



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**In:** KSC-BC-2020-05  
**The Specialist Prosecutor v. Salih Mustafa**

**Before:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Date:** 5 October 2020

**Language:** English

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**Public Redacted Version of Decision on the Confirmation of the Indictment  
Against Salih Mustafa**

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**THE PRE-TRIAL JUDGE**,<sup>1</sup> pursuant to Article 39(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 86 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby issues the following decision.

## I. PROCEDURAL BACKGROUND

1. On 14 February 2020, the Specialist Prosecutor submitted for confirmation a strictly confidential and *ex parte* indictment ("Indictment") together with evidentiary material supporting the facts underpinning the charges and a detailed outline demonstrating the relevance of each item of evidentiary material to each allegation.<sup>2</sup>

2. On 28 February 2020, the Pre-Trial Judge issued an order, in which he requested the Specialist Prosecutor to, *inter alia*, prepare a revised Indictment in order to provide more specificity and clarity in the charges.<sup>3</sup> The Pre-Trial Judge also requested that the Specialist Prosecutor file separate submissions regarding (i) the jurisdiction of the Specialist Chambers ("SC") over the war crime of arbitrary detention under Article 14(1)(c) of the Law, as pleaded, or under Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (1976) ("SFRY Criminal Code") and (ii) the legal elements of this offence.<sup>4</sup>

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<sup>1</sup> KSC-BC-2020-05, F00001, President, *Decision Assigning a Pre-Trial Judge*, 14 February 2020, public.

<sup>2</sup> KSC-BC-2020-05, F00002, Specialist Prosecutor, *Submission of Indictment for Confirmation and Related Requests* ("Initial Submission"), 14 February 2020, strictly confidential and *ex parte*, with Annexes 1-3, strictly confidential and *ex parte*.

<sup>3</sup> KSC-BC-2020-05, F00003, Pre-Trial Judge, *Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules* ("Order Pursuant to Rule 86(4)"), 28 February 2020, strictly confidential and *ex parte*, para. 21(b).

<sup>4</sup> Order Pursuant to Rule 86(4), para. 21(c).

3. On 18 March 2020, the Specialist Prosecutor submitted a revised Indictment for confirmation together with other information, as requested.<sup>5</sup> A further revised indictment was submitted on 20 March 2020 ("Further Revised Indictment").<sup>6</sup>

4. On 26 May 2020, the Pre-Trial Judge issued an order setting the target date for the issuance of this decision.<sup>7</sup>

## II. SUBMISSIONS

5. In the Further Revised Indictment, the Specialist Prosecutor's Office ("SPO") charges Salih Mustafa ("Mr Mustafa") with war crimes under Article 14(1)(c) of the Law committed in the context of a non-international armed conflict.<sup>8</sup> More specifically, the SPO alleges that arbitrary detention (Count 1),<sup>9</sup> cruel treatment (Count 2),<sup>10</sup> and torture (Count 3)<sup>11</sup> were committed between approximately 1 April 1999 and 19 April 1999 in Zllash/Zlaš, Kosovo.<sup>12</sup> In addition, the SPO alleges that murder (Count 4) was committed between approximately 19 April 1999 and around the end of April 1999 in the same location.<sup>13</sup> According to the SPO, Mr Mustafa incurs individual criminal responsibility under Article 16(1)(a) of the Law for having physically committed, ordered and/or instigated the crimes under Counts 1-3.<sup>14</sup> Mr Mustafa is also alleged to have

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<sup>5</sup> KSC-BC-2020-05, F00004, Specialist Prosecutor, *Submission of Revised Indictment for Confirmation and Related Requests* ("Second Submission"), 18 March 2020, strictly confidential and *ex parte* with Annexes 1 and 2, strictly confidential and *ex parte*.

<sup>6</sup> KSC-BC-2020-05, F00005, Specialist Prosecutor, *Submission of Further Revised Indictment for Confirmation* ("Third Submission"), 20 March 2020, strictly confidential and *ex parte*, with Annex 1 ("Further Revised Indictment"), strictly confidential and *ex parte*.

<sup>7</sup> KSC-BC-2020-05, F00006, Pre-Trial Judge, *Order Setting Target Date for a Decision Pursuant to Article 39(2)*, 26 May 2020, strictly confidential and *ex parte*.

<sup>8</sup> Further Revised Indictment, paras 3-6, 35.

<sup>9</sup> Further Revised Indictment, paras 18-20, 35.

<sup>10</sup> Further Revised Indictment, paras 21-28, 35.

<sup>11</sup> Further Revised Indictment, paras 29-30, 35.

<sup>12</sup> Further Revised Indictment, paras 5, 35.

<sup>13</sup> Further Revised Indictment, paras 31-33, 35.

<sup>14</sup> Further Revised Indictment, paras 12-13, 34.

committed between approximately 1 April 1999 and around the end of April 1999 through a joint criminal enterprise (in its basic and extended forms),<sup>15</sup> and/or aided and abetted,<sup>16</sup> the crimes under Counts 1-4. In the alternative, the SPO alleges that Mr Mustafa is individually criminally responsible as a superior for the crimes under Counts 1-4 pursuant to Article 16(1)(c) of the Law.<sup>17</sup> Additionally, the SPO contends that Mr Mustafa is responsible for the aforementioned war crimes set out in Counts 1-4 under Articles 15(1)(a) and 16(2) of the Law in conjunction with Articles 22, 24, 26, 30, 142 and 145 of the SFRY Criminal Code.<sup>18</sup>

6. The SPO requests that the Pre-Trial Judge (i) confirm the Further Revised Indictment<sup>19</sup> and (ii) issue an arrest warrant, authorisation for search and seizure, and transfer order.<sup>20</sup>

7. In addition, the SPO requests the temporary non-disclosure of the Further Revised Indictment and related documents to the public until further order<sup>21</sup> as well as the interim non-disclosure of the identities of witnesses and victims until appropriate protective measures have been ordered.<sup>22</sup> The SPO submits that there are real risks of Mr Mustafa's flight,<sup>23</sup> interference with witnesses and victims,<sup>24</sup>

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<sup>15</sup> Further Revised Indictment, paras 8, 34. With respect to Count 4, the SPO alternatively alleges that Mr Mustafa committed the crime through the extended form of joint criminal enterprise, see Further Revised Indictment, para. 8.

<sup>16</sup> Further Revised Indictment, paras 11, 34.

<sup>17</sup> Further Revised Indictment, paras 14-17, 34.

<sup>18</sup> Further Revised Indictment, para. 35.

<sup>19</sup> Third Submission, para. 3.

<sup>20</sup> Third Submission, para. 3. The SPO incorporates by reference its submissions made with respect to these requests in its Initial Submission, Section B(4)-(6), see Second Submission, paras 7, 24(b).

<sup>21</sup> Third Submission, para. 3. The SPO incorporates by reference its submissions made with respect to these requests in its Initial Submission, Section D, see Second Submission, paras 7-8, 24(d).

<sup>22</sup> Third Submission, para. 3. The SPO incorporates by reference its submissions made with respect to these requests in its Initial Submission, Section C, see Second Submission, paras 7-8, 24(c).

<sup>23</sup> Initial Submission, paras 6-7.

<sup>24</sup> Initial Submission, paras 8-11.

and the commission of further crimes<sup>25</sup> that demonstrate good cause justifying these requests.

8. To effectuate the non-disclosure of the identities of victims and witnesses, the SPO requests: (i) the non-disclosure of the name and identifying information of witnesses and victims to the public; (ii) redactions to the supporting material of identifying information and the assignment of provisional pseudonyms to witnesses and victims named in the supporting material prior to disclosure to the Accused or the public; and (iii) the continuation of non-disclosure until further decision on application from the SPO or after hearing the SPO.<sup>26</sup>

### III. APPLICABLE LAW

#### A. REVIEW OF INDICTMENT

9. Article 39(1) and (2) of the Law and Rule 86(4) of the Rules provide that the Pre-Trial Judge shall have the power to review an indictment. Pursuant to Article 39(2) of the Law and Rule 86(4) and (5) of the Rules, if satisfied that a well-grounded suspicion has been established by the Specialist Prosecutor, the Pre-Trial Judge shall confirm the indictment. If the Pre-Trial Judge is not so satisfied, the indictment or charges therein shall be dismissed. Rule 86(5) of the Rules provides that the Pre-Trial Judge must render a reasoned decision.

10. Pursuant to Rule 86(3) of the Rules, an indictment must set forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime(s) with which the suspect is charged, in particular the alleged mode of liability in relation to the crimes charged. The indictment shall be filed together

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<sup>25</sup> Initial Submission, para. 12.

<sup>26</sup> Initial Submission, para. 21(i)-(iii).

with supporting material, i.e. evidentiary material supporting the facts underpinning the charges and a detailed outline demonstrating the relevance of each item of evidentiary material to each allegation.

11. Upon confirmation of any charge(s) of the indictment, Rule 86(6) of the Rules provides that the suspect shall have the status of an Accused and the Pre-Trial Judge may issue any other decisions or orders provided for in Article 39(3) of the Law.

12. Rule 86(8) and (10) of the Rules provides that the Registrar shall retain and prepare certified copies of the confirmed indictment bearing the seal of the Specialist Chambers and notify the President of the confirmed indictment.

#### B. CRIMES AND MODES OF LIABILITY

13. In addition to adjudicating in accordance with the Constitution of Kosovo, the Law, provisions of Kosovo law expressly incorporated in the Law, and international human rights law, Articles 3(2)(d), (3), and 12 of the Law provide that the SC shall apply customary international law, as applicable at the time the relevant crimes were committed. In determining customary international law at the time the crimes were committed, a Judge may be assisted by sources of international law, including subsidiary sources such as the jurisprudence from the international *ad hoc* tribunals, the International Criminal Court, and other criminal courts.

14. Article 14(1)(c) of the Law provides that for the purpose of this Law, under customary international law during the temporal jurisdiction of the SC, war crimes means, in the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 ("Common Article 3"), including any of the following acts committed against

persons taking no active part in hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause: (i) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture; (ii) committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) taking of hostages; and (iv) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.

15. For crimes in Article 14 of the Law, Article 16(1)(a) provides, *inter alia*, that a person who instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of such a crime shall be individually responsible for the crime. Article 16(1)(c) of the Law further provides that the fact that any of the acts or omissions were committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

#### C. MAINTAINING CONFIDENTIALITY

16. Article 39(11) of the Law stipulates that the Pre-Trial Judge may, where necessary, provide for the protection of victims and witnesses.

17. Rule 85(4) of the Rules provides that all documents and information submitted by the SPO to the Pre-Trial Judge during investigation shall remain at the least confidential and *ex parte*, subject to Rule 102 of the Rules.



18. Rule 88 of the Rules provides that the indictment shall be made public upon confirmation by the Pre-Trial Judge. However, in exceptional circumstances, upon a showing of good cause, the Pre-Trial Judge may order the temporary non-disclosure of the indictment, related documents or information to the public until further order. The indictment shall in any case be made public, with redactions, where necessary, no later than the Accused's initial appearance. The SPO may disclose an indictment or part thereof to the authorities of a Third State or another entity, if deemed necessary for the purposes of an investigation or prosecution.

19. Rule 102(1)(a) of the Rules provides that the SPO shall make available to the Accused, as soon as possible, but at least within 30 days of the initial appearance of the Accused, the supporting material to the indictment submitted for confirmation as well as all statements obtained from the Accused.

20. Rule 105(1) of the Rules provides that the SPO may apply to the Panel for interim non-disclosure of the identity of a witness or victim participating in the proceedings until appropriate protective measures have been ordered.

#### IV. JURISDICTION

21. In order to be confirmed, an indictment must fulfil the subject matter and temporal requirements, and must have either a territorial or personal basis for jurisdiction.

##### A. SUBJECT MATTER JURISDICTION

22. Article 6 of the Law provides that the SC shall have jurisdiction over crimes set out in Articles 12-15 of the Law. The war crimes of cruel treatment, torture, and murder (Counts 2-4), as pleaded by the Specialist Prosecutor, are listed in

Article 14(1)(c)(i) of the Law and therefore fall within the subject matter jurisdiction of the Specialist Chambers.

23. In the Further Revised Indictment, the SPO submits that Mr Mustafa is also criminally responsible for the war crime of arbitrary detention (Count 1), in violation of Article 14(1)(c) of the Law.<sup>27</sup> While this provision does not explicitly list arbitrary detention as a war crime in non-international armed conflict, it does not limit the crimes falling under SC jurisdiction to those expressly enumerated therein. Nonetheless, in order to exercise jurisdiction over a war crime that is not listed in Article 14(1)(c)(i)-(iv) of the Law, such crime must: (i) constitute a serious violation of Common Article 3; and (ii) be prohibited by customary international law at the time of its commission, in conformity with Articles 3(2)(d) and 12 of the Law.

24. Common Article 3 provides that “persons taking no active part in hostilities, including [...] those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely [...]”. This protection, also stipulated in Article 4(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) of 8 June 1977, must be enforced by all parties to the armed conflict and must be afforded to all detained persons, irrespective of the reason for deprivation of liberty.<sup>28</sup> The requirement of humane treatment constitutes a fundamental obligation of international humanitarian law

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<sup>27</sup> Further Revised Indictment, paras 18-20, 35.

<sup>28</sup> ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2<sup>nd</sup> edition, 2016 (“2016 ICRC Commentary”) states regarding Common Article 3: “it is undisputed that the substantive provisions of common Article 3 bind all such armed groups when they are party to an armed conflict” (para. 508). *See also* ICRC, *Commentary on the Additional Protocols to the Geneva Conventions*, 1987 (“1987 ICRC Commentary to Additional Protocol II”) regarding Article 1 (paras 4460, 4470). Regarding Article 5, the 1987 ICRC Commentary to Additional Protocol II clarifies that the expression “those who are responsible for the internment or the detention” refers to “persons who are responsible *de facto* for camps, prisons, or any other places of detention, independently of any recognized legal authority” (para. 4582).

("IHL") and reflects customary international law.<sup>29</sup> It is broader than the prohibitions expressly listed in Common Article 3, which serve as examples of conduct that is indisputably in violation of the provision.<sup>30</sup>

25. Deprivation of liberty without a legal basis or in violation of basic safeguards is not compatible with and violates the requirement of humane treatment of all persons placed *hors de combat*, including by detention, as enshrined in Common Article 3.<sup>31</sup>

26. Customary international law prohibits arbitrary deprivation of liberty. Extensive state practice, in the form of, *inter alia*, military manuals, criminal legislation, documents of international organisations and conferences, and international judicial and quasi-judicial bodies, establishes the applicability of this prohibition in both international and non-international armed conflicts.<sup>32</sup> This has also been confirmed by the ICRC in Rule 99 of its 2005 Customary International Humanitarian Law Study.<sup>33</sup>

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<sup>29</sup> See Rule 87, in Henckaerts J.-M., Doswald-Beck L., *Customary International Humanitarian Law* ("CIHL Study"), Vol. I (Rules), Cambridge University Press 2005, p. 306. See also ICJ, *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, [Judgment of 27 June 1986](#), para. 218; ICTY, *Prosecutor v. Tadić*, IT-94-1-AR72, Appeals Chamber, [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction](#) ("Tadić Decision on Jurisdiction"), 2 October 1995, para. 98.

<sup>30</sup> 2016 ICRC Commentary regarding Common Article 3, para. 555; ICTY, *Prosecutor v. Aleksovski*, I-95-14/1, Trial Chamber, [Judgement](#), 25 June 1999, para. 49.

<sup>31</sup> Rule 99, CIHL Study, Vol. I (Rules), p. 344.

<sup>32</sup> See the practice referred to in Rule 99, CIHL Study, Vol. I (Rules), p. 347; Vol. II (Practice), pp. 2331-2344, in particular pp. 2331 (para. 2555), 2332 (para. 2563), 2333 (paras 2576, 2579, 2580), 2334 (para. 2593), 2335 (paras 2599, 2600, 2605), 2336 (paras 2606, 2607, 2608, 2611); UN Security Council Resolutions: 1019 (1995), U.N. Doc. S/RES/1019, 9 November 1995; 1034 (1995), U.N. Doc. S/RES/1034, 21 December 1995; UN General Assembly Resolution 50/193 (1996), U.N. Doc. A/RES/50/193, 11 March 1996; UN Commission on Human Rights, Situation of human rights in the Republic of Bosnia and Herzegovina, the State of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro), U.N. Doc. E/CN.4/RES/1996/71, 23 April 1996; UN Commission on Human Rights, Situation of human rights in the Sudan, U.N. Doc. E/CN.4/RES/1996/73, 23 April 1996, para. 15. See also Article 142 of the SFRY Criminal Code.

<sup>33</sup> Rule 99, CIHL Study, Vol. I (Rules), p. 344.

27. In light of the foregoing, the Pre-Trial Judge finds that arbitrary detention constitutes a serious violation of Common Article 3 and was prohibited by customary international law at the time of commission of the crimes alleged in the Further Revised Indictment. The status of the law, at the national and international level, was sufficiently clear and foreseeable to anticipate that depriving someone of his or her liberty in an arbitrary manner might give rise to individual criminal responsibility.<sup>34</sup>

28. Accordingly, the Pre-Trial Judge concludes that the SC may exercise jurisdiction over this war crime under Article 14(1)(c) in combination with Article 12 of the Law.

#### B. TEMPORAL JURISDICTION

29. Article 7 of the Law provides that the SC shall have jurisdiction over crimes within its subject matter jurisdiction, which occurred between 1 January 1998 and 31 December 2000. As the Specialist Prosecutor has alleged that the crimes under Counts 1-3 were committed between approximately 1 April 1999 and 19 April 1999, and the crime under Count 4 was committed between approximately 19 April 1999 and around the end of April 1999,<sup>35</sup> the Pre-Trial Judge finds that the crimes fall within SC temporal jurisdiction.

#### C. TERRITORIAL OR PERSONAL JURISDICTION

30. Pursuant to Article 8 of the Law, the SC shall have jurisdiction over crimes within its subject matter jurisdiction, which were either commenced or committed in Kosovo. Pursuant to Article 9(2) of the Law, the SC shall have personal

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<sup>34</sup> See also Article 142 of the SFRY Criminal Code.

<sup>35</sup> Further Revised Indictment, para. 35; [REDACTED].

jurisdiction when the suspect is a person having Kosovo/Federal Republic of Yugoslavia ("FRY") citizenship (active personality principle) or crimes are committed against persons of Kosovo/FRY citizenship (passive personality principle), wherever those crimes were committed. The territorial and personal jurisdictional bases are thus in the alternative. Satisfying one of these requirements is sufficient to reach an affirmative finding on jurisdiction.

31. The crimes alleged by the Specialist Prosecutor occurred in Zllash/Zlaš, Kosovo.<sup>36</sup> The Pre-Trial Judge therefore finds that the territorial jurisdiction requirement of Article 8 of the Law has been met.

32. In light of the foregoing, the Pre-Trial Judge finds that the case falls within the jurisdiction of the SC.

## V. LEGAL REQUIREMENTS

### A. NATURE AND SCOPE OF THE REVIEW

#### 1. Nature of the Review

33. The confirmation of the indictment is an *ex parte* process without the involvement of the Defence. Judicial review ensures that only those charges are considered at trial for which sufficient evidence has been presented. It also ensures that the indictment provides the Accused with sufficient information to understand clearly and fully the nature and cause of the charges against him or her with a view to preparing an adequate defence.<sup>37</sup>

34. Pursuant to Article 38(4) of the Law and Rule 86(1) of the Rules, the Specialist Prosecutor submits the indictment, together with supporting material, for review

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<sup>36</sup> Further Revised Indictment, para. 5; [REDACTED].

<sup>37</sup> Order Pursuant to Rule 86(4), para. 9.

by the Pre-Trial Judge. During the review process, the Pre-Trial Judge determines whether the indictment meets the requirements under Rule 86(3) of the Rules, in particular the sufficiency of information as regards the name and particulars of the suspect, the statement of facts and the statement of crimes,<sup>38</sup> and whether there is a need to revert to the Specialist Prosecutor, pursuant to Rule 86(4)(a)-(c) of the Rules. Notably, the Pre-Trial Judge may request or permit the Specialist Prosecutor to present additional material in support of any or all charges. Subsequently, pursuant to Article 39(2) of the Law and the chapeau of Rule 86(4) of the Rules, the Pre-Trial Judge examines the supporting material in relation to each charge in the indictment, to determine whether the SPO has established a well-grounded suspicion that the suspect committed or participated in the commission of a crime under the jurisdiction of the SC.

35. While neither the Law nor the Rules define well-grounded suspicion, the threshold is clearly differentiated from other evidentiary standards provided in the SC's legal framework. The Law establishes four progressively higher evidentiary thresholds: (i) grounds to believe (in Article 38(3)(a) of the Law regarding the status of suspects); (ii) grounded suspicion (in Article 41(6) of the Law regarding arrest warrants by the SC or arrest orders by the SPO); (iii) well-grounded suspicion (in Article 39(3) of the Law and Rule 86(4) of the Rules regarding the confirmation of an indictment); and (iv) beyond reasonable doubt (in Article 21(3) of the Law and Rule 158(3) of the Rules regarding convictions). As the threshold for triggering proceedings against an Accused, well-grounded suspicion is necessarily more onerous than those required for ascertaining

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<sup>38</sup> In this respect, the Pre-Trial Judge must give due regard to the rights of the Accused set out in Article 21(4)(a), (c) and (d) of the Law, which echoes Article 6(1), (3)(a) and (b) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14(3)(a), (b) and (c) of the International Covenant on Civil and Political Rights.

suspects and ordering arrests, and is evidently less demanding than the standard for conviction following trial.

36. The Pre-Trial Judge notes that, according to Article 19.1.12 of the Kosovo Criminal Procedure Code of 2012, No. 04/L-123 ("CPC"), well-grounded suspicion is reached when the evidence "would satisfy an objective observer that a criminal offence has occurred and the defendant has committed the offence".<sup>39</sup> Notably, it is not sufficient, as required for grounded suspicion under Article 19.1.9 CPC, that the objective observer be satisfied that "the person concerned is more likely than not to have committed the offence".

37. Therefore, while falling short of the certainty of a proven fact, determining the existence of well-grounded suspicion nevertheless requires a conviction on the part of the Pre-Trial Judge, beyond mere theory or suspicion, that (i) the contextual elements of the crime (if any) are present; (ii) the underlying acts or crimes have indeed occurred; and (iii) the suspect committed or participated in the commission of the crime through the alleged mode(s) of liability. The Pre-Trial Judge bases such findings on concrete and tangible supporting material, demonstrating a clear line of reasoning underpinning the charges in the indictment. In so doing, the Pre-Trial Judge evaluates the supporting material holistically, without scrutinising each item of evidentiary material in isolation.<sup>40</sup>

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<sup>39</sup> "Objective" is defined as "not influenced by personal feelings or opinions in considering and representing facts; impartial, detached", see *OED Online* (Oxford University Press, December 2019), available at <https://www.oed.com/view/Entry/129634?redirectedFrom=objective#eid> (last accessed 12 June 2020).

<sup>40</sup> Similarly, ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, [\*Decision on the Confirmation of Charges\*](#), 29 January 2007, para. 39; *Prosecutor v. Gbagbo*, ICC-02/11-01/11-656-Red, Pre-Trial Chamber I, [\*Decision on the Confirmation of Charges Against Laurent Gbagbo\*](#), 12 June 2014, para. 22.



## 2. Scope of the Review

38. Pursuant to Rule 86(4) of the Rules, to determine whether a well-grounded suspicion exists, the Pre-Trial Judge examines the indictment, the detailed outline and the supporting material only, without regard to any extraneous information or material, albeit publicly available. Accordingly, the Pre-Trial Judge may confirm or dismiss the indictment based solely on the information and evidentiary material submitted by the SPO.<sup>41</sup>

39. As part of the review process, the Pre-Trial Judge conducts a preliminary assessment of the supporting material, without encroaching on the prerogatives of the Trial Panel in determining the admissibility and weight of the evidence, as set out in Rules 137-139 of the Rules.<sup>42</sup> That being said, the Pre-Trial Judge shall not rely on material that is manifestly (i) non-authentic or (ii) obtained by means of a violation of the Law, the Rules, or standards of international human rights law, or under torture or any other inhumane or degrading treatment, as provided in Rule 138(2)-(3) of the Rules.

## B. ELEMENTS OF CRIMES

### 1. Contextual Requirements: War Crimes

40. The contextual requirements for war crimes committed in the context of an armed conflict not of an international character consist of: (i) the existence of an armed conflict of certain intensity in the territory of a state between organs of authority and organised armed groups or between such groups; (ii) a nexus

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<sup>41</sup> Similarly, STL, *Prosecutor v. Ayyash et al.*, STL-17-07/I/AC/R176bis, Appeals Chamber, [Interlocutory Decision on the Applicable Law: Criminal Association and Review of the Indictment](#), 18 October 2017, para. 111.

<sup>42</sup> Similarly, STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I, Pre-Trial Judge, [Decision Relating to the Examination of the Indictment of 10 June 2011 Issued Against Mr Salim Jamil Ayyash, Mr Mustafa Badreddine, Mr Hussein Hassan Oneissi & Mr Assad Hassan Sabra](#), 28 June 2011, para. 26.



between the underlying offence and the armed conflict; and (iii) knowledge of the existence of the armed conflict.

(a) Existence of an armed conflict

41. Article 14(2) of the Law provides that armed conflicts not of an international character take place in the territory of a state when there is protracted armed conflict between the organs of authority and organised armed groups or between such groups.<sup>43</sup>

42. Armed conflicts are characterised by the outbreak of hostilities that take place in the territory of a state.

43. In relation to the parties to the hostilities, Article 14(2) of the Law mentions two categories of possible parties to the armed conflict that ought to be construed in compliance with customary international law. "Organs of authority" include governmental authorities, such as a state's regular armed forces, police units, national guards or other authorities of a similar nature,<sup>44</sup> including armed groups and militias incorporated in armed forces.<sup>45</sup> "Organised armed groups" imply a degree of organisation but "do not necessarily need to be as organised as the armed forces of a State".<sup>46</sup> They do not need to carry out sustained and concerted

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<sup>43</sup> ICTY, [Tadić Decision on Jurisdiction](#), para. 70; *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-A, Appeals Chamber, [Judgement](#) ("Boškoski and Tarčulovski Appeal Judgment"), 19 May 2010, para. 21. See also ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2359, Trial Chamber VI, [Judgment](#) ("Ntaganda Trial Judgment"), 8 July 2019, para. 701; *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Trial Chamber I, [Judgment Pursuant to Article 74 of the Statute](#) ("Lubanga Trial Judgment"), 14 March 2012, para. 533.

<sup>44</sup> ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-T, [Judgement](#) ("Boškoski and Tarčulovski Trial Judgment"), 10 July 2008, paras 178, 195.

<sup>45</sup> Article 43(3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), of 8 June 1977.

<sup>46</sup> ICTY, [Boškoski and Tarčulovski Trial Judgment](#), paras 195, 197; *Prosecutor v. Orić*, IT-03-68-T, Trial Chamber, [Judgement](#) ("Orić Trial Judgment"), 30 June 2006, para. 254; *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Trial Chamber, [Judgement](#) ("Haradinaj Trial Judgment"), 3 April 2008, para. 60; *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Chamber, [Judgement](#) ("Limaj et al. Trial Judgment"), 30 November 2005, para. 89.

military operations, but they must be sufficiently organised to confront each other with military means.<sup>47</sup> When deciding whether a non-state entity can carry out protracted armed violence, the following indicative factors may be taken into account: (i) existence of a command structure, including headquarters, a general staff or high command, identifiable ranks and positions, and internal regulations; (ii) issuance of political statements or communiqués and the use of spokespersons; (iii) operational capacity and the ability to carry out military operations; (iv) logistical capacity, including the availability of weapons and equipment, and the capacity to move troops and to recruit and train personnel; (v) territorial control, including a division into zones of responsibility; (vi) internal disciplinary system, including the implementation of IHL through the armed group's ranks; and (vii) ability to speak with one voice on behalf of the armed group, for example in political negotiations or cease-fire agreements.<sup>48</sup>

44. In relation to the level of intensity of the conflict, Article 14(2) of the Law requires that hostilities between the parties must reach a certain degree of intensity, exceeding internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature. In this context, the notion of “protracted armed violence” informs the intensity test as it refers “more to the intensity of the armed violence than its duration”.<sup>49</sup> Intensity may be inferred from, for example: (i) the seriousness and frequency of attacks; (ii) their spread over the territory and over a period of time, and whether any ceasefire orders have

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<sup>47</sup> ICTY, [Boškoski and Tarčulovski Trial Judgment](#), paras 197-198.

<sup>48</sup> See also Article 1(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International armed Conflicts (Protocol II), of 8 June 1977 (“Additional Protocol II”). See also ICTY, [Boškoski and Tarčulovski Trial Judgment](#), paras 194-203. However, the degree of organisation for an armed group to a conflict to which Common Article 3 applies, does not need to be at the level of organisation required for parties to Additional Protocol II armed conflicts, see ICTY, [Boškoski and Tarčulovski Trial Judgment](#), para. 197.

<sup>49</sup> ICTY, [Haradinaj Trial Judgment](#), para. 49; See also *Prosecutor v. Kordić and Čerkez*, IT-95-14-A, Appeals Chamber, [Judgment](#) (“Kordić and Čerkez Appeal Judgment”), 17 December 2004, para. 341; *Prosecutor v. Tadić*, IT-94-1-T, Trial Chamber, [Opinion and Judgment](#), 7 May 1997, para. 562.

been issued; (iii) the increase and number of forces deployed; (iv) the mobilisation and distribution of weapons amongst the conflict parties; (v) the type of weapons used, in particular the use of heavy artillery; (vi) the type of military equipment, in particular the use of tanks; (vii) whether the situation attracted the attention of the United Nations Security Council, or other international organisations; (viii) the effects on the civilian population, the extent of destruction and the number of persons killed or displaced; and (ix) the manner in which the armed group was treated by others and under which body of law it claimed to be operating.<sup>50</sup>

45. Lastly, the temporal and geographical scope of armed conflicts not of an international character extends beyond the exact time and place of hostilities; the applicable rules apply beyond the cessation of hostilities until a peaceful settlement is achieved.<sup>51</sup> Thus, the norms of IHL apply regardless of whether actual combat activities are taking place in a particular location.<sup>52</sup> In case of persons whose liberty has been restricted, IHL continues to apply until such deprivation or restriction of liberty comes to an end.<sup>53</sup>

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<sup>50</sup> ICTY, [Boškoski and Tarčulovski Trial Judgment](#), para. 177, confirmed by the [Boškoski and Tarčulovski Appeal Judgment](#), paras 22 and 24; ICC, [Ntaganda Trial Judgment](#), paras 703-704, 716; *Prosecutor v. Bemba*, ICC-01/05-01/08-3343, Trial Chamber III, [Judgment Pursuant to Article 74 of the Statute](#) ("Bemba Trial Judgment"), 21 March 2016, para. 137; [Lubanga Trial Judgment](#), para. 538; *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-tENG, Trial Chamber II, [Judgment Pursuant to Article 74 of the Statute](#) ("Katanga Trial Judgment"), 7 March 2014, paras 1186-1187.

<sup>51</sup> ICTY, [Tadić Decision on Jurisdiction](#), paras 67-70; [Limaj et al. Trial Judgment](#), para. 84; *Prosecutor v. Vasiljević*, IT-98-32-T, Trial Chamber, [Judgment](#), 29 November 2002, para. 25; *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Appeals Chamber, [Judgment](#) ("Kunarac et al. Appeal Judgment"), 12 June 2002, para. 57.

<sup>52</sup> ICTY, [Orić Trial Judgment](#), para. 255; [Tadić Decision on Jurisdiction](#), para. 70.

<sup>53</sup> 1987 ICRC Commentary to Additional Protocol II regarding Article 2(2), paras 4491-4496.

## (b) Nexus to the armed conflict

46. The alleged crimes must be sufficiently linked with the armed conflict. The armed conflict need not have been causal to the commission of the crime charged, but it must have played, at a minimum, a substantial part in the perpetrator's ability to commit that crime, his or her decision to commit it, the manner in which it was committed, or the purpose for which it was committed.<sup>54</sup> In determining the nexus, heed may be paid: (i) to the status of the perpetrator and victim; (ii) whether the act serves the ultimate goal of a military campaign; or (iii) whether the act was committed as part of, or in context of, the perpetrator's official duties.<sup>55</sup>

## (c) Awareness of the existence of the armed conflict

47. The perpetrator must be aware of the factual circumstances establishing the armed conflict not of an international character.<sup>56</sup> Knowledge of the correct legal classification of the armed conflict is not necessary.<sup>57</sup>

## 2. Specific Requirements: War Crimes

48. All crimes must be committed against protected persons. The chapeau of Article 14(1)(c) of the Law referring to Common Article 3(1) requires that the victim was not actively taking part in the hostilities at the time the offence was

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<sup>54</sup> ICTY, [Kunarac et al. Appeal Judgment](#), para. 58; *Prosecutor v. Stakić*, IT-97-24-A, Appeals Chamber, [Judgement](#) ("Stakić Appeal Judgment"), 22 March 2006, para. 342; [Tadić Decision on Jurisdiction](#), para. 70; ICTR, *Setako v. Prosecutor*, ICTR-04-81-A, Appeals Chamber, [Judgement](#) ("Setako Appeal Judgment"), 28 September 2011, para. 249; *Rutaganda v. Prosecutor*, ICTR-96-3-A, Appeals Chamber, [Judgement](#), 26 May 2003, paras 569-570.

<sup>55</sup> ICTY, [Kunarac et al. Appeal Judgment](#), para. 59; ICC, [Bemba Trial Judgment](#), para. 143.

<sup>56</sup> ICTY, *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Appeals Chamber, [Judgement](#) ("Naletilić and Martinović Appeal Judgment"), 3 May 2006, paras 118-121; [Boškoski and Tarčulovski Trial Judgment](#), para. 295. See also ICC, [Ntaganda Trial Judgment](#), para. 698.

<sup>57</sup> ICTY, [Naletilić and Martinović Appeal Judgment](#), para. 119; [Kordić and Čerkez Appeal Judgment](#), para. 311.

committed.<sup>58</sup> Active participation in hostilities means carrying out acts as part of the conduct of hostilities intended by their nature or purpose to cause actual harm to the personnel or equipment of the adverse party.<sup>59</sup> Persons taking no active part in 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, are protected under Common Article 3. The perpetrator must know or should have known the status of the victims as persons taking no active part in the hostilities.<sup>60</sup>

(a) Arbitrary Detention

***Material elements (actus reus)***

49. The crime of arbitrary detention as a war crime, within the meaning of Article 14(1)(c) of the Law, is committed through an act or omission resulting in depriving a person not taking active part in hostilities of his or her liberty without legal basis or without complying with basic procedural safeguards.

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<sup>58</sup> ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.9, Appeals Chamber, [Decision on Appeal from Denial of Judgment of Acquittal for Hostage-Taking](#) ("Karadžić Decision 11 December 2012"), 11 December 2012, paras 8, 21; IT-95-5/18-AR72.5, Appeals Chamber, [Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment](#), 9 July 2009, paras 22-26; *Boškoski and Tarčulovski Appeal Judgment*, para. 66; *Prosecutor v. Strugar*, IT-01-42-A, Appeals Chamber, [Judgment](#) ("Strugar Appeal Judgment"), 17 July 2008, paras 172, 178; *Prosecutor v. Mucić et al.*, IT-96-21-A, Appeals Chamber, [Judgment](#) ("Mucić et al. Appeal Judgment"), 20 February 2001, paras 420, 424.

<sup>59</sup> ICTY, [Strugar Appeal Judgment](#), para. 178; ICC, [Katanga Trial Judgment](#), paras 789-790. See also Article 13(3) of Additional Protocol II.

<sup>60</sup> ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Trial Chamber, [Judgment](#) ("Mladić Trial Judgment"), 22 November 2017, para. 3017; [Karadžić Decision 11 December 2012](#), para. 22; *Boškoski and Tarčulovski Appeal Judgment*, para. 66.

50. The deprivation of liberty is without legal basis when it is justified neither by criminal proceedings nor by reasonable grounds to believe that security concerns make it absolutely necessary.<sup>61</sup>

51. The basic procedural safeguards encompass, in particular (i) the obligation to inform a person who is arrested of the reasons for arrest; (ii) the obligation to bring a person arrested on a criminal charge promptly before a judge or other competent authority; and (iii) the obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention.<sup>62</sup>

52. When assessing the compliance with basic procedural safeguards, it is irrelevant whether (i) the initial deprivation of liberty was justified<sup>63</sup> or (ii) the perpetrator is personally responsible for the failure to have the detainee's procedural rights respected.<sup>64</sup>

### *Mental element (mens rea)*

53. The perpetrator must have acted intentionally in relation to his or her conduct. In addition, the perpetrator must have no reasonable grounds to believe that security concerns of the parties to the conflict make the detention absolutely necessary, or the perpetrator must know that the detainees have not been afforded the requisite procedural guarantees, or be reckless as to whether those guarantees have been afforded or not.<sup>65</sup>

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<sup>61</sup> ICTY, [Mucić et al. Appeal Judgment](#), paras 320-322; [Kordić and Čerkez Appeal Judgment](#), paras 72-73; ECCC, *Co-Prosecutors v. Kaing Guek Eav*, 001/18-07-2007/ECCC/TC, Trial Chamber, [Judgment](#) ("Duch Trial Judgment"), 26 July 2010, para. 465.

<sup>62</sup> Rule 99, CIHL Study, Vol. I (Rules), pp. 349-350. *See also*, Article 6, Additional Protocol II.

<sup>63</sup> ICTY, [Mucić et al. Appeal Judgment](#), para. 322. *See also*, ICTY, [Kordić and Čerkez Appeal Judgment](#), para. 73; ECCC, [Duch Trial Judgment](#), para. 465.

<sup>64</sup> ICTY, [Mucić et al. Appeal Judgment](#), para. 379.

<sup>65</sup> ICTY, [Mucić et al. Appeal Judgment](#), para. 378.



(b) Cruel Treatment

***Material elements (actus reus)***

54. The crime of cruel treatment as a war crime, within the meaning of Article 14(1)(c)(i) of the Law, is committed through an act or omission, which causes serious mental or physical suffering or injury, or which constitutes a serious attack on human dignity.<sup>66</sup>

55. The seriousness of the harm or injury must be assessed on a case-by-case basis, taking into account such factors as: (i) the severity of the alleged conduct; (ii) the nature of the act or omission; (iii) the context in which the conduct occurred; (iv) its duration and/or repetition; (v) its physical and mental effects on the victim; and (vi) the personal circumstances of the victim, including age, gender, and health.<sup>67</sup>

56. The suffering inflicted by the act upon the victim does not need to be lasting so long as it is real and serious.<sup>68</sup>

***Mental element (mens rea)***

57. The perpetrator must have acted intentionally or with the knowledge that the serious mental or physical suffering or injury, or the serious attack on human dignity, was a probable consequence of the act or omission.<sup>69</sup>

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<sup>66</sup> ICTY, [Mucić et al. Appeal Judgment](#), paras 424. See also, ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Appeals Chamber, [Judgment](#) ("Haradinaj Appeal Judgment"), 19 July 2010, paras 93-94; *Prosecutor v. Blaškić*, IT-95-14-A, Appeals Chamber, [Judgment](#) ("Blaškić Appeal Judgment"), 29 July 2004, para. 595.

<sup>67</sup> ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Chamber, [Judgment](#) ("Popović et al. Trial Judgment"), 10 June 2010, fn. 3249; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeals Chamber, [Judgment](#) ("Kvočka et al. Appeal Judgment"), 28 February 2005, paras 584-585; *Prosecutor v. Mrkšić et al.*, IT-95-13/1-T, Trial Chamber, [Judgment](#) ("Mrkšić et al. Trial Judgment"), 27 September 2007, paras 516, 525, 537; *Prosecutor v. Krnojelac*, IT-97-25-T, Trial Chamber, [Judgment](#) ("Krnojelac Trial Judgment"), 15 March 2002, para. 131.

<sup>68</sup> ICTY, [Krnojelac Trial Judgment](#), para. 131.

<sup>69</sup> ICTY, [Popović et al. Trial Judgment](#), para. 974; [Mrkšić et al. Trial Judgment](#), para. 516; [Limaj et al. Trial Judgment](#), para. 231; *Prosecutor v. Strugar*, IT-01-42-T, Trial Chamber, [Judgment](#) ("Strugar Trial Judgment"), 31 January 2005, para. 261.

(c) Torture

***Material elements (actus reus)***

58. The crime of torture as a war crime, within the meaning of Article 14(1)(c)(i) of the Law, is committed by an act or omission inflicting severe pain or suffering, whether physical or mental upon another person.<sup>70</sup> Whether an act or omission qualifies as an act of torture must be considered on a case-by-case basis,<sup>71</sup> taking into account, for example, the (i) nature and context of the infliction of pain; (ii) premeditation and institutionalisation of the ill-treatment; (iii) physical condition of the victim; (iv) manner and method used; (v) position of inferiority of the victim; (vi) extent to which an individual has been mistreated over a prolonged period of time; (vii) subjection to repeated or various forms of mistreatment that are inter-related, follow a pattern, or are directed to the same prohibited goal.<sup>72</sup> Conditions imposed during detention such as beatings, sexual violence, prolonged denial of sleep, food, hygiene and medical assistance, as well as threats to torture, rape, or kill relatives have been considered sufficiently severe as to amount to torture.<sup>73</sup>

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<sup>70</sup> ICTY, [Haradinaj Appeal Judgment](#), para. 290; [Kunarac et al. Appeal Judgment](#), para. 142. See also, ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Pre-Trial Chamber II, [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Gombo](#), 15 June 2009, para. 292; ECCC, [Duch Trial Judgment](#), para. 354.

<sup>71</sup> ICTY, *Prosecutor v. Brđanin*, IT-99-36-A, Appeals Chamber, [Judgement](#) (“Brđanin Appeal Judgment”), 3 April 2007, para. 251; [Naletilić and Martinović Appeal Judgment](#), para. 299; [Kunarac et al. Appeal Judgment](#), para. 149.

<sup>72</sup> ICTY, *Prosecutor v. Simić et al.*, IT-95-9-T, Trial Chamber, [Judgement](#) (“Simić et al Trial Judgment”), 17 October 2003, para. 80, referring to the [Krnojelac Trial Judgment](#), para. 182. See also ECCC, [Duch Trial Judgment](#), para. 355.

<sup>73</sup> ECCC, [Duch Trial Judgment](#), para. 355, referring to ICTY, *Prosecutor v. Mucić et al.*, IT-96-21-T, Trial Chamber, [Judgement](#) (“Mucić et al. Trial Judgment”), 16 November 1998, para. 467; *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Trial Chamber, [Judgement](#) (“Kvočka et al. Trial Judgment”), 2 November 2001, para. 151.



59. The consequences of the act or omission need not be visible on the victim to constitute torture, nor is there a requirement that the injury be permanent.<sup>74</sup> There is no requirement that the perpetrator acted in a public official capacity or as person in authority.<sup>75</sup>

***Mental element (mens rea)***

60. The perpetrator must have inflicted the pain or suffering intentionally and for such purpose as obtaining information or a confession, or punishing, intimidating, coercing or discriminating against, on any ground, the victim or a third person.<sup>76</sup> It is sufficient that one of the prohibited purposes forms part of the motivation behind the conduct; it need not be the “predominant or sole purpose” behind the infliction of severe pain or suffering.<sup>77</sup>

(d) Murder

***Material elements (actus reus)***

61. The crime of murder as a war crime, within the meaning of Article 14(1)(c)(i) of the Law, is committed through an act or omission resulting in the death of a person.<sup>78</sup>

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<sup>74</sup> ECCC, [Duch Trial Judgment](#), para. 355.

<sup>75</sup> ICTY, [Kunarac et al. Appeal Judgment](#), para. 148; [Kvočka et al. Appeal Judgment](#), para. 284.

<sup>76</sup> ICTY, [Kunarac et al. Appeal Judgment](#), para. 153; [Limaj et al. Trial Judgment](#), paras 235, 239; ECCC, [Duch Trial Judgment](#), para. 356.

<sup>77</sup> ICTY, [Simić et al Trial Judgment](#), para. 81; [Kvočka et al. Trial Judgment](#), para. 153; [Mucić et al. Trial Judgment](#), para. 470; ECCC, [Duch Trial Judgment](#), para. 356.

<sup>78</sup> ICTY, [Kvočka et al. Appeal Judgment](#), paras 259-261; [Krnojelac Trial Judgment](#), paras 326-327.

### *Mental element (mens rea)*

62. The perpetrator must have killed the person intentionally or wilfully caused serious bodily harm, which the perpetrator should reasonably have known might lead to death.<sup>79</sup>

### C. MODES OF LIABILITY

63. The Specialist Prosecutor pleads the following modes of liability: commission, both direct commission and commission pursuant to a joint criminal enterprise, as well as ordering, instigating, aiding and abetting, and superior responsibility.<sup>80</sup> The objective and subjective elements of these modes of liability are set out below.

#### **1. Direct Commission (Article 16(1)(a) of the Law)**

##### (a) Objective elements

64. Direct commission requires that the perpetrator physically carries out the objective elements of a crime, or omits to act when required to do so under the law.<sup>81</sup>

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<sup>79</sup> ICTY, [Mladić Trial Judgment](#), para. 3050; [Kvočka et al. Appeal Judgment](#), para. 261; ICTR, [Setako Appeal Judgment](#), para. 257; ECCC, [Duch Trial Judgment](#), para. 333.

<sup>80</sup> Further Revised Indictment, para. 34.

<sup>81</sup> ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, [Judgment](#) (“Tadić Appeal Judgment”), 15 July 1999, para. 188; *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Trial Chamber, [Judgment](#), 17 January 2005, para. 694; *Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, Trial Chamber, [Judgment](#) (“Lukić Trial Judgment”), 20 July 2009, paras 897; ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Appeals Chamber, [Judgment](#) (“Nahimana et al. Appeal Judgment”), 28 November 2007, para. 478; *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Appeals Chamber, [Judgment \(Reasons\)](#) (“Kayishema and Ruzindana Appeal Judgment”), 1 June 2001, para. 187.

(b) Subjective element

65. The perpetrator must intend to commit the crime or must act in the awareness of the substantial likelihood that the crime would occur as a consequence of his or her conduct.<sup>82</sup>

## 2. Joint Criminal Enterprise (Article 16(1)(a) of the Law)

66. Joint Criminal Enterprise ("JCE") as mode of liability encompasses three forms or categories (basic, systemic, and extended). In the basic form ("JCE I"), several perpetrators act on the basis of a common purpose; in the systemic form ("JCE II"), a variant of the first form, the crimes are committed within an organised system of ill-treatment, by members of military or administrative units, such as in concentration or detention camps; in the extended form ("JCE III"), criminal responsibility is established for acts of a co-perpetrator that go beyond the common plan but which were a foreseeable consequence of the realisation of the plan.<sup>83</sup>

(a) Objective elements

67. All forms of JCE require the following objective elements: (i) a plurality of persons who act pursuant to a common purpose; (ii) a common purpose which amounts to or involves the commission of a crime provided for in the Law; and (iii) participation of the perpetrator in furthering the common design or purpose.<sup>84</sup>

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<sup>82</sup> ICTY, [Lukić Trial Judgment](#), para. 900; ICTR, [Kayishema and Ruzindana Appeal Judgment](#), para. 187.

<sup>83</sup> ICTY, [Kvočka et al. Appeal Judgment](#), paras 82-83; *Prosecutor v. Vasiljević*, IT-98-32-A, Appeals Chamber, [Judgment](#) ("Vasiljević Appeal Judgment"), 25 February 2004, para. 98; [Tadić Appeal Judgment](#), paras 196, 202-203, 228. ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber, [Judgment](#) ("Ntakirutimana Appeal Judgment"), 13 December 2004, para. 464.

<sup>84</sup> ICTY, [Mladić Trial Judgment](#), para. 3561; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, [Public Redacted Version of Judgement Issued on 24 March 2016](#), 24 March 2016, para. 561, referring to the [Tadić Appeal Judgment](#), para. 227; [Stakić Appeal Judgment](#), para. 64. See also ICTR, *Karemura and Ngirumpatse v. Prosecutor*, ICTR-98-44-A, Appeals Chamber, [Judgment](#), 29 September 2014, para. 110; [Ntakirutimana](#)

68. *Plurality of persons.* A JCE exists when a plurality of persons participates in the realisation of a common criminal objective.<sup>85</sup> The persons participating in the criminal enterprise need not be organised in a military, political, or administrative structure.<sup>86</sup> They must, however, be identified with specificity, for instance by name or by categories or groups of persons.<sup>87</sup>

69. *Common purpose which amounts to or involves the commission of a crime.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.<sup>88</sup> A common purpose does not presume preparatory planning or explicit agreement among JCE participants, or between JCE participants and third persons.<sup>89</sup> Moreover, a JCE may exist even if none or only some of the physical perpetrators of the crimes are members of the JCE, yet are used by one or more members of the JCE to commit crimes pursuant to the common purpose.<sup>90</sup>

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[Appeal Judgment](#), paras 461-468; STL, *Prosecutor v. Ayyash et al.*, STL-11-O1/I, Appeals Chamber, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (“*Ayyash et al.* Decision on Applicable Law”), 16 February 2011, paras 236-249.

<sup>85</sup> ICTY, [Haradinaj Trial Judgment](#), para. 138; [Kvočka et al. Trial Judgment](#), para. 307.

<sup>86</sup> ICTY, [Mladić Trial Judgment](#), para. 3561; [Tadić Appeal Judgment](#), para. 227.

<sup>87</sup> ICTY, [Mladić Trial Judgment](#), para. 3561; *Prosecutor v. Krajišnik*, IT-00-39-A, Appeals Chamber, [Judgment](#) (“*Krajišnik Appeal Judgment*”), 17 March 2009, paras 156-157; [Brđanin Appeal Judgment](#), para. 430.

<sup>88</sup> ICTY, [Tadić Appeal Judgment](#), para. 227; *Prosecutor v. Furundžija*, IT-95-17/1-A, Appeals Chamber, [Judgment](#), 21 July 2000, para. 119.

<sup>89</sup> ICTY, [Haradinaj Trial Judgment](#), para. 138; [Brđanin Appeal Judgment](#), para. 418; [Kvočka et al. Appeal Judgment](#), paras 117-119.

<sup>90</sup> ICTY, [Mladić Trial Judgment](#), para. 3561; [Krajišnik Appeal Judgment](#), paras 225-226, 235-236; [Brđanin Appeal Judgment](#), paras 410, 413.

70. In JCE III, the perpetrator is responsible for crimes committed beyond the common purpose, but which are nevertheless an objectively foreseeable consequence of that common purpose.<sup>91</sup>

71. *Contribution*. The perpetrator must have participated in the furthering of the common purpose at the core of the JCE by assisting in or contributing to the execution of the common plan or purpose, but need not have performed any part of the *actus reus* of the crime charged.<sup>92</sup> The perpetrator's contribution to the JCE need not be, as a matter of law, necessary or substantial, but it should at least be a significant contribution to the crimes for which he or she is found responsible.<sup>93</sup> The contribution does not need to be criminal *per se*.<sup>94</sup>

(b) Subjective element

72. The subjective elements differ according to the category of JCE under consideration.

73. With regard to JCE I, the perpetrator must share the intent with the other participants to carry out the crimes forming part of the common purpose, including the special intent.<sup>95</sup>

74. With regard to JCE II, personal knowledge of the system of ill-treatment is required as well as the intent to further this common concerted system of ill-treatment.<sup>96</sup>

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<sup>91</sup> See reference to the "person of reasonable prudence" test in STL, [Ayyash et al. Decision on Applicable Law](#), para. 242.

<sup>92</sup> ICTY, [Krajišnik Appeal Judgment](#), paras 215, 218, 695; [Tadić Appeal Judgment](#), para. 227.

<sup>93</sup> ICTY, [Mladić Trial Judgment](#), para. 3561; [Krajišnik Appeal Judgment](#), paras 215, 662, 675, 695-696; [Brđanin Appeal Judgment](#), para. 430; [Kvočka et al. Appeal Judgment](#), paras 97-98.

<sup>94</sup> ICTY, [Krajišnik Appeal Judgment](#), para. 695.

<sup>95</sup> ICTY, *Prosecutor v. Đorđević*, IT-05-87/1-A, Appeals Chamber, [Judgement](#), 27 January 2014, para. 468.

<sup>96</sup> ICTY, [Tadić Appeal Judgment](#), para. 228; [Limaj et al. Trial Judgment](#), para. 511; [Kvočka et al. Appeal Judgment](#), para. 82.

75. With regard to JCE III, the perpetrator is responsible for crimes committed beyond the common purpose, if, under the circumstances of the case, (i) the perpetrator intended to participate in and contribute to the furtherance of the common purpose; (ii) it was foreseeable to the perpetrator that the extended crime might be perpetrated by one or more members of the group or by persons used by any member of the group, in carrying out the common purpose; and (iii) the perpetrator willingly took the risk that the extended crime might occur when participating in the common purpose.<sup>97</sup> Foreseeability occurs when the perpetrator was aware that the deviatory crime was a possible consequence in the execution of that common purpose.<sup>98</sup> The perpetrator willingly takes the risk when, with the awareness that such a crime was a possible consequence of the implementation of the enterprise, the perpetrator decides to participate in that enterprise.<sup>99</sup>

76. The following factors, among others, have been considered in determining whether the crime was foreseeable to the perpetrator: : (i) knowledge of how the JCE is implemented on the ground;<sup>100</sup> (ii) awareness of the criminal background and propensity of members of the enterprise to commit crimes;<sup>101</sup> (iii) statements by the perpetrator;<sup>102</sup> (iv) time and location of the deviatory crimes;<sup>103</sup> (v) knowledge of personal motives of revenge of members of the enterprise or persons used thereby;<sup>104</sup> (vi) awareness of the ethnic hatred between the parties to

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<sup>97</sup> ICTY, [Tadić Appeal Judgment](#), para. 228; *Prosecutor v. Šainović et al.*, IT-05-87-A, Appeals Chamber, [Judgement](#) (“Šainović et al. Appeal Judgment”), 23 January 2014, para. 1557; [Brđanin Appeal Judgment](#), paras 365, 411; [Stakić Appeal Judgment](#), para. 65; [Kvočka et al. Appeal Judgment](#), para. 83.

<sup>98</sup> The possibility of the extended crime being committed must be sufficiently substantial as to be reasonably foreseeable, based on the information available to the perpetrator at the time. See, ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Appeals Chamber, [Judgement](#) (“Stanišić and Župljanin Appeal Judgment”), 30 June 2016, para. 627.

<sup>99</sup> ICTY, [Brđanin Appeal Judgment](#), para. 411.

<sup>100</sup> ICTY, [Stanišić and Župljanin Appeal Judgment](#), paras 627, 1002.

<sup>101</sup> ICTY, [Stanišić and Župljanin Appeal Judgment](#), paras 628, 647, 1002.

<sup>102</sup> ICTY, [Šainović et al. Appeal Judgment](#), para. 1090.

<sup>103</sup> ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Appeals Chamber, [Judgement](#) (“Popović et al. Appeal Judgment”), 30 January 2015, para. 1434.

<sup>104</sup> ICTY, [Popović et al. Appeal Judgment](#), para. 1434.

the conflict;<sup>105</sup> and (vii) knowledge of the activities of the perpetrator-subordinates in the mistreatment of the prisoners.<sup>106</sup>

### 3. Ordering (Article 16(1)(a) of the Law)

#### (a) Objective elements

77. Ordering requires that a perpetrator in a position of *de facto* or *de jure* authority instructs another person directly or indirectly to commit a crime.<sup>107</sup> This authority need not be formal and may even be temporary.<sup>108</sup> The perpetrator is held liable if the crime is committed or is attempted. The order must have had a direct and substantial effect on the commission or attempted commission of the crime.<sup>109</sup> However, it is unnecessary to prove that the crime would not have been perpetrated in the absence of the order.<sup>110</sup>

#### (b) Subjective element

78. The perpetrator must intend to order a crime, or must at least be aware of the substantial likelihood that a crime would be committed in the execution of the conduct ordered.<sup>111</sup>

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<sup>105</sup> ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Appeals Chamber, [Judgement](#) ("Tolimir Appeal Judgment"), 8 April 2015, para. 520; [Stanišić and Župljanin Appeal Judgment](#), para. 1002.

<sup>106</sup> ICTY, [Tolimir Appeal Judgment](#), para. 539.

<sup>107</sup> ICTY, *Prosecutor v. Blaškić*, IT-95-14-T, Trial Chamber, [Judgement](#) ("Blaškić Trial Judgment"), 3 March 2000, para. 282; *Prosecutor v. Tolimir*, IT-05-88/2-T, Trial Chamber, [Judgement](#) ("Tolimir Trial Judgment"), 12 December 2012, para. 905.

<sup>108</sup> ICTY, *Prosecutor v. Dragomir Milošević*, IT-98-29/1-A, Appeals Chamber, [Judgement](#), 12 November 2009, para. 290; [Kordić and Čerkez Appeal Judgment](#), para. 28; ICTR, *Semanza v. Prosecutor*, ICTR-97-20-A, Appeals Chamber, [Judgement](#) ("Semanza Appeal Judgment"), 20 May 2005, para. 363.

<sup>109</sup> ICTY, [Tolimir Trial Judgment](#), para. 905; ICTR, *Kamuhanda v. Prosecutor*, ICTR-99-54A-A, Appeals Chamber, [Judgement](#), 19 September 2005, para. 75.

<sup>110</sup> ICTY, [Strugar Trial Judgment](#), para. 332.

<sup>111</sup> ICTR, [Nahimana et al. Appeal Judgment](#), para. 481; ICTY, [Kordić and Čerkez Appeal Judgment](#), paras 29-30; [Blaškić Appeal Judgment](#), para. 42.



#### 4. Instigating (Article 16(1)(a) of the Law)

##### (a) Objective elements

79. Instigation requires that the perpetrator prompts another person, either by implied or express conduct,<sup>112</sup> to commit an offence,<sup>113</sup> which is actually committed.<sup>114</sup> It is not necessary to prove that the crime would not have been committed without the involvement of the perpetrator; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.<sup>115</sup> It also need not be proven that the perpetrator had any effective control or any other authority over the physical perpetrator.<sup>116</sup>

##### (b) Subjective element

80. The perpetrator must intend to instigate another person to commit a crime or at a minimum must be aware of the substantial likelihood that a crime will be committed in the execution of the conduct instigated.<sup>117</sup> The perpetrator must share the special intent.<sup>118</sup>

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<sup>112</sup> ICTY, [Tolimir Trial Judgment](#), para. 902; [Orić Trial Judgment](#), para. 273; *Prosecutor v. Brđanin*, IT-99-36-T, Trial Chamber, [Judgment](#) (“Brđanin Trial Judgment”), 1 September 2004, para. 269; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-A, Appeals Chamber, [Judgment](#), 1 June 2001, para. 478.

<sup>113</sup> ICTY, [Kordić and Čerkez Appeal Judgment](#), para. 27.

<sup>114</sup> ICTY, [Orić Trial Judgment](#), para. 269; [Brđanin Trial Judgment](#), para. 267.

<sup>115</sup> ICTY, [Kordić and Čerkez Appeal Judgment](#), para. 27.

<sup>116</sup> ICTY, [Tolimir Trial Judgment](#), para. 902; [Orić Trial Judgment](#), para. 272; ICTR, [Semanza Appeal Judgment](#), para. 257.

<sup>117</sup> IRMCT, *Ngirabatware v. Prosecutor*, MICT-12-29-A, Appeals Chamber, [Judgment](#), 18 December 2014, para. 166; ICTY, [Kordić and Čerkez Appeal Judgment](#), paras 29, 32; ICTR, [Nahimana et al. Appeal Judgment](#), para. 480.

<sup>118</sup> ICTR, *Nchamihigo v. Prosecutor*, ICTR-01-63-A, Appeals Chamber, [Judgment](#), 18 March 2010, para. 61; *Prosecutor v. Seromba*, ICTR-2001-66-A, Appeals Chamber, [Judgment](#), 12 March 2008, para. 175.



## 5. Aiding and Abetting (Article 16(1)(a) of the Law)

### (a) Objective elements

81. Aiding and abetting, either through an act or omission,<sup>119</sup> requires that the perpetrator assists, encourages, or lends moral support to the commission of a crime where this support has a substantial effect on the perpetration of the crime.<sup>120</sup> Aiding and abetting may occur before, during, or after the commission of the crime and in a different place from the crime.<sup>121</sup> It is unnecessary to establish that the crime would not have been committed without the contribution of the aider and abettor<sup>122</sup> or that there was a plan or agreement between the aider and abettor and the perpetrator.<sup>123</sup> There is also no requirement of a showing that the acts of the aider and abettor were specifically directed to assist, encourage, or lend moral support to the commission of the crimes.<sup>124</sup>

### (b) Subjective element

82. The aider and abettor must have knowledge that his or her acts or omissions assist in the commission of the crime of the perpetrator.<sup>125</sup> In particular, the aider and abettor must be aware of the essential elements of the crime which was

<sup>119</sup> ICTY, *Mrkšić and Šljivančanin*, IT-95-13/1-A, Appeals Chamber, [Judgment](#) (“*Mrkšić and Šljivančanin* Appeal Judgment”), 5 May 2009, paras 49, 134, 154; [Blaškić Appeal Judgment](#), para. 47.

<sup>120</sup> ICTY, [Tadić Appeal Judgment](#), para. 229; [Vasiljević Appeal Judgment](#), para. 102; *Prosecutor v. Aleksovski*, IT-95-14/1-A, Appeals Chamber, [Judgment](#) (“*Aleksovski* Appeal Judgment”), 24 March 2000, paras 162, 164; ICTR, *Kalimanzira v. Prosecutor*, ICTR-05-88-A, Appeals Chamber, [Judgment](#) (“*Kalimanzira* Appeal Judgment”), 20 October 2010, para. 74; [Nahimana et al. Appeal Judgment](#), para. 482; SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A, Appeals Chamber, [Judgment](#) (“*Taylor* Appeal Judgment”), 26 September 2013, para. 475.

<sup>121</sup> ICTY, [Mrkšić and Šljivančanin Appeal Judgment](#), para. 81; *Prosecutor v. Simić*, IT-95-9-A, Appeals Chamber, [Judgment](#) (“*Simić* Appeal Judgment”), 28 November 2006, para. 85; [Blaškić Appeal Judgment](#), para. 48; [Mucić et al. Appeal Judgment](#), para. 352; ICTR, [Nahimana et al. Appeal Judgment](#), para. 482.

<sup>122</sup> ICTY, [Mrkšić and Šljivančanin Appeal Judgment](#), para. 81; [Simić Appeal Judgment](#), para. 85; [Blaškić Appeal Judgment](#), para. 48.

<sup>123</sup> ICTY, [Brđanin Appeal Judgment](#), para. 263; [Tadić Appeal Judgment](#), para. 229.

<sup>124</sup> ICTY, [Šainović et al. Appeal Judgment](#), paras 1649-1651.

<sup>125</sup> ICTY, [Vasiljević Appeal Judgment](#), para. 102; ICTR, [Kalimanzira Appeal Judgment](#), para. 86; SCSL, [Taylor Appeal Judgment](#), para. 437.

ultimately committed,<sup>126</sup> including the perpetrator's state of mind and any relevant specific intent,<sup>127</sup> although he or she need not share that specific intent.<sup>128</sup>

## 6. Superior Responsibility (Article 16(1)(c) of the Law)

### (a) Objective elements

83. For a superior to incur criminal liability, the following objective elements must be established: (i) the existence of superior-subordinate relationship and (ii) the superior's failure to take necessary and reasonable measures to prevent the crime(s) of his or her subordinate(s) or to punish the perpetrator(s) thereof.<sup>129</sup> For the purposes of Article 16 of the Law, there is no requirement of causality between the superior's failure to prevent and the occurrence of the crime.<sup>130</sup>

84. *Existence of a superior-subordinate relationship.* The perpetrator must be a superior with *de jure* or *de facto* authority<sup>131</sup> over subordinates who committed one or more crimes set out in Articles 13-14 of the Law. This relationship can be direct or indirect,<sup>132</sup> within a hierarchy that is formal or informal,<sup>133</sup> and civilian or military.<sup>134</sup> To incur liability, a superior must have the material ability to prevent

<sup>126</sup> ICTY, [Mrkšić and Šljivančanin Appeal Judgment](#), paras 49, 159; [Brđanin Appeal Judgment](#), para. 484.

<sup>127</sup> ICTY, *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, Appeals Chamber, [Judgement](#), 9 May 2007, para. 127; [Vasiljević Appeal Judgment](#), para. 142; *Prosecutor v. Krnojelac*, IT-97-25-A, Appeals Chamber, [Judgement](#) ("Krnojelac Appeal Judgment"), 17 September 2003, para. 52.

<sup>128</sup> ICTY, [Simić Appeal Judgment](#), para. 86; [Krnojelac Appeal Judgment](#), para. 52; [Aleksovski Appeal Judgment](#), para. 162.

<sup>129</sup> ICTY, [Aleksovski Appeal Judgment](#), para. 72; ICTR, [Nahimana et al. Appeal Judgment](#), para. 484.

<sup>130</sup> ICTY, *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-A, Appeals Chamber, [Judgement](#) ("Hadžihasanović and Kubura Appeal Judgment"), 22 April 2008, paras 38-40; [Blaškić Appeal Judgment](#), paras 73-77.

<sup>131</sup> ICTY, [Mucić et al. Appeal Judgment](#), paras 192-193, 195; ICTR, [Kayishema and Ruzindana Appeal Judgment](#), para. 294.

<sup>132</sup> ICTY, *Prosecutor v. Halilović*, IT-01-48-A, Appeals Chamber, [Judgement](#) ("Halilović Appeal Judgment"), 16 October 2007, para. 59; [Mucić et al. Appeal Judgment](#), paras 252, 303.

<sup>133</sup> ICTY, [Halilović Appeal Judgment](#), para. 59; [Mucić et al. Appeal Judgment](#), paras 197, 303; ICTR, [Kayishema and Ruzindana Appeal Judgment](#), para. 294.

<sup>134</sup> ICTY, [Mucić et al. Appeal Judgment](#), paras 195-196; ICTR, *Kajelijeli v. Prosecutor*, ICTR-98-44A-A, Appeals Chamber, [Judgement](#), 23 May 2005, para. 85.

or punish the subordinate at the time of the commission of the crime (“effective control”).<sup>135</sup> Factors to be considered in assessing effective control include, *inter alia*: (i) the perpetrator’s position; (ii) the perpetrator’s capacity to issue orders and whether those orders were in fact followed; (iii) the authority to take disciplinary measures; and (iv) the power to promote or fire personnel.<sup>136</sup>

85. *Failure to take necessary and reasonable measures.* The superior has two distinct duties: the duty to prevent (future) crimes and the duty to punish the subordinate for (past) crimes.<sup>137</sup> The duty to prevent attaches to a superior from the moment he or she knows or has reason to know that a crime is about to be committed by the subordinate under his or her effective control, while the duty to punish arises after the subordinate has committed the crime.<sup>138</sup> The superior may be held liable for violating either duty. Consequently, failure to prevent a crime cannot be cured by subsequently punishing the subordinate for the crime.<sup>139</sup>

86. “Necessary” measures are measures appropriate for the superior to fulfil his or her duty to try genuinely to prevent or punish, and “reasonable” measures are those, which reasonably fall within the material powers of the superior.<sup>140</sup> What

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<sup>135</sup> ICTY, [Aleksovski Appeal Judgment](#), para. 76; [Halilović Appeal Judgment](#), para. 59; [Mucić et al. Appeal Judgment](#), paras 191-192, 196-198, 256, 266, 303; ICTR, *Prosecutor v. Ntawukulilyayo*, ICTR-05-82-T, Trial Chamber, [Judgement and Sentence](#) (“Ntawukulilyayo Trial Judgment”), 3 August 2010, para. 420; *Prosecutor v. Karera*, ICTR-01-74-T, Trial Chamber, [Judgement and Sentence](#), 7 December 2007, para. 564; [Kayishema and Ruzindana Appeal Judgment](#), para. 294.

<sup>136</sup> ICTY, *Prosecutor v. Perišić*, IT-04-81-A, Appeals Chamber, [Judgement](#), 28 February 2013, para. 97; [Strugar Appeal Judgment](#), para. 254; [Halilović Appeal Judgment](#), para. 66; [Orić Trial Judgment](#), para. 312; [Mucić et al. Appeal Judgment](#), paras 190, 206.

<sup>137</sup> ICTY, *Prosecutor v. Đorđević*, IT-05-87/1-T, Trial Chamber, [Public Judgement with Confidential Annex](#) (“Đorđević Trial Judgment”), 23 February 2011, para. 1888; *Prosecutor v. Delić*, IT-04-83-T, Trial Chamber, [Judgement](#) (“Delić Trial Judgment”), 15 September 2008, para. 69; [Hadžihasanović and Kubura Appeal Judgment](#), para. 259; [Blaškić Appeal Judgment](#), para. 83; [Mucić et al. Trial Judgment](#), paras 333-334.

<sup>138</sup> ICTY, [Delić Trial Judgment](#), paras 69, 72; [Strugar Trial Judgment](#), para. 416; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Trial Chamber, [Judgement](#), 26 February 2001, paras 445-446.

<sup>139</sup> ICTY, [Delić Trial Judgment](#), para. 69; [Strugar Trial Judgment](#), para. 373; [Blaškić Trial Judgment](#), para. 336.

<sup>140</sup> ICTY, [Đorđević Trial Judgment](#), para. 1887; *Prosecutor v. Orić*, IT-03-68-A, Appeals Chamber, [Judgement](#), 3 July 2008, para. 177; [Halilović Appeal Judgment](#), para. 63.

constitutes “necessary and reasonable” is a matter of evidence and must be assessed *in concreto*.<sup>141</sup> The duty to prevent may include measures such as: (i) to secure reports that military actions were carried out in accordance with international law;<sup>142</sup> (ii) to issue orders aimed at bringing the relevant practices into accord with the rules of armed conflict;<sup>143</sup> (iii) to take disciplinary measures to prevent the commission of atrocities; or (iv) to insist before a superior authority that immediate action be taken.<sup>144</sup> The duty to punish may include, at a minimum (i) the obligation to investigate possible crimes or have the matter investigated, and, (ii) if the superior has no power to sanction, to report them to the competent authorities.<sup>145</sup> The degree of effective control can be used to determine what measures are necessary and reasonable within the competence of the superior.<sup>146</sup>

(b) Subjective element

87. According to Article 16(1)(c) of the Law, superiors must have actually known<sup>147</sup> or must have had reason to know that the subordinates were about to commit a crime or had done so. In determining whether the superiors “had reason to know”, it must be shown that they must have had information available to them that was sufficiently alarming to put them on notice of crimes committed or about

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<sup>141</sup> ICTY, [Dorđević Trial Judgment](#), para. 1887; [Delić Trial Judgment](#), para. 76; [Blaškić Appeal Judgment](#), paras 72, 417.

<sup>142</sup> ICTY, [Delić Trial Judgment](#), para. 76; [Strugar Trial Judgment](#), para. 374.

<sup>143</sup> ICTY, [Delić Trial Judgment](#), para. 76; [Strugar Trial Judgment](#), para. 374.

<sup>144</sup> ICTY, [Strugar Trial Judgment](#), para. 374.

<sup>145</sup> ICTY, [Dorđević Trial Judgment](#), para. 1890; [Hadžihasanović and Kubura Appeal Judgment](#), para. 154; [Halilović Appeal Judgment](#), para. 182; [Blaškić Appeal Judgment](#), para. 83.

<sup>146</sup> ICTY, [Dorđević Trial Judgment](#), para. 1887; [Halilović Appeal Judgment](#), para. 63; [Blaškić Appeal Judgment](#), para. 72.

<sup>147</sup> Factors to reach a finding on the superior’s actual knowledge include, for example: the number of illegal acts, their scope, whether their occurrence is widespread, the timing of their occurrence, the type and number of subordinates involved, the means of available communication, the scope and nature of the superior’s position and location of the superior at the time and the geographical location of the crimes, see ICTY, [Dorđević Trial Judgment](#), para. 1885; [Orić Trial Judgment](#), para. 319; [Blaškić Trial Judgment](#), para. 307; [Mucić et al. Trial Judgment](#), para. 386; ICTR, [Ntawukulilyayo Trial Judgment](#), paras 420-421.

to be committed by their subordinates and justifying further inquiry.<sup>148</sup> It is not necessary that the superior shares the same intent as the subordinate, notably special intent.<sup>149</sup> Knowledge requires an assessment of the specific situation of the superior at the time in question.<sup>150</sup>

## VI. CHARGES

88. Before examining the supporting material in relation to each charge and determining whether a well-grounded suspicion has been established against Mr Mustafa, the Pre-Trial Judge notes that the SPO has complied with the requirements under Rule 86(3) of the Rules by submitting (i) a further revised indictment; (ii) evidentiary material supporting the facts underpinning the charges; and (iii) a detailed outline demonstrating the relevance of each item of evidentiary material to each allegation.

### A. CONTEXTUAL ELEMENTS OF THE CRIMES CHARGED

89. In the Further Revised Indictment, the SPO alleges that the crimes charged took place in the context of and were associated with an armed conflict in Kosovo between the Kosovo Liberation Army (“KLA”) and forces of the FRY and Republic of Serbia, including units of the Yugoslav Army, police and other units of the Ministry of Internal Affairs, and other groups fighting on behalf of the FRY and Serbia (collectively “Serbian forces”).<sup>151</sup>

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<sup>148</sup> ICTY, [Dorđević Trial Judgment](#), para. 1886; [Krnojelac Appeal Judgment](#), paras 59, 155; [Mucić et al. Appeal Judgment](#), paras 238-239, 241; ICTR, [Nahimana et al. Appeal Judgment](#), para. 791; *Prosecutor v. Bagilishema*, ICTR-95-1-A, Appeals Chamber, [Judgement \(Reasons\)](#), 3 July 2002, paras 28, 42.

<sup>149</sup> ICTY, [Brđanin Trial Judgment](#), paras 720-721; [Krnojelac Appeal Judgment](#), para. 155; ICTR, [Nahimana et al. Appeal Judgment](#), para. 865.

<sup>150</sup> ICTY, [Krnojelac Appeal Judgment](#), para. 156; [Mucić et al. Appeal Judgment](#), para. 239.

<sup>151</sup> Further Revised Indictment, para. 3.

90. In relation to the existence of hostilities, the Pre-Trial Judge finds that the supporting material indicates that armed violence between Serbian forces, on the one hand, and the KLA, on the other hand, was ongoing on the territory of Kosovo before, during and after the period relevant to the charges in the Further Revised Indictment.<sup>152</sup>

91. In relation to the parties to the hostilities, the supporting material indicates that Serbian forces acted as organs of authority of the governments of the FRY and the Republic of Serbia.<sup>153</sup> Furthermore, the supporting material indicates that the KLA was an organised entity with a command structure, disposing of a considerable operational capacity, including weaponry, and exercising territorial control. More specifically, it issued various orders for the recruitment and mobilisation of forces to counter the Serbian offensive, in particular as of the end of March 1999.<sup>154</sup> It also released communiqués and political declarations on a regular basis, updating about its military operations.<sup>155</sup> In addition, the KLA had a centralised command structure, comprising of a General Staff and a field structure made of operational zones commanders.<sup>156</sup> The KLA was also able to speak through spokespersons<sup>157</sup> and was in

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<sup>152</sup> 074222-074225, p. 1 (074222); 074226-074231, pp. 1-2 (074226-074227); K0223066-K0223071 (IT-05-87-P00444), pp. 1-3 (0223066-0223068); U0038552-U0038690, p. 107 (U0038658), p. 109 (U0038660), p. 115 (U0038666) and p. 131 (U0038682); IT-05-87.1, at, *inter alia*, p. 23 (03524828), pp. 24-25 (03524830-03524831), p. 30 (03524848), p. 31 (03524852), p. 40 (03525165), p. 52 (03525239), p. 162 (03525493) and following.

<sup>153</sup> U003-8552-U003-8690, p. 60 (U0038611), p. 62 (U0038613), p. 68 (U0038619); IT-05-87 P01975-E; IT-05-87.1 P01029, p. 105 (03525372), p. 144 (03525440), p. 157 (03525485), p. 161 (03525491), p. 167 (03525506).

<sup>154</sup> SPOE00054519-SPOE00054522-ET, pp. 1-2 (SPOE00054519-SPOE00054520-ET), pp. 2-3 (SPOE00054520-SPOE00054521-ET), pp. 3-4 (SPOE00054521-SPOE00054522-ET).

<sup>155</sup> U003-8552-U003-8690, for example p. 107 (U0038658), p. 109 (U0038660), p. 112 (U0038663), p. 113 (U0038664), p. 115 (U0038666), p. 116 (U0038667), p. 122 (U0038673), p. 130 (U0038681), p. 132 (U0038683), p. 137 (U0038688), and p. 138 (U0038688).

<sup>156</sup> U003-8552-U003-8690, p. 91 (U0038642), p. 109 (U0038660), p. 115 (U0038666); SPOE00054519-SPOE00054522-ET, p. 2 (SPOE00054520); SPOE00054519-SPOE00054522-ET, p. 4 (SPOE00054522); IT-05-87.1 P01029, p. 4 (03524677).

<sup>157</sup> U003-8552-U003-8690, p. 24 (U0038575), p. 29 (U0038580), p. 35 (U0038586), p. 43 (U0038594), p. 90 (U0038641), p. 133 (U0038684).



a position to take part in peace negotiations.<sup>158</sup> The KLA exercised solid territorial control in vast parts of Kosovo, which it implemented through its centralised command structure down to its field structure of operational zones commanders,<sup>159</sup> which in turn resulted in its ability to carry out concerted military operations.<sup>160</sup> It also disposed of heavy weaponry to this effect.<sup>161</sup> The BIA Guerrilla Unit ("BIA Unit") was part of the organisational structure of the KLA and operated in various areas of Kosovo, including Zllash/Zlaš.<sup>162</sup> It also assisted various operational zones with logistics.<sup>163</sup> The BIA Unit's tasks included weapons supply, medical supply, propaganda, and intelligence gathering.<sup>164</sup>

92. In relation to the level of intensity, the supporting material indicates that, at all times relevant to the charges as well as in the period of time leading thereto, intense fighting occurred between Serbian forces and the KLA in various parts of Kosovo,<sup>165</sup> also due to the availability of heavy weaponry by both parties,<sup>166</sup> including tanks<sup>167</sup>

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<sup>158</sup> U003-8552-U003-8690, for example p. 110 (U0038661), p. 112 (U0038663), p. 130 (U0038681), p. 132 (U0038683).

<sup>159</sup> U003-8552-U003-8690, p. 109 (U0038660), p. 115 (U0038666). *See also* SPOE00054519-SPOE00054522-ET, p. 2 (SPOE00054520), p. 4 (SPOE00054522); IT-05-87.1 P01029, p. 4 (03524677).

<sup>160</sup> U0038552-U0038690, p. 107 (U0038658), p. 113 (U0038664), p. 115 (U0038666). *See also* [REDACTED], Part 2, pp. 4, 8; Part 3, p. 12, where it is explained that the BIA Guerrilla Unit, as part of the KLA, had a presence in various areas.

<sup>161</sup> IT-05-87 P01975-E, p. 1, in which the Serbian Joint Command for Kosovo and Methoiija informs troops on the field, ahead of an operation against the KLA, about the weapons in possession of the KLA.

<sup>162</sup> [REDACTED], Part 2, p. 4; Part 3, p. 12.

<sup>163</sup> [REDACTED], Part 2, p. 8.

<sup>164</sup> [REDACTED], Part 2, p. 8.

<sup>165</sup> U003-8552-U003-8690, p. 107 (U0038658), p. 109 (U0038660), p. 115 (U0038666), p. 131 (U0038682); IT-05-87 P00444, pp. 1-3 (K0223066-K0223068); 074222-074225, p. 1 (074222); IT-05-87.1 P01029, at, *inter alia*, p. 23 (03524828), pp. 24-25 (03524830-03524831), p. 30 (03524848), p. 31 (03524852), p. 40 (03525165), p. 52 (03525239), p. 162 (03525493).

<sup>166</sup> IT-05-87.1 P01029, p. 36 (03524860); IT-05-87 P01975-E, p. 1.

<sup>167</sup> U003-8552-U003-8690, p. 60 (U0038611), p. 102 (U0038653), p. 122 (U0038673); IT-05-87.1 P01029, p. 17 (03524808), p. 21 (03524820), p. 31 (03524852), p. 41 (03525176), p. 64 (03525270), p. 74 (03525295), p. 84 (03525312), p. 95 (03525354), p. 134 (03525427), p. 141 (03525437), p. 156 (03525482).

and mortars.<sup>168</sup> Sniper attacks<sup>169</sup> and burning of houses<sup>170</sup> have also been reported. Notably, reports by the United Nations High Commissioner for Refugees refer to continuing military activities, which caused a significant exodus of displaced persons towards neighbouring countries.<sup>171</sup>

93. Having examined the supporting material as a whole in relation to the aforementioned requirements, the Pre-Trial Judge finds that there is a well-grounded suspicion that at least throughout the period relevant to the charges in the Further Revised Indictment, a non-international armed conflict existed within the meaning of Article 14(2) of the Law between the Serbian forces and the KLA.

## B. THE CRIMES CHARGED

### 1. Count 1: Arbitrary Detention as a War Crime

94. In the Further Revised Indictment, the SPO alleges that between approximately 1 April 1999 and 19 April 1999, at least six persons were arbitrarily deprived of their liberty at the Zllash/Zlaš Detention Compound, which constitutes a war crime according to Article 14(1)(c) of the Law.<sup>172</sup>

95. Regarding the material elements of the crime, the Pre-Trial Judge finds that the supporting material indicates that, on or around 1 April 1999, at least six detainees, from different locations across Kosovo, were taken into custody by KLA members and subsequently detained at the Zllash/Zlaš Detention Compound.<sup>173</sup>

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<sup>168</sup> IT-05-87.1 P01029, p. 31 (03524852), p. 40 (03525165), p. 52 (03525239), p. 61 (03525264), p. 62 (03525266), p. 64 (03525270), p. 123 (03525396), p. 126 (03525414), p. 182 (03525541).

<sup>169</sup> IT-05-87.1 P01029, p. 61 (03525264), p. 143 (03525439).

<sup>170</sup> U003-8552-U003-8690, p. 73 (U0038624), p. 122 (U0038673), p. 126 (U0038677); IT-05-87.1 P01029, p. 51 (03525238), p. 55 (03525246), p. 62 (03525265), p. 67 (03525280), p. 74 (03525295), p. 81 (03525321), p. 135 (03525428), p. 137 (03525432), p. 142 (03525439), p. 144 (03525440), p. 149 (03525461), p. 164 (03525497).

<sup>171</sup> 074222-074225, p. 1 (074222); 074226-074231, pp. 1-5 (074226-074230).

<sup>172</sup> Further Revised Indictment, paras 18, 35.

<sup>173</sup> [REDACTED].



The detainees concerned were kept in a room that was locked with chains and guarded.<sup>174</sup> Six detainees were kept in custody for 18 days, until on or around 19 April 1999.<sup>175</sup> A seventh detainee was in custody for three days.<sup>176</sup>

96. According to the supporting material, the apprehension and detention of these individuals was justified neither by criminal proceedings nor by reasonable grounds to believe that security concerns made their deprivation of liberty absolutely necessary. Notably, the detainees concerned were held for their alleged friendship or interaction with Serbs, for their alleged wealth, or for their political sympathies.<sup>177</sup> [REDACTED].<sup>178</sup> [REDACTED],<sup>179</sup> [REDACTED].<sup>180</sup>

97. The detainees were not informed of the reason for their arrest and detention or shown any documentation in this regard. During all this time, these detainees had not been given the opportunity to challenge the lawfulness of their detention. At the time of their release, on or around 19 April 1999 – the day of the Serbian offensive in the area<sup>181</sup> – [REDACTED],<sup>182</sup> [REDACTED].<sup>183</sup>

98. Regarding the protected status of the victims, the supporting material indicates that, at the time relevant to the charges, the detainees concerned were taking no active part in the hostilities due to their detention condition.

99. Regarding the mental element of the crime, the intent of Mr Mustafa and the other KLA members emerges from the deliberate manner in which they arbitrarily held the detainees at the Zllash/Zlaš Detention Compound without affording any basic

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<sup>174</sup> [REDACTED].

<sup>175</sup> [REDACTED].

<sup>176</sup> [REDACTED].

<sup>177</sup> [REDACTED].

<sup>178</sup> [REDACTED].

<sup>179</sup> [REDACTED].

<sup>180</sup> [REDACTED].

<sup>181</sup> [REDACTED].

<sup>182</sup> [REDACTED].

<sup>183</sup> [REDACTED].

guarantees. As a further indication of Mr Mustafa's intent to commit the crime, the supporting material suggests that at no point he intended to release the detainees or to provide them with any basic guarantees, other than when the Serbian forces closed down on the Zllash/Zlaš Detention Compound, at which point the detainees were suddenly released and the KLA forces prepared for retreat.<sup>184</sup>

100. Regarding the nexus, the supporting material indicates that the aforementioned arrests, transfers and detention of detainees took place in the context of the on-going armed conflict between Serbian forces and the KLA. During the time period relevant to the Further Revised Indictment, BIA soldiers based in Zllash/Zlaš<sup>185</sup> reported intelligence related to Albanians who were believed to assist Serbian forces.<sup>186</sup> In particular, the detainees in the Zllash/Zlaš Detention Compound were questioned and accused, *inter alia*, of hanging out with Serbs, collaborating with them or being spies.<sup>187</sup>

101. Lastly, regarding the awareness of the factual circumstances establishing the armed conflict and the status of the victims, the supporting material suggests that at all times between approximately 1 April 1999 and 19 April 1999, the KLA members and Mr Mustafa were aware of the existence of a non-international armed conflict, considering the activities undertaken by the BIA Unit in general and Mr Mustafa's position as BIA commander in particular.<sup>188</sup> Considering Mr Mustafa's commanding position at the Zllash/Zlaš Detention Compound<sup>189</sup> and his participation in the commission of the crimes charged along with other KLA members,<sup>190</sup> they were also

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<sup>184</sup> [REDACTED].

<sup>185</sup> [REDACTED].

<sup>186</sup> [REDACTED].

<sup>187</sup> [REDACTED]. *See also* para. 113 (Count 3: Torture).

<sup>188</sup> [REDACTED].

<sup>189</sup> [REDACTED].

<sup>190</sup> *See supra* paras 95-97, 99 (Count 1), para. 106 (Count 2), para. 113 (Count 3) and accompanying footnotes.

aware that the detainees were taking no active part in hostilities due to their detention situation.

102. Having examined the supporting material as a whole in relation to the aforementioned requirements, the Pre-Trial Judge finds that there is a well-grounded suspicion that the war crime of arbitrary detention under Article 14(1)(c) of the Law was committed at the Zllash/Zlaš Detention Compound involving at least six persons between approximately 1 April 1999 and 19 April 1999.

## **2. Count 2: Cruel Treatment as a War Crime**

103. In the Further Revised Indictment, the SPO alleges that, between approximately 1 April 1999 and 19 April 1999, cruel treatment was committed against at least six detainees at the Zllash/Zlaš Detention Compound, which constitutes a war crime according to Article 14(1)(c)(i) of the Law.<sup>191</sup>

104. Regarding the material elements of the crime, the Pre-Trial Judge finds that the supporting material indicates that, between approximately 1 April 1999 and 19 April 1999, KLA members caused serious physical and psychological injury and suffering upon at least six detainees at the Zllash/Zlaš Detention Compound. The conditions of detention were wholly inadequate. Detainees were deprived of liberty without due process of law.<sup>192</sup> They were kept in a barn for animals, with hay on the ground, no proper windows or natural light.<sup>193</sup> Food and water were insufficient and not provided regularly,<sup>194</sup> to the point that when detainees were freed they could not stop eating food.<sup>195</sup> Detainees had to sleep on the ground, in water puddles and in cold

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<sup>191</sup> Further Revised Indictment, paras 21-22, 35.

<sup>192</sup> See *supra* paras 95-97 (Count 1) and accompanying footnotes.

<sup>193</sup> [REDACTED].

<sup>194</sup> [REDACTED].

<sup>195</sup> [REDACTED].

conditions.<sup>196</sup> They had no access to toilet or fresh water and had to relieve themselves in a bucket in the barn.<sup>197</sup> Not only was there no medical care, but detainees were beaten up if they asked for a doctor.<sup>198</sup>

105. The detainees concerned were beaten almost daily, sometimes twice a day, both in the room where they were kept and in another room situated upstairs.<sup>199</sup> On at least one occasion, a detainee was put a black sack over his head and punched in the face [REDACTED], causing his mouth to bleed.<sup>200</sup> Beatings occurred as soon as the detainees arrived at the Zllash/Zlaš Detention Compound, or shortly afterwards.<sup>201</sup> The supporting material shows that, at least on one occasion, KLA members beat and kicked a detainee in turn, including with a wooden stick, all over his body, [REDACTED].<sup>202</sup> From the barn where they were kept, detainees could hear the other inmates screaming while being beaten upstairs, before they were taken back to the barn.<sup>203</sup> In addition to beatings, the supporting material indicates that KLA members: (i) tied electric wires to the feet of detainees and electrocuted them;<sup>204</sup> (ii) undressed them and dripped hot wax from candles to burn parts of the body;<sup>205</sup> (iii) at least on two occasions held a hot iron against detainees' body;<sup>206</sup> (iv) burned parts of the body with a hot metal bar;<sup>207</sup> (v) inflicted cuts with knives;<sup>208</sup> and (vi) urinated on detainees.<sup>209</sup>

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<sup>196</sup> [REDACTED].

<sup>197</sup> [REDACTED].

<sup>198</sup> [REDACTED].

<sup>199</sup> [REDACTED].

<sup>200</sup> [REDACTED].

<sup>201</sup> [REDACTED].

<sup>202</sup> [REDACTED].

<sup>203</sup> [REDACTED].

<sup>204</sup> [REDACTED].

<sup>205</sup> [REDACTED].

<sup>206</sup> [REDACTED].

<sup>207</sup> [REDACTED].

<sup>208</sup> [REDACTED].

<sup>209</sup> [REDACTED].

106. Notably, the supporting material highlights three incidents Mr Mustafa took part in. On one occasion, on or around 1 April 1999 Mr Mustafa, who introduced himself to the detainees as Commander Cali,<sup>210</sup> beat a detainee and then ordered other KLA members to beat him.<sup>211</sup> On another occasion, also on or around 1 April 1999, Mr Mustafa beat a detainee and ordered other KLA members to beat him as well;<sup>212</sup> towards the end of the beating, Mr Mustafa [REDACTED].<sup>213</sup> After approximately ten days, Mr Mustafa beat [REDACTED] in the presence of three to four other KLA members.<sup>214</sup>

107. As regards the seriousness of the harm or injury, the supporting material indicates that the mistreatment of the detainees during their captivity at the Zllash/Zlaš Detention Compound left them with both bodily injuries, such as broken arms, fingers and teeth,<sup>215</sup> as well as psychological trauma.<sup>216</sup> Detainees lost consciousness after some of the beatings.<sup>217</sup> Upon their release, detainees were in poor condition, with their clothes ripped off, long nails, unshaved, with marks on their bodies and [REDACTED].<sup>218</sup>

108. Regarding the mental element of the crime, the supporting material indicates the failure to ensure humane detention conditions, the deliberate manner in which detainees were beaten and mistreated, the types of instruments used in the physical assault as well as the injuries caused. This demonstrates that Mr Mustafa, together with other KLA members partaking in the aforementioned acts and omissions, meant

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<sup>210</sup> [REDACTED].

<sup>211</sup> [REDACTED].

<sup>212</sup> [REDACTED].

<sup>213</sup> [REDACTED].

<sup>214</sup> [REDACTED].

<sup>215</sup> [REDACTED].

<sup>216</sup> [REDACTED].

<sup>217</sup> [REDACTED].

<sup>218</sup> [REDACTED].

to cause serious mental or physical suffering or injury or to commit a serious attack upon the human dignity of the detainees concerned.<sup>219</sup>

109. Lastly, regarding the protected status of victims, nexus and the perpetrators' awareness of the factual circumstances establishing the armed conflict and the status of the victims, the Pre-Trial Judge refers to the findings in relation to Count 1 above.<sup>220</sup>

110. Having examined the supporting material as a whole in relation to the aforementioned requirements, the Pre-Trial Judge finds that there is a well-grounded suspicion that the war crime of cruel treatment within the meaning of Article 14(1)(c)(i) of the Law was committed at the Zllash/Zlaš Detention Compound involving at least six detainees between approximately 1 April 1999 and 19 April 1999.

### **3. Count 3: Torture as a War Crime**

111. In the Further Revised Indictment, the SPO alleges that between approximately 1 April 1999 and 19 April 1999, torture was committed against at least six detainees at the Zllash/Zlaš Detention Compound, which constitutes a war crime according to Article 14(1)(c)(i) of the Law.<sup>221</sup>

112. Regarding the material elements of the crime, the Pre-Trial Judge finds that the supporting material indicates that, through acts and omissions described in relation to cruel treatment (Count 2) above, Mr Mustafa, together with other KLA members, inflicted severe pain or suffering on at least six detainees.

113. Regarding the mental element of the crime, the supporting material indicates the deliberate manner in which the detainees were beaten and mistreated, the types of instruments used in the physical assault, the threats of injury and death, and the injuries caused. In particular, the supporting material shows that, between

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<sup>219</sup> [REDACTED].

<sup>220</sup> See *supra* paras 98, 100-101 (Count 1) and accompanying footnotes.

<sup>221</sup> Further Revised Indictment, paras 29, 35.

approximately 1 April 1999 and 19 April 1999, the detainees at the Zllash/Zlaš Detention Compound, while being mistreated, were questioned and explicitly accused of collaborating or hanging out with Serbs or otherwise being spies or thieves.<sup>222</sup> Mr Mustafa, personally, in the course of an interrogation, asked a detainee [REDACTED]. [REDACTED].<sup>223</sup> During a previous interrogation [REDACTED], Mr Mustafa threatened to kill [REDACTED].<sup>224</sup> On another occasion, Mr Mustafa asked a detainee the reason why [REDACTED].<sup>225</sup> [REDACTED], Mr Mustafa accused him [REDACTED], slapped him and kicked him.<sup>226</sup> This demonstrates that Mr Mustafa, and other KLA members, partaking in the aforementioned acts and omissions, meant to inflict upon the detainees concerned severe pain and suffering for the purposes of obtaining information or a confession, punishment, intimidation or coercion.

114. Lastly, regarding the protected status of victims, nexus and the perpetrators' awareness of the factual circumstances establishing the armed conflict and the status of the victims, the Pre-Trial Judge refers to the findings in relation to Count 1 above.<sup>227</sup>

115. Having examined the supporting material as a whole in relation to the aforementioned requirements, the Pre-Trial Judge finds that there is a well-grounded suspicion that the war crime of torture within the meaning of Article 14(1)(c)(i) of the Law was committed at the Zllash/Zlaš Detention Compound involving at least six persons between approximately 1 April 1999 and 19 April 1999.

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<sup>222</sup> [REDACTED].

<sup>223</sup> [REDACTED].

<sup>224</sup> [REDACTED].

<sup>225</sup> [REDACTED].

<sup>226</sup> [REDACTED].

<sup>227</sup> See *supra* paras 98, 100-101 (Count 1) and accompanying footnotes.



#### 4. Count 4: Murder as a War Crime

116. In the Further Revised Indictment, the SPO alleges that one of the detainees at the Zllash/Zlaš Detention Compound was killed on a date between on or about 19 April 1999 and around the end of April 1999, which constitutes a war crime to Article 14(1)(c)(i) of the Law.<sup>228</sup>

117. Regarding the material elements of the crime, the Pre-Trial Judge finds that the supporting material indicates that, throughout the time frame of the charges in the Further Revised Indictment, the victim was held at the Zllash/Zlaš Detention Compound, [REDACTED].<sup>229</sup> More specifically, the supporting material indicates that he was [REDACTED],<sup>230</sup> and that he was [REDACTED]<sup>231</sup> to such an extent that he could no longer [REDACTED].<sup>232</sup> The victim was burned with a heated metal bar<sup>233</sup> as well as with a hot iron,<sup>234</sup> had electric wires applied on him,<sup>235</sup> showed signs of knife cuts,<sup>236</sup> and was covered in blood after every interrogation session.<sup>237</sup> During his detention at the Zllash/Zlaš Detention Compound in April 1999, the victim's family attempted to gather information on his whereabouts and condition and were told that they could [REDACTED],<sup>238</sup> [REDACTED].<sup>239</sup> While some detainees were released on or around 19 April 1999, [REDACTED]. He was unable to stand.<sup>240</sup> His body was

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<sup>228</sup> Further Revised Indictment, paras 31-32, 35.

<sup>229</sup> [REDACTED].

<sup>230</sup> [REDACTED].

<sup>231</sup> [REDACTED].

<sup>232</sup> [REDACTED].

<sup>233</sup> [REDACTED].

<sup>234</sup> [REDACTED].

<sup>235</sup> [REDACTED].

<sup>236</sup> [REDACTED].

<sup>237</sup> [REDACTED].

<sup>238</sup> [REDACTED].

<sup>239</sup> [REDACTED].

<sup>240</sup> [REDACTED].

discovered [REDACTED] in [REDACTED].<sup>241</sup> [REDACTED].<sup>242</sup> [REDACTED].<sup>243</sup> His body showed a bullet hole in the back and signs of mistreatment, including both legs broken and wounds all over.<sup>244</sup>

118. Regarding the mental element of the crime, the supporting material indicates the deliberate manner in which the victim was mistreated and shot, the degree of violence and the types of instruments used in the physical assault, and the injuries caused, including the bullet hole in the back. Several family members of the victim were also [REDACTED].<sup>245</sup> This demonstrates that Mr Mustafa and the other KLA members, partaking in the aforementioned acts and omissions, meant to kill or at least wilfully caused serious injury or grievous bodily harm, which they should reasonably have known might lead to the detainee's death.

119. Lastly, regarding the protected status of victim, nexus and the perpetrators' awareness of the factual circumstances establishing the armed conflict and the status of the victim, the Pre-Trial Judge refers to the findings in relation to Count 1 above.<sup>246</sup>

120. Having examined the supporting material as a whole in relation to the aforementioned requirements, the Pre-Trial Judge finds that there is a well-grounded suspicion that the war crime of murder within the meaning of Article 14(1)(c)(i) of the Law was committed at the Zllash/Zlaš Detention Compound involving one detainee on a date between on or about 19 April 1999 and around the end of April 1999.

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<sup>241</sup> [REDACTED]. *See also* [REDACTED]; [REDACTED]; SPOE00128266-00128273, p. 1 (SPOE00128266), pp. 5-6 (SPOE00128270-SPOE00128271), showing the respective coordinates and locations of the Zllash/Zlaš Detention Compound [REDACTED].

<sup>242</sup> [REDACTED].

<sup>243</sup> [REDACTED].

<sup>244</sup> [REDACTED].

<sup>245</sup> [REDACTED].

<sup>246</sup> *See supra* paras 98, 100-101 (Count 1) and accompanying footnotes.

## C. THE MODES OF LIABILITY CHARGED

### 1. Direct Commission

121. In the Further Revised Indictment, the SPO alleges that Mr Mustafa physically committed the war crimes of arbitrary detention (Count 1), cruel treatment (Count 2) and torture (Count 3), according to Article 16(1)(a) of the Law.<sup>247</sup>

122. Regarding the objective<sup>248</sup> and subjective<sup>249</sup> elements of Mr Mustafa's physical commission of the crime of arbitrary detention, cruel treatment and torture, the Pre-Trial Judge refers to the above findings in Counts 1-3.

123. Having examined the supporting material as a whole, the Pre-Trial Judge finds that there is well-grounded suspicion that Mr Mustafa physically committed the war crimes of arbitrary detention (Count 1), cruel treatment (Count 2) and torture (Count 3), within the meaning of Article 16(1)(a) of the Law.

### 2. Joint Criminal Enterprise I

124. In the Further Revised Indictment, the SPO alleges that Mr Mustafa committed, as a member of a JCE, the war crimes of arbitrary detention (Count 1), cruel treatment (Count 2), torture (Count 3), and murder (Count 4), according to Article 16(1)(a) of the Law.<sup>250</sup>

125. Regarding the objective elements of this mode of liability, the Pre-Trial Judge finds that the supporting material indicates that a plurality of persons, including Mr Mustafa, was involved in the operation of the Zilash/Zlaš Detention Compound and the mistreatment of the detainees therein. In particular, KLA members, such as

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<sup>247</sup> Further Revised Indictment, paras 34-35.

<sup>248</sup> See *supra* paras 95-97 (Count 1), paras 104-107 (Count 2), para. 112 (Count 3) and accompanying footnotes.

<sup>249</sup> See *supra* para. 99 (Count 1), para. 108 (Count 2), para. 113 (Count 3) and accompanying footnotes.

<sup>250</sup> Further Revised Indictment, paras 7-10, 34-35.

Mr Mustafa, “Tabut” (or “Tabuti” or “Kommandant Tabuti”), “Ilmi Vela”, “Bimi”, “Dardan”, “Afrim” and other KLA soldiers, police and guards were involved in the detention and mistreatment of detainees.<sup>251</sup>

126. The supporting material further indicates that the aforementioned individuals shared a common purpose during the timeframe of the charges to interrogate and mistreat detainees at the Zllash/Zlaš Detention Compound. The common purpose involved the crimes of arbitrary detention, cruel treatment, torture, and murder. In particular, the acts and omissions described in relation to Counts 1-4 demonstrate that Mr Mustafa and other KLA members acted with the common purpose of arbitrarily detaining, severely mistreating, interrogating, wilfully causing serious bodily injuries leading to death and killing detainees at the Zllash/Zlaš Detention Compound.<sup>252</sup>

127. Mr Mustafa’s significant contribution to the common purpose is apparent from his acts and omissions as described in relation to Counts 1-4. The supporting material indicates that Mr Mustafa, in his capacity as Commander Cali,<sup>253</sup> participated in the common plan by, *inter alia*: (i) commanding other KLA members at the Zllash/Zlaš Detention Compound during the timeframe of the charges; (ii) participating in the commission of the crimes of arbitrary detention (Count 1), cruel treatment (Count 2), torture (Count 3), and murder (Count 4); (iii) ordering other KLA members to commit such crimes; and (iv) acquiescing and supporting the commission of these crimes by his presence.<sup>254</sup>

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<sup>251</sup> [REDACTED].

<sup>252</sup> See *supra* paras 95-97, 99 (Count 1), paras 104-107 (Count 2), paras 112-113 (Count 3) and accompanying footnotes.

<sup>253</sup> [REDACTED]; [REDACTED] (where Mr Mustafa acknowledges that he was known as Commander Cali and he used to wear a red beret).

<sup>254</sup> See *supra* para. 99 (Count 1), para. 106 (Count 2), para. 113 (Count 3), para. 117 (Count 4). See also para. 150 (Superior Responsibility) and accompanying footnotes.

128. Regarding the subjective element of this mode of liability, the supporting material indicates that with his active and continuing participation in the mistreatment of the detainees, including for the purposes of obtaining information or punishing them, and by refraining from taking any measures to release the detainees or provide them with basic procedural guarantees, Mr Mustafa shared the intent to commit the crimes under Counts 1-4 forming part of the common purpose of the JCE.<sup>255</sup>

129. Having examined the supporting material as a whole, the Pre-Trial Judge finds that there is well-grounded suspicion that Mr Mustafa committed, as a member of a JCE, the war crimes of arbitrary detention (Count 1), cruel treatment (Count 2), torture (Count 3) and murder (Count 4), within the meaning of Article 16(1)(a) of the Law.

### **3. Joint Criminal Enterprise III**

130. In the alternative to Mr Mustafa's alleged responsibility under Count 4 through significant contribution to a JCE, the SPO alleges in the Further Revised Indictment that Mr Mustafa committed the war crime of murder, according to Article 16(1)(a) of the Law, as it was foreseeable to him that the crime was a possible consequence of the implementation of the JCE's common purpose and he willingly took that risk.<sup>256</sup>

131. The Pre-Trial Judge assesses this mode of liability in the alternative, in the event that the war crime of murder (Count 4) went beyond the common purpose of the aforementioned JCE. Accordingly, regarding the objective elements of this mode of liability, the Pre-Trial Judge refers to the above findings: that Mr Mustafa was a member of a JCE, the common purpose of which involved the commission of arbitrary

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<sup>255</sup> See *supra* para. 99 (Count 1), para. 108 (Count 2), para. 113 (Count 3), para. 118 (Count 4) and accompanying footnotes.

<sup>256</sup> Further Revised Indictment, para. 8.

detention, cruel treatment and torture.<sup>257</sup> In addition, Mr Mustafa's previous orders for mistreatment, the harsh detention conditions and severe physical and psychological assaults of the detainees over a prolonged period of time made the death [REDACTED] an objectively foreseeable consequence of the implementation of the JCE's common purpose.

132. Regarding the subjective element of this mode of liability, the supporting material indicates that Mr Mustafa intended to participate in and contribute to the furtherance of the common purpose.<sup>258</sup> In addition, the supporting material indicates that Mr Mustafa, as commanding officer, was aware that the victim was [REDACTED]<sup>259</sup> during detention to such an extent that he was covered in blood after every interrogation session<sup>260</sup> and could no longer [REDACTED].<sup>261</sup> Moreover, Mr Mustafa was aware of the inhumane conditions, including absence of medical care, in which [REDACTED], along with other detainees, was held.<sup>262</sup> Furthermore, Mr Mustafa's willingness to take the risk that [REDACTED] might be killed can be inferred from the deliberate manner in which the victim was mistreated, as well as the conditions of detention at the Zllash/Zlaš Detention Compound.<sup>263</sup>

133. Having examined the supporting material as a whole, the Pre-Trial Judge finds that, in the alternative to Mr Mustafa's alleged responsibility for the same crime under JCE I, there is well-grounded suspicion that Mr Mustafa committed, as a member of a JCE, the war crime of murder (Count 4), by being aware that such a crime might be perpetrated in carrying out the common purpose of the JCE and by willingly taking that risk, within the meaning of Article 16(1)(a) of the Law.

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<sup>257</sup> See *supra* paras 125-126 (Joint Criminal Enterprise I) and accompanying footnotes.

<sup>258</sup> See *supra* para. 128 (Joint Criminal Enterprise I) and accompanying footnotes.

<sup>259</sup> [REDACTED].

<sup>260</sup> [REDACTED].

<sup>261</sup> See *supra* para. 117 (Count 4) and accompanying footnotes.

<sup>262</sup> See *supra* para. 104 (Count 1) and accompanying footnotes.

<sup>263</sup> See *supra* paras 104-107 (Count 2), para. 117 (Count 4) and accompanying footnotes.

#### 4. Ordering

134. In the Further Revised Indictment, the SPO alleges that Mr Mustafa ordered the commission of the war crimes of arbitrary detention (Count 1), cruel treatment (Count 2) and torture (Count 3), according to Article 16(1)(a) of the Law.<sup>264</sup>

135. Regarding the objective elements of this mode of liability, the supporting material indicates that Mr Mustafa held a position of *de jure* and *de facto* authority within the BIA Unit's structure, as he was the only commander supervising 10 to 15 units, composed of up to five KLA members each, and that he reported directly to the General Staff.<sup>265</sup> Mr Mustafa was known to the detainees of the Zllash/Zlaš Detention Compound as Commander Cali.<sup>266</sup>

136. The supporting material shows that Mr Mustafa ordered other KLA members to arbitrarily detain and severely mistreat the detainees and, in the execution of such orders, the KLA members proceeded to arbitrarily detain, beat and physically and psychologically assault the detainees in Mr Mustafa's presence.<sup>267</sup> The supporting material thus indicates that Mr Mustafa's orders had a direct and substantial effect on the commission of the aforementioned crimes.

137. Regarding the subjective element of this mode of liability, the supporting material indicates that due to his commanding authority and his direct participation

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<sup>264</sup> Further Revised Indictment, paras 13, 34-35.

<sup>265</sup> [REDACTED].

<sup>266</sup> [REDACTED]; [REDACTED] (where Mr Mustafa acknowledges that he was known as Commander Cali and he used to wear a red beret). *See also supra* para. 101 (Count 1: Arbitrary Detention), para. 106 (Count 2: Cruel Treatment).

<sup>267</sup> [REDACTED].



in the commission of the crimes charged,<sup>268</sup> Mr Mustafa intended the crimes or at least was aware that the crimes would be committed in the execution of the acts ordered.<sup>269</sup>

138. Having examined the supporting material as a whole, the Pre-Trial Judge finds that there is well-grounded suspicion that Mr Mustafa ordered the commission of the war crimes of arbitrary detention (Count 1), cruel treatment (Count 2) and torture (Count 3), within the meaning of Article 16(1)(a) of the Law.

## 5. Instigating

139. In the Further Revised Indictment, the SPO alleges that Mr Mustafa instigated the war crimes of arbitrary detention (Count 1), cruel treatment (Count 2), and torture (Count 3), according to Article 16(1)(a) of the Law.<sup>270</sup>

140. As regards the objective and subjective elements, the Pre-Trial Judge refers to the findings with regard to the modes of liability of direct commission and ordering.<sup>271</sup>

141. Having examined the supporting material as a whole, the Pre-Trial Judge finds that there is well-grounded suspicion that Mr Mustafa instigated the commission of the war crimes of arbitrary detention (Count 1), cruel treatment (Count 2) and torture (Count 3), within the meaning of Article 16(1)(a) of the Law.

## 6. Aiding and Abetting

142. Further, and alternatively to the alleged responsibility for commission, the SPO alleges in the Further Revised Indictment that Mr Mustafa is criminally responsible for aiding and abetting the war crimes of arbitrary detention (Count 1), cruel

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<sup>268</sup> See *supra* para. 99 (Count 1), para. 106 (Count 2), para. 113 (Count 3) and accompanying footnotes.

<sup>269</sup> See *supra* para. 99 (Count 1), para. 108 (Count 2), para. 113 (Count 3) and accompanying footnotes. See also [REDACTED].

<sup>270</sup> Further Revised Indictment, paras 13, 34-35.

<sup>271</sup> See *supra* para. 122 (Direct Commission), paras 136-137 (Ordering) and accompanying footnotes.

treatment (Count 2), torture (Count 3), and murder (Count 4), according to Article 16(1)(a) of the Law.<sup>272</sup>

143. Regarding the objective elements of this mode of liability, the supporting material indicates that Mr Mustafa's acts and omissions amounted to practical assistance, encouragement or moral support in committing the aforementioned crimes. In particular, Mr Mustafa: (i) was present where detainees were held and mistreated;<sup>273</sup> (ii) failed to apply appropriate detention procedures;<sup>274</sup> (iii) failed to take adequate measures to ensure humane detention conditions at the Zllash/Zlaš Detention Compound;<sup>275</sup> and (iv) participated and assisted other perpetrators in the routine assault of several detainees, including during interrogation sessions.<sup>276</sup> The supporting material further indicates that the contribution of Mr Mustafa had a substantial effect on the commission of the aforementioned crimes. In particular, Mr Mustafa's position as a commander encouraged other KLA members to commit the crimes and legitimated them.<sup>277</sup> Likewise, his participation and assistance in the assaults and the degree of violence exerted on the detainees<sup>278</sup> substantially contributed to the commission of the aforementioned crimes.

144. Regarding the subjective element of this mode of liability, the supporting material indicates Mr Mustafa's deliberate manner in which he was involved in the commission of the crimes, whether directly or by way of encouraging his subordinates to commit them, his presence in the interrogation rooms and his continuing participation in the mistreatment of the detainees.<sup>279</sup> This shows that Mr Mustafa had knowledge that his acts and omissions assisted other KLA members in the

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<sup>272</sup> Further Revised Indictment, paras 34-35.

<sup>273</sup> See *supra* para. 106 (Count 2), para. 113 (Count 3) and accompanying footnotes. See also [REDACTED].

<sup>274</sup> See *supra* paras 95-97 (Count 1) and accompanying footnotes.

<sup>275</sup> See *supra* paras 104-107 (Count 2), paras 112-113 (Count 3) and accompanying footnotes.

<sup>276</sup> See *supra* paras 104-107 (Count 2), paras 112-113 (Count 3) and accompanying footnotes.

<sup>277</sup> See *supra* para. 106 (Count 2: Cruel Treatment), para. 113 (Count 3: Torture).

<sup>278</sup> See *supra* paras 104-107 (Count 2), paras 112-113 (Count 3) and accompanying footnotes.

<sup>279</sup> See *supra* para. 106 (Count 2), para. 113 (Count 3) and accompanying footnotes.

commission of the aforementioned crimes and that he was aware of the essential elements of the crimes, which were ultimately committed.

145. Having examined the supporting material as a whole, the Pre-Trial Judge finds that, in the alternative to Mr Mustafa's alleged responsibility for commission, there is well-grounded suspicion that Mr Mustafa aided and abetted the war crimes of arbitrary detention (Count 1), cruel treatment (Count 2), torture (Count 3) and murder (Count 4), within the meaning of Article 16(1)(a) of the Law.

## 7. Superior Responsibility

146. Further, and alternatively to the modes of liability under Article 16(1)(a) of the Law, the SPO alleges in the Further Revised Indictment that Mr Mustafa is criminally responsible as a superior for the war crimes of arbitrary detention (Count 1), cruel treatment (Count 2), torture (Count 3) and murder (Count 4), according to Article 16(1)(c) of the Law.<sup>280</sup>

147. Regarding the superior-subordinate relationship, the Pre-Trial Judge refers to the findings on Mr Mustafa's position as commander within the BIA Unit's structure.<sup>281</sup> Mr Mustafa, as the sole commander of the BIA Unit, reported directly to the General Staff and had effective authority over its soldiers and the sub-units of the BIA, including with regard to discipline.<sup>282</sup> Mr Mustafa also had a deputy to assist him,<sup>283</sup> who was present at the Zilash/Zlaš Detention Compound during the relevant time.<sup>284</sup> This shows that Mr Mustafa had the material ability to prevent and punish his subordinates at the time of the commission of the crimes. From the foregoing, it

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<sup>280</sup> Further Revised Indictment, paras 14-17, 34-35.

<sup>281</sup> See *supra* para. 101 (Count 1), para. 106 (Count 2), para. 113 (Count 3) and accompanying footnotes. See also para. 135 (Ordering).

<sup>282</sup> [REDACTED].

<sup>283</sup> [REDACTED].

<sup>284</sup> [REDACTED].

follows that there was a superior-subordinate relationship, during the time relevant to the charges, between Mr Mustafa, as BIA Unit commander, and the KLA members at the Zllash/Zlaš Detention Compound.

148. Regarding the crimes committed, the Pre-Trial Judge refers to his findings with regard to the crimes of arbitrary detention (Count 1), cruel treatment (Count 2), torture (Count 3) and murder (Count 4), as committed by Mr Mustafa's subordinates.<sup>285</sup>

149. Regarding Mr Mustafa's knowledge, the supporting material indicates that during the time relevant to the charges, he instructed his subordinates to commit crimes, was present in the Zllash/Zlaš Detention Compound and was also actively participating in their commission.<sup>286</sup> This demonstrates that Mr Mustafa, in the concrete circumstances at the time, not only knew about the crimes committed but had information available that was sufficiently alarming to put him on notice of the crimes justifying further inquiry. It follows that Mr Mustafa knew or had reason to know that his subordinates were about to commit the crimes charged or had done so.

150. Regarding Mr Mustafa's failure to take necessary and reasonable measures, the supporting material indicates that, in his capacity as commander within the BIA Unit structure, Mr Mustafa had the duty to prevent the commission of crimes in the Zllash/Zlaš Detention Compound and the duty to punish his subordinates for the crimes they committed during the time relevant to the charges.<sup>287</sup> Yet, Mr Mustafa failed to take any necessary and reasonable measures with a view to complying with his duties as a commander. In particular, while Mr Mustafa was to be informed of infringements by BIA Unit's soldiers and had the power to discipline his

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<sup>285</sup> See *supra* paras 95-97 (Count 1), paras 104-105, 107 (Count 2), paras 112-113 (Count 3), para. 117 (Count 4) and accompanying footnotes.

<sup>286</sup> See *supra* para. 99 (Count 1), para. 106 (Count 2), para. 113 (Count 3) and accompanying footnotes.

<sup>287</sup> See *supra* para. 147 (Superior Responsibility) and accompanying footnotes.

subordinates,<sup>288</sup> there is no indication in the supporting material that he took any measure to prevent or punish the perpetrators of the crimes charged. The supporting material suggests that at no point Mr Mustafa intended to release the detainees, to provide them with any basic guarantees, or otherwise to put an end to the ill-treatment, including of the detainee who was ultimately lost his life.<sup>289</sup> In fact, only when Serbian forces closed down on the Zllash/Zlaš Detention Compound the detainees were suddenly released and the KLA forces prepared for retreat.<sup>290</sup>

151. Having examined the supporting material as a whole, the Pre-Trial Judge finds that, in the alternative to the modes of liability under Article 16(1)(a) of the Law, there is well-grounded suspicion that Mr Mustafa is criminally responsible as a superior for the war crimes of arbitrary detention (Count 1), cruel treatment (Count 2), torture (Count 3) and murder (Count 4), within the meaning of Article 16(1)(c) of the Law.

## VII. LEGAL CHARACTERISATION OF THE CHARGES

152. The SPO charges Mr Mustafa with arbitrary detention, cruel treatment, torture and murder under Article 14 of the Law as well as Article 142 of the SFRY Criminal Code, as incorporated in Article 15(1)(a) and 16(2) of the Law.<sup>291</sup>

153. The Pre-Trial Judge notes that Article 142 of the SFRY Criminal Code provides that, among other violations “of rules of international law effective at the time of war, armed conflict or occupation”, killings, torture, inhuman treatment as well as illegal arrests and detention are punishable as war crimes against the civilian population. Inasmuch as Article 142 of the SFRY Criminal Code incorporates by reference the international law applicable during armed conflict,

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<sup>288</sup> [REDACTED].

<sup>289</sup> See *supra* para. 97 (Count 1) and accompanying footnotes.

<sup>290</sup> [REDACTED].

<sup>291</sup> Further Revised Indictment, p. 1 (Introduction), para. 35.

the constitutive elements of the charged crimes under Article 142 correspond to those identified above under Article 14(1)(c) of the Law.

154. For these reasons and in light of the Specialist Chambers' obligation to adjudicate and function in accordance with the Law as *lex specialis*,<sup>292</sup> the Pre-Trial Judge finds that Article 14(1)(c) of the Law is the primary and appropriate legal basis for the charged crimes.

#### VIII. RELATED REQUESTS FOR MAINTAINING CONFIDENTIALITY

155. As a general rule, Rule 88(1) of the Rules provides that an indictment shall be made public upon confirmation. Further, pursuant to Rules 95(1) and (2)(b) and 102(1)(a) of the Rules, any disclosure of material, including the names of witnesses and victims, will take place after the initial appearance of the Accused, for whom an indictment has been confirmed. In exceptional circumstances, however, pursuant to Rules 88(2) and 105(1) of the Rules, the SPO may apply for the temporary non-disclosure of the indictment, related documents, and the identities of victims and witnesses to continue after confirmation of the indictment or initial appearance of the Accused, as the case may be. It is highlighted that Rule 105(1) measures are provisional in nature, allowing for the protection of vulnerable witnesses and victims until such time a request for protective measures is submitted.

156. With respect to the suspect's risk of flight, the Pre-Trial Judge considers that the Mr Mustafa's (i) awareness of the notification of the charges, as contained in the indictment to be served, and potential penalties;<sup>293</sup> (ii) awareness of publicly reported convictions of senior Llap Operational Zone commanders for similar

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<sup>292</sup> Article 3(2)(b) of the Law.

<sup>293</sup> Initial Submission, para. 6.

crimes;<sup>294</sup> (iii) current employment [REDACTED] within the Ministry of Defence of Kosovo;<sup>295</sup> and (iv) ability to travel freely to countries not requiring a visa demonstrate that he has an incentive and means to flee.<sup>296</sup> Moreover, the Pre-Trial Judge notes the submissions of the SPO in relation to the lack of physical or medical conditions that would root him to his place of residence.<sup>297</sup>

157. With respect to the interference with victims and witnesses, the Pre-Trial Judge considers that [REDACTED].<sup>298</sup> [REDACTED].<sup>299</sup> In addition, some witnesses and victims [REDACTED].<sup>300</sup> [REDACTED].<sup>301</sup> Furthermore, according to the SPO, trial proceedings against Mr Mustafa's direct superior have been marred by witness intimidation.<sup>302</sup> The Pre-Trial Judge therefore concludes that Mr Mustafa has the incentive, means and opportunity to interfere with witnesses and victims and, consequently, obstruct the progress of criminal proceedings.

158. With respect to the further commission of crimes, the Pre-Trial Judge notes that the suspect has publicly bragged about the execution of Serbs thereby demonstrating a further risk that he may resort to physical violence or threats thereof against victims and witnesses.<sup>303</sup>

159. In light of the factors enumerated in paragraphs 156-158 above, the Pre-Trial Judge finds that the SPO has demonstrated good cause justifying exceptional circumstances that allow, pursuant to Rule 88(2) of the Rules, the temporary non-disclosure of: (i) the indictment as confirmed ("Confirmed Indictment"); and

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<sup>294</sup> Initial Submission, para. 6; Kosovo, Basic Court of Prishtinë/Priština, *Prosecutor v. R. Mustafa et al.*, P 448/2012, Judgment, 7 June 2013.

<sup>295</sup> Initial Submission, para. 7; [REDACTED].

<sup>296</sup> Initial Submission, para. 7.

<sup>297</sup> Initial Submission, para. 7.

<sup>298</sup> Initial Submission, para. 10.

<sup>299</sup> Initial Submission, para. 11; [REDACTED].

<sup>300</sup> Initial Submission, para. 10.

<sup>301</sup> Initial Submission, para. 10.

<sup>302</sup> Initial Submission, para. 9.

<sup>303</sup> Initial Submission, para. 12; [REDACTED].



(ii) the Initial Submission with its annexes, the Second Submission with its annexes and the Third Submission with its annex ("Related Documents").

160. In light of the factors enumerated in paragraphs 157 and 158 above, the Pre-Trial Judge also finds that the SPO has demonstrated exceptional circumstances, pursuant to Rule 105(1) of the Rules, justifying interim non-disclosure of the identities of witnesses and victims, until appropriate protective measures have been ordered.

161. As a result, the non-disclosure of the Confirmed Indictment towards the public<sup>304</sup> shall be maintained until further order of the Pre-Trial Judge, but no later than the initial appearance of the Accused, as per Rule 88(2) of the Rules. The Accused shall be served with the strictly confidential Confirmed Indictment with redactions, as appropriate, pursuant to Rules 87(1) and 105(1) of the Rules. Notwithstanding the confidentiality of the Confirmed Indictment, pursuant to Rule 88(3) of the Rules, the SPO may disclose the (redacted) version or part thereof to authorities of Kosovo, a Third State or another entity, if deemed necessary for the purposes of an investigation or prosecution.

162. The non-disclosure of the Related Documents and supporting material to the Confirmed Indictment shall also be maintained until further order of the Pre-Trial Judge, as provided in Rule 88(2) of the Rules. However, the supporting material shall be made available to the Accused with redactions, as appropriate, no later than 30 days of his initial appearance, as per Rules 102(1)(a) and 105(1) of the Rules.

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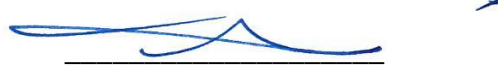
<sup>304</sup> For the purposes of this decision, public shall mean all persons, organisations, entities, Third States, clients, associations and groups, including the media, other than the judges of the Specialist Chambers (and their staff), the Registry, the SPO, and the Accused, Salih Mustafa.

## IX. DISPOSITION

163. In light of the foregoing, the Pre-Trial Judge hereby:

- a. **CONFIRMS** the charges of arbitrary detention (Count 1), cruel treatment (Count 2), torture (Count 3) and murder (Count 4) against Mr Mustafa, as war crimes punishable under Articles 14(1)(c) and 16(1)(a) and (c) of the Law, as specified in the present decision;
- b. **ORDERS** the Specialist Prosecutor to submit, within one week of the notification of the present decision, a further revised indictment charging Mr Mustafa solely under Articles 14(1)(c) and 16(1)(a) and (c) of the Law, which shall be considered the "Confirmed Indictment";
- c. **AUTHORISES** the SPO to redact the name and identifying information of any victim or witness from the Confirmed Indictment, Related Documents, and supporting material and assign and use provisional pseudonyms to these victims and witnesses;
- d. **ORDERS** the SPO to submit a strictly confidential, redacted version of the Confirmed Indictment within one week of notification of the present decision;
- e. **ORDERS** the Registry to serve on the Accused, in consultation with the SPO, the strictly confidential, redacted version of the Confirmed Indictment;
- f. **AUTHORISES** the SPO to disclose the strictly confidential, redacted Confirmed Indictment or parts thereof to authorities of Kosovo, a Third State or another entity, if deemed necessary for the purposes of the investigation or prosecution;
- g. **ORDERS** the non-disclosure of the Related Documents and supporting material until further order;
- h. **ORDERS** the non-disclosure of the Confirmed Indictment to the public until further order; and

- i. **ORDERS** the SPO to submit a request for protective measures, if any, in relation to victims and witnesses identified in the Confirmed Indictment, Related Documents and supporting material within two weeks of the initial appearance of the Accused.



**Judge Nicolas Guillou**  
**Pre-Trial Judge**

Dated this Monday, 5 October 2020  
At The Hague, the Netherlands.