

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Rexhep Selimi

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**Public Redacted Version of Selimi Defence Challenge to
the Form of the Indictment, KSC-BC-2020-06/F00222,
dated 15 March 2021**

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I. INTRODUCTION

1. The Indictment submitted by the SPO to the Pre-Trial Judge on 24 April 2020, revised on 24 July 2020¹ and confirmed by the Pre-Trial Judge on 26 October 2020² is defective as it is insufficiently detailed in relation to material facts relevant to the case against Mr. Selimi. Unless these defects are remedied by the Pre-Trial Judge, these will severely hamper the Defence's ability to prepare effectively and confront the Prosecution case.
2. These defects in the Indictment are grievously prejudicial to Mr. Selimi in and of themselves. However, in conjunction with the extreme protective measures in place and envisaged to be implemented throughout pre-trial proceedings, the extensive redactions to the Indictment and the shambolic disclosure practices, the prejudice is exponentially exacerbated.
3. Prompt and extensive intervention by the Pre-Trial Judge is thus vital to correct, clarify and rectify the mistakes, ambiguities and gaps in the Indictment, as well as to ensure the fairness of proceedings.³

II. APPLICABLE LAW

4. Article 21(4)(a) of the Law⁴ provides that the accused is entitled to be informed promptly and *in detail* of the nature and cause of the charge against him. Rule 86(3) of the Rules⁵ provides that the indictment "shall set forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime(s) with which the suspect is charged, in particular the alleged mode of liability in relation to the crimes charged pursuant to Article 16 of the Law." In addition, as well as the indictment supporting material, Rule 86(3)(b) provides that the

¹ *Prosecutor v. Thaci et al.*, Specialist Prosecutor, Submission of Revised Indictment for Confirmation ("Second Submission"), strictly confidential and *ex parte* with Annex 1 ("Revised Indictment"), strictly confidential and *ex parte*, KSC-BC-2020-06, F00011, 24 July 2020.

² *Prosecutor v. Thaci et al.*, Confidential 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, 26 October 2020. ("Confirmation Decision").

³ This motion is filed confidentially because it refers to confidential filings. A public redacted version will be filed in due course.

⁴ 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.

⁵ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

indictment shall be filed together with “a detailed outline demonstrating the relevance of each item of evidentiary material to each allegation, with particular reference to the conduct of the suspect with respect to the alleged crime(s).” Rule 86(4)(b) further provides that the Pre-Trial Judge shall examine the supporting material in relation to each of the charges and shall determine whether a well-grounded suspicion has been established against the suspect and in so doing may “request the Specialist Prosecutor to review the indictment with the aim to provide more specificity on any or all charges, and the specific conduct of the suspect, or to ensure legal accuracy or greater clarity in the presentation of the charges.” Detailed written records of any such requests shall be made and shall be included in the case file.

5. A detailed, clear, and unambiguous indictment is an essential prerequisite for a fair and expeditious trial.⁶ Clear notice of the allegations against an accused is a cornerstone of his right to a fair trial, and a specific indictment also assists the Prosecution in focusing its case and the Trial Chamber in ensuring efficient proceedings.⁷ Inadequate pleadings will also affect the length of proceedings, forcing parties to litigate aspects of the charges that either do not form part of the Prosecution case or which, if clarified, could reduce the amount of evidence relevant to the charges. These general principles of pleading have been repeatedly endorsed by different international tribunals and are also, undoubtedly, at the very heart of the novel requirement for the Prosecution to file the Rule 86(3)(b) Outline.

6. An indictment is pleaded with sufficient particularity only if it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare effectively for trial.⁸ If the Defence is not properly notified of the material facts of the accused’s alleged criminal activity until the Prosecution files its pre-trial brief or until trial itself, it will be difficult for the Defence to conduct meaningful preparation.⁹ The Prosecution is bound and required to provide the “best particulars” that it has based on the information in its possession.¹⁰

⁶ ICTR, *Prosecutor v. Zigiranyirazo*, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, 15 July 2004 (“*Zigiranyirazo* Decision on Form of Indictment”), para. 28; ICTR, *Prosecutor v. Ntagerura et al.*, Judgement and Sentence, 25 February 2004 (“*Ntagerura* Trial Judgement”), paras 28-29; ECtHR, *Pélissier and Sassi v. France*, Application No. 2455/94, Judgment, 25 March 1999, para. 52.

⁷ ICTR, *Prosecutor v. Bizimungu et al.*, Decision on Bizimungu’s Request for Certification to Appeal the Oral Decision Dated 8 June 2005, 30 June 2005, para. 18; *Zigiranyirazo* Decision on Form of Indictment, para. 28.

⁸ ICTR, *Prosecutor v. Nahimana et al.*, Judgement, 28 November 2007 (“*Nahimana* Appeal Judgement”), para. 322; ICTY, *Prosecutor v. Blaškić*, Judgement, 29 July 2004 (“*Blaškić* Appeal Judgement”), para. 209.

⁹ ICTY, *Prosecutor v. Kvočka et al.*, Judgement, 28 February 2005 (“*Kvočka* Appeal Judgement”), para. 28.

¹⁰ See e.g. *Prosecutor v. Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 57. See also *Prosecutor v. Brdjanin and Talic*, Decision on Objections by Momir Talic to the Form of

7. When material facts are pleaded without sufficient specificity, the indictment is defective.¹¹ A defective indictment “goes to the heart of the substantial safeguards that an indictment is intended to furnish to an accused, namely, to inform him of the case he has to meet.”¹²
8. Rule 97(1)(b) authorises preliminary motions to be filed before the Pre-Trial Judge in accordance with Article 39(1) of the Law, which allege defects in the form of the indictment, within 30 days from the disclosure of all material and statements referred to in Rule 102(1)(a). The Pre-Trial Judge established this deadline as 15 March 2021.¹³ This is the procedural vehicle by which the Pre-Trial Judge must ensure that the Defence has adequate notice of charges to prepare and effectively confront the Prosecution case and that, where necessary, further particularisation of charges may be ordered.¹⁴ In all cases, the Prosecution must provide the “best particulars” it can, namely, information that is as detailed and as clear as it is capable of providing the Defence based on the information in its possession.¹⁵

the Amended Indictment, 20 February 2001, para. 19; *Prosecutor v Krnojelac*, Decision on Preliminary Motion on Form of Indictment, 11 February 1999, para. 57; *Prosecutor v Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 12; *Prosecutor v Mrksic*, Decision on Form of Indictment, 19 June 2003, paras. 42 and 48.

¹¹ *Kvočka* Appeal Judgement, para. 31; *Blaškić* Appeal Judgement, para. 220; *Nahimana* Appeal Judgement, para.324.

¹² ICTY, *Prosecutor v. Kupreškić et al.*, Appeal Judgement, 23 October 2001, para. 122. The procedural possibility to obtain further and better particulars has been duly endorsed in the jurisprudence of other international tribunals. See e.g. ICTY, *Prosecutor v. Delalić*, Decision on the Accused Mucić’s Motion for Particulars, 26 June 1996, para. 7; ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion on the Form of the Indictment, 14 November 1995; ICTY, *Prosecutor v. Halilović*, Decision on Defence Motion for Particulars, 16 December 2003; ICTY, *Prosecutor v. Blaškić*, Decision Rejecting the Defence Motion in *Limine* Regarding *mens rea* Required for Charges Alleging Command Responsibility and for Bill of Particulars Re Command Responsibility Portions of the Indictment, 4 April 1997; ICTY, *Prosecutor v. Kordić*, Decision on Defence Application for Bill of Particulars, 2 March 1999; ICTY, *Prosecutor v. Krajišnik*, Decision on Motion from Momcilo Krajišnik to Compel the Prosecution to Provide Particulars, 8 May 2001; ICTR, *Bagosora et al.*, Decision on Kabiligi Request for Particulars of the Amended Indictment, 27 September 2005; Similarly, and by analogy, the Prosecution has sought particulars of alibi defences. See ICTR, *Prosecutor v. Ndirabatware*, Decision on Prosecutor’s Supplementary Motion to Compel the Accused to Disclose Particulars of his Alibi, 16 April 2010; ICTR, *Prosecutor v. Nizeyimana*, Decision on Prosecutor’s Urgent Second Motion for Disclosure of the Particulars of a Defence of Alibi Pursuant to Rule 54 and 67(A)(ii); ICTY, *Prosecutor v. Tolimir*, Decision on Prosecution Motion for Order Requiring Particulars of Accused’s Alibi Defence, 1 December 2010.

¹³ *Prosecutor v. Thaci et al.*, Confidential Redacted Version of Decision on Specialist Prosecutor’s Second Request for Protective Measures and Renewed Request for Protective Measures and Procedural Matters, KSC-BC-2020-06/F00190/CONF/RED, 5 February 2021.

¹⁴ STL, *Prosecutor v. Ayyash et al.*, Motion for Particulars, 30 November 2012.

¹⁵ ICTY, *Prosecutor v Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 57; ICTY, *Prosecutor v. Brdjanin and Talic*, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001, para. 19; ICTY, *Prosecutor v. Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 12; ICTY, *Prosecutor v. Mrksic*, Decision on Form of Indictment, 19 June 2003, paras 42 and 48. See also *R v Liddy*, Supreme Court of Australia [2002] SASC 19 (31 January 2002), para. 262.

III. SUBMISSIONS

A. Redactions to the Indictment and Disclosed Materials

9. At the time of Filing, the Indictment against Mr. Selimi, although lesser redacted than the public version that was provided at the time of his arrest and transfer from Kosovo,¹⁶ still contains substantial redactions¹⁷ including in relation to the alleged personal conduct of Mr. Selimi and other members of the alleged JCE.
10. For example, after alleging that Mr. Selimi, together with Mr. Thaci, Mr. Veseli and Mr. Krasniqi “personally participated in the treatment of Opponents on the ground”¹⁸ the following paragraph is entirely redacted. Similarly, two paragraphs later, there appears to be a redaction in relation to an action in the Dukagjini Operational Zone where Mr. Selimi is specifically named.¹⁹ The same applies to conduct alleged against Mr. Selimi in relation to the transfer, detention and/or release of detainees held at a detention site near Kleçkë/Klečka.²⁰
11. These redactions are evidently severely detrimental to the ability of Mr. Selimi to know the nature and cause of the case against him and impede his ability to prepare effectively. Given that these redactions appear to cover allegations regarding Mr. Selimi’s acts and conduct, and by extension his alleged contribution to the JCE, it is likely that they will be subject to the greatest need for investigation and challenge by the Defence. The prejudice caused by these redactions is therefore exponentially increased.
12. However, the redactions are not simply limited to these allegations for they permeate the entire Indictment. They include allegations relating to Drenoc/Drenovac,²¹ [REDACTED],²² Llapashticë/Lapaštica and Related Sites,²³ Zllash/Zlaš,²⁴ Kleçkë/Klečka and Related

¹⁶ *Prosecutor v. Thaci et al*, Further redacted Indictment, KSC-BC-2020-06/F00045/A03/2, 4 November 2020 (“PRV Indictment”).

¹⁷ *Prosecutor v. Thaci et al*, Lesser Redacted Version of Redacted Indictment, KSC-BC-2020-06/F00045/A02, 4 November 2020, KSC-BC-2020-06/F00134, 11 December 2020 (“Indictment”).

¹⁸ Indictment, para. 41.

¹⁹ *Ibid*, para. 43.

²⁰ *Id*, para. 47.

²¹ *Id*, paras 64, 145-150.

²² *Id*, paras 66, 102.

²³ *Id*, paras 69, 105.

²⁴ *Id*, paras 72, 106, 157.

Locations,²⁵ [REDACTED]²⁶ Cahan,²⁷ Kukës,²⁸ [REDACTED]²⁹ Novobërdë/Novo Brdo,³⁰ Likoc/Likovac,³¹ Jabllanicë/Jablanica,³² [REDACTED]³³ Prizren,³⁴ Malishevë/Mališevo³⁵ and [REDACTED].³⁶ Multiple redactions are also applied to the names of the alleged victims set out in Schedules A, B and C to the Indictment.

13. Each individual redaction impedes the ability of Mr. Selimi to understand the allegations against him. However, taken together, the 147 redactions applied to the purportedly ‘Lesser’ Redacted Indictment combine to cause significant prejudice to the Defence.
14. While it is possible that the Defence may not contest individual instances of crimes as set out in the Indictment, depending on the evidence disclosed and Defence investigations, the decision on whether to be able to take this position will depend on the extent to which the Defence has been able to undertake full and effective investigations of each of these incidents. The first step towards that goal is evidently to be provided with sufficient information as to be able to understand the precise contours of the allegations and the alleged role of Mr. Selimi in them. Moreover, even if the existence of certain sporadic and isolated crimes may not ultimately be contested, the identity of the perpetrator of these alleged crimes may still be a significant issue between the parties, especially in light of the Indictment which charges Mr. Selimi with superior responsibility. Whether or not a particular crime, if it occurred at all, was committed by an individual under the effective control of Mr. Selimi could therefore be a crucial issue at trial and is currently in large part redacted from Mr. Selimi.
15. The basis for these redactions is somewhat opaque, but appears to be Rule 88(2) which was relied upon by the Pre-Trial Judge in ordering the temporary non-disclosure of the Indictment as confirmed,³⁷ as well as Rule 105(1) which was similarly relied upon to justify the interim non-disclosure of the identities of witnesses and victims, until appropriate protective measures

²⁵ Id, paras 75-76, 112-113, 158.

²⁶ Id, paras 77, 114.

²⁷ Id, paras 78, 115.

²⁸ Id, paras 79, 116-117, 164.

²⁹ Id, paras 80, 118.

³⁰ Id, para 92, 133,

³¹ Id, paras 97, 137-139.

³² Id, paras 98, 141.

³³ Id, para. 111.

³⁴ Id, paras 123-125, 165.

³⁵ Id, para. 152.

³⁶ Id, para. 163.

³⁷ Confirmation Decision, para. 517.

have been ordered.³⁸ However, even though three decisions have been issued by the Pre-Trial Judge granting protective measures to prospective Prosecution witnesses none of these redactions appear to have been lifted since the Lesser Redacted Indictment was filed. Nor is there a clear schedule according to which these redactions will be lifted and the full unredacted version of the Indictment provided.

16. These redactions to the Indictment must also be understood in the context of the extensive redactions authorised by the Pre-Trial Judge to the statements, interviews and associated documents of many prospective Prosecution witnesses. These extensive redactions, [REDACTED], exacerbate the restrictions on Mr. Selimi being able to properly understand the allegations against him.
17. In these circumstances, the redactions to the Indictment have a substantial ongoing impact upon Mr. Selimi's ability to know the nature of the allegations against him. This impacts not only upon the specific redacted allegations, but also the nature and scope of the entire alleged JCE when the underlying crimes cannot be artificially separated.
18. These redactions must therefore be fully borne in mind by the Single Judge when assessing this Motion. The Defence also reserves the right to challenge the form of any of the parts of the indictment, which are currently redacted as and when the redactions are lifted, as well as other parts of the indictment which are related to these redacted portions.

B. Methodology for assessing allegations in the Indictment

19. It is uncontroversial that the Indictment must contain all the necessary and relevant allegations underpinning the allegations against an accused as the primary charging document. This challenge, pursuant to Rule 97(1)(b), therefore relates to the content and form of this document and does not assess whether the evidence is sufficient to support the allegations which has already been conducted by the Pre-Trial Judge.
20. However, it would be a mistake to assess the Indictment in a vacuum. It is framed and influenced by the culture, background and history of the reader. It may include terms or

³⁸ Ibid, para. 518.

concepts that may mean different things to different people. As a consequence, the Pre-Trial Judge may need to look beyond the specific terms included within an Indictment to properly assess whether its form corresponds with the applicable legal principles. While such an examination would not seek to replicate the indictment confirmation process, which has already been completed in accordance with Article 86(4), this process was necessarily *ex parte* and was not therefore issued after contradictory proceedings involving the Defence.

21. For example, the Pre-Trial Judge may need to examine in detail the Rule 86(3)(b) Outline and how it corresponds with the terms of the Indictment to ensure that they are consistent. Indeed, this appears to have been the very purpose for introducing the Outline, a requirement that was not in force at either the ad hoc international tribunals, or the STL. Similarly, the disclosed indictment supporting material may also need to be re-examined by the Pre-Trial Judge to verify how the terms of the Indictment are to be understood, and whether such material is consistent with the Indictment, and whether sufficient specificity has been provided. This will also be dependent on the extent to which such materials have been categorised effectively by the disclosing party.
22. However, to be clear, the review of these other documents to understand the meaning of the terms in the Indictment, does not mean that such other documents can provide sufficient notice by themselves to constitute sufficient notice to the accused of the allegations against him. Such notice can only be provided by the Indictment itself and allegations in other documents do not substitute for this. Where there is additional clarity or specificity that can be provided in the Indictment, due to information provided by reviewing the Outline or supporting material, this should be undertaken to adequately protect the rights of Mr. Selimi.
23. In assessing the Indictment, the following principles are suggested.
24. First, although the allegations in an indictment may be examined holistically, and artificially separating one phrase or even one word from the context within which it is placed is neither necessary or appropriate, this does not require an accused to have to search for the precise meaning of any part of the Indictment through a convoluted amalgamation of different terms, which may be spread out over different sections within the Indictment. The Prosecution may not shift its obligation to provide sufficient clarity in the Indictment, on to an accused.

25. Second, although cross-referral within an indictment to other paragraphs therein may be permitted, for example when the same acts of an accused are alleged to constitute different crimes or different modes of liability, such as JCE and Superior Responsibility, this must be clearly set out in the Indictment, and the Accused must be provided with sufficient notice of the precise differences between the different crimes or modes of liability in order to prepare his defence. Therefore, when the same conduct allegedly amounts to both a contribution to a JCE and Aiding and Abetting, the Indictment must specify precisely whether all of the same conduct amounts to both allegations, or only to some of them.
26. Third, an Indictment must be internally consistent. The obligation therefore weighs on the SPO to ensure that where terms are used more than once in the Indictment, they are intended to have exactly the same meaning. If any difference in meaning it intended, this must be explicitly clarified by the SPO.
27. This robust methodology for assessing the Indictment is necessary not only to provide sufficient notice for the Defence, but also serves to ensure that clarity, as regards all material aspects of the Prosecution, is also necessary and essential to the Pre-Trial Judge's ability to fulfil his obligations under Rule 95.

C. Specific challenges to the form of the amended indictment

28. The Defence limits the submissions in this Motion to the allegations underpinning Mr. Selimi's alleged responsibility as a member of a JCE, as an aider and abettor or as a superior. As such, the Defence will not address specifically the underlying crimes set out in paragraphs 56 onwards. However, having reviewed the submissions of the Defence for Mr. Thaci on these issues, the Defence for Mr. Selimi fully endorses and supports those submissions.³⁹

³⁹ *Prosecutor v. Thaci et al.*, Public Redacted Version of Motion Alleging Defects in the Indictment against Mr Hashim Thaci, KSC-BC-2020-06/F00215/RED, 12 March 2021, paras 58-61.

1. Allegations regarding Aiding and Abetting and JCE

29. The Defence has previously filed a challenge to the jurisdiction over JCE liability⁴⁰ and fully maintains the position that this form of liability is not applicable before the KSC, as it was not included within the KSC Law, was not part of customary international law, and even if it was, is not applicable before a domestic Kosovo court.
30. Further to this Challenge to Jurisdiction, the Defence also contests the following elements of the way that JCE is pleaded in the Indictment.

a. Membership of the JCE

31. The JCE is alleged to contain the accused in this case, named individuals “as well as certain other KLA and PGoK political and military leaders, including other General Staff members; PGoK ministers and deputy ministers; KLA zone commanders, deputy zone commanders, and other members of zone command staffs; brigade and unit commanders; commanders and members of the KLA and PGoK police and intelligence services; other KLA soldiers and PGoK officials; and others acting on behalf of the KLA or PGoK (together with Hashim THAÇI, Kadri VESELI, Rexhep SELIMI, and Jakup KRASNIQI, collectively, ‘JCE Members’).”⁴¹
32. The use of the word “included” impermissibly implies that other individuals may also form part of the JCE even when there is no reference to them in the Indictment. It must be struck from the Indictment or replaced with the word “comprised” to clarify that membership does not extend beyond those individuals who are specifically referenced therein, even if not named.
33. Moreover, the larger problem with the pleading of the membership of the alleged JCE in the Indictment is that it could include practically any member of the Kosovo Liberation Army, police or intelligence services or any official, at any level, in the PGoK. This may be the intention behind the SPO position, namely, to re-write history and propagate a narrative that the KLA was somehow inherently criminal rather than fighting a war of liberation against

⁴⁰ *Prosecutor v. Thaci et al.*, Selimi Defence Challenge to Jurisdiction – Joint Criminal Enterprise, KSC-BC-2020-06/F00198, 10 February 2021.

⁴¹ Indictment, para. 35.

systemic oppression. However, in pleading the JCE in this manner, Mr. Selimi is effectively charged with a form of liability based on mutual attribution of criminal conduct with any number of unknown and unidentifiable members. Given this responsibility for the alleged acts of others, this non-identification of other JCE members is inherently prejudicial to Mr. Selimi and must be rectified.

34. This prejudice is amplified by the SPO's approach of alleging that the above named and unnamed individuals were JCE Members, while simultaneously pleading in the alternative that "some or all of these individuals were not members of the joint criminal enterprise but were used by members of the joint criminal enterprise to carry out crimes committed in furtherance of the common purpose (together with the JCE Members, collectively 'JCE Members and Tools')." With this form of pleading, the SPO is alleging multiple mutually exclusive interpretations of its case against Mr. Selimi and his co-accused. On one hand, it alleges that anyone of the named or named members could either have fully formed the agreement underpinning the JCE together with Mr. Selimi, and therefore fully shared the intent and agreed with the alleged objective of the JCE, or, on the other hand, could alternatively have been wholly unaware of the objective of the JCE and did not have the intention to carry it out.
35. This pleading constitutes the epitome of seeking to have your Prosecutorial cake and eating it. Without this fundamental defect being corrected, it would allow the Prosecution to prosecute its case, see which way the evidence falls, and then at the end of proceedings mould its case to fit the evidence presented without ever having informed the Defence of what specific role each JCE Member or Tool was supposed to have had. It would also require the Defence to challenge the Prosecution evidence in multiple, potentially contradictory manners, to address whether any individual was either a JCE Member or JCE Tool. This would unnecessarily extend the duration of proceedings to the detriment of the Accused.
36. The Defence notes that the Pre-Trial Judge briefly addressed the identification of alleged members of the JCE when confirming the Indictment,⁴² where no reference is made to the supposed JCE Tools alleged in the Indictment. Indeed, it appears clear that the Pre-Trial Judge limited his analysis to finding that a plurality of persons, including the accused, were "involved in the crimes committed at the locations" without addressing or resolving this issue.

⁴² Confirmation Decision, para. 452.

37. The Prosecution must therefore be required to specify who was in the JCE and therefore a full member sharing the other elements thereof, and, by contrast, who was used by the JCE as a tool to carry out its objectives. It simply cannot plead both. If it is unwilling or unable to do this, then it must withdraw JCE liability from the Indictment.

b. Objective of the JCE

38. The Prosecution alleges that the objective of the JCE charged against Mr. Selimi and his co-accused was “to gain and exercise control over all of Kosovo by means including unlawfully intimidating, mistreating, committing violence against, and removing those deemed to be opponents.”⁴³
39. Anyone reading the first part of this objective would be hard pressed to understand how this could form the basis of a criminal offence. The objective of gaining and exercising control over Kosovo, to evict an occupying army which was responsible for systematic oppression of the Kosovo Albanian population is laudable rather than criminal.
40. This is why those cases at the ad hoc⁴⁴ Tribunals that allowed for JCE liability required the objective of the JCE to be inherently criminal, namely, to “amount to or involve the commission of a crime provided for in the Statute.”⁴⁵ As the objectives of alleged JCEs charged before the ad hoc Tribunals were crimes in and of themselves, such as murder, deportation, genocide or other crimes against humanity or war crimes, there was no improper widening of the scope of liability. This approach also reflected the JCE cases relied upon by the *Tadic* Appeals Chamber in creating JCE. Even those domestic cases that were impermissibly relied upon for the creation of this form of liability all had an identifiable crime as the objective of their alleged joint criminal conduct.
41. That is why the move towards basing JCE liability on an objective or common purpose which is not a crime under the relevant court’s jurisdiction, but which merely “contemplates crimes

⁴³ Indictment, para. 32.

⁴⁴ ICTY, *Prosecutor v. Brdjanin*, Sixth Amended Indictment, 9 December 2003, para. 27.1 “The purpose of the joint criminal enterprise was the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state by the commission of the crimes.”

⁴⁵ *Ibid.*

within the Statute as a means of achieving its objective”⁴⁶ is so inherently problematic based on fundamental criminal law principles and must be firmly rejected by the Pre-Trial Judge.

42. As charged, the legitimate objective of the JCE, was allegedly sought and achieved “by means including unlawfully intimidating, mistreating, committing violence against, and removing those deemed to be opponents.”⁴⁷
43. By using the word “including” there is a definite if implied recognition that some, if not most, of the means which were or would be relied upon to achieve a free Kosovo by the alleged JCE Members, were legitimate. This includes, evidently, for example, the actual taking up of arms against the Serbian forces on the territory of Kosovo which was entirely legitimate in the circumstances.
44. Moreover, as the JCE objective in the Indictment is phrased, there is no specific requirement that these means were considered to be necessary to achieve the alleged JCE objective in the sense that it could not be achieved without the resort to such crimes. As such, the objective at the heart of the charged JCE is predicated on nothing more than the vague possibility of criminal means being used to achieve it.
45. In order to rectify this crucial defect, the SPO must be required to amend the objective of the JCE to allege that the objective of the JCE required that the alleged JCE Members knew and agreed that the objective was going to be achieved by unlawful means. While the Defence should not be required to specify the language in the Indictment, to assist the Pre-Trial Judge, this would specifically mean amending the JCE objective to:

“gain and exercise control over all of Kosovo by means, which the JCE Members agreed, necessarily included unlawfully intimidating, mistreating, committing violence against, and removing those deemed to be opponents.”
46. It is only by requiring this additional clarity in the Indictment that the Pre-Trial Judge will be able to prevent JCE liability from moving further away from fundamental criminal law principles.

⁴⁶ See, e.g. SCSL, *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Appeal Chamber, Judgment, 22 February 2008, para. 80; *Kvočka et al.* Appeal Judgment, para. 46.

⁴⁷ Indictment, para 32.

c. Mr. Selimi's alleged contribution to the JCE

47. Mr. Selimi's alleged contribution to the JCE is pleaded in a wholly inadequate and defective manner. In one part, it is based on alleged personal involvement in specific crimes, without actually appearing to require that he contribute to the crime itself. In the other part, it instead seeks to criminalise Mr. Selimi's legitimate actions. In neither of these two scenarios is the precise nature of his contribution to the JCE, or indeed his contribution as an aider and abettor, sufficiently set out. Moreover, it is based on an erroneous interpretation of the applicable law regarding the nature and extent of the contribution to a JCE.

48. Mr. Selimi is alleged to have "significantly contributed to achieving the common purpose."⁴⁸ In the Confirmation Decision, when analysing the elements of JCE, the Pre-Trial Judge held that:

The perpetrator must have participated in the furthering of the common purpose at the core of the JCE by assisting in or contributing to the execution of the common plan or purpose, but need not have performed any part of the actus reus of the crime charged. The perpetrator's contribution to the JCE need not be, as a matter of law, necessary or substantial, but it should at least be significant contribution to the crimes for which he or she is found responsible. The contribution does not need to be criminal per se.⁴⁹

49. The Defence notes that the decisions upon which these findings are based all derive from ICTY cases where the pleaded JCE amounted to the commission of a crime. In none of these cases was the accused convicted for JCE liability when the common purpose was legitimate but contemplated the commission of a crime.⁵⁰ As such, any findings as to the level of contribution to JCE may not be automatically transposed to a JCE with a legitimate objective where a noticeable higher standard is appropriate.

50. In a JCE with a criminal objective at its core, as the crime is the objective, any contribution to the execution of this objective must by definition contribute to the fulfilment of that objective, even if the contribution is not to the actus reus of the crime. For example, a contribution to a JCE which had as its objective, the "permanent forcible removal of Bosnian Muslim and

⁴⁸ Indictment, para. 50.

⁴⁹ Confirmation Decision, para. 110 (footnotes omitted).

⁵⁰ ICTY, *Prosecutor v. Krajišnik*, Appeal Judgment, 17 March 2009, paras 215, 218, 662, 675 695-696; ICTY *Prosecutor v. Tadić*, Appeal Judgment, 15 July 1999 para. 227; ICTY, *Prosecutor v. Mladić*, Trial Judgment, 22 November 2017, para. 3561; ICTY, *Prosecutor v. Brđjanin*, Appeal Judgment, 3 April 2007, para. 430; Kvočka et al. Appeal Judgment, para. 97-98.

Bosnian Croat inhabitants from the territory”, namely, deportation, would be sufficient to ground liability.

51. By contrast, in a JCE with a non-criminal objective, such as in the present case, the participant who contributes to the execution of the common plan or purpose may be significantly more detached from the alleged criminality which is contemplated by the common purpose. Therefore, in order to properly ground liability for a contribution by a JCE member to a non-criminal objective, it is submitted that the contribution itself must be criminal or directly contribute to the actus reus of the offence to be sufficient to ground liability. Otherwise, if such a requirement did not exist, JCE would fail to properly distinguish between, on the one hand, those individuals who have contributed to a non-criminal objective using non-criminal means who should not face criminal charges, and, on the other hand those who have contributed to a lawful objective by using unlawful act which could result in criminal liability.
52. In the circumstances of this case therefore, only those allegations involving either a substantial contribution to the common purpose or an inherently criminal contribution could be considered to sufficiently contribute to the JCE given its legitimate purpose. As such, on those specific allegations included in paragraphs 42-45 and 47 of the indictment, could potentially satisfy the test for contributing to a JCE. By contrast, the remaining general and not inherently criminal contributions, set out in paragraph 50 and further addressed below, are insufficient to ground liability and should be removed from the Indictment.
53. In the alternative, if the Pre-Trial Judge considers that the general, and non-criminal allegations against Mr. Selimi in paragraph 50 of the Indictment, must constitute the requisite contribution to the JCE, they are currently framed in such a vague and deliberately unhelpful manner as to render Mr. Selimi’s preparation against these allegations all but impossible.
54. First, the allegation of participating in “plans, policies and practices in furtherance of the common purpose”⁵¹ is so vague as to be almost meaningless. No information is provided as to what plans, policies and practices are intended to be covered by this allegation and how they relate to the common purpose. The form that they take, which is included in this allegation, fails to compensate for this lack of specificity as to the content and purpose of these documents, and how they allegedly sought to further the common purpose.

⁵¹ Indictment, para. 50(a).

55. Second, the allegation of “participating in, facilitating, condoning, encouraging, and/or otherwise aiding in the crimes in furtherance of the common purpose”⁵² appears to be nothing more than the repetition of the other specification allegations set out in paragraphs 42-45 and 47. Absent of any further specification, the Defence will prepare on the basis of this understanding. No further allegations of a contribution to the JCE can be derived from this allegation.
56. Third, the allegation of failing to take adequate steps to prevent and investigate crimes, and/or punish or discipline the perpetrators,⁵³ appears to be nothing more than merely a repetition of one element of superior responsibility, alleged elsewhere in the Indictment.⁵⁴ However, no reference is made to these other allegations. As such, it is wholly unclear as to whether these are the same allegations of failing to prevent or punish or completely different allegations. Moreover, contrary to the allegations relating to superior responsibility, the allegation of failing to prevent and punish is divorced from any requirement that Mr. Selimi maintained effective control over the individuals that he is alleged to have failed to prevent from committing crimes or failed to punish them. Nor is it even alleged that he knew about the crimes that were about to be committed or indeed had allegedly been committed. Essentially, according to the Indictment in its current form, Mr. Selimi is being prosecuted for failing to prevent or punish crimes which had been or were about to be committed by individuals who were not necessarily his subordinates and regarding which he had no knowledge. It is almost impossible to envisage an allegation being based on less proximity to the actual criminal offence charged.
57. Fourth, the allegation that Mr. Selimi was responsible for “disseminating and/or facilitating the dissemination of information intended to promote the common purpose and engender fear, distrust, and hatred of Opponents, including through communiques, public statements, and other media”⁵⁵ appears to be indistinguishable from the allegations set out in paragraph 50(a). Indeed, the Defence is genuinely unable to differentiate between participating in the dissemination of plans, policies, and practices in furtherance of the common purpose⁵⁶ and “disseminating and/or facilitating the dissemination of information intended to promote the

⁵² Indictment, para. 50(b).

⁵³ Indictment, para. 50(c).

⁵⁴ Indictment, para. 55.

⁵⁵ Indictment, para. 50(d).

⁵⁶ Indictment, para. 50(a).

common purpose.”⁵⁷ This is also achieved through the same media, namely, communiques, and public statements. While the Defence is far from clear as to the meaning of either, the distinction between the two is even more opaque.

58. Fifth, the allegation that Mr. Selimi was responsible for “appointing, promoting, and/or approving the appointment and promotion of JCE Members and Tools, including persons with a history of alleged involvement in serious crimes”⁵⁸ fails to specify who these JCE Members and Tools were, and also whether they were indeed Members or Tools. While not every specific appointment, promotion or approval may need to be specifically delineated in the Indictment, for this to amount to a concrete and substantial contribution to the JCE, significantly more information is required as to the specific allegation of Mr. Selimi’s role in the identification of these individuals allegedly promoted by Mr. Selimi, and the process by which this occurred.
59. Sixth, the allegation that Mr. Selimi was responsible for “providing, arranging, and/or facilitating political, logistical, military, and/or financial support, including to JCE Members and Tools committing crimes in furtherance of the common purpose”⁵⁹ essentially alleges nothing more than that Mr. Selimi was responsible for equipping soldiers in line with his duties and responsibilities within the KLA. There is no suggestion that Mr. Selimi favoured those who committed serious crimes and did so in order to further the common purpose, although this would be necessary to demonstrate that his actions were in any way culpable. In fact, this allegation, as currently framed, could apply to any individual within the KLA structure who was somehow responsible for equipping soldiers within that army. It essentially seeks to impose a form of strict liability on Mr. Selimi.
60. The Seventh and final allegation against Mr. Selimi is perhaps the most confusing and defective of all. Mr. Selimi is alleged to be responsible for “coordinating and liaising between JCE Members and Tools in furtherance of the common purpose.”⁶⁰ While the language of “coordinating and liaising” is inherently meaningless without more specificity as to what this actually entailed, the Prosecution is wholly unable to even identify who were the JCE Members in the Indictment and who were the Tools. Apart from Mr. Selimi and his fellow accused, all

⁵⁷ Indictment, para. 50(d).

⁵⁸ Indictment, para. 50(e).

⁵⁹ Indictment, para. 50(f).

⁶⁰ Indictment, para. 50(g).

the other named or unnamed individuals in the Indictment could be either a Member or Tool. Therefore, it is impossible for Mr. Selimi to actually understand which is which and who he is supposed to have liaised between (whatever that actually means).

d. Alleged foreseeable crimes

61. The Indictment alleges that “to the extent that some of these crimes did not fall within the joint criminal enterprise, it was foreseeable that they might be perpetrated by one or more members of the joint criminal enterprise, or by persons used by any member of the joint criminal enterprise to carry out the crimes within the common purpose.”⁶¹ This pleading, purported to be based on the third form of JCE is framed in the alternative to the primary allegation that all the alleged crimes set out in the Indictment, were encompassed within the common purpose, namely, the first form of JCE.⁶²
62. The Defence notes at the outset that the alleged additional and foreseeable crimes based on JCE III liability the additional crimes must generally be in line with the agreed upon criminal offence.⁶³ It is also fundamental that the “additional crime” is the outgrowth of previously agreed or planned criminal conduct for which each participant in the common plan is already responsible” which is “rendered possible by the prior joint plan to commit the agreed crime(s) other than the one 'incidentally' or 'additionally' perpetrated.”⁶⁴ Under this logic, there can be no extended form of JCE without a basic or systemic JCE on which to base it.
63. This causes the first problem with the pleading of JCE in the Indictment. Displaying a complete lack of clarity of its own case, the Prosecution effectively pleads simultaneously that all of the crimes listed therein could either be within the common purpose of the JCE, or a natural and foreseeable consequence of it. There is simply no concrete and definitive identification by the SPO of the core JCE and which crimes were definitely part of it. For example, it is wholly unclear whether the JCE charged, encompassed murder and deportation within the common purpose, and alleged persecution and inhumane acts as the foreseeable crime, or the other way around. In fact, there are hundreds of different possible combinations of crimes in this regard

⁶¹ Indictment, para. 34.

⁶² Ibid, para. 32.

⁶³ STL-11-01/I, Interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging, 16 February 2011, para. 241.

⁶⁴ STL-11-01/I, Interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging, 16 February 2011, para. 243.

(or indeed thousands if the alleged locations where the crimes were committed are taken into account). Coupled with the improper pleading relating to the relationship between alleged JCE Member and JCE Tools above, the SPO appears to be thereby depriving Mr. Selimi of any real opportunity to defend himself against it.

64. The Prosecution must be ordered to identify and plead which crimes it alleges were definitely part of the core JCE. Once it has unambiguously done this, it may plead with clarity which other crimes were either part of the JCE or a natural and foreseeable consequence of these core crimes. If it is unable to make such a determination, and inform Mr. Selimi accordingly, then this aspect of the Indictment is inherently defective and the entire JCE allegation must be removed.

2. Allegations concerning Superior Responsibility

a. Effective control over subordinates.

65. The Indictment alleged that Mr. Selimi and other accused were members of the General Staff, among the highest-ranking officials in the KLA and/or PGoK. In these capacities and pursuant to their de facto authority as senior leadership figures in the KLA and PgoK, it is alleged that “each had effective control over the JCE Members and Tools who committed the crimes charged in this indictment.”⁶⁵
66. However, no more specificity is provided in the Indictment as to the identity of the subordinates over which Mr. Selimi allegedly maintained effective control. Instead, the operative paragraph simply appears to refer back to the general paragraph relating to the alleged JCE Members and Tools which is addressed above which potentially includes any and every member of the KLA.⁶⁶ This resolutely fails to provide the necessary notice to Mr. Selimi of the specific individuals, or at least whichever military units they belonged to.
67. Moreover, while the Indictment specifies that “the term ‘committed’, as used in the context of superior responsibility, includes all modes of liability covered by Article 16(1) of the Law”⁶⁷

⁶⁵ Indictment, para. 53.

⁶⁶ Selimi Defence Challenge to the Form of the Indictment, paras 31-37.

⁶⁷ Indictment, para. 53.

the Prosecution has failed to specify which forms of liability are actually applicable to these underlying crimes. For example, it is unclear whether Mr. Selimi is charged for crimes alleged physically committed by subordinates, either directly or through a JCE, aided and abetted them or even instigated them. Coupled with the failure to identify the specific subordinates who allegedly were responsible for these crimes, Mr. Selimi is simply not provided with sufficient information to prepare effectively.

b. Knowledge of crimes

68. The Indictment alleges that Mr. Selimi knew that crimes were about to be committed or had been committed based on four different specific bases, which are all impermissibly vague. However, this list is not exhaustive because of the use of the word “including” in relation to these four categories. This would allow the Prosecution to impermissibly expand the factors allegedly providing notice to Mr. Selimi without providing him the necessary notice. It should thus be removed.
69. As for the other four alleged allegations of knowledge, none provides the requisite level of specificity. For example, the allegation that Mr. Selimi was involved in “the preparation, design, and/or execution of such crimes”⁶⁸ essentially provides no indication to which alleged crimes this allegation refers. The same applies to the alleged “receipt of information about the commission of such crimes,”⁶⁹ which is so vague as to be meaningless. Which information does this refer to? How was it provided? Who was it provided to? These are not questions of evidence which can be provided by the SPO in the Pre-Trial Brief, but actually must be set out now, in the Indictment. It provides further support for the suspicion that the SPO simply does not know its case on this issue and instead is simply trying to provide generic notice to Mr. Selimi that it can then later on claim encompasses any evidence it hopes to find.
70. As regards the other two allegations of Mr. Selimi’s knowledge, namely, the presence of Mr. Selimi at locations where crimes were committed or “personal observation of evidence of the commission of such crimes”⁷⁰, it is wholly unclear whether this is intended to refer exclusively to the allegations in the Indictment where Mr. Selimi’s physical presence is alleged. If so, this

⁶⁸ Ibid, para. 54(a).

⁶⁹ Id, para. 54(c).

⁷⁰ Id, paras 54(b) & (d).

must be clarified. If not, notice must be provided to Mr. Selimi of these alleged other crimes or evidence of such crimes.

c. Necessary and reasonable measure

71. The specific allegations allegedly supporting the general assertion that Mr. Selimi failed to take the necessary and reasonable measures to prevent the commission of the crimes charged in the Indictment by JCE Members and Tools, are vague and circular. They simply provide no real information and evidence to Mr. Selimi.
72. First, the alleged “failure to order or initiate genuine or adequate investigations into, or take other genuine and adequate measures to address, allegations of the commission of crimes”⁷¹ does not provide sufficient notice of which crimes this refers to, the capacity or authority to issue such investigations and their alleged lack of genuineness of effectiveness.
73. Second, the alleged failure by the accused to “report information about the commission or possible commission of crimes by JCE Members and Tools to appropriate authorities”⁷² again fails to identify which specific crimes this refers to and to which authorities such information could or should have been reported.
74. Third, the alleged failure to “discipline, dismiss, or demote JCE Members and Tools,”⁷³ fails to provide the requisite notice as the specific legal or factual authority is accorded to the accused which would allow such actions against subordinates. It cannot simply be assumed that Mr. Selimi has such authority and this must be specified clearly in this Indictment.
75. Fourth, the alleged “failure to issue the orders that were necessary and reasonable in the circumstances to prohibit or put a stop to the commission of crimes by JCE Members and Tools”⁷⁴ is entirely circular and institutes a form of strict liability. Essentially it alleges that by failing to stop the crimes, Mr. Selimi is responsible for failing to take adequate measures to prevent or punish them. By failing to specify the actual necessary and reasonable measures which were allegedly available to Mr. Selimi, and how these could or would have prohibited or prevented such crimes, this allegation is defective.

⁷¹ Id, para. 55(a).

⁷² Id, para. 55(b).

⁷³ Id, para. 55(c).

⁷⁴ Id, para. 55(d).

76. Fifth, the allegation that Mr. Selimi and his co-accused failed “to take other adequate measures, including ensuring adequate training and establishing necessary regulations and procedures, to ensure that JCE Members and Tools would not commit crimes”⁷⁵ is impermissibly vague. Through use of the word “including” the allegation is at heart that Mr. Selimi failed to take other adequate measures, which adds nothing to the general formulation of failing to take necessary and reasonable measures. Moreover, the generic allegation of “ensuring adequate training” is impermissibly vague. It also fails to particularise the specific training that he was authorised to provide and to whom it was directed.
77. Overall, despite being drafted in a manner to suggest that the underlying allegations in paragraphs 55(a)-(e) provide more notice to the accused than the general formulation of having failed to undertake the necessary and reasonable measures in Article 16(1)(c) of the Law, even a cursory analysis of these sub allegations establishes that this is not the case. They add very little detail and must be extensively expanded and clarified to provide the necessary notice to Mr. Selimi.

I. CONCLUSION & RELIEF SOUGHT

78. The Indictment is systematically defective. It’s very object and purpose appear to provide as little clarity to the Defence as to the nature of its case as possible. The extreme vagueness of each of the allegations relating to Mr. Selimi’s alleged responsibility member of a JCE, as a superior and as an aider and abettor addressed above, must be understood in the context of the refusal of the Prosecution to properly categorise its disclosed evidence, as well as its attempts to delay the provision of the Prosecution pre-trial brief to the last possible moment.
79. The Defence therefore requests the Pre-Trial Judge to:
- a. **GRANT** this Challenge to the Form of the Indictment;
 - b. **ORDER** the SPO to amend the Indictment based on the Challenges contained herein to provide greater specificity regarding the allegations against Mr. Selimi.

⁷⁵ Indictment, para. 55(e).

Word count: 8320

Respectfully submitted on 11 May 2021,

A handwritten signature in blue ink that reads "David A. Young". The signature is written in a cursive style with a large initial "D".

DAVID YOUNG
Lead Counsel for Rexhep Selimi

A handwritten signature in blue ink that reads "G. Roberts". The signature is written in a cursive style with a large initial "G".

GEOFFREY ROBERTS
Co-counsel for Rexhep Selimi