

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

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I. INTRODUCTION

A. OVERVIEW

1. Pursuant to the order of the Pre-Trial Judge,¹ the Defence for Mr Hashim Thaçi (“the Defence”) files its Pre-Trial Brief in accordance with Rule 95(5) of the Rules.² Mr Thaçi has been detained for 24 months, without provisional release. Consistent with his position throughout, Mr Thaçi denies all allegations against him, and will continue to cooperate with these proceedings to clear his name.

2. The investigation by the Specialist Prosecutor’s Office (“SPO”) originated in allegations of organ trafficking, as presented in the 2011 Marty Report.³ The website of the Kosovo Specialist Chambers (“KSC”) lists the Marty Report as a “Foundational Document”,⁴ and the Court’s jurisdiction was prescribed with reference to this report.⁵ These organ trafficking allegations have been widely discredited.⁶

¹ KSC-BC-2020-06, Transcript of Twelfth Status Conference – Oral Order 4, 20 May 2022 (“Transcript of Twelfth Status Conference”), p. 1324 lines 1-6.

² Rules of Procedure and Evidence Before the KSC, KSC-BD-03/Rev3/2020, 2 June 2020 (“Rules”).

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

⁴ KSC & SPO, “Foundational Documents”, 2022, <https://www.scp-ks.org/en/documents/foundational-documents>.

⁵ Article 162(1) of the Kosovo Constitution provides Kosovo may establish the KSC and the SPO to “comply with its international obligations in relation to the [Marty Report].” Article 6 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“KSC Law”) provides “[t]he Specialist Chambers shall have jurisdiction over crimes set out in Articles 12-16 which relate to the [Marty Report]”; Article 1(2) of the KSC Law provides that the KSC and SPO “are necessary to fulfil the international obligations, [...] in relation to allegations... which relate to those reported in the [Marty Report]”.

⁶ See, e.g., UNSC, S/2014/558, Annex II-Statement dated 29 July 2014 of the Chief Prosecutor of the Special Investigative Task Force, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 1 August 2014 (“SITF Findings”), p. 20/26. On 21 July 2022, the Albanian Parliament unanimously approved a resolution for the Council of Europe, that the report’s allegations are “unproven and not based on evidence and facts, so they should be considered as such by all national and international institutions”: Republika e Shqipërisë Kuvendi, ‘Kuvendi u mbledh në seancë plenare, miratoi projektrezolutën për Kosovën, projektrezolutat për katër institucione të pavarura dhe katër projektligje’, 21 July 2022, <https://www.parlament.al/News/Index/15837>. On 12 October 2022, the Albanian Prime Minister again called for charges against Kosovo to be dropped, on

3. In their place, the SPO has produced an indictment of more than 170 paragraphs,⁷ which stitches together isolated incidents repeatedly investigated and prosecuted over the past 20 years by the Kosovo judiciary and various international courts and tribunals, including the United Nations Mission in Kosovo (“UNMIK”), the European Union Rule of Law Mission in Kosovo (“EULEX”) and the International Criminal Tribunal for the former Yugoslavia (“ICTY”).

4. The SPO has now apparently reached a conclusion that these well-funded international investigators, prosecutors, judges and courts all missed. According to the SPO, it was in fact Hashim Thaçi and his co-accused who were responsible for these crimes, as the masterminds of a vast and complex conspiracy to commit violence against Opponents⁸ in order to gain and maintain control of Kosovo.

5. In reaching this novel conclusion, 22 years after the fact, the SPO has failed to ground it in evidence. The SPO case is devoid of context or evidence of conspiracy. Instead, the SPO has carved out allegations of otherwise disconnected crimes, and put them at the centre of an alleged criminal conspiracy encompassing the entire Kosovo Liberation Army (“KLA”),⁹ consisting of a widespread or systematic attack directed against a civilian population, which has never been found to exist, and in fact has been explicitly rejected.¹⁰

the basis that “shameful” organ trafficking allegations had never been proven: Council of Europe, Parliamentary Assembly, 'Address of Mr Edi RAMA, Prime Minister of Albania', 12 October 2022, <https://pace.coe.int/en/verbatim/2022-10-12/pm/en>.

⁷ KSC-BC-2020-06/F00999/A02, Annex 2 – Confidential Redacted Version of Amended Indictment, 30 September 2022 (“Indictment”).

⁸ KSC-BC-2020-06/F00709/A02/CONF, Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief, 24 February 2022 (“SPO Pre-Trial Brief”), para. 2: [REDACTED].

⁹ Indictment, para. 35.

¹⁰ ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Chamber II, Judgement, 30 November 2005 (“*Limaj* Trial Judgment”), para. 228.

6. Most egregious is the SPO's decision to present its case in a contextual void; a history of events with the history erased. The SPO case circumvents the decades of persecution of Kosovo Albanians that culminated in a highly coordinated plan by the Serbian state to remove the ethnic Albanian population from Kosovo.¹¹ The armed civil resistance to the brutal Serbian campaign of ethnic cleansing is presented by the SPO not as a battle for survival, but as a criminal KLA plan to take and maintain power. 863,000 Kosovo Albanians fled for their lives to Albania, Macedonia and Montenegro, while being targeted by Serbian forces intent on their removal.¹² An additional 590,000 people were internally displaced ("IDPs").¹³ This is presented by the SPO as the "movement" of KLA soldiers and large numbers of Albanian civilians to areas where the KLA had already established facilities and personnel.¹⁴

7. There is no justification for this distortion of history. The Serb ethnic cleansing campaign is at the centre of these events, and explains the spontaneity and breadth of the armed resistance which the SPO has now put on trial. The phenomenon of 863,000

¹¹ UK House of Commons, Foreign Affairs, Fourth Report, Session 1999-2000, 23 May 2000, <https://publications.parliament.uk/pa/cm199900/cmselect/cmcaff/28/2802.htm>, para. 93: "...German Foreign Minister, Joschka Fischer, was also quoted as saying that the Serbs had set in motion a plan called Operation Horseshoe, which aimed at expelling Kosovo's ethnic Albanian population", citing, *inter alia*, T. Judah, *Kosovo: War and Revenge*, (Yale University Press, 2000) ("Kosovo: War and Revenge"), pp. 240-241. See also R. Goldstone, *The Kosovo Report: Conflict, International Response, Lessons Learned*, (OUP, 2000) ("The Kosovo Report"), p. 88; N. Malcolm, *Kosovo: A Short History* (Pan Books, 2002) ("A Short History"), pp. xxxvi-xxxviii; IT-05-87.1 P00833, Transcripts from *Milošević* case-Richard CIAGLINSKI, 16 April 2002, pp. 3218-3224; IT-05-87_1 P00834, Transcripts from *Milutinović* case-Richard CIAGLINSKI, 17 November 2006, pp. 6831-6835.

¹² M. Weller, *The Crisis in Kosovo 1989-99: From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities, International Documents and Analysis, Volume I*, (Documents & Analysis Publishing Ltd, 1999) ("Crisis in Kosovo"), p. 241.

¹³ The Kosovo Report, p. 90; UNMIK, 'UNMIK Report, 10-20 Jun 1999', 20 June 1999 <https://reliefweb.int/report/albania/un-interim-administration-mission-kosovo-unmik-10-20-jun-1999> ("June UNMIK Report").

¹⁴ Indictment, para. 25.

Kosovo Albanians,¹⁵ and 590,000 internally displaced persons¹⁶ then returning to their villages in Kosovo to find their homes destroyed, and the bodies of their loved ones in the streets, informs all the events that follow. The SPO's attempt to restrict the Trial Panel to a selective and distorted presentation of events is not only offensive to the community who lived through them, but will not find support in either the evidential record already in existence, or the record re-created by the SPO at trial.

8. In order to link the alleged crimes to Mr Thaçi,¹⁷ the SPO has been forced to present a case in the broadest of terms, relying on the extended form of Joint Criminal Enterprise ("JCE") (known as JCE III), the most controversial form of individual criminal responsibility, which allows an accused to be convicted where he neither intended the crime to occur, nor made any kind of essential contribution to its occurrence. At the centre is an alleged criminal plan, on the part of Mr Thaçi and others, to take power in Kosovo through the commission of crimes against humanity and war crimes.

9. Importantly, in formulating this alleged criminal plan, the SPO has criminalised the KLA, with the plan allegedly encompassing "General Staff members; PGoK ministers and deputy ministers; KLA zone commanders, deputy zone commanders, and other members of zone command staffs; brigade and unit commanders; commanders and members of the KLA and PGoK police and

¹⁵ Crisis in Kosovo, p. 241.

¹⁶ The Kosovo Report, p. 90; June UNMIK Report.

¹⁷ Creating a link between the crimes and Mr Thaçi appears to have been the SPO's political objective from the outset. An SPO Press Statement from 24 June 2020 revealed, contrary to Rule 88, the filing of an indictment with the Pre-Trial Judge's permission, ahead of Mr Thaçi's meeting with President Aleksander Vučić at the White House: *see* SPO, 'Press Statement', 24 June 2020, <https://www.scp-ks.org/en/press-statement>. *See also*, Washington Post, 'Kosovo's president Hashim Thaçi, indicted on war crimes charges ahead of planned White House meeting,' 24 June 2020, https://www.washingtonpost.com/world/europe/kosovo-president-hashim-thaci-war-crimes/2020/06/24/2df7346e-b627-11ea-9a1d-d3db1cbe07ce_story.html.

intelligence services; and other KLA soldiers and PGoK officials".¹⁸ This is not merely standard charging language. In September 2022, the SPO publicly stated the KLA operated as a "secretive non-state actor" behind its public face.¹⁹

10. The crude framing of the charges in such wide terms demonstrates the weakness of the SPO's case. A prosecuting authority with credible evidence of an accused's guilt would never be required to cast the net so wide as to impute individual criminal responsibility to thousands of people, simply on the basis of their KLA membership, or involvement in the Provisional Government of Kosovo ("PGoK"). The SPO's repeated insistence that the KLA is not on trial²⁰ cannot be reconciled with the framing of these charges as a collective indictment, with the KLA and the liberation war itself in the dock.

11. The SPO has also revised another central part of the historical record: the involvement of the international community. The role played by states, international figures, the UN Security Council, the Contact Group,²¹ the North Atlantic Treaty Organization ("NATO"), the Kosovo Diplomatic Observer Mission (KDOM), and the OSCE's Kosovo Verification Mission (OSCE-KVM), all of whom were central to the unfolding of events, and provided essential support in the fight against the brutal Serb campaign, is also entirely missing. This revision is deliberate. The SPO's decision to charge this case as a Joint Criminal Enterprise means that the international support given by the KLA's international partners, such as the United States ("U.S."), United

¹⁸ Indictment, para. 35.

¹⁹ KSC-BC-2020-06/F00948, Prosecution submission of revised witness list, 2 September 2022, para. 3.

²⁰ See, e.g., KSC-BC-2020-06, Transcript of Fourteenth Status Conference, 8 September 2022, ("Transcript of Fourteenth Status Conference"), pp. 1535-1536; KSC-BC-2020-06, Transcript of Thirteenth Status Conference, 13 July 2022, ("Transcript of Thirteenth Status Conference"), pp. 1445-1446; Transcript of Twelfth Status Conference, p. 1319 lines 14-21.

²¹ The Contact Group is the "principal group of nations that monitors and supervises international policy in Kosovo", namely the U.S., U.K., France, Germany, Italy and Russia: U.S. Department of State, 'The Contact Group', <https://2001-2009.state.gov/p/eur/ci/kv/c13102.htm>.

Kingdom (“U.K.”), France, Italy, and Germany, was material support for a criminal plan to commit a widespread or systematic attack against a civilian population. Of course, it was not.

12. In reality, the SPO evidence does not establish that: (i) the charged common criminal plan existed; (ii) Mr Thaçi was engaged in a common plan to gain and exercise control over Kosovo through the commission of crimes against humanity and war crimes;²² (iii) exercised control, effective or otherwise, over the perpetrators of alleged crimes;²³ or (iv) made a contribution to the commission of crimes which had a substantial effect on their commission.²⁴

13. The SPO’s case is a dangerously partial misrepresentation and revision of historical events, which cannot be sustained on the evidence. It stands in contrast to the reports, records and findings of well-placed governments and international organisations. What took place during the Indictment period was undoubtedly a battle for the soul and independence of Kosovo. It was also a battle for survival, prompted by a brutal Serbian campaign of ethnic cleansing that sought to expel the ethnic Albanian population from Kosovo’s territory.²⁵ The vast criminal conspiracy formulated by the SPO simply never existed.

B. SCOPE OF THE PRE-TRIAL BRIEF

14. Rule 95(5) of the Rules authorises the Pre-Trial Judge “to **invite** the Defence” to file a Pre-Trial Brief, indicating the elective nature of the filing. In order to assist the Trial Panel, the Defence has endeavoured to explain, in general terms, the nature of

²² Indictment, para. 32.

²³ Indictment, para. 55.

²⁴ Indictment, para. 54.

²⁵ A Short History, pp. xxxvi-xxxviii.

the Accused's defence, and to highlight the broad divergence between the SPO's case as charged, and the Defence's position.

15. For the reasons explained in the body of this submission, the timing of this Pre-Trial Brief poses challenges. It is being filed in the face of a heavily redacted Indictment, before a trial date has been set, and before the SPO has finished disclosing its evidence. It was prepared against a backdrop of delayed, piecemeal and incomplete SPO disclosure, and the most broad-ranging witness protective measures authorised in the history of international criminal justice. The Defence, for example, is still waiting to see: (i) the identity of 68 witnesses; and (ii) 46,000 pages of new, less redacted or unredacted material, which will only be revealed 30 days before trial.²⁶

16. The Defence is on the record about the impact of these delays and redactions on the preparation of its case, and its ability to understand the SPO's case against Mr Taçi.²⁷ Defence preparations have also been stymied by the witness protocol in place,²⁸ and its inability to engage in any confidential communication with the 319 individuals on the SPO's list of witnesses.²⁹ This is despite the fact that many of these people are unaware that they have been designated as SPO witnesses, and/or have no intention of testifying.³⁰

²⁶ KSC-BC-2020-06/F00952, Prosecution submissions for fourteenth status conference, 5 September 2022 ("F00952"), para. 11.

²⁷ The Defence have repeatedly raised concerns about the impact of redactions, protective measures and disclosure issues. For example, see the Defence's recent submissions in: Transcript of Fourteenth Status Conference, pp. 1543-1544, 1559-1560. See also sections VI. B-D, below.

²⁸ KSC-BC-2020-06/F00854, Pre-Trial Judge, Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant, 24 June 2022, ("Decision on Framework"); pp. 85-91 containing the 'Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant' ("Framework").

²⁹ KSC-BC-2020-06/F00948/A02, Annex 2, Revised Witness List, 2 September 2022, ("SPO Witness List").

³⁰ KSC-BC-2020-06/F00741, Taçi Defence Supplemental Submissions on the SPO's Proposed Framework for Contacts with Witnesses, 21 March 2022, ("Taçi Supplemental Submissions"), paras. 9-11.

17. The Defence is accordingly not in a position to provide a list of potential witnesses, nor specify the charges and matters which the Accused disputes with reference to the 714 paragraphs of the SPO Pre-Trial Brief, and reserves its right to provide further and more detailed responses, and to file a further brief upon presentation of the SPO case.

II. EVIDENTIARY PRINCIPLES

A. PRESUMPTION OF INNOCENCE

18. Article 21(3) of the KSC Law presumes the innocence of the accused “until proved guilty beyond reasonable doubt according to the provisions of this Law”, thereby incorporating the central right of an accused provided in Article 31(5) of the Constitution and Article 6(2) of the ECHR.

19. The presumption of innocence covers statements made by public officials about criminal investigations that encourage a public belief in the guilt of the accused and prejudice findings.³¹ The presumption “will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before his guilt has been proved according to law”.³²

20. The Specialist Prosecutor’s reported statement that the Indictment against Mr Thaçi will result in his receiving a life-sentence, undoubtedly falls foul of this standard.³³ As does the KSC’s decision to elevate the Martyr Report and its unproven

³¹ ECtHR, *Alenet de Ribemont v. France*, 15175/89, Court (Chamber), Judgment, 10 February 1995, para. 41; ECtHR, *Daktaras v. Lithuania*, 42095/98, Third Section, Judgment, 10 October 2000, paras. 41-43.

³² ECtHR, *Avaz Zeynalov v. Azerbaijan*, 37816/12 25260/14, Fifth Section, Judgment, 22 April 2021, para. 68.

³³ KSC-BC-2020-06/F00434/A01/CONF, Annex 1-Notes from Diplomatic Briefing on 7 December 2020, 16 August 2021, p. 4.

allegations to the status of a Foundational Document.³⁴ A Defence challenge on this basis was dismissed,³⁵ and the report remains on the KSC website.

B. BURDEN OF PROOF

21. The presumption of innocence requires that “the general burden of proof must lie with the prosecution”, and that “the court, in its inquiry into the facts, must find for the accused in case of doubt”.³⁶ A conviction cannot be entered until the offences for which Mr Taçi is charged have been established by the SPO beyond a reasonable doubt.³⁷

22. The standard “beyond reasonable doubt” means that “the evidence establishes a particular point and it is beyond dispute that any reasonable alternative is possible”.³⁸ It requires a trial panel to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused.³⁹ The reasonable doubt standard must also be applied to “the facts constituting the elements of the crime and of the mode of liability of the Accused as charged, as well as to other facts on which the conviction depends”.⁴⁰

³⁴ KSC-BC-2020-06/F00217, Taçi, Motion challenging jurisdiction on the basis of violations of fundamental rights enshrined in the Constitution, 12 March 2021, paras. 30-35.

³⁵ KSC-BC-2020-06/F00450, Pre-Trial Judge, Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused, 31 August 2021, paras. 131-142.

³⁶ Harris, O'Boyle, and Warbrick, *Law of the European Convention on Human Rights* (OUP, 2014), p. 461.

³⁷ KSC Rules, Rule 140(1): “[a] Panel may find an Accused guilty where guilt is proved beyond reasonable doubt”. See also Rule 158(3).

³⁸ MICT, *Prosecutor v. Ngirabatware*, MICT-12-29-A, Appeals Chamber, Judgment, 18 December 2014, para. 20; ICTY, *Prosecutor v. Mrkšić and Šljivančanin*, IT-95-13/1-A, Appeals Chamber, Judgment, 5 May 2009, para. 220.

³⁹ *Ibid*, also citing ICTY, *Prosecutor v. Milošević*, IT-98-29/1-A, Appeals Chamber, Judgment, 12 November 2009, para. 20; ICTY, *Prosecutor v. Martić*, IT-95-11-A, Appeals Chamber, Judgment, 8 October 2008, para. 61.

⁴⁰ KSC Rules, Rule 140(2).

23. As such, the SPO must prove, beyond a reasonable doubt, the commission of the crimes alleged in Counts 1 through 10 of the Indictment, meaning: the alleged underlying acts and contextual elements, any individual responsibility alleged to Mr Taçi under Article 16 of the KSC Law, as well as the existence of JCE liability as charged in the Indictment.

III. THE MISSING HISTORICAL CONTEXT

A. RELEVANT POLITICAL CONTEXT

24. The SPO's case is presented in a contextual vacuum. The background and context of the events is explained in the SPO Indictment in less than 20 paragraphs,⁴¹ with the story beginning with the accused being [REDACTED] with a common criminal purpose.⁴²

25. The political and regional complexities that underpin the charges cannot be exhaustively captured in a written brief. However, there are aspects of the SPO's simplistic and selective presentation of events that give an inaccurate impression to the Trial Panel, and require clarification and correction.

26. For example, the SPO "Statement of Facts" begins with the extraordinary statement that "[i]n 1989, in the context of increasing tensions and schisms throughout the former Yugoslavia, Kosovo's status as an autonomous province **was rescinded.**"⁴³ No credible history of events could be presented in these terms.

⁴¹ Indictment, paras. 13-31.

⁴² SPO Pre-Trial Brief, para. 1.

⁴³ Indictment, para. 13 (Emphasis added).

27. Despite efforts made by the majority Albanian population towards self-determination during World War II, Kosovo remained under the control of the military-political regime in Belgrade between 1945 and 1968. Inspired by the protests in Europe and the region, in 1968, Kosovo Albanians began to take to the streets.⁴⁴ These demonstrations sought the status of a republic within the federation of Yugoslavia, on the basis of social and economic demands. Although the demonstrations were forcibly quashed, they were followed by concessions by the Yugoslav leadership, resulting in the adoption of the new Yugoslav Constitution in 1974.⁴⁵ While legally referring to Kosovo as an autonomous province within Serbia, the 1974 Constitution also gave Kosovo the prerogatives of an autonomous province within the federation, with its own Assembly, Government, Judiciary, and National Bank, and a limited ability to engage in foreign relations.

28. This recognition of Kosovo as a constituent unit of the federation gave Kosovo a number of prerogatives and involvement in decision making. A counter-campaign soon began, characterising the 1974 Constitution as an attack on Serbia's national interests. In April 1987, a group of Kosovo Serbs sent a petition to the Serbian Communist Party in Belgrade alleging discrimination under the Albanian leadership in Kosovo. Slobodan Milošević was sent to hear their complaints. A riot ensued, which was forcefully disbanded by the Albanian-dominated police. Milošević declared himself as the protector of Serbs in Kosovo, and emerged at the forefront of political leadership in Serbia.⁴⁶

29. In 1988, acting on a petition of Kosovo Serbs for closer ties with Serbia, Milošević developed a new draft Constitution of Serbia. It was adopted in February

⁴⁴ T. Judah, *Kosovo: What Everyone Needs to Know* (OUP 2008), p. 53.

⁴⁵ Constitution of the Socialist Federal Republic of Yugoslavia (SFRY) ("1974 Constitution"), reprinted in *Crisis in Kosovo*, pp. 54-56.

⁴⁶ *Kosovo: War and Revenge*, pp. 33, 53.

1989 by the Serbian Assembly, and essentially stripped the provinces of Kosovo and Vojvodina of their autonomy. The Kosovo Assembly was forced to ratify the amendments during a state of national emergency, with the Kosovo Assembly building surrounded by tanks. This coerced ratification by the Kosovo Assembly was followed by massive demonstrations, which were suppressed violently by the Serbian-dominated federal police deployed to Kosovo as a result of the state of emergency.⁴⁷

30. As such, the SPO claim that “[i]n 1989... Kosovo’s status as an autonomous province was **rescinded**”,⁴⁸ gives the false impression that Kosovo’s autonomy was revoked by a lawful higher authority, being Serbia. In reality, it was abolished unlawfully, through force and coercion by the Serbian authorities, led by Slobodan Milošević.

31. Following the stripping of Kosovo’s autonomy and the quashing of dissent, the Serbian Assembly moved forward with the enactment of discriminatory laws against the majority-Albanian population, and the segregation of society.⁴⁹ These laws transferred control over Kosovo’s political institutions, and presented a package of incentives for the resettlement of Serbs in Kosovo. These laws also resulted in dismissals of Kosovo Albanians from positions in political and economic institutions, state-owned enterprises and civil service (including the police, prosecutorial service, judiciary, media, health and education). In practical terms, these laws denied Kosovo Albanians’ access to public services, education and employment, particularly for those refusing to pledge allegiance and loyalty to the Serbian authorities. To complete this

⁴⁷ Kosovo: War and Revenge, pp. 55-56.

⁴⁸ Indictment, para. 13 (emphasis added).

⁴⁹ See, *inter alia*, ‘Law on the Activities of Organs of the Republic in Exceptional Circumstances 1990’, adopted in furtherance of the ‘Programme for the Realisation of Peace, Freedom, Equality, Democracy and Prosperity of the Socialist Autonomous Province of Kosovo 1989’, cited in M. Weller, *Contested Statehood: Kosovo’s Struggle for Independence* (OUP, 2009) (“Contested Statehood”), pp. 37-38.

purge, resettled Serbs were invited to take these posts, and the Serbian authorities started to arm Serb civilians.

32. Consequently, by 1991, Kosovo was dominated by Serbs in every aspect of life.⁵⁰ In the face of this constitutional repression, the Kosovo polity chose to resist through peaceful means, and focused instead on establishing parallel institutions, despite their lack of power. On 2 July 1990, 114 out of 123 members of the Kosovo Assembly adopted a 'Constitutional Declaration' characterising Kosovo as an independent entity within Yugoslavia.⁵¹ The Albanian parliament then adopted a new Constitution of Kosovo in September 1990, which again recognised the Yugoslav sovereignty. In September 1991, Kosovo issued a declaration of independence, and Albanians overwhelmingly voted in a referendum for the creation of an independent state.⁵² In October 1991, the Kosovo Albanian political parties agreed to a document in which three options were presented for the status of Kosovo, including complete independence.⁵³ Parallel elections were held in May 1992, in which the Democratic League of Kosovo ("LDK"), headed by Dr. Ibrahim Rugova, won 76% of the votes. Dr. Rugova was elected the President of Kosovo and a new parallel government of Kosovo was elected.⁵⁴ Under President Rugova, resistance was peaceful.

33. While this peaceful approach received international praise, it was ignored by the Serb authorities, who continued to maintain their hold. Then, the International

⁵⁰ Kosovo: War and Revenge, p. 62.

⁵¹ Kosovo Prime Minister Office, 'Message of the Prime Minister of the Republic of Kosovo, Hashim Thaçi, on the 23rd anniversary of the Constitutional Declaration (July 2, 1990)', 2 July 2013, <https://kryeministri.rks-gov.net/en/blog/message-of-the-prime-minister-of-the-republic-of-kosovo-hashim-thaci-on-the-23rd-anniversary-of-the-constitutional-declaration-july-2-1990/>.

⁵² Crisis in Kosovo, p. 72; IT-05-87.1 P00285, ICTY Statement of Ibrahim Rugova, 3 November 2001 ("Rugova Statement"), pp. 2-3.

⁵³ Rugova Statement, p. 3.

⁵⁴ See 'Kosova Report: 24 May Multiparty Elections for Parliament and President of Kosovo, 15 June 1992', reprinted in: Crisis in Kosovo, p. 73.

Conference on Yugoslavia, chaired by Lord Carrington, which adopted the criteria for the dissolution of the federation, ignored the question of Kosovo entirely.⁵⁵ Similarly, the 1995 Dayton Agreement, which ended the war in Bosnia, made no reference to the question of Kosovo.⁵⁶ These events severely weakened the peaceful resistance movement, within and outside the parallel institutions headed by President Rugova. It became increasingly clear to the disillusioned population and international community, that an armed resistance was the only way to ensure the survival of the Kosovo Albanian community by liberating Kosovo from Serbia. This belief was echoed with increasing volume in the Kosovo diaspora, civil society, and the media. It also became clear that the support of the international community would be essential.

B. THE CONTEXT OF WIDESPREAD SERB CRIMES

34. The resistance of Kosovo Albanians took place against the pervasive pattern of human rights abuses and oppressive authority exercised by Serbia in Kosovo in the years preceding the open armed conflict.

35. The situation began to significantly deteriorate in the mid-1990s,⁵⁷ with student and other peaceful protests suppressed by the Serbian government with increasing

⁵⁵ Contested Statehood, p. 44.

⁵⁶ *Ibid.*, p. 51; Crisis in Kosovo, pp. 50, 59.

⁵⁷ For a general overview of the human rights situation in Kosovo during the 1992-1996 period, see the following UN General Assembly Resolutions: A/RES/47/147, [Situation of human rights in the territory of the former Yugoslavia](#), adopted on 18 December 1992, 26 April 1993; A/RES/48/153, [Situation of human rights in the territory of the former Yugoslavia: violations of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia \(Serbia and Montenegro\)](#), adopted on 20 December 1993, 7 February 1994; A/RES/49/196, [Situation of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia \(Serbia and Montenegro\)](#), adopted on 23 December 1994, 10 March 1995; A/RES/49/204, [Situation of human rights in Kosovo](#), adopted on 23 December 1994, 13 March 1995; A/RES/50/190, [Situation of human rights in Kosovo](#), adopted on 22 December 1995, 6 March 1996; A/RES/50/193, [Situation of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia \(Serbia and Montenegro\)](#), adopted on 22 December 1995, 11 March

strength. A peaceful protest of 20,000 students in Prishtinë/Priština in October 1997, demanding return into the university campus from which they had been expelled, was met with a violent assault by the Serbian police. This was a tipping point for the growing belief that no progress would result from peaceful resistance. The population started mobilising.

36. By late 1997, villages were intent on organising their own security. Local village-based resistance units began to sporadically revolt against Serb repression. The highly disproportionate responses by Serb security forces created opportunities for the KLA to step in.⁵⁸ With the rise of KLA groups, Serbian police harassment continued, and in the summer of 1998, a “campaign of destruction against Albanian villages”⁵⁹ commenced in earnest. Numerous cases of police mistreatment of ethnic Albanians were documented by human rights organisations on the ground, including instances of “arbitrary arrest, detention, physical abuse, illegal searches and extra-judicial killing”.⁶⁰ These organisations also reported a high prevalence of beatings, and the use of torture to extract false confessions.⁶¹

37. The situation escalated further by the beginning of 1998. As the KLA started to appear publicly, and attacks between KLA and the Serbian Police increased, the Serbian authorities brought in special security forces, who responded to KLA activity with brutal force against civilians. A typical, and highly disproportionate response consisted of “reprisal attacks on villages, using military helicopters and armoured

1996; A/RES/51/111, [Situation of human rights in Kosovo](#), adopted on 12 December 1996, 5 March 1997; A/RES/51/116, [Situation of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia \(Serbia and Montenegro\)](#), adopted on 12 December 1996, 7 March 1997.

⁵⁸ The Kosovo Report, p. 67.

⁵⁹ A Short History, pp. xxvii-xxviii.

⁶⁰ The Kosovo Report, p. 53.

⁶¹ The Kosovo Report, p. 53.

personnel carriers, accompanied by brutal house-to-house raids and indiscriminate arrests.”⁶² Throughout this period, many suspected of being KLA supporters were apprehended, kidnapped and detained.

38. On 28 February and 1 March 1998, the Serbian police mounted a major attack on Qirez/Ćirez and Likoshan/Likošane villages in Drenicë/Drenica. Special police forces attacked without warning, firing indiscriminately at women, children and other non-combatants. Helicopters and military vehicles sprayed village rooftops with gunfire, before police entered the village on foot, firing into homes.⁶³ Over 24 civilians were killed, and hundreds tortured. Evidence suggested that the police summarily executed at least 14 people.⁶⁴ In response, protests were held throughout Kosovo and the diaspora. On 2 March 1998, a protest organised in Prishtinë/Priština was violently suppressed by Serb forces using water cannons, tear gas, and batons, injuring at least 289 people.⁶⁵ Other protests in Kosovo were likewise met with violent force from the Serbs.

39. Then, a turning point: the massacre of the Jashari family in Prekaz in March 1998. Serb authorities had tried to arrest Adem Jashari in January 1998, but had been met with resistance. The Serb authorities then prepared a coordinated military offensive, blocking, occupying and attacking the surrounding villages in Drenicë/Drenica to prevent KLA elements and local villagers from coming to the family's defence. By the end of the operation, 59 members of the Jashari family had been killed, including 18 women and 10 children under the age of sixteen. One person

⁶² [REDACTED] OSCE, 'Kosovo/Kosova As Seen, As Told, Parts I-IV', 12 May 2003 [REDACTED].

⁶³ [REDACTED] Human Rights Watch Report, "Humanitarian Law Violations in Kosovo", October 1998 [REDACTED], p. 18.

⁶⁴ *Ibid.*, p. 19.

⁶⁵ S. Troebst, *Conflict in Kosovo: Failure of Prevention?* (European Centre for Minority Issues, No. 1, 1998), p. 3.

survived the attack, Jashari's niece, then 10 years old. One observer later found "no doubt" that the killing of family members continued long after resistance had ceased.⁶⁶ On 24 March 1998, Serbian forces also launched an offensive in the villages surrounding Deçan/Dečani, including an attack on the Haradinaj family compound in Glllogjan/Glođane.⁶⁷

40. The same Serbian campaign of destruction was repeated in villages throughout Kosovo in the spring and summer of 1998: brutal force, deliberate damage and destruction of houses, and the killing of women, children and the elderly. In six months, approximately 300 villages were ravaged with over 250,000 people driven from their homes.⁶⁸ These attacks were accompanied by military operations against the KLA by the Yugoslav Army ("VJ") and Serbian police ("MUP") from the spring of 1998, increasing in intensity over summer until October 1998.⁶⁹

41. The Serbian forces fired indiscriminately at crowds of people; separated inhabitants from their family and executed them; and terrorised entire villages. This happened in Deçan/Dečani and Gjakovë/Đakovica on 23 April 1998, when Serbian forces killed 20 Albanians; and in Poklek i Ri/Novi Poklek on 31 May 1998, where approximately 100 Serbian policemen surrounded the village and started shooting with firearms, killing at least 10 inhabitants.⁷⁰ Throughout July 1998, similar attacks by Serb forces resulted in the death of approximately 38 civilians.⁷¹ Coordinated attacks continued through August 1998, with Serb forces bombing, shelling and

⁶⁶ [REDACTED], p. 19.

⁶⁷ ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84bis-T, Trial Chamber, Judgment, 29 November 2012 ("Haradinaj Retrial Judgment"), para. 28.

⁶⁸ A Short History, p. xxxii.

⁶⁹ ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-T, Trial Chamber, Judgment – Volume 1, 26 February 2009 (Šainović Trial Judgment), para. 920.

⁷⁰ [REDACTED] Humanitarian Law Centre, 'The Kosovo Memory Book, Volume 1' ("Kosovo Memory Book"), p. 87.

⁷¹ Kosovo Memory Book, pp. 312, 319-320, 322-323.

burning villages and killing 17 civilians, including eight children.⁷² This included an horrific attack on 27 August 1998 in Kleçkë/Klečka, Lipjan/Lipljan Municipality, when Serb forces killed eight people, ranging from children who were nine months old to elderly over 60, and injured over 39 people.⁷³

42. The killing of civilians continued in September 1998: over 10 different attacks are recorded in that period, with more than 200 civilian victims.⁷⁴ In Abria e Epërme/Gornje Obrinje on 26 September 1998, Serb forces killed 21 members of the Delijaj family including women and children, and a new born child.⁷⁵ Some members of the family were found dead in the nearby forest, likely killed while in hiding. The elderly family patriarch “was burned in the house, while one of the other men had been killed and his body found in the village well.”⁷⁶ On the same day in 1998, Serb forces separated 14 inhabitants of Golluboc/Golubovac and other villages from their families, beat them and then executed them by gunshot. One survivor, among the corpses, escaped death.⁷⁷

⁷² Kosovo Memory Book, pp. 99, 405; J. Osmani, *The Serb Government's Crimes in Kosova 1998-1999*, Book 1, (Createspace, 2016) (“Serb Government’s Crimes in Kosova”), p. 82.

⁷³ Serb Government’s Crimes in Kosova, p. 80; J. Osmani, *Serbia’s Crimes Against Children in Kosova*, (State Agency of Kosova Archives, 2012) (“Serbia’s Crimes Against Children in Kosova”), p. 86.

⁷⁴ Attacks were conducted in: Lez/Les village, Prizren Municipality, 11 victims; Dejnë/Danjane village, Rahovec/Orahovac municipality, 8 victims; Strelc i Ulët/Donji Streoc, Deçan/Dečani, 10 victims; Shala e Bajgorës, 12 victims, and Çyçavica/Çiçavica, where heavily armed Serb army and police and armed Serb civilians and paramilitaries killed at least 60 inhabitants; Dubovc/Dubovac, 13 victims; and Dashec/Daševci, 7 victims: *see, e.g.*, Serb Government’s Crimes in Kosova, pp. 80-81; Kosovo Memory Book, pp. 336-337, 380-381, 434; Koha Ditore, Issue No. 478, 14 September 1998, p. 2; Assembly of the Republic of Kosovo, No. 06-R-017, Resolution on Genocide committed by Serbia in Kosovo, 16 May 2019 (“Resolution on Genocide”), p. 4, http://old.kuvendikosoves.org/common/docs/2019_05_31_Rezolutë%2006-R-017%20për%20gjenocidin%20e%20kryer%20serb%20në%20Kosovë_Eng'.pdf.

⁷⁵ Šainović Trial Judgment, para. 899.

⁷⁶ Šainović Trial Judgment, paras. 901-902.

⁷⁷ Kosovo Memory Book, pp. 220-221; Serb Government’s Crimes in Kosova, p. 80.

43. In December 1998, reports of Serb attacks on villages again became commonplace.⁷⁸ Then, in the early hours of 15 January 1999, Serbian police and paramilitary forces and local Serbs mobilised from various locations, entered the village of Reçak/Raçak. They terrorised, tortured and then executed 45 inhabitants of the village and injured dozens of others. 40 bodies were found in different locations (five had already been removed for burial by relatives), all of which had been shot. Some of the dead showed signs of having been killed arbitrarily at close range, including 20 men who were reportedly arrested the day before; others appeared to have been shot whilst running away. Some had been decapitated. Among the dead were women and a 12-year-old child.⁷⁹ Serb claims that the victims were KLA fighters, and their uniforms had been changed for civilian clothes, were dismissed as not credible.⁸⁰

44. Attacks continued in March 1999,⁸¹ including: (i) the “Green Market massacre” on 13 March 1999 in the centre of Mitrovicë/Mitrovica, where Serb forces threw explosive ordnances in the middle of the market, leaving six dead;⁸² and (ii) the killing of 29 civilians aged 15 to 70 in Skënderaj/Srbica municipality by Serb forces on 20 March 1999.⁸³ The same day, they threw grenades at civilians fleeing from Tërrinavë/Trnava, Podujevë/Podujevo, killing four, including children who were six and seven years old.⁸⁴

⁷⁸ The Kosovo Report, p. 79.

⁷⁹ [REDACTED], OSCE, ‘Kosovo/Kosova As Seen, As Told, Part V’, 12 May 2003, [REDACTED].

⁸⁰ [REDACTED]; [REDACTED] Human Rights Watch, ‘Under Orders: War Crimes in Kosovo’, 26 October 2001 [REDACTED], p. 57. *See also* The Guardian, ‘Recak bodies ‘were tampered with’, 21 January 1999, <https://www.theguardian.com/world/1999/jan/21/8>.

⁸¹ *See* incidents identified in: Resolution on Genocide, p. 4; Serb Government’s Crimes in Kosova, p. 82.

⁸² Resolution on Genocide, p. 4; Serb Government’s Crimes in Kosova, p. 82.

⁸³ Serb Government’s Crimes in Kosova, p. 82; Resolution on Genocide, p. 4.

⁸⁴ Resolution on Genocide, p. 4; Serb Government’s Crimes in Kosova, p. 82.

45. In March 1999, the humanitarian crisis reached an even more alarming level. The Serb response to the NATO offensive was to retaliate against the civilian population, and implement a plan to expel the Kosovo Albanian population from Kosovo. During the course of this Operation Horseshoe,⁸⁵ civilians were encircled and expelled to Macedonia, Montenegro and Albania, in many cases with their identity and property documents seized by Serb authorities to prevent their ultimate return.⁸⁶ Approximately 863,000 civilians sought or were forced into refuge outside Kosovo,⁸⁷ and an additional 590,000 were internally displaced; figures that equate to over 90% of the Kosovo Albanian population at the time.⁸⁸

46. In addition to killing Kosovo Albanian civilians, the Serb forces also demonstrated a willingness to kill their own. On 14 December 1998, unidentified armed men attacked the Panda Bar Café in Peja/Peć, leaving six young Serbs dead and two injured.⁸⁹ Serbian authorities initially blamed ethnic Albanians and the KLA specifically, undertaking reprisal actions against them, and arresting and mistreating Albanians alleged to be responsible.⁹⁰ However, statements by Serbian leaders later revealed that it was the Serbian government who was responsible for the killing of their own youth,⁹¹ presumably to create a pretext for further abuses against Kosovo Albanians.

⁸⁵ See fn. 11 above.

⁸⁶ U.S. State Department Report, 'Ethnic Cleansing in Kosovo: An Accounting', December 1999 ("Ethnic Cleansing in Kosovo"), https://1997-2001.state.gov/global/human_rights/kosovooii/homepage.html, p. 4: "Kosovar Albanians were systematically stripped of identity and property documents including passports, land titles, automobile license plates, identity cards, and other forms of documentation."

⁸⁷ Crisis in Kosovo, p. 241.

⁸⁸ The Kosovo Report, p. 90; June UNMIK Report.

⁸⁹ [REDACTED], pp. 56-57.

⁹⁰ *Ibid.*, p. 289.

⁹¹ KSC-BC-2020-06/F00877/COR, Corrected Version of Joint Defence Motion for Disclosure Pursuant to Rule 103, 21 July 2022 ("F00877"), para. 36 and footnotes cited therein.

47. Over 25 attacks against civilians are recorded in the period between 24 and 31 March 1999, totalling more than 1,200 victims in that week alone. This included attacks in: (i) Bellacërkë/Bela Crkva village, where Serb police, military and paramilitaries killed, mutilated and burned 47 Albanian residents in their homes, including women and children aged three to nine years old;⁹² (ii) Celinë/Celina, where 82 civilians, aged two to 106 years old were tortured and killed;⁹³ (iii) Krushë e Madhe/Velika Kruša, where Serb police and paramilitary forces killed 241 people including children, women and elderly, and burned many of their bodies;⁹⁴ (iv) Krushë e Vogël/Mala Kruša, where 113 civilians were killed;⁹⁵ (v) Izbicë/Izbica, where Serb police, military and paramilitaries killed 147 civilians, including some with disabilities;⁹⁶ and (vi) Pastasellë/Pusto Selo, where 106 civilians were killed.⁹⁷

48. The atrocities continued in April 1999. On 4 April 1999, in Kralan/Kraljane, Gjakovë/Đakovica, over 87 inhabitants were killed and some of the bodies burned.⁹⁸ On 21 April 1999, 60 civilian males in a column of IDPs from the village of Gallup/Gollak were shot in the back of the head by Serb forces, and their bodies thrown into the river. On 27 April 1999, Serbian military and police killed and/or disappeared at least 377 Albanians from the Reka e Keqe region.⁹⁹ On 30 April 1999, Serb forces attacked the villages of Vërboc/Vrbovac and Shtuticë/Štutica, killing 96 civilians in Vërboc/Vrbovac and over 70 civilians in Shtuticë/Štutica. A number of other civilians were detained, tortured and imprisoned in the Qirez/Ćirez mosque,

⁹² Serb Government's Crimes in Kosova, p. 83; Serbia's Crimes Against Children in Kosova, p. 95.

⁹³ Serbia's Crimes Against Children in Kosova, p. 95; F. Ramosaj, *Against Forgetfulness - Genocide of Serbia in Kosovo 1998-1999* ("Against Forgetfulness"), p. 137.

⁹⁴ Resolution on Genocide, p. 4.

⁹⁵ Serb Government's Crimes in Kosova, p. 83; Ethnic Cleansing in Kosovo, p. 60.

⁹⁶ Against Forgetfulness, p. 148; [REDACTED], p. 157.

⁹⁷ Serb Government's Crimes in Kosova, p. 85; Serbia's Crimes Against Children in Kosova, p. 96; Resolution on Genocide, p. 4.

⁹⁸ Serb Government's Crimes in Kosova, p. 87.

⁹⁹ [REDACTED], p. 240; Against Forgetfulness, p. 185.

where 176 Albanian civilians of various ages (including children) were held. The next day, the Albanian civilians were loaded into six trucks and were sent in the direction of Drenas (also known as Glllogoc/Glogovac); 120 were then executed.¹⁰⁰ On 2 May 1999, Serb police, army and paramilitaries killed 116 persons in Studime/Studimlja and Vushtrri/Vučitrn, including women and children.¹⁰¹

49. The attacks also encompassed the destruction of religious and cultural objects, with the OSCE reporting that some 200 mosques were damaged or destroyed, as well as deliberate damage to historic centres and market areas,¹⁰² setting the scene for the removal of the Kosovo Albanian population who relied on them. The UN Educational, Scientific and Cultural Organization (“UNESCO”) also reported the intentional destruction of cultural property, including that “mosques and churches were burnt and blown up with dynamite, religious and cultural symbols were destroyed or disfigured, and cemeteries desecrated”.¹⁰³

50. This list is far from being exhaustive, and yet this crime base is absent from the SPO’s case. The SPO case requires the KLA to exist, out of any context, as a murderous gang with a criminal plan to seize and maintain control of Kosovo. In reality, this was a voluntary armed civil resistance to a brutal Serbian campaign of ethnic cleansing. The SPO’s simplistic framing of this period cannot erase these horrific events committed by the Serbs, nor their victims. The events in the Indictment took place against the backdrop of a brutal and coordinated Serb campaign, which informed the creation, formation and functioning of the KLA. It also informed the anger and

¹⁰⁰ Krimet e Luftës në Kosovë 1998-1999, Monografi 1, Këshilli për Mbrojtjen e të Drejtave e të Lirive të Njeriut, 2010, p. 276.

¹⁰¹ Serb Government's Crimes in Kosova, p. 91; [REDACTED], p. 116.

¹⁰² [REDACTED].

¹⁰³ UNESCO, 'Cultural heritage in South-East Europe: Kosovo', 2003, <https://unesdoc.unesco.org/ark:/48223/pf0000134426>, p. 6.

desperation among a brutalised population that led to individual and isolated acts of revenge committed under no centralised authority or command.

C. THE INVOLVEMENT OF THE INTERNATIONAL COMMUNITY

51. The brutality and scope of the Serb attacks against the Albanian civilian population put Kosovo at the forefront of the international agenda. International condemnation was widespread.¹⁰⁴ The U.S. *chargé d'affaires* in Belgrade, and his Russian counterpart, launched KDOM on 6 July 1998, to observe and report on conditions throughout Kosovo "by providing an overt international presence of non-intrusive observer teams."¹⁰⁵ KDOM was unarmed, and operated under the authority of the Ambassadors of the Contact Group.

¹⁰⁴ Council of Europe, Parliamentary Assembly, Recommendation 1360 (1998), 'Crisis in Kosovo', 18 March 1998, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16597&lang=en>; Council of Europe, Parliamentary Assembly, Recommendation 1384 (1998), 'Crisis in Kosovo and situation in the FRY', 24 September 1998, <https://www.refworld.org/docid/3ae6b39130.html>; U.S. State Department, 'London Contact Group Meeting, Statement on Kosovo,' 9 March 1998, https://1997-2001.state.gov/travels/980309_kosovo.html; OHR, 'Contact Group Statement – Rome', 29 April 1998, http://www.ohr.int/ohr_archive/contact-group-statement-rome-29-april-1998/; EU, 9246/98 (Presse 193), 'Declaration by the European Union on Kosovo', *ReliefWeb*, 9 June 1998, <https://reliefweb.int/report/serbia/declaration-european-union-kosovo>; ICRC, 'Public statement by the ICRC on the situation in Kosovo', 15 September 1998, <https://www.icrc.org/en/doc/resources/documents/article/other/57jpiq.htm>; UNGA, A/RES/53/164, 'Situation of human rights in Kosovo', adopted 9 December 1998, <https://www.refworld.org/docid/3b00f52e8.html>; OHR, 'Contact Group, Chairman's Conclusions - London', 22 January 1999, http://www.ohr.int/ohr_archive/chairmans-conclusions-london-22-january-1999; UNSC, S/PRST/1999/5, 'Statement made on behalf of the Security Council', 29 January 1999, <https://digitallibrary.un.org/record/267508>; European Parliament, 'Statement by the European Council Concerning Kosovo', 24-25 March 1999, https://www.europarl.europa.eu/summits/ber2_en.htm#partIII; UNSC, 'Letter dated 9 April 1999 from the Secretary-General addressed to the President of the Security Council', *ReliefWeb*, 9 April 1999, <https://reliefweb.int/report/serbia/letter-dated-9-april-1999-secretary-general-addressed-president-security-council>.

¹⁰⁵ U.S. Department of State, 'Kosovo Diplomatic Observer Mission - Fact Sheet released by the Bureau of European and Canadian Affairs', 8 July 1998, https://1997-2001.state.gov/regions/eur/fs_980708_kom.html.

52. On 23 September 1998, the UN Security Council passed Resolution 1199, a Chapter VII resolution expressing grave concern over the “excessive and indiscriminate use of force” by the Serbs.¹⁰⁶ It demanded that all parties cease hostilities and that the Federal Republic of Yugoslavia (“FRY”) “order the withdrawal of security units used for civilian repression”.¹⁰⁷ Compliance with Resolution 1199 rested with the OSCE-KVM,¹⁰⁸ created in October 1999 with the backing of the UN Security Council.¹⁰⁹

53. For its part, the U.S. appointed a special envoy, Richard Holbrooke, who was tasked with ensuring Milošević’s compliance with Resolution 1199. In October 1998, Holbrooke succeeded in brokering an interim agreement with Milošević which contemplated the complete withdrawal of Serbian police and military offensive units from Kosovo, a diplomatic observer mission, and air surveillance with the aim of monitoring compliance.¹¹⁰ The KLA announced its unilateral acceptance and compliance with S/RES 1199, including a commitment to exercise self-restraint in order to contribute to its implementation.¹¹¹ This ceasefire opened the way to an intensified diplomatic effort led by U.S. diplomat Christopher Hill, and authorised by the Contact Group. The primary aim of this diplomatic campaign was to facilitate an interim agreement that would end the conflict and restore Kosovo’s self-governance.¹¹² The ceasefire never took hold, and the violence continued.

¹⁰⁶ UNSC, S/RES/1199, Resolution 1199 (1998), adopted by the Security Council at its 3930th meeting on 23 September 1998, p. 1, <https://digitallibrary.un.org/record/260416?ln=en>.

¹⁰⁷ *Ibid.*, p. 3.

¹⁰⁸ OSCE Permanent Council, PC.DEC/263, Decision No 263, 25 October 1998, <https://www.osce.org/files/f/documents/d/a/20595.pdf>.

¹⁰⁹ See UNSC, S/RES/1203, Resolution 1203 (1998), adopted by the Security Council at its 3937th meeting on 24 October 1998, <https://digitallibrary.un.org/record/262334?ln=en>.

¹¹⁰ Crisis in Kosovo, p. 274; PBS, Frontline, “A Kosovo Chronology”, <https://www.pbs.org/wgbh/pages/frontline/shows/kosovo/etc/cron.html>.

¹¹¹ 043808-043808-ET Revised, KLA General Staff Political Declaration No. 12, 15 October 1998.

¹¹² Crisis in Kosovo, p. 348.

54. Then, according to the SPO, “[i]n early February 1999, an international peace conference was organised in Rambouillet, France”,¹¹³ after “provocations and hostilities continued”.¹¹⁴ In reality, the “provocations and hostilities” was the Christmas offensive launched by the Serb forces to test the resolve of the OSCE-KVM monitors and NATO. This offensive encompassed brutal massacres, including in Reçak/Račak,¹¹⁵ and prompted a strident reaction from the Contact Group. This reaction included calling an emergency meeting of the Contact Group Ministers in London on 29 January 1999. Determined to end the violence, the Contact Group Ministers condemned the Reçak/Račak massacre and summoned the parties to Rambouillet in an effort to “stop the spiral of violence that is building toward renewed humanitarian catastrophe and all out war”.¹¹⁶ The UN Security Council provided its full support to these efforts,¹¹⁷ and NATO expressed its readiness “to take whatever measures necessary” if the parties failed to meet the demands of the international community.¹¹⁸

55. When the Contact Group summoned the parties to Rambouillet in January 1999, the KLA’s General Political Representative was Adem Demaçi, another figure who is conspicuously absent from the SPO narrative. Demaçi’s role as the KLA’s chief political representative, however, cannot simply be written out of history. Since August 1998, Demaçi had operated from a designated office in Prishtinë/Priština, with 12 advisors, and held weekly press conferences to present the KLA’s political positions. He met regularly with representatives of the international community,

¹¹³ Indictment, para. 24.

¹¹⁴ Indictment, para. 23.

¹¹⁵ See discussion at para. 43.

¹¹⁶ U.S. Department of State, ‘Secretary of State Madeleine K. Albright - Press Conference, Foreign and Commonwealth Office,’ 29 January 1999, <https://1997-2001.state.gov/statements/1999/990129.html>.

¹¹⁷ Crisis in Kosovo, pp. 392, 415-6.

¹¹⁸ NATO Press Release 99(12), ‘Statement by the North Atlantic Council on Kosovo’, 30 January 1999, <https://www.nato.int/docu/pr/1999/p99-012e.htm>.

issued passes to international diplomats and journalists to go to KLA-controlled areas, and mediated the release of KLA detainees. He was also staunchly against the KLA's presence and participation in Rambouillet.¹¹⁹

56. The Kosovo delegation, by contrast, saw Rambouillet as the opportunity for a political solution. The Kosovo delegation was comprised of Ibrahim Rugova, Bujar Bukoshi, Fehmi Agani, Edita Tahiri and Idriz Ajeti (LDK), and Rexhep Qosja, Hydajet Hyseni, Mehmet Hajrizi, and Bajram Kosumi (United Democratic Movement ("LBD")). The KLA was represented by Azem Syla, Hashim Thaçi, Jakup Krasniqi, Xhavit Haliti, and Ramë Buja. Veton Surroi and Blerim Shala attended as independents. The Kosovo delegation faced vehement opposition to their attendance and engagement from within some KLA factions, and from members of the diaspora.

57. Mr Thaçi presented at Rambouillet as reasonable, articulate, and willing to compromise. Despite his youth, and inexperience in international negotiations, he emerged as the interlocutor of choice for the international community. However, the international figures, including U.S. Secretary of State Madeleine Albright, who urged Mr Thaçi to sign the proposed agreement, soon realised that he had no authority to do so. KLA authority was in the hands of the Zone Commanders on the ground. U.S. diplomat Christopher Hill recalls asking Mr Thaçi "why can't you agree to this?", given what Hill saw as the "near-fatal consequences" of a refusal to sign. Mr Thaçi replied that "[i]t is you who doesn't understand. If I agree to this, I will go home and they will kill me".¹²⁰ This reality is illustrated by the fact that, while these negotiations were taking place in France, back in Kosovo, the Zone Commanders were in fact changing the composition of the KLA, including within the leadership.

¹¹⁹ Shkëlzen Gashi, *Kosova: lufta dhe paqja* (Rrokullia, 2019).

¹²⁰ C.R. Hill, *Outpost, Life on the Frontlines of American Diplomacy, A memoir* (Simon & Schuster, 2014), p. 153.

58. Eventually, the Kosovo delegation secured two key concessions. The first was that the Rambouillet Agreement would require the transformation, rather than the dissolution, of the KLA. Second, the Rambouillet Agreement would include “a right for the people of Kosovo to hold a referendum on the final status of Kosovo after three years”. This assurance was conveyed in a draft letter from the U.S. delegation, that the Kosovo Albanian delegates were told U.S. Secretary of State Albright would sign if their delegation signed the Rambouillet Agreement by a set deadline.¹²¹ Armed with these concessions, Mr. Thaçi and the other members of the Kosovo delegation had what they needed to explain the Agreement to the Zone Commanders on the ground. Meanwhile, Adem Demaçi, who remained staunchly against the Rambouillet Agreement, had resigned from the KLA in protest on 2 March 1999.

59. Regarding the Rambouillet Conference outcome, the SPO states that, “[i]n late February and early March 1999, FRY forces launched a series of further offensives. The peace talks **collapsed** in mid-March 1999.”¹²² Again, this is inaccurate. These were not peace talks, but rather the process of reaching a political agreement at the Contact Group’s urging, and under its supervision. Nor did the process collapse. Members of the Kosovo delegation signed the Rambouillet Agreement on 18 March 1999, despite it granting only self-government for Kosovo, and despite many within the KLA and other segments in Kosovo society regarding this as treason. It was, however, rejected by Serbia.¹²³ Even when the Serbs were unwilling to sign, the hosts gave Belgrade more time to change its position and prevent the impending military campaign.¹²⁴

¹²¹ Kosovo: War and Revenge, p. 215.

¹²² Indictment, para. 24.

¹²³ 065812-065813, AP Archive file, ‘France: Latest Developments in Kosovo Peace Talks’, 18 March 1999.

¹²⁴ CBC, ‘Holbrooke admits defeat in Kosovo’, 23 March 1999, <https://www.cbc.ca/news/world/holbrooke-admits-defeat-in-kosovo-1.189861>.

60. Again, these facts are ignored by the SPO, who presents this phase in the following extraordinary terms:¹²⁵

On 24 March 1999, the North Atlantic Treaty Organisation ('NATO') forces began airstrikes **against targets in Kosovo and Serbia**. As a result, and due to large-scale operations by FRY forces, KLA soldiers, and large numbers of Kosovo Albanian civilians moved from Kosovo to Albania, **where the KLA had already established facilities and personnel**.

61. This description is extremely problematic. The SPO gives the impression that this "movement" of Kosovo Albanian refugees to Albania was voluntary, or the result of a strategic choice; in reality, hundreds of thousands of civilians were deported at gunpoint by Serbian forces. Kosovo Albanian civilians were fleeing for their lives, with their families, and against their will, to Albania, Macedonia and Montenegro, while being targeted by Serbian forces in furtherance of "Operation Horseshoe", which resulted in the ultimate expulsion of approximately 863,000 Albanians from Kosovo,¹²⁶ and the internal displacement of 590,000 more.¹²⁷ The Serb plan was to encircle civilians inside the "Horseshoe" and force their exit from Kosovo, while stripping them of their identity and property documents.¹²⁸ In this context, the deliberate link drawn by the SPO between the "movement" of these refugees to Albania only, and the KLA's establishment of facilities and personnel in Albania, is misleading and offensive to the population that lived through these events. Operation Horseshoe created one of the largest number of refugees and IDPs in the world at that time, and its resulting crimes were so egregious that the ICTY Prosecutor launched an investigation into Serbia's actions, that led to the eventual indictment and arrest of Milošević.

¹²⁵ Indictment, para. 25 (emphasis added).

¹²⁶ Crisis in Kosovo, p. 241.

¹²⁷ The Kosovo Report, p. 90; June UNMIK Report.

¹²⁸ Ethnic Cleansing in Kosovo, p. 4.

62. The SPO then presents an inaccurate picture of the PGoK, alleging that “on 2 April 1999, the composition of the PGoK, which had been initiated in discussions at Rambouillet, was publicly announced. As set out above, Hashim THAÇI, Rexhep SELIMI, Jakup KRASNIQI and other senior KLA officials assumed prominent positions in the PGoK”,¹²⁹ thereby giving the impression of a functioning operational government.

63. This was not the reality. The request for a unified structure to speak on behalf of Kosovo Albanians came from U.S. Secretary of State Albright during the Rambouillet negotiations. The PGoK was intended to be an implementing partner for the Rambouillet Agreement, and for OSCE and NATO. It was also intended to be an inclusive structure, not just comprised of KLA members, but also members of LDK and LBD.¹³⁰

64. In reality, the PGoK had no legal or actual mandate. The PGoK was never recognised by the international community, or the LDK, who never nominated ministers and in fact continued its government-in-exile. The self-styled PGoK was also without a budget, staff, control of a police force, or legal authority. The various PGoK actors, together with other Kosovo actors, representatives from Serbia and civil society, then cooperated with the Kosovo Transitional Council, established by the Special Representative of the UN Secretary General (“UN SRSG”) in Kosovo in June 1999,¹³¹ which was itself shortly thereafter subsumed by UNMIK.

65. The involvement of the international community is essentially removed from the SPO’s version of these events. Neither the Contact Group, nor its purpose, is ever

¹²⁹ Indictment, para. 26.

¹³⁰ [REDACTED].

¹³¹ [REDACTED].

mentioned; nor are the various states and international figures that played such vital roles. The SPO states “an international peace conference was organised in Rambouillet”,¹³² but does not say why or by whom. The SPO Indictment and Pre-Trial Brief present these historical events as resulting from a dispute between Kosovo and Serbia. Or, more accurately, the result of a common criminal plan by a group of KLA criminal thugs and their Kosovo Albanian supporters who “moved” to Albania to the KLA’s pre-established facilities, and then made their way back to Kosovo.

66. The SPO’s revision of the international community’s role in confronting the mounting Serbian atrocities is deliberate. The SPO’s decision to charge this case under the rubric of a Joint Criminal Enterprise throws wide open the reality that the international community’s unwavering tangible and intangible support of the KLA is material support for a criminal plan to commit a widespread and systematic attack against a civilian population.

67. In reality, the international community was seeking to protect the Kosovo Albanian population from the brutal attacks by Serbian forces, in an effort to prevent a humanitarian catastrophe. The outcome, being the eventual ending of Serbia’s grip, was not the result of a common plan to commit crimes against humanity against Opponents. It was the result of international and domestic diplomatic and military efforts, which led to the adoption of UN Security Council Resolution 1244 on 10 June 1999,¹³³ and the end of the war.

¹³² Indictment, para. 24.

¹³³ [REDACTED], UN Security Council Resolution 1244, 10 June 1999 (“UNSC Resolution 1244”). *See also*: UNSC, S/RES/1244(1999), Resolution 1244 (1999), adopted by the Security Council at its 4011th meeting, on 10 June 1999, <https://digitallibrary.un.org/record/274488?ln=en>.

D. UN AUTHORITY IN KOSOVO POST-JUNE 1999

68. UNMIK, created pursuant to UN Security Council Resolution 1244 on 10 June 1999,¹³⁴ was not a typical peacekeeping mission. It was an unprecedented UN undertaking, in terms of magnitude and complexity, and the first time the UN had established an international civil and security presence¹³⁵ to assume full control over judicial, legal, security and administrative functions.¹³⁶ UNMIK was mandated with establishing the rule of law and restoring Kosovo's institutions of self-government.¹³⁷ Already daunting, the circumstances under which UNMIK assumed this enormous mandate gave rise to additional obstacles.

69. The retreating Serbian administration had taken everything, from public records to office furniture. What could not be carried was destroyed. Of course, the impact of the war in Kosovo was far greater than physical destruction. The ethnic cleansing campaign carried out by Milošević's regime in March 1999, which drove 863,000 people out of Kosovo,¹³⁸ and displaced 590,000 internally,¹³⁹ was the culmination of a decades-long period of oppression, characterised by massive human rights violations and segregation of the population. The social upheaval which prevailed during this period affected every sphere of life. This reality, combined with the lack of UNMIK staff and resources for the monumental task assigned to them,¹⁴⁰ meant that the situation on the ground was chaos, with UNMIK¹⁴¹ and the NATO-led

¹³⁴ UNSC Resolution 1244, paras. 10-11.

¹³⁵ UNSC Resolution 1244, para. 5.

¹³⁶ Former UN SRSG, Sérgio Vieira De Mello, said that "United Nations were facing an unprecedented task of immense proportions in Kosovo": UNDGC, 'Top UN humanitarian official says UN on track in setting up its operations in Kosovo', *ReliefWeb*, 23 July 1999, <https://reliefweb.int/report/serbia/top-un-humanitarian-official-says-un-track-setting-its-operations-kosovo>.

¹³⁷ UNSC Resolution 1244, paras. 11(a), (c), (i).

¹³⁸ *Crisis in Kosovo*, p. 241.

¹³⁹ *The Kosovo Report*, p. 90; *June UNMIK Report*.

¹⁴⁰ [REDACTED].

¹⁴¹ [REDACTED].

international peacekeeping Kosovo Force (“KFOR”)¹⁴² being unable to establish anything close to a civil society.¹⁴³

70. Moreover, the security situation in Kosovo at this time has to be viewed against the backdrop of the returning dispossessed. The UN High Commissioner for Refugees (“UNHCR”) reported that 50,000 Serbs had left Kosovo by 20 June 1999, meaning they had essentially left with the retreating Serb forces.¹⁴⁴ 863,000 Kosovo Albanians who had fled the country, and 590,000 more who had been internally displaced,¹⁴⁵ then returned to find their homes destroyed, and bodies of their loved ones in the streets. With KFOR and UNMIK unable to establish law and order, local residents took matters into their own hands. By 1 September 1999, UNMIK had 748 police officers for the whole of Kosovo,¹⁴⁶ being a fraction of the minimum 5,100 approved by the UN Security Council.¹⁴⁷ Barring the occasional arrest, KFOR was not functioning as a police force, nor were they trained to do so. There was no capacity to address the individual score settling and revenge violence that was impossible to control.

71. However tenuous its grip on its mandate, UNMIK’s civil and security presence did not step aside and cede governmental control to any person or entity. While the UN SRSG sought to consult with local representatives and members of civil society as a confidence building measure, Section 1 of the UNMIK Regulations provided that “[a]ll legislative and executive authority with respect to Kosovo,

¹⁴² [REDACTED].

¹⁴³ [REDACTED].

¹⁴⁴ UNHCR Public Information Section, ‘Kosovo Crisis Update’, 21 June 1999, <https://www.unhcr.org/news/updates/1999/6/3ae6b80a24/kosovo-crisis-update.html?query=kosovo>.

¹⁴⁵ The Kosovo Report, p. 90; June UNMIK Report.

¹⁴⁶ UNMIK, ‘The UN in Kosovo Factsheet 13 Jul - 16 Nov 1999’, *ReliefWeb*, 16 November 1999, <https://reliefweb.int/report/bosnia-and-herzegovina/un-kosovo-factsheet-13-jul-16-nov-1999> (“UN in Kosovo Factsheet”).

¹⁴⁷ [REDACTED].

including the administration of the judiciary” was vested solely in UNMIK.¹⁴⁸ UNMIK emphasised regularly to its interlocutors that, while it was willing to consult local representatives, it retained ultimate control.¹⁴⁹

72. Nor would KLA control on the ground have been consistent with its 20 June 1999 commitment to demilitarise. Contemporaneous reports (including by Supreme Commander of the Alliance, General Wesley Clark) recognised that the process of KLA troops disarming and handing in their weapons was [REDACTED] and with [REDACTED].¹⁵⁰ [REDACTED] noted the KLA’s [REDACTED], driven by the KLA’s own chain of command.¹⁵¹ The UN Secretary-General reported to the Security Council on 3 March 2000, that the KLA “continued to meet the commitments made respectively on the undertaking of demilitarization and transformation” and that “with demilitarization completed, the focus is now on the return of former KLA soldiers to civilian life.”¹⁵²

73. As soon as the war ended, most KLA soldiers handed in their guns, took off their uniforms and began searching for their loved ones. The urgency of finding lost family members, whether dead or alive, and providing basic necessities for those who survived was paramount. This was not a group that wanted to take and hold power

¹⁴⁸ UNMIK/REG/1999/1, Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo, 25 July 1999. *See also* UNSC, S/1999/779, ‘Report of the Secretary-General on the UNMIK’, 12 July 1999, <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kos%20S1999%20779.pdf>, para 35: “The Security Council, in its resolution 1244 (1999), has vested in the interim civil administration authority over the territory and people of Kosovo. All legislative and executive powers, including the administration of the judiciary, will, therefore, be vested in UNMIK.”

¹⁴⁹ [REDACTED].

¹⁵⁰ [REDACTED].

¹⁵¹ [REDACTED].

¹⁵² UNSC, S/2000/177, Report of the Secretary-General on UNMIK, 3 March 2000, paras. 26-27, <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/kos%20S2000%20177.pdf>.

by targeting its Opponents. The immeasurable value coming from their cooperation with international partners would never have been worth jeopardising.

74. When the facts are fully and fairly viewed, it becomes clear that the SPO's case has, at its centre, a criminal purpose that never existed, superimposed over a partial and incomplete version of events. The witnesses who testify before the Trial Panel, and who lived through these events, will be well placed to fill in the deliberate gaps in the SPO's narrative. In the interim, the Defence offers the above summary as a means of starting to correct the distorted record already being presented.

IV. TEMPORAL SCOPE OF THE ARMED CONFLICT

75. For each of the war crimes charged in the Indictment, the SPO is required to prove beyond reasonable doubt that they were committed during an armed conflict.¹⁵³

76. The SPO states that [REDACTED].¹⁵⁴ This is not correct, under any interpretation of international humanitarian law. There was no armed conflict after 20 June 1999, based on the events that led to the cessation of hostilities:

- (i) The Kumanovo Agreement signed on 9 June 1999 between KFOR and the FRY provided for an immediate ceasefire and complete withdrawal of FRY forces from Kosovo by 20 June 1999,¹⁵⁵ which was completed as scheduled;
- (ii) On 10 June 1999, NATO suspended its military campaign. On the same day, the UN Security Council adopted Resolution 1244 (1999), authorising the deployment of an international civil and security presence in Kosovo

¹⁵³ ICTY, *Prosecutor v. Milošević*, IT-98-29/1-A, Appeals Chamber, Judgement, 12 November 2009, para. 20; *Limaj* Trial Judgment, para. 10.

¹⁵⁴ SPO Pre-Trial Brief, para. 697.

¹⁵⁵ 005892-005899, NATO and Kosovo Document named Military Technical Agreement, 9 June 1999.

to deter renewed hostilities, enforce a ceasefire, and ensure withdrawal of the FRY forces and demilitarisation of the KLA. Resolution 1244, a Chapter VII Resolution under the UN Charter, which binds all member states, determined that the war was over;¹⁵⁶

- (iii) On 12 June 1999, KFOR began to deploy into Kosovo. Within days, 20,000 KFOR troops were deployed. By 18 June 1999, all FRY troops had left Kosovo, leaving KFOR as the only security presence;¹⁵⁷ and
- (iv) On 20 June 1999, the KLA signed the Demilitarization Agreement, received by KFOR, which established the modalities and the schedule for the demilitarization of the KLA.¹⁵⁸ A similar agreement was signed with the 'Armed Forces of the Republic of Kosovo' ("FARK").¹⁵⁹

77. Therefore, based on the facts on the ground, the armed conflict in Kosovo ended on 20 June 1999. This also finds confirmation in the rulings and statements of:

- (i) Kosovo local courts, including the Supreme Court of Kosovo;¹⁶⁰

¹⁵⁶ UNSC Resolution 1244, para. 10.

¹⁵⁷ [REDACTED]; NATO, 'NATO's role in relation to the conflict in Kosovo', 15 July 1999, <https://www.nato.int/kosovo/history.htm>.

¹⁵⁸ [REDACTED], Undertaking of demilitarisation and transformation by the UCK, 20 June 1999. See also: NATO, 'Undertaking of demilitarisation and transformation by the UCK', 20 June 1999, <https://www.nato.int/kosovo/docu/a990620a.htm>.

¹⁵⁹ [REDACTED].

¹⁶⁰ Supreme Court of Kosovo, *Kolasinac*, AP-KZ 230 /2003, Decision, 5 August 2004, p. 21, <https://www.legal-tools.org/doc/3da647/pdf/>; Supreme Court of Kosovo, *Latif Gashi et al.*, AP-KZ 139/2004, Decision, 21 July 2005, https://www.hlc-kosovo.org/storage/app/media/Grupi%20i%20Llapit/Latif%20Gashi%20et%20al-Supreme%20Court%20Decision-21.07.%202005_Redacted.pdf; District Court of Pristina, *NK et al. ("Kleçkë Case")*, P. 425/11, Decision, 2 May 2012, https://www.eulex-kosovo.eu/eul/repository/docs/Klecka_Judgment_4_Accused_02_05_12_FINAL_-REDACTED.pdf; Decision of the Supreme Court of Kosovo, *FG*, Pml.Kzz 157/2014, Judgment, 2 October 2014, [https://www.eulex-kosovo.eu/eul/repository/docs/\(2014.10.02\)_JUD_-_FG_\(SC\)_ENG.pdf](https://www.eulex-kosovo.eu/eul/repository/docs/(2014.10.02)_JUD_-_FG_(SC)_ENG.pdf); Basic Court of Mitrovicë/a, *O.I. et al.*, P 98/14, Judgment, 30 March 2016, https://www.eulex-kosovo.eu/eul/repository/docs/P.98-14_-_Jugment_dated_30_March_2016_-_English_Redacted.pdf; *Radivojević*, PKR 955/13, Judgment, 12 February 2014, https://www.hlc-kosovo.org/storage/app/media/Ivan%20Radivojevic/Ivan%20Radivojević-Judgment-12.02.2014_Redacted.pdf; Supreme Court of Kosovo, *D.S. v. The Inheritors of H.Ç.*, GSK-KPA-A-129/13,

- (ii) The ICTY in *Sainović et al.*,¹⁶¹ *Dorđević*,¹⁶² and *Haradinaj*;¹⁶³
- (iii) UNMIK;¹⁶⁴
- (iv) The Independent International Commission on Kosovo;¹⁶⁵
- (v) Local¹⁶⁶ and international NGOs, including Human Rights Watch¹⁶⁷ and Amnesty International,¹⁶⁸ and
- (vi) Carla del Ponte, as ICTY Chief Prosecutor.¹⁶⁹

Kosovo Property Agency (KPA) Appeals Panel, Judgment, 3 June 2015, https://www.eulex-kosovo.eu/eul/repository/docs/90946-GSK-KPA-A-129-13_final_decision_ENG.pdf.

¹⁶¹ *Šainović* Trial Judgment, para. 1217.

¹⁶² ICTY, *Prosecutor v. Dorđević*, IT-05-87/1-T, Trial Chamber, Judgment, 23 February 2011, paras. 1579-1580.

¹⁶³ *Haradinaj* Retrial Judgment, fn. 2039.

¹⁶⁴ UNMIK, Regulation No. 2000/66, 21 December 2000, Section 1.5: "For the purpose of the present regulation, the armed conflict in Kosovo is deemed to have occurred between 27 February 1998 and 20 June 1999". UNMIK, Regulation No. 2006/50, 16 October 2006, Section 3: "3.1 The Kosovo Property Agency shall, through the Executive Secretariat, have the competence to receive and register and, through the Property Claims Commission, have the competence to resolve, subject to the right of appeal to the Supreme Court of Kosovo, the following categories of conflict-related claims involving circumstances directly related to or resulting from **the armed conflict that occurred between 27 February 1998 and 20 June 1999**: [...] [emphasis added]. See also UNHRC, CCPR/C/UNK/1, Report Submitted by UNMIK to the Human Rights Committee on the Human Rights Situation in Kosovo since June 1999, 13 March 2006, para. 10: "Following the NATO intervention and **the end of hostilities in June 1999**, [...]"; and Council of Europe, Report Submitted by UNMIK Pursuant to Article 2.2 of the Agreement Between UNMIK and the Council of Europe Related to the Framework Convention for the Protection of National Minorities, 2 June 2005, p. 4.

¹⁶⁵ The Kosovo Report, p. 30.

¹⁶⁶ Humanitarian Law Center, 'The Cover-up of Evidence of Crimes During the War in Kosovo: The Concealment of Bodies Operation', 31 January 2017, http://www.hlc-rdc.org/wp-content/uploads/2017/01/Dosije_OPERACIJA_SKRIVANJA_TELA_eng.pdf.

¹⁶⁷ [REDACTED], pp. 489, 493.

¹⁶⁸ See, e.g., Amnesty International, 'Nearly 2,000 people missing ten years after Kosovo conflict', *ReliefWeb*, 10 June 2009, [link](#); Amnesty International Press Release, 'Serbia/Kosovo: Wounds still open 10 years after start of war over Kosovo', 19 March 2009, <https://www.amnesty.org/en/latest/press-release/2009/03/serbiakosovo-wounds-still-open-10-years-after-start-war-over-kosovo-2009/>.

¹⁶⁹ ICTY Press Release, 'Address to the Security council by Carla Del Ponte', 24 November 2000, <https://www.icty.org/en/press/address-security-council-carla-del-ponte-prosecutor-international-criminal-tribunals-former>. See also ICTY Press Release, Statement by Carla Del Ponte Prosecutor of the ICTY on the investigation and Prosecution of crimes committed in Kosovo, 29 September 1999, <https://www.icty.org/en/press/statement-carla-del-ponte-prosecutor-international-criminal-tribunal-former-yugoslavia>.

78. As such, the position that an armed conflict existed in Kosovo after 20 June 1999 is untenable and unsupported by the evidence considering the applicable law. It follows that the crimes alleged to have commenced after that date cannot be prosecuted as war crimes, namely those in paragraphs 90, 92, 93, 94, 95, 128, [REDACTED], 133, 134, [REDACTED], 170, [REDACTED], 172, 174 of the Indictment, and those for which the date is currently redacted, insofar as they refer to events after 20 June 1999.

V. THE NATURE OF THE ACCUSED'S DEFENCE

A. THE FLAWED AND PARTIAL PRESENTATION OF A CASE

79. For the reasons outlined above, the SPO's case is based on a partial and selective misrepresentation of the events in question. No longer is an independent Kosovo the result of a struggle, supported by international allies, for freedom from a repressive and brutal Serbian regime. Instead, according to the SPO, Kosovo's statehood is the result of a complex and wide-reaching criminal plan to gain and exercise control over all of Kosovo through the commission of crimes against humanity and war crimes, under the watchful eyes of these same international allies.

80. Journalists, scholars, diplomats, historians and jurists have examined these events closely, both contemporaneously, and over the last two decades. The ICTY has adjudicated cases involving the same events and allegations.¹⁷⁰ The population of Kosovo lived through them. None have reached the specious conclusion advanced by the SPO: that the creation of an independent Kosovo was the result of a criminal conspiracy, with Hashim Thaçi and his co-accused at the centre, who managed to maintain the international support needed to defeat one of Europe's strongest armies, all while pursuing a criminal plan to target all those deemed to be Opponents. In

¹⁷⁰ *Dorđević* (IT-05-87/1); *Haradinaj et al.* (IT-04-84); *Limaj et al.* (IT-03-66); *Šainović et al.* (IT-05-87).

reality, Mr Thaçi's dealings with international partners were transparent and public. They were not part of a criminal plan.

81. Importantly, the Indictment and SPO Pre-Trial Brief present a case that has yet to be elicited and tested in court, let alone proven beyond a reasonable doubt. A trial date has not been set. The SPO's witness list continues to shift, with regular amendments, and the SPO will only **start** to provide its order of witness presentation in November 2022. Defence preparations are still hindered by the heavily redacted Indictment, and 96 SPO witnesses remain anonymous. SPO disclosure remains incomplete, and 46,000 pages of new, less redacted or unredacted material, will only be disclosed 30 days before trial.¹⁷¹ In these circumstances, an accused cannot reasonably respond to a case that is yet to exist.

82. What is evident now, however, is that great care that must be taken in reviewing the SPO's core trial documents against Mr Thaçi, and the materials relied on. Many of the sweeping statements in the SPO Pre-Trial Brief, including on central questions of command and control, are unsupported by the evidence cited in the footnotes. There are many examples.¹⁷² The SPO claims that [REDACTED].¹⁷³ None of the cited evidence indicates that [REDACTED].¹⁷⁴ The SPO claims that Mr Thaçi [REDACTED].¹⁷⁵ None of the cited evidence indicates that [REDACTED].¹⁷⁶

¹⁷¹ F00952, para. 11.

¹⁷² [REDACTED].

¹⁷³ SPO Pre-Trial Brief, para. 111(a)(ii) (emphasis added).

¹⁷⁴ SPO Pre-Trial Brief, fn. 366.

¹⁷⁵ SPO Pre-Trial Brief, para. 111(a)(vi) (emphasis added).

¹⁷⁶ SPO Pre-Trial Brief, fn. 372.

83. The SPO claims that Mr Thaçi [REDACTED].¹⁷⁷ One of the references is redacted. The other says nothing about [REDACTED].¹⁷⁸ Referring to [REDACTED], the SPO claims that [REDACTED].¹⁷⁹ The cited evidence describes [REDACTED].¹⁸⁰ These are significant and prejudicial statements, presented by the SPO without basis, and designed to fit the narrative it has advanced. The SPO's need to over-sell its case is another indicator of its inherent weakness.

84. Moreover, it is now apparent that many of the documents on which the SPO relies, came from Serbian governmental organs,¹⁸¹ the same organs that have a vested interest in the outcome of these proceedings, and attempted to assassinate Dick Marty for the purpose of blaming his death on the Kosovo Albanians.¹⁸² Other flaws in the SPO case are discussed in the analysis below.

B. THE ALLEGED JOINT CRIMINAL ENTERPRISE

1. Legal Requirements

85. JCE is not provided for under the KSC Law.¹⁸³ Nor did JCE enjoy the status of customary international law at the time of the alleged crimes, particularly not in its extended form of JCE III. This extended form 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

¹⁷⁷ SPO Pre-Trial Brief, para. 111(a)(v) (emphasis added).

¹⁷⁸ SPO Pre-Trial Brief, fn. 371.

¹⁷⁹ SPO Pre-Trial Brief, para. 100 (emphasis added).

¹⁸⁰ SPO Pre-Trial Brief, fn. 312.

¹⁸¹ See F00877.

¹⁸² RTS Radio Télévision Suisse, 'Mise au Point: Dick Marty menacé de mort, 10 April 2022, <https://www.rts.ch/play/tv/mise-au-point/video/mise-au-point?urn=urn:rts:video:13009164>, from 5:09 to 21:20.

¹⁸³ KSC Law, Article 16(1).

guilt by association.”¹⁸⁴ The Defence reiterates prior objections to Mr Thaçi’s prosecution under this most controversial of modes, recognised by practitioners and academics alike as being incompatible with basic principles of criminal accountability.¹⁸⁵

86. In order to establish JCE liability, the SPO must prove: (i) a plurality of persons who act pursuant to a common purpose; (ii) a common purpose which involves the commission of a crime provided for in the KSC Law; and (iii) the participation of the accused in furthering the common design or purpose.¹⁸⁶

87. For the **plurality of persons**, the group need not be organised in a formal military or political structure, but the criterion used to identify the group must be sufficiently specific as to avoid vagueness and ambiguity.¹⁸⁷

88. A **common plan** amounting to or involving an understanding or an agreement between two or more persons that they will commit a crime must be proved.¹⁸⁸ Its existence may be inferred only after examining the totality of the circumstances,¹⁸⁹ and it must be the only reasonable inference available from the evidence.¹⁹⁰ A Trial Panel is required to make a finding that this criminal purpose is not merely the same, but

¹⁸⁴ H. Olasolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Hart Publishing, 2009), p. 5.

¹⁸⁵ KSC-BC-2020-06/F00216, Thaçi, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, 12 March 2021, (“Jurisdiction Preliminary Motion”), paras. 60-71; KSC-BC-2020-06/IA009/F00012, Thaçi Defence Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 27 August 2021, (“Jurisdiction Appeal”), paras. 45-86.

¹⁸⁶ ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999 (“*Tadić* Appeal Judgement”), para. 227.

¹⁸⁷ ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Appeals Chamber, Judgement, 17 March 2009, para. 157.

¹⁸⁸ ICTY, *Prosecutor v. Brdjanin*, IT-99-36-T, Trial Chamber II, Judgement, 1 September 2004 (“*Brdjanin* Trial Judgement”), para. 262.

¹⁸⁹ *Šainović* Trial Judgement, para. 102.

¹⁹⁰ *Brdjanin* Trial Judgement, para. 353.

also common to all of the persons acting together within a JCE.¹⁹¹ Importantly, the existence of coordination on the ground among various factions may not necessarily suffice to show that their cooperation was in pursuance of a common criminal purpose.¹⁹² In other words, mere coordination is not necessarily sufficient. Nor can it be assumed that people who hold a common objective are necessarily members of a JCE. It is the interaction or cooperation among persons - their joint action - that makes these persons a group. Joint action among members of the JCE must be proven.¹⁹³

89. The SPO must establish that **the accused's participation** takes the form of a significant contribution to the execution of the common purpose.¹⁹⁴ An accused's acts must in some way be directed to furthering the common criminal plan of the JCE, which is an essential consideration in determining whether the contribution to the JCE was significant.¹⁹⁵

90. As for the required *mens rea*, where a conviction under JCE I is sought, the SPO must prove that the accused shared: (i) the intent to commit the crimes that form part of the common purpose of the JCE; and (ii) the intent to participate in a common plan aimed at their commission.¹⁹⁶ JCE I requires intent in the sense of *dolus directus*. Recklessness or *dolus eventualis* does not suffice.¹⁹⁷

¹⁹¹ ICTY, *Prosecutor v. Šešelj*, MICT-16-99-A, Appeals Chamber, Judgement, 11 April 2018 (“*Šešelj* Appeal Judgement”), para. 96.

¹⁹² *Šešelj* Appeal Judgement, para. 117.

¹⁹³ ICTY, *Prosecutor v. Krajišnik*, IT-00-39-T, Trial Chamber I, Judgement, 27 September 2006 (“*Krajišnik* Trial Judgement”), para. 884; ICTY, *Prosecutor v. Stanišić & Simatović*, IT-03-69-T, Trial Chamber I, Judgement, 30 May 2013 (“*Stanišić & Simatović* Trial Judgment”), para. 1259; *Prosecutor v. Mladić*, IT-09-92-T, Trial Chamber I, Judgement, 22 November 2017 (“*Mladić* Trial Judgement”), para. 3561.

¹⁹⁴ ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Appeals Chamber, Judgement, 30 January 2015 (“*Popović* Appeal Judgement”), para. 1378.

¹⁹⁵ ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Appeals Chamber, Judgement, 29 November 2017 (“*Prlić* Appeal Judgement”), para. 1880.

¹⁹⁶ *Popović* Appeal Judgement, para. 1369.

¹⁹⁷ *Mladić* Trial Judgement, fn. 13437.

91. For JCE III, the SPO must establish the possibility that a crime committed outside the agreed common plan is reasonably foreseeable to the accused, and that the accused willingly took the risk that such a crime might occur by continuing to participate in the agreed common plan.¹⁹⁸ The subjective element of JCE III is not satisfied by implausibly remote scenarios. It requires that the possibility “that a crime could be committed is sufficiently substantial as to be foreseeable to the accused.”¹⁹⁹ This question must be assessed in relation to the knowledge of a particular accused. What is natural and foreseeable to one person might not be natural and foreseeable to another, depending on the information available to them.²⁰⁰ In this way, there must be a link between the accused and the extended JCE crimes.

92. The Indictment alleges Mr Thiçi and the JCE members used undefined individuals, or “**Tools**”, to carry out crimes in furtherance of the common purpose.²⁰¹ JCE members can only be held responsible for crimes carried out by principal perpetrators who were non-JCE members, where it has been shown that the crimes can be imputed to at least one JCE member and that the latter - when using the principal perpetrators - acted in accordance with the common objective.²⁰² Crimes committed by persons who share the objective of the JCE but are not linked with the operations of the group are not attributable to the members of the JCE.²⁰³

¹⁹⁸ ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Appeals Chamber, Judgement, 8 April 2015 (“*Tolimir Appeal Judgement*”), para. 514; *Prlić Appeal Judgement*, para. 2836.

¹⁹⁹ ICTY, *Prosecutor v. Stanišić & Župljanin*, IT-08-91-A, Appeals Chamber, Judgement, 30 June 2016 (“*Stanišić & Župljanin Appeal Judgement*”), para. 1055.

²⁰⁰ *Stanišić & Župljanin Appeal Judgement*, para. 621.

²⁰¹ Indictment, para. 35.

²⁰² ICTY, *Prosecutor v. Brdjanin*, IT-99-36-A, Appeals Chamber, Judgement, 3 April 2007 (“*Brdjanin Appeal Judgement*”), para. 413; *Šešelj Appeal Judgement*, para. 109.

²⁰³ *Krajišnik Trial Judgement*, para. 1082.

2. The flaws in the SPO case on JCE

93. There was no common criminal purpose to gain and exercise control over all of Kosovo through the commission of murder, torture, persecution and other crimes against humanity or war crimes against Opponents. The link between the crimes alleged in the Indictment and Mr Thaçi cannot be established through the framing of the case around a plan that did not exist, and adopting the most attenuated form of liability in criminal justice to bring him closer to them.

94. There was no KLA policy to target Opponents, or commit the charged crimes against them. Like all military and security structures, even nascent ones such as the KLA, maintaining internal security from the threat of those within the Serbian secret services, or working with the Serbian authorities, was a concern to the entire KLA. As in all armed conflicts historically, there were attempts to prevent infiltration of those bent on harming the KLA and its members, but there was no policy to subject them to war crimes or crimes against humanity through a widespread and systematic attack.

95. In deciding to frame the charges in a sweeping manner, the SPO has included “members of the KLA”, and “other KLA soldiers” as JCE members.²⁰⁴ Defence challenges to the vagueness of this formulation of the JCE members²⁰⁵ have been rejected.²⁰⁶ The difficulty with this overbroad formulation is demonstrated by the SPO’s own evidence of “KLA membership” often meaning nothing more than the wearing of insignia, or the self-proclamation of allegiance. The SPO’s case hangs on these thousands of people who voluntarily joined the KLA, at the same time being part of the same common criminal purpose. It ignores entirely the chaotic and frenzied

²⁰⁴ Indictment, para. 35.

²⁰⁵ KSC-BC-2020-06/F00215, Thaçi, Motion Alleging Defects in the Indictment against Mr Hashim Thaçi, 12 March 2021, paras. 23-28.

²⁰⁶ KSC-BC-2020-06/F00413, Pre-Trial Judge, Decision on Defence Motions Alleging Defects in the Form of the Indictment, 22 July 2021, paras. 72-80.

reality on the ground: tens of thousands of Kosovo citizens rising up against a campaign of Serb brutality and repression, at a rate that outpaced any attempts to organise, regularise or even act in coordination with the recognised KLA groups.

96. Also entirely missing from the SPO's narrative is the phenomenon discussed above: 863,000 Kosovo Albanians refugees from outside the country,²⁰⁷ and 590,000 internally displaced persons²⁰⁸ returning to find their homes and lives destroyed, and seeking retribution for the horror inflicted over weeks, months and years by the Serb oppressors. This reality is overlaid by the philosophy of "*Kanun*", the unwritten customary law which regulates some parts of Albanian society and [REDACTED].²⁰⁹ In propagating social values such as honour and shame, the *Kanun* has served as the ideological justification for violence, particularly for individual acts of violence, particularly revenge killing and the cover-up of ordinary crimes.²¹⁰

97. It cannot be assumed that people who hold a common objective are necessarily members of a JCE. It is the interaction or cooperation among persons - their joint action - that makes these persons a group. This joint action must also be established beyond a reasonable doubt.²¹¹ The SPO's attempts to superimpose a framework of common purpose over a reality of utter chaos and instability, in order to link Mr Thaçi to the disconnected and sporadic incidents of violence, is insufficient as a case theory, unsupported by the evidence disclosed, and cannot be reconciled with the reality of the events in question.

²⁰⁷ Crisis in Kosovo, p. 241.

²⁰⁸ The Kosovo Report, p. 90; June UNMIK Report.

²⁰⁹ [REDACTED].

²¹⁰ [REDACTED].

²¹¹ *Krajišnik* Trial Judgement, para. 884; *Stanišić & Simatović* Trial Judgment, para. 1259; *Mladić* Trial Judgment, para. 3561.

98. Perhaps most importantly, Mr Thaçi, other members of the KLA and the PGoK had no incentive to commit crimes against Opponents, and in fact had an overriding imperative not to. They fully understood that their engagement with the international community, utterly essential for their survival, depended on the KLA not being a criminal enterprise, but a movement worthy of this engagement and support. Had the KLA been operating pursuant to a criminal plan to murder, torture and abuse civilians, it would have never had the backing of the U.S., U.K., NATO, the OSCE, the Contact Group, or the wider international community. Of course it did. There was no KLA-wide common criminal plan. The international community would never have stood for it.

C. COMMAND RESPONSIBILITY

1. Legal Requirements

99. In order for an accused to be liable as a superior for a crime for which a subordinate is criminally responsible, the SPO is required to establish that: (i) there was a superior-subordinate relationship between the accused and the perpetrator; (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and (iii) the superior failed to take necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.²¹²

100. The Defence contests the Pre-Trial Judge's finding that "[f]or the purposes of Article 16 of the Law, there is no requirement of causality between the superior's failure to prevent and the occurrence of the crime."²¹³ The Pre-Trial Judge relies on the

²¹² ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, Judgement, 24 March 2016, para. 579; ICTY, *Prosecutor v. Perišić*, IT-04-81-A, Appeals Chamber, Judgement, 28 February 2013, para. 86.

²¹³ KSC-BC-2020-06/F00026/CONF/RED, Pre-Trial Judge, Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 26 October 2020, para. 118.

ICTY Appeals Chamber in *Hadžihasanović*, which itself relies on the *Blaškić* Appeal Judgment, which held that, while the existence of causality as between a commander's failure to prevent and the occurrence of crimes is not a formal element of command, "it is more a question of fact to be established on a case by case basis".²¹⁴ Since then, the International Criminal Court ("ICC") has confirmed **the requirement of a causal nexus between the crimes and the dereliction of a superior's duty**.²¹⁵ The requirement of causality is consistent with the fundamental idea enumerated in *Tadić* that "nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)."²¹⁶

101. A **superior-subordinate relationship** exists when the superior has the material ability to prevent or punish the subordinate at the time of the commission of the crime ("effective control"). A finding that a person was legally or formally appointed to a position of military command or authority over the relevant forces is not sufficient, in itself, to satisfy the effective control requirement.²¹⁷ As regards allegations of *de facto* positions of authority, "great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote".²¹⁸ Substantial influence which falls short of effective control over subordinates is also insufficient to incur liability.²¹⁹

²¹⁴ ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Appeals Chamber, Judgement, 29 July 2004, para. 77.

²¹⁵ ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 423. See also G. Mettraux, *The Law of Command Responsibility* (OUP, 2009), pp. 88-89.

²¹⁶ *Tadić* Appeal Judgment, para. 186.

²¹⁷ ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-3343, Trial Chamber III, Judgement pursuant to Article 74 of the Statute, 21 March 2016 ("*Bemba* Trial Judgement"), para. 189; ICTY, *Prosecutor v. Mucić et al.*, IT-96-21-A, Appeals Chamber, Judgement, 20 February 2001 ("*Mucić* Appeal Judgement"), para. 197.

²¹⁸ *Mucić* Appeal Judgement, para. 197.

²¹⁹ ICTY, *Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-T, Trial Chamber, Judgement, 15 March 2006 ("*Hadžihasanović* Trial Judgement"), para. 80.

102. Factors that may indicate a lack of effective control over forces include: (i) the existence of a different exclusive authority over the forces in question; (ii) disregard or non-compliance with orders or instructions of the accused; or (iii) a weak or malfunctioning chain of command.²²⁰ As regards civilian superiors, the ICTY endorsed the view expressed by the International Law Commission that the doctrine of command responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.²²¹

103. As regards knowledge, an accused's position of authority cannot lead to an automatic presumption, beyond a reasonable doubt, that he or she **knew or had reason to know** of the crimes for which a conviction is sought.²²² While high positions or authority in an organisation may indicate that persons are being informed of and approve of what is occurring, this is not necessarily the case,²²³ and actual knowledge cannot be presumed.²²⁴

104. Mere rumours circulating in the streets do not suffice to constitute the *mens rea* of command responsibility.²²⁵ Moreover, a superior having information that one group of subordinates has committed crimes cannot be presumed to have had reason to know that other groups of subordinates would also commit crimes.²²⁶ The threshold required to prove knowledge of a superior may be higher for those exercising more

²²⁰ *Bemba* Trial Judgement, para. 190.

²²¹ *Mucić* Appeal Judgement, para. 197.

²²² ICTY, *Prosecutor v. Delalić*, IT-96-21-A, Appeals Chamber, Judgement, 20 February 2001, para. 313.

²²³ *Tolimir* Appeal Judgement, para. 444.

²²⁴ *Hadžihasanović* Trial Judgement, para. 94.

²²⁵ *Hadžihasanović* Trial Judgement, para. 1223.

²²⁶ *Hadžihasanović* Trial Judgement, para. 117.

informal authority than those operating within a well-defined and structured chain of command.²²⁷

105. As regards the “**had reason to know**” standard, it must be established that the superior had information sufficiently alarming as to justify further inquiry.²²⁸ The accused’s duty to investigate further only arises from the time at which admonitory information becomes available to him, and a failure to seek out such information in the first place will not, on its own, trigger liability.²²⁹

106. The requirement **to take the necessary and reasonable measures to prevent or punish crimes** is limited to those which are within a superior’s power, meaning “within his material possibility”. A commander is not obliged to perform the impossible.²³⁰ Regard must also be had to the prevailing circumstances.²³¹

107. A superior is not criminally responsible merely because he has breached his duty to prevent or punish. To attract criminal responsibility, the breach of duty must be of sufficient gravity, being a ‘gross breach’ and one with grave consequences.²³² Mere negligence is insufficient to attract his superior responsibility under international law.²³³ Concerning the failure to prevent crimes, this requires a situation

²²⁷ ICTY, *Prosecutor v. Orić*, IT-03-68-T, Trial Chamber, Judgement, 30 June 2006 (“*Orić* Trial Judgement”), para. 320.

²²⁸ ICTY, *Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-A, Appeals Chamber, Judgement, 22 April 2008, para. 28; *Popović* Appeal Judgement, para. 1910.

²²⁹ *Šainović* Trial Judgement, para. 120; *Hadžihasanović* Trial Judgement, para. 96; *Orić* Trial Judgement, para. 324.

²³⁰ ICTY, *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Trial Chamber I, Judgement, 17 January 2005, para. 793.

²³¹ *Popović* Appeal Judgement, para. 1928.

²³² ICTR, *Prosecutor v. Bagilishema*, ICTR-95-01A, Appeals Chamber, Judgement (Reasons), 3 July 2002 (“*Bagilishema* Appeal Judgement”), para. 36.

²³³ See, e.g., ICTY, *Prosecutor v. Halilović*, IT-01-48-T, Trial Chamber I, Judgement, 16 November 2005, para. 71; *Bagilishema* Appeal Judgement, paras. 35-36.

where “the superior failed to take *any* meaningful steps to prevent the commission of the subordinate crime”.²³⁴

2. The flaws in the SPO case on command

108. The SPO has presented the KLA as a sophisticated, functioning, organised armed force, with a hierarchical structure that allowed for the exercise of effective control over those who were carrying out the common criminal plan on the ground, and the ability to prevent and punish. The KLA General Staff is described as exercising [REDACTED],²³⁵ which [REDACTED],²³⁶ and engaged in collective decision-making²³⁷ about a range of issues including [REDACTED].²³⁸

109. The gap between this picture and the reality is momentous.

110. Against the backdrop of the horrifically brutal Serbian campaign, the massacre of 59 people in the Jashari family compound in March 1998, had an unprecedented unifying effect on the Kosovo population. 100,000 people took to the streets in Prishtinë/Priština. The event unified both peaceful and armed resisters, all now demanding action. The numbers of volunteers who wanted to join the KLA increased exponentially.

111. Among those moved to action was Hashim Thaçi. In March 1998, Mr Thaçi was living in Switzerland, where he had moved in 1995. Mr Thaçi had been granted political asylum on 16 February 1996, following which he applied to the University of Zurich to pursue a doctorate in European History, beginning in the winter semester

²³⁴ ICTY, *Prosecutor v. Kordić*, IT-95-14/2-T, Trial Chamber, Judgement, 26 February 2001, para. 444 (emphasis in original).

²³⁵ SPO Pre-Trial Brief, para. 97.

²³⁶ SPO Pre-Trial Brief, para. 105.

²³⁷ SPO Pre-Trial Brief, para. 106.

²³⁸ SPO Pre-Trial Brief, para. 107.

of 1996/97. He had started to learn German in Kosovo, continuing at the University of Vienna in 1994, and then through a university course in Fribourg in the summer of 1996. Mr Thaçi was accepted to pursue advanced academic studies at the University of Zurich, starting from 21 October 1996. His admission was conditional on his physical presence in Zurich by that same date. By late February 1998, his wife had joined him in Switzerland, and they were expecting a son. Mr Thaçi was 29 years old.

112. The murder of the Jashari family in March 1998, whom he knew, signalled the end of Mr Thaçi's time in Switzerland. Like so many of his fellow countrymen, he voluntarily returned home. The situation was one of chaos. The population had been mobilised in a way that simply could not be absorbed by the limited KLA structures already in place. Given the clan-based nature of Kosovo society, and the fact that Albanians had been expelled from institutional structures during Serbian rule, the growing resistance was a popular uprising, and not a state-organised resistance. This was a village-based movement growing from the bottom up, as families and communities came together to defend their homes and villages, rather than a movement organised and recruited from a central authority.

113. As such, insurgent elements were comprised mainly of inexperienced volunteers, who served in their own villages and neighbourhoods. All had suffered greatly at the hands of the Serbian forces. The mostly inexperienced commanders struggled to organise and train their rapidly increasing numbers. At the same time, they were required to marshal these lightly-armed and ill-equipped people to defend their homes and villages from the brutal Serbian campaign of ethnic cleansing and murder, carried out by well-armed professional soldiers, combat police and paramilitaries, supported by battle tanks, heavy artillery and armoured vehicles.

114. The reactive and popular nature of the uprising that developed to defend against the Serb attacks, meant that its organisation and structure was also, by its very nature, local. Rather than being institutionalised and top-down, it was the soldiers on the ground who chose their commanders, from among their local community, and their loyalties remained local. The commanders themselves had different motivations and interests as they each fought for the survival of their individual communities and clans, undermining attempts at coordinated operation from above.

115. Mr Thaçi was not a trained soldier, and had no effective control over troops. His value came from his abilities as a communicator, both among and outside his peers. It also came from his recognition that the KLA was no match for the military strength or capabilities of the Serb forces,²³⁹ and that his community's survival required the help of the international community. Mr Thaçi's value was in his ability to communicate with them, and with the domestic and international press. As such, his theatre of war was essentially outside Kosovo, in a role more akin to a diplomat than a soldier.

(a) March 1998 – November 1998

116. Between **March and May 1998**, Mr Thaçi travelled between Kosovo, Albania and Switzerland. While in Kosovo during this period, Mr Thaçi stayed in the house of his aunt and his cousin, Idriz Nuraku, in the village of Plluzhinë/Plužina, Skënderaj/Srbica municipality. Mr Thaçi's family were also living in Plluzhinë/Plužina at the time.

117. Between **June 1998 and mid-July 1998**, Mr Thaçi attended various meetings abroad, including with Albanian Prime Minister, Fatos Nano, and the Prime Minister

²³⁹ [REDACTED].

of the LDK Government-in-Exile, Bujar Bukoshi, in Tirana. During July, Mr Thaçi also met with Jan Kickert, an Austrian Ambassador to Belgrade, in Kosovo.

118. From **mid-July 1998 until mid-November 1998**, Mr Thaçi was primarily in Kosovo: engaged in public outreach, speaking with the media, and engaging with local and foreign journalists.

(b) November 1998 – March 1999

119. Between **November 1998**²⁴⁰ and **mid-March 1999**, Mr Thaçi was primarily outside of Kosovo. He was moving throughout Albania, Switzerland, Austria, Belgium, and Slovenia, engaging in political talks to resolve the conflict. Mr Thaçi's engagements in this period included travel to:

- (i) Vienna, meeting with [REDACTED];
- (ii) Geneva, meeting with the Swiss Secretary General and the American delegation;
- (iii) Belgium, meeting Nicole Fontaine, President of the European Parliament;²⁴¹ and
- (iv) Brussels, meeting with Pal Refsdal.²⁴²

120. The Rambouillet Conference commenced on **6 February 1999** and concluded on **23 February 1999**, when it was postponed.²⁴³ After the Conference, Mr Thaçi travelled between Switzerland²⁴⁴ and other European countries, including to:

²⁴⁰ [REDACTED].

²⁴¹ Getty Images, 'Nicole Fontaine, President Of European Parliament On January 1999 In Belgium', 1 January 1999, <https://www.gettyimages.ch/detail/nachrichtenfoto/nicole-fontaine-president-of-european-parliament-on-nachrichtenfoto/113326384?adppopup=true>.

²⁴² [REDACTED].

²⁴³ [REDACTED].

²⁴⁴ [REDACTED].

- (i) Slovenia, including meetings with Adem Demaçi,²⁴⁵ Slovenian Secretary-General, Hernt Petricht, and Carl Seibintritt, and Slovenian President, Janez Drnovšek;
- (ii) Tirana, meeting with Albanian President, Rexhep Mejdani, and Albanian Foreign Minister, Paskal Milo;²⁴⁶
- (iii) France, for the International Meeting for Peace in Kosovo, and the resumption of the Rambouillet Conference;²⁴⁷ and
- (iv) Kosovo, to discuss the proposed Rambouillet Agreement with the KLA Zone Commanders.²⁴⁸

(c) March 1999 – September 1999

121. From the **end of March to the end of May 1999**, Mr Thaçi travelled between Kosovo and Albania. His engagements included:

- (i) Meeting the Chairman of the Democratic Party, Sali Berisha,²⁴⁹ and the Albanian Minister of Foreign Affairs, Paskal Milo,²⁵⁰ in Albania;²⁵¹
- (ii) Visiting refugees in Tirana, with Albanian Prime Minister, Pandeli Majko;²⁵² and

²⁴⁵ [REDACTED]; J. Kim, CRS Report for Congress, 'Kosovo Conflict Chronology: September 1998 - March 1999', 6 April 1999, <https://www.hsdl.org/?view&did=451445>; IT-05-87 P02793, Transcript of Wolfgang Petritsch in *Milošević*, 2 July 2002, p. 7284.

²⁴⁶ [REDACTED].

²⁴⁷ [REDACTED]; Getty Images, 'International Meeting For Peace In Kosovo On March 15th, 1999. In Paris, France', <https://www.gettyimages.ca/detail/news-photo/international-meeting-for-peace-in-kosovo-on-march-15th-news-photo/113414420>.

²⁴⁸ [REDACTED].

²⁴⁹ RTV Klan Arkiv, 'Takimi Berisha - Thaçi, Speciale (23 Maj 1999)', 28 February 2020, <https://www.youtube.com/watch?v=eId20BrpbCU>.

²⁵⁰ ATA, 'Thaçi backs the propose on creation of National Security Council', 25 May 1999, <http://www.hri.org/news/balkans/ata/1999/99-05-25.ata.html#11> ("ATA Press Review – 25 May 1999").

²⁵¹ [REDACTED].

²⁵² AP Archive, 'Albania: KLA Chief Hashim Thaci Visit', 24 May 1999, [link](http://www.aparchive.com/metadata/youtube/660cbe1536d083dc4fce07730622f21); AP Archive, 'Albania: Kosovo Crisis: KLA Press Briefing', 22 May 1999, <http://www.aparchive.com/metadata/youtube/660cbe1536d083dc4fce07730622f21>.

- (iii) Visiting both the Kukës refugee camp with Albanian Deputy Prime Minister, Ilir Meta, and other ministers,²⁵³ and the Korçë refugee camp.²⁵⁴

122. From the **end of May 1999 to mid-June 1999**, Mr Thaçi was primarily outside of Kosovo, including travel to:

- (i) Paris, meeting French Foreign Minister, Hubert Védrine;²⁵⁵
- (ii) Brussels, meeting NATO Secretary General, Javier Solana, and the Supreme Commander of the Alliance, General Wesley Clark;²⁵⁶
- (iii) London, meeting British Foreign Secretary, Robin Cook;²⁵⁷
- (iv) Zurich, where he gave a television interview;²⁵⁸
- (v) Cologne (twice): initially meeting British Prime Minister, Tony Blair, and giving an interview on German television, then later meeting with Ibrahim Rugova, Rexhep Qosja and U.S. Secretary of State, Madeleine Albright;²⁵⁹
- (vi) Oslo, meeting with Norwegian Prime Minister, Kjell Magne Bondevik;²⁶⁰
- (vii) Berne, meeting with Swiss Foreign Minister, Joseph Deiss;²⁶¹

²⁵³ Reuters/Alamy Stock Photo, 'Kosovo Liberation Army leader Hashim Thaci waves to refugees in a camp in the northern Albanian town of Kukes May 24', 24 May 1999, [link](#).

²⁵⁴ ATA Press Review – 25 May 1999.

²⁵⁵ 019775-019776, AP, 'French Foreign Min Meets With Kosovo Rebel Leader THACI', 27 May 1999.

²⁵⁶ RTV Klan Arkiv, 'Hashim Thaçi takon Havier Solanën dhe Uesli Klark (28 Maj 1999)', 3 March 2020, https://www.youtube.com/watch?v=ESYBxL_EZ3I.

²⁵⁷ PA Images/Alamy Stock Photo, 'Robin Cook & Hashim Taci/KLA', 30 May 1999, <https://www.alamy.com/stock-photo-robin-cook-hashim-tacikla-106171070.html>; 019781-019783, Guardian, 'Scent of victory stokes KLA rivalry', 31 May 1999, p. 019781.

²⁵⁸ SRF, 'Der Stuhl: Studiogast Hashim Thaci', 2 June 1999, <https://www.srf.ch/play/tv/rundschau/video/der-stuhl-studiogast-hashim-thaci?urn=urn:srf:video:196257dc-4067-4e59-88de-d1a5e9c386e7>.

²⁵⁹ AP Archive, 'Germany: Kosovo: Blair Meets With Leader Of KLA, Hashim Thaci', 3 June 1999, <http://www.aparchive.com/metadata/youtube/59ed7b5a2415ab166463d8ad97cd5b52>; SRF, 'Thaci zu G8-Kosovo-Friedens-Resolution', 8 June 1999, <https://www.srf.ch/play/tv/10-vor-10/video/thaci-zu-g8-kosovo-friedens-resolution?urn=urn:srf:video:5e8ca7ad-cc7b-4eda-b3e7-20995e817d06>.

²⁶⁰ ATA Press Review, 'Norwegian Premier, Bondevik, to visit Albania on Sunday', 12 June 1999, <http://www.hri.org/news/balkans/ata/1999/99-06-12.ata.html>.

²⁶¹ Reuters/Alamy Stock Photo, 'Kosovo Liberation Army leader Hashim Thaqi (C) and his bodyguards enter the parliament building in Berne June 9', 9 June 1999, [link](#).

- (viii) Rome, meeting with Italian Foreign Minister, Lamberto Dini, and speaking at a press conference;²⁶²
- (ix) Vienna, giving an interview for Austrian state radio;²⁶³ and meeting with Austrian Foreign Minister Wolfgang Schuessel;
- (x) Skopje, meeting with Macedonian Prime Minister, Ljubco Georgievski, and the leader of the Democratic Party of Albanians, Arben Xhaferi,²⁶⁴ as well as visiting the Stenkovec refugee camp.²⁶⁵

123. From **mid-June 1999**, Mr Thaçi continued to meet with key international figures in Kosovo, including:

- (i) James Rubin, U.S. Assistant Secretary of State for Public Affairs;²⁶⁶
- (ii) NATO Secretary General, Javier Solana, NATO Supreme Allied Commander, General Wesley Clark and KFOR commander, General Mike Jackson, and a Serbian orthodox church delegation;²⁶⁷
- (iii) Serb and Albanian political leaders, and UN and KFOR representatives, chaired by Sérgio Vieira de Mello;²⁶⁸
- (iv) U.S. Senator Bob Dole;²⁶⁹
- (v) UN SRSG Bernard Kouchner, on at least two occasions,²⁷⁰

²⁶² Reuters/Alamy Stock Photo, 'Il leader dell'Esercito di liberazione del Kosovo Hashim Thaçi interviene durante una conferenza stampa dopo i colloqui con il Ministro degli Esteri italiano Lamberto Dini a Roma nel giugno 10', 10 June 1999, [link](#).

²⁶³ 020414-020415, AP, 'KLA leader: can't guarantee security of Russian troops', 12 June 1999, p. 020414.

²⁶⁴ [REDACTED].

²⁶⁵ Frankfurter Allgemeine, 'Die Mauer des Schweigens um Hashim Thaçi', 16 June 1999, <https://www.faz.net/aktuell/politik/ausland/anklage-gegen-praesidenten-des-kosovos-thaci-und-die-mauer-des-schweigens-16832684/hashim-thaci-im-16832512.html>.

²⁶⁶ 087008-01, Video of negotiation of KLA demilitarization agreement, 17 June 1999.

²⁶⁷ AP Archive, 'Kosovo: Pristina: NATO Chief Solana Visit Update', 24 June 1999, [link](#).

²⁶⁸ [REDACTED].

²⁶⁹ AP Archive, 'Kosovo: Pristina: Bob Dole Visit', 4 July 1999, [link](#).

²⁷⁰ UN in Kosovo Factsheet; [REDACTED].

- (vi) German Chancellor, Gerhard Schröder, Rexhep Qosja and LDK representatives;²⁷¹
- (vii) U.S. Secretary of State, Madeleine Albright, and James Rubin;²⁷² and
- (viii) U.K. Prime Minister, Tony Blair.²⁷³

124. In **August 1999**, Mr Thaçi travelled between Kosovo, Albania and Switzerland, including attending meetings with Richard Holbrooke in Kosovo.²⁷⁴

125. In **September 1999**, Mr Thaçi again travelled abroad to attend daily meetings, facilitated by UNMIK, which included:

- (i) London, meeting with Robin Cook;²⁷⁵
- (ii) Berlin, meeting with German Federal Foreign Minister, Joschka Fischer;²⁷⁶
- (iii) Washington DC, attending the “Workshop on Democratic Coalition Building” organised by the U.S. Institute of Peace.²⁷⁷ This workshop brought together a diverse group of Kosovo Albanian leaders and Kosovan Serb representatives, to outline a framework for cooperation and discuss the future of democracy in Kosovo; and
- (iv) New York, visiting the United Nations and meeting with Under-Secretary-General for Political Affairs, Kieran Prendergast.²⁷⁸

²⁷¹ [REDACTED].

²⁷² AP Archive, ‘Kosovo: Albright Visit’, 29 July 1999, [link](#).

²⁷³ AP Archive, ‘Kosovo: Pristina: British PM Tony Blair Visit’, 31 July 1999, [link](#).

²⁷⁴ AP Archive, ‘Kosovo: Richard Holbrooke Visit Wrap’, 29 August 1999, [link](#); New York Times, ‘U.N. Envoy Pushes for Kosovo Democracy’, 30 August 1999, <https://www.nytimes.com/1999/08/30/world/un-envoy-pushes-for-kosovo-democracy.html>; AP Archive, ‘Kosovo: Richard Holbrooke Visit’, 30 August 1999, [link](#).

²⁷⁵ AP Archive, ‘UK: KLA Political Leader Thaci Meets Robin Cook’, 2 September 1999, [link](#).

²⁷⁶ Getty Images, ‘Fischer, Joschka /1’, 6 September 1999, <https://www.gettyimages.ch/detail/nachrichtenfoto/politiker-bündnis-90-die-grünen-dbundesaussenminister-nachrichtenfoto/541822233>.

²⁷⁷ USIP, ‘Kosovar Albanian Leaders Agree on Declaration of Cooperation’, 14 September 1999, <https://www.usip.org/press/1999/09/kosovar-albanian-leaders-agree-declaration-cooperation>.

²⁷⁸ UN Press Briefing, ‘Press Conference Sponsored by Permanent Mission of Albania’, 17 September 1999, <https://press.un.org/en/1999/19990917.thacibriefing.doc.html>.

126. Quite clearly, Mr Thaçi's role included meeting with international leaders and diplomats to report on the situation of the civilians and refugees on the ground, and to find a political solution to the raging war and the resulting humanitarian crisis. He did this well, and gained the trust of key international players, through his readiness to compromise, his focus on seeking practical solutions to problems, and being always active, efficient, and prepared.

127. These engagements and trust would have been impossible if the KLA was, in reality, forged on a common criminal purpose to commit crimes against humanity and war crimes against Opponents. The SPO allegations that, while engaged in high-level diplomatic work, Mr Thaçi was at the same time exercising effective control over troops alleged to be committing crimes on the ground, is not only unsupported by evidence, it is devoid of logic.

D. AIDING AND ABETTING

1. Legal Requirements

128. Aiding and abetting consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of a crime.²⁷⁹

129. In order to incur criminal liability by omission: (1) the accused must have had a legal duty mandated by a rule of criminal law; (2) he must have had the ability to act; (3) he must have failed to act, intending the criminally sanctioned consequences, or with awareness and consent that the consequences would occur; and (4) the failure to act must have resulted in the commission of the crime.²⁸⁰ Mere presence at the scene

²⁷⁹ *Popović* Appeal Judgement, para. 1732.

²⁸⁰ ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-T, Trial Chamber II, Judgement, 12 December 2012, para. 1117.

of the crime does not constitute aiding and abetting, unless the person has a duty to prevent it.²⁸¹

130. As for the mental element, the SPO must establish beyond reasonable doubt that: (1) the aiding and abetting was intentional; (2) the accused both intended to further his own contribution and to further the intentional completion of the crime by the perpetrator; (3) the accused was aware of the commission of the crime and accepted it as more likely than not; and (4) he was aware of the type and essential elements of the crime to be committed.²⁸² In cases of specific intent crimes such as persecution, the aider and abettor must know of the principal perpetrator's specific intent.²⁸³

2. The flaws in the SPO case on aiding and abetting

131. In alleging that Mr Thaçi aided and abetted the charged crimes, the SPO states that [REDACTED], claiming that Mr Thaçi's acts and omissions had a substantial effect on their commission, and he was aware of this.²⁸⁴

132. It is illogical that Hashim Thaçi would have been making a substantial contribution to crimes, while working closely with the international community to try to stop them. Putting aside the physical improbability of accomplishing both objectives, there could have been no possible advantage to him in doing so; the future of an independent Kosovo relied on the support of the international community who had taken military action to free them from the Serbs, and whose support would disappear if the KLA engaged in a widespread and systematic attack against a civilian

²⁸¹ *Orić* Trial Judgement, para. 283.

²⁸² *Orić* Trial Judgement, para. 288.

²⁸³ ICTY, *Prosecutor v. Krstić*, IT-98-33-A, Appeals Chamber, Judgement, 19 April 2004, para. 140.

²⁸⁴ SPO Pre-Trial Brief, para. 708.

population, as now alleged by the SPO. In particular, the U.S. government had made clear that the KLA would lose its support if it was targeting civilians or relying on fundamentalists.²⁸⁵

133. A central flaw in the SPO's aiding and abetting allegation is the wealth of evidence to contradict it; evidence of Mr Thaçi repeatedly, consistently, condemning crimes against Serbs and calling for peace. On 8 June 1999, within the framework of discussions with U.S. Secretary of State Albright on the withdrawal of Serb troops, Mr Thaçi, as a political spokesperson for the KLA, stated that the KLA would suspend armed actions against Serb forces when NATO-led peacekeepers moved into Kosovo. Mr Thaçi also said that he would work to protect the rights of Kosovo's minorities, including Serbs, exemplifying his will to collaborate closely with the international community.²⁸⁶ On 17 June 1999, Mr Thaçi urged Serbs not to flee Kosovo, assuring them of a safe and meaningful life in Kosovo, stating:²⁸⁷

I appeal to the Serbs outside Kosovo to return to Kosovo.

The massacres were not carried out by ordinary Serbs but by the regime. We have no plans to organise any repression against the Serbs. They were also the victims of this war.

Albanian society needs the Serbs. They can make a great contribution to the stability of Kosovo.

134. On 26 June 1999, Mr Thaçi prevented a violent clash between crowds of Kosovo Albanians who were marching together with doctors and nurses to demand a return

²⁸⁵ H.H. Perritt, *Kosovo Liberation Army: the Inside Story of an Insurgency* (University of Illinois Press, 2008), pp. 141-142; [REDACTED].

²⁸⁶ 020400-020401, Dow Jones, 'KLA leader swears off attacks on retreating Serb troops', 10 June 1999, p. 020400.

²⁸⁷ Reuters, 'Macedonia: KLA Political Leader Hashim Thaçi Urges Serbs Not to Flee Kosovo', 17 July 1999, <https://reuters.screenocean.com/record/517960>; 020458-020460, Reuters Interview with Hashim Thaçi, 18 June 1999, p. 020458.

to the hospitals and clinics on the northern side of Mitrovicë/Mitrovica, with their paths blocked by French KFOR. Mr Thaçi addressed the crowd saying:²⁸⁸

We have come here today with Mr. de Mello to talk to you, and also to talk to the Serb side across the bridge. We crossed the bridge, we went to the hospital, we have sent our people there. They have started work. We are interested in regulating everything in close cooperation with the international community, and we are going to regulate it.

As always, we are really interested in solving every problem in a dignified way, with discipline, culture. We have even waged our war in a cultural way. And so are we going back to premises and build lives with a real civic culture, not only Albanian culture, but a democratic and world culture. We need to understand that Serbs too need to live in Mitrovica, those who have not committed crimes. Those who have not killed people.

We are not interested and we do not fuel the fires of a monoethnic life. We need to understand that whoever wants to live in Kosovo should live in Kosovo. Kosovo belongs to Kosovars. And they are going to live here. [...]

135. The crowds then dispersed.

136. On 2 July 1999, Mr Thaçi signed and read out in Albanian a joint statement by Kosovo Albanian and Serb leaders condemning the violence and calling for peace and tolerance:²⁸⁹

[...] We have met to discuss security and human rights; in order for the human rights of all people to be exercised they must be free of fear. They must feel safe staying in their homes, going to their jobs, going to their places of worship, visiting friends and family, taking their exams at university, and going about all the other tasks of everyday life.

We know that we have to urgently address this problem if we want to realise our joint goal of a civil society in Kosovo, a society where no one has to have fear for his lie, his family, his job, or his home just because of his ethnicity or belief. We are determined not to look back but to look forward. In this respect we reach out to all national communities living in Kosovo. In particular, we want to stop the exodus of Serb, Montenegrin and other civilians from Kosovo and encourage the return of those who have already left.

We have a rich common heritage. We want to preserve it. We therefore call on everyone: stay in and come back to Kosovo. KFOR and UNMIK have promised us

²⁸⁸ 020505-020506, Dow Jones, 'KLA leader helps defuse confrontation in French sector', 26 June 1999, p. 020505; Kosova Arkiv, 'Hashim Thaçi ne vitin 1999 kur e ndau Mitrovicen!', 22 October 2015, <https://www.youtube.com/watch?v=v25XxcyzO4M>.

²⁸⁹ 017863-017864, 'Albanian and Serb leaders of Kosovo Joint Statement', 2 July 1999.

that they would do their utmost to secure your safety and to guarantee your future in your homeland. We trust them and we urge you to do likewise [...]

137. On 8 July 1999, Mr Thaçi again condemned such violence, distancing both himself and the PGoK from these acts, and condemned robbery and vandalism as [REDACTED].²⁹⁰ On 17 July 1999, during the first Kosovo Transitional Council meeting, Mr Thaçi praised [REDACTED] necessary for working together, and recalled that he had already made very strong statements distancing himself from crimes against non-Albanians, while being under a lot of pressure as there were still 6,000-7,000 Albanian political prisoners in Serbia. He also confirmed his willingness to appear publicly with the SRSG to urge an end to the violence.²⁹¹ These were messages being given in local languages, being disseminated locally, talking directly to the population who had just lived through these events.

138. On 22 July 1999, to improve the security situation and establish confidence-building measures, the SRSG, Serbian leader Momcilo Trajković and Mr Thaçi, visited apartments in Prishtinë/Priština that had been occupied by Albanians. The SRSG emphasised that the Serbs had the right to return to their homes, and the problems that led Albanians to occupy Serb apartments had to be solved; his thoughts were echoed by Mr Thaçi and Mr Trajković.²⁹²

139. In addition to trying to prevent violence, Mr Thaçi openly condemned it when it happened. On 24 July 1999, Mr Thaçi became the only Kosovo Albanian leader to visit Gracko, where he condemned the killing of Serbs:²⁹³

²⁹⁰ [REDACTED].

²⁹¹ [REDACTED].

²⁹² [REDACTED].

²⁹³ 066061-066062, AP Archive, 'Kosovo: KLA Leader Thaci Condemns Murder of Gracko Serbs', 24 July 1999', p. 066062; 020640-020641, BBC, 'Kosovo "premier" condemns killing of Serbs', 25 July 1999, p. 020640; AP Archive, 'Kosovo: KLA Leader Thaci Condemns Murder of Gracko Serbs', 24 July 1999, https://youtu.be/0qA4j4C_e5I.

This act (Serb killings) is against democracy, against the people of Kosovo, against the international community, this act suits only Milosevic and his regime and no one else in Kosovo or the world. This act happened at the end of the second phase of the demilitarisation of the KLA which has already been complied with. I use this opportunity once again to urge those Serbs that live in Kosovo not to leave Kosovo now. They don't have to be afraid, we have to live together, to help each other.

140. The U.S. State Department recognised Mr Thaçi's public denouncing of the Gracko attack, confirming "[t]here is no evidence that the former UCK leadership is orchestrating the violence."²⁹⁴ On 2 August 1999, in a political declaration issued on behalf of the Interim Government of Kosovo, Mr Thaçi stressed that:²⁹⁵

[REDACTED].

141. In a 13 August 1999 meeting of OSCE Senior Human Rights Officers, Ambassador Daan Everts (then Head of the OSCE-KVM) further responded to a question by citing Mr Thaçi's statements condemning violence.²⁹⁶

142. Nor was Mr Thaçi's outreach limited to the Serbian community. In mid-October 1999, he visited Mamushë/Mamusha, a Turkish town in the Prizren region. He spoke to a large crowd of people waving Turkish and Albanian flags, and convened a town hall meeting, engaging in a Q&A with representatives of the Turkish community, and calling for tolerance, understanding, and co-existence.²⁹⁷ He repeated the same message on 4 October 1999, emphasising the need to protect freedom irrespective of ethnic backgrounds, and urged cooperation with UNMIK, OSCE and KFOR, in a meeting with the SRSG in Vitomiricë/Vitimirica, a Bosniak town in the Peja/Peć region.²⁹⁸ Again, on 15 October 1999, Mr Thaçi condemned violence during a

²⁹⁴ Ethnic Cleansing in Kosovo, p. 15.

²⁹⁵ [REDACTED].

²⁹⁶ [REDACTED].

²⁹⁷ [REDACTED].

²⁹⁸ [REDACTED].

press conference in Prishtinë/Priština, emphasising that “the philosophy of forgiveness and tolerance should prevail in Kosovo, not that of revenge”.²⁹⁹

143. On 5 November 1999, during an official meeting with Austrian Foreign Minister Wolfgang Schuessel, Mr Thaçi condemned the shooting of Mr Trajković and an attack against a Serb convoy near Peja/Peć, promising to do what he could to avoid such attacks.³⁰⁰ On 1 December 1999, Mr Thaçi publicly condemned the attack on a Serb family by a mob in Prishtinë/Priština, in a formal statement on the front page of the Koha Ditore daily newspaper in Kosovo.³⁰¹ Again, talking directly to the local community.

144. These are not the only examples of Mr Thaçi’s acts, conduct and words during this period, but they establish a corroborative and consistent picture that he prioritised a peaceful transition through maintaining the support of the international community. This picture is corroborated by the KLA’s subsequent demilitarisation, again demonstrating an overarching determination to work with the international community, rather than assume control at any cost.

VI. PROCEDURAL ANOMALIES

A. THE KSC’S LACK OF JURISDICTION OVER THE INDICTMENT EVENTS

145. The KSC do not have jurisdiction over the events charged in the Indictment. The Court’s jurisdiction was illegally expanded to encompass crimes that the Kosovo

²⁹⁹ [REDACTED]; RTV Klan Arkiv, ‘Hashim Thaçi dhe situata në Kosovë (15 Tetor 1999)’, 5 May 2020, <https://youtu.be/dr7kv5QJvWE>.

³⁰⁰ [REDACTED].

³⁰¹ 020951-020952, AP media article, ‘KOUCHNER condemns attack on Serb family’, 1 December 1999, p. 020951; 020955-020956, BBC, ‘Kosovo Albanian leader's party condemns anti-Serb violence’, 3 December 1999, p. 020955.

Parliament never intended it to address, the prosecution of which are without a legal basis.

146. This issue has been raised in preliminary motions,³⁰² and a Constitutional Court Panel referral.³⁰³ It is included here to contextualise: (i) the SPO's disregard for constitutional limitations of the Kosovo Parliament; and (ii) its inability to frame a credible case against Mr Thaçi. For a full briefing of the issues, the Defence refers to the earlier litigation. By way of overview, it is undisputed that the impetus for the creation of the KSC was the allegations in the Marty Report.

147. The origins of the Marty Report are important. In April 2008, three months after resigning as ICTY Prosecutor, Carla del Ponte published her book,³⁰⁴ in which she alleged that KLA commanders were trafficking human organs from Serb prisoners. The ICTY Office of the Prosecutor investigated these allegations, but "no reliable evidence" was obtained.³⁰⁵ Del Ponte recognised the ICTY's inability to prosecute such allegations given its temporal and geographical mandate: namely, because the alleged conduct occurred in Albania and after the war.³⁰⁶ Regardless, the timing and inflammatory nature of the allegations, attracted international attention.

³⁰² Jurisdiction Preliminary Motion; Jurisdiction Appeal.

³⁰³ KSC-CC-2022-15/F00001, Referral to the Constitutional Court Panel on the Violation of Mr Thaçi's Fundamental Rights to an Independent and Impartial Tribunal Established by Law, and to a Reasoned Opinion, 28 February 2022,.

³⁰⁴ Carla Del Ponte & Chuck Sudetic, *A Caccia: io e i criminali di guerra* (The Hunt: Me and War Criminals) (Feltrinelli, 2008) ("The Hunt").

³⁰⁵ ICTY, 'ICTY Weekly Press Briefing', 16 April 2008, <https://www.icty.org/en/press/icty-weekly-press-briefing-16-april-2008>.

³⁰⁶ 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".

148. The organ trafficking allegations were seized upon by a member of the Council of Europe's Parliamentary Assembly from the Russian Federation,³⁰⁷ an opponent of Kosovo's independence. On 15 April 2008, he tabled a draft motion for an investigation referencing the "Memoirs by Carla Del Ponte [...] that militants of the Kosovo Liberation Army (KLA) kidnapped **more than 300 people** [...] who **had their vitally important organs extracted** later".³⁰⁸ Dick Marty was appointed to investigate. To accuse an adversary of organ trafficking is a documented tactic of the Russian regime, employed in relation to the conflicts in Ukraine,³⁰⁹ and in Syria.³¹⁰ In Ukraine and Syria, as in Kosovo, the allegations had no factual basis.

1. The Scope of the Marty Report

149. The Marty Report allegations were unsubstantiated and have been widely discredited.³¹¹ On 21 July 2022, the Albanian Parliament unanimously approved a resolution against the report, to be submitted to the Council of Europe, calling the report's allegations "unproven and not based on evidence and facts."³¹²

150. Despite being unfounded, the allegations were specific and precise. The Marty Report addressed two accusations, "inhumane treatment of people" and "illicit

³⁰⁷ United Press International, 'Russia may veto Kosovo's UN independence', 24 January 2007, https://www.upi.com/Top_News/2007/01/24/Russia-may-veto-Kosovos-UN-independence/54621169673682/.

³⁰⁸ Council of Europe, Parliamentary Assembly, Doc. 11574, Motion for Resolution – Inhumane treatment of people and illicit trafficking in human organs in Kosovo, 15 April 2008, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=11868&lang=en> (emphasis added).

³⁰⁹ K. Devlin & O. Robinson, 'Ukraine crisis: Is Russia waging an information war?', *BBC News*, 23 February 2022, <https://www.bbc.com/news/60292915>.

³¹⁰ See, e.g., C. Hadjimatheou, 'Mayday: How the White Helmets and James Le Mesurier got pulled into a deadly battle for truth', *BBC News*, 27 February 2021, <https://www.bbc.com/news/stories-56126016>; S. Van Sant, 'Russian Propaganda is Targeting Aid Workers', *Foreign Policy*, 1 August 2022, <https://foreignpolicy.com/2022/08/01/russia-disinformation-ukraine-syria-humanitarian-aid-workers/>.

³¹¹ See, e.g., SITF Findings, p. 20/26.

³¹² See fn. 6 above.

trafficking of human organs,” alleged to have taken place in detention facilities in Northern Albania: Cahan, Kukës, Bicaj (vicinity), Burrel, Rripe, Durrës and Fushë-Krujë.³¹³

151. The Marty Report’s temporal scope focused on acts “alleged to have occurred for the most part from the summer of 1999 onwards,”³¹⁴ being after the end of the armed conflict in Kosovo. In 2010, then-Prime Minister Thaçi, despite being personally accused, called for an independent investigation.³¹⁵

2. Investigation of Marty Report Allegations by the SITF

152. In May 2011, the EU Political and Security Committee adopted changes in the operational plan of EULEX,³¹⁶ envisaging a Special Investigative Task Force (“SITF”) authorised “to investigate and, if warranted, prosecute individuals **for crimes alleged in the [Marty] Report.**”³¹⁷

153. The SITF’s mandate was expressly linked to, and limited by, the scope of the Marty Report,³¹⁸ filling a jurisdictional gap in the mandates of ICTY and UNMIK prosecutions. On 29 July 2014, SITF Chief Prosecutor Williamson stated: “[w]hat our

³¹³ Marty Report, para. 96, page 18.

³¹⁴ Marty Report, para. 4, page 6.

³¹⁵ The Guardian, ‘Kosovo PM calls for inquiry over organ trafficking claims’, 21 December 2010, https://www.theguardian.com/world/2010/dec/21/kosovo-hashim-thaci-inquiry?CMP=gu_com.

³¹⁶ See 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, 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.”

³¹⁷ SITF, “Special Investigative Task Force Fact Sheet”, <http://club.bruxelles2.eu/wp-content/uploads/2014/03/SpecialInvestigativeTaskForce.pdf> (“SITF Fact Sheet”).

³¹⁸ *Ibid.*

investigation has done and what this court will do, is to fill the void left by the [ICTY's] jurisdictional limitations".³¹⁹ At the same press conference, Williamson stated he had not found sufficient evidence of organ trafficking to support indictments.³²⁰ For the remaining allegations, Williamson stated that indictments would be issued once Kosovo established a "specialised" judicial forum for their adjudication.

154. In reality, the SITF investigation was a "Kosovo-wide criminal investigation" into all allegations of crimes against humanity and war crimes,³²¹ far broader than an investigation into the Marty Report allegations.³²² Williamson explained that his investigators had not just investigated Marty Report allegations, but also those contained in key OSCE and Human Rights Watch reports.³²³ Having untethered his investigation from the Marty Report, Williamson felt free to make extremely general allegations of war crimes and crimes against humanity that took place in Albania and Kosovo, both before and during the armed conflict.³²⁴

3. The Constitutional Basis for the Establishment of the KSC and its Subject-Matter Jurisdiction

155. On 3 August 2015, the Assembly of Kosovo adopted Amendment No. 24 to the Constitution, providing the basis for the establishment of the KSC and the SPO through new Article 162. The Amendment **did not** endorse the broad approach adopted by the SITF; Article 162(1) links the jurisdiction of the court to the narrower allegations of the Marty Report.

³¹⁹ SITF Findings, p. 21/26.

³²⁰ SITF Findings, p. 20/26.

³²¹ SITF Findings, p. 19/26.

³²² SITF Findings, p. 18/26.

³²³ SITF Findings, p. 19/26.

³²⁴ SITF Findings, p. 19/26.

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

157. The use of “and” rather than “or” in Article 1(2) of the KSC Law limits the KSC’s scope to allegations contained in the Marty Report, **and** investigated by the SITF; a deliberately narrow crossover.

4. The Indictment Exceeds the Subject-Matter Jurisdiction of the KSC and Defeats the *raison d’être* of the KSC

158. The SPO apparently concluded that the SITF material concerning the Marty Report’s organ trafficking allegations could not form the basis of a successful prosecution. Instead, a different case was built from recycled UNMIK, EULEX or ICTY cases, exceeding the subject-matter jurisdiction of the KSC, which was designed to exclude the allegations revived by the SPO.

159. The only locations identified in the Marty Report are seven detention facilities in Albania.³²⁵ By contrast, the crimes alleged in the Indictment took place almost exclusively in Kosovo. The Indictment lists 43 alleged detention sites.³²⁶ Only two are in Albania: Cahan, and the Metal Factory in Kukës. All others are in Kosovo. The Indictment lists alleged murders and killings in 22 different locations.³²⁷ Only one is in Albania: the Metal Factory in Kukës. All others are in Kosovo. The Indictment

³²⁵ Marty Report, para. 93, page 18.

³²⁶ Indictment, pp. 55–59.

³²⁷ Indictment, pp. 60–67.

alleges enforced disappearance of individuals in seven alleged locations.³²⁸ All are in Kosovo.

160. Both Marty³²⁹ and Del Ponte³³⁰ acknowledged that the ICTY could not investigate the organ trafficking allegations because of **where** they occurred. The Marty Report filled this gap. Thus, the reference to the Marty Report in Article 162(1) limits the jurisdiction of the KSC in terms of subject-matter, and territorial reach. The KSC was, in essence, established to investigate crimes alleged to have occurred in Albania. Absent a nexus to this territory, the KSC has no jurisdiction.

161. The Indictment's temporal scope is limited to "at least March 1998 through September 1999."³³¹ However, in its opening paragraphs, the Marty Report refers to acts "alleged to have occurred **for the most part** from the summer of 1999 onwards."³³² The two documents are accordingly, and necessarily, dealing with different events. To the extent that the KSC Law describes its territorial jurisdiction as starting in 1998, thereby going beyond the Marty Report, it is at variance with Article 162(1) of the Constitution.

162. Rather than acting within the bounds of its clearly delineated mandate, the SPO has treated the KSC as a blank canvas from which to engineer a completely different case, encompassing alleged crimes spanning the 1998-1999 conflict in Kosovo. The case is proceeding without a jurisdictional basis.

³²⁸ Indictment, pp. 68–69.

³²⁹ Marty Report, para. 3, page 6.

³³⁰ See fn 306.

³³¹ Indictment, para. 16.

³³² Marty Report, para. 4, page 6 (emphasis added).

B. THE SPO'S ONE-SIDED INVESTIGATION

163. The SPO is required to investigate both incriminating and exonerating circumstances, and act independently,³³³ and as impartial ministers of justice, including making reasonable efforts to obtain exculpatory information not in their possession.³³⁴ In this case however, the SPO investigations have been one-sided.

164. As at 21 October 2022, the SPO has disclosed 18,076 items of incriminating evidence pursuant to Rule 102(1), and 6,235 items of exculpatory evidence pursuant to Rule 103. On its face, the SPO therefore overwhelmingly prioritised the disclosure of incriminating evidence.

165. However, the pace and timing of its disclosures are also telling: while between 20 July 2021 and 1 February 2022, the SPO disclosed **15,327** documents pursuant to Rule 102(1)(b), and only **1,226** documents pursuant to Rule 103; 44% of the total Rule 103 material was disclosed between February and September 2022, 30% more than the amount of exculpatory documents the SPO had disclosed in the entire 12 month period prior. This correlates with significant pressure being applied to the SPO, including court-ordered deadlines.³³⁵ Further, the SPO often only disclosed material shortly before the court-ordered deadline for completion, when much of the relevant material had been in its possession long before, thereby violating its obligation to disclose exculpatory material immediately.

166. The one-sided nature of the SPO disclosure has not been lost on the Pre-Trial

³³³ KSC Law, Article 35(1).

³³⁴ ICC, *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-1655-Red, Trial Chamber V(a), Decision on Joint Defence Application for Further Prosecution Investigation Concerning [REDACTED] of Certain Prosecution Witnesses, 12 January 2015, para. 32.

³³⁵ KSC-BC-2020-06, Transcript of Eleventh Status Conference- Oral Order 3, 24 March 2022, pp. 1161-1162; Transcript of Twelfth Status Conference – Oral Order 2, p. 1323 lines 10-15.

Judge,³³⁶ who has repeatedly found the SPO had not been “fully diligent” in disclosing exculpatory material,³³⁷ and has twice ordered the SPO to file disclosure reports, to ensure their compliance with legal requirements.³³⁸

167. The SPO’s disclosed material provides further evidence of one-sided investigations. SPO investigators declined to capture or discuss exculpatory material, or otherwise failed to pursue exculpatory lines of inquiry, including by failing to respond to the substance of a witness’ exculpatory statement, redirecting the witness to more inculpatory avenues or ending the discussion.³³⁹ As one witness stated, the totality of the evidence “seems to reflect a lesser interest in exculpatory than incriminating information”.³⁴⁰ This is not an impartial search for the truth.

C. THE SPO’S FLAWED APPROACH TO DISCLOSING ITS CASE

168. The SPO is required to “fulfil its disclosure obligations in an organised, comprehensible, useful and effective manner so as to ensure delays are minimised and the accused’s fundamental rights to a fair trial are respected”,³⁴¹ even where there is a voluminous amount of material to be properly categorised.³⁴² The SPO has failed to

³³⁶ KSC-BC-2020-06/F00936, Pre-Trial Judge, Public Redacted Version of Decision on Thaçi and Krasniqi Defence Motions Seeking Remedies for Non-Compliance with Disclosure Obligations, 26 August 2022, (“Disclosure Decision”).

³³⁷ Disclosure Decision, para. 32.

³³⁸ KSC-BC-2020-06/F01016/CONF/RED, Pre-Trial Judge, Confidential Redacted Version of Decision on the Fourth Prosecution Request for Protective Measures for Items Containing Rule 103 Information, 7 October 2022, para. 29; Disclosure Decision, para. 37.

³³⁹ See, e.g., [REDACTED].

³⁴⁰ [REDACTED].

³⁴¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Decision on the Sabra Defence’s First, Second, Third, Fourth, Fifth and Sixth Motions for Disclosure, 8 November 2012, para. 32.

³⁴² STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230, 2 June 2017, para. 103.

do so, resulting in a “fractured, unhelpful and piecemeal”³⁴³ disclosure system plagued by delays, and prejudice to the Defence.

1. Rule 102(1)(b) Disclosure

169. In addition to an eight month delay in finalising Rule 102(1)(b) disclosure,³⁴⁴ disclosure was intermittent and haphazard; the SPO ignored (repeated) Defence suggestions to organise materials into packages by witness,³⁴⁵ and the largest volume of material was consistently disclosed by the SPO shortly before any set deadlines.³⁴⁶

170. Disclosure was also poorly organised, and missing key information in its metadata,³⁴⁷ or containing errors and omissions, including omitting material to which a witness is referred during interviews.³⁴⁸

2. Rule 102(3) Disclosure

171. The Defence faced similar problems with Rule 102(3) disclosure. First, the SPO failed to provide a **detailed** notice as required, lacking information that would allow the Defence to assess relevance.³⁴⁹ Further, the time taken by the SPO to meet its Rule 102(3) obligations has been excessive, consistently delayed, and only accelerated when

³⁴³ KSC-BC-2020-06, Transcript of Fourth Status Conference, 24 March 2021 (“Transcript of Fourth Status Conference”), p. 331 lines 12-13.

³⁴⁴ See, e.g., KSC-BC-2020-06/F00218, Pre-Trial Judge, Decision on Categorisation of Evidence Under Rule 109(c) and Related Matters, 12 March 2021, para. 22; KSC-BC-2020-06, Transcript of Sixth Status Conference – Oral Order 1, 21 July 2021, p. 536 lines 4-9; KSC-BC-2020-06, Transcript of Seventh Status Conference – Oral Order 2, 14 September 2021, p. 625 lines 7-23; KSC-BC-2020-06, Transcript of Eighth Status Conference, 29 October 2021, pp. 753-754.

³⁴⁵ See, e.g., Transcript of Fourth Status Conference, p. 332, lines 6-15.

³⁴⁶ For example, 1,613 documents (or 10% of the SPO’s total Rule 102(1)(b) disclosure) were disclosed between 28 and 1 February 2022, when the SPO’s final deadline was 31 January 2022.

³⁴⁷ See, e.g., KSC-BC-2020-06/F00213, Taçi Defence Request for Orders related to Disclosure, 8 March 2021, para. 19.

³⁴⁸ *Ibid*, paras. 10-17.

³⁴⁹ KSC-BC-2020-06/F00460, Pre-Trial Judge, Decision on the Defence Request for an Amended Rule 102(3) Notice, 8 September 2021, paras. 19-23.

a final deadline was re-imposed. Even after that deadline passed, disclosure remains unfinished. The SPO also failed to adequately organise this material. Requested items were disclosed with different ERNs, or pursuant to different rules, making it impossible to track the progress of disclosures.³⁵⁰

3. Rule 103 Disclosure

172. The problems with the SPO's disclosure pursuant to Rule 103 have been set out above.³⁵¹ In short, the SPO failed to meet its obligations to immediately disclose all exculpatory material in its custody or knowledge.

4. Impact of the Flawed Disclosure Regime

173. The flaws in the SPO's disclosure regime have created significant obstacles, both for the SPO and the Defence. Chaos still exists in the elucidation of the SPO's case, and the materials it intends to rely on to prove it. The SPO has sought seven amendments in the ten months since the first Exhibit List was submitted,³⁵² so far resulting in the addition of 1,922 documents.³⁵³ Up to nine months after the filing of their Witness List, the SPO filed two additional requests to add witnesses.³⁵⁴ The underlying rationale for these delays has been a lack of diligence by the SPO; the flawed disclosure regime means it has repeatedly "overlooked" allegedly relevant

³⁵⁰ KSC-BC-2020-06/F00744, Veseli Defence Submissions for Eleventh Status Conference, 21 March 2022, paras. 4-7.

³⁵¹ See 'The SPO's One-Sided Investigation'.

³⁵² For details, see: KSC-BC-2020-06/F00974, Thaçi Defence Response to Prosecution request to add two witnesses and associated materials (F00947), 15 September 2022, para. 10, fns. 18-19.

³⁵³ The total number of items in the first Exhibit List filed by the SPO on 21 December 2021 was 16,304, while the most recent SPO Exhibit List contains 18,226: *see* KSC-BC-2020-06/F00967/A02, Annex 2 – Prosecution submission of amended exhibit list, 13 September 2022, p. 1328.

³⁵⁴ KSC-BC-2020-06/F00890/CONF/RED, Prosecution Rule 102(2) submission and related requests, 21 July 2022; KSC-BC-2020-06/F00947/CONF/RED, Prosecution request to add two witnesses and associated materials, 2 September 2022.

evidence or otherwise failed to appreciate the significance of particular witnesses or materials.

174. Second, the Defence has had to expend a substantial amount of its already limited time and resources attempting to collate and organise a voluminous amount of disorganised and incoherent material. Ongoing disclosure delays and SPO disorganisation also cause corresponding delays in the Defence's ability to investigate in a timely manner, and frustrate Mr Thaçi's fair trial rights.

D. THE OVER-RELIANCE ON PROTECTIVE MEASURES

175. The SPO witnesses in this case benefit from a protective measures regime that far exceeds the scope of those authorised in prior international criminal proceedings. 155 SPO witnesses currently benefit from protective measures of various types, sought by the SPO and authorised over consistent Defence objections as to their lack of objective justification, and near-blanket application.³⁵⁵ Most problematically, the accused's rights³⁵⁶ have been relegated in favour of witness protection, with the over-reliance on protective measures stifling Defence preparations.

176. The delayed and rolling disclosure of SPO witness identities is perhaps the most intrusive measure. In simple terms, limiting the time period in which the Defence can investigate SPO witness allegations, limits the Defence's ability to conduct investigations. Such measures have been imposed for huge numbers of SPO

³⁵⁵ The Defence have filed more than 30 filings challenging the SPO's requests for protective measures, from the beginning of this case, *see, e.g.*, KSC-BC-2020-06/F00129/CONF, Thaçi Defence Response to "Request for Protective Measures", KSC-BC-2020-06/F00094, dated 19 November 2020 with confidential Annex 13", 8 December 2020, continuing all the way to the present, *see e.g.*, KSC-BC-2020-06/F01040, Thaçi Defence Response to Prosecution requests for protective measures for certain information requested by the Defence pursuant to Rule 102(3) (F00995, F00996 & F01003), 17 October 2022.

³⁵⁶ KSC Law, Articles 21(2) & 21(4)(c).

witnesses, with seemingly no consideration of their “exceptional” nature, and no mitigating measures.³⁵⁷ Delayed disclosure was imposed for **119** witnesses, or 37% of the SPO’s witnesses, including two witnesses whose identity will **never** be revealed to the Defence.

177. It is not just the **identities** of these SPO witnesses that are being withheld from the Defence. These witnesses’ prior statements, interviews and associated materials are also being withheld or redacted, further impacting the ability of the Defence to understand their proposed testimony, and prepare to test their evidence at trial. In total, approximately **92** witnesses, benefit from additional orders that related material be withheld and/or redacted, including some where only summaries have been provided. For example, the practical result of these measures is that **46,000 pages** of new, less redacted or unredacted material will be disclosed 30 days before trial.³⁵⁸

178. In addition to this delayed and partial disclosure of **who** the SPO witnesses are and **what** they will testify about, wide-ranging **in-court protective measures** (including pseudonyms, closed and private session testimony, and face and voice distortion), mean that the trial, in large part, will not be a public one.

179. The protective measures regime in place will lead to a trial largely hidden from public view, and will make the SPO allegations more difficult to investigate and test. These measures have not been adequately balanced against the central fair trial safeguards on which they undoubtedly trample, jeopardising the fairness of the trial and ultimate legitimacy of these proceedings.

³⁵⁷ ICC, *Prosecutor v. Al Hassan*, ICC01/12-01/18-741-Red2, Trial Chamber X, Public redacted version of Decision on the Prosecution request for delayed disclosure of the identities of Witnesses P-0538, P-0542, P0553, P-0570, P-0574, and P-0603, 15 April 2020, paras. 26, 58.

³⁵⁸ F00952, para. 11.

E. VIOLATION OF THE RIGHT TO DEFENCE INVESTIGATIONS THROUGH THE FRAMEWORK FOR WITNESS CONTACT

180. Currently, 319 people are held out by the SPO as providing evidence supporting the SPO case. Many will also have information that tends to **disprove** the SPO case. As such, the Defence has an interest in interviewing the people on the SPO Witness List,³⁵⁹ and arguably an obligation to do so in the diligent exercise of its duties.

181. In June 2022, after years of SPO investigations, and after the accused had been in prison for 20 months, the Pre-Trial Judge imposed the Framework to regulate contact with witnesses, which put barriers between these 319 people. The Framework was appealed by all Defence teams.³⁶⁰

182. The Framework is the most restrictive regime for witness contact in the history of international criminal justice. The Framework had an immediately stifling effect on Defence investigations, and has protracted Defence preparation for trial to an extent that the fairness of the proceedings has been impacted.

183. The Framework, purportedly based on the ICC Protocol,³⁶¹ goes well beyond it in several key respects. For example, the Framework requires the Defence to audio-video record all interviews with SPO witnesses, which can then be “admitted in evidence by the Trial Panel *proprio motu*”.³⁶² In practical terms, Defence Counsel is therefore required to conduct interviews with the 319 SPO witnesses, seeking to

³⁵⁹ ICTY, *Prosecutor v. Halilović*, IT-01-48-AR73, Appeals Chamber, Decision on the issuance of subpoenas, 21 June 2004, para. 12.

³⁶⁰ KSC-BC-2020-06/IA024/F00002, *Thaçi Appeal Against the “Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant”*, 8 September 2022 (“Defence Appeal”).

³⁶¹ ICC, *Chambers’ Practice Manual, Annex: Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant*, Fifth Edition, 25 March 2022 (“ICC Protocol”).

³⁶² Framework, Sections II(j)(iv), II(o).

uncover **new** information, knowing the recording of the interview will be provided to the finder of fact, may automatically become part of the evidential record of the case, and be relied upon to make adverse findings against their client. How can Counsel ask questions to which the answer may be either incriminating or exculpatory, if any incriminating answer will go directly to the Trial Panel and can be admitted into evidence? Proper investigations are impossible.

184. The prejudice of the Framework is exponentially increased by its application to **all SPO witnesses**, regardless of their circumstances. The Pre-Trial Judge declined to draw any distinction between witnesses with different security risks, despite being urged to do so by the Defence, and in violation of the KSC Law.³⁶³

185. The details of how the Framework violates central fair trial rights are set out in full in the Defence Appeal. This overview is provided as a means of explaining how these novel procedures have restricted Defence investigations, and to create a record for future requests for a remedy.

VII. THE CHARGES AND MATTERS WHICH THE ACCUSED DISPUTES

186. Pursuant to Rule 95(5)(b), at this stage, and in particular considering the extensive redactions still applied to the Indictment and to the SPO's Pre-Trial Brief, and the withholding of the identity of 96 out of 319 witnesses on the SPO Witness List, the Defence disputes the entirety of the charges against Mr Thaçi.

VIII. CONCLUSION

187. Mr Thaçi was detained 24 months ago, and all requests for provisional release have been denied. The SPO has presented a case which has no link to the organ

³⁶³ Decision on Framework, para. 120.

trafficking allegations for which the Court was established to investigate and prosecute and which has, at its centre, a selective and simplistic presentation of historical events. A review of the material cited in the SPO Pre-Trial Brief in support of the allegations reveals that, even at its highest, the SPO's case is not what it represents. The pre-trial phase has been protracted, with Defence preparation and investigations being restricted by a shambolic disclosure process, and the most restrictive protective measures and witness contact regimes in international criminal history.

188. Regardless, throughout this process, Mr Thaçi and his counsel have cooperated fully with the proceedings in order to clear his name. Mr Thaçi seeks fair, expeditious and public proceedings and files this Pre-Trial Brief in support of that aim.

[Word count: 23,295 words]

Respectfully submitted,



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At Tampa, United States