In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Pre-Trial Judge**
	Judge Nicolas Guillou
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Rexhep Selimi
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Selimi Defence Challenge to Jurisdiction – Joint Criminal Enterprise

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I. INTRODUCTION

1. Pursuant to Article 39(1) of the Law[1] and Rule 97(1)(a) of the Rules,[2] the Defence for Mr. Rexhep Selimi hereby challenges the jurisdiction of the Kosovo Specialist Chambers over Joint Criminal Enterprise ("JCE") as charged in the Indictment.

2. JCE is inapplicable before the KSC as a form of liability because: a) it is not specified in Article 16(1)(a) of the Law; b) it is not part of Kosovo domestic criminal law or the law of the FRY; c) it is not recognized by an international convention enforceable at the KSC; d) it is not recognized in customary international law but, even if it were so recognized today, it was not customary international law in 1998 and 1999; e) customary international law establishing individual criminal liability is not directly applicable in Kosovo courts; and f) applying JCE at the KSC would violate the principle of *nullum crimen sine lege*.

II. NATURE AND SCOPE OF THE MOTION

3. Pursuant to Rule 97(1)(a), an accused is entitled to challenge an indictment on the ground that it does not relate to, inter alia, the material jurisdiction of the Chambers which encompasses both the substantive crime charged and the applicability of the mode of liability to the relevant crime.[3]

4. The current challenge to the application of JCE is not therefore merely an argument relating to the contours or elements of the doctrine of JCE, which is distinguishable from other examples of challenges to the application of JCE to specific underlying acts

[1] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.
[2] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.
[3] ICTY, *Prosecutor v. Hadžihasanović et al*., IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002; and ICTY, *Prosecutor v. Hadžihasanović et al.,* IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, 16 July 2003.

of war crimes, crimes against humanity, and/or genocide, which were dismissed.[4] It is a jurisdictional challenge [5]

5. As this Motion does not challenge the legality of the KSC *per se*, or the jurisdiction of the KSC over superior responsibility or aiding and abetting (both of which were also included in the confirmed indictment against Mr. Selimi), if successful, it will not cause the cessation of proceedings against him. Instead, if the Pre-Trial Judge determines that JCE does not fall within the KSC's jurisdiction, this allegation should be struck from the Indictment, whereby the case may continue on the basis of the remaining forms of liability in the confirmed indictment (which may include alleged individual actions of commission against Mr. Selimi).[6]

III. SUBMISSIONS

A. Nature of the KSC and application of customary international law

6. The KSC is unambiguously a domestic Kosovo Court. It was created "within the Kosovo justice system."[7] Specialist Chambers are "attached to each level of the court system in Kosovo: the Basic Court of Pristina, the Court of Appeals, the Supreme Court and the Constitutional Court."[8] Consistent with the territorial jurisdiction of Kosovo, its jurisdiction is limited to crimes within its subject matter jurisdiction which were "either commenced or committed in Kosovo."[9] Similarly, its personal jurisdiction is limited to "persons of Kosovo/FRY citizenship or over persons who committed crimes within its subject matter jurisdiction against persons of Kosovo/FRY citizenship

[4] ICTY, *Prosecutor v. Karadžić'*, IT-95-5/18-AR72.1-AR72.3, Decision on Radovan Karadžić's Motions Challenging Jurisdiction (Omission Liability, JCE-III, Special Intent Crimes, Superior Responsibility), 25 June 2009, paras 33-37 (cites therein)
[5] ICTY, *Prosecutor v. Ojdanić,* Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise, 21 May 2003, para. 5 ("*Ojdanić* JCE Decision") referring to *Prosecutor v. Milutinovic, Sainovic, and Ojdanic*, IT-99-37-AR72, Bench Decision pursuant to Rule 72(E) as to Validity of Appeal, Appeals Chamber, 25 March 2003, p. 3 (Appeals Bench holding that Ojdanic's appeal had been validly filed insofar as it challenged the jurisdiction of the Tribunal in relation to his individual criminal responsibility for allegedly participating in a JCE).
[6] IRMCT, *Prosecutor v. Turinabo et al,* Decision on Challenges to Jurisdiction, 12 March 2019, para. 32 ("Turinabo JCE Decision").
[7] Article 1(2) of the Law.
[8] Article 3(1) of the Law.
[9] Article 8 of the Law.

wherever those crimes were committed."[10] It was created through a law which was passed by the Kosovo Assembly, which required specific adherence to the Kosovo Constitution. Where this law was held to be in conflict with the Constitution, a new article had to be added to the Constitution to ensure that it was consistent.[11]

7. This wholly domestic nature of the KSC directly contrasts with other hybrid tribunals, such as the ECCC,[12] STL[13] and SCSL[14] which were created by Agreement with the UN. More importantly, the KSC contrasts with both the ICTY and ICTR which were purely international tribunals which were created by Security Council Resolution[15] and exclusively enjoyed jurisdiction over "serious violations of international humanitarian law"[16] as well as the ICC, which was established by agreement between the States Parties and only entered into force upon the domestic ratification of the treaty establishing it by a sufficient number of states.[17]

8. In terms of applicable law before the KSC, Article 12 of the Law provides as follows:

> The Specialist Chambers shall apply customary international law and the substantive criminal law of Kosovo 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 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.

[10] Article 9(2) of the Law.
[11] See Amendment No. 24 to the Constitution of the Republic of Kosovo, No.05 -D- 139 3 August 2015 which created Article 162.
[12] Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003.
[13] Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon Beirut, 29 January 2007.
[14] Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone, 12 April 2002.
[15] S/RES/827 (1993) 25 May 1993; S/RES/955 (1994)* 8 November 1994.
[16] ICTY Statute, Article 1.
[17] Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998.

9. Customary international law can only be created through (a) general and consistent state practice[18] and (b) *opinio juris*.[19] In order to assist the judges to determine whether a specific rule constitutes customary international law, Article 3 of the Law further provides that:

> In determining the customary international law at the time crimes were committed, Judges may be assisted by sources of international law, including subsidiary sources such as the jurisprudence from the international ad hoc tribunals, the International Criminal Court and other criminal courts.

10. As such, as well as domestic Kosovo law, which the KSC would be mandated to apply to events on the territory of Kosovo, it appears to have been authorised by the Law to also directly apply customary international law at the time the alleged crimes were committed and to rely extensively on jurisprudence from other international courts and criminal courts to identify these rules.

11. No further explanation is provided by the Law as to the legal basis for directly applying customary international law, whether there are any limits to its application and indeed which parts of customary international law may apply. Nor is there any further explanation of how this provision relates to the incorporation of international law into the Kosovo domestic legal system. However, this question cannot be regulated so simply. Whenever customary international law is invoked in a national court, the court should consider if and under what circumstances the national legal system applies customary international law. In the absence of specific directives in its Constitution, legislation or national jurisprudence, a national court is under no obligation to apply customary international law.[20] For example, in The Netherlands, the Dutch Supreme

[18] In relation to state practice, the ICJ has held that "[t]he party which relies on custom…must prove that this custom is established in such a manner that it has become binding on the other Party …[and] that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question..." *Columbian-Peruvian asylum case*, Judgment of November 20th, 1950, ICJ Reports 1950, p. 276. State practice should be "extensive and virtually uniform in the sense of the provision invoked". *Nicaragua v. United States*, (Merits), ICJ Reports 1986, para. 74.

[19] As for *opinio juris,* the ICJ has held that States "must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it." *Nicaragua v. United States*, (Merits), ICJ Reports 1986, para. 14.

[20] *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 303 (Oxford University Press 2003) "Normally national courts do not undertake proceedings for international crimes only on the basis of international *customary* law, that is, if a crime is only provided for in that body of law. They instead tend to require either a national *statute* defining the crime and granting national courts jurisdiction over it, or, if a treaty has been ratified on the matter by the State, the passing of *implementing legislation* enabling courts to fully apply the relevant treaty provisions." *See also Nulyarimma v. Thompson* [1999] FCA 1192, paras 22, 26 (Federal Court of Australia) (opinion of Wilcox J.), "[I]t is not enough to say that, under international law, an international crime is punishable in a domestic tribunal even in the absence of a domestic law declaring that conduct to be punishable. If genocide is to be

Court rejected the claim that in view of the applicability of treaties, it must also accept the applicability of other sources of international law, including customary law.[21]

12. This contrasts with the situation at hybrid or international courts which have held that they may directly apply customary international law.[22] Simply because the ICTY found it could apply customary international law directly, this does not mean that the KSC can follow this precedent.

13. While it is to be hoped that the Kosovo Constitution would directly resolve this issue, neither of the relevant constitutional provisions refer specifically to customary international law. Article 16(3) provides that "The Republic of Kosovo shall respect international law" whereas Article 19(2) provides that "Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo." Customary international law is not mentioned in either provision.

14. Despite this, Article 3(2)(d) of the Law provides that the 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." This provision goes beyond the relevant provisions of the Constitution and ascribes to customary international law a direct applicability and superiority that is not supported by the Constitution.

15. The Pre-Trial Judge may not therefore assume that customary international law is directly applicable before the KSC but must demonstrate how customary international

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regarded as punishable in Australia, on the basis that it is an international crime, it must be shown that Australian law permits that result." (Emphasis added); *id*., at para. 26 "[D]omestic courts face a policy issue in deciding whether to recognise and enforce a rule of international law. If there is a policy issue, I have no doubt it should be resolved in a criminal case by declining, in the absence of legislation, to enforce the international norm."; Gabriele Olivi, *The Role of National Courts in Prosecuting International Crimes: New Perspectives*, 18 SRI LANKA J. INT'L L. 83, 87 (2006) *quoting Reportiers sans Frontières v. Mille Collines*, Paris Court of Appeals, Judgment, 6 November 1995, at 48-51 "in the absence of domestic law international custom cannot have effect of extending the extraterritorial jurisdiction of the French courts."; *U.S. v. Yousef*, 327 F.3d 56, 91 (2nd Cir. 2003) "United States law is not subordinate to customary international law or necessarily subordinate to treaty-based international law and, in fact, may conflict with both."

[21] *The Nyugat v. The Netherlands,* (S.Cl, March 6, 1959) 10 Nederiands Tijdschrift Int'l Recht (1963) 82, 86. See also Hoge Raad, 18 September 2001, LJN AB1471, NJ 2002, no. 559; ILDC 80 (NL 2001) (Bouterse); Hoge Raad, 8 July 2008, LJN BC7418 (for a translation in English see LJN BG1476), RvdW (Rechtspraak van de Week) 2008, no. 761; ILDC 1071 (NL 2008).

[22] ICTY, *Prosecutor v. Tadic,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 94.

law is a legally binding norm of international law against Kosovo citizens under Article 19(2) of the Constitution and therefore directly applicable before a domestic Kosovo court.

16. In this regard, the Defence notes the Pre-Trial Judge's Decision on the Confirmation of the Indictment[23] which referred on multiple occasions to customary international law.[24] This *ex parte* Decision, while necessarily issued in the absence of Defence submissions given the confidential nature of the submitted indictment at the time, appears to have fallen into this trap and assumed the direct applicability of customary international law before the KSC without addressing this question. This requires an assessment anew of this issue by the Pre-Trial Judge for while certain provisions of customary international law may have achieved such legally binding status, such as those guaranteeing fundamental human rights of an accused, directly applying complex and controversial modes of liability such as JCE based exclusively on customary international law, have clearly not.

B. Nature and creation of JCE liability

17. JCE is a judicial construct created through a selective analysis of a limited number of post-World War II cases and international conventions, leading the ICTY Appeals Chamber in *Tadić* to the very controversial conclusion[25] that JCE "is firmly established in customary international law."[26] In so holding, the Appeals Chamber "scoured through the post-World War II jurisprudence, locating cases in which it believed the doctrine had been employed."[27] Furthermore, it relied upon two international conventions which were not yet in force at the relevant time period when the alleged crimes in *Tadić* occurred[28] and which did not reflect the nature, or elements, of JCE.

[23] *Prosecutor v. Thaci et al.,* Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 26 October 2020 ("Confirmation Decision").
[24] Confirmation Decision, paras 36, 37, 75, 77 and 87.
[25] "Since the *Tadić* appeal judgement of 15 July 1999, joint criminal enterprise (JCE) as a mode of international criminal responsibility has developed into one of the most controversial elements of substantive international criminal law." Göran Sluiter, *Guilt by Association: Joint Criminal Enterprise on Trial*, 5 J. INT'L CRIM. JUST. 67 (2007).
[26] ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 220 ("*Tadić* Appeal Judgement").
[27] ICTY, *Prosecutor v. Brdjanin,* IT-99-36-A, Amicus Brief of Association of Defence Counsel – ICTY, 5 July 2005, para.14.
[28] *Tadić* Appeal Judgement, paras 221-222.

18. Even though not explicitly listed in the ICTY Statute, the *Tadić* Appeals Chamber also found JCE to be a form of "committing."[29]

19. As recognized by the Pre-Trial Judge,[30] JCE, as applied at the *ad hoc* tribunals, has three distinct forms:

a. JCE I (basic form) ascribes individual criminal liability when "all co-perpetrators, acting pursuant to a common purpose, [and] possess the same criminal intention […] although each of the participants may carry out a different role [within the JCE]."[31]

b. JCE II (systemic form) is "characterized by the existence of an organized criminal system, in particular in the case of concentration or detention camps."[32]

c. JCE III (extended form) ascribes individual criminal liability in situations "involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common plan, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose."[33]

20. The required *actus reus* elements, common to all three forms, are: (1) "A plurality of persons"; (2) "The existence of a common plan, design, or purpose which amounts to or involves the commission of a crime provided for in the Statute"; and (3) "Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute"[34] which appears to be "significant".[35]

21. The *mens rea* differs for the three forms. The *mens rea* required for JCE I is the shared intent of all members to commit a certain crime.[36] For JCE II, the required *mens rea* is (a) the personal knowledge of the system of ill-treatment and (b) "the intent to further this common concerted system of ill-treatment."[37] For JCE III, the required *mens rea* is

[29] *Id.*, paras 187-93.
[30] Confirmation Decision, para. 105.
[31] *Prosecutor v. Vasiljević,* IT-98-32-A, Judgement, 25 February 2004, ("*Vasiljević* Appeal Judgement"), para. 97.
[32] *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka* Appeal Judgement"), para. 82.
[33] *Vasiljević* Appeal Judgement, para. 99. *See also Tadić* Appeal Judgement, para. 204.
[34] Confirmation Decision, para. 106; *Tadić* Appeal Judgement, para. 227.
[35] Confirmation Decision, para. 110; *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement"), para. 430.
[36] *Tadić* Appeal Judgement, para. 228. *See also Vasiljević* Appeal Judgement, para. 101.
[37] *Tadić* Appeal Judgement, para. 228. *See also Kvočka* Appeal Judgement, para. 243.

"the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group."[38] "[R]esponsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstance in the case, (i) it was foreseeable that such a crime might be perpetrated […] and (ii) the accused willingly took that risk."[39] *Dolus eventualis* (advertent recklessness) is the required standard, which is more than mere negligence.[40]

C. JCE does not fall within Article 16(1)(a) of the Law

22. By contrast with Superior Responsibility, Article 16(1)(a) of the Law does not explicitly include JCE as a form of liability as it accords liability to any suspect who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of crimes within the KSC's jurisdiction. This contrasts both with the ICC Statute adopted in 1998, which explicitly includes a form of liability which the Appeals Chamber in *Tadic* considered to be akin to JCE[41] as well as the STL Statute which does the same.[42] The explicit exclusion of JCE from the text of Article 16(1)(a) of the Law, which was drawn up many years after JCE was created in *Tadić,* appears to be a deliberate choice to reject JCE as a form of liability that may be applied at the KSC.

23. The Defence notes that at both the ICTY[43] and ECCC,[44] JCE has been considered to be a form of commission liability and therefore falling within the respective provisions granting jurisdiction to those courts over committing as a form of liability. The ECCC PTC JCE Decision explained further that "had the drafters of the ECCC Law intended to limit the "commission" envisaged in Article 29 to persons who physically and

[38] *Tadić* Appeal Judgement, para. 228.
[39] *Id.* (Emphasis added).
[40] *Id.*, para. 220. *See also Kvočka* Appeal Judgement, para. 83, *citing Tadić* Appeal Judgement, para. 204.
[41] Article 25(3)(d) of the ICC Statute reads in pertinent part: "In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime."
[42] *See* Article (3)(1)(b) of the STL Statute.
[43] *Ojdanić* JCE Decision, paras 12-18.
[44] ECCC, Case of Ieng Sary, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, para. 49 ("ECCC PTC JCE Decision").

directly carry out the *actus reus* of the crime(s), they would have made such restriction explicit.

24. This finding misunderstands the nature of a jurisdictional challenge. Although raised by the Defence, the party seeking to rely on JCE bears the burden of demonstrating that this form of liability was explicitly included within the Law. The SPO was instead obliged to demonstrate that the word "commission" encompassed acts beyond its logical and natural meaning of physically and directly carrying out the actus reus of the crime rather than the Defence carrying out the opposite. This is supported by the *Turinabo* JCE Decision where the Single Judge granted the Defence challenge to JCE for contempt and held that:

> "[i]n the absence of clear evidence that the doctrine of joint criminal enterprise applies to contempt in customary international law or as a general principle of international law, I am not satisfied that the Mechanism has jurisdiction over this form of responsibility for crimes committed in violation of Rule 90 of the Rules."[45]

25. This demonstrates that the obligation weighs clearly upon the party which claims that the KSC does have jurisdiction over JCE, namely the SPO, to justify that it indeed falls within Article 16(1)(a) of the Law, rather than requiring the Defence to demonstrate that it does not.

26. In any event, it is hard to envisage how much more explicit the KSC could be, than by not referring to JCE in Article 16(1)(a). Jurisdiction, whether personal, temporal or geographical, is rarely, if ever described in the negative. Indeed, it would be bizarre to require, as the Pre-Trial Chamber did, that a Court specifically exclude a form of liability in its statutory provision.

27. Consequently, if the word "committing" in Article 16(1)(a) was intended to include JCE, a greater and more direct indication of this would have been required. For example, this provision could have referred explicitly to Joint Criminal Enterprise, or "committing, either individually or jointly with others." Or even "acting in concert" with others, to demonstrate that JCE liability was included within a court's jurisdiction. None of these occurred. As a consequence, JCE may not be applied before the KSC.

[45] *Turinabo* JCE Decision, para. 32.

D. JCE was not part of Kosovo law or the law of the FRY in 1998

28. Article 6(1) of the Law grants jurisdiction to the KSC over both international crimes covered by Articles 12-16 and specific domestic Kosovan criminal offenses set out in Article 6(2), although these are limited to offences against the administration of justice. Article 12 of the Law provides that the KSC "shall apply customary international law and the substantive criminal law of Kosovo insofar as it is in compliance with customary international law, both as applicable at the time the crimes were committed."

29. Article 25(1) of the SFRY Criminal Code, applicable in Kosovo in 1998, provides that "the co-perpetrator shall be criminally responsible within the limits set by his own intention or negligence, and the inciter and the aider -- within the limits of their own intention." Article 22 of the same code provides that "if several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act". Whereas Article 26 provides that:

> Anybody creating or making use of an organization, gang, cabal, group or any other association for the purpose of committing criminal acts is criminally responsible for all criminal acts resulting from the criminal design of these associations and shall be punished as if he himself has committed them, irrespective of whether and in what manner he himself directly participated in the commission of any of those acts.

30. None of these provisions provides either implicitly or explicitly for a mode of liability which could be equated to JCE, either in form or substance under domestic law applicable in Kosovo in 1998.

31. While superficially appearing similar to JCE, co-perpetration under Kosovo law differs from JCE for three principal reasons. First, co-perpetration requires each co-perpetrator to have personally accomplished the material actions constituting the offence and therefore each co-perpetrator must be present on the crime scene and taking part in the specific offence. By contrast, it has been held that presence of the JCE member is not required for the accused to be held criminally liable under JCE.[46] Second, as co-perpetration requires each co-perpetrator to have personally accomplished the material actions constituting the offence, the co-perpetrators may not use others who are not co-perpetrators to physically commit the offence. By contrast, it has been held that the

[46] ICTY, *Prosecutor v. Krnojelac,* IT-97-25-A, Judgement, 17 September 2005, para. 81.

principal or physical perpetrators may be outside the JCE if used by JCE members.[47] Third, JCE liability separates the alleged common plan into an objective and the means contemplated to achieve that objective. By contrast, co-perpetration appears not to distinguish the two.[48]

32. Similarly, JCE also differs from accomplice liability as understood in Articles 22-24 of the FRY Criminal Code. First, participation in a JCE has been considered a form of "committing."[49] By contrast, the aider and abettor is an "accessory to a crime perpetrated by another person."[50] Second, unlike JCE, "aid or assistance" or "means supplied" does not require proof of a common plan: the principal perpetrator might not even know about the contribution of the accomplice.[51] Third, the required *mens rea* element of "aid or assistance" or "means supplied" is knowledge that the acts assist in the commission of the crime. By contrast, JCE liability requires that the co-perpetrators intend that the crime be committed (JCE I) or have the "intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed" (JCE III).[52]

33. In light of these substantive differences between JCE and the modes of liability under Kosovo law the SPO may not rely on JCE being part of domestic law applicable in Kosovo to justify the application of JCE against Mr. Selimi.

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[47] *Brđanin* Appeal Judgement, para. 414.
[48] The consequences of this distinction are that a person could be liable under JCE liability when the same conduct would not be criminal under co-perpetration. Firstly, where "the accused have participated in furthering the common purpose at the core of the JCE" this is sufficient for criminal liability to attach. *Brđanin* Appeal Judgement, para. 427. For co-perpetration, however, it is required that each member personally accomplish the material actions constituting the offence, namely a part of the *actus reus* of the offence. Secondly, by introducing the distinction between the objective and the means used to achieve that objective, liability is possible under JCE when the alleged enterprise is of a "vast scope." *Prosecutor v. Karamera et al.*, ICTR-98-44-AR72.5 & ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, para. 16. This is because in a JCE the objective may be as vague as "to take any actions necessary to gain and exercise political power and control over the territory." *Prosecutor v. Brima et al.*, SCSL-04-16-T, Judgement, 20 June 2007, para. 67. In contrast, as the objective and means of achieving that objective are identical in co-perpetration, only the criminal acts which the accused and the other co-perpetrators have a direct part in and personal knowledge of, may fall under this form of liability. Thirdly, one may still be liable under JCE theory when the objective is not an international crime if the means contemplated to achieve that objective are criminal. *Prosecutor v. Brima et al.,* SCSL-04-16-A, Judgement, 22 February 2008, para. 76. In contrast, co-perpetration in international criminal law could only apply as a form of liability where the objective was an international crime as it would have to be the same as the means envisaged to achieve the objective.
[49] *Ojdanić* JCE Decision, para. 20.
[50] *Tadić* Appeal Judgement, para. 229.
[51] *Id.*
[52] *Id.*

E. JCE was not part of conventional or customary international law in 1998

34. No international conventions binding on Kosovo include JCE. There is therefore no treaty basis for applying this form of liability.

35. Instead, the SPO seeks to rely exclusively on JCE under customary international law to apply it against Mr. Selimi. However, contrary to the finding in *Tadić* and the other cases that have sought to apply it since, JCE was not part of customary international law either in 1992, when the offences were committed by *Tadić*, or in March 1998 when the alleged JCE supposedly commenced.[53]

i. JCE, Co-Perpetration and Customary International Law

36. In creating JCE, the *Tadić* Appeals Chamber failed to conduct the rigorous review, analysis and identification of either state practice or *opinio juris* as required to identify a rule of customary international law.[54] If they had done so, the Appeals Chamber would have concluded that most states use co-perpetration rather than JCE[55] but do not even do that uniformly for co-perpetration to constitute a rule of customary international law by itself.

37. First, the Chamber relied upon on a very limited number of cases from a limited number of jurisdictions. In relation to JCE I, the *Tadić* Appeals Chamber merely relied on six

[53] Indictment, para. 32.
[54] ICTY, *Prosecutor v. Orić,* IT-03-68-A, Appeals Judgement, 3 July 2008, Partially Dissenting Opinion and Declaration of Judge Liu, para. 26, referring to the texts of the Draft Code of Crimes Against the Peace and Security of Mankind and Article 28 of the ICC Statute being adopted subsequent to the adoption of the ICTY and ICTR Statute. *See also* ICTY, *Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction In Relation To Command Responsibility, ("*Hadžihasanović* Interlocutory Appeal") Partially Dissenting Opinion of Judge Shahabuddeen, 16 July 2003, para. 21, where Judge Shahabuddeen noted that "weight has of course to be given to the texts as indicative of the state of customary international law as it existed when they were adopted. But, as the texts [Draft Code of Crimes Against the Peace and Security of Mankind] were adopted subsequent both to the making of the Statute of the Tribunal and to the dates on which the alleged acts … were committed, on the question what was the state of customary international law on these occasions they do not seem to speak with the same authority as do the earlier provisions … of the 1977 Additional Protocol I to the Geneva Conventions 1949."
[55] ICTY, *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, 7 July 2006, para. 24. "[W]hen interpreting the meaning of 'committing' based on imputed liability, it is the noble obligation of an international criminal tribunal to merge and harmonize the major legal systems of the world and to accept also other recognized developments in criminal law over the past decades."

cases in total, four from British military tribunals, one from a Canadian tribunal and one from an American tribunal: *Otto Sandrock and three others*; *Hoelzer et al.; Gustav Alfred Jepsen and other; Franz Schonfeld and others; Feurstein and others; Otto Ohlenforf et al.* With respect to JCE II, the *Tadić* Appeals Chamber relied upon two cases in the body of the judgment: the Dachau Concentration Camp case (*Trial of Martin Gottfried Weiss and thirty-nine others*) and the Belsen case (*Trial of Josef Kramer and forty-four others*). For JCE III the *Tadić* Appeals Chamber relied upon the *Essen Lynching Case, Borkum Island Case,* numerous *unpublished* decisions from post World War II Italian jurisprudence: *Repubblica Sociale Italiana; D'Ottavio et al; Aratano et al; Tossani; Ferrida; Bonati et al, Mannelli*.

38. These cases are either inconsistent or do not even support this form of liability as alleged. In certain cases the Judge Advocate failed to state the law[56] thereby demonstrating that the *Tadić* Appeals Chamber simply assumed that a case stood for that principle rather than concretely identified it. In this regard, although Article 3 of the Law allows the KSC to rely on decisions of other courts when identifying rules of customary international law, both international and domestic, these cases must be accurately and objectively analysed before any reliance may be placed on them. Simply, the cases relied upon by the *Tadić* Appeals Chamber provide "almost no support for the most controversial aspects of contemporary joint criminal enterprise doctrine."[57]

39. Second, the Appeals Chamber relied upon provisions in two international conventions: the International Convention for the Suppression of Terrorist Bombing (ICSTB),[58] and the Rome Statute of the International Criminal Court (ICC Statute)[59] in support of this form of liability. These were drafted, signed and entered into force after the date of

[56] *Tadić* Appeal Judgement, paras 208, 212. Additionally, with some cases, the *Tadić* Appeals Chamber assumed that the Prosecution's arguments in respect to criminal liability were followed because the accused was convicted. In reviewing the *Essen Lynching* case, for example, the Appeals Chamber inappropriately assumed that as the Defendant was convicted, the court must have accepted the Prosecution's arguments in respect of criminal liability. *Tadić* Appeal Judgment, para. 208.
[57] "The cases cited in *Tadić* … do not support the sprawling form of JCE, particularly the extended form of this kind of liability, currently employed at the ICTY. Instead, the cases discussed in Tadić fall into one of two types. The first involves unlawful killings of small groups of Allied POWs, either by German soldiers or by German soldiers and German townspeople. The second group of cases concerns concentration camps. … [T]here is no indication in [*Essen Lynching*] that the prosecutor explicitly relied on the concept of common design, common purpose, or common plan. The Tadić court nevertheless cited this case as support for Category Three of JCE." Danner & Martinez, *supra* note 36, at 110-11.
[58] G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998).
[59] July 17, 1998, Art. 25, 2187 U.N.T.S. 3, 105.

commission of the offences in *Tadić*, and hence have very limited value, if any, in assessing the customary status of JCE.[60] Further, the ICSTB deals with different crimes than the ICTY Statute. Moreover, the form of liability created by these two provisions, and to which one may also add Article 3(1)(b) of the STL Statute, is actually a "a residual form of accessoryship" which is a markedly different from JCE.[61]

40. As a consequence of this failure of analysis, the very basis for the creation of JCE liability, the *Tadić* Appeal Decision, is fundamentally flawed. There was simply insufficient evidence of *opinio juris* and state practice identified by the Appeals Chamber to support this finding. Nor does the subsequent reference to *Tadić* in every ICTY decision or judgement relating to JCE reinforce this. It simply demonstrates the consistency of the ICTY jurisprudence after that judgement was issued, and a noticeable reluctance to open the judicial pandora's box of whether JCE really was customary international law, given the severe consequences for the vast majority of ICTY indictments which were based on this form of liability if this was held not to be the case.

41. When the customary international law basis of JCE liability was challenged directly by the Defence in *Milutinović et al.*, the Appeals Chamber simply asserted that it:

> "does not propose to revisit its finding in *Tadić* concerning the customary status of this form of liability. It is satisfied that the state practice and *opinio juris* reviewed in that decision was sufficient to permit the conclusion that such a norm existed under customary international law in 1992 when *Tadić* committed the crimes for which he had been charged and for which he was eventually convicted."[62]

[60] The offences in *Tadić* were committed in 1992. The ICSTB was adopted by consensus by the United Nations General Assembly through resolution 52/164 of 15 December 1997, opened for signature on 12 January 1998, and entered into force on 23 May 2001. The ICC Statute entered into force in 2002. As held by Judge Liu in his partially dissenting opinion and declaration in *Orić* noted that "because customary international law has to be assessed as of the date of commission of the offenses, the fact that … texts were adopted subsequent to these dates, further limit their weight and usefulness as sources of customary international law at the time the crimes were committed."
[61] ICC, *Prosecutor v. Katanga*, Judgement pursuant to article 74 of the Statute, 7 March 2014, paras 1618-1619.
[62] *Ojdanić* JCE Decision, para. 29.

42. Yet, if the Appeals Chamber was incorrect in *Tadić* to have held that JCE was part of customary internatiounal law in *Tadić,* then the same institution continually repeating this error does not rectify it.[63]

43. In this regard it is noteworthy that one of the ICTY Appeal Chamber judges who voted in favour of the creation of JCE in *Tadić* appears to have admitted that this was an error. Judge Mohamed Shahabuddeen subsequently admitted that neither JCE, which has roots in the common law or co-perpetratorship, which has roots in the civil law, "can claim the status of customary international law."[64]

44. When this challenge to JCE was raised before the ECCC, the Pre-Trial Chamber recognized the failings of *Tadić* but sought to rectify them to see whether other cases were more persuasive in justifying the creation of JCE liability. It identified two specific cases, the *Justice* and *RuSHA* cases, in support of this position as the "legal elements applied by the Military Tribunal to determine the liability of the accused are sufficiently similar to those of JCE (as described above) and constitute a valid illustration of the state of customary international law with respect to the basic form and systemic form of JCE (JCE I & II)."[65] This was an error.

45. First, as admitted by the ECCC Pre-Trial Chamber, neither of these Judgements specifically referred to joint criminal enterprise. Nor do they appear to have referred to common criminal purpose either, often used by the *Tadić* Appeals Chamber. This is not a mere terminological difference between these cases and *Tadić*. It provides persuasive evidence that the relevant courts in both of these cases did not intend for the creation of such a form of liability.

46. Second, in the clear terms of the decision, at most the Pre-Trial Chamber held that the form of liability applied in those cases was "similar" to JCE.[66] Similarity is not enough.

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[63] Justice Sir Isaac Isaacs, in a case before the High Court of Australia, noted, "[i]f, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right." *Australian Agricultural Co. v. Federated Engine-Drivers & Firemen's Assn of Australasia* (1913), 17 C.L.R. 261 at 278 (Isaacs J).

[64] Mohamed Shahabuddeen, Judicial Creativity and Joint Criminal Enterprise, in Judicial Creativity at the International Criminal Tribunals 188 (Shane Darcy & Joseph Powderly, eds., Oxford University Press, 2010).

[65] ECCC PTC Decision, para. 65.

[66] Ibid, paras 66, 68.

Various different forms of liability may be "similar" to each other, but to rely on such cases for the creation of a specific form of liability, must meet a far higher threshold. This is accentuated by the Pre-Trial Chamber's recognition of the holding in *Rwamakuba* that:

> ["t]he post-World War II materials do not always fit neatly into the so-called "three categories" of joint criminal enterprise discussed in Tadic, in part because the tribunals' judgements did not always dwell on the legal concepts of criminal responsibility, but simply concluded that, based on the evidence, the accused were "connected with," "concerned in," "inculpated in," or "implicated in" war crimes and crimes against humanity did not always dwell on the legal concepts of criminal responsibility, but simply concluded that, based on the evidence, the accused were "connected with," "concerned in," "inculpated in," or "implicated in" war crimes and crimes against humanity."[67]

47. Delineating clear principles of criminal responsibility based on these ambiguous findings is thereby an impossible task. There is simply not enough clarity from these post-World War II decisions to be satisfied that the relevant cases intended to find principal rather than accessory liability and what exactly the elements of it were.

48. Third, the facts of these cases do not support the conclusion that a form of JCE was applied. In the *Justice* Case, the defendant Lautz was held to be "an accessory to, and took a consenting part in, the crime of genocide."[68] As an accessory, whether or not he took a consenting part in the crime, it was clear that Lautz was not considered as a principal. As explained above, this separates the form of liability held against Lautz from JCE.

49. In the same vein the ECCC Pre-Trial Chamber relied upon the finding that Rothaug "identified himself with this national program and gave himself utterly to its accomplishment, thus participating in the crime of genocide."[69] Yet, there are no further findings which suggest that he was being held responsible for based on a form of liability akin to JCE. No reference is made to the elements of any of the three forms of JCE identified by the Appeals Chamber in *Tadić* and there is no indication from the judgement as to how it could be used to support such a finding.

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[67] ICTY, *Rwamakuba v. Prosecutor*, ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, Appeals Chamber, 22 October 2004 ("Rwamakuba JCE Decision"), para. 24.
[68] Justice Judgement, p. 1028.
[69] ECCC PTC Decision, para. 67.

50. The same applies to the findings in the *RuSHA* case. While the Military Tribunal found that the defendants Hofmann and Hildebrandt bore full responsibility for crimes against humanity and war crimes, for their participation in the abortion and kidnapping programmes and knowledge of the conduct of the examiners, there was no clear explanation of what level of participation was required, nor whether they were being held responsible as principals or accessories.

51. At most therefore, these additional two cases provide no more than the most minimal support for the existence of a form of liability akin to JCE. However, this is insufficient to compensate for the flaws identified in the *Tadić* Judgement above.

52. Nor, do the London Charter or Control Council Law No. 10, both of which the ECCC Pre-Trial Chamber relied upon, compensate for these gaps. Neither Article 6 of the Charter or Article II(2) of Control Council Law No. 10, may be relied upon to establish the substantive law to apply to cases brought under these statutory documents as they were passed after the crimes were committed. In the same manner, Article 6 of the Law can only establish the jurisdiction of the KSC over modes of liability which were part of binding domestic or international law at the time of the alleged events in 1998. Simply put, Article 6 only allowed the IMT to apply the modes of liability that were part of law binding on individuals at the time of commission of offences. It is therefore impermissible to rely upon it as proof of the existence of such binding modes of liability.

53. Moreover, neither article actually provides for JCE liability. Article 6 of the Charter confers jurisdiction over those "participating in the formulation or execution of a common plan or conspiracy to commit." Article II(c) and (d) of Control Council Law 10, confers jurisdiction to these Courts for any person who (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission." Neither of these provisions assist in justifying the existence of JCE liability.

54. Finally, the ECCC Pre-Trial Chamber refused to address the reliance on the ICC Statute and ICSTB by the *Tadić* Appeals Chamber because they found that JCE was part of customary international law.[70] If, however, these conventions had provided the

[70] ECCC PTC JCE Decision, para. 69.

necessary support for this finding they would also have been relied upon by the ECCC Pre-Trial Chamber. Their absence is telling.

55. Therefore, despite the ECCC Pre-Trial Chamber's best efforts to compensate for the gaps in the reasoning of the *Tadić* Appeals Chamber there is still insufficient *opinio juris* and state practice to demonstrate that JCE was part of customary international law at the time that the crimes in the Indictment against Mr. Selimi were allegedly committed.

ii. JCE III

56. Even if the Pre-Trial Judge considers that JCE in general as a form of liability is part of customary international law, this finding is limited to JCE I and II. JCE III was not part of customary international law in 1998 and may not be applied against Mr. Selimi.

57. As the ECCC Pre-Trial Chamber clearly held:

> "Having reviewed the authorities relied upon by Tadic in relation to the extended form of JCE (JCE III), the Pre-Trial Chamber is of the view that they do not provide sufficient evidence of consistent state practice or opinio juris at the time relevant to Case 002. The Pre-Trial Chamber concludes that JCE III was not recognized as a form of responsibility applicable to violations of international humanitarian law for the following reasons."[71]

58. The rigorous analysis by the Pre-Trial Chamber of the cases relied upon by the *Tadić* Appeals Chamber to justify JCE III demonstrates the intellectual creativity employed by the latter. While recognising that both *Borkum Island* and *Essen Lynching* may be relevant to JCE III, in "absence of a reasoned judgement in these cases, one cannot be certain of the basis of liability actually retained by the military courts."[72]

59. In *Borkum Island,* the Chamber held that as the Prosecution pleaded that all accused shared the intent that the airmen be killed, the court may as well have been satisfied that these six individuals possessed such intent rather than having merely foreseen this possible outcome. In *Essen Lynching,* despite the inferences put forward as to the basis of liability in that case, "there is no indication in the case that the Prosecutor even

[71] Ibid, para. 77.
[72] Id, para. 79.

explicitly relied on the concept of common design and this case alone would not warrant a finding that JCE III exists in customary international law."[73]

60. The ECCC Pre-Trial Chamber finally considered that the other Italian cases relied upon by the *Tadić* Appeals Chamber, "in which domestic courts applied domestic law, 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."[74] In light of these findings, the Pre-Trial Chamber held that "the principle of legality requires the ECCC to refrain from relying on the extended form of JCE in its proceedings."[75]

61. The ECCC Pre-Trial Chamber Decision was the first time an international court had independently assessed the customary international law underpinnings of JCE liability since its creation unburdened by the consequences of finding that Tadic was decidedly wrongly on this issue. It was a challenge raised early in pre-trial proceedings and allowed the trial to be conducted on a clear basis.

62. The ECCC Pre-Trial Decision was also confirmed by the Trial Chamber when the Co-Prosecutors sought to re-initiate this form of liability during trial proceedings. Holding that it "agrees in substance with the Pre-Trial Chamber's analysis of the above post-WWII cases"[76] (namely *Borkum Island* and *Essen Lynching*) the Trial Chamber also addressed additional cases identified by the Appeals Chamber before the STL, which had issued a finding that JCE III would be applicable before that Tribunal.[77] Notwithstanding the fact that the STL Interlocutory Decision was issued in abstract proceedings which were subsequently criticised by the Trial Chamber, in the absence of concrete facts or representation of an accused, and that none of the STL cases actually applied this form of liability, the ECCC Trial Chamber also correctly held that the additional cases relied upon therein, *US. v. Ulrich and Merkle* and *US. v. Wuelfert*, did "not provide the legal reasoning behind the affirmed convictions" and therefore "do not necessarily support guilt based upon JCE III."

[73] Id, para. 81.
[74] Id, para. 82.
[75] Id, para. 87.
[76] ECCC, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, paras 29-31 ("ECCC Trial Chamber Decision").
[77] STL, Interlocutory Decision on the Applicable law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal for Lebanon, STL-ll-0111, 16 February 2011.

63. Moreover, the Trial Chamber also addressed the issue of whether JCE III constituted a 'general principle of law recognized by civilized nations' which the Pre-Trial Chamber did not specifically rule upon and which the Tadic Appeals Chamber held "would be necessary to show that most, if not all, countries adopt the same notion of common purpose."[78] In light of its own survey of several national legal systems, which showed considerable divergence of approach between various national jurisdictions, it therefore confirms the assessment of the ICTY Appeal Chamber that state practice in this area lacks sufficient uniformity to be considered a general principle of law.[79]

64. Despite this confirmation of the ECCC Pre-Trial Decision and the inapplicability of JCE III, this issue was again raised before the Supreme Court Chamber, which held as follows:

> "791. In this regard, the Supreme Court Chamber notes with approval the Pre-Trial Chamber Decision on JCE (D97/15/9), in which the Pre-Trial Chamber analysed in detail the jurisprudence of the ad hoc tribunals regarding the notion of JCE III and concluded that the decisions upon which the ICTY Appeals Chamber relied in *Tadić* when finding that JCE III was part of customary international law did not constitute a "sufficiently firm basis" for such a finding. […]
>
> 792. Similar problems arise in respect of the other cases to which the Co-Prosecutors refer, which were addressed neither in *Tadić* nor in the Pre-Trial Chamber Decision on JCE (D97/15/9). As to the *Renoth* Case (British Military Court, Germany), the summary of the trial – in the course of which three individuals were found guilty of the killing of an Allied prisoner of war even though the actual killing had been carried out by another accused – specifically noted that "[i]t is impossible to say conclusively whether the court found that the three accused took an active part in the beating or whether they were liable under the doctrine set out by the Prosecutor", who had argued that even without active participation in the beating, the three accused could be found guilty; the Co-Prosecutors themselves argue that the requirements of JCE III "appear" to have been fulfilled in this case – hardly a sufficient basis to identify a rule of customary international law.
>
> 793. None of the other cases to which the Co-Prosecutors refer 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."[80]

65. The Supreme Court Chamber then proceeded to address the Italian cases cited in *Tadić*, finding them to be inapposite, misplaced, and unsupportive of JCE III and issued the following specific findings:

[78] *Tadić* Appeal Judgement, para. 225.
[79] ECCC Trial Chamber Decision, para. 37.
[80] ECCC, Case of Nuon Chea and Khieu Saphan, Appeal Judgement, 23 November 2016, paras 791-793 ("ECCC Appeal Judgement").

a. *D'Ottavio*: "members of the group were *not* convicted of a crime falling outside the common plan;"[81]
b. *Aratano*: "the Italian Court of Cassation *overturned* the conviction for a homicide perpetrated during an operation aimed at arresting some partisans, since the common purpose of the operation did not encompass killing;"[82]
c. Italian Amnesty cases: these cases were "highly context-dependent, as shown by the somewhat inconsistent case law" and "hardly provide a firm guidance;"[83] and,
d. Other Italian cases: the final category of Italian cases did not concern war crimes, "but ordinary crimes under Italian law, perpetrated by and against Italian nationals, and adjudicated before Italian domestic authorities."[84]

66. Reviewing even more post-World War II cases, the Supreme Court Chamber found that "[t]he vast majority … does not lend any support to the argument that accused may incur criminal responsibility for crimes that were not encompassed by the common purpose and the *actus reus* of which they did not commit."[85] It considered that only five of the cases merited discussion:

a. *Rüsselsheim*: it was unclear as to whether the U.S. Military Commission in Germany *adopted* the prosecution's view that common purpose liability extends to crimes that do not fall within the common purpose but are its natural and probable consequence;[86]
b. *Tashiro*: the prosecution's argument that American prisoners "met their deaths … in accordance with a preconceived plan; or at least, as a result of gross negligence" of the accused did not demonstrate attribution based on an extended form of JCE;[87] and
c. Australian Military Court cases: the three cases before Australian military courts either did not indicate that convictions were based on anything

[81] Ibid, para. 795.
[82] Id, para. 796.
[83] Id, para. 797.
[84] Id, para. 798.
[85] Id, para. 799.
[86] Id, para. 800.
[87] Id, para. 801.

> resembling JCE III or acquitted the accused for crimes not foreseen by the common purpose.[88]

67. Finally, the Supreme Court Chamber found that the vast majority of domestic cases and legislation referred to "relate to ordinary domestic cases without any international element."[89] Nor were these examples of domestic law sufficient to establish JCE III as a general principle of international law,[90] echoing the earlier finding of the Trial Chamber.

68. These clear, reasoned and definitive findings permanently put paid to the application of JCE III liability at the ECCC. No other cases been identified between the period covered by the ECCC's jurisdiction and the decision of the *Tadić* Appeals Judgement in July 1999 which would be able to affect the outcome of this decision. Indeed, JCE liability has also since been held not to be applicable to contempt, therefore continuing the distancing from this form of liability. The Pre-Trial Judge should therefore follow this weight of authority and detailed judicial reasoning and hold that JCE III is similarly not applicable before the KSC as it was not part of customary international law at the time the alleged crimes were committed.

F. Foreseeability and accessibility

69. As held by the Trial Chamber in *Vasiljević:*

> "[f]rom the perspective of the nullum crimen sine lege principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was insufficiently accessible at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility."[91]

70. The principle of *nullum crimen sine lege* has been applied to forms of liability as well as substantive crimes.[92] This reflects the finding by the ICTY Appeals Chamber in *Ojdanić* that for a mode of liability to be applicable it must have been sufficiently

[88] Id, para. 802-4.
[89] Id, para. 805.
[90] Id, para. 806.
[91] ICTY, *Prosecutor v. Vasiljević,* Trial Judgement, 29 November 2002, para. 193.
[92] *Hadžihasanović* Interlocutory Appeal, paras 32-35.

accessible at the relevant time to anyone who acted in such a way and such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.[93] As explained by the ECCC Pre-Trial Chamber 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. As to accessibility, reliance can be placed on a law which is based on custom."[94]

71. In the context of the KSC, to satisfy the principle of legality, it must be demonstrated that JCE liability was part of binding and applicable customary international law at the time of the alleged crimes, as well as sufficiently foreseeable and accessible to the Accused.[95] The requirements of foreseeability and accessibility must be determined through an objective analysis, namely that the crimes and modes of liability must be foreseeable and accessible in general.[96] Therefore, even if the Pre-Trial Judge considers that any of the three forms of JCE were part of customary international law in March 1998, he must also examine whether these forms were sufficiently foreseeable and accessible to anyone in Kosovo at that date to be applied against Mr. Selimi. They were not.

72. First, as outlined above, JCE liability is not found in Kosovo law. As such, the Pre-Trial Judge would not be able to rely upon the alleged underpinning of JCE in Kosovo law to demonstrate that JCE was accessible and foreseeable to Mr. Selimi contrary to the finding by the ECCC Pre-Trial Chamber.[97]

73. Second, the *Tadić* Appeal Judgement was issued on 15 July 1999, only two months before the end of the JCE charged against Mr. Selimi.[98] As a consequence, relying upon its findings to ascribe to JCE sufficient foreseeability and accessibility is impermissible.

[93] ICTY, *Ojdanić* JCE Appeal Decision, para. 10. *Prosecutor v. Blagojevie and Jokic*, IT -02-60-T, Judgement, Trial Chamber I, 17 January 2005 ("*Blagojević* and *Jokić* Trial Judgement"), para. 695. Prosecutor v. *Stakić*, IT -97-24-T, Judgement, Trial Chamber II, 3 1 July 2003 ("S*takić* Trial Judgement"), para. 431.
[94] ECCC Pre-Trial Chamber Decision, para. 45.
[95] Id, para. 758. See also ECCC Pre-Trial Chamber Decision, para. 45.
[96] Supreme Court Judgement, para. 761.
[97] ECCC Pre-Trial Chamber Decision, para. 72.
[98] Indictment, para. 32.

IV. CONCLUSION & RELIEF SOUGHT

74. The KSC, in accordance with the Kosovo Constitution and recognized human rights principles, is prohibited from retroactively applying criminal law, including modes of liability, that were not applicable and binding in Kosovo at the time the offences charged were allegedly committed. Thus, the only forms of liability for which Mr. Selimi may be prosecuted are those which would have been applicable to him in March 1998 in Kosovo. This simply does not include JCE. To apply this against him would violate the principle of *nullum crimen sine lege,* which prohibits a retroactive application of criminal law. This principle is recognized in domestic Kosovo law and under international law binding on Kosovo.[99]

75. The Defence therefore requests the Pre-Trial Judge to:

a. GRANT this Challenge to Jurisdiction and confirm that the Kosovo Specialist Chambers do not have jurisdiction over Joint Criminal Enterprise liability; and

b. ORDER the SPO to remove paragraphs 32-52 from the Indictment insofar as they relate to Joint Criminal Enterprise.

Respectfully submitted on 10 February 2021,

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[99] Article 15(1) of the ICCPR provides that "No one shall be held guilty of any criminal offence on account of any act of omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."