



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-04

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 12 June 2020

Language: English

Classification: Public

**Public Redacted Version of the
Decision on the Confirmation of the Indictment Against Pjetër Shala**

Specialist Prosecutor
Jack Smith

Counsel for the Accused
Jean-Louis Gilissen

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 39(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 86 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby issues the following decision.

I. PROCEDURAL BACKGROUND

1. On 14 February 2020, the Specialist Prosecutor submitted for confirmation a strictly confidential and *ex parte* indictment ("Indictment") together with evidentiary material supporting the facts underpinning the charges and a detailed outline demonstrating the relevance of each item of evidentiary material to each allegation.²

2. On 28 February 2020, the Pre-Trial Judge issued an order, in which he requested the Specialist Prosecutor to, *inter alia*, prepare a revised Indictment in order to provide more specificity and clarity with respect to the charges and to submit additional evidentiary material.³ The Pre-Trial Judge also requested that the Specialist Prosecutor file separate submissions regarding (i) the jurisdiction of the Specialist Chambers ("SC") over the war crime of arbitrary detention under Article 14(1)(c) of the Law, as pleaded, or under Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (1976) ("SFRY Criminal Code") and (ii) the legal elements of this offence.⁴

¹ KSC-BC-2020-04, F00001, President, *Decision Assigning a Pre-Trial Judge*, 14 February 2020, public.

² KSC-BC-2020-04, F00002, Specialist Prosecutor, *Submission of Indictment for Confirmation and Related Requests* ("Initial Submission"), 14 February 2020, strictly confidential and *ex parte*, with Annexes 1-3, strictly confidential and *ex parte*.

³ KSC-BC-2020-04, F00003, Pre-Trial Judge, *Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules* ("Order Pursuant to Rule 86(4)"), 28 February 2020, strictly confidential and *ex parte*, para. 21(b) and (c).

⁴ Order Pursuant to Rule 86(4), para. 21(d).

3. On 18 March 2020, the Specialist Prosecutor submitted a revised Indictment for confirmation (“Revised Indictment”) together with additional material and other information, as requested.⁵

4. On 26 May 2020, the Pre-Trial Judge issued an order setting a target date for the issuance of this decision.⁶

II. SUBMISSIONS

5. In the Revised Indictment, the Specialist Prosecutor’s Office (“SPO”) charges Pjetër Shala (“Mr Shala”) with war crimes under Article 14(1)(c) of the Law committed in the context of a non-international armed conflict.⁷ More specifically, the SPO alleges that arbitrary detention (Count 1),⁸ cruel treatment (Count 2),⁹ and torture (Count 3)¹⁰ were committed during the period from on or about 17 May 1999 until on or about 5 June 1999¹¹ in Kukës, Albania.¹² In addition, the SPO alleges that murder (Count 4) was committed on or about 5 June 1999 in the same location.¹³ According to the SPO, Mr Shala incurs individual criminal responsibility under Article 16(1)(a) of the Law for having physically committed the crimes under Counts 1-3.¹⁴ It is also alleged that Mr Shala incurs individual criminal responsibility for committing, between approximately 17 May 1999 and 5 June 1999, through his participation in a joint criminal enterprise (in its basic and

⁵ KSC-BC-2020-04, F00004, Specialist Prosecutor, *Submission of Revised Indictment for Confirmation and Related Requests* (“Second Submission”), 18 March 2020, strictly confidential and *ex parte* with Annexes 1 (“Revised Indictment”), 2 and 3, strictly confidential and *ex parte*.

⁶ KSC-BC-2020-04, F00005, Pre-Trial Judge, *Order Setting Target Date for a Decision Pursuant to Article 39(2)*, 26 May 2020, strictly confidential and *ex parte*.

⁷ Revised Indictment, paras 3-4.

⁸ Revised Indictment, paras 14-17, 31.

⁹ Revised Indictment, paras 18-25, 31.

¹⁰ Revised Indictment, paras 26-27, 31.

¹¹ Revised Indictment, paras 8, 14-15, 18, 28.

¹² Revised Indictment, paras 3-7, 31.

¹³ Revised Indictment, paras 28-29, 31.

¹⁴ Revised Indictment, paras 13, 30.

extended forms)¹⁵ and/or having aided and abetted¹⁶ the crimes under Counts 1-4. Additionally, the SPO contends that Mr Shala is responsible for the aforementioned war crimes set out in Counts 1-4 under Articles 15(1)(a) and 16(2) of the Law in conjunction with Articles 22, 24, 26, 30 and 142 of the SFRY Criminal Code.¹⁷

6. The SPO requests that the Pre-Trial Judge (i) confirm the Revised Indictment¹⁸ and (ii) issue an arrest warrant, authorisation for search and seizure, and transfer order.¹⁹

7. In addition, the SPO requests the temporary non-disclosure of the Revised Indictment and related documents to the public until further order²⁰ as well as the interim non-disclosure of the identities of witnesses and victims until appropriate protective measures have been ordered.²¹ The SPO submits that there are real risks of Mr Shala's flight,²² interference with witnesses and victims,²³ and the commission of further crimes²⁴ that demonstrate good cause justifying these requests.

8. To effectuate the non-disclosure of the identities of victims and witnesses, the SPO requests: (i) the non-disclosure of the name and identifying information of witnesses and victims to the public; (ii) redactions to the supporting material of

¹⁵ Revised Indictment, paras 8-11, 30. With respect to Count 4, the SPO alternatively alleges that Mr Shala committed the crime through the extended form of joint criminal enterprise, *see* Revised Indictment, para. 9.

¹⁶ Revised Indictment, paras 12, 30.

¹⁷ Revised Indictment, para. 31.

¹⁸ Second Submission, para. 24(a).

¹⁹ The SPO incorporates by reference its submissions made with respect to these requests in its Initial Submission, Sections B(4)-(5), *see* Second Submission, paras 7, 24(b).

²⁰ The SPO incorporates by reference its submissions made with respect to these requests in its Initial Submission, Section D, *see* Second Submission, paras 7-8, 24(d).

²¹ The SPO incorporates by reference its submissions made with respect to these requests in its Initial Submission, Section C, *see* Second Submission, paras 7-8, 24(c).

²² Initial Submission, paras 6-7.

²³ Initial Submission, paras 8-10.

²⁴ Initial Submission, para. 11.

identifying information and the assignment of provisional pseudonyms to witnesses and victims named in the supporting material prior to disclosure to the Accused or the public; and (iii) the continuation of non-disclosure until further decision on application from the SPO or after hearing the SPO.²⁵

III. APPLICABLE LAW

A. REVIEW OF INDICTMENT

9. Article 39(1) and (2) of the Law and Rule 86(4) of the Rules provide that the Pre-Trial Judge shall have the power to review an indictment. Pursuant to Article 39(2) of the Law and Rule 86(4) and (5) of the Rules, if satisfied that a well-grounded suspicion has been established by the Specialist Prosecutor, the Pre-Trial Judge shall confirm the indictment. If the Pre-Trial Judge is not so satisfied, the indictment or charges therein shall be dismissed. Rule 86(5) of the Rules provides that the Pre-Trial Judge must render a reasoned decision.

10. Pursuant to 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.

11. Upon confirmation of any charge(s) of the indictment, Rule 86(6) of the Rules provides that the suspect shall have the status of an Accused and the Pre-Trial

²⁵ Initial Submission, para. 18(i)-(iii).

Judge may issue any other decisions or orders provided for in Article 39(3) of the Law.

12. Rule 86(8) and (10) of the Rules provides that the Registrar shall retain and prepare certified copies of the confirmed indictment bearing the seal of the Specialist Chambers and notify the President of the confirmed indictment.

B. CRIMES AND MODES OF LIABILITY

13. In addition to adjudicating in accordance with the Constitution of Kosovo, the Law, provisions of Kosovo law expressly incorporated in the Law, and international human rights law, Articles 3(2)(d), (3), and 12 of the Law provide that the SC shall apply customary international law, as applicable at the time the relevant crimes were committed. In determining customary international law at the time the crimes were committed, a Judge may be assisted by sources of international law, including subsidiary sources such as the jurisprudence from the international *ad hoc* tribunals, the International Criminal Court, and other criminal courts.

14. Article 14(1)(c) of the Law provides that for the purpose of this Law, under customary international law during the temporal jurisdiction of the SC, war crimes means, in the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 (“Common Article 3”), including any of the following acts committed against persons taking no active part in hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause: (i) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture; (ii) committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) taking of hostages; and (iv) the passing of sentences and the

carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.

15. For crimes in Article 14 of the Law, Article 16(1)(a) provides, *inter alia*, that a person who instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of such a crime shall be individually responsible for the crime.

C. MAINTAINING CONFIDENTIALITY

16. Article 39(11) of the Law stipulates that the Pre-Trial Judge may, where necessary, provide for the protection of victims and witnesses.

17. Rule 85(4) of the Rules provides that all documents and information submitted by the SPO to the Pre-Trial Judge during investigation shall remain at the least confidential and *ex parte*, subject to Rule 102 of the Rules.

18. Rule 88 of the Rules provides that the indictment shall be made public upon confirmation by the Pre-Trial Judge. However, in exceptional circumstances, upon a showing of good cause, the Pre-Trial Judge may order the temporary non-disclosure of the indictment, related documents or information to the public until further order. The indictment shall in any case be made public, with redactions, where necessary, no later than the Accused's initial appearance. The SPO may disclose an indictment or part thereof to the authorities of a Third State or another entity, if deemed necessary for the purposes of an investigation or prosecution.

19. Rule 102(1)(a) of the Rules provides that the SPO shall make available to the Accused, as soon as possible, but at least within 30 days of the initial appearance of the Accused, the supporting material to the indictment submitted for confirmation as well as all statements obtained from the Accused.

20. Rule 105(1) of the Rules provides that the SPO may apply to the Panel for interim non-disclosure of the identity of a witness or victim participating in the proceedings until appropriate protective measures have been ordered.

IV. JURISDICTION

21. In order to be confirmed, an indictment must fulfil the subject matter and temporal requirements, and must have either a territorial or personal basis for jurisdiction.

A. SUBJECT MATTER JURISDICTION

22. Article 6 of the Law provides that the SC shall have jurisdiction over crimes set out in Articles 12-15 of the Law. The war crimes of cruel treatment, torture and murder (Counts 2-4), as pleaded by the Specialist Prosecutor, are listed in Article 14(1)(c)(i) of the Law and therefore fall within the subject matter jurisdiction of the Specialist Chambers.

23. In the Revised Indictment, the SPO submits that Mr Shala is also criminally responsible for the war crime of arbitrary detention (Count 1), in violation of Article 14(1)(c) of the Law.²⁶ While this provision does not explicitly list arbitrary detention as a war crime in non-international armed conflict, it does not limit the crimes falling under SC jurisdiction to those expressly enumerated therein. Nonetheless, in order to exercise jurisdiction over a war crime that is not listed in Article 14(1)(c)(i)-(iv) of the Law, such crime must: (i) constitute a serious violation of Common Article 3; and (ii) be prohibited by customary international law at the time of its commission, in conformity with Articles 3(2)(d) and 12 of the Law.

²⁶ Revised Indictment, paras 14-17, 31.

24. Common Article 3 provides that “persons taking no active part in hostilities, including [...] those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely [...]”. This protection, also stipulated in Article 4(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) of 8 June 1977, must be enforced by all parties to the armed conflict and must be afforded to all detained persons, irrespective of the reason for deprivation of liberty.²⁷ The requirement of humane treatment constitutes a fundamental obligation of international humanitarian law (“IHL”) and reflects customary international law.²⁸ It is broader than the prohibitions expressly listed in Common Article 3, which serve as examples of conduct that is indisputably in violation of the provision.²⁹

25. Deprivation of liberty without a legal basis or in violation of basic safeguards is not compatible with and violates the requirement of humane treatment of all persons placed *hors de combat*, including by detention, as enshrined in Common Article 3.³⁰

²⁷ ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd edition, 2016 (“2016 ICRC Commentary”) states regarding Common Article 3: “it is undisputed that the substantive provisions of common Article 3 bind all such armed groups when they are party to an armed conflict” (para. 508). See also ICRC, *Commentary on the Additional Protocols to the Geneva Conventions*, 1987 (“1987 ICRC Commentary to Additional Protocol II”) regarding Article 1 (paras 4460, 4470). Regarding Article 5, the 1987 ICRC Commentary to Additional Protocol II clarifies that the expression “those who are responsible for the internment or the detention” refers to “persons who are responsible de facto for camps, prisons, or any other places of detention, independently of any recognized legal authority” (para. 4582).

²⁸ See Rule 87, in Henckaerts J.-M., Doswald-Beck L., *Customary International Humanitarian Law* (“CIHL Study”), Vol. I (Rules), Cambridge University Press 2005, p. 306. See also ICJ, *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, [Judgment of 27 June 1986](#), para. 218; ICTY, *Prosecutor v. Tadić*, IT-94-1-AR72, Appeals Chamber, [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction](#) (“Tadić Decision on Jurisdiction”), 2 October 1995, para. 98.

²⁹ 2016 ICRC Commentary regarding Common Article 3, para. 555; ICTY, *Prosecutor v. Aleksovski*, I-95-14/1, Trial Chamber, [Judgment](#), 25 June 1999, para. 49.

³⁰ Rule 99, CIHL Study, Vol. I (Rules), p. 344.

26. Customary international law prohibits arbitrary deprivation of liberty. Extensive state practice, in the form of, *inter alia*, military manuals, criminal legislation, documents of international organisations and conferences, and international judicial and quasi-judicial bodies, establishes the applicability of this prohibition in both international and non-international armed conflicts.³¹ This has also been confirmed by the ICRC in Rule 99 of its 2005 Customary International Humanitarian Law Study.³²

27. In light of the foregoing, the Pre-Trial Judge finds that arbitrary detention constitutes a serious violation of Common Article 3 and was prohibited by customary international law at the time of commission of the crimes alleged in the Revised Indictment. The status of the law, at the national and international level, was sufficiently clear and foreseeable to anticipate that depriving someone of his or her liberty in an arbitrary manner might give rise to individual criminal responsibility.³³

28. Accordingly, the Pre-Trial Judge concludes that the SC may exercise jurisdiction over this war crime under Article 14(1)(c) in combination with Article 12 of the Law.

³¹ See the practice referred to in Rule 99, CIHL Study, Vol. I (Rules), p. 347; Vol. II (Practice), pp. 2331-2344, in particular pp. 2331 (para. 2555), 2332 (para. 2563), 2333 (paras 2576, 2579, 2580), 2334 (para. 2593), 2335 (paras 2599, 2600, 2605), 2336 (paras 2606, 2607, 2608, 2611); UN Security Council Resolutions: 1019 (1995), U.N. Doc. S/RES/1019, 9 November 1995; 1034 (1995), U.N. Doc. S/RES/1034, 21 December 1995; UN General Assembly Resolution 50/193 (1996), U.N. Doc. A/RES/50/193, 11 March 1996; UN Commission on Human Rights, Situation of human rights in the Republic of Bosnia and Herzegovina, the State of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro), U.N. Doc. E/CN.4/RES/1996/71, 23 April 1996; UN Commission on Human Rights, Situation of human rights in the Sudan, U.N. Doc. E/CN.4/RES/1996/73, 23 April 1996, para. 15. See also Article 142 of the SFRY Criminal Code.

³² Rule 99, CIHL Study, Vol. I (Rules), p. 344.

³³ See also Article 142 of the SFRY Criminal Code.

B. TEMPORAL JURISDICTION

29. Article 7 of the Law provides that the SC shall have jurisdiction over crimes within its subject matter jurisdiction, which occurred between 1 January 1998 and 31 December 2000. As the Specialist Prosecutor has alleged that the crimes under Counts 1-3 were committed between approximately 17 May 1999 and 5 June 1999, and the crime under Count 4 was committed on or about 5 June 1999,³⁴ the Pre-Trial Judge finds that the crimes fall within SC temporal jurisdiction.

C. TERRITORIAL OR PERSONAL JURISDICTION

30. Pursuant to Article 8 of the Law, the SC shall have jurisdiction over crimes within its subject matter jurisdiction, which were either commenced or committed in Kosovo. Pursuant to Article 9(2) of the Law, the SC shall have personal jurisdiction when the suspect is a person having Kosovo/Federal Republic of Yugoslavia ("FRY") citizenship (active personality principle) or crimes are committed against persons of Kosovo/FRY citizenship (passive personality principle), wherever those crimes were committed. The territorial and personal jurisdictional bases are thus in the alternative. Satisfying one of these requirements is sufficient to reach an affirmative finding on jurisdiction.

31. In the present case, the suspect, Mr Shala, was allegedly a citizen of the FRY at all times relevant to the Revised Indictment,³⁵ and the victims of the alleged crimes were all FRY citizens.³⁶ The Pre-Trial Judge therefore finds that both the active and passive personal jurisdiction requirements of Article 9(2) of the Law have been met.

³⁴ Revised Indictment, para. 31; [REDACTED].

³⁵ Revised Indictment, para. 1; KSC-BC-2020-04, F00002/A03, Annex 3 to Submission of Indictment for confirmation and related requests (Supplementary Proces-Verbal 002157/2016), 14 February 2020, p. 5 (074120).

³⁶ Revised Indictment, para. 6; [REDACTED].

32. In light of the foregoing, the Pre-Trial Judge finds that the case falls within the jurisdiction of the SC.

V. LEGAL REQUIREMENTS

A. NATURE AND SCOPE OF THE REVIEW

1. Nature of the Review

33. The confirmation of the indictment is an *ex parte* process without the involvement of the Defence. Judicial review ensures that only those charges are considered at trial for which sufficient evidence has been presented. It also ensures that the indictment provides the Accused with sufficient information to understand clearly and fully the nature and cause of the charges against him or her with a view to preparing an adequate defence.³⁷

34. Pursuant to Article 38(4) of the Law and Rule 86(1) of the Rules, the Specialist Prosecutor submits the indictment, together with supporting material, for review by the Pre-Trial Judge. During the review process, the Pre-Trial Judge determines whether the indictment meets the requirements under Rule 86(3) of the Rules, in particular the sufficiency of information as regards the name and particulars of the suspect, the statement of facts and the statement of crimes,³⁸ and whether there is a need to revert to the Specialist Prosecutor, pursuant to Rule 86(4)(a)-(c) of the Rules. Notably, the Pre-Trial Judge may request or permit the Specialist Prosecutor to present additional material in support of any or all charges.

³⁷ Order Pursuant to Rule 86(4), para. 9.

³⁸ In this respect, the Pre-Trial Judge must give due regard to the rights of the Accused set out in Article 21(4)(a), (c) and (d) of the Law, which echoes Article 6(1), (3)(a) and (b) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14(3)(a), (b) and (c) of the International Covenant on Civil and Political Rights.

Subsequently, pursuant to Article 39(2) of the Law and the chapeau of Rule 86(4) of the Rules, the Pre-Trial Judge examines the supporting material in relation to each charge in the indictment, to determine whether the SPO has established a well-grounded suspicion that the suspect committed or participated in the commission of a crime under the jurisdiction of the SC.

35. While neither the Law nor the Rules define well-grounded suspicion, the threshold is clearly differentiated from other evidentiary standards provided in the SC's legal framework. The Law establishes four progressively higher evidentiary thresholds: (i) grounds to believe (in Article 38(3)(a) of the Law regarding the status of suspects); (ii) grounded suspicion (in Article 41(6) of the Law regarding arrest warrants by the SC or arrest orders by the SPO); (iii) well-grounded suspicion (in Article 39(3) of the Law and Rule 86(4) of the Rules regarding the confirmation of an indictment); and (iv) beyond reasonable doubt (in Article 21(3) of the Law and Rule 158(3) of the Rules regarding convictions). As the threshold for triggering proceedings against an Accused, well-grounded suspicion is necessarily more onerous than those required for ascertaining suspects and ordering arrests, and is evidently less demanding than the standard for conviction following trial.

36. The Pre-Trial Judge notes that, according to Article 19.1.12 of the Kosovo Criminal Procedure Code of 2012, No. 04/L-123 ("CPC"), well-grounded suspicion is reached when the evidence "would satisfy an objective observer that a criminal offence has occurred and the defendant has committed the offence".³⁹ Notably, it is not sufficient, as required for grounded suspicion under Article 19.1.9 CPC, that

³⁹ "Objective" is defined as "not influenced by personal feelings or opinions in considering and representing facts; impartial, detached", see *OED Online* (Oxford University Press, December 2019), available at <https://www.oed.com/view/Entry/129634?redirectedFrom=objective#eid> (last accessed 12 June 2020).

the objective observer be satisfied that “the person concerned is more likely than not to have committed the offence”.

37. Therefore, while falling short of the certainty of a proven fact, determining the existence of well-grounded suspicion nevertheless requires a conviction on the part of the Pre-Trial Judge, beyond mere theory or suspicion, that (i) the contextual elements of the crime (if any) are present; (ii) the underlying acts or crimes have indeed occurred; and (iii) the suspect committed or participated in the commission of the crime through the alleged mode(s) of liability. The Pre-Trial Judge bases such findings on concrete and tangible supporting material, demonstrating a clear line of reasoning underpinning the charges in the indictment. In so doing, the Pre-Trial Judge evaluates the supporting material holistically, without scrutinising each item of evidentiary material in isolation.⁴⁰

2. Scope of the Review

38. Pursuant to Rule 86(4) of the Rules, to determine whether a well-grounded suspicion exists, the Pre-Trial Judge examines the indictment, the detailed outline and the supporting material only, without regard to any extraneous information or material, albeit publicly available. Accordingly, the Pre-Trial Judge may confirm or dismiss the indictment based solely on the information and evidentiary material submitted by the SPO.⁴¹

39. As part of the review process, the Pre-Trial Judge conducts a preliminary assessment of the supporting material, without encroaching on the prerogatives of the Trial Panel in determining the admissibility and weight of the evidence, as

⁴⁰ Similarly, ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, [Decision on the Confirmation of Charges](#), 29 January 2007, para. 39; *Prosecutor v. Gbagbo*, ICC-02/11-01/11-656-Red, Pre-Trial Chamber I, [Decision on the Confirmation of Charges Against Laurent Gbagbo](#), 12 June 2014, para. 22.

⁴¹ Similarly, STL, *Prosecutor v. Ayyash et al.*, STL-17-07/I/AC/R176bis, Appeals Chamber, [Interlocutory Decision on the Applicable Law: Criminal Association and Review of the Indictment](#), 18 October 2017, para. 111.

set out in Rules 137-139 of the Rules.⁴² That being said, the Pre-Trial Judge shall not rely on material that is manifestly (i) non-authentic or (ii) obtained by means of a violation of the Law, the Rules, or standards of international human rights law, or under torture or any other inhumane or degrading treatment, as provided in Rule 138(2)-(3) of the Rules.

B. ELEMENTS OF CRIMES

1. Contextual Requirements: War Crimes

40. The contextual requirements for war crimes committed in the context of an armed conflict not of an international character consist of: (i) the existence of an armed conflict of certain intensity in the territory of a state between organs of authority and organised armed groups or between such groups; (ii) a nexus between the underlying offence and the armed conflict; and (iii) knowledge of the existence of the armed conflict.

(a) Existence of an armed conflict

41. Article 14(2) of the Law provides that armed conflicts not of an international character take place in the territory of a state when there is protracted armed conflict between the organs of authority and organised armed groups or between such groups.⁴³

⁴² Similarly, 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. 26.

⁴³ ICTY, [Tadić Decision on Jurisdiction](#), para. 70; *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-A, Appeals Chamber, [Judgment](#) (“Boškoski and Tarčulovski Appeal Judgment”), 19 May 2010, para. 21. See also ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2359, Trial Chamber VI, [Judgment](#) (“Ntaganda Trial Judgment”), 8 July 2019, para. 701; *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Trial Chamber I, [Judgment Pursuant to Article 74 of the Statute](#) (“Lubanga Trial Judgment”), 14 March 2012, para. 533.

42. Armed conflicts are characterised by the outbreak of hostilities that take place in the territory of a state.

43. In relation to the parties to the hostilities, Article 14(2) of the Law mentions two categories of possible parties to the armed conflict that ought to be construed in compliance with customary international law. “Organs of authority” include governmental authorities, such as a state’s regular armed forces, police units, national guards or other authorities of a similar nature,⁴⁴ including armed groups and militias incorporated in armed forces.⁴⁵ “Organised armed groups” imply a degree of organisation but “do not necessarily need to be as organised as the armed forces of a State”.⁴⁶ They do not need to carry out sustained and concerted military operations, but they must be sufficiently organised to confront each other with military means.⁴⁷ When deciding whether a non-state entity can carry out protracted armed violence, the following indicative factors may be taken into account: (i) existence of a command structure, including headquarters, a general staff or high command, identifiable ranks and positions, and internal regulations; (ii) issuance of political statements or communiqués and the use of spokespersons; (iii) operational capacity and the ability to carry out military operations; (iv) logistical capacity, including the availability of weapons and equipment, and the capacity to move troops and to recruit and train personnel; (v) territorial control, including a division into zones of responsibility; (vi) internal disciplinary system, including the implementation of IHL through the armed group’s ranks;

⁴⁴ ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-T, Trial Chamber, [Judgement](#) (“*Boškoski and Tarčulovski* Trial Judgment”), 10 July 2008, paras 178, 195.

⁴⁵ Article 43(3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), of 8 June 1977.

⁴⁶ ICTY, [Boškoski and Tarčulovski Trial Judgment](#), paras 195, 197; *Prosecutor v. Orić*, IT-03-68-T, Trial Chamber, [Judgement](#) (“*Orić* Trial Judgment”), 30 June 2006, para. 254; *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Trial Chamber, [Judgement](#) (“*Haradinaj* Trial Judgment”), 3 April 2008, para. 60; *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Chamber, [Judgement](#) (“*Limaj et al.* Trial Judgment”), 30 November 2005, para. 89.

⁴⁷ ICTY, [Boškoski and Tarčulovski Trial Judgment](#), paras 197-198.

and (vii) ability to speak with one voice on behalf of the armed group, for example in political negotiations or cease-fire agreements.⁴⁸

44. In relation to the level of intensity of the conflict, Article 14(2) of the Law requires that hostilities between the parties must reach a certain degree of intensity, exceeding internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature. In this context, the notion of “protracted armed violence” informs the intensity test as it refers “more to the intensity of the armed violence than its duration”.⁴⁹ Intensity may be inferred from, for example: (i) the seriousness and frequency of attacks; (ii) their spread over the territory and over a period of time, and whether any ceasefire orders have been issued; (iii) the increase and number of forces deployed; (iv) the mobilisation and distribution of weapons amongst the conflict parties; (v) the type of weapons used, in particular the use of heavy artillery; (vi) the type of military equipment, in particular the use of tanks; (vii) whether the situation attracted the attention of the United Nations Security Council, or other international organisations; (viii) the effects on the civilian population, the extent of destruction and the number of persons killed or displaced; and (ix) the manner in which the armed group was treated by others and under which body of law it claimed to be operating.⁵⁰

⁴⁸ See also Article 1(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International armed Conflicts (Protocol II), of 8 June 1977 (“Additional Protocol II”). See also ICTY, [Boškoski and Tarčulovski Trial Judgment](#), paras 194-203. However, the degree of organisation for an armed group to a conflict to which Common Article 3 applies, does not need to be at the level of organisation required for parties to Additional Protocol II armed conflicts, see ICTY, [Boškoski and Tarčulovski Trial Judgment](#), para. 197.

⁴⁹ ICTY, [Haradinaj Trial Judgment](#), para. 49. See also *Prosecutor v. Kordić and Čerkez*, IT-95-14-A, Appeals Chamber, [Judgment](#) (“Kordić and Čerkez Appeal Judgment”), 17 December 2004, para. 341; *Prosecutor v. Tadić*, IT-94-1-T, Trial Chamber, [Opinion and Judgment](#), 7 May 1997, para. 562.

⁵⁰ ICTY, [Boškoski and Tarčulovski Trial Judgment](#), para. 177, confirmed by the [Boškoski and Tarčulovski Appeal Judgment](#), paras 22 and 24; ICC, [Ntaganda Trial Judgment](#), paras 703-704, 716; *Prosecutor v. Bemba*, ICC-01/05-01/08-3343, Trial Chamber III, [Judgment Pursuant to Article 74 of the Statute](#) (“Bemba Trial Judgment”), 21 March 2016, para. 137; [Lubanga Trial Judgment](#), para. 538; *Prosecutor v. Katanga*,

45. Lastly, the temporal and geographical scope of armed conflicts not of an international character extends beyond the exact time and place of hostilities; the applicable rules apply beyond the cessation of hostilities until a peaceful settlement is achieved.⁵¹ Thus, the norms of IHL apply regardless of whether actual combat activities are taking place in a particular location.⁵² In case of persons whose liberty has been restricted, IHL continues to apply until such deprivation or restriction of liberty comes to an end.⁵³

(b) Nexus to the armed conflict

46. The alleged crimes must be sufficiently linked with the armed conflict. The armed conflict need not have been causal to the commission of the crime charged, but it must have played, at a minimum, a substantial part in the perpetrator's ability to commit that crime, his or her decision to commit it, the manner in which it was committed, or the purpose for which it was committed.⁵⁴ In determining the nexus, heed may be paid: (i) to the status of the perpetrator and victim; (ii) whether the act serves the ultimate goal of a military campaign; or (iii) whether the act was committed as part of, or in context of, the perpetrator's official duties.⁵⁵

ICC-01/04-01/07-3436-tENG, Trial Chamber II, [Judgment Pursuant to Article 74 of the Statute](#) ("Katanga Trial Judgment"), 7 March 2014, paras 1186-1187.

⁵¹ ICTY, [Tadić Decision on Jurisdiction](#), paras 67-70; [Limaj et al. Trial Judgment](#), para. 84; *Prosecutor v. Vasiljević*, IT-98-32-T, Trial Chamber, [Judgment](#), 29 November 2002, para. 25; *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Appeals Chamber, [Judgement](#) ("Kunarac et al. Appeal Judgment"), 12 June 2002, para. 57.

⁵² ICTY, [Orić Trial Judgment](#), para. 255; [Tadić Decision on Jurisdiction](#), para. 70.

⁵³ 1987 ICRC Commentary to Additional Protocol II regarding Article 2(2), paras 4491-4496.

⁵⁴ ICTY, [Kunarac et al. Appeal Judgment](#), para. 58; *Prosecutor v. Stakić*, IT-97-24-A, Appeals Chamber, [Judgement](#) ("Stakić Appeal Judgment"), 22 March 2006, para. 342; [Tadić Decision on Jurisdiction](#), para. 70; ICTR, *Setako v. Prosecutor*, ICTR-04-81-A, Appeals Chamber, [Judgement](#) ("Setako Appeal Judgment"), 28 September 2011, para. 249; *Rutaganda v. Prosecutor*, ICTR-96-3-A, Appeals Chamber, [Judgement](#), 26 May 2003, paras 569-570.

⁵⁵ ICTY, [Kunarac et al. Appeal Judgment](#), para. 59; ICC, [Bemba Trial Judgment](#), para. 143.

(c) Awareness of the existence of the armed conflict

47. The perpetrator must be aware of the factual circumstances establishing the armed conflict not of an international character.⁵⁶ Knowledge of the correct legal classification of the armed conflict is not necessary.⁵⁷

2. Specific Requirements: War Crimes

48. All crimes must be committed against protected persons. The chapeau of Article 14(1)(c) of the Law referring to Common Article 3(1) requires that the victim was not actively taking part in the hostilities at the time the offence was committed.⁵⁸ Active participation in hostilities means carrying out acts as part of the conduct of hostilities intended by their nature or purpose to cause actual harm to the personnel or equipment of the adverse party.⁵⁹ Persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, are protected under Common Article 3. The perpetrator must know or should

⁵⁶ ICTY, *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Appeals Chamber, [Judgement](#) (“*Naletilić and Martinović* Appeal Judgment”), 3 May 2006, paras 118-121; [Boškoski and Tarčulovski Trial Judgment](#), para. 295. See also ICC, [Ntaganda Trial Judgment](#), para. 698.

⁵⁷ ICTY, [Naletilić and Martinović Appeal Judgment](#), para. 119; [Kordić and Čerkez Appeal Judgment](#), para. 311.

⁵⁸ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.9, Appeals Chamber, [Decision on Appeal from Denial of Judgment of Acquittal for Hostage-Taking](#) (“*Karadžić* Decision 11 December 2012”), 11 December 2012, paras 8, 21; IT-95-5/18-AR72.5, Appeals Chamber, [Decision on Appeal of Trial Chamber’s Decision on Preliminary Motion to Dismiss Count 11 of the Indictment](#), 9 July 2009, paras 22-26; [Boškoski and Tarčulovski Appeal Judgment](#), para. 66; *Prosecutor v. Strugar*, IT-01-42-A, Appeals Chamber, [Judgement](#) (“*Strugar* Appeal Judgment”), 17 July 2008, paras 172, 178; *Prosecutor v. Mucić et al.*, IT-96-21-A, Appeals Chamber, [Judgement](#) (“*Mucić et al.* Appeal Judgment”), 20 February 2001, paras 420, 424.

⁵⁹ ICTY, [Strugar Appeal Judgment](#), para. 178; ICC, [Katanga Trial Judgment](#), paras 789-790. See also Article 13(3) of Additional Protocol II.

have known the status of the victims as persons taking no active part in the hostilities.⁶⁰

(a) Arbitrary detention

Material elements (actus reus)

49. The crime of arbitrary detention as a war crime, within the meaning of Article 14(1)(c) of the Law, is committed through an act or omission resulting in depriving a person not taking active part in hostilities of his or her liberty without legal basis or without complying with basic procedural safeguards.

50. The deprivation of liberty is without legal basis when it is justified neither by criminal proceedings nor by reasonable grounds to believe that security concerns make it absolutely necessary.⁶¹

51. The basic procedural safeguards encompass, in particular (i) the obligation to inform a person who is arrested of the reasons for arrest; (ii) the obligation to bring a person arrested on a criminal charge promptly before a judge or other competent authority; and (iii) the obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention.⁶²

52. When assessing the compliance with basic procedural safeguards, it is irrelevant whether (i) the initial deprivation of liberty was justified⁶³ or (ii) the

⁶⁰ ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Trial Chamber, [Judgment](#) (“*Mladić Trial Judgment*”), 22 November 2017, para. 3017; [Karadžić Decision 11 December 2012](#), para. 22; [Boškoski and Tarčulovski Appeal Judgment](#), para. 66.

⁶¹ ICTY, [Mucić et al. Appeal Judgment](#), paras 320-322; [Kordić and Čerkez Appeal Judgment](#), paras 72-73; ECCC, *Co-Prosecutors v. Kaing Guek Eav*, 001/18-07-2007/ECCC/TC, Trial Chamber, [Judgement](#) (“*Duch Trial Judgment*”), 26 July 2010, para. 465.

⁶² Rule 99, CIHL Study, Vol. I (Rules), pp. 349-350. See also Article 6, Additional Protocol II.

⁶³ ICTY, [Mucić et al. Appeal Judgment](#), para. 322. See also ICTY, [Kordić and Čerkez Appeal Judgment](#), para. 73; ECCC, [Duch Trial Judgment](#), para. 465.

perpetrator is personally responsible for the failure to have the detainee's procedural rights respected.⁶⁴

Mental element (mens rea)

53. The perpetrator must have acted intentionally in relation to his or her conduct. In addition, the perpetrator must have no reasonable grounds to believe that security concerns of the parties to the conflict make the detention absolutely necessary, or the perpetrator must know that the detainees have not been afforded the requisite procedural guarantees, or be reckless as to whether those guarantees have been afforded or not.⁶⁵

(b) Cruel Treatment

Material elements (actus reus)

54. The crime of cruel treatment as a war crime, within the meaning of Article 14(1)(c)(i) of the Law, is committed through an act or omission, which causes serious mental or physical suffering or injury, or which constitutes a serious attack on human dignity.⁶⁶

55. The seriousness of the harm or injury must be assessed on a case-by-case basis, taking into account such factors as: (i) the severity of the alleged conduct; (ii) the nature of the act or omission; (iii) the context in which the conduct occurred; (iv) its duration and/or repetition; (v) its physical and mental effects on the victim;

⁶⁴ ICTY, [Mucić et al. Appeal Judgment](#), para. 379.

⁶⁵ ICTY, [Mucić et al. Appeal Judgment](#), para. 378.

⁶⁶ ICTY, [Mucić et al. Appeal Judgment](#), paras 424. See also ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Appeals Chamber, [Judgement](#) ("Haradinaj Appeal Judgment"), 19 July 2010, paras 93-94; *Prosecutor v. Blaškić*, IT-95-14-A, Appeals Chamber, [Judgement](#) ("Blaškić Appeal Judgment"), 29 July 2004, para. 595.

and (vi) the personal circumstances of the victim, including age, gender, and health.⁶⁷

56. The suffering inflicted by the act upon the victim does not need to be lasting, so long as it is real and serious.⁶⁸

Mental element (mens rea)

57. The perpetrator must have acted intentionally or with the knowledge that the serious mental or physical suffering or injury, or the serious attack on human dignity, was a probable consequence of the act or omission.⁶⁹

(c) Torture

Material elements (actus reus)

58. The crime of torture as a war crime, within the meaning of Article 14(1)(c)(i) of the Law, is committed by an act or omission inflicting severe pain or suffering, whether physical or mental upon another person.⁷⁰ Whether an act or omission qualifies as an act of torture must be considered on a case-by-case basis,⁷¹ taking into account, for example, the (i) nature and context of the infliction of pain;

⁶⁷ ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Chamber, [Judgement](#) (“*Popović et al.* Trial Judgment”), 10 June 2010, fn. 3249; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeals Chamber, [Judgement](#) (“*Kvočka et al.* Appeal Judgment”), 28 February 2005, paras 584-585; *Prosecutor v. Mrkšić et al.*, IT-95-13/1-T, Trial Chamber, [Judgement](#) (“*Mrkšić et al.* Trial Judgment”), 27 September 2007, paras 516, 525, 537; *Prosecutor v. Krnojelac*, IT-97-25-T, Trial Chamber, [Judgment](#) (“*Krnojelac* Trial Judgment”), 15 March 2002, para. 131.

⁶⁸ ICTY, [Krnojelac Trial Judgment](#), para. 131.

⁶⁹ ICTY, [Popović et al. Trial Judgment](#), para. 974; [Mrkšić et al. Trial Judgment](#), para. 516; [Limaj et al. Trial Judgment](#), para. 231; *Prosecutor v. Strugar*, IT-01-42-T, Trial Chamber, [Judgement](#), 31 January 2005, para. 261.

⁷⁰ ICTY, [Haradinaj Appeal Judgment](#), para. 290; [Kunarac et al. Appeal Judgment](#), para. 142. See also ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Pre-Trial Chamber II, [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Gombo](#), 15 June 2009, para. 292; ECCC, [Duch Trial Judgment](#), para. 354.

⁷¹ ICTY, *Prosecutor v. Brđanin*, IT-99-36-A, Appeals Chamber, [Judgement](#) (“*Brđanin* Appeal Judgment”), 3 April 2007, para. 251; [Naletilić and Martinović Appeal Judgment](#), para. 299; [Kunarac et al. Appeal Judgment](#), para. 149.

(ii) premeditation and institutionalisation of the ill-treatment; (iii) physical condition of the victim; (iv) manner and method used; (v) position of inferiority of the victim; (vi) extent to which an individual has been mistreated over a prolonged period of time; (vii) subjection to repeated or various forms of mistreatment that are inter-related, follow a pattern, or are directed to the same prohibited goal.⁷² Conditions imposed during detention such as beatings, sexual violence, prolonged denial of sleep, food, hygiene and medical assistance, as well as threats to torture, rape, or kill relatives have been considered sufficiently severe as to amount to torture.⁷³

59. The consequences of the act or omission need not be visible on the victim to constitute torture, nor is there a requirement that the injury be permanent.⁷⁴ There is no requirement that the perpetrator acted in a public official capacity or as person in authority.⁷⁵

Mental element (mens rea)

60. The perpetrator must have inflicted the pain or suffering intentionally and for such purpose as obtaining information or a confession, or punishing, intimidating, coercing or discriminating against, on any ground, the victim or a third person.⁷⁶ It is sufficient that one of the prohibited purposes forms part of the motivation

⁷² ICTY, *Prosecutor v. Simić et al.*, IT-95-9-T, Trial Chamber, [Judgement](#) (“*Simić et al* Trial Judgment”), 17 October 2003, para. 80, referring to the [Krnojelac Trial Judgment](#), para. 182. See also ECCC, [Duch Trial Judgment](#), para. 355.

⁷³ ECCC, [Duch Trial Judgment](#), para. 355, referring to ICTY, *Prosecutor v. Mucić et al.*, IT-96-21-T, Trial Chamber, [Judgement](#) (“*Mucić et al.* Trial Judgment”), 16 November 1998, para. 467; *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Trial Chamber, [Judgement](#) (“*Kvočka et al.* Trial Judgment”), 2 November 2001, para. 151.

⁷⁴ ECCC, [Duch Trial Judgment](#), para. 355.

⁷⁵ ICTY, [Kunarac et al. Appeal Judgment](#), para. 148; [Kvočka et al. Appeal Judgment](#), para. 284.

⁷⁶ ICTY, [Kunarac et al. Appeal Judgment](#), para. 153; [Limaj et al. Trial Judgment](#), paras 235, 239; ECCC, [Duch Trial Judgment](#), para. 356.

behind the conduct; it need not be the “predominant or sole purpose” behind the infliction of severe pain or suffering.⁷⁷

(d) Murder

Material elements (actus reus)

61. The crime of murder as a war crime, within the meaning of Article 14(1)(c)(i) of the Law, is committed through an act or omission resulting in the death of a person.⁷⁸

Mental element (mens rea)

62. The perpetrator must have killed the person intentionally or wilfully caused serious bodily harm, which the perpetrator should reasonably have known might lead to death.⁷⁹

C. MODES OF LIABILITY

63. The Specialist Prosecutor pleads the following modes of liability: commission, both direct commission and commission pursuant to a joint criminal enterprise, as well as aiding and abetting.⁸⁰ The objective and subjective elements of these modes of liability are set out below.

⁷⁷ ICTY, [Simić et al Trial Judgment](#), para. 81; [Kvočka et al. Trial Judgment](#), para. 153; [Mucić et al. Trial Judgment](#), para. 470; ECCC, [Duch Trial Judgment](#), para. 356.

⁷⁸ ICTY, [Kvočka et al. Appeal Judgment](#), paras 259-261; [Krnojelac Trial Judgment](#), paras 326-327.

⁷⁹ ICTY, [Mladić Trial Judgment](#), para. 3050; [Kvočka et al. Appeal Judgment](#), para. 261; ICTR, [Setako Appeal Judgment](#), para. 257; ECCC, [Duch Trial Judgment](#), para. 333.

⁸⁰ Revised Indictment, para. 30.

1. Direct Commission (Article 16(1)(a) of the Law)

(a) Objective elements

64. Direct commission requires that the perpetrator physically carries out the objective elements of a crime, or omits to act when required to do so under the law.⁸¹

(b) Subjective element

65. The perpetrator must intend to commit the crime or must act in the awareness of the substantial likelihood that the crime would occur as a consequence of his or her conduct.⁸²

2. Joint Criminal Enterprise (Article 16(1)(a) of the Law)

66. Joint Criminal Enterprise (“JCE”) as mode of liability encompasses three forms or categories (basic, systemic, and extended). In the basic form (“JCE I”), several perpetrators act on the basis of a common purpose; in the systemic form (“JCE II”), a variant of the first form, the crimes are committed within an organised system of ill-treatment, by members of military or administrative units, such as in concentration or detention camps; in the extended form (“JCE III”), criminal responsibility is established for acts of a co-perpetrator that go beyond the

⁸¹ ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, [Judgement](#) (“Tadić Appeal Judgment”), 15 July 1999, para. 188; *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Trial Chamber, [Judgement](#), 17 January 2005, para. 694; *Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, Trial Chamber, [Judgement](#) (“Lukić Trial Judgment”), 20 July 2009, paras 897; ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Appeals Chamber, [Judgement](#) (“Nahimana et al. Appeal Judgment”), 28 November 2007, para. 478; *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Appeals Chamber, [Judgment \(Reasons\)](#) (“Kayishema and Ruzindana Appeal Judgment”), 1 June 2001, para. 187.

⁸² ICTY, [Lukić Trial Judgment](#), para. 900; ICTR, [Kayishema and Ruzindana Appeal Judgment](#), para. 187.

common plan, but which were a foreseeable consequence of the realisation of the plan.⁸³

(a) Objective elements

67. All forms of JCE require the following objective elements: (i) a plurality of persons who act pursuant to a common purpose; (ii) a common purpose which amounts to or involves the commission of a crime provided for in the Law; and (iii) participation of the perpetrator in furthering the common design or purpose.⁸⁴

68. *Plurality of persons.* A JCE exists when a plurality of persons participates in the realisation of a common criminal objective.⁸⁵ The persons participating in the criminal enterprise need not be organised in a military, political, or administrative structure.⁸⁶ They must, however, be identified with specificity, for instance by name or by categories or groups of persons.⁸⁷

69. *Common purpose which amounts to or involves the commission of a crime.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect

⁸³ ICTY, [Kvočka et al. Appeal Judgment](#), paras 82-83; *Prosecutor v. Vasiljević*, IT-98-32-A, Appeals Chamber, [Judgment](#) (“Vasiljević Appeal Judgment”), 25 February 2004, para. 98; [Tadić Appeal Judgment](#), paras 196, 202-203, 228. ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber, [Judgment](#) (“Ntakirutimana Appeal Judgment”), 13 December 2004, para. 464.

⁸⁴ ICTY, [Mladić Trial Judgment](#), para. 3561; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, [Public Redacted Version of Judgment Issued on 24 March 2016](#), 24 March 2016, para. 561, referring to the [Tadić Appeal Judgment](#), para. 227; [Stakić Appeal Judgment](#), para. 64. See also ICTR, *Karemura and Ngirumpatse v. Prosecutor*, ICTR-98-44-A, Appeals Chamber, [Judgment](#), 29 September 2014, para. 110; [Ntakirutimana Appeal Judgment](#), paras 461-468; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I, Appeals Chamber, [Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging](#) (“Ayyash et al. Decision on Applicable Law”), 16 February 2011, paras 236-249.

⁸⁵ ICTY, [Haradinaj Trial Judgment](#), para. 138; [Kvočka et al. Trial Judgment](#), para. 307.

⁸⁶ ICTY, [Mladić Trial Judgment](#), para. 3561; [Tadić Appeal Judgment](#), para. 227.

⁸⁷ ICTY, [Mladić Trial Judgment](#), para. 3561; *Prosecutor v. Krajišnik*, IT-00-39-A, Appeals Chamber, [Judgment](#) (“Krajišnik Appeal Judgment”), 17 March 2009, paras 156-157; [Brđanin Appeal Judgment](#), para. 430.

a joint criminal enterprise.⁸⁸ A common purpose does not presume preparatory planning or explicit agreement among JCE participants, or between JCE participants and third persons.⁸⁹ Moreover, a JCE may exist even if none or only some of the physical perpetrators of the crimes are members of the JCE, yet are used by one or more members of the JCE to commit crimes pursuant to the common purpose.⁹⁰

70. In JCE III, the perpetrator is responsible for crimes committed beyond the common purpose, but which are nevertheless an objectively foreseeable consequence of that common purpose.⁹¹

71. *Contribution.* The perpetrator must have participated in the furthering of the common purpose at the core of the JCE by assisting in or contributing to the execution of the common plan or purpose, but need not have performed any part of the *actus reus* of the crime charged.⁹² The perpetrator's contribution to the JCE need not be, as a matter of law, necessary or substantial, but it should at least be a significant contribution to the crimes for which he or she is found responsible.⁹³ The contribution does not need to be criminal *per se*.⁹⁴

(b) Subjective element

72. The subjective elements differ according to the category of JCE under consideration.

⁸⁸ ICTY, [Tadić Appeal Judgment](#), para. 227; *Prosecutor v. Furundžija*, IT-95-17/1-A, Appeals Chamber, [Judgement](#), 21 July 2000, para. 119.

⁸⁹ ICTY, [Haradinaj Trial Judgment](#), para. 138; [Brđanin Appeal Judgment](#), para. 418; [Kvočka et al. Appeal Judgment](#), paras 117-119.

⁹⁰ ICTY, [Mladić Trial Judgment](#), para. 3561; [Krajišnik Appeal Judgment](#), paras 225-226, 235-236; [Brđanin Appeal Judgment](#), paras 410, 413.

⁹¹ See reference to the "person of reasonable prudence" test in STL, [Ayyash et al. Decision on Applicable Law](#), para. 242.

⁹² ICTY, [Krajišnik Appeal Judgment](#), paras 215, 218, 695; [Tadić Appeal Judgment](#), para. 227.

⁹³ ICTY, [Mladić Trial Judgment](#), para. 3561; [Krajišnik Appeal Judgment](#), paras 215, 662, 675, 695-696; [Brđanin Appeal Judgment](#), para. 430; [Kvočka et al. Appeal Judgment](#), paras 97-98.

⁹⁴ ICTY, [Krajišnik Appeal Judgment](#), para. 695.

73. With regard to JCE I, the perpetrator must share the intent with the other participants to carry out the crimes forming part of the common purpose, including the special intent.⁹⁵

74. With regard to JCE II, personal knowledge of the system of ill-treatment is required as well as the intent to further this common concerted system of ill-treatment.⁹⁶

75. With regard to JCE III, the perpetrator is responsible for crimes committed beyond the common purpose, if, under the circumstances of the case, (i) the perpetrator intended to participate in and contribute to the furtherance of the common purpose; (ii) it was foreseeable to the perpetrator that the extended crime might be perpetrated by one or more members of the group or by persons used by any member of the group, in carrying out the common purpose; and (iii) the perpetrator willingly took the risk that the extended crime might occur when participating in the common purpose.⁹⁷ Foreseeability occurs when the perpetrator was aware that the deviatory crime was a possible consequence in the execution of that common purpose.⁹⁸ The perpetrator willingly takes the risk when, with the awareness that such a crime was a possible consequence of the implementation of the enterprise, the perpetrator decides to participate in that enterprise.⁹⁹

76. The following factors, among others, have been considered in determining whether the crime was foreseeable to the perpetrator: (i) knowledge of how the

⁹⁵ ICTY, *Prosecutor v. Đorđević*, IT-05-87/1-A, Appeals Chamber, [Judgement](#), 27 January 2014, para. 468.

⁹⁶ ICTY, [Tadić Appeal Judgment](#), para. 228; [Limaj et al. Trial Judgment](#), para. 511; [Kvočka et al. Appeal Judgment](#), para. 82.

⁹⁷ ICTY, [Tadić Appeal Judgment](#), para. 228; *Prosecutor v. Šainović et al.*, IT-05-87-A, Appeals Chamber, [Judgement](#) (“*Šainović et al. Appeal Judgment*”), 23 January 2014, para. 1557; [Brđanin Appeal Judgment](#), paras 365, 411; [Stakić Appeal Judgment](#), para. 65; [Kvočka et al. Appeal Judgment](#), para. 83.

⁹⁸ The possibility of the extended crime being committed must be sufficiently substantial as to be reasonably foreseeable, based on the information available to the perpetrator at the time. See, ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Appeals Chamber, [Judgement](#) (“*Stanišić and Župljanin Appeal Judgment*”), 30 June 2016, para. 627.

⁹⁹ ICTY, [Brđanin Appeal Judgment](#), para. 411.

JCE is implemented on the ground;¹⁰⁰ (ii) awareness of the criminal background and propensity of members of the enterprise to commit crimes;¹⁰¹ (iii) statements by the perpetrator;¹⁰² (iv) time and location of the deviatory crimes;¹⁰³ (v) knowledge of personal motives of revenge of members of the enterprise or persons used by them;¹⁰⁴ (vi) awareness of the ethnic hatred between the parties to the conflict;¹⁰⁵ and (vii) knowledge of the activities of the perpetrator-subordinates in the mistreatment of the prisoners.¹⁰⁶

3. Aiding and Abetting (Article 16(1)(a) of the Law)

(a) Objective elements

77. Aiding and abetting, either through an act or omission,¹⁰⁷ requires that the perpetrator assists, encourages, or lends moral support to the commission of a crime, where this support has a substantial effect on the perpetration of the crime.¹⁰⁸ Aiding and abetting may occur before, during, or after the commission of the crime and in a different place from the crime.¹⁰⁹ It is unnecessary to establish

¹⁰⁰ ICTY, [Stanišić and Župljanin Appeal Judgment](#), paras 627, 1002.

¹⁰¹ ICTY, [Stanišić and Župljanin Appeal Judgment](#), paras 628, 647, 1002.

¹⁰² ICTY, [Šainović et al. Appeal Judgment](#), para. 1090.

¹⁰³ ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Appeals Chamber, [Judgement](#) (“*Popović et al. Appeal Judgment*”), 30 January 2015, para. 1434.

¹⁰⁴ ICTY, [Popović et al. Appeal Judgment](#), para. 1434.

¹⁰⁵ ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Appeals Chamber, [Judgement](#) (“*Tolimir Appeal Judgment*”), 8 April 2015, para. 520; [Stanišić and Župljanin Appeal Judgment](#), para. 1002

¹⁰⁶ ICTY, [Tolimir Appeal Judgment](#), para. 539.

¹⁰⁷ ICTY, *Mrkšić and Šljivančanin*, IT-95-13/1-A, Appeals Chamber, [Judgement](#) (“*Mrkšić and Šljivančanin Appeal Judgment*”), 5 May 2009, paras 49, 134, 154; [Blaškić Appeal Judgment](#), para. 47.

¹⁰⁸ ICTY, [Tadić Appeal Judgment](#), para. 229; [Vasiljević Appeal Judgment](#), para. 102; *Prosecutor v. Aleksovski*, IT-95-14/1-A, Appeals Chamber, [Judgement](#) (“*Aleksovski Appeal Judgment*”), 24 March 2000, paras 162, 164; ICTR, *Kalimanzira v. Prosecutor*, ICTR-05-88-A, Appeals Chamber, [Judgement](#) (“*Kalimanzira Appeal Judgment*”), 20 October 2010, para. 74; [Nahimana et al. Appeal Judgment](#), para. 482; SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A, Appeals Chamber, [Judgement](#) (“*Taylor Appeal Judgment*”), 26 September 2013, para. 475.

¹⁰⁹ ICTY, [Mrkšić and Šljivančanin Appeal Judgment](#), para. 81; *Prosecutor v. Simić*, IT-95-9-A, Appeals Chamber, [Judgement](#) (“*Simić Appeal Judgment*”), 28 November 2006, para. 85; [Blaškić Appeal Judgment](#), para. 48; [Mucić et al. Appeal Judgment](#), para. 352; ICTR, [Nahimana et al. Appeal Judgment](#), para. 482.

that the crime would not have been committed without the contribution of the aider and abettor¹¹⁰ or that there was a plan or agreement between the aider and abettor and the perpetrator.¹¹¹ There is also no requirement of a showing that the acts of the aider and abettor were specifically directed to assist, encourage, or lend moral support to the commission of the crimes.¹¹²

(b) Subjective element

78. The aider and abettor must have knowledge that his or her acts or omissions assist in the commission of the crime of the perpetrator.¹¹³ In particular, the aider and abettor must be aware of the essential elements of the crime which was ultimately committed,¹¹⁴ including the perpetrator's state of mind and any relevant specific intent,¹¹⁵ although he or she need not share that specific intent.¹¹⁶

VI. CHARGES

79. Before examining the supporting material in relation to each charge and determining whether a well-grounded suspicion has been established against Mr Shala, the Pre-Trial Judge notes that the SPO has complied with the requirements under Rule 86(3) of the Rules by submitting (i) a revised indictment; (ii) evidentiary material supporting the facts underpinning the charges; and (iii) a

¹¹⁰ ICTY, [Mrkšić and Šljivančanin Appeal Judgment](#), para. 81; [Simić Appeal Judgment](#), para. 85; [Blaškić Appeal Judgment](#), para. 48.

¹¹¹ ICTY, [Brđanin Appeal Judgment](#), para. 263; [Tadić Appeal Judgment](#), para. 229.

¹¹² ICTY, [Šainović et al. Appeal Judgment](#), paras 1649-1651.

¹¹³ ICTY, [Vasiljević Appeal Judgment](#), para. 102; ICTR, [Kalimanzira Appeal Judgment](#), para. 86; SCSL, [Taylor Appeal Judgment](#), para. 437.

¹¹⁴ ICTY, [Mrkšić and Šljivančanin Appeal Judgment](#), paras 49, 159; [Brđanin Appeal Judgment](#), para. 484.

¹¹⁵ ICTY, *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, Appeals Chamber, [Judgement](#), 9 May 2007, para. 127; [Vasiljević Appeal Judgment](#), para. 142; *Prosecutor v. Krnojelac*, IT-97-25-A, Appeals Chamber, [Judgement](#) ("Krnojelac Appeal Judgment"), 17 September 2003, para. 52.

¹¹⁶ ICTY, [Simić Appeal Judgment](#), para. 86; [Krnojelac Appeal Judgment](#), para. 52; [Aleksovski Appeal Judgment](#), para. 162.

revised detailed outline demonstrating the relevance of each item of evidentiary material to each allegation.

A. CONTEXTUAL ELEMENTS OF THE CRIMES CHARGED

80. In the Revised Indictment, the SPO alleges that the crimes charged took place in the context of and were associated with an armed conflict in Kosovo, including along the border with Albania, between the Kosovo Liberation Army (“KLA”) and forces of the FRY and Republic of Serbia, including units of the Yugoslav Army (“VJ”), police and other units of the Ministry of Internal Affairs (“MUP”), and other groups fighting on behalf of the FRY and Serbia.¹¹⁷

81. In relation to the existence of hostilities, the Pre-Trial Judge finds that the supporting material indicates that armed violence between forces of the FRY and the Republic of Serbia, on one hand, and the KLA, on the other hand, was ongoing on the territory of Kosovo, including along the border of Albania, before, during and after the period relevant to the charges in the Revised Indictment.¹¹⁸

82. In relation to the parties to the hostilities, the supporting material indicates that forces of the FRY and the Republic of Serbia, including units of the VJ, police and other units of the MUP (“Serbian forces”), acted as organs of authority of the

¹¹⁷ Revised Indictment, paras 3-4. The supporting material suggests that after 24 March 1999, NATO forces engaged in armed hostilities with the FRY/Serbian forces, *see* Revised Indictment, para. 5; 075007-075129, p. 72 (075078). The Pre-Trial Judge notes that distinct armed conflicts may co-exist on the same territory. *Similarly*, ICTY, [Tadić Decision on Jurisdiction](#), paras 72-77; ICC, [Bemba Trial Judgment](#), para. 129; [Lubanga Trial Judgment](#), para. 540. However, noting that the Specialist Prosecutor refers only to armed hostilities between the FRY/Serbian forces and the KLA, the Pre-Trial Judge does not contemplate the existence of an international armed conflict any further.

¹¹⁸ 075007-075129, p. 52 (075058); SPOE00054519-SPOE00054522-ET, p. 3 (SPOE00054521-ET); 075007-075129, p. 1 (075007); 074222-074225, p. 1 (074222); 075007-075129, p. 20 (075026), p. 36 (075042), pp. 43-44 (075049-070050), p. 50 (075056); SPOE00055399-SPOE00055399-ET; 075007-075129, p. 57 (075063); 074226-074231, p. 1 (074226); 075007-075129, pp. 72-75 (075078-075081), pp. 81-83 (075087-075089), pp. 90-91 (075096-075097), pp. 98-100 (075104-075106), pp. 115-117 (075121-075123).

governments of the FRY and the Republic of Serbia.¹¹⁹ Furthermore, the supporting material also indicates that the KLA was an organised entity with a command structure, disposing of a considerable operational capacity and exercising territorial control. In particular, the KLA had a centralised command structure with a General Staff and several operational zones,¹²⁰ each headed by a zone commander and operations staff.¹²¹ The KLA issued orders to its forces and subordinates reported on the execution of the orders.¹²² The KLA General Staff also released communiqués and political declarations published by the Kosovar press.¹²³ KLA records appear to have been dated, numbered and/or archived.¹²⁴ The KLA General Staff had the capacity to order the general mobilisation of the Kosovo population and to compel all inhabitants of Kosovo between the ages of 18 and 50 to report for admission in the KLA ranks.¹²⁵ Moreover, the KLA had the capacity to establish new training centers and to train a large number of new recruits.¹²⁶

83. In relation to the level of intensity, the supporting material indicates that, at least throughout the period relevant to the charges in the Revised Indictment, there was protracted armed violence between Serbian forces and the KLA in various parts of Kosovo,¹²⁷ including along the border with Albania. In particular, reports by the United Nations High Commissioner for Refugees (“UNHCR”) refer

¹¹⁹ 075007-075129, p. 2 (075008), p. 35 (075041), p. 52 (075058), pp. 107-108 (075113-075114), p. 117 (075123).

¹²⁰ [REDACTED]; IT-04-84bis P00073.E; SPOE00054441-SPOE00054442-ET; SPOE00054519-SPOE00054522-ET, p. 4, para. 4 (SPOE00054522-ET); SPOE00055399-SPOE00055399-ET; [REDACTED].

¹²¹ [REDACTED]; IT-04-84bis P00073.E; SPOE00054519-SPOE00054522-ET, p. 4, paras 4, 6-7 (SPOE00054522-ET); SPOE00055399-SPOE00055399-ET.

¹²² IT-04-84 P01189.E; [REDACTED]; IT-04-84bis P00073.E; SPOE00054519-SPOE00054522-ET, p. 4, para. 7 (SPOE00054522-ET).

¹²³ SPOE00054441-SPOE00054442-ET; SPOE00055399-SPOE00055399-ET.

¹²⁴ IT-04-84 P01189.E; [REDACTED]; IT-04-84bis P00073.E; SPOE00054441-SPOE00054442-ET; SPOE00054519-SPOE00054522-ET, p. 4, para. 4 (SPOE00054522-ET); SPOE00055399-SPOE00055399-ET.

¹²⁵ SPOE00054519-SPOE00054522-ET, pp. 3-4, paras 1-3 (SPOE00054521-SPOE00054522-ET).

¹²⁶ SPOE00054519-SPOE00054522-ET, p. 4, para. 5 (SPOE00054522-ET); [REDACTED].

¹²⁷ 075007-075129, p. 1 (075007), p. 52 (075058), pp. 106-107 (075112-075113), p. 115 (075121).

to large numbers of refugees crossing the border from Kosovo into Albania,¹²⁸ the VJ setting up checkpoints to prevent the crossing of the border,¹²⁹ and Serbian forces beating, arresting, detaining or killing civilians as well as occupying or burning villagers' houses.¹³⁰ UNHCR reports also refer to intense clashes, including artillery fighting,¹³¹ mortar attacks¹³² and sniper fire,¹³³ between Serbian forces and the KLA along the Albanian border.¹³⁴

84. Having examined the supporting material as a whole in relation to the aforementioned requirements, the Pre-Trial Judge finds that there is a well-grounded suspicion that at least throughout the period relevant to the charges in the Revised Indictment a non-international armed conflict existed within the meaning of Article 14(2) of the Law between the Serbian forces and the KLA.

B. THE CRIMES CHARGED

1. Count 1: Arbitrary Detention as a War Crime

85. In the Revised Indictment, the SPO alleges that between approximately 17 May 1999 and 5 June 1999, at least [REDACTED] persons were arbitrarily

¹²⁸ 075007-075129, p. 1 (075007), pp. 42-43 (075048-075049), p. 50 (075056), p. 57 (075063), p. 61 (075071); 074226-074231, p. 1 (074226); 075007-075129, pp. 72-73 (075078-075079), p. 81 (075087), pp. 98-99 (075104-075105).

¹²⁹ 074222-074225, p. 1 (074222); 075007-075129, p. 35 (075041), p. 45 (075051).

¹³⁰ 074222-074225, p. 1 (074222); 075007-075129, pp. 18-20 (075024-075026), p. 36 (075042), pp. 42-43 (075048-075049), p. 52 (075058), pp. 57-59 (075063-075065), p. 66 (075072), p. 73 (075079), p. 75 (075081), p. 83 (075089), p. 91 (075097), p. 99 (075105), p. 108 (075114).

¹³¹ 075007-075129, p. 36 (075042); 074226-074231, p. 1 (074226); 075007-075129, p. 73 (075079), p. 91 (075097), p. 116 (075122).

¹³² 075007-075129, p. 73 (075079), p. 91 (075097), p. 116 (075122).

¹³³ 074226-074231, p. 1 (074226); 075007-075129, p. 74 (075080).

¹³⁴ 075007-075129, p. 1 (075007); 074222-074225, p. 1 (074222); 075007-075129, p. 50 (075056); SPOE00055399-SPOE00055399-ET; 075007-075129, pp. 72-73 (075078-075079), p. 82 (075088), pp. 90-91 (075096-075097), p. 99 (075105).

deprived of their liberty at the Kukës Metal Factory, which constitutes a war crime according to Article 14(1)(c) of the Law.¹³⁵

86. Regarding the material elements of the crime, the Pre-Trial Judge finds that the supporting material indicates that, during the period relevant to the charges, KLA members, including Mr Shala, transferred to or apprehended at the Kukës Metal Factory at least [REDACTED] persons.¹³⁶ In particular, Mr Shala, together with other KLA members, participated in the transfer of detainees, such as [REDACTED] on or about 17 May 1999 from a location in or around [REDACTED] to the Kukës Metal Factory.¹³⁷ Throughout their detention, the detainees were held under armed guard in makeshift cells,¹³⁸ handcuffed and tied,¹³⁹ and deprived of their passports and money.¹⁴⁰ Furthermore, Mr Shala was regularly present in the rooms where detainees were held, contributing to acts enforcing and continuing the detention.¹⁴¹

87. According to the supporting material, the apprehension, transfer and detention of these individuals was justified neither by criminal proceedings nor by reasonable grounds to believe that security concerns made their deprivation of liberty absolutely necessary. Notably, the detainees concerned were held for their alleged relationships with Serbs or failure to support the KLA.¹⁴² At least [REDACTED] persons arrived voluntarily at the Kukës Metal Factory to join the KLA, but were arrested before being able to do so.¹⁴³ Others were working [REDACTED],¹⁴⁴

¹³⁵ Revised Indictment, paras 14-16, 31.

¹³⁶ [REDACTED].

¹³⁷ [REDACTED].

¹³⁸ [REDACTED].

¹³⁹ [REDACTED].

¹⁴⁰ [REDACTED].

¹⁴¹ See *infra* paras 95-97 (Count 2) and accompanying footnotes.

¹⁴² [REDACTED].

¹⁴³ [REDACTED].

¹⁴⁴ [REDACTED].

were travelling to help their family,¹⁴⁵ were [REDACTED],¹⁴⁶ or had other civilian occupations.¹⁴⁷

88. These individuals were detained at the factory without being informed of the reasons for their arrest,¹⁴⁸ nor were they brought before a judge or other competent authority or otherwise given the opportunity to challenge the lawfulness of their deprivation of liberty.¹⁴⁹ Notably, Mr Shala failed to apply appropriate detention procedures.¹⁵⁰

89. Regarding the protected status of the victims, the supporting material indicates that the persons who were subjected to the aforementioned transfers, arrests, and detention, were not taking active part in the hostilities due to their detention condition.

90. Regarding the mental element of the crime, the supporting material indicates the deliberate manner in which detainees were transferred, held and released at the Kukës Metal Factory. This demonstrates that at least some of the KLA members, including Mr Shala, meant to deprive these persons of their liberty without due process of law.¹⁵¹

91. Regarding the nexus, the supporting material further indicates that the aforementioned transfers, arrests and detention of detainees took place in the context of the ongoing armed conflict between Serbian forces and the KLA in Kosovo, including along the border with Albania. In particular, in addition to the presence of tens of thousands of Kosovar refugees in Kukës,¹⁵² UNHCR reports

¹⁴⁵ [REDACTED].

¹⁴⁶ [REDACTED].

¹⁴⁷ [REDACTED].

¹⁴⁸ [REDACTED].

¹⁴⁹ [REDACTED].

¹⁵⁰ See *infra* paras 95-97 (Count 2) and accompanying footnotes.

¹⁵¹ Mr Shala was a member of the KLA's Military Police in 1998 and was aware of the rules applicable to Military Police members, see 066845-066855-ET Revised, pp. 4, 9 (066848, 066853). See also [REDACTED].

¹⁵² 075007-075129, p. 2 (075008); 074222-074225, p. 1 (074222).

also note an increased KLA presence in the same area.¹⁵³ The Kukës Metal Factory was used as a KLA headquarters from the beginning of April 1999 to support military operations in Kosovo.¹⁵⁴ The factory was also used: as offices for KLA officers;¹⁵⁵ for recruitment, registration and mobilisation of soldiers,¹⁵⁶ storage of supplies and military equipment,¹⁵⁷ and logistical preparation;¹⁵⁸ as a transit location for KLA soldiers¹⁵⁹ and detention site.¹⁶⁰ In particular, some detainees at the factory were accused by KLA members of, *inter alia*, helping the Serbs or working for the Yugoslavian secret services.¹⁶¹

92. Lastly, regarding the awareness of the factual circumstances establishing the armed conflict and the status of the victims, the supporting material indicates that KLA members, including Mr Shala, partaking in the transfers, arrests and detention were aware of the factual circumstances of the ongoing armed conflict by virtue of their membership in the organised armed group and their presence at the Kukës Metal Factory.¹⁶² Mr Shala and other KLA members also knew that the detainees took no active part in the hostilities.¹⁶³

¹⁵³ 075007-075129, pp. 72-73 (075078-075079).

¹⁵⁴ [REDACTED].

¹⁵⁵ [REDACTED].

¹⁵⁶ [REDACTED].

¹⁵⁷ [REDACTED].

¹⁵⁸ [REDACTED].

¹⁵⁹ [REDACTED].

¹⁶⁰ [REDACTED].

¹⁶¹ [REDACTED].

¹⁶² Mr Shala was a KLA member, known as “Ujku” (Wolf), *see* 066845-066855-ET Revised, pp. 3, 7 (066847, 066851); [REDACTED]; IT-04-84bis P00073.E. He returned to Kosovo from Belgium after learning about the KLA’s order for general mobilisation. Mr Shala was in Kukës pursuant to what he believed to be orders from the KLA General Staff to lead the KLA’s 128th brigade, *see* [REDACTED]. *See also* [REDACTED].

¹⁶³ Mr Shala was one of the persons who transferred [REDACTED] to Kukës and it was apparent to him that [REDACTED] was taking no active part in hostilities at least from that time onwards, *see* [REDACTED]. Similarly, Mr Shala [REDACTED] and he accordingly saw that neither were taking active part in hostilities at the time, *see* [REDACTED]. *See also* [REDACTED].

93. Having examined the supporting material as a whole in relation to the aforementioned requirements, the Pre-Trial Judge finds that there is a well-grounded suspicion that the war crime of arbitrary detention within the meaning of Article 14(1)(c) of the Law was committed at the Kukës Metal Factory involving at least [REDACTED] persons between approximately 17 May 1999 and 5 June 1999.

2. Count 2: Cruel Treatment as a War Crime

94. In the Revised Indictment, the SPO alleges that, between approximately 17 May 1999 and 5 June 1999, cruel treatment was committed against detainees at the Kukës Metal Factory, which constitutes a war crime according to Article 14(1)(c)(i) of the Law.¹⁶⁴

95. Regarding the material elements of the crime, the Pre-Trial Judge finds that the supporting material indicates that, between approximately 17 May 1999 and 5 June 1999, KLA members caused serious physical and psychological injury and suffering upon detainees at the Kukës Metal Factory. KLA members, including Mr Shala, established and maintained inhumane detention conditions at the Kukës Metal Factory. In particular, these conditions were characterised by deprivation of liberty without due process of law,¹⁶⁵ as well as inadequate provisions of food,¹⁶⁶ water,¹⁶⁷ sanitation and hygiene,¹⁶⁸ bedding¹⁶⁹ and medical care.¹⁷⁰

96. Furthermore, the supporting material indicates that between approximately 17 May 1999 and 5 June 1999, KLA members, including Mr Shala, routinely assaulted the detainees both physically and psychologically. In particular, they were beaten

¹⁶⁴ Revised Indictment, paras 18-24, 31.

¹⁶⁵ See *supra* paras 86-88 (Count 1) and accompanying footnotes.

¹⁶⁶ [REDACTED].

¹⁶⁷ [REDACTED].

¹⁶⁸ [REDACTED].

¹⁶⁹ [REDACTED].

¹⁷⁰ [REDACTED].

nearly every day or night,¹⁷¹ with hands and feet,¹⁷² or using various instruments, such as rubber batons,¹⁷³ wooden batons covered with bandages,¹⁷⁴ baseball bats¹⁷⁵ as well as iron or metal bars, guns, sharp objects and knives.¹⁷⁶ KLA members threw salt or vinegar on at least two detainees' wounds or in their eyes.¹⁷⁷ [REDACTED], were also shot at,¹⁷⁸ and KLA members pushed [REDACTED]'s head in a bucket of water until he could not breathe.¹⁷⁹ The detainees were also assaulted psychologically, including through threats of death and serious bodily injury.¹⁸⁰ Some detainees were forced to perform manual labour during their detention.¹⁸¹

97. Notably, the supporting material highlights three incidents Mr Shala took part in. First, on or about [REDACTED] May 1999, Mr Shala and other KLA members physically and psychologically assaulted at least [REDACTED] detainees at the factory.¹⁸² On that occasion, Mr Shala beat [REDACTED], including with a rubber baton and a baseball bat.¹⁸³ Mr Shala ordered [REDACTED] to hit [REDACTED] with a rubber baton and when [REDACTED] refused, KLA members, including Mr Shala, beat him up.¹⁸⁴ Secondly, on or about [REDACTED] June 1999, certain KLA members, including Mr Shala, beat [REDACTED], forced them to [REDACTED] and shot at them with automatic weapons.¹⁸⁵ Thirdly, on or about [REDACTED] June 1999, certain KLA members, including Mr Shala, severely beat [REDACTED] detainees, including

¹⁷¹ [REDACTED].

¹⁷² [REDACTED].

¹⁷³ [REDACTED].

¹⁷⁴ [REDACTED]).

¹⁷⁵ [REDACTED].

¹⁷⁶ [REDACTED].

¹⁷⁷ [REDACTED].

¹⁷⁸ [REDACTED].

¹⁷⁹ [REDACTED].

¹⁸⁰ [REDACTED].

¹⁸¹ [REDACTED].

¹⁸² [REDACTED].

¹⁸³ [REDACTED].

¹⁸⁴ [REDACTED].

¹⁸⁵ [REDACTED].

with metal bars, baseball bats and guns.¹⁸⁶ During the same night, KLA members participating in the mistreatment shot [REDACTED] and wounded the [REDACTED] detainees,¹⁸⁷ and continued beating them despite their gunshot wounds.¹⁸⁸ [REDACTED] were refused adequate medical treatment,¹⁸⁹ despite a request from a doctor to transfer [REDACTED] to the hospital in Kukës.¹⁹⁰

98. As regards the seriousness of the harm or injury, the supporting material indicates that the acts and omissions caused serious mental and/or physical suffering to the detainees, or constitute a serious attack on human dignity. In particular, the detainees lost consciousness¹⁹¹ and control of bodily functions,¹⁹² sustained broken bones,¹⁹³ were seriously wounded,¹⁹⁴ covered in blood,¹⁹⁵ humiliated¹⁹⁶ and had psychological and physical conditions that continued after their release.¹⁹⁷

99. Regarding the mental element of the crime, the supporting material indicates the failure to ensure humane detention conditions, the deliberate manner in which detainees were beaten and mistreated, the types of instruments used in the physical assault as well as the injuries caused. This demonstrates that at least some of the KLA members, including Mr Shala, partaking in the aforementioned acts and omissions, meant to cause serious mental or physical suffering or injury or to commit a serious attack upon the human dignity of the detainees.¹⁹⁸

¹⁸⁶ [REDACTED].

¹⁸⁷ [REDACTED].

¹⁸⁸ [REDACTED].

¹⁸⁹ [REDACTED].

¹⁹⁰ [REDACTED].

¹⁹¹ [REDACTED].

¹⁹² [REDACTED].

¹⁹³ [REDACTED].

¹⁹⁴ [REDACTED].

¹⁹⁵ [REDACTED].

¹⁹⁶ [REDACTED].

¹⁹⁷ [REDACTED].

¹⁹⁸ See *supra* paras 96-98 (Count 2) and accompanying footnotes. See also [REDACTED].

100. Lastly, regarding the protected status of victims, nexus and the perpetrators' awareness of the factual circumstances establishing the armed conflict and the status of the victims, the Pre-Trial Judge refers to the findings in relation to Count 1 above.¹⁹⁹

101. Having examined the supporting material as a whole in relation to the aforementioned requirements, the Pre-Trial Judge finds that there is a well-grounded suspicion that the war crime of cruel treatment within the meaning of Article 14(1)(c)(i) of the Law was committed at the Kukës Metal Factory between approximately 17 May 1999 and 5 June 1999.

3. Count 3: Torture as a War Crime

102. In the Revised Indictment, the SPO alleges that, between approximately 17 May 1999 and 5 June 1999, torture was committed against detainees at the Kukës Metal Factory, which constitutes a war crime according to Article 14(1)(c)(i) of the Law.²⁰⁰

103. Regarding the material elements of the crime, the Pre-Trial Judge finds that the supporting material indicates that, through the acts and omissions described in relation to Count 2, certain KLA members, including Mr Shala, inflicted severe pain or suffering on the detainees. As set out in relation to Count 2, Mr Shala actively participated in the repeated physical and psychological assault of the detainees,²⁰¹ including in sessions where KLA members accused, questioned and punished the detainees.²⁰² At least on one occasion, Mr Shala accused [REDACTED] of being a spy, alleged that he was of Serbian ethnicity and beat [REDACTED] for refusing to hit [REDACTED].²⁰³

¹⁹⁹ See *supra* paras 89, 91, 92 (Count 1) and accompanying footnotes.

²⁰⁰ Revised Indictment, paras 26, 31.

²⁰¹ See *supra* paras 96-97 (Count 2) and accompanying footnotes.

²⁰² [REDACTED].

²⁰³ [REDACTED].

104. Regarding the mental element of the crime, the supporting material indicates the deliberate manner in which detainees were beaten and mistreated, the types of instruments used in the physical assault, the threats of injury and death, the injuries caused as well as the escalation of the mistreatment despite the detainees' worsening situation. This demonstrates that at least some of the KLA members, including Mr Shala, partaking in the aforementioned acts and omissions, meant to inflict upon the detainees concerned severe pain and suffering for the prohibited purposes.²⁰⁴ In particular, such purposes included: the obtaining of information or confessions,²⁰⁵ punishment for alleged relationships or collaboration with Serbs,²⁰⁶ or for not supporting the KLA financially,²⁰⁷ as well as intimidation,²⁰⁸ coercion²⁰⁹ and discrimination, for similar reasons.²¹⁰ KLA members would often have a tape recorder present during beatings in order to record confessions.²¹¹

105. Lastly, regarding the protected status of victims, nexus and the perpetrators' awareness of the factual circumstances establishing the armed conflict and the status of the victims, the Pre-Trial Judge refers to the findings in relation to Count 1 above.²¹²

106. Having examined the supporting material as a whole in relation to the aforementioned requirements, the Pre-Trial Judge finds that there is a well-grounded suspicion that the war crime of torture within the meaning of Article 14(1)(c)(i) of the Law was committed at the Kukës Metal Factory between approximately 17 May 1999 and 5 June 1999.

²⁰⁴ See *supra* paras 95-98 (Count 2), 103 (Count 3) and accompanying footnotes. See also [REDACTED].

²⁰⁵ [REDACTED].

²⁰⁶ [REDACTED].

²⁰⁷ [REDACTED].

²⁰⁸ [REDACTED].

²⁰⁹ [REDACTED].

²¹⁰ [REDACTED].

²¹¹ [REDACTED].

²¹² See *supra* paras 89, 91, 92 (Count 1) and accompanying footnotes.

4. Count 4: Murder as a War Crime

107. In the Revised Indictment, the SPO alleges that on or about 5 June 1999 one detainee was killed at the Kukës Metal Factory, which constitutes a war crime according to Article 14(1)(c)(i) of the Law.²¹³

108. Regarding the material elements of the crime, the Pre-Trial Judge finds that the supporting material indicates that, on or about [REDACTED] June 1999, certain KLA members, including Mr Shala, beat [REDACTED] and shot at him with automatic weapons.²¹⁴ On or about [REDACTED] June 1999, certain KLA members, including Mr Shala,²¹⁵ shot and wounded him,²¹⁶ and continued beating him despite his gunshot wounds.²¹⁷ After the shooting and the beating, [REDACTED].²¹⁸ [REDACTED]²¹⁹ and was refused adequate medical treatment,²²⁰ despite a request from a doctor to transfer him to the hospital in Kukës, specifying that if he did not go to the hospital, he would not be able to live.²²¹ [REDACTED] died within 24 hours of being shot.²²² As already found in relation to Count 2, Mr Shala actively participated in the violent assaults against [REDACTED].²²³

109. Regarding the mental element of the crime, the supporting material indicates the deliberate manner in which, on or about [REDACTED] June 1999, [REDACTED] was mistreated and shot, the degree of violence and the types of instruments used in the physical assault, the injuries caused, the refusal to provide medical treatment despite the warnings of a doctor as well as the statements made

²¹³ Revised Indictment, paras 28-29, 31.

²¹⁴ [REDACTED].

²¹⁵ [REDACTED].

²¹⁶ [REDACTED].

²¹⁷ [REDACTED].

²¹⁸ [REDACTED].

²¹⁹ [REDACTED].

²²⁰ [REDACTED].

²²¹ [REDACTED].

²²² [REDACTED].

²²³ See *supra* para. 97 (Count 2) and accompanying footnotes.

by some KLA members anticipating his death.²²⁴ This demonstrates that at least some KLA members partaking in the aforementioned acts and omissions meant to kill [REDACTED] or at least wilfully caused him serious injury or grievous bodily harm, which they should reasonably have known might lead to the detainee's death.

110. Lastly, regarding the protected status of victim, nexus and the perpetrators' awareness of the factual circumstances establishing the armed conflict and the status of the victim, the Pre-Trial Judge refers to the findings in relation to Count 1 above.²²⁵

111. Having examined the supporting material as a whole in relation to the aforementioned requirements, the Pre-Trial Judge finds that there is a well-grounded suspicion that the war crime of murder within the meaning of Article 14(1)(c)(i) of the Law was committed at the Kukës Metal Factory involving one detainee on or about 5 June 1999.

C. THE MODES OF LIABILITY CHARGED

1. Direct Commission

112. In the Revised Indictment, the SPO alleges that Mr Shala physically committed the war crimes of arbitrary detention (Count 1), cruel treatment (Count 2) and torture (Count 3), according to Article 16(1)(a) of the Law.²²⁶

113. Regarding the objective²²⁷ and subjective²²⁸ elements of Mr Shala's physical commission of the crimes of arbitrary detention, cruel treatment and torture, the Pre-Trial Judge refers to the above findings in Counts 1-3.

²²⁴ See *supra* paras 96-98 (Count 2), 103 (Count 3) and accompanying footnotes. [REDACTED].

²²⁵ See *supra* paras 89, 91, 92 (Count 1) and accompanying footnotes.

²²⁶ Revised Indictment, paras 13, 30.

²²⁷ See *supra* paras 86-88 (Count 1), 95-98 (Count 2), 103 (Count 3) and accompanying footnotes.

²²⁸ See *supra* paras 90 (Count 1), 99 (Count 2), 104 (Count 3) and accompanying footnotes.

114. Having examined the supporting material as a whole, the Pre-Trial Judge finds that there is well-grounded suspicion that Mr Shala physically committed the war crimes of arbitrary detention (Count 1), cruel treatment (Count 2) and torture (Count 3), within the meaning of Article 16(1)(a) of the Law.

2. Joint Criminal Enterprise I

115. In the Revised Indictment, the SPO alleges that Mr Shala committed, as a member in a JCE, the war crimes of arbitrary detention (Count 1), cruel treatment (Count 2), torture (Count 3) and murder (Count 4), according to Article 16(1)(a) of the Law.²²⁹

116. Regarding the objective elements of this mode of liability, the Pre-Trial Judge finds that the supporting material indicates that a plurality of persons, including Mr Shala, was involved in the operation of the detention site at Kukës Metal Factory and the mistreatment of the detainees therein. In particular, KLA members, such as Mr Shala, Sabit Geci, Xhemshit Krasniqi, [REDACTED] and [REDACTED] were involved in the detention and mistreatment of detainees, along with other KLA soldiers, police and guards.²³⁰

117. The supporting material further indicates that the aforementioned individuals shared a common purpose during the timeframe of the charges to interrogate and mistreat detainees at the Kukës Metal Factory. This common purpose involved the commission of the crimes of arbitrary detention, cruel treatment, torture and murder. In particular, the acts and omissions described in relation to Counts 1-4 demonstrate that Mr Shala and other KLA members acted with the common purpose to: (i) deprive individuals of their liberty without due process of law; (ii) detain them in inhumane conditions; (iii) severely mistreat detainees for an extended period of time, including

²²⁹ Revised Indictment, paras 8-9, 11, 30.

²³⁰ [REDACTED].

through physical assaults with various instruments; (iv) interrogate and punish detainees; and (v) kill or wilfully cause them serious bodily injuries leading to death.²³¹

118. Mr Shala's significant contribution to the common purpose is apparent from his acts and omissions as described in relation to Counts 1-4. In particular, Mr Shala: (i) participated in the transfer of [REDACTED] to the Kukës Metal Factory;²³² (ii) participated in acts continuing and enforcing arbitrary detention;²³³ (iii) was regularly present in the rooms where detainees were held and failed to apply appropriate detention procedures;²³⁴ (iv) failed to take adequate measures to ensure humane detention conditions at the Kukës Metal Factory;²³⁵ (v) routinely assaulted several detainees, both psychologically and physically, including through beatings with various instruments;²³⁶ (vi) was present at interrogation sessions, during several of which he beat detainees and at least on one occasion punished or coerced them;²³⁷ and (vii) actively participated in the assault that led to the death of [REDACTED].²³⁸

119. Regarding the subjective element of this mode of liability, the supporting material indicates Mr Shala's regular presence in the detention rooms, his active and continuing participation in the mistreatment, including for the purposes of obtaining information from or punishing detainees, as well as the degree of violence with which he participated in the assaults.²³⁹ This demonstrates that Mr Shala shared the intent to commit the crimes under Counts 1-4 forming part of the common purpose of the JCE.

²³¹ See *supra* paras 86-90 (Count 1), 95-99 (Count 2), 103-104 (Count 3), 108-109 (Count 4) and accompanying footnotes.

²³² See *supra* para. 86 (Count 1) and accompanying footnotes.

²³³ See *supra* paras 86 (Count 1) and 96-97 (Count 2) and accompanying footnotes.

²³⁴ See *supra* paras 86-88 (Count 1) and accompanying footnotes.

²³⁵ See *supra* para. 95 (Count 2) and accompanying footnotes.

²³⁶ See *supra* paras 96-97 (Count 2) and accompanying footnotes.

²³⁷ See *supra* para. 103 (Count 3) and accompanying footnotes.

²³⁸ See *supra* paras 97 (Count 2), 108 (Count 4) and accompanying footnotes.

²³⁹ See *supra* paras 86-90 (Count 1), 86-99 (Count 2), 103-104 (Count 3), 108-109 (Count 4) and accompanying footnotes.

120. Having examined the supporting material as a whole, the Pre-Trial Judge finds that there is well-grounded suspicion that Mr Shala committed, as a member of a JCE, the war crimes of arbitrary detention (Count 1), cruel treatment (Count 2), torture (Count 3) and murder (Count 4), within the meaning of Article 16(1)(a) of the Law.

3. Joint Criminal Enterprise III

121. In the alternative to Mr Shala's alleged responsibility under Count 4 through significant contribution to a JCE, the SPO alleges in the Revised Indictment that Mr Shala committed the war crime of murder, according to Article 16(1)(a) of the Law, as it was foreseeable to him that the crime was a possible consequence of the implementation of the JCE's common purpose and he willingly took that risk.²⁴⁰

122. The Pre-Trial Judge assesses this mode of liability in the alternative, in the event that the war crime of murder (Count 4) went beyond the common purpose of the aforementioned JCE. Accordingly, regarding the objective elements of this mode of liability, the Pre-Trial Judge refers to the above findings: that a JCE involving the crimes of arbitrary detention, cruel treatment and torture existed and that Mr Shala was a member thereof.²⁴¹ Furthermore, the manner in which the JCE was implemented, notably, the harsh detention conditions and severe physical and psychological assaults on the detainees over a prolonged period of time, made the death of [REDACTED] an objectively foreseeable consequence of the implementation of the JCE's common purpose.

123. Regarding the subjective element of this mode of liability, the Pre-Trial Judge found above that Mr Shala intended to participate in and contribute to the furtherance of the common purpose.²⁴² In addition, the supporting material indicates that it was

²⁴⁰ Revised Indictment, para. 9.

²⁴¹ See *supra* paras 116-118 (Joint Criminal Enterprise I) and accompanying footnotes.

²⁴² See *supra* para. 119 (Joint Criminal Enterprise I) and accompanying footnotes.

foreseeable to Mr Shala that the murder of [REDACTED] might be perpetrated in carrying out the common purpose of the JCE. In particular, Mr Shala: (i) was aware of the inhumane conditions in which [REDACTED] was kept;²⁴³ (ii) had knowledge of and contributed to the extreme level of violence used against him;²⁴⁴ (iii) was aware that others involved in the mistreatment carried firearms and were willing to use them;²⁴⁵ (iv) was present during and actively participated in the beating and shooting of [REDACTED] on or about [REDACTED] June 1999;²⁴⁶ and (v) witnessed his deteriorating state and grave injuries.²⁴⁷ Furthermore, Mr Shala's willingness to take the risk that [REDACTED] might be killed can be inferred from his continued and active participation in extremely violent assaults, including against [REDACTED] on or about [REDACTED] June 1999.²⁴⁸

124. Having examined the supporting material as a whole, the Pre-Trial Judge finds that, in the alternative to Mr Shala's alleged responsibility for the same crime under JCE I, there is well-grounded suspicion that Mr Shala committed as a member of a JCE, the war crime of murder (Count 4), by being aware that such a crime might be perpetrated in carrying out the common purpose of the JCE and by willingly taking that risk, within the meaning of Article 16(1)(a) of the Law.

4. Aiding and Abetting

125. Further, and alternatively to the alleged responsibility for commission, the SPO alleges in the Revised Indictment that Mr Shala is criminally responsible for aiding and abetting the war crimes of arbitrary detention (Count 1), cruel treatment

²⁴³ See *supra* paras 86 (Count 1), 95 (Count 2) and accompanying footnotes.

²⁴⁴ See *supra* paras 96-98 (Count 2), 103 (Count 3) and accompanying footnotes.

²⁴⁵ [REDACTED].

²⁴⁶ See *supra* paras 97 (Count 2), 108 (Count 4) and accompanying footnotes.

²⁴⁷ [REDACTED].

²⁴⁸ See *supra* paras 97 (Count 2), 103 (Count 3), 108 (Count 4) and accompanying footnotes.

(Count 2), torture (Count 3) and murder (Count 4), according to Article 16(1)(a) of the Law.²⁴⁹

126. Regarding the objective elements of this mode of liability, the supporting material indicates that Mr Shala's acts and omissions amounted to practical assistance, encouragement or moral support in committing the aforementioned crimes. In particular, Mr Shala: (i) participated in the transfer of [REDACTED] to the Kukës Metal Factory;²⁵⁰ (ii) was regularly present in the rooms where detainees were held and failed to apply appropriate detention procedures;²⁵¹ (iii) failed to take adequate measures to ensure humane detention conditions at the Kukës Metal Factory;²⁵² and (iv) participated in and assisted other perpetrators in the routine assault of several detainees, including during interrogation sessions.²⁵³ The supporting material further indicates that the contribution of Mr Shala had a substantial effect on the perpetration of the aforementioned crimes. In particular, at the detention site, Mr Shala was perceived as a superior and a close associate of high-ranking KLA members, whose orders could not be refused.²⁵⁴ Likewise, his active participation in at least one of the transfers²⁵⁵ as well as in the assaults on the detainees,²⁵⁶ coupled with the degree of violence he exerted on them,²⁵⁷ substantially contributed to the commission of the aforementioned crimes.

127. Regarding the subjective element of this mode of liability, the supporting material indicates Mr Shala's regular presence in the detention rooms and his continuing participation in the mistreatment of the detainees.²⁵⁸ This demonstrates

²⁴⁹ Revised Indictment, paras 12, 30.

²⁵⁰ See *supra* para. 86 (Count 1) and accompanying footnotes.

²⁵¹ See *supra* para. 86 (Count 1) and accompanying footnotes.

²⁵² See *supra* para. 95 (Count 2) and accompanying footnotes.

²⁵³ See *supra* paras 96-97 (Count 2), 103 (Count 3) and accompanying footnotes.

²⁵⁴ [REDACTED].

²⁵⁵ See *supra* para. 86 (Count 1) and accompanying footnotes.

²⁵⁶ See *supra* paras 96-97 (Count 2), 103 (Count 3), 108 (Count 4) and accompanying footnotes.

²⁵⁷ See *supra* paras 96-97 (Count 2), 103 (Count 3), 108 (Count 4) and accompanying footnotes.

²⁵⁸ See *supra* paras 96-97 (Count 2), 103 (Count 3), 108 (Count 4) and accompanying footnotes.

Mr Shala's knowledge that his conduct assisted other KLA members in the commission of the aforementioned crimes and that he was aware of the essential elements of the crimes, which were ultimately committed.

128. Having examined the supporting material as a whole, the Pre-Trial Judge finds that, in the alternative to Mr Shala's alleged responsibility for commission, there is well-grounded suspicion that Mr Shala aided and abetted the war crimes of arbitrary detention (Count 1), cruel treatment (Count 2), torture (Count 3) and murder (Count 4), within the meaning of Article 16(1)(a) of the Law.

VII. LEGAL CHARACTERISATION OF THE CHARGES

129. The SPO charges Mr Shala with arbitrary detention, cruel treatment, torture and murder under Article 14 of the Law and Article 142 of the SFRY Criminal Code, as incorporated in Articles 15(1)(a) and 16(2) of the Law.²⁵⁹

130. The Pre-Trial Judge notes that Article 142 of the SFRY Criminal Code provides that, among other violations "of rules of international law effective at the time of war, armed conflict or occupation", killings, torture, inhuman treatment as well as illegal arrests and detention are punishable as war crimes against the civilian population. Inasmuch as Article 142 of the SFRY Criminal Code incorporates by reference the international law applicable during armed conflict, the constitutive elements of the charged crimes under Article 142 correspond to those identified above under Article 14(1)(c) of the Law.

131. For these reasons and in light of the Specialist Chambers' obligation to adjudicate and function in accordance with the Law as *lex specialis*,²⁶⁰ the Pre-Trial

²⁵⁹ Revised Indictment, p. 1 (Introduction), para. 31.

²⁶⁰ Article 3(2)(b) of the Law.

Judge finds that Article 14(1)(c) of the Law is the primary and appropriate legal basis for the charged crimes.

VIII. RELATED REQUESTS FOR MAINTAINING CONFIDENTIALITY

132. As a general rule, Rule 88(1) of the Rules provides that an indictment shall be made public upon confirmation. Further, pursuant to Rules 95(1) and (2)(b) and 102(1)(a) of the Rules, any disclosure of material, including the names of witnesses and victims, will take place after the initial appearance of the Accused, for whom an indictment has been confirmed. In exceptional circumstances, however, pursuant to Rules 88(2) and 105(1) of the Rules, the SPO may apply for the temporary non-disclosure of the indictment, related documents, and the identities of victims and witnesses to continue after confirmation of the indictment or initial appearance of the Accused, as the case may be. It is highlighted that Rule 105(1) measures are provisional in nature, allowing for the protection of vulnerable witnesses and victims until such time a request for protective measures is submitted.

133. With respect to the suspect's risk of flight, the Pre-Trial Judge considers that Mr Shala's (i) awareness of the notification of the charges, as contained in the indictment to be served, and potential penalties;²⁶¹ (ii) awareness of publicly reported convictions of his alleged co-perpetrators;²⁶² (iii) residence in a jurisdiction in which the SC does not have any direct means to compel his appearance at trial;²⁶³ and (iv) ability to travel freely to neighbouring countries and

²⁶¹ Initial Submission, para. 6.

²⁶² Initial Submission, para. 6; Kosovo, Basic Court of Mitrovicë/Mitrovica, *Case against XH. K*, P 184/2015, Judgment, 8 August 2016; Kosovo, District Court of Mitrovicë/Mitrovica, *Case against S. Geci et al.*, P 45/2010, Judgment, 29 July 2011.

²⁶³ Initial Submission, para. 7; [REDACTED].

assimilate into communities in those countries demonstrate that he has an incentive and means to flee.²⁶⁴ [REDACTED].²⁶⁵

134. With respect to the interference with victims and witnesses, the Pre-Trial Judge notes that Mr Shala [REDACTED].²⁶⁶ Mr Shala also [REDACTED]²⁶⁷ and therefore has increased means to interfere with them and, in consequence, obstruct the progress of criminal proceedings.

135. With respect to the further commission of crimes, the Pre-Trial Judge notes that Mr Shala [REDACTED].²⁶⁸

136. In light of the factors enumerated in paragraphs 133-135 above, the Pre-Trial Judge finds that the SPO has demonstrated good cause justifying exceptional circumstances that allow, pursuant to Rule 88(2) of the Rules, the temporary non-disclosure of: (i) the indictment as confirmed (“Confirmed Indictment”); and (ii) the Initial Submission with its annexes and the Second Submission with its annexes (“Related Documents”).

137. In light of the factors enumerated in paragraphs 134 and 135 above, the Pre-Trial Judge also finds that the SPO has demonstrated exceptional circumstances, pursuant to Rule 105(1) of the Rules, justifying interim non-disclosure of the identities of witnesses and victims, until appropriate protective measures have been ordered.

138. As a result, the non-disclosure of the Confirmed Indictment towards the public²⁶⁹ shall be maintained until further order of the Pre-Trial Judge, but no later

²⁶⁴ Initial Submission, para. 7.

²⁶⁵ Initial Submission, para. 7; [REDACTED].

²⁶⁶ Initial Submission, paras 8-10.

²⁶⁷ Initial Submission, para. 9; [REDACTED].

²⁶⁸ Initial Submission. 10; F00002/A03, Annex 3 to Submission of Indictment for confirmation and related requests [REDACTED].

²⁶⁹ For the purposes of this decision, public shall mean all persons, organisations, entities, Third States, clients, associations and groups, including the media, other than the judges of the Specialist Chambers (and their staff), the Registry, the SPO, and the Accused, Pjetër Shala.

than the initial appearance of the Accused, as per Rule 88(2) of the Rules. The Accused shall be served with the strictly confidential Confirmed Indictment with redactions, as appropriate, pursuant to Rules 87(1) and 105(1) of the Rules. Notwithstanding the confidentiality of the Confirmed Indictment, pursuant to Rule 88(3) of the Rules, the SPO may disclose the (redacted) version or part thereof to authorities of Kosovo, a Third State or another entity, if deemed necessary for the purposes of an investigation or prosecution.

139. The non-disclosure of the Related Documents and supporting material to the Confirmed Indictment shall also be maintained until further order of the Pre-Trial Judge, as provided in Rule 88(2) of the Rules. However, the supporting material shall be made available to the Accused with redactions, as appropriate, no later than 30 days of his initial appearance, as per Rules 102(1)(a) and 105(1) of the Rules.

IX. DISPOSITION

140. In light of the foregoing, the Pre-Trial Judge hereby:

- a. **CONFIRMS** the charges of arbitrary detention (Count 1), cruel treatment (Count 2), torture (Count 3) and murder (Count 4) against Mr Shala, as war crimes punishable under Articles 14(1)(c) and 16(1)(a) of the Law, as specified in the present decision;
- b. **ORDERS** the Specialist Prosecutor to submit, within one week of the notification of the present decision, a further revised indictment charging Mr Shala solely under Articles 14(1)(c) and 16(1)(a) of the Law, which shall be considered the "Confirmed Indictment";
- c. **AUTHORISES** the SPO to redact the name and identifying information of any victim or witness from the Confirmed Indictment, Related Documents, and supporting material, and assign and use provisional pseudonyms to these victims and witnesses;
- d. **ORDERS** the SPO to submit a strictly confidential, redacted version of the Confirmed Indictment within one week of notification of the present decision;
- e. **ORDERS** the Registry to serve on the Accused, in consultation with the SPO, the strictly confidential, redacted version of the Confirmed Indictment;
- f. **AUTHORISES** the SPO to disclose the strictly confidential, redacted Confirmed Indictment or parts thereof to authorities of Kosovo, a Third State or another entity, if deemed necessary for the purposes of the investigation or prosecution;
- g. **ORDERS** the non-disclosure of the Related Documents and supporting material until further order;
- h. **ORDERS** the non-disclosure of the Confirmed Indictment to the public until further order; and

- i. **ORDERS** the SPO to submit a request for protective measures, if any, in relation to victims and witnesses identified in the Confirmed Indictment, Related Documents and supporting material within two weeks of the initial appearance of the Accused.



Judge Nicolas Guillou

Pre-Trial Judge

Dated this Friday, 12 June 2020
At The Hague, the Netherlands.