

**Case No.:** KSC-BC-2020-04  
**Specialist Prosecutor v. Pjetër Shala**  
**Before:** Pre-Trial Judge  
Judge Nicolas Guillou  
**Registrar:** Dr Fidelma Donlon, Registrar  
**Date:** 9 September 2021  
**Filing Party:** Specialist Defence Counsel  
**Original Language:** English  
**Classification:** Public

**THE SPECIALIST PROSECUTOR**  
**v.**  
**PJETËR SHALA**

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**Public Redacted Version of 'Preliminary Motion by the Defence of Pjetër  
Shala Challenging the Form of the Indictment'**

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**Specialist Prosecutor's Office:**  
Jack Smith

**Specialist Counsel for the Accused:**  
Jean-Louis Gilissen  
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## I. INTRODUCTION

1. Pursuant to Rule 97(1)(b) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers, the Defence for Mr Pjetër Shala files this motion alleging defects in the form of the Indictment (“Motion”).
2. The Defence submits that there are five defects in the Indictment which concern: (i) the prosecution’s cumulative charging of crimes and modes of liability; (ii) the defective pleading of war crimes; (iii) the defective pleading of modes of liability; (iv) the prosecution’s use of vague and non-exhaustive language; and the (v) failure to provide sufficient particulars as to material facts and elements of the crimes the Accused is charged with.
3. Given the nature and extent of the defects and their detrimental effects on the rights of the Accused to a fair trial, the Defence requests that the Specialist Prosecutor’s Office (“SPO”) be ordered to amend the Indictment and provide full and specific details on the matters identified below. In the event that the SPO is unable to amend the Indictment, the Defence submits that the vague allegations in the Indictment should be struck out.
4. The Motion is filed confidentially as it includes confidential information. The Defence intends to file a public redacted version of the Motion in due course.

## II. PROCEDURAL BACKGROUND

5. On 14 February 2020, the SPO submitted for confirmation a strictly confidential and *ex parte* indictment against Mr Pjetër Shala.<sup>1</sup> On 18 March 2020, the SPO

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<sup>1</sup> KSC-BC-2020-04, F00002, Specialist Prosecutor, Submission of Indictment for Confirmation and Related Requests, 14 February 2020, strictly confidential and *ex parte*, with Annexes 1-3, strictly confidential and *ex parte*. All further references to filings in this Motion concern Case No. KSC-BC-2020-04 unless otherwise indicated.

submitted a revised indictment for confirmation.<sup>2</sup> On 12 June 2020, the Pre-Trial Judge confirmed the revised Indictment against the Accused.<sup>3</sup>

6. On 25 May 2021, the SPO filed its “Submission of Further Lesser Redacted Version of Confirmed Indictment with Confidential Annex 1”.<sup>4</sup>

### III. APPLICABLE LAW

7. Article 21(4)(a) of Law No. 5/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“the Law”) provides that “[i]n the determination of any charge against the accused pursuant to this Law, the accused shall be entitled to [...] be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her.”
8. Pursuant to Article 38(4) of the Law “[...] the Specialist Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the person is charged under this Law.” Rule 86(3) of the Rules requires the indictment to set forth a concise statement of the facts of the case and of the crimes with which the suspect is charged “in particular the alleged mode of liability in relation to the crimes charged pursuant to Article 16 of the Law.”
9. As the KSC Court of Appeals has held “the charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused and enable

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<sup>2</sup> F00004, Specialist Prosecutor, Submission of Revised Indictment for Confirmation and Related Requests, 18 March 2020, strictly confidential and *ex parte* with Annexes 1-3, strictly confidential and *ex parte* (“Revised Indictment”).

<sup>3</sup> F00007, Pre-Trial Judge, Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Pjetër Shala, 12 June 2020 (confidential)(“Confirmation Decision”).

<sup>4</sup> F000038, Specialist Prosecutor, Submission of Further Lesser Redacted Version of Confirmed Indictment with confidential Annex 1, 25 May 2021 (confidential)(“Indictment”).

him or her to prepare a meaningful defence.”<sup>5</sup> The Court of Appeals has also established that “[a]n indictment is defective when it fails to plead the facts underpinning the charges or it does so in an insufficient or unclear manner, creating ambiguity as regards the pleaded charges, including the modes of liability, and thus impairing the defence’s ability to prepare.”<sup>6</sup> The degree of specificity required depends on the nature and circumstances of the case. The decisive factors in determining the degree of required specificity are the Prosecution’s characterisation of the alleged criminal conduct, the proximity of the accused to the events or underlying offences and the scale of the alleged crimes.<sup>7</sup>

10. The need for specificity in relation to the particular acts and conduct of the accused is also clearly established in human rights law. According to Article 6(3)(a) of the European Convention on Human Rights (“ECHR”), everyone charged with a criminal offence has the right to be informed *promptly* and *in detail* “of the nature and cause of the accusation against him”. The adequacy of the information provided to the accused must be assessed in relation to Article 6(3)(b) of the ECHR, which confers on everyone the right to have adequate time and facilities for the preparation of their defence, and in the light of the more general right to a fair hearing enshrined in Article 6(1).<sup>8</sup> The European Court of Human Rights (“ECtHR”) has consistently held that the accused must at least

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<sup>5</sup> KSC-BC-2020-07, IA004/F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021 (“Decision on the Defence Appeals”), para. 36. *See also* F00003, Pre-Trial Judge, Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules, 28 February 2020 (“PTJ Order”), paras. 9-11.

<sup>6</sup> Decision on the Defence Appeals, para. 38.

<sup>7</sup> *Ibid.*, para. 42. *See also* ICC, ICC-01/05-01/08, *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute, 21 March 2016 (“Bemba Judgment”), para. 34; PTJ Order, para. 15.

<sup>8</sup> ECtHR, *Mattoccia v. Italy*, no. 23969/94, 25 July 2000, para. 60; ECtHR, *Bäckström and Andersson v. Sweden* (dec.), no. 67930/01, 5 September 2006.

be provided with sufficient information to understand fully the extent of the charges against him, in order to prepare an adequate defence.<sup>9</sup>

#### IV. SUBMISSIONS

##### A. The fairness of the indictment confirmation procedure

11. At the outset, the Defence notes that the indictment confirmation procedure before the KSC was conducted confidentially and *ex parte* in the absence of any adversarial proceedings involving either the Accused or his Defence.<sup>10</sup> Despite the right of the Accused to be informed promptly and precisely of the charges against him, the indictment confirmation procedure was conducted while the Accused was unaware of any charges against him for more than a year.<sup>11</sup>

12. The *ex parte* nature of these proceedings stands in stark contrast to the requirements of the Kosovo Code of Criminal Procedure, which seeks to include the defendant and protect his rights from the earliest stage possible.<sup>12</sup> In particular, Articles 242 and 245 of the Code of Criminal Procedure provide that a defendant must be provided with the indictment at the latest at the initial hearing, which must be held *within 30 days of the indictment being filed*.<sup>13</sup> Article 244 of the Code provides that, at the latest, when an indictment is filed the defence must be provided with notice of the main evidence supporting the prosecution's case, including the names of witnesses the prosecution intends to call to testify. Following the initial hearing, which must be held in the presence of the defendant and defence counsel, the defence is given the opportunity to challenge the indictment.<sup>14</sup>

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<sup>9</sup> *Mattoccia v. Italy*, para. 60.

<sup>10</sup> Rule 86 of the Rules; Article 39(2) of the Law.

<sup>11</sup> The SPO submitted the Indictment to the Pre-Trial Judge on 14 February 2020 while Mr Shala was informed of it and its (redacted) contents when he was arrested on 16 March 2021.

<sup>12</sup> See also Article 61 of the Rome Statute.

<sup>13</sup> Criminal Procedure Code 2012, Law No. 04/L-123, Official Gazette No. 37, 28 December 2012.

<sup>14</sup> Article 245 of the Kosovo Criminal Procedure Code.

13. This Motion represents the first opportunity for the Defence to challenge the form of the Indictment. The Defence submits that, as a prerequisite for making the trial adversarial and upholding the principle of equality of arms, the Pre-Trial Judge's assessment of this Motion must be rigorous and open to conclusions different to the ones adopted in his Confirmation Decision of 12 June 2020.

## **B. Cumulative charging**

14. The Indictment charges Mr Shala with arbitrary detention (count 1), cruel treatment (count 2), torture (count 3), and murder (count 4).<sup>15</sup> These counts are presented as cumulative and not alternative. Counts 1 to 3 are inappropriately overlapping and do not comply with the *Blockburger* test and the principle of reciprocal speciality.<sup>16</sup> The manner in which the charges are presented deprive Mr Shala of adequate notice of the charges, forcing him to focus the scarce resources available to his Defence team on multiple similar charges. This will unnecessarily prolong the trial and pose a heavy burden on the defence in preparing and presenting its case. The Pre-Trial Judge's intervention at this stage is merited to protect the right of Mr Shala to a fair trial. The Pre-Trial Judge should not allow the cumulative charging of the crimes charged in counts 1 to 3.

15. The Defence has filed a Preliminary Motion challenging the KSC's jurisdiction over the crime of arbitrary detention in a non-international armed conflict ("NIAC") and fully maintains its position and arguments presented in that motion. In addition to this challenge to the jurisdiction of the KSC, and to the

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<sup>15</sup> Indictment, para. 31.

<sup>16</sup> *Blockburger v. US*, 284 U.S. 299 (1932); *Rutledge v. US*, 517 U.S. 292 (1996) ("the test for determining whether there are two offences is whether each of the statutory provisions requires proof of a fact which the other does not"); ICTY, IT-95-16-T, *Prosecutor v. Kupreskić et al.*, Trial Chamber, *Judgment*, 14 January 2000 ("*Kupreskić* Trial Judgment"), paras. 684, 685.

extent that it is determined that the KSC may exercise jurisdiction over the charge of arbitrary detention, the Defence submits that the cumulative charging of arbitrary detention and cruel treatment as war crimes places an undue burden on the Defence.<sup>17</sup> The same applies to the cumulative charging of cruel treatment and torture. In the circumstances of the present case, the SPO's cumulative charging renders the Indictment defective.

16. Although the practice of cumulative charging was generally permitted by the ICTY and ICTR,<sup>18</sup> recent case-law has correctly reaffirmed the right of an accused to a fair trial and the need to ensure that the defence is not required to respond to multiple charges for the same facts, that only distinct crimes protecting distinct values may justify cumulative charging and that, ultimately, only distinct charges can be confirmed.<sup>19</sup> This is only possible if each statutory provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other.<sup>20</sup>

17. In confirming an indictment, the Pre-Trial Judge should exercise caution and only allow cumulative charging when there are separate elements in each of the charged offences that render them truly distinct. A chamber cannot confirm a charge in circumstances where the essence of the violation of the law

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<sup>17</sup> ICC, ICC-01/05-01/08, *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009 ("Bemba Decision"), paras. 201, 202. See also *Blockburger v. US*, 284 U.S. 299 (1932); *Rutledge v. US*, 517 U.S. 292 (1996).

<sup>18</sup> See, for instance, ICTR, ICTR-96-13-A, *Alfred Musema v. The Prosecutor*, Appeals Chamber, Judgment, 16 November 2001, paras. 369, 370; ICTY, Case No. IT-96-21-A, *Prosecutor v. Delalić et al.*, Appeals Chamber, Judgment, 20 February 2001 ("Čelebići Appeal Judgment"), para. 400.

<sup>19</sup> *Bemba Decision*, para. 202; STL, STL-11-01/1, Appeals Chamber, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, 16 February 2011 ("STL 2011 Interlocutory Decision on Applicable Law"), paras. 298, 299; STL, STL-17-07/I/AC/R176bis, Appeals Chamber, *Interlocutory Decision on the Applicable Law: Criminal Association and Review of the Indictment*, 18 October 2017, paras. 94, 95; ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, D99/2/42, Pre-Trial Chamber, *Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias "Duch"*, 5 December 2008, para. 83. See also *Kupreškić Trial Judgment*, paras. 682, 683, 684.

<sup>20</sup> *Bemba Decision*, para. 202. See also *Čelebići Appeal Judgment*, para. 412.

underlying the pleaded charges is fully subsumed by another charge.<sup>21</sup> Likewise, if the offences are provided for under a general provision and a special provision, the Judge should always favour the special provision.<sup>22</sup> Ultimately, should the prosecution's case be proved at trial to the requisite standard, a conviction can only be entered for the crime under the more specific provision.<sup>23</sup>

18. In essence, the prosecution must not present the same facts under different legal characterisations and must choose the most appropriate characterisation.<sup>24</sup> This is to avoid requiring the Defence to respond to multiple charges on the same facts, particularly in circumstances such as the present where the Defence is functioning under scarce resources.<sup>25</sup> The prosecutorial practice of inappropriate cumulative charging has been shown to have an adverse impact on a range of rights of the accused; the right to adequate time and resources to prepare his or her defence, the right to adequate notice of the charges, the right to equality of arms, the right to a trial within reasonable time.<sup>26</sup> Allowing the trial to commence on the basis of the Indictment as it currently stands will waste valuable resources and judicial time.

19. In the present case, the count of arbitrary detention as pleaded by the SPO is largely subsumed by the count of cruel treatment, which is the most appropriate legal characterisation of the conduct presented.

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<sup>21</sup> STL 2011 Interlocutory Decision on Applicable Law, paras. 298, 301; ICC, ICC-01/05-01/08, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber, *Decision on the Prosecutor's Application for Leave to Appeal the 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 18 September 2009, para. 53.

<sup>22</sup> Bemba Decision, paras. 202, 302, 312; STL 2011 Interlocutory Decision on Applicable Law, para. 298.

<sup>23</sup> ICTY, IT-05-88-A, *Popović et al.*, Appeals Chamber, *Judgement*, 30 January 2015, para. 537; ICTR, ICTR-98-41A-A, *Ntabakuze v. Prosecutor*, Appeals Chamber, *Judgement*, 8 May 2012, paras. 260, 261; Čelebići Appeal Judgment, paras. 412, 413; *Kupreškić* Trial Judgment, paras. 718-719.

<sup>24</sup> Bemba Decision, paras. 201, 202.

<sup>25</sup> *Ibid.*, paras. 201, 202.

<sup>26</sup> *Ibid.*, para. 202.



20. With regard to the count of arbitrary detention, the Indictment states that Mr Shala and other Kosovo Liberation Army ("KLA") members "deprived at least [REDACTED] persons of their liberty without due process of law at the Kukës Metal Factory. They were held under armed guard in makeshift cells, handcuffed and tied, relieved of travel documents and money, and subjected to acts of cruel treatment and torture, as described in paragraphs 18-24 and 26 below. These persons were arrested and detained without legal basis, not informed of the reason for their arrest or detention, and/or had no opportunity to challenge the basis for their detention."<sup>27</sup> Mr Shala is accused of participating in "acts enforcing and continuing arbitrary detention at the Kukës Metal Factory, including through acts of cruel treatment and torture of detainees, as described in paragraphs 20-23 and 26 below."<sup>28</sup>

21. Turning to the count of cruel treatment, the Indictment states that Mr Shala and other KLA members "established and maintained inhumane detention conditions at the Kukës Metal Factory" which were "characterized by *deprivation of liberty without due process of law*, as set out in paragraphs 14-16 above, and inadequate provisions of food, water, sanitation and hygiene, bedding and other accommodation, and medical care."<sup>29</sup> It accuses Mr Shala of routinely assaulting detainees and states that he took no measures to prevent or curtail the violence or to otherwise assist or ensure the humane treatment of the detainees.<sup>30</sup> It describes three alleged instances of such assaults.<sup>31</sup> It states that the described acts and omissions "constituted *a serious attack on human dignity*" and violated the "*fundamental rights of the victims to liberty and security*

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<sup>27</sup> Indictment, para. 14.

<sup>28</sup> *Ibid.*, para. 16.

<sup>29</sup> *Ibid.*, para. 18.

<sup>30</sup> *Ibid.*, para. 20.

<sup>31</sup> *Ibid.*, paras. 21-23.

*of person, freedom of movement, due process of law, and freedom from discrimination on political grounds.”<sup>32</sup>*

22. In its Submission of Revised Indictment for Confirmation, the SPO submits that the fundamental principle behind the count on arbitrary detention was the requirement under Common Article 3 that persons taking no active part in hostilities are treated humanely.<sup>33</sup> As indicated above, the stated purpose behind charging arbitrary detention as well as its elements are fully subsumed by the count of cruel treatment. With respect to arbitrary detention, the SPO pleads that the Accused “participated in acts enforcing and continuing arbitrary detention at the Kukës Metal Factory, *including through acts of cruel treatment and torture of detainees, as described in paragraphs 20-23 and 26 below.*”<sup>34</sup> Conversely, with regard to cruel treatment the SPO pleads that the *inhumane detention conditions* the Accused established and maintained were, *inter alia*, “characterised by deprivation of liberty without due process of law, as set out in paragraphs 14-16 above.”<sup>35</sup> The Pre-Trial Judge should not allow the cumulative charging of arbitrary detention and cruel treatment.

23. Similarly, as to the count of torture the Indictment states that “[t]hrough the acts and omissions described in paragraphs 18-24 above” Mr Shala and other KLA members “inflicted severe pain or suffering with the aim of obtaining information or confessions, punishing, intimidating, or coercing the victims, and/or discriminating, including on political grounds, against the victims.”<sup>36</sup>

24. The SPO’s cumulative charging of cruel treatment and torture is defective. It breaches the principle of the ‘lesser included offence’ and the principle of

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<sup>32</sup> Indictment, para. 24.

<sup>33</sup> F00004, Public Version of ‘Submission of revised Indictment for confirmation and related requests’, filing KSC-BC-2020/04/F00004 dated 18 March 2020 with public redacted Annex 1, paras. 11, 12.

<sup>34</sup> Indictment, para. 16.

<sup>35</sup> Indictment, para. 18.

<sup>36</sup> Indictment, para. 26.

consumption. The Pre-Trial Judge should only allow charging the more serious count which fully encompasses the criminality of the conduct. Specifically, the cumulative – as opposed to alternative – presentation of the count of cruel treatment and torture is defective as torture always constitutes cruel and inhuman treatment.<sup>37</sup> This is illustrated in the case law of the ECtHR in which torture and cruel and inhuman treatment are always dealt with in the alternative and the Court's findings of a violation depend on an assessment of the gravity of the ill-treatment sustained. The Court enters a finding of a violation of Article 3 on account of either torture or inhuman treatment.

25. In the alternative, the counts charging arbitrary detention, cruel treatment, and torture are bad for duplicity as they charge more than one offence in each count. The count of cruel treatment is pleaded in a manner that includes the offence of arbitrary detention, and the count of torture includes the offence of cruel treatment.

26. The Pre-Trial Judge should reject the inappropriate cumulative charging regarding the acts of arbitrary detention, cruel treatment, and torture as war crimes within the meaning of Article 14(1)(c). Leaving the concern about cumulative charges to be dealt with at the end of the trial creates prejudice for the Defence,<sup>38</sup> particularly in the present circumstances where the Defence is required to operate with scarce resources. It is essential for the fairness of these proceedings for the issues in the Indictment to be clarified and narrowed at the outset to allow the parties to proceed to trial in a focused and efficient manner.

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<sup>37</sup> *Kupreskić* Trial Judgment, para. 690.

<sup>38</sup> ICTY, IT-98-33-PT, *Prosecutor v. Radislav Krstić*, Trial Chamber, *Decision on Defence Preliminary Motion on the Form of the Amended Indictment, Count 7-8*, 28 January 2000; *Kupreskić* Trial Judgment, paras. 721-723.

### C. Other defects in the form of Indictment

27. The Defence recalls that allegations within an indictment are defective in their form if they are not sufficiently clear and precise with respect to their factual and legal constituent elements and do not allow an accused to fully understand the nature and cause of the charges brought against him so as to prepare his defence.<sup>39</sup> It is incumbent on the Prosecution to set forth the material facts of its case in an indictment clearly and unambiguously.<sup>40</sup> A specific, precise, clear and unambiguous indictment is an essential requirement for a fair trial, it allows the Prosecution to focus its case and the Defence to focus in responding to it and assists the Trial Chamber to ensure the efficient use of court time.<sup>41</sup>

28. Importantly, as the KSC Court of Appeals has held “when the proximity of an accused to the alleged criminal conduct is high, the pleading requirements are more rigorous.”<sup>42</sup> This is certainly the case in the present circumstances in which the Pre-Trial Judge has expressly acknowledged “the relatively small size of the group making up the alleged JCE and the fact that the events underlying the charges are easily distinguishable”.<sup>43</sup>

29. Despite the rigorous obligation for specificity, the language employed by the SPO in the Indictment is impermissibly vague and fails to state the material facts underpinning the charges with sufficient clarity and detail so as to *inform* Mr Shala of the charges against him. The Indictment fails to provide sufficient

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<sup>39</sup> ICTR, ICTR-98-44-T, *Prosecutor v. Karemera*, Trial Chamber, *Decision on the Defence Motion pursuant to Rule 72 of the Rules of Procedure and Evidence, pertaining to, inter alia, Lack of Jurisdiction and Defects in the Form of the Indictment*, 25 April 2001, para. 16; PTJ Order, paras. 9-10; ICTY, IT-95-16-A, *Prosecutor v. Kupreškić et al.*, Appeals Chamber, *Judgment*, 23 October 2001, para. 88; *Bemba Judgment*, para. 33.

<sup>40</sup> ICTR, ICTR-98-42-A, *Prosecutor v. Niyiramasuhuko et al.*, Appeals Chamber, *Judgment*, 14 December 2015, para. 2538.

<sup>41</sup> ICTR, ICTR-01-73-I, *Prosecutor v. Zigiranyirazo*, Trial Chamber, *Decision on the Defence Preliminary Motion Objecting to the Form of the Indictment*, 15 July 2004, para. 28.

<sup>42</sup> Decision on the Defence Appeals, para. 43.

<sup>43</sup> F00045, Pre-Trial Judge, Decision on Pjetër Shala’s Request for Provisional Release, 15 June 2021 (“Decision on Provisional Release”), para. 26.

particulars as to the identity of the alleged co-perpetrators and assisted persons and the conduct of Mr Shala that allegedly constitutes the *actus reus* of the offences. As a result, the Indictment does not make clear what the SPO alleges against Mr Shala. This makes it impossible for him to prepare a meaningful defence and he is forced to defend himself in the abstract. This is particularly prejudicial in light of the scarce resources available to his Defence team. The Pre-Trial Judge's intervention is merited to prevent the Prosecution from inappropriately moulding its case depending on how its evidence unfolds at trial.

*i. The pleading of war crimes is defective*

30. The SPO fails to plead adequately the nexus requirement of war crimes. It does not provide sufficient information as to the required nexus between the charged conduct and incidents and the NIAC in question. Its attempt to do so in paragraphs 3-7 of the Indictment is characterised by vagueness and imprecision. The SPO fails to specify when the armed conflict in Kosovo between the KLA and forces of the FRY and the Republic of Serbia took place;<sup>44</sup> and when the KLA used the Kukës Metal Factory in Albania as a KLA base.<sup>45</sup> The purpose of this nexus is to protect people as victims of a NIAC as opposed to people victimised by crimes unrelated to the conflict, however reprehensible.<sup>46</sup> As the ICTY Appeals Chamber has held “[w]hat ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed [...] the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision

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<sup>44</sup> See Indictment, para. 3.

<sup>45</sup> See Indictment, para. 6 which merely states “[a]t all times relevant to this indictment”.

<sup>46</sup> ICTR, ICTR-97-20-T, *Prosecutor v. Semanza*, Trial Chamber, *Judgement*, 15 May 2003, para. 368.

to commit it, the manner in which it was committed or the purpose for which it was committed.”<sup>47</sup>

31. Moreover, at paragraph 6 of the Indictment, the Prosecution states that the crimes charged were committed “against persons detained at the Kukës Metal Factory” who were “all FRY citizens and were persons taking no active part in hostilities”. It fails to provide any additional information or specify the precise status of these alleged victims.

32. The Defence submits that the Indictment should have provided more information on the alleged victims, their background and relationship with the Serbian, FRY, VJ, MUP, or any other forces. In this connection, the Pre-Trial Judge concluded that the alleged victims of the war crimes Mr Shala is charged with were not taking an active part in hostilities due to their “detention condition”.<sup>48</sup> However, in respect of the Accused’s alleged participation in the *arrests* of the alleged victims without legal basis,<sup>49</sup> it remains unclear whether such victims can reasonably be described as *hors de combat* at the time of their arrest. The failure to describe the status of the victims that were arrested or otherwise deprived of their liberty makes the Indictment in that part defective.

*ii. The pleading of modes of liability is defective*

33. It has been well-established in the international criminal tribunals’ case-law that the charges must also give notice to an accused of the material facts associated with his or her particular form of participation.<sup>50</sup>

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<sup>47</sup> ICTY, IT-96-23/1-A, *Kunarac et al.* Appeal Judgement, 12 June 2002, para. 58.

<sup>48</sup> Confirmation Decision, para. 89.

<sup>49</sup> Indictment, para. 14; Confirmation Decision, paras. 89, 92.

<sup>50</sup> ICC, ICC-01/14-01/18-874, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Appeals Chamber, *Judgment on the Appeal of Mr. Alfred Yekatom against the decision of Trial Chamber V of 29 October 2020 entitled ‘Decision on motions on the Scope of the Charges and the Scope of Evidence at Trial’*, 5 February 2021, para. 43.

34. The prosecution must identify the co-perpetrators at a minimum by category or group and provide their specific identities when known.<sup>51</sup> Where it is alleged that a criminal act was physically committed by the accused, the allegation must be particularised as far as possible and with the greatest precision.<sup>52</sup> That requires the SPO to set out specifically the date, location, and identity of victims. Where it is alleged that the accused is responsible for a crime through other modes of liability, the particular acts or course of conduct of the accused that demonstrate the relevant mode of liability should be pleaded.<sup>53</sup> Where a Prosecutor alleges liability pursuant to a JCE, the indictment must specify, *inter alia*, the identities of its members.<sup>54</sup>

35. The Indictment states that Mr Shala participated in a JCE the common purpose of which involved the crimes of arbitrary detention, cruel treatment, torture and murder.<sup>55</sup> It argues in the alternative, that his liability for murder was through the third form of JCE namely that it was foreseeable to him that the crime of murder might be perpetrated by a member of the JCE or a person used by a member of the JCE and with that awareness he participated in the JCE and willingly took that risk.<sup>56</sup> The Indictment relies on the same alleged acts and omissions and charges Mr Shala with aiding and abetting the crimes charged in the Indictment.<sup>57</sup> It also relies on the same acts and omissions and alleges that Mr Shala “physically committed” the crimes of arbitrary detention, cruel treatment and torture.<sup>58</sup>

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<sup>51</sup> Decision on the Defence Appeals, para. 45.

<sup>52</sup> ICTR, ICTR-95-1B-A, *Muhimana v. Prosecutor*, Appeals Chamber, *Judgment*, 21 May 2007, para. 76.

<sup>53</sup> ICTY, IT-95-14-A, *Prosecutor v. Blaškić*, Appeals Chamber, *Judgment*, 29 July 2004, para. 213.

<sup>54</sup> Decision on the Defence Appeals, para. 36.

<sup>55</sup> Indictment, para. 8.

<sup>56</sup> *Ibid.*, para. 9.

<sup>57</sup> Indictment, para. 12.

<sup>58</sup> *Ibid.*, para. 13.



36. The Indictment does not provide sufficient particulars on material facts, specifically the identity and number of alleged co-perpetrators and assisted persons, and does not plead the participation/contribution of the Accused with sufficient clarity and precision. Although such practice could be accepted in other types of cases that involve criminality on a large-scale by accused, who due to their position, were distanced from the physical commission of the charged crimes, this is not the case in the present circumstances. The Pre-Trial Judge has accepted that there is a small number of members in the JCE described in the indictment.<sup>59</sup> As such, there is no justification for the lack of clarity and material information supporting the Prosecution's case in the Indictment. This renders the Indictment defective.

*α) Joint Criminal Enterprise*

37. The Defence has filed a Preliminary Motion challenging the KSC's jurisdiction over the mode of liability of participation in a Joint Criminal Enterprise ("JCE"). It fully maintains the position that this form of liability is not applicable before the KSC. In addition to the jurisdiction challenge, and to the extent that the KSC concludes that it may exercise jurisdiction over the crimes allegedly committed through a JCE, the Defence submits that the vague framing of the JCE in the Indictment is defective, in a manner that is unfair to the Accused.

38. When the Prosecution alleges liability pursuant to a JCE, it must plead the following material facts: "the nature and purpose of the enterprise, the period over which the enterprise is said to have existed, the identity of the participants in the enterprise, and the nature of the accused's participation in the enterprise."<sup>60</sup> In order for an accused to fully understand the acts for which he

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<sup>59</sup> Decision on Provisional Release, para. 26.

<sup>60</sup> ICTR, ICTR-99-50-A, *Mugenzi & Mugiraneza v. Prosecutor*, Appeals Chamber, *Judgement*, 4 February 2014, para. 116; ICTR, ICTR-97-36A-A, *Prosecutor v. Munyakazi*, Appeals Chamber, *Judgement*, 28



is allegedly responsible, the indictment should further clearly indicate which form of JCE is being alleged: basic, systemic, or extended.<sup>61</sup> These constitute material facts that have to be pleaded in the Indictment, particularly in the circumstances of the present case.

39. The Defence submits that the pleading of the membership of the JCE in the Indictment, in particular the identity and the role of JCE members and tools is impermissibly vague. In this respect, the Pre-Trial Judge noted “the relatively small size of the group making up the alleged JCE and the fact that the events underlying the charges are easily distinguishable”.<sup>62</sup> Due to the scale of the JCE and underlying events, the SPO is in a position to identify the alleged co-perpetrators, has additional information on their identity, and should have provided such information in the Indictment.

40. The Indictment pleads in paragraph 8 that Mr Shala and “certain other KLA soldiers, police, and guards” shared a common purpose that involved the commission of the charged crimes. At paragraphs 9 and 10 it states that the Accused, four named individuals and “certain other KLA soldiers, police, and guards present at the Kukës Metal Factory” were members of the JCE which committed the crimes charged. Although the Indictment purports to identify co-perpetrators by reference to their affiliation to the KLA and presence at the Kukës Metal Factory, this is impermissibly vague particularly in the present circumstances of an allegedly small group of co-perpetrators and activities taking place at one location in the course of three weeks. On this basis, the scale of the events alleged in the present case, which has been acknowledged by the

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September 2011, para. 161; ICTY, IT-95-9-A, *Prosecutor v. Simić*, Appeals Chamber, *Judgement*, 28 November 2006, para. 22.

<sup>61</sup> ICTR, ICTR-01-75-AR72(C), *Uwinkindi v. The Prosecutor*, Appeals Chamber, *Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment*, 16 November 2011 (“Unwinkindi Decision”), para. 11.

<sup>62</sup> Decision on Provisional Release, para. 26.

Pre-Trial Judge when denying Mr Shala's motion for provisional release,<sup>63</sup> does not allow for any ambiguity in identifying JCE members.<sup>64</sup>

41. The Indictment fails to meet the robust obligations for specificity that come into play due to the alleged proximity of Mr Shala to the physical commission of the charged offences. The lack of sufficient particulars about the number and identity of all but five of the JCE members creates impermissible ambiguity and renders the Indictment defective.<sup>65</sup> In any event, the Prosecution is required to indicate whether the names of additional members are known or unknown,<sup>66</sup> which has not been done in the Indictment. The Prosecution should be required to provide more information on these issues.

42. Similarly, the SPO has not even attempted to distinguish JCE "Members" from "Tools" despite the fact that they clearly have different roles in the alleged crimes and their alleged criminal activity is subject to different *mens rea* requirements. Rather, the Indictment appears to use the terms interchangeably: in paragraph 10, it states that "[a]lternatively, some or all of these individuals were not members of the joint criminal enterprise, but were used by members of the joint criminal enterprise to carry out crimes committed in furtherance of the common purpose." The SPO fails to identify the alleged members of the relevant JCE and distinguish the roles of persons that were used by such members to perpetrate the crimes charged in the Indictment. The SPO impermissibly hedges its bets and blurs the contours of its case to fit the evidence as it is presented in court. The Prosecution must specify the identity and respective roles and capacity in which the alleged members to the JCE

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<sup>63</sup> Decision on Provisional Release, para. 26.

<sup>64</sup> *Compare and contrast*, ICTR, ICTR-98-44-PT, *Prosecutor v Karamera et al.*, Trial Chamber, *Decision on Defects in the Form of the Indictment*, 5 August 2005 ("Karamera Decision"), para. 20.

<sup>65</sup> Indictment, para. 10.

<sup>66</sup> Karamera Decision, para. 20.

described in the Indictment participated in the charged crimes, as well as the identity and respective roles of perpetrators used by JCE members as a tool to carry out its objectives.<sup>67</sup> Moreover, if crimes were perpetrated by persons who were not members of the JCE, the SPO should identify in the indictment the link between such perpetration and the activity of a JCE member; it must specify how the acts of the so-called tool can be imputed to a person who was a member of the JCE. Nothing in the Indictment identifies what material facts the SPO intends to rely upon to prove this matter.

43. Mr Shala is effectively charged with a form of liability that is based on the attribution of criminal conduct to any number of unknown and unidentifiable members. Given that liability derives from the alleged acts of others, the lack of specificity on the identity of JCE members and tools is inherently prejudicial to Mr Shala, gives insufficient notice on material facts and elements related to the commission of the crimes charged in the Indictment, and prevents Mr Shala from preparing his defence. Mr Shala cannot be reasonably expected to defend himself against the allegation of the existence of a JCE whose size and members the SPO cannot even identify.

44. In addition, the Indictment attempts to specify the allegation that Mr Shala has *significantly contributed* to the common purpose at paragraph 11. Despite extending to four subparagraphs, paragraph 11 neglects to identify any concrete act or omission of Mr Shala that is alleged to have significantly contributed to the JCE. With regard to illegal or arbitrary detention, the particulars provided in paragraphs 15 and 16 are impermissibly imprecise. Paragraph 15 alleges that Mr Shala together with other KLA members participated in the transfer of a person to the Kukës Metal Factory. Paragraph 16 alleges that he participated in acts enforcing and continuing arbitrary

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<sup>67</sup> See *Uwinkindi* Decision, para. 16.

detention “including through acts of cruel treatment and torture.” Paragraph 20 alleges that Mr Shala took no measures to prevent or curtail the violence against detainees or to otherwise assist or ensure the humane treatment of the detainees. Paragraphs 21-23 set out three incidents during which Mr Shala allegedly participated in interrogating and physically and psychologically assaulting detainees at Kukës Metal Factory. The Defence submits that Mr Shala is entitled to clear and precise notice of the concrete alleged acts imputed, so that he can prepare to defend himself against concrete and tangible allegations. The SPO’s reliance on generic descriptions of alleged conduct without reference to any concrete incidents is impermissible.<sup>68</sup> If the SPO is unable to plead its case in the Indictment with the requisite degree of specificity, the allegation that Mr Shala has participated in a JCE through which the alleged crimes were committed should be struck out of the Indictment.

45. Lastly, the Indictment fails to specify expressly which form of JCE is being alleged: basic, systemic, or extended. When it is alleged that an accused person has “committed” a crime, the indictment should specifically provide particulars on the manner of commission and the particular form of JCE pleaded. This is crucial information for the Defence and should be provided in the primary accusatory instrument.

*β) Aiding and abetting*

46. Where an accused is charged with a form of accomplice liability, the indictment must plead with specificity the “particular acts” or the “particular course of conduct” by which the accused allegedly planned, instigated, ordered or aided and abetted the offence.<sup>69</sup> In addition, where it is alleged that the accused aided

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<sup>68</sup> KSC-BC-2020-06, Pre-Trial Judge, Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules, 2 July 2020 (“PTJ Thaçi Order”), para. 16.

<sup>69</sup> Decision on the Defence Appeals, para. 53 and references made therein. *See also* ICTR, ICTR-99-46-T, *Prosecutor v. Ntagerura et al.*, Trial Chamber, Judgment and Sentence, 25 February 2004, para. 33.

and abetted the commission of crimes, the Prosecution must identify the persons allegedly aided and assisted by the accused as these constitute material facts to be pleaded in an indictment.<sup>70</sup>

47. The Indictment lacks the required detail about Mr Shala's specific conduct and the means through which it is alleged that he aided and abetted the commission of each crime charged. It also fails to identify the persons who allegedly were assisted by Mr. Shala. The pleading of this mode of liability is therefore defective.

48. The allegation of “practical assistance, encouragement, and/or moral support” in paragraph 12 of the Indictment is a generic description without any reference to concrete incidents or attributed acts. The SPO thereby failed to plead the material facts of Mr Shala's alleged conduct that allegedly make him culpable, as required.

49. The existence of a substantial effect on a specified crime is an essential element of a case founded on aiding and abetting and hence a material fact which must be pleaded.<sup>71</sup> The same applies to the persons who allegedly were assisted by Mr Shala. The SPO has failed to specify, as required, how Mr Shala's acts and omissions had a *substantial effect* on the alleged perpetration of the crimes charged as well as the identity of the alleged principal perpetrators.

50. In light of the above, the SPO must submit a revised Indictment that pleads this mode of liability with the required degree of specificity. In the alternative, the allegation of aiding and abetting should be struck out of the defective Indictment.

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<sup>70</sup> Decision on the Defence Appeals, para. 53. *See also, by analogy, Uwinkindi* Decision, para. 36; ICTR, ICTR-98-42-A, *Nyiramasuhuko et al. Appeal Judgement*, para. 1099.

<sup>71</sup> *See, e.g.,* ICTY, IT-94-1-A, *Prosecutor v. Duško Tadić*, Appeal Judgement, 15 July 1999, para. 229.

γ) Physical Commission

51. The Indictment states at paragraph 14 that Mr Shala “and certain other KLA members” including four identified KLA members deprived “at least” [REDACTED] persons of their liberty. At paragraph 15, it states that Mr Shala together with another named KLA member and “certain other KLA members” participated in the transfer of a detainee to the Kukës Metal Factory. At paragraphs 18-23, the SPO alleges that Mr Shala participated in the perpetration of cruel treatment by a group that includes “certain other KLA members”. At paragraph 22 it is stated that “[c]ertain other KLA members” forced two detainees to wear bullet-proof vests and shot at them with automatic weapons. It is not clarified whether the Prosecution’s case is that this was done in the presence of Mr Shala.

52. At paragraph 23, it is stated that “KLA members participating in the mistreatment shot and wounded these detainees.” Similarly, at paragraph 26 the Indictment states that Mr Shala together with four named KLA members and “certain other KLA members” inflicted severe pain or suffering against the victims. The identity of such members is not specified. Whether Mr Shala was allegedly present is left open.

53. The Indictment states at paragraph 23 that “[t]he [REDACTED] detainees continued to be severely beaten despite their gunshot wounds, including by certain KLA members kicking them and stepping on their wounds. They were refused adequate medical attention. Within 24 hours of being shot, [REDACTED] died”. The identity of the persons severely beating the detainees in question is left entirely unspecified. No particulars are given as to the identity of the person or persons who refused to provide the detainees with medical attention. It is not even specified whether the prosecution’s case is that Mr Shala was present or in any way involved in either assaulting the detainees

during the night of [REDACTED] 1999, refusing medical attention, or leaving [REDACTED] unattended to die. The same lack of clarity is present in paragraph 26 of the Indictment.

54. The lack of sufficient particulars about the identity of all but five of the alleged co-perpatrators and Mr Shala's alleged conduct creates impermissible ambiguity and renders the Indictment defective.

*iii. Use of vague and non-exhaustive language in the Indictment*

55. An indictment must not rely on vague allegations or generic descriptions. Ambiguous and open-ended phrases, such as "among others", the formulation of "and/or", "including" when used in connection to the pleaded modes of liability or material facts that should be set out with precision, including the identity of co-perpetrators or accomplices, are impermissible.<sup>72</sup>

56. At paragraph 8, the Indictment states that Mr Shala "and certain other" KLA members participated in a JCE with a common purpose involving the crimes of arbitrary detention, cruel treatment, torture, and murder. At paragraph 10, it states that the members of the JCE "included" four named KLA members and "certain other KLA soldiers, police, and guards present at the Kukës Metal Factory". At paragraph 14, the Indictment states that Mr Shala and "other" KLA members, "including" four identified individuals deprived persons of their liberty. At paragraph 11 it states that Mr Shala and "certain other KLA members" participated in the transfer of a detainee. At paragraphs 18 and 19, it states that Mr Shala "and certain other KLA members, including" four named individuals unlawfully deprived detainees of their liberty and routinely assaulted them. At paragraph 21, the Indictment sets out particulars of an incident that allegedly took place on or about [REDACTED] 1999. It uses the

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<sup>72</sup> Decision on the Defence Appeals, paras. 68, 69, 73.



same vague formulation as in previous paragraphs to identify the alleged perpetrators. At paragraph 22, the indictment sets out particulars related to an incident that allegedly occurred on or about [REDACTED] 1999. It vaguely identifies the persons who forced the victims to [REDACTED] and shot at them by referring to “certain KLA members”. The Defence is entitled to better particulars related to this incident. The alleged role of Mr Shala and the extent of his alleged participation, if any, is left entirely unclear.

57. At paragraph 23, the Indictment provides particulars on the interrogation, ill-treatment, and wounding of [REDACTED] detainees and the death of [REDACTED]. It provides no particulars as to the identity of the alleged perpetrators of the shooting and beatings of the detainees during the night of the [REDACTED] 1999. It also does not explain the alleged involvement, if any, of Mr Shala in this incident. At paragraph 24 it states that Mr Shala “and certain other KLA members” tried to force the victims to act against their will and conscience. It provides no particulars as to the identity of such co-perpetrators. It does not specify whether this paragraph concerns incidents going beyond those identified in paragraphs 21-23. At paragraph 26, the Indictment uses the vague formulation that Mr Shala acted together with “other KLA members, including” the four named individuals in allegedly torturing an unspecified number of unidentified detainees. At paragraph 28, the Indictment alleges that Mr Shala acting as part of a group of “certain [unidentified] KLA members” forced [REDACTED] victims to [REDACTED] and shot and assaulted them. The Indictment fails as such to provide sufficient particulars as to the identity of the alleged co-perpetrators. The reference to “KLA members” in lines 7 and 10 of paragraph 28 does not even specify whether Mr Shala was allegedly included in the group of perpetrators.

58. As emphasised above, the use of vague and non-exhaustive language fails to give sufficient notice to Mr Shala as to the identity of the alleged co-



perpetrators and his alleged conduct and participation in the commission of the charged crimes.

59. At paragraphs 11(c) and (d) the Indictment states that Mr Shala significantly contributed to achieving the common purpose of the JCE by failing to take adequate measures to ensure the human treatment of detainees “and/or” otherwise aiding and abetting the charged crimes, “including” by encouraging and assisting the perpetrators, “and/or” by the example of his own participation in crimes. The use of the formulation “and/or” and “including” renders the pleading of the relevant modes of liability impermissibly vague. The same imprecise formulation is employed in line 5 of paragraph 30 of the Indictment. The use of “and/or” is to be contrasted with the wording of paragraph 12, which states that through the “same” acts and omissions, Mr Shala provided practical assistance, encouragement “and/or”<sup>73</sup> moral support that had a substantial effect on the perpetration of the crimes charged in the Indictment. Whether the Indictment charges Mr Shala with aiding and abetting in the alternative remains unclear. The use of “and/or” when pleading the alleged modes of liability creates unjustified ambiguity. The Indictment should be revised to provide specific notice of the charged modes of liability and the alleged nature of the responsibility of Mr Shala.

60. At paragraph 13, the Indictment states in relation to Mr Shala’s alleged *mens rea* that he intended the commission of the crimes of arbitrary detention, cruel treatment, and torture “and/or, in relation to arbitrary detention, acted in the reasonable knowledge that the act or omission was likely to cause arbitrary deprivation of liberty.” The use of this imprecise formulation for an essential element of the offences charged constitutes another defect of the Indictment.

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<sup>73</sup> Mr Shala’s alleged contribution is stated in imprecise and general terms.

61. The Defence submits that the only purpose of using open-ended and vague formulations in the Indictment, such as “including”, “and/or” and “certain other”, is to keep the Prosecution’s case deliberately open and allow additional allegations to be introduced as the evidence unfolds.<sup>74</sup> This is impermissible and unfair. Removal of each of these non-exhaustive terms in the Indictment is therefore required.

*iv. The pleading of specific crimes is defective*

62. As set out below, the Indictment fails to plead with the required level of specificity some of the material facts and elements of the crimes detailed in paragraphs 14-29 of the Indictment.

63. Specifically, it does not provide sufficient detail as to the identities of the perpetrators, several of the victims and the alleged role Mr Shala is accused of. Moreover, by grouping Mr Shala's conduct together with other named and unnamed alleged members of JCE, the Indictment fails to identify precisely which allegations are said to be attributable to Mr Shala and which to other alleged JCE members.

64. The Defence submits that the SPO needs to address each of the defects identified below and provide sufficient specificity for the Accused to be able to prepare effectively his defence.

*α) Arbitrary Detention*

- *Paragraphs 14-16: What was Mr Shala's role in the crime?*

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<sup>74</sup> ICC, ICC-01/09-01/11-373, *Prosecutor v. Ruto et al.*, Pre-Trial Chamber, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 January 2012, para. 99.

- *Paragraphs 14-16:* Who were the detainees? The Prosecution must be aware of the identity of at least some of the alleged victims. This is information that constitutes material facts that should be included in the Indictment.
- *Paragraph 14:* Other than Geci, Krasniqi, “[REDACTED]” and “[REDACTED]”, who are the “certain other KLA members” who deprived at least [REDACTED] persons of their liberty? Who were these [REDACTED] persons? Who exactly held them under armed guard in makeshift cells, handcuffed and tied, deprived them of travel documents and money, and subjected them to acts of cruel treatment and torture? Were all of the [REDACTED] persons subjected to such measures and/or treatment? Who arrested them and where? How long was each of them detained?
- *Paragraph 15:* Other than “[REDACTED]”, who are the “certain other KLA members” who participated in the transfer of [REDACTED]? What was the specific role of each of those involved in the transfer? Who guarded [REDACTED] and who threatened him with death?
- *Paragraph 16:* What specifically did Mr Shala do to participate in “enforcing and continuing arbitrary detention”?
- *Paragraphs 14-17:* although the count of arbitrary detention concerns a violation of human rights law, it fails to rise to the level of a war crime, which would attract individual criminal responsibility under the Law.

#### *β) Cruel Treatment*

- *Paragraphs 18-24:* What was Mr Shala's role in the crime?
- *Paragraphs 18-24:* Who were the detainees? The Prosecution must be aware of the identity of at least some of the alleged victims. This is information that constitutes material facts that should be included in the Indictment.

- *Paragraph 18:* Other than Geci, Krasniqi, “[REDACTED]” and “[REDACTED]”, who are the “certain other KLA members” who established and maintained inhumane detention conditions at the Kukës Metal Factory? What was the specific role of each of those involved? Who was subjected to inhumane detention conditions? Were such conditions applied to everyone at the Kukës Metal Factory? How, specifically, did deprivation of liberty without due process of law amount to inhumane detention conditions?
- *Paragraph 19:* Other than Geci, Krasniqi, “[REDACTED]” and “[REDACTED]”, who are the “certain other KLA members” who routinely assaulted detainees at the Kukës Metal Factory? What was the specific role of each of those involved? Who exactly and how they assaulted the detainees? Were all the detainees assaulted? Who was forced to perform manual labour during detention? Who forced them to do so?
- *Paragraph 20:* Were all detainees beaten on an almost daily basis? What sort of measures should Mr Shala have taken “to prevent or curtail the violence?” Did he have the authority to do so and on what basis?
- *Paragraph 21:* Other than Geci and Krasniqi, who are the “certain other KLA members” who interrogated and assaulted at least [REDACTED] detainees? What was the specific role of each of those involved? Who does the reference to “another [REDACTED] detainee” concern? Who exactly ordered the beating of [REDACTED]? What was the role of Mr Shala in beating and assaulting the detainees? Were all the detainees threatened and accused of collaboration with the Serbian authorities and/or of not supporting the KLA? Who was the “KLA member” who informed [REDACTED] that he had been sentenced to prison and execution?
- *Paragraph 22:* Who were the “certain KLA members” who forced the [REDACTED] detainees to [REDACTED] and shot at them?

- *Paragraph 23:* Other than Geci, Krasniqi, “[REDACTED]” and “[REDACTED]”, who are the “certain other KLA members” who interrogated and beat [REDACTED]? Who are the “KLA members” who continued to beat them despite their gunshot wounds? Who refused [REDACTED]?
- *Paragraph 24:* Who are the “certain other KLA members” who tried to force victims to act against their will and conscience? Who sustained what injuries as a result of their treatment at the Kukës Metal Factory?

#### *γ) Torture*

- *Paragraph 26:* Other than Geci, Krasniqi, “[REDACTED]” and “[REDACTED]”, who are the “certain other KLA members” who inflicted severe pain or suffering against the victims? What was the specific role of each of those involved? Which acts were carried out by Mr Shala? Who questioned the detainees and what were they questioned about? Who are the victims?

#### *δ) Murder*

- *Paragraph 28:* Who are the “certain KLA members” who forced [REDACTED] to [REDACTED], shot at them with automatic weapons and severely beat them? What was Mr Shala's role in the perpetration of this crime? Was Mr Shala present throughout the night? Which “KLA members” advised that [REDACTED] ? Was Mr Shala present at the time? Did he have the authority and/or means to take [REDACTED] to [REDACTED]?
- *Paragraph 29:* How and when did Mr Shala know that the crime of murder might be committed, so as to be able to take steps to prevent it?<sup>75</sup>

## **V. RELIEF REQUESTED**

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<sup>75</sup> See also Indictment, para. 9.

65. As the KSC Court of Appeals has confirmed “when deficiencies surface at the pre-trial stage, they should be resolved before the start of the trial by amending the Indictment.”<sup>76</sup> The Defence has identified a number of deficiencies in the Indictment that cause considerable prejudice and prevent it from effectively defending Mr Shala. Mr Shala’s right to a fair trial requires the Pre-Trial Judge to intervene and order the SPO to amend the Indictment to ensure that all ambiguity in the charges presented therein be rectified and removed as soon as possible and in any event before the trial commences.

66. For these reasons, the Defence requests the Pre-Trial Judge to:

- a. **GRANT** this Motion challenging the Form of the Indictment;
- b. **ORDER** the SPO to amend the Indictment in light of the identified defects; and if it cannot, to remove from the Indictment those charges and modes of liability against Mr Shala that are defective.

Respectfully submitted,



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**Jean-Louis Gilissen**  
**Specialist Defence Counsel**



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**Hedi Aouini**  
**Defence Co-Counsel**

Thursday, 9 September 2021  
The Hague, the Netherlands

**Word count:** 8,916

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<sup>76</sup> Decision on the Defence Appeals, para. 51 and references made therein.