

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

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

**Registrar:** Dr Fidelma Donlon

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

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**Public Redacted Version of**  
**Motion Alleging Defects in the Indictment against Mr Hashim Thaçi**

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## I. INTRODUCTION

1. Pursuant to Rule 97(b) of the Rules,<sup>1</sup> the defence for Mr Hashim Thaçi (“Defence”) submits that the Indictment filed against him<sup>2</sup> is defective due to a lack of specificity and significant errors in pleading. The Defence requests that the Special Prosecutor’s Office (“SPO”) be ordered to provide greater specificity about the conduct it alleges on the part of Mr Thaçi, failing which, that the SPO be ordered to reduce, narrow or remove the offending charges and in addition, remove otherwise defective charges.
2. This motion is filed confidentially because it refers to confidential filings.
3. The Defence reserves its position in respect of redacted sections of the Indictment.

## II. BACKGROUND

4. On 26 October 2020, an (amended) Indictment was confirmed against Mr Thaçi and his co-defendants.<sup>3</sup>
5. Mr Thaçi is charged with ten counts: persecution, imprisonment, other inhumane acts, torture, murder and enforced disappearance of persons as crimes against humanity and illegal or arbitrary arrest and detention, cruel treatment, torture, and murder as war crimes. The Indictment alleges that he committed these crimes through participation in a joint criminal enterprise (“JCE”) and/or aided and abetted them and/or that he is liable as a superior for their commission.

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

<sup>2</sup> KSC-BC-2020-06/F000134/1 of 69, Lesser Redacted Version of Redacted Indictment, KSC-BC-2020-06/F00045/A02, 4 November 2020 (“Indictment”).

<sup>3</sup> KSC-BC-2020-06/F00026/CONF/RED/1 of 266, Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 20 October 2020 (“Confirmation Decision”). Public Version issued on 30 November 2020, KSC-BC-2020-06/F00026/RED/1 of 236 (“Public Redacted Confirmation Decision”).

### III. SUBMISSIONS

#### A. APPLICABLE LAW

6. Article 38(4) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 86(3) of the Rules require the SPO to set out in the indictment a concise statement of the facts of the case and the crime(s) with which the accused is charged, and in particular, the alleged mode of liability in relation to the crimes charged.
7. This obligation must be interpreted in conjunction with the accused's right to a fair and public hearing, pursuant to Articles 21(2), 21(4)(a) and (c) of the Law. These articles provide that, in the determination of any charge against him, the accused is entitled to a fair hearing, to be informed promptly of the nature and cause of the charge against him and to have adequate time and facilities to prepare his defence.
8. These requirements have been elaborated upon by the Appeals Chambers of the international *ad hoc* tribunals and the International Criminal Court,<sup>4</sup> which have consistently held that the "charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide clear notice to the accused."<sup>5</sup> It is well established

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<sup>4</sup> See Public Redacted Confirmation Decision, para. 22: "In determining customary international law at the time the crimes were committed, a Judge may be assisted by sources of law including the jurisprudence from the international *ad hoc* tribunals, the International Criminal Court, and other criminal courts".

<sup>5</sup> ICTR, *Prosecutor v Uwinkindi*, ICTR-01-75-AR72 (C), Appeals Chamber, Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011, ("*Uwinkindi* Appeals Decision on Defects"), para. 5; ICTR, *Prosecutor v Muvunyi*, ICTR-2000-55A-A, Appeals Chamber, Judgment, 29 August 2008, ("*Muvunyi* Appeal Judgment"), para. 18 (citing ICTR, *Prosecutor v Seromba*, ICTR-2001-66-A, Appeals Chamber, Judgment, 12 March 2008, paras. 27, 100; ICTR, *Prosecutor v Simba*, ICTR-01-76, Appeals Chamber, Judgment, 27 November 2007, para. 63; ICTR, *Prosecutor v Muhimana*, ICTR-95-1B-A, Appeals Chamber, Judgment, 21 May 2007, paras. 76, 167, 195; ICTR, *Prosecutor v Gacumbitsi*, ICTR-2001-64-A, Appeals Chamber, Judgment, 7 July 2006, para. 49; ICTR, *Prosecutor v Nindabahizi*, ICTR-01-71-A, Appeals Chamber, Judgment, 16 January 2007, para. 16. See also, ICTY, *Prosecutor v Kupreskic et al.*, IT-95-16-A, Appeals Chamber, Judgment, 23 October 2001, ("*Kupreskic et al.*, Appeal Judgement"), para. 88; ICC, *Prosecutor v Bemba*, ICC-01/05-01/08, Trial Chamber, Judgment, 21 March 2016, ("*Bemba* Trial Judgement"), para. 31.

that “whether an indictment is pleaded with sufficient particularity is dependent on whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.”<sup>6</sup> The Prosecution “is expected to know its case before proceeding to trial and cannot mould the case against the accused in the course of the trial depending on how the evidence unfolds.”<sup>7</sup>

9. Whether ‘facts’ are material depends on the nature of the Prosecution’s case, i.e., the nature of the charges, the proximity of the accused to the events he is said to be criminally responsible for and the scale of the crimes.<sup>8</sup> Where the “Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail.”<sup>9</sup> An indictment that does not set out the material facts with sufficient precision is defective.<sup>10</sup>
10. It is submitted, in line with international jurisprudence, that where defects in the indictment surface at the pre-trial phase, the Prosecution cannot refrain from amending the indictment by arguing that it will correct all defects through material supporting or filed after the indictment.<sup>11</sup>

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<sup>6</sup> *Kupreskic et al.*, Appeal Judgment, para.88. See also ICC, *Prosecutor v Ongwen*, ICC-02/04-01/15 OA4, Appeals Chamber, Judgment on the Appeal of Dominic Ongwen Against Trial Chamber IX’s Decision on Defence Motions Alleging Defects in the Confirmation Decision, 17 July 2019, para. 69.

<sup>7</sup> *Muvunyi* Appeal Judgment, para 18 (citing ICTR, *Prosecutor v Ntagerura et al.*, ICTR-99-46-A, Appeals Chamber, Judgment, 7 July 2006, (“*Ntagerura et al.*, Appeal Judgment”), para.27. See also ICTY, *Prosecutor v Kvočka et al.*, IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005 (*Kvočka et al.*, Appeal Judgment), para. 30; ICTR, *Prosecutor v Niyitegeka*, ICTR-96-14-A, Appeals Chamber, Judgment, 9 July 2004, (*Niyitegeka* Appeal Judgment), para. 194; ICTY, *Kupreskic et al.*, Appeal Judgment, para. 92.)

<sup>8</sup> *Uwinkindi* Appeals Decision on Defects, paras. 4-5; ICTR, *Prosecutor v Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber, Judgment, 13 December 2004, para.25 citing *Kupreskic et al.* Appeal Judgment paras.88-89. See also, *Bemba* Trial Judgment, para.34.

<sup>9</sup> *Kupreskic et al.*, Appeal Judgment, para. 89.

<sup>10</sup> *Uwinkindi* Appeals Decision on Defects, para. 114.

<sup>11</sup> See *Uwinkindi* Appeals Decision on Defects, para.13, where the ICTR Appeals Chamber held: “in a case such as the present, where defects in the indictment surface at the pre-trial stage, the Prosecution cannot refrain from amending the indictment by arguing that it will correct existing defects through its Pre-Trial Brief.”; ICTR, *Prosecutor v. Dominique Ntawukulilyayo*, ICTR-05- 82-PT, Trial Chamber, Decision on Defence Preliminary Motion Alleging Defects in the Indictment, 28 April 2009, (“*Ntawukulilyayo*, Decision on Defects in the Indictment”), para.13.

11. Rather, if the SPO knows ‘material facts’ now that it has omitted from pleading in this Indictment, it should be required to amend the Indictment to include them. It is the SPO’s responsibility to inform Mr Thaçi of its case in the primary charging instrument. He should not be required to have to work out the what, when, how and to whom, by picking through the greatly redacted Outline, supporting material or pre-trial brief to piece it together. This would impermissibly shift the burden onto Mr Thaçi in breach of his fair trial rights under Article 21 of the Law, Articles 30 and 31 of the Kosovan Constitution and Article 6 of the European Convention on Human Rights. It will also take longer to prepare his defence if he has to piece the case against him together.
12. As the ICTR Appeals Chamber held, “[i]t is to be assumed that an Accused will prepare his defence on the basis of material facts contained in the indictment, not on the basis of all the material disclosed to him that may support any number of additional charges, or expand the scope of existing charges.”<sup>12</sup>

#### **B. THE PLEADING OF JCE IS DEFECTIVE**

13. When pleading JCE, the SPO must plead the nature and purpose of the enterprise, the identity of the participants, the nature of the accused’s participation in the enterprise and the period of the enterprise.<sup>13</sup>
14. The Defence’s Preliminary Motion to Dismiss the Indictment due to a Lack of Jurisdiction demonstrates the inapplicability of JCE as a mode of liability before the KSC, and its incompatibility with fundamental principles of individual criminal responsibility.<sup>14</sup> Given its already shaky foundation, the deliberately

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<sup>12</sup> ICTR, *Prosecutor v Muvunyi*, ICTR-0055A-AR73, Appeals Chamber, Decision on Prosecution Interlocutory Appeal, 12 May 2005, (“*Muvunyi* Appeal Decision on Amendment of the Indictment”) para.22.

<sup>13</sup> *Uwinkindi* Appeals Decision on Defects, para.11; ICTY, *Prosecutor v Simic*, IT-95-9-A, Appeals Chamber, Judgment, 28 November 2006, para. 22; *Kvočka et al.* Appeal Judgment, para. 28.

<sup>14</sup> See KSC-BC-2020-06, Defence for Mr. Hashim Thaçi, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, 12 March 2021, paras 60-71.

vague framing of JCE liability in the Indictment gives rise to a fundamental risk of unfairness to the accused.

## 1. The JCE's common plan as set out in the Indictment is defective

15. The *actus reus* for all forms of JCE liability consists of the following three elements:

- (i) a plurality of persons;
- (ii) the existence of a common plan, design or purpose **which amounts to or involves the commission of a crime provided for in the Statute**; and
- (iii) participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.<sup>15</sup>

16. The common plan, which is at the heart of JCE liability, is the basis for the reciprocal or mutual attribution of the JCE members' different contributions. It is through the common plan that the JCE members assume responsibility for each other's acts. It is therefore unsurprising that, in formulating the elements of JCE, the ICTY Appeals Chamber in *Tadić* found that the plan itself must be a criminal one; it must "amount to or involve the commission of a crime provided for in the Statute."<sup>16</sup>

17. In the majority of cases, whether the common plan was indeed a criminal one has not been in issue, given that JCE members were alleged to have agreed to "destroy, in whole or in part, the Tutsi ethnic group";<sup>17</sup> or to "murder the hundreds of able-bodied men identified from the crowd of Muslims in Potočari"; patently criminal acts.<sup>18</sup>

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<sup>15</sup> ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 227.

<sup>16</sup> *Ibid.*

<sup>17</sup> ICTR, *Prosecutor v. Ndirabatswe*, ICTR-99-54-T, Trial Chamber, Judgment, 20 December 2012, para. 1305; ICTR, *Prosecutor v. Gatete*, ICTR-00-61, Trial Chamber, Judgment, 31 March 2011, paras. 585, 588.

<sup>18</sup> ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Chamber, Judgment, para. 1047; ICTY, *Prosecutor v. Krstić*, IT-98-33-T, Trial Chamber, Judgment, 2 August 2001, para. 612.

18. In this case, Mr. Thaçi is alleged to have been a part of a common plan “to gain and exercise control over all of Kosovo”.<sup>19</sup> This is not a common plan to commit a crime provided for in the Law. Seeking to gain and exercise political power over a territory is not an international crime.<sup>20</sup> As such, the JCE pleaded in this case is defective.
19. Some Chambers of international courts have given an expanded interpretation to the common plan requirement, finding that, in contrast to the plain language of *Tadić*, a common plan is **not** required to amount to or involve the commission of a crime. In cases where the common plan as charged was not a criminal one, Chambers have held that a criminal plan can either “have as its objective a crime within the Statute, or contemplate crimes within the Statute as a means of achieving its objective”.<sup>21</sup> The Indictment alleges that the (non-criminal) common plan of gaining control of Kosovo “encompassed the crimes of persecution, imprisonment, illegal or arbitrary arrest and detention, other inhumane acts, cruel treatment, torture, murder, and enforced disappearance of persons”.<sup>22</sup> As such, it appears that the SPO assumes that the KSC will adopt an expanded reading of the “common plan” requirement.
20. It is submitted that it should not. JCE allows for individual criminal liability in circumstances where the causal link between the accused’s conduct and the crimes charged is already remote. The counterbalance to this is the requirement that the accused must have evinced an agreement to commit crimes; namely that he agreed to be part of a plan that amounts to or involves the commission of a

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<sup>19</sup> Indictment, para. 32.

<sup>20</sup> SCSL, *Prosecutor v. Brima et al.*, SCSL-04-16-T, Trial Chamber, Judgment, 20 June 2007, para. 67. See also SCSL, *Prosecutor v. Kallon and Kamara*, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Trial Chamber, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, para. 20, citing M. N. Shaw, *International Law* (5th ed., 2003) p. 1040: “Whether to prosecute the perpetrators of rebellion for their act of rebellion and challenge to the constituted authority of the State as a matter of internal law is for the state authority to decide. There is no rule against rebellion in international law.”

<sup>21</sup> See, e.g. SCSL, *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Appeal Chamber, Judgment, 22 February 2008, para. 80; *Kvočka et al.* Appeal Judgment, para. 46.

<sup>22</sup> Indictment, para. 32.

crime under the Statute. Anything other than a plain reading of the *Tadić* elements risks distorting the causal link to a degree that is incompatible with principles of individual criminal responsibility, and runs counter to the principle of legal certainty and predictability as an aspect of fair trials.

21. However, even if the KSC adopts an expanded definition and finds that a common criminal plan is not a pre-requisite to JCE liability, this does not cure the Indictment's defects. Following the enumeration of the common plan, the Indictment continues:<sup>23</sup>

**Alternatively, to the extent that some of these crimes did not fall within the joint criminal enterprise, it was foreseeable that they might be perpetrated by one or more members of the joint criminal enterprise, or by persons used by any member of the joint criminal enterprise to carry out the crimes within the common purpose.** With the awareness that such crimes were a possible consequence of the implementation of the common purpose of the joint criminal enterprise, Hashim THAÇI, Kadri VESELI, Rexhep SELIMI, and Jakup KRASNIQI participated in that enterprise and thus, willingly took that risk.

22. As such, the SPO acknowledges that "some" of the crimes, and therefore potentially each of them, may not have fallen within the JCE. More specifically, they were not part of the common plan. The consequence of (deliberately) clouding this issue, and failing to identify which crimes fell within the JCE and those which may have fallen outside, is significant. The alternative pleading strips the JCE – and its non-criminal common plan - of the crimes it was said to also "encompass". That these crimes are alleged to have been a possible consequence of the implementation of the common plan is irrelevant; they are not "a means contemplated to achieve the objective", as required by the expanded definition. This alternative formulation, presumably intended to hedge the SPO's bets, ends up rendering the pleading of JCE defective. By any measure, a plan "to gain and exercise control" in Kosovo, which may or may not encompass crimes, cannot give rise to individual criminal responsibility in this case.

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<sup>23</sup> Indictment, para. 34.



- 2. Identity and role of JCE Members and Tools are defined overly broadly**
23. The pleading of the identity of the JCE members is impermissibly vague. First, the use of the word ‘included’ in paragraph 35 of the Indictment indicates that the list of members is non-exhaustive. Second, save for the four accused and the eight specifically named individuals in paragraph 35, the Indictment does not provide a sufficient degree of specificity with regard to the identity of the other JCE members.
24. When members are not identified by name, adequate temporal and geographical references should, if possible, be given.<sup>24</sup> For example, in *Munyakazi*, the ICTR Appeals Chamber, reading the indictment as a whole, confirmed that the identity of JCE participants was properly pleaded by reference to *Munyakazi* and the Bugarama Interahamwe killing Tutsi civilians at Shangi and Mblizi parishes, respectively on 29 and 30 April 1994.<sup>25</sup>
25. While the Indictment does define the members by category in paragraph 35, i.e., General Staff members, KLA zone commanders, police services etc., it does not indicate in what capacity these categories of individuals were involved in alleged crimes and when. Rather, the Indictment pleads in paragraphs 56-171 that certain named individuals and ‘other KLA members’ or ‘certain KLA members’ committed the crimes charged. These categories of individuals identified as JCE members do not feature in the description of the crimes themselves.
26. Furthermore, paragraph 35 of the Indictment does not link any of these categories of individuals to specific locations which could better identify them. For example, what zones and/or brigades and/or police districts were they from

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<sup>24</sup> *Uwinkindi* Appeals Decision on Defects, paras. 15-17; See also, ICTR, *Prosecutor v Munyakazi*, ICTR-97-36A-A, Appeals Chamber, Judgement, 28 September 2011, (*Munyakazi* Appeal Judgment) para. 162.

<sup>25</sup> *Munyakazi* Appeal Judgment, para. 162.

or based in? This lack of detail about the identity of all but twelve of the JCE members renders this pleading defective and prevents Mr Thaçi from conducting meaningful investigations and mounting a defence.

27. Similarly, the SPO has not pleaded the definition of “JCE Tools” with the required level of specificity. “Tools” are not defined in any autonomous way; in fact, the Indictment does not even attempt to distinguish JCE ‘Members’ from ‘Tools’ despite the fact that they clearly have different roles in the alleged crimes and presumably *mens rea* requirements. Rather, the Indictment appears to use the terms interchangeably in paragraph 35:

Alternatively, some or all of these individuals were not members of the joint criminal enterprise, but were used by members of the joint criminal enterprise to carry out crimes committed in furtherance of the common purpose (together with the JCE Members, collectively ‘JCE Members and Tools’).

28. This pleading illustrates that the SPO does not know who are JCE Members as opposed to Tools. The SPO is impermissibly hedging its bets and blurring the contours of its case to fit the evidence as it is heard. This is unfair and improper. The SPO is required to know its case before proceeding to trial.<sup>26</sup> Mr Thaçi cannot reasonably be expected to defend himself against an allegation of JCE whose members the SPO cannot even identify.

### 3. Nature of the Accused’s participation in the JCE is impermissibly vague

29. The SPO also fails to plead properly the nature of the accused’s participation in the enterprise.
30. The SPO pleads Mr Thaçi’s alleged personal participation in the JCE (and as an aider and abettor) in paragraphs 39-48 of the Indictment. Paragraph 40 appears to be a chapeau/introductory paragraph for paragraphs 41-48:

Hashim THAÇI, Kadri VESELI, Rexhep SELIMI, and Jakup KRASNIQI personally participated in the treatment of Opponents on the ground, including participating in the

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<sup>26</sup> *Muvunyi* Appeal Judgment, para 18 (citing *Ntagerura et al.*, Appeal Judgment, para. 27). See also *Kvočka et al.*, Appeal Judgment, para. 30; *Niyitegeka* Appeal Judgment, para. 194; *Kupreškic et al.*, Appeal Judgment, para. 92.

intimidation, interrogation, mistreatment, and detention of the Opponents, *like* in the cases discussed below. (Emphasis added).

31. The use of the word “like” suggests that the examples of Mr Thaçi’s alleged conduct listed in paragraphs 41-48 are non-exhaustive. This is impermissible. The requirement that the SPO knows its case before trial requires that the Indictment contain an exhaustive list of charges, rather than ‘edited highlights’.<sup>27</sup>
32. In addition, in many instances, the SPO has pleaded Mr Thaçi’s role in the JCE overly broadly and has not specified the required material facts supporting each of the charges. A material fact is an act or omission of the accused that gives rise to the allegation of infringement of a legal prohibition.<sup>28</sup> The SPO has failed to plead these acts and omissions in paragraphs 39 and 42-48 of the Indictment. In addition, the SPO has used non-exhaustive terms such as “including” to refer to dates and locations which is impermissibly vague; and the identities of the victims have not been specified.
33. Taking each allegation separately:
  - **Paragraph 39:** What specific “directions, instructions and orders” did he issue? What is meant by “the focus on Opponents”? What type of ‘focus’? Was it criminal? What “internal rules and regulations, trainings, policy documents and information booklets” does the Indictment refer to? When were they published and/or operational and to whom were they issued?
  - **Paragraph 42:** What was the nature of the “operations” that he participated in and coordinated? Were they criminal? How exactly did he ‘participate’ and ‘coordinate’? Which villages surrounding Rahovec/Orahovac did they occur in? What are the “other locations” referred to? Who was detained?

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<sup>27</sup> See comparable discussion re “including” in IRMCT, *Prosecutor v. Turinabo et al.*, MICT-118-116-T, Single Judge, Decision on Maximillien Turinabo’s, Anselme Nzabonimpa, and Marie Rose Fatuma’s Motions Challenging the Form of the Indictment, 12 March 2019, para. 21.

<sup>28</sup> See, *Muvunyi*, Appeals Decision on Amendment of the Indictment, para. 19.

- **Paragraph 43:** How did he take steps to “intimidate and assert dominance over units affiliated with the LDK, including [...] (FARK)”, i.e., what steps did he take? Which other units are referred to by the use of the word “including”? On what other occasions, in addition to early September 1998 is it alleged this occurred?
- **Paragraph 44:** Who were the [REDACTED] individuals detained and who did he threaten?
- **Paragraph 45:** Who is [REDACTED]?
- **Paragraph 46:** Who were [REDACTED]?
- **Paragraph 47:** Who were the detainees?
- **Paragraph 48a:** What “plans, policies and practices” did he formulate, and/or develop, approve, promote, disseminate and implement? How and when did he do this?
- **Paragraph 48b:** How, when and where did he participate in, facilitate, condone, encourage or otherwise aid the commission of crimes in furtherance of the common purpose and which of these did he do?
- **Paragraph 48c:** How, when and where did he fail to prevent and investigate crimes; and/or punish or discipline the perpetrators? What would an ‘adequate step’ have been (see paragraph 40 below)?
- **Paragraph 48d:** When, where and by what means did he facilitate the dissemination of such material? What was this material, and to whom was it disseminated?
- **Paragraph 48e:** How did he co-ordinate, engage or facilitate such activity? Where and when did he do this and to whom? For example, who is included in the term “the international community”? Who were the “monitors”? Which “public”?
- **Paragraph 48f:** Who did he appoint/promote? Who specifically had a history of alleged involvement in serious crimes? How did he know this?

- **Paragraph 48g:** When and where did he provide this support? What was the specific form/s of this support? Which crimes was it in furtherance of?
  - **Paragraph 48h:** How and using what methods did he co-ordinate and liaise? Which JCE Members and Tools did he co-ordinate and/or liaise with? The terms 'JCE Members and Tools' impermissibly encompass a vast and undefined number of individuals heightening the need for specificity (see paragraphs 23-28 above).
34. The charging of JCE is fundamentally flawed. In addition to pleading an impermissible common purpose, the JCE allegation is too broad, imprecise, and its members and tools are insufficiently defined. As a result, this Indictment fails to fulfil its fundamental purpose of providing Mr Thaçi with a description of the charges against him with sufficient particularity to allow him to mount a defence.

### C. THE PLEADING OF AIDING AND ABETTING IS DEFECTIVE

35. Where it is alleged that an accused aided and abetted in the planning, preparation or execution of alleged crimes, the Prosecutor is required to identify the 'particular acts' or 'particular course of conduct' by the accused which forms the basis for the charges.<sup>29</sup>
36. In paragraph 52 of the Indictment, the SPO states that "through these same acts and omissions" Mr Thaçi is alleged to have aided and abetted the crimes charged. It is unclear to which acts and omissions the SPO is referring, as no cross-references to any paragraphs of the Indictment are provided. However, if the SPO is referring to the allegations in paragraphs 39-48 of the Indictment, the Defence repeats its submissions above at paragraphs 29-34 that these pleadings

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<sup>29</sup> ICTR, *Prosecutor v Renzaho*, ICTR-97-31-A, Appeals Chamber, Judgement, 1 April 2011, para. 53; *Ntagerura et al.*, Appeal Judgment, para. 25 citing ICTY, *Prosecutor v Blaškić*, IT-95-14, Appeals Chamber, Judgement, 29 July 2004, ("*Blaškić* Appeal Judgment") para. 213.

are defective for being impermissibly vague. Specifically, they lack the required detail about matters including Mr Thaçi's specific conduct and the means through which it is alleged he aided and abetted the commission of each crime charged; some of the locations; some of the dates; and the identity of victims.

37. Further, how exactly is it alleged that Mr Thaçi knew of the probability of these crimes being committed? The SPO has simply lifted the elements of this mode of liability and placed them in an indictment without specifying the material facts of Mr Thaçi's alleged conduct that make him culpable, as required.
38. In addition, the SPO has failed to specify, as required, how these acts and omissions had a substantial effect on the perpetration of the crimes charged.
39. For these reasons, the pleading of aiding and abetting is defective.

#### **D. THE PLEADING OF SUPERIOR RESPONSIBILITY IS DEFECTIVE**

40. An indictment alleging liability through superior responsibility must plead the following: (1) that the accused is a superior of subordinates sufficiently identified, over whom he had effective control – i.e., a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible; (2) the criminal conduct of the others for whom he is alleged to be responsible; (3) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and (4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators who committed them.<sup>30</sup> This latter requirement obliges prosecutors to include, in the charging document, the

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<sup>30</sup> *Muvunyi* Appeal Judgment, para. 19 (citing ICTR, *Prosecutor v Nahimana et al.*, ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 323; *Ntagerura et al.*, Appeal Judgment, paras. 26, 152. See also ICTY, *Prosecutor v Naletilic and Martinovic*, Appeals Chamber, Judgment, 3 May 2006, para. 67, *Blaškić* Appeal Judgment, para. 218); ICC, *Prosecutor v Bemba*, ICC-01/05-01/08-3636-RED, Appeals Chamber, Judgment, 18 June 2018, para. 186.

measures it alleges the accused could have taken, and failed to take. General allegations of “a failure to take necessary and reasonable measures” will not provide an accused with the information required to defend against this alleged dereliction of duty. ICTY indictments regularly listed with precision the inquiries and investigations the accused should have undertaken, into whom, and from what dates.<sup>31</sup> This is also the practice at the ICC.<sup>32</sup>

## **1. Failure to identify clearly the individuals over whom it alleges Mr Taçi had effective control**

41. The Indictment alleges that Mr Taçi had effective control over the “JCE Members and Tools”.<sup>33</sup> As stated above in paragraphs 23-28, the definition of ‘JCE Members and Tools’ is so vast as to be meaningless. If the SPO cannot individually identify individuals over whom it alleges Mr Taçi had effective control, it must, at a minimum, refer to their class or position in the group. Under certain circumstances, referring to an alleged subordinate by category can be sufficient identification, i.e., military personnel hailing from a specific location/military camp.<sup>34</sup> For example the ICTR Appeals Chamber held that the following provided a reasonable identification of an alleged subordinate: “a soldier from the Ngoma Military Camp”<sup>35</sup> and “ESO Camp soldiers” at the University of Butare.<sup>36</sup>

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<sup>31</sup> ICTY, *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, IT-04-82-PT, Amended Indictment, 2 November 2005, paras. 15-17; ICTY, *Prosecutor v. Sefer Halilović*, IT-01-48-I, Indictment, 10 September 2001, para. 34; ICTY, *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, IT-01-47-PT, Third Amended Indictment, 26 September 2003, paras. 9-10, 40-41, 45-46.

<sup>32</sup> ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-856-Red-AnxA, Revised Second Amended Document Containing the Charges, 18 August 2010, paras. 93-100; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-458-AnxA, Amended Document Containing the Charges, 16 February 2015, para. 150.

<sup>33</sup> Indictment, para. 53.

<sup>34</sup> ICTR, *Prosecutor v. Karemera & Ngirumpatse*, ICTR-98-44-A, Appeals Chamber, Judgment, 29 September 2014, para. 370.

<sup>35</sup> ICTR, *Prosecutor v. Hategekimana*, ICTR-00-55B-A, Appeals Chamber, Judgment, 8 May 2012, para. 166.

<sup>36</sup> *Muvunyi* Appeal Judgement, para. 55.

42. However, the SPO has not done this in relation to the definition of JCE Members and Tools (see above at paragraphs 25-27) and, thus, the pleading is defective.

**2. Failure to identify clearly the criminal conduct of subordinates**

43. The Defence repeats its submissions at paragraphs 29-34 above that the criminal conduct allegedly perpetrated by JCE Members and Tools (over whom it is alleged Mr Thaçi exercised superior responsibility) is defectively pleaded.

**3. Failure to identify clearly the conduct of Mr Thaçi by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates**

44. At paragraph 54 of the Indictment, the SPO sets out the conduct by which it is alleged that Mr Thaçi knew or had reason to know that crimes had or were about to be committed by his subordinates. This conduct is insufficiently detailed and does not contain the material facts of Mr Thaçi's alleged conduct which the prosecutor is required to plead.

45. Taking each allegation separately:

- **Paragraph 54(a):** How exactly was he involved in the preparation, design, and/or execution of the crimes, i.e., what is he alleged to have done?
- **Paragraph 54(b):** Which locations does the SPO allege that he was present at and when?
- **Paragraph 54(c):** Which Indictment crimes is it alleged that he received information about? How did he get it? Who gave it to him? When was he told?
- **Paragraph 54(d):** What does "personal observation of evidence of the commission of such crimes" mean? Does it mean physical presence at a crime site or more and, if so, what?



4. **Failure to plead with sufficient specificity the conduct by which it is alleged that Mr Thaçi failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators who committed them.**
46. Paragraph 55 of the Indictment sets out a generic list of alleged failures to act by Mr Thaçi, absent any material facts. As set out above at paragraph 40, without these details, the Indictment is defective.
47. Taking each allegation separately:
- **Paragraph 55(a):** Which crimes, committed by which subordinates, and when is it alleged that he failed to order investigations into?
  - **Paragraph 55(b):** Which crimes, committed by who and when is it alleged that he failed to report to the appropriate authorities? Who does the SPO say was the appropriate authority?
  - **Paragraph 55(c):** Which Members/Tools is it said that he failed to discipline, demote, dismiss etc, for which crimes and when?
  - **Paragraph 55(d):** Which crimes, and committed by who, is it said that he could prohibit or stop by issuing such an order?
  - **Paragraph 55(e):** What training and/or regulations and procedures is it suggested would have ensured that his alleged subordinates would not commit crimes?
48. For these reasons, the pleading of superior responsibility is defective.

**E. THE PLEADING OF THE CHAPEAU OF CRIMES AGAINST HUMANITY IS DEFECTIVE**

49. The pleading of crimes against humanity in the Indictment is defective because the crimes charged are not directed against a “civilian population” (the nexus requirement) as required by Article 13 of the Law and customary international law, but rather a sub-set of alleged civilians: so-called “Opponents”.

50. In paragraph 16 of the Indictment, the 'attack' is alleged to have been directed against the "civilian population of Opponents (defined below)". In paragraph 17 of the Indictment, the 'attack' is alleged to have been directed against simply "Opponents" - the term 'civilian' is omitted. Paragraph 32 contains a definition of "Opponents":

Such opponents included persons who were or were perceived to have been: (a) collaborating or associating with FRY forces or officials or state institutions or (b) otherwise not supporting the aims or means of the KLA and later the PGoK, including persons associated with the LDK and persons of Serb, Roma, and other ethnicities.<sup>37</sup>

51. In *Limaj*, the ICTY held that "the targeting of a select group of civilians – for example, the targeted killing of a number of political opponents" cannot satisfy the requirements of a crime against humanity.<sup>38</sup> The requirement that a 'civilian population' be targeted is to exclude "from the realm of crimes against humanity the perpetration of crimes against a limited and randomly selected number of individuals".<sup>39</sup> This Indictment falls foul of that prohibition as "Opponents" is a select group of civilians. Thus, as currently pleaded, Article 13 of the Law is inapplicable as a 'civilian population' contemplated by Article 13 has not, on the SPO's case, come under attack.

52. Furthermore, aspects of the definition of "Opponents", namely "other ethnicities" in paragraph 32(b) is impermissibly vague. What ethnicities does "other" encompass? Is it 'all' other ethnicities in addition to Serb or Roma, or just some and, if so, which?

#### F. THE PLEADING OF WAR CRIMES VICTIMS IS DEFECTIVE

53. In paragraph 31 of the Indictment, it is alleged that all war crimes charged were committed against victims who took "no active part in hostilities". This is in accordance with customary international law as reflected in Article 14(1)(c) of

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<sup>37</sup> Indictment, para. 32

<sup>38</sup> ICTY, *Prosecutor v Limaj et al*, IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, para. 187.

<sup>39</sup> *Ibid*, para. 218.

the Law that victims of war crimes committed in non-international armed conflict must be persons taking no active part in hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause.<sup>40</sup> The identity of these victims is not further defined in paragraph 31 of the Indictment.

54. However, paragraph 32 detailing the modes of liability, namely JCE and aiding and abetting through which Mr Thaçi is alleged to have committed these war crimes, defines the victims as 'Opponents'.
55. It is unclear what the SPO means in paragraph 32 of the Indictment (quoted above in paragraph 50) by those "collaborating" or "associating with FRY forces". However, *prima facie*, these people arguably cannot be said to be taking no active part in hostilities as they are working with FRY forces by 'collaborating' or 'associating' with them. Therefore, the nexus requirement of war crimes being targeted against those taking no part in active hostilities is not met, rendering the Indictment defective.
56. This defect is not cured by the insertion of the word "civilian" at paragraph 16 of the Indictment, as the definition cross-referenced at paragraph 32 expressly includes those taking part in hostilities. Moreover, "civilian" is not used in paragraph 17. Therefore, the pleading is itself contradictory, thus creating additional levels of impermissible confusion.
57. This argument applies equally to the 'chapeau' requirement for crimes against humanity as it is hard to see how an attack directed in part against those working with FRY forces could be said to be against a civilian population.

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<sup>40</sup> ICTY, *Prosecutor v Strugar*, IT-01-42-A, Appeals Chamber, Judgment, 17 July 2008, paras. 172, 178; ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-tENG, Trial Chamber, Judgment, 7 March 2014, paras. 789-790.

## G. THE PLEADING OF SPECIFIC CRIMES IS DEFECTIVE

58. As set out below, the Indictment fails to plead with the required level of specificity some of the material facts of the crimes detailed in paragraphs 56-171 of the Indictment. Specifically, it is largely silent as to the identities of the perpetrators, save generic references to them being “KLA members”, and many of the victims. It is also vague about the locations of some crimes and insufficiently details Mr Thaçi’s link to the crimes, as well as the role he is accused of playing. The net result is that it is difficult for Mr Thaçi to investigate these crimes and mount a defence.

59. Taking each alleged crime separately:

### 1. Imprisonment/ Illegal or Arbitrary Arrest and Detention

- **Paragraphs 60-63, 65-93:** What was his role in these crimes?
- **Paragraph 60:** Other than Selimi and Geci, who are the ‘multiple other KLA members’? Who are the 25 detainees? What are the ‘certain other locations in Likoc/Likovac, Skënderaj/Srbica where they were detained and for how long? Who were the detainees that were detained at other detention sites and which ones?
- **Paragraph 61:** Other than Brahimaj, who are the ‘multiple other KLA members’? Who are the 13 persons detained and for how long?
- **Paragraph 62:** Who are the ‘certain KLA members’ that operated the detention site? Who was detained here and when? Other than Limaj and Buja, who are the ‘multiple KLA members’ who arrested and detained the detainees?
- **Paragraph 63:** Who are the 38 detainees? How long was each detained for? Who was transferred from or to other detention sites, and where were they transferred from or to?

- **Paragraph 65:** Who are the 'certain KLA members' involved in transportation and detention? Who are the 'at least' 48 persons detained? How long was each detained?
- **Paragraph 66:** Who are the 'certain KLA members'? Who are the five detainees and how long was each detained?
- **Paragraph 67:** Who are the 'certain KLA members' that detained at least eight persons in Bare, Podujevë/Podujevo in August 1998? Who are these eight persons? How long was each detained? [REDACTED] Who are the 'certain KLA members' that detained 'at least' 16 persons in Bajgorë/Bajgora, Podujevë/Podujevo between August and September 1998 and who were the detainees? How long was each detained? Which detainees were transferred from or to other detention sites, and where were they transferred from or to?
- **Paragraph 68:** Other than Mustafa and Gashi, who are the 'certain other KLA members'? Who are the 52 detainees? How long was each detained?
- **Paragraph 69:** Who is the detainee?
- **Paragraph 70:** Who are the [REDACTED] detainees and who transferred them to Majac/Majance? Who are the [REDACTED] detainees and who transferred them to Potok, Podujevë/Podujevo?
- **Paragraph 71:** Who are the 'certain KLA members' who arrested this man? Who beat him?
- **Paragraph 72:** Who are the 'certain KLA members'? Where specifically is the 'location used by KLA members' and what was it used for? Who is responsible for detaining seven people in the compound in Zllash/Zlaš? Who are the seven people?
- **Paragraph 73:** Other than [REDACTED], who are the 'other KLA members' who participated in the arrest and detention of the [REDACTED] individuals? Who were the [REDACTED] individuals?
- **Paragraph 74:** Who are the 'certain KLA members'? Who are the four detainees? How long was each detained? [REDACTED]?

- **Paragraph 75:** Who are the ‘certain KLA members’? Who are the 20 detainees? How long was each detained? Other than the four people specified, who are the ‘multiple KLA members’? What is the specific role of each of those involved in the transfer, detention and/or release of detainees held at the detention site near Kleçkë/Klečka?
- **Paragraph 76:** Which detainees were transferred from or to other detention sites and which detention sites? Who was the person detained and how long was he detained? Who are the ‘certain KLA members’?
- **Paragraph 77:** Who are the ‘certain KLA members’ involved in the detention of 13 persons in [REDACTED], Kaçanik/Kaçanik? Who are these 13 persons? How long was each detained? Who are the five detainees detained in [REDACTED], [REDACTED]? How long was each detained? Who are the five detainees detained in [REDACTED], [REDACTED]? Who are the ‘multiple KLA members’ involved in the detentions?
- **Paragraph 78:** Other than Geci, who are the ‘certain KLA members’? Who are the 17 detainees? How long was each detained? Who are the detainees transferred from or to other KLA detention sites and which sites?
- **Paragraph 79:** Other than Geci, who are the ‘certain KLA members’? Who are the 20 detainees? How long was each detained? Who are the detainees transferred from or to other detention sites and which detention sites?
- **Paragraph 80:** Who are the ‘certain KLA members’ that detained persons at [REDACTED], Malishevë/Mališevo? Who are the three detainees? How long was each detained? Who are the ‘certain KLA members’ who detained persons at [REDACTED], [REDACTED]? Who are the seven persons detained in [REDACTED]? How long was each detained?
- **Paragraph 81:** Who are the ‘certain KLA members’? Who was the person detained in [REDACTED], Drenas (Glllogoc)/Glogovac and for how long? Who is responsible for his transfer and detention?

- **Paragraph 82:** Who are the 'certain KLA members'? What were the locations 'in or around [REDACTED], Prishtinë/Priština'? Who are the three persons that were detained and for how long? Who are the two detainees that were detained at other locations, where and for how long?
- **Paragraph 83:** Who are the 'certain KLA members'? Who are the nine detainees? How long was each detained?
- **Paragraph 84:** Who are the 'certain KLA members'? Who are the eight persons detained? Which detainees were previously detained elsewhere, where and when?
- **Paragraph 85:** Who are the 'certain KLA members'? Who are the 15 persons detained? Which detainees were transferred to or from other locations, where and for how long?
- **Paragraph 86:** Who are the 'certain KLA members'? Who are the two detainees?
- **Paragraph 87:** Who are the 'certain KLA members'? Who are the three detainees? How long was each detained?
- **Paragraph 88:** Who are the 'certain KLA members'? Who is the detainee?
- **Paragraph 89:** Who are the 'certain KLA members'? Who are the [REDACTED] detainees and how long were they detained?
- **Paragraph 90:** Who are the 'certain KLA members'? Who are the three detainees and how long were they detained?
- **Paragraph 91:** Who are the 'certain KLA members', who did they detain and for how long? Other than [REDACTED], what other locations was this person transferred to and for how long?
- **Paragraph 92:** Who are the 'certain KLA members' and who were the four people they arrested?
- **Paragraph 93:** Who are the 'certain KLA members'?

## 2. Other Inhumane Acts and Cruel Treatment

- **Paragraphs 97-107, 109, 111-133:** What was Mr Thaçi's role in these crimes?
- **Paragraphs 97-106, 109, 111-125, 129-133:** Who were the detainees?
- **Paragraph 97:** Other than Selimi and Geci, who are the 'multiple KLA members' beating and abusing detainees?
- **Paragraph 98:** Other than Brahimaj, who are the 'multiple KLA members' beating and abusing detainees?
- **Paragraphs 99-101:** Who are the 'multiple KLA members' beating and abusing detainees?
- **Paragraph 102:** Who are the 'certain KLA members' beating and abusing detainees? Which detainee was interrogated about being a spy?
- **Paragraph 103:** Who are the 'multiple KLA members' beating and abusing detainees? Which detainee was subject to [REDACTED]?
- **Paragraph 104:** Who are the 'multiple KLA members' beating and abusing detainees?
- **Paragraph 105:** Which detainee suffered prior mistreatment? When, and where did this occur? Who are the 'certain KLA members' subjecting the detainee to beatings and abuse?
- **Paragraph 106:** Who are the 'multiple KLA members' subjecting detainees to beatings and abuse?
- **Paragraph 107:** Who are the 'multiple KLA members' subjecting detainees to beatings and abuse? Who are the six detainees that were beaten, kicked, stamped upon, punched and/or threatened with death?
- **Paragraph 108:** When specifically is it alleged that [REDACTED] questioned [REDACTED]?
- **Paragraph 109:** Who are the 'multiple KLA members' subjecting detainees to beatings and abuse? Which four detainees were subjected to beatings and abuse?



- **Paragraph 110:** Who are [REDACTED]? What exact locations [REDACTED], and for how long? When and where [REDACTED]? Who is [REDACTED]? Who are [REDACTED]?
- **Paragraph 111:** Who is the 'KLA member' that told a detainee he would be killed?
- **Paragraph 112:** Who are the 'certain KLA members' beating and abusing detainees? Other than Limaj, who are the 'multiple other KLA members' involved?
- **Paragraph 113:** Which detainees suffered abuse at other locations before or after leaving Klečkë/Klečka? At what locations did this occur? What abuse was suffered by the detainees at other locations? Which KLA members interrogated, and abused the detainee?
- **Paragraph 114:** Who are the 'multiple KLA members' subjecting detainees to beatings and abuse?
- **Paragraph 115:** Other than Geci, who are the 'multiple KLA members' subjecting detainees to beatings and abuse?
- **Paragraph 116:** Other than Geci, who are the 'multiple KLA members' beating and abusing detainees? Who are the 'certain KLA members' who shot two detainees and who were the detainees? Who are the 'certain KLA members' who forced detainees to perform manual labour? Which detainee was informed he had been sentenced to prison and execution?
- **Paragraph 117:** [REDACTED], who was the other KLA member that questioned the detainee?
- **Paragraphs 118, 119, 120, 122:** Who are the 'multiple KLA members' subjecting detainees to beatings and abuse?
- **Paragraph 121:** Who are the 'multiple KLA members' subjecting detainees to beatings and abuse? Which detainee had [REDACTED]?
- **Paragraph 123:** Who are the 'multiple KLA members' subjecting detainees to beatings and abuse? Which detainee had his teeth pulled out?

- **Paragraph 124:** Who are the 'multiple KLA members' subjecting detainees to beatings and abuse? Who are the two detainees interrogated and accused of committing crimes?
- **Paragraph 125:** Who are the 'multiple KLA members' subjecting detainees to beatings and abuse? Which detainee was forced to drink paint thinner? Which 'one KLA member' ordered the two detainees to undress and have sex?
- **Paragraph 126:** Who are the 'multiple KLA members' subjecting [REDACTED] and his wife to abuse? Other than beating [REDACTED] in front of his wife, were they abused in any other ways? Who are the 'certain KLA members' that set fire to [REDACTED]'s house?
- **Paragraph 127:** Who are the 'multiple KLA members' subjecting [REDACTED] to abuse? Other than beating [REDACTED], what other physical and psychological abuse was perpetrated on [REDACTED]? Who are the 'certain KLA members' that took [REDACTED] away?
- **Paragraph 128:** Who are the 'multiple KLA members' and 'certain KLA members' that subjected [REDACTED] to abuse? What harassment and abuse of [REDACTED] continued until [REDACTED] 1999?
- **Paragraph 129:** Who are the 'multiple KLA members' that subjected the detainee to beatings and abuse? Who is responsible for [REDACTED]?
- **Paragraph 130:** Who are the 'multiple KLA members' that subjected the detainees to beatings and abuse? Which detainee was hit with rifle butts, kicked, punched and threatened with death?
- **Paragraph 131:** Who are the 'multiple KLA members' that subjected the detainees to beatings and abuse? Which [REDACTED]?
- **Paragraph 132:** Who are the 'multiple KLA members' that subjected the detainee to beatings and abuse? Who are the 'certain KLA members' that questioned the detainee? Who are the 'certain KLA members' that tied up

and transferred the detainee? Who is responsible for the detention, interrogation and treatment of the detainee at [REDACTED]?

- **Paragraph 133:** Who is the Serb that was arrested and detained? Who are the 'certain KLA members' that participated in the detainee's arrest and detention? Who is responsible for abusing and beating the detainee at Novobërdë/Novo Brdo? Who are the 'certain KLA members' that threatened the detainee and his family members?

### 3. Torture

- **Paragraph 135:** Which JCE Members and Tools committed acts that amount to torture, when, where and who were the victims? What was Mr Thaçi's role?

### 4. Murder

- **Paragraphs 137-170:** What was Mr Thaçi's role in these murders?
- **Paragraph 137:** Who are the 'certain KLA members' that perpetrated the abduction? Who is the 'KLA soldier' who advised that '[REDACTED]' would join him later'? Who are the 'KLA members' that told people that missing men were being questioned?
- **Paragraph 138:** Who are the uniformed KLA members responsible for the abduction?
- **Paragraph 139:** Who is responsible for perpetrating each of the events described?
- **Paragraph 140:** Who are the 'certain KLA members' that arrested and beat [REDACTED]?
- **Paragraph 141:** Who are the 'certain KLA members' that beat and killed the detainee?

- **Paragraph 142:** Who is responsible for perpetrating each of the events described?
- **Paragraph 143:** Who beat and later killed [REDACTED]?
- **Paragraph 144:** Who are the 'certain KLA members' responsible for each of the events described? Other than the nine named detainees, who are the approximately 21 remaining detainees? Other than the nine named detainees, which detainees were released, and which were killed?
- **Paragraphs 145-146:** Who are the 'certain KLA members' responsible for beating, detaining and killing the detainees?
- **Paragraph 147:** Who perpetrated the events described? Who are the 'KLA members' that the families begged for information?
- **Paragraph 148:** Who are the 'certain KLA members' that arrested the detainee and brought him to Drenoc/Drenovac? Who killed him?
- **Paragraph 149:** Who are the 'certain KLA members' that arrested, detained, beat and killed the detainee?
- **Paragraph 150:** Who are the 'certain KLA members' that arrested and detained the detainee? Who is responsible for his death?
- **Paragraph 151:** Who are the 'KLA members' that beat and kicked the detainees? Who are the 'certain KLA members' that killed the detainees? Who escaped?
- **Paragraph 152:** Who are the 'KLA members' that killed the detainees? Who is responsible for the other events described (i.e. detention, transfer, denial of information to family members)? Were all detainees in the site killed?
- **Paragraph 153:** When was [REDACTED] detained? Who are the 'KLA members' that detained and interrogated him? Who killed him? Who are the 'KLA members' that [REDACTED]?
- **Paragraph 154:** How long, and in what exact locations, were [REDACTED] each detained? Who are the 'certain KLA members' that detained and mistreated each of them in Llapashticë/ Lapaštica? Who told detainees at

Majac/Majance to [REDACTED]? Who is responsible for killing the named individuals?

- **Paragraph 155:** How long were [REDACTED] each detained in Llapashticë/Lapaštic? Who are the 'certain KLA members' that detained and mistreated these individuals? Who is responsible for their death?
- **Paragraph 156:** Who is responsible for the beatings and killing of the Roma man?
- **Paragraph 157:** Who is responsible for perpetrating each of the events described? How was the individual mistreated? Where, when and how did he die?
- **Paragraph 158:** Who are the 'certain KLA members' responsible for the arrest and beatings of the detainee?
- **Paragraph 159:** Who are the 'KLA members' responsible for the arrests of [REDACTED]? Who is responsible for their beating and killing?
- **Paragraph 160:** Who are the 'certain KLA members' responsible for [REDACTED]'s arrest and death?
- **Paragraph 161:** Who is responsible for the 'disappearance', detention and deaths of [REDACTED]?
- **Paragraph 162:** Who are the 'certain KLA members' allegedly responsible for detaining and killing [REDACTED]?
- **Paragraph 163:** Who is responsible for perpetrating each of the events described?
- **Paragraph 164:** Other than [REDACTED], who are the 'certain KLA members' that arrested, detained, beat and killed the detainee?
- **Paragraph 165:** Who are the 'certain KLA members' that arrested and detained the detainee? Who is responsible for the detainee's beatings and death?
- **Paragraph 166:** Who are the 'certain KLA members' who arrested and mistreated [REDACTED], and how? Who is responsible for their death?

- **Paragraph 167:** Who are the 'certain KLA members' who took [REDACTED] away and who is responsible for his death?
- **Paragraph 168:** Who are the 'certain KLA members' who took [REDACTED] away and who killed him?
- **Paragraph 169:** Who are the 'certain KLA members' who took away, interrogated and beat [REDACTED]? Who is responsible for his death?
- **Paragraph 170:** Who are the 'certain KLA members' who killed the man?

## 5. Enforced Disappearance

60. The Defence notes that the use of the word 'include' to create a non-exhaustive pleading of enforced disappearances is impermissibly vague. It also repeats its questions above related to instances pleaded in paragraphs 137, 139, 142, 147, 149, 150, 152-157 and 163 of the Indictment. Finally, what was Mr Thaçi's role in these disappearances?

### H. THE INDICTMENT DOES NOT COMPLY WITH THE KOSOVAN CRIMINAL PROCEDURE CODE

61. Contrary to the provisions of the Kosovo Criminal Procedure Code the Indictment does not sufficiently specify the legal name of the criminal offence citing the provisions of the relevant Code.<sup>41</sup> Such referencing is mandatory under Kosovan law. Rule 86(3) of the KSC Rules specifies that the indictment shall set out the crime(s) with which the suspect is charged. Article 19 of the Law states that in determining its Rules of Procedure and Evidence the Specialist Chambers shall be guided by the Kosovo Criminal Procedure Code, while the KSC Rules specify that they shall be interpreted in a manner consonant with the framework as set out in Article 3 of the Law and, where appropriate, the Kosovo Criminal Procedure Code. Proper legal classification of the alleged offence under

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<sup>41</sup> No. 04/L-123 Procedure Code, Article 24.1.4.

the substantive law applicable at the time is necessary, and a departure from such protective provisions of Kosovo law unjustified.

**I. CONCLUSION AND REMEDY SOUGHT**

62. The indictment is the principle charging document and the 'rules' that require it to provide clear notice are there for the benefit of the accused person, not the lawyers. This Indictment, containing as it does a multiplicity of overlapping crimes, each in respect of modes of liability of increasing tenuousness and complexity and to which is added a lack of necessary detail, remote referencing and redaction, is unworthy of any court aspiring to provide a fair trial.
63. For the reasons set out in this filing, the Indictment is defective. The Defence invites the Pre-Trial Judge to:

**ORDER** the SPO to amend the Indictment in light of the identified defects; and if it cannot, to remove those charges that are defectively pleaded.

**Word count: 8885**

Respectfully submitted,



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**David Hooper Q.C.**

**Specialist Counsel for Hashim Thaçi**

12 March 2021

At London, the United Kingdom.