



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

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

**Before:** **Court of Appeals Panel**  
Judge Michèle Picard  
Judge Emilio Gatti  
Judge Nina Jørgensen

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 10 January 2022

**Language:** English

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**Prosecution response to Defence appeal against the 'Decision on Motion  
Challenging the Form of the Indictment'**

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## I. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') hereby responds to the Defence Appeal challenging the form of the Indictment.<sup>1</sup>

2. The Appeal should be dismissed in its entirety because the Defence has failed to demonstrate any error in the Decision warranting the intervention of the Court of Appeals Panel ('the Panel').<sup>2</sup> In its submissions, the Defence selectively describes the information available in the Confirmed Indictment and mischaracterises the Decision by failing to acknowledge specific findings of the Pre-Trial Judge. The Defence has also failed to demonstrate that any of the Pre-Trial Judge's findings are based on a wrong application of the law or an abuse of discretion.

## II. PROCEDURAL HISTORY

3. On 13 July 2021, the Defence filed a preliminary motion challenging the form of the Confirmed Indictment.<sup>3</sup> The SPO responded on 6 September 2021,<sup>4</sup> and the Defence replied on 24 September 2021.<sup>5</sup>

4. On 18 October 2021, the Pre-Trial Judge issued his Decision, partially granting the Defence Motion and ordering the SPO to submit a corrected version of the Confirmed Indictment by 1 November 2021.<sup>6</sup>

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<sup>1</sup> Defence Appeal with Leave against the 'Decision on Motion Challenging the Form of the Indictment', KSC-BC-2020-04/IA004/F00004, 17 December 2021 ('Appeal').

<sup>2</sup> Decision Assigning a Court of Appeals Panel, KSC-BC-2020-04/IA004/F00001, 2 December 2021.

<sup>3</sup> Preliminary Motion by the Defence of Pjetër Shala Challenging the Form of the Indictment, KSC-BC-2020-04/F00055, 13 July 2021 ('Motion').

<sup>4</sup> Prosecution Response to Shala Defence's Corrected Version of the Preliminary Motion Challenging the form of the Indictment, 6 September 2021, KSC-BC-2020-04/F00070, Confidential.

<sup>5</sup> Defence Reply to the Prosecution Response to the Preliminary Motion of Pjetër Shala Challenging the Form of the Indictment, 24 September 2021 ('Reply').

<sup>6</sup> Decision on Motion Challenging the Form of the Indictment, KSC-BC-2020-04/F00089, 18 October 2021, Confidential ('Decision'), para.118.

5. On 26 October 2021, the Defence sought certification to appeal certain aspects of the Decision;<sup>7</sup> the SPO responded on 10 November 2021.<sup>8</sup>
6. On 1 November 2021, the SPO submitted the Corrected Indictment.<sup>9</sup>
7. On 29 November 2021, the Pre-Trial Judge issued the Certification Decision, partly granting the Certification Request in relation to two issues:<sup>10</sup>
  - a. *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 ('Ground 1');* and
  - b. *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 ('Ground 2').*<sup>11</sup>
8. On 2 December 2021, the Defence sought an extension of time to file its appeal against the Decision on 17 December 2021.<sup>12</sup> On 10 December 2021, the Panel granted

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<sup>7</sup> Defence Application for Leave to Appeal the Decision on Motion Challenging the Form of the Indictment, KSC-BC-2020-04/F00094, 26 October 2021, Confidential ('Certification Request').

<sup>8</sup> Prosecution Response to the Defence Application for leave to appeal the Decision on Motion Challenging the Form of the Indictment, KSC-BC-2020-04/F00103, Confidential.

<sup>9</sup> Submission of Corrected Indictment with confidential Annex 1, KSC-BC-2020-04/F00098/A01, 1 November 2021. *See also* Submission of public redacted version of corrected Indictment with public Annex 1 KSC-BC-2020-04/F00107/A01, 16 November 2021.

<sup>10</sup> Decision on Application for Leave to Appeal 'Decision on Motion Challenging the Form of the Indictment', KSC-BC-2020-04/F00116, 29 November 2021, ('Certification Decision'), paras 26, 31.

<sup>11</sup> Certification Decision, para.26.

<sup>12</sup> Defence Request for an Extension of Time to Appeal the 'Decision on Motion Challenging the Form of the Indictment', KSC-BC-2020-04/IA004/F00002, 2 December 2021, Confidential, para.10.

the Defence request and extended the deadline for the SPO response to 5 January 2022.<sup>13</sup>

9. On 15 December 2021, the SPO sought leave to respond to the appeal by 10 January 2022, after the end of the judicial recess.<sup>14</sup> On 20 December 2021, the Appeals Panel granted the request.<sup>15</sup>

10. On 17 December 2021, the Defence filed the Appeal.<sup>16</sup>

### III. STANDARD OF REVIEW

11. For interlocutory appeals, the Panel applies *mutatis mutandis* the standard of review for appeals against judgements set out at Article 46(1) of the Law<sup>17</sup> which includes errors of law and errors of fact.

12. Alleging an error of law requires identifying the alleged error, presenting arguments in support of the claim, and explaining how the error invalidates the decision.<sup>18</sup> An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.<sup>19</sup>

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<sup>13</sup> Email from CMU, KSC-BC-2020-04/IA004/F00002, 10 December 2021, received at 16:01 hours.

<sup>14</sup> Prosecution Request for an extension of time to respond to the 'Defence Request for an Extension of Time to Appeal the 'Decision on Motion Challenging the Form of the Indictment'', KSC-BC-2020-04/IA004/F00003, paras 1, 4.

<sup>15</sup> Decision on Specialist Prosecutor's Office's Request for Variation of Time Limit, KSC-BC-2020-04/IA004/F00005, para.5.

<sup>16</sup> Appeal, KSC-BC-2020-04/IA004/F00004.

<sup>17</sup> Decision on Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020 ('Gucati Appeal Decision'), paras 4-13.

<sup>18</sup> Gucati Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.12.

<sup>19</sup> Gucati Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.12.

13. An error of fact can only be found if no reasonable trier of fact could have made the impugned finding.<sup>20</sup> In determining whether a finding was reasonable, the Panel will not lightly overturn findings of fact made by a lower level panel.<sup>21</sup>

14. Notably, when the challenged decision is discretionary, the appellant must demonstrate 'a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.'<sup>22</sup> The discernible error must have resulted in prejudice to that party.<sup>23</sup>

#### IV. SUBMISSIONS

##### A. GROUND 1

#### **1. The Pre-Trial Judge correctly found that the Indictment adequately pleads the identity of the alleged JCE members**

15. In finding that the members of the alleged JCE were pleaded with sufficient specificity in the Confirmed Indictment,<sup>24</sup> the Pre-Trial Judge correctly interpreted and applied the law developed by the *ad hoc* tribunals and adopted by the Kosovo Specialist Chambers ('KSC').<sup>25</sup>

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<sup>20</sup> *Gucati* Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.13.

<sup>21</sup> *Gucati* Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.13.

<sup>22</sup> *Gucati* Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.14.

<sup>23</sup> ICTR, *Prosecutor v. Uwinkindi*, ICTR-01-75-AR72(C), Decision on Defence Appeal against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011 ('*Uwinkindi* Decision'), para.6.

<sup>24</sup> The governing accusatory instrument in the case now is the Corrected Indictment, filed on 1 November 2021, which employs the same language as the Confirmed Indictment in listing the alleged JCE members.

<sup>25</sup> *Gucati and Haradinaj* Appeal Decision, para.45.

16. KSC and international jurisprudence require the SPO to specify the identities of alleged JCE members when they are known.<sup>26</sup> This jurisprudence also acknowledges, however, that it is 'not necessary or always possible to name each of the individuals involved'<sup>27</sup> in a JCE. In such cases, these individuals must be identified by reference to particular groups of persons.<sup>28</sup> The Defence itself acknowledges this principle.<sup>29</sup>

17. In the Decision, the Pre-Trial Judge first took into consideration that five alleged JCE members, including the Accused, are identified by name or nickname. He then rightly observed that the other alleged members were identified as members of the KLA, either guards, soldiers, or police.<sup>30</sup> The Pre-Trial Judge also considered that the alleged criminal conduct of these individuals is circumscribed to the Kukës Metal Factory between 17 May and 5 June 1999.<sup>31</sup>

18. By specifying the affiliation and category of the unnamed JCE members and narrowly framing the temporal and geographical scope of their alleged criminal conduct, the Confirmed Indictment amply meets the standard of specificity required under the KSC legal framework as interpreted by a KSC Appeals Panel.<sup>32</sup> The Pre-Trial Judge made no error in this regard in the Decision. The Confirmed Indictment plainly provides more than enough information for the Defence to investigate and defend the alleged charges.

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<sup>26</sup> Decision on Defence Appeals against Decision on Preliminary Motions, KSC-BV-2020-07/IA004/F00007, 23 June 2021 ('*Gucati and Haradinaj* Appeal Decision'), para.45; *Unwinkindi* Decision, para.15.

<sup>27</sup> *Gucati and Haradinaj* Appeal Decision, para.45.

<sup>28</sup> *Gucati and Haradinaj* Appeal Decision, paras 45, 47; *Unwinkindi* Decision, para.15.

<sup>29</sup> Appeal, para.14.

<sup>30</sup> Decision, para.55.

<sup>31</sup> Corrected Indictment, paras 8, 10.

<sup>32</sup> See *Gucati and Haradinaj* Appeal Decision, KSC-BC-2020-07/IA004/F00007, paras 42-43, 45, 47.

19. In claiming that the Pre-Trial Judge erred on this point, the Defence unconvincingly re-argues that the language of the Confirmed Indictment is too vague,<sup>33</sup> and that given the small scale of the case, the Prosecution should provide more information about the unnamed JCE members.<sup>34</sup>

20. With respect to the scale of the case, the Defence argues that the Pre-Trial Judge failed to apply the 'more rigorous' standard required when there is high proximity between an accused and the alleged crimes.<sup>35</sup> On the contrary, the Pre-Trial Judge explicitly took this factor into account in the Decision.<sup>36</sup> The scale of a case is an important consideration in assessing the degree of specificity of the charges, and a KSC Appeals Panel held that, in smaller cases, more specificity is required.<sup>37</sup> In keeping with this principle, the Pre-Trial Judge gave due consideration to the small size of the JCE alleged in this case before concluding that the language of the Confirmed Indictment was not impermissibly vague.<sup>38</sup>

21. When the Defence argues that the Confirmed Indictment should specify the number of alleged JCE members or the number of individuals falling into each of the identified categories,<sup>39</sup> it does so without citing any authority.<sup>40</sup> Indeed, this unsupported claim which seeks to create an unrealistically onerous obligation is not grounded in the jurisprudence of the KSC Appeals Panel.<sup>41</sup>

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<sup>33</sup> Motion, para. 39 and Appeal, para. 16

<sup>34</sup> Motion, paras 40-41, 56 and Appeal, paras 17-20

<sup>35</sup> Appeal, para.17, citing *Gucati and Haradinaj* Appeal Decision, para.43. See also *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005, para.65.

<sup>36</sup> Decision, paras 55-56.

<sup>37</sup> *Gucati and Haradinaj* Appeal Decision, KSC-BC-2020-07/IA004/F00007, paras 42-43.

<sup>38</sup> Decision, paras 55-56.

<sup>39</sup> Appeal, para.16.

<sup>40</sup> Appeal, para.16.

<sup>41</sup> See *Gucati and Haradinaj* Appeal Decision, KSC-BC-2020-07/IA004/F00007, paras 42-43, 45, 47 and the jurisprudence of the *ad hoc* tribunals cited therein.

22. For these reasons, Ground 1 should be denied.

**2. Defence submissions exceeding the scope of the Certification Decision should be summarily dismissed**

23. Rule 170(2) provides that an appeal shall be filed in respect of the issues certified by the lower panel. Importantly, an Appeals Panel recalled that the Panel's review is strictly limited to issues certified by the Pre-Trial Judge.<sup>42</sup>

24. However, under Ground 1 the Defence introduces submissions relating to issues that have been ruled on in the Decision, but which have not been certified for appeal.<sup>43</sup>

25. For instance, the Defence takes issue with the fact that, in the Confirmed Indictment, some JCE members are, in the alternative, also alleged to have acted as 'tools' of the JCE members.<sup>44</sup> This issue was resolved in the Decision,<sup>45</sup> but is not included amongst the certified issues.<sup>46</sup> In any event, the Pre-Trial Judge correctly found that alternative pleading of charges is both allowed and commonly found in the practice of international courts and tribunals.<sup>47</sup> The Defence has failed to show any error with respect to this finding.

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<sup>42</sup> *Gucati and Haradinaj* Appeal Decision, paras.18-20.

<sup>43</sup> In paragraph 18, the Defence argues that the Pre-Trial Judge erred in finding that the conduct of the Accused was sufficiently specified in the Confirmed Indictment. In paragraphs 21 and 22, the Defence takes issue with the alternative pleading of members/tools of the JCE. Both matters are outside the scope of the Appealable Issues. *See* Certification Decision, para.27 and fn.42. With respect to the conduct of the Accused, any defect found by the Pre-Trial Judge in the Decision has been rectified with the filing, on 1 November 2021, of the Corrected Indictment.

<sup>44</sup> Decision, paras 21-22.

<sup>45</sup> Decision, paras 58-63.

<sup>46</sup> *See* Certification Decision, para.27 and fn.42.

<sup>47</sup> *See* Decision, para.61, and the references cited under footnote 109.



26. The Defence also argues that the Pre-Trial Judge erred in finding that the conduct of the Accused was sufficiently specified in the Confirmed Indictment.<sup>48</sup> This issue was also not certified for appeal.<sup>49</sup> Furthermore, any defect found by the Pre-Trial Judge in the Decision in this regard<sup>50</sup> has been rectified with the filing, on 1 November 2021, of the Corrected Indictment.

27. It is unclear if the Defence intends to include these issues within the scope of its requested relief.<sup>51</sup> In any event, these submissions should be dismissed because they are both outside the scope of certification and devoid of merit.

## B. GROUND 2

### **1. The Pre-Trial Judge correctly found that the Indictment adequately pleads the identity of the victims**

28. The Pre-Trial Judge committed no error in finding that the level of detail about the victims in the Confirmed Indictment, including their status at the moment of their arrest, is compatible with the SPO's obligation to provide sufficient notice to the Accused.

29. The Confirmed Indictment sufficiently provides information on both the identity and the status of the victims in this case. The Defence's claim that the Pre-Trial Judge's determination in this regard prejudices the fairness of the proceedings is unsupported in both facts and law.<sup>52</sup> In addition, a number of the Defence's

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<sup>48</sup> Decision, para.18.

<sup>49</sup> Certification Decision, para.27 and fn.42.

<sup>50</sup> Decision, paras 64-77 and 118.

<sup>51</sup> Appeal, paras 35-36.

<sup>52</sup> Appeal, para.26.

submissions grossly mischaracterise the information contained in the Confirmed Indictment and fail to acknowledge key findings made by the Pre-Trial Judge.

30. The Defence claims, for instance, that the Confirmed Indictment fails to provide ‘any number or identity’ of the alleged victims of cruel treatment or torture. It does so by reference to a selected number of paragraphs that, read in isolation, offer only a partial view of the information available to the Accused.<sup>53</sup>

31. On the contrary, the Confirmed Indictment clearly states that the victims of cruel treatment and torture were the people detained at the Kukës Metal Factory,<sup>54</sup> specifying that those detained there were at least nine.<sup>55</sup> It also identifies by name five of the victims of cruel treatment and torture, and specifies the sex of two other victims.<sup>56</sup> Other sections of the Confirmed Indictment, as noted by the Pre-Trial Judge, provide additional information about their citizenship, their status, their perceived political affiliation, and other particulars with respect to the alleged crime site.<sup>57</sup> The Defence’s claim that the Pre-Trial Judge upheld an indictment containing no information on the number and identity of the victims of torture and cruel treatment is thus without merit.

## **2. The Pre-Trial Judge correctly found that the Indictment adequately pleads the status of the victims at the time of their arrest**

32. The Pre-Trial Judge was also correct in finding that the Confirmed Indictment provides sufficient information on the status of the victims at the moment of their

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<sup>53</sup> Appeal, paras 26, 29.

<sup>54</sup> Corrected Indictment, paras 19 and 26.

<sup>55</sup> Corrected Indictment, para.14.

<sup>56</sup> Corrected Indictment, paras 21, 26.

<sup>57</sup> Decision, para.103. *See* Confirmed Indictment, paras 6, 14, 18-19, 21.

arrest.<sup>58</sup> The Judge correctly observed that, pursuant to Common Article 3 of the 1949 Geneva Conventions, the victims were placed *hors de combat* by virtue of their arrest.<sup>59</sup> The Defence argues that the lack of information on the status of the victims at the time of their arrest prejudices its ability to prepare its case.<sup>60</sup> However, it does not explain how and why this prejudice arises.

33. First, the Confirmed Indictment makes it clear that the charge of arbitrary detention under Count 1 is not limited to the arrest, but covers the entire period of deprivation of liberty of the victims.<sup>61</sup> Thus, the status of the victims at the time of their arrest is not determinative of whether the crime of arbitrary detention was committed.

34. Second, it should be noted that the Confirmed Indictment does provide the information sought by the Defence. In particular, it specifies that the victims were ‘arrested and detained without legal basis,’<sup>62</sup> thus clearly alleging that, at the moment of their arrest, the victims did not possess a status that would have made their arrest lawful under international humanitarian law.

35. For these reasons, Ground 2 should be dismissed.

## V. CONCLUSION

36. The Pre-Trial Judge’s determinations of the issues under Grounds 1 and 2 are legally correct, based on a comprehensive analysis of the Confirmed Indictment as a

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<sup>58</sup> Decision, para.104; Appeal, paras 31-33.

<sup>59</sup> Decision, para.104.

<sup>60</sup> Appeal, paras 31-34.

<sup>61</sup> Corrected Indictment, para.14.

<sup>62</sup> Corrected Indictment, para.14.

whole,<sup>63</sup> and respectful of the Accused's right to be informed in detail of the charges enshrined in Article 6(3)(a) of the European Convention on Human Rights.<sup>64</sup>

37. The Defence's allegations of vagueness and imprecision are based on multiple mischaracterisations of the information contained in the Confirmed Indictment. The Defence has not demonstrated that, in operating within the margin of discretion allowed by the law, the Pre-Trial Judge has committed any abuse, or that the Decision violates the Accused's rights under international and Kosovo law.

## VI. RELIEF REQUESTED

38. For the foregoing reasons, the Panel should reject the Appeal in its entirety.

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**Jack Smith**  
**Specialist Prosecutor**

Monday, 10 January 2022  
At The Hague, the Netherlands.

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<sup>63</sup> Decision, para.103.

<sup>64</sup> See ECtHR, *Mattoccia v. Italy*, 15 July 2000, para.60, where the Court stated that, while assessing whether an indictment provides sufficient detail requires a context-dependent analysis, the accused must be provided with sufficient information to understand fully the case against him or her, with a view of preparing an adequate defence. See also ECtHR, *Brozicek v. Italy*, 19 December 1989, para.42, where the Court considered detailed information had been provided in that case, because the indictment listed the offences charged with sufficient specificity, stated the place and date of the offence, specified the law in violation of the alleged conduct, and mentioned the names of the victims.