

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

Before: Trial Panel II
Judge Charles L. Smith III, Presiding
Judge Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

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Pre-Trial Brief of Jakup Krasniqi, KSC-BC-2020-06/F01051,

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I. INTRODUCTION

1. Pursuant to Rule 95(5) of the Rules¹ and the Oral Order of the Pre-Trial Judge,² the Defence for Jakup Krasniqi (“Defence”) hereby submits its Pre-Trial Brief in response to the Corrected Pre-Trial Brief submitted by the Specialist Prosecutor’s Office (“SPO”), on 24 February 2022.³

2. Mr. Krasniqi is a writer and historian. He joined the Kosovo Liberation Army (“KLA”) in a bid to defend his people against the cruelty and demonstrated criminality of the regime of former President Milošević. As crimes against humanity were being inflicted on the most vulnerable in Kosovo, he joined those who wished to be defined by the rights of an individual and the Rule of Law. This trial will, the Defence submits, expose the manifest and multiple weaknesses of the SPO case, and demonstrate that Mr. Krasniqi should never have been charged.

3. Mr. Krasniqi rejects all the charges against him. He was not tried for any crime by the International Criminal Tribunal for the former Yugoslavia (“ICTY”), United Nations Mission in Kosovo (“UNMIK”), European Union Rule of Law Mission in Kosovo (“EULEX”), or any national court in Kosovo. He was not named in any way in the Council of Europe Report, which led to the establishment of this Court.⁴ Instead, Mr. Krasniqi was summoned as a witness by the Prosecution at the ICTY on two occasions. On both occasions, he was treated by the Prosecution as a witness – not a suspect. His evidence was accepted by the Trial Chambers as true and was relied upon

¹ Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).

² KSC-BC-2020-06, In Court – Oral Order, Order on Deadline for Filing Defence Pre-Trial Brief, 20 May 2022, public.

³ KSC-BC-2020-06, F00709/A02, Specialist Prosecutor, *Annex 2 to Prosecution Submission of Corrected Pre-Trial Brief and Related Request* (“SPO PTB”), 24 February 2022, confidential.

⁴ Council of Europe, Parliamentary Assembly, “Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo” (“Council of Europe Report”), Doc. 12462, 7 January 2011.

in reaching verdicts of acquittal on charges of Joint Criminal Enterprise (“JCE”) against former members (including General Staff members) of the KLA.⁵ Now, more than 20 years after the alleged offences, and more than 10 years after his testimony at the ICTY, the SPO is simply seeking to recycle the same or similar allegations and evidence – unsuccessfully raised against previous suspects – and to impugn them to Mr. Krasniqi.

4. Mr. Krasniqi did not personally participate in any crime and there is no credible evidence linking him to any act of violence. As he himself said at his initial appearance, he never sought to mistreat or detain people.⁶ Far from being the divisive figure that the SPO seeks to present, throughout his political life, including the Indictment Period, he sought to be a unifying figure and never intended to intimidate or to commit crimes against ‘opponents’ or any non-Albanian ethnicity in Kosovo.⁷ His recognition by all political parties in Kosovo as a figure of consolidation was shown by his re-election as the Speaker of the Kosovo Assembly, on 21 February 2011, when he received 90 votes from the 120 voters in the Kosovo Assembly, including the Democratic League of Kosovo (“LDK”) members and elected representatives of the Serbian minority.⁸

5. The Defence will set out below in general terms the nature of Mr. Krasniqi’s defence, the charges and matters which he disputes and the reasons why he disputes them in accordance with Rule 95(5). Noting that Rule 95(5) provides that the Pre-Trial

⁵ ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Chamber II, *Judgement* (“*Limaj Judgment*”), 30 November 2005, paras 57-58, 60, 64, 99, 102, 118, 128, 137, 215, 220, 597, 622; *Prosecutor v. Haradinaj et al.*, IT-04-84bis-T, Trial Chamber II, *Judgement* (“*Haradinaj Retrial Judgment*”), 29 November 2012, paras 39-40, 47, 74, 80, 83, 92, 254, 630, 632-635.

⁶ KSC-BC-2020-06, Transcript of Hearing (“*First Initial Appearance*”), 9 November 2020, public, p. 23, lines 9-14.

⁷ [REDACTED]. See also *Limaj Judgment*, para. 215; *Haradinaj Retrial Judgment*, paras 634-635.

⁸ Deutsche Welle, Jakup Krasniqi rizgjidhet kryetar i Kuvendit të Kosovës, 21 February 2011, available at: <https://amp.dw.com/sq/jakup-krasniqi-rizgjidhet-kryetar-i-kuvendit-t%C3%AB-kosov%C3%ABs/a-14858749>.

Judge shall “invite” the Defence to file a Pre-Trial Brief and the filing of a Pre-Trial Brief is therefore optional, the Defence will not individually address every single matter alleged in the SPO Pre-Trial Brief. Any factual allegation, assertion or matter in the SPO Pre-Trial Brief, which is not expressly agreed in this Pre-Trial Brief, is disputed and the SPO is required to prove the same to the required standard.⁹

6. In compliance with Rule 95(5)(c), the Defence indicates that, at the present time, it has not identified witnesses that it “intends to call”. Should it be necessary to call a defence after the close of the SPO’s case, the Defence will inform the Trial Panel of any witnesses and evidence it wishes to present pursuant to Rules 119(1) and 119(2)(a). These provisions accurately reflect the differing burdens on the Defence and the SPO. Rule 95(5)(c) is expressed to be “without prejudice to any subsequent amendment or filing” of a witness list. The Defence therefore reserves the right to file a list of potential witnesses at an appropriate time, including after the close of the SPO’s case.

7. The Amended Indictment charges Mr. Krasniqi with committing, through a JCE, aiding and abetting and/or bearing command responsibility for 10 counts: persecution on political, racial, ethnic, or religious grounds contrary to Article 13(1)(h) of the Law,¹⁰ imprisonment contrary to Article 13(1)(e) of the Law, illegal or arbitrary arrest and detention contrary to Article 14(1)(c) of the Law, other inhumane acts contrary to Article 13(1)(j) of the Law, cruel treatment contrary to Article 14(1)(c)(i) of the Law, torture contrary to Article 13(1)(f) of the Law, torture contrary to Article 14(1)(c)(i) of the Law, murder contrary to Article 13(1)(a) of the Law, murder contrary to Article 14(1)(c)(i) of the Law and enforced disappearance of persons contrary to Article 13(1)(i) of the Law.

⁹ This is sufficient to comply with Rule 95(5). See in particular, STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Pre-Trial Judge, *Decision on “Prosecution Motion Regarding the Defence Pre-Trial Briefs”*, 5 July 2013, paras 22, 24; ICTY, *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Trial Chamber II, *Decision on Prosecution Response to “Defendant Brđanin’s Pre-Trial Brief”*, 14 January 2002, paras 7-8.

¹⁰ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”).

8. Mr. Krasniqi pleaded *not guilty* to all the counts in the Indictment and Amended Indictment.¹¹ The Defence reiterates, in accordance with Rule 95(5)(1)(b), that all charges are therefore disputed.

9. Although the SPO has brought charges against four Accused in the same Indictment, each one of the Accused has the constitutional right to a fair and impartial trial,¹² and the evidence against each Accused must be weighed individually. The burden of proof is on the SPO to establish the individual criminal responsibility of each Accused, bearing in mind at all times that Mr. Krasniqi is entitled to be presumed innocent.¹³

II. THE DEFENCE CANNOT RESPOND FULLY AT THIS STAGE

10. The Defence respectfully submits that the SPO's approach to disclosure in this case manifestly prejudices the Defence. The Defence has a clear right to know the content of the case against Mr. Krasniqi, as well as the underlying evidence. This right is provided for in Rules 102 and 103 of the Rules. The extent of redactions, the recent deluge of SPO disclosure (which is continuing as of the date this Pre-Trial Brief is being drafted), the ongoing litigation about amendments to the SPO List of Witnesses and List of Exhibits, and outstanding responses from third parties to Defence Requests for Assistance, prevent the Defence from filing a complete or comprehensive response to the SPO Pre-Trial Brief. Notwithstanding this, every effort has been made to submit a Pre-Trial Brief that will assist the Trial Panel in the management of this case and in understanding the Defence positions at this stage.

¹¹ First Initial Appearance, p. 18, lines 5-7; KSC-BC-2020-06, Transcript of Hearing, 10 May 2022, public, p. 1203, lines 13-14.

¹² Constitution of the Republic of Kosovo, Article 31.

¹³ *Idem*, Article 31(5).

11. At the time of filing this Pre-Trial Brief, the identity of 97 witnesses remains unknown to the Defence,¹⁴ the SPO Pre-Trial Brief remains redacted, and even whole paragraphs of the Indictment itself are redacted.¹⁵ The SPO recently calculated that current protective measures provide for it to disclose for the first time, or lift redactions relating to, 35,000 pages of documents only 30 days before trial, with pending requests relating to a further 11,000 pages.¹⁶ These 46,000 pages do not include the unknown number of pages of material which will become disclosable during trial, 30 days prior to the testimony of the remaining delayed disclosure witnesses. There is thus a huge volume of material relied on by the SPO which the Defence has not seen and to which the Defence cannot respond.

12. The Defence notes that the Court of Appeals Panel has previously found some merit in the Defence claim that the Accused need to be put on full notice of the material facts underlying the charges against them and considered that “the Accused must have sufficient time and resources to meaningfully prepare in relation to the alleged charged incidents that are potentially affected by existing redactions in the Indictment”.¹⁷ The ability of the Defence to meaningfully prepare this Pre-Trial Brief is considerably constrained by these redactions. The redactions and protective measures are also impeding Defence preparations more broadly and the impact which they have upon the fairness of proceedings is likely to be challenged before the Trial Panel. The Defence regrets that this is the evidentiary and disclosure landscape which confronts it at this juncture. It could – and it is respectfully submitted *should* – have

¹⁴ KSC-BC-2020-06, F00948/A02, Specialist Prosecutor, *Annex 2 to Prosecution Submission of Revised Witness List*, 2 September 2022, confidential.

¹⁵ KSC-BC-2020-06, F00999/A02, Specialist Prosecutor, *Annex 2 to Submission of Confirmed Amended Indictment (“Indictment”)*, 30 September 2022, confidential, paras 41-42, 66.

¹⁶ KSC-BC-2020-06, F00952, Specialist Prosecutor, *Prosecution Submissions for Fourteenth Status Conference*, 5 September 2022, public, para. 11.

¹⁷ KSC-BC-2020-06, IA012/F00015, Court of Appeals Panel, *Decision on Defence Appeals Against Decision on Motions Alleging Defects in the Form of the Indictment*, 22 August 2022, confidential, para. 29.

been quite different had a fairer and more principled approach to disclosure been taken by the SPO.

13. A glimpse into the disadvantage and prejudice faced on account of the SPO's approach to disclosure may be what transpired during the night of 30 September 2022 – 1 October 2022. During this period, either just before or just after the deadline imposed by the Pre-Trial Judge,¹⁸ the SPO disclosed to the Defence 2,648 items pursuant to Rule 102(3). Almost two weeks after the deadline had passed, on 13 October 2022, the SPO disclosed an additional 1,162 items under Rule 102(3) to the Defence.¹⁹ The Defence has not had adequate time to assess this material before filing its Pre-Trial Brief. At the time of writing, there are at least three pending applications by the SPO to amend its List of Exhibits or List of Witnesses.²⁰

14. As a result of these matters, this Defence Pre-Trial Brief is necessarily provisional. It is not possible for the Defence to respond to allegations and evidence which are redacted, which have only very recently been disclosed or which are the subject of pending applications for amendments. The Defence reserves the right to seek to submit a more comprehensive Pre-Trial Brief once redactions are lifted and the Defence has been provided with sufficient time and resources to review and refute the SPO's case. At the same time, the decision and approach to disclosure adopted by the

¹⁸ KSC-BC-2020-06, In Court – Oral Order, Order on Disclosure of Rule 102 (3) Material, 20 May 2022, public.

¹⁹ KSC-BC-2020-06, F01034, Specialist Prosecutor, *Prosecution Notification of Disclosure*, 13 October 2022, public, para. 3; Disclosure Package 571.

²⁰ KSC-BC-2020-06, F00890/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of 'Prosecution Rule 102(2) Submission and Related Requests'*, KSC-BC-2020-06-F00890, dated 20 July 2022, 21 July 2022, confidential, with Annexes 1-7 and 9, strictly confidential and *ex parte*, and Annex 8, confidential; F00891/CONF/RED/COR, Specialist Prosecutor, *Corrected Version of 'Confidential Redacted Version of 'Prosecution Request to Amend the Exhibit List and for Protective Measures'*, KSC-BC-2020-06/F00891, dated 20 July 2022', 8 August 2022, confidential; F00947/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of Prosecution Request to Add Two Witnesses and Associated Materials*, 2 September 2022, confidential, with Annexes 1-2, strictly confidential and *ex parte*.

SPO is part of the backdrop of this case, and one which the Defence submits may have ongoing ramifications as trial progresses.

III. BURDEN AND STANDARD OF PROOF

15. The SPO has brought this case against Mr. Krasniqi and it is the SPO that must prove its case. At all times, Mr. Krasniqi is constitutionally entitled to the presumption of innocence.²¹ It follows that the SPO bears the burden of proving each and every factual allegation in the SPO Pre-Trial Brief.

16. In accordance with Article 21(3) of the Law and Rule 140(2), the standard of proof is *beyond reasonable doubt* and this standard applies to the facts constituting the elements of the crimes, the mode of liability of the Accused and all other facts on which the conviction depends.

17. Rule 140(3) highlights that:

In respect of circumstantial evidence, the standard of proof beyond reasonable doubt is only satisfied if the inference from that evidence is the only reasonable one that could be drawn from the evidence presented. If the evidence allows for other reasonable conclusion(s) to be drawn, the standard of proof beyond reasonable doubt is not satisfied.

18. Rule 140(3) is particularly important in the context of this case. There is no credible direct evidence of any common criminal purpose. The SPO's entire case rests on circumstantial evidence. The existence of a common criminal plan must be the only reasonable inference resulting from the evidence.

²¹ Constitution of the Republic of Kosovo, Article 31(5); Criminal Procedure Code of Kosovo, Article 3(1). *See also* Article 21(3) of the Law.

19. The Defence underscores that there is no burden of proof on the Defence. Mr. Krasniqi is not required to disprove the SPO's case. Even in relation to any issue of alibi, it is for the SPO to establish beyond reasonable doubt that Mr. Krasniqi committed the alleged offences, despite the evidence of alibi and not for the Defence to prove that he did not.²² Mr. Krasniqi is entitled to an acquittal, if the SPO fails to prove any element of its case.

20. Moreover, it follows from the presumption of innocence that any doubt about the evidence must be resolved in favour of Mr. Krasniqi, pursuant to the principle *in dubio pro reo*.²³

21. The evidence relied on by the SPO is insufficient to discharge the standard of proof in relation to any charge in the Indictment.

22. The Defence has agreed the following background and contextual facts pursuant to Rule 95(3): -

- i. Jakup Krasniqi, son of Januz, was born on 1 January 1951 in Fatos (Negroc/Negrovce), Drenas (Glllogoc/Glogovac municipality), Kosovo;
- ii. Jakup Krasniqi has Kosovan nationality (personal number 1011284813);
- iii. Jakup Krasniqi became Chairman of the Kosovo Assembly in December 2007;
- iv. Between September 2010 and April 2011, Jakup Krasniqi was acting President of Kosovo;

²² ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Appeals Chamber, *Judgement*, 30 January 2015, para. 343.

²³ Criminal Procedure Code of Kosovo, Article 3(2).

- v. In 2014, Kadri Veseli became Chairman of the Kosovo Assembly;
- vi. Hashim Thaçi was elected President of Kosovo on 26 February 2016;
- vii. Kadri Veseli was elected President of the PDK in the 7th Extraordinary Election Convention of PDK held on 7 May 2016;
- viii. On 10 June 1999, NATO announced the suspension of its air-strikes campaign; and
- ix. On 20 June 1999, KFOR announced the complete withdrawal of FRY Forces from Kosovo.

23. Apart from these nine agreed facts, other facts and matters alleged in the Indictment and in the SPO Pre-Trial Brief remain in dispute. Accordingly, the Trial Panel must assess, in relation to each count in the Indictment and each allegation in the SPO Pre-Trial Brief, whether it is satisfied that every element of the crimes alleged and the modes of responsibility pleaded have been established beyond reasonable doubt by the SPO's evidence.

IV. CREDIBILITY AND RELIABILITY OF THE SPO'S EVIDENCE

24. In assessing whether the SPO has discharged its burden of proof, the Defence highlights at the outset that there are manifest and serious concerns about the credibility and reliability of much of the evidence relied upon by the SPO. As a result, the veracity and reliability of all of the evidence relied on by the SPO in its Pre-Trial Brief is disputed or otherwise not accepted by the Defence at this stage. In simple terms, the SPO is put to strict proof in relation to all matters not expressly accepted by the Defence.

25. In particular, despite the obligation on the SPO to contribute to the establishment of the truth,²⁴ the SPO Pre-Trial Brief relies on witnesses who have previously been found to be unreliable (or not credible) by other courts and tribunals. This is a matter of a profound concern to the Defence and should, it is submitted, give the Trial Panel considerable pause for thought. Witnesses found not credible by other international judges, when testifying to the same issues, have been relied upon by the SPO without caution or discernment. For instance, an EULEX Trial Panel found that [REDACTED] was not a credible witness in relation to Klečkë/Klečka and [REDACTED] “[REDACTED]”.²⁵ Yet, the SPO is content to rely upon this “[REDACTED]” evidence.²⁶ More troubling still, perhaps, the SPO has deliberately failed to appropriately justify its reliance on such discredited evidence. At the very least, an ethical prosecution, conducting a fair and objective investigation and trial would have been expected to have alerted the Trial Panel to previous findings by international judges and not leave it to the Defence to ensure the Trial Panel is alerted to such powerfully expressed concerns.

26. Similarly, the SPO relies on allegations in relation to accused persons who were acquitted in previous ICTY or EULEX proceedings.²⁷ For instance, the SPO submits in its PTB that [REDACTED] “[REDACTED]” [REDACTED].²⁸ One would not know from reading the SPO Pre-Trial Brief that Mr. Limaj was charged with individual criminal responsibility for the exact same crimes committed at Llapushnik/Lapušnik and was acquitted of all charges.²⁹ These findings were upheld on appeal.³⁰ Given the burden of proof that rests at all times upon the SPO, and the ethical obligations that

²⁴ Rule 62.

²⁵ [REDACTED].

²⁶ SPO PTB, paras 110, 145, 149, 303-309, 316, 329-334, 469, 474, 480, 488, 490-494, 496-497, 502-503, 505-506, 514-516.

²⁷ ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-A, Appeals Chamber, *Judgement* (“*Limaj Appeal Judgment*”), 27 September 2007, paras 219, 275; *Haradinaj Retrial Judgment*, paras 681-685; A.K. *Judgment*, p. 237.

²⁸ SPO PTB, para. 307.

²⁹ *Limaj Judgment*, para. 740.

³⁰ *Limaj Appeal Judgment*, paras 219, 275-276.

should underpin every action and decision of the SPO,³¹ it is extremely troubling that the SPO chose to remain silent regarding such critically important findings.

27. Further, caution is needed given the source of much of the evidence that the SPO seeks to rely upon. The trial will expose much of this evidence as tainted and incapable of reliance given the burden of proof. It is clear that much of the SPO's evidence emanates directly from the Serbian State or, at least, has been gathered with the aid of Serbia. The SPO relies on witnesses directly from the Serbian intelligence services, including those who were actively engaged in Kosovo during the conflict.³² Indeed, some of these witnesses appear to have been part of, or otherwise supported individuals involved in, a common plan of the Serbian regime to inflict crimes against humanity and war crimes on the people of Kosovo and who were dedicated to the defeat of the KLA who stood in their way. One such witness, [REDACTED], was even offered incentives by the Head of the Serbian intelligence and by the Serbian President to cooperate with the SPO.³³ [REDACTED] appear to have been contacted through the Serbian State and a representative of Serbia attended their interviews with the SPO.³⁴ [REDACTED].³⁵

28. Evidence which derives from the adversary during a conflict must be approached with the greatest caution, given the inevitable bias and competing agendas which arise.³⁶ These risks are not theoretical or abstract. Serbia has a long and demonstrable history of doctoring evidence and seeking to use it to implicate the KLA for crimes which it did not commit. For instance, on 14 December 1998, a gunman shot

³¹ Code of Professional Conduct-for Counsel and Prosecutors before the Kosovo Specialist Chambers, Article 31(c).

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-T, Trial Chamber II, *Judgement*, 12 December 2012, para. 37; *Haradinaj* Retrial Judgment, para. 653.

at a group of young Serbs in Panda café in Peja/Peć, leaving six dead and two injured.³⁷ After several Albanians were arrested, tortured, tried, and eventually found not guilty,³⁸ the highest levels of the Serbian apparatus, including Serbia's former Prime Minister Drašković and President Vučić, admitted that the massacre had been orchestrated by the Serbian intelligence in order to blame the KLA.³⁹ Additional, similar incidents have been highlighted by the Defence in the course of pre-trial proceedings.⁴⁰

29. More than 20 years after the end of the armed conflict, there is ample evidence that Serbian efforts to smear the KLA continue. In April 2022, it was reported that Dick Marty was under police protection in Switzerland as a result of a plot by the Serbian intelligence services to kill him and blame the KLA.⁴¹ The SPO's penchant for using such evidence blindly and without proper scrutiny is a further example of a prosecution that endangers the fair trial rights of the Accused by presenting obviously tainted or unreliable evidence as if it would be safely relied upon.

30. One-sided and evidentially questionable Serbian evidence occupies a central role in the SPO Pre-Trial Brief. For instance, the Serbian intelligence witnesses are relied

³⁷ See Balkan Transitional Justice, Kosovo's Panda Café Massacre Mystery Unsolved 20 years on, 14 December 2018, available at: <https://balkaninsight.com/2018/12/14/kosovo-s-panda-caf%C3%A9-massacre-mystery-unsolved-20-years-on-12-13-2018/>.

³⁸ *Ibid.*

³⁹ See Kurir, Vuk Drašković: Milošević naredio Radetu i Legiji da ubiju srpsku decu!, 18 January 2014, available at: <https://www.kurir.rs/vesti/politika/1185359/vuk-draskovic-milosevic-naredio-radetu-i-legiji-da-ubiju-srpsku-decu>; Rade Marković dao nalog da se ubiju srpska deca u Peći 1998?!, 17 January 2014, available at: <https://www.kurir.rs/vesti/politika/1182597/rade-markovic-dao-nalog-da-se-ubiju-srpska-deca-u-peci-1998>.

⁴⁰ KSC-BC-2020-06, F00877, Joint Defence, *Corrected Version of Joint Defence Motion for Disclosure Pursuant to Rule 103, With Public Annexes 1-3 and Confidential Annex 4 (F00877, dated 12 July 2022)*, 21 July 2022, confidential, paras 34-45.

⁴¹ Swiss Info, Former Swiss Prosecutor 'Targeted by Serbian Assassins', 12 April 2022, available at: <https://www.swissinfo.ch/eng/former-swiss-prosecutor--targeted-by-serbian-assassins-/47506812>; RTS Radio Télévision Suisse, Menacé de Mort, Dick Marty vit sous haute protection depuis seize mois, 11 April 2022, available at: <https://www.rts.ch/info/suisse/13007228-menace-de-mort-dick-marty-vit-sous-haute-protection-depuis-seize-mois.html>.

upon in an attempt to establish the authenticity and reliability of what are said to be written records of contemporaneous intercepted communications between the KLA Commanders,⁴² which in turn are relied upon to allege “the detention and mistreatment of members of the FRY forces and of Opponents”.⁴³ The original recordings (if genuine) have never been produced. Nor has the SPO obtained a complete set of purported intercepts records, [REDACTED].⁴⁴ Taking into account their history of distorting evidence and planting false information,⁴⁵ the Chamber should be very slow to accept the word of Serbian intelligence officers that these typed documents are genuine and, in general, should exercise extreme caution in evaluating the reliability and credibility of evidence emanating from the Serbian state.

V. MR. KRASNIQI'S DEFENCE

31. In general terms, Mr. Krasniqi denies the existence of a JCE, as alleged in the Indictment. There was no common criminal purpose to gain control of Kosovo by unlawful means including the commission of crimes against suspected collaborators, LDK members, Serbian and Roma civilians or any other ‘opponents’, nor was Mr. Krasniqi a party to any common criminal purpose.

32. Instead, the only common purpose which brought the members of the KLA and the General Staff together was to liberate Kosovo from the repressive and discriminatory Serbian regime, which was condemned by the international community, and to protect civilians against the horrific crimes which were being committed by the Serbian military and paramilitary forces. Any crimes which the SPO establishes were, in fact, committed by any members of the KLA were not the product

⁴² [REDACTED].

⁴³ SPO PTB, para. 88.

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

of a common criminal purpose, but were instead isolated and sporadic acts committed by individuals for their own reasons.

33. The SPO overstates Mr. Krasniqi's role, responsibilities, and powers within the KLA and the Provisional Government of Kosovo ("PGoK"). Mr. Krasniqi denies that he contributed at *all*, let alone *significantly* contributed, to any common criminal purpose and/or to any crime.

34. Further, Mr. Krasniqi also denies that he intended the commission of any crime. The SPO overlooks that both he, and the General Staff more broadly, spoke in favour of the protection of civilians. These statements were not false denials, but represented the genuinely-held position of Mr. Krasniqi and the General Staff.⁴⁶ It is further denied that the commission of any crime was foreseeable to Mr. Krasniqi.

35. The SPO similarly exaggerates the organisation and structure of the KLA. The true position is that the KLA was a voluntary army, which at the start of the Indictment Period in March 1998, had a small number of members and no vertical command structure. Significant numbers of people volunteered to join the KLA following the notorious killing of the Jashari family in Prekaz/Prekaze, in March 1998. The entirely legitimate attempts to accommodate these volunteers, were swept aside by repeated offensives by Serbian Forces against the KLA and during the North Atlantic Treaty Organisation ("NATO") bombings. It was never possible for the KLA to achieve the hierarchy, command structure and/or communications network pleaded by the SPO.

36. Mr. Krasniqi denies that he had effective control over any member of the KLA or any other individual who is alleged to have committed crimes charged in the

⁴⁶ *Contra* SPO PTB, para. 263.

Indictment. He did not possess disciplinary powers; he did not have *any* military experience, as a commander or otherwise. Mr. Krasniqi did not have knowledge that any crime had been committed by members of the KLA or was likely to be committed by KLA members. Further, Mr. Krasniqi did not fail to take necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the alleged perpetrators. No such measures were within his power.

37. It is further denied that Mr. Krasniqi provided any assistance, encouragement and/or moral support which had any, let alone a substantial effect on the perpetration of any crime.⁴⁷

38. The structure of the remainder of this Pre-Trial Brief will: set out the military and political context; summarise the legal requirements of the modes of responsibility charged; address the limited role of Mr. Krasniqi; and respond to the SPO Pre-Trial Brief allegations on the structure of the KLA. The Defence will then set out its position on the counts charged, including the contextual elements that the SPO is required to establish.

VI. MILITARY AND POLITICAL CONTEXT

39. The context of this case, which is barely acknowledged in the Indictment and only referred to in passing in the SPO Pre-Trial Brief, is that of a massive persecutory campaign of murder, torture, and ethnic cleansing committed by the military, police and paramilitary forces of the Federal Republic of Yugoslavia and Republic of Serbia (together “Serbian Forces”) against Kosovo Albanians.

⁴⁷ SPO PTB, para. 708.

40. The appalling criminal campaign by the Serbian Forces is clearly documented, following a thorough review of evidence, as reflected in ICTY judgments.⁴⁸ The summary which follows is almost entirely drawn from adjudicated facts in those proceedings.⁴⁹

41. There is a long history of discrimination against the Albanian population of Kosovo, ranging from the quelling of demonstrations in 1981,⁵⁰ which led to the arrests and detentions of political activists, including Mr. Krasniqi,⁵¹ to the murders and disappearances of Albanian youth serving in the Yugoslav People's Army ("VJ").⁵² This would set a pattern of behaviour by the Serbian Forces that would endure throughout the 1980s and 1990s, beyond the Indictment Period. The campaign waged by Serbian Forces during the Indictment Period traces its proximate origins to 28 March 1989, when the Serbian Assembly amended the Constitution and effectively revoked Kosovo's autonomous status. All Kosovo institutions and governing bodies, including the Constitutional Court and the Assembly of Kosovo, were either dissolved or formally subordinated to Serbia.⁵³

42. Following these events, the Serbian Assembly adopted a series of political and economic measures specifically targeting Kosovo Albanians.⁵⁴ Albanian language schools were closed,⁵⁵ and both Albanian students and professors were denied access

⁴⁸ ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, Trial Chamber III, *Judgement*, ("Milutinović Vol. 1"; "Milutinović Vol. 2" and "Milutinović Vol. 3"), 26 February 2009; *Prosecutor v. Đorđević*, IT-05-87/1-T, Trial Chamber II, *Public Judgement with Confidential Annex, Volume I of II* ("Đorđević Judgment"), 23 February 2011; *Limaj Judgment*.

⁴⁹ Rule 157(2) entitles the Panel to take judicial notice of adjudicated facts from final proceedings from other jurisdictions relating to matters at issue in the current proceedings.

⁵⁰ *Đorđević Judgment*, para. 22; *Milutinović Vol. 1*, para. 218.

⁵¹ IT-04-84 P00340, p. 3289, lines 1-22.

⁵² Balkan Transitional Justice, Fate of 'Disappeared' Yugoslav Soldiers from Kosovo Still Unknown, 16 November 2000, available at <https://balkaninsight.com/2020/11/16/fate-of-disappeared-yugoslav-soldiers-from-kosovo-still-unknown/>.

⁵³ *Limaj Judgment*, para. 38; *Đorđević Judgment*, para. 28; *Milutinović Vol. 1*, para. 220.

⁵⁴ *Limaj Judgment*, para. 39.

⁵⁵ *Đorđević Judgment*, para. 31.

to universities.⁵⁶ In the spring of 1990, around 8,000 Kosovo Albanian students were poisoned with a chemical substance, while Serbian and Montenegrin students in the same institutions were spared. This act is attributed to Serbian State Security.⁵⁷ Kosovo Albanians were thus forced to set-up a parallel, unofficial system of education in Albanian language, which was established by the LDK. Classes were taught in private facilities and financed through private contributions. This system remained in place until the end of the conflict in 1999.⁵⁸

43. Around the same time, Kosovo Albanians were dismissed from industries, business enterprises, and public institutions, including ministries and the judiciary, and replaced with Serbs.⁵⁹ By 1993, it is estimated that more than 150,000 Kosovo Albanians had lost their jobs.⁶⁰ Kosovo Albanian newspapers, radio and television stations were also closed down.⁶¹

44. In parallel, Serbian Forces in Kosovo took steps to repress dissent, encompassing not only the suppression of all forms of protests (in particular the brutal quelling of peaceful demonstrations)⁶² but also daily beatings, mistreatment, arrests, arbitrary detentions and torture of Kosovo Albanians.⁶³ Tensions were further exacerbated by the Dayton Agreement in December 1995, in which the situation of Kosovo was not even addressed, leading to mounting frustration amongst the Kosovo Albanian population.⁶⁴ In the aftermath, dissent and protests were met with further instances of arbitrary detentions and abuses of Kosovo Albanians by the Serbian police.⁶⁵ During

⁵⁶ *Limaj Judgment*, para. 39; *Milutinović Vol. 1*, para. 225.

⁵⁷ Kohanet, Nga Helmimet e 90-ës, Shumë Nxënës Shqiptarë Mbetën me Pasoja, 25 May 2015, available at: <https://archive.koha.net/?id=1&l=56023>; [REDACTED].

⁵⁸ *Dorđević Judgment*, para. 31; *Milutinović Vol. 1*, para. 225.

⁵⁹ *Dorđević Judgment*, para. 29; *Milutinović Vol. 1*, para. 224.

⁶⁰ *Dorđević Judgment*, para. 29.

⁶¹ *Dorđević Judgment*, para. 27; *Milutinović Vol. 1*, para. 224.

⁶² *Dorđević Judgment*, paras 32, 34; *Milutinović Vol. 1*, para. 235.

⁶³ *Dorđević Judgment*, para. 33; *Milutinović Vol. 1*, para. 224; *Limaj Judgment*, para. 47.

⁶⁴ *Limaj Judgment*, para. 47.

⁶⁵ *Dorđević Judgment*, para. 33.

this period, estimates suggest that almost 7,000 Kosovo Albanians were arrested, interrogated and detained for political reasons, often on the sole basis of forced confessions given under torture.⁶⁶

45. Due to these events, many Kosovo Albanians left Kosovo. Estimates suggest that between 1989 and 1997, approximately 350,000 Kosovo Albanians left the country, while the Serbian government set up various incentives, such as housing benefits, to encourage Serbians and Montenegrins to move to Kosovo.⁶⁷

46. In 1998, the leaderships of the Federal Republic of Yugoslavia (“FRY”) and Serbia intensified their actions, and implemented a common criminal plan to modify the ethnic balance in Kosovo⁶⁸ by waging a campaign of terror, persecution and extreme violence against the Kosovo Albanian civilian population.⁶⁹ To enact this plan, massive Serbian Forces were deployed in Kosovo. In the spring of 1999, the VJ in Kosovo had a total manpower of 61,892.⁷⁰ In October 1998, there were also around 14,000 personnel from the Ministry of Internal Affairs of Serbia (“MUP”) in Kosovo, which increased to 15,779 in April 1999.⁷¹ In addition to these regular forces, various paramilitary groups under the control of Serbia and acting in concert with the Serbian MUP were also present in Kosovo.⁷² The most notorious groups included the Scorpions, Arkan’s Tigers, the White Eagles (aka Šešelj’s men), and the Pauk Spiders.⁷³ In addition, starting in early 1998, Serbian Forces armed and trained the local

⁶⁶ Fazliu E., Kosovo 2.0, Kosovo’s Political Prisoners, 26 April 2016, available at: <https://kosovotwopointzero.com/en/kosovos-political-prisoners/>.

⁶⁷ *Dorđević Judgment*, para. 29; *Milutinović Vol. 1*, para. 227.

⁶⁸ Prior to 1999, the population of Kosovo was approximately 2.1 million, 1.7 million (83%) of which were ethnic Albanians. By June 1999, more than 800,000 Kosovo Albanians had left the country. See *Dorđević Judgment*, para. 2009.

⁶⁹ *Dorđević Judgment*, para. 2007.

⁷⁰ *Idem*, paras 270, 2060.

⁷¹ *Idem*, para. 269.

⁷² *Dorđević Judgment*, para. 194; *Milutinović Vol. 1*, paras 737-745.

⁷³ *Dorđević Judgment*, paras 75, 83, 204-205, 209-210, 212, 214, 216.

population holding non-Albanian ethnicity in Kosovo so that, by July 1998, 54,683 non-Albanian civilians in Kosovo were armed.⁷⁴

47. Serbian Forces sought to terrorise and expel the Albanian population of Kosovo through a variety of brutal crimes,⁷⁵ including, but not limited to: (i) the indiscriminate shelling of Albanian villages; (ii) the use of threats and violence against Albanian civilians; (iii) the looting and burning of houses and entire villages; (iv) the burning of mosques; (v) the killing of Albanian individuals – including women, children, and the elderly – or entire families, often to serve as a warning to others that they would undergo the same fate if they did not leave their homes; and (vi) the forced expulsion of Albanians from their homes, villages or towns, in most cases to join columns of displaced persons directed by Serbian Forces across borders.⁷⁶ The expulsion of the Albanian population was systematic and organised,⁷⁷ to the extent that the MUP and the VJ forces seized and destroyed identity documents and licence plates of displaced Kosovo Albanians, in order to prevent them from proving their identities as citizens with the right to return.⁷⁸

48. Atrocious massacres were perpetrated by the Serbian Forces throughout the Indictment Period. Notably, these crimes did not spare women and children; by the end of the conflict, it is estimated that more than 1,000 Kosovo Albanian children under the age of 18 were killed by Serbian Forces, and more than 20,000 women were raped.⁷⁹

⁷⁴ *Dorđević* Judgment, paras 92, 217-223, 324; *Milutinović* Vol. 1, paras 764, 775, 784.

⁷⁵ *Dorđević* Judgment, paras 2007, 2130.

⁷⁶ *Dorđević* Judgment, para. 2129.

⁷⁷ *Dorđević* Judgment, para. 549; *Milutinović* Vol. 2, paras 1099, 1148-1149, 1240-1245, 1259; *Milutinović* Vol. 3, paras 42, 95, 822.

⁷⁸ *Dorđević* Judgment, para. 2080; *Milutinović* Vol. 2, paras 75, 139, 184, 266, 323, 460, 514.

⁷⁹ U.S. House of Representatives Committee on Foreign Affairs, *Kosovo's Wartime Victims: the Quest for Justice*, 30 April 2019, pp. 2, 6, 9, 12, 14, 25-26, 38, 40, 59, 63-64, 74-75, available at: <https://www.govinfo.gov/content/pkg/CHRG-116hhrg36132/pdf/CHRG-116hhrg36132.pdf>.

49. Following the events in Qirez/Ćirez, Likoshan/Likošane, and Prekaz/Prekaze in February/March 1998, when Serbian Forces killed at least 24 and 59 people respectively (including pregnant women and children),⁸⁰ the level of violence intensified dramatically. For example, in August/September 1998, a large number of Albanian villages along the Peja/Peć-Prishtinë/Priština road, and parts of Malishevë/Mališevo, were looted, burned, and eventually razed to the ground.⁸¹ On 26 September 1998, Serbian Security Forces killed 21 members of the Delijaj family in the village of Abri-e-Epërme/Gornje Obrinje, Glllogoc/Glogovac municipality. Many of the victims, including women (one of whom was pregnant), children, and elderly, were brutally executed.⁸²

50. In early 1999, the scale and frequency of the crimes committed by Serbian Forces increased, despite the ceasefire negotiated in the Holbrooke-Milošević agreement of October 1998.⁸³ On 15 January 1999, no less than 45 Kosovo Albanian civilians, including a woman and a child, were killed in Reçak/Račak, Shtime/Štimlje municipality, many having been shot at close range, and one victim decapitated.⁸⁴

51. Between 25 and 28 March 1999, Serbian Forces perpetrated six different massacres of Kosovo Albanian civilians in different areas of Kosovo. On 25 March 1999, in the village of Bellacërkë/Bela Crkva, Rahovec/Orahovac municipality, MUP Forces set houses on fire, and shot at 14 civilians, ten of whom were women and children. Only one person survived.⁸⁵ Later that day, the MUP Forces opened fire at a group of 65 civilians, killing 41. Serbian Forces also destroyed the mosque and several

⁸⁰ *Dorđević* Judgment, para. 271; *Limaj* Judgment, para. 49.

⁸¹ *Milutinović* Vol. 1, paras 878, 883, 886, 890, 893-894.

⁸² *Dorđević* Judgment, para. 339; *Milutinović* Vol. 1, paras 899, 901-902, 912.

⁸³ *Dorđević* Judgment, paras 2011, 2026; [REDACTED]; with regard to the events in Reçak/Račak, *see* [REDACTED].

⁸⁴ *Dorđević* Judgment, para. 416.

⁸⁵ *Dorđević* Judgment, paras 460-465; [REDACTED].

other buildings in the village.⁸⁶ On the same day, Serbian Forces entered the village of Krushë-e-Vogël/Mala Kruša, also in Rahovec/Orahovac municipality. With the help of local Serbian villagers, they looted and set Albanian houses on fire.⁸⁷ Nine Kosovo Albanians, who had refused to leave their house, were burned alive.⁸⁸ MUP Forces then gathered a large group of civilians in a barn, shot at them, and then set the barn on fire. At least 104 civilians were killed.⁸⁹ On 26 March 1999, at least 45 members of the Berisha family, including young children and women (one of whom was pregnant), were brutally killed in Suharekë/Suva Reka by local MUP members.⁹⁰ The bodies were transported and buried in a mass grave at the Batajnica SAJ Centre, in Serbia, from where they were exhumed in 2001.⁹¹ Around the same time, MUP and VJ forces carried out murders, forced displacement, looting, and burning of buildings, including mosques, in Celinë/Celina, Rahovec/Orahovac municipality.⁹² Further, on 28 March 1999, over 100 civilians were gathered and shot by Serbian Forces in the village of Izbicë/Izbica, Skënderaj/Srbica municipality. At least 89 were killed.⁹³

52. In April and May 1999, the situation further deteriorated. For instance, on 27 April 1999, the MUP and VJ forces killed no less than 296 unarmed civilians in Mejë/Meja, during “Operation Reka”.⁹⁴ On 14 May 1999, Serbian Forces burned Albanian houses and executed 35 civilian men in Qyshk/Ćuška. Only two individuals survived.⁹⁵

⁸⁶ *Dorđević* Judgment, paras 469-478.

⁸⁷ *Idem*, paras 482, 486.

⁸⁸ *Idem*, para. 485.

⁸⁹ *Idem*, paras 490, 495.

⁹⁰ *Dorđević* Judgment, paras 670, 672, 674-676, 683; *Milutinović* Vol. 2, para. 535.

⁹¹ *Dorđević* Judgment, para. 1377.

⁹² *Idem*, paras 520-531.

⁹³ *Dorđević* Judgment, paras 620, 622, 632-633; *Milutinović* Vol. 2, paras 679, 1219.

⁹⁴ *Dorđević* Judgment, paras 1736-1739, 1741; *Milutinović* Vol. 2, paras 216-217, 238, 1159, 1197.

⁹⁵ *Dorđević* Judgment, paras 754-761.

53. At the same time, the forced displacement of Albanians from Kosovo continued. On 28 March 1999, in the Dushanovë/Dušanovo suburb of Prizren alone, 4,000-5,000 Kosovo Albanians were expelled by Serbian Forces.⁹⁶ In April 1999, around 4,000 people were deported from the town of Përlepnice/Prilepnica, in Gjilan/Gnjilane municipality.⁹⁷ Similar deportations were carried out in many other municipalities, including Rahovec/Orahovac, Suharekë/Suva Reka, Mitrovicë/Kosovska Mitrovica, Ferizaj/Uroševac, Kaçanik/Kaçanik/, Deçan/Dečani and Vushtrri/Vučitrn.⁹⁸ By June 1999, estimates suggest that over 800,000 Kosovo Albanians had been forced out of the country.⁹⁹

54. In highlighting the brutal crimes committed by Serbian Forces against Kosovo Albanians, the Defence does not, of course, assert a defence of *tu quoque*.¹⁰⁰ It is, however, submitted that the crimes and human rights abuses committed against Kosovo Albanians are of vital importance to:

- i. *Understand* the relevant events in light of the historical reality of Kosovo;
- ii. *Illustrate* the prevailing climate of tension, violence, and fear throughout Kosovo;
- iii. *Comprehend* the reasons why groups of Kosovo Albanians felt compelled to self-organise and take up arms, becoming local staffs;

⁹⁶ *Dorđević* Judgment, paras 571, 1626; *Milutinović* Vol. 2, paras 286, 1201.

⁹⁷ *Dorđević* Judgment, paras 1035, 1659.

⁹⁸ *Idem*, para. 1701.

⁹⁹ IT-05-87.1 P00734.

¹⁰⁰ The Defence readily acknowledges that *tu quoque* (i.e. that the other party to a conflict has committed atrocities) is not a defence to charges of war crimes or crimes against humanity.

- iv. *Support* the contention that the only common purposes pursued by the KLA were to defend Albanian civilians from the indiscriminate and intentional attacks by the Serbian Forces and to liberate Kosovo from this oppression;
- v. *Guide* any assessment of whether there was effective command and control within the KLA, since the constant attacks by a better-equipped and ruthless adversary did not afford the KLA the space to implement the formal hierarchical structure of a regular army; and
- vi. Should the SPO establish the perpetration of any crime to the requisite standard, *validate* the defence that any such crimes were not part of a common criminal purpose at a leadership level, but were spontaneous and sporadic acts undertaken by inexperienced individuals for personal motivations such as revenge and in reaction to the horrific crimes being committed around them.

VII. LEGAL REQUIREMENTS

55. The SPO Pre-Trial Brief fails to set out the legal requirements of the pleaded modes of responsibility or crimes. Indeed, the dearth of analysis of the Accused's alleged individual criminal responsibility in the SPO Pre-Trial Brief stands in stark contrast to the attention devoted, for example, to the alleged crimes in this case. The Defence will attempt to assist the Trial Panel by setting out the applicable legal requirements below, whilst reserving the right to challenge any legal issues raised by the SPO as and when the SPO actually pleads its position.

A. JOINT CRIMINAL ENTERPRISE

56. The Defence has already made clear its objections to the use of JCE in this case, and continues to assert that the Kosovo Specialist Chambers (“KSC”) has no jurisdiction over JCE as a mode of liability.

57. The Defence disputes that JCE – and particularly the extended form of Joint Criminal Enterprise (“JCE III”) – are modes of responsibility which are incorporated into the Law, formed part of customary international law during the Indictment Period and were foreseeable and accessible to Mr. Krasniqi.¹⁰¹ It must also be noted that the Specialist Chamber of the Constitutional Court has rejected the Defence referral regarding JCE as “premature”,¹⁰² which indicates that the Defence retains the right to challenge this issue, including *inter alia* before the Trial Panel, the Supreme Court and, ultimately, the Constitutional Court. Whilst the Defence notes the contrary conclusion of the Appeals Chamber,¹⁰³ the applicability of JCE remains a disputed issue in the proceedings.

58. Without prejudice to its primary position that JCE, and particularly JCE III, are inapplicable, the Defence sets out below the requirements of JCE as defined by the *ad hoc* tribunals.

¹⁰¹ KSC-BC-2020-06, F00220, Krasniqi Defence, *Krasniqi Defence Preliminary Motion on Jurisdiction*, 15 March 2021, public, with Annex 1, public.

¹⁰² KSC-CC-2022-13, F00010, Specialist Chamber of the Constitutional Court, *Decision on the Referral of Jakup Krasniqi Concerning the Legality of Charging Joint Criminal Enterprise*, 13 June 2022, public, paras 53, 55-56.

¹⁰³ KSC-BC-2020-06, IA009/F00030, Court of Appeals Panel, *Decision on Appeals Against “Decision on Motions Challenging the Jurisdiction of the Specialist Chambers” (“Appeals Panel Jurisdiction Decision”)*, 23 December 2021, public, paras 144, 158, 194, 196, 224.

59. The Defence emphasises at the outset that JCE is not an open-ended concept and does not permit convictions based on guilt by association.¹⁰⁴ Instead, it requires the SPO to prove beyond reasonable doubt that:

- i. The participants shared a common state of mind to commit the crimes constituting the criminal purpose of the JCE (“JCE I”)¹⁰⁵ or for JCE III that any crimes committed were a natural and foreseeable consequence of the JCE and the Accused knowingly assumed a risk that they would occur (JCE III);¹⁰⁶
- ii. The members of the JCE acted collectively in consort with each other in the implementation of the common purpose;¹⁰⁷
- iii. The members of the JCE shared the criminal intent to commit the crimes forming part of the JCE.¹⁰⁸ In order to prove this, the SPO must show that intent is the only reasonable inference arising from the evidence;¹⁰⁹
- iv. The contribution made by the members of the JCE to the execution of the crimes was ‘significant’.¹¹⁰ This requires that the Accused made a significant contribution to the common criminal purpose itself,¹¹¹ as distinct from any general contribution to the resistance against Serbian repression.

¹⁰⁴ ICTY, *Prosecutor v. Brđanin*, IT-99-36-A, Appeals Chamber, *Judgement* (“*Brđanin* Appeal Judgment”), 3 April 2007, para. 428.

¹⁰⁵ ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, *Judgement* (“*Tadić* Appeal Judgment”), 15 July 1999, para. 228.

¹⁰⁶ ICTY, *Prosecutor v. Martić*, IT-95-11-A, Appeals Chamber, *Judgement*, 8 October 2008, para. 83.

¹⁰⁷ *Brđanin* Appeal Judgment, paras 413, 430.

¹⁰⁸ *Tadić* Appeal Judgment, para. 228.

¹⁰⁹ *Brđanin* Appeal Judgment, para. 429.

¹¹⁰ *Idem*, para. 430.

¹¹¹ *Idem*, para. 427, and fns 908-909.

60. Further, where crimes were perpetrated by a person who was not a member of the JCE, the crime must be imputed to at least one member of the JCE, who has been found to have acted in accordance with the common criminal plan in using the principal perpetrator. The existence of this link between the principal perpetrator and a member of the JCE must be assessed on a case-by-case basis.¹¹²

61. Finally, the Defence denies that JCE III is capable of applying to specific intent crimes such as persecution. Relying in particular on the jurisprudence of the Special Tribunal for Lebanon (“STL”),¹¹³ the Pre-Trial Judge held that it would be a legal anomaly to convict the Accused pursuant to JCE III for a specific intent crime.¹¹⁴ Although the Court of Appeals Panel overturned the Pre-Trial Judge’s conclusion, it did so only on the basis that the contours of a mode of responsibility are not a jurisdictional issue and hence reserved this issue to the Trial Panel.¹¹⁵

B. COMMAND RESPONSIBILITY

62. Article 16(1)(c) of the Law provides that “the fact that any of the acts or omissions were committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof”.

63. The SPO alleges that “the Accused” constituted the highest-ranking members of the KLA/PGoK, who failed to take necessary or reasonable measures to prevent the

¹¹² *Idem*, paras 413, 430.

¹¹³ STL, *Prosecutor v. Ayyash et al.*, STL-11/01/I, Appeals Chamber, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, 16 February 2011, paras 248-249.

¹¹⁴ KSC-BC-2020-06, F00412, Pre-Trial Judge, *Decision on Motions Challenging the Jurisdiction of the Specialist Chambers*, 22 July 2021, public, para. 208.

¹¹⁵ Appeals Panel Jurisdiction Decision, paras 235-236.

commission of the crimes charged and therefore are responsible for any alleged crimes committed by their subordinates.¹¹⁶ However, the evidence does not establish any *specific* way in which individual responsibility may be attributed to Mr. Krasniqi pursuant to command responsibility.

64. Command responsibility requires the SPO to prove beyond reasonable doubt: -
- i. The existence of a superior-subordinate relationship;
 - ii. That the alleged superior knew or had reason to know that specific crimes had been committed by his subordinates or would be committed by them;
 - iii. That the alleged superior failed to take necessary and reasonable steps to prevent the commission of the crime or to punish the perpetrator;¹¹⁷ and
 - iv. That a causal relationship existed between the alleged failure of the superior and the commission of the crime or the impunity of the direct perpetrator.¹¹⁸

65. A superior-subordinate relationship is established when the superior has effective control over the subordinate; effective control requires the superior to have the ability to maintain and enforce the compliance of the subordinate with rules and orders.¹¹⁹ It is not sufficient to show that the superior had influence over the subordinate to reach a threshold of effective control, even if that influence is

¹¹⁶ SPO PTB, paras 4, 261, 709-713.

¹¹⁷ ICTY, *Prosecutor v. Halilović*, IT-01-48-A, Appeals Chamber, *Judgement* (“Halilović Appeal Judgment”), 16 October 2007, para. 59.

¹¹⁸ Mettraux, G., *The Law of Command Responsibility* (“Mettraux”), Oxford University Press 2009, pp. 82-89.

¹¹⁹ ICTY, *Prosecutor v. Orić*, IT-03-68-T, Trial Chamber II, *Judgement* (“Orić Judgment”), 30 June 2006, para. 311.

substantial.¹²⁰ The ability to exercise effective control will almost invariably not be satisfied unless a relationship of subordination existed¹²¹ and the superior possessed a material ability to prevent subordinate activities or punish subordinate offenders.¹²²

66. It follows that it is a necessary precursor to the assessment of effective control that the SPO must identify the subordinates who directly perpetrated the underlying crimes with sufficient precision to enable the Trial Panel to assess whether the alleged superior had effective control over the direct perpetrators.

67. In relation to knowledge, the SPO must show that the Accused had knowledge of the elements constitutive of the crimes charged.¹²³ Mere rumours circulating in the streets are insufficient to ascribe knowledge to the Accused.¹²⁴ Moreover, in the context of an informal military structure such as the KLA, the threshold required to establish knowledge is higher than for those operating within a highly disciplined and formalised chain of command with established reporting and monitoring systems.¹²⁵

68. The assessment of whether the superior failed to take necessary and reasonable measures should be conducted on a case-by-case basis.¹²⁶ It must be grounded in the consideration of what measures were at the superior's disposal at the material time and, indeed, in what crimes the superior knew about.¹²⁷ The superior is not expected

¹²⁰ ICTY, *Prosecutor v. Delalić et. al.*, IT-96-21-Abis, Appeals Chamber, *Judgement* ("Delalić Appeal Judgment"), 20 February 2001, para. 266.

¹²¹ *Halilović Appeal Judgment*, para. 59.

¹²² *Delalić Appeal Judgment*, para. 266.

¹²³ ICTY, *Prosecutor v. Krnojelac*, IT-97-25-A, Appeals Chamber, *Judgement*, 17 September 2003, paras 153-155.

¹²⁴ ICTY, *Prosecutor v. Hadžihasanović and Kubara*, IT-01-47-T, Trial Chamber, *Judgement*, 15 March 2006, para. 1223.

¹²⁵ *Orić Judgment*, para. 320.

¹²⁶ ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-T, Trial Chamber, *Judgement*, 25 June 1999, para. 81.

¹²⁷ ICC, *Prosecutor v. Bemba*, ICC-0105-01/08-3636RED, Appeals Chamber, *Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute"*, 8 June 2018, para. 168.

to do the impossible. The burden is thus on the SPO to establish that the superior did not take specific and concrete measures which were available to him and which a reasonably diligent commander in a comparable situation would have taken; the burden is not on the Defence to establish that the measures taken by the superior were sufficient.¹²⁸

69. International law, further, requires proof of a causal relationship between the alleged failure of the superior and either the commission of the crime or the resulting impunity of the perpetrator. Where failure to prevent a crime is alleged, the requisite causal link is that the superior's failure was a significant contributing factor in the commission of the crime. Where failure to punish a crime is alleged, the requisite causal link is satisfied when there is a link between the conduct of the superior and the failure to the competent authorities to investigate, identify and punish the perpetrators.¹²⁹

70. Additionally, the Defence highlights that an Accused cannot be convicted of command responsibility for a crime which was committed by a subordinate before the Accused assumed command over that subordinate.¹³⁰

C. AIDING AND ABETTING

71. Aiding and abetting, as established in Article 16(1)(a) of the Law, requires the SPO to establish beyond reasonable doubt that: -

¹²⁸ *Idem*, para. 170.

¹²⁹ Mettraux, pp. 82-89.

¹³⁰ ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-AR72, Appeals Chamber, *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, 16 July 2003, para. 51.

- i. The Accused carried out practical assistance, encouragement or moral support which had a substantial effect on the perpetration of the crime;
- ii. The Accused knew:
 - a. That his acts assisted the commission of the crime;¹³¹
 - b. The essential elements of the crime committed by the principal offender;¹³² and
 - c. The *mens rea* of the principal offender (including specific intent, with regard to specific intent crimes).¹³³

D. CRIMES CHARGED

72. The Defence notes that the SPO has not taken a position in its Pre-Trial Brief on the legal elements of the crimes charged. The Defence reserves the right to address these elements at a later point.

73. The Defence does, however, highlight that not every detention during a non-international armed conflict should be treated as a war crime or crime against humanity. The SPO alleges that during the Indictment Period, individuals were detained at detention sites without due process, meeting the threshold of a war crime under Article 14(1)(c) of the Law and a crime against humanity under Article 13(1)(e)

¹³¹ ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-A, Appeals Chamber, *Judgement*, 23 January 2014, paras 1626, 1650.

¹³² ICTY, *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, Appeals Chamber, *Judgement*, 9 May 2007, para. 127.

¹³³ ICTY, *Prosecutor v. Simić et al.*, IT-95-9-A, Appeals Chamber, *Judgement*, 28 November 2006, para. 86; *Prosecutor v. Krstić*, IT-98-33-A, Appeals Chamber, *Judgement*, 19 April 2004, paras 140-141.

of the Law.¹³⁴ The Defence disputes that any detentions which the evidence establishes took place in Kosovo during a non-international armed conflict were prohibited by customary international law or International Humanitarian Law (“IHL”) during the Indictment Period. In the *absence of a specific prohibition* against detentions by those actors, detentions were permissible at that time. As has been previously argued in this case, there is little evidence of criminalisation of detentions by non-state actors in the FRY or beyond, during the Indictment Period.¹³⁵ In fact, IHL in non-international armed conflicts *may* permit the right of a non-state actor to detain pursuant to specific security needs, for instance the need to prevent prisoners of war from re-taking up arms or otherwise continuing to participate in a conflict.¹³⁶ In the event that security cannot be safeguarded by less severe means and detentions are a direct result of a conflict, such actions can be justified as an imperative measure.¹³⁷

VIII. REBUTTAL OF ALLEGATIONS AGAINST MR. KRASNIQI

74. Throughout its Pre-Trial Brief, the SPO considerably overstates the role, responsibilities, and powers of Mr. Krasniqi. Mr. Krasniqi has pleaded not guilty to all crimes alleged against him. The SPO is required to prove all its allegations about Mr. Krasniqi.

A. MR. KRASNIQI DID NOT PERSONALLY PARTICIPATE IN ANY CRIME

75. The Indictment alleges that there were two occasions on which Mr. Krasniqi directly participated in the commission of crimes.

¹³⁴ Indictment, paras 32, 40.

¹³⁵ KSC-BC-2020-06, IA009/F00010, Veseli Defence, *Veseli Defence Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers*, 27 August 2021, public, paras 3, 101-106, 108.

¹³⁶ ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd edition, 2016, para. 489.

¹³⁷ Debuf, E., “Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict” (2009) Volume 91 Number 876 *International Review of the Red Cross*, p. 864.

76. The first allegation is that in late July 1998 Mr. Krasniqi was present at the former police station in Malishevë/Mališevo and that, on one occasion, he visited a room where female detainees were being kept.¹³⁸

77. The Defence is unable to respond fully to this allegation because the evidence relied upon by the SPO is redacted. Three out of the four documents cited by the SPO in its Pre-Trial Brief contain substantial redactions;¹³⁹ in one of the documents the entirety of the relevant page is redacted.¹⁴⁰

78. Nonetheless, the evidence relied upon by the SPO appears to come from one [REDACTED], [REDACTED],¹⁴¹ which the SPO seeks to adduce pursuant to Rule 155, and the hearsay evidence of two witnesses appearing pursuant to Rule 154, [REDACTED] and [REDACTED], who are being called to testify regarding the hearsay of what they recall [REDACTED] telling them.¹⁴² The admissibility of this written hearsay evidence is disputed. The evidence relates directly to the alleged acts of Mr. Krasniqi. It is difficult to imagine anything more prejudicial to a fair trial than to admit contested identification evidence in circumstances where the Defence will have no opportunity to challenge the identification through cross-examination of the first-hand witness to these alleged events. Full submissions will be provided at the appropriate time.

79. The Defence maintains that they are prejudiced by the vagueness of the Indictment, which pleads that Mr. Krasniqi was present at the former police station in Malishevë/Mališevo in “late July 1998”.¹⁴³ The SPO’s failure to plead the date of this

¹³⁸ SPO PTB, para. 371; Indictment, para. 44.

¹³⁹ SPO PTB, fn. 1517, [REDACTED].

¹⁴⁰ [REDACTED].

¹⁴¹ [REDACTED].

¹⁴² [REDACTED].

¹⁴³ Indictment, para. 44.

allegation with any precision has prevented the Defence from being able to present an alibi.

80. The second allegation is that, between about January and May 1999, Mr. Krasniqi was involved in “various aspects” of the transfer, detention or release of detainees at Kleçkë/Klečka.¹⁴⁴ The Defence cannot respond to this allegation since critical sentences of paragraph 49 of the Indictment remain redacted.

B. MR. KRASNIQI’S ROLE

81. This section will address some aspects of the actual role of Mr. Krasniqi and how and why he joined the KLA. Before the Defence addresses this topic, however, it is necessary to underline that the SPO Pre-Trial Brief fails to set out its case on the Indictment allegations. Although the SPO Pre-Trial Brief alleges various actions on the part of Mr. Krasniqi, it fails to particularise which of those actions the SPO relies upon as evidence of a significant contribution to a common criminal purpose (either by cross-reference to paragraph 53 of the Indictment or otherwise) or as the *actus reus* of aiding and abetting. The Defence cannot take a position on this without further particulars, nor should Mr. Krasniqi be convicted for allegations which have not been properly or specifically put to Mr. Krasniqi by the SPO.

82. As previously stated, Mr. Krasniqi is a historian and a long-standing political opponent of the Serbian regime in Kosovo. He was imprisoned by Serbia for his political activities in 1981-1991.¹⁴⁵

¹⁴⁴ *Idem*, para. 49.

¹⁴⁵ IT-04-84 P00340, p. 3289, lines 2-22.

83. Upon his release from prison, Mr. Krasniqi joined the LDK.¹⁴⁶ From around 1995 – 1998, he was the Chairman of the Drenas Education Council.¹⁴⁷ In March – April 1998, at a time when the SPO alleges that he was part of a JCE which intended to unlawfully intimidate, mistreat and commit violence against ‘opponents’, including persons associated with the LDK, Mr. Krasniqi was himself part of the LDK and remained actively engaged in the parallel education system on its behalf.¹⁴⁸

84. In or around 1997, Mr. Krasniqi was asked by Adem Jashari to join the body referred to as the General Staff¹⁴⁹ of the KLA because he was a political figure who was familiar with the politics of Kosovo.¹⁵⁰ Mr. Krasniqi was not involved in the initial creation of the KLA by the People’s Movement for Kosovo (“LPK”) and was never a member of LPK. In 1997-1998, he was the newest member of the General Staff.¹⁵¹ He did not know all of the other members of the General Staff and they did not all know him.¹⁵²

85. On 12 June 1998, it was announced that Mr. Krasniqi was appointed as the Spokesperson of the KLA.¹⁵³ On or around 13 August 1998, it was announced that Mr. Krasniqi was one of six “political representatives” of the KLA.¹⁵⁴

86. In these roles, Mr. Krasniqi communicated with international representatives and the international media on occasions, though it is denied that those communications were directed towards or assisted in the commission of any crime or

¹⁴⁶ *Idem*, p. 3290, lines 9-13.

¹⁴⁷ *See* [REDACTED].

¹⁴⁸ [REDACTED].

¹⁴⁹ For ease of comparison, the Defence has followed the format of the SPO PTB in referring to the ‘General Staff’ throughout, although in earlier periods the term Central Staff was more commonly used and the term General Headquarters was also used.

¹⁵⁰ [REDACTED].

¹⁵¹ *Idem*, [REDACTED].

¹⁵² *Idem*, [REDACTED].

¹⁵³ U003-8552-U003-8690, p. U003-8575.

¹⁵⁴ [REDACTED].

significantly contributed to any common criminal purpose. Mr. Krasniqi disputes that, as alleged by the SPO, he was “actively involved in and had control over essential political and operational activities, including in relation to units, sites and locations where crimes are alleged to have occurred”.¹⁵⁵ He had no effective control over any KLA members and no authority to give orders. He did not act in concert with others in pursuit of any common criminal purpose.

87. On or around 6 February 1999, Mr. Krasniqi travelled to Rambouillet as part of the KLA delegation to the peace negotiations, which continued until around 23 February 1999 and Mr. Krasniqi returned to Kosovo on or around 25 February 1999.¹⁵⁶ Mr. Krasniqi strove to co-operate with all other members of the Albanian delegation – including those who the SPO mischaracterises as ‘opponents’ - to try to achieve a peaceful resolution. Internationals remarked that Mr. Krasniqi had worked constructively, co-operatively and positively on the draft agreement.¹⁵⁷

88. On or around 11 March 1999 – 19 March 1999, Mr. Krasniqi travelled to Paris as part of the KLA delegation to the resumed peace negotiations.¹⁵⁸ The KLA delegation which included Mr. Krasniqi signed the draft peace agreement; the Serbian representatives did not.

89. Mr. Krasniqi was not able to return to Kosovo after the Paris negotiations. After 19 March 1999 until 15 June 1999, he was either in Albania or visiting countries in Western Europe,¹⁵⁹ where he met with representatives of the international community and actively participated in the dialogues for finding a peaceful solution for the conflict in Kosovo. Notably, Mr. Krasniqi travelled to:

¹⁵⁵ *Contra* SPO PTB, para. 111.

¹⁵⁶ [REDACTED].

¹⁵⁷ *See*, IT-05-87 P02658-E, p. 3.

¹⁵⁸ IT-04-84 P00340, p. 3314, lines 1-2; [REDACTED].

¹⁵⁹ [REDACTED]; IT-04-84 P00340, p. 3290, lines 14-19; [REDACTED].

- i. Austria, where he met with, among others, Wolfgang Petritsch and Albert Rohan at the Austrian Ministry of Foreign Affairs;¹⁶⁰
- ii. Belgium, where he met with, among others, Robin Cook, Madeleine Albright, James Rubin, James Dobbins, Lawrence G. Rossin, David J. Kostelancik, Anne-Marie Lizin;¹⁶¹
- iii. Germany, where he met with, among others, Rolf Pauls;¹⁶²
- iv. France, where he attended meetings at the French Ministry of Foreign Affairs and Ministry of Interior; and met with, among others, Gerard Errera;¹⁶³
- v. Switzerland, where he visited the Ministry of Foreign Affairs and met with, among others, Franz Von Daeniken;¹⁶⁴
- vi. Italy, where he visited the Italian Ministry of Foreign Affairs and met with, among others, Laura Mirachian.¹⁶⁵

90. In Albania, Mr. Krasniqi attended meetings at the Albanian Ministry of Defence and at the American Embassy, and met with, among others, Rexhep Meidani, Sabri Godo, Tony Blair, Willem Kok, Knut Vollebaek, Daan Everts, Lawrence G. Rossin, and William Walker.¹⁶⁶

¹⁶⁰ [REDACTED].

¹⁶¹ [REDACTED].

¹⁶² [REDACTED].

¹⁶³ [REDACTED].

¹⁶⁴ [REDACTED].

¹⁶⁵ [REDACTED].

¹⁶⁶ [REDACTED].

91. On 2 April 1999, it was announced that Mr. Krasniqi would be the Spokesperson of the PGoK.¹⁶⁷ He did not have any ongoing role or authority in the KLA. His actions within the PGoK did not implement any common criminal purpose. His interaction with the media and international representatives was entirely lawful.

92. On or around 15 June 1999, Mr. Krasniqi returned to Kosovo.

93. In the summer of 1999, Mr. Krasniqi was appointed as Minister for Reconstruction and Development in the PGoK.¹⁶⁸ He was appointed, not by the KLA, but by the Democratic Union Movement (“LBD”). As Minister for Reconstruction and Development, he worked on urgent issues such as assessing the war damage and revitalising the construction industry (which was a priority since such a significant proportion of the population’s homes had been destroyed). The Ministry headed by Mr. Krasniqi was entirely unrelated to the KLA. He had nothing whatsoever to do with any military, public order, crime, or detention issues. He did not have control over essential political and operational activities, nor effective control over any KLA or PGoK member.

94. Mr. Krasniqi thus denies that he ever had any responsibility for military or operational matters, including any matter relating to the alleged detentions. He did not contribute at all, still less significantly contribute, to any crime or common criminal purpose. He was known as the Spokesperson of the KLA and later of the PGoK, and he carried out those roles in good faith.

IX. NO COMMON CRIMINAL PURPOSE

95. Mr. Krasniqi denies the existence of any common criminal purpose to gain control over all of Kosovo by unlawfully intimidating, mistreating, committing

¹⁶⁷ SPOE00054541-SPOE00054541-ET.

¹⁶⁸ See, e.g. 021083-021102, p. 021098; [REDACTED].

violence against or removing 'opponents', or that he ever was a party to any such common purpose. His only intention, and the only common purpose which brought the members of the KLA and the General Staff together, was to liberate Kosovo from the repressive and discriminatory Serbian regime and to protect civilians against the horrific crimes which were being committed by the Serbian military and paramilitary forces.

96. It bears emphasising that the international community, including the Contact Group and NATO amongst others, played an important role alongside the KLA in achieving the liberation of Kosovo. NATO and the international community would not have lent their support to a common criminal purpose.

97. The Defence notes the extraordinary breadth of the alleged common purpose, which the SPO alleges applies to: (i) a sweeping and ill-defined category of alleged 'opponents' including suspected collaborators with FRY Forces, persons associated with the LDK and persons of Serbian, Roma and other ethnicities; (ii) the entire territory of Kosovo and parts of Albania; (iii) the entire 18 month time period covered by the Indictment; (iv) all the crimes charged in the Indictment; and (v) implementation through any soldier of the KLA or representative of the PGoK. The evidence does not support the existence of this – or any – common criminal purpose.

98. In attempting to craft a common purpose so broad that every random or isolated crime committed in Kosovo could fall within it, the SPO has been oblivious to the paucity of evidence available and which is necessary to properly support its case.

99. The SPO attempts to prove the existence of a common criminal purpose through evidence of: public statements; regulations, directions and orders; and structures through which the alleged common purpose was implemented. None of this evidence establishes the existence of a common criminal purpose to the required standard.

100. In relation to public statements including communiqués, it is denied that they are evidence of any common criminal purpose. It is appropriate to recall that some of the same communiqués and statements were cited by the Prosecution before the ICTY, whose judges concluded that they failed to establish the existence of a common criminal purpose.¹⁶⁹ The ICTY accepted Mr. Krasniqi's evidence that it was never the KLA's policy to target civilians of any ethnicity.¹⁷⁰ These judgments were upheld on appeal or on re-trial.¹⁷¹

101. Further, after the creation of the provisional government, Mr. Krasniqi stated that the PGoK's intention was that "in free Kosovo, freedom, peace, and justice for all—regardless of religion, ethnicity or race—will rule".¹⁷² On 6 June 1999, he made a statement about "the economic and social prosperity of Kosovo and all its citizens equally".¹⁷³ On 10 June 1999, as PGoK Spokesperson, he said expressly that the rights of Serbian civilians will be respected, called on KLA fighters to show restraint and not to retaliate against those who cooperated with the Serbian Forces.¹⁷⁴ These statements represented the true intentions of Mr. Krasniqi.

102. It is denied that the evidence establishes that KLA regulations, directives or orders evidence a common criminal purpose. Once again, the SPO's citation of the evidence is cherry-picked. For instance, the SPO quotes one phrase about the Military Police from the Internal Regulations of the Internal Life of the Army,¹⁷⁵ whilst turning a blind eye to the preceding provisions which instruct the military police: "not to use physical force except when attacked or prevented from carrying out their duty";¹⁷⁶ to

¹⁶⁹ *Haradinaj* Trial Judgment, paras 472, 475; *Haradinaj* Retrial Judgment, para. 635; *Limaj* Trial Judgment, para. 118.

¹⁷⁰ *Limaj* Judgment, para. 215; *Haradinaj* Retrial Judgment, paras 634-635.

¹⁷¹ *Limaj* Appeal Judgment; *Haradinaj* Retrial Judgment, para. 635.

¹⁷² [REDACTED].

¹⁷³ [REDACTED].

¹⁷⁴ Arkiva Lajme - Tv Klan 1999, available at: <https://www.youtube.com/watch?v=D8RqexuEmO0>.

¹⁷⁵ SPO PTB, para. 72.

¹⁷⁶ [REDACTED].

have “good manners in their dealings with citizens and travellers of all categories;” to carry out their duties with a “high degree of responsibility;” and to treat “all travellers equally”.¹⁷⁷ Moreover, the evidence does not establish that any regulations, directions or orders were distributed to all members of the KLA, were complied with or had any connection to the commission of the alleged crimes.

103. It is denied that evidence about the structure of the KLA supports the existence of a common criminal purpose. The SPO considerably over-states the structure and organisation of the KLA. Instead, the lengthy sections in the SPO Pre-Trial Brief about the structure of the KLA appear designed to obscure the absence of evidence actually connecting Mr. Krasniqi – or the General Staff – to the alleged crimes. There is no reliable evidence that the alleged crimes were reported to Mr. Krasniqi or the General Staff, or that the alleged crimes followed or were causally connected to any action of the General Staff.

104. Further, the allegation that Mr. Krasniqi was part of a common criminal purpose to commit crimes against members of the LDK is particularly absurd. The LDK shared the objective to free Kosovo from the Serbian regime. Mr. Krasniqi was a member of LDK at the start of the Indictment Period.¹⁷⁸ His appointment as Spokesperson of the KLA in June 1998 is itself evidence that the KLA was not hostile to LDK members. Other General Staff members, such as Rame Buja, were also senior LDK members.¹⁷⁹ Indeed, members of the KLA at every level were also often members of the LDK. The criticisms which Mr. Krasniqi at times directed to LDK figures were part of a purely political dialogue addressing specific situations that were in no way a call to violence.

¹⁷⁷ [REDACTED].

¹⁷⁸ [REDACTED]; IT-04-84*bis* P00064, pp. 5071, 5096; IT-04-84 T5000-T5086, p. 5023.

¹⁷⁹ [REDACTED]; 019640-019642, p. 2; [REDACTED].

105. The reality is that the KLA took steps to try to work with all political actors in Kosovo. It participated in attempts to form a unified Kosovo government platform in July 1998.¹⁸⁰ In or around September 1998, the KLA appointed Adem Demaçi as political representative.¹⁸¹ Mr. Krasniqi himself described Mr. Demaçi's mandate as to "work with the political parties and with other tried and tested individuals to create an institutional life for Kosovo".¹⁸² Furthermore, the KLA co-operated with other political parties including the LDK in the Rambouillet negotiations.¹⁸³ As set out above, internationals noted that Mr. Krasniqi was personally involved in this co-operation.¹⁸⁴ After Rambouillet, the KLA and Mr. Krasniqi in particular, engaged in constructive talks with LDK representatives in Tirana.¹⁸⁵ Such cooperation is inconsistent with the alleged common criminal purpose.

106. The SPO must therefore establish that the existence of the common criminal purpose, as well as Mr. Krasniqi's participation, are the only reasonable inferences available from the circumstantial evidence on which it intends to rely. The evidence falls very far short of meeting this standard.

X. NO ORGANISED HIERARCHICAL MILITARY STRUCTURE

107. It is denied that Mr. Krasniqi had effective control over any member of the KLA or any other individual alleged to have committed a crime. Contrary to the impression created by the SPO, the KLA never had anything resembling a professionally organised system of command and control.

¹⁸⁰ [REDACTED]; IT-05-87 5D00119-E.

¹⁸¹ [REDACTED].

¹⁸² IT-04-84 P00340.O, p. 32; *See also* [REDACTED].

¹⁸³ [REDACTED].

¹⁸⁴ *Supra*, para. 87.

¹⁸⁵ [REDACTED].

108. On 5 March 1998, Serbian Forces attacked the family compound of Adem Jashari in Prekaz i Poshtëm/Donje Prekaze and killed the entire Jashari family, except for an 11-year-old girl.¹⁸⁶ On 24 March 1998, Serbian Forces also attacked the Haradinaj family compound in Gllloxhan/Glodjane.¹⁸⁷ Similar attacks occurred in other parts of Kosovo.¹⁸⁸

109. In response to these attacks, in March-April 1998, the KLA expanded rapidly. Villagers, particularly in what became known as the Drenica and Dukagjini sub-zones, began spontaneously to organize themselves into defence units.¹⁸⁹ These groups of volunteers attempted to defend their villages against the campaign of violence intended to displace Kosovo Albanians directed by Serbian Forces. They set up local staff in their villages, having their origins in the clan-based society. They made their own decisions and conducted typical “guerrilla” actions.¹⁹⁰ These groups had no command structure outside of their own informal and consensual arrangements.¹⁹¹

110. Moreover, these self-organised groups, while attempting to defend their families and their villages, contacted Kosovo Albanians living abroad in the West and asked them to contribute for the cause. The diaspora, recognising the danger faced by their families in Kosovo, began to voluntarily contribute funds towards local village staff.

111. The KLA was thus in the early stages of an insurgency movement. It could not absorb the significant number of volunteers who wanted to join the movement. There was a lack of communication and co-ordination between local staffs, which in many cases elected their own village commanders.¹⁹² Arms were scarce, and people were

¹⁸⁶ *Dorđević* Judgment, para. 271; *Limaj* Judgment, para. 49.

¹⁸⁷ *Haradinaj* Retrial Judgment, paras 144-147.

¹⁸⁸ *Supra*, paras 39-54.

¹⁸⁹ [REDACTED]. See also *Haradinaj* Retrial Judgment, para. 44.

¹⁹⁰ [REDACTED]; IT-03-66 DL13, pp. 11 at para. 3, 14 at para. 14, 16 at para. 25, 23 at para. 48.

¹⁹¹ [REDACTED].

¹⁹² [REDACTED]; *Haradinaj* Retrial Judgment, para. 47.

using any weaponry they could access.¹⁹³ Any spontaneous military operations were conducted by poorly organised and ill-equipped volunteers fighting against the vastly superior firepower of the Serbian Forces.

112. Over time, locally or self-appointed volunteers awarded themselves titles.¹⁹⁴ These ‘commanders’ were appointed by a voluntary process based on local reputation and acclamation in the majority of cases, and were answerable downwards towards their men, rather than upwards to any superior officers as in a conventional military situation.¹⁹⁵

113. The KLA lacked any proper military and centralised organisation. Labels such as the “supreme command”, “central staff” or the “General Staff” of the KLA did not reflect the reality on the ground. Most of the members of the General Staff had no or limited military experience and they were forced to operate clandestinely. Zone commanders were often inexperienced and did not have effective control on the ground.

114. The KLA suffered massive setbacks throughout the Indictment Period as a result of Serbian offensives. In particular, during the second half of July 1998, Serbian Forces launched a series of fierce attacks on the KLA in the Llapushnik/Lapušnik Gorge, which spread to the villages along the Peja/Peć-Prishtinë/Priština road and the villages along the Suharekë/Suva Reka-Malishevë/Mališevo road.¹⁹⁶ The large-scale Serbian offensives in June, July, and August 1998 almost destroyed the KLA entirely. Further, in December 1998, Serbian Forces commenced further offensives against ethnic Albanian villages and committed the Reçak/Račak massacre of January 1999. In late

¹⁹³ [REDACTED].

¹⁹⁴ IT-03-66 DL13, p. 14 at para. 15.

¹⁹⁵ *Idem*, p. 10.

¹⁹⁶ [REDACTED]; *Dorđević* Judgment, para. 322; *Milutinović* Vol. I, para. 892.

February and early March 1999, Serbian Forces launched a series of further offensives.¹⁹⁷ On 24 March 1999, NATO commenced bombing the Serbian Forces. Further Serbian offensives and massive forced deportations brought the war into previously untouched regions, including Karadak, and made it impossible for the KLA to operate.

115. It is against this chaotic and changeable background that the SPO must prove all of its allegations about the structure of the KLA. The Defence anticipates that the SPO's attempt to portray the KLA as an organised and hierarchical structure, which had effective control over subordinates and planned the commission of crimes, will not be borne out by the evidence.

116. During the Rambouillet negotiations, the KLA, the LDK and the LBD had agreed that a provisional government would be formed and a representative of the KLA would be responsible for forming the government.¹⁹⁸ On 2 April 1999, the composition of the Provisional Government of Kosovo was announced.¹⁹⁹

117. On 9 June 1999, the Military Technical Agreement between the International Security Force ("KFOR") and the Governments of Yugoslavia and the Republic of Serbia ("Kumanovo Agreement") provided for Serbian Forces to withdraw from Kosovo by 20 June 1999.²⁰⁰ It is an agreed fact that KFOR announced the complete withdrawal of Serbian Forces on 20 June 1999.

118. As the Serbian Forces withdrew, they implemented local scorched earth policies. At around the same time as the withdrawal of Serbian Forces, very large numbers of

¹⁹⁷ IT-05-87 P02261, pp. 00763260-00763261; [REDACTED].

¹⁹⁸ [REDACTED].

¹⁹⁹ SPOE00054541-SPOE00054541-ET.

²⁰⁰ 005892-005899.

Kosovo Albanian refugees sought to return to Kosovo. On their return, all too often they found their houses destroyed, their possessions looted or burned and their family members killed.

119. It is important to appreciate that, with the retreat of Serbian Forces, Kosovo was suddenly left with no police force, no prison staff, no wardens and no judges. People who had lost everything, and who were often armed, found that there was no law and order to deter or prevent them from taking private revenge. The environment allowed crimes to be committed almost with impunity; anarchy was never far.²⁰¹

120. Neither the PGoK nor the KLA had authority for maintaining law and order. United Nations Security Council (“UNSC”) Resolution 1244/1999 placed primary responsibility for maintaining civil law and order and establishing local police forces on the international civil presence (“UNMIK”),²⁰² while tasking the international security presence (“KFOR”) with ensuring public safety and order until the international civil presence could take responsibility for this task.²⁰³ UNMIK and KFOR, however, struggled to fill the gap. UNMIK had to create a Kosovo Police Force from nothing and it took as long as two to three months to get significant numbers of international police officers on the ground.²⁰⁴ [REDACTED] “[REDACTED]”.²⁰⁵ In the resulting chaos, it is denied that any attempt by members of the KLA to carry out policing in some localities, was part of a common criminal purpose; it is more likely that it was simply an attempt to provide law and order in terribly difficult circumstances.²⁰⁶

²⁰¹ 087342-087360, para. 9.

²⁰² 005915-005922, para. 11(i).

²⁰³ *Idem*, para. 9(d).

²⁰⁴ [REDACTED].

²⁰⁵ [REDACTED].

²⁰⁶ *Contra* SPO PTB, paras 150-154.

121. The security situation on the ground remained tenuous until the end of the Indictment Period. Any attacks which took place were neither systematised nor organised, and were often the product of interpersonal disputes and individual actions. NATO Chief Wesley Clark noted in August 1999 that there were “no facts to suggest that the KLA are behind the attacks.”²⁰⁷

122. On 20 June 1999, the KLA signed the Undertaking of Demilitarisation and Transformation (“Demilitarisation Agreement”) with KFOR in which the KLA agreed to disarm and committed to a schedule for disarmament.²⁰⁸ The KLA, and the KLA leadership in particular, sought to comply with the Agreement. Evidence of compliance with this Demilitarisation Agreement is *prima facie* incompatible with the alleged common criminal purpose.

123. In these extremely difficult post-conflict conditions, the PGoK was ineffective. It had limited communications, administration and resources following the Serbian withdrawal and NATO bombings. Mr. Krasniqi denies that the PGoK was involved in or connected to the commission of crimes.

124. The Defence thus requires the SPO to prove all its allegations about the structure of the KLA and PGoK and anticipates that the SPO’s attempt to portray the KLA, and later the PGoK, as organised and hierarchical structures, which had effective control over subordinates and planned the commission of crimes, will not be borne out by the evidence.

²⁰⁷ [REDACTED].

²⁰⁸ [REDACTED].

XI. LEGAL SCOPE OF THE ARMED CONFLICT

125. It is denied that there was a non-international armed conflict on the territory of Kosovo throughout the Indictment Period,²⁰⁹ defined by the SPO as “from at least March 1998 through September 1999”.²¹⁰

126. The existence of a non-international armed conflict requires protracted armed violence between governmental authorities and organised armed groups.²¹¹ It is thus the intensity of the conflict and the degree of organisation of the parties which distinguish a non-international armed conflict from an internal disturbance. Whilst there was sporadic fighting in spring 1998, the Defence disputes that the fighting in Kosovo had attained the required intensity and that the KLA had attained the required level of organisation for an armed conflict to have existed as early as March 1998.

127. The Defence relies on the persuasive authorities of the ICTY which addressed the onset of the armed conflict in Kosovo on five occasions and on each occasion concluded that a non-international armed conflict began in Kosovo significantly later than March 1998.²¹²

128. The Defence further disputes that the armed conflict continued until September 1999. The true position is that by mid-June 1999 the Serbian Forces had withdrawn from Kosovo and the KLA had undertaken to disarm and demilitarise; a peaceful

²⁰⁹ *Contra* SPO PTB, paras 697-701.

²¹⁰ Indictment, para. 16.

²¹¹ ICTY, *Prosecutor v. Tadić*, IT-94-1, Appeals Chamber, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, para. 70.

²¹² *Limaj* Judgment, paras 171-173, finding that an armed conflict existed “before the end of May 1998”; *Milutinović* Vol. 1, paras 840-841, finding that an armed conflict existed “from at least mid-1998”; *Dorđević* Judgment, paras 1536, 1579, finding that an armed conflict existed “as of the end of May 1998”; *Haradinaj* Trial Judgment, paras 100, 110, finding that an armed conflict existed from and including 22 April 1998 onwards; *Haradinaj* Retrial Judgment, 29 November 2012, paras 410-411, finding that the Chamber was not satisfied that an armed conflict existed in the period between 1 March 1998 and 21 April.

settlement was thus achieved. The Kumanovo Agreement laid out that within 11 days from the entry into force of the agreement on 9 June 1999, “all FRY Forces in Kosovo will have completed their withdrawal [...] to locations in Serbia outside Kosovo”.²¹³ Serbian Forces indeed withdrew by 20 June 1999. It is an agreed fact that on 20 June 1999, KFOR announced the complete withdrawal of Serbian Forces from Kosovo. On the same date, the KLA delivered to KFOR the KLA’s Demilitarisation Agreement. By 20 June 1999, there was no longer an armed conflict – one party had withdrawn and the other had undertaken to demilitarise.

129. Consistent with this clear factual position, the ICTY also concluded that the armed conflict ended in June 1999.²¹⁴

130. The Defence highlights that a non-international armed conflict is ended “even if there are isolated or sporadic acts of violence by remnants of the dissolved Party”.²¹⁵ The “hostile and provocative acts” relied upon by the SPO²¹⁶ amount to nothing more than the isolated and sporadic acts of violence which occur regrettably regularly in a post-conflict environment. At no point after 20 June 1999 was there a real risk of a resumption of hostilities.

131. Furthermore, it is disputed that Article 14 of the Law can apply to crimes alleged to have been committed in Albania. The geographic scope of the armed conflict was limited to Kosovo. Article 14(2) of the Law confirms that war crimes “apply to armed conflicts that take place in the territory of a State”. Common Article 3 also limits the application of IHL to armed conflicts occurring “in the territory of one of the High Contracting Parties”. In the absence of evidence that any fighting occurred on the

²¹³ 005892-005899, Article II(2)(e).

²¹⁴ *Milutinović* Vol. 1, para. 1217; *Dorđević* Judgment, paras 1579-1580.

²¹⁵ ICRC, *Commentary to GCI*, 2016, available at: <https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt3>, para. 489.

²¹⁶ SPO PTB, para. 699.

territory of Albania, there is simply no scope for applying the laws applicable to a non-international armed conflict outside the territory of the State in which the conflict occurred.

132. In addition to the existence of a non-international armed conflict, in order to establish the commission of a war crime there must be a nexus between the armed conflict and the commission of a crime.²¹⁷ The SPO is required to prove the existence of a sufficient nexus between the armed conflict and each of the crimes alleged in the Indictment.

XII. NO WIDESPREAD OR SYSTEMATIC ATTACK ON A CIVILIAN POPULATION

133. Pursuant to Article 13 of the Law, it is a necessary element of a crime against humanity that one of the prescribed crimes is committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of that attack”.

134. It is denied that there was a widespread or systematic attack on a civilian population and that Mr. Krasniqi had knowledge of any such attack.²¹⁸

135. The ICTY also considered and rejected the allegation that crimes against humanity were committed by the KLA. In *Limaj*, the Trial Chamber concluded that “[t]he means and methods used by the KLA [...] do not evince characteristics of an

²¹⁷ ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23& IT-96-23/1-A, Appeals Chamber, *Judgement*, 12 June 2002, para. 55; *Prosecutor v. Strugar*, IT-01-42-T, Trial Chamber II, *Judgement*, 31 January 2005, para. 215; *Orić Judgment*, para. 253; *Prosecutor v. Krajišnik*, IT-00-39-T, Trial Chamber I, *Judgement*, 27 September 2006, paras 844, 846; ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-tENG, Trial Chamber II, *Judgment Pursuant to Article 74 of the Statute*, 7 March 2014, para. 1176; *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2359, Trial Chamber VI, *Judgment*, 8 July 2019, para. 731.

²¹⁸ *Contra* SPO PTB, paras 702-708.

attack directed against a civilian population. At least in most cases of which there is evidence, the individuals who were abducted and then detained were singled out as individuals [...] and not because they were members of a general population".²¹⁹ The Trial Chamber in *Haradinaj* reached the same conclusion.²²⁰

XIII. THE SPO MUST PROVE THE CRIMES ALLEGED

136. The Indictment alleges that Mr. Krasniqi is responsible through the alleged JCE, aiding/abetting or through command responsibility for ten counts, including offences allegedly committed in a range of different locations and at a range of different dates. The SPO must therefore prove the constituent elements of all these offences.

137. Contrary to the SPO's suppositions, Mr. Krasniqi's mere presence in the same town or region as a detention centre does not prove that he knew about the detention centre nor that he contributed, let alone significantly contributed, to criminal activities. This is particularly the case when the SPO alleges Mr. Krasniqi's presence in locations without specifying that he was at the specific locations at the specific times where and when crimes are alleged to have occurred.²²¹ Citing evidence that Mr. Krasniqi was in Kleçkë/Klečka in June or July 1998,²²² for example, is wholly irrelevant to the Indictment which alleges that detentions took place at Kleçkë/Klečka months later "between at least November 1998 and June 1999".²²³ Mr. Krasniqi denies any involvement in any such detention centre and further denies any involvement in any crimes alleged to have been committed therein pursuant to Articles 13 and 14 of the

²¹⁹ *Limaj* Trial Judgment, para. 227.

²²⁰ *Haradinaj* Trial Judgment, para. 122.

²²¹ See SPO PTB, paras 286, 360, 483, 486, 501, 557. The mere presence of an Accused in the same area as an alleged detention site, provides insufficient linkage in the absence of specifics indicating temporal overlap, awareness, intent, or contributions on the part of the Accused to the activities at those sites.

²²² SPO PTB, fn. 71 [REDACTED].

²²³ Indictment, para. 115.

Law. He had no authority in relation to operational matters. Accordingly, the Defence requires the SPO to prove its allegations in relation to all of the alleged crimes.²²⁴

138. Moreover, it is denied that the alleged crimes have any link to Mr. Krasniqi and/or indeed to the General Staff. The SPO is required to prove that any crime that it establishes was committed has any connection to Mr. Krasniqi or any alleged common criminal purpose. In particular, the Defence requires the SPO to prove that the alleged crimes were actually committed by individuals who were actually members of the KLA or PGoK.

XIV. CONCLUSION

139. Mr. Krasniqi has pleaded not guilty to all counts on the Amended Indictment. He is not guilty. There is no credible evidence of the existence of a common criminal purpose, or that Mr. Krasniqi was a party to any common criminal purpose, or that he intended or foresaw the commission of any crime. The evidence also falls far short of establishing command responsibility or aiding/abetting to the required standard. Mr. Krasniqi should be acquitted.

140. The Defence reserves the right to respond more fully in due course and following complete disclosure by the SPO.

²²⁴ SPO PTB, paras 269-696.

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LIST OF ACRONYMS	
Acronym	Full Name
EULEX	European Union Rule of Law Mission in Kosovo
FRY	Federal Republic of Yugoslavia
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
JCE	Joint Criminal Enterprise
KFOR	International Security Force or Kosovo Force
KLA	Kosovo Liberation Army
KSC	Kosovo Specialist Chambers
LBD	Democratic Union Movement
LDK	Democratic League of Kosovo
LPK	People's Movement for Kosovo
MUP	Ministry of Internal Affairs of Serbia
NATO	North Atlantic Treaty Organisation
PDK	Democratic Party of Kosovo
PGoK	Provisional Government of Kosovo
SAJ	Special Anti-Terrorist Unit
SPO	Specialist Prosecutor's Office
STL	Special Tribunal for Lebanon

UNMIK	United Nations Mission in Kosovo
UNSC	United Nations Security Council
VJ	Yugoslav People's Army