

Case No.: KSC-BC-2020-04
Specialist Prosecutor v. Pjetër Shala

Before: **President of Kosovo Specialised Chambers**
Judge Ekaterina Trendafilova

Registrar: Dr Fidelma Donlon

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THE SPECIALIST PROSECUTOR
v.
PJETËR SHALA

**Defence Appeal against Decision on Motion Challenging the
Establishment and Jurisdiction of the Specialist Chambers**

Specialist Prosecutor's Office:
Jack Smith

Specialist Counsel for the Accused:
Jean-Louis Gilissen
Hedi Aouini

I. INTRODUCTION

1. Pursuant to Article 45(2) of Law No. 05/L-053 'On Specialist Chambers and Specialist Prosecutor's Office' ('Law') and Rule 97(3) of the Rules of Procedure and Evidence ('Rules'), the Defence of Mr Pjetër Shala ('Defence') hereby submits its appeal against the Decision on Motions Challenging the Establishment and Jurisdiction of the Specialist Chambers ('Impugned Decision').¹
2. The Impugned Decision rejected the Defence Preliminary Motion to Challenge the Jurisdiction of the Specialist Chambers ('SC') in which the Defence requested the Pre-Trial Judge to confirm that the SC lack jurisdiction over arbitrary detention as a war crime in non-international armed conflict ('NIAC') and over the mode of liability of joint criminal enterprise ('JCE').²
3. Mr Shala is being prosecuted on the basis of the Law which was introduced in Kosovo in August 2015 and has been interpreted by the Pre-Trial Judge in his Impugned Decision in a way that gives direct effect to Customary International Law ('CIL') and criminalises conduct that did not constitute a criminal offence as well as conduct prosecuted on the basis of a mode of liability that was not recognised in the law applicable in Kosovo at the material time. It does so in violation of the principle of legality as guaranteed by the Kosovo Constitution and international and european obligations that are binding on Kosovo and the Specialist Chambers ('SC').

¹ KSC-BC-2020-04, F00088, Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 18 October 2021. All further references to filings in this Motion concern Case No. KSC-BC-2020-04 unless otherwise indicated.

² Impugned Decision, para. 104(b); F00054, Preliminary Motion of the Defence of Pjeter Shala to Challenge the Jurisdiction of the KSC, 12 July 2021 ('Motion'). *See also* F00084, Defence Reply to the Prosecution Response to the Preliminary Motion of Pjeter Shala challenging the jurisdiction of the KSC, 24 September 2021 ('Reply').

4. In his Impugned Decision, the Pre-Trial Judge made a series of material errors of law in dismissing the Defence submissions. Such errors are the result of the Pre-Trial Judge's failure to address the substance of such submissions. The Pre-Trial Judge has also failed to give sufficient and adequate reasons for dismissing them. These errors taken either separately and/or cumulatively have the effect of invalidating the Impugned Decision. Specifically, the Pre-Trial Judge:

- (i) erred in attributing unqualified superiority to CIL over national law, despite the explicit wording of relevant provisions and binding case law to the contrary, in circumstances where his interpretation of the applicable legal framework on which the proceedings against Mr Shala are based violates Mr Shala's fundamental rights as an accused;³
- (ii) erred by finding that the Law, which was introduced in 2015 and has been interpreted so as to enable the prosecution of Mr Shala under a mode of liability and for a crime that were not recognised as such in Kosovo in 1999, does not raise any issue of retroactivity and is compatible with Article 7 of the ECHR and the analogous guarantee of the Kosovo Constitution;⁴
- (iii) erred in finding that liability under the first and third form of a JCE is included in Article 16(1)(a) of the Law;⁵ and
- (iv) erred in finding that arbitrary detention in a NIAC was correctly charged in these circumstances.⁶

³ Impugned Decision, paras. 81-89.

⁴ Impugned Decision, paras. 85-87.

⁵ Impugned Decision, para. 91.

⁶ Impugned Decision, paras. 98-103.

5. The Defence requests the Court of Appeals to correct these errors, identify the correct applicable legal standard, and ensure that the proceedings against Mr Shala proceed in a manner that ensures the protection of his fundamental rights.

II. APPLICABLE LAW

6. The Court of Appeals has held that the standard of review applicable to interlocutory appeals would be the analogous of the standard of review provided for under Article 46(1) of the Law to appeals against judgments, requiring: (i) an error of law invalidating the judgment; (ii) an error of fact occasioning a miscarriage of justice; or, regarding discretionary decisions, (iii) a discernible error in that the decision is based on an incorrect interpretation of governing law, a patently incorrect conclusion of fact, or is so unfair or unreasonable that it constitutes an abuse of discretion.⁷

III. GROUNDS OF APPEAL

(i) the Pre-Trial Judge erred by attributing unqualified superiority to CIL and interpreting the applicable legislative framework in breach of Mr Shala's fundamental rights

7. The Pre-Trial Judge erred in attributing unqualified superiority to CIL over national law, despite the explicit wording of relevant provisions and binding case law to the contrary, in circumstances where his interpretation of the applicable legal framework on which the proceedings against Mr Shala are based violates Mr Shala's fundamental rights as an accused.

⁷ KSC-BC-2020-06, IA001-F00005, Appeals Chamber, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, 30 April 2021, paras. 4-7; *Gucati* Appeal Decision, paras. 10-14.

8. Specifically, the Pre-Trial Judge erred in his finding that *'when adjudicating crimes under Article[s] 13 and 14 of the Law [...] the SC shall apply, first, CIL and, second, Kosovo law only insofar as it is expressly incorporated in the Law and complies with CIL.'*⁸ The Pre-Trial Judge's finding violates Article 16 of the Constitution that guarantees the primacy of the Kosovo Constitution in the internal legal order.⁹ The Pre-Trial Judge fails to provide adequate reasons for his conclusion that the Law could lawfully provide that CIL is to be given precedence over domestic law despite explicit Constitutional provisions to the contrary. The Pre-Trial Judge failed to address the Defence submissions that the SC is a domestic Kosovo Court which needs to operate in compliance with domestic law and that the Law needs to be interpreted and integrated in the Kosovo legal order.¹⁰ The Pre-Trial Judge's position that *'categorising a court of law as domestic, international, hybrid, or otherwise, is not dispositive of the applicable law'*¹¹ demonstrates the uncertainty as to the law to be applied by the SC and how judicial interpretation seeks to alter the character of the SC and undermines the *'quality'* of the legislative framework applied. Appellate intervention is merited to clarify the nature of the SC which will inevitably reflect the SC's role and application of the law. Depending on how this issue is determined the weight attributed to how the ICTY, ICTR, and MICT Statutes have been interpreted will fundamentally differ.
9. In any event, the Pre-Trial Judge's interpretation of the relevant legal framework is impermissibly teleological in that it appears aimed to ensure the lawfulness of the Indictment and continuation of the proceedings against Mr Shala instead of impartially reviewing whether the charges therein have a solid

⁸ Impugned Decision, para. 98.

⁹ Article 16(1) of the Constitution of Kosovo provides that *'[t]he Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution.'*

¹⁰ Impugned Decision, para. 22. See Motion, paras. 5, 6, 7.

¹¹ Impugned Decision, para. 82.

legal basis in Kosovo law which was in force at the material time. This approach is flawed, inappropriate, and in violation of the guarantees of fundamental rights of an accused that require interpreting statutory penal provisions in accordance with principles that guarantee the fairness of criminal proceedings as set out in the case law of the ECtHR concerning Articles 6 and 7 of the Convention.¹² In doing so, the Pre-Trial Judge fails to consider the Defence submissions about the lack of clarity as to the applicable law that violates the requirements of the 'quality of law'; the accessibility, foreseeability and precision requirements set out in Article 33 of the Constitution and Article 7 of the ECHR.¹³

10. The Pre-Trial Judge did not even attempt to reconcile the inconsistency between Article 3(2)(d) of the Law and Article 19(2) of the Constitution; he interpreted them both as attributing superiority to CIL over domestic laws despite the qualification in Article 19(2) which refers to '*legally binding norms of international law*', and construed these provisions in the abstract without taking into consideration in his analysis seminal judgments of the Supreme Court of Kosovo finding that at the time material to the Indictment the 1974 SFRY Constitution applied. The latter required criminal offences to be set out in a domestic statute and made CIL inapplicable to events alleged to have occurred in 1999.¹⁴ These authorities are compatible with ECtHR case law that finds incorporation of an international norm prescribing an offence into domestic law an important consideration in assessing the compatibility of criminal

¹² See, for instance, ECtHR, *Gregarevic v. Croatia*, no. 58331/09, 10 October 2012, para. 49; *Negulaescu v. Romania*, no.11230/12, 31 May 2021, paras. 39-42; *S.W. v. The United Kingdom*, no. 20166/92, 22 November 1995, para. 36; *G.I.E.M. S.R.L. a.o. v. Italy*, nos. 1828/06 and 2 others, paras. 251-261, *Jorgic v. Germany*, no. 74613/01, 12 July 2007, paras 109-113.

¹³ Motion, para. 12.

¹⁴ Motion, para. 12, referring to Supreme Court of Kosovo (UNMIK), *Case against Latif Gashi et al.*, AP-KZ no. 139/2004, 21 July 2005, pp. 6, 12; Supreme Court of Kosovo (UNMIK), *Case against Veselin Bešović*, AP-KZ no. 80/2004, 7 September 2004, pp. 18, 19.

proceedings with the guarantee enshrined in Article 7 ECHR.¹⁵ Accordingly, the Pre-Trial Judge made a material error of law in finding that *'neither the SFRY Constitution nor the SFRY Criminal Code limit the jurisdiction of the SC in the manner suggested by the Defence'*.¹⁶

11. The Pre-Trial Judge failed to address the Defence arguments and provide adequate reasons for dismissing them; the suggestion that binding authority of the Supreme Court of Kosovo relied upon by the Defence is *'distinguishable'* because it relates *'to the principle of legality as established in the SFRY Constitution'*¹⁷ fails to explain how the principle of legality can allow a less favourable framework governing SC proceedings and the attribution of direct effect to CIL through the retrospective enactment of the Law or indeed how the principle of legality in the SFRY Constitution differs from the principle of legality that is in force in the Kosovo Constitution or the principles guaranteed by Article 7 ECHR which are binding on the SC. To the extent that the Pre-Trial Judge acknowledged a difference in the applicable legal regime, including with regard to the scope of the principle of legality, he should have assessed which regime should be applied in light of the Accused's right that criminal law must not be extensively construed to his detriment in accordance with the guarantee enshrined in Article 7 ECHR.¹⁸
12. Furthermore, the Pre-Trial Judge erred in finding that Article 12 of the Law is compatible with the principle of non-retroactivity guaranteed by Article 7 of the ECHR and Article 33 of the Kosovo Constitution. His erroneous interpretation of the applicable legislative framework fundamentally calls into

¹⁵ See, for instance, ECtHR, *Korbely v. Hungary*, no. 9174/02, 18 September 2008, paras. 74, 75.

¹⁶ Impugned Decision, para. 82.

¹⁷ Impugned Decision, para. 83.

¹⁸ See, for instance, ECtHR, *Korbely v. Hungary*, no. 9174/02, 18 September 2008, para. 70. The Defence repeats that this is an argument raised explicitly and in substance throughout its preliminary Motion and Reply by all references to the guarantee enshrined in Article 7 ECHR.

question the quality of the law applied by the SC and the SPO, and fails to acknowledge the obsolete nature of Article 7 paragraph 2 of the ECHR (which was relied upon in Article 12 of the Law). The Pre-Trial Judge also failed to address in an adequate manner the Defence submission that application of CIL in the manner proposed by the Prosecution would violate the principle requiring application of the law most favourable to the Accused and Article 7 of the ECHR.¹⁹ In this respect, the Pre-Trial Judge erred by declining to address the Defence submission that in considering the lawfulness of the charges of the Indictment and their compatibility with Mr Shala's rights the law most favourable to him must be applied.²⁰ This is despite the fact that the relevant principle under Article 7 was explicitly mentioned in the Defence Preliminary Motion and was developed in the Defence Reply in addressing arguments made by the SPO.²¹ Had the Pre-Trial Judge considered the Defence submissions in this respect (as he was obliged to do), he should have determined which framework is the more favourable to the Accused and ensure that the proceedings proceed within the confines set in that framework. Instead, the Pre-Trial Judge concluded that CIL is superior and the domestic law was valid to the extent that it is consistent with CIL. The Pre-Trial Judge's approach fails to take into account relevant and determining considerations, fails to conduct a proper assessment of which framework is more favourable, let alone apply it. This applies both to the application of CIL as the basis for charging Mr Shala with arbitrary detention in the context of a NIAC as well as to the charges based on JCE liability.

¹⁹ Motion, paras. 28 (explicitly referring to authority prescribing interpreting the law to the 'detriment' of defendants), 32 (explicitly referring to the requirement under Article 7 ECHR that 'criminal law must not be extensively construed to an accused's detriment, for instance by analogy'), referring to ECtHR, *Kokkinakis v. Greece*, no. 14307/88, 25 May 1993, para. 52; *Vasiliauskas v. Lithuania*, para. 154.

²⁰ Impugned Decision, para. 81.

²¹ Reply, para. 29 (where the Defence notes that the SPO fails to present accurately relevant authorities and replies that the SCK correctly applied the principle of *lex mitior*).

13. The Pre-Trial Judge's errors undermine legal certainty, breach Mr Shala's fundamental rights causing irreparable prejudice that warrants immediate appellate intervention.

(ii) the Pre-Trial Judge erred by failing to acknowledge the interference with the principle of non-retroactivity and violation of Article 7 ECHR and the analogous guarantee of the Kosovo Constitution

14. The Pre-Trial Judge erred in finding that the introduction of domestic legislation allowing prosecutions for conduct which took place before the penalisation was introduced in domestic law does not engage any issue of retroactivity and is compatible with Article 7 of the ECHR and the analogous guarantee of the Kosovo Constitution.²² Article 7 of the ECHR imposes an unconditional prohibition of the retrospective application of criminal law where that is to an accused's disadvantage.²³

15. In this respect the Pre-Trial Judge's analysis is manifestly unreasonable in denying the obvious retroactive character of such legislation. At paragraph 85 of the Impugned Decision the Pre-Trial Judge considers that *'in adopting domestic legislation explicitly providing for international crimes already existing under CIL at the material time, the legislator can allow – or even mandate- prosecution for conduct that took place before the penalisation was introduced in domestic written law without any issue of retroactivity arising.'*²⁴ His analysis, which fails to consider the requirements of accessibility and foreseeability and address the Defence arguments in this respect is flawed. Introducing criminal offences that apply to conduct predating such introduction strikes at the essence of the principle of non-retroactivity and should be carefully scrutinised to ensure compatibility with the fundamental rights of an accused. The Pre-Trial Judge

²² Impugned Decision, paras. 85-87.

²³ See, for instance, ECtHR, *Del Rio Prada v. Spain*, no. 42750/09 (GC), 21 October 2013, para. 116.

²⁴ Impugned Decision, para. 85.

failed to engage in such assessment. This in itself constitutes a procedural violation of the rights of Mr Shala under Articles 6 and 7 ECHR. The Pre-Trial Judge erred by finding that the charges against Shala that are derived from CIL are lawful despite the fact that they were not incorporated into Kosovo law at the material time. He also erred by declining to follow ruling authority by the Supreme Court of Kosovo that provided that criminal offences must be incorporated in specific domestic legislation.²⁵

16. The Pre-Trial Judge made a material error of law in failing to apply the correct test under ECtHR case law,²⁶ which allows prosecution on the basis of international law without domestic incorporation in respect of '*flagrantly unlawful*' conduct, the criminal nature of which is '*evidently*' accessible and foreseeable to an accused.²⁷ In doing so, he failed to address and provide sufficient reasons for rejecting the Defence submissions on this matter.²⁸
17. The Pre-Trial Judge considered that: '*[t]he ECtHR has found that the reference to a criminal offence under international law entails that no violation of Article 7(1) ensues if a conviction is based on domestic legal provisions that were not in force when the offence was committed, provided that the conviction was based on either conventional international law or CIL as applicable at the time.*'²⁹ In this respect, the Pre-Trial Judge makes a material error of law in how he interprets ECHR case law. He relies in support on a sole authority that simply does not support his interpretation. Specifically, the paragraph on which the Pre-Trial Judge relies is an introductory paragraph that precedes the ECtHR's examination and application of the relevant principles. In that paragraph, the ECtHR enters a

²⁵ Impugned Decision, para. 83.

²⁶ Impugned Decision, paras. 84-86.

²⁷ ECtHR, *Streletz, Kessler and Krenz v. Germany*, nos. 34044/96, 35532/97, 44801/98, 22 March 2001, paras. 85, 87; ECtHR, *K.H.W. v Germany* [GC], no. 37201/97, para. 75 ; ECtHR, *Polednova v. the Czech Republic*, no. 2615/10, 21 June 2011 (dec.); ECtHR, *Simsic v. Bosnia and Herzegovina*, paras. 23, 24.

²⁸ See, for instance, Reply paras. 21-23, 27.

²⁹ Impugned Decision, para. 86, referring to ECtHR, *Vasiliauskas v. Lithuania*, no. 35343/05, 20 October 2015, para. 166.

finding that in the circumstances of that case ‘*the applicant’s conviction was based upon legal provisions that were not in force in 1953 and that such provisions were therefore applied retroactively.*’ The ECtHR therefore first assessed and concluded that criminal provisions were applied retroactively, an assessment that the Pre-Trial Judge declined to make. The ECtHR then found that ‘*this [the retroactive application] would constitute a violation of Article 7 of the Convention unless it can be established that [the applicant’s] conviction was based upon international law as it stood at the relevant time.*’ It therefore provided for an exception, which just like all exceptions to ECHR guarantees need to be subject to careful scrutiny and narrowly interpreted. Accordingly, the ECtHR noted that ‘*the applicant’s conviction had to be examined from that perspective*’ and proceeded to examine whether the particular norm of international law was sufficiently accessible and foreseeable, a thorough examination which is developed in paragraphs 169-190 of its judgment and includes an assessment of the definition of the crime in question in treaties and customary international law at the material time as well as subsequently, and a thorough review of the domestic court’s reasoning and understanding of the crime in question as it stood at the relevant time. The Court concluded that the applicant’s conviction for genocide in that case could not have been foreseen at the time of the killings in question.³⁰ *Vasiliauskas v. Lithuania* does not support the Pre-Trial Judge’s interpretation of guiding ECHR case law.

18. The Pre-Trial Judge’s reliance on the Court’s decision in *Šimšić v. Bosnia and Herzegovina* is equally erroneous.³¹ The evident unlawfulness of persecution committed as part of a widespread and systematic attack against a civilian population through murders, incarceration, torture, enforced disappearances

³⁰ ECtHR, *Vasiliauskas v. Lithuania*, no. 35343/05, 20 October 2015, para. 186 and preceding analysis.

³¹ Impugned Decision, para. 86.

and rapes is fundamentally different from the controversial concepts of liability under a JCE and the war crime of arbitrary detention in NIAC under CIL.³² Both liability under a JCE as well as the crime of arbitrary detention in NIAC fail to satisfy the high threshold of '*flagrant unlawfulness*' required under the ECtHR.³³

19. The Pre-Trial Judge's finding that Article 7 ECHR and Article 15 ICCPR '*are to be read as encompassing the totality*' of those provisions including '*the references to Article 7(2) of the ECHR and Article 15(2) of the ICCPR*'³⁴ fails to apply the essence of these provisions and acknowledge the obsolete character of the limitation in their second paragraph. It also fails to address and provide adequate reasoning for dismissing the relevant Defence submissions.³⁵

(iii) the Pre-Trial Judge erred in finding that liability under the first and third form of a JCE is included in Article 16(1)(a) of the Law

20. The Pre-Trial Judge erred in finding that liability under the first and third form of a JCE is included in Article 16(1)(a) of the Law.³⁶ In this respect, the manner in which the Pre-Trial Judge interpreted and applied this provision violates fundamental rights of Mr Shala. Article 16(1)(a) of the Law does not explicitly provide for liability under a JCE; the Pre-Trial Judge has interpreted it as such by erroneously interpreting and relying on CIL, denied the controversial nature of JCE and the latter's effect on the 'quality of the applicable law' and compatibility with the requirements of foreseeability and accessibility guaranteed by Article 7 ECHR and equivalent provision of the Constitution of Kosovo. The Pre-Trial Judge erred in finding that liability under JCE I and JCE

³² See Motion, para. 60.

³³ See authorities at n. 25 above.

³⁴ Impugned Decision, para. 85.

³⁵ Motion, paras. 4, 13, 14; F00084, Defence Reply to the Prosecution Response to the Preliminary Motion of Pjetër Shala Challenging the Jurisdiction of the KSC, para. 30.

³⁶ Impugned Decision, para. 91.

III were foreseeable and accessible to the Accused at the time the alleged crimes were committed.³⁷ It is telling that the UK Supreme Court considered JCE liability 'highly controversial and a continuing source of difficulty for trial judges.'³⁸ The Pre-Trial Judge erred by declining to consider Mr Shala's arguments that the accessibility and foreseeability of such controversial notion cannot be taken for granted.

21. He equally erred in finding that JCE and particularly its third form was firmly established in CIL at the relevant time.³⁹ His declining to consider the Defence arguments on the basis of JCE III in CIL because Mr Shala is not charged with torture under JCE III fail to address in an adequate manner the Defence submissions as to the latter's 'insufficient basis' in CIL.⁴⁰ Mr Shala is charged under JCE III of murder. The Pre-Trial ought to have consider the Defence submissions on JCE III. The Pre-Trial Judge erred by finding that the Decisions of the Kosovo Court of Appeals regarding JCE relied upon by the Defence are not relevant in ruling on the SC's jurisdiction and compatibility of the Indictment with the principle of legality.⁴¹
22. The Pre-Trial Judge erred in finding that JCE III is compatible with the principle of individual culpability.⁴² Culpability under JCE III for crimes falling outside the common purpose of the JCE does not require intent or significant contribution. The Pre-Trial Judge failed to consider the Defence submissions that the analysis and reasoning of the ECCC and the UK Supreme Court as well as the relevant academic opinions cited in the Defence submissions demonstrate the poor quality of law when it comes to this mode of liability that

³⁷ Impugned Decision, para. 95.

³⁸ *Jogee v. The Queen* [2016] UKSC 8; *Ruddock v. the Queen* [2016] UKPC 7 ("*Jogee*"), para. 81.

³⁹ Impugned Decision, para. 92 and contrast with Motion, paras. 33, 36-40.

⁴⁰ Impugned Decision, para. 93.

⁴¹ Impugned Decision, para. 90.

⁴² Impugned Decision, para. 94.

fails to meet the robust standards imposed by Article 7 ECHR.⁴³ The Defence requested the Pre-Trial Judge to consider the errors of logic and the incompatibility with basic principles of fairness that were highlighted therein.⁴⁴

The lack of a statutory foundation to apply JCE as a mode of liability, the unlawful reliance on CIL to provide such foundation and the failure to consider the impact of the applicability of JCE on the right of Mr Shala to have access and foresee that his alleged conduct could give rise to prosecution under this form of liability warrant appellate intervention.

(iv) The Pre-Trial Judge made an error of law in finding that Arbitrary detention in a NIAC falls within the scope of the SC's jurisdiction

23. Mr Shala has been charged with the war crime of arbitrary detention (Count 1) under Article 14(1)(c) of the Law. The Pre-Trial Judge erred in finding that arbitrary detention in a NIAC was correctly charged in these circumstances and failed to address the Defence arguments in this respect.⁴⁵ The Pre-Trial Judge's interpretation of Article 14(1)(c) of the Law in a non-exhaustive manner violates the principle of legal certainty, is fundamentally flawed and inappropriate for interpreting statutory provisions penalising conduct. His finding that, at the time material to the Indictment, arbitrary detention in a NIAC was a crime in Kosovo and that this was sufficiently foreseeable for Mr Shala is manifestly unreasonable and should be set aside while the cursory dismissal of the Defence submissions fail to provide adequate reasoning which in itself is a further error of law.

⁴³ Motion, paras. 12, 36-40, 60; Reply, paras. 34.

⁴⁴ Reply, paras. 44-48.

⁴⁵ Impugned Decision, paras. 98-103; Motion, paras. 46-60; Reply, paras. 35-39.

24. These errors invalidate the Impugned Decision and undermine the lawfulness and fairness of these proceedings. Appellate intervention is merited to prevent further prejudice from the breach of Mr Shala's fundamental rights.

IV. RELIEF

25. For the above reasons, the Defence submits that the Pre-Trial Judge made a number of errors that, individually and/or cumulatively, invalidate the Impugned Decision. The Defence respectfully requests the Court of Appeals Panel to set aside the Impugned Decision and its erroneous findings and find that the SC has no jurisdiction over the mode of liability of JCE or the crime of arbitrary detention in a NIAC and that continuing the proceedings on the basis of the Indictment in its present form violates Mr Shala's fundamental rights under Articles 6 and 7 ECHR and the equivalent guarantees of the Kosovo Constitution. The Defence requests the Appeals Chamber to order the SPO to file a revised Indictment against Mr Shala that complies with the domestic law as applied at the material time and respects Mr Shala's fundamental rights.

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Jean-Louis Gilissen
Specialist Defence Counsel



Hedi Aouini
Defence Co-Counsel