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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Selimi Defence Reply to SPO Response to Defence Challenge to Jurisdiction – Joint Criminal Enterprise

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I. INTRODUCTION

1. Pursuant to Article 16(1)(a) of the Law,[1] Rule 76 of the Rules[2] and the Scheduling Order issued by the Pre-Trial Judge,[3] the Defence for Mr. Rexhep Selimi hereby replies to the new issues raised in the Specialist Prosecutor's Response[4] to the Defence Challenge to the jurisdiction of the Kosovo Specialist Chambers over Joint Criminal Enterprise ("JCE") as charged in the Indictment.[5]

2. This Reply addresses the following issues which all arise directly from the Response:

   a. Whether the Defence can challenge one or more forms of JCE or is obliged to challenge the entire form of liability;
   b. Whether JCE is a form of commission under Article 16(1)(a) of the Law;
   c. Whether and on what specific basis customary international law ("CIL") may be directly applied in Kosovo courts;
   d. Whether Kosovo domestic criminal law at the time of the offences includes liability akin to JCE; and,
   e. Whether the SPO identifies sufficient state practice and *opinio juris* to support the existence of JCE in CIL.

3. While the Defence stands fully behind its original submissions in the Challenge, and does not accept that the Response sufficiently undermines or contradicts them, given the limited scope of replies, only the above issues will be addressed herein.

II. SUBMISSIONS

a. Scope of jurisdictional challenge to JCE

[1] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').
[2] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').
[3] Pre-Trial Judge, Oral order on timeline for provision of responses and replies to preliminary motions filed by Defence, 24 March 2021.
[4] Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise (JCE), KSC-BC-2020-06/F00263, 23 April 2021 ("Response").
[5] Selimi Defence Challenge to Jurisdiction – Joint Criminal Enterprise, KSC-BC-2020-06/F00198, 10 February 2021 ("Challenge").

4. The Defence challenges the jurisdiction of the KSC over all of the supposed three forms of JCE created by the *Tadic* Appeals Chamber for various reasons. However, even if the Pre-Trial Judge is satisfied that JCE I and JCE II are applicable, this does not prevent the Defence from raising an objection to JCE III and for the Pre-Trial Judge to exclude jurisdiction for this form of JCE only.

5. The SPO argues that "a jurisdictional challenge is valid when it focuses on whether a form of responsibility *in toto* comes within its jurisdiction."[6] Yet, the cases it cites in support of this supposed principle do not support it. *Ojdanic* holds that a challenge to JCE when "the commission of a crime is said to have been effected through the hands of others whose *mens rea* is not explored and determined, and who are not shown to be participants in the JCE" is not jurisdictional.[7] *Milutinovic* holds that "what must therefore be established in the present case is whether, at the time the acts were allegedly committed […] joint criminal enterprise as a form of liability existed under customary international law"[8] not to limit which forms of JCE can be applied but to determine whether the Report of the Secretary-General limits the applicable law before that Tribunal.[9] *Hadzihasanovic* simply repeats the general limitations on jurisdictional motions.[10]

6. Similarly, the other two ECCC decisions relied upon by the SPO simply confirm that challenging a form of liability is a jurisdictional challenge[11] and proceed to uphold the first two forms of JCE while confirming a lack of jurisdiction over the third form.[12] As such, it specifically upholds a challenge to only one form of JCE, directly contradicting the SPO's position on this point.

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[6] Response, para. 7.
[7] ICTY, Trial Chamber, *Prosecutor v. Milutinovic et al.,* IT-05-87-PT 'Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration', 22 March 2006 ('Ojdanić Co-Perpetration Decision'), paras 23-24.
[8] ICTY, Appeals Chamber, *Prosecutor v. Milutinović et al.,* IT-99-37-AR72 'Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise', 21 May 2003, para. 11.
[9] Ibid, para. 10.
[10] ICTY, Trial Chamber, *Prosecutor v. Hadžihasanović et al.,* IT-01-47-PT, Decision on Joint Challenge to Jurisdiction', 12 November 2002 ('Hadžihasanović et al. TC Decision'), para.7;
[11] 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'), paras 23-24 in relation to JCE and 'Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order', 15 February 2011, para. 68 in relation to Superior Responsibility.
[12] PTC Decision on JCE, para. 88.

7. By the same token, the position in the Response, that "jurisdictional challenges related to the mental element of modes of liability have been rejected by other tribunals"[13] again addresses issues regarding the proper level of *mens rea* and does not identify any cases which support the principle that one form of JCE in its totality cannot be applicable.

8. This is entirely logical. The purpose of jurisdictional challenges is to raise, address and dispense with challenges that are based not on the weight or analysis of evidence, but on legal principle. They prevent the court from bringing to trial an individual over which they have no legal authority and allow for either the partial or complete removal of certain crimes or modes of liability, thereby reducing time and cost of proceedings and contributing to the good administration of justice.

9. Contrary to the SPO's unsurprising but entirely misplaced submissions that "there are no efficiency reasons which could militate against this approach" and "litigation on such matters now may in fact hinder rather than help the progress of proceedings"[14] removing JCE III could have a significant impact on proceedings, thereby improving clarity, reducing the size of the case and its resulting potential duration. While the SPO has set out its desire to retain an Indictment which allows for all crimes to be either inside the common plan or a natural and foreseeable consequence of it for its own strategic reasons, removing JCE III liability now would force the SPO to specifically identify which crimes were within the common plan and only prosecute those.

b. Application of CIL of JCE before the KSC

10. The SPO noted in the Response that its submissions on CIL before the KSC are included elsewhere.[15] As recognised therein, challenges to the applicability of JCE based on CIL were also raised in the Challenge[16] and will therefore be addressed here.[17]

[13] Response, para. 8, Fn. 22.
[14] Response, para. 8, Fn. 23.
[15] Response, Fn. 2 referring to Prosecution response to preliminary motion concerning applicability of customary international law, KSC-BC-2020-06/F00262, 23 April 2021 ("CIL Response").
[16] CIL Response, para. 17, Fn. 32.
[17] The Defence will not file a separate reply in relation to the CIL Response.

11. In 1999, Kosovo was placed under an international supervisory regime, namely UNMIK[18] which enacted a number of regulations which have served to establish the law applicable to crimes committed during the Kosovo War, as well as the characteristics and operation of the criminal judicial system. UNMIK Regulation UNMIK Regulation 1999/24 on the Law Applicable in Kosovo (as amended by 2000/59) ("UNMIK Regulation") should therefore have been the starting point of the SPO's analysis in identifying the relevant legal framework applicable to the acts of the defendants and whether CIL may be applied directly in Kosovo courts.

12. Notably, Article 1.1(b) of the UNMIK Regulation provides that the law in force in Kosovo on 22 March 1989 is the law applicable. This provision seeks to establish the overarching legal framework within which specific laws operate. On 22 March 1989 the applicable Constitution was the 1974 SFRY Constitution. Although the applicability of a Constitution adopted after 22 March 1989 is not precluded, it is conditional upon such a Constitution being non-discriminatory in nature as per Article 1.2 of the Regulation.

13. Further Article 1.4 provides:

> "1.4 […]. In criminal proceedings, the defendant shall have the benefit of the most favourable provision in the criminal laws which were in force in Kosovo between 22 March 1989 and the date of the present regulation."

14. This provision adds a layer of protection for the accused, beyond non-discrimination, as it allows for a comparison between the criminal law in force on22 March 1989 and the criminal laws enacted afterwards to enable the application of the laws more favourable to the accused.

15. Under Article 210 of the SFRY Constitution of 21 February 1974:

> "International treaties which have been promulgated shall be directly applied by the courts."[19]

16. More specifically, Article 181 of the 1974 Constitution states:

[18] Security Council Resolution 1244, UN Doc S/RES/1244.
[19] Constitution of the Social Federal Republic of Yugoslavia ('1974 Constitution'), 21 February 1974, Article 210.

> "No 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 was threatened. Criminal offences and criminal-law sanctions may only be established by Statute…"

17. By contrast, under Article 16 of the 1992 Constitution:

> "Article 16
>
> […]
>
> International treaties which have been ratified and promulgated in conformity with the present Constitution and generally accepted rules of international law shall be a constituent part of the internal legal order."[20]

18. Therefore, while the 1992 Constitution could theoretically allow for the direct application of CIL in Kosovo Courts (and so would the 2008 Constitution, as amended) the 1974 Constitution could not. In accordance with Article 1.4 of the UNMIK Regulation, Kosovo courts would apply the most favourable version of the constitution and would exclude JCE under CIL from being directly applied against Mr. Selimi.

19. When interpreting these Articles and the UNMIK Regulation, the Supreme Court in 2005 *Gashi and others,* held that the District Court of Prishtina had erred in finding the 1992 Constitution applicable and that in fact the applicable Constitution was the 1974 one. The Panel thereby found that Articles 210 and 181 of the 1974 SFRY Constitution made CIL inapplicable to the events of that case which were alleged to have occurred in 1998 and 1999.[21]

c. JCE does not fall within Article 16(1)(a) of the Law

20. The SPO argues that "liability pursuant to the mode of JCE is a form of commission found in Article 16(1)(a)"[22] and that the ICTY, ICTR, SCSL, IRMCT and ECCC "had consistently and repeatedly found that 'commission' within the meaning of their statutes encompasses individual criminal responsibility for persons who contribute to

[20] Constitution of the Former Republic of Yugoslavia ('1992 Constitution'), 27 April 1992, Article 16.
[21] Kosovo, Supreme Court Case AP-KZ No. 139/2004 Latif Gashi and others, Decision of the Supreme Court, panel of UNMIK judges, p. 6.
[22] Response, para. 13.

the commission of crimes carried out jointly, that is, by a group of persons acting pursuant to a common criminal purpose or JCE."[23]

21. As with so much international jurisprudence regarding JCE, the other cases cited by the SPO do nothing more than simply repeat and regurgitate the findings from Tadic on this issue.[24] There is little, if any, additional authority identified by each to support the expansive interpretation of the word "commission" or "committing" in the equivalent provisions of the Statute.

22. The argument expounded by the Appeals Chamber in *Tadic* to find that Article 7(1) of the ICTY Statute encompasses JCE is also flimsy. It relies on the supposed object and purpose of the Statute, to hold that "the Statute intends to extend the jurisdiction of the International Tribunal to all those "responsible for serious violations of international humanitarian law" committed in the former Yugoslavia" and on this basis, Article 7(1) does not "exclude those modes of participating in the *commission* of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons."[25] Yet, the ICTY Statute, as well as the Law, already provides for many other forms of liability to allow for prosecution of individuals other that those who physically perpetrated a particular crime, whether it is aiding and abetting, instigation or even ordering.[26] There is no explanation by the *Tadic* Appeals Chamber as to why these other forms of liability do not sufficiently reflect the object and purpose of the Statute and why an unnecessarily expansive interpretation of the word 'commission' is hence justified.

23. In this regard, the Defence has already addressed the issue of whether the adoption of the Law after these decisions affects its interpretation, but there is no need for the Pre-

[23] Response, para. 14, Fn. 40.
[24] See for example: *Ojdanić* JCE Decision, para.20 which simply refers to Tadic and states that "The Appeals Chamber therefore regards joint criminal enterprise as a form of "commission" pursuant to Article 7(1) of the Statute"; ICTR, Appeals Chamber, Prosecutor v. Ntakirutimana and Ntakirutimana, ICTR-96-10-A and ICTR-96-17-A Judgement, para. 462; 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', para. 308 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, "Notably, the jurisprudence of the ICTY has held that the word "committed" in Article 7(1) of its Statute implicitly includes participation in a joint criminal enterprise."
[25] Tadic Appeals Judgement, para. 190.
[26] Law, Article 16(1)(a).

Trial Judge to enter this debate, despite the Prosecution's failure to address and/or satisfy its burden in this regard.[27]

24. All the courts relied upon by the SPO which interpreted "commission" are either international or internationalized. They are detached from the state in which the crimes over which they exercise jurisdiction were allegedly committed. As such, the interpretation they give to the term "commission" is a natural consequence of how 'commission' is interpreted internationally rather than within the specific context in which they operate. Indeed, each of the decisions cited by the SPO rely on cases or instruments beyond the state of supposed execution of the crimes.

25. In light of the KSC's status as a fully domestic court within the Kosovo Court system, the Pre-Trial Judge must look no further than Kosovo domestic law in order to interpret this term. As explained in detail below, while Kosovo does potentially recognize commission liability involving two or more individuals, this form of liability is co-perpetration, rather than JCE.

26. Contrary to the position of the SPO therefore,[28] if co-perpetration falls within commission under Article 16(1)(a), this does directly affect whether JCE could apply. This is not because Article 16(1)(a) may not theoretically authorize more than one form of liability, but simply that the form or forms of liability over which it does confer jurisdiction must be understood by Kosovo law to amount to "commission" which is limited to co-perpetration.

27. Alternatively, even if the word "commission" in Article 16(1)(a) can be considered to encompass liability when several persons having a common purpose embark on criminal activity that is then carried out jointly, this does not automatically grant jurisdiction to the KSC over all three forms of JCE. Given the nature of JCE III liability, which relies on foreseeability of risk rather than intent, it is even more distant that the concept of physically and intentionally committing a crime. There could be perfectly justifiable reasons for thus limiting the jurisdiction of the KSC only to JCE I and II, and

[27] Challenge, para. 24.
[28] Response, para. 22.

excluding JCE III in the same way that the Law has limited the KSC's subject matter,[29] temporal,[30] geographic[31] and personal jurisdiction.[32]

28. The KSC is a Specialised Court, exercising limited jurisdiction over a limited number of individuals for events that occurred during, or connected to, a particular conflict. Carefully circumscribing jurisdiction by international courts is recognized as legitimate and entirely justified. It may not simply be assumed that the object and purpose of the KSC as a whole is the same as the ICTY and that the interpretation of commission based on this object and purpose would be the same.

29. Allowing jurisdiction over JCE III, poses significant risks for the KSC. Indeed, as currently drafted, the Indictment allows for all crimes to either intended as within the common criminal purpose[33] or, in the alternative the crimes may fall outside the JCE, and "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."[34] Notwithstanding the Defence challenges to this form of pleading,[35] if JCE III were excluded from the KSC's jurisdiction pursuant to Article 16(1)(a) of the Law, the Prosecution would be prohibited from alleging the latter alternative, thereby greatly reducing the complexity and resulting cost and time of the case.

30. This is not an abstract fear. Prosecutors armed with the weapon of JCE liability tend to find restraint an alien concept. As explained by the Bosnian State Court:

> **"**The Prosecutor essentially alleged that hundreds, perhaps even thousands, of military and police members who happened to be in the Srebrenica enclave from 11 to 18 July 1995 were member of a single JCE, the common purpose of which was to persecute Bosniak civilians. Thus, sprawling horizontally as well vertically, the alleged JCE morphed into a gigantic octopus encompassing and interlocking every person from the highest ranking officers to the lowest foot soldiers of the VRS and RS MUP, thus attributing totality of crimes to the group as a whole."[36]

[29] Law, Article 6, limiting the subject matter jurisdiction to "crimes set out in Articles 12-16."
[30] Law, Article 7, limiting the temporal jurisdiction to 1 January 1998 - 31 December 2000.
[31] Law, Article 8, limiting the territorial jurisdiction to crimes "which were either commenced or committed in Kosovo."
[32] Law, Article 9 of the law, limiting the personal jurisdiction to "natural persons and, in addition to territorial jurisdiction, "persons of Kosovo/FRY citizenship or over persons who committed crimes within its subject matter jurisdiction against persons of Kosovo/FRY citizenship."
[33] Indictment, para. 33.
[34] Ibid, para. 34.
[35] Selimi Defence Challenge to the Form of the Indictment, KSC-BC-2020-06/F00222, 15 March 2021.
[36] Božic Zdravko et al., Case No. X-KRZ-06/236, 5 October 2009, para. 122.

31. Excluding JCE III liability from the KSC's jurisdiction is thus the only manner of appropriately deciding over this power.

d. JCE was not part of Kosovo law or the law of the FRY in 1998

32. The SPO argues that the issue of whether domestic notions of co-perpetration vary from the parameters of JCE liability is irrelevant to the issue of whether JCE applies before the KSC.[37] By implication, the SPO therefore admits that JCE is not traditionally part of Kosovo law and is different from co-perpetration as understood under the law of the FRY. For example, it has identified no case where JCE liability was applied by the courts of the FRY before the events relevant to the Indictment.

33. The SPO does assert that "the Supreme Court of Kosovo has upheld JCE as a mode of liability, holding that JCE is firmly established in CIL and exists in three forms, [and that] … Defendants tried in Kosovo courts are thus subject to prosecution for war crimes on the basis of JCE liability."[38] However, in so doing, the SPO "cherry-picked" instances in which JCE was applied in Kosovo Courts.[39] It omitted several later judgments in which the Kosovo Court of Appeals either did not accept JCE in its entirety or the extended variant as a valid form of liability.

34. For example, in case P122/2014, the Kosovo Court of Appeals, presided by the same judge that recognised the status of JCE in Kosovo in *L.G. et al*, concurred with the reasoning of the Basic Court of Mitrovica in that "finding the defendant's co-perpetration in a murder at which he was not present proven on the sole basis of his *dolus eventualis,* i.e. JCE III, would violate the legality principle[40] as it would stretch the meaning of co-perpetration beyond the boundaries set by Article 22 of the 1976 SFRY Criminal Code."[41]

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[37] Response, para. 121.
[38] Ibid.
[39] *See e.g.* Kosovo, Supreme Court of Kosovo, *L.G. et al.,* Judgement, Case PLm. Kzz. 18/2016, 13 May 2016, paras 69-74; Kosovo, Supreme Court, *L.G. et al.,* Judgement AP.-KZ. 89/2010, 26 January 2011, paras 114-115; Kosovo, Supreme Court, *E.K. et al.,* Judgement, 7 August 2014, Case No. PA II 3/2014, para. xlii referring to Kosovo, Court of Appeals, *E.K. et al.,* Judgement, 30 January 2014, Case No. PAKR 271/13, paras 36-40.
[40] Article 33(1) of the Constitution of Kosovo.
[41] Kosovo, Basic Court of Mitrovica Case no. P184/15, 8 August 2016, paras 82-88; Kosovo, Court of Appeals, Case P122/2014 of 22 June 2017, page 10.

35. In another case before the Kosovo Court of Appeals, the Panel found that the requirements for JCE III were far less explicit or demanding than those for co-perpetration, holding that applying JCE III would be to the detriment of the defendants and that JCE was not in fact a mode of liability foreseen in the criminal code of Kosovo or set in any of the modes of criminal liability in any of the applicable codes.[42]

36. Consequently, contrary to the SPO's submissions, Kosovo courts have not consistently or comprehensively applied all three forms of JCE liability. Nor has the SPO submitted, let alone proven that on the occasions where EULEX courts did apply this mode of liability, specific challenges to its applicability were raised and/or dismissed by the relevant courts.

e. JCE was not foreseeable and accessible to the accused.

i. Application of principle of legality

37. The SPO erroneously argues that "JCE liability was sufficiently foreseeable and accessible at the relevant time to warrant its application the Accused"[43] by seeking to water down the fundamental protection accorded to accused by the principle of legality.

38. In this regard, the SPO suggests that "flexibility in terminology must be permitted, as well as in the particular elements of an offense", "a stricter construction of this requirement would risk wrongly constricting the applicability of the law" and that "gradual clarification and judicial interpretation are particularly critical in the realm of international law due to its unique sources, development and characteristics."[44] Yet these are nothing more than eloquent, if misplaced slogans, rather than a thorough analysis of the law.

39. At the outset, the current issue is whether JCE liability is applicable before the KSC. The Defence does not contest that war crimes and crimes against humanity were crimes

[42] Kosovo, Court of Appeals, Case PAKR455/15 of 15 September 2016.
[43] Response, para. 122.
[44] Response, paras 124-125.

under CIL at the time of the commission of offences. As such, the SPO's reference to the "gravity of crimes" or their "atrocious nature" is not directly relevant to this question.[45] What matters, is whether liability on the basis of JCE for these crimes would be foreseeable. Even if JCE was found not to be foreseeable and accessible this would not mean that all the other forms of liability under Article 16(1)(a) of the Law would not still be under the KSC's jurisdiction and therefore applicable.

40. It is not foreseeable that a form of liability could be applied against Mr. Selimi as a form of commission, when:

a. His contribution is not necessarily criminal;
b. His contribution does not need to cause the alleged resulting crime;
c. The objective of the common plan is not inherently criminal;
d. The means used to achieve the plan are not exclusively criminal; and,
e. He is still liable for all the foreseeable crimes of the plan.

41. Yet, according to the SPO this is the law relating to JCE. This is not a Mr. Selimi seeking notice of the elements of the offence, but is instead requiring a relatively straightforward and comprehensible explanation of what conduct would be criminal.

ii. Assessing foreseeability and accessibility by reference to Kosovo law

42. By contrast to relying upon obscure post WW2 cases to render criminal liability for JCE foreseeable, reliance on national law in force at the time the crimes were committed would be more direct and reasonable.

43. Despite earlier claiming that Kosovo law was irrelevant,[46] the SPO proceeds to rely on various provisions of the SFRY Criminal Code to seek to demonstrate that "forms of responsibility recognised in domestic law may be relevant when determining whether it was foreseeable to an accused that their conduct may attract criminal responsibility."[47] None of its interpretations of Kosovo law are convincing.

[45] Response, para. 134.
[46] Response, para. 121.
[47] Response, para. 129.

44. Rather than engaging in a systematic analysis of the elements of liability under Article 26, the SPO chooses to rely upon the supposed "striking resemblance" found in *Ojdanić* when the ICTY compared JCE and Article 26.[48] Yet, the resemblance is far from as clear as the decision in *Ojdanić* concluded.

45. Article 23 of the Yugoslav Criminal Code of 1951 which preceded the 1976 SFRY Criminal Code, represents the origins of the liability under Article 26 and contains an identical formulation of the latter. In 1953, the Supreme Court of Croatia, when applying this provision, took the view that the organiser of a criminal association could not be held liable for a murder which was committed by a member of the group at his own initiative, absent the order or subsequent approval of the organizer. It further went on to find that holding members of criminal associations responsible for offences in which they did not take part would lead to complex constructions of causation and guilt, and ultimately unfairness.[49]

46. The phrase "…all criminal acts resulting from the criminal design of the association" in Article 26 can only be interpreted as meaning that the organiser of the criminal enterprise can be held liable solely for the crimes which are carried out within the framework of the criminal design. In contrast, JCE III holds each member of the enterprise (including the organiser) as responsible for offences resulting from the criminal design of the enterprise as well as those offences which were a "natural and foreseeable" consequence of the design, thereby distinguishing Articles 23 and 26 of the SFRY Criminal Code from JCE III.[50]

47. The scope of commission liability under Article 26 is therefore far narrower than that under JCE and as such, the familiarity of the accused with this provision cannot reasonably be extrapolated to the doctrine of JCE being accessible and foreseeable to him.

[48] Response, paras 130-131.
[49] Narodna Republika Hrvatska, Vrhovni sud, Kž 685/53 of 04.06.1953 (Unofficial translation).
[50] It is noted that the SPO did not seek to suggest that accomplice liability under the SFRY Criminal Code is similar enough to JCE to provide requisite notice to the accused. *See* Challenge, para. 32.

f. JCE was not part of CIL at the time of commission of the alleged crimes

48. The vast majority of the Response is dedicated to an effort by the SPO to justify the status of JCE under CIL at the time the offences were allegedly committed.[51] Despite unambiguously claiming that "JCE, in all of its forms was part of CIL at all times relevant to the indictment"[52] the extensive, if unpersuasive reasoning that it adopts to attempt to convince the Pre-Trial Judge of this fact belies this allegedly certainty. While the Defence rests on the extensive submissions it has already made on the CIL status of JCE in the Challenge, certain new arguments that have been raised by the SPO are addressed below.

i. Statutes of IMT and IMTFE

49. The SPO asserts that both the IMT Statute and IMTFE Statute International Military "contain provisions which outline criminal liability for participation in a common purpose, plan or enterprise"[53] which "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)."[54]

50. As explained in the Challenge, relying on the Statutes of the IMTs, drafted after the crimes over which they had jurisdiction were committed, as the substantive basis for criminal liability violates the principle of legality.[55] The relevant provisions of these Statutes simply established the jurisdiction of the IMTs or over crimes and modes of liability that had to have a separate and pre-existing legal basis for the IMT to apply them. The same principle applies to Control Council Law 10 ("CCL10") which was enacted on 20 December 1945, after the events had occurred for which it granted jurisdiction. This is the same regardless of how many states endorsed or supported the Statutes.[56] It simply means that they all agreed with exercising jurisdiction over such individuals, but on the basis of CIL as it existed at the time of the events, not afterwards.

[51] Response, paras 26-103, 106-120.
[52] Response, para. 26.
[53] Ibid, para. 32.
[54] Id, para. 33.
[55] Challenge, para. 52.
[56] Response, para. 30.

Indeed, this is what the *Hostages* and *Einsatzgruppen* cases relied upon by the SPO actually held, that the relevant provisions granted them jurisdiction over "international law theretofore existing",[57] namely what the judges in those cases considered substantive binding international criminal law to be. The vague statements that these Statutes constituted a contribution to international law[58] do not affect this conclusion, especially when no reference is made to the specific provisions relied upon by the SPO.

51. The Statutes of the ICC and ICTY perfectly encapsulate this distinction between substantive law and jurisdiction. The ICTY Statute, created after the crimes over which it had jurisdiction can only establish the jurisdiction over certain crimes as long as they were part of CIL at the time of the crimes. By contrast, the ICC Statute, only applying to crimes after its entry into force on 1 July 2002, creates both substantive criminal law and the limits of the Court's jurisdiction over such crimes. The SPO fails to understand or apply the crucial distinction between these regimes.

52. Further, even though the IMT Statute was limited to establishing that Tribunal's jurisdiction over crimes and forms of liability after the crimes were committed but based on pre-existing international law, it is perhaps unsurprising that elements of it were relied upon to shape the contours of liability even if this was impermissible. Confronted with supposed pre-existing customary international criminal law, which was not written down, the IMT Judges or indeed those applying cases under CC10, would unsurprisingly rely upon the Statute to interpret that law, even if it constituted the tail of jurisdiction wagging the dog of substantive crimes. Any such statements relying on Article 6 to as establish crimes should thus be disregarded.

ii. Post-WW2 cases

53. The purported high point of the SPO's justification of JCE is the application of supposed common criminal purpose liability in Post WW2 cases. However, these cases, to a large part relied upon previously by the *Tadic* Appeals Chamber and examined thoroughly by Trial and Appeal Chambers at other Tribunals, do not however, provide

[57] Ibid, para. 36.
[58] Response, paras. 34, 36, Fn. 81, 86.

the certainty and uniformity required to form the basis under CIL of these forms of liability.

54. The SPO's recognition that, "not every reported case from the WWII era contains detailed reasoning with regard to the responsibility of the accused,"[59] is the embodiment of understatement. The convoluted manner in which the SPO seeks to interpret cases that it has only discovered, many twenty years after the *Tadic* Appeals Judgement, demonstrates the lengths to which it will go to seek to identify substantive underpinnings for this form of liability.

55. Even on the SPO's own reasoning however, the gaps and ambiguities prevail. The explanation of the role of the Judge Advocate's role in British and Australian Courts is based on nothing more that the forward to the first volume of law reports with unexplained status, while it suggests nothing more than those assessing the facts "should" follow the legal interpretation given,[60] with no indication that this was done or what the consequences were if it was not followed. The absence of the equivalent position in US military tribunals[61] only complicates the matter further in terms of seeking a consistent and coherent understanding of the legal principles derived from these cases.

56. The suggestion that "difficulty in surmising the reasoning applied can be overcome by analysing and comparing the materials contained in the case reports, including the indictment, the speeches of counsel, and the judgement" which is brushed off as simply being "a more labour-intensive analysis compared to modern international criminal judgements" wholly misses the point.

57. As explained below, these cases are being relied upon by the SPO, almost exclusively, for the creation of the most wide-ranging form of criminal liability in international criminal law which can result in potential criminal liability as a principal, for many of the most serious international crimes. The consequences for those prosecuted under this form of liability are severe and permanent. Regardless of the issues of foreseeability that arise in this context when such a complicated exercise needs to be undertaken to

[59] Response, para. 38.
[60] Response, para. 39.
[61] Ibid, para. 40.

identify the supposedly binding legal principle,[62] these secondary materials are not officially part of the relevant judgements and the SPO does not and cannot explain how they can and must do so.

58. The very process of comparison and interpretation of these materials results in findings so vague and subjective that they cannot be seriously relied upon, regardless of the result. In this regard, the SPO's citation of the approval by the *Dordevic* Appeals Chamber of the Separate Opinion of Judge Shahabuddeen,[63] that it was appropriate to refer to Counsel's argument in the absence of a clear judicial statement, is significantly undermined by Shahabuddeen's later recognition that "neither JCE, which has roots in the common law or co-perpetratorship, which has roots in the civil law, "can claim the status of CIL."[64]

59. As for the cases relied upon by the SPO in the Response, all were addressed, and dispensed with, by the ECCC Supreme Court Chamber[65] and referred to in the Challenge.[66] While disagreeing with the ECCC Supreme Court's findings and reasoning in relation to these cases, the SPO fails to articulate how its reasoning was incorrect.

iii. Jurisprudence of international and hybrid tribunals

60. The SPO asserts that "the status of JCE as a mode of liability in CIL has been affirmed by every modern international (or internationalised) court with comparable governing laws to those of the KSC."[67] Yet all of these decisions were issued after the facts relevant to the Indictment and cannot therefore be relied upon as a source of CIL for the existence of JCE in CIL at that time. As such they should be assessed for the quality of their analysis and reasoning rather than anything else. The "quantity over quality" approach of the SPO appears to accord undue weight to the repetition of a mode of

[62] See above, paras 36-46.
[63] Response, para. 41 citing *Dordevic* Appeals Judgement, para. 45 which in turn had endorsed the *Krajišnik* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 24.
[64] Challenge, para 43.
[65] ECCC, Case of Nuon Chea and Khieu Saphan, Appeal Judgement, 23 November 2016, paras 791-810 ("ECCC Appeal Judgement").
[66] Challenge, paras 65-68.
[67] Response, para. 101.

liability by the ICTY or ICTR Trial Chambers after it was created by the *Tadic* Appeals Chamber, rather than the detailed analysis of the ECCC Supreme Court, examining almost twice as many cases as *Tadic*. It is to be hoped the Pre-Trial Judge does not fall into the same trap.

iv. Status of sources

61. Given the implicit acceptance that JCE liability does not exist directly in Kosovo law under the Kosovo criminal code, the SPO must persuade the Pre-Trial Judge that it is part of CIL at the time of events relevant to the Indictment. Yet the SPO did not make any reference to how a rule of CIL is created and specifically one establishing criminal liability, instead it sought to water down the principle without even establishing it.

62. As set out in the Challenge, CIL can only be created through general and consistent state practice and *opinio juris*. This is not merely a convenient mantra, but a principle to be applied strictly and consistently by the Pre-Trial Judge when assessing any claim of a rule based on custom. Rules of CIL may not simply be magicked out of thin air but must rest on identifiable, concrete and binding principles. As held in *North Sea Continental Shelf*:[68]

> "State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."

63. Consequently, although custom may crystallise over a (relatively) short period, it must still follow strict rules in this process.

64. Article 3 of the Law permits Judges of the KSC, in determining the CIL at the time crimes were committed to be "assisted by sources of international law, including

[68] North Sea Continental Shelf (Ger. v. Den., Ger. v. Neth.), Merits, 1969 I.C.J. 3, I paras. 71, 73- 74 (Feb. 20).

subsidiary sources such as the jurisprudence from the international ad hoc tribunals, the International Criminal Court and other criminal courts."

65. While this provision authorises the reference to jurisprudence of other criminal and international courts, it only permits this as a "subsidiary" or additional source. There must be a primary source which these sources may be said to support. This provision cannot replace the fundamental requirements of proof of state practice and *opinio juris,* and does not allow the Pre-Trial Judge, or any other Panel of the KSC to create a rule of CIL by applying a lower standard than that required of any other customary rule.

66. In this regard, in light of its acceptance that the ICC Statute and the Convention for the Suppression of Terrorist Bombings may not relied upon as evidence of the customary status of JCE,[69] the sources relied upon by the SPO for the creation of JCE under CIL, are almost exclusively post World War II cases applied by British, US or Australian Military Courts of either German or Japanese perpetrators. Neither the Soviet or French occupying powers appeared to apply Control Council Law 10 and certainly the SPO identified no cases relevant to the application of JCE if they did. The legal principles applied by these courts were therefore exclusively those from the common law. Far from being "settled jurisprudence, spanning from WWII to the present day, showing that JCE liability is firmly rooted in CIL"[70] the SPO is actually relying on a collection of cases from a limited period of four years from 1945-1949 and then a gap of half a century until the *Tadic* Appeals Judgement in 1999. There are no examples of JCE liability being applied in the interim.

67. Further, the staffing of these separate military tribunals by Judges and Prosecutors from the same legal system, means that they cannot be imbued with the supposed importance of decisions of international tribunals, where the different nationalities and legal backgrounds of judges is in part intended to ensure that the principles applied are truly international. The post WW2 cases are, at heart, decided by domestic military tribunals. Their decisions, while important, should not be given any more weight than that.

[69] Response, para. 116.
[70] Id, para. 117.

68. Finally, while the Defence contests that Article 26 of the SFRY Criminal Code reflects and encapsulates JCE liability, the 1999 Commentary of the 1976 Criminal Code of the SFRY on Article 26 also alludes to the contested validity of this mode of liability by stating:

> "The provisions of this Article regulate a specific form of complicity, which is not recognised by the majority of contemporary criminal legislations and the overwhelming opinion is that it is about the overcome form of complicity which would be eliminated from our criminal legislation as soon as possible, since criminal association is foreseen in the criminal laws of the Republic as an independent criminal act."[71]

69. Similarly, Bačić, one of the most prominent legal scholars of the time, stated in relation to Article 26 in 1995 that:

> "…It would be best to delete the responsibility of the organiser of the criminal association, to abandon this institution, and resolve this issue in the manner which is well established in European continental criminal jurisprudence. This responsibility is lacking not only in the area of guilt but also opens questions as to the objective contribution of the organizer to the execution of criminal acts in which he does not participate."[72]

70. These commentaries suggest that the extended form of JCE did not fall within the meaning of Article 26 and moreover, was not recognised as representing CIL in the FRY including Kosovo at the time of the events relevant to the Indictment, thereby supporting the idea that it was no more than a common law concept.

III. RELIEF SOUGHT

71. The importance of the Pre-Trial Judge's Decision on this issue cannot be overstated. As witnessed from *Tadic*, once a decision on JCE has been issued, the requirement of "cogent reasons" to depart from prior jurisprudence means that it will shape the future of the KSC. For the reasons set out herein, there are many reasons why that future should be devoid of JCE.

72. The Defence therefore requests the Pre-Trial Judge to:

a. GRANT the Challenge to Jurisdiction and confirm that the Kosovo Specialist Chambers do not have jurisdiction over Joint Criminal Enterprise liability; and

[71] Ljubisa Lavarevic, *Commentary of the Criminal Code of the FRY* (1999), Article 26, para. 1 (Unofficial translation).
[72] Franjo Bačić, *Criminal Law: General Part* (1995), 304-306 (Unofficial translation).

b. ORDER the SPO to remove paragraphs 32-52 from the Indictment insofar as they relate to Joint Criminal Enterprise.

Word count: 6961

Respectfully submitted on 14 May 2021,

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