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:	**Court of Appeals Panel**
	Judge Michèle Picard Judge Emilio Gatti Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Prosecutor
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Prosecution response to Krasniqi Defence appeal against the 'Decision on Motions challenging the jurisdiction of the Specialist Chambers'

with public annex 1

Specialist Prosecutor's Office

Jack Smith

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

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I. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') hereby responds to the Defence Appeal challenging the jurisdiction of the Specialist Chambers.[1] No error invalidating the Decision[2] has been shown and the Appeal should be rejected.

II. PROCEDURAL HISTORY

2. On 26 October 2020, the Pre-Trial Judge ('PTJ') confirmed the indictment against the Accused ('Indictment') including charges of crimes against humanity and war crimes, including murder, enforced disappearance of persons, persecution, and torture.[3]

3. On 15 March 2021, the Defence filed its Preliminary Motion on Jurisdiction,[4] which was followed by the SPO Responses on 23 April 2021.[5]

4. On 22 July 2021, the PTJ rendered the Decision, rejecting the Motion.

5. On 28 July 2021, the Court of Appeals Chamber granted the requests of the Defence[6] and the SPO[7] seeking an extension of the time limit to file appeals against the Decision, and related responses.[8]

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[1] KRASNIQI Defence Appeal against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/IA009/F00013, 27 August 2021 ('Appeal').
[2] Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/F00412, 22 July 2021 ('Decision').
[3] KSC-BC-2020-06/F00026/RED.
[4] KRASNIQI Defence Preliminary Motion on Jurisdiction, KSC-BC-2020-06/F00220, 15 March 2021 ('Motion').
[5] Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE), KSC-BC-2020-06/F00263, 23 April 2021 ('SPO Response-JCE'); Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigation Deadline, and Temporal Mandate, KSC-BC-2020-06/F00259, 23 April 2021 (together the 'SPO Responses').
[6] KSC-BC-2020-06/IA009/F00001.
[7] KSC-BC-2020-06/IA009/F00003.
[8] KSC-BC-2020-06/IA009/F00005. *See also* KSC-BC-2020-06/IA009/F00017.

6. On 27 August 2021 the Defence filed the Appeal.

III. STANDARD OF REVIEW

7. Alleging an error of law requires identifying the alleged error, presenting arguments in support of the claim, and explaining how the error invalidates the decision.[9] An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.[10]

8. An error of fact can only be found if no reasonable trier of fact could have made the impugned finding.[11]

9. Finding an abuse of discretion requires that the Decision was so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.[12]

IV. SUBMISSIONS

A. JCE IS FOUND IN ARTICLE 16(1)(A) OF THE LAW

10. The Decision correctly finds that JCE, in all forms, is a form of commission recognised in Article 16(1)(a) of the Law. Defence arguments challenging this finding[13] fail to demonstrate an error of law and instead repeat submissions previously considered and rejected.[14]

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[9] Decision on Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, ('*Gucati* Appeals Decision'), KSCS-BC-2020-7/IA001/F00005, para.12.
[10] KSCS-BC-2020-7/IA001/F00005, para.12.
[11] KSCS-BC-2020-7/IA001/F00005, para.13.
[12] KSCS-BC-2020-7/IA001/F00005, para.14.
[13] Appeal, paras 69-77. The Defence plead this ground with 'JCE III only' in the alternative. Unless otherwise noted, the arguments made in response apply to all categories of JCE.
[14] *See* Motion, paras 17-20, 22-23.

11. The Decision provides sufficient reasoning and expressly confirms that Article 16(1)(a) must be interpreted within the context of the KSC's legal framework.[15] The Decision does not suggest that *any* CIL mode would be applicable, rather that JCE, which is a form of commission, is applicable because of, *inter alia,* the legal framework of the KSC and the specific language of Article 16(1)(a).[16] The PTJ further explained that 'commission' can be understood by assessing the interpretation of virtually identical statutory provisions of other courts.[17] This is consistent with Article 3(3) of the Law and is appropriate, as the enumerated courts also apply CIL modes of liability according to their statutes.[18] Defence arguments concerning conceptual reconciliation of commission with JCE III are not decisive and do not meet the standard for showing an error of law.[19]

12. The PTJ's interpretation of 'commission' in Article 16(1)(a) should be affirmed. In 2015 when the Law was adopted, five other courts - interpreting virtually identical language - had consistently determined that JCE is a form of commission.[20] In suggesting inconsistency in JCE's characterisation, including within the ICTY, the Defence overlooks that the ICTY Appeals Chamber has addressed this issue. In

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[15] Decision, para.177; *Contra* Appeal, paras 70-71.
[16] Decision, para.177; *Contra* Appeal, para.70.
[17] Decision, para.177.
[18] *See* Decision, para.177.
[19] *Contra* Appeal, para.74.
[20] ICTY, Appeals Chamber, *Prosecutor v. Tadić*, IT-94-1-A Judgement, 15 July 1999 (*Tadić* AJ), para.190; ICTY, Appeals Chamber, *Prosecutor v. Milutinović et al.*, IT-99-37-AR72 'Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*', 21 May 2003 ('*Ojdanić* JCE Decision'), para.20; ECCC, Trial Chamber, *Co-Prosecutors v. Kaing Guek Eav* alias *Duch*, 001/18-07-2007/ECCC/TC Judgement, 26 July 2010 ('*Duch* TJ'), para.511; ECCC, PTC, 002/19-09-2007-ECCC/OCIJ (PTC38) 'Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)', 20 May 2010 ('PTC Decision on JCE'), para.49; ECCC, Trial Chamber, 0002/19-09-2007/ECCC/TC 'Decision on the Applicability of Joint Criminal Enterprise', 12 September 2011 ('ECCC TC JCE Decision') paras 15, 22; ICTR, Appeals Chamber, *Prosecutor v. Ntakirutimana and Ntakirutimana, ICTR-96-10-A* and *ICTR-96-17-A* Judgement, 13 December 2004 ('*Ntakirutimana* AJ'), paras 461-484; SCSL, Trial Chamber II, *Prosecutor v. Brima et al.*, SCSL-04-16-T 'Decision on Defence Motions for Judgment of Acquittal pursuant to Rule 98', 31 March 2006 ('*Brima et al*. Decision on Judgment of Acquittal'), paras 308-326.

Ojdanić, the Appeals Chamber stated that JCE is not a form of accomplice liability to be applied to those who aid and abet a crime.[21] No terminological variations, which have been acknowledged and made plain by the ICTY Appeals Chamber, call into doubt JCE's status in CIL. Likewise, *Jogee,* a domestic decision concerning a different form of liability, namely accessorial liability under UK law, has no bearing on the CIL status of JCE.[22]

13. Like the ICTY Statute, the Law was not enacted in a void. It was adopted by the Kosovo Assembly as the requisite legislation contemplated pursuant to the agreements establishing the KSC.[23] It therefore must be interpreted with consideration of its context, object and purpose.[24] Article 1 states that the court shall exist to *inter alia*, 'ensure secure, independent, impartial, fair and efficient criminal proceedings'.[25] Fulfilling the Law's purpose requires applying it to those responsible for crimes within the KSC's jurisdiction, whether they acted alone or with others.[26] This was an animating concern for the drafters of the CoE Report.[27] The Law was designed to, and does, include JCE as a mode of liability for precisely these circumstances. While the term 'natural meaning' is not explained in the Appeal,[28] it is submitted that this phrase

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[21] *Ojdanić* JCE Decision, paras 20, 31; *Contra* Appeal, para.75.
[22] Decision, para.188. *Contra* Appeal, para.75. *See* SPO Response-JCE, paras 120-121; UK, *R v. Jogee,* [2016] UKSC 8, Supreme Court, *Judgment*, 18 February 2016; IRMICT, Appeals Chamber, *Prosecutor v. Karadžić*, MICT-13-55-A, Judgement, 20 March 2019 ('*Karadžić* AJ'), paras 422-437.
[23] *See* Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused, KSC-BC-2020-06/F00450, 31 August 2021, paras 86-88.
[24] *See* SPO Response-JCE, paras 17-20.
[25] Law, Art.1.
[26] *See e.g.* Law, Art.13-14, Art.16(1)(b-d) (noting and dispensing with any impediment to prosecution based on official position, order by a government or superior, or due to subordinates' acts).
[27] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report: Inhumane treatment of people and illicit trafficking in human organs in Kosovo, Doc.12462, 7 January 2011 ('CoE Report') Executive Summary, Draft Resolution, para.14, Report, paras 7, 69, 169-174, 176. *See also* Law, Art.1; Law No. 04/L-274 on Ratification of the International Agreement Between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo, 23 April 2014 ('Exchange of Letters'). The Exchange of Letters itself does not have internal page numbering, the SPO has used the pdf page number in the version of Law No.04/L-274 on the KSC's website.
[28] Appeal, paras 69, 70, 72.

is vague at best in this context, and, at worst, is meant to encompass only physical perpetrators, as submitted by the Defence previously.[29] To find that the modes of liability in the Law encompass only physical perpetrators would yield an impunity gap for those who created and implemented criminal plans and policies, instead reaching only those who implemented the resulting crimes. In light of consistent and precedential caselaw on JCE as a form of commission, had the drafters intended to limit 'commission' to physical perpetrators, they would have had to make such a restriction explicit.[30]

14. The inclusion of JCE as a mode of commission liability reflects the reality of many crimes committed during a period of conflict or unrest. These crimes are frequently perpetrated by groups acting together in pursuance of a common criminal design, and not solely based on an individual's criminal proclivity.[31] Some participants may be physical perpetrators, and those who are not may have made contributions bearing like moral gravity.[32] The modes of liability appropriate in such settings support accountability for those whose significant contributions make possible the physical perpetration of crimes.[33]

15. The PTJ correctly rejected the Defence submission on *in dubio pro reo*.[34] As outlined above, no reasonable doubt exists warranting the application of this principle once the Law is interpreted in context, considering its language, object and purpose.

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[29] Motion, paras 22-23.
[30] PTC Decision on JCE, para.49.
[31] *Tadić* AJ, para.191; PTC Decision on JCE, para.55; SCSL, Appeals Chamber, *Prosecutor v. Taylor*, SCSL-03-01-A Judgment, 26 September 2013, para.383.
[32] *Tadić* AJ, para.191.
[33] *Tadić* AJ, para.192; ICTR, Trial Chamber, *Prosecutor v. Karemera et al*., ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Nzirorera, Karemera, Rwamakuba and Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 11 May 2004 ('*Karemera* Decision on Preliminary Motions'), para.36; ICTR, Appeals Chamber, *Prosecutor v. Rwamakuba*, ICTR-98-44-AR72.4 'Decision on Interlocutory Appeal regarding Application of Joint Criminal Enterprise to the Crime of Genocide', 22 October 2004 ('*Rwamakuba* JCE Decision'), para.29.
[34] Decision, para.204; *Contra* Appeal, para.73; Motion, para.19.

It is clear that the KSC's jurisdiction extends not only to perpetrators acting alone, but also to those acting together, committing crimes in executing a common criminal purpose. As found by ICTY Appeals Chamber when considering this argument, the proper interpretation of the court's jurisdiction 'simply leave[s] no room for' application of the *in dubio pro reo* principle.[35] Article 16(1)(a), properly interpreted, includes responsibility for all perpetrators who contribute to the commission of crimes carried out jointly, by a group acting pursuant to a common criminal purpose or JCE.[36] The PTJ's finding is correct and the Defence fails to demonstrate error.

B. JCE III IS AN ESTABLISHED MODE OF LIABILITY IN CIL

16. Contrary to Defence submissions,[37] the Decision correctly found that JCE III (and JCE I)[38] were part of CIL during the temporal jurisdiction of the KSC.[39] Defence arguments ignore relevant findings, misconstrue the Decision and do not demonstrate error.

1. The Decision does not lack reasoning or reverse any burden

17. The Decision reveals that the PTJ analysed the status of JCE III in CIL and provided reasons for his findings. This includes an analysis of underlying sources of law, and consideration of Defence criticisms of those sources.

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[35] *Ojdanić* JCE Decision, paras 27-28; *See also* ICTY, Appeals Chamber, *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction *Joint Criminal Enterprise*, 21 May 2003 ('Hunt *Ojdanić* Separate Opinion'), annexed to *Ojdanić* JCE Decision, para.26.
[36] *See similarly Tadić* AJ, paras 186, 190; Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993 ('Report of the Secretary-General').
[37] Appeal, paras 12-58.
[38] Since the Ground 1 submissions concern JCE III, this response also concerns JCE III.
[39] Decision, para.190.

18. In particular, having explicitly considered the sufficiency of the basis upon which they rest,[40] the Decision correctly considers, and endorses, clear and consistent jurisprudence finding that JCE III forms - and, at the time of the charges, formed - part of CIL.[41] There was no requirement for the PTJ to replicate in the Decision prior reasoning with which he agrees. The authorities, their basis and the PTJ's consideration of them are clearly set out. Equally clear is the PTJ's consideration of Defence submissions[42] – the majority of which, as noted in the Decision, merely repeat challenges which had been considered and adjudicated in prior jurisprudence.[43]

19. For example, the PTJ explored the statutory foundation of the post-WWII prosecutions for war crimes and crimes against humanity and concluded that the IMT Charter and CCL10 'clearly provide for criminal liability for participation in a common plan or enterprise.'[44] He thus rejected Defence arguments to the contrary and held that Defence submissions on the *post facto* status of these laws were without merit, noting some of the many sources which show that these statutes reflect pre-existing law.[45]

20. In endorsing the analysis and findings of other courts, the Decision expressly finds that the jurisprudence underlying them provides a 'clear and sufficient' basis for the existence of JCE III as part of CIL.[46] The analysis includes explicit consideration of the elements of state practice and *opinio juris*.[47] The Decision also expressly addresses Defence submissions.[48] The PTJ thus opined on relevant sources of law, the

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[40] Decision, para.186.
[41] Decision, paras 181-190.
[42] Decision, paras 183-189.
[43] Decision, para.185 (in respect of JCE 1). *See also* SPO Response-JCE, paras 101-120.
[44] Decision, para.183, including fn.385.
[45] Decision, para.183.
[46] Decision, para.186.
[47] Decision, para.186.
[48] Decision, para.186. See also paras 187-189, 202-208 addressing Defence submissions against JCE, including JCE III, and paras 191, 193-200 regarding Defence arguments against foreseeability and accessibility.

requirements for a rule of CIL, and, having assessed the Defence submissions on JCE III, enumerated the standard for satisfying the requirements for CIL, applied it, and gave reasons for his decision.

21. Faced with clear, settled and elaborated sources of law and prior analysis and jurisprudence on the matter, there was no error in the PTJ assessing whether Defence challenges raised previously unconsidered arguments or were otherwise meritorious to a degree warranting departure.[49] This does not reflect a shifting of burden. The SPO met its burden in presenting an elaborate identification and analysis of multiple sources of law grounding a finding that JCE (including JCE III) existed in customary international law at the relevant time.[50] As outlined above, it is apparent that the Decision's endorsement of the authorities in question reflected independent consideration of their sufficiency. The Decision then exceeded what was strictly required in giving express consideration to Defence challenges.

22. Moreover, the Decision correctly identified relevant legal principles[51] for the assessment of the sufficiency of state practice and *opinio juris*. This may include consideration of the overall context in which the subject-matter arises, the nature of the rule, and the particular circumstances relevant to the source of evidence of the rule.[52] For example, the practice of the most-affected states should be considered and state practice may take a wide range of forms, including in decisions of international courts.[53]

23. The legal principles enumerated in the Decision reveal that the PTJ took into account that due to the subject-matter of the rule and the frequency of its operation,

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[49] *Contra* Appeal, para.14.
[50] *See* SPO Response-JCE, paras 26-120.
[51] Decision, para.182.
[52] Decision, para.182. *See also* SPO Response-JCE, para.109.
[53] Decision, para.182.

there is a limited volume of relevant sources of law. This is the correct approach. In areas of international law of regular engagement, such as diplomatic relations, state practice must be widely exhibited, while for rules on matters in which fewer states engage, a lesser amount of practice suffices.[54] This principle is particularly relevant for international modes of liability as state practice is manifested through prosecutions and, for various reasons, such prosecutions are relatively scarce. Under these circumstances, as recognised by the ECCC Supreme Court Chamber, paucity of prosecutions could not be found to disprove the existence of state practice under international law.[55] It is both appropriate and explicitly permitted by the Law,[56] for the PTJ to have both observed and described the links in his analysis with that of other courts and to refer to the judicial determinations of those courts as part of his decision-making process.

24. The Decision reflects evaluation of the underlying legal sources (including precedent from the post-WWII era), consideration of the assessment made by courts which interpreted like sources and which have further elaborated upon the applicability and parameters of JCE through judicial application of the doctrine and robust litigation challenging the same, and finally, assessment of whether these sources support the principle of common purpose liability. Before reaching a conclusion, the PTJ expressly noted his consideration of Defence submissions as well

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[54] Report of the International Law Commission, sixty-eighth session (2 May-10 June and 4 July-12 August 2016), A/71/10, p.76 - Text of the draft conclusions on identification of CIL adopted by the Commission ('ILC Report CIL') Conclusion 8, p.94, para.3. *See* Decision, para.182, fn.377.
[55] ECCC, Supreme Court Chamber, *Co-Prosecutors v. Kaing Guek Eav* alias *'DUCH'*, Appeal Judgement, 3 February 2012 ('*Duch* AJ'), para.93. Similarly, the social and moral need for the observance of a certain rule, coupled with *opinio juris* expressed by states or international entities, may suffice to establish a customary rule of international humanitarian law absent widespread state practice. *See* A. Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, in 11 European Journal of International Law (2000), 187-216. *See also* R. Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, in International Review of the Red Cross, 30 April 1997, No. 317 www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm.
[56] Law, Art.3(3).

as the reasoning by other courts.[57] There was no error in the Decision's approach, nor – as set out below – in its conclusion.

2. JCE III is a mode of liability with CIL status and was so at the relevant time

(a) WWII-era sources of law reveal the CIL status of JCE, including JCE III

25. The roots of modern JCE liability extend to no later than the waning days of WWII, when many nations acting jointly adopted a legal framework for future prosecutions.[58] The establishment of the IMT, the adoption of its Charter, and the adoption of CCL10, accomplished pursuant to multi-lateral agreements,[59] provided the 'machinery for the actual application of international law theretofore existing'.[60]

26. The IMT Charter and CCL10 contain provisions for criminal liability for participation in a common purpose, plan or enterprise.[61] The IMT Charter, attributing liability for 'all acts performed by any persons in execution of such plan' and CCL10,

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[57] Decision, para.186.
[58] *See also* SPO Response-JCE, paras 27-100.
[59] The IMT was established by agreement between the Allied Powers with the following expressing adherence to the agreement: Yugoslavia, Greece, Denmark, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay. *See United States of America v. Goering et al.*, IMT, Judgement, 1 October 1946, in *Trial of the Major War Criminals* (Vol. I, 1947) ('IMT Judgement'), p.171; Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945 ('IMT Charter'), p.1. CCL10 was enacted by legislative act, jointly passed by the US, USSR, France and Great Britain, reflecting international agreement as to the law applicable to international crimes and the jurisdiction of the military courts adjudicating these cases. *See* PTC Decision on JCE, para.57.
[60] *United States of America v. Ohlendorf et al*., 1947, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (United States Government Printing Office, Vol. IV, 1951) ('*Einsatzgruppen*'), p.459. *See* SPO Response-JCE, paras 34-36.
[61] Article 6 of the IMT Charter provides that persons: 'participating in the formulation or the execution of a common plan or conspiracy to commit [crimes against peace, war crimes, or crimes against humanity] are responsible *for all acts performed by any persons* in execution of such plan'. IMT Charter, Article 6 (emphasis added). Article II(2) of CCL10 provides that '[a]ny person…is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was *connected with plans or enterprises involving its commission*'. CCL10, Article II(2) (emphasis added).

providing liability for persons 'connected with plans or enterprises involving the commission of a crime' encompass responsibility for not only crimes falling within the common plan (JCE I), but also for other crimes committed in the execution of the plan or connected to the plan (JCE III).[62] Contrary to the Defence submission, and as evident in the Decision[63] this does not exclude JCE III - all categories of JCE require participation in a common plan or enterprise.[64]

27. The Defence arguments that these laws support JCE I and not JCE III fail to consider the substantial overlap between all forms of JCE, specifically the legal requirements and the conduct of an accused and his agreement to be part of a common plan, all of which must be shown to satisfy the requirements of JCE.[65] There are strict requirements for attribution of criminal responsibility through all forms of JCE: it is necessary to prove, *inter alia*, that each accused made a significant contribution to the common criminal plan with the required *mens rea*, namely intent for the crimes forming part of the common plan ('JCE I') and foreseeability for those crimes that, albeit not intended, were a natural and foreseeable consequence of the plan ('JCE III'). The 'additional crime' that an accused could be responsible for under JCE III is nothing more than the 'the outgrowth' of previously agreed or planned criminal conduct for which each JCE member is *already* responsible.[66] As such, it only arises where a perpetrator who already had criminal intent, and had made a significant contribution,

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[62] Further, as noted by the PTJ, seminal documents related to the adoption of these laws show that liability was expected to attach for members of a common plan or design for each offense committed and that the crimes committed, which were the subject of prosecution pursuant to the IMT Charter and CCL10, included those which were the 'natural and probable consequence' of the criminal enterprise. Decision, para.183 and cites at fn.384.
[63] Decision, para.183; *Contra* Appeal, para.52.
[64] *Tadić* AJ, para.227.
[65] *See* Appeal, para.52. *See* KSC-BC-2020-06/F00026/RED, paras 105-115 (noting requirements for JCE). *Tadić* AJ, paras 196-204.
[66] Special Tribunal for Lebanon ('STL'), STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 ('STL Decision on Applicable Law'), para.243.

could and did foresee the possibility of an additional crime and willingly took that risk.[67]

28. Criminal responsibility through participation in a plan or enterprise was clearly pre-existing law at the time of the IMT Charter and CCL10.[68] When assessing whether this responsibility extended to JCE III, the statutory provisions of these instruments and their *travaux préparatoires* cannot be considered in isolation.[69] As previously established, the IMT Charter and CCL10, as well the pleadings and decisions from relevant cases, have much in common with the modern elements of JCE, but do not always employ language that 'fit[s] neatly' into the three categories of JCE.[70] Modes of liability or their constitutive elements are not described with the same methodology and terminology of modern international courts.[71]

29. This, however, is not necessary under the principle of legality, which only requires that an accused be able to appreciate that his or her conduct is criminal in the sense generally understood, without reference to any specific provision.[72] Similarly, as recognised by the ICTY Appeals Chamber, in lieu of detailed discussions on legal concepts underpinning responsibility, some period judgements find the accused responsible, based on the evidence, as they were 'connected with', 'concerned in', or 'inculpated in' the commission of crimes.[73]

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[67] STL Decision on Applicable Law, paras 243, 245.
[68] Decision, para.183 (and citations therein).
[69] *Contra* Appeal, paras 52-53.
[70] *Rwamakuba* JCE Decision, para.24.
[71] *See Rwamakuba* JCE Decision, para.24; ECCC, Supreme Court Chamber, *Co-Prosecutors v. Nuon Chea and Khieu Samphân*, 002/19-09-2007-ECCC/SC, Appeal Judgement, 23 November 2016 ('SCC AJ'), paras 776-777, 779.
[72] ICTY, Appeals Chamber, *Prosecutor v. Hadžihasanović et al*., IT-01-47-AR72 'Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility', 16 July 2003 ('*Hadžihasanović et al*. Jurisdiction Appeal Decision'), para.34.
[73] *Rwamakuba* JCE Decision, para.24.

30. This characterisation, coupled with factual narratives which support the applicability of principles akin to JCE III, demonstrate that the cases proceed upon the principle that when two or more persons act together to further a common criminal purpose, offenses perpetrated by any of them may entail the criminal liability of all the members of the group.[74]

31. For many cases, the trial records, including statements of counsel, Judge Advocates and written judgments, and the related legal analyses prepared on post-conviction review, being over 70 years old, do not address the constitutive elements of modes of liability in the manner of modern international courts.[75] This does not obviate their utility as examples of the presence of the doctrine, nor pose a problem of legality.[76] These cases require assessment of the totality of the information available concerning the existence of relevant legal principles. This includes counsels' statements and those of Judge Advocates, who provided advice on points of law.[77] Judges are competent to assess available records, in addition to the judgements in these cases:

> the Appeals Chamber was competent, particularly 'when a clear judicial statement was unavailable', to examine the statements of counsel engaged in cases to ascertain how the court in fact proceeded; courts sometimes do that. The arguments of counsel are given in the better law reports of some jurisdictions before the judgement is laid out. That practice, where it applies, is not an ornamental flourish on the part of the reporter: counsels' arguments help appreciation of what the issues were. Thus, it cannot be wrong to refer to counsel's arguments. […] [T]he material question is whether [these statements] correctly reflected CIL.[78]

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[74] *See Tadić AJ*, para.195.
[75] *See Rwamakuba* JCE Decision, para.24; *See* SPO Response-JCE, para.42.
[76] *See* SPO Response-JCE, paras 28-29.
[77] *See* SPO Response-JCE, paras 38-41; Report of the Judge Advocate for War Crimes – European Command, June 1944 to July 1948 ('European Command War Crimes Report') Section VIII, p.71 (loc.gov/rr/frd/Military_Law/pdf/report-deputy-JA-war-crimes.pdf).
[78] ICTY, *Prosecutor v. Dorđević*, Judgement, IT-05-87/1-A, 27 January 2014 ('*Đorđević* AJ'), para.45 (citing with approval the clarification found in *Prosecutor v. Krajišnik*, IT-00-39-A, Separate Opinion of Judge Shahabuddeen, 17 March 2009, para.24 annexed to *Krajišnik* AJ). *See also* Extraordinary African

The value of applying this approach to the cases[79] is apparent upon closer examination of jurisprudence.

32. *Borkum Island*:[80] In *Borkum Island*, brought following the killing of U.S. airmen, fifteen soldiers and civilians were indicted for wilful killing and assault.[81] Fourteen accused were convicted of assault, with six also convicted of wilful killing.[82] The *Tadić* Appeals Chamber observed that:

> [i]t may be inferred from this case that all the accused found guilty were held responsible for pursuing a criminal common design, the intent being to assault the prisoners of war. However, some of them were also found guilty of murder, even where there was no evidence that they had actually killed the prisoners. Presumably, this was on the basis that the accused, whether by virtue of their status, role or conduct, were in a position to have predicted that the assault would lead to the killing of the victims by some of those participating in the assault.[83]

33. *Tadić's* treatment of *Borkum Island* reflects judicial deduction showing the application of legal principles to facts. Available records contain additional information and detail, which confirm *Tadić* correctly found liability based on foreseeability for the killings.[84]

34. The Deputy Judge Advocate's Review and Recommendations explicitly confirmed the applicable law, setting forth a standard akin to JCE III:

> all those who join as participants in a plan to commit an unlawful act, the natural and probable consequence of the execution of which involve the contingency of taking

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Chambers, Trial Chamber, *Ministere Public v. Hissene Habré* Judgment, 30 May 2016 ('*Habré* TJ') paras 1872, 1884.

[79] *See also* SPO Response-JCE, paras 62-93.

[80] *United States v. Kurt Goebell et al.*, Case No. 12-489, Review and Recommendations, 1 August 1947, ('*Borkum Island*'), www.legal-tools.org/doc/aeb036/pdf/

[81] *Borkum Island*, p.1.

[82] *Borkum Island*, p.2.

[83] *Tadić* AJ, para.213.

[84] The ECCC PTC recognised this case may be relevant to JCE III. PTC Decision on JCE, para.79. *Contra* Appeal, paras 24-25.

> human life, are legally responsible as principals for homicide committed by any of them in pursuance of or in furtherance of the plan.[85]

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

36. Further, the Judge Advocate's legal analysis is linked to legal texts which apply principles underlying JCE III. In reviewing *Borkum Island*, the Judge Advocate refers to *US v. Joseph Hartgen* (also called *Rüsselsheim*) and notes that the theory in *Borkum Island* is the same as in *Rüsselsheim*.[86] In the U.S. War Crimes Manual, described below, *Rüsselsheim* is cited for a legal principle which demonstrates JCE III liability:

> All who join in a common design to commit an unlawful act, *the natural and probable consequence of the execution of which* involves the contingency of taking human life, are responsible for a homicide committed by one of them while acting in pursuance of or in furtherance of the common design, *although not specifically contemplated by the parties*, or even forbidden by defendant, or although the actual perpetrator is not identified.[87]

37. These statements of law make plain that *Borkum Island* concerns criminal responsibility for foreseeable crimes committed by those with the intent to commit crimes as part of a common criminal plan, such as in a mob. The prosecutor's opening statement reinforces the customary status of the doctrine of common criminal design, a pivotal element of all forms of joint criminal enterprise:

> [I]t is important, as I see it, to determine the guilt of each of these accused in the light of the particular role that each one played. They did not all participate in exactly the same manner. Members of mobs seldom do. One will undertake one special or particular action and another will perform another particular action. It is the composite of the actions of all that results in the commission of the crime. Now, all legal authorities agree that where a common design of a mob exists and the mob has

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[85] *Borkum Island*, pp.22, 24, 26, 43-44. *See also* Robert Charles Clarke, 'Return to Borkum Island: Extended Joint Criminal Enterprise Responsibility in the Wake of World War II', 9 *J. INT'L CRIM. JUST*. 839 (2011) ('Clarke, Return to Borkum Island') p.855.
[86] *Borkum Island* case, pp.9-10.
[87] U.S. War Crimes Trial Manual, Section 410, 15 July 1946 ('U.S. War Crimes Manual'), p.305 (emphasis added).

> carried out its purpose, then no distinction can be drawn between the finger man and the trigger man *(sic)*. No distinction is drawn between the one who, by his acts, caused the victims to be subjected to the pleasure of the mob or the one who incited the mob, or the ones who dealt the fatal blows. This rule of law and common sense must, of necessity, be so. Otherwise, many of the true instigators of crime would never be punished.[88]

38. The application of this doctrine is further confirmed by the reviewing military officers, who stated that Krolikovski's acts as they emerged from the evidence were 'compatible with the plan and in furtherance thereof'.[89] Contrary to the Defence submission, this finding does not exclude JCE III as (i) the fact that his acts were compatible with the plan does not mean that other members of the plurality of persons must have refrained from engaging in crimes outside the common plan and (ii) additional crimes not falling within the plan can still be found to be compatible with it.[90] The evidence underpinning Krolikovski's conviction shows that intent was not required to convict him for wilful killing. The Judge Advocate's detailed summary shows that Krolikovski took no active part in the beating or shooting of the airmen, and had no knowledge that they would eventually be killed.[91]

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

> 'a universally recognized principle of criminal law, governing the determination of guilt of an accomplice, that one who knowingly and willingly participates in a criminal design or undertaking is equally with the direct perpetrator or perpetrators responsible for any act in pursuance of that design or undertaking, or which is a natural or probable consequence of it, but only if it was committed after he became a participant to the scheme'.[92]

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[88] *Tadić* AJ, para.210.
[89] *Borkum Island* case, p.20.
[90] *Contra* Appeal, para.26.
[91] *Borkum Island*, p.18. *See also* Koessler, Borkum Island Tragedy and Trial, pp.188-189; SPO Response-JCE, para.70; European Command War Crimes Report, p.65-66.
[92] Koessler, Borkum Island Tragedy and Trial, p.194.

40. The Defence's argument against the application of the principles underlying JCE III in *Borkum Island* ignores that an accused could be acquitted for reasons besides lacking *mens rea,* i.e. insufficient evidence of a significant contribution or of belonging to the plurality of persons. The suggestion that acquittal is impossible with JCE III lacks merit.[93]

41. *Essen Lynching*:[94] The accused, composed of members of the military and civilians, were charged with killing three downed British airmen. They were killed following physical violence of various sorts by multiple persons, and the accused, who played differing roles, were found to have been 'concerned in the killing.'[95] While the record is brief in terms of legal reasoning,[96] the factual narrative is sufficient to infer the relevant principles applied.[97] The principle emerges that a co-participant in a crime may be held responsible for additional crimes committed by other participants that he or she had not intended. The judges issued convictions for the killing of the airmen against individuals who had not manifested any intent in that regard.[98] It is apparent that this responsibility is attributed based on the foreseeability or predictability of the fate that befell the airmen.[99]

42. Contrary to the Defence claim, the trial was not under English law.[100] The prosecutor emphasised, at closing, that while he used the word 'murder' in opening, 'murder' is a crime under English law, as noted by the legal member of the Court, and

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[93] *Contra* Appeal, para.27.
[94] *Trial of Erich Heyer et al.*, British Military Court for the Trial of War Criminals, Essen, 18-19 and 21-22 December 1945, in *UNWCC* (Vol. I) ('*Essen Lynching*'), p.88.
[95] *Essen Lynching*, p. 91.
[96] *Essen Lynching*, p. 88, 91.
[97] *Tadić* AJ, paras 207-209.
[98] *Essen Lynching,* p.88, 90-91. The prosecution submitted that a finding of intent was not necessary for a conviction. Transcript of Prosecutor's remarks, Public Record Office, London, WO 235/58, p.65 (on file with KSC library) ('*Essen Lynching Transcript*').
[99] *See Tadić* AJ, paras 207-209.
[100] *Essen Lynching,* p.91 ('the legal member pointed out that this was not a trial under English law'); *Contra* Appeal, para.22.

that he had used 'murder' as an illustration.[101] Rather, the charge was of being 'concerned in the killing', a charge with a lesser *mens rea* requirement than murder.[102] He noted that although Defence counsel's closing emphasised that intent to kill was required for the charge, counsel's claim was incorrect and that, in the circumstances of this case, the court need find that the accused had intent to commit an unlawful act of violence.[103] The prosecutor summarised the evidence, and in so doing, highlighted evidence in the record suggesting foreseeability of the killings.[104] The ECCC PTC acknowledged that an element of foreseeability exists in the case but found that alone it would not warrant a finding that JCE III was part of CIL.[105] However, this case does not stand alone. It must be considered together with the other cases and materials, where the principle underlying JCE III was expressly stated and/or evidently applied.

43. *D'Ottavio and others*:[106] The precedential value for certain post-WWII domestic court cases, including those with international elements,[107] including *D'Ottavio and others*, should not be limited by merely categorising it as domestic.[108] The principle underlying JCE III is central to the convictions[109] and the Italian Court of Cassation made a specific finding of foreseeability in respect of a crime falling outside the

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[101] *Essen Lynching Transcript*, p.65.
[102] *Essen Lynching Transcript*, p.65.
[103] *Essen Lynching Transcript*, p.65 (for example, 'a person might slap another's face with no intent to kill at all but if through some misfortune, for example that person having a weak skull, that person died, in my submission the person striking the blow would be guilty of manslaughter and that would be such a killing as would come within the words of this charge.').
[104] *See e.g. Essen Lynching Transcript*, p.67 (for Boddenberg the timing of his involvement suggested that it was foreseeable that two airmen, not yet killed, could be killed and he nonetheless joined in and struck them).
[105] PTC Decision on JCE, para.81.
[106] *D'Ottavio et al.*, Italian Court of Cassation, Criminal Section I, Judgement no. 270 of 12 March 1947, *Journal of International Criminal Justice* 5 (2007) ('*D'Ottavio*), pp.232-234.
[107] The prisoners were foreign nationals.
[108] *Contra* Appeal, para.29 (misconstruing Decision, para.188 concerning a domestic case without international elements).
[109] The Court of Cassation explicitly reasoned that all accused shared the intent to illegally detain the victim, 'while *foreseeing* a possible different crime, as it can be inferred from the use of weapons: it was to anticipate that one of them might have shot at the fugitives with a view of achieving a common purpose to capture them.' *D'Ottavio*, p.234 (emphasis added).

common purpose to illegally detain prisoners, namely the shooting of a prisoner.[110] This applied in convicting three co-accused, who did not fire the shot for the involuntary homicide perpetrated by the shooter, and were convicted because they shared the intent to illegally detain the prisoners and – as noted by the Court – the shooting was *foreseeable* to them.[111] Given the international elements, this case may thus qualify as state practice relevant to the identification of a rule of CIL, including with respect to modes of liability.[112]

44. Additional cases from the post-WWII period also evidence responsibility based on principles akin to JCE III.

45. *Rüsselsheim*:[113] In one of the first trials by American military commissions in Europe, German civilians were charged with the assault and killing of U.S. airmen who were attacked and killed by a mob.[114] The prosecution argued that the accused participated in a common plan and were therefore responsible for any killing that was its natural and probable consequence, 'although not specifically contemplated by the parties or even forbidden by the defendant'.[115]

46. In the post-conviction review, the Judge Advocate sustained the guilty verdict and sentences based on evidence showing each accused were motivated by a common

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[110] In 1947 responsibility under Article 116 of the Italian Penal Code could arise under strict liability without foreseeability being established, however, in this case, the court made an explicit finding of foreseeability. *D'Ottavio*, p.234; *Contra* SCC AJ, para.795.
[111] *Contra* SCC AJ, para.795.
[112] *See* SCC AJ, para.805. The victims' nationality and Italy's extensive involvement in WWII are relevant factors. When assessing state practice concerning the formation of custom, the practice of states that are particularly faced with certain questions of law may be given particular consideration. ILC Report CIL, Conclusion 8, p.94. *See also* ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports 2012, p.123, para.55; ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, *ICJ* Reports 1969, p.43, para.74.
[113] *United States v. Hartgen et al.*, Case No. 12-1497, United States Military Commission, Review and Recommendation, 29 September 1945 ('*Rüsselsheim*').
[114] *Rüsselsheim*, pp.2, 3, 6; Clarke, Return to Borkum Island, pp. 839, 853.
[115] Trial transcript of the *Rüsselsheim* case, as quoted in Clarke, Return to Borkum Island, pp. 839, 854.

design and legally were principals in the killings.[116] Any doubt concerning the application of the prosecution's theory is resolved in available records, which show that the foreseeability standard was applied.

47. The 1946 US Forces' Manual for Trial of War Crimes contains authoritative statements of applicable law in war crimes trials on many topics for practitioners.[117] Concerning 'Liability of Multiple Participants for War Crimes' it states:

> All who join in a common design to commit an unlawful act, *the natural and probable consequence of the execution of which* involves the contingency of taking human life, are responsible for a homicide committed by one of them while acting in pursuance of or in furtherance of the common design, *although not specifically contemplated by the parties*, or even forbidden by defendant, or although the actual perpetrator is not identified.[118]

48. The authority cited for this specific principle is *Hartgen et al.* also called *Rüsselsheim*. This reference resolves any ambiguity, as U.S. authorities would have certainly known the legal principles upon which its own military commission decided the case. In addition, the application of this rule in one of the earliest trials, cited in subsequent cases and included in the Manual is both a reflection of the application of principles underlying JCE III and proof that in adjudicating cases of international crimes, this legal concept existed and was utilised, contributing to state practice and the formation of custom.

49. Contrary to Defence submissions, that the Judge Advocate identified a provision of U.S. law in his recitation of the applicable law does not diminish its CIL status.[119] As noted in the Decision, even before the agreements between nations for the prosecution of war criminals were finalised, liability for multiple participants acting

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[116] Extract from Opinion of Deputy Theater Judge Advocate for War Crimes in the case of *United States v. Josef Hartgen, et al.*, October 1945 *reprinted in* U.S. War Crimes Manual, p.305.
[117] U.S. War Crimes Manual. In its foreword, it states that it is a compilation of directives covering important aspects of trials, with citations of authorities derived from past decisions on questions arising therein.
[118] U.S. War Crimes Manual, p.305 (emphasis added).
[119] *Contra* Appeal, para.42.

pursuant to a common plan for serious crimes, including war crimes, was considered a critical feature for future prosecutions.[120] The IMT Charter contains common purpose liability in order to reach 'a great many of the equally guilty persons against whom evidence of specific violent acts may be lacking although there is ample proof that they participated in the common plan or enterprise'.[121]

50. It is logical that when the concept of common purpose liability, including for crimes outside the common plan, was applicable in a case, that it was explained using wording most closely akin to that recognisable to counsel and judges from a particular jurisdiction. As with *Essen Lynching*, this does not mean that the trial was under domestic law. The *Rüsselsheim* prosecutor explained in closing that participants in a common purpose were responsible for any killing which was its natural and probable consequence, 'although not specifically contemplated by the parties or even forbidden by the defendant' and that this principle was 'grounded in both American law and in universal human experience ─ there are many things that a group… will do...that men and women acting singularly and alone wouldn't dare.'[122]

51. *Ikeda*:[123] In this 1947 casein Batavia, Ikeda was convicted for crimes that were a predictable consequence of a criminal plan in which he had engaged. The judges found that the plan Ikeda had devised and engaged in was criminal:

> [t]he mere recruitment of volunteers from the internment camps, using in this process the poor and inhumane circumstances in respect of food and their position in the camps, which they [the accused] had effectively created and maintained, was contrary to morality and humanity and was therefore, in light of the circumstances, a violation of the laws and customs of war.[124]

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[120] Decision, para.183 and fn.384 and sources cited therein; *See* Clarke, Return to Borkum Island, pp. 839, 842.
[121] Report of Robert H. Jackson to the International Conference on Military Trials, London, 1945, pp.300-302. *See also, inter alia*, pp. 332-333, 362-363, 376-384, 387-388.
[122] Trial transcript of the *Rüsselsheim* case, as quoted in Clarke, Return to Borkum Island, pp. 839, 854.
[123] *Queen v. Ikeda*, Case No. 72A/1947, Judgement, 8 September 1948 ('*Ikeda*'), p.8.
[124] *Ikeda*, p.8.

52. The court then described how Ikeda furthered the criminal plan and the consequence of his engagement for criminal responsibility:

> Therefore the accused […] by approving a plan of this sort, by participating in the further elaboration of the plan and by failing to check in hindsight how the plan had actually been carried out and how the brothels that had been established on the basis of that plan were operating, must be held liable for the criminal offences committed in the process.[125]

53. Crucially, the judges found that the crimes of Ikeda's co-accused 'could and should have been anticipated and prevented by the accused.'[126]

54. The Defence argues that this case may have applied JCE I or superior responsibility.[127] This is unsupported by the record. The judge reasoned that Ikeda was convicted for crimes that he 'could and should have anticipated'.[128] This excludes a finding that Ikeda had knowledge and shows that he lacked intent for the crimes resulting from the criminal plan.

55. Concerning superior responsibility, the Defence ignores the significance of the finding that Ikeda contributed to a criminal plan. Without the plan, Ikeda's conduct could have amounted to superior liability; in the context of that plan Ikeda's conduct is a contribution by omission.[129]

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[125] *Ikeda*, p.8.
[126] *Ikeda*, p.8.
[127] Appeal, paras 43-45.
[128] *Ikeda*, p.8.
[129] A contribution by omission may include failing to (i) discipline the criminal acts of subordinates, or (i) protect a specific group. *See e.g. S&Z* AJ, paras 110-111.

56. *Ishiyama and Yasusaka*:[130] The Australian military case of *Ishiyama and Yasusaka* concerns the killing of two prisoners by members of the Japanese military.[131] CIL was directly applicable in the proceedings.[132]

57. The Judge Advocate explained that where the common purpose was to commit a felony, liability arose for felonies not encompassed by the common purpose but done in furtherance thereof.[133] This is the same principle enunciated in *Borkum Island* and *Rüsselsheim,* and codified in the 1946 Manual for Trial of War Crimes, and also appearing in *Ikeda*. Contrary to the Defence submission, the Judge Advocate's statement is consistent with JCE III.[134] In the context of the Judge Advocate's explanation, the Defence's focus on the absence of an express reference to 'foreseeability' in a particular sentence does not change the analysis of the legal principle applied.

58. *United States v. Tashiro et al.* ('*Tashiro*'):[135] At the American Military Commission of Japan, Koshikawa and others were charged with *inter alia,* participation in a criminal plan to release American prisoners from their cells after a fire or air strike following the release of Japanese prisoners and, in furtherance of this plan, having caused the American prisoners' death.[136] The court convicted Koshikawa based on

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[130] *Prosecutor v. Kumakichi Ishiyama et al.*, Australian Military Court, 8-9 April 1946, p.5 ('*Ishiyama*') (accessed at www.legal-tools.org/doc/c9884d/).
[131] *Ishiyama,* p.5.
[132] The trial was based on the 1945 Australian War Crimes Act, which applied international law, *see e.g.* Article 17, entitled "Defence based on laws, customs and usages of war", which refers to international law, crimes against humanity, and the laws, customs, and usages of war, *see Ishiyama,* p.15.
[133] *Ishiyama,* pp.24-26. Importantly, the Judge Advocate stated in submissions that he was advising 'upon the law'.
[134] *Contra* Appeal, para.50.
[135] *United States of America v. Tashiro et al.*, Review of the Staff Judge Advocate, 7 January 1949 (*'Tashiro'*).
[136] *Tashiro,* pp.5-7, 71 (with reference to the accused Koshikawa), Specification 2.

participation in this plan, which was 'grossly negligent' as it contributed to the American prisoners' deaths.[137]

59. The findings of the case are clear with regard to Koshikawa's participation in a criminal plan that brought about the additional consequence of deaths.[138] While deaths were unintended by Koshikawa, he was nevertheless responsible because of his participation in the grossly negligent plan, *inter alia*, because there were elements to foresee the possible consequences.[139]

(b) WWII-era laws and principles have been widely recognised as CIL

60. The legal principles from WWII-era statutes and trials were pre-existing principles of law, which were further recognised as CIL when efforts to hold trials were underway.[140] Following the IMT Judgement (1946), the principles found therein and the IMT Charter were affirmed at the UN Secretary-General's recommendation and included in a General Assembly resolution, ensuring that the principles form a permanent part of international law immediately.[141]

61. In 1993 the UN Secretary-General identified the IMT Charter as a source of customary law applicable before the ICTY.[142] The ICTY Appeals Chamber, noted that WWII-era caselaw and legislation is a source of CIL and then determined that the principles of liability stemming from commission through a common design, from

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[137] *Tashiro,* p.72.
[138] *Tashiro,* p.72.
[139] *Tashiro,* pp.71-72. *See also* Clarke, Return to Borkum Island, p.855.
[140] Decision, para.183. *See* SPO Response-JCE, paras 34-36, 94-100.
[141] *See* SPO Response-JCE, para.95, citing Supplementary Report on the Work of the Organization presented to the General Assembly on 24 October 1946, (A/65/Add.1); Sixth Committee of the General Assembly, Draft resolution submitted by the United States of America (A/C.6/69, 15 November 1946); UN General Assembly Resolution 95 (I), Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal, 11 December 1946.
[142] Report of the Secretary-General, para.35.

that caselaw and legislation, are firmly established in CIL.[143] The ECCC[144], ICTR[145] and ICTY[146] have found that these sources can be relied upon, *inter alia*, as demonstrative of JCE's CIL status.[147]

(c) JCE, including JCE III, has been consistently recognised as a mode of liability in CIL

62. The status of WWII-era legal principles on modes of liability, including the modes akin to JCE, in CIL is settled law, recognised before multiple courts. The doctrine of JCE III, which was systematised in *Tadić* and grounded the existence of this mode at the time of the crimes forming the subject of that case, has been further recognised by the modern international (or internationalised) courts applying CIL with comparable governing laws to those of the KSC. JCE III has been affirmed by the ICTY,[148] the ICTR,[149] the IRMCT,[150] the SCSL,[151] the STL,[152] and other international or internationalised tribunals.[153] All chambers of the ECCC and the Co-Investigative

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[143] *Tadić* AJ, para.194, 220.
[144] PTC Decision on JCE, para.60.
[145] *Rwamakuba* JCE Decision, para.14 citing Hunt *Ojdanić* Separate Opinion, para.12; *Rwamakuba* JCE Decision, paras 14-31.
[146] ICTY, Trial Chamber, *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000, paras 540-541. The *Kupreškić* finding was noted with approval by the ICTY Appeals Chamber in *Đorđević* AJ, para.43.
[147] The ECCC PTC found the case law from the above-mentioned military tribunals offer an authoritative interpretation of their constitutive instruments and can be relied upon to determine the state of CIL with respect to the existence of JCE as a form of criminal responsibility […]. PTC Decision on JCE, para.60.
[148] *See e.g. Prosecutor v. Prlić et al.*, IT-04-74-A, Judgement – Volume II, 29 November 2017, para.590; *Kvočka et al.* AJ, paras 81-83, 86.
[149] *See e.g.* ICTR, *Prosecutor v. Karemera and Ngirumpatse*, Judgement, ICTR-98-44-A, 29 September 2014, paras 623, 627, 629.
[150] *See e.g. Karadžić* AJ, para.433.
[151] *Brima et al*. Decision on Judgment of Acquittal, paras 308-326 and SCSL, *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgment, 22 February 2008, para.84.
[152] STL Decision on Applicable Law, paras 239-247.
[153] *Habré* TJ, para.1885.

Judges have recognised JCE I and II in CIL.[154] Such widespread recognition is not noted to suggest that JCE III must be recognised in CIL simply because other courts have.[155] Rather, it underscores the widespread acceptance and subsequent application of the principles underlying this mode of liability, which were enumerated in the WWII-era and which have continued to be found applicable for trials across a broad array of actors, conflicts and legal systems. The Decision correctly found that JCE III is based in CIL and should be affirmed.

C. THE PTJ CORRECTLY FOUND THAT JCE WAS ACCESSIBLE AND FORESEEABLE TO THE ACCUSED

63. The Defence fails to show that the PTJ erred of law or fact in finding JCE, including JCE III, foreseeable and accessible.[156] The Decision contains a robust assessment of the legal standard for these requirements, reflects the parties' arguments, and provides reasons for concluding that JCE, in all forms, was foreseeable and accessible to the Accused at the relevant time. The Defence has also not met its burden for an error of fact concerning the application of these requirements.

64. Concerning the alleged error of law, the PTJ correctly considered the legal requirements for finding foreseeability and accessibility, including with respect to legality[157] and what types of law may be considered,[158] and how the analysis may

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[154] ECCC, OCIJ, 002/19-09-2007-ECCC-OCIJ 'Decision on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise', 8 December 2009, para.23; *Duch* TJ, paras. 511-512; ECCC TC JCE Decision, paras. 15, 22; PTC Decision on JCE, para.69; SCC AJ, para.807.
[155] *Contra* Appeal, para.58.
[156] *Contra* Appeal, paras 59-68.
[157] Decision, para.192. *See e.g. Hadžihasanović et al*. Jurisdiction Appeal Decision, para.34; *See* ECtHR, *Vasiliauskas v. Lithuania* [GC], 35343/05, 20 October 2015, para.154; *S.W. v. United Kingdom*, 20166/92, 22 November 1995, para.35; *Cantoni v. France*, 17862/91, 15 November 1996, para.29.
[158] Decision, para.193. Customary law may be unwritten and practice may still be sufficient to determine compliance with legality. *Ojdanić* JCE Decision, para.41; *Duch* TJ , ECCC, paras 290, 26 July 2010. *See also Vasiliauskas v. Lithuania* [GC], para.154; *S.W. v. UK*, para.35; *Cantoni v. France*, para.29.

depend on content, sometimes termed specificity.[159] The PTJ clearly laid out the legal standard, and addressed the arguments claiming a lack of foreseeability based on an absence of precise uniformity in terminology.[160] This aligns with relevant jurisprudence, which further clarifies that no violation of legality is incurred by the gradual clarification of the rules of criminal liability through judicial interpretation, which in turn allows the progressive development of the law.[161]

65. Next, the Decision assessed Defence arguments that the Accused was not able to foresee criminal liability based on committing crimes as part of a common plan.[162] The PTJ noted, *inter alia*, that *Furundžija* discussed JCE in 1998, and found that the date of *Tadić* does not mean that JCE was not accessible and foreseeable.[163] Indeed, there is no issue with the date of the systematisation of JCE in *Tadić,* which confirmed that the requirements for application of JCE were met as of the date of events in that case.[164] Further, due to the positions of the Accused, the post-WWII general legal framework, and ongoing ICTY prosecutions, the PTJ found that the requirement of foreseeability is met.[165] Regarding the post-WWII legal framework, the ICTY Appeals Chamber found a long and consistent stream of judicial decisions and international instruments

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[159] Decision, para.193. *See e.g. See e.g. United States of America v. List et al.*, Military Tribunal V, Case 7, Judgement, 19 February 1948, p. 1230 in *Trials of War Criminals before the Nuremburg Military Tribunals under Control Council Law No. 10* (Vol. XI), p.1241; *Holzer et. al.*, Canadian Military Court, 25 March-6 April 1946, in *Record of Proceedings at Aurich, Germany* (Vol. I), p.336 (*'Holzer'*); *United States v. Alstoetter et al.,* U.S. Military Tribunal, Judgment, 3-4 December 1947, in *Trials of War Criminals before the Nuremburg Military Tribunals under Control Council Law No. 10* (Vol. III, 1951), p.966; *Ojdanić* JCE Decision, paras 37-43; *Duch* TJ, para.31. PTC Decision on JCE, para. 45 citing *Ojdanić* JCE Decision, paras 37-39.
[160] Decision, para.193.
[161] *See S.W. v. The United Kingdom*, para.35-36; ECtHR, *Kokkinakis v. Greece*, 14307/88, 25 May 1993, paras 36, 40; *EK v Turkey*, 28496/95, Judgment, 7 February 2002, para.52. *See also* ECtHR, *C.R. v United Kingdom*, Judgment, Application No. 20190/92, 22 November 1995, para. 34; ECtHR, *Streletz, Kessler and Krenz v. Germany*, Judgment, Application No. 37201/97, 22 March 2001, para.29.
[162] Decision, paras 194-200.
[163] Decision, paras 193-194, 201.
[164] The attacks in *Tadić* occurred on 14 June 1992. *See Ojdanić* JCE Decision, para.29.
[165] Decision, para.194.

that would have permitted any individual to regulate his conduct and provided reasonable notice that if infringed, criminal responsibility may result.[166]

66. While the Defence disagree with these reasons, citing ICTY findings concerning the operations of the KLA General Staff,[167] nothing in the Defence arguments reveal any factual or legal error. The Defence repeat submissions which were considered and rejected previously.[168] The foreseeability requirement will be met if the person may be found to know from the wording of a law (national or international, written or unwritten), with the assistance of the courts' interpretation and informed legal advice if need be, what acts and omissions attract liability.[169] This is the correct standard, and was reasonably applied to the Accused.

67. While the Decision contains reasons and no error is shown, it bears mention that in 1998-1999, the ICTY, operating pursuant to its Statute and CIL, had jurisdiction over crimes in Kosovo. That the ICTY was monitoring crimes and the actions of all sides was well-known.[170] Beginning in March 1998,[171] the ICTY Prosecutor made public statements affirming jurisdiction and the prosecution's investigations into crimes in Kosovo.[172] Certain statements were directed to leaders,[173] including Kosovo

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[166] *Ojdanić* JCE Decision, para.41.
[167] Appeal, para.64.
[168] Appeal, para.62; Motion, para.50. The IMT Charter, decisions arising from it, CCL10 cases and background materials explaining the prosecution of war criminals, were disseminated and published in the official UN War Crimes Commission Reports from 1947.
[169] *See* Decision, para.193.
[170] *Contra* Appeal, para.83.
[171] *See* Prosecutor's Statement Regarding the Tribunal's Jurisdiction in Kosovo, 10 March 1998, The Hague, CC/PIO/302-E *available at* icty.org/en/press/prosecutors-statement-regarding-tribunals-jurisdiction-over-kosovo
[172] *See e.g.* Statement ICTY Prosecutor, Press Release, 4 November 1998, The Hague, CC/PIU/358-E *available at* icty.org/en/press/statement-justice-louise-arbour-prosecutor-icty-0.
[173] *See e.g.* Statement by the Prosecutor, Press Release, 31 March 1999, The Hague, CC/PIU/391-E *available at* icty.org/en/press/statement-prosecutor-0.

Albanian leaders.[174] That members of the KLA General Staff would lack awareness of ICTY investigations, of UN Security Council statements regarding the same, and of the potential for prosecution pursuant to the applicable law of the ICTY is not plausible.[175]

68. Further, the PTJ found that provisions of domestic law are relevant to evaluating foreseeability and accessibility.[176] The PTJ did not err in law by doing so.[177] In the Decision, while discussing the test for foreseeability, the PTJ notes that foreseeability may be shown by various legal sources, including by reference to domestic law, which demonstrates that a given act is criminal under international law, such as participating in a common criminal plan.[178] Recourse to domestic law, where it exists, is relevant as a comparable provision to CIL, which may be used to evaluate foreseeability or accessibility.[179] JCE or JCE III liability are not based solely on Kosovo law, rather, the Decision explains that provisions of domestic law are relevant to establishing that the Accused could reasonably have known that an offence or the offence committed in the way charged was prohibited and punishable.[180]

69. The SFRY Criminal Code provisions include: (i) Article 22, which attributes liability for persons who commit a criminal act jointly and (ii) Article 26, which attributes liability for the acts of members of a group, to those who create or make use

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[174] *See e.g.* Prosecutor's Communication to the Contact Group Members, Press Release, 7 July 1998, The Hague, CC/PIO/329-E *available at* icty.org/en/press/communication-prosecutor-contact-group-members.
[175] Contemporaneous Security Council resolutions describe events in Kosovo including with specific requests for action by the ICTY Prosecutor. *See* UN SC Resolution 1160 (31 March 1998), p.4. Further in Resolution 1199 (23 September 1998), p.4, the Kosovo Albanian community and FRY authorities were called upon to cooperate fully with the ICTY concerning violations within its jurisdiction. Resolution 1203 (4 October 1998), p.4.
[176] Decision, paras 195-200.
[177] *Contra* Appeal, para.60.
[178] Decision, para.193.
[179] Decision, para.195.
[180] Decision, paras.193, 195-200. *See Ojdanić* JCE Decision, para.40.

of the group for the purpose of committing criminal acts.[181] Articles 11 and 13 of the SFRY Criminal Code, concerning *mens rea*, specify that Kosovo citizens could thus be held criminally liable for crimes they did not intend, but which were a possible or foreseeable outcome of their conduct. These provisions are significant because they encapsulate certain legal principles relevant to liability for commission through a group and liability regardless of intent, where the consequence was foreseeable. It is not required that a particular construction of provisions of domestic law have been applied in a similar case to a similar accused before 1998.[182] The Defence disagrees with the PTJ's assessment of domestic law provisions, but the PTJ has solid support in the jurisprudence of the ICTY, which was asked to make the same assessment of foreseeability and accessibility with reference to the same domestic law and found Article 26 'strikingly similar'.[183] The Defence fails to show error.

D. THE PTJ CORRECTLY INTERPRETED SUBJECT-MATTER JURISDICTION[184]

70. The Decision interprets the subject-matter jurisdiction of the KSC in accordance with the plain language of the Law,[185] of the Constitution, and in a manner which accords with the applicable legal framework as a whole.

71. In particular, the Decision assesses and makes a finding upon whether the charged crimes 'relate to' the CoE Report.[186] This reflects the express language of Article 162(1) of the Constitution and Article 6(1) of the Law. Consistent with the plain

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[181] Article 26 specifically contemplates criminal liability for an accused in a situation in which there are multiple persons in a group, for crimes committed based on a criminal plan or design, regardless of whether the accused directly perpetrated the crime, irrespective of the manner of participation, and irrespective of their *mens rea*. *See* SPO Response-JCE, paras 130-131.
[182] *Contra* Appeal, para.67.
[183] *See* Decision, para.197-200. *See similarly* PTC Decision on JCE, para.45.
[184] *Contra.* Appeal, para.4(4): 'The Impugned Decision erred in law in finding that the charges must only be sufficiently connected to the Report'.
[185] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.
[186] Decision, paras 107, 111, 139.

meaning of the relevant phrases, the PTJ consequently required a sufficient connection between the charged crimes and the CoE Report.[187] This does not necessitate perfect overlap, nor does it confine consideration to particular allegations or case studies in the CoE Report. As correctly found in the Decision, any limitation of such a particular nature would have to have been expressly stated.[188]

72. Further, in claiming that the KSC only has jurisdiction over those crimes mentioned in the CoE Report which Kosovo 'is obliged to investigate',[189] the Defence misconstrues the origin and nature of the international obligations at issue. It is undisputed that, pursuant to international human rights law, Kosovo has the obligation to conduct effective investigations in relation to (suspected) violent deaths, and into plausible allegations of torture or mistreatment.[190] Such obligations would certainly have arisen from the CoE Report, published in 2011, as well as from reports submitted to relevant authorities by victims and their family members, and other sources.

73. However, when, by way of the Exchange of Letters, it undertook further international obligations. These obligations also relate to the CoE Report, and included, *inter alia*, the obligation to: (i) set up dedicated, specialist chambers and a specialist prosecutor's office for any criminal proceedings arising out of investigations, then ongoing, by the SITF; and (ii) adopt appropriate legislation for the establishment and operation of those chambers in accordance with the terms outlined in the Exchange of Letters.[191]

[187] Decision, paras 107, 139.
[188] Decision, para.108.
[189] Appeal, paras 78, 80, 83-84, 87.
[190] Appeal, para.84.
[191] Exchange of Letters, pp.8-9.

74. That it is this broader set of international obligations which is at issue is apparent from the language of the Constitution, of the Law, and from the analysis contained in the KCC Judgment.[192] Article 162(1) of the Constitution and the Law were duly passed by the Kosovo Assembly on the same day. Both mention Kosovo's international obligations in a manner which is connected to the establishment of the KSC,[193] rather than the obligation to investigate.

75. The analysis in the KCC Judgment further confirms that reading. It (i) specifically recalled the Exchange of Letters,[194] (ii) noted the establishment of specialist chambers and a specialist prosecutor's office as 'a requirement for the Republic of Kosovo to comply with its international obligations',[195] and (iii) expressly identified that the international obligations in question were incorporated into the Kosovo legal framework by way of Law No.04/L-274.[196] The obligation to investigate, and as relevant, prosecute criminal allegations is not one that required incorporation into the Kosovo legal framework, whether through Law No.04/L-274 or otherwise; that obligation arose from the pre-existing provisions of the Constitution[197] - and (as recognised in the Exchange of Letter) investigations were already underway. The international obligations which were incorporated by way of Law No.04/L-274 were, in particular, related to the establishment of the specialist chambers and specialist prosecutor's office, as reflected in the Law and the Constitution.

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[192] Constitutional Court of the Republic of Kosovo, 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, Judgment in Case No. KO26/15, ('KCC Judgment').
[193] Law, Art.1(2); Constitution, Art.162(1). The Defence provides only selective quotes from these provisions, see Appeal, para.83.
[194] KCC Judgment, para.37.
[195] KCC Judgment, paras 39, 50.
[196] KCC Judgment, para.51.
[197] Constitution, Articles 25-28, 53.

76. However, even if – for the sake of argument – Law No.04/L-274 were to be interpreted as having given rise to the obligation to investigate in relation to the CoE Report, it did not limit the obligation to investigate to any particular allegations or particular crimes. Rather, in language even broader than that of the Law and the Constitution, it incorporated an obligation in respect of '*any* […] proceedings' resulting from the SITF's investigations.[198]

77. Relatedly, the necessity for the establishment of the KSC did not derive simply from a human rights law obligation to investigate the allegations in the CoE Report.[199] If that were the only consideration the obligation could have been fulfilled by the existing Kosovo judicial framework. Rather, the KSC is necessary to, *inter alia*, (i) fulfilling Kosovo's international obligations pursuant to the Exchange of Letters (as outlined above), and (ii) providing secure, independent, impartial, fair and efficient criminal proceedings,[200] for crimes relating to the CoE Report, in particular taking account of the nature of the allegations and the relevant context.[201] Contrary to Defence submissions,[202] allegations relating to the CoE Report are not logically excluded by the requirement of necessity. Crimes which are sufficiently related to the CoE Report necessarily raise the same considerations warranting adjudication by specialised chambers as the specific case studies elaborated in the report. Equally, the reference in the KCC Judgment to 'highly specific criminal allegations'[203] is appropriately read in the context of the KCC's consideration of the type of allegations which may necessitate specialist measures, procedures or institutions,[204] not as a reference to

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[198] Exchange of Letters, p.9 (emphasis added).
[199] *Contra.* Appeal, paras 78, 80-82, 84.
[200] SCCC, Judgment on the Referral of Proposed Amendments to the Constitution of Kosovo, KSC-CC-2020-11/F00015, 26 November 2020, ('SCCC Judgment') paras 55, 68; Law, Art.1. *See also* Exchange of Letters, pp.8-10 (in particular, requiring an environment 'conducive to the proper administration of justice').
[201] KCC Judgment, para.52; SCCC Judgment, paras 50-53.
[202] Appeal, para.82.
[203] KCC Judgment, para.51.
[204] KCC Judgment, paras 50-52.

specific sections of (or any 'subset of allegations' in) the CoE Report, as the Defence attempts to portray.[205]

78. As outlined above, the Defence submissions are factually and legally misconceived and should be rejected accordingly.

E. THE CHARGED CRIMES RELATE TO THE COE REPORT[206]

79. The PTJ correctly and reasonably concluded that the charges in the Indictment relate to the CoE Report.[207] There is no error in that finding.[208]

80. The Decision is based on a careful multi-factor analysis, encompassing, *inter alia*, alleged perpetrators, victims, locations, timeframes, the *modus operandi*, the nature of the conduct, the intent behind the conduct and the context in which it occurred.[209] The Decision also, correctly, considers the CoE Report as a whole in a manner consistent with the Law and the Constitution – both of which refer to the entire report, and not only to particular sections or allegations.

81. With no basis in the Law for doing so, the Defence attempts to parse out what it believes is the 'main thrust' or 'central' geographic and temporal focus of the CoE Report,[210] and limit the KSC's jurisdiction accordingly. This misguided approach: (i) disregards repeated, broader temporal and geographical references in the CoE Report; (ii) improperly elevates two individual factors, ignoring the multiple other indicators

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[205] Appeal, paras 81-82, 85.
[206] *Contra.* Appeal, para.4(5): 'The Impugned Decision erred in law and fact in finding that the crimes alleged in the Indictment are related to the Report'.
[207] Decision, para.142.
[208] Noting that the Defence challenges the manner in which the PTJ applied Article 6(1) to the charges in this case (*for example* Appeal, para.88 (claiming a temporal and geographic mismatch between the Indictment and the CoE Report)), the relevant standard is whether the conclusion reached by the PTJ is one which no reasonable trier of fact could have made (*see* ICTY, *Prosecutor v. Strugar*, Appeal Judgement, 17 July 2008, para.252; *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.13).
[209] Decision, paras 111, 124-141.
[210] Appeal, paras 89-90, 94.

of relation between the charges in the Indictment and the CoE Report; and (iii) renders meaningless the provisions on temporal and geographic jurisdiction in the Law, contrary to basic principles of statutory interpretation.

82. As determined in the Decision and as outlined below, the charges in the Indictment – including the nature of the charged conduct, the common purpose, the locations and means employed, the perpetrators, and victims, as well as the temporal and geographic scope of events – all clearly relate to the CoE Report. In fact, although not necessary to satisfy the requirements of Article 6(1),[211] they fall within the scope of matters expressly addressed in the report.

83. Consistent with the Indictment, a core focus of the CoE Report is crimes committed in or in connection with KLA-run detention facilities. The 'general characteristics' of KLA detention are described in the CoE Report as seeming to meet the threshold for war crimes,[212] and that conclusion is supported by detailed descriptions of beatings and 'gratuitous' mistreatment.[213] In addition to the extensive descriptions of detention (including arbitrarily)[214] and of inhuman treatment, specific reference is also made in the CoE Report to murders,[215] torture,[216] and enforced disappearance.[217] All being allegations which directly reflect the charges presented in the Indictment.

84. Other aspects of the case against the Accused - such as the existence of KLA intelligence structures and their use in committing crimes,[218] and how detention

[211] *See* para.71 above.
[212] CoE Report, para.101.
[213] CoE Report, para.112.
[214] CoE Report, para.117.
[215] CoE Report, Draft Resolution, para.12; Explanatory Memorandum, paras 19, 124, 174.
[216] CoE Report, paras 128, 173, 174.
[217] CoE Report, para.137.
[218] CoE Report, para.52, fn.22.

facilities were part of a co-ordinated network[219] - were similarly recognised in the CoE Report.

85. Also prominently featured in the CoE Report, and directly reflected in the Indictment,[220] is that suspected 'collaborators', as well as other perceived opponents, were especially targeted.[221] For example, the CoE Report describes one subset targeted for detention as being 'ethnic Albanian civilians – as well as some KLA recruits – suspected of being 'collaborators' or traitors, either on the premise that they spied for Serbs or because they were thought to have belonged to, or supported, the KLA's political and military rivals, especially the LDK and the emergent Armed Forces of the Republic of Kosovo (FARK)'.[222]

86. In a summary which explicitly reflects, amongst other things, the temporal and geographic parameters which would subsequently be granted through the Law, the CoE Report describes certain KLA leaders as having:

> ordered – and in some cases personally overseen – assassinations, detentions, beatings and interrogations in various parts of Kosovo and, of particular interest to our work, in the context of KLA-led operations on the territory of Albania, between 1998 and 2000.[223]

87. The Defence's attempt to dismiss this - and other similar temporal and geographic references - as mere 'background' is disingenuous. The CoE Report is not divisible in the manner suggested, and - perhaps more importantly - Article 6(1) make no such differentiation. The CoE Report describes an interconnected pattern of

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[219] CoE Report, para.98.
[220] *For example* Indictment, KSC-BC-2020-06/F00455/CONF/RED/A01, para.32.
[221] CoE Report, Draft Resolution, para.11; Explanatory Memorandum, paras 4, 44 (noting that arguably more resources and political capital were devoted to ethnic Albanian rivals), 52, 86 (referring to 'perceived rivals, traitors, and persons suspected of being 'collaborators' with the Serbs'), 88, 111.
[222] CoE Report, para.111.
[223] CoE Report, para.72.

conduct spanning from, at least, 1998, and encompassing both Kosovo and Albania, as correctly identified in the Decision.[224]

88. The Defence presents a reference to the phrase '[a]gainst this background' in paragraph 89 of the CoE Report as a purported pivot point, between 'historical background' and 'analysis' or 'allegations'.[225] It is, however, apparent that the 'background' in question was the aggressive targeting of minorities, perceived rivals and alleged 'collaborators',[226] resulting in 'abuses widespread enough to constitute a pattern'[227] and seemingly conducted according to an 'evolving, overarching strategy'[228] on the part of certain KLA leadership. The reference which the Defence seeks to rely on merely reinforces the fact that the specific case studies detailed in certain paragraphs of the CoE Report were reflective of a broader pattern of closely related criminal conduct, of central relevance to the CoE Report.

89. The CoE Report arises out of allegations of crimes committed during and in connection with the conflict in Kosovo.[229] The very title of the CoE Report is 'Inhumane treatment of people and illicit trafficking in human organs *in Kosovo*'.[230] The Rapporteur describes himself as having been tasked to look into 'the allegations and human rights violations *said to have been committed in Kosovo* in the material period' (emphasis added).[231] In preparing the report he visited mass grave sites in Kosovo,[232] and the report expressly references criminal activity in various parts of Kosovo.[233] The draft resolution forming part of the CoE Report calls for cooperation from Albanian

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[224] Decision, paras 132-136.
[225] Appeal, paras 91-92.
[226] CoE Report, paras 86-88 (these are the paragraphs preceding the reference to 'background').
[227] CoE Report, para.89.
[228] CoE Report, para.90.
[229] *For example* CoE Report, Draft Resolution, para.1.
[230] Emphasis added.
[231] CoE Report, para.175.
[232] CoE Report, para.14, fn.11.
[233] *For example* CoE Report, paras 4, 23, 72, 85, 87-88, 123.

and Kosovar authorities with EULEX to, *inter alia*, 'find out the truth about crimes committed in Kosovo'.[234] With respect to temporal scope, as reflected in the quote above and elsewhere,[235] the CoE Report explicitly identified allegations of specific forms of criminal conduct occurring from, at the latest, 1998.

90. The position advanced by the Defence[236] is such that the same form of inhumane treatment, committed by the same perpetrators, against the same category of targeted victims, by the same means, at the same detention site, pursuant to the same common purpose, and in the context of the same conflict would fall within the jurisdiction of the KSC if occurring in May 1999 – but if it occurred in April 1999, it would not.[237] Not only does that approach have no foundation in the Law, it is contrary to it. As a basis for distinguishing the requisite degree of relation for the purposes of subject-matter jurisdiction pursuant to Article 6(1), it is self-evidently untenable.

91. The jurisdictional provisions of the Law were drafted in full knowledge of, and in the case of subject-matter jurisdiction with reference to, the CoE Report. The provisions were tailored specifically for the KSC. If temporal and geographic jurisdiction were now to be determined by reference to, and interpretation of, the CoE Report alone, and in the manner advocated by the Defence, Articles 7, 8 and 9(2) are

[234] CoE Report, Draft Resolution, para.19.5.1.
[235] *See* para.86. *See also* CoE Report, para.56 (describing criminal enterprises in Albania beginning 'at the latest in 1998').
[236] Appeal, para.96 (seeking to have the charges confined only to crimes occurring after April 1999 and which are connected with Albania).
[237] Based on the approach urged by the Defence, a similar arbitrary situation would arise in respect of the same form of inhumane treatment, committed by the same perpetrators, against the same category of targeted victims, by the same means, at the same time, pursuant to the same common purpose, and in the context of the same conflict, should one occur in Albania and the other wholly in Kosovo.

redundant. The Defence advances discordant interpretations which involve voiding the Law's plain language, and such arguments must be rejected.[238]

92. Finally, it is unavailing to claim that only specific 'sufficiently detailed' case studies of criminal conduct in the CoE Report warranted investigation.[239] First, by its very nature, a 'case study' is designed to be illustrative of a broader phenomenon, and therefore non-exhaustive. Second, to claim that criminal investigation should only proceed in respect of events for which detailed allegations have already been laid out and reported on – prior to any criminal investigation having occurred - is to misunderstand the necessity for and purpose of investigation and prosecution.

93. The charged crimes must 'relate to' the CoE Report. As demonstrated above, the actual correlation is much stronger than that. The charges in the Indictment are clearly reflected and encompassed in the allegations in the CoE Report. The KSC has subject-matter jurisdiction over the charges, and the Defence request should be rejected.

V. CONCLUSION

94. The PTJ correctly found that JCE, including JCE III, exists in the statutory framework of the KSC, is a recognised mode of liability with a firm basis in CIL, and that liability pursuant to JCE was accessible and foreseeable to the Accused. The Decision reflects accurate interpretation of the KSC's subject-matter jurisdiction and the charged crimes relate to the CoE Report. The Defence have not demonstrated any error of law or fact.

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[238] *See* Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson Reuters 2012), chapter 27 (Harmonious-Reading Canon: the provisions of a text should be interpreted in a way that renders them compatible, not contradictory). *See also* chapter 5 (Presumption of Validity: an interpretation that validates outweighs one that invalidates (*ut res magis valeat quam pereat*)).
[239] Appeal, para.90.

VI. RELIEF REQUESTED

95. For the foregoing reasons, the Appeal should be rejected.

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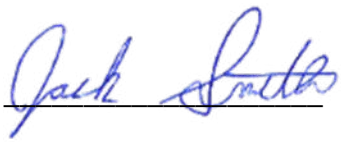

Jack Smith

Specialist Prosecutor

Thursday, 30 September 2021

At The Hague, the Netherlands.