to Krasniqi Appeal, paras 18-20.
[409] SPO Response to Thaçi Appeal, paras 46-47; SPO Response to Veseli Appeal, paras 46, 49; SPO Response to Selimi Appeal, paras 42, 46; SPO Response to Krasniqi Appeal, paras 17, 21.
[410] SPO Response to Thaçi Appeal, para. 43; SPO Response to Veseli Appeal, para. 47; SPO Response to Selimi Appeal, paras 44, 47; SPO Response to Krasniqi Appeal, para. 18.
[411] SPO Response to Thaçi Appeal, para. 48.
[412] SPO Response to Thaçi Appeal, paras 42, 47-48; SPO Response to Veseli Appeal, paras 46-49; SPO Response to Selimi Appeal, paras 43-46; SPO Response to Krasniqi Appeal, paras 17-20, 23-24.

Impugned Decision correctly identified the relevant legal principles for assessing the sufficiency of state practice and *opinio juris*.[413] The Impugned Decision does not, according to the SPO, reflect a shifting of a burden to the Defence, as the Pre-Trial Judge's endorsement of the authorities concerning the recognition of JCE in CIL demonstrated an independent consideration of their sufficiency.[414]

(ii) Assessment of the Court of Appeals Panel

152. The Court of Appeals Panel recalls that Article 3(3) of the Law provides that "[i]n determining the [CIL] at the time crimes were committed, Judges may be assisted by sources of international law, including subsidiary sources such as the jurisprudence from the international *ad hoc* tribunals, the International Criminal Court and other criminal courts".[415] However, the Panel notes that the term "subsidiary" denotes the ancillary role of such decisions in elucidating the law, as opposed to being themselves a source of international law, but does not suggest that such decisions are not important for the identification of CIL.[416] Further, the Panel notes that the value of such jurisprudence in identifying customary rules depends both on the quality of its reasoning and on its reception, for example in subsequent case law.[417]

153. In this regard, the Panel agrees with the Pre-Trial Judge that "the customary nature of JCE has been thoroughly reviewed and repeatedly confirmed by all contemporary international tribunals applying JCE, except for the ECCC in relation to JCE III".[418] The extent of divergence is important in assessing whether the requirements for establishing a norm of CIL are met.[419] The Panel is, therefore, of the

[413] SPO Response to Krasniqi Appeal, paras 22-23.
[414] SPO Response to Krasniqi Appeal, para. 21. See also SPO Response to Veseli Appeal, para. 49; SPO Response to Selimi Appeal, para. 46.
[415] See also ILC Draft Conclusions, Conclusion 13(1).
[416] ILC Draft Conclusions, Conclusion 13(1), Commentary (2).
[417] ILC Draft Conclusions, Conclusion 13(1), Commentary (3).
[418] See Impugned Decision, para. 181 (internal footnotes omitted).
[419] See ILC Draft Conclusions, Conclusion 9, fn. 728 (wherein the ILC notes that where the members of the international community are "profoundly divided" on the question of whether a certain practice is accompanied by *opinio juris*, the latter does not exist).

view that the Pre-Trial Judge correctly considered the number of international and internationalised criminal courts trying war crimes and crimes against humanity that followed the ICTY Appeals Chamber precedent in the *Tadić* case. In this regard, the Panel also notes that, for this specific subject matter, considering the decisions of other courts trying similar crimes as those before the Specialist Chambers was an appropriate method of discerning the existence of CIL, especially since the Law recognises explicitly the role of such decisions in determining the existence of a rule in CIL.[420]

154. With respect to the Pre-Trial Judge's duty to provide reasoning, the Panel notes that while he must, at a minimum, provide reasoning in support of his findings on the substantive considerations relevant for a decision,[421] he does not have an obligation to spell out every step in his reasoning.[422] The extent of the duty to provide a reasoned opinion can only be determined in the light of the circumstances of the case.[423]

155. The Court of Appeals Panel further notes that the Pre-Trial Judge applied the correct legal standard for the formation of CIL.[424] The Panel considers that whether the two requirements of CIL are met must be carefully investigated in light of the relevant circumstances of each case.[425] As noted above, the Pre-Trial Judge did not err in relying on decisions of international tribunals and courts to establish whether JCE was established in CIL.[426] In addition, their findings are of particular relevance, as they

[420] See Article 3(3) of the Law.
[421] ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.4, Decision on Prosecution Appeal Following Trial Chamber's Decision on Remand and Further Certification, 11 May 2007, para. 25; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007, para. 16.
[422] See e.g. *Veseli* Appeal Decision on Interim Release, para. 72.
[423] ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 69; ICTR, *Prosecutor v. Kayishmena and Ruzindana*, ICTR-95-1-A, Judgment (Reasons), 1 June 2001, para. 165.
[424] See Impugned Decision, para. 182. See also Thaçi Appeal, para. 63, referring, *inter alia*, to ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-PT, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006, para. 32.
[425] See ILC Draft Conclusions, Conclusion 3, Commentary (2).
[426] See above, para. 153.

concern the identification of CIL approximately at the time of the alleged events in this case and the text of Article 16(1) of the Law is identical to the corresponding provisions of the Statutes of the *ad hoc* tribunals.[427] The fact that the Pre-Trial Judge stated that he would consider "whether the Defence has presented persuasive reasons warranting different legal findings"[428] does not mean that he applied the legal standard for the determination of a rule in CIL incorrectly.[429] In the Panel's view, the Pre-Trial Judge was simply referring to factors that could have convinced him to depart from what he considered "consistent jurisprudence".[430] Therefore, the Panel finds that the Pre-Trial Judge did not improperly shift the burden onto the Defence in these circumstances.

156. The Panel also notes that, contrary to the Defence arguments, it is clear from the language of the Impugned Decision that the Pre-Trial Judge explicitly took into consideration the authorities on the basis of which the ICTY Appeals Chamber in *Tadić* decided that JCE existed in CIL at the material time.[431] By referring to them as the basis for the conclusions of the ICTY Appeals Chamber,[432] it is clear to the Panel that the Pre-Trial Judge agreed with how the ICTY Appeals Chamber had interpreted them. As such, there was no need for the Pre-Trial Judge to provide a detailed analysis in the Impugned Decision which would merely repeat the same interpretation. The fact that other courts may have provided a more detailed analysis of the jurisprudence is irrelevant. The Panel also notes that the Pre-Trial Judge considered the reasons why the ECCC deviated from previous jurisprudence with respect to JCE III and provided

[427] See Article 7(1) of the ICTY Statute; Article 6(1) of the ICTR Statute. See also above, para. 153.
[428] See Impugned Decision, para. 181.
[429] Thaçi's argument that the ICTY continued to entertain throughout its history challenges to JCE with a "far greater level of analysis than that offered by the Pre-Trial Judge" (see Thaçi Appeal, para. 65, referring to *Popović et al.* Appeal Judgement, paras 1670-1674; IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, Judgement, 20 March 2019 ("*Karadžić* Appeal Judgement"), paras 425-437), does not affect this conclusion, since the Pre-Trial Judge also addressed the challenges to JCE submitted by the Accused. See below, para. 157.
[430] See Impugned Decision, para. 181.
[431] See Impugned Decision, paras 183-186.
[432] See Impugned Decision, paras 185-186.

an explanation as to why, in his view, the ECCC findings did not constitute "persuasive reasons to question the validity of the interpretation adopted and conclusions reached" by all other international jurisdictions apart from the ECCC.[433] He further addressed the Defence arguments about the impact that the incorporation of co-perpetration in the Rome Statute could have on the status of JCE as CIL.[434]

157. Finally, the Panel notes that the Pre-Trial Judge considered and addressed the Defence arguments.[435] The Panel observes that Veseli and Selimi do not identify in their appeals any specific argument left unaddressed by the Pre-Trial Judge. Regarding the Pre-Trial Judge's finding that the Defence had not advanced any arguments that would warrant a novel review of the jurisprudence, Thaçi points in his appeal to two arguments that, in his view, had not been raised in the past and were nevertheless not discussed by the Pre-Trial Judge, namely that: (i) the ICC's acceptance of the theory of co-perpetration undermines any claim to custom; and (ii) the inconsistent characterisation of JCE at the ICTY and the ICTR was incompatible with the principle of legality.[436] However, the first issue was addressed elsewhere in the Impugned Decision,[437] while the second issue had in fact been considered by international courts and tribunals, including the specific jurisprudence cited by the Pre-Trial Judge.[438] The Panel is, therefore, of the view that the Pre-Trial Judge provided sufficient reasoning to explain the bases of his conclusions.

158. In light of the foregoing, the Court of Appeals Panel finds that the Defence has not demonstrated that the Pre-Trial Judge erred in law or abused his discretion by not independently investigating the CIL status of JCE. Thaçi's Ground B2, Veseli's

[433] See Impugned Decision, para. 186.
[434] See Impugned Decision, para. 187. See also below, paras 163-168, 195.
[435] See Impugned Decision, paras 183-189.
[436] See Thaçi Appeal, para. 66, referring to Impugned Decision, para. 185. See also Thaçi Reply, para. 15; Krasniqi Reply, para. 10.
[437] See Impugned Decision, paras 187, 212.
[438] See Impugned Decision, para. 185, fn. 398, referring to ECCC Case 002 Supreme Court Appeal Judgement, paras 775-789. See, in particular, ECCC Case 002 Supreme Court Appeal Judgement, paras 777-778.

Ground 9 in part, Selimi's Ground C1 and Krasniqi's Ground 1 in part are therefore dismissed. The Court of Appeals Panel will now turn to the Defence's substantive challenges regarding the customary status of JCE.

(b) Whether JCE I Was Part of CIL at the Time of the Charged Crimes (Thaçi Ground B3)

(i) Submissions of the Parties

159. Thaçi first submits that the Pre-Trial Judge erred in dismissing the reflection of the Presiding Judge of the ICTY *Tadić* Appeals Chamber, Judge Shahabuddeen, that the co-existence of two rival theories, JCE and co-perpetration, implied that neither is part of CIL.[439] Thaçi further argues that the Pre-Trial Judge erred in finding that the incorporation of co-perpetration in the Rome Statute "has no bearing" on the question of whether JCE is a mode of liability under CIL, and in concluding that the state parties to the Rome Statute did not seek to codify CIL regarding, *inter alia*, modes of liability.[440] In Thaçi's view, the Pre-Trial Judge's reliance on Article 21 of the Rome Statute in reaching this conclusion is misplaced, and the preparatory debates to the Rome Statute demonstrate that its drafters were seeking to codify existing rules of CIL, including the provisions on modes of liability.[441] Furthermore, Thaçi contends that the Pre-Trial Judge's finding is contradicted by international courts and tribunals that referenced the Rome Statute as reflective of both state practice and *opinio juris*.[442] Finally, Thaçi submits that a CIL rule should exist "beyond any doubt" and argues that this cannot be the case for JCE, since co-perpetration has been preferred by many states and has been applied in national proceedings and in several post-World War II cases.[443]

---

[439] Thaçi Appeal, paras 68-69.
[440] Thaçi Appeal, paras 2(vi), 70-72, 75, 77. See also Thaçi Reply, para. 17.
[441] Thaçi Appeal, paras 72-75. See also Thaçi Reply, para. 18.
[442] Thaçi Appeal, para. 76.
[443] Thaçi Appeal, paras 69, 78. In particular, Thaçi submits that co-perpetration has been applied in various national proceedings (referring to the "Eichmann, Argentinean Generals, East German border killings" cases) and may be identified in the United States, Military Tribunal, *US v. Alstoetter et al*.,

160. The SPO responds that the Rome Statute is a treaty applicable at the ICC and is binding only on those who are subject to the ICC's jurisdiction, not on those subject to the jurisdiction of the Specialist Chambers.[444] The SPO argues that the existence of co-perpetration in the Rome Statute is not relevant to the question of the CIL status of JCE.[445] The SPO also argues that the drafting history of the Rome Statute is primarily relevant to the interpretation of this instrument and does not undermine the development of CIL which occurred prior to its adoption.[446] In its view, it is logical, though not determinative, that the states' delegates in Rome sought to reach an agreement on substantive crimes and modes of liability, and in doing so drew on CIL in many instances.[447] Relying notably on a finding by the ICTY Appeals Chamber in the *Prosecutor v. Đorđević* case, the SPO further contends that neither Article 25(3) of the Rome Statute, which includes co-perpetration as a mode of liability, nor the ICC jurisprudence, exclude JCE as a continuing mode of liability under CIL.[448]

161. Thaçi replies that the SPO failed to address two of the relevant errors raised by him[449] and that the *Đorđević* case is not relevant to the customary status of JCE.[450]

Judgment, 3-4 December 1947, in CCL10 Military Tribunals, US Government Printing Office, Volume III, 1951 ("*Justice* case") and the United States, Military Tribunal, *US v. Greifelt et al.*, US Military Tribunal, Judgment, 10 March 1948, in CCL10 Military Tribunals, US Government Printing Office, Volumes IV-V, 1951 ("*RuSHA* case"). The Panel notes that Thaçi does not provide the references of the authorities he refers to, despite being obliged to do so. See KSC-BD-15, Registry Practice Direction, Files and Filings before the Kosovo Specialist Chambers, 17 May 2019 ("Practice Direction"), Article 46(1).

[444] SPO Response to Thaçi Appeal, para. 49. See also SPO Response to Veseli Appeal, para. 51.

[445] SPO Response to Thaçi Appeal, para. 49. See also SPO Response to Veseli Appeal, para. 51.

[446] SPO Response to Thaçi Appeal, para. 50.

[447] SPO Response to Thaçi Appeal, para. 50.

[448] SPO Response to Thaçi Appeal, para. 50, referring to ICTY, *Prosecutor v. Đorđević*, IT-05-87/1-A, Judgement, 27 January 2014 ("*Đorđević* Appeal Judgement"), para. 38.

[449] Thaçi Reply, para. 19, referring to Thaçi Appeal, paras 71-72 (where he submits that the Pre-Trial Judge did not offer any alternative as to the basis on which states were "deciding" which modes of liability should be included in the Rome Statute) and paras 78-80 (where he submits that the Pre-Trial Judge failed to give weight to his arguments on the preference of co-perpetration by many states, in national proceedings and in several post-World War II cases, and on the fact that a CIL rule should exist "beyond any doubt").

[450] Thaçi Reply, para. 19.

(ii) Assessment of the Court of Appeals Panel

162. At the outset, the Panel notes that Thaçi is the only accused who raises the question of the customary status of JCE I on appeal.[451] The Appeals Panel will thus focus solely on Thaçi's arguments as regards JCE I.

163. Turning first to Thaçi's arguments concerning the Rome Statute, the Panel observes that the Pre-Trial Judge held that the Rome Statute is a treaty in which "[s]tate parties did not seek to codify customary international law in respect of, *inter alia*, modes of liability", that the incorporation of a mode of liability in the Rome Statute may be *relevant*, but *not determinative* to that notion's customary nature, and that, in any event, the existence of co-perpetration in the Rome Statute has no bearing on the question of the status of JCE in CIL.[452]

164. The Panel recalls that a rule set forth in a treaty, while binding only on the state parties, may reflect a rule in CIL if, *inter alia*, it is established that the treaty rule codified a customary rule.[453] In the present case, the Panel agrees with the Pre-Trial Judge that the state parties to the Rome Statute did not aim at codifying CIL in respect of modes of liability for the following reasons.[454]

165. The fact that 120 states voted in favour of the Rome Statute in 1998 is a relevant factor, but is not conclusive for the customary status of a rule.[455] Furthermore, the Rome Statute does not contain any text indicating that the state parties aimed to codify custom in adopting the Statute.[456] Nevertheless, the Panel considers that it

[451] Veseli also refers to the Rome Statute, yet only makes submissions on the impact of its adoption on JCE III. See Veseli Appeal, para. 87. See also below, para. 195.
[452] Impugned Decision, para. 187 (emphasis added).
[453] ILC Draft Conclusions, Conclusion 11.
[454] See Impugned Decision, para. 187.
[455] See ILC Draft Conclusions, Conclusion 11, Commentary (3) (providing, *inter alia*, that treaties that have obtained near-universal acceptance may be seen as "particularly indicative" of CIL). The fact that 120 states voted in favour of the Rome Statute in 1998 (and, at present, 123 states have ratified or have otherwise become party to the Rome Statute) cannot be considered to be near-universal acceptance.
[456] ILC Draft Conclusions, Conclusion 11, Commentary (5).

cannot be inferred from Article 21 of the Rome Statute that the state parties necessarily excluded the possibility that any CIL rule may have been incorporated in the Statute.

166. In these circumstances, the Panel agrees with Thaçi that the preparatory work (*travaux préparatoires*) to the Rome Statute may provide evidence of an intention to codify an existing customary rule.[457] However, the Panel observes that none of the references brought by Thaçi,[458] nor any other aspect of the preparatory work,[459] supports his argument that the state parties, in adopting Article 25(3)(d) of the Rome Statute, aimed to codify customary rules on modes of liability, or more specifically a customary rule of co-perpetration as opposed to JCE. Not only are these references not specific to modes of liability,[460] but they also acknowledge that the delegates did not seek to exhaustively codify existing CIL.[461]

167. The Panel further notes that, while international courts and tribunals have considered in several instances that the Rome Statute may reflect state practice and/or *opinio juris*, they were looking into specific CIL rules which have been incorporated

[457] Thaçi Appeal, paras 73-74. See also ILC Draft Conclusions, Conclusion 11, Commentary (5).
[458] See Thaçi Appeal, fns 97-102.
[459] See e.g. Text of the Draft Statute for the International Criminal Court: Part 3: General Principles of Criminal Law, A/AC.249/1998/CRP.9, 1 April 1998, pp. 2-3. In footnote 6, it is mentioned that "the inclusion of [the] subparagraph [regarding the "common purpose" liability] gave rise to divergent views". See also Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II (Compilation of proposals), A/51/22[VOL-II](SUPP), 13 September 1996, p. 82: "A question was raised whether this article [Criminal responsibility of principals] is required, and whether it would be sufficient merely to state that a person who commits a crime under the Statute is criminally responsible and liable for punishment".
[460] See e.g. Thaçi Appeal, para. 74, mentioning the drafting of the "definition of crimes" and referring to Sadat, L. N. and Carden, S. R., "The New International Criminal Court: An Uneasy Revolution" (2000) 88(381) *Georgetown Law Journal* 381 ("Sadat and Carden, *The New International Criminal Court: An Uneasy Revolution*"), pp. 389-390, and Kreß, C., "International Criminal Law", in *Max Planck Encyclopedia of Public International Law*, Oxford University Press 2009, pp. 3, 6.
[461] Thaçi Appeal, fn. 99, referring to Sadat and Carden, *The New International Criminal Court: An Uneasy Revolution*, fn. 35. See also Thaçi Appeal, para. 75, referring to Gaeta, P., "The Defence of Superior Orders: The Statute of International Criminal Court versus Customary International Law" (1999) 10.1 *European Journal of International Law* 172, p. 174, fn. 3.

into the Rome Statute.[462] The only authority Thaçi referred to as supporting the argument that the Rome Statute may reflect the *opinio juris* of the state parties is the *Tadić* Appeal Judgement according to which, in fact, Article 25(3)(d) of the Rome Statute contained a notion similar to JCE.[463] By way of contrast, the Panel notes that the *ad hoc* tribunals have consistently found that "co-perpetration" is not part of CIL.[464] However, the Panel acknowledges that while clear that it did not exist in CIL in 1998, and in particular during the Indictment period, the notion of co-perpetration as included in the Rome Statute could become part of CIL in the future through consistent practice.

168. The Panel considers that the Pre-Trial Judge did not err in finding that the incorporation of co-perpetration in the Rome Statute is not relevant to whether JCE I is a mode of liability under CIL.[465] As correctly submitted by the SPO,[466] neither

---

[462] See e.g. SCSL, *Prosecutor v. Norman*, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, para. 33 (where the SCSL Appeals Chamber considered, with regard to the crime of child recruitment in international and internal armed conflict, that "[t]he discussion during the preparation of the Rome Statute focused on the codification and effective implementation of the existing customary norm rather than the formation of a new one"). See also ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgement, 10 December 1998 ("*Furundžija* Trial Judgement"), para. 227, where the ICTY Trial Chamber found that:

> [The Rome Statute] was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the General Assembly's Sixth Committee on 26 November 1998. *In many areas* the Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States. […] *Depending on the matter at issue*, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, *whereas in some areas it creates new law or modifies existing law*. (emphasis added, internal citations omitted).

Contra Thaçi Appeal, para. 76.

[463] See Thaçi Appeal, para. 76, citing *Tadić* Appeal Judgement, para. 223. See also *Tadić* Appeal Judgement, para. 222; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, 29 January 2007, paras 334-335; ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-tENG, Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 1625.

[464] ICTY, *Prosecutor v. Stakić*, IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement"), para. 62; *Đorđević* Appeal Judgement, para. 63. See also STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I/AC/R176bis, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 ("STL Interlocutory Decision"), para. 256.

[465] Impugned Decision, para. 187.

[466] See SPO Response to Thaçi Appeal, para. 50.

the Rome Statute nor the ICC jurisprudence have excluded the existence of JCE as a continuing mode of liability under CIL.

169. The Panel also finds unpersuasive Thaçi's submissions in relation to the academic reflections of Judge Shahabuddeen.[467] The Panel notes that while statements or publications of highly respected academics may be considered as a subsidiary means in determining CIL,[468] Article 3(3) of the Law invites the Judges to be guided by the jurisprudence of the *ad hoc* tribunals. The Panel first considers that the academic writings of Judge Shahabuddeen concerned JCE III as "it permits a conviction without proof of intent",[469] and that the author ultimately agreed in his judicial capacity with the adoption of JCE in the *Tadić* Appeal Judgement.[470] The Pre-Trial Judge thus correctly found that such publications "cannot overturn the settled jurisprudence of international tribunals."[471]

170. The Panel also finds unconvincing Thaçi's arguments that co-perpetration has been applied in various national proceedings and may be identified in the *Justice* and *RuSHA* cases. Instead of providing precise references to the case law,[472] Thaçi relies on academic writings discussing these cases,[473] and fails to present any arguments that would justify conducting a novel review of those cases by the

[467] See Thaçi Appeal, paras 68-69.
[468] See ICJ Statute, Article 38(1)(d); *Đorđević* Appeal Judgement, para. 33. See also ILC Draft Conclusions, Conclusion 14, Commentary (3); ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Separate Opinion of Judge Shahabuddeen, 17 March 2009, paras 6-8.
[469] Shahabuddeen, M., "Judicial Creativity and Joint Criminal Enterprise" in S. Darcy and J. Powderly (eds), *Judicial Creativity at the International Criminal Tribunals*, Oxford University Press 2010 ("Shahabuddeen, *Judicial Creativity and Joint Criminal Enterprise*"), pp. 188-191, 202. The author noted that his arguments "will be confined to category III of joint criminal enterprise, the essential ground of criticism of categories I and II being more manageably met."
[470] Shahabuddeen, *Judicial Creativity and Joint Criminal Enterprise*, p. 201: "[t]he writer had the honour of presiding over the bench of the Appeals Chamber of the ICTY which adopted joint criminal enterprise. And he agrees with its judgment on that point." See ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009, paras 153-290 and Separate Opinion of Judge Shahabuddeen. See also *Tadić* Appeal Judgement, paras 187-228.
[471] See Impugned Decision, para. 188.
[472] Practice Direction, Article 46(1).
[473] Thaçi Appeal, para. 78. See also Thaçi Jurisdiction Motion, para. 64.

Appeals Panel. In particular, Thaçi does not explain how the Pre-Trial Judge erred in relying on jurisprudence of the ICTR and ICTY Appeals Chambers which have identified the *Justice* and *RuSHA* cases as additional evidence of the customary nature of JCE.[474]

171. Furthermore, the Panel dismisses as unsubstantiated Thaçi's undeveloped and unsupported argument that because many states have applied a construct akin to "co-perpetration" in domestic proceedings, it is impossible for JCE to form part of CIL.[475]

172. In light of the foregoing, the Court of Appeals Panel finds that Thaçi has failed to show that the Pre-Trial Judge erred in finding that JCE I is a mode of liability under CIL, including at the time the alleged crimes were committed. Thaçi's Ground B3 is therefore dismissed.

(c) Whether JCE III Was Part of CIL at the Time of the Charged Crimes (Veseli Ground 9 in part; Selimi Ground C2; Krasniqi Ground 1 in part)

173. The Court of Appeals Panel considers that the relevant part of Veseli's Ground 9, Selimi's Ground C2, as well as part of Ground 1 presented by Krasniqi overlap in that they all allege that the Pre-Trial Judge erred in finding that JCE III was part of CIL at the time of the alleged crimes in this case; therefore, these grounds will be considered together.

---

[474] See Impugned Decision, para. 185. See also ICTR, *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* Appeal Decision on JCE"), paras 13-31; *Brđanin* Appeal Judgement, paras 393-404. See also ECCC, *Ieng Sary et al*., 002/19-09-2007-ECCC/OCIJ, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010 ("ECCC Case 002 Pre-Trial Chamber Decision"), paras 65-68, wherein the ECCC found that the *Justice* and *RuSHA* cases "constitute a valid illustration of the state of customary international law with respect to the basic form and systemic form of JCE (JCE I & II)."

[475] Thaçi Appeal, para. 78. On the summary dismissal of unsubstantiated submissions, see KSC-BC-2020-07, F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021, para. 29 and jurisprudence cited therein; *Gucati* Appeal Decision, para. 22 and jurisprudence cited therein; see also *Thaçi* Appeal Decision on Review of Detention, para. 41.

(i) Submissions of the Parties

174. The Defence argues that JCE III was not established in CIL at the relevant time of the charged crimes, and requests that the Appeals Panel reverse the findings of the Pre-Trial Judge and find that JCE III does not have customary status.[476] All four Accused argue that the post-World War II jurisprudence relied on by the ICTY Appeals Chamber in the *Tadić* case does not support the inclusion of JCE III in CIL.[477]

175. Selimi submits that even if CIL may be applied by the Specialist Chambers and further, that even if JCE has customary status, JCE III does not have customary status.[478] In particular, Selimi argues that the departure of JCE III from JCE I and II in its *mens rea* requirement—relying on foreseeability of risk rather than intent—does not have the necessary legal support as a customary rule and should never have been adopted by the ICTY Appeals Chamber in the *Tadić* case.[479]

176. Selimi and Krasniqi further contend that neither the underlying jurisprudence referred to by the Appeals Chamber of the Special Tribunal for Lebanon ("STL") in the STL Interlocutory Decision, nor the Charter of the International Military Tribunal[480] or Control Council Law No. 10,[481] as relied upon by the Pre-Trial Judge,[482] establish JCE III as part of CIL.[483] Selimi and Krasniqi submit that following a thorough analysis of post-World War II jurisprudence, including the authorities relied on by the

[476] Veseli Appeal, paras 85-87; Selimi Appeal, paras 8(iii), 50, 54, 60-77, 80-81, 87(iii); Krasniqi Appeal, paras 4(1), 12, 17, 55-58. See also Thaçi Appeal, paras 61, 67, 80; Veseli Reply, para. 41; Krasniqi Reply, para. 10.
[477] Veseli Appeal, paras 85-86; Selimi Appeal, paras 53-56, 59-69, 72-77, 80; Krasniqi Appeal, paras 17-32, 54-55. See also Thaçi Appeal, para. 61; Selimi Reply, paras 22-25, 29-31, 40-43, 45; Krasniqi Reply, para. 9.
[478] Selimi Appeal, para. 50.
[479] Selimi Appeal, para. 60. See also Selimi Reply, paras 11-12.
[480] Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 279, 8 August 1945 ("Nuremberg Charter").
[481] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55 (1946) ("CCL10").
[482] See Impugned Decision, para. 183.
[483] Selimi Appeal, paras 54, 62-71, 82; Krasniqi Appeal, paras 17, 33-38, 52-54.

ICTY and STL Appeals Chambers, three ECCC chambers found that JCE III is not supported in CIL.[484] Moreover, according to Selimi, the ECCC's finding does not constitute a mere divergence of views from other tribunals which have followed the *Tadić* Appeal Judgement, but is rather "an extensive and incurable rot in the jurisprudential foundation of the JCE III structure".[485]

177. Selimi argues that the ICTY Appeals Chamber in *Tadić* presumed and inferred a legal theory where either none existed, or at best *may* have been adopted, and in Selimi's view, "close enough" is not an appropriate standard by which to establish the customary status of any liability theory, but in particular not one with such profound implications as JCE III.[486]

178. Krasniqi and Selimi further argue that the additional post-World War II cases cited by the SPO do not support JCE III as forming part of CIL, and even if they did, a few cases would not amount to the requisite settled and consistent practice.[487] According to Krasniqi, the Specialist Chambers must assess whether the post-World War II cases provide sufficient bases to conclude that JCE III was part of CIL at the material time, in March 1998, and if not, JCE III cannot be relied on in this case according to the principle of legality.[488]

---

[484] Selimi Appeal, paras 53-56, 61-77, referring to ECCC Case 002 Pre-Trial Chamber Decision, paras 49, 59, 78-83, 87; ECCC, *Ieng Sary et al.*, 002/19-09-2007/ECCC/TC, Decision on the Applicability of Joint Criminal Enterprise (JCE), 12 September 2011 ("ECCC Case 002 Trial Chamber Decision"), paras 29-31; ECCC Case 002 Supreme Court Appeal Judgement, paras 791-793, 795-806; Krasniqi Appeal, para. 54, referring generally to ECCC Case 002 Pre-Trial Chamber Decision; ECCC Case 002 Trial Chamber Decision; ECCC Case 002 Supreme Court Appeal Judgement. See also Thaçi Appeal, para. 64, referring to ECCC Case 002 Supreme Court Appeal Judgement, paras 773-810; Veseli Appeal, para. 86, referring generally to ECCC Case 002 Pre-Trial Chamber Decision; Krasniqi Appeal, fn. 75, referring to ECCC Case 002 Supreme Court Appeal Judgement, paras 793-794, 800-801, 804.
[485] Selimi Appeal, paras 53-58.
[486] Selimi Appeal, para. 80.
[487] Krasniqi Appeal, paras 39-51, 55, 58; Krasniqi Reply, paras 7-8; Selimi Reply, paras 26-28, 32-39. See also SPO JCE Response, paras 72-83, 92-93.
[488] Krasniqi Appeal, paras 13, 58.

179. Finally, according to Krasniqi, the absence of JCE III as a mode of liability in any international treaty, including the Rome Statute, undermines the submission that JCE III is part of CIL, as it demonstrates discrepancies in state practice and the absence of *opinio juris*.[489] Veseli also argues that "160 States participating[490] in the Rome Conference" adopted modes of liability which excluded JCE III, demonstrating a departure from existing CIL.[491] Veseli submits that, as such, "in 2021, there exists two 'international' modes of liability sufficiently based under CIL".[492]

180. The SPO responds that the Accused's submissions should be rejected as unsourced, selective and merely repeating arguments that they disagreed with or that were unsuccessful before the Pre-Trial Judge.[493] The SPO argues that JCE III is firmly grounded in CIL and is "an appropriate and fair mode of liability to address the responsibility of leaders for the crimes committed in 1998-1999".[494]

181. The SPO responds to Selimi's argument that JCE III is vastly different from JCE I and II, because of its *mens rea* requirement, and lacks support in custom,[495] asserting that Selimi ignores the substantial overlap between the three categories of JCE and that they in fact derive support from many of the same sources of law.[496] In particular, the SPO submits that JCE III liability only arises where a perpetrator who already had criminal intent, and made a significant contribution, could and did

[489] Krasniqi Appeal, para. 56. See also Krasniqi Reply, para. 10; Thaçi Appeal, paras 69, 72-76, 78; Thaçi Reply, para. 18.
[490] Veseli Appeal, para. 87. The Panel observes that the reference to 160 state parties having adopted modes of liability which excluded JCE III is not accurate. In 1998, 120 states had voted in favour of the Rome Statute. In 2021, there are 123 state parties to the Rome Statute. See e.g. ICC Assembly of State Parties, ICC-ASP/20/9, Report on the Activities of the International Criminal Court (Twentieth session, The Hague, 6-11 December 2021), 8 November 2021, p. 20.
[491] Veseli Appeal, para. 87.
[492] Veseli Appeal, para. 87.
[493] SPO Response to Veseli Appeal, paras 45, 50-51; SPO Response to Selimi Appeal, paras 42, 79; SPO Response to Krasniqi Appeal, para. 16. See also SPO Response to Thaçi Appeal, para. 58.
[494] SPO Response to Selimi Appeal, paras 2, 4-6, 40.
[495] See Selimi Appeal, para. 60.
[496] SPO Response to Selimi Appeal, para. 48, referring to Confirmation Decision, paras 105-115; *Tadić* Appeal Judgement, paras 196-204.

foresee the possibility of a further crime and willingly took that risk; as such, JCE III factually follows from the same agreed conduct of a JCE I accused.[497]

182. In response to Selimi's and Krasniqi's arguments,[498] the SPO submits that early World War II-era sources of law, such as the Nuremberg Charter and CCL10, and the post-World War II jurisprudence support the inclusion of JCE III as CIL.[499] According to the SPO, these World War II-era sources and jurisprudence may not always employ language that "fits neatly" into the three JCE categories, or terms used by modern international courts, but this 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 a generally understood sense.[500] Furthermore, the SPO argues that chambers at the ECCC, ICTR and ICTY have found that the abovementioned sources can be relied upon, *inter alia*, as demonstrative of JCE's status in CIL.[501]

183. Moreover, the SPO submits that the doctrine of JCE III systematised in the *Tadić* case has since been affirmed by the ICTY, ICTR, IRMCT, SCSL, STL and other international or internationalised courts.[502] The SPO elaborates, however, that it does not note such widespread recognition of a principle in CIL to argue that JCE III must be recognised in CIL because of the number of courts to recognise it as such, but rather, to demonstrate the widespread acceptance and subsequent application of the principles underlying JCE III, which were enumerated in the World War II-era sources and jurisprudence and continue to be applicable.[503] The SPO submits that while Selimi

[497] SPO Response to Selimi Appeal, para. 48, referring to STL Interlocutory Decision, paras 243, 245; SPO Response to Krasniqi Appeal, para. 27.
[498] See above, paras 174, 176.
[499] SPO Response to Selimi Appeal, paras 5 (and, in particular, fn. 10), 49-50, 52-74; SPO Response to Krasniqi Appeal, paras 25-27, 31-59.
[500] SPO Response to Selimi Appeal, paras 51-52, referring to *Rwamakuba* Appeal Decision on JCE, para. 24; ICTY, *Prosecutor v. Hadžihasanović et al*., IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 ("*Hadžihasanović* Appeal Decision"), para. 34; SPO Response to Krasniqi Appeal, paras 28-30.
[501] SPO Response to Selimi Appeal, para. 76; SPO Response to Krasniqi Appeal, para. 61.
[502] SPO Response to Selimi Appeal, para. 77; SPO Response to Krasniqi Appeal, para. 62.
[503] SPO Response to Selimi Appeal, para. 77; SPO Response to Krasniqi Appeal, para. 62.

may rely heavily on ECCC jurisprudence to argue against the customary status of JCE III, all three ECCC chambers have recognised the existence of JCE I and II in CIL, and with regard to JCE III, the ECCC's conclusions are "based on an incorrect and incomplete reading of the relevant records".[504]

184. In response to Veseli's and Krasniqi's arguments regarding the Rome Statute, the SPO argues that Veseli misrepresents the Impugned Decision by failing to acknowledge that the Pre-Trial Judge made express findings on the Rome Statute's impact on the CIL status and applicability of JCE both at the time of the charges and at present.[505] The SPO responds further that Veseli's attempts to argue that the development of "co-perpetration" at the ICC is a change to subsisting JCE liability are without merit and should be dismissed.[506]

185. Selimi replies that the SPO makes an "absurd leap of logic" in its argument that JCE III factually follows from the same agreed conduct for which a JCE member is liable under JCE I and thus, that the same jurisprudence invoked in support of JCE I provides support for JCE III.[507] Selimi submits that this shows the SPO's awareness of the inherent weakness in JCE III's customary status.[508] Selimi further replies that the recognition of JCE I and II by three ECCC chambers is irrelevant to the customary status of JCE III, and again shows the SPO's confusion regarding the interrelationship between JCE I and III.[509]

[504] SPO Response to Selimi Appeal, para. 77.
[505] SPO Response to Veseli Appeal, para. 51, referring to Impugned Decision, para. 190. The SPO did not respond to this specific argument by Krasniqi in the SPO Response to Krasniqi Appeal, but responded to a similar argument advanced by Veseli in the SPO Response to Veseli Appeal. See also Krasniqi Reply, para. 10 (arguing that the SPO skips over relevant sources that do not recognise JCE III, including primarily the Rome Statute).
[506] SPO Response to Veseli Appeal, para. 51.
[507] Selimi Reply, para. 10, referring to SPO Response to Selimi Appeal, para. 48.
[508] Selimi Reply, para. 10. See also Selimi Reply, paras 13-15; Krasniqi Reply, paras 5-6.
[509] Selimi Reply, paras 44-46.

(ii) Assessment of the Court of Appeals Panel

186. At the outset, the Panel recalls that it found above that the Pre-Trial Judge did not err in finding that JCE I was established in CIL at the time the alleged crimes in the Indictment were committed.[510]

187. The Panel further found that the Pre-Trial Judge did not err in relying on decisions of international tribunals and courts to establish whether JCE was recognised in CIL and that, in particular, for this specific subject matter, considering the decisions of other courts trying similar crimes as those before the Specialist Chambers was the most appropriate method of discerning the existence of CIL.[511] Moreover, the Panel considered that findings by the *ad hoc* tribunals were particularly relevant because they identify CIL at the approximate time of the crimes alleged in this case.[512] In this regard, the Panel notes that the Pre-Trial Judge agreed with the conclusions of the ICTY Appeals Chamber in *Tadić* regarding JCE III forming part of CIL at the time of the alleged crimes.[513] Moreover, the Panel has noted that the Pre-Trial Judge considered the reasons why the ECCC deviated from existing jurisprudence regarding JCE III and provided reasoning as to why he disagreed with the ECCC's findings.[514]

188. The Panel recalls that pursuant to Article 3(3) of the Law, Judges may be assisted by jurisprudence from international courts and tribunals in determining the existence of CIL at the time crimes were committed.[515] However, the value of such

[510] See above, paras 162-172.
[511] See above, paras 152-153 (finding that Article 3(3) of the Law recognises explicitly the role of such decisions in determining the status of a rule in CIL).
[512] See above, para. 155.
[513] See Impugned Decision, para. 186.
[514] See above, para. 156.
[515] See above, para. 152, citing ILC Draft Conclusions, Conclusion 13(1).

jurisprudence varies depending on both the quality of the reasoning and on the reception of the CIL rule in subsequent case law.[516]

189. The Panel first notes that, in large part, the Defence arguments challenging the CIL status of JCE III are repetitive of submissions already considered and rejected by the Pre-Trial Judge. The Panel notes that in particular, the Defence repeats on appeal its submissions that the ECCC deviated from the findings of other international courts and tribunals with respect to recognising JCE III as part of CIL and that the post-World War II jurisprudence does not sufficiently support JCE III as CIL.[517] In this regard, the Defence's mere disagreement with the conclusions of the Pre-Trial Judge does not suffice to establish a clear error.[518] The Panel considers that the Defence does not show any real error in these arguments on appeal.

190. Furthermore, the Panel considers that while the ECCC departed from the *Tadić* holding in determining that JCE III did not exist in CIL during its temporal jurisdiction (from 1975 to 1979),[519] this departure is not determinative of the status of JCE III as a matter of CIL at the time of the crimes alleged in the present case. Notably, the temporal jurisdiction of the ECCC is at least two decades earlier than, for example, that of the ICTY or the STL.[520] Moreover, while the crimes charged in the current case were allegedly being committed, the ICTY was in full operation, as the first international court building on the Nuremberg precedent, including the focus on "plans and enterprises", and the jurisprudence on modes of liability was rapidly taking shape.[521] As discussed further below, the ICTY first addressed JCE liability in December 1998 in the *Furundžija* case and elaborated on the elements of JCE III

[516] ILC Draft Conclusions, Conclusion 13, Commentary (3). See also above, para. 152.
[517] *Compare* Selimi Appeal, paras 60-77 *with* Selimi Jurisdiction Motion (JCE), paras 49-52, 56-68 *and* Selimi JCE Reply, paras 60-67; *compare* Krasniqi Appeal, paras 17-54 *with* Krasniqi Jurisdiction Motion, paras 24, 28-38 *and* Krasniqi JCE Reply, paras 13-41.
[518] See e.g. *Gucati* Appeal Decision, para. 64.
[519] See ECCC Case 002 Pre-Trial Chamber Decision, paras 49, 59, 78-83, 87; ECCC Case 002 Trial Chamber Decision, paras 29-31; ECCC Case 002 Supreme Court Appeal Judgement, paras 773-810.
[520] See ECCC Case 002 Trial Chamber Decision, para. 33.
[521] See e.g. *Furundžija* Trial Judgement; *Tadić* Appeal Judgement.

liability not long after in July 1999 in *Tadić*.[522] The Panel considers the close time frame between the evolving interpretation of JCE liability under CIL in the jurisprudence of the ICTY and the crimes alleged in this case as particularly relevant in assessing whether JCE III was recognised in CIL at the time the charged crimes were allegedly committed.

191. The Panel recognises that the finding in the *Tadić* Appeal Judgement and other subsequent jurisprudence on JCE III refers to numerous sources of law dating from the post-World War II era, prior to the temporal jurisdiction of the ECCC. Although the ECCC found that these underlying sources of law did not sufficiently support JCE III as CIL,[523] as the Pre-Trial Judge noted, there can be and "often are reasonable disputes as to the existence of a rule of [CIL]".[524]

192. In this regard, the Panel considers that the ICTY Appeals Chamber's finding on JCE III in *Tadić* has since been discussed, confirmed and adopted by the ICTY,[525]

---

[522] *Furundžija* Trial Judgement; *Tadić* Appeal Judgement. See also below, paras 213-214.

[523] See ECCC Case 002 Pre-Trial Chamber Decision, paras 78-82 (referring, *inter alia*, to Nuremberg Charter, CCL10, US Military Tribunal, *US v. Haesiker et al*., Case No. 12-489-1, Deputy Judge Advocate's Office, 7708 War Crimes Group – European Command, Review and Recommendations, 16 October 1947 ("*Borkum Island* case"), British Military Court for the Trial of War Criminals, *Trial of Erich Heyer and six others*, Essen, 18-19 and 21-22 December 1945, UNWCC Law Reports, vol. I (1949) ("*Essen Lynching* case")); ECCC Case 002 Trial Chamber Decision, paras 30-31 (referring, *inter alia*, to *Borkum Island* case, *Essen Lynching* case, US Military Tribunal, *US v. Ulrich and Merkle*, Case No. 000-50-2-17, Deputy Judge Advocate's Office, 7708 War Crimes Group – European Command, Review and Recommendations, 12 June 1947 ("*US v. Ulrich and Merkle* case"), US Military Tribunal, *United States v. Wuelfert et al*., Case No. 000-50-2-72, Deputy Judge Advocate's Office, 7708 War Crimes Group – European Command, Review and Recommendations, 19 September 1947 ("*US v. Wuelfert* case"); ECCC Case 002 Supreme Court Appeal Judgement, paras 791-801 (referring, *inter alia*, to Italian Court of Cassation, *D'Ottavio et al*., No. 270, Criminal Section I, *Judgment*, 12 March 1947, published in *Journal of International Criminal Justice* 5 (2007), ("*D'Ottavio et al.* case"), General Military Government Court of the United States Zone, Martin Gottfried Weiss et al., Case No. 60, Trial of Martin Gottfried Weiss and Thirty-Nine Others, 15 November-13 December 1945, UNWCC, Law Reports of Trials of War Criminals, Vol. XI at 5-17 ("*Dachau Concentration Camp* case"), US Military Commission, *US v. Hartgen et al*., Case No. 12-1497, Review and Recommendations, 23 August 1945 ("*Rüsselsheim* case").

[524] Impugned Decision, para. 186.

[525] *Ojdanić* Appeal Decision, para. 30; ICTY, *Prosecutor v. Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, paras 29-32; ICTY, *Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, 25 February 2004, paras 95, 99; *Stakić* Appeal Judgement, paras 100-103; ICTY, *Prosecutor v. Martić*, IT-95-11-A, Judgement, 8 October 2008, paras 80-81; *Đorđević* Appeal Judgement, paras 48-53; *Popović et al.* Appeal Judgement, paras 1672-1674; ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Judgement, 8 April 2015, paras 281-282.

ICTR,[526] SCSL,[527] STL[528] and IRMCT, thereby constituting an established, widespread and consistent practice.[529] According to this jurisprudence, JCE III liability is established where (i) an accused agreed with other persons to a common plan involving the commission of a crime and participated in the furtherance of the common plan (*actus reus*) but (ii) one of the perpetrators committed an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of effectuating that common purpose, and (iii) the accused intended to participate and willingly took the risk that this may occur (*mens rea*).[530]

193. The Panel agrees with the Pre-Trial Judge's endorsement of the almost unanimous jurisprudence of international and internationalised courts and tribunals,[531] and notes the weight of this largely consistent judicial opinion relating to alleged crimes committed contemporaneously with those over which the Specialist Chambers have jurisdiction. The Panel also considers relevant that the Kosovo Supreme Court has found on several occasions that all forms of JCE liability were "firmly established" under CIL in cases concerning events that occurred approximately at the same time as the events alleged in the present case.[532] Such

[526] ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, paras 463-465; ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR72.5 and ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, paras 15-16; ICTR, *Prosecutor v. Ngirabatware*, ICTR-99-54-T, Judgement and Sentence, 20 December 2012, paras 1299-1302; ICTR, *Prosecutor v. Karemera and Ngirumpatse*, ICTR-98-44-A, Judgement, 29 September 2014, para. 110.

[527] SCSL, *Prosecutor v. Brima et al.*, SCSL-04-16-T, Judgement, 20 June 2007, para. 61; SCSL, *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Judgement, 2 August 2007, paras 209-210; SCSL, *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Judgment ("*Sesay et al.* Appeal Judgement"), 26 October 2009, paras 398-400; *Taylor* Trial Judgement, paras 458, 466.

[528] STL Interlocutory Decision, para. 256. In this decision, the STL Appeals Chamber referred to further underlying cases to support JCE III as CIL, including, *inter alia*, *RuSHA* case, *Dachau Concentration Camp* case, *US v. Ulrich and Merkle* case, *US v. Wuelfert* case.

[529] See *Karadžić* Appeal Judgement, paras 435-437.

[530] See e.g. *Tadić* Appeal Judgement, paras 204, 227-228; *Brđanin* Appeal Judgement, para. 411; ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Judgement, 9 December 2015, para. 77; *Sesay et al.* Appeal Judgement, paras 398-400; STL Interlocutory Decision, paras 239, 241.

[531] See Impugned Decision, para. 186. See also above, paras 152-153.

[532] See e.g. Kosovo, Supreme Court, *L. G. et al*. (also known as "Llapi group" case), APKZ 89/2010, Judgment, 26 January 2011, paras 114-115 (first re-trial). These findings were endorsed in the second re-trial. See Kosovo, Supreme Court, *L.G. et al.*, Plm Kzz 18/2016, Judgment, 13 May 2016, para. 69

application and acceptance in Kosovo further contributes to the development of the *opinio juris* recognising JCE III as part of CIL.

194. The Panel therefore finds no persuasive reasons in favour of a different conclusion as to the status of JCE III in CIL in the current proceedings. The Panel further acknowledges that there have been controversies associated with the *application* of JCE III in practice, but that in the present Decision, the Panel is concerned with the Specialist Chambers' jurisdiction over JCE III as such.

195. The Panel turns finally to the arguments elucidated by Veseli and Krasniqi that the absence of JCE III as a mode of liability in the Rome Statute, much less in any international treaty, shows a discrepancy in state practice, an absence of *opinio juris*, and is thus a departure from existing CIL.[533] The Panel first recalls its discussion above on the related arguments for JCE I and its finding that the incorporation of "co-perpetration" in the Rome Statute, or as a mode of liability in states' domestic systems, is not determinative of whether JCE is established in CIL.[534] The Panel also recalls that a rule set forth in a treaty, while binding only on the state parties, may reflect a rule in CIL if, *inter alia*, it is established that the treaty rule codified a customary rule.[535] The Panel found above that it agreed with the Pre-Trial Judge that the state parties to the Rome Statute did not aim to codify CIL regarding modes of liability.[536] The Panel considers that the Accused's arguments with respect to JCE III cannot be distinguished from the related submissions on JCE I. The Panel thus finds that the Pre-Trial Judge did not err in finding that the fact that JCE III was

(second re-trial). See also Kosovo, Supreme Court, *E.K and S.B.*, PAII 3/2014, Judgment, 7 August 2014 ("Kosovo Supreme Court Judgment dated 2014"), paras xIi-xIii; Kosovo, Supreme Court, *S.K. et al.*, Ap.-Kz No 371/2008, Judgment, 10 April 2009 ("Kosovo Supreme Court Judgment dated 2009"), pp. 14-16, 63-64. See also below, para. 223.

[533] See Veseli Appeal, para. 87; Krasniqi Appeal, para. 56; Krasniqi Reply, para. 10. See also Thaçi Appeal, paras 69-78; Thaçi Reply, paras 17-19.

[534] See above, paras 163-168, 170-171.

[535] See above, para. 164, citing ILC Draft Conclusions, Conclusion 11.

[536] See above, paras 163-168. See also Impugned Decision, paras 187, 189.

not adopted in the Rome Statute, or any other international treaty, is not determinative of whether it existed as a mode of liability in CIL at the relevant time.

196. In light of the foregoing, the Court of Appeals Panel finds that the Accused have failed to show that the Pre-Trial Judge erred in finding that JCE III is a mode of liability under CIL, including at the time the charged crimes were allegedly committed. The relevant parts of Veseli's Ground 9 and Krasniqi's Ground 1, as well as Selimi's Ground C2, are therefore dismissed.

(d) Whether JCE III is Compatible with the Principle of Non-Retroactivity (Selimi Ground C3)

(i) Submissions of the Parties

197. Selimi submits that applying JCE III in the present case would violate Article 7 of the ECHR and Article 15 of the ICCPR.[537] In his view, the ECtHR jurisprudence focused on certain "foundational factors" for the determination of the status of a mode of liability in CIL prior to considering how the mode of liability was treated in international tribunals.[538] According to him, by these standards, the declaration of JCE III as CIL in the *Tadić* case would be irrelevant in determining its customary status.[539]

198. The SPO responds that the ECtHR jurisprudence referred to by Selimi relates to the hypothetical treatment of superior responsibility and is irrelevant to the legality

[537] Selimi Appeal, paras 82, 85.
[538] Selimi Appeal, paras 83-84. These foundational factors are, according to Selimi, whether a mode of liability was: (i) retained in trials prior to World War II; (ii) contained in codifying instruments and state declarations during and immediately after World War II; and (iii) retained in national and international trials of crimes committed during World War II. See Selimi Appeal, para. 83, referring to *Kononov v. Latvia* Judgment, para. 211.
[539] Selimi Appeal, para. 84.

of JCE and JCE III.[540] The SPO further submits that Selimi has not brought a concrete legal argument against legality which constitutes a ground of appeal.[541]

(ii) Assessment of the Court of Appeals Panel

199. The Panel notes that Selimi does not articulate an error committed by the Pre-Trial Judge and does not identify the findings of the Impugned Decision he wishes to challenge in this ground of appeal. In addition, while Selimi argues in his Jurisdiction Motion and Reply before the Pre-Trial Judge that applying JCE III at the Specialist Chambers would violate the principle of legality,[542] his reliance on ECtHR case law is raised for the first time on appeal. The Panel considers that Selimi's ground of appeal could be dismissed on these bases alone.[543]

200. In any event, the Court of Appeals Panel is not persuaded by Selimi's arguments. In the Panel's view, the ECtHR simply listed the factors it considered to confirm the CIL status of superior responsibility in relation to a case of war crimes committed during World War II, including its recognition in the jurisprudence and statutes of international courts and tribunals.[544] The approach of the ECtHR is not different from that which the Pre-Trial Judge followed and the Panel confirmed; a mode of liability, in this case JCE III, must exist in CIL applicable at the time of the alleged events.[545] In this regard, the Panel recalls its findings above that the Pre-Trial Judge did not err by relying on the *Tadić* precedent and its endorsement in subsequent case law for the identification of CIL.[546] In light of the above, and having found that JCE III is part of CIL,[547] the Panel finds no violation of the principle of non-retroactivity

[540] SPO Response to Selimi Appeal, para. 78.
[541] SPO Response to Selimi Appeal, fn. 185.
[542] See e.g. Selimi Jurisdiction Motion (JCE), paras 69-74; Selimi JCE Reply, paras 34, 39-47.
[543] See *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 15.
[544] See *Kononov v. Latvia* Judgment, para. 211. See also Selimi Appeal, para. 83.
[545] See above, para. 196; Impugned Decision, paras 181-186; *Kononov v. Latvia* Judgment, paras 211, 213.
[546] See above, paras 152-153.
[547] See above, para. 196.

enshrined in Article 7 of the ECHR and Article 15 of the ICCPR.[548] Selimi's Ground C3 is therefore dismissed.

3. Whether JCE Was Foreseeable and Accessible to the Accused (Thaçi Ground B4; Krasniqi Ground 2)

201. The Panel observes that the arguments presented in Thaçi's Ground B4 and Krasniqi's Ground 2 with regard to the accessibility and foreseeability of JCE overlap and thus will be assessed together.

(a) Submissions of the Parties

202. Thaçi submits that the Pre-Trial Judge's finding that JCE was foreseeable and accessible to the Accused is so unfair and unreasonable as to constitute an abuse of discretion, while in Krasniqi's view, it constitutes an error of law and fact.[549]

203. Both Thaçi and Krasniqi submit that none of the factors relied on by the Pre-Trial Judge demonstrate that they could have known in March 1998 that participation in a common plan could lead to criminal liability both for crimes within that plan and foreseeable crimes outside the scope of the plan.[550] In particular, they argue that: (i) up to 18 months before the *Tadić* Appeal Judgement was issued, at the time of the alleged events, JCE only existed in CIL as an inference from a limited number of post-World War II cases that were not accessible in Kosovo and did not clearly define the JCE mode of liability;[551] (ii) the *Furundžija* Trial Judgement was delivered on 10 December 1998, i.e. nine months after the start of the Indictment period in the present case, and used JCE and co-perpetration interchangeably;[552] (iii) the finding that the Accused's high-ranking positions, alleged responsibilities and powers gave them access to information which made JCE foreseeable to them is an unsubstantiated

[548] See above, paras 35-40.
[549] Thaçi Appeal, paras 2(vii), 86; Krasniqi Appeal, para. 4(2); Thaçi Reply, para. 22.
[550] Thaçi Appeal, paras 82-83; Krasniqi Appeal, para. 61.
[551] Thaçi Appeal, paras 81-83; Krasniqi Appeal, paras 62, 65; Krasniqi Reply, para. 13.
[552] Krasniqi Appeal, para. 63.

and contested issue to be litigated at trial,[553] which also ignores the reality of the conflict;[554] and finally, (iv) the Pre-Trial Judge presumed unrealistic contemporaneous knowledge of ICTY prosecutions by the Accused.[555] Krasniqi also argues that the above arguments are even stronger in relation to JCE III.[556]

204. Krasniqi further submits that the Pre-Trial Judge erred in finding that the foreseeability of JCE in either CIL *or* "Kosovo law" was sufficient.[557] According to Krasniqi, JCE comes directly from CIL and thus, the foreseeability of JCE in CIL is determinative; "Kosovo law" is only relevant to the extent it provided notice of CIL to the Accused.[558]

205. Regarding the foreseeability of JCE III in laws applicable in Kosovo at the time of the alleged events, both Thaçi and Krasniqi submit that the Pre-Trial Judge erred in finding that Articles 22 and 26 of the 1976 SFRY Criminal Code mirror the elements of JCE,[559] and, in Thaçi's view, the Pre-Trial Judge failed to consider his relevant submissions.[560] Krasniqi submits that, to reach this conclusion, the Pre-Trial Judge erred in relying on a decision issued by the Supreme Court of Kosovo in May 2012, as (i) this decision does not support the interpretation that JCE III was accepted or foreseeable in March 1998 at the time of the alleged offences;[561] (ii) the Pre-Trial Judge misread the decision;[562] and (iii) subsequent decisions of the Kosovo Court of Appeals contradicted the Kosovo Supreme Court Judgment dated 2012 and found JCE I and III

[553] Krasniqi Appeal, para. 64.
[554] Thaçi Appeal, paras 82-83; Krasniqi Appeal, para. 64.
[555] Thaçi Appeal, paras 82-83; Krasniqi Appeal, para. 64. See also Krasniqi Reply, para. 14.
[556] Krasniqi Appeal, para. 66, referring to his arguments in Ground 1.
[557] Krasniqi Appeal, para. 60, referring to Impugned Decision, para. 193.
[558] Krasniqi Appeal, para. 60.
[559] Thaçi Appeal, para. 84; Krasniqi Appeal, para. 67.
[560] Thaçi Appeal, para. 85. See also Thaçi Appeal, para. 86; Thaçi Reply, para. 20.
[561] Krasniqi Appeal, paras 59, 67, referring to Kosovo, Supreme Court, *D.N.*, Ap-Kz 67/2011, Judgment, 29 May 2012 ("Kosovo Supreme Court Judgment dated 2012"). See also Krasniqi Reply, para. 15.
[562] Krasniqi Appeal, para. 67. Krasniqi submits that the Kosovo Supreme Court Judgment dated 2012 only interpreted Article 13 of the 1976 SFRY Criminal Code in conjunction with Article 25, and not Articles 22 or 26.

inapplicable.[563] Thaçi further argues that JCE was not recognised under Serbian law either, as the Serbian Constitutional Court found in a recent decision.[564]

206. The SPO responds that the Pre-Trial Judge applied the correct legal standard and adequately addressed the Defence arguments on lack of foreseeability due to an absence of precise uniformity in terminology.[565] In its view, the gradual clarification of the rules of criminal liability through judicial interpretation does not violate the principle of legality.[566]

207. The SPO further agrees with the Pre-Trial Judge that the systematisation of JCE in the *Tadić* case confirmed that this mode of liability could be applied as of the date of the relevant events in the *Tadić* case—in June 1992—which precedes the Indictment period in this case.[567] The SPO agrees with the Pre-Trial Judge that the foreseeability requirement is met if a person may be found to know from the wording of a law, with legal assistance if necessary, what acts and omissions attract liability.[568] In this regard, the SPO notes that the Nuremberg Charter and post-World War II decisions were disseminated and published in the official UN War Crimes Commission Reports from 1947 ("UNWCC Law Reports").[569] The SPO further submits that the KLA General Staff could not possibly be unaware of the ongoing ICTY prosecutions in light of the ICTY's jurisdiction over crimes committed in Kosovo, as well as the ICTY Prosecutor's and Security Council's public statements about ongoing investigations into such crimes, including some specifically directed at Kosovo Albanian leaders.[570]

[563] Krasniqi Appeal, para. 67, referring to Kosovo Supreme Court Judgment dated 2012.
[564] Thaçi Appeal, paras 83-84, referring to Serbian Constitutional Court Judgment, p. 14.
[565] SPO Response to Thaçi Appeal, paras 51-52; SPO Response to Krasniqi Appeal, para. 64.
[566] SPO Response to Thaçi Appeal, para. 52; SPO Response to Krasniqi Appeal, para. 64.
[567] SPO Response to Thaçi Appeal, para. 53, citing *Ojdanić* Appeal Decision, para. 29; SPO Response to Krasniqi Appeal, para. 65.
[568] SPO Response to Thaçi Appeal, para. 54; SPO Response to Krasniqi Appeal, para. 66.
[569] SPO Response to Krasniqi Appeal, fn. 168.
[570] SPO Response to Thaçi Appeal, para. 55; SPO Response to Krasniqi Appeal, para. 67.

208. Furthermore, the SPO argues that the Defence merely disagrees with the Pre-Trial Judge's interpretation of the relevant provisions of the 1976 SFRY Criminal Code and that Kosovo domestic law is relevant to evaluate foreseeability and accessibility.[571] The SPO argues that it is not required that a provision in Kosovo domestic law be applied in a similar case to a similar accused before 1998,[572] and that the Pre-Trial Judge's interpretation of domestic law provisions is supported by ICTY jurisprudence.[573]

209. Thaçi replies that the SPO cannot, on appeal, "patch up the holes" in the Pre-Trial Judge's reasoning with regard to, for example, the alleged public knowledge in Kosovo of ICTY investigations in 1998 and statements allegedly directed to Kosovo Albanian leaders,[574] and that, in any event, the argument that KLA leaders were aware of the ICTY investigations and potential prosecutions is unsubstantiated and irrelevant to the question of the foreseeability of JCE.[575]

210. Krasniqi replies that it is unclear from the SPO's submissions if the UNWCC Law Reports or the cases it provides to support JCE III[576] were translated into Albanian and were accessible in Kosovo.[577] Regarding the ICTY public statements, Krasniqi notes that the Pre-Trial Judge correctly did not rely upon them as they could not put the Accused on notice of any mode of liability, including JCE III.[578]

[571] SPO Response to Thaçi Appeal, paras 56-57; SPO Response to Krasniqi Appeal, paras 68-69.
[572] SPO Response to Krasniqi Appeal, para. 69.
[573] SPO Response to Thaçi Appeal, para. 57; SPO Response to Krasniqi Appeal, para. 69.
[574] Thaçi Reply, para. 21.
[575] Thaçi Reply, para. 22.
[576] According to the SPO, the following cases support JCE III: *Essen Lynching* case, *Borkum Island* case, *D'Ottavio et al*. case, *Rüsselsheim* case, *Ikeda*, *Ishiyama et al.*, and *Tashiro et al.* See SPO Response to Krasniqi Appeal, paras 32-59.
[577] Krasniqi Reply, para. 13.
[578] Krasniqi Reply, para. 14.

(b) Assessment of the Court of Appeals Panel

211. At the outset, the Panel recalls that the principle of legality under Article 7(1) of the ECHR and Article 33(1) of the Constitution of Kosovo requires that the law clearly defines the criminal offences and the sanctions by which an individual is punished, "such as to be accessible and foreseeable in its effects".[579] Not only the offences, but also the modes of liability must be sufficiently foreseeable and accessible to the accused at the relevant time.[580] In this regard, the Panel agrees with the standard set out by the Pre-Trial Judge with respect to the principle of legality and the requirements for foreseeability and accessibility.[581]

212. The Appeals Panel will first turn to the Defence arguments on the accessibility and foreseeability in CIL. The Panel recalls that an assessment of the foreseeability and accessibility requirements should take into account the particular nature of international law, including its reliance on unwritten custom.[582] Accessibility can be demonstrated by the existence of an applicable treaty or CIL during the relevant period.[583] To satisfy the requirement of foreseeability, as recalled by the Pre-Trial Judge, "the Accused must have been able to appreciate that their conduct is criminal in the sense generally understood, without reference to any specific provision".[584]

213. To find JCE foreseeable in CIL, the Pre-Trial Judge considered the following factors: (i) his finding that JCE I and III were part of CIL at the time of the alleged events in the present case; (ii) that the ICTY first found JCE liability in

[579] See ECtHR, *G.I.E.M. S.R.L. and Others v. Italy*, nos. 1828/06, 34163/07, 19029/11, Judgment, 28 June 2018, para. 242.
[580] *Ojdanić* Appeal Decision, para. 37; ECCC, *Kaing Guek Eav* alias *Duch*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012 ("ECCC Case 001 Supreme Court Appeal Judgement"), para. 96.
[581] Impugned Decision, para. 193 and jurisprudence cited therein.
[582] ECCC, *Kaing Guek Eav* alias *Duch*, 001/18-07-2007/ECCC/TC, Trial Chamber, Judgement, 26 July 2010 ("ECCC Case 001 Trial Judgement"), para. 31. See also *Kononov v. Latvia* Judgment, para. 237.
[583] ECCC 001 Supreme Court Appeal Judgement, para. 160.
[584] Impugned Decision, para. 193, referring to *Hadžihasanović* Appeal Decision, para. 34; ECCC Case 001 Trial Judgement, para. 31. See also ECCC Case 001 Supreme Court Appeal Judgement, para. 160.

December 1998 in the *Furundžija* Trial Judgement; (iii) the Accused's high-ranking positions within the KLA; (iv) the post-World War II general legal framework; and (v) the ongoing ICTY prosecutions at the time of the relevant events.[585]

214. With respect to the Defence arguments on the absence of an accessible definition of JCE before the *Tadić* Appeal Judgement allowing the Accused to foresee its application,[586] the Panel recalls that it is evident from the *Tadić* Appeal Judgement,[587] and subsequent case law from international courts and tribunals, that JCE was clearly recognised as a mode of liability under CIL at the time of the alleged crimes in this case.[588] The Panel observes in this respect that the dates of the crimes in the *Tadić* case, as well as in the *Furundžija* case, precede the Indictment period in this case.[589] The Appeals Panel finds no issue with the date of the *Tadić* Appeal Judgement, as it did not create new law but only systematised and clarified the elements of JCE on the basis of already existing CIL. In this regard, the Panel recalls that the principle of legality allows gradual clarification of the rules of criminal liability through judicial interpretation, as well as the progressive development of the law.[590] Furthermore, the findings of the ICTY

---

[585] Impugned Decision, para. 194.
[586] Krasniqi Appeal, para. 62; Thaçi Appeal, para. 82.
[587] *Tadić* Appeal Judgement, paras 195-226.
[588] See above, paras 162-172 (with respect to JCE I) and 186-196 (with respect to JCE III).
[589] In the *Tadić* case, the events which led to the conviction of the accused on the basis of JCE occurred on 14 June 1992. In the *Furundžija* case, the crimes occurred on or about 15 May 1993. See also SPO Response to Thaçi Appeal, para. 53.
[590] See ECtHR, *S.W. v. the United Kingdom*, no. 20166/92, Judgment, 22 November 1995, para. 36:

> However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 (art. 7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.

See also ECtHR, *Kokkinakis v. Greece*, no. 14307/88, Judgment, 25 May 1993, para. 40; ECtHR, C.*R. v. the United Kingdom*, no. 20190/92, Judgment, 22 November 1995, para. 34; ECtHR, *Streletz, Kessler and Krenz v. Germany*, nos 34044/96, 35532/97 and 44801/98, Judgment, 22 March 2001, para. 82; *Ojdanić* Appeal Decision, para. 38.

Appeals Chamber in *Tadić* and subsequent international case law on JCE were largely based on the World War II legal framework[591] and post-World War II case law,[592] of which the vast majority had been published[593] at the time of the relevant events in this case.[594]

215. With regard to the Accused's high-ranking positions within the KLA, the Panel finds the Defence arguments unconvincing.[595] The foreseeability standard, which requires that the person concerned, if needed, receive appropriate legal advice to assess the consequences of their action, [596] is even stricter in relation to persons with higher responsibilities, notably persons in leading government positions or commanding officers of military or paramilitary groups.[597] The Panel finds that the Pre-Trial Judge did not err in considering that the alleged status of the Accused and their access to information, as high-ranking KLA members, is a relevant factor to assess foreseeability.[598] Furthermore, the Panel agrees with Krasniqi[599] that the correct

[591] Nuremberg Charter and CCL10.
[592] In relation to JCE III, see above, paras 182, 191.
[593] As noted by the SPO, the Nuremberg Charter, decisions arising from it, CCL10 cases and background materials explaining the prosecution of war criminals, were disseminated and published in UNWCC Law Reports in 1947. See SPO Response to Krasniqi Appeal, fn. 168. Some post-World War II cases were published in other sources, such as the "Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10" by the US Government Printing Office. However, some of the Italian decisions relied upon by the ICTY Appeals Chamber in the *Tadić* case, for the purpose of identifying JCE III as a CIL rule, were not published. See *Tadić* Appeal Judgement, fns 270-271 (*D'Ottavio et al.* case), 272 (*Aratano et al.* case), 275 (*Bonati et al.* case).
[594] Furthermore, Krasniqi's submission that this framework and case law was not translated in Albanian and not disseminated in Kosovo is irrelevant. See also *Kononov v. Latvia* Judgment, para. 237. Contra Krasniqi Appeal, para. 62.
[595] Krasniqi Appeal, para. 64. See also Thaçi Appeal, paras 82-83.
[596] Impugned Decision, para. 193. See also ECtHR, *Achour v. France*, no. 67335/01, Judgment, 29 March 2006, para. 54; *Kononov v. Latvia* Judgment, para. 185.
[597] See e.g. ECtHR, *Kuolelis and Others v. Lithuania*, nos. 74357/01, 26764/02 and 27434/02, Judgment, 19 February 2008, para. 120 (as concerns "leading professional politicians"); *Kononov v. Latvia* Judgment, para. 235 ("in the context of a commanding officer and the laws and customs of war"); *Vasiliauskas v. Lithuania* Judgment, paras 13, 157 (as concerns a member of the Ministry of State Security); ECtHR, *Jorgic v. Germany*, no. 74613/01, Judgment, 12 July 2007 ("*Jorgic v. Germany* Judgment"), para. 113 (with regard to the "leader of a paramilitary group").
[598] Impugned Decision, para. 194. See also Impugned Decision, para. 103, referring to Confirmation Decision, paras 455-472.
[599] See Krasniqi Appeal, para. 64.

venue to discuss the extent of Krasniqi's powers, responsibility and access to information is at trial, hence not in a motion challenging jurisdiction.

216. The Panel finds the Defence arguments that the reality of conflict prevented KLA leaders from accessing information to be without merit.[600] To the contrary, during an armed conflict, the participants in the conflict, in particular the leaders of armed groups, are duty-bound to inform themselves regarding what acts and omissions may render them criminally liable.[601]

217. With regard to the ongoing ICTY prosecutions and cases at the time of the relevant events in this case, as relied upon by the Pre-Trial Judge,[602] although the Panel considers that they cannot specifically demonstrate that the Accused could have known in March 1998 that they could be liable under JCE, this is but one of several factors that must be considered. The Panel considers, however, that the ICTY prosecutions of leaders of armed groups on the territory of the former Yugoslavia and the investigations into crimes committed in Kosovo could not have been ignored by the Accused.[603]

218. The Appeals Panel turns next to the Defence arguments on the foreseeability of JCE in laws applicable in Kosovo at the time of the alleged events.[604] The Panel observes in particular that Krasniqi's argument is based on a misinterpretation of the decision to which he refers,[605] where the ICTY Appeals Chamber found that "[i]t may […] have recourse to domestic law for the purpose of establishing that the accused could reasonably have known that the offence in question […] was

[600] See Thaçi Appeal, para. 83; Krasniqi Appeal, para. 64.
[601] See e.g. in the context of the war in Bosnia, *Jorgic v. Germany* Judgment, paras 100, 113.
[602] See Impugned Decision, para. 194. See also Impugned Decision, para. 104. See also Krasniqi Appeal, paras 61, 65; Thaçi Reply, para. 22; Krasniqi Reply, para. 14.
[603] See SPO Response to Thaçi Appeal, para. 55; SPO Response to Krasniqi Appeal, para. 67.
[604] See Thaçi Appeal, paras 83-85; Krasniqi Appeal, para. 67; Thaçi Reply, para. 20; Krasniqi Reply, para. 15.
[605] Krasniqi Appeal, para. 60, referring to *Ojdanić* Appeal Decision, para. 41.

prohibited and punishable"[606] and that domestic law "may provide some notice to the effect that a given act is regarded as criminal under international law", but conceded that sometimes such notice may be insufficient, in which case, CIL may provide sufficient guidance.[607] Based on the above, the Appeals Panel finds that the Pre-Trial Judge did not err in finding that both CIL *and* laws applicable in Kosovo are relevant to determine the foreseeability of JCE liability to the Accused.

219. The Pre-Trial Judge correctly found that where a written prohibition exists in domestic law that mirrors the underlying CIL prohibition, "such a comparable provision is relevant for evaluating whether the prohibition in question was indeed foreseeable and accessible".[608] The question is not whether JCE is also punishable in domestic law, in addition to CIL, but whether a comparable mode of liability can be inferred from laws applicable in Kosovo during the Indictment period.[609]

220. With regard to JCE I, the Appeals Panel agrees with the Pre-Trial Judge's interpretation that Articles 22 and 26 of the 1976 SFRY Criminal Code both mirror the concept of common purpose liability,[610] and bear resemblance to JCE I,[611] which is also supported by Kosovo courts and ICTY case law.[612] The Panel notes that on appeal, Thaçi repeats the arguments he previously made before the Pre-Trial Judge regarding Article 26 of the 1976 SFRY Criminal Code.[613] The Panel finds that Thaçi

[606] *Ojdanić* Appeal Decision, para. 40. See also ECCC Case 001 Supreme Court Appeal Judgement, para. 96; ECCC Case 002 Supreme Court Appeal Judgement, para. 762.
[607] *Ojdanić* Appeal Decision, para. 41.
[608] See Impugned Decision, para. 195.
[609] See ECCC Case 002 Pre-Trial Chamber Decision, para. 45.
[610] Impugned Decision, para. 195.
[611] Impugned Decision, paras 196-199 and jurisprudence cited therein.
[612] Impugned Decision, paras 195-199. With regard to Article 22 of the 1976 SFRY Criminal Code, see Kosovo, Basic Court of Mitrovicë/Mitrovica, *S.G. et al.*, No. 14/2013, Judgment, 12 September 2013, p. 37; Kosovo, Court of Appeals, *S.G. et al.*, PAKR 966/2012, Judgment, 11 September 2013, para. 74; Kosovo, Court of Appeals, *E.K and S.B.*, PAKR 271/2013, Judgment, 30 January 2014, paras 36-39; Kosovo Supreme Court Judgment dated 2014, paras xIi-xIii. With regard to Article 26 of the 1976 SFRY Criminal Code, see Kosovo Supreme Court Judgment dated 2009, pp. 14-16, 63-64 (confirming the decision of Kosovo, District Court of Prizren, *S.K. et al.*, P 85/2005, Judgment, 10 August 2006); *Ojdanić* Appeal Decision, para. 40.
[613] *Compare* Thaçi JCE Reply, para. 27 *with* Thaçi Appeal, para. 84.

merely disagrees with the Pre-Trial Judge's finding and fails to articulate any clear error. Such arguments should thus be summarily dismissed.[614] In any event, Thaçi's interpretation that Article 26 of the 1976 SFRY Criminal Code "does not attribute criminal liability to all members of a group on the basis of a shared common plan" is directly contradicted by the judgment of the Kosovo Supreme Court referred to in the Impugned Decision.[615] With regard to Thaçi's argument on the decision of the Serbian Constitutional Court,[616] the Panel observes that the decision does not actually refer to JCE, and recalls that, in any event, the Specialist Chambers are not bound to follow the interpretation of the law by other jurisdictions, including Serbia.[617]

221. In relation to Krasniqi's argument that certain decisions of the Kosovo Court of Appeals have found JCE inapplicable,[618] the Panel notes that the concept of JCE has a strong underpinning in the Kosovo domestic system, as confirmed by the Kosovo Supreme Court.[619] In light of the above, the Panel finds that JCE I liability was sufficiently accessible and foreseeable to the Accused.[620]

222. Concerning JCE III, the Panel also agrees with the Pre-Trial Judge's interpretation, relying on the Kosovo Supreme Court Judgment dated 2012, that a

---

[614] *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 15.
[615] Impugned Decision, fn. 430. See Kosovo Supreme Court Judgment dated 2009, p. 15 ("[t]he conduct of 'making use' of the group is clearly referred to all participants, although they are not the creators or the organizers").
[616] Thaçi Appeal, para. 83, referring to Serbian Constitutional Court Judgment, p. 14.
[617] See above, para. 28. See also Impugned Decision, para. 100.
[618] Krasniqi Appeal, para. 67, referring to Kosovo, Court of Appeals, *J.D. et al.*, PAKR Nr 455/15, Judgment, 15 September 2016, p. 45; Kosovo, Court of Appeals, *Xh. K.*, PAKR Nr 648/16, Judgment, 22 June 2017, p. 10. The Panel observes that in the latter, the Kosovo Court of Appeals did not reject entirely the concept of JCE. In fact, it accepted that "[t]here are arguments in favor of a direct application of the concept of JCE in all its variants in cases of war crimes committed during the Kosovo war", finding that JCE II was applicable and that JCE III did not apply because the interpretation of co-perpetration under Article 22 of the 1976 SFRY Criminal Code, which was the basis for the charges in that case, cannot extend to include JCE III. See Kosovo, Court of Appeals, *Xh. K.*, PAKR Nr 648/16, Judgment, 22 June 2017, p. 10, referring to Kosovo, Basic Court of Mitrovicë/Mitrovica, *Xh. K.*, P. no. 184/2015, Judgment, 8 August 2016, paras 87-88, 138.
[619] See Articles 22 and 26 of the 1976 SFRY Criminal Code. See also decisions cited above in fn. 612. See in particular Kosovo Supreme Court Judgment dated 2009, pp. 14-16, 63-64 and Kosovo Supreme Court Judgment dated 2014, paras xIi-xIii.
[620] Similarly *Ojdanić* Appeal Decision, paras 37-43; ECCC Case 002 Pre-Trial Chamber Decision, para. 72.

combined reading of Articles 11 and 13 of the 1976 SFRY Criminal Code, together with Articles 22 and 26, mirror the elements of JCE III.[621]

223. The Panel observes that with respect to the relationship between Article 22 of the 1976 SFRY Criminal Code and JCE III, Thaçi merely refers to his previous submissions before the Pre-Trial Judge,[622] but fails to articulate any clear error in the Impugned Decision.[623] These arguments must therefore be dismissed.[624] The Panel also rejects Krasniqi's arguments that the Kosovo Supreme Court Judgment dated 2012 is not relevant for the foreseeability of JCE III.[625] First, it is not required that a particular construction of domestic law provisions have been applied in a similar case to a similar accused before 1998.[626] Second, in the Kosovo Supreme Court Judgment dated 2012, the underlying facts for which the accused were found responsible can be categorised under JCE III.[627] The Panel also notes that contrary to Krasniqi's assertion, the decision does combine a reading of Articles 11, 13, 25 *and* 22 of the 1976 SFRY Criminal Code.[628] Thus, the Pre-Trial Judge's reading of this code is consistent with the interpretation of the Kosovo Supreme Court. Additionally, the Kosovo Supreme Court has found on several occasions that all JCE forms of liability were "firmly established" under CIL.[629]

224. In light of the above, the Court of Appeals Panel finds that Thaçi and Krasniqi have failed to demonstrate that the Pre-Trial Judge erred in finding that JCE, in both

---

[621] Impugned Decision, para. 200, referring to Kosovo Supreme Court Judgment dated 2012, pp. 7-9.
[622] *Compare* Thaçi JCE Reply, paras 27-28 *with* Thaçi Appeal, para. 84.
[623] Thaçi argues that the Pre-Trial Judge failed to take into account his submissions and give weight to relevant considerations but does not explain why the Pre-Trial Judge's reasoning was incorrect. See Thaçi Appeal, para. 85.
[624] See e.g. *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 15.
[625] See Krasniqi Appeal, para. 67; Krasniqi Reply, para. 15.
[626] See e.g. *Kononov v. Latvia* Judgment, para. 237. See also *Korbely v. Hungary* Judgment, paras 74-75; ECtHR, *K.-H.W. v. Germany*, no. 37201/97, Judgment, 22 March 2001, para. 85.
[627] Kosovo Supreme Court Judgment dated 2012, paras 34, 36-37, 39-40.
[628] Kosovo Supreme Court Judgment dated 2012, paras 35, 41. The Panel notes that Article 25 of the 1976 SFRY Criminal Code, entitled "The limits of responsibility and punishability of accomplices, inciters and aiders", applies to the complicity mode of liability set out in Article 22.
[629] See above, fn. 532.

its first and third forms, was foreseeable and accessible to the Accused at the material time. Thaçi's Ground B4 and Krasniqi's Ground 2 are therefore dismissed.

4. Whether the Applicability of JCE III to Special Intent Crimes Is a Jurisdictional Challenge (SPO Ground 1)

(a) Submissions of the Parties

225. The SPO submits that the Pre-Trial Judge committed a legal error in ruling on the applicability of JCE III to special intent crimes, despite acknowledging that challenges to its applicability are not "strictly speaking, entirely jurisdictional in nature".[630] The SPO underlines that, in its view, challenging the application of JCE III to special intent crimes exceeds the scope of Rule 97 of the Rules, violating the plain language of Rule 86(7) of the Rules.[631] In the alternative, the SPO submits that the Pre-Trial Judge erred in law in holding that it is impermissible to convict persons of special intent crimes on the basis of JCE III.[632]

226. Relying on ICTY jurisprudence and specifically on findings made in the *Karadžić* case, the SPO contends that challenges to the contours of modes of liability – including the applicability of JCE III to special intent crimes – as opposed to the availability of a mode of liability in its entirety, are not valid jurisdictional challenges and should be addressed at trial.[633]

227. In response, Veseli argues that the SPO repeats previous submissions and fails to provide a legal basis for its attempt to distinguish challenges to the "contours" of modes of liability from challenges to the "availability" of modes of liability.[634] To the

[630] SPO Appeal, paras 11-13. See also SPO Reply, para. 2.
[631] SPO Appeal, para. 11. See also SPO Reply, para. 2.
[632] SPO Appeal, paras 1, 14-26; SPO Reply, paras 6-11.
[633] SPO Appeal, para. 12, referring, *inter alia*, to *Karadžić* Decision on Jurisdiction Challenges, paras 29-33; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR72.1, IT-95-5/18-AR72.2 and IT-95-5/18-AR72.3, Decision on Radovan Karadžić's Motions Challenging Jurisdiction (Omission Liability, JCE-III – Special Intent Crimes, Superior Responsibility), 25 June 2009 ("*Karadžić* Appeal Decision on Jurisdiction Challenges"), paras 33-37.
[634] Veseli Response to SPO Appeal, paras 3, 5.

contrary, according to Veseli, Rule 97(1)(a) of the Rules and Article 39(1) of the Law simply relate to challenges to the jurisdiction of the Specialist Chambers, and this includes challenges to the applicability of modes of liability, including the applicability of a mode of liability to a certain type of crime.[635] Relying notably on ICTR jurisprudence in the *Rwamakuba* case, Veseli submits that decisions issued by the *ad hoc* tribunals on what constitute jurisdictional challenges are inconsistent, that the SPO's references are selective and that its arguments should be rejected.[636]

228. Veseli further submits that a crime is "inoperable without an applicable mode of liability" and that both are part of the subject-matter jurisdiction of the Specialist Chambers. In his view, this matter is best addressed at the outset of the proceedings, because if the Panel was to confirm that JCE III does not attach to specific intent crimes, those crimes charged via this mode of liability would be outside of the Specialist Chambers' jurisdiction.[637]

229. In reply, the SPO reaffirms its position.[638] The SPO notably underlines that the ICTY jurisprudence from the *Karadžić* case is part of the same line of jurisprudence as that which Veseli cites, which over time coalesced into the views expressed in the *Karadžić* case, and which is therefore well-settled jurisprudence.[639]

(b) Assessment of the Court of Appeals Panel

230. The Court of Appeals Panel recalls that, according to a combined reading of Articles 6 to 9 of the Law and Rule 97(1)(a) of the Rules and as previously established in prior decisions, a challenge to the jurisdiction of the Specialist Chambers pertains

[635] Veseli Response to SPO Appeal, paras 5-6, 10.
[636] Veseli Response to SPO Appeal, paras 3, 9-10 referring, *inter alia*, to ICTR, *Rwamakuba v. Prosecutor*, ICTR-98-44-AR72.4, Decision on Validity of Appeal of André Rwamakuba Against Decision Regarding Application of Joint Criminal Enterprise to the Crime of Genocide Pursuant to Rule 72(E) of the Rules of Procedure and Evidence, 23 July 2004 ("*Rwamakuba* Appeal Decision on Jurisdiction Challenges"), paras 14-15.
[637] Veseli Response to SPO Appeal, paras 7-8.
[638] SPO Reply, paras 2-5, 12.
[639] SPO Reply, paras 3-4.

to the personal, territorial, temporal or subject-matter jurisdiction of the Specialist Chambers.[640]

231. The core issue of Ground 1 of the SPO Appeal is whether a challenge to the applicability of JCE III to special intent crimes concerns subject-matter jurisdiction within the meaning of Rule 97(1)(a) of the Rules. The Panel notes that the SPO and Veseli disagree on whether challenges relating to the contours, elements, and application of JCE III to special intent crimes qualify as jurisdictional challenges. The Panel finds that the jurisprudence of the ICTY is particularly relevant to addressing the SPO's first ground of appeal, in particular because Rule 72(D) of the ICTY Rules limits jurisdictional challenges to comparable sub-categories of jurisdiction listed under this rule.[641]

232. Contrary to Veseli's assertion, the jurisprudence of the *ad hoc* tribunals is well-settled on this matter. The Panel notes that the ICTY jurisprudence from the Appeals Chamber in the *Karadžić* case deals with the same question as the one raised by Ground 1 of the SPO Appeal and also provides an overview of the jurisprudence available to date, including the ICTR jurisprudence in the *Rwamakuba* case.[642]

233. In the *Karadžić* Appeal Decision on Jurisdiction Challenges, the ICTY Appeals Chamber acknowledges that certain earlier decisions, including the *Rwamakuba* Appeal Decision on Jurisdiction Challenges, lend some support to the view that issues such as the contours and elements of modes of liability could be jurisdictional in nature.[643] The Appeals Chamber however noted that more recent jurisprudence had gradually resolved previous uncertainty relating to the issue of which questions

[640] See *Gucati* Appeal Decision, para. 17; *Gucati and Haradinaj* Appeal Decision on Admissibility, para. 14.
[641] The Court of Appeals Panel has, in prior decisions, relied on the jurisprudence of the *ad hoc* tribunals, as guidance to interpreting its own legal framework. See e.g. *Gucati* Appeal Decision, paras 9-10, 50; *Krasniqi* Appeal Decision on Interim Release, para. 17.
[642] *Karadžić* Appeal Decision on Jurisdiction Challenges, paras 21-23, 33-37.
[643] *Karadžić* Appeal Decision on Jurisdiction Challenges, para. 34.

qualified as jurisdictional challenges.[644] Relying on post-2005 ICTY jurisprudence, the Appeals Chamber explained that:

> […] the Appeals Chamber's approach to subject matter jurisdiction now focuses on whether the crime charged is envisioned by the statute, and whether the mode of liability upholds the principle of individual criminal responsibility; the contours and elements of modes of liability are considered an "issue[ ] of law… which can be properly advanced and argued during the course of trial".[645]

234. The *Karadžić* Appeal Decision on Jurisdiction Challenges clearly establishes that challenges to the applicability of JCE III to special intent crimes do not qualify as jurisdictional. The Panel agrees with this finding and notes that the Pre-Trial Judge did not himself disagree with the assessment in *Karadžić*. In the Impugned Decision, the Pre-Trial Judge found that "none of these challenges [including the challenge on the applicability of JCE III to special intent crimes] are, strictly speaking, entirely jurisdictional in nature".[646] Accordingly, there is no need to elaborate further on this aspect of the SPO Appeal.

235. The Pre-Trial Judge decided nonetheless to address the Defence's argument alleging that JCE III does not attach to special intent crimes, "only if and to the extent that [it] affect[s] the application of JCE before the [Specialist Chambers]".[647] The Pre-Trial Judge further decided to grant the Defence's motion on this matter and ordered the SPO to amend the Indictment to exclude JCE III liability for the special intent crimes.[648] Given that the *applicability* of JCE III as a mode of liability for special intent crimes before the Specialist Chambers does not qualify as a jurisdictional question, the Panel disagrees with the Pre-Trial Judge's reasoning and rather considers that it would have been preferable not to address the issue within the ambit of a preliminary motion under Rule 97 of the Rules. In that regard, the Panel acknowledges that specific

[644] *Karadžić* Appeal Decision on Jurisdiction Challenges, para. 34.
[645] *Karadžić* Appeal Decision on Jurisdiction Challenges, para. 36 and references cited therein.
[646] Impugned Decision, para. 203.
[647] Impugned Decision, para. 203.
[648] Impugned Decision, para. 208.

circumstances may have justified a different approach and that a judge may have valid reasons to decide to address some issues at the outset of the trial, for example, in the interests of judicial economy and justice. However, none of these reasons were put forward by the Pre-Trial Judge.[649]

236. In light of the above, the Court of Appeals Panel finds that the Pre-Trial Judge erred in ruling on the applicability of JCE III to special intent crimes in addressing a preliminary motion challenging jurisdiction under Rule 97 of the Rules and that these challenges can be properly advanced and argued during the course of trial since they involve non-jurisdictional issues.[650] Like challenges concerning the contours of a substantive crime, challenges concerning the contours or elements of a mode of liability or its application are matters to be addressed at trial.[651] Accordingly, the Panel grants Ground 1 of the SPO Appeal and declares that Ground 2 of the SPO Appeal is moot.[652]

IV. DISPOSITION

237. For these reasons, the Court of Appeals Panel:

DENIES the Thaçi Appeal;

DENIES the Veseli Appeal;

DENIES the Selimi Appeal;

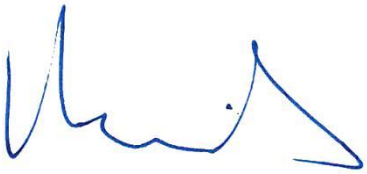
DENIES the Krasniqi Appeal;

---

[649] See, despite different wording in the relevant provision, ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1707, Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, 4 January 2017, para. 26.
[650] *Karadžić* Appeal Decision on Jurisdiction Challenges, para. 36 and references cited therein.
[651] *Karadžić* Appeal Decision on Jurisdiction Challenges, para. 36. See also ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-PT, Decision on Several Motions Challenging Jurisdiction, 19 March 2007, para. 22.
[652] The SPO's second ground of appeal was only submitted in the alternative to the arguments provided in support of the SPO's first ground of appeal. See SPO Appeal, para. 13.

GRANTS Ground 1 of the SPO Appeal; and

DECLARES moot Ground 2 of the SPO Appeal.



Judge Michèle Picard,

Presiding Judge

Dated this Thursday, 23 December 2021

At The Hague, the Netherlands