

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: Defence Counsel for Jakup Krasniqi

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Krasniqi Defence

Preliminary Motion Alleging Defects in the Indictment

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I. INTRODUCTION

1. Pursuant to Rule 97(1)(b) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), the Defence for Jakup Krasniqi (“Defence”) hereby challenge the form of the Indictment.

2. The core defect in the Indictment is its failure specifically to define the particular acts or course of conduct that Mr. Krasniqi himself allegedly performed (or omitted to perform) which justify the alleged modes of responsibility. Mr. Krasniqi is entitled to understand clearly and fully the nature and cause of the charges against him in order that he can prepare his defence. On the few occasions where allegations are made about his personal conduct, the Indictment fails to particularise the specific dates, locations or conduct pertaining to each allegation. Moreover, the Indictment relies on generic descriptions of alleged conduct without defining concrete incidents. The result is that instead of specificity and clarity, the Indictment only offers vague and generic allegations which do not put Mr. Krasniqi on notice of the nature or cause of the case against him.

3. In this motion, the Defence challenge the following defects:-

- a. The failure to specify the particular acts that allegedly show that Mr. Krasniqi participated in a Joint Criminal Enterprise or aided and abetted the commission of crimes;
- b. The failure to specify the required elements of command responsibility;
- c. The failure to adequately identify the plurality of persons in the alleged joint criminal enterprise;

- d. The vague allegation of acts of persecution in paragraph 58(g), (h) and (i) of the Indictment;
- e. The failure to plead material facts relating to the crime of enforced disappearance in paragraph 171 of the Indictment;
- f. The use of open-ended and imprecise terms such as “including” or “about” throughout the Indictment.

4. Insofar as they are not inconsistent with this Preliminary Motion, the Defence also adopt and join any Preliminary Motions alleging defects in the Indictment submitted by the Defence for Hashim Thaçi, Kadri Veseli and Rexhep Selimi.

5. The Defence submit that the SPO should be ordered to amend the Indictment to provide full and specific details on the matters identified below. In the event that the SPO is unable to provide further particulars on any allegations, those allegations should be struck out.

6. At the time of filing this preliminary motion, substantial passages of the Indictment remain redacted. Accordingly, the Defence reserve the right to challenge the form of the redacted segments at a later date when the redactions are lifted. Further, the Defence make it clear at the outset that Mr. Krasniqi denies all of the charges in the Indictment. Nothing in this challenge to the form of the Indictment in any way limits or waives his right to contest all of the charges in the course of the trial.

II. APPLICABLE LAW

7. Article 38(4) of Law No.5/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") provides that "[...] the Specialist Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the person is charged under this Law".

8. Article 21(4) provides in part that:

In the determination of any charge against the accused pursuant to this Law, the accused shall be entitled to the following minimum guarantees, in full equality:-

- (a) to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
- (b) [...];
- (c) to have adequate time and facilities for the preparation of his or her defence and to communicate with Specialist Counsel of his or her own choosing [...]. (emphasis added)

9. Rule 97(1)(b) of the Rules provides that:

The Accused may file preliminary motions before the Pre-Trial Judge in accordance with Article 39(1) of the Law, which:

- (b) allege defects in the form of the indictment; and

10. Further guidance may be derived from Article 241 of the Kosovo Criminal Procedure Code¹ which provides at para. 1.5 that the Indictment shall contain "the time and place of commission of the criminal offence, the object upon which and the instrument by which the criminal offence was committed, and other circumstances necessary to determine the criminal offence with precision".

11. The Pre-Trial Judge previously considered the meaning of Articles 21 and 38 and found that:

The requirement of being informed "in detail" and "concise[ly]" entails that the information is set out with precision and briefly, but comprehensively, without diffusion. Accordingly, a combined reading of these provisions requires *specificity* and *clarity* in stating the facts of the case

¹ Rule 4(1) provides that "[t]he Rules 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".

and the crimes, including the modes of liability charged. Only an indictment meeting these requirements will put the accused formally on notice.²

12. Consistent with the above conclusions of the Pre-Trial Judge, the *ad hoc* Tribunals have considered the required level of specificity in a number of persuasive decisions. The obligation on the SPO is to state the material facts underpinning the charges, with enough detail to inform the accused of the charges against him so that he can prepare his defence.³ It is material facts as distinct from evidence which must be pleaded.⁴ The materiality of a particular fact depends on the nature of the Prosecution case and the proximity of the accused to the events alleged in the indictment.⁵ Where it is alleged that a criminal act was physically committed by the accused, the allegation must be particularised as far as possible and with the greatest precision.⁶ That requires the SPO to set out specifically the date, location and victim.⁷ Where it is alleged that the accused is responsible for a crime through other modes of responsibility, the particular acts or course of conduct of the accused that demonstrate the relevant mode of responsibility should be pleaded.⁸ As the Pre-Trial Judge concluded earlier, this requires detailed information regarding *inter alia* “the accused’s alleged conduct giving rise to criminal responsibility” and “the accused’s contribution” to the common criminal plan.⁹

² KSC-BC-2020-06, F00010, Pre-Trial Judge, *Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules* (“PTJ Order”), 2 July 2020, public, para. 10.

³ ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeals Chamber, *Appeal Judgment* (“Kupreškić Appeal Judgment”), 23 October 2001, para. 88.

⁴ *Ibid.*

⁵ ICTY, *Prosecutor v. Perišić*, IT-04-81-PT, Trial Chamber, *Decision on Preliminary Motions* (“Perišić Decision on Preliminary Motions”), 29 August 2005, para. 6.

⁶ PTJ Order, para. 17, citing to ICTY, *Prosecutor v. Krnojelac*, IT-97-25, Trial Chamber II, *Decision on Preliminary Motion on Form of Amended Indictment* (“Krnojelac Decision”), 11 February 2000, para. 18; *Prosecutor v. Blaškić*, IT-95-14-A, Appeals Chamber, *Judgment* (“Blaškić Appeal Judgment”), 29 July 2004, para. 213. See also, SCSL, *Prosecutor v. Brima et al. (AFRC case)*, SCSL-2004-16-A, Appeals Chamber, *Judgment*, 22 February 2008, para. 38.

⁷ ICTR, *Muhimana v. Prosecutor*, ICTR-95-1B-A, Appeals Chamber, *Judgment*, 21 May 2007, para. 76.

⁸ Blaškić Appeal Judgment, para. 213.

⁹ PTJ Order, para. 18.

13. Defects in the indictment cannot be cured by reference to the underlying evidence or the Rule 86(3)(b) Outline. The Indictment is a stand-alone document. As the Pre-Trial Judge stated “the accused should not be required to consult other documents in order to understand and piece together the factual allegations underpinning the charges”.¹⁰ Similarly, the submission that the Prosecution can simply provide further details in the Pre-Trial Brief without amending the indictment was specifically considered and rejected by the Appeals Chamber of the International Criminal Tribunal for Rwanda (“ICTR”), which held that “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”.¹¹ Accordingly, defects in the Indictment must be cured at this stage in order that Mr. Krasniqi can understand the nature of the case against him and prepare his defence.

14. Furthermore, the Indictment must not rely on vague allegations or generic descriptions.¹² As the Pre-Trial Judge has already found, that precludes the SPO from relying on open-ended statements of facts.¹³ In determining whether particular phrases are impermissibly open-ended, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) has previously been particularly critical of the use of imprecise phrases such as “including” or “about”.¹⁴ Further, the International Criminal Court (“ICC”) has also ruled against the use of the word “including” on the basis that this “broad formulation” might “have an impact on expanding the

¹⁰ PTJ Order, para. 11.

¹¹ ICTR, *Uwinkindi v. Prosecutor*, ICTR-01-75-AR72(C), Appeals Chamber, *Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment* (“Uwinkindi Appeal Decision”), 16 November 2011, para. 13.

¹² PTJ Order, para. 16.

¹³ *Ibid.*, para. 18.

¹⁴ ICTY, *Prosecutor v. Blaškić*, IT-95-14, Trial Chamber, *Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness / Lack of Adequate Notice of Charges)* (“Blaškić Decision on Defence Motion to Dismiss Indictment”), 4 April 1997, paras 22-23.

parameters of [the Prosecutor's] case before the Trial Chamber".¹⁵ A concrete example of the consequences of the vague parameters of the Indictment, was recently provided by the Registry's submission that the use of the words "including" and "illustrative" mean that the Indictment is not limited to particular crime sites but embraces "any event that could constitute a crime alleged in the Confirmed Indictment that occurred between March 1998 and September 1999 in the territory of Kosovo and northern Albania by or with the authorization or support of KLA members".¹⁶ Plainly, an Indictment which permits this expansive interpretation could not have been drafted with sufficient precision.

III. THE FAILURE TO SPECIFY THE PARTICULAR ACTS THAT ALLEGEDLY SHOW THAT MR. KRASNIQI PARTICIPATED IN A JOINT CRIMINAL ENTERPRISE OR AIDED AND ABETTED THE COMMISSION OF CRIMES

15. Mr. Krasniqi is entitled to be given proper notice about what exactly it is that he personally is alleged to have done. The ICTY has recognised there is a particular need for precision in relation to "the acts of the accused".¹⁷ The Defence acknowledge that the jurisprudence recognises a distinction between cases in which the accused is alleged to have physically perpetrated a crime and cases in which they did not. However, even in the latter category of cases "the Prosecution is required to identify the 'particular acts' or 'the particular course of conduct' on the part of the accused which forms the basis for the charges in question".¹⁸ The Indictment does not provide

¹⁵ ICC, *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-373, Pre-Trial Chamber II, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute* ("Ruto Decision on the Confirmation of Charges"), 23 January 2012, para. 99. See further ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Pre-Trial Chamber I, *Decision on the Confirmation of Charges* ("Mbarushimana Decision on the Confirmation of Charges"), 16 December 2011, paras 82-83.

¹⁶ KSC-BC-2020-06, F00203, Registrar, *First Registry Report to the Pre-Trial Judge on Victims' Applications for Participation in the Proceedings*, 15 February 2021, public, paras 29-30.

¹⁷ Blaškić Appeal Judgment, para. 210.

¹⁸ *Ibid.*, para. 213.

that notice, lacks specificity and makes it impossible for Mr. Krasniqi to prepare his defence.

1. JOINT CRIMINAL ENTERPRISE

16. The Defence have filed a Preliminary Motion demonstrating that the Kosovo Specialist Chambers (“KSC”) does not have jurisdiction over joint criminal enterprise. In addition to that jurisdiction challenge, and to the extent that the KSC concludes that it may exercise jurisdiction over the allegation of joint criminal enterprise, the Defence submit that the pleading of joint criminal enterprise is defective.

17. Joint criminal enterprise must be specifically pleaded.¹⁹ The SPO must plead as material facts “the nature and purpose of the enterprise, the period over which the enterprise is said to have existed, the identity of the participants in the enterprise, and the nature of the accused’s participation in the enterprise”.²⁰

18. Further, the Indictment must plead the facts that are material to Mr. Krasniqi’s alleged involvement in a joint criminal enterprise.²¹ In *Kvočka*, the ICTY held that “[m]erely to allege [...] that the accused participated in certain crimes without identifying the specific acts alleged to have been committed by the accused does not meet the requirement for a ‘concise statement of the facts’”.²² Further, in *Kordić*, the Appeals Chamber of the ICTY held that the Prosecutor should have pleaded the accused’s alleged involvement in a particular meeting of civilian and military leaders

¹⁹ ICTY, *Prosecutor v. Simić*, IT-95-9-A, Appeals Chamber, *Judgment* (“Simić Appeal Judgment”), 28 November 2006, para. 22.

²⁰ *Ibid.*

²¹ Uwinkindi Appeal Decision, paras 11-18.

²² ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1, Trial Chamber, *Decision on Defence Preliminary Motions on the Form of the Indictment*, 12 April 1999, para. 32.

on 15 April 1993 because it was “a fundamental part of the Prosecution’s case”.²³ Similarly, the ICTR has found that the accused’s participation in particular attacks were material facts which should have been pleaded in the Indictment.²⁴

19. Thus, if the Indictment alleges that the accused personally participated in a crime, the pleading of that allegation requires the greatest precision; the Indictment must plead “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”.²⁵

20. If, however, it is alleged that the accused did not personally participate in a crime, then the Indictment must still plead the particular acts or particular course of conduct from which the Prosecution will attempt to prove his responsibility.²⁶ As the above case from the *ad hoc* tribunals show, this means that the Indictment must specifically plead any particular meetings or other actions which are fundamental to the Prosecution’s case on the contribution of the accused or the accused’s involvement in a common criminal plan.

21. Instead, the Indictment is remarkably coy about Mr. Krasniqi’s own acts or course of conduct. There are two occasions – two in the entire 18 month period of the Indictment – in which it is alleged that Mr. Krasniqi was personally involved in a crime. Neither is particularised with the greatest (or indeed any) precision. Neither sufficiently specifies the date or the actions of Mr. Krasniqi in detail, or in such a way that Mr. Krasniqi will be able to investigate and contest those charges consistent with the rights and minimum guarantees afforded to the accused:-

²³ ICTY, *Prosecutor v. Kordić et al.*, IT-95-14/2-A, Appeals Chamber, *Judgment*, 17 December 2004, para. 144.

²⁴ ICTR, *Prosecutor v. Ntakirutimana et al.*, ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber, *Judgment*, 13 December 2004, paras 86, 98, 99.

²⁵ Kupreškić Appeal Judgment, para. 89.

²⁶ Blaškić Appeal Judgment, para. 213.

- a. Paragraph 47. In addressing detentions at Kleçkë / Klečka, the Indictment alleges that “[i]n 1999, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi were involved in various aspects of the transfer, detention, and / or release of detainees held at a detention site near Kleçkë / Klečka”.²⁷ That fails to particularise the specific acts that are alleged against Mr. Krasniqi. First, by grouping Mr. Krasniqi’s conduct together with two other accused, the Indictment fails to identify precisely which allegations are said to be attributable to Mr. Krasniqi and which to the other accused. Second, the pleading that he was “involved in various aspects” of “transfer, detention, and / or release” again fails to identify exactly what Mr. Krasniqi is alleged to have done. Does his alleged involvement relate to transfer, detention or releases? What exactly is meant by “involved in”? Is it alleged that Mr. Krasniqi’s own involvement was criminal? Third, the date of these allegations is identified only by the year 1999. In order that Mr. Krasniqi can defend himself against this allegation, the SPO should be required to amend the Indictment to identify what specific aspects of transfer, detention or release at Kleçkë / Klečka Mr. Krasniqi is alleged to have been involved in, when he is alleged to have been involved in them and the nature of his alleged involvement;
- b. Paragraph 42. In addressing Malishevë / Mališevo, the Indictment alleges “in late July 1998, Jakup Krasniqi was identified as being present on site and, on one occasion, visiting the room where detainees were held”.²⁸ The Indictment again fails to provide enough specific information to allow Mr. Krasniqi to investigate and refute the allegation. First, the Indictment fails to identify precisely *when* and in what context Mr. Krasniqi is alleged to

²⁷ KSC-BC-2020-06, F00045/A03, Specialist Prosecutor, *Further Redacted Indictment* (“Indictment”), 4 November 2020, public, para. 47, *see also* para. 75.

²⁸ *Ibid.*, para. 42.

have visited the room where detainees were held. The pleading “in late July 1998” does not provide the greatest precision; this vagueness handicaps the Defence because it cannot investigate matters including alibi without knowing exactly when it is alleged that Mr. Krasniqi was in Malishevë / Mališevo. Even elsewhere in the same Indictment, the dates of detentions at Malishevë / Mališevo are pleaded with more precision so that it must be possible for the SPO to provide further particularisation of the dates.²⁹ Second, the relationship between the allegation that he was “present on site” and the allegation that he “visit[ed] the room” is unclear. Is it alleged that he was present in Malishevë / Mališevo for a longer period of time during which he visited the room on one occasion, or that there was only one occasion when he was identified in Malishevë / Mališevo and that was also the occasion when he allegedly visited the room? What is it alleged that Mr. Krasniqi did upon visiting the room?

22. Those are the only specific paragraphs of the Indictment that name Mr. Krasniqi in relation to any concrete incident. However, the Indictment alleges that “Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi personally participated in the treatment of Opponents on the ground, including participating in the intimidation, interrogation, mistreatment, and detention of Opponents, like in the cases discussed below” (underlining added).³⁰ This is a clear example of an open-ended statement which should not be permitted.³¹ The only purpose served by this broad formulation, is to allow the Prosecution the possibility of expanding its case at trial to rely on additional unpleaded allegations of personal participation against Mr. Krasniqi. Such a pleading wholly undermines the requirement to give the accused notice of the charges and is exactly the conduct expressly ruled out by the Pre-Trial

²⁹ Indictment, para. 65.

³⁰ *Ibid.*, para. 40.

³¹ PTJ Order, para. 18.

Judge, the ICC³² and the Appeals Chamber of the ICTR.³³ Paragraph 40 of the Indictment must be amended to remove the words “including” and “like in the cases discussed below” and to specify what conduct is alleged against Mr. Krasniqi himself.

23. Whilst it does not appear to be alleged that Mr. Krasniqi personally participated in any other alleged crime, the Indictment must still plead clearly and specifically the acts or course of conduct on his part (as an individual) which are said to give rise to his responsibility for the crimes. The Indictment does not do this. The lack of particularity is palpable in the following paragraphs:-

- a. Paragraph 37. The Indictment alleges that “JCE Members and Tools, including those closely aligned with Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi, held key roles in the KLA, and subsequently PGoK, structures. JCE Members and Tools, including those in military police and intelligence structures, actively identified and targeted Opponents, abducting, interrogating, and mistreating them”.³⁴ First, the Indictment fails to identify which alleged JCE Members and Tools are said to be closely aligned with Mr. Krasniqi. Second, the pleading that Members and Tools “including those in military police and intelligence structures” is inappropriately vague because it provides no specificity about which groups outside the military police and intelligence are said to be involved. Third, the pleading “actively identified and targeted Opponents” fails to provide any specificity as to when, how or which Opponents were actively identified and targeted;

³² PTJ Order, para. 18; Ruto Decision on the Confirmation of Charges, para. 99; *see further* Mbarushimana Decision on the Confirmation of Charges, paras 82-83.

³³ Uwinkindi Appeal Decision, paras 25-27.

³⁴ Indictment, para. 37.

b. Paragraph 39. The Indictment alleges that “JCE Members and Tools, including Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi, as members of the General Staff, issued directions, instructions, and orders regarding Opponents. The focus on Opponents was similarly reflected in certain internal rules and regulations, trainings, policy documents, and information booklets adopted or issued by the General Staff, and other levels of the KLA/PGoK command”.³⁵ First, that again fails to identify what Mr. Krasniqi himself (as distinct from the other accused) is alleged to have done. Second, it fails completely to particularise the “directions, instructions, and orders” or the “rules and regulations, trainings, policy documents, and information booklets” which are relied upon against Mr. Krasniqi. What directions, instructions, orders, rules and regulations, trainings, policy documents and information booklets did Mr. Krasniqi issue or adopt? When and to whom were they issued? Third, what is meant by “the focus on Opponents” and, critically, is that focus on Opponents said to be unlawful?

24. Moreover, the Indictment then attempts to particularise the allegation that Mr. Krasniqi significantly contributed to the common purpose at paragraph 51. Despite extending to eight subparagraphs, paragraph 51 neglects to identify any concrete act or omission done by Mr. Krasniqi that is alleged to have contributed to the JCE. The Defence recall that generic descriptions of alleged conduct without reference to any concrete incidents are not permitted.³⁶

25. The required level of specificity is usefully illustrated by comparison with the pleading practice of the ICTY. For instance, in *Prlić et al.*, broad allegations of significant contribution were particularised by pleading concrete acts: in paragraph

³⁵ Indictment, para. 39.

³⁶ PTJ Order, para. 16.

17.1(d) of the Second Amended Indictment, when pleading that the accused Prlić participated in the formation and adoption of decisions and decrees, the Indictment pleaded the specific decisions and decrees that the accused was involved in;³⁷ when pleading the power to appoint or remove persons, the Second Amended Indictment provided specific examples of which positions the accused had the power to appoint;³⁸ the Second Amended Indictment provided detail on specific acts attributable to the accused.³⁹ The required level of detail as to the accused's significant contribution to a joint criminal enterprise allegation is further illustrated by the Revised Second Consolidated Amended Indictment in the *Popović et al.* case.⁴⁰

26. Set against the detailed Indictments previously pleaded in joint criminal enterprise cases from the former Yugoslavia, the inadequacy of the pleading of Mr. Krasniqi's alleged significant contribution to the joint criminal enterprise in this case is laid bare. The allegations are so inadequately defined that they have no substance to which Mr. Krasniqi can respond. In particular:-

- Paragraph 51(a) "[f]ormulating and/or participating in the development, approval, promotion, dissemination, and implementation of plans, policies, and practices in furtherance of the common purpose, including in the form of communiqués, public statements, internal rules and regulations, structures, and information-gathering and reporting mechanisms". What plans, policies or practices? Did Mr. Krasniqi formulate, develop, approve, promote, disseminate or implement them? When did he do this? What communiqués did he formulate, approve, promote or disseminate? What public statements did he formulate,

³⁷ ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, *Second Amended Indictment*, 11 June 2008, para. 17.1(d).

³⁸ *Ibid.*, paras 17.1(i), 17.2(b).

³⁹ *Ibid.*, e.g. paras 17.1(l), 17.2(i), 17.3(b), 17.3(e).

⁴⁰ ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, *Revised Second Consolidated Amended Indictment*, 4 August 2006, paras 74-82.

approve, promote or disseminate? What internal rules and regulations did he formulate, approve, promote or disseminate? What structures did he formulate, approve, promote or disseminate? What information-gathering and reporting mechanism did he formulate, approve, promote or disseminate? Further, the open-ended word “including” should be struck out.

- Paragraph 51(b) “[p]articipating in, facilitating, condoning, encouraging, and/or otherwise aiding in the crimes in furtherance of the common purpose”. Which specific crimes? When and in what way is it alleged that Mr. Krasniqi participated in, facilitated, condoned, encouraged or aided in these crimes?
- Paragraph 51(c) “[f]ailing to take adequate steps to prevent and investigate crimes, and/or punish or discipline the perpetrators”. What steps is it alleged that Mr. Krasniqi was required to take? Which crimes did Mr. Krasniqi not take adequate steps to prevent or investigate? Which perpetrators did Mr. Krasniqi not take adequate steps to punish or discipline? How and when did Mr. Krasniqi know that crimes were going to be committed, so as to have enabled him to take steps to prevent them? How and when did Mr. Krasniqi know that crimes had been committed, so as to enable him to investigate or punish them?;
- Paragraph 51(d) “[d]isseminating and/or facilitating the dissemination of information intended to promote the common purpose and engender fear, distrust, and hatred of Opponents, including through communiques, public statements, and other media”. What information

did Mr. Krasniqi disseminate or facilitate the dissemination of? When, how and to whom is Mr. Krasniqi alleged to have disseminated or facilitated the dissemination of this information? What information was intended to promote the common purpose or to engender fear, distrust and hatred of opponents? Which communiques were intended to support the common purpose or engender fear, distrust and hatred of opponents? Which public statements were intended to support the common purpose or engender fear, distrust and hatred of opponents? What other media was intended to support the common purpose or engender fear, distrust and hatred of opponents? Further, the open-ended word “including” should be struck out;

- Paragraph 51(e) “[c]oordinating, engaging in, and/or facilitating efforts to deny or to provide false, incomplete, or misleading information to the international community, monitors, and the public, including relating to the criminal activities of the JCE Members and Tools and the KLA/PGoK’s purported adherence to international humanitarian law”. How is it alleged that Mr. Krasniqi coordinated, engaged in or facilitated efforts to deny or to provide false information? When and where is it alleged that he did so? Who is he alleged to have provided false, incomplete or misleading information to? What criminal activities of JCE members did he provide this false, incomplete or misleading information about? What criminal activities of JCE tools did he provide false, incomplete or misleading information about? Further, the open-ended word “including” should be struck out;

- Paragraph 51(f) “[a]ppointing, promoting, and/or approving the appointment and promotion of JCE Members and Tools, including persons with a history of alleged involvement in serious crimes”. Who did Mr. Krasniqi appoint who was a JCE Member or Tool (and were they a JCE Member or a Tool)? Who did Mr. Krasniqi promote who was a JCE Member or Tool (and were they a JCE Member or a Tool)? Who did Mr. Krasniqi approve the appointment or promotion of who was a JCE Member or Tool (and were they a JCE Member or a Tool)? Who did Mr. Krasniqi appoint who had a history of alleged involvement in serious crimes? Who did Mr. Krasniqi promote who had a history of alleged involvement in serious crimes? Who did Mr. Krasniqi approve the appointment or promotion of who had a history of alleged involvement in serious crimes? How and when did Mr. Krasniqi know that any such individual had a history of alleged involvement in serious crimes?;
- Paragraph 51(g) “[p]roviding, arranging, and/or facilitating political, logistical, military, and/or financial support, including to JCE Members and Tools committing crimes in furtherance of the common purpose”. What specific support is it alleged that Mr. Krasniqi provided, arranged or facilitated that was political? Where, when and how did he do this? What specific support is it alleged that Mr. Krasniqi provided, arranged or facilitated that was logistical? Where, when and how did he do this? What specific support is it alleged that Mr. Krasniqi provided, arranged or facilitated that was military? Where, when and how did he do this? What specific support is it alleged that Mr. Krasniqi provided, arranged or facilitated that was financial? Where, when and how did he do this? What specific support did Mr. Krasniqi provide to JCE Members committing crimes in furtherance of the common purpose? What specific support did Mr. Krasniqi provide to JCE Tools committing

crimes in furtherance of the common purpose? Which specific crimes are referred to?

- Paragraph 51(h) “[c]oordinating and liaising between JCE Members and Tools in furtherance of the common purpose”. Which JCE Members and Tools did Mr. Krasniqi coordinate with? Which JCE Members and Tools did Mr. Krasniqi liaise with? How was that coordination and liaison in furtherance of the common purpose?

27. The Defence have set out these paragraphs in turn and addressed the absence of detail because these issues go to the heart of the SPO’s case against Mr. Krasniqi. He is entitled to clear and specific notice of the concrete acts alleged against him, so that there are concrete tangible allegations that he can investigate and defend himself against, instead of the generic list of descriptions which have been provided. The Defence therefore submit that the SPO should be ordered to amend the Indictment to provide further and better particulars of the specific allegations against Mr. Krasniqi. If the SPO is unable to plead further specificity, the allegation of joint criminal enterprise should be struck out.

2. AIDING AND ABETTING

28. The ICTY has held in relation to aiding and abetting that “what is most material is the conduct of the accused by which he may be found to have planned, instigated, ordered, committed or otherwise aided and abetted”.⁴¹ The Trial Chamber in that case explained “the accused is entitled to know the manner in which he is to be held responsible – for example, whether it is alleged that he ordered the persecution,

⁴¹ Krnojelac Decision, para. 18; see further, Blaškić Appeal Judgment, para. 213; ICTY, *Prosecutor v. Brđanin and Talić*, IT-99-36, Trial Chamber II, *Decision on Objections by Momir Talić to the Form of the Amended Indictment*, 20 February 2001, para. 20.

torture, beatings, countless killings, forced labour and inhumane conditions, or whether he merely assisted in some other *identified* way. The accused is entitled to a specific, albeit concise, statement in the indictment of the nature and extent of his participation in the several courses of conduct alleged".⁴²

29. The entirety of the pleading of aiding and abetting is contained in one paragraph of the Indictment which simply states:

Through these same acts and omissions, Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi provided practical assistance, encouragement, and/or moral support, which had a substantial effect on the perpetration of the crimes charged in this indictment. They were aware of the probability that these crimes would be committed and that their acts or omissions would contribute to their commission.⁴³

30. The defects in paragraph 52 are:-

- a. It fails to identify with any specificity the particular acts or course of conduct on the part of Mr. Krasniqi (as opposed to the other accused) that are relied upon to establish his personal responsibility;
- b. That error cannot be cured by reference to "these same acts and omissions" pleaded earlier in the Indictment, because as set out above, the preceding paragraphs are also vague, non-specific and fail to identify what Mr. Krasniqi himself is alleged to have done. Nor does the Indictment identify by cross-reference which of the previous paragraphs is relied upon for this purpose;
- c. The allegation of "practical assistance, encouragement, and/or moral support" is a generic description without concrete incidents. What practical assistance is Mr. Krasniqi alleged to have provided? What encouragement

⁴² Krnojelac Decision, para. 22.

⁴³ Indictment, para. 52.

is Mr. Krasniqi alleged to have provided? What moral support is Mr. Krasniqi alleged to have provided? No concrete acts of practical assistance or specific instances of encouragement are identified. The allegation of “moral support” is particularly nebulous and could lead to an expansive range of allegations being pursued at trial without notice to Mr. Krasniqi;

- d. No attempt is made in the Indictment to connect particular allegations of assistance or encouragement to particular crimes. The existence of a substantial effect on a specified crime is an essential element of a case founded on aiding and abetting and hence a material fact which must be pleaded;
- e. Further, the Indictment does not specify how Mr. Krasniqi is alleged to have been aware of the probability of the crimes being committed. The material facts which are relied upon to establish the alleged knowledge should be pleaded.
- f. Finally, the imprecise pleading “and/or” compounds the other deficiencies identified above, and underscores the intention to maintain a broad pleading without providing specific notice of the Prosecution’s case.

31. The Defence therefore submit that the SPO should be ordered to amend the Indictment to provide further and better particulars of paragraph 52, to set out the specific allegations against Mr. Krasniqi and the supporting material facts. If the SPO is unable to plead further specificity, the allegation of aiding and abetting should be struck out

IV. THE FAILURE TO SPECIFY THE REQUIRED ELEMENTS OF COMMAND RESPONSIBILITY

32. In relation to command responsibility, an Indictment must specify: (1) that the accused was the superior of (2) subordinates sufficiently identified (3) over whom he had effective control and (4) for whose acts he is alleged to be responsible.⁴⁴

33. First, as to the accused's conduct giving rise to responsibility as a superior, "the accused needs to know [...] what is alleged to have been his own conduct giving rise to his responsibility as a superior".⁴⁵ The Indictment alleges that all four accused were:

members of the General Staff and among the highest-ranking officials in the KLA and/or PGoK. In these capacities and pursuant to their *de facto* authority as senior leadership figures in the KLA and PGoK, Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi each had effective control over the JCE Members and Tools who committed the crimes charged in this indictment.⁴⁶

34. Aside from identifying that the case is based on *de facto* rather than *de jure* responsibilities, this pleading fails to identify the material facts from which the SPO will invite the KSC to deduce that a superior-subordinate relationship existed. In the particular context of the KLA, it has already been placed on the record that the existence of sufficient operational organisation and lines of authority and communication in the KLA to justify a finding of command responsibility are in issue.⁴⁷ It is therefore particularly important that the Indictment specifies the Prosecution case on this issue.

35. Second, as to the precise identity of the subordinates who committed crimes, the subordinates need to be sufficiently identified.⁴⁸ On this issue, the ICTY has held that

⁴⁴ Blaškić Appeal Judgment, para. 218.

⁴⁵ *Ibid.*, para. 216.

⁴⁶ Indictment, para. 53.

⁴⁷ KSC-BC-2020-06, F00087, Veseli Defence, *Submissions on behalf of Kadri Veseli, Status Conference – Wednesday 18 November*, 17 November 2020, public, para. 12(e).

⁴⁸ Blaškić Appeal Judgment, para. 218.

“the identity of the officers subordinate to the Accused who committed acts relevant to the charges in the Indictment under Article 7(3) constitute material facts to be pleaded in the Indictment and the Prosecution is under an obligation to give all the particulars which it is able to give”.⁴⁹ This does not mean that the Indictment is obliged to identify by name each individual soldier who is alleged to have physically perpetrated a crime. It does, however, mean that the Indictment must give sufficient details, including for instance identifying the officers or the units involved, so that the accused can investigate the allegation of a superior-subordinate relationship.

36. Multiple paragraphs of the Indictment simply identify the physical perpetrators as “certain KLA members”,⁵⁰ or “multiple KLA members”⁵¹ or fail to identify the perpetrators at all.⁵² That does not provide the clarity or specificity required for the Defence to identify the relevant subordinates and therefore to investigate the alleged existence of a superior-subordinate relationship.

37. Third, in relation to Mr. Krasniqi’s state of knowledge, the Indictment was required to plead the material facts by which the accused may be found to have known or had reason to have known that crimes were committed.⁵³ The material facts which are said to support his knowledge of crimes committed by subordinates are pleaded as follows:

Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi knew or had reason to know that crimes were about to be committed or had been committed [...] through numerous sources, including: (a) their involvement in the preparation, design, and/or execution of such crimes; (b) their presence at locations where crimes were committed; (c) their receipt of information about the commission of such crimes; and/or (d) their personal observation of evidence of the commission of such crimes.⁵⁴

⁴⁹ Perišić Decision on Preliminary Motions, para. 35.

⁵⁰ Indictment, paras 62, 65-67, 71-72, 74-93, 102, 105, 112-113, 116, 126-128, 132-133, 137, 140-141, 143-146, 148-151, 153-156, 158-162, 164-170.

⁵¹ *Ibid.*, paras 62, 75, 77, 97-104, 106-107, 109, 114-116, 118-132.

⁵² *Ibid.*, para. 63.

⁵³ Blaškić Appeal Judgment, para. 218.

⁵⁴ Indictment, para. 54.

38. Paragraph 54 is defective for the following reasons:-

- a. Once again, no differentiation is made between each of the accused and no attempt is therefore made to identify the specific acts or conduct of Mr. Krasniqi – as an individual – by which his alleged knowledge is to be established;
- b. The Indictment relies on general descriptions rather than concrete acts or events. If it is alleged that Mr. Krasniqi was present at “locations where crimes were committed”, the particulars of where he was, when he was there and what he is alleged to have done or observed there must be identified, especially since elsewhere the Indictment only pleads one occasion when Mr. Krasniqi is said to have been present when a crime was committed.⁵⁵ If it is alleged that Mr. Krasniqi was in “receipt of information” the particulars of what information he received, how and when he received it must be pleaded. If it is alleged that Mr. Krasniqi “personal[ly] observ[ed]” crimes being committed, the SPO must identify when and where he is said to have observed specific crimes being committed;
- c. The pleading of “numerous sources, including” is vague and open-ended.⁵⁶ The SPO should particularise the alleged sources and the word “including” should be struck out.

39. Finally, the Indictment fails to plead the conduct of Mr. Krasniqi by which he may be found to have failed to take necessary and reasonable measures to prevent crimes or punish perpetrators. The generic nature of the pleading in paragraph 55 is

⁵⁵ Indictment, para. 42.

⁵⁶ Blaškić Decision on Defence Motion to Dismiss Indictment, para. 22.

shown by the fact that no attempt is made to differentiate between the four accused and therefore to plead their individual concrete acts.

40. The Defence therefore submit that the SPO should be ordered to amend the Indictment to provide further and better particulars of paragraphs 53-55, and to include the specific allegations against Mr. Krasniqi. If the SPO is unable to plead further specificity, the allegation of command responsibility should be struck out

V. THE FAILURE TO ADEQUATELY IDENTIFY THE PLURALITY OF PERSONS

41. The identity of the members of a JCE is legally significant. Where a crime is committed by a physical perpetrator who is not a member of the JCE, responsibility can only attach to the members of the JCE if the crime can be imputed to at least one member of the JCE.⁵⁷ The required link between the crime and a member of the JCE which justifies this imputation is a matter to be determined on a case by case basis.⁵⁸

42. As a result of the importance of this distinction, the identity of the alleged participants in JCE is one of the material facts that must be pleaded in relation to any joint criminal enterprise allegation.⁵⁹ In *Krajišnik*, the ICTY held that the Trial Chamber's conclusion that the plurality of persons included a "rank and file consist[ing] of local politicians, military and police commanders, paramilitary leaders, and others" was impermissibly vague in that it "failed to specify whether all or only some of the local politicians, militaries, police commanders and paramilitary leaders were rank and file JCE members".⁶⁰

⁵⁷ ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Appeals Chamber, *Judgment* ("Krajišnik Appeal Judgment"), 17 March 2009, para. 225.

⁵⁸ *Ibid.*, para. 226.

⁵⁹ Simić Appeal Judgment, para. 22.

⁶⁰ Krajišnik Appeal Judgment, para. 157.

43. The Indictment identifies the plurality of persons in this way:

Other members of the joint criminal enterprise included Azem SYLA, Lahi BRAHIMAJ, Fatmir LIMAJ, Sylejman SELIMI, Rrustem MUSTAFA, Shukri BUJA, Latif GASHI and Sabit GECL, as well as certain other KLA and PGoK political and military leaders, including other General Staff members; PGoK ministers and deputy ministers; KLA zone commanders, deputy zone commanders, and other members of zone command staffs; brigade and unit commanders; commanders and members of the KLA and PGoK police and intelligence services; other KLA soldiers and PGoK officials; and others acting on behalf of the KLA or PGoK.⁶¹

44. It then pleads in the alternative that “[a]lternatively, 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”.⁶²

45. First, the indictment makes the same error as the *Krajišnik* Trial Chamber in that it fails to identify whether it is really alleging that all or only some of the broad groups of people identified were members of the JCE. Further, some of the categories identified are wholly unspecific, such as “others acting on behalf of the KLA or PGoK” or “other KLA soldiers and PGoK officials”. No geographic or temporal limitations are used to narrow the scope of the allegation, which would again permit the SPO to mould its case as the evidence develops to an impermissible extent. Indeed, at its broadest, every member of the KLA, every official of the PGoK and anyone else “acting on behalf of the KLA or PGoK” appear to be accused of membership of the JCE.

46. Second, if crimes were committed by persons who were not members of the JCE, it is necessary for the SPO to show that they can be imputed to a person who was a member of the JCE.⁶³ Nothing in the Indictment identifies what material facts the SPO intends to rely upon to prove this matter, or through which member of the JCE the crimes are to be imputed.

⁶¹ Indictment, para. 35.

⁶² *Ibid.*

⁶³ *See* para. 41 above.

47. The Defence therefore submit that the SPO should be ordered to provide better particulars of the alleged Members of the JCE, to differentiate between Members and Tools and where crimes were committed by Tools to identify how they are alleged to be imputed to the JCE.

VI. THE VAGUE ALLEGATION OF ACTS OF PERSECUTION IN PARAGRAPH 58(G), (H) AND (I) OF THE INDICTMENT

48. The Indictment is required to charge particular acts as persecutions.⁶⁴ Persecution cannot be charged in generic terms but must “particularise the material facts of the alleged criminal conduct of the accused that [...] go[] to the accused’s role in the alleged crime”.⁶⁵ For example, if an attack on a particular family is fundamental to the persecution charge, that specific attack is a material fact which must be pleaded.⁶⁶

49. In pleading the crime of persecution, the Indictment pleads “58(g) [u]nlawful passing of sentences against persons at or in connection with detention sites including those identified in Schedule A; (h) [m]isappropriation of personal property of persons at or in connection with detention sites including those identified in Schedule A”. That does not sufficiently particularise those allegations. First, the Indictment is insufficiently precise in that it does nothing to identify the alleged victims or the dates of the alleged crimes. There are 42 different locations alleged in Schedule A. The Defence do not know at which of those different locations it is alleged that these crimes took place or when. Second, the use of the phrase “including those identified in

⁶⁴ Blaškić Appeal Judgment, para. 139.

⁶⁵ Kupreškić Appeal Judgment, para. 98.

⁶⁶ *Ibid.*, para. 99.

Schedule A” is impermissibly vague and open-ended because it suggests that the SPO may rely on other allegations as yet unidentified.⁶⁷

50. The vagueness in the pleading of persecution reaches its zenith in subparagraph 58(i) which reads “[i]mposition and maintenance of other restrictive and discriminatory measures, including arbitrary searches, coerced or forced statements and confessions, intimidation, and harassment”. Not only does the Indictment continue using the open-ended and ill-defined word “including”, compounded on this occasion by the use of the word “illustrative” and the reference to a time period “before, during, and after the Indictment Period” in the preceding paragraph,⁶⁸ but also the entire pleading of this subparagraph is impermissibly vague because no concrete acts of arbitrary searches, coerced statements or intimidation are specifically pleaded. Neither are any particulars attributing them to Mr. Krasniqi. The Defence are not given the date, location, victims or details of any relevant acts said to constitute this crime. It is therefore impossible for Mr. Krasniqi to prepare a defence to that charge.

51. The Defence therefore submit that the SPO should be ordered to amend the Indictment to provide further and better particulars of paragraphs 57 and 58(g), (h) and (i), and to include the specific allegations against Mr. Krasniqi. If the SPO is unable to plead further specificity, these allegations of persecution should be struck out

VII. THE FAILURE TO PLEAD MATERIAL FACTS RELATING TO THE CRIME OF ENFORCED DISAPPEARANCE IN PARAGRAPH 171 OF THE INDICTMENT

⁶⁷ Blaškić Decision on Defence Motion to Dismiss Indictment, para. 22.

⁶⁸ Indictment, para. 57.

52. The Pre-Trial Judge previously determined that it is a necessary element of the crime of enforced disappearance that “[t]he perpetrator must have: (i) intentionally deprived a person of his or her liberty and be aware that the deprivation of liberty would be followed by a refusal to acknowledge such deprivation of liberty or to give information on the fate or whereabouts of the victim; or (ii) intentionally refused to disclose information regarding the fate or whereabouts of the person concerned and be aware that such refusal was preceded or accompanied by that deprivation of liberty”.⁶⁹ Similar requirements were stated in the ICC’s Elements of Crimes.⁷⁰

53. Whilst the Defence reserve the right to challenge the exact definition of the elements making up the *actus reus* and *mens rea* of the crime of enforced disappearance at a later juncture, the above authorities suggest that there must be a connection between the deprivation of liberty and the failure to provide information. If the perpetrator who detains the victim is not aware that the detention will be followed by a refusal to give information, and the perpetrator who intentionally refused to give information is not aware that the victim had been detained, the offence of enforced disappearance would not be committed.

54. The Indictment pleads:

During the Indictment Period, JCE Members and Tools arrested, abducted, or detained persons by or with the authorisation, support or acquiescence of the KLA/PGoK in Kosovo and northern Albania, including in areas under KLA/PGoK control and at or in connection with detention sites including those identified in Schedule A. When family members and others sought information concerning the missing persons, JCE Members and Tools frequently refused to respond, or provided false or misleading information. They also frequently refused requests to access detention sites or visit detainees, threatened or assaulted those who sought information, and failed to inquire about or investigate the fate or whereabouts of missing persons. Incidents of enforced disappearance of persons include those identified in Schedule C, and described in paragraphs 137, 139, 142, 147, 149, 150, 152, 157 and 163 above.⁷¹

⁶⁹ KSC-BC-2020-06, F00026/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 19 November 2020, confidential, para. 77.

⁷⁰ Element of Crime, Article 7(1)(i).

⁷¹ Indictment, para. 171.

55. The Indictment thus fails to plead a material element of the offence, namely the connection between the deprivation of liberty and the subsequent denial of information. The SPO must identify whether it contends that the physical perpetrator of the deprivation of liberty knew that false information would thereafter be provided (and the basis for that knowledge) or that the person who provided false information knew of the deprivation of liberty (and the basis for that knowledge). In the absence of these material facts, the pleading is defective because the material facts pleaded do not amount to the offence charged. It is the connection between the deprivation of liberty and the provision of false information that creates the distinct crime of enforced disappearance.

56. In any event, the pleading that “[i]ncidents of enforced disappearance of persons include [...]” is defective because the use of the broad term “include” is vague and open-ended.⁷²

57. The Defence therefore submit that the SPO should be ordered to amend the Indictment to provide further and better particulars of paragraph 171. If the SPO is unable to plead further specificity, the charge of enforced disappearance should be struck out.

VIII. THE USE OF VAGUE AND OPEN-ENDED TERMS SUCH AS “INCLUDING” OR “ABOUT” THROUGHOUT THE INDICTMENT

58. As set above, the Pre-Trial Judge, the ICTY and the ICC have all held that terms such as “including” have no place in an Indictment because they are vague and open-ended.⁷³ Thus, the ICTY has held that the use of terms such as “including, but not

⁷² Blaškić Decision on Defence Motion to Dismiss Indictment, para. 22.

⁷³ See para. 14 above.

limited to” and “among others” are “vague and subject to interpretation”.⁷⁴ In the same decision, the ICTY held that the word “about” in relation to dates was “overly vague” and “whenever used, must therefore be stricken”.⁷⁵

59. The Indictment repeatedly introduces allegations using the word “including”.⁷⁶ As the Pre-Trial Judge previously identified, the word “including” should not be used because it is open-ended. Each and every time it appears in the Indictment, the word “including” should be struck out so that it is clear that allegations that have not been specifically pleaded in the Indictment cannot be relied upon against the Accused.

60. The Indictment is also impermissibly vague in two further respects. First, it pleads vague dates, sometimes using the formation “about”, on a number of occasions.⁷⁷ Second, it alleges that victims were transferred from or to other KLA detention sites without specifying which victims were transferred, from where they were transferred or to where they were transferred.⁷⁸ The SPO should be ordered to amend the relevant paragraphs.

IX. CONCLUSION

61. Mr. Krasniqi is entitled to be informed with clarity and specificity of the concrete acts that he is alleged to have done and which are said to give rise to his criminal responsibility. The Indictment as drafted does not satisfy these requirements. It lapses into general descriptions rather than pleading the concrete acts or course of conduct that are alleged against him.

⁷⁴ Blaškić Decision on Defence Motion to Dismiss Indictment, para. 22.

⁷⁵ *Ibid.*, para. 23.

⁷⁶ Indictment, paras 59, 94-95, 136, 171.

⁷⁷ *Ibid.*, paras 36, 47.

⁷⁸ *Ibid.*, paras 76, 78 and 79.

62. Accordingly, the Defence respectfully request the Pre-Trial Judge to:-
- a. Order the SPO to amend the Indictment to provide the necessary further details in relation to the allegations that Mr. Krasniqi personally participated in crimes, participated in and significantly contributed to a joint criminal enterprise, aided and abetted the commission of crimes, had command responsibility, and to provide specificity in relation to the allegation of a plurality of persons, the allegation of persecution and the allegation of enforced disappearance;
 - b. Order the SPO to amend the Indictment to strike out the use of impermissibly vague and open-ended terms such as “including”;
 - c. Order that if material particulars of any allegation cannot be provided, the SPO must remove that allegation from the Indictment.

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