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MODULE 11: DEFENCES AND GROUNDS FOR EXCLUDING LIABILITY

Part of the OSCE-ODIHR/ICTY/UNICRI Project “Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions”

Developed by International Criminal Law Services

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11. DEFENCES AND OTHER GROUNDS FOR EXCLUDING LIABILITY

11.1. INTRODUCTION

These training materials have been developed by International Criminal Law Services (ICLS) as a part of the OSCE-ODIHR-ICTY-UNICRI “War Crimes Justice Project”, funded by the European Union. An introduction to how to use the materials can be found in Module 1, which also includes a case study and hypotheticals that can be used as training tools, and other useful annexes. The materials are intended to serve primarily as training tool and resource for legal trainers in Bosnia and Herzegovina (BiH), Croatia and Serbia, but are also envisaged for adaptation and use in other jurisdictions of the region. Discussion questions, tips, and other useful notes for training have been included where appropriate. However, trainers are encouraged to adapt the materials to the needs of the participants and the particular circumstances of each training session. Trainers are also encouraged to update the materials as may be necessary, especially with regards to new jurisprudence or changes to the criminal codes in their relevant jurisdiction.

Each module provides a general overview of the international criminal law relevant to the Module’s topic before discussing the relevant law and jurisprudence for BiH, Croatia, and Serbia, respectively. The materials make use of the most relevant and available jurisprudence. It should be noted that where a first instance judgement has been cited, the drafters have taken special care to ensure that the part referred to was upheld on appeal. It may be useful for trainers to discuss additional cases that might also be relevant or illustrative for each topic, and to ask participants to discuss their own cases and experiences.

11.1.1. MODULE DESCRIPTION

This Module discusses defences and grounds for excluding liabilities recognised at the international courts. It begins with a discussion of immunities and amnesties. The Module then discusses “defences” or grounds for excluding liability, including:

- Official capacity;
- Superior orders;
- Self-defence;
- Duress and necessity;
- Lack of or diminished mental capacity;
- Intoxication;
- Alibi;
- Mistake of law and fact;
- Military necessity;
- *Tu quoque*; and
- Reprisals.

The Module in the regional section deals with defences that are available in the domestic jurisdictions of BiH, Croatia and Serbia for war crimes, crimes against humanity and genocide. This Module does not provide an exhaustive explanation of all of the defences to war crimes,

crimes against humanity and genocide. For a full discussion of defending crimes before the international criminal courts and domestic jurisdictions, this Module should be read together with the War Crimes Justice Project's Manual for Defence Lawyers.

11.1.1.1. MODULE OUTCOMES

At the end of this Module, participants should understand:

- Whether specific immunities could be a bar to prosecution;
- The differences between functional and personal immunity;
- Whether amnesties constitute a bar to prosecutions; and
- The various defences available before the ICTY, ICTR and ICC, as well as the domestic courts of the region.

Notes for trainers:

- Although the participants will mainly be judges and prosecutors, it is important for them to understand the various defences that have developed under international law so that they are able to anticipate and evaluate them in future investigations and prosecutions.
- Trainers should ensure that participants discuss the different defences that are available under international law and consider the extent to which they apply before their national courts. It should be expected that defence counsel will rely on defences under international law in their own domestic proceedings.
- The case study provides a useful tool for prosecutors to discuss which particular defences they anticipate the accused will raise, and how they intend to respond as prosecutors to each of these defences.
- The international section of this Module is structured to first deal with immunities and amnesties, which do not prevent prosecutions before international criminal courts and secondly, to deal with each of the specific defences that are incorporated within the Statutes of the ICTY, ICTR and ICC.
- In order to achieve these objectives you will find "Notes to trainers" in the boxes inserted at the beginning of important sections. These notes will highlight the main issues for trainers to address, identify questions which the trainers can use to direct the participants to focus on the important issues and to stimulate discussion, make references to the parts of the case study that are relevant and identify which case studies can be used as practical examples to apply the legal issues being taught.

11.2. INTERNATIONAL LAW AND JURISPRUDENCE

11.2.1. IMMUNITIES AND AMNESTIES

Before considering each of the specific defences under international law, it is important to recognise that immunities and amnesties are not a bar to prosecution before international criminal courts. As set out below, immunities and amnesties may be defences before national courts—see sections 11.5.1 (BiH), 11.6.1 (Croatia) and 11.7.1 (Serbia).

11.2.1.1. IMMUNITIES

Under international law, two types of immunity are broadly recognised: functional immunity and personal immunity. These immunities are recognised on the basis of the sovereignty of states, and therefore only apply to prosecutions in national courts. Neither functional nor personal immunities are a bar to trials before the international or hybrid criminal courts.

Neither functional nor personal immunities are a bar to trials before the international or hybrid courts.

ICTY/ICTR Statutes Articles 7(2)/6(2) Irrelevance of official capacity

The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

ICC Statute Article 27 Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Functional immunity (immunity *rationae materiae*) applies to government officials acting in their official capacity. It protects conduct, and extends widely to anyone who carries out state functions. Protected persons cannot be charged for criminal acts if they are acting in an official capacity, as they are considered to be acting as an arm of the government and not as individuals. They can usually only be charged for criminal acts if they are acting in a personal capacity. The functional immunity lasts forever—a person can never be charged for crimes committed while acting in an official capacity.

However, an exception has developed for some serious crimes of international concern. In the *Pinochet* case, the British House of Lords held that immunity for a former head of state did not extend to a trial for charges of torture.¹ This has been extended by some other national courts to include crimes against humanity and other serious international crimes.²

The International Court of Justice found that there is no exception to personal immunity in national courts, even for serious international crimes.

Personal immunity (immunity *rationae personae*) applies to high level government officials, such as heads of state or diplomats. It is unclear exactly which government officials benefit from personal immunity. Personal immunity protects the person, and is absolute while the person is in office.³ It is based on the idea that government officials must

be free from the threat of criminal sanctions in order to effectively do their jobs and facilitate international relations. Thus, while in office, they cannot be tried for crimes committed either in their personal or official capacity. However, when a person leaves office, they can be charged for crimes committed while they held office if they were acting in their personal capacity.

The International Court of Justice (ICJ) found that there is no exception to personal immunity in national courts, even for serious international crimes.⁴ However, the ICJ also found that personal immunity was no bar to prosecution before international courts.⁵

11.2.1.2. AMNESTIES

Amnesties are laws that preclude criminal prosecutions (and sometimes civil claims) in the state in which they are issued.⁶ Amnesties have a long history.⁷ The status of amnesties in

¹ R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 2) [1999] 1 All ER 577, HL.

² See, e.g., Bouterse (2000) 51 NEDERLANDSE JURISPRUDENTIE 302; UN Doc. A/CN.4/596, 31 March 2008, ¶¶ 180 – 190; Tihomir Blaškić, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, ¶ 41.

³ For example, each of the seven lords who sat in the *Pinochet* case stated that had Pinochet been a sitting head of state, he would have been immune from prosecution before national courts. These decisions are included in Further Reading, section 11.8, at the end of this Module.

⁴ Arrest Warrant (D.R.C. v. Belgium), [hereinafter “Yerodia”], 2002 I.C.J. ¶ 75 (Feb. 14).

⁵ *Ibid.* at ¶ 61; see also Charles Taylor, Case No. SCSL-2003-01-I, Decision on Immunity From Jurisdiction, Appeal Chamber, 31 May 2004, ¶¶ 51 – 3 (relying on *Yerodia* and holding that personal immunity was no bar to jurisdiction in international courts and therefore it had jurisdiction to try former Liberian president Charles Taylor).

⁶ See Ould Dah v. France, Case No. 13113/03, Eur. Ct. HR 17 March 2009 (holding that an amnesty for torture granted in Mauritania did not prevent France from prosecuting torture in France).

international law is unclear. There is some indication that amnesties are no bar to prosecution for some crimes, such as torture.⁸ The SCSL Appeals Chamber has stated that a “norm that a government cannot grant amnesty for serious violations of crimes under international law [...] is developing under international law”.⁹ The Inter-American Court of Human Rights has stated that:

This Court considers that all amnesty provisions, provisions on the prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognised by international human rights law.¹⁰

The Rome Statute indicates that amnesties are no bar to prosecution before the ICC. Under the Rome Statute, states have a duty to prosecute serious crimes—otherwise the ICC will.¹¹ The prosecutor’s position is that the drafters of the Rome Statute chose prosecution as the correct response to international crimes.¹²

⁷ See ROBERT CRYER, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 563 (2d ed. 2010) for a discussion of amnesties and their various applications and formats.

⁸ See General Comment 20, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev. 1 at 30 (1994) (stating that amnesties for state officials for torture were “generally incompatible” with the duty to prosecute human rights violations); Anto Furundžija, Case No. IT-95-17/1-T, Trial Judgement, 10 Dec. 1998, ¶ 155 (holding that amnesties for torture are no bar to prosecution because torture is *jus cogens*); see also Radovan Karadžić, Case No. IT-95-5/18-PT, Decision on Accused’s Second Motion For Inspection and Disclosure: Immunity Issue, Trial Chamber, 17 Dec. 2008.

⁹ Morris Kallon and Brima Kamara, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeal Chamber, 13 March 2004, ¶ 82.

¹⁰ Case of Barrios Altos v. Peru, Series C No. 75 [2001], Inter-Am. C.H.R. 5, 14 March 2001.

¹¹ Rome Statute, Preamble.

¹² ICC Office of the Prosecutor, Policy Paper on the Interests of Justice, 3 – 4, September 2007.

11.2.2. SPECIFIC DEFENCES

Notes for trainers:

- This section considers each of the defences that are listed in the Statutes of the ICTY and ICC, or which have been recognised by the jurisprudence of these courts.
- It is important for participants to understand that many of the defences raised by accused persons are based on a factual dispute in the case. Accused persons often rely on an alternative version of events supported by their own evidence. This Module does not discuss these kinds of defences or provide examples of them from cases before international courts. Participants should nevertheless be encouraged to highlight any cases that they have been involved in where defences have been raised to determine whether any of them would be covered by the specific defences set out below.
- As a result of this reliance on factual disputes, many of the defences outlined below are not often utilised and hence the jurisprudence is quite limited. Participants should be encouraged to discuss the differences between the defences available at the ICTY as opposed to the ICC. They should be asked whether these defences are available within their domestic jurisdictions, and if so, what the elements those defences contain. As far as is possible, practical cases from the participants' domestic jurisdictions should be used to generate discussion. Trainers should also bear in mind that they should use the case study as a way of testing whether participants have understood the legal requirements of each of the defences.

11.2.2.1. THE RELEVANT PROVISIONS

The relevant provisions of the ICTY and ICC Statutes are included here for reference. While the ICC Rome Statute provides a statutory framework for defences, the ICTY has developed its grounds relating to grounds for excluding liability through its rules and its jurisprudence.¹³

¹³ See, e.g., ICTY Rules of Procedures and Evidence, Rule 67(b) which provides for the defence of alibi and any special defences, including that of diminished or lack of mental responsibility.

The ICC includes several specific grounds for excluding liability. However, it is also silent on some defences recognised by other international tribunals. Article 31(3) provides the court with the freedom to consider other defences not mentioned in the Rome Statute, as long as the defence is derived from one of the sources of law accepted by the Rome Statute.¹⁴

ICC Statute

Article 31: Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

¹⁴ As set out in the Rome Statute, Art. 21. See Module 2 section 2.4.

Article 31: Grounds for excluding criminal responsibility (continued)

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be

ICC Statute

Article 32: Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Each of the defences set out above are discussed in more detail below as they apply before the ICTY, ICTR and ICC. Many of these same defences are applicable in BiH, Croatia and Serbia and are discussed in the regional section in the same headings. Participants should note the similarities and differences between how the defences are interpreted and applied.

11.2.2.2. OFFICIAL CAPACITY

Before the ICTY, ICTR and ICC, official capacity cannot be claimed to excuse the commission of war crimes.¹⁵ It is neither a defence nor a mitigating circumstance.¹⁶ Official capacity is not a bar to personal jurisdiction and prosecution before the ICC.¹⁷

Before the ICTY, ICTR and ICC, official capacity cannot be claimed to excuse the commission of war crimes.

¹⁵ *Blaškić*, AJ ¶ 41; see also Statute of the Special Court for Sierra Leone, Art. 6; Charter of the Nuremberg Tribunal, Art. VII; and the Genocide Convention, Art. IV.

¹⁶ Rome Statute, Art. 27(1).

¹⁷ *Ibid.* at Art. 27(2).

11.2.2.3. SUPERIOR ORDERS

ICTY Statute Article 7(4) and ICTR Statute Article 6(4) preclude superior orders being used as a defence, but permit superior orders to be considered in mitigation of punishment.

At the ICC, however, superior orders can exclude criminal liability in limited circumstances:

- where the accused had a legal obligation to obey the orders;
- where the accused did not know the order was illegal; and
- the order was not manifestly unlawful.

According to the Rome Statute, orders to commit genocide or crimes against humanity are manifestly unlawful.¹⁸

ICC Statute

Article 33: Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

11.2.2.4. SELF-DEFENCE

Although not expressed in its Statute, the ICTY considers self-defence to be an applicable defence under customary international law, finding that the ICC Statute definition reflects provisions found in most national codes and as such constitutes customary international law.¹⁹ However, self-defence cannot be used to excuse a deliberate attack upon a civilian population.²⁰

Self-defence cannot be used to excuse a deliberate attack upon a civilian population.

¹⁸ *Ibid.* at Art. 33.

¹⁹ Dario Kordić, Case No. IT-95-14/2-T, Trial Judgement, 26 Feb. 2001, ¶¶ 449-451.

²⁰ Milan Martić, Case No. IT-95-11-A, Appeal Judgement, 8 Oct. 2008, ¶ 268.

Under the Rome Statute, defence of yourself, another person, or property can be grounds for excluding criminal liability. There must be a threat of an “imminent and unlawful use of force”.²¹ The accused must have acted reasonably and proportionately to the threat. Defence of property can only be raised as a defence to a war crime, and only with regards to property that is essential for the survival of the accused or another person, or for accomplishing a military mission.²²

11.2.2.5. DURESS AND NECESSITY

Duress does not afford a complete defence to a soldier charged with crimes against humanity or war crimes in international law when the taking of innocent lives is involved, but it may be taken into account in the mitigation of punishment.

The ICTY Statute does not include a provision on duress and necessity. However, the jurisprudence of the ICTY has dealt with this matter. The majority of the ICTY Appeals Chamber has held that duress does not afford a complete defence to a soldier charged with crimes against humanity or war crimes in

international law when the taking of innocent lives is involved, but it may be taken into account in mitigation of punishment.

The dissenting judges of the ICTY Appeals Chamber held that:

[I]t is a general principle of law recognised by civilised nations that an accused person is less blameworthy and less deserving of full punishment when he performs a certain prohibited act under duress [such as] imminent threats to the life of an accused if he refuses to commit a crime. [While] a large number of jurisdictions recognise duress as a complete defence absolving the accused from all criminal responsibility [...] [,] [i]n other jurisdictions, duress does not afford a complete defence to offences generally but serves merely as a factor which would mitigate the punishment to be imposed on a convicted person.²³

The Rome Statute recognises duress as a defence when an accused acts under duress from a threat of imminent death or continuing or imminent serious bodily harm of the accused or another person. The accused’s actions must have been caused by the threat, and they have acted necessarily and reasonably to avoid the threat. Moreover, the accused cannot have intended to cause more harm than the harm they were trying to avoid. Threats can be made by another person or can arise from other circumstances outside of the accused’s control.²⁴

²¹ Rome Statute, Art. 31(1)(c).

²² Statute for the International Criminal Court, Art. 31(1)(c).

²³ Drazen Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Li, Appeal Chamber, 7 Oct. 1997, ¶¶ 66, 73-5, 88.

²⁴ Rome Statute, Art. 31(1)(d).

11.2.2.6. LACK OF MENTAL CAPACITY AND DIMINISHED MENTAL RESPONSIBILITY

The defendant's diminished mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal.

The relevant principle of law upon which both the common law and the civil law systems are based is that the defendant's *diminished* mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal.²⁵

On the other hand, if the defendant raises the issue of *lack* of mental capacity, he is challenging the presumption of sanity by entering a plea of insanity. This constitutes a complete defence to the charge. In raising this defence, the defendant bears the onus of establishing that at the time of the offence he was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act or, if he did know it, that he did not know that what he was doing was wrong. Such a plea, if successful, is a complete defence to a charge and it leads to an acquittal.²⁶ Rule 67(B)(i)(b) of the ICTY RPE provides for special defences including diminished or lack of responsibility.²⁷

Lack of mental capacity constitutes a complete defence to the charge.

At the ICC, this defence applies if the accused, at the time of his conduct, suffers from a defective mental state that destroys his ability to either understand the unlawfulness of or control his conduct.²⁸ The defence is seemingly limited to “mental”, not psychic, disturbances.²⁹ Also, the mental state must be “destroyed”, not merely diminished, in order to serve as a defence. Diminished mental capacity is not specifically mentioned in the Rome Statute, but under Article 31(3), it could be considered as a defence.

See also Rule 74*bis* of the ICTY RPE and ICTR RPE, which provides that the trial chamber can order a medical, psychiatric or psychological medical examination.³⁰ Similarly, Rule 135 of the ICC RPE provides for the possibility of a medical examination of the accused to determine fitness to stand trial and adjourn the trial if the accused is unfit.³¹

11.2.2.7. INTOXICATION

Intoxication can also exclude criminal liability at the ICC. If the accused, at the time of conduct, was intoxicated to the point that they could not understand the lawfulness of or control their behaviour, they cannot be held guilty. It is notable that the intoxication must destroy the accused's mental capacity—impairment, even if extreme, is not enough. The defence does not

²⁵ See, e.g., Zejnil Delalić et al. (Čelibići), Case No. IT-96-21-A, Appeal Judgement, ¶ 590; see also ¶ 839.

²⁶ *Ibid.* at ¶ 582.

²⁷ ICTY Rules of Procedure and Evidence, Rule 67(B)(1)(b).

²⁸ Rome Statute, Art. 31(1)(a).

²⁹ COMMENTARY ON THE ROME STATUTE OF THE CRIMINAL COURT 525 (Otto Triffterer ed., 1999).

³⁰ ICTY RPE, Rule 74*bis*.

³¹ ICC RPE, Rule 135.

apply if the accused was voluntarily intoxicated and knew, or disregarded the risk, that they would be likely to commit a crime under the jurisdiction of the ICC if intoxicated.³²

11.2.2.8. ALIBI

If a defendant raises an alibi, he is denying that he was in a position to commit the crime. By raising that issue, the defendant requires the prosecution to eliminate the reasonable possibility that the alibi is true.³³ The purpose of an alibi is to cast reasonable doubt on the prosecutor's allegations; the burden is on the prosecution to prove all aspects of the case beyond reasonable doubt, notwithstanding the alibi raised by the defence.³⁴

A successful alibi does not require conclusive proof of an accused's whereabouts.

A successful alibi does not require conclusive proof of an accused's whereabouts.³⁵ There is no requirement that an alibi excludes the possibility that the accused committed a crime; the alibi need only raise reasonable doubt that the accused was in a position to commit the crime.³⁶

Where an alibi is properly raised, the prosecution must establish that, despite the alibi, the facts alleged are nevertheless true.³⁷ For example, the prosecution may demonstrate that the alibi does not in fact reasonably account for the period when the accused is alleged to have committed the crime. Where the alibi evidence *prima facie* accounts for the accused's activities at the relevant time, the prosecution must "eliminate the reasonable possibility that the alibi is true".³⁸ For example, the prosecution could demonstrate that the alibi evidence is not credible. There is no obligation on the prosecution to investigate the alibi.³⁹

The alibi need only raise reasonable doubt that the accused was in a position to commit the crime.

The ICC also recognises alibi as a defence, although it is not included in the Rome Statute.

Under Rule 67(B)(i)(a) of the ICTY RPE and Rule 79 of the ICC RPE, the defence must inform the prosecution whether there is an alibi and disclose information about the alibi.

11.2.2.9. MISTAKE OF LAW AND FACT

Under the Rome Statute, a mistake of fact excludes criminal liability if it negates the mental element required by the alleged crime.⁴⁰ A mistake of law may exclude criminal liability if it

³² Rome Statute, Art. 31(1)(b).

³³ *Čelibići*, AJ ¶ 581.

³⁴ Clément Kayishema, Case No. ICTR-95-1-T, Trial Judgement, 21 May 1999, ¶ 234; Protais Zigiranyirazo, Case No. ICTR-01-73-A, Appeal Judgement, 16 Nov. 2009, ¶ 17.

³⁵ *Zigiranyirazo*, AJ ¶ 42.

³⁶ *See ibid.* at ¶ 43.

³⁷ *Ibid.* at ¶ 19.

³⁸ Juvènal Kajelijeli, Case No. ICTR-98-44A-A, Appeal Judgement, 23 May 2005, ¶ 41; *Kayishema*, AJ ¶ 106.

³⁹ Ferdinand Nahimana, Case No. ICTR-99-52-A, Appeal Judgement, 28 Nov. 2007, ¶¶ 417-8.

⁴⁰ Rome Statute, Art. 32(1).

negates the mental element required by the alleged crime.⁴¹ A mistake about whether an act is a crime is not a defence at the ICC.⁴²

11.2.2.10. MILITARY NECESSITY

The ICTY Appeals Chamber has held that military necessity is not a defence for attacks on civilians.⁴³ The appeals chamber, moreover, has held on various occasions that the absolute prohibition against attacking civilians “may not be derogated from because of military necessity”.⁴⁴

The ICTY Appeals Chamber has held that military necessity is not a defence for attacks on civilians.

Military necessity may nevertheless be used as a defence in certain circumstances. The Rome Statute, for example, provides that military necessity could be raised as a ground for excluding liability for war crimes involving the destruction of property. In Article 8(2)(a)(iv), it notes that extensive destruction of property is a war crime when it is not justified by military necessity and is carried out unlawfully and wantonly.

11.2.2.11. TU QUOQUE

The *tu quoque* argument posits that breaches of international humanitarian law, being committed by the enemy, justify similar breaches by the other party to the conflict. However, the *tu quoque* defence has no place in contemporary international humanitarian law, as it implies that humanitarian law is based upon a narrow bilateral exchange of rights and obligations. In contrast, the bulk of humanitarian law declares absolute obligations that are unconditional and not based on reciprocity.⁴⁵

The tu quoque defence has no place in contemporary international humanitarian law.

11.2.2.12. REPRISALS

Reprisals against civilians are forbidden in all armed conflicts.

Under the jurisprudence of the ICTY, reprisals against civilians are forbidden in all armed conflicts.⁴⁶ Reprisals consist of unlawful acts that are undertaken in response to unlawful acts committed by the

⁴¹ *Ibid.* at Art. 32(2).

⁴² *Ibid.*

⁴³ Pavle Strugar, Case No. IT-01-42-A, Appeal Judgement, 17 July 2008, ¶ 275 citing Stanislav Galić, Case No. IT-98-29-A, Appeal Judgement, 30 Nov. 2006, ¶ 132, fn 706.

⁴⁴ *Galić*, AJ ¶ 130 citing Tihomir Blaškić, Case No. IT-95-14-A, 29 June 2004, Appeal Judgement, ¶ 109, and *Kordić*, AJ ¶ 54. In this sense, the fighting on both sides affects the determination of what is an unlawful attack and what is acceptable collateral damage, but not the prohibition itself (*Galić*, AJ fn. 704). It has also been held that even the presence of individual combatants within the population attacked does not necessarily change the legal qualification of this population as civilian in nature (*Galić*, AJ ¶ 136). See also Module 7 for a detailed discussion of the nature of a civilian population.

⁴⁵ Zoran Kupreškić et al., Case No. IT-95-16-T, Trial Judgement, 14 Jan. 2000, ¶¶ 515-520; *Martić*, AJ ¶ 111.

⁴⁶ *Martić*, Decision on the Review of Indictment, 8 March 1996. ¶¶ 15 – 16; see also *Martić*, AJ ¶ 263, discussing reprisals generally.

opposing armed force in an effort to persuade this force to desist from committing further unlawful acts. Reprisals are prohibited by AP I, which is applicable to international armed conflicts. No mention is made of reprisals in AP II, but as noted above, the ICTY's jurisprudence has indicated that reprisals are forbidden in all armed conflicts.

11.3. REGIONAL LAW AND JURISPRUDENCE

Notes for trainers:

- The Module now shifts to focus on the national laws of BiH, Croatia and Serbia. However, it is not recommended to discuss the regional sections in isolation while training this Module. For that reason, cross references have been included in the international section to the main regional laws and developments. The sections that follow provide a basis for more in-depth discussion about the national laws with practitioners who will be implementing them in their domestic courts.
- As the SFRY Criminal Code is still relevant to defences for crimes arising out of the conflicts in the former Yugoslavia, it is important to start with the provisions in this code and for participants to discuss the relevance and applicability of these provisions.
- It is important for trainers to have in mind that the SFRY legal tradition was unfamiliar with the concept of “defences” or a “theory of defence” (or, for that matter “prosecution theory”) as understood by common law countries. Under the SFRY CC, every criminal offence had its essential elements that distinguished it from any other criminal offence. As in all criminal systems, the prosecution had to prove each and every essential element. The primary defence was to argue that the prosecution failed to prove all or some of the essential elements, and that the alleged conduct thus did not constitute the criminal offence as charged. Accordingly, trainers should note that although the failure to prove the elements of a crime is not a specific defence, a discussion on this topic has been included in the regional law discussion below as a means by which a defence can be raised to charges of war crimes, crimes against humanity and genocide.
- Trainers should bear in mind that Module 5 provides an in-depth overview of the way in which international law is incorporated within the national laws. For this reason, such issues are not dealt with in detail in this section of this Module, and it would be most helpful to have trained Module 5 in advance of Modules that deal with substantive crimes.
- After the section on the SFRY Criminal Code, the Module deals with the laws applicable in BiH, Croatia and Serbia in separate sections so that participants from any of these countries need only focus on their jurisdiction. Where available, the most relevant jurisprudence has also been cited. Participants should be encouraged to use their own cases to discuss the defences being taught.
- One very effective way of engaging the participants is to ask them to analyse one of the most important cases that concerns these issues in their domestic jurisdiction. Some cases have been cited below, but others may be raised by the participants themselves or provided by the trainers.

11.4. SFRY

When trying war crimes cases arising out of the conflicts in the former Yugoslavia, BiH entity level courts and Brčko District courts generally apply the SFRY Criminal Code. The Court of BiH generally does not apply the SFRY Criminal Code and uses the BiH Criminal Code in its proceedings.

In Croatia, the courts apply the OKZ RH as the law applicable at the time of perpetration of the crimes arising out of the conflicts in the former Yugoslavia; the provisions of the OKZ RH regarding defences reflect the provisions as set out in the SFRY Criminal Code.

Serbian courts, when trying the war crimes cases arising out of the conflicts in the former Yugoslavia, apply either the SFRY Criminal Code or the FRY Criminal Code, also reflecting defences as set out under the SFRY Criminal Code.

Therefore, the relevant provisions of the SFRY Criminal Code will be examined below.

11.4.1. FAILURE TO PROVE THE ELEMENTS OF THE CRIME

Under the SFRY Criminal Code, every criminal offence, including the criminal offences under Chapter XVI (Criminal offences against humanity and international law), had essential elements that distinguished it from any other criminal offence.

The prosecution had to prove each and every essential element. If the prosecution failed to prove some of those essential elements, then the conduct alleged could not constitute the charged criminal offence.

As all of the essential elements had to be described in the factual description of the indictment, the basic defence under this principle consisted of contesting the existence of some or all of the essential elements of the crime as charged and described in the indictment.

The basic defence under this principle consisted of contesting the existence of some or all of the essential elements of the crime as charged and described in the indictment.

The conduct might constitute another crime if the conduct, as described and proven, contained essential elements of another criminal offence. For instance, in a case where killing or wounding an enemy soldier occurred after the enemy soldier was captured, such conduct could constitute a war crime against prisoners of war set out in Article 144 of the SFRY Criminal Code. However, if killing or wounding the enemy soldier occurred after the enemy soldier laid down his arms or unconditionally surrendered, but prior to being captured, such killing or wounding could constitute the criminal offence of unlawful killing or wounding the enemy set out in Article 146 of the SFRY Criminal Code.⁴⁷ Or, for example, in a case where the criminal offence charged

⁴⁷ Komentar krivičnog Zakona Socijalističke Federativne Republike Jugoslavije, Savremena administracija, 1978, str.508, (Commentary of the SFRY Criminal Code, Savremena administracija, 1978). Note that under Article 144 of the SFRY CC (war crime against prisoners of war) the sentence prescribed is minimum 5 years' imprisonment, maximum death penalty, while under Article 146(1) of the SFRY CC (unlawful killing

contained an element that the conduct was “in violation of international law”, if this violation was not proven, the conduct of the accused could not constitute the criminal offence as charged.

This principle of the need for all the elements of the criminal offence to be proven was later adopted in the criminal systems of the new states that emerged after dissolution of the SFRY.

11.4.2. SFRY CRIMINAL CODE

The main defences under the SFRY Criminal Code⁴⁸ are discussed below and their particular elements are highlighted for participants.

11.4.2.1. AMNESTY

Article 101 of the SFRY Criminal Code provides that:

Persons covered by an act of amnesty are granted immunity from prosecution, complete or partial exemption from the execution of punishment, substitution of the imposed punishment by a less severe one, expunging of the conviction, or annulment of legal consequences incident to conviction.⁴⁹

Article 103 provides that granting amnesty or pardon shall in no way affect the rights of third parties emanating from the judgement.⁵⁰

11.4.2.2. SUPERIOR ORDERS

Under Article 239 of the SFRY Criminal Code, no punishment could be imposed on a subordinate if he committed a criminal offence pursuant to the order of a superior given in the line of official duty, unless:

- the order was directed toward committing a war crime;
- the order was directed towards committing any other grave criminal offence; or
- if it was obvious that the carrying out of the order constituted a criminal offence.

A subordinate cannot be punished if he committed a criminal offence pursuant to the order of a superior given in the line of duty unless:

- *the order was to commit a war crime*
- *the order was to commit any other grave criminal offence*
- *if it was obvious that carrying out the order constituted a criminal offence*

or wounding the enemy) the sentence prescribed is minimum 1 year imprisonment, maximum 15 years' imprisonment.

⁴⁸ SFRY Criminal Code, Official Gazette No. 44/76, 36/77, 34/84, 74/87, 57/89, 3/90, 38/90.

⁴⁹ *Ibid.* at Art. 101.

⁵⁰ *Ibid.* at Art. 103.

11.4.2.3. NECESSARY DEFENCE (SELF-DEFENCE)

Article 9 of the SFRY Criminal Code provides for necessary defence as a ground for excluding criminal liability:

- (1) An act committed in necessary defence is not considered a criminal offence.
- (2) Necessary defence is an act of defence which is absolutely necessary for the offender to avert an immediate and unlawful attack from himself or from another.
- (3) If the offender exceeds the limits of necessary defence, the court may reduce the punishment, and if he has exceeded the limits by reason of great irritation or fright stirred up by the attack, it may also refrain from imposing a punishment on him.

11.4.2.4. EXTREME NECESSITY

Under Article 10 of the SFRY Criminal Code, extreme necessity could be a ground for excluding criminal liability where the perpetrator committed a crime in order to prevent an immediate danger to himself or another where:⁵¹

- The perpetrator was not the cause of the danger;
- The danger could not have been avoided except by committing the acts; and
- The wrong-doing of the perpetrator's acts cannot exceed that of the threat.⁵²

If the offender negligently caused the danger or exceeded the limits of extreme necessity, the court could mitigate the punishment or, if he exceeded the limits under especially mitigating circumstances, it may refrain from imposing a punishment.⁵³

Importantly for war crimes cases, Article 10(4) provides that "there is no extreme necessity if the offender was under an obligation to expose himself to the danger".⁵⁴

11.4.2.5. LACK OF MENTAL CAPACITY AND DIMINISHED MENTAL RESPONSIBILITY

According to Article 12 of the SFRY Criminal Code, an offender lacks mental capacity to commit a crime if, at the time of the commission of the offence:

- he could not comprehend the meaning of his act or
- he could not control his actions
- due to permanent or temporary mental disease, temporary mental disturbance or mental retardation.

⁵¹ SFRY CC, Arts. 10(1) – (2).

⁵² *Ibid.* at Art. 10(2).

⁵³ *Ibid.* at Art. 10(3).

⁵⁴ *Ibid.* at Art. 10(4).

In such a case, there is no criminal liability.

If, due to lack of mental capacity, the offender could not comprehend the significance of his act or his ability to control his actions was substantially diminished, the court may impose a reduced sentence.

If, due to these conditions, the capacity of the offender to comprehend the significance of his act or his ability to control his actions was substantially diminished, the court may impose a reduced sentence (*substantially diminished capacity*).

However, the offender shall be criminally liable if:

- He consumed alcohol or drugs or in some other way placed himself in a state in which he was not capable of comprehending the meaning of his act or controlling his actions; and
- Prior to his placing himself in such a condition, the perpetrator intended to commit the act or if he was negligent in relation to the criminal act (insofar as the act in question is punishable by law if committed negligently).

11.4.2.6. MISTAKE OF LAW

According to Article 17 of the SFRY Criminal Code, the court may reduce the punishment of a perpetrator who had justifiable reasons for not knowing that his conduct was prohibited.

It was not required that the perpetrator be aware that he was violating rules of international law by his conduct.⁵⁵

11.4.2.7. MISTAKE OF FACT

In accordance with Article 16(1) of the SFRY Criminal Code, a person is not criminally responsible if, at the time of committing a criminal act, he was not aware of some statutory element of it; or if he mistakenly believed that circumstances existed which, if they had actually existed, would render such conduct permissible.

11.4.2.8. PROTECTION OF POPULATION AND MILITARY NECESSITY

The Commentary on the SFRY Criminal Code noted that military necessity could justify some actions as long as they were lawful, such as:

- forcible deportation of the civilian population from the occupied territory performed in order to protect the civilian or due to imperative military needs (in which case the occupation force needed to secure the accommodation, food and hygiene conditions necessary);⁵⁶
- forced labour conducted in the interest of the civilian population of the occupied territory;⁵⁷

⁵⁵ See, e.g., Commentary of the SFRY Criminal Code, p. 501.

⁵⁶ *Ibid.* at p. 499.

⁵⁷ *Ibid.* at p. 499.

- requisition of food supplies, clothing, means of transportation or providing services in the form of work force required for the needs of the occupation army, as long as it was on a local scale and took into account the economic strength of the country and the needs of civilian population.⁵⁸

⁵⁸ *Ibid.*

11.5. BIH

Notes for trainers:

- In this section the defences available under the BiH Criminal Code are listed and discussed. This code is applied by the Court of BiH and these defences are thus available before this court.
- As the BiH entity level courts and Brčko District courts generally apply the SFRY Criminal Code, it is important that the previous section is discussed with participants.
- It may be useful to engage the participants in discussion to get them to compare the defences available before the Court of BiH with those applicable before the entity courts.
- The case study can also be used to ask the participants to imagine that the case is being tried before their domestic courts. The participants should consider what defences should be available on the evidence outlined in the case summary, and how they as prosecutors may be able to rebut any of those defences.

The BiH Criminal Code is applied by the Court of BiH when trying war crimes cases arising out of the conflicts in the former Yugoslavia, although the SFRY Criminal Code was the Criminal Code in force at the time of the commission of the crimes. However, if it finds the SFRY Criminal Code to be more lenient to the accused, the Court of BiH will apply the SFRY Criminal Code. The BiH entity level courts and the Brčko District courts apply the SFRY Criminal Code as *tempore criminis* law.⁵⁹ For more on this, please see Module 5.

11.5.1. IMMUNITY

Immunity law, as a ground for exclusion or limitation of the application of criminal legislation, applies for some persons based on their official status (*e.g.* diplomatic and consular representatives, other international officials, heads of foreign states and their escorts while they are on the territory of BiH, heads of diplomatic missions and members of their family, diplomatic staff and their family, unless they are BiH nationals) or when performing certain public functions (*e.g.* members of parliament, judges, etc.).⁶⁰ As far as procedural immunity is concerned, such immunity relates to and influences only the commencement of criminal proceedings or conducting criminal proceedings and is terminated once the mandate is over.⁶¹

⁵⁹ For more on this, see Module 5.

⁶⁰ Komentar Krivičnog/kaznenog zakona Bosne i Hercegovine, Savjet/Vijeće Evrope / Evropska komisija, 2005., str. 81-82 (Commentary of the BiH Criminal Code, pp. 81-82).

⁶¹ *Ibid.* at p. 82.

The issue of immunities is regulated by the BiH Criminal Code provisions,⁶² as well as BiH, FBiH, RS and BD laws on immunity.⁶³

In accordance with BiH, FBiH, RS and BD laws on immunity, immunity can be a defence in criminal proceedings involving members of both houses of the BiH/FBiH/RS Parliament, members of the FBiH cantonal legislative bodies and members of the BD Assembly. However, this immunity is granted to the above-mentioned persons *only* in relation to “acts carried out within the scope of their duties”, *i.e.* conduct that stems from the duties which an individual has in relation to the above-mentioned institutions.⁶⁴ The immunity can be invoked at any time, but it cannot represent a general bar to the criminal prosecution.⁶⁵

BiH Criminal Code provisions from Chapter XVII (criminal offences against humanity and values protected by international law) regarding immunity are based on the corresponding provisions from the ICTY and the ICC Statutes.⁶⁶ Article 180(1) of the BiH Criminal Code provides that:

The official position of any individual, whether as Head of State or Government or as a responsible Government official person, shall not relieve such person of culpability nor mitigate punishment.

It is irrelevant whether the immunity or special procedural rules are based on provisions of domestic legislation or international law.⁶⁷ Therefore, when trying war crimes cases, such immunities do not represent a bar to criminal prosecution nor grounds for relieving such persons of culpability or mitigating the punishment.⁶⁸

When trying war crimes cases, immunities do not represent a bar to criminal prosecution nor grounds for relieving such persons of culpability or mitigating the punishment.

11.5.2. AMNESTY

The Criminal Codes of BiH, FBiH, RS and BD⁶⁹ provide for several types of amnesty, including:

- a release from criminal prosecution (abolition);
- complete or partial release from the execution of punishment;
- substitution of the imposed punishment by a less severe one;
- repealing the conviction; or

⁶² Note that the issue of immunities is also regulated by the FBiH, RS and BD Criminal Codes, but for the present issue only BiH CC is relevant, as it is the only the BiH CC that regulates the criminal offences against humanity and values protected by international law and the non-applicability of immunities in relation to such criminal offences.

⁶³ BiH Law on Immunity, BiH Official Gazette No. 32/02, 37/03 and 75/09; FBiH Law on Immunity, FBiH Official Gazette No. 52/02 and 19/03; RS Law on Immunity, RS Official Gazette No. 69/02; BD Law on Immunity, BD Official Gazette No. 2/03.

⁶⁴ BiH Law on Immunity, Art. 3.

⁶⁵ *Ibid.* at Art. 4.

⁶⁶ Commentary of the BiH Criminal Code, 2005, pp. 557, 595.

⁶⁷ *Ibid.* at p. 595.

⁶⁸ *Ibid.*

⁶⁹ BiH CC, Art. 118; FBiH CC, Art. 122; RS CC, Art. 116; and BD CC, Art. 122.

- repealing any legal consequences related to the conviction.

An amnesty for the criminal offences prescribed under the BiH Criminal Code may be granted by the Parliamentary Assembly of BiH by virtue of a law. For the criminal offences prescribed by FBiH Criminal Code, RS Criminal Code and BD Criminal Code, amnesty may be granted by virtue of law brought by the Parliament of FBiH, National Assembly of RS and the Assembly of BD, respectively.

The 1999 FBiH Law on Amnesty,⁷⁰ 2005 RS Law on Amnesty,⁷¹ and 2001 BD Law on Amnesty⁷² abolished and completely released from punishments (both pronounced punishments and remaining terms of punishment) all persons who committed any crimes included in the criminal codes applicable on the territory of FBiH and RS, respectively, from 1 January 1991 to 22 December 1995. However, the amnesty granted by these laws did not cover the most serious criminal offences committed during that period (e.g. murder, rape, serious cases of robbery, etc.), including:

In war crimes cases before the courts in BiH, amnesty does not represent a valid defence.

- crimes defined by the ICTY Statute;
- criminal offences against humanity and international law from Chapter XVI of the adopted SFRY Criminal Code.⁷³

Therefore, in war crimes cases before the courts in BiH, amnesty does not represent a valid defence.

11.5.3. FAILURE TO PROVE THE ELEMENTS OF THE CRIME

As under the SFRY Criminal Code, every criminal offence contained in the BiH Criminal Code, including the criminal offences under Chapter XVII (criminal offences against humanity and values protected by international law) has essential elements that distinguish it from any other criminal offence.

The prosecution has to prove each and every such element for each crime charged. If the prosecution fails to prove some of those essential elements, then the alleged conduct cannot constitute the charged offence.

The conduct may constitute another crime if, as alleged and proven, it contains essential elements of another criminal offence. For instance, if persecution was not committed with the intent to destroy in whole or in part a national, ethnic, racial or religious group, it could not constitute the crime of genocide as set out in Article 171 of the BiH Criminal Code. However, if all other requirements were met, it could constitute a crime against humanity as set out in

⁷⁰ FBiH Law on Amnesty, FBiH Official Gazette No. 48/99.

⁷¹ RS Law on Amnesty, RS Official Gazette No. 95/05.

⁷² BD Law on Amnesty, BD Official Gazette No. 10/01, 16/01, 19/07.

⁷³ FBiH Law on Amnesty and BD Law on Amnesty refer to both the criminal offences under Chapter XVI of the adopted SFRY CC and the crimes envisaged by the ICTY Statute, while the RS Law on Amnesty refers only to the crimes envisaged by the ICTY Statute.

Article 172(1)(h) of the BiH Criminal Code.⁷⁴ Or, for example, if the conduct of the accused did not violate the rules of international law, or was not committed during war, armed conflict or occupation, the conduct could not constitute a war crime, but it could constitute another crime (e.g. murder, rape, severe bodily injury, etc.) if all other necessary elements have been proven.⁷⁵

As all of the essential elements need to be described in the factual description of the indictment, the basic defence under this principle consists of contesting the existence of some or all of the essential elements of the crime as charged and described in the indictment.

11.5.4. SPECIFIC DEFENCES

The various defences available under the BiH Criminal Code are outlined here.⁷⁶ The elements of each of these defences are highlighted, and to the extent that it is known, some of the main cases in which these defences were applied are discussed.

11.5.4.1. SUPERIOR ORDERS

The fact that a person acted pursuant to an order of a Government or of a superior shall not relieve him of culpability, but may be considered in mitigation of punishment.

In accordance with Article 180(3) of the BiH Criminal Code, the fact that a person acted pursuant to an order of a Government or of a superior shall not relieve him of culpability, but may be considered in mitigation of punishment if the court determines that

justice so requires.

11.5.4.2. NECESSARY DEFENCE (SELF-DEFENCE)

Article 24 of the BiH Criminal Code:

- (1) An act committed in necessary defence is not considered a criminal offence.
- (2) A defence is considered to be necessary if it is absolutely necessary for the defender to avert a coinciding or direct and imminent illicit attack from himself or from another, and which is proportionate to the attack.
- (3) If the perpetrator exceeds the limits of necessary defence, the punishment can be reduced, and if the excess occurs due to strong irritation or fright caused by the attack, the punishment can be remitted.

⁷⁴ See, e.g., Commentary of the BiH Criminal Code, 2005, p. 565.

⁷⁵ See, e.g., *ibid.* at pp. 572-573.

⁷⁶ BiH CC, BiH Official Gazette No. 03/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 08/10, consolidated version, available at www.sudbih.gov.ba.

In the *Stupar et al.* case, the defence argued that killings of prisoners had been committed in self-defence.⁷⁷ The appellate panel found that this argument was contrary to the facts of the case.

The appellate panel noted that it was true that the killings of the prisoners in Kravica were preceded by an incident in which one of the prisoners grabbed the rifle of a Skelani platoon member and killed him, while the other person, deputy commander of the detachment, was injured trying to prevent the prisoner from continuing to shoot at others.⁷⁸ The panel also noted that the prisoner was killed immediately and that, soon after, fire was opened upon the other prisoners, first from an M84 machinegun and then from automatic rifles, followed by hand-grenades.⁷⁹ Furthermore, the panel noted that the killings of the prisoners in the warehouse lasted for about an hour and a half whereupon the detachment left the location to be replaced by members of other units who continued shooting and throwing hand-grenades long into the night.⁸⁰

Taking into account the overall circumstances of the entire event, the appellate panel found that no prisoner in the warehouse was culpable of the Skelani platoon member's death and stressed that the prisoners had been unarmed, exhausted and some had been wounded and injured, while the accused had been heavily armed.⁸¹ Moreover, the warehouse was a completely closed area except for the windows on the back which were guarded by the accused.⁸² Consequently, the appellate panel concluded that the prisoners had not been a threat of any kind to the armed soldiers, and there had been no indication of acting in self-defence.⁸³

The appellate panel concluded:

[T]here was no "attack" as that term is used in Article 24, and [...] the response of the Accused was clearly and indisputably massively disproportionate to any threat from the unarmed prisoners, who were unquestionably well-secured in the warehouse.⁸⁴

⁷⁷ Court of BiH, *Stupar et al.*, Case No. X-KRZ-05/24, 2nd Instance Verdict, 9 Sept. 2009, ¶ 473.

⁷⁸ *Ibid.* at ¶ 475.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.* at ¶ 476.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.* at ¶ 474.

11.5.4.3. EXTREME NECESSITY

Extreme necessity is a defence under Article 25 of the BiH Criminal Code, which provides:

Article 25 of the BiH Criminal Code

- (1) An act committed out of extreme necessity is not considered a criminal offence.
- (2) An act is committed out of extreme necessity, if committed for the purpose of averting from himself or from another an immediate or direct and imminent and unprovoked danger that could not have been averted in any other way, provided that the harm resulting from such act did not exceed the harm threatened.
- (3) If the perpetrator himself has negligently provoked the danger, or he has exceeded the limits of extreme necessity, the court may impose reduced punishment on him, and if he exceeded the limits under particularly mitigating circumstances, the punishment may be remitted.
- (4) There is no extreme necessity if the perpetrator was under an obligation to expose himself to the danger.

11.5.4.4. IRRESISTIBLE FORCE AND THREAT

Irresistible force and threat is also a defence under Article 25a of the BiH CC, which provides:

Article 25a of the BiH Criminal Code

- (1) An offence shall not be considered criminal if committed under the influence of irresistible force (*vis absoluta*).
- (2) A less severe sanction may be imposed on a perpetrator who committed a criminal offence under the influence of a resistible force or a threat (*vis compulsiva* or *vis moralis*).
- (3) In the case referred to in paragraph (1) of this Article, the person who applied an irresistible force shall be deemed the perpetrator.

11.5.4.5. LACK OF MENTAL CAPACITY AND DIMINISHED MENTAL RESPONSIBILITY

Article 34 of the BiH Criminal Code provides that an offender is not accountable if, at the time of perpetrating the criminal offence, he was incapable of comprehending the significance of his acts or controlling his conduct due to a lasting or temporary mental disease, temporary mental disorder or retardation.

If, due to these conditions, the capacity of the offender to comprehend the significance of his act or his ability to control his actions was considerably diminished (as opposed to being completely inexistent), he might be punished less severely.

An offender is not accountable if, at the time of perpetrating the criminal offence, he was incapable of comprehending the significance of his acts or controlling his conduct due to a lasting or temporary mental disease, temporary mental disorder or retardation.

However, the offender shall be considered guilty and ineligible for a reduced sentence if this diminished mental capacity was created because:

- the perpetrator consumed alcohol or drugs or in some other way brought himself into a state of being incapable of comprehending the significance of his actions or of controlling his conduct; and
- prior to bringing himself into such a condition, the act was intended by him, or he was negligent about the criminal offence (for crimes where negligence is a basis of liability).

In the *Ljubinac Radisav* case, the defence argued that at the time the crime was committed, the accused was under the constant influence of alcohol and therefore had a mental incapacity.⁸⁵ The panel noted that the defence called witnesses who spoke about the accused as a drunkard and person who “was not consulted about anything”.⁸⁶ A neuropsychiatric evaluation of the accused was performed to determine his mental capacity at the time of the crime, which concluded that the accused did have diminished mental capacity at the relevant time, but not to a significant extent.⁸⁷ The panel concluded that, pursuant to Article 34 of the BiH Criminal Code, these facts did not provide sufficient grounds either for reduction or aggravation of sentence of a criminally responsible person.⁸⁸

11.5.4.6. ALIBI

Alibis have been used as a defence in a number of cases.⁸⁹ Some of these will be discussed below.

In the *Damjanović Goran et al.* case, the defence appealed the trial panel’s decision not to give credibility to defence witnesses who tried to provide alibis for both accused, stating that the accused Goran and Zoran were not present at the critical location and time.⁹⁰

⁸⁵ Court of BiH, *Ljubinac Radisav*, Case No. X-KR-05/154, 1st Instance Verdict, 8 March 2007, p. 28 (p. 26 BCS) (upheld in appeal).

⁸⁶ *Ibid.* at p. 28 (p. 27 BCS).

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* at pp. 28-29 (p. 27 BCS).

⁸⁹ For other examples see, e.g., Court of BiH, *Janković Gojko*, Case No. X-KR-05/161, 1st Instance Verdict, 16 Feb. 2007, pp. 47-50 (p. 45-48 BCS); *Lelek Željko*, Case No. X-KRZ-06/202, 2nd Instance Verdict, 12 Jan. 2009, ¶¶ 34-36; *Savić Momir*, Case No X-KR-07/478, 1st Instance Verdict, 3 July 2009, p. 85 *et seq* (p. 74 *et seq* BCS).

The appellate panel, upholding the trial panel, held that there was only a small probability that two men fit for military service (accused Goran Damjanović and alibi witness Zdravko Jović), members of the Army of RS, had been free to go and pay a visit to a hospital in Koran during an extensive military operation and attack on Ahatovići.⁹¹ The panel continued to state that this alibi was largely refuted by the evidence of prosecution witnesses who recognised the accused at the crime scene, and was based on inconsistent and contradictory testimony of defence witnesses.⁹²

In relation to the accused Zoran Damjanović, the appellate panel upheld the trial panel's holding, and noted that the alibi was unreliable because of inconsistencies.⁹³ The appellate panel observed that, compared to the prosecution witnesses, the defence witnesses who testified about the alibi were unconvincing and appeared to have adjusted their testimonies to the needs of the alibi for the accused.⁹⁴

In the *Kurtović Zijad* case, the appellate panel also upheld the trial panel's findings that the defence of alibi was unsuccessful due to the credibility of defence and prosecution witnesses.⁹⁵ According to the appellate panel, statements from defence witnesses indicating that the accused was serving at the front lines during the period when the crimes had been committed did not establish an effective alibi.⁹⁶ Specifically, the appellate panel held that the accused could have travelled to the place relevant to the charges on his own initiative during the evening hours (which was when the crimes occurred) and returned to the command for assignments in the morning, since the command was located only three kilometres.⁹⁷

11.5.4.7. MISTAKE OF LAW

In accordance with Article 38 of the BiH Criminal Code, a perpetrator of a criminal offence, who had a justifiable reason for not knowing that his conduct was prohibited, may be released from punishment.

It is not required that the perpetrator was aware that he was violating rules of international law by his conduct.⁹⁸

11.5.4.8. MISTAKE OF FACT

Article 37(1) of the BiH Criminal Code provides that a perpetrator is not guilty of the criminal offence committed under an irreversible mistake of fact.

⁹⁰ Court of BiH, *Damjanović Goran et al.*, Case No. X-KRZ-25/107, 2nd Instance Verdict, 19 Nov. 2007, p. 9 (p. 9 BCS); see also *Damjanović Goran et al.*, 1st inst. p. 10 (p. 11 BCS).

⁹¹ *Damjanović Goran et al.*, 2nd inst. p. 9 (p. 9 BCS).

⁹² *Ibid.*

⁹³ *Ibid.* at p. 10 (p. 9 BCS).

⁹⁴ *Ibid.*

⁹⁵ Court of BiH, *Kurtović Zijad*, Case No. X-KRZ-06/299, 2nd Instance Verdict, 25 March 2009, ¶¶ 68 – 70.

⁹⁶ *Ibid.* at ¶ 79.

⁹⁷ *Ibid.*

⁹⁸ See, e.g., Commentary of the BiH Criminal Code, 2005, p. 573.

According to Article 37(2) of the BiH Criminal Code, mistake of fact is irreversible if, at the time of the perpetration of a criminal offence the perpetrator was not aware of one of its elements defined by law, or if he mistakenly believed that circumstances existed which, if they had actually existed, would render such conduct permissible.

11.5.4.9. PROTECTION OF POPULATION AND MILITARY NECESSITY

As the explained in the Commentary of the BiH Criminal Code with regard to war crimes against civilians, under the rules of international law applicable in time of war, it is permitted, in certain circumstances, that the occupation force, the warring party or their bodies undertake certain measures limiting or violating freedom and rights of the civilian population.⁹⁹ For example:

- Requisitioning or taking property away from the enemy is permitted, but only within the scope determined by the economic strength of the population and the local regulations.¹⁰⁰
- In order for resettlement of the population by the occupying force to represent a war crime against civilians, it is required, *inter alia*, that such resettlement is conducted in violation of the rules of international law.¹⁰¹
- Destruction of property or appropriation of property that is justifiable by military needs would not constitute a war crime against civilians.¹⁰²

Therefore, military necessity can be grounds for excluding criminal liability for some acts that would otherwise amount to war crimes under the BiH Criminal Code.

Military necessity can be grounds for excluding criminal liability for some acts that would otherwise amount to war crimes.

11.5.4.10. TU QUOQUE

In the *Lučić Kreso* case, the appellate panel stated that the *tu quoque* defence:

[M]ay amount to saying that breaches of international humanitarian law, being committed by the enemy, justify similar breaches by a belligerent. However, the *tu quoque* defense has no place in contemporary humanitarian law.¹⁰³

The appellate panel continued to explain that the *tu quoque* defence had to be universally rejected and was flawed in principle as it envisaged “humanitarian law as based on a narrow bilateral exchange of rights and obligations”.¹⁰⁴

⁹⁹ See, e.g., *ibid.* at p. 572.

¹⁰⁰ See, e.g., *ibid.*

¹⁰¹ See, e.g., *ibid.* at p. 573.

¹⁰² See BiH CC, Art. 173(1)(f); see also, e.g., Commentary of the BiH Criminal Code, 2005, p. 572.

¹⁰³ Court of BiH, Krešo Lučić, Case No. X-KRZ- 06/298, 2nd Instance Verdict, 16 Dec. 2008, ¶ 38 – referring to *Kupreškić et al.*, TJ ¶¶ 51, 515-520.

¹⁰⁴ *Lučić*, 2nd inst. at ¶ 38.

The tu quoque defence must be universally rejected and was flawed in principle.

Instead, as held by the appellate panel, “the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words based on reciprocity”.¹⁰⁵

The appellate panel rejected the defendant’s *tu quoque* argument that it was the ARBiH which first attacked the Kreševo Municipality and the town of Kreševo.¹⁰⁶ The appellate panel held that this can be viewed from the opposite perspective.¹⁰⁷ The appellate panel considered the ICTY finding that HVO attacks and persecution of the Bosniak civilian population in the Central Bosnia region (Lašva Valley) were not justifications for its adversary, the ARBiH, to commit similar acts by shelling civilian targets in the territory of Kreševo.¹⁰⁸

11.5.4.11. CHALLENGING THE IDENTITY OF THE ACCUSED

In the *Janković Zoran* case, the defence stressed the differences in the descriptions of the accused given by two witnesses during an identification line-up and before the trial panel.¹⁰⁹ The general objection of the defence was related to the appearance of the accused (specifically, his eye colour), the place where the accused had worked, and his surname.¹¹⁰ The trial panel concluded it was not possible to clearly identify the accused, and that the prosecutor had not proven beyond reasonable doubt that the accused was the man seen by the witness at the relevant time and location.¹¹¹

11.5.4.12. ATTEMPT

Article 26 of the BiH Criminal Code:

(1) Whoever intentionally commences execution of a criminal offence, but does not complete such offence, shall be punished for the attempted criminal offence when, for the criminal offence in question, the punishment of imprisonment for a term of three years or a more severe punishment may be imposed, and for the attempt of another criminal offence when the law expressly prescribes punishment of the attempt alone.

(2) An attempted criminal offence shall be punished within the limits of the punishment prescribed for the same criminal offence perpetrated, but the punishment may also be reduced.

¹⁰⁵ *Ibid.*, referring to Human Rights Watch, *Genocide, War Crimes, Crimes against Humanity*, Thematic Collection of Excerpts from the ICTY jurisprudence, UNDP, Serbia and Montenegro, 2004, p. 143

¹⁰⁶ *Lučić*, 2nd inst. at ¶ 41.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ Court of BiH, *Janković Zoran*, Case No. X-KR-06/234, 1st instance verdict of 19 June 2007, p 11 (p 10 BCS) (verdict upheld in appeal)

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, at p. 19 (p. 17 BCS)

Article 27 of the BiH Criminal Code:

If a person tries to perpetrate a criminal offence by inappropriate means or against an inappropriate object may be released from sentencing or punished less severely.

Article 28 of the BiH Criminal Code:

(1) A perpetrator, who voluntarily abandons the execution of a punishable attempt, may be released from punishment.

(2) In the event of voluntary abandonment of an attempt, the perpetrator shall be punished for those acts that constitute other separate criminal offences.

Articles 26, 27 and 28 of the BiH Criminal Code include provisions with respect to attempted commission of a crime.

11.6. CROATIA

Notes for trainers:

- This section discusses the provisions of the OKZ RH that provide for defences. These provisions are applicable to crimes arising out of the conflicts in the former Yugoslavia. The section discusses immunity and amnesty issues at the outset, and thereafter, lists the specific defences and their elements as provided for in the OKZ RH.
- To the extent that they are known, the main cases that have dealt with these defences are discussed. Participants should be encouraged to assess these cases and to identify any cases that they have been involved in, in order to discuss the jurisprudence on defences available under the code.
- Even though the 1998 code is not applicable to conflicts arising out of the conflicts in the former Yugoslavia, participants could also be asked to discuss the defences available under this code and to consider whether any of them may be taken into account.
- The case study can also be used to ask the participants to imagine that the case is being tried before their domestic courts. The participants should consider what defences should be available on the evidence outlined in the case summary, and how they as prosecutors may be able to rebut any of those defences.

11.6.1. IMMUNITY

Immunity does not exclude liability in cases where a member of parliament is accused of committing a war crime.

Members of Parliament in Croatia enjoy immunity before the national courts. The Croatian Constitution stipulates that no representative shall be prosecuted, detained or punished for an opinion expressed or vote cast in the Croatian Parliament. However, immunity does not exclude liability in cases where a Member of

Parliament is accused of committing a war crime.¹¹²

The Mandate-Immunity Committee of the Croatian Parliament must rule before a Member of Parliament becomes a subject of a trial. Therefore, immunity is never an issue per se before the courts, since Members of Parliament would be stripped of immunity before the trial. For

¹¹² These immunities extend to Judges. Constitution of Croatia, Arts. 119 and 123, (Official Gazette of Croatia „Narodne Novine“ No. 56/90, 135/97, 8/98 – consolidated text, 113/2000, 124/2000 – consolidated text, 28/2001, 41/2001 – consolidated text, 55/2001 – correction).

example, Branimir Glavaš, a Member of Parliament, was convicted and sentenced to eight years' imprisonment for committing a war crime after being stripped of his immunity.¹¹³

11.6.2. AMNESTY

As described in Module 13, the Croatian Parliament can grant amnesty to persons for specific crimes in a specified time period or pass a special law for that purpose. After the conflicts in the former Yugoslavia, Parliament enacted three Croatian General Amnesty Acts in 1996.¹¹⁴

The General Amnesty Act grants general amnesty from criminal prosecution and proceedings against perpetrators of criminal acts committed during or related to aggression, armed rebellion or armed conflicts from 17 August 1990 to 23 August 1996. The amnesty also relates to the execution of the final verdict passed against the perpetrators of criminal acts referred to in the Act. If the person had been convicted of committing a crime before the Amnesty Act was passed, after the moment of the implementation of the Amnesty Act, that person would not need to serve the sentence.¹¹⁵

If criminal prosecution for the crimes included in the Amnesty Act has been undertaken, it must be stopped, and if criminal proceedings have been initiated, the proceedings must be stopped ex officio by a court ruling. If the person to whom the amnesty is related is deprived of liberty, the person must be released by a court ruling.¹¹⁶

The amnesty for criminal acts referred to in Article 1 of the Act excludes perpetrators of the most serious violations of humanitarian law having the characteristics of war crimes, specifically, crimes under Articles 119 – 137 of the Basic Criminal Code of the Republic of Croatia,¹¹⁷ as well as the criminal act of terrorism regulated by provisions of international law.¹¹⁸

The amnesty excludes perpetrators of the most serious violations of humanitarian law having the characteristics of war crimes.

In the *Čepin* case, the accused argued that the crime he was accused of had already been decided on by the court,¹¹⁹ as the accused had been granted amnesty for murder under the General Amnesty Act. However, the court reasoned that even if the charges concerned the same event, this did not prevent the court from convicting him for committing a war crime against the civilian population since this crime is not only directed against a human life and body but is also against international law. Since it had been proven that the accused was not following the rules and customs of war during the armed conflict and had not acted according to the rules of international law that protects a civilian population during the armed conflict, he was found to

¹¹³ Zagreb County Court, Glavaš et al. Case No. K-rz-1/07, 1st Instance Verdict, 8 May 2009. Glavaš' immunity was removed by a vote of the Mandate-Immunity Committee of the Croatian Parliament on May 11, 2009.

¹¹⁴ Amnesty Act from 25 Sept. 1992; Amnesty Act from 17 May 1996; Amnesty Act from 20 Sept. 1996.

¹¹⁵ General Amnesty Act, Art. 1 (Official Gazette of Croatia „Narodne Novine“ No. 80/1996).

¹¹⁶ *Ibid.* at Art. 2 (Official Gazette of Croatia „Narodne Novine“ No. 80/1996).

¹¹⁷ Official Gazette of Croatia „Narodne Novine“, No. 31/93 - revised text, 35/93, 108/95, 16/96, and 28/96.

¹¹⁸ General Amnesty Act, Art. 3 of the (Official Gazette of Croatia „Narodne Novine“ No. 80/1996).

¹¹⁹ Osijek County Court, Čepin, Case No. K-4/97-159, 1st Instance Verdict.

have committed a crime against the civilian population. Thus, the court rejected the defence's objection that the case concerned a crime already adjudicated.¹²⁰

11.6.3. SPECIFIC DEFENCES

Each of the specific defences available under the OKZ RH are discussed here. The elements of these defences are highlighted and the main case law, as far as it is known, is discussed.

11.6.3.1. SUPERIOR ORDERS

For crimes arising out of the conflicts in the former Yugoslavia, the courts apply the OKZ RH. It should be noted that the OKZ RH did not provide for the doctrine of superior responsibility.¹²¹

The fact that the crime was committed upon the order of a superior can be considered by courts as a mitigating factor during sentencing. It does not constitute a full defence.

The fact that the crime was committed upon the order of a superior can be considered by courts as a mitigating factor during sentencing. It does not constitute a full defence as it cannot exclude the perpetrator of the crime from his or her liability. However, the extent to which judges consider following or conveying orders as a mitigating circumstance varies from case to case.

Please see Module 13 for more information on sentencing.

11.6.3.2. SELF-DEFENCE

The Croatian Criminal Code provides that there shall be no criminal offence when the perpetrator acts in self-defence: when it is absolutely necessary for the perpetrator to avert an imminent or immediate unlawful attack on him or on another person. If the perpetrator exceeds the limits of self-defence, the punishment can be mitigated, and if the excess occurs due to strong irritation or fright caused by the attack, the punishment can be remitted.¹²²

Although self-defence has been used as a defence in some cases involving "normal" crimes, in war crimes cases the Court has not accepted such a defence.

The court has not accepted self-defence as a defence in war crimes cases.

For example, in the *Koranski* case, although the accused claimed the crime had been committed in self-defence and although the County Court accepted such a defence as valid in the first

¹²⁰ Osijek County Court, Čepin, Case No. K-33/06, 1st Instance Verdict 21 March 2007.

¹²¹ However, from 1 Oct. 2004 superior responsibility has been included in Croatian law and was adopted from Article 28 of the Rome Statute. Criminal Code from 15 July 2004 (Official Gazette of Croatia „Narodne Novine“ No. 105/04). See also Ana Garačić, *Komentar Kaznenog zakona, Organizator*, Zagreb 200 (2009). Superior responsibility is discussed in more detail in Module 10.

¹²² Croatia Basic Criminal Code, Art. 7 - OKZ RH (Official Gazette of Croatia „Narodne Novine“ No. 32/93).

instance verdict, the Supreme Court convicted the accused Mihajlo Hrastov to seven years of imprisonment.¹²³

The accused had been indicted for murdering prisoners who had voluntarily surrendered (and were therefore *hors de combat*). The accused had testified that the prisoners had not truly surrendered since they attacked him and his comrade. The accused thus claimed that he had to kill the prisoners in self-defence. The first instance court considered the testimony of the accused and his comrade and a ballistics report as credible evidence. The court did not consider the victims' testimony or an expert medical report and pathological report to be credible evidence.¹²⁴

On appeal, the Supreme Court again examined all witnesses and expert witnesses and decided that the County Court wrongly concluded that the accused acted in self-defence. The Supreme Court considered the victims' testimony and medical and pathological expert reports as credible evidence. The Supreme Court thus concluded that it was not self-defence and that the accused had murdered prisoners who had surrendered.¹²⁵

11.6.3.3. DURESS AND NECESSITY

The OKZ RH stipulates that there shall be no criminal offence when the perpetrator has acted in order to avoid imminent danger for himself or another which could not have been averted in any other way, provided that in doing so a lesser harm was done than that which had been threatened.¹²⁶

Additionally, where the perpetrator was reasonably mistaken about the circumstances of the alleged act (such as a person using a plastic gun to attack the perpetrator, who reasonably believed it was a real gun and therefore injured the attacker), he shall be punished for negligence if, for the committed offence, the code prescribes punishment for negligence.¹²⁷

The defence of necessity is not, however, available if the perpetrator was obliged to expose himself to danger, such as persons who, due to their profession, are more likely to be exposed to risks (*e.g.* policemen, doctors, soldiers, etc.).¹²⁸

In the *Čepin* case, the accused Tomislav Dilber argued that he was acting under duress when he murdered a man because he was terrified for his own life. Dilber's superior, Fred Marguš, allegedly threatened Dilber with death if he did not kill the prisoner. The court did not find the accused Dilber's defence reliable and decided his superior's threat was not grave enough and that the accused Dilber could have saved a person's life.¹²⁹ The court followed the Defence Code

¹²³ SC of Croatia, Koranski, Case No. Kž-12/09, 2nd Instance Verdict, 24 Nov. 2009.

¹²⁴ Karlovac County Court, Mihajlo Hrastov, Case No. K-7/04, 1st Instance Verdict, 28 March 2007, pp. 25 - 26.

¹²⁵ SC of Croatia, Case No. Kž-738/07, 2nd Instance Verdict, 4 May 2009, p. 19.

¹²⁶ Croatia Basic CC, Art. 8(2) - OKZ RH (Official Gazette of Croatia „Narodne Novine“ No. 32/93).

¹²⁷ *Ibid.* at Art. 8(3) - OKZ RH (Official Gazette of Croatia „Narodne Novine“ No. 32/93).

¹²⁸ *Ibid.* at Art. 8(4) - OKZ RH (Official Gazette of Croatia „Narodne Novine“ No. 32/93).

¹²⁹ *Čepin*, 1st inst. p. 27.

and found that a superior's order to commit the crime was not binding for the HV soldier.¹³⁰ The fact that the accused Dilber was acting upon the order was, however, taken as a mitigating factor (see also Module 13 on sentencing).¹³¹

11.6.3.4. LACK OF MENTAL CAPACITY AND DIMINISHED MENTAL RESPONSIBILITY

According to the OKZ RH, a person is mentally incapable if, at the time of the perpetration of an illegal act, they were incapable of understanding the significance of their conduct, or could not control their will due to mental illness, temporary mental disorder, mental deficiency or some other severe mental disturbance.¹³²

The punishment of a perpetrator may be mitigated if, at the time of the perpetration of a criminal offence, the perpetrator was of substantially diminished mental capacity due to one of these conditions.¹³³

A perpetrator who, due to the consumption of alcohol, narcotic drugs or other substances, culpably brings himself into a state in which he is incapable of understanding the significance of his conduct or of controlling his own will shall not be deemed mentally incapable if, at the time of bringing himself into such a state, his intent encompasses the offence committed, or if at this time he is negligent with regard to the offence (provided that the statute includes negligence as a form of culpability for that offence).¹³⁴

In the *Čepin* case, the accused Fred Marguš claimed that, due to a lack of mental capacity, he could not understand his acts and should not accordingly be held responsible for the alleged crime. The medical report prepared by an expert witness stated that although the capability of the accused was reduced at the time the crime had been committed, he was still capable of understanding the importance of the committed crime and was able to manipulate his acts. The court accordingly held that although the mental sanity of the accused was reduced, he was able to understand all important elements of the crime: that the crime was directed against the civilians and that it was against international law.¹³⁵ For this reason, the accused was not acquitted but his reduced sanity was taken into account as a mitigating factor and finally led to a lower sentence (see also Module 13 on sentencing).¹³⁶

11.6.3.5. ALIBI

Alibi has not been described in the Croatian Criminal Code as a defence, but is a frequently used argument in practice.

Alibi has not been described as a defence in the Croatian Criminal Code, but is a frequently used argument in practice.

¹³⁰ Defence Code from 20 Sept. 1991, Art. 48 (Official Gazette of Croatia „Narodne Novine“ No. 49/1991).

¹³¹ *Čepin*, 1st inst. p. 28.

¹³² Croatia Basic CC, Art. 10(1) - OKZ RH (Official Gazette of Croatia „Narodne Novine“ No. 32/93).

¹³³ *Ibid.* at Art. 10(2) - OKZ RH (Official Gazette of Croatia „Narodne Novine“ No. 32/93).

¹³⁴ *Ibid.* at Art. 10(3) - OKZ RH (Official Gazette of Croatia „Narodne Novine“ No. 32/93).

¹³⁵ *Čepin*, 1st inst. p. 12.

¹³⁶ *Ibid.* at p. 28.

For example, in the *Čepin* case, the accused Fred Marguš defended himself by relying on an alibi. However, the court stated that none of his statements corroborated the fact that he was not present at the crime scene.¹³⁷

Alibi was also relied upon by the defence in the *Lora* case, but the court decided that it was proved beyond reasonable doubt that the accused committed the crime.¹³⁸

11.6.3.6. MISTAKE OF LAW AND FACT

A perpetrator, who, for justified reasons, does not know and could not have known that the offence was prohibited, shall not be culpable.¹³⁹

A perpetrator, who, for justified reasons, does not know and could not have known that the offence was prohibited, shall not be culpable.

If the mistake is avoidable, the punishment may be mitigated.¹⁴⁰

If the mistake is avoidable, the punishment may be mitigated.

A perpetrator would not be held criminally responsible, if at the time of the perpetration of a criminal offence, he was not aware of one of its material elements.¹⁴¹

If the perpetrator's mistake regarding the material elements of the criminal offence is due to his negligence, he shall be culpable (provided that the statute includes negligence as a form of culpability for that offence).¹⁴²

¹³⁷ *Čepin*, 1st inst. p. 11.

¹³⁸ Split County Court, *Lora*, Case No. K-93/04, 1st Instance Verdict, 2 March 2006.

¹³⁹ Croatia Basic CC, Art. 15(1) - OKZ RH (Official Gazette of Croatia „Narodne Novine“ No. 32/93).

¹⁴⁰ *Ibid.* at Art. 15(2) - OKZ RH (Official Gazette of Croatia „Narodne Novine“ No. 32/93).

¹⁴¹ *Ibid.* at Art. 14(1) - OKZ RH (Official Gazette of Croatia „Narodne Novine“ No. 32/93).

¹⁴² *Ibid.* at Art. 14(2) - OKZ RH (Official Gazette of Croatia „Narodne Novine“ No. 32/93).

11.7. SERBIA

Notes for trainers:

- In this section, the provisions of the FRY Criminal Code that provide for defences are discussed. These provisions, as well as provision from the SFRY Criminal Code, are applicable to crimes arising out of the conflicts in the former Yugoslavia. The section discusses immunity and amnesty issues at the outset, and thereafter, lists the specific defences and their elements as provided for in the FRY Criminal Code.
- To the extent that they are known, the main cases that have dealt with these defences are discussed. Participants should be encouraged to assess these cases and to identify any cases that they have been involved in, in order to discuss the jurisprudence on defences available under the code.
- Even though the 2006 Criminal Code is not applicable crimes arising out of the conflicts in the former Yugoslavia, participants could discuss the defences available under this code as well and could consider whether any of them may be taken into account.
- Trainers could also ask the participants to imagine that the case study is being tried before their domestic courts. The participants should consider what defences should be available based on the evidence outlined in the case summary, and how they as prosecutors may be able to rebut any of those defences.

War crimes cases in the Republic of Serbia have been tried on the basis of the laws that were in force in the Republic of Serbia at the time when the crimes charged have been committed, *i.e.* either the SFRY Criminal Code or the Criminal Code of the FRY (reflecting the SFRY Criminal Code in most aspects, including defences).

11.7.1. IMMUNITY

According to the 2006 Constitution of Serbia, members of the Serbian parliament, the President of the Republic of Serbia, the Prime Minister and Ministers, while in office, are protected by immunity, if they raise it, from detention or criminal prosecution for an act punishable by a prison term unless their immunity is lifted by the Parliament (for an MP or the President) or by the Government (for the Prime Minister or Minister).¹⁴³

11.7.2. AMNESTY

Besides the general provisions on amnesty in the SFRY and FRY Criminal Codes (see section 11.4.2.1 above), as well as the provisions in the current 2006 Criminal Code, there are also two special laws on amnesties that concern crimes committed during an armed conflict.

¹⁴³ Constitution of Serbia, Arts. 103, 119 and 134 (2006).

The 2001 Law on Amnesty grants amnesty to individuals who committed, or who are suspected of having committed, offences against the army and military service, armed rebellion, incitement to violent change of the constitutional order from 27 April 1992 to 7 October 2001.¹⁴⁴

The 2002 Law on Amnesty gives amnesty to persons who committed, or are suspected of having committed, a crime of terrorism (Art 125 of the FRY CC) and armed rebellion (Art 136 of the FRY CC) from 1 January 1999 to 31 May 2001 on the territories of the municipalities Prešovo, Bujanovac and Medveđa.¹⁴⁵

Neither of these laws grants amnesties for any of the crimes enumerated in Chapter XVI of the FRY Criminal Code (Criminal offences against humanity and international law).

11.7.3. FAILURE TO PROVE THE ELEMENTS OF THE CRIME

This is a common line of defence. References to the specific elements of the crimes, in Modules 6, 7 and 8, as well as the modes of liability, in Modules 9 and 10, should be made as appropriate. Some examples are included below. See also above, section 11.4.1, discussing this defence under the SFRY Criminal Code.

11.7.3.1. EXISTENCE OF AN ARMED CONFLICT, WAR OR OCCUPATION

In the *Lekaj* case, the defence argued on appeal to the Supreme Court of Serbia that the criminal offences he was convicted of took place after a Military and Technical Agreement came into force, and that therefore the armed conflict did not exist at the time.

The Supreme Court, rejecting appellant's argument, concluded that the Military and Technical Agreement contained a provision setting a period of 11 days for demilitarisation and retreat of Yugoslav armed forces from the territory of Kosovo and Metohija. The Supreme Court concluded that the retreat implied a military operation, therefore the armed conflict ceased to exist after the determined period had expired. The Supreme Court considered this approach consistent with Article 6(II) of Geneva Convention IV.¹⁴⁶

11.7.3.2. STATUS OF THE VICTIMS

In the *Ovčara* case, the appellants contested the finding of the trial panel that the crime in question concerned the war crime against prisoners of war.¹⁴⁷ The defence argued that the following demonstrated that the victims were not POWs:¹⁴⁸

- Members of the Croatian armed forces could not be defined as or be attributed the status of prisoners of war because at the time Croatia still formed part of an

¹⁴⁴ Law on Amnesty, Official Gazette of FRY 9/01, Arts. 1 and 2.

¹⁴⁵ Law on Amnesty, Official Gazette of FRY 37/02, Art. 1.

¹⁴⁶ Supreme Court of Serbia, *Lekaj*, Case No. Kz I P3 3/06, 2nd Instance Verdict, 26 Feb. 2007, p. 4.

¹⁴⁷ WCC, Appellate Court in Belgrade, *Ovčara*, Case No. Kz1 PO2-1/2010, 2nd Instance Verdict, 23 June 2010, ¶ 69; See also Supreme Court of Serbia, *Škorpion*, Case No Kz. I p.z. 2/07, 2nd Instance Verdict, 13 June 2008, pp. 9-10.

¹⁴⁸ *Ibid.* at ¶ 72.

internationally recognised State, the SFRY, and thus had no right to its own armed forces.¹⁴⁹

- Many of those who had committed war crimes earlier were hiding in the Vukovar hospital, “camouflaged” as patients.¹⁵⁰
- The status of the prisoners of war had not been clearly defined, nor had the status of the victims been adapted to the Geneva Conventions, because:
 - Among those killed were two women, one of whom was pregnant, while the other was 60 years old, which would indicate the presence of civilians among the persons killed.¹⁵¹
 - Medical bandages were found on the corpses of 50 exhumed victims, which implied that the crimes were committed against the wounded and the sick.¹⁵² In relation to this, the defence pointed to a possible violation of Article 37 Protocol I Additional to the Geneva Convention.¹⁵³

The defence argued that the trial panel’s finding that the perpetrators intended to commit a criminal offence against prisoners of war because the perpetrators perceived and experienced them as such, was insufficient to fully resolve all the aforementioned issues.¹⁵⁴

In the opinion of the appellate panel, the trial panel correctly qualified the armed conflict at the time in the area of Vukovar as an internal conflict, which represented a conflict on the territory of one state (the then internationally recognised state—SFRY), where no foreign forces were partaking in the military operations.¹⁵⁵ The appellate panel noted that the internal conflict was regulated by both national and international law, in particular by Common Article 3, Additional Protocol II, other treaty regulations which relate to the internal conflict and rules of international customary law.¹⁵⁶

The appellate panel further noted that where the status of the POWs were concerned, this status did not appear in the context of internal armed conflicts, except in the situation when the parties to the conflict agreed to grant such status to persons deprived of their liberty.¹⁵⁷ Upholding the conclusion of the trial panel, the appellate panel held that this specific situation concerned POWs because the perpetrators were aware that it concerned members of the counterparty, given that all the accused, witnesses and witness-collaborators spoke of POWs, even though there existed among the victims two women who were killed later and a number of medically treated persons (the wounded).¹⁵⁸ In support of this finding, the appellate panel referred to the listings of the RH medical corps headquarters as well as the position of the SAO Krajina government, which requested a hand over of the prisoners from the JNA.¹⁵⁹ This was

¹⁴⁹ *Ibid.* at ¶ 70.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.* at ¶ 71.

¹⁵² *Ibid.*

¹⁵³ *Ibid.* at ¶ 72.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.* at ¶ 73.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.* at ¶ 74.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.* at ¶ 75.

further corroborated, the appellate panel held, in certain JNA documents, such as an operational log, indicating that the JNA accepted the application of provisions of international law.¹⁶⁰ The appellate panel noted that not only did this precisely indicate the existence of negotiations between the parties to the conflict, in which arrangements were made in relation to, *inter alia*, the status of the persons deprived of liberty, but it also indicated the existence of conclusions that persons as such were to be treated as POWs.¹⁶¹

The appellate panel concluded that, based on the written evidence, as well as on the witnesses heard, members of the Croatian armed forces had been identified and placed under supervision of the JNA as POWs.¹⁶² The manner of their treatment related not only to persons deprived of liberty upon surrender and takeover of the hospital, but earlier as well, upon surrender of the so-called Mitnički battalion of the Croatian armed forces.¹⁶³ The appellate panel upheld the trial panel finding on the status of POW and its conclusion that, as a consequence, the later treatment of captured participants of the Croatian armed forces was in violation of GC III, Article 3 (1)(a) and (c); GC III, Article 4(1), (2) and (4); and AP II, Article 4(1)-(2)(a).¹⁶⁴

The appellate panel also noted that the presence of two women, assumed to be civilians, as well as a number of wounded persons, which imply the violation of other Geneva Conventions, did not affect the conclusion of the trial panel that this case concerned a criminal offence against POWs.¹⁶⁵ The fact that the vast majority of the killed belonged to the category of POWs, that the accused were aware of such status of those persons, and that the accused were injuring and killing them in the context of the fact that they considered them POWs, was the basis for the conclusion that the victims were POWs.¹⁶⁶ The appellate panel therefore rejected this appeal.¹⁶⁷

The Supreme Court upheld the first instance court's finding¹⁶⁸ that nobody among the victims was a combatant, as they were civilians who were deprived of liberty, detained and kept for exchange. They also relied on the testimony at the trial by one of the detained Croats that he was captured in civilian clothing without any military insignia.¹⁶⁹

¹⁶⁰ *Ibid.* The appellate panel mentions the Order of the Command of the First Military District of 18 November 1991 from which it transpires that the JNA agreed to consider the members of the Croat armed forces as POWs and that Geneva Convention III shall apply in relation to them. The war log of the Guard Mechanised Brigade points to the same fact and this evidence was also read during the trial phase, where on page 02935479 of the log of 18 November 1991 Major M4 made the entry "Commander of the Operative Group Jug spoke with the representative (trustee) of the HDZ for Vukovar regarding the conditions for the handover of ustaša forces in Vukovar. It is concluded with the unconditional handover and safety is guaranteed to the ustaša forces in accordance with the Geneva Conventions".

¹⁶¹ *Ovčara*, 2nd inst. ¶ 75.

¹⁶² *Ibid.* at ¶ 76.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.* at ¶ 77.

¹⁶⁶ *Ibid.* at ¶ 82.

¹⁶⁷ *Ibid.* at ¶ 84.

¹⁶⁸ WCC, Belgrade District Court, Boro Trbojević (Velika Peratovica), Case No. K.V.5/08, 1st Instance Verdict, 27 May 2009, p. 29.

¹⁶⁹ Supreme Court of Serbia, Boro Trbojević (Velika Peratovica), Case No. Kz.I Rz 2/09, 2nd Instance Verdict, 27 May 2009, p. 2.

11.7.4. SPECIFIC DEFENCES

The specific defences available under the FRY Criminal Code and as recognised in various cases, are set out below.

11.7.4.1. NECESSARY DEFENCE (SELF-DEFENCE)

In the *Nenad Malić (Stari Majdan)* case, the War Crimes Chamber dismissed the accused's argument that he was acting in self-defence. The court found that this defence was contrary to the facts of the case, including:

- it was the accused who told the victim to come out, not *vice versa*;
- one of the victims was both stabbed and shot, which also suggests that even if there had been an attack, such defence would have not been absolutely necessary;
- the manner in which one of the victims was shot in the head; and
- the words the accused uttered when leaving the café with one of the victims ("*Ja ću njega*") and when returning ("*Ja sam njega*") while passing his finger over his own neck as the sign of what happened to the men he took outside.¹⁷⁰

11.7.4.2. EXTREME NECESSITY

In the *Ovčara* case, the defence appealed the accused's conviction on the basis of extreme necessity, claiming that he was forced by NN under threat of a weapon to partake in the killing of the POWs.¹⁷¹ The appellate panel, however, dismissed this appeal because the appellant failed to present any evidence that could corroborate such allegations.¹⁷²

11.7.4.3. LACK OF MENTAL CAPACITY

After considering an expert witness report, which established that one of the defendants suffered only from a partial posttraumatic stress disorder (PTSD), the court in *Zvornik I (Slavković et al.)* did not accept the defence of the lack of or diminished mental capacity of the defendant.¹⁷³

¹⁷⁰ WCC, Belgrade District Court, Nenad Malić (Stari Majdan), Case No. KV 3/2009, 1st Instance Verdict, 7 Dec. 2009, p. 35 (upheld on appeal).

¹⁷¹ *Ovčara*, 2nd inst., ¶¶ 118-119.

¹⁷² *Ibid.* at ¶ 119.

¹⁷³ WCC, Belgrade District Court, Zvornik I (Slavković et al.), Case No. KV 5/05, 1st Instance Verdict, 29 May 2008, p. 182 (upheld on appeal - Supreme Court of Serbia, Zvornik I (Slavković et al.), Case No. Kz I RZ 3/08, 2nd Instance Verdict, 8 April 2009, p. 17).

11.7.4.4. LACK OF MENTAL CAPACITY AND DIMINISHED MENTAL RESPONSIBILITY

In the *Malić* case, the court accepted expert witnesses' reports (from a forensic medicine expert and a psychiatrist) that the accused was in a state of temporary mental disturbance during the commission of the crime, resulting from a combination of acute alcohol intoxication, altered psyche due to alcohol consumption over a long period of time, and his personal characteristics—modest intellectual abilities, emotional instability, low tolerance to stress and high impulsivity.¹⁷⁴ The court concluded that the offender's capacity to comprehend the significance of his act or his ability to control his actions was substantially diminished. However, this was considered a mitigating circumstance, not a defence.¹⁷⁵

The court concluded that the offender's capacity to comprehend the significance of his act of his ability to control his actions was substantially diminished. However, this was considered a mitigating circumstance, not a defence.

11.7.4.5. INTOXICATION

In the *Medak* case, the court found that the alleged alcohol intoxication of one of the defendants at the time of the offence did not significantly reduce his capacity to understand and control his acts. The conclusion was based on an expert witness' findings that the accused remembered the incident, and that, at the time of the incident, he had been sufficiently capable to focus his acts, communication and attention on the time and persons surrounding him.¹⁷⁶

11.7.4.6. ALIBI

In *Lekaj*, the appellant argued that the trial verdict wrongly established the facts of the case.¹⁷⁷ The accused objected to the fact that the trial panel rejected witness statements that provided an alibi for the accused: his presence in Albania at the time of the commission of the criminal acts.¹⁷⁸

The appellate panel upheld the conclusion of the trial panel. It confirmed that the accused was present in Đakovica at the time of the commission as this was established beyond reasonable doubt by the trial panel.¹⁷⁹ The appellate panel held that the testimony of the injured parties that recognised the accused without doubt as member of the OVK and perpetrator of the incriminated acts were crucial.¹⁸⁰ In addition, the panel held, one of the injured parties knew the accused previously while other injured parties testified that they had seen the accused in Đakovica together with other members of the OVK on the day of the departure of the Army of

¹⁷⁴ *Nenad Malić*, 1st inst., p. 26.

¹⁷⁵ *Ibid.* at p. 37.

¹⁷⁶ WCD, High Court in Belgrade, *Medak* (Lazić et al.), Case No. K.Po2 36/2010, 2nd Instance Verdict, 15 June 2010, p. 46 (upheld on appeal).

¹⁷⁷ Supreme Court of Serbia, *Lekaj*, Case No KZ.I P3 3/06, 2nd Instance Verdict, 26 Feb. 2007, p. 9.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.* at p. 10.

¹⁸⁰ *Ibid.*

FRY, armed and in uniform.¹⁸¹ The appellate panel upheld the conclusions of the trial panel with regard to alibi witnesses.¹⁸²

In the *Sireta* case, the defendant contended that he left the area where the crime was committed (Vukovar) before its commission. The court dismissed this defence because it was contrary to what two witness collaborators had testified about the defendant's presence at the spot, and because the defence was not corroborated by the alibi witnesses, who all left open the possibility that the defendant was in Vukovar on the day of the crime.¹⁸³

In the *Medak* case, the court did not accept an alibi offered by one of the accused, as it found the alibi witnesses' statements to be unconvincing and contradictory, and, therefore, aimed at shielding the defendant from responsibility.¹⁸⁴

In the Sinan Morina case, the Supreme Court quashed the first instance court's verdict, which acquitted the defendant, and ordered a retrial. The Supreme Court based this decision on the first instance court's failure to respond to and assess the defence of the accused, namely, that he had been in Germany during the crime in Kosovo.¹⁸⁵

11.7.4.7. CHALLENGING THE IDENTITY OF THE ACCUSED

One of the defendants in the *Zvornik I (Slavković et al.)* case was acquitted because of most of the witnesses failed to recognise the defendant as the perpetrator, neither on the photograph shown to the witnesses during the investigation, nor at the main hearing. Only one witness said, and only at the main hearing, that he "thought" the defendant was a person with a particular nickname ("Bosanac") that one of the perpetrators had. However, but the court concluded that many people in that area had the same nickname. His testimony about the acts and conduct of the accused was assessed by the court as imprecise.¹⁸⁶

In the *Podujevo II (Đukić)* case, the accused raised on appeal the defence of wrong identification, pointing to the fact that the victim-witnesses had not recognised the accused as one of the perpetrators during the line-up identification before the investigative judge. The appellate court dismissed this defence, taking into account that the accused had considerably lost weight since the event, as well as the young age of the witnesses and the physical and mental trauma they suffered at the moment of the crime (they sustained heavy injuries and lost their family members). The court held that the witness' failure to identify the accused does not mean he was

¹⁸¹ *Ibid.*

¹⁸² *Ibid.* at pp. 10-11.

¹⁸³ WCC, Belgrade District Court, Damir Sireta, Case No. K.V. 9/2008, 1st Instance Verdict, 23 June 2009, pp. 44-46.

¹⁸⁴ WCD, High Court in Belgrade, Medak (Lazić et al.), Case No. K.Po2 36/2010, 2nd Instance Verdict, 15 June 2010, pp. 38-39 (upheld on appeal).

¹⁸⁵ Supreme Court of Serbia, Sinan Morina, Case No. Kz. I RZ 1/08, 2nd Instance Decision to Quash the Verdict, 3 March 2009, p. 4.

¹⁸⁶ *Zvornik I (Slavković et al.)*, 1st inst. pp. 189-193 (upheld on appeal).

not at the location of the crime, as they recognised those who they had remembered and there was other corroborating evidence of his presence and participation in the crime.¹⁸⁷

¹⁸⁷ WCD, Belgrade Appellate Court, *Podujevo II*, Case No. Kž1 Po2 2/2011, 2nd Instance Verdict, 11 Feb. 2011 ¶¶ 10 – 11.

11.8. FURTHER READING

11.8.1. BOOKS

- Bohlander, M., Boed, R. and Wilson, R., eds. DEFENCE IN INTERNATIONAL CRIMINAL PROCEEDINGS (Transnational Pub, 2006).
- Cassese, A., INTERNATIONAL CRIMINAL LAW, (2d ed.) (Oxford, 2008).
- May, L., CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT (Cambridge University Press, 2005).

11.8.2. ARTICLES

- Ambos, K., *Defences in International Criminal Law in* RESEARCH HANDBOOK ON INTERNATIONAL CRIMINAL LAW. Bentram S. Brown (eds.) (Edward Elgar Publishing, 2011).
- Fournet, C., *Judicial Development of the Law of Defences by the International Criminal Tribunals in* Darcy, S., and Powderly, J., JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS (Oxford University Press, 2010).
- Van der Wilt, H., *Justifications and Excuses in International Law: An Assessment of the Case-law of the ICTY in* Swart, B., Zahar, A., and Sluiter, G. (eds.), THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (Oxford University Press, 2011).

11.8.3. CASES

- The *Pinochet 3* decision of the House of Lords of the United Kingdom: <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm>.
- The *Yerodia* decision of the International Court of Justice: <http://www.icj-cij.org/docket/files/121/8126.pdf>.
 - Separate Opinion of President Guillaume: <http://www.icj-cij.org/docket/files/121/8128.pdf>.
 - Separate Opinion of Judges Higgins, Kooijmans and Buergenthal: <http://www.icj-cij.org/docket/files/121/8136.pdf>.