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

Preliminary Motion on Jurisdiction

with Public Annex 1

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I. INTRODUCTION

1. Joint criminal enterprise ("JCE") is not identified as a mode of responsibility in Article 16(1) of Law No.5/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"). JCE was not a part of customary international law at the time when the alleged crimes were committed. Further, the application of JCE was not foreseeable to Mr. Krasniqi at the material time. Accordingly, pursuant to Article 39(1) of the Law and Rule 97(1)(a) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), the Defence for Jakup Krasniqi ("Defence") request the Pre-Trial Judge to find that the Kosovo Specialist Chambers ("KSC") has no jurisdiction over the allegation of JCE.

2. Moreover, the KSC does not have jurisdiction over most of the Indictment crimes, because contrary to Article 6(1) of the Law they do not "relate to" the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011 ("the Council of Europe Report"). The Council of Europe Report addressed crimes committed outside Kosovo in Albania, after April 1999 and in the context of organised crime rather than an armed conflict. The Indictment alleges crimes committed predominantly within Kosovo, beginning over a year earlier in March 1998 and in the context of the armed conflict. Apart from the allegations about Kukës and Cahan,[1] which do appear to relate to the Council of Europe Report, the remainder of the Indictment allegations are outside the scope of the KSC's jurisdiction and must therefore be dismissed.

3. Further, insofar as they are not inconsistent with the submissions advanced herein, the Defence adopt and join the jurisdiction challenges submitted by the Defences for Hashim Thaçi, Kadri Veseli and Rexhep Selimi.

[1] KSC-BC-2020-06, F00045/A03, Specialist Prosecutor, *Further Redacted Indictment* ("Indictment"), 4 November 2020, public, paras 78-79, 115-116, 164.

II. APPLICABLE LAW AND INDICTMENT

4. Rule 97(1)(a) of the Rules provides that:

> The Accused may file preliminary motions before the Pre-Trial Judge in accordance with Article 39(1) of the Law, which:
> (a) challenge the jurisdiction of the Specialist Chambers.

5. Article 1(2) of the Law provides:

> Specialist Chambers within the Kosovo justice system and the Specialist Prosecutor's Office are necessary to fulfil the international obligations undertaken in Law No. 04/L-274, to guarantee the protection of the fundamental rights and freedoms enshrined in the Constitution of the Republic of Kosovo, and to ensure secure, independent, impartial, fair and efficient criminal proceedings in relation to allegations of grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo, which relate to those reported in the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011 ("The Council of Europe Assembly Report") and which have been the subject of criminal investigation by the Special Investigative Task Force ("SITF") of the Special Prosecution Office of the Republic of Kosovo ("SPRK").

6. Article 6(1) of the Law provides:

> The Specialist Chambers shall have jurisdiction over crimes set out in Articles 12-16 which relate to the Council of Europe Assembly Report.

7. Article 16 of the Law provides (in part):

> **Individual Criminal Responsibility**
> (1) […]:
> a. a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of such a crime shall be individually responsible for the crime.

8. The KSC must apply customary international law as it was at the time when the alleged crimes were permitted. Article 12 of the Law provides that "[t]he Specialist Chambers shall apply customary international law […] as applicable at the time the crimes were committed".

9. Moreover, the right against retrospective application of criminal laws as stated in Article 7 of the European Convention on Human Rights ("ECHR")[2] and Article 15 of the International Covenant on Civil and Political Rights ("ICCPR")[3] is a fundamental right which overrides any contradictory provision pursuant to Article 22 of the Constitution and Articles 3(2)(e) and 19(2) of the Law.

10. Article 3(3) of the Law provides that "[i]n 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".

11. JCE derives from the jurisprudence of the *ad hoc* tribunals. In the Tadić Appeal Judgment,[4] the International Criminal Tribunal for the former Yugoslavia ("ICTY") defined three forms of JCE: the basic form of JCE ("JCE I"), the systemic form of JCE ("JCE II") and the extended form of JCE ("JCE III"). According to the ICTY, the *actus reus* for all forms of JCE requires (1) a plurality of persons (2) a common criminal plan, design or purpose and (3) participation by the accused in the common design.[5] The *mens rea* required, however, differs. In JCE I, the accused must intend to commit the crime. In JCE III, by contrast, the accused is made responsible for a crime which falls outside the common plan if (1) it was foreseeable that the crime might be perpetrated and (2) the accused willingly took that risk.[6]

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[2] Article 7 of the ECHR, No Punishment Without Law, provides:

> (1) No one shall be held guilty of any criminal office 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 […].

[3] Article 15 of the ICCPR provides:

> (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 […].

[4] ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, *Judgment* ("Tadić Appeal Judgment"), 15 July 1999.

[5] *Ibid.*, para. 227.

[6] *Ibid.*, para. 228.

12. The Indictment pleads JCE as the primary mode of criminal responsibility. Thus, it pleads that a plurality of persons[7] had a common criminal purpose to gain and exercise control over Kosovo by using means including unlawfully intimidating, mistreating, committing violence against and removing those deemed to be opponents[8] and that Mr. Krasniqi significantly contributed to the common purpose.[9]

13. The Indictment relies on both JCE I and JCE III. It pleads that Mr. Krasniqi shared the intent for the commission of the specified crimes (JCE I)[10] and, in the alternative, pleads that if certain crimes did not fall within the common purpose then it was foreseeable that they might be committed and Mr. Krasniqi willingly took that risk (JCE III).[11]

14. The Defence submit that the KSC does not have jurisdiction over the mode of responsibility called JCE. First, JCE is not a mode of responsibility within the Law (see paras 17-23). Second, JCE was not a part of customary international law during the Indictment period which is March 1998 – September 1999[12] (see paras 24-49). Third, JCE was not foreseeable to Mr. Krasniqi in March 1998 – September 1999 (see paras 50-54).

15. Further, the Indictment pleads that the JCE existed from March 1998 to September 1999 and had as its purpose "to gain and exercise control over all of Kosovo".[13] The crimes are alleged to have been committed in 42 detention locations, 40 of which are in Kosovo and 2 (Cahan and Kukës) are in Albania, to have occurred

[7] Indictment, para. 35.
[8] *Ibid.*, para. 32.
[9] *Ibid.*, para. 51.
[10] *Ibid.*, para. 33.
[11] *Ibid.*, para. 34.
[12] *Ibid.*, para. 32.
[13] *Ibid.*

on various dates within the period March 1998 – September 1999 and to have been targeted against 'Opponents'.[14]

16. The KSC does not have jurisdiction over the vast majority of the Indictment allegations, because the jurisdiction of the KSC is expressly limited to those crimes which relate to the Council of Europe Report. The Indictment allegations are outside the temporal and geographic scope of the Council of Europe Report and occurred in a different context (and one which has already been considered by other courts and tribunals including the ICTY and EULEX) (see paras 55-69 below).

III. JCE IS NOT A MODE OF RESPONSIBILITY WITHIN ARTICLE 16(1) OF THE LAW

17. In essence, this point is straightforward. Article 16(1) of the Law, which codifies the modes of individual criminal responsibility applicable before the KSC, makes no mention of JCE. Therefore, JCE is not a mode of responsibility recognised by the Law.

18. Article 16(1)(a) states that "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of such a crime shall be individually responsible for the crime". The drafting is clear. It states five modes of responsibility: planning, instigating, ordering, committing and aiding and abetting.[15] No mention is made of JCE. The list is exhaustive; just as there would be no warrant for reading another mode of responsibility such as conspiracy into Article 16(1)(a), so too JCE cannot be read into the Law. Interpretation cannot be used to fill perceived gaps in the available arsenal of forms of criminal responsibility.[16]

[14] Indictment, paras 32, 60-171.
[15] Command responsibility is added subsequently in Article 16(1)(c) of the Law.
[16] ICC, *Prosecutor v. Ngudjolo*, ICC-01/04-02/12-4, Trial Chamber II, *Judgment pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert* ("Concurring Opinion of Judge Wyngaert"), 18 December 2012, para. 16.

19. Even if there is any ambiguity in Article 16(1) (which there is not), the KSC should apply the interpretation most favourable to the Accused. In order to respect the presumption of innocence, it is a general principle of criminal law that doubt should be resolved in favour of the Accused (*in dubio pro reo*).[17] This principle applies to all stages of proceedings.[18] It applies to the interpretation of the definition of crimes;[19] it applies to the definition of modes of responsibility.[20] Rule 4(3) of the Rules expressly adopts this principle, stating that any ambiguity in the Rules should be resolved by "the adoption of the most favourable interpretation to […] the Accused". The same rule of interpretation must apply to the Law. Adopting the interpretation of Article 16(1) most favourable to the Defence, excludes reading into Article 16(1) any additional mode of liability which is not expressly stated there.

20. International human rights law also constrains the KSC against creative interpretation of Article 16(1)(a). It follows from Article 7 of the ECHR that "the criminal law must not be extensively construed to an accused's detriment, for instance by analogy".[21] International human rights law has superiority over any norm, law or standard applicable before the KSC, pursuant to Article 22 of the Constitution and Article 3(2)(e) of the Law. Reading JCE into Article 16(1)(a) would be an expansive interpretation of the criminal law to the detriment of the Accused, which would violate Article 7(1) of the ECHR.

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[17] *See*, for instance, ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, *Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence*, 15 October 1998, para. 73.
[18] ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Pre-Trial Chamber II, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 June 2009, para. 31.
[19] ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Chamber I, *Judgment*, 2 September 1998, paras 319, 501.
[20] Concurring Opinion of Judge Wyngaert, para. 18.
[21] ECtHR, *Kokkinakis v. Greece*, no. 14307/88, *Judgment (Merits and Just Satisfaction)* ("Kokkinakis Judgment"), 25 May 1993, para. 52; *Vasiliauskas v. Lithuania*, no. 35343/05, *Judgment (Merits and Just Satisfaction)* ("Vasiliauskas Judgment"), 20 October 2015, para. 154.

21. On this issue, the KSC should not follow the jurisprudence of the ICTY, which read the concept of JCE into the word "committed" in the identically worded Article 7 of the Statute of the ICTY.[22] The obvious distinction between the position of the ICTY and the KSC is that the Law was drafted more than 20 years after the Statute of the ICTY. In preparing the Law, the drafters were aware not only of the adoption of JCE by the Tadić Appeal Judgement, but also of the rejection of JCE by the International Criminal Court ("ICC")[23] and the rejection of JCE III by the Extraordinary Chambers in the Courts of Cambodia ("ECCC").[24] Moreover, the drafters were aware of the criticism of JCE which exists even within the ICTY jurisprudence.[25] In the context of this well-known controversy about JCE – and JCE III in particular – the omission of any specific reference to JCE in the Law must reflect a deliberate decision not to include JCE as a mode of responsibility within the jurisdiction of the KSC.

22. Furthermore, contrary to the Tadić Appeal Judgment, JCE III cannot fall within any natural meaning of the word "committed". JCE III renders an Accused criminally responsible for a crime that he did not directly perpetrate or intend and which fell outside the common criminal plan, merely because it was foreseeable that it might be committed.[26] Such an Accused cannot be said to have "committed" the crime; in JCE

[22] Tadić Appeal Judgment, paras 189-193.
[23] ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, *Decision on the Confirmation of Charges* ("Lubanga Confirmation of Charges"), 29 January 2007, paras 326-339; *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-717, Pre-Trial Chamber I, *Decision on the Confirmation of Charges* ("Katanga Confirmation of Charges"), 30 September 2008, para. 480.
[24] ECCC, *Co-Prosecutors v. Ieng Sary et al.*, 002/19-09-2007-ECCC/OCIJ (PTC38), Pre-Trial Chamber, *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)* ("ECCC PTC Decision"), 20 May 2010; *Co-Prosecutors v. Ieng Sary et al.*, 002/19-09-2007/ECCC/TC, Trial Chamber, *Decision on the Applicability of Joint Criminal Enterprise* ("ECCC TC Decision"), 12 September 2011.
[25] *See e.g.* ICTY, *Prosecutor v. Stakić*, IT-97-24-T, Trial Chamber II, *Judgement* ("Stakić Trial Judgment"), 31 July 2003, paras 438-441; *Prosecutor v. Prlić et al.*, IT-04-74-T, Trial Chamber III, *Judgment, Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti* ("Separate and Partially Dissenting Opinion Judge Antonetti"), 29 May 2013, pp. 100-182.
[26] *See supra* para. 11.

III, the crime can only be said to be "committed" by the direct perpetrator.[27] Nor does JCE III fall within the definition of "otherwise aided and abetted" in Article 16(1). Aiding and abetting is a specific form of accomplice liability with different requirements to JCE III. For instance, JCE III requires significant contribution to the common plan whilst aiding and abetting requires the higher standard of substantial contribution to the crime.[28] Any attempt to bring JCE III within the wording of "commits" or "otherwise aided and abetted" would stretch the language of Article 16(1)(a) beyond breaking point, to the detriment of the Accused.

23. JCE is not expressly stated in Article 16(1) and it cannot properly be implied into the language of Article 16(1). The KSC thus has no jurisdiction over any allegation based on JCE.

IV. JCE DID NOT FORM PART OF CUSTOMARY INTERNATIONAL LAW AT THE TIME THE OFFENCES WERE COMMITTED

24. JCE was not part of customary international law at the time that the alleged offences were committed beginning in March 1998. In relation to JCE I, the Defence adopt and join the submission of the Defence for Rexhep Selimi.[29] The analysis below shows that in relation to JCE III, the post-World War II cases are vague and inconclusive; the only conclusion that can be drawn from them is that in no case did any court or tribunal unequivocally impute responsibility for a crime which fell outside a common plan to any accused on the basis of foreseeability. Nor is there the necessary consistency in national practise to generate a rule of customary international

[27] *See e.g.* ECCC, *Co-Prosecutors v. Kaing Guek Eav*, 001/18-07-2007-ECCC/OCIJ (PTC02), Pre-Trial Chamber, *Amicus Brief for the Pre-Trial Chamber on Joint Criminal Enterprise from Professor Kai Ambos*, 27 October 2008, paras 2-3.
[28] *See* e.g. ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Appeals Chamber, *Judgment*, 30 January 2015, para. 1732.
[29] KSC-BC-2020-06, F00198, Selimi Defence, *Selimi Defence Challenge to Jurisdiction – Joint Criminal Enterprise*, 10 February 2021, public, paras 36-55.

law. As a result, to rely on JCE III against Mr. Krasniqi would represent a fundamental error of law and a violation of the rights of the Accused.

25. The KSC is not bound to repeat the mistakes of the Tadić Appeal Judgment. This Court is not bound by the jurisprudence of the *ad hoc* Tribunals and must make its own determination of the status of customary international law in March 1998. In doing so, the KSC may be assisted by the jurisprudence of the *ad hoc* Tribunals,[30] but they carry no more weight than the decision of any other international tribunal. The Tadić Appeal Judgment and the subsequent ICTY cases following it are no more authoritative before the KSC than the carefully reasoned decisions of three chambers of the ECCC which rejected the customary status of JCE III.[31] The ECCC is only one of the many sources doubting the correctness of the Tadić Appeal Judgment, for instance:

a. First, JCE has been criticised within the ICTY. Judge Per-Johan Lindholm held that "[t]he concept or 'doctrine' has caused confusion and a waste of time, and is in my opinion of no benefit to the work of the Tribunal or the development of international criminal law".[32]

b. Second, Judge Shahabuddeen, Presiding Judge of the Tadić Appeals Chamber, later recognised extra-judicially that "neither co-perpetratorship nor joint criminal enterprise (including liability to conviction without

[30] The Law, Article 3(3).
[31] ECCC PTC Decision; ECCC TC Decision; ECCC, *Co-Prosecutors v. Nuon Chea et al.*, 002/19-09-2007-ECCC/SC, Supreme Court Chamber, *Appeal Judgment* ("ECCC SC Decision"), 23 November 2016.
[32] ICTY, *Prosecutor v. Simić et al.*, IT-95-9-T, Trial Chamber II, *Judgment, Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm*, 17 October 2003, para. 5; *See also* Stakić Trial Judgment, paras 438-441; *Prosecutor v. Simić*, IT-95-9-A, Appeals Chamber, *Judgment, Dissenting Opinion of Judge Schomburg*, 28 November 2006, fn. 20; Separate and Partially Dissenting Opinion Judge Antonetti.

intent) is customary international law […] save for judicial creativity, there is no basis on which those theories could be recognized as law";[33]

c. Third, there has been extensive academic criticism of JCE III, for instance "[c]onsidering the scarcity of Nuremberg-era jurisprudence on this construct and its general absence from the international legislation of that period, one could rightly question the holding that JCE III responsibility is firmly established in customary international law".[34]

26. A rule of customary international law is not lightly established. Custom is derived from the practice of States.[35] It requires both a "settled practice" and "a belief that this practice is rendered obligatory by the existence of a rule of law requiring it".[36] In relation to the first requirement, although "complete consistency" is not required, it is necessary that "the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule".[37] Where State practice shows uncertainty and contradiction, fluctuation and discrepancy, the requisite settled practice cannot be established.[38]

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[33] Shahabuddeen, M., "Judicial Creativity and Joint Criminal Enterprise", in Darcy, S., and Powderly, J. (eds), *Judicial Creativity at the International Criminal Tribunals*, Oxford University Press 2010, p. 190.
[34] Yanev, L., "Joint Criminal Enterprise", in Hemptinne, J., Roth, R., and Sliedregt, E. (eds), *Modes of Liability in International Criminal Law*, Cambridge University Press 2019, p. 166, para. 74; *see also* Badar, M.E., "'Just Convict Everyone!' – Joint Perpetration: From *Tadić* to *Stakić* and Back Again" (2006) 6 *International Criminal Law Review*; Darcy, S., "An Effective Measure of Bringing Justice? The Joint Criminal Enterprise Doctrine of the International Criminal Tribunal for the Former Yugoslavia" (2004-2005) 20 *American University International Law Review*; Damgaard, C., "The Joint Criminal Enterprise Doctrine: A 'Monster Theory of Liability' or a Legitimate and Satisfactory Tool in the Prosecution of the Perpetrators of Core International Crimes?", in Damgaard, C., *Individual Criminal Responsibility for Core International Crimes*, Springer 2008.
[35] ICJ Statute, Article 38(1)(b).
[36] ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969* ("North Sea Continental Shelf Case"), para. 77.
[37] ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, *Judgment of 27 June 1986*, para. 186.
[38] ICJ, *Asylum Case (Colombia/Peru), Judgment of 20 November 1950*, p. 277.

27. Applying this test, there is wholly insufficient consistent State practice to support the existence of JCE III as an established norm of customary international law throughout the Indictment period. JCE III cannot properly be inferred from a small number of inconclusive post-World War II cases, none of which discussed the existence of specific modes of responsibility in international law. Its existence in customary international law is not supported by international treaties. Further, it is not supported by general principles of criminal law drawn from State practice, which show diversity, fluctuation and discrepancy rather than a generally consistent adoption of JCE III.

1. JCE III IS NOT SUPPORTED BY THE POST-WORLD WAR II CASES

28. A variety of post-World War II cases are sometimes said to support the existence of JCE III in customary international law, with more creativity than fidelity to the records of those cases. None of those cases expressly entered convictions for crimes which fell outside a common criminal design on the basis that the crimes were foreseeable to the accused. Nor can it be inferred that any convictions must have been on the basis of JCE III. The certainty or consistency required to establish a rule of customary international law is conspicuously absent.

29. The Tadić Appeal Judgment relied primarily on the *Essen Lynching* case and the *Borkum Island* case to justify the existence of JCE III in customary international law.[39] However, in neither case can it be established that the accused were convicted for offences which fell outside a common design on the basis of foreseeability.

30. In the *Essen Lynching* case, prisoners of war were being escorted for interrogation. A captain instructed the private soldier who was escorting them not to

[39] Tadić Appeal Judgment, paras 207-213.

intervene if civilians should molest the prisoners. Along the way, the prisoners were beaten and killed by a crowd of civilians. The British Military Court convicted three civilians, the captain and the soldier escort on the charge of being "concerned in the killing"; two other civilians were acquitted.[40]

31. Nothing in the limited reporting of the case indicates that a mode of responsibility akin to JCE III was applied. There was no detailed record of the Court's reasoning; there was no Judge Advocate appointed and no summing up was delivered in open court. The Notes on the Case rightly acknowledge that the considerations relied upon by the Court "cannot, therefore, be quoted from the transcript in so many words".[41] It cannot be inferred that convictions for killing must have been entered on the basis that the convicted persons could have foreseen that others would kill the prisoners.[42] Various modes of responsibility are referred to including being "concerned in the killing", a vague mode of responsibility with uncertain requirements, incitement / instigation and omission by the private to protect those in his custody.[43] Insofar as a common design was alleged, it was a common design to kill – beginning with "incitement to the crowd to murder".[44] The convictions could be explained by JCE I. Of course, if there was a common plan to kill and the accused shared the intent to kill, JCE I does not require that the specific accused struck the death blow only that they significantly contributed to the common design.[45] Nor do the acquittals suggest that a foreseeability standard was applied, because they were simply based on the failure to prove the allegations against those accused.[46] As a

[40] British Military Court for the Trial of War Criminals, *Erich Heyer et al.*, Case No. 8, *Trial of Erich Heyer and Six Others* ("Essen Lynching Case"), 18-19 and 21-22 December 1945, UNWCC, Law Reports of Trials of War Criminals, Vol. I at 88-92.
[41] *Ibid.*, p. 91.
[42] *Contra* Tadić Appeal Judgment, para. 209.
[43] Essen Lynching Case, pp. 88-90.
[44] *Ibid.*, p. 89.
[45] *Ibid.*, p. 91.
[46] *Ibid*.

result, the *Essen Lynching* case does not support the existence of JCE III in customary international law.[47]

32. The *Borkum Island* case is equally unconvincing as a precedent for JCE III.[48] In that case, prisoners of war were escorted by soldiers on a pre-planned route through a densely populated area, on the way civilians were encouraged to beat them and they were ultimately shot and killed. The charges were of "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing]", first, in the killing and, second, in assaults.[49] The US Military Court convicted some of both assault and killing, others solely of assault and one was acquitted altogether.

33. Nothing in the record of the case expressly suggests a mode of responsibility based on the foreseeability of offences which fell outside a common criminal design. No detailed summing up explaining the reasoning of the Court survives. It cannot be inferred that convictions were entered on the basis of a common criminal design to assault, with additional convictions for killing for those accused who foresaw that killing might result from the assault.[50] First, the charges quoted above embrace participation, encouraging and aiding and abetting as modes of responsibility. It is unclear which was applied. Second, that the convictions for killing were entered on the basis of foreseeability is no more than one possible inference. Alternatively, the Court may simply have found that some but not all of the Accused intended the killings and therefore convicted those who had the requisite intent pursuant to JCE I and acquitted those who did not. Third, inferring that the convictions were based on foreseeability, begs the question why any acquittals were entered. There is no reason why killing was foreseeable to some but not all of the Accused. Accordingly, this case

[47] *See* ECCC PTC Decision, para. 81, ECCC TC Decision, para. 31, ECCC SC Decision, para. 791.
[48] United States Army War Crimes Trials, *United States v. Kurt Goebell et al.*, Case No. 12-489, *Review and Recommendations* ("Borkum Island Case"), 1 August 1947.
[49] *Ibid*., Section II, p. 1.
[50] *Contra* Tadić Appeal Judgment, para. 213.

too does not support the conclusion that JCE III existed in customary international law.[51]

34. The Defence anticipate that the SPO, realising the impossibility of defending JCE III on the basis of these two cases, may assert that other post-World War II cases demonstrate the existence of JCE III. Objectively analysed, as the ECCC Supreme Court Chamber held,[52] no other case supports the existence of responsibility in customary international law for crimes outside the scope of a common design on the basis of foreseeability. No case expressly relied on this mode of responsibility. Nor can it be inferred that this mode of responsibility must have been applied because the limited material available is equally consistent with other modes of responsibility. Further, none of these cases analysed customary international law in relation to modes of responsibility:-

a. Rüsselsheim.[53] In this case, the accused were alleged to have participated in a mob which attacked and killed prisoners of war when they were being escorted through Rüsselsheim. The charge was of "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in the killing". In the absence of any written judgment, it cannot be concluded that the Court found that the killings fell outside the common purpose but the accused were responsible having foreseen the possibility of killing rather than simply that the killings were within the common design.[54] The prosecution theory that 'all who join in a common design to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, are responsible for a

[51] *See* ECCC PTC Decision, para. 80, ECCC TC Decision, para. 30, ECCC SC Decision, para. 791.
[52] ECCC SC Decision, paras 792-794.
[53] United States Army War Crimes Trials, *United States v. Josef Hartgen et al.*, Case No. 12-1497, *Review and Recommendations of the Deputy Theater Judge Advocate*, 29 September 1945.
[54] As the ECCC concluded, ECCC SC Decision, para. 800.

homicide committed by one of them', does not evidence JCE III since, first, it is not clear that this submission was accepted by the Commission, second, the prosecution theory could be consistent with JCE I since intent could be inferred from a finding that death was a natural and probable consequence, third, natural and probable consequence is a higher standard than that espoused by JCE III[55] and, fourth, it relates only to the specific crime of killing and should therefore be understood in the context of the *mens rea* requirement for homicide, which in many jurisdictions does not require the intent to kill for all offences;[56]

b. The IMT Judgment. There was minimal discussion of modes of responsibility in this case. The judgment does not specify modes of responsibility or even specific offences (beyond the broad category of war crimes or crimes against humanity).[57] Insofar as any inferences can be drawn from the Judgment, it suggests that all crimes were part of the common plan. The pleaded Indictment in relation to war crimes alleged that the defendants "formulated and executed a Common Plan or Conspiracy" and all the alleged crimes were part of that common plan.[58] The pleading of crimes against humanity is in the same terms.[59] There is no indication that responsibility for crimes outside the common plan was ever alleged. It cannot be assumed that the Tribunal relied upon a *mens rea* standard of foreseeability in relation to any accused, rather than drawing inferences

[55] JCE III only requires foresight that the crime *might* be committed, *see* paras 11 and 13 above.
[56] *See*, for instance, England and Wales where the *mens rea* for murder is intent to kill or cause grievous bodily harm e.g. United Kingdom, *R v. Woollin*, [1998] 1 AC 82, House of Lords, *Judgment*, 22 July 1998.
[57] *See e.g.* International Military Tribunal, *Trial of the Major War Criminals*, Vol. I, *Judgment* ("IMT Judgment"), 14 November 1945-1 October 1946, p. 333, simply convicting Accused Speer under Counts 3 (which was war crimes) and 4 (which was crimes against humanity).
[58] *See* International Military Tribunal, *Trial of the Major War Criminals*, Vol. I, *Indictment*, 14 November 1945-1 October 1946, p. 43 *et seq*.
[59] *Ibid.*, p. 65.

about their intent from their knowledge and participation in the plan.[60] For example, Accused Sauckel was "informed of the bad conditions" and "aware of ruthless methods […] and vigorously supported them".[61] The Tribunal could have inferred his intent from these findings;

c. Hans Renoth.[62] After his plane crashed, a pilot was arrested by Accused Renoth, attacked and beaten by *inter alia* three others before Accused Renoth shot him. All four were accused and convicted of murder. The case notes recognise "[i]t is impossible to say conclusively" the basis for the convictions.[63] The Prosecution argued that there was a "common design in which all four accused shared to commit a crime war" (an allegation of JCE I not JCE III).[64] In the absence of any summing up or reasoned judgment, it cannot be inferred that the Court rejected this allegation and instead relied on an unmentioned finding of foreseeability for a crime outside the common design;

d. Dachau Concentration Camp. The Prosecution allegation in this case was that there was a common design to commit crimes at the concentration camp[65] and that the common design was to run the camps "in a manner so that the great numbers of prisoners would die or suffer severe injury".[66] All the crimes alleged were part of the common criminal plan. There is no basis

[60] Knowledge and acceptance (through continued participation in the common plan) have been held sufficient basis to infer intent for JCE1: *see* ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Appeals Chamber, *Judgment*, 29 November 2017, para. 1800.
[61] IMT Judgment, p. 321.
[62] British Military Court, *Hans Renoth et al.*, Case No. 68, *Trial of Hans Renoth and Three Others*, 8-10 January 1946, UNWCC, Law Reports of Trials of War Criminals, Vol. XI at 76-78.
[63] *Ibid.*, p. 77.
[64] *Ibid.*, p. 76.
[65] General Military Government Court of the United States Zone, *Martin Gottfried Weiss et al.*, Case No. 60, *Trial of Martin Gottfried Weiss and Thirty-Nine Others* ("Dachau Concentration Camp Case"), 15 November-13 December 1945, UNWCC, Law Reports of Trials of War Criminals, Vol. XI at 5-17, p. 5.
[66] *Ibid.*, p. 7.

for alleging that any convictions were entered for crimes outside the scope of the common design on the basis of foreseeability (even in Tadić, the case was considered authority for the existence of the systemic form of JCE, but it was not considered in relation to JCE III);[67]

e. Pohl.[68] It cannot be maintained that any of the Accused in this concentration camp case were convicted of crimes which fell outside the common design. Similarly to the Dachau Concentration Camp Case, all of the crimes were part and parcel of the common plan which resided in the whole system of operation of the camps. No findings of liability for crimes outside the scope of the common design based on foreseeability were made;

f. Einsatzgruppen.[69] This case concerned murders committed by special task forces called 'Einsatzgruppen'. Before the ECCC, the Co-Prosecutors maintained that Accused Franz Six was convicted under JCE III because he was convicted despite not taking an active part in the murder system.[70] That assumption is not justified; the accused can be convicted under JCE I without playing an "active part", provided that the crime formed part of the common design, the accused made a significant contribution to it and intended it. That was the essence of the conviction against Accused Six, the atrocities were part of the common design and he was part of the organisation engaged in them;[71]

[67] Tadić Appeal Judgment, para. 202.
[68] United States Military Tribunal II, *United States of America v. Oswald Pohl et al.*, Case No. 4, *Judgment*, 3 November 1947, Trials of War Criminals before the Nuernberg Military Tribunals, Vol. V at 958-1163.
[69] United States Military Tribunal II, *United States of America v. Otto Ohlendorf et al.*, Case No. 9, *Opinion and Judgment* ("Einsatzgruppen Case"), 8-9 April 1948, Trials of War Criminals before the Nuernberg Military Tribunals, Vol. IV at 411-589.
[70] *See* ECCC, *Co-Prosecutors v. Nuon Chea et al.*, 002/19-09-2007-ECCC/SC, Supreme Court Chamber, *Co-Prosecutors' Appeal Against the Judgment of the Trial Chamber in Case 002/01*, 28 November 2014, para. 38.
[71] Einsatzgruppen Case, p. 526.

g. Sch.[72] the Accused was the leader of a group of SS who entered the victim's house (knowing that he had not been involved in any crime), took him to a burning synagogue where he was insulted and mistreated. Then, on the way back to the police station, the victim was shot in the back, assaulted by a crowd of people, and subsequently died in police custody from the bullet wound. The available material is limited to a summary of a review decision from the Supreme Court for the British Zone, which overturned the Jury Court decision (which is unavailable) because the reasoning relied "simply on the presence of the Accused".[73] One passage in the summary does state that "[i]f it should be found that the Accused was aware or even reckoned with the possibility that he would be responsible for N.'s terrible fate when he took him there, he would bear criminal responsibility, with regard to crimes against humanity, for everything that happened to N. at the burning synagogue, for all the insults, mistreatment and threats".[74] Read in context, 'reckoning with the possibility' is not a reference to JCE III. First, JCE III applies where it is foreseeable "that such a crime might be perpetrated".[75] Instead, the above quotation refers to foresight of the "possibility that he would be responsible" which is a different matter altogether. As to foresight of the actual crimes, the jury court had already held that the Accused "intended and accepted the mistreatment" which suggests the *mens rea* for JCE I. Responsibility for a crime outside a common design based on foreseeability was not considered in this case, as shown by the fact that the Accused was not charged with killing;[76]

[72] Supreme Court for the British Zone, *Sch. et al.*, *Decision of the Supreme Court*, 20 April 1949, Walter de Gruyter & Co., Decisions in Criminal Cases, Vol. 2, found in ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Appeals Chamber, *Consolidated Book of Authorities for Prosecution Response Briefs*, 7 May 2015, pp. 39-47.
[73] *Ibid.*, p. 40.
[74] *Ibid.*, p. 41.
[75] *See* Tadić Appeal Judgment, para. 228.
[76] *See* the analysis in ECCC SC Decision, para. 793.

h. Ikeda.[77] The Accused was charged with allowing subordinates to take a group of 35 women from internment camps to brothels to be forced into prostitution or raped, when he knew or ought reasonably to have suspected that the war crimes would be committed. He was convicted. The Judgment does not specify modes of responsibility. There was a finding that "by approving a plan of this sort, by participating in the further elaboration of the plan and by failing to check in hindsight how the plan had actually been carried out" he must be liable.[78] Those findings could be consistent with JCE I or command responsibility. There is no reason to assume a mode of responsibility akin to JCE III.

35. The Tadić Appeal Judgment also relied on certain *Italian* cases to justify the existence of JCE III in customary international law.[79] That approach is wrong: it is wrong in principle because these were purely national cases. The need to resort to national cases in search of support for JCE III itself suggests that no firm grounding in international law could be found. In any event, the *Italian* cases do not truly support JCE III.

36. First, all these cases were domestic *Italian* cases applying *Italian* national law. Even taking at their highest, they are not capable of supporting the existence of JCE III in customary international law, only of supporting the domestic state practice of one country.[80]

37. Second, these cases do not support the Tadić Appeal Judgment's conclusion that a mode of liability resembling JCE III was applied:-

[77] Temporary Court Martial in Batavia, *The Queen v. Ikeda*, No. 72 A/1947, *Judgment*, 30 March 1948.
[78] *Ibid.*, p. 8 of the English Translation.
[79] Tadić Appeal Judgment, paras 214-219.
[80] *See* ECCC PTC Decision, para. 82.

a. In *D'Ottavio et al.*,[81] armed civilians shot at an escaped prisoner of war without intending to kill him, but he subsequently died from his wounds. They were convicted of manslaughter. Those convictions were not based on JCE III, but on the wording of Article 116 of the Italian Criminal Code, which provided that "whenever the crime committed is different from that willed by one of the participants, also that participant answers for the crime, if the fact is a consequence of his action or omission". The group was not convicted because they foresaw the commission of a crime outside the common plan, but because the death was caused by the crime that they had intended and committed;[82]

b. In *Aratano et al.*,[83] the Court of Cassation overturned the conviction of militiamen for the offence of killing in circumstances where they had intended to arrest but not kill certain partisans. The overturning of these convictions on the basis that the killing fell outside the common purpose – without apparently considering whether foreseeability provided sufficient basis for conviction – is inconsistent with the existence of JCE III;[84]

c. Cases concerning the application of the Italian amnesty law of 22 June 1946 provide no support for the existence of JCE III because, first, the cases do not clearly spell out *mens rea* requirements (as the Tadić Appeal Judgment conceded)[85] and, second, because they are inconsistent;[86]

[81] Italian Court of Cassation, *D'Ottavio et al.*, No. 270, Criminal Section I, *Judgment*, 12 March 1947, published in (2007) 5 *Journal of International Criminal Justice*, pp. 232-234.
[82] *See* ECCC SC Decision, para. 795.
[83] Italian Court of Cassation, *Aratano et al.*, No. 102, Criminal Section II, *Judgment*, 21 February 1949, published in (2007) 5 *Journal of International Criminal Justice*, pp. 241-242.
[84] *See* ECCC SC Decision, para. 796.
[85] Tadić Appeal Judgment, para. 218.
[86] *See* ECCC SC Decision, para. 797.

d. Whilst the Tadić Appeal Judgment also considered other *Italian* national cases from the same time period in order to consider the *mens rea* standards,[87] these cases have no connection to international crimes and hence are irrelevant.

38. The existence of JCE III cannot be proved from such uncertain and inconclusive precedents. Every case can be explained without relying on JCE III. None of the cases expressly convicted any Accused for an offence which was found to fall outside the scope of the common criminal plan based on a *mens rea* standard of foreseeability. They provide no foundation for JCE III.

2. *JCE III IS NOT SUPPORTED BY INTERNATIONAL TREATIES*

39. International treaties do not provide any foundation for JCE III. Treaties do not automatically create customary international law.[88] Thus, the appearance of a mode of responsibility in a treaty does not necessarily support its existence in customary international law. Treaties might reflect an existing custom, but that would require evidence of the prior existence of the custom (which clearly does not exist in relation to JCE III).

40. The Tadić Appeal Judgment sought support for JCE III in the International Convention for the Suppression of Terrorist Bombings and the Rome Statute of the International Criminal Court. Neither supports the existence of JCE III during the Indictment Period. First, neither treaty was in force during the Indictment Period. The

[87] Tadić Appeal Judgment, para. 218.
[88] North Sea Continental Shelf Case, para. 71.

International Convention for the Suppression of Terrorist Bombings entered into force on 23 May 2001.[89] The Rome Statute entered into force on 1 July 2002.[90]

41. Second, whilst Article 25(3) of the Rome Statute includes a mode of responsibility of contributing to the commission of a crime by a group of persons acting with a common purpose, the ICC has held definitively that this relates to co-perpetration and not to any form of JCE.[91] Article 2(3)(c) of the International Convention for the Suppression of Terrorist Bombings is worded in the same way as Article 25(3) of the Rome Statute and therefore should bear the same interpretation. Thus neither treaty supports JCE III.

42. Fundamentally, there is not one international treaty specifically defining JCE III as a mode of criminal responsibility. The implication is clear; if JCE III really reflected the settled practice and *opinio juris* of States, it would surely have been included expressly and systematically in the many treaties concerning international criminal law. Its absence is symptomatic of the fact that it does not enjoy this recognition in customary law.

3. *JCE III IS NOT SUPPORTED BY GENERAL PRINCIPLES OF LAW FROM NATIONAL LEGAL SYSTEMS*

43. The existence of a mode of liability akin to JCE III in various national systems is insufficient to support the existence of a rule of customary international law. National rules in relation to national offences do not form a proper basis for inferring a rule of

[89] International Convention for the Suppression of Terrorist Bombings, United Nations Treaty Collection available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-9&chapter=18&clang=_en (last accessed 12 March 2021).
[90] Rome Statute of the International Criminal Court, International Criminal Court Legal Tools Database available at https://www.legal-tools.org/doc/9c9fd2/ (last accessed 12 March 2021).
[91] Lubanga Confirmation of Charges, paras 326-339; Katanga Confirmation of Charges, para. 480.

international law. There is insufficient support for JCE III in national legal systems to create a settled general principle of law.

44. First, it must be underscored that even if a sufficient number of national criminal laws uniformly included a mode of responsibility for national offences equivalent to JCE III, that would not create or establish a rule of customary international law applicable to *international crimes*. National criminal practice in national crimes does not amount to State practice in relation to international crimes.[92] National cases could only potentially be relevant as evidence of a general principle of national law or as an aid to the interpretation of international law.[93] To rely on national criminal codes and cases to evidence the existence of a rule of customary international law impermissibly collapses the distinction between customary international law and principles of domestic law.

45. Second, in any event, there is no broad agreement in national systems as to JCE III. The Tadić Appeal Judgment surveyed only nine national systems, finding that two did not allow JCE III and seven did.[94] The ECCC Trial Chamber surveyed seven national legal systems and found "considerable divergence".[95] Neither Court found sufficient consistency in these limited surveys to justify a general principle of law. [96]

46. The Max Planck Institute for Foreign and International Criminal Law was commissioned by the Office of the Prosecutor of the ICTY to carry out a survey of the domestic practice of 40 states regarding participation in criminal offences. The study concluded that there was a "high degree of variance among the legal systems studied"

[92] *See* ECCC SC Decision, para. 805.
[93] *See* Crawford, J., *Brownlie's Principles of Public International Law* (9th Edition), Oxford University Press 2019, pp. 38-39.
[94] Tadić Appeal Judgment, para. 224.
[95] ECCC TC Decision, para. 37.
[96] Tadić Appeal Judgment, para. 225.

and that more states applied co-perpetration than JCE.[97] That is a realistic assessment. No survey of the disparate national jurisdictions could show sufficient convergence to justify a finding that JCE III exists as a general principle of law.

47. Additionally, in England and Wales, a national jurisdiction previously assumed to support JCE III,[98] the Supreme Court has determined that foreseeability is not a sufficient *mens rea* requirement in JCE.[99] Earlier cases applying JCE III were "based on an incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments".[100] The Court made it clear that, in the common law, foreseeability is no more than evidence from which a jury might infer intent.[101] England and Wales must therefore be added to the list of jurisdictions which do not embrace JCE III.

48. National practice in relation to JCE III is not settled. Any survey of the different national legal systems would have to acknowledge that it is contradictory and inconsistent. National practice thus provides no support to the existence of JCE III in customary international law.

4. Conclusion

49. The sources relied upon in support of JCE III in the Tadić Appeal Judgment are vague and inconclusive. The KSC should conclude that there is no evidence that JCE III existed in customary international law during the Indictment period and therefore find that the KSC has no jurisdiction over this mode of responsibility.

[97] 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.
[98] *See* Tadić Appeal Judgment, para. 224.
[99] United Kingdom, *R v. Jogee*, [2016] UKSC 8, Supreme Court, *Judgment*, 18 February 2016.
[100] *Ibid*., para. 79.
[101] *Ibid*., para. 83.

V. JCE III WAS NOT FORESEEABLE TO THE ACCUSED

50. Even if, contrary to the above submissions, the SPO established that customary international law included JCE III, that alone would be insufficient to establish that the KSC has jurisdiction over JCE III; the SPO must also show that JCE III was accessible and foreseeable to the Accused.[102] Plainly, it was not. Until the Tadić Appeal Judgment on 15 July 1999 (only two months prior to the end of the Indictment period), no-one in Kosovo could have foreseen this mode of responsibility being deduced from the archives of a limited number of post-World War II precedents many of which are inaccessible and indeed inconclusive on this central issue.

51. The European Court of Human Rights ("ECtHR") has held that the criminal law must be accessible and it must be foreseeable in the sense that the Accused can know (with the benefit of legal advice if necessary) what acts will amount to crimes.[103] Thus in *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 held to fall within the definition of genocide.[104] The ICTY similarly accepted that it must be satisfied that the criminal liability in question was sufficiently foreseeable and that the law providing for such liability must have been sufficiently accessible at the relevant time.[105] The principle applies to modes of responsibility just as it does to the offences themselves.[106]

[102] *See e.g.* Kokkinakis Judgment, para. 52.
[103] *Ibid*.
[104] Vasiliauskas Judgment, paras 148, 170-186.
[105] ICTY, *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Appeals Chamber, *Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise*, 21 May 2003, para. 37.
[106] ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-AR72, Appeals Chamber, *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, 16 July 2003, para. 34.

52. Even if the KSC concluded that JCE III existed in customary international law, during most of the Indictment period in this case it existed only as an inferential deduction from a small number of post-World War II cases. Those cases were not accessible. Complete case records are unavailable. Some of the cases relied on in the Tadić Appeal Judgment were only available in their original language.[107] Where decisions were available, as set out above, the concept of becoming responsible for crimes which fell outside the scope of a common plan because the crimes were foreseeable was not expressly mentioned. No-one in 1998 – even with the benefit of legal advice – could have foreseen the application of JCE III.

53. Recourse to the law of the Federal Republic of Yugoslavia does not render JCE III foreseeable to the Accused. First, a provision of domestic law cannot put an individual on notice of a crime under international law. Second, Article 26 of the Criminal Code of the Socialist Federal Republic of Yugoslavia provided, at the relevant time, that "[a]nybody creating or making use of an organisation, 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". That mode of responsibility is not analogous to JCE III. It makes no reference at all to a foreseeability standard. Further, the *actus reus* is also different from JCE, requiring that the Accused "create" or "make use" of an organisation "for the purpose of committing criminal acts", which implies a narrower degree of control over the organisation than is required in JCE.

54. In March 1998, Mr. Krasniqi could not have anticipated that he would be accused of crimes which he did not intend on the basis of a rule of customary international law inferred from a small number of inaccessible decisions. This is a separate and additional reason why the KSC should declare that it has no jurisdiction over JCE III.

[107] *See* for instance, Separate and Partially Dissenting Opinion Judge Antonetti, p. 148.

VI. NO JURISDICTION OVER CRIMES WHICH DO NOT RELATE TO THE COUNCIL OF EUROPE REPORT

55. The KSC was created in order to prosecute the crimes alleged in the Council of Europe Report.[108] Its jurisdiction is expressly limited to crimes which "relate to" that Report.[109] Yet, the Indictment pleads a wide range of crimes which go far beyond the scope of the Council of Europe Report including those which have already been prosecuted before the ICTY. The KSC has no jurisdiction over these matters.

56. In April 2008, the former prosecutor of the ICTY, Carla del Ponte, published memoirs which contained the notorious allegation that organs had been trafficked from Serb prisoners by the KLA. These allegations could not be pursued by the ICTY because the date of the allegations was after the armed conflict and the crimes were said to have occurred in Albania.[110]

57. The Council of Europe Report was commissioned in order to investigate those specific allegations (i.e. the allegation of organ trafficking by members of the KLA after the end of the armed conflict in Albania).[111] The summary of the Council of Europe Report reflects those parameters: "some Serbians and some Albanian Kosovars were held prisoner in secret places of detention under KLA control in northern Albania and were subjected to inhuman and degrading treatment, before ultimately disappearing. Numerous indications seem to confirm that, during the period immediately after the end of the armed conflict […] organs were removed".[112]

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[108] Council of Europe, Parliamentary Assembly, 'Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo' ("Council of Europe Report"), Doc. 12462, 7 January 2011.
[109] Article 6(1) of the Law.
[110] Ponte, C. D., and Sudetic, C., *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity*, Other Press 2009, Chapter 11.
[111] *See* Council of Europe Report, paras 1-2.
[112] *Ibid*., Summary.

58. The temporal scope of the Council of Europe Report was clearly limited to the period after April 1999.[113] It alleged three categories of detentions: the first sub-set being prisoners of war in the period April 1999 – June 1999;[114] the second sub-set being post-conflict detentions occurring "after 12 June 1999";[115] and third the sensational allegations about the victims of organised crime also in the post-conflict period.[116] The Report makes no allegation about crimes which occurred prior to April 1999.

59. The geographic scope of the Council of Europe Report was also narrowly focussed on detention locations in Albania.[117] Thus the allegations focussed on two sets of crimes: "running the KLA's ad hoc network of detention facilities on the territory of Albania" and "determining the fate of the prisoners who were held in those facilities, including the many abducted civilians brought over the border into Albania from Kosovo".[118] The detention facilities named in the report – Cahan, Kukës, Bicaj (vicinity), Burrel, Rripe, Durrës and Fushë-Krujë - are all on the territory of Albania.[119] The report expressly identified that "[t]he common denominator between all of the facilities was that civilians were held captive therein, on Albanian territory, in the hands of members and affiliates of the KLA".[120]

60. Further, insofar as the report delved into criminal responsibility, the focus was not on war crimes or crimes against humanity, but on organised crime. A substantial proportion of the report is devoted to links to organised crime.[121] The allegation set out there is that a subset of the KLA leadership evolved from being involved in armed

[113] *See* Council of Europe Report, summary "immediately after the end of the armed conflict"; para. 4 "from the Summer of 1999 onwards".
[114] *Ibid*., para. 102.
[115] *Ibid*., para. 129.
[116] *Ibid*., para. 156.
[117] *See ibid*., paras 36, 103, 129, 156.
[118] *Ibid*., para. 74.
[119] *Ibid*., paras 93, 96.
[120] *Ibid*., para. 98.
[121] *Ibid*., paras 37-92.

conflict to being "a conspicuously powerful band of criminal entrepreneurs".[122] Crimes were motivated by "revenge, punishment and profit".[123]

61. The Council of Europe Report triggered the creation of the Special Investigative Task Force ("SITF"). SITF clearly understood that its mandate was to investigate crimes in the post-conflict period.[124] There were very good reasons why the mandate was limited in this way. First, any crimes alleged to have been committed in the period March 1998 – April 1999 in Kosovo fell squarely within the jurisdiction of the ICTY. The ICTY had jurisdiction over crimes against humanity and war crimes committed in Kosovo if they occurred during the armed conflict[125] and did in fact investigate and prosecute such crimes, including crimes alleged to have occurred in detention centres in Lapušnik/Llapushnik in 1998[126] and Jablanica/Jabllanicë in 1998.[127] Second, SITF was created in response to former Prosecutor Del Ponte's allegations and the Council of Europe Report, both of which were limited to the post-conflict period and crimes committed in Albania.

62. The creation of the KSC was a further step in an unbroken logical progression from the original allegations by former Prosecutor Del Ponte, the Council of Europe Report and the mandate of SITF. It is clear that the scope of proceedings before the KSC was intended to be limited to the allegations in the Council of Europe Report. First, the Constitution of Kosovo was amended to permit the creation of the KSC by

[122] Council of Europe Report, para. 92.
[123] *Ibid*., para. 129.
[124] *See* for instance, Statement of the Chief Prosecutor of the Special Investigative Task Force, 29 July 2014, p. 1 "the most comprehensive investigation ever done of crimes perpetrated in the period after the war ended in Kosovo in June 1999".
[125] Statute of the ICTY, Articles 1 – 5.
[126] ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Chamber II, *Judgment*, 30 November 2005. Compare Indictment, paras 62, 144, with ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-PT, *Second Amended Indictment*, 6 November 2003, paras 23, 35-36.
[127] ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84*bis*-T, Trial Chamber II, *Public Judgment with Confidential Annex*, 29 November 2012. Compare Indictment, para. 61, with ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84*bis*-PT, *Revised Fourth Amended Indictment*, 21 January 2011, para. 41.

the inclusion of Article 162. Article 162(1) provides: "[t]o comply with its international obligations in relation to the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011, the Republic of Kosovo may establish Specialist Chambers and a Specialist Prosecutor's Office within the justice system of Kosovo". Thus the Constitution only permitted the creation of Specialist Chambers "to comply with [Kosovo's] international obligations in relation to the Council of Europe" report.[128]

63. Second, the Constitution also only permitted the establishment of a Specialized Court when necessary and the only necessity in this instance arises from the Council of Europe Report. Article 103(7) of the Constitution provides that "[s]pecialized courts may be established by law when necessary". In reviewing the legality of the above Article 162 amendment, the Constitutional Court of Kosovo held that it was necessary to create the KSC relying on, first, international obligations arising from the Council of Europe Report which "outlines a number of highly specific criminal allegations and recommends them for investigation and prosecution" and, second, ECtHR jurisprudence about the need for specialist courts to tackle "corruption and organised crime".[129] Thus the Constitution only empowered the Kosovo legislature to create a Specialist Chamber insofar as it was necessary to prosecute the highly specific criminal allegations of organised crime in the Council of Europe Report.

64. The Law must be interpreted in light of these provisions of the Constitution and the above Constitutional Court decision. Article 1(2) of the Law refers back to the requirement of necessity for establishing the KSC and does so with specific reference to allegations of crimes "which relate to those reported in the Council of Europe

[128] Referring, of course, to the positive obligation in Articles 2 and 3 of the ECHR to investigate and prosecute the allegations in the Council of Europe Report.
[129] Kosovo, Constitutional Court, *Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433/DO-318*, KO 26/15, Judgment, 15 April 2015, paras 51-52.

Parliamentary Assembly Report Doc 12462 of 7 January 2011 […] and which have been the subject of criminal investigation by the Special Investigative Task Force".

65. Article 6(1) of the Law provides that "[t]he Specialist Chambers shall have jurisdiction over crimes set out in Articles 12-16 which relate to the Council of Europe Assembly Report". The Defence submit that, read in the historical and legislative context, Article 6(1) limits the jurisdiction of the Specialist Chambers to that jurisdiction which was necessary to prosecute the specific criminal allegations in the Council of Europe Report i.e. the allegations of organised crime in detention centres in Albania in the period after April 1999. That interpretation is supported by:-

a. The Constitution. Article 162 of the Constitution only permits the establishment of the KSC to comply with international obligations arising from the Council of Europe Report. Moreover, Article 103(7) only permits the establishment of a Specialist Court "when necessary" and the Constitutional Court has already held that the only necessity here comes from the specific allegations in the Council of Europe Report and from organised crime. It cannot possibly be argued that it was "necessary" to create a Specialist Court to address allegations of detention centre crimes committed in Kosovo during the conflict. Those crimes have already been investigated and prosecuted by the ICTY[130] and by EULEX, with at least 111 individuals indicted for war crimes in Kosovo[131] including high profile cases.[132] Such allegations could be prosecuted today in Kosovo without a Specialist Chamber. Accordingly, the Constitution only gave the Kosovo legislature the power to create a Specialist Chamber to prosecute the

[130] *See* fns 126 and 127 above.
[131] Humanitarian Law Center Kosovo, 'An Overview of War Crime Trials in Kosovo 1999-2018', October 2018, p. 414.
[132] *See* EULEX, *People v. AK et al.*, P 766/12, Basic Court of Pristina, *Judgment*, 17 September 2013; *People v. Sabit Geci et al.*, P. nr. 45/2010, District Court of Mitrovica, *Judgment*, 29 July 2011.

allegations in the Council of Europe Report. The legislature had no authority to create a broader jurisdiction. If the Constitution only allows the creation of a Specialist Court to prosecute one set of allegations, that Specialist Court cannot have jurisdiction over any other allegations. Any attempt to create a broader jurisdiction would be *ultra vires*. Article 6(1) must be read in the light of that limited authority;

b. The historical context. The above submissions trace the creation of the KSC from the allegations made by former Prosecutor del Ponte, through the Council of Europe Report and the SITF. The original allegation related to crimes committed after the conflict and in Albania (and hence outside the geographic and subject matter jurisdiction of the ICTY). The Council of Europe Report addressed detentions in Albania in the period after April 1999. SITF was created to investigate those same Council of Europe Report allegations. It follows logically that the KSC was created to prosecute the specific allegations of crimes in detention centres in Albania after April 1999, not detention related crimes within Kosovo beginning in March 1998;

c. The natural meaning of Article 6(1). In light of the Constitution and the historical context, the words "relate to the Council of Europe Assembly Report" must impose a limitation on the breadth of the KSC's jurisdiction, preventing it from over-reaching the narrow jurisdiction delegated by Article 162 of the Constitution. Had the drafters of the Law intended to permit a broader range of crimes to be prosecuted, the Law or the Rules would have provided statutory guidance on the meaning of "relate to" as, for example, the Statute of the Special Tribunal for Lebanon did in providing a statutory definition of "connection".[133] In the absence of

[133] *See* STL, *Prosecutor v. Ayyash*, STL-18-10/PT/TC, Trial Chamber II, *Decision on Defence Preliminary Motion Challenging Jurisdiction*, 10 September 2020.

statutory definition of circumstances in which the KSC can take jurisdiction over more expansive allegations, this exceptional jurisdiction should be confined to those allegations contained within the Council of Europe Report;

d. Human Rights Law. There are good reasons not to adopt an expansive definition of the KSC's jurisdiction. The jurisdiction of the KSC is an exception to the usual jurisdiction of the Kosovo Courts and should therefore be construed narrowly. Further, as explained above, as a matter of human rights law, the KSC should not adopt an expansive interpretation of its jurisdiction to the detriment of the Accused and should construe any ambiguity in favour of the Accused.[134]

66. Fundamentally, a broad construction of the words "relate to the Council of Europe Assembly Report" which permits jurisdiction over allegedly similar crimes from a different temporal and geographic scope to the Council of Europe Report is inconsistent with the Constitution. A Specialist Court could only be created where necessary to prosecute the allegations in the Council of Europe Report. The creation of a broader mandate is outside that limited purpose. Similarly, the temporal jurisdiction in Article 7 of the Law cannot be read to extend the jurisdiction of the KSC beyond the remit of the Council of Europe Report because any such extension would be outside the scope of Articles 162 and 103(7) of the Constitution and hence *ultra vires*.

67. The result is that Article 6(1) of the Law, read together with Article 1(2) of the Law and Articles 103 and 162 of the Constitution, limits the jurisdiction of the KSC to those crimes which relate to the Council of Europe Report. The Council of Europe Report addressed allegations of crimes committed in Albania in the period after April 1999 in the context of organised crime. The only allegations in the Indictment which

[134] *See* paras 19-20 above.

address the same geographic and temporal scope are the allegations relating to Cahan and Kukës.[135] None of the other allegations in the Indictment are contained in or referenced in the Council of Europe Report. They occurred at a different time. They occurred in a different country. They occurred in a different context (the allegation is not organised crime after the conflict but a common plan to gain and exercise control during the conflict). The KSC has no jurisdiction over these other allegations.

68. The Court should not be seduced by any submission that the Council of Europe Report addressed allegations of the wartime detention of suspected collaborators and that therefore all of the Indictment loosely relates to the Council of Europe Report. The closest that the Council of Europe Report comes to the Indictment is that in relation to certain detainees in the period April – June 1999 it refers to an alleged policy whereby suspected collaborators were detained on the territory of Albania for interrogation[136] and identifies that individuals were suspected of being collaborators on the basis of spying for the Serbs or supporting the KLA's political and military rivals.[137] That remains far removed from this Indictment:-

a. The temporal period is different. The Council of Europe Report allegations only arise after April 1999;[138]
b. The geographic area is different. The Council of Europe Report allegations only relate to detentions on Albanian territory;[139]
c. The identity of the alleged perpetrators is different. Mr. Krasniqi is not mentioned at all in the Council of Europe Report;
d. The purpose and motivation are different. The Council of Europe report identified the purpose of these detentions as "primarily for

[135] Indictment, paras 78-79, 115-116, 164.
[136] Council of Europe Report, paras 102-103.
[137] *Ibid*., para. 111.
[138] *Ibid*., para. 102.
[139] *Ibid*., paras 102, 108.

interrogation".[140] The purpose alleged in the Indictment is to "gain and exercise control over all of Kosovo";[141]

69. Accordingly, the Defence invite the KSC to conclude that it only has jurisdiction over what the Constitutional Court identified as the highly specific criminal allegations in the Council of Europe Report. It does not, therefore, have jurisdiction over crimes committed in a different time period, in a different place and in a different context. Alternatively, even if the KSC finds that a broader definition of "relate to the Council of Europe Assembly Report" is permissible, it should still find that the allegations in the Indictment are not sufficiently connected to the Council of Europe Report. They relate to different times, different places, different perpetrators, and a different context.

VII. CONCLUSION

70. The KSC should reject the allegations of JCE: JCE is not within Article 16(1)(a) of the Law; JCE was not part of customary international law at the time; and JCE was not foreseeable to Mr. Krasniqi. Accordingly, the KSC should find that it does not have jurisdiction over allegations of any form of JCE. Alternatively, the KSC should find that it does not have jurisdiction in relation to JCE III because JCE III is not within Article 16(1)(a) of the Law, JCE III did not form part of customary international law and was not foreseeable to Mr. Krasniqi. These conclusions would not result in the dismissal of the Indictment, but they would require the SPO to amend the Indictment to remove the allegation of JCE (or JCE III) and to set out which modes of responsibility, within the terms of Article 16, it can rely on against Mr. Krasniqi.

[140] Council of Europe Report, para. 112. *See also* paras 102-105.
[141] Indictment, para. 32.

71. Further, the KSC should find that it does not have jurisdiction over crimes which occurred prior to April 1999 and in Kosovo because they do not relate to the Council of Europe Report. The KSC should therefore find that it does not have jurisdiction over paragraphs 57 (insofar as it relates to detention centres in Kosovo), 60-77, 80-114, 117-163 and 165-171 (insofar as they relate to detention centres in Kosovo) of the Indictment.

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