PUBLIC
Date original: 21/10/2022 18:57:00
Date public redacted version: 08/05/2023 13:22:00

In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Trial Panel II**
	Judge Charles L. Smith III
	Judge Christoph Barthe
	Judge Guénaël Mettraux
	Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Rexhep Selimi
Date:	8 May 2023
Language:	English
Classification:	Public

Public Redacted Version of Selimi Defence Pre-Trial Brief, KSC-BC-2020-06/F01049, dated 21 October 2022

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TABLE OF CONTENTS

I. INTRODUCTION

1. Pursuant to Rule 95(5) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers,[1] the Defence team for Mr. Rexhep Selimi hereby files its Pre-Trial Brief ("Defence PTB") in response to the charges as pleaded against Mr. Selimi in the Amended Indictment and described in further detail in the Specialist Prosecutor's Office ("SPO") Pre-Trial Brief.[2]

2. The SPO case against Mr. Selimi is constructed around a Joint Criminal Enterprise ("JCE") that simply did not exist. The SPO has aggregated almost every sporadic and disparate incident of violence that occurred in the Kosovo conflict, erroneously assuming that they must have been born of a common plan, formed and directed by Mr. Selimi and his co-accused, as if they could not have occurred without one. This logical fallacy is replicated throughout the allegations, relied upon to demonstrate Mr. Selimi's alleged contribution to this plan. Any action on the part of Mr. Selimi is artificially construed by the SPO to amount to a contribution to the alleged plan, or otherwise proof of aiding and abetting. The SPO's desperation in relying on such allegations is telling.

3. The only plan on the part of Mr. Selimi during the Indictment Period was to fight against the Serb military, paramilitary, and police forces directed by Serbian President Slobodan Milošević, who were responsible for perpetrating horrific violence against Kosovo Albanians, both as war crimes and crimes against humanity. This plan was entirely legitimate, did not include unlawful violence, and was wholly supported both by the Kosovo Albanian population and the

[1] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ("Rules"). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.
[2] KSC-BC-2020-06, F00709/A02, Annex 2 to Prosecution submission of corrected Pre-Trial Brief and related request with strictly confidential and *ex parte* Annexes 1 and 3 and confidential Annex 2, 24 February 2022 ("SPO PTB").

international community, ultimately achieving the long-sought liberation of Kosovo.

4. Perhaps aware of the fundamental absence of logic or evidence to buttress its JCE allegations, the SPO's attempts to fall back on Mr. Selimi's responsibility as a superior are similarly misplaced. The SPO's assertions as to the organised military hierarchy and structure of the Kosovo Liberation Army ("KLA") during the time of the alleged crimes are fanciful, and conspicuously fail to reflect the voluntary, informal, and decentralised way in which the KLA was created and the chaotic circumstances in which it was forced to operate.

II. PURPOSE AND LIMITATIONS ON DEFENCE PRE-TRIAL BRIEF

A. Nature and purpose of the Defence Pre-Trial Brief

5. At the outset of this Brief, it is of utmost importance to underline the respective roles of the Parties at this stage of proceedings and their obligations towards one another, as well as towards the Trial Chamber, in the filing of their Pre-Trial Briefs.[3]

6. The SPO's responsibility to the Defence, as the charging body, is to provide sufficient clarity as to the nature of its case and its evidential basis, in order to facilitate the fair preparation of a meaningful defence to the criminal charges it seeks to prove, while respecting the rights of the Accused, in accordance with

[3] In this respect, taking into account the relative paucity of jurisprudence generated at the KSC on this specific issue, the parameters of this Brief are also guided by the practice at the international tribunals that, similar to the KSC, make provision for the submission of Pre-Trial Briefs in their procedural framework, namely the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), the Special Tribunal for Lebanon ("STL") and the Special Court for Sierra Leone ("SCSL"). It is noted, however, that although the International Criminal Court ("ICC") does not make specific provision for the submission of Pre-Trial Briefs in its framework, recent practice has tended towards requesting Briefs from the parties on a case-by-case basis.

the Law,[4] the Rules, and the various international human rights treaties applicable in the present circumstances.

7. The Defence is under no obligation to present a case at the conclusion of the Prosecution's evidence, though it may choose to do so pursuant to the relevant provisions of Rule 119. The Defence is therefore under no obligation to notify the Prosecution at this stage of proceedings as to any case it may present at that later stage.

8. Rule 95(5) provides that, upon the acceptance of the invitation issued by the Pre-Trial Judge to file, within a set time limit, a Pre-Trial Brief, the Defence shall file a Brief which indicates:

(i) In general terms, the nature of the Accused's defence;

(ii) The charges and matters which the Accused disputes, by reference to particular paragraphs in the Specialist Prosecutor's Pre-Trial Brief, and the reasons why the Accused disputes them; and

(iii) A list of potential witnesses the Defence intends to call, without prejudice to any subsequent amendment or filing thereof. In relation to each witness, the Defence shall specify to which particular relevant issue the evidence relates.

9. In line with its role as the charging party, the Prosecution is required to file a more comprehensive Pre-Trial Brief addressing in detail the issues to be raised and to provide information about the witnesses and the evidence that will be

[4] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ("Law"). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

provided by those witnesses, as well as the exhibits it intends to use at trial, a relatively extensive obligation.[5]

10. By contrast, the Defence PTB is primarily intended to be a response to the Prosecution's Pre-Trial Brief. It is a tool for identifying areas of possible agreement between the parties so that the trial may be conducted as efficiently as possible.[6]

11. Although the Rules of Procedure and Evidence at the *ad hoc* tribunals oblige the Defence to address both "factual and legal" matters it disputes from the Prosecution Pre-Trial Brief, it must be noted that Rule 95(5) contains no such explicit requirement, instead referring only generally to "charges and matters" in dispute.

12. Further, the SPO Pre-Trial Brief contained no explicit analysis of the law underlying the charges. Nonetheless, to assist the Pre-Trial Judge and Trial Chamber, the Defence will identify aspects of law with which the Defence takes issue,[7] as well as highlight jurisprudence relevant to a fair determination of the charges; subject to the right being reserved to further challenge or to dispute any legal issue related to those charges as, and when, they arise throughout the course of trial.

[5] ICTY, *Prosecutor v. Brđanin & Talić*, IT-99-36-PT, Decision on Prosecution Response to "Defendant Brđanin's Pre-Trial Brief', 14 January 2022, para. 2 ("Brđanin Decision"); *Prosecutor v. Mrkšić et al*., IT-95-13/1, Decision on Prosecution's Motion for Relief Pursuant to Rule 65ter (F), 10 October 2005, para. 3 ("Mrkšić Decision").
[6] Brđanin Decision, para. 4; Mrkšić Decision, para. 3; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ/F1176, Decision on the Prosecution's Motion Regarding the Defence Updated Pre-Trial Briefs, 5 July 2013, para. 19 ("STL First Decision").
[7] Brđanin Decision, para. 12; STL First Decision, para. 25.

13. The Defence is not required to produce, at this stage, specific details as to the evidence it intends to adduce in the course of its case,[8] nor to provide any further support for its assertions.[9]

14. The Defence is neither obliged to make any admissions at any stage of the trial, nor to *disprove* the SPO's charges. Any aspect of the SPO's case, which is not expressly or implicitly addressed or rebutted, should not be considered an acceptance of, or concession to, any point of law or alleged fact, unless expressly stated to the contrary.

15. However, for clarity, the position of the Defence for Mr. Selimi is that all charges are refuted in their entirety, and it is the unwavering position of the Defence that each of these charges, as well as their corresponding modes of liability, are devoid of any evidential basis upon which a reasonable Panel could enter a conviction.

B. Limitations on Defence Pre-Trial Brief

16. The nature of Mr. Selimi's defence, the charges and matters which are disputed, along with the underlying reasons for such dispute are set out herein. However, the Defence's ability to do so is substantially limited by the following factors: (1) the scope and impact of the extensive protective measures ordered in the case; (2) the delays and failures of all forms of disclosure; and, most importantly (3) the limitations, errors, and omissions in the SPO PTB and Outline.[10]

[8] Mrkšić Decision, para. 3. *See also* Brđanin Decision, para. 10.
[9] Brđanin Decision, para. 10.
[10] KSC-BC-2020-06, F00647/A02, Annex 2 to Prosecution submission of lesser redacted versions of Indictment and Rule 86(3)(b) outline with confidential redacted Annexes 1-2, 17 January 2022 ("Outline").

1. Scope and impact of protective measures

17. Pre-trial proceedings have lasted for almost two years. While no trial date is yet set, it is reasonably expected that trial proceedings will commence early in 2023. Despite this advanced pre-trial procedural posture, the Indictment, the SPO PTB and significant amounts of evidence relied upon by the SPO are replete with extensive redactions.

18. The Defence recognises these redactions have either been judicially authorised or are otherwise within the legal authority of the SPO, and that the Pre-Trial Judge has considered the impact of these redactions on Defence preparations when granting the SPO requests.

19. However, they do prevent the Defence from properly understanding the nature and cause of the case against Mr. Selimi and comprehensively responding to it herein. The impact of these redactions is set out below.

a. Indictment and Pre-Trial Brief

20. Two paragraphs of the Amended Indictment in relation to the allegations against Mr. Selimi are redacted in their entirety,[11] with partial redactions applied to two further paragraphs.[12] It is unclear whether these paragraphs relate specifically to Mr. Selimi but given their position in the Indictment, and references to him in other parts of those redacted paragraphs,[13] it is reasonably likely that this may be the case.

21. Extensive redactions appear throughout the text of the SPO PTB, even in relation to allegations directly against Mr. Selimi, for example:

[11] KSC-BC-2020-06, F00999/A02, Annex 2 to Submission of confirmed Amended Indictment with strictly confidential and *ex parte* Annex 1, confidential Annex 2, and public Annex 3, 30 September 2022, paras 41 and 42 ("Amended Indictment").
[12] Amended Indictment, paras 43, 49.
[13] Ibid, para. 49 which refers to the [REDACTED].

"272. [REDACTED]."

22. Similarly, even where the text of the allegation in the SPO PTB is not redacted, the underlying information which purports to support it is entirely redacted:

"145. [REDACTED]."

23. The footnote underlying this allegation is entirely redacted, with the allegation neither appearing in the Amended Indictment, nor with any further information appearing in the Outline, thereby preventing the Defence from taking any meaningful position on the allegation or evidence relied upon by the SPO to support it.

24. Finally, in relation to underlying crimes, redactions are applied to 40 of the Amended Indictment paragraphs.[14] While these underlying crimes largely do not specifically mention Mr. Selimi, redactions appear in relation to one detention centre where he is named.[15] Many allegations relating to underlying crimes in the SPO PTB are also redacted, both in the substance of the brief as well as the supporting evidence. By way of example, in relation to [REDACTED]:

"566. [REDACTED]."

25. These examples represent a non-exhaustive cross-section of the extensive redactions applied throughout the SPO PTB.

b. Redactions to underlying evidence

26. Throughout the pre-trial phase, the SPO has requested, and has been granted, extensive protective measures in relation to approximately one third of the total number of SPO witnesses.

[14] Ibid, within the range of paras 66-168.
[15] Ibid, para. 79.

27. At the time of this filing, the actual number of exhibits on the operative version of the SPO exhibit list is 18,226.[16] Of these, redactions have been applied to many thousands of exhibits.

28. Any protective measures impede the Defence's ability to know the case against it.[17] However, the impact of such measures in this case has been exacerbated due to the piecemeal manner in which they have been sought, with the applications for the protected witnesses being divided over twelve separate requests, spread out over the course of 11 months.

29. Instead of organising these witnesses according to thematic or substantive connection, each request has simply grouped together witnesses without any common thread.

30. Given that these requests themselves require extensive redactions, it has often been largely impossible for the Defence to make meaningful submissions in response. Most of the redactions to statements of protected witnesses will only be lifted thirty days before trial is due to start, or thirty days before a particular witness is due to testify. For certain witnesses, these redactions impact many documents, especially where prior testimony exists. It is therefore the case that the Defence will be unable to investigate the evidence of these witnesses until close to the beginning of trial and even during trial proceedings.

31. These redactions must be assessed in conjunction with the redactions to the Indictment and SPO PTB. Although the redactions to the Indictment and SPO PTB may be consistent with such protective measures and indeed necessary

[16] The most recent amended exhibit list was submitted by the SPO on 13 September 2022, KSC-BC-2020-06, F00788/A02, Annex 2 to Prosecution submission of amended exhibit list with strictly confidential and *ex parte* Annex 1 and confidential Annex 2.
[17] KSC-BC-2020-06, F00127, Selimi Defence Response to Confidential Redacted Version of Specialist Prosecutor's 'Request for Protective Measures' and Supplement to Request for Protective Measures', 8 December 2020.

because of them, the combined impact is that for many allegations the Defence simply cannot identify with sufficient clarity the specific allegations against Mr. Selimi or its purported support. Instead of phrasing its charging documents in a manner which allows the Defence to be informed of at least the allegation, if not the evidence, the SPO has created an environment where the Defence's ability to respond thereto is severely curtailed.

2. Disclosure delays and failures

32. Prompt disclosure is a prerequisite for efficient and effective pre-trial and trial proceedings. As the KSC employs adversarial proceedings, the SPO maintains primary responsibility for the gathering of evidence, a task undertaken in different guises since the SITF started operating in October 2011, eleven years ago. Further, the SPO holds a corresponding responsibility for reviewing, categorising, and ultimately disclosing the evidence relevant to the charges against Mr. Selimi, pursuant to Rules 102(1)(b), 102(3) and 103. Yet, the SPO has consistently failed to adequately meet these obligations.

33. First, notwithstanding its wildly optimistic initial estimation of when it could commence trial,[18] and thus the fulfilment of its Rule 102(1)(b) obligations, the SPO has only now completed Rule 102(1)(b) disclosure for all its 319 witnesses, after repeatedly seeking, and being granted, extensions of the deadline for such disclosure.

34. Despite being ordered to categorise such disclosure by the Pre-Trial Judge,[19] Rule 102(1)(b) disclosure has been, at best, haphazard. Each disclosure batch appears to comprise a randomly selected collection of documents, without any categorical link. Translations have been disclosed with a different ERN to the

[18] KSC-BC-2020-06, F00076, Prosecution Submissions for first Status Conference, 13 November 2020, para. 2.
[19] KSC-BC-2020-06, F00218, Decision on Categorisation of Evidence under Rule 109(c) and Related Matters, 12 March 2021, para. 27(d) ("Categorisation Decision").

original language version and no link provided to match both documents, the same deficient practice being employed in the disclosure of lesser redacted versions of documents. Even where documents have been linked to Mr. Selimi, or to a specific mode of liability pursuant to the Categorisation Decision, this has often been subject to error, as admitted by the SPO.[20]

35. Second, the SPO's approach to the disclosure of exculpatory evidence "immediately" pursuant to Rule 103 has been lackadaisical at best. While the first batch of Rule 103 materials was disclosed early in pre-trial proceedings,[21] the remainder was de-prioritised, and it is unclear, even at this late stage in proceedings, whether this procedure has been completed. The importance of exculpatory evidence and its immediate disclosure to the Defence is self-evident not only to Defence preparation, but also to Defence investigations.

36. Moreover, many of the exculpatory documents that were disclosed, had clearly been in the possession of the SPO since well before the Indictment was confirmed against Mr. Selimi.[22] The SPO has offered no coherent or justifiable reason for delaying its disclosure, beyond those entirely dependent on its own choices as to scope of the case it has charged and the consequential disclosure obligations that this decision necessarily entailed.

37. Further, many of the documents now disclosed under Rule 103 originally appeared on the Rule 102(3) list, illustrating that the SPO had not properly conducted a thorough review of its holdings for exculpatory evidence before providing the 102(3) list to the Defence.

[20] KSC-BC-2020-06, Transcript, 29 October 2022, p. 671 lines 22-25.
[21] Disclosure Batch 8, 10 December 2020.
[22] KSC-BC-2020-06, F00724, Thaçi Defence Motion for an Independent and Impartial Review of Exculpatory Material, 29 March 2022; KSC-BC-2020-06, F00735, Selimi Defence Joinder to F00724 and F00730, 15 March 2022.

38. Third, the scope and process for disclosure of the extensive materials on the Rule 102(3) list has severely hampered the preparation of the Defence PTB.

39. The SPO prepared the original Rule 102(3) list on 31 July 2021 which included 68,753 items. To facilitate the process of Rule 102(3) disclosure, the Defence requested that all materials on this list be provided, a request vigorously opposed by the SPO.[23] Consequently, the Defence first requested items from the list on 24 September 2021 with the final request submitted on 7 March 2022.

40. Further to the Pre-Trial Judge's Order,[24] the SPO was obliged to have discharged its Rule 102(3) obligations by 30 September 2022. However, not all documents requested by the Defence were timeously disclosed, as the SPO sought protective measures and challenged the materiality of a substantial number of these documents and indeed, the Defence have not received the documents in redacted format, as a judicial decision is pending on these requests.[25]

41. Moreover, on 7 October 2022, the SPO submitted a supplemental Rule 102(3) Notice, listing items falling under Rule 102(3) either identified or cleared since the July 2021 Notice during the SPO investigation process[26]. This Supplemental Note consists of almost 9,000 additional items, with no deadline yet set for the process of request and subsequent disclosure from this list.

42. The combined effect of these deficiencies would have prejudiced any Defence in its preparation of a PTB, irrespective of the size of case pleaded. However, given the size and nature of the SPO case in this instance, their effects are magnified

[23] KSC-BC-2020-06, Transcript, 29 October 2022, p. 694 lines 3-25.
[24] KSC-BC-2020-06, Transcript, 20 May 2022, p. 1323 lines 16 - 25.
[25] The Defence requested an Order from the Pre-Trial Judge to require such applications to be filed by 26 August 2022, to allow for judicial resolution before 30 September 2022 which was implicitly rejected by the Pre-Trial Judge. *See* Selimi Submissions for the Thirteenth Status Conference, para. 16(iii).
[26] KSC-BC-2020-06, F01021, Prosecution supplemental Rule 102(3) notice with confidential Annex 1, 7 October 2022.

and have severely hampered the Defence's ability to identify, assess, review, and consequently respond to the evidence through this PTB.

3. Limitations of SPO Pre-Trial Brief & Outline

43. The SPO PTB of 78,696 words fails to properly inform the Pre-Trial Judge, Trial Chamber and the Defence of its case, and limits the ability of the Defence to set out its position on legal and factual issues.

a. Absence of submissions on the law

44. Pursuant to Rule 98(e)(vi), the Pre-Trial Judge is required to submit a Handover Document which summarises "the questions of fact and law that are in dispute" which the Pre-Trial Judge has consistently referred to in the pre-trial status conferences.

45. There are no specific submissions on the law in the SPO Pre-Trial Brief. Instead, the SPO appears to simply repeat elements of alleged offences, modes of liability or jurisdictional elements, without confirming that it considers these to be the legal elements or standards, or their basis.

46. While the Defence raised this issue,[27] the SPO contended that it had provided its full position in response to Defence challenges to jurisdiction, referring to it as a "huge referendum".[28] However, as the SPO itself argued, such challenges were limited to the jurisdictional basis for modes of liability or crimes rather than their elements.[29] Further, the jurisdiction challenges raised by the Defence only

[27] KSC-BC-2020-06, Transcript, 20 May 2022, p. 1288 lines 7-10.
[28] KSC-BC-2020-06, Transcript, 20 May 2022, p. 1288 lines 22-25.
[29] KSC-BC-2020-06, F00263, Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise (JCE), 23 April 2021; 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.

addressed certain modes of liability and underlying offences in the Indictment.[30] As such, though some legal issues were addressed in the context of jurisdictional litigation, that is no substitute for the SPO setting out what it considers the law that applies to each and every crime or mode of liability in the Indictment.

47. With the burden on the SPO to prove its case beyond reasonable doubt, that is to prove each element of the charged crime (as defined with respect to the relevant mode of liability), the SPO's refusal to set out these legal standards is glaring.[31]

b. Failure to adequately set out the SPO case

48. The SPO PTB is manifestly deficient in how it presents its case and the evidence upon which it relies. In many ways, the absence of any reference to the vast number of exhibits included in the SPO Rule 95(4)(c) Exhibit List and of a substantial number of witnesses from the SPO Rule 95(4)(b) Witness List necessarily infers the fact that the SPO has padded both its exhibit and witness lists with witnesses it has no intention to call, and exhibits it has no intention of tendering.

49. Moreover, the SPO PTB conspicuously fails to refer to the allegations as they appear in the Amended Indictment. Noticeably, apart from generic reference to the "Indictment Period",[32] there are barely any references to the paragraphs of the Indictment to which these allegations relate.[33]

[30] KSC-BC-2020-06, F00198, Selimi Defence Challenge to Jurisdiction – Joint Criminal Enterprise, 10 February 2021; KSC-BC-2020-06, IA009/F00011, Selimi Defence Appeal against the "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 27 August 2021.
[31] ICTY, *Prosecutor v. Stakić*, IT-97-24-A, Appeals Chamber Judgment, 22 March 2006, para. 219 ("Stakić AJ").

[32] *See* e.g. SPO PTB, paras 267, 702, 703, 707.
[33] The Defence notes that at Fn. 1106 of the SPO PTB, the SPO explains that the locations and crimes set out below are in roughly chronological order, following the order they were presented in the Indictment. *See* Indictment, KSC-BC-2020-06/F00455/A01, paras 55-171, Schedules A-C; Amended Indictment, KSC-BC-2020-06/F00455/A02, paras 59-177, Schedules A-C.

50. This is particularly noticeable in relation to the specific allegations as to which conduct allegedly constituted Mr. Selimi's contribution to the JCE or the *actus reus* of aiding and abetting set out in paragraph 52(a)-(g) of the Indictment. As the SPO PTB may not create entirely new allegations against Mr. Selimi but must fall within these allegations as pleaded in the Amended Indictment, the SPO should have linked any allegation of Mr. Selimi's conduct in the SPO PTB to these more general allegations, yet conspicuously failed to do so.

C. Presumption of innocence and the standard/burden of proof

51. Article 21(3) and Rule 140 provide for the presumption of innocence and the standard of proof. It is for the SPO to prove, beyond reasonable doubt, all elements of the crimes charged, the underlying acts, and the modes of liability, absent any admissions or statements of agreed facts and/or law.[34] This burden of proof remains with the SPO throughout the trial.[35] Correlated to this burden is the fact that it is not for the Defence to disprove any of the charges brought against the accused, as doing so would constitute an impermissible shift in the burden of proof.[36]

52. The standard of proof beyond reasonable doubt must be applied not only to establish the facts forming the elements of the crime and mode of liability, *but also* with respect to the facts which are indispensable for entering a conviction and other facts needed to be proven beyond reasonable doubt due to the manner

[34] *See* e.g. ICTY, *Prosecutor v. Delalić et al*., IT-96-21-T, Trial Judgment, 16 November 1998, para. 599 ("Čelebići TJ"); *Prosecutor v. Brđanin*, IT-99-36-T, Trial Judgment, 1 September 2004, para. 22.
[35] ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Trial Judgment (Volume IV), 22 November 2017, para. 5250 ("Mladić TJ"); *Prosecutor v. Boškoski and Tarčulovski,* IT -04-82-T, Trial Judgement, 10 July 2008, para. 9.
[36] ICTR, *Ntawukulilyayo v. Prosecutor,* ICTR-05-82-A, Appeals Chamber Judgement, 14 December 2011, para. 103.

in which the case was pleaded.[37] If any facts essential to a finding of guilt are not proven beyond a reasonable doubt, no conviction can be entered.[38]

53. This standard applies whether the evidence presented by the SPO is direct or circumstantial.[39] On the evidence, guilt must not be determined to be *one* reasonable or likely conclusion, it must be the *only* reasonable conclusion.[40] Particularly with regard to circumstantial evidence this principle holds true.[41] If there is another available inference or conclusion which is also reasonably open from the evidence, taking into consideration what the evidence has proved and what is still unknown,[42] and which is consistent with the innocence of the accused, then a finding must be made in his favour.[43] Consistent with principle *in dubio pro reo*, a component of the presumption of innocence,[44] any ambiguity, doubt or uncertainty must always be ruled in favour of the accused.[45]

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[37] ICC, *Prosecutor v. Ngudjolo,* ICC-01104-02/12-271-Corr, Trial Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitles "Judgment pursuant to article 74 of the Statute", 7 April 2015, para. 124; ICTY, *Prosecutor v. Halilović,* IT-01-48-A, Appeals Chamber Judgement, 16 October 2007, para. 129 ("Halilović AJ"); ICTR, *Prosecutor v. Ntagerura et al.,* ICTR-99-46-A, Appeals Chamber Judgement, 7 July 2006, para. 175 ("Ntagerura AJ"); ICTY, *Prosecutor v. Blagojević and Jokić,* IT -02-60-A, Appeals Chamber Judgement, 9 May 2007, para. 226 ("Blagojević AJ").
[38] Ntagerura AJ, para. 175.
[39] Halilović AJ, para. l29; Blagojević AJ, para. 226.
[40] ICTY, *Prosecutor v. Stanišić and Simatović,* IT -03-69-T, Trial Judgment (Volume I), 30 May 2013, para. 7; *Prosecutor v. Blagojević and Jokić*, IT -02-60-T, Trial Judgement, 17 January 2005, para. 21 ("Blagojević TJ"); *Prosecutor v. Halilović*, IT-01-48-T, Trial Judgment, 16 November 2005, para. 15 ("Halilović TJ"); *Prosecutor v. Martić*, IT-95-11-A, Appeals Chamber Judgment, 8 October 2008, para. 55.
[41] Rule 140(3).
[42] ICC, *Prosecutor v. Bemba,* ICC-01105-01108-3636-Anx2, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, 8 June 2018, para. 14 ("Bemba AJ Majority Opinion").
[43] ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeals Chamber Judgment, para. 458 ("Čelebići AJ"); Stakić AJ, para. 219; *Prosecutor v. Strugar*, IT-01-42-T, Trial Judgement, 31 January 2005, para. 5; *Prosecutor v. Limaj et al.,* IT-03-66-T, Trial Judgement, 30 November 2005, para. l0 ("Limaj TJ"); Ntagerura AJ, para. 306.
[44] ICC, *Prosecutor v. Bemba,* ICC-01105-01108-3343, Judgment pursuant to Article 74 of the Statute, 21 March 2016, para. 218 ("Bemba TJ"); Bemba AJ Majority Opinion, para. 5; ICTR, *Renzaho v. Prosecutor*, ICTR-97 -31-A, Appeals Chamber Judgment, 1 April 2011, para. 474.
[45] ICTY, *Prosecutor v. Delić*, IT -04-83-T, Trial Judgement, 15 September 2008, para. 24; Blagojević TJ, para. 18; Halilović TJ, para. 12; ICTR, *Prosecutor v. Ntakirutimana et al*., ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber Judgement, 13 December 2004, para. 172.

III. RELEVANT FACTUAL CONTENT

54. The KLA did not exist in a vacuum. Instead, it was a consequence of the environment in which it was created, an environment which encouraged many thousands of Kosovo Albanians to wager their lives in an existential struggle against the more numerous, superiorly equipped and better trained Serb forces.

55. The SPO's conspicuous failure to address this vital factual background, and thus the reflexive nature of the opposition spawned by the immediacy of the Serb oppression and aggression, except in the most cursory manner, drastically undermines its theory of a well-defined and coherent structure and organisation within the KLA.

56. Ignoring this background, the SPO then seeks to draw together disparate individual actions, attempting to prove the existence of a coherent leadership structure and military hierarchy, with Mr. Selimi exercising rigid control in varying degrees of authority, since well before the beginning of the war, throughout the Indictment Period.

57. But this is a false proposition. The opposition to Serbian rule emerged as a people's movement, an uprising in self-defence or *levée en masse*, driven by the idea of a free Kosovo, shared by ordinary Kosovo Albanians, rather than a carefully planned, formal, hierarchical, and regular armed force. This opposition spread throughout all echelons of Kosovo Albanian society, who as a people were faced with the eradication or displacement of its population as a result of the violent and repressive campaign pursued against them for over a decade, fuelled by President Slobodan Milošević's brutal design for the creation of a Serb ethno-state in Kosovo.

A. Serb oppression and discrimination against Kosovo Albanians

58. Milošević was elected as Serbia's President in 1989 on a nationalist platform and quickly began the process of implementing the "Serbianisation of Kosovo" to oppose what Serbians viewed as the "Albanisation" of Kosovo. Milošević's inflammatory rhetoric during a speech at the six-hundredth anniversary of the 1389 Battle of Kosovo at Kosovo Polje, in which he demanded that Kosovo be restored to Serbian sovereignty, was emblematic of this extreme nationalistic policy.

59. At the time of this speech, the Serbian Parliament had already amended the country's constitution in March 1989 to modify the status of Kosovo, suspending the autonomy of the Kosovo Provincial Government, thereby granting the Serbian Assembly greater direct authority over Kosovo's security, judicial, financial, and social planning in 1989. Although prior to this, formally the Kosovo Albanians were granted autonomy under the Federal Republic of Yugoslavia ("FRY") Constitution, they had been continuously subjected to hostile treatment, discrimination and repression by Serb authorities throughout the 1980s. The official abolition of this autonomy effectively did away with the need for secrecy on the part of Serbia in carrying out discriminatory policies.

60. Protests and rallies in support of Kosovo Albanians followed, culminating in 1989 with a hunger strike by over 1,000 workers at the Trepça lead and zinc mining and processing complex. In response, Belgrade implemented emergency measures and dispatched the army and federal police. This led to widespread protests by Albanian demonstrators, which the Serb security forces ruthlessly quashed, killing indeterminate numbers of people, but which included violent clashes with the police in late January 1990 in which at least 27 Albanians were killed by Serbian authorities.

61. In March 1990, the Belgrade administration removed practically all Albanians from the public sector, suspended the Provincial Parliament and Municipal Assemblies, installing Serbian authorities in their place and made Serbian the only official language in Kosovo, closing all Albanian language schools. Albanian and Serbian pupils were segregated. Teachers who refused to teach a single Serb-oriented curriculum were deemed to have resigned. Over 100,000 Albanians were dismissed from educational institutions, and the University of Pristina and most secondary school buildings were closed to Albanian students and pupils. The few Albanian professors who were not expelled were ordered to lecture solely in Serbian, and the number of Kosovo Albanians attending university significantly decreased to barely a token level by the end of 1991.

62. The response of Kosovo Albanians was to unite under the recently established political party known as the Democratic League of Kosovo ("LDK"), establish their own shadow government, and engage in a peaceful boycott of all Serbian institutions. On 2 July 1990, the Assembly of Kosovo passed the Constitutional Declaration in secret, which prepared the path for claiming Kosovo's equality with the other Yugoslav republics. On 7 September 1990, the Assembly convened in the town of Kaçanik, adopted the constitution, and proclaimed Kosovo a Republic.

63. Serbian authorities designated this political organisation as unlawful, and though it gained no formal international recognition, it did, however, provide a legal platform for representing the majority of people of Kosovo.

64. The LDK administration, in attempting to stem the dismemberment of Kosovo Albanian society, established parallel health care, welfare, and education systems, supported by the Albanian diaspora's financial donations. By 1993, the parallel education system employed roughly 20,000 teachers, lecturers, professors, and administrative personnel. It included 5,291 pre-school students,

312,000 elementary school students, 65 secondary schools with 56,920 students, two special schools for disabled children, 20 faculties and colleges with approximately 12,000 students, and several other educational establishments. Primary schools were allowed to utilise their own buildings but were not provided with funding. The remaining 204 facilities, such as residences and garages, were donated by Kosovo Albanians.

65. Belgrade increased repression by placing Serb officials in all public posts, including higher education, police, courts, and the media, even though only around 10% of Kosovo's population of about 2 million people were of Serb ethnicity. The Albanian civil resistance's political strategy on the other hand was centred on campaigning for Western support of its movement. Notwithstanding these efforts, throughout the first part of the 1990s, Kosovo was not at the forefront of international discussions.

66. Amongst the Kosovo Albanians, it was hoped that Kosovo's autonomy would be secured through the Dayton Conference in November 1995. However, the international community was preoccupied with resolving the situation in Bosnia, which suffered protracted, widespread ethnic cleansing of non-Serb populations from vast swathes of its territory, with the active support of the Yugoslav Army and participation by Serb paramilitary organisations, culminating in the genocide of 8,000 Bosnian men and boys at Srebrenica and its environs in July 1995 by Serb forces. Lost on the international community at this time was the risk of a campaign with similar, if not identical, goals being launched against Kosovo Albanians, a risk that would become reality only a few years later.

B. Active opposition to Serb oppression

67. Active opposition to Serb authority was never under the exclusive and hierarchical control of what became the KLA leadership. It operated in a

horizontal and loosely structured manner, with limited coordination between different groups. Villages in different regions acted spontaneously and autonomously. Brave and committed fighters risked their lives to protect their homes, families, and their national identity. They organised themselves to fend off Serb military offensives, seeking neither permission nor direction from anyone.

68. Political opposition was fragmented. For example, abroad, some individuals clustered around the People's Movement for Kosovo ("LPK"), although it was not the only Kosovo opposition within the diaspora, contrary to the insinuation in the SPO PTB.[46] Within Kosovo itself, several extended families provided the bulk of the opposition to Serb authority. This was most prevalent in what later became the Drenica and Dukagjin zones, where opposition structures based around family units became a prevalent feature throughout the conflict. In addition, there were also young activists or students in Kosovo, who set out to confront and oppose the Serbian police of their own volition. Finally, much of the conservative and nationalist political opposition was focused around the LDK and the parallel institutions it established as set out above.[47]

69. These different strands of opposition were neither directed by the KLA nor were they under the exclusive control of the LPK. Groups were often fighting for different political reasons, with different ideologies and different objectives. Any attempts by the LPK to create a "Special Sector" for coordinating activities within armed units in Kosovo, the members of which were supposedly to coordinate with Mr. Selimi to "unify armed groups and create a military organisation, and

[46] SPO PTB, para. 93.
[47] *See* above, para. 64.

hierarchy",[48] at some stage during the 1990s were largely aspirational and essentially ineffective.

70. The distorting and rewriting of this history by the SPO, which seeks to place the KLA at the top of a hierarchy of opposition prior to the Indictment Period, is based solely on its need to invent a level of planning, structure, organisation, and military hierarchy within the KLA, and especially within the Central Staff and then General Staff, to buttress its overlapping charges based on JCE liability and superior responsibility. The reality was very different.

C. Crimes by Serb forces during the Indictment Period

71. Most conspicuous by its prominent absence from the SPO PTB is the scale of crimes perpetrated against Kosovo Albanians by Serb forces throughout the Indictment Period. These massacres are too numerous to set out in this brief but will be directly pertinent to various issues at trial. However, two massacres deserve particular attention.

72. First, Serbian tanks and other artillery surrounded the village of Prekaz on 5 March 1998, with the goal of annihilating the Jashari family. These forces laid siege to the family's compound for three days, continuously shelling the houses within the compound and sniping any of those trapped inside who attempted to flee. 59 residents, of whom 55 were from the Jashari family, were massacred during this attack.

73. The massacre demonstrated the horrific and brutal lengths that the Serbian authorities were willing to take in suppressing any opposition to their grip on Kosovo. However, far from quietening such opposition, this event became the catalyst which would inspire and drive an unprecedented recruitment for the KLA. Despite their absence of training, experience or arms, thousands of

[48] SPO PTB, para. 94.

volunteers poured into Albania in the weeks and months after the attack at Prekaz to fight for the KLA.

74. Second, after the deal brokered by the US Envoy Richard Holbrooke to cease hostilities in late 1998 broke down, a further massacre in Reçak laid bare the barbarity of the Serbian authorities, as well as indicating that Kosovo Albanians had valid reason to fear the same fate as many Bosnian Muslims only a handful of years prior.

75. In the early hours of 15 January 1999, Serbian-Yugoslav Army troops and local Serbs mobilized from Ferizaj, Shterpca, Shtime, Viti, Lipjan, and other villages, and attacked the village of Reçak, executing 45 ethnic Albanians. Victims of this massacre would be found with extensive mutilation to their bodies. Among those killed were elderly and young people, as well as women and children. The scene of the massacre was inspected by international monitors on 16 January 1999 and declared a crime against humanity.

76. The two massacres at Prekaz and Reçak were exceptional by their notoriety and brutality, but were only two of many massacres committed by the Serb forces in Kosovo during the Indictment Period. Massacres of Kosovo Albanian civilians came to epitomise the entire conflict, increasing in frequency throughout 1999.

D. Attempts to resolve the conflict and international intervention

77. The Contact Group organised discussions in Rambouillet, France, between Pristina and Belgrade to draft and sign the "Interim Agreement for Peace and Self-Government in Kosovo". The composition of the Kosovo Delegation was finalised on 3 February 1999 and included KLA representatives Hashim Thaçi, Jakup Krasniqi, Azem Syla, Xhavit Haliti, and Ramë Buja, LBD representatives Rexhep Qosja, Hydajet Hyseni, Bajram Kosumi, and Mehmet Hajrizi, LDK representatives Ibrahim Rugova, Bujar Bukoshi, Idriz Ajeti, Fehmi Agani, and

Edita Tahiri, as well as Veton Surroi and Blerim Shala as independent personalities. The delegation from FRY/Serbia was composed of middle-level politicians who would report to Milošević in Belgrade.

78. The Rambouillet Conference took place between 6 and 23 February 1999. The Kosovo delegation requested a period of grace before approving the final draft agreement, to consult with others back in Kosovo. Several Kosovo leaders expressed strong opposition to accepting an agreement.

79. The Peace Accord discussions commenced in Paris between 15 and 18 March 1999, where the Kosovo delegation signed the document on 18 March. Even though it sought to guarantee the FRY/Serbia's territorial integrity, it also provided for an international conference to decide Kosovo's political status within three years, "taking into consideration the will of the people". The Kosovar delegation viewed this as an interim agreement paving the path for a referendum and subsequently, independence. FRY authorities did not sign the agreement.

80. After Rambouillet, final attempts to convince Belgrade to accept the peace agreements, or face military repercussions failed. The Organisation for Security and Cooperation in Europe – Kosovo Verification Mission ("OSCEKVM") subsequently withdrew from Kosovo.

81. On 22 and 23 March 1999, UN Secretary-General Kofi Annan requested that the Yugoslav military forces end their attack on Kosovo immediately. In a letter to the UN Secretary-General dated 23 March 1999, the NATO Secretary-General Dr. Javier Solana highlighted a series of incidents showing a significant deterioration of the situation in Kosovo. He placed particular emphasis on the massive escalation in FRY military activity following the withdrawal of OSCEKVM. The NATO Secretary-General also warned of a humanitarian disaster resulting from the FRY's disproportionate and indiscriminate use of force. The Yugoslav

government announced a state of emergency the same day. Deeming that all diplomatic means had been exhausted, NATO planes launched a military campaign against Yugoslavia on 24 March 1999.

82. The NATO military campaign against the FRY lasted 78 days until 9 June 1999. On this day, NATO and FRY/Serbia signed the Military Technical Agreement ("MTA") in Kumanovo, Macedonia, setting the terms of the latter's immediate withdrawal northward from Kosovo to Serbia. The MTA also defined the terms and objectives of the deployment of an international military presence.

83. On 10 June 1999, the UN Security Council enacted Resolution 1244. This resolution established the legal framework for the UN administration and Kosovo Forces ("KFOR"), the NATO-led peacekeeping force, in Kosovo, in Kosovo. NATO entered Kosovo on 12 June 1999 from the south while FRY/Serb forces were withdrawing to the north. In accordance with the resolution, Kosovo entered a phase of international administration under the United Nations Interim Administration Mission in Kosovo ("UNMIK"). UNMIK was composed of a number of international institutions and organisations, and its primary goal was to provide coordinated efforts for post-war reconstruction and institution-building. KFOR was deployed to provide security in the territory of Kosovo and the monitoring of the KLA's demilitarisation and transition was one of its initial tasks.

84. In accordance with UNSCR 1244, KFOR was to:

- establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission;
- contribute to a secure environment for the international civil implementation presence, and other international organisations, agencies, and non-governmental organisations;

- provide appropriate control of the borders of FRY in Kosovo with Albania and North Macedonia until the arrival of the civilian mission of the UN.

85. UNMIK was also established in accordance with Resolution 1244, which mandated that it carry out fundamental civil administrative functions, promote the establishment of significant autonomy and self-government in Kosovo, facilitate a political process to decide on Kosovo's future status, coordinate the humanitarian relief efforts of all international organisations, assist in the reconstruction of vital infrastructure, maintain civil law and order, promote human rights, and ensure the safe and unhindered return of refugees.

86. UNSC Resolution 1244 required that the KLA end all offensive actions and comply with the requirements for demilitarisation (Article 15). It stipulated that the public security mechanisms would be reserved as executive competencies of UNMIK.

87. The ''Undertaking on Demilitarization of the Kosovar Albanian force'' agreement was signed on 21 June 1999, between KFOR and the KLA. General Mike Jackson, the then-KFOR commander, General Agim Çeku, and Hashim Thaçi, all signed the document in the presence of General Wesley K. Clark, the Supreme Allied Commander Europe of NATO, and Bernard Kouchner, the Special Representative of the Secretary-General ("SRSG") of UNMIK. This agreement outlined the terms, procedure, and the timeline for demobilising KLA combatants, and indicated that the power for monitoring the implementation lay with the Commander of KFOR.

88. By 20 September 1999, demilitarisation was complete. The Kosovo Protection Corps ("KPC"), a civilian agency tasked with providing emergency response and rebuilding services, was established on the same day. The capacity to carry firearms was limited to 200 members in the KPC. No riot control, anti-terrorist

operations, or duties involving the upkeep of law and order could be performed by the Corps.

IV. GENERAL STAFF AUTHORITY AND FUNCTIONING

89. The first paragraph of the SPO PTB asserts in dramatic terms that the Accused:

> "[…] leveraged fear, personal and political loyalties, control over resources, and their positions within the KLA/PGoK - including as members of the General Staff - to execute a common criminal purpose."[49]

90. The SPO further alleges in the Indictment that "throughout the Indictment Period the KLA was an organised armed group."[50] As the Indictment Period spans from March 1998 until September 1999,[51] this means that, without qualification, the SPO alleges that the KLA was fully organised on the first day of the armed conflict with the FRY, and that this organisation continued three months beyond the entry onto Kosovo territory of KFOR.

91. However, the SPO appears to recognise the limitations on the authority of the General Staff when it concedes:

> "The KLA was not the military of a recognised state and the PGoK was not an officially recognised governmental structure. As such, not all aspects of their functioning were formally regulated and power structures did not always follow formal hierarchy."[52]

92. Despite this admission, the SPO continues to place substantial emphasis on the organisation and authority of the General Staff and Mr. Selimi's role within it,

[49] SPO PTB, para. 1.
[50] Amended Indictment, para. 19.
[51] Ibid, para. 32.
[52] SPO PTB, para. 90.

most noticeably and erroneously asserting as fact that "the General Staff was the body which exercised political and operational decision-making and control."[53]

93. The Defence neither contests that a body which referred to itself as the General Staff existed in Kosovo during the Indictment Period, nor that Mr. Selimi was a member of this body. However, the SPO's blanket assertion, completely fails to understand or acknowledge the vast differences in the levels of organisation of the General Staff and the KLA as a whole throughout the Indictment Period.

94. The manner in which the SPO sets out its interpretation of how the General Staff operated, switching at random between different individuals and between different time periods[54], further frustrates a clear understanding of its position regarding the functioning of this body.

95. In this respect, the Defence highlights that:

(i) The General Staff was preceded by a Central Staff, which was substantially different in composition, role and authority;

(ii) If the General Staff, from November 1998 onwards, sought to exercise control over purportedly subordinate units, this cannot carry the presumption that they were able to do so effectively, coherently or consistently;

(iii) Both the relationship between the General Staff and zones, as well as the functioning of the General Staff itself, was not fixed and varied substantially throughout the indictment period based on the composition of both, and the circumstances of the ongoing conflict;

[53] SPO PTB, para. 97.
[54] Ibid, paras 101-103.

(iv) Decision making and communication in the General Staff was fluid, depending *inter alia* on the nature of the subject to be decided and the attendees of meetings;

(v) Assumptions based on purported laws, codes, rules or regulations, or by comparison with similar titles in other regular armed forces, regarding the functioning of the General Staff, other KLA entities or individual positions within the General Staff, such as the Head of the Operational Directorate or Inspector-General, are fundamentally unreliable.

V. ALLEGATIONS BASED ON JOINT CRIMINAL ENTERPRISE LIABILITY

96. Mr. Selimi is charged with liability under two of its three categories; basic (JCE I) and extended (JCE III). Both the notice of such forms of liability, as well as the underlying evidence in support of this alleged plan, are distinctly lacking.

97. At the outset, the Defence reiterates its objection to the application of JCE liability against Mr. Selimi, especially in relation to JCE III, notwithstanding the Appeals Panel's dismissal of such objections when raised as jurisdictional challenges.[55]

98. Mr. Selimi refutes, in its entirety, the SPO's allegation that he was a key member of, participated in, or otherwise contributed to any JCE, and further refutes that any such JCE existed.[56]

A. Applicable law on JCE

99. When basic (JCE I) and extended (JCE III) modes of JCE liability are charged simultaneously, as in the case against Mr. Selimi, a conviction on the extended

[55] KSC-BC-2020-06, IA009/F00030, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2022, paras 187-194, 199-200.
[56] SPO PTB, paras. 5 – 272.

form of JCE cannot be entered without the establishment, beyond reasonable doubt, of its basic form.[57]

100. The two forms of JCE share objective elements; to establish liability under the doctrine of JCE, it must be proven that an accused, along with at least one other person, identified with a degree of specificity;[58] engaged in "an arrangement or understanding amounting to an agreement"[59] regarding a common plan, design or purpose which amounts to or involves the commission of a crime; and that the accused participated in the execution of the common design involving the perpetration of a crime.[60]

101. With regard to the common plan, it is required to be proven that the criminal purpose of all participants in the common plan is not merely the same, but common to each person acting together in the joint criminal enterprise.[61] While a common plan may be inferred from events on the ground,[62] the simple existence of a certain level of coordination on the ground among various factions and the commission of crimes by some of these factions may not suffice to show beyond a reasonable doubt that such cooperation was in pursuance of a common criminal purpose.[63]

102. A common objective alone is not always sufficient to determine a group, because different and independent groups may happen to share identical objectives. It is

[57] ICTY, *Prosecutor v Gotovina & Markač,* IT-06-90-A, Appeals Chamber Judgement, 16 November 2012, para. 97.
[58] ICTY, *Prosecutor v. Brđanin*, IT-99-36-A, Appeals Chamber Judgment, para. 430 ("Brđanin AJ").
[59] ICTY, *Prosecutor v. Simić et al.*, IT-95-9-T, Trial Judgement, 17 October 2003, para. 158.
[60] ICTY, *Prosecutor v. Tadić,* IT -94-1-A, Appeals Chamber Judgement, 15 July 1999, para. 227 ("Tadić AJ").
[61] ICTY, *Prosecutor v. Šešelj,* MICT-16-99-A, Appeals Chamber Judgement, 11 April 2018, para. 96 ("Šešelj AJ").
[62] ICTY, *Prosecutor v. Šainović et al.,* IT-05-87-A, Appeals Chamber Judgement, 23 January 2014, para. 611.
[63] Šešelj AJ, para. 117.

thus the interaction or cooperation among persons – their joint action – in addition to their common objective that forges a group out of a mere plurality. In other words, the persons in a criminal enterprise must be shown to act together, or in concert with each other, in the implementation of a common objective, if they are to share responsibility for crimes committed through the JCE.[64]

103. It is not enough for the SPO to merely show participation in the execution of this common plan (assuming the existence of such a plan can be established), as it has been underlined specifically that "not every type of conduct would amount to a significant enough contribution to the crime for this to create criminal liability for the accused regarding the crime in question".[65] In order for liability to attach, it must be proven that such contribution was significant to the crimes.[66] A significant contribution is an act or omission "that makes an enterprise efficient or effective".[67] Thus, while participation of the accused need not be a *conditio sine qua non* for the commission of the offence, it must nevertheless be shown that the participation in the crime was part of the chain of causation.[68]

104. The subjective elements for JCE I and III differ. JCE I requires proof that all participants shared the same criminal intent, and further, that the accused intended to participate in the common plan aimed at the commission of the crime.[69] Put plainly, JCE I requires intent in the sense of *dolus directus*. Recklessness or *dolus eventualis* does not suffice.[70]

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[64] Mladić TJ (Volume IV), para. 3561.
[65] Brđanin AJ, para. 427.
[66] ICTY, *Prosecutor v. Kvočka et al.*, IT-98-3011-T, Trial Judgement, 02 November 2001, para. 309 ("Kvočka TJ").
[67] Kvočka TJ, para. 309.
[68] Blagojević TJ, para. 702.
[69] ICTY, *Prosecutor v. Vasiljević*, IT -98-32-A, Appeals Chamber Judgement, 25 February 2004, para. 101.
[70] Mladić TJ (Volume IV), fn. 13437.

105. Although knowledge of crimes in combination with failure to intervene to prevent them may be a basis for inferring intent, it does not compel such a conclusion.[71] Further, inaction or action which might have encouraged or facilitated crimes does not necessarily equate to, or compel a finding of, intent for those crimes.[72]

106. The test for JCE III is whether the accused was subjectively reckless (*dolus eventualis*) and is not a test of negligence.[73] While JCE III does not require that the crime be a probable outcome, it nevertheless requires that the possibility of the extended crime is substantial enough that it is foreseeable to the accused.[74]

107. Liability for crimes outside of the common purpose under JCE III requires that in addition to a perpetrator's intent to participate in and contribute to the furtherance of that common purpose, it was foreseeable to them that a crime committed beyond the common purpose might be committed by one or more members of the group, or by persons used by any member of the group as a natural and foreseeable consequence of the execution of the common plan and that the accused willingly took that risk.[75] However, this question must be assessed in relation to the knowledge of a particular accused, as what is natural and foreseeable to one person might not be natural and foreseeable to another,

[71] IRMCT, *Prosecutor v. Karadžić,* MICT-13-55-A, Appeals Chamber Judgement, 20 March 2019, para. 688 ("Karadžić AJ").
[72] Karadžić AJ, para. 689.
[73] Tadić, AJ, para. 220.
[74] ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR72.4, Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability on JCE, 25 June 2009, para. 18.
[75] Brđanin AJ, para. 411.

depending on the information available to them.[76] Further, the subjective element of JCE III is not satisfied by implausibly remote scenarios.[77]

108. Finally, as noted above,[78] when proof of the state of mind of the accused is sought to be established by inference, that inference must be the only reasonable inference available on the evidence. It is settled that the benefit of the doubt must always go to the accused.[79]

B. There was no JCE against Opponents

1. Duration and membership of JCE

109. The SPO case against Mr. Selimi alleges the existence of a JCE "[b]etween at least March 1998 through September 1999"[80] but not when exactly it began or ended.

110. Members of the JCE were alleged to be "Hashim Thaçi, Kadri Veseli, Rexhep Selimi, Jakup Krasniqi, and other members of the joint criminal enterprise."[81] These other members were described as "Azem Syla, Lahi Brahimaj, Fatmir Limaj, Sylejman Selimi, Rrustem Mustafa, Shukri Buja, Latif Gashi and Sabit Geci, as well as certain other KLA and Provisional Government of Kosovo ("PGoK") political and military leaders, including other General Staff members; PGoK ministers and deputy ministers; KLA zone commanders, deputy zone commanders, and other members of zone command staffs; brigade and unit

[76] ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Appeals Chamber Judgment (Volume III), 29 November 2017, para. 2836.
[77] ICTY, *Prosecutor v. Stanisić & Zupljanin,* IT-08-91-A, Appeals Chamber Judgement, 30 June 2016, para. 1055.
[78] *See* above, para. 53.
[79] ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeals Chamber Judgement, 28 February 2005, para. 237.
[80] Amended Indictment, para. 32.
[81] Ibid.

commanders; commanders and members of the KLA and PGoK police and intelligence services; and other KLA soldiers and PGoK officials"[82]

111. However, the SPO is not even certain that these individuals it has described are actually JCE members apart from the four Accused, for it alleges in the alternative that "some or all of these individuals were not members of the joint criminal enterprise, but were used by members of the joint criminal enterprise to carry out crimes committed in furtherance of the common purpose."[83] Essentially, any KLA member could be considered as a member of the JCE under this formulation as long as they, through their "acts or omissions, contributed to achieving the common purpose."[84]

112. Consequently, the Defence PTB is prepared and presented on the basis that one single JCE is alleged by the SPO which began on or before March 1998 and ended on or after September 1999 and that Members or Tools of this single JCE were limited to the Co-Accused, Azem Syla, Lahi Brahimaj, Fatmir Limaj, Sylejman Selimi, Rrustem Mustafa, Shukri Buja, Latif Gashi and Sabit Geci. This is the only JCE reasonably considered to be alleged by the SPO over that period. If the SPO wishes to expand the members of the JCE, its Tools or indeed its duration, beyond these named individuals, they must notify the Defence in an explicit and transparent manner and such individuals must fall within the residual category of individuals set out in the Indictment.[85]

[82] Amended Indictment, para. 35.
[83] Ibid.
[84] Ibid.
[85] Ibid. Namely "other KLA and PGoK political and military leaders, including other General Staff members, PGoK ministers and deputy ministers, KLA zone commanders, deputy zone commanders, and other members of zone command staffs; brigade and unit commanders, commanders and members of the KLA and PGoK police and intelligence services, and other KLA soldiers and PGoK officials."

2. Purpose of the JCE

113. There was no common plan or purpose "to gain and exercise control over all of Kosovo by means including unlawfully intimidating, mistreating, committing violence against, and removing those deemed to be opponents."[86]

114. There was no plan to target 'Opponents' defined by the SPO as "persons who were or were perceived to have been: (a) collaborating or associating with FRY forces or officials or state institutions or (b) otherwise not supporting the aims or means of the KLA and later the PGoK, including persons associated with the LDK and persons of Serb, Roma, and other ethnicities."[87] These are fundamentally different groups, and in forcing them into a single inconsistent entity, the SPO demonstrates its desperation to find a case against Mr. Selimi and other members of the General Staff.

115. Even a cursory analysis of the Opponents demonstrates the lack of coherence between them and undermines the SPO's theory that there is a single feature which unifies all those who are its alleged victims, to support the proposition that any crimes that occurred must have been the result of this plan.

116. Every disparate and isolated criminal act that was carried out during the Indictment Period is aggregated to try and create a semblance of coherence and logic.

117. While the formulation of this JCE was authorised by the Pre-Trial Judge when confirming the Indictment,[88] as well as withstood challenges to its formulation in relation to motions challenging the form of the Indictment,[89] this does not

[86] Ibid, para. 32.
[87] Ibid.
[88] KSC-BC-2020-06, F00026, Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 26 October 2020, paras 105-115 ("Confirmation Decision").
[89] KSC-BC-2020-06, F00413, Decision on Defence Motions Alleging Defects in the Form of the Indictment, 22 July 2021, para. 177.

compensate for the fact that the SPO is unable to articulate or present a clear and consistent case.

C. Mr. Selimi did not participate in and contribute to a JCE

1. Intent and foreseeability

118. Mr. Selimi did not intend to participate in and contribute to the commission of any of the crimes set out in the Indictment where any of these crimes is charged on the basis of JCE I.

119. Where any of these crimes is alleged on the basis of JCE III, Mr. Selimi reiterates that there was no common plan as alleged by the SPO. Thus, he could not and did not foresee that a crime committed beyond a common purpose might be committed by one or more members of the group or by persons used by any member of the group. There were no crimes that were a natural and foreseeable consequence of the execution of such a common plan and as such, no point at which Mr. Selimi could have willingly taken a risk that they would occur.

2. Contribution to the JCE

a. Personal participation

120. Mr. Selimi refutes in their entirety the SPO's allegations concerning his purported contribution to a common purpose through personal participation in incidents as set out in the SPO PTB and Amended Indictment.

b. Preparation of Communiques, public statements, internal rules and regulations & disseminating public information against Opponents[90]

121. None of the Communiques purportedly produced by the General Staff were signed or drafted by Mr. Selimi. At no stage did the preparation or production of Communiques fall within his remit as Head of G3 or Inspector General.

122. The same applied to other statements or regulations relied upon by the SPO. Mr. Selimi was not aware of these documents and had no role in their preparation or promulgation.

c. Failing to take adequate steps to prevent and investigate crimes, and/or punish or discipline the perpetrators[91]

123. Given its overlap with the allegations relating to Superior Responsibility, these allegations are addressed below.[92]

d. Appointing & promoting JCE Members and Tools involved in serious crimes[93]

124. Mr. Selimi had no direct or indirect authority, either individually or collectively, to appoint or approve alleged JCE Members or Tools. His ability to appoint any individuals was severely limited to those individuals under his direct authority, none of whom are specified as such JCE Members or Tools. Retroactive approvals by the General Staff of appointments of zone and brigade leadership positions, proposed and supported at the zone level or below, do not constitute decisions taken at the General Staff level.

125. Even if Mr. Selimi is considered to have some role in the appointment or promotion of any individuals involved in criminal acts, Mr. Selimi had neither

[90] Amended Indictment, paras 52(a) & (d).
[91] Ibid, para. 52(c).
[92] *See* below, Section VII.
[93] Amended Indictment, para. 52(e).

prior knowledge of their involvement in crimes before they were appointed or promoted, nor did he gain such knowledge subsequently.

e. Providing political, logistical, military and/or financial support, to JCE Members and Tools committing crimes in furtherance of the common purpose[94]

126. The SPO's case is that any member of the KLA could potentially be a JCE Member or Tool. Consequently, any political, logistical, military and/or financial support to JCE Members and Tools could potentially fall within it even if evidently non-criminal.

127. Mr. Selimi sought to support all those volunteers who fought with or for the KLA against the Serb forces occupying Kosovo and committing crimes throughout the Indictment Period. Any support he provided was solely for this purpose and at no stage did he provide any support for the commission of crimes, as alleged in the Indictment.

128. Moreover, there were significant limits upon what support Mr. Selimi could provide in any capacity. Given his role, and his focus on personally fighting the Serb forces on the ground, he had little role in providing such support.

f. Coordinating and liaising between JCE Members and Tools in furtherance of the common purpose[95]

129. Mr. Selimi's authority with regards to any issues that arose between members of the KLA, was limited to mediation rather than instruction.

130. Mr. Selimi always sought fair and peaceful solutions to such disputes, with the aim of forging unity with Kosovo Albanian volunteers fighting the Serb forces.

[94] Ibid, para. 52(f).
[95] Amended Indictment, para. 52(g).

None of his actions could in any way be properly interpreted as contributing to the alleged criminal purpose underlying the alleged common plan.

VI. ALLEGATIONS BASED ON AIDING AND ABETTING

131. Mr. Selimi refutes, in its entirety, the SPO's allegation that he aided and abetted the charged crimes.[96]

1. Law on Aiding and Abetting

132. The *actus reus* of aiding and abetting, an accessory form of liability, is that the accused, either through an act or omission,[97] provided assistance, encouragement or moral support to a principal perpetrator of a crime under the Law.[98] The material elements of the crime committed by the principal perpetrator must be established[99] and although there is no causal link required between the act or omission of the accused and the crime, it must be shown to have had a "substantial effect" on the commission of that crime,[100] determined by a fact-based inquiry.[101]

133. To show that an accused provided substantial assistance to a crime through tacit approval or encouragement, such encouragement or moral support can only form substantial contribution to a crime when the principal perpetrators were

[96] SPO PTB, para. 708
[97] ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Appeals Chamber Judgment, 29 July 2004, para. 47 ("Blaškić AJ").
[98] ICTR, *Nahimana et al. v. Prosecutor,* ICTR-99-52-A, Appeals Chamber Judgement, 28 November 2007, para. 482.
[99] ICTY, *Prosecutor v. Kupreškić et al*., IT-95-16-A, Appeals Chamber Judgment, 23 October 2001, para. 254.
[100] Blagojević TJ, para. 726.
[101] Blagojević AJ, para. 134.

aware of it,[102] or understood it to be encouragement or approval of a crime about to be committed.[103]

134. Where a person aids and abets a crime through omission, it is required to be shown that they had the means[104] and legal duty to act, but failed to do so.[105] "Mere presence" at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated that the accused had a duty to prevent it.[106] To enter a conviction for aiding and abetting murder by omission, at a minimum, all the basic elements of aiding and abetting must be fulfilled.[107]

135. The *mens rea* for aiding and abetting requires that (i) it is intentional; (ii) that the aider and abettor had the "double intent" to further his own contribution and to further the intentional completion of the crime by the perpetrator; (iii) that the aider and abettor accepted the criminal result of his conduct whereby the consequence of his contribution is that the commission of the crime is more likely than not; and (iv) that the accused is aware of the type and essential elements of the crime to be committed,[108] including the perpetrator's state of mind and any relevant specific intent.[109]

[102] Brđanin AJ, para. 277.
[103] ICTY, *Prosecutor v. Orić*, IT-03-68-T, Trial Judgement, 30 June 2006, para. 283 ("Orić TJ").
[104] ICTY, *Prosecutor v. Popovic et al.*, IT-05-88-A, Appeals Chamber Judgement, 30 January 2015, para. 1740.
[105] Blaškić AJ, para. 47, 663.
[106] Orić TJ, para. 283.
[107] ICTY, *Prosecutor v Mrkšić et al*., IT-95-13/1-A, Appeals Chamber Judgement, 5 May 2009, para. 49.
[108] Orić TJ, para. 288.
[109] Blagojević AJ, para. 127.

2. Mr. Selimi is not responsible for Aiding and Abetting any of the charged crimes

136. The SPO charges Mr. Selimi for aiding and abetting are based on the same allegations which underpin the allegations based on JCE liability,[110] including, apparently, the allegations of personal participation set out above.

137. Mr. Selimi's position in relation to all these factual allegations has been set out above. In summary, Mr. Selimi:

a. Did not provide assistance, encouragement or moral support to a principal perpetrator of an underlying crime alleged in the Indictment;

b. Did not intend to provide assistance, encouragement or moral support, or to further the intentional completion of any underlying crimes by the perpetrator as alleged in the Indictment; and,

c. Was not aware of the type and essential elements of any crime to be committed as alleged in the Indictment.

VII. ALLEGATIONS BASED ON SUPERIOR RESPONSIBILITY

138. The allegations against Mr. Selimi based on Superior Responsibility are set out in three paragraphs of the Indictment.[111] These paragraphs allege that all four Accused: (1) had effective control over the JCE Members and Tools responsible for having committed underlying crimes alleged in the Indictment; (2) knew or had reason to know that crimes were about to be committed or had been committed by these individuals; and (3) failed to take the necessary and

[110] Amended Indictment, paras 32-54.
[111] Ibid, paras 55-57.

reasonable measures to prevent the commission of the crimes and/or to punish the perpetrators. Similarly, these paragraphs are repeated in the SPO PTB with little, if any, further elucidation.[112]

139. This generic phrasing of the first constituent element of superior responsibility, denies the Defence the ability to understand how such control was purportedly exercised and over which units, individuals, or groups allegedly responsible. While the second and third elements are supplemented by some specification as recognised by the Appeals Panel,[113] the grouping of Mr. Selimi together with the other three Accused, even though they exercised different roles from each other with different obligations and responsibilities, limits the ability of the Defence to reply to the allegations with specificity.

140. Mr. Selimi refutes, in its entirety, the SPO's allegation that he is individually responsible as a superior for the charged crimes through failing to take necessary and reasonable measures to prevent their commission or punish the perpetrators.[114]

A. Applicable law in relation to Superior Responsibility

141. The three cumulative elements necessary to prove criminal liability as a superior in accordance with Article 16(1)(c) are:

(i) The existence of a superior-subordinate relationship;

(ii) That the superior failed to take necessary and reasonable measures to prevent the criminal act(s) of the subordinate or to punish the perpetrator; and,

[112] SPO PTB, paras 709-713.
[113] KSC-BC-2020-06, IA012/F00015, Decision on Defence Appeals Against Decision on Motions Alleging Defects in the Form of the Indictment, 22 August 2022, paras 126-133, 137-142.
[114] SPO PTB, paras. 709 – 713.

(iii) That the superior knew or had reason to know that the criminal act was about to be committed or that the criminal act had in fact been committed.

1. Effective control over subordinates

142. The SPO must establish first the existence of culpable subordinates. Not only must underlying crimes be established, but further that the subordinates of the superior were culpable in the commission of those crimes.[115] Those subordinates must also be identified with a degree of specificity or precision (as well as being specifically implicated in the crimes), in order for superior responsibility to be established.[116]

143. The superior-subordinate relationship is characterised by a hierarchical relationship,[117] which can exist as a result of the *de jure* or *de facto* authority of the superior over the subordinate person(s) responsible for the underlying crime.[118] This relationship need not be determined solely by formal status, and both direct and indirect relationships of subordination within that hierarchy could suffice.[119] *De Jure* control is the formal authority to command and control subordinates and *De Facto* is the informal authority to command and control subordinates. However, the perpetrator of the underlying offence must still be shown to be a subordinate of the person of higher rank and under his direct/indirect control.[120]

144. For both *de jure* and *de facto* superiors; central to the question of liability under the doctrine of superior responsibility is whether or not a superior exercised "effective control" over the perpetrators of the offence.[121] This is determined by

[115] ICTY, *Prosecutor v. Orić,* IT-03-68-A, Appeals Chamber Judgment, 3 July 2008, para. 35 ("Orić AJ").
[116] Blagojević AJ, para. 287; Orić AJ, para. 35.
[117] Čelebići AJ, para. 303.
[118] Ibid, para. 193.
[119] Čelebići TJ, paras 252, 370.
[120] Čelebići TJ, para. 354; Čelebići AJ, para. 193.
[121] Čelebići AJ, paras 196, 197.

the "ability to maintain or enforce compliance of others with certain rules and orders" and whether "the responsible superior would have means to prevent the relevant crimes from being committed or to take efficient measures for having them sanctioned."[122]

145. Without meeting the threshold test for effective control, "substantial influence" does not suffice to establish superior responsibility.[123] Further, mere material ability on the part of the accused to contribute to an investigation or to prevent or punish crimes is not by itself sufficient to establish effective control and can only do so if predicated on a pre-existing superior-subordinate relationship.[124]

146. Where control over other individuals is shared by a group of individuals, the SPO must demonstrate that the Accused, in his personal capacity and/or in his role as a member of that group, was personally able to exercise effective control over the perpetrators up to the required standard.[125]

147. Superior responsibility does not extend to acts committed by the subordinate perpetrators prior to the superior's assumption of command. If effective control is acquired after crimes are committed, then the Superior cannot be held liable for failure to prevent or punish them.[126]

148. The Defence contests that the term 'committed', as used in the context of superior responsibility, includes all modes of liability covered by Article 16(1) of the Law, and asserts that this term only refers to the responsibility of superiors

[122] Orić TJ, para. 311.
[123] Čelebići AJ, para. 266.
[124] Halilović AJ, paras. 59, 210.
[125] Brđanin TJ, para. 277.
[126] ICTY, *Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 51; Orić TJ, para. 335; *Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-T, Trial Judgement, 15 March 2006, para. 199 ("Hadžihasanović TJ").

for crimes that were actually committed by their own subordinates as principal perpetrators.[127]

2. Knowledge of the superior

149. The subjective element of superior responsibility, is first of all that a superior be aware of his own position of authority, namely that the superior is aware that he or she has effective control, under the specific circumstances, over the subordinates who committed or were about to commit the relevant crimes.[128]

150. Then, it must be shown that the superior either knew, or had reason to know that their subordinates committed or were about to commit the underlying crimes. This must be shown through direct or circumstantial evidence of actual knowledge (which cannot be presumed)[129] as to the risk that these crimes would be committed or their actual commission; or constructive knowledge by having "in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates".[130] Although this information may be general in nature, it must nevertheless be sufficiently specific to demand further clarification.[131]

151. An accused's position of authority cannot lead to an automatic presumption, beyond a reasonable doubt, that he or she knew or had reason to know of the crimes for which a conviction is sought.[132]

[127] SPO PTB, fn. 3012.
[128] Orić TJ, para. 316.
[129] Hadžihasanović TJ, para. 94.
[130] Čelebići TJ, para. 266.
[131] Orić TJ, paras 321 – 323.
[132] ICTR, *Prosecutor v. Kajelijeli*, ICTR-98-44-A, Trial Judgement, 1 December 2003, para. 776.

152. The standard for knowledge on the part of the superior is not that he "should have known" about the risk of, or the actual commission of, the underlying crimes. Thus, failure to acquire such information, (or indeed any act which may be regarded as, or inferred as, criminal negligence) may not form the basis of liability under superior responsibility.[133]

153. Furthermore, mere knowledge on the part of the superior that crimes were being committed is not sufficient. It must be proven that the superior had knowledge of the crimes that were about to be, or had been, committed by his subordinates specifically,[134] as knowledge of the crime and knowledge of the criminal conduct of someone else are two distinct matters.[135]

3. Necessary and reasonable measures to prevent and punish

154. "Necessary measures" are those required to discharge the obligation to prevent or punish, in the circumstances prevailing at the time. "Reasonable" measures are those which the commander was in a position to take in the circumstances prevailing at the time.[136]

155. The appropriate measures to be taken may vary from case to case depending upon the particular circumstances.[137] The kind and extent of measures to be taken ultimately depend on the degree of effective control over the conduct of subordinates at that time, and further, since a superior is duty bound only to undertake what appears appropriate under the given conditions, he or she is not obliged to do the impossible.[138]

[133] Hadzihasanović TJ, paras 95-96.
[134] Orić AJ, para. 59.
[135] ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Trial Judgement (Volume I), 29 May 2013, para. 252.
[136] ICTY, *Prosecutor v. Blaškić*, IT-95-14-T, Trial Judgment, 3 March 2000, para. 333.
[137] Orić TJ, para. 329.
[138] Ibid.

B. Mr. Selimi fulfilled none of the elements to be considered criminally liable as a Superior

1. Mr. Selimi had no effective control[139]

156. Mr. Selimi had no direct or indirect control over any individuals who were alleged to have committed crimes.[140] This included: the period as Head of G3, as Inspector-General or as the Minister of Public Order in the PGoK. He had no authority to issue any orders to the zone or brigade commanders and did not sign any orders. Nor did he have any authority or control over the other Directorates in the General Staff, including the Military Police Directorate.

157. In this regard, the General Staff as a whole did not exercise effective control over the local staffs or other independent military units. Nor did they exercise effective control over the zones and brigades, including the Military Police units created and operating within the brigades. Any laws, rules or regulations which purport to grant the General Staff as a whole, or members thereof, such effective control, were aspirational, unenforceable, and unknown both to those who were supposed to exercise such authority, as well as those over whom authority was sought to be exercised.

158. As Minister of Public Order, Mr. Selimi had no authority over subordinates considering the structure of the Ministry and the role of UNMIK and KFOR in relation to the PGoK. Any laws, rules or regulations which purport to do so were aspirational and unenforceable.

[139] Amended Indictment, para. 55.
[140] As set out above, the burden is on the SPO to prove the existence of all crimes alleged in the Indictment.

2. Mr. Selimi had no knowledge or reason to know[141]

159. Mr. Selimi had no direct and personal knowledge of crimes alleged in the Indictment. He was not directly and personally involved in any crimes and was not aware of detention centres as set out in the Indictment. Information received from zone commanders did not inform him, or provide sufficient indication of, any crimes being committed against detained persons.

160. Mr. Selimi did not receive any information of a nature which would put him on notice of the risk of such offences indicating the need for additional investigation. Nor were the existence of crimes against Opponents during the Indictment Period, as alleged by the SPO, common knowledge.

161. As Minister of Public Order, Mr. Selimi received no direct information of crimes committed by subordinates, or information which would indicate the need for additional investigation.

3. There were no necessary and reasonable measures that Mr. Selimi was able and/or obliged to take

162. Mr. Selimi had no authority or capacity to take measures to prevent crimes which were about to be committed by any individuals who the SPO alleges were under his control. Nor did he have the authority or capacity to take measures to punish any alleged perpetrators after the events.

163. In particular, as Minister of Public Order, after the entry into Kosovo of UNMIK and KFOR, Mr. Selimi had no authority to initiate or refer crimes for investigation in relation to any individual working for the Ministry.

164. Mr. Selimi had no authority to directly discipline, dismiss, or demote soldiers who were allegedly responsible for such crimes. Nor did he have the authority

[141] Amended Indictment, paras 54(a)-(d).

to issue the orders that were necessary and reasonable in the circumstances to prevent any crimes either as a staff officer in the KLA or as the Minister of Public Order.

165. Training, and establishing regulations and procedures, were outside Mr. Selimi's authority as Head of Operations or Inspector-General.

VIII. UNDERLYING CRIMES AND CONTEXTUAL ELEMENTS

A. Burden on SPO to prove constituent elements of all underlying crimes

166. The Indictment includes almost fifty different crime sites, which allegedly vary from informal, unregistered locations where single individuals were detained in a private residence or building,[142] to more formal locations which were purportedly under the direct supervision and control of zones.[143] Mr. Selimi is not alleged to have visited any of these detention facilities, apart from the single specific limited instance where Mr. Selimi was alleged to have interrogated a single prisoner.[144] Other allegations relating to Mr. Selimi's visits to the towns or villages where these facilities were allegedly located do not specifically allege that he visited the facility itself.

167. The burden therefore remains on the SPO to prove all such crimes beyond reasonable doubt, whether or not they are subject to specific challenge by the Defence.[145] For clarity, Mr. Selimi contests all alleged criminal liability for the charged crimes, under all modes of liability charged by the SPO. In particular, it is disputed that any underlying crimes were actually committed by KLA

[142] Amended Indictment, *see* e.g. paras 78, 84, 86, 87, 91.
[143] Ibid, *see* e.g. paras 63, 64, 65, 68, 69.
[144] SPO PTB, para. 278.
[145] SPO PTB, paras. 273 – 696.

members rather than individuals holding themselves out as KLA members and committing crimes for their own motives.

168. In addition, as set out above, the extensive protective measures relating to the Indictment, the SPO PTB and underlying evidence, relate often, although far from exclusively, to the alleged victims, thereby resulting in a lack of clarity of the allegation, let alone the evidence underpinning these crimes. Therefore, when such new information is provided, the Defence reserves the right to readdress those allegations.

B. Contextual elements

1. Crimes against humanity

169. The threshold-based contextual requirements for crimes against humanity as set out in the Law are that the specified prohibited acts in Article 13(1)(a) – (j) are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

170. "*Attack*": An "attack", for the purposes of Article 13, is not equivalent to an "armed conflict" and indeed may precede, outlast or continue during the armed conflict, but need not be part of it,[146] and need not constitute a military attack.[147] Further, "an attack in the context of a crime against humanity can be defined as a course of conduct involving the commission of acts of violence",[148] as opposed to a single, or isolated, act or event.

171. "*Widespread or systematic*": "Widespread" may be defined as a "massive, frequent, large-scale action, carried out collectively with considerable

[146] ICTY, *Prosecutor v. Kunarac, et al.*, IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, 22 June 2002, para. 86 ("Kunarac AJ").
[147] ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-2311-T, Trial Judgment, 22 February 2001, para. 416 ("Kunarac TJ").
[148] ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87, Trial Judgment (Volume I), 26 February 2009, para. 144.

seriousness and directed against a multiplicity of victims".[149] "Systematic" is in reference to an organised character of the acts of violence and non-accidental regular repetition of similar criminal conduct,[150] involving "a pattern or methodical plan",[151] or one that is "thoroughly organised and following a regular pattern".[152]

172. "*Directed against any civilian population*": "Directed against" requires that the civilian population is the primary object of the attack (of which the accused's alleged act forms a part), not its incidental target.[153] "Any" recognises that protection under Article 13 may extend to a State's own population.[154] "Civilian" requires that the target of the broader attack must be "predominantly civilian in nature".[155]

173. "*With knowledge of the attack*": It must be proven that an accused had knowledge of the broader context in which his acts occurred, in that they knew of the widespread or systematic attack directed against a civilian population and that their actions were part of the attack, or at least that they took the risk their acts were part thereof.[156]

174. *Nexus requirement*: A crime which is committed before or after the main attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack. Implicit in the concept of "sufficiently connected" is that the crime must not be isolated in nature. An act would be

[149] ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 580 ("Akayesu TJ").
[150] Kunarac TJ, para. 429.
[151] ICTY, *Prosecutor v. Tadić,* IT-94-1-T, Trial Judgment, 7 May 1997, para. 648.
[152] Akayesu TJ, para. 580.
[153] Kunarac AJ, para. 92.
[154] Kunarac TJ, para. 423.
[155] ICTY, *Prosecutor v Karadžić*, IT-95-5/18-T, Trial Judgement, 24 March 2016, para. 474.
[156] Kunarac AJ, paras 102-103.

regarded as an isolated act when it is so far removed from the attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack.[157] Thus, it is not enough that the underlying act simply coincided with, was incidental to, an attack and the "sufficient connection" between the act and attack must be proven beyond reasonable doubt.

175. The Defence contests that the underlying crimes in the Indictment were part of a widespread or systematic attack directed against a civilian population, namely the Opponents.[158] Any sporadic alleged underlying crimes were neither coordinated, organised, nor did they follow a consistent pattern.

176. Further, it is contested that Mr. Selimi had knowledge of the alleged widespread and systematic attacks on the civilian population, the broader context of the alleged attack or that the charged crimes were part of the attack.[159]

2. War crimes

177. War crimes are serious violations of International Humanitarian Law ("IHL") committed in international and non-international armed conflicts that give rise to individual criminal responsibility. In relation to war crimes, Mr. Selimi is charged pursuant to Article 14(1)(c), which prohibits serious violations of Article 3 common to the four Geneva Conventions ("Common Article 3").[160] With regard to the serious violations of Common Article 3, the nature of the conflict need not

[157] Kunarac AJ, para. 100.
[158] SPO PTB, paras 702–705.
[159] SPO PTB, paras 706–707.
[160] *See* ICTY, *Prosecutor v. Duško Tadić*, IT -94-1-T, Decision on the Defence Motion for Interlocutory on Jurisdiction, 2 October 1995, paras 102, 134 ("Tadić Jurisdiction Decision").

be proven.[161] However, for such violations, there exist two jurisdictional prerequisites.

178. First, it must be proven that an armed conflict was in existence at the time of the alleged offence(s).[162] Article 14(1)(c) is set out in relation to armed conflicts not of an international character. There are two determinative elements relevant to a non-international armed conflict, namely its intensity and the organisation of the parties involved used to distinguish non-international armed conflict from "mere acts of banditry or unorganised and short-lived insurrections",[163] or that when distinguishing from "cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of organisation of the parties involved."[164] Once established, the state of armed conflict continues until a peaceful settlement is achieved.[165]

179. Second, it must be shown that there is a clear or close nexus between the armed conflict and the commission of the crime, and that the perpetrator acted in furtherance of or under the guise of the armed conflict. There need not be a causal connection between the armed conflict and the commission of the crime, but the armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, then manner in which it was committed and the purpose for which it was committed.[166] It is not enough to merely show that the crime was committed "at the same time as an armed

[161] Tadić Jurisdiction Decision, para. 102.
[162] ICTY, *Prosecutor v. Stakić*, IT-97-24-A, Appeals Chamber Judgment, 22 March 2006, ("Stakić AJ"), para. 342.
[163] Limaj TJ, para. 89; Akayesu TJ, paras. 619-20.
[164] Čelebići TJ, para. 184.
[165] Tadić Jurisdiction Decision, para. 70; ICTY, *Prosecutor v. Gotovina et al*., IT -06-90-T, Judgement (Volume II), 15 April 2011, para. 1676.
[166] Kunarac TJ, para. 58.

conflict" and/or "in any circumstances created in part by the armed conflict".[167] Similarly, while the perpetrator's alleged crimes need not have been committed in the area of armed conflict, they must at least be "substantially related" to the area of armed conflict, extending to the entire territory under the control of the fighting parties. To this end, there must be established a geographical and temporal link between the alleged crimes and the armed conflict.[168]

180. The burden is on the SPO to prove the existence of an armed conflict throughout the alleged Indictment Period, namely from March 1998 until September 1999. Mr. Selimi does not concede the existence, or the qualification of such an armed conflict, at any point during this period.[169]

181. In particular, it is specifically challenged that since the MTA on 9 June 1999, there was a conflict of any type on the territory of Kosovo. The sporadic instances of violence subsequent to the withdrawal of FRY forces from Kosovo on 20 June 1999 did not carry with it any real risk of the resumption of hostilities.[170]

IX. RULE 95(C) POTENTIAL WITNESS LIST

182. At the present time, the Defence has not identified "potential witnesses [that it] intends to call", and therefore is not in a position to provide such a list at this stage of proceedings. The Defence notes that the filing of such a list pursuant to Rule 95(5)(c) is framed "without prejudice to any subsequent amendment or filing […]". Following the close of the SPO's case, or following a decision pursuant to Rule 130, should the Defence choose to present a case, it will comply fully with the provisions of Rule 119 and any related order of the Trial Panel.

[167] ICTR, *Prosecutor v. George Rutaganda*, ICTR-96-3-A, Appeals Chamber Judgement, 26 May 2003, para. 570.
[168] Stakić AJ, para. 342.
[169] SPO PTB, paras 697, 700.
[170] SPO PTB, paras 698-699; *See* Common Article 3, 2016 Commentary to Geneva Convention I, para. 489.

Accordingly, while it is not possible to provide one at present, the Defence reserves its right to file such a list if, and when, the appropriate time arises.

X. CONFIDENTIALITY

183. This filing is submitted as confidential pursuant to Rule 82(4). A public redacted version will be filed in due course.

XI. CONCLUSION

184. Almost two years ago, the Pre-Trial Judge confirmed the Indictment against Mr. Selimi on the basis that "a well-grounded suspicion has been established by the Specialist Prosecutor" that he committed the crimes set out therein.[171] Mr. Selimi was arrested shortly afterwards and has remained in detention since that day.

185. The evidentiary basis for the findings against Mr. Selimi in the Confirmation Decision remain extensively redacted. The SPO PTB does little to provide greater clarity in this regard. Almost two years since he was first detained, Mr. Selimi is prevented from properly knowing, and being able to confront, the specific allegations against him and must instead guess at large swathes of the SPO case. In these circumstances, pursuant to Rule 95(5)(b), the Defence refutes the entirety of the charges and allegations against Mr. Selimi.

186. Notwithstanding these limitations, through this brief Mr. Selimi seeks to assist the Pre-Trial Judge and ultimately the Trial Panel as much as possible to understand, in general terms, the nature of his defence, which may be supplemented as and when appropriate.

Word count: 15,233

[171] Article 39(2); Rule 86(4); Confirmation Decision.

Respectfully submitted on 8 May 2023,

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