

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

**Before:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Hashim Thaçi

**Date:** 12 March 2021

**Language:** English

**Classification:** Public

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**Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction**

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## I. INTRODUCTION

1. Pursuant to Rule 97(1)(a) of the Rules,<sup>1</sup> the defence for Mr. Hashim Thaçi submits that the charges in the Specialist Prosecutor's Office ("SPO") Indictment against Hashim Thaçi<sup>2</sup> exceed the jurisdiction of the Kosovo Specialist Chambers ("KSC"), given that:
  - a. None of the charges relate to the allegations against Mr. Thaçi in the Council of Europe Report on "Inhuman treatment of people and illicit trafficking in human organs in Kosovo," compiled by Senator Dick Marty;<sup>3</sup>
  - b. The SPO exceeded the legally prescribed deadline for conducting criminal investigations under Article 159 of the Criminal Procedure Code;<sup>4</sup>
  - c. Pursuant to Articles 16, 19(1), 162 and Amendment No. 24 of the Constitution<sup>5</sup> and the Constitutional Court Judgment concerning Amendment No. 26,<sup>6</sup> the temporal mandate of the KSC and SPO expired on 3 August 2020; and
  - d. The KSC lack jurisdiction under Articles 12 and 16(1) of the KSC Law<sup>7</sup> to prosecute Mr. Thaçi for crimes alleged to have been committed through a Joint Criminal Enterprise.

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<sup>1</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules").

<sup>2</sup> KSC-BC-2020-06/F00134, Lesser Redacted Version of Redacted Indictment, KSC-BC-2020-06/F00045/A02, 4 November 2020 ("Indictment").

<sup>3</sup> Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report: Inhuman treatment of people and illicit trafficking in human organs in Kosovo, Doc. 12462, 7 January 2011 ("Marty Report").

<sup>4</sup> Code No. 04/L-123 on the "Criminal Procedure Code of Kosovo" ("Criminal Procedure Code").

<sup>5</sup> Constitution of the Republic of Kosovo ("Constitution").

<sup>6</sup> KSC-CC-2020-11/F00015, Judgment on the Referral of Proposed Amendments to the Constitution of Kosovo, 26 November 2020, para. 69 ("Amendment Judgment").

<sup>7</sup> Law No. 05/L-053 on the "Specialist Chambers and Specialist Prosecutor's Office" ("KSC Law").

2. Considered separately or cumulatively, and for the reasons set out below, these errors warrant the dismissal of the charges against Mr. Thaçi for lack of jurisdiction on the part of the KSC to adjudicate them.

## II. BACKGROUND

### A. EVENTS INSTIGATING THE MARTY REPORT

3. Article 6 of the KSC Law delineates the subject-matter jurisdiction of the KSC, and provides that “[t]he Specialist Chambers shall have jurisdiction over crimes set out in Articles 12-16 which relate to the Council of Europe Assembly Report.”
4. In order to establish the extent of the Indictment’s departure from this provision, it is worth considering the events that preceded the adoption of the KSC Law, and provided the KSC’s *raison d’être*.
5. In April 2008, less than three months after resigning as ICTY Prosecutor, Carla Del Ponte published her book *A Caccia: io e i criminali di Guerra*,<sup>8</sup> in which she made the dramatic allegation that KLA Commanders were implicated in trafficking human organs taken from Serb prisoners.
6. These allegations had been investigated by the ICTY Office of the Prosecutor during Del Ponte’s tenure but “no reliable evidence had been obtained to substantiate the allegations”.<sup>9</sup> Del Ponte also recognised the ICTY’s inability to prosecute organ trafficking allegations given its temporal and geographical mandate.<sup>10</sup> Regardless, the timing of the book’s publication, and the inflammatory nature of the accusations, attracted wide international attention.

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<sup>8</sup> *A Caccia: io e i criminali di guerra* (The Hunt: Me and War Criminals), Carla Del Ponte, in collaboration with Chuck Sudetic, (April 2008) (“The Hunt”).

<sup>9</sup> ICTY, ‘ICTY Weekly Press Briefing’, 16 April 2008, available at: <https://www.icty.org/en/press/icty-weekly-press-briefing-16-april-2008>.

<sup>10</sup> The Hunt, p. 285: “There were also jurisdictional obstacles, given the dates of the reported abductions, the transport of the victims across the border into Albania, the criminal activity in Albania, and the crime scene there”.

7. The book was published two months after the declaration of Kosovo's independence and less than a month after Serbia announced it would seek UN General Assembly support for an International Court of Justice advisory opinion on the declaration's compliance with international law.<sup>11</sup> Against this backdrop, the allegations fed the agenda of states opposing Kosovo's statehood.
8. The organ trafficking allegations were seized upon by Mr Konstatin Kosachev,<sup>12</sup> a member of the Council of Europe's Parliamentary Assembly from the Russian Federation and opponent of Kosovo's independence. On 15 April 2008, Kosachev tabled a draft motion for an investigation referring to the "memoirs of Carla Del Ponte... that militants of the Kosovo Liberation Army (KLA) kidnapped more than 300 people from Serbian enclaves of the province, who had their vitally important organs extracted later... [t]he Assembly believes that a thorough investigation of facts and consequences, provided by Del Ponte, should be carried out."<sup>13</sup> The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe then appointed Senator Dick Marty to investigate and report.

## B. THE SCOPE OF THE MARTY REPORT

9. The Marty Report focuses almost entirely on two specific accusations, "inhumane treatment of people" and "illicit trafficking of human organs," alleged to have taken place in detention facilities in Northern Albania: *Cahan, Kukës, Bicaç* (vicinity), *Burrel, Rripe, Durrës* and *Fushë Krujë*.<sup>14</sup> While reference is made to

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<sup>11</sup> b92, "Serbia to go to ICJ over Kosovo", 26 March 2008, available at:

[https://www.b92.net/eng/news/politics.php?yyyy=2008&mm=03&dd=26&nav\\_id=48824](https://www.b92.net/eng/news/politics.php?yyyy=2008&mm=03&dd=26&nav_id=48824).

<sup>12</sup> United Press International, "Russia may veto Kosovo's UN independence," 24 January 2007, available at:

[https://www.upi.com/Top\\_News/2007/01/24/Russia-may-veto-Kosovos-UN-independence/54621169673682/](https://www.upi.com/Top_News/2007/01/24/Russia-may-veto-Kosovos-UN-independence/54621169673682/).

<sup>13</sup> Council of Europe, Parliamentary Assembly, Motion for Resolution – Inhumane treatment of people and illicit trafficking in human organs in Kosovo, Doc. 11574, 15 April 2008, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=11868&lang=en>.

<sup>14</sup> Marty Report, para. 96, page 18.

sources referring to crimes in various parts of Kosovo such reports are seen as being "...of particular interest to our work, in the context of KLA-led operations on the territory of Albania, between 1998 and 2000."<sup>15</sup>

10. The Marty Report states; "the acts with which we are presently concerned are alleged to have occurred for the most part from the summer of 1999 onwards... at a time when the "Serbian security forces had abandoned Kosovo" and "[i]t was in the course of this critical period that numerous crimes were committed";<sup>16</sup> i.e. after the end of the armed conflict in Kosovo. Seemingly, it was on this basis that the crimes identified in the Marty Report were characterized as "organized crime,"<sup>17</sup> rather than war crimes or crimes against humanity. The Marty Report claimed that the "most significant operational activities undertaken by members of the KLA – prior to, during, and in the immediate aftermath of the conflict – took place on the territory of Albania, where the Serb security forces were never deployed."<sup>18</sup> The KLA, it stated, was "divided by a deep-rooted internal factionalism" and that "[i]t should be restated, for emphasis, that the KLA was not a single, unitary combatant faction in the manner of a conventional Army. There was no formally appointed overall leader, or "commander-in-chief", whose authority was universally recognised by the other commanders and whose orders were met with compliance among all the rank and file". The report portrayed "mafia-like banditry."<sup>19</sup>

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<sup>15</sup> *Ibid.*, para. 72, page 16.

<sup>16</sup> *Ibid.*, para. 4, page 6.

<sup>17</sup> *Ibid.*, paras. 10, 11, 37-92, 156-167 and Council of Europe, Parliamentary Assembly, Investigation of allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo, Resolution 1782, 25 January 2011, paras. 5, 11 and 19.

<sup>17</sup> Marty Report, para. 36, page 12.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid* para. 95. Also see The Guardian, "Kosovo PM is head of human and arms ring, Council of Europe reports", 14 December 2020, available at:

<https://www.theguardian.com/world/2010/dec/14/kosovo-prime-minister-llike-mafia-boss>.

11. The Marty Report led to further investigations. The US Department of State – while acknowledging that “[b]oth the UN[MIK] and the ICTY has investigated allegations of organ trafficking as far back as 2004, but decided to take no action”, still encouraged “any cooperation or collaboration in any further investigation of these matters.”<sup>20</sup>
12. Human rights organizations, such as Amnesty International<sup>21</sup> and Human Rights Watch<sup>22</sup> also called for an international investigation. Despite considering the allegations baseless,<sup>23</sup> the Kosovo authorities similarly called for an investigation.<sup>24</sup> The Prime Minister, Thaçi, despite being personally accused, called for “an independent investigation to ‘dispel the mist’ over allegations that he led a gang that murdered detainees to sell their kidneys.”<sup>25</sup>

### C. THE INVESTIGATION OF THE MARTY REPORT ALLEGATIONS BY THE SPECIAL INVESTIGATIVE TASK FORCE

13. In May 2011, the European Union Political and Security Committee adopted changes in the operational plan of EULEX,<sup>26</sup> envisaging a Special Investigative

<sup>20</sup> United States Department of State, Philip J. Crowley, Daily Press Briefing, 15 December 2010, available at: <https://2009-2017.state.gov/r/pa/prs/dpb/2010/12/152930.htm>.

<sup>21</sup> Amnesty International Press Release, “Kosovo: EU Police & justice mission must investigate post-conflict abductions,” 15 December 2010, available at: <https://www.amnesty.eu/news/0476-0476/>.

<sup>22</sup> Human Rights Watch Press Release, “Kosovo: EU Mission Needs Special prosecutor to investigate KLA,” 19 January 2011, available at: <https://www.hrw.org/news/2011/01/19/kosovo-eu-mission-needs-special-prosecutor-investigate-klan>.

<sup>23</sup> BBC, “Kosovo rejects Hashim Thaci organ-trafficking claims”, 15 December 2010, available at: <https://www.bbc.com/news/world-europe-11996255>.

<sup>24</sup> The Guardian, “Kosovo PM calls for inquiry over organ trafficking claims”, 21 December 2010, available at: <https://www.theguardian.com/world/2010/dec/21/kosovo-hashim-thaci-inquiry>.

<sup>25</sup> *Ibid.*

<sup>26</sup> According to the Council of the European Union, Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, available at [https://www.eulex-kosovo.eu/eul/repository/docs/WEJointActionEULEX\\_EN.pdf](https://www.eulex-kosovo.eu/eul/repository/docs/WEJointActionEULEX_EN.pdf), EULEX was established in February 2008 following Kosovo’s declaration of independence with the mandate to, *inter alia*, ensure that “cases of war crimes, terrorism, organized crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced.”

Task Force (“SITF”) authorized “to investigate and, if warranted, prosecute individuals **for crimes alleged in the [Marty] Report**” [*Emphasis added*].<sup>27</sup>

14. The SITF’s mandate could have been formulated in far broader terms, such as “to investigate alleged crimes committed after the conclusion of the armed conflict in Kosovo”. It was not. Its mandate was expressly linked to and limited by the scope of the Marty Report. In addition to the organ trafficking allegations, SITF was also authorized to investigate “possible unlawful detention, deportation, inhumane acts, torture and killings, as well as any other crimes, **related to the allegations contained in the [Marty] Report.**”<sup>28</sup> The SITF was not given a mandate to re-investigate crimes that had formed the basis of UNMIK or ICTY investigations and prosecutions. It was, in fact, filling a jurisdictional gap in the scope of these proceedings.

15. This was clear from the statement of the SITF Chief Prosecutor Williamson on 29 July 2014, when he presented the results of the SITF’s investigation into the Marty Report allegations at a press conference in Brussels. Having referred to a “specialist court” to be established “hopefully early next year”, Williamson stated that:

What our investigation has done and what this court will do, is to fill the void left by the [ICTY’s] jurisdictional limitations.<sup>29</sup>

16. These “jurisdictional limitations” were the fact that the Marty Report was primarily concerned with crimes committed after June 1999, and in Albania. Del Ponte had been open about these “jurisdictional obstacles, given the dates of the

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<sup>27</sup> SITF, “Special Investigative Task Force Fact Sheet” (“SITF Fact Sheet”), available at: <http://club.bruxelles2.eu/wp-content/uploads/2014/03/SpecialInvestigativeTaskForce.pdf>.

<sup>28</sup> *Ibid* [*Emphasis added*].

<sup>29</sup> UNSC, Annex II - *Statement dated 29 July 2014 of the Chief Prosecutor of the Special Investigative Task Force*, in: Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc S/2014/558, 1 August 2014 (“SITF Findings”) p. 21/26. *See also* “The Tribunal, however, was prevented from prosecuting crimes in the post-war period — the period which has been the primary focus of our investigation — because its jurisdiction did not allow for prosecutions outside armed conflict.”

reported abductions, the transport of the victims across the border into Albania, the criminal activity in Albania, and the crime scene there.”<sup>30</sup> Prosecution of these crimes would have required an enlargement of the ICTY’s jurisdiction. Both Williamson<sup>31</sup> and Del Ponte<sup>32</sup> acknowledged that this had been attempted. Once unsuccessful, the proposed “specialist” court was being created to fill the jurisdictional void in relation to the Marty Report allegations. Williamson properly presented the Marty Report and the ICTY jurisdiction as being mutually exclusive in relation to the Marty Report allegations.<sup>33</sup>

17. At the 29 July 2014 press conference, while Williamson claimed to have found “compelling indications” that organ trafficking had occurred on a “very limited scale” and with “a small number of individuals”,<sup>34</sup> he had not found sufficient evidence to support indictments with respect to the Marty Report’s allegations.<sup>35</sup>
18. For the remainder of the allegations, Williamson stated that indictments would be issued once Kosovo established a “specialised” judicial forum for their adjudication. His statement of findings was described as a “placeholder” until the establishment of the court would allow formal indictments to be filed.<sup>36</sup> For him, the work had been done.

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<sup>30</sup> The Hunt, p. 285.

<sup>31</sup> SITF Findings, p. 21/26: “In 2000, Tribunal Prosecutor Carla del Ponte actually requested revisions to the statute to allow the Tribunal to investigate and prosecute crimes during this period, but her request was not acted upon.”

<sup>32</sup> ICTY Press Release, JL/P.I.S./542-e, Address to the Security Council by Carla Del Ponte, Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, to the UN Security Council, 24 November 2000: “as the Tribunal’ Statute is presently drafted, the requirement that crimes are linked to an armed conflict effectively precludes my Office from dealing with on-going crimes in Kosovo. They lie outside the Tribunal’s jurisdiction. I therefore formally request the Council to extend the Tribunal’s jurisdiction in this respect.”

<sup>33</sup> SITF Findings, p. 21/26.

<sup>34</sup> *Ibid.*, p. 20/26. See also UNSC, UN Doc S/2014/558, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 1 August 2014, para. 21.

<sup>35</sup> SITF Findings, p. 20/26: “I do not yet feel that there is a strong enough evidentiary basis to conclude that indictments can be brought as to this aspect of the case”.

<sup>36</sup> *Ibid.*



19. However, even though Williamson reiterated that SITF's mandate had been to conduct an investigation "into allegations contained in the [Marty Report],"<sup>37</sup> the reality was quite different. The SITF investigation was a full scale "Kosovo-wide criminal investigation" into any and all allegations of crimes against humanity and war crimes.<sup>38</sup> Williamson explained that his investigators had not just investigated Marty Report allegations, but also those contained in the OSCE Report "Human Rights in Kosovo: As seen as Told (Vol. II)" and a Human Rights Watch report titled "Abuses against Serbs and Roma in the new Kosovo", stating that:<sup>39</sup>

This is the first time [...] that the allegations in those reports, and now those in the Marty report as well, have been subjected to prosecutorial review in the context of a Kosovo-wide criminal investigation.

20. Having untethered his investigation from the Marty Report, absent any authority to do so, Williamson was then free to make extremely general allegations of war crimes and crimes against humanity that took place not only in Albania, but also in Kosovo. His findings encompassed intentionally targeting minority populations, persecution, unlawful killings, abductions, sexual violence, enforced disappearances, illegal detention camps in Albania and Kosovo, other forms of inhumane treatment, forced displacement, desecration and destruction of churches and other religious sites and ethnic cleansing of large portions of the Serb and Roma populations in designated areas.<sup>40</sup> Williamson reported that:<sup>41</sup>

I am convinced that the Task Force has conducted the most comprehensive investigation ever done of crimes perpetrated in the period after the war ended in Kosovo in June 1999.

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<sup>37</sup> *Ibid.*, p. 18/26.

<sup>38</sup> *Ibid.*, p. 19/26.

<sup>39</sup> *Ibid.*, p. 21/26.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, p. 18/26.

21. Importantly, the SITF findings included crimes committed both during and after the completion of the armed conflict. The temporal mandate of the SITF investigation was first described by Williamson as being “the period after the war ended in Kosovo in June 1999,” which he then impermissibly qualified and expanded as being the “primary”<sup>42</sup> rather than exclusive focus of the investigation.
22. The SITF investigation was thus not “an investigation into the Marty Report allegations.” It was far broader. That the SITF exceeded its prescribed mandate is important for understanding the legislative intent of the instruments adopted by the Assembly of Kosovo to establish the KSC and SPO, which would soon follow.

**D. THE CONSTITUTIONAL AND LEGAL BASIS FOR THE ESTABLISHMENT OF THE KSC AND ITS SUBJECT-MATTER JURISDICTION**

23. On 3 August 2015, the Assembly of Kosovo adopted Amendment No. 24 to the Constitution, providing the constitutional basis for the establishment of the KSC and the SPO through new Article 162.
24. Significantly, the Amendment did not endorse the broad approach adopted by the SITF, and instead linked the jurisdiction of the new “specialist” court back to the far narrower allegations of the Marty Report. Article 162(1) of the Constitution is explicit that Kosovo may establish the KSC and the SPO to “comply with its international obligations in relation to the [Marty Report].”
25. This limitation on the KSC’s subject-matter jurisdiction is then reinforced in the KSC Law, which provides in Article 1(2) that the KSC and SPO “are necessary to fulfil the international obligations undertaken in Law No. 04/L-274, [...] and to ensure secure, independent, impartial, fair and efficient criminal proceedings in relation to allegations of grave trans-boundary and international crimes

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<sup>42</sup> *Ibid.*, p. 21/26.

committed during and in the aftermath of the conflict in Kosovo, which relate to those reported in the [Marty Report] **and** which have been the subject of criminal investigation by the [SITF].” Article 6(1) of the KSC Law then provides that the “[KSC] shall have jurisdiction over crimes set out in Articles 12-16 which relate to the [Marty Report].”

26. The use of the word “and” rather than “or” in Article 1(2) of the KSC Law is significant, limiting the KSC’s scope to those allegations which were both contained in the Marty Report, **and** investigated by the SITF; a deliberately narrow crossover. No scope was provided for the prosecution of crimes that fell outside the Marty Report allegations, or arising from subsequent SPO investigations. Given the limited scope of its jurisdiction (and the existence of the SITF’s “placeholder” findings) the temporal mandate of the KSC and SPO was limited to a maximum period of five years from the date of the adoption of the Amendment No. 24.<sup>43</sup>
27. It would appear from a review of the Indictment that the SPO eventually came to the conclusion that the SITF material concerning the Marty Report’s allegations of organ thefts could not found a successful prosecution. Instead, a new and different case was constructed that has little or nothing to do with the Marty Report and is instead built from recycled UNMIK, EULEX or ICTY cases. This approach suffers from three basic flaws. First, the new case exceeds the subject-matter jurisdiction of the KSC, which was designed to exclude the very allegations revived by the SPO. Second, the SPO exceeded the legally prescribed deadline for conducting criminal investigations under Article 159 of the Criminal Procedure Code. Third, in the time it took to abandon a Marty-based case and build another, the fixed temporal mandate of the KSC expired.

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<sup>43</sup> Constitution, Article 162(2).

### III. SUBMISSIONS

#### A. THE INDICTMENT EXCEEDS THE SUBJECT-MATTER JURISDICTION OF THE KSC AND DEFEATS THE *RAISON D'ÊTRE* OF THE KSC

##### 1. Applicable Law

28. The SITF investigation and allegations went well beyond the scope of the Marty Report. Williamson's claim that his investigation was a full scale "Kosovo-wide criminal investigation,"<sup>44</sup> was reflected in his findings which went far beyond the allegations of organ trafficking and inhumane treatment in detention centres in Albania that were the focus of the Marty Report.
29. The Assembly of Kosovo ("Assembly") was aware of the scope of Williamson's findings when it drafted Constitutional Amendment No. 24 ("Amendment") establishing the KSC and SPO. Rather than endorsing the scope of the SITF investigation, the Assembly reined in the jurisdictional reach of these new institutions, linking their purpose and existence in Article 162(1) to compliance with "international obligations in relation to the [Marty Report]." The debates in the National Assembly on the constitutional amendment confirm that the intent was to limit the jurisdiction of the KSC to the allegations in the Marty Report and to limit the life of the KSC to five years. Where there are unclear provisions in a constitution, it is very widely recognised that reference may be made to the drafting history in order to clarify the intent of the text. As such, the KSC are constitutionally limited by the content of this Report. The reference to the Marty Report in the Constitution is not merely "adjectival." It is fundamental to jurisdiction.
30. The drafters of the Amendment were entitled to frame the KSC's subject-matter jurisdiction in any manner of ways, including creating a court to prosecute the

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<sup>44</sup> SITF Findings, p. 19/26.

allegations resulting from the SITF investigation, or empower the SPO to investigate further. They did not. A decision was made to focus in from the broader contours of the SITF investigation, and link the KSC's operation back to the narrower confines of the Marty Report itself.

31. The narrow scope of the Amendment also reflects the Assembly's intent that the KSC would, in the words of Williamson, "fill a void" left by the ICTY's jurisdictional limits. The stated *raison d'être* of the KSC was indeed to fill this gap.<sup>45</sup> ICTY Chief Prosecutor Del Ponte had been explicit in her request to the Security Council to extend the ICTY's jurisdiction, that the requirement that "crimes are linked to an armed conflict effectively precludes my Office from dealing with ongoing crimes in Kosovo."<sup>46</sup> Further obstacles were identified as "the dates of the reported abductions" and "the criminal activity in Albania."<sup>47</sup> Their timing, location, and lack of nexus to the armed conflict all put the Marty Report crimes firmly out of the ICTY's reach. The KSC's jurisdiction was intended, and crafted, to address this void.
32. In that sense, the KSC's proceedings are also properly limited to crimes falling outside the jurisdiction of the ICTY. For crimes committed before the end of the armed conflict, these crimes were properly within the jurisdiction of the ICTY, and therefore fall outside that of the KSC. Moreover, in accordance with the requirement that Article 162 of the Constitution, as *lex specialis*, should be interpreted strictly, violations committed after June 1999 are outside the KSC's jurisdiction to the extent that they have a nexus with the armed conflict. Having

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<sup>45</sup> SITF Findings, p. 21/26.

<sup>46</sup> ICTY Press Release, JL/P.I.S./542-e, Address to the Security Council by Carla Del Ponte, Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, to the UN Security Council, 24 November 2000.

<sup>47</sup> The Hunt, p. 285: "There were also jurisdictional obstacles, given the dates of the reported abductions, the transport of the victims across the border into Albania, the criminal activity in Albania, and the crime scene there".

this nexus, they are prosecutable by the ICTY, and as such outside the KSC's jurisdictional reach.

## 2. The Indictment vastly exceeds the KSC's jurisdictional limits

33. The Indictment has been drafted with a disregard for the limitations imposed by the Constitution and confirmed in the legislation establishing the KSC. Of course, the lack of overlap between the Indictment and the Marty Report confirms the latter was unable to survive any independent prosecutorial or judicial scrutiny. Regardless, a comparison of their geographical and temporal scope renders a claim that the KSC are exercising jurisdiction over "crimes set out in Articles 12-16 which relate to the [Marty Report]" implausible.<sup>48</sup> Consequently, rather than address jurisdictional gaps left by the Statute of the ICTY, in substance, the SPO is attempting to revive the ICTY.

34. Most obvious is the lack of geographic overlap. The only locations listed with any specificity in the Marty Report are the "detention facilities on the territory of the Republic of Albania".<sup>49</sup> The detention centres identified during the inquiry were in the following locations: *Cahan*, *Kukës*, *Bicaj* (vicinity), *Burrel*, *Rripe*, *Durrës* and *Fushë Krujë*.<sup>50</sup> Significantly, they are all in Albania.<sup>51</sup>

35. The crimes alleged in the Indictment took place almost exclusively in Kosovo. The Indictment lists 42 alleged detention sites.<sup>52</sup> Only two are in Albania, being *Cahan*, and *Metal Factory in Kukës*. All others are in Kosovo. The Indictment lists alleged murders and killings in 20 different locations.<sup>53</sup> Only one is in Albania, again being *Metal Factory in Kukës*. All others are in Kosovo. The Indictment then alleges

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<sup>48</sup> KSC Law, Article 1(2).

<sup>49</sup> Marty Report, para. 93, page 18.

<sup>50</sup> *Ibid.*, para. 96, page 19.

<sup>51</sup> *Ibid.*, Annex, page 28.

<sup>52</sup> Indictment, pages 54 – 58.

<sup>53</sup> Indictment, pages 60 – 66.

enforced disappearance of individuals, and lists six alleged locations where these took place.<sup>54</sup> All are in Kosovo.

36. This geographic separation is significant. Both Marty<sup>55</sup> and Del Ponte<sup>56</sup> acknowledged that the ICTY was not in a position to investigate the organ trafficking allegations because of a lack of territorial jurisdiction. While the ICTY had carried out an exploratory mission, “the ICTY’s mandate was restricted to a clearly defined timeframe and territory [...] and its jurisdiction does not extend to Albania.”<sup>57</sup> The Marty Report filled this gap. Thus, reference to the Marty Report in Article 162(1) of the Constitution limits the jurisdiction of the KSC not only in terms of its subject-matter, but also its territorial reach. The KSC were established to investigate crimes alleged in Albania. Absent a nexus to this territory, the KSC have no jurisdiction.
37. The same disconnect exists with respect to temporal jurisdiction. The Indictment’s temporal scope is limited to “at least March 1998 through September 1999.”<sup>58</sup> The Marty Report is concerned with the period that follows. In its opening paragraphs, the Marty Report states, “[t]he acts with which we are presently concerned are alleged to have occurred **for the most part** from the summer of 1999 onwards.”<sup>59</sup> The two documents are accordingly, and necessarily, dealing with different events.
38. This reflects Williamson’s understanding, articulated in July 2014, that the purpose of a subsequent specialized court would be to adjudicate offences that had escaped the jurisdictional reach of the ICTY, because they had occurred in

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<sup>54</sup> Indictment, pages 67 – 68.

<sup>55</sup> Marty Report, para. 3, page 6.

<sup>56</sup> The Hunt, p. 285: “There were also jurisdictional obstacles, given the dates of the reported abductions, the transport of the victims across the border into Albania, the criminal activity in Albania, and the crime scene there”.

<sup>57</sup> Marty Report, para. 3, page 6.

<sup>58</sup> Indictment, para. 17.

<sup>59</sup> Marty Report, para. 4, page 6.

what he called the “post-war period.”<sup>60</sup> To the extent that the KSC Law describes its territorial jurisdiction as starting in 1998 and thereby going beyond the Marty Report in either a temporal or territorial sense, it is unconstitutional for being at variance with Article 162(1) of the Constitution, whereby the legislature was authorized to create specialist chambers only with respect to the allegations in the Marty Report, which themselves had been investigated by the SITF.

39. In addition to the lack of overlap on temporal and territorial scope, the Marty Report and the Indictment diverge more fundamentally. The Marty Report makes no reference to war crimes or crimes against humanity. None of the allegations contained therein, even taken at their highest, provide support for the contextual elements of these crimes.
40. Rather, the framework of the alleged criminal activity is what the Marty Report describes as “organized crime.”<sup>61</sup> The Marty Report’s alleged findings on “KLA factionalism and the nexus with organized crime” and “victims of organized crime” comprise 9 of 13 pages of factual findings.<sup>62</sup> The Marty Report’s concluding paragraphs emphasize the “dreadful problem in the region” of organized crime, which “also affects Serbia, Montenegro and Albania, to name but a few examples,” and lauds the Report’s demonstration that “organized crime is a significant phenomenon in Kosovo,” claiming “[w]e have highlighted and documented the shady, and in some cases open, connections between organised crime and politics.”<sup>63</sup> Rather than forming the basis for an international crimes indictment, the Marty Report gives no indication that the alleged criminal activity rises to this level.

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<sup>60</sup> SITF Findings, p. 21/26.

<sup>61</sup> Marty Report, Part A, paras. 5, 11, 19; Part B, paras. 10, 11, 37 – 92, 156 – 167.

<sup>62</sup> *Ibid.*, paras. 37 – 92, 156 – 167, pages 12 – 18, 24 – 25.

<sup>63</sup> *Ibid.*, para. 176, page 26.



41. By contrast, the Indictment makes no reference to organized crime in Kosovo or elsewhere. Through the Indictment, the SPO is not prosecuting crimes alleged in the Marty Report. It is pursuing a different case which, for the reasons set out above, it had neither the jurisdiction nor authority to do.
42. The Confirmation Decision<sup>64</sup> does not address whether the crimes charged fall within the subject-matter jurisdiction of the KSC, in accordance with Article 6(1) of the KSC Law. Concerningly, the Confirmation Decision removes the references to the Marty Report in its citation to Article 6(1).<sup>65</sup> Whether the crimes fall within the KSC's jurisdiction was a central question. It was simply skipped over. Given the clear constitutional limitation on the exercise of the KSC's jurisdiction, the deeply contrasting nature of the Marty Report and the Indictment mandates the dismissal of this significantly different case.
43. In sum, both the SITF investigation and the SPO Indictment exceed the jurisdictional limits of the KSC. Both by failing to address the central allegations of the Marty Report, and by focusing on matters falling squarely with the jurisdictional reach of the ICTY, the present case steps far outside the court's intended bounds.

#### **B. THE TEMPORAL MANDATE OF THE KSC AND SPO HAS EXPIRED**

44. Article 162(13) of the Constitution sets the minimum and the maximum temporal mandate of the KSC and SPO. The maximum mandate is five years from the date of the adoption of this constitutional amendment on 3 August 2015. If the Council of the European Union notifies Kosovo about the conclusion of the work for which KSC and SPO have been established, the temporal mandate can also be shorter.

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<sup>64</sup> KSC, KSC-BC-2020-06/F00026/CONF/RED, Confidential Redacted Version of Decision of the Pre-Trial Judge of Kosovo Specialist Chambers, Nicolas Guillou, on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 26 October 2020 ("Confirmation Decision").

<sup>65</sup> *Ibid*, para. 32.

45. It is important to review the proper context for the mandate being a maximum of five years. It is consistent with the KSC and SPO being preceded by a full-scale criminal investigation by SITF, and assertions by Williamson that the only obstacle to indictments was the lack of a judicial forum. The five-year mandate of the KSC and SPO therefore reflects the legislative intent of the Assembly to establish these institutions for a sufficient period, and for the purpose of proceedings in connection with Marty Report allegations that had also been investigated by the SITF. A five year mandate was entirely realistic in that context. This timeframe is also consistent with the right of the accused to be tried within a reasonable time which is enshrined in the Constitution.<sup>66</sup>
46. The maximum temporal mandate of the KSC and SPO expired on 3 August 2020, being the fifth anniversary of the constitutional amendment by which KSC and SPO were established.<sup>67</sup> As a result, the work of the KSC and SPO after 3 August 2020 is unconstitutional. The Indictment issued thereafter is invalid, and must be dismissed.
47. Given the expiration of the KSC and SPO's mandate, on 24 August 2020, the then President Thaçi submitted to the Assembly of Kosovo for consideration Constitutional Amendment No. 26, which proposed the indefinite extension of the mandate of the KSC and SPO until the completion of their work ("Proposed Amendment").<sup>68</sup> The Proposed Amendment sought to ensure that the mandate and the work of KSC and SPO continued without any constitutional impediments. However, the Specialist Chamber of the Constitutional Court held that the Proposed Amendment diminished the rights and freedoms in Chapter II of the

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<sup>66</sup> See KSC-BC-2020-06, Defence for Mr. Hashim Thaçi, Motion challenging jurisdiction on the basis of violations of fundamental rights enshrined in the Constitution, 12 March 2021, para. 7 et seq.

<sup>67</sup> Constitution, Article 162(13).

<sup>68</sup> Radio Free Europe, "Thaçi proposes constitutional amendments for the mandate of the Special Court," 25 August 2020, available at: <https://www.evropaelire.org/a/30801717.html>.

Constitution, by failing to refer to Law No. 04/L-274.<sup>69</sup> As such, the Proposed Amendment was unable to be presented to the Assembly.

48. There are no conflicts between the Constitution and Law No. 04/L-274 for the Establishment of KSC and SPO in this respect. In fact, the latter does not address the temporal mandate of KSC and SPO at all. Even if it did, and in light of a conflict, the mandate prescribed by the Constitution would prevail, given that Article 16(1) of the Constitution provides that “[t]he Constitution is the highest legal act of the Republic of Kosovo” and that “[l]aws and other legal acts shall be in accordance with this Constitution.” Article 19 of the Constitution then provides that “[r]atified international agreements and legally binding norms of international law have superiority [only] over the laws of the Republic of Kosovo.”
49. Nor can any plausible argument be advanced that Article 162(14) provides a continuing mandate to the KSC absent a notification of completion.<sup>70</sup> There is clearly an incoherence as between Articles 162(12), 162(13) and 162(14). The reference to “paragraph 12” in Article 162(14) does not make sense. Given that it is the role of the interpreter of the Constitution to give it sense, the logical explanation is that Article 162(13) was inserted subsequently, indicating an intention on the part of the legislator that the five year mandate of the KSC and SPO was expressly included.
50. Regardless, the notification on the end of the mandate of the KSC and SPO to which Article 162(14) refers applies only to the *minimum* temporal mandate, which is subject to such a notification. Nothing in Article 162(14) impairs or diminishes

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<sup>69</sup> Amendment Judgment, para. 69.

<sup>70</sup> Constitution, Article 162(14): “In the absence of notification of completion of the mandate under paragraph 12, the mandate of the Specialist Chambers and the Specialist Prosecutor’s Office shall continue until notification of completion is made in accordance with Law No. 04/L-274 and in consultation with the Government.”

the clarity on the maximum duration of the mandate of the KSC and SPO foreseen in Article 162(13) of the Constitution, particularly given the reasons why a five year temporal mandate was warranted.

51. Moreover, the KSC and SPO were established by an exercise of sovereignty by way of an international agreement under Article 20 of the Constitution, which cannot be indefinite, uncertain or unilateral. As such, the maximum temporal mandate of the KSC and SPO is that set by Article 162(13). It was for this reason that then President Thaçi was required to submit Constitutional Amendment No. 26 to expand the KSC and SPO's mandate to allow them to complete their work.
52. Finally, the KSC are entitled to rule on their own temporal mandate by virtue of the principle of *la compétence de la compétence*, which subsumes the question of whether a court was validly constituted.<sup>71</sup> Such a ruling would serve the purpose of complying with the defendants' right to be tried by "a tribunal established by law,"<sup>72</sup> as guaranteed by Article 32 of the Constitution, and reflected in international conventions.<sup>73</sup>

### **C. THE SPO CONDUCTED NEW CRIMINAL INVESTIGATIONS AGAINST MR THAÇI WITHOUT A LEGAL BASIS**

53. The SPO had no legal or constitutional basis to conduct new and additional investigations to find evidence to support an Indictment. Article 1(2) of the KSC Law limits the KSC's jurisdiction to allegations "which relate to those reported in

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<sup>71</sup> ICC, *Situation in Bangladesh/Myanmar*, ICC-RoC46(3)-01/18-37, Pre-Trial Chamber I, Request under Regulation 46(3) of the Regulations of the Court - Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', 6 September 2018, paras 30-32. *See also*, ICTY, *Prosecutor v. Tadić*, IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 10-12, 18, 22; ICC, *Prosecutor v. Gicheru and Bett*, ICC-01/09-01/15-61, Pre-Trial Chamber A, Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence, 10 December 2020 ("*Gicheru and Bett* Decision"), para. 34.

<sup>72</sup> *Gicheru and Bett* Decision, paras. 31-35.

<sup>73</sup> European Convention on Human Rights, Article 6(1); International Covenant on Civil and Political Rights, Article 14(1).

the [Marty Report] **and** which have been the subject of criminal investigation by the [SITF].” It did not then add: “or any other allegations arising from any subsequent SPO investigations.” A “full scale” criminal investigation had been completed, with its findings acting as a “placeholder” until formal indictments could be filed. The fact that years then passed without indictments being issued did not then allow the SPO to unilaterally decide fundamentally to alter its mandate and role.

54. Neither the KSC Law nor the Rules of Procedure and Evidence (“RPE”) specifically regulate the period within which a SPO investigation may be carried out. Article 38(4) of the KSC Law obliges the SPO to prepare an indictment upon determining that there exists a well-grounded suspicion that a person is criminally liable for any offence within the jurisdiction of the KSC. If the SPO does not file an indictment “within a reasonable time after the person became a suspect,” Rule 47(1) of the RPE allows the suspect to request the investigation’s termination. As such, the RPE address what happens following the completion of SPO investigations, but are silent on their duration.
55. In the absence of a specific deadline for SPO investigations, Rule 3 provides that “[the RPE] shall be interpreted in a manner consonant with the framework as set out in Article 3 of the [KSC Law] and, where appropriate, the [Criminal Procedure Code].” In light of this, and Articles 3(2)(c) and 19(2) of the KSC Law, the provisions of the Criminal Procedure Code should be applied when determining the maximum period for an SPO investigation. Article 159 of the Criminal Procedure Code provides that “the investigation shall be completed within two (2) years.” Accordingly, if an indictment is not filed, or a suspension is not entered, within two years of the start of the investigation, the investigation shall be automatically terminated.

56. The first investigation into the Marty Report allegations was initiated by the SITF in 2011. While it is uncertain as to when the actual investigation commenced for each case, it is evident that the investigation was governed solely by the then criminal procedural rules, including the Criminal Procedure Code, as neither the KSC Law nor the RPE existed at the time.
57. In 2014, the SITF stated that it had gathered enough evidence to support indictments, with the only obstacle being the absence of a specialised judicial forum. This is reinforced by the international agreement for the establishment of the KSC, effected by the exchange of letters between the President of Kosovo and the High Representative of the European Union for Foreign Affairs and Security Policy, Catherine Ashton, which refers to the KSC's purpose as being for "trial and appellate proceedings arising from the SITF investigation."<sup>74</sup>
58. Following the establishment of the KSC and SPO in 2015 (**four years** after the first investigations started), the authority of SITF to prosecute the suspects of the alleged crimes in the Marty Report was assumed by the SPO. The SPO then failed to file the Indictment within the deadline of two years set in Article 159 of the Criminal Procedure Code. The Indictment was filed in 2020 (**nine years** after the initiation of the investigation).
59. The SPO did not have legal authority to conduct an entirely new criminal investigation into the Marty Report allegations, as the maximum duration permitted under Article 159 of the Criminal Procedure Code had already been used up by the SITF. The new investigation undertaken by the SPO is without a legal basis, meaning that charges based upon them must be dismissed.

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<sup>74</sup> Law No. 04/L-274 on the "Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo" ("Law on the International Agreement for the Establishment of the KSC and SPO"), available at: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=9476>.

**D. JCE IS NEITHER PROVIDED FOR UNDER THE KSC LAW NOR REPRESENTS INTERNATIONAL CUSTOMARY LAW**

60. Mr Thaçi has been accused of committing the crimes in Counts 1-10 through his alleged participation in a JCE between March 1998 and September 1999.<sup>75</sup> Mr Thaçi is charged with JCE's first and third forms, "JCE I" and "JCE III." The Indictment alleges that to the extent that some of the charged crimes did not fall within the JCE, it was foreseeable that they might be perpetrated by other members or tools, and the accused willingly took that risk.<sup>76</sup>
61. JCE is not included in the KSC Statute.<sup>77</sup> While co-perpetration is indeed a form of "commission" liability,<sup>78</sup> the SPO has provided no justification for its reliance on JCE in charging the accused. International criminal courts have recognised two constructs of liability through the reciprocal imputation of co-perpetrators' acts. The International Criminal Court ("ICC") has adopted the doctrine of co-perpetration based on joint control over the crime, whereby an accused incurs liability through his essential contribution to a criminal plan that will result in the charged crimes.<sup>79</sup> The ICTY applied JCE, through which co-perpetrators incur liability by way of their agreement to a common plan involving a commission of a crime, and by contributing to that plan.<sup>80</sup>
62. Article 12 of the KSC Law requires Judges to apply customary international law and the substantive criminal law of Kosovo insofar as it is in compliance with

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<sup>75</sup> Indictment, paras. 172-173.

<sup>76</sup> Indictment, paras. 32-34.

<sup>77</sup> Pursuant to Article 16(1) of the KSC Law, an accused can be held individually criminally liable for war crimes or crimes against humanity, if he or she "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of such a crime shall be individually responsible for the crime".

<sup>78</sup> R. O'Keefe, *International Criminal Law* (Oxford University Press, 2015), at 179.

<sup>79</sup> ICC Statute, Article 25(3)(a); ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, paras. 338, 343-367.

<sup>80</sup> ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999 (*Tadić* Appeal Judgment), para. 220.

customary international law applicable at the time of the alleged crimes. JCE was not part of the substantive criminal law of Kosovo at the time of the alleged crimes. Article 22 of the SRFY Criminal Code (1976) provided for a basic form of mutual attribution liability, stating that “[i]f several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act.” There is no basis for asserting that this provision demonstrates that JCE liability was sufficiently foreseeable to the accused at the time of the alleged crimes.

63. Turning then to customary international law,<sup>81</sup> JCE did not enjoy the status of customary international law at the time of the alleged crimes. The ICTY Appeals Chamber in its 1999 *Tadić* judgment concluded that “common design as a form of accomplice liability is firmly established in customary international law.”<sup>82</sup> It is not an exaggeration to cite this among the most controversial of the ICTY’s judicial pronouncements. One of its authors, His Honour Judge Shahabuddeen, later reflected on the question of whether JCE or co-perpetration enjoyed the status of customary international law, and wrote that “two rival theories—joint criminal enterprise and co-perpetratorship—hold sway in major parts of the world, but not generally; neither is therefore entitled to be regarded as customary international law.”<sup>83</sup> Indeed, the ICTY Judges in the *Stakić* case held that co-perpetration most closely resembles what most legal systems understand as “committing”, and not JCE.<sup>84</sup>

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<sup>81</sup> Article 3(3) of the KSC Law provides that in determining the status of customary international law at the time of the crimes, Judges “may be assisted by sources of international law, including subsidiary sources such as the jurisprudence from the international ad hoc tribunals, the International Criminal Court and other criminal courts.”

<sup>82</sup> *Tadić* Appeal Judgment, para. 220.

<sup>83</sup> M. Shahabuddeen, ‘Judicial Creativity and Joint Criminal Enterprise’ in S Darcy and J Powderly (eds) *Judicial creativity at the international criminal tribunals* (OUP 2010), p.188.

<sup>84</sup> ICTY, *Prosecutor v. Stakić*, IT-97-24-T, Trial Chamber, Judgement, 31 July 2003, para. 441. See also ICTY, *Prosecutor v. Prlić et al*, IT-04-74-T, Trial Chamber, Judgement, Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti, 29 May 2013, p. 155; ICTR, *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Appeals Chamber, Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, 7 July 2006, para. 21.



64. Of course, in 1998, States in Rome had already adopted co-perpetration as the mode through which an accused could be held individually criminally responsible for the crimes of others at the ICC. Indeed, co-perpetration “has been applied in various national proceedings (Eichmann, Argentinean Generals, East German border killings) and may be identified in the Nuremberg *Justice* case,”<sup>85</sup> as well as in the *RuSHA* Judgment.<sup>86</sup>
65. Moreover, a review conducted of the ICTY and ICTR jurisprudence reveals that JCE was inconsistently characterised; at times as perpetration (or commission) and at times as accomplice liability. This ambivalence “not only casts doubt over the ‘firm’ recognition of JCE under customary law, but it also raises some problems with regard to the requirement of precision, as a corollary of the principle of legality.”<sup>87</sup> If JCE could not be consistently defined and delineated, it could not represent any kind of general practice accepted as law by states.
66. Whether a rule forms part of customary law should be “beyond any doubt” in order to avoid the problem of adherence.<sup>88</sup> That many states prefer a construct akin to “co-perpetration,” makes it impossible that JCE is firmly entrenched in custom, or that it was in 1998-1999. The KSC do not have a basis for asserting jurisdiction over crimes alleged to have been committed pursuant to a JCE. It was not part of customary international law at the time of the crimes.

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<sup>85</sup> See K. Ambos, ‘Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to Those “Most Responsible”,’ in H. van der Wilt and A. Nollkaemper (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009) at 143 (internal footnotes omitted).

<sup>86</sup> R. Clark, ‘Together Again? Customary Law and Control over the Crime’ 26 *Criminal Law Forum* (2015) 457, at 466.

<sup>87</sup> S Manacorda and C Meloni, ‘Indirect Perpetration versus Joint Criminal Enterprise Concurring Approaches in the Practice of International Criminal Law?’ 9 *JICJ* (2011) 159 at 166. See also J.D. Ohlin, ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise’ 5 *JICJ* (2007) 69 at 75; and S. Powles, ‘Joint Criminal Enterprise - Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?’ 2 *JICJ* (2004) 606, at 615.

<sup>88</sup> UNSC, UN Doc S/25704, Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, para. 34.

67. Should the Pre-Trial Judge find that the KSC **do** have jurisdiction to adjudicate crimes charged under this mode of liability, this jurisdiction cannot extend to JCE in its extended form, being JCE III.<sup>89</sup> Through JCE III, the *mens rea* requirement is said to be fulfilled where the accused was aware that the actions of either his co-participants (or individuals being used as “tools” to implement the common plan) would most likely commit that crime, and willingly took that risk.<sup>90</sup> As such, JCE III allows an accused to be convicted of an international crime where he neither intended the crime to occur, nor made any kind of essential contribution to its occurrence, thereby “endanger[ing] the principle of individual and culpable responsibility by introducing a form of collective liability, or guilt by association”.<sup>91</sup>
68. JCE III was not part of the substantive law of Kosovo at the time the crimes were committed, nor was it part of customary law. Both the ICTY<sup>92</sup> and IRMCT<sup>93</sup> have acknowledged the lack of uniform implementation of JCE III at the domestic and international levels. JCE III was held inapplicable to terrorism charges by the Special Tribunal for Lebanon,<sup>94</sup> and was rejected by the ECCC, where the Supreme Court Chamber held:

In this regard, the Supreme Court Chamber notes with approval the Pre-Trial Chamber Decision on JCE (D97/15/9), in which the Pre-Trial Chamber analysed in detail the jurisprudence of the *ad hoc* tribunals regarding the notion of JCE III and concluded that the decisions upon which the ICTY Appeals Chamber relied in *Tadic* when finding that JCE III

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<sup>89</sup> *Tadić* Appeal Judgment, para. 203.

<sup>90</sup> *Ibid.*, para. 220.

<sup>91</sup> H. Olasolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Hart publishing, 2009), p. 5.

<sup>92</sup> *Tadić* Appeal Judgment, para. 225.

<sup>93</sup> ICTY, *Prosecutor v. Karadžić*, MICT-13-55-A, Appeals Chamber, Judgment, 20 March 2019, para. 436 (“*Karadžić* Appeal Judgment”).

<sup>94</sup> STL, STL-11-01/1, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 248: “the better approach under international criminal law is not to allow convictions under JCE III for special intent crimes like terrorism.”

was part of customary international law did not constitute a “sufficiently firm basis” for such a finding.’<sup>95</sup>

69. JCE III’s outlier status was further confirmed in 2016 when the UK Supreme Court in *Jogee v. The Queen*<sup>96</sup> examined scenarios where an accused intended to commit an offence as part of a common criminal purpose (the original crime) and, in the course of carrying out that common purpose, another participant committed another offence (the extended crime). Under the position pre-*Jogee*, the accused could be liable if he or she foresaw the extended crime might be committed. The UK Supreme Court unanimously found that courts had been wrong to equate foresight of the commission of an extended crime with the *mens rea* element applicable to an accused. Instead, foreseeability was just a factual consideration (not the legal standard) from which the accused’s intent could be inferred.<sup>97</sup>
70. The significance of this correction is that the only support that the ICTY Appeals Chamber found in *Tadić* for treating foreseeability as a legal requirement for the “extended” crimes stems from domestic jurisprudence – including some cases that *Jogee* either overturned or identified as inconsistent with treating foresight as a legal element.<sup>98</sup> The ICTY has since rejected challenges to JCE III on this basis, relying in part on the stringent standards for departing from its own jurisprudence, and the need for legal certainty,<sup>99</sup> factors which are not relevant at the KSC.
71. By placing JCE III at the centre of its indictment, the SPO is hanging its case on a form of liability that is not reflected in customary international law. JCE III has been disavowed in its original form by two of its authors (Judges Cassese and

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<sup>95</sup> ECCC, *Prosecutor v. Khieu Sampan & Nuon Chea*, 002/19-09-2007-ECCC/SC, Supreme Court Chamber, Judgment, 23 November 2016, para. 791.

<sup>96</sup> *Jogee v. The Queen* [2016] UKSC 8 (“*Jogee*”).

<sup>97</sup> *Ibid.*, para. 87.

<sup>98</sup> See further, ICTY, *Prosecutor v. Karadžić*, MICT-13-55-A, Appeals Chamber, Request for leave to Make Submissions as *Amicus Curiae*, 24 August 2017.

<sup>99</sup> *Karadžić Appeal Judgment*, para. 433.

Shahabuddeen).<sup>100</sup> The wall of academic criticism (and subsequent judicial rejection) of JCE III will mean that any conviction rendered under this mode of liability at the KSC will expose the verdict to automatic questions as to its credibility and legitimacy. If the SPO is confident of its case and the evidence it collected, it should not resort to reliance on a mode of liability incompatible with basic principles of criminal accountability. More importantly, under Article 12 of the KSC Law, it is not entitled to.

#### IV. CONCLUSION

72. The mandate of the KSC and SPO was, in essence, a simple one. Del Ponte raised allegations of organ trafficking, which were enthusiastically confirmed by the Marty Report. The Marty Report gave rise to the SITF, which debunked the organ trafficking claims, and announced in July 2014 that the findings of its investigation meant that indictments could be filed as soon as a specialized court was established, “hopefully next year”. In the meantime, the findings would stand as a “placeholder.”<sup>101</sup>
73. Armed with the Marty Report, and the far broader findings of the SITF, the Assembly then adopted a Constitutional Amendment establishing the KSC and SPO, and setting a five-year timeframe for its work. Article 162(1)’s reference to the Marty Report acts as an explicit limitation on their mandates. The KSC Law then reinforced this limitation, restricting prosecutions to those allegations in the Marty Report that had also been investigated by the SITF.<sup>102</sup> The KSC and SPO represented the final step in an already-protracted process; rather than act as a “residual” ICTY, they were intended to fill an identified gap in its jurisdiction.

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<sup>100</sup> A. Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, JICJ 5 (2007), 109-133; M. Shahabuddeen, ‘Judicial Creativity and Joint Criminal Enterprise’ in S Darcy and J Powderly (eds) *Judicial creativity at the international criminal tribunals* (OUP 2010), pp. 190-200.

<sup>101</sup> SITF Findings, p. 20/26.

<sup>102</sup> KSC Law, Article 1(2).

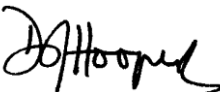
74. Rather than acting within the bounds of this limited mandate, the SPO has treated the KSC as a blank canvas from which to launch an unlimited third attempt to build cases against the same targets, apparently unconstrained by the time limits in operation. As such, the SPO has produced an Indictment which has no legal grounding in the constitutive documents or mandate of the KSC, which charges crimes that fall outside the KSC's jurisdiction and which, perhaps most significantly, is out of time. In order to link these recycled allegations to the accused, the SPO has then hung its case on the most controversial of modes, requiring a JCE III to bridge the gap between its vague allegations, and the accused.

75. On the basis of the foregoing, the Defence respectfully asks the Pre-Trial Judge to:

**DECLARE** that the KSC do not have jurisdiction over the crimes as charged in the Indictment, which should accordingly be dismissed.

[Word count: 8897]

Respectfully submitted,

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12 March 2021

At London, United Kingdom