



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**In:** KSC-BC-2020-04

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

**Registrar:** Fidelma Donlon

**Date:** 22 February 2022

**Original language:** English

**Classification:** Public

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**Public Redacted Version of Decision on Pjetër Shala's Appeal against Decision on Motion Challenging the Form of the Indictment**

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**Counsel for Victims:**

Simon Laws

**THE PANEL OF THE COURT OF APPEALS CHAMBER** of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively)<sup>1</sup> acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”) is seised of an appeal filed on 17 December 2021 by Pjetër Shala (“Shala” or “the Accused”),<sup>2</sup> against the “Decision on Motion Challenging the Form of the Indictment” (“Impugned Decision”).<sup>3</sup> The Specialist Prosecutor’s Office (“SPO”) responded on 11 January 2022 that the Appeal should be rejected.<sup>4</sup> Shala replied on 17 January 2022.<sup>5</sup>

## I. BACKGROUND

1. On 14 February 2020, the SPO submitted for confirmation a strictly confidential and *ex parte* indictment against Shala, together with evidentiary material in support of the factual allegations and a detailed outline pursuant to Rule 86(3)(b) of the Rules linking each item of evidentiary material to each allegation.<sup>6</sup> On 18 March 2020,

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<sup>1</sup> F00001, Decision Assigning a Court of Appeals Panel, 2 December 2021.

<sup>2</sup> F00004, Defence Appeal with Leave against the ‘Decision on Motion Challenging the Form of the Indictment’, 17 December 2021 (“Appeal”). On 10 December 2021, the Court of Appeals Panel extended the deadline for Shala to file his appeal by 17 December 2021 and the SPO its response by 5 January 2022. Shala’s request for variation of time from 2 December 2021 was accidentally only distributed to the Appeals Panel on 10 December 2021. See CRSPD17, Email from Court of Appeals Panel re IA004-F00002, 10 December 2021 (confidential). See also F00002, Defence Request for an Extension of Time to Appeal the ‘Decision on Motion Challenging the Form of the Indictment’, 2 December 2021 (confidential). On 20 December 2021, the Appeals Panel further extended the deadline for the SPO to file its response to Shala’s Appeal to 10 January 2022. See F00005, Decision on Specialist Prosecutor’s Office’s Request for Variation of Time Limit, 20 December 2021. See also F00003, Prosecution request for extension of time to respond to ‘Defence Request for an Extension of Time to Appeal the ‘Decision on Motion Challenging the Form of the Indictment’, 15 December 2021.

<sup>3</sup> F00089/RED, Public Redacted Version of Decision on Motion Challenging the Form of the Indictment, 18 October 2021 (confidential version filed on 18 October 2021) (“Impugned Decision”).

<sup>4</sup> F00006, Prosecution response to Defence appeal against the ‘Decision on Motion Challenging the Form of the Indictment’, 10 January 2022 (“Response”), paras 2, 38.

<sup>5</sup> F00007, Defence Reply to Prosecution Response to Appeal against the ‘Decision on Motion Challenging the Form of the Indictment’, 17 January 2022 (“Reply”).

<sup>6</sup> F00002/RED, Public Redacted Version of ‘Submission of Indictment for confirmation and related requests’, filings KSC-BC-2020-04/F00002 dated 14 February 2020, 26 April 2021 (strictly confidential and *ex parte* version filed on 14 February 2020).

following an order from the Pre-Trial Judge,<sup>7</sup> the SPO submitted a revised indictment for confirmation.<sup>8</sup>

2. On 12 June 2020, the Pre-Trial Judge confirmed the indictment against Shala and ordered the SPO to file a further revised indictment, as confirmed.<sup>9</sup> On 19 June 2020, the SPO submitted the Confirmed Indictment.<sup>10</sup>

3. On 16 March 2021, further to a decision and an arrest warrant issued by the Pre-Trial Judge,<sup>11</sup> Shala was arrested.<sup>12</sup>

4. On 13 July 2021, Shala filed a preliminary motion challenging the form of the Confirmed Indictment.<sup>13</sup> On 6 September 2021, the SPO responded.<sup>14</sup> On 24 September 2021, Shala replied.<sup>15</sup>

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<sup>7</sup> F00003, Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules, 28 February 2020 (strictly confidential and *ex parte*, reclassified as public on 19 April 2021).

<sup>8</sup> F00004/RED, Public Version of 'Submission of revised Indictment for confirmation and related requests', filing KSC-BC-2020-04/F00004 dated 18 March 2020, 26 April 2021 (strictly confidential and *ex parte* version filed on 18 March 2020).

<sup>9</sup> F00007/RED, Public Redacted Version of the Decision on the Confirmation of the Indictment against Pjetër Shala, 6 May 2021 (strictly confidential and *ex parte* version filed on 12 June 2020).

<sup>10</sup> F00010/A02, Annex 2 to Submission of Confirmed Indictment, 19 June 2020 (strictly confidential and *ex parte*, reclassified as confidential on 29 April 2021). See also F00016/A02, Annex 2 to Submission of lesser redacted and public redacted versions of confirmed Indictment and related requests, 31 March 2021 (strictly confidential and *ex parte*, reclassified as public on 15 April 2021) ("Confirmed Indictment").

<sup>11</sup> F00008/RED, Public Redacted Version of the Decision on Request for Arrest Warrant and Transfer Order, 6 May 2021 (strictly confidential and *ex parte* version filed on 12 June 2020); F00008/A01/RED, Public Redacted Version of Arrest Warrant for Mr Pjetër Shala, 15 April 2021 (strictly confidential and *ex parte* version filed on 12 June 2020, reclassified as confidential on 19 October 2021). See also F00008/A02/RED, Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers, 15 April 2021 (strictly confidential and *ex parte* version filed on 12 June 2020).

<sup>12</sup> F00013, Notification of Arrest of Pjetër Shala Pursuant to Rule 55(4), 16 March 2021 (strictly confidential and *ex parte*, reclassified as public on 29 April 2021).

<sup>13</sup> F00055/COR/RED, Public Redacted Version of 'Preliminary Motion by the Defence of Pjetër Shala Challenging the Form of the Indictment', 9 September 2021 (uncorrected confidential version filed on 13 July 2021) ("Defence Preliminary Motion").

<sup>14</sup> F00070/RED, Public Redacted Version of 'Prosecution Response to the SHALA Defence's Corrected Version of the Preliminary Motion Challenging the Form of the Indictment', 1 November 2021 (confidential version filed on 6 September 2021).

<sup>15</sup> F00083, Defence Reply to the Prosecution Response to the Preliminary Motion of Pjetër Shala Challenging the Form of the Indictment, 24 September 2021 (confidential, reclassified as public on 18 October 2021).

5. On 18 October 2021, the Pre-Trial Judge issued the Impugned Decision, granting the Defence Preliminary Motion in part, and ordering the SPO to file a corrected version of the Confirmed Indictment in order to provide the required level of specificity and clarity and to ensure that the scope of the SPO's case cannot be expanded at trial.<sup>16</sup> The Pre-Trial Judge dismissed the remainder of the Defence Preliminary Motion, finding that the Confirmed Indictment otherwise set out with sufficient clarity and specificity the facts underpinning the charges, including the modes of liability charged.<sup>17</sup>

6. On 26 October 2021, Shala applied for leave to appeal the Impugned Decision.<sup>18</sup> On 10 November 2021, the SPO submitted its response.<sup>19</sup>

7. On 1 November 2021, the SPO submitted a corrected version of the Confirmed Indictment, namely the operative Indictment.<sup>20</sup>

8. On 29 November 2021, the Pre-Trial Judge granted in part Shala's request and certified two issues for appeal (collectively, "Certified Issues"),<sup>21</sup> defined as follows:

- (a) Whether the Pre-Trial Judge erred in finding that the level of detail as to the members of the alleged joint criminal enterprise ("JCE") is compatible with the Prosecution's obligation to give sufficient notice of its case as well as Article 6 of the European Convention on Human Rights ("ECHR") and the equivalent provisions of the Kosovo Constitution; and

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<sup>16</sup> Impugned Decision, paras 117-118. See also Impugned Decision, paras 69, 73, 75.

<sup>17</sup> Impugned Decision, para. 117.

<sup>18</sup> F00094, Defence Application for Leave to Appeal the Decision on Motion Challenging the Form of the Indictment, 26 October 2021 (confidential, reclassified as public on 29 November 2021) ("Certification Request").

<sup>19</sup> F00103, Prosecution Response to the Defence application for leave to appeal the Decision on Motion Challenging the Form of the Indictment, 10 November 2021 (confidential, reclassified as public on 29 November 2021).

<sup>20</sup> F00098/A01, Corrected Indictment, 1 November 2021 (confidential). See also F00107/A01, Public Redacted Version of Corrected Indictment, 16 November 2021 ("Indictment").

<sup>21</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, 31.

(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.

## II. STANDARD OF REVIEW

9. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.<sup>22</sup>

## III. PRELIMINARY MATTER

### A. ISSUES FALLING OUTSIDE THE SCOPE OF CERTIFIED ISSUES

10. The Court of Appeals Panel recalls that the scope of its review lies strictly within the confines of the issues certified by the lower panel and that it may thus decline to consider arguments of an appellant that go beyond the issues in relation to which certification has been granted.<sup>23</sup> The Panel also recalls the limited scope of the Issues certified by the Pre-Trial Judge.<sup>24</sup> Before addressing the substance of the Appeal, the Panel will assess whether it exceeds the scope of the Certified Issues.<sup>25</sup>

11. The Panel notes that under Ground 1, Shala's appellate submissions contain allegations on the lack of specificity in the Indictment regarding the pleading of his own alleged conduct, the conduct of the alleged JCE members, and the alternative

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<sup>22</sup> KSC-BC-2020-07, F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, paras 4-14. See also e.g. F00005, Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Provisional Release, 20 August 2021 (confidential version filed on 20 August 2021), para. 5.

<sup>23</sup> See KSC-BC-2020-07, F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021 ("*Gucati and Haradinaj* Appeal Decision on Preliminary Motions"), para. 20. See also e.g. KSC-BC-2020-07, F00006, Decision on Nasim Haradinaj's Appeal Against Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, 7 January 2022, para. 11.

<sup>24</sup> See above, para. 8.

<sup>25</sup> See *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 20.

pleading of members or “tools” of the JCE.<sup>26</sup> In addition, the Panel notes that under Ground 2, Shala’s submissions in his Reply contain allegations on the lack of specificity of the Indictment regarding his alleged role in the arrest of the victims.<sup>27</sup> The Panel observes that Shala did not seek leave to certify these specific issues arising from the Impugned Decision pursuant to Rule 77 of the Rules.<sup>28</sup> Consequently, the Panel finds that these arguments fall outside of the scope of the Certified Issues, as defined in the Certification Decision.<sup>29</sup> The Appeals Panel therefore declines to consider these submissions and formally dismisses them.

#### IV. DISCUSSION

##### A. ALLEGED ERRORS CONCERNING THE PRE-TRIAL JUDGE’S FINDING ON THE LACK OF PARTICULARITY IN THE INDICTMENT AS TO THE MEMBERS OF THE JCE (GROUND 1)

###### 1. Submissions of the Parties

12. Shala submits that 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>30</sup> Recalling the obligation for the prosecution to provide sufficient detail as to the identity of the JCE members in the indictment and his right to be informed “promptly

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<sup>26</sup> See Appeal, paras 18 (mentioning that the Indictment does not plead the participation or contribution of the Accused with sufficient clarity and precision), 21 (mentioning that the SPO did not attempt to distinguish JCE members and tools and that the Indictment uses the terms interchangeably), 22 (mentioning that the SPO should specify in the Indictment the identity and respective roles of perpetrators used as tools by JCE members, as well as the link between the perpetration by the tool and the activity of the JCE member); Reply, para. 7 (mentioning that the conduct or alleged role of JCE members is directly relevant to the Defence ability to understand the SPO’s case).

<sup>27</sup> See Reply, para. 12 (mentioning that the Indictment should contain improved particulars, *inter alia*, as to the Accused’s alleged role in the arrest of the victims).

<sup>28</sup> See Certification Request.

<sup>29</sup> See Certification Decision, para. 27, fn. 42, referring to Impugned Decision, paras 55-57, 103, 109 (thereby delineating the contours of the appealable issues within the Impugned Decision to these specific paragraphs). See also Certification Decision, para. 26. The Panel further notes that the SPO submits that such arguments should be summarily dismissed for the same reasons. See Response, paras 24-27.

<sup>30</sup> Appeal, para. 13, referring to Impugned Decision, paras 55-57. See also Appeal, paras 18, 20, 22, 24-25; Reply, paras 4-5.



and in detail” of the nature and cause of the charges against him,<sup>31</sup> Shala contends that the lack of particulars regarding the number and identity with respect to all but five of the JCE members renders the Indictment defective.<sup>32</sup> In his view, the use of open-ended and vague language such as “certain other KLA members” and the identification of co-perpetrators by the sole reference to their affiliation to the KLA and presence at the Kukes Metal Factory is impermissibly vague.<sup>33</sup> Shala argues that while the Pre-Trial Judge acknowledged the scale of the case and the alleged proximity of the Accused to the events, he erred in failing to apply the more rigorous standard in terms of specificity required in such circumstances which involve an alleged small group of co-perpetrators at one location in the course of three weeks.<sup>34</sup> He adds that, due to the scale of the alleged JCE, the SPO must be deemed able to identify its members and should indicate whether the names of additional members are known or unknown.<sup>35</sup> Shala finally submits that this situation forces him to prepare in the abstract and prevents him from preparing a meaningful defence.<sup>36</sup>

13. The SPO responds that the Pre-Trial Judge committed no error when finding, in line with international jurisprudence adopted by the Specialist Chambers, that the JCE members were pleaded with sufficient specificity in the Indictment.<sup>37</sup> According to the SPO, the fact that the Indictment identifies by name or nickname five alleged JCE members and further identifies other unnamed alleged members by affiliation or category while narrowly framing the temporal and geographical scope of their alleged criminal conduct provides sufficient information to the Defence.<sup>38</sup> The SPO argues that contrary to Shala’s contention, the Pre-Trial Judge explicitly took into account the scale

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<sup>31</sup> Appeal, paras 14-15, 23. See also Appeal, paras 16, 25; Reply, paras 3, 5-6.

<sup>32</sup> Appeal, paras 16, 19-20, 24.

<sup>33</sup> Appeal, paras 16, 19; Reply, paras 5-6.

<sup>34</sup> Appeal, paras 17, 19- 20. See also Appeal, para. 18; Reply, para. 3.

<sup>35</sup> Appeal, paras 19-20, 25; Reply, paras 5-6. See also Reply, paras 3-4.

<sup>36</sup> Appeal, para. 24; Reply, paras 4, 6. See also Appeal, paras 20, 25.

<sup>37</sup> Response, para. 15. See also Response, paras 16, 19.

<sup>38</sup> Response, paras 17-18.

of the case and the small size of the alleged JCE.<sup>39</sup> It adds that Shala's submission that the Indictment should specify the number of JCE members or the numbers of individuals falling into each identified category is unsupported.<sup>40</sup>

14. In his reply, Shala illustrates the alleged prejudice caused to his ability to prepare his defence, by the allegations set out in paragraph 21 of the Indictment, arguing in particular, with regard to a specific incident, that the identity of the unidentified KLA member mentioned as having allegedly informed a detainee of his sentence is a material fact that should have been pleaded in the Indictment.<sup>41</sup>

## 2. Assessment of the Court of Appeals Panel

15. At the outset, the Court of Appeals Panel recalls that, in accordance with Articles 21(4)(a) and 38(4) of the Law, as well as Rule 86(3) of the Rules, an indictment must set forth with sufficient specificity and clarity the facts underpinning the charged crimes, including the modes of liability charged.<sup>42</sup> This ensues directly from the right of the accused to be informed of the nature and cause of the accusation against him or her, as enshrined in Article 30(1) of the Constitution of Kosovo and Article 6(3)(a) of the ECHR.<sup>43</sup> The indictment is the primary accusatory instrument and an accused should not have to decipher the alleged basis of his criminal responsibility from scattered factors read together.<sup>44</sup> An indictment will be deemed defective when it fails to plead the facts underpinning the charges or it does so in an insufficient or unclear

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<sup>39</sup> Response, para. 20.

<sup>40</sup> Response, para. 21.

<sup>41</sup> Reply, para. 6.

<sup>42</sup> See *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 35 and references cited therein. See also Impugned Decision, para. 25.

<sup>43</sup> See *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 35.

<sup>44</sup> See *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 49 and references cited therein. See also Impugned Decision, para. 25.



manner, creating ambiguity as regards the pleaded charges, including the modes of liability, and thus impairing the Defence's ability to prepare.<sup>45</sup>

16. Turning first to the identity of the members of the alleged JCE, the Panel observes that the Indictment identifies by name or nickname five alleged members of the JCE, including the Accused, and identifies the other members as being "certain other KLA soldiers, police, and guards present at the Kukës Metal Factory".<sup>46</sup> The Panel recalls that, at a minimum, the indictment must identify members of a JCE by category or group, and provide their specific identities when known.<sup>47</sup> Although it is not necessary or always possible to name each of the individuals involved, if some members of the JCE cannot be individually identified, they should be identified by referring to categories or groups of persons.<sup>48</sup>

17. As to the degree of specificity that has to be provided in an indictment, the Panel recalls that it depends on the nature and circumstances of the case, and notably the proximity of the accused to the events or underlying offences and the scale of the alleged crimes.<sup>49</sup> When the proximity of an accused to the alleged criminal conduct is close, the pleading requirements are more rigorous.<sup>50</sup> In the present case, the Panel observes that Shala, in addition to being charged for taking part in a JCE, is also alleged, *inter alia*, to have directly carried out some of the crimes charged.<sup>51</sup> The Panel further notes that the alleged JCE is of a comparatively small size and that the events underlying the charges are restricted to one location and a relatively short timeframe.

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<sup>45</sup> *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 38 and references cited therein. See also Impugned Decision, para. 36.

<sup>46</sup> Indictment, para. 10. See also Indictment, para. 8.

<sup>47</sup> *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 45 and references cited therein. See also Impugned Decision, paras 30, 32; ICTR, *Uwinkindi v. Prosecutor*, ICTR-01-75-AR72(C), Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011 ("*Uwinkindi* Appeal Decision"), para. 11.

<sup>48</sup> *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 45 and references cited therein.

<sup>49</sup> *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 42 and references cited therein. See also Impugned Decision, para. 26.

<sup>50</sup> *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 43 and references cited therein.

<sup>51</sup> See Indictment, paras 8-13, 30.

The Panel therefore finds that having regard to the limited scope of the present case, a higher degree of specificity than in larger-scale cases is required. In that regard, the Panel is satisfied that the Pre-Trial Judge not only acknowledged this principle but, contrary to Shala's assertion, also expressly took it into account when assessing whether the Indictment was sufficiently specific in light of the scale of the allegations.<sup>52</sup>

18. In the present case, the Panel notes that the Indictment refers clearly to three different categories of individuals, namely KLA soldiers, police and guards, in addition to the five alleged JCE members identified by name or nickname.<sup>53</sup> Mindful of the relatively small scale of the case, the Panel further notes that the unnamed alleged JCE members are identified in the Indictment not only by categories or groups but also narrowed down to those who were present at one detention site, namely the Kukës Metal Factory, during a very specific timeframe, from 17 May 1999 to 5 June 1999.<sup>54</sup> The Panel does not consider that the identification of the unnamed JCE members in the Indictment, as circumscribed in terms of geographical and temporal scope, is impermissibly vague. The Panel rather finds that the level of detail provided in the Indictment in terms of number and identification of the alleged JCE members – especially in light of the fact that frequent reference is made to the names of some of them throughout the Indictment – is sufficient to allow the Accused to understand the factual allegations underpinning the charges against him. In that regard, the Panel recalls that, in determining whether an accused was adequately put on notice of the nature and cause of the charges against him, the indictment must be considered as a whole and select paragraphs read in the context of the entire document.<sup>55</sup> Consequently, the Panel considers that the identification of each and every JCE member specifically by name is not warranted in this case.<sup>56</sup> The Panel therefore finds

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<sup>52</sup> See Impugned Decision, paras 55-57.

<sup>53</sup> See Indictment, para. 10. See also Impugned Decision, para. 55.

<sup>54</sup> See Indictment, paras 8, 10. See also Impugned Decision, para. 55.

<sup>55</sup> See *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 56 and references cited therein.

<sup>56</sup> See above, para. 16.

that the Pre-Trial Judge was correct to conclude that the membership of the alleged JCE is pleaded with sufficient specificity in the Indictment.<sup>57</sup>

19. While Shala is correct that the SPO should provide the Defence with all information in its possession as to the alleged JCE members,<sup>58</sup> the Panel recalls that the Indictment does not need to set out the evidence proving the pleaded material facts underpinning the charges.<sup>59</sup> Therefore, a distinction should be drawn between what constitutes a material fact to be pleaded in the Indictment and additional details that can be provided through subsequent disclosure of evidentiary materials. Having found that the Indictment identifies with sufficient specificity the alleged JCE members,<sup>60</sup> the Panel considers that any further detail in that respect constitutes evidentiary material that can be provided subsequently.<sup>61</sup> That being said, the Appeals Panel stresses that should the SPO be in a position to identify additional alleged JCE members by name, it should do so.<sup>62</sup>

20. Turning next to whether the use of the words “certain other KLA members” constitutes impermissible open-ended language, the Panel notes that while in certain instances the use of the formulation “others” may lead to some ambiguity,<sup>63</sup> the Panel

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<sup>57</sup> Impugned Decision, para. 57.

<sup>58</sup> See Reply, para. 5.

<sup>59</sup> See *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 38 and references cited therein. See also Impugned Decision, para. 27.

<sup>60</sup> See above, para. 18.

<sup>61</sup> This encompasses, for instance, any additional details with regard to the allegation in paragraph 21 of the Indictment concerning a KLA member informing a detainee that he had been sentenced to prison and execution referred to by Shala. See Reply, para. 6. See also Impugned Decision, para. 114, fn. 205 (finding that this information constitutes evidentiary matters which may be discussed at trial but need not be pleaded in the Indictment).

<sup>62</sup> While Shala claims that “[i]t can be safely assumed and indeed expected that the Prosecution has additional information on their identity”, the SPO does not indicate whether it is in fact in possession or not of such information. See Appeal, para. 25; Reply, para. 5. See also ICTY, *Prosecutor v. Popović et al.*, IT-05-88-PT, Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules, 31 May 2006, para. 40.

<sup>63</sup> See e.g. *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, paras 47, 55; ICTR, *Prosecutor v. Ndahimana*, ICTR-2001-68-PT, Decision on Ndahimana’s Motion on Defects in the Amended Indictment, 30 April 2010, para. 15; ICTY, *Prosecutor v. Čermak and Markač*, IT-03-73-PT, Decision on Ivan Čermak’s and Mladen Markač’s Motions on Form of Indictment, 8 March 2005, para. 55; ICTR, *Prosecutor v. Ntawukulilyayo*, ICTR-05-88-PT, Decision on Defence Preliminary Motion Alleging Defects

does not find that this is the case here. Indeed, the formulation is not used on its own without any further detail but refers to KLA members specifically present at the Kukës Metal Factory at the time of the events.<sup>64</sup> It is further explicit from a reading of the Indictment that the use of “certain” in connection with “others” means particular KLA members who belonged to the groups of soldiers, police and guards at the Kukës Metal Factory.<sup>65</sup> In addition, in many instances, the Indictment refers to specific named JCE members among these other KLA members as being allegedly directly involved in specific allegations.<sup>66</sup> For these reasons, the Panel finds that the Pre-Trial Judge committed no error in concluding that this formulation was not impermissibly vague.<sup>67</sup>

21. The Court of Appeals Panel is satisfied that the information available in the Indictment is sufficient to provide adequate notice to the Accused with regard to the alleged JCE members in order to prepare a meaningful defence. In light of the above, the Panel dismisses the arguments set forth in Ground 1.

B. ALLEGED ERRORS CONCERNING THE PRE-TRIAL JUDGE’S FINDING ON THE LACK OF PARTICULARITY IN THE INDICTMENT AS TO THE VICTIMS (GROUND 2)

**1. Submissions of the Parties**

22. Shala submits that the Pre-Trial Judge erred in finding that the level of specificity in the Indictment regarding the identity of the victims was adequate.<sup>68</sup> He notably points to some paragraphs of the Indictment which, according to him, fail to

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in the Indictment, 28 April 2009, para. 25. See also *Uwinkindi* Appeal Decision, paras 15, 17; ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on Defects in the Form of the Indictment, 5 August 2005, para. 20, referred to at Appeal, para. 19.

<sup>64</sup> See Indictment, paras 8, 10, 14-15, 18-19, 21-23, 26, 28. See also above, para. 18.

<sup>65</sup> See Indictment, para. 10.

<sup>66</sup> See e.g. Indictment, paras 14-15, 18-19, 21-23, 26, 28.

<sup>67</sup> See Impugned Decision, para. 56.

<sup>68</sup> Appeal, para. 26, referring to Impugned Decision, paras 103, 109 and Confirmed Indictment, paras 14, 18-21, 24, 26. See also Appeal, paras 27-29, 34; Reply, para. 13.

provide “any number or identity of the alleged victims of cruel treatment or torture”.<sup>69</sup> Shala further argues that the Pre-Trial Judge failed to “properly address” the Defence’s submissions in that regard and to provide sufficient reasoning in dismissing them.<sup>70</sup> Shala finally contends that due to the limited nature and scale of the allegations in the present case, the identification of the victims only as a group or the indication of their approximate number was not sufficient and the SPO failed to provide adequate notice in this respect.<sup>71</sup>

23. With regard to arbitrary detention in particular, Shala submits that the status of the victims at the moment of their arrest, notably whether they were *hors de combat*, is a material fact to be pleaded in the Indictment.<sup>72</sup> In Shala’s view, this information is necessary to enable him to prepare adequately.<sup>73</sup> He further argues that the Pre-Trial Judge erred in finding that it was an evidentiary matter to be developed at trial.<sup>74</sup>

24. The SPO responds that the Indictment provides sufficient information as to the identity of the victims and their status at the moment of their arrest.<sup>75</sup> According to the SPO, Shala, when arguing that it fails to provide “any number or identity” of alleged victims of cruel treatment or torture, “grossly mischaracterize[s]” the information contained in the Indictment and only refers to selected paragraphs, read in isolation.<sup>76</sup> The SPO contends that the Indictment provides for the number of such victims, identifies [REDACTED] by name and specifies the [REDACTED] of [REDACTED] others, in addition to providing additional information as to their citizenship, status or perceived affiliation.<sup>77</sup> As to the status of the victims at the

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<sup>69</sup> Appeal, para. 26, referring to Confirmed Indictment, paras 18-20, 24, 26.

<sup>70</sup> Appeal, para. 26, referring to Defence Preliminary Motion, paras 31-32, 63, 64(α)-(δ). See also Appeal, para. 30, referring to Defence Preliminary Motion, para. 34.

<sup>71</sup> Appeal, para. 27. See also Appeal, para. 29; Reply, paras 9-11.

<sup>72</sup> Appeal, paras 28, 31-33. See also Reply, para. 12.

<sup>73</sup> Appeal, paras 31, 33; Reply, para. 12. See also Appeal, para. 34.

<sup>74</sup> Appeal, para. 28.

<sup>75</sup> Response, paras 28-29, 32.

<sup>76</sup> Response, paras 29-30, referring to Appeal, para. 26.

<sup>77</sup> Response, para. 31.

moment of their arrest, the SPO submits that the Indictment provides sufficient information in that regard, notably by indicating that they were “arrested and detained without legal basis”.<sup>78</sup> In the SPO’s view, because the charge of arbitrary detention is not limited to the arrest but covers the entire period of deprivation of liberty, the status of the victims at the moment of their arrest is not determinative.<sup>79</sup>

25. Shala replies that reading the Indictment as a whole confirms the SPO’s “inconsistent yet deliberate choice” to identify alleged victims of certain crimes but not others, violating the Accused’s rights in that respect.<sup>80</sup> He adds that even where certain information is provided, it remains insufficient to allow for proper trial preparation.<sup>81</sup>

## 2. Assessment of the Court of Appeals Panel

26. Turning first to the identity of the alleged victims, the Court of Appeals Panel notes that the Pre-Trial Judge considered that the Indictment, read as a whole, provided sufficient information on the number and identities of the alleged victims.<sup>82</sup> The Panel recalls the principle that whether the identity of the victims is a material fact depends upon the alleged proximity of the accused to those events and the type of responsibility alleged by the Prosecution.<sup>83</sup> In certain circumstances, the nature and scale of the alleged crimes makes the determination of the identity of victims impossible.<sup>84</sup> In such cases, less detail may be acceptable<sup>85</sup> and the identification of the

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<sup>78</sup> Response, paras 32, 34.

<sup>79</sup> Response, para. 33.

<sup>80</sup> Reply, para. 10.

<sup>81</sup> Reply, para. 11.

<sup>82</sup> Impugned Decision, paras 103, 109. See also Impugned Decision, para. 31.

<sup>83</sup> IRMCT, *Ngirabatware v. Prosecutor*, MICT-12-29-A, Judgement, 18 December 2014 (“*Ngirabatware Appeal Judgement*”), para. 140; ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004 (“*Blaškić Appeal Judgement*”), para. 210.

<sup>84</sup> *Ngirabatware Appeal Judgement*, para. 140; ICTR, *Rukundo v. Prosecutor*, ICTR-2001-70-A, Judgement (“*Rukundo Appeal Judgement*”), 20 October 2010, para. 160; ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Judgement, 23 October 2001 (“*Kupreškić et al. Appeal Judgement*”), paras 89-90. See also Impugned Decision, para. 31.

<sup>85</sup> ICTR, *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Judgement, 7 July 2006 (“*Ntagerura et al. Appeal Judgement*”), para. 23.



victims as a group or the indication of their approximate number may be sufficient.<sup>86</sup> On the other hand, where the prosecution alleges that an accused personally committed the criminal acts in question, it must plead the identity of the victim with the greatest precision.<sup>87</sup> Even in cases where a high degree of specificity is impractical, if the Prosecution is in a position to name the victims, it should do so, since the identity of the victim is information that is valuable to the preparation of the defence case.<sup>88</sup>

27. As recalled above, the degree of specificity required for the material facts to be pleaded depends on the nature of the case and the alleged proximity of the Accused to the events.<sup>89</sup> In light of the relatively limited scope of the present case and the fact that Shala is charged, *inter alia*, for having directly committed some of the alleged crimes set forth in the Indictment,<sup>90</sup> the Panel considers that the pleading requirements with regard to the alleged victims will be correspondingly higher.

28. In the present case, the Panel observes that the Indictment provides detailed information as to the alleged victims of the charged crimes. The Indictment refers to them as the persons detained at the Kukës Metal Factory during the charged timeframe and specifies that they were [REDACTED].<sup>91</sup> It is clear from a plain reading of the Indictment that the alleged victims of cruel treatment and torture belong to the same group of [REDACTED] persons detained at the Kukës Metal Factory who were

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<sup>86</sup> ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-PT, Decision on Ante Gotovina's Preliminary Motions Alleging Defects in the Form of the Joinder Indictment, 19 March 2007 ("*Gotovina et al.* Decision"), para. 41; ICTR, *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Judgement and Sentence, 25 February 2004, para. 32; *Rukundo* Appeal Judgement, para. 160.

<sup>87</sup> *Ntagerura et al.* Appeal Judgement, para. 23; *Blaškić* Appeal Judgement, para. 213; *Kupreškić et al.* Appeal Judgement, para. 89; ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005, para. 28. See also ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, para. 122.

<sup>88</sup> ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-AR73.3, Decision on Joint Defence Interlocutory Appeal Against Trial Chamber's Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 26 January 2009, para. 18. See also *Kupreškić et al.* Appeal Judgement, para. 90.

<sup>89</sup> See above, paras 17, 26.

<sup>90</sup> See above, para. 17.

<sup>91</sup> See Indictment, para. 14. See also e.g. Indictment, paras 6, 8, 19.

allegedly victims of arbitrary detention.<sup>92</sup> The Indictment further identifies by name [REDACTED] of the alleged victims of acts of cruel treatment and identifies the [REDACTED] one as [REDACTED].<sup>93</sup> The alleged victim of murder is also directly identified by name.<sup>94</sup> The Panel further notes, as pointed out by the Pre-Trial Judge, that the Indictment provides further particulars such as the victims' citizenship or (perceived) political affiliation.<sup>95</sup>

29. The Panel finds that the information contained in the Indictment as to the identity and number of alleged victims, coupled with the particulars pertaining to the narrow time period and the location where the crimes have purportedly been committed, is sufficiently specific to provide adequate notice to Shala in that respect. In light of the number of alleged victims being identified directly by name and the level of detail provided otherwise, the Panel, while mindful of the limited scope of the case and of the alleged proximity of the Accused with the events, finds that the fact that some victims are not identified by name does not render the Indictment defective with regard to the allegations pleaded. Nevertheless, the Appeals Panel stresses that if the SPO is in a position to provide the identity of unnamed victims, it should do so.

30. For these reasons, the Court of Appeals Panel finds that Shala has failed to demonstrate any error in the Pre-Trial Judge concluding that the Indictment provided sufficient information on the identities of the alleged victims and that any further information constituted evidentiary matters to be addressed at trial.<sup>96</sup>

31. Turning next to the status of the victims at the time of their arrest, the Panel notes that the Indictment states that the alleged victims were all citizens of the Federal

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<sup>92</sup> Compare Indictment, para. 14 with Indictment, paras 18-20, 24, 26. Notably, the section on allegations of torture refers to "the acts and omissions described in paragraphs 18-24 above". See Indictment, para. 26. Contra Reply, para. 9.

<sup>93</sup> Indictment, para. 21.

<sup>94</sup> Indictment, para. 28.

<sup>95</sup> See Indictment, paras 6, 21, 26. See also Impugned Decision, para. 103.

<sup>96</sup> See Impugned Decision, paras 103, 109.

Republic of Yugoslavia not taking part in the hostilities.<sup>97</sup> In the Panel's view, and contrary to Shala's claim, this constitutes sufficient notice of the status of the alleged victims.<sup>98</sup> In any event, the Panel notes that the Indictment also specifies that the alleged victims were "arrested and detained without legal basis".<sup>99</sup> The Panel therefore agrees with the Pre-Trial Judge that any further information regarding the status of the victims at the moment of their arrest would constitute evidentiary matters to be addressed at trial.<sup>100</sup> In addition, the Panel finds no merit in Shala's contention that the Pre-Trial Judge failed to properly consider his arguments on the alleged lack of specificity regarding the status of the alleged victims.<sup>101</sup>

32. Recalling that the Indictment does not need to set out the evidence proving the material facts underpinning the charges,<sup>102</sup> the Panel further considers that the question of whether the alleged victims were *hors de combat* at the time of their arrest does not constitute a material fact to be pleaded in the Indictment but an evidentiary matter to be addressed at trial.<sup>103</sup> In addition, the question of whether the alleged victims *had* to be *hors de combat* at the time of their arrest,<sup>104</sup> is a question of law to be resolved at trial because it concerns the legal elements of the crime,<sup>105</sup> and does not

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<sup>97</sup> Indictment, para. 6. See Impugned Decision, para. 103.

<sup>98</sup> See, similarly, *Gotovina et al.* Decision, para. 51. Contra Appeal, paras 31-33.

<sup>99</sup> See Indictment, para. 14.

<sup>100</sup> Impugned Decision, paras 103, 109.

<sup>101</sup> See Appeal, para. 26.

<sup>102</sup> See above, para. 19.

<sup>103</sup> See e.g. *Gotovina et al.* Decision, para. 51 (finding that the indictment was sufficiently specific as to the status of victims and that the question relating to the legal definition of "civilians" and of "whether or not a particular victim ultimately falls under one or both of these categories" were "matters to be resolved at trial"). See also, similarly, ICC, *Prosecutor v. Yekatom and Ngaiisona*, ICC-01/14-01/18-585, Decision on Yekatom Defence Motion for Additional Details, 13 July 2020, paras 27-28 (finding that whether victims may have been combatants rather than members of the civilian population was a matter of evidence to be determined at trial); ICTY, *Prosecutor v. Šešelj*, IT-03-67/PT, Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, 26 May 2004, para. 41 (finding that the questions of whether an armed conflict existed, whether the civilian population was victim of the armed conflict, whether any attacks against the civilian population were systematic and whether there was a nexus between such attacks and the armed conflict are matters of evidence not appropriately raised in challenges to the form of the indictment but should be left for determination at trial).

<sup>104</sup> See Appeal, paras 32-33; Reply, para. 12; Response, para. 33. See also Impugned Decision, para. 104.

<sup>105</sup> See KSC-BC-2020-06, F00030, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021 ("*Thaçi et al.* Appeal Decision on

relate to the specificity or clarity of the charges or challenges to the form of the indictment. The Panel further recalls its finding, with regard to the offence of arbitrary detention in particular, that the question of the legal basis of detention relates to the contours or elements of the crime and is a matter to be addressed at trial because it falls outside the scope of challenges brought under Rule 97(1) of the Rules.<sup>106</sup> The Panel thus declines to address any submission or finding made in that regard.<sup>107</sup>

33. In light of the above, Shala's Ground 2 is dismissed.

#### V. DISPOSITION

34. For these reasons, the Court of Appeals Panel:

**DENIES** the Appeal.



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**Judge Michèle Picard,  
Presiding Judge**

Dated this Tuesday, 22 February 2022

At The Hague, the Netherlands

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Jurisdiction"), paras 98, 100; ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, 6 June 2007, paras 17-18. See also Impugned Decision, para. 28.

<sup>106</sup> *Thaçi et al.* Appeal Decision on Jurisdiction, paras 98, 100.

<sup>107</sup> See Appeal, paras 32-33; Reply, para. 12; Response, paras 32-34. See also Impugned Decision, para. 104.