

**Case No.:** KSC-BC-2020-04  
**Before:** A Panel of the Court of Appeals Chamber  
Judge Michèle Picard  
Judge Emilio Gatti  
Judge Nina Jørgensen  
**Registrar:** Dr Fidelma Donlon  
**Date:** 17 December 2021  
**Filing Party:** Defence Counsel  
**Original Language:** English  
**Classification:** Public

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

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**Defence Appeal with Leave against  
the ‘Decision on Motion Challenging the Form of the Indictment’**

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**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'), Rule 77 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 Motion Challenging the Form of the Indictment.<sup>1</sup>
2. On 29 November 2021, the Pre-Trial Judge certified two issues for appeal which concern the lack of specificity and clarity of material facts pleaded in the Indictment concerning the members of the alleged JCE and the victims of the alleged criminal activities.<sup>2</sup> As reformulated by the Pre-Trial Judge, the grounds forming the basis of the present appeal are the following:

*Whether the Pre-Trial Judge erred in finding that the level of detail as to the members of the alleged JCE is compatible with the Prosecution's obligation to give sufficient notice of its case as well as Article 6 of the ECHR and the equivalent provisions of the Kosovo Constitution; and*

*Whether the Pre-Trial Judge erred in finding that the level of detail as to the victims of Mr Shala's alleged criminal activities, including their status at the moment of arrest, is compatible with the Prosecution's obligation to give sufficient notice of its case and Mr Shala's rights under Article 6 of the ECHR and the equivalent provisions of the Kosovo Constitution.*<sup>3</sup>

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<sup>1</sup> KSC-BC-2020-04, F00089, Decision on Motion Challenging the Form of the Indictment, 18 October 2021 ('*Impugned Decision*'). All further references to filings in this Appeal concern Case No. KSC-BC-2020-04 unless otherwise indicated.

<sup>2</sup> F00116, Decision on Application for Leave to Appeal "Decision on Motion Challenging the Form of the Indictment", 29 November 2021 ('*Certification Decision*'), paras. 26, 30, 31(a).

<sup>3</sup> *Certification Decision*, paras. 26, 30, 31(a).

3. In rejecting the submissions in the Defence Preliminary Motion in relation to these issues,<sup>4</sup> the Pre-Trial Judge erred in allowing the Prosecution to evade its obligations under the Law and failed to secure the rights of Mr Shala including his right to prepare a meaningful defence.
4. The Defence requests the Appeals Chamber to correct the above-mentioned discernible errors which invalidate the Impugned Decision and order the Prosecution to amend the Indictment in such a manner that ensures respect of Mr Shala's fundamental rights.

## II. PROCEDURAL HISTORY

5. On 14 February 2020, the Prosecution submitted for confirmation a strictly confidential and *ex parte* indictment against Mr Pjetër Shala.<sup>5</sup> On 18 March 2020, the Prosecution 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>
6. On 25 May 2021, the Prosecution filed its "Submission of Further Lesser Redacted Version of Confirmed Indictment with Confidential Annex 1".<sup>8</sup>

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<sup>4</sup> F00055, Corrected Version of 'Preliminary Motion by the Defence of Pjetër Shala Challenging the Form of the Indictment', 13 July 2021 (confidential) ('*Motion*'), paras. 2, 30, 33-43, 56 and 64 (α)-(δ). A public redacted version of the Motion was filed on 9 September 2021.

<sup>5</sup> KSC-BC-2020-04, F00002, Submission of Indictment for Confirmation and Related Requests, 14 February 2020, strictly confidential and *ex parte*, with Annexes 1-3, strictly confidential and *ex parte*. All further references to filings in this Motion concern Case No. KSC-BC-2020-04 unless otherwise indicated.

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

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

<sup>8</sup> F000038, Submission of Further Lesser Redacted Version of Confirmed Indictment with confidential Annex 1, 25 May 2021 (confidential).

7. On 13 July 2021, the Defence filed its Motion challenging the form of the Indictment.
8. The Impugned Decision partially granted the Defence Preliminary Motion to Challenge the Form of the Indictment.<sup>9</sup>
9. On 26 October 2021, the Defence sought certification to appeal four issues arising from the the Impugned Decision.<sup>10</sup>
10. On 1 November 2021, the Prosecution submitted a revised indictment pursuant to the Impugned Decision.<sup>11</sup>
11. On 29 November 2021, the Pre-Trial Judge certified the aforesaid two issues for appeal.<sup>12</sup>

### III. APPLICABLE LAW

12. According to established jurisprudence of the Court of Appeals, the standard of review applicable to interlocutory appeals is analogous to 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.<sup>13</sup>

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<sup>9</sup> Impugned Decision, paras. 118(a)(b), 69, 73, 75; F00055, Corrected Version of 'Preliminary Motion by the Defence of Pjetër Shala Challenging the Form of the Indictment', 13 July 2021 (confidential) ('*Motion*'). A public redacted version of the Motion was filed on 9 September 2021.

<sup>10</sup> F00094, Defence Application for Leave to Appeal the Decision on Motion Challenging the Form of the Indictment, 26 October 2021 (confidential).

<sup>11</sup> F00098/A01, Submission of Corrected Indictment with Confidential Annex 1, 1 November 2021 (confidential) ('*Revised Indictment*'); F00107/A01, Submission of public redacted version of corrected Indictment with public Annex 1, 16 November 2021.

<sup>12</sup> Certification Decision, paras. 30, 31(a).

<sup>13</sup> KSC-BC-2020-06, IA001-F00005, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, 30 April 2021, paras. 4-7; *Gucati* Appeal Decision, paras. 10-14.

#### IV. GROUNDS OF APPEAL

*i. Error in upholding the lack of specificity as to the members of the alleged JCE violates the Prosecution's obligation to give sufficient notice of its case under Article 6 of the ECHR and the equivalent provisions of the Kosovo Constitution*

13. The Pre-Trial Judge erred in finding that the Indictment provided sufficient particulars as to the identity of the members of the alleged JCE.<sup>14</sup> The Pre-Trial Judge was satisfied that the identity of the members of the alleged JCE (described in paragraph 55 of the Impugned Decision as entailing other than the specific identification 'of five members of the JCE', clear reference to 'three discrete categories of individuals' and a clearly circumscribed geographical scope of the JCE within a specific time-frame), is pleaded in the Confirmed Indictment with sufficient specificity.<sup>15</sup> He also found that the wording 'certain other KLA members' is not impermissibly vague, as the JCE members are identified as soldiers, policemen and guards present at a specific location during a particular time-frame.<sup>16</sup>
14. It is settled case law that when relying on the mode of liability of JCE, the Prosecution needs to plead with sufficient detail the identity of the participants in the alleged JCE.<sup>17</sup> When JCE members cannot be identified by name then the Prosecution must make a real effort to provide sufficient detail of the relevant circumstances that allow their identification including temporal and

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<sup>14</sup> Impugned Decision, paras. 55- 57.

<sup>15</sup> Impugned Decision, paras. 55, 57.

<sup>16</sup> Impugned Decision, para. 56.

<sup>17</sup> ICTR, ICTR-01-75-AR72(C), *Prosecutor v. Uwinkindi*, Decision on Defence appeal against the decision denying Motion Alleging Defects in the Indictment, 16 November 2011 ('Uwinkindi Decision of 16 November 2011'), para. 11; ICTY, IT-95-9A, *Prosecutor v. Simic*, Judgment, 28 November 2006, para. 22.

geographical references.<sup>18</sup> It is incumbent on the Prosecution to set forth the material facts of its case in an indictment clearly and unambiguously.<sup>19</sup> A specific, precise, clear and unambiguous indictment is an essential requirement for a fair trial, it allows the Prosecution to focus its case and the Defence to focus in responding to it and assists the Trial Chamber to ensure the efficient use of court time.<sup>20</sup>

15. According to Article 6(3)(a) of the European Convention on Human Rights, everyone charged with a criminal offence has the right to be informed promptly and in detail 'of the nature and cause of the accusation against him'. The adequacy of the information provided to the accused must be assessed in relation to Article 6(3)(b) of the ECHR, which confers on everyone the right to have adequate time and facilities for the preparation of their defence, and in the light of the more general right to a fair hearing enshrined in Article 6(1).<sup>21</sup> The European Court of Human Rights ("ECtHR") has consistently held that the accused must at least be provided with sufficient information to understand fully the extent of the charges against him, in order to prepare an adequate defence.<sup>22</sup>
16. In effect, the Pre-Trial Judge erroneously found that, due to the location and time-frame specificity provided, the Indictment was not required to identify the number of the members let alone the identity of the members of the alleged JCE or provide any additional detail given that five of them were identified and the rest (unknown number) were identified under three (broad professional)

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<sup>18</sup> *Uwinkindi* Decision of 16 November 2011, paras. 15-17.

<sup>19</sup> ICTR, ICTR-98-42-A, *Prosecutor v. Niyiramasuhuko et al.*, Appeals Chamber, *Judgment*, 14 December 2015, para. 2538.

<sup>20</sup> ICTR, ICTR-01-73-I, *Prosecutor v. Zigiranyirazo*, Trial Chamber, *Decision on the Defence Preliminary Motion Objecting to the Form of the Indictment*, 15 July 2004, para. 28.

<sup>21</sup> ECtHR, *Mattoccia v. Italy*, no. 23969/94, 25 July 2000, para. 60; ECtHR, *Bäckström and Andersson v. Sweden* (dec.), no. 67930/01, 5 September 2006.

<sup>22</sup> ECtHR, *Mattoccia v. Italy*, para. 60.

categories, without even specifying how many members fell into each such category. Added to this lack of specificity and the open-ended phrase '*certain other KLA members*', is the fact that such categories are broad in nature and it cannot be excluded that they will be expansively used by the SPO at trial, at the expense of Mr Shala's fair trial rights, especially with regard to his right to receive adequate notice of the Prosecution's case and have sufficient time and facilities to respond to the allegations against him.<sup>23</sup> The Pre-Trial Judge erred by failing to acknowledge that because of their open-ended character and vague language, the impugned phrases in the Indictment are impermissible.<sup>24</sup>

17. Furthermore, the Pre-Trial Judge erred in declining to apply the '*more rigorous*' standard applicable '*when the proximity of an accused to the alleged criminal conduct is high*'.<sup>25</sup> The latter requires greater specificity. The alleged proximity of the accused to the events set out in the Indictment was expressly acknowledged in the present case in that '*the relatively small size of the group making up the alleged JCE and the fact that the events underlying the charges are easily distinguishable*'.<sup>26</sup>
18. The Pre-Trial Judge erred in finding that the Indictment provides sufficient particulars on material facts, specifically the identity and number of alleged co-perpetrators and assisted persons, and does not plead the participation/contribution of the Accused with sufficient clarity and precision. Although such practice could be accepted in other types of cases that involve criminality on a large-scale by the accused, who due to their position, were

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<sup>23</sup> Article 6(3)(a)(b) of the European Convention on Human Rights ('ECHR').

<sup>24</sup> KSC-BC-2020-07, IA004/F00007, *Prosecutor v. Gucati and Haradinaj*, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021 ('*Gucati and Haradinaj* Decision'), paras. 68, 69, 73.

<sup>25</sup> *Gucati and Haradinaj* Decision, para. 43.

<sup>26</sup> F00045, Decision on Pjetër Shala's Request for Provisional Release, 15 June 2021 (confidential), para. 26. *See also*, Impugned Decision, para. 55. The Defence raised this issue at paragraph 28 of the Motion.

distanced from the physical commission of the charged crimes, this is clearly not the case in the present circumstances.

19. The Indictment pleads in paragraph 8 that Mr Shala and ‘certain other KLA soldiers, police, and guards’ shared a common purpose that involved the commission of the charged crimes. At paragraphs 9 and 10, it states that the Accused, four named individuals and ‘*certain other KLA soldiers, police, and guards present at the Kukës Metal Factory*’ were members of the JCE which committed the crimes charged. Although the Indictment purports to identify co-perpetrators by reference to their affiliation to the KLA and presence at the Kukës Metal Factory, this is impermissibly vague particularly in the present circumstances of an allegedly small group of co-perpetrators and activities taking place at one location in the course of three weeks. On this basis, the scale of the events alleged in the present case, which has been acknowledged by the Pre-Trial Judge,<sup>27</sup> does not allow for any ambiguity in identifying JCE members.<sup>28</sup>
20. The Indictment fails to meet the robust obligations for specificity that come into play due to the alleged proximity of Mr Shala to the physical commission of the charged offences. The lack of sufficient particulars about the number and identity of all but five of the JCE members creates impermissible ambiguity and renders the Indictment defective.<sup>29</sup> In any event, the Prosecution is required to indicate whether the names of additional members are known or unknown,<sup>30</sup> which has not been done in the Indictment. The Prosecution should be required to provide more information on these issues. The Pre-Trial Judge erred by failing to acknowledge the violation of Mr Shala’s right to receive prompt and

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<sup>27</sup> Decision on Provisional Release, para. 26.

<sup>28</sup> *Compare and contrast*, ICTR, ICTR-98-44-PT, *Prosecutor v Karamera et al.*, Trial Chamber, *Decision on Defects in the Form of the Indictment*, 5 August 2005 (“*Karamera Decision*”), para. 20.

<sup>29</sup> Indictment, para. 10.

<sup>30</sup> *Karamera Decision*, para. 20.



adequate notice of the charges against him and require the Prosecution to provide better particulars.

21. Similarly, the Prosecution has not even attempted to distinguish JCE “Members” from “Tools” despite the fact that they clearly have different roles in the alleged crimes and their alleged criminal activity is subject to different *mens rea* requirements. Rather, the Indictment appears to use the terms interchangeably: in paragraph 10, it states that *‘[a]lternatively, some or all of these individuals were not members of the joint criminal enterprise, but were used by members of the joint criminal enterprise to carry out crimes committed in furtherance of the common purpose.’*
22. The SPO fails to identify the alleged members of the relevant JCE and distinguish the roles of persons that were used by such members to perpetrate the crimes charged in the Indictment. The Prosecution impermissibly blurs the contours of its case to fit the evidence as it is presented in court. The Prosecution must specify the identity and respective roles and capacity in which the alleged members to the JCE described in the Indictment participated in the charged crimes, as well as the identity and respective roles of perpetrators used by JCE members as a tool to carry out its objectives.<sup>31</sup> Moreover, if crimes were perpetrated by persons who were not members of the JCE, the Prosecution should identify in the Indictment the link between such perpetration and the activity of a JCE member; it must specify how the acts of the so-called tool can be imputed to a person who was a member of the JCE. Nothing in the Indictment identifies what material facts the SPO intends to rely upon to prove this matter.

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<sup>31</sup> See *Uwinkindi* Decision, para. 16.

23. The Defence reiterates that the Indictment is the primary accusatory instrument and the SPO must provide in the Indictment its best understanding of its case against the accused.<sup>32</sup> In addition, as the Appeals Chamber previously ruled an accused should not be required to consult documents other than the indictment in order to understand and piece together the factual allegations underpinning the charges.<sup>33</sup>
24. At paragraph 57 of the Impugned Decision, the Pre-Trial Judge erred in dismissing the Defence submissions that the lack of sufficient particulars as to the members of the alleged JCE violates Mr Shala's rights. The approval of the considerable lack of specificity and clarity in the Indictment concerning the identity and number of the alleged JCE members does not comply with the Prosecution's obligation to provide sufficient notice to Mr Shala, to enable him to prepare a meaningful defence.<sup>34</sup> The Defence is left in the unacceptable position that it must prepare its case in the abstract on the basis of a series of assumptions and possible scenarios, contrary to the rigorous standards of pleading and human rights standards established exactly to provide the accused with a fair and effective opportunity to respond to the charges against them.
25. As the Defence submitted, due to the scale of the alleged JCE and underlying events, the Prosecution must be deemed able to identify Mr Shala's alleged co-perpetrators. It can be safely assumed and indeed expected that the Prosecution has additional information on their identity. Such information is vital to the

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<sup>32</sup> *Gucati and Haradinaj* Decision, para. 49, referring to *Uwinkindi* Decision of 16 November 2011, para. 4. See also ICTR-2001-72-PT, *Prosecutor v. Bikindi*, Decision on the Amended Indictment and the Taking of a Plea Based on the Said Indictment, 11 May 2005, para. 7. See also MICT-18-116-PT, *Prosecutor v. Turinabo et al*, Decision on Dick Prudence Munyeshuli's Motion Alleging Defects in the Indictment, 12 March 2019, para. 6; MICT, MICT-13-38-PT, *Prosecutor v. Kabuga*, Decision on Defence Preliminary Motion, 14 May 2021, para. 5.

<sup>33</sup> *Gucati and Haradinaj* Decision, para. 49.

<sup>34</sup> *Gucati and Haradinaj* Decision, para. 36.

preparation of the Defence case and should be set out in the primary accusatory instrument. This would enable Mr Shala to understand fully the extent and nature of the charges against him. The Pre-Trial Judge's failure to order the Prosecution to provide sufficient particulars in this respect constitutes an error that merits appellate intervention.<sup>35</sup>

*ii. Error in Upholding the Lack of Specificity as to the Victims violates the Prosecution's obligation to give sufficient notice of its case and Mr Shala's rights under Article 6 of the ECHR and the equivalent provisions of the Kosovo Constitution*

26. The Pre-Trial Judge erred in finding adequate the level of specificity provided in the Indictment regarding the identity of the victims of the Accused's alleged criminal activities.<sup>36</sup> Specifically, the Pre-Trial Judge found that the victims were '*extensively named*' in the Indictment and approved as sufficient and clear the information provided on the victims' citizenship.<sup>37</sup> In addition, the Pre-Trial Judge failed to properly address the submissions of the Defence as to the impermissible level of ambiguity and generality present across the Indictment with respect to the alleged crimes and provide sufficient reasoning in his decision dismissing such submissions.<sup>38</sup> Notably, paragraph 14 of the Indictment identifies '*at least nine persons*' as victims of '*Illegal or Arbitrary Arrest and Detention*'. Paragraphs 18-20, 24 and 26 of the Indictment fail to provide any number or identity of the alleged victims of cruel treatment or torture. Paragraph 21 fails to identify the female victim.

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<sup>35</sup> Motion, para. 39.

<sup>36</sup> Impugned Decision, paras. 103, 109.

<sup>37</sup> Impugned Decision, paras. 54, 103.

<sup>38</sup> See Motion, paras. 31, 32, 63, 64 (α)-(δ).

27. The Pre-Trial Judge erroneously relied on jurisprudence establishing that *'[a]s regards the determination of the identity of the victims, the nature and scale of the alleged offences may make such determination impossible. In such cases, the identification of the victims as a group or the indication of their approximate number is sufficient'*, concluding that the identification of the victims as a group or the indication of the approximate number is sufficient as sufficient information and clarity may be derived from the Indictment.<sup>39</sup> To the Defence's knowledge, there is nothing to suggest such impossibility or even potential impossibility attributable to the *'nature and scale of the alleged offences'* in the present case where the Prosecution's case is based on very specific and limited time frame at one location. On the contrary, as the Pre-Trial Judge recognised, the events underlying the charges are easily distinguishable,<sup>40</sup> while the scale of the case clearly does not justify the impermissible lack of clarity in the Indictment. The Pre-Trial Judge made an error of law in relying on inapposite authority to draw his conclusions and in failing to require the Prosecution to provide adequate notice of its case in this respect.
28. In relation to alleged illegal/arbitrary detention, the Pre-Trial Judge further erred in finding that sufficient information has been provided on the identity of the victims in relation to the alleged crime of illegal/arbitrary detention or arrest and that further information as to the make-up or background of that group or category or the status of the victims at the moment of their arrest is an evidentiary matter to be developed at trial.<sup>41</sup>
29. At paragraphs 14-16, 18-24 and 26 of the Indictment the Prosecution refers to victims of Mr Shala's alleged criminal activities. The Prosecution must be aware

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<sup>39</sup> Impugned Decision, para. 103 *referring to* Impugned Decision, para. 31 and case law cited therein.

<sup>40</sup> F00045, Decision on Pjetër Shala's Request for Provisional Release, 15 June 2021, para. 26 (confidential).

<sup>41</sup> Impugned Decision, para. 109 (footnotes omitted).

of the identity of at least some – if not all- of the alleged victims. The identity of the victims referred to in these provisions is information that constitutes material facts that should be included in the Indictment. The Pre-Trial Judge made an error in accepting such lack of specificity.

30. The Pre-Trial Judge made an error of law by failing to properly address and provide adequate reasoning in dismissing the Defence submissions requesting assessment of the the applicable standards requiring the SPO to particularise as much as possible and with greatest possible degree of precision its allegations in the Indictment in relation to alleged victims.<sup>42</sup>
31. In addition, the Defence notes that providing further information on the alleged victims' status (for instance if they were *hors de combat* at the time of their arrest) would provide necessary information as to the alleged circumstances of the criminal activity in question and should be set out in the Indictment to enable the Defence to focus its preparation to respond to the charges.
32. The Pre-Trial Judge erred in finding that no further particulars are required as to whether the alleged victims were *hors de combat* at the time of their arrest. In this respect, the Pre-Trial Judge observed 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.*'
33. However, the Pre-Trial Judge erred in failing to address the Defence submission that providing better particulars of the victims' respective status at the time of their arrest would enable the Defence to understand and prepare its

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<sup>42</sup> Motion, para. 34 and references made therein.

response to the Prosecution's case. The Defence made no argument as to the applicability of Common Article 3 or protection of the alleged victims. It merely noted that their status at the time of arrest is a material fact that should be specified in the Indictment. The Pre-Trial Judge failed to address the Defence submission and failed to provide adequate reasoning in dismissing it.

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

## V. RELIEF REQUESTED

35. 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.

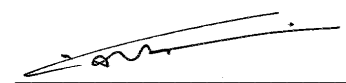
36. The Defence respectfully requests the Court of Appeals to set aside the Impugned Decision and its erroneous findings and order the Prosecution to file a revised Indictment that meets the required standards of specificity of pleading and ensuring protection of the rights of Mr Shala under Article 6 of the ECHR as well as Articles 21(4)(a) and 38(4) of the Law and the equivalent guarantees of the Kosovo Constitution.

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



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