



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

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

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

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 1 November 2021

**Language:** English

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**Public Redacted Version of 'Prosecution Response to the SHALA Defence's  
Corrected Version of the Preliminary Motion Challenging the Form of the  
Indictment', filing KSC-BC-2020-04/F00070, dated 6 September 2021**

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## I. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') hereby responds to Pjetër Shala's ('Defence') 'Corrected Version of "Preliminary Motion by the Defence of Pjetër Shala Challenging the Form of the Indictment"'.<sup>1</sup> The Motion fails to identify any defects in the form of the Indictment<sup>2</sup> under Rule 97(1)(b) of the Rules<sup>3</sup> and should be dismissed. Consistent with Article 38(4) of the Law<sup>4</sup> and Rule 86(3), 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, and is sufficient to permit the Defence to prepare for trial.

## II. PROCEDURAL HISTORY

2. On 14 February 2020, the SPO submitted for confirmation a strictly confidential and *ex parte* indictment against Mr. Pjetër Shala.<sup>5</sup> On 18 March 2020, the SPO submitted a revised indictment for confirmation.<sup>6</sup> On 12 June 2020, the Pre-Trial Judge confirmed the revised Indictment against the Accused.<sup>7</sup>

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<sup>1</sup> Corrected Version of 'Preliminary Motion by the Defence of Pjetër Shala Challenging the form of the Indictment', KSC-BC-2020-04/F00055/COR, 12 July 2021 ('Motion'). All further filings in this Motion concern Case No. KSC-BC-2020-04 unless otherwise indicated.

<sup>2</sup> Submission of Further Lesser Redacted Version of Confirmed Indictment with confidential Annex 1, KSC-BC-2020-04/F000038, 25 May 2021 ('Confirmed Indictment' or 'Indictment').

<sup>3</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

<sup>4</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

<sup>5</sup> Submission of Indictment for Confirmation and Related Requests, KSC-BC-2020-04/F00002, 14 February 2020, strictly confidential and *ex parte*, with Annexes 1-3.

<sup>6</sup> Submission of Revised Indictment for Confirmation and Related Requests, KSC-BC-2020-04/F00004, 18 March 2020, strictly confidential and *ex parte* with Annexes 1-3 ('Revised Indictment').

<sup>7</sup> Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Pjetër Shala, KSC-BC-2020-04/F00007, 12 June 2020 ('Confirmation Decision').

3. On 25 May 2021, the SPO filed its “Submission of Further Lesser Redacted Version of Confirmed Indictment with Confidential Annex 1”.<sup>8</sup>

4. On 2 July 2021, the SPO submitted a request to vary the time limit for its Response to 6 September 2021 (‘Request’).<sup>9</sup> The Defence confirmed it had no objection to the proposed variation of the time limits.<sup>10</sup> On 5 July 2021, the Pre-Trial Judge granted the SPO’s Request and ordered it to submit its Response by no later than 6 September 2021.<sup>11</sup>

5. On 12 July 2021, the Defence filed the Motion.

### III. SUBMISSIONS

6. The Confirmed Indictment provides the Defence with sufficient information to understand the charges against him and to prepare a defence.<sup>12</sup> In the Confirmed Indictment, the SPO both provides the required notice to the Defence, and respects and adheres to the requirement that the Indictment be a ‘concise statement of facts and the crime or crimes with which the person is charged.’<sup>13</sup>

7. An indictment is not a final brief after trial. It ‘need not set out the evidence by which the facts underpinning the charges are to be proven.’<sup>14</sup> Moreover, ‘[a]ny disputes as to issues of fact are for determination at trial and not via preliminary motions relating to the form of the indictment.’<sup>15</sup> Thus, adhering to the requirement

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<sup>8</sup> Submission of Further Lesser Redacted Version of Confirmed Indictment with Confidential Annex 1, KSC-BC-2020-04/F00038, 25 May 2021.

<sup>9</sup> Request for Modification of Timeline for Preliminary Motions, KSC-BC-2020-04/F00051, 2 July 2021, public, (‘Request’), para.2.

<sup>10</sup> Request, KSC-BC-2020-04/F00051, para.2.

<sup>11</sup> Decision on Request to Vary a Time Limit, KSC-BC-2020-04/F00052, 5 July 2021.

<sup>12</sup> See Order to the Specialist Prosecutor Pursuant to Rule 86(4), KSC-BC-2020-06/F00010, 20 July 2020, (‘Rule 86(4) Order’), para.9.

<sup>13</sup> Article 38(4).

<sup>14</sup> Indictment Decision, KSC-BC-2020-06/F00413, para.29.

<sup>15</sup> Indictment Decision, KSC-BC-2020-06/F00413, para.29.

that the indictment be 'concise' also respects the division of functions between the pre-trial and trial chambers, and promotes efficiency.

8. The Confirmed Indictment provided

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 contribution thereto; the related mental element; and the identities of any alleged co-perpetrators or JCE members, *if known*.<sup>16</sup>

9. As reflected by this formulation, indictments are practical documents which are required to set forth a concise statement of the material facts necessary to fulfil the relevant elements<sup>17</sup> with sufficient specificity,<sup>18</sup> but need not reflect every detail. Rather, as befits a document that is required to be 'concise' and comes before the full factual development of trial, an indictment may permissibly provide the framework of the case as long as it is sufficient to put the Defence on notice of the material facts. In particular, 'precise limits' of more generally indicated facts are matters for determination at trial.<sup>19</sup>

10. Thus, a range of dates may be provided where specific dates are unavailable;<sup>20</sup> an approximate number of victims or identification of victims as a group is permissible where specific victims are unknown;<sup>21</sup> and '[w]here the actual identity of co-perpetrators or JCE Members cannot be established, they can be identified by pseudonym, affiliation, or group delimited by geographic, temporal or other parameters.'<sup>22</sup> The nature of certain crimes may also render certain details—such as

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<sup>16</sup> Indictment Decision, KSC-BC-2020-06/F00413, para.32 (emphasis added).

<sup>17</sup> Rule 86(4) Order, KSC-BC-2020-06/F00010, para.15.

<sup>18</sup> Rule 86(4) Order, KSC-BC-2020-06/F00010, para.9.

<sup>19</sup> Indictment Decision, KSC-BC-2020-06/F00413, para.96.

<sup>20</sup> Indictment Decision, KSC-BC-2020-06/F00413, para.33.

<sup>21</sup> Indictment Decision, KSC-BC-2020-06/F00413, para.34.

<sup>22</sup> Indictment Decision, KSC-BC-2020-06/F00413, para.35.

the identity of particular victims—unnecessary, if unknown.<sup>23</sup> Additionally, ‘certain details of the case, such as the number and identify of victims, [may] remain obscure even after the end of the trial.’<sup>24</sup>

11. Finally, and importantly, when considering whether an indictment provides sufficient notice, ‘[t]he Indictment must be considered as a whole and select paragraphs or phrases should be read in the context of the entire document.’<sup>25</sup>

12. The SPO rebuts each of the Defence’s claims below. As a preliminary matter, however, the SPO notes the Defence’s objections to the ‘fairness of the indictment confirmation procedure’ contained in the Motion.<sup>26</sup> The Defence does not include these objections in their list of defects of the Indictment,<sup>27</sup> and makes no request for relief on them.<sup>28</sup> As such, these objections have not been pled as part of the Motion, and the SPO will not respond to them at length.

13. Challenges to the indictment confirmation procedure do not constitute proper challenges to the form of the Indictment pursuant to Rule 97(1)(b).<sup>29</sup> Regardless, the indictment confirmation procedure followed in this case was consistent with all applicable law, rules, and rights. The Defence’s references to the Kosovo Criminal Procedure Code (‘KCPC’) are inapposite. The Law operates as *lex specialis* and any provisions of Kosovo law must be explicitly incorporated.<sup>30</sup> The Law, and the Rules

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<sup>23</sup> Indictment Decision, KSC-BC-2020-06/F00413, para.156.

<sup>24</sup> Indictment Decision, KSC-BC-2020-06/F00413, para.28.

<sup>25</sup> Decision on Defence Motions Alleging Defects in the Form of the Indictment, KSC-BC-2020-06/F00413, 22 July 2021, (‘Indictment Decision’), para.28.

<sup>26</sup> Motion, KSC-BC-2020-04/F00055/COR, paras.11-13.

<sup>27</sup> Motion, KSC-BC-2020-04/F00055/COR, para.2.

<sup>28</sup> Motion, KSC-BC-2020-04/F00055/COR, para.66.

<sup>29</sup> See Indictment Decision, KSC-BC-2020-06/F00413, para.49.

<sup>30</sup> Article 3(2)(b) and (c); Public Redacted Version of Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi, KSC-BC-2018-01/F00180/RED, 23 July 2021, para.6.

created pursuant to it (which have been confirmed by the Constitutional Court<sup>31</sup>), are clear on the process for investigation and for confirmation of the indictment.<sup>32</sup> By contrast, Articles 242, 244, and 245 of the KCPC have not been incorporated into the Law.

#### A. CUMULATIVE CHARGING IS PERMISSIBLE

14. The Defence argues that the Confirmed Indictment impermissibly charges cumulatively. They allege that the counts of detention, cruel treatment, and torture are ‘inappropriately overlapping and do not comply with the *Blockburger* test and the principle of reciprocal specialty.’<sup>33</sup>

15. As the Defence are forced to recognise,<sup>34</sup> the *ad hoc* tribunals permitted cumulative charging. Indeed, the permissibility of cumulative charging at the ICTY and ICTR is ‘settled jurisprudence.’<sup>35</sup> As stated in the *Čelebići* Appeals Judgement:

Cumulative charging is allowed in light of the fact that, prior to the presentation of all the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties’ presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence.<sup>36</sup>

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<sup>31</sup> Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chambers of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L053 on Specialist Chambers and Specialist Prosecutor’s Office, KSC-CC-PR-2017-01/F00004, 26 April 2017.

<sup>32</sup> See Articles 38, 39(2); Rules 30, 43.

<sup>33</sup> Motion, KSC-BC-2020-04/F00055/COR, para.14.

<sup>34</sup> Motion, KSC-BC-2020-04/F00055/COR, para.16.

<sup>35</sup> ICTY, Appeals Chamber, Prosecutor v. Kunarac et al, IT-96-23, *Judgement*, 12 June 2002, para.167

<sup>36</sup> ICTY, Appeals Chamber, Prosecutor v. Delalić et al., IT-96-21-A, *Judgement*, 20 February 2001, para. 400; see also ICTY, Appeals Chamber, Prosecutor v. Kupreškić et al, IT-95-16-A, *Appeal Judgement*, 23 October 2001, para.385-386 (‘Under the reasoning set forth in the *Čelebići* Appeal Judgement, cumulative charging on the basis of the same set of facts is generally permissible.’); ICTR, Appeals Chamber, Prosecutor v. Semanza, ICTR-97—20-A, *Appeals Judgement*, 20 May 2005, para.309 (holding appeals challenging cumulative charging ‘plainly meritless in light of the *Čelebići-Musema* principle. Regardless of whether the charges were cumulative or not, the Prosecution was entitled to bring overlapping charges. It is up to the Trial Chamber at a later stage to winnow the charges and to prevent impermissibly cumulative convictions.’); ICTY, Trial Chamber, Prosecutor v. Krnojelac, Case No. IT-97-25-PT, *Decision on the Defence Preliminary Motion on the Form of the Indictment*, 24 February 1999, para.5 (‘This pleading issue has already been determined by the International Tribunal in favour of the

16. The Defence relies heavily on a decision in the ICC's *Bemba* case in arguing that cumulative charging is not permissible.<sup>37</sup> But that Pre-Trial Chamber decision relied<sup>38</sup> on the fact that at the ICC, unlike at the *ad hoc* tribunals and the KSC, the chambers are explicitly empowered to recharacterise the facts put forward by the prosecutor should that be deemed appropriate at a later stage. This explicit power mitigates the motivating concern of the *Čelebići* Appeals Judgement that the prosecution cannot know with certainty prior to trial which charges will be proven.

17. Indeed, the *Bemba* decision expressly highlighted this difference in procedures, observing that

the ICC legal framework differs from that of the *ad hoc* tribunals, since under regulation 55 of the Regulations, the Trial Chamber may re-characterise a crime to give it the most appropriate legal characterisation. Therefore, before the ICC, there is no need for the Prosecutor to adopt a cumulative charging approach and present all possible characterisations in order to ensure that at least one will be retained by the Chamber.<sup>39</sup>

The ICC *Bemba* Decision that the Defence relies on therefore implicitly recognises that cumulative charging is valid at judicial institutions that do not explicitly provide for similar re-characterisation.

18. Nor is the *Bemba* Decision reflective of current practice before the ICC. More recently, a Pre-Trial Chamber in the *Ongwen* case upheld cumulative charging and

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prosecution: previous complaints that there has been an impermissible accumulation where the prosecution has charged . . . different offences based upon the same facts . . . have been consistently dismissed by the Trial Chambers, upon the basis that the significance of that fact is relevant only to the question of penalty.'). ICTY, Appeals Chamber, Prosecutor v. Delalić et al., Case No. IT-96-21-AR72.5, *Decision Application for Leave to Appeal by Hazim Delic (Defects in the Form of the Indictment)*, 6 December 1966, para.36 (refusing leave to appeal Trial Chamber decision that cumulative charging is better dealt with at penalty stage).

<sup>37</sup> Motion, KSC-BC-2020-04/F00055/COR, paras 16, 18.

<sup>38</sup> ICC, ICC-01/05-01/08, Pre-Trial Chamber, Prosecutor v. Jean-Pierre Bemba Gombo, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 June 2009, paras 201, 202 ('*Bemba* Decision').

<sup>39</sup> *Bemba* Decision, para.203.

rejected the rationale that the judicial power to recharacterise was an appropriate alternative, finding that it is better to address cumulative charges ‘following a full trial.’<sup>40</sup> Indeed, the *Ongwen* Decision described its approach as being in line with what is now the ‘established practice’ of ICC pre-trial chambers.<sup>41</sup> In *Ongwen*, the Chamber held that ‘questions of concurrence of offences are better left to the determination of the Trial Chamber’<sup>42</sup> and observed that

article 61(7) of the [Rome] Statute mandates the Chamber to decline to confirm charges only when the evidence does not provide substantial grounds to believe 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. When the Prosecutor meets the applicable burden of proof, the Chamber shall confirm the charges as presented.<sup>43</sup>

19. The Chamber rejected that ICC Regulation 55,<sup>44</sup> allowing for re-characterisation of crimes, warranted diverging from this view:

Regulation 55 provides for a procedural remedy to situations in which the evidence heard at trial warrants a modification to the legal characterisation of the facts confirmed by the Pre-Trial Chamber. This provision does not address or otherwise concern situations in which the same set of facts could constitute simultaneously more than one crime under the Statute, *i.e.* those situations warranting cumulative charging or cumulative convictions.<sup>45</sup>

20. At points, the Defence’s argument seeks to elide the differences between the propriety of cumulative charging, and the propriety of cumulative convictions.<sup>46</sup> Reference to case law concerning cumulative convictions after trial is inapplicable to

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<sup>40</sup> ICC, Pre-Trial Chamber, Prosecutor v. Ongwen, ICC-02/04-01/15, *Decision on the confirmation of charges against Dominic Ongwen*, 23 March 2016, para.33 (*‘Ongwen Decision’*).

<sup>41</sup> *Ongwen* Decision, para.33 (and references therein). See also ICC Chambers Practice Manual, November 2019, para.68 (stating that where cumulative charges are presented the Pre-Trial Chamber will confirm them provided they are sufficiently supported by the available evidence and each crime contains materially distinct elements).

<sup>42</sup> *Ongwen* Decision, para.30.

<sup>43</sup> *Ongwen* Decision, para.30.

<sup>44</sup> ICC, Regulations of the Court (as amended), ICC-BD/01-05-16.

<sup>45</sup> *Ongwen* Decision, para.31.

<sup>46</sup> Motion, KSC-BC-2020-04/F00055/COR, paras 16-17.



the decision at this stage,<sup>47</sup> except to highlight that it is after trial that is the appropriate time for chambers to consider whether any proven charges overlap and how that should be addressed in conviction and sentencing.

21. Because, as described above, cumulative charging is permissible, this Defence argument should be rejected. However, the SPO will briefly address the specific charges that the Defence claim are cumulative. Although the Motion initially states that 'Counts 1 to 3 are inappropriately overlapping',<sup>48</sup> giving the impression that they contend that all three charges overlap with each other, the Defence later clarify that their argument is that: 1) Counts 1 and 2 (Arbitrary Detention and Cruel Treatment, respectively) overlap; and, 2) Counts 2 and 3 (Cruel Treatment and Torture, respectively) overlap.<sup>49</sup>

22. Reviewing the elements of these crimes as contained in the Confirmation Decision<sup>50</sup> reveals that arbitrary detention and cruel treatment each contain an element that is distinct from one another, and therefor satisfy the principle of reciprocal specialty.<sup>51</sup> Arbitrary detention requires deprivation of liberty, which cruel treatment does not. Cruel treatment requires serious mental or physical suffering or injury, or a serious attack on human dignity, which arbitrary detention does not.<sup>52</sup>

23. As regards torture and cruel treatment, in the view of the SPO, every act of proven torture will also qualify as cruel treatment, although not every act of cruel treatment will qualify as torture, both because cruel treatment permits conviction for

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<sup>47</sup> See *Ongwen* Decision, para.30 ('Arguments concerning the permissibility of cumulative convictions are extraneous to the question of whether this Chamber should allow the Prosecutor to charge Dominic Ongwen with more than one crime on the same set of facts, and present these charges to the Trial Chamber.').

<sup>48</sup> Motion, KSC-BC-2020-04/F00055/COR, para.14.

<sup>49</sup> Motion, KSC-BC-2020-04/F00055/COR, paras 19, 24.

<sup>50</sup> Confirmation Decision, KSC-BC-2020-04/F00007/RED, paras 48-60.

<sup>51</sup> See ICTY, Trial Chamber, Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, *Judgement*, 14 January 2000, para.718; ICTY, Appeals Chamber, Prosecutor v. Jelisić, *Judgement*, 5 July 2001, para.82; ICTY, Appeals Chamber, Prosecutor v. Kupreškić et al, IT-95-16-A, *Judgement*, 23 October 2001, para.387.

<sup>52</sup> Confirmation Decision, KSC-BC-2020-04/F00007/RED, paras 49, 54.

serious attacks on human dignity (which torture does not, unless such an attack causes the requisite mental suffering), and because torture requires that the suffering be imposed for a prohibited purpose.<sup>53</sup> Under the facts as proven at trial, however, conviction under each of these may engage a different legal interest.<sup>54</sup>

#### B. WAR CRIMES ARE CORRECTLY PLED IN THE CONFIRMED INDICTMENT

24. The Defence argues that the Indictment is defective in pleading war crimes by not providing sufficient information concerning: 1) the nexus between the charged conduct and the Non-International Armed Conflict; and, 2) information concerning alleged victims.

25. The Defence's precise concerns regarding the nexus requirement are that the period of the armed conflict between the KLA and forces of the FRY and the Republic of Serbia, and the period of KLA use of the Kukës Metal Factory, are not clear.<sup>55</sup> Viewing the Indictment as a whole provides sufficient clarity on these issues, and thus this is not a defect in the Confirmed Indictment.

26. The Confirmed Indictment states that at all times relevant to the Indictment the Kukës Metal Factory was in use as a KLA base.<sup>56</sup> The Indictment (i) specifies that armed hostilities occurred before, during, and after the period relevant to the indictment,<sup>57</sup> (ii) specifies that the crimes charged took place in the context of, and were associated with, an armed conflict,<sup>58</sup> and (iii) charges as war crimes events occurring between approximately 17 May 1999 and 5 June 1999.<sup>59</sup> As such, at a minimum, the armed conflict was occurring at this time and the Kukës Metal Factory

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<sup>53</sup> Confirmation Decision, KSC-BC-2020-04/F00007/RED, para.60.

<sup>54</sup> *Ongwen* Decision, para.32.

<sup>55</sup> Motion, KSC-BC-2020-04/F00055/COR, paras 30-31.

<sup>56</sup> Confirmed Indictment, KSC-BC-2020-04/F00038, para.6.

<sup>57</sup> Confirmed Indictment, KSC-BC-2020-04/F00038, para.4.

<sup>58</sup> Confirmed Indictment, KSC-BC-2020-04/F00038, para.3.

<sup>59</sup> Confirmed Indictment, KSC-BC-2020-04/F00038, para.31.

was being used as a base. This pleading is sufficiently clear to put the Defence on notice concerning this 20-day period.

27. As regards the identity of the alleged victims, the Confirmed Indictment makes clear that they are persons detained in a specific place (the Kukës Metal Factory), during a 20-day period [REDACTED].<sup>60</sup> Reading the Confirmed Indictment as a whole provides clarification that these included [REDACTED] persons<sup>61</sup> including [REDACTED].<sup>62</sup> Formulations that provide some particulars following a general category, while allowing for further facts regarding the makeup of that group or category to be developed at trial by use of the word ‘including’ or similar terms, are to be read as providing further specificity and are not impermissibly vague.<sup>63</sup>

28. Together, the information provided in the Confirmed Indictment as a whole sufficiently describes the victims and further development is an evidentiary matter for trial. It is additionally permissible that some victims’ identities may never be fully known, a possibility that neither creates a defect in the Indictment nor prevents possible conviction regarding crimes against those victims.<sup>64</sup>

### C. THE INDICTMENT CORRECTLY PLEADS MODES OF LIABILITY

29. The Defence argue that the Confirmed Indictment is defective in pleading each of the modes of liability presented in the Indictment: commission through a Joint Criminal Enterprise, aiding and abetting, and commission.

30. As regards JCE, the Defence argue that the Confirmed Indictment is impermissibly vague in respect of JCE membership, namely concerning the identity

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<sup>60</sup> Confirmed Indictment, KSC-BC-2020-04/F00038, paras.6, 8, 14, 19, 31.

<sup>61</sup> Confirmed Indictment, KSC-BC-2020-04/F00038, para.14.

<sup>62</sup> Confirmed Indictment, KSC-BC-2020-04/F00038, para.21.

<sup>63</sup> Indictment Decision, KSC-BC-2020-06/F00413, para.134.

<sup>64</sup> Indictment Decision, KSC-BC-2020-06/F00413, para.156.

of JCE members and tools.<sup>65</sup> This argument fails as the Confirmed Indictment identifies JCE members by name and/or nickname, affiliation, temporal and geographic location, and role or position.<sup>66</sup> Contrary to the Defence claim, this level of identification is compatible with the scale of events.<sup>67</sup>

31. The Defence next argue that the SPO has not attempted to distinguish JCE Members from Tools, and has failed to identify in the Indictment the link between the acts of a Tool and a JCE member.<sup>68</sup> This argument fails because it is permitted to allege that certain individuals were either JCE members or Tools if done using alternative pleading.<sup>69</sup> This is the case for paragraph 10 of the Confirmed Indictment, and in fact, is an established practice before similarly-situated international courts.<sup>70</sup> The precise determination is a matter to be ruled on by the trial panel following the presentation of evidence.<sup>71</sup> No notice violation has resulted since the Defence is on notice that if some alleged JCE members are found not to be JCE members, the SPO alleges that they instead acted as Tools.<sup>72</sup> Finally, details concerning identification of a JCE member to whom responsibility may be imputed based on the conduct of a Tool is also a matter for determination at trial.<sup>73</sup>

32. In alleging that the Confirmed Indictment lacks specificity on the identity of JCE members and tools, the Defence argues that applying JCE to the Accused is ‘effectively’ charging him with liability derived from the conduct of others, namely for conduct committed by ‘any number of unknown and unidentifiable members’.<sup>74</sup>

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<sup>65</sup> Motion, KSC-BC-2020-04/F00055/COR, paras 39-41.

<sup>66</sup> See Confirmation Decision, KSC-BC-2020-06/F00413, paras.72-78, 151 (identifying members of the JCE by category or group is sufficient).

<sup>67</sup> *Contra*. Motion, KSC-BC-2020-04/F00055/COR, paras 39-41;

<sup>68</sup> Motion, KSC-BC-2020-04/F00055/COR, para.42.

<sup>69</sup> Indictment Decision, KSC-BC-2020-06/F00413, para.82.

<sup>70</sup> Indictment Decision, KSC-BC-2020-06/F00413, para.82.

<sup>71</sup> Indictment Decision, KSC-BC-2020-06/F00413, para.82.

<sup>72</sup> Indictment Decision, KSC-BC-2020-06/F00413, para.82.

<sup>73</sup> Indictment Decision, KSC-BC-2020-06/F00413, para.83.

<sup>74</sup> Motion, KSC-BC-2020-04/F00055/COR, para.43.

This argument reflects a fundamental misunderstanding of the mode of liability of JCE and is not a challenge to the form of the Indictment.<sup>75</sup>

33. The Defence argue further that the Confirmed Indictment is impermissibly imprecise in respect of the Accused's conduct related to concrete alleged acts and incidents and that the SPO instead relies on generic descriptions without reference to concrete incidents.<sup>76</sup> Contrary to this argument, paragraph 11 of the Indictment refers to multiple ways in which the Accused contributed to the common purpose, with specific references, including by using paragraph numbers referring to specified incidents. These are detailed descriptions and the Confirmed Indictment describes the Accused's alleged conduct, including (i) transferring a named victim under threat of death on a particular date from a specified location to another specified location; (ii) interrogating, beating and psychologically assaulting detainees, including with specified implements; (iii) levying particular threats and accusations against detainees while interrogating, beating and assaulting them; and (iv) over the course of two days beating, interrogating and severely wounding named detainees in a specific manner with specified weapons.<sup>77</sup> Given the abundant detail provided about (i) the variety of activities engaged in by the Accused in various locations during the Indictment period, (ii) specific incidents of severe mistreatment by the Accused at Kukës Metal Factory with dates, co-perpetrators and named detainees listed, and (iii) details about the kind of acts committed by the Accused and those who committed the crimes with him against particular detainees, it is simply false that the Confirmed Indictment rests

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<sup>75</sup> The Defence argument ignores that the Accused will only be found liable pursuant to this mode of liability if all the requirements for JCE liability are met, including that the Accused's conduct is shown to have constituted a significant contribution to the common purpose. *See e.g.* Confirmation Decision F00007/CONF/RED, para.71.

<sup>76</sup> Motion, KSC-BC-2020-04/F00055/COR, para.44.

<sup>77</sup> Confirmed Indictment, KSC-BC-2020-04/F00038, para.11 and paragraphs referred to therein.

on generic descriptions of conduct without reference to concrete incidents. Details beyond those specified are matters for determination at trial.

34. The Defence challenge the Confirmed Indictment as having failed to specify which form of JCE is alleged.<sup>78</sup> Paragraph 9 of the Confirmed Indictment states that the Accused shared the intent for the commission of these crimes with other members of the joint criminal enterprise. In the alternative, it was foreseeable to the Accused that murder might be perpetrated and with awareness of the fact that murder was a possible consequence of the implementation of the common purpose, the Accused participated and thus willingly took that risk.<sup>79</sup> The Confirmed Indictment thus puts the Accused on notice that JCE I liability is pleaded for all crimes and additionally that JCE III liability is pleaded, in the alternative to JCE I, for the crime of murder. There is no error as the SPO may charge an Accused with multiple forms of JCE, as long as it clearly indicates which form is alleged.<sup>80</sup>

35. As regards aiding and abetting, the Defence argue that the Confirmed Indictment lacks sufficient detail concerning Shala's conduct and the means of his aiding and abetting, as well as the persons aided and abetted.<sup>81</sup> Ignoring the requirement to read the Indictment as a whole, the Defence overlook that all of the factual underpinnings of the JCE are also incorporated by reference as concern aiding and abetting, thereby providing sufficient notice to the Defence.<sup>82</sup>

36. Specifically, the Defence complain that "[t]he allegation of "practical assistance, encouragement, and/or moral support" in paragraph 12 of the Indictment is a generic description without any reference to concrete incidents or attributed acts."<sup>83</sup> But this

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<sup>78</sup> Motion, KSC-BC-2020-04/F00055/COR, para.45.

<sup>79</sup> Confirmed Indictment, KSC-BC-2020-04/F00038, para.9.

<sup>80</sup> Indictment Decision, KSC-BC-2020-06/F00413, para.65

<sup>81</sup> Motion, KSC-BC-2020-04/F00055/COR, paras 46-50.

<sup>82</sup> See Indictment Decision, KSC-BC-2020-06/F00413, para.111.

<sup>83</sup> Motion, KSC-BC-2020-04/F00055/COR, para.48.

omits the first part of that same paragraph 12 sentence, which states ‘*Through these same acts and omissions, Pjetër SHALA provided practical assistance, encouragement and/or moral support, which had a substantial effect on the perpetration of the crimes charged in this indictment.*’<sup>84</sup> The omitted phrase refers the reader to a list of Shala’s actions and contributions, and incorporates paragraphs that further identify individuals that Shala allegedly aided and abetted. Thus, the Defence’s claim that the Indictment does not specify the ‘conduct and means’<sup>85</sup>, fails to make ‘reference to concrete incidents or attributed acts’, and does not identify the substantial effects on the alleged perpetrators of the crimes and their identities<sup>86</sup> is demonstrably false.

37. The degree of detail necessary regarding the assisted persons ‘will depend on the nature and circumstances of the case.’<sup>87</sup> Here, the Indictment provides a general category of assisted persons (KLA members), some of their names, their location, and the time period at that location. Under the circumstances, this is sufficient to put the Defence on notice. The Confirmed Indictment therefore provides adequate notice to the Defence, and additional information beyond that provided in the Indictment, including whether Shala’s actions and omissions actually had a substantial effect and additional information regarding those Shala aided and abetted, are matters for determination at trial.<sup>88</sup>

38. The Defence’s arguments that the allegation of commission liability is defective<sup>89</sup> repeat claims that the other perpetrators are not sufficiently identified in the Indictment. As stated above (and additionally addressed below), the other

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<sup>84</sup> Confirmed Indictment, KSC-BC-2020-04/F00038, para.12 (emphasis added).

<sup>85</sup> Motion, KSC-BC-2020-04/F00055/COR, para.47.

<sup>86</sup> Motion, KSC-BC-2020-04/F00055/COR, para.49.

<sup>87</sup> Decision on the Defence Appeals Against Decision on Preliminary Motions, KSC-BC-2020-07/IA004/F00007, 23 June 2021, para.54.

<sup>88</sup> Confirmation Decision, KSC-BC-2020-06/F00413, paras 111-112.

<sup>89</sup> Motion, KSC-BC-2020-04/F00055/COR, paras 51-54.

perpetrators are sufficiently identified when reading the Indictment as a whole, and other factual details concerning their identities are to be addressed at trial.

#### D. THE LANGUAGE OF THE CONFIRMED INDICTMENT IS NOT DEFECTIVE

39. The Defence avers, in multiple sections of the Motion,<sup>90</sup> that there is insufficient detail regarding individuals with whom Shala acted in concert. Viewing the Indictment as a whole, these individuals are sufficiently identified by their description as belonging to the group 'KLA members', their geographical and temporal location, and the names of some of those individuals.<sup>91</sup> Additional information concerning members of this group is factual evidence to be developed at trial.

40. The Defence also object to the use of the word 'including'.<sup>92</sup> However, as used in the Confirmed Indictment, the term 'including' is appropriately applied to provide further, known detail supporting the material facts and does not create ambiguity or create the risk that the SPO will expand its case beyond the approved scope. '[W]hen 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>93</sup> That is the situation here as regards other perpetrators. The category is KLA members, and certain members of that category are then further identified.

41. The Defence argues that the use of 'and/or' in relation to the possible ways that Shala contributed to the JCE or aided and abetted certain crimes, as well as in alleging possible modes of liability, creates impermissible ambiguity. But in context these formulations simply recognise that Shala may be shown to have contributed to the

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<sup>90</sup> Motion, KSC-BC-2020-04/F00055/COR, paras. 51-58, pp.25-28.

<sup>91</sup> See Confirmation Decision, KSC-BC-2020-06/F00413, paras 72-78, 151 (identifying members of the JCE by category or group is sufficient).

<sup>92</sup> Motion, KSC-BC-2020-04/F00055/COR, para.55.

<sup>93</sup> Confirmation Decision, KSC-BC-2020-06/F00413, para.39.



alleged crimes in more than one of the listed ways. Similarly, the use of the phrase ‘and/or’ concerning Shala’s *mens rea* in relation to arbitrary detention<sup>94</sup> allows for the factual development of this issue at trial.

#### E. THE DETAILS OF THE ALLEGED CRIMES ARE CORRECTLY PLED

42. The Defence repeats arguments across all of the crimes that the Confirmed Indictment does not provide sufficient information regarding Shala’s and other perpetrator’s exact actions in regards to the crimes alleged, as well as regarding who the victims were. As mentioned above, where unavailable, precise details regarding victims need not be included in an indictment, and even if not available by the end of trial the lack of such details would not necessarily prevent conviction. Regardless, all of these issues are quintessential factual matters to be addressed at trial.

43. For completeness, the SPO notes that the Defence also argues that arbitrary detention does not qualify as a war crime.<sup>95</sup> This is not a proper challenge to the form of the indictment under 97(1)(b), but is a substantive challenge to the confirmed indictment, and therefore should be dismissed.<sup>96</sup>

#### IV. RELIEF REQUESTED

44. For the foregoing reasons, the SPO respectfully requests the Pre-Trial Judge to dismiss the Motion.

**Word Count: 4,991**

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<sup>94</sup> Motion, KSC-BC-2020-04/F00055/COR, para.60

<sup>95</sup> Motion, KSC-BC-2020-04/F00055/COR, p.26.

<sup>96</sup> See Confirmation Decision, KSC-BC-2020-06/F00413, para.49.



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**Jack Smith**

**Specialist Prosecutor**

Monday, 1 November 2021  
At The Hague, the Netherlands.