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 Kadri Veseli

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Veseli Defence Reply to the Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE)

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I. INTRODUCTION

1. The Defence submits that the SPO Response ("Response")[1] to the Preliminary Motion ("Motion") challenging the applicability of JCE before the KSC[2]: a) fails to respond to the core submissions of the Defence; b) deliberately mischaracterises clear submissions of the Defence, c) is devoid of factual and legal basis; and d) is a repetition of arguments previously rejected in proceedings before the ECCC. Consequently, the arguments raised in the SPO response should be summarily rejected.

2. The Defence's arguments stem from the inescapable fact that Mr Veseli is charged before a domestic court, in violation of the non-retroactivity principle (a non-derogable constitutional right) with crimes that did not exist under the domestic law in Kosovo in 1998-1999.

3. At the time, Kosovo was part of Serbia, and the applicable law was the Constitution and Criminal Code of the SFRY. The highest Court in the successor State, the Constitutional Court of Serbia (CCS), has recently given definitive legal guidance concerning the scope of the criminal law applicable to alleged war crimes in Kosovo at the time of the conflict and the Constitutional prohibition on holding an accused person guilty of a crime under international law that did not form part of the domestic law applicable to Kosovo at the time of the conflict. The legal situation considered by the Serbian Constitutional Court is indistinguishable from the legal situation facing the KSC in the present challenge.

[1] F00263, Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise (JCE), 23 April 2021 ("Response").
[2] F00223, Preliminary motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC, 15 March 2021 – Part III ("Motion").

4. The CCS is the ultimate legal authority charged with interpreting the law applicable to Serbia to the 1988-1999 conflict and was the guardian of the Constitution of the SFRY and its successor States, the FRY Serbia-Montenegro and now Serbia. It is, with respect, inconceivable that the KSC, a municipal court of Kosovo, should approach the question of retrospective reliance on international law as a source of criminal liability less favourably towards those accused of conflict-related crimes in Kosovo in 1998-1999 than the Serbian Constitutional Court has done in respect of crimes allegedly committed in the same conflict at the same time and in the same place.

5. In a judgment delivered at the end of last year, the CCS ruled that for crimes allegedly connected to the conflict in Kosovo:

a. The only source of criminal liability that could found jurisdiction to try an accused was the domestic criminal law applicable to Kosovo at the time of the conflict in 1998-1999. The domestic (Serbian) criminal law applicable to Kosovo at the time did not include either (a) crimes against humanity or (b) command responsibility.

b. Accordingly, the criminal court lacked the necessary jurisdiction to try an accused Serbian official charged, based on command responsibility, with the failure to prevent or punish crimes against humanity.

c. Since the applicable law and constitutional guarantees, in that case, are precisely the same framework of domestic and constitutional law as applies to the facts of the present case, the decision of the CCS must form a (if not *the*) central part of the KSC's analysis of Mr Veseli's challenge.

d. If this recent and binding decision of the CCS is a correct application of the law (and there is no right of appeal against the ruling), then it follows *a fortiori* that the KSC has no jurisdiction to entertain charges against Mr Veseli alleging command responsibility and the commission of crimes against humanity concerning events occurring during the conflict in Kosovo in 1998-199. As the Serbian Constitutional Court has held, neither of these principles of criminal responsibility formed part of the domestic criminal and constitutional law applicable at the time of the events.

e. There obviously cannot be a different legal regime applicable to Serbian and Albanian protagonists alleged to have committed crimes during the very same conflict. However, the implications go very much further than that.

f. The principle laid down by the Serbian Criminal Court applies equally to certain substantive offences alleged (e.g. arbitrary detention), which was not a criminal offence under domestic law at the time of the conflict.

g. It also applies to the concepts of JCE I, JCE II, and JCE III, none of which formed part of the applicable domestic law at the time of the events alleged on the Indictment – and the SFRY Constitution at that time expressly prohibited reliance on international law as sufficient in itself to introduce criminal offences or modes of criminal liability that were not directly included by Parliament into a domestic criminal provision.

h. The only forms of inchoate or secondary participation recognized in the applicable domestic law at the time of the conflict were incitements to commit a particular crime, aiding and abetting a particular crime, and attempt to commit a crime in the case a specific offence that was begun but not completed.

6. Assuming the decision of the CCS judgment sets out the applicable law, then it necessarily follows that the KSC has jurisdiction to try Mr Veseli *only* in respect of any substantive offences alleged against him that constituted criminal acts under domestic law at the time they were committed. It also follows that the KSC's jurisdiction is limited to specific and particularised allegations that Mr Veseli either committed a specified crime personally or otherwise aided and abetted the particular crime, according to the law on aiding and abetting as it was appliable to Kosovo at the time of the events.

7. Modes of participation (such as aiding and abetting, command responsibility and JCE) are also subject to the prohibition on retrospectivity since they have the effect of criminalising conduct that would not have previously been a crime in national law. As the Serbian Supreme Court rightly recognised in relation to command responsibility, the retrospective introduction of a mode of liability would be unconstitutional because the principle of legality prohibits the retrospective criminalisation of conduct that did not clearly constitute an offence under national law at the time.

8. The CCS clearly did not consider that Article 7(2) of the ECHR amounted to a permanent derogation from Article 7(1) so that a person who is accused in a domestic criminal prosecution of war crimes in the Kosovo conflict could be tried based on international criminal liability in apparent breach of Article 7(1). The Court could not have ruled as it did if this was the case.

9. As Mr Veseli has previously pointed out, Article 7(2) was no more than a transitional provision. The SPO's reliance on Article 7(2) as being a permanent derogation from Article 7(1) in connection with crimes under international law is absurd. There is *no such thing* as a permanent derogation under the ECHR. All derogations must be strictly justified under Article 15 and formally notified to the

Council of Europe. Above all, they must be proportionate and time-limited. The derogating State is required to demonstrate that the circumstances permitting the derogation (or suspension) of a guaranteed right in the domestic legal order must be periodically reviewed and the derogation withdrawn when the circumstances which justified it no longer require its continued application.

10. Most ECHR rights can be formally suspended (or derogated) from under Article 15 in times of war or serious public emergency. However, certain rights can never be derogated from. Torture in Article 3 and the prohibition on the retrospective application of the criminal law in Article 7(1) are the two most important non-derogable rights in the Convention. Given that the right guaranteed by Article 7(1) cannot be the subject of derogation by Sovereign State Party to the Convention, even *during* an ongoing war or public emergency, it is absurd for the SPO to suggest that Article 7(2) amounts to an unending derogation from the core right guaranteed by Article 7(1).

11. It was a time-limited provision, just like any other derogation. The Article 7(2) derogation was not intended to continue in effect indefinitely. As the ECHR has definitively ruled, it has no continuing relevance to conflicts post-dating the second world war. Article 7(2) simply has no application to domestic criminal proceedings (in Serbia or Kosovo) arising out of the 1998-1999 conflict. However, the KSC's claimed jurisdiction to try offences that were not crimes when they were committed relies entirely on this obviously mistaken construction of Article 7(2)'s continuing application.

12. The CCS was clearly of this view when it applied the principle of the FRY constitution, applicable to Kosovo at the time, that expressly prohibited reliance on international law as a source of criminal liability unless a particular offence or mode of liability was directly incorporated into domestic law at the time, through the

adoption by Parliament of domestic criminal legislation. The same is equally true of the law applicable in Kosovo at the time of the events at issue.

13. The CCS ruled that the prohibition on the retrospective application of the criminal law (so as to render criminal acts that were not defined as criminal under domestic law at the time they were committed) operated to prevent prosecution for an offence under international criminal law which was not justiciable in the national courts at the time the offence allegedly occurred. Accordingly, where the accused was charged with command responsibility for failing to prevent or punish crimes against humanity during the 1998-1999 conflict in Kosovo, the domestic criminal court lacked the necessary jurisdiction to try or convict the accused of crimes alleged. He could not be tried and convicted of crimes against humanity because there was no such offence in the domestic criminal law of the SFRY at the time of the conflict in Kosovo. The domestic criminal court also lacked jurisdiction to try an accused based on a mode of participation (command responsibility) that had not been enacted into domestic criminal law at the time of the conflict.

14. As noted above, the CCS, which has the final competence to interpret and apply the SFRY Constitution and criminal code in force in Kosovo at the time, held unequivocally in judgement no Uz-11470/2017[3] that the SFRY Constitution prevents the application of command responsibility and crimes against humanity to acts occurring during the conflict in Kosovo. This judgment is binding on the KSC as regards the state of the criminal and constitutional law applicable in Kosovo in 1998-1999.

15. The applicant challenged a decision by the Serbian prosecution service not to prosecute a former Yugoslav general, Dragan Zivanovic, on principles of command

[3] Constitutional Court of Serbia, Judgment no. Uz-11470/2017, 10 January 2020, published in the Official Gazette of RS, no. 127/2020.

responsibility for his alleged involvement in crimes against humanity that occurred during the conflict in Kosovo. The CCS confirmed that 'command responsibility and 'crimes against humanity were not recognised as forms of criminal liability under national law during the conflicts in the SFRY in the 1990s, including the conflict in Kosovo. Accordingly, any prosecution based on criminal norms that did not exist at the time would be in violation of the principle of non-retroactivity.[4] The Court found:

> Therefore, the Constitutional Court considers that the principle of command responsibility in the Republic of Serbia can be applied only from the entry into force of the valid Criminal Code ("Official Gazette of RS", no. 85/05, 88/05, 107/05, 72/09 and 111 / 09), on January 1, 2006, and whose retroactive application is prohibited in accordance with the principle of legality, which is guaranteed by Article 34, paragraph 1 of the Constitution, as well as the Criminal Code itself - Article 1. Command responsibility is implemented by this Code as a separate criminal offence of failing to prevent the commission of crimes against humanity and other civilian objects protected by international law under Article 384 of the Criminal Code.[5]

16. The Defence submits that:

A) The judgement no Uz-11470/2017 is binding in itself

17. This decision on the state of the criminal and constitutional law applicable in Kosovo in 1998-1999 is final and binding. The Pre-Trial Judge is required to follow the judgment of a competent Constitutional Court on the interpretation and application

[4] Article 34 (1) the Constitution of Serbia. No person may be held guilty for any act which did not constitute a criminal offence under law or any other regulation based on the law at the time when it was committed, nor shall a penalty be imposed which was not prescribed for this act.
[5] Uz-11470/2017, page 17 (translated document).

of the criminal and constitutional law of the SFRY because the CCS has the ultimate (unappealable) jurisdiction to determine the meaning of the law applicable to Kosovo at the time of the conflict since it was at that time a part of the SFRY. Serbia has been recognised by the ICJ as the successor State of the SFRY as regards its international obligations. It follows that since Kosovo was part of the SFRY at the time, the Constitutional Court with primary jurisdiction to rule on the applicable domestic law at the time of the conflict is the Constitutional Court of Serbia. There would need to be overwhelmingly cogent reasons for the KSC to adopt a different approach, less favourable to the (Albanian) accused.

18. This CCS judgement no Uz-11470/2017[6] is also binding as regards its finding that the SFRY Constitution did not permit recourse to international law as a means of establishing criminal liability for conduct not specifically prohibited in applicable provisions of domestic criminal law statutes. The Constitution prohibited reliance on international law as the sole basis for establishing criminal responsibility. At the time of the incidents, JCE, command responsibility and crimes against humanity were not part of the domestic law of the SFRY.

B) Any departure from the judgement no Uz-11470/2017 would be in violation of the principles of legality, taken alone and in conjunction with the guarantee of equality before the law

19. The ECHR forms part of the current Constitution of Kosovo, applicable in the proceedings. Article 14 of the Convention prohibits any form of discrimination in the manner or extent to which any State implements the other substantive Convention rights. Article 14 cannot be invoked alone. It must be invoked in conjunction with one

[6] Constitutional Court of Serbia, Judgment no. Uz-11470/2017, 10 January 2020, published in the Official Gazette of RS, no. 127/2020.

of the substantive rights guaranteed under Articles 2 to 13 of the Convention or in the Protocols. Thus, for example, a regime of temporary detention may not be arbitrary in itself (if it is attended by appropriate safeguards against arbitrary deprivation of liberty). So, there is no violation of Article 5 standing alone. However, if the same regime is applied only to one ethnic group, then it will violate Article 14 in conjunction with Article 5.

20. In order to show unjustified discrimination in the delivery of a Convention right, the complainant must show that s/he is a member of a group that share certain *abiding inherent characteristics.* S/he must also show that members of his/her group are treated less favourably in the delivery of a Convention right than members of a comparator group that are in a relevantly similar situation. The *abiding inherent characteristic* that distinguished the two groups can be any inherent feature such as race, religion ethnicity, nationality, gender, sexual orientation, disability or "other status".

21. Where there is shown to be such a difference in treatment in the delivery of a Convention right, the State concerned must demonstrate (a) that the difference in treatment pursues a legitimate aim; (b) that the extent of the difference in treatment is proportionate to that justification on which it is based: and (c) that the difference in treatment is strictly necessary in a democratic society. Note that in each stage of this analysis it is not the action taken against the claimant that must be justified – it is the difference in treatment between the complainant and the comparator.

22. In the context of a disintegrating State (the SFRY) which has reconfigured over time into a number of successor States, the selection of the appropriate comparator is important. But here again, this exercise must be done from the perspective of the law as it applied at the time. Those accused in Serbian criminal courts (primarily Serbs) are relevantly situated for the purposes of applying Article 7 as those accused before

the KSC (exclusively Albanian). They were all protagonists in the same conflict at the same time and in the same place. They are therefore in a relevantly similar situation as regards the retrospective application of international criminal law to that conflict. If the KSC were to allow the retrospective application of offences derived from international criminal law when the Constitutional Court of Serbia has forbidden this on the basis of the law that was applicable to both groups at the time, this would self-evidently constitute an unjustifiable difference in treatment in the delivery of Article 7 to the two groups of accused persons.

23. Accordingly, even if the Pre-Trial Judge does not accept that the Serbian Constitutional Court judgement no Uz-11470/2017 is binding, the non-retroactivity principle that it rests upon is an undisputed cornerstone of international law and domestic constitutional law that is mirrored in both the Serbian and Kosovo constitutions, as well as reflected in Article 7(1) ECHR.

24. Accordingly, since Article 7 and Article 14 of the ECHR both form part of the Constitution of Kosovo by direct incorporation, it necessarily follows that an unjustifiable difference of treatment in the delivery of the right guaranteed by Article 7(1) as between two domestic criminal jurisdictions that emerged from the same disintegrating State would be a violation of the ECHR and thus of the Constitution of Kosovo.

25. It follows that if the KSC departs from the clear approach of the CCS so as to treat Albanian members of the KLA less favourably (in terms of the retrospective application of international criminal law) than Serbian officials who were their protagonists have been treated in a different successor State, this would violate the Kosovo Constitution directly. This is not merely to argue that there must be fair treatment as between two different legal systems trying different accused who were party to the same conflict.

26. The jurisdiction of the KSC and the Serbian Constitutional Court only came into existence following the conflict. Both Courts are emanations of their respective successor States which emerged from the disintegration of a larger federal State. That federal State (SFRY) was in existence at the time of the conflict and was subject to the criminal and constitutional law of the SFRY, which applied to all parties to the conflict equally. The KSC and the Serbian Constitutional Court are emanations of two new States that have inherited by succession their respective shares of the SFRY's sovereign powers and obligations."

27. It follows that one is not simply drawing a comparison between the way two different States operate their criminal law in respect of people accused of crimes committed during the same armed conflict (although consistency of approach is clearly desirable even in those circumstances). The comparison here is between the way two successor States have assumed (or declined) jurisdiction to try offences that occurred during a conflict that took place on the territory of the former federal State (the SFRY) before those States came into existence.

28. The difference in treatment that needs to be justified derives from the fact that all protagonists were subject to the same domestic law at the time the offences were alleged to have occurred. The nexus of the two comparator groups could not be closer. There would need to be an overwhelmingly compelling justification for a difference in treatment that had the effect of treating one group as immune from prosecution for offences that did not form part of domestic law at the time, whilst at the same time allowing international criminal law to be applied retrospectively to the other group.

29. Attempting to justify this difference in treatment under the three step process required by Article 14 ECHR leads to the obvious and inevitable conclusion that it produces a situation that violates Article 14 and therefore violates the Constitution of

Kosovo. It fails at the first hurdle. There is no legitimate aim for the difference in treatment. It is important to recall again that what must be justified is not simply the decision taken in relation to the group that has been treated less favourably. That could, in itself, be justified but nevertheless violate Article 14. What has to be justified in this case would be the *difference* in treatment. It is necessary for the SPO to show that there is legitimate aim in treating the (Albanian) KLA accused in a much less favourable way than their Serbian protagonists are treated. That is an unarguable position for the SPO to take.

30. Even if the SPO is able to conjure some pretextual justification for treating Albanian accused so much more harshly than their Serbian counterparts, it would still be necessary for the KSC to decide whether the extent of the difference in treatment is *proportionate* to that suggested justification and produces a result that is necessary in a democratic society. The extent of the difference in treatment is stark. A Serbian official accused in Serbia on the present SPO Indictment would inevitably walk free if there was no charge of direct participation against him. The Court would simply have no jurisdiction to try him for JCE, command responsibility or crimes against humanity. Nor would it have jurisdiction to try him for any supposed offence of arbitrary detention. The Albanian accused, on the other hand, face lengthy terms of imprisonment for precisely the same classes of conduct. That difference is impossible to justify on any basis.

31. The fact that this exercise involves comparisons between two different legal systems is not a justification for a difference in treatment in the present. It is a distinction without a difference. This is because, exceptionally, this case involves comparison between two legal systems both of which incorporate the prohibition on retrospective criminal law, both of which came into existence after the offences alleged had occurred, and both of which are emanations of the same successor State, the law of which plainly excluded reliance on principles of international criminal law as the

basis for criminal liability in any territory of the SFRY. So one is in fact comparing the way two different parts of the same federal State have implemented a non-retroactivity guarantee in respect of the law that applies when those successor States were in fact part of the same Federal State. There can then be no conceivable justification for such a stark and extreme difference in treatment between two groups who were similarly situated (from the point of view of the applicable criminal law) at the time these events occurred. This would involve the retrospective implementation of a much more severe standard of criminal liability by a mono-ethnic special court in the investigation and prosecution of Albanians, when compared to Serbian officials prosecuted in the domestic courts of Serbia, for conduct arising out of the same conflict, at the same time and place, and to which the same domestic criminal and constitutional law applied.

32. Such a distinction would violate the basic constitutional guarantees of equality before the law (Article 24 of the Kosovo Constitution and Article 180 of the 1974 SFRY Constitution) as well as anti-discrimination guarantees (Article 14 of the ECHR in conjunction with Articles 5, 6 and 7).

a) JCE is not included in the Law

33. Following the same logic, JCE is not included in the Law and the SPO cannot escape the fact that Article 16 is 'silent' on JCE. The SPO instead argues that it should be applied by analogy simply because other tribunals have interpreted similar provisions in their statutes accordingly.[7]

34. The SPO has failed to respond to the Defence submission that the principle of legality is stringent and that Article 33 of the Constitution (and Article 7 of the ECHR)

[7] Response para. 14, 16.

would prohibit expansive interpretations of criminal statutes not expressly set out in the Law.[8] Their interpretation Article 16(1) of the Law by reference to the interpretation of a similar provision contained in the statute of an international tribunal violates the principle that criminal law should not be construed to an accused's detriment. The SPO argument that the drafters should have modified the language of Article 16(1)(a) of the Law had they wanted to exclude JCE[9] is illogical considering that the rule set out in Article 33 of the Constitution and Article 7 of the ECHR prohibits *any* type of interpretation by analogy to the detriment of the accused.

35. Should the Judge determine, however, that Article 16 of the Law may be interpreted as including a JCE provision, the Defence submits that the KSC can only make such a finding, following a thorough review of both state practice and *opinio juris*. Only thereafter should the KSC consider the precedent of international or hybrid criminal courts and tribunals to determine the CIL at the time.

36. The cases relied on[10] by the SPO have been previously discussed by other courts but the conclusion remains that JCE cannot be said to have reached CIL status.[11] At most, an argument can be made that JCE I may have achieved regional customary law status with regard to states adhering to the common law tradition.[12] In this regard, the Defence notes that while post-WWII cases elaborate on the CIL basis for substantive atrocity crimes, no similar basis is discussed concerning the modes of liability applied by these courts. Every military court applied its own domestic mode of liability. Accordingly, even if the Judge should favour the application of JCE I, it would still be

[8] Motion, para. 95. See also ECtHR, Case of Del Rio Prada v. Spain, App. No. 42750/09, Judgment, 21 October 2013, para. 78; and ECtHR, Coëme and Others v. Belgium, Apps. Nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000, para. 145.
[9] Response, para. 15.
[10] Response, paras 44-60.
[11] Mohamed Shahabuddeen, 'Judicial Creativity and Joint Criminal Enterprise', in Shane Darcy and Joseph Powderly, *Judicial Creativity at the International Criminal Tribunals*, (OUP 2010), pp.202-203
[12] See, ILC, A/73/10, Draft conclusions on identification of customary international law, with commentaries (2018), pp.154-156.

illogical for a domestic, civil law court such as the KSC to make use of it – in so far as it is, fundamentally, a common law concept.

37. With regards to the JCE III caselaw,[13] it is inconceivable that a few cases, some of which were decided by laypersons, would be used as a sufficient legal basis for finding that JCE III is, without a doubt, part of CIL.[14] The SPO does nothing more than replicate the appeals of the ECCC co-prosecutors, which were conclusively rejected by all ECCC chambers. Such a resounding rejection of JCE III by such a notable judicial institution should be sufficient, on its own, to confirm that the doctrine is not part of CIL. None of the cases adduced by the SPO can serve as precedent for determining the existence of JCE III under CIL because they have all been previously litigated before the ECCC and rejected:

a) *Borkum Island*:[15] The SPO 's claims are nothing more than mere disagreement with the findings of the various Chambers of the ECCC. The SPO instead points to the principles of law stated by the Judge Advocate reviewing the case 'as relevant, authoritative and reliable in respect of the applicable principles, and is a clear expression of the customary status of JCE III.'[16]

b) *Russelsheim*:[17] the same argument is valid again here. As to the authorities citing this case,[18] the Defence recalls[19] that relying on secondary sources is impermissible.

[13] Response, paras 61-93.
[14] See, ILC, A/73/10, Draft conclusions on identification of customary international law, with commentaries (2018), Conclusion 13, Commentary, page 149, para. 3.
[15] Response, paras 64-72.
[16] Response, para. 66.
[17] Response, para. 72.
[18] Response, paras 74-75.
[19] ECCC, Co-Prosecutors v. Nuon Chea et al, Case No. 002/19-09-2007/ECCC/SC, Appeal Judgment, 23 November 2016, para. 791.

c) *Ikeda*:[20] As the ECCC Supreme Court correctly held, this case did not specifically address modes of liability.[21]

d) *Ishiyama and Yasusaka*:[22] The Supreme Court Chamber of the ECCC did not take this case into account because, despite the Judge Advocate's address to the court explaining the common design doctrine, only Ishiyama was found guilty. In any event, even if both would have been found guilty, then the issue would have not been the foreseeability of the crime outside the common design, but a simple change in the original design of both perpetrators.

e) *Essen Lynching*:[23] The same argument as in *Borkum Island* and *Russelheim* is also applicable to this case.

f) *D'Ottavio and others*:[24] The SPO has not explained why this unpublished case, based on domestic criminal law and in which all the accused shared the same intent,[25] should carry more weight than the reasoning of the ECCC Supreme Court Chamber.

g) *United States v. Tashiro et al*:[26] The SPO concedes that the case is not related to the JCE doctrine, but rather concerns a case of gross negligence. The SPO does

[20] Response, paras 76-80.
[21] ECCC, Co-Prosecutors v. Nuon Chea et al, Case No. 002/19-09-2007/ECCC/SC, Appeal Judgment, 23 November 2016, para. 794.
[22] Response, paras 81-83.
[23] Response, paras 84-86.
[24] Response, paras 87-91.
[25] ECCC, Co-Prosecutors v. Nuon Chea et al, Case No. 002/19-09-2007/ECCC/SC, Appeal Judgment, 23 November 2016, para. 795.
[26] Response, paras 92-93.

not even attempt to disagree with the finding of the ECCC Supreme Court Chamber that this case has no precedential value.[27]

38. Furthermore, even if the Judge should follow the *Tadic* Appeal Chamber and recognise JCE III as part of CIL, the judicial pronouncements in that ruling do not prevent CIL from further evolving.[28] The Judge should, therefore, consider whether the Rome Statute, ICC case-law, *opinio juris* or any other general judicial dissent from ICTY precedent, may have produced a result that is substantively more favourable to an accused.

39. The argument that JCE should apply to prevent impunity is a 'policy consideration'[29] is based on the erroneous assumption that the KSC can only try leadership figures through JCE while disregarding domestic or other modes of liability and should be summarily dismissed.

b) The Challenge to JCE falls squarely within the ambit of Rule 97(1)(a)[30]

46. The SPO's claim that the challenge to JCE does not raise proper jurisdictional challenges is devoid of any legal basis and unsupported by the case-law. There is no provision which 'invalidates' a challenge to the jurisdiction that does not focus 'on whether a form of responsibility *in toto* comes within its jurisdiction.'[31] Rule 97(1)(a) and Articles 39(1) of the Law are clear and self-evident: they relate to challenges to the 'jurisdiction' of the KSC. To the extent that any preliminary motion challenging the

[27] ECCC, Co-Prosecutors v. Nuon Chea et al, Case No. 002/19-09-2007/ECCC/SC, Appeal Judgment, 23 November 2016, para. 801.
[28] ILC, A/73/10, Draft conclusions on identification of customary international law, with commentaries (2018), Conclusion 13, Commentary, page 149, para. 3.
[29] ICTY, Prosecutor v Brdanin, Case no IT-99-36-A, Judgement, 3 April 2007, para. 421.
[30] Response, paras 7-9.
[31] Response, para. 7.

jurisdiction of the KSC affects the applicability of any of the Article, 6-10 of the Law, the test for admissibility will have been met.

47. The sub-test for the 'applicability' of modes of liability (Article 6 of the Law) is a simple one and requires the fulfilment of any of the following conditions whether: a) a particular mode of liability is part of CIL;[32] b) it can independently serve as a basis for conviction; or c) whether it can be applied to the crime charged.

48. The SPO's claim that, once there is a finding that the JCE doctrine is established under CIL, there will be no need to prove the status of JCE III under CIL (since JCE III is considered as a 'contour' of this mode of liability) is unfounded, considering that JCE III can certainly operate independently of JCE I (hence the 'alternative' charge).[33] Likewise, the SPO's claim that its case is strong enough so that it will not be necessary for the Panel to make use of it,[34] is equally without merit.

49. Furthermore, the SPO incorrectly misquotes the Defence submissions[35] and puts forward authorities that are misplaced. Even by applying the stricter, late stage ICTY standard, the cases cited by the SPO are not comparable to the present challenge, which relates to the applicability under CIL of JCE I and JCE III. In *Gotovina*, the accused had not challenged the CIL basis of JCE but simply the Trial Chamber's interpretation of *Tadic*[36] or deportation and forcible transfer as a crime against

[32] Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), para. 34.
[33] Indictment, para. 34.
[34] Response, footnote 23.
[35] Response, para. 9.
[36] Ibid, para. 22.

humanity, but only 'the expansion by the Prosecution, if its *actus reus*'.[37] In *Tolimir*, the accused had not challenged the applicability of JCE (or JCE III).'[38]

50. The Defence, on the other hand, can point to the decision by the ICTR Appeals Chamber to accept the admissibility of an identical challenge in Rwamakuba.[39]

B. WWII era legislation and case-law are relevant for ascertaining the CIL basis of international crimes only[40]

51. Relevant UN resolutions did not recognize JCE as having a basis under CIL, but simply approved the principles of international law recognized by the Charter of the Nuremberg Tribunal.[41] As to the emphasis of the SPO on the 'principle of individual criminal responsibility for crimes under international law,'[42] it is clear that the ILC argued that international law can apply not only to states, but also to individuals responsible for committing international crimes.

52. With regard to the relevance of post WWII case-law,[43] the authorities cited by the SPO simply affirm that judicial decisions may be referred to as persuasive subsidiary authority to determine CIL.[44] It is an entirely different matter, however, to argue, as the SPO does, that all post-WWII cases are CIL and applicable at the KSC.[45] In its conclusions on the identification of CIL, the ILC has explained that the value of

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[37] ICTY, Prosecutor v. Gotovina et al., Case No. IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal against Decision on Several Motions Challenging Jurisdiction, 6 June 2007, para. 18.
[38] ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Tolimir Second Preliminary Motion, 1 October 2008, para. 10.
[39] ICTR, Prosecutor v. Rwamakuba, Case no, ICTR-98-44-AR72.4, Decision on Validity of Appeal of Andre Rwamakuba Against Decision Regarding Application of Joint Criminal Enterprise to The Crime Of Genocide Pursuant To Rule 72(E) Of The Rules Of Procedure And Evidence, 23 July 2004
[40] Response, paras 94-100.
[41] Response, para. 95.
[42] Ibid.
[43] Response paras 96-100.
[44] Response, para 97 (*Tadic* quote); para. 98 (reference to *Kupreskic*)
[45] Response, para. 100.

judicial decisions varies greatly, 'depending both on the quality of the reasoning […] and on the reception of the decision, in particular by States and in subsequent case law'.[46] All the post-WWII cases in support of JCE III were issued by domestic courts applying rules of international law (with the exception of *D'Ottavio* which was purely domestic).

C. Case-law of international criminal courts and tribunals[47]

53. While the Judge is invited to consider the prior practice of other courts and tribunals in the identification of rules of CIL, it is submitted that, it falls to the Pre-Trial Judge to make a determination as to whether JCE I or JCE III were established, beyond any doubt, under CIL at the time of the events relevant to the indictment. The Judge will do so based on a thorough investigation of the available sources and by exercising the appropriate methodology for ascertaining CIL.

D. The ICC case-law is relevant to establish whether CIL has evolved[48]

35. The SPO fails to engage with the main point raised by the Defence, namely that CIL is not static, but evolving in nature.[49]

36. While the SPO is incorrect in claiming that the *lex mitior* principle is not applicable when both CIL and the domestic law equally apply, the SPO at least accepted that *lex mitior* applies to 'like' applicable laws.[50] Even if JCE III could, arguably, have existed in CIL, the Judge would still need to consider and compare

[46] ILC, A/73/10, Draft conclusions on identification of customary international law, with commentaries (2018), Conclusion 13, Commentary, page 149, para. 3.
[47] Response, paras 101-103.
[48] Response, para. 104.
[49] Motion, para. 116. (The SPO responds exclusively to paras 117-118) ILC, A/73/10, Draft conclusions on identification of customary international law, with commentaries (2018), Conclusion 13, Commentary, page 149, para. 3.
[50] Response (F00262), para. 30.

subsequent developments and adopt the most lenient regime. Thereafter, Judge will also be obliged to compare that lenient regime to domestically applicable law and assess, once more, which substantive law is more lenient to the accused.

37. The SPO misrepresents the argument of the Defence when it seeks to identify purported differences between Article 16 of the Law and Article 25 of the Rome Statute.[51] The Defence suggested that, *even if JCE had CIL status*, an overwhelming majority of states decided to repudiate JCE as a mode of liability opting for a more objective-based concept of co-perpetration.[52] Since the ICC Statute was negotiated around the time of the commission of the crimes mentioned in the indictment, it should be accorded more weight than any other source on joint liability, given that it reflects the result of negotiations of many participating states and international bodies.[53]

38. The SPO continues to misrepresent the argument of the Defence regarding the importance of ICC case-law,[54] which should be seen as evidence of developments in customary international law and departure from the JCE doctrine as such, rather than disagreement with the *Tadic* findings on the existence of JCE in customary international law (as the ECCC did). The reference to the *Dordevic* Appeals Chamber judgment is also misguided since the Appeals Chamber was discussing *Dordevic*'s claim that 'the Appeals Chamber in Tadić incorrectly referred to Article 25(3) of the ICC Statute in support of its finding that joint criminal enterprise is a principal, rather than accessorial, form of liability'.[55]

[51] Response, para. 104.
[52] Motion, para. 117.
[53] *See* William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2010), p. 21.
[54] Response, para. 105.
[55] ICTY, Prosecutor v Dordevic, Case no. IT-05-87/1-A, Appeals Chamber, Judgement, 27 January 2014, para. 36.

E. Opinion of the experts

39. Conscious of the overwhelming criticism that the JCE doctrine, and especially JCE III has received in academic circles, the SPO seeks to minimize the importance of the writings of eminent jurists. Even two of the most prominent members of the *Tadic* Bench, Judge Cassese and Shahabuddeen have openly accepted that Tadic either went too far[56] or did not fully reflect CIL.[57]

40. Finally, *Jogee* is in fact indicative of the development of state practice regarding JCE and significantly affects its alleged CIL status.[58] *Jogee* is important since it is widely understood that JCE has its roots, to a significant degree, planted in English common law. The question put to the Appeals Chamber in Karadzic was whether, in view of *Jogee*, cogent reasons now existed for the Appeals Chamber to depart from precedent dating back 20 years or so. Had the ICTY reversed its case-law and repealed *Tadic* at such a late stage, it would have opened the flood gates and potentially reversed many of its convictions. The Judge should consider *Jogee* by viewing it through the prism of the natural evolution that every legal doctrine undergoes.

F. The two cases that applied JCE in Kosovo are a minority and do not even overturn *Besovic, Vuckovic* and *Kolasinac*.[59]

41. The fact that JCE has been applied in only two cases in Kosovo[60] proves nothing more than a renewed attempt by a few international judges to import ICTY case law into domestic Kosovo law. *Besovic* is the settled case-law on the issue, and those few

[56] Antonio Cassese, 'The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise', 5 Journal of International Criminal Justice (2007), 109-133.
[57] Mohamed Shahabuddeen, 'Judicial Creativity and Joint Criminal Enterprise', in Shane Darcy and Joseph Powderly, *Judicial Creativity at the International Criminal Tribunals*, (OUP 2010), pp. 202-203.
[58] Response para. 119.
[59] Response, para. 121.
[60] The SPO refers to *Prosecutor v LG et al* and *Prosecutor v. E.K. et al*, (footnote 277).

cases do not even attempt to overturn such a practice. Indeed, while *Besovic* has provided cogent reasons why earlier attempts at importing ICTY case-law into the Kosovo domestic system is unconstitutional, the cases cited by the SPO do nothing more than simply cite *Tadic* as binding authority. In any case, the accused were formally charged with a domestic mode of liability, which was then interpreted as a form of JCE.

G. Foreseeability and accessibility must be interpreted in accordance with the domestic principle of legality

42. The issue of whether JCE was foreseeable and accessible to the accused should be analysed in light of the stringent standard of domestic law. While it might be true that the ICTY judiciary has held that international law does not necessarily require that criminal conduct be proscribed in a statute, this is because there is no international criminal code or 'international criminal law order' or 'international worldwide constitution'. The SPO's claim that 'flexibility in terminology must be permitted' may be taken into consideration by international courts applying international law but is categorically prohibited by the Constitution, which clearly requires, through the duality test, that all criminal laws should be introduced by way of legislated statute.

II. CONCLUSION

43. In light of all the aforementioned, the Defence for Mr Veseli respectfully requests that the Pre-Trial Judge accepts its challenge to JCE as a valid mode of liability at the KSC.

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