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In:	**KSC-BC-2020-06** **Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**
Before:	**Judge** Judge Nicolas Guillou
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Kadri Veseli
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Public Redacted Version of

"Preliminary motion by the Defence of Kadri Veseli

to Challenge the Indictment", dated 15 March 2021

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I. Introduction

1. The Defence files this motion under Rule 97(1)(b) of the Rules of Procedure and Evidence alleging two main defects in the Indictment.[1]

2. Firstly, the Defence submits that the Pre-Trial Judge erred in law and in fact in his determination of the contextual requirements for war crimes in holding that (i) a non-international armed conflict (NIAC) existed on the territory of Kosovo from at least March 1998 between the KLA, and Serbian forces; (ii) the conflict ended approximately on 16 September 1999; and (iii) the conflict extended beyond Kosovo, into Albania. Based on the supporting materials available, the applicable law, and ICTY case-law, the Defence submits that a NIAC existed between the KLA and Serbian forces in Kosovo from mid-1998 until 10 June 1999.

3. Secondly, the Judge failed to adequately address the question of whether a NIAC existed in Albania at the time of the events alleged in the Indictment and he erred in confirming the Indictment for alleged incidents that occurred in Albania.[2] An assessment of the facts indicates that there was no armed conflict in Albania and that, as a result, any alleged criminal act or omission committed therein cannot be classified as a war crime but as a common crime subject to the prosecution by Albanian authorities.

II. Erroneous finding on the Temporal Scope of the Armed Conflict

4. In his Decision, the Judge found, "based on the supporting material, that armed violence between Serbian force and the KLA was ongoing on the territory of

[1] The Defence for Mr Veseli also adopts the submissions of the Defence of Mr Thaci, to the extent that they are not inconsistent with the arguments raised in this submission.
[2] First, the lack of jurisdiction is not concerned with cases of alleged crimes already initiated in Kosovo and later finalized in Albania, since these cases would fall within the jurisdiction of the KSC.

Kosovo from at least March 1998."[3]

5. The Judge erred in the evaluation of the evidence and the application of the law in determining the temporal scope of the existence of a NIAC in Kosovo between the KLA and the Serbian forces because:

a) He failed to properly apply the *Tadic* test, namely of the assessment of the 'intensity of the conflict' and the 'organisation of the KLA' as a party to the conflict,[4]

b) the supporting material relied on (which consists entirely of evidence admitted and evaluated in ICTY proceedings) does not, in any way, warrant a conclusion that a NIAC existed throughout Kosovo in March 1998 and ended in September 1999; and

c) his finding contradicts the ICTY case-law on the existence of an armed conflict in Kosovo.

6. Contrary to the SPO's claim, and consistent with the settled case-law of the ICTY on the matter, the jurisdiction of the KSC with regards to war crimes extends only to events that occurred between mid-1998 until 10 June 1999.

[3] KSC-BC-2020-06/F00026/RED, Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 26 October 2020 ("Decision on Indictment"), para.131.
[4] ICTY, Prosecutor v. Tadic, Case no IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, ("Tadic Appeal") para.70.

A. Failure to apply the *Tadic* test

7. The ICTY Appeals Chamber, in the leading Jurisdiction decision in *Prosecutor v Tadic,* held that a NIAC exists whenever there is "protracted armed violence between governmental authorities and organised armed groups or between such groups within a State."[5] Under the test, two cumulative criteria must be met concurrently: a) the conflict must be of a specific intensity, and b) the parties to the conflict must have reached a minimum level of organisation that would allow for the implementation of the essential obligations of the Common Article 3 of the Geneva Conventions.[6]

8. This Tadic test provides that the following factors need to be considered when assessing the intensity of the conflict:

> "(…)the seriousness of attacks and whether there has been an increase in armed clashes; the spread of clashes over territory and over a period of time; any increase in number of government forces and mobilisation and the distribution of weapons among both parties to the conflict; involvement of the UN Security Council; number of civilians forced to flee from the combat zones; types of weapons used, particularly heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blockading or besieging of towns and heavy shelling of towns; the extent of destruction and number of casualties caused by shelling or fighting; the quantity of troops and units deployed; existence and change of

[5] Tadic Appeal, para.70; Prosecutor v Fofana & Kondewa, Trial Judgment, 2 August 2007 ("Kondewa") para.124; Prosecutor v Lubanga, Judgment pursuant to art 74 of the Statute, 14 March 2012, para.533; Prosecutor v Katanga Judgment pursuant to art 4 of the Statute, 7 March 2014, para.1173; Prosecutor v Bemba, Judgment pursuant to art 74 of the statute, 21 March 2016, para.128.
[6] See, for example, ICTY, Prosecutor v Haradinaj, Case no IT-04-84bis-T, Judgement, 29 November 2012, ("Haradinaj Judgement"), para.392.

front lines between the parties; the occupation of territory, towns and villages; the deployment of government forces to the crisis area; closure of roads; cease fire orders and agreements; the attempt of representatives from international organisations to broker and enforce cease fire agreements; and the intensity, including the protracted nature, of violence which has required the engagement of the armed forces and the high number of casualties and extent of material destruction.

9. On the other hand, the level of organisation of the parties to the conflict requires the assessment of factors[7] "signalling the presence of a command structure; factors indicating that the armed group could carry out operations in an organised manner; factors indicating a level of logistic; factors relevant to the armed group's level of discipline and its ability to implement the basic obligations of Common Article 3; and factors indicating that the armed group was able to speak with one voice."[8]

10. While the Judge formally considered the factors in his Decision in paragraphs 132 and 133, he failed to indicate at what point in time the two criteria set out in Tadic were met. The relevant question here that the Judge failed to address adequately is, therefore not whether a conflict existed, but when both of the criteria required for the existence of an armed conflict materialised in line with the Tadic test.

11. In reaching this Decision on the temporal scope of the existence of a NIAC in Kosovo, the Judge discussed in general terms the level of organisation of the parties, and the intensity of the conflict,[9] without specifying: (i) when the KLA

[7] See, for example Haradinaj Judgement, para.392.
[8] Ibid, paras.394-395.
[9] Haradinaj Judgement, paras.132 and 133.

became sufficiently organised to exercise control over its members in order to implement the basic obligations of Common Article 3 of the Geneva Conventions, and (ii) when the conflict reached the required level of intensity to meet the threshold for the existence of an armed conflict.

12. As a logical consequence, the process of making a finding on the existence of an armed conflict necessarily involves a chronological assessment of the events to determine, based on the factors above, the exact moment when the intensity of the conflict reached the level of 'protracted armed violence', and, in the present instance, when the KLA, reached the minimum level of organisation to allow the basic obligations of the Common Article 3 of the Geneva Conventions to be implemented.

13. Because both of these criteria need to be met at the same time for an armed conflict to exist, the failure of the Judge to conduct this assessment of the timing of the materialisation of these two requirements vitiates his finding on the temporal scope of the existence of an armed conflict in Kosovo.

B. Factual error in the determination of the beginning of the armed conflict

14. The Judge based his assessment of the temporal scope of the existence of a NIAC entirely on the supporting materials listed in footnote 273 and 283 of the Decision[10] without providing any analysis thereof, and in doing so, he made a series of patent factual errors amounting to findings that were not reasonably open to him on the evidence.

15. The Defence submits that upon a closer analysis of all the documents referred to

[10] [REDACTED]

in footnote 273 and 283 of the Decision, no reasonable trier of fact could conclude that either March 1998 or April 1998 could be considered as the period marking the existence of an armed conflict.

16. The Judge bases his findings relating to March 1998 only [REDACTED],[11] none of which support the conclusion that either the conflict had reached the required level of intensity or that the KLA was sufficiently organised in March 1998.

17. The supporting material likewise referred to[REDACTED],[12] which do not provide a reasonable basis to assess that either the conflict had reached the required level of intensity or that the KLA was sufficiently organised in April 1998.

18. The Defence will proceed to review each of the supporting documents relied on by the Judge in the Decision to assess when an armed conflict came into existence in Kosovo.

1. Facts relied on by the Judge

a) [REDACTED]

19. [REDACTED][13] refers to [REDACTED][14] [REDACTED],[15] relating to an attack by [REDACTED]. It was an isolated incident since there was no mention of other

[11] [REDACTED]
[12] [REDACTED]
[13] [REDACTED]
[14] [REDACTED]
[15] [REDACTED].

clashes between the KLA and Serbian forces at the time.

20. [REDACTED][16] [REDACTED], .[17] [REDACTED].[18]

b) [REDACTED]

21. [REDACTED],[19] refers to two incidents in [REDACTED]:

i) [REDACTED] ."[20] and

ii) [REDACTED]. [21]

22. Both of these incidents are isolated instances of conflict that do not meet the required threshold for finding that either the conflict was of the required intensity or that the KLA was sufficiently organised at the time. While at [REDACTED] further states that [REDACTED] there is no indication that an 'armed conflict' existed in March 1998.

23. On the contrary, [REDACTED]states that [REDACTED] [REDACTED][22] [REDACTED].

24. [REDACTED]. The use of the term [REDACTED] confirms the statement of [REDACTED][23] that the Serbian forces intensified their attacks during the

[16] [REDACTED]
[17] [REDACTED]
[18] [REDACTED]
[19] [REDACTED]
[20] [REDACTED]
[21] [REDACTED].
[22] [REDACTED]
[23] [REDACTED]

months of July, August and September 1998.

25. [REDACTED].[24] Considering that [REDACTED], no inference can be drawn [REDACTED] for the purpose of pinpointing with certainty the date or month when the internal armed conflict started.

c) [REDACTED]

26. [REDACTED][25] [REDACTED]

27. [REDACTED]the incident, whether taken cumulatively or in isolation with the other statements, does not indicate the existence of an armed conflict.

d) [REDACTED]

28. [REDACTED]. [26] This incident, [REDACTED], cannot be considered to meet any of the factors identified for the intensity of the conflict or the organisation of the KLA.

e) [REDACTED]

29. [REDACTED]:

    i) [REDACTED].[27] [REDACTED]; and

[24] [REDACTED]
[25] [REDACTED]
[26] [REDACTED]
[27] [REDACTED]

ii) [REDACTED]

30. These amount to "unorganised and short-lived insurrections or terrorist activities which are not subject to international humanitarian law"[28] and do not meet the threshold to establish the existence of an armed conflict.

f) [REDACTED]

31. [REDACTED].[29] [REDACTED]

g) [REDACTED]

32. It is unclear why [REDACTED] is cited in support of the finding because it refers to [REDACTED].[30]

h) [REDACTED]

33. No inference can be drawn [REDACTED], [31] because they [REDACTED]and do not support an assessment of the intensity of the conflict or the organisation of the KLA.

i) [REDACTED]

34. According to [REDACTED].[32] [REDACTED]. The situation changed later [REDACTED]in line with the Defence submission.[33]

[28] Kondewa, para.124.
[29] [REDACTED]
[30] [REDACTED]
[31] [REDACTED]
[32] [REDACTED]
[33] [REDACTED].

j) [REDACTED]

35. The whole [REDACTED]is immaterial to the present discussion since it relates to[REDACTED].[34]

k) Two redacted documents

36. Due to the Defence's inability to assess and respond to these documents, no reliance should be made by the Judge on the matter.[35]

2. ICTY case-law

37. The importance of the ICTY case-law on the temporal scope of the armed conflict is twofold: firstly, the ICTY has already dealt with the armed conflict in Kosovo, and secondly, all of the supporting material submitted by the SPO is derived from the ICTY proceedings. The Judge has made factual errors resulting in a fundamentally different conclusion than the ICTY on the temporal scope of the case, on the basis of the same evidence.

38. The ICTY has made findings relating to the armed conflict in Kosovo on five occasions:

a) Prosecutor v. Limaj et al.

[34] [REDACTED]
[35] Decision, para.F00026RED, fn. 273.

The ICTY Trial Chamber conducted a detailed analysis of the *Tadic* test[36] and concluded that by the end of May 1998, the KLA units were constantly engaged in armed clashes with substantial Serbian forces in different areas of Kosovo. The Chamber was satisfied that by the end of May 1998, the KLA had a General Staff, which appointed zone commanders, gave directions to the various units and issued public statements on behalf of the organisation.[37]

b) Prosecutor v. Milutinovic et al.

The ICTY Trial Chamber noted that 'the general course of this fighting [between the KLA and Serbian forces] was marked by a gradual increase in clashes during the first half of 1998, and a more dramatic increase in KLA activity in May, June, and July, followed by the fairly successful execution of a plan by VJ and MUP forces to push the KLA out of entrenched positions in the late summer.'[38] The Chamber concluded from its analysis of the events that the intensity of the armed violence had met the requirement of 'protracted violence' by mid-1998.[39]

The Chamber accepted that 'different aspects of the KLA's organisation and activities developed at different paces', that the evidence revealed 'a gradual progression towards centralisation of authority and coordination of efforts against the FRY/Serbian forces', and that, by mid-1998, the KLA had met the minimum criteria required to be considered as an 'organised armed group'.[40]

[36] ICTY, Prosecutor v. Limaj et al., Case no. IT-03-66-T, Trial Chamber, Judgment, 30 November 2005. in paras.94-173.
[37] Ibid, paras.172-173.
[38] ICTY, Prosecutor v Milutinovic et al, Case no. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009 para.795.
[39] Ibid,para.820.
[40] Ibid,para.840.

c) Prosecutor v Dordevic

The Chamber followed, to a certain extent, the analysis done by the *Milutinovic* Trial Chamber and found that by 'the end of May 1998, the conflict in Kosovo between the Serbian security forces and the KLA had the requisite level of intensity to be considered as an armed conflict'.[41]

d) Prosecutor v. Haradinaj

The Chamber acknowledged that it had 'received little specific evidence of clashes between the KLA and Serbian forces between 25 March and 21 April 1998'[42] and correctly found that, while the attacks on the 'Ahmeti, Jashari, and Haradinaj compounds between late February and late March 1998 marked a significant escalation in the conflict between the KLA and the Serbian forces', they were 'isolated events followed by periods of relative calm'.[43] However, unlike the previous case in Limaj, the Chamber determined that the resumption of the clashes on 22 April 1998[44] eventually triggered the application of the law of armed conflict throughout the territory of Kosovo.

The finding of the Trial Chamber in the first *Haradinaj* proceedings does not reflect a correct interpretation of the Tadic test because sporadic armed violence does not become 'protracted' from one day to the other (from the 21 to 22 April 1999) simply because clashes between the KLA and the Serbian forces resumed on that day nor does the KLA suddenly become organised overnight. [45] The bar

[41] ICTY, Prosecutor v. Dordevic, Case no. IT-05-87/1-T, Judgment, 23 February 2011 para.1536 and 1578.
[42] ICTY, Prosecutor v. Haradinaj et al, Case no. IT-04-84-T, Judgment, 3 April 2008.para.95.
[43] Ibid,para.56.
[44] Ibid,para.98.
[45] Ibid,para.406.

for the application of IHL is necessarily high, considering that, once it is triggered, the obligation to respect the rules of IHL remains in place until the end of the conflict.

In the *Haradinaj* retrial proceedings[46], another ICTY Chamber was very hesitant in accepting the 22 April 1998 as the start of the armed conflict between the KLA and Serbian forces and specifically rejected the proposition of the prosecution that an armed conflict existed between 1 March 1998 and 21 April 1998.[47] While the Chamber was visibly not satisfied that such conflict existed by 22 April 1998, it nevertheless accepted such finding only because the parties had already agreed on 22 April 1998 as the trigger date for the application of IHL.

39. In conclusion, while any reference to March 1998 as the starting date of the conflict has no basis whatsoever in the evidence presented by the SPO and the settled ICTY case-law, the finding of the *Milutinovic* Trial Chamber that an armed conflict existed by mid-1998 represents the most accurate finding, considering the evidence and the high threshold set out by the Tadic test.

C. Factual and Legal error in the determination of the end of the Armed Conflict

40. The Judge made an error of fact and in law in reaching his conclusion that the hostilities did not end until 16 September 1999.

41. In *Tadic*, *Oric* and *Haradinaj,* the ICTY Appeals Chamber held that IHL continues to apply 'beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved'.[48]

[46] Haradinaj Judgement.
[47] Ibid,paras.410-411.
[48] Tadic Appeal, para.70.

The ICRC has interpreted 'peaceful settlement' as not necessarily requiring a formal agreement between the parties.[49] In addition, IHL experts[50] have suggested that a NIAC will also end when:

(i) one of the parties has disappeared or no longer meets the level of organisation required by IHL;
(ii) there is a general close of military operations as characterised by the cessation of actions of the armed forces with a view to combat;
(iii) or where the hostilities have ceased, and there is no real risk of their resumption, with the result that the situation amounts to a general close of the military operations involving forces against a particular opposing party.[51]

42. The Judge cites two examples to back his assertion that hostilities did not end until 16 September 1999: (i) one incident on 10 August 1999 (10 rounds of mortars fired into a Serbian village) and (ii) reports of attacks with mortars and explosives against Serb religious sites toward the end of August 1999.[52] (*all sources are redacted*) from which he inferred a 'risk of resumption of violence between the parties'.[53]

43. While these sources continue to be redacted, the Defence[REDACTED]The Judge erred concluding, on the basis of this document, that i) the KLA was responsible

[49] ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflict, 32IC/15/11, October 2015, at p.10. see also Common Article 3, 2016 Commentary to Geneva Convention I, para.485.
[50] (including Dustin A. Lewis, Gabriella Blum, Naz K. Modirzadeh, and Tristan Ferrero)
[51] See, Dustin A. Lewis, Gabriella Blum, Naz K. Modirzadeh, Indefinite War: Unsettled International Law on the End of the Armed Conflict' Harvard Law School, Legal Briefing, February 2017. See also, Tristan Ferrero, 'The Applicability and Application of International Humanitarian Law to Multinational Forces, International Review of the Red Cross (2013), 561–612, at 607.
[52] Ibid, para.134.
[53] Ibid, para.135.

for the attack, and ii) that 'according to the KLA [the site] was used to hide Serb paramilitaries.[54]

44. As to the reports of attacks with mortars and explosives against Serb religious sites at the end of August 1999,[REDACTED].[55] [REDACTED], but the Judge still mentions and relies on these incidents. By the time of the events, no FRY force was present in Kosovo, and the KLA had officially been disbanded.

45. Furthermore, the intensity of the 'attack' in the two examples mentioned by the Judge is consistent with single incidents or skirmishes which are expected in volatile, post-conflict environments, where weapons are available.

46. The Judge conflated limited incidents of post-conflict violence with military activities from warring parties and that he has erred in law when he placed a special emphasis on whether there existed a real risk of resumption of the hostilities between the parties since it imposes a substantially lower threshold for the assessment of the existence of an armed conflict that departs from the standards set by case law and IHL experts. The Judge used a subjective criterion of assessing a risk rather than the objective approach prescribed in the caselaw to determine whether the hostilities between the parties have ended.

47. In view of the above, and considering that international law does not specifically prescribe *when* a NIAC ends, the ILA's objective and subjective indicators will be considered below.[56]

[54] Confirmation Decision, para.134.
[55] [REDACTED]
[56] International Law Association, Final Report on the Meaning of Armed Conflict in International Law, 2010, p.31.

1. The facts

a) All hostilities ended by 10 June 1999

48. The end of the NIAC between the KLA and Serbian forces is inextricably linked to the end of the IAC between NATO and Serbian forces. Between 10 and 20 June 2020, all Serbian troops left the territory of Kosovo and simultaneously, the UN and KFOR took over the interim administration of Kosovo.

49. Contrary to the finding of the Judge, Serbian forces did not 'begin redeploying some of their units outside of Kosovo'[57] in June 1999, but instead, the Serbian forces withdrew all their units from the territory of Kosovo by 20 June 1999.[58] It was not up to the Serbian forces to decide whether and when to redeploy their forces outside Kosovo. The Military Technical Agreement between the International Security Force (KFOR) and the Governments of Yugoslavia and the Republic of Serbia, 9 June 1999 ("Kumanovo Agreement") laid out that within eleven (11) days from the entry into force of the agreement (9 June 1999), 'all FRY Forces in Kosovo will have completed their withdrawal (...)to locations in Serbia outside Kosovo'.[59]

50. Resolution 1244/99 of the UN Security Council was also crucial because it authorised an international military and civilian presence to provide transitional administration, which avoided that KFOR troops be considered as occupying

[57] Decision on Indictment, para.134.
[58] 4D225 (3rd Army Report to Lieutenant General Michael Jackson, 20 June 1999), in ICTY, Prosecutor v. Milutinovic et al, Case no. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, ("Milutinovic TC Judgment") para. 1216; See also S/1999/779, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 July 1999; Indeed, by 14 June 1999, approximately half of the Serbian forces had been withdrawn from Kosovo, see Initial report on the international security force (KFOR) operations (12-15 June 1999, para.2(a).
[59] Article II(2)(e) Kumanovo agreement.

force, thus potentially extending the application of IHL through the law of belligerent occupation.

b) Both the Serbian forces and the KLA fully complied with the terms to end hostilities

51. The Judge established that 'Serbian forces and the KLA were found to be in violation of their respective agreements on some occasions during the summer of 1999'.[60]

52. [REDACTED].[61]

53. With regard to Serbian forces, the SPO claims that 'following their withdrawal on 20 June 1999, FRY forces were discovered on the border of and in Kosovo on several occasions'.[62] However, it is clear that [REDACTED]could not, in the context at the time, be considered as a 'violation' entailing a 'real risk' of resumption of the hostilities.

54. The SPO claims that 'the KLA maintained unauthorised weapons depots, police stations, and detention facilities; and both the KLA and FRY continued hostile and provocative acts through at least September 1999.[63] These 'violations' or 'provocative acts' were regular and, in fact, to be expected in a post-conflict zone but clearly fall short of amounting to or posing a real risk of a resumption of hostilities.

[60] Decision on the Confirmation of Charges, para.134.
[61] [REDACTED].
[62] [REDACTED]
[63] [REDACTED]

55. While a violation might be relevant if it is of such a nature as to frustrate the 'general close of military operations' imposed by the Kumanovo Agreement, there is no mention of the Judge's assessment of violations of such a nature. Furthermore, it is recalled that a NIAC may end 'even if there are isolated or sporadic acts of violence by remnants of the dissolved Party'.[64] In order to be relevant, any of these 'violations' must have occurred between 10 June 1999 and 20 June 1999, the latter being a date in which (i) all Serbian troops withdrew from the territory of Kosovo in accordance with the terms of the Kumanovo Agreement; and (ii) the KLA effectively ceased to exist by deciding to demilitarise and transform. By 21 June 1999, there was, simply, no enemy to fight with.

56. Even when examining[REDACTED][65], [REDACTED].[66] NATO authorities, on the other hand, while acknowledging single incidents, never expressed any concern about a real risk of resumption of hostilities.[67] On 14 June 1999, the NATO Spokesperson briefed on some isolated incidents and reiterated: 'We have not seen any significant violations of the Military Technical Agreement'.[68] On 18 June 1999, asked about reports concerning fights between paramilitary Serbs and Albanians in the Italian Sector, the Spokesperson answered: "Yes, I saw one report, just one report, yesterday of that. (...) But I noted only one incident yesterday, I don't think this is a general trend."[69]

57. On 20 June 1999, Serbian authorities notified KFOR of the completion of the withdrawal of their troops and promised co-operation through the newly

[64] Common Article 3, 2016 Commentary to Geneva Convention I, para.489.
[65] [REDACTED].
[66] [REDACTED].
[67] Morning Briefing by Mr Jamie Shea, NATO Spokesman, 12 June 1999.
[68] Morning Briefing by Mr Jamie Shea, NATO Spokesman, 14 June 1999.
[69] Morning Briefing by Mr Jamie Shea, NATO Spokesman, 18 June 1999.

established Commission for Co-operation with the United Nations Mission and the Joint Implementation Commission.[70] The same day, the KLA, in view of its obligation to demilitarise imposed by UNSC Res 1244/99, delivered to KFOR their Undertaking of Demilitarisation and Transformation by the UCK. 20 June 1999.[71] At this point in time, the party in conflict with the KLA was not present anymore in Kosovo. The KLA would have hardly decided to demilitarise and disband had there been any real risk of resumption of hostilities.

58. On 21 June 1999, General Sir Mike Jackson, Commander of the KFOR, announced that very soon, KFOR would be the only military presence in Kosovo.[72] The UN Special Representative of the Secretary-General to Kosovo stated that "The total withdrawal of VJ forces is a success, and I think the government of the FRY deserves congratulations for adhering strictly to the agreement that General Jackson signed with them in Kumanovo on 10 June. Secondly, we are indeed happy with the undertaking by the KLA. We have been consulted on the requirements for the demilitarisation of the KLA, which are vital to the success of both our tasks here and particularly the fact that they will be all assembled within (...)days.[73]

59. The KLA, too, fully complied with its Undertaking[74]. As of 30 June 1999:

> Uniformed members of UCK had virtually disappeared from the streets. Tension has reduced accordingly. Approximately 3,700 members of UCK have reported to the assembly areas to date. However, most of the 576 weapons turned in by UCK are old and worn. There were no reports of UCK members either armed or in uniform outside their assembly areas.[75]

[70] Milutinovic TC Judgment, para.1216.
[71] Unlike the suggestion of the Judge, the Undertaking of Demilitarisation and Transformation by the UCK. 20 June 1999 was not an 'agreement', between KFOR and the KLA, but a unilateral undertaking of the KLA.
[72] KFOR Press Conference, by General Sir Mike Jackson, 21 June 1999.
[73] Ibid.
[74] KFOR Press Conference by the NATO Secretary General Javier Solana, 27 September 1999.
[75] Second report to the Security Council on the operations of KFOR (17-30 June 1999). para. 8.

60. In his first Report to the Security Council on 12 July 1999, the UN Secretary-General stated that '[T]he general situation in Kosovo has been tense but is stabilising'. The report acknowledged that 'high profile killings and abductions, as well as looting, arsons and forced expropriation of apartments, have prompted departures'.[76] Yet, in the opinion of the Secretary-General, '[T]he security problem in Kosovo is largely a result of the absence of law and order institutions and agencies. (...)Criminal gangs competing for control of scarce resources are already exploiting this void'.[77] The issues faced by UNMIK and KFOR were typical of a post-conflict situation, and not that of an armed conflict.

61. In his second Report, covering the period from 12 July – 16 September 1999, the UN Secretary-General noted that 'senior Kosovo Albanian personalities, including the leadership of the KLA, have voiced increasingly forthright public positions on tolerance and security for minorities. Senior KLA figures denied KLA involvement in attacks and called for non-Albanians to remain in Kosovo, and repeatedly affirmed their commitment to human rights, tolerance and diversity.[78]On 2 July 1999, in response to harassment and attacks against minority groups, the Special Representative brought together Kosovo Serb and Kosovo Albanian leaders to agree on concrete measures to enhance security.[79]

c) No real risk of the resumption of the hostilities

[76] S/1999/779, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 July 1999, para.5.
[77] Ibid, para.6.
[78] S/1999/987, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 16 September 1999., para.4.
[79] S/1999/779, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 July 1999, para.26.

62. The SPO's argument that, even in the absence of hostilities, a real risk of the resumption of the hostilities existed until 16 September 1999 is equally flawed. In this scenario, the SPO accepts that (i) Serbian forces completely withdrew from the territory of Kosovo in mid-June 1999 and that (ii) no armed violence occurred between the KLA and the Serbian forces in the summer of 1999. Yet – so the argument goes – because of these 'incidents' and 'provocations', the 'redeployment of FRY forces and resumption of hostilities in Kosovo was a real concern among the parties to the conflict'.[80]

63. In support of such a claim, the SPO again refers[REDACTED]to (i) [REDACTED][81]; (ii)[REDACTED];[82] (iii)[REDACTED];[83] and finally (iv) a newspaper report[REDACTED],[84][REDACTED].[85]

64. There was no real risk that either NATO or the Security Council would allow redeployment of Serbian forces in Kosovo[REDACTED].[86][REDACTED].[87]

d) Peacetime activities resumed and refugees returned

65. Another telling indicator is the flow of refugees from and to the combat zones.[88]

[80] SPO Outline, p.7.
[81] [REDACTED].
[82] [REDACTED]
[83] [REDACTED]
[84] [REDACTED]
[85] [REDACTED]
[86] [REDACTED]
[87] [REDACTED].
[88] R. Bartels, 'From Jus In Bello to Jus Post Bellum, When do NIACs End?', in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson, Jus Post Bellum: Mapping the Normative Foundations, (OUP2014), at p. 309.

By 18 June 1999, fifty thousand refugees had already returned to Kosovo. As of 8 July 1999, more than 650,000 refugees returned to Kosovo (either spontaneously or through UNHCR).[89] Had there been any risk that an armed conflict between the KLA and Serbian forces would resume, no refugee would have returned.

2. ICTY case law and other sources

a) ICTY caselaw

66. While, on the one hand, there are differences in ICTY case law on when the armed conflict between the KLA and the Serbian forces started, there is universal acceptance that both the internal (KLA v FRY) and the international (NATO v FRY) armed conflict, ended with the cessation of the NATO bombing campaign, on 10 June 1999.

67. In *Milutinovic et al.*, the ICTY Trial Chamber found, beyond any reasonable doubt, that an armed conflict existed on the territory of Kosovo at all times relevant to the Indictment period, starting in 1998 and continuing into 1999 and ending with the cessation of the NATO bombing campaign.[90] According to the Chamber, the NATO campaign was an aerial operation lasting from the evening of 24 March to 10 June 1999.[91] This finding was then confirmed by the Appeals Chamber.[92]

68. Likewise, in *Dordevic*, the Trial Chamber followed the approach of the Chamber in *Milutinovic,* stating that:

[89] S/1999/779, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 July 1999, para. 9.
[90] Milutinovic TC Judgment, para.1217.
[91] Ibid, at para.1209.
[92] See for example, Miluninovic Judgement, para.777.

> The Chamber is satisfied that as of the end of May 1998, an armed conflict existed in Kosovo between Serbian forces, in particular forces of the VJ and the MUP, and the KLA. This armed conflict continued until at least June 1999.
>
> On 24 March 1999, NATO commenced its military operations in the FRY. On the same day, the government of the FRY declared a state of war. On this basis, the Chamber is satisfied that from 24 March 1999, until the end of hostilities in June 1999, an IAC existed in Kosovo between Serbian forces and the forces of NATO.[93]

69. While the Trial Chamber in Dordevic did not specify an exact start date, it clearly implied that, at the latest, the conflict ended on 20 June 1999. This is because even the OTP of the ICTY– which unsuccessfully claimed that an armed conflict existed throughout Kosovo in early 1998 or March 1998 – never claimed that the armed conflict between the KLA and forces of the FRY and Serbia extended later than 20 June 1999.[94]

b) The Special Investigative Task Force

70. The SPO's predecessor, Mr Clint Williamson, the then Chief Prosecutor of the Special Investigative Task Force (SITF), also confirmed, in his statement dated 29 July 2014 that marked the end of the investigation, that June 1999, and not 16 September 1999, is the period when the armed conflict ended in Kosovo. He stated unambiguously:[95]

[93] ICTY, Prosecutor v. Dordevic, Case no. IT- IT-05-87/1-T, Trial Chamber, Judgment, 23 February 2011,paras.1579-1580.
[94] See Prosecutor v Milutinovic et al, OTP Final Brief, para. 296; Prosecutor v Dordevic, IT-05-87,OTP Final Brief, para. 612.
[95] Statement of the Chief Prosecutor of the Special Investigative Task Force, 29 July 2014.

> I am convinced that SITF has conducted the most comprehensive investigation ever done of crimes perpetrated in the period after the war ended in Kosovo in June 1999.[96]

71. With regard to events post-June 1999, Mr Williamson implicitly acknowledged that a charge for war crimes would not be feasible, thus leaving charges for crimes against humanity as the only alternative:

> 'The widespread or systematic nature of these crimes in the period after the war ended in June 1999 justifies a prosecution for crimes against humanity. Accordingly, we anticipate that such charges can be filed in this matter against several senior officials of the former KLA and that an indictment would also likely include charges for war crimes and certain violations of domestic Kosovo law, including murder.'[97]

72. While the SPO is entitled to change its position on a specific matter as its investigation progresses into a more advanced stage, Mr Williamson's statement is clear as to why war crimes could not be charged in regard to events that occurred after mid-June 1999:

> 'The ICTY had the jurisdiction to address crimes occurring during the period of armed conflict, so up to the point that the war ended in mid-June 1999 (...) [the] ICTY brought a number of prosecutions against senior Serbian officials for crimes against humanity and war crimes during this period for acts directed at Kosovo Albanian victims. ICTY, however, was prevented from prosecuting crimes in the post-war period – the period which has been the primary focus of our investigation – because their

[96] Ibid, p.1.
[97] Ibid, page 2.

> jurisdiction did not allow for prosecutions outside armed conflict. In 2000, ICTY Prosecutor Carla del Ponte actually requested revisions to the statute to allow ICTY to investigate and prosecute crimes during this period, but her request was not acted upon. As a result, crimes committed in Kosovo in the pre-war period and during the war itself have largely been dealt with by the ICTY. The majority of these involved Serb perpetrators. What our investigation has done, and what this court will do, is to fill the void left by the ICTY's jurisdictional limitations. The reality is that the primary perpetrators during the post-war period were certain individuals affiliated with the KLA, but this is not singling them out for harsher treatment than others; it is only subjecting them to the same sort of international justice processes that have already been brought in relation to Serb perpetrators'.[98]

c) Report from the Serbian authorities

73. In a final report from the Serbian authorities entitled 'Summary review of criminal proceedings against persons who committed crimes in the area of Kosovo during the NATO aggression from 24 March until 10 June 1999'[99] 10 June 1999 marks the date when the armed conflict in Kosovo ended. The ICTY Chamber in *Dordevic* referred to it as evidence that military courts had 'lost their jurisdiction to try cases involving offences by the VJ at the end of the war unless a case was at the investigative stage or an indictment had been confirmed.'[100]

74. In light of all the facts above, the Judge made an error of fact in determining that the armed conflict ended in September 1999. From 10 June 1999, all the parties stopped maintaining battle positions because the IAC between the Serbian forces

[98] Ibid, p.4.
[99] ICTY, Prosecutor v. Dordevic, Case no. IT-05-87/1-T, Exhibit D510.
[100] Dordevic Judgment, para.2107.

and NATO forces as well as the NIAC between the Serbian forces and the KLA had ended. All the parties accepted that the UN would take over the interim administration of Kosovo and begin work toward reconstruction and rebuilding of the institutions. From 10 June 1999 until 20 June 1999, Serbian forces withdrew all their troops from the territory of Kosovo, while simultaneously NATO forces and the UN presence started to enter Kosovo, thereby avoiding any void in terms of security presence. The KLA, in concert with the NATO forces, was specifically instructed not to interfere with the withdrawal of the Serbian forces. Kosovo Albanian refugees immediately started to return back from Albania, Montenegro and the (then) FYROM.

III. Erroneous finding on the Geographic Scope of the Indictment

75. With regard to the war crimes allegedly committed in Albania, the Judge relying on the personal jurisdiction and found that the active personal jurisdiction requirement of Article 9(2) of the Law had been met.[101] However, Article 9(2) of the Law[102] cannot be engaged if the alleged crime falls outside the subject matter jurisdiction of the KSC.

76. Article 14(2) of the Law specifies that serious violations of Common Article 3 of the Geneva Conventions apply 'to armed conflicts that take place in the territory of a state when there is a protracted armed conflict between the organs of authority and organised armed groups or between such groups'. Consequently, the material issue to be determined is whether there was any 'protracted armed

[101] Decision on Indictment, para.42.
[102] Article 9(2): Consistent with the active and passive personality jurisdiction of the Kosovo courts under applicable criminal laws in force between 1 January 1998 and 31 December 2000, and in addition to its territorial jurisdiction set out in Article 8, the Specialist Chambers shall have jurisdiction over persons of Kosovo/FRY citizenship or over persons who committed crimes within its subject matter jurisdiction against persons of Kosovo/FRY citizenship wherever those crimes were committed.

conflict between the Serbian forces and the KLA in Albania.

77. The Judge failed to first consider whether a NIAC existed in Albania at the time of the events in the Indictment and that, as a result, he erred in confirming the Indictment for alleged incidents that occurred in Albania relating to crimes other than those of a continuous nature that started in Kosovo and continued in Albania.[103]

78. An assessment of the facts indicates that there was no armed conflict in Albania and that, as a result, any alleged criminal act or omission committed therein cannot be classified as a war crime but as a common crime subject to the prosecution by Albanian authorities.

79. Both the relevant law and settled case-law concerning war crimes allow the application of IHL beyond the 'theatre of operations', but such application of IHL does not extend outside the territory of that state. While it has been suggested that IHL may apply in cases of so-called spill-over conflicts, the facts of the case do not support the application of such theory, considering that there is no proof that armed hostilities between the KLA and Serbian forces did 'spill-over' inside the territory of Albania. It has not been demonstrated that the KLA exercised effective control over Albania. Finally, the suggestion that parties to the conflict would bring with them the application of IHL in third countries is both dangerous (due to the risk of applying IHL worldwide) and unsupported by state practice and *opinio juris*, academics and legal practitioners.

80. Indeed, the Law is clear in limiting the application of IHL in the territory of the state in which an armed conflict takes place. Unlike other crimes under domestic

[103] First, the lack of jurisdiction is not concerned with cases of alleged crimes already initiated in Kosovo and later finalised in Albania, since these cases would fall within the jurisdiction of the KSC.

or international law, the application of war crimes is dependent on the existence of an armed conflict (in the present case, NIAC) whose geographical scope must be clearly delineated. Article 14(2) of the Law specifies:

> Articles 14 (1)(c) and (d) apply to armed conflicts, not of an international character and do not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. They apply to armed conflicts that take place in the territory of a state when there is a protracted armed conflict between the organs of authority and organised armed groups or between such groups.

81. The wording is taken verbatim from Article 8(2)(f) of the Rome Statute, which is in itself based on the finding of the ICTY Appeals Chamber in the Tadic Decision on Jurisdiction, albeit with a slight difference in wording.[104] In international law, the geographical limitation of NIACs is found in Common Article 3 of the Geneva Conventions, which limits the application of IHL to armed conflicts occurring 'in the territory of one of the High Contracting Parties'.[105] The need to specifically limit the geographical scope of the application of IHL reflects the view, at the time of the drafting of the Geneva Conventions, that conflicts occurred 'within the confines of a single State, in the sense of an 'internal' armed conflict'.[106]

82. However, even with armed conflicts occurring within a State, the question arose whether IHL applied exclusively inside the so-called 'hot-zones' of hostilities or

[104] In Tadic, the Appeals Chamber refers to protracted 'armed violence', whilst Article 8(2)(f) of the Rome Statute uses the term 'armed conflict'.
[105] Reference to 'High Contracting Parties' has prompted discussions whether Common Article 3 applies to those states party to the Geneva Conventions, or whether, in view of the spirit and purpose of Common Article 3, they apply universally. However, the issue is moot considering that the former Yugoslavia was a party to the Geneva Conventions.
[106] Geneva Convention III, Common Article 3, Commentary of 2020, para. 489.

'theatre of operations'. In *Tadic*, the ICTY Appeals Chamber rejected such approach, holding that the geographical scope of both IACs and NIACs was 'broader', and that 'at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities'.[107] It concluded that an armed conflict existed whenever there was a 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a State', and that IHL continues to apply (...) 'in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.'[108]

83. While the ICTY extended the application of Common Article 3 to the whole territory of a State, it introduced the concept of 'nexus' between the crime and the context of armed conflict in order to avoid that common domestic crimes are wrongfully classified as war crimes. It is important to note that the nexus of the crime is, likewise, immaterial since its purpose is to connect the 'motive' of the underlying act (for example, murder) with the armed conflict, but it does not either restrict or expand the geographical application of IHL. On the contrary, the nexus of the crime is relevant to avoid that any crime committed in the territory of a State party to the conflict be necessarily considered as a war crime.[109]

1. Legal analysis

84. Common Article 3 requires that the armed conflicts be (1) non-international and (2) confined to the territory of 'one of the High Contracting Parties'. While the

[107] Tadic Appeal, para.68.
[108] Ibid, para.70.
[109] Geneva Convention III, Common Article 3, Commentary of 2020, para. 494.

Defence notes the Supreme Court in *Geci et al.* that concluded that 'the obligations to the parties of the conflict are not restricted to any specific territorial area, but rather apply to all the activities related to the conflict, wherever these take place',[110] it submits that the Court selectively and misleadingly claimed that 'the quoted wording in Common Article 3 GC clearly states that the acts are prohibited 'at any time and in any place whatsoever'.[111] The Supreme Court conveniently ignored that the *chapeau* of Common Article 3 clearly limits its application to armed conflict occurring 'in the territory of one of the High Contracting Parties'.

85. This approach to the extra-territorial application of IHL on a global level would be highly problematic since it would allow the targeting, for example, of an individual fighter by opposing forces in a non-belligerent state where human rights law would apply exclusively.[112] Except for one particular State, there is no state practice nor *opinio juris* in support of the global or transnational NIAC.[113] The ICRC does not support this expansive view either.[114]

2.The facts

a) There was no spill-over of the conflict in Albania

86. The Defence accepts the proposition that IHL might also apply in cases of so-

[110] Supreme Court, Case Pml.Kzz 1/2014, Judgment, 7 May 2014, para.3.9 (p.12).
[111] Ibid.
[112] Geneva Convention III, Common Article 3, Commentary of 2020, para.513.
[113] Ibid, para.516.
[114] ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflict, 32IC/15/11, October 2015, at p.15 (The ICRC is of the view that it would be more legally and practically sound to consider that a member of an armed group or an individual civilian directly participating in hostilities in a NIAC from the territory of a non-belligerent State should not be deemed targetable by a third State under IHL. Rather, the threat he or she poses should be dealt with under the rules governing the use of force in law enforcement).

called spill-over conflicts,[115] however, in the case at hand, there is no evidence to suggest that any fighting between the two sides to the armed conflict took place outside the territory of Kosovo. Albania did not become a party to the conflict, it was neither a NATO member state at the time of the events nor involved in an IAC with the Serbian forces relating to the NATO bombing.

b)The KLA did not exercise effective control over Albania

87. In Tadic, the Appeals Chamber's reference to 'the whole territory under the control of a party' clearly meant the territory within a State. However, in the Sabit Geci *et al.* case, which was eventually rejected by the Supreme Court of Kosovo, the Basic Court of Mitrovica[1] and the Appeals Court[1] incorrectly interpreted 'territory' and held that Common Article 3 would apply, as long as the alleged conduct occurred on the territory under the control of one of the parties to the conflict.[1] The evidence does not, in any way, indicate that the KLA ever exercised effective control over any part of the territory of Albania.

IV. Conclusion

88. In view of the above, the Defence respectfully requests the Judge to:
    a) **Grant** the motion;
    b) **Review** his findings in the Decision accordingly;
    c) **Order** the SPO to amend the Indictment to exclude the allegations relating to the incidents of war crimes of illegal or arbitrary arrest, and detention, cruel treatment, torture, and murder alleged to have occurred before mid-

[115] Michael N. Schmitt, 'Charting the Legal Geography of Non-International Armed Conflict', 90 International Law Studies 1 (2014) at p.11; See also, Geneva Convention III, Common Article 3, Commentary of 2020, para.508.

1998 or after 10 June 1999; and

d) **Order** the SPO to amend the Indictment and remove the allegations of war crimes of illegal or arbitrary arrest and detention[116] war crimes of cruel treatment,[117] torture, and murder,[118] relating to incidents alleged to have occurred in Has District, Kukes, and other unspecified locations in Albania.

V. Confidentiality

This motion is filed as confidential because it refers to confidential evidence.

Word count: 8141

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[116] [REDACTED]; Indictment Schedule A para 16 and 17
[117] Indictment, para 115-116
[118] Indictment, paras 136 and 164; Indictment Schedule B para 39.