



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-06
Specialist 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 Prosecutor

Date: 23 April 2021

Language: English

Classification: Public

Consolidated Prosecution response to THAÇI, SELIMI, and KRASNIQI preliminary motions on the form of the Indictment

Specialist Prosecutor's Office
Jack Smith

Counsel for Hashim Thaçi
David Hooper

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagenda

I. INTRODUCTION

1. The Motions¹ fail to identify any defect in the form of the Indictment² and should be dismissed. Consistent with Article 38(4) of the Law³ and Rule 86(3) of the Rules,⁴ the Indictment sets forth a concise statement of the material facts of the SPO's⁵ case and of the crimes and modes of liability charged.

II. SCOPE AND NATURE OF THE CHARGES

2. This case concerns the individual criminal responsibility of four Accused alleged to have been members of the Kosovo Liberation Army ('KLA')⁶ General Staff and among the highest-ranking officials in the KLA and Provisional Government of Kosovo ('PGoK') from at least March 1998 through September 1999 ('Indictment Period').⁷ Each Accused is allegedly responsible for all charged crimes through their participation in a joint criminal enterprise ('JCE'), aiding and abetting, and superior responsibility.⁸

¹ Motion Alleging Defects in the Indictment Against Mr Hashim Thaçi, KSC-BC-2020-06/F00215, 12 March 2021, Confidential ('THAÇI Motion'); Krasniqi Defence Preliminary Motion Alleging Defects in the Indictment, KSC-BC-2020-06/F00221, 15 March 2021 ('KRASNIQI Motion'); Selimi Defence Challenge to the Form of the Indictment, KSC-BC-2020-06/F00222, 15 March 2021, Confidential ('SELIMI Motion', collectively with the THAÇI Motion and KRASNIQI Motion, 'Motions'). *See also* Thaçi Defence Response to Preliminary Motions filed by the Veseli, Selimi and Krasniqi Defence Teams, KSC-BC-2020-06/F00238, 25 March 2021, para.6 (adopting the submissions raised in the Motions); Preliminary Motion by the Defence of Kadri Veseli to Challenge the Indictment, KSC-BC-2020-06/F00225, 15 March 2021, Confidential, fn.1 (adopting the THAÇI Motion). Considering that the Defence teams have made overlapping submissions and have joined one another's submissions, the Defence teams for all Accused are collectively referred to in this response as the 'Defence'.

² Lesser Redacted Version of 'Redacted Indictment, KSC-BC-2020-06/F00045/A02, 4 November 2020', KSC-BC-2020-06/F000134, 11 December 2020, Confidential ('Indictment').

³ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁵ In this response, the Specialist Prosecutor's Office is referred to as the 'SPO'.

⁶ As applicable, defined terms referenced in this response have the same meaning as in the Indictment.

⁷ Indictment, KSC-BC-2020-06/F000134, paras 2, 5, 8, 11, 15-16, 26, 53.

⁸ Indictment, KSC-BC-2020-06/F000134, paras 32-55, 172-173.

3. The Accused and other JCE members ('JCE Members') allegedly shared a common purpose to gain and exercise control over all of Kosovo by means including unlawfully intimidating, mistreating, committing violence against, and removing those deemed to be opponents ('Opponents').⁹ Acting through their high level positions, the Accused are alleged to have significantly contributed to achieving the common purpose through their overarching and ongoing roles in its formulation and implementation throughout the 19-month Indictment Period.¹⁰

4. The common purpose encompassed widespread, continuing, and recurring crimes against hundreds of Opponents.¹¹ These crimes formed part of a campaign of persecution throughout Kosovo and northern Albania, were committed in the context of and were associated with an ongoing armed conflict, and were part a widespread and systematic attack against the civilian population of Opponents.¹² The Indictment details incidents of persecution, imprisonment/arbitrary detention, other inhumane acts/cruel treatment, torture, murder, and enforced disappearance at or in connection with more than 40 locations in at least 16 municipalities throughout Kosovo and two districts of northern Albania.¹³ Both perpetrators and victims were regularly moved between locations, including due to the ongoing armed conflict, related operations, and changing boundaries.¹⁴ The crimes were widely known and reported, followed a consistent pattern, impacted the victims' wider families and communities, and were intended to serve as a warning and to exert pressure on the targeted population as a whole.¹⁵

⁹ Indictment, KSC-BC-2020-06/F000134, para.32.

¹⁰ Indictment, KSC-BC-2020-06/F000134, paras 36-51.

¹¹ Indictment, KSC-BC-2020-06/F000134, paras 17, 37, 40-47, 57-171, Schedules A-C.

¹² Indictment, KSC-BC-2020-06/F000134, paras 17-18, 32, 57-58.

¹³ Indictment, KSC-BC-2020-06/F000134, paras 59-93. *See also* Schedules A-C.

¹⁴ *See, for example*, Indictment, KSC-BC-2020-06/F000134, paras 19-22, 25-28, 42, 44, 59-60, 62, 63, 65, 67, 69-70, 73, 74, 76, 78-79, 81, 84-85, 91.

¹⁵ Indictment, KSC-BC-2020-06/F000134, paras 17, 38.

III. SUBMISSIONS

5. Considering the scope and nature of the alleged crimes, modes of liability, and circumstances of this case,¹⁶ the Indictment, which is nearly 70 pages long, sets forth a concise statement of the material facts necessary to fulfil the relevant elements¹⁷ and with sufficient specificity.¹⁸ Each of the submissions below,¹⁹ in particular concerning the level of detail provided in the Indictment and the use of certain, inclusive language, must be considered within this context. The Indictment describes in sufficient detail ‘who did what, when, where and against whom’,²⁰ including, as much as possible:²¹ (i) the places, times, and approximate number of victims; (ii) the accused’s alleged conduct giving rise to criminal responsibility; (iii) the related mental elements; and (iv) the identities of any alleged JCE participants, accomplices, and subordinates.²² In the circumstances, the charges and the liability of the Accused do not depend on the further, evidentiary details

¹⁶ The required level of specificity depends on, *inter alia*, the alleged form of participation, proximity of the accused (in this case, their high level positions, ongoing and overarching participation in the common purpose, and lack of direct proximity to the majority of the crimes), nature of the crime itself, including the recurring and continuing nature of the crimes, whether it is characterised by the movement of the victim, and whether the crime was committed in numerous locations within a defined geographic area. See *Specialist Prosecutor v. Gucati and Haradinaj*, KSC-BC-2020-07/F00147, Decision on Defence Preliminary Motions, 8 March 2021 (*Gucati and Haradinaj* Decision), paras 38-39; Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules, KSC-BC-2020-06/F00010, 2 July 2020 (*Rule 86(4) Order*), para.16. See also ICC, *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18 OA2, Judgment on the appeal of Mr Alfred Yekatom against the decision of Trial Chamber V of 29 October 2020 entitled ‘Decision on motions on the Scope of the Charges and the Scope of Evidence at Trial’, 5 February 2021 (*Yekatom* Appeal Decision), paras 38, 54; STL, *Prosecutor v. Ayyash*, STL-18-10/PT/TC, Decision on Alleged Defects in the Form of the Indictment, 28 September 2020 (*STL Decision*), para.14(f)-(g) and the sources cited therein; SCSL, *Prosecutor v Sesay et al.*, SCSL-04-15-A, Judgment, 26 October 2009 (*Sesay* Appeal Judgment), para.830.

¹⁷ Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules, KSC-BC-2020-06/F00010, 2 July 2020 (*Rule 86(4) Order*), para.15.

¹⁸ Rule 86(4) Order, KSC-BC-2020-06/F00010, para.9; STL Decision, para.14(a) and the sources cited therein.

¹⁹ See paras 7-42 below.

²⁰ Rule 86(4) Order, KSC-BC-2020-06/F00010, para.11.

²¹ Rule 86(4) Order, KSC-BC-2020-06/F00010, paras 15, 17-18 (details need only be pleaded ‘as far as possible’, ‘as much as possible’, and ‘if known’, provided necessary particulars have been provided to make out the elements of the crimes); STL Decision, para.14(m) and the sources cited therein (the Prosecution must offer its best understanding of the case in the Indictment based on the best information available).

²² Rule 86(4) Order, KSC-BC-2020-06/F00010, para.18.

sought by the Defence, the full scope of which may remain unknown at the end of the proceedings and does not impact on the clarity of the pleaded allegations.²³

6. Despite Defence attempts to cast its arguments in terms of defects in the form of the Indictment, the Motions improperly: (i) request evidentiary details which need not be pleaded in the Indictment and have been or will be provided in accordance with the relevant framework;²⁴ (ii) attempt to litigate the factual and legal sufficiency of the confirmed charges, which are matters for trial;²⁵ and (iii) challenge certain words, phrases, and allegations in isolation, without regard to the Indictment as a whole.²⁶ The Motions fail to demonstrate any actual defect in the form of the Indictment, which clearly and unambiguously puts the Accused on notice of the SPO's case.

A. THE INDICTMENT ADEQUATELY PLEADS JCE

7. The Indictment pleads the material facts relating to the alleged JCE, namely:²⁷ its nature and purpose, its period of existence, the identities of the participants, and the nature of each Accused's participation.²⁸

²³ *Gucati and Haradinaj* Decision, para.39; STL Decision, para.54(b); ECtHR, *Previti v. Italy*, 45291/06, Decision, 8 December 2009 ('*Previti* Decision'), para.208.

²⁴ The Prosecution is not required to plead the evidence proving the material facts. See *Gucati and Haradinaj* Decision, KSC-BC-2020-07/F00147, para.40.

²⁵ Rule 86(7); *Gucati and Haradinaj* Decision, KSC-BC-2020-07/F00147, paras 40, 44, 70; ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-PT, Decision on Ante Gotovina's Preliminary Motions Alleging Defects in the Form of the Joinder Indictment, 19 March 2007 ('*Gotovina* Decision'), para.51; ICTY, *Prosecutor v. Šešelj*, IT-03-67/PT, Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, 26 May 2004 ('*Šešelj* Decision'), para.41; ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-PT, Decision on Form of Indictment, 7 December 2001 ('*Hadžihasanović* Decision'), para.35; ICTY, *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 November 2001 ('*Brđanin* November 2001 Decision'), para.8.

²⁶ The Indictment must be read as a whole and select paragraphs should be read in the context of the entire document. See *Gucati and Haradinaj* Decision, KSC-BC-2020-07/F00147, para.39 and the sources cited therein. See also Indictment, KSC-BC-2020-06/F000134, p.53.

²⁷ Indictment, KSC-BC-2020-06/F000134, paras 32-51.

²⁸ ICTY, *Prosecutor v. Simić*, IT-95-9-A, Judgement, 28 November 2006, para.22. See also Rule 86(4) Order, KSC-BC-2020-06/F00010, para.18..

1. Nature and purpose

8. The Defence challenges do not allege that the JCE, as pleaded, is unclear or ambiguous;²⁹ rather, they merely argue that it is insufficient to constitute a common criminal purpose. As such, to the extent their submissions on the JCE's nature and purpose simply revolve around the factual and legal sufficiency of the SPO's case, such arguments are not suitable for a challenge to the form of the Indictment.³⁰

9. Nonetheless, contrary to Defence arguments,³¹ the common purpose – which comprises both the JCE's objective and the means contemplated to achieve that objective³² – is unambiguously and inherently criminal as pleaded:³³ the objective was to be achieved by the contemplated criminal means and encompassed (i.e. involved³⁴) the crimes charged.³⁵

10. The phrase 'by means including'³⁶ indicates that there were other (including potentially lawful) means employed to achieve the objective besides those criminal means charged.³⁷ This does not impact on the common *criminal* purpose clearly alleged

²⁹ THAÇI Motion, KSC-BC-2020-06/F00215, paras 15-22; SELIMI Motion, KSC-BC-2020-06/F00222, paras 38-46, 61-64.

³⁰ See fn.25 above.

³¹ THAÇI Motion, KSC-BC-2020-06/F00215, paras 15-20; SELIMI Motion, KSC-BC-2020-06/F00222, paras 38-46.

³² *Sesay* Appeal Judgment, para.106.

³³ Indictment, KSC-BC-2020-06/F000134, para.32. See also para.3 above.

³⁴ Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026, 26 October 2020, Strictly Confidential and *Ex Parte* ('Confirmation Decision'), paras 108, 454. See also THAÇI Motion, KSC-BC-2020-06/F00215, para.16; SELIMI Motion, KSC-BC-2020-06/F00222, para.40.

³⁵ *Sesay* Appeal Judgment, para.106; SCSL, *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgment, 22 February 2008 ('*Brima* Appeal Judgment'), paras 80-84. See also ECCC, *Case against Nuon and Khieu*, 002/19-09-2007-ECCC/SC, Appeal Judgement, 23 November 2016, paras 789, 815-816; ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Judgement, 30 June 2016 ('*Stanišić and Župljanin* Appeal Judgment'), para.69; UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol.XI, 1949, Case no.66 (Schonfeld), p.68 ('if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means [...]').

³⁶ Indictment, KSC-BC-2020-06/F000134, para.32. See also para.3 above.

³⁷ SELIMI Motion, KSC-BC-2020-06/F00222, para.43.

in the Indictment. It is neither legally³⁸ nor logically required that the criminal means were necessary to achieve the objective of the common purpose;³⁹ what matters is that it involved the commission of crimes and the Accused shared the common criminal purpose and the *mens rea* for the charged crimes. The applicable *mens rea* for both alleged forms of JCE is expressly pleaded,⁴⁰ as are facts from which each Accused's mental state may be inferred.⁴¹ Either would be sufficient and the Indictment exceeds the minimum pleading requirements.⁴²

11. Moreover, the alternative pleading of crimes encompassed by the common purpose as foreseeable consequences thereof clearly puts the Accused on notice of the SPO's case.⁴³ The Indictment states that this alternative applies to 'some' of the charged crimes, thereby acknowledging that at least one crime must fall within the JCE in order for liability to arise concerning any foreseeable crimes.⁴⁴ Contrary to Defence arguments,⁴⁵ pleading of all charged crimes as either falling within the common criminal purpose or, in the alternative, as being foreseeable consequences thereof does not create ambiguity.⁴⁶

³⁸ See fn.35 above.

³⁹ *Contra* SELIMI Motion, KSC-BC-2020-06/F00222, paras 44-45. Further, contrary to Defence submissions, other international and hybrid courts have consistently acknowledged that the objective of a JCE need not be itself criminal. See, for example, the sources in fn.35 above.

⁴⁰ Indictment, KSC-BC-2020-06/F000134, paras 32-34.

⁴¹ See paras 30, 41 below.

⁴² See, similarly, ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-PT, Decision on Mićo Stanišić's and Stojan Župljanin's Motions on Form of the Indictment, 19 March 2009 ('*Stanišić and Župljanin* March 2009 Decision'), paras 43-44; ICTY, *Prosecutor v. Stakić*, IT-97-24-PT, Decision on the Defence Motion Objecting to the Form of the Indictment, 13 November 2001 ('*Stakić* Decision'), para.46.

⁴³ Indictment, KSC-BC-2020-06/F000134, para.34.

⁴⁴ Cf. SELIMI Motion, KSC-BC-2020-06/F00222, para.62.

⁴⁵ THAČI Motion, KSC-BC-2020-06/F00215, paras 21-22; SELIMI Motion, KSC-BC-2020-06/F00222, paras 62-64.

⁴⁶ ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Judgement, 29 November 2017 ('*Prlić* Appeal Judgment'), paras 3014-3017; *Sesay* Appeal Judgment, para.109; SCSL, *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Judgement, 2 March 2009 ('*Sesay* Trial Judgment'), paras 387, 390; *Brima* Appeal Judgment, para.85; ICTY, *Prosecutor v. Mrkšić*, IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003, para.57 (rejecting an argument that such pleading would require the defence to prepare 'in two opposite ways'); *Stakić* Decision, para.45;

Identification of which specific crimes are encompassed by or foreseeable consequences of the common criminal purpose is not a material fact to be pleaded, but a matter of evidence for trial.⁴⁷

2. Participants

12. The alleged JCE Members are more than sufficiently identified in the Indictment.⁴⁸ Certain, prominent JCE Members are identified by name and/or position.⁴⁹ Others are identified by category or group, including according to their rank and membership of certain bodies or services within the KLA and PGoK.⁵⁰ Use of the word 'included' is appropriate and does not create ambiguity,⁵¹ considering, in particular, that the charges and the liability of the Accused do not depend on the full scope of JCE Members, which

ICTY, *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 ('*Brđanin June 2001 Decision*'), paras 40-41.

⁴⁷ ICTY, *Prosecutor v. Đorđević*, IT-05-87/1-PT, Decision on Form of Indictment, 3 April 2008 ('*Đorđević Decision*'), para.24. See also, *Gucati and Haradinaj Decision*, KSC-BC-2020-07/F00147, para.45.

⁴⁸ *Gucati and Haradinaj Decision*, KSC-BC-2020-07/F00147, para.42. In cases of varying scope and size, chambers have generally found that an indictment may sufficiently identify certain, prominent JCE members by name and identify other members by reference to a category or group. See IRMCT, *Prosecutor v. Stanišić and Simatović*, MICT-15-96-T, Decision on Stanišić's Motion for Further Particularisation of the Prosecution Case, 2 May 2018 ('*Stanišić and Simatović May 2018 Decision*'), para.16; ICTY, *Prosecutor v. Hadžić*, IT-04-75-PT, Decision on Defence Motion Alleging Defects in Form of First Amended Indictment, 10 November 2011 ('*Hadžić Decision*'), paras 16-17; ICTY, *Prosecutor v. Mladić*, IT-09-92-PT, Decision on Defence Preliminary Motion Objecting to the Form of the Second Amended Indictment, 13 October 2011 ('*Mladić Decision*'), para.14; *Stanišić and Župljanin March 2009 Decision*, para.31; *Gotovina Decision*, paras 14-15; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-PT, Decision on Defence Preliminary Motions Alleging Defects in the Form of the Indictment, 22 July 2005 ('*Prlić July 2005 Decision*'), para.34; ICTY, *Prosecutor v. Martić*, IT-95-11-PT, Decision on Preliminary Motion Against the Amended Indictment, 2 June 2003 ('*Martić Decision*'), paras 9, 12. See also ICTY, *Prosecutor v. Blagojević et al.*, IT-02-60-PT, Decision on Motions Challenging the Form of Amended Joinder Indictment, 1 August 2002, para.26.

⁴⁹ Indictment, KSC-BC-2020-06/F000134, para.35.

⁵⁰ Indictment, KSC-BC-2020-06/F000134, para.35.

⁵¹ *Gucati and Haradinaj Decision*, KSC-BC-2020-07/F00147, paras 44, 70; ICTY, *Prosecutor v. Kvočka*, IT-98-30/1, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para.26.

will remain unknown at the end of the proceedings and does not impact on the scope of the known JCE Members identified in the Indictment.⁵²

13. Moreover, Defence submissions that the Indictment fails to link the alleged JCE Members with the perpetrators of the crimes⁵³ or any geographical, temporal, or other parameters⁵⁴ are unsubstantiated and incorrectly based on a selective reading of certain paragraphs of the Indictment in isolation. The perpetrators of the charged crimes are identified as: (i) JCE Members and Tools;⁵⁵ and (ii) by either name⁵⁶ or as 'KLA members'.⁵⁷ This pleading is appropriate, as KLA affiliation was common to the perpetrators⁵⁸ and puts them squarely within the scope of the identified JCE Members.⁵⁹ In addition, certain JCE Members and Tools are also referred to by their unit⁶⁰ and/or linked to KLA operational zones,⁶¹ commanders,⁶² bases, headquarters, and other locations, acts, events, and time periods.⁶³

⁵² See fns.23-24 above. *Contra* THAÇI Motion, KSC-BC-2020-06/F00215, para.23; SELIMI Motion, KSC-BC-2020-06/F00222, para.32.

⁵³ THAÇI Motion, KSC-BC-2020-06/F00215, para.25; KRASNIQI Motion, KSC-BC-2020-06/F00221, paras 46-47.

⁵⁴ THAÇI Motion, KSC-BC-2020-06/F00215, para.26; KRASNIQI Motion, KSC-BC-2020-06/F00221, paras 45, 47.

⁵⁵ Indictment, KSC-BC-2020-06/F000134, paras 57, 59, 94-96, 134-136, 171. *See also* paras 16-17, 31, 35, 37-38, 44, 48(g), 49(f), 50(f), 51(e), 53, 55.

⁵⁶ Indictment, KSC-BC-2020-06/F000134, paras 44, 46-47, 60-62, 67-68, 75, 77-78, 97, 98, 108, 110, 112, 115, 117, 143, 154, 156, 161, 164.

⁵⁷ Indictment, KSC-BC-2020-06/F000134, paras 60-93, 97-133, 137-170. *See also* para.37.

⁵⁸ *See, similarly, Stanišić and Župljanin* March 2009 Decision, para.35.

⁵⁹ Indictment, KSC-BC-2020-06/F000134, para.35.

⁶⁰ Indictment, KSC-BC-2020-06/F000134, paras 72, 77.

⁶¹ Indictment, KSC-BC-2020-06/F000134, paras 60, 67-68, 71-72, 77, 80, 93.

⁶² Indictment, KSC-BC-2020-06/F000134, paras 44, 46-47, 60-62, 67-68, 75, 77-78, 97, 98, 108, 110, 112, 115, 117, 143, 154, 156, 161, 164.

⁶³ Indictment, KSC-BC-2020-06/F000134, paras 57-171.

14. The additional details requested by Defence – for example, the names of additional JCE Members, their specific unit, or the exact structure, size, or membership of any identified category or group of JCE Members⁶⁴ – are matters of evidence.⁶⁵

15. Defence arguments seeking to exaggerate the potential scope of JCE Members,⁶⁶ are without foundation. Only KLA/PGoK members who shared the common *criminal* purpose fall within the scope of the alleged JCE.⁶⁷

16. Finally, the Defence fails to explain how the alternative characterisation of JCE Members and Tools⁶⁸ is vague or ambiguous.⁶⁹ Indeed, the pleading of JCE Members and Tools precisely sets out the SPO's position on who was a member of the JCE, while also alleging that, if some of the identified JCE Members are found not to be members, then they were tools used by JCE Members to commit the charged crimes.⁷⁰ The material facts have been pleaded, and the Accused have sufficient detail of the charges to be able to prepare their defence.⁷¹

3. Participation of the Accused

17. Acting through the high-level positions they held in the KLA and PGoK during the Indictment Period,⁷² the Accused are each alleged to have played key, overarching,

⁶⁴ THAČI Motion, KSC-BC-2020-06/F00215, paras 25-26.

⁶⁵ *Sesay* Trial Judgment, para.367; *Šešelj* Decision, para.59; ICTY, *Prosecutor v. Rašević*, IT-97-25/1-PT, Decision regarding Defence Preliminary Motion on the Form of the Indictment, 28 April 2004, para.47; *Brdanin* November 2001 Decision, para.10.

⁶⁶ SELIMI Motion, KSC-BC-2020-06/F00222, para.33.

⁶⁷ *See, similarly, Stanišić and Župljanin* Appeal Judgment, fn.248; *Šešelj* Decision, para.59.

⁶⁸ Indictment, KSC-BC-2020-06/F000134, para.35.

⁶⁹ THAČI Motion, KSC-BC-2020-06/F00215, paras 27-28; SELIMI Motion, KSC-BC-2020-06/F00222, paras 34-35, 37.

⁷⁰ *See, similarly, Hadžić* Decision, paras 16-17.

⁷¹ *Gucati and Haradinaj* Decision, KSC-BC-2020-07/F00147, para.45; *Hadžić* Decision, paras 16-17. The fact that the Pre-Trial Judge did not address the alternative characterisation of JCE Members and Tools does not create any ambiguity, considering the purpose of the Confirmation Decision, which need not address or confirm all alternative characterisations of the facts. *Contra* SELIMI Motion, KSC-BC-2020-06/F00222, para.36.

⁷² Indictment, KSC-BC-2020-06/F000134, paras 48-51, *referring to* paras 2, 5, 8, 11. *See also* paras 15, 26, 37, 53.

and ongoing roles in the formulation and implementation of the common criminal purpose. The concrete descriptions of each⁷³ Accused's participation in the JCE⁷⁴ – through the identified acts and courses of conduct ongoing throughout the Indictment Period – is sufficiently precise.⁷⁵

18. Moreover, while the Accused are not charged with having personally committed any crimes charged, the Indictment details certain examples of each Accused's direct involvement in and/or close proximity to certain matters, events, and criminal acts.⁷⁶ The facts relating to such matters, events, and criminal acts have been pleaded in sufficient detail. Indeed, the Defence selectively reads certain paragraphs in isolation. A proper, holistic reading of the Indictment provides certain details sought by the Defence.⁷⁷

19. Contrary to Defence arguments otherwise, (i) potentially overlapping forms of participation do not create ambiguity, particularly where, as in the Indictment, each identified form of participation provides greater specificity or concerns different aspects of certain conduct or areas of focus;⁷⁸ (ii) each Accused's contributions are expressly alleged to be in furtherance of the common criminal purpose and none of the charged

⁷³ Insofar as the KRASNIQI Defence claims that further differentiation is required between the Accused (*see* KRASNIQI Motion, KSC-BC-2020-06/F00221, para.21(a)), the Indictment clearly indicates when an allegation pertains to one or more of the Accused. Insofar as an allegation refers to all Accused, it is clear that such allegation in turn concerns them all.

⁷⁴ Indictment, KSC-BC-2020-06/F000134, paras 36-51.

⁷⁵ *Hadžić* Decision, paras 20, 41; *Šešelj* Decision, paras 47, 60.

⁷⁶ Indictment, KSC-BC-2020-06/F000134, paras 36-47. *See also* paras 73, 75, 101, 108, 110, 117.

⁷⁷ For example, (i) certain of the details sought by the Defence concerning the Rahovec/Orahovac attack and related events, including at Malishevë/Mališevo (*see* THAÇI Motion, KSC-BC-2020-06/F00215, para.33, bullet point 2; KRASNIQI Motion, KSC-BC-2020-06/F00221, para.21(b)) are provided in other sections describing these events (*see* Indictment, KSC-BC-2020-06/F000134, paras 42, 65, 101, 151-152); and (ii) certain details concerning events at Kleçkë/Klečka (*see* KRASNIQI Motion, KSC-BC-2020-06/F00221, para.21(a)) are provided in other sections describing these events (*see* Indictment, KSC-BC-2020-06/F000134, paras 47, 75-76, 112-113, 158-162).

⁷⁸ *Contra* SELIMI Motion, KSC-BC-2020-06/F00222, para.57. *Compare* Indictment, KSC-BC-2020-06/F000134, para.50(a) (concerning, *inter alia*, the dissemination of 'plans, policies, and practices in furtherance of the common purpose') and para.50(d) (concerning, *inter alia*, the dissemination of 'information intended to promote the common purpose and engender fear, distrust, and hatred of Opponents').

modes of liability require their presence at or direct participation in any of the alleged crimes;⁷⁹ (iii) there is no requirement that omissions must be linked to a legal duty to constitute a contribution to a JCE;⁸⁰ and (iv) regardless of whether the objective or means of an alleged common purpose are criminal,⁸¹ ‘the law does not foresee specific types of conduct which *per se* could not be considered a contribution to the common purpose’.⁸² Ultimately, whether and how an alleged act or omission contributes to the common criminal purpose is a matter of evidence.⁸³

20. As set out above, in the circumstances of the case, the material facts have been pleaded. Additional details sought by the Defence – including any specific plans, policies, and practices, the specific modalities of formulation or implementation thereof, and the Accused’s specific relationship with and the identities of specific members of the international community, monitors, media, JCE Members and Tools, and Opponents⁸⁴ – are matters of evidence.⁸⁵ In this context, the words ‘including’ and ‘like’ are appropriately used to provide further, known detail supporting the material facts and do

⁷⁹ See, similarly, *Gotovina* Decision, paras 23-24 (noting that the Indictment identified the Accused’s forms of participation in the JCE and alleged that the crimes were part or foreseeable consequences of the JCE and finding that: ‘In so doing, it is clear that the Joinder Indictment pleads that the Accused’s alleged participation is ultimately linked to criminal acts’); ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, Decision on Motion to Amend the Indictment and on Challenges to the Form of the Amended Indictment, 25 October 2006, para.25; *Prlić* July 2005 Decision, para.50; *Martić* Decision, para.31. *Contra* THAČI Motion, KSC-BC-2020-06/F00215, paras 33, 58-60; KRASNIQI Motion, KSC-BC-2020-06/F00221, para.50; SELIMI Motion, KSC-BC-2020-06/F00222, paras 48-52.

⁸⁰ *Stanišić and Župljanin* Appeal Judgment, para.110. *Contra* SELIMI Motion, KSC-BC-2020-06/F00222, para.56.

⁸¹ SELIMI Motion, KSC-BC-2020-06/F00222, paras 50-51.

⁸² ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009, para.696. The accused must also possess the required mental state. See para.10 above.

⁸³ *Stanišić and Župljanin* Appeal Judgment, para.110 and the sources cited therein; *Stanišić and Župljanin* March 2009 Decision, para.39.

⁸⁴ THAČI Motion, KSC-BC-2020-06/F00215, para.33; KRASNIQI Motion, KSC-BC-2020-06/F00221, paras 21, 23-27; SELIMI Motion, KSC-BC-2020-06/F00222, paras 53-60.

⁸⁵ See, similarly, *Stanišić and Župljanin* March 2009 Decision, paras 39, 41; *Gotovina* Decision, para.24; *Martić* Decision, para.31. See also paras 12-16 above and paras 27-28, 36-42 below.

not create ambiguity or the possibility that the SPO may seek to expand its case to include forms of participation not pleaded.⁸⁶

B. THE INDICTMENT ADEQUATELY PLEADS AIDING AND ABETTING

21. In relation to aiding and abetting, the Indictment pleads the material facts⁸⁷ namely, the particular acts and particular courses of conduct of the Accused and the applicable mental state.⁸⁸

22. Contrary to Defence assertions of ambiguity,⁸⁹ the phrase '[t]hrough these same acts and omissions'⁹⁰ clearly refers to the acts and omissions described in the immediately preceding paragraphs concerning each Accused's participation in the JCE.⁹¹ The absence of a cross-reference to specific paragraphs does not impair the ability of the Defence to understand the charges.⁹² As set out above, each Accused's acts and courses of conduct are described in more than sufficient detail to enable the Defence to prepare.⁹³ The effect of such conduct on any specific crime and whether such acts or courses of conduct constitute practical assistance, encouragement, and/or⁹⁴ moral support are matters of

⁸⁶ *Contra* THAÇI Motion, KSC-BC-2020-06/F00215, paras 31-32; KRASNIQI Motion, KSC-BC-2020-06/F00221, paras 22, 26.

⁸⁷ Indictment, KSC-BC-2020-06/F000134, para.52.

⁸⁸ *Gucati and Haradinaj* Decision, KSC-BC-2020-07/F00147, para.42; ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004 ('*Blaškić* Appeal Judgment'), para.213. *See also* Rule 86(4) Order, KSC-BC-2020-06/F00010, para.18.

⁸⁹ THAÇI Motion, KSC-BC-2020-06/F00215, para.36. *See also* KRASNIQI Motion, KSC-BC-2020-06/F00221, para.30; SELIMI Motion, KSC-BC-2020-06/F00222, para.25.

⁹⁰ Indictment, KSC-BC-2020-06/F000134, para.52.

⁹¹ Indictment, KSC-BC-2020-06/F000134, paras 36-51. Similar pleadings have been found sufficient in other cases of varying size and scope. *See Stanišić and Simatović* May 2018 Decision, para.20; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, 30 January 2015, para.68; *Hadžić* Decision, para.41; *Stanišić and Župljanin* March 2009 Decision, paras 25, 28.

⁹² *See, similarly*, STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Decision on Alleged Defects in the Form of the Indictment Against Hassan Habib Merhi, 28 March 2014, para.22.

⁹³ *See* paras 17-20 above. *Contra* THAÇI Motion, KSC-BC-2020-06/F00215, para.36; KRASNIQI Motion, KSC-BC-2020-06/F00221, para.30(b).

⁹⁴ Use of 'and/or' is appropriate here and does not create ambiguity. *See Gucati and Haradinaj* Decision, KSC-BC-2020-07/F00147, para.45. *Contra* KRASNIQI Motion, KSC-BC-2020-06/F00221, para.30(f).

evidence.⁹⁵ Further, the Indictment unambiguously charges each Accused with aiding and abetting all charged crimes.⁹⁶ No further differentiation is necessary, as the material facts pertaining to each Accused's alleged acts and courses of conduct are adequately pleaded.⁹⁷

23. Finally, the applicable *mens rea* is expressly alleged,⁹⁸ as are facts by which the Accused's mental state may be inferred.⁹⁹ Either would be sufficient.¹⁰⁰ As the Indictment pleads both, undeveloped Defence claims of ambiguity and prejudice are patently unfounded.¹⁰¹

C. THE INDICTMENT ADEQUATELY PLEADS SUPERIOR RESPONSIBILITY

24. The Indictment pleads the material facts pertaining to superior responsibility, namely:¹⁰² (i) the Accused's superior positions; (ii) their subordinates' criminal conduct; (iii) that the Accused knew or had reason to know that the crimes were about to be or had been committed by their subordinates; and (iv) that the Accused failed to take necessary and reasonable measures to prevent the commission of crimes by their subordinates and/or to punish the perpetrators thereof.¹⁰³

⁹⁵ See para.19 above. *Contra* THAČI Motion, KSC-BC-2020-06/F00215, paras 38, 58-60; KRASNIQI Motion, KSC-BC-2020-06/F00221, paras 30(c)-(d), 50.

⁹⁶ Indictment, KSC-BC-2020-06/F000134, paras 52, 172. *See, similarly, Stanišić and Župljanin* March 2009 Decision, paras 55-58.

⁹⁷ *Prlić* Appeal Judgment, para.3140. *Contra* KRASNIQI Motion, KSC-BC-2020-06/F00221, para.30(a).

⁹⁸ Indictment, KSC-BC-2020-06/F000134, para.52.

⁹⁹ See paras 30, 41 below.

¹⁰⁰ *Stanišić and Simatović* May 2018 Decision, para.20; *Stanišić and Župljanin* March 2009 Decision, para.46.

¹⁰¹ THAČI Motion, KSC-BC-2020-06/F00215, para.37; KRASNIQI Motion, KSC-BC-2020-06/F00221, para.30(d).

¹⁰² Indictment, KSC-BC-2020-06/F000134, paras 53-55.

¹⁰³ *Blaškić* Appeal Judgment, paras 216, 218-219. *See also* Rule 86(4) Order, KSC-BC-2020-06/F00010, para.18.

1. The Accused's superior positions

25. The Accused are alleged to be General Staff members and among the highest-ranking officials in the KLA and/or PGoK.¹⁰⁴ This constitutes a sufficient basis for asserting the material fact that each Accused was in a position of superior authority and exercised effective control.¹⁰⁵ Whether each Accused, in fact, had the material ability to prevent the crimes or punish the perpetrators is an evidentiary matter.¹⁰⁶

26. The Indictment, however, goes beyond the minimum requirement and also alleges facts demonstrating the Accused's effective control,¹⁰⁷ for example: (i) their responsibility to take necessary and reasonable measures to prevent the crimes and punish the perpetrators;¹⁰⁸ and their involvement in and/or responsibility for (ii) plans, policies, and practices;¹⁰⁹ (iii) appointment and promotion of subordinates;¹¹⁰ and (iv) provision of political, logistical, military, and/or financial support to subordinates.¹¹¹ Accordingly, contrary to Defence submissions,¹¹² the Indictment pleads the material facts for each Accused's alleged superior position and effective control more than adequately.¹¹³

¹⁰⁴ Indictment, KSC-BC-2020-06/F000134, paras 2, 5, 8, 11, 53. *See also* paras 15, 26, 37.

¹⁰⁵ *Prlić* Appeal Judgment, para.3139; *Hadžić* Decision, para.38 and the sources cited therein.

¹⁰⁶ *Sesay* Appeal Judgment, paras 74-76; *Sesay* Trial Judgment, para.408; *Gotovina* Decision, paras 28, 34; ICTY, *Prosecutor v. Todović and Rašević*, IT-97-25/1-PT, Decision on Todović Defence Motion on the Form of the Joint Amended Indictment, 21 March 2006 ('*Todović* Decision'), para.14; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-PT, Decision on Ljube Boškoski's Motion Challenging the Form of the Indictment, 22 August 2005 ('*Boškoski* Decision'), paras 25-26; ICTY, *Prosecutor v. Milutinović et al.*, IT-99-37-PT, Decision on Defence Preliminary Motion Filed by the Defence for Nikola Šainović, 27 March 2003 ('*Milutinović* Decision'), p.4; *Stakić* Decision, para.40.

¹⁰⁷ Indictment, KSC-BC-2020-06/F000134, paras 36-55.

¹⁰⁸ Indictment, KSC-BC-2020-06/F000134, para.55.

¹⁰⁹ Indictment, KSC-BC-2020-06/F000134, paras 39, 48(a), 49(a), 50(a) 51(a). *See also* para.55(a)-(b), (d)-(e).

¹¹⁰ Indictment, KSC-BC-2020-06/F000134, paras 48(f), 49(e), 50(e), 51(f). *See also* para.55(c).

¹¹¹ Indictment, KSC-BC-2020-06/F000134, paras 48(g), 49(f), 50(f), 51(g). *See also* paras 48(h), 49(g), 50(g), 51(h).

¹¹² KRASNIQI Motion, KSC-BC-2020-06/F00221, paras 33-34.

¹¹³ *See, similarly, Stanišić and Župljanin* March 2009 Decision, paras 55-58.

27. The Indictment also clearly identifies the Accused's alleged subordinates, using the defined term, JCE Members and Tools.¹¹⁴ As set out above,¹¹⁵ (i) JCE Members and Tools are identified by both name and category, according to their rank and membership of certain bodies and services of the KLA and PGoK; (ii) the perpetrators of the crimes charged are identified as JCE Members and Tools and by name or group; and (iii) further detail is provided in relation to certain JCE Members and Tools, who are referred to by their unit and/or linked to certain KLA zones, commanders, bases, locations, acts, and time periods. Considering that a superior need not know the specific identity of any individual subordinate to incur liability,¹¹⁶ the Accused's alleged subordinates are sufficiently identified.¹¹⁷ Any further details sought by the Defence¹¹⁸ – including details of the relationship between the Accused and any specific alleged subordinate¹¹⁹ – are matters of evidence for trial.¹²⁰

¹¹⁴ Indictment, KSC-BC-2020-06/F000134, paras 53, 55.

¹¹⁵ See paras 12-14 above. The KRASNIQI Defence's assertion that no perpetrators are identified in paragraph 63 of the Indictment is based on a selective reading of that paragraph in isolation (see KRASNIQI Motion, KSC-BC-2020-06/F00221, para.36, fn.52). Read in its proper context, including other paragraphs of the Indictment relating to this location, it is alleged that the relevant acts of arbitrary detention were committed at a 'KLA headquarters' (Indictment, KSC-BC-2020-06/F000134, para.63) and the perpetrators are clearly identified as JCE Members and Tools (Indictment, KSC-BC-2020-06/F000134, para.59) and KLA members (Indictment, KSC-BC-2020-06/F000134, paras 100, 145-150).

¹¹⁶ ICTR, *Prosecutor v. Muvunyi*, ICTR-00-55A-A, Judgement, 29 August 2008, paras 55-56.

¹¹⁷ Pleading in this manner has been accepted in other cases of varying size and scope. See *Prlić* Appeal Judgment, para.3139; *Hadžić* Decision, para.38; *Stanišić and Župljanin* March 2009 Decision, paras 55-58; *Dorđević* Decision, paras 29-30; *Prlić* July 2005 Decision, para.47; ICTY, *Prosecutor v. Orić*, IT-03-68-PT, Decision on Preliminary Motion Regarding Defects in the Form of the Indictment, 3 July 2003, pp.3-4; *Martić* Decision, para.19; *Milutinović* Decision, p.4; *Stakić* Decision, para.42. Even in cases where the Accused are geographically and otherwise proximate to the crimes charged, it has been found to be sufficient to plead subordinates by category or group. See ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, 14 December 2015 ('*Nyiramasuhuko* Appeal Judgment'), para.1255; ICTY, *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Judgement, 3 May 2006 ('*Naletilić* Appeal Judgment'), para.88.

¹¹⁸ THAČI Motion, KSC-BC-2020-06/F00215, paras 41, 58-60; KRASNIQI Motion, KSC-BC-2020-06/F00221, paras 35-36, 50; SELIMI Motion, KSC-BC-2020-06/F00222, para.66.

¹¹⁹ *Hadžić* Decision, para.38; *Mladić* Decision, para.15; *Martić* Decision, para.31.

¹²⁰ See, similarly, *Stanišić and Župljanin* March 2009 Decision, para.52.

2. Criminal conduct of subordinates

28. The material facts pertaining to the criminal conduct of the Accused's alleged subordinates are set out with sufficient detail,¹²¹ including considering that, in cases of superior responsibility, details concerning the subordinates' acts are often unknown and largely not at issue.¹²² The allegation concerning the criminal conduct of the Accused's subordinates in paragraph 53 of the Indictment must be read in light of the material facts pertaining to the charged crimes.¹²³ Further details, including the characterisation of the alleged subordinates' conduct in accordance with the Article 16(1) modes of liability,¹²⁴ need not be pleaded in the Indictment and are evidentiary matters for trial.¹²⁵

3. Mental element

29. The material fact under this limb, namely, the applicable *mens rea*¹²⁶ – that each Accused 'knew or had reason to know that crimes were about to be committed or had been committed by persons under their effective control' – is expressly pleaded.¹²⁷ In turn, the facts by which the SPO intends to prove that the Accused knew or should have known that crimes were about to be or had been committed by their subordinates are matters of evidence and need not be pleaded.¹²⁸

30. The Indictment, however, exceeds the minimum requirement and also pleads facts by which each Accused's mental state may be directly or indirectly established,¹²⁹

¹²¹ *Contra* THAČI Motion, KSC-BC-2020-06/F00215, para.43; SELIMI Motion, KSC-BC-2020-06/F00222, para.67.

¹²² *Blaškić* Appeal Judgment, para. 218(b).

¹²³ Indictment, KSC-BC-2020-06/F000134, paras 56-171. *See also* paras 36-42 below.

¹²⁴ Indictment, KSC-BC-2020-06/F000134, para.53.

¹²⁵ ICTY, *Prosecutor v. Perišić*, IT-04-81-PT, Decision on Preliminary Motions, 29 August 2005, para.31; *Milutinović* Decision, p.4. *Contra* SELIMI Motion, KSC-BC-2020-06/F00222, para.67.

¹²⁶ Rule 86(4) Order, KSC-BC-2020-06/F00010, para.18.

¹²⁷ Indictment, KSC-BC-2020-06/F000134, para.54.

¹²⁸ *Blaškić* Appeal Judgment, para. 219; *Sesay* Appeal Judgment, paras 70-71.

¹²⁹ *See, similarly, Prlić* Appeal Judgment, para.3140; *Sesay* Appeal Judgment, para.133; *Stakić* Decision, para.46.

including: (i) the numerous sources of information at their disposal;¹³⁰ (ii) the Accused's senior positions, their overarching and ongoing roles in the formulation and implementation of the common criminal purpose, and their direct involvement in and proximity to certain events;¹³¹ (iii) the fact that the crimes were widely known and reported, on multiple occasions resulting in intervention by family members, international actors and organisations, or other persons seeking to locate the victims and/or secure their release;¹³² and (iv) the widespread, continuing, and recurring nature of the crimes.¹³³ In this context, the word 'including' does not create ambiguity;¹³⁴ rather, it is used to provide greater specificity than what is required, namely, known examples of the Accused's sources of information.¹³⁵

31. Accordingly, as the material facts pertaining to each Accused's *mens rea* have been more than adequately pleaded, the Defence request for differentiation between the Accused¹³⁶ is unsubstantiated¹³⁷ and the further details sought¹³⁸ are evidentiary matters.

4. Failure to take necessary and reasonable measures

32. The Indictment expressly pleads that the Accused failed to take necessary and reasonable measures to prevent the commission of the charged crimes or punish the perpetrators thereof.¹³⁹ In this case, this constitutes the material fact and no further detail

¹³⁰ Indictment, KSC-BC-2020-06/F000134, para.54.

¹³¹ See paras 17-20 above. See also Indictment, KSC-BC-2020-06/F000134, para.54(a)-(d).

¹³² Indictment, KSC-BC-2020-06/F000134, para.38.

¹³³ See paras 36-38 below.

¹³⁴ *Contra* KRASNIQI Motion, KSC-BC-2020-06/F00221, para.38(c); SELIMI Motion, KSC-BC-2020-06/F00222, para.68.

¹³⁵ Indictment, KSC-BC-2020-06/F000134, para.54.

¹³⁶ KRASNIQI Motion, KSC-BC-2020-06/F00221, para.38(a).

¹³⁷ See, similarly, *Prlić* Appeal Judgment, para.3140.

¹³⁸ THAÇI Motion, KSC-BC-2020-06/F00215, paras 44-45; KRASNIQI Motion, KSC-BC-2020-06/F00221, para.38(b); SELIMI Motion, KSC-BC-2020-06/F00222, paras 69-70.

¹³⁹ Indictment, KSC-BC-2020-06/F000134, para.55.

need be provided.¹⁴⁰ This stems from the fact that the Accused's failure to prevent or punish may, *inter alia*, be inferred from the continuing or widespread nature of the crimes committed by their subordinates.¹⁴¹

33. The Indictment, however, goes beyond the minimum requirement in this case and pleads certain acts and omissions that demonstrate the Accused's failure to take necessary and reasonable measures.¹⁴² In this context, the word 'including'¹⁴³ does not create ambiguity;¹⁴⁴ rather, it is used to provide greater specificity than required. The further details sought by the Defence¹⁴⁵ are a matter of evidence for trial and need not be pleaded in the Indictment.¹⁴⁶

D. THE INDICTMENT ADEQUATELY PLEADS A CIVILIAN POPULATION AND THE VICTIMS' STATUS

34. Contrary to Defence arguments,¹⁴⁷ there is no contradiction or ambiguity¹⁴⁸ in pleading that a widespread or systematic attack was directed against the civilian population of Opponents,¹⁴⁹ while also identifying Opponents without the civilian qualifier in other parts of the Indictment.¹⁵⁰ As pleaded in the Indictment¹⁵¹ and as acknowledged in the Confirmation Decision, the term Opponents encompasses persons

¹⁴⁰ *Prlić* Appeal Judgment, para.3140; *Sesay* Appeal Judgment, paras 74-76; *Dorđević* Decision, para.34.

¹⁴¹ ICTR, *Ntabakuze v. Prosecutor*, ICTR-98-41A-A, Judgement, 8 May 2012, para.123.

¹⁴² Indictment, KSC-BC-2020-06/F000134, para.55(a)-(e).

¹⁴³ Indictment, KSC-BC-2020-06/F000134, para.55(e).

¹⁴⁴ *Contra* SELIMI Motion, KSC-BC-2020-06/F00222, para.76.

¹⁴⁵ THAČI Motion, KSC-BC-2020-06/F00215, paras 46-48; KRASNIQI Motion, KSC-BC-2020-06/F00221, para.39; SELIMI Motion, KSC-BC-2020-06/F00222, paras 71-77.

¹⁴⁶ Other chambers have reached a similar conclusion in cases of varying size and scope. *See Sesay* Appeal Judgment, paras 74-76; *Stanišić and Župljanin* March 2009 Decision, para.63; *Gotovina* Decision, paras 28, 34; *Boškovski* Decision, paras 25-26; *Milutinović* Decision, p.4; *Hadžihasanović* Decision, paras 24-25; *Stakić* Decision, para.40.

¹⁴⁷ THAČI Motion, KSC-BC-2020-06/F00215, paras 56-57. *See also* para.50.

¹⁴⁸ *See, similarly, Hadžić* Decision, para.44.

¹⁴⁹ Indictment, KSC-BC-2020-06/F000134, para.16.

¹⁵⁰ Indictment, KSC-BC-2020-06/F000134, paras 17, 19, 32, 36-37, 39-40, 48-51, 57, 135.

¹⁵¹ Indictment, KSC-BC-2020-06/F000134, para.32. *See also, for example,* paras 161-162.

‘employed by or [...] affiliated with the Serbian/Yugoslavian military or police’.¹⁵² The Pre-Trial Judge found that the small number of victims falling into this category were not taking active part in the hostilities at the time when the crimes were committed and therefore fell within the scope of the civilian population.¹⁵³ Ultimately, the Pre-Trial Judge found well-grounded suspicion that, as pleaded in the Indictment:¹⁵⁴ (i) there was a widespread or systematic attack against the civilian population of Opponents,¹⁵⁵ which constituted a significant segment of Kosovo’s civilian population;¹⁵⁶ and (ii) the victims of the crimes were persons not taking active part in hostilities.¹⁵⁷ Defence challenges to the legal and factual sufficiency of the Pre-Trial Judge’s findings concerning the civilian population and the status of the victims¹⁵⁸ are not properly raised in a motion concerning the form of the Indictment; rather, they are matters to be resolved at trial.¹⁵⁹

35. Finally, the targeted Opponents are sufficiently defined by group and affiliation.¹⁶⁰ The word ‘including’ and the phrase ‘other ethnicities’ in this context does not impact on the clarity of the targeted group of Opponents;¹⁶¹ rather, this language is used to provide particularly pertinent examples of groups of persons falling therein. These phrases should also be read in light of other paragraphs of the Indictment which further identify persons and categories of persons falling within the clearly defined group of

¹⁵² Confirmation Decision, KSC-BC-2020-06/F00026, para.126.

¹⁵³ Confirmation Decision, KSC-BC-2020-06/F00026, paras 126, 448. *See also* para.53 (considering, *inter alia*, that the civilian population includes those not taking active part in hostilities and the presence of non-civilians among the population does not alter its status).

¹⁵⁴ Indictment, KSC-BC-2020-06/F000134, paras 13-14, 31.

¹⁵⁵ Confirmation Decision, KSC-BC-2020-06/F00026, para.129. *Contra* THAÇI Motion, KSC-BC-2020-06/F00215, para.49.

¹⁵⁶ Confirmation Decision, KSC-BC-2020-06/F00026, para.126. *Contra* THAÇI Motion, KSC-BC-2020-06/F00215, para.51.

¹⁵⁷ Confirmation Decision, KSC-BC-2020-06/F00026, para.448. *Contra* THAÇI Motion, KSC-BC-2020-06/F00215, paras 55-56.

¹⁵⁸ *Contra* THAÇI Motion, KSC-BC-2020-06/F00215, paras 49, 51, 55-56.

¹⁵⁹ *See* fn.25 above.

¹⁶⁰ Indictment, KSC-BC-2020-06/F000134, para.32.

¹⁶¹ *Contra* THAÇI Motion, KSC-BC-2020-06/F00215, para.52.

Opponents.¹⁶² Any further detail concerning the identities of Opponents is an evidentiary matter for trial.¹⁶³

E. THE INDICTMENT ADEQUATELY PLEADS THE CHARGED CRIMES

36. Through well over 100 paragraphs and three schedules,¹⁶⁴ the Indictment pleads the material facts – namely, as far as possible, the places, times, and approximate number of victims, including the necessary particulars to make out the elements of the crimes¹⁶⁵ – of persecution, imprisonment/arbitrary detention, other inhumane acts/cruel treatment, torture, murder, and enforced disappearance.

37. As clearly alleged in the Indictment, the SPO's case is that, during the Indictment Period, the crimes formed part of a campaign of persecution throughout Kosovo and northern Albania¹⁶⁶ and were widespread, continuing, and recurring following arrests or abductions and at and around, or in connection with, detention sites in Kosovo and northern Albania.¹⁶⁷ For example, the Indictment alleges that:

- a. hundreds of Opponents were detained, mistreated, and/or killed;¹⁶⁸
- b. the crimes followed a consistent pattern, impacted the victims' wider families and communities, and were intended to serve as a warning and to exert pressure on the targeted population as a whole;¹⁶⁹

¹⁶² See, for example, Indictment, KSC-BC-2020-06/F000134, paras 43, 105, 115, 123. In addition, throughout the Indictment, Opponents are described by reference to, *inter alia*, geographical and temporal parameters and certain events.

¹⁶³ See also para.42 below.

¹⁶⁴ Indictment, KSC-BC-2020-06/F000134, paras 59-171, Schedules A-C.

¹⁶⁵ Rule 86(4) Order, KSC-BC-2020-06/F00010, para.18.

¹⁶⁶ Indictment, KSC-BC-2020-06/F000134, paras 57-58. See also Confirmation Decision, KSC-BC-2020-06/F00026, para.444.

¹⁶⁷ Indictment, KSC-BC-2020-06/F000134, paras 57-59, 94-95, 135, 136, 171. See also paras 17, 37, 60-93, 97-134, 137-170.

¹⁶⁸ Indictment, KSC-BC-2020-06/F000134, paras 19, 37. See also Schedules A-C.

¹⁶⁹ Indictment, KSC-BC-2020-06/F000134, para.17. See also para.136.

- c. victims were detained in more than 40 locations, some of which encompassed several detention sites;¹⁷⁰
- d. the crimes were committed in at least 16 municipalities, more than half of those existing in Kosovo during the Indictment Period, and two districts of Albania;¹⁷¹
- e. many victims were transferred between detention sites;¹⁷²
- f. many detention sites were operational for months, others for days or weeks;¹⁷³
- g. detention conditions were ‘characterised’ by their inhumane nature;¹⁷⁴
- h. victims were ‘routinely assaulted’ and acts of physical and psychological assault were a ‘regular occurrence’;¹⁷⁵ and
- i. JCE Members and Tools ‘frequently’ refused to provide truthful information about and access to detainees, ‘frequently’ threatened or assaulted those who sought information, and ‘frequently’ failed to inquire about or investigate the fate and whereabouts of missing persons.¹⁷⁶

38. Further, by their very nature and as pleaded in this case,¹⁷⁷ (i) imprisonment/arbitrary detention and enforced disappearance are both continuing crimes, meaning that they are generally not completed by a specific act at a specific time in a specific place and may continue – potentially over an extended period of time, through the acts and omissions of various persons, and at diverse locations – so long as

¹⁷⁰ Indictment, KSC-BC-2020-06/F000134, paras 59-93. *See also* Schedule A.

¹⁷¹ Indictment, KSC-BC-2020-06/F000134, paras 59-171. *See also* Schedules A-C.

¹⁷² *See, for example*, Indictment, KSC-BC-2020-06/F000134, paras 59-60, 62, 63, 65, 67, 69-70, 73, 74, 76, 78-79, 81, 84-85, 91.

¹⁷³ *See, for example*, Indictment, KSC-BC-2020-06/F000134, paras 60-63, 68, 70, 75, 78.

¹⁷⁴ Indictment, KSC-BC-2020-06/F000134, para.94.

¹⁷⁵ Indictment, KSC-BC-2020-06/F000134, para.95. *See also* paras 96-101, 103-104, 106, 112, 114-116, 118-124.

¹⁷⁶ Indictment, KSC-BC-2020-06/F000134, paras 96, 171.

¹⁷⁷ Indictment, KSC-BC-2020-06/F000134, paras 57-93, 134 (‘The acts and omissions described in paragraphs 59-133 above, considered alone or together [...]’), 135, 171.

the relevant elements are satisfied;¹⁷⁸ and (ii) persecution, other inhumane acts/cruel treatment, and torture may consist of a series of acts and/or be based on a cumulative consideration of acts and omissions potentially by and against various persons, over an extended period of time, and at diverse locations.¹⁷⁹

39. Considering the circumstances of this case, including the nature and scope of the crimes and modes of liability charged, the Indictment need not exhaustively list all criminal acts underlying each charge.¹⁸⁰ In this context, words such as ‘about’, ‘including’, ‘included’, and ‘illustrative’ are appropriately used to provide further, known detail supporting the material facts pleaded in relation to certain dates, locations, victims, perpetrators, and means of commission and do not create ambiguity as to the charges or modes of liability.¹⁸¹

40. The Defence selectively reads certain parts of the persecution charge in isolation,¹⁸² without acknowledging any of the specific acts of unlawful passing of sentences, misappropriation of personal property, and other restrictive and discriminatory measures alleged in other parts of the Indictment.¹⁸³ Such particulars were pleaded to

¹⁷⁸ Confirmation Decision, KSC-BC-2020-06/F00026, paras 57-60, 76. *See, similarly*, ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2359, Judgment, 8 July 2019 (*Ntaganda Judgment*), para.42.

¹⁷⁹ Confirmation Decision, KSC-BC-2020-06/F00026, paras 67, 79, 233-347 (assessing the seriousness of the harm based on a cumulative consideration of the relevant acts and omissions), 351-353.

¹⁸⁰ Other chambers have confirmed that charging documents need not necessarily exhaustively list all criminal acts underlying each charge, which may be described in a less specific manner depending on the circumstances of the case, including having regard to the nature and scope of the crimes and modes of liability charged. *See, for example*, ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06 A A2, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, 30 March 2021 (*Ntaganda Appeal Judgment*), paras 325-327 and the sources cited therein; *Ntaganda Judgment*, para.40; fn.195 below and the sources therein.

¹⁸¹ *Contra* THAÇI Motion, KSC-BC-2020-06/F00215, paras 46-48; KRASNIQI Motion, KSC-BC-2020-06/F00221, paras 50, 56, 59-60.

¹⁸² KRASNIQI Motion, KSC-BC-2020-06/F00221, paras 49-50 (concerning the underlying acts of unlawful passing of sentences, misappropriation of personal property, and other restrictive and discriminatory measures).

¹⁸³ *See, for example*, Indictment, KSC-BC-2020-06/F000134, paras 40-47, 95, 97-135. *See also* Confirmation Decision, KSC-BC-2020-06/F00026, para.440.

make out the elements of persecution for purposes of confirmation, but should not be understood as reducing the clearly pleaded scope of the alleged persecution campaign.¹⁸⁴

41. Finally, contrary to Defence arguments,¹⁸⁵ the *mens rea* for enforced disappearance has been adequately pleaded, including facts from which it may be inferred.¹⁸⁶ For example, in addition to other facts relevant to the Accused's mental state, as set out above,¹⁸⁷ the following pleaded facts may directly or indirectly establish awareness that either an intentional deprivation of liberty would be followed by a refusal of information or that an intentional refusal of information was preceded or accompanied by a deprivation of liberty:¹⁸⁸ (i) acts of enforced disappearance followed arrests and abductions or were committed at or in connection with detention sites;¹⁸⁹ (ii) acts of arbitrary detention against hundreds of victims were recurring throughout the Indictment Period and in locations throughout Kosovo and northern Albania;¹⁹⁰ (iii) abductions and detentions by JCE Members and Tools were widely known and reported, on multiple occasions resulting in intervention of family members, international actors and organisations, or other persons seeking to locate the victims and/or secure their release;¹⁹¹ (iv) detention conditions were 'characterised' by their inhumane nature;¹⁹² and (v) the denial of information concerning detained and missing persons and related acts were 'frequent'.¹⁹³

¹⁸⁴ See, similarly, ICTY, *Prosecutor v. Galić*, IT-98-29-T, Judgement and Opinion, 5 December 2003, paras 186-188. See also *Ntaganda* Appeal Judgment, paras 325-327; fn.195 below and the sources therein.

¹⁸⁵ *Contra* KRASNIQI Motion, KSC-BC-2020-06/F00221, para.55.

¹⁸⁶ Indictment, KSC-BC-2020-06/F000134, paras 56, 171. See also paras 137, 139, 142, 147, 149-150, 152, 157, and 163.

¹⁸⁷ See para.30 above.

¹⁸⁸ Confirmation Decision, KSC-BC-2020-06/F00026, para.77.

¹⁸⁹ Indictment, KSC-BC-2020-06/F000134, para.171.

¹⁹⁰ See para.37 above.

¹⁹¹ Indictment, KSC-BC-2020-06/F000134, para.38.

¹⁹² Indictment, KSC-BC-2020-06/F000134, para.94.

¹⁹³ Indictment, KSC-BC-2020-06/F000134, paras 96, 171.

42. In light of the foregoing, the material facts relating to persecution, imprisonment/arbitrary detention, other inhumane acts/cruel treatment, torture, murder, and enforced disappearance have been adequately pleaded. The additional details requested by the Defence – including the specific identities of victims and perpetrators, exact dates, specific types of abuse, specific locations, and the exact relationship between the Accused and specific criminal acts¹⁹⁴ – are matters of evidence for trial.¹⁹⁵

F. THE INDICTMENT IDENTIFIES THE CHARGED CRIMES AND MODES OF LIABILITY

43. Consistent with Article 38(4) and Rule 86(3), the Indictment identifies the crimes and modes of liability charged under the Law, including by reference to the applicable provisions.¹⁹⁶ Contrary to Defence submissions,¹⁹⁷ CPC¹⁹⁸ Article 145 does not apply to the

¹⁹⁴ THAČI Motion, KSC-BC-2020-06/F00215, paras 58-60; KRASNIQI Motion, KSC-BC-2020-06/F00221, paras 49-51, 57, 60.

¹⁹⁵ Other chambers have found that such details need not be pleaded in a range of cases, *inter alia*, (i) concerning widespread, recurring, and/or continuing crimes or crimes against a group of persons; and (ii) involving both charges, on the one hand, of personal commission and/or proximate accused and, on the other hand, high-level accused who are generally removed from the crimes. See *Gucati and Haradinaj* Decision, KSC-BC-2020-07/F00147, paras 41, 44; ICTY, *Prosecutor v. Karadžić*, MICT-13-55-A, Judgement, 20 March 2019, paras 55-56, 62; *Stanišić and Simatović* May 2018 Decision, para.19; *Nyiramasuhuko* Appeal Judgment, paras 493-494, 1126, 1128-1129, 1131, 1198; ICTR, *Nzabonimana v. Prosecutor*, ICTR-98-44D-A, Judgement, 29 September 2014, paras 32-33; ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-A, Judgement, 23 January 2014, paras 234-235; *Mladić* Decision, para.8; ICTR, *Prosecutor v. Rukundo*, ICTR-2001-70-A, Judgement, 20 October 2010, para.160; *Sesay* Appeal Judgment, para.830; *Sesay* Trial Judgment, para.427; *Gotovina* Decision, para.44; *Todović* Decision, paras 17-18; ICTR, *Gacumbitsi v. Prosecutor*, ICTR-2001-64-A, Judgement, 7 July 2006, paras 89-90; ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-PT, Decision on Defence Motion Regarding Defects in the Form of the Second Amended Indictment, 12 April 2006, para.22; *Naletilić* Appeal Judgment, para.58; ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005, paras 439, 442; ICTY, *Prosecutor v. Stanišić*, IT-04-79-PT, Decision on Defence Preliminary Motion on the Form of the Indictment, 19 July 2005, paras 22-23; *Martić* Decision, para.26; *Prlić* July 2005 Decision, para.46; *Brđanin* June 2001 Decision, paras 59, 62; *Stakić* Decision, paras 23, 29-30; ICTY, *Prosecutor v. Krajišnik*, IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 August 2000, paras 11-12; ICTY, *Prosecutor v. Naletilić and Martinović*, IT-98-34-PT, Decision on Defendant Vinko Martinović's Objection to the Indictment, 15 February 2000, para.22. See also paras 12-14, 17-20, 22, 27-28, 32-33 above (addressing, *inter alia*, pleading of the Accused's relationship with the crimes and perpetrators, and the identities and conduct of JCE participants and subordinates).

¹⁹⁶ Indictment, KSC-BC-2020-06/F000134, *inter alia*, p.1, paras 172-173.

¹⁹⁷ THAČI Motion, KSC-BC-2020-06/F00215, para.61.

¹⁹⁸ Criminal Procedure Code, No.04/L-123, 2012 ('CPC').

Specialist Chambers ('SC'), as it has not been expressly incorporated in the Law.¹⁹⁹ In any event, the crimes are charged under Articles 13-14, which refer to customary international law during the SC's temporal jurisdiction, and Article 16(1), and not under Articles 15 and 16(2)-(3), which concern crimes under relevant substantive criminal laws in force in Kosovo. Accordingly, the Defence fails to identify any defect in the naming of the offences, modes of liability, or citation of relevant provisions.

G. THE DEFENCE WILL RECEIVE THE EVIDENTIARY DETAILS SOUGHT

44. As set out above, all material facts have been pleaded with sufficient detail in the Indictment, which is, by its very nature and purpose, concise.²⁰⁰ In accordance with the established framework, the Defence has already received and will continue to receive all available evidentiary details supporting the material facts, including those requested in the Motions. For example, evidentiary details: (i) have been provided in the Rule 86(3)(b) outlines, Confirmation Decision, and disclosed materials; and (ii) will be provided through, *inter alia*, future disclosures, witness and exhibit lists, and the pre-trial brief. The combined information provided through these documents and the Indictment ensures the ability of the Defence to fully prepare and the fairness of these proceedings.²⁰¹ Accordingly, any amendment of the Indictment at this stage to include details beyond the material facts already pleaded would be unjustified and potentially threaten the fairness and expeditiousness of the proceedings.²⁰²

¹⁹⁹ Article 3(2)(c), 4.

²⁰⁰ Article 38(4); Rule 86(3). *See also* ECtHR, *Sampech v. Italy*, 55546/09, Decision, 19 May 2015, para.110 (considering that, by their very nature, the charges were drafted in a summary manner and details of the alleged conduct would normally result from other documents); *Previti* Decision, para.208.

²⁰¹ *Gucati and Haradinaj* Decision, KSC-BC-2020-07/F00147, para.40; Rule 86(4) Order, KSC-BC-2020-06/F00010, para.13; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06 A5, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, para.128; STL Decision, para.47; *Yekatom* Appeal Decision, para.57; *Previti* Decision, para.208.

²⁰² *Yekatom* Appeal Decision, para.54 (the right to be informed does not impose any special formal requirement as to the manner in which an accused is to be informed of the nature and cause of the charges)

H. REDACTIONS TO THE INDICTMENT ARE NECESSARY TO GIVE EFFECT TO COURT-ORDERED PROTECTIVE MEASURES

45. Submissions concerning redactions to the Indictment are irrelevant to form and fall outside the scope of Rule 97. Nevertheless, the Defence has failed to demonstrate that the redactions to the Indictment unduly or unfairly prejudice their preparations.²⁰³ Such redactions are necessary to give effect to court-ordered protective measures, insofar as they concern identifying information of witnesses relied upon in the indictment supporting materials who were granted delayed disclosure by the Pre-Trial Judge.²⁰⁴ In doing so, the Pre-Trial Judge appropriately balanced competing interests at stake, including the protection of witnesses, participating victims, and other persons at risk and the rights of the Accused.²⁰⁵

46. Pursuant to Rule 82(5), the redactions remain under review and lesser redacted versions of the Indictment will be filed where the basis for redaction(s) no longer exist,²⁰⁶ including in light of the applicable, staggered deadlines for disclosure of the identities of the relevant witnesses.²⁰⁷

against him or her); *Nyiramasuhuko* Appeal Judgment, para.2271 (Where it is clear that the accused was informed of the charges in a sufficiently precise and timely manner, mere technicalities of pleading should not be permitted to intrude). *See also* Rule 86(4) Order, KSC-BC-2020-06/F00010, para.9 (indicating that the level of detail provided in the Indictment should enable, not prejudice, trial within a reasonable time).

²⁰³ SELIMI Motion, KSC-BC-2020-06/F00222, paras 9-18.

²⁰⁴ *See, in particular*, Corrected Version of First Decision on Specialist Prosecutor's Request for Protective Measures, KSC-BC-2020-06/F00133/COR, 10 December 2020, Strictly Confidential and *Ex Parte* ('First Decision'); Decision on Specialist Prosecutor's Second Request for Protective Measures and Renewed Request, KSC-BC-2020-06/F00190, 5 February 2021, Strictly Confidential and *Ex Parte* ('Second Decision').

²⁰⁵ *See, for example*, First Decision, KSC-BC-2020-06/F00133/COR, paras 21, 39, 44, 58, 64, 88, 98, 105.

²⁰⁶ Indeed, the Indictment (as defined in fn.2 above), which is itself a lesser redacted version, was filed simultaneously with the SPO's first request for protective measures, removing redactions where the classification was no longer justified.

²⁰⁷ First Decision, KSC-BC-2020-06/F00133/COR; Second Decision, KSC-BC-2020-06/F00190.

IV. REQUESTED RELIEF

47. For the foregoing reasons, the Pre-Trial Judge should dismiss the Motions in their entirety.

Word count: 8963



Jack Smith
Specialist Prosecutor

Friday, 23 April 2021

At The Hague, the Netherlands.