SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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
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Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise (JCE)

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I. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') hereby responds to the Defence Motions challenging the applicability of joint criminal enterprise ('JCE').[1] The Defence Motions should be rejected. As a preliminary matter, certain Defence challenges are outside the bounds of permissible preliminary challenges and should be rejected on that basis. The remaining challenges are without merit.

2. JCE exists in the statutory framework of the KSC and is a recognised mode of liability with a firm basis in customary international law ('CIL').[2] Liability pursuant to JCE was accessible and foreseeable to the Accused during the Indictment[3] period. Consequently, the application of this mode of liability is both permissible before the Kosovo Specialist Chambers ('KSC') and respectful of the rights of the Accused.

3. JCE is not merely a well-established legal mechanism that conforms to the principle of legality. There are strict requirements for attribution of criminal responsibility through JCE: it is necessary to prove, *inter alia*, that each accused made a significant contribution to the common criminal plan with the required *mens rea*, namely intent for the crimes forming part of the common plan ('JCE I') and foreseeability for those crimes that, albeit not intended, were a natural and foreseeable

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[1] For the sake of judicial economy, this Response addresses the JCE-related arguments in one response, namely: SELIMI Defence Challenge to Jurisdiction – Joint Criminal Enterprise, KSC-BC-2020-06/F00198, 10 February 2021, paras 17-75 ('Selimi Motion'); Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, KSC-BC-2020-06/F00216, 12 March 2021, paras 60-71 ('THAÇI Motion'); KRASNIQI Defence Preliminary Motion on Jurisdiction, KSC-BC-2020-06/F00220, 15 March 2021, paras 14, 17-54 ('Krasniqi Motion'); Preliminary motion of the Defence of Kadri VESELI to Challenge the Jurisdiction of the KSC, KSC-BC-2020-06/F00233, 15 March 2021, paras 94-119 ('Veseli Motion') (the Selimi Motion, the THAÇI Motion, the Krasniqi Motion and the Veseli Motion collectively being the 'Defence Motions'). Submissions in response to certain related challenges are dealt with in other responses, identified herein.

[2] Submissions on CIL in proceedings before the Kosovo Specialist Chambers ('KSC') are made in Prosecution response to preliminary motion concerning applicability of customary international law, 23 April 2021.

[3] Lesser Redacted Version of 'Redacted Indictment, KSC-BC-2020-06/F00045/A02, 4 November 2020', KSC-BC-2020-06/F000134, 11 December 2020, Confidential ('Indictment').

consequence of the plan ('JCE III'). The 'additional crime' that an accused could be responsible for under JCE III is nothing more than the 'the outgrowth' of previously agreed or planned criminal conduct for which each JCE member is *already* responsible.[4] As such, it only arises where a perpetrator who already had criminal intent, and had made a significant contribution, could and did foresee the possibility of an additional crime and willingly took that risk.[5] There are sound and just reasons for attributing liability to persons pursuing criminal enterprises in this manner, especially in the context of grave international crimes.[6] Where someone intentionally contributes to a common criminal purpose involving the commission of crimes such as those at issue in this case - war crimes and crimes against humanity – it is fair and right that they be liable for other foreseeable crimes committed in the context of that enterprise. To the extent there are differing degrees of culpability between various actors, that can be reflected in sentencing.[7]

4. JCE is the most suitable mode of liability in the case of widespread, systematic and grave crimes committed through the joint action of multiple individuals who, while often acting remotely from the physical perpetration of the crimes, nonetheless played a central role in their commission.[8] Indeed, common purpose liability was included in the IMT Charter because it was necessary to reach 'a great many of the equally guilty persons against whom evidence of specific violent acts may be lacking although there is ample proof that they participated in the common plan or

[4] Special Tribunal for Lebanon ('STL'), STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 ('STL Decision on Applicable Law'), para.243.
[5] STL Decision on Applicable Law, paras 243, 245.
[6] Crimes of this nature shock the conscience of mankind: ICTY, Appeals Chamber, *Prosecutor v. Tadić*, IT-94-1-AR72 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', 2 October 1995, paras 57, 59.
[7] STL Decision on Applicable Law, paras 237, 245.
[8] The STL Appeals Chamber described the contributions of different actors in a JCE as 'cogs in a machine' whose overall object and purpose is to commit criminal offences, personally or through other individuals. STL Decision on Applicable Law, para.237.

enterprise'.[9] As detailed below, the common design doctrine for both JCE I and III was considered in the post-WWII jurisprudence as a fair, effective, and just vehicle to assess the responsibility of those alleged to have committed mass atrocities. It was reflected in statutes and codes,[10] in clear statements of applicable law by Judge Advocates and others,[11] and was applied in judicial decisions.[12]

5. Kosovo courts have recognised the CIL status of JCE in all forms. The Supreme Court of Kosovo has upheld JCE as a mode of liability, holding that JCE (i) is firmly established in CIL, (ii) exists in three forms, and (iii) has been illuminated in decisions of the ICTY. Defendants tried in Kosovo courts are thus subject to prosecution for war crimes on the basis of JCE liability.[13] The foreseeability of JCE to the Accused is further reinforced by strikingly similar provisions of the SFRY Code in force in Kosovo at the relevant time.[14]

6. JCE, firmly grounded in CIL, is an appropriate and fair form of liability to address the responsibility of leaders for the crimes committed in 1998-1999, whether intended or foreseeable, which are the consequence of a criminal plan, and based on the significant contribution they each made thereto.

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[9] Report of Robert H. Jackson to the International Conference on Military Trials, London, 1945, pp.300-302. *See also, inter alia*, pp. 332-333, 362-363, 376-384, 387-388.
[10] For example, the Charter of the International Military Tribunal and Control Council Law No.10, discussed herein, each encompass liability for acts committed in execution of a common purpose.
[11] For example, in the *Borkum Island* case discussed below, the Judge Advocate stated: 'all those who join as participants in a plan to commit an unlawful act, *the natural and probable consequence of the execution of which* involve the contingency of taking human life, are legally responsible as principals for homicide committed by any of them in pursuance of or in furtherance of the plan' (emphasis added).
[12] For example, as discussed herein, the 1946 U.S. Manual for Trial of War Crimes setting out the law with relevant citations to immediate post-WW II jurisprudence, again outlined the following principle: '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 homicide committed by one of them while acting in pursuance of or in furtherance of the common design, although not specifically contemplated by the parties, or even forbidden by defendant, or although the actual perpetrator is not identified.'
[13] *See* para.121 below.
[14] *See* para.131 below.

II. SUBMISSIONS

A. THE DEFENCE MOTIONS CHALLENGING THE CONTOURS OF JCE ARE NOT JURISDICTIONAL CHALLENGES

7. The scope of preliminary challenges to jurisdiction under Rule 97(1)(a)[15] is not infinite. A jurisdictional challenge is valid when it focuses on whether a form of responsibility *in toto* comes within its jurisdiction.[16] By contrast, 'challenges relating to the specific contours of […] a form of responsibility, are matters to be addressed at trial.'[17] One such example is when an accused disputes the interpretation of a term underpinning a mode of liability.[18] Similarly, challenges to the specific contours of crimes are matters to be addressed at trial.[19] This standard accords with the consistent jurisprudence of other similarly-situated tribunals, protects against the infringement

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[15] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all references to 'Rule(s)' are to the Rules.

[16] *See e.g.* ICTY, Trial Chamber, *Prosecutor v. Milutinovic et al.*, IT-05-87-PT 'Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration', 22 March 2006 ('*Ojdanić* Co-Perpetration Decision'), para.23; ICTY, Appeals Chamber, *Prosecutor v. Milutinović et al.*, IT-99-37-AR72 'Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*', 21 May 2003 ('*Ojdanić* JCE Decision'), para.11; ICTY, Trial Chamber, *Prosecutor v. Hadžihasanović et al*., IT-01-47-PT, 'Decision on Joint Challenge to Jurisdiction', 12 November 2002 ('*Hadžihasanović et al.* TC Decision'), para.7; ECCC, PTC, 002/19-09-2007-ECCC/OCIJ (PTC38) 'Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)', 20 May 2010 ('PTC Decision on JCE'), paras 23-24; *See also* ECCC, PTC, Case File No: 002/19-09-2007-ECCC/OCIJ (PTC 145&146) 'Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order', 15 February 2011 ('PTC Decision on Nuon Chea and Ieng Thirith Appeals'), para.68.

[17] *Ojdanić* Co-Perpetration Decision, para.23; *See also* ICTY, Trial Chamber, *Prosecutor v. Karadžić,* IT-95-5/18-PT 'TC Decision on Six Preliminary Motions Challenging Jurisdiction', 28 April 2009, paras 30-32; PTC Decision on JCE, para.23.

[18] ICTY, Appeals Chamber, *Prosecutor v. Gotovina et al.*, IT-06-90-AR72.1 'Decision on Ante Gotovina's Interlocutory Appeal against Decision on Several Motions Challenging Jurisdiction', 6 June 2007 ('*Gotovina et al*. Decision on Interlocutory Appeal'), paras 15, 18.

[19] *See e.g.* PTC Decision on JCE, para.23 citing ICTY, Appeals Chamber, *Prosecutor v. Mucić et al.*, IT-96-AT72.5 'Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment)', 6 December 1996, para.27 (holding that any dispute regarding the substance of the crimes enumerated in Articles 2-5 of the Statute 'is a matter for trial, not for pre-trial objections'); ICTY, Trial Chamber, *Prosecutor v. Furundžija*, IT-05-17/1-T Judgement, 10 December 1998 ('*Furundžija* TJ), paras 172-186; ICTY, Trial Chamber, *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T Judgement, 22 February 2001, paras 436-460 (trial judgements ascertaining the contours of rape as a crime against humanity).

of the principle of legality, and equally allows for the trial panel to assess elements and contours of the mode in line with the evidence presented at trial.[20]

8. JCE falls squarely within the jurisdiction of the KSC, regardless of whether the SPO has pled differing, or alternative, forms of it.[21] Once jurisdiction over JCE has been found, the PTJ need not proceed to also address various forms of it, such as JCE III[22] at this stage.[23]

9. The VESELI defence argues that even if JCE III is found applicable, it does not apply to special intent crimes.[24] While this conclusion is incorrect,[25] it also does not

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[20] ECCC, PTC Decision on Nuon Chea and Ieng Thirith Appeals, para.62. In determining whether to adopt the jurisdictional challenge standards of the *ad hoc* tribunals, the ECCC PTC determined that the ECCC framework was 'comparable' to the *ad hoc* tribunals and thus adopted their approach to preliminary challenges. PTC Decision on JCE, paras 23-24.

[21] ICTY, Appeals Chamber, *Prosecutor v. Tolimir*, IT-05-88/2-AR72.1 'Decision on Tolimir's "Interlocutory Appeal against the Decision of the Trial Chamber on the Part of the Second Preliminary Motion concerning the Jurisdiction of the Tribunal', 25 February 2009 ('*Tolimir* Decision on Interlocutory Appeal'), para.10.

[22] Jurisdictional challenges related to the mental element of modes of liability have been rejected by other tribunals: *Gotovina et al*. Decision on Interlocutory Appeal, paras 22-24 (specifically addressing challenges to the different forms of JCE i.e the differing *mens rea* standards); ICTY, Appeals Chamber, *Prosecutor v. Karadžić,* IT-95-5/18-AR72.1 'Decision on Radovan Karadžić's Motions Challenging Jurisdiction (Omission liability, JCE-III – Special Intent Crimes, Superior Responsibility)', 25 June 2009 ('*Karadžić* AC Decision on Motions Challenging Jurisdiction'), paras 35-37; *Tolimir* Decision on Interlocutory Appeal, para.10. *See also Ojdanić* Co-Perpetration Decision, para.23 (whether JCE liability extends to the use of 'tools'); IRMICT, Appeals Chamber, *Prosecutor v. Turinabo*, 'Separate Concurring Opinion of Judge Orie Regarding the Decision on Prosecution Appeal Against Decision on Challenges to Jurisdiction', 28 June 2019, para.2 (concerning the application of JCE to contempt offences).

[23] Noting the alternative modes of liability charged, there are no efficiency reasons which could militate against this approach as all of the evidence relevant to the contours of JCE liability and to the specific intent crimes would anyway need to be presented. Indeed, having heard the evidence and made certain liability determinations, it may not even be necessary for the Panel to address, let alone apply, JCE III liability. As such, litigation on such matters now may in fact hinder rather than help the progress of proceedings. For Defence submissions on JCE III see: Selimi Motion, paras 56-68; Krasniqi Motion, paras 28-54; Thači JCE Motion, paras 67-71; Veseli Motion, paras 98-119.

[24] Veseli Motion, paras 106-114.

[25] *See e.g.* ICTY, Appeals Chamber, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A Judgement, 30 June 2016 ('*S&Z* AJ'), para.599; ICTY, Appeals Chamber, *Prosecutor v. Đorđević*, IT-05-87/1-A, Judgement, 27 January 2014 ('*Đorđević* AJ'), paras 80-84; ICTY, Appeals Chamber, *Prosecutor v. Brđanin*, IT-99-36-A, 'Decision on Interlocutory Appeal', 19 March 2004, paras 5-10. *See contra* STL Decision on Applicable Law, para.249, which considered it 'the better approach under international criminal law' not to apply JCE III to the special intent crime of terrorism.

amount to a jurisdictional challenge pursuant to Rule 97(1)(a). VESELI is not arguing lack of jurisdiction over a particular crime or mode of liability, but rather challenges the applicability of JCE III to special intent crimes. This challenge is not jurisdictional as it concerns the contours of a mode of liability and is a matter to be addressed at trial.[26] The Pre-Trial Judge should again deny VESELI's motion at this time.[27]

B. THE PRE-TRIAL JUDGE CORRECTLY IDENTIFIED THE ELEMENTS OF JCE AND RIGHTLY CONFIRMED THE INDICTMENT WHICH INCLUDES JCE LIABILITY

10. Under the legal framework of the KSC, criminal responsibility attaches to perpetrators who made, with the requisite intent, a significant contribution to the implementation of a common criminal purpose. That these persons, who are sometimes termed 'members' or 'co-perpetrators', may be found liable for the crimes physically carried out by other persons is rooted in CIL. This form of liability is known as 'joint criminal enterprise' or JCE.[28]

11. In the Confirmation Decision, the Pre-Trial Judge correctly identified the requirements for individual responsibility pursuant to JCE liability.[29] The ICTY Appeals Chamber has held that JCE comprises three categories:

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[26] *See Karadžić* AC Decision on Motions Challenging Jurisdiction, paras 35-37; *Tolimir* Decision on Interlocutory Appeal, para.10; *Gotovina et al*. Decision on Interlocutory Appeal'), paras 23-24; ICTR, Appeals Chamber, *Prosecutor v. Rwamakuba*, ICTR-98-44-AR72.4 'Decision on Interlocutory Appeal regarding Application of Joint Criminal Enterprise to the Crime of Genocide', 22 October 2004 ('*Rwamakuba* JCE Decision'), paras 10, 13, 17.

[27] The SPO has refrained from advancing its substantive arguments in this response for the foregoing reasons. If the Pre-Trial Judge is minded to consider VESELI's challenge on the merits now, the SPO requests leave to file supplemental submissions.

[28] It has also been described as acting 'jointly', in 'concert', and pursuant to a common design, purpose, and/or plan.

[29] Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026/RED, 26 October 2020 ('Confirmation Decision'), paras. 105-115.

- The first category ('JCE I'), where all participants, acting pursuant to a common purpose, possess the same criminal intention to effectuate that purpose;[30]

- The second category ('JCE II'), referring to instances of ill-treatment in organised systems or institutions, such as concentration camps;[31]

- The third category ('JCE III'), where participants have agreed on a common purpose involving the perpetration of crime(s) and are liable for criminal acts which, while outside the common purpose, are nevertheless a natural and foreseeable consequence of effectuating that common purpose.[32]

12. To find an accused responsible for his participation in any of the three types of JCE, the following elements must be established: (i) the existence of a plurality of persons who act pursuant to a common purpose;[33] (ii) the existence of a common plan, design, or purpose which amounts to or involves the commission of a crime provided for in relevant law;[34] and (iii) the participation of the accused in furthering the common design or purpose.[35]

C. JCE EXISTS IN THE STATUTORY FRAMEWORK OF THE KSC

[30] ICTY, Appeals Chamber, *Prosecutor v. Tadić*, IT-94-1-A Judgement, 15 July 1999 (*Tadić* AJ), paras 196-201 (as confirmed in ICTY, Appeals Chamber, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A Judgement, 28 February 2005 ('*Kvočka et al.* AJ'), para.82 and ICTY, Appeals Chamber, *Prosecutor v. Vasiljević*, IT-98-32-A Judgement, 25 February 2004 ('*Vasiljević* AJ'), para.97).
[31] *Tadić* AJ, paras 202-203 (as confirmed in *Kvočka et al.* AJ, para.82 and *Vasiljević* AJ, para.99).
[32] *Tadić* AJ, para.204. *See* ICTY, Trial Chamber, *Prosecutor v. Krajišnik,* IT-00-39-T Judgement, 27 September 2006 ('*Krajišnik* TJ'), para.882.
[33] *Tadić* AJ, para.227.
[34] *Tadić* AJ, para.227.
[35] *Tadić* AJ, para.227 (*as confirmed in* ICTY, Appeals Chamber, *Prosecutor v. Brđanin,* IT-99-36-A, Judgement, 3 April 2007 ('*Brđanin* AJ'), paras 364, 430; ICTY, Appeals Chamber, *Prosecutor v. Stakić*, IT-97-24-A, Judgement, 22 March 2006, para.64; *Kvočka et al.* AJ, para.81; *Vasiljević* AJ, para.100; ICTY, Appeals Chamber, *Prosecutor v. Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para.31).

13. The Law,[36] which establishes and regulates the jurisdiction of the Specialist Chambers and SPO,[37] specifies that individuals subject to its jurisdiction shall be held responsible on the basis of their individual criminal responsibility, as delineated in Article 16. 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'.[38] Liability pursuant to the mode of JCE is a form of commission found in Article 16(1)(a).

14. Article 16(1)(a) is virtually identical to the equivalent provisions setting out modes of liability at the International Criminal Tribunal for the former Yugoslavia ('ICTY'), International Criminal Tribunal for Rwanda ('ICTR'), International Residual Mechanism for Criminal Tribunals ('IRMCT'), Special Court for Sierra Leone ('SCSL') and the Extraordinary Chambers in the Courts of Cambodia ('ECCC').[39] At the time the Law was adopted in 2015, each of those courts had consistently and repeatedly found that 'commission' within the meaning of their statutes encompasses individual criminal responsibility for persons who contribute to the commission of crimes carried

[36] 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.
[37] Article 1 of the Law.
[38] Article 16(1) of the Law.
[39] The relevant provisions of the Statutes of the KSC, ICTY, ICTR, International Residual Mechanism for Criminal Tribunals ('IRMCT'), and Special Court for Sierra Leone ('SCSL') are identical; there are two minor, non-pertinent differences with Article 29 of the Law on Extraordinary Chambers in the Courts of Cambodia ('ECCC') in that the Statutes of the KSC, ICTY, ICTR and SCSL (i) include the word "otherwise" before aiding and abetting; and (ii) the mode of liability of commission is listed before aiding and abetting. *See* Article 7(1) of the ICTY Statute; Article 6(1) of the ICTR Statute; Article 6(1) of the SCSL Statute; Article 29 of the ECCC Law. The Statute of the IRMCT was adopted on 22 December 2010 by Security Council Resolution 1966. Article 1 states that '[t]he Mechanism shall continue the material, territorial, temporal and personal jurisdiction of the ICTY and ICTR as set out in Articles 1 to 8 of the ICTY Statute and Articles 1 to 7 of the ICTR Statute'. Unless otherwise specified, references herein to the ICTY Statute refer as well to the ICTR and IRMCT Statutes.

out jointly, that is, by a group of persons acting pursuant to a common criminal purpose or JCE.[40]

15. The drafters of the Law were free to frame the applicable modes of liability for the KSC in any way that they wanted. In choosing, in Article 16(1)(a), to adopt identical language from the statutes of those courts, and in full awareness of how those statutes have been consistently interpreted, there can be no question that the drafters intended JCE to apply before the KSC. In fact, in the circumstances, far from having to expressly or exhaustively list JCE in Article 16 in order for it to apply,[41] had the drafters wanted to *exclude* it, they should have modified the language of Article 16(1)(a) so as to employ different terms from those found in the ICTY Statute. They did not do so and instead they adopted the precise language of the ICTY Statute.

16. As such, 'commission' within the meaning of Article 16(1)(a) must be read to encompass JCE liability.[42] Indeed, it is necessarily the case that the Law was designed to, and does, provide for JCE as a relevant mode of liability for the prosecution of persons acting pursuant to a common plan, design or purpose.

1. The context, object and purpose of the Law further supports application of JCE liability

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[40] *Tadić* AJ, para.190; *Ojdanić* JCE Decision, para.20; ECCC, Trial Chamber, *Co-Prosecutors v. Kaing Guek Eav* alias *Duch*, 001/18-07-2007/ECCC/TC Judgement, 26 July 2010 ('*Duch* TJ'), para. 511; PTC Decision on JCE'), para. 49; ECCC, Trial Chamber, 0002/19-09-2007/ECCC/TC 'Decision on the Applicability of Joint Criminal Enterprise', 12 September 2011 ('ECCC TC JCE Decision') paras 15, 22; ICTR, Appeals Chamber, *Prosecutor v. Ntakirutimana and Ntakirutimana, ICTR-96-10-A* and *ICTR-96-17-A* Judgement, 13 December 2004 ('*Ntakirutimana* AJ'), paras 461-484; SCSL, Trial Chamber II, *Prosecutor v. Brima et al.*, SCSL-04-16-T 'Decision on Defence Motions for Judgment of Acquittal pursuant to Rule 98', 31 March 2006 ('*Brima et al*. Decision on Judgment of Acquittal'), paras 308-326.

[41] *Contra* Krasniqi Motion, paras 18, 21, Selimi Motion, paras 22, 27. *See also Ojdanić* JCE Decision, paras 18-19 (addressing arguments regarding the need for JCE to be expressly or exhaustively enumerated in the Statute).

[42] *Tadić* AJ, para.190; *Ojdanić* JCE Decision, paras 18-21; *Duch* TJ, 26 July 2010, para. 511; PTC Decision on JCE, para. 49; ECCC TC JCE Decision, paras 15, 22; *Ntakirutimana* AJ, paras 461-484; *Brima et al*. Decision on Judgment of Acquittal, paras 308-326.

17. The Law recognises that the KSC and SPO shall exist to, *inter alia*, 'ensure secure, independent, impartial, fair and efficient criminal proceedings'.[43] To meet these standards, the KSC necessarily has the remit to try *all* those whose alleged crimes fall within its jurisdiction, whether they acted alone or together with others. The seriousness of the crimes within the KSC's jurisdiction under Articles 13 and 14, and the explicit rejection of purported bars to prosecution in Articles 16(2), 16(3), and 16(4), reveal that the Law, as drafted and adopted by the Assembly of Kosovo, must operate to reach all perpetrators. This also reflects a central concern of the CoE Report, which was impunity – in particular amongst leadership figures, as opposed to direct perpetrators – for allegations of grave crimes and a repeated emphasis on the joint participation of individuals, or participation in a 'group', in the commission of those crimes.[44] To find that Article 16(1)(a) does not encompass the liability of individuals who participated in such a manner would thwart the purpose of the Law and shield many perpetrators from justice.[45]

18. The ICTY Appeals Chamber in *Tadić*, conducting a similar assessment with respect of the object and purpose of the ICTY Statute, also concluded that it must apply *to all those* who participated in the commission of the crimes in question, including '[w]hoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose'.[46]

19. Due to their nature and scale, many crimes perpetrated in a period of unrest and war are committed not solely as the result of the 'criminal propensity of single

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[43] Article 1 of the Law.
[44] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report: Inhumane treatment of people and illicit trafficking in human organs in Kosovo, Doc.12462, 7 January 2011, Executive Summary, Draft Resolution, para.14, Report, paras 7, 69, 169-174, 176. *See also* Article 1 of the Law; Law No. 04/L-274 on Ratification of the International Agreement Between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo, 23 April 2014.
[45] *See similarly Tadić* AJ, paras 186, 190.
[46] *Tadić* AJ, paras 186, 190; Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993 ('Report of the Secretary-General').

individuals', but rather are carried out by groups of individuals acting together in pursuance of a common criminal design.[47] Certain members may act as physical perpetrators, while others may make other significant contributions and 'the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts'.[48] To hold liable only the person who carries out the criminal act itself would disregard the role of those who made it possible for the physical perpetrator to carry out the crime.[49]

20. The KSC should affirm that its Law, in particular Article 16(1)(a), extends to all who participate in the commission of the enumerated crimes, subject to fulfilment of the other jurisdictional requirements.[50] This principle applies as fully to the crimes in Kosovo and Albania as it has to perpetrators in other parts of the former Yugoslavia and around the world.

2. The remaining Defence arguments are without merit and, if accepted, would create accountability gaps

21. The remaining defence submissions concerning the absence of the words 'joint criminal enterprise' in the Law do not advance the argument.

22. THAÇI notes that different modes of liability for the reciprocal imputation of co-perpetrators' acts are applied as between the ICC and ICTY,[51] and that co-perpetration as applied before the ICC is also a form of 'commission' liability.[52] The

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[47] *Tadić* AJ, para. 191; PTC Decision on JCE, para.55; SCSL, Appeals Chamber, *Prosecutor v. Taylor*, SCSL-03-01-A Judgment, 26 September 2013, para.383.
[48] *Tadić* AJ, para. 191.
[49] *Tadić* AJ, para.192; ICTR, Trial Chamber, *Prosecutor v. Karemera et al*., ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Nzirorera, Karemera, Rwamakuba and Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 11 May 2004 ('*Karemera* Decision on Preliminary Motions'), para.36; *Rwamakuba* JCE Decision, para.29.
[50] *E.g.* Articles 6-9 of the Law.
[51] Thaçi Motion, para.61.
[52] Thaçi Motion, para.61.

modes of liability applied at the ICC are based on its own detailed statute, which differs entirely from Article 16(1)(a) of the Law. While it may be argued that co-perpetration could also fall within 'commission' in Article 16(1)(a), that argument has no effect on the applicability of JCE liability.

23. KRASNIQI errs in suggesting that *in dubio pro reo* could assist in determining whether JCE is included in the Law.[53] As outlined above, no reasonable doubt exists warranting the application of this principle once the Law is interpreted in context, namely through its plain language and in consideration of its object and purpose. It is clear that the jurisdiction of the KSC extends not only to physical perpetrators and criminals acting alone, but also those who, acting together, commit crimes in executing a common criminal purpose. As the ICTY Appeals Chamber in *Ojdanić* described it, when considering this same argument, the proper interpretation of the court's jurisdiction 'simply leave[s] no room for' application of the *in dubio pro reo* principle.[54]

24. SELIMI argues that the SPO has failed to show that commission is not 'logically and naturally' limited in its application to physically and directly carrying out the *actus reus* of the crime.[55] Similarly, KRASNIQI highlights the situation of a person who did not physically carry out a crime and argues that for such a person, liability through commission could only be 'implied into' the Law because the natural meaning of 'committed' would exclude all but the direct perpetrator.[56] As outlined above, to find that 'commission' in the Law encompasses only physical perpetrators would result in an impunity gap for those who created and implemented criminal plans and policies, instead reaching only those who carried out the resulting crimes. As found by the

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[53] Krasniqi Motion, para.19.
[54] *Ojdanić* JCE Decision, paras 27-28; *See also* ICTY, Appeals Chamber, *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction *Joint Criminal Enterprise*, 21 May 2003 ('Hunt *Ojdanić* Separate Opinion'), annexed to *Ojdanić* JCE Decision, para.26.
[55] Selimi Motion, para.24.
[56] Krasniqi Motion, paras 22-23.

ECCC Pre-Trial Chamber ('ECCC PTC'), in light of consistent and precedential case law on the existence of JCE as a mode of commission liability, had the drafters intended to limit 'commission' to physical perpetrators, they would have had to make such a restriction explicit.[57] Apart from disagreeing with the ECCC PTC's finding in this regard, SELIMI points to no authority to support his position, as, contrary to his suggestion, the Single Judge in *Turinabo et al.* did not find that the term 'commission' excludes persons other than a physical perpetrator. Rather, it was concluded that there was insufficient evidence showing JCE applies to contempt offenses in CIL or as a general principle of international law.[58] That limited holding has no impact on these proceedings.

25. There is thus no merit to the argument that JCE liability represents an expansion of the modes in Article 16(1)(a). A determination that JCE is a form of commission liability is not a creative or 'extensively construed' interpretation of the Law.[59] Prosecution of all persons who committed violations of Articles 13 and 14 is consistent with the plain language, context, object and purpose of the Law, and reflects the nature of the crimes committed during periods of conflict or unrest.[60]

D. JCE FORMED PART OF CIL AT ALL TIMES RELEVANT TO THE INDICTMENT

26. For JCE to be applicable to the Accused, it must have existed in CIL at the relevant time, and have been foreseeable and accessible to the Accused. JCE, in all of its forms, satisfies these conditions.

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[57] PTC Decision on JCE, para.49.
[58] MICT, Single Judge, *Prosecutor v. Turinabo et al.*, 'Decision on Challenges to Jurisdiction', 12 March 2019 ('*Turinabo et al*. Decision on Jurisdiction'), para.31. The Single Judge re-affirmed the applicability of JCE to the core crimes in the Statute, including genocide, crimes against humanity and war crimes. *See also Turinabo et al*. Decision on Jurisdiction, para. 29.
[59] *Contra* Veseli Motion, para.95, Krasniqi Motion, para.20 (seeking to invoke the *nullum crimen sin lege* principle in Article 7 of the European Convention on Human Rights).
[60] *Contra* Veseli Motion, para.95, Krasniqi Motion, para.20.

1. The relevant statutes and jurisprudence from post-WWII trials show that JCE liability is found in CIL

27. Following World War II, international efforts were taken to establish a legal framework for the prosecution of those suspected of committing atrocities. Through the adoption of various statutes and the application of other sources of law including conventions, custom and domestic laws, the Allied Powers prosecuted war criminals in Europe and the Far East. The jurisprudence from the post-WWII trials reveals that accused persons were convicted of international crimes, including crimes against humanity and/or war crimes, on the basis of their contributions to a common purpose or common design. In addition, it was recognised that culpability is not limited to the physical perpetrator, but also attaches to those who did not carry out the *actus reus* of the international crime charged, but had acted in concert with others, based on a common purpose and having made a contribution to its implementation. Importantly, these cases established that – in terms of the required contribution – there is no necessity that the defendant participate or be present at the moment of the commission of a crime.

28. The Charter of the International Military Tribunal ('IMT Charter'),[61] Control Council Law No.10 ('CCL10'),[62] and the cases reviewed in this section date back more than 70 years. They do not always address specific modes of liability or their constitutive elements with the same methodology and terminology of modern international courts.[63] This, however, is not necessary under the principle of legality, which only requires that an accused be able to appreciate that his or her conduct is criminal in the sense generally understood, without reference to any specific

[61] Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945 ('IMT Charter').
[62] Control Council Law Nr. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945 ('CCL10').
[63] *See Rwamakuba* JCE Decision, para.24.

provision.[64] Nor is it necessary for the formation of a rule of CIL, where state practice need not be 'in absolute rigorous conformity' with the customary rule, if it is consistent.[65] Requiring uniform terminology would be 'unrealistic'.[66] That these cases do not use the terms 'joint criminal enterprise' or 'significant contribution to the implementation of the common purpose' is not determinative, as these terms are modern phrases adopted to express the principles arising from the post-WWII caselaw.[67]

29. The principle of legality, while remaining a fundamental tenet, needs to be applied with a view of maintaining a balance between the rights of the accused and the necessity of deterring, prosecuting, and punishing the most serious crimes known to humanity.[68] For modes of liability, variations in the terminology used in the reviewed cases are not an obstacle to the determining the customary status of JCE, as long as the underlying principles are fundamentally equivalent.

(a) Post-WWII statutes demonstrate that JCE existed in CIL

30. The International Military Tribunal ('IMT') was established to ensure the 'just and prompt trial and punishment of the major war criminals of the European Axis'.[69] In addition to the United States, the Soviet Union, France and Great Britain, the following countries expressed their adherence to the agreement establishing the IMT:

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[64] ICTY, Appeals Chamber, *Prosecutor v. Hadžihasanović et al*., IT-01-47-AR72 'Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility', 16 July 2003 ('*Hadžihasanović et al*. Jurisdiction Appeal Decision'), para.34.
[65] *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. USA)*, Merits, Judgment, I.C.J. Reports 1986, para.186.
[66] ECCC, Supreme Court Chamber, *Co-Prosecutors v. Nuon Chea and Khieu Samphân*, 002/19-09-2007-ECCC/SC, Appeal Judgement, 23 November 2016 ('SCC AJ'), paras 776-777.
[67] SCC AJ, paras.779.
[68] *See Karemera* Decision on Preliminary Motions, para.43, (holding that given the specificity of international criminal law, the principle of legality does not apply to the same extent as it applies to the national legal systems); ICTY, Trial Chamber, *Prosecutor v. Delalić et al.*, IT-96-21-T Judgement, 16 November 1998 (*Delalić* TJ), para.405.
[69] IMT Charter, Article 1.

Yugoslavia, Greece, Denmark, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay.[70] The IMT Charter served as the governing law at Nuremberg, at which 22 high ranking members of the Nazi regime were tried.[71] It was adopted in 1945 by agreement between the United States, the Soviet Union, France and Great Britain acting in the interests of all the United Nations.[72]

31. CCL10 was adopted in 1945 to provide a 'uniform legal basis' for the prosecution of war criminals, other than those dealt with at the IMT.[73] CCL10 was enacted by legislative act, jointly passed by the four occupying powers (the United States, the Soviet Union, France and Great Britain), reflecting international agreement among the occupying powers as to the law applicable to international crimes and the jurisdiction of the military courts charged with adjudicating these cases.[74] These trials of 'next level' German war criminals took place before U.S., British, Canadian and Australian military tribunals, and in German courts.[75] In addition to applying CCL10, these courts were to follow the IMT Charter and the jurisprudence of the IMT.[76]

32. Both the IMT Charter and CCL10 contain provisions which outline criminal liability for participation in a common purpose, plan or enterprise. Article 6 of the IMT Charter provides that persons: 'participating in the formulation or the execution of a common plan or conspiracy to commit [crimes against peace, war crimes, or crimes

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[70] *See United States of America v. Goering et al.*, International Military Tribunal, Judgement, 1 October 1946, in *Trial of the Major War Criminals* (Vol. I, 1947) ('IMT Judgement' or '*Goering et al.*'), p.171.
[71] IMT Judgement, p.171.
[72] IMT Charter, p.1 ("The Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of the Soviet Socialist Republics acting in the interests of all the United Nations and by their representatives duly authorized thereto have concluded this Agreement").
[73] CCL10.
[74] CCL10 was signed on 20 December 1945 by representatives of each of the Allies in Berlin). *See also* PTC Decision on JCE, para.57.
[75] PTC Decision on JCE, para.57, fn 164.
[76] CCL10; PTC Decision on JCE, para.57, fn.164.

against humanity] are responsible for all acts performed by any persons in execution of such plan'.[77] Article II(2) of CCL10 provides that '[a]ny person…is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission'.[78]

33. As drafted and as applied, the language of the IMT Charter, attributing liability for 'all acts performed by any persons in execution of such plan' and of CCL10, providing liability for persons 'connected with plans or enterprises involving the commission of a crime' encompasses responsibility for not only crimes falling within the common plan (JCE I), but also for other crimes committed in the execution of the plan or connected to the plan (JCE III). Further, the relevant provisions of the IMT Charter and CCL10 explicitly include perpetrators who bore liability for their contributions to the commission of crimes, in whatever form those contributions were made, not solely on the basis of physically committing the *actus reus* of a crime.[79]

34. Contrary to SELIMI's claim that the IMT Charter and CCL10 cannot be relied on to show the status of CIL because they were enacted after the crimes,[80] these instruments reflect the determination of multiple countries to pursue individual criminal responsibility for crimes based on international law applicable at the time of the events. In the 1946 IMT Judgement, the court explored its jurisdiction and found that the IMT Charter was not an *ex post facto* act, as alleged, and that it [the Charter] 'is

[77] IMT Charter, Article 6. Article 6 is identical to Article 5 in the Charter of the International Military Tribunal for the Far East adopted on 19 January 1946.
[78] CCL10, Article II(2).
[79] SCC AJ, para.788.
[80] Selimi Motion, para.52.

the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law'.[81]

35. This conclusion was considered and adopted by subsequent chambers, including those applying CCL10. For example, in the *Hostages* case,[82] the judges explicitly adopted the holding in the IMT Judgement and found that the crimes defined in CCL10 were crimes under *pre-existing* rules of international law, including by convention and through custom and that the crimes as charged under CCL10 thus reflected crimes already declared unlawful.[83]

36. Further, in the *Einsatzgruppen* case, the judges considering the chamber's jurisdiction, stated that like the IMT Charter, CCL10 was an expression of international law existing at the time of its creation, representing 'the codification and systematization of already existing legal principles, rules and customs. […] they have been international law for decades if not centuries'.[84] Thus, the Chamber concluded that the military tribunal and CCL10 functioned as the 'machinery for the actual application of international law theretofore existing'.[85] Further, as in the IMT

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[81] IMT Judgement, p.218. The IMT observed that the laws already in existence prohibiting certain methods of war (Hague Convention of 1907), including the inhumane treatment of prisoners, have, despite not being designated as criminal in the Hague Convention, certainly been crimes and treated by courts as such. IMT Judgement, pp.220-221. In the *Justice* case, the military tribunal stated that while the IMT Judgment pronounced on crimes against peace, it was extending the holding at IMT Judgement, p.218 to war crimes and crimes against humanity as the opinion expressed in the IMT Judgment was 'equally applicable' to those crimes. *Justice,* Judgement, p.975.

[82] *United States of America v. List et al.,* Military Tribunal V, Case 7, Judgement, 19 February 1948, p.1230 in Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No.10, Volume XI ('*Hostages*').

[83] *Hostages*, p.1238-1239 (emphasis added). The judges reviewed the Hague Conventions of 1907 and custom and found that 'the pre-existing international law has declared the acts constituting the crimes herein charged and included in Control Council Law No. 10 to be unlawful, both under the conventional law and the practices and usages of land warfare that had ripened into recognized customs which belligerents were bound to obey.' *Hostages,* p.1240.

[84] *United States of America v. Ohlendorf et al*., 1947, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (United States Government Printing Office, Vol. IV, 1951) ('*Einsatzgruppen*'), p.457-458. *See also* p.454 (describing its origins).

[85] *Einsatzgruppen*, p.459

Judgement, it found that CCL10 not only reflects international law but is a 'highly significant contribution to written international law'.[86]

(b) Post-WWII caselaw demonstrates that JCE existed in CIL

37. The caselaw stemming from post-WWII trials, contained in official records which were mainly published immediately after the trials, is most helpful for discerning the principles animating individual criminal responsibility at the time that the first large scale effort was made to conduct such prosecutions. As such, they have been the source of previous legal analysis before other tribunals and rightly form part of the legal basis for individual criminal responsibility for international crimes, along with the statutory instruments described above.

(i) Format of reported cases and role of the Judge Advocate

38. Not every reported case from the WWII era contains detailed reasoning with regard to the responsibility of the accused. The published cases are accurate records, prepared using recordings of hearings or based on the records kept by the Judge Advocate General ('Judge Advocate') or similar officer in the courtroom.[87] The statements of counsel, as well as the legal submissions and post-conviction case reviews by Judge Advocates, further complement the record and serve an invaluable complementary role in the assessment of the relevant legal principles and their application.

39. The reported cases reveal that not every trial was constituted in a like manner. In particular, some military tribunals were assisted by the statements made by Judge

[86] *Einsatzgruppen*, p.460.
[87] IMT Judgement, p.172 (noting that a complete stenographic record of everything said in the case has been made, as well as an electrical recording of all the proceedings). *See* Statement of UNWCC Chairperson the Right Honorable Lord Wright of Durley October 1946, Forward, at 'x', Law Reports of Trial of War Criminals, Volume I, English edition, 1947 ('Foreward Volume I').

Advocates, who were institutional advisors charged with assisting the military tribunals on points of law. As explained in the forward to the first volume of the law reports issued in 1946, in cases heard before British military tribunals, 'the Judge Advocate, who sits to help the Tribunal on questions of law and who sums up, provides in his addresses an analysis […] *which goes to explain the judgment*'.[88] This function is made plain in the words of one Judge Advocate addressing the bench on the day of summing up: 'as far as the law of the case is concerned you will, or at least you should, as it is said, take the law from me...the facts, as I say, …are entirely for you to decide'.[89] Judge Advocates in cases tried before Australian military courts had the same role as their British counterparts. The Judge Advocate in *Ishiyama and Yasusaka* stated at the beginning of his submissions that he was advising the court 'upon the law'.[90]

40. The position of Judge Advocate in the courtroom was unfilled in trials before United States military tribunals; instead, 'legal questions are examined and discussed between prosecuting counsel (a member of the Judge Advocate's staff) and defending counsel…'.[91] However, lawyers of the Judge Advocate's staff played an important role after the trial, as they were responsible for a technical review of the court's findings and to make recommendations to the highest military commander of the occupation zone on the execution of the court's ruling.[92] The Judge Advocate's review of the

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[88] Forward Volume I (emphasis added).
[89] *Feurstein and Others* (Ponzano), British Military Court sitting at Hamburg, Germany, Judgment of 24 August 1948, p. 19, ('*Ponzano*') p. 19.
[90] *Prosecutor v. Kumakichi Ishiyama et al.*, Australian Military Court, 8-9 April 1946, p.24, www.legal-tools.org/doc/c9884d/
[91] Forward Volume I.
[92] For an explanation of the role of the Judge Advocate Staff in the post-WWII trials, *see* Report of the Judge Advocate for War Crimes – European Command, June 1944 to July 1948 ('European Command War Crimes Report') Section VIII, p.71 (loc.gov/rr/frd/Military_Law/pdf/report-deputy-JA-war-crimes.pdf). *See also* Maximilian Koessler, Borkum Island Tragedy and Trial, 47 J. Crim. L. Criminology & Police Sci. 183 (1956-1957) ('Koessler, Borkum Island Tragedy and Trial'), p.192, where it refers to the role played by the Judge Advocate in *Borkum Island*. Koessler explains that '[a]ccording to established procedure, a judgement could go into effect only to the extent as it was approved by the highest military

Borkum Island case, for instance, provides insights into the role of each defendant in the case and explores the legal principles applied.[93]

41. For the cases without Judge Advocate submissions, any difficulty in surmising the reasoning applied can be overcome by analysing and comparing the materials contained in the case reports, including the indictment, the speeches of counsel, and the judgement.[94] As explained by the ICTY Appeals Chamber, its consideration of the reported statements of counsel, where no statement of the Judge Advocate is provided, does not detract from its assessment of the law. In *Đjorđević*, the Appeals Chamber noted, with approval, the following clarification to *Tadić*:

> the Appeals Chamber was competent, particularly 'when a clear judicial statement was unavailable', to examine the statements of counsel engaged in cases to ascertain how the court in fact proceeded; courts sometimes do that. The arguments of counsel are given in the better law reports of some jurisdictions before the judgement is laid out. That practice, where it applies, is not an ornamental flourish on the part of the reporter: counsels' arguments help appreciation of what the issues were. Thus, it cannot be wrong to refer to counsel's arguments. […] [T]he material question is whether [these statements] correctly reflected CIL.[95]

42. The lack of a degree of detail in some of the judgements reviewed in this brief is not a barrier in determining the customary status of JCE. While they may require a more labour-intensive analysis compared to modern international criminal judgements, the materials in the case reports, including the indictment, the speeches of counsel, the judgement, and the submissions and reviews by the Judge Advocates

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commander of the occupation zone, who made his decision after an elaborate review of the record by several members of the Judge Advocate Staff, supposed to submit a summary of the facts along with an opinion as to approval or disapproval of convictions and sentences.'

[93] *Borkum Island*.

[94] Forward Volume I.

[95] *Đorđevic* AJ, para.45 (citing with approval the clarification found in *Prosecutor v. Krajišnik*, IT-00-39-A, Separate Opinion of Judge Shahabuddeen, 17 March 2009, para.24 annexed to *Krajišnik* AJ). *See also* Extraordinary African Chambers, Trial Chamber, *Ministere Public v. Hissene Habré* Judgment, 30 May 2016 ('*Habré* TJ') paras 1872, 1884. *Contra* Selimi Motion, para.38, fn.56.

offer sufficient elements to discern the essence of the legal principles applied in these cases.[96]

43. In the trials described below, accused persons were tried based on their actions taken as part of a common design, purpose or plan, with others, including in instances in which it was proven that an accused intended the commission of crimes as part of that plan or design. Other trials revealed liability based on the same *actus reus* requirements, but extending to crimes outside the common plan which were considered a foreseeable consequence of it. The following non-exhaustive recounting of post-WWII cases - concerning various fact patterns and accused persons with varying positions and contributions - further establish the existence of JCE in CIL.

(ii) Cases evidencing the application of JCE I liability

44. *United States v. Alstoetter et al.* ('*Justice*'):[97] In 1947, a U.S. military tribunal in Nuremberg applied CCL10 to the case of sixteen defendants, including Lautz, the Chief Public Prosecutor of the People's Court and Rothaug, the former Chief Justice of the Special Court in Nuremberg, who were charged with war crimes and crimes against humanity as they were, *inter alia,* connected to plans and enterprises involving the commission of crimes within the jurisdiction of the court.[98] The court summarised the essence of the charges, stating:

> [t]he charge, in brief, is that of conscious participation in a nationwide government-organized system of cruelty and injustice, in violation of the laws of war and of

[96] Forward Volume I.
[97] *United States v. Alstoetter et al.,* U.S. Military Tribunal, Judgement, 3-4 December 1947, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (Vol. III, 1951) Indictment ('*Justice*'), p.15-16. Although not considered in *Tadić,* the ECCC PTC and the ICTY and ICTR Appeals Chamber have found that the *Justice* case is a valid illustration of the state of CIL in respect of JCE. *See* PTC Decision on JCE, paras 65-67; *Rwamakuba* JCE Decision, paras 14-31; *Brđanin* AJ, paras 394, 404; *Prosecutor v. Milutinovic*, IT-05-87-PT, Separate Opinion of Judge Bonomy, 22 March 2006 ('Bonomy Separate Opinion') annexed to *Ojdanić Co-Perpetration Decision,* in particular paras 15-20, 26; *Krajišnik* AJ, para.659.
[98] *Justice*, Indictment, p.15-16.

> humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts.[99]

Voluminous evidence revealed a 'plan of racial persecution' which was executed through the Ministry of Justice.[100]

45. To find the accused criminally responsible, the court had to find '(i) the fact of the great pattern or plan of racial persecution and extermination; and (ii) specific conduct of the individual defendant in furtherance of the plan.[101] The court considered the knowledge, intent and motive of each accused. The test applied was to assess whether each 'had knowledge of an offense charged in the indictment and established by the evidence, and that he was connected with the commission of that offense'.[102] The court considered that it was required to determine whether each accused had 'consciously participated in the plan or took a consenting part therein'.[103]

46. For example, with respect to Rothaug, who was convicted of crimes against humanity, the court clarified that his conscious participation had to be understood as follows:

> The individual cases in which Rothaug applied the cruel and discriminatory law against Poles and Jews cannot be considered in isolation. It is of the essence of the charges against him that he participated in the national program of racial persecution. It is of the essence of the proof that he identified himself with this national program and gave himself utterly to its accomplishment.[104]

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[99] *Justice*, Judgement, p.985.
[100] *Justice*, Judgement, p.1081.
[101] *Justice*, Judgement, p.1063. The court stated that '[t]his is but an application of the general concepts of criminal law'.
[102] *Justice*, Judgement, p.1093.
[103] *Justice*, Judgement, p.1081.
[104] *Justice*, Judgement, p. 1156.

47. *United States v. Greifelt et al. ('RuSHA'):*[105] Nazi officials were charged with war crimes and crimes against humanity,[106] including the accused Hofmann and Hildebrandt who were officials of the SS Race and Resettlement Main Office ('RuSHA').[107] The defendants represented members of various organisations implementing a policy, which the court found was aimed at 'the two-fold objective of weakening and eventually destroying other nations while at the same time strengthening Germany, territorial and biologically, at the expense of conquered nations'.[108] Those who implemented certain programs developed to achieve this objective, including a 'Germanisation' plan, were found to have, from the very beginning, envisioned drastic and oppressive measures, which were applied in all twelve countries which were overrun by Hitler's armed forces.[109]

48. The court found that Hofmann and Hildebrandt contributed to the Germanisation plan by causing, through their employees and agents, abortions on foreigners impregnated by Germans, punishment for sexual intercourse between Germans and non-Germans, slave labour of Poles and other Easterners, the persecution of Jews and Poles and the kidnapping of foreign children.[110] In the matter of kidnapping of children, both accused had knowledge of the program of abducting

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[105] *United States v. Greifelt et al.*, U.S. Military Tribunal, Judgement, 10 March 1948, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (Vol. IV-V, 1951) ('*RuSHA*'). Although not considered in *Tadić*, the ECCC PTC and the ICTY and ICTR Appeals Chamber have found that the *RuSHA* case is a valid illustration of the state of CIL in respect of JCE. *See* PTC Decision on JCE, paras 65, 68; *Rwamakuba* JCE Decision, paras 14-31; *Brđanin* AJ, paras 394, 404; Bonomy Separate Opinion, in particular paras 21-26.

[106] *RuSHA*, Indictment, Vol. IV, p.609, para.2 (alleging crimes against humanity), p.617, para.24 (re-incorporating crimes against humanity provisions for purposes of allegations of war crimes).

[107] Hofmann was RuSHA Chief from July 1940-April 1943. Hildebrandt was RuSHA Chief from April 1943 until the end of the war.

[108] *RuSHA*, Judgement, Vol. V, p.90.

[109] *RuSHA*, Judgement, Vol. V, p.96 (oppressive measures included deportation of Poles and Jews, separation of family groups and kidnapping of children to train them in Nazi ideology, confiscation of property of Poles and Jews for resettlement purposes, destruction of the economic and cultural life of the Polish population, hampering of reproduction in the Polish population).

[110] *RuSHA*, Judgement, Vol. V, p.101, 160-161.

children, which was implemented by RuSHA agents, and issued instructions and orders to carry out it out.[111] On the basis of their participation in the abortion program and their knowledge of how it was applied by RuSHA personnel acting as 'racial examiners', Hofmann and Hildebrandt were found responsible for forcible abortions.[112] In respect of the programs of punishment for sexual intercourse with Germans and programs which hampered the reproduction of 'enemy nationals', the court concluded that both accused knew the details of the programmes and willingly assisted in their execution, and as a consequence '[b]ore responsibility for the criminal acts committed'.[113] Their conduct, committed in furtherance of the Germanisation plan, was found to warrant criminal responsibility for the criminal activities alleged in the indictment.[114]

49. *IMT Judgement:*[115] At the IMT, in the case of *Goering et al.* also known as the 'IMT Judgement', judges heard extensive evidence against twenty-two accused who were alleged to have 'formulated and executed a common plan or conspiracy' to commit crimes in the jurisdiction of the IMT and in fact committed crimes as part of that common plan.[116] In charging the accused, the prosecution specified that the crimes were committed by them and by other persons for whose acts they were responsible

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[111] *RuSHA*, Judgement, Vol. V, p.106, 115.
[112] *RuSHA*, Judgement, Vol. V, p.111-112, 160-161. The tribunal noted Hildebrandt's secret memorandum describing the program's objectives: 'to […] further all valuable racial strains for the strengthening of our people, and to accomplish a complete elimination of everything racially inferior.' *RuSHA*, Judgement, Vol. V, p.111-112.
[113] *RuSHA*, Judgement, Vol. V, p. 117-125 (quotation at p. 125).
[114] The military tribunal held that '[t]he evidence establishes beyond any reasonable doubt [the accused's] guilt and criminal responsibility for the […] criminal activities", including the kidnapping of children, forcible abortions, child-stealing, punishment for sexual intercourse with Germans, and the hampering of enemy nationals' reproduction. RuSHA, Judgement, Vol. V, p. 160 (findings with respect to Hofmann); p.160-161 (identical findings for Hildebrandt).
[115] *United States of America v. Goering et al.*, International Military Tribunal, Judgement, 1 October 1946, in *Trial of the Major War Criminals* (Vol. I, 1947) ('IMT Judgement').
[116] *United States of America v. Goering et al.*, International Military Tribunal, Indictment, 14 November 1945-1 October 1946, in *Trial of the Major War Criminals* ('IMT Indictment'), p.43, 65.

(under Article 6 of the Charter) as the acts were committed in execution of the common plan and conspiracy to commit crimes.[117]

50. The record of the IMT proceedings concerning two accused, Sauckel and Speer, bear exploration. Sauckel, Plenipotentiary-General for the Utilisation of Labour, was charged, *inter alia*, with war crimes and crimes against humanity, based on his involvement in forcing residents of occupied countries into slave labour.[118] Speer, Minister of Armaments and War Production, faced the same charges in relation to abuse and exploitation of persons for forced labour.[119] Other co-accused including Hermann Goering were involved in the slave labour program.[120] The Prosecution alleged that Speer and Sauckel made contributions, as described below, which contributed to the realisation of the common plan to commit the crimes enumerated in the IMT Charter.

51. The court considered Sauckel's contributions to the slave labour program and his knowledge of the poor conditions under which the workers toiled. It found that '[h]e was aware of the ruthless methods being taken to obtain labourers, and vigorously supported them [...]'.[121] The court recounted that with knowledge of the bad conditions, Sauckel issued an order to 'exploit [the workers] to the highest possible extent'.[122]

52. Speer coordinated with Sauckel on labour needs in various industries.[123] Speer knew that the labourers he requested were recruited through 'violent methods'.[124] He was the principal beneficiary of the slave labour program, which he promoted,

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[117] IMT Indictment, p.43, 65.
[118] IMT Indictment, p.73.
[119] IMT Indictment, p.73.
[120] IMT Judgement, p.282.
[121] IMT Judgement, p.321.
[122] IMT Judgement, p.245, 322.
[123] IMT Judgement, p.331.
[124] IMT Judgement, p.332.

knowing the conditions endured by labourers.[125] The court found that he was aware of the cruelty of the slave labour program, though he was not directly concerned in that aspect of it.[126]

53. On the basis of each man's contributions, Sauckel and Speer were convicted of all charges of war crimes and crimes against humanity[127] which spanned atrocities far beyond those committed in respect of the slave labour program. They were convicted on the basis of their contributions to a common criminal plan, with the court making findings on the *mens rea* of each, which sufficed to show they had the requisite intent for the crimes.[128]

54. *Einsatzgruppen*:[129] In 1947-1948, a U.S. military tribunal in Nuremberg heard the case against members of the German special task force units called 'Einsatzgruppen' alleged to have followed the German army east, from 1941-1943, exterminating 'racially inferior' or 'politically undesirable' persons, with approximately 1 million victims.[130] The charges included war crimes and crimes against humanity, on the basis of *inter alia,* CCL10, various conventions, customary law and general principles of law.[131] In closing, the Prosecution specified that:

> '[n]ow with respect to this contention that the defendants did not participate directly, the elementary principle must be borne in mind that neither under Control Council Law No. 10 nor under any known system of criminal law is guilt for murder confined

[125] IMT Judgement, p.332.
[126] IMT Judgement, p.332.
[127] IMT Judgement, p.322.
[128] For Sauckel, the Chamber noted that he provided vigorous support to the continuation of a program which he knew involved ruthless recruitment. For Speer, the Chamber made multiple findings of his knowledge of crimes committed pursuant to the slave labour program and his continued participation in the common plan. IMT Judgement, paras 514-515, 522-523. The existence of knowledge and continued participation is often used to show intent. *See e.g.* ICTR, *Prosecutor v. Karemera and Ngirumpatse,* ICTR-98-44-A, Judgement, 29 September 2014, para.632 ('*Karemera and Ngirumpatse* AJ').
[129] *United States of America v. Ohlendorf et al*., 1947, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (United States Government Printing Office, Vol. IV, 1951) ('*Einsatzgruppen*').
[130] *Einsatzgruppen,* p.46, 118.
[131] *See e.g.* counts one – crimes against humanity - and two – war crimes - described at p.15-22.

> to the man who pulls the trigger or buries the corpse. In line with recognized principles common to all civilized legal systems, paragraph 2 of Article II of Control Council Law No. 10 specifies a number of types of connection with crime which are sufficient to establish guilt. Thus, not only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime. These provisions embody no harsh or novel principles of criminal responsibility […]'.[132]

55. *Sandrock et al., ('Almelo')*:[133] In November 1945, a British military court with members from The Netherlands, the UK and Canada, issued a judgement against four German non-commissioned officers who, in March 1945, executed a downed British pilot and a Dutch civilian. During each execution, which transpired three days apart, the accused knew they were going to kill the victim. One man fired the lethal shot, another gave the order and the third remained by the car to prevent people from coming near while the shooting took place. In summing up, the Judge Advocate stated that:

> '[t]here is no dispute, as I understand it, that all three [Germans] knew what they were doing and had gone there for the very purpose of having this officer killed; and, as you know, if people are all present together at the same time taking part in a common enterprise which is unlawful, each one in their (sic) own way assisting the common purpose of all, they are all equally guilty in point of law'.[134]

Thus, each accused was found guilty of the killing given their agreement to kill the prisoners and their contributions to that plan.

56. *Holzer et al.*:[135] Similar facts can be found in the records of a Canadian military court sitting in 1946 in Germany charging Holzer and two co-accused with murder of a Canadian prisoner of war. Following the forced evacuation from their aircraft,

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[132] *Einsatzgruppen,* p.371-372.
[133] *Trial of Sandrock et al.,* British Military Court for the Trial of War Criminals, Almelo, Holland, 24th-26th November 1945, in *UNWCC* (Vol. I) ('*Almelo*'), p.35.
[134] The quotation comes from the Official Transcript, Public Record Office, London, WO 235/8, p.70 on file with KSC Library; the report in UNWCC, Vol. I, p.40 is slightly different. *Almelo*, p.40.
[135] *Holzer et al.,* Canadian Military Court, 25 March-6 April 1946, in *Record of Proceedings at Aurich, Germany* (Vol. I) ('*Holzer*').

Canadian airmen were held and ultimately killed. Each accused played a different role, and conduct of each, including that of an accused who stated that his role was physically transporting the wounded victim by car and on foot to the execution site, meant they were each 'concerned in the killing'.[136] The Judge Advocate stated, in summing up, that:

> '[i]f the court finds that prior to the departure with the third airman from the kreisleitung that all three [Germans] knew the purpose was to kill this airman, then, as the Court is well aware, persons together taking part in a common enterprise which is unlawful, each in their own way assisting the common purpose of all, then they are all equally guilty in point of law'.[137]

57. *Jepsen et al.*:[138] In a British military court trial in August 1946, Jepsen and others were charged with ill-treatment and killing of prisoners held near Nuengamme Concentration Camp. Jepsen, a camp commando, oversaw a multi-day transport of prisoners in April 1945, during which time the prisoners were transported in poor conditions, left in the open in an air raid and injured, then starved, beaten, deprived of medical attention and finally shot.[139] Jepsen admitted to shooting six prisoners and to causing another to order the execution of the other prisoners, an act carried out by guards and in which he participated. At the close of evidence, the Prosecutor explained Jepsen's liability for the murders:

> [i]f Jepsen actively associated himself with and assisted the other guards in a wholesale slaughter, the act of every one of those persons became the act of all… […] If Jepsen was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way assisting in that act.[140]

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[136] *Holzer*, p.340.
[137] *Holzer*, p.341. *See also* p.347.
[138] *Trial of Gustav Alfred Jepsen et al.*, Proceedings of a War Crimes Trial held at Luneberg, Germany 13-23 August 1946, Judgement, 24 August 1946 *('Jepsen')* (original transcript in Public Record Office, Kew, Richmond; on file with KSC Library).
[139] It was estimated that 262 prisoners of an original 300-400 on the transport were buried at Duneburg and after the war ended, at least 240 bodies were exhumed from a mass grave. *Jepsen*, p.4-5.
[140] *Jepsen*, p.241 (handwritten on bottom of page). Jepsen was sentenced to life imprisonment.

58. *Schonfeld*:[141] In June 1946, a British military court in Essen tried numerous members of the German security police operating in The Netherlands in 1944. The members of the group made arrests to suppress the Dutch resistance. Four members of the group went to a private home where three Allied airmen were found and shot by one of the accused. After hearing the eyewitness evidence, the Judge Advocate stated that:

> [i]f several persons combine for an unlawful purpose or a lawful purpose to be effected by unlawful means, and one of them in carrying out that purpose kills a man, it is murder in all who are present […] provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly.[142]

59. *Ponzano*:[143] In August 1948, a British military tribunal convened in Germany to try multiple German soldiers for their part in executing British prisoners of war in 1943. The prosecutor emphasised that while the accused may not be the only responsible persons or the actual executioner, they remain responsible as persons 'concerned in the killing'.[144] In summing up, the Judge Advocate echoed the prosecutor[145] and explained participation as follows:

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[141] *Trial of Franz Schonfeld et al.,* British Military Court, Essen, June 11th-June 26th 1946, in *UNWCC* (Vol. XI) ('*Schonfeld*') p.68.
[142] *Schonfeld,* p.68. All four accused were convicted and sentenced to death.
[143] *Trial of Feurstein and others,* Proceedings of a War Crimes Trial held at Hamburg, Germany, 4-24 August 1948 ('*Ponzano*').
[144] *Ponzano*, p.9. At the conclusion of the evidence, the Prosecutor stated: '[t]hey are charged with being concerned in the killing, they are not charged with being solely responsible for it, or even, for that matter, with being the main person responsible for it. […] the fact that there are other people concerned does not acquit these five men in the dock.'
[145] The Prosecutor stated that: 'it is an opening principle of English law, and indeed of all law, that a man is responsible for his acts and is taken to intend the natural and normal consequences of his acts and if these men in the dock here set the machinery in motion by which the four men were shot, then they are guilty of the crime of killing these men. It does not- it never has been essential for any one of these men to have taken those soldiers out themselves and to have personally executed them or personally dispatched them. That is not at all necessary; all that is necessary to make them responsible is that they set the machinery in motion which ended in the volleys that killed the four men we are concerned with'. *Ponzano,* p.4.

> […] the requirement that an accused, before he can be found guilty, must have been concerned in the offence. […] that is to say, a person can be concerned in the commission of a criminal offence who, without being present at the place where the offence was committed, took such a part in the preparations for this offence as to further its object.[146]

60. *Ulrich and Merkle; Wuelfert et al.*:[147] In two separate cases, at the conclusion of proceedings, the Judge Advocate conducted a review of the trial and sentences of multiple accused who worked at factories linked to Dachau, utilising detainee labor.[148] The accused, factory personnel and SS members working in management, were convicted of war crimes on the basis of 'acting in pursuance of a common design to commit' cruelties and mistreatment against prisoners of war and civilians forced to work at the factories.[149] The court applied the provisions of the IMT Charter applicable to common defences[150] and assessed the participation of the accused, namely the substantiality, nature and extent of their participation, in light of previous findings that the operations at Dachau were criminal in nature.[151] In reviewing the sufficiency of the evidence against each accused, the Judge Advocate confirmed that an accused, who had not personally inflicted cruelties, was nonetheless guilty, because he

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[146] *Ponzano,* p.25.
[147] *United States v Hans Ulrich and Merkle*, Case No. 000-50-2-17, 7708 War Crimes 78 79 80 Group – European Command, Review and Recommendation, 12 June 1947 ('*Ulrich*'); *United States v Hans Wuelfert et al,* Case No. 000-50-2-72, 7708 War Crimes Group – European Command, Review and Recommendation, 19 September 1947 ('*Wuelfert et al.*').
[148] The accused in *Ulrich* and *Wuelfert et al.* were tried in Dachau, Germany and thereafter, the Judge Advocate undertook a review of both cases. The Judge Advocate confirmed the findings, the absence of any error or omission against the accused and recommended approval of the sentences. *Wuelfer et al.*, p.6, 8, 11-12; *Ulrich,* p.2, 10-11.
[149] *Wuelfert et al.*, p.1; *Ulrich,* p.2.
[150] *Ulrich,* p.10.
[151] In *Wuelfert et al.* and *Ulrich*, the court was required to take cognizance of findings in the main Dachau Concentration Camp case (*U.S. v. Weiss et al.,* 000-50-2, March 1946) that the mass atrocity operation was criminal in nature and that the participants therein, acting in pursuance of the common design, subjected persons to killings, beatings, torture, etc and that those who participated knew of the criminal nature thereof. *Wuelfert et al.,* p.11-12; *Ulrich,* p.10-11.

participated in the common design to inflict cruelties and mistreatment on labourers.[152]

(iii) Cases demonstrating the application of JCE III liability

61. As outlined above, the principles underlying JCE III can already be identified in Article 6 of the IMT Charter and Article II(2) of CCL10, which provided for a wide spectrum of liability for participation in a criminal plan. These principles were expressed and applied in the post-WWII jurisprudence.

62. *Borkum Island*:[153] Seven U.S. airmen who had crashed on Borkum Island, Germany, were killed on 4 August 1944. They were captured by German soldiers and then forced to march, under military guard, through the streets of Borkum. One of the German officers in charge of the operation had given an order to the escort not to intervene if civilians used violence against the captives. During their march, the seven airmen were beaten by a crowd of civilians and then shot by German soldiers.[154] Fifteen soldiers and civilians were indicted for the wilful killing (Count 1) and assault (Count 2).[155] Fourteen accused were convicted for the assault, with six of them also being convicted for the wilful killing.[156]

63. In analysing the findings of the case, the ICTY Appeals Chamber in *Tadić* observed that:

> [i]t may be inferred from this case that all the accused found guilty were held responsible for pursuing a criminal common design, the intent being to assault the prisoners of war. However, some of them were also found guilty of murder, even where there was no evidence that they had actually killed the prisoners. Presumably,

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[152] *Wuelfert et al.*, p.8 (concerning Accused Huber).
[153] *United States v. Kurt Goebell et al.*, Case No. 12-489, Review and Recommendations, 1 August 1947, ('*Borkum Island*'), www.legal-tools.org/doc/aeb036/pdf/
[154] *See Tadić* AJ, paras 210-213 and *Borkum Island*, p.2-8. *See also* Koessler, Borkum Island Tragedy and Trial, pp.183-185.
[155] *Borkum Island*, p.1.
[156] *Borkum Island*, p.2.

> this was on the basis that the accused, whether by virtue of their status, role or conduct, were in a position to have predicted that the assault would lead to the killing of the victims by some of those participating in the assault.[157]

64. Four different elements emerging from the trial record show the *Tadić* analysis is correct and that common criminal purpose liability was applied:[158] (i) the unambiguous statement of the law by the Judge Advocate, (ii) express reference in the Judge Advocate's review of the case to the fact that the accused were convicted for crimes based on the same legal principles enunciated in two other sources, which concern liability for crimes that were the foreseeable consequence of the intended crimes, (iii) the statements of the prosecutor reiterating the application of a common design theory of liability to crimes committed by mobs, and (iv) the facts underpinning Krolikovski's conviction.

The principles of law stated by the Judge Advocate reviewing the case

65. The trial records reveal that the Judge Advocate considered the responsibility of these accused through the application of the following principle:

> all those who join as participants in a plan to commit an unlawful act, the natural and probable consequence of the execution of which involve the contingency of taking human life, are legally responsible as principals for homicide committed by any of them in pursuance of or in furtherance of the plan.[159]

66. Considering the advisory role of the Judge Advocate in this case, this statement is relevant, authoritative and reliable in respect of the applicable principles, and is a clear expression of the customary status of JCE III.

The legal analysis of the Judge Advocate is linked to other legal texts applying this principle

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[157] *Tadić* AJ, para.213.
[158] *Contra* Thaçi Motion, para.63; Veseli Motion, paras 100, 111; Selimi Motion, paras 58-59; Krasniqi Motion, paras 29, 32; PTC Decision on JCE, para.80; SCC AJ, para.791.
[159] *Borkum Island*, pp.22, 24, 26, 43-44. *See also* Robert Charles Clarke, 'Return to Borkum Island: Extended Joint Criminal Enterprise Responsibility in the Wake of World War II', 9 *J. INT'L CRIM. JUST*. 839 (2011) ('Clarke, Return to Borkum Island') p.855.

67. In his review of *Borkum Island*, the Judge Advocate references by name the case of *United States v. Joseph Hartgen* (also known as the *Rüsselsheim* case) and notes that the theory of the case in *Borkum Island* is the same as that applied in *Rüsselsheim*, reviewed below.[160] In the U.S. War Crimes Manual, the *Rüsselsheim* case is cited for the following legal principle:

> 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 homicide committed by one of them while acting in pursuance of or in furtherance of the common design, *although not specifically contemplated by the parties*, or even forbidden by defendant, or although the actual perpetrator is not identified.[161]

The statements of the prosecutor in the case and the facts underpinning Krolikovski's conviction

68. While the foregoing statements of law make plain that *Borkum Island* concerns criminal responsibility for foreseeable crimes committed by those with the intent to commit crimes as part of a common criminal plan, such as in a mob, the prosecutor's opening statement shows that the doctrine of common criminal design, a pivotal element of all forms of joint criminal enterprise, was well-established in custom at the time:

> [I]t is important, as I see it, to determine the guilt of each of these accused in the light of the particular role that each one played. They did not all participate in exactly the same manner. Members of mobs seldom do. One will undertake one special or particular action and another will perform another particular action. It is the composite of the actions of all that results in the commission of the crime. Now, all legal authorities agree that where a common design of a mob exists and the mob has carried out its purpose, then no distinction can be drawn between the finger man and the trigger man *(sic).* No distinction is drawn between the one who, by his acts, caused the victims to be subjected to the pleasure of the mob or the one who incited the mob, or the ones who dealt the fatal blows. This rule of law and common sense must, of necessity, be so. Otherwise, many of the true instigators of crime would never be punished.[162]

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[160] *Borkum Island* case, pp.9-10.
[161] War Crimes Trial Manual, Section 410, 15 July 1946, p.305 (emphasis added).
[162] *Tadić* AJ, para.210 (emphasis added).

69. The actual application of this doctrine to the facts is confirmed by the words of the reviewing military officers in relation to the accused Krolikovski, who stated that his acts as they emerged from the evidence were 'compatible with the plan and in furtherance thereof'.[163] A review of the evidence underpinning Krolikovski's conviction shows that intent was not required by the judges to convict him for wilful killing. In particular, the detailed summary of the evidence drafted by the Judge Advocate in the post-conviction review and recommendations, shows that Krolikovski took no active part in the beating or shooting of the airmen, and had no knowledge that they would eventually be killed. Krolikovski only learned of the violence used against the airmen half-way through their march, and attempted to take measures, which were however not considered sufficient by the court.[164]

70. Any remaining doubt on the application of the common criminal purpose doctrine in this case is dispelled by the Report of the Judge Advocate for War Crimes of the European Command on war crimes trials conducted by the U.S. military forces between June 1944 and July 1948.[165] In the section of the report reviewing the legal principles applied in trials, the Judge Advocate discussed, under the heading 'Certain Questions of Responsibility', two particular cases of 'Participation in Mob Action'. The report noted that these cases concerned charges of 'acting jointly and in conjunction with others' in the killing of American airmen, who were attacked by a mob as they were paraded through a town.[166] The report states that in these cases the principle of 'joint responsibility for participation in mob action' applied, and that responsibility

[163] *Borkum Island* case, p.20.
[164] *Borkum Island*, p.18. *See also* Koessler, Borkum Island Tragedy and Trial, pp.188-189.
[165] European Command War Crimes Report, p.65-66.
[166] While the specific cases are not named in the report, the resemblance to *Borkum Island* is striking. Even if this is not one of the cases discussed in the report, the facts are so similar that the characterisation made for the two cases also applies to *Borkum Island*. European Command War Crimes Report, p.65-66.

for the killing was attached both to those who incited mob action and to those who did the actual beating and killing.[167]

71. In 1956, an international law scholar summarised, when commenting on this case, that it was:

> 'a universally recognized principle of criminal law, governing the determination of guilt of an accomplice, that one who knowingly and willingly participates in a criminal design or undertaking is equally with the direct perpetrator or perpetrators responsible for any act in pursuance of that design or undertaking, or which is a natural or probable consequence of it, but only if it was committed after he became a participant to the scheme'.[168]

72. *Rüsselsheim*:[169] German civilians were charged with the assault and killing of six U.S. airmen who were attacked by a mob and eventually shot dead by one of the defendants after having crash-landed their aircraft.[170] At trial, the prosecution argued that the accused participated in a common plan and were therefore responsible for any killing that was its natural and probable consequence, 'although not specifically contemplated by the parties or even forbidden by the defendant'.[171]

73. The ECCC refrained from relying upon this case for the purposes of JCE III out of a concern that despite the pleading and view of the prosecution, it was possible that the military commission had found the murder of the airmen to have become part of the mob's plan, rather than simply a foreseeable consequence.[172] However, that concern is squarely refuted in available records, which clearly resolve the matter in favour of the foreseeability standard having been applied.[173]

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[167] European Command War Crimes Report, p.65-66.
[168] Koessler, Borkum Island Tragedy and Trial, p.194.
[169] *United States v. Hartgen et al.*, Case No. 12-1497, United States Military Commission, Review and Recommendation, 29 September 1945 ('*Rüsselsheim*').
[170] *Rüsselsheim*, pp.2, 3, 6.
[171] Trial transcript of the *Rüsselsheim* case, as quoted in Clarke, Return to Borkum Island, pp. 839, 854.
[172] SCC AJ, para.800.
[173] *Contra* Selimi Motion, para.66, Krasniqi Motion, para.34.

74. As discussed above, Section 410 of the 1946 United States Manual for Trial of War Crimes, under the heading 'Liability of Multiple Participants in War Crimes', states 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 homicide committed by one of them while acting in pursuance of or in furtherance of the common design, *although not specifically contemplated by the parties*, or even forbidden by defendant, or although the actual perpetrator is not identified.[174]

75. In its foreword, the Manual states that it contains a compilation of directives covering important aspects of trials, together with citations of authorities derived from past decisions on questions arising therein. The authority cited in support of this specific principle is the *Hartgen et al.* case, also known as the *Rüsselsheim* case. As such, this reference resolves any ambiguity noted by the ECCC, as U.S. authorities would have certainly known the legal principles upon which its own military commission in Germany decided the case, and indeed specifically reflected that principle in the 1946 War Crimes Manual.

76. *Ikeda*:[175] In this case, tried in 1947 by the Dutch authorities before the Temporary Court Martial of Batavia, the judges convicted the accused Ikeda for crimes that were a predictable consequence of a criminal plan in which he had engaged. Colonel Ikeda was convicted for enslavement, enforced prostitution, and rape in relation to his use of female prisoners of war in brothels set up for Japanese soldiers. In convicting the accused, the judges first found that the plan Ikeda had devised and engaged in was criminal in nature:

> [t]he mere recruitment of volunteers from the internment camps, using in this process the poor and inhumane circumstances in respect of food and their position in the camps, which they [the accused] had effectively created and maintained, was

[174] War Crimes Trial Manual, Section 410, 15 July 1946, p.305 (emphasis added).
[175] *Queen v. Ikeda*, Case No. 72A/1947, Judgement, 8 September 1948 ('*Ikeda*'), p.8.

> contrary to morality and humanity and was therefore, in light of the circumstances, a violation of the laws and customs of war.[176]

77. The court then went on to specify the conduct through which Ikeda had furthered the criminal plan and the consequence of his engagement therein for his criminal responsibility:

> Therefore the accused […] 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 and how the brothels that had been established on the basis of that plan were operating, must be held liable for the criminal offences committed in the process.[177]

78. Crucially, the judges then found that the crimes committed by Ikeda's co-accused 'could and should have been anticipated and prevented by the accused.'[178]

79. In reviewing this case, the ECCC acknowledged that Ikeda could have been convicted for crimes not encompassed by the common purpose. However, it found two other explanations to be equally possible, namely that the crimes Ikeda was convicted for were implicit in the common purpose, or that he was convicted under superior responsibility, since the judges noted the accused's rank and failure to investigate.[179] The record does not support those conclusions. With regard to the first possibility, the judge's reasoning is in fact clear that Ikeda was convicted for crimes that he 'could and should have anticipated'.[180] This excludes a finding that Ikeda had intent for the crimes that resulted from the criminal plan he had initiated.

80. With respect superior responsibility, the ECCC failed to appreciate that Ikeda was found to have contributed to a criminal plan. Without the criminal plan, Ikeda's conduct could have amounted to superior liability; in the context of that plan Ikeda's

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[176] *Ikeda*, p.8.
[177] *Ikeda*, p.8.
[178] *Ikeda*, p.8.
[179] SCC AJ, para.794.
[180] *Ikeda*, p.8.

conduct amounts to a contribution by omission. Under JCE, a participant in a common criminal plan can contribute to it in a variety of forms, including by omission, for instance by failing to discipline the criminal acts of his or her subordinates, or by failing to protect a specific group of people.[181]

81. *Ishiyama and Yasusaka*:[182] The Australian military case of *Ishiyama and Yasusaka* concerns the killing of two Indian prisoners of war by two members of the Japanese military.[183]

82. In this case, the Judge Advocate explained that where the common purpose was to commit a felony, liability arose also in respect of felonies not encompassed by the common purpose but done in furtherance of that common purpose.[184] This is the same principle which was clearly enunciated in *Borkum Island* and *Rüsselsheim,* and then codified in the 1946 United States Manual for Trial of War Crimes. It is also the same principle which was applied by the Dutch Court Martial in *Ikeda.*

83. Importantly, the Judge Advocate in *Ishiyama* stated at the beginning of his submissions that he was advising the court 'upon the law'.[185] The trial records also reveal, in this regard, that CIL was directly applicable in the proceedings.[186] The statement of the Judge Advocate thus amounts to valuable, clear, and authoritative evidence of the state of CIL in 1946.

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[181] *See e.g. S&Z* AJ, paras 110-111.
[182] *Prosecutor v. Kumakichi Ishiyama et al.*, Australian Military Court, 8-9 April 1946, p.5 ('*Ishiyama*') (accessed at www.legal-tools.org/doc/c9884d/).
[183] *Ishiyama,* p.5.
[184] *Ishiyama,* pp.24-26.
[185] *Ishiyama,* p.24.
[186] The trial was based on the 1945 Australian War Crimes Act, which applied international law, *see e.g.* Article 17, entitled "Defence based on laws, customs and usages of war", which refers to international law, crimes against humanity, and the laws, customs, and usages of war, *see Ishiyama,* p.15.

84. *Essen Lynching*:[187] In the trial against *Heyer et al.*, also known as the *Essen Lynching* case, the accused were charged with the killing of three British prisoners of war. Heyer, a German army captain, had ordered private Koenen to escort three captured British airmen to the nearest base for interrogation. Heyer gave Koenen and another escort, who was not tried in Essen Lynching, orders not to intervene should civilians, who in the meantime had gathered in front of the barracks, molest the prisoners. Witnesses testified that Heyer audibly stated something to the effect that the prisoners 'ought to be shot or would be shot'.[188] As the prisoners were marched through the streets of Essen the crowd started hitting them, one shot was fired against them, and eventually the three airmen were thrown over the parapet of a bridge, with one dying in the fall and others finished by gunshots fired from the bridge and by further physical violence by the crowd.[189] Heyer, Koenen, and three civilians were convicted for the killings. Two civilians were acquitted.[190]

85. In *Essen Lynching*, the judges issued convictions for the killing of the airmen against individuals who had not manifested any intent in that regard. One of the convicted civilians, for instance, had only struck the victims as they were marched through town. This is hardly a circumstance from which intent to kill can be inferred. Yet, because of his participation in the collective mistreatment of the airmen, he was convicted for their death.[191] Koenen neither struck nor shot the prisoners, but failed to protect them from the crowd, something that, in spite of orders to the contrary, he was

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[187] *Trial of Erich Heyer et al.*, British Military Court for the Trial of War Criminals, Essen, 18-19 and 21-22 December 1945, in *UNWCC* (Vol. I) ('*Essen Lynching*'), p.88.
[188] *Essen Lynching*, p. 88.
[189] *Essen Lynching*, p.89.
[190] *Essen Lynching*, p.88, 90-91.
[191] *Essen Lynching*, p.88, 90-91. *See also* Prosecution's submissions, p.66, with regard to the accused Sembol.

duty bound to do. He, too, was convicted for their death.[192] The prosecution itself had submitted that a finding of intent in this case was not necessary for a conviction.[193]

86. While admittedly the case record is brief in terms of legal reasoning,[194] the factual narrative is sufficient to infer the relevant principles applied.[195] The principle emerges that a co-participant to a crime may be held responsible for additional crimes committed by other participants that he or she had not intended. It is apparent that this responsibility is attributed on account of the foreseeability or predictability of the fate that befell the three prisoners. The ECCC's PTC even acknowledged that an element of foreseeability emerged from the facts of the case but found that this case alone would not warrant a finding that JCE III was part of CIL.[196] This case does not stand alone. It must be considered together with the cases reviewed above, where the principle underlying JCE III was expressly stated and/or evidently applied.

87. *D'Ottavio and others*:[197] The Italian Court of Cassation heard the case of four villagers who had attempted to capture two Yugoslav prisoners of war. In the course of that attempt, one of them shot at one of the fugitives, wounding his arm. The wounded man died sometime later because of an untreated infection. All four were convicted of *omicidio preterintenzionale* (non-voluntary homicide or, literally, homicide beyond intention).[198]

88. In contrast to the cases examined above, *D'Ottavio* was tried by an Italian court. Its relevance, however, should not be disregarded. The case features international

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[192] *Essen Lynching*, p. 88, p.90.
[193] *Essen Lynching* case, p.65.
[194] *Essen Lynching*, p. 88, 91.
[195] *Tadić* AJ, paras 207-209. *Contra* Veseli Motion, paras 100, 111; Selimi Motion, paras 58-59; Krasniqi Motion, paras 29, 30-31; SCC AJ, para.791, *citing* PTC Decision on JCE, paras 79-81.
[196] PTC Decision on JCE, para.81.
[197] *D'Ottavio et al.*, Italian Court of Cassation, Criminal Section I, Judgement no. 270 of 12 March 1947, *Journal of International Criminal Justice* 5 (2007) ('*D'Ottavio),* pp.232-234.
[198] *D'Ottavio,* pp.232-234.

elements (the victims were foreign prisoners of war) and may thus qualify as state practice relevant to the identification of a rule of CIL, including with respect to modes of liability.[199]

89. The Court of Cassation explicitly reasoned that all the accused shared the intent to illegally detain the victim, 'while *foreseeing* a possible different crime, as it can be inferred from the use of weapons: it was to anticipate that one of them might have shot at the fugitives with a view of achieving a common purpose to capture them.'[200] The principle underlying JCE III is thus central to the convictions.[201]

90. The ECCC dismissed the precedential value of this case seemingly because the 'death of the victim happened for unforeseen circumstances, an infection not properly treated', and because the four were convicted of involuntary homicide, not for murder, 'an offence which only requires intention to cause bodily harm, with the death being attributed to the accused – according to the jurisprudence as it stood in the 1940s – through strict liability.'[202] However, the relevance of the case is clearly the conviction of the three co-accused, who did not fire the shot for the involuntary homicide perpetrated by the shooter, and were convicted because they shared the

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[199] *See* SCC AJ, para.805. In addition, Italy's extensive involvement in World War II and its occupation by Nazi-Fascist forces between 1943 and 1945 caused it to be extensively involved with the investigation and trial of a high number of war crimes, (*see e.g.* F. Focardi, Giustizia e ragion di Stato – La punizione dei criminali di Guerra Tedeschi in Italia, in Storicamente, December 2006, pp.492-497). This is a relevant circumstance because, when assessing the generality of state practice with respect to the formation of custom, the practice of states that are particularly faced with certain questions of law may be given particular consideration, *see* United Nations, Report of the International Law Commission, Sixty-Eighth Session (2 May-10 June and 4 July-12 August 2016), A/71/10, p.76 - Text of the draft conclusions on identification of CIL adopted by the Commission, Conclusion 8, p.85. *See also* ICJ, *Jurisdictional Immunities of the States (Germany v. Italy: Greece intervening),* Judgment, 3 February 2012, ICJ Reports 2012, p.123, para.55; ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands),* Judgment, 20 February 1969, *ICJ* Reports 1969, p.43, para.74.
[200] *D'Ottavio*, p.234 (emphasis added).
[201] *Contra* Selimi Motion, para.65; Krasniqi Motion, paras 36-37; SCC AJ, para.795.
[202] SCC AJ, para.795.

intent to illegally detain the prisoners and – as noted by the Court – the shooting of a prisoner was *foreseeable* to them.

91. Further, while in 1947 responsibility under Article 116 of the Italian Penal Code[203] could arise under strict liability without foreseeability being established, in this case the Court of Cassation made a specific finding of 'foreseeability'.[204]

92. *United States v. Tashiro et al.*('*Tashiro*'):[205] At the American Military Commission of Japan, Tashiro, Koshikawa and three other accused were charged with three crimes, one of which was their alleged participation in a criminal plan to release American prisoners from their cells in the event of a fire or air strike only after Japanese prisoners had been released and to have, in furtherance of this plan, caused the American prisoners' death by burning in their cells.[206] The court convicted Koshikawa on the basis of his participation in this plan, which the court considered 'grossly negligent' as it contributed to the death of the American prisoners of war.[207]

93. The findings of the case are clear with regard to Koshikawa's participation in a criminal plan that brought about the additional consequence of the prisoners' death.[208] The prisoners' death was unintended by Koshikawa, but he was nevertheless found responsible by virtue of his participation in the grossly negligent plan, *inter alia*, because there were elements to foresee the possible consequences.[209]

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[203] Article 116 of the Italian Penal Code states that '[w]henever 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.'
[204] *Contra* SCC AJ, para.795. Indeed, since 1965 foreseeability has become a requirement for this extended form of co-perpetration (Italian Constitutional Court, Judgment N. 42 of 1965, 31 May 1965).
[205] *United States of America v. Tashiro et al.*, Review of the Staff Judge Advocate, 7 January 1949 (*'Tashiro'*).
[206] *Tashiro,* pp.5-7, 71 (with reference to the accused Koshikawa), Specification 2.
[207] *Tashiro,* p.72.
[208] *Tashiro,* p.72.
[209] *Tashiro,* pp.71-72. *See also* Clarke, Return to Borkum Island, p.855 where the author concluded Koshikawa was convicted for a crime that he did not intend.

(c) WWII era laws and jurisprudence are widely recognised as CIL and should be so recognised by the KSC

94. The cases described above and applicable statutes including the IMT Charter and CCL10, are persuasive precedents which demonstrate the existence and application of international criminal law principles, including JCE liability, applied at the conclusion of World War II. This jurisprudence has been recognised as forming part of CIL.

(i) The principles from WWII era trials were explicitly recognised as CIL by the United Nations

95. The significance of the WWII era jurisprudence was further confirmed in October 1946, three weeks after the IMT Judgement, by the Secretary-General's statement to the UN General Assembly that the principles of the IMT Judgement should be made a 'permanent part' of international law as quickly as possible.[210] In November 1946, the U.S. presented a proposal to the General Assembly that the General Assembly should affirm the principles of international law recognised by the IMT Charter and the IMT Judgement.[211] In December 1946, the General Assembly, then numbering 55 member states, unanimously adopted a resolution affirming the legal principles in the IMT Charter and IMT Judgement and specified that those principles should be included in the future code of offenses against the peace and security of mankind, to be prepared by the International Law Commission ('ILC').[212] The ILC described the principle of individual criminal responsibility for crimes under

[210] Supplementary Report on the Work of the Organization presented to the General Assembly on 24 October 1946, (A/65/Add.1).
[211] Sixth Committee of the General Assembly, Draft resolution submitted by the United States of America (A/C.6/69, 15 November 1949).
[212] UN General Assembly Resolution 95 (I), Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal, 11 December 1946.

international law, as recognised at Nuremberg, as the 'cornerstone of international criminal law'.[213]

(ii) International courts have recognised that the WWII era jurisprudence, including principles on individual criminal responsibility, are CIL

96. Courts assessing the WWII era laws and related jurisprudence have found that the IMT Charter, CCL10 and related jurisprudence evidence CIL. In 1993, the Secretary-General specified the customary law applicable to the future international tribunal as:

> the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of Genocide of 9 December 1948; *and the Charter of the International Military Tribunal of 8 August 1945*.[214]

97. In *Tadić*, the ICTY Appeals Chamber recognised that the caselaw and international legislation from the post-WWII period is a source of CIL, which it reviewed before concluding that the principles of common design discussed therein are firmly established in CIL.[215] In 2010, in considering whether JCE formed part of CIL in the 1970s, the ECCC PTC found:

> the case law from the above-mentioned military tribunals offer an authoritative interpretation of their constitutive instruments and can be relied upon to determine the state of CIL with respect to the existence of JCE as a form of criminal responsibility [...].[216]

98. The ECCC PTC endorsed the *Kupreškić* Trial Chamber's assessment of these sources noting that it provided persuasive analysis on the value of the judicial

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[213] Yearbook of the International Law Commission 1996, Volume II, A/CN.4/SER.A/1996/Add.I (Part II), p.19.
[214] Report of the Secretary-General, para. 35 (emphasis added).
[215] *Tadić* AJ, para.194, 220.
[216] PTC Decision on JCE, para.60.

decisions of WWII era courts in determining existing law, including whether state practice and *opinio juris* support the existence of a given rule in custom.[217] The *Kupreškić* chamber found:

> judicial decisions may prove to be of invaluable importance for the determination of existing law. […] It cannot be gainsaid that great value ought to be attached to decisions of such international criminal courts as the international tribunals of Nuremberg or Tokyo, or to national courts operating by virtue, and on the strength of Control Council Law no. 10 […]. These courts operated under international instruments laying down provisions that were either declaratory of existing law or which had been gradually transformed into CIL.[218]

99. The ICTR Appeals Chamber reviewed the decisions of a U.S. military tribunal applying CCL10 before finding that CIL recognised JCE liability for genocide.[219] In considering the weight appropriate for international judicial decisions in determining the existence of custom, in particular from the post-WWII cases, it observed that following the recognition in *Tadić* of the modes of liability in WWII caselaw, the Appeals Chamber:

> has placed similar reliance in other cases on proceedings held following World War II, including in proceedings before the International Military Tribunal and before tribunals operating under Allied Control Council Law No. 10 […], as indicative of principles of CIL at that time.[220]

100. In light of the clear and consistent recognition of the CIL status of the WWII era statutes and caselaw, there is no reasonable doubt that these sources of law are CIL and are applicable at the KSC.

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[217] PTC Decision on JCE, para.60.
[218] ICTY, Trial Chamber, *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000 ('*Kupreškić et al*. TJ'), paras 540-541. This finding of the *Kupreškić* Trial Chamber was noted with approval by the ICTY Appeals Chamber in *Đorđević* AJ, para.43.
[219] *Rwamakuba* JCE Decision, paras 14-31.
[220] *Rwamakuba* JCE Decision, para.14, citing Hunt *Ojdanić* Separate Opinion, para.12 ('It is clear that, notwithstanding the domestic origin of the laws applied in many trials of persons charged with war crimes at that time, the law which was applied must now be regarded as having been accepted as part of CIL').

2. All relevant international courts considering the issue including the ICTY, ICTR, SCSL, STL and ECCC have found that JCE is a mode of liability in CIL

101. As discussed herein, consistent with the ICTY Appeals Chamber decision in *Tadić*, the status of JCE as a mode of liability in CIL has been affirmed by every modern international (or internationalised) court with comparable governing laws to those of the KSC.[221]

102. In cases after *Tadić*, multiple chambers adjudicating similar crimes as the ICTY analysed the status of JCE in CIL. The ICTR, SCSL and STL have each consistently concluded that JCE, in all of its forms, was a mode of liability in existence at the time of the crimes in question.[222] All three chambers of the ECCC and the Co-Investigative Judges have recognised the existence of JCE I and II in CIL.[223]

103. Moreover, JCE III specifically has been affirmed by the ICTY,[224] the ICTR,[225] the IRMCT,[226] the SCSL,[227] the STL,[228] and other international or internationalised tribunals.[229] Indeed, in addition to the extensive sources outlined above, these courts and tribunals have identified and relied upon numerous other cases and materials in

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[221] Due to the unique nature of the Rome Statute, the ICC's jurisprudence on modes of liability is not relevant. *See* below, paras 105-106.
[222] *Ntakirutimana* AJ, para. 468; *Karemera* Decision on Preliminary Motions, paras 25, 38; *Rwamakuba* JCE Decision, para.14; STL Decision on Applicable Law, para.236, fn.354; *Brima et al*. Decision on Judgment of Acquittal, paras 308-311.
[223] ECCC, OCIJ, 002/19-09-2007-ECCC-OCIJ 'Decision on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise', 8 December 2009, para.23; *Duch* TJ, paras. 511-512; ECCC TC JCE Decision, paras. 15, 22; PTC Decision on JCE, para.69; SCC AJ, para.807.
[224] *See e.g. Prosecutor v. Prlić et al.*, IT-04-74-A, Judgement – Volume II, 29 November 2017, para.590; *Kvočka et al.* AJ, paras 81-83, 86.
[225] *See e.g. Karemera and Ngirumpatse* AJ, paras 623, 627, 629.
[226] *See e.g.* IRMICT, Appeals Chamber, *Prosecutor v. Karadžić*, MICT-13-55-A, Judgement, 20 March 2019 ('*Karadžić* AJ'), para.433.
[227] *Brima et al*. Decision on Judgment of Acquittal, paras 308-326 and *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgment, 22 February 2008, para.84.
[228] STL Decision on Applicable Law, paras 239-247.
[229] *Habré* TJ, para.1885.

which further elements supportive of JCE III liability are to be found.[230] The Defence teams rely heavily – indeed, almost exclusively – on ECCC jurisprudence to argue against the customary status of JCE III.[231] The Pre-Trial Judge should dismiss these challenges because they are based on an incorrect and incomplete reading of the relevant records.

3. The modes of liability and related caselaw from the ICC are irrelevant to the applicability of JCE at the KSC

104. Contrary to VESELI's claims,[232] neither the provisions of the Rome Statute nor the decisions of ICC chambers are material to the jurisdiction of the KSC concerning applicable modes of liability. The ICC's jurisprudence has developed pursuant to the provisions of its highly detailed Statute and other governing documents. The Rome Statute's provision on individual criminal responsibility, Article 25(3), stands in marked contrast to Article 16(1)(a). That the provisions on war crimes and crimes against humanity in the Rome Statute and the Law are similar has no bearing on the modes of liability to be applied at either court.[233] As held by the ICTY Appeals Chamber, unlike the ICTY Statute, or the Law, the Rome Statute is the exemplar of a meticulously detailed code.[234]

105. Subsequent ICC case law developed after the *Tadić* decision, applying Article 25(3), does not affect the status of JCE in CIL. As stated by the ICTY Appeals Chamber in response to *Đorđević's* similar claim:

> the interpretation in the ICC jurisprudence regarding the objective or subjective elements of the mode of liability based on a "common purpose" derived from the ICC

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[230] *For example,* see JCE III sources cited in STL Decision on Applicable Law, fn.355.
[231] Selimi Motion, paras 56-68; Krasniqi Motion, paras 28-54; Thači JCE Motion, paras 67-71; Veseli Motion, paras 98-119.
[232] *Contra* Veseli Motion, paras 117-118.
[233] *Contra* Veseli Motion, paras 117-118.
[234] *Ojdanić* JCE Decision, para.18.

Statute does not undermine the Tribunal's analysis on the issue of the existence of the "notion of common purpose" in CIL.[235]

4. The Defence attacks on *Tadić* and other cases applying JCE reflect an incomplete understanding of JCE and are not persuasive

106. The Defence Motions attacking *Tadić* and ensuing ICTY cases contain repetitive and disproven claims and are not persuasive. Certain features of the *Tadić* analysis – including the analysis of Article 7 of the ICTY Statute, WWII era statutes and jurisprudence, and the *Tadić* chamber's delineation of the contours of JCE liability – have already been explained. Equally, many of the misperceptions and misunderstandings of *Tadić* reflected in the Defence Motions have already been refuted. Other challenges raised are addressed herein.

Tadić reflects CIL

107. As outlined above, the findings in *Tadić* were firmly grounded in CIL, and have been repeatedly upheld by multiple courts with no vested interest in doing so. The Defence's characterisation of *Tadić* as 'created' based on a 'fundamentally flawed' analysis of sources of law[236] is meritless; the reasoning of *Tadić* – and that of the multiple other courts who conducted an independent analysis of this question – withstand all such criticism. SELIMI's claim that JCE has been upheld on policy reasons is unsubstantiated, and his attempt to impugn the support underpinning *Tadić* by labelling it a judge-made creation has been roundly rejected.[237]

Sufficiency of state practice on joint criminal enterprise

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[235] *Đorđević* AJ, para.38.
[236] *E.g.* Selimi Motion, paras 17, 40.
[237] *See e.g. Krajišnik* AJ, para.655 (holding that 'because JCE does not go beyond the Statute and forms part of custom as explained below, JCE counsel's claim that the Judges "created" this form of liability fails). *Contra* Selimi Motion, paras 17, 40.

108. SELIMI and KRASNIQI argue that in its assessment of the customary status of JCE, *Tadić* relied upon too few cases.[238] The cases relied on in *Tadić* were more than sufficient to establish that joint criminal enterprise exists in CIL. However, in this brief, the SPO has set out additional cases which further demonstrate the correctness of *Tadić*'s findings. Indeed, no instance has been identified by the defence where responsibility for foreseeable crimes was considered contrary to the customary rules on attribution of responsibility which formed in the aftermath of World War II. This is an important consideration in evaluating the formation of a rule of custom.[239]

109. Moreover, in assessing the sufficiency of state practice with regard to JCE, it bears recalling that the amount of practice required for the formation of custom may vary depending on the nature of the rule in question.[240] The ILC considered that in areas of international law in which all states regularly engage, such as diplomatic relations, state practice must be widely exhibited, while for rules on matters in which fewer states engage, a lesser amount of practice would suffice.[241]

110. This principle is particularly relevant in the case of international modes of liability. For modes of liability, state practice is manifested through prosecutions and,

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[238] Selimi Motion, para.37; Krasniqi Motion, paras 24, 27.
[239] Although completely uniform state practice is not required for the formation of a rule of CIL (*see e.g.* Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p.98, para.186), the lack of contradictory or inconsistent state practice is an important factor in this process, *see e.g.* International Law Commission, Draft conclusions on identification of CIL, with commentaries, in *Yearbook of the International Law Commission,* 2018, vol. II, Part Two, p.136, para.3.
[240] Report of the International Law Commission, Sixty-eighth session (2 May-10 June and 4 July-12 August 2016), A/71/10, p.76 - Text of the draft conclusions on identification of CIL adopted by the Commission, Conclusion 3: 'In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinion juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.'). *See also ibid*., p.86.
[241] Report of the International Law Commission, sixty-eighth session (2 May-10 June and 4 July-12 August 2016), A/71/10, p.76 - Text of the draft conclusions on identification of CIL adopted by the Commission, Conclusion 8, p.94, para.3.

for a variety of reasons, such prosecutions are relatively scarce.[242] Under these circumstances, as the ECCC Supreme Court Chamber has recognised, a paucity of prosecutions could not be found to disprove the existence of state practice under international law.[243]

111. Similarly, the social and moral need for the observance of a certain rule, coupled with the *opinio juris* expressed by a number of states or international entities, may suffice to establish a customary rule of international humanitarian law even in the absence of widespread state practice.[244]

THAÇI's mischaracterises ICTY and IRMCT jurisprudence

112. The thorough and balanced assessment of case law in *Tadić* was complemented by a survey of domestic practice and its relevance, if any. After finding that the doctrine of acting in pursuance of a common purpose is rooted in the national law of many states, the ICTY Appeals Chamber conducted an assessment of state practice to

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[242] Lack of political will and other geopolitical factors are often insurmountable obstacles the prosecution of the most heinous international crimes. The Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea ('DPRK') published a report in 2014 finding that DPRK's institutions and officials were involved in the commission of systematic, widespread and gross human rights violations, some of which amounted to crimes against humanity, *see Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (Main Findings)*, 7 February 2014, A/HRC/25/63, p.15. In light of its findings, it recommended the United Nations' Security Council to refer the situation to the International Criminal Court, *see ibid*., para.95(a). An international group of independent experts on accountability, as well as other bodies, echoed these recommendations, *see Report of the group of independent experts on accountability*, 24 February 2017, A/HRC/34/66/Add.1, paras 51-61 and *Inquiry on crimes against humanity in North Korean Political Prisons*, War Crimes Committee - International Bar Association, December 2017. In spite of this, and of follow-up reports confirming the ongoing campaign of gross human rights violations in the DPRK, no serious prospect of prosecution exists at the moment or in the foreseeable future. To provide just one further example, the Human Rights Council's recommendations on the prosecution of crimes committed during the conflict in Sri Lanka met a similar fate, *see* Human Rights Council, Promoting reconciliation, accountability, and human rights in Sri Lanka, 9 April 2014, A/HRC/RES/25/1.

[243] ECCC, Supreme Court Chamber, *Co-Prosecutors v. Kaing Guek Eav* alias *'DUCH'*, Appeal Judgement, 3 February 2012 ('*Duch* AJ'), para.93.

[244] *See* A. Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, in 11 European Journal of International Law (2000), 187-216. *See also* R. Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, in International Review of the Red Cross, 30 April 1997, No. 317 www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm.

determine whether JCE had achieved the status of a general principle of law.[245] It concluded that it had not achieved the status of a general principle of law because the corresponding provisions of national laws reflect some divergence in practice. Nonetheless, *Tadić* concluded that the notion of common purpose upheld in international criminal law has an underpinning in many national systems.[246]

113. In his motion, THAÇI misstates the holdings of the ICTY and IRMCT Appeals Chamber in *Tadić* and *Karadžić*.[247] While THAÇI claims that the Appeals Chamber, in both instances, 'acknowledged the lack of uniform implementation of JCE III at the domestic and international levels', this claim contains multiple errors.[248] First, in the section of *Tadić* referred to by THAÇI, the Appeals Chamber is not discussing the application of JCE III at the international level as stated by THAÇI; instead it summarises its findings on national laws.[249] Second, the Appeals Chamber's conclusion in the same paragraph of *Tadić*, that JCE III is not a 'general principle of law recognised by all the nations of the world' is a conclusion reached following its survey in the preceding paragraph of national practice, not international practice.[250] In attempting to suggest that the Appeals Chamber has acknowledged a deficit in domestic implementation, THAÇI ignores the plain language of the first sentence of the very paragraph he cites, which clearly states that '[i]t should be emphasised that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems'.[251]

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[245] *Tadić* AJ, paras 224-225.
[246] *Tadić* AJ, para.225.
[247] Thaçi Motion, para.68 referring to *Tadić* AJ, para.225.
[248] Thaçi Motion, para.68.
[249] *Tadić* AJ, para.225. There is no mention of JCE III at the international level. *See also Tadić* AJ, para.224.
[250] *Tadić* AJ, para.225.
[251] *Tadić* AJ, para.225

114. Similar errors are made by THAÇI in his reference to the *Karadžić* Appeals Judgement. In *Karadžić*, the Appeals Chamber referred back to the same paragraph of *Tadić* in which the Appeals Chamber had considered whether domestic practice can be relied upon as a source of international principles recognised by the nations of the world.[252] Contrary to THAÇI's submissions, the *Karadžić* Appeals Chamber did not find that JCE III has not been uniformly implemented at the domestic and international levels.[253] It made no statement as to its implementation internationally. Rather, the Appeals Chamber referred back to, and confirmed, *Tadić*'s holding, namely that since there are different approaches in domestic systems, domestic legislation and caselaw cannot be found to be a source evincing JCE III's status as an international principle or rule, under the doctrine of the general principles of law recognised by the nations of the world.[254] THAÇI's misstatement of the Appeals Chamber's finding in *Karadžić* is all the more puzzling since the text contains a textual footnote reproducing the relevant paragraph of *Tadić* which is thus confirmed.[255]

115. In faulting the ICTY and ICTR for using the terms 'perpetration', 'commission' and at times, 'accomplice liability' and suggesting that this has resulted in a lapse in precision,[256] THAÇI overlooks that the ICTY Appeals Chamber has addressed this issue. In *Ojdanić*, the Appeals Chamber specified that while there may be different terms used, the term 'common purpose' liability is the same form of liability as JCE, clarifying that the Appeals Chamber has used the terms 'common purpose' and 'joint

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[252] Thaçi Motion, para.68 referring to *Karadžić* AJ, para.436.
[253] *Contra* Thaçi Motion, para.68.
[254] *Karadžić* AJ, para.436.
[255] *Karadžić* AJ, para.436, fn.1154.
[256] Thaçi Motion, paras 65-66. THAÇI fails to provide any cite or example showing how JCE failed to be designed or delineated in a given decision. It is recognised that in *Tadić*, the Appeals Chamber used multiple terms when describing JCE liability. *See* A. Cassese, Proper Limits of Individual Responsibility under the Doctrine of JCE, JICJ 5 (2007). At p. 115, Cassese noted that the use of the terms "co-perpetrators' and 'accomplice liability' in Tadić 'may have contributed to misgivings or misinterpretation. The fact remains, however, that the fundamentals of the doctrine are solid, and the use of slightly misleading language does not detract from the basic soundness of the concept.'

criminal enterprise' interchangeably and they refer to 'one and the same thing'.[257] Despite the unsupported suggestion that any of the terminological variations acknowledged and made plain by the Appeals Chamber should merit the wholesale rejection of JCE as part of CIL, there is no uncertainty as to the contours of JCE or its existence as a mode of commission liability in CIL.[258]

Tadić's reliance on the ICC Statute and the Convention for the Suppression of Terrorist Bombings

116. The Defence mischaracterises the reference in *Tadić* to the ICC Statute and the Convention for the Suppression of Terrorist Bombings. Contrary to the Defence suggestions,[259] the ICTY Appeals Chamber in *Tadić* acknowledged that these conventions had not yet entered into force[260] and did not rely on them as evidence of the customary status of JCE, including JCE III. Instead, as repeatedly noted by the ICTY Appeals Chamber, they were referenced, correctly, to demonstrate the consistent view of a large number of states on the existence of a notion of a 'common criminal purpose, as such'.[261] This argument fails to show that *Tadić* was wrongly decided.

Extra-judicial statements

117. The extra-judicial statements of judges, including those made in academic articles, are not capable of overturning the settled jurisprudence, spanning from WWII to the present day, showing that JCE liability is firmly rooted in CIL.[262] Furthermore,

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[257] *Ojdanić* JCE Decision, para.36 (*see also* paras 20, 30). *See also* SCSL, Trial Chamber I, *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Judgement, 2 August 2007, para.206.
[258] *Contra* Thaçi Motion, paras 65-66.
[259] Selimi Motion, para. 39. *See also* Krasniqi Motion, paras 39-42 for a similar argument made on JCE III).
[260] *Tadić* AJ, para.221.
[261] ICTY, Appeals Chamber, *Prosecutor v. Popović et al*., IT-05-88-A, Judgement, 30 January 2015 ('*Popović et al*. AJ'), para.1673; *Đorđević* AJ, paras 37-39.
[262] *S&Z* AJ, paras 598, 974, 975; *Popović et al*. AJ, paras 1437-1443, 1674; *Đorđević* AJ, paras 33, 38, 39, 50-53, 83; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001 ('*Celebici* AJ'), para.24.

it is well-established that the views and criticisms expressed by academic commentators are of a subsidiary nature and are not binding on any court.[263] THAÇI errs in exaggerating and misstating the content of these articles.[264] Academic articles cannot displace the extensive evidence of JCE liability in CIL.[265]

JCE is not guilt by association

118. THAÇI's argument that JCE III introduces a form of guilt by association[266] fails because it does not acknowledge a foundational requirement of JCE: that there must be participation by the accused, which may take the form of assistance in or contribution to, the execution of the common purpose.[267] The accused are charged not for membership in a joint criminal enterprise, but for the part each has played in carrying it out, which needs to be at least 'significant'.[268] As set out above, under JCE III, a JCE member is being held liable for the foreseeable consequences of a criminal purpose involving grave crimes, which they intentionally participated in and

[263] *Contra* Krasniqi Motion, para.25, Thaçi Motion, para.71. Article 38(1) of the Statute of the ICJ, which is regarded as CIL, enumerates, *inter alia*: 'the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rule of law'. *See Đorđević* AJ, para.33; *Kupreškić et al*. TJ, para.540; *Delalić* TJ, para.414; *Furundzija*, TJ, para.227; ICTY, Appeals Chamber, *Prosecutor v. Aleksovski*, IT-95-14/1-T 'Declaration of Judge Hunt', 24 March 2000, para.2, ICTY, Appeals Chamber, *Prosecutor v. Erdemović*, IT-96-22-A 'Joint Separate Opinion of Judge McDonald and Judge Vohrah' 7 October 1997, para.43. *See also* ICTY, Appeals Chamber, *Prosecutor v. Krstić*, IT-98-33-A Judgement, 19 April 2004, para.11, fn 20.
[264] Thaçi Motion, para.71. Cassese's publication cannot be said to disavow JCE, but rather pertains to the *application* of JCE III to certain crimes. In 2007, he professed to be making suggestions on how to 'qualify' or 'straighten out' JCE III, restricting criticism for one sub-tenet of JCE doctrine, JCE III and special intent crimes, which he 'respectfully criticized'. *See* A. Cassese, The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise, JICJ 5 (2007), p.109-133, p.133. In 2008, after the article's publication, Cassese filed an amicus brief outlining JCE and confirming all three forms. *See Amicus Curiae* Brief of Professor Antonio Cassese and Members of the Journal of International Justice on Joint Criminal Enterprise, Case No. 001/18-07-2007-ECCC/OCIJ(PTC 02), 27 October 2008.
[265] *Contra* Selimi Motion, para.43.
[266] Thaçi Motion, para.67.
[267] *Vasiljević* AJ, para.100; *Brđanin* AJ, para.424.
[268] *Brđanin* AJ, para.430.

significantly contributed to.[269] This is fair and just that they are held liable for those foreseeable consequences.

The Jogee decision does not affect the customary status of JCE in international law

119. The *Jogee* decision of the UK Supreme Court does not invalidate JCE liability at the KSC or any other jurisdiction applying international law. This was authoritatively determined by the ICTY, which, contrary to THAÇI's claims, considered the issue in full, not only through the lens of legal certainty.[270] While *Jogee* represented a change in the law in the England and Wales, this applies to England, Wales, and the jurisdictions bound by the jurisprudence of the Privy Council. It has not been followed by other common law jurisdictions.[271]

120. Further, in suggesting that *Jogee* bears on JCE liability, THAÇI, KRASNIQI and VESELI ignore that it is not directly on point.[272] While JCE, as articulated in *Tadić* and subsequent ICTY Appeals Chamber decisions, is a form of commission liability applicable to perpetrators, *Jogee* concerns English accomplice or accessorial liability. Other common law jurisdictions, in declining to follow *Jogee,* confirmed that it concerns domestic accomplice liability in England and Wales.[273] THAÇI also misconstrues the role of English domestic law in JCE jurisprudence, falsely claiming that it represents the 'only support' found by the ICTY Appeals Chamber in determining the *mens rea* standard for JCE III.[274] *Jogee* in fact confirms the analysis made in 1999 in *Tadić* – that there is a lack of a consistent domestic law approach to

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[269] *See* para.3 above.
[270] *Contra* Thaçi Motion, paras 69-70; *Karadžić* AJ, paras 422-437.
[271] *See e.g.* Court of Final Appeal of the Hong Kong Special Administrative Region, *HKSAR v. Chan Kam-shing* [2016] HKCFA 87 ('*Chan Kam-shing*'), paras. 32, 33, 40, 58, 60, 62, 71, 98; High Court of Australia, *Miller v. The Queen, Smith v. The Queen, Presley v. The Director of Public Prosecutions* [2016] HCA 30 ('*Miller*'), para.43.
[272] *Contra* Krasniqi Motion, para.47, Thaçi Motion, paras 69-70, Veseli Motion, para.119. *See also Karadžić* AJ, para.434.
[273] *Miller*, paras.3-50, 131-148; *Chan Kam-shing*, paras.58-105.
[274] *Contra* Thaçi Motion,para.70.

common purpose liability. This further reduces any value that *Jogee* could have on the application of international criminal law.

5. The Defence arguments about domestic law ignore both Articles 3 and 12 of the Law and the application of JCE in Kosovo courts

121. While devoting significant energy to irrelevant arguments that domestic notions of co-perpetration vary from the parameters of JCE liability and ignoring the plain meaning of Articles 3 and 12 of the Law,[275] SELIMI[276] fails to mention that JCE liability has been applied in Kosovo courts adjudicating the commission of war crimes committed during the same period as the crimes charged in the Indictment. As noted above, the Supreme Court of Kosovo has upheld JCE as a mode of liability, holding that JCE (i) is firmly established in CIL, (ii) exists in three forms, and (iii) has been illuminated in decisions of the ICTY.[277] Defendants tried in Kosovo courts are thus subject to prosecution for war crimes on the basis of JCE liability.

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[275] Article 3(2) of the Law states that the Specialist Chambers shall adjudicate and function in accordance with, *inter alia,* CIL. Article 12 specifies that the Specialist Chambers shall apply CIL and the substantive criminal law of Kosovo insofar as it is in compliance with CIL, both as applicable at the time the crimes were committed, in accordance with Article 7(2) of the European Convention on 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.

[276] Selimi Motion, paras 28-33.

[277] *See e.g. See e.g.* Kosovo, Supreme Court of Kosovo, *L.G. et al.,* Judgement, Case PLm. Kzz. 18/2016, 13 May 2016, paras 69-74 (concurring with first Supreme Court Decision in the same case, noted herein, and holding that JCE liability exists in three forms and may be applied, as done by lower courts, to the accused in cases of unlawful detention and mistreatment); Kosovo, Supreme Court, *L.G. et al.,* Judgement AP.-KZ. 89/2010, 26 January 2011, paras 114-115 (holding that JCE is firmly established in CIL and exists in three forms); Kosovo, Supreme Court, *E.K. et al.,* Judgement, 7 August 2014, Case No. PA II 3/2014, para.xlii (adopting the law on JCE set out by the lower court and holding that 'ICTY jurisprudence is a legitimate source of precedent for cases prosecuted within the Republic of Kosovo, and any other part of the Former Yugoslavia, and finds that it is entirely appropriate and justified to refer to jurisprudence of the ICTY in dealing with cases of War Crimes at the domestic level. In that respect the Court finds it appropriate to note that the responsibility of a person for war crimes and other internationally recognized crimes is based on individual criminal responsibility. However the individual criminal responsibility may take the form of both commission of a crime in person, and by participation in a group committing crimes. Joint criminal enterprise is one of the possible ways of perpetration.') referring to Kosovo, Court of Appeals, *E.K. et al.,* Judgement, 30 January 2014, Case No.

E. JCE LIABILITY WAS FORESEEABLE AND ACCESSIBLE TO THE ACCUSED

122. JCE liability was sufficiently foreseeable and accessible at the relevant time to warrant its application the Accused. As explained in this section, compliance with this principle must be assessed in the particular context of violations of international law.

123. The *nullum crimen* principle is a fundamental tenet of justice, which was already recognised in WWII-era decisions.[278] The *nullum crimen* principle prevents courts from convicting a person of a crime for conduct that was not criminal at the time it was committed.[279] In the *Hadžihasanović* case, the ICTY Appeals Chamber explained that application of this principle does not require that conduct be proscribed in a specific code provision in order for it to be criminal.[280] Rather, the conduct in question only need be 'criminal in the sense generally understood, without reference to any specific provision'.[281] The *Hadžihasanović* Appeals Chamber concurred with the *Hadžihasanović* Trial Chamber on this issue, which held in relevant part that:

> In interpreting the principle of *nullum crimen sin lege*, it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance.[282]

124. The emphasis on conduct, rather than a particular term or provision of a code punishing certain conduct, reflects the fact that terminology may vary both as between

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PAKR 271/13, paras 36-40 (holding that 'this form of criminal liability [JCE] is applicable in the Kosovo jurisdiction for the criminal offence of War Crimes Against the Civilian Population. As referred to by the ICTY it is a form of criminal liability established in international criminal law' which may also be inferred from domestic law).

[278] *See* IMT Judgment, p.219 (in describing *nullum crimen sin lege,* the IMT found it is first and foremost a principle of justice); *Hostages,* p.1241.

[279] *See e.g.* Rome Statute, Article 22(1): A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

[280] *Hadžihasanović et al*. Jurisdiction Appeal Decision, para.34 affirming *Hadžihasanović et al.* TC Decision, para.62.

[281] *Hadžihasanović et al*. Jurisdiction Appeal Decision, para.34.

[282] *Hadžihasanović et al.* TC Decision, para.62.

national jurisdictions and in instruments of international law. Flexibility in terminology must be permitted, as well as in the particular elements of an offense. As stated in *Hadžihasanović*, for this purpose, '[i]t is not necessary that the elements of an offence are defined, but rather that general description of the prohibited conduct be provided'.[283] A stricter construction of this requirement would risk wrongly constricting the applicability of the law. The *nullum crimen* principle, therefore, does not prevent a court from 'interpreting and clarifying the elements of a particular crime'.[284] No violation is incurred by the gradual clarification of the rules of criminal liability through judicial interpretation, which in turn allows the progressive development of the law by the court.[285]

125. Gradual clarification and judicial interpretation are particularly critical in the realm of international law due to its unique sources, development and characteristics. Requiring uniform, precise definitions of all elements to find that they constituted crimes or modes ignores the fact that international criminal law, by its nature, has developed progressively and that customary law, is, by definition, elastic and not static.[286] As stated at Nuremberg:

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[283] *Hadžihasanović et al.* TC Decision, para.58, citing ECtHR, *S.W. v. The United Kingdom* Judgment, Application No. 20166/92, 22 November 1995 ('*S.W. v. The United Kingdom*'), para.35 and ECtHR, *Kokkinakis v. Greece* (1993), Application No. 14307/88, 25 May 1993 (*Kokkinakis v. Greece*), para.52.
[284] ICTY, Appeals Chamber, *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000 ('*Aleksovski* AJ'), paras 126-127; *Celebici* AJ, para.173 ('the principle of *nullum crimen sin lege* does not prevent a court from interpreting and clarifying the elements of a particular crime').
[285] *See S.W. v. The United Kingdom*, para.35-36 (interpreting Article 7(1) of the European Convention on Human Rights which provides in part: "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 it was committed."); *Kokkinakis v. Greece,* paras 36, 40 (ECHR); EV v Turkey, Judgment, 7 February 2002, para.52. *See also* ECtHR, *C.R. v United Kingdom*, Judgment, Application No. 20190/92, 22 November 1995, para. 34; ECtHR, *Streletz, Kessler and Krenz v. Germany*, Judgment, Application No. 37201/97, 22 March 2001, para.29.
[286] *See e.g. Hostages*, p.1241; *Holzer et. al.*, p.336; *Justice,* Judgment, p. 966 (noting that 'international law is not the product of statute. Its content is not static. The absence from the world of any governmental body authorised to enact substantive rules of international law has not prevented the progressive development of that law. After the manner of the English common law it has grown to meet the exigencies of changing conditions'.).

> International law is not the product of statute for the simple reason that there is yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs...[287]

126. International courts grappling with this feature of the law, which is distinguishable from domestic jurisdictions, have held that due regard must be given to the specificity of international law. Writing from Nuremberg, a bench of an American military tribunal warned that 'sheer absurdity' would result from applying the *ex post facto* principle to a treaty, a custom, or a common law decision of an international tribunal as 'applying the ex post facto principle to judicial decisions of common international law would have been to strangle that law at birth'.[288] In the *Hostages* case, a panel applying CCL10 to defendants charged with war crimes and crimes against humanity observed that 'the codification of principles, while helpful, cannot interfere with resiliency', as '[t]o place the principles of international law in a formalistic strait-jacket would ultimately destroy any effectiveness that it has acquired'.[289] As such, it was recognised in cases applying CCL10 that there are varied sources of law which would put an accused on notice that his conduct could result in punishment. In *Einsatzgruppen*, the chamber found that:

> [l]aw does, in fact, come into being as the result of formal written enactment and thus we have codes, treaties, conventions, and the like, but it may also develop effectively through custom and usage and through the application of common law. The latter methods are no less binding than the former.[290]

127. Following the precedent of WWII era cases, the ICTR in *Karemera* held that 'given the specificity of international criminal law, the principle of legality does not apply to international criminal law to the same extent as it applies in certain national

[287] *Justice,* p.974-975.
[288] *Justice,* p.974-975.
[289] *Hostages*, p. 1235.
[290] *Einsatzgruppen*, p.458.

legal systems'.[291] Requiring that criminal liability based on the conduct of the accused be foreseeable and accessible ensures against violations of the *nullum crimen* principle. Before the ICTY, this requirement was articulated by the Appeals Chamber in *Ojdanić*, which emphasised that the specificity of international law must be taken into account when assessing the requirements of foreseeability and accessibility.[292] The ECCC has adopted the formulation of the ICTY Appeals Chamber, which has succinctly explained as follows:

> [a]s to foreseeability, the conduct in question is the concrete conduct of the accused; he must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision. As to accessibility, in the case of an international tribunal such as this, accessibility does not exclude reliance being placed on a law which is based on custom...'[293]

128. Accessibility requires that the law dictating liability for conduct be available to a person who acted in such a way.[294] Various sources of law may be considered in assessing accessibility. The existence of a law in custom does not render it inaccessible to an accused – as stated by the ECCC, 'reliance may be placed on a law which is based in custom'.[295] Rules of CIL may provide sufficient guidance as to the standard the violation of which could entail criminal liability.[296] This is the case in instances in which there is no international criminal code and the assessment is thus less straightforward.[297] Customary law may be represented in unwritten law and practice and may still be sufficient to determine whether the principle of legality has been abridged.[298]

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[291] *Karemera* Decision on Preliminary Motions, para.43. *See also Delalić* TJ, para.405.
[292] *Ojdanić* JCE Decision, paras 37-43. This is acknowledged by Selimi Motion, para.69.
[293] *Duch* TJ, para.31. PTC Decision on JCE, para. 45 citing *Ojdanić* JCE Decision, paras 37-39.
[294] *See Ojdanić* JCE Decision, para.21.
[295] PTC Decision on JCE, para.45 citing *Ojdanić* JCE Decision, paras 37-39. *See also Hadžihasanović et al*. Jurisdiction Appeal Decision, para.34.
[296] *Ojdanić* JCE Decision, para.41, citing X Ltd and Y v United Kingdom, D and R 28 (1982), Appl 8710/79, p. 77, 78-81.
[297] *Ojdanić* JCE Decision, para.41.
[298] *Ojdanić* JCE Decision, para.41; *Duch* TJ , ECCC, paras 290, 26 July 2010.

129. The vast body of law described above made JCE liability foreseeable to the Accused, namely the principles found in various post-WWII statutes and cases, and also as codified in the 1946 U.S. War Crimes Trial Manual, which included specific references to the principles underlying JCE III, including its applications in post-WWII international jurisprudence.[299] The Accused were further on notice that their conduct could result in prosecution from the domestic laws applicable in 1998. Before the ICTY, it has been recognised that relevant domestic law from the time of the commission of crimes can help establish that the accused could reasonably have known that 'the offence in question or the offence committed in the way charged in the indictment was prohibited and punishable'.[300] The ECCC has also confirmed that forms of responsibility recognised in domestic law may be relevant when determining whether it was foreseeable to an accused that their conduct may attract criminal responsibility.[301]

130. Contrary to the claims of KRASNIQI[302] and SELIMI[303], the criminal code of the Socialist Federal Republic of Yugoslavia ('SFRY'), namely Article 26, specifically contemplates criminal liability for an accused in a situation in which there are multiple persons in a group, for crimes committed based on a criminal plan or design, regardless of whether the accused directly perpetrated the crime, irrespective of the manner of participation, and irrespective of their *mens rea*. Article 26 states:

> Anybody 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 and shall be

[299] *See* paras.44-93 above.
[300] *Ojdanić* JCE Decision, para.40.
[301] PTC Decision on JCE, para.45.
[302] Krasniqi Motion, para.53.
[303] Selimi Motion, paras 29-33.

> 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 these acts.[304]

131. As noted by the ICTY Appeals Chamber, Article 26 is 'strikingly similar' to JCE.[305] Regardless of whether the text exactly aligns with JCE liability, the striking similarity between Article 26 and JCE liability means that potential liability for the crimes, as committed, was both foreseeable and accessible to the Accused. This conclusion applies equally to crimes committed by the accused directly, or by others. It extends to intended crimes and to foreseeable crimes resulting from the common design, regardless of the physical perpetrator. KRASNIQI is incorrect in claiming that the only way that JCE liability could be foreseen in Kosovo is with the post-World War II precedents and the *Tadić* Appeals Judgement in hand.[306] Moreover, it cannot be accepted that a person living in Kosovo, part of the former Yugoslavia, in 1998-1999 could be unable to foresee that committing war crimes and crimes against humanity could result in prosecution for international crimes including through the use of modes accepted in CIL.[307]

132. Another provision of the 1976 SFRY Code further evidences the foreseeability of possible prosecution under JCE, in all its forms. The general part of the 1976 SFRY Code set a *mens rea* standard that included both cases where an accused intended the commission of a crime and where a crime was merely a possible outcome of the accused's conduct. Article 11 states that criminal responsibility arises in the presence

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[304] In 1992, the name of the Criminal Code of the Socialist Federal Republic of Yugoslavia was changed to 'Criminal Code of the Federal Republic of Yugoslavia' (Official Gazette of the FRY No 35/92).
[305] *Ojdanić* JCE Decision, para.40.
[306] *Contra* Krasniqi Motion, para. 50. The IMT Charter, decisions arising from it, CCL10 cases and background materials explaining the prosecution of war criminals, were disseminated and published in the official UN War Crimes Commission Reports beginning in 1947.
[307] The ECCC PTC considered and rejected the argument made by IENG Thirith that because the international jurisprudence relied on in Tadić essentially refers to crimes committed in WWII and is based on military case law from North American and European Courts it cannot be applied in Asia, including before the ECCC and the 'Cambodian context.' *See* PTC Decision on JCE, para.73.

of 'premeditation' or 'negligence'. Article 13 defines 'premeditation', which appears to be used by the Code as a synonym for intent, as follows:

> [a] criminal act is premeditated if the offender is conscious of his deed and wants its commission; or when he is conscious that a prohibited consequence might result from his act or omission and consents to its occurring.[308]

133. Kosovo citizens could thus be held criminally liable for crimes that they did not intend, but which were merely a possible or foreseeable outcome of their conduct. Literally interpreted, this is a lower standard than the 'awareness of the substantial likelihood that a crime would be committed' standard applicable, in addition to direct intent, to the international modes of liability of ordering, planning, and instigating.[309]

134. Finally, SELIMI and KRASNIQI have failed to acknowledge that there are additional compelling facets to the analysis of foreseeability and accessibility which must be undertaken by the KSC, namely an assessment of other factors, recognised by international courts, which show that prosecution pursuant to JCE liability does not violate the *nullum crimen* principle. The gravity of the crimes at issue may refute any defence claim alleging lack of awareness of the criminality of the acts for which they stand accused.[310] The ICTY and ECCC have recognised that the atrocious nature of the crimes charged is relevant to, though not determinative of, the customary status of a crime and would have provided the necessary notice to meet the requirements of foreseeability and accessibility.[311] In particular, in *Ojdanić*, concerning acts in Kosovo

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[308] Article 13 SFRY Criminal Code, emphasis added.
[309] *See* ICTY, Appeals Chamber, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A Judgement, 17 December 2004, paras 30-32; ICTY, Appeals Chamber, *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, para.42.
[310] *Ojdanić* JCE Decision, para.42.
[311] The ICTY Appeals Chamber held that: '[d]ue to the lack of any written norms or standards, war crimes courts have often relied upon the atrocious nature of the crimes charged to conclude that the perpetrator of such an act must have known that he was committing a crime. In the *Tadić* Judgment, for instance, the Appeals Chamber noted the "moral gravity" of secondary participants in a joint criminal enterprise to commit serious violations of humanitarian law to justify the criminalisation of their actions. Although the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation under CIL, it may in fact play a role in that respect, insofar as it may refute any claim

in 1999, the ICTY Appeals Chamber, in dismissing a defence claim that the Accused could not have foreseen criminal liability before 1999, found that the egregious nature of the crimes charged, among other factors, would have put *anyone* on notice of potential criminal responsibility on the basis of JCE.[312] The ECCC found the same, in respect of crimes committed in 1975-1979.[313] The KSC should similarly find that the gravity of the crimes affects the foreseeability of criminal sanction to the Accused, operating – like the *Ojdanić* accused before the ICTY – in Kosovo in the late 1990s.

III. CONCLUSION

135. While the Defence Motions oppose the application of JCE liability, they fail to raise any reasonable doubt that JCE has a strong foundation in CIL, is provided for by the Law, and was foreseeable and accessible to the Accused. The Law clearly foreshadows the application of JCE in that it replicates, in pertinent part, the statutes of other courts. Any demand that this court apply the modes of liability employed at the ICC ignores that the ICC is a unique, treaty-based organ with a distinct and comprehensive legal framework requiring the application of its own statute.

136. The Law, interpreted in accordance with its context, object and purpose, will function to ensure secure, independent, impartial, fair and efficient criminal proceedings as required by Article 1. This court, applying CIL, may proceed to trial utilising JCE liability if it is satisfied that the other jurisdictional requirements are met.

137. The arguments made against its application, such as the wording of the Law or the existence of academic criticism, are not persuasive. The Accused are not subject to prosecution because they belonged to the KLA. Any claim of 'guilt by association'

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by the Defence that it did not know of the criminal nature of the acts. *Ojdanić* JCE Decision, para.42 (footnotes omitted). *See also Duch* AJ, para.96.

[312] *Ojdanić* JCE Decision, para.43 (emphasis added).

[313] *Duch* AJ, para.96.

ignores that the Indictment charges the Accused for their part in carrying out the JCE. Any claim that JCE is somehow unfair to the Accused ignores that, as stated in the *Einsatzgruppen* case in 1948, it is neither a 'harsh [n]or novel principle' that those who are involved in a common enterprise and contribute to the commission of a crime may be found responsible for that crime though they did not themselves pull the trigger or bury the corpse.[314]

IV. RELIEF REQUESTED

138. For the foregoing reasons, the Defence Motions should be rejected.

Word count: 23870

Jack Smith

Specialist Prosecutor

Friday, 23 April 2021

At The Hague, the Netherlands.

[314] *Einsatzgruppen*, p.372.