

Case No.: KSC-CC-2026-32

Before: **The Specialist Chamber of the Constitutional Court**
Judge Vidar Stensland
Judge Roumen Nenkov
Judge Piotr Hofmański

Registrar: Dr Fidelma Donlon

Date: 1 June 2026

Filing Party: Specialist Defence Counsel

Original Language: English

Classification: Public

THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Public Redacted Version of Referral to the Constitutional Court Panel concerning the violation of Mr Shala's fundamental rights guaranteed by Articles 30, 31 and 33 of the Kosovo Constitution, Articles 6 and 7 of the ECHR and Articles 14, 15, and 26 of the ICCPR

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I. INTRODUCTION

1. Pursuant to Articles 30, 31, 33, and 113(7) of the Constitution of the Republic of Kosovo (“Constitution”), Article 49(3) of the Law No. 05/L-053 on the Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 4, 20, and 29 of the Rules of Procedure for the Specialist Chamber of the Constitutional Court (“SCCC Rules”), the Defence for Mr Pjetër Shala (“Defence”) introduces this Referral. Mr Shala complains of a violation of his rights under Articles 30, 31, and 33 of the Constitution, Articles 6 and 7 of the European Convention on Human Rights (“ECHR”) and Articles 14, 15, and 26 of the International Covenant on Civil and Political Rights (“ICCPR”) as a result of the Supreme Court Panel’s Decision on the Defence Request for Protection of Legality (“Impugned Decision”), wherein all Grounds raised by the Defence were dismissed.

II. PROCEDURAL BACKGROUND

2. On 16 July 2024, Trial Panel I found Mr Shala guilty of the war crimes of arbitrary detention, torture and murder, and sentenced him to 18 years of imprisonment, with credit for time served.¹

3. On 14 July 2025, the Appeals Panel affirmed Mr Shala’s convictions for the war crimes of arbitrary detention, torture, and murder, whilst partly granting Mr Shala’s Grounds 7, 12, and 14 in part.² Moreover, the Appeals Panel reversed, in part, his convictions under Counts 1 and 3 and set aside the sentences imposed for Counts 3 and 4, imposing a revised sentence of 13 years imprisonment with credit for time served.³

¹ KSC-BC-2020-04, F00847, Trial Judgment and Sentence with One Confidential Annex, 16 July 2024 (“Trial Judgment”).

² KSC-CA-2024-03, F00847, Appeal Judgment, 14 July 2025 (“Appeal Judgment”).

³ Appeal Judgment, paras. 934, 935.

4. On 14 October 2025, the Defence submitted its Request for Protection of Legality before the Supreme Court Panel.⁴

5. On 9 March 2026, the Supreme Court Panel issued its Decision⁵, rejecting the request in its entirety, having found no violations of Mr Shala's fair trial rights, the Law, or procedures. It also found the Defence's Grounds 5 and 8 inadmissible.

6. On 24 March 2026, the Defence submitted a request for an extension of time to file its referral to the Constitutional Court.⁶

7. On 31 March 2026, The Specialist Chamber of the Constitutional Court ("SCCC") extended the deadline for the Defence to file the present referral to 1 June 2026.⁷

III. ADMISSIBILITY

8. Pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1) of the SCCC Rules, an individual may lodge a referral before the SCCC in relation to violations by the Specialist Chambers of his individual rights and freedoms guaranteed by the Kosovo Constitution, subject to two conditions:

(i) the individual has exhausted all remedies provided by law with regard to the alleged violation of his rights; and

(ii) the referral is filed within two months from the date of the notification of the final ruling concerning the alleged violation.

⁴ KSC-SC-2025-06, PL001-F00001, Defence Request for Protection of Legality with confidential annex 1, 14 October 2025 ("Defence Request for Protection of Legality").

⁵ KSC-SC-2025-06, PL001-F00008, Decision on Defence Request for Protection of Legality, 9 March 2026 ("Impugned Decision").

⁶ KSC-CC-2026-32, F00001, Defence Request for an Extension of Time to File a Referral to the Constitutional Court, 24 March 2026.

⁷ KSC-CC-2026-32, F00003, Decision on Pjetër Shala's Request for an Extension of Time to File a Referral to the Constitutional Court, 31 March 2026.

9. The Referral concerns Mr Shala's fundamental rights as guaranteed by Articles 30, 31, and 33 of the Constitution, Articles 6 and 7 of the ECHR and Articles 14, 15, and 26 of the ICCPR.

10. The Referral is admissible given that: (i) Mr Shala has exhausted all available legal remedies upon the Supreme Court Panel's Decision on the Defence Request for Protection of Legality, wherein all Grounds raised by the Defence were dismissed⁸; (ii) Mr Shala is a direct victim of the violation of his rights as guaranteed by Articles 30, 31, and 33 of the Constitution, Articles 6 and 7 of the ECHR and Articles 14, 15, and 26 of the ICCPR; and (iii) the Referral is filed before the SCCC within two months – plus the additional three weeks granted by the Constitutional Court Panel – from the date of the notification of the final ruling concerning the violation of Mr Shala's rights, namely, 9 March 2026.

A. Mr Shala Has Exhausted All Legal Remedies

11. At the present stage of proceedings, the Law does not allow any further appeals nor other (extra)ordinary remedies for the afore-mentioned violation of Mr Shala's rights. Mr Shala – having made a request for Protection of Legality which was subsequently denied in its entirety - has exhausted all available legal remedies.⁹

B. Victim Status of Mr Shala

12. The Kosovo Constitutional Court has interpreted constitutional provisions on fundamental rights and freedoms in a manner consistent with the case-law of the European Court of Human Rights ("ECtHR"), pursuant to Article 53 of the Constitution.¹⁰ Established case-law of the ECtHR requires, with regard to an

⁸ Impugned Decision, para. 178.

⁹ Impugned Decision, para. 178.

¹⁰ KSC-CC-2022-14, F00009, Decision on the Referral of Jakup Krasniqi Concerning the Legality of Charging Joint Criminal Enterprise and the Referral of Kadri Veseli Concerning Decision of the Appeals Panel on Challenges to the Jurisdiction of the Specialist Chambers, 13 June 2022, para. 45, *referring* to Constitutional Court, KI 207/19, Judgment, 10 December 2020 (5 January 2021), para. 109; KI 195/19, 5

applicant's victim status, that "[t]he individual concerned must be able to show that he or she was 'directly affected' by the measure complained of"¹¹ and that "there must be a sufficiently direct link between the applicants and the harm which they consider they have sustained on account of the alleged violation".¹²

13. Mr Shala is directly affected by the Impugned Decision, wherein the Supreme Court Panel dismissed Mr Shala's arguments that (i) the delay between the events and his trial undermined the reliability and fairness of the proceedings;¹³ (ii) the admission and reliance on self-incriminatory statements violated Mr Shala's right to legal assistance;¹⁴ (iii) his conviction on the basis of liability through Joint Criminal Enterprise ("JCE") and for the war crime of arbitrary detention in a non-international armed conflict ("NIAC") breached the principle of legality;¹⁵ (iv) the lack of notice and precision in the charges violated Mr Shala's right to a fair trial;¹⁶ and lastly (v) the Trial and Appeals Panel made errors in sentencing, violating the principle of legality and equality before law.¹⁷ The cumulative effect of such findings is the clear violation of Mr Shala's rights as guaranteed by Articles 30, 31, and 33 of the Constitution, Articles 6 and 7 of the ECHR and Articles 14, 15, and 26 of the ICCPR.

May 2021, para. 94; KI 12/19, Resolution on inadmissibility, 10 April 2019, para. 38; *Gëzim and Makfire Kastrati against Municipal Court in Prishtina and Kosovo Judicial Council*, KI 41/12, Judgment, 25 January 2013, para. 58.

¹¹ ECtHR, *Kalfagiannis and Pospert v. Greece*, no. 74435/14, 9 June 2020, para. 40, referring to *British Gurkha Welfare Society and Others v. the United Kingdom*, no. 44818/11, 15 September 2016, para. 50; *Association des amis de Saint Raphaël et de Fréjus et autres v. France* (dec.), no. 45053/98, 29 February 2000; *Dayras and Others and the association "SOS Sexisme" v. France* (dec.), no. 65390/01, 6 January 2005; and *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy (no.2)*, no. 26740/02, 31 May 2007, para. 20.

¹² ECtHR, *Kalfagiannis and Pospert v. Greece*, para. 44, referring to *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, ECHR 2004-III, para. 35.

¹³ Impugned Decision, para. 28.

¹⁴ Impugned Decision, paras. 49; 60.

¹⁵ Impugned Decision, para. 65.

¹⁶ Impugned Decision, para. 83.

¹⁷ Impugned Decision, para. 167.

14. Considering the continuous impact of the violation of Mr Shala's rights and in line with the relevant jurisprudence of the ECtHR,¹⁸ the violations described must be remedied. Hence, the examination of the Referral at present is warranted. Direct and timely redress are crucial aspects of the effectiveness of Mr Shala's right to a remedy.¹⁹

IV. MERITS

COMPLAINT 1: PASSAGE OF TIME

15. The trial of Mr Shala began 24 years after the events described in the charges against him. Such an extraordinary lapse of time has affected the reliability and probative value of evidence and the effectiveness of investigations. Consequently, Mr Shala has suffered prejudice (i) as a result of the undue delay in the investigation and prosecution of the case and; (ii) the double standard applied by the Trial Panel in utilising the passage of time as a justification for evidentiary imprecisions of the Prosecution's witnesses. This has resulted in a violation of Mr Shala's right to a fair trial pursuant to Article 31(2) of the Constitution and Article 6(1) of the ECHR.

16. The prejudice occasioned by this delay is both profound and self-evident. Witnesses who might once have provided exculpatory accounts have long since died or cannot be traced; those who remain alive are subject to the inevitable deterioration of memory over time. The detention rooms, together with their walls and windows, have been demolished, and no one can now state with certainty what events unfolded within those walls or what could once have been seen through those windows.

¹⁸ See, *inter alia*, KSC-CC-2022-18, F00004, Decision on the Referral of Pjetër Shala to the Constitutional Court Panel Concerning Fundamental Rights Guaranteed by Articles 30 and 31 of the Kosovo Constitution and Article 5 of the European Convention on Human Rights, 22 August 2022 (confidential), para. 18, referring to ECtHR, *Osmanov and Husseinov v. Bulgaria* (dec.), nos. 54178/00 and 59901/00, 4 September 2003.

¹⁹ ECtHR, *Bezmyannaya v. Russia*, no. 21851/03, 22 December 2009, para. 21 (with respect to the rights guaranteed under Article 6 of the ECHR). See also *Mandić and Jović v. Slovenia*, nos. 5774/10 and 5985/10, 20 October 2010, para. 107; *Melnik v. Ukraine*, no. 72286/01, 28 March 2006, para. 68 (with respect to the rights secured under Article 3 of the ECHR).

17. The Supreme Court Panel found that Mr Shala only referred to Mr Ruzhdi Saramati as a witness for which he was deprived of the opportunity to explore for the purposes of his defence, and that he “did not explain what impact, if at all, this witness could have had on his case, nor did he argue on appeal that the absence of this person’s specific testimony was “fatal” to the proceedings in his case”.²⁰

18. However, on the contrary, the Defence clearly noted that this witness was a key figure in Kukës in 1999.²¹ Thus, it goes without saying that the Defence’s inability to obtain statements from said witness – which might have contradicted the Prosecution’s account – infringed on Mr Shala’s ability to conduct proper investigations and infringed the principle of equality of arms, constituting a violation of his right to a fair trial as guaranteed under Article 31(2) of the Constitution and Article 6(1) of the ECHR.

19. In any case, the undue delay in which this case has been investigated and prosecuted by the Prosecution is highly prejudicial and it cannot be denied that in the 24 years since the events described in the charges against Mr Shala and the trial, there will be loss of information and opportunities that are bound to have a negative effect on the Defence. Unlike the Prosecution, the Defence did not have the possibility to conduct investigations and collect evidence since at least 2002. Due to the age of the case, the Defence cannot know what evidence, witness recollections, record, or investigative opportunities have been lost, degraded, or rendered unavailable over time. As a result, the prejudice is not limited to identifiable missing evidence but extends to information and avenues of investigation that can no longer be discovered or reconstructed because of the delay.

20. Moreover, The Supreme Court Panel noted the existence of “sufficient safeguards” for the evaluation of evidence in both the Trial and Appeals Panels’

²⁰ Impugned Decision, para. 39.

²¹ Defence Request for Protection of Legality, para. 9.

judgments.²² However, rather than examining whether the identified safeguards operated to mitigate the specific reliability concerns raised by the Defence,²³ the Supreme Court Panel treated the mere existence of these safeguards as dispositive. In doing so, it failed to engage with the Defence's central contention that the passage of time had effectively been used to *excuse*, rather than critically evaluate, evidentiary deficiencies, which resulted in a breach of Mr Shala's fair trial rights pursuant to Article 31(2) of the Constitution and Article 6(1) of the ECHR.

21. Ultimately, neither the Trial, Appeals, nor Supreme Court Panel remedied the passage of time and its impact on the fairness of proceedings and Mr Shala's rights, as set out above. Furthermore, the Supreme Court Panel failed to recognise such violations and failed to address whether the passage of time was used merely as contextual background or, impermissibly, as a justification to excuse evidentiary weaknesses.

22. Thus, the failure to consider the passage of time on the impact on the fairness of the proceedings by the Trial Panel, Appeals Panel, and the Supreme Court Panel gives rise to a violation of Mr Shala's right to a fair trial as guaranteed by Article 31(2) of the Constitution and Article 6(1) of the ECHR.

COMPLAINT 2: ADMISSION AND RELIANCE ON SELF-INCRIMINATORY STATEMENTS IN VIOLATION OF THE RIGHT TO LEGAL ASSISTANCE

23. Mr Shala complains of a violation of his right to a fair trial as guaranteed by Article 31(2) of the Constitution and 6(1) of the ECHR as a result of the Trial Panel's decision to admit and rely on statements made by Mr Shala during interviews conducted before the International Criminal Tribunal for the former Yugoslavia ("ICTY") in 2005 and 2007; to the Belgian Federal Judicial Police in 2016; and to the

²² Impugned Decision, para. 38.

²³ Defence Request for Protection of Legality, paras. 9-10; KSC-CA-2024-03, F00029COR, Corrected Version of Defence Appeal Brief with confidential Annexes 1 and 2, 25 November 2024, para. 190.

Belgian Federal Judicial Police and SPO in 2019, despite the fact that he was questioned as a suspect without the benefit of legal assistance either prior to or during questioning.²⁴ For all of these interviews, Mr Shala was questioned without a lawyer present and without being afforded an opportunity to consult with a lawyer prior to or during his questioning.²⁵

24. At the time of these interviews, Mr Shala, who never completed schooling and only attained minimal education, was vulnerable and unable to appreciate the gravity of the situation and its potential consequences without specialised legal advice.²⁶ In addition, Mr Shala felt reluctant to rely on the interpreter who did not appear objective to him and Mr Shala preferred to communicate in French despite his limited command of the language and the complexity of the issues discussed.²⁷ The decision on admission, the availability of such statements for the purposes of deliberations, and the reliance on such statements for the purposes of incriminating judicial findings violated Mr Shala's fundamental right to a fair trial under Article 6(1) of the ECHR and Article 31(2) of the Constitution.

25. The Appeals Panel confirmed that Mr Shala's right to adequate legal assistance was violated in the 2016 Belgian interview and that this procedural failure constituted a violation of the standards of international human rights law. However, the Appeals

²⁴ KSC-BC-2020-04, F00364COR, Corrected version of Decision concerning prior statements given by Pjetër Shala, 6 December 2022, paras. 52, 114(b); Trial Judgment, para. 1126.

²⁵ KSC-BC-2020-04, F00364COR, Corrected version of Decision concerning prior statements given by Pjetër Shala, 6 December 2022, paras. 52, 80, 110; T000-2742-T000-2742-Alb and Eng Transcript-A, pp. 2, 5-7; T001-0105-1-A-TR, pp. 1-2; T001-0105-3-A-TR, pp. 1-2; 074117-074129-ET Revised, p. 3; 066843-066855-ET Revised RED, p. 3; 066888-TR-ET Part 1 Revised, p. 95.

²⁶ KSC-BC-2020-04, F00358, Defence Response to Prosecution Motion for Admission of Accused's Statements, 24 November 2022, para. 20.

²⁷ KSC-BC-2020-04, F00821, Defence Final Trial Brief with Annex 1, 25 March 2024, para. 303; KSC-BC-2020-04, F00358, Defence Response to Prosecution Motion for Admission of Accused's Statements, 24 November 2022, para. 64.

Panel nevertheless allowed the resulting statements to remain “available for consideration” by the Trial Panel.²⁸

26. Furthermore, the 2019 Belgian statement was negatively tainted by his 2016 Belgian statement and therefore, according to the doctrine of the fruit of the poisonous tree - as developed by the ECtHR and similarly applied at the ICTY and at the ICTR - the breach of Mr Shala’s rights during the 2016 Belgian statement taints the legitimacy of admission of the 2019 statement.²⁹ Nonetheless, the Appeals and Supreme Court Panel erred in disregarding the manifest unlawfulness resulting from the circumstances in which those statements were taken and declaring that “there is no ‘poisonous tree’” and that the “issue” related to the statements “had no impact” on the fairness of the proceedings.³⁰

27. Any statement obtained from Mr Shala in breach of his right to legal assistance cannot be used as evidence against him as required by his right against self-

²⁸ KSC-BC-2020-04, IA006-F00007, Decision on Shala’s Appeal Against Decision Concerning Prior Statements, 5 May 2023, paras. 78, 81, 109.

²⁹ ECtHR, *Panovits v. Cyprus*, no. 4268/04, Judgment, 11 December 2008, paras. 75, 84-86; ECtHR, *Salduz v. Turkey*, Grand Chamber, no. 36391/02, Judgment, 27 November 2008, paras. 54-55; ECtHR, *Öcalan v. Turkey*, Grand Chamber, no. 46221/99, Judgment, 12 May 2005, para. 148; ECtHR, *Lanz v. Austria*, no. 24430/94, Judgment, 31 January 2002, para. 50; ECtHR, *John Murray v. the United Kingdom*, Grand Chamber, no. 18731/91, Judgment, 8 February 1996, para. 45; ECtHR, *Funke v. France*, no. 10828/84, Judgment, 25 February 1993, para. 44. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, Article 3. ECtHR, *Panovits v. Cyprus*, no. 4268/04, Judgment, 11 December 2008, paras. 85-86; ECtHR, *Yaremenko v. Ukraine* (No. 2), no. 66338/09, Judgment, 30 April 2015, paras. 66-67; ECtHR, *Gäfgen v. Germany*, Grand Chamber, no. 22978/05, Judgment, 1 June 2010, para. 168; ECtHR, *K.S. and M.S. v. Germany*, no. 33696/11, Judgment, Concurring Opinion of Judge Vehabović, 6 October 2016; ECtHR, *Dvorski v. Croatia*, Grand Chamber, no. 25703/11, Judgment, 20 October 2015, para. 111. See also ECtHR, *Dvorski v. Croatia*, Grand Chamber, no. 25703/11, Judgment, Concurring Opinion of Judge Zupančič, paras. 5-6. ICTR, *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumpatse, 2 November 2007, paras. 23-32; ICTR, *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Prosecutor’s Motion for the Admission of Certain Materials Under Rule 89(c), 14 October 2004, para. 21; ICTY, *The Prosecutor v. Delalić et al.*, Case No. IT-96-21, Decision on Zdravko Mucić’s Motion for the Exclusion of Evidence, 2 September 1997, paras. 43, 55.

³⁰ Appeal Judgment, para. 115. See also Appeal Judgment, para. 110; Impugned Decision, para. 57.

incrimination.³¹ In the present case, however, all of Mr Shala's prior statements, including the 2016 statement, formed part of the evidentiary record of the case. It means they were available for consideration and were relied upon by the Trial Panel for its verdict. The absence of explicit reference to them in the reasoning underpinning the incriminating findings does not mean that the statements were without influence on the Panel's assessment or deliberative process. To suggest otherwise would be to disregard the legal and practical consequences of their admission into evidence and the express declaration that they were available for consideration. In fact, the Trial Panel specifically noted that "the Panel considered, during its deliberations, the evidence that was part of the evidentiary record" and that the evaluation of evidence is a holistic evaluation "weighing of *all* the evidence taken as a whole".³² Thus, contrary to the assessment of the Supreme Court Panel, all of Mr Shala's statements, including the 2016 statement, were considered in the deliberative process and thus, the Trial Panel indeed relied on tainted evidence for its verdict.³³

28. The Trial Panel relied heavily on Mr Shala's statements from the two ICTY interviews and the 2019 Belgian interview to make findings regarding: (i) Mr Shala's membership of the KLA in 1998 and 1999; ii) the presence of a KLA base at Kukës in May–June 1999; (iii) the use of the Kukës Metal Factory ("KMF"); (iv) the layout of the KMF compound; (v) KLA detention operations at the KMF; (vi) Mr Shala's encounters with TW4-01, [REDACTED], and W04733 at the KMF; (vii) Mr Shala's presence at the KMF during the Indictment Period; (viii) Mr Shala's degree of autonomy and authority within the KLA at the KMF; (ix) Mr Shala's participation in crimes; and (x) Mr Shala's alleged lack of remorse and empathy for the victims.³⁴ The statements were

³¹ ECtHR, *Paolenko v. Russia*, no. 42371/02, Judgment, 1 April 2010, paras. 101, 102 referring to ECtHR, *Jalloh v. Germany*, Grand Chamber, no. 54810/00, Judgment, 11 July 2006, para. 101; ECtHR, *Sejdovic v. Italy*, Grand Chamber, no. 56581/00, Judgment, 1 March 2006, para. 86.

³² Trial Judgment, paras. 75, 78.

³³ Impugned Decision, para. 58.

³⁴ Trial Judgment, paras. 281, 284-293, 297-299, 306-310, 338-340, 348, 352-353, 361, 376-379, 451-455, 850-874, 881-882, 895-903, 910-914, 923-924, 929-931, 951-956, 1010-1011, 1014, 1104, 1107, 1116-1118.

therefore decisive for the outcome of the proceedings and had a prominent role in the Judgment, forming an “integral” part of the probative evidence upon which the conviction was based.³⁵

29. On top of that, the Trial Panel shifted the burden of proof to the Defence and expected the Defence to discredit the Prosecution’s evidence.³⁶ For example, the Trial Panel held that “[h]is statements *do not cast doubt on* the highly consistent and mutually corroborative evidence given by witnesses TW4-01, W04733 and W01448 who were detained at the KMF and were mistreated by him”.³⁷ The language the Trial Panel used in its assessment of the statements, requiring the statements to “discredit” and to “cast doubt on” the Prosecution’s evidence, demonstrate the reversal of the burden of proof.³⁸

30. Lastly, the Defence was prejudiced by the Trial Panel’s choice to issue the admissibility decision concerning Mr Shala’s 2016 and 2019 statements as part of the Trial Judgment. As a result, Mr Shala was deprived of an effective opportunity to respond to the merits of the issues raised in evidence tendered but not yet admitted throughout the trial. Consequently, he could not shape the presentation of his case, jeopardising his right not to incriminate himself any further and had to proceed without knowing whether the incriminatory evidence would form part of the evidentiary record to be relied upon for the judgment. The Appeals Panel noted that the decision made by the Defence not to comment on those statements was deliberate.

³⁵ ECtHR, *Gäfgen v. Germany*, Grand Chamber, no. 22978/05, Judgment, 1 June 2010, para. 164; ECtHR, *Bykov v. Russia*, Grand Chamber, no. 4378/02, Judgment, 10 March 2009, para. 89; ECtHR, *Jalloh v. Germany*, Grand Chamber, no. 54810/00, Judgment, 11 July 2006, para. 96; ECtHR, *Leka v. Albania*, no. 60569/09, Judgment, 5 March 2024, paras. 107-118; ECtHR, *Ayetullah Ay v. Turkey*, nos. 29084/07 and 1191/08, Judgment, 27 October 2020, paras. 123-130. For instance, Trial Judgment, paras. 850-874, 896-897, 910-914.

³⁶ The Appeals Panel erred by failing to acknowledge that the trial was rendered unfair because of the inappropriate reversal of the burden of proof. Appeal Judgment, paras. 159, 160. Trial Judgment, paras. 405, 412-413, 439, 472, 493, 496, 511, 553, 562, 565, 572, 576, 581, 583, 610, 638, 730, 747, 853-873, 910-914.

³⁷ Trial Judgment, para. 913 (emphasis added).

³⁸ ICTR, *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-01-73-A, Appeal Judgment, 16 November 2009, para. 19.

However, it failed to acknowledge that such a choice was compelled by the privilege of non-self-incrimination given that any comment could be considered incriminatory.³⁹

31. Accordingly, the admission and reliance upon Mr Shala's statements for the purposes of his convictions amount to a violation of Mr Shala's fair trial rights under Article 31(2) of the Constitution and Article 6(1) of the ECHR.

COMPLAINT 3: BREACH OF THE PRINCIPLE OF LEGALITY

32. Mr Shala complains of a violation of his rights under Article 33(1) of the Constitution, Article 7(1) of ECHR and, and Article 15(1) ICCPR as a result of the convictions on the basis of liability through JCE and for the war crime of arbitrary detention in a NIAC.

33. The principle *nullum crimen sine lege* which is guaranteed by Article 33 of the Constitution and Article 7 of the ECHR prohibits the retroactive application of criminal law, including modes of liability. Neither JCE liability nor arbitrary detention in a NIAC formed part of Kosovo law or customary international law in 1999 and were not foreseeable nor accessible to Mr Shala.

34. Regarding the JCE liability, the Trial Panel failed to respect this principle by interpreting Article 16(1)(a) of the Law to include JCE liability, despite the absence of any express reference to such liability. The Panel should have adopted the most favourable reading to the accused, which means excluding any mode of liability not expressly stated. Instead, the Trial Panel construed Article 16(1)(a) to Mr Shala's detriment and in violation of Article 7(1) of the ECHR. In 1999, JCE liability had not been codified domestically, nor sufficiently crystallised in customary international law; its declaration as such in the *Tadić Appeal Judgment* post-dated the alleged JCE in

³⁹ Appeal Judgment, para. 149.

this case.⁴⁰ Given Mr Shala's limited education and lack of senior role, such liability was neither foreseeable nor accessible to him.

35. This is especially problematic since Mr Shala was convicted for murder despite the fact that the Trial Panel found that the death of the victims was caused by the acts and omissions of others.⁴¹ Due to the JCE liability, Mr Shala's criminal liability was improperly extended despite the fact that Mr Shala did not play an integral role in the killing and no evidence demonstrated that he possessed the requisite intent.

36. With regard to the conviction for arbitrary detention in a NIAC, Article 14(1)(c) of the Law enumerates an exhaustive list of specific acts that constitute war crimes in a NIAC, none of which include arbitrary detention. Additionally, in 1999, there was no settled state practice or *opinio juris* establishing arbitrary detention in a NIAC as a crime under international law. The expansive interpretation of Article 14(1)(c) of the Law amounts to retroactive criminalisation that violates the principle of legality.

37. No reasonable tribunal could have found that, in 1999, the offence of arbitrary detention in a non-international armed conflict was prescribed by law, formed part of the applicable law in Kosovo, and was defined with sufficient clarity and foreseeability to satisfy the requirements of Article 7 of the ECHR.

38. For these reasons, the convictions entered on these bases contravene the principle of legality as guaranteed by Article 7(1) of the ECHR, Article 33(1) of the Constitution and Article 15(1) of the ICCPR.

COMPLAINT 4: INSUFFICIENT NOTICE OF PROSECUTION'S CASE

39. Mr Shala complains of a violation of his rights under Article 30(1) of the Constitution and Article 6(3) of the ECHR as a result of a defective Indictment that failed to provide sufficient particulars regarding the members of the alleged JCE and

⁴⁰ ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Appeal Judgment, 15 July 1999.

⁴¹ Trial Judgment, paras. 988, 989.

the victims of the alleged crimes. As a result of this, the Defence was deprived of an effective notice of charges against Mr Shala and a genuine opportunity to investigate and respond to the charges against him, which constitutes a violation of Article 30(1) of the Constitution and Article 6(3) of the ECHR.

40. Regarding the alleged JCE members, considering the limited scope of the case and the Prosecution's knowledge of the relevant names, the lack of sufficient particulars as to the members of the alleged JCE failed to satisfy the minimum pleading requirements. The unfairness was further exacerbated by the Trial Panel that, instead of remedying the issue, impermissibly expanded the Prosecution's case and considered Osman Kryeziu and Fatmir Limaj as the JCE members.⁴² The Trial Panel found that Fatmir Limaj was a member of the alleged JCE despite his name never appearing in the Indictment or the Prosecution's Pre-Trial Brief.⁴³ If, on the basis of the Prosecution's evidence, it was sufficiently clear to the Trial Panel that Limaj formed part of the alleged JCE, it should have been equally clear to the Prosecution, who should have included his name in the Indictment.⁴⁴ The Panel also found that the JCE included Osman Kryeziu, who was a Prosecution witness since the beginning of the proceedings.⁴⁵ Yet at no point did the Prosecution plead that he was part of the JCE nor did the Trial Panel oblige the Prosecution to file an amended indictment to correct this deficiency. Had the Defence been aware that Osman Kryeziu would have been considered a member of the alleged JCE, it would have been able to make informed decisions regarding the witness, for example, by challenging the admission of his

⁴² Appeal Judgment, para. 216 (noting that "the SPO never alleged [that these two individuals] were alleged members of the JCE").

⁴³ Trial Judgment, paras. 357, 363, 1003.

⁴⁴ The Prosecution does not refer to Fatmir Limaj in relation to charged crimes until filing of its Final Trial Brief (*see* KSC-BC-2020-04, F00818, Prosecution Final Trial Brief with confidential Annexes 1 and 3 and public Annex 2, 25 March 2024, paras. 74, 213). The Defence was prejudiced by the lack of notice and could not have foreseen the necessity to challenge the evidence of W04733 with contradictory evidence of W01448 regarding the presence of Fatmir Limaj during 20 May 1999 incident.

⁴⁵ KSC-BC-2020-04, F00135/A02, ANNEX 2 to Submission of Pre-Trial Brief, with witness and exhibit lists - List of Witnesses, 28 January 2022, p. 17.

untested evidence.⁴⁶ However, the Defence was not afforded this opportunity and instead, it was forced to act without the foresight that the witness was relevant and that he would be considered as a member of the JCE by the Trial Panel.

41. As to the lack of specificity regarding the identity of the victims, while the Appeals Panel found a defect in the Indictment with respect to the number of victims contained therein, it incorrectly determined that the conviction of crimes in respect of nine additional victims did not amount to a conviction of a new charge or a radical transformation of the Prosecution's case against Mr Shala.⁴⁷ The Supreme Court Panel erred by agreeing with the Appeals Panel's conclusion that the lack of specificity in the Indictment had been remedied.⁴⁸

42. As a result, Mr Shala was deprived of effective notice of the charges against him and a genuine opportunity to investigate and respond to them, in violation of the rights afforded to him under Article 30(1) of the Constitution and Article 6(3) of the ECHR.

COMPLAINT 5: ERRORS IN SENTENCING

43. Mr Shala complains of a violation of his rights under Article 33(2) and (4) of the Constitution and Article 7(1) of the ECHR as a result of treating the applicable law on sentencing - the 1976 Socialist Federal Republic of Yugoslavia ("SFRY") Criminal Code which prescribed a sentencing range of five to fifteen years' of imprisonment - as a mere factor to be taken into account, rather than a mandatory sentencing range. This also constitutes a violation of Article 24(1) of the Constitution and Articles 14(1) and 26 of the ICCPR, given the failure to ensure equality before law in imposing Mr Shala's sentence.

⁴⁶ KSC-BC-2020-04, F00481, Defence Response to the Prosecution Motion for Admission of Evidence Pursuant to Rule 155 with confidential Annex 1, 6 April 2023, para. 33.

⁴⁷ Appeal Judgment, para. 195.

⁴⁸ Impugned Decision, para. 91.

44. The 1976 SFRY Criminal Code was the applicable law in 1999 and as such, should have been applied in determining of Mr Shala's sentence. A law that has entered into force sixteen years after the alleged offense, such as the Law on Specialist Chambers and Specialist Prosecutor's Office, cannot lawfully be considered as the applicable sentencing framework.

45. Additionally, the imposed sentence fails to ensure equality before law by failing to attach appropriate weight to sentence in comparable and related cases. The *Geci* and *Krasniqi* cases concern individuals who, according to the Trial Panel's findings, had commanding roles at the KMF⁴⁹ with greater responsibility than Mr Shala. Sabit Geci was sentenced to 15 years' imprisonment for inhumane treatment, violation of bodily integrity, and torture in Kukës but also in Cahan.⁵⁰ Xhemshit Krasniqi was initially sentenced to 8 years' imprisonment for illegal detention, torture, violation of bodily integrity or health of witnesses and unknown civilians, which was reduced to 7 years on appeal.⁵¹ Considering the position of Sabit Geci and Xhemshit Krasniqi in the KLA command structure, as recognized by the Trial Panel, as well as their greater involvement and control over the indicted crimes, the sentence for Mr Shala is disproportionate to his alleged involvement.

46. Therefore, the Appeals Panel, by unlawfully applying a broader sentencing framework that permits a life imprisonment, expanded the applicable ceiling of punishment. Consequently, this violated the principle of legality, Article 33(2) and (4) of the Constitution, Article 7(1) of the ECHR and the principle of equality before law as protected by Article 24(1) of the Constitution and Articles 14 and 26 of the ICCPR.

V. CONCLUSION

⁴⁹ Trial Judgment, paras. 345, 349. The Panel admitted that Mr Shala did not hold a commanding role, Trial Judgment, paras. 1104, 1108.

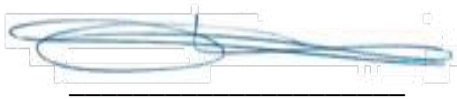
⁵⁰ District Court of Mitrovica of Kosovo, *Case against Sabit Geci et al.*, Case P. no. 45/2010, Trial Judgement, 29 July 2011.

⁵¹ Basic Court of Mitrovica of Kosovo, *Case against Xhemshit Krasniqi*, Case P. no. 184/15, Judgment, 8 August 2016.

47. In light of the above, the Defence requests the Constitutional Court Panel to acknowledge the violations of Mr Shala's fundamental rights and seeks (i) a declaration of the violation of his rights as guaranteed under Articles 24, 30, 31 and 33 of the Constitution, Articles 6 and 7 of the European Convention on Human Rights and Articles 14, 15 and 26 of the ICCPR; and (ii) a referral of the case to the appropriate panel for a new determination that is aligned with the Constitutional Court Panel's conclusions regarding the violations.

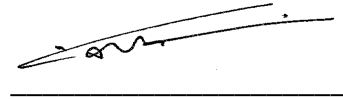
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