



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

**In:** KSC-BC-2020-06  
**Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi**

**Before:** A01  
The President of the Specialist Chambers  
Judge Ekaterina Trendafilova

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 27 August 2021

**Language:** English

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**Prosecution Appeal against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers' pursuant to Rule 97(3)**

**with public annex 1**

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## I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law<sup>1</sup> and Rule 97 of the Rules,<sup>2</sup> the Specialist Prosecutor's Office ('SPO') appeals the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers' ('Decision') on the following grounds:<sup>3</sup>

- a. The Decision erred in law in ruling on the applicability of JCE III to special intent crimes in response to a preliminary motion challenging jurisdiction under Rule 97; and, in the alternative,
- b. The Decision erred in law in holding that it is impermissible to convict persons of special intent crimes on the basis of JCE III.<sup>4</sup>

2. Challenges to the interpretation and application of JCE III in the Confirmation Decision<sup>5</sup> exceed the scope of Rule 97, violate Rule 86(7), and therefore should not have been entertained in the Decision. In any event, under the Law and consistent with customary international law, modes of liability, including JCE III, apply to all crimes, without distinction. The Decision's holding that JCE III is applicable at the Kosovo Specialist Chambers ('KSC') is consistent with these sources of law that are the guideposts

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<sup>1</sup> Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article' or 'Articles' are to the Law.

<sup>2</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

<sup>3</sup> Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/F00412, 22 July 2021.

<sup>4</sup> JCE III refers to the third form of Joint Criminal Enterprise wherein a JCE member may be held liable for crimes committed outside of the common plan that were nevertheless foreseeable and for which the individual willingly took the risk they could occur (ICTY, Appeals Chamber, *Prosecutor v. Tadić*, IT-94-1-A Judgement, 15 July 1999, paras 227-228).

<sup>5</sup> Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026, 26 October 2020, Strictly Confidential and *Ex Parte* ('Confirmation Decision'). See also KSC-BC-2020-06/F00026/CONF/RED (confidential redacted); KSC-BC-2020-06/F00026/RED (public redacted).

of this Court, while its digression into JCE III applicability to special intent crimes claims no such provenance.

3. This appeal is filed as of right pursuant to Rule 97(3) as an appeal from a decision on a preliminary motion challenging the jurisdiction of the KSC.

## II. PROCEDURAL HISTORY

4. On 26 October 2020, the Pre-Trial Judge confirmed the Indictment against Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi, (collectively, 'Accused').<sup>6</sup> Subsequently, Selimi filed two preliminary motions<sup>7</sup> claiming jurisdictional challenges, and Thaçi,<sup>8</sup> Veseli,<sup>9</sup> and Krasniqi<sup>10</sup> filed one each. The SPO responded in three filings,<sup>11</sup>

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<sup>6</sup> See also Indictment, KSC-BC-2020-06/F00045/A01, 4 November 2020, Strictly Confidential and *Ex Parte* ('Indictment'). See also KSC-BC-2020-06/F00045/A03 (public redacted); Lesser Redacted Version of Redacted Indictment, KSC-BC-2020-06/F00134, 11 December 2020, Confidential.

<sup>7</sup> Selimi Defence Challenge to Jurisdiction – Joint Criminal Enterprise, KSC-BC-2020-06/F00198, 10 February 2021; Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction – Discrimination, KSC-BC-2020-06/F00219.

<sup>8</sup> Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, KSC-BC-2020-06/F00216, 12 March 2021.

<sup>9</sup> Preliminary Motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC, KSC-BC-2020-06/F00223, 15 March 2021 ('Veseli Motion').

<sup>10</sup> Krasniqi Defence Preliminary Motion on Jurisdiction with Public Annex 1, KSC-BC-2020-06/F00220, 15 March 2021.

<sup>11</sup> Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigation Deadline, and Temporal Mandate, KSC-BC-2020-06/F00259, 23 April 2021; Prosecution Response to Preliminary Motion Concerning Applicability of Customary International Law, KSC-BC-2020-06/F00262, 23 April 2021; Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE), KSC-BC-2020-06/F00263, 23 April 2021 ('Prosecution Response').

followed by the Accused's replies,<sup>12</sup> an additional SPO response,<sup>13</sup> and a further reply by Veseli.<sup>14</sup>

5. The SPO submitted that the Veseli Defence's argument that JCE III should not be applicable to special intent crimes<sup>15</sup> was not a proper jurisdictional challenge under Rule 97(1) and, in any event, was incorrect on the law.<sup>16</sup> The SPO requested that, should the Pre-Trial Judge decide to rule on this issue, the SPO be given an opportunity to file supplementary submissions.<sup>17</sup>

6. On 22 July 2021, the Pre-Trial Judge issued the Decision. In Section D, entitled 'Challenges related to the application of JCE', the Pre-Trial Judge addressed certain Defence submissions that were not 'strictly speaking, entirely jurisdictional in nature'.<sup>18</sup> This section addressed, *inter alia*, the issue of JCE III and special intent crimes.<sup>19</sup> The Decision held that, for the purposes of the present case, JCE III is not applicable to crimes

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<sup>12</sup> Krasniqi Defence Reply to Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigation Deadline, and Temporal Mandate, KSC-BC-2020-06/F00299, 14 May 2021; Krasniqi Defence Reply to Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE), KSC-BC-2020-06/F00302, 14 May 2021; Selimi Defence Reply to SPO Response to Defence Challenge to Jurisdiction – Joint Criminal Enterprise, KSC-BC-2020-06/F00301, 14 May 2021; Thaçi Defence Reply to 'Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigation Deadline, and Temporal Mandate', KSC-BC-2020-06/F00304, 14 May 2021; Thaçi Defence Reply to 'Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE)', KSC-BC-2020-06/F00306, 14 May 2021; Veseli Defence Reply to the Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE), KSC-BC-2020-06/F00310, 17 May 2021; Veseli Defence Reply to Prosecution Response to the Preliminary Motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC (Customary International Law), KSC-BC-2020-06/F00311, 17 May 2021.

<sup>13</sup> Prosecution Sur-Reply, KSC-BC-2020-06/F00333, 1 June 2021.

<sup>14</sup> Veseli Defence Response to Prosecution Sur-Reply, KSC-BC-2020-06/F00342, 4 June 2021.

<sup>15</sup> Veseli Motion, KSC-BC-2020-06/F00223, paras 106-114.

<sup>16</sup> Prosecution Response, KSC-BC-2020-06/F00263, 23 April 2021, para.9.

<sup>17</sup> Prosecution Response, KSC-BC-2020-06/F00263, 23 April 2021, fn. 27.

<sup>18</sup> Decision, KSC-BC-2020-06/F00412, para.203.

<sup>19</sup> Decision, KSC-BC-2020-06/F00412, paras 207-209.

requiring special intent.<sup>20</sup> The Pre-Trial Judge therefore ordered the SPO to amend the Indictment to exclude JCE III liability for torture as a war crime and crime against humanity, and persecution as a crime against humanity.<sup>21</sup>

7. On 28 July 2021, the Court of Appeals extended to 27 August 2021 the deadline for the filing of appeals against the Decision.<sup>22</sup>

### III. SUBMISSIONS

#### A. STANDARD OF REVIEW

8. The Court of Appeals applies *mutatis mutandis* the standard of review provided for appeals against judgements under Article 46(1) to interlocutory appeals.<sup>23</sup> Appeals may be filed alleging, *inter alia*, an error on a question of law invalidating the judgement.<sup>24</sup>

9. Article 46(4) states in relation to errors of law in judgements that:

When the Court of Appeals Panel determines that a Trial Panel has made an error of law in a judgement arising from the application of an incorrect legal standard, the Court of Appeals Chamber shall articulate the correct legal standard and apply that standard to the evidence contained in the trial record to determine whether to sustain, enter or overturn a finding of guilty on appeal. Alternatively, if the Trial Panel is available and could more efficiently address the matter, the Court of Appeals Panel may return the case to the Trial Panel to review its findings and the evidence based on the correct legal standard.<sup>25</sup>

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<sup>20</sup> Decision, KSC-BC-2020-06/F00412, paras 207-208. ‘Special intent’, also referred to as ‘specific intent’ or *dolus specialis*, is intent that goes beyond a requirement that the underlying conduct be intentional.

<sup>21</sup> Decision, KSC-BC-2020-06/F00412, paras 208-209, 214(d).

<sup>22</sup> Decision on Requests for Variation of Time Limits, KSC-BC-2020-06/IA009/F00005, 28 July 2021.

<sup>23</sup> Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020 (‘Gucati Appeal Decision’), para.10.

<sup>24</sup> Article 46(1).

<sup>25</sup> Article 46(4).

10. Prior jurisprudence from the KSC has instructed:

A party alleging an error of law must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision. An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground. However, 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.<sup>26</sup>

B. GROUND ONE: THE APPLICABILITY OF JCE III TO SPECIAL INTENT CRIMES IS NOT JURISDICTIONAL

11. The Defence's motion challenging, *inter alia*, the applicability of JCE III to special intent crimes was filed pursuant to Rule 97(1),<sup>27</sup> which concerns challenges to the KSC's jurisdiction. However, this particular challenge did not argue that the KSC does not have jurisdiction over JCE;<sup>28</sup> rather, it, in effect, sought to challenge the interpretation and application of JCE III in the Confirmation Decision.<sup>29</sup> The Decision acknowledges as much, addressing this issue in a section concerning challenges to the application of JCE that are not 'strictly speaking, entirely jurisdictional in nature'<sup>30</sup> and proceeding to rule on the applicability of JCE III to special intent crimes 'for the purposes of the present case'.<sup>31</sup> This challenge to the application of JCE III to special intent crimes, which exceeds

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<sup>26</sup> Gucati Appeal Decision, para. 12.

<sup>27</sup> Veseli Motion, KSC-BC-2020-06/F00223, para.1.

<sup>28</sup> While the Veseli Defence challenged the KSC's jurisdiction over JCE and JCE III in other parts of its motion, in the section relevant to special intent, its submissions are made assuming *arguendo* that JCE III falls within the jurisdiction of the KSC. *See* Veseli Motion, KSC-BC-2020-06/F00223, paras 106-114.

<sup>29</sup> Confirmation Decision, KSC-BC-2020-06/F00026/RED, paras 105-115 (setting out the applicable law relevant to JCE, including JCE III), 475-478 (applying the law concerning JCE III and finding a well-grounded suspicion that the Accused committed all charged crimes, including persecution and torture, as it was foreseeable to them that such crimes were a possible consequence of the implementation of the JCE's common purpose and they willingly took that risk).

<sup>30</sup> Decision, KSC-BC-2020-06/F00412, para.203.

<sup>31</sup> Decision, KSC-BC-2020-06/F00412, para.208.

the scope of Rule 97, violates the plain language of Rule 86(7)<sup>32</sup> and should not have been ruled upon in the Decision.

12. Challenges to the contours of modes of liability—including the applicability of JCE III to special intent crimes—as opposed to the availability of a mode of liability in its entirety, are not valid jurisdictional challenges and should be addressed at trial.<sup>33</sup> Adhering to the confines of Rule 97 is important not only to promote clarity and predictability, but also to ensure the efficient administration of justice. Questions concerning the contours of modes of liability are best addressed at trial in the factual and procedural context of the case as a whole, as further explained in Section III.C below.

13. Therefore, whether JCE III can apply to special intent crimes is outside of the scope of the tightly cabined parameters for preliminary motions set by the Judges in the Rules, and it was legal error to address it at this stage. In the view of the SPO, a favourable ruling on this ground would obviate the need to address the second, alternative ground of appeal, which is nonetheless set out below.

### C. GROUND TWO: JCE III IS APPLICABLE TO SPECIAL INTENT CRIMES

14. As found by the Pre-Trial Judge in the Decision, JCE III formed part of customary international law at the time of the commission of the alleged crimes in this case and is

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<sup>32</sup> Rule 86(7) ('Challenges by the Defence to a decision on the indictment shall be limited to those under Rule 97').

<sup>33</sup> ICTY, Trial Chamber, *Prosecutor v. Karadžić*, IT-95-5/18/PT 'Decision on Six Preliminary Motions Challenging Jurisdiction,' 28 April 2009, paras 29-33 (holding, *inter alia*, that challenges regarding JCE applicability to special intent crimes are not jurisdictional); ICTY, Appeals Chamber, IT-95-5/18-AR72.1, Decision on Radovan Karadžić's Motions Challenging Jurisdiction (Omission Liability, JCE-III – Special Intent Crimes, Superior Responsibility), 25 June 2009, paras 33-37. *See also* ICTY, Trial Chamber, *Prosecutor v. Milutinović et al.*, IT-05–87-PT 'Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration', 22 March 2006, para.23; ECCC, PTC, 002/19-09-2007-ECCC/OCIJ (PTC38) 'Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise', 20 May 2010, para.23.

an available mode of liability at the KSC.<sup>34</sup> However, the view that it would be a ‘legal anomaly’ to allow for liability for special intent crimes through JCE III<sup>35</sup> not only runs contrary to long-standing and persuasive customary international law jurisprudence from the ICTY Appeals Chamber, but is also logically inconsistent with the application of other modes of liability. At the same time, the Special Tribunal for Lebanon decision holding that JCE III cannot be applied to special intent crimes—cited in the Decision—is unpersuasive in its reasoning on this point, does not reflect customary international law, and does not purport to.

15. In the landmark *Tadić* Appeal Judgement,<sup>36</sup> the ICTY Appeals Chamber ‘found, on the basis o[f] numerous sources from both civil and common law jurisdictions, including post-World War II cases, that the third category of joint criminal enterprise has existed as a mode of liability in customary international law since at least 1992 and that it applies to all crimes.’<sup>37</sup> The availability of JCE III for all crimes, including special intent crimes, was thereafter confirmed by extensive ICTY jurisprudence.<sup>38</sup> As the ICTY Appeals

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<sup>34</sup> Decision, KSC-BC-2020-06/F00412, para.190; *see also* Law, Article 16(1)(a).

<sup>35</sup> Decision, KSC-BC-2020-06/F00412, para.208.

<sup>36</sup> ICTY, Appeals Chamber, *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999 (*‘Tadić Appeal Judgement’*).

<sup>37</sup> ICTY, Appeals Chamber, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Judgement, 30 June 2016, para.599.

<sup>38</sup> *See* ICTY, Appeals Chamber, *Prosecutor v. Stakić*, IT-97-24-A, Judgement, 22 March 2006, para.38 (‘it is now clear that the third category of joint criminal enterprise and the crime of genocide are indeed compatible’); ICTY, Appeals Chamber, *Prosecutor v. Krstić*, IT-98-33-A, Judgement, 19 April 2004, para.150 (convicting for specific intent crimes on basis of JCE III); ICTY, Appeals Chamber, *Prosecutor v. Martić*, IT-95-11-A, Judgement, 8 October 2008, paras 194-195, 202-204, 205 (*‘Martić Appeal Judgement’*) (same); ICTY, Appeals Chamber, *Prosecutor v. Šainović et al.*, Judgement, IC-05-87-A, 23 January 2014, paras 1089-1093, 1280-1283 (upholding convictions for, *inter alia*, persecution pursuant to JCE III); ICTY, Trial Chamber, *Prosecutor v. Milošević*, Decision on Motion for Judgement of Acquittal, IT-02-54-T, 16 June 2004, para.291 (affirming application of JCE III to special intent crimes); *see also* ICTR, *Rwamakuba v. Prosecutor*, ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004, para.31.

Chamber in *Brđanin* explained, allowing JCE III liability for special intent crimes is neither novel nor unique:

As a mode of liability, the third category of joint criminal enterprise is no different from other forms of criminal liability which do not require proof of intent to commit a crime on the part of an accused before criminal liability can attach. Aiding and abetting, which requires knowledge on the part of the accused and substantial contribution with that knowledge, is but one example. Command responsibility liability, which requires the Prosecution to establish that a Commander knew or had the reason to know of the criminality of subordinates, is another.<sup>39</sup>

16. To rule that JCE III liability is not available for special intent crimes is to conflate the *mens rea* required for the mode of liability with the *mens rea* required for a particular criminal act.<sup>40</sup> That JCE III is distinguishable from other modes of liability in various ways is, as the *Brđanin* Decision identified, ‘beside the point.’<sup>41</sup> When the standard necessary for JCE III liability is established, ‘criminal liability can attach to an accused for any crime that falls outside of an agreed upon joint criminal enterprise.’<sup>42</sup>

17. It bears emphasising that liability under JCE III arises only in the case of a perpetrator with existing criminal intent, who has made a significant contribution to criminal conduct—relating to grave international war crimes and crimes against humanity—and requires not only foreseeability of further aberrant crimes, but also the perpetrator’s willingness to take the risk that the foreseeable crimes will, in fact, occur.<sup>43</sup> The underlying JCE I will, in almost all circumstances, create the circumstances that allow

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<sup>39</sup> ICTY, Appeals Chamber, *Prosecutor v. Brđanin*, Decision on Interlocutory Appeal, IT-99-36-A, 19 March 2004, para.7 (*‘Brđanin Decision’*).

<sup>40</sup> See *Brđanin* Decision, para.10.

<sup>41</sup> *Brđanin* Decision, para.9

<sup>42</sup> *Brđanin* Decision, para.9.

<sup>43</sup> See Elies van Sliedregt, *Criminal Responsibility in International Law*, 14 Eur. J. Crime Crim. L. & Crim. Just. 81, 111 (2006) (*‘[W]hen the “collateral crime” can be qualified as a foreseeable consequence of the common criminal plan in which A voluntarily and willingly participated, the element of personal fault is respected. B’s crime generated individual criminal responsibility for A.’*) (emphasis in original).

for the additional foreseeable crimes, regardless of whether they include special intent. Notably, although Judge Shahabuddeen dissented from the *Brđanin* Decision, his disagreement with the majority was not with the availability of JCE III for special intent crimes, but rather the rationale for allowing it. In Judge Shahabuddeen's view, the *mens rea* standard required to satisfy JCE III crimes, *i.e.*, foreseeability and willing assumption of risk, is sufficient to satisfy special intent.<sup>44</sup>

18. The jurisprudence referenced above serves to highlight how JCE III liability for special intent crimes conforms with the logic underlying other modes of liability. Multiple modes of liability permit the accused to have a different *mens rea* from the direct perpetrator. This is true not only in relation to aiding and abetting and command responsibility, as the *Brđanin* Decision noted, but also for JCE II, which requires personal knowledge of a system of ill treatment and intent to further that system,<sup>45</sup> but might encompass crimes with differing *mens rea* standards including special intent. JCE III liability for special intent crimes therefore flows seamlessly from the logic that permits liability based on proof of meeting the *mens rea* standards of other modes of liability without having to prove the *mens rea* required by the underlying crime.<sup>46</sup>

19. It is true that a minority of judicial decisions have held that JCE III cannot encompass special intent crimes. As the Pre-Trial Judge noted, this was the holding of the Appeals Chamber of the Special Tribunal for Lebanon,<sup>47</sup> which a trial chamber of the

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<sup>44</sup> *Brđanin* Decision, Shahabuddeen, J. dissenting, paras 7-8.

<sup>45</sup> *Tadić* Appeal Judgement, para.228.

<sup>46</sup> That the specific *mens rea* of the underlying crime need not follow the entire chain of persons along the mode of liability can also be seen in the inverse. A member of a joint criminal enterprise may be held liable for special intent crimes carried out by tools (*i.e.*, direct perpetrators who are not a member of a JCE) of another member of the JCE even where those tools do not share the special intent required. *Martić* Appeal Judgement, paras. 168, 171.

<sup>47</sup> Special Tribunal for Lebanon, Appeals Chamber, *Prosecutor v. Ayyash et al.*, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I/AC/R176bis, 16 February 2011, paras. 248-249 ('STL Appeals Decision').

Special Court for Sierra Leone found persuasive.<sup>48</sup> However, the STL Appeals Decision commits the same error of conflation of mode of liability *mens rea* and underlying crime *mens rea* that the *Brđanin* Decision rightfully criticised.

20. More significantly, however, the STL Appeals Decision did not purport to be identifying customary international law when it reached its decision regarding JCE III and special intent crimes.<sup>49</sup> The ICTY, on the other hand, did find that applying JCE III to all crimes was reflective of customary international law.<sup>50</sup>

21. Furthermore, the STL Appeals Decision's holding concerning JCE III and special intent crimes was reached in the abstract, while the ICTY jurisprudence resulted from consideration and application of JCE III in the context of concrete facts.<sup>51</sup> As acknowledged by the STL Appeals Chamber itself, there are significant reasons to treat opinions and findings reached *in abstracto* or *in dicta* with caution, particularly when considered against findings necessary to a decision and reached *in concreto*.<sup>52</sup> Indeed, the

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<sup>48</sup> Special Court for Sierra Leone, Trial Chamber II, *Prosecutor v. Taylor*, Judgement, SCSL-03-01-T, 18 May 2012, para.468 ('Taylor Trial Judgement').

<sup>49</sup> See STL Appeals Decision, para.249 (referring simply to the 'better approach', rather than an assessment of customary international law status).

<sup>50</sup> See, e.g., ICTY, Appeals Chamber, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Judgement, 30 June 2016, para.599.

<sup>51</sup> See STL Appeals Decision, paras 8-9. Likewise, the Trial Chamber in the *Taylor* case was not required to consider this issue, as it found that it had not been proved that the accused participated in a common plan which amounted to or involved the commission of a crime and therefore did not reach any consideration of which charged crimes fell within or outside the scope of the common plan. See *Taylor Trial Judgement*, para.6900.

<sup>52</sup> See STL Appeals Decision, para.9 ('There are significant reasons for the normal practice of refraining from giving judgment, even on interpretation of a statute, in the absence of a specific factual context. The experience of law is that general observations frequently require modification in light of particular facts, which can provide sharper focus and trigger a more nuanced response.'). Indeed, the STL Trial Chamber itself emphasised that the STL Appeals Decision's analysis of JCE III was unnecessary and was effectively *dicta*. Special Tribunal for Lebanon, Trial Chamber, *The Prosecutor v. Ayyash, et al.*, Judgment, STL-11-01/T/TC, 18 August 2020, para.6014 ('[N]othing in the wording of Article 3(1)(a) suggests, much less mandates, that a chamber should look to international criminal law case law to determine the meaning of

Decision's blanket rejection in all circumstances of the applicability of JCE III to special intent crimes could lead to incongruous results. For instance, it fails to account for possibilities where an accused may be shown to have the special intent required, but the crime at issue was unintended yet foreseeable.<sup>53</sup>

22. Addressing the contours of JCE III liability in the specific circumstances of trial, as opposed to through preliminary motions, is not only legally correct, but also allows for the possibility that, as recognised by the STL Appeals Chamber, the 'common objective of the JCE can evolve over time'<sup>54</sup> and that 'alleged authors of crimes can originally incur individual criminal responsibility via JCE III but, depending on the circumstances and the evidence presented, their liability can instead result in a conviction via JCE I.'<sup>55</sup> The STL Appeals Chamber explained further: 'when a participant in a JCE foresees an additional crime he originally had not subscribed to and nevertheless agrees to continue providing his significant contribution to the JCE, the only reasonable inference might be that he has come to agree to that additional crime, therefore bringing his liability back into the fold of JCE I.'<sup>56</sup>

23. Moreover, a close reading of the STL Appeals Decision as regards JCE III reveals that the motivating concern for the judicial panel was one of categorisation of criminal

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any of the ordinary criminal law concepts already recognized in Lebanese law, of "committed, participated as accomplice, organized or directed other to commit the crime."").

<sup>53</sup> As an example, consider that an accused enters a JCE and has all required special intent to persecute both Victims A and B. Underlying acts of persecution perpetrated by JCE members against Victim A fall within the scope of the common plan (JCE I), whereas underlying acts of persecution perpetrated by members of the JCE against Victim B fall outside the plan but are a foreseeable consequence of its implementation, and the accused willingly accepts that risk. On the logic of the Decision, the accused cannot be convicted under JCE III for persecution of Victim B even though the accused meets all the elements for JCE III and has persecutory intent.

<sup>54</sup> STL Appeals Decision, para.246.

<sup>55</sup> STL Appeals Decision, para.246.

<sup>56</sup> STL Appeals Decision, para.246.

culpability. The STL Appeals Decision thought it unfair to apply the ‘stigma of full perpetratorship’<sup>57</sup> to persons attaining liability for special intent crimes pursuant to JCE III. But when the assumptions underlying this view are interrogated, they are unsatisfactory to support the conclusion. For instance, the stigma rationale does not explain why it would be permissible to use JCE III for non-special intent crimes but not for special intent crimes. The answer cannot be, as the STL Appeals Decision seems to assume, that special intent crimes inherently carry with them more stigma; that, for instance, there is necessarily less stigma associated with murder than with persecution.<sup>58</sup>

24. Criminal judgements involve extensive legal reasoning and fact-specific assessments, and are not simply a list of findings on counts. The premise of the STL Appeals Decision—that JCE III liability for special intent crimes should not be permissible because as a mode of ‘commission’ it carries an enhanced stigma of ‘full perpetratorship’—is not reflective of the entire picture of culpability as described in such judgements. Instead, it is a reductive view that would turn lengthy and thoughtful legal and factual descriptions of culpability—of which the mode of liability is only one part—into simple bullet points. This view should be resisted. The context and factual circumstances of any crimes are central to their perception,<sup>59</sup> and any subtleties and

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<sup>57</sup> STL Appeals Decision, para.249.

<sup>58</sup> See, e.g., ICTR, Appeals Chamber, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Judgment, 1 June 2001, para.367 (‘The Appeals Chamber remarks that there is no hierarchy of crimes under the Statute, and that all of the crimes specified therein are “serious violations of international humanitarian law”’); SCSL, Appeals Chamber, *Prosecutor v. Taylor*, SCSL-03-01-A, Judgment, 26 September 2013, para.670 (‘under the Statute, Rules and customary international law, there is no hierarchy or distinction for sentencing purposes between forms of criminal participation’); ICC, Appeals Chamber, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13 A6 A7 A8, Judgment, 8 March 2018, para.60 (rejecting that ‘the principal perpetrator of a crime/offence necessarily deserves a higher sentence than the accessory to that crime/offence’, and instead holding that ‘whether this is actually the case ultimately depends upon all the variable circumstances of each individual case’).

<sup>59</sup> See Leila Nadya Sadat, *Can the ICTY Šainović and Perišić Cases be Reconciled?*, 108 Am. J. Int’l L. 475, 485 (2014) (‘As the Special Court for Sierra Leone recently noted, the gravity of a crime depends not on the mode of liability chosen but on the particular facts of its commission and the accused’s criminal conduct.’).

distinctions in culpability can be fully conveyed over the course of a judgment while still allowing for JCE III convictions for special intent crimes.

25. The driving rationale of the STL Appeals Decision cannot outweigh the studied views of the ICTY decisions. At the KSC, as elsewhere, any judgement resulting in conviction would provide ample space to differentiate between types of perpetrators, including those convicted under JCE III. Likewise, variations in sentencing can and should reflect—and be proportionate to—differing degrees of culpability.<sup>60</sup> Trial chambers should ‘weigh the relevant factors in order to determine a sentence that reflects the culpability of the convicted person.’<sup>61</sup>

26. In sum, the arguments against allowing for conviction of special intent crimes pursuant to JCE III do not withstand scrutiny, while those in favor are consistent with enduring international criminal law doctrine.

#### IV. RELIEF SOUGHT

27. In light of the foregoing, the SPO respectfully requests the Appeals Chamber to:
- a. Vacate the section of the Decision concerning the applicability of JCE III to special intent crimes as outside the scope of Rule 97; or, in the alternative,
  - b. Reverse the Decision as regards the applicability of JCE III to special intent crimes.

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<sup>60</sup> See *Martić* Appeal Judgement, para.84 (‘It is up to the trier of fact to consider the level of contribution – as well as the category of JCE under which responsibility attaches – when assessing the appropriate sentence, which shall reflect not only the intrinsic gravity of the crime, but also the personal criminal conduct of the convicted person and take into account any other relevant circumstance.’); see also ICC, Appeals Chamber, *The Prosecutor v. Lubanga Dyilo*, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the ‘Decision on Sentence pursuant to Article 6 of the Statute,’ 1 December 2014 (*Lubanga* Sentencing Appeals Judgement), para.40 (‘Proportionality is generally measured by the degree of harm caused by the crime and the culpability of the perpetrator and, in this regard, relates to the determination of the length of sentence.’).

<sup>61</sup> *Lubanga* Sentencing Appeals Judgement, para.40.

**Word count: 4,618**



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**Jack Smith**

**Specialist Prosecutor**

Friday, 27 August 2021

At The Hague, the Netherlands.