



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

**In:** KSC-BC-2020-04  
**The Prosecutor v. Pjetër Shala**

**Before:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Date:** 18 October 2021

**Language:** English

**Classification:** Public

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**Public Redacted Version of Decision on Motion Challenging the Form of the  
Indictment**

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**THE PRE-TRIAL JUDGE**,<sup>1</sup> pursuant to Article 39(1) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 97(1)(b) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 19 June 2020, further to a decision by the Pre-Trial Judge ("Confirmation Decision"),<sup>2</sup> the Specialist Prosecutor's Office ("SPO") submitted the Confirmed Indictment.<sup>3</sup>

2. On 16 March 2021, further to a decision and an arrest warrant issued by the Pre-Trial Judge,<sup>4</sup> Pjetër Shala ("Mr Shala" or "Accused") was arrested in the Kingdom of Belgium ("Belgium").<sup>5</sup>

3. On 15 April 2021, upon conclusion of the judicial proceedings in Belgium, Mr Shala was transferred to the detention facilities of the Specialist Chambers ("SC") in the Hague, the Netherlands.<sup>6</sup>

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

<sup>2</sup> KSC-BC-2020-04, F00007, Pre-Trial Judge, *Decision on the Confirmation of the Indictment against Pjetër Shala*, 12 June 2020, strictly confidential and *ex parte*. A confidential redacted version and a public redacted version were issued on 6 May 2021, F00007/CONF/RED and F00007/RED.

<sup>3</sup> KSC-BC-2020-04, F00010, Specialist Prosecutor, *Submission of Confirmed Indictment*, 19 June 2020, public, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential. A confidential, lesser redacted version and a public, further redacted version of the Confirmed Indictment were submitted on 31 March 2021, F00016/A01 and F00016/A02.

<sup>4</sup> KSC-BC-2020-04, F00008, Pre-Trial Judge, *Decision on Request for Arrest Warrant and Transfer Order*, 12 June 2020, confidential. A public redacted version was issued on 6 May 2021, F00008/RED. F00008/A01, Pre-Trial Judge, *Arrest Warrant for Mr Pjetër Shala*, 12 June 2020, strictly confidential and *ex parte*. A public redacted version was issued on 15 April 2021, F00008/A01/RED.

<sup>5</sup> KSC-BC-2020-04, F00013, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 16 March 2021, public.

<sup>6</sup> KSC-BC-2020-04, F00019, Registrar, *Notification of Reception of Pjetër Shala in the Detention Facilities of the Specialist Chambers and Conditional Assignment of Counsel*, 15 April 2021, confidential, para. 2, with Annexes 1-2, confidential. A public redacted version was issued on 26 April 2021, F00019/RED.

4. On 13 July 2021, further to an oral order varying the applicable time limits,<sup>7</sup> the Defence for Mr Shala (“Defence”) filed a preliminary motion challenging the form of the Confirmed Indictment (“Defence Motion”).<sup>8</sup>
5. On 6 September 2021, further to a decision additionally varying the applicable time limits (“5 July 2021 Decision”) and a decision varying the applicable word limit,<sup>9</sup> the SPO responded (“Response”).<sup>10</sup>
6. On 24 September 2021, further to the 5 July 2021 Decision and an oral order varying the applicable word limit,<sup>11</sup> the Defence replied (“Reply”).<sup>12</sup>

## II. SUBMISSIONS OF THE PARTIES

7. The Defence submits that the Confirmed Indictment is defective due to: (i) the SPO’s cumulative charging of the crimes and modes of liability; (ii) the defective pleading of war crimes; (iii) the defective pleading of the modes of liability; (iv) its vague and non-exhaustive language; and (v) the lack of specificity of some of the material facts and elements of the crimes pleaded.<sup>13</sup> The Defence further avers that the

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<sup>7</sup> KSC-BC-2020-04, Transcript, 21 June 2021, p. 62, lines 12-19, public.

<sup>8</sup> KSC-BC-2020-04, F00055, Defence for Mr Shala, *Preliminary Motion by the Defence of Pjetër Shala Challenging the Form of the Indictment*, 13 July 2021, confidential (a corrected version was submitted on 15 July 2021, F00055/COR and a public redacted version on 9 September 2021, F00055/COR/RED). The Pre-Trial Judge observes that the Defence Motion was submitted after the expiry of the applicable time limit, namely 12 July 2021. The Defence did not explain the lateness or request an extension of time, pursuant to Rule 9(5) of the Rules. However, despite these failures, the Pre-Trial Judge accepts in the present instance this Motion in the interests of justice and to preserve the interests of the Accused. That being said, the Pre-Trial Judge reminds the Defence to comply in the future with deadlines and to request properly a variation of time, should it be unable to make submissions within the proscribed time limits.

<sup>9</sup> KSC-BC-2020-04, F00052, Pre-Trial Judge, *Decision on Request to Vary a Time Limit*, 5 July 2021, public; F00067, Pre-Trial Judge, *Decision on SPO Request for Extension of Word Limit*, 3 September 2021, public, paras 10, 14(a).

<sup>10</sup> KSC-BC-2020-04, F00070, Specialist Prosecutor, *Prosecution Response to Shala Defence’s Corrected Version of the Preliminary Motion Challenging the Form of the Indictment*, 6 September 2021, confidential.

<sup>11</sup> KSC-BC-2020-04, Transcript, 23 September 2021, p. 101, line 19 – p. 102, line 7, public.

<sup>12</sup> KSC-BC-2020-04, F00083, Defence for Mr Shala, *Defence Reply to the Prosecution Response to the Preliminary Motion of Pjetër Shala Challenging the Form of the Indictment*, 24 September 2021, confidential.

<sup>13</sup> Defence Motion, paras 2, 14-64.

indictment confirmation procedure ran counter to the Accused's fair trial rights as laid out in the 2012 Kosovo Code of Criminal Procedure, Law No. 04/L-123 ("KCPC").<sup>14</sup> It, therefore, requests that the SPO be ordered to amend the Confirmed Indictment in light of the identified defects or remove otherwise defective charges and modes of liability.<sup>15</sup>

8. The SPO responds that the Defence Motion fails to identify any defects in the form of the Confirmed Indictment under Rule 97(1)(b) of the Rules and must be accordingly dismissed. It further submits that, consistent with Article 38(4) of the Law and Rule 86(3) of the Rules, the Confirmed Indictment sets forth a concise statement of the material facts of the SPO's case and of the crimes and modes of liability charged.<sup>16</sup> Lastly, it considers the Defence's challenges to the confirmation procedure to be wrongly pled, and in any case ill-founded.<sup>17</sup>

9. The Defence replies to the issues arising from the Response.<sup>18</sup> It further requests the Pre-Trial Judge to convene a hearing during which the Defence can develop the submissions presented in the Defence Motion and in the Reply.<sup>19</sup>

### III. APPLICABLE LAW

#### A. PRELIMINARY MOTIONS

10. Pursuant to Article 39(1) of the Law, the Pre-Trial Judge shall have the power to rule on any preliminary motions, including challenges to the indictment.

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<sup>14</sup> Defence Motion, paras 11-13.

<sup>15</sup> Defence Motion, paras 3, 66.

<sup>16</sup> Response, para. 1.

<sup>17</sup> Response, paras 12-13.

<sup>18</sup> Reply, paras 2, 4-17.

<sup>19</sup> Reply, para. 19(iii).

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

#### B. SOURCES OF LAW AND RULES OF INTERPRETATION

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

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

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

#### C. INDICTMENT

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

15. Pursuant to Article 38(4) of the Law and Rule 86(3) of the Rules, an indictment must set forth the name and particulars of the suspect and a concise statement of the

facts of the case and of the crime(s) with which the suspect is charged, in particular the alleged mode of liability in relation to the crimes charged. The indictment shall be filed together with supporting material, i.e. evidentiary material supporting the facts underpinning the charges and a detailed outline demonstrating the relevance of each item of evidentiary material to each allegation.

#### IV. DISCUSSION

##### A. PRELIMINARY MATTERS

##### 1. Request for a Public Hearing

16. The Defence requests the Pre-Trial Judge to convene a hearing to develop the submissions presented in the Defence Motion and the Reply.<sup>20</sup>

17. It is recalled that, under the legal framework of the SC, oral hearings are strictly necessary in certain instances,<sup>21</sup> while they may be conducted as a matter of discretion in other instances.<sup>22</sup> As to the matters arising from the Defence Motion, an oral hearing is not mandatory under the Law and the Rules.

18. The Pre-Trial Judge observes that the Defence has not provided specific reasons demonstrating why an oral hearing is required. In addition, as set out above, the Defence has been granted an extension of time to submit the Defence Motion and an extension of the word limit for its Reply.<sup>23</sup> It has, therefore, been afforded ample opportunity to present its submissions. Moreover, having considered the Parties' extensive submissions, the Pre-Trial Judge is of the view that he has sufficient

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<sup>20</sup> Reply, para. 19(iii).

<sup>21</sup> For instance, Article 41(5) of the Law; Rule 92 of the Rules (initial appearances); Rule 96 of the Rules (status conferences).

<sup>22</sup> For instance, Rule 95(2)(d) of the Rules; KSC-BC-2020-06, F00178, Pre-Trial Judge, *Decision on Kadri Veseli's Application for Interim Release*, 22 January 2021, public, para. 62; F00150, Pre-Trial Judge, *Decision on the Conduct of Detention Review and Varying the Deadline for Preliminary Motions*, 16 December 2020, public, para. 18.

<sup>23</sup> See paras 4 and 6 above.

information to rule on the Defence Motion and that additional oral arguments are neither necessary nor conducive to the expeditious adjudication of the matters at issue. Accordingly, the Pre-Trial Judge rejects the Defence's request.

## 2. Fairness of the Indictment Confirmation Procedure

19. The Defence submits that the indictment confirmation procedure was conducted *ex parte* for more than a year, in violation of the Accused's fair trial rights.<sup>24</sup> More specifically, the Defence avers that, whereas the indictment was submitted to the Pre-Trial Judge for confirmation on 14 February 2020, Mr Shala was only informed of it on 16 March 2021, when he was arrested.<sup>25</sup> In its view, such an approach stands in stark contrast with the procedures laid down in Articles 242 and 245 of the KCPC, which provide that a defendant must be provided with the indictment at the latest at the initial hearing, to be held within 30 days of the indictment being filed, and in Article 244 of the KCPC, which provides that the Defence must be provided with notice of the main evidence supporting the prosecution's case at the latest when an indictment is filed.<sup>26</sup> For these reasons, the Defence requests the Pre-Trial Judge to be rigorous in the assessment of the Defence Motion.<sup>27</sup>

20. The SPO responds that, since the Defence's objection is not included among the alleged defects of the Confirmed Indictment and no specific relief has been requested, it should not be considered as part of the Defence Motion.<sup>28</sup> In any case, the SPO avers that challenges to the indictment confirmation procedure are not challenges to the form of the indictment.<sup>29</sup> Moreover, as the Law operates as *lex specialis* and any Kosovo law must be explicitly incorporated into the Law to be given effect in the SC legal

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<sup>24</sup> Defence Motion, para. 11.

<sup>25</sup> Defence Motion, para. 12 and footnote 11.

<sup>26</sup> Defence Motion, para. 12.

<sup>27</sup> Defence Motion, para. 13.

<sup>28</sup> Response, para. 12.

<sup>29</sup> Response, para. 13.



framework, provisions of the KCPC which have not been incorporated into the Law shall not apply to proceedings before the SC.<sup>30</sup>

21. The Defence replies that, due to the highly prejudicial confirmation procedure that interfered with Mr Shala's rights under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), it had invited the Pre-Trial Judge to remedy the prejudice by reconsidering his previous findings.<sup>31</sup>

22. The Pre-Trial Judge recalls that any preliminary motion challenging the indictment may only pertain to its form. This notwithstanding, Article 39(1) of the Law stipulates that the Pre-Trial Judge can rule on *any* preliminary motions, including but not limited to challenges to the indictment and jurisdiction.<sup>32</sup> Accordingly, the Pre-Trial Judge will address the Defence's challenge to the fairness of the indictment confirmation procedure under Article 39(1) of the Law.

23. In this regard, insofar as the Defence requests the Pre-Trial Judge to be rigorous in the assessment of the Defence Motion, the Pre-Trial Judge considers that the assessment of the Defence Motion is independent of the nature of the procedure relating to the confirmation of the indictment. The Pre-Trial Judge will review the Confirmed Indictment in light of the challenges raised by the Defence in accordance with the applicable standards and the outcome of this assessment is in no way pre-determined, curtailed or otherwise affected by the confirmation procedure. Moreover, insofar as the Defence relies on Articles 242, 244 and 245 of the KCPC to allege the unfairness of the indictment confirmation procedure, the Pre-Trial Judge notes that these have not been expressly incorporated into the Law. Accordingly, recalling that any Kosovo law, regulation, piece of secondary regulation, other rule or custom and practice which has not been expressly incorporated into the Law shall not apply to the

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<sup>30</sup> Response, para. 13.

<sup>31</sup> Reply, para. 4.

<sup>32</sup> *Similarly*, KSC-BC-2020-04, F00088, Pre-Trial Judge, *Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers* ("Jurisdiction Decision"), 18 October 2021, public, para. 69.

organisation, administration, functions or jurisdiction of the SC and the SPO and that the Law shall prevail over any and all contrary provisions of any other law or regulation, the Defence's reliance on them to allege any irregularity in the confirmation procedure is misplaced.<sup>33</sup>

24. The Pre-Trial Judge accordingly dismisses the Defence's challenges in relation to the fairness of the confirmation procedure.

## B. GENERAL STANDARDS PERTAINING TO THE FORM OF THE CONFIRMED INDICTMENT

### 1. Specificity and Clarity

25. The Pre-Trial Judge recalls that, in accordance with Articles 21(4)(a) and 38(4) of the Law, as well as Rule 86(3) of the Rules, an indictment must set forth with sufficient specificity and clarity the facts underpinning the charges and the crimes, including the modes of liability charged.<sup>34</sup> Such specificity and clarity must ensure that the indictment, as a stand-alone document,<sup>35</sup> provides an accused with sufficient information to understand clearly and fully the nature and cause of the charges against him, with a view to preparing an adequate defence.<sup>36</sup> An accused should

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<sup>33</sup> See, similarly, KSC-BC-2020-06, F00413, Pre-Trial Judge, *Decision on Defence Motions Alleging Defects in the Form of the Indictment* ("Thaçi et al. Indictment Decision"), 22 July 2021, confidential, para. 49. A public redacted version was issued on the same day, F00413/RED; F00450, Pre-Trial Judge, *Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused*, 31 August 2021, public, paras 73-74; KSC-BC-2018-01, IA001-F00005, Court of Appeals Panel, *Decision on Appeal against "Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi*, 1 October 2021, public, para.16.

<sup>34</sup> *Thaçi et al. Indictment Decision*, para. 27; KSC-BC-2020-07, IA004/F00007, Court of Appeals Panel, *Decision on the Defence Appeals Against Decision on Preliminary Motions* ("Gucati and Haradinaj Appeal Decision"), 23 June 2021, public, para. 35; F00147, Pre-Trial Judge, *Decision on Preliminary Motions* ("Gucati and Haradinaj Preliminary Motions Decision"), 8 March 2021, confidential, para. 38 (a public redacted version was issued on the same day, F00147/RED).

<sup>35</sup> *Thaçi et al. Indictment Decision*, para. 27; *Gucati and Haradinaj Preliminary Motions Decision*, para. 38; KSC-BC-2020-04, F00003, *Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules*, 28 February 2020 ("Rule 86(4) Order"), public, para. 11.

<sup>36</sup> *Thaçi et al. Indictment Decision*, para. 27, with further references; *Gucati and Haradinaj Appeal Decision*, para. 36; *Gucati and Haradinaj Preliminary Motions Decision*, para. 38. See also Rule 86(4) Order, paras 9, 11.

accordingly not be required to consult other documents in order to understand and piece together the factual allegations underpinning the charges.<sup>37</sup>

26. Whether a fact underpins any particular charge and must accordingly be pleaded in the indictment with specificity cannot be decided in the abstract, but on a case-by-case basis, taking into account, *inter alia*, the nature and scale of the crimes charged, the circumstances of the case, the alleged proximity of the accused to the events and the mode of liability charged.<sup>38</sup> Nonetheless, in some instances, it cannot be excluded that certain details of the case, such as the number and identity of victims,<sup>39</sup> would remain obscure even after the end of the trial.<sup>40</sup> In any event, when determining whether an indictment fulfils the above conditions, the indictment must be considered as a whole and select paragraphs or phrases should be read in the context of the entire document.<sup>41</sup>

27. Furthermore, a clear difference must be drawn between facts underpinning the charges, which must be pleaded as provided above, and evidence proffered to prove them.<sup>42</sup> The indictment need not set out the evidence by which the facts underpinning the charges are to be proven.<sup>43</sup> Such evidence will be disclosed according to the relevant provisions. Any disputes as to issues of fact are for determination at trial and

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<sup>37</sup> *Thaçi et al.* Indictment Decision, para. 27, with further references; *Gucati and Haradinaj* Appeal Decision, para. 49; *Gucati and Haradinaj* Preliminary Motions Decision, para. 38; Rule 86(4) Order, para. 11.

<sup>38</sup> *Thaçi et al.* Indictment Decision, para. 28, with further references; *Gucati and Haradinaj* Appeal Decision, paras 38, 42; *Gucati and Haradinaj* Preliminary Motions Decision, para. 39; Rule 86(4) Order, para. 15.

<sup>39</sup> *Thaçi et al.* Indictment Decision, para. 28, with further references; *Gucati and Haradinaj* Preliminary Motions Decision, para. 39.

<sup>40</sup> *Thaçi et al.* Indictment Decision, para. 28, with further references; *Gucati and Haradinaj* Preliminary Motions Decision.

<sup>41</sup> *Thaçi et al.* Indictment Decision, para. 28, with further references; *Gucati and Haradinaj* Appeal Decision, para. 56; *Gucati and Haradinaj* Preliminary Motions Decision, para. 39.

<sup>42</sup> *Thaçi et al.* Indictment Decision, para. 29, with further references; *Gucati and Haradinaj* Appeal Decision, para. 38; *Gucati and Haradinaj* Preliminary Motions Decision, para. 40.

<sup>43</sup> *Thaçi et al.* Indictment Decision, para. 29, with further references; *Gucati and Haradinaj* Appeal Decision, para. 38; *Gucati and Haradinaj* Preliminary Motions Decision, para. 40.

not via preliminary motions relating to the form of the indictment.<sup>44</sup> At any rate, the SC legal framework ensures that, in addition to the disclosure process, further evidentiary details are provided early on to the accused in the Rule 86(3)(b) Outline, the Confirmation Decision, and the submissions under Rule 95(4) of the Rules.<sup>45</sup>

28. Lastly, challenges concerning the legal elements of a crime or a mode of liability do not constitute challenges to the form of the indictment, but are matters to be addressed at trial.<sup>46</sup>

## 2. Particulars

29. When alleging that the accused personally carried out the acts underlying the crime(s) charged, it is necessary to set out, as far as possible, and with “the greatest precision”:<sup>47</sup> the identity of the victim(s); the place and approximate date of the alleged acts; the manner and means by which they were committed and the related mental element.<sup>48</sup>

30. On the other hand, where an accused is not alleged to have directly carried out the crime or where, by their nature, the crimes are directed against a group or collectivity of people, the accused must be provided with as much detailed information as possible regarding: the places, times, and approximate number of victims; the necessary particulars to make out the elements of the offences, such as the accused’s alleged conduct giving rise to criminal responsibility including the contours of the common plan or purpose, its implementation as well as the accused’s

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<sup>44</sup> *Thaçi et al.* Indictment Decision, para. 29, with further references; *Gucati and Haradinaj* Preliminary Motions Decision, para. 40.

<sup>45</sup> See Rules 86(3), (5) and 95(4) of the Rules; *Thaçi et al.* Indictment Decision, para. 29, with further references; *Gucati and Haradinaj* Preliminary Motions Decision, para. 40.

<sup>46</sup> *Thaçi et al.* Indictment Decision, para. 30, with further references.

<sup>47</sup> *Thaçi et al.* Indictment Decision, para. 31, with further references; Rule 86(4) Order, para. 16.

<sup>48</sup> *Thaçi et al.* Indictment Decision, para. 31, with further references; Rule 86(4) Order, para. 16.

contribution thereto; the related mental element; and the identities of any alleged co-perpetrators or Joint Criminal Enterprise (“JCE”) members, if known.<sup>49</sup>

31. As regards the determination of the identity of victims, the nature and scale of the alleged offences may make such determination impossible.<sup>50</sup> In such cases, the identification of the victims as a group or the indication of their approximate number is sufficient.<sup>51</sup>

32. Where the actual identity of co-perpetrators or JCE members cannot be established, they can be identified by pseudonym,<sup>52</sup> affiliation,<sup>53</sup> or group delimited by geographic, temporal or other parameters.<sup>54</sup> In any event, there is no requirement to identify all individuals involved in the offences who are not considered to be co-perpetrators of the charged offences or JCE members.<sup>55</sup>

33. When an accused is alleged to have aided and abetted in the commission of a crime, the indictment must identify the particular acts or course of conduct on the part of the accused which forms the basis of the charges.<sup>56</sup>

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<sup>49</sup> *Thaçi et al.* Indictment Decision, para. 32, with further references; *Gucati and Haradinaj* Appeal Decision, para. 45; *Gucati and Haradinaj* Preliminary Motions Decision, para. 41; Rule 86(4) Order, para. 17.

<sup>50</sup> *Thaçi et al.* Indictment Decision, para. 34, with further references; *Gucati and Haradinaj* Preliminary Motions Decision, para. 43.

<sup>51</sup> *Thaçi et al.* Indictment Decision, para. 34, with further references; *Gucati and Haradinaj* Preliminary Motions Decision, para. 43.

<sup>52</sup> *Thaçi et al.* Indictment Decision, para. 35, with further references; *Gucati and Haradinaj* Preliminary Motions Decision, para. 42.

<sup>53</sup> *Thaçi et al.* Indictment Decision, para. 35, with further references; *Gucati and Haradinaj* Preliminary Motions Decision, para. 42.

<sup>54</sup> *Thaçi et al.* Indictment Decision, para. 35, with further references; *Gucati and Haradinaj* Appeal Decision, para. 45; *Gucati and Haradinaj* Preliminary Motions Decision, para. 42.

<sup>55</sup> *Thaçi et al.* Indictment Decision, para. 35, with further references; *Gucati and Haradinaj* Preliminary Motions Decision, para. 42.

<sup>56</sup> *Thaçi et al.* Indictment Decision, para. 36, with further references; *Gucati and Haradinaj* Appeals Decision, para. 53; *Gucati and Haradinaj* Preliminary Motions Decision, para. 42.

34. Open-ended statements in respect of the facts underpinning the charges (such as “including, but not limited to”) are not permitted,<sup>57</sup> unless they are exceptionally necessary given the circumstances of the case or the nature and scale of the offences and they do not create ambiguity as regards the charged offences.<sup>58</sup> The information must be set out with precision and comprehensively, without diffusion.<sup>59</sup> Moreover, when a certain category pertaining to the facts underpinning the charges is defined, and the word “including” is used to provide a list of non-exhaustive examples falling within such category, the use of the word “including” is permitted.<sup>60</sup> Where, however, a certain category is not defined, and only refers to a list of non-exhaustive examples falling within such category, preceded by the word “including”, such use of the word “including” is not permitted, as it would impermissibly allow the scope of the corresponding category to be expanded at trial.<sup>61</sup>

35. Alternative formulations such as “and/or” are permitted as long as they pertain to evidentiary material to be determined at trial,<sup>62</sup> and do not create ambiguity as regards the charged offences or modes of liability.<sup>63</sup>

### 3. Defective Indictment

36. An indictment is defective when it fails to plead the facts underpinning the charges or it does so in an insufficient or unclear manner, creating ambiguity as

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<sup>57</sup> *Thaçi et al.* Indictment Decision, para. 39, with further references; *Gucati and Haradinaj* Appeals Decision, para. 84; *Gucati and Haradinaj* Preliminary Motions Decision, para. 44; Rule 86(4) Order, para. 17.

<sup>58</sup> *Thaçi et al.* Indictment Decision, para. 39, with further references; *Gucati and Haradinaj* Appeals Decision, para. 84; *Gucati and Haradinaj* Preliminary Motions Decision, para. 44.

<sup>59</sup> *Thaçi et al.* Indictment Decision, para. 39, with further references; Rule 86(4) Order, para. 10.

<sup>60</sup> *Thaçi et al.* Indictment Decision, para. 39.

<sup>61</sup> *Thaçi et al.* Indictment Decision, para. 39.

<sup>62</sup> *Gucati and Haradinaj* Preliminary Motions Decision, para. 45, with further references.

<sup>63</sup> *Gucati and Haradinaj* Preliminary Motions Decision, para. 45, with further references.

regards the pleaded charges, including the modes of liability, and thus impairing the Defence's ability to prepare.<sup>64</sup>

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

### C. CUMULATIVE CHARGING

38. The Defence submits that the Confirmed Indictment is defective insofar as it charges Mr Shala with arbitrary detention (Count 1), cruel treatment (Count 2), and torture (Count 3) and these counts are presented as cumulative and not alternative.<sup>65</sup> The Defence claims that cumulative charging places an undue burden on the Defence, interferes with a range of fair trial rights and will unnecessarily prolong the trial.<sup>66</sup> Relying on jurisprudence of the International Criminal Court ("ICC"), the Defence avers that only distinct crimes protecting distinct values may justify cumulative charging and that the Pre-Trial Judge should exercise caution in this regard.<sup>67</sup>

39. With regard to Counts 1 and 2, the Defence submits that Count 1 (arbitrary detention), as pleaded by the SPO, is largely subsumed by Count 2 (cruel treatment), which is the most appropriate legal characterisation for the facts pleaded.<sup>68</sup> Similarly, the Defence avers that the cumulative charging of Counts 2 and 3, namely cruel treatment and torture, breaches the principles of the lesser included offence and

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<sup>64</sup> *Thaçi et al.* Indictment Decision, para. 40, with further references; *Gucati and Haradinaj* Appeal Decision, para. 38; *Gucati and Haradinaj* Preliminary Motions Decision, para. 46.

<sup>65</sup> Defence Motion, para. 14. The Pre-Trial Judge notes that, in paragraph 14 of the Defence Motion, the Defence submits that Counts 1-4 are impermissibly cumulative. However, the Pre-Trial Judge will only address this argument in relation to Counts 1-3 in light of the fact that the Defence only develops its argument in connection with the latter counts.

<sup>66</sup> Defence Motion, paras 14-15, 18.

<sup>67</sup> Defence Motion, paras 16-17.

<sup>68</sup> Defence Motion, paras 19-22.

consumption.<sup>69</sup> In the alternative, the Defence challenges Counts 2 and 3 as charging more than one offence in each count.<sup>70</sup>

40. The Defence concludes that leaving a decision on the cumulative charges to be made at trial is prejudicial to its preparation and to the Accused's fair trial rights, particularly in the present circumstances where the Defence is required to operate with scarce resources.<sup>71</sup> It accordingly requests the Pre-Trial Judge not to allow cumulative charging.<sup>72</sup>

41. The SPO responds that the *ad hoc* tribunals permitted cumulative charging and the ICC decision relied upon by the Defence has to be read against the particularities of the ICC legal framework.<sup>73</sup> In any case, the SPO avers that the ICC has also recently found that cumulative charges might be better addressed at trial.<sup>74</sup>

42. As to the specific challenges made by the Defence, the SPO argues that arbitrary detention and cruel treatment each contain an element that is distinct from the other and therefore satisfy the principle of reciprocal speciality. It adds that, whereas it is true that every act of torture will qualify as cruel treatment, the opposite is not.<sup>75</sup>

43. The Defence replies that the SC must not automatically follow practices and jurisprudence from other tribunals and shall take into consideration that cumulative charging often leads to unduly protracted proceedings.<sup>76</sup> Although the Defence concedes that the ICC decision it relied upon needs to be read against the ICC legal framework, it avers that this decision had at its basis the inherent unfairness of cumulative charging.<sup>77</sup> Lastly, the Defence submits that, having regard to the

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<sup>69</sup> Defence Motion, paras 23-24.

<sup>70</sup> Defence Motion, para. 25.

<sup>71</sup> Defence Motion, para. 26.

<sup>72</sup> Defence Motion, para. 14.

<sup>73</sup> Response, paras 14-17.

<sup>74</sup> Response, paras 18-19.

<sup>75</sup> Response, paras 21-23.

<sup>76</sup> Reply, para. 8.

<sup>77</sup> Reply, paras 6-7.



jurisprudence of the European Court of Human Rights (“ECtHR”),<sup>78</sup> it is necessary to protect the Accused from the risk of prejudice arising from deferring the issue of cumulative charges to be dealt with at trial.<sup>79</sup>

44. The Pre-Trial Judge observes at the outset that neither the Law nor the Rules contain provisions prohibiting the possibility of employing different legal qualifications for the same acts in an indictment, i.e. cumulative charging.

45. The Pre-Trial Judge further notes that various international tribunals have repeatedly permitted cumulative charging by the prosecution. More specifically, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) first found that cumulative charging is allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine with certainty which of the charges brought against an accused will be proven.<sup>80</sup> This principle has been repeatedly upheld by, *inter alia*, the *ad hoc* tribunals,<sup>81</sup> the Extraordinary Chambers in the Courts of Cambodia (“ECCC”),<sup>82</sup> the Special Court for Sierra Leone (“SCSL”)<sup>83</sup> and, with certain reservations, the Special Tribunal for Lebanon (“STL”).<sup>84</sup> While it is true that

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<sup>78</sup> Reply, paras 10-11.

<sup>79</sup> Reply, paras 9, 12-14.

<sup>80</sup> ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeals Chamber, [Judgement](#) (“Čelebići Appeals Judgment”), 20 February 2001, para. 400.

<sup>81</sup> ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeals Chamber, [Appeal Judgement](#), 23 October 2001, paras 385-386; *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Appeals Chamber, [Judgement](#), 3 May 2006, para. 103; *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, [Judgement](#), 12 June 2002, para. 167; ICTR, *Prosecutor v. Rutaganda*, ICTR-96-3-T, Trial Chamber I, [Judgement and Sentence](#), 6 December 2009, para. 116; *Prosecutor v. Kanyabashi*, ICTR-96-15-I, Trial Chamber II, [Decision on Defence Preliminary Motion for Defects in the Form of the Indictment](#), 31 May 2000, paras 5.5-5.7.

<sup>82</sup> See, for example, ECCC, *Prosecutor v. Kaing Guek Eav (“Duch”)*, 001/18-07-2007-ECCC/OCIJ (PTC 02), Pre-Trial Chamber, [Public Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias “Duch” \(“Duch” Appeal against Closing Order\)](#), 5 December 2008, paras 85-88.

<sup>83</sup> SCSL, *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Appeals Chamber, [Judgement](#), 22 February 2008, para. 212, footnote 327.

<sup>84</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I, Appeals Chamber, [Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging](#), 16 February 2011, paras 265-301.

the ICC, as the Defence avers, initially disagreed with this practice,<sup>85</sup> it has lately allowed cumulative charging by the prosecution.<sup>86</sup>

46. The Pre-Trial Judge notes that Article 39(2) of the Law mandates him to decline to confirm an indictment only when the evidence provided by the SPO does not support a well-grounded suspicion that the person committed the charged crime, and not when one possible legal characterisation of the relevant facts is to be preferred over another, equally viable.

47. In this regard, the Pre-Trial Judge is of the view that it will be for the Trial Panel to fully assess the relevant circumstances and to resolve the question of concurrence of offences, following the presentation of the evidence.<sup>87</sup> Therefore, the Pre-Trial Judge considers that prior to the presentation of all the evidence at trial, the SPO must have the means to present the charges in such a manner that will allow the future Trial Panel to decide on the most appropriate charges, based on the sufficiency of the evidence.

48. The Pre-Trial Judge is aware that, as the Defence avers, cumulative charging might have an impact on the fair trial rights of the Accused, such as the right to have adequate time and resources to prepare his defence or the right to a trial within reasonable time, and might place a burden on the Defence in terms of workload.<sup>88</sup> In the present instance, however, the Pre-Trial Judge notes that the Defence does not substantiate these arguments in detail and for the present case but simply avers, in

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<sup>85</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, 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 Bemba Gombo](#), 15 June 2009, paras 200-205.

<sup>86</sup> ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-403-Red-Corr, Pre-Trial Chamber II, [Public Redacted Corrected version of "Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona"](#) ("Yekatom and Ngaïssona Confirmation Decision"), 14 May 2020, paras 120-121; *Prosecutor v. Ongwen*, ICC-02/04-01/15-422-Red, [Decision on the Confirmation of Charges against Dominic Ongwen](#), 23 March 2016 ("Ongwen Confirmation Decision"), paras 31-33.

<sup>87</sup> Similarly, ICTY, [Čelebići Appeals Judgment](#), para. 400; ICC, [Yekatom and Ngaïssona Confirmation Decision](#), para. 121; [Ongwen Confirmation Decision](#), paras 30, 33.

<sup>88</sup> See also ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Trial Chamber, [Judgment](#), 14 January 2000, paras 724-725.

general terms, that the practice of inappropriate cumulative charging has been shown to have an adverse impact on a range of rights of the Accused and places an undue burden on the Defence.<sup>89</sup> .

49. The Pre-Trial Judge further considers that the Defence’s concerns relating to the “very real” risk of prejudice to the Accused<sup>90</sup> uniquely pertain to the different concept of cumulative convictions which is extraneous to the question of whether the Pre-Trial Judge shall allow the SPO to charge Mr Shala for the same set of facts pursuant to distinct legal qualifications.<sup>91</sup>

50. Likewise, the Pre-Trial Judge finds that the Defence’s reference to Article 4 of Protocol 7 of the ECHR is inapposite, as the latter prohibits the repetition of criminal proceedings for an offence for which an individual has already been finally acquitted or convicted and does not address the problem of a set of facts possibly constituting various offences in the same criminal proceedings. Assigning different legal qualifications in relation to the same acts in an indictment does not inherently threaten the *ne bis in idem* principle because it does not involve the actual assignment of liability or punishment.<sup>92</sup>

51. In light of the foregoing, the Pre-Trial Judge dismisses the Defence’s challenges in relation to cumulative charging.

#### D. PLEADING OF MODES OF LIABILITY

##### 1. Joint Criminal Enterprise

52. The Defence submits that the pleading of the JCE in the Confirmed Indictment is vague and therefore defective.<sup>93</sup> It further recalls that the Pre-Trial Judge has

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<sup>89</sup> Defence Motion, para. 18; Reply, para. 8.

<sup>90</sup> Reply, para. 9.

<sup>91</sup> ICC, [Ongwen Confirmation Decision](#), para. 30.

<sup>92</sup> ECCC, [Duch Appeal against Closing Order](#), para. 88.

<sup>93</sup> Defence Motion, para. 37.

previously accepted that there is a small number of JCE members (“JCE Members”) in the present case and therefore there is no justification for the lack of clarity and material information supporting the SPO’s case.<sup>94</sup>

a) Membership of the JCE

53. The Defence claims that, having regard to the scale of the JCE and underlying events, the identity and the role of the alleged JCE Members and tools - i.e. individuals who were not JCE Members, but were allegedly used by JCE Members to carry out crimes committed in furtherance of the common purpose (“Tools”) - is impermissibly vague.<sup>95</sup> Claiming that more robust obligations for specificity come into play due to Mr Shala’s proximity to the physical commission of the charged offences, the Defence argues that the reference to “certain other [Kosovo Liberation Army (“KLA”)] soldiers, police, and guards present at the Kukës Metal Factory” is too vague and the SPO must be ordered to indicate whether the names of additional members are known or unknown.<sup>96</sup>

54. The SPO responds that the JCE Members and Tools are identified by name and/or nickname, affiliation, temporal and geographic location, and role or position in the Confirmed Indictment and that such a level of identification is compatible with the scale of the events.<sup>97</sup>

55. The Pre-Trial Judge observes that the Confirmed Indictment pleads that, besides Mr Shala, other members of the JCE included Sabit Geci aka “Qopa”, Xhemshit Krasniqi, KLA soldiers nicknamed [REDACTED] and [REDACTED], and certain other KLA soldiers, police, and guards present at the Kukës Metal Factory.<sup>98</sup> The Pre-Trial

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<sup>94</sup> Defence Motion, para. 36.

<sup>95</sup> Defence Motion, para. 39.

<sup>96</sup> Defence Motion, paras 40-41, 56.

<sup>97</sup> Response, para. 30.

<sup>98</sup> Confirmed Indictment, para. 10.

Judge thus notes that the Confirmed Indictment identifies five JCE Members, including the Accused. Other members of the alleged JCE are identified as being “certain other KLA soldiers, police, and guards”. While the Pre-Trial Judge previously found that the size of the JCE in the present case is relatively small and that the events underlying the charges are easily distinguishable,<sup>99</sup> this does not entail that the language used by the SPO is impermissibly vague. In this regard, the Pre-Trial Judge recalls that an indictment must identify the JCE members at least by category or group.<sup>100</sup> The Confirmed Indictment, after having specifically identified five members of the JCE, makes clear reference to three discrete categories of individuals and clearly circumscribes the geographical scope of the JCE by locating those individuals at the Kukës Metal Factory within a specific time-frame, from 17 May 1999 to 5 June 1999.<sup>101</sup>

56. Similarly, the use of the words “certain other KLA members” in the present case is not impermissibly vague seeing as the JCE Members are identified as soldiers, policemen and guards present at a specific location during a particular time-frame.

57. Accordingly, taking into account Mr Shala’s alleged proximity, the Pre-Trial Judge is satisfied that the membership of the alleged JCE has been pleaded with sufficient specificity. The Pre-Trial Judge accordingly dismisses the Defence’s challenges in relation to the membership of the JCE.

#### b) Definition of Tools

58. The Defence argues that the SPO does not distinguish JCE Members from Tools, but rather uses the terms interchangeably, without specifying their respective identities and roles.<sup>102</sup> Claiming that such a lack of specificity is inherently prejudicial

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<sup>99</sup> KSC-BC-2020-04, F00045, Pre-Trial Judge, *Decision on Pjetër Shala’s Request for Provisional Release*, 15 June 2021, confidential, para. 26. A public redacted version was issued on 23 June 2021, F00045/RED.

<sup>100</sup> See *Gucati and Haradinaj* Appeal Decision, para. 45.

<sup>101</sup> Confirmed Indictment, para. 8.

<sup>102</sup> Defence Motion, para. 42.

to Mr Shala, the Defence avers that the latter is being charged with liability derived from the conduct of others, and in particular from any number of unknown and unidentifiable members.<sup>103</sup>

59. The SPO responds that it is permitted to allege that certain individuals are either JCE Members or Tools if done using alternative pleading. It further argues that the Defence has suffered no prejudice as it has been on notice that, if some alleged JCE Members are found not to be as such, the SPO alleges that they acted as Tools.<sup>104</sup> Lastly, the SPO responds that the Defence's allegation that Mr Shala's liability derives from the conduct of "any number of unknown and unidentifiable members" is not a challenge to the form of the Confirmed Indictment.<sup>105</sup>

60. The Pre-Trial Judge notes that, after having identified the alleged JCE Members, the Confirmed Indictment states that such Members, by their acts or omissions, contributed to achieving their common purpose.<sup>106</sup> It is further noted that, in the alternative, the Confirmed Indictment pleads that some or all of these individuals were not members of the JCE, but were used by the JCE Members to carry out crimes committed in furtherance of the common purpose.<sup>107</sup> Therefore, the Confirmed Indictment defines the Tools with reference to the same individuals, categories and groups as the JCE Members, which the Pre-Trial Judge has found are pleaded with sufficient specificity.<sup>108</sup>

61. The Pre-Trial Judge finds that the SPO is allowed to plead that all or some of the individuals mentioned in paragraph 10 of the Confirmed Indictment were either JCE Members or Tools if it does so in the alternative. In this regard, the Pre-Trial Judge recalls that alternative pleading is permitted and is, in fact, a well-established practice

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<sup>103</sup> Defence Motion, para. 43.

<sup>104</sup> Response, para. 31.

<sup>105</sup> Response, para. 32.

<sup>106</sup> Confirmed Indictment, para. 10.

<sup>107</sup> Confirmed Indictment, para. 10.

<sup>108</sup> See paras 55-57 above.

at the international criminal courts and tribunals.<sup>109</sup> It will be for the Trial Panel to make this determination following the presentation of all the evidence. For the purpose of informing the Accused of the charges, the Defence is hereby put on notice that, if some of the alleged JCE Members are found not to have been so, they are nevertheless alleged to have been Tools.

62. Lastly, as far as the Defence submits that Mr Shala is charged with a form of liability that is based on the attribution of criminal conduct to any number of unknown and unidentifiable members, the Pre-Trial Judge finds that, having determined that the identity of the JCE Members and Tools has been correctly pleaded,<sup>110</sup> this submission does not require to be addressed any further.<sup>111</sup> In any case, such a challenge pertains to the legal elements of this mode of liability and, therefore, it is not a challenge to the form of the indictment.<sup>112</sup> Accordingly, this submission is dismissed.

63. The Pre-Trial Judge accordingly dismisses the Defence's challenges in relation to the definition of Tools.

c) The Accused's Contribution to the JCE

64. The Defence avers that the Confirmed Indictment fails to demonstrate under which circumstances Mr Shala substantially contributed to the JCE and that he is entitled to clear and precise notice of the concrete alleged acts imputed.<sup>113</sup> The Defence argues that the Confirmed Indictment identifies no concrete act or omission by Mr Shala that is alleged to have significantly contributed to the JCE. More specifically, the Defence identifies the following defects, stemming from generic descriptions of alleged conduct without reference to any concrete incidents, that, in its view,

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<sup>109</sup> *Similarly, Thiçi et al.* Indictment Decision, para. 82, with further references.

<sup>110</sup> *See* paras 55-57 above.

<sup>111</sup> *See also, similarly,* Jurisdiction Decision, para. 94.

<sup>112</sup> *See* para. 28 above.

<sup>113</sup> Defence Motion, para. 44.

jeopardise Mr Shala's capacity to prepare a defence: (i) the generic description of Mr Shala's participation, together with other KLA members, in the transfer of a person to the Kukës Metal Factory, as described in paragraph 15 of the Confirmed Indictment;<sup>114</sup> (ii) the use of the word "including" at paragraph 16 of the Confirmed Indictment;<sup>115</sup> (iii) the generic allegation 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;<sup>116</sup> (iv) the generic description of three incidents during which Mr Shala allegedly participated in interrogating and physically and psychologically assaulting detainees at Kukës Metal Factory;<sup>117</sup> and (v) the use of the word "including" and of the expression "and/or" at paragraph 11 (c)-(d) of the Confirmed Indictment.<sup>118</sup>

65. The SPO responds that paragraph 11 of the Confirmed Indictment refers to the multiple ways in which the Accused contributed to the common purpose, including by using paragraph numbers referring to specific incidents.<sup>119</sup> In particular, the SPO avers that the Confirmed Indictment describes the Accused's conduct in detail and identifies a series of events, acts or omissions of the Accused, or of those who committed the crimes with him against particular detainees.<sup>120</sup> The SPO further submits that the use of the word "including" does not create ambiguity or create the risk that the SPO will expand its case beyond the approved scope.<sup>121</sup> Lastly the SPO

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<sup>114</sup> Defence Motion, para. 44.

<sup>115</sup> Defence Motion, para. 44.

<sup>116</sup> Defence Motion, para. 44.

<sup>117</sup> Defence Motion, para. 44; *see also* para. 56, *in fine*, para. 57, para 64(β), referring to Confirmed Indictment, paragraph 22 (who were "the certain KLA members" who forced the [REDACTED] detainees to [REDACTED] and shot at them), 23 (who are the "KLA members who continued to beat them despite their gunshot wounds).

<sup>118</sup> Defence Motion, para. 59.

<sup>119</sup> Response, para. 33.

<sup>120</sup> Response, para. 33.

<sup>121</sup> Response, para. 40.



argues that the use of “and/or” in relation to the modes of liability does not create impermissible ambiguity.<sup>122</sup>

66. The Pre-Trial Judge notes, at the outset, that the Confirmed Indictment alleges that Mr Shala made contributions to the common purpose of the JCE by, *inter alia*, directly participating in or otherwise contributing to the crimes charged.<sup>123</sup> The Pre-Trial Judge recalls that instances in which the Accused is alleged to have personally participated or otherwise contributed to the crimes charged must be exhaustively pleaded.<sup>124</sup> Failure to do so – whether partially or entirely – is failure to inform the Accused (fully) of the conduct that is alleged to give rise to his criminal responsibility. This can impair his ability to defend himself.<sup>125</sup>

67. Turning to the specific challenges of the Defence, the Pre-Trial Judge notes that paragraph 11 of the Confirmed Indictment states that Mr Shala participated in acts of cruel treatment and torture, including as alleged in paragraphs 20-23 therein. In turn, paragraphs 22 and 23 of the Confirmed Indictment describe two incidents of the alleged cruel treatment of [REDACTED]. At paragraph 22, after alleging that “[...] Pjetër Shala beat [REDACTED]”, the SPO pleads that “[c]ertain KLA members then forced these two detainees to [REDACTED] and shot at them with automatic weapons, wounding both men”.

68. In the view of the Pre-Trial Judge, whereas in the first sentence it is pleaded in a clear manner that Mr Shala physically participated in the incident, the formulation contained in the second sentence is ambiguous and does not allow the Defence to understand whether it is pleaded that Mr Shala was among those “certain KLA members” or not and whether it is alleged that he personally participated in the incident.

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<sup>122</sup> Response, para. 41.

<sup>123</sup> Confirmed Indictment, para. 11.

<sup>124</sup> See *Thaçi et al.* Indictment Decision, para. 91.

<sup>125</sup> *Thaçi et al.* Indictment Decision, para. 91, with further references.

69. The Pre-Trial Judge further notes that the same incident is referred to in paragraph 28 of the Confirmed Indictment, where, conversely, it is clearly specified that Mr Shala was present when the [REDACTED] detainees were forced to [REDACTED] and shot with automatic weapons.<sup>126</sup> In order to remedy any ambiguity, the SPO is ordered to clarify whether, with regard to the incident referred in the second sentence of paragraph 22 of the Confirmed Indictment and the first sentence of paragraph 28, it is pleading that Mr Shala personally participated in it or not, and, if not, if he was nevertheless present.

70. As regards paragraph 23 of the Confirmed Indictment, the Pre-Trial Judge notes that the SPO pleads that:

On or about [REDACTED], Pjetër Shala [...] and certain other KLA members, [...] interrogated and beat [REDACTED] including with metal bars, baseball bats, and guns. As the beating continued through the night, KLA members participating in the mistreatment shot and wounded these detainees. The [REDACTED] detainees continued to be severely beaten despite their gunshot wounds, [REDACTED].

71. In the view of the Pre-Trial Judge, the formulation contained in the second and third sentences of paragraph 23 of the Confirmed Indictment is ambiguous and does not allow the Defence to understand whether it is pleaded that Mr Shala was among those “KLA members” or not. In particular, whereas the first sentence refers to Mr Shala and certain other co-perpetrators, the second and third sentences only refer in general to KLA members. It is not, therefore, sufficiently clear whether it is pleaded that Mr Shala personally participated in the aforementioned incidents or not.

72. The Pre-Trial Judge finds that the same level of ambiguity affects the relevant parts of paragraph 28 of the Confirmed Indictment,<sup>127</sup> which describe the same

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<sup>126</sup> Confirmed Indictment, para. 28.

<sup>127</sup> The sentences in question are the *verbatim* reproduction of the second and third sentences of paragraph 23: “As the beating continued through the night, KLA members participating in the mistreatment shot and wounded these detainees. The [REDACTED] detainees continued to be severely beaten despite their gunshot wounds, [REDACTED]”. See also Defence Motion, para. 64(δ), referring to Confirmed Indictment, paragraph 28 (who are the “certain KLA members” who forced [REDACTED] to [REDACTED], shot at them with automatic weapons and severely beat them).

incidents referred to in the aforementioned section of paragraph 23 of the Confirmed Indictment.<sup>128</sup> In addition, whereas in the first sentence of paragraph 23 of the Confirmed Indictment the SPO pleads that Mr Shala, individually and in concert with other individuals, interrogated and beat [REDACTED], the second sentence of paragraph 28, which refers to the same incident, is affected by ambiguity, and it is not sufficiently clear whether it is pleaded that Mr Shala personally participated in the incident or not.

73. Reiterating that instances of personal participation must be exhaustively pleaded in the Confirmed Indictment, the Pre-Trial Judge directs the SPO to clarify whether, with regard to the incidents referred to in the second and third sentence of paragraph 23 of the Confirmed Indictment and the second, third and fourth sentence of paragraph 28, it is pleading that Mr Shala personally participated in it or not, and, if not, if he was nevertheless present.

74. As far as the rest of the alleged acts/omissions of the Accused are concerned, the Pre-Trial Judge notes that paragraph 11 of the Confirmed Indictment refers to the multiple ways in which Mr Shala allegedly contributed to the common purpose. In doing so, paragraph 11 refers to other paragraphs of the Confirmed Indictment, namely paragraphs 15-16, 20-23 and 26, which describe specific incidents. The Pre-Trial Judge notes that the alleged acts/omissions are, subject to the findings made above, pleaded with sufficient specificity (e.g. transferring an individual under threat of death from a place to another;<sup>129</sup> interrogating and physically and psychologically assaulting at least [REDACTED] detainees, including through beatings with various instruments;<sup>130</sup> threatening the detainees and accusing them of collaborating with the Serbian authorities and/or of not supporting the KLA<sup>131</sup>). In addition, the Pre-Trial Judge notes that the described incidents are sufficiently detailed insofar as:

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<sup>128</sup> See also Defence Motion, para. 57 *in fine*.

<sup>129</sup> Confirmed Indictment, para. 15.

<sup>130</sup> Confirmed Indictment, para. 21.

<sup>131</sup> Confirmed Indictment, para. 21.

(i) locations of the alleged crimes are provided;<sup>132</sup> (ii) specific dates are provided;<sup>133</sup> and (iii) co-perpetrators and victims are extensively named.<sup>134</sup> In the view of the Pre-Trial Judge, these alleged acts do not need to be further particularised. What matters is that the Accused is put on notice of the conduct that is alleged to give rise to his criminal responsibility. Details beyond those already provided are matters for determination at trial.

75. The Pre-Trial Judge turns to the Defence's challenge that the use of the word "including" in paragraphs 11(d) and 16 of the Confirmed Indictment is defective as it pleads instances of personal participation of the Accused in an impermissibly imprecise manner. The Pre-Trial Judge notes that the word "including" is not meant to provide non-exhaustive examples regarding a defined category but is used in both instances as an open-ended formulation that could leave scope for the SPO add additional purported instances other than those expressly described in the indicated paragraphs at trial. In this regard the Pre-Trial Judge finds that the word "including" is also improperly used in paragraph 11(a)-(b). Therefore, the Pre-Trial Judge finds some merit in the Defence's challenge. Accordingly, the Pre-Trial Judge orders the SPO to file a corrected version of the Confirmed Indictment: (i) deleting the word "including" in paragraph 11 (a), (b) and (d) of the Confirmed Indictment; and (ii) deleting the word "including" in paragraph 16 of the Confirmed Indictment.

76. Conversely, the Pre-Trial Judge finds that the use of the expression "and/or" in paragraph 11(c) of the Confirmed Indictment does not create any ambiguity as regards the charged mode of liability, as it is used by the SPO to indicate that Mr Shala might have contributed to the JCE common purpose in more than one of the listed ways, a matter that will be determined at trial.

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<sup>132</sup> Confirmed Indictment, paras 15-16, 21. *See also* paras 18 and 24.

<sup>133</sup> Confirmed Indictment, paras 15-16, 21-23, 28.

<sup>134</sup> Confirmed Indictment, paras 15-16, 21-23, 28.

77. Accordingly, the Pre-Trial Judge grants, limited to the findings made in paragraphs 69-73, and 75 above, the Defence Motion in regard to the Accused's alleged contribution to the common purpose. The Pre-Trial Judge dismisses the remainder of the Defence's challenges concerning the Accused's alleged contribution to the common purpose as being pleaded with sufficient clarity and specificity in the Confirmed Indictment.

d) Form of the JCE pleaded

78. The Defence submits that the Confirmed Indictment fails to expressly specify which form of JCE is being alleged. It is of the view that this information should be provided in the Confirmed Indictment as it is crucial for the Defence.<sup>135</sup>

79. The SPO responds that it is rather clear that the Confirmed Indictment put the Accused on notice that the first form of JCE ("JCE I") is pleaded for all crimes and that the third form of JCE ("JCE III") is pleaded for the crime of murder in the alternative to JCE I.<sup>136</sup>

80. The Pre-Trial Judge notes that the Confirmed Indictment clearly states that the Accused shared the intent for the commission of the crimes of arbitrary detention, cruel treatment, torture, and murder with other JCE Members.<sup>137</sup> The Pre-Trial Judge finds that it is, therefore, clear that the SPO pleaded, for the aforementioned crimes, JCE I.<sup>138</sup> In the alternative, the Confirmed Indictment states that it was foreseeable to the Accused that the crime of murder might be perpetrated by one or more members of the JCE, or by persons used by any member of the JCE to carry out the crimes involved in the common purpose, that he was aware that murder was a possible consequence of the implementation of the common purpose of the JCE, and that he

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<sup>135</sup> Defence Motion, para. 45.

<sup>136</sup> Response, para. 34.

<sup>137</sup> Confirmed Indictment, para. 9.

<sup>138</sup> See also Confirmation Decision, paras 115-120.

participated in the JCE and thus willingly took that risk. As the Defence itself recognises,<sup>139</sup> it is clear that, for the crime of murder and in the alternative to JCE I, the SPO pleaded JCE III.<sup>140</sup>

81. The Pre-Trial Judge accordingly dismisses the Defence's challenges in relation to the form of the JCE pleaded.

## 2. Aiding and Abetting

82. The Defence submits that the Confirmed Indictment lacks the required detail about the conduct by means of which the Accused allegedly aided and abetted the commission of each crime charged and fails to identify the persons allegedly assisted by Mr Shala.<sup>141</sup> The Defence further claims that the SPO fails to specify how Mr Shala's acts and omissions had a substantial effect on the alleged perpetrators of the crimes charged and their identities. Lastly, the Defence avers that the use of "and/or" in paragraphs 11(c), 12 and 30 creates unjustified ambiguity as it is not clear whether Mr Shala is charged with aiding and abetting in the alternative and his alleged contribution is stated in imprecise and general terms.<sup>142</sup>

83. The SPO responds that the Confirmed Indictment is not defective as: (i) it states that all the factual underpinning of the JCE are also incorporated by reference as concerns aiding and abetting;<sup>143</sup> (ii) it lists several actions and contributions, in addition to incorporating paragraphs, that further identify the individuals that Mr Shala allegedly aided and abetted;<sup>144</sup> (iii) the degree of detail regarding the assisted persons is sufficient to put the Defence on notice;<sup>145</sup> (iv) the effects of Mr Shala's

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<sup>139</sup> Defence Motion, para. 35: "[...] his liability for murder was through the third form of JCE [...]"

<sup>140</sup> See also Confirmation Decision, paras 121-124.

<sup>141</sup> Defence Motion, paras 47-48.

<sup>142</sup> Defence Motion, para. 59.

<sup>143</sup> Response, para. 35.

<sup>144</sup> Response, para. 36.

<sup>145</sup> Response, para. 37.

actions or omissions are matters for determination at trial;<sup>146</sup> and (v) the use of “and/or” in relation to this mode of liability does not create impermissible ambiguity.<sup>147</sup>

84. The Pre-Trial Judge observes that the Confirmed Indictment clearly states that “[the] same acts and omissions” pleaded under JCE liability also form the basis of aiding and abetting.<sup>148</sup> Recalling that the Confirmed Indictment must be read as a whole,<sup>149</sup> the Pre-Trial Judge finds that the Confirmed Indictment makes clear that these acts and omissions are incorporated by reference and the SPO relies on them when pleading aiding and abetting. Having already found that these acts or omissions, subject to the findings made above,<sup>150</sup> are set out with sufficient specificity, the Pre-Trial Judge will not address this issue any further.

85. As far as the degree of detail regarding the assisted persons is concerned, the Pre-Trial Judge recalls that, where it is alleged that the accused planned, instigated ordered, or aided and abetted crimes, the SPO must identify, at a minimum, the persons allegedly assisted or incited by the accused by category, group, or affiliation, which constitute material facts to be pleaded in the Indictment.<sup>151</sup>

86. In this regard, paragraph 12 of the Confirmed Indictment states that “[the] same acts and omissions” pleaded under JCE liability also form the basis of aiding and abetting. The Pre-Trial Judge finds that each described conduct identifies a category of assisted persons (KLA members, often identified by their name)<sup>152</sup> and clearly circumscribes the geographical and temporal scope of the events. The Pre-Trial Judge

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<sup>146</sup> Response, para. 37.

<sup>147</sup> Response, para. 41.

<sup>148</sup> Confirmed Indictment, para. 12.

<sup>149</sup> See para. 26 above.

<sup>150</sup> See paras 69-73, and 75 above.

<sup>151</sup> *Gucati and Haradinaj* Appeal Decision, para. 53.

<sup>152</sup> Confirmed Indictment, paras 14-15, 18-19, 21-23, 26, 28.

finds that this is sufficient to put the Defence on notice and any further details will have to be assessed at trial.

87. The Pre-Trial Judge further considers that whether the alleged acts and omissions had a substantial effect on the perpetration of the crimes charged is a matter for determination at trial.<sup>153</sup>

88. With regard to the use of “and/or” in paragraph 11(c) of the Confirmed Indictment, the Pre-Trial Judge finds that no ambiguity stems from the choice of the SPO to plead, on the one hand, that Mr Shala aided and abetted the charged crimes and, in this way, contributed to the JCE common purpose<sup>154</sup> and, on the other hand, that Mr Shala is, in the alternative, responsible pursuant to aiding and abetting as a mode of liability.<sup>155</sup> More specifically, the Pre-Trial Judge understands that the reference to aiding and abetting in paragraph 11(d) of the Confirmed Indictment is only meant in relation to his contribution to the JCE and does not constitute a separate charge of aiding and abetting. This is because it is clarified in paragraph 12 of the Confirmed Indictment that aiding and abetting (as a separate charged mode of liability) is pleaded separately on the basis of the same acts, in their totality, as alleged in relation to JCE.

89. With regard to the use of “and/or” in paragraph 12 of the Confirmed Indictment, the Pre-Trial Judge finds that it does not create any ambiguity as regards the charged mode of liability, as it is used by the SPO to allege that Mr Shala aided and abetted in more than one of the listed ways, a matter that will be determined at trial.

90. Lastly, the Pre-Trial Judge considers that the use of “and/or” in paragraph 30 of the Confirmed Indictment does not create any ambiguity since it is clear that the SPO is pleading aiding and abetting, in the alternative, as a separate mode of liability.<sup>156</sup>

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<sup>153</sup> Similarly, *Thaçi et al.* Indictment Decision, para. 111.

<sup>154</sup> Confirmed Indictment, para. 11(d).

<sup>155</sup> Confirmed Indictment, para. 12.

<sup>156</sup> See also Confirmation Decision, para. 125, where the Pre-Trial Judge found that “*alternatively* (emphasis added) to the alleged responsibility for commission, the SPO alleges in the Revised



The Pre-Trial Judge recalls, in this regard, that alternative pleading is permitted and is, in fact, a well-established practice at the international criminal courts and tribunals.<sup>157</sup>

91. In light of the foregoing, the Pre-Trial Judge finds that the mode of liability of aiding and abetting is pleaded with sufficient clarity and specificity in the Confirmed Indictment and dismisses the Defence's challenges in this regard.

### 3. Physical Commission

92. The Defence submits that the pleading of physical commission in the Confirmed Indictment is defective for the following reasons: (i) the ambiguity concerning the identity of the co-perpetrators, referred to as "KLA members" or "certain other KLA members" at paragraphs 14, 15, 22, 23, and 26 of the Confirmed Indictment;<sup>158</sup> (ii) the lack of clarity as to whether Mr Shala was present at the incidents described in paragraphs 22 and 23 of the Confirmed Indictment;<sup>159</sup> and (iii) the use of "and/or" at paragraph 13 of the Confirmed Indictment.<sup>160</sup>

93. The SPO responds that the claims that other perpetrators are not sufficiently identified in the Confirmed Indictment are ill-founded insofar as the Confirmed Indictment, read as a whole, provides the Accused with sufficient information, and further factual details concerning their identities are to be addressed at trial.<sup>161</sup> As far as the use of "and/or" in paragraph 13 of the Confirmed Indictment is concerned, the SPO responds that its use allows for the factual development of the issue at trial.<sup>162</sup>

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Indictment that Mr Shala is criminally responsible for aiding and abetting 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.

<sup>157</sup> *Similarly, Thiçi et al.* Indictment Decision, para. 82, with further references.

<sup>158</sup> Defence Motion, paras 51-54.

<sup>159</sup> Defence Motion, paras 51-53

<sup>160</sup> Defence Motion, para. 60.

<sup>161</sup> Response, paras 38-39.

<sup>162</sup> Response, para. 41, *in fine*.

94. With regard to the identity of the co-perpetrators, the Pre-Trial Judge recalls the established principle that the Specialist Prosecutor is required, in an indictment, to identify co-perpetrators, at a minimum, by category or group, and to provide their specific identities when known.<sup>163</sup> The Pre-Trial Judge finds that each of the described conducts identifies a category of co-perpetrators (KLA members, often identified by their name)<sup>164</sup> and clearly circumscribe the geographical and temporal scope of the events. The Pre-Trial Judge finds that this is sufficient to put the Defence on notice and any further details will have to be assessed at trial.

95. As regards the circumstances of Mr Shala's physical participation in the events described in paragraphs 22 and 23 of the Confirmed Indictment, the Pre-Trial Judge recalls his findings made above in the context of the pleading of the JCE.<sup>165</sup> The Pre-Trial Judge considers that the ordered amendments will address the Defence's challenges with regard of this mode of liability and, therefore, another finding is not necessary.

96. Lastly, the Pre-Trial Judge finds that the use of "and/or" in paragraph 13 of the Confirmed Indictment does not create any ambiguity as the SPO is pleading that Mr Shala intended the commission of arbitrary detention and, in addition or in the alternative, that he acted in the reasonable knowledge that the act or omission was likely to cause arbitrary deprivation of liberty. The Pre-Trial Judge considers that this is a matter to be discussed at trial and the Defence is hereby put on notice that the SPO is pleading an alternative form of *mens rea* in relation to this crime.

97. In light of the foregoing, the Pre-Trial Judge finds that the mode of liability of physical perpetration is pleaded with sufficient clarity and specificity in the Confirmed Indictment and dismisses the Defence's challenges in this regard.

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<sup>163</sup> *Gucati and Haradinaj* Appeal Decision, para. 45.

<sup>164</sup> Confirmed Indictment, paras 14-15, 18-19, 21-23, 26.

<sup>165</sup> See paras 69-73 above.

## E. PLEADING OF WAR CRIMES

### 1. *Chapeau* Elements of War Crimes

98. The Defence submits that the pleading of the *chapeau* elements of war crimes is defective.<sup>166</sup> In particular, the Defence argues that the SPO fails to provide sufficient information as to the required nexus between the charged conduct and the non-international armed conflict (“NIAC”) in question.<sup>167</sup> The Defence further challenges the lack of specific information on the status of the alleged victims, and submits that the Confirmed Indictment should have provided more information on their background, status and relationship with the forces engaged in the conflict.<sup>168</sup>

99. The SPO responds that the Confirmed Indictment, read as a whole, provides sufficient clarity on the period of the armed conflict between the KLA and forces of the Federal Republic of Yugoslavia (“FRY”) and the Republic of Serbia and the period of KLA use of the Kukës Metal Factory.<sup>169</sup> As regards the identity and the background of the alleged victims, the SPO claims that the Confirmed Indictment clearly states that these were citizens of FRY and included at least [REDACTED] persons who were detained in a specific place over a 20-day period.<sup>170</sup>

100. The Defence replies reiterating that the pleading of war crimes is defective and that the “requirement to read the Indictment as a whole” does not sufficiently address the defects identified in the Defence Motion.<sup>171</sup>

101. At the outset, the Pre-Trial Judge understands that the Defence does not only challenge the Confirmed Indictment insofar as it relates to the nexus requirement, but also in respect of the existence of a NIAC as such.<sup>172</sup>

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<sup>166</sup> Defence Motion, paras 30-32.

<sup>167</sup> Defence Motion, para. 30.

<sup>168</sup> Defence Motion, paras 31-32.

<sup>169</sup> Response, paras 25-26.

<sup>170</sup> Response, para. 27.

<sup>171</sup> Reply, paras 16-17.

<sup>172</sup> See Defence Motion, para. 30.

102. The Pre-Trial Judge observes that the Confirmed Indictment states that: (i) a conflict between the KLA and forces of the FRY, the Republic of Serbia, including units of the Yugoslav Army, police and other units of the Ministry of Internal Affairs, in addition to other groups fighting on behalf of the FRY and the Republic of Serbia, was ongoing in the period relevant to the indictment;<sup>173</sup> (ii) the charged crimes took place in the context of and were associated with such an armed conflict;<sup>174</sup> (iii) the Kukës Metal Factory was used as a KLA base at all times relevant to the indictment for a variety of purposes related to the NIAC;<sup>175</sup> and (iv) the charged crimes were allegedly committed between 17 May 1999 and 5 June 1999.<sup>176</sup> Hence, the existence of the armed conflict and the nexus thereto have been described with sufficient specificity in the Confirmed Indictment.

103. As regards the status of the alleged victims, the Pre-Trial Judge notes that the Confirmed Indictment clearly states that the alleged victims were all citizens of the FRY not taking part in the hostilities.<sup>177</sup> In relation to their identity, the Pre-Trial Judge recalls that the identification of the victims as a group or the indication of their approximate number is sufficient.<sup>178</sup> In this regard, the Pre-Trial Judge is satisfied that the Confirmed Indictment, if read as a whole, provides sufficient information on the number of alleged victims and sufficiently clear information regarding their identities,<sup>179</sup> especially coupled with the particulars pertaining to the time period and the location where the crimes have been purportedly committed, and other specifics, such as the victims' citizenship,<sup>180</sup> (perceived) political affiliation,<sup>181</sup> or further

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<sup>173</sup> Confirmed Indictment, para. 3.

<sup>174</sup> Confirmed Indictment, para. 3.

<sup>175</sup> Confirmed Indictment, para. 6.

<sup>176</sup> Confirmed Indictment, para. 8-12, 14-16, 18-24, 26, 28.

<sup>177</sup> Confirmed Indictment, para. 6.

<sup>178</sup> See para. 31 above.

<sup>179</sup> Confirmed Indictment, para. 14, 21-23, 28. The Pre-Trial Judge notes that [REDACTED] detainees are identified by name, and a [REDACTED] is identified as a "[REDACTED] detainee".

<sup>180</sup> Confirmed Indictment, para. 6.

<sup>181</sup> Confirmed Indictment, paras 6, 21.

particulars with respect to the alleged crime site.<sup>182</sup> Accordingly, any further information regarding the makeup or background of that group or category, or the status of the victims at the moment of their arrest is a matter to be developed at trial.

104. Lastly, as to the Defence's submission that it remains unclear whether the alleged victims of arrests were *hors de combat* at the time of their arrest,<sup>183</sup> the Pre-Trial Judge notes that Common Article 3 to the 1949 Geneva Conventions refers to those placed *hors de combat* by, *inter alia*, detention. Thus, a person is rendered *hors de combat* by virtue of an arrest. It, therefore, does not have to be demonstrated that, at the time of arrest, a person is *hors de combat*. Accordingly, the Defence's submission that the Confirmed Indictment is impermissibly vague in this respect is misplaced.

105. Having regard to the above, the Pre-Trial Judge considers that the Confirmed Indictment provides sufficient information concerning the contextual elements pertaining to war crimes. In light of the foregoing, the Pre-Trial Judge finds that the *chapeau* elements of war crimes are pleaded with sufficient clarity and specificity in the Confirmed Indictment and dismisses the Defence's challenges in this regard.

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<sup>182</sup> Confirmed Indictment, paras 6, 14, 18-19.

<sup>183</sup> Defence Motion, para. 32.

## 2. Illegal/Arbitrary Detention, Cruel Treatment, Torture, and Murder

106. The Defence challenges that the pleading of the specific crimes is defective insofar as: (i) the role of Mr Shala in the commission of the crimes, as well as the circumstances of his and the co-perpetrators' participation, are not clear;<sup>184</sup> (ii) the alleged detainees have not been identified;<sup>185</sup> (iii) the alleged co-perpetrators of the crimes have not been identified but only referred to as "certain other KLA members" or "certain KLA members";<sup>186</sup> (iv) the use of the word "including" and of the expression "and/or"

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<sup>184</sup> Defence Motion, para. 64(α)-(δ), referring to Confirmed Indictment, paragraphs 14-16, 18-24 (what was Mr Shala's role in the crime), 14 (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), 15 (what was the specific role of each of those involved in the transfer), 16 (what specifically did Mr Shala do to participate in "enforcing and continuing arbitrary detention"), 18-19, 21, 26 (what was the specific role of each of those involved), 19 (who exactly and how they assaulted the detainees), 21 (who exactly ordered to beat [REDACTED]; what was the role of Mr Shala in beating and assaulting of the detainees) 23 (who refused [REDACTED]), 26 (which acts were carried out by Mr Shala; who questioned the detainees and what were they questioned about), 28 (what was Mr Shala's role in the perpetration of this crime; was Mr Shala present throughout the night; which KLA member advised that [REDACTED]; was Mr Shala present at the time; did he have the authority and/or means to take [REDACTED] to [REDACTED]), and 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>185</sup> Defence Motion, para. 64(α)-(δ) referring to Confirmed Indictment, paragraphs 14-16, 18-24 (who were the detainees), paragraph 14 (who were these [REDACTED] persons), 18 (who was subjected to inhuman detention condition), 21 (who is "another [REDACTED] detainee"), and 26 (who are the victims).

<sup>186</sup> Defence Motion, para. 64(α)-(δ) referring to Confirmed Indictment, paragraphs 14 (other than Geci, Krasniqi, [REDACTED] and [REDACTED], who are the "certain other KLA members" who deprived at least [REDACTED] persons of their liberty), 15 (other than [REDACTED], who are the "certain other KLA members" who participated in the transfer of [REDACTED]?), 18 (other than Geci, Krasniqi, [REDACTED] and [REDACTED], who are the "certain other KLA members who established and maintained inhuman detention conditions at the Kukës Metal Factory), 19 (other than Geci, Krasniqi, [REDACTED] and [REDACTED], who are the "certain other KLA members" who routinely assaulted detainees at the Kukës Metal Factory), 21 (other than Geci and Krasniqi, who are the "certain other KLA members" who interrogated and assaulted at least [REDACTED] detainees), 23 (other than Geci, Krasniqi, [REDACTED] and [REDACTED], who are the "certain other KLA members" who interrogated and beat [REDACTED]), and 26 (other than Geci, Krasniqi, [REDACTED] and [REDACTED], who are the "certain other KLA members" who inflicted severe pain or suffering against the victims); *see also* paras 56-57, with specific reference to paragraphs 8, 11, 14, 15, 18, 19, 21, 22, 24, 26, 28 of the Confirmed Indictment.

when used in connection to the pleaded material facts;<sup>187</sup> and (v) the count of arbitrary detention fails to rise to the level of a war crime.<sup>188</sup>

107. The SPO responds that: (i) the Confirmed Indictment provides sufficient details about the identity of individuals with whom Mr Shala acted in concert and their respective roles;<sup>189</sup> (ii) the word “including” is appropriately applied to provide further and known detail supporting the material facts and does not create ambiguity;<sup>190</sup> (iii) precise details regarding victims need not be included in an indictment;<sup>191</sup> and (iv) a challenge to the legal qualification of arbitrary detention is not a challenge to the form of the indictment.<sup>192</sup>

108. As regards the exact role allegedly played by Mr Shala or the co-perpetrators in relation to the charged crimes of arbitrary detention, cruel treatment, torture, and murder (“Four Alleged Crimes”), the Pre-Trial Judge considers that, subject to the findings made above in relation to the incidents described at paragraphs 22, 23 and 28 of the Confirmed Indictment,<sup>193</sup> the Confirmed Indictment pleads with sufficient specificity the link between Mr Shala and the charged crimes, as well as the roles allegedly played by him and his alleged co-perpetrators. Having carefully reviewed the elements raised by the Defence,<sup>194</sup> the Pre-Trial Judge considers that they need not be pleaded in the Confirmed Indictment and rather constitute evidentiary matters to be determined at trial.

109. As to the identity or the precise number of the victims of the crime of illegal/arbitrary detention or arrest, the Pre-Trial Judge recalls his finding that the Confirmed Indictment provides sufficient information on the identity of the victims

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<sup>187</sup> Defence Motion, para

<sup>188</sup> Defence Motion, para. 64( $\alpha$ ), referring to paragraphs 14-17 of the Confirmed Indictment.

<sup>189</sup> Response, para, 39.

<sup>190</sup> Response, para. 40.

<sup>191</sup> Response, para. 42.

<sup>192</sup> Response, para. 43.

<sup>193</sup> See paras 69-73 above.

<sup>194</sup> See footnote 184 above.

and finds that further information regarding the make-up or background of that group or category,<sup>195</sup> or the status of the victims at the moment of their arrest is an evidentiary matter to be developed at trial.<sup>196</sup>

110. As regards the identity of the physical perpetrators of the Four Alleged Crimes, the Pre-Trial Judge recalls his findings made above at paragraphs 55-57, 86, and 94, and finds that additional details regarding the identity of the physical perpetrators/co-perpetrators of the Four Alleged Crimes<sup>197</sup> need not be pleaded further in the Confirmed Indictment. They rather constitute evidentiary matters which may be discussed at trial.

111. As regards the use of the word “including” throughout the Confirmed Indictment, the Pre-Trial Judge recalls, at the outset, the findings he made above with regard to its use in paragraphs 11 and 16 of the Confirmed Indictment.<sup>198</sup> As regards the use of “including” in the third sentence of paragraph 23 and in paragraph 28 of the Confirmed Indictment, the Pre-Trial Judge recalls that he has ordered the SPO to clarify whether it is pleading that Mr Shala personally participated in the alleged incident at issue or not,<sup>199</sup> and finds that such amendments will also address any ambiguity stemming from the use of the word “including” in such instances.

112. As regards the use of the word “including” at paragraphs 14, 18, 19, 21, 23 (first sentence), and 26 (first sentence, first instance and second sentence) of the Confirmed Indictment, the Pre-Trial Judge finds that, in each instance, the language following the word “including” is aimed at providing further specificity in relation to the discussed incidents, namely the identity of some of the physical perpetrators,<sup>200</sup> further details

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<sup>195</sup> See footnote 185 above.

<sup>196</sup> See para. 103 above.

<sup>197</sup> See footnote 186 above.

<sup>198</sup> See para. 75 above.

<sup>199</sup> See para. 73 above.

<sup>200</sup> For example, Confirmed Indictment paras 14, 18, 19 (first sentence, first instance), 21 (first sentence, first instance), 26 (first sentence, first instance and second sentence).



about some of the victims,<sup>201</sup> the weapons used in given factual incidents,<sup>202</sup> the way the assault against detainees was allegedly carried out.<sup>203</sup> Such specifications do not allow the SPO to impermissibly expand the factual allegations of its case and the scope of the charges at trial. In these circumstances, the Pre-Trial Judge finds that the use of the word “including” in the aforementioned instances does not render the pleading of the Four Alleged Crimes defective.

113. As regards the use of the word “including” in paragraph 26 of the Confirmed Indictment (first sentence, second instance), the Pre-Trial Judge finds that the language following this word is aimed at providing further specificity as regards a defined category, i.e. the grounds on the basis of which victims were allegedly discriminated against, and it, therefore, does not allow the SPO to impermissibly expand the factual allegations of its case and the scope of the charges at trial.<sup>204</sup>

114. In respect of the remaining details referred to by the Defence,<sup>205</sup> the Pre-Trial Judge, after a careful review, finds that they do not constitute facts underpinning the charges and therefore need not be pleaded in the Confirmed Indictment separately. They rather constitute evidentiary matters which may be discussed at trial.

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<sup>201</sup> For example, Confirmed Indictment, para. 21 (first sentence, second instance).

<sup>202</sup> For example, Confirmed Indictment, paras 21 (third sentence), 23.

<sup>203</sup> Confirmed Indictment, para. 19 (first sentence, second and third instances).

<sup>204</sup> Similarly, *Thaçi et al.* Indictment Decision, para. 166.

<sup>205</sup> Defence Motion, para. 64(α), (β), (δ), referring to Confirmed Indictment paragraphs 14 (were all the [REDACTED] subjected to such measures and/or treatment; who arrested them and where, how long was each of them detained), 15 (who guarded [REDACTED] and who threatened him with death), 18 (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), 19 (were all the detainees assaulted; who was forced to perform manual labour during detention; who forced them to do so), 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), 21 (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), and 24 (who sustained what injuries as a result of their treatment at the Kukës Metal Factory).

115. Lastly, the Pre-Trial Judge notes that Mr Shala's submission that arbitrary detention does not qualify as a war crime is not a challenge to the form of the indictment but is a legal question and is, accordingly, summarily dismissed.<sup>206</sup>

116. In light of the foregoing, the Pre-Trial Judge finds that the Four Alleged Crimes are pleaded with sufficient clarity and specificity in the Confirmed Indictment and dismisses the Defence's challenges in this regard.

#### F. CONCLUSION

117. In the light of the foregoing, the Pre-Trial Judge finds that, in order to provide the required level of specificity and clarity and to ensure that the scope of the SPO's case cannot be expanded at trial, the Confirmed Indictment needs to be amended as set out in paragraphs 69, 73, 75 above. The Pre-Trial Judge further finds that the Confirmed Indictment otherwise sets out the facts underpinning the charges and the crimes, including the modes of liability charged, with sufficient clarity and specificity. The Pre-Trial Judge accordingly dismisses the remainder of the Defence's challenges to the form of the Confirmed Indictment.

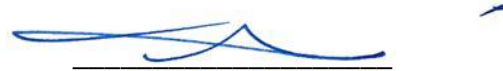
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<sup>206</sup> In any event, the Pre-Trial Judge has addressed the Defence's arguments that the SC does not have jurisdiction over the war crime of arbitrary detention in a separate decision. *See* Jurisdiction Decision, paras 98-103.

## V. DISPOSITION

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

- (a) **GRANTS, IN PART**, the Defence Motion to the extent specified in the present decision;
- (b) **ORDERS** the SPO to submit a corrected version of the Confirmed Indictment, as per the instructions set out in paragraphs 69, 73, 75 above by no later than **Monday, 1 November 2021**;
- (c) **REJECTS** the remainder of the Defence Motion;
- (d) **ORDERS** the SPO to submit a public redacted version of the Response by no later than **Monday, 1 November 2021**; and
- (e) **ORDERS** the Registrar to reclassify the Reply as public.



**Judge Nicolas Guillou**  
**Pre-Trial Judge**

Dated this Monday, 18 October 2021

At The Hague, the Netherlands.