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

In:	**KSC-BC-2020-06** **The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**
Before:	**Pre-Trial Judge** Judge Nicolas Guillou
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Prosecutor
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Prosecution response to preliminary motion concerning applicability of customary international law

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Specialist Prosecutor
Jack Smith

Counsel for Hashim Thaçi
David Hooper

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagendra

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I. INTRODUCTION

1. The VESELI Defence's arguments challenging the application of customary international law ('CIL'), and the customary status of certain crimes and modes,[1] fail on all fronts. The Law applies CIL at the time of the crimes, in full conformity with constitutional and human rights principles. This CIL was accessible and foreseeable to the Accused, and the Law confers jurisdiction to prosecute the charged war crimes and crimes against humanity under CIL. In particular, superior responsibility, illegal/arbitrary arrest and detention, and enforced disappearance were all established under CIL during the charged timeframe.

II. SUBMISSIONS

A. APPLICABILITY OF CUSTOMARY INTERNATIONAL LAW

2. It is clear that, in establishing the Kosovo Specialist Chambers ('KSC'), the lawmakers intended to grant this court jurisdiction over, *inter alia*, crimes against humanity and war crimes as defined in CIL during the KSC's temporal jurisdiction. This grant of jurisdiction was constitutional, necessary to fulfil international obligations, including to protect fundamental human rights and prosecute international crimes, and consistent with the rights guaranteed in Chapters II and III of the Constitution and the European Convention on Human Rights ('ECHR').

[1] Preliminary motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC, KSC-BC-2020-06/F00223, 15 March 2021 ('Request'). Arguments in the Request concerning joint criminal enterprise are addressed in a separate response.

3. Both Article 162 of the Constitution and the Law,[2] which were adopted to fulfil international obligations arising from the Exchange of Letters,[3] regulate the jurisdiction of the KSC.[4] Articles 13 and 14 of the Law provide the KSC with, *inter alia*, subject-matter jurisdiction over crimes against humanity and war crimes under CIL during the KSC's temporal jurisdiction. The Indictment[5] charges the Accused solely with crimes against humanity and war crimes pursuant to Articles 13 and 14. No crimes are charged pursuant to Article 15, which concerns the substantive criminal laws in force under Kosovo law at the relevant time, including the SFRY Code referenced by the Defence. As the charges are based solely on international law, consistent with Article 12, CIL at the time of the commission of the crimes applies.[6]

4. The Kosovo Constitutional Court, in finding Article 162 of the Constitution to be constitutional, considered, *inter alia*, that the scope of the KSC's jurisdiction must

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[2] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.
[3] Law No.04-L-274 on Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo, 23 April 2014.
[4] Constitution, Article 162(1); Law, Article 1(1).
[5] Annex 3 to Submission of corrected and public redacted versions of confirmed Indictment and related requests, KSC-BC-2020-06/F00045/A03, 4 November 2020 (reclassified on 5 November 2020) ('Indictment').
[6] In *Šimšić v. Bosnia and Herzegovina*, the ECtHR rejected as manifestly unfounded the complaint that the crimes against humanity of which the applicant was convicted were not a criminal offence under national law at the relevant time and therefore violated Article 7 of the ECHR. While considering that the relevant crime against humanity was not a crime under national law at the relevant time, it was at the time of commission a crime against humanity under international law, defined with sufficient accessibility and foreseeability therein. ECtHR, *Šimšić v. Bosnia and Herzegovina*, 51552/10, Decision, 10 April 2012, paras 20, 23-25. *See also* ECtHR (Grand Chamber), *Maktouf and Damjanović v. Bosnia and Herzegovina*, 2312/08 & 34179/08, Judgment, 18 July 2013, para.55 (noting that the *Šimšić* court considered the fact that crimes against humanity had not been criminal offences under national law at the relevant time was 'irrelevant, since they clearly constituted criminal offences under international law at that time').

comply with the rights provided by Chapters II and III of the Constitution.[7] One such right is guaranteed in Article 33(1) of the Constitution, which provides that persons may not be charged or punished for any act which did not constitute a penal offence under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law. Article 33(1) is consistent with Article 7 of the ECHR and Article 15 of the ICCPR, which permit persons to be held responsible for criminal offences under either national or international law, including CIL,[8] at the time they were committed.

5. With reference to Article 33(1) of the Constitution, Kosovo courts have entered war crimes convictions when such crimes were recognised in CIL at the time they were committed.[9] The ECtHR, applying Article 7 of the ECHR, has confirmed that prosecutions and convictions for crimes under CIL – even when not criminalised under domestic law at the relevant time – do not *per se* violate the principle of legality,

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[7] Constitutional Court of the Republic of Kosovo, Case No.K026/15, Judgement - Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433/DO-318, 15 April 2015, paras 45, 57, 59-60.

[8] *See, for example*, ECtHR (Grand Chamber), *Kononov v. Latvia*, 36376/04, Judgment, 17 May 2010, paras 186, 213, 227, 237, 244.

[9] *See, for example,* Kosovo, Court of Appeals, *Prosecutor v. X.K.*, Case No.648/16, Judgment, 22 June 2017, paras 2.1.12 (finding that the war crimes at issue were introduced to 'Kosovo's domestic legal order only after the war in Kosovo was over'), 2.1.13-2.1.15 (considering that Article 33(1) of the Constitution, which conforms with Article 7 of the ECHR, permits prosecution and punishment of acts that at the time they were committed were recognised as genocide, war crimes, and crimes against humanity according to international law), 2.1.16 (finding that, as a consequence of Article 33(1) of the Constitution, subsequent pieces of legislation, i.e. both the Provisional Code and Criminal Code of Kosovo should also be analysed for the legal classification of the relevant crimes). *See also* Kosovo, Court of Appeals, *Prosecutor v. J.D. et al.*, PAKR Nr.455/15, Judgment, 15 September 2016, p.49 (considering Article 33(1) of the Constitution, Article 7 of the ECHR and Article 15 of the ICCPR, the Panel concluded 'the criminal liability for the war crimes committed in 1998 in Kosovo is in accordance with the law'); Kosovo, Basic Court of Mitrovica, *Prosecutor v. A.D. et al.*, P.58/14, Verdict, 27 May 2015, para.250.

provided such crimes have a sufficiently clear legal basis in CIL and were accessible and foreseeable to the Accused.[10]

6. ECCC chambers have previously addressed and categorically rejected submissions similar to those raised in the Request, considering, amongst other factors, that: (i) where national law did not incorporate an international crime at the relevant time, a court may rely on international law without violating the principle of legality;[11] (ii) whether international law is directly applicable in domestic law generally is irrelevant where the legislator, in the specific law establishing the court, granted jurisdiction over crimes defined in international law and determined that such definition was directly applicable;[12] and (iii) national legislation concerning international crimes does not empower a government to prosecute such crimes; rather, such legislation falls within the 'basic exercise of its jurisdiction' and governments are obliged to prosecute such crimes.[13] As the ECCC is in a position similar to the KSC – at least insofar as it was established pursuant to domestic legislation necessary to fulfil obligations arising from an international agreement and its subject-matter jurisdiction

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[10] *Egs* ECtHR, *Kononov v. Latvia*, 36376/04, Judgment, 17 May 2010, paras 196, 199; ECtHR, *Šimšić v. Bosnia and Herzegovina*, 51552/10, Decision, 10 April 2012, paras 20, 22-25.

[11] ECCC, *Case against Nuon and Khieu*, 002/19-09-2007/ECCC/TC, Case 002/01 Judgement, 7 August 2014, para.18; ECCC, *Case against Nuon et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, para.213. *See also* ECCC, *Case against Kaing*, 001/18-07-2007/ECCC/SC, Appeal Judgement, 3 February 2012, para.99 and fn.188.

[12] ECCC, *Case against Nuon and Khieu*, 002/19-09-2007/ECCC/TC, Case 002/01 Judgement, 7 August 2014, para.18; ECCC, *Case against Nuon et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, paras 208, 212-213 ('the characterization of the Cambodian legal system as monist or dualist has no bearing on the validity of the law applicable before the ECCC').

[13] ECCC, *Case against Nuon et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, para.213. *See also* ECtHR, *Kononov v. Latvia*, 36376/04, Judgment, 17 May 2010, para.241 (considering that it is legitimate and foreseeable for a successor state to bring criminal proceedings against persons who committed crimes under a former regime and successor courts cannot be criticised for applying law applicable at that time, and noting the obligations on states to protect the right to life and prosecute, *inter alia*, violations of the laws and customs of war).

is based, *inter alia*, on CIL – this jurisprudence is highly relevant and the general principles enunciated, which are consistent with the interpretation and application of rights under the Constitution and ECHR, equally apply before the KSC.

7. The crimes and modes of liability charged in the Indictment were accessible and foreseeable to the Accused and, as set out in more detail below, the Defence fails to demonstrate that the KSC does not have jurisdiction over the crimes under CIL or that any other law applies.

1. The Law Applies CIL Which was Accessible and Foreseeable to the Accused At the Time

8. Article 12 of the Law provides that the KSC applies CIL 'at the time the crimes were committed'. The Accused cannot be prosecuted for any offence that did not constitute a criminal offence under national or international law at the time it was committed,[14] but the Accused are indeed being prosecuted under CIL crimes and modes of liability as of the charged timeframe (March 1998 through September 1999).[15] CIL was substantive law in force at the time of the events, and it is being applied by a specialised court duly established in accordance with Article 103(7) of the Constitution.[16]

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[14] Request, KSC-BC-2020-06/F00223, paras 6, 16(vi).
[15] *Contra* Request, KSC-BC-2020-06/F00223, para.58.
[16] As such, the *jus de non evocando* principle (defined by the Defence as 'no domestic or international law can bar the application of the substantive criminal law which was in force at the time of the events') does not apply. Request, KSC-BC-2020-06/F00223, para.29. Not only is this principle not implicated when the KSC prosecutes CIL in force at the time of the charged crimes, it has also been found not to be breached when transferring accused from the former Yugoslavia to the ICTY. ICTY, *Prosecutor v.*

9. The CIL applicable to the crimes charged must be both accessible and foreseeable to the Accused.[17]

10. As of the charged timeframe, various international instruments made it perfectly clear that war crimes and crimes against humanity were criminal under CIL. War crimes and crimes against humanity were criminalised under the IMT Charter,[18] Control Council Law 10,[19] and the ICTY Statute.[20] In the Nuremberg Principles, the International Law Commission stated in 1950 that 'the fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law'.[21] The ICC Statute criminalising these same offences was also very advanced as of the beginning of the charged timeframe, and was finalised in July 1998.[22]

11. Further, the SFRY ratified treaties relevant to the crimes charged, including Additional Protocol II of the Geneva Conventions[23] and the Torture Convention.[24] The

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Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995 (*Tadić* Jurisdiction Decision), paras 61-62.

[17] ECtHR (Grand Chamber), *Korbely v. Hungary*, 9174/02, Judgment, 19 September 2008, para.70.

[18] Article 6 of the Charter of the International Military Tribunal, 82 UNTS 279, 8 August 1945 (adhered to by Federal Republic of Yugoslavia as of 29 September 1945).

[19] Article II of Control Council Law 10, 20 December 1945.

[20] Articles 2-3 and 5 of the ICTY Statute, 25 May 1993.

[21] Principle II of International Law Commission, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal, 1950.

[22] Articles 7 and 8 of the ICC Statute, 17 July 1998.

[23] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, 8 June 1977 (ratified by SFRY with effect from 11 December 1979).

[24] Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984 (ratified by SFRY 10 September 1991).

SFRY also ratified the treaty confirming that no statute of limitations exists for war crimes or crimes against humanity.[25]

12. In the face of all this information, most of which was available decades before the charged timeframe, it was clearly accessible to the Accused that the charges in the Indictment constituted crimes at the time of their commission.[26]

13. As concerns foreseeability, it must be stressed that the crimes charged in the Indictment all concern flagrant human rights violations.[27] It is simply untenable to suggest that the Accused were not aware that launching a widespread and systematic attack against perceived opponents during war could lead to war crimes and crimes against humanity prosecutions. It must also be emphasised that the crimes and modes of liability within the jurisdiction of the KSC are those defined under CIL only. Cases where international crimes were retroactively prosecuted using definitions broader than those under CIL are not comparable.[28]

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[25] Article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 UNTS 73, 26 November 1968 (ratified by SFRY on 9 June 1970).
[26] *In accord with* Kosovo, District Court of Pec/Peja, *Prosecutor v. Besović*, C/P 136/2001, Verdict, 26 June 2003, para.454 ('Common Article 3 and Additional Protocols I and II are binding on Kosovo by virtue of the treaty obligations of the SFRY and FRY and UNMIK Regulation 1999/24, as amended by 2000/59. These instruments prohibit acts that are also punished in Kosovo law. The acts listed in the international treaties and international law, such as murder, taking hostages, pillage, degrading treatment and rape constitute offences both under international law and the national law of Kosovo. So nobody who commits or is party to one more of those offences can claim in good faith that he/she was not aware of the prohibition.').
[27] *See* ECtHR (Grand Chamber), *Kononov v. Latvia*, 36376/04, Judgment, 17 May 2010, paras 236-39.
[28] *See* ECtHR (Grand Chamber), *Vasiliauskas v. Lithuania*, 35343/05, Judgment, 20 October 2015, paras 165-66, 178, 181, 185-86, 191 (finding Article 7 violation for genocide conviction against a political group; domestic statute found to exceed CIL definition for the crime). As the crimes under the Law are the same as CIL, the Defence's reliance on this case is inapposite. Request, KSC-BC-2020-06/F00223, para.18.

14. Given that the ICTY could exercise jurisdiction over war crimes and crimes against humanity in Kosovo during the charged timeframe, it is unreasonable that the Accused could not foresee that they may be subject to prosecutions for such crimes. Domestic prohibitions in the SFRY Code also mirror the underlying acts charged under CIL, with Article 142 of the SFRY Code (governing a 'war crime against the civilian population')[29] being the most prominent example.[30]

15. The Accused were political and military leaders of an organised movement seeking control over all of Kosovo. Their responsibilities demanded that they be particularly familiar with prohibited war crimes and crimes against humanity.[31] Even

[29] This article provides that: '[w]hoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy's army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty'.

[30] Domestic provisions criminalising acts like murder are further examples, although these are not qualified as international crimes.

[31] ECtHR (Grand Chamber), *Vasiliauskas v. Lithuania*, 35343/05, Judgment, 20 October 2015, para.157; ECtHR (Grand Chamber), *Kononov v. Latvia*, 36376/04, Judgment, 17 May 2010, paras 238-39. KLA communiques demonstrate the General Staff's overall awareness of the laws of war. *Egs* KLA Communique #54, 21 September 1998, 043803-043803-ET Revised; KLA Communique #45, 9 March 1998, SPOE40000792-40000792 (Alb), SPOE40000792-SPOE40000792-ET Revised, p.2. Further, in July 1998, VESELI, together with Hashim THAÇI, attended a meeting with internationals at which compliance with the Geneva Conventions was raised in the context of allegations regarding abductions of civilians by the KLA. THAÇI gave an assurance that the KLA would respect the Geneva Conventions because it is a regular army. ICTY Witness Statement, U008-1323-U008-1333, paras 11, 16, 24; SPO

the most cursory assessment of their conduct would reveal the wrongfulness of such actions.

16. The gravity of the crimes charged, the ICTY's jurisdiction over CIL in Kosovo at the time, domestic equivalents to the crimes charged, and the positions of the Accused in the KLA all contribute to establishing the foreseeability of being prosecuted for war crimes and crimes against humanity under CIL. Insofar as the Defence challenges the accessibility and foreseeability of specific crimes and modes of liability, such submissions are addressed in more detail below and in other related responses.

2. The Law Confers Jurisdiction to Prosecute CIL At the Time

17. The Defence arguments that CIL cannot be applied without a law giving CIL direct effect in Kosovo[32] also fail.

18. The Law constitutes domestic legislation granting the KSC jurisdiction over the CIL crimes, as at the relevant timeframe. Consequently, the Law gives CIL direct effect

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Witness Statement, 075993-076009, paras 23-27. *See also* SPO Statement of W04408, 075552-075578, paras 91-100.

[32] Request, KSC-BC-2020-06/F00223, paras 7, 19-22, 31, 40(a), 41-43, 82-90. The SELIMI Defence makes essentially the same argument on this point in its preliminary motion on joint criminal enterprise. Selimi Defence Challenge to Jurisdiction – Joint Criminal Enterprise, KSC-BC-2020-06/F00198, 10 February 2021, paras 11-16. *See also* Preliminary motion of the Defence of Kadri Veseli to Challenge Jurisdiction on the basis of violations of the Constitution, KSC-BC-2020-06/F00224, 15 March 2021, paras 13-19.

before the KSC. In this respect, as set out further below,[33] and contrary to Defence arguments,[34] the Law is constitutional.

19. In light of the Law's adoption, the cases relied upon by the Defence to argue that the SFRY statutory scheme did not permit the domestic application of CIL to establish offences are inapposite. Cited cases like *Besović* and *Kolasinac* provide that international treaties cannot be directly applied unless the provisions of international law correspond to domestic law.[35] This reasoning does not undermine application of CIL before the KSC. The drafters specified which CIL crimes could be prosecuted in the Law, and in doing so crafted a domestic law allowing for the direct application of CIL.[36]

20. For these same reasons, the Defence's invocation of the 'duality test' is misplaced. The Defence has not provided any authority[37] for the proposition that the duality test is a necessary pre-requisite to the application of international law in Kosovo more generally, beyond Article 142 of the SFRY Code.[38] But, in any event,

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[33] Section II.A.3 below.
[34] *See* Request, KSC-BC-2020-06/F00223, paras 57-59.
[35] Supreme Court of Kosovo, *Prosecutor v. Besović*, AP-KZ No.80/2004, Verdict, 7 September 2004, pp.18-19; Supreme Court of Kosovo, *Prosecutor v. Kolasinac*, AP–KZ 230/2003, Decision, 5 August 2004, pp.21-22, 33. The cases from various national jurisdictions cited across paragraphs 82-90 of the Request all identify the same principle.
[36] As concerns command responsibility specifically, the Supreme Court in *Kolasinac* noted in 2004 that no violation of Article 7(1) of the ECHR would have stemmed from applying superior responsibility with retroactive effect in Kosovo. Supreme Court of Kosovo, *Prosecutor v. Kolasinac*, AP–KZ 230/2003, Decision, 5 August 2004, p.33, fn.72.
[37] *See* Request, KSC-BC-2020-06/F00223, para.51. All authorities cited for the duality test only apply it in the particular context of Article 142 of the SFRY Code.
[38] *See* Request, KSC-BC-2020-06/F00223, paras 47, 53. The reason the 'duality test' applies to Article 142 of the SFRY Code is because it has both domestic and international legal elements. In particular, Article 142 of the SFRY Code requires: (i) the commission of one of the enumerated acts specified in this

where the Law has, through domestic legislation, directly applied CIL at the relevant time, no such comparison is required.

21. When considering how the Law permits prosecutions under CIL from 1998-2000, it is important to distinguish the *criminality* of the Accused's conduct from the *jurisdiction* to prosecute that conduct. When the Defence asserts that there needed to be domestic prohibitions of CIL in the SFRY Code in order for the KSC to prosecute them today,[39] it conflates this distinction.

22. The International Military Tribunal, ICTY, ICTR, ECCC, and SCSL are all obvious examples of courts created to prosecute CIL offences committed in the past. All did so without offending the non-retroactivity principle because the offences within their jurisdiction fell under CIL at the time of their commission.[40] All these courts did was create a new jurisdiction to prosecute offences existing at the time the crimes were committed.

23. Similarly, Kosovo itself has previously passed laws incorporating international crimes within domestic law and, with reference to Article 33(1) of the Constitution, applied them with respect to acts committed before the relevant national laws came into force.[41]

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provision and (ii) that these acts were in violation of rules of international law effective at the time of war.

[39] Request, KSC-BC-2020-06/F00223, paras 12, 19, 31.

[40] *See generally* ECtHR (Grand Chamber), *Kononov v. Latvia*, 36376/04, Judgment, 17 May 2010, (Joint Concurring Opinion of Judges Rozakis, Tulkens, Spielmann, and Jebens, para.6: 'no one can speak of retrospective application of substantive law, when a person is convicted, even belatedly, on the basis of rules existing at the time of the commission of the act').

[41] *See* para.5 above.

24. The KSC is designed in the same fashion. The Law does not create new crimes or change old ones. It unlocks a jurisdictional avenue in Kosovo to prosecute CIL applicable between 1998-2000. That the duly promulgated Law creates jurisdiction in 2015 for 1998-2000 crimes is perfectly compatible with the principle of legality and the Constitution.

25. For these reasons, the Defence's submissions that the KSC cannot apply CIL generally must be rejected. Article 12 requires the application of CIL at the KSC, and does so in full conformity with all applicable constitutional and human rights requirements.[42]

3. *Lex Mitior* is not Implicated

26. The *lex mitior* principle relied upon at length by the Defence is inapposite in the present circumstances.[43] *Lex mitior* provides that, in the event of a change in the law, the more lenient law shall be applied to the Accused.[44] This applies at the KSC in accordance with human rights principles, and the Law does not constrict this principle's application.[45] Because the international law applied by the KSC is CIL

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[42] *Contra* Request, KSC-BC-2020-06/F00223, paras 19-28, 60, 75.
[43] *Contra* Request, KSC-BC-2020-06/F00223, para.32.
[44] *See* ECtHR (Grand Chamber), *Scoppola v. Italy (no. 2)*, 10249/03, Judgment, 17 September 2009, para.109.
[45] *Contra* Request, KSC-BC-2020-06/F00223, paras 23, 65. In this regard, the Defence argues that Article 15(1)(c) is unconstitutional because it denies the application of more lenient laws subsequent to the offences. Article 15(1)(c) speaks of the application of 'any more lenient substantive criminal law in force between 1989 and July 1999/27 October 2000', but this provision is not applicable to the current charges. Article 15(1) sets out 'the substantive criminal laws in force under Kosovo law during the temporal jurisdiction of the Specialist Chambers', of which more lenient domestic legislation may have formed a part. But this case is not predicated on Article 15, but rather on CIL as provided for in Article 12. Indeed, Article 15(1) sets out the law historically applying in Kosovo 'subject to Article 12'.

during the charged timeframe, the Law does not 'change' the substantive law applicable to the crimes charged.[46]

27. In arguing for application of the *lex mitior* principle, the Defence seeks to compare the Law to criminal provisions of the Socialist Federal Republic of Yugoslavia,[47] most notably Article 142 of the SFRY Code.

28. However, the Law is not applying Article 142 of the SFRY Code, or any amended version of it. It is instead applying the CIL applicable as of the crimes charged. The SFRY Code's overlap with CIL contributes to the foreseeability of the CIL applied,[48] but the Law's substantive provisions are not changing the SFRY Code's crimes or modes of liability such as to create a conflict requiring a comparison.[49]

29. The STL jurisprudence relied upon by the Defence does not translate to the KSC context.[50] The STL – a hybrid court formed pursuant to an agreement between Lebanon and the United Nations - applies Lebanese law subject to the provisions of the STL Statute.[51] This creates potential conflict as to how to interpret those provisions in the STL Statute which are inconsistent with Lebanese law. The STL Appeals Chamber resolved this by concluding that, when such conflicts arose, Lebanese law and international criminal law would be compared and the more favourable law to

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[46] It is noted that Article 7 of the ECHR only extends to substantive law such as crimes, modes of liability, and penalties. Procedural law can be applied retroactively without implicating Article 7 of the ECHR. ECtHR (Grand Chamber), *Scoppola v. Italy (no. 2)*, 10249/03, Judgment, 17 September 2009, para.110.
[47] Request, KSC-BC-2020-06/F00223, paras 49-56.
[48] Section II.A above.
[49] *Contra* Request, KSC-BC-2020-06/F00223, paras 62-64, 76-77.
[50] Request, KSC-BC-2020-06/F00223, para.76.
[51] Article 2 of the STL Statute, 30 May 2007.

the accused would be applied.[52] But the KSC is a specialised domestic court and its statute is a domestic law, so no comparison between the Law and 'national law' is necessary. As the Law mandates that the KSC apply CIL as it applied to Kosovo at the relevant time, there is likewise no need to compare the Law to 'international law'.

30. The application of the *lex mitior* principle additionally requires both the old and new laws to be binding on the KSC. As explained by the *Nikolić* Appeals Chamber in the context of sentencing at the ICTY:

> The principle of *lex mitior* is understood to mean that, if the law relevant to the offence of the accused has been amended, the less severe law should be applied. It is an inherent element of this principle that the relevant law must be binding upon the court. Accused persons can only benefit from the more lenient sentence if the law is binding, since they only have a protected legal position when the sentencing range must be applied to them. The principle of *lex mitior* is thus only applicable if a law that binds the International Tribunal is subsequently changed to a more favourable law by which the International Tribunal is also obliged to abide.[53]

31. By the plain terms of Article 12 of the Law, only CIL is binding upon the KSC.[54] To the extent the crimes and modes of liability of the SFRY overlap with CIL, there is no comparison to be done. To the extent those crimes and modes of liability do not reflect CIL, they are not binding upon the KSC and, therefore, do not implicate *lex mitior*.

32. Similar considerations apply in relation to the applicable penalties in Article 44 of the Law and Article 142 of the SFRY Code. As the Law exclusively concerns war

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[52] STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I/AC/R176bis/F0010/Cor, 16 February 2011, para.211.
[53] ICTY, *Prosecutor v. Nikolić*, IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005, para.81 (emphasis in original).
[54] Law, Article 12 (emphasis added: '[t]he Specialist Chambers shall apply customary international law and the substantive law of Kosovo *insofar as it is in compliance with customary international law* […]').

crimes and crimes against humanity as defined under CIL, no conflicting sentencing regime in Kosovo could be globally understood to apply.[55] In analysing cases from Bosnia and Herzegovina implicating Article 142 of the SFRY Code, the European Court of Human Rights distinguished between imposing penalties for crimes falling under CIL which were subsequently criminalised under domestic law (where *lex mitior* was found not to apply) and imposing penalties for war crimes falling equally under Article 142 of the SFRY Code and a later domestic law (where *lex mitior* was found to apply).[56] The present case falls under the first situation, as Article 142 of the SFRY Code does not directly criminalise CIL as is done in Articles 12-14 and 16. There

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[55] *Contra* Request, KSC-BC-2020-06/F00223, paras 24, 40(b), 66-69. In this regard, *see* Kosovo, Supreme Court, *Prosecutor v. J.D. et al*., PA II 11/2016, 3 July 2017, para.55; ECtHR (Grand Chamber), *Maktouf and Damjanović v. Bosnia and Herzegovina*, 2312/08 and 34179/08, Judgment, 18 July 2013 (Concurring Opinion of Judges Albuquerque and Vučinić, para.8, with emphasis added: '[t]he finding of *lex mitior* under Article 7 § 1 of the ECHR also implies a global comparison of the punitive regime under each of the penal laws applicable to the offender's case (the global method of comparison). *The judge cannot undertake a rule-by-rule comparison (differentiated method of comparison), picking the most favourable rule of each of the compared penal laws*. Two reasons are traditionally given for this global method of comparison: firstly, each punitive regime has its own rationale, and the judge cannot upset that rationale by mixing different rules from different successive penal laws; secondly, the judge cannot exceed the legislature's function and create a new *ad hoc* punitive regime composed of a miscellany of rules deriving from different successive penal laws. Hence, Article 7 § 1 of the ECHR presupposes a concrete and global finding of *lex mitior*.').

[56] *Compare* ECtHR, *Šimšić v. Bosnia and Herzegovina*, Decision, 51552/10, 10 April 2012, paras 23, 25 (finding no Article 7 violation), *with* ECtHR (Grand Chamber), *Maktouf and Damjanović v. Bosnia and Herzegovina*, 2312/08 and 34179/08, Judgment, 18 July 2013, paras 55, 67-76 (finding an Article 7 violation, and explicitly distinguishing the finding in *Šimšić*). The Defence presents a misleading summary of *Maktouf and Damjanović* by describing the Article 7 violation as stemming from the fact that 'the conduct (a war crime) was already a criminal offence under domestic law'. Request, KSC-BC-2020-06/F00223, para.79. The ECtHR Grand Chamber did note that Article 142 of the SFRY Code and the 2003 Criminal Code in Bosnia and Herzegovina criminalised war crimes, but the violation was found on the retroactive application of penalties, not the substantive crimes. *See* ECtHR (Grand Chamber), *Maktouf and Damjanović v. Bosnia and Herzegovina*, 2312/08 and 34179/08, Judgment, 18 July 2013, para.67 (emphasis added: '[m]oreover, the applicants did not dispute that their acts constituted criminal offences defined with sufficient accessibility and foreseeability at the time when they were committed. *The lawfulness of the applicants' convictions is therefore not an issue in the instant case*').

are not multiple applicable criminal laws available for comparison. In any event, any such comparison is premature, as this would only be relevant following a conviction and the trial in this case has yet to begin.

33. Article 33 of the Constitution confirms the non-applicability of *lex mitior* in the present situation.[57] Article 33(1) of the Constitution provides that no one shall be charged or punished for any act which did not constitute a penal offence under law at the time it was committed, but then makes an exception for 'acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law.'[58] As all crimes charged are CIL war crimes and crimes against humanity, the exception under this constitutional provision applies to all of them. This reading of Article 33(1) of the Constitution is consistent with Article 19(2) of the Constitution, which provides that 'legally binding norms of international law have superiority over the laws of the Republic of Kosovo.'[59] Article 33(2) of the Constitution governs penalties by providing that 'no punishment for a criminal act shall exceed the penalty provided by law at the time the criminal act was committed'. However, this provision does not prevent sentencing for CIL offences not previously provided for under domestic law.[60] Were this otherwise, then the exception in Article 33(1) of the Constitution would be without object.

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[57] *Contra* Request, KSC-BC-2020-06/F00223, paras 56-59.
[58] The Defence submission that this exception is confined to reflecting Article 7(2) of the ECHR is entirely unsupported, and contradicted by the plain language of the provision itself.
[59] *See also* Law, Article 3(2)(d).
[60] Paragraph 31 above. *See also* Kosovo, Basic Court of Mitrovica, *Prosecutor v. A.D. et al.*, P.58/14, Verdict, 27 May 2015, para.250.

34. Finally, it is hard to imagine how citing to a human rights convention somehow offends constitutional human rights protections, but this is exactly what the Defence argues regarding the inclusion of Article 7(2) of the ECHR[61] in Article 12.[62] As affirmed in the Defence's own cited jurisprudence, Article 7(2) must be read concordantly with Article 7(1) of the ECHR and does not constitute an exception to it.[63] This jurisprudence never holds that Article 7(2) has no continuing application, and the Defence is inaccurate when asserting otherwise.[64] So long as Article 7(2) is read consistently with Article 7(1) of the ECHR – merely as a 'contextual clarification of the liability limb of [Article 7(1)]'[65] - then it can apply in modern times and there is no constitutional impediment to the Law referencing it. The reference to Article 7(2) of the ECHR in Article 12 is not presented as an exception to the principle of non-retroactive application of criminal law to the detriment of the Accused,[66] and has no bearing of the issue at hand. All the reference reveals is a clear legislative intention that crimes under CIL from 1998 and 2000 are to be prosecuted by the KSC.

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[61] This provision provides: '[t]his article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations'.
[62] Request, KSC-BC-2020-06/F00223, paras 17, 70-74.
[63] ECtHR (Grand Chamber), *Maktouf and Damjanović v. Bosnia and Herzegovina*, 2312/08 and 34179/08, Judgment, 18 July 2013, para.72.
[64] *Contra* Request, KSC-BC-2020-06/F00223, paras 4, 16(vi)-(vii), 26. That Article 7(2)'s historical impetus was to ensure there would be no doubt about the validity of post-World War II era prosecutions does not mean that the provision is relevant or valid only in that context.
[65] ECtHR (Grand Chamber), *Maktouf and Damjanović v. Bosnia and Herzegovina*, 2312/08 and 34179/08, Judgment, 18 July 2013, para.72.
[66] *Contra* Request, KSC-BC-2020-06/F00223, para.27.

35. For these reasons, the Pre-Trial Judge was never required to compare domestic law to CIL in respect of the crimes, modes of liability, and potential penalties charged. Reliance on *lex mitior* is simply out of context.

B. SUPERIOR RESPONSIBILITY WAS CIL AT THE TIME

36. Superior responsibility, as delineated by the Pre-Trial Judge in the Confirmation Decision,[67] is a mode of liability that was recognised in CIL in 1998. As demonstrated above, the Pre-Trial Judge is not required to apply SFRY modes of liability or compare them to CIL,[68] as CIL applies before the KSC.[69] The Pre-Trial Judge should reject the Defence's motion in respect of superior responsibility, as the remaining arguments concern contours of the superior responsibility doctrine and are not a proper jurisdictional challenge pursuant to Rule 97(1)(a).

1. Superior responsibility has a firm basis in CIL

37. The existence of superior responsibility in CIL prior to 1998 is firmly established; it is settled law before international courts and has been found to constitute a general principle of international criminal law.[70] The weight of the treaty and conventional law in favour of this position, spanning from at least the early years of the last century, is such that the Defence has elected not to directly attack its status

[67] Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026/RED, 26 October 2020 (reclassified on 30 November 2020) ('Confirmation Decision').
[68] *Contra* Request, KSC-BC-2020-06/F00223, paras 120-123.
[69] Section II.A.3 above.
[70] ICTY, *Prosecutor v. Hadžihasanović*, IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002, paras 93(v), 167.

in CIL, positing instead that '[e]ven if' superior responsibility is part of CIL, the Pre-Trial Judge erred in his assessment of its parameters.[71] Since this statement on the CIL status of superior responsibility suggests that the Defence has implicitly acknowledged the existence of this mode in CIL, the SPO has determined that it is not in the interest of judicial economy to prepare exhaustive submissions on the origins and application of the doctrine, but will instead elucidate several of the key sources of law which have contributed to the overwhelming consensus on the status of superior responsibility in CIL.[72]

38. The Hague Conventions of 1907 have been found by the ICTY Appeals Chamber to have incorporated the concept of responsible command, which underlies the superior responsibility doctrine.[73] The Hague Conventions of 1907 and associated annexes thereto reveal the roots of the modern doctrine.[74] In 1919 at the Preliminary Peace Conference in Versailles, the International Commission on the Responsibility of

[71] Request, KSC-BC-2020-06/F00223, para.124.
[72] In the event that the Defence is challenging the customary status of superior responsibility, the SPO reserves the right to make further submissions on this matter.
[73] ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, 16 July 2003, para.14.
[74] *See e.g.* Article 3 of the Hague Convention IV (the principle of command responsibility is stated as follows: '[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'); Article 1 of the Annex to the Hague Convention IV (stating that '[t]he laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: 1. To be commanded by a person responsible for his subordinates; […] 4. To conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army"'); Article 43 of the Annex to the Hague Convention IV (stating that a person in authority must 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety.').

the Authors of the War and on Enforcement of Penalties presented a report recommending the establishment of a tribunal for the prosecution of all those who:

> [o]rdered or with knowledge thereof and power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing violations of the laws or customs of war.[75]

39. While the plans for a tribunal were never realised, the events of WWII[76] led certain nations to adopt legislation recognising liability of a superior for the acts of subordinates in certain circumstances.[77] In addition, in military courts adjudicating the crimes of the German and Japanese leadership after WWII, those charged were found to bear individual criminal responsibility on the basis of their failure to act as superiors in instances in which subordinates committed criminal acts.[78] For example,

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[75] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties – Report Presented to the Preliminary Peace Conference, Versailles, 29 March 1919, reprinted in 14 AJIL 95 (1920), p. 121.

[76] In describing how the doctrine of command responsibility, which pre-existed WWII, was applied in the post-war period, one commentator explained that '[w]hile that custom – an imposition of responsibility upon a commander for the illegal acts of his subordinates – existed prior to World War II, it was the action of commanders and national leaders during that conflict which so shocked the conscience of the world as to demand a strict accounting for the commencement and conduct of those hostilities. […] The law of war, and as part thereof the law of command responsibility, witness great progression through definition and delineation, perhaps reaching a high water mark as international jurists concentrated their efforts on the subject.' William H. Parks, 'Command Responsibility for War Crimes', 62 Mil. L. Rev. 1 (1973), p.77.

[77] *See e.g.* Article 4 of the French Ordinance of 28 August 1944 which provided: '[w]here a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organized or tolerated the criminal acts of their subordinates.' UN War Crimes Commission, Law Reports of Trials of War Criminals, Volume IV, 1949, p.87; Article IX of the Chinese Law of 24 October 1946 which stated: '[p]ersons who occupy a supervisory or commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals.' UN War Crimes Commission, Law Reports of Trials of War Criminals, Volume IV, 1949, p.88.

[78] *See e.g. In re Yamashita,* 327 US 1 (1946), pp.14-16 (before the Supreme Court on habeas petition from the Military Commission in Manila); *United States v. Karl Brandt et al.,* Trials of War Criminals before

in *In re Yamashita,* the US Supreme Court cited a number of statutory provisions, including Articles 1 and 43 of the Hague Regulations, in answering in the affirmative the following question:

> Whether the law of war imposed on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war … and whether he may be charged with personal responsibility for his failure to take such measures when violations result.[79]

40. Although superior responsibility was not included in the Geneva Conventions in 1949, the principle was codified in 1977 in Articles 86 and 87 of Additional Protocol I.[80] The *travaux preparatoires* of Additional Protocol I reveal those present considered

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the Nurnberg Military Tribunals under Control Council Law No.10, Volume II, 1950, pp.207 (regarding the accused Handloser), 212 (regarding the accused Schroeder); *United States v. Wilhelm List et al.*, Trials of War Criminals before the Nurnberg Military Tribunals under Control Council Law No. 10, Volume XI, 1950, p.1230, 1303; *United States v. Wilhelm von Leeb et al.*, Trials of War Criminals before the Nurnberg Military Tribunals under Control Council Law No. 10, Volume XI, 1950, p.462, 512.

[79] *In re Yamashita,* 327 US 1 (1946), p.15. General Yamashita was convicted by a US military commission on 7 December 1945 of 64 separate allegations of crimes committed by subordinates as he had unlawfully disregarded and failed to discharge his duties to control the acts of members of his command who committed war crimes. Trial of General Tomoyuki Yamashita, Case No. 21 (8 November-7 December 1945), Law Reports of Trials of War Criminals, Volume IV.

[80] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 UNTS 3, Article 86 (Failure to Act): '1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so. 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.', Article 87 (Duty of Commanders): '1.The High Contracting Parties and Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, and prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and this Protocol. 2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces

that the text declared the pre-existing law — namely that superior responsibility — formed part of CIL.[81]

41. Domestic military manuals, including those of the U.S., the U.K., and the former SFRY also contained provisions recognising superior responsibility.[82] The provisions of Article 7(3) of the ICTY Statute, Article 6(3) of the ICTR Statute and Article 28 of the ICC Statute reflect the decision of the international community to impose liability on the basis of superior responsibility.[83] Further in 1996, the ILC included a provision similar to Article 16(1)(c) of the Law in the adopted Draft Code of Crimes Against the Peace and Security of Mankind.[84] The Commentary on the ILC

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under their command are aware of the obligations under the Conventions and this Protocol. 3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.'.

[81] *See e.g.* comments of the Swedish delegate at CCDH/I/SR.64, in Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Swiss Federal Political Department: Bern 1978) Volume IV, p.315, para.61. The ICTY Appeals Chamber affirmed that command responsibility was part of CIL before the adoption of Protocol I. ICTY, *Prosecutor v. Hadžihasanović et al.,* IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, 16 July 2003, para.29; ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002, para.157.

[82] US Department of Army FM 27-10: The Law of Land Warfare (1956), para. 501; The War Office, The Law of War on Land: being Part III of the Manual of Military Law, 1958, para. 631; SFRY Federal Secretariat for National Defence, Regulations Concerning the Application of International Law to the Armed forces of SFRY (1988) Article 21, reprinted in M C Bassiouni, The Law of the International Criminal Tribunal for the Former Yugoslavia, 1996, p.661.

[83] The ICTY Statute and ICTR Statute were each adopted by the UN Security Council on 25 May 1993 and 8 November 1994 respectively. The Rome Statute was adopted on 17 July 1998 and entered into force on 1 July 2002.

[84] ILC, Draft Code of Crimes Against the Peace and Security of Mankind, A/48/10, 1996 ('ILC Draft Code') p.34, Article 6 states: '[t]he fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or

Draft Code found that superior responsibility was recognised in the 1907 Hague Convention and 'reaffirmed' in subsequent instruments including Additional Protocol I and II.[85]

42. The jurisprudence of the *ad hoc* and hybrid tribunals is replete with judicial interpretation of the doctrine of superior responsibility, including as concerns acts committed before the KSC's temporal jurisdiction. These tribunals, which have a statutory framework akin to the KSC, determined that superior responsibility is a mode of liability found in CIL applicable to crimes committed between the 1970s and 1990s.[86] For example, the ECCC confirmed that, based on a review of relevant jurisprudence and sources, superior responsibility was a mode of liability recognised in CIL by 1975.[87] Before the ICTY, multiple chambers, including the Appeals Chamber, found that superior responsibility is well-established in conventional and customary law.[88] At the ICTR, various chambers interpreted Article 6(3) of the ICTR Statute on

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had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.' In the 1950 draft of the ILC Draft Code, the ILC, having assessed the extent of state responsibility under international law, responsibility of subordinates found in national laws, and WWII caselaw precedent, recommended that the following principle be included, including in respect of war crimes: '[a]ny person in an official position, whether civil or military, who fails to take the appropriate measures in his power and within his jurisdiction, in order to prevent or repress punishable acts under the draft code shall be responsible therefor under international law and subject to punishment.' Report of J Spiropoulous, Special Rapporteur, A/CN.4/25, 26 April 1950, paras 88-100.

[85] ILC, Yearbook of the International Law Commission 1996, A/CN.4/SER/A/1996/Add.1, Commentary to Article 6, paragraph 1.

[86] This analysis excludes the development of the mode at the ICC, as its highly detailed statute has determined the application of the mode rather than CIL as such.

[87] ECCC, *Case 002*, 002/19-09-2007-ECCC/OCIJ (PTC 145&146), Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, para.230.

[88] ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, para.195 affirming the Trial Chamber's finding: '[t]hat military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-

superior responsibility by considering the post-WWII cases, Additional Protocol I and other sources of law, including those considered previously by the ICTY.[89] Further, the SCSL held that the principle that an individual may be held responsible as a superior in the course of an armed conflict is enshrined in CIL.[90] While the jurisprudence of these courts is not binding on the KSC, it does reflect detailed judicial consideration of relevant sources of law and the widespread consensus on the status of command responsibility in CIL.

2. The Pre-Trial Judge assessed the status of superior responsibility in CIL

43. Contrary to the Defence claim,[91] the Pre-Trial Judge assessed the statutory authorisations for the applicability of CIL and outlined the applicable law for modes of liability charged in the Indictment.[92] For each objective and subjective element of superior responsibility, the Pre-Trial Judge provided a citation to the particular source of CIL supporting the inclusion of that element or aspect of the mode.[93] The pronouncements of law from international courts and tribunals may be used to

established norm of customary and conventional international law.' ICTY, *Prosecutor v. Delalić et al.*, IT-96-21, Judgement, 16 November 1998, para.333; ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, 16 July 2003, para.31; ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002, paras 167, 179; ICTY, *Prosecutor v. Blaškić,* IT-95-14-T Judgement, 3 March 2000, para.290; ICTY, *Prosecutor v. Aleksovski,* IT-95-14/1-T, Judgement, 25 June 1999, para.70.

[89] *See e.g.*, ICTR, *Prosecutor v. Kayishema and Ruzindana,* ICTR-95-1-T, Judgement, 21 May 1999, paras 220, 492; ICTR, *Prosecutor v. Musema,* ICTR-96-13-T, Judgement and Sentence, 27 January 2000, paras 128-148.

[90] SCSL, *Prosecutor v. Brima et al.*, SCSL-2004-16-T, Judgement, 20 June 2007, para. 782. Article 6(3) of the SCSL Statute concerns command responsibility. The Statute entered into force on 12 April 2002.

[91] Request, KSC-BC-2020-06/F00223, paras 124-130.

[92] Confirmation Decision, KSC-BC-2020-06/F00026/RED, paras 22-25, 104-123.

[93] Confirmation Decision, KSC-BC-2020-06/F00026/RED, footnotes 221-242.

determine the status of CIL.[94] The fact that other international courts have applied superior responsibility and in so doing have further elaborated upon the application of the mode, shows that the contours of the mode have developed in CIL. In this regard, the principle of legality does not prohibit a court from interpreting or clarifying the law, the elements, or the contours thereof or from relying on decisions that do so in other cases.[95]

44. The Defence have pointed to no specific facts that would demonstrate that the Pre-Trial Judge's holdings were erroneous. In any event, as set out further below, challenges to the elements and their contours are not properly raised or considered as jurisdictional challenges within the meaning of Rule 97. The Defence arguments suggesting that the Pre-Trial Judge did not consider the parameters of the doctrine in CIL must fail.

3. The remaining Defence arguments are not jurisdictional challenges

45. The remaining Defence claims amount to nothing more than arguments about the contours of the mode of liability of superior responsibility. The contours and elements of modes of liability have been found to be an 'issue[ ] of law […] which can be properly advanced and argued during the course of trial.'[96] As has been found at

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[94] Article 3(3) of the Law.
[95] ECCC, *Case against Kaing*, 001/18-07-2007/ECCC/SC, Appeal Judgement, 3 February 2012, paras 95, 234 (noting that the principle of legality does not prevent the Chamber from progressive development of the law, provided a Chamber, in doing so, does not create new law). *See also* ECtHR, *S.W. v. UK*, 20166/92, Judgment, 22 November 1995, para.35.
[96] ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-AR72.1, Decision on Tolimir's "Interlocutory Appeal against the Decision of the Trial Chamber on the Part of the Second Preliminary Motion Concerning the Jurisdiction of the Tribunal", paras 7, 10; *see also* ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal against Decision on Several Motions Challenging

the ICTY, one such example of a claim outside the scope of a jurisdictional appeal is when an accused disputes the definition or interpretation of a term underpinning a mode of liability.[97]

46. This is precisely what the Defence has done in this instance, making arguments about terms like 'knowledge' and 'effective control' underpinning aspects of the mode. For example, the Defence disputes the meaning of the *mens rea* standard of 'knew or had reason to know'.[98] In the *Gotovina* case, the ICTY Appeals Chamber determined that a challenge concerning the applicable *mens rea* to a mode of liability was not related to jurisdiction as such, but rather appeared to relate to the definition and interpretation of a particular element of the mode of liability.[99] Further, the Defence question the application of the test of 'effective control'.[100] A determination on whether an accused had effective control will depend on the facts of the case as they are established at trial. Delineating the outer limits of effective control, as requested by the Defence, in the absence of any evidence about the accused and their

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Jurisdiction, 6 June 2007, paras 22-24; ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-PT, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-perpetration, 22 March 2006, para. 23 (holding that 'like challenges to the contours of a substantive crime, challenges concerning the contours of a form of responsibility are matters to be addressed at trial.'); ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR72.1, IT-95-5/18-AR72.2, IT-95-5/18-AR72.3, Decision on Radovan Karadžić's Motions Challenging Jurisdiction (Omission Liability, JCE-III – Special Intent Crimes, Superior Responsibility), 25 June 2009, para. 36; ECCC, *Case 002*, 002/19-09-2007-ECCC/OCIJ (PTC 145&146), Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, paras 60 *et seq*.

[97] ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal against Decision on Several Motions Challenging Jurisdiction, 6 June 2007, paras 15, 18.

[98] Request, KSC-BC-2020-06/F00223, para.128.

[99] ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal against Decision on Several Motions Challenging Jurisdiction, 6 June 2007, para. 24 (finding that '[s]uch an argument goes to the pleading practice and the form of the indictment and is not a challenge to jurisdiction.').

[100] Request, KSC-BC-2020-06/F00223, para.129.

subordinates would wrongly restrict any assessment made at trial. This type of challenge was dismissed in the *Karadžić* case at the ICTY, in which the Pre-Trial Chamber determined that an accused's effective control over the persons involved in the commission of a crime will be determined based on the evidence led at trial.[101]

47. In sum, the Defence claims which do not concern whether superior responsibility is a mode of liability applicable at the KSC are not jurisdictional challenges. Plainly, superior responsibility is a mode of liability firmly based in CIL and applicable to the accused. No error in the Pre-Trial Judge's assessment of superior responsibility has been shown.

C. ILLEGAL/ARBITRARY ARREST AND DETENTION WAS CIL AT THE TIME

48. Equally, contrary to Defence challenges,[102] the Pre-Trial Judge correctly found that arbitrary detentions were prohibited under CIL, and that the KSC may exercise jurisdiction over this crime under Articles 14(1)(c) and 12 of the Law.[103] Accordingly, the Defence's challenge against count three of the indictment should be dismissed.

1. The prohibition against arbitrary detention is included in Article 14(1)(c)

49. Article 14(1)(c) grants the KSC jurisdiction over serious violations of Common Article 3 of the 1949 Geneva Conventions. Common Article 3 provides, *inter alia*, that persons taking no active part in hostilities shall, in all circumstances, be treated

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[101] ICTY, *Prosecutor v. Karadzić*, IT-95-5/18-PT, Decision on Six Preliminary Motions Challenging Jurisdiction, 28 April 2009, paras 32, 80.
[102] Request, KSC-BC-2020-06/F00223, paras 131-150.
[103] Confirmation Decision, KSC-BC-2020-06/F00026/RED, paras 32-38.

humanely.[104] Common Article 3 is a rule of CIL containing a non-exhaustive list of prohibited acts.[105] As found by the ICTY in *Aleksovski*, the purpose of Common Article 3 'is to uphold and protect the inherent human dignity of the individual', and its general proscription is against inhumane treatment.[106]

50. The Defence concedes that humane treatment is a requirement in NIACs,[107] but contrary to its submissions, this baseline principle is not purely a context dependent concept. The fundamental guarantee against arbitrary detention is non-derogable,[108] and respect for fundamental and non-derogable rights is a necessary component of the prohibition against inhumane treatment enshrined in Common Article 3.[109] As

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

[105] For the customary status of Common Article 3 *see e.g.* ICTY, *Prosecutor v. Tadić,* IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para.98. For the non-exhaustive character of the list of crimes in Article 3 *see e.g.* ICRC, Commentary of 1952, pp.53-54; ICRC, Commentary of 1958, pp.38-39.

[106] ICTY, *Prosecutor v. Aleksovski,* IT-95-14/1-T, Judgment, para.49. *See* also para.51 ('[t]he general proscription in common Article 3 is against inhuman treatment').

[107] Request, KSC-BC-2020-06/F00223, para.141.

[108] Human Rights Committee, CCPR General Comment No. 35, Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, para.66.

[109] ICRC, Commentary to the First Geneva Convention, 1952, p.48 (Common Article 3 'ensures the rules of humanity which are recognized as essential by civilized nations'); Commentary on Additional Protocol II, 1987, paras 4521, 4523 (humane treatment 'covers all the rights of the individual, that is, the rights and qualities which are inseparable from the human being by the very fact of his existence and his mental and physical powers').

noted both by the Kosovo Supreme Court,[110] and the ICRC, 'common Article 3 of the Geneva Conventions, as well as both Additional Protocols I and II, require that all civilians and persons hors de combat be treated humanely (see Rule 87), whereas arbitrary deprivation of liberty is not compatible with this requirement'.[111]

51. Article 14(1)(c) uses the word 'including' before listing certain prohibited acts. The plain and literal interpretation of this word indicates a non-exhaustive list of prohibited conduct.[112]

2. The prohibition against arbitrary detention in NIACs is part of CIL

52. Both the ICRC and the Inter-American Commission on Human Rights found that the prohibition against arbitrary detention in NIACs is part of CIL.[113] The customary status of this prohibition is based both on state practice[114] and international humanitarian and human rights law.[115] Indeed, there is nothing anywhere in

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[110] Supreme Court of Kosovo, *L. Gashi et al.*, Plm. Kzz. 18/2016, Judgment, 13 May 2016, para.58 ('[d]uring the armed conflict, the civilians shall be treated humanely, whereas arbitrary deprivation of liberty and beating is not compatible with this requirement.').
[111] ICRC CIL Study, Rule 99.
[112] Confirmation Decision, KSC-BC-2020-06/F00026/RED, para.33.
[113] ICRC, Customary International Humanitarian Law, Volume I: Rules, 2005 (reprinted with corrections 2009), Rule 99, p.347 ('the prohibition of arbitrary deprivation of liberty in non-international armed conflicts is established by State practice in the form of military manuals, national legislation, and official statements, as well as on the basis of international human rights law').
[114] ICRC, Customary International Humanitarian Law, Volume I: Rules, 2005 (reprinted with corrections 2009), Rule 99, pp.346-348.
[115] ICRC, Customary International Humanitarian Law, Volume I: Rules, 2005 (reprinted with corrections 2009), Rule 99, pp.344, 347-352. *See also* Universal Declaration of Human Rights, 10 December 1948, Article 9; International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966, Article 9; European Convention on Human Rights, 4 November 1950, Article 5; American Convention on Human Rights, 22 November 1969, Article 7; Supreme Court of Kosovo, *L. Gashi et al.*, Plm. Kzz. 18/2016, Judgment, 13 May 2016, para.57 ('international humanitarian law and human rights law strictly prevents detention unless there are clearly established needs, in particular

international law or state practice that permits detention other than on a lawful basis.[116]

53. Contrary to Defence submissions,[117] in affirming the customary status of the prohibition in the context of NIACs, the ICRC CIL Study cited a variety of both national and international sources consisting of 19 national laws, four military manuals, three UN Security Council Resolutions, two UN General Assembly Resolutions, and three UN Commission on Human Rights Resolutions. [118] Of the 19 cited national laws, only one was enacted after 31 December 2000.[119] All four of the military manual provisions cited were adopted prior to 1998 and have since remained unchanged.[120] Three of the UN Security Council Resolutions,[121] one of the UN General

security needs, and provides certain conditions and procedures to prevent disappearance and to supervise the continued need for detention').

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

[117] Request, KSC-BC-2020-06/F00223, paras 143-145 (challenging, *inter alia*, the state practice as 'insufficiently dense'). Those objections appear to be based solely on and essentially taken from, arguments made by the United States in relation to the ICRC CIL Study (Request, KSC-BC-2020-06/F00223, para.143, footnotes 117 and 118, *citing* John B. Bellinger, III and William J. Haynes II, A US government response to the International Committee of the Red Cross study on Customary International Humanitarian Law, International Review of the Red Cross, Vol. 89 No. 866, June 2007, pp.443-471, at 444-445).

[118] ICRC, Customary International Humanitarian Law, Volume I: Rules, 2005 (reprinted with corrections 2009), Rule 99, pp.347-352.

[119] Niger added criminal code amendment prohibiting deprivation of liberty in 2003.

[120] Namely, those of Australia, Croatia, Germany, and South Africa.

[121] UNSC, S/RES/1019, 9 November 1995, preamble; UNSC, S/RES/1034, 21 December 1995, preamble and para.2; UNSC, S/RES/1072, 30 August 1996, preamble.

Assembly Resolutions,[122] and two of the UN Commission on Human Rights Resolutions,[123] were adopted before 1998, with a third adopted on 22 April 1998.[124]

54. With respect to the Defence's argument against the use of 'written materials' by the ICRC instead of 'operational practice', it suffices to say that military manuals, national laws, and resolutions of international organisations are appropriate sources to assess state practice in international humanitarian law.[125]

55. Further, the standard for humane treatment applies equally across international humanitarian law,[126] and arbitrary detention is well-established as conduct which violates the principle of humane treatment.[127]

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[122] UNGA, A/RES/50/193, 22 December 1995, preamble (expressing concern of reports about unlawful detention in Bosnia and Herzegovina, Croatia, and the SFRY).
[123] UN Commission on Human Rights, E/CN.4/1996/71, 23 April 1996, para.1 (condemning detentions in Bosnia and Herzegovina, Croatia and the FRY); UN Commission on Human Rights, E/CN.4/1996/73, 23 April 1996, § 15 (condemning arbitrary detention by all parties in Sudan).
[124] UN Commission on Human Rights, E/CN.4/1998/75, 22 April 1998, para.5 (calling on the LRA to release abducted children).
[125] *See e.g.* the list of sources for the formation of custom provided by the ICRC, which includes military manuals and resolutions of international organisations, at www.ihl-databases.icrc.org/customary-ihl/eng/docs/src. *See also* UNGA, Report of the International Law Commission, Sixty-eight session (2 May-10 June and 4 July-12 August 2016), A/71/10, p.101 for the significance of international organisations resolutions in the investigation of customary international law.
[126] Commentary of 2017, para.1422 ('[g]iven that it is based on the fundamental concept of human dignity, the standard of humane treatment is the same for all categories of protected persons and applies equally in international and non-international armed conflict'); ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, 16 November 1998, para.543 ('acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment').
[127] As a grave breach: Commentary of 2016, paras 2977-2978 (describing inhuman treatment as the 'umbrella' under which all of the grave breaches fall; unlawful confinement of civilians is a grave breach pursuant to Article 147 of the Fourth Geneva Convention); ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, 16 November 1998, para.543 (similarly describing grave breaches as falling under the umbrella of inhuman treatment). See also ICTY, *Prosecutor v. Blaškić*, IT-9514-T, Judgment, 3 March

56. Finally, the fair trial rights guaranteed in Common Article 3(1)(d)[128] are necessarily incompatible with the possibility of permitting arbitrary detention in a non-international armed conflict. It would be pointless to oblige a party to the conflict to respect the fair trial rights of a detainee if, at the same time, that party is free to by-pass that requirement by carrying out detentions without any legal basis or basic procedural guarantees.[129] Hence, the prohibition of arbitrary detention as a threshold matter is implicit in Common Article 3.

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

57. Arbitrary detention is a serious violation of Common Article 3 within the meaning of Article 14(1)(c) of the Law. The prohibition against this crime aims in fact to protect, primarily, the fundamental rights to life, liberty and security of the person.[130] It also protects other human rights, for instance those concerning physical

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2000, para.154. As crimes against humanity: Article 13(1)(j) ('other inhumane acts') (emphasis added) indicates that the other enumerated crimes against humanity, including imprisonment (Article 13(1)(e)), are also inhuman. See also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),S/25704, 3 May 1993, para. 48 ('Crimes against humanity refer to inhumane acts of a very serious nature' (emphasis added)).

[128] *See also* Article 14(1)(c)(iv) and Articles 2(2) and 6 of Additional Protocol II.

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

[130] Human Rights Committee, CCPR General Comment No. 35, Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, paras 2, 55.

integrity, which the practice of arbitrary detention has historically endangered.[131] The majority of episodes of physical and mental abuse as well as killings charged in this case are alleged to have been committed against persons who were arbitrarily detained.

4. Arbitrary detention was prohibited by Article 142 of the SFRY Code

58. Article 142 of the SFRY Code, the nature and scope of which has been reviewed *supra*, prohibited illegal arrests and detentions as war crimes, contributing to the foreseeability by the Accused that they could be prosecuted for these crimes. Article 142 specified that the acts proscribed therein are criminalised insofar as they constitute a violation 'of rules of international law effective at the time of war'.[132] As demonstrated above, the prohibition against arbitrary detention is included under Common Article 3 and is a rule of CIL.

59. The Defence, after noting that Article 142 provided that 'unlawful bringing in concentration camps and other illegal arrest and detention' is a war crime, argues that this provision is 'a clear reference to such criminalisation as part of the grave breaches of the Geneva Convention system,' which does not encompass NIACs.[133] The plain reading of Article 142 does not allow this conclusion to be drawn. Article 142 does not restrict its scope of applicability to international armed conflicts, and in addition to

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[131] Human Rights Committee, CCPR General Comment No. 35, Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, paras 2, 33, 56, 58.
[132] *See also* Article 12, which states the applicability of the substantive criminal law of Kosovo insofar as it complies with customary international law.
[133] Request, KSC-BC-2020-06/F00223, para.146.

confinement in 'concentration camps', it criminalises 'other illegal arrests and detention.'

60. The Defence also submits that the Prosecution at the ICTY did not charge illegal detentions in the *Limaj et al.* and *Haradinaj et al.* cases, in spite of the fact that the factual allegations involved cases of detention, some of which are charged in the indictment in this case.[134] This circumstance, which is the outcome of the exercise of prosecutorial discretion and may be based on a multitude of considerations, including evidentiary ones, is immaterial to the customary status of arbitrary detention as an offence applicable in NIACs.

D. ENFORCED DISAPPEARANCE OF PERSONS WAS CIL AT THE TIME

61. Contrary to Defence submissions,[135] enforced disappearance was a crime against humanity in CIL by 1998. Further, Defence arguments pertaining to the *mens rea* of enforced disappearance[136] are not properly raised as a jurisdictional challenge under Rule 97. They can be properly advanced and argued in the course of the trial.[137] In any event, intent to remove the victim from the protection of the law is not an element of enforced disappearance under CIL.

1. The crime against humanity of enforced disappearance was recognised in CIL by 1998.

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[134] Request, KSC-BC-2020-06/F00223, para.146.
[135] Request, KSC-BC-2020-06/F00223, paras 151-159, 162.
[136] Request, KSC-BC-2020-06/F00223, paras 159-161.
[137] Section II.B.3 above.

62. A cumulative consideration of consistent state practice and *opinio juris* from at least 1946, as well as the persistent absence of contrary practice or objection,[138] demonstrate that, by 1998, enforced disappearance was a crime against humanity under CIL.

63. Between 1946 and 1947, the International Military Tribunal[139] and United States Military Tribunal at Nuremberg ('NMT')[140] entered convictions for war crimes and crimes against humanity based on, *inter alia*, conduct amounting to enforced disappearance. In *Altstötter et al.*, the NMT found that detaining persons secretly and incommunicado 'is inhumane treatment […] meted out not only to the prisoners

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[138] ICRC, Customary International Humanitarian Law, Volume I: Rules, 2005 (reprinted with corrections 2009), Rule 98, p.341 ('No official contrary practice was found in the sense that no State has claimed the right to enforce the disappearance of the persons').
[139] Trial of Major War Criminals Before the International Military Tribunal, 1947, Volume I, pp.171-341, *USA et al. v. Göring et al.*, Judgment, 1 October 1946, pp.289-291 (in convicting Keitel of war crimes and crimes against humanity, referring to, *inter alia*, his involvement in the issuance of the Night and Fog Decree, but not specifying whether that particular conduct amounted to a war crime, crime against humanity, or both). *See also* pp.232-233 (describing the Night and Fog Decree as resulting in persons being secretly taken to Germany; 'no word of them was permitted to reach the country from which they came, or their relatives; even in cases when they died awaiting trial the families were not informed, the purpose being to create anxiety in the minds of the family of the arrested person.'). *See also* Trial of Major War Criminals Before the International Military Tribunal, 1947, Volume I, pp.27-92, *USA et al. v. Göring et al.*, Indictment, *as corrected* 7 June 1946, pp.44 (the war crimes charge (Count 3), *inter alia*, referred to the Night and Fog Decree, included conduct amounting to enforced disappearance of persons as a form of ill-treatment of civilians), 66 (the crimes against humanity charge (Count 4), *inter alia*, incorporated by reference the allegations of ill-treatment against civilians charged as war crimes in Count 3).
[140] Trials of War Criminals before the Nuremberg Military Tribunals, Volume III, 1951, pp.954-1177, *USA v. Altstötter et al.*, Opinion and Judgment, 3-4 December 1947, pp.1032-1062, 1118, 1128-1134, 1137-1138, 1142 (entering convictions for conduct amounting to enforced disappearances as both a war crime and crime against humanity).

themselves but their friends and relatives back home who were in constant distress of mind as to their whereabouts and fate.'[141]

64. In 1978, the UN General Assembly ('UNGA'), '[d]eeply concerned by reports from various parts of the world relating to enforced or involuntary disappearances of persons', issued a resolution condemning enforced disappearance and called on governments to, *inter alia*, hold individuals legally accountable.[142] In 1980, the UN Commission on Human Rights, considered that enforced disappearance constituted a 'grave violation of human rights' and noted that 'many thousands of persons and their families appeared to be victims of the phenomenon'.[143] In 1981, the ICRC, 'alarmed at the phenomenon of forced or involuntary disappearances', declared that 'such disappearances imply violations of fundamental human rights such as the right to life, freedom and personal safety, the right not to be submitted to torture or cruel, inhuman or degrading treatment, the right not to be arbitrarily arrested or detained, and the right to a just and public trial'.[144]

65. Thereafter, between 1981 and 1998, (i) the UN Security Council, UNGA, and other UN bodies condemned acts of enforced disappearance in, for example, Guatemala, Chile, Botswana, Honduras, Indonesia, and the former Republic of

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[141] Trials of War Criminals before the Nuremberg Military Tribunals, Volume III, 1951, pp.954-1177, *USA v. Altstötter et al.*, Opinion and Judgment, 3-4 December 1947, p.1058.
[142] UNGA, *Disappeared persons*, 20 December 1978, A/RES/33/173.
[143] Commission on Human Rights, Report on the 36th Session, E/CN.4/1408, 1980, pp.74-76. *See also* pp.180-181, Resolution 20 (establishing the Working Group on Enforced or Involuntary Disappearances ('WGEID')).
[144] International Review of the Red Cross, No.225, November-December 1981, pp.319-320, Resolution II.

Yugoslavia;[145] (ii) international and regional human rights bodies and courts considered that acts of enforced disappearance constitute grave violations of fundamental human rights;[146] (iii) domestic courts confirmed that, by international consensus, practices of enforced disappearance have been 'met with universal condemnation and opprobrium';[147] (iv) various human rights groups and non-governmental organisations adopted declarations and draft conventions recognising enforced disappearance as a crime against humanity;[148] and (v) the UN, Organisation of American States ('OAS'), Parliamentary Assembly of the Council of Europe

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[145] Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 36th Session, E/CN.4/1986/5, EC/CN.4/Sub.2/1985/57, 4 November 1985; ICRC, Customary International Humanitarian Law, Volume I: Rules, 2005 (reprinted with corrections 2009), p.341 and the sources cited therein.

[146] ICRC, Customary International Humanitarian Law, Volume I: Rules, 2005 (reprinted with corrections 2009), Rule 98, pp.342-343 and the sources cited therein; Confirmation Decision, KSC-BC-2020-06/F00026/RED, footnotes 115-116, 121-122, 124, 126, and the sources cited therein. *See also* ICRC, Customary International Humanitarian Law, Volume I: Rules, 2005 (reprinted with corrections 2009), Rule 98, pp.340-341, 343 (stating, *inter alia*, that (i) state practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts; (ii) enforced disappearance is prohibited by international humanitarian law; and (iii) although it is the widespread or systematic practice of enforced disappearance that constitutes a crime against humanity, any enforced disappearance is a violation of international humanitarian law and human rights law); Human Rights Committee, CCPR General Comment No. 29, Article 4 (Derogations during a State of Emergency), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para.13(b) ('The prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.').

[147] US, District Court for the District of Massachusetts, *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995), 12 April 1995, pp.184-185; US, District Court for the Northern District of California, *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988), Memorandum Opinion and Order Regarding Motion for Reconsideration, 25 July 1988, pp.710-711 ('In the Court's view, the submitted materials are sufficient to establish the existence of a universal and obligatory international proscription of the tort of "causing disappearance."').

[148] O Triffterer and K Ambos, Rome Statute of the International Criminal Court: A Commentary, 3rd edition, 2016, Part 2: Jurisdiction, Admissibility and Applicable Law, 'Article 7', Hall and van den Herik, pp.227-228 and the sources cited therein.

('PACE'), and other international and regional governmental bodies and courts consistently recognised that enforced disappearance constitutes a crime against humanity,[149] including as set out below.

66. In October 1983, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities requested the preparation of a draft 'Declaration Against Unacknowledged Detention of Persons, Whatever Their Condition' and put forth a 'number of juridical arguments' for the declaration of enforced disappearance as a crime against humanity.[150]

67. In November 1983, the OAS declared 'that the practice of forced disappearance of persons in the Americas is an affront to the conscience of the hemisphere and constitutes a crime against humanity'.[151]

68. In 1984, the PACE considered that enforced disappearances 'are a flagrant violation of a whole range of human rights recognised in the international instruments on the protection of human rights' and declared 'that the recognition of enforced

[149] Contrary to Defence arguments (*see* Request, KSC-BC-2020-06/F00223, para.152), UNGA resolutions and regional conventions constitute suitable evidence of customary international law. *See, for example*, Resolution adopted by the General Assembly on 20 December 2018: Identification of customary international law, A/RES/73/203, 11 January 2019, Annex, Conclusions 6, 10-12.
[150] Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 36th Session, E/CN.4/1984/3, E/CN.4/Sub.2/1983/43, 20 October 1983, paras 279, 283, pp.90-91.
[151] OAS, Resolution, AG/RES. 666 (XIII-O/83), 18 November 1983 (considering, *inter alia*, that 'the forced disappearance of persons without trial is a cruel and inhuman practice that undermines the rule of law, which weakens those norms that guarantee protection against arbitrary detention and the right to personal safety and security').

disappearance as a crime against humanity is essential if it is to be prevented and its authors punished.'[152]

69. In 1988, the IACtHR noted that international practice and doctrine categorised enforced disappearance as a crime against humanity.[153]

70. In 1991, the International Law Commission ('ILC') acknowledged that criminal conduct amounting to 'a practice of systematic disappearances of persons […] deserved to be specifically mentioned' in the draft Code of Crimes Against the Peace and Security of Mankind ('ILC Draft Code').[154]

71. In 1992, the UNGA adopted the Declaration on the Protection of All Persons from Enforced Disappearance ('1992 Declaration'), proclaiming it to be a 'body of principles for all States' and considering that 'enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity.'[155] The 1992 Declaration provided, *inter alia*, that 'any act of enforced disappearance' is: (i) 'an offence to human dignity';[156] and (ii) 'places the persons subjected thereto outside the protection of the law and inflicts

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[152] PACE, Resolution 828, 1984 ('PACE Resolution'), paras 4, 12.
[153] IACtHR, *Velásquez-Rodríguez v. Honduras*, Judgment, 29 July 1988, para.153.
[154] ILC, Yearbook of the International Law Commission 1991, Volume II, Part Two, Report of the Commission to the General Assembly on the work of its forty-third session, A/46/10, p.104.
[155] UNGA, Declaration on the Protection of All Persons from Enforced Disappearance, A/RES/47/133, 18 December 1992.
[156] UNGA, Declaration on the Protection of All Persons from Enforced Disappearance, A/RES/47/133, 18 December 1992, Article 1(1).

severe suffering on them and their families.'[157] It declared that '[a]ll acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness.'[158] Following the 1992 Declaration, a draft convention concerning enforced disappearance was proposed in a UN working group to assist in implementation of the 1992 Declaration.[159]

72. In 1994, the Inter-American Convention on Forced Disappearance of Persons ('1994 Convention') 'reaffirm[ed] that the systematic practice of enforced disappearances of persons constitutes a crime against humanity' and provided that state parties would 'punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories'.[160]

73. In 1996, the ILC included the crime against humanity of 'forced disappearance of persons' in the ILC Draft Code 'because of its extreme cruelty and gravity'.[161]

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[157] UNGA, Declaration on the Protection of All Persons from Enforced Disappearance, A/RES/47/133, 18 December 1992, Article 1(2).
[158] UNGA, Declaration on the Protection of All Persons from Enforced Disappearance, A/RES/47/133, 18 December 1992, Article 4(1). *See also* Article 14.
[159] Commission on Human Rights, Report of the sessional working group on the administration of justice and the question of compensation, E/CN.4/Sub.2/1995/16, 11 August 1995, paras 34-37.
[160] Inter-American Convention on Forced Disappearance of Persons, AG/RES. 1256 (XXIV-O/94), 6 September 1994, preamble, Article 1(b).
[161] ILC, Yearbook of the International Law Commission 1996, Volume II, Part Two, Report of the Commission to the General Assembly on the work of its forty-eighth session, A/51/10, pp.47, 50. While, as submitted by the Defence (*see* Request, KSC-BC-2020-06/F00223, para.155), enforced disappearance was not included in the ILC Draft Code until 1996, the ILC specifically declared in 1991 its intention to do so. *See* para.69 above.

74. In July 1998, 120 states voted to ratify the ICC Statute, including the crime against humanity of 'enforced disappearance of persons'.[162] A PACE resolution later welcomed this 'confirmation of the crime of enforced disappearance as a crime against humanity.'[163] Both before and after the ICC Statute, many states criminalised enforced disappearance, including as a crime against humanity.[164]

75. Further, post-1999 statutes and jurisprudence of international and hybrid courts, as well as domestic courts applying international law, confirmed that acts of enforced disappearance committed before and during the KSC's temporal jurisdiction constituted crimes against humanity. For example, the statutes of the Special Panels for Serious Crimes within the District Court of Dili, East Timor ('SPSC')[165] (concerning crimes committed in 1999) and the Extraordinary African Chambers ('EAC')[166] (concerning crimes committed between 1982 and 1990) expressly included enforced

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[162] Article 7(1)(i) of the ICC Statute. The uncited reference in the Request to 'considerable debate' in the Rome Statute *travaux* does not detract from the consistent evidence of the crime's pre-existing status in customary international and the fact that 120 states voted to ratify the ICC Statute, including enforced disappearance as a crime against humanity. *Contra* Request, KSC-BC-2020-06/F00223, para.154.
[163] PACE, Resolution, Doc. 10243, 30 June 2004, para.8. While, as submitted by the Defence (*see* Request, KSC-BC-2020-06/F00223, para.157), the PACE, in 2005, acknowledged and addressed certain impunity gaps in the definition and domestic criminalisation of acts of enforced disappearance, it did so in light of the recognised criminal status and nature of enforced disappearance, including as a crime against humanity. *See* PACE, Report, Doc.10679, 19 September 2005, Explanatory Memorandum, paras 9-44, Appendix I.
[164] O Triffterer and K Ambos, Rome Statute of the International Criminal Court: A Commentary, 3rd edition, 2016, Part 2: Jurisdiction, Admissibility and Applicable Law, 'Article 7', Hall and van den Herik, pp.230-232; ICRC, Customary International Humanitarian Law, Volume I: Rules, 2005 (reprinted with corrections 2009), Rule 98, p.341.
[165] United Nations Transitional Administration in East Timor, Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, 6 June 2000, Section 5.1(i).
[166] Statute of the Extraordinary African Chambers, Articles 3 and 11, International Legal Materials, vol. 52, (2013), pp.1020–1036, Article 6(f).

disappearance as a crime against humanity. Both courts prosecuted and/or entered convictions for acts of enforced disappearance as a crime against humanity.[167] The EAC found that enforced disappearance was a crime against humanity in CIL by, at least, the 1980s.[168]

76. While the statutes of other international and hybrid courts did not explicitly include enforced disappearance as a crime against humanity, the ECCC[169] (concerning crimes committed in 1975-1979), ICTY[170] (concerning crimes committed from 1991), and SCSL[171] (concerning crimes committed from 1996) all recognised that acts of enforced disappearance rise to the level of other crimes against humanity and may, if all relevant elements are satisfied, constitute the crimes against humanity of other inhumane acts and persecution. The ECCC entered convictions for conduct amounting to enforced disappearance.[172] Drawing on ICTY jurisprudence, courts in Bosnia and Herzegovina entered convictions for acts of enforced disappearance committed in 1992.[173]

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[167] *See, for example,* SPSC, *Prosecutor v. Maubere*, 23/2003, Indictment, 11 September 2003; EAC, *Public Minister v. Habré*, Judgment, 30 May 2016.
[168] EAC, *Public Minister v. Habré*, Judgment, 30 May 2016, paras 1457-1466.
[169] ECCC, *Case against Nuon and Khieu*, 002/19-09-2007/ECCC/TC, Case 002/01 Judgement, 7 August 2014, paras 441-448.
[170] ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-T, Judgement, 15 April 2011, paras 1831-1839; ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000, para.566. *See also* ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgement, 2 November 2001, para.208.
[171] SCSL, *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgement, 22 February 2008, paras 184-185.
[172] ECCC, *Case against Nuon and Khieu*, 002/19-09-2007/ECCC/TC, Case 002/01 Judgement, 7 August 2014; ECCC, *Case against Nuon and Khieu*, 002/19-09-2007/ECCC/TC, Case 002/02 Judgement, 16 November 2018. *See also* ECCC, *Case against Nuon and Khieu*, 002/19-09-2007/ECCC/SC, Appeal Judgement, 23 November 2016.
[173] *See, for example*, Bosnia and Herzegovina, *Prosecutor v. Boban Šimšić*, X-KRZ-05/04, Verdict, 7 August 2007, pp.47-48.

77. In 2006, the UNGA adopted the International Convention on the Protection of All Persons Against Enforced Disappearances ('2006 Convention'), which had been under development and consideration since the mid-1990s.[174] The 2006 Convention acknowledged the pre-existing status of enforced disappearance as a crime against humanity in international law.[175]

78. The selective Defence submissions[176] fail to detract from, and largely ignore, the foregoing consistent state practice and evidence of *opinio juris* spanning decades, which, considered together, demonstrate that enforced disappearance was a crime against humanity in CIL by 1998.[177] This crime and potential individual criminal

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[174] *See* para.71 above.
[175] UNGA, International Convention on the Protection of All Persons Against Enforced Disappearances, A/RES/61/177, 20 December 2006, preamble. *See also* Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/13/31, 21 December 2009, para.39: General comments on enforced disappearance as a crime against humanity ('2009 General Comment'), paras 5-6. Defence submissions that the WGEID first recognised enforced disappearance as customary international law in the 2009 General Comment are misleading (*see* Request, KSC-BC-2020-06/F00223, para.162). The 2009 General Comment, acknowledging the pre-existing status of enforced disappearance as a crime against humanity, addressed the customary status of the contextual elements of crimes against humanity.
[176] Request, KSC-BC-2020-06/F00223, paras 151-157, 161-162.
[177] Insofar as the Defence cites commentary of one scholar in support of its submissions (*see* Request, KSC-BC-2020-06/F00223, para.156), academic commentary cannot, in and of itself, detract from decades of consistent practice and *opinio juris*, particularly when it is selectively quoted and the relevant conclusions are reached in summary fashion and are disputed by other scholars. In this regard, (i) the Defence omits Cassese's full considerations on the matter, including that 'various stands [including treaty law, IACtHR case law, and UNGA resolutions] have been instrumental in the gradual formation of a customary rule prohibiting enforced disappearance of persons. The ICC Statute has *upheld and laid down in a written provision of* [sic] *the criminalization of this conduct*' (*see* A Cassese, International Criminal Law, 3rd edition, 2013, p.98 (emphasis added); (ii) Cassese's one paragraph assertions concerning enforced disappearance are uncited and general, without any in-depth treatment or consideration of the 'treaty law', 'case law' and 'number of UN General Assembly resolutions' he generally references; and (iii) other scholars, engaging in a more fulsome analysis, disagree with Cassese's conclusions (*see, for example*, G Mettraux, International Crimes: Law and Practice, Volume II: Crimes Against Humanity, 2020, pp.361, 702-709 (considering that relevant practice and *opinio juris* 'all support the reasonable

responsibility therefor were both foreseeable and accessible to the Accused,[178] considering, *inter alia*: (i) the consistent and longstanding practice and *opinio juris* set out above; (ii) the universally recognised and inherent gravity of the crime;[179] and (iii) the fact that enforced disappearance, by its very nature, violates a range of fundamental human rights and involves or is frequently accompanied by other crimes against humanity recognised in CIL, including imprisonment, murder, torture, persecution, and other inhumane acts.[180]

79. Finally, even assuming *arguendo* that enforced disappearance was not an explicitly recognised crime against humanity in CIL by 1998 – which it certainly was for the reasons set out above – enforced disappearance, by its very nature, rises to the level of other crimes against humanity: it necessarily constitutes a serious attack on human dignity and causes serious suffering or injury.[181] In turn, when the elements of enforced disappearance are satisfied, it *per se* constitutes an other inhumane act[182] and thus a crime against humanity.[183] Considered in this light, the express inclusion of this

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conclusion that enforced disappearance existed as a self-standing crime under customary international law no later than the early 1990s and perhaps even earlier.')).

[178] Request, KSC-BC-2020-06/F00223, para.158.

[179] *See* paras 62-64, 67-68, 71 above.

[180] *See* paras 62-64, 68, 71 above. *See also* G Mettraux, International Crimes: Law and Practice, Volume II: Crimes Against Humanity, 2020, pp.701-702; ICRC, Customary International Humanitarian Law, Volume I: Rules, 2005 (reprinted with corrections 2009) , p.340.

[181] *See* paras 62-64, 68, 71 above.

[182] Confirmation Decision, KSC-BC-2020-06/F00026, para.62 ('The crime of other inhumane acts as a crime against humanity, within the meaning of Article 13(1)(j) of the Law, is committed through an act or omission of similar gravity to the other enumerated acts under Article 13 of the Law, resulting in serious mental or physical suffering or injury, or constituting a serious attack on human dignity').

[183] ICTY Chambers have found that certain crimes (including enforced disappearance) – regardless of whether they were enumerated in the ICTY Statute and/or recognised in customary international law in their own right at the relevant time – by their very nature necessarily: (i) constitute an attack on human dignity and cause serious suffering and injury; and (ii) rise to the level of enumerated and

crime in the Law discloses the animating desire of the drafters to recognise the inherently grave and criminal nature of enforced disappearance, including in the particular circumstances of the conflict in Kosovo. Defence submissions therefore necessarily fail to demonstrate that the KSC does not have jurisdiction over the crime against humanity of enforced disappearance.

2. No special intent is required.

80. For the same reasons set out above for superior responsibility, arguments as to the special intent of enforced disappearance go to the contours of this crime and are improperly advanced as a jurisdictional challenge.[184]

81. In any event, consistent with the Confirmation Decision,[185] intent to remove the victim from the protection of the law is not a requirement for the crime of enforced disappearance under CIL.[186] Rather, as indicated in, *inter alia*, the 1992 Declaration and 2006 Convention, enforced disappearance has the *consequence* of placing victims outside the protection of the law.[187] This recognised consequence of the crime was not

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recognised crimes. *See, for example*, ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-T, Judgement, 15 April 2011, paras 1838-1839 (considering that the crime of enforced disappearance rises to the level of other crimes against humanity and, if all other elements are satisfied, constitutes persecution); ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23/1-A, Judgement, 12 June 2002, paras 151-152 (finding that '[s]evere pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering'); ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, paras 593, 597.

[184] Section II.B.3 above.

[185] Confirmation Decision, KSC-BC-2020-06/F00026/RED, para.77.

[186] *Contra* Request, KSC-BC-2020-06/F00223, paras 159-161.

[187] UNGA, Declaration on the Protection of All Persons from Enforced Disappearance, A/RES/47/133, 18 December 1992, preamble, Article 1(2); UNGA, International Convention on the Protection of All Persons Against Enforced Disappearances, A/RES/61/177, 20 December 2006, Article 2. *See also* Report of the Working Group on Enforced or Involuntary Disappearances, Addendum: Best practices on

intended to and does not give rise to any special intent element. Rather, while such special intent element features in the Rome Statute and practice deriving therefrom, it has not been included in any other definition of the crime of enforced disappearance.[188] It was not in 1998 and is not now a requirement under CIL. In turn, Defence arguments concerning application of the regime most favourable to the Accused are misplaced and unfounded.[189]

III. RELIEF REQUESTED

82. For the foregoing reasons, the KSC has jurisdiction over customary international law. In particular, the KSC has jurisdiction over superior responsibility, illegal/arbitrary arrest and detention, and enforced disappearance. The relief sought should be rejected in full.

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enforced disappearances in domestic criminal legislation, A/HRC/16/48/Add.3, 28 December 2010, paras 29-32.

[188] *See, for example*, EAC, *Public Minister v. Habré*, Judgment, 30 May 2016, paras 1467-1471; ECCC, *Case against Nuon and Khieu*, 002/19-09-2007/ECCC/TC, Case 002/01 Judgement, 7 August 2014, para.448; , ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-T, Judgement, 15 April 2011, para.1837; Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/7/2, 10 January 2008, p.10; UNGA, International Convention on the Protection of All Persons Against Enforced Disappearances, A/RES/61/177, 20 December 2006, Article 2; Report of the Working Group on Enforced or Involuntary Disappearances, E/CN.4/1996/38, 15 January 1996, para. 55; Inter-American Convention on Forced Disappearance of Persons, AG/RES. 1256 (XXIV-O/94), 6 September 1994, Article II; UNGA, Declaration on the Protection of All Persons from Enforced Disappearance, A/RES/47/133, 18 December 1992, preamble; US, District Court for the Northern District of California, *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988), Memorandum Opinion and Order Regarding Motion for Reconsideration, 25 July 1988, pp.710-711. *See also* Confirmation Decision, KSC-BC-2020-06/F00026/RED, para.77 and the sources cited therein.

[189] Request, KSC-BC-2020-06/F00223, para.160.

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Jack Smith

Specialist Prosecutor

Friday, 23 April 2021
At The Hague, the Netherlands.