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KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In:	**KSC-BC-2020-04**
Before:	**A Panel of the Court of Appeals Chamber** Judge Michèle Picard Judge Emilio Gatti Judge Nina Jørgensen
Registrar:	Fidelma Donlon
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Decision on Pjetër Shala's Appeal Against Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers

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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 an appeal filed on 9 November 2021 by Pjetër Shala ("Shala" or "Accused" or "Defence", and "Appeal", respectively)[2] against the "Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers" ("Impugned Decision").[3] On 29 November 2021, the Specialist Prosecutor's Office ("SPO") filed its response to the Appeal ("Response").[4] On 9 December 2021, Shala filed his reply ("Reply").[5]

I. BACKGROUND

1. On 19 June 2020, further to a decision by the Pre-Trial Judge,[6] the SPO submitted the confirmed Indictment.[7] On 1 November 2021, the SPO submitted the operative Indictment, pursuant to a decision of the Pre-Trial Judge ("Indictment").[8]

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[1] F00004, Decision Assigning a Court of Appeals Panel, 10 November 2021.

[2] F00003, Defence Appeal against Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 9 November 2021 ("Appeal"). The Court of Appeals Panel extended, on 28 October 2021, the deadline for the filing of the Appeal (see F00002, Decision on Shala's Request for Variation of Time Limit, 28 October 2021) and, on 17 November 2021, for the filing of the response and the reply thereto (see F00007, Decision on the Parties' Requests for Variation of Time Limits, 17 November 2021).

[3] F00088, Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 18 October 2021 ("Impugned Decision").

[4] F00008, Prosecution response to Defence appeal against the 'Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers', 29 November 2021 ("Response").

[5] F00009, Defence Reply to Prosecution Reponse to Appeal against 'Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers', 9 December 2021 ("Reply").

[6] F00007/RED, Public Redacted Version of Decision on the Confirmation of the Indictment against Pjetër Shala, 6 May 2021 (confidential and strictly confidential and *ex parte* versions filed on 12 June 2020) ("Confirmation Decision").

[7] F00010/A02, Annex 2 to Submission of Confirmed Indictment, 19 June 2020 (strictly confidential and *ex parte*, reclassified as confidential on 29 April 2021). See also F00016/A02, Annex 2 to Submission of lesser redacted and public redacted versions of confirmed Indictment and related requests, 31 March 2021 (strictly confidential and *ex parte*, reclassified as public on 15 April 2021).

[8] See F00098/A01, Annex 1 to Submission of Corrected Indictment, 1 November 2021 (confidential); F00107/A01, Annex 1 to Submission of public redacted version of corrected Indictment, 16 November

2. On 16 March 2021, further to a decision[9] and an arrest warrant issued by the Pre-Trial Judge,[10] Shala was arrested in the Kingdom of Belgium ("Belgium").[11]

3. On 15 April 2021, Shala was transferred to the detention facilities of the Specialist Chambers in The Hague, the Netherlands.[12]

4. On 12 July 2021, further to an oral order varying the applicable time limit,[13] Shala filed a preliminary motion challenging the jurisdiction of the Specialist Chambers.[14]

5. On 6 September 2021, pursuant to a decision further varying the applicable time limits[15] and a decision varying the applicable word limit,[16] the SPO filed its response to the Preliminary Motion.[17]

2021 ("Indictment"). See also F00089/RED, Public Redacted Version of Decision on Motion Challenging the Form of the Indictment, 18 October 2021(confidential version filed on 18 October 2021), para. 118.

[9] F00008/RED, Public Redacted Version of Decision on Request for Arrest Warrant and Transfer Order, 6 May 2021 (strictly confidential and *ex parte* version filed on 12 June 2020).

[10] F00008/A01/RED, Public Redacted Version of Arrest Warrant for Mr Pjetër Shala, 15 April 2021 (strictly confidential and *ex parte* version filed on 12 June 2020, reclassified as confidential on 19 October 2021). See also F00008/A02/RED, Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers, 15 April 2021 (strictly confidential and *ex parte* version filed on 12 June 2020).

[11] F00013, Notification of Arrest of Pjetër Shala Pursuant to Rule 55(4), 16 March 2021 (strictly confidential and *ex parte*, reclassified as public on 29 April 2021).

[12] F00019/RED, Public Redacted Version of 'Notification of Reception of Pjetër Shala in the Detention Facilities of the Specialist Chambers and Conditional Assignment of Counsel', 26 April 2021 (confidential version filed on 15 April 2021).

[13] Transcript of 21 June 2021, p. 62, lines 12-19.

[14] F00054, Preliminary Motion of the Defence of Pjetër Shala to Challenge the Jurisdiction of the KSC, 12 July 2021 ("Preliminary Motion").

[15] F00052, Decision on Request to Vary a Time Limit, 5 July 2021 ("Decision Varying Time Limit").

[16] F00067, Decision on SPO Request for Extension of Word Limit, 3 September 2021 ("Decision Extending Word Limit for Response to Preliminary Motion").

[17] F00071, Prosecution Response to Shala Defence Preliminary Motion Challenging the Jurisdiction of the KSC, 6 September 2021 ("Response to Preliminary Motion").

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6. On 25 September 2021, further to the Decision Varying Time Limit and an oral order varying the applicable word limit,[18] Shala filed his reply.[19]

7. On 18 October 2021, the Pre-Trial Judge issued the Impugned Decision, rejecting, *inter alia*, the Preliminary Motion as far as it challenges the jurisdiction of the Specialist Chambers.[20]

II. STANDARD OF REVIEW

8. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.[21]

III. PRELIMINARY MATTER

9. Shala requests an extension of the word limit for his Reply by 1,210 words because of the importance of the matters at stake.[22] The Panel notes that Article 46(3) of the Practice Direction on Files and Filings before the Kosovo Specialist Chambers ("Practice Direction")[23] stipulates that an interlocutory appeal against a decision on a preliminary motion submitted pursuant to Rule 97(3) of the Rules and a response thereto shall not exceed 9,000 words and that a reply to such response shall not exceed 3,000 words. In addition, Article 36(1) of the Practice Direction stipulates that participants to proceedings may seek, sufficiently in advance, an extension of the

[18] Transcript of 23 September 2021, p. 101, line 19 – p. 102, line 7 ("Order Extending Word Limit for Preliminary Reply").
[19] F00084, Defence Reply to the Prosecution Response to the Preliminary Motion of Pjetër Shala Challenging the Jurisdiction of the KSC, 25 September 2021 ("Preliminary Reply").
[20] Impugned Decision, paras 79, 89, 97, 103-104.
[21] KSC-BC-2020-07, F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, paras 4-14. See also e.g. F00005/RED, Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Provisional Release, 20 August 2021 (confidential version filed on 20 August 2021), para. 5.
[22] Reply, fn. 1. Shala appears to have exceeded the word limit for his Reply by 1,207 words.
[23] KSC-BD-15, Registry Practice Direction, Files and Filings before the Kosovo Specialist Chambers, 17 May 2019 ("Practice Direction").

word limit upon showing that good cause exists constituting exceptional circumstances.

10. The Panel notes that Shala filed the request for extension of the applicable word limit as part of his Reply, rather than "sufficiently in advance" as stipulated by the Practice Direction. The Panel further notes that Shala does not specifically argue that good cause for an extension of the word limit constituting exceptional circumstances exists, other than submitting in a footnote that such an extension "is required".[24]

11. In addition, the Panel is mindful of the fact that the Response does not exceed the applicable word limit. Nevertheless, the Panel is also mindful that it has granted extensions of the applicable word limit with respect to filings on jurisdictional challenges in other cases due to the significance of such appeals and the Panel's interest in receiving more detailed submissions than would normally be permitted.[25] Further, the Panel observes that the word count of the Appeal is well below the applicable word limit and notes that the requested extension of the word limit is reasonable.

12. The Panel, therefore, finds that despite the significant shortcomings of the request for extension of the applicable word limit identified above,[26] good cause constituting exceptional circumstances exists and that an extension of the word limit is justified on an absolutely exceptional basis in the circumstances of this Appeal which concerns complex jurisdictional issues. The Panel urges, however, Shala – and

[24] See Reply, fn. 1.
[25] See e.g. KSC-BC-2020-06, F00024, Decision on Selimi's Request for Variation of Word Limit, 14 October 2021; KSC-BC-2020-06, F00017, Decision on Request for Variation of Word Limits, 24 September 2021; KSC-BC-2020-06, F00009, Decision on Requests for Variation of Word Limits, 19 August 2021, in particular para. 5. The Pre-Trial Judge also granted an extension of the word limits for the Response to Preliminary Motion and for the Preliminary Reply. See Decision Extending Word Limit for Response to Preliminary Motion; Order Extending Word Limit for Preliminary Reply.
[26] See above, para. 10.

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the Parties in general – to anticipate and to file sufficiently in advance any similar future requests.

IV. DISCUSSION

13. At the outset, the Panel notes the SPO's submission that Shala's arguments on the applicability of customary international law ("CIL"), joint criminal enterprise ("JCE") and arbitrary detention contain "considerable overlap" and should be addressed in a manner consistent with the approach taken by the Pre-Trial Judge, in that the applicability of CIL, retroactivity, JCE and arbitrary detention are addressed separately.[27] In reply, Shala submits that his grounds of appeal should be addressed as presented and not as interpreted by the SPO, because the application of CIL in the manner set out in the Impugned Decision is incorrect for multiple reasons, each one of which engages different fundamental rights of the Accused and has been developed in separate grounds of appeal.[28]

14. In the Panel's view, if CIL is applicable at the Specialist Chambers and has primacy over domestic law, then it would be sufficient for the recognition of the Specialist Chambers' jurisdiction over JCE and arbitrary detention in a non-international armed conflict that they were established as a mode of liability and crime respectively in CIL at the relevant time and satisfy the requirements of the principle of legality, including that they were accessible and foreseeable to the Accused. Therefore, the issue of whether CIL is applicable and has primacy over domestic law and whether the recognition of CIL in the Law complies with the principle of legality are distinct from whether the Specialist Chambers have jurisdiction over JCE and arbitrary detention in a non-international armed conflict. The Panel observes that the

[27] Response, para. 9, referring to Impugned Decision, para. 80.
[28] Reply, para. 3, referring to Response, para. 9.

headings of Shala's grounds of appeal reflect this.[29] The Panel, therefore, finds no error in the approach taken by the Pre-Trial Judge,[30] and will follow the same approach.

15. Further, the Panel observes that it has already issued a decision on the main issues raised in the four grounds of appeal presented by Shala, namely: (i) the superiority of CIL over domestic law;[31] (ii) the interference of the Law with the principle of non-retroactivity under Article 7 of the European Convention on Human Rights ("ECHR") and the analogous provisions of the Constitution of Kosovo;[32] (iii) the inclusion of the first and third forms of JCE in Article 16(1) of the Law;[33] and (iv) the jurisdiction of the Specialist Chambers over arbitrary detention in a non-international armed conflict.[34] In this regard, the Panel notes that, in the interests of legal certainty and predictability, an appeals panel is expected to follow its previous decisions and should depart from them only for cogent reasons in the interests of justice.[35]

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[29] The headings of Shala's grounds of appeal are as follows: (i) "the Pre-Trial Judge erred by attributing unqualified superiority to CIL and interpreting the applicable legislative framework in breach of Mr Shala's fundamental rights"; (ii) "the Pre-Trial Judge erred by failing to acknowledge the interference with the principle of non-retroactivity and violation of Article 7 ECHR and the analogous guarantee of the Kosovo Constitution"; (iii) "the Pre-Trial Judge erred in finding that liability under the first and third form of a JCE is included in Article 16(1)(a) of the Law"; and (iv) "[t]he Pre-Trial Judge made an error of law in finding that Arbitrary detention in a [non-international armed conflict] falls within the scope of the [Specialist Chamber]'s jurisdiction". See also Appeal, para. 4.

[30] Impugned Decision, para. 80.

[31] Compare Appeal, paras 7-13 *with* KSC-BC-2020-06, F00030, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021 ("*Thaçi et al.* Appeal Decision on Jurisdictional Challenges"), paras 22-29, 52-59.

[32] Compare Appeal, paras 14-19 *with Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 35-40.

[33] Compare Appeal, paras 20-22 *with Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 135-144. See also *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 162-172, 186-196, 211-224.

[34] Compare Appeal, paras 23-24 *with Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 87-89. See also *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 94-102, 106-111.

[35] See ICTR, *Prosecutor v. Semanza*, ICTR-97-23-A, Decision, 31 May 2000, para. 92; ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, paras 107-110 (wherein the ICTY Appeals Chamber held, *inter alia*, that instances where cogent reasons in the interests of justice would require departure from appeals decisions would be cases where decisions were made on the basis of a wrong legal principle or where the judges were ill-informed about the applicable law).

A. ALLEGED ERRORS REGARDING THE APPLICABILITY OF CUSTOMARY INTERNATIONAL LAW (GROUNDS (I), (II))

1. Whether CIL has superiority over domestic law in the Kosovo legal framework (Ground (i) in part)

(a) Submissions of the Parties

16. In his first ground of appeal, Shala submits that the Pre-Trial Judge erred in attributing "unqualified" superiority to CIL over domestic law despite the explicit wording of relevant provisions and binding case law to the contrary, thereby violating his fundamental rights.[36] According to Shala, the Pre-Trial Judge's finding violates the supremacy of the Constitution under Article 16 of the Constitution of Kosovo and does not reconcile the inconsistency between Article 3(2)(d) of the Law and Article 19(2) of the Constitution of Kosovo.[37] In addition, Shala submits that the Pre-Trial Judge failed to provide adequate reasons for his conclusion that the Law could lawfully give precedence to CIL.[38] Shala also argues that the Pre-Trial Judge failed to address his submissions that the Specialist Chambers as a domestic court need to operate in compliance with domestic law, thereby undermining the quality of the applicable legal framework and creating an uncertainty about the weight to be attributed to the statutes of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal for Rwanda ("ICTR") and the International Residual Mechanism for Criminal Tribunals.[39] Shala finally argues that the Pre-Trial Judge erred in finding that the 1974 Constitution of the Socialist Federal Republic of Yugoslavia ("SFRY" and "1974 SFRY Constitution") and the 1976 SFRY Criminal Code do not limit the jurisdiction of the Specialist Chambers[40] and in

[36] Appeal, paras 3-4(i), 7. See also Reply, para. 4.
[37] Appeal, paras 8, 10. See also Reply, paras 12, 23.
[38] Appeal, para. 8. See also Reply, paras 15-16.
[39] Appeal, paras 8, 9, 12-13. See also Reply, para. 17.
[40] Appeal, para. 10; Reply, paras 6, 8.

ignoring judgments wherein the Kosovo Supreme Court held that the 1974 SFRY Constitution applied at the material time.[41]

17. The SPO responds that the Law gives CIL direct application before the Specialist Chambers[42] and that the Pre-Trial Judge recognised the appropriate role of the Constitution of Kosovo and considered the relevant Defence arguments.[43] According to the SPO, the applicable law does not create any uncertainty regardless of the nature of the Specialist Chambers.[44]

(b) Assessment of the Court of Appeals Panel

18. The Panel notes that while the Pre-Trial Judge recognised that the Law is subject to the principles and safeguards provided in the Constitution of Kosovo,[45] he did not specifically examine whether the recognition of the primacy of CIL in the Law is in compliance with the Constitution of Kosovo, despite being required to carry out such an examination.[46] Nevertheless, the Panel recalls its previous finding that CIL has primacy over domestic legislation in the Kosovo legal framework and that this is in line with the Constitution of Kosovo.[47] The Panel specifically recalls that, contrary to Shala's arguments,[48] there is 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", since CIL is binding on all states.[49] The Panel further recalls that,

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[41] Appeal, para. 10; Reply, paras 7-8. See also Appeal, para. 15; Reply, para. 6.
[42] Response, para. 10. See also Response, para. 23 (submitting that it is clear from the Law that the Kosovo legislature understood the crimes and modes of liability in Articles 14 and 16 of the Law as "legally binding norms of international law").
[43] Response, paras 13-16, 19.
[44] Response, para. 17.
[45] Impugned Decision, paras 65, 77, 82.
[46] See *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, para. 22, referring to 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.
[47] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 23-24.
[48] See Appeal, paras 7, 10; Reply, para. 12.
[49] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 23-24.

in light of this, there is no legal basis requiring a corresponding provision under domestic law applicable at the time of the alleged crimes.[50] In the Panel's view, the finding that CIL has superiority over Kosovo domestic legislation, pursuant to Article 19(2) of the Constitution of Kosovo, does not violate Article 16 of the Constitution of Kosovo, which refers to the relationship between the Constitution, on the one hand, and laws and other legal acts, on the other hand.[51]

19. The Panel notes that the requirement that the Law is in compliance with the Constitution of Kosovo is unambiguous[52] and the sources of law applicable at the Specialist Chambers, including the role of the jurisprudence of the *ad hoc* tribunals in determining the CIL applicable at the relevant time, is clear.[53] The Panel considers that it is not the categorisation of the Specialist Chambers as a particular type of court that determines the applicable law, but the Law itself. The Panel, therefore, agrees with the Pre-Trial Judge's finding that "categorising a court of law as domestic, international, hybrid, or otherwise, is not dispositive of the applicable law".[54]

20. Moreover, the Panel recalls that the 1974 SFRY Constitution does not limit the Specialist Chambers' jurisdiction, since, *inter alia*, the Constitution of Kosovo adopted in 2008 superseded any constitution previously applicable in the territory of Kosovo and the Specialist Chambers are only bound to uphold the protections enshrined in it.[55] Having found that CIL has primacy over domestic legislation, and considering

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[50] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, para. 24.
[51] The Panel acknowledges that the Law must be in accordance with the Constitution of Kosovo. See above, fn. 46 and below, fn. 52.
[52] See Article 162(2) of the Constitution of Kosovo; Article 3(2) of the Law.
[53] See Article 3(2) and (3) of the Law. See also *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, para. 152.
[54] See Impugned Decision, para. 82. Contra Appeal, para. 8; Reply, para. 17.
[55] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 25-26. In any event, 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 International Covenant on Civil and Political Rights ("ICCPR"). 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*

that this is in line with the Constitution of Kosovo,[56] the Panel also finds no error in the Pre-Trial Judge's conclusion that the 1976 SFRY Criminal Code does not limit the jurisdiction of the Specialist Chambers.[57] Further, the Panel recalls that the judgments of the Kosovo Supreme Court to which Shala refers in support of his argument that CIL is inapplicable to events alleged to have occurred in 1999[58] are irrelevant for the Specialist Chambers, as they concern a different constitutional framework.[59]

21. In light of the above, the Panel finds that Shala has failed to demonstrate that the Pre-Trial Judge erred in finding that CIL has supremacy over domestic legislation in the Kosovo legal framework. The Court of Appeals Panel, accordingly, dismisses the relevant part of Ground (i) of Shala's Appeal.

2. Whether applying CIL pursuant to the Law interferes with the principle of legality (Grounds (i) in part, (ii))

(a) Submissions of the Parties

22. In part of his first ground of appeal and in his second ground of appeal, Shala argues that the Pre-Trial Judge's interpretation of the legal framework is "impermissibly teleological" and, as such, in violation of Articles 6 and 7 of the ECHR.[60] Shala specifically submits that the Pre-Trial Judge's analysis is "manifestly unreasonable" because it denies the "obvious retroactive character" of the Law and

it is affiliated […] In order to carry these principles into effect the [SFRY] shall strive: […] for *respect of generally accepted rules of international law* […]" (emphasis added).

[56] See above, para. 18. See also Impugned Decision, para. 82.

[57] See *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, para. 26 (wherein the Panel also held that this is consistent with the limited application of the 1976 SFRY Criminal Code, pursuant to Article 15(1) of the Law, "subject to Article 12 of the Law").

[58] Appeal, para. 10, 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. 6, 12, Kosovo, Supreme Court, *Besović*, AP-KZ 80/2004, Judgment, 7 September 2004 ("Kosovo Supreme Court Judgment of 7 September 2004"), pp. 18-19. See also Appeal, para. 7.

[59] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, para. 27, referring *inter alia* to Kosovo Supreme Court Judgment of 21 July 2005, p. 8; Kosovo Supreme Court Judgment of 7 September 2004, pp. 18-19. See also Impugned Decision, para. 83.

[60] Appeal, para. 9. See also Appeal, para. 25; Reply, para. 17.

fails to consider Shala's submissions about the lack of clarity of the applicable law.[61] According to Shala, this violates the requirements of the "quality of law" concerning the accessibility, foreseeability and precision required under the Constitution of Kosovo and the ECHR.[62] Shala also submits that the Pre-Trial Judge erred in finding that the introduction of domestic legislation for conduct that occurred prior to its penalisation does not violate the principle of legality, particularly since Article 7 of the ECHR imposes an unconditional prohibition of retrospective application of criminal law where that is to an accused's disadvantage.[63] According to Shala, the Pre-Trial Judge failed to apply the correct test under the case law of the European Court of Human Rights ("ECtHR"), which allows prosecution on the basis of international law only in respect of "flagrantly unlawful" conduct, the criminal nature of which is "evidently" accessible and foreseeable to the accused.[64] Shala also argues that the Pre-Trial Judge erred in finding that Article 12 of the Law is compatible with the principle of non-retroactivity while not acknowledging the obsolete nature of Article 7(2) of the ECHR.[65] Shala finally submits that the Pre-Trial Judge failed to assess which regime should have applied in accordance with Article 7 of the ECHR and to explain how the principle of legality can allow a less favourable framework, especially with respect to the charges of arbitrary detention in non-international armed conflict and joint criminal enterprise.[66]

23. The SPO responds that there is no issue of retroactive application, as CIL applies as at the time of the alleged crimes.[67] According to the SPO, Article 12 of the Law leaves no ambiguity regarding the role of CIL at the Specialist Chambers and is in conformity with the Constitution of Kosovo, including its non-retroactivity

[61] Appeal, paras 9, 15. See also Reply, paras 12-13, 18.
[62] Appeal, paras 9, 15. See also Reply, paras 5, 22.
[63] Appeal, paras 4(ii), 10, 14; Reply, paras 9, 14, 20-23. See also Appeal, paras 3, 15.
[64] Appeal, paras 16-18; Reply, para. 24.
[65] Appeal, paras 12, 19. See also Reply, paras 19, 26.
[66] Appeal, paras 11-12; Reply, paras 9-13, 25.
[67] Response, para. 11.

principle, Article 7 of the ECHR and Article 15 of the ICCPR, as well as case law of the ECtHR.[68] According to the SPO, the Pre-Trial Judge's conclusion that the punishability of conduct amounting to crimes under CIL was accessible and foreseeable to the Accused is correct[69] and Shala's allegation that the Pre-Trial Judge's interpretation was "impermissibly teleological" is unsupported.[70] The SPO also submits that the Specialist Chambers do not function in accordance with the 1974 SFRY Constitution and decisions pursuant to UNMIK Regulation 1999/24 applying the 1974 SFRY Constitution have no bearing in the present case.[71] The SPO, finally, argues that the principle of *lex mitior* is not implicated, because the Specialist Chambers are bound to apply CIL, so that there are no sets of binding changed law for comparison purposes, and the relevant Defence arguments should be dismissed because they were only raised in the Preliminary Reply.[72]

(b) Assessment of the Court of Appeals Panel

24. The Panel recalls its finding that Article 12 of the Law does not violate the principle of legality under international human rights law and the Constitution of Kosovo.[73] In the Panel's view, Article 12 of the Law does not raise an issue of retroactivity, since, as the Pre-Trial Judge noted, the subject-matter jurisdiction of the Specialist Chambers is delineated by the CIL which applied at the time of the commission of the alleged crimes, prior to the promulgation of the Law.[74]

25. The Panel notes that Shala does not substantiate what he means by the characterisation of Article 7(2) of the ECHR as "obsolete."[75] The Panel understands

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[68] Response, paras 12, 20-24, 26-28. See also Response, para. 23.
[69] Response, para. 24. See also Response, para. 17.
[70] Response, para. 18.
[71] Response, paras 25-26.
[72] Response, fn. 18.
[73] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 37-40.
[74] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, para. 38, referring to Articles 12, 13(1) and 14(1) of the Law. See also Impugned Decision, para. 85.
[75] See Appeal, paras 12, 19.

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his argument to refer to the fact that this provision was introduced to ensure the validity of the judgments of the Nuremberg Tribunal.[76] In this regard, the Panel recalls that it 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 meant to emphasise the special nature of core international crimes, which were only recently reflected in domestic written legislation.[77] 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".[78] As noted, Article 12 of the Law does not constitute an exception to the principle of retroactivity which would require reference to Article 7(2) of the ECHR and Article 15(2) of the ICCPR to be justified.[79] Further, the Panel recalls that, pursuant to 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 of Kosovo, including the principle of legality, and therefore it finds no error in the Pre-Trial Judge's finding that Article 7 of the ECHR and Article 15 of the ICCPR apply in

[76] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, para. 38, referring to European Commission of Human Rights, Preparatory Work on Article 7 of the European Convention on Human Rights, 21 May 1957, pp. 4-5, 7, 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)); ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina*, nos. 2312/08 and 34179/08, Judgment, 18 July 2013 ("*Maktouf and Damjanović v. Bosnia and Herzegovina* 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.
[77] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, para. 39.
[78] The Extraordinary Chambers in the Courts of Cambodia ("ECCC") also included an exception for international crimes in their formulation of the principle of legality in national law. 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. 214.
[79] See also Kosovo, Supreme Court, *Kolasinac*, AP–KZ 139/2003, Judgment, 5 August 2004 ("Kosovo Supreme Court Judgment of 5 August 2004"), p. 33, fn. 72 (wherein the Supreme Court of Kosovo acknowledged that retroactivity in relation to superior responsiblity was not forbidden under Article 7 of the ECHR, despite the fact that this form of criminal liability was included in Kosovo domestic legislation after the events alleged to have occurred in 1998 and 1999).

their entirety to Article 12 of the Law.[80] In view of this, the Panel also finds that Pre-Trial Judge addressed the relevant arguments submitted by Shala and provided adequate reasoning for his finding.[81]

26. The Panel turns next to Shala's submission that, according to ECtHR case law, the incorporation of an international norm prescribing an offence into domestic law is an important consideration in assessing the compatibility of criminal proceedings with Article 7 of the ECHR.[82] In the Panel's view, Shala misrepresents the ECtHR judgments to which he refers.[83] Moreover, in the same judgments, the ECtHR held that it is well-accepted that the term "law" in Article 7(1) of the ECHR comprises both written and unwritten law,[84] therefore clearly accepting CIL as a source of penalisation. The Panel notes that Article 33(1) of the Constitution of Kosovo upholds the principle of legality, similarly to Article 7(1) of the ECHR, where the act constituting a criminal offense was foreseen under "law"[85] and explicitly provides that

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[80] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, para. 36, referring, *inter alia*, to *Maktouf and Damjanović v. Bosnia and Herzegovina* Judgment, para. 72 (where the ECtHR held that the two paragraphs of Article 7 of the ECHR are interlinked and are to be interpreted in a concordant manner). See Impugned Decision, para. 85.

[81] Contra Appeal, para. 19.

[82] See Appeal, para. 10, referring to ECtHR, *Korbely v. Hungary*, no. 9174/02, Judgment, 19 September 2008 ("*Korbely v. Hungary* Judgment"), paras 74-75; Reply, para. 22, referring to ECtHR, *Kononov v. Latvia*, no. 36376/04, Judgment, 17 May 2010 ("*Kononov v. Latvia* Judgment"), para. 214 (submitting that "the ECtHR requires compatibility with Article 7 to be assessed by examining whether there is 'a sufficiently clear and contemporary legal basis for the specific war crimes'").

[83] In the first judgment, the ECtHR simply considered whether the Geneva Conventions were accessible to the accused in light of the fact that their text was not incorporated in the domestic legislation proclaiming them and ultimately concluded that they were accessible. See *Korbely v. Hungary* Judgment, para. 75. In the second judgment, the ECtHR examined whether there was a sufficiently clear and contemporary legal basis for the specific war crimes and concluded that "there was a sufficiently clear legal basis, *having regard to the state of international law* in 1944". See *Kononov v. Latvia* Judgment, paras 214, 227 (emphasis added).

[84] *Kononov v. Latvia* Judgment, para. 185; *Korbely v. Hungary* Judgment, para. 70; ECtHR, *Šimšić v. Bosnia and Herzegovina*, no. 51552/10, Decision, 10 April 2012 ("*Šimšić v. Bosnia and Herzegovina* Decision"), para. 23. See also *Ieng Sary* Appeal Decision, para. 213 (wherein the Pre-Trial Chamber of the 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).

[85] See *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, para. 37; Article 53 of the Constitution of Kosovo. See also Reply, para. 20 (wherein Shala submits that Article 33 of the Constitution of Kosovo needs to be construed in line with Article 7 of the ECHR).

acts which constituted genocide, war crimes or crimes against humanity "according to international law" at the time of their commission are punishable.[86] The Panel considers 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.[87] The judgment of the Kosovo Supreme Court referred to by Shala in support of his argument that criminal offenses must be incorporated in domestic legislation at the time of their commission is, as the Panel found above, irrelevant for the Specialist Chambers, since it concerns a different constitutional framework.[88]

27. Shala argues further that the Pre-Trial Judge relied erroneously on a "sole authority" to support his interpretation that there is no violation of Article 7(1) of the ECHR in cases of conviction based on domestic legislation not in force at the relevant time, provided that it was based on conventional international law or CIL as applicable at the time.[89] The Panel notes that, contrary to Shala's arguments, the cited paragraph is not an "introductory paragraph that precedes the ECtHR's examination", but part of the Court's assessment which clearly did not exclude the possibility that a conviction for genocide in such case would not violate Article 7 of the ECHR if based upon international law as it stood at the relevant time.[90] In any event, these conclusions are consistent with additional ECtHR jurisprudence which found

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[86] Core international crimes being part of CIL, as opposed to general "international law", would in any event be binding. See *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 23, 37.

[87] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, para. 39.

[88] See above, para. 20. Contra Appeal, para. 15, referring to Impugned Decision, para. 83 citing Kosovo Supreme Court Judgment of 7 September 2004, p. 18.

[89] Appeal, para. 17, referring to Impugned Decision, para. 86 citing ECtHR, *Vasiliauskas v. Lithuania*, no. 35343/05, Judgment, 20 October 2015 ("*Vasiliauskas v. Lithuania* Judgment"), para. 166.

[90] *Vasiliauskas v. Lithuania* Judgment, para. 166. In this case, the ECtHR found that there were no legal provisions in force at the time of commission and that such provisions were therefore applied retroactively, but it did not characterise this as an exception to Article 7 of the ECtHR. Moreover, the reason that the ECtHR found that the applicant's conviction for genocide could not have been foreseen was because "it [was] not immediately obvious that the ordinary meaning of the terms "national" or "ethnic" in the Genocide Convention can be extended to cover partisans." See *Vasiliauskas v. Lithuania* Judgment, paras 179-186. Contra Appeal, para. 17. The Pre-Trial Judge also referred to a second case in support of his finding, as Shala himself acknowledges. See Appeal, para. 18, referring to Impugned Decision, para. 86, citing *Šimšić v. Bosnia and Herzegovina* Decision, paras 22-25. See also above, fn. 79.

no violation of Article 7 of the 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.[91] The Panel is not persuaded by Shala's attempt to differentiate the findings in some of these judgments from the present case.[92] The Panel also notes that the requirements of accessibility and foreseeability as part of the principle of legality are assessed on a case-by-case basis with respect to specific crimes and modes of liability.[93]

28. Moreover, the Panel considers that none of the cited judgments support Shala's argument that the ECtHR case law allows prosecution on the basis of international law, without domestic incorporation at the relevant time, only in respect of "flagrantly unlawful" conduct, the criminal nature of which is "evidently" accessible and foreseeable to the accused.[94] Instead of requiring "flagrantly unlawful" conduct to allow prosecution on the basis of international law, the ECtHR in these cases simply

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[91] 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); *Kononov v. Latvia* Judgment, paras 237-244. See also *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 24, 37, referring also to Article 33(1) of the Constitution of Kosovo; *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").

[92] See Reply, fn. 21, referring to *Kononov v. Latvia* Judgment, *Korbely v. Hungary* Judgment. In both cases, the ECtHR acknowledged that the recognition of an act as criminal in international law would suffice to satisfy the requirements of Article 7 of the ECHR.

[93] See below, section IV (B), (C).

[94] Appeal, para. 16; Reply, para. 24, referring to ECtHR, *Streletz, Kessler and Krenz v. Germany*, nos. 34044/96, 35532/97, 44801/98, Judgment, 22 March 2001 ("*Streletz et al. v. Germany* Judgment"), paras 85, 87; ECtHR, *K.H.W. v Germany*, no. 37201/97, Judgment, 22 March 2001 ("*K.H.W. v Germany* Judgment"), para. 75; ECtHR, *Polednová v. the Czech Republic*, no. 2615/10, Decision, 21 June 2011 ("*Polednová v. the Czech Republic* Judgment"); *Šimšić v. Bosnia and Herzegovina* Decision, paras 23, 24. See also Appeal, para. 18.

held that the "flagrantly unlawful" nature of the accused's conduct must have made its criminal nature foreseeable for the purposes of Article 7(1) of the ECHR.[95]

29. Regarding Shala's allegation that the Pre-Trial Judge's interpretation of the legal framework was "impermissibly teleological" and, as such, violated the fairness of criminal proceedings under Articles 6 and 7 of the ECHR,[96] the Panel considers that Shala does not explain how the alleged violation of Article 6 of the ECHR caused prejudice such that it amounts to an error of law invalidating the Impugned Decision.[97] In any event, the authorities cited by Shala do not support his arguments.[98]

30. The fact that the Specialist Chambers operate under the current Constitution applicable in Kosovo does not mean that the Pre-Trial Judge was obliged to engage in assessing which regime is more favourable. The Panel notes that the Pre-Trial Judge dismissed Shala's arguments in this regard *in limine* because they were raised for the

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[95] *Streletz et al. v. Germany* Judgment, paras 77-78, 87-89; *K.H.W. v Germany* Judgment, paras 75, 90-91; *Polednová v. the Czech Republic* Judgment, pp. 25-26; *Šimšić v. Bosnia and Herzegovina* Decision, paras 23-25.

[96] Appeal, para. 9, referring to ECtHR, *Gregačević v.Croatia*, no. 58331/09, Judgment, 10 October 2012 ("*Gregačević v.Croatia* Judgment"), para. 49; ECtHR, *Negulescu v. Romania*, no. 11230/12, Judgment, 31 May 2021 ("*Negulescu v. Romania* Judgment"), paras 39-42; ECtHR, *S.W. v. The United Kingdom*, no. 20166/92, Judgment, 22 November 1995 ("*S.W. v. The United Kingdom* Judgment"), para. 36; ECtHR, *G.I.E.M. S.R.L. a.o. v. Italy*, nos. 1828/06, 34163/07 and 19029/11, Judgment, 28 June 2018 ("*G.I.E.M. S.R.L. a.o. v. Italy* Judgment"), paras 251-261; ECtHR, *Jorgic v. Germany*, no. 74613/01, Judgment, 12 [October] 2007 ("*Jorgic v. Germany* Judgment"), paras 109-113. See also Appeal, paras 15, 25.

[97] See KSC-BC-2020-07, F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021, para. 44.

[98] See *Gregačević v.Croatia* Judgment, paras 29, 49 (wherein the ECtHR examined whether the accused had adequate time and facilities to prepare his defence in accordance with Article 6 of the ECHR with respect to the revocation of the suspension of his sentence); *Negulescu v. Romania* Judgment, paras 39-42 (finding that the procedural safeguards of Article 6 of the ECHR apply even with respect to acts considered as non-criminal in domestic law); *S.W. v. The United Kingdom* Judgment, para. 36 (finding that the gradual clarification of criminal laws is allowed under Article 7 of the ECHR if it is consistent with the essense of the offence and could be reasonably foreseen); *G.I.E.M. S.R.L. a.o. v. Italy* Judgment, paras 251-261 (finding that where all the elements of the offence of unlawful site development were made out and the proceedings were discontinued solely due to statutory limitation, those findings can be regarded, in substance, as a conviction for the purposes of Article 7 of the ECHR, and allow for confiscation measures to be applied in the absence of a formal conviction of the property's owner); *Jorgic v. Germany* Judgment, paras 109-113 (finding that even a broader definition of genocide than that supported by some authorities could be reasonably foreseeable to the accused). See also Response, fn. 38.

first time in reply.[99] The Panel agrees with the Pre-Trial Judge that, pursuant to Rule 76 of the Rules, a reply is only considered to the extent that it concerns issues arising out of the response.[100] Considering that the issue of *lex mitior* had not been raised by Shala in the Preliminary Motion, nor by the SPO in the Response to Preliminary Motion, the Panel finds that the Pre-Trial Judge did not err in dismissing *in limine* Shala's arguments in this regard.[101] In any event, the principle of *lex mitior* concerns a comparison between criminal laws,[102] and, as the Panel has previously held, concrete challenges to the applicable criminal law do not constitute jurisdictional challenges.[103] The Panel notes that, in light of this and considering that CIL is binding on all states, there was no obligation on the Pre-Trial Judge to compare the principles of legality between the two Constitutions.[104]

31. In light of the above, the Panel finds that Shala has failed to demonstrate that the Pre-Trial Judge erred in finding that the primacy of CIL recognised in the Law does not violate the principle of legality. The Court of Appeals Panel, accordingly, dismisses the remainder of Ground (i) and Ground (ii) of Shala's Appeal.

B. ALLEGED ERRORS REGARDING JOINT CRIMINAL ENTERPRISE (GROUND (III))

1. Submissions of the Parties

32. In his third ground of appeal, Shala submits that the Pre-Trial Judge erred in finding that liability under the first and third forms of JCE is included in Article 16(1)(a) of the Law.[105] Shala argues that the Law does not provide explicitly for liability

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[99] Impugned Decision, para. 81.
[100] Impugned Decision, para. 81.
[101] Contra Reply, fn. 11.
[102] See ICTY, *Prosecutor v. Nikolić*, IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005, para. 80; ECtHR, *Del Rio Prada v. Spain*, no. 42750/09, Judgment, 21 October 2013, para. 116; *Vasiliauskas v. Lithuania* Judgment, para. 154; ECtHR, *Kokkinakis v. Greece*, no. 14307/88, Judgment, 25 May 1993, para. 52.
[103] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 52-59.
[104] Contra Appeal, para. 11. See above, para. 20. See also *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, para. 25.
[105] Appeal, paras 4(iii), 20-22. See also Appeal, para. 25.

under JCE and that the Pre-Trial Judge erred in denying the controversial nature of JCE and its effect on the "quality of the applicable law" as well as on the compatibility of JCE with the requirements of foreseeability and accessibility.[106] According to Shala, the Pre-Trial Judge also erred in finding that JCE, particularly its third form, was firmly established in CIL at the material time, without considering the Defence submissions, decisions of the Kosovo Court of Appeals, the ECCC and the Supreme Court of the United Kingdom ("UK"), as well as academic opinions.[107] Further, Shala argues that the Pre-Trial Judge erred in finding that JCE III is compatible with the principle of individual culpability.[108]

33. The SPO responds that the Impugned Decision provides sufficient reasoning and expressly confirms that Article 16(1) of the Law must be interpreted within the context of the legal framework of the Specialist Chambers, with consideration of the context, object and purpose of the Law, and in accordance with the interpretation of JCE by international and internationalised courts.[109] The SPO further argues that JCE III, along with JCE I, was part of CIL during the temporal jurisdiction of the Specialist Chambers and is compatible with the principle of individual culpability.[110] According to the SPO, the Accused misrepresents the Impugned Decision and fails to demonstrate an error on the part of the Pre-Trial Judge with respect to his conclusion about the CIL status of JCE III.[111]

34. Shala replies that the SPO fails to address his arguments challenging the Pre-Trial Judge's interpretation and application of Article 16(1)(a) of the Law and simply repeats the Pre-Trial Judge's findings.[112] According to Shala, the lack of explicit inclusion of JCE in the Law despite the fact that it was enacted at a time when its

[106] Appeal, paras 20, 22. See also Reply, paras 29, 31.
[107] Appeal, paras 20-22.
[108] Appeal, para. 22.
[109] Response, paras 30-34. See also Response, para. 39.
[110] Response, paras 35-41.
[111] Response, paras 29, 35, 42.
[112] Reply, paras 27-29.

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drafters were aware of the controversial jurisprudence on JCE demonstrates their deliberate choice not to include it.[113] This interpretation is, in Shala's view, required by Article 7 of the ECHR and Articles 33 and 53 of the Constitution of Kosovo.[114]

2. Assessment of the Court of Appeals Panel

35. The Panel notes that Shala challenges the Pre-Trial Judge's finding that liability under the first and third forms of JCE is included in Article 16(1)(a) of the Law on the basis that the Pre-Trial Judge erroneously relied on CIL and denied the controversial nature of JCE, including its compatibility with the requirements of foreseeability and accessibility.[115] The Panel notes that the Pre-Trial Judge held that Article 16(1) of the Law must be interpreted in accordance with CIL as applicable at the time of the alleged crimes, because: (i) CIL has primacy over domestic legislation at the Specialist Chambers; (ii) Articles 13-14 of the Law, with which the Accused is charged, specifically refer to CIL; and (iii) the terminology of Article 16(1) of the Law is virtually identical to the corresponding provisions of the *ad hoc* tribunals.[116] The Panel agrees with this conclusion and recalls its previous finding that it is satisfied that the Law provides for JCE as a form of criminal liability.[117] In this regard, the Panel considers, *inter alia*, that it 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 and that JCE has been generally applied to the core crimes within the jurisdiction of these courts as a form of commission on the basis of CIL.[118]

36. The Panel will next examine Shala's submissions as to whether the Pre-Trial Judge erred in finding that JCE was part of CIL at the relevant time and that it was

[113] Reply, para. 29.
[114] Reply, para. 30.
[115] Appeal, para. 20, referring to Impugned Decision, para. 91.
[116] Impugned Decision, para. 91.
[117] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 136-138, 140.
[118] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 136-138. See also *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, para. 139 (finding that based on the ordinary meaning of Article 16(1)(a) of the Law as *lex specialis*, JCE is subsumed under the term "committed").

foreseeable and accessible to the Accused. The Panel notes that contrary to Shala's arguments, the Pre-Trial Judge did not take for granted that JCE was foreseeable and accessible to the Accused, but considered a number of factors, including the relevant legal framework developed after World War II, the fact that the first ICTY judgment to take note of JCE liability was issued in December 1998, and the fact that Articles 22 and 26 of the 1976 SFRY Criminal Code mirror the concept of common purpose liability.[119] The Panel recalls its finding, on the basis of *inter alia* the same considerations, that JCE, in its first and third forms, was accessible and foreseeable to other accused at the material time.[120] In the Panel's view, a decision of the UK Supreme Court in a case that concerns a domestic offense under a domestic form of accessory liability cannot alter this conclusion.[121]

37. As for the CIL status of JCE, the Panel recalls its earlier finding that JCE, in both its first and third forms, is a mode of liability under CIL, including at the time the alleged crimes were committed.[122] The Panel considers that Shala's submission that the Pre-Trial Judge declined to consider his arguments regarding the CIL status of JCE III because he is not charged with torture misrepresents the Impugned Decision.[123] In this regard, the Panel notes that the Pre-Trial Judge only declined to consider Shala's arguments in relation to jurisprudence of the Special Tribunal for Lebanon and the Special Court for Sierra Leone concerning the application of JCE III to specific intent crimes, because Shala is not charged with any specific intent crime.[124] Contrary to Shala's arguments, the Pre-Trial Judge considered his submissions that the jurisprudence of the ECCC and the UK Supreme Court, as well as academic opinions

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[119] See Impugned Decision, para. 95. Contra Appeal, paras 20, 22.
[120] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 211-214, 218-224.
[121] See Impugned Decision, para. 93. Contra Appeal, para. 20, referring to UK, Supreme Court, *Jogee v. The Queen* [2016] UKSC 8 and *Ruddock v. the Queen* [2016] UKPC 7, Judgment, 18 February 2016, para. 81.
[122] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 172, 196.
[123] Appeal, para. 21, referring to Impugned Decision, para. 93.
[124] See Impugned Decision, para. 93.

demonstrate that JCE III fails to meet the standards of Article 7 of the ECHR.[125] The Panel finds no error in the Pre-Trial Judge's assessment of these authorities.[126]

38. Further, the Panel notes that Shala does not substantiate his argument that the Pre-Trial Judge erred by considering as irrelevant the decisions of the Kosovo Court of Appeals on which Shala relied to support his argument that JCE was inapplicable.[127] In any event, the Panel does not find an error in the Pre-Trial Judge's conclusion that these decisions of the Kosovo Court of Appeals were issued under a different legal framework.[128] In addition, the Panel notes that the Kosovo Supreme Court has found on several occasions that all forms of JCE liability were "firmly established" under CIL.[129]

39. Concerning the compatibility of JCE III with the principle of individual culpability, the Panel notes that the Pre-Trial Judge held that this issue is not entirely jurisdictional in nature and that, in any event, Shala's arguments are without merit.[130]

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[125] See Impugned Decision, para. 93. Contra Appeal, para. 22.
[126] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 153, 187, 190-193 (regarding the deviation of the ECCC with respect to JCE III), 169 (regarding the role of academic writings in determining CIL). See above, para. 36 (regarding the role of the UK Supreme Court decision in determining the CIL status of JCE).
[127] Appeal, para. 21, referring to Impugned Decision, para. 90, referring to Preliminary Motion, para. 28 citing Kosovo, Court of Appeals, *J.D. et al.*, PAKR Nr 455/15, Judgment, 15 September 2016, p. 45; Kosovo, Basic Court of Mitrovicë/Mitrovica (EULEX), Case against XH. K, P 184/2015, Judgment, 8 August 2016 ("Basic Court Judgment of 8 August 2016"), paras 82-88; Kosovo, Court of Appeals (EULEX), Case against XH. K, PAKR 648/16, 22 June 2017 ("Kosovo Court of Appeal Judgment of 22 June 2017"), p. 10. The Panel observes that in the last cited judgment, the Kosovo Court of Appeals 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" and found 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 Appeal Judgment of 22 June 2017, p. 10, referring to Basic Court Judgment of 8 August 2016, paras 87-88, 138.
[128] See Impugned Decision, para. 90.
[129] See *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 193, 223, referring to 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 (second re-trial). See also Kosovo, Supreme Court, *E.K and S.B*., PAII 3/2014, Judgment, 7 August 2014, paras xIi-xIii; Kosovo, Supreme Court, *S.K. et al*., Ap.-Kz No 371/2008, Judgment, 10 April 2009, pp. 14-16, 63-64.
[130] See Impugned Decision, para. 94.

The Panel notes that Shala merely repeats on appeal arguments he previously made before the Pre-Trial Judge.[131] The Panel therefore finds that Shala fails to articulate any clear error committed by the Pre-Trial Judge when addressing these arguments and summarily dismisses them.[132]

40. In light of the above, the Court of Appeals Panel finds that Shala has failed to demonstrate that the Pre-Trial Judge erred in finding that JCE is included in Article 16(1) of the Law and, accordingly, dismisses Ground (iii) of Shala's Appeal.

C. ALLEGED ERRORS REGARDING SUBJECT-MATTER JURISDICTION OVER ARBITRARY DETENTION (GROUND (IV))

1. Submissions of the Parties

41. In his fourth ground of appeal, Shala submits that the Pre-Trial Judge erred in finding that arbitrary detention in non-international armed conflict was "correctly charged".[133] According to Shala, the Pre-Trial Judge's interpretation of Article 14(1)(c) of the Law in a non-exhaustive manner violates the principle of legal certainty and is "fundamentally flawed", and his conclusion that arbitrary detention was sufficiently foreseeable to Shala is "manifestly unreasonable".[134] Shala also submits that Pre-Trial Judge failed to provide adequate reasoning in dismissing his arguments in this respect.[135]

42. The SPO responds that the Accused's submissions should be dismissed for being "cursory and conclusory to a degree which is patently inadequate".[136] The SPO

[131] *Compare* Preliminary Motion, para. 24 *with* Appeal, para. 22.
[132] See e.g. KSC-BC-2020-06, 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; KSC-BC-2020-07, F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021, para. 15.
[133] Appeal, paras 4(iv), 23-25.
[134] Appeal, para. 23; Reply, paras 32-34.
[135] Appeal, para. 23.
[136] Response, para. 43.

further argues that these arguments also fail on the merits, as the Pre-Trial Judge correctly found that arbitrary detention is incompatible with the requirement of inhumane treatment and constitutes a serious violation of international humanitarian law, including Article 3 common to the four Geneva Conventions of 12 August 1949 ("Common Article 3").[137] According to the SPO, reading this crime into Article 14(1) of the Law does not implicate the principle of legal certainty, because the scope of the provision is still circumscribed to serious violations of Common Article 3 and to offenses that have existed under CIL at the time they are alleged to have been committed.[138] The SPO, finally, contends that the existence of a CIL rule criminalising arbitrary detention was accessible and foreseeable for the Accused.[139]

43. Shala replies that the SPO fails to justify the Pre-Trial Judge's departure from binding precedent of the Kosovo Supreme Court that quashed charges for arbitrary detention in non-international armed conflict and fails to consider that, at the material time, this crime was neither criminalised nor considered a violation of Common Article 3.[140]

2. Assessment of the Court of Appeals Panel

44. The Panel agrees with the Pre-Trial Judge that the formulation "including any of the following acts" in Article 14(1)(c) of the Law 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.[141] Considering that for an act to be included in the Law, and thus within the jurisdiction of the Specialist Chambers, it must have existed under CIL during their temporal jurisdiction and must constitute a serious violation of Common Article 3, the Panel finds that the non-exhaustive

[137] Response, paras 43-47, 49, 52.
[138] Response, paras 44, 49.
[139] Response, paras 48, 50-51.
[140] Reply, paras 32-34.
[141] Impugned Decision, para. 98. See also Confirmation Decision, para. 23. See *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, para. 87.

language of the Law does not violate the principle of legal certainty. The Panel notes that Shala does not substantiate his argument that the Pre-Trial Judge's interpretation of Article 14(1)(c) of the Law might be otherwise flawed.

45. The Panel notes that the Pre-Trial Judge found that arbitrary detention amounts to a serious violation of Common Article 3 and that this is firmly rooted in the terms of Common Article 3, which forms part of CIL.[142] In this regard, the Panel recalls that detention becomes arbitrary and constitutes a serious violation of Common Article 3 when the principle of humane treatment is violated, irrespective of whether there is a legal basis to detain.[143]

46. Moreover, the Panel notes that the Pre-Trial Judge: (i) independently confirmed the existence of a rule of CIL criminalising arbitrary detention in non-international armed conflict at the material time;[144] and (ii) considered that in light of the CIL status of arbitrary detention, the criminalisation of arbitrary deprivation of liberty in the former Yugoslavia and the condemnation of such conduct by the United Nations ("UN") in relation to the conflicts in the former Yugoslavia, it was accessible and foreseeable to the Accused at the relevant time that involvement in acts of arbitrary detention might give rise to individual criminal responsibility.[145] The Panel recalls its agreement with these conclusions.[146] The Panel, therefore, finds that charges of arbitrary detention in non-international armed conflict in this case do not violate the principle of legality. Further, the Panel finds that Shala has not substantiated his arguments that the Pre-Trial Judge's conclusion that arbitrary detention in a non-

[142] Impugned Decision, para. 100.
[143] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 95-97.
[144] Impugned Decision, para. 101.
[145] Impugned Decision, para. 102.
[146] *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras 106-109, 111 (finding, *inter alia*, that: arbitrary detention in a non-international armed conflict existed as a war crime in CIL during the temporal jurisdiction of the Specialist Chambers; the 1976 SFRY Criminal Code provided at the time for the express criminalisation of illegal arrest as a war crime without distinguishing between non-international and international armed conflicts; and relevant UN resolutions confirm that such violation could trigger consequences in terms of criminal responsibility).

international armed conflict was sufficiently foreseeable to the Accused at the material time was "manifestly unreasonable" in a manner that would persuade the Panel to depart from these conclusions.[147] The Panel is similarly unable to identify any argument raised by Shala that the Pre-Trial Judge did not address and therefore finds that the Pre-Trial Judge provided adequate reasoning in this respect.[148]

47. In light of the above, the Court of Appeals Panel finds that Shala has failed to demonstrate that the Pre-Trial Judge erred in finding that the Specialist Chambers have jurisdiction over arbitrary detention as a war crime committed in non-international armed conflict pursuant to Article 14(1)(c) of the Law and, accordingly, dismisses Ground (iv) of Shala's Appeal.

[147] See Appeal, para. 23; Reply, para. 33. See also Reply, para. 32, referring to Kosovo Supreme Court Judgment of 21 July 2005, p. 12. See above, para. 20 (where the Panel has found that this, along with other judgments pursuant to UNMIK Regulation 1999/24, is irrelevant for the Specialist Chambers, as it concerns a different constitutional framework). Moreover, 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. See *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, para. 107, referring to 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).

[148] See Appeal, para. 23. A judge must, at a minimum, provide reasoning in support of findings on the substantive considerations relevant for a decision. See *Thaçi et al.* Appeal Decision on Jurisdictional Challenges, para. 154, referring to 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.

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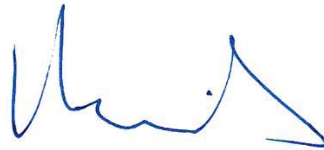
V. DISPOSITION

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

DENIES the Appeal.



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Judge Michèle Picard,

Presiding Judge

Dated this Friday, 11 February 2022

At The Hague, the Netherlands