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:	Defence Counsel for Jakup Krasniqi
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Krasniqi Defence Appeal

Against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers

with public Annex 1

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I. INTRODUCTION

1. Pursuant to Article 45(2) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 170(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), the Defence for Jakup Krasniqi ("Defence") submit this appeal against the Decision on Motions Challenging the Jurisdiction of the Specialist Chambers ("Decision").[1]

2. Since the Decision relates to a preliminary motion challenging jurisdiction, Mr. Krasniqi may appeal as of right pursuant to Article 45(2) of the Law.

3. The Decision determined that: there was a clear and sufficient basis to conclude that the third form of joint criminal enterprise ("JCE III") was part of customary international law ("CIL") at the time the offences were committed;[2] joint criminal enterprise ("JCE") was foreseeable to the Accused;[3] the omission to mention JCE in Article 16(1)(a) of the Law did not mean that JCE was excluded as a mode of responsibility;[4] and the charges in the Indictment are sufficiently connected to the contents of the Council of Europe Report ("Report")[5] that they "relate to" it for the purposes of Article 6(1) of the Law.[6]

4. The Defence submit the following grounds of appeal:-

[1] KSC-BC-2020-06, F00412, Pre-Trial Judge, *Decision on Motions Challenging the Jurisdiction of the Specialist Chambers*, 22 July 2021, public.
[2] *Ibid*., paras 186-190.
[3] *Ibid*., paras 193-201.
[4] *Ibid*., para. 177.
[5] Council of Europe, Parliamentary Assembly, 'Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo', Doc. 12462, 7 January 2011.
[6] Decision, paras 139, 141.

1) The Impugned Decision erred in law in finding that JCE III was part of CIL at the time the offences were committed;

2) The Impugned Decision erred in law and fact in finding that JCE liability was foreseeable and accessible to Mr. Krasniqi;

3) The Impugned Decision erred in law in finding that JCE, alternatively JCE III, falls within the meaning of "committed" in Article 16(1)(a) of the Law;

4) The Impugned Decision erred in law in finding that the charges must only be sufficiently connected to the Report;

5) The Impugned Decision erred in law and fact in finding that the crimes alleged in the Indictment are related to the Report.

5. These errors invalidate the Decision. The Defence request the Court of Appeals Chamber ("Appeals Chamber") to correct these errors and to find that: the Kosovo Specialist Chambers ("KSC") does not have jurisdiction over JCE, alternatively does not have jurisdiction over JCE III; and that the KSC does not have jurisdiction over crimes committed prior to April 1999 in Kosovo because they do not relate to the Report.

II. PROCEDURAL HISTORY

6. On 26 October 2020, the Pre-Trial Judge confirmed the revised indictment.[7] The Indictment pleads JCE as the primary mode of criminal responsibility, relying on both

[7] 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*, 19 November 2020, confidential.

JCE I and JCE III against Mr. Krasniqi.[8] The Indictment alleges that between at least March 1998 and September 1999, Mr. Krasniqi was a member of a JCE to gain and exercise control over Kosovo by criminal means.[9] It alleges that crimes were committed at various locations in Kosovo and Albania pursuant to the supposed JCE.

7. On 15 March 2021, the Defence filed their Preliminary Motion on Jurisdiction which contended that the KSC does not have jurisdiction over JCE, alternatively does not have jurisdiction over JCE III, and that the KSC does not have jurisdiction over certain Indictment crimes because they do not relate to the Report.[10]

8. On 23 April 2021, the Specialist Prosecutor's Office ("SPO") responded separately to the challenges to jurisdiction based on JCE[11] and the Report.[12]

9. On 14 May 2021, the Defence replied to those Responses.[13]

10. On 22 July 2021, the Pre-Trial Judge rendered the Decision.

III. APPLICABLE LAW

[8] KSC-BC-2020-06, F00045/A03, Specialist Prosecutor, *Further Redacted Indictment*, 4 November 2020, public, paras 32-52, 172.
[9] *Ibid*., para. 32.
[10] KSC-BC-2020-06, F00220, Krasniqi Defence, *Krasniqi Defence Preliminary Motion on Jurisdiction* ("Defence Preliminary Motion"), 15 March 2021, public, with Annex 1, public.
[11] KSC-BC-2020-06, F00263, Specialist Prosecutor, *Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE)* ("JCE Response"), 23 April 2021, public.
[12] KSC-BC-2020-06, F00259, Specialist Prosecutor, *Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigation Deadline, and Temporal Mandate* ("Report Response"), 23 April 2021, public.
[13] KSC-BC-2020-06, F00299, Krasniqi Defence, *Krasniqi Defence Reply to Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigation Deadline, and Temporal Mandate*, 14 May 2021, public; F00302, Krasniqi Defence, *Krasniqi Defence Reply to Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE)* ("Defence Reply JCE"), 14 May 2021, public.

11. Appeals may challenge errors of law and errors of fact.[14] In the Gucati Appeal Decision, the Appeals Chamber elaborated the standards of review applicable in an interlocutory appeal. In relation to errors of law, a party "must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision".[15] Regarding errors of fact, the Court will "only find the existence of an error of fact when no reasonable trier of fact could have made the impugned finding" and the factual error must have "caused a miscarriage of justice" by affecting the outcome of the decision.[16]

IV. GROUND 1

The Impugned Decision erred in law in finding that JCE III was part of CIL at the time the offences were committed

12. As demonstrated below, there is nothing in the small number of relevant post-World War II cases, or any other authority, that establishes that a mode of responsibility akin to JCE III was part of CIL at the material time.

13. The Decision failed to scrutinise the post-World War II jurisprudence. In place of its own analysis, it simply held that the Defence had failed to present persuasive reasons warranting a different conclusion from that reached by the *ad hoc* tribunals[17] and that the precedents listed by those tribunals "provide a clear and sufficient basis to conclude that JCE III was part of customary international law at the time".[18] There is no precedent for the application of JCE III at this Court. The KSC should not simply

[14] Article 46(1) of the Law, which applies *mutatis mutandis* to interlocutory appeals; KSC-BC-2020-07, IA001/F00005, Court of Appeals Chamber, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention* ("Gucati Appeal Decision"), 9 December 2020, public, para. 10.
[15] Gucati Appeal Decision, para. 12. In the same paragraph, the Appeals Chamber continued "[…] *even if the party's arguments are insufficient to support the contention of an error, the Panel may find for other reasons that there is an error of law*".
[16] Gucati Appeal Decision, para. 13.
[17] Decision, para. 181.
[18] *Ibid*., para. 186.

follow other tribunals but must itself assess whether the post-World War II cases provide sufficient foundation to conclude that JCE III was part of CIL at the material time. That issue is decisive; if it is not established that JCE III was part of CIL in March 1998, then pursuant to the principle of legality it is impossible to rely on policy or other considerations to justify reliance on JCE III in this case.[19]

14. The Decision's analysis was fatally flawed in two respects. First, it reversed the burden of proof by requiring the Defence to rebut the *ad hoc* tribunals' jurisprudence. Relying on Article 3(3) of the Law, the Decision held that it would only consider the Defence challenges to the customary status of JCE III "to the extent of ascertaining whether the Defence has presented persuasive reasons warranting different legal findings".[20] That approach is wrong. The burden is not on the Defence to establish that JCE III was not part of CIL. Rather, it is the SPO who seeks to rely on JCE III. It follows from the presumption of innocence, that the burden is on the SPO to establish that JCE III was part of CIL.

15. Article 3(3) provides no justification for reversing the burden of proof. It stipulates that the Judges of the KSC "may be assisted" by jurisprudence from the international *ad hoc* tribunals, the International Criminal Court ("ICC") and other criminal courts. Jurisprudence of the *ad hoc* tribunals is thus only a subsidiary source which may be considered. It does not bind the KSC.[21] It carries no greater weight than the jurisprudence of the ICC or other criminal courts. The Decision was therefore required to assess for itself whether JCE III was part of CIL rather than requiring the Defence to rebut the *ad hoc* tribunals' jurisprudence.

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[19] *See*, e.g., Jørgensen, N.H.B., "On Being 'Concerned' in a Crime: Embryonic Joint Criminal Enterprise?" ("On Being Concerned in a Crime"), in Linton, S. (ed), *Hong Kong's War Crimes Trials*, Oxford University Press 2013, p. 166.
[20] Decision, para. 181.
[21] KSC-BC-2020-06, IA001/F00005, Court of Appeals Chamber, *Decision on Kadri Veseli's Appeal Against Decision on Interim Release*, 30 April 2021, public, para. 51.

16. Second, the Decision failed to give reasons for its conclusion. The reasoning provided must be sufficient so that the parties can comprehend how the Decision reached its conclusions in order to exercise their right to appeal.[22] The decisive finding that "the precedents listed by these jurisdictions [referring to the *ad hoc* tribunals] provide a clear and sufficient basis to conclude that JCE III was part of customary international law"[23] is devoid of reasoning. It completely fails to analyse any of the post-World War II cases cited by any of the parties. It fails to consider and give reasons for rejecting[24] any of the relevant Defence submissions explaining why all of the precedents listed by the *ad hoc* tribunals are inadequate.[25]

17. Whilst the Defence do not know the basis on which the Decision found that the precedents relied on by other tribunals provide a clear and sufficient basis to conclude that JCE III was part of CIL,[26] the analysis below shows that this conclusion is wrong. First, neither the cases listed by the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the Special Tribunal for Lebanon ("STL"), nor the cases cited in the JCE Response, nor the statutes of the post-World War II tribunals support the existence of JCE III. Second, even if *arguendo* there are one or two cases which could be consistent with JCE III, that would still be wholly insufficient to prove the existence of a rule of CIL.

A. THE WORLD WAR II CASES AND MATERIALS DO NOT SUPPORT JCE III

1. CASES RELIED UPON BY THE ICTY

[22] KSC-BC-2020-06, IA002/F00005, Court of Appeals Chamber, *Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release*, 30 April 2021, confidential, para. 31.
[23] Decision, para. 186.
[24] ECtHR, *Fomin v. Moldova*, no. 36755/06, *Judgment (Merits and Just Satisfaction)*, 11 January 2012, para. 31.
[25] Defence Preliminary Motion, paras 28-38; Defence Reply JCE, paras 15-41.
[26] Decision, para. 186.

18. In *Tadić*, the ICTY relied on the *Essen Lynching* case, the *Borkum Island* case and certain *Italian* national cases.[27] Had the Decision analysed those cases, it would have been clear that they do not support JCE III.

Essen Lynching

19. In the *Essen Lynching* case, prisoners of war were being escorted for interrogation. A captain instructed the private soldier who was escorting them not to intervene if civilians should molest the prisoners. Along the way, the prisoners were beaten and killed by a crowd of civilians. The British Military Court convicted three civilians, the captain and the soldier escort on the charge of being "concerned in the killing"; two other civilians were acquitted.[28]

20. It cannot safely be concluded that these convictions support the existence of JCE III because the limited available records are open to various interpretations.[29] First, the records do not expressly confirm which modes of responsibility were applied. There is no record of the Court's reasoning. There was no Judge Advocate appointed. No summing up was delivered in open court. The Notes on the Case rightly acknowledge that the considerations relied upon by the Court "cannot, therefore, be quoted from the transcript in so many words".[30] As such, submissions about modes of responsibility are purely speculative.

21. Second, it cannot safely be inferred that any conviction was entered on the basis that the commission of a crime outside the common purpose was foreseeable to the

[27] ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, *Judgment* ("*Tadić* Appeal Judgment"), 15 July 1999, paras 207-219.
[28] British Military Court for the Trial of War Criminals, *Erich Heyer et al.*, Case No. 8, *Trial of Erich Heyer and Six Others* ("*Essen Lynching* Case"), 18-19 and 21-22 December 1945, UNWCC, Law Reports of Trials of War Criminals, Vol. I at 88-92.
[29] *See* Jørgensen, N.H.B., *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* ("Elgar Companion to the ECCC"), Edward Elgar Publishing Limited 2018, p. 299.
[30] *Essen Lynching* Case, p. 91.

accused; the convictions could equally be explained by JCE I. To the extent that it is discernible from the records, the Prosecution case theory was that the crimes were within the common purpose. The Prosecutor submitted that "every person who, following the incitement to the crowd to murder these men, voluntarily took aggressive action against any one of these three airmen, was guilty in that he was concerned in the killing".[31] Thus the Prosecution theory was not that the killing was a foreseeable crime outside the common purpose, but that murder was the plan from the outset, beginning with the 'incitement […] to murder'.

22. Third, the Prosecution submission that intent to kill was not necessary for a conviction for murder does not establish that JCE III was relied upon.[32] The Prosecution submitted "[i]f you prove an intent to kill you would prove murder; but you can have an unlawful killing, which would be manslaughter, where there is not an intent to kill but merely the doing of an unlawful act of violence".[33] Thus, for any conviction for murder under any mode of responsibility, the Prosecution submitted that intent was required. That must mean that the Prosecution accepted that foreseeability did not suffice for the crime of murder and hence JCE III was not applied. However, expressly relying on "British law",[34] the Prosecution submission (which may or may not have been accepted by the Court) was that intent to kill was not required for the separate offence of manslaughter. Far from evidencing a generally applicable mode of responsibility in CIL, that submission simply reflects the elements of unlawful act manslaughter in the national law of England and Wales.[35] Accordingly, the *Essen Lynching* case provides no support for JCE III.

[31] *Essen Lynching* Case, p. 89.
[32] *Contra* JCE Response, para. 85.
[33] Prosecution Submission reproduced in *Tadić* Appeal Judgment, para. 208.
[34] *Tadić* Appeal Judgment, para. 208.
[35] Namely commission of an unlawful act, which was objectively dangerous and which caused the death of the victim: United Kingdom, *DPP v. Newbury and Jones*, [1977] AC 500, House of Lords, *Judgment*, 12 May 1976.

Borkum Island

23. In the *Borkum Island* case, which was only 1 of around 200 cases considered by the US Army Court, whilst prisoners of war were escorted by soldiers on a pre-planned route through a densely populated area, civilians were encouraged to beat them and they were ultimately shot and killed. The charges were of "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing]", first, in the killing and, second, in assaults.[36] Some of the accused were convicted of both assault and killing, others solely of assault and one was acquitted altogether.

24. Once again, the legal basis for the findings is unclear. Reliance on the Judge Advocate's review materials does not prove what modes of liability were actually applied by the tribunal.[37] Nothing in the surviving records states that any convictions were entered on the basis of foreseeability of crimes falling outside a common plan.

25. Moreover, it cannot safely be inferred that convictions were entered pursuant to a foreseeability standard, rather than on the basis of JCE I. The record of the case is equally consistent with the killings being within the common plan (for those accused convicted of killing).[38] Thus, the Prosecution's opening statement that "where a common design of a mob exists and the mob has carried out its purpose, then no distinction can be drawn between the finger man and the trigger man"[39] is wholly consistent with a common plan to kill in which the accused participated in different ways. That is confirmed by the submission that the mob "carried out its purpose". The subsequent statement in the Report of the Deputy Judge Advocate for War Crimes of the European Command that "[r]esponsibility was attached to those who incited mob

[36] United States Army War Crimes Trials, *United States v. Kurt Goebell et al*., Case No. 12-489, *Review and Recommendations* ("*Borkum Island* Case"), 1 August 1947, Section II, p. 1.
[37] *See* ECCC, *Co-Prosecutors v. Nuon Chea et al*., 002/19-09-2007-ECCC/SC, Supreme Court Chamber, *Appeal Judgment* ("ECCC SC Judgment"), 23 November 2016, para. 791.
[38] *See* Elgar Companion to the ECCC, p. 307 describing this as the "best reading".
[39] *Tadić* Appeal Judgment, para. 210.

action by shouts and other forms of encouragement as well as to those who did the actual beating and killing"[40] is also entirely consistent with a common plan to kill and inconsistent with any crimes falling outside the common plan or foreseeability. In any event, that report, which does not even identify this case by name,[41] is simply one person's subsequent review and carries no more authority than any subsequent commentary.

26. The SPO argued wrongly that Krolikovski must have been convicted on the basis of JCE III.[42] No record survives of what evidence or mode of responsibility the tribunal actually relied on against him. It cannot safely be inferred that a foreseeability standard was applied. The Judge Advocate's Review concluded that "his acts were compatible with the plan and in the furtherance thereof".[43] That suggests JCE I whereas the absence of any discussion of foreseeability excludes JCE III. Moreover, there was material from which intent could have been inferred. Krolikovski "saw the guards hitting the fliers and did nothing to prevent it"; he ordered a Lieutenant to follow them "but gave him no orders concerning any steps to be taken to protect the fliers";[44] he later ordered that "the soldiers were not to write or talk about the killing".[45] His intent and contribution to the common plan could have been inferred from his knowledge, his failure as a commanding officer to protect and the steps he took subsequently to cover up the killing. That Krolikovski took no active part in the beating / shooting does not exclude JCE I or intent.

27. Yet further, the fact that acquittals were entered in relation to certain accused appears to be inconsistent with JCE III. If a standard based on foreseeability was

[40] European Command, 'Report of the Deputy Judge Advocate for War Crimes', June 1944 to July 1948, p. 66.
[41] *Ibid*, pp. 65-66.
[42] JCE Response, para. 69.
[43] *Borkum Island* Case, p. 20.
[44] *Ibid*., p. 18.
[45] *Ibid*., p. 19.

applied to the killings, there is no obvious reason why any accused would have been acquitted. In the circumstances pertaining at the time, the killings would have been foreseeable to all accused.

28. Finally, the reference in the Judge Advocate's Review to *Rüsselsheim*[46] adds nothing because *Rüsselsheim* itself does not rely on JCE III.[47]

Italian National Cases

29. The primary problem with reliance on the *Italian* cases is that they are not evidence of CIL at all. They were domestic cases applying *Italian* national law. Even taken at their highest, they are not capable of establishing that JCE III was part of CIL.[48] Insofar as they relate to CIL, they only evidence the domestic practice of one State.[49] Plainly the practice of one State is insufficient to establish the existence of a rule of CIL.

30. In any event, none of the *Italian* cases support a mode of responsibility which resembles JCE III. The SPO placed particular reliance[50] on *D'Ottavio et al*.[51] In that case, armed civilians shot at an escaped prisoner of war without intending to kill him, but he subsequently died from his wounds. They were convicted of manslaughter. The critical paragraph of the judgment reads:

> [W]here the crime committed is other than the one willed by one of the participants, also that participant is accountable for the crime if the criminal result is a consequence of his action or omission […] the participant's responsibility envisaged in Article 116 is grounded not in the

[46] *Borkum Island* Case, pp. 9-10.
[47] *See* paras 40-42 below.
[48] *See* Decision, para. 188, finding that a case from England and Wales has "no bearing" on the determination of CIL.
[49] *See* ECCC, *Co-Prosecutors v. Ieng Sary et al*., 002/19-09-2007-ECCC/OCIJ (PTC38), Pre-Trial Chamber, *Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)* ("ECCC PTC Decision"), 20 May 2010, para. 82.
[50] JCE Response, paras 87-91.
[51] Italian Court of Cassation, *D'Ottavio et al.*, No. 270, Criminal Section I, *Judgment* ("*D'Ottavio*"), 12 March 1947, published in *Journal of International Criminal Justice* 5 (2007), pp. 232-234.

> notion of collective responsibility (provided for in Article 42(3) of the Italian Criminal Code) but in the fundamental principle of concurrence of interdependent causes […].[52]

31. This passage demonstrates that convictions were not entered for a mode of responsibility based on foreseeability but due to the application of national laws on causation. Specifically, Article 116 of the *Italian* Criminal Code provided that "whenever the crime committed is different from that willed by one of the participants, also that participant answers for the crime, if the fact is a consequence of his action or omission".[53] That states a rule of causation not of *mens rea*. Whilst the word 'foreseeability' is mentioned in the judgment, it is only mentioned in relation to "psychological causation", an aspect of causation which appears after the primary discussion of the "nexus of objective causation".[54] Clearly, these convictions were not entered on the basis that the accused foresaw the killing but on the basis that, applying *Italian* national law, the killing was a consequence of their actions. Accordingly, the case offers no support to JCE III.

32. None of the remaining *Italian* cases cited in *Tadić* offer any support to JCE III. Indeed, it is telling that in its JCE Response, the SPO did not even attempt to justify the existence of JCE III on the basis of these cases. The Defence submit that:-

1) In *Aratano et al.*,[55] the Court of Cassation overturned the conviction of militiamen for the offence of killing in circumstances where they had intended to arrest but not kill certain partisans. The overturning of these convictions on the basis that the killing fell outside the common purpose –

[52] *D'Ottavio*, p. 233.
[53] *Ibid*.
[54] *Ibid*., p. 234.
[55] Italian Court of Cassation, *Aratano et al.*, No. 102, Criminal Section II, *Judgment*, 21 February 1949, published in *Journal of International Criminal Justice* 5 (2007), pp. 241-242.

without considering whether foreseeability provided sufficient basis for conviction – is inconsistent with the existence of JCE III;[56]

2) Cases concerning the application of the *Italian* amnesty law of 22 June 1946 provide no support for the existence of JCE III because, first, the cases do not clearly spell out *mens rea* requirements (as the *Tadić* Appeal Judgment conceded)[57] and, second, because they are inconsistent;[58]

3) Whilst the *Tadić* Appeal Judgment also considered other *Italian* national cases from the same time period in order to consider the *mens rea* standards,[59] these cases have no connection to international crimes and hence are irrelevant.

2. CASES RELIED ON BY THE STL

33. The STL found that the *RuSHA* and *Dachau Concentration Camp* cases support JCE III and that responsibility for additional foreseeable crimes was also considered in *Ulrich & Merkle*, *Wuelfert et al.* and *Tashiro Toranosuke et al.*.[60] None of these cases supports JCE III (as the SPO accepted as it did not rely on them in relation to JCE III in its JCE Response).

RuSHA

[56] *See* ECCC SC Judgment, para. 796.
[57] *Tadić* Appeal Judgment, para. 218.
[58] *See* ECCC SC Judgment, para. 797.
[59] *Tadić* Appeal Judgment, paras 218-219.
[60] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I, Appeals Chamber, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, 16 February 2011, fn. 355.

34. The *RuSHA* case[61] does not support JCE III. The case involved accused connected with four organisations (Staff Main Office, VoMi, RuSHA and Lebensborn) said to be concerned in evacuating and resettling conquered territory, 'Germanization' of the population and using other parts of the population as slave labour. The Indictment alleged that the accused were "principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups connected with atrocities and offenses".[62] Since the judgment contains no detailed discussion of modes of responsibility, it is impossible to ascertain which of these various modes of responsibility was actually relied upon.

35. Nevertheless, there is nothing in the judgment which suggests that a mode of responsibility based on foreseeability of crimes outside the common plan was contemplated. Notably, officers connected with Lebensborn were acquitted on counts concerning war crimes and crimes against humanity on the basis that Lebensborn "did everything in its power to adequately provide for the children".[63] If a mode of responsibility akin to JCE III had been applied, those acquittals could not have been entered without expressly considering whether those crimes were foreseeable to them.

Dachau Concentration Camp

36. The *Dachau Concentration Camp* case might be an example of JCE I or II but it offers no support to JCE III. The Prosecution allegation in that case was that there was a common design to commit crimes at the concentration camp.[64] The common design

[61] United States Military Tribunal I, *United States of America v. Greifelt et al*., Case No. 8, *Opinion and Judgment*, 20 October 1947-10 March 1948, Trials of War Criminals before the Nuernberg Military Tribunals, Vol. V at 88-167.
[62] *Ibid*., pp. 88-89.
[63] *Ibid*., p. 163.
[64] General Military Government Court of the United States Zone, *Martin Gottfried Weiss et al*., Case No. 60, *Trial of Martin Gottfried Weiss and Thirty-Nine Others* ("*Dachau*"), 15 November-13 December 1945, UNWCC, Law Reports of Trials of War Criminals, Vol. XI at 5-17, p. 5.

was to run the camps "in a manner so that the great numbers of prisoners would die or suffer severe injury".[65] All the crimes alleged were part of that common criminal plan. There is no basis for alleging that any convictions were entered for crimes outside the scope of the common design, nor that foreseeability rather than intent was the basis for any conviction. [66]

Ulrich & Merkle and Wuelfert et al.

37. These cases concerned additional prosecutions arising from the operation of the Dachau Concentration Camp and both adopt the reasoning of the above 'parent case'.[67] In both cases, the accused were convicted because they significantly participated in a common criminal design to inflict cruelty and mistreatment on the detainees at Dachau Concentration Camp.[68] There is no basis for concluding that these convictions were entered on the basis that additional crimes were foreseeable to the accused. Rather, all crimes were part of the common plan. No doubt for that reason, the SPO previously submitted that both cases were examples of JCE I not JCE III.[69]

Tashiro Toranosuke et al.

38. In this case, three members of the medical squad for a prisoner of war camp were prosecuted for inhumane treatment causing physical suffering and the deaths of many.[70] They were convicted of all crimes apart from "causing the deaths of many". No written judgment survives. The available records suggest that this case is

[65] *Dachau*, p. 7.
[66] The ICTY considered this an example of JCE II: *Tadić* Appeal Judgment, para. 202.
[67] General Military Government Court of the United States Zone, *United States v. Ulrich and Merkle*, Case No. 000-50-2-17, *Review and Recommendations* ("*Ulrich and Merkle* Case"), 12 June 1947, pp. 10-11; *United States v. Hans Wuelfert et al*., Case No. 000-50-2-72, *Review and Recommendations* ("*Wuelfert* Case"), 19 September 1947, pp. 11-12.
[68] *Ulrich and Merkle* Case, pp. 1, 10-11; *Wuelfert* Case, pp. 1, 11-12.
[69] JCE Response, para. 60.
[70] Hong Kong Military Court for the Trial of War Criminals No. 5, *Tashiro Toranosuke et al*., Case No. WO235/905, *Judge Advocate's Summing Up and Recommendation to Commander in Forces in Hong Kong* ("*Toranosuke*"), 28 October 1946.

unrelated to JCE III. The reviewing Judge Advocate presumed that the reason for the acquittals for causing the deaths was that "the Prosecution had failed to produce satisfactory evidence of a sufficient number of specific instances of neglect or brutal illtreatment such as could reasonably be held to have contributed to the deaths".[71] Obviously, proving that the accused caused the deaths was a necessary element of the crime. The acquittals on that count were entered because the evidence did not establish causation (partly because medical testimony was not led).[72] A foreseeability standard was not applied.

3. ADDITIONAL CASES IN THE SPO RESPONSE

39. The JCE Response relied on four additional cases.[73] The Decision did not rely on these cases.[74] Indeed, for good reason, no international tribunal has ever found that these cases support JCE III.[75] To complete its analysis, the Defence address these additional cases below.

Rüsselsheim

40. The *Rüsselsheim* case concerned a mob killing of downed airmen. The records do not expressly say that a foreseeability standard was applied nor can that safely be inferred from the record. It is at least equally likely that the killing was or became part of the mob's common plan.

41. The available records are consistent with the killing being within the common plan. Thus, the charge did not plead JCE III but that the accused did "wilfully,

[71] *Toranosuke*, p. 2 (p. 10 of available records).
[72] *Ibid*.
[73] JCE Response, paras 72-83, 92-93.
[74] The Decision mentions only the cases listed in the *ad hoc* tribunals' jurisprudence, Decision, para. 186.
[75] The ECCC found that they did not support JCE III. ECCC SC Judgment, paras 793-794, 800-801, 804.

deliberately and wrongfully encourage, aid, abet and participate in the killing".[76] Further, the evidence that "[t]he flyers were set upon by a large crowd […] and struck with rocks, clubs, and other objects until they lay bleeding and prostrate upon the ground"[77] is entirely consistent with a common plan to kill. The Deputy Theater Judge Advocate's review states "each of the five accused […] actively contributed to the death of the airmen. They were motivated by a common design and legally are all principals in the perpetration of the murders. It matters not that some assumed more brutal roles than others, or that the injuries inflicted by some were more severe than those inflicted by the others".[78] Similarly, the Staff Judge Advocate's review referred to "a blood-hungry, brutal mob, incensed by the damage done to their village during the preceding night's raid, determined to exact its revenge from the helpless aviators".[79] These passages from the reviewing decisions are perfectly consistent with a common design to kill (JCE I) and inconsistent with JCE III.

42. Nor is a different conclusion compelled by the 1946 US Manual for Trial of War Crimes.[80] The Manual is a secondary source. It is not the judgment of the Court but a digest which reprints only one part of the reviewing judge advocate's discussion. It is no more authoritative that any other subsequent commentary. The Manual does state that "[a]ll who join in a common design to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, are responsible for a homicide committed by one of them […]".[81] Decisively, the authority cited in *Rüsselsheim* for this proposition was "29 Corpus Juris,

[76] United States Army War Crimes Trials, *United States v. Josef Hartgen et al.*, Case No. 12-1497, *Review and Recommendations of the Deputy Theater Judge Advocate* ("*Rüsselsheim* Deputy Theater Judge Advocate"), 29 September 1945, p. 1.
[77] *Ibid*., p. 2.
[78] *Ibid*., p. 8.
[79] United States Army War Crimes Trials, *United States v. Josef Hartgen et al.*, Case No. 12-1497, *Review of the Staff Judge Advocate*, 23 August 1945, p. 6.
[80] JCE Response, paras 74-75.
[81] Deputy Theater Judge Advocate's Office War Crimes Group, *Manual for Trial of War Crimes and Related Cases*, 15 July 1946, Section 410, p. 305.

Sec 46, p. 1073".[82] That is an encyclopaedia of American national law. Exactly the same rule appears in the current edition and it only applies to homicide.[83] Thus the only proposition from *Rüsselsheim* which mentions foreseeability is not a rule of CIL, but a rule of the national criminal law of one State which relates to one offence or group of offences. The existence of a national rule in relation to one offence cannot prove the existence of a generally applicable mode of responsibility in CIL.

Ikeda

43. The *Ikeda* case is equally inconclusive; it cannot be concluded that the conviction was based on JCE III rather than superior responsibility or JCE I.[84]

44. *Ikeda* is full of references to superior responsibility. The charge of "allow[ing] civilians and soldiers who were subordinate to him to take a group of about 35 women […] and force them into prostitution and to be raped, while he knew or ought reasonably to have suspected that these war crimes were being committed"[85] pleads the superior-subordinate relationship and the *mens rea* of knowledge or constructive knowledge which are the elements of superior responsibility. There are references throughout the judgment to the accused's role as a "heitan officer" or "senior officer".[86] The final operative paragraph focusses on the Accused's failure to punish, concluding "if the accused had appreciated and exercised the duties for which he was responsible as a *heitan* officer correctly, it is inconceivable why he did not immediately start an investigation".[87] These references all strongly suggest superior responsibility. The statement that crimes "could and should have been anticipated and prevented by

[82] *Rüsselsheim* Deputy Theater Judge Advocate, p. 9.
[83] Common design of participants, 40 C.J.S. Homicide 30; *see also* Common design of participants-To kill, 40 C.J.S. Homicide 31.
[84] Temporary Court Martial in Batavia, *The Queen v. Ikeda*, No. 72 A/1947, *Judgment* ("*Ikeda*"), 30 March 1948.
[85] *Ibid*., p. 1.
[86] *Ibid*., pp. 1, 8-10.
[87] *Ibid*., p. 9.

the accused"[88] is not a reference to JCE III but to the knowledge threshold for superior responsibility.

45. Alternatively, the judges could have found that all the crimes were within the criminal plan or that the crimes within the common plan expanded over time.[89] Finding that Ikeda "participated in formulating and elaborating the plan" and was "participating in the further elaboration of the plan"[90] is consistent with JCE I and an expanding plan. Moreover, nothing in the finding that he "could and should have" anticipated certain crimes excludes intent.[91] Knowledge and acceptance have been held sufficient to infer intent.[92]

46. Finally, *Ikeda* cannot be an example of JCE III since no clear distinction was drawn between which crimes fell within the common plan and which additional crimes were convicted pursuant to a foreseeability standard.

Ishiyama and Yasusaka

47. The evidence in this case included that: Yasusaka said that he and Ishiyama decided to scare two prisoners and so tied them up; Yasusaka said that they should let the prisoners go; Ishiyama responded that '[w]e have gone this far, we may as well finish it' and then shot them.[93] Only Ishiyama was convicted.[94]

[88] *Ikeda*, p. 8.
[89] ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Appeals Chamber, *Judgment*, 17 March 2009, para. 163.
[90] *Ikeda*, p. 8.
[91] *Contra* SPO Response, para. 79.
[92] ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Appeals Chamber, *Judgment*, 29 November 2017, para. 1800.
[93] Australian Military Court, *Ishiyama et al.*, AWC No. 2225 and AWC No. 2229, *Trial of Japanese War Criminals* ("*Ishiyama*"), 8-9 April 1946, p. 30.
[94] *Ibid.*, p. 27.

48. The acquittal of Yasusaka,[95] despite evidence of a common plan to tie up and scare the victims and without any discussion of whether the killing was foreseeable to him, establishes that JCE III was not applied.

49. In one passage, the Judge Advocate suggested that "[i]f an act done by some one of the party in the course of his endeavours to effect the common object of the offenders results in the death of some person the others are equally liable for the murder as principals in the second degree".[96] On its own, this submission establishes nothing. Without evidence that the Court, which was "the sole judges of fact and also the judges of law",[97] accepted this proposition, the Judge Advocate's words do not establish that JCE III was part of CIL.

50. In any event, the Judge Advocate's approach was not consistent with JCE III. The Judge Advocate also stated that if "the only agreement between the two accused was to frighten the two Indians and that one of the accused decided to shoot them and that the shooting was not done by him in an endeavour to effect a common purpose then the other would not be liable as a principal in the second degree under the doctrine of common design".[98] That statement is inconsistent with JCE III because it excludes responsibility for the additional crime of the shooting, without any consideration of foreseeability. In any event, the Judge Advocate's comments are limited to homicide cases in the same way as the principle of US national law cited in *Rüsselsheim* and unlawful act manslaughter in the law of England and Wales in the *Essen Lynching* case.

United States v. Tashiro et al.

[95] *Ishiyama*, p. 27.
[96] *Ibid*., p. 24.
[97] *Ibid*.
[98] *Ibid*., p. 25.

51. In *Tashiro et al.*, fires had started in a prison and officers were prosecuted for failing to evacuate prisoners of war so that they burned to death. Koshikawa was convicted for "participat[ing] in formulating and adopting such a grossly negligent plan for the release of American [P's] that when same was put in operation, it resulted in keeping them confined during imminent danger and thereby proximately contributed to the death of at least a large majority".[99] That cannot be construed as an application of JCE III. There is no analysis of crimes outside the common plan or foreseeability. Instead, it sets a different *mens rea* standard based on gross negligence (at least in circumstances where the accused, as prison officers, had a duty to protect).

4. OTHER WORLD WAR II MATERIAL

52. Control Council Law No. 10 ("CCL10") and the Nuremberg Charter do not support JCE III.[100] Indeed, the Decision failed to distinguish between the forms of JCE; its analysis that CCL10 and the Nuremberg Charter support "criminal liability for participation in a common plan" is consistent with JCE I not JCE III.[101] First, CCL10 provides that a person who was "connected with plans or enterprises involving" the commission of a crime is criminally responsible for it.[102] That does not support JCE III as it says nothing about foreseeability or responsibility for additional crimes outside the scope of plans or enterprises. Second, Article 6 of the Nuremberg Charter also contains no reference to foreseeability or to JCE III. Significantly, Article 6 was considered at the time to refer to complicity not JCE.[103] Third, the *travaux préparatoires*

[99] United States Military Commission Yokohama, *United States v. Tashiro et al.*, Case No. 78, *Review of the Staff Judge Advocate*, 7 January 1949, p. 72.
[100] *Contra* Decision, para. 183; *see* further, Elgar Companion to the ECCC, p. 297.
[101] Decision, para. 183.
[102] Article II(2)(d).
[103] 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal', in ILC, 'Report of the International Law Commission to the General Assembly', A/1316, 5 June – 29 July 1950, Yearbook of the International Law Commission, Vol. II, 1950, pp. 364-85, para. 125.

of the Nuremberg Charter indicates that extended JCE responsibility "was never clearly raised during drafting".[104]

53. Although the Decision relies on American Memorandums as "seminal documents",[105] those represent only the proposed position of one State. In any event, they clearly contemplated responsibility for crimes falling within a broad common plan not responsibility for additional foreseeable crimes. The Memorandums propose to charge "joint participation in a broad criminal enterprise which included and intended these crimes, or was reasonably calculated to bring them about".[106] That is consistent with JCE I. The phrase "reasonably calculated" is more consistent with intent than foreseeability; calculating to bring an event about requires more than merely foreseeing it. That is confirmed by the following sentence which states that the common enterprise should "be so couched as to permit full proof of the entire Nazi plan"[107] i.e. all the crimes were within the common plan. Similarly, the suggestion 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"[108] relies on the offences committed being within the criminal plan. Nothing in those memoranda expressly addresses responsibility for crimes which were outside the common plan or the issue of foreseeability. Accordingly, CCL10 and the Nuremberg Charter do not support JCE III.

5. CONCLUSION: THE WORLD WAR II CASES DO NOT SUPPORT JCE III

[104] Clarke, R. C., "Return to *Borkum Island* Extended Joint Criminal Enterprise Responsibility in the Wake of World War II", *Journal of International Criminal Justice* 9 (2011), p. 841; *contra* JCE Response, paras 32-33.
[105] Decision, para. 183. International Conference on Military Trials: London, 1945, *American Memorandum Presented at San Francisco* ("American Memorandum"), 30 April 1945. *See also* International Conference on Military Trials: London, 1945, *Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General* ("Yalta Memorandum"), 22 January 1945.
[106] American Memorandum, Section III(b); Yalta Memorandum, Section V.
[107] *Ibid*.
[108] *Ibid*.

54. This analysis of all the cases and materials relied upon by the ICTY, the STL and the SPO in support of JCE III shows that there is no case in which it can be established that responsibility was imposed for crimes outside a common plan on the basis of foreseeability. The same conclusion was reached by three chambers of the Extraordinary Chambers in the Courts of Cambodia ("ECCC").[109] This goes beyond "terminological differences" and state practice not being "entirely consistent".[110] There is no state practice regarding JCE III at all because there is no case in which the SPO can establish that a foreseeability standard was applied to convict any accused of crimes falling outside a common plan.[111] As a result, the Decision erred in finding that the cases support JCE III.

B. JCE III WAS NOT PART OF CIL

55. There is also a more fundamental deficiency in the case for JCE III. Combing through the archives to find one or two cases which could be said to support JCE III (even if this could be done), is not sufficient to establish a rule of CIL. The establishment of a rule of CIL requires consistent state practice and the belief that this practice is rendered obligatory.[112] That practice must be generally consistent and not contradictory or uncertain.[113] The precedents claimed by the *ad hoc* tribunals and the SPO consist of a very small number of cases (representing a tiny proportion of military tribunal prosecutions). Amongst this small number of cases, none applied with any

[109] ECCC PTC Decision; ECCC SC Judgment; ECCC, *Co-Prosecutors v. Ieng Sary et al.*, 002/19-09-2007/ECCC/TC, Trial Chamber, *Decision on the Applicability of Joint Criminal Enterprise* ("ECCC TC Decision"), 12 September 2011.
[110] *Contra* Decision, para. 186.
[111] *See* Elgar Companion to the ECCC, p. 313.
[112] ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, *Judgment of 20 February 1969* ("North Sea Continental Shelf Cases"), para. 77.
[113] ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, *Judgment of 27 June 1986*, para. 186; *Asylum Case (Colombia/Peru)*, *Judgment of 20 November 1950*, p. 277.

certainty the core features of JCE III: responsibility based on the foreseeability of additional offences which fell outside a common criminal plan.[114] Even if *arguendo* the SPO establishes that one or two of these cases could be consistent with JCE III, that would not amount to the requisite settled and consistent practice.[115] Instead, that a mode of liability akin to JCE III was never expressly identified and is entirely absent from the vast majority of the post-World War II cases prevents any finding that JCE III had attained customary status.

56. There is no alternative basis on which JCE III could be found to have been part of CIL. There is no international treaty which expressly incorporates JCE III.[116] The Rome Statute of the ICC does not incorporate JCE III; Article 25(3)(a) of the Rome Statute relates to co-perpetration and not to JCE.[117] The absence of JCE III from any relevant multi-lateral treaty is significant for two reasons. First, it removes any possible submission that international treaties suggest that JCE III was part of CIL.[118] Second, the absence of JCE III from such treaties does undermine any submission that JCE III is part of CIL.[119] It evidences discrepancies in state practice and the absence of *opinio juris*; if States believed that JCE III was part of CIL they would have agreed to include it as a mode of responsibility in relevant treaties.

57. Nor can the KSC find that JCE III was part of CIL as a general principle of law. There is no broad agreement in national systems as to JCE III. The *Tadić* Appeal Judgment surveyed only nine national systems, finding that two did not allow JCE III and seven did.[120] The ECCC Trial Chamber surveyed seven national legal systems and

[114] *Tadić* Appeal Judgment, para. 204.
[115] North Sea Continental Shelf Cases, para. 77.
[116] *Contra Tadić* Appeal Judgment, paras 221-223.
[117] ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, *Decision on the Confirmation of Charges*, 29 January 2007, paras 326-339; *Prosecutor v. Katanga et al*., ICC-01/04-01/07-717, Pre-Trial Chamber I, *Decision on the Confirmation of Charges*, 30 September 2008, para. 480.
[118] *Contra Tadić* Appeal Judgment, para. 223.
[119] *Contra* Decision, para. 187.
[120] *Tadić* Appeal Judgment, para. 224.

found "considerable divergence".[121] Neither Court found sufficient consistency in these limited surveys to justify a general principle of law.[122] The Max Planck Institute for Foreign and International Criminal Law surveyed 40 states and concluded that there was a "high degree of variance among the legal systems studied" and that more states applied co-perpetration than JCE.[123] The SPO has not submitted any analysis of national jurisdictions capable of altering those conclusions.

58. The Defence respectfully request the Appeals Chamber to step out of the shadow of *Tadić* and to carry out its own forensic analysis of the post-World War II cases and materials. Had the Decision carried out this analysis, it would have revealed that the cases and materials provide no precedent for JCE III. Since there is no other basis on which the KSC could apply JCE III, the Appeals Chamber should overturn the Decision and find that the KSC does not have jurisdiction over JCE III.

V. GROUND 2

The Impugned Decision erred in law and fact in finding that JCE liability was foreseeable and accessible to Mr. Krasniqi

59. The Decision erred in finding that JCE liability was accessible and foreseeable to Mr. Krasniqi in CIL and the law of Kosovo.[124] JCE – and JCE III most especially – was not sufficiently clearly defined at the start of the indictment period in March 1998 so as to be accessible or foreseeable to Mr. Krasniqi.

[121] ECCC TC Decision, para. 37.
[122] *Tadić* Appeal Judgment, para. 225.
[123] Sieber, U., Koch, H. G., and Simon, J. M., Office of the Prosecutor Project Coordination, Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks, Expert Opinion, Commissioned by the United Nations – ICTY, 2006, Introduction, p. 3; Part 1, p. 16.
[124] Decision, paras 194, 199-200.

60. The Decision erred in finding that foreseeability of JCE either in CIL or in Kosovo law sufficed.[125] JCE as applied by the KSC comes directly from CIL and not the criminal law of Kosovo.[126] It follows that it is the foreseeability of JCE in CIL which is determinative. The law of Kosovo is only relevant to the extent that it provided notice to Mr. Krasniqi of the content of CIL.[127]

61. JCE was not foreseeable to Mr. Krasniqi as part of CIL. The Decision held that JCE was foreseeable based upon: the finding that JCE I and III were part of CIL at the time; the *Furundžija* Trial Judgment; the accused's high-ranking position within the KLA; and the general legal framework and ongoing ICTY prosecutions.[128] None of these factors actually demonstrate that Mr. Krasniqi could have known in March 1998 that participation in a common plan could lead to criminal liability for both crimes within the common plan and foreseeable crimes outside the scope of the plan.[129]

62. First, if JCE was part of CIL at the material time[130] that alone is not enough to render its application foreseeable. A rule of CIL must be sufficiently clearly defined that it is foreseeable to the accused.[131] JCE was not clearly defined in March 1998, but was in a state of flux.[132] If JCE was part of CIL at all, in March 1998 it existed only as an inferential deduction from a small number of post-World War II cases and associated materials. Those cases were inaccessible: there is no evidence of their translation, publication and dissemination in Kosovo[133] and, as set out above in

[125] Decision, para. 193.
[126] *Ibid*., paras 178-179.
[127] ICTY, *Prosecutor v. Milutinović et al*., IT-99-37-AR72, Appeals Chamber, *Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise*, 21 May 2003, para. 41.
[128] Decision, para. 194.
[129] ECtHR, *Kokkinakis v. Greece*, no. 14307/88, *Judgment (Merits and Just Satisfaction)* ("*Kokkinakis* Judgment"), 25 May 1993, para. 52.
[130] The Defence maintain that JCE III was not (*see* Ground 1).
[131] ECtHR, *Kononov v. Latvia*, no. 36376/04, *Judgment (Merits and Just Satisfaction*), 17 May 2010, para. 185.
[132] On Being Concerned in a Crime, p. 166.
[133] *See* ECtHR, *Korbely v. Hungary*, no. 9174/02, *Judgment (Merits and Just Satisfaction*), 19 September 2008, para. 75.

relation to JCE III, the limited surviving records of those cases do not clearly define modes of responsibility. Moreover, the objective and subjective elements of the forms of JCE had not been defined. It was not until July 1999 that *Tadić* systematised the definition of JCE for the first time.[134] Prior to *Tadić*, there was no accessible definition of any mode of JCE and, as a result, no individual could have foreseen the scope of responsibility under it.

63. Second, *Furundžija* is irrelevant. The *Furundžija* Trial Judgment was delivered on 10 December 1998.[135] It cannot have made JCE foreseeable to Mr. Krasniqi at the start of the indictment period nine months earlier. Further, it used JCE and co-perpetration interchangeably.[136]

64. Third, the Decision relied on the accused's high-ranking position and the alleged "vast set of responsibilities and powers that allowed them to access a variety of public information and knowledge".[137] The Decision thus relied, unquestioningly, on the high-point of the SPO's allegations about Mr. Krasniqi's responsibilities, powers and access to information in order to find that JCE was foreseeable to him.[138] That approach was wrong:-

i. The Decision identified no specific evidential basis for its conclusions about Mr. Krasniqi's responsibilities, powers and access to information;[139]

[134] Decision, para. 184.
[135] ICTY, *Prosecutor v. Anto Furundžija*, IT-95-17/1-T, Trial Chamber, *Judgment* ("*Furundžija*"), 10 December 1998.
[136] *Ibid*., paras 216, 257.
[137] Decision, para. 103.
[138] The SPO did not advance these matters in support of foreseeability. JCE Response, paras 129-134.
[139] Decision, para. 103.

ii. The true extent of Mr. Krasniqi's powers, responsibility and access to information are all contested issues which will be litigated at trial. Ignoring the presumption of innocence, the Decision determined those factual issues against Mr. Krasniqi before trial has even started;

iii. Moreover, the Decision failed to analyse how Mr. Krasniqi's supposed powers and responsibilities would make JCE liability foreseeable to him. The factual context matters. For instance, the ICTY concluded that the General Staff of the KLA had no consistent place of location, was forced to function as an underground organisation, its members were under constant risk of capture, it met irregularly and it communicated primarily by telephone and fax.[140] The finding that Mr. Krasniqi, operating in those circumstances, was nonetheless in an enhanced position to foresee the labyrinthine provisions of CIL is unreasonable and wholly unrealistic.

65. Fourth, the Decision erred in relying on the "post-World War II general legal framework" and the ongoing ICTY prosecutions.[141] It completely failed to analyse what features of that framework or what ongoing prosecutions in March 1998 sufficed to make JCE liability foreseeable.

66. The above points show that JCE liability was not foreseeable to Mr. Krasniqi, but each point applies with even more force in relation to JCE III.[142] As set out in Ground 1 above, JCE III was not mentioned in any statutory material or treaty, does not appear expressly in any post-World War II case and the ICTY constructed it from just two

[140] ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Chamber II, *Judgment*, 30 November 2005, para. 104.
[141] Decision, para. 194.
[142] The Decision appears to recognise this difficulty, finding only that it was foreseeable that participation in a common plan could give rise to liability – which does not necessarily include JCE III liability: Decision, para. 194.

post-World War II cases (neither of which has a written judgment available or clearly applied a foreseeability standard) and certain *Italian* cases (which even an experienced Judge of the ICTY struggled to locate).[143] In March 1998, the ICTY had not defined JCE III; although relied on by the Decision, *Furundžija* regarded intent as an element of JCE and hence cannot have made JCE III foreseeable.[144] The existence of JCE III remains highly controversial today. It is fanciful to imagine that Mr. Krasniqi could have foreseen it in March 1998.

67. Further, JCE III was not a foreseeable part of the criminal law applicable in Kosovo in March 1998. To reach the contrary finding, the Decision read Article 13 of the SFRY Criminal Code together with Article 22 or 26 of the Code and claimed support for this interpretation based on one Kosovo Supreme Court Decision from May 2012.[145] That does not demonstrate that this construction of the SFRY Criminal Code was foreseeable in 1998. First, there is no evidence of any authority prior to the alleged offences in March 1998 which shows that the interpretation advocated in the Decision reflects the accepted or foreseeable position at that time. Second, the Supreme Court Decision only read Article 13 of the SFRY Criminal Code in conjunction with Article 25 and not Article 22 or 26.[146] Third, the Supreme Court Decision has not been followed in Kosovo. Later Court of Appeals decisions – which unlike the Supreme Court Decision directly used the term JCE – have found JCE / JCE III inapplicable.[147] These Court of Appeal decisions are significant precisely because they took a different view.[148] Inconsistent case-law vitiates the required precision to enable individuals to

[143] ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Trial Chamber III, *Judgment, Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti*, 29 May 2013, p. 148.
[144] *Furundžija*, paras 249, 257(i).
[145] Decision, para. 200, relying on EULEX, *People v. D.N.*, Ap-Kž-67/2011, Supreme Court of Kosovo, *Judgment*, 29 May 2012, pp. 7-9.
[146] *Ibid*.
[147] EULEX, *People v. Xh. K.*, PAKR Nr 648/16, Court of Appeals, *Judgment*, 22 June 2017, p. 10; *People v. J.D. et al.*, PAKR Nr 455/15, Court of Appeals, *Judgment*, 15 September 2016, p. 45.
[148] *Contra* Decision, para. 200.

foresee liability.[149] There is no evidence that the law applicable in Kosovo in March 1998 rendered the application of JCE, and in particular JCE III, foreseeable to Mr. Krasniqi.

68. The Appeals Chamber should correct the above errors which invalidate the decision, find that JCE, alternatively JCE III, was not foreseeable and accessible to Mr. Krasniqi at the material time, and hence the KSC has no jurisdiction over it.

VI. GROUND 3

The Impugned Decision erred in law in finding that JCE, alternatively JCE III, falls within the meaning of "committed" in Article 16(1)(a) of the Law

69. The Decision erred in law in finding that Article 16(1)(a) included JCE because the meaning of "committed" must be interpreted in accordance with CIL.[150] Article 16(1)(a) is a self-contained code which should have been interpreted first and foremost based on the natural meaning of its terms as *lex specialis*; reading JCE into Article 16(1)(a) is an unlawful expansive reading of a criminal statute to the detriment of the Defence; and, in any event, JCE III cannot fall within the meaning of "committed".

70. First, the Decision erred in relying on CIL to interpret Article 16(1)(a) rather than simply interpreting its natural meaning. The Decision held that the Law applies CIL "as its principal source" relying particularly on Article 3(2)(c) – (d) and Article 3(3).[151] This led the Decision to find that the KSC can "only apply modes of liability that were part of customary international law at the time the alleged crimes were committed".[152]

[149] ECtHR, *Žaja v. Croatia*, no. 37462/09, *Judgment (Merits and Just Satisfaction)*, 4 January 2017, paras 93, 103.
[150] Decision, para. 177.
[151] *Ibid.*
[152] *Ibid.*, para. 179.

That does not assist in the interpretation of Article 16(1)(a). Certainly, the principle of legality prevents the KSC applying a mode of responsibility which did not form part of CIL. But the KSC cannot apply any mode of liability which existed in CIL at the material time; that would strip the modes of liability defined in Article 16(1)(a) of meaning. If a mode of responsibility is not set out in Article 16(1)(a), the KSC cannot apply it whether or not it forms part of CIL.

71. The true principal source for the KSC is the Constitution of the Republic of Kosovo ("Constitution") and the Law itself. The Decision's focus on Article 3(2)(c) and (d) overlooks the preceding provisions in Article 3(2)(a) and (b). In the hierarchy of applicable rules, Article 3(2) first names (a) the Constitution and "(b) this Law as the *lex specialis*". The principal sources for the KSC are thus the Constitution and the terms of the Law. The Decision recognised correctly that Article 16(1)(a) is a "self-contained, autonomous regime"[153] but failed to draw the logical conclusion; since the KSC must adjudicate in accordance with this self-contained regime as *lex specialis*, the applicable modes of responsibility must be found within the four walls of Article 16(1)(a) and nowhere else.

72. The natural meaning of Article 16(1)(a) is plain. Five modes of responsibility are stated ("planned, instigated, ordered, committed or otherwise aided and abetted"); five modes of responsibility may be applied. Article 16(1)(a) does not specify JCE; therefore, the KSC may not apply JCE. If the KSC was intended to apply other modes of responsibility, they would have been included in Article 16(1)(a).

73. Second, the Constitution imposes fundamental protections which guard against expansive interpretation of modes of responsibility. These include the principle of legality,[154] which requires that "the criminal law must not be extensively construed to

[153] Decision, para. 177.
[154] Article 33(1); *see also* Article 7(1) of the ECHR which is directly applicable.

an accused's detriment, for instance by analogy"[155] and the presumption of innocence, which requires that any doubt about the interpretation of Article 16(1)(a) must be resolved in favour of the accused.[156] The consequence of these fundamental rights is that in interpreting Article 16(1)(a) the principles of strict construction and *in dubio pro reo* are paramount.[157] Applying JCE, a mode of liability not expressly stated in Article 16(1)(a), violates those principles.

74. Third, the word "committed" cannot be construed so broadly that it encompasses JCE III because JCE III is not a form of commission. The Decision failed to address this issue although it was raised by the Defence.[158] JCE III cannot conceptually be reconciled with the meaning of commission. His Honour Judge Ambos, writing extra-judicially, exposed the issue in the following terms:

> Perpetration requires that the perpetrator themselves fulfil all objective and subjective elements of the offence. If one or more of element is missing and is only imputed to the person by *vicarious liability (responsabilité du fait d'autrui)*, by making a 'non-actor' responsible for the conduct of another actor, as done by JCE III, the non-actor can only be considered an aider or abettor to the crime in question.[159]

75. Indeed, JCE has not consistently been classified as a mode of commission. For instance, in *R v. Jogee*, in which the UK Supreme Court found that foreseeability was not a sufficient *mens rea* requirement for JCE,[160] JCE was treated as a form of accessory liability and JCE III was termed "parasitic accessory liability".[161] Even within the ICTY, there was controversy about the correct categorisation of JCE. *Tadić* itself held that

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[155] *Kokkinakis* Judgment, para. 52; ECtHR, *Vasiliauskas v. Lithuania*, no. 35343/05, *Judgment (Merits and Just Satisfaction)*, 20 October 2015, para. 154.
[156] ICC, *Prosecutor v. Ngudjolo*, ICC-01/04-02/12-4, Trial Chamber II, *Judgment Pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert*, 18 December 2012, para. 16.
[157] *Ibid*., para. 18.
[158] Defence Preliminary Motion, paras 17-23; Defence Reply JCE, paras 9-12.
[159] Ambos, K., "Joint Criminal Enterprise and Command Responsibility" *Journal of International Criminal Justice* 5 (2007), pp. 168-169.
[160] United Kingdom, *R v. Jogee*, [2016] UKSC 8, Supreme Court, *Judgment*, 18 February 2016, paras 79, 83.
[161] *Ibid*., para. 2.

"the notion of common design as a form of accomplice liability is firmly established in customary international law".[162] Trial Chambers have interpreted these words to mean that JCE was a form of accessory liability.[163]

76. That JCE III is not a form of "commission" decisively undermines the Decision's construction of Article 16(1)(a). JCE III was only found to be within the Law on the basis that all forms of JCE fell within the meaning of "committed". The legal error is that it cannot be said that an accused "committed" a crime which they did not physically perpetrate, which did not form part of a common plan and which the accused did not intend. That is a form of accessory liability not of commission.

77. Accordingly, the Appeals Chamber should correct the errors, find that JCE (or JCE III) cannot fall within the meaning of "committed" and hence that the KSC has no jurisdiction over JCE, alternatively no jurisdiction over JCE III.

VII. GROUND 4

The Impugned Decision erred in law in finding that the charges must only be sufficiently connected to the Report

78. The Decision erred in law in concluding that the KSC has jurisdiction over all charges "sufficiently connected" to the Report rather than only over those crimes alleged in the Report which Kosovo is obliged to investigate.[164] The KSC's lawful jurisdiction is not only delineated by the Law but also by the Constitution which established it. The Constitution stipulates that specialised courts may only be

[162] *Tadić* Appeal Judgment, para. 220.
[163] ICTY, *Prosecutor v. Krnojelac*, IT-97-25-T, Trial Chamber II, *Judgment*, 15 March 2002, para. 77; *Prosecutor v. Brđanin et al.*, IT-99-36, Trial Chamber II, *Decision on Motion by Momir Talić for Provisional Release*, 28 March 2001, paras 43-45, underscoring that the ordinary meaning of commission is physical perpetration by the accused.
[164] Decision, para. 111.

established when "necessary". The necessity to create the KSC arose from the international obligation to investigate and prosecute the allegations specifically contained in the Report. Accordingly, the scope of the KSC's jurisdiction is limited to those charges which "relate to the Council of Europe Assembly Report",[165] meaning that they relate to the allegations in the Report which Kosovo has an international obligation to investigate and prosecute.

79. The scope of the KSC's jurisdiction is defined by the legal provisions permitting its establishment. Mr. Krasniqi is entitled to be tried by a tribunal established by law.[166] Specialised courts may only be established if they have a basis in law.[167] If the KSC steps outside the parameters for which a specialised jurisdiction was established (or could lawfully be established), then it ceases to be established by law. Accordingly, the decisive question is not the jurisdictional rules in Articles 6-11 of the Law,[168] but the scope of jurisdiction permitted by the Constitution.

80. The key provision limiting the scope of jurisdiction of a specialised court is Article 103(7) of the Constitution, which the Decision only referred to in passing.[169] Article 103(7) stipulates that "[s]pecialized courts may be established by law when necessary". Interpreting that provision, the Constitutional Court of Kosovo held that it was necessary to establish the KSC for Kosovo to comply with international obligations arising from the Report, which "outlines a number of highly specific criminal allegations and recommends them for investigation and prosecution".[170]

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[165] Article 6(1) of the Law.
[166] Constitution, Article 31(2); Article 6(1) ECHR.
[167] ECtHR, *Fruni v. Slovakia*, no. 8014/07, *Judgment (Merits and Just Satisfaction)*, 21 September 2011, para. 142.
[168] Decision, paras 107-109.
[169] *Ibid*., para. 118.
[170] 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 Decision"), KO 26/15, Judgment, 15 April 2015, public, paras 50-51.

Importantly, it continued that the "scope of jurisdiction" of the specialised court defined in the proposed amendment was "in compliance with the requirement of 'necessity'".[171] Thus, not only the establishment of the KSC but also the scope of its jurisdiction must comply with the requirement of necessity.

81. Erroneously, the Decision treated the Constitutional Court's reference to "highly specific criminal allegations" as merely a "general description".[172] It was the highly specific criminal allegations in the Report and the international obligation to investigate which thereby arises, which led the Constitutional Court to accept that it was necessary to establish the KSC.[173] The Constitutional Court emphasised this point by finding that the amendment to Article 162(1) of the Constitution was lawful because it was for "the purpose of fighting specific crimes",[174] obviously referring to the specific crimes in the Report.

82. The Constitutional Court thus did confine the scope of jurisdiction of the KSC to that which was necessary to fight the specific crimes in the Report. The Decision wrongly held that this "does not exclude allegations arising from the Report exceeding organ trafficking and inhumane treatment allegedly committed in detention centres in Albania".[175] The Constitutional Court did limit the scope of jurisdiction of the KSC to the highly specific criminal allegations in the Report. Contrary to the Decision, that logically excludes allegations which do not arise directly from the Report but are only "sufficiently connected" to its contents.

83. Article 162(1) of the Constitution is also consistent with this limitation on the KSC's jurisdiction. It permitted Kosovo to establish the KSC "[t]o comply with its

[171] Constitutional Court Decision, para. 53.
[172] Decision, para. 118.
[173] Constitutional Court Decision, paras 50-51.
[174] *Ibid*., para. 71.
[175] Decision, para. 118.

international obligations in relation to the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011". Consistent with Article 103(7) and the Constitutional Court Decision, Article 162(1) only permits Kosovo to establish a specialised court to comply with international obligations arising from the Report; the establishment of any broader jurisdiction would be *ultra vires*. It does not permit a broad jurisdiction over charges which merely correlate to the Report[176] but, as the Constitutional Court held, created the KSC "for the purpose of fighting specific crimes".[177]

84. Article 103(7) and Article 162(1) of the Constitution establish that the KSC was created (and could only lawfully be created) to have jurisdiction over those allegations in the Report which Kosovo had an international obligation to investigate and prosecute. The scope of the positive obligation to investigate is defined by international human rights law. Authorities have a positive obligation to investigate once they are informed of a death.[178] They are obliged to investigate mistreatment or torture "where an individual raises an arguable claim that he has been seriously ill-treated".[179] The positive obligation to investigate does not arise in the abstract, but is triggered by the receipt of specific allegations. The Report gave rise to an international obligation to investigate the specific crimes identified in the Report, it did not give rise to an obligation to investigate crimes which merely have some correlation to it.

85. The provisions of Articles 6 - 14 of the Law cannot be used to found a broader jurisdiction than the Constitution permits. It is irrelevant that the correct interpretation of the Constitution would "render the jurisdictional provisions largely

[176] *Contra* Decision, paras 107-108.
[177] Constitutional Court Decision, para. 71.
[178] ECtHR, *Iorga v. Moldova*, no. 12219/05, *Judgment (Merits and Just Satisfaction)*, 23 June 2010, para. 26.
[179] ECtHR, *Assenov et al. v. Bulgaria*, no. 90/1997/874/1086, *Judgment (Merits and Just Satisfaction)*, 28 October 1998, para. 102.

meaningless".[180] If the KSC could only lawfully be established under the Constitution in relation to one subset of allegations, no provision in the Law can lawfully enlarge the KSC's jurisdiction beyond that subset. The Constitution provides the lawful basis of the KSC and, if the Law established a jurisdiction broader than the Constitution permits, the KSC would cease to be a tribunal "established by law".

86. Moreover, the Decision's expansive construction of the KSC's jurisdiction is inconsistent with the principle of necessity in Article 103(7) of the Constitution. There was no factual necessity to establish a specialised court with jurisdiction over offences committed as early as March 1998 and at locations in Kosovo, in circumstances where those crimes had already been investigated and prosecuted by the ICTY and have been (and are still) being investigated and prosecuted in national proceedings in Kosovo itself. These alleged crimes should not be disregarded but they do not need to be prosecuted by the KSC in the Hague rather than in Kosovo.

87. Accordingly, the Decision was wrong to determine that the charges need only be "sufficiently connected" to the Report. The correct interpretation of Article 6(1) and the scope of jurisdiction permitted to the KSC by the Constitution, is that the KSC only has jurisdiction over crimes which Kosovo was obliged to investigate as a result of the Report. This error invalidates the Decision because it reveals that a "sufficient connection" between the charges and the Report is not enough to establish jurisdiction. The Appeals Chamber should overturn the Decision, find that the KSC only has jurisdiction over crimes that Kosovo was obliged to investigate as a result of the Report and therefore only has jurisdiction over the charges related to Cahan, Kukës and any other charges with a cross-border element involving Albania.[181]

VIII. GROUND 5

[180] Decision, para. 110.
[181] *See* Ground 5 below.

The Impugned Decision erred in law and fact in finding that the crimes alleged in the Indictment are related to the Report

88. Even if the Decision was correct that only a "sufficient connection" was required between the charges and the Report, it erred in relying on tangential features of the Report to find that all the crimes alleged in the Indictment are sufficiently connected to the Report.[182] The mismatch between the temporal and geographic scope of the Indictment and the Report is profound. The Report analyses specific allegations of crimes committed after April 1999 in Albania or with a cross-border element. The Indictment alleges crimes committed between March 1998 – September 1999 in around 42 detention locations, only two of which were within Albania. The majority of the allegations are not sufficiently connected to the temporal and geographic scope of the Report.

89. First, the Decision erred in finding that charges relating to the period 1998 – Summer 1999 "accord fully with the Report" and that it "is explicitly concerned with" crimes which occurred "at least" in 1998.[183] That elevates background findings to central importance whilst entirely overlooking the main thrust of the Report.

90. The Decision fails to mention the three subsets of cases which dominate the Report. The first occurred in the period "between April and June 1999";[184] the second in "the weeks and months directly after 12 June 1999";[185] and the third also occurred in the "post-conflict period".[186] The analysis of these three categories runs from paragraphs 102 – 167 of the Report, covers the only detailed analysis of individual

[182] Decision, paras 141-142.
[183] *Ibid.*, para. 136.
[184] Report, para. 102.
[185] *Ibid.*, para. 137.
[186] *Ibid.*, para. 156. *See also* Report, para. 129.

cases and the only case studies of detention centres in the Report. On any objective reading, they are the Report's central focus and the only allegations of criminality sufficiently detailed to require an investigation. Contrary to the Decision,[187] the overview that the crimes "occurred for the most part from the summer of 1999 onwards"[188] actually emphasises the focus on the period after Summer 1999 whilst reflecting the fact that the first subset of cases began in April 1999.

91. The Decision relied on references to 1998 in paragraphs 36, 41-63 and 72 of the Report,[189] overlooking that those paragraphs all stem from one introductory section which attempts to summarise the history and structure of the KLA and makes only highly generalised allegations of criminality. The Report itself continues "[a]gainst this background, our account […]"[190] and goes on to address the three subsets of cases identified above. The Report thus clearly differentiated between the background (which the Decision wrongly relied upon) and the actual analysis of the Report (which relates to the period after April 1999). The Decision erred in defining the content of the Report by reference to its historical background, rather than the specific allegations that it sets out.

92. The Decision makes exactly the same error in relation to the geographical parameters. It cherry-picks three paragraphs of the Report[191] (3 out of 176) to find that the Report "contains several references to crimes allegedly committed in Kosovo without any connection to Albania".[192] All of those three paragraphs are drawn from the same introductory section as the above references to 1998. The Report itself describes this as "background" before stating that its account is of "abuses committed

[187] Decision, para. 135.
[188] Report, para. 4.
[189] Decision, para. 135.
[190] Report, para. 89.
[191] *Ibid*., paras 72, 85, 87.
[192] Decision, para. 133.

[…] in Albania".[193] Even within this background section, the focus is on Albania; although paragraph 72 does refer generally to crimes in Kosovo, it continues "and, of particular interest to our work, in the context of KLA-led operations on the territory of Albania".

93. The Decision compounds this focus on a background section of the Report, with a failure to give appropriate weight to more prominent sections in the Report. It ignored the SPO's correct concession that the Report "focuses on crimes committed in Albania".[194] The Report states that the "most significant operational activities undertaken by members of the KLA […] took place on the territory of Albania".[195] It identifies six detention centres in Albania; it names none in Kosovo.[196] It states that the common denominator was that "civilians were held captive therein, on Albanian territory".[197] The critical three subsets of captives identified above all relate to Albania: the first where "KLA detentions on Albanian territory were discernibly based on the perceived strategic imperatives of fighting a guerrilla war";[198] the second relates to people transported "out of Kosovo to new detention facilities in Albania"[199] and "abducted into secret detention on Albanian territory";[200] and the third relates to victims "taken into central Albania to be murdered".[201] All of the detail of the Report, all of the detention centres specifically studied, all of the subsets of cases analysed relate to or involve Albania.

94. Even if only a "sufficient connection" to the Report is required, that excludes connections which are incidental or tangential. Any objective reading of the Report

[193] Report, para. 89.
[194] Report Response, para. 19.
[195] Report, para. 36.
[196] *Ibid.*, para. 93.
[197] *Ibid.*, para. 98.
[198] *Ibid.*, para. 102.
[199] *Ibid.*, para. 129.
[200] *Ibid.*, para. 130.
[201] *Ibid.*, para. 156.

reveals that its focus was on crimes committed after April 1999 in Albania, or with a cross-border element. Charges which fall outside these temporal and geographic parameters are not sufficiently connected to the Report, even if some tangential or other link is demonstrated. Applying this test correctly, only the Indictment allegations about detentions in Cahan and Kukës, or linked to Cahan and Kukës are connected to the core concerns of the Report.

95. The Indictment also alleges crimes, for instance, committed in Llapushnik and Jabllanicë in April – July 1998. Those allegations are not sufficiently connected to the Report. They allegedly occurred a year before the period on which the Report focussed and wholly within Kosovo with no cross-border element. There was no necessity to establish a specialised Court to try these allegations. The relationship of those alleged crimes – and all crimes alleged prior to April 1999 – to the Report is tangential and insufficient. Accordingly, the Decision erred in finding that the whole broad tapestry of the Indictment was sufficiently connected to the Report.

96. The Appeals Chamber should correct that error and find that only crimes committed after April 1999 and with some connection to Albania are sufficiently connected to the Report.

IX. CONCLUSION

97. The Defence request the Appeals Chamber to grant this appeal, overturn the Decision and:-

1) Find that the KSC does not have jurisdiction over JCE; or
2) Find that the KSC does not have jurisdiction over JCE III; and
3) Find that the KSC only has jurisdiction over crimes committed after April 1999 and connected to Albania; and
4) Require the SPO to amend the Indictment accordingly.

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