



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

**In:** KSC-BC-2020-05  
**Before:** Pre-Trial Judge  
Judge Nicolas Guillou  
  
**Registrar:** Dr Fidelma Donlon  
**Filing Participant:** Specialist Prosecutor  
**Date:** 2 October 2020  
**Language:** English  
**Classification:** Public

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**Public Version of**

**'Submission of revised Indictment for confirmation and related requests', filing**

**KSC-BC-2020-05/F00004 dated 18 March 2020**

**with public redacted Annex 1 and public Annex 2**

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**Specialist Prosecutor's Office**

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## I. INTRODUCTION

1. Pursuant to the Order,<sup>1</sup> Article 38(4) of the Law,<sup>2</sup> and Rule 86(2)-(4) of the Rules,<sup>3</sup> the Specialist Prosecutor's Office ('SPO') hereby files:

- a. a revised indictment for confirmation against Salih MUSTAFA aka 'Commander CALI', in respect of crimes committed in Zllash/Zlaš, Kosovo, in 1999 ('Revised Indictment');<sup>4</sup>
- b. submissions regarding the Specialist Chambers' jurisdiction over the war crime of arbitrary detention under Article 14(1)(c), as pleaded, or under Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (1976) as incorporated in Article 15(10)(a), including its legal elements;<sup>5</sup>
- c. a recent photograph of Salih MUSTAFA.<sup>6</sup>

## II. REVISED INDICTMENT

2. The Revised Indictment (i) sets out further particulars and identifying information of Salih MUSTAFA,<sup>7</sup> (ii) provides more specificity in relation to the statement of facts,<sup>8</sup> and (iii) clarifies the legal characterisation of those material facts.<sup>9</sup>

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<sup>1</sup> Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules, KSC-BC-2020-05/F00003, 28 February 2020, Strictly Confidential and *Ex Parte* ('Order'), para.21. On 14 February 2020, the SPO initially submitted an indictment against Salih MUSTAFA for confirmation. *See* Submission of Indictment for confirmation and related requests, KSC-BC-2020-05/F00002, 14 February 2020, Strictly Confidential and *Ex Parte* ('Initial Submission').

<sup>2</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

<sup>3</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev1/2017, 5 July 2017 ('Rules'). Unless otherwise indicated, all references to 'Rule(s)' are to the Rules.

<sup>4</sup> Annex 1. *See* Order, KSC-BC-2020-05/F00003, para.21(b).

<sup>5</sup> *See* Order, KSC-BC-2020-05/F00003, para.21(c).

<sup>6</sup> Annex 2. *See* Order, KSC-BC-2020-05/F00003, para.21(a).

<sup>7</sup> Order, KSC-BC-2020-05/F00003, para.21(b)(i).

<sup>8</sup> Order, KSC-BC-2020-05/F00003, para.21(b)(ii).

<sup>9</sup> Order, KSC-BC-2020-05/F00003, para.21(b)(iii).

3. The Revised Indictment, which must be read as a whole,<sup>10</sup> pleads the material facts in the particular circumstances of the SPO's case against Salih MUSTAFA,<sup>11</sup> but not the evidence which will be used to prove such facts.<sup>12</sup>

4. Where physical commission is alleged in the Revised Indictment,<sup>13</sup> the SPO has provided further detail as to the identity of the victims, place and approximate date, manner and means of commission, and related mental element.<sup>14</sup>

5. Consistent with the Order, where joint criminal enterprise, superior responsibility and aiding and abetting are alleged, but not physical commission,<sup>15</sup> the

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<sup>10</sup> SCSL, *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Judgement, 26 October 2009 ('*Sesay et al.* Appeal Judgment'), para.86 and the sources cited therein; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, 30 January 2015 ('*Popović et al.* Appeal Judgment'), paras 37, 68 and the sources cited therein.

<sup>11</sup> Order, KSC-BC-2020-05/F00003, para.15.

<sup>12</sup> Material facts are those necessary to satisfy the elements of the crimes and modes of liability alleged and depend on the particular circumstances of the case. The material facts – upon which the Prosecution relies and which must be included in an indictment – must be distinguished from the evidence by which those material facts are to be proven. See Rule 86(3)(a) (distinguishing between the 'material facts' and the evidentiary material supporting such facts); Order, KSC-BC-2020-05/F00003, paras 12, 14-17; *Sesay et al.* Appeal Judgment, para.143 and the sources cited therein; ECtHR, *Previti v. Italy*, Application No.45291/06, Decision on Admissibility, 8 December 2009, paras 203-210 and the sources cited therein; ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11, Decision on the date of the confirmation of charges hearing and proceedings leading thereto, 14 December 2012, paras 27-29 and the sources cited therein; STL, *Ayyash et al.*, STL-11-01/PT/TC, Decision on Alleged Defects in the Form of the Amended Indictment of 21 June 2013, 13 September 2013 ('STL Decision'), para.17 and the sources cited therein; *Popović et al.* Appeal Judgment, para.47 and the sources cited therein; ECtHR, *Sampech v. Italy*, Application No.55546/09, Decision, 19 May 2015, paras 105-112; ICC, Chambers Practice Manual, May 2017, p.12. In both *Previti* (at para.208) and *Sampech* (at para.110), the ECtHR noted that the charging instruments were by their very nature drafted in a concise manner and notice of further details of the alleged conduct resulted from other documents, such as the committal for trial and exhibits in the case file. See also ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, paras 128-130; STL Decision, paras 17, 27. There is no requirement as to the form in which notice must be provided and the fairness of the proceedings must be assessed with regard to the proceedings as a whole. See ECtHR, *Pélissier and Sassi v. France*, Application no.25444/94, Judgment, 25 March 1999, paras 46, 53.

<sup>13</sup> Annex 1, para.12.

<sup>14</sup> Order, KSC-BC-2020-05/F00003, para.16.

<sup>15</sup> Annex 1, paras 7-11, 13-16.

SPO pleads the material facts for these modes of liability<sup>16</sup> and, in relation to the crimes, the places, times and approximate number of victims.<sup>17</sup>

6. The Revised Indictment and supporting material demonstrate that there is a well-grounded suspicion<sup>18</sup> that Salih MUSTAFA has committed or participated in the commission of crimes within the jurisdiction of the Specialist Chambers. The SPO accordingly requests the Pre-Trial Judge to confirm the Revised Indictment.

### III. RELATED REQUESTS

7. As part of its Initial Submission, the SPO requested that the Pre-Trial Judge (i) issue an arrest warrant, authorisation for search and seizure, and transfer order; (ii)

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<sup>16</sup> Order, KSC-BC-2020-05/F00003, para.17; IRMCT, *Ngirabatware v. Prosecutor*, MICT-12-29-A, Judgement, 18 December 2014, para.248 and the sources cited therein (for joint criminal enterprise, the Prosecution must plead the following material facts: the nature and purpose of the enterprise, the period over which the enterprise is said to have existed, the identity of the participants in the enterprise, the nature of the accused's participation in the enterprise and the form of joint criminal enterprise alleged); ICTR, *Ntawukulilyayo v. Prosecutor*, ICTR-05-82-A, Judgement, 14 December 2011, para.188 and the sources cited therein (where it is alleged that the accused planned, instigated, ordered, or aided and abetted the planning, preparation or execution of the alleged crimes, the Prosecution is required to identify the particular acts or the particular course of conduct on the part of the accused which forms the basis for the charges in question); ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Judgment, 28 November 2007, para.323 (for superior responsibility, the material facts to be pleaded are that the accused is the superior of sufficiently identified subordinates over whom he had effective control and for whose acts he is alleged to be responsible, the criminal acts committed by those for whom the accused is alleged to be responsible, the conduct of the accused by which he may be found to have known or had reason to know the crimes were about to be committed or had been committed by his subordinates, and the conduct of the accused by which he may be found to have failed to take necessary and reasonable measures to prevent such acts or to punish the persons who committed them. In many cases it is sufficient to plead that the accused did not take any necessary and reasonable measures).

<sup>17</sup> Order, KSC-BC-2020-05/F00003, para.17. As the proximity of the accused to the crimes becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused upon which the Prosecution relies to establish responsibility for crimes physically committed by others. See ICTY, *Prosecutor v. Kvočka*, IT-98-30/1-A, Judgement, 28 February 2005, para.65. Further, where it is alleged that the crimes were a regular occurrence and/or continuing over a given time period, the accused's ability to prepare a defence does not depend on details of specific incidents. See, for example, ICTY, *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Judgement, 3 May 2006, para.89; ICTR, *Ndindabahizi v. Prosecutor*, ICTR-01-71-A, Judgement, 16 January 2007, paras.21-22; ICTR, *Rukundo v. Prosecutor*, ICTR-2001-70-A, Judgement, 20 October 2010, para.163.

<sup>18</sup> Article 38(4) and Rule 86(1). See also Kosovo, Criminal No.04/L-123, Procedure Code, 2012 ('CPC'), Article 19(1.12) ('Well-grounded suspicion – means filing an indictment. Possession of admissible evidence that would satisfy an objective observer that a criminal offence has occurred and the defendant has committed the offence').

order the non-disclosure of the indictment, related documents or information to the public until further order; and (iii) order the interim non-disclosure of the identities of witnesses and victims in the supporting material until appropriate protective measures have been ordered.<sup>19</sup> The SPO renews these requests in connection with this submission of the Revised Indictment and incorporates by reference the related submissions.

8. Further, pursuant to Rule 105 and for the same reasons outlined in the Initial Submission,<sup>20</sup> the SPO requests that the Pre-Trial Judge:

- a. Order that the name and identifying information of any witness or victim identified in the Revised Indictment shall not be disclosed to the public;
- b. Authorise the SPO to redact the identity and identifying information of, and assign provisional pseudonyms to, witnesses and victims named in the Revised Indictment prior to disclosure to the accused or public; and
- c. Order that such interim non-disclosure continues until further order of the Pre-Trial Judge on application of the SPO or after hearing the SPO.

#### IV. ARBITRARY DETENTION

9. As set out below, arbitrary detention constitutes a serious violation of Common Article 3<sup>21</sup> and therefore falls within the Specialist Chamber's jurisdiction under Article 14(1)(c).

10. Arbitrary detention, framed as 'illegal arrests and detention', is also criminalised under Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (1976) ('FRY Code'), and incorporated within the Specialist Chamber's jurisdiction by way of Article 15(1)(a).

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<sup>19</sup> Initial Submission, KSC-BC-2020-05/F00002, paras 4-22, 24.

<sup>20</sup> Initial Submission, KSC-BC-2020-05/F00002, para.21.

<sup>21</sup> Article 3 common to the Geneva Conventions of 1949 ('Common Article 3').

### a. Arbitrary detention is a violation of Common Article 3

11. Common Article 3 provides, *inter alia*, that persons taking no active part in hostilities shall, in all circumstances, be treated humanely.<sup>22</sup> The acts enumerated in Common Article 3(1)(a)-(d) – which are also reflected in Article 14(1)(c)(i)-(iv) – are non-exhaustive examples of prohibited acts.<sup>23</sup> Other acts incompatible with ‘humane treatment’ – including arbitrary detention – are also prohibited and fall within the scope of Article 14(1)(c).

12. Respect for fundamental, non-derogable rights – such as the protection from arbitrary detention<sup>24</sup> – is a necessary component of Common Article 3’s guarantee of humane treatment.<sup>25</sup> Specifically, as noted by the Kosovo Supreme Court<sup>26</sup> and the ICRC, ‘common Article 3 of the Geneva Conventions, as well as both Additional Protocols I and II, require that all civilians and persons *hors de combat* be treated

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<sup>22</sup> Common Article 3, para.1 (‘Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘*hors de combat*’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.’). The requirement of humane treatment is the fundamental principle underlying Common Article 3 and the four Geneva Conventions. *See* Commentary to the First Geneva Convention, 1952, (‘Commentary of 1952’), p.52; ICRC, Commentary to the First Geneva Convention, 2016, (‘Commentary of 2016’), paras 550-551; ICRC, Commentary to the Second Geneva Convention, 2017, (‘Commentary of 2017’), paras 572-573; ICRC, Commentary to the Third Geneva Convention, 1960, (‘Commentary of 1960’), p.38; ICRC, Commentary to the Fourth Geneva Convention, 1958, (‘Commentary of 1958’), p.38.

<sup>23</sup> Commentary of 1952, pp.53-54; Commentary of 1958, pp.38-39; Commentary of 1960, pp.35-36; Commentary of 2016, paras 554-555; Commentary of 2017, paras 575-576. *See also* Article 14(1)(c) which refers to ‘serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, including any of the following acts [...]’ (emphasis added).

<sup>24</sup> HRC, General Comment No. 35, Article 9: Liberty and security of person, (‘General Comment No.35’), para.66 ([t]he fundamental guarantee against arbitrary detention is non-derogable, [..]).

<sup>25</sup> Commentary of 1952, p.48 (Common Article 3 ‘ensures the rules of humanity which are recognized as essential by civilized nations’); ICRC, Commentary on Additional Protocol II, 1987, paras 4521, 4523 (humane treatment ‘covers all the rights of the individual, that is, the rights and qualities which are inseparable from the human being by the very fact of his existence and his mental and physical powers’).

<sup>26</sup> Kosovo, Supreme Court, *L. Gashi et al.*, Plm. Kzz. 18/2016, Verdict, 13 May 2016 (‘*Gashi Judgment*’), para.58 ([d]uring the armed conflict, the civilians shall be treated humanely, whereas arbitrary deprivation of liberty and beating is not compatible with this requirement.’)

humanely (see Rule 87), whereas arbitrary deprivation of liberty is not compatible with this requirement'.<sup>27</sup>

13. The prohibition on arbitrary detention is recognised in customary international law, including in the context of non-international armed conflicts.<sup>28</sup> That customary international law prohibition is based on state practice<sup>29</sup> and international humanitarian and human rights law.<sup>30</sup> Indeed, there is nothing anywhere in international law or state practice that permits detention other than on a lawful basis.<sup>31</sup>

14. Further, the standard for humane treatment applies equally across international humanitarian law.<sup>32</sup> Arbitrary detention is well-established as conduct which violates the principle of humane treatment, including in the form of unlawful confinement of

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<sup>27</sup> ICRC, Customary International Humanitarian Law, Volume I: Rules, Jean-Marie Henckaerts and Louise Doswald-Beck, 2005 (reprinted with corrections in 2009) ('ICRC CIL Study'), Rule 99, p.344.

<sup>28</sup> ICRC CIL Study, Rule 99, p.344. *See also* Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Columbia, 26 February 1999, para.300 (considering in the context of an internal armed conflict that 'detentions by paramilitary groups may be considered to constitute arbitrary deprivations of liberty, in violation of international humanitarian law').

<sup>29</sup> *See* ICRC CIL Study, pp.347-348. The majority of the State laws and military manuals relied upon by the ICRC, including that of the Socialist Federal Republic of Yugoslavia, were already in force between 1998 and 2000.

<sup>30</sup> ICRC CIL Study, Rule 99, pp.344, 347-352. *See also* Universal Declaration of Human Rights ('UDHR'), Article 9; International Covenant on Civil and Political Rights ('ICCPR'), Article 9; European Convention on Human Rights ('ECHR'), Article 5; American Convention on Human Rights ('ACHR'), Article 7; *Gashi* Judgment, para.57 ('international humanitarian law and human rights law strictly prevents detention unless there are clearly established needs, in particular security needs, and provides certain conditions and procedures to prevent disappearance and to supervise the continued need for detention').

<sup>31</sup> ICRC CIL Study, Rule 99, p.347 ('[n]o official contrary practice was found with respect to either international or non-international armed conflicts. Alleged cases of unlawful deprivation of liberty have been condemned').

<sup>32</sup> Commentary of 2017, para.1422 ('[g]iven that it is based on the fundamental concept of human dignity, the standard of humane treatment is the same for all categories of protected persons and applies equally in international and non-international armed conflict'); ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, 16 November 1998 ('*Delalić et al.* Trial Judgment'), para.543 ('acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment').

protected persons as a grave breach of the Geneva Conventions<sup>33</sup> and imprisonment as a crime against humanity.<sup>34</sup>

15. Finally, the fair trial rights guaranteed in Common Article 3(1)(d)<sup>35</sup> are necessarily incompatible with the possibility of permitting arbitrary detention in a non-international armed conflict. It would be pointless to oblige a party to the conflict to respect the fair trial rights of a detainee if, at the same time, that party is free to bypass that requirement by carrying out detentions without any legal basis or basic procedural guarantees.<sup>36</sup> Hence, the prohibition of arbitrary detention as a threshold matter is implicit in Common Article 3.

### **b. Arbitrary detention is serious**

16. Arbitrary detention is 'serious', within the meaning of Article 14(1)(c), because it constitutes a breach of a rule protecting important values, which involves grave consequences for the victim.<sup>37</sup> As set out above, protection from arbitrary detention

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<sup>33</sup> Commentary of 2016, paras 2977-2978 (describing inhuman treatment as the 'umbrella' under which all of the grave breaches fall; unlawful confinement of civilians is a grave breach pursuant to Article 147 of the Fourth Geneva Convention); *Delalić et al.* Trial Judgment, para.543 (similarly describing grave breaches as falling under the umbrella of inhuman treatment). *See also* ICTY, *Prosecutor v. Blaškić*, IT-95-14-T, Judgment, 3 March 2000, para.154.

<sup>34</sup> Article 13(1)(j) ('other *inhumane* acts') (emphasis added) indicates that the other enumerated crimes against humanity, including imprisonment (Article 13(1)(e)), are also inhuman. *See also* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),S/25704, 3 May 1993, para. 48 ('Crimes against humanity refer to *inhumane* acts of a very serious nature' (emphasis added)).

<sup>35</sup> *See also* Article 14(1)(c)(iv) and Articles 2(2) and 6 of Additional Protocol II.

<sup>36</sup> *See, similarly*, General Comment No.35, para.14 ('[t]he regime must not amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections'). *See also* ECCC, *Nuon and Samphan*, 002/19-09-2007/ECCC/TC, Case 002/02 Judgment, 16 November 2018 ('Case 002/02 Trial Judgment'), para.2584 ('[t]he arbitrary arrests, the systematic failure to inform and sufficiently particularise the charges levelled against prisoners that allegedly caused their detention, the prolonged detention without access to procedural safeguards or any ability to challenge their detention all demonstrates the flagrant, deliberate and continuous denial of due process rights that constitutes arbitrary detention contrary to international law').

<sup>37</sup> *See, similarly*, ICTY, *Prosecutor v. Tadić*, IT-94-1-PT, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 90, 94(iii) (considering the standard of a 'serious' violation of the laws or customs of war for the purposes of Article 3 of the ICTY Statute).



constitutes a fundamental, non-derogable right.<sup>38</sup> The prohibition of arbitrary detention protects rights of life, liberty and security of person.<sup>39</sup> According to the Human Rights Committee, '[l]iberty and security of person are precious for their own sake, and also because the deprivation of liberty and security of person have historically been principle means for impairing the enjoyment of other rights'.<sup>40</sup> Indeed, arbitrary detention creates or increases the risk of torture and other ill-treatment.<sup>41</sup>

17. These considerations are particularly important in a context where, as is the case with the armed conflict under consideration,<sup>42</sup> arbitrary detention was carried out on a very large scale and formed an integral part of the perpetrators' conduct.

### c. Elements

18. The basic elements of arbitrary detention have been consistently defined, including in the context of unlawful confinement as a grave breach and imprisonment as a crime against humanity. Given that the prohibition on arbitrary detention is common to both international humanitarian and human rights law,<sup>43</sup> courts, in defining the elements of arbitrary detention, have had regard to procedural and other guarantees in the Geneva Conventions, Additional Protocols to the Geneva Conventions and human rights instruments, such as the UDHR, ICCPR, ACHR, and ECHR.<sup>44</sup>

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<sup>38</sup> See para.12 above; General Comment No.35, para.66 ('[t]he fundamental guarantee against arbitrary detention is non-derogable, [..]').

<sup>39</sup> General Comment No.35, paras 2, 55. See also ICRC CIL Study, Rule 99, p.344 (noting the role of the procedural requirements of the prohibition in preventing disappearances).

<sup>40</sup> General Comment No.35, para.2.

<sup>41</sup> General Comment No.35, paras 33, 56, 58.

<sup>42</sup> This is true not only in respect of the charges already filed, but also the broader array of conduct subject to the SPO's ongoing investigations and likely to form the subject matter of future proceedings.

<sup>43</sup> See paras 12-15 above.

<sup>44</sup> See, for example, ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Judgment, 29 November 2017 ('*Prlić et al.* Appeal Judgment'), paras 471-473 and the sources cited therein; ICTY, *Prosecutor v. Krnojelac*, IT-97-25-T, Judgment, 15 March 2002 ('*Krnojelac* Trial Judgment'), para.113; Case 002/02 Trial Judgment, paras 692-693, 780. See also ICC, Situation in the Republic of Burundi, Public Redacted Version of "Decision

19. These basic elements, in addition to relevant contextual elements and the general requirements of Common Article 3,<sup>45</sup> are:<sup>46</sup>

- (i) deprivation of an individual's liberty without due process of law;<sup>47</sup> and
- (ii) intent to deprive the individual of liberty without due process of law or in the reasonable knowledge that the act or omission is likely to cause arbitrary deprivation of liberty.

**d. Arbitrary detention is a violation of Article 142 of the FRY Code**

20. Arbitrary detention, framed as 'illegal arrests and detention', is also expressly prohibited as a war crime in Article 142 of FRY Code, and incorporated within the Specialist Chamber's jurisdiction by way of Article 15(1)(a).

21. The acts enumerated under Article 142 of the FRY Code are criminalised in so far as they constitute a violation 'of rules of international law effective at the time of war'.<sup>48</sup> As outlined above, arbitrary detention constitutes a violation of customary

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Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017 ('Burundi Decision'), para.68.

<sup>45</sup> Article 14(1)(c), (2).

<sup>46</sup> See, similarly, for the definition of the grave breach of unlawful confinement: ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgment, 26 February 2001, paras 298, 301; ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgment, 17 December 2004 ('Kordić and Čerkez Appeal Judgment'), para.73; and for the definition of the crime against humanity of imprisonment: *Kordić and Čerkez Appeal Judgment*, para.116; *Krnjelac*, Trial Judgment, para.115; Case 002/02 Trial Judgment, paras 689, 697. See also Burundi Decision, para.68.

<sup>47</sup> Deprivation of liberty has been considered to be arbitrary or illegal, and therefore without due process of law, in a wide variety of circumstances including, *inter alia*, where there is no legal basis or the legal basis is not understandable, accessible, retroactive or not applied in a consistent and predictable way to everyone equally, the detention is not based on a reasonable or genuine suspicion, the detention continues after the legal basis ceases to exist, or the detention is not in accordance with the procedures established by law. See, for example, *Prlić et al.* Appeal Judgment, paras 471-472; ICTY, *Prosecutor v. Krajisnik*, IT-0039-T, Judgment, para.753; General Comment No.35, paras 11, 17, 22-23, 43-44; Case 002/02 Trial Judgment, paras 692-693, 2579-2580, 2584; HRC, Report of the Working Group on Arbitrary Detention, A/HRC/22/44, 24 December 2012, Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, paras 62-63; UN OHCHR, Fact Sheet No. 26, The Working Group on Arbitrary Detention, May 2000; Burundi Decision, paras 68, 89.

<sup>48</sup> Article 142 of the FRY Code ('Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, [...]'). See also Article 12.

international humanitarian law applicable in a non-international armed conflict, of Common Article 3, and of international human rights law.<sup>49</sup>

22. Consequently, the elements of arbitrary detention in the framework of Article 142 of the FRY Code, consistent with the prohibition under international law, and in addition to relevant contextual elements, are:

- (i) deprivation of an individual's liberty without due process of law; and
- (ii) intent to deprive the individual of liberty without due process of law or in the reasonable knowledge that the act or omission is likely to cause arbitrary deprivation of liberty.

## V. CLASSIFICATION

23. This filing and its annexes are submitted as strictly confidential and *ex parte* in accordance with Rule 82(4).

## VI. RELIEF REQUESTED

24. For the foregoing reasons, the SPO requests that the Pre-Trial Judge:
- a. Confirm the Revised Indictment;
  - b. Issue an arrest warrant, authorisation for search and seizure, and transfer order, in the terms requested in Section B(4)-(6) of the Initial Submission;
  - c. Order the interim non-disclosure of witness and victim identities, in the terms requested in Section C of the Initial Submission and paragraph 8 above; and

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<sup>49</sup> See paras 11-15 above. It is well-established that international human rights law, including the right to liberty and security of person, remains applicable in times of armed conflict. See General Comment No.35, para.64; International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p.178, para.106.

- d. Order the temporary non-disclosure to the public of the Revised Indictment, related documents and information, in the terms requested in Section D of the Initial Submission.

**Word count: 3,974**



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**Jack Smith**

**Specialist Prosecutor**

Wednesday, 2 October 2020

At The Hague, the Netherlands.