In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**President of the Kosovo Specialist Chambers**
	Judge Ekaterina Trendafilova
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Rexhep Selimi
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Selimi Defence Appeal against the "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers"

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I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law[1] and Rule 97(3) of the Rules[2], the Defence for Mr. Rexhep Selimi hereby files this Appeal[3] against the Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, issued by the Pre-Trial Judge on 22 July 2021 and notified on 23 July 2021,[4] which rejected the Selimi Defence Challenge to Jurisdiction – Joint Criminal Enterprise.[5]

2. The Impugned Decision is based on erroneous findings of law, failed to take into account relevant factors in making those findings and made findings so unreasonable as to constitute an abuse of his discretion. Accordingly, the Defence respectfully submits that the Pre-Trial Judge arrived at a flawed decision that prejudices the Accused and must be reversed by the Appeals Panel.

II. STANDARD OF APPELLATE REVIEW

3. It is established in KSC jurisprudence that the Court of Appeals Panel will apply *mutatis mutandis* to appeals the standard of review provided for appeals against judgments under Article 46(1) of the Law,[6] which specifies, in relevant part, the following grounds of appeal:

   (i) An error on a question of law invalidating the judgment;

   (ii) An error of fact which has occasioned a miscarriage of justice; or

   (iii) […]

4. In relation to errors of law, the Law states that:

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[1] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.
[2] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.
[3] The Rule 170(1) time limit for the filing of this Appeal was varied by the Appeals Panel pursuant to Rule 9(5)(a) in KSC-BC-2020-06/IA009, F00005, Decision on Requests for Variation of Time Limits, 28 July 2021, public.
[4] KSC-BC-2020-06, F00198, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021, public ("Impugned Decision").
[5] KSC-BC-2020-06, F00198, Selimi Defence Challenge to Jurisdiction – Joint Criminal Enterprise, 10 February 2021, public ("JCE Motion").
[6] KSC-BC-2020-07, F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("Gucati Appeal Decision"), paras 4-13; KSC-BC-2020-07, F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021 ("Haradinaj Appeal Decision"), paras 11-13.

> "When the Court of Appeals Panel determines that a Trial Panel has made an error of law in a judgement arising from the application of an incorrect legal standard, the Court of Appeals Chamber shall articulate the correct legal standard and apply that standard to the evidence contained in the trial record to determine whether to sustain, enter or overturn a finding of guilty on appeal. Alternatively, if the Trial Panel is available and could more efficiently address the matter, the Court of Appeals Panel may return the case to the Trial Panel to review its findings and the evidence based on the correct legal standard."[7]

5. In relation to errors of fact the Law states that:

> In reviewing the factual findings of the Trial Panel, the Court of Appeals Panel shall only substitute its own findings for that of the Trial Panel where the evidence relied on by the Trial Panel could not have been accepted by any reasonable trier of fact or where the evaluation of the evidence is wholly erroneous.[8]

6. In challenging a discretionary decision, the appellant must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion. The Court of Appeals Panel will also consider whether the lower level panel has given weight or sufficient weight to relevant considerations in reaching its decision.[9]

7. All of the grounds of appeal identified below fall into one or more of the aforementioned categories.

III. GROUNDS OF APPEAL

8. The Defence raises the following issues on appeal:

(i) The Pre-Trial Judge erred in finding that Article 12 of the Law does not violate the principle of non-retroactivity in relation to JCE;

(ii) The Pre-Trial Judge erred finding that JCE could be implied from Article 16(1)(a) of the Law;

[7] Article 46(4) of the Law.
[8] Article 46(5) of the Law.
[9] *Gucati* Appeal Decision, para. 14; *Haradinaj* Appeal Decision, para. 14.

(iii) The Pre-Trial Judge erred in finding JCE III to be established as a form of commission in customary international law.

IV. SUBMISSIONS

A. The Pre-Trial Judge erred in finding that Article 12 of the Law does not violate the principle of non-retroactivity

9. The Impugned Decision contains significant errors of law and also fails to address certain Selimi Defence arguments concerning the direct applicability of customary international law within the context of the KSC as a domestic Kosovo Court, and specifically to the application of JCE as customary international law before the KSC.[10]

1. The Pre-Trial Judge erred in finding that customary international law may be directly applied before the KSC

10. The Pre-Trial Judge held that

> "the plain language of Article 12 of the Law sets customary international law as the source of reference, specifying that the substantive criminal law of Kosovo shall apply only insofar as it is in compliance with customary international law" [and that] "the centrality of customary international law is confirmed by other references to this source of law, notably in Articles 3(2)(d), 3(2)(3), 13 and 14 of the Law, as opposed to the subsidiary role of domestic law (see Articles 3(4) and 12 of the Law)".[11]

11. Although the Law appears on its face to have authorised the KSC to directly apply customary international law over Kosovo domestic law, the Pre-Trial Judge failed to take into account the Defence submissions concerning an unresolved conflict of terms between Article 3(2)(d) the Law and Article 19(2) of the Constitution of Kosovo

[10] KSC-BC-2020-06, F00301, Selimi Defence Reply to SPO Response to Defence Challenge to Jurisdiction – Joint Criminal Enterprise, 14 May 2021, public ("JCE Reply")

[11] Impugned Decision, para. 91. See also; Impugned Decision, para. 99 "As discussed above, the applicable law chosen by the Kosovar legislator for the SC comprises, first, customary international law and, second, domestic Kosovo law only insofar as it is expressly incorporated in the Law, as stipulated by Article 3(2)(c) and (4) of the Law. The domestic law referred to in the Law may apply directly to crimes under Article 15 of the Law and may apply to international crimes under Article 13 and 14 of the Law only insofar as it is in compliance with customary international law, as stipulated by Article 12 of the Law. […] [t]hus, for the purposes of the proceedings before the SC, *customary international law is and remains the primary source of law in accordance with the Constitution and the Law*." [Emphasis added]

("Constitution"), from which "the superiority [of customary international law] over domestic laws" is ostensibly based.[12] Therefore, the Constitutional authority from which the Law purportedly derives the superiority of customary international law over Kosovo's domestic law is not established. Accordingly, the Pre-Trial Judge erred in law.

12. As stated in the JCE Motion, the KSC is unambiguously a domestic Kosovo Court, created "within the Kosovo justice system", and consistent with the territorial jurisdiction of Kosovo, its jurisdiction is limited to crimes within its subject matter jurisdiction which were either commenced or committed in Kosovo and over persons of Kosovo/FRY citizenship or over persons who committed crimes within its subject matter jurisdiction against persons of Kosovo/FRY citizenship wherever those crimes were committed.[13] This principle is reflected in the Law[14] and by the Constitutional Court of Kosovo, which considered the proposal to establish the KSC as meaning "a court with a specifically defined scope of jurisdiction, and which remains within the existing framework of the judicial system of the Republic of Kosovo and operates in compliance with its principles".[15]

13. The Impugned Decision notes that, in the view of the Pre-Trial Judge, "the exercise of categorising a court of law as domestic, international, hybrid, or otherwise, is not dispositive of the law it shall apply when adjudicating cases".[16] However, while it may be the case that such a categorisation is not *dispositive* of the law such a court must apply when adjudicating cases; it is nevertheless relevant, particularly within the context of the various legislative provisions and legal opinions which reiterate the placement of the KSC within the Kosovo justice system and the requirement that it operate in compliance with that system.

14. Further to this point, Article 103(7) of the Constitution specifically prohibits the establishment of courts operating outside of this legal order; "Specialized courts may be established by law when necessary but no extraordinary court may ever be created.", a

[12] JCE Motion, paras 6 – 16.
[13] *Id.*, para. 6.
[14] See Articles 1(2), 3(1) and 8 of the Law.
[15] Kosovo, Constitutional Court, *Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo* on 9 March 2015 by Letter No. 05-433/DO-318 ("Constitutional Court Judgment"), KO 26/15, Judgment, 15 April 2015, public, para. 43.
[16] Impugned Decision, para. 98.

prohibition highlighted and emphasised by the Constitutional Court when contemplating the establishment of the KSC in the context of the then proposed amendment to the Constitution.[17]

15. It is incorrect and inappropriate to state simply that the character of these institutions is not dispositive of the law to be applied therein as a means to imply that, in effect, those institutions and their respective legal frameworks can be regarded as somewhat interchangeable, with their categorisation taking only a minor role in the determination of those frameworks.

16. In light of this, and as set out in the JCE Motion, the domestic nature of the KSC directly contrasts with other hybrid tribunals created by agreement with the UN and, of particular relevance to the present ground, contrasts with the ICTY and ICTR; both of which were purely international tribunals created by UN Security Council Resolution.[18]

17. Taking the ICTY and the ICTR as examples, the statutes of both tribunals granted jurisdiction to those courts to prosecute persons responsible for serious violations of international humanitarian law "in accordance with the provisions of [those] Statute[s]".[19] These provisions are reflective of the fact that those tribunals, as UN courts, were not bound to adhere, or even refer to domestic legal sources outside of those provided for in their respective Statutes. More specifically, they had jurisdiction solely with regard to crimes recognised as such under customary international law,[20] therefore the question of whether those courts could directly apply customary international law was easily resolved.[21]

18. In the case of the KSC, a court placed squarely within the legal order of Kosovo, this question of direct applicability is not answered as simply as the Impugned Decision implies. Although the text of Article 3(2)(d) the Law, as interpreted by the Pre-Trial Judge, appears to authorise direct application of customary international law by

[17] Constitutional Court Judgment, paras. 43, 44.
[18] JCE Motion, para. 7.
[19] Updated Statue of the International Criminal Tribunal for the Former Yugoslavia, September 2009, Article 1, Statute of the International Criminal Tribunal for Rwanda, January 2010, Article 1.
[20] *Prosecutor v Milutinovic et al,* No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise (21 May 2003) at para. 9; *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration (22 March 2006) at para. 15
[21] ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 94.

reference to Article 19(2) of the Constitution, that Constitutional provision differs in language from the Law to a degree that this purported authority has not been sufficiently established.

19. The text of Article 3(2)(d) of the Law states that "customary international law [is] given superiority over domestic laws by Article 19(2) of the Constitution". However, Constitutional Article 19(2) provides merely that "ratified international agreements and *legally binding norms* of international law have superiority over the laws of the Republic of Kosovo" [emphasis added]. As highlighted in the JCE Motion,[22] yet unaddressed by the Impugned Decision, the Law takes a step beyond the actual text of the Constitution and inappropriately presumes that "legally binding norms" must refer to customary international law.

20. The inherent ambiguity in the phrase "legally binding norms" contained in Article 19(2) requires far more for the Pre-Trial Judge to interpret as a clear reference to customary international law. This is particularly so in the present case where such a question carries with it profound implications for the fundamental rights of the accused, as well as the proper exercise of justice. It is antithetical to those rights to grant customary international law an unfettered superiority over national law where such dissonance between legal texts exists and where an unreasoned presumption of meaning is required in order to reconcile the two.

21. As noted in the JCE Motion, where customary international law is invoked in a national court, the court should consider if, and under what circumstances, the national legal system applies that law. It follows that with an absence of specific directives in its constitution, legislation or national jurisprudence, a national court is under no obligation to apply customary international law,[23] an example of this exact principle having being

[22] JCE Motion, paras 11 – 15.

[23] JCE Motion, citing ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 303 (Oxford University Press 2003) "Normally national courts do not undertake proceedings for international crimes only on the basis of international customary law, that is, if a crime is only provided for in that body of law. They instead tend to require either a national statute defining the crime and granting national court's jurisdiction over it, or, if a treaty has been ratified on the matter by the State, the passing of *implementing legislation* enabling courts to fully apply the relevant treaty provisions."; See also *Nulyarimma v. Thompson* [1999] FCA 1192, paras 22, 26 (Federal Court of Australia) (opinion of Wilcox J.), "[I]t is not enough to say that, under international law, an international crime is punishable in a domestic tribunal even in the absence of a domestic law declaring that conduct to be punishable. If genocide is to be regarded as punishable in Australia, on the basis that it is an international crime, it must be shown that Australian law permits that result." (Emphasis added); id., at para. 26 "[D]omestic courts face a policy issue in deciding whether to recognise and enforce a rule of international law. If there is a policy

applied in a case decided upon by the Dutch Supreme Court.[24] While it is not the position of the Defence that this jurisprudence, or legal opinion, is binding on the KSC, the legal principle contained therein is nevertheless of such relevance to the question of direct applicability of customary international law in national jurisdictions that it must be addressed by the Appeals Panel where the Pre-Trial Judge has failed to do so.

22. In presuming the direct applicability of customary international law from Article 3(2)(d), without reconciling its conflict with the ambiguous Constitutional Article upon it derives this purported superiority, the Pre-Trial Judge has erred in law. Furthermore, without specific directives in the Constitution, legislation or national jurisprudence, customary international law cannot be presumed to have the superiority which is ascribed to it by the Law. The Defence respectfully submits that the Law, as it relates to the direct application of customary international law is *ultra vires* the Constitution and a direct application of customary international law in the manner contemplated by the Impugned Decision effectively allows for the functioning of the KSC as an extraordinary court, contrary to the prohibition contained in Article 103(7) of the Constitution.

23. Accordingly, the Defence respectfully requests that the Appeals Panel reverse the Pre-Trial Judge's findings as they relate to the superiority, and therefore direct applicability, of customary international law at the KSC.

2. The Pre-Trial Judge erred in not giving weight to relevant jurisprudence of the Kosovo Supreme Court

24. Taking the view that the superiority of customary international law has lawfully been established, the Pre-Trial Judge states that the SFRY Constitution and the SFRY Criminal Code do not limit the jurisdiction of the KSC.[25] Further, the Pre-Trial Judge

issue, I have no doubt it should be resolved in a criminal case by declining, in the absence of legislation, to enforce the international norm."; Gabriele Olivi, *The Role of National Courts in Prosecuting International Crimes: New Perspectives*, 18 SRI LANKA J. INT'L L. 83, 87 (2006) quoting *Reportiers sans Frontières v. Mille Collines*, Paris Court of Appeals, Judgment, 6 November 1995, at 48-51 "in the absence of domestic law international custom cannot have effect of extending the extraterritorial jurisdiction of the French courts."; *U.S. v. Yousef*, 327 F.3d 56, 91 (2nd Cir. 2003) "United States law is not subordinate to customary international law or necessarily subordinate to treaty-based international law and, in fact, may conflict with both."

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

[25] Impugned Decision, para. 99.

reasoned that the KSC "are not bound to follow judicial precedents from *other jurisdictions* [and that] it is wholly conceivable that *different jurisdictions*, including jurisdictions originating from the same predecessor entity prosecute persons […] pursuant to different laws".[26] The Pre-Trial Judge, in making this pronouncement, failed to consider and address the submissions of the Defence regarding relevant jurisprudence of the Kosovo Supreme Court.

25. As set out in the JCE reply; in 1999, UNMIK Regulation 1999/24 on the Law Applicable to Kosovo (as amended by 2000/59) ("UNMIK Regulation") must be the starting point in identifying the relevant legal framework applicable to the alleged acts and central to the question of whether customary international law may be applied directly in Kosovo courts.[27] Article 1.1(b) of the UNMIK Regulation provides that the relevant law in force in Kosovo on 22 March 1989 is the law applicable, which at that time was the 1974 SFRY Constitution.[28] In this regard, the Defence noted that Article 1.4 of the Regulation ensures that a comparison between the criminal law in force on 22 March 1989 and those enacted afterwards enable the application of laws most favourable to the accused.[29]

26. Contrasting Articles 210 and 181 of the 1974 SFRY Constitution against Article 16 of the 1992 Constitution (as amended in 2008) reveals a conflict between provisions as they relate to the application of customary international law to the domestic legal order.[30] Namely, under the legal regime in force in 1999, by virtue of Article 1.4 of the UNMIK Regulation, Kosovo courts would be obliged to apply the most favourable laws to the accused, which in turn would logically exclude JCE as a mode of liability in customary international law being directly applied in the present case.

27. This very point was considered and approved by the Kosovo Supreme Court in 2005, which held that the District Court of Prishtina had erred in applying the 1992 Constitution over that enacted in 1974, thereby finding that the relevant Articles of the 1974 SFRY Constitution made customary international law inapplicable to events

[26] *Id.*, para. 100 [Emphasis added].
[27] JCE Reply, para. 11.
[28] *Id.*, para. 12. The Defence also noted that although the applicability of a Constitution adopted after 22 March 1989 is not precluded, it is conditional upon such a Constitution being non-discriminatory in nature as per Article 1.2 of the Regulation.
[29] *Id.*, para. 14.
[30] *Id.*, paras 15 – 18.

alleged to have occurred in 1998 and 1999.[31] Specifically, the Supreme Court stated that the trial verdict erred "by referring to 'customary international law' or 'generally accepted rules of international law'. Those concepts do not fall within the parameters of Articles 181 and 210 of the 1974 Constitution of the [SFRY] and, thus were erroneously relied upon in the trial verdict".[32]

28. The Pre-Trial Judge's pronouncement that he is not bound to follow judicial precedents from other jurisdictions is not applicable in light of the above jurisprudence, particularly bearing in mind the various reiterations that the KSC is a court which remains within the existing framework of the judicial system of the Republic of Kosovo and operates in compliance with its principles.[33] In this context, and coupled with the conflict between the Constitution and the Law submitted above, jurisprudence of the Kosovo Supreme Court which specifically rejects the applicability of customary international law to the temporal period of the indictment must be regarded as having legal effect, particularly when performing an analysis of the Law in context of the principle of legality.

29. In this perspective, Mr. Selimi, as a citizen of Kosovo, is entitled to legal certainty in the judicial system of Kosovo. Directly applying JCE through customary international law, in direct conflict with extant jurisprudence of the Kosovo Supreme Court, creates a contradiction which destabilises the legal order in which both institutions co-exist.

30. Accordingly, in disregarding relevant jurisprudence of the Kosovo Supreme Court, the Pre-Trial Judge abused his discretion and the Defence respectfully requests that the Appeals Panel reverse the Impugned Decision as it relates to the limits placed on the jurisdiction of the KSC by the SFRY Constitution and Criminal Code.

3. <u>The Pre-Trial Judge erred in finding that the direct application of customary international law does not violate the principle of non-retroactivity</u>

31. In making his findings regarding the interpretation of Article 12 from the perspective of non-retroactivity, the Pre-Trial Judge focuses on the wording of Article 7(1) ECHR (and

[31] *Id.*, paras 18, 19. See Kosovo, Supreme Court Case AP-KZ No. 139/2004 *Latif Gashi and others*, Decision of the Supreme Court, panel of UNMIK ("*Gashi")*, pgs. 5-8.
[32] *Gashi*, pg. 8.
[33] See above, 12.

by implication, Article 15(1) ICCPR) as the basis to reject challenges to Article 12 under the principle of non-retroactivity, stating that:

> "the legal construction of Article 7 ECHR, therefore, implies that if an act or omission constitutes pursuant to Article 7(1) ECHR, *an offence under "international law"*, constitutes, which encompasses both treaty law and customary international law, it is not necessary to make an assessment under Article 7(2) of the Convention.[34]

In disregarding the conflict between the Constitution and the Law, the relevant jurisprudence of the Kosovo Supreme Court and the fact that JCE is a mode of liability and not an "offence under international law", the Pre-Trial Judge has erred in finding that Article 12 does not violate the principle of non-retroactivity.

32. At the outset of the discussion regarding Article 12 in the Impugned Decision, it is rightly noted that the Law is *lex specialis* with regard to the mandate and functioning of the KSC and that its reliance on customary international law must be in accordance the principle on non-retroactivity enshrined in Article 33 of the Constitution, Article 7 ECHR and Article 15 ICCPR.[35] However, in the analysis that follows, the Pre-Trial Judge fails to correctly apply those constitutional safeguards in a manner which satisfies and protects the principle of non-retroactivity.

33. Article 7 ECHR and Article 15 ICCPR are identical in providing that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed". In the guide on Article 7, it is noted that the provision "should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment".[36]

34. As noted above, the direct applicability of customary international law by the KSC is predicated on a Constitutional provision which is ambiguous in its wording to such a degree, that without specific directives in the Kosovo constitution, legislation or national jurisprudence, customary international law cannot be presumed to have the superiority which is ascribed to it by the Law. This is an imperative consideration where the effect

[34] Impugned Decision, para. 93 [emphasis added].
[35] *Id.*, para. 90.
[36] Guide on Article 7 of the European Convention on Human Rights, updated 30 April 2021, pg. 5, para. 1.

of presuming such a superiority without adequate legal authority inevitably leads to the violation of human rights principles enshrined in the Constitution and national law.

35. That Article 7(1) mentions "international law" as a permissible criminalising source does not in and of itself establish the legitimacy of relying on customary international law as a means to avoid the violation of the principle on non-retroactivity. This is particularly relevant where jurisprudence emanating from the Kosovo Supreme Court has already decided that customary international law has no legal effect with regard to crimes alleged to have occurred during the material time of the indictment.

36. This in turn calls into question the Pre-Trial Judge's central finding regarding the "authority of the Kosovar legislator to lawfully adopt domestic legislation explicitly providing for international crimes already existing under customary international law at the material time".[37]

37. First, the authority of the Kosovar legislator to adopt domestic legislation for this exact situation has already been fettered by the jurisprudence of the Supreme Court by ruling that customary international law did not exist as a concept compatible with the constitutional law applicable at the time of the alleged crimes and in that regard, the adoption of such legislation was *ultra vires* from the outset.

38. Second, whether "the legislator can allow – or even mandate – prosecution for conduct that took place before the penalisation was introduced in domestic written law" depends on there being no judicial precedent which specifically states that conduct could not be criminalised in the domestic jurisdiction by the application of such legal regimes. It is inappropriate and prejudicial for the Pre-Trial judge to dismiss challenges to the legality of the Law by describing the actions of the legislator as a "simpl[e] transpos[ition]" from which no issue of retroactivity emerges. Imposing criminal sanctions relating to a legal order which the Kosovo Supreme Court has found to not be applicable is in and of itself the essence of a violation of non-retroactivity, regardless of how it is framed.

39. The Defence respectfully requests that the Appeals Panel reverse the findings of the Pre-Trial Judge, find that Article 12 of the Law is in violation of the principle of retroactivity

[37] Impugned Decision, para. 101.

and that JCE as a mode of liability in customary international law cannot be directly applied in the present case.

B. The Pre-Trial Judge erred in finding that JCE could be implied from Article 16(1)(a) of the Law

40. The Pre-Trial Judge, in finding that Article 16(1)(a) of the Law must be interpreted to include JCE as a form of commission, points to three factors supporting his decision, prior to addressing the substantive issue of "commission" under customary international law. These are that:

(i) "By virtue of Articles 3(2)(c) - (d), (4) and 12 of the Law, the SC applies customary international law as its principal source and Kosovo substantive criminal law, where the latter is specifically incorporated into the Law and insofar as it is in compliance with customary international law";

(ii) "Articles 13 – 14 of the Law specifically refer to customary international law as the applicable law for crimes against humanity and war crimes during the SC temporal jurisdiction"; and

(iii) "The terminology employed in Article 16(1)(a) of the Law is virtually identical to provisions regulating modes of liability in the statutes of the ICTY and ICTR, both of which applied modes of liability from customary international law".[38]

These factors are either legally incorrect or irrelevant.

41. First, as addressed above, the direct applicability of customary international law at the KSC is founded on a Constitutional provision which does not explicitly establish the superiority of customary international law over Kosovo domestic law. The conflict between the language of the Constitution and the relevant Articles of the Law must not be reconciled by judicial interpretation in such a manner which violates the fundamental rights of the Accused. This, coupled with the jurisprudence of the Kosovo Supreme Court outlined above rejecting the applicability of customary international law to the relevant period and crimes, renders this factor legally incorrect.

[38] *Id.*, para. 177.

42. Second, the Pre-Trial Judge's reference to "Articles 13 – 14 of the Law [referring] to customary international law as the applicable law for crimes against humanity and war crimes during the SC temporal jurisdiction" is irrelevant to determining whether JCE falls within either Article 16(1)(a) or customary international law in general. Neither crimes against humanity nor war crimes are modes of liability and whether the applicable law governing these two categories of crimes is customary international law or not has no bearing on how individual liability for those crimes is determined.

43. Third, the Pre-Trial Judge relies on the fact that "the terminology employed in Article 16(1)(a) of the Law is virtually identical to provisions regulating modes of liability in the statutes of the ICTY and ICTR, both of which applied modes of liability from customary international law" to support, by implication, his view that Article 16(1)(a) must be interpreted to contemplate JCE as a mode of liability at the KSC. The flawed reasoning employed by the Pre-Trial Judge regarding this point in particular must be rejected by the Appeals Panel.

44. As noted in the JCE Motion,[39] the lack of explicit reference to JCE as a mode of liability in Article 16(1)(a) is significant, particularly in light of the time which had passed between the drafting of the statutes of both the ICTR and ICTY compared with the Law, the vast number of challenges to the inclusion of JCE as a form of commission, divergent academic opinion on the issue and later rejection of JCE's place in customary international law by an author of the *Tadić* Appeals Judgment.[40] It is absurd to envisage that the drafters of the Law, faced with the opportunity to clarify the legal basis of individual criminal responsibility at the foundation of the KSC, would favour yet more prosecutorial and judicial interpretation of an ambiguous provision over a comprehensible and uncontroversial description of JCE.

45. The flaws of this reasoning are apparent when the judicial extrapolation of JCE from Article 16(1)(a) is contrasted with the unambiguous description of superior responsibility in Article 16(1)(c). As noted by the Pre-Trial Judge, JCE has three distinct

[39] JCE Motion, paras 22 – 27.
[40] Göran Sluiter, *Guilt by Association: Joint Criminal Enterprise on Trial*, 5 J. INT'L CRIM. JUST. 67 (2007); Martinez, Jennifer (Jenny) S. and Danner, Allison Marston, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law* (March 2004); Mohamed Shahabuddeen, *Judicial Creativity and Joint Criminal Enterprise, in Judicial Creativity at the International Criminal Tribunals* 188 (Shane Darcy & Joseph Powderly, eds., Oxford University Press, 2010).

forms.[41] There are three *actus reus* elements common to all three of these forms[42] and each form has differing *mens rea* elements.[43] Merely referring to these three distinct forms and their constituent elements, without providing any explanation as to their content, requires extensive reference to the international jurisprudence from which the concept originated.

46. Conversely, the objective and subjective elements of superior responsibility are set out unambiguously within its own provision in the Law, despite the fact that in comparison to JCE, it is of far lesser complexity. Set against the single word contained in Article 16(1)(a) from which JCE is inferred, the contrast in statutory clarity is stark. That this same deficiency in clarity existed in both the ICTY and ICTR statutes merely highlights the weakness in the statutory basis from which JCE is purportedly derived.

47. Stated plainly, JCE is perhaps the most conceptually dense mode of liability in international criminal law, yet is the only one which does not appear in either the statutes of the ICTY, ICTR and now the KSC. Its absence must properly be regarded as evidence of both its genesis as a judicial and prosecutorial invention,[44] and of the drafters' intention to exclude it from the Law.

48. Accordingly, the above, coupled with the Supreme Court's rejection of the application of customary international law to the domestic legal order must logically defeat the Pre-Trial Judge's decision to interpret "commission" in accordance with customary international law.

49. The Defence respectfully requests that the Appeals Panel reverse the findings of the Pre-Trial Judge and find that there is no statutory basis on which to apply JCE as a mode of liability.

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[41] KSC-BC-2020-06, F00026/CONF/RED, Pre-Trial Judge, Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 26 October 2020, confidential ("Confirmation Decision"), para. 105. See *Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, 25 February 2004, ("Vasiljević Appeal Judgement"), paras 97, 99; *Prosecutor v. Kvočka et al*., IT-98-30/1-A, Judgement, 28 February 2005 ("Kvočka Appeal Judgement"), para. 82;

[42] Confirmation Decision, paras 106, 110; *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, 3 April 2007 ("Brđanin Appeal Judgement"), para. 430.

[43] *Tadić* Appeal Judgement, para. 228. See also *Vasiljević* Appeal Judgement, para. 101; *Kvočka* Appeal Judgement, paras 83, 243.

[44] Antonio Cassese, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 J. Int. Just. 103, 104 (2007).

C. The Pre-Trial Judge erred in finding JCE III to be established as a form of commission in customary international law

50. Irrespective of the applicability of customary international law and the status of JCE in its basic form as a mode of liability, the Impugned Decision both misconstrues the submissions of the Defence regarding JCE III and fails to establish its customary nature. Even if it is accepted that customary international law may be directly applied at the KSC and therefore that JCE has customary status and, which the Defence does not accept as explained above, JCE in its extended form (JCE III) is purely a creation of modern international criminal law, which does not have either the state practice or *opinio juris* on which to base its customary status.

1. The Pre-Trial Judge failed to address and misconstrues the submissions of the Defence

51. The Pre-Trial Judge states that "the customary nature of JCE has been thoroughly reviewed and repeatedly confirmed by all contemporary tribunals applying JCE, except for the ECCC in relation to JCE III". The Impugned Decision refers to Article 3(3) of the Law, which allows the decision-maker to be "assisted" by various sources of international law in determining the customary international law at the time the alleged crimes were committed, implying a level of discretion in accepting that assistance. The Pre-Trial Judge states that he will address the questions of the Defence "only to the extent of ascertaining whether […] persuasive reasons warranting different legal findings on the matter at hand [have been presented].[45] However, the Pre-Trial Judge fails to carry out any meaningful analysis of the arguments presented by the Defence as they relate to JCE III and the findings of the ECCC in particular.

52. In dismissing the challenges of the Defence, the Pre-Trial Judge reasoned that they were not persuasive because

(i) "State practice is not always entirely consistent, nor are [their] indications of *opinio juris* always unequivocal. There can and often are reasonable disputes as to the existence of a rule of customary international law or its content [resulting from]

[45] Impugned Decision, para. 181.

inter alia, terminological differences, or the frequency and nature of the relevant practice";

(ii) "[That] what is important […] is to reveal the common threads of practice that show that such a rule was applied with a sense of legal right"; and that

(iii) Only one international tribunal has interpreted State practice and *opinio juris* in the same way.[46]

53. The reasons given by the Pre-Trial Judge fail to address the substance on which the Defence challenges to JCE III are based. The Defence submissions were not based on merely highlighting that one international tribunal reached a different conclusion on the same jurisprudence as other tribunals. Instead, the submissions were concerned with the fact that the only tribunal to have carried out an analysis of the state practice and *opinio juris* upon which the *Tadić* Appeals Chamber based its judgment could not find support for JCE III as a mode of liability in customary international law. In essence, the existence of a differing opinion by the ECCC is not the point raised by the Defence, but rather the analysis and reasoning employed by that tribunal in reaching that decision, which the Pre-Trial Judge conspicuously failed to replicate and refute. Accordingly, the Pre-Trial Judge both failed to take into account relevant factors and erred in law in reaching his decision.

54. Additionally, it is relevant to note that when the discussion reached the ECCC Trial Chamber, it took the opportunity to review the cases added by the STL Appeals Chamber in alleged support of the customary status of JCE III and in doing so, found them as lacking in legal reasoning as those originally cited by the *Tadić* Appeals Chamber. In this light, the three ECCC decisions are not only a comprehensive deconstruction of the customary basis of the theory as set out by *Tadić*, but also a contemporaneous critical commentary on attempts to bolster JCE III in international criminal law *post facto*.[47]

55. The deficiency in the Pre-Trial Judge's analysis and failure to take necessary account of this criticism is plain from the fact that the bases upon which the ECCC dismissed each case used by *Tadić* to support JCE III (which includes those relied upon by the SPO)

[46] Impugned Decision, para. 186
[47] See below, para. 70 – 72.

are listed in the Impugned Decision, yet a judicial discussion as to of the validity of those reasons is avoided in favour of dismissing them as mere differences of opinion.[48] The divergent stance taken by the ECCC in relation to JCE III cannot be so blithely dismissed as a quirk of judicial interpretation, or simply a divergent view over terminological differences.

56. The decisions of the ECCC Pre-Trial Chamber, Trial Chamber and finally the Supreme Court were founded on a rigorous and detailed analysis of the jurisprudence which the *Tadić* Appeals Chamber relied on to create JCE III in contemporary international criminal law. The flaws found by the ECCC Chambers in that jurisprudence, as well as in the additional jurisprudence presented by the OTP to support its submissions, revealed an extensive and incurable rot in the jurisprudential foundation of the JCE III structure.

57. Further, the Pre-Trial Judge's emphasis that there is only one international tribunal which has not recognised JCE III as part of customary international law is clear evidence of his eagerness to adopt a "quantity over quality" approach to addressing the challenges, rather than performing his own analysis of the reasons why that divergent opinion exists. It is not the fact that a sole tribunal did not follow suit in relation to JCE III that is at issue, it is the fact that when the basis of the theory was subjected to full critical analysis, it could not support the weight of JCE III.

58. The fact that other international tribunals adopted the JCE III theory following *Tadić* is dispositive of nothing except that they chose to build upon the same rotten foundation without proper examination of its soundness. If the Pre-Trial Judge wished to hold up the adoption of JCE III at those other tribunals as a valid reason for rejecting the findings of the ECCC (and the challenges posed by the Defence), it was incumbent upon him to either identify precedent from those tribunals which contradicted the ECCC in relation to each, or even some of the cases analysed, or to perform his own analysis of those cases and identify the errors in the ECCC's decision. The choice to reduce the matter to a mere calculation of those for or against JCE III speaks to the Pre-Trial Judge's reluctance in engaging with the substance of the Defence's challenge. An error remains an error regardless of how many courts repeat it.

[48] Impugned Decision, para. 186

2. JCE III does not have customary status

59. In light of the submissions above, the Impugned Decision lacks any valid reason for its dismissal of the challenges submitted by the Defence in relation to JCE III. The Pre-Trial Judge neglected to perform even a rudimentary review of the ECCC findings in relation to the relevant case law that might constitute a sufficiently reasoned decision. It is respectfully submitted that the ECCC's thorough analysis, and rejection, of the cases relied upon by the Appeals Chamber in *Tadić* to support JCE III (and in turn, the SPO) must be reviewed and adopted by the Appeals Panel.

60. The core of the Defence submissions relating to JCE III are founded on concerns regarding the vast departure it takes from JCE I and II in its *mens rea* requirement. Specifically, that what sets JCE III apart from the other two forms of liability is that it relies on foreseeability of risk rather than intent makes it even more distant than one which relies on the physical and intentional commission of a crime. Responsibility for crimes other than one agreed upon in the common plan by individuals not alleged to be members of the JCE and the imposition of the standard of *dolus eventualis* relating to the actions is without the necessary legal support for a customary rule and one which should never have been adopted by the Appeals Chamber in *Tadić*.

61. The essence of this concern is directly supported by jurisprudence of all three chambers of the ECCC, with the Pre-Trial Chamber holding that:

> "Having reviewed the authorities relied upon by Tadic in relation to the extended form of JCE (JCE III), the Pre-Trial Chamber is of the view that they do not provide sufficient evidence of consistent state practice or *opinio juris* at the time relevant to Case 002. The Pre-Trial Chamber concludes that JCE III was not recognized as a form of responsibility applicable to violations of international humanitarian law..."[49]

62. The ECCC Pre-Trial Chamber found that the Nuremburg Charter and Control Council Law No. 10 do not specifically offer support for JCE III.[50] The Impugned Decision dismisses this point only with reference to "seminal documents leading to [their adoption]" and describes the documents themselves as not "purport[ing] to embody an exhaustive codification of customary international law", merely reflecting "pre-existing

[49] ECCC, *Case of Ieng Sary,* Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, para. 49 ("ECCC PTC JCE Decision").
[50] PTC JCE Decision, para. 78.

law".[51] To support his findings, the Pre-Trial Judge refers to two examples of "seminal documents" in support of his decision, neither of which support JCE III.[52] Furthermore, the Pre-Trial Judge's observation that both instruments (merely) provide for "criminal liability for participation in a common plan or enterprise" in effect confirms that JCE III is not supported by either document.[53]

63. Regarding the *Borkum Island*[54] and *Essen Lynching*[55] cases, the ECCC Pre-Trial Chamber found that irrespective of whether the facts may be relevant to JCE III, the absence of a reasoned judgment ensures that "one cannot be certain of the basis of liability actually retained by the military courts".[56]

64. In *Borkum Island*, the ECCC Pre-Trial Chamber notes that the *Tadić* Appeals Chamber took into account the fact that "the Prosecutor substantially propounded a doctrine of common purpose which presupposes that all the participants in the common purpose shared the same criminal intent, namely, to commit murder".[57] However, with no reasoned verdict on which to base its conclusion, *Tadić* assumed that "the court upheld the common design doctrine, but in a different form, for it found some defendants guilty of both the killing and assault charges, while others were only found guilty of assault".[58] *Tadić* further inferred that an extended form of JCE had been established by virtue of some accused being found guilty of murder even though no evidence was produced that they had actually killed the prisoners "*presumably*, […] on the basis that the accused,

[51] Impugned Decision, para. 183.
[52] *Id.*, para. 183, citing at fn. 384: International Conference on Military Trials: London, 1945, *American Memorandum Presented at San Francisco*, 30 April 1945, providing that "German leaders and their associates" should be charged with "joint participation in a broad criminal enterprise" and "[t]here should be invoked the rule of liability, common to most penal systems and included in the general doctrine of the laws of war, that those who participate in the formulation and execution of a criminal plan involving multiple crimes are jointly liable for each of the offenses committed and jointly responsible for the acts of each other" (Part III.B). The same memorandum also referred to the "great Nazi criminal enterprise, of which the crimes and atrocities which have shocked the world were an integral part or at least the natural and probable consequence" (Part V). See also the Yalta Memorandum, which was a precursor to the San Francisco Memorandum and which includes similar language in Part V. International Conference on Military Trials: London, 1945, Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, 22 January 1945.
[53] *Id.*, para. 183, see fn. 385.
[54] *United States v. Haesiker*, Case No. 12-489-1, 16 October 1947, Review Judgement (based on the same facts as *United States of America v. Goebell*, et. at. 6 February-21 March 1946) ("Borkum Island case").
[55] *Trial of Erich Heyer and Six Others*, British Military Court of the Trial of War Criminals, Essen, 18-19 and 21-22 December 1945, UNWCC, Vol. 1 (1949) ("Essen Lynching case").
[56] PTC JCE Decision, para. 79.
[57] *Id.*, para. 79, citing *Tadić* Appeal Judgment, para 211.
[58] *Id.*, para. 79, citing *Tadić* Appeal Judgment, para. 212.

whether by virtue of their status, role or conduct were in a position to have predicted that the assault would lead to the killing…".[59]

65. The ECCC Pre-Trial Chamber declined to make the same assumption as the *Tadić* Appeals Chamber, noting that the circumstances of the case do not allow for inferring that the mode of liability based on which the military court convicted the accused was an extended form of JCE. Specifically, "in light of the fact that the Prosecution pleaded that all accused shared the intent that the airmen be killed, the court may as well have been satisfied that these six individuals possessed such intent rather than having merely foreseen this possible outcome".[60] In any event, the fact that *Tadić* had to "presume" the basis on which the defendants had been convicted speaks volumes to the inappropriately creative approach taken in reaching this decision.

66. In *Essen Lynching*, it is of relevance that the record of the judgment in this case exists only as a summary provided by the UN War Crimes Commission. Nevertheless, *Tadić* "assumed" that the court accepted the Prosecution's arguments despite the absence of proper judicial record or clear legal basis for the convictions in question.[61] The *Tadić* Appeals Chamber repeated its inferences as to the existence of an extended form of JCE liability, even though "there is no indication in the case that the Prosecutor even explicitly relied on the concept of common design and this case alone would not warrant a finding that JCE III exists in customary international law".[62]

67. In considering the other Italian cases relied upon by the *Tadić* Appeals Chamber, the ECCC Pre-Trial Chamber found that cases "in which domestic courts applied domestic law, do not amount to international case law and the ECCC Pre-Trial Chamber does not consider them as proper precedents for the purpose of determining the status of customary law in this area".[63] The Defence notes that the Pre-Trial Judge shares this opinion with the ECCC Pre-Trial Chamber regarding the relevance of such cases in determining customary international law.[64]

[59] *Tadić* Appeal Judgment, para. 213 [emphasis added].
[60] JCE PTC Decision, para. 80.
[61] *Id.*, para. 81, citing *Tadić* Appeal Judgment, para. 208. See also, ECCC, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, para. 31 ("ECCC Trial Chamber Decision").
[62] *Id.*, para. 59.
[63] *Id.*, para. 82.
[64] Impugned Decision, para. 189.

68. Accordingly, the ECCC Pre-Trial Chamber "[did] not find [that] the authorities relied upon in *Tadić*, […] constitute a sufficiently firm basis to conclude that JCE III formed part of customary international law…"[65] and that "the principle of legality requires the ECCC to refrain from relying on the extended form of JCE in its proceedings".[66]

69. The decision of the ECCC Pre-Trial Chamber, with its reasoned concerns that *Tadić* had been based on a fiction, should have been enough for any reasonable decision-maker to, at the very least, conduct an independent review of those same cases, and if arriving at a conclusion which left JCE III intact as a customary mode of liability, to explain why the ECCC Pre-Trial Chamber's concerns were unfounded. The Pre-Trial Judge's decision to not give weight to these relevant findings alone and avoid dealing with the issue should alone be reason to reverse his findings. However, the weight of the ECCC's criticism did not conclude at this point.

70. In confirming the ECCC Pre-Trial Chamber's decision, the ECCC Trial Chamber agreed with the Pre-Trial Chamber's analysis of the *Borkum Island* and *Essen Lynching* cases.[67] Adding to this analysis, the ECCC Trial Chamber addressed the validity of two additional cases identified by the STL Appeals Chamber, which had upheld the applicability of JCE III as a form of liability in customary international law applicable to that tribunal some months before.[68] As noted above,[69] the STL Appeals Chamber, presided over by an author of the *Tadić* Appeals Judgment, introduced two additional cases in an attempt to bolster the legal basis for the JCE III in customary international law. However, subjected to the same critical analysis as the jurisprudence from *Tadić*, these cases were similarly lacking in providing legal support for JCE III as a principle of customary international law.

71. These two cases, *U.S. v. Ulrich* and *Merkle and U.S. v. Wuelfert*, originated from the Dachau Military Tribunal.[70] In similar fashion to the *Tadić* Appeals Chamber's

[65] PTC JCE Decision, para. 83.
[66] *Id.*, para. 87.
[67] ECCC, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, paras 29-31 ("ECCC Trial Chamber Decision").
[68] STL, Interlocutory Decision on the Applicable law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal for Lebanon, STL-ll-0111, 16 February 2011.
[69] See above, para. 54.
[70] *United States v Hans Ulrich and Merkle*, Case No. 000-50-2-17, Deputy Judge Advocate's Office, 7708 War Crimes Group -European Command, Review and Recommendations, 12 June 1947, Reviews of United States Army War Crimes Trials in Europe 1945-1948, available at: http://www.jewishvirtuallibrary.orgljsourcelHolocaustidachautrialldl9.pdf (" Ulrich and Merkle case"); *United*

treatment of *Borkum Island* and *Essen Lynching* cases, the STL Appeals Chamber cited only review judgments of the cases in question which did not provide legal reasoning behind the affirmed convictions. As noted by the ECCC Trial Chamber in reference to the *U.S. v Ulrich* case in particular, the review judgment relied upon by the STL Appeals Chamber:

> "… merely concludes that "[both of the Accused were shown to have participated in the mass atrocity and the Court was warranted by the evidence adduced ... in concluding ... that they not only participated to a substantial degree, but the nature and extent of their participation was such as to warrant the sentence imposed."[71]

72. Adding to this, the ECCC Trial Chamber noted that, following its own survey of several national legal systems, which showed considerable divergence of approach between various national jurisdictions, that the state practice in this area lacks sufficient uniformity to be considered a general principle of law.[72]

73. The ECCC Trial Chamber Decision did not merely affirm the ECCC Pre-Trial Chamber's Decision, it added an extra layer of jurisprudential analysis which further reinforced the already established concerns over the legal basis for the *Tadić* Appeals Judgment's findings in relation to JCE III. The Pre-Trial Judge's decision to not engage with these further findings should rightly be regarded as an additional failure to take into account relevant jurisprudence in making his decision.

74. As noted in the JCE Motion,[73] the ECCC Supreme Court issued its own findings on the matter, conducting an even more extensive and comprehensive analysis of the jurisprudence relied upon in *Tadić*, as well as other cases brought before it by the ECCC Co-Prosecutors, in a final attempt to salvage the JCE III theory.

75. In its ruling, the ECCC Supreme Court held:

Stales v Hans Wuelfert el aI, Case No. 000-50-2-72, Deputy Judge Advocate's Office, 7708 War Crimes Group -European Command, Review and Recommendations, 19 September 1947, Reviews of United States Army War Crimes Trials in Europe 1945-1948, available at: http://dev.jewishvirtuallibrary.orgiitems1711O.html ("Wuelfert case.

[71] ECCC Trial Chamber Decision, citing *Ulrich and Merkle* case, Section 5 ("comments").

[72] See JCE Motion, para. 63 – Noting that the Trial Chamber also addressed the issue of whether JCE III constituted a 'general principle of law recognized by civilized nations' which the Pre-Trial Chamber did not specifically rule upon and which the Tadic Appeals Chamber held "would be necessary to show that most, if not all, countries adopt the same notion of common purpose.", citing *Tadić* Appeal Judgement, para. 225.

[73] *Id.*, paras 64 – 67.

> "791. In this regard, the Supreme Court Chamber notes with approval the Pre-Trial Chamber Decision on JCE (D97/15/9), in which the Pre-Trial Chamber analysed in detail the jurisprudence of the ad hoc tribunals regarding the notion of JCE III and concluded that the decisions upon which the ICTY Appeals Chamber relied in Tadić when finding that JCE III was part of customary international law did not constitute a "sufficiently firm basis" for such a finding. […]
>
> 792. Similar problems arise in respect of the other cases to which the Co-Prosecutors refer, which were addressed neither in Tadić nor in the Pre-Trial Chamber Decision on JCE (D97/15/9). As to the Renoth Case (British Military Court, Germany), the summary of the trial – in the course of which three individuals were found guilty of the killing of an Allied prisoner of war even though the actual killing had been carried out by another accused – specifically noted that "[i]t is impossible to say conclusively whether the court found that the three accused took an active part in the beating or whether they were liable under the doctrine set out by the Prosecutor", who had argued that even without active participation in the beating, the three accused could be found guilty; the Co-Prosecutors themselves argue that the requirements of JCE III "appear" to have been fulfilled in this case – hardly a sufficient basis to identify a rule of customary international law.
>
> 793. None of the other cases to which the Co-Prosecutors refer support the existence under customary international law of criminal liability for crimes in which the actus reus was not carried out by the accused and that were not covered by the common purpose."[74]

76. Addressing the Italian cases in *Tadić*, the ECCC Supreme Court found them inapposite, misplaced and unsupportive of JCE III.[75] In its review of more post World War II cases, the ECCC Supreme Court found that "[t]he vast majority … does not lend any support to the argument that accused may incur criminal responsibility for crimes that were not encompassed by the common purpose and the actus reus of which they did not commit".[76] Finally, the decision set out that the vast majority of domestic cases and legislation referred to "relate to ordinary domestic cases without any international element", as well as the fact that none of these examples of domestic law were sufficient

[74] ECCC, *Case of Nuon Chea and Khieu Saphan*, Appeal Judgement, 23 November 2016, paras 791-793 ("ECCC Appeal Judgement").
[75] See JCE Motion, para. 65 summary of findings regarding the Italian cases, citing ECCC Appeal Judgment, paras. 795 – 798.
[76] *Id.*, para. 66 summary of findings relating to the only additional post-World War II cases which merited discussion and nevertheless did not support JCE III, citing ECCC Appeal Judgment, paras 799 – 804.

to establish JCE III as a general principle of international law, thus reflecting the earlier finding of the ECCC Trial Chamber.[77]

77. The ECCC Supreme Court's Decision represented the third time in which the JCE III theory and its jurisprudential findings had been properly addressed, assessed and tested. It represented the third time that additional cases and legal sources had been offered in support and it represented the third time that JCE III had been found lacking. The Pre-Trial Judge's failure to engage with this decision represented the third source of effective legal criticism of the theory of liability from which he shied away.

78. The Defence notes that the manner in which Article 3(3) of the Law is drafted allows for a certain amount of judicial discretion in seeking assistance from sources of international law. However, it is respectfully submitted that a decision-maker who refuses to take into account multiple sources of consistent and well-reasoned authority which challenge the very foundations of a supposed customary rule has arrived at a finding so unreasonable that he has abused that discretion. This is particularly so where the same cases analysed in those sources of authority are one and the same with those presented by the SPO in favour of adopting that customary rule at the KSC.

79. In addition, noting that successive ICTY Chambers and other tribunals referred to *Tadić* in adopting JCE III is not sufficient to refute the findings of the ECCC without showing a parity in legal analysis of that same jurisprudence. A noted above, a repetition of the same error does not cure that error.

80. A common theme running through the ECCC criticism of the *Tadić* Appeals Chamber's acceptance of the post-World War II cases is that it was satisfied, without legal reasoning, as to how a conviction was arrived at. In doing so, *Tadić* "presumed" and "inferred" a legal theory, where either none existed, or in the very best-case scenario, *may* have been adopted. The Defence respectfully submits that "close enough" is not in any way an appropriate standard for a Chamber to adopt in establishing the customary status of a liability theory with the profound and prejudicial implications of JCE III, or indeed any form of liability theory.

[77] ECCC Appeal Judgment, paras 805, 806. Also, see above, para. 67.

81. The Defence respectfully requests that the Appeal Panel reverse the findings of the Pre-Trial Judge and find that JCE III does not have customary status.

3. Applying JCE III in the present case would violate Articles 7 ECHR and 15 ICCPR

82. Irrespective of whether JCE I and II are found to be established as principles of customary international law, JCE III does not have the necessary legal basis upon which to make this finding. As outlined in detail above, the ECCC was the only tribunal post *Tadić* to carry out a comprehensive analysis of legal basis upon which the *Tadić* Appeals Chamber built JCE III as a principle of customary international law. This critique establishes that no clear support for the mode of liability can be found in the cited jurisprudence (or in the additional jurisprudence cited later by the STL). Following these decisions, and in accordance with relevant jurisprudence of the European Court of Human Rights, to apply JCE III in the present case would violate the principle of non-retroactivity.

83. In considering the customary status of superior responsibility in the context of an Article 7 challenge, the European Court of Human Rights considered three preliminary factors in making its determination; i) that the mode was retained in certain trials prior to the Second World War, ii) that it was contained in codifying instruments and State declarations during and immediately after that war, iii) that it was retained in (national and international) trials of crimes committed during the Second World War.[78] The court went on to say that "it has since been confirmed as a principle of customary international law"[79] and is "a standard provision in the constitutional documents of international tribunals".[80]

84. It is of particular relevance that the court focused on these foundational factors prior to considering how the mode of liability was treated in the international tribunals. As detailed above, all three ECCC Chambers found that JCE III was neither retained in certain trials prior to the Second World War, nor in codifying instruments and State

[78] *Kononov v. Latvia*, Application no 36376/04, Council of Europe: European Court of Human Rights, 17 May 2010, para. 211.
[79] *Id.*, para. 211, citing *Prosecutor v. Delalic et al.*, IT-96-21-A, judgment of 20 February 2001, § 195, Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY); D. Sarooshi, "Command Responsibility and the Blaškić Case", *International and Comparative Law Quarterly*, vol. 50, no. 2, 2001, p. 460; and *Prosecutor v. Blaškić*, IT-95-14-T, judgment of 3 March 2000, Trial Chamber of the ICTY, § 290.
[80] *Id.*, para. 211, citing The Statute of the ICTY (Article 7 § 3); the Statute of the International Criminal Tribunal for Rwanda (Article 6); the Rome Statute of the International Criminal Court (Article 25); and the Statute of the Special Court for Sierra Leone (Article 6).

declarations, nor that it was retained in national and international trials of crimes committed during the Second World War. By the standards of the jurisprudence of the European Court of Human Rights, that *Tadić* declared JCE III to be a principle of customary international law would be irrelevant in determining its customary status unless the necessary preliminary legal criteria had been established. This would hold true with regard to any subsequent tribunal which built upon this error.

85. In line with the submissions above, it is not posited that this jurisprudence is binding on the KSC, however it is indicative of how Article 7 ECHR (and by extension, Article 15 ICCPR) would be interpreted in this context. It follows that if the European Court of Human Rights applied the same critical analysis as the ECCC to the legal foundation of JCE III as a purported mode of liability with customary status, it would be found deficient. Consequently, the application of JCE III as a mode of liability at the KSC would constitute a violation of Articles 7 ECHR and 15 ICCPR.

V. CONCLUSION

86. In making his decision, the Pre-Trial Judge erred in law, failed to take into relevant factors and arrived at findings so unreasonable as to constitute an abuse of his discretion.

87. In light of all the aforementioned, the Appeals Panel is respectfully requested to allow the Defence Appeal and find that:

(i) Customary international law may not be directly applied by the KSC; and that

(ii) JCE cannot therefore be applied as a mode of liability in the present proceedings;

and/or

(iii) JCE III does not have sufficient legal basis to establish it as a principle of customary international law.

Word count: 8479

Respectfully submitted on 27 August 2021,

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