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

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I. INTRODUCTION

1. Mr Hashim Thaçi appeals as of right,[1] the Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, issued by the Pre-Trial Judge on 22 July 2021.[2]

2. In reaching the conclusions in the Impugned Decision, the Pre-Trial Judge made a series of discernible errors which, considered individually or cumulatively, invalidate his conclusions. These errors of fact and law are raised in the following grounds of appeal:

In relation to the Marty Report:[3]

(i) The Pre-Trial Judge's approach to jurisdiction circumvents the findings of the Constitutional Court of the Republic of Kosovo ("KCC"), and renders the KSC a prohibited extraordinary court;

(ii) The Pre-Trial Judge adopted the wrong approach to the determination of jurisdictional limits; and

(iii) The Pre-Trial Judge relied on an erroneous reading of the Marty Report.

In relation to Joint Criminal Enterprise ("JCE"):

(iv) The Pre-Trial Judge misapplied the KSC's statutory framework;

(v) The Pre-Trial Judge erred in looking only to the conclusions reached by international criminal courts and tribunals;

[1] Article 45(2), Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ("KSC Law"); Rule 97(3), Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ("Rules").

[2] KSC-BC-2020-06/F00412, Pre-Trial Judge, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021 ("Impugned Decision").

[3] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report: Inhuman treatment of people and illicit trafficking in human organs in Kosovo, Doc. 12462, 7 January 2011 ("Marty Report").

(vi) The Pre-Trial Judge erred in finding that the decision not to include JCE in the Rome Statute "has no bearing on the question of whether JCE is a mode of liability under customary international law"; and

(vii) The finding that JCE was foreseeable and accessible to the accused is so unfair and unreasonable as to constitute an abuse of discretion.

II. PROCEDURAL HISTORY

3. On 12 March 2021,[4] the Defence for Mr Thaçi ("Defence") filed a preliminary motion challenging the jurisdiction of the KSC on the following four grounds:[5]

(i) None of the charges relate to the allegations against Mr Thaçi in the Marty Report;

(ii) The SPO exceeded the legally prescribed deadline for conducting criminal investigations under Article 159 of the Criminal Procedure Code;[6]

(iii) Pursuant to Articles 16, 19(1), 162 and Amendment No. 24 of the Constitution[7] and the Constitutional Court Judgment concerning Amendment No. 24,[8] the temporal mandate of the KSC and SPO expired on 3 August 2020; and

[4] *See*, KSC-BC-2020-06/F00150, Pre-Trial Judge, Decision on the Conduct of Detention Review and Varying the Deadline for Preliminary Motions, 16 December 2020, paras. 28-30, varying the time limit to submit preliminary motions to 10 February 2021 following a joint defence request; KSC-BC-2020-06/F00190/CONF/RED, Pre-Trial Judge, Confidential Redacted Version of Decision on Specialist Prosecutor's Second Request for Protective Measures and Renewed Request for Protective Measures and Procedural Matters, 5 February 2021, paras. 140-144, varying the time limit to submit preliminary motions to 15 March 2021 as a result of further disclosure of Rule 102(1)(a) material by the SPO on 12 February 2021 triggering the 30-day deadline set out in Rule 97(2) of the Rules.

[5] KSC-BC-2020-06/F00216, Thaçi Defence, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, 12 March 2021 ("Defence Motion"), para. 1.

[6] Code No. 04/L-123 on the Criminal Procedure Code of Kosovo ("Criminal Procedure Code").

[7] Constitution of the Republic of Kosovo ("Constitution").

[8] KSC-CC-2020-11/F00015, Constitutional Court, Judgment on the Referral of Proposed Amendments to the Constitution of Kosovo, 26 November 2020 ("Amendment Judgment"), para. 69.

(iv) The KSC lack jurisdiction under Articles 12 and 16(1) of the KSC Law to prosecute Mr Thaçi for crimes alleged to have been committed through a JCE.

4. On 23 April 2021, following an extension of the deadline,[9] the SPO filed three relevant responses addressing the issues raised in the Defence Motion. These responses related to: (i) the Marty Report, investigation deadline and temporal mandate;[10] (ii) the applicability of customary international law;[11] and (iii) JCE.[12] On 14 May 2021, the Defence filed replies to the SPO's CoE Response[13] and JCE Response.[14] On 19 May 2021 and 24 June 2021, the Pre-Trial Judge varied the time limit for disposing of the preliminary motions until 22 July 2021.[15]

5. During a status conference on 21 July 2021, the Pre-Trial Judge advised the parties that a decision on motions challenging the jurisdiction of the KSC pursuant to Rule 97(1)(a) would be issued on 22 July 2021. The Pre-Trial Judge also advised that a decision regarding constitutional challenges would be issued in August, after the recess.[16]

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[9] KSC-BC-2020-06, Transcript of Fourth Status Conference, Fifth Oral Order, 24 March 2021, page 391, lines 11-19.

[10] KSC-BC-2020-06/F00259, Specialist Prosecutor, Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigation Deadline, and Temporal Mandate, 23 April 2021 ("SPO CoE Response").

[11] KSC-BC-2020-06/F00262, Specialist Prosecutor, Prosecution Response to Preliminary Motion Concerning Applicability of Customary International Law, 23 April 2021.

[12] KSC-BC-2020-06/F00263, Specialist Prosecutor, Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise (JCE), 23 April 2021 ("SPO JCE Response").

[13] KSC-BC-2020-06/F00304, Thaçi Defence, Thaçi Defence Reply to "Prosecution response to preliminary motions concerning Council of Europe Report, investigation deadline, and temporal mandate", 14 May 2021 ("Defence CoE Reply").

[14] KSC-BC-2020-06/F00306, Thaçi Defence, Thaçi Defence Reply to "Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise (JCE)", 14 May 2021 ("Defence JCE Reply").

[15] KSC-BC-2020-06, Transcript of Fifth Status Conference, 19 May 2021, p. 451, lines 15-17; KSC-BC-2020-06/F00370, Pre-Trial Judge, Decision on Prosecution Request for Extension of Time Limit to Provide its Rule 102(3) Notice, 24 June 2020, paras 15, 16(f).

[16] KSC-BC-2020-06, Transcript of Sixth Status Conference, 21 July 2021, p. 457, lines 5-16.

6. On 22 July 2021, the Pre-Trial Judge issued the Impugned Decision, in which he rejected grounds (a) and (d) of the Defence Motion; namely, the grounds challenging the charges against Mr Thaçi on the basis that they exceed the Marty Report and the jurisdiction of the KSC in relation to JCE.[17]

III. STANDARD OF REVIEW

7. The standard of review for interlocutory appeals mirrors the standard for appeals against judgments, as specified in Article 46(1) of the KSC Law.[18] In relation to an **error of law**, a party must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision.[19] Article 46(4) of the KSC Law provides:

> When the Court of Appeals Panel determines that a Trial Panel has made an error of law in a judgment 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.

8. In relation to an **error of fact**, a party must demonstrate that no reasonable trier of fact could have made the impugned finding and only an error that has

[17] Impugned Decision, para. 214(b). The Defence presumes that the grounds (b) and (c) of the Defence Motion, which have not been addressed in the Impugned Decision, will be resolved in the forthcoming decision on constitutional challenges. To the extent that is not the case, the Defence reserves its right to challenge these through a further appeal.
[18] *Prosecutor v. Gucati*, KSC-BC-2020-07/IA001/F00005, Appeals Panel, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati* Appeals Decision"), para. 10.
[19] *Gucati* Appeals Decision, para. 12.

caused a miscarriage of justice will cause the Panel to overturn a decision.[20] Article 46(5) of the KSC Law provides:

> 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.

9. In relation to **a discretionary decision**, a party must demonstrate that the lower level panel has committed a discernible error, in that the exercise of discretion is based on an erroneous interpretation of the law; it is exercised on a patently incorrect conclusion of fact; or where the decision is so unfair and unreasonable as to constitute an abuse of discretion.[21] The Court of Appeals Panel will also consider whether the lower level panel has given weight to extraneous or irrelevant considerations, or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.[22]

IV. GROUNDS OF APPEAL

A. THE MARTY REPORT

10. The establishment of the KSC represents an extraordinary and unprecedented concession by a sovereign state; the creation of a specialised chamber from which the participation of its nationals are excluded. The impetus for the KSC's creation were the allegations set out in the January 2011 Marty Report.[23] This is undisputed.

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[20] *Gucati* Appeals Decision, para. 13.
[21] *Gucati* Appeals Decision, para. 14; *Prosecutor v. Haradinaj,* KSC-BC-2020-07/IA002/F00005, Appeals Panel, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021 ("*Haradinaj* Appeals Decision"), para. 14: "The Court of Appeals Panel will also consider whether the lower level panel has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations."
[22] *Gucati* Appeals Decision, para. 14; *Haradinaj* Appeals Decision, para. 14.
[23] Defence Motion, paras. 3-22.

11. The allegations in the Marty Report are contained in Part 3.[24] They relate only to "Detention Facilities and inhuman treatment of captives". Part 4 of the Marty Report concerns the "Medicus Clinic", and addresses the allegations of trafficking of human organs. **All of these allegations**, without exception, took place "on the territory of the Republic of Albania".[25] The acts were alleged to have occurred "for the most part" from the summer of 1999 onwards, with the exception of some acts in detention occurring "between April and June 1999".[26]

12. The present litigation centres on how the Court can move from a report about post-war organ trading and inhuman detention in Albania, to asserting jurisdiction over all war crimes or crimes against humanity allegedly committed in Albania or Kosovo during the conflict itself. The Pre-Trial Judge committed numerous errors of law and reasoning in attempting to make this leap, which undermine this conclusion and warrant the Court of Appeals Panel's intervention.

1. The Pre-Trial Judge's approach to jurisdiction circumvents the findings of the KCC, and renders the KSC a prohibited extraordinary court

13. The constitutionality of the proposed Amendment No. 24, through which the KSC was incorporated into Kosovo's legal and constitutional order, was assessed by the KCC.[27] As part of this assessment, the KCC considered whether the potential Court would constitute an "extraordinary court", which would have been prohibited under Article 103(7) of the Constitution.

[24] Marty Report, pp. 18-25.
[25] Marty Report, para. 101.
[26] Marty Report, para. 102 (emphasis added).
[27] KCC, AGJ 788/15, Judgment in Case No. KO26/15 - 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, 15 April 2015 ("KCC Judgment").

14. The KCC held that a specialised court "means 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."[28] Significantly, the KCC held that in order for a court **not** to be considered as extraordinary (and thus prohibited), "**there needs to be a necessity for its establishment**."[29]

15. As to this requirement of "necessity", the KCC elaborated that, in this case, the need for the KSC derives from the "**requirement for the Republic of Kosovo to comply with its international obligations**."[30] The international obligations in question, were identified as those which **"stem from the Report […], which outlines a number of highly specific criminal allegations and recommends them for investigation and prosecution**."[31] Only after having identified this need, did the KCC then conclude that the KSC satisfies the requirement of "necessity" and could be qualified as a specialist court.[32] Its analysis was reinforced by reference to ECtHR case law which, in the view of the KCC, held that specialised court chambers must also satisfy the requirement of coming within a specialised scope of jurisdiction.[33]

16. Importantly, the KCC identified which parts of the Marty Report gave rise to the KSC's status as a specialised court. It found that the four structural elements being introduced into Kosovo's legal and constitutional order cleared the constitutional test under Articles 103(7) and 31 of the Constitution, because they were "done by law **and for the purpose of fighting specific crimes**, which, **in**

[28] KCC Judgment, para. 43 (emphasis added).
[29] KCC Judgment, para. 45 (emphasis added).
[30] KCC Judgment, paras. 50, 51 (emphasis added).
[31] KCC Judgment, para. 51 (emphasis added).
[32] KCC Judgment, para. 53.
[33] KCC Judgment, para. 53.

accordance with the case law of the ECtHR, requires measures, procedures and institutions of a specialized character."[34]

17. As such, the "specific crimes" referenced are those alleged in the Marty Report, and not the broad range of crimes later incorporated into Articles 12-16 of the KSC Law. This is clear from the reference to the "case law of the ECtHR", cited earlier in the KCC Judgment,[35] in which the ECtHR held that "…fighting corruption and organised crime may well require measures, procedures and institutions of a specialised character." The language of the Marty Report makes clear that the allegations of cruel treatment and organ trafficking were considered in the Report as falling within a framework of corruption and organized crime.[36] As such, the "specific crimes" that the KCC considered as validating the KSC's establishment are cruel treatment and organ trafficking, and not the Articles 12-16 crimes more generally.

18. The KCC thereby confirmed the Marty Report as the KSC's literal *raison d'être,* and as setting the bounds of its subject-matter jurisdiction. In doing so, the KCC Judgment precludes the expansion of the KSC's jurisdiction which was sought by the SPO, and now approved by the Pre-Trial Judge.

19. To circumvent this authoritative and unambiguous ruling, the Pre-Trial Judge found that the KCC Judgment does not mean what it says. With no reasoning or justification offered in support, the Pre-Trial Judge refers to the KCC's identification of "a number of highly specific criminal allegations" outlined by Marty Report, but then concludes, without any apparent basis, that this "does not exclude allegations

[34] KCC Judgment, para. 71 (emphasis added).
[35] KCC Judgment, paras. 51, 54.
[36] Marty Report, Part A, paras. 5, 11, 19; Part B, paras. 10, 11, 37 – 92, 156 – 167.

arising from the Report **exceeding** organ trafficking and inhumane treatment allegedly committed in detention centers in Albania."[37]

20. Of course, it does. The KCC laid down a clear path to the exceptional creation of a Kosovan court which fits within the Constitutional and legislative confines: (i) the Court must have "a **specifically defined scope of jurisdiction**"; (ii) there "needs to be a **necessity** for its establishment"; (iii) in this case, the necessity stems from the "requirement for the Republic of Kosovo to comply with its **international obligations**"; (iv) the international obligations in question, stem from the Marty Report which "outlines a number of **highly specific criminal allegations** and recommends them for investigation and prosecution"; and (v) that the structural elements being introduced were compatible with Article 103(7) and Article 31 of the Constitution because they were "done by law **and for the purpose of fighting specific crimes**."[38] The only "highly specific criminal allegations" in the Marty Report are contained in Part 3 which lists specific allegations of inhuman treatment of detainees in facilities in Albania, and Part 4 which relates to organ trafficking.

21. There is simply no space within this precise and clinical reasoning for the Pre-Trial Judge to find a basis for the subsequent Court to assert jurisdiction over *any* war crime, and *any* crime against humanity, committed in either Albania or Kosovo, during a different temporal period. The Pre-Trial Judge's attempted use of the phrase "for the purpose of fighting specific crimes" as opening the door is misplaced;[39] this phrase cannot be cherry-picked and isolated, it must be read in combination with the specific crimes relevant to the KSC, which in this case, were identified by the KCC as the "highly specific criminal allegations" contained in the Marty Report.

[37] Impugned Decision, para. 118.
[38] KCC Judgment, paras. 43, 45, 50, 51 and 71 (emphasis added).
[39] Impugned Decision, para. 118.

22. If the Pre-Trial Judge's position is accepted, then a more significant problem arises. If indeed the KSC was *not* established solely for adjudicating the highly specific criminal allegations contained in the Marty Report, despite the plain wording of the KCC Judgment, then it is just another domestic court exercising jurisdiction over war crimes and crimes against humanity alleged during and after the Kosovo conflict. The effect is that the KSC loses its specialised nature, and the necessity for its establishment accordingly evaporates. As such, it is a court of general jurisdiction, and not a specialized court, under Article 102(1) of the Kosovo Constitution, because it does not address a clearly defined need. It is therefore an extraordinary court prohibited under Article 103(7) of the Constitution.

23. The framework of the KSC limits its operation, functioning, and jurisdiction. Carefully calibrated and mutually supporting legislative and Constitutional limits cannot simply be dispensed with because the original allegations in the Marty Report could not be established on their facts. In attempting to stretch the jurisdiction of the Court beyond recognition, the Pre-Trial Judge has undermined the legal basis on which it was resting. His conclusion constitutes an error of law, and amounts to a failure to give reasons, warranting its reversal on appeal.

2. The Pre-Trial Judge adopted the wrong approach to the determination of jurisdictional limits

24. In drafting Constitutional Amendment No. 24, the Assembly of Kosovo linked the purpose and existence of the KSC in Article 162(1) to compliance with "international obligations in relation to the [Marty Report]".[40] Article 6(1) of the KSC

[40] Constitution, Article 162(1) relevantly provides: "To comply with its international obligations in relation to the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011, the

Law then designates the KSC with jurisdiction over crimes which relate to the Marty Report.[41] Article 1(2) of the KSC Law then makes the same link, and further limits the KSC's jurisdictional scope to allegations that were contained in the Marty Report **and** investigated by the SITF, a deliberately narrow crossover.[42] These provisions set the limits of the KSC's jurisdiction.

25. Having referenced these provisions, the Pre-Trial Judge engaged in a seemingly redundant exercise, using the Oxford English Dictionary to identify synonyms for terms of common usage that are clear on their face. The Pre-Trial Judge held that the words "in relation to" can be defined "as with regard to, in respect of", and that "related to" can mean "connected or having relation to something else".[43] The Pre-Trial Judge then put these synonyms together, and found that they cumulatively mean that there must be "a correlation" between the charges and the Report.[44] This new term "correlation" is then used as the touchstone for the finding that charges before the KSC need not be limited to organ trafficking and inhumane treatment in detention centres in Albania.[45] Three errors undermine this approach.

Republic of Kosovo may establish Specialist Chambers and a Specialist Prosecutor's Office within the justice system of Kosovo."

[41] KSC Law, Article 6(1) provides: "The Specialist Chambers shall have jurisdiction over crimes set out in Articles 12-16 which relate to the Council of Europe Assembly Report."

[42] KSC Law, Article 1(2) provides that the KSC and SPO "are necessary to fulfil the international obligations undertaken in Law No. 04/L-274, […] and to ensure secure, independent, impartial, fair and efficient criminal proceedings in relation to allegations of grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo, which relate to those reported in the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011 ("The Council of Europe Assembly Report") and which have been the subject of criminal investigation by the Special Investigative Task Force ("SITF") of the Special Prosecution Office of the Republic of Kosovo ("SPRK")."

[43] Impugned Decision, para. 107.

[44] Impugned Decision, para. 108.

[45] Impugned Decision, paras. 107-112.

26. First, the Pre-Trial Judge recites the subject matter, temporal and territorial limits as set out in the KSC Law, and concludes that the KSC is permitted to exercise jurisdiction over all of it.[46] Namely, any crimes against humanity or war crimes, which occurred between 1 January 1998 and 31 December 2000, in Kosovo or Albania, can be charged by the SPO. According to the Pre-Trial Judge, if the exercise of the KSC's jurisdiction was intended to be limited to organ trafficking and inhumane treatment of detainees in Albania, "such a limitation would have had to be reflected consistently in the jurisdictional parameters defined by the law."[47]

27. This is not how jurisdictional limits operate. It is not a case of simply pointing to the most permissive articulation of jurisdiction, and allowing the charges to expand out to that point. The different jurisdictional bases, which indeed form the KSC's mandate, do not stand alone. They are cumulative, and act as progressive filters on its jurisdiction. As such, while the temporal, territorial and personal jurisdiction of the KSC may be drafted in broader terms, they are insufficient (either individually or cumulatively) for the KSC to exercise its mandate over a particular crime. The conduct alleged must also pass through the filter of the KSC's subject-matter jurisdiction, which is set out in Article 6(1) and Article 1(2) of the KSC Law and Article 162(1) of the Constitution. Namely, the crime must be related to the Marty Report **and** have been investigated by the SITF.

28. The ICC Statute, for example, proclaims that the States Parties are establishing a permanent court, "with jurisdiction over the most serious crimes of concern to the international community as a whole".[48] This does not mean that the ICC can exercise jurisdiction over all serious crimes of international concern. The various jurisdictional filters set out in the Statute and the declarations of State Parties then

[46] Impugned Decision, paras. 109-110.
[47] Impugned Decision, para. 110.
[48] Rome Statute, preamble and art. 1.

come into play: temporal, territorial, personal, and subject matter. Through these filters, the jurisdictional limits of possible ICC charges are narrowed, and set.

29. The Pre-Trial Judge's approach of looking to the outer limits of the jurisdictional provisions, and finding that the KSC has jurisdiction over any crime falling within any of these limits, was an error. It also leads to an absurd result, namely that that the KSC can exercise jurisdiction over any international or domestic crime perpetrated in Kosovo or Albania between 1998 and 2000. For the reasons set out above, such an approach would undermine the KSC's status as a specialised court.

30. The second error in the Pre-Trial Judge's reasoning is that, while he claims that jurisdiction expands to any charges which exhibit a "correlation" to the Marty Report, this is where he stops. Crucially, he does not go on and engage with the jurisdictional exercise he established, and determine whether the counts in the Indictment are correlated to the Marty Report. Just where one would expect the Pre-Trial Judge to engage in this analysis, the reasoning abruptly ends with the assertion that the Defence's submissions are based on "an erroneous legal assessment and an incorrect reading" of the scope of the Marty Report.[49] Even if the Pre-Trial Judge's approach is correct, which is disputed, his failure to then apply his own standard constitutes a failure to give reasons, and renders the Impugned Decision incomplete.

31. Third, the Pre-Trial Judge's finding that "Article 1 of the Law does not impose a jurisdictional limitation since it is restricted to defining the Law's scope and purpose"[50] is self-defeating. The Pre-Trial Judge is correct that the limitation under Article 1 of the Law is not only jurisdictional in nature. It sets a far broader and even more important limitation, being the Court's scope and purpose, which delineates

[49] Impugned Decision, para. 139.
[50] Impugned Decision, para. 120.

the most outer limits to the KSC's jurisdiction. It is for this reason that no jurisdictional basis of the KSC can exceed or be read in a manner inconsistent with Article 1 of the KSC Law.

32. Similarly, the fact that the KSC Law was adopted *after* the SITF had announced that its investigation went beyond organ trading and inhuman treatment of detainees in Albania, actually undermines the Pre-Trial Judge's position.[51] The drafters of the KSC Law were indeed aware of the broad scope of the SITF investigation. Rather than embracing it, and aligning the KSC's subject-matter jurisdiction with that broader scope, they deliberately narrowed it to those crimes which were both investigated by the SITF **and** related to the Marty Report.[52]

33. The Pre-Trial Judge's expansion of the KSC's jurisdiction beyond the limits set in the Court's constitutive documents is undermined in full by these discernible errors. In misconstruing the operation of jurisdictional limits, failing to make findings on the basis of the standard he himself set, and mistakenly relying on a non-existent limit in Article 1(2) of the KSC Law, the Pre-Trial Judge reached an erroneous conclusion that should be corrected on appeal.

3. The Pre-Trial Judge relies on an erroneous reading of the Marty Report

34. Finally, the Pre-Trial Judge turns to the text of the Marty Report itself, and cites to phrases and references therein which purportedly show that the Report is about more than allegations of post-war organ trafficking and inhuman treatment of detainees in Albania, but rather about international crimes during the conflict in Kosovo.[53]

[51] Impugned Decision, para. 121.
[52] KSC Law, Article 1(2).
[53] Impugned Decision, paras. 124-136.

35. The Marty Report is 28 pages in length. It contains background information, contextual information, and findings which detail highly specific criminal allegations. These allegations, are as follows:

> 3.3 Detention Facilities and inhuman treatment of captives
> 3.3.1 KLA Detentions ***in wartime*** – first subset of captives: "the prisoners of war"
> 3.3.1.1 Case study on the nature of the facilities: *Cahan*
> 3.3.1.2 Case study on the nature of the facilities: *Kukës*
> 3.3.2 ***Post-conflict*** detentions carried out by KLA members and affiliates
> 3.3.2.1 Second subset of captives: "the disappeared"
> 3.3.2.1.1 Case study on the nature of the facilities: *Rripe*
> 3.3.1.1.2 Observations on the conditions of detention and transport
> 3.3.2.2 Third subset of captives: the "victims of organised crime"
> 3.3.2.3.1 Case study on the nature of the facilities: *Fushë-Krujë*

36. The detention centers identified in these highly specific criminal allegations are located in C*ahan*, *Kukës*, *Bicaj* (vicinity), *Burrel*, *Rripe*, *Durrës* and *Fushë Krujë*. Accordingly, all are on the territory of the Republic of Albania.[54]

37. As regards the KSC's ***geographical parameters***, the conclusion that the Marty Report did not limit the KSC's jurisdiction to crimes committed in Albania, relies on the fact that, according to the Pre-Trial Judge:

(i) non-international armed conflicts can spill into neighbouring states,

(ii) protections under IHL move with protected persons across state lines; and

(iii) the crimes committed in Albania and Kosovo form part of the same attack.[55]

38. While these statements may all be correct, they are not relevant to a determination of the KSC's geographical scope. The relevant question is not whether

[54] Marty Report, Annex, page 28.
[55] Impugned Decision, paras. 131-132.

a conflict stops at a state border, but rather what geographical scope has been designated to the Court in question by virtue of its constitutive documents? The fact that the conflict in Rwanda spilled into the Democratic Republic of the Congo (then Zaïre) did not give the ICTR jurisdiction over the crimes committed in this third state. Similarly, the principle that civilians continue to enjoy IHL protections even if they move across borders, does not operate to expand the geographical scope of a court's jurisdiction if and when they do. The Pre-Trial Judge relied on irrelevant considerations, and reached a finding that was not open to a reasonable Pre-Trial Judge.

39. As regards the Court's ***temporal parameters***, the Marty Report's introductory remarks state that: "[t]he acts with which we are presently concerned are alleged to have occurred *for the most part* from the summer of 1999 onwards".[56] The Pre-Trial Judge found it to be "evident" that the reference to "for the most part" expresses that the Marty Report also includes acts that occurred *prior* to the summer of 1999. However, in doing so, the Pre-Trial Judge failed to take into account the Defence submissions on this precise point, that explained the reason for the temporal nuance, and undermined his conclusion.[57]

40. Namely, as regards the phase "for the most part", the Defence CoE Reply noted that the Report's findings divide the inhuman treatment in detention into two time periods:

> 3.3.1 KLA Detentions ***in wartime***, being "between April and June 1999";[58] and
> 3.3.2 ***Post-conflict*** detentions.

41. The Defence submitted that this division explains the reference to acts occurring "for the most part" from the summer of 1999 onwards. Namely, according

[56] Marty Report, para. 4 (emphasis added).
[57] Defence CoE Reply, paras. 19-20.
[58] Marty Report, para. 102 (emphasis added).

to the Marty Report, the alleged inhuman treatment of detainees did not materialise overnight on 12 June 1999, but also occurred between April and June 1999. However, this phrase "for the most part" relates to the inhuman treatment of detainees in Albania discussed in the Marty Report, and does not throw open the door for the SPO to expand its jurisdiction over any and all acts or alleged crimes committed during the preceding armed conflict.[59]

42. The Defence CoE Reply, comprising 15 pages of reasoned argument, is not referenced once in the Impugned Decision, outside the introductory section in which it is summarised. Accordingly, the Pre-Trial Judge's finding that the phrase "for the most part" extends the temporal scope of the KSC to include the entire armed conflict, appears to have been made without consideration of the Defence submissions as to why it does not. This constitutes either a failure to give weight to relevant considerations, or a failure to give a reasoned opinion.

43. While the accused's right to a reasoned opinion does not necessarily translate into a Panel being required to give a detailed answer to every submission, it cannot be that reasoned submissions on the precise point are ignored on the way to an adverse finding.[60] This error accordingly undermines the Pre-Trial Judge's conclusions on the KSC's temporal scope.

44. A 28-page report on cruel treatment and trafficking of human organs in Albania which occurred (for the most part) from the summer of 1999 onwards, could never have been written in a vacuum, and with no reference to the armed conflict that preceded the post-conflict events being investigated. References to prior allegations of war crimes, or events in Kosovo, or general characteristics of KLA

[59] Defence CoE Reply, paras. 19-20.
[60] *See,* KSC-BC-2020-06/IA004/F00005, Appeals Panel, Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021 ("Appeal Decision on Interim Release"), para. 27.

detention in wartime, do not transform the Marty Report into a report about international crimes, or a report about Kosovo. Whatever was written before, and whatever came afterwards, the allegations are those set out in Part 3 of the Report, and cited above. The Pre-Trial Judge's findings otherwise are undermined by the errors set out above, which warrant their reversal.

B. JCE

45. Article 16(1) of the KSC Law, setting out the modes of liability applicable at the KSC, is framed exhaustively. JCE is not included.

46. The KSC Law was drafted in 2015. By this time, its drafters would necessarily have been aware of the extent and persistence of the criticisms of this mode of liability, particularly in its extended form. They would have been aware of the question marks hanging over JCE's compatibility with the principle of culpability, and its status as custom, as well as the consistent unease expressed by practitioners and academics alike, at the way in which it had been "read into" the ICTY Statute.[61] The drafters would also have been aware of the importance of a criminal statute exhaustively articulating the bases for individual criminal responsibility so as to avoid uncertainty, and engender fair proceedings.

47. Regardless, the Pre-Trial Judge has formed the view that the absence of JCE from the KSC Law does not mean that it was not included. Rather, according to the Pre-Trial Judge, the drafters intended that JCE be read into the otherwise unambiguous and exhaustive language in Article 16(1) of the KSC Law. No other

[61] *See, e.g.*, J.D. Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise' (2007) 5 JICJ 69; S. Powles, 'Joint Criminal Enterprise - Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?' (2004) 2 JICJ 606; ECCC, *Prosecutor v Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/OCIJ (PTC 02), Amicus Curiae Brief Submitted by Professor Kai Ambos, 27 October 2008; Michael Karnavas, 'Case 003 Defence Submission in Intervention or *Amicus Curiae Brief* on JCE III Applicability', 12 January 2015.

modes of liability need to be divined in this manner, only this most controversial form, JCE.

48. In 2019, when addressing the silence of the IRMCT Statute on JCE, the Mechanism held in relation to a jurisdictional challenge, that:[62]

> [t]he doctrine of joint criminal enterprise liability is not expressly mentioned in the Mechanism, ICTR, and ICTY Statutes or in their respective Rules. Instead, the doctrine has been applied by the Tribunals as a form of commission under Article 6(1) of the ICTR Statute and Article 7(1) of the ICTY Statute, **but only after a detailed review of customary international law**.

49. Even if, therefore, the position is accepted that the KSC Law drafters intended legislative ambiguity, intended to inject uncertainty into the Court's legal regime, and intended for the Court's resources to be expended on inevitable pre-trial litigation around the applicability of JCE, Article 16(1) can only be found to include JCE "after a detailed review of customary international law".

50. The Pre-Trial Judge had all the tools at his disposal to conduct such a review. The question of whether JCE formed part of customary international law at the time of the alleged crimes was addressed by the parties in 107 pages of submissions. Inexplicably, he decided not to engage with them. His reasoning for finding that JCE reflects custom, amounts to nothing more than finding that other international criminal courts and tribunals said that it did.[63] This, and other manifest errors which undermine his conclusions on JCE, are set out below.

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[62] IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Challenges to Jurisdiction, 12 March 2019, para. 28 (emphasis added). *See also,* IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-AR79.1, Decision on Prosecution Appeal of Decision on Challenges to Jurisdiction, 28 June 2019, para. 10.

[63] Impugned Decision, para. 181: "the customary nature of JCE has been thoroughly reviewed and repeatedly confirmed by all contemporary international tribunals applying JCE, except for the ECCC in relation to JCE III"; para. 184: "[a]s regards the Defence argument that the post-World War II case-law cited does not support JCE I, nor JCE III, and coupled with post-SC jurisdiction case-law it is insufficient to determine customary international law, the Pre-Trial Judge notes that JCE as a form of liability was systematised in the July 1999 *Tadić* appeal judgment of the ICTY"; para. 185: "[t]hese

1. The Pre-Trial Judge misapplied the KSC's statutory framework

51. In seeking to simply adopt the conclusions of other international courts as regards the applicability of JCE, the Pre-Trial Judge failed to consider that, unlike the Judges of these other courts, he is constrained by the KSC's specific legal framework. In doing so, he committed an error of law as regards the applicability of customary international law at the KSC, which undermines the entirety of his reasoning on JCE, for the reasons set out below.

52. Concerning the absence of JCE from the KSC Law, the Defence submitted that it is unreasonable to conclude that the drafters intended the KSC to apply JCE given that, *inter alia*, Article 16(1) was framed exhaustively.[64]

53. In response, the Pre-Trial Judge acknowledged that Article 16(1) of the KSC Law provides for a "self-contained autonomous regime for modes of liability", but found that this autonomous regime must be interpreted in accordance with the context of the KSC framework. Notably, he held that "by virtue of Articles 3(2)(c)-(d), (4) and 12 of the KSC Law, the SC applies customary international law as its principal source and Kosovo substantive criminal law, where the latter is specifically incorporated in the Law and insofar as it is in compliance with customary international law."[65] The Pre-Trial Judge then concluded that the KSC can apply

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findings have been repeatedly confirmed by the ICTY, ICTR, SCSL, STL, ECCC, and IRMCT. In light of the consistent confirmation of the aforementioned post-World War II cases as evidence of the customary nature of JCE I, the Pre-Trial Judge considers that the Defence has not advanced any arguments that have not been previously considered and that would warrant a novel review of the aforementioned cases"; para. 186: "all but one international tribunal have interpreted State practice and *opinio juris* in the same way, i.e. recognizing that JCE III forms part of customary international law...".

[64] *See* Defence Motion, para. 62; Defence JCE Reply, paras. 13-16.

[65] Impugned Decision, para. 177.

"modes of liability that were part of customary international law at the time the alleged crimes were committed".[66]

54. However, customary international law is not incorporated *en bloc* into the framework of the KSC's applicable law, without any legal qualification or limitation. Rather, Article 3(2)(d) of the KSC Law provides that the KSC shall apply "customary international law, as given superiority over domestic laws by Article 19(2) of the Constitution". This is where the Pre-Trial Judge fell into error.

55. Article 19(2) of the Constitution specifies that only "**[r]atified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo**." Interpreting Article 3(2)(d) of the KSC Law in accordance with Article 19(2) of the Constitution, restricts the KSC's application of customary international law to those sources or parts that have been ratified as international agreements or have reached the status of binding norms of international law, or *jus cogens* norms, which are far more limited in number. While *jus cogens* norms invariably qualify as customary international law,[67] not all customary international law rises to the level of binding norms of international law from which no derogation is permitted.[68] As such, JCE's applicability before the KSC not only requires that it be found to be reflective of customary international law, but that it also constitutes a legally binding norm of international law.

56. This step is missing from the Pre-Trial Judge's analysis.[69] While citing Article 3(2)(d) of the KSC Law, the Pre-Trial Judge fails to then consider the implication of

[66] Impugned Decision, para. 179.
[67] W. Czapliński, 'Concepts of *jus cogens* and Obligations *erga omnes* in International Law in the Light of Recent Developments', (1997/98) 23 *Polish Yearbook of International Law* 87, at 88.
[68] ICTY, *Prosecutor v. Furundžija,* IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998 ("*Furundžija* Judgment"), para. 153: "peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules".
[69] Impugned Decision, paras. 99, 178-179.

its incorporation of Article 19(2) of the Constitution, which acts as a specific limitation to the scope of customary international law that takes precedence over Kosovo law. This reading is supported by Article 3(2)(d)'s distinction between parts of custom which are given superiority by Article 19(2) of the Constitution (as opposed to those that are not), and by the use of the same language in Article 12 of the KSC Law.[70] It is also consistent with the KSC's status as a domestic court, which does not simply adopt all of customary international law in a wholesale and blanket manner, and elevate it above its own domestic law. Rather, the KSC regime allows for the integration of customary international law within the confines of a specific framework, and as delineated by the Constitution.

57. In sweepingly referring to "customary international law" indiscriminately and as a whole, without attempting to explain whether relevant parts were ratified international treaties or represented binding norms of international law at the relevant time, the Pre-Trial Judge erred.

58. As such, even if JCE can be considered as being reflective of custom, and even if there was no requirement on the Pre-Trial Judge to do anything other than repeat previous findings of other international courts in reaching that conclusion, his finding on the applicability of JCE before the KSC is undermined in full by his failure to apply the relevant statutory framework.

59. The KSC is a domestic court. Excluding Article 19(2) of the Constitution from the statement of applicable law,[71] whether deliberately or otherwise, cannot circumvent its operation. Indeed, Article 3(2)(a) of the KSC Law requires the Specialist Chambers to 'adjudicate and function in accordance with […] the

[70] KSC Law, Article 12: "The Specialist Chambers shall apply customary international law and the substantive criminal law of Kosovo insofar as it is in compliance with customary international law […]."
[71] Impugned Decision, para. 99.

Constitution of Kosovo […]'. This legal error undermines the entirety of the Pre-Trial Judge's reasoning on JCE, warranting a reversal of the Impugned Decision's conclusions thereon.

2. The Pre-Trial Judge erred in looking only to the conclusions reached by international criminal courts and tribunals

60. The Pre-Trial Judge concluded that JCE was part of customary international law. This conclusion was based entirely on his finding that he found no reason to depart from the decisions of other international courts and tribunals.

61. Rather than engaging with the Defence submissions as to why JCE could not be considered as custom, the Pre-Trial Judge moved straight to finding that JCE had been systematized by the ICTY in *Tadić*, confirmed by the ICTY, ICTR, SCSL, STL, ECCC and the IRMCT (with the exception of the ECCC and JCE III), and that the Defence "has not advanced any arguments that have not been previously considered and would warrant a review of the aforementioned cases".[72] This was manifestly insufficient, and amounts to a failure to give reasons, a failure to give weight to relevant considerations, and is undermined by a series of additional errors which require its reversal.

62. First, the Pre-Trial Judge appears to ground his singular reliance on prior international criminal cases in Article 3(3) of the KSC Law. The Pre-Trial Judge is correct that Article 3(3) of the KSC Law allows him to take this jurisprudence into consideration.[73] However, Article 3(3) rightly acknowledges that the jurisprudence of international and ad hoc tribunals exist as a *subsidiary* source, which *may* be taken

[72] Impugned Decision, para. 185. As regards JCE III, the Pre-Trial Judge found "no persuasive reasons to question the validity of the interpretation adopted and conclusions reached by all aforementioned international jurisdictions on the customary nature of JCE III" (para. 186).
[73] Impugned Decision, para. 181.

into account. It does not act as a gateway to the KSC simply adopting, wholesale, earlier determinations of custom in the absence of any independent scrutiny or reasoning, particularly in the face of detailed challenges from a party.

63. The International Law Commission's *Draft conclusions on identification of customary international law* provide that the requirement of general practice as a constituent element of custom, "refers primarily to the practice of States",[74] whereas decisions of international courts and tribunals "are a subsidiary means for the determination of such rules".[75] As such, the ICTY Appeals Chamber has started from the position that to hold that a principle was part of customary international law, a Chamber must be "satisfied that State practice recognized the principle on the basis of supporting *opinio juris*."[76] To this end, the ILC has identified an "overarching principle" in the determination of custom, which requires that the "assessment of any and all available evidence must be careful and contextual" and "must be carefully investigated in each case, in the light of the relevant circumstances" to promote credibility of the ultimate decision.[77]

[74] 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 ("ILC Draft Conclusions on CIL"), Conclusion 4.
[75] ILC Draft Conclusions on CIL, Conclusion 13.
[76] ICTY, *Prosecutor v. Milutinovic et al.*, IT-05-87-PT, Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006, para. 32. *See also, e.g.*, ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-AR72, Trial Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, 16 July 2003, para. 12; SCSL, *Prosecutor v. Norman*, SCSL-2004-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004 ("*Norman* Decision"), para. 17; ICTY, *Prosecutor v. Erdemović*, IT-96-22-A, Appeals Chamber, Judgment, Separate Opinion of Judges McDonald and Vohrah, 7 October 1997, para. 50.
[77] ILC Draft Conclusions on CIL, p. 127, citing to North Sea Continental Shelf, I.C.J. Reports 1969, p. 3, at p. 44, dissenting opinion of Judge Tanaka, at p. 175: "To decide whether these two factors in the formative process of a customary law exist or not, is a delicate and difficult matter. The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances".

64. Rather than a careful and contextual review of the parties' submissions on relevant state practice and *opinio juris*, the Pre-Trial Judge decided to look no further than the easily digestible decisions of international criminal courts and tribunals. This was an error. Nor can it be reconciled with the practice of the international courts on which he relies.[78] When seized with a similar challenge, the ECCC Supreme Court Chamber spent 37 paragraphs and 24 pages discussing the existence and scope of criminal liability based on a significant contribution to common purpose, before ultimately concluding that an extended form of JCE did not form part of customary international law at the relevant time.[79] The Supreme Court gave considered attention to: (i) the arguments put forward by the parties;[80] (ii) the approach taken in other courts and tribunals;[81] and (iii) the relevant post-WWII jurisprudence as possible sources of customary international law.[82]

65. This is standard practice for courts, whether regional or international, determining the applicability of JCE for the first time. In *Habré*,[83] the Extraordinary African Chambers ("EAC") conducted a review spanning 27 paragraphs and 9 pages, to determine that JCE formed part of customary international law and was sufficiently accessible and foreseeable to the accused.[84] The EAC analysed and engaged with a range of post-WWII jurisprudence from sources such as the IMT, Law No. 10 of the Allied Control Council, and the Bavaria Temporary Court Martial.[85] Beyond simply citing *Tadić*, the EAC analysed and noted deficiencies in the

[78] *See, e.g.*, ECCC, 002/19-09-2007-ECCC/OCIJ (PTC 138), Pre-Trial Chamber, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, paras. 53-89: in this Decision, the Pre-Trial Chamber took 26 paragraphs and 26 pages to determine whether JCE was part of customary international law.
[79] ECCC, *Prosecutor v. Khieu Sampan & Nuon Chea*, 002/19-09-2007-ECCC/SC, Supreme Court Chamber, Judgment, 23 November 2016 ("ECCC Supreme Court Judgment"), paras. 773-810.
[80] ECCC Supreme Court Judgment, paras. 775-776, 778, 790-793, 805-806, 810.
[81] ECCC Supreme Court Judgment, paras. 773-776, 778, 789, 791, 806.
[82] ECCC Supreme Court Judgment, paras. 776, 780-788, 791-804.
[83] EAC, *Le Procureur Général v. Hissein Habré*, Judgment, 27 April 2017 ("*Habré* Judgment").
[84] *Habré* Judgment, paras. 1865-1892.
[85] *See, e.g.*, *Habré* Judgment, paras. 1875-1884.

approaches of other courts in their review of the post-WWII jurisprudence.[86] Moreover, in addition to its own lengthy *Tadić* analysis, the ICTY continued to entertain challenges to various aspects of JCE throughout its history, with a far greater level of analysis than that offered by the Pre-Trial Judge in this case.[87]

66. The Pre-Trial Judge's finding that "the Defence has not advanced any arguments that have not been previously considered and that would warrant a novel review of the aforementioned cases",[88] is concerning. The Defence submitted that the ICC's acceptance of the rival theory of co-perpetration undermines any claim to custom.[89] It was also submitted that the inconsistent characterisation of JCE at the ICTR and ICTY was incompatible with the principle of legality.[90] The Pre-Trial Judge's unsubstantiated finding that these arguments have been "previously considered",[91] is incorrect. This error further undermines the Pre-Trial Judge's approach, and ultimate conclusion.

67. Finding that JCE can be "read into" an otherwise unambiguous and exhaustive statutory provision, is a significant judicial finding. Before reaching this conclusion, the Pre-Trial Judge was required to *engage* with the central concerns raised by the accused, and properly consider them. His deferral to the conclusions of other international courts, particularly when presiding over the chamber of a domestic court with a significantly different legal framework, was an abdication of his judicial functions, and an error. His JCE findings must accordingly be quashed.

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[86] *Habré* Judgment, paras. 1869-1874.
[87] ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, paras. 1670-1674; ICTY, *Prosecutor v. Karadžić,* MICT-13-55-A, Appeals Chamber, Judgment, 20 March 2019, paras. 425-437.
[88] Impugned Decision, para. 185.
[89] Defence Motion, para. 64; Defence JCE Reply, paras. 24-25.
[90] Defence Motion, para. 65.
[91] Impugned Decision, para. 185.

3. The Pre-Trial Judge erred in finding that the decision not to include JCE in the Rome Statute "has no bearing on the question of whether JCE is a mode of liability under customary international law"

68. The Presiding Judge of the *Tadić* Appeals Chamber, Judge Shahabuddeen, later reflected on the question of whether JCE enjoyed the status of customary international law, particularly given the existence of the "rival theory" of co-perpetration. He wrote that "two rival theories—joint criminal enterprise and co-perpetratorship—hold sway in major parts of the world, but not generally; neither is therefore entitled to be regarded as customary international law."[92]

69. The Pre-Trial Judge dismissed this analysis by finding that "the statements of (former) judges of international tribunals […] cannot overturn the settled jurisprudence of international tribunals".[93] The Defence did not argue that academic contributions overturn jurisprudence, but rather relied on Judge Shahabuddeen's framing of this important question; how a mode of liability can be considered as reflective of custom "beyond any doubt",[94] when a conflicting theory of co-perpetratorship holds sway in major parts of the world.

70. This question is made all the more relevant by the fact that, in 1998, States in Rome adopted **co-perpetration** as the mode through which an accused could be held individually criminally responsible for the crimes of others at the ICC. The Pre-Trial Judge was specifically asked to consider "why co-perpetration was included in the Rome Statute, and whether its inclusion undermines the SPO's position that JCE represents the practice of states?" His response was to adopt the blanket position that "the incorporation of co-perpetration in the ICC Statute has **no bearing** on the

[92] M. Shahabuddeen, 'Judicial Creativity and Joint Criminal Enterprise' in S. Darcy and J. Powderly (eds), *Judicial creativity at the international criminal tribunals* (OUP 2010), p. 188.
[93] Impugned Decision, para. 188.
[94] Defence Motion, para. 66, fn. 88, citing UNSC, UN Doc S/25704, Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, para. 34.

question whether JCE is a mode of liability under customary international law." Specifically, the Pre-Trial Judge held that in drafting the Rome Statute:[95]

> State parties did not seek to codify customary international law in respect of, *inter alia*, modes of liability; instead, they decided which among those should be placed within the jurisdiction of the ICC.

71. This conclusion is undermined by three errors. First, while the Pre-Trial Judge dismisses the idea that States were aiming to codify custom, he offers no alternative as to the basis on which States were "deciding" which modes of liability should be included. This reasoning amounts to nothing more than saying "co-perpetration was included in the Rome Statute because it was decided it should be included", which is manifestly insufficient.

72. For support, the Pre-Trial Judge then seeks to rely on Article 21 of the ICC Statute as apparently reflecting the fact that States were not seeking to codify customary international law with respect to modes of liability. This reliance is similarly misplaced. Article 21 of the ICC Statute indeed "provides that the primary source of applicable law is the Statute, the Elements of Crimes and the Rules of Procedure and Evidence" while "principles or rules of international law constitute a secondary source applicable only when the statutory material fails to prescribe a legal solution."[96] This is not in dispute. What is relevant, is that the ICC Statute, being the primary source of applicable law, was drafted to include co-perpetration in Article 25(3)(d), and not JCE. This is not a question of the ICC Statute "not prescribing a legal solution"; the ICC Statute is clear. As such, JCE remains a concept of imputation without an explicit basis in codified international criminal law.

73. Second, those present at Rome and who have studied its preparatory debates are united in the view that the purpose was not to simply "decide" what should be

[95] Impugned Decision, para. 187.
[96] Impugned Decision, para. 187.

placed in the ICC Statute. Rather, the reports of the preparatory committee note the view of delegates that "the statute should codify customary international law and not extend to the progressive development of international law",[97] supporting the view that the goal of the Rome Conference was to achieve the broadest possible acceptance of the ICC by adopting provisions recognised under customary international law.[98]

74. Having consulted with the delegates, *Sadat* and *Carden* concluded that indeed the drafters were "generally quite conservative in crafting the definitions of crimes, and for the most part adhered to existing treaties, or in the absence of treaties, fairly well-established principles of customary international law",[99] and that "much of the

[97] UNGA, A/AC.249/1, Preparatory Committee on the Establishment of an International Criminal Court, Summary of the Proceedings of the Preparatory Committee During the Period 25 March-12 April 1996, 7 May 1996, p. 10, para. 14.

[98] G. Werle, *Principles of International Criminal Law* (TMC Asser, 2005) ("Werle"), p. 402, n. 108. *See also* Fausto Pocar, 'Returning to Customary Law, in The International Criminal Court: Contemporary Challenges and Reform Proposals', in R. Steinberg (ed), *The International Criminal Court: Contemporary Challenges and Reform Proposals* (Brill, 2020), p. 300; Lisa LaPlante, "The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence" (2010) 43(3) *John Marshall Law Review*, at 650: "the Rome Statute elucidates customary international law that is binding on all states; ultimately states acting pursuant to these universal standards will contribute to the development of international criminal law regardless of whether they are members of the ICC or have cases that fall within its jurisdiction."

[99] Sadat, Leila N. and Carden, S. Richard, 'The New International Criminal Court: An Uneasy Revolution' (2000) 88(381) *Georgetown Law Journal*, p. 389-390. See also fn. 35: "It is possible to view the government representatives in Rome merely as scribes writing down already existing customary international law, rather than as legislators prescribing laws for the international community or as framers of a new international organization. Indeed, this is partly true, and any revolution is evolutionary in a sense-not breaking completely with the past, even if seeming to, but building upon pre-existing ideas. But it is disingenuous to suggest that the Rome process was in no way legislative, given that most of the crimes were very poorly defined in customary international law. That is, there was general agreement on the concept, but not the precise content, of each offense. Descriptions of international conferences at the turn of the Century emphasized how they differed from Parliamentary assemblies. […] The delegates to the Conference with whom we have consulted do not believe that they were innovating at Rome but that they were simply being unusually vigorous and successful in doing something very familiar."

substantive criminal law in the Statute was essentially a codification of the customary international law outside the Statute."[100] *Kreβ* agrees that:[101]

> […] it was the understanding shared by those formulating the crimes in the ICC Statute to only codify or at best crystallize international criminal law *stricto sensu*, ie crimes under general international law instead of creating new crimes under international conventional law.

75. Against this backdrop, *Gaeta* has noted that all the other parts of the ICC Statute, **including the provisions on modes of liability**, were "aimed at codifying existing rules of customary international law or, at least, at spelling out the principles of *lex lata* without, however, excluding the possibility of laying down laws that departed from established rules or practice.[102] As such, the Pre-Trial Judge's position that the incorporation of co-perpetration in the ICC Statute has **no bearing** on the question whether JCE is a mode of liability under customary international law, cannot be reconciled with the exercise the delegates themselves claimed to be undertaking.

76. In making this disconnect between the ICC Statute and customary international law, the Pre-Trial Judge also departs from the understanding of the Judges in international courts and tribunals,[103] who referenced the ICC Statute as reflective of both state practice and *opinio juris*. As early as the *Furundzjia* Judgment in July 1998, an ICTY Trial Chamber found that: "the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great

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[100] Leila N. Sadat, 'Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute,' (2000) 49 *DePaul Law Review* 909, at 918.
[101] Claus Kreβ, 'International Criminal Law', in *Max Planck Encyclopedia of Public International Law* (OUP, 2009), p. 3,6.
[102] Paola Gaeta, 'The Defence of Superior Orders: The Statute of International Criminal Court versus Customary International Law', (1999) 10.1 *European Journal of International Law*, p. 174, fn. 3.
[103] *See, e.g.*, ICTR, *Prosecutor v Rwamakuba,* ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007, para. 27; *Rwamakuba v Prosecutor*, ICTR-98-44C-A, Decision on Appeal Against Decision on Appropriate Remedy, 13 September 2007, para. 6; STL, *Prosecutor v. Ayyash et al.*, STL-II-O1111AC/R176bis, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, paras. 85-87, 91-109.

number of States",[104] with SCSL Judges also referring to deliberations at Rome and the Rome Conference proposals as "state practice".[105] Even the Appeals Chamber in *Tadić*, while being mistaken in its understanding of the application of Article 25(3)(d), was clear that "[t]he Statute was adopted by an overwhelming majority of the States attending the Rome Conference and was substantially endorsed by the Sixth Committee of the UN General Assembly. This shows that that text is supported by a great number of States and may be taken to express the legal position, i.e. *opinio juris* of those States".[106]

77. Against this backdrop, the Pre-Trial Judge's insistence that the clearest modern authoritative expression of the legal views of a great number of States is "irrelevant" to the question of JCE's claim to custom, was not a conclusion that could be reached by a reasonable Panel.

78. Third, the Pre-Trial Judge's conclusion is further undermined by his failure to consider the Defence's arguments in support. The Pre-Trial Judge failed entirely to consider the submissions that in addition to having been adopted by states in Rome:

- co-perpetration "has been applied in various national proceedings (Eichmann, Argentinean Generals, East German border killings) and may be identified in the Nuremberg *Justice* case," as well as in the *RuSHA* Judgment;[107] and
- whether a rule forms part of customary law should be "beyond any doubt" in order to avoid the problem of adherence, and the fact that many states prefer

[104] *Furundžija* Judgment, para 227. *See also*, ICTY, *Prosecutor v. Krnojelac*, ICTY-97-25-A, Appeals Chamber Judgment, 17 September 2003, para. 221.
[105] *Norman* Decision, para. 17.
[106] ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999 ("*Tadić* Appeal Judgment), para. 223.
[107] Defence Motion, para. 64, citing "K. Ambos, 'Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to Those "Most Responsible'," in H. van der Wilt and A. Nollkaemper (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009) at 143 (internal footnotes omitted)"; and "R. Clark, 'Together Again? Customary Law and Control over the Crime' 26 Criminal Law Forum (2015) 457, at 466".

a construct akin to "co-perpetration," makes it impossible that JCE is firmly entrenched in custom, or that it was in 1998-1999.[108]

79. While the right of an accused to a reasoned opinion does not necessarily translate into a Panel being required to give a detailed answer to every submission, it cannot be that numerous reasoned submissions are simply ignored. The Court of Appeals Chamber has previously recognised that, "[i]n the conduct of its assessment, a Panel has a duty to provide sufficient reasoning,"[109] emphasising the importance of thoroughly reasoned decisions.[110] While the extent of the reasoning required depends on the circumstances of the case, the Court of Appeals Chamber has also determined that "it is nevertheless essential that the lower level panel indicates with sufficient clarity the basis of the decision."[111]

80. Central arguments as regards the existence of this "rival theory" of co-perpetration were never addressed. This either amounts to a failure to give weight to relevant considerations, or amounts to a manifest failure of the Pre-Trial Judge to give reasons, or indicate with sufficient clarity the basis for his decision. The errors set out above in his approach to the Defence submissions, further undermine the Pre-Trial Judge's conclusions on JCE, which must be reversed.

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[108] Defence Motion, para. 66, citing "UNSC, UN Doc S/25704, Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, para. 34".
[109] *See,* Appeal Decision on Interim Release, para. 27.
[110] Appeal Decision on Interim Release, para. 27, fn. 62, citing: "See ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-773, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006 ("Lubanga Appeal Decision"), para. 20; ICC, *Prosecutor v. Bemba et al*., ICC-01/05-01/13-2275, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018 ("Bemba et al. Decision dated 8 March 2018"), paras 102-108; Gbagbo Appeal Decision, paras 46-50; ICC, Prosecutor v. Bemba, ICC-01/05-01/08-323, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release", 16 December 2008 ("Bemba Decision dated 16 December 2008"), paras 53, 66, 67."
[111] Appeal Decision on Interim Release, para. 27.

4. The finding that JCE was foreseeable and accessible to the accused is so unfair and unreasonable as to constitute an abuse of discretion

81. The *Tadić* Appeal Judgment was rendered in July 1999. Despite the existence of the *Furundžija* Judgment, which also referenced JCE in several paragraphs,[112] the ICTY Appeals Chamber's analysis spans 31 paragraphs before any conclusion is reached as to JCE's status in customary international law at the time of the crimes alleged in that case. This was not a straightforward or obvious question, demonstrated by resort to post-World War II caselaw and fundamental principles of individual criminal culpability.

82. In this case, the Pre-Trial Judge found that, up to 18 months before the ICTY Appeals Chamber reached its decision, the accused in this case - alleged to have been engaged in an active armed conflict at the time – were in a position to reach the same conclusion themselves. Specifically, given their "high-ranking positions within the KLA, and taking into consideration, inter alia, the post-World War II general legal framework and the ongoing ICTY prosecutions at the time", the Pre-Trial Judge held that it was foreseeable to the accused that they could be held liable on the basis of the actions of other participants in a common plan to which they had agreed.[113]

83. This conclusion is incompatible with the reality of conflict, and presumes unrealistic and unsubstantiated levels of contemporaneous knowledge of ICTY proceedings on the part of the accused. It is also undermined by a recent decision of the Serbian Constitutional Court[114] that JCE is not recognised under Serbian law, and

[112] Impugned Decision, para. 194, citing *Furundžija* Judgment, paras. 216, 249, 250-257.
[113] Impugned Decision, para. 194.
[114] Constitutional Court of Serbia, Judgment no. Uz-11470/2017, 10 January 2020, published in the Official Gazette of RS, no. 127/2020: see KSC-BC-2020-06/F00310/A02, Annex 2 to Veseli Defence Reply to the Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE), 17 May 2021, p. 14.

nor was it recognised by the SFRY Criminal Code.[115] It is accordingly so unfair and unreasonable as to constitute an abuse of discretion.

84. In support, the Pre-Trial Judge also relies on Articles 22 and 26 of the SFRY Criminal Code, finding that they mirror the elements of JCE. The Defence JCE Reply addressed these specific provisions, and made submissions as to why they did not. Namely, the Defence submitted that Article 26 of the SFRY Criminal Code is a specific provision directed at "the **organizers** of criminal associations",[116] which criminalises the actions of organizers who are "creating or making use of an organization".[117] Unlike JCE, Article 26 of the SFRY Criminal Code does not attribute criminal liability to all members of a group on the basis of a shared common plan. The Defence argued that any suggestion that Article 26 specifically contemplates criminal liability for accused in which there are multiple persons in a group, skips over the central limitation of the Article, being its object.[118] Submissions were also made on the irrelevance of Article 22 of the SFRY Criminal Code to the same question.[119]

85. None of these submissions were taken into account. The Defence JCE Reply is not even referenced. This amounts to a failure to give weight to relevant considerations, or to give reasons.

[115] Criminal Code of the Socialist Federal Republic of Yugoslavia (1976) ("SFRY Criminal Code").
[116] Article 26 is titled 'Criminal responsibility and punishability of the **organizers** of criminal associations'.
[117] Article 26 provides that: 'Anybody creating or making use of an organization, gang, cabal, group or any other association for the purpose of committing criminal acts is criminally responsible for all criminal acts resulting from the criminal design of these associations and shall be punished as if he himself has committed them, irrespective of whether and in what manner he himself directly participated in the commission of any of those acts.'
[118] Defence JCE Reply, para. 26.
[119] Defence JCE Reply, paras. 27-28.

86. The Pre-Trial Judge decided to address the arguments of the four accused on JCE together in one consolidated decision. This decision cannot operate to the detriment of Mr Thaçi,[120] or mean that his detailed submissions on the very issues in question are just ignored. JCE as a mode of liability was not foreseeable or accessible to the accused at the time of the alleged crimes. The Pre-Trial Judge's flawed reasoning in concluding otherwise warrants the reversal of this finding.

V. RELIEF SOUGHT

87. In light of the foregoing, the Defence requests that the Court of Appeals Panel:

REVERSE the Impugned Decision; and

DECLARE that the KSC do not have jurisdiction over the crimes as charged in the Indictment, which should accordingly be dismissed.

Word count: 11,402 words

Respectfully submitted,

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Friday, 27 August 2021

At Tampa, United States

[120] ICTY, *Prosecutor v. Kupreškić et al*., IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, para. 339: "The principle that the case against each accused must be considered separately. The fact that the accused have been tried together does not mean that their cases should not receive separate consideration."; ICTR, *Prosecutor v. Ntahobali*, ICTR-97-21-T, Trial Chamber, Decision on Ntahobali's Motion for Separate Trial, 2 February 2005, para. 39.