Reclassified as Public pursuant to Order contained in F00089 of 18 October 2021.

BEFORE THE PRE-TRIAL JUDGE

KOSOVO SPECIALIST CHAMBERS

Case No.:	KSC-BC-2020-04
Before:	Judge Nicolas Guillou, Pre-Trial Judge
Registrar:	Dr Fidelma Donlon, Registrar
Date:	24 September 2021
Filing Party:	Defence Counsel
Original Language:	English
Classification:	Confidential

THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Defence Reply to the Prosecution Response to the Preliminary Motion of Pjetër Shala Challenging the Form of the Indictment

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Specialist Prosecutor
Jack Smith

Counsel for the Accused
Jean-Louis Gilissen
Hedi Aouini

I. INTRODUCTION

1. The Defence for Mr Pjetër Shala ("Defence" and "Accused", respectively) presents its submissions in reply to the Prosecution response to its Preliminary Motion Challenging the Form of the Indictment ("Motion").[1]

2. The Reply is limited to addressing the submissions made in the Response.[2] The Defence maintains the arguments presented in its Motion and opposes every submission made in the Response unless it is otherwise specifically indicated.

3. The Reply is filed confidentially pursuant to Rule 82(4) of the Rules following the classification of the original Motion. As the Reply does not contain any confidential information it may be reclassified.

II. SUBMISSIONS

A. THE UNFAIRNESS OF THE INDICTMENT CONFIRMATION PROCEDURE

4. In paragraphs 11 to 13 of the Motion, the Defence addresses the flaws in the Indictment confirmation procedure that interfered with Mr Shala's rights under Article 6 of the ECHR. As argued therein, the Confirmation Decision was highly prejudicial for Mr Shala who was not informed of these proceedings and could not challenge the form of the Indictment *before* the latter was confirmed. The Defence invited the Judge to remedy such

[1] KSC-BC-2020-04, Prosecution Response to the SHALA Defence's Corrected Version of the Preliminary Motion Challenging the Form of the Indictment, 6 September 2021 ("Response"). All further references to filings concern Case No. KSC-BC-2020-04 unless otherwise indicated.
[2] *See* Rule 76 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules").

prejudice by reconsidering, where appropriate, his previous findings on these matters.[3]

B. IMPERMISSIBLE CUMULATIVE CHARGING

5. Counts 1 to 3 of the Indictment are impermissibly overlapping, fail to provide adequate notice, and force the Defence to direct its scarce resources on multiple intertwined charges based on identical or substantially the same alleged conduct. This is unfair and inefficient.

6. In paragraph 16 of the Motion, the Defence observed that, although cumulative charging was "generally" permitted before the *ad hoc* Tribunals, the ICC Pre-Trial Chamber II in *Bemba* has correctly reaffirmed the inherent unfairness of forcing the defence to respond to multiple charges for the same facts that cannot be considered "distinct".[4] The Prosecution presents the *ad hoc* Tribunals' jurisprudence on this matter as "settled" and uniform. In this respect, the Defence refers the Judge to the analysis of conflicting case law before the *ad hoc* Tribunals set out in the ICC Pre-Trial Chamber II's Decision on the Confirmation of Charges in the *Bemba* case.[5]

7. The Prosecution correctly observes that the ICC Pre-Trial Chamber in *Bemba* relied on the different framework before the ICC, which allows a chamber to give the most appropriate legal characterization to the facts put forward by the Prosecution.[6] This does not detract from the fact that the

[3] Motion, para. 13.
[4] ICC, ICC-01/05-01/08, *Prosecutor v. Jean-Pierre Bemba Gombo*, 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 Gombo, 18 September 2009, para. 53.
[5] 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* Confirmation of Charges Decision"), n. 276.
[6] *Bemba* Confirmation of Charges Decision, para. 203.

core justification for the Pre-Trial Chamber's decision was the inherent unfairness of cumulative charging. As the Chamber itself observed:

> "By its decision, the Chamber intended to make it clear that the prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence. The Chamber considers that, as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges."[7]

8. The practice of cumulative charging led to unduly protracted proceedings before the *ad hoc* tribunals that affected their overall fairness. The KSC should not automatically follow "settled" practices and jurisprudence of other tribunals that, in any event, are not binding and may not meet the highest standards of fairness that the KSC aspire to.[8] The fact that judicial re-characterisation of the charges is not provided for within the KSC framework does not change the fact that cumulative charging places an undue burden on the Defence.

9. The relevance of the test determining whether cumulative convictions are permissible when considering cumulative charging lies in its underlying purpose: to protect against the "very real" risk of prejudice to the accused and the consideration that only distinct crimes justify multiple convictions.[9]

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[7] *Bemba* Confirmation of Charges Decision, para. 202, *referring to Čelebići* Appeals Judgement, para. 412 ("reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.") *See also Čelebići* Appeals Judgement, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, paras. 26, 27.

[8] The same consideration applies to the Prosecution's reliance on the ICC Decision on the Confirmation of Charges against Ongwen. *See* Response, paras. 18, 19 *referring to* ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15, Decision on the Confirmation of Charges Against Dominic Ongwen, 23 March 2016. In any event, the *Ongwen* decision is inapposite: the Chamber was of the view that questions of concurrence of offences "are better left to the determination of the Trial Chamber" in light of the specific wording of Article 61(7) of the ICC Statute and its finding that Regulation 55 did not address cumulative charging.

[9] *See, e.g.*, ICTY, *Kunarac et al.* Appeal Judgement, paras. 168-174; *Čelebići* Appeals Judgement, para. 412.

As Judge Hunt and Bennouna observed "[t]he fundamental consideration raised by this issue is that it is necessary to avoid any prejudice being caused to an accused by being penalized more than once in relation to the same conduct."[10]

10. The same concerns make relevant the test used under the *non bis in idem* guarantee to ascertain whether the offence for which an accused is prosecuted is the same as the one of which he or she was already finally convicted. The *non bis in idem* guarantee is binding on the KSC *inter alia* by virtue of Article 4 of Protocol No. 7 to the ECHR. Its aim is to avoid prejudice caused to an accused by being penalized more than once in relation to the same conduct. In this respect, the ECtHR has held that:

> "the approach [which focuses on a comparison of the legal characterization or elements of the two offences as opposed to the underlying conduct] is too restrictive on the rights of the individual, for if the Court limits itself to finding that the person was prosecuted for offences having a different legal classification it risks undermining the guarantee enshrined in Article 4 of Protocol No. 7 rather than rendering it practical and effective as required by the Convention. Accordingly, the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second 'offence' in so far as it arises from identical facts or facts which are substantially the same."[11]

11. The reasoning of the ECtHR in interpreting this test should be applied by analogy when assessing the fairness of the cumulative charges set out in the Indictment.

12. Finally, the Defence refers the Judge to the following concern as acknowledged by the ICTY Appeals Chamber in *Kunarac et al.*:

[10] *Čelebići* Appeals Judgement, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, para. 12.
[11] ECtHR, GC, *Sergey Zolotukhin v. Russia*, 10 February 2009, paras. 80-82.

> "the *Čelebići*/Blockburger test serves to identify distinct offences within this constellation of statutory provisions. While subscribing to this test, the Appeals Chamber is aware that it is deceptively simple. In practice, it is difficult to apply in a way that is conceptually coherent and promotes the interests of justice".[12]

13. The very real risk of prejudice to the accused justifies exercising the greatest caution and refraining from proceeding to trial with cumulative charges. Leaving the concern for not punishing an accused more than once in respect of the same criminal act to be addressed at the sentencing stage: (i) increases the risk of prejudice; (ii) is difficult to do in practice; and (iii) does not promote the interests of justice, as a whole trial would have taken place on the basis of charges in respect of which convictions cannot be entered. The right to expeditious proceedings and to have an effective opportunity to challenge the Prosecution's case, particularly in the present circumstances where the Defence operates with limited resources, tilts the balance in favour of addressing the flaws of cumulative charges at the pre-trial stage.

14. As the Prosecution acknowledges,[13] the Defence position is that as pleaded the count of arbitrary detention is largely subsumed by the count of cruel treatment and the count of cruel treatment is subsumed by the count of torture. A plain reading of how these counts are presented in the Indictment makes their overlapping character apparent and the Indictment defective in this respect.[14] At paragraph 23 of the Response, the Prosecution concedes that "every act of torture will also qualify as cruel treatment". This shows that, in the event of a conviction, the particular counts would fall squarely within the ambit of the *Čelebići* test. The ICC Appeals Chamber has even accepted that a bar to multiple convictions could arise in situations

[12] ICTY, *Kunarac et al.* Appeal Judgement, para. 172.
[13] Response, para. 21; Motion, paras. 19, 23, 24.
[14] Motion, paras. 20-24.

where the same conduct fulfils the elements of two offences even if these offences have different legal elements, for instance if one offence is fully consumed by the other or is viewed as subsidiary.[15]

15. The Defence requests the Pre-Trial Judge to order the Prosecution to revise the Indictment so that the counts in the Indictment are truly distinct.

C. THE PLEADING OF WAR CRIMES, MODES OF LIABILITY, AND THE USE OF VAGUE AND NON-EXHAUSTIVE LANGUAGE IS DEFECTIVE

16. The Defence maintains its position as set out in the Motion that the pleading of war crimes and modes of liability is defective. Neither the Indictment nor the Prosecution's Response provides sufficient clarity as to the nexus between the charged conduct and the non-international armed conflict in question, the identity and status of the alleged victims as well as other relevant information that can shed light on the conditions of the victims' arrest. In any event, the clarifications provided in the Prosecution's Response, should be included in a revised version of the Indictment.[16]

17. The "requirement to read the Indictment as a whole"[17] does not sufficiently address the defects identified in the Motion.

III. RELIEF REQUESTED

18. The objective of the pre-trial phase is to define the parameters of the trial in a way that ensures its fairness; it is at this stage that deficiencies must be detected and remedied before they compromise the entire proceedings.

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[15] ICC-01/05-01/13 A, *Prosecutor v. Jean-Pierre Bemba Gombo et al*., Judgment on the Appeals of Mr Jean-Pierre Bemba Gombo, Mr Aime Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidele Babala Wandu and Mr Narcisse Arido Against the Decision of Trial Chamber VII Entitled "Judgment Pursuant to Article 74 of the Statute", 8 March 2018, para. 751.
[16] Response, para. 26.
[17] Response, paras. 11, 33, 35, 38, 39 (as an indication).

Such deficiencies left undetected can substantially inhibit the prospects of the defence case at trial to an extent that cannot be subsequently remedied on trial or appeal.[18]

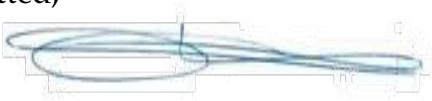
19. In light of the above, the Defence respectfully requests the Judge to:

(i) GRANT the Motion;

(ii) ORDER the Prosecution to amend the Indictment in light of the identified defects and, if it cannot, remove from the Indictment the charges and modes of liability against Mr Shala that are defective;

(iii) CONVENE a hearing during which the Defence can develop the submissions presented in the Motion and Reply.

Respectfully submitted,



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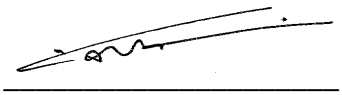

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Friday, 24th September 2021

The Hague, the Netherlands

Word count: 2036

[18] *See, e.g.*, ECtHR, *Panovits v. Cyprus*, 11 December 2008, para. 84.