Case No.:	KSC-CC-2022-16
Before:	**The President of the Specialist Chambers** Judge Ekaterina Trendafilova
Registrar:	Dr Fidelma Donlon, Registrar
Date:	14 April 2022
Filing Party:	Counsel for Pjetër Shala
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Referral to the Constitutional Court Panel concerning the violation of Mr Shala's fundamental rights guaranteed by Article 33 of the Kosovo Constitution and Article 7 of the European Convention on Human Rights

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I. INTRODUCTION

1. Pursuant to Articles 33 and 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), and 20 and 29 of the Rules of Procedure for the Specialist Chamber of the Constitutional Court ("SCCC Rules"), the Defence for Mr Pjetër Shala ("Defence" and "Accused", respectively) introduces this Referral presenting Mr Shala's complaints of a violation of his rights under Article 33 of the Kosovo Constitution and Article 7 of the European Convention on Human Rights ("ECHR") as a result of the charges brought against him under the mode of liability of a joint criminal enterprise ("JCE") and for the war crime of arbitrary detention in a non-international armed conflict ("NIAC").

2. The principle *nullum crimen sine lege* which is guaranteed by Article 33 of the Kosovo Constitution and Article 7 of the ECHR prohibits the retroactive application of criminal law, including modes of liability. The only crimes and forms of liability which could be lawfully charged are those which were part of the law in Kosovo during the Indictment period in 1999. At the material time, the war crime of arbitrary detention in NIAC and the mode of liability of JCE were not part of the Kosovo legal order or otherwise applicable in Kosovo.

3. Notwithstanding the above, Mr Shala is being charged for arbitrary detention in NIAC and for other crimes through a JCE on the basis of the KSC Law which was introduced in Kosovo sixteen years after the Indictment period. The KSC Law has been interpreted by the Specialist Prosecutor's Office ("SPO"), Pre-Trial Judge, and Panel of the Court of Appeals Chamber ("Appeals Chamber") in this case in a manner that gives direct effect to Customary International Law ("CIL") and criminalises

conduct that did not constitute a criminal offence in the law applicable in Kosovo at the material time.[1] This violates the rights of the Accused under Article 33 of the Constitution and Article 7 of the ECHR as will be demonstrated below.

4. For the purposes of this Referral and pursuant to Rule 20(3) of the Rules, the Accused nominates his appointed counsel to act on his behalf.

II. PROCEDURAL BACKGROUND

5. On 12 July 2021, the Accused filed his Preliminary Motion challenging the jurisdiction of the Kosovo Specialist Chambers ("KSC").[2] On 6 September 2021, the Prosecution filed its response to the Preliminary Motion.[3] On 24 September 2021, the Accused filed his reply to the Prosecution's response.[4] On 18 October 2021, the Pre-Trial Judge rejected the Preliminary Motion.[5]

6. On 9 November 2021, the Accused filed his appeal against the Pre-Trial Judge's rejection of the Preliminary Motion.[6] On 29 November 2021, the

[1] KSC-BC-2020-04/IA002, F00010, Decision on Pjetër Shala's Appeal Against Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 11 February 2022 ("Appeals Chamber Decision on Jurisdiction"), paras. 18, 19, 44. The Pre-Trial Judge found that "when adjudicating crimes under Article[s] 13 and 14 of the Law […] the SC shall apply, first, CIL and, second, Kosovo law only insofar as it is expressly incorporated in the Law and complies with CIL." *See* KSC-BC-2020-04, F00088, Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 18 October 2021, para. 98.

[2] KSC-BC-2020-04, F00054, Preliminary Motion of the Defence of Pjetër Shala to Challenge the Jurisdiction of the KSC, 12 July 2021 ("Preliminary Motion"). All further references to filings in this Referral concern Case No. KSC-BC-2020-04 unless otherwise indicated.

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

[4] F00084, Defence Reply to the Prosecution Response to the Preliminary Motion of Pjetër Shala Challenging the Jurisdiction of the KSC, 24 September 2021 ("Reply").

[5] F00088, Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 18 October 2021 ("Pre-Trial Judge's Decision on Jurisdiction").

[6] KSC-BC-2020-04/IA002, F00003, Defence Appeal against Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 9 November 2021 ("Appeal").

Prosecution filed its response to the Appeal.[7] On 9 December 2021, the Accused filed his reply to the Prosecution's submissions.[8] On 11 February 2022, the Appeals Chamber denied the Appeal.[9]

III. ADMISSIBILITY

7. Pursuant to Article 113(7) of the Kosovo Constitution, Article 49(3) of the KSC Law and Rule 20 of the SCCC Rules, an accused can lodge a referral with the SCCC in relation to violations by the Specialist Chambers of his individual rights and freedoms guaranteed by the Constitution, subject to two conditions:

(i) the accused has exhausted all remedies provided by law with regard to the complaints of violation of his rights;

(ii) the referral is filed within two months from the date of the notification of the final ruling concerning the alleged violation which was issued on 11 February 2022.

8. This Referral is admissible as: (i) the Accused has exhausted all available effective remedies upon the rejection of his Appeal by the Appeals Chamber; and (ii) the Referral is filed before the SCCC within two months of the notification of the Appeals Chamber decision. The KSC Law does not allow any further appeals or other ordinary remedies for the afore-mentioned violations of the rights of the Accused.

[7] KSC-BC-2020-04/IA002, F00008, Prosecution response to Defence appeal against the 'Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers' with public Annex 1, 29 November 2021.
[8] KSC-BC-2020-04/IA002, F00009, Defence Reply to Prosecution Response to Appeal Against the 'Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers', 9 December 2021.
[9] KSC-BC-2020-04/IA002, F00010, Decision on Pjetër Shala's Appeal Against Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 11 February 2022.

9. Furthermore, the Referral falls within the SCCC's jurisdiction as it concerns the complaints by the Accused of serious violations of his fundamental rights arising out of acts and/or omissions of the Specialist Prosecutor's Office and Specialist Chambers.

IV. MERITS

10. The Accused complains of a violation of his rights guaranteed by Article 33 of the Constitution and Article 7 of the ECHR as a result of the charges brought against him under the doctrine of JCE and for the war crime of arbitrary detention in NIAC.

11. Article 33(1) of the Constitution 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."

12. Article 7 of the ECHR provides that:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

1. Article 7(1) of the ECHR contains the general rule of non-retroactivity in criminal law. The European Court of Human Rights ("ECtHR") has repeatedly held that only law can define a crime and prescribe a penalty

(*nullum crimen, nulla poena sine lege*) from which it follows that an offence must be clearly defined in the law, be it national or international.[10]

13. The ECtHR has accepted no general exception to guarantees of Article 7. In this respect, it has interpreted Article 7(2) of the ECHR as a time-limited clarification intended to ensure the validity of prosecutions after the Second World War.[11] It has unequivocally held that Article 7(2) cannot be applied to conflicts that occurred since the Second World War.[12]

14. It is well-settled case law of the ECtHR, that the rights guaranteed under Article 7 are non-derogable: no derogation is permitted in times of war or public emergencies. Article 7 of the Convention guarantees a number of related principles: (i) for a criminal provision to be compatible with this provision it must be sufficiently precise and clear to avoid uncertainty and arbitrariness; (ii) the retrospective application of criminal law to an accused's disadvantage is prohibited; (iii) only the law can define a crime and prescribe a penalty; and (iv) criminal law cannot be construed extensively to an accused's detriment.[13] In addition, the principle of legality applies both to crimes as well as to modes of liability.[14]

15. Neither the mode of liability of JCE nor the war crime of arbitrary detention in NIAC formed part of the domestic law that applied during the Indictment period. At the material time, the SFRY Constitution applied which required domestic incorporation of criminal provisions. The charges against Mr Shala were based instead on the KSC Law, through which CIL

[10] ECtHR, *Vasiliauskas v. Lithuania* [GC], no. 35343/05, 20 October 2015, para. 154.
[11] ECtHR, *Vasiliauskas v. Lithuania*, paras. 187-190; *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, 13 July 2013, para. 72; ECtHR, *Kononov v. Latvia* [GC], no. 36376/04, 17 May 2010, para. 186.
[12] *Ibid.*
[13] *See, generally,* ECtHR, *Kokkinakis v. Greece*, no. 14307/88, 25 May 1993, para. 52.
[14] ECtHR, *Kononov v. Latvia* [GC], para. 211.

was purportedly applied to Mr Shala's clear disadvantage in breach of Article 33 of the Constitution and Article 7 of the ECHR.

JCE Liability and the War Crime of Arbitrary Detention were not part of Kosovo Law in 1999

16. According to the Supreme Court of Kosovo, international law, including international law related to criminal matters, does not have direct effect in Kosovo and cannot be directly applied by Kosovo courts unless "the duality test" is satisfied.[15] Neither the Constitution of Kosovo nor the 1974 Constitution of the Socialist Federal Republic of Yugoslavia ("SFRY Constitution")[16], which was applicable in 1999,[17] allow Kosovo courts to enforce criminal prohibitions deriving from CIL without domestic incorporation in the form of a domestic statutory provision. Article 181 of the SFRY Constitution provided that "[n]o one shall be punished for any act, which before its commission was not defined as a punishable offence by law or a legal provision based on law, or for which no penalty was envisaged. Criminal offences and criminal law sanctions may only be established by statute". International treaties and CIL cannot create offences in the internal legal order of Kosovo without a statutory enactment giving them domestic effect.

[15] Supreme Court (EULEX), *Case against Gj.K.*, AP-KZ no. 353/2009, 14 June 2011, pp. 8-9; Article 19(1) of the Constitution which limits the direct effect only to ratified international agreements of a "self-applicable" nature and Article 55 of the Constitution requiring that fundamental rights and freedoms guaranteed by the Constitution may only be limited by law.

[16] The relationship between the principle of legality in criminal matters and the principle of direct applicability of international law in the internal legal order did not change with the 1992 FRY Constitution (see Article 16 and Article 27 of the FRY Constitution).

[17] *See* Article 1 of the UNMIK Regulation 1999/24 on the Law Applicable in Kosovo (as amended by 2000/59) ("UNMIK Regulation") which established the legal framework relevant to crimes committed during the Kosovo War, holding that the law in force in Kosovo on 22 March 1989 was the law applicable, unless the later criminal law was more favourable to the defendant. *See also* Supreme Court of Kosovo (EULEX), *Case against Bešović*, AP-KZ no. 80/2004, 7 September 2004, p. 18.

17. The Kosovo Supreme Court has thus unequivocally established that, at the material time, the 1974 SFRY Constitution applied, which required criminal offences to be set out in a domestic statute.[18] The Kosovo Supreme Court has also held that Articles 210 and 181 of the 1974 SFRY Constitution made CIL inapplicable to events alleged to have occurred in 1999.[19]

18. Despite the above, the Pre-Trial Judge and Appeals Chamber in this case found that the introduction of domestic legislation allowing prosecutions for conduct which took place before the penalisation was introduced in domestic law does not engage any issue of retroactivity and is compatible with Article 33 of the Constitution and Article 7 of the ECHR.[20] This was in breach of Article 7 of the ECHR that prohibits the retrospective application of criminal law where that is to an accused's disadvantage.[21]

Violation of the Principle of Non-Retroactivity

19. Introducing criminal offences that apply to conduct predating their introduction strikes at the essence of the principle of non-retroactivity. As such, it should be carefully scrutinised to ensure compatibility with the fundamental rights of an accused. The Pre-Trial Judge and Appeals Chamber in this case failed to acknowledge the interference with Article 33 of the Constitution and Article 7 of the ECHR by the charges against the Accused that are based on provisions enacted after the alleged conduct had

[18] Supreme Court of Kosovo (UNMIK), *Case against Latif Gashi et al*., AP-KZ no. 139/2004, 21 July 2005, pp. 6, 12.
[19] Supreme Court of Kosovo (UNMIK), *Case against Latif Gashi et al*., AP-KZ no. 139/2004, 21 July 2005, pp. 6, 12; Supreme Court of Kosovo (UNMIK), *Case against Veselin Bešović*, AP-KZ no. 80/2004, 7 September 2004, pp. 18, 19.
[20] Pre-Trial Judge's Decision on Jurisdiction, paras. 85-87 ("in adopting domestic legislation explicitly providing for international crimes already existing under CIL at the material time, the legislator can allow – or even mandate- prosecution for conduct that took place before the penalisation was introduced in domestic written law without any issue of retroactivity arising."); Appeals Chamber Decision on Jurisdiction, paras. 24, 25.
[21] *See, for instance,* ECtHR, *Del Rio Prada v. Spain*, no. 42750/09 [GC], 21 October 2013, para. 116.

taken place and failed to assess with the required caution whether the contested charges are compatible with the principle of legality. This in itself constitutes a procedural violation of the rights of Mr Shala under Article 33 of the Constitution and Article 7 of the ECHR.

Breach of the strict requirement that criminal law must be clear, precise, accessible and foreseeable to an accused

20. The evident lack of clarity as to the applicable law violates the requirements of the "quality of the law" that are required Article 33 of the Kosovo Constitution, the latter interpreted in accordance with Article 7(1) of the ECHR that sets a high standard for clarity, precision, accessibility, and foreseeability.[22] In this connection, the ECtHR has held that lack of clarity arising out of discrepancies within the domestic law violates the accessibility, foreseeability and precision requirements of Article 7(1) of the ECHR.[23]

21. The Supreme Court of Kosovo unambiguously held that "criminal offences and punishments must be provided for in specific domestic legislation".[24] According to its case-law concerning the application of CIL, the constitutional principle of legality in criminal matters operates as *lex specialis* with regard to the principle of direct applicability of international law in the internal legal order, requiring as such a domestic statutory provision to establish a criminal offence.[25]

22. This can be contrasted with the Pre-Trial Judge's finding that "when adjudicating crimes under Article[s] 13 and 14 of the Law […], the SC shall

[22] *See also* Preliminary Motion, para. 12. For the "quality of law" requirements under the ECHR see, for instance, ECtHR, *Kafkaris v. Cyprus*, no. 21906/04 (GC), 12 February 2008, para. 150.
[23] *Vasiliauskas v. Lithuania*, paras. 154, 185, 186.
[24] Supreme Court of Kosovo (EULEX), *Case against Bešović*, AP-KZ no. 80/2004, 7 September 2004, p. 18.
[25] *Ibid*., pp. 18-19.

apply, first, CIL and, second, Kosovo law only insofar as it is expressly incorporated in the Law and complies with CIL."[26]

23. The Appeals Chamber endorsed the Pre-Trial Judge's approach and found that the KSC 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".[27]

24. The findings of the Pre-Trial Judge and Appeals Chamber violate Article 16 of the Constitution which guarantees the primacy of the Kosovo Constitution in the internal legal order.[28] According primacy to CIL despite explicit Constitutional provisions to the contrary undermines the "quality" of the applicable law and demonstrates how such law was neither accessible nor foreseeable to the Accused.

25. Furthermore, the Pre-Trial Judge's position, which was upheld on appeal,[29] that "categorising a court of law as domestic, international, hybrid, or otherwise, is not dispositive of the applicable law"[30] demonstrates the uncertainty as to the law applied by the SC, how the KSC Law is to be interpreted, as well as the role of case law of international criminal tribunals for the purposes of adjudication by KSC judicial panels. Such uncertainty undermines the "quality" of the applicable law.

[26] *See* Pre-Trial Judge's Decision on Jurisdiction, para. 90.
[27] Appeals Chamber Decision on Jurisdiction, paras. 35, 38.
[28] Appeals Chamber Decision on Jurisdiction, para. 18.
[29] Appeals Chamber Decision on Jurisdiction, para. 19.
[30] Pre-Trial Judge's Decision on Jurisdiction, para. 82.

The exception allowing charges based solely on CIL only in respect of "flagrantly unlawful" conduct

26. The suggestion that Article 7 of the ECHR allows as a matter of principle the validity of prosecutions based on CIL of offences that did not form part of a domestic legal system is misleading. The ECtHR has insisted on thorough assessment of the particular circumstances of each case. Even in war crimes prosecutions, 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".[31]

27. The suggestion that there is no violation of Article 7 of the ECHR as no issue of retroactivity arises when the legislator is transposing into domestic law crimes that were already binding according to international law ignores the wide spectrum of the protection offered by Article 7. The latter goes beyond a mere assessment of whether an offence existed in international law at the time of the alleged events; it has additional requirements of accessibility, foreseeability and, generally, the quality of the law in question which must be assessed in the particular context. The latter includes a subjective assessment of the understanding of the legal

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

framework by a particular accused. ECtHR case law allows prosecution on the basis of international law without domestic incorporation only in respect of '*flagrantly unlawful*' conduct, the criminal nature of which is '*evidently*' accessible and foreseeable to an accused.[32]

28. As noted above, the ECtHR has repeatedly confirmed that "the drafters of the Convention did not allow for any general exception to the rule of non-retroactivity".[33] ECtHR case law has acknowledged that prosecution on the basis of international law without domestic incorporation is only allowed in respect of "*flagrantly unlawful*" conduct, the criminal nature of which is "evidently" accessible and foreseeable to an accused.[34]

29. For instance, in *Šimsić v. Bosnia and Herzegovina* the applicant was convicted of the crime against humanity of persecution within the context of a widespread and systematic attack against the Bosniac civilian population through the underlying crimes of murders, incarceration, torture, enforced disappearances and rapes. The ECtHR found that the impugned acts were "flagrantly unlawful", "evidently" constituted a crime against humanity under international law at the time of their commission, and that "even the most cursory reflection by the applicant" would have made their unlawful nature apparent.[35] In these specific circumstances and given the particularities of the framework in Bosnia and Herzegovina, the ECtHR accepted the lawfulness of Šimsić's conviction even though the domestic

[32] ECtHR, *Streletz, Kessler and Krenz v. Germany*, nos. 34044/96, 35532/97, 44801/98, 22 March 2001, paras. 85, 87; ECtHR, *K.H.W. v Germany* [GC], no. 37201/97, para. 75; ECtHR, *Polednova v. the Czech Republic*, no. 2615/10, 21 June 2011 (dec.); ECtHR, *Šimšić v. Bosnia and Herzegovina*, no. 51552/10, 10 April 2012, paras. 23, 24.
[33] *See, e.g.*, ECtHR, *Maktouf and Damjanovic v. Bosnia and Herzegovina*, 18 July 2013, para. 72.
[34] ECtHR, *Streletz, Kessler and Krenz v. Germany*, nos. 34044/96, 35532/97, 44801/98, 22 March 2001, paras. 85, 87; ECtHR, *K.H.W. v. Germany* [GC], no. 37201/97, para. 75; ECtHR, *Polednova v. the Czech Republic*, no. 2615/10, 21 June 2011 (dec.); ECtHR, *Šimsić v. Bosnia and Herzegovina*, paras. 23, 24. *See also* Preliminary Motion, para. 60.
[35] ECtHR, *Šimsić v. Bosnia and Herzegovina*, paras. 23, 24.

law at the time the relevant offences were committed did not penalize them. This was because of the evident unlawfulness of his conduct that could not be doubted.

30. The evident unlawfulness of persecution committed as part of a widespread and systematic attack against a civilian population through murders, incarceration, torture, enforced disappearances and rapes is fundamentally different from the controversial concepts of liability under a JCE and the war crime of "arbitrary detention" in NIAC under CIL.[36] Liability under a JCE (especially its third form) as well as the crime of arbitrary detention in NIAC fail to meet the high threshold of "*flagrant unlawfulness*" of ECtHR case law.[37] Neither formed part of domestic or international law at the relevant time nor were they in any sense accessible and foreseeable to the Accused.

31. The Pre-Trial Judge –whose findings have been confirmed on appeal– considered that: "[t]he ECtHR has found that the reference to a criminal offence under international law entails that no violation of Article 7(1) ensues if a conviction is based on domestic legal provisions that were not in force when the offence was committed, provided that the conviction was based on either conventional international law or CIL as applicable at the time."[38] In support, the Pre-Trial Judge relied in this respect on a single authority: the Grand Chamber judgment in *Vasiliauskas v. Lithuania*.[39] The Pre-Trial Judge made a material error of law in how he interpreted ECHR

[36] *See* Preliminary Motion, para. 60.
[37] *See also Streletz, Kessler and Krenz v. Germany*, 22 March 2001, para. 87 (finding that the GDR's border-policing policy "*flagrantly* infringes human rights").
[38] Pre-Trial Judge's Decision on Jurisdiction, para. 86. *See also* Appeals Chamber Decision on Jurisdiction, paras. 27, 28.
[39] Pre-Trial Judge's Decision on Jurisdiction, para. 86, n. 189, *referring to* ECtHR, *Vasiliauskas v. Lithuania*, no. 35343/05, 20 October 2015, para. 166.

case law. In addition, *Vasiliauskas* simply does not support his interpretation of ECtHR case law.

32. In that case, the ECtHR first made a finding that "the applicant's conviction was based upon legal provisions that were not in force in 1953 and that such provisions were therefore applied retroactively."[40] The ECtHR therefore first assessed and concluded that criminal provisions were applied retroactively, an assessment that the Pre-Trial Judge and Appeals Chamber declined to make in this case. The ECtHR then held that "[the retroactive application] would constitute a violation of Article 7 of the Convention unless it can be established that [the applicant's] conviction was based upon international law as it stood at the relevant time".[41] It therefore provided for a specific exception, which just like all exceptions to ECHR guarantees need to be subject to careful scrutiny and be narrowly interpreted. The ECtHR noted that "the applicant's conviction had to be examined from that perspective" and proceeded to assess whether the particular norm of international law was sufficiently accessible and foreseeable. Its thorough examination was developed in paragraphs 169-190 of its judgment and includes an assessment of the definition of the crime in question in treaties and CIL at the material time and afterwards, as well as a thorough review of the domestic court's reasoning and understanding of the crime in question as it stood at the relevant time. The ECtHR concluded that the applicant's conviction for genocide in that case could not have been foreseen at the time of the killings in question.[42] The conduct in question did not meet the "flagrantly unlawful" test.

Additional discrepancies in the applicable law

[40] ECtHR, *Vasiliauskas v. Lithuania*, no. 35343/05, 20 October 2015, para. 166.
[41] ECtHR, *Vasiliauskas v. Lithuania*, no. 35343/05, 20 October 2015, para. 166.
[42] ECtHR, *Vasiliauskas v. Lithuania*, no. 35343/05, 20 October 2015, para. 186 and preceding analysis.

33. The lack of certainty as to the applicable law is further demonstrated by the inconsistency between Articles 3(2)(d) and 12 of the KSC Law and Articles 19(2) and 22 of the Constitution.

34. Article 3(2)(d) of the KSC Law states in so far as relevant that:

> "[t]he Specialist Chambers shall adjudicate and function in accordance with customary international law, as given superiority over domestic laws by Article 19(2) of the Constitution".

35. Article 12 of the KSC Law provides that:

> "[t]he Specialist Chambers shall apply customary international law and the substantive criminal law insofar as it is in compliance with customary international law, both as applicable at the time the crimes were committed, in accordance with Article 7(2) of the European Convention of [sic] Human rights and Fundamental Freedoms and Article 15(2) of the International Covenant on Civil and Political Rights, as incorporated and protected by articles 19(2), 22(2), 22(3) and 33(1) of the Constitution".

36. Article 19(2) of the KSC Law provides in so far as relevant that: "[t]he Rules of Procedure and Evidence shall reflect the highest standards of international human rights law including the ECHR and ICCPR with a view to ensuring a fair and expeditious trial taking into account the nature, location and specificities of the proceedings to be heard by the Specialist Chambers."

37. The above provisions are to be contrasted with the findings of seminal judgments of the Supreme Court of Kosovo which held that the 1974 SFRY Constitution applied during the Indictment period and that the SFRY

Constitution required criminal offences to be set out in a domestic statute and made CIL inapplicable to events alleged to have occurred in 1999.[43]

38. These authorities are consistent with ECtHR case law that finds incorporation of an international norm prescribing an offence into domestic law an important consideration in assessing the compatibility of criminal proceedings with the guarantee enshrined in Article 7 ECHR.[44]

39. The Appeals Chamber found that:

> "Article 12 of the [KSC] 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 [KSC] Law."[45]

40. The Appeals Chamber and Pre-Trial Judge failed to acknowledge the inherent retroactivity in that the KSC Law was enacted sixteen years after the events alleged in the Indictment and the domestic law at the time required international law and particularly offences prescribed in international law to be incorporated in the Kosovo legal order to have a legal effect.

41. To the extent that Articles 3 and 12 of the KSC Law allow the introduction in the Kosovo legal order of offences derived from CIL that were not otherwise incorporated in the internal legal order at the material time, they violate Article 33 of the Constitution and Article 7 of the ECHR.[46] The

[43] Preliminary Motion, para. 12, *referring to* Supreme Court of Kosovo (UNMIK), *Case against Latif Gashi* et al., AP-KZ no. 139/2004, 21 July 2005, pp. 6, 12; Supreme Court of Kosovo (UNMIK), Case against Veselin Bešović, AP-KZ no. 80/2004, 7 September 2004, pp. 18, 19.
[44] *See, for instance,* ECtHR, *Korbely v. Hungary*, no. 9174/02, 18 September 2008, paras. 74, 75.
[45] Appeals Chamber Decision on Jurisdiction, para. 24.
[46] Article 33 of the Kosovo Constitution; Article 27 of the 1992 FRY Constitution; Articles 181 and 210 of the SFRY 1974 Constitution that, according to the Supreme Court of Kosovo (UNMIK) applied at the time. See Supreme Court of Kosovo (UNMIK), *Case against Veselin Bešović*, AP-KZ no. 80/2004, 7 September 2004 ("*Bešović* Judgement"), pp. 18, 19.

reference in Article 12 of the KSC Law to Article 7(2) of the ECHR is also inconsistent with ECtHR case law that has restricted the applicability of this provision to World War II prosecutions.[47] As such, Article 7(2) of the ECHR cannot be applied to conflicts that occurred since the Second World War.[48]

42. In this respect, the Defence requests that Articles 3 and 12 of the KSC Law as interpreted by the Pre-Trial Judge and Appeals Chamber be declared invalid as incompatible with Article 33 of the Constitution.

The acknowledgement by the Pre-Trial Judge and Appeals Chamber that multiple legal frameworks are at stake

43. Importantly, the Pre-Trial Judge considered that binding authority of the Supreme Court of Kosovo relied upon by the Defence is "distinguishable" because it relates "to the principle of legality as established in the SFRY Constitution".[49] His findings were upheld by the Appeals Chamber which found that the judgments of the Kosovo Supreme Court to which Mr Shala refers in support "are irrelevant for the Specialist Chambers, as they concern a *different constitutional framework*".[50] However, this view fails to explain how the principle of legality in the SFRY Constitution can possibly differ from the principle of legality guaranteed by the Kosovo Constitution, or how the principle of legality can allow a less favourable framework to govern SC proceedings despite the principles guaranteed by

[47] As the Defence observed in its Preliminary Motion, Article 7(2) of the ECHR was a time-limited clarification intended to ensure the validity of prosecutions for war crimes committed during the Second World War after the Second World War and does not constitute a general exception to the rule of retroactivity. *See* Preliminary Motion, para. 14; *see also Vasiliauskas v. Lithuania*, paras. 187-190; ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, 13 July 2013, para. 72; ECtHR, *Kononov v. Latvia* [GC], para. 186.
[48] *Vasiliauskas v. Lithuania*, paras. 187-190; ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, 13 July 2013, para. 72; ECtHR, *Kononov v. Latvia* [GC], para. 186.
[49] Pre-Trial Judge's Decision on Jurisdiction, para. 83.
[50] Appeals Chamber's Decision on Jurisdiction, para. 20 (emphasis added). *See also* Appeals Chamber's Decision on Jurisdiction, para. 26.

Article 7 ECHR which are binding on the SC. To the extent that the Pre-Trial Judge and Appeals Chamber considered that there is a difference in the various potentially applicable regimes (SFRY or KSC), including with regard to the scope of the principle of legality, they should have compared the two and applied the most favourable to Mr Shala as required by his right that criminal law must not be construed to his detriment as guaranteed in Article 7 ECHR.[51] Instead, the Appeals Chamber noted that: "[t]he 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."[52] The Appeals Chamber also observed that "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."[53] However, to the extent that there is doubt as to the applicable law, and the existence of conflicting case law by the Kosovo Constitutional Court suffices to raise such doubt, the principle of *dubio pro reo* requires such comparison to determine that it is the law that is most favourable to the Accused that must be applied.[54]

[51] *See, for instance,* ECtHR, *Korbely v. Hungary*, no. 9174/02, 18 September 2008, para. 70.
[52] Appeals Chamber's Decision on Jurisdiction, para. 20. In this respect, the Pre-Trial Judge and Appeals Chamber considered that the Defence had not properly raised their complaint of a violation of the principle of *lex mitior*. This is despite the clear references in the relevant Defence briefs in this respect. In any event, the Defence notes that as the Appeals Chamber has in fact considered and dismissed the Defence submissions on this point, the Defence has exhausted the relevant domestic remedies and the Panel of the Constitutional Court can properly consider its submissions in this respect. *See* Appeals Chamber's Decision on Jurisdiction, para. 31.
[53] Appeals Chamber's Decision on Jurisdiction, para. 31.
[54] *See, for instance,* ICTR, *Akayesu*, Trial Judgment, 2 September 1998, paras. 500-501; ICTY, *Krstić*, Trial judgment, 2 August 2001, para. 502; ICTY, *Galić,* Appeals Judgment, 30 November 2006, paras. 76-78; ICTY, *Limaj et al*., Appeals Judgment, 27 September 2007, paras. 21, 22; ICC, Situation in the Democratic Republic of Congo, Decision on the OPCD's Request for Leave to Appeal the 3 July 2008 Decision on applications for Participation, 4 September 2008, para. 23; Article 22(2) of the Statute of the International Criminal Court.

44. The Pre-Trial Judge and the Appeals Chamber should have determined which framework is more favourable to the Accused and ensured that the proceedings proceed within the confines set in that framework. Instead, they concluded that CIL is superior and the domestic law was valid to the extent that it is consistent with CIL. The direct application of CIL in this manner violates the rights of the Accused under Article 33 of the Constitution and Article 7 of the ECHR that protect him from the retroactive application of criminal law.

45. In any event, even assuming that CIL included JCE liability or the crime of arbitrary detention in a NIAC in 1999, it cannot be considered that such CIL provisions were accessible to Mr Shala.

46. In the sections that follow, the Defence will develop the above arguments to show that charging Mr Shala: (a) under the liability of a JCE; and (b) for the crime of arbitrary detention in a NIAC violates Article 33 of the Constitution and Article 7 of the ECHR.

A. Joint Criminal Enterprise

47. Mr Shala has been accused of committing the crimes set out in Counts 1-4 of the Indictment through his alleged participation in a JCE between approximately 17 May and 5 June 1999. The Prosecution pleads that the Accused shared the intent for the commission of the crimes set out in Counts 1-4 and that, in the alternative, the Accused could foresee that murder might be perpetrated by other JCE members or tools and willingly took that risk.[55] Mr Shala is therefore charged under the first and third (extended) form of JCE.

[55] Indictment, para. 9.

48. However, the mode of liability of JCE did not form part of Kosovo criminal law or the law of the FRY at the time the alleged offences were committed in 1999.[56] It was also excluded from KSC Law and was not established in CIL at the relevant time.

JCE Liability was excluded from the provisions of KSC Law

49. JCE liability is not explicitly set out in Article 16(1)(a) of the KSC Law or elsewhere.[57] It cannot be assumed that the lack of any reference to JCE in the KSC Law is anything but a deliberate omission by the drafters of the KSC Law. It cannot be convincingly maintained that JCE was not included in the KSC Law because its drafters intended it to be interpreted to include liability under a JCE. This would contradict basic principles of statutory interpretation. The fact that JCE was not included in the KSC Law should be taken at face value and understood consistently with the principle of legality: it is because liability through a JCE was deliberately excluded from the jurisdiction of the KSC.

50. The drafters of the KSC Law expressly established the KSC as a domestic court that is part of the Kosovo justice system.[58] The domestic law at the time of the alleged offences did not acknowledge JCE as a mode of liability in the sense that this is relied upon in the Indictment against the Accused. While the case-law of international criminal tribunals can be of assistance to KSC Chambers for guiding purposes, the principle of legality does not allow such case-law to be used as the basis for criminal prosecutions. That would not be foreseeable or accessible to an accused. Yet the Pre-Trial Judge and Appeals Chamber introduce JCE as a form of "commission" under Article 16 of the Law relying on case law of international criminal

[56] *See* Preliminary Motion, paras. 25-28.
[57] *See also* Preliminary Motion, paras. 29-32.
[58] *See, for instance,* KSC Law, Articles 1(2), 3(1).

tribunals.[59] This is incompatible with the guarantees that are enshrined in Articles 33 and 55 of the Kosovo Constitution and Article 7 of the ECHR.

JCE Liability was not established in CIL during the Indictment period

51. Furthermore, JCE, in general, and JCE III, in particular, was not established in CIL in 1999 and could not generate liability for offences committed at that time.[60] As was confirmed by different judicial chambers of the ECCC, there was insufficient evidence of both *opinio juris* and state practice to support the finding of the Appeals Chamber of the ICTY in the case of *Tadić*.[61] This view is also widely supported in academic discourse.[62]

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[59] Pre-Trial Judge's Decision on Jurisdiction, paras. 91, 93, 96; Appeals Chamber's Decision on Jurisdiction, para. 36. *See also* Confirmation Decision, paras. 66-76.

[60] *See* Preliminary Motion, paras. 33-43.

[61] The ECCC Pre-Trial Chamber rigorously analysed the cases relied upon by the *Tadić* Appeals Chamber to justify JCE III and unambiguously concluded that: "they do not provide sufficient evidence of consistent state practice or *opinio juris* at the time [the crimes in Cambodia were committed and that] JCE III was not recognized as a form of responsibility applicable to violations of international humanitarian law". *See* ECCC Pre-Trial Chamber Decision, para. 77. While recognising that both *Borkum Island* and *Essen Lynching* may be relevant to JCE III, in the "absence of a reasoned judgement in these cases, one cannot be certain of the basis of liability actually retained by the military courts". Having considered the other Italian cases relied upon by the *Tadić* Appeals Chamber, "in which domestic courts applied domestic law, [the Pre-Trial Chamber held that they] do not amount to international case law and the Pre-Trial Chamber does not consider them as proper precedents for the purpose of determining the status of customary law in this area". *See* ECCC Pre-Trial Chamber Decision, para. 82. The issue of inapplicability of JCE III was subsequently raised before the Supreme Court Chamber, which upheld the Pre-Trial Chamber's analysis of the jurisprudence of the *ad hoc* tribunals regarding the notion of JCE III and its conclusion that the decisions upon which the ICTY Appeals Chamber relied in *Tadić* when finding that JCE III was part of CIL did not constitute a "sufficiently firm basis" for such a finding. In respect of other cases referred to by the Co-Prosecutors which were not addressed in *Tadić* or in the Pre-Trial Chamber Decision on JCE, the Supreme Court Chamber came to the same conclusion; namely that they do not "support the existence under customary international law of criminal liability for crimes in which the *actus reus* was not carried out by the accused and that were not covered by the common purpose." ECCC, *Case of Nuon Chea and Khieu Saphan*, Supreme Court Chamber, *Appeal Judgement*, 23 November 2016 ("ECCC Appeal Judgement"), para. 793. The STL Appeals Chamber and the ICTY Appeals Chamber declined to apply JCE III to specific intent crimes. *See* STL, STL-11-01/1, Appeals Chamber, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, 16 February 2011 ("STL Decision"), para. 238. This position has been followed by the Special Court for Sierra Leone. SCSL, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T, *Trial Judgement*, 18 May 2012, para. 468.

[62] *See, for instance,* Mohamed Shahabuddeen, 'Judicial Creativity and Joint Criminal Enterprise', in Shane Darcy and Joseph Powderly, *Judicial Creativity at the International Criminal Tribunals*, (OUP 2010),

52. Lastly, as to the charge against the Accused which is brought specifically under the third form of JCE, JCE III did not form part of CIL at the time the offences charged in the Indictment against the Accused were allegedly committed. The Defence endorses in this respect the detailed Defence submissions in the Krasniqi Defence Referral to the Constitutional Court Panel on the Legality of Charging Joint Criminal Enterprise in Case no. KSC-CC-2022-13 that address the case law relied upon by prosecutors to suggest that JCE III liability is established in CIL.[63] It is the Defence's submission that, prior to the acceptance of JCE liability by the ICTY Appeals Chamber in *Tadić*, JCE was not recognized as a form of liability in CIL. In this respect, it is indicative that the *Tadić* Appeal Judgment was issued on 15 July 1999.[64] The Indictment period starts on 17 May and extends to 5 June 1999. It is inconceivable that the state of the law in Kosovo concerning JCE liability and the impact on that of the *Tadić* Appeal Judgment as soon as that was issued was accessible to Shala at the time.

53. Moreover, there is not a single international criminal law treaty specifically defining JCE III as a mode of criminal responsibility. This demonstrates in itself that JCE III to date does not enjoy recognition in CIL. The 1998 Rome Statute is a very strong indicator that an overwhelming majority of States

pp. 202-203. Judge Mohammed Shahabuddeen, one of the Judges of the ICTY Appeals Chamber who was in favour of applying the notion of JCE in *Tadić* later admitted that JCE, which has roots in common law, cannot claim the status of CIL. *See also* A. Cassese, The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise, JICJ 5 (2007), 109-133; K. Gustafson, The Requirement of an 'Express Agreement' for Joint Criminal Enterprise Liability, JICJ 5 (2007), 134-158; J. Ohlin, Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise, JICJ 5 (2007), 69-90; ICTY, IT-99-36-A, Brdanin Decision on Interlocutory Appeal, 19 March 2004, Separate Opinion of Judge Shahabuddeen.

[63] KSC-CC-2022-13/F00001, Krasniqi Defence Referral to the Constitutional Court Panel on the Legality of Charging Joint Criminal Enterprise with public Annex 1, 28 February 2022, paras. 45-58.

[64] ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999.

rejected JCE as a mode of liability and opted for requiring knowledge rather than foreseeability for individual criminal liability.[65]

54. The Max Planck Institute for Foreign and International Criminal Law survey of the domestic practice of 40 states concluded that there was a "high degree of variance among the legal systems studied" and that more States applied co-perpetration than JCE.[66]

55. The errors of logic and incompatibility with basic principles of fairness that are inherent in the form of liability under JCE III were unequivocally confirmed when the UK Supreme Court reversed 30-years of case-law on joint enterprise liability, which was relied upon by the ICTY Appeals Chamber in *Tadić* and found that the English common law never recognized an "extended" common purpose doctrine.[67] The significance of this for the purpose of determining the applicable law on liability is that the only support that the ICTY Appeals Chamber had in *Tadić* for treating foreseeability as a legal requirement for the "extended" crimes stems from domestic jurisprudence, including important common law authorities which were reversed in *Jogee* as erroneously treating foresight as a legal element.

56. Given that JCE III was not part of CIL at the material time and was not otherwise part of the Kosovo legal order, the Accused's prosecution on the

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[65] Article 25(3)(d) of the Rome Statute. *See also* K. Ambos, 'Joint Criminal Enterprise and Command Responsibility', pp. 172, 173 ("JCE II and III are not included in Article 25(3)(d)").
[66] Sieber, U., Koch, H. G., and Simon, J. M., Office of the Prosecutor Project Coordination, 'Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks', Expert Opinion, Commissioned by the United Nations – ICTY, 2006, Introduction, p. 3; Part 1, p. 16.
[67] *Jogee v. The Queen* [2016] UKSC 8; *Ruddock v. the Queen* [2016] UKPC 7, paras. 2, 3. The UK Supreme Court in its seminal judgment in *R v. Jogee; Ruddock v. The Queen* held that foresight should not be treated as an element of *mens rea* for the purpose of establishing liability for extended crimes committed outside the execution of a common principal purpose. Instead it was relevant as evidence from which it might be possible to draw an inference of intent to assist or encourage.

basis of this form of liability violates his rights under Articles 33 of the Constitution and Article 7 of the ECHR.

57. Article 7 of the ECHR requires that "the criminal law must not be extensively construed to an accused's detriment, for instance by analogy".[68] JCE III imputes responsibility to an accused for a crime that was not part of a criminal plan, which he did not intend and cannot fall within any natural meaning of the word "committed". Extending the interpretation of the word "committing" in Article 16(1)(a) so to include JCE, and, in particular, JCE III, stretches the language of Article 16(1)(a) beyond breaking point, to the detriment of the Accused, and violates Article 7(1) of the ECHR and Article 33 of the Constitution.

58. Mr Shala could not foresee in mid-1999 that he may be committing a crime through the alleged participation in a JCE. The applicable law at the time was neither clear or precise and fails to meet the requirements imposed as to the "quality of law" under Article 33 of the Constitution and Article 7(1) of the ECHR. It is telling that the UK Supreme Court considered JCE liability 'highly controversial and a continuing source of difficulty for trial judges' let alone for laymen.[69]

59. Foreseeability means that an accused "must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision".[70] The ECtHR has held that criminal law must be accessible and foreseeable in the sense that the Accused can know (with the benefit of legal advice if necessary) what acts will amount to crimes.[71] In

[68] ECtHR, *Kokkinakis v. Greece*, no. 14307/88, 25 May 1993, para. 52; *Vasiliauskas v. Lithuania*, para. 154.
[69] *Jogee v. The Queen* [2016] UKSC 8; *Ruddock v. the Queen* [2016] UKPC 7 ("*Jogee*"), para. 81.
[70] ECCC Pre-Trial Chamber Decision, para. 45.
[71] ECtHR, *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, 28 June 2018, para. 242; ECtHR, *Jorgić v. Germany*, no. 74613/01, 12 July 2007, paras. 109-113.

Vasiliauskas v. Lithuania, the ECtHR found that the international law on genocide was accessible because it was codified in the 1948 Genocide Convention, but that the applicant's rights had been violated because it was not foreseeable that his conduct would have been found to fall within the scope of definition of genocide.[72]

60. Mr Shala could not have anticipated that he would be accused of a crime he did not intend on the basis of a judicially constructed rule of CIL inferred from a small number of post-World War II cases which were inaccessible and inconclusive as to the application of this form of liability. This applies with even more force to the fact that he is charged under JCE III for murder.

61. The prosecution of Mr Shala for crimes allegedly committed through a JCE violates his right not to be charged for an act which did not constitute a criminal offence at the time it was committed. As such, all references to the mode of liability of JCE in the Indictment should be struck out as incompatible with the fundamental rights of the Accused guaranteed by Article 33 of the Constitution and Article 7 of the ECHR.

B. Arbitrary Detention in NIAC

62. Mr Shala has been charged with the war crime of arbitrary detention (Count 1) under Article 14(1)(c) of the Law. As to arbitrary detention in a NIAC, the Defence notes that this crime is not expressly mentioned in Article 14(1)(c) of the Law. In addition, it was not prescribed as an offence in the law applicable to Kosovo in 1999. Furthermore, it was not considered a serious violation of Common Article 3 to the 1949 Geneva Conventions and its prohibition did not form part of CIL in May and June of 1999. Therefore, in these circumstances prosecuting the Accused for arbitrary

[72] *Vasiliauskas v. Lithuania*, paras. 148, 170-186.

detention in a NIAC is incompatible with Article 33 of the Constitution and Article 7 of the ECHR and violates his rights guaranteed by these provisions.

Arbitrary detention was excluded from Article 14(1)(c) of the Law

63. Article 14(1)(c) enumerates a list of specific acts which should be considered as war crimes in NIAC. It does not list arbitrary detention as a war crime in NIAC. The exhaustiveness of this list is clear from the different qualifier used in the immediately preceding paragraph of the KSC Law, Article 14(1)(b) where the legislator specifically provided "including, *but not limited to*, any of the following acts". The interpretation by the Pre-Trial Judge and Appeals Chamber of the provision, according to which the KSC's jurisdiction is not only limited to the crimes expressly enumerated therein,[73] goes beyond the clear text of the provision (*in claris non fit interpretatio*) and against the principle of legality, as enshrined in Article 33(1) of the Kosovo Constitution and Article 7 of the ECHR.

Arbitrary detention as a war crime was not an offence in domestic law

64. Article 142 of the SFRY Criminal Code provided that the "unlawful bringing in concentration camps and other illegal arrests and detention" was prohibited as a war crime. However, the Kosovo Supreme Court held that "the conduct set out in Article 142 CL FRY constitutes a war crime pursuant to that Article only if … at the same time [it] constitutes a violation of international law effective at the relevant time…. [I]n practice the conduct set out in Article 142 of the Criminal Law of FRY constitutes a war crime only if it constitutes a violation of the relevant ratified treaties. Any developments in international humanitarian customary law … cannot be

[73] Pre-Trial Judge's Decision on Jurisdiction, para. 99; Appeals Chamber Decision on Jurisdiction, para 44. *See also* Confirmation Decision, para. 23.

considered as applicable in the domestic courts of Kosovo in so far as the implementation of Article 142 CL FRY is concerned…Therefore, in the application of Article 142 CL FRY it would not be legitimate to resort to international customary law."[74]

65. The Supreme Court also held that, with regard to events which were alleged to have occurred in 1999, the applicable Constitution was the 1974 SFRY Constitution.[75] Articles 210 and 181 of the 1974 SFRY Constitution made CIL inapplicable to events alleged to have occurred in 1999.[76] Considering that the 1974 Constitution excluded the direct applicability of CIL, the reference to "illegal arrest and detention" in Article 142 of the SFRY Criminal Code cannot be interpreted so as to include arbitrary detention in NIAC, as this was not a criminal offence under any of the applicable treaties. Moreover, in accordance with the principle of legality, no such conduct was proscribed by the text of Common Article 3.

66. In the case of *X.K*, the accused was charged and convicted before the Basic Court of Mitrovica of illegal detention as war crime under Article 142 of the SFRY Criminal Code. The Basic Court held that Mr X.K. "as a member of the KLA, in co-perpetration with S.G. and other KLA members, arrested and illegally detained … and other unknown civilians in such centre for a prolonged period of time, in K. (north of Albania) during April, May and through mid-June of 1999".[77] Importantly, this case concerns exactly the same detention centre and time as that concerned in the Indictment against Mr Shala. The Court of Appeals reclassified the charge of illegal detention

[74] Supreme Court of Kosovo (UNMIK), *Case against Veselin Bešović*, AP-KZ no. 80/2004, 7 September 2004, p. 19.
[75] Supreme Court of Kosovo (UNMIK), *Case against Latif Gashi et al.*, AP-KZ no. 139/2004, 21 July 2005, pp. 6, 12.
[76] *Ibid.*, pp. 6, 12.
[77] Kosovo, Basic Court of Mitrovicë/Mitrovica (EULEX), *Case against XH. K*, P 184/2015, Judgment, 8 August 2016.

as "coercion" and finally rejected it due to the expiration of statutory limitation. It also held that Article 142 of the SFRY Criminal Code, as amended on 30 August 1990, did not criminalize acts which did not cause grave bodily injuries or serious damage to the victims' health. It was found that "[u]nlawful detention of individual civilians is not penalized as a War crime against individual persons under any of the applicable statutes".[78]

Arbitrary detention is not a serious violation of Common Article 3 to the 1949 Geneva Conventions

67. There is no agreement among States or leading scholars as to what amounts to arbitrary detention in the context of NIAC.[79] In addition, it is commonly accepted that deprivation of liberty is an inevitable but lawful occurrence in armed conflicts.[80] The ICRC Study acknowledges that detention of civilians will not be considered arbitrary under international humanitarian law and human rights law if based on security imperatives.[81]

68. The Pre-Trial Judge and Appeals Chamber support their position that arbitrary detention constitutes a serious violation of Common Article 3 by finding that every instance of detention without legal basis or adequate procedural guarantees in NIAC amounts to inhumane treatment.[82] Such an absolute approach lacks any nuance and conflates arbitrary detention with

[78] Kosovo, Court of Appeals (EULEX), *Case against XH. K*, PAKR 648/16, 22 June 2017, p. 18.
[79] *See, for instance,* Triffterer, Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Ed, (Hart, 2016), p. 547 (para. 878) which specifically lists "imprisonment without adequate judicial guarantees" as a non-serious violation of Common Article 3. Knut Dormann, 'Detention in Non-International Armed Conflicts', in International Law Studies (US Naval College), Vol. 88, p. 349. *See also* Robert Barnsby, 'Yes We Can: The Authority to Detain as Customary International Law' (2009) 202 Military Law Review, p. 69; Ryan Goodman, 'The Detention of Civilians in Armed Conflict' (2009) 103 AJIL, pp. 55–56.
[80] ICRC, Detention in non-international armed conflict - Meeting of all States, 27-29 April 2015, 30 April 2015.
[81] ICRC Study, Vol. I, p. 344.
[82] Pre-Trial Judge's Decision on Jurisdiction, para. 100; Appeals Chamber Decision on Jurisdiction, para. 45.

inhumane treatment. It is well established that one can be arbitrarily deprived of his liberty and still be detained in conditions which are humane.[83] Under the ECHR, the question of arbitrary detention is examined under Article 5 of the Convention, while complaints for inhumane treatment fall to be examined under Article 3. There is a clear distinction between the rights protected with those provisions: the first protects liberty, while the second protects individual's physical and mental integrity.

Arbitrary detention as a war crime in NIAC was not prohibited by CIL in 1999

69. The Pre-Trial Judge and Appeals Chamber relied extensively on the ICRC Customary International Humanitarian Law Study in confirming the charge of arbitrary detention against Mr Shala.[84] However, as shown below, the ICRC Study is an aspirational statement of principle not supported by any other compelling source of international law.

70. As of 1999 there was no settled State practice which deemed arbitrary detention a crime under CIL.[85] The first time that the ICRC suggested the international humanitarian law prohibits arbitrary detention was in 2005, six years after the alleged events. Until 2005 not even a preliminary general study on the matter existed, let alone a norm of CIL. The approximately 60 States that the ICRC Study relies on hardly follow a consistent approach and it is unclear whether the criminalisation of arbitrary deprivation of liberty in the examined national systems applies to both categories of

[83] ECtHR, *Khlaifa and Others v. Italy* [GC], no. 16483/1215 December 2016; ECtHR, *Kosenko v. Russia*, nos. 15669/13 and 76140/13, 17 March 2020.
[84] Pre-Trial Judge's Decision on Jurisdiction, para. 101; Appeals Chamber Decision on Jurisdiction, para. 46, *referring to Thaçi et al.* Appeal Decision on Jurisdictional Challenges, paras. 106-109, 111.
[85] *North Sea Continental Shelf cases*; State practice must be "extensive", "virtually uniform" and "settled".

armed conflict. Moreover, many of the criminal codes referred to in the Study were adopted after 1999, which is the relevant threshold in this case.

71. The State practice cited in the Study is insufficient to meet the "extensive and virtually uniform" standard generally required to demonstrate the existence of a customary rule. Even if all the States that had enacted any legislation on the matter were taken into account, they would still represent only a relative minority of UN Member States. Moreover, the Study puts too much emphasis on written materials, such as military manuals, as opposed to actual operational practice by States during armed conflict.[86]

72. It is also important to take into consideration that the 1998 Rome Statute did not include arbitrary detention in the list of serious violations of Common Article 3.[87]

73. Customary international humanitarian law does not impose specific obligations on non-State armed groups concerning detention in NIAC beyond the general requirement to ensure "humane treatment" of a person once detained. Thus, deprivation of liberty in the context of a NIAC was not, *per se*, a criminal offence in CIL at the time.

74. The KSC has subject-matter jurisdiction only over substantive offences that were unambiguously recognised as such at the time of the events that are the subject of the Indictment, that were defined with sufficient clarity and specificity to meet the Convention's "quality of law" test, and that were incorporated into the domestic legal order. With the number of uncertainties surrounding the notion of arbitrariness when it comes to

[86] John B. Bellinger, III and William J. Haynes II, 'A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law', International Review of the Red Cross Vol. 89 No. 866 (2007), p. 445.
[87] *See* Article 8, Rome Statute.

detention and in the absence of any domestic or international norm prohibiting arbitrary deprivation in NIAC at the time relevant for the Indictment, Mr Shala could not have foreseen that he could be charged with it.

75. The Defence requests the SCCC to declare that the charge of arbitrary detention in a NIAC violates Mr Shala's rights under Article 33 of the Constitution and Article 7 of the ECHR and should be struck out from the Indictment.

V. REQUEST FOR AN ORAL HEARING

76. The Defence requests the SCCC to afford it the opportunity to develop its submissions in support of this Referral in an oral hearing. In light of the importance of the matters at stake, an oral hearing is warranted.

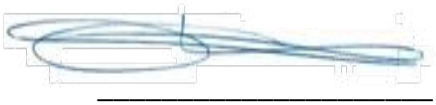
VI. RELIEF REQUESTED

77. In light of the above, the Defence respectfully seeks a declaration that the prosecution of the Accused under the mode of liability of a JCE and for the crime of arbitrary detention is unconstitutional and violates his rights under Article 33 of the Constitution and Article 7 of the ECHR.

78. The Defence requests the SCCC to order that all references to the mode of liability of JCE and the crime of arbitrary detention in a NIAC be struck out of the Indictment against the Accused.

79. The Defence also requests that, to the extent that Articles 3 and 12 of the Law introduce within the Kosovo legal order the offence of arbitrary detention in NIAC and liability under a JCE, they be declared invalid as incompatible with Article 33 of the Constitution and Article 7 of the ECHR.

Respectfully submitted,



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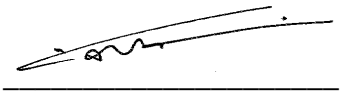

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Thursday, 14th April 2022

The Hague, the Netherlands

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