In:	**KSC-CC-2022-14**
	Referral by Kadri Veseli to the Constitutional Court Panel concerning Decision of the Appeals Panel on Challenges to the Jurisdiction of the Specialist Chambers.
Before:	**President of the Kosovo Specialist Chambers**
	Judge Ekaterina Trendafilova
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Kadri Veseli
Date:	**28 February 2022**
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Constitutional Referral by Kadri Veseli Against
"Decision on Appeals Against 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers'"

Applicant

Kadri Veseli

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I. INTRODUCTION

1. Pursuant to Article 113(7) of the Constitution of the Republic of Kosovo ("Constitution"), Article 49(3) of Law No.05/L-053 ("KSC Law"), and Rules 4(c), 20 and 29 of the Rules of Procedure for the Specialist Chamber of the Constitutional Court, ("SCCC Rules"), Mr Kadri Veseli (the "Accused") lodges this Referral, through his Defence Counsel ("Defence"), against the "Decision on Appeals Against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers'".[1]

II. SUMMARY

2. The present referral is based on a simple, uncontroversial proposition. The Accused should be tried according to the law which was in force at the time of the impugned conduct.

3. He is protected from the retroactive application of less favourable provisions of criminal law by his rights under the Constitution of Kosovo (the "Constitution") and international human rights law ("IHRL"). He is further protected, under the same legal regime, from unequal treatment before the law and discrimination in the enjoyment of his fundamental rights.

4. Mr Veseli's counterparts - whether in Kosovo and subject to the jurisdiction of the ordinary courts, Serbia or another successor State to the Federal Republic of Yugoslavia - rightly enjoy these, basic rights.

5. Nevertheless, Mr Veseli now stands accused on the basis of legislation which came into force in 2015. To his detriment, this law purports to give direct effect

[1] IA009/F00030, Decision on Appeals Against 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers', 23 December 2021, ("Impugned Decision").

to crimes under customary international law ("CIL") which have no counterpart in the domestic law in force at the relevant time.

6. The Defence has consistently maintained that, insofar as this law sanctions such direct application of CIL, it and the actions of the KSC are incompatible with the Constitution. These arguments have been ignored or misunderstood by the Pre-Trial Judge and now the Court of Appeals Panel (the "Appeals Panel"). The Defence now refers the appropriate issues to the SCCC and seeks relief to restore and protect the Constitutional rights of the Accused.

7. In this connection, the Defence seeks relief in relation to the following grounds:

a. Ground 1 - The direct application of CIL as a basis to prosecute the Accused is contrary to the Accused's rights pursuant to Article 19 of the Constitution; further or in the alternative

b. Ground 2 – The direct application of CIL as a basis to prosecute the Accused is contrary to the prohibition on retroactive application of the criminal law under Article 33(1) of the Constitution, Article 7 ECHR and Article 15 ICCPR; further

c. Ground 3 - The direct application of CIL as a basis to prosecute the Accused is contrary to the prohibition on discrimination and equality before the law under Article 24 of the Constitution, Article 26 of the ICCPR and Article 14 ECHR (combined with Article 7); further or in the alternative

d. Ground 4 - The prosecution of the Accused on the basis of JCE and / or arbitrary detention, in circumstances where neither is expressly set out in the law, is contrary to Articles 33 and 55 of the Constitution; and further or in the alternative

e. Ground 5 - Violation of the *nullum crimen sine lege* principle under Article 33 of the Constitution and Article 7 ECHR/ Article 14 ICCPR (JCE III, unlawful detention, as well as enforced disappearance were not crimes under CIL during 1998).

III. PROCEDURAL BACKGROUND

8. On 27 August 2021, the Veseli Defence appealed the Pre-Trial Judge's decision rejecting its challenges to the jurisdiction of the Specialist Chambers.[2] This appeal was rejected by the Appeals Panel on 23 December 2021.[3]

IV. JURISDICTION

9. Pursuant to Article 162(3) of the Constitution and Articles 3(1) and 49 of the KSC Law, the Specialist Chamber of the Constitutional Court ("Constitutional Chamber" or "SCCC") […] shall exclusively decide any constitutional referrals under Article 113(7) of the Constitution relating to the Specialist Chambers and Specialist Prosecutor's Office.

10. This constitutional referral is lodged against a decision issued by a KSC Court of Appeals Panel. The Constitutional Chamber therefore has jurisdiction to decide the matter.

V. ADMISSIBILITY

11. Pursuant to Article 113(7) of the Constitution, as well as Articles 49(3) of the KSC Law, and Rule 20 of the SCCC Rules, an accused alleging a violation by the KSC of his individual rights and freedoms as guaranteed by the Constitution may lodge a referral before the Constitutional Chamber if:

    a. all effective remedies provided by law against the alleged violation have been exhausted; and

    b. the referral is filed within two (2) months from the date of the notification of the final ruling concerning the alleged violation.

[2] IA009/F00010, Veseli Defence Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 27 August 2021 ("Appeal").
[3] Impugned Decision.

12. Article 48(6) of the KSC Law provides, *inter alia*, that "during criminal proceedings which have not been completed in final form, a request for protection of legality may only be filed against final decisions ordering or extending detention on remand."

13. The Referral is admissible considering that: (i) Mr Veseli stands accused in criminal proceedings before the KSC; (ii) it concerns individual rights and freedoms guaranteed by the Constitution, the continued violation of which may seriously compromise the fairness of the trial;[4] (iii) the KSC Law provides no effective remedy against the Impugned Decision; and (iv) said decision was notified to Mr Veseli on 23 December 2021.

VI. SUBMISSIONS

A. Ground 1 - The direct application of CIL as a basis to prosecute the Accused is contrary to the Accused's rights pursuant to Article 19 of the Constitution

14. Article 16 of the Constitution renders invalid any provision of domestic law, including the KSC Law, which is incompatible with the Constitution. As confirmed by the Kosovo Constitutional Court:

> The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution.
>
> [W]hen a matter is prescribed by the Constitution, it cannot be amended, undermined, or transformed through an act with the lower legal power as the law. Based on the supremacy of the constitutional norm, […] all other legal acts should be in compliance with it.[5]

15. The question of whether CIL has direct effect is primarily governed by Article 19 of the Constitution[6] "Applicability of International Law". This provides that:

[4] KSC-CC-2019-05/F00012, Decision on the referral of Mahir Hasani concerning Prosecution Order of 20 December 2018, 20 February 2019, paras 39-40.
[5] Constitutional Court, Case No. KO 43/19, Judgment, 27 June 2019, para. 69.
[6] *See* Constitution of the Republic of Kosovo, June 2008 ("Constitution").While Article 19 is contained in Chapter I of the Constitution, not Chapter II which governs fundamental rights and freedoms, it

> 1. International agreements ratified by the Republic of Kosovo become part of the internal legal system after their publication in the Official Gazette of the Republic of Kosovo. They are directly applied **except for cases when they are not self-applicable and the application requires the promulgation of a law.**
>
> 2. Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo.

16. Article 22 provides a specific list of international human rights treaties which are made directly applicable and given primacy over provisions of laws and other acts of public institutions.

17. On the basis of a straightforward reading of the text of these provisions, the Defence has submitted that the Constitution limits the direct effect of international law to:[7]

    a. international norms of a self-executing nature, which in turn requires that their content is sufficiently specific and creates rights for an individual; and

    b. specific, named IHRL treaties.

18. Where a conflict of norms exists between a provision of municipal law (other than the Constitution, which has primacy under Article 16) and a provision under international law (*i.e.* under a ratified international agreement or pursuant to another legally binding norm of international law), such conflict is to be determined in accordance with international law. However, the operation of this rule always remains subject to the overriding requirement that the prevailing norm is compatible with guarantees under IHRL (Article 22 of the Constitution). Further, pursuant to Article 33(1), a penal offence may be established only by "law of the Assembly".[8]

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evidently engages individual rights by virtue of clause on exceptions to direct application in Article 19(1), among which is the penal law, *see* Article 33(1).

[7] F00223, Preliminary motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC, 15 March 2021, ("Motion") para. 43; Appeal, para. 20.

[8] Constitutional Court, Judgment in Case No. KO54/20, 6 April 2020, para. 191. Whether that 'law' may be applied retroactively pursuant to Article 33(1) of the Constitution is a separate issue which concerns the application in time of 'domestic laws'.

19. By expressly restricting the direct effect of international law to specific provisions of international agreements in certain, specified circumstances, Article 19(1) excludes the possibility of crimes under CIL, being directly applied. The Constitution is entirely unambiguous on this point; the direct application of any norm of international law which does not meet the requirements under Article 19(1) or fall within one of the treaties listed in Article 22 is prohibited.

20. There are two exceptions to the Constitutional prohibition on the direct effect of CIL which are recognised by the Kosovo courts:[9]

    a. where a crime under CIL satisfies the "duality test", *i.e.* where it corresponds with a crime under the domestic criminal law in force at the time of the relevant conduct; and

    b. where a crime under CIL is more lenient to the accused.

21. Such constitutional limitations exist in order to guarantee the individual rights and freedoms guaranteed by the Constitution. By requiring codification, they offer legal certainty and provide safeguards against arbitrariness. In no area are such rights and freedoms more important than criminal law, in circumstances where a person's liberty is at issue.

22. Article 19(2) does not provide the executive with a licence to give direct effect to a purported norm of CIL; nor does it give licence to the legislature to adopt legislation which purports to provide direct effect to CIL. This would circumvent the strict rules on direct application of international law set out in Articles 19(1) and 22. Furthermore, even if such direct application were permissible under Article 19(1), to be compatible with the Constitution, it

[9] Supreme Court of Kosovo, *Prosecutor v. Besovic* Case no. AP-KZNO.80/2004, Verdict, 7 September 2004, pp. 18-19; Supreme Court of Kosovo, *Prosecutor v. Vuckovic* Case no. AP –Kz. No. 186/03, Decision, 15 July 2004, pp. 23-24; Supreme Court of Kosovo, *Prosecutor v. Kolasinac*, Case no. AP–KZ230/2003, Decision, 5 August 2004, p. 44.

would need to be in conformity with the human rights of the accused, including the prohibition on retroactivity (Article 22). For the reasons set out below in Ground 2, this condition is not satisfied here.

23. The KSC Law constitutes a subordinate "law or other legal act" for the purposes of Article 16(1) of the Constitution. Accordingly, its terms must be interpreted in accordance with the Constitution. If this is not possible, they are rendered invalid and must be struck out.

24. Accordingly, the Defence submits that the provisions of the KSC Law which purport to give direct effect to CIL (namely Articles 3(2)(d), 3(3), 12, 13, 14 and 16(1)) are irreconcilable with Article 19(1) of the Constitution and should be struck out.

25. The Appeals Panel considered these arguments at paragraphs 23 – 24 of the Impugned Decision which provide, in material part, that:

> […]CIL is binding on all states. 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". Further, in light of the above, 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.

26. The Defence makes the following points in response:

27. First, the reference to Article 19(1) at the end of paragraph 23 of the Impugned Decision makes no sense. Article 19(1) expressly sets out the specific subset of international agreements which are exclusively capable of direct effect. Self-evidently, this does not include CIL. It is therefore difficult to follow the line of reasoning that 19(1) adheres to the principle that CIL is binding on all States.

28. It is possible that this reference to Article 19(1) is a typographical error and that the reference should be to Article 19(2). Indeed, this would make more sense as the words "legally binding norms of international law" in 19(2) can logically be read to mean CIL. Further, this is the provision on which the SPO founds its arguments on the direct application of CIL. However, even assuming this to be the case, the Impugned Decision fails to address the Defence's central contention on this constitutional issue. The Defence does not necessarily contend that there is a contradiction between the language of the KSC Law and Article 19(2); rather it contends that direct effect is prohibited under Article 19(1) and that nothing in Article 19(2) affects this (see paragraph 18 to 22 above). These submissions remain unaddressed and the Defence respectfully requests that they are given due consideration by the SCCC.

29. Second, and in any event, it is axiomatic that binding norms of CIL are binding on all States. However, it does not necessarily follow that, when a criminal offence acquires customary status, a State immediately has a corresponding, binding obligation under international law to criminalise that offence or, absent a provision of domestic law conferring jurisdiction over that offence, to prosecute it.[10] Moreover, none of the authorities cited by the Appeals Panel at footnotes 61 or 62 of the Impugned Judgment support such a contention. In the absence of such an obligation, there is no conflict of norms or inconsistency between Kosovo's international obligations and its domestic law such as to activate the hierarchy of norms provision under Article 19(2) of the

[10] Insofar as the Constitutional Chamber considers ICRC Rule 158 relevant, the Defence notes the commentary to that Rule, in particular: "*State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.* ***This rule, read together with Rule 157, means that States must exercise the criminal jurisdiction which their national legislation confers upon their courts****, be it limited to territorial and personal jurisdiction, or include universal jurisdiction, which is obligatory for grave breaches."* It further notes that Grave Breaches of the Geneva Conventions were criminalized under the 1976 SFRY Criminal Code.

Constitution. Accordingly, the domestic law continues to apply, unaffected by CIL.

30. Third, regardless, none of the authorities cited at footnotes 64 and 65 support the conclusion that the Constitution of Kosovo does not require a corresponding provision under domestic law applicable at the time of the alleged crimes. The Defence has previously noted that reliance on the ECCC is misplaced,[11] considering that such court is an international, treaty-based court, which operates 'separately from the Cambodian court structure".[12] As for the ECtHR cases cited at footnote 65, in all those cases the accused were tried on the basis of **domestic law** applied retroactively.[13]

31. In light of the foregoing, the Defence requests the following relief:

a. A declaration that, pursuant to Article 19 of the Constitution, the direct application of CIL to criminalise conduct is prohibited save insofar as either: there is a corresponding criminal offence and mode of liability under duly promulgated domestic law in force at the time of the relevant act or omission; or an offence or mode of liability under CIL is beneficial to the accused; and

b. A declaration pursuant to Rule 29(1) of the SCCC Rules that, insofar as Articles 3(2)(d), 3(3), 12, 13, 14 and 16(1) of the KSC Law purport to give direct effect to CIL to criminalise conduct which was not so criminalised under the domestic law applicable at the time, these provisions are unconstitutional and therefore invalid.

[11] F00311, Veseli Defence CIL Reply, 17 May 2021, paras 16(d)(e), 26-27.
[12] ECCC, Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, para. 131.
[13] ECHR, *Penart v. Estonia*, no. 14685/04, Decision, 24 January 2006, p. 1 ('Article 61-1 § 1 of the Criminal Code (*Kriminaalkoodeks*)'); ECHR, *Šimšić v. Bosnia and Herzegovina*, no. 51552/10, Decision, 10 April 2012, para. 6 ('2003 Criminal Code'); ECHR. *Kononov v. Latvia*, no. 36376/04, Judgment, 17 May 2010, para. 38 ('1961 Criminal Code').

B. Ground 2 – The Direct Application of CIL as a Basis to Prosecute the Accused is Contrary to the Prohibition on Retroactive Application of the Criminal Law Under Article 33(1) of the Constitution, Article 7 ECHR and Article 15 ICCPR

32. Article 33(1) of the Constitution provides that:

> No 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.

33. Article 33(1) reflects, and provides materially the same protection to individuals as the prohibition on retroactive application of the criminal law under Article 7 of the European Convention on Human Rights ("ECHR"). Similarly, the exception to the prohibition for acts which constituted genocide, war crimes, or crimes against humanity under Article 33(1) of the Constitution reflects a substantially similar exception provided under Article 7(2) of the ECHR. Article 15 of the ICCPR also provides a substantially similar prohibition and exception.

34. Pursuant to Article 55 of the Constitution, fundamental rights and freedoms guaranteed by the law, such as the prohibition on retroactive application of the criminal law under Article 33(1), may only be limited: by law (55(1)); and, to the extent necessary (55(2)). Under Article 55(4), any such limitation by a public authority "shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved […]".

35. Pursuant to Article 22, Article 33(1) of the Constitution should be read in accordance with Article 7 ECHR and, to the extent that there is a conflict to the detriment of an accused, Article 7 shall have precedence.

36. Furthermore, pursuant to Article 53 of the Constitution, the prohibition on retroactivity under Article 33(1) "shall be interpreted consistent with court Decisions of the European Court of Human Rights". In this connection, the Defence recalls three important principles from the ECtHR's jurisprudence on Article 7:

a. The essence of the right protected under Article 7 ECHR is to protect the individual from arbitrary prosecution, conviction and punishment by the State.[14] This must guide the interpretation of Article 7 and, according to ordinary rules of interpretation under IHRL (and, for present purposes, Article 55(4) of the Constitution specifically), any limitation to the prohibition against retroactivity should be construed narrowly.

b. The exception to the prohibition on retroactivity provided in Article 7(2) is, in accordance with settled jurisprudence of the ECtHR,[15] defunct. Article 7(2) provides a contextual clarification of the prohibition on retroactive application, included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of crimes committed during the war. It does not provide for a freestanding limitation on the prohibition under Article 7(1).

c. Properly construed in light of the jurisprudence of the ECHR, Article 7(1) ECHR is permissive.[16] It neither obliges a State to accept the direct effect of CIL in its internal legal order, nor does it operate as a substitute for constitutional rules that regulate the relationship between domestic and international law by requiring that crimes be established by domestic law.

37. These principles must, by operation of Articles 22, 53 and 55 of the Convention, inform the interpretation of Article 33 of the Constitution. It is on this basis that the issue of retroactivity in the present case must be determined.

[14] *See* ECHR, *S.W. v the United Kingdom*, no. 20166/92, Judgment, 22 November 1995, para 34.
[15] *Maktouf and Damjanović v. Bosnia and Herzegovina,* GC, nos. 2312/08 and 34179/08, Judgment, 13 July 2013, para. 72.
[16] *See* ECHR, *Šimšić v. Bosnia and Herzegovina,* no. 51552/10, Decision, 10 April 2012; *Damjanovic v. BiH* and discussion thereof in Motion paras 79 and 80.

38. Mr Veseli is accused of certain acts and omissions which allegedly took place in 1998 on the territory of the then-Federal Republic of Yugoslavia ("FRY"). At that time, all people within the jurisdiction of the FRY were subject to one criminal law, as set out in the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia (the "1976 SFRY Code"). As appears to be common ground between the parties, this law did not establish criminal liability for many of the substantive offences or modes of participation charged in the indictment (namely crimes against humanity, the war crime of arbitrary detention or joint criminal enterprise).[17]

39. A person accused of a criminal offence taking place on the territory of the FRY in 1998 benefitted from certain safeguards under the constitution in force at the time, the 1974 SFRY Constitution. Like the Constitution of Kosovo, the 1974 SFRY Constitution expressly prohibited the direct application of CIL to establish a criminal offence.[18]

40. This was the law in force at the time of the impugned conduct. This is the law which the Serbian Constitutional Court and Appellate Court of Montenegro has held must apply to prosecutions for the same conduct, taking place on the same territory, at the same time.[19] Moreover, this is the law which continues to be applied in other Kosovar domestic courts.[20] Taking this into account, the Defence submits this is the law which must, consistent with the prohibition against retroactivity under Article 33(1) of the Constitution, Article 7 ECHR and Article 15 ICCPR, (not to mention the constitutional protection of equality

[17] *See* Motion paras 9 – 13 and references to the 1976 SFRY Criminal Code therein.
[18] Articles 181 and 208; *See* Motion, para. 7.
[19] Constitutional Court of Serbia, Case no Uz-11470/2017; Appellate Court of Montenegro, case Kž-S 1/2012, Judgment, 22 March 2012 ("*Bukovica* case"), *see* also Appeal, paras 39 to 41; IA009/F00026, Veseli Defence Reply to SPO Response (KSC-BC-2020 06/IA009/F00020), 18 October 2021, para. 11.
[20] Humanitarian Law Center Kosovo, An overview of war crime trials in Kosovo 1999-2018 (English version starting from p. 280).

against the law and non-discrimination, as set out further under Ground 3, below), apply to the accused.

41. Nevertheless, the prosecution proceeds, to the detriment of the accused, on the basis of CIL, with the endorsement of the Pre-Trial Judge and the Appeals Panel.

42. In the Impugned Decision, the Appeals Panel makes two principal findings, each of which is addressed in turn.

43. First, it holds that:

> 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. 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.[21]

44. In this connection, the Defence submits that:

a. It is correct that Articles 7 ECHR and 15 ICCPR must be read in their entirety. However, as set out above (paragraph36.a), the essence of these provisions is to protect the individual against arbitrary prosecution by the State; it is not to facilitate prosecutions of international crimes. When read together, and in light of the overall object and purpose of the Conventions, it is clear that the prohibition against retroactivity should be construed broadly and the exception (insofar as it exists at all) relating to crimes under international law should be construed narrowly, in favour of the rights holder and not the State. This is not the approach taken by the Appeals Panel.

b. The only approach which, the Defence submits, is compatible with Article 33 of the Constitution and the corresponding provisions under the ECHR and ICCPR is to apply the body of law which was in force at the time, which, is the 1976 SFRY Criminal Code.

[21] Impugned Decision, para. 36.

c. In any event, to the extent that there is any doubt as to which body of law should apply, such doubt must be resolved in favour of the accused in accordance with the principle in *dubio pro reo*.[22]

45. Second, the Appeals Panel held that:

> It is well-accepted that the term "law" in Article 7(1) of the ECHR comprises both written and unwritten law. 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. Veseli and Selimi argue that this does not prevent states from adopting a stricter standard, 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.[23]

46. In this connection, the Defence submits that:

a. The word "*ligj*" used in Article 33(1) of the, authoritative Albanian[24] (as well as in Serbian)[25] version of the Constitution has a specific meaning which is not in conformity with the broad definition adopted by the Appeals Panel. "*Ligj*" is properly translated as "statute" and refers exclusively to a legislative act of the assembly, pursuant to Article 65(1) of the Constitution. This has been confirmed by the Constitutional Court in the context of the use of the same word in Article 55 of the Constitution:

> The Court emphasizes that the word "law" used in the first paragraph of Article 55 of the Constitution, means a law issued by the Assembly, according to the relevant legislative procedures. First, it means that no limitation of freedoms and rights can be made unless such limitation is "prescribed by law" of the Assembly. Second, this means that the authorities called upon to implement a law of the Assembly where limitations are envisaged may apply the limitations only to the extent that it is "prescribed by law" of the Assembly. This consequently represents the first and essential requirement which must be met in order to determine whether a "limitation" of fundamental rights and freedoms is constitutional or not.[26]

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[22] *See*, STL, Interlocutory Decision on the Applicable, Law, 16 February 2011, para. 263.
[23] Impugned Decision, para. 37; *See* also, footnote 103.
[24] Constitution, Article 5(1).
[25] *See*, difference between the terms law ("*zakonom*") and international law ("*međunarodnog prava*"). "Prava" is translated, similarly to Albanian as "right", or body of law encompassing legal norms.
[26] Constitutional Court, Judgment in Case No. KO54/20, 6 April 2020, para. 191.

b. There is no reason to differentiate between the use of the term "*ligj*" in Article 55 from its use in Article 33 of the Constitution. On this basis, Article 33(1) contains a clear, textual prohibition on the direct application of unwritten, CIL as a basis to prosecute conduct, unless there was a corresponding provision of domestic law in force at the relevant time.

c. Further, whether it is a stricter standard of protection than offered by the ECHR or not, the Constitution requires (as set out above in relation to Ground 1) that a criminal offence derived from international law must be written in corresponding domestic legislation. The constitutional rights of the accused in this respect cannot be undermined or circumvented on the basis of Article 7; it is a provision which exists to protect people in the position of the Accused from the State. The approach of the Appeals Panel effectively turns this protection on its head and uses it as a justification for imposing on the Accused a body of criminal law which works to his detriment. This is a perverse and illogical approach which is impermissible under the Constitution and IHRL.

d. Moreover, (as set out above at paragraph 36.b) the exception from the prohibition on retroactivity for crimes under international law in Article 33(1) must be read in concordance with the jurisprudence of the ECtHR on Article 7(2) ECHR which has found that this exception is defunct (proposition with which the Appeals Panel appears to agree).[27] The consequence is, pursuant to Articles 22 and 55, that the exception to the prohibition under Article 33(1) is rendered unconstitutional and is of no effect.

47. Finally, even if the Defence is wrong and the exception to retroactivity under Article 33(1) can somehow be interpreted as to apply in the present case, this would still be limited to crimes established by domestic law, *i.e.* crimes against humanity or command responsibility charged pursuant to the 2003 Provisional Criminal Code or the 2012 Criminal Code (war crimes and genocide were already criminalised during 1998-2000).

[27] Impugned Decision, para. 38.

48. In light of the foregoing, the Defence requests the following relief:

a. A declaration that, pursuant to Article 33(1) of the Constitution, read in conformity with Article 22 of the Constitution, Article 7 ECHR, and Article 15 ICCPR, the Accused is entitled to be prosecuted on the basis of the 1976 SFRY Criminal Code (or, alternatively subsequent domestic criminal legislation); and, further that his prosecution on the basis of criminal offences and/or modes of liability derived solely from CIL is a violation of his rights under the same Articles; and

b. A declaration pursuant to Rule 29(1) of the SCCC Rules that, insofar as Articles 3(2)(d), 3(3), 12, 13 ,14 and 16(1) of the KSC Law purport to give direct effect to CIL to criminalise conduct which was not so criminalised under the domestic law applicable at the time, these provisions are unconstitutional and therefore invalid.

C. Ground 3 - The Direct Application of CIL as a Basis to Prosecute the Accused is Contrary to the Prohibition on Discrimination and Equality Before the Law Under Article 24 of the Constitution, Article 26 of the ICCPR and Article 14 ECHR (Combined with Article 7)

Vis-a-vis Serbian counterparts

49. Article 24 of the Constitution provides, in material part, that:

> (1) All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.
>
> (2) No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.

50. It mirrors and, pursuant to Article 22 of the Constitution, must be read in conformity with the principle of equality before the law without discrimination under Article 26 ICCPR and the prohibition of discrimination under Article 14 ECHR.

51. The Defence recalls that other participants in the same conflict, accused of the same conduct, on the same territory, at the same time are afforded the

protection of the prohibition against retroactivity (under Article 33(1) of the Constitution and/or Articles 7 ECHR and 15 ICCPR) and prosecuted only for crimes under the domestic law which was in force at the relevant time.[28] To deny the Accused of the same protection is a violation of Article 24 of the Constitution and the corresponding provisions of international human rights law. This is particularly egregious given that the Accused and his co-accused, indeed every single person ever indicted by the KSC, all belong to a single ethnic group.

52. The Defence has set out its arguments on discrimination and equality before the law at length in previous submissions.[29] In particular, in the Appeal, it set out the significance of the fact that Kosovo and Serbia emerged from the fragmentation of a single State and the continuing obligations to which Kosovo is bound. In summary, it is the Defence's position that:

a. At the relevant time, there was one federal State, the FRY, and its citizens were subject to the same criminal law and protected by the same rights and safeguards under the SFRY Constitution and applicable IHRL.

b. These rights and safeguards belonged to the people who were subject to the jurisdiction of the FRY in 1998, irrespective of their ethnicity, place of residence or the nationality they acquired subsequent to the break-up of the FRY.[30]

c. These rights and the corresponding obligations devolve with the territory meaning that Successor States automatically succeed to their predecessor's obligations and rightsholders enjoy the continued protection of their accrued rights. This imposes both prospective and retrospective

[28] Constitutional Court of Serbia, case no Uz-11470/2017; *Bukovica* case.
[29] *See* in particular the Veseli CIL Reply paras 3 – 15; Response to Sur-Reply paras 2 – 12; and Appeal paras 42 to 57.
[30] *See* UNHRC, CCPR/C/21/Rev.1/Add.8/Rev.1, General Comment 26 on Continuity of Obligations, para. 4.

obligations, meaning that the State must take steps to respect and ensure the accrued rights of people within its jurisdiction.[31]

d. Accordingly, both Serbia, as successor State to the FRY, and Kosovo as successor State to Serbia, inherited the obligations to respect and ensure to all individuals within their territory and subject to their jurisdiction the accrued rights to equality before the law, non-discrimination and non-retroactivity. Materially the same rights are protected under the 1976 SFRY Constitution and the Constitution of Kosovo. Accordingly there is a continuity of accrued obligations and rights under both international human rights law and domestic constitutional law. Such continuity is not interrupted by a further fragmentation of the State or the introduction of a new constitution.

e. Nevertheless, if the Impugned Decision is allowed to stand, people within the territory of Kosovo and subject to the jurisdiction of the KSC (who are predominantly, if not exclusively of Albanian ethnicity and Kosovar nationality) will be denied the same protection against retroactive application of the criminal law which is afforded to their Serbian counterparts. This amounts to a violation of the right to equality before the law without discrimination under Article 26 ICCPR and under Article 24 of the Constitution of Kosovo.

f. Further, the Defence repeats its submissions that such a difference in treatment requires a compelling justification in order not to violate the prohibition of discrimination under Article 14 ECHR.[32] The burden to provide such justification rests with the Respondent State.[33] To date, no effort has been made to discharge such a burden. As Article 22 of the Constitution of Kosovo provides for the direct application[34] and primacy of the ECHR and ICCPR over other sources of domestic law, including the KSC Law, it is submitted that the KSC is obliged to give effect to Articles 15 and 26 ICCPR and Articles 7 and 14 ECHR in order to ensure that people

[31] See, inter alia, Art 34 1978 Vienna Convention on State Succession in Respect of Treaties (to which the SFRY was a signatory): Serbia's failure to restrict the retrospective application of the Genocide Convention by purporting to accede to it with a reservation in 2001 and the international condemnation thereof; M. Kamminga, "State Succession in Respect of Human Rights Treaties", (1996) 7 European Journal of International Law (1996) with references to doctrine and state practice on this point.
[32] Veseli CIL Reply, para. 14.
[33] ECtHR, Timishev v. Russia, Apps. No 55762/00 55974/00, Judgment, 13 December 2005, para. 57.
[34] The Defence recalls that, pursuant to Article 22 of the Constitution of Kosovo, direct effect is permitted under the Constitution only with respect to human rights treaties.

within its jurisdiction are afforded the same protection against retroactive application of the criminal law as their Serbian counterparts. The consequence is that the KSC is obliged under the Constitution to apply a standard of criminal liability in relation to the 1998 conflict in Kosovo which is no less favourable to the Accused than the standard applied in Serbia.

53. The Appeals Panel considered these arguments and disposed of them in a single paragraph:

> 45. The Panel notes that the protection enshrined in both the ICCPR 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". 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 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.

54. In this connection, the Defence submits that the Appeals Panel, like the Pre-Trial Judge before it, treats Kosovo and Serbia as completely separate entities. In doing so, it fails entirely to engage with the Defence's arguments on the continuity of obligations and accrued rights. Indeed, these arguments are dismissed summarily in a single sentence at the end of paragraph 45. The Defence maintains that, under the Constitution and international human rights law incorporated therein, Kosovo inherits the FRY's accrued obligation to ensure equality before the law and non-discrimination in relation to events taking place prior to the break-up of the FRY. In this context, the Appeals Panel cannot reject the jurisprudence of the Serbian Constitutional Court as a simple reflection of how a different State interprets its obligations under the ICCPR.

55. Kosovo, acting through the KSC, is obliged, pursuant to international law and the Constitution, to take note of the judgment and ensure that the Accused is not treated less favourably than a Serbian counterpart whose rights to non-

retroactivity accrued at the same time, in the context of the same conflict. The only way to do so, and therefore to bring the legislation and practice of the KSC into conformity with the Constitution is to follow the same approach as the SCC and declare invalid the provisions of the KSC Law which purport to give the KSC jurisdiction over crimes under international law which are not otherwise reflected in domestic law in force in 1998.

56. Even if the Defence is incorrect on the first point, judgments of the Serbian Supreme Court and Montenegrin Appellate Court, interpreting precisely the question at issue in the present referral, must, at a minimum, be considered highly authoritative and given due consideration in determining the merits of the Defence's arguments on retroactivity, discrimination and equality before the law. However, it appears that the Appeals Panel gave no consideration whatsoever to the reasoning of the courts in these judgments.

57. The fact remains that the KSC Law is the only piece of legislation that, contrary to the FRY successor states Serbia or Montenegro, and other SFRY successor states such as Croatia, Slovenia or Bosnia,[35] fails to uphold the basic fundamental guarantees that criminal offences are established by statute; and that CIL is not directly applicable in the absence of domestic laws that both criminalise and penalise the conduct in question.

Vis-a-vis others accused before the Kosovo Courts

58. Further, the Defence submits that there is an unjustifiable difference in treatment between defendants – whether Serbian or Kosovar Albanian – before the ordinary courts of Kosovo, and defendants before the KSC. Despite being entitled to the same constitutional guarantees, the Accused is denied the

[35] It must be noted that despite allowing the retroactive application of international crimes, Bosnian courts never directly applied CIL as such. (*see* ECHR, *Boban Simsic v Bosnia and Hezegovina,* App No 51552/10, Decision, 10 April 2012; or *Damjanovic v. BiH*).

treatment accorded to others in relevantly similar situations, *i.e.* individuals brought before Kosovo courts for crimes relating to the same armed conflict – which are alleged to have occurred within the same temporal and geographical scope as those in the Indictment – all of whom have been tried on the basis of the 1976 SFRY Criminal Code.

59. In the Impugned Decision, the Appeals Panel dismissed these submissions on the bases that:

a. the Defence does not identify any ground for discrimination under Article 14; and

b. any difference in treatment was objectively and reasonably justified on the basis that the KSC was established to try crimes "falling under the jurisdictional parameters set forth under Articles 6 to 9 of the Law and which relate to the Council of Europe report."[36]

60. With respect to the first basis, the Defence recalls that the prohibition on discrimination on grounds of any "other status" in Article 14 is construed broadly[37] and is not limited to discrimination on the basis of characteristics which are personal in the sense of being innate or inherent.[38] For instance, the ECtHR has considered as examples of "other status" generic features such as being:

a. a prisoner;[39]

b. subject to differences in procedural requirements for early release which depend on the length of the sentence[40] (analogous to the application of different substantive and sentencing law applied at the KSC);

[36] Impugned Decision, para. 46.
[37] ECHR, *Carson et al v. UK*, App no. 42184/05, [GC], Judgment, 16 March 2010, para. 70.
[38] ECHR, *Kiyutin v. Russia*, App. no. 2700/10, Judgment, 10 March 2011, para. 56.
[39] ECHR, *Stummer v. Austria*, App. no. 37452/02, Judgment, 7 July 2011, para. 90.
[40] ECHR, *Clift v. UK*, App. no. 7205/07, Judgment, 13 July 2010.

c. a member of an organisation[41] (under which membership of the KLA or even the KLA General Staff would fall);

d. resident in a certain place;[42] or

e. subject to conflicting decisions of the Supreme Court.[43]

61. With respect to the second basis, the Defence makes the following submissions:

62. First, the Appeals Panel's argument is circular. It apparently seeks to justify the difference in legal treatment in respect of the difference in law, whereas the Defence's contention is that a difference in law requires justification for the difference in legal treatment. This problem is unresolved. The Appeals Panel fails to explain why alleged crimes relating to the Council of Europe Report should not be prosecuted on the basis of existing Kosovo laws, in the same vein that other Kosovo courts, facilitated by EULEX or UNMIK, have done so far.

63. Second and in any event, as the Defence has noted in the context of a separate, pending appeal,[44] in practice, there is no objective criterion determining whether the KSC may exercise jurisdiction. On a plain reading of Article 1 of the KSC Law, it could be said that the qualifying criterion is that only persons suspected of crimes which relate to those reported in the Council of Europe Report are liable to be tried in the KSC. However, as the Pre-Trial Judge found, the Council of Europe Report extends to an extremely broad class of suspects.[45] The SPO has not sought to prosecute all of the suspects who fall into this class. Indeed, all of the individuals currently standing trial in the ordinary courts of Kosovo for crimes allegedly carried out in the context of the conflict in 1998 would fall into this class.

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[41] ECHR, *Danilenkov et al. v. Russia*, App. no. 67336/01, Judgment, 30 July 2009.
[42] ECHR, *Aleksandr Aleksandrov v. Russia*, App. no. 14431/06, Judgment, 27 March 2018; ECHR, *Carson et al v. UK*, App no. 42184/05, [GC], Judgment, 16 March 2010.
[43] ECHR, *Beian v. Romania*, App. no. 30658/05, Judgment, 6 December 2007; ECHR, *Maggio et al. v. Italy*, Case nos 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, Judgment, 31 May 2011.
[44] F00450, Veseli Defence Appeal Against Decision on Motions Challenging Violations of Certain Constitutional Rights of the Accused, paras 21–23.
[45] IA013-F00005, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021, para. 139.

Accordingly, even on its own terms, this criterion does not provide "a reasonable and objective justification". Even if this were considered a suitably objective criterion, the Appeals Panel does not begin to explain why it is justifiable to treat those falling within such a class differently to other people accused of the same conduct at the same time.

64. In light of the foregoing, the Defence requests the following relief:

a. A declaration that in applying customary international law as a basis to prosecute the Accused, the KSC violates the principle of equality under the law and the prohibition on discrimination under Article 24 of the Constitution, Articles 7 and 15 of the ECHR and Article 15 ICCPR; and

b. A declaration pursuant to Rule 29(1) of the SCCC Rules that, insofar as Articles 3(2)(d), 3(3), 12, 13, 14 and 16(1) of the KSC Law purport to give direct effect to CIL to criminalise conduct which was not so criminalised under the domestic law applicable at the time, these provisions are unconstitutional and therefore invalid.

D. Ground 4 – The Prosecution of the Accused on the Basis of JCE and/or Unlawful Detention, in Circumstances Where Neither is Expressly set out in the Law, is Contrary to Articles 33 and 55 of the Constitution

65. Articles 33 and 55 of the Constitution and Article 7 of the ECHR prohibit expansive interpretations of criminal statutes to introduce forms of criminal liability that are not expressly set out in law.[46] The Defence recalls that the term 'law' in the Constitution and the Kosovo legal order means "a law issued by the Assembly, according to the relevant legislative procedures."[47] It further recalls the joint concurring opinion of judges Ljatifi, Hoxha and Laban in Case No. KI230/19.[48]

[46] [46] See, Motion, para. 95.
[47] Constitutional Court, Judgment in Case No. KO54/20, 6 April 2020, para. 191.
[48] Joint Concurring Opinion of Judges Bajram Ljatifi, Safet Hoxha and Radomir Laban in Case No. KI230/19, 8 January 2021, paras 13-14.

66. The Defence submits that by applying modes of liability or criminal offences without an express provision of jurisdiction in the KSC Law, the KSC directly violates the principle of legality enshrined in Article 33 as well as Article 55 of the Constitution. While judges of the KSC may have recourse to the jurisprudence of international criminal tribunals for the purpose of identification of CIL norms, such recourse cannot extend to the existence of substantive crimes or modes of liability not previously identified in the Law. In sum, the Constitution limits the recourse to the jurisprudence of international criminal courts to crimes and modes of liability explicitly enumerated in the KSC Law.

JCE

67. At paragraph 137 of the Impugned Decision the Appeals Panel considered the following regarding the specificity of the KSC Law:

> 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, 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.

68. In observing that the KSC law does not purport to be "a meticulously detailed code," like the Rome Statute, the Appeals Panel apparently overlooks that Articles 13 and 14 of the KSC Law are taken verbatim from the Rome Statute.

69. Moreover, the KSC is not akin to the ICTY and ICTR which were international courts; and it is not for the Appeals Panel, and not for any court, to decide on the required level of specificity required in a law. Such standard is set out by the constitutional principle of legality, which requires that laws -- and especially those relating to criminal justice -- must be prescriptive and specific, in order to avoid uncertainties, unlawful analogy, judge-made law, or arbitrariness.

70. The Defence reiterates that JCE is not referred to in Article 16 or anywhere else in the Law. If the drafters of the Law intended to make use of such doctrine, they would, consistent with established principles of Kosovar constitutional law, have expressly included it in the Law. The fact that they did not do so establishes conclusively that JCE falls outside the scope of the KSC's subject matter jurisdiction.

Arbitrary detention

71. At paragraph 87 of the Impugned Decision, the Appeals Panel acknowledges "that arbitrary detention is not expressly mentioned in the list of acts provided under Article 14(1)(c) of the Law". The Defence submits that, pursuant to the constitutional principles outlined above, this fact alone warrants a finding that the KSC has no jurisdiction over arbitrary detention in the context of a NIAC.[49]

72. In light of the above, the Defence requests the following relief:

a. a declaration that criminal offences and/or modes of liability must be expressly described by law; that descriptions of the substance of criminal offences and/or modes of liability in legal norms must be clear and precise and not applied by analogy; and accordingly

b. a finding that the Pre-Trial Judge and the Appeals Panel violated the principle of legality enshrined in Articles 33 and 55 of the Constitution by holding that the KSC has jurisdiction to apply arbitrary detention and JCE.

E. Ground 5 - Violation of the *Nullum Crimen Sine Lege* Principle Under Article 33 of the Constitution and Article 7 ECHR / 15 ICCPR (JCE III, Unlawful Detention, as well as Enforced Disappearance Were not Crimes Under CIL During 1998)

73. The Defence maintains that, as the Pre-Trial Chamber of the ECCC concluded in Case 002, there is no basis to conclude that JCE III forms part of CIL.[50] On

[49] *See* also, IA009/F00026, Veseli Defence Reply to SPO Response (KSC-BC-2020-06/IA009/F00020), para. 43.
[50] Motion, paras. 98-105.

this basis, even if CIL were found to have direct effect before the KSC, JCE III could not be employed as a mode of liability.

74. The Defence submits that neither the Pre-Trial Judge nor the Appeals Panel gave adequate consideration to the Defence submissions[51] and failed, as was their duty, to investigate anew the relevance of the pertinent post-WWII cases.[52] The fact that the existence of JCE III under CIL was not settled, and that all the accused specifically requested the lower courts to investigate themselves the status of JCE under CIL, was a cogent reason for engaging in an inquiry sufficiently thorough to ensure that the accused would not be tried in violation of the principle *of nullum crimen sine lege*. Accordingly, in the event that the SCCC decides that CIL is directly applicable, it is invited to investigate and authoritatively determine whether JCE III was part of CIL at the time of the relevant events.

Arbitrary/Illegal Detention

75. The Defence submits that the SPO charges for the war crime of arbitrary detention under Article 14(1)(c) have no basis in the Law and so violates the Constitution. Nor was arbitrary detention in the context of a NIAC a serious violation of Common Article 3 to the 1949 Geneva Conventions prohibited under customary international humanitarian law. As a result, the KSC has no jurisdiction over such crimes.

Whether Arbitrary Detention is a Serious Violation of Common Article 3

76. At the outset, the Defence notes that neither the Pre-Trial Judge, nor the Appeals Panel could point to a single authority from an international criminal court to suggest that by 1998, arbitrary detention was a serious violation of Common Article 3. Nor could they rely on any international instrument which

[51] Motion, Section III(B); (D).
[52] See, Appeal, Ground 9; Impugned Decision, paras 186-196.

could suggest the existence of state practice or *opinio juris* to that effect. To the contrary, the Rome Statute, which is in general an authoritative indicator of the status of CIL in 1998, specifically excluded arbitrary detention from the list of conduct which constituted serious violation of Common Article 3.

77. Moreover, the reasoning of the Appeals Panel is methodologically and legally flawed.

78. First, in Aleksovski,[53] the ICTY Trial Chamber merely observed that unnecessary violence against a detainee could violate the "outrages" provision of Common Article 3. It did not recognise a crime of arbitrary detention.[54]

79. Second, all the authorities referred to in footnote 267 of the Impugned Decision, refer to 'acts' which related to conducts already listed in Common Article 3 (*forced labour and atmosphere of terror as cruel treatment; rape and sexual slavery as outrage upon personal dignity*).

80. Third, the Appeal Panel refers exclusively to the 2020 Commentary to the Third Geneva Convention, whereas, the first time that the ICRC itself mentioned arbitrary detention in relation to Common Article 3 was in 2005, where it observed that there was "uncertainty resulting from the silence of humanitarian treaty law on the procedure for deprivation of liberty in non-international armed conflict[55] which prompted it to produce guidelines, on the issue. Indeed, as of 2020, it was still, according to the ICRC, unclear what were the grounds for and procedural safeguards attendant to detention in a NIAC.[56]

[53] Impugned Decision, footnotes 265, 266, 268.
[54] *Aleksovski* Trial Judgment, para. 54. *See* also footnote 75 and ECHR reference therein.
[55] ICRC, GC III, 2020 Commentary, Common Article 3, para. 760.
[56] ICRC, GC III, 2020 Commentary, Common Article 3, para. 758.

Whether Arbitrary Detention was Sufficiently Based in CIL During 1998

81. The acknowledgment from the Appeal Panel that "the relevant state practice at that time was rather limited"[57] is sufficient to conclude that one of the necessary elements of CIL is not established. As for 'subsequent practice' post 1998, the Defence notes that such discussion is irrelevant to the issue whether arbitrary detentions existed in CIL.

82. Its subsequent analysis of the remaining 14 jurisdictions criminalised arbitrary detention during NIACs in 1998 was flawed in various respects.

83. For instance, it dismissed the Defence's reference to Article 142 of the 1976 SFRY Code which did not criminalise arbitrary detention in NIACs on the basis that (in its view) the 1976 SFRY Code did not apply to the KSC, when in fact the Defence had invoked it as evidence of custom.[58]

84. As to other jurisdictions which did not differentiate between IACs and NIACs, the Defence notes that the Appeals Panel failed entirely to engage with the argument that, considering that such legislative provisions were taken verbatim from Article 147 GCIV, (which was applicable only in IACs), it could be inferred that these states also sought to refer exclusively to unlawful detention in the context of IACs.[59]

Enforced Disappearance

85. The Defence submits that at the time of the relevant events, the crime of enforced disappearance had not crystallised under CIL and therefore falls outside the jurisdiction of the KSC even if CIL is found to have direct effect. As with arbitrary detention, the Appeal Panel could not point to a single authority

[57] Impugned Decision, para. 106..
[58] Impugned Decision, para. 107.
[59] Appeal, para. 106.

from an international criminal court to suggest that by 1998, enforced disappearance was established as a separate crime under CIL.

86. Prior to 1998, only two "international" legal instruments addressing enforced disappearances existed: (i) The 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance; and (ii) The 1994 Inter-American Convention on the Forced Disappearance of Persons.

87. Enforced disappearance was first incorporated in a binding international instrument in 1998, in the Rome Statute – but, crucially, not as a reflection of – an already existing CIL rule.[60] It follows that neither the "accessibility" nor the "foreseeability" requirements of the principle of legality could have been met when the events that are the subject of the Indictment occurred. Even with the benefit of legal advice, the accused could not have possibly known that the offence existed or – what is comprised. That is because, on a proper construction of the international law sources, no such offence existed at the time of the 1998-99 conflict.

88. For the foregoing reasons, the Defence submits that neither arbitrary detention, nor enforced disappearance constituted a criminal offence under CIL during 1998. Accordingly, the Defence requests the following relief:

a. A declaration that, arbitrary detention during NIACs, enforced disappearance and JCE III were not sufficiently based under CIL during 1998; and consequently

b. Prosecution for such crimes violates the *nullum crimen since lege* principle as guaranteed by Articles 33 of the Constitution and 7 of the ECHR.

[60] Antonio Cassese, International Criminal Law, p. 80, 2003-2013 Edition.

VII. REQUEST FOR ORAL HEARING

89. The Defence respectfully requests the SCCC to schedule an oral hearing, as soon as possible, for considering the present Referral. The hearing is warranted, considering the utmost importance of the matters to be resolved, which directly affect the fundamental rights of the accused, including his fair trial rights, and particularly the right to equality before the law and discrimination. In addition, the decision will bind the jurisprudence of the Constitutional Court in relation to the relationship between Kosovo and international law.

90. The Defence respectfully requests the President of the SCCC to refrain from invoking a change in venue to the Host State, considering i) the importance of the topic to the people of Kosovo; and ii) the lack of any safety or security needs concerning ongoing investigations or relating to the protection of witnesses.

VIII. CONCLUSION AND RELIEF

91. Considering the above the Defence requests the following relief:

a. Under Ground 1, a declaration that, pursuant to Article 19 of the Constitution, the direct application of CIL to criminalise conduct is prohibited save insofar as either: there is a corresponding criminal offence and mode of liability under duly promulgated domestic law in force at the time of the relevant act or omission; or an offence or mode of liability under CIL is beneficial to the accused.

b. Under Ground 2, a declaration that, pursuant to Article 33(1) of the Constitution, read in conformity with Article 22 of the Constitution and Article 7 ECHR and Article 15 ICCPR, the Accused is entitled to be prosecuted on the basis of the 1976 SFRY Criminal Code (or, alternatively subsequent domestic criminal legislation); and, further that his prosecution on the basis of criminal offences and / or modes of liability derived solely from CIL is a violation of his rights under the same Articles.

c. Under Ground 3, a declaration that in applying CIL as a basis to prosecute the Accused, the KSC violates the principle of equality under the law and

the prohibition on discrimination under Article 24 of the Constitution, Articles 7 and 15 of the ECHR and Article 15 ICCPR.

d. Whether under Ground 1, 2 or 3, a declaration pursuant to Rule 29(1) of the SCCC Rules that, insofar as Articles 3(2)(d), 3(3), 12, 13, 14 and 16(1) of the KSC Law purport to give direct effect to CIL to criminalise conduct which was not so criminalised under the domestic law applicable at the time, these provisions are unconstitutional and therefore invalid.

e. Under Ground 4, a declaration that, in applying arbitrary detention and JCE, the KSC violates the principle of *nullum crimen sine lege* enshrined in Articles 33 and 55 of the Constitution

f. Under Ground 5, that arbitrary detention during NIAC, enforced disappearance and JCE III were not sufficiently based under CIL during 1998 and that in prosecuting such offences, the KSC violates the *nullum crimen since lege* principle as guaranteed by Articles 33 of the Constitution and 7 of the ECHR.

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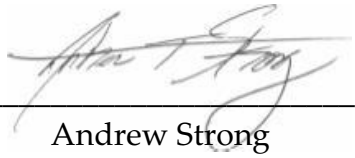

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