



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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

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**Public Redacted Version of
Decision on Defence Motions Alleging Defects in the Form of the Indictment**

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 39(1) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 9(5)(a) and 97(1)(b) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 24 April 2020, the Specialist Prosecutor's Office ("SPO") submitted for confirmation a strictly confidential and *ex parte* indictment against Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi ("Mr Thaçi", "Mr Veseli", "Mr Selimi", and "Mr Krasniqi", respectively, and collectively referred to as "Accused"), together with evidentiary material in support of the factual allegations and a detailed outline linking each item of evidentiary material to each allegation.²

2. On 2 July 2020, the Pre-Trial Judge ordered the SPO to file a revised indictment, incorporating a detailed statement of facts delineating, with more specificity, a description of the factual allegations corresponding to each charged crime.³

3. On 24 July 2020, the SPO submitted a revised indictment for confirmation ("Revised Indictment").⁴

¹ KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

² KSC-BC-2020-06, F00002, Specialist Prosecutor, *Submission of Indictment for Confirmation*, 24 April 2020, strictly confidential and *ex parte*, with Annexes 1-3, strictly confidential and *ex parte*. Public redacted versions of the main filing and of Annex 1 were filed on 18 November 2020, F00002/RED and F00002/RED/A01.

³ KSC-BC-2020-06, F00010, Pre-Trial Judge, *Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules* ("Rule 86(4) Order"), 2 July 2020, public.

⁴ KSC-BC-2020-06, F00011, Specialist Prosecutor, *Submission of Revised Indictment for Confirmation*, 24 July 2020, confidential, with Annex 1, strictly confidential and *ex parte*. Public redacted versions of the main filing and of Annex 1 were filed on 18 November 2020, F00011/RED and F00011/RED/A01.

4. On 26 October 2020, the Pre-Trial Judge confirmed the Revised Indictment (“Confirmation Decision”).⁵
5. On 30 October 2020, the SPO submitted the indictment as confirmed (“Confirmed Indictment”),⁶ with redactions as authorised by the Pre-Trial Judge.⁷
6. On 12 March 2021, the Defence for Mr Thaçi (“Thaçi Defence”) filed its preliminary motion under Rule 97(1)(b) of the Rules, alleging defects in the form of the Confirmed Indictment (“Thaçi Preliminary Motion”).⁸
7. On 15 March 2021, the Defence for Mr Veseli (“Veseli Defence”),⁹ Mr Selimi (“Selimi Defence”),¹⁰ and Mr Krasniqi (“Krasniqi Defence”)¹¹ filed their respective preliminary motions challenging the Confirmed Indictment (“Veseli Preliminary Motion”, “Selimi Preliminary Motion”, and “Krasniqi Preliminary Motion”, respectively).
8. On 25 March 2021, the Thaçi Defence filed a response to the preliminary motions filed by the Defence for the other three Accused, submitting that it adopts

⁵ KSC-BC-2020-06, F00026/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 26 October 2020, confidential. A public redacted version was filed on 30 November 2020, F00026/RED.

⁶ KSC-BC-2020-06, F00034, Specialist Prosecutor, *Submission of Confirmed Indictment and Related Requests*, 30 October 2020, confidential, with Annex 1, strictly confidential and *ex parte*, and Annexes 2-3, confidential. A further corrected confirmed indictment, correcting certain clerical errors, was submitted on 4 November 2020, in strictly confidential and *ex parte* (F00045/A01), confidential redacted (F00045/A02), and public redacted version (F00045/A03). A lesser redacted version of F00045/A02 was submitted on 11 December 2021, F00134, confidential.

⁷ Confirmation Decision, para. 521(c)-(d).

⁸ KSC-BC-2020-06, F00215, Thaçi Defence, *Motion Alleging Defects in the Indictment against Mr Hashim Thaçi*, 12 March 2021, confidential. A public redacted version was filed on the same day, F00215/RED.

⁹ KSC-BC-2020-06, F00225, Veseli Defence, *Preliminary Motion by the Defence of Kadri Veseli to Challenge the Indictment*, 15 March 2021, confidential. A public redacted version was filed on 18 March 2021, F00225/RED2.

¹⁰ KSC-BC-2020-06, F00222, Selimi Defence, *Selimi Defence Challenge to the Form of the Indictment*, 15 March 2021, confidential. A public redacted version was filed on 11 May 2021, F00222/RED,

¹¹ KSC-BC-2020-06, F00221, Krasniqi Defence, *Krasniqi Defence Preliminary Motion Alleging Defects in the Indictment*, 15 March 2021, public.

their submissions to the extent that they are not inconsistent with, or prejudicial to, the position adopted in the Thaçi Preliminary Motion.¹²

9. On 23 April 2021, in line with the deadline set by the Pre-Trial Judge,¹³ the SPO submitted: (i) a consolidated response to the preliminary motions filed by the Thaçi Defence, Selimi Defence, and Krasniqi Defence (“SPO Consolidated Response”);¹⁴ and (ii) a response to the preliminary motion filed by the Veseli Defence (“SPO Additional Response”).¹⁵

10. On 14 and 17 May 2021, in line with the respective deadlines set by the Pre-Trial Judge,¹⁶ the Thaçi Defence,¹⁷ the Selimi the Defence,¹⁸ and Krasniqi Defence¹⁹ replied to the SPO Consolidated Response and the Veseli Defence replied to the SPO Additional Response.²⁰

¹² KSC-BC-2020-06, F00238, Thaçi Defence, *Thaçi Defence Response to the Preliminary Motions filed by the Veseli, Selimi and Krasniqi Defence Teams*, 25 March 2021, public.

¹³ KSC-BC-2020-06, Transcript of Hearing, 24 March 2021 (“24 March 2021 Transcript”), public, p. 391, lines 11-18.

¹⁴ KSC-BC-2020-06, F00258, Specialist Prosecutor, *Consolidated Prosecution Response to THAÇI, SELIMI, and KRASNIQI Preliminary Motions on the Form of the Indictment*, 23 April 2021, public.

¹⁵ KSC-BC-2020-06, F00261, Specialist Prosecutor, *Prosecution Response to VESELI Preliminary Motion to Challenge the Indictment*, 23 April 2021, public.

¹⁶ 24 March 2021 Transcript, p. 391, lines 11-18; KSC-BC-2020-06, F00296, Pre-Trial Judge, *Decision on Veseli Defence Request for a Time Limit Variation*, 14 May 2021, public.

¹⁷ KSC-BC-2020-06, F00303, Thaçi Defence, *Thaçi Defence Reply to “Consolidated Prosecution Response to THAÇI, SELIMI, and KRASNIQI Preliminary Motions on the Form of the Indictment”* (“Thaçi Reply”), 14 May 2021, public.

¹⁸ KSC-BC-2020-06, F00297, Selimi Defence, *Selimi Defence Reply to SPO Response to Defence Challenge to the Form of the Indictment* (“Selimi Reply”), 14 May 2021, public.

¹⁹ KSC-BC-2020-06, F00298, Krasniqi Defence, *Krasniqi Defence Reply to Consolidated Prosecution Response to Thaçi, Selimi, and Krasniqi Preliminary Motions on the Form of the Indictment* (“Krasniqi Reply”), 14 May 2021, public.

²⁰ KSC-BC-2020-06, F00309, Veseli Defence, *Veseli Defence Reply to Prosecution Response to Preliminary Motion to Challenge the Indictment* (“Veseli Reply”), 17 May 2021, public.

11. On 19 May 2021, and 24 June 2021, respectively, the Pre-Trial Judge varied the time limit for disposing of the preliminary motions brought in the present case and indicated that the decisions thereon will be issued on Thursday, 22 July 2021.²¹

II. SUBMISSIONS OF THE PARTIES

A. VESELI DEFENCE CHALLENGES

12. The Veseli Defence submits that the Pre-Trial Judge erred in fact and in law in his determination of the contextual requirements for war crimes²² and made erroneous findings as regards the geographical scope of the Confirmed Indictment.²³ It therefore requests that the Pre-Trial Judge review his findings in the Confirmation Decision accordingly and order the SPO to: (i) amend the Confirmed Indictment to exclude the allegations relating to the incidents of war crimes alleged to have occurred before mid-1999 or after 10 June 1999; and (ii) amend the Confirmed Indictment and remove the allegations of war crimes relating to incidents alleged to have occurred in Albania.²⁴

13. The SPO responds that the Veseli Preliminary Motion fails to identify any defect in the form of the Confirmed Indictment under Rule 97(1)(b) of the Rules and must be summarily dismissed as it exceeds the scope of permissible preliminary motions under the aforementioned rule.²⁵

²¹ KSC-BC-2020-06, Transcript of Hearing, 19 May 2021, public, p. 451, lines 15-17; F00370, Pre-Trial Judge, *Decision on Prosecution Request for Extension of Time Limit to Provide its Rule 102(3) Notice*, 24 June 2020, public, paras 15, 16(f).

²² Veseli Preliminary Motion, paras 4-74.

²³ Veseli Preliminary Motion, paras 75-87.

²⁴ Veseli Preliminary Motion, para. 88(b)-(d).

²⁵ SPO Additional Response, paras 1-5, 7-8 and the references contained therein.

14. The Veseli Defence replies that the SPO Additional Response is an attempt to hide the SPO's inability to address the substantive issues raised by it and to impermissibly narrow the scope of Rule 97(1)(b) of the Rules and Article 39(1) of the Law.²⁶

B. THAÇI DEFENCE, SELIMI DEFENCE, AND KRASNIQI DEFENCE CHALLENGES

15. The Thaçi Defence submits that the Confirmed Indictment is defective due to a lack of specificity and significant errors in pleading.²⁷ It requests that the SPO be ordered to: (i) provide greater specificity about the conduct it alleges on the part of Mr Thaçi, failing which, the SPO should be ordered to reduce, narrow, or remove the offending charges; and (ii) remove otherwise defective charges.²⁸

16. The Selimi Defence submits that the Confirmed Indictment is defective as it is insufficiently detailed in relation to material facts relevant to the case against Mr Selimi.²⁹ It further endorses and supports the Thaçi Defence challenges to the pleading of specific crimes in the Confirmed Indictment.³⁰ The Selimi Defence requests that the SPO be ordered to amend the Confirmed Indictment based on the challenges contained in its preliminary motion so as to provide greater specificity regarding the allegations against Mr Selimi.³¹

17. The Krasniqi Defence takes issue with: (i) the pleading of (certain elements of) joint criminal enterprise ("JCE") and command responsibility; (ii) the alleged failure to specifically 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; (iii) the pleading of persecution and enforced disappearance; and

²⁶ Veseli Reply, paras 1-2, 14-15.

²⁷ Thaçi Preliminary Motion, para. 1.

²⁸ Thaçi Preliminary Motion, paras 1, 63.

²⁹ Selimi Preliminary Motion, paras 1, 78.

³⁰ Selimi Preliminary Motion, para. 28.

³¹ Selimi Preliminary Motion, para. 79(b).

(iv) the use of open-ended terms such as “including” or “about” throughout the Confirmed Indictment.³² Insofar as they are not inconsistent with its own preliminary motion, it also adopts and joins the preliminary motions alleging defects in the Confirmed Indictment submitted by the Defence for the other three Accused.³³ The Krasniqi Defence requests that the SPO be ordered to amend the Confirmed Indictment so as to address the challenges it had raised.³⁴

18. The SPO responds that the Thaçi Preliminary Motion, the Selimi Preliminary Motion, and the Krasniqi Preliminary Motion fail to identify any defect in the form of the Confirmed Indictment and should therefore be dismissed.³⁵ It submits that, consistent with Article 38(4) of the Law and Rule 86(3) of the Rules, the Confirmed Indictment sets forth a concise statements of the material facts of the SPO’s case and of the crimes and modes of liability charged.³⁶

19. The Thaçi Defence replies to three issues arising from the SPO Consolidated Response.³⁷ The Selimi Defence replies to six issues arising from the SPO Consolidated Response.³⁸ The Krasniqi Defence replies to four issues addressed in the SPO Consolidated Response.³⁹

III. APPLICABLE LAW

A. PRELIMINARY MOTIONS

20. Pursuant to Article 39(1) of the Law, the Pre-Trial Judges rules on any preliminary motions, including challenges to the indictment.

³² Krasniqi Preliminary Motion, paras 2-3.

³³ Krasniqi Preliminary Motion, para. 4.

³⁴ Krasniqi Preliminary Motion, paras 5, 62(a)-(c).

³⁵ SPO Consolidated response, paras 1, 47

³⁶ SPO Consolidated response, para. 1.

³⁷ Thaçi Reply, para. 2.

³⁸ Selimi Reply, para. 2.

³⁹ Krasniqi Reply, paras 5-31.

21. Pursuant to Rule 97(1)(b) of the Rules, the Accused may file preliminary motions before the Pre-Trial Judge in accordance with Article 39(1) of the Law, which allege defects in the form of the indictment.

B. SOURCES OF LAW AND RULES OF INTERPRETATION

22. Article 3(2) of the Law stipulates that the Specialist Chambers (“SC”) shall adjudicate and function in accordance with:

- a. the Constitution of the Republic of Kosovo (“Constitution”);
- b. the Law as *lex specialis*;
- c. other provisions of Kosovo law as expressly incorporated in the Law;
- d. customary international law, as given superiority over domestic laws by Article 19(2) of the Constitution; and
- e. international human rights law, as given superiority over domestic laws by Article 22 of the Constitution.

23. Article 3(4) of the Law further provides that any other Kosovo law, regulation, piece of secondary regulation, other rule or custom and practice which has not been expressly incorporated into the Law shall not apply to the organisation, administration, functions or jurisdiction of the SC and the SPO and that the Law shall prevail over any and all contrary provisions of any other law or regulation.

24. Rule 4(1) of the Rules states that the Rules shall be interpreted in a manner consonant with the framework set out in Article 3 of the Law and, where appropriate, the Kosovo Criminal Procedure Code (“KCPC”). Pursuant to Rule 4(3), any ambiguity not settled in accordance with the aforementioned interpretation shall be resolved by the adoption of the most favourable interpretation to the suspect or the accused in the given circumstances.

C. INDICTMENT

25. Pursuant to Article 21(4)(a) of the Law, the Accused shall be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.

26. Pursuant to Article 38(4) of the Law and Rule 86(3) of the Rules, an indictment must set forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime(s) with which the suspect is charged, in particular the alleged mode of liability in relation to the crimes charged. The indictment shall be filed together with supporting material, i.e. evidentiary material supporting the facts underpinning the charges and a detailed outline demonstrating the relevance of each item of evidentiary material to each allegation.

IV. DISCUSSION

A. GENERAL STANDARDS PERTAINING TO THE FORM OF THE CONFIRMED INDICTMENT

1. Specificity and Clarity

27. The Pre-Trial Judge recalls that, in accordance with Articles 21(4)(a) and 38(4) of the Law, as well as Rule 86(3) of the Rules, an indictment must set forth with sufficient specificity and clarity the facts underpinning the charges and the crimes, including the modes of liability charged.⁴⁰ Such specificity and clarity must ensure that the indictment, as a stand-alone document,⁴¹ provides an accused with sufficient information to understand clearly and fully the nature and cause of the charges against him, with a view to preparing an adequate defence.⁴² An accused should

⁴⁰ KSC-BC-2020-07, IA004/F00007, Court of Appeals Panel, *Decision on the Defence Appeals Against Decision on Preliminary Motions (“Gucati and Haradinaj Appeal Decision”)*, 23 June 2021, para. 35; KSC-BC-2020-07, F00147, Pre-Trial Judge, *Public Redacted Version of Decision on Preliminary Motions (Gucati and Haradinaj Preliminary Motions Decision)*, 8 March 2021, public, para. 38; Rule 86(4) Order, para. 10.

⁴¹ *Gucati and Haradinaj Preliminary Motions Decision*, para. 38; Rule 86(4) Order, para. 11.

⁴² *Gucati and Haradinaj Appeal Decision*, para. 36; *Gucati and Haradinaj Preliminary Motions Decision*, para. 38. See also Rule 86(4) Order, public, paras 9, 11. ECtHR, *Mattochia v. Italy*, no. 23969/94, [Judgment](#).

accordingly not be required to consult other documents in order to understand and piece together the factual allegations underpinning the charges.⁴³

28. Whether a fact underpins any particular charge and must accordingly be pleaded in the indictment with specificity cannot be decided in the abstract, but on a case-by-case basis, taking into account, *inter alia*, the nature and scale of the crimes charged, the circumstances of the case, the alleged proximity of the accused to the events and the mode of liability charged.⁴⁴ Nonetheless, in some instances, it cannot be excluded that certain details of the case, such as the number and identity of

25 July 2000, para. 60. Similarly, ICTR, *Prosecutor v. Nsengiyumva*, ICTR-96-12-I, Trial Chamber III, [Decision on the Defence Motion Raising Objections on Defects in the Form of the Indictment and to Personal Jurisdiction on the Amended Indictment](#), 12 May 2000, para. 1, p. 6; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Appeals Chamber, [Judgement](#) (“Ntagerura Appeal Judgment”), 7 July 2006, para. 22; ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeals Chamber, [Judgement](#) (“Kupreškić Appeal Judgment”), 23 October 2001, para. 88; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I, Pre-Trial Judge, [Decision Relating to the Examination of the Indictment of 10 June 2011 Issued Against Mr Salim Jamil Ayyash, Mr Mustafa Badreddine, Mr Hussein Hassan Oneissi & Mr Assad Hassan Sabra](#), 28 June 2011, para. 27; ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-143-tENG, Pre-Trial Chamber I, [Decision on the Defence Request Concerning the Time Limit for the Prosecutor to File the Document Containing a Detailed Description of the Charges](#) (“Al Hassan 5 October 2018 Decision”), 5 October 2018, para. 30; *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-199, Pre-Trial Chamber II, [Decision on the “Prosecution’s Request to Postpone the Confirmation Hearing and All Related Disclosure Deadlines”](#) (“Yekatom and Ngaïssona 15 May 2019 Decision”), 15 May 2019, paras 41-42.

⁴³ *Gucati and Haradinaj* Appeal Decision, para. 49; *Gucati and Haradinaj* Preliminary Motions Decision, para. 38; Rule 86(4) Order, para. 11.

⁴⁴ *Gucati and Haradinaj* Appeal Decision, paras 38, 42; *Gucati and Haradinaj* Preliminary Motions Decision, para. 39; Rule 86(4) Order, para. 16. Similarly, ICTY, [Kupreškić Appeal Judgment](#), para. 89; *Prosecutor v. Blaškić*, IT-95-14-A, Appeals Chamber, [Judgement](#) (“Blaškić Appeal Judgment”), 29 July 2004, para. 210; ICTR, [Ntagerura Appeal Judgment](#), para. 23; *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 16 November 2011 Decision”), 16 November 2011, paras 4-5; ICC, [Al Hassan 5 October 2018 Decision](#), para. 30; [Yekatom and Ngaïssona 15 May 2019 Decision](#), paras 41-42; *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2359, Trial Chamber VI, [Judgment](#) (“Ntaganda Trial Judgment”), 8 July 2019, para. 38; *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-585, Trial Chamber V, [Decision on the Yekatom Defence Motion for Additional Details](#), 13 July 2020, para. 19; *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/04-01/18-874, Appeals Chamber, [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’](#) (“Yekatom and Ngaïssona 5 February 2021 Judgment”), 5 February 2021, para. 54.

victims,⁴⁵ would remain obscure even after the end of the trial.⁴⁶ In any event, when determining whether an indictment fulfils the above conditions, the indictment must be considered as a whole and select paragraphs or phrases should be read in the context of the entire document.⁴⁷

29. Furthermore, a clear difference must be drawn between facts underpinning the charges, which must be pleaded as provided above, and evidence proffered to prove them.⁴⁸ The indictment need not set out the evidence by which the facts underpinning the charges are to be proven.⁴⁹ Such evidence will be disclosed according to the relevant provisions. Any disputes as to issues of fact are for determination at trial and not via preliminary motions relating to the form of the indictment.⁵⁰ At any rate, the

⁴⁵ *Gucati and Haradinaj* Preliminary Motions Decision, para. 39; ECtHR, *Sampech v. Italy*, no. 55546/09, [Décision](#) (“*Sampech* 19 May 2015 Decision”), 19 May 2015, para. 110. Similarly, ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Appeals Chamber, [Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against His Conviction](#) (“*Lubanga* Appeal Judgment”), 1 December 2014, para. 123; [Al Hassan 5 October 2018 Decision](#), para. 30; [Yekatom and Ngaïssona 15 May 2019 Decision](#), para. 41.

⁴⁶ *Gucati and Haradinaj* Preliminary Motions Decision, para. 39; ECtHR, *Previti v. Italy*, no. 45291/06, [Judgment](#), 8 December 2009, para. 208. Similarly, STL, *Prosecutor v. Ayyash*, STL-18-10/PT/TC, Trial Chamber II, [Decision on Alleged Defects in the Form of the Indictment](#) (“*Ayyash* 28 September 2020 Decision”), 28 September 2020, para. 54(b).

⁴⁷ *Gucati and Haradinaj* Appeal Decision, para. 56; *Gucati and Haradinaj* Preliminary Motions Decision, para. 39. Similarly, ICTR, *Rutaganda v. Prosecutor*, ICTR-96-3-A, Appeals Chamber, [Judgment](#), 26 May 2003, para. 304; *Gacumbitsi v. Prosecutor*, ICTR-2001-64-A, Appeals Chamber, [Judgment](#), 7 July 2006, para. 123; *Prosecutor v. Seromba*, ICTR-2001-66-A, Appeals Chamber, [Judgment](#), 12 March 2008, para. 27; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Appeals Chamber, [Judgment](#) (“*Prlić et al.* Appeal Judgment”), 29 November 2017, para. 27; STL, [Ayyash 28 September 2020 Decision](#), para. 14(e); ICC, [Yekatom and Ngaïssona 5 February 2021 Judgment](#), para. 54.

⁴⁸ *Gucati and Haradinaj* Appeal Decision, para. 38; *Gucati and Haradinaj* Preliminary Motions Decision, para. 40. Similarly, ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-A, Appeals Chamber, [Judgment](#) (“*Furundžija* Appeal Judgment”), 21 July 2000, para. 153; [Blaškić Appeal Judgment](#), para. 210; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2205, Appeals Chamber, [Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor Against the Decision of Trial Chamber I of 14 July 2009 Entitled “Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55\(2\) of the Regulations of the Court”](#), 8 December 2009, footnote 163.

⁴⁹ *Gucati and Haradinaj* Appeal Decision, para. 38; *Gucati and Haradinaj* Preliminary Motions Decision, para. 40. Similarly, ICTY, [Furundžija Appeal Judgment](#), para. 147; [Kupreškić Appeal Judgment](#), para. 88; [Prlić et al. Appeal Judgment](#), para. 27.

⁵⁰ *Gucati and Haradinaj* Preliminary Motions Decision, para. 40. Similarly, ICTY, *Prosecutor v. Kunarac*, IT-96-23, Trial Chamber, [Decision on the Form of Indictment](#), 4 November 1999, para. 13; *Prosecutor v. Krajišnik*, IT-00-39, Trial Chamber, [Decision Concerning Preliminary Motion on the Form of the Indictment](#),

SC legal framework ensures that, in addition to the disclosure process, further evidentiary details are provided early on to the accused in the Rule 86(3)(b) Outline, the Confirmation Decision, and the submissions under Rule 95(4) of the Rules.⁵¹

30. Lastly, challenges concerning the legal elements of a crime or a mode of liability do not constitute challenges to the form of the indictment, but are matters to be addressed at trial.⁵²

2. Particulars

31. When alleging that the accused personally carried out the acts underlying the crime(s) charged, it is necessary to set out, as far as possible, and with “the greatest precision”:⁵³ the identity of the victim(s); the place and approximate date of the alleged acts; the manner and means by which they were committed and the related mental element.⁵⁴

32. On the other hand, where an accused is not alleged to have directly carried out the crime or where, by their nature, the crimes are directed against a group or collectivity of people, the accused must be provided with as much detailed information as possible regarding: the places, times, and approximate number of

1 August 2000, para. 8; STL, [Ayyash 28 September 2020 Decision](#), para. 14(o). See also ECtHR, [Sampech 19 May 2015 Decision](#), para. 110.

⁵¹ See Rules 86(3), (5) and 95(4) of the Rules; *Gucati and Haradinaj* Preliminary Motions Decision, para. 40. Similarly, see ICC, [Lubanga Appeal Judgment](#), para. 124; [Ntaganda Trial Judgment](#), para. 37.

⁵² Similarly, ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-PT, Trial Chamber III, [Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration](#), 22 March 2006, para. 23; *Prosecutor v. Mucić et al.*, IT-96-21, Appeals Chamber, [Decision on Application for Leave to Appeal by Hazim Delic \(Defects in the Form of the Indictment\)](#), 6 December 1996, p. 8.

⁵³ Rule 86(4) Order, para. 17. Similarly, ICTY, *Prosecutor v. Krnojelac*, IT-97-25, Trial Chamber, [Decision on Preliminary Motion on Form of Amended Indictment](#) (“*Krnojelac* 11 February 2000 Decision”) 11 February 2000, para. 18; [Blaskić Appeal Judgment](#), para. 213. See also SCSL, *Prosecutor v. Brima et al.* (AFRC case) (“*Brima et al.* Appeal Judgment”), SCSL-2004-16-A, Appeals Chamber, [Judgment](#), 22 February 2008, para. 38.

⁵⁴ Rule 86(4) Order, para. 17. Similarly, ICTY, [Blaskić Appeal Judgment](#), para. 213; ICC, [Lubanga Appeal Judgment](#), paras 122-123; [Al Hassan 5 October 2018 Decision](#), para. 30; [Yekatom and Ngaïssona 15 May 2019 Decision](#), paras 41-42.

victims; the necessary particulars to make out the elements of the offences, such as the accused's alleged conduct giving rise to criminal responsibility including the contours of the common plan or purpose, its implementation as well as the accused's contribution thereto; the related mental element; and the identities of any alleged co-perpetrators or JCE members, if known.⁵⁵

33. As regards the date when a crime was allegedly committed, if a precise date cannot be specified, a reasonable range of dates may be provided.⁵⁶

34. As regards the determination of the identity of victims, the nature and scale of the alleged offences may make such determination impossible.⁵⁷ In such cases, the identification of the victims as a group or the indication of their approximate number is sufficient.⁵⁸

35. Where the actual identity of co-perpetrators or JCE Members cannot be established, they can be identified by pseudonym,⁵⁹ affiliation,⁶⁰ or group delimited

⁵⁵ *Gucati and Haradinaj* Appeal Decision, para. 45; *Gucati and Haradinaj* Preliminary Motions Decision, para. 41; Rule 86(4) Order, para. 18. Similarly, ICC, [Al Hassan 5 October 2018 Decision](#), para. 30; [Yekatom and Ngaïssona 15 May 2019 Decision](#), paras 41-42; [Lubanga Appeal Judgment](#), para. 123. See Rule 86(4) Order, para. 17. Similarly, ICTY, [Krnojelac 11 February 2000 Decision](#), para. 18; [Blaškić Appeal Judgment](#), para. 213; SCSL, [Brima et al. Appeal Judgment](#), para. 38; ICTR, *Bagosora et al. v. Prosecutor*, ICTR-98-41-A, Appeals Chamber, [Judgement](#), 14 December 2011, para. 132; ICC, [Lubanga Appeal Judgment](#), paras 122-123; [Al Hassan 5 October 2018 Decision](#), para. 30; [Yekatom and Ngaïssona 15 May 2019 Decision](#), paras 41-42.

⁵⁶ Similarly, STL, [Ayyash 28 September 2020 Decision](#), para. 14(j); ICTR, *Prosecutor v. Ntawukuriryayo*, ICTR-05-82-PT, Trial Chamber III, [Decision on defence preliminary motion alleging defects in the indictment](#), 28 April 2009, para. 15; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Trial Chamber III, [Judgement and Sentence](#) (“Ntagerura Trial Judgment”), 25 February 2004, para. 32.

⁵⁷ *Gucati and Haradinaj* Preliminary Motions Decision, para. 43. Similarly ICTR, *Rukundo v. Prosecutor*, ICTR-2001-70-A, Appeals Chamber, [Judgement](#) (“Rukundo Appeal Judgment”), 20 October 2010, para. 160; *Renzaho v. Prosecutor*, ICTR-97-31-A, Appeals Chamber, [Judgement](#) (“Renzaho Appeal Judgment”), 1 April 2011, para. 467.

⁵⁸ *Gucati and Haradinaj* Preliminary Motions Decision, para. 43. Similarly, ICTR, [Ntagerura Trial Judgment](#), para. 32; [Rukundo Appeal Judgment](#), para. 160; ICC, [Al Hassan 5 October 2018 Decision](#), para. 30; [Yekatom and Ngaïssona 15 May 2019 Decision](#), paras 41-42.

⁵⁹ *Gucati and Haradinaj* Preliminary Motions Decision, para. 42. Similarly, STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, Trial Chamber, [Decision on Alleged Defects in the Form of the Amended Indictment](#) (“Ayyash et al. 12 June 2013 Decision”), 12 June 2013, para. 41.

⁶⁰ *Gucati and Haradinaj* Preliminary Motions Decision, para. 42. Similarly, ICTR, *Simba v. Prosecutor*, ICTR-01-76-A, Appeals Chamber, [Judgement](#) (“Simba Appeal Judgment”), 27 November 2007, para. 72;

by geographic, temporal or other parameters.⁶¹ In any event, there is no requirement to identify all individuals involved in the offences who are not considered to be co-perpetrators of the charged offences or JCE members.⁶²

36. When an accused is alleged to have aided and abetted in the commission of a crime, the indictment must identify the particular acts or course of conduct on the part of the accused which forms the basis of the charges.⁶³ With respect to the *mens rea*, there are two ways in which the relevant state of mind may be pleaded: (i) either the state of mind itself is pleaded, in which case the facts by which the state of mind is to be established are ordinarily matters of evidence and need not be pleaded; or (ii) the facts from which the state of mind is to be inferred are pleaded.⁶⁴

37. When an accused is charged with superior responsibility, the material facts that must be pleaded in the indictment are: (i) that the accused is the superior of sufficiently identified subordinates, over whom he or she had effective control, in the sense of a material ability to prevent or punish the criminal conduct of the subordinates; (ii) the criminal acts committed by the subordinates; (iii) the *mens rea* or the facts by which the accused may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his or her subordinates; and (iv) the conduct of the accused by which he or she may be found to

Prosecutor v. Munyakazi, ICTR-97-36A-A, Appeals Chamber, [Judgement](#) (“*Munyakazi Appeal Judgment*”), 28 September 2011, para. 162.

⁶¹ *Gucati and Haradinaj Appeal Decision*, para. 45; *Gucati and Haradinaj Preliminary Motions Decision*, para. 42. Similarly, ICTR, [Simba Appeal Judgment](#), paras 71-72; [Munyakazi Appeal Judgment](#), para. 162.

⁶² *Gucati and Haradinaj Preliminary Motions Decision*, para. 42. Similarly, ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-648, Pre-Trial Chamber I, [Decision on the Three Defences’ Requests Regarding the Prosecution’s Amended Charging Document](#), 25 June 2008, para. 24; STL, [Ayyash et al. 12 June 2013 Decision](#), para. 40; [Ayyash 28 September 2020 Decision](#), para. 51.

⁶³ *Gucati and Haradinaj Appeals Decision*, para. 53; *Gucati and Haradinaj Preliminary Motions Decision*, para. 42. Similarly, ICTR, [Ntagerura Trial Judgment](#), para. 33; ICTY, [Blaškić Appeal Judgment](#), para. 213.

⁶⁴ ICTY, [Blaškić Appeal Judgment](#), para. 219; [Brđanin and Talić Decision](#), para. 33.

have failed to take necessary and reasonable measures to prevent such acts or to punish the persons who committed them.⁶⁵

38. The subordinates must be sufficiently identified in order for an accused to be properly informed.⁶⁶ However, this does not mean that the subordinates must be identified by name.⁶⁷ When the identities or roles of subordinates are not known, it is sufficient if they are identified by category or group.⁶⁸ Regarding the *mens rea*, the same principle as set out in relation to aiding and abetting applies here as well. Regarding the conduct by which the accused may be found to have failed to take necessary and reasonable measures to prevent or punish the commission of the crimes, it will be sufficient in many cases to plead that the accused did not take any necessary and reasonable measures.⁶⁹

39. Open-ended statements in respect of the facts underpinning the charges (such as “including, but not limited to”) are not permitted,⁷⁰ unless they are exceptionally necessary given the circumstances of the case or the nature and scale of the offences

⁶⁵ ICTR, [Renzaho Appeal Judgment](#), para. 54; *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Appeals Chamber, [Judgement](#) (“Nahimana Appeal Judgement”) 28 November 2007, para. 323; ICTY, [Blaškić Appeal Judgment](#), para. 218.

⁶⁶ ICTY, [Blaškić Appeal Judgment](#), para. 218; *Prosecutor v. Stanišić and Župljanin*, IT -08-91-PT, Trial Chamber, [Decision on Mićo Stanišić’s and Stojan Župljanin’s Motions on Form of the Indictment](#), (“Stanišić and Župljanin Decision”), 19 March 2009, para. 51.

⁶⁷ See ICTR, *Prosecutor v. Muvunyi*, ICTR-2000-55A-A, Appeals Chamber, [Judgement](#), 29 August 2008, para. 55 (stating that “[a] superior need not necessarily know the exact identity of his or her subordinates who perpetrate crimes in order to incur liability”).

⁶⁸ ICTR, *Prosecutor v. Karemera and Ngirumpatse*, ICTR-98-44-A, Appeals Chamber, [Judgement](#), 29 September 2014, para. 370; ICTY, [Blaškić Appeal Judgment](#), para. 217; *Prosecutor v. Hadžić*, Trial Chamber, IT-04-75-PT, [Decision on Defence Motion Alleging Defects in Form of First Amended Indictment](#), 10 November 2011, para. 38; [Stanišić and Župljanin Decision](#), para. 51; *Prosecutor v. Perišić*, IT-04-81-PT, Trial Chamber, [Decision on Preliminary Motions](#), (“Perišić Decision”), 29 August 2005, para. 35.

⁶⁹ ICTR, [Renzaho Appeal Judgment](#), para. 54, para. 54; [Nahimana Appeal Judgement](#), para. 323.

⁷⁰ *Gucati and Haradinaj* Appeals Decision, para. 84; *Gucati and Haradinaj* Preliminary Motions Decision, para. 44; Rule 86(4) Order, para. 18. Similarly, ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Pre-Trial Chamber I, [Decision on the Confirmation of Charges](#), 16 December 2011, paras 82-83; *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](#), 23 January 2012, paras 99, 101 and 103; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-382-Red, Pre-Trial Chamber II, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 23 January 2012, para. 106.

and they do not create ambiguity as regards the charged offences.⁷¹ The information must be set out with precision and comprehensively, without diffusion.⁷² Moreover, when a certain category pertaining to the facts underpinning the charges is defined, and the word “including” is used to provide a list of non-exhaustive examples falling within such category, the use of the word “including” is permitted. Where, however, a certain category is not defined, and only refers to a list of non-exhaustive examples falling within such category, preceded by the word “including”, such use of the word “including” is not permitted, as it would impermissibly allow the scope of the corresponding category to be expanded at trial.

3. Defective Indictment

40. An indictment is defective when it fails to plead the facts underpinning the charges or it does so in an insufficient or unclear manner, creating ambiguity as regards the pleaded charges, including the modes of liability, and thus impairing the Defence’s ability to prepare.⁷³

41. The Pre-Trial Judge accordingly notes that the aforementioned findings will inform and guide the ensuing assessment of the alleged concrete deficiencies of the Confirmed Indictment.

⁷¹ *Gucati and Haradinaj* Appeals Decision, para. 84; *Gucati and Haradinaj* Preliminary Motions Decision, para. 44; Rule 84(6) Order. Similarly, ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30-PT, Trial Chamber, [Decision on Defence Preliminary Motions on the Form of the Indictment](#) (“*Kvočka et al.* 12 April 1999 Decision”), 12 April 1999, para. 26.

⁷² Rule 86(4) Order, para. 10.

⁷³ *Gucati and Haradinaj* Appeal Decision, para. 38; *Gucati and Haradinaj* Preliminary Motions Decision, para. 46. Similarly, ICTY, *Prosecutor v. Galić*, IT-98-29-AR72, Appeals Chamber, [Decision on Application by Defence for Leave to Appeal](#), 30 November 2001, para. 11; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeals Chamber, [Judgement](#), 28 February 2005, para. 31; SCSL, *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Chamber I, [Judgement](#), 2 March 2009, para. 329.

B. CHALLENGES TO THE CONFIRMATION DECISION AND APPLICABILITY OF THE KCPC TO THE FORM OF THE INDICTMENT

1. Challenges to the Confirmation Decision

(a) Submissions

42. The Veseli Defence submits that the Pre-Trial Judge erred in law and in fact in his determination of the contextual requirements for war crimes in holding that: (i) a non-international armed conflict existed in the territory of Kosovo from at least March 1998 between the Kosovo Liberation Army (“KLA”) and Serbian forces; (ii) the conflict ended approximately on 16 September 1999; and (iii) the conflict extended beyond Kosovo, into Albania.⁷⁴ It further argues that the Pre-Trial Judge failed to adequately address the question of whether a non-international armed conflict existed in Albania at the time of the events alleged in the Confirmed Indictment and erred in confirming the indictment for alleged incidents that occurred in their entirety in Albania.⁷⁵ Specifically, the Veseli Defence submits that an assessment of the facts indicates that there was no armed conflict in Albania and that, as a result, any alleged criminal act or omission committed therein cannot be classified as a war crime, but as a common crime subject to prosecution by Albanian authorities.⁷⁶

43. The SPO responds that the two challenges concerning the temporal and geographical scope of the armed conflict merely amount to a disagreement with the Confirmation Decision, are an attempt to prematurely litigate evidentiary matters, and are factual matters for determination at trial.⁷⁷

44. In reply, the Veseli Defence argues that: (i) a restrictive, textual, or teleological interpretation of Rule 86(7) of the Rules, in light of Article 162(6) of the Constitution,

⁷⁴ Veseli Preliminary Motion, paras 2, 4-74.

⁷⁵ Veseli Preliminary Motion, paras 3, 75-77, footnotes 2, 103.

⁷⁶ Veseli Preliminary Motion, paras 3, 78, 86-87.

⁷⁷ SPO Additional Response, paras 1, 3-4, 6-7 and the references contained therein.

Articles 19(2) and 39(1) of the Law, and Rules 4(1) and (3) and 5 of the Rules all point to the conclusion that recourse should be made to the equivalent provision to Rule 97 of the Rules in the KCPC, namely Article 250 thereof, which does not restrictively limit a challenge to the indictment and allows the Defence to challenge the sufficiency of the evidence against the Accused;⁷⁸ and (ii) the SPO's submissions are clearly in contradiction with previous findings of the Specialist Chamber of the Constitutional Court ("SCCC"), as their application would practically deny the Defence its right to appeal the determination of the Pre-Trial Judge.⁷⁹

(b) Determination

45. The Pre-Trial Judge notes that Article 39(1) of Law refers to the power of the Pre-Trial Judge to, *inter alia*, "rule on any preliminary motions, including challenges to the indictment". This provision must be read together with other provisions, in particular Articles 33(1)(b) and 40(1) of the Law, which make reference to "challenges to the form of the indictment" (emphasis added). Further, consonant with the Law, Rule 97(1)(b) of the Rules clearly states that the accused may file preliminary motions alleging "defects in the form of the indictment". In light of the aforementioned provisions, the Pre-Trial Judge finds that the Law is clear in that any "challenges to the indictment", as referred to in Article 39(1) of the Law, shall pertain to its form, which includes the nature and cause of the charges,⁸⁰ but not the merits of the accusations or the evidence underpinning the charges.

⁷⁸ Veseli Reply, paras 6-9.

⁷⁹ Veseli Reply, paras 11-12, referring to KSC-CC-PR-2017-01, F00004, SCCC, *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office* ("SCCC 26 April 2017 Judgment"), 26 April 2017, public, para. 143.

⁸⁰ See also Rule 86(4) Order, para. 9.

46. As regards Mr Veseli's argument that the SC legal framework must be interpreted in light of Article 250 of the KCPC,⁸¹ the Pre-Trial Judge notes that: (i) he is duty-bound to adjudicate in accordance with the Law as *lex specialis* and that, should other provisions of Kosovo law be relied upon, such provisions must be expressly incorporated in the Law; (ii) Article 250 of the KCPC has not been expressly incorporated into the Law; (iii) the SC legal framework contains clear and comprehensive provisions as concerns preliminary motions challenging the indictment; (iv) Article 162(6) of the Constitution and Article 19(2) of the Law prescribe that, when determining its Rules of Procedure and Evidence, the SC shall be "guided", *inter alia*, by the KCPC; they do not stipulate that *the Law* shall be interpreted in light of the KCPC (unless expressly referred to in the Law); (v) Article 162(6) of the Constitution and Article 19(2) of the Law do not pertain to the application, but rather to the creation of the Rules, by imposing an obligation on the SC Judges sitting in Plenary to be guided by the KCPC in the drafting and adoption of the Rules and any amendments thereto; (vi) Rules 4(1) and (3) and 5 of the Rules, which are inferior to the Law, cannot be relied upon to circumvent or amend the procedures set out in the Law; and (vii) Rule 4(1) of the Rules states that the Rules shall be interpreted in a manner consonant with the KCPC "where appropriate", that is, when provisions of the KCPC have been expressly incorporated in the Rules. Therefore, Article 250 of the KCPC is inapplicable before the SC.

47. The Pre-Trial Judge further notes the Veseli Defence's contention that a challenge to the indictment is a challenge to the Confirmation Decision, including its legal and factual findings.⁸² The Pre-Trial Judge underscores that the Law does not foresee the

⁸¹ Article 250 of the KCPC states, in relevant part: "1. Prior to the second hearing, the defendant may file a request to dismiss the indictment, based upon the following grounds: 1.1. the act charged is not a criminal offence; 1.2. circumstances exist which exclude criminal liability; 1.3. the period of statutory limitation has expired, a pardon covers the act, or other circumstances exist which bar prosecution; or 1.4. there is not sufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offence in the indictment".

⁸² Veseli Reply, paras 5-12, 17.

possibility for the defence to appeal a decision on the review of the indictment. Moreover, Rule 86(7) of the Rules, regulating the procedure for the submission, review, and confirmation of the indictment, expressly states that “[c]hallenges by the Defence to a decision on the indictment shall be limited to those under Rule 97”. In this respect, and further to the above, the Veseli Defence’s reliance on the finding of the SCCC pertaining to the need for SC Panels to adequately reason their decisions⁸³ is misplaced. The relevant SCCC finding neither stipulates a right to appeal such determinations, nor can it be read as creating a right to appeal the Rule 86(5) determinations of the Pre-Trial Judge, where no such right is provided for in the SC legal framework.

48. Lastly, the Pre-Trial Judge notes that the Court of Appeals Panel has confirmed that submissions pertaining to, *inter alia*, the evidentiary basis for the confirmation of an indictment do not constitute challenges to the form of the indictment under Rule 97(1)(b) of the Rules.⁸⁴ This finding of the Court of Appeal Panel further confirms the restrictive nature of Rule 97(1)(b) motions.

49. In light of the foregoing, the Pre-Trial Judge finds that, in accordance with the SC legal framework, any preliminary motion challenging the indictment may only pertain to its form. Such legal framework does not give the right to the defence to challenge, by means of a preliminary motion filed under Rule 97(1)(b) of the Rules, the factual sufficiency of the findings made in the decision confirming the indictment and/or their legal qualification. In these circumstances, the Pre-Trial Judge further finds that the Veseli Preliminary Motion exceeds the scope of preliminary motions under Rule 97(1)(b) of the Rules and must be rejected.

⁸³ Veseli Reply, para. 11, referring to SCCC 26 April 2017 Judgment, para. 143.

⁸⁴ *Gucati and Haradinaj* Appeal Decision, para. 23.

2. Applicability of the KCPC to the Form of the Indictment

(a) Submissions

50. The Thaçi Defence submits that, contrary to the provisions of the KCPC, the Confirmed Indictment does not sufficiently specify the legal name of the criminal offence citing the provisions of the relevant code.⁸⁵

51. The SPO responds that: (i) the KCPC does not apply to the SC, as it has not been expressly incorporated into the Law; (ii) in any event, the Accused are charged with the commission of crimes under Articles 13-14 of the Law, which refer to customary international law during the SC's temporal jurisdiction, and Article 16(1) of the Law, as concerns the charged modes of liability; and (iii) the Accused are not charged under Articles 15 and 16(2)-(3) of the Law, which concern crimes under relevant substantive criminal laws in force in Kosovo.⁸⁶

52. The Thaçi Defence replies that, in application of Article 19(2) of the Law and Rule 4(1) of the Rules, it is appropriate to ensure that the Confirmed Indictment complies with the KCPC.⁸⁷ Moreover, any ambiguity in the Rules shall, in accordance with Rule 4(3) of the Rules, be resolved by the adoption of the interpretation most favourable to the Accused, which in this case would amount to requiring that the Confirmed Indictment is interpreted in a manner consonant with the KCPC.⁸⁸

(b) Determination

53. The Pre-Trial Judge recalls that, pursuant to Article 38(4) of the Law and Rule 86(3) of the Rules, an indictment must set out, among others, the crime(s) with which a suspect is charged. As regards the crimes to be included in an indictment

⁸⁵ Thaçi Preliminary Motion, para. 61.

⁸⁶ SPO Consolidated Response, para. 43.

⁸⁷ Thaçi Reply, paras 17-18.

⁸⁸ Thaçi Reply, paras 18-19.

before the SC, the Pre-Trial Judge recalls that these are, pursuant to Article 6 of the Law: (i) the crimes set out in Articles 13-14 of the Law,⁸⁹ in compliance with customary international law at the relevant time;⁹⁰ (ii) subject to Article 12 of the Law, the crimes under substantive laws in force under Kosovo law at the relevant time, insofar as compliant with customary international law;⁹¹ and (iii) certain offences set out in the Kosovo Criminal Code (“KCC”), where they relate to SC official proceedings and officials.⁹²

54. As regards the Thaçi Defence argument that the Confirmed Indictment needs to be compliant with the specific requirements of Article 241 of the KCPC, the Pre-Trial Judge recalls that he is duty-bound to apply the Law as *lex specialis* and that Article 241 of the KCPC has not been expressly incorporated into the Law. Hence, in accordance with Article 3(2) and (4) of the Law, Article 241, sub-paragraph 1.5., of the KCPC⁹³ is not applicable before the SC.

55. The Pre-Trial Judge further notes that Rule 86(3) of the Rules expressly prescribes that the crime(s) with which the suspect is charged should clearly be set out in the indictment. In this context it is also recalled that the Pre-Trial Judge ordered the SPO to re-submit the indictment with the correct statement of crimes (legal characterisation), pursuant to Rule 86(4)(b) of the Rules.⁹⁴ In addition, the Pre-Trial Judge notes that Article 241 of the KCPC applies in instances where the indictment charges a suspect with crimes other than those referred to in Article 6(2) of the Law and therefore does not pertain to the crimes set forth in the Law. In these circumstances, the Pre-Trial Judge finds that Rule 86(3) of the Rules cannot be interpreted as requiring that an indictment filed before the SC shall contain a reference

⁸⁹ Article 6(1) of the Law.

⁹⁰ Article 12 of the Law.

⁹¹ Article 15(1) of the Law.

⁹² Articles 6(2) and 15(2) of the Law.

⁹³ Article 241, sub-paragraph 1.5. of the KCPC stipulates: “The indictment shall contain [...] 1.5. the legal name of the criminal offence with a citation of the provisions of the [KCC]”.

⁹⁴ Rule 86(4) Order, paras 23-26, 27(b).

to the legal name of the criminal offence as set out in the KCC. Further, and most importantly, the Pre-Trial Judge notes that the Confirmed Indictment charges the Accused with the commission of: (i) persecution, imprisonment, other inhumane acts, torture, murder, and enforced disappearance as crimes against humanity under Article 13(1)(a),(e)-(f), and (h)-(j) of the Law; and (ii) arbitrary detention, cruel treatment, torture, and murder as war crimes under Article 14(1)(c) and (c)(i) of the Law, pursuant to modes of liability set out in Article 16(1)(a) and (c) of the Law.⁹⁵ They have not been charged with offences under Kosovo law. Hence the Accused have been informed specifically of the legal name of the criminal offence with citation to the applicable legal provision.

56. In light of the foregoing, the Pre-Trial Judge finds that, in line with Article 38(4) of the Law and Rule 86(3) of the Rules, the Confirmed Indictment adequately sets out the crimes – within the subject matter jurisdiction of the SC and in accordance with Articles 3(2)(b) and (4) and 12 of the Law – that the Accused are charged with, including by reference to the relevant provisions under the Law. The Thaçi Defence challenge in this respect must therefore be rejected.

C. PLEADING OF JCE

1. Common Purpose

(a) Submissions

57. The Thaçi Defence and the Selimi Defence submit that the common purpose pleaded in the Confirmed Indictment is defective because: (i) it is not a common purpose to commit a crime provided for in the Law; and (ii) the SPO fails to

⁹⁵ Confirmed Indictment, paras 172-173.

identify which crimes were definitely part of the common purpose and which were, in the alternative, foreseeable consequences of its implementation.⁹⁶

58. More specifically, on the first issue, the Thaçi Defence and the Selimi Defence argue that the common purpose alleged in the present case – “to gain and exercise control over all of Kosovo” – does not meet the definition that a common purpose must “amount to or involve the commission of a crime provided for in the Statute” (“*Tadić* Definition”).⁹⁷ They argue that the SC should not adopt an expanded definition whereby the common purpose need not amount to or involve the commission of a crime, but may merely contemplate crimes as a means to achieve its objective.⁹⁸ They advance that this would improperly widen the scope of liability.⁹⁹ The Selimi Defence submits that, to prevent this, the SPO should be required to amend the Confirmed Indictment to state that the alleged JCE members in the present case (“JCE Members”) agreed that the common purpose would necessarily include unlawful means.¹⁰⁰

59. On the second issue, the Thaçi Defence and the Selimi Defence submit that the SPO’s case lacks clarity because it alleges that each, and potentially all, of the crimes charged could be either part of the common purpose or foreseeable consequences of its implementation.¹⁰¹ This, the Thaçi Defence argues, strips the common purpose of the very crimes it is alleged to encompass.¹⁰² The Thaçi Defence and the Selimi Defence add that the SPO must identify which crimes were

⁹⁶ Thaçi Preliminary Motion, paras 15-22; Selimi Preliminary Motion, paras 38-46, 61-64; Thaçi Reply, paras 4-6; Selimi Reply, paras 27-28.

⁹⁷ Thaçi Preliminary Motion, paras 15-18, *referring to* ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, [Judgement](#), 15 July 1999, para. 227; Selimi Preliminary Motion, paras 38-40.

⁹⁸ Thaçi Preliminary Motion, paras 19-20; Selimi Preliminary Motion, para. 41.

⁹⁹ Thaçi Preliminary Motion, para. 20; Selimi Preliminary Motion, paras 42-46.

¹⁰⁰ Selimi Preliminary Motion, paras 45-46.

¹⁰¹ Thaçi Preliminary Motion, para. 22; Selimi Preliminary Motion, para. 63.

¹⁰² Thaçi Preliminary Motion, para. 22; *see also* Thaçi Reply, para. 5.

definitely part of the common purpose and which were, in the alternative, foreseeable consequences of its implementation.¹⁰³

60. The SPO responds that: (i) the Defence is, in effect, not challenging the form of the Confirmed Indictment, but contesting the factual and legal sufficiency of the SPO's case; (ii) the common purpose is, in any case, unambiguously and inherently criminal, as its objective was to be achieved by means including the crimes charged; (iii) contrary to the Selimi Defence's submissions, it is not required that the criminal means be necessary to achieve the objective of the common purpose; (iv) the Confirmed Indictment acknowledges that at least one crime must fall within the common purpose in order for liability to arise; and (v) identifying which crimes were part of the common purpose and which were foreseeable consequences thereof is a matter of evidence at trial.¹⁰⁴

(b) Determination

(i) *Scope of the Common Purpose*

61. Concerning the first issue raised by the Thaçi Defence and the Selimi Defence, the Pre-Trial Judge notes, at the outset, that an alleged common purpose "to gain and exercise control over all of Kosovo" would not, indeed, without more, constitute a criminal common purpose giving rise to JCE liability. However, this is not the common purpose pleaded in the Confirmed Indictment. Rather, the Confirmed Indictment alleges that, between at least March 1998 and September 1999, the Accused and other JCE Members "shared the common purpose to gain and exercise control over all of Kosovo *by means including* unlawfully intimidating, mistreating, committing violence against, and removing

¹⁰³ Selimi Preliminary Motion, para. 64; Thaçi Reply, para. 6.

¹⁰⁴ SPO Consolidated Response, paras 8-11.

those deemed to be opponents”.¹⁰⁵ The common purpose allegedly “encompassed the crimes of persecution, imprisonment, illegal or arbitrary arrest and detention, other inhumane acts, cruel treatment, torture, murder, and enforced disappearance of persons”.¹⁰⁶ Contrary to the Thaçi Defence’s and the Selimi Defence’s suggestion, the common purpose pleaded in the Confirmed Indictment is not limited to gaining and exercising control over Kosovo.

62. Further, insofar as the submissions of the Thaçi Defence and the Selimi Defence relate to the legal definition of the common purpose, namely whether the SC should adopt the *Tadić* Definition or – what the Defence term – an expanded definition, the Pre-Trial Judge finds that this is a question of law and does not relate to the specificity or clarity of the charges. The Defence is free to litigate this issue at trial, if it so wishes, where it may make submissions on both the alleged facts and the applicable law.

63. In light of the foregoing, the Pre-Trial Judge rejects the Thaçi Defence’s and the Selimi Defence’s challenge in this regard.

(ii) *Alternative Pleading of the Basic Form and Extended Form of JCE*

64. Turning to the second issue raised by the Thaçi Defence and the Selimi Defence, the Pre-Trial Judge notes that the Confirmed Indictment alleges that the Accused “shared the intent for the commission of each of the crimes charged [...] with other members of the joint criminal enterprise”.¹⁰⁷ In the alternative, “to the extent that some of [the] crimes did not fall within the joint criminal enterprise”, it alleges that they were foreseeable consequences of the implementation of the

¹⁰⁵ Confirmed Indictment, para. 32 (emphasis added).

¹⁰⁶ Confirmed Indictment, para. 32.

¹⁰⁷ Confirmed Indictment, para. 33.

common purpose and that the Accused participated in the JCE and willingly took that risk.¹⁰⁸

65. Thus, the Confirmed Indictment pleads that the Accused are responsible, in the first place, under the basic form of JCE (“JCE I”) for all crimes charged and, in the alternative, to the extent that some of the crimes did not fall within the common purpose, under the extended form of JCE (“JCE III”). The Confirmed Indictment puts the Defence on notice that JCE III liability is pleaded, in the alternative to JCE I, with respect to all crimes charged. The Pre-Trial Judge does not find any defect in this. The SPO may charge an accused with multiple forms of JCE, as long as it clearly indicates which forms are being alleged and it may do so with respect to all crimes charged.¹⁰⁹

66. The Confirmed Indictment makes clear, through the use of the word “some” in paragraph 34, that at least one of the charged crimes is alleged to have been part of the common purpose. Beyond this, the Pre-Trial Judge finds that the SPO is not required to set out specifically which crimes definitely fell within the common purpose and which not when pleading JCE III liability in the alternative to JCE I. It will be for the Trial Panel to determine, following the presentation of the evidence, which alleged crime(s) were part of the common purpose and which were foreseeable consequences thereof, if any.¹¹⁰ As mentioned above, the Defence is hereby put on notice that JCE III liability is pleaded, in the alternative to JCE I, with respect to all crimes charged.

¹⁰⁸ Confirmed Indictment, para. 34.

¹⁰⁹ [Prlić et al. Appeal Judgment](#), para. 3014; ICTY, *Prosecutor v. Brđanin and Talić*, IT-99-36, Trial Chamber, [Decision on Form of Further Amended Indictment and Prosecution Application to Amend](#) (“Brđanin and Talić Decision”), 26 June 2001, paras 40-41; SCSL, [Brima et al. Appeal Judgment](#), para. 85; ICTR, *Prosecutor v. Simba*, ICTR-01-76-A, Appeals Chamber, [Judgement](#), 27 November 2007, para. 77.

¹¹⁰ Similarly, ICTY, *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, Appeals Chamber, [Judgement](#), 20 February 2001, para. 400.

67. In light of the foregoing, the Pre-Trial Judge finds that the pleading of the alleged JCE common purpose in the Confirmed Indictment is not defective and rejects the Thaçi Defence's and the Selimi Defence's challenges in this regard.

2. Plurality of Persons

(a) Submissions

68. The Thaçi Defence, the Krasniqi Defence, and the Selimi Defence submit that the Confirmed Indictment is defective because: (i) it fails to adequately identify the JCE Members; and (ii) the pleading of the JCE tools – i.e. individuals who were not JCE Members, but were allegedly used by JCE Members to carry out crimes committed in furtherance of the common purpose (“Tools”)¹¹¹ – lacks clarity and specificity.¹¹²

69. More specifically, with regard to the JCE Members, the Thaçi Defence and the Selimi Defence submit, first, that the Confirmed Indictment is defective because the list of JCE Members is not exhaustively pleaded, as suggested by the use of the word “included” in paragraph 35 of the Confirmed Indictment.¹¹³ The Selimi Defence submits that the word “included” should be struck out or replaced with the word “comprised”.¹¹⁴ Second, the Thaçi Defence and the Krasniqi Defence advance that, apart from the individuals who are named, the Confirmed Indictment fails to identify other JCE Members with sufficient specificity, by reference, for instance, to geographic or temporal indicators, or the capacity in which they were allegedly involved in the crimes charged.¹¹⁵ Both the Krasniqi

¹¹¹ Confirmed Indictment, para. 35.

¹¹² Thaçi Preliminary Motion, paras 23-28; Krasniqi Preliminary Motion, paras 41-47; Selimi Preliminary Motion, paras 31-37.

¹¹³ Thaçi Preliminary Motion, para. 23; Selimi Preliminary Motion, para. 32.

¹¹⁴ Selimi Preliminary Motion, para. 32; Selimi Reply, paras 19(b), 22.

¹¹⁵ Thaçi Preliminary Motion, paras 23-26; Krasniqi Preliminary Motion, para. 45; Thaçi Reply, para. 7.

Defence and the Selimi Defence highlight that, as a consequence, the JCE could include any and every member of the KLA, amounting to an unknown and unidentifiable number of individuals.¹¹⁶ Lastly, the Krasniqi Defence argues that the Confirmed Indictment is defective because it fails to specify whether all or only some of the broad groups of people identified were JCE Members.¹¹⁷

70. With regard to the Tools, all the Defence for all three Accused submit that the Confirmed Indictment is defective because it fails to distinguish between JCE Members and Tools, although they have different roles and *mens rea* requirements.¹¹⁸ The Krasniqi Defence further adds that the Confirmed Indictment is defective because it does not identify how the crimes committed by the Tools can be imputed to the JCE Members and through which member.¹¹⁹

71. The SPO responds that: (i) the JCE Members are sufficiently identified by name and/or position, category or group – including membership in certain bodies or services within the KLA and the Provisional Government of Kosovo (“PGoK”) – by rank, unit, operational zone, base, commander, headquarters, and other locations, acts, events and time periods; (ii) the charges and the liability of the Accused do not depend on the full scope of JCE membership, which will remain unknown even at the end of the proceedings and does not impact on the scope of the known JCE Members identified in the Confirmed Indictment; and (iii) the Defence fails to explain how the alternative characterisation of JCE Members as Tools is vague and ambiguous.¹²⁰

¹¹⁶ Krasniqi Preliminary Motion, para. 45; Selimi Preliminary Motion, para. 33; Selimi Reply, para. 23.

¹¹⁷ Krasniqi Preliminary Motion, para. 45.

¹¹⁸ Thaçi Preliminary Motion, para. 27; Krasniqi Preliminary Motion, para. 47; Selimi Preliminary Motion, paras 34-35; Thaçi Reply, para. 8; Selimi Reply, paras 23-24.

¹¹⁹ Krasniqi Preliminary Motion, paras 46-47.

¹²⁰ SPO Consolidated Response, paras 12-16.

(b) Determination

(i) *Identity of JCE Members*

72. The Confirmed Indictment in the present case pleads that the JCE Members were the four Accused and

[o]ther members [...] [who] included Azem SYLA, Lahi BRAHIMAJ, Fatmir LIMAJ, Sylejman SELIMI, Rrustem MUSTAFA, Shukri BUJA, Latif GASHI and Sabit GECI, 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.¹²¹

73. The Pre-Trial Judge notes, first, that the Confirmed Indictment identifies by name 12 of the JCE Members (including the four Accused).¹²²

74. Second, other JCE Members who are not named are identified by: (i) affiliation and position (“KLA and PGoK political and military leaders”, “PGoK ministers and deputy ministers”, “PGoK officials”); (ii) affiliation and rank (“KLA zone commanders”, “deputy zone commanders”, “brigade and unit commanders”, “commanders [...] of the KLA and PGoK police and intelligence services”, “KLA soldiers”); or (iii) membership (“General Staff members”, “members of zone command staff”, “members of the KLA and PGoK police and intelligence services”).¹²³

75. Third, contrary to the Thaçi Defence’s and the Krasniqi Defence’s submissions,¹²⁴ the Confirmed Indictment provides more specificity in various other sections throughout, where JCE Members are further identified by geographic, temporal, and other parameters. This includes references to:

¹²¹ Confirmed Indictment, para. 35.

¹²² Confirmed Indictment, paras 32-33, 35.

¹²³ Confirmed Indictment, para. 35.

¹²⁴ Thaçi Preliminary Motion, paras 23-26; Krasniqi Preliminary Motion, para. 45.

operational zones,¹²⁵ units,¹²⁶ commanders,¹²⁷ headquarters and bases,¹²⁸ alleged detention sites,¹²⁹ other locations,¹³⁰ as well as other identifying information.¹³¹ Moreover, all KLA members at the locations where the charged crimes are alleged to have been committed are further identified by references to the specific timeframes relevant to each location.

76. The Pre-Trial Judge does not find merit in the Selimi Defence's submission that the Confirmed Indictment is defective because the above-mentioned categories and groups comprise any number of unknown and unidentifiable members.¹³² The fact that the number of alleged JCE Members is relatively high is not a defect in the Confirmed Indictment, but a reflection of the scope of the case.¹³³

¹²⁵ Confirmed Indictment, paras 60, 67, 68, 71, 72, 93 (e.g. Drenicë Operational Zone, Llap Operational Zone).

¹²⁶ Confirmed Indictment, paras 72, 77 (e.g. members of the BIA Guerilla unit within the Llap Operational Zone, members of [REDACTED] within the Nerodime Operational Zone).

¹²⁷ Confirmed Indictment, paras 60, 61, 67, 68, 77.

¹²⁸ Confirmed Indictment, paras 61, 63, 66, 80, 81, 90, 92, 137, 170 (e.g. KLA headquarters in Jabllanicë/Jablanica, Drenoc/Drenovac, [REDACTED], in a former boarding school and dormitory in Gjilan/Gnjilane, [REDACTED] Novobërdë/Novo Brdo, in Likoc/Likovac, or a KLA base at [REDACTED]).

¹²⁹ Confirmed Indictment, paras 62, 65, 75, 78, 79, 81, 83, 84, 86, 87, 88, 89, 91, 140-142, 158-162, 164, 165 (e.g. compound in Llapushnik/Lapušnik; former police station in Malishevë/Mališevo; house and surrounding buildings near Kleçkë/Klečka; KLA military barracks in Cahan, Has District, Albania; former metal factory in Kukës, Kukës District, Albania; houses in [REDACTED], or in or around Ferizaj/Uroševac; [REDACTED] Prizren, [REDACTED] Prizren, [REDACTED] Prizren; former police station in Suharekë/Suva Reka; KLA barracks in Jabllanicë/Jablanica).

¹³⁰ Confirmed Indictment, paras 74, 80, 81, 82, 126-128, 144, 145, 151-157, 163.

¹³¹ Confirmed Indictment, paras 44, 73 [REDACTED]).

¹³² Selimi Preliminary Motion, para. 33.

¹³³ See similarly ICTY, *Prosecutor v. Šešelj*, IT-03-67/PT, Trial Chamber, *Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment*, 26 May 2004, para. 59 (finding that the identity of the JCE participants had been sufficiently pleaded by naming certain participants and identifying others by reference to categories including: "the army of the Republika Srpska Krajina", "the army of the Republika Srpska", "local Serb, Republic of Serbia and Republika Srpska police forces", and "the State Security/Drzavna bezbednost/ Branch of the Ministry of Interior of the Republic of Serbia"); ICTR, *Prosecutor v. Karemera and Ngirumpatse*, ICTR-98-44-A, Appeals Chamber, *Judgement*, 29 September 2014, para. 150 (finding no error in the Trial Chamber's description of members of the JCE as "political leaders", "persons of authority within the military, the *Interahamwe*, and the territorial administration", and "influential businessmen"); SCSL, *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Chamber, *Judgement*, 2 March 2009, paras 362-367 (finding that the identity of the JCE participants had

77. Further, contrary to the Krasniqi Defence's submission,¹³⁴ the Pre-Trial Judge does not consider that it is necessary for the Confirmed Indictment to specify whether all or only some of the individuals from these categories or groups were JCE Members.¹³⁵ This is a matter to be discussed at trial on the basis of the evidence. What matters to satisfy the notice requirements is that the Confirmed Indictment contains the categories or groups of persons allegedly forming part of the JCE (when the specific identification of each JCE Member is not possible).

78. Having said that, the Pre-Trial Judge recalls that an indictment must identify the JCE members at least by category or group. In the view of the Pre-Trial Judge, the phrase "others acting on behalf of the KLA or the PGoK" does not meet that requirement and is impermissibly vague. Accordingly, the SPO is instructed to delete the words "and others acting on behalf of the KLA or PGoK" from paragraph 35 of the Confirmed Indictment.

79. Turning to the Thaçi Defence's and the Selimi Defence's submission that the list of JCE Members is not exhaustively pleaded,¹³⁶ the Pre-Trial Judge notes that paragraph 35 of the Confirmed Indictment employs the words "included" and "including" on two occasions (first line and fourth line). With regard to the word "included" in paragraph 35, first line, the Pre-Trial Judge finds that it creates ambiguity as it allows the SPO to plead that other individuals and groups of persons, not presently mentioned in the Confirmed Indictment, were JCE Members. With regard to the word "including" in paragraph 35, fourth line, the Pre-Trial Judge notes that it is not employed as an open-ended formulation. Rather, it is meant to provide more specificity in relation to "certain other KLA

been sufficiently pleaded by naming certain participants and identifying others as "other superiors in the RUF, Junta and AFRC/RUF forces").

¹³⁴ Krasniqi Preliminary Motion, para. 45.

¹³⁵ Similarly, ICTY, *Prlić et al. Appeal Judgment*, para. 1522.

¹³⁶ Thaçi Preliminary Motion, para. 23; Selimi Preliminary Motion, para. 32.

and PGoK political and military leaders". This is plainly clear from the text of the Confirmed Indictment.¹³⁷

80. In light of the foregoing, the Pre-Trial Judge orders the SPO to submit a corrected version of the Confirmed Indictment: (i) removing the phrase "and others acting on behalf of the KLA or the PGoK" in paragraph 35, eighth line; and (ii) replacing the word "included" with the word "comprised" in paragraph 35, first line. The Pre-Trial Judge considers that, with these changes and when read in light of the Confirmed Indictment as a whole, the pleading of the JCE membership is not defective and provides the Defence with sufficient specificity.

(ii) Definition of Tools

81. The Pre-Trial Judge notes that the Confirmed Indictment pleads that some or all of the JCE Members mentioned in paragraph 35 were, in the alternative, not JCE Members, but were used by JCE Members to carry out crimes committed in furtherance of the common purpose, i.e. they were Tools.¹³⁸ Thus, the Confirmed Indictment defines the Tools with reference to the same individuals, categories and groups as the JCE Members, which the Pre-Trial Judge has found are pleaded with sufficient specificity.

82. The Pre-Trial Judge considers that the SPO is allowed to plead that all or some of the individuals mentioned in paragraph 35 of the Confirmed Indictment where either JCE Members or Tools if it pleads so in the alternative. It is recalled that alternative pleading is permitted and is, in fact, a well-established practice at

¹³⁷ Noting the Krasniqi Defence's submission made elsewhere, the Pre-Trial Judge clarifies that the same applies to paragraph 37 of the Confirmed Indictment, where the word "including" is used to introduce examples of groups or categories of JCE Members and Tools. These groups or categories have already been captured in the definition of JCE Members and Tools and thus the use of the word "including" in paragraph 37 does not expand the scope of the definition; see Krasniqi Preliminary Motion, para. 23(a). The same principle applies also to paragraphs 39, 42 and 44, second line, of the Confirmed Indictment.

¹³⁸ Confirmed Indictment, para. 35.

the international criminal courts and tribunals.¹³⁹ It will be for the Trial Panel to determine with more specificity who was a JCE Member and who was a Tool, following the presentation of the evidence. For the purpose of informing the Accused of the charges, the Defence is hereby put on notice that, if some of the alleged JCE Members are found not to have been so, they are nevertheless alleged to have been Tools.¹⁴⁰

83. Regarding the Krasniqi Defence's submission that the Confirmed Indictment must identify through which member of the JCE the crimes are to be imputed,¹⁴¹ the Pre-Trial Judge finds that this is also a matter for determination at trial.

84. In light of the foregoing, the Pre-Trial Judge finds that the pleading of the alleged Tools, as set out in paragraph 35 of the Confirmed Indictment, is not defective and rejects the Thaçi Defence's, the Krasniqi Defence's, and the Selimi Defence's challenges in this regard.

3. The Accused's Contribution to the JCE

(a) Submissions

85. The Thaçi Defence, the Krasniqi Defence and the Selimi Defence submit that the Accused's contributions to the JCE are not pleaded with sufficient specificity, making it impossible for them to prepare a defence.¹⁴²

86. More specifically, with regard to the instances in which the Accused are alleged to have personally participated in the crimes charged, the Thaçi Defence

¹³⁹ See *supra* para. 65 and the references contained therein. See also ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-309, Pre-Trial Chamber II, [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda](#), 9 June 2014, para. 100.

¹⁴⁰ Similarly, ICTY, *Prosecutor v. Hadžić*, IT-04-75-PT, Trial Chamber, [Decision on Defence Motion Alleging Defects in Form of First Amended Indictment](#), 10 November 2011, para. 17.

¹⁴¹ Krasniqi Preliminary Motion, paras 46-47.

¹⁴² Thaçi Preliminary Motion, paras 29-34; Krasniqi Preliminary Motion, paras 15-27; Selimi Preliminary Motion, paras 47-60; Krasniqi Reply, para. 17.

and the Krasniqi Defence submit that they are defectively pleaded as: (i) they are not exhaustively set out; and (ii) the dates, locations, identities of victims, and acts of the Accused are not provided with sufficient specificity.¹⁴³ The Krasniqi Defence specifically requests in this regard that the words “including” and “like in the cases discussed below”, in paragraph 40 of the Confirmed Indictment, be removed.¹⁴⁴ It further takes issue with the fact that Mr Krasniqi’s conduct is not pleaded separately from that of the other Accused.¹⁴⁵

87. With regard to the remaining alleged contributions of the Accused (other than their personal participation in the crimes charged), the Defence for all three Accused submit that they are generic, overly broad, and vague and that the Confirmed Indictment fails to provide the material facts supporting each allegation.¹⁴⁶ The Krasniqi Defence specifically requests that these allegations be struck out if the SPO cannot provide further and better particulars.¹⁴⁷ It also requests – together with the Selimi Defence – that the word “including” be removed from paragraphs 50(a), (d)-(f) and 51(a), (d), and (e) of the Confirmed Indictment.¹⁴⁸ Furthermore, once again, the Krasniqi Defence submits that the Confirmed Indictment fails to identify what Mr Krasniqi himself is alleged to have done, distinct from the other Accused.¹⁴⁹

88. Lastly, the Selimi Defence argues that the Confirmed Indictment is defective also because it is based on an erroneous interpretation of the law that the contribution to a JCE need not be criminal per se.¹⁵⁰ It submits that only a

¹⁴³ Thaçi Preliminary Motion, paras 30-33, 59; Krasniqi Preliminary Motion, paras 21-22; Thaçi Reply, para. 10; Krasniqi Reply, paras 18-23.

¹⁴⁴ Krasniqi Preliminary Motion, para. 22; Krasniqi Reply, para. 29.

¹⁴⁵ Krasniqi Preliminary Motion, para. 21(a); Krasniqi Reply, para. 23.

¹⁴⁶ Thaçi Preliminary Motion, paras 32-33; Krasniqi Preliminary Motion, paras 23-27; Selimi Preliminary Motion, paras 53-60; Thaçi Reply, para. 9; Krasniqi Reply, paras 24-26; Selimi Reply, paras 30-37.

¹⁴⁷ Krasniqi Preliminary Motion, para. 26.

¹⁴⁸ Krasniqi Preliminary Motion, para. 26; Selimi Reply, paras 20, 22.

¹⁴⁹ Krasniqi Preliminary Motion, para. 23(b).

¹⁵⁰ Selimi Preliminary Motion, paras 47-52.

substantial contribution or an inherently criminal one could give rise to liability.¹⁵¹ As none of the alleged contributions in paragraph 50 of the Confirmed Indictment meet this test, they should be removed.¹⁵²

89. The SPO responds that the Confirmed Indictment is not defective as: (i) the Accused are alleged to have played key, overarching, and ongoing roles in the formulation of the common criminal purpose; (ii) they are not charged with having personally committed any of the alleged crimes and the Confirmed Indictment only details certain examples of direct involvement of the Accused and/or proximity to certain matters, events, and criminal acts; (iii) potentially overlapping forms of participation do not create ambiguity; (iv) details beyond those already provided are matters of evidence at trial; (v) the words “including” and “like” are meant to introduce further details and do not create the possibility for the SPO to expand its case and include forms or participation not pleaded; and (vi) the law does not foresee specific types of conduct which per se could not constitute contributions to a common criminal purpose.¹⁵³

(b) Determination

(i) *Personal Participation in Crimes Charged*

90. The Pre-Trial Judge notes that the Accused in the present case are charged, in the first place, with committing the alleged crimes through participation in a JCE.¹⁵⁴ They are not charged with having directly committed any of the alleged crimes. However, the Confirmed Indictment does allege that the Accused made contributions to the common purpose of the JCE by, *inter alia*, personally

¹⁵¹ Selimi Preliminary Motion, paras 51-52.

¹⁵² Selimi Preliminary Motion, para. 52.

¹⁵³ SPO Consolidated Response, paras 17-20.

¹⁵⁴ Confirmed Indictment, para. 172.

participating in or otherwise contributing to the crimes charged.¹⁵⁵ It then goes on to provide examples of instances of alleged personal participation. That these are examples is clear from the use of the formulations “including” and “like in the cases discussed below” in paragraph 40 of the Confirmed Indictment and this is also expressly acknowledged by the SPO.¹⁵⁶

91. The Pre-Trial Judge finds that such instances in which the Accused are alleged to have personally participated in or otherwise contributed to the crimes charged must be exhaustively pleaded. The SPO’s submission that this is not necessary because the Accused are charged with JCE liability and not direct commission is not persuasive. The Confirmed Indictment alleges that the Accused’s personal participation in and contribution to the crimes charged constitutes contribution to the common purpose of the JCE. Thus, instances of personal participation are material facts which must be pleaded in the Confirmed Indictment. Failure to do so – whether partially or entirely – is failure to inform the Accused (fully) of the conduct that is alleged to give rise to their criminal responsibility. This can impair their ability to defend themselves. The fact that the conduct is legally qualified as contribution to the common purpose of the JCE and not as direct commission is immaterial. An accused must always be provided with detailed information of the conduct alleged to give rise to his or her criminal responsibility and the indictment must contain *all* facts underpinning the charges.¹⁵⁷

92. In light of the foregoing, the Pre-Trial Judge finds that the Confirmed Indictment is defective as far as it does not plead instances of personal

¹⁵⁵ Confirmed Indictment, paras 40-47.

¹⁵⁶ SPO Consolidated Response, para. 18.

¹⁵⁷ See Rule 86(4) Order, paras 8-9, 15, 18; ICTY, [Blaškić Appeal Judgment](#), para. 210 (stating that “[t]he precise details to be pleaded as material facts are the acts of the accused”); ICC, [Lubanga Appeal Judgment](#), para. 123 (stating that “the accused must be provided with detailed information regarding [...] his or her alleged conduct that gives rise to criminal responsibility”).

participation of the Accused in and contribution to the crimes charged exhaustively. Accordingly, the Pre-Trial Judge orders the SPO to file a corrected version of the Confirmed Indictment: (i) replacing the word “including” in paragraph 40 of the Confirmed Indictment with “by”; and (ii) replacing the words “like in the cases discussed below” with “as discussed below”.¹⁵⁸ In the event that the SPO wishes to plead further instances of personal participation of the Accused in the crimes charged, it will be required to seek an amendment of the Confirmed Indictment.¹⁵⁹

93. The Pre-Trial Judge turns to the Thaçi Defence’s and the Krasniqi Defence’s submissions that the dates, locations, identities of victims, and acts of the Accused are not provided with sufficient specificity.

94. With regard to the dates, the Pre-Trial Judge recalls that, when a precise date cannot be specified, a reasonable range of dates may be provided.¹⁶⁰ Paragraphs 41-47 of the Confirmed Indictment contain references to either specific timeframes (such as “July 1998”,¹⁶¹ “late July 1998”, “October 1998”, [REDACTED]), or approximate dates (“[o]n or around [REDACTED] 1998”). The Pre-Trial Judge further notes that paragraphs 41-47 must be read together with the section of the Confirmed Indictment concerning the crimes charged and Schedules A-C.¹⁶² These parts add more specificity to the charges by providing further approximate dates.¹⁶³

¹⁵⁸ The Pre-Trial Judge clarifies that the word “including” in paragraph 44, ninth line, may remain as it is meant to provide further details regarding conduct (“questioned [REDACTED] members”) that is already pleaded with sufficient specificity; *see further infra* para. 99.

¹⁵⁹ *Gucati and Haradinaj* Appeals Decision, para. 87.

¹⁶⁰ *See supra* para. 33.

¹⁶¹ This timeframe is made even more specific by the reference to “the immediate aftermath of the attack by KLA units on Rahovec/Orahovac”; Confirmed Indictment, para. 42.

¹⁶² *See*, for example, Confirmed Indictment, paras 65, 73, 101, 107-108, 110.

¹⁶³ The Pre-Trial Judge notes that, while certain information is currently redacted from the Defence in paragraphs 41, 43, and 47 of the Confirmed Indictment, as well as in the section concerning the crimes charged and in the Schedules, in line with judicially granted protective measures, these redactions do

95. Having said that, the Pre-Trial Judge notes that, on two occasions, the Confirmed Indictment remains ambiguous as to the relevant timeframes:

- a) in paragraph 43, the SPO alleges that “[o]n a number of occasions”, Mr Thaçi and Mr Selimi took steps to intimidate and assert dominance over units affiliated with the Democratic League of Kosovo (“LDK”). The formulation “[o]n a number of occasions” is followed by a sole example described in time and location, introduced by the word “including”. In the view of the Pre-Trial Judge, this formulation does not adequately notify the Accused of the “occasions” on which they allegedly took steps to intimidate and assert dominance over units affiliated with the LDK. Accordingly, the SPO is ordered to either: (i) provide more specificity on the instances involving the Accused when they are alleged to have taken such steps; or (ii) remove the words “On a number of occasions, including” from paragraph 43 of the Confirmed Indictment;¹⁶⁴
- b) in paragraph 47, the SPO alleges that Messrs Veseli, Selimi, and Krasniqi were “involved in various aspects of the transfer, detention, and/or release of detainees held at a detention site near Kleçkë/Klečka” throughout 1999. The Pre-Trial Judge notes that, even when read together with the section of the Confirmed Indictment concerning the crimes charged and Schedule A, this does not adequately notify the Accused of the relevant timeframe of their alleged involvement. The SPO is accordingly ordered to either: (i) provide more specificity in the Confirmed Indictment regarding the relevant timeframe; or (ii) delete the sentence “In 1999, Kadri VESELI, Rexhep SELIMI

not affect the specificity of the Confirmed Indictment, as any such redacted particulars will be available to the Defence in due course.

¹⁶⁴ The Pre-Trial Judge notes that the word “including” is also employed when referring to “units affiliated with the LDK, *including* the government-in-exile affiliated Armed Forces of Kosovo Republic” (emphasis added). The Pre-Trial Judge observes that the word “including” in this context is aimed at providing further specificity as concerns a defined category (“units affiliated with the LDK”). As such, it does not create ambiguity or the possibility for the SPO to expand its case.

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” from paragraph 47 of the Confirmed Indictment. The same applies to paragraph 75 of the Confirmed Indictment.

96. With regard to the locations, the Pre-Trial Judge notes that paragraphs 41-47 of the Confirmed Indictment provide references to either specific or approximate locations (such as “Rahovec/Orahovac and its surrounding villages”, “in and around Rahovec/Orahovac”, “the former police station in Malishevë/Mališevo”, [REDACTED], “Jabllanicë/Jablanica”, [REDACTED], “a detention site near Kleçkë/Klečka”).¹⁶⁵ The Pre-Trial Judge does not consider that formulations such as “Rahovec/Orahovac and its surrounding villages”, or “in and around Rahovec/Orahovac” are defective. The precise limits of the area in question may not be clearly ascertainable and these are matters for determination at trial. The SPO is not required at this stage to list all relevant “surrounding villages”.

97. The Pre-Trial Judge notes that the Thaçi Defence also takes issue with the formulation “other locations” in paragraph 42 of the Confirmed Indictment,¹⁶⁶ which refers to certain detainees having allegedly been abducted “in and around Rahovec/Orahovac and *other locations*” (emphasis added). The Pre-Trial Judge does not consider that this formulation creates ambiguity as the location to which the detainees were allegedly taken is specifically identified (a “former police station in Malishevë/Mališevo”).

98. With regard to the alleged victims, the Pre-Trial Judge notes that paragraphs 41-47 of the Confirmed Indictment identifies them by reference to:

¹⁶⁵ Confirmed Indictment, paras 42-47. The Pre-Trial Judge notes that, while certain information in paragraphs 41, 43, and 47 of the Confirmed Indictment is currently redacted from the Defence, in line with judicially granted protective measures, these redactions do not affect the specificity of the Confirmed Indictment, as any such redacted particulars will be available to the Defence in due course.

¹⁶⁶ Thaçi Preliminary Motion, para. 33.

(i) the time period or date and location of alleged abduction or arrest and the location to which they were allegedly transferred (e.g. “abducted in and around Rahovec/Orahovac” in July 1998 and “transferred to the former police station in Malishevë/Mališevo”; allegedly arrested in [REDACTED], on or around [REDACTED] 1998, and transferred to [REDACTED]); (ii) ethnicity (e.g. “Serb civilians”, [REDACTED]); (iii) number (e.g. [REDACTED]); and/or (iv) occupation (e.g. [REDACTED]). The Pre-Trial Judge further notes that paragraphs 41-47 must be read together with the section of the Confirmed Indictment concerning the crimes charged and Schedule A, which provide further similar particulars and identify some of the victims by name.¹⁶⁷

99. With regard to the alleged acts of the Accused, the Pre-Trial Judge notes that they are pleaded summarily and with sufficient specificity (e.g. [REDACTED] “were involved in various aspects of the transfer, detention and/or release of detainees”).¹⁶⁸ These alleged acts do not need to be further particularised. What matters is that the Accused are put on notice of the conduct that is alleged to give rise to their criminal responsibility. Details beyond those already provided are matters for determination at trial.

100. Lastly, the Pre-Trial Judge turns to the Krasniqi Defence’s submission that the Confirmed Indictment is defective because Mr Krasniqi’s conduct is not pleaded separately from that of the other Accused.¹⁶⁹ The Pre-Trial Judge does not consider that referring to multiple Accused together renders the Confirmed Indictment unspecific or defective, considering that the Accused are alleged to have acted pursuant to a JCE. Where applicable, it sets out their personal

¹⁶⁷ See, for example, Confirmed Indictment, paras 65, 107-108, 110. The Pre-Trial Judge notes that, while certain information contained in paragraphs 41, 43, and 47 of the Confirmed Indictment, as well as in the section concerning the crimes charged and in Schedule A, is currently redacted from the Defence, in line with judicially granted protective measures, these redactions do not affect the specificity of the Confirmed Indictment as any such redacted particulars will be available to the Defence in due course.

¹⁶⁸ Confirmed Indictment, paras 42-47.

¹⁶⁹ Krasniqi Preliminary Motion, para. 21(a); Krasniqi Reply, para. 23.

participation in the crimes charged in sufficient detail, allowing them to identify the events or incidents in question. The Pre-Trial Judge understands that, whenever multiple Accused are mentioned together, the alleged conduct applies to all mentioned Accused.

101. However, the Pre-Trial Judge stresses that the SPO is not permitted to allege the same type(s) of conduct against multiple Accused if such conduct does not apply to all of them. Such a practice fails to inform an accused clearly of the nature and cause of the charges against him or her. It also risks impairing his or her preparation, as it requires the defence to allocate time and resources to investigate and refute allegations that are in fact not relevant or applicable. Accordingly, whenever different types of conduct are alleged against multiple Accused simultaneously, if such conduct does not apply to all of them, the SPO is ordered to provide more specificity as to which conduct is alleged against which Accused.

102. In light of the foregoing, the Pre-Trial Judge finds, with the caveat made in paragraphs 92 and 95 above, that the Accused's alleged personal participation in the crimes charged is pleaded with sufficient clarity and specificity in the Confirmed Indictment.

(ii) Other Forms of Contribution

103. Turning to the Accused's alleged contributions to the common purpose, other than their alleged personal participation in the crimes charged, the Pre-Trial Judge first notes that paragraphs 48-51 of the Confirmed Indictment set out summarily yet comprehensively the different forms in which the Accused are alleged to have contributed to achieving the common purpose. Importantly, the alleged contributions are pleaded exhaustively and the Confirmed Indictment leaves no room for ambiguity in this regard.

104. Second, the Pre-Trial Judge recalls that the Accused are alleged to have been high-ranking KLA and PGoK officials and they shared a common purpose with other JCE Members.¹⁷⁰ The nature of the charges in the present case, the large scope and extended duration of the alleged crimes, and the alleged involvement of other individuals in the commission of the alleged crimes make it impracticable for the Confirmed Indictment to list all specific particulars concerning the Accused's alleged contributions, as requested by the Defence.¹⁷¹ Such details may be provided in the Rule 86(3)(b) Outline and the evidence submitted. While the SPO cannot plead additional forms of contribution not included the Confirmed Indictment through the Rule 86(3)(b) Outline or the evidence, this material does provide the Defence with additional underlying particulars and assists the Accused in preparing their defence. The Pre-Trial Judge further notes that the manner in which the SPO pleads the Accused's alleged contributions to the common purpose is in line with the practice of international criminal tribunals.¹⁷²

105. Third, with regard to the use of the word "including" in paragraphs 48-51 of the Confirmed Indictment, the Pre-Trial Judge notes that the formulation is used to introduce examples regarding the forms of contribution already expressly pleaded. As such, in this context, the word "including" is not employed as an open-ended formulation and does not create the possibility for the SPO to expand its case. Thus, the Pre-Trial Judge finds that the references to "including" in paragraphs 48-51 of the Confirmed Indictment may remain.¹⁷³

106. That said, the Pre-Trial Judge notes that paragraphs 48-51 of the Confirmed Indictment provide that each of the Accused contributed to the common purpose

¹⁷⁰ Confirmed Indictment, paras 2, 5, 8, 11.

¹⁷¹ See *Thaçi Preliminary Motion*, para. 33; *Krasniqi Defence Motion*, paras 23(b), 26.

¹⁷² See ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-PT, [Third Amended Indictment](#), 27 February 2009, para. 14; *Prosecutor v. Krajišnik and Plavšić*, IT-00-39 & 40-PT, [Amended Consolidated Indictment](#), 7 March 2002, para. 8; *Prosecutor v. Gotovina et al.*, IT-06-90-T, [Amended Joinder Indictment](#), 12 March 2008, paras 17-20.

¹⁷³ The same principle applies to paragraph 36 of the Confirmed Indictment.

“in one or more of the [...] ways” listed therein. The Pre-Trial Judge understands this to mean that possibly not all forms of contribution listed therein are applicable or relevant to all Accused. To the extent that this is the case and for the reasons set out in paragraph 101 above, the Pre-Trial Judge orders the SPO to set out with clarity and specificity which specific forms of contribution are alleged against which Accused.

107. In light of the foregoing, the Pre-Trial Judge finds, with the caveat made in paragraph 106 above, that the Accused’s alleged contributions to the common purpose are pleaded with sufficient clarity and specificity in the Confirmed Indictment.

(iii) Alleged Defect in Criminalising Legitimate Action

108. The Pre-Trial Judge turns to the Selimi Defence’s challenge that the Confirmed Indictment is defective because it is based on an erroneous interpretation of the law that the contribution to a JCE need not be criminal per se.¹⁷⁴ The Pre-Trial Judge notes that this is a question of law, which the Defence may litigate at trial, if it so wishes. Further, the resulting question – whether conduct that appears to be non-criminal can be taken into account when establishing the responsibility of the Accused – is premature. In any event, including certain forms of alleged non-criminal conduct in the Confirmed Indictment, which is meant to notify the Accused of the SPO’s case, does not render it defective. In light of the foregoing, the Pre-Trial Judge rejects the Selimi Defence’s challenge.

¹⁷⁴ Selimi Preliminary Motion, paras 47-52.

D. PLEADING OF AIDING AND ABETTING

(a) Submissions

109. The Thaçi Defence, the Krasniqi Defence, and the Selimi Defence submit that the pleading of aiding and abetting is defective as it is unclear which acts and omissions of the Accused are relied upon to establish their responsibility.¹⁷⁵ To the extent that the acts and omissions are the same as those relied upon to establish JCE liability, the Thaçi Defence and the Krasniqi Defence add that: (i) as previously submitted, these allegations are impermissibly vague and generic; (ii) the Confirmed Indictment fails to specify how the alleged acts and omissions had a substantial effect on the perpetration of the crimes charged; and (iii) it fails to plead how the Accused knew of the probability of the crimes being committed.¹⁷⁶

110. The SPO responds that the Confirmed Indictment is not defective as: (i) it clearly states that the acts and omissions pleaded under aiding and abetting are the same as those pleaded under JCE liability; (ii) the acts and course of conduct are described in sufficient detail; (iii) the effects of such conduct on any specific crime are a matter of evidence; and (iv) the *mens rea* is expressly alleged, as are the facts by which the Accused's mental state may be inferred.¹⁷⁷

(b) Determination

111. First, the Pre-Trial Judge observes that the Confirmed Indictment clearly states that "[the] same acts and omissions" pleaded under JCE liability also form the basis of aiding and abetting.¹⁷⁸ Second, the Pre-Trial Judge has already found

¹⁷⁵ Thaçi Preliminary Motion, para. 36; Krasniqi Preliminary Motion, para. 30(a)-(b); Selimi Preliminary Motion, paras 25, 29 *et seq.*

¹⁷⁶ Thaçi Preliminary Motion, paras 36-39; Krasniqi Preliminary Motion, para. 30(b)-(f).

¹⁷⁷ SPO Consolidated Response, paras 21-23.

¹⁷⁸ Confirmed Indictment, para. 52.

that these acts or conduct, with the caveats made above, are set out with sufficient specificity.¹⁷⁹ This issue will not be addressed further. Third, whether the alleged acts and omissions had a substantial effect on the perpetration of the crimes charged is a matter for determination at trial. Lastly, regarding the *men rea*, the Pre-Trial Judge notes that the Confirmed Indictment pleads the state of mind itself. Thus, in such a case, the facts by which the state of mind is to be established are matters of evidence.¹⁸⁰

112. In light of the foregoing, the Pre-Trial Judge finds that the mode of liability of aiding and abetting is pleaded with sufficient clarity and specificity in the Confirmed Indictment and rejects the Thaçi Defence's, the Krasniqi Defence's, and the Selimi Defence's challenge in this regard.

E. PLEADING OF SUPERIOR RESPONSIBILITY

(a) Submissions

113. The Thaçi Defence, the Krasniqi Defence, and the Selimi Defence submit that the pleading of superior responsibility is defective as the Confirmed Indictment fails to identify clearly and precisely: (i) the material facts from which it is deduced that a superior-subordinate relationship existed; (ii) the identity of the subordinates; (iii) the criminal conduct of the subordinates and corresponding forms of liability; (iv) the conduct of the Accused by which they may be found to have known or had reason to know that the crimes were about to be committed or had been committed by their subordinates; and (v) the conduct of the Accused by

¹⁷⁹ See *supra* paras 90-102.

¹⁸⁰ See *supra* para. 36.

which it is alleged that they failed to take the necessary and reasonable measures to prevent the acts or punish the perpetrators.¹⁸¹

114. The SPO responds that the Confirmed Indictment is not defective as: (i) the Accused are alleged to have been General Staff members and among the highest-ranking officials in the KLA and/or PGoK, which is sufficient to assert their superior positions; (ii) the Confirmed Indictment clearly identifies the alleged subordinates by reference to the previously defined JCE Members and Tools; (iii) the allegations concerning the subordinates' criminal conduct must be read in light of the material facts underpinning the crimes charged; (iv) the *mens rea* is expressly pleaded; and (v) the Accused's failure to take necessary and reasonable measures to prevent the commission of the charged crimes or punish the perpetrators is itself the material fact that needs to be pleaded and further details are not required.¹⁸² The SPO adds that the Confirmed Indictment goes beyond the minimum requirements by pleading facts demonstrating the Accused's effective control, facts by which their mental state may be directly or indirectly established, and certain acts and omissions that demonstrate their failure to take necessary and reasonable measures.¹⁸³

(b) Determination

(i) *Superior-Subordinate Relationship and Identity of Subordinates*

115. The Pre-Trial Judge notes that the Confirmed Indictment alleges that the Accused were members of the KLA General Staff and the PGoK. They allegedly

¹⁸¹ Thaçi Preliminary Motion, paras 40-48; Krasniqi Preliminary Motion, paras 32-40; Selimi Preliminary Motion, paras 65-77; Thaçi Reply, paras 11-12; Selimi Reply, paras 19-22.

¹⁸² SPO Consolidated Response, paras 24-33.

¹⁸³ SPO Consolidated Response, paras 26, 30, 33.

held the following positions, at various times throughout the period relevant to the Confirmed Indictment, demonstrating their superior positions:

- a. Mr Thaçi: head of the KLA Political and Information Directorates, KLA Commander-in-Chief, and Prime Minister of the PGoK;
- b. Mr Veseli: member of the KLA Political Directorate, head of the KLA intelligence services, chief of the Kosovo Intelligence Service, and PGoK Minister of the Intelligence Service;
- c. Mr Selimi: head of the KLA Operational Directorate, KLA Inspector General, and PGoK Minister of Public Order/Minister of Internal Affairs;
- d. Mr Krasniqi: member of the KLA Political Directorate, official KLA spokesperson, KLA Deputy Commander, and PGoK spokesperson.¹⁸⁴

116. The Confirmed Indictment further pleads that, in these capacities and pursuant to their *de facto* authority, the Accused had effective control over the JCE Members and Tools who committed the crimes charged.¹⁸⁵ The Pre-Trial Judge considers that the basis for the Accused's alleged superior responsibility is sufficiently pleaded in the Confirmed Indictment and finds no defect in this regard.

117. Noting that the Krasniqi Defence contests that the KLA had a sufficient degree of organisation and lines of authority and communication to justify a finding of command responsibility,¹⁸⁶ the Pre-Trial Judge highlights that this is a matter of evidence to be determined at trial. If the Krasniqi Defence contests the existence of a superior-subordinate relationship, it may litigate this issue before the Trial Panel. For the purpose of informing the Accused of the charges, the facts

¹⁸⁴ Confirmed Indictment, paras 2, 5, 8, 11.

¹⁸⁵ Confirmed Indictment, para. 53.

¹⁸⁶ Krasniqi Preliminary Motion, para. 34.

supporting the alleged superior-subordinate relationship have been sufficiently pleaded.

118. Turning to the identities of the subordinates, the Pre-Trial Judge notes that, the Confirmed Indictment identifies the alleged subordinates as being the JCE Members and Tools.¹⁸⁷ The Pre-Trial Judge has already found above that the JCE Members and Tool are sufficiently identified.¹⁸⁸ For the same reasons and in light of the principles set out in paragraph 38 above, the Pre-Trial Judge finds that the alleged subordinates have been sufficiently identified.

(ii) Conduct of Subordinates and Corresponding Forms of Liability

119. Noting the Thaçi Defence's submission that the criminal conduct of the subordinates is defectively pleaded, The Pre-Trial Judge highlights that the section of the Confirmed Indictment on superior responsibility must be read together with the part setting out the crimes charged.¹⁸⁹ Regarding the Selimi Defence's submission that the Confirmed Indictment is defective because it fails to specify the forms of liability applicable to the crimes charged,¹⁹⁰ the Pre-Trial Judge finds that, while the crimes committed by the subordinates are material facts to be pleaded, the corresponding modes of liability are not.¹⁹¹ For these reasons, the Pre-Trial Judge rejects the Thaçi Defence's and the Selimi Defence's challenges in this regard.

¹⁸⁷ Confirmed Indictment, para. 53.

¹⁸⁸ See *supra* paras 80, 84.

¹⁸⁹ Thaçi Preliminary Motion, para. 43.

¹⁹⁰ Selimi Preliminary Motion, para. 67.

¹⁹¹ Similarly, ICTY, [Perišić Decision](#), para. 31.

(iii) *Mental Element*

120. The Pre-Trial Judge recalls that the SPO may plead either the state of mind itself, in which case the facts by which it is established are matters of evidence, or it may plead the facts from which the state of mind is to be inferred.¹⁹²

121. The Confirmed Indictment alleges that the Accused knew or had reason to know that crimes were about to be committed or had been committed by persons under their effective control.¹⁹³ It then goes on to set out, in a non-exhaustive way, certain facts from which the Accused's state of mind may be inferred: (i) their involvement in the preparation, design, and/or execution of the crimes; (ii) their presence at locations where crimes were committed; (iii) their receipt of information about the commission of such crimes; and/or (iv) their personal observation of evidence of the commission of such crimes.¹⁹⁴

122. The Pre-Trial Judge finds that, by pleading the state of mind itself, the Confirmed Indictment sufficiently informs the Accused of their alleged mental state. The Confirmed Indictment is not required to further plead the facts from which the state of mind is to be inferred. Whether these facts are generic and vague – as submitted by the Defence¹⁹⁵ – is immaterial. This will be assessed at trial. Similarly, the use of the open-ended formulation “including” in paragraph 54 of the Confirmed Indictment – which the Defence takes issues with¹⁹⁶ – does not render the Confirmed Indictment defective. Rather, it is used to provide more specificity, by pleading certain facts from which the state of mind is to be inferred.

¹⁹² See *supra* paras 36-38.

¹⁹³ Confirmed Indictment, para. 54.

¹⁹⁴ Confirmed Indictment, para. 54.

¹⁹⁵ Thaçi Preliminary Motion, para. 44; Krasniqi Preliminary Motion, para. 38; Selimi Preliminary Motion, paras 68-70.

¹⁹⁶ Krasniqi Preliminary Motion, para. 38(c); Selimi Preliminary Motion, para. 68; Selimi Reply, paras 19, 21.

123. For these reasons, the Pre-Trial Judge rejects the Defence's challenges in this regard.

(iv) Conduct by Which the Accused may be Found to Have Failed to Take Necessary and Reasonable Measures

124. The Pre-Trial Judge recalls that it will be sufficient in many cases to plead that the accused did not take any necessary and reasonable measure to prevent or punish the commission of criminal acts.¹⁹⁷

125. The Confirmed Indictment alleges that the Accused failed to take the necessary and reasonable measures to prevent the commission of the crimes charged and/or punish the perpetrators.¹⁹⁸ It then goes on to set out a non-exhaustive list of measures that the Accused allegedly failed to take: (i) initiate genuine or adequate investigations, or other genuine and adequate measures; (ii) report the commission or possible commission of crimes; (iii) discipline, dismiss or demote; (iv) issue orders to prohibit or stop the commission of crimes; and/or (iv) other adequate measures to ensure that crimes would not be committed, such as adequate training, regulations and procedures.¹⁹⁹

126. The Pre-Trial Judge finds that, by pleading that the Accused failed to take the necessary and reasonable measures to prevent the commission of the crimes charged and/or punish the perpetrators, the Confirmed Indictment sufficiently informs the Accused of their alleged failures to take necessary and reasonable measures. The Confirmed Indictment is not required to further plead the specific particulars which allegedly demonstrate their failure to take necessary and

¹⁹⁷ See *supra* para. 38.

¹⁹⁸ Confirmed Indictment, para. 55.

¹⁹⁹ Confirmed Indictment, para. 55.

reasonable measures. These are matters of evidence for determination at trial.²⁰⁰ The fact that the Confirmed Indictment employs the word “including” in paragraph 55(e) – which the Selimi Defence takes issues with²⁰¹ – does not render it defective, as the formulation is used to provide more specificity. For these reasons, the Pre-Trial Judge rejects this challenge.

F. CHALLENGES TO THE PLEADING OF SPECIFIC CRIMES

1. General Considerations

127. At the outset, the Pre-Trial Judge notes that the circumstances of the present case and the nature and scale of the crimes and the modes of liability charged must be taken into consideration when determining the degree of specificity required in the pleading of specific crimes. Accordingly, the Pre-Trial Judge notes that the Accused are not alleged to have physically perpetrated any of the charged crimes themselves. Rather, they are alleged to have committed such crimes through their participation in a JCE and/or as aiders and abettors.²⁰² In addition or alternatively, the Accused are alleged to be responsible as superiors for crimes committed by their subordinates.²⁰³

128. The Pre-Trial Judge further notes that the charged crimes are alleged to have been widespread, continuing, and recurring and to have been committed: (i) following arrests and abductions and at, or in connection with 42 detention sites located at a number of named locations in 16 municipalities in Kosovo and

²⁰⁰ SCSL, *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Appeals Chamber, *Judgement*, 26 October 2009, para. 76.

²⁰¹ Selimi Preliminary Motion, para. 76.

²⁰² Confirmed Indictment, paras 32-52, 172-173.

²⁰³ Confirmed Indictment, paras 53-55, 172-173.

two districts in northern Albania; (ii) throughout a time period spanning over 19 months; and (iii) against hundreds of victims.²⁰⁴

2. *Chapeau* Elements of War Crimes and Crimes Against Humanity

(a) Submissions

129. The Thaçi Defence submits that the pleading of the *chapeau* elements of war crimes and crimes against humanity in the Confirmed Indictment is defective.²⁰⁵ As regards the *chapeau* elements of war crimes it argues that the victims thereof, defined as “Opponents”, cannot be said to be taking no active part in hostilities, considering that the SPO further details the term as including those “collaborating” or “associating with” Federal Republic of Yugoslavia Forces (“FRY”).²⁰⁶ The Thaçi Defence concludes that the nexus requirement of war crimes is not met.²⁰⁷

130. As regards the *chapeau* elements of crimes against humanity, the Thaçi Defence avers that the crimes charged are not directed against a “civilian population” as required by Article 13 of the Law and customary international law, but rather a sub-set of alleged civilians, the “Opponents”.²⁰⁸ It is purported that: (i) the Confirmed Indictment either includes (paragraph 16) or omits (paragraph 17) the term “civilian”; (ii) the “Opponents” are a randomly selected group of civilians; and (iii) it is hard to see how an attack directed in part against those working with FRY forces could be said to be against a civilian population.²⁰⁹

²⁰⁴ Confirmed Indictment, paras 16, 19, 37, 57-59, 94-96, 135-136, 171. *See also* Confirmed Indictment, paras 57-171, Schedules A-C. The Pre-Trial Judge notes that: (i) the approximate minimum number of alleged victims referred to in Schedule A is 430; (ii) the number of victims referred to in Schedule B is 98; and (iii) the number of victims referred to in Schedule C is 18.

²⁰⁵ Thaçi Preliminary Motion, paras 49-57.

²⁰⁶ Thaçi Preliminary Motion, paras 54-55.

²⁰⁷ Thaçi Preliminary Motion, para. 55.

²⁰⁸ Thaçi Preliminary Motion, para. 49.

²⁰⁹ Thaçi Preliminary Motion, paras 50-51, 57.

Moreover, the Thaçi Defence submits that one aspect of the definition of “Opponents”, namely the reference to “other ethnicities” in paragraph 32(b) of the Confirmed Indictment is impermissibly vague, by failing to specify what other ethnicities it encompasses.²¹⁰

131. The SPO responds that: (i) as pleaded in the Confirmed Indictment and acknowledged in the Confirmation Decision, the term “Opponents” encompasses persons “employed by or [...] affiliated with the Serbian/Yugoslavian military or police”, which were however found by the Pre-Trial Judge in the Confirmation Decision not to have been taking active part in the hostilities at the time when the crimes were committed and therefore fell within the scope of the civilian population;²¹¹ and (ii) Defence challenges to the legal and factual sufficiency of the Pre-Trial Judge’s findings concerning the civilian population and the status of the victims are not properly raised in a preliminary motion concerning the form of the indictment, but are matters to be resolved at trial.²¹² It further argues that the targeted “Opponents” are sufficiently defined by group and affiliation and the word “including” and the phrase “other ethnicities” in this context does not impact on the clarity of the targeted group; rather, such language is used to provide particularly pertinent examples of groups of persons falling therein.²¹³ Moreover, the SPO submits that these phrases should also be read in light of other paragraphs of the Confirmed Indictment which further identify persons and categories of persons falling within the clearly defined group of “Opponents”, while any further detail concerning the identities of the members of the group is an evidentiary matter for trial.²¹⁴

²¹⁰ Thaçi Preliminary Motion, para. 52.

²¹¹ SPO Consolidated Response, para. 34, referring to Confirmation Decision, paras 126, 448.

²¹² SPO Consolidated Response, para. 34.

²¹³ SPO Consolidated Response, para. 35.

²¹⁴ SPO Consolidated Response, para. 35.

(b) Determination

132. As regards the *chapeau* elements of war crimes and crimes against humanity, the Pre-Trial Judge notes that paragraph 32 of the Confirmed Indictment sets out the definition of “Opponents”, alleged to constitute the “civilian population” against which a widespread or systematic attack was purportedly directed,²¹⁵ as well as the victims of the crimes charged.

133. With regard to the fact that the “Opponents” are defined as including those “collaborating” or “associating with” FRY forces, the Pre-Trial Judge notes that the question whether or not individuals so defined are to be considered as taking active part in the hostilities constitutes an evidentiary matter to be discussed at trial. Similarly, the legal definition of “civilian population” and whether the “Opponents”, as defined in the Confirmed Indictment, fulfil that requirement are matters for determination at trial. The Thaçi Defence challenges in this respect are therefore rejected.

134. With regard to the use of the word “including” in the second part of the definition of “Opponents” (paragraph 32(b) of the Confirmed Indictment, as referred to by the Thaçi Defence), the Pre-Trial Judge notes that the word precedes an enumeration which is aimed at providing further specificity as concerns a defined category, that is part of the alleged targeted group, i.e. persons who were (perceived to be) “not supporting the aims and means of the KLA and later the PGoK”. Therefore, rather than expanding the scope of the Confirmed Indictment, the word “including” and the enumeration following it provide further specificity as regards the alleged targeted group.

135. With regard to the reference to “other ethnicities” in the same sentence of paragraph 32 of the Confirmed Indictment, the Pre-Trial Judge finds that by

²¹⁵ Confirmed Indictment, para. 16.

stating that part of the alleged targeted group comprised “persons associated with the LDK and persons of Serb, Roma, and *other ethnicities*” (emphasis added), the Confirmed Indictment is sufficiently specific as concerns the membership of such group. Moreover, recalling that the Confirmed Indictment must be read as a whole,²¹⁶ the definition set out in paragraph 32 of the Confirmed Indictment ought to be read together with the other paragraphs of the Confirmed Indictment, which provide further specificity as regards the victims of the charged crimes²¹⁷ – including as pertains to their ethnicity²¹⁸ – and, therefore, the members of the alleged targeted group.

136. In light of the foregoing, the Pre-Trial Judge finds that the use of the word “including” and the reference to “other ethnicities” in paragraph 32 of the Confirmed Indictment do not render the pleading of the *chapeau* elements of crimes against humanity defective.

3. Persecution

(a) Submissions

137. The Krasniqi Defence argues that the crime of persecution is inadequately pleaded in that: (i) paragraph 58(g) and (h) of the Confirmed Indictment does not identify the alleged victims or the dates of the alleged crimes and impermissibly uses the open-ended phrase “including those identified in Schedule A”;²¹⁹ and (ii) paragraph 58(i) of the Confirmed Indictment impermissibly uses the

²¹⁶ See *supra* para. 28.

²¹⁷ See *infra* para. 152.

²¹⁸ Confirmed Indictment, paras Confirmed Indictment, paras 71, 98, 99, 100, 101, 103, 104, 110, 112, 117, 119, 120, 121, 122, 123, 125, 129, 130, 131, 133, 151, 152, 156, 170, Schedule B. The Pre-Trial Judge notes that, while certain particulars pertaining to alleged victims are currently redacted from the Defence in line with judicially granted protective measures, these redactions do not affect the specificity of the Confirmed Indictment since any such redacted particulars will be available to the Defence in due course.

²¹⁹ Krasniqi Preliminary Motion, para. 49.

open-ended word “including”, compounded 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; additionally, it does not refer to any concrete acts of arbitrary searches, coerced statements or intimidation, fails to provide the date, location, victims or any other details of the relevant acts, and fails to attribute any particulars specifically to Mr Krasniqi.²²⁰

138. The SPO responds that the Defence selectively reads certain parts of the charge of persecution in isolation, 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 Confirmed Indictment.²²¹ It submits that such particulars were pleaded to 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.²²²

(b) Determination

139. With regard to the charge of persecution, the Pre-Trial Judge notes at the outset that paragraphs 57-58 of the Confirmed Indictment must be read together with the charges of imprisonment/arbitrary detention, other inhumane acts/cruel treatment, torture, murder, and enforced disappearance, as set out in paragraphs 59-171 and Schedules A-C of the Confirmed Indictment.²²³

140. As regards the use of the word “illustrative” in paragraph 57 of the Confirmed Indictment, the Pre-Trial Judge notes that the second sentence of

²²⁰ Krasniqi Preliminary Motion, para. 50.

²²¹ SPO Consolidated Response, para. 40.

²²² SPO Consolidated Response, para. 40.

²²³ Confirmed Indictment, paras 58-59, 94, 136, 171.

paragraph 57 of the Confirmed Indictment, by referring to a geographical and temporal scope beyond that of the charges in the present case, is aimed at contextualising the charge of persecution, as further detailed in the following paragraph. Moreover, the same considerations apply as regards the use of the word “including” in the first sentence of paragraph 57 of the Confirmed Indictment. However, allowing the words “illustrative” and “including” to remain therein could indeed leave scope for the SPO to bring at trial evidence of additional purported (types of) persecutory acts. In these circumstances, replacing the word “illustrative” with the word “demonstrative” in the second sentence of paragraph 57 of the Confirmed Indictment and deleting the word “including” from the first sentence of paragraph 57 of the Confirmed Indictment would remedy any resulting ambiguity and clarify that any purported additional (types of) underlying acts of persecution do not fall within the scope of the charges in the present case.

141. As regards the use of the word “including” in the *chapeau* sentence of paragraph 58 of the Confirmed Indictment, the Pre-Trial Judge notes that the purpose of this paragraph is to provide an overview of the purported persecutory acts, as set out under points (a)-(i) thereof. The list of acts following the word “including” is intended as an exhaustive enumeration of the purported persecutory acts. However, allowing the word “including” to remain therein could indeed leave scope for the SPO to bring at trial evidence of additional types of purported persecutory acts. In these circumstances, removing the word “including” from the *chapeau* sentence of paragraph 58 would remedy any resulting ambiguity and clarify that purported additional, unpleaded types of underlying acts of persecution do not fall within the scope of the charge of persecution in the present case.

142. The Pre-Trial Judge further considers that the same considerations apply in relation to the use of the word “including” under points (g)-(i) of paragraph 58 of the Confirmed Indictment. In order to avoid any ambiguity as concerns the alleged (types of) persecutory acts, the words “including those” should be removed from paragraph 58(g) and (h) while in paragraph 58(i) the word “including” shall be replaced with the word “comprising”.

143. In light of the foregoing, the Pre-Trial Judge orders the SPO to submit a corrected version of the Confirmed Indictment: (i) replacing the word “illustrative” with the word “demonstrative” in the second sentence of paragraph 57 of the Confirmed Indictment; (ii) removing the word “including” from the first sentence of paragraph 57 of the Confirmed Indictment and from the *chapeau* sentence of paragraph 58; (iii) removing the words “including those” and from paragraph 58(g) and (h); and (iv) replacing the word “including” with the word “comprising” in paragraph 58(i) of the Confirmed Indictment.

144. As regards the allegation that paragraph 58(g)-(i) of the Confirmed Indictment does not specify any concrete instances of or further detail concerning the alleged persecutory acts, the Pre-Trial Judge notes that the purported underlying acts of persecution referred to under points (g)-(i), while not charged as separate crimes, must be read in conjunction with paragraph 59-171 of the Confirmed Indictment. Such reading provides adequate information as concerns purported instances of unlawful passing of sentences, misappropriation of personal property, and imposition and maintenance of other restrictive and discriminatory measures, including information as to the approximate date, location, purported victims, and further details of the purported acts.²²⁴ In these circumstances, the Pre-Trial Judge finds that, when read in the context of the

²²⁴ See, for example, Confirmed Indictment, paras 98, 99, 100, 126, and 128 (providing further details as concerns purported instances of misappropriation of personal property), 110 and 116 (providing further details as concerns purported instances of unlawful passing of sentences).

whole Confirmed Indictment, and with the caveat set out above as regards the words “including” and “illustrative” used therein, the pleading of paragraph 58(g)-(i) of the Confirmed Indictment sets out with sufficient clarity and specificity the facts underpinning the charge of persecution.

145. As regards the Accused’s link to the charged crimes, the Pre-Trial Judge refers to his considerations in Section IV.F.6. below.

4. Imprisonment/Arbitrary Detention, Other Inhumane Acts/Cruel Treatment, Murder, and Torture

(a) Submissions

146. The Thaçi Defence submits that the Confirmed Indictment fails to plead with the required level of specificity some of the material facts of the crimes charged.²²⁵ Specifically, it avers that the Confirmed Indictment: (i) fails to specify the identities of the perpetrators, save generic references to them being “KLA members”; (ii) fails to specify the identity of many of the victims; (iii) is vague about the location of some crimes; (iv) provides insufficient details as regards Mr Thaçi's link to the crimes and the role he is accused of playing; and (v) fails to provide certain other details with respect to some of the crimes and the victims thereof.²²⁶ The Krasniqi Defence adds that: (i) in a number of instances, the Confirmed Indictment fails to provide certain details concerning victims transferred to or from unspecified KLA detention sites;²²⁷ and (ii) the use of the open-ended word “including” in a number of instances is impermissible.²²⁸

²²⁵ Thaçi Preliminary Motion, para. 58.

²²⁶ Thaçi Preliminary Motion, paras 58-59, referring to Confirmed Indictment, paras 60-63, 65-93, 97-133, 137-170.

²²⁷ Krasniqi Preliminary Motion, para. 60, referring to Confirmed Indictment, paras 76, 78, 79.

²²⁸ Krasniqi Preliminary Motion, para. 59, referring to, *inter alia*, Confirmed Indictment, paras 59, 94-95, 136.

147. Specifically as regards torture, the Thaçi Defence avers that the Confirmed Indictment is unclear as to: (i) which JCE Members and Tools committed acts that amount to torture, when, where, and against whom; (ii) what was Mr Thaçi's role therein.²²⁹

148. As regards the pleading of specific crimes, the SPO responds that the Confirmed 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 charged crimes.²³⁰ It further submits that, by their very nature and as pleaded in this case: (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 at various locations – so long as the relevant elements are satisfied; 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.²³¹ Moreover, considering the circumstances of the case, including the nature and scope of the crimes and modes of liability charged, the Confirmed Indictment need not exhaustively list all criminal acts underlying each charge.²³² In this context, terms such as “about”, “including”, “included”, and “illustrative” are appropriately used to provide further, known details supporting the material facts pleaded in relation to, *inter alia*, certain dates, locations, victims, perpetrators, and means of commission and do not create ambiguity as to the charges.²³³ In the SPO's submission, the

²²⁹ Thaçi Preliminary Motion, para. 59, referring to Confirmed Indictment, para. 135.

²³⁰ SPO Consolidated Response, paras 36-37, 42.

²³¹ SPO Consolidated Response, para. 38 and the references contained therein.

²³² SPO Consolidated Response, para. 39 and the references contained therein.

²³³ SPO Consolidated Response, para. 39.

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 acts – are matters of evidence for trial.²³⁴

149. In reply, the Thaçi Defence submits that: (i) the nature of a crime as continuous does not per se relieve the SPO of its duty to plead all material facts within its possession to enable the Accused to prepare a defence;²³⁵ and (ii) contrary to the SPO's submission, the use of non-exhaustive terms such as "including" is impermissible as it creates ambiguity.²³⁶ The Selimi Defence and Krasniqi Defence further aver that the SPO makes no attempt to show that the use of the word "including" was exceptionally necessary and that its use creates the possibility for the SPO to expand its case at trial.²³⁷

(b) Determination

(i) Imprisonment/Arbitrary Detention, Other Inhumane Acts/Cruel Treatment, and Murder

150. With regard to the charges of imprisonment/arbitrary detention, other inhumane acts/cruel treatment, and murder (jointly, "Five Alleged Crimes"), the Pre-Trial Judge notes at the outset that: (i) the charges of imprisonment/arbitrary detention shall be read together with Schedule A;²³⁸ (ii) the charges of other inhumane acts/cruel treatment shall be read together with Schedule A and paragraphs 60-93 of the Confirmed Indictment, pertaining to the charges of

²³⁴ SPO Consolidated Response, para. 42 and the references contained therein.

²³⁵ Thaçi Reply, para. 14 and the references contained therein.

²³⁶ Thaçi Reply, para. 15.

²³⁷ Selimi Reply, para. 22; Krasniqi Reply, paras 28-30.

²³⁸ Confirmed Indictment, para. 59.

imprisonment/arbitrary detention;²³⁹ and (iii) the charge of murder shall be read together with Schedules A and B and the charges of other inhumane acts/cruel treatment and imprisonment/arbitrary detention.²⁴⁰

151. As regards the identity of the physical perpetrators²⁴¹ of the Five Alleged Crimes, the Pre-Trial Judge notes that, in a number of instances, the identities of (some of) the physical perpetrators are specified in the Confirmed Indictment.²⁴² As regards those not specifically named, the Confirmed Indictment further identifies them by group and affiliation (“KLA member(s)”/“KLA soldiers”, i.e. those affiliated with the KLA during the time frame of the Confirmed Indictment),²⁴³ and, in some instances, links them to operational zones,²⁴⁴ specific units,²⁴⁵ or named commanders.²⁴⁶ As regards the small number of instances where, due to the use of passive voice in the formulation of the charges, the alleged physical perpetrators pertaining to specific incidents are not expressly pleaded, the Pre-Trial Judge considers that a contextual reading of the paragraphs at stake makes it clear that those perpetrators are also alleged to have been KLA members,²⁴⁷ in one instance further identified by unit and operational zone.²⁴⁸ Since the charged crimes and modes of liability do not require the specific identity of

²³⁹ Confirmed Indictment, para. 94.

²⁴⁰ Confirmed Indictment, para. 136.

²⁴¹ The Pre-Trial Judge uses the term “physical perpetrators” to refer to the individuals who allegedly directly committed the crimes that the Accused are charged with through the various modes of liability referred to in the Confirmed Indictment.

²⁴² Confirmed Indictment, paras 60, 61, 62, 68, 75, 78, 79, 97, 98, 110, 112, 115, 116, 117, 143, 154, 155, 156, 161, 164.

²⁴³ Confirmed Indictment, paras 60, 61, 62, 65, 66, 67, 68, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 137, 138, 140, 141, 143, 144, 145, 146, 148, 149, 150, 151, 152, 153, 154, 155, 156, 158, 159, 160, 161, 162, 164, 165, 166, 167, 168, 169, 170.

²⁴⁴ Confirmed Indictment, paras 60, 67, 68, 71, 72, 77, 80, 93.

²⁴⁵ Confirmed Indictment, paras 72, 77.

²⁴⁶ Confirmed Indictment, paras 60, 61, 67, 68, 77.

²⁴⁷ Confirmed Indictment, paras 63, 69, 70, 72, 80, 81, 132, 133, 139, 142, 147, 156, 157, 163.

²⁴⁸ Confirmed Indictment, para. 72.

the physical perpetrators,²⁴⁹ and considering the nature and the scale of the crimes charged in the present case, the Pre-Trial Judge finds that additional details as regards the identity of the physical perpetrators of the Five Alleged Crimes need not be pleaded further in the Confirmed Indictment. Rather, they constitute evidentiary matters which may be discussed at trial.

152. As regards the identity of the victims of the Five Alleged Crimes, the Pre-Trial Judge notes that some of them are identified by name or as relatives of a named person,²⁵⁰ while others are identified either by number or by approximate minimum number.²⁵¹ Moreover, the alleged victims of imprisonment/arbitrary detention and other inhumane acts/cruel treatment are further identified as those detained at a particular detention site, during a specified time period.²⁵² Furthermore, with respect to some of the victims, additional particulars are provided, such as: (i) ethnicity;²⁵³ (ii) (perceived) political affiliation;²⁵⁴ (iii) the fact that they were transferred to or from other detention sites, or were subjected to purported mistreatment at other locations;²⁵⁵ and (iv) other particulars specific to each crime.²⁵⁶ Considering: (i) the fact that detailed information as to the victims of the Five Alleged Crimes has been provided, where available; (ii) the nature and

²⁴⁹ See *supra* paras 35-37.

²⁵⁰ Confirmed Indictment, paras 126, 127, 128, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 152, 153, 154, 155, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, Schedule B. The Pre-Trial Judge notes that, while some of the names of and particulars pertaining to alleged victims are currently redacted from the Defence in line with judicially granted protective measures, these redactions do not affect the specificity of the Confirmed Indictment since any such redacted particulars will be available to the Defence in due course.

²⁵¹ Confirmed Indictment, paras 60, 61, 62, 63, 65, 66, 67, 68, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 105, 107, 109, 119, 129, 132, 133, 151, 156, Schedule A.

²⁵² Confirmed Indictment, paras 60-93, 97-134, Schedule A. See also *infra* para. 154.

²⁵³ Confirmed Indictment, paras Confirmed Indictment, paras 71, 98, 99, 100, 101, 103, 104, 110, 112, 117, 119, 120, 121, 122, 123, 125, 129, 130, 131, 133, 151, 152, 156, 170, Schedule B.

²⁵⁴ Confirmed Indictment, paras 99, 100, 101, 104, 105, 106, 114, 115.

²⁵⁵ For example, Confirmed Indictment, paras 60, 62, 63, 65, 67, 69, 70, 74, 76, 78, 79, 82, 84, 85, 91, 92, 105, 107, 113, 132, 152, 154.

²⁵⁶ For example, Confirmed Indictment, paras 71 and 156 (after the man arrived from Serb controlled territory), 73 and 107 ([REDACTED]), 93 and 170 (elderly Serb man), 110 ([REDACTED]).

scale of the charged crimes, particularly the fact that they are alleged to have been committed against hundreds of victims;²⁵⁷ and (iii) the fact that the Accused are not charged to have physically perpetrated any of the crimes themselves, the Pre-Trial Judge finds that additional details as regards the identity of the victims of the Five Alleged Crimes need not be pleaded further in the Confirmed Indictment. Rather, they constitute evidentiary matters which may be discussed at trial.

153. As regards the location of commission of the Five Alleged Crimes, the Pre-Trial Judge makes the following findings. With regard to the charges of imprisonment/arbitrary detention, the Pre-Trial Judge notes that the crimes are alleged to have been committed at 42 detention sites staffed and operated by the KLA, identified by the name of the settlement (e.g., city, town, village, or neighbourhood) where they were purportedly located, as well as by reference to the relevant municipality or district.²⁵⁸ With regard to the charges of other inhumane acts/cruel treatment, the Pre-Trial Judge notes that they are alleged to have been committed either at one of the aforementioned identified detention sites or at another location identified in a similar manner.²⁵⁹ Moreover, in a number of instances, further particulars are provided with respect to the alleged crime site, including by reference to specific buildings where individuals are alleged to have been detained.²⁶⁰ As regards the instances where the crime(s) are alleged to have

²⁵⁷ See *supra* para. 128.

²⁵⁸ Confirmed Indictment, paras 59-93, Schedule A.

²⁵⁹ Confirmed Indictment, paras 94-134.

²⁶⁰ Confirmed Indictment, paras 60 (former police station), 61 (compound which also served as a barracks), 62 (fenced compound), 63 (KLA headquarters, including a former school building and a former registration office), 65 and 101 (former police station), 66 (basement of KLA headquarters), 68 (location near the military police and zone headquarters), 69 (KLA headquarters), 71 (in the middle of the village), 72 (a location used by KLA members and a compound used by members of the BIA Guerilla unit as a safe house and interrogation and detention site), 73 and 107 ([REDACTED]), 74 ([REDACTED]), 78 (a room at the KLA military barracks), 79 (former metal factory), 80 (KLA headquarters), 81 (KLA headquarters), 84 and 122 ([REDACTED]), 85 and 123 (former MUP building), 86 and 124 ([REDACTED]), 87 and 125 ([REDACTED]), 90 and 131 (KLA headquarters located in a

been committed “in or around” a named locality,²⁶¹ the Pre-Trial Judge finds that this does not create any ambiguity in pleading, noting that the precise limits of the settlements in question may not be clearly ascertainable and that the question whether the locations of the alleged detention sites can be considered to be “in or around” these settlements constitutes a matter for determination at trial. With regard the charge of murder, the Pre-Trial Judge notes that the Confirmed Indictment refers to either: (i) the location of the alleged acts and conduct amounting to murder; or (ii) the location and/or circumstances in which the purported victims were last seen alive, similarly identified by the name of the settlement and the municipality or district where such settlement is located.²⁶² Moreover, in some instances, the location where the remains of the alleged victims were subsequently recovered is also specified.²⁶³ Considering: (i) the fact that detailed information as to the location of commission of the Five Alleged Crimes has been provided, where available; (ii) the nature and scale of the charged crimes; and (iii) the fact that the Accused are not charged to have physically perpetrated any of the crimes themselves, the Pre-Trial Judge finds that additional details as regards the location where the Five Alleged Crimes were committed need not be pleaded further in the Confirmed Indictment. Rather, they constitute evidentiary matters which may be discussed at trial.

154. As regards the alleged duration of imprisonment/arbitrary detention, the Pre-Trial Judge notes at the outset that imprisonment/arbitrary detention are continuous crimes which are completed for as long as a person is deprived of physical liberty without due process of law/without legal basis or without

former boarding school and dormitory), 91 and 132 (former police station), 92 and 133 (KLA headquarters located [REDACTED]), 93 (KLA base), 126 (house of a named individual), 127 ([REDACTED]), 128 ([REDACTED]).

²⁶¹ Confirmed Indictment, paras 71, 82, 88, 129.

²⁶² Confirmed Indictment, paras 136-170, Schedule B.

²⁶³ For example, Confirmed Indictment, paras 137, 138, 144, 148, 150, 151, 153, 154, 155, 157, 161, 162.

complying with basic procedural safeguards.²⁶⁴ The Pre-Trial Judge further notes that the Confirmed Indictment sets out the approximate dates when persons were purportedly deprived of their liberty at each of the locations relevant to the charges.²⁶⁵ Specifically, the charged instances of imprisonment/arbitrary detention are alleged to have taken place over specified time periods ranging from one or two days²⁶⁶ to several months.²⁶⁷ In these circumstances, and considering the scale of alleged commission of imprisonment/arbitrary detention as set out in the Confirmed Indictment, the Pre-Trial Judge finds that additional details concerning exactly which detainees were detained for how long and/or during which period need not be pleaded further in the Confirmed Indictment. Rather, they constitute evidentiary matters which may be discussed at trial.

155. As regards the use of the formulation “about” when referring to specific dates,²⁶⁸ the Pre-Trial Judge finds that, in each individual instance,²⁶⁹ this formulation provides sufficient specificity, considering that the Confirmed Indictment also provides other information pertaining to the alleged physical perpetrators, the purported victims, and the alleged location of commission of the charged crimes, in the manner specified above.

156. As regards: (i) the question which specific victims were purportedly subjected to specific forms of mistreatment;²⁷⁰ and (ii) the Thaçi Defence and

²⁶⁴ Confirmation Decision, paras 57-60, 93-96.

²⁶⁵ Confirmed Indictment, paras 60-93, Schedule A.

²⁶⁶ For example, Confirmed Indictment, [REDACTED].

²⁶⁷ For example, Confirmed Indictment, paras 68, 75.

²⁶⁸ Krasniqi Preliminary Motion, para. 60.

²⁶⁹ Confirmed Indictment, paras 62, 64, 65, 69, 70, 73, 77, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 93, 97, 99, 101, 105, 106, 107, 110, 111, 114, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 132, 133, 143, 144, 145, 147, 149, 150, 151, 152, 153, 154, 155, 157, 163, 164, 166, 168, 169. The Pre-Trial Judge notes that the word “about” in paragraphs 64 and 111 of the Confirmed Indictment is currently redacted from the Defence so as to give effect to judicially granted protective measures. The redaction will be lifted in due course.

²⁷⁰ Thaçi Preliminary Motion, para. 59, referring to Confirmed Indictment, paras 102, 103, 107, 109, 116, 121, 123, 124, 125, 130, 131.

Krasniqi Defence submission that, in a number of instances, the Confirmed Indictment fails to provide certain details concerning alleged victims transferred to or from unspecified KLA detention sites,²⁷¹ the Pre-Trial Judge recalls the nature and scale of imprisonment/arbitrary detention and of detention-related inhumane acts/cruel treatment in this case, which may make the determination of the identity of victims impossible, as well as the fact that the Accused are not charged to have physically perpetrated any of the crimes themselves. In these circumstances, the Pre-Trial Judge finds that a specific mention of the identities of alleged victims is not necessary, if unknown. Rather, it suffices if an approximate number of purported victims per location is provided to the Defence, coupled with the particulars pertaining to the time period and the location where the crimes were purportedly committed, and other specifics, such as, e.g., the victims' ethnicity²⁷² and/or (perceived) political affiliation²⁷³ or further particulars with respect to the alleged crime site.²⁷⁴ Similarly, considering the modes of liability charged in the present case, it is sufficient for the perpetrators to be identified by category or group in relation to a particular crime site. The Pre-Trial Judge further notes that information pertaining to the alleged victims' purported transfer between detention sites constitutes additional background information which need not be pleaded in the Confirmed Indictment. As a result, the Pre-Trial Judge finds that the Confirmed Indictment need not provide further particulars as concerns: (i) the *specific* victims subjected to *specific* forms of alleged mistreatment; or (ii) further particulars concerning alleged victims transferred to and from KLA detention sites. Rather, they constitute evidentiary matters which may be discussed at trial.

²⁷¹ Thaçi Preliminary Motion, para. 59, referring to Confirmed Indictment, paras 60, 63, 67, 70, 74, 75, 76, 78, 79, 81, 82, 84, 85, 91; Krasniqi Preliminary Motion, para. 60.

²⁷² See *supra* footnote 253.

²⁷³ See *supra* footnote 254.

²⁷⁴ See *supra* footnote 260.

157. As regards further forms of purported mistreatment in addition to those specifically pleaded in the Confirmed Indictment,²⁷⁵ the Pre-Trial Judge notes that each of the paragraphs in the Confirmed Indictment referred to by the Thaçi Defence gives a satisfactory, detailed factual account of the alleged criminal acts and that the further details requested constitute evidentiary matters which may be discussed at trial.

158. As regards certain other details referred to by the Thaçi Defence,²⁷⁶ the Pre-Trial Judge finds that they do not constitute facts underpinning the charges and therefore need not be pleaded in the Confirmed Indictment. Rather, they constitute evidentiary matters which may be discussed at trial.

159. As regards the use of the words “including” and “include(s)” in the pleading of the Five Alleged Crimes, the Pre-Trial Judge makes the following findings. The Pre-Trial Judge notes that: (i) the use of the word “including” in paragraphs 59 (first sentence), 94 (first sentence), 95 (last sentence, first instance), and 136 (second sentence) of the Confirmed Indictment; and (ii) the use of the word “include” in the last sentence of paragraph 136 of the Confirmed Indictment could indeed leave scope for the SPO to bring at trial evidence of: (i) additional purported detention sites where inhumane conditions were established and where acts of physical and psychological assault allegedly occurred; and (ii) additional alleged murder incidents.

160. In these circumstances, in order to remedy any resulting ambiguity and clarify that the scope of the charges in the present case is limited to the alleged instances of imprisonment/arbitrary detention, inhumane acts/cruel treatment, and murder expressly referred to in the Confirmed Indictment, including

²⁷⁵ Thaçi Preliminary Motion, para. 59, referring to Confirmed Indictment, paras 126, 127, 128, 157.

²⁷⁶ Thaçi Preliminary Motion, para. 59, referring to Confirmed Indictment, paras 144 (who were the detainees who were not allegedly killed), 151 (who was the detainee who escaped the alleged killing), 154 ([REDACTED]).

Schedules A and B, as the case may be, the Pre-Trial Judge orders the SPO to submit a corrected version of the Confirmed Indictment: (i) removing the words “including those” in paragraphs 59 (first sentence), 94 (first sentence), 95 (last sentence), and 136 (second sentence) of the Confirmed Indictment; and (ii) replacing the word “include” with the word “comprise” in the last sentence of paragraph 136 of the Confirmed Indictment.

161. As regards the use of the word “including” in the first sentence of paragraph 136 of the Confirmed Indictment and of the word “includes” in the second sentence of the same paragraph, the Pre-Trial Judge notes that the purpose of the first four sentences of paragraph 136 is to provide an exhaustive overview of the three types of circumstances in which killings committed by JCE Members and Tools allegedly occurred, as further detailed in paragraphs 137-170 of the Confirmed Indictment, that is: (i) following arrests or abductions; (ii) at or in connection with detention sites; and (iii) in connection with KLA withdrawals from sites in the face of offensives by FRY forces. Therefore, the use of the words “including” and “include” in the aforementioned instances does not impermissibly allow the SPO to further expand the factual allegations of its case at trial. The Pre-Trial Judge further notes that replacing the word “include” with the word “comprise” in the last sentence of paragraph 136 of the Confirmed Indictment will remove any ambiguity as to the fact that the charge of murder in the present case is limited to the incidents identified in Schedule B and further described in paragraphs 137-170 of the Confirmed Indictment.

162. As regards the use of the word “including” in paragraphs 62 (last sentence), 63 (first and last sentence), 65 (first sentence), 67 (fourth sentence), 72 (last sentence), 73 (first sentence), 74 (first sentence), 75 (last sentence), 77 (fifth sentence), 78 (first and last sentence), 79 (first and last sentence), 84 (last sentence), 85 (last sentence), 91 (first and second sentence), 95 (first and second sentence; last

sentence, second instance), 97 (second and fourth sentence), 98 (third sentence), 102 (first and third sentence), 112 (fourth and last sentence),²⁷⁷ 114 (last sentence),²⁷⁸ 115 (first and third sentence), 116 (third and seventh sentence), 118 (first sentence),²⁷⁹ 120 (first and fourth sentence), 121 (fifth sentence), 123 (fifth sentence),²⁸⁰ 125 (first sentence), 147 (sixth sentence),²⁸¹ 152 (fourth sentence), and 164 (second sentence) of the Confirmed Indictment, the Pre-Trial Judge finds that, in each individual instance, the language following the word “including” is aimed at providing further specificity as regards the respective discussed incidents, such as the identity of some of the physical perpetrators,²⁸² further details as regards some of the victims,²⁸³ or as to the precise location of alleged detention.²⁸⁴ Such specifications do not allow the SPO to impermissibly expand the factual allegations of its case at trial. In these circumstances, the Pre-Trial Judge finds that the use of the word “including” in the aforementioned instances does not render the pleading of the Five Alleged Crimes defective.

163. The Pre-Trial Judge further finds that the same considerations apply to the use of the word “included” in paragraphs 98 (last sentence), 99 (last sentence), 100 (last sentence), 101 (last sentence), 102 (third sentence), 103 (last sentence), 104

²⁷⁷ The Pre-Trial Judge notes that the word “including” in the fourth sentence of paragraph 112 of the Confirmed Indictment is currently redacted from the Defence so as to give effect to judicially granted protective measures. The redaction will be lifted in due course.

²⁷⁸ The Pre-Trial Judge notes that the word “including” in the last sentence of paragraph 114 of the Confirmed Indictment is currently redacted from the Defence so as to give effect to judicially granted protective measures. The redaction will be lifted in due course.

²⁷⁹ The Pre-Trial Judge notes that the word “including” in the first sentence of paragraph 118 of the Confirmed Indictment is currently redacted from the Defence so as to give effect to judicially granted protective measures. The redaction will be lifted in due course.

²⁸⁰ The Pre-Trial Judge notes that the word “including” in the fifth sentence of paragraph 123 of the Confirmed Indictment is currently redacted from the Defence so as to give effect to judicially granted protective measures. The redaction will be lifted in due course.

²⁸¹ The Pre-Trial Judge notes that the word “including” in the sixth sentence of paragraph 147 of the Confirmed Indictment is currently redacted from the Defence so as to give effect to judicially granted protective measures. The redaction will be lifted in due course.

²⁸² For example, Confirmed Indictment, paras 79, 97, 164.

²⁸³ For example, Confirmed Indictment, paras 84, 97, 102.

²⁸⁴ For example, Confirmed Indictment, paras 63, 72, 74.

(last sentence), 106 (last sentence),²⁸⁵ 112 (seventh sentence), 115 (last sentence), 117 (second sentence), 122 (last sentence), 123 (last sentence),²⁸⁶ and 152 (second and third sentence) of the Confirmed Indictment, where, in each individual instance, the language following the word “included” provides further specificity as to the alleged victims of the crimes charged. In these circumstances, the Pre-Trial Judge finds that the use of the word “included” in the aforementioned instances does not render the pleading of the Five Alleged Crimes defective.

164. As regards the Accused’s link to the charged crimes, the Pre-Trial Judge refers to his considerations in Section IV.F.6. below.

(ii) Torture

165. With regard to the charge of torture, the Pre-Trial Judge notes at the outset that paragraph 135 of the Confirmed Indictment must be read together with Schedule A and the charges of imprisonment/arbitrary detention and inhumane acts/cruel treatment, as set out in paragraphs 59-134.²⁸⁷ Against this backdrop and considering the findings made elsewhere in this decision, the Pre-Trial Judge finds that such reading provides the required specificity with regard to the alleged physical perpetrators of the purported acts and omissions amounting to torture,²⁸⁸ the alleged victims,²⁸⁹ the approximate time of commission,²⁹⁰ and their location.²⁹¹

²⁸⁵ The Pre-Trial Judge notes that the word “included” in the last sentence of paragraph 106 of the Confirmed Indictment is currently redacted from the Defence so as to give effect to judicially granted protective measures. The redaction will be lifted in due course.

²⁸⁶ The Pre-Trial Judge notes that the word “included” in the last sentence of paragraph 123 of the Confirmed Indictment is currently redacted from the Defence so as to give effect to judicially granted protective measures. The redaction will be lifted in due course.

²⁸⁷ Confirmed Indictment, para. 135.

²⁸⁸ See *supra* para. 151.

²⁸⁹ See *supra* para. 152.

²⁹⁰ See *supra* paras 154-155.

²⁹¹ See *supra* para. 153.

166. As regards the use of the word “including” in the first sentence of paragraph 135 of the Confirmed Indictment, the Pre-Trial Judge finds that the language following it is aimed at providing further specificity as regards a defined category, i.e. the grounds on the basis of which victims were allegedly discriminated against and therefore does not allow the SPO to impermissibly expand the factual allegations of its case at trial.

167. As regards the Accused’s link to the charged crimes, the Pre-Trial Judge refers to his considerations in Section IV.F.6. below.

5. Enforced Disappearance

(a) Submissions

168. The Krasniqi Defence argues that the elements of enforced disappearance as set out by the Pre-Trial Judge in the Confirmation Decision suggest that there must be a connection between the deprivation of liberty and the subsequent denial of information, whilst the Confirmed Indictment fails to plead this material element of the offence.²⁹² Moreover, the Thaçi Defence and the Krasniqi Defence argue that the use of the word “include” to create a non-exhaustive pleading of enforced disappearances is impermissibly vague.²⁹³ Finally, the Thaçi Defence submits that it is unclear what was Mr Thaçi’s role in the alleged disappearances.²⁹⁴

²⁹² Krasniqi Preliminary Motion, paras 52-55.

²⁹³ Thaçi Preliminary Motion, para. 60; Krasniqi Preliminary Motion, para. 56.

²⁹⁴ Thaçi Preliminary Motion, para. 60.

169. The SPO responds that, contrary to Defence arguments, the requisite *mens rea* has been adequately pleaded, including the facts from which it may be inferred.²⁹⁵

(b) Determination

170. The Pre-Trial Judge notes at the outset that paragraph 171 of the Confirmed Indictment must be read together with Schedules A and C and certain paragraphs pertaining to the charge of murder.²⁹⁶ Specifically, paragraph 171 of the Confirmed Indictment refers to paragraphs 137, 139, 142, 147, 149, 150, 152, 157, and 163, pertaining to the charge of murder, which, in turn, must be read together with Schedules A and B and the charges of other inhumane acts/cruel treatment and imprisonment/arbitrary detention.²⁹⁷

171. As regards the use of the words “including” and “include” in the first and last sentence of paragraph 171 of the Confirmed Indictment, the Pre-Trial Judge notes that such use could indeed leave scope for the SPO to bring at trial evidence of additional purported instances of enforced disappearance other than those expressly pleaded. In these circumstances, in order to remedy any resulting ambiguity and clarify that the charged instances of enforced disappearance are limited to those expressly pleaded, the Pre-Trial Judge orders the SPO to submit a corrected version of the Confirmed Indictment: (i) removing the words “including” (before “in areas”) and “including those” (following “detention sites”) in the first sentence of paragraph 171 of the Confirmed Indictment; and

²⁹⁵ SPO Consolidated Response, para. 41, referring to, *inter alia*, Confirmed Indictment, paras 56, 137, 139, 142, 147, 149-150, 152, 157, 163, 171.

²⁹⁶ Confirmed Indictment, para. 171.

²⁹⁷ *See supra* para. 150.

(ii) replacing the word “include” with the word “comprise” in the last sentence of paragraph 171 of the Confirmed Indictment.

172. As regards the requisite *mens rea* of enforced disappearance, specifically the requirement of awareness that the refusal to disclose information regarding the fate or whereabouts of the person concerned was preceded or accompanied by the deprivation of liberty of such person,²⁹⁸ the Pre-Trial Judge notes that, while as in the case of other charged crimes,²⁹⁹ the specific state of mind itself has not been and need not be expressly pleaded, the evidentiary facts from which such state of mind may be inferred are contained in the Confirmed Indictment.³⁰⁰ The question whether or not such facts are sufficient to infer the requisite state of mind is a matter to be discussed at trial.

173. As regards the Accused’s link to the charged crimes, the Pre-Trial Judge refers to his considerations in Section IV.F.6. below.

6. The Accused’s Link to the Charged Crimes

174. With regard to the Accused’s alleged link to the charged crimes and the role allegedly played by them therein, the Pre-Trial Judge recalls that the Accused are alleged to bear responsibility for the crimes charged: (i) through their

²⁹⁸ Confirmation Decision, para. 77.

²⁹⁹ The Pre-Trial Judge notes that, for example, in relation to imprisonment/arbitrary detention, the fact that the perpetrators intended to deprive the alleged victims of their physical liberty or acted in the reasonable knowledge that their acts or omissions were likely to cause arbitrary deprivation of the person’s physical liberty (Confirmation Decision, para. 61) is not expressly pleaded, but is to be inferred from the relevant evidentiary facts set out in paragraphs 59-93 of the Confirmed Indictment.

³⁰⁰ For example, Confirmed Indictment, paras 38 (stating that the alleged crimes were widely known and reported and resulted on multiple occasions in intervention from family members, international actors and organisations, or other persons seeking to locate the victims and/or secure their release), 96 and 171 (stating that some purported instances of enforced disappearance were allegedly committed at or in connection with detention sites and that instances of denial of information concerning detained persons were frequent).

participation in a JCE and/or as aiders and abettors;³⁰¹ and/or (ii) as superiors for crimes committed by their subordinates.³⁰² None of the aforementioned modes of liability contain an element requiring that the Accused played a direct role in the commission of the charged crimes. Rather, the Accused's link to the charged crimes is to be established by means of their: (i) contribution to the common purpose which amounts to or involves the commission of a crime provided for in the Law (JCE);³⁰³ (ii) assistance, encouragement, or moral support to the commission of a crime where this support has a substantial effect on the perpetration of the crime (aiding and abetting);³⁰⁴ and/or (iii) failure to take necessary and reasonable measures to prevent the crimes of *de jure* or *de facto* subordinates or to punish the perpetrators of crimes committed by such subordinates (superior responsibility).³⁰⁵

175. In these circumstances, the Pre-Trial Judge finds that additional details as regards the Accused's alleged link to the charged crimes and the role allegedly played by them therein need not be pleaded further in the Confirmed Indictment.

G. CONCLUSION

176. In light of the foregoing, the Pre-Trial Judge finds that, in order to provide the required level of specificity and clarity and to ensure that the scope of the SPO's case cannot be expanded at trial, the Confirmed Indictment needs to be amended as set out in paragraphs 80, 92, 95, 143, 160, and 171 above. Moreover, as noted in paragraphs 101 and 106 above, whenever different types of conduct/forms of contribution are alleged against multiple Accused

³⁰¹ Confirmed Indictment, paras 32-52, 172-173.

³⁰² Confirmed Indictment, paras 53-55, 172-173.

³⁰³ Confirmation Decision, paras 106-110.

³⁰⁴ Confirmation Decision, para. 116.

³⁰⁵ Confirmed Indictment, paras 118-121.

simultaneously, if such conduct/forms of contribution do not apply to all of them, the SPO shall provide more specificity as to which conduct/form of contribution applies with respect to which Accused. Accordingly, the Pre-Trial Judge orders the SPO to submit, by Friday, 3 September 2021, a corrected version of the Confirmed Indictment, as per the instructions set out in paragraphs 80, 92, 95, 143, 160, and 171 above.

177. The Pre-Trial Judge further finds that, considering: (i) the structure of the Confirmed Indictment; (ii) the specific and detailed information provided, to the extent possible; (iii) the nature and circumstances of the case and the scale of the charged crimes; and (iv) the fact that the Accused are not charged to have physically perpetrated any of the crimes themselves, with the above amendments, the Confirmed Indictment sets out with sufficient clarity and specificity the facts underpinning the charges and the crimes, including the modes of liability charged. The remainder of the Defence's challenges to the form of the Confirmed Indictment are accordingly rejected.

H. EXTENSION OF TIME LIMIT FOR CERTIFICATION TO APPEAL

178. The Pre-Trial Judge notes that, in accordance with Rule 77(1) of the Rules, when a Party seeks to appeal a decision for which an appeal does not lie as of right, that Party shall request certification from the Panel that rendered the impugned decision within seven (7) days thereof. In light of the upcoming summer judicial recess,³⁰⁶ the Pre-Trial Judge considers it appropriate to vary, pursuant to Rule 9(5)(a) of the Rules, the time limit for requesting certification to appeal the present decision. Accordingly, any such request(s) shall be filed by

³⁰⁶ The summer judicial recess runs from Monday, 26 July 2021, to Friday, 13 August 2021, see KSCPR-2020, President, *Judicial Recess Periods for 2021*, 10 November 2020, public.

Friday, 27 August 2021. Any related responses and replies shall follow the time limits set out in Rule 76 of the Rules.

V. DISPOSITION

179. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **GRANTS, IN PART**, the Thaçi Preliminary Motion;
- b. **GRANTS, IN PART**, the Selimi Preliminary Motion;
- c. **GRANTS, IN PART**, the Krasniqi Preliminary Motion;
- d. **ORDERS** the SPO to file, by **Friday, 3 September 2021**, a corrected version of the Confirmed Indictment, as per the instructions set out in paragraphs 80, 92, 95, 101, 106, 143, 160, and 171, above; and
- e. **REJECTS** the remainder of the Thaçi Preliminary Motion, the Selimi Preliminary Motion, and the Krasniqi Preliminary Motion;
- f. **REJECTS** the Veseli Preliminary Motion in its entirety; and
- g. **VARIES** the time limit for any request(s) for certification to appeal the present decision and **ORDERS** that any such request(s) shall be filed by **Friday, 27 August 2021**.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Thursday, 22 July 2021
At The Hague, the Netherlands.