In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**A Court of Appeals Panel** Judge Michèle Picard Judge Emilio Gatti Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Kadri Veseli
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Veseli Defence Response to SPO Appeal against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers'

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I. INTRODUCTION

1. The Defence for Mr Kadri Veseli ("Defence") hereby submits its Response to the SPO Appeal Against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers' ("SPO Appeal").[1]

2. The SPO raises two grounds of appeal. Neither substantiates any error which would necessitate setting aside the relevant section in the Impugned Decision.

3. With respect to the SPO's first ground, whether the question of JCE III's application to specific intent crimes is a jurisdictional issue, the SPO fails to provide a legal basis in KSC law for the distinction it attempts to draw between challenges to the 'contours' of the doctrine, and challenges to its 'availability'. The Defence submits that this distinction is meaningless, and that the SPO's selective deployment of ICTY precedent to bolster its case should be rejected.

4. With respect to its second ground, whether JCE III may attach to special intent crimes, the SPO fails to demonstrate that the Pre-Trial Judge's rejection of the ICTY's doctrine was legally erroneous. Contrary to the SPO's submissions, the approach followed by the ICTY (i) does not reflect customary international law; (ii) constitutes a significant legal anomaly by undermining crucial notions such as 'personal culpability' and 'causation'; and, considering the purely legal nature of the issue, (iii) is not a matter that needs to be left to trial.

II. RESPONSE

A. Ground 1

5. The SPO merely repeats previous submissions by claiming, without any legal basis, that only challenges to modes of liability, in their entirety, may be

[1] KSC-BC-2020-06/IA009/F00014, Prosecution Appeal against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers' pursuant to Rule 97(3) with public annex 1, 27 August 2021 ("SPO Appeal").

considered as jurisdictional challenges.[2] Such a restrictive interpretation is inconsistent with both the text and spirit of Rule 97(1)(a) of the Rules.

6. The Defence recalls that Rule 97(1)(a) of the Rules and Articles 39(1) of the Law simply relate to challenges to the 'jurisdiction' of the KSC. These provisions do not qualify or limit the concept of jurisdiction for the purposes of such challenges. Accordingly, a challenge to the subject-matter jurisdiction of the KSC may be understood as relating to any motion, which, if granted, would have the effect of barring the applicability of (i) a certain crime; (ii) a mode of liability; or (iii) a mode of liability to a certain type of crime.

7. The argument that the scope of JCE III is not a jurisdictional issue because it engages the 'contours' as opposed to the 'availability' of this mode of liability is unpersuasive. A crime is inoperable without an applicable mode of liability; together, they are the composite elements of subject-matter jurisdiction. If it is correct that JCE III does not attach to specific intent crimes, then those crimes charged via this mode of liability are outside the Court's jurisdiction.[3]

8. This becomes apparent by contemplating an indictment that consists solely of specific intent crimes alleged to have been committed pursuant to JCE III. In such a scenario, a successful challenge to the 'contours' of JCE III would preclude the Court from exercising its jurisdiction entirely. This demonstrates that it is not a 'factual' or 'procedural'[4] matter best addressed at trial. It is self-evidently one which is preliminary and jurisdictional in nature, and best addressed at the outset of the proceedings.

[2] SPO Appeal, paras 11-13; KSC-BC-2020-06/F00263, Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise (JCE), 23 April 2021, para. 9.
[3] Guénaël Mettraux, *International Crimes and the ad hoc Tribunals* (OUP, 2005), 259.
[4] *Contra* SPO Appeal, para. 12.

9. The Defence observes that the decisions issued by Appeals Chamber of the *ad hoc* tribunals on what constituted a jurisdictional challenge are inconsistent.[5] The SPO appeals to the narrower view adopted in some of those cases,[6] ignoring cases such *Rwamakuba*, where the Appeals Chamber found that an identical challenge to the one at issue here was jurisdictional.[7] The Defence submits that choosing one line of cases over the other would introduce an element of arbitrariness into the judicial process of this Court, given that one line did not clearly overrule the other.[8]

10. In sum, neither Rule 97(1)(a) nor Article 39(1) qualify or limit the notion of jurisdiction for the purposes of jurisdictional challenges. The Defence submits that the distinction between 'contour' and 'availability' is nonsensical and should not be imported into the law of this Court, either by reliance on ICTY jurisprudence, which is problematic on this point, or by any other means.

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[5] ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR72.1 Decision on Radovan Karadžić's Motions Challenging Jurisdiction (Omission liability, JCE-III – Special Intent Crimes, Superior Responsibility), 25 June 2009, para. 34 (many of the decisions cited by *Karadžić* lend some support to the view that even relatively granular issues, such as the contours and elements of modes of liability, could be jurisdictional in nature").

[6] SPO Appeal, fn. 33.

[7] ICTR, *Prosecutor v. Rwamakuba*, 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, paras. 14-15. The Appeals Chamber reasons that the earlier decision is less persuasive because it was taken by a smaller number of judges (three as opposed to five). While this may be considered evidence of the weight of judicial opinion at that tribunal under the circumstances there, it is not evidence that the matter was correctly decided as a matter of law.

[8] The Defence notes that Appeals Chamber in *Karadžić* (espousing the narrower view) appears to have placed weight on the fact that earlier decisions were taken by smaller panels of three as opposed to five judges, to justify departure from them.[8] The Defence submits that while the ruling of a (slightly) larger panel may possibly be considered stronger evidence of overall judicial opinion at the ICTY under the circumstances at the time, it does not establish that earlier decisions were incorrectly decided as a matter of law. ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR72.1 Decision on Radovan Karadžić's Motions Challenging Jurisdiction (Omission liability, JCE-III – Special Intent Crimes, Superior Responsibility), 25 June 2009, para. 34.

B. Ground 2

11. In essence, the SPO claims that the Pre-Trial Judge erred in departing from ICTY case-law, in favour of the approach followed by the STL, SCSCL (and ECCC).[9] It contends that the application of JCE III to specific intent crimes is *not* legally anomalous, contrary to the STL decision endorsed by the Pre-Trial Judge.[10] The SPO adopts a three-pronged attack.

12. The **first prong** concerns the claim that ICTY case-law reflects customary international law as first established in the 'landmark *Tadić* Appeals Judgment'.[11] However:

- In *Tadić*, the ICTY Appeals Chamber simply stated, in an apparent *dictum*, that JCE may attach to crimes envisaged in the Statute;[12]
- In *Rwamakuba*, the ICTR Appeals Chamber actually rejected the prosecution's argument that, once JCE was recognised under customary international law, it would apply to all crimes.[13] However, when 'ascertaining' that customary international law did recognise the applicability of JCE in relation to genocide, the Appeals Chamber relied exclusively on WWII case-law supporting the existence of JCE I only;[14]

[9] It is not clear why the SPO considers the majority view, 'a minority of judicial opinions', SPO Appeal, para. 19.
[10] SPO Appeal, para. 14 (citing to the Pre-Trial Judge's Decision at para. 208, which references STL, STL-11-01/I/AC/R176*bis*, Interlocutory Decision on the Applicable Law, 16 February 2011, para 248).
[11] SPO Appeal, para. 15.
[12] ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeal Judgment, 15 July 1999, para. 188.
[13] ICTR, *Prosecutor v. Rwamakuba*, ICTR-98-44-AR7, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004, para. 12 ('The Prosecution essentially argues that a mode of liability, once recognized as customary international law, applies to all crimes; because *Tadic* concluded that the doctrine of common purpose was recognized as of 1992, all persons accused of criminal acts committed after that year were subject to prosecution through that mode of liability, regardless of which crime was charged. The Prosecution does not cite any authority specifically advancing this proposition.')
[14] ICTR, *Prosecutor v. Rwamakuba*, ICTR-98-44-AR7, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004, paras 15-25.

- In *Đorđević*, where the ICTY Appeals Chamber recalled its prior findings that JCE applies to all crimes, it relied solely on *Tadić* and *Rwamakuba;*[15]
- In *Stanišić & Župljanin*,[16] the ICTY Appeals Chamber simply repeated its previous holding in *Đorđević*;[17]
- In *Brđanin,* as Judge Mettraux correctly puts it, the ICTY Appeals Chamber 'failed to provide any authority (let alone any state practice or *opinio juris*) which would support its finding under customary international law';[18]
- In *Stakić* and *Milošević*, the Appeals Chamber cites only *Brđanin;*[19]
- In the remainder of the cases cited by the SPO in support of its position – *Krstić, Martić,* and *Sainović* – the Appeals Chamber simply upholds the Trial Chamber's decisions without reference to any authorities.[20]

13. It follows that the SPO's claim that the ICTY found that 'applying JCE III to all crimes was reflective of customary international law',[21] is misleading. The ICTY could not find – because it did not exist – any precedent which supported the view that customary international law recognised the application of JCE III liability to special intent crimes.

[15] ICTY, *Prosecutor v. Đorđević*, IT-05-87/1-A, Appeal Judgement, 27 January 2014, para. 81, fn 258.
[16] SPO Appeal, para. 20.
[17] ICTY, *Prosecutor v. Stanišić & Župljanin,* IT-08-91-A, Appeal Judgement, 30 June 2016, para. 599, fn. 2055.
[18] Guénaël Mettraux, *International Crimes and the ad hoc Tribunals* (OUP, 2005), 265 (referencing *Prosecutor v. Brđanin,* IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004).
[19] ICTY, *Prosecutor v. Stakić*, IT-97-24-A, Appeals Judgement, 22 March 2006, para.38, fn 38; ICTY, *Prosecutor v. Milošević*, IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004, para. 291, fn 758.
[20] ICTY, *Prosecutor v. Krstić*, IT-98-33-A, Appeals Judgment, 19 April 2004, para. 150; ICTY, *Prosecutor v. Martić*, IT-95-11-A, Appeals Judgement, 8 October 2008, paras 194-195, 202-204, 205; ICTY, *Prosecutor v. Šainović et al.*, IC-05-87-A, Appeals Judgement, 23 January 2014, paras 1089-1093, 1280-1283.
[21] SPO Appeal, para. 20.

14. The **second prong** of the SPO's argument claims that the STL Appeals Chamber committed the same logical error as the Trial Chamber in *Brđanin*, by 'conflating the *mens rea* required for the mode of liability with the *mens rea* required for a particular act'.[22] In reality, as Judge Mettraux has observed, it was the *Brđanin* Appeals Chamber that conflated 'modes of liability and *chapeau* elements of the offence and […] ignore[d] the specificity of that crime'.[23] As Mettraux explains:

> The special genocidal intent does not form part of the *mens rea* specific to the mode of participation. Instead, it is an element of the *chapeau* of the offence which characterizes it as an international crime and which must be met (as with the requirement of a 'widespread or systematic attack on a civilian population' and knowledge thereof for crimes against humanity) in relation to each and every individual charged with such a crime. Unless all *chapeau* elements are met by the accused individually, he or she is not participating in an international crime, but in something else and his acts do not come within the Tribunal's jurisdiction.[24]

15. In line with this observation, Cassese pointed out that it would be illogical to accuse someone of 'committing a crime that requires special intent (in addition to the intent needed for the underlying crime) unless that special intent can be proved, whatever the mode of responsibility.'[25] Otherwise, he concluded, 'the crucial notions of "personal culpability" and "causation" would be torn to shreds.'[26]

16. It is telling that the SPO cannot cite even one authority in favour of its proposition that the STL Appeals Chamber's approach was erroneous. Indeed, Professor van Sliedregt (cited by the SPO)[27] appears to directly contradict the SPO's position:

> [I]t is interesting that the Special Tribunal for Lebanon, in its interlocutory decision on the crime of terrorism, has held that extended JCE does not apply to a special intent

[22] SPO Appeal, paras 15-19.
[23] Guénaël Mettraux, *International Crimes and the ad hoc Tribunals* (OUP, 2005), 265.
[24] Mettraux, *International* Crimes at 259 (citations omitted).
[25] Antonio Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of JCE', 5 JICJ (2007) 121.
[26] Antonio Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of JCE', 5 JICJ (2007) 122.
[27] SPO Appeal, fn. 43.

> crime like terrorism and that a person's attitude under extended JCE should be regarded as assistance to the terrorist act rather than a form of perpetration. This ruling may be welcomed for recognizing the differentiation within the JCE concept.[28]

17. The **third prong** of the SPO's argument[29] claims that the STL Decision is inferior because it was issued in *abstracto*, and thus failed to consider the 'specific circumstances of trial'[30] and precluded the Tribunal from taking advantage of the 'ample space to differentiate between different types of perpetrators' during sentencing.[31] None of the submissions it makes in support of this contention are convincing.

18. To begin with, the hypothetical trial scenario described by the SPO, whereby an accused is shown to have the special intent required to persecute Victim B, but the crime at issue was unintended yet foreseeable'[32] is illogical and contradictory since it assumes that an accused may have, at the same time, both JCE I and JCE III *mens rea* vis-à-vis the same victim.[33]

19. Further, the intimation that the parties should 'wait and see' if what is currently pleaded as JCE III transforms into JCE I based on the evidence at trial[34] evinces a worryingly casual approach to international prosecutions particularly where, as here, it has had ten years to investigate the case. The SPO is expected to have analysed its own evidence *before* presenting the Indictment. It must, therefore, be assumed that its evidence taken at its highest is not capable of supporting JCE I. If new evidence (previously unknown to the SPO) emerges that is capable

[28] Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (OUP 2012) 142 (quoting Van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide', 5 JICJ (2007) 184–207, 205, arguing that JCE III may attach to special intent crimes only if the accused is charged for "participating" in a genocidal JCE rather than "committing" genocide.
[29] SPO Appeal, paras 21-25.
[30] SPO Appeal, para. 22.
[31] SPO Appeal, para. 25.
[32] SPO Appeal, para. 21.
[33] SPO Appeal, fn 53 ('even though the accused meets all the elements for JCE III and has persecutory intent')
[34] SPO Appeal, para. 22.

of supporting a different mode of liability, then the Law and the Rules provide for the relevant remedies, including potential amendments to the Indictment.

20. The Defence observes that the SPO also mischaracterises the STL Appeals Chambers remarks on stigma. The SPO contends that the 'avoidance of the stigma of full perpetratorship' is not a compelling reason to preclude JCE III from attaching to specific intent crimes, given that there is no clear difference in the stigma that attaches to, for example, murder and persecution.[35] Yet, in that instance, the STL Appeals Chamber was referring to the 'stigma' of someone having 'committed' the crime, as opposed to rendering 'assistance':

> JCE III makes the 'secondary offender' a perpetrator, while aiding and abetting is evidently a lower mode of liability: one can be liable for less than direct intent because the system does not intend to pin on him the stigma of full perpetratorship, but rather that of a less serious participatory modality.[36]

21. Finally, the Defence submits that the SPO cannot meaningfully advocate for the KSC to follow the ICTY approach, *except* when it comes to the hierarchy of the modes of liability.[37] The distinction in ICTY case-law between commission/perpetration and aiding and abetting, whereby the latter mode of liability is less blameworthy than perpetration was central to its sentencing doctrine.[38] The SPO's attempt to minimise the significance of modes of liability as it relates to sentencing cannot be reconciled with its vigorous endorsement of ICTY jurisprudence on modes of liability elsewhere in its appeal.

22. The Prosecution has failed to present any legitimate reasons to demonstrate either that the Pre-Trial Judge was wrong to depart from ICTY jurisprudence,

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[35] SPO Appeal, para. 23.
[36] STL Interlocutory Decision, para. 249.
[37] SPO Appeal, paras 23-24.
[38] ICTY, *Prosecutor v. Vasiljević*, Case IT-98-32-A, Appeal Judgement, 25 February 2004, para. 182. The Defence further notes that the ICTR authority in footnote 58 is misplaced since the Appeals Chamber in *Kayishema and Ruzindana* was referring to lack of hierarchy in respect of 'crimes', rather than 'modes of liability'.

or that this matter is best left for trial. Accordingly, Ground 2 of the SPO Appeal should also fail as unfounded.

III. CONCLUSION

23. In view of the foregoing, the Defence respectfully requests the Appeals Chamber Panel to dismiss the SPO Appeal in its entirety.

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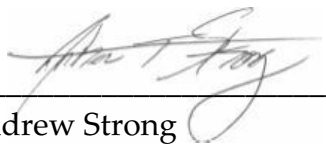

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