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 on JCE to Selimi Defence appeal against the 'Decision on Motions challenging the jurisdiction of the Specialist Chambers'

with public annexes 1-2

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

Contents

I. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') hereby responds to the Selimi Defence Appeal challenging the jurisdiction of the Specialist Chambers including the applicability of joint criminal enterprise ('JCE').[1] The Appeal should be rejected as the Defence fail to show any error requiring reversal of the Decision,[2] which correctly confirmed the applicability of customary international law ('CIL') and JCE, in all forms, before the Kosovo Specialist Chambers ('KSC').

2. JCE exists in the statutory framework of the KSC and is a recognised mode of liability with a firm basis in CIL. Liability pursuant to JCE was accessible and foreseeable to the Accused during the Indictment[3] period. Consequently, the application of this mode of liability is both permissible before the KSC and respectful of the rights of the Accused.

3. JCE is not merely a well-established legal mechanism that conforms to the principle of legality. There are strict requirements for attribution of criminal responsibility through 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

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[1] SELIMI Defence Appeal against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/IA009/F00011, 27 August 2021 ('Appeal'). Submissions in response to certain related challenges are dealt with in other responses, identified herein.
[2] Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06-F00412, 22 July 2021 ('Decision').
[3] Lesser Redacted Version of 'Redacted Indictment, KSC-BC-2020-06/F00045/A02, 4 November 2020', KSC-BC-2020-06/F000134, 11 December 2020, Confidential ('Indictment').

agreed or planned criminal conduct for which each JCE member is *already* responsible.[4] As such, it only arises where a perpetrator who already had criminal intent, and had made a significant contribution, could and did foresee the possibility of an additional crime and willingly took that risk.[5]

4. There are sound and just reasons for attributing liability to persons pursuing criminal enterprises in this manner, especially in the context of grave international crimes.[6] Where someone intentionally contributes to a common criminal purpose involving the commission of crimes such as those at issue in this case — war crimes and crimes against humanity — it is fair and right that they be liable for other foreseeable crimes committed in the context of that enterprise. To the extent there are differing degrees of culpability between various actors, that can be reflected in sentencing.[7]

5. JCE is the most suitable mode of liability in the case of widespread, systematic and grave crimes committed through the joint action of multiple individuals who, while often acting remotely from the physical perpetration of the crimes, nonetheless played a central role in their commission.[8] Indeed, common purpose liability was included in the International Military Tribunal at Nuremberg Charter because it was necessary 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

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[4] 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.
[5] STL Decision on Applicable Law, paras 243, 245.
[6] Crimes of this nature shock the conscience of mankind: ICTY, Appeals Chamber, *Prosecutor v. Tadić*, IT-94-1-AR72 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', 2 October 1995, paras 57, 59.
[7] STL Decision on Applicable Law, paras 237, 245.
[8] The STL Appeals Chamber described the contributions of different actors in a JCE as 'cogs in a machine' whose overall object and purpose is to commit criminal offences, personally or through other individuals. STL Decision on Applicable Law, para.237.

participated in the common plan or enterprise'.[9] As detailed below, the common design doctrine for both JCE I and III was considered in the post-WWII jurisprudence as a fair, effective, and just vehicle to assess the responsibility of those alleged to have committed mass atrocities. It was reflected in statutes and codes,[10] in clear statements of applicable law by Judge Advocates and others,[11] and was applied in judicial decisions.[12]

6. JCE, firmly grounded in CIL, is an appropriate and fair form of liability to address the responsibility of leaders for the crimes committed in 1998-1999, whether intended or foreseeable, which are the consequence of a criminal plan, and based on the significant contribution they each made thereto.

II. STANDARD OF REVIEW

7. The Court of Appeals applies *mutatis mutandis* the standard of review provided for appeals against judgements under Article 46(1) of the Law to interlocutory appeals.[13] Appeals may be filed alleging an error on a question of law invalidating the judgement, an error fact, or an abuse of discretion.

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[9] 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.
[10] For example, the Charter of the International Military Tribunal and Control Council Law No.10, discussed herein, each encompass liability for acts committed in execution of a common purpose.
[11] For example, in the *Borkum Island* case discussed below, the Judge Advocate stated: '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 human life, are legally responsible as principals for homicide committed by any of them in pursuance of or in furtherance of the plan' (emphasis added).
[12] For example, as discussed herein, the 1946 U.S. Manual for Trial of War Crimes setting out the law with relevant citations to immediate post-WW II jurisprudence, again outlined the following principle: '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.'
[13] Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, ('*Gucati* Appeals Decision'), para.10.

8. 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.[14] An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.[15]

9. An error of fact can only be found if no reasonable trier of fact could have made the impugned finding.[16] In determining whether a finding was reasonable, the Panel will not lightly overturn findings of fact made by a lower level panel.[17]

10. 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.[18]

III. PROCEDURAL HISTORY

11. On 26 October 2020, the Pre-Trial Judge ('PTJ') confirmed a ten-count indictment against the Accused which charged him with a range of crimes against humanity and war crimes, including murder, enforced disappearance of persons, persecution, and torture.[19]

12. On 10 February 2021, the Selimi Defence filed a preliminary motion challenging the jurisdiction of the KSC in relation to Joint Criminal Enterprise,[20] which was followed by the SPO Responses on 23 April 2021.[21]

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[14] *Gucati* Appeals Decision, KSCS-BC-2020-7/IA001/F00005, para.12.
[15] *Gucati* Appeals Decision, KSCS-BC-2020-7/IA001/F00005, para.12.
[16] *Gucati* Appeals Decision, KSCS-BC-2020-7/IA001/F00005, para.13.
[17] *Gucati* Appeals Decision, KSCS-BC-2020-7/IA001/F00005, para.13.
[18] *Gucati* Appeals Decision, KSCS-BC-2020-7/IA001/F00005, para.14.
[19] Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026/RED, 26 October 2020 (public version notified 30 November 2020).
[20] Selimi Defence Challenge to Jurisdiction – Joint Criminal Enterprise, KSC-BC-2020-06/F00198, 10 February 2021 ('Preliminary Motion on Jurisdiction').
[21] Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE), KSC-BC-2020-06/F00263, 23 April 2021; Prosecution Response to Preliminary Motions

13. On 22 July 2021, the PTJ rendered the Decision,[22] rejecting the Preliminary Motion on Jurisdiction.

14. On 28 July 2021, the Court of Appeals Chamber granted the requests of the Defence[23] and the SPO[24] seeking an extension of the time limit to file their respective appeals against the Decision, and responses to any such appeals.[25]

15. On 27 August 2021 the Defence filed the Appeal.[26]

IV. SUBMISSIONS

A. APPLICABILITY OF CUSTOMARY INTERNATIONAL LAW

16. The Law constitutes domestic legislation granting the KSC jurisdiction over CIL crimes, as at the relevant timeframe. Consequently, the Law gives CIL direct application before the KSC.

17. Importantly, pursuant to the applicable framework, including Articles 19(2), 22, and 33(1) of the Constitution and Articles 3 and 12 of the Law, the KSC applies CIL as at the time the crimes were committed. As such, there is no retroactive application of the law, because it is the law at the time the crimes were committed which applies.

Concerning Council of Europe Report, Investigation Deadline, and Temporal Mandate, KSC-BC-2020-06/F00259, 23 April 2021 (together the 'SPO Responses').

[22] Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/F00412, 22 July 2021 ('Decision').

[23] Selimi, Krasniqi and Thaçi Defence Request for an Extension of Time to Submit their Appeals against the Pre-Trial Judge's Decision on Preliminary Motions, KSC-BC-2020-06/IA009/F00001, 23 July 2021.

[24] Prosecution Request for Extension of Time Limits, KSC-BC-2020-06/IA009/F00003, 26 July 2021.

[25] Decision on Requests for Variation of Time Limits, KSC-BC-2020-06/IA009/F00005, 28 July 2021. *See also* Decision on Request for Variation of Word Limits, KSC-BC-2020-06/IA009/F00017, 24 September 2021.

[26] Selimi Defence Appeal against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers', KSC-BC-2020-06/IA009/F00011 ('Appeal').

18. This framework — as recognised by the PTJ — is clear, coherent, and logical. It is in full conformity with the Constitution, Article 7 of the ECHR, and Article 15 of the ICCPR. Many national jurisdictions incorporate CIL offences into the domestic order through a rule of reference like the Law, and it is settled by the ECtHR Grand Chamber that prosecutions pursuant to such laws are permissible for conduct criminalised under CIL prior to their promulgation.[27] The Law plainly reflects the intent of the legislator to prosecute serious CIL crimes committed in Kosovo between 1998-2000.[28]

19. The Selimi Defence arguments against this framework depend on disregarding straightforward statutory language, citing authorities out of context, and misrepresenting the standard of review.

20. On this last point, all arguments that the Pre-Trial Judge failed to consider legal submissions raised by the Defence should be summarily dismissed.[29] Errors of law are subject to a full *de novo* review — the Appeals Panel's inquiry for an error of law is solely whether or not the correct legal standard was articulated.[30] There is no requirement for a lower panel to reason purely legal considerations in the same way as factual findings or discretionary decisions, where the Appeals Panel must know which evidence/factors were relied upon in order to evaluate the lower panel's determination. If the law was stated correctly, it must be confirmed.

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[27] Examples include Latvia (ECtHR, Grand Chamber, *Kononov v. Latvia*, 36376/04, 'Judgment', 17 May 2010) and Hungary (ECtHR, Grand Chamber, *Korbely v. Hungary*, 9174/02, 'Judgment', 19 September 2008, though finding a violation in how this law was applied in the specific case).
[28] *See* ECtHR, *Ould Dah v. France*, 13113/03, 'Admissibility Decision', 17 March 2009, p.17 (in the context of torture: 'the absolute necessity of prohibiting torture and prosecuting anyone who violates that universal rule, and the exercise by a signatory State of the universal jurisdiction provided for in the United Nations Convention against Torture, would be deprived of their very essence if States could exercise only their jurisdictional competence and not apply their legislation').
[29] Appeal, KSC-BC-2020-06/IA009/F00011, paras 24, 30 (in para.30, wrongly characterising a failure to consider legal authorities when determining applicable law an abuse of discretion).
[30] Law, Article 46(4); *Prosecutor v. Gucati and Haradinaj*, KSC-BC-2020-07/IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, paras 4-13.

1. Article 12 is fully compatible with the non-retroactivity principle

21. This and the following sub-section cover Ground 1 of the Selimi Appeal.

22. The PTJ correctly identified Article 12 as the central reference point for the applicable law at the KSC.[31] The provision leaves no ambiguity of the centrality of CIL at the KSC.

23. The Indictment charges the Accused solely with crimes against humanity and war crimes pursuant to Articles 13-14 and 16. No crimes are charged pursuant to Article 15, which concerns the substantive criminal laws in force under Kosovo law at the relevant time. As the charges are based solely on international law, consistent with Article 12, CIL at the time of the commission of the crimes applies.

24. The KSC must function in accordance with the Constitution,[32] and the KSC's application of CIL is in conformity with relevant non-retroactivity protections in the Constitution.[33] Article 33(1) of the Constitution makes an explicit exception for 'acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law.' As all crimes charged are CIL war crimes and crimes against humanity, the exception under this constitutional provision applies. This reading of Article 33(1) of the Constitution is also consistent with Article 19(2) of the Constitution, which provides that 'legally binding norms of international law have superiority over the laws of the Republic of Kosovo.'

25. That the Kosovo legislator understood the crimes and modes of liability in Articles 13-14 and 16 as 'legally binding norms of international law' is clear. This phrase in Article 19(2) of the Constitution creates no uncertainty in the application of CIL, noting that it is the plain language in Article 12 which confers the primacy of CIL

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[31] Decision, KSC-BC-2020-06/F00412, para.91.
[32] Law, Article 3(2)(a).
[33] *Contra* Appeal, KSC-BC-2020-06/IA009/F00011, paras 10-20.

before the KSC.[34] The cross-reference to Article 19(2) of the Constitution in Article 3(2)(d), as read with Article 12, leaves no ambiguity. Moreover, noting that the rights and freedoms in the Constitution, including Article 33, are to be interpreted consistent with the jurisprudence of the ECtHR,[35] it is settled by the ECtHR Grand Chamber that this approach is compliant with that framework, and that prosecutions pursuant to statutes such as the Law are permissible for conduct criminalised under CIL prior to their promulgation.[36]

26. Unlike the Constitution, Article 181 of the SFRY Constitution provided that no one could be punished for any act which before its commission was not defined by statute, without providing an express exception for CIL crimes.[37] However, the SFRY Constitution is not listed in Article 3, and the KSC does not function in accordance with the principle of legality — or other rights and principles — set out in that instrument.[38] As such, legal proceedings conducted under UNMIK Regulation 1999/24 — which applied the principle of legality in the SFRY Constitution — have no bearing on the present inquiry.[39]

27. The drafters of the Law clearly understood the principle of legality in the Constitution to supersede that of the SFRY Constitution. The Kosovo Constitutional

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[34] *Contra* Appeal, KSC-BC-2020-06/IA009/F00011, paras 17-20.
[35] Constitution, Article 53.
[36] Examples include Latvia (ECtHR, Grand Chamber, *Kononov v. Latvia*, 36376/04, 'Judgment', 17 May 2010) and Hungary (ECtHR, Grand Chamber, *Korbely v. Hungary*, 9174/02, 'Judgment', 19 September 2008, though finding a violation in how this law was applied in the specific case).
[37] SFRY, Constitution, Article 181 (in relevant part: '[n]o one shall be punished for any act which before its commission was not defined as a punishable offence by statute or a legal provision based on statute, or for which no penalty vas threatened. Criminal offences and criminal-law sanctions may only be established by statute. Sanctions for criminal offences shall be imposed by the competent court in proceedings regulated by statute').
[38] Decision, KSC-BC-2020-06/F00412, para.99. *Contra* Appeal, KSC-BC-2020-06/IA009/F00011, paras 25-28.
[39] *See* Kosovo, Supreme Court, *Latif Gashi and others*, 'Decision of the Supreme Court, panel of UNMIK', 21 July 1005, AP-KZ No. 139/2004, pp.5-8, *in reference to* Article 1.1 of UNMIK Regulation no.1999/24 on the Law Applicable in Kosovo, 12 December 1999 (as amended by regulation 2000/59). *Contra* Appeal, KSC-BC-2020-06/IA009/F00011, paras 27, 40-41, 48.

Court necessarily reached the same conclusion, finding the constitutional amendment to establish the KSC constitutional so long as the scope of the KSC's jurisdiction complies with the rights provided by Chapters II and III of the Constitution (of which Article 33 of the Constitution is part).[40] These determinations are consistent with Article 7 of the ECHR, which only extends to substantive law such as crimes, modes of liability, and penalties.[41] Article 33 of the Constitution does not define substantive offences or the penalties for them. It is more similar to a pre-condition for the examination of a case like a statute of limitations, for which Article 7 of the ECHR has been found not to apply.[42]

28. Finally, the Pre-Trial Judge correctly found Article 12 to be in conformity with human rights law. Article 12 makes explicit reference to both Article 7(2) of the ECHR and Article 15(2) of the ICCPR. The Pre-Trial Judge did not err in reading all of Article 7 of the ECHR into the provision, noting that the KSC is required to function in accordance with international human rights law[43] and Article 7(2) must be read concordantly with Article 7(1) of the ECHR.[44]

29. No error is identified in the Pre-Trial Judge's conclusion that CIL applies at the KSC without offending the principle of non-retroactivity as stated in the Constitution or international human rights law.

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[40] Constitutional Court of the Republic of Kosovo, 'Judgement: Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433/DO-318', 15 April 2015, Case No.K026/15, paras 45, 57, 59-60.
[41] ECtHR, Grand Chamber, *Scoppola v. Italy (no. 2)*, 10249/03, 'Judgment', 17 September 2009, para.110.
[42] ECtHR, *Borcea v. Romania*, 55959/14, 'Admissibility Decision', 22 September 2015, para.64; ECtHR, *Previti v. Italy*, 1845/08, 'Admissibility Decision', 12 February 2013, para.80. *See also* ECtHR, Grand Chamber, *Kononov v. Latvia*, 36376/04, 'Judgment', 17 May 2010, paras 229-33.
[43] Law, Article 3(2)(e). *See also* Constitution, Article 22.
[44] ECtHR, Grand Chamber, *Maktouf and Damjanović v. Bosnia and Herzegovina*, 2312/08 and 34179/08, 'Judgment', 18 July 2013, para.72.

2. The Law confers jurisdiction to prosecute CIL during the charged timeframe

30. This section covers the remainder of Ground 1 of the Selimi Appeal.

31. The domestic law necessary to apply CIL at the KSC is the Law itself.[45] Authorities and arguments that domestic legislation is required in order to give direct effect to CIL are immaterial — there is such a law in this instance and, noting the previous sub-section, it need not have been promulgated at the time of the charged crimes.[46]

32. It bears emphasis that the Accused was bound by the CIL prohibitions charged in this case at the time the crimes were committed. They were crimes under international law. There is no retroactive application of the law in this respect; all that has changed is that these crimes were transposed into the domestic legal order by virtue of the Law.[47] Defence arguments that it is not possible to unlock a jurisdictional avenue to try such crimes are meritless.[48] Not only does Article 33(1) of the Constitution expressly envision this possibility, the International Military Tribunal, ICTY, ICTR, ECCC, and SCSL are all obvious examples of courts created to prosecute CIL offences committed in the past. All did so without offending the non-retroactivity principle because the offences within their jurisdiction fell under CIL at the time of their commission.[49]

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[45] Decision, KSC-BC-2020-06/F00412, para.98.
[46] *Contra* Selimi Appeal, KSC-BC-2020-06/IA009/F00011, paras 21-22, 34-37.
[47] Decision, KSC-BC-2020-06/F00412, para.101.
[48] Appeal, KSC-BC-2020-06/IA009/F00011, para.38.
[49] *See generally* ECtHR, Grand Chamber, *Kononov v. Latvia*, 36376/04, 'Judgment', 17 May 2010 (Joint Concurring Opinion of Judges Rozakis, Tulkens, Spielmann, and Jebens, para.6: 'no one can speak of retrospective application of substantive law, when a person is convicted, even belatedly, on the basis of rules existing at the time of the commission of the act').

33. In particular, ECCC chambers have previously addressed and categorically rejected submissions similar to those raised on appeal, considering, amongst other factors, that: (i) where national law did not incorporate an international crime at the relevant time, a court may rely on international law without violating the principle of legality;[50] and (ii) whether international law is directly applicable in domestic law generally is irrelevant where the legislator, in the specific law establishing the court, granted jurisdiction over crimes defined in international law and determined that such definition was directly applicable.[51] These considerations apply equally to the way the principle of legality is defined in the Constitution.

34. The Pre-Trial correctly found that the Law confers jurisdiction to prosecute CIL during the charged timeframe, and no error in that finding is identified.

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

35. The PTJ was correct in finding that JCE, in all forms, is a form of commission recognised in Article 16(1)(a) of the Law. Defence arguments challenging this finding[52] fail to demonstrate that the PTJ reached an erroneous conclusion of law and instead repeat submissions considered and rejected by the PTJ.[53] The additional arguments

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[50] ECCC, *Case against Nuon and Khieu*, 002/19-09-2007/ECCC/TC, 'Case 002/01 Judgement', 7 August 2014, para.18; ECCC, *Case against Nuon et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), 'Decision on Ieng Sary's Appeal Against the Closing Order', 11 April 2011, para.213. *See also* ECCC, *Case against Kaing*, 001/18-07-2007/ECCC/SC, 'Appeal Judgement', 3 February 2012, para.99 and fn.188.
[51] ECCC, *Case against Nuon and Khieu*, 002/19-09-2007/ECCC/TC, 'Case 002/01 Judgement', 7 August 2014, para.18; ECCC, *Case against Nuon et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), 'Decision on Ieng Sary's Appeal Against the Closing Order', 11 April 2011, paras 208, 212-213 ('the characterization of the Cambodian legal system as monist or dualist has no bearing on the validity of the law applicable before the ECCC').
[52] Appeal, paras 40-49.
[53] *See e.g.* Appeal, para.44; SELIMI Defence Challenge to Jurisdiction – Joint Criminal Enterprise, KSC-BC-2020-06/F00198, 10 February 2021 ('Selimi Motion'), paras 22-27. The type of error alleged is unclear but it is assumed that the Defence allege an error of law. *See e.g.* Appeal, para.7.

offered on appeal are not persuasive and cannot ground a request for appellate intervention.[54]

36. As the Defence acknowledge,[55] they have previously argued at length that the absence of the words 'joint criminal enterprise' in Article 16(1)(a) of the Law, coupled with the passage of time and scholarly disagreement, signify the drafter's intent to exclude JCE as a mode of liability. Those submissions were duly considered by the PTJ.[56] 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.[57] That framework, *inter alia*, mandates the application of customary international law.[58] As noted in the Decision,[59] consistent with Articles 3 and 12, Article 16 itself specifically indicates where other sources of law — such as modes of liability found in domestic statutes — were to be applied.[60] Moreover, Article 16(1) self-evidently incorporates international law modes of liability, including superior responsibility, which are consequently appropriately interpreted by reference to applicable customary international law.

37. The PTJ explained that the interpretation of the term 'commission' can be understood by assessing the interpretation of virtually identical statutory provisions of other relevant courts.[61] This approach is consistent with Article 3(3) of the Law and is appropriate, as the enumerated courts also apply CIL modes of liability to war crimes and crimes against humanity, within the confines of their respective statutes.[62]

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[54] *See e.g.* Appeal, para.47.
[55] Appeal, para.44.
[56] For example Decision, paras 177, 188. *Contra* Appeal, para.2.
[57] Decision, para.177; *Contra* Appeal, paras.70-71.
[58] Article 12.
[59] Decision, para.178.
[60] Article 16(2) and (3).
[61] Decision, para.177.
[62] For submissions on the applicability of CIL, see § IV(A) above. In addition, it was noted by the PTJ that the modes of liability in Law, Art.16(1)(a) apply to war crimes and crimes against humanity, unlike the crimes in Art.15, which apply Kosovo law. Decision, para.177.

There is also no merit in the Defence claim[63] that the contrast between Articles 16(1)(a) and 16(1)(c) allows for any conclusion to be drawn about the strength of the statutory basis for JCE. On the contrary, the language of Article 16(1)(c) reinforces the drafters' intent to replicate and incorporate international law modes of liability, as consistently interpreted and applied elsewhere.

38. The PTJ's interpretation of Article 16(1)(a) should be affirmed. In 2015 when the Law was adopted, five courts — interpreting virtually identical language — had consistently determined that JCE is a form of commission, a statutorily-prescribed means of incurring individual criminal responsibility for war crimes and crimes against humanity.[64]

39. Like the ICTY Statute and other similar statutes, 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.[65] It therefore must be interpreted with consideration of its context, object and purpose.[66] Article 1, the Scope and Purpose of the Law, states that the court shall exist to *inter alia*, 'ensure secure,

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[63] Appeal, paras.45-47.

[64] 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.

[65] 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.

[66] *See* Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise, KSC-BC-2020-06/F00263, 23 April 2021 ('SPO Response JCE'), paras 17-20.

independent, impartial, fair and efficient criminal proceedings'.[67] Fulfilling the Law's purpose requires applying it to those responsible for the crimes within the KSC's jurisdiction, whether they acted alone or together with others.[68] This was an animating concern for the drafters of the CoE Report, who expressed concern about the gravity of crimes and the commission of crimes by those participating in a group.[69] The Law was designed to, and does, include JCE as a mode of liability for precisely these circumstances.

40. The inclusion of JCE as a mode of liability has been found to reflect the reality of many crimes committed during a period of conflict or unrest. Courts adjudicating the same and related substantive crimes have consistently found that these crimes are frequently perpetrated by groups of individuals acting together in pursuance of a common criminal design, and not solely based on the criminal proclivity of an individual.[70] Some participants may be physical perpetrators, and those who are not may be found to have also made contributions of the same or similar moral gravity.[71] The modes of liability appropriate in such settings support accountability for those whose significant contributions make possible the physical perpetration of crimes.[72]

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[67] Law, Art.1.

[68] *See e.g.* Law, Art.13-14 (jurisdiction for war crimes and crimes against humanity), Art.16(1)(b-d) (noting and dispensing with any impediment to prosecution based on official position, order by a government or superior, or based on the acts of subordinates).

[69] 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.

[70] *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.

[71] *Tadić* AJ, para. 191.

[72] *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

41. Prosecution of all persons who committed violations of Articles 13 and 14 is consistent with the plain language, context, object and purpose of the Law, and reflects the nature of the crimes committed during periods of conflict or unrest. The text of Article 16(1)(a), interpreted in light of these factors, includes responsibility for all perpetrators who contribute to the commission of crimes carried out jointly, by a group of persons acting pursuant to a common criminal purpose or JCE.[73] The PTJ's finding on this point is correct and the Defence fails to demonstrate error.

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

42. The Defence's challenge to the existence of JCE III liability in CIL,[74] ignores relevant findings in the Decision, simply disagrees with the PTJ's conclusions, and does not demonstrate an error of law. While the Decision does in fact explain why aspects of the reasoning of divergent authorities is unpersuasive,[75] the PTJ was not obligated to dissect and minutely critique ECCC decisions in adjudicating a challenge to the jurisdiction of the KSC. The PTJ correctly found that JCE III (and JCE I)[76] were part of CIL during the temporal jurisdiction of the KSC.[77]

1. The Decision does not fail to address or misconstrue Defence submissions

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'Decision on Interlocutory Appeal regarding Application of Joint Criminal Enterprise to the Crime of Genocide', 22 October 2004 ('*Rwamakuba* JCE Decision'), para.29.

[73] *See similarly Tadić* AJ, paras 186, 190 (the Appeals Chamber concluded that the jurisdiction conferred in the Statute must apply *to all those* who participated in the commission of the crimes in question, including '[w]hoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose'); 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').

[74] Appeal, paras 50-85.

[75] Decision, para.186.

[76] Since the Defence submissions in ground (iii) of the Appeal focus on JCE III, this response also concerns JCE III.

[77] Decision, para.190. *Contra* Appeal, paras 59-85.

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

44. In particular, having explicitly considered the sufficiency of the basis upon which they rest,[78] 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.[79] 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 is clearly set out. Equally clear is the PTJ's consideration of Defence submissions[80] — the majority of which, as noted in the Decision, merely repeat challenges which had been considered and adjudicated in prior jurisprudence.[81]

45. For example, the PTJ explored the laws forming the statutory foundation of the post-WWII prosecutions for war crimes and crimes against humanity and concluded in respect of the International Military Tribunal at Nuremberg ('IMT') Charter and Control Council Law No. 10 ('CCL10') that they 'clearly provide for criminal liability for participation in a common plan or enterprise.'[82] He thus rejected Defence arguments to the contrary and further clarified that Defence submissions on the *post facto* status of these laws were without merit, noting some of the many sources which make plain that these statutes reflect pre-existing law.[83]

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[78] Decision, para.186.
[79] Decision, paras 181-190.
[80] Decision, paras 183-189.
[81] Decision, para.185 (in respect of JCE 1). *See also* SPO Response JCE, paras 101-120 (noting finds of courts considering the same or substantially similar arguments).
[82] Decision, para.183, including fn.385.
[83] Decision, para.183.

46. Turning to relevant post-WWII caselaw, 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.[84] The analysis in the Decision included an explicit consideration of the elements of state practice and *opinio juris*.[85] While there is no requirement to respond to each and every argument of a party in order to meet the requirement of providing reasons,[86] the Decision also expressly addresses Defence submissions.[87] The PTJ thus opined on relevant sources of law, the 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.[88] Contrary to Defence submissions,[89] the Decision did not rest on statistical calculation. As outlined above, it is apparent that the Decision's endorsement of the authorities in question, reflected independent consideration of their sufficiency.[90]

47. The Defence arguments on appeal wrongly suggest that the PTJ erred because he failed to 'replicate' or 'refute' the analysis of a panel of judges of another court.[91]

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[84] Decision, para.186.
[85] Decision, para.186.
[86] *See* ICTY, *Prosecutor v. Anto Furundzija,* Appeal Judgment, IT-95-17/1-A, 21 July 2001, para.69; ICTR, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgment (Reasons), ICTR-95-1-A, 4 December 2001; paras 165, 245; ICTY, *Prosecutor v. Miroslav Kvočka et al.*, Appeal Judgement, IT-98-30/1-A, 28 February 2005, para.23; ICTY, *The Prosecutor v. Radovan Karadzic*, Decision on Duration of Defence Case, IT-95-5/18-AR73.10, 29 January 2013, para.21.
[87] Decision, para.186. In addition to the examples listed showing the PTJ addressed Defence challenges to the support for JCE III, paras 187-189, 202-208 address Defence submissions against JCE, including JCE III. The PTJ discussed the Defence arguments against finding that JCE was foreseeable and accessible to the Accused at paras 191, 193-200.
[88] In addition to the examples listed showing the PTJ addressed Defence challenges to the support for JCE III – *See* Decision, paras 187-189, 202-208 address Defence submissions against JCE, including JCE III. The PTJ discussed the Defence arguments against finding that JCE was foreseeable and accessible to the Accused - *See* Decision, paras 191, 193-200.
[89] Appeal, para.58.
[90] Appeal, para.53.
[91] *Contra* Appeal, paras 53, 55, 58.

There is no such requirement,[92] and a Panel has a relatively broad discretion in the structuring of a decision. Nonetheless, the PTJ did specifically note that as part of the deliberative process, he had considered the ECCC's findings,[93] including on post-WWII cases, which is acknowledged by the Defence.[94] While the PTJ is not obliged to perform an irrelevant analysis of 'why […] divergent opinion exists' as claimed by the Defence,[95] the Decision does, in fact, contain the PTJ's conclusions as to the reasons why he is not persuaded by the position taken by the ECCC and related Defence arguments.[96]

2. JCE III has CIL status and is applicable at the KSC

48. In arguing against the existence of JCE III in CIL, the Defence posit that it is the *mens rea* element of JCE III and responsibility for crimes not falling within the common plan that signal a vast departure from JCE I and II and lack support in custom.[97] This argument ignores the substantial overlap between the various categories of JCE.[98] It also does not alter the fact that 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

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[92] Similarly, the Appeals Panel is not obliged to 'review and adopt' the ECCC's analysis and rejection of jurisprudence supporting JCE III. *Contra* Appeal, para.59.
[93] Decision, para.186, including as referenced in fn.407-410.
[94] Appeal, para.55.
[95] Appeal, para.57.
[96] Decision, para.186.
[97] Appeal, para.60.
[98] The Confirmation Decision correctly identifies the requirements for individual responsibility pursuant to JCE. *See* Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026/RED, 26 October 2020 ('Confirmation Decision'), paras. 105-115. The ICTY Appeals Chamber has described the three categories of JCE: (i) JCE I: where all participants, acting pursuant to a common purpose, possess the same criminal intention to effectuate that purpose; (ii) JCE II: referring to instances of ill-treatment in organised systems or institutions, such as concentration camps; (iii) JCE III: where participants have agreed on a common purpose involving the perpetration of crime(s) and are liable for criminal acts which, while outside the common purpose, are nevertheless a natural and foreseeable consequence of effectuating that common purpose. ICTY, Appeals Chamber, *Prosecutor v. Tadić*, IT-94-1-A Judgement, 15 July 1999 (*Tadić* AJ), paras 196-204.

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.[99] As such, it only arises where a perpetrator who already had criminal intent, and had made a significant contribution, could and did foresee the possibility of an additional crime and willingly took that risk.[100] JCE III therefore factually follows from the same agreed conduct of an Accused. As such, the three categories of JCE derive support from many of the same sources of law. These sources, discussed below, demonstrate that JCE III is based in CIL.

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

49. 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 of grave crimes.[101] The establishment of the IMT, the adoption of its Charter ('IMT Charter'), and the adoption of CCL10, all accomplished pursuant to the

[99] 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.
[100] STL Decision on Applicable Law, paras 243, 245.
[101] *See also* SPO Response JCE, paras 27-100.

agreements of various states,[102] provided the 'machinery for the actual application of international law theretofore existing'.[103]

50. The IMT Charter and CCL10 contain provisions for criminal liability for participation in a common purpose, plan or enterprise.[104] The language of the IMT Charter, attributing liability for 'all acts performed by any persons in execution of such plan' and of CCL10, providing liability for persons 'connected with plans or enterprises involving the commission of a crime' encompasses 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).[105] Contrary

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[102] The IMT was established by agreement between the Allied Powers with the following countries 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.*, International Military Tribunal, Judgement, 1 October 1946, in *Trial of the Major War Criminals* (Vol. I, 1947) ('IMT Judgement'), p.171. The IMT Charter was adopted in August 1945. 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 ('The Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of the Soviet Socialist Republics acting in the interests of all the United Nations and by their representatives duly authorized thereto have concluded this Agreement'). CCL10 was enacted by legislative act, jointly passed by the four occupying powers (the United States, the Soviet Union, France and Great Britain), reflecting international agreement among the occupying powers as to the law applicable to international crimes and the jurisdiction of the military courts charged with adjudicating these cases. *See* PTC Decision on JCE, para.57. Courts applying CCL10 tried 'next level' war criminals, other than those tried at the IMT, were also to follow the IMT Charter and jurisprudence of the IMT. CCL10; PTC Decision on JCE, para.57, fn.164.

[103] *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.

[104] 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).

[105] 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

to the Defence submission, and as evident in the Decision[106] this does not exclude JCE III — it is a requirement for all categories of JCE that there be participation in a common plan or enterprise.[107]

51. Further, as has been established before other appellate chambers, the IMT Charter and CCL10, as well the pleadings and decisions from the cases tried pursuant to those instruments, have much in common with the modern elements of JCE, but do not always employ language that 'fit[s] neatly' into each of the three categories of JCE.[108] Modes of liability or their constitutive elements are not described with the same methodology and terminology of modern international courts.[109] 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.[110] Requiring uniform terminology would be 'unrealistic'.[111] That these materials do not use the terms 'joint criminal enterprise' or 'significant contribution to the implementation of the common purpose' is not determinative, as these terms are modern phrases adopted to express the principles arising from the post-WWII caselaw.[112] Similarly, as recognised by the ICTY Appeals Chamber, in lieu of detailed discussions on legal concepts

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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. *See* Decision, para.183 and cites at fn.384.

[106] Decision, para.183(finding that the IMT Charter and CCL10 clearly provides for criminal liability for participation in a common plan or enterprise). *Contra* Appeal, para.62.

[107] For every category of JCE, the following must be established: (i) the existence of a plurality of persons who act pursuant to a common purpose; (ii) the existence of a common plan, design, or purpose which amounts to or involves the commission of a crime provided for in relevant law; and (iii) the participation of the accused in furthering the common design or purpose. *Tadić* AJ, para.227.

[108] *Rwamakuba* JCE Decision, para.24.

[109] *See Rwamakuba* JCE Decision, para.24.

[110] 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.

[111] 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.

[112] SCC AJ, paras.779.

underpinning responsibility, some judgements from this era conclude that the accused were responsible for serious crimes, based on the evidence, as they were found to be 'connected with', 'concerned in', or 'inculpated in' the commission of crimes.[113] This characterisation by the courts, coupled with factual narratives which support the applicability of principles akin to JCE III, demonstrate that the cases, described below, 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.[114]

52. Jurisprudence from post-WWII cases, including in relation to modes of liability, further supports the application of JCE III. However, 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 always address specific modes of liability or their constitutive elements with the same precision and terms used by modern international courts.[115] This does not obviate their utility as examples of the application of the doctrine, nor does it pose a problem of legality.[116] The records of trials from that era must be understood by looking at the totality of the information available concerning the application of relevant legal principles. This includes the reporting of statements of counsel and of Judge Advocates, who, as institutional advisers to the court or as part of the staff of the parties, provided advice on points of law.[117] The ICTY Appeals Chamber noted, with approval, the clarification to *Tadić,* that made plain that judges must be competent to

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[113] *Rwamakuba* JCE Decision, para.24.
[114] *See Tadić AJ,* para.195.
[115] *See Rwamakuba* JCE Decision, para.24; *See* SPO Response, para.42.
[116] *See* SPO Response, paras 28-29.
[117] *See* SPO Response, 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).

assess post-WWII caselaw, including by examining 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.[118]

The value of applying this approach to the cases described in the Appeal and SPO Response[119] is apparent upon closer examination of the materials identified by the SPO and when the caveats found in ECCC decisions are then re-assessed.

53. *Borkum Island*:[120] In the *Borkum Island* case, which the ECCC PTC recognised may be relevant to JCE III,[121] brought following the killing of seven downed U.S. airmen, fifteen soldiers and civilians were indicted for wilful killing (Count 1) and assault (Count 2).[122] Fourteen accused were convicted for the assault, with six of them also being convicted for the wilful killing.[123] 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,

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[118] *Đorđevic* 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 Chambers, Trial Chamber, *Ministere Public v. Hissene Habré* Judgment, 30 May 2016 ('*Habré* TJ') paras 1872, 1884.
[119] *See also* SPO Response JCE, paras 62-93.
[120] *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/.
[121] PTC Decision on JCE, para.79.
[122] *Borkum Island*, p.1.
[123] *Borkum Island*, p.2.

> 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.[124]

54. *Tadić's* treatment of *Borkum Island* reflects judicial deduction showing the application of legal principles to facts. Available records contain additional information, which confirms *Tadić* correctly found liability based on foreseeability for the killings.[125]

55. First, 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 human life, are legally responsible as principals for homicide committed by any of them in pursuance of or in furtherance of the plan.[126]

56. Considering the advisory role of the Judge Advocate in this case, 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.

57. Further, the Judge Advocate's legal analysis is linked to legal texts which apply this principle. In reviewing *Borkum Island*, the Judge Advocate refers to *US v. Joseph Hartgen* (also known as *Rüsselsheim*) and notes that the theory of the case in *Borkum Island* is the same as in *Rüsselsheim*.[127] In the U.S. War Crimes Manual, described below, *Rüsselsheim* is cited for the following legal principle which plainly includes the legal principles underlying 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

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[124] *Tadić* AJ, para.213.
[125] The ECCC PTC recognised this case may be relevant to JCE III. PTC Decision on JCE, para.79. *Contra* Appeal, paras 63-65.
[126] *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.
[127] *Borkum Island* case, pp.9-10.

> 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.[128]

58. While the foregoing 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 shows that the doctrine of common criminal design, a pivotal element of all forms of JCE, was well-established in custom at the time:

> [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 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.[129]

59. The application of this doctrine to the facts is confirmed by the words of 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'.[130] A review of the evidence underpinning Krolikovski's conviction shows that intent was not required by the judges to convict him for wilful killing. In particular, the detailed summary of the evidence drafted by the Judge Advocate in the post-conviction review and recommendations, 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.[131]

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[128] War Crimes Trial Manual, Section 410, 15 July 1946, p.305 (emphasis added).
[129] *Tadić* AJ, para.210 (emphasis added).
[130] *Borkum Island* case, p.20.
[131] *Borkum Island*, p.18. *See also* Maximilian Koessler, Borkum Island Tragedy and Trial, 1956, pp.188-189: SPO Response-JCE, para.70. (records from the Report of the Judge Advocate for War Crimes

60. 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.[132]

61. Two additional cases, criticised by the Defence, were considered by the ECCC but without due consideration for the totality of information available about the cases and principles enumerated. Rather than considering sources of law piecemeal and in isolation, the available legal sources should be considered as a whole.

62. *Rüsselsheim*:[133] In one of the first trials conducted by American military commissions in Europe, German civilians were charged with the assault and killing of U.S. airmen who were attacked by a mob and eventually shot dead.[134] In the post-conviction review, the Judge Advocate stated that the findings of guilt were sustained and the sentences justified based on the evidence showing each accused was motivated by a common design and legally were principals in committing the killings.[135] The ECCC declined to rely upon *Rüsselsheim* because it considered there to be uncertainty as to whether the court hearing the case viewed the killings as part of the mob's plan or as its natural and probable consequence, as the prosecution had

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regarding trials conducted between 1944 and 1948 reveal that in two unnamed cases of killings during mob action against American airmen, resulting in charges of 'acting jointly and in conjunction with others,' the principle of 'joint responsibility for participation in mob action' applied, and responsibility for the killing attached both to those who incited mob action and to those who did the actual beating and killing); European Command War Crimes Report, p.65-66.

[132] Koessler, Borkum Island Tragedy and Trial, p.194.

[133] *United States v. Hartgen et al.*, Case No. 12-1497, United States Military Commission, Review and Recommendation, 29 September 1945 ('*Rüsselsheim*').

[134] *Rüsselsheim*, pp.2, 3, 6; Clarke, Return to Borkum Island, pp. 839, 853.

[135] Extract from Opinion of Deputy Theater Judge Advocate for War Crimes in the case of United States v. Josef Hartgren, et al., October 1945 *reprinted in* War Crimes Trial Manual, Section 410, 15 July 1946, p.305.

submitted.[136] Any such doubts are resolved in available records, not considered by the ECCC, which show that the foreseeability standard was applied.

63. The 1946 U.S. Forces' Manual for Trial of War Crimes contains authoritative statements of the law applicable in war crimes trials on many topics for practitioners.[137] Concerning 'Liability of Multiple Participants for War Crimes' the Manual 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.[138]

64. The authority cited in support of this specific principle is *Hartgen et al.* also called *Rüsselsheim*. As such, this reference resolves any ambiguity, as U.S. authorities would have certainly known the legal principles upon which its own military commission in Germany 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 thereby contributing to state practice and the formation of custom. In light of this support for the standard enumerated by the Prosecution at trial and upheld post-conviction, the ECCC's caveat about this case is no longer an impediment to determining its value as precedent for JCE III.

65. Similarly, when considering the support found for a mode of liability akin to JCE III in the *Essen Lynching* case, also concerning downed airmen, the ECCC PTC

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[136] Trial transcript of the *Rüsselsheim* case, as quoted in Clarke, Return to Borkum Island, pp. 839, 854; SCC AJ, para.800.
[137] War Crimes Trial Manual, Section 410, 15 July 1946. In its foreword, the Manual states that it contains a compilation of directives covering important aspects of trials, together with citations of authorities derived from past decisions on questions arising therein.
[138] War Crimes Trial Manual, Section 410, 15 July 1946, p.305 (emphasis added).

acknowledged that an element of foreseeability emerged from the facts of the case, but declined to reach conclusions on the basis of the record of that case alone.[139] The case does not stand alone and should, along with the other cases cited in *Tadić* and by the SPO, be considered as part of the consistent record of cases which illustrate the existence of principles akin to JCE III. In *Essen Lynching*, heard by a British military court,[140] the prosecution submitted that a finding of intent was not necessary for a conviction[141] and the judges issued convictions for the killing of the airmen against individuals who had not manifested any intent in that regard.[142] The factual narrative reveals that a co-participant to a crime may be held responsible for additional crimes committed by other participants that he or she had not intended. It is apparent that this responsibility is attributed on account of the foreseeability or predictability of the fate that befell the airmen.[143]

66. The following cases from the post-WWII period further demonstrate liability for crimes committed in furtherance of the common plan, based on the foreseeability that such crimes would be committed.

67. *Ikeda*:[144] In this 1947 case, tried by Dutch authorities before the Temporary Court Martial of Batavia, the judges convicted Ikeda for crimes that were a predictable consequence of a criminal plan in which he had engaged. In convicting the accused, the judges first found that the plan Ikeda had devised and engaged in was criminal in nature:

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[139] PTC Decision on JCE, para.81. *See also* PTC Decision on JCE, para.79 (noting that the facts may be directly relevant to JCE III).
[140] *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, 91. The Court stated that it was not a trial under English law.
[141] Transcript of Prosecutor's remarks, Public Record Office, London, WO 235/58 (on file with KSC library) ('*Essen Lynching Transcript'*), p.65.
[142] *Essen Lynching*, p.88, 90-91.
[143] *See Tadić* AJ, paras 207-209.
[144] *Queen v. Ikeda*, Case No. 72A/1947, Judgement, 8 September 1948 ('*Ikeda*'), p.8.

> [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.[145]

68. The court then went on to specify the conduct through which Ikeda had furthered the criminal plan and the consequence of his engagement therein for his 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.[146]

69. Crucially, the judges then found that the crimes committed by Ikeda's co-accused 'could and should have been anticipated and prevented by the accused.'[147] Any claim that this case may have applied JCE I if the crimes were within the common purpose or that he was convicted based on superior responsibility is not supported by the record. The judge reasoned that Ikeda was convicted for crimes that he 'could and should have anticipated'.[148] This excludes a finding that Ikeda had knowledge and shows that he lacked intent for the crimes that resulted from the criminal plan he had initiated. With respect to superior responsibility, this claim fails to appreciate that Ikeda was found to have contributed to a criminal plan. Without the criminal plan, Ikeda's conduct could have amounted to superior liability; in the context of that plan Ikeda's conduct amounts to a contribution by omission.[149]

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[145] *Ikeda*, p.8.
[146] *Ikeda*, p.8.
[147] *Ikeda*, p.8.
[148] *Ikeda*, p.8.
[149] A contribution by omission may include failing to (i) discipline the criminal acts of subordinates, or (i) protect a specific group. *See e.g.* ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Appeal Judgement, 30 June 2016, paras 110-111.

70. *Ishiyama and Yasusaka:*[150] The Australian military case of *Ishiyama and Yasusaka* concerns the killing of two Indian prisoners of war by two members of the Japanese military.[151] The trial records reveal that CIL was directly applicable in the proceedings.[152]

71. In this case, the Judge Advocate explained that where the common purpose was to commit a felony, liability arose also in respect of felonies not encompassed by the common purpose but done in furtherance of that common purpose.[153] This is the same principle which was clearly enunciated in *Borkum Island* and *Rüsselsheim,* and then codified in the 1946 Manual for Trial of War Crimes. It is also the same principle which was applied by the Dutch Court Martial in *Ikeda.*

72. *United States v. Tashiro et al.*(*'Tashiro'*):[154] At the American Military Commission of Japan, Koshikawa and others were charged with three crimes, including participation in a criminal plan to release American prisoners from their cells in the event of a fire or air strike only after Japanese prisoners had been released and to have, in furtherance of this plan, caused the American prisoners' death by burning in their cells.[155] The court convicted Koshikawa on the basis of his participation in this plan, which the court considered 'grossly negligent' as it contributed to the death of the American prisoners of war.[156]

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[150] *Prosecutor v. Kumakichi Ishiyama et al.*, Australian Military Court, 8-9 April 1946, p.5 ('*Ishiyama*') (accessed at www.legal-tools.org/doc/c9884d/).
[151] *Ishiyama,* p.5.
[152] 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.
[153] *Ishiyama,* pp.24-26. Importantly, the Judge Advocate in *Ishiyama* stated at the beginning of his submissions that he was advising the court 'upon the law'.
[154] *United States of America v. Tashiro et al.*, Review of the Staff Judge Advocate, 7 January 1949 (*'Tashiro'*).
[155] *Tashiro,* pp.5-7, 71 (with reference to the accused Koshikawa), Specification 2.
[156] *Tashiro,* p.72.

73. The findings of the case are clear with regard to Koshikawa's participation in a criminal plan that brought about the additional consequence of the prisoners' death.[157] The prisoners' death was unintended by Koshikawa, but he was nevertheless found responsible by virtue of his participation in the grossly negligent plan, *inter alia*, because there were elements to foresee the possible consequences.[158]

74. Finally, the Defence wrongly suggest that the PTJ has agreed that certain Italian cases are not proper precedents.[159] No such finding was made and the precedential value for certain cases in domestic courts, including *D'Ottavio and others*[160] should not be limited by merely categorising it as domestic. Rather, in this case, which has certain international elements,[161] the principle underlying JCE III is central to the convictions[162] and the Italian Court of Cassation made a specific finding of foreseeability in respect of a crime falling outside the common purpose to illegally detain prisoners, namely the shooting of a prisoner.[163] This finding applied in the conviction of three co-accused, namely those 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 of a prisoner was *foreseeable* to them.[164] Given the international elements, this

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[157] *Tashiro,* p.72.
[158] *Tashiro,* pp.71-72. *See also* Clarke, Return to Borkum Island, p.855 where the author concluded Koshikawa was convicted for a crime that he did not intend.
[159] Appeal, para.67, referring to Decision, para.89 and PTC Decision on JCE, para.82.
[160] *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.
[161] The victims were foreign prisoners of war.
[162] The Court of Cassation explicitly reasoned that all the 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).
[163] SPO Response, paras 89-91.
[164] *Contra* SCC AJ, para.795 (explaining that the case lacked precedential value because 'the death of the victim happened for unforeseen circumstances, an infection not properly treated', and because the four were convicted of involuntary homicide, not for murder, 'an offence which only requires intention to cause bodily harm, with the death being attributed to the accused – according to the jurisprudence as it stood in the 1940s – through strict liability.').

case may thus qualify as state practice relevant to the identification of a rule of CIL, including with respect to modes of liability.[165]

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

75. The legal principles from WWII-era statutes and trials were pre-existing principles of law, which were further recognised as representing CIL at the time that the efforts to hold trials were fully underway.[166] In 1946, following the delivery of the IMT Judgement, the principles found therein and the IMT Charter were affirmed at the UN Secretary-General's recommendation and included in a General Assembly resolution, with the goal of ensuring that the principles form a permanent part of international law without delay.[167]

76. In addition to recognition by the UN in 1946, in 1993 the UN Secretary-General identified the IMT Charter as a source of customary law applicable before the ICTY.[168] When brought before the ICTY Appeals Chamber, the Chamber took note of the fact 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,

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[165] *See* SCC AJ, para.805. In addition, Italy's extensive involvement in World War II and its occupation by Nazi-Fascist forces between 1943 and 1945 caused it to be extensively involved with the investigation and trial of a high number of war crimes. This is a relevant circumstance because, when assessing the generality of state practice with respect to the formation of custom, the practice of states that are particularly faced with certain questions of law may be given particular consideration, *see* United Nations, 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, Conclusion 8, p.85. *See also* ICJ, *Jurisdictional Immunities of the States (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.

[166] Decision, para.183. *See also* SPO Response, paras 34-36, 94-100.

[167] *See also* SPO Response, 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 1949); UN General Assembly Resolution 95 (I), Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal, 11 December 1946.

[168] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, para.35.

discussed in that caselaw and legislation, are firmly established in CIL.[169] Chambers at the ECCC[170], ICTR,[171] and ICTY[172] have found that these sources can be relied upon, *inter alia,* as demonstrative of JCE's status in CIL.[173]

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

77. As demonstrated in preceding sections, the status of WWII-era legal principles on modes of liability, including the modes akin to JCE, in custom 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 specifically has been affirmed by the ICTY,[174] the ICTR,[175] the IRMCT,[176] the SCSL,[177] the STL,[178] and other international or internationalised

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[169] *Tadić* AJ, para.194, 220.
[170] PTC Decision on JCE, para.60.
[171] *Rwamakuba* JCE Decision, para.14 citing Hunt *Ojdanić* Separate Opinion, para.12 ('It is clear that, notwithstanding the domestic origin of the laws applied in many trials of persons charged with war crimes at that time, the law which was applied must now be regarded as having been accepted as part of CIL'); *Rwamakuba* JCE Decision, paras 14-31.
[172] ICTY, Trial Chamber, *Prosecutor v. Kupreškić et al*., IT-95-16-T, Judgement, 14 January 2000 ('*Kupreškić et al*. TJ'), paras 540-541. This finding of the *Kupreškić* Trial Chamber was noted with approval by the ICTY Appeals Chamber in *Đorđević* AJ, para.43.
[173] In 2010, in considering whether JCE formed part of CIL in the 1970s, 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.
[174] *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.
[175] *See e.g. Karemera and Ngirumpatse* AJ, paras 623, 627, 629.
[176] *See e.g.* IRMICT, Appeals Chamber, *Prosecutor v. Karadžić,* MICT-13-55-A, Judgement, 20 March 2019 ('*Karadžić* AJ'), para.433.
[177] *Brima et al*. Decision on Judgment of Acquittal, paras 308-326 and *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgment, 22 February 2008, para.84.
[178] STL Decision on Applicable Law, paras 239-247.

tribunals.[179] All three chambers of the ECCC and the Co-Investigative Judges have recognised the existence of JCE I and II in CIL.[180] Such widespread recognition of a principle in CIL is not noted in support of an argument that JCE III must be recognised in CIL because of the number of courts that have recognised it as such.[181] Rather, this is noted to underscore 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. On this topic, the Defence rely heavily on ECCC jurisprudence to argue against the customary status of JCE III.[182] The Appeals Panel should dismiss these challenges because the conclusions of the ECCC are based on an incorrect and incomplete reading of the relevant records.[183]

78. The Defence arguments on the treatment of superior responsibility are irrelevant to the legality of JCE and JCE III.[184] The submissions, which are based on nothing more than opinion on how a decision 'would' be reached and what that decision 'would' be — based on arguments which have been refuted above — do not undermine the jurisprudence confirming the legality of JCE.[185] The Decision correctly found that JCE III is based in CIL and should be affirmed.

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[179] *Habré* TJ, para.1885.
[180] 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.
[181] *Contra* Appeal, para.79.
[182] Appeal, paras 59-81.
[183] *See* § IV(C)(2), *supra*.
[184] *Contra* Appeal, paras 82-85. The Defence concede that the ECtHR jurisprudence it cites on superior responsibility is not binding on the Appeals Panel.
[185] Given the nature of the Defence submission, described above, the SPO does not consider that the Defence has brought a concrete legal argument against legality which constitutes a ground of appeal.

V. CONCLUSION

79. The PTJ correctly found that the KSC shall apply at all times CIL, and does so without violating the principle of non-retroactivity. The PTJ also 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 during the Indictment period. The Defence submissions on appeal fail to show legal error, or that the PTJ has abused his discretion. The Decision reflects due consideration of relevant factors and is based on a reasonable and correct assessment of the Law and jurisprudence. The Appeal should thus be rejected and the Appeals Panel should affirm the applicability of JCE, in all its forms, before the KSC.

VI. RELIEF REQUESTED

80. For the foregoing reasons, the SPO respectfully requests that the Court of Appeals reject the Appeal in its entirety.

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Jack Smith

Specialist Prosecutor

Thursday, 30 September 2021

At The Hague, the Netherlands.