

# INTERNATIONAL CRIMINAL LAW

& PRACTICE

TRAINING MATERIALS

# GENOCIDE

*Supporting the Transfer of Knowledge and Materials  
of War Crimes Cases from the ICTY to National  
Jurisdictions, funded by the European Union*

Developed by International Criminal Law Services

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# MODULE 6:

# GENOCIDE

*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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## 6. GENOCIDE

### 6.1. INTRODUCTION FOR TRAINERS

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.

#### 6.1.1. MODULE DESCRIPTION

This Module covers the legal requirements and relevant case law for the crime of genocide. As a crime which has attracted much international attention, the Module aims to provide an overview of the manner in which this crime has been prosecuted and adjudicated by international courts. It also raises the pertinent questions for prosecuting this crime before national courts.

#### 6.1.2. MODULE OUTCOMES

At the end of this Module, participants should understand:

- The essential elements of the crime of genocide;
- The “specific intent” requirement and the difficulties of proving this element;
- The acts that constitute genocide;
- The forms of participation in genocide;

- The manner in which the crime of genocide could be prosecuted before domestic courts.

*Notes for trainers:*

- Participants need to appreciate the drafting history of the Genocide Convention, which is the basis for interpreting and applying the elements of the crime of genocide.
- Despite the significance of charging the crime of genocide, regarded as the most serious crime against humanity, prosecutors should only proceed with the crime of genocide where there is sufficient evidence of each of the elements of the crime. Therefore, it is vital to convey the very specific nature of the legal elements of this offence.
- When prosecuting genocide, whether in an international or national setting, careful consideration must be given to whether the evidence establishes the unique requirements of this offence. Crimes against humanity can be charged where there is insufficient evidence of genocide, providing that the requirements for such crimes are met.
- In order to achieve these objectives you will find “Notes to trainers” inserted at the beginning of important sections. These notes will highlight the main issues for trainers to address, identify questions the trainers can use to focus on the important issues and to stimulate discussion, make references to the parts of the case study that are relevant and which can be used as practical examples to apply the legal issues being taught.

## 6.2. DEFINITION OF GENOCIDE

*Notes for trainers:*

- This first section deals with the definition of genocide under international law.
- It is important to show the source of the definition as it has been incorporated into the statutes of the international tribunals and national jurisdictions.
- Key considerations that arise from this definition are set out so as to introduce the participants to the main questions that they will have to consider in this Module.

### 6.2.1. THE GENOCIDE CONVENTION

Genocide was described by the UN General Assembly as “a denial of the right of existence of entire human groups, as homicide is the denial of the right to life of individual human beings”.<sup>1</sup>

As defined by the Genocide Convention, the crime of genocide is:

- committing a prohibited act
- with intent to destroy, in whole or in part
- a protected group, as such.

The Genocide Convention, ratified by BiH, Croatia and Serbia<sup>2</sup>, obligates states to prevent and punish the crime.

The core provisions of the Convention, including the definition of the crime, also exist as customary international law, which is also reflected in the jurisprudence of the Court of BiH.<sup>3</sup>

The statutes of the ICTY and the ICTR copy the definition of the crime verbatim from the Genocide Convention.<sup>4</sup>

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<sup>1</sup> G.A. Res. 96/1 U.N. Doc. A/RES/96/1 (Dec. 11, 1946).

<sup>2</sup> The Genocide Convention was ratified by the Socialist Federal Republic of Yugoslavia and therefore Bosnia and Herzegovina, Croatia and Serbia are also parties to this convention. United Nations, U.N. Treaty Collection, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en) (accessed 6/13/2011).

<sup>3</sup> See, e.g., ICJ Advisory Opinion on Reservations to the Genocide Convention, and UN Secretary-General's Report on the establishment of the ICTY, 3 May 1993, S/25704.

<sup>4</sup> The Rome Statute applies a somewhat different definition. See below, sections 6.3.7 and 6.3.2.

The definitions of the crime of genocide in the criminal codes of BiH, Croatia and Serbia are also similar to the Genocide Convention. See sections 6.5.1 (SFRY), 6.6.1 (BiH), 6.7.1 (Croatia), and 6.8.1 (Serbia).

#### ICTY Statute Article 4: Genocide

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

The following acts shall be punishable:

- (a) genocide;
- (b) conspiracy to commit genocide;
- (c) direct and public incitement to commit genocide;
- (d) attempt to commit genocide;
- (e) complicity in genocide

#### 6.2.2. KEY CONSIDERATIONS

In light of this definition, key considerations when prosecuting genocide include:

- However serious the crime, it is very narrowly defined, and many mass killings cannot *per se* be considered genocide.
- Genocide is a crime against a group, even if it involves harming individuals.
- Genocide requires that the perpetrator have a very specific mental state while committing the crime: a specific intent to destroy a protected group. It is a *jus cogens* crime<sup>5</sup> and its prohibition is an *erga omnes* obligation that all states owe to the international community.<sup>6</sup>

The sections below describe the various legal requirements for the crime of genocide.

<sup>5</sup> *Case concerning Armed Activities on the Territory of the Congo (DRC v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, ICJ Judgement of 3 Feb. 2006, ¶ 64.

<sup>6</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion (1951) ICJ Rep 15, 23.

### 6.3. ELEMENTS OF THE CRIME OF GENOCIDE

#### *Notes for trainers:*

- It is always most effective to commence any discussion on genocide with a focus on the intent requirement. This section describes the intent that needs to be proven for a prohibited act (described below in section 6.3.4) to constitute genocide. This section also covers the meaning of “destruction” of the group, and the definition of what is a “protected group”.
- As noted above, the statutes of various international and hybrid courts, including the ICTY and the ICTR, copy the definition of the crime verbatim from the Genocide Convention.
- It is useful for participants to compare the intent for genocide with the intent for crimes against humanity (see section 6.3.2).
- It is useful for participants to compare how genocide is different from other crimes, such as persecution (see section 6.3.1.7).
- For this section, you should also refer to the case study and discuss with participants whether there is evidence of specific intent to commit genocide.
- It is useful to pose questions at the beginning of this section in order to highlight the main concerns for the participants and to get them thinking about what the answers should be.
- Questions could include:
  - What is the mental state for genocide and how is it different from crimes against humanity?
  - For genocide, one has to intend to destroy a protected group, what do we mean by the “requirement to destroy”?
  - In the ICC case regarding the Sudan situation, President Al-Bashir was charged with genocide on the basis of alleged statements he made that he did not want any prisoners taken. Would such statements be sufficient to establish the intent required for genocide? If not, what type of statements would be required to prove the specific intent?
  - Can “destruction” include cultural destruction?
  - In Cambodia, 1.7 million people were killed when the Khmer Rouge took power over the government. Assuming that the majority of those killed were those who lived in the city, or were educated, would this group of people be a protected group under the Genocide Convention?
  - What means of proof can the prosecution rely upon to show that enough people have been targeted to constitute a sufficient “part” of the group?

**Hint:** One of the key ways in which specific intent is proved is through circumstantial evidence (see section 6.3.1.5). A hint for practitioners, which could be discussed with the participants, is how the general crime base and patterns of unlawful conduct can be used to show that the intention behind the commission of the crimes was to destroy the group. For example, if all men of a military age were targeted and killed, would that be sufficient to show that there was an intention to destroy a group, in whole or in part? If not, what additional evidence might be required?

### 6.3.1. SPECIFIC INTENT

A perpetrator of genocide must:

- Intend to destroy
- in whole or in part
- a protected group, as such.

This *dolus specialis*, or specific intent, makes genocide different from other crimes.

Specific intent is an element of the crime, and requires that the perpetrator clearly intended the result charged. In the case of genocide, the perpetrator must intend that his or her actions will result in the destruction, in whole or in part, of a protected group.<sup>7</sup>

*Genocidal acts must be committed against a person because of their membership in a particular group and as an incremental step in the overall objective of destroying the group.*

This intent turns in part on the reason a victim or victims were targeted. They must have been targeted specifically because they were members of a protected group. As stated by the ICTR trial chamber:

[F]or any of the acts charged to constitute genocide, the said acts must have been committed against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group. Thus, the victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group. The victim of the act is, therefore, a member of a given

<sup>7</sup> Georges A. N. Rutaganda, Case No. ICTR-96-3-T, Trial Judgement, 6 Dec. 1999, ¶ 59.

group selected as such, which, ultimately, means the victim of the crime of genocide is the group itself and not the individual alone. The perpetration of the act charged, therefore, extends to encompass the realization of the ulterior purpose to destroy, in whole or in part, the group of which the person is only a member.<sup>8</sup>

The Court of BiH has recognised that the specific intent requirement sets genocide apart from other crimes, and applies the same test as the ICTY when determining whether the accused has the requisite intent.<sup>9</sup> See section 6.6.3.

This specific intent has also been recognised by the Supreme Court of Croatia, although in its statement of the specific intent, the court omitted the reference to destroying a protected group “in part”.<sup>10</sup> See section 6.7.2.

**Note:** The Rome Statute may permit a lower level of *mens rea* in that it allows for commanders to be held liable for genocide committed by their subordinates when the commander has no real knowledge of the crime.<sup>11</sup> However, this is yet to be tested and applied in the case law of the ICC.

#### 6.3.1.1. “INTEND TO DESTROY”

Genocidal intent must be present at the moment the acts are committed, but does not have to be formed prior to committing the acts.<sup>12</sup>

The specific intent of genocide is not:

- simply to harm the group or discriminate against the group, or even to commit discriminatory killings, but rather the specific intention of the perpetrator must be “to destroy” the protected group
- the same as motive (see below section 6.3.1.3)
- the intent to merely dissolve a group.<sup>13</sup>

“To destroy” means the physical and biological destruction of a protected group.

“To destroy” means the physical and biological destruction of a protected group.

<sup>8</sup> *Ibid.* at ¶ 60. For more discussion on protected groups, see sections 6.3.1.6 and 6.3.1.7.

<sup>9</sup> See, e.g., Court of BiH, Milorad Trbić, Case No. X-KR-07/386, 1st Instance Verdict, 16 Oct. 2009, ¶ 192.

<sup>10</sup> Supreme Court of the Republic of Croatia, Mikluševci case, Case No. I Kz 683/09-8, 17 Nov. 2009, pp. 7-8 (available in Croatian only; unofficial translation of the quote).

<sup>11</sup> Rome Statute, Art 18.; See also COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS NOTES, ARTICLE BY ARTICLE 109 (Otto Triffterer ed., 1999).

<sup>12</sup> Aloys Simba, Case No. Ictr-01-76-A, Appeal Judgement, 27 Nov. 2007, ¶ 266; but see Clément Kayishema et al., Case No. ICTR-95-I-A, Appeal Judgement, 1 June 2001, ¶ 91.

<sup>13</sup> Milomir Stakić, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, ¶ 519.

As held by the ICTR:

Customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. [...]. [A]n enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give that group its own identity distinct from the rest of the community would not fall under the definition of genocide.<sup>14</sup>

Methods of material destruction of a group can include:

- Forcible transfer<sup>15</sup> (see section 6.3.2);
- Destroying a significant section of a group, such as the leadership;<sup>16</sup> or
- The systematic destruction of the male members of part of a group which has detrimental consequences for the physical survival of the group as a whole.<sup>17</sup>

The State Court of BiH has recognised forcible transfer as a method of destroying a protected group.<sup>18</sup> See section 6.6.4.3.

#### 6.3.1.2. “IN WHOLE OR IN PART”

To be convicted of genocide, a perpetrator must intend to destroy a protected group entirely, or in part. As noted by the ICTY appeals chamber, the intent to destroy a group:

[E]ven if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group [...] they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such.<sup>19</sup>

<sup>14</sup> Radislav Krstić, Case No. IT-98-33-A, Appeal Judgement, 19 April 2004, ¶ 25.

<sup>15</sup> *Ibid.* at ¶ 31, 33.

<sup>16</sup> Stakić, TJ ¶ 525.

<sup>17</sup> Krstić, AJ ¶ 28.

<sup>18</sup> Court of BiH, Miloš Stupar et al., Case No. X-KR-05/24, First instance Verdict, 29 July 2008, p. 56-57 (p. 60-61 BCS; Trbić, 1<sup>st</sup>. inst., ¶ 168; Miladin Stevanović, Case No.X-KR-05/24-2, First instance Verdict, 29 July 2008, p. 42 (Eng. version); Petar Mitrović, Case No. X-KR-05/24-1, First instance Judgement, 29 July 2008, p. 43 (p. 45 BCS); Radomir Vuković, Case No.X-KR-06/180-2, First instance Verdict, 22 April 2010, ¶ 547.

<sup>19</sup> Radislav Krstić, Case No. IT-98-33-A, Trial Judgement, 2 Aug. 2001, ¶ 590; Krstić, AJ ¶¶ 19, 22.

Key concepts related to the requirement that the group be destroyed “in whole or in part” include:

- A perpetrator need not intend to annihilate the entire targeted group. “In part” requires the intention to destroy at least a *substantial part* of the group.<sup>20</sup> See also section 6.6.3.2 for a discussion about the factors examined by the State Court of BiH to determine if part of a group is substantial.
- While the part of the group targeted must be substantial, it does not need to form an important part of the group.<sup>21</sup>
- There is no numeric threshold of victims necessary to establish genocide.<sup>22</sup> However, the numeric size of the targeted part of the group can help determine whether it is a “substantial” part of the group as a whole.<sup>23</sup>
- It is enough to intend to destroy a part of that group. “Part” can be defined geographically, such as a specific identity located in a particular location.<sup>24</sup>
- It is important to note that the prohibited genocidal acts must be committed against an individual *because of* his membership in a particular group *and* as an incremental step in the overall objective of destroying the group.<sup>25</sup>
- The requirement that the perpetrator intended to destroy a group in whole or in part should not be confused with the scale of participation of an individual offender.

#### 6.3.1.3. MOTIVE VS. SPECIFIC INTENT

The personal motive of the perpetrator may be, for example, to obtain personal economic benefits, political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.<sup>26</sup> The fact that an accused took “pleasure” in killings does not detract in any way from his intent to perform such killings, as this is a matter that goes to motivation.<sup>27</sup> Similarly, evidence that an accused was acting in the quest of a personal goal, such as vengeance, material gain or for the elimination of a business competitor, may explain their motivations but does not preclude a finding of specific intent.<sup>28</sup>

<sup>20</sup> Kayeshima TJ ¶ 96; Ignace Bagilishema, Case No. ICTR-95-1A, Trial Judgement, 7 June 2001, ¶ 64; Laurent Semanza, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, ¶ 316.

<sup>21</sup> Goran Jelisić, Case No. IT-95-10T, Trial Judgement, 14 Dec. 1999, ¶¶ 81 – 82.

<sup>22</sup> Semanza, TJ ¶ 316; Stakić, TJ ¶ 522.

<sup>23</sup> Krstić, AJ ¶¶ 12, 14; Radoslav Brđanin, Case No. IT-99-36-T, Trial Judgement, 1 Sept. 2004, ¶ 702.

<sup>24</sup> Krstić, TJ ¶ 590.

<sup>25</sup> Jelisić, TJ ¶ 66.

<sup>26</sup> Goran Jelisić, Case No. IT-95-10A, Appeal Judgement, 5 July 2001, ¶ 49.

<sup>27</sup> Ibid. at ¶ 71.

<sup>28</sup> Kayishema, AJ ¶ 161.

#### 6.3.1.4. THE EXISTENCE OF A PLAN OR POLICY AS EVIDENCE OF INTENT

The existence of a plan or governmental policy is not required, but if there is a plan or policy that if implemented will promote genocidal conduct, it may provide evidence of the genocidal intent of those behind that plan or policy.<sup>29</sup>

#### 6.3.1.5. HOW DO YOU PROVE SPECIFIC INTENT?

The specific intent element is difficult to prove. Direct evidence of genocidal intent is often unavailable.

##### 6.3.1.5.1. INFERRING SPECIFIC INTENT THROUGH CIRCUMSTANTIAL EVIDENCE

*The prosecution must prove beyond a reasonable doubt that the perpetrator possessed the specific genocidal intent.*

Specific intent is often deduced from circumstantial evidence including the actions and words of the perpetrator, or from the behaviour of others, as long as it is the only reasonable inference from the totality of the evidence.<sup>30</sup> In the absence of a confession from the accused, his intent can be deduced from, for example:

- The general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others.<sup>31</sup>
- Other factors such as:
  - the scale of atrocities committed;
  - their general nature;
  - their execution in a particular region or country;
  - the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups;<sup>32</sup>
  - the political doctrine which gave rise to the acts referred to;
  - the repetition of destructive and discriminatory acts;
  - the perpetration of acts which violate the very foundation of the group; or considered as such by their perpetrators.<sup>33</sup>

<sup>29</sup> Krstić, AJ ¶ 225 which refers to Jelisić, AJ ¶ 48. See section 6.3.2 for a discussion of the requirement of a manifest pattern at the ICC.

<sup>30</sup> See, e.g., Ferdinand Nahimana, Case No. ICTR-96-11, Appeal Judgement, 28 Nov. 2007, ¶ 524; Sylvestre Gacumbitsi, Case No. ICTR-01-64, Appeal Judgement, 7 July 2006, ¶¶ 40 – 41; Krstić, AJ ¶ 34; Georges A. N. Rutaganda, Case No. ICTR-96-3-A, Appeal Judgement, 26 May 2003, ¶ 525; Jelisić, AJ ¶ 47; Kayishema and Ruzindana, AJ ¶ 159.

<sup>31</sup> Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Judgement, 2 Sept. 1998, ¶ 523.

<sup>32</sup> *Ibid.* at ¶ 523.

Based on the above, it is very helpful for prosecutors to prepare chronologies of the alleged incidents and crimes committed in order to discern common themes and patterns from which inferences can be drawn. Other indicia, such as uniforms worn, age of victims, times of attacks, and those who were not harmed should also be examined.<sup>34</sup>

The inferred intent underlying the crime of genocide may also be consistent with other crimes. The prosecution must prove beyond a reasonable doubt that the perpetrator possessed the specific genocidal intent and not the intent of some other crime.

*Specific intent is often inferred from circumstantial evidence, such as the actions and words of the perpetrator, or from the behaviour of others.*

Evidence of specific intent can be difficult to find. Often specific intent must be inferred from evidence. In the *Al Bashir* case before the ICC, the court relied on several different types of evidence in evaluating whether an accused had the requisite genocidal intent sufficient for the pre-trial chamber to issue an arrest warrant. That evidence included:

- Official statements and public documents, which, according to the prosecution, provided reasonable grounds to believe in the existence of a genocidal policy.
- The nature and extent of the acts of violence committed by forces against the civilian population of the ethnic groups. This was demonstrated by evidence of unbearable conditions of life inside internal displacement camps containing the ethnic groups, including evidence from various inter-governmental reports and reports from NGOs such as:
  - UN Security Council;
  - UN High Commissioner for Human Rights;
  - UN Office for the Coordination of Humanitarian Affairs;
  - UN's System Standing Committee on Nutrition;
  - UN Resident Coordinator;
  - UN Inter-agency Fact Finding Mission Report;
  - Human Rights Watch;
  - Médecins Sans Frontières; and
  - International newspapers.<sup>35</sup>

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<sup>33</sup> *Seromba*, AJ ¶ 176; See also Radovan Karadžić, Case No. IT-95-5, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, ¶ 95.

<sup>34</sup> For example, see the Croatian *Mikluševci* case, Supreme Court of the Republic of Croatia, Judgment No. I Kz 683/09-8 of 17 Nov. 2009, p. 8.

<sup>35</sup> ICC, Pre-Trial Chamber, No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ¶¶ 164 – 189.

The State Court of BiH has also inferred genocidal intent through circumstantial evidence. See section 6.6.3.4 for a discussion of the test applied by the State Court of BiH to determine the existence of genocidal intent.

Courts in Croatia have also relied on circumstantial evidence to infer the existence of genocidal intent, although a clear test is not apparent from the jurisprudence. See section 6.7.2 for a discussion and comparison of how two courts in Croatia have approached proving specific intent.

#### 6.3.1.5.2. IF SPECIFIC INTENT CANNOT BE PROVED

If specific intent cannot be proved, alternative forms of liability, such as aiding and abetting, may exist. For example, in the ICTY's *Krstić* case, it was held that in circumstances where the accused knew of the genocidal intent of others and failed to take any action to stop troops under his command participating in genocidal acts, his knowledge alone cannot support an inference of specific genocidal intent:<sup>36</sup> "Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established."<sup>37</sup> If it has not been so established, the accused might not be convicted as a principle perpetrator of genocide but may be convicted of having aided and abetted genocide.<sup>38</sup>

An accused could also still be convicted as a direct perpetrator of the underlying crime, or for crimes against humanity. See sections 6.3.5 on other forms of liability for genocide, where the special intent is not required, and section 6.3.2, on the difference between genocide and crimes against humanity.

#### 6.3.1.5.3. SPECIFIC INTENT AND SUPERIOR RESPONSIBILITY

The issue of specific intent makes charging an accused for genocide under the superior responsibility doctrine difficult. The issue is whether the superior himself must have the necessary genocidal intent, or if he must merely know that his subordinates possessed genocidal intent. Jurisprudence at the ICTY and ICTR seems to indicate that the superior does not need to have the specific genocidal intent himself, but must have known or had reason to know that his subordinates had the required specific intent.<sup>39</sup>

*The issue of specific intent makes charging an accused for genocide under the superior responsibility doctrine difficult.*

<sup>36</sup> *Krstić*, AJ ¶¶ 134–144.

<sup>37</sup> *Ibid.* at ¶ 134.

<sup>38</sup> *Ibid.* at ¶¶ 134–144.

<sup>39</sup> See, e.g., *Krstić*, TJ ¶¶ 647 – 52; *Brđanin*, TJ ¶ 719; Vidoje Blagojević, Case No. IT-02-60-T, Trial Judgment, 17 Jan. 2005, ¶ 686.

For example, a trial chamber at the ICTR has held that an accused can be liable for genocide under the doctrine of superior responsibility for failing to prevent or punish genocide.<sup>40</sup> The trial chamber held that:

[A] superior will be found to have possessed or will be imputed with the requisite *mens rea* sufficient to incur criminal responsibility provided that:

- (i) the superior had actual knowledge, established through direct or circumstantial evidence, that his subordinates were about to commit, were committing, or had committed, a crime under the statute; or
- (ii) the superior possessed information providing notice of the risk of such offences by indicating the need for additional investigations in order to ascertain whether such offences were about to be committed, were being committed, or had been committed by subordinates.<sup>41</sup>

See also Module 10 on superior responsibility.

The Serbian Criminal Code specifically provides for superior responsibility as a mode of liability for the crime of genocide. See section 6.8.2.1.

#### 6.3.1.5.4. PROVING SPECIFIC INTENT AND INTENT FOR PROHIBITED ACT

In addition to proving the specific genocidal intent, prosecutors must also prove that the accused had the required mental state for committing the underlying prohibited act. For more on this, see section 6.3.4.

#### 6.3.1.6. “A PROTECTED GROUP”

The Genocide Convention states that the protected group must be a:

- National;
- Ethnic;
- Racial; or
- Religious group, as such.

*The crime of genocide is directed at the collective, not the individual.*

The Conventions does not define these groups. Definitions have emerged from international jurisprudence, which has been relied upon by the Court of BiH.<sup>42</sup>

- *National group*: “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”<sup>43</sup>

<sup>40</sup> André Ntagerura, Case No. ICTR-96-10A, Trial Judgement, 1 Sept. 2009, ¶ 694.

<sup>41</sup> *Ibid.*

<sup>42</sup> See *infra*, footnote 172 and surrounding text.

- *Ethnic group*: “a group whose members share a common language or culture”.<sup>44</sup>
- *Racial group*: a group “based on the hereditary physical traits often identified with a geographic region, irrespective of linguistic, cultural, national or religious factors.”<sup>45</sup>
- *Religious groups*: a group “whose members share the same religion, denomination or mode of worship”.<sup>46</sup>

The prosecution must prove either that the victim belongs to the targeted group, or that the perpetrator believed that the victim belonged to the group.<sup>47</sup>

*The prosecution must prove either that the victim belongs to the targeted group, or that the perpetrator believed that the victim belonged to the group.*

It should be noted that political groups are excluded from the definitions of targeted groups that could qualify. The killing of members of a political group could not thus be charged as genocide, but may nevertheless qualify as a crime against humanity, which has no similar restriction.

#### 6.3.1.7. “AS SUCH”

The term “as such” emphasises that the victim of genocide is not the individual—it is the group itself.

The harm is not the death or suffering of the individual but the physical or biological destruction of the identifiable group.

The ICTR has stated that the term “has been interpreted to mean that the prohibited act must be committed against a person based on that person’s membership in a specific group and specifically because the person belonged to this group, such that the real victim is not merely the person but the group itself.”<sup>48</sup>

*Genocide is different from the crime of persecution, in which the perpetrator chooses his or her victims because they belong to a specific group but does not necessarily seek to destroy the group itself*

A group cannot be defined negatively, such as “non-Americans”. When a person targets individuals because they lack a particular national, ethnical, racial or religious characteristic, “the intent is not to destroy particular groups with particular identities as such, but simply to destroy individuals

because they lack certain national, ethnical, racial or religious characteristics”.<sup>49</sup>

<sup>43</sup> *Akayesu*, TJ ¶ 512.

<sup>44</sup> *Ibid.* at ¶ 513.

<sup>45</sup> *Ibid.* at ¶ 514.

<sup>46</sup> *Ibid.* at ¶ 515.

<sup>47</sup> Mikaeli Muhimana, Case No. ICTR-95-1B, Trial Judgement, 28 April 2005, ¶ 500; Juvénal Kajelijeli, Case No. ICTR-98-44A, Trial Judgement, 1 Dec. 2003, ¶ 813.

<sup>48</sup> *Muvunyi*, TJ ¶ 485.

Thus, the elements of genocide must still be separately considered, *i.e.*, whether each individual group which makes up the aggregate group is itself a positively defined target group within the terms of the Convention.<sup>50</sup>

Genocide is different from the crime of persecution, in which the perpetrator chooses his or her victims because they belong to a specific group but does not necessarily seek to destroy the group itself.<sup>51</sup>

#### **6.3.1.7.1. JURISPRUDENCE: PROTECTED GROUP CONSIDERED ON A CASE-BY-CASE BASIS**

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A protected group may not have precisely defined boundaries, and jurisprudence indicates that when determining whether a group is a protected group, it should be “assessed on a case-by-case basis by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators.”<sup>52</sup>

ICTY and ICTR jurisprudence acknowledges that perception of the perpetrators of the crimes may, in some circumstances, be taken into account for purposes of determining membership of a protected group.<sup>53</sup> However, an ICTR chamber has held that “a subjective definition alone is not enough to determine victim groups, as provided for in the Genocide Convention.”<sup>54</sup> Other ICTR judgements have also concluded that target groups cannot be only subjectively defined.<sup>55</sup>

For example, the *Nahimana* appeals chamber<sup>56</sup> determined that the Tutsi ethnic group may be regarded as a protected group; however, “Hutu political opponents” did not constitute a “national, ethnical, racial or religious group” under the provisions of the Genocide Convention. Thus, acts committed against Hutu political opponents could not be perceived as acts of genocide, because the victims of genocide must have been targeted because they belonged to a protected group. In this example, Hutu political opponents could potentially be considered part of the Tutsi ethnic group if they were subjectively perceived as such by the perpetrators or victims; however, this fact would have to be established by the evidence. Even if the perpetrators of the genocide believed that eliminating Hutu political opponents was necessary

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<sup>49</sup> Milomir Stakić, Case No. IT-97-24-A, Appeal Judgement, 31 July, 20003, ¶ 20.

<sup>50</sup> *Stakić*, AJ ¶ 27.

<sup>51</sup> *Jelisić*, TJ ¶ 79.

<sup>52</sup> *Semanza*, TJ ¶ 317.

<sup>53</sup> *Stakić*, AJ ¶ 25; *Muhimana*, TJ ¶ 500; Emmanuel Ndindabahizi, Case No. ICTR-01-71, Trial Judgement, 15 July, 2004, ¶ 468; Sylvestre Gacumbitsi, Case No. ICTR-01-64, Trial Judgement, 17 June 2004, ¶ 255; *Kajelijeli*, TJ ¶ 813; *Bagilishema*, TJ ¶ 65; Alfred Musema, Case No. ICTR-96-13, Trial Judgement, Jan. 27 2000, ¶ 161; *Rutaganda*, TJ ¶ 56.

<sup>54</sup> *Rutaganda*, TJ ¶¶ 56-7.

<sup>55</sup> *Musema*, TJ ¶ 162; See also *Semanza*, TJ ¶ 317; *Bagilishema*, TJ ¶ 65.

<sup>56</sup> *Nahimana*, AJ ¶ 496.

for the successful execution of their genocidal project against the Tutsi population, the killing of Hutu political opponents cannot constitute acts of genocide.<sup>57</sup>

The ICTR trial chamber in *Ndindabahizi* decided that an individual whose father was German and mother Rwandan was perceived to be, at least in part, of Tutsi ethnicity. Testimony indicated that physical traits were an important, if not decisive, indicator of ethnic identity in Rwanda in 1994: since the victim had the physical appearance of a Tutsi, he was understood to be Tutsi. The trial chamber also considered that it was highly improbable the victim would have been targeted if his Rwandan ethnicity was perceived to be Hutu or Twa, and the victim was killed soon after the accused had instructed that Tutsi be killed.<sup>58</sup>

### 6.3.2. DIFFERENCE BETWEEN GENOCIDE AND CRIMES AGAINST HUMANITY

*Crimes against humanity require a connection to a widespread or systematic attack directed against any civilian population. Genocide requires specific genocidal intent.*

The primary difference between genocide and crimes against humanity is the specific intent requirement for the crime of genocide, which requires the alleged perpetrator to physically destroy a protected group. The crime against humanity of persecution affords civilians protection from discrimination rather than elimination. Crimes against humanity, unlike genocide, require a connection to a widespread or systematic attack directed against any civilian population.<sup>59</sup>

### 6.3.3. NO NEXUS TO ARMED CONFLICT OR POLICY/PLAN REQUIRED

Under international law, genocide can be committed in time of peace or war. Thus, a nexus to an armed conflict is not an element of the crime. This was affirmed by the ICTY appeals chamber, which stated that “proof of the existence of a ‘high level genocidal plan’ is not required in order to convict an accused of genocide or for the mode of liability of instigation to commit genocide.”<sup>60</sup>

The existence of a policy or plan to commit genocide is not an element of the crime.<sup>61</sup>

<sup>57</sup> See Vanessa Thalmann, Rwandan Genocide Cases, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 498-505, 500 (Cassese et al. ed. in chief, 2009), noting that in some post-1994 cases Rwandan courts, accused who killed Hutu political opponents were nevertheless convicted of genocide.

<sup>58</sup> *Ndindabahizi*, TJ ¶ 469 (conviction reversed on appeal on another ground).

<sup>59</sup> See also ICC, Pre-Trial Chamber, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ¶¶ 190 – 201, for a discussion of the distinction between crimes against humanity and the specific intent requirement for genocide.

<sup>60</sup> Siméon Nchamihigo, Case No. ICTR-2001-63-A, Appeal Judgement, 18 March 2010, ¶ 363.

<sup>61</sup> *Ibid.*; See also Laurent Semanza, Case No. ICTR-97-20-A, Appeal Judgment, 20 May 2005, ¶ 260; See also *Simba*, AJ ¶ 260.

#### 6.3.4. PROHIBITED ACTS

*Notes for trainers:*

- Having dealt with specific intent, the participants now need to focus on the underlying prohibited acts. This section describes the underlying criminal acts that can amount to the crime of genocide, to help explain the basis for interpreting and applying the elements of the crime of genocide.
- This section explains that genocide can be committed in time of peace or war and that according to the ICTY and ICTR, no policy or plan is needed. It could be useful to discuss why this is the case.
- It is useful for participants to recognise the key jurisprudence from the ICTY and ICTR.
- It is useful for participants to discuss the difference between the *mens rea* of the underlying acts with the specific intent required to prove genocide.
- It is recommended to review the case study with the participants to identify whether any prohibited acts are indicated from the facts.
- Useful questions to pose to the participants for this section can include:
  - In the Sudan situation before the ICC, the prosecution has alleged that hindering access to humanitarian aid in refugee camps could amount to inflicting conditions on the group calculated to bring about its physical destruction. Would such evidence be sufficient to establish the prohibited act? What other evidence could be relied upon?
  - If the prosecution wishes to rely on prohibited acts other than killing, what does the prosecution need to prove to show that the acts did or could have resulted in the destruction of the group?

Under ICL, and as incorporated into the laws of BiH, Croatia and Serbia, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group; and
- forcibly transferring children of the group to another group.

Key concepts related to prohibited acts include:

- Three of these prohibited acts require proof of a result: killing, causing serious bodily or mental harm, and forcibly transferring children of the group to another group.
- Proof of these crimes requiring results also requires evidence that the act itself is a “substantial cause” of the outcome.<sup>62</sup>
- The other two prohibited acts do not require proof of an end result, but do require proof of intent to deliberately inflict conditions of life calculated to bring about its physical destruction or imposing measures intended to prevent births within the group.
- These prohibited acts can be acts of commission or omission.
- Forcible transfer does not in itself constitute genocide, although it can be a method of material destruction of the group.<sup>63</sup> This principle has been applied by the Court of BiH.<sup>64</sup>

Each of these acts are discussed in further detail below, referring to ICTY and ICTR jurisprudence as guidance.

**Note:** At the ICC, these prohibited acts must be committed “in the context of a manifest pattern of similar conduct” directed against a targeted national, ethnical, racial or religious group, or was conduct that could itself effect the destruction of the group.<sup>65</sup> “In the context of” can include the initial acts of an emerging pattern.<sup>66</sup> However, this is not a requirement under international law, only under the ICC Elements of Crimes.

The State Court of BiH has specifically recognised that the prosecutor must prove the *mens rea* of the underlying prohibited act in addition to the specific intent required for genocide.<sup>67</sup> See section 6.6.3.5.

#### 6.3.4.1. “KILLING MEMBERS OF THE GROUP”

In addition to proving the specific genocidal intent, criminal liability for killing members of the group also requires proof that the perpetrator intentionally killed a member of the protected group.<sup>68</sup>

The killing must be intentional as opposed to resulting from involuntary or negligent behaviour. The killing does not necessarily have to be premeditated.<sup>69</sup>

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<sup>62</sup> Zejnil Delalić et al., Case No. IT-96-21-T, Trial Judgment, 16 Nov. 1998, ¶ 424.

<sup>63</sup> Krstić, AJ ¶¶ 31, 33.

<sup>64</sup> See section 6.6.4.3.

<sup>65</sup> ICC Elements of Crimes, Art. 6(a)-(e).

<sup>66</sup> ICC Elements of Crimes, Art. 6.

<sup>67</sup> See, e.g., Stupar et al., 1st inst. Of 13 Jan. 2009, p. 56, fn26 (BCS); Mitrović, 1st inst., p. 45 fn25 (p. 47 fn 25 BCS); Trbić, 1st inst., ¶ 174, fn 93, ¶194.

<sup>68</sup> Semanza, TJ ¶ 319. See also Akayesu, TJ ¶ 588.

<sup>69</sup> Stakić, TJ ¶ 515.

Relying on ICTR jurisprudence, the State Court of BiH has held that killing one person can still amount to an act of genocide.<sup>70</sup> Relying on ICTY jurisprudence, the State Court of BiH has also held that concealment of killings can also be a part of this prohibited act.<sup>71</sup> See section 6.6.4.1.

#### 6.3.4.2. “CAUSING SERIOUS BODILY HARM OR MENTAL HARM TO MEMBERS OF THE GROUP”

Serious harm can be physical harm (physical injury) or mental harm (some mental impairment).

- Mental or physical harm does not need to be permanent or irremediable.<sup>72</sup>
- Serious mental harm is more than minor or temporary impairment of mental faculties.<sup>73</sup>
- Whether harm is “serious” is to be decided on a case-by-case basis.<sup>74</sup>

The bodily or mental harm inflicted on members of a group must be of such a serious nature as to threaten the group’s destruction in whole or in part.

The ICTR has held that the following acts *do not* constitute serious bodily or mental harm:

- physical weakening caused by a refusal to allow refugees to get food from a banana plantation;
- refusing to celebrate mass; and
- decisions to expel employees and refugees which caused a constant state of anxiety.<sup>75</sup>

*The bodily or mental harm inflicted on members of a group must be of such a serious nature as to threaten the group’s destruction in whole or in part.*

The State Court of BiH, relying on ICTY and ICTR jurisprudence, has found that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury and that the harm must be inflicted intentionally.<sup>76</sup> See section 6.6.4.2.

**Note:** In the Rome Statute of the ICC, serious bodily or mental harm can include, but is not limited to, acts of torture, rape, sexual violence or inhuman or degrading treatment.<sup>77</sup>

<sup>70</sup> See, e.g., *Stupar et al.*, 1st inst., p. 54 (p. 57 BCS) and references therein; *Mitrović*, 1st inst., p. 45 (p. 48 BCS) and references therein; *Stevanović*, 1st inst., p. 44 (p. 41 BCS) and references therein; *Trbić*, 1st inst., ¶¶ 178, 780.

<sup>71</sup> *Trbić*, 1st inst., ¶ 180.

<sup>72</sup> *Akayesu*, TJ ¶ 502.

<sup>73</sup> *Semanza*, TJ ¶ 321.

<sup>74</sup> *Kayeshima*, TJ ¶ 110.

<sup>75</sup> *Seromba*, AJ ¶¶ 46-9 (the trial chamber’s vague reasoning may have contributed to said finding).

<sup>76</sup> *Trbić*, 1st inst., ¶ 183-185 and references therein.

<sup>77</sup> ICC Elements of Crimes, Art. 6(b).

#### 6.3.4.2.1. ACTS OF SEXUAL VIOLENCE, INCLUDING RAPE

Acts of sexual violence, including rape, can constitute genocide. Important considerations on considering rape and sexual violence in the context of genocide include:

- Rape and sexual violence constitute serious bodily and mental harm.
- Rape and sexual violence can be used as a tool by which to commit genocide, and should not be construed as personal acts of individual perpetrators.
- If acts of sexual violence are committed with the intent to destroy a group, then such acts are acts of genocide.
- In relation to intent, rape or sexual violence can be evidence of the intent for genocide, depending on the circumstances—such as when the perpetrator commits rape with the belief (or to ensure) that the victim will never re-marry, or that the rape will have such an impact on her or the group that she will not procreate.

*Acts of sexual violence, including rape, can constitute genocide.*

The jurisprudence of the ICTR and ICTY with regard to rape and sexual violence as acts of genocide is discussed below.

##### 6.3.4.2.1.1. JURISPRUDENCE OF THE ICTR

*Akayesu* was the first case in which it was found that rape and sexual violence, if carried out with genocidal intent, can constitute genocide. Subsequently, the *Rutaganda*, *Musema*, *Gacumbitsi* and *Muhimana* cases all made similar findings on acts of rape and sexual violence as underlying acts of genocide. By contrast, the *Rukundo* Appeal Judgement (which overturned the trial chamber's conclusion that *Rukundo* possessed the required *mens rea* for the rape to constitute a genocidal act) is an example of a situation where the appeals chamber was not satisfied that sexual violence constitutes genocide.

As stated above, *Akayesu* was the first accused to be convicted for genocide, partly based on charges of rape and sexual violence.<sup>78</sup> He was found responsible for the numerous incidents of rape that occurred on or near the premises of the bureau communal of Taba, where he was *bourgmestre*. With regard to rape and sexual violence, the chamber underscored that these acts:

[C]onstitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims, and are even [...] one of the worst ways of inflicting harm on the victim as he or she suffers both

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<sup>78</sup> *Akayesu* TJ, Verdict.

bodily and mental harm. [...] These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.<sup>79</sup>

To infer that *Akayesu* possessed the required genocidal intent in relation to the rapes, the trial chamber relied on the following factual circumstances:

- The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them (a Tutsi woman, married to a Hutu, was not raped because her ethnic background was unknown).
- The Tutsi women were presented as sexual objects, as part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi: before being raped and killed, three women were forced to undress and ordered to run and do exercises “in order to display the thighs of Tutsi women”; the Interahamwe who subsequently raped one of the women, said “let us now see what the vagina of a Tutsi woman feels like”; on another occasion, *Akayesu* himself, speaking to the Interahamwe who were committing the rapes, said to them, “don’t ever ask again what a Tutsi woman tastes like”. This sexualized representation of ethnic identity illustrates that Tutsi women were subjected to sexual violence because they were Tutsi. In this way, “sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself”.
- In most cases, the rapes of Tutsi women in Taba, were accompanied with the intent to kill those women: many rapes were perpetrated near mass graves where the women were taken to be killed; peasants and men could take away captured Tutsi women with the promise that they would be collected later to be executed; following an act of gang rape, *Akayesu* said “tomorrow they will be killed” and they were actually killed. The acts of rape and sexual violence clearly reflected the determination to make Tutsi women suffer and to mutilate them even before killing them. Therefore the intent was to destroy the Tutsi group while inflicting acute suffering on its members in the process.<sup>80</sup>

*Although these acts of rape and sexual violence were not included in the indictment, the Chamber nevertheless took them into account in determining the acts that formed the actus reus of the genocide.*

The *Rutaganda* case was the second case in which rape and other forms of sexual violence (which occurred during the forced diversion of refugees to Nyanza, and during the massacre which took place in Nyanza) formed part of the genocide conviction.<sup>81</sup> Although these acts of rape and sexual violence were

<sup>79</sup> *Ibid.*, ¶ 731.

<sup>80</sup> *Ibid.*, ¶ 732-733.

<sup>81</sup> *Rutaganda*, TJ ¶¶ 300-303, 390.

not included in the indictment,<sup>82</sup> the Chamber nevertheless took them into account in determining the acts that formed the *actus reus* of the genocide.<sup>83</sup> In determining whether *Rutaganda* possessed genocidal intent, the Chamber assessed all the underlying acts of the genocide together.<sup>84</sup> It did not make any specific determination on genocidal intent in relation to the rapes or sexual violence.

In the *Musema* case, only one incident of rape formed part of the genocide conviction. It concerned the rape of a young Tutsi woman called Nyiramusugi, during the attack on Muyira Hill.<sup>85</sup> In deciding that *Musema* possessed genocidal intent in relation to this rape, the chamber took into account the fact that acts of serious bodily and mental harm, including rape and other forms of sexual violence, were often accompanied by humiliating utterances. The chamber considered these utterances to be clear indications that the intention underlying each specific act was to destroy the Tutsi group as a whole. Specifically in relation to this incident, the chamber took the example of *Musema* declaring, before raping Nyiramusugi: "The pride of the Tutsis will end today". Because the acts of rape and sexual violence targeted Tutsi women, in particular, and specifically contributed to their destruction and therefore that of the Tutsi group as such, those acts were an integral part of the plan conceived to destroy the Tutsi group. This assumption was corroborated by a witness, who testified that Nyiramusugi, who was left for dead after she was raped, had indeed been killed in a way, because "what they did to her is worse than death".<sup>86</sup> However, on the basis of additional evidence on appeal, the appeals chamber concluded that there was a reasonable doubt as to *Musema*'s responsibility for the rape of Nyiramusugi.<sup>87</sup> The genocide conviction was nevertheless affirmed,<sup>88</sup> since it was supported by a number of other genocidal acts.

*To infer the genocidal intent of the accused in relation to the rapes, the Chamber considered Gacumbitsi's actions and utterances (inciting the Hutu to kill the Tutsi), and specifically his instigations to rape Tutsi women and girls.*

Following *Musema*, rape and sexual violence were found to be underlying acts of genocide in the *Gacumbitsi* case.<sup>89</sup> The accused drove around announcing by megaphone that Tutsi women should be raped and sexually degraded ("Tutsi girls that have always refused to sleep with Hutu should be raped and sticks placed in their genitals", "Tutsi girls who resisted should be killed in an atrocious manner"). Following these statements, such rapes were carried out,

<sup>82</sup> Georges A. N. Rutaganda, Case No. ICTR-96-3-I, Indictment, ¶¶ 15-16 and ¶¶ 15-16 of the supporting documentation.

<sup>83</sup> *Rutaganda*, TJ ¶ 390, 300-301.

<sup>84</sup> *Ibid.*, ¶ 397-401.

<sup>85</sup> *Musema*, TJ ¶¶ 846-862, 907-908; Alfred Musema, Case No. ICTR-96-1-I, Indictment, ¶ 4.10.

<sup>86</sup> *Musema*, TJ ¶ 933.

<sup>87</sup> *Musema*, AJ ¶¶ 178-194.

<sup>88</sup> *Ibid.*, Disposition.

<sup>89</sup> *Gacumbitsi*, TJ, ¶¶ 293, 321-333.

including by inserting sticks in the victim's genitals causing the death of some victims. The Chamber found that these rapes were a direct consequence of the statements made.<sup>90</sup> *Gacumbitsi* was found responsible for genocide by instigating the rape of Tutsi women and girls.<sup>91</sup> To infer the genocidal intent of the accused in relation to the rapes, the Chamber considered *Gacumbitsi*'s actions and utterances (inciting the Hutu to kill the Tutsi), and specifically his instigations to rape Tutsi women and girls on 17 April 1994.<sup>92</sup>

In the *Muhimana* case, various acts of rape and sexual violence also formed part of *Muhimana*'s conviction for genocide.<sup>93</sup> *Muhimana* participated in various attacks, whereby he killed and caused serious bodily or mental harm to members of the Tutsi group, including by raping numerous Tutsi women or women whom he believed to be Tutsi, and by abetting others who raped women.<sup>94</sup> To infer *Muhimana*'s genocidal intent in relation to the rapes and other acts of sexual violence, the trial chamber relied on the following:

- during the attacks, *Muhimana* targeted Tutsi civilians by shooting and raping Tutsi victims. He also raped a young Hutu girl, whom he believed to be Tutsi, but later apologised to her when he was informed that she was Hutu;
- during the course of some of the attacks and rapes, *Muhimana* specifically referred to the Tutsi ethnic identity of his victims.<sup>95</sup>

However, *Muhimana*'s conviction for the rapes of two women in his house was reversed on appeal. The appeals chamber was convinced that the two women were indeed raped in *Muhimana*'s house, but it was not persuaded that the trial chamber acted reasonably in determining that it was *Muhimana* who raped the two women, rather than another person present in the house.<sup>96</sup>

The most recent case with regard to sexual violence as genocide, is the *Rukundo* case. *Rukundo* was convicted by the trial chamber of genocide by causing serious mental harm to witness CCH, a young Tutsi woman, when he sexually assaulted her towards the end of May 1994 at the Saint Leon Minor Seminary.<sup>97</sup> The trial chamber inferred *Rukundo*'s genocidal intent in relation to this incident, from:

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<sup>90</sup> *Ibid.* at ¶¶ 198, 200-228.

<sup>91</sup> *Ibid.* at ¶¶ 292-293.

<sup>92</sup> *Ibid.* at ¶ 259-260.

<sup>93</sup> *Muhimana*, TJ ¶¶ 513, 519, 563.

<sup>94</sup> *Ibid.*, ¶ 513.

<sup>95</sup> *Ibid.* at ¶ 517.

<sup>96</sup> Mikaeli Muhimana, Case No. ICTR-95-1-A, Appeal Judgement, 21 May 2007, ¶¶ 46-53.

<sup>97</sup> Rukundo arrived to store some items in a room there, when witness CCH introduced herself to Rukundo, and asked him if he could hide her. Rukundo responded that he could not help her, and said that her entire family had to be killed because her relative was an *Inyenzi*. Nevertheless, witness CCH assisted him in carrying some items to his room, in the hope that he would change his mind and hide her. While in the room, Rukundo locked the door, and subsequently tried to have sexual intercourse with witness CCH,

- the general context of mass violence against the Tutsi in Gitarama *prefecture* and in Kabgayi;
- specifically, *Rukundo's* assertion, prior to the incident, that witness CCH's "entire family had to be killed for assisting the Inyenzi".<sup>98</sup>

In reviewing the trial chamber's finding, the appeals chamber recalled that, while evidence concerning the use of expressions such as "Inyenzi" can in some circumstances suffice to establish genocidal intent, inferences drawn from circumstantial evidence must be the only reasonable inference available.

The appeals chamber, Judge Pocar dissenting, also considered that the "general context of mass violence" cited by the trial chamber was insufficient to justify a finding of genocidal intent with respect to this incident. The appeals chamber considered that the crime concerned was "qualitatively different" from the other acts of genocide perpetrated by *Rukundo*, because it appears to have been unplanned and spontaneous (for other acts, the trial chamber relied on the systematic, repeated searches for Tutsi's on the basis of identity cards or lists, and the subsequent killing or assault of those individuals removed, to infer genocidal intent). In this context, the appeals chamber found that this act could reasonably be construed as an "opportunistic crime" that was not accompanied by the specific intent to commit genocide. Therefore, the appeals chamber held that *Rukundo's* sexual assault, while taking place during a genocide, was not necessarily a part of the genocide itself. Consequently, the appeals chamber held that it was not established that the only reasonable inference available from the evidence was that *Rukundo* possessed genocidal intent in relation to the sexual assault of witness CCH. Accordingly, the appeals chamber reversed *Rukundo's* conviction for genocide, in part, for causing serious mental harm to Witness CCH.<sup>99</sup>

Trainers should also refer participants to the partially dissenting opinion, Judge Pocar explains why he disagrees with this reasoning and the conclusion of the majority of the appeals chamber with regards to this holding.<sup>100</sup>

Judge Pocar considers that *Rukundo's* assault of witness CCH is of similar gravity and fits squarely within the larger context of violence targeting Tutsi's in the area, as well as his own pattern of genocidal conduct. He emphasised that the jurisprudence does not require (as the majority suggested) that the crime fits into a pattern of identical criminal conduct. Rather, a perpetrator's

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but she resisted. Rukundo then gave up trying to have intercourse, but rubbed himself against her until he ejaculated. Emmanuel Rukundo, Case No. ICTR-01-70-T, Trial Judgement, Feb 27, 2009, ¶¶ 372-373.

<sup>98</sup> *Ibid.* at ¶¶ 574-576.

<sup>99</sup> *Ibid.* at ¶¶ 236-238.

<sup>100</sup> Kunarac et al., AJ ¶ 153; See also Gacumbitsi, AJ ¶ 103.

genocidal intent may rather be inferred, more generally, from “other culpable acts systematically directed against the same group.”<sup>101</sup> In sum, Judge Pocar concluded that:

Rukundo knew the victim, was aware that she was a refugee, and suggested that her entire family had to be killed because one of her relatives assisted the “Inyenzi”. This evidence reasonably demonstrates Rukundo’s *mens rea*, in particular in the context of “mass violence against the Tutsis” in the area as well as the specific evidence of his role in the repeated abductions and killings of Tutsis from the Saint Leon Minor Seminary.”<sup>102</sup>

#### 6.3.4.2.1.2. JURISPRUDENCE OF THE ICTY

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In contrast to the ICTR, to date, the ICTY has not entered any convictions for genocide based on sexual violence. The issue will arise in the pending cases of *Karadzic*<sup>103</sup> & *Mladic*<sup>104</sup> where rape and other acts of sexual violence (which occurred in detention facilities in numerous municipalities) are charged as underlying acts of genocide.

However, although so far there are no explicit findings of an ICTY chamber qualifying acts of rape and sexual violence as underlying acts of genocide, ICTY case law confirms the theoretical possibility of this outcome.<sup>105</sup>

Further support for the theoretical possibility of genocide based on sexual violence is found in *obiter dicta* in the *Furundžija* judgement:

The prosecution of rape is explicitly provided for in Article 5 of the Statute of the International Tribunal as a crime against humanity. Rape may also amount to [...] an act of genocide (art. 4 Statute), if the requisite elements are met, and may be prosecuted accordingly.<sup>106</sup>

In subsequent cases such as *Stakić*<sup>107</sup> and *Brđanin*<sup>108</sup>, the trial chamber specified that “causing serious bodily or mental harm”, as an element of the genocide definition, is understood to mean, *inter alia*, acts of sexual violence including rape. In the *Krajišnik* case, the indictment charged sexual violence as an underlying act of genocide, for “causing serious bodily or mental

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<sup>101</sup> Emmanuel Rukundo, Case No. ICTR-01-70-A, Appeal Judgement, Partially dissenting opinion of Judge Pocar, Oct. 20, 2010, ¶¶ 10-11.

<sup>102</sup> *Ibid.*, Partially dissenting opinion of Judge Pocar, ¶ 12.

<sup>103</sup> Radovan Karadžić, Case No. IT-95-5, Prosecution’s Marked-up Indictment, 19 Oct. 2009, ¶ 40 (b) and (c).

<sup>104</sup> Ratko Mladić, Case No. IT-09-92, Prosecution’s Second Amended Indictment, 1 June 2011, ¶ 39 (b) and (c).

<sup>105</sup> See, e.g., *Karadžić & Mladić*, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, ¶¶ 62, 64, 94.

<sup>106</sup> Anto Furundžija, Case No. IT-95-17/1-T, Trial Judgment, 10 Dec. 1998, ¶ 172.

<sup>107</sup> *Stakić*, TJ ¶ 516.

<sup>108</sup> *Brđanin*, TJ ¶ 690.

*Although so far there are no explicit findings of an ICTY chamber qualifying acts of rape and sexual violence as underlying acts of genocide, ICTY case law confirms the theoretical possibility of this outcome.*

harm”, and for “inflicting on the group conditions of life calculated to bring about their physical destruction”.<sup>109</sup> However, *Krajišnik* was finally not convicted for genocide due to insufficient evidence of genocidal intent.<sup>110</sup>

See also sections 7.2.2.2.8 (in Module 7, Crimes against humanity) and 8.4.2.3 (in Module 8, on War crimes) for a discussion of rape as a crime against humanity or war crime.

#### 6.3.4.3. “DELIBERATELY INFILTING CONDITIONS OF LIFE CALCULATED TO BRING ABOUT ITS PHYSICAL DESTRUCTION IN WHOLE OR IN PART”

This refers to “the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.”<sup>111</sup>

Such methods of destruction can include:

- subjecting the group to a subsistence diet;
- systematic expulsion from homes;
- denial of the right to medical services;
- creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion;<sup>112</sup> and
- rape.<sup>113</sup>

**Note:** Conflict situations often lead to circumstances where the civilian population has inadequate food, water, accommodation or medical assistance. Establishing that these conditions were purposefully created in order to meet the required legal standard can be difficult.

For example, one ICTR chamber has held that although victims were deprived of food, water and adequate sanitary and medical facilities, these deprivations were not deliberately created with

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<sup>109</sup> *Krajišnik & Plavšić*, Case No. IT-00-39 & 40-PT, Amended Consolidated Indictment, 17 (b) and (c); *Momčilo Krajišnik*, Case No. IT-00-39-T, Trial Judgement, 27 Sept. 2006, ¶ 859.

<sup>110</sup> The chamber found that some of the crimes, including some instances of cruel or inhumane treatment, such as acts of rape and sexual violence, met the requirements of the *actus reus* for genocide. However, the chamber did not find that any of these acts were committed with the necessary genocidal intent. In order to establish the *mens rea*, the chamber had considered the surrounding circumstances, including words uttered by the perpetrators and other persons at the scene of the crime and official reports on the crimes, but considering the evidence as a whole, the chamber could not make a conclusive finding that any acts were committed with the required genocidal intent. *Krajišnik*, TJ, ¶¶ 1125, 800, 867, 869.

<sup>111</sup> *Akayesu*, TJ ¶ 505.

<sup>112</sup> *Ibid.* at ¶¶ 505-6; *Rutaganda*, TJ ¶ 51; *Brđanin*, TJ ¶¶ 691-692.; ICC Elements of Crimes, Art. 6(c).

<sup>113</sup> *Clément Kayishema et al.*, Case No. ICTR-95-I-T, Trial Judgement (Reasons), 21 May, 1999, ¶¶ 114-116.

an intention to bring about their destruction and were not of sufficient length or scale to bring about their destruction.<sup>114</sup>

#### 6.3.4.4. “MEASURES INTENDED TO PREVENT BIRTHS WITHIN THE GROUP”

Measures intended to prevent births include:

- rape;
- sexual mutilation;
- the practice of sterilisation;
- forced birth control;
- separation of the sexes;
- prohibition of marriages;
- impregnation of a woman to deprive group identity; and
- mental measures.

*Rape can be a measure intended to prevent births when the victim later refuses to procreate.*

The ICTR has held, for example:

In patriarchal societies, where membership of a group is determined by the identity of a father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group.<sup>115</sup>

Rape can be a measure intended to prevent births “when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.”<sup>116</sup>

#### 6.3.4.5. “FORCIBLY TRANSFERRING CHILDREN OF THE GROUP TO ANOTHER GROUP”

There is little international jurisprudence on this prohibited act. The objective of this offence is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.<sup>117</sup>

Important points to consider include:

- This is the only *actus reus* which does not lead to physical or biological destruction, and thus is at odds with other prohibited acts.

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<sup>114</sup> *Akayesu*, TJ ¶ 548.

<sup>115</sup> *Ibid.* at ¶ 507.

<sup>116</sup> *Ibid.* at ¶¶ 507-8.

<sup>117</sup> *Akayesu*, TJ ¶ 509; *Kayishema*, TJ ¶ 118; *Rutaganda*, TJ ¶ 53.

- It alone, as an act without any of the other enumerated acts, does not lead to the physical or biological destruction of the group.
- In other words, the group is not eliminated.

**Note:** The ICC Elements of Crimes provides some additional elements to this act, which seem to differ from the standard at the ICTY and ICTR. Key points on this difference include:

- At the ICC, the perpetrator must forcibly transfer one or more persons.
- Although the ICC includes a definition of “forcibly” that comprises “threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment,” it appears as though the transfer must have actually occurred—not just would have occurred—in order to prove this prohibited act.<sup>118</sup>
- The ICC also adds that the persons transferred must have been under the age of eighteen, and that the perpetrator knew they were under eighteen.<sup>119</sup>

### 6.3.5. FORMS OF PARTICIPATION

*Notes for trainers:*

- Once the participants are familiar with the specific intent requirements and the prohibited acts, they should be introduced to the forms of participation.
- This section deals with the ways in which an accused can commit genocide.
- Participants should be referred to the case study to identify the applicable forms of participation that are evident from the facts.
- Questions to be asked to prompt discussion can include:
  - What is the difference between a principle perpetrator and an accomplice? Should the requisite intent be different?
  - Can superiors be charged for the genocidal acts committed by their subordinates? What evidence would be required to prove that the superior is also responsible for the commission of genocide?
- Participants should also be encouraged to consider the ways in which genocide can be charged and some key considerations are outlined in this section.
- Hint: Prosecutors may charge an accused with more than one form of participation, which can provide the prosecution with an alternative set of charges in the event that one or the other forms of participation cannot be proved on the evidence. For example, an accused can be charged with both committing genocide as a principle perpetrator and with complicity in genocide.

<sup>118</sup> ICC Elements of Crimes, Art. 6(3)(1).

<sup>119</sup> ICC Elements of Crimes, Art. 6(e)(5)-(6).

Article 3 of the Genocide Convention prohibits the following forms of participation in and crimes of genocide:

- Genocide;
- Conspiracy to commit genocide;
- Direct and public incitement to commit genocide;
- Attempt to commit genocide; and
- Complicity in genocide.

There is some debate as to whether these are all crimes, or modes of liability or participation.<sup>120</sup>

*An accused does not have to commit an underlying crime with his own hands to be convicted of committing genocide.*

Under SFRY Criminal Code Article 141, there were additional modes of liability for genocide in addition to directly perpetrating and ordering genocide. These included liability for organising a group for the purpose of committing genocide, becoming a member of such a group and instigating the commission of genocide. See section 6.5.1.

These modes of liability are also criminalised in the BiH Criminal Code (see section 6.6.5), the Croatian Criminal Code (see section 6.7.4.1.), and the Serbian Criminal Code (see section 6.8.2). The Serbian Criminal Code is the only code that also specifically criminalises conspiracy with another to commit genocide.

#### 6.3.5.1. COMMISSION

Commission of the crime requires perpetration of one of the prohibited acts with the required specific intent.

*"Committing" genocide is not limited to direct and physical perpetration; other acts can constitute direct participation in the actus reus of the crime.*

"Committing" genocide is not limited to direct and physical perpetration; other acts can constitute direct participation in the *actus reus* of the crime.

The question of whether an accused acts with his own hands when killing people is not the only relevant criterion. For example, an ICTR trial chamber interpreted "commission" to be very inclusive, holding that an accused that personally and closely supervised a massacre and participated in it by separating those to be killed on the

<sup>120</sup> See, e.g., Florian Jessberger, *Incitement to Commit Genocide*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE pp. 373-4 (Cassese et al., ed. in chief, 2009) (stating that unlike instigation, incitement is a crime, not a mode of participation).

basis of ethnicity has been convicted of “committing” genocide even though he did not personally kill anyone.<sup>121</sup>

#### 6.3.5.2. CONSPIRACY TO COMMIT GENOCIDE

The crime of conspiracy to commit genocide, like direct and public incitement and attempt to commit genocide, is an inchoate crime under the common law approach adopted by the Genocide Convention and the ICTY and ICTR.

*Conspiracy to commit genocide is an agreement between two or more individuals to commit the crime. It is the act or process of conspiracy itself that is punishable, not its result.*

An inchoate offence (“*crime formel*” in civil law) is consummated simply by the use of a means or process calculated to produce a harmful effect, irrespective of whether that effect is produced. Thus, an inchoate crime penalises the commission of certain acts capable of constituting a step in the commission of another

crime, even if that crime is not in fact committed.<sup>122</sup>

Accordingly, conspiracy to commit genocide is an agreement between two or more individuals to commit the crime.<sup>123</sup> It is the act or process of conspiracy itself that is punishable and not its result.<sup>124</sup> Conspiracy to commit genocide is punishable even if it fails to produce a result, that is, even if the substantive offence, in this case genocide, has not actually been perpetrated.<sup>125</sup>

**Note:** Article 25(3) of the Rome Statute defines conspiracy as “the commission or attempted commission of such a crime by a group of persons acting with a common purpose”. This definition applies to genocide as well as other Rome Statute crimes, and thus at the ICC, conspiracy to commit genocide is not an inchoate crime.

Conspiracy to commit genocide can be inferred from coordinated actions by individuals who have a common purpose and are acting within a unified framework.

A formal or informal coalition can constitute such a framework so long as those acting within the coalition are aware of its existence, their participation in it, and its role in

*Conspiracy to commit genocide is punishable even if it fails to produce a result.*

<sup>121</sup> *Gacumbitsi*, TJ ¶¶ 59-61. However, the level of inclusiveness found by the court in Gacumbitsi may not be found in every case. See also *Seromba*, AJ ¶¶ 161-2, 171-3.

<sup>122</sup> *Nahimana*, AJ ¶ 720.

<sup>123</sup> *Ibid.* at ¶ 894 citing *Musema*, TJ ¶ 191.

<sup>124</sup> *Musema*, TJ ¶ 193 (accused cannot be convicted of both genocide and conspiracy to commit genocide); Ferdinand Nahimana, Case No. ICTR-96-11, Trial Judgement, 3 Dec. 2003, ¶ 1043 (accused can be convicted of both genocide and conspiracy to commit genocide).

<sup>125</sup> *Musema*, TJ ¶ 194.

furtherance of their common purpose.<sup>126</sup>

Conspiracy can be inferred on the basis of personal collaboration of the accused and interaction among institutions within their control, but also on the basis of the accused attending and speaking at meetings, planning, leading and participating in attacks against the targeted group.

The qualifiers “concerted or coordinated”—referring to the action of a group of individuals as evidence of an agreement—are important as these words are “the central element that distinguishes conspiracy from ‘conscious parallelism’ i.e. similarity of conduct which is associated with the concept guilty by association.”<sup>127</sup>

The Serbian Criminal Code is the only code that also specifically criminalises conspiracy with another to commit genocide (see section 6.8.2).

#### 6.3.5.3. DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE

Direct and public incitement to commit genocide crime consists of:

[D]irectly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, or offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.<sup>128</sup>

A few key points about direct and public incitement to commit genocide are discussed below, including:

- The incitement must be both public and direct;
- There is no need to prove expected result;
- Mens rea for incitement to commit genocide; and the
- Difference between instigation, and public and direct incitement.

The incitement must be both public and direct:

- Direct incitement to commit genocide assumes that the speech is a direct appeal to commit a genocidal act.

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<sup>126</sup> See *Nahimana*, TJ ¶ 1055; *Nahimana*, AJ ¶ 897; Eliézer Niyitege, Case No. ICTR-96-14-T, Trial Judgement, 16 May 2003, ¶ 429.

<sup>127</sup> *Nahimana*, AJ ¶ 897.

<sup>128</sup> *Akayesu*, TJ ¶ 559.

- Directness must be judged on a case-by-case basis in order to determine whether the persons for whom the message was intended immediately grasped the implication of what was being said.<sup>129</sup>
- In some contexts, culture, including the nuances of language, should be considered in determining what constitutes direct and public incitement to commit genocide. For this reason, it may be helpful to examine how a speech was understood by its intended audience in order to determine its true message.
- Incitement may be implicit but nonetheless direct.

There is no need to prove expected result:

- A person can still be liable for direct and public incitement to commit genocide even where such incitement failed to produce the result—or attempt at the result—expected by the perpetrator.
- However where such a causal relationship between the incitement and any genocidal acts exists, it is evidence that the incitement was intended to have that effect.<sup>130</sup>

*Mens rea:*

- The *mens rea* of incitement is that the perpetrator intended “to create by his actions a particular state of mind necessary to commit such a crime in the mind of the person(s) he is so engaging”.<sup>131</sup>

The difference between instigation, and public and direct incitement:

- Instigation is a mode of responsibility; criminal responsibility follows only if the instigation in fact substantially contributed to the crime.
- By contrast, direct and public incitement to commit genocide is itself a crime, and it is not necessary to demonstrate that it in fact substantially contributed to the commission of acts of genocide.
- The second difference is that incitement to commit genocide must have been direct and public, whereas instigation need not be.<sup>132</sup>

#### 6.3.5.4. ATTEMPT TO COMMIT GENOCIDE

The crime of attempt to commit genocide, like the crime of direct and public incitement to commit genocide, is an inchoate offence.<sup>133</sup>

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<sup>129</sup> See *Nahimana*, AJ ¶ 700; *Akayesu*, TJ ¶¶ 557-8; *Niyitegeka*, TJ ¶ 431.

<sup>130</sup> *Akayesu*, TJ ¶ 562; *Nahimana*, TJ ¶¶ 1015, 1029. The line between aiding and abetting and incitement of an actual genocidal act is blurred.

<sup>131</sup> *Kajelijeli*, TJ ¶ 854.

<sup>132</sup> *Nahimana*, AJ ¶¶ 678-9.

It has not been charged or adjudicated at the ICTY or ICTR.

Instead of a charge of attempt, like attempted murder, alternative offences such as violence to life or inhumane acts can be charged.<sup>134</sup>

#### 6.3.5.5. COMPLICITY TO COMMIT GENOCIDE

*Complicity encompasses aiding and abetting genocide as a form of individual criminal responsibility.*

Complicity to commit genocide refers to all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide.<sup>135</sup>

Practical assistance can include identifying people belonging to the group to be killed, transporting victims to execution sites, and providing forces, ammunition and logistical support to the executioners.<sup>136</sup>

A person cannot be convicted of both genocide and complicity in genocide in respect of the same act because he cannot be both the principal perpetrator and accomplice at the same time.<sup>137</sup>

The State Court of BiH has recognised accessory liability as a form of complicity for the crime of genocide where the accused was aware of the genocidal intent of the perpetrator but did not share the intent.<sup>138</sup> See section 6.6.5.3.

Croatian Criminal Code Article 187(b) also criminalises being an accessory to genocide.<sup>139</sup> See section 6.7.4.3.

##### 6.3.5.5.1. COMPLICITY CAN ENCOMPASS AIDING AND ABETTING GENOCIDE

Due in part to the vagueness and ambiguity of the meaning of “complicity” there has been confusion between complicity to commit genocide and aiding and abetting genocide.

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<sup>133</sup> *Ibid.* at ¶ 720.

<sup>134</sup> See Mitar Vasiljević, Case No. IT-98-32-T, Trial Judgment, 29 Nov. 2002, ¶¶ 114, 239.

<sup>135</sup> *Semanza*, TJ ¶ 395.

<sup>136</sup> Elizaphan Ntakirutimana et al., Case No. ICTR-96-10-T and ICTR-96-17-T, Trial Judgement, 21 Feb. 2003, ¶¶ 789, 791, 829.

<sup>137</sup> *Akayesu*, TJ ¶¶ 532, 700; *Musema*, TJ ¶ 175; *Nahimana*, TJ ¶ 1056.

<sup>138</sup> *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶¶ 570-571, 573.

<sup>139</sup> This article relates not only to the crime of genocide, but also to other criminal offences against the values protected by international law referred to in the Criminal Code.

*Complicity encompasses aiding and abetting genocide as a form of individual criminal responsibility.*

The ICTY appeals chamber has dealt with the relationship between complicity in genocide and aiding and abetting genocide as a form of individual criminal responsibility. The appeals chamber held that the terms “complicity” and “accomplice” may encompass conduct that is broader than that of aiding and abetting genocide. Thus, complicity encompasses aiding and abetting genocide as a form of individual criminal responsibility.<sup>140</sup>

The *Krstić* appeals chamber held that when complicity in genocide is charged for conduct broader than aiding and abetting, proof that the accomplice had the specific intent to destroy a protected group is required.<sup>141</sup>

### 6.3.6. ICTR JUDICIAL NOTICE OF GENOCIDE

The ICTR may take judicial notice of facts of common knowledge pursuant to ICTR RPE Rule 94(A), meaning that if a fact qualifies as a “fact of common knowledge” then a chamber shall not require proof of said fact.

“Common knowledge” encompasses facts that are not reasonably subject to dispute, such as commonly accepted or universally known facts including general facts of history or geography, or the laws of nature.<sup>142</sup> Facts that are taken judicial notice do not require proof it does not remove, for example, the need to link the accused to the genocide, or to prove his specific intent<sup>143</sup>).

The ICTR now takes judicial notice of the following facts:

- the existence of Twa, Tutsi and Hutu as protected groups falling under the Genocide Convention
- between 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group.<sup>144</sup>

### 6.3.7. CHARGING GENOCIDE

<sup>140</sup> *Krstić*, AJ ¶¶ 138-9; See also Elizaphan Ntakirutimana et al., Case No. ICTR-96-10-A and ICTR-96-17-A, Appeals Judgement, 13 Dec. 2004, ¶ 371.

<sup>141</sup> *Krstić*, AJ ¶ 142; But see *Semanza*, TJ ¶¶ 394-5 (there is no material distinction between complicity in genocide and the broad definition accorded to aiding and abetting; the *mens rea* requirement for complicity to commit genocide mirrors that for aiding and abetting; “The accused must have acted intentionally and with the awareness that he was contributing to the crime of genocide, including all its material elements.”); *Musema*, TJ ¶ 183; *Akayesu*, TJ ¶¶ 538-545; *Ntakirutimana et al.*, AJ ¶ 364; *Krstić*, AJ ¶ 140.

<sup>142</sup> *Semanza*, AJ ¶ 194.

<sup>143</sup> *Ibid.* at ¶¶ 191-2.

<sup>144</sup> *Karemera*, AC Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, ¶¶ 25, 33-38; *Semanza*, AJ ¶ 192; *Protais Zigiranyirazo*, Case No. ICTR-01-7-T, Trial Judgement, 18 Dec. 2008, ¶ 10.

Some key considerations when charging genocide include:

- An accused could be charged with participating in the commission of genocide in more than one form, as long as each form of alleged criminal responsibility relates to different underlying acts.<sup>145</sup> For example, an accused could be charged as a direct participant and as an accomplice.
- Ethnic cleansing can be charged as genocide as long as it can be shown that the intent of the cleansing campaign was the destruction of the group. Although the crime base for genocide, war crimes and crimes against humanity might overlap with the prohibited genocidal acts, the specific elements of genocide must be established to convict an accused of genocide.
- An accused can be convicted of genocide, war crimes and crimes against humanity for the same underlying acts, but the sentence must reflect the overall conduct of the accused.<sup>146</sup>
- Genocide can be charged under a Joint Criminal Enterprise (JCE) theory of liability.<sup>147</sup> Given that the specific intent can be inferred from circumstantial evidence, an accused can be charged for genocide under JCE as long as the facts from which the state of mind is to be inferred are pleaded.<sup>148</sup> See Module 9 for a discussion of JCE.

#### 6.3.8. ICC

As discussed above, the ICC adopted Article 2 of the Genocide Convention as its definition of genocide. However, it is notable that the drafters of the ICC Statute did not elect to include the terms of Article 3 of the Genocide Convention which sets out five acts of participation. Instead, the forms of participation which attract individual criminal responsibility for this offence are the same as those set out for all other offences under the ICC Statute and enumerated in Article 25 (“Individual criminal responsibility”) of the Statute, including Article 25(3)(e). Moreover, Article 33(2) establishes that superior orders can never be a defence to this crime.

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<sup>145</sup> *Akayesu*, TJ ¶ 532; Jean Kambanda, Case No. ICTR-97-23-T, Trial Judgment, 4 Sept. 1998, ¶ 40(4).

<sup>146</sup> *Zejnil Delalić et al.*, Case No. IT-96-21-A, Appeal Judgment, 20 Feb. 2001, ¶¶ 412 – 413; *Krstić*, AJ ¶¶ 216 – 233.

<sup>147</sup> See, e.g., Radoslav Brđanin, Case No. IT-99-36, Decision on Interlocutory Appeal, AC, 19 March 2004, ¶ 5.

<sup>148</sup> *Simba*, AJ ¶ 264; *Blaškić*, AJ ¶ 219.

## 6.4. 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 with this Module. For that reason, cross references should be made between the international section and 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 the crime of genocide, it is important to start with the provisions in this code and for participants to discuss the relevance and applicability of these provisions.
- 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 application of the laws and procedures being taught.
- Tip to trainers: One effective method to engage the participants is to ask them to analyse one of the most important cases that has occurred in their domestic jurisdiction. Some cases have been cited below, but others may be raised by the participants themselves or provided by the trainers.

## 6.5. SFRY CRIMINAL CODE

The SFRY Criminal Code<sup>149</sup> criminalised genocide. These provisions are included here to provide trainers and participants with the status of the law before the creation of the criminal codes of BiH, Croatia and Serbia. These sections can provide a comparative example of the relevant genocide codes and could provide the basis for prosecution of genocide in some jurisdictions.

### 6.5.1. DEFINITION OF GENOCIDE

Article 141 of the SFRY Criminal Code defined the crime of genocide similar to the ICTY/ICTR and the Genocide Convention. See the text box below.

### 6.5.2. MODES OF LIABILITY

In addition to the modes of liability included in Article 141, ordering or committing, Article 145 criminalised:

- organising a group for the purpose of committing genocide;
- becoming a member of such a group; and
- instigating the commission of genocide and war crimes.

See section 6.3.5.3 on the relationship between instigating genocide and direct and public incitement of genocide as approached by the ICTY. See Module 9 for more information on modes of liability.

#### SFRY Criminal Code

#### Article 141

Whoever, with the intention of destroying a national, ethnic, racial or religious group in whole or in part, orders the commission of killings or the inflicting of serious bodily injuries or serious disturbance of physical or mental health of the group members, or a forcible dislocation of the population, or that the group be inflicted conditions of life calculated to bring about its physical destruction in whole or in part, or that measures be imposed intended to prevent births within the group, or that children of the group be forcibly transferred to another group, or whoever with the same intent commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.

<sup>149</sup> Official Gazette of the SFRY, No. 44/76, 36/77, 34/84, 74/87, 57/89, 3/90, 38/90.

**6.5.3. STATUTE OF LIMITATIONS**

Under Article 100 of the SFRY Criminal Code, the statute of limitations does not apply to prosecution or sentencing for crimes under Articles 141 – 145, or for criminal acts for which a statute of limitations cannot apply under international treaties.

## 6.6. BIH

### *Notes for trainers:*

- This section focuses on BiH law for genocide as well as case law from the State Court of BiH. There is no available recent jurisprudence from the entity courts on genocide.
- It will be useful for participants to compare the law and jurisprudence of BiH with the jurisprudence of ICTY, for example, in relation to specific intent and protected groups.
- The specific intent of this crime will need particular attention and discussion.
- The case involving the accused Stupar and Mitrović provides a useful example to show how the State Court of BiH appeals panel has dealt with proof of specific intent. The findings are described in detail below and can be considered by the participants as a case study.

The following sections describe how the BiH Criminal Code<sup>150</sup> defines the crime of genocide, including the elements and modes of liability, and sets the sentencing limits for each form of participation.

Where appropriate, there is also a comparison to the relevant provisions of the SFRY Criminal Code.

Relevant jurisprudence from the BiH State Court is also discussed. There was no available recent jurisprudence from the entity courts on genocide.

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<sup>150</sup> 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](http://www.sudbih.gov.ba).

### 6.6.1. DEFINITION OF GENOCIDE

BiH Criminal Code Article 171 provides a definition and elements of the crime of genocide, including the required special intent ("with an aim to destroy, in whole or in part, a national, ethnical, racial or religious group") and liability in the form of ordering or committing the crime.

The text of the BiH Criminal Code defines genocide exactly as it is defined in international criminal law. Therefore, reference to Section 6.2 will be useful in reviewing the elements of this crime, especially with regards to the specific intent requirement.

#### **BiH Criminal Code**

#### **Article 171**

Whoever, with an aim to destroy, in whole or in part, a national, ethnical, racial or religious group, orders perpetration or perpetrates any of the following acts:

- a) Killing members of the group;
  - b) Causing serious bodily or mental harm to members of the group;
  - c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - d) Imposing measures intended to prevent births within the group;
  - e) Forcibly transferring children of the group to another group,
- shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

This provision of the BiH Criminal Code is identical in most respects to Article 141 of the SFRY Criminal Code and Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.<sup>151</sup> However, Article 141 of the SFRY Criminal Code includes forcible dislocation of the population as a prohibited act. This could be analogous to the prohibited act of systematic expulsion from homes, considered by the international criminal tribunals as a method of deliberately inflicting conditions of life calculated to bring about the physical destruction, in whole or in part, of the protected group (see section 6.5.1.).

According to the Court of BiH, in order to establish genocide, the evidence must establish:

- the *actus reus* of the offence, which consists of one or several of the acts enumerated under Article 171 [see text box above];

<sup>151</sup> See above 6.4.1.1; see also Stupar et al., 1st inst., p. 52 (p. 54 BCS); Trbić, 1st inst., ¶ 168; Stevanović, 1st inst., p. 42, (p. 39 BCS); Mitrović, 1st inst. p. 43 (p. 45 BCS); Vuković, 1st inst., ¶ 547.

- the *mens rea* of the offence, which is described as the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.<sup>152</sup>

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#### 6.6.2. RECOGNITION OF THE CUSTOMARY STATUS OF THE CRIME OF GENOCIDE

The Court of BiH has held that although the application of BiH Criminal Code Article 171 need not be premised on the customary status of the crime of genocide, it is indisputable that genocide is recognised as a crime under customary international law.<sup>153</sup> In this holding, the Court of BiH relied on the ICJ Advisory Opinion in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Secretary General's Report pursuant to Security Council Resolution 808 and Security Council Resolution 827, as well as jurisprudence from the ICTY and the ICTR.<sup>154</sup>

The trial panel also stressed that:

- BiH Criminal Code Article 171, as well as SFRY Criminal Code Article 141 before it, were adopted as domestic law in order to meet the state's obligation under the Genocide Convention;
- The SFRY took an active role in the drafting of the Genocide Convention and
- The SFRY ratified the Genocide Convention in 1950.<sup>155</sup>

The trial panel concluded that Article 171 was "domestic law [...] derived from international law" and therefore brings with it "international legal heritage [and] the international jurisprudence that applies it" as persuasive authorities.<sup>156</sup> For more on this see relevant parts of sections on domestic application of international criminal law, Module 5.

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#### 6.6.3. SPECIFIC INTENT

According to the Court of BiH and international practice and jurisprudence, the specific intent to destroy, in whole or in part, a protected group makes genocide distinct from other crimes. The Court of BiH has said:

Genocide is distinct from many other crimes because it includes a [...] specific intent, included as an element of the crime, which requires the perpetrator to clearly seek to produce the act charged. [...] A person may only be convicted of genocide if he/she committed one of the enumerated acts with the specific

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<sup>152</sup> *Trbić*, 1st inst., ¶ 191.

<sup>153</sup> See *Stupar et al.*, 1st inst., p. 53 (p. 55 BCS); *Mitrović*, 1st inst. p. 44 (p. 46 BCS); *Stevanović*, 1st inst., p. 43 (Eng.), p. 40; *Trbić*, 1st inst., ¶ 171.

<sup>154</sup> See, e.g., *Stupar et al.*, 1st inst., p. 53 (p. 55 BCS); *Mitrović*, 1st inst. p. 44 (p. 46-47 BCS) and references therein; *Stevanović*, 1st inst., p. 43 (Eng.), p. 40; *Trbić*, 1st inst., ¶ 171.

<sup>155</sup> See, e.g., *Stupar et al.*, 1st inst., p. 53 (p. 56 BCS); *Mitrović*, 1st inst. p. 44 (p. 47 BCS) and references therein; *Stevanović*, 1st inst., p. 43 (Eng.), p. 41; *Trbić*, 1st inst., ¶ 173.

<sup>156</sup> *Ibid.*

intent. The offender is culpable if he/she intended the act committed to extend beyond its actual commission, for the realization of an ulterior motive, which is to destroy, in whole or part, the group of which the victims are part of.<sup>157</sup>

Relying on international practice and jurisprudence, the Court of BiH defined Article 171 genocidal intent as the aim to destroy, in whole or in part, a national, ethnical, racial or religious group.<sup>158</sup>

- Genocidal intent is:*
- 1) *The aim to destroy*
  - 3) *In whole or in part*
  - 4) *A national, ethnical, racial or religious group.*

#### 6.6.3.1. “THE AIM TO DESTROY”

The Court of BiH has also held that the destruction, in whole or in part, of a protected group must be the deliberate and conscious aim of the underlying crime(s).<sup>159</sup> Referring to Article 2 of the Genocide Convention, the court further held that the term ‘aim’ encompasses the intent to destroy the group ‘as such’, and noted that:

[T]he evidence must establish that ‘the proscribed acts were committed against the victims *because of* their membership in the protected group,’ although they need not have been committed ‘*solely* because of such membership’.<sup>160</sup>

According to the Court of BiH, the “destruction” element is established if the perpetrator intended to achieve the physical or biological destruction of the group—*i.e.*, the destruction of its material existence.<sup>161</sup>

*“Destruction” is established if the perpetrator intended to achieve the physical or biological destruction of the group—*i.e.*, the destruction of its material existence.*

This destruction can be accomplished through many means, which constitute the prohibited

<sup>157</sup> *Trbić*, 1st inst., ¶ 192, .

<sup>158</sup> See, e.g., *Stupar et al.*, 1st inst., p. 56 (p. 59-60 BCS) and references therein; *Mitrović*, 1st inst. p. 47 (p. 50 BCS) and references therein; *Trbić*, 1st inst., ¶ 186.

<sup>159</sup> *Stupar et al.*, 1st inst., p. 56 (p. 60 BCS); *Mitrović*, 1st inst. p. 47 (p. 51 BCS); *Trbić*, 1st inst., ¶ 187; See also *Vuković*, 1st inst., ¶ 568.

<sup>160</sup> *Ibid.*

<sup>161</sup> *Stupar et al.*, 1st inst., p. 56-57 (p. 60-61 BCS); *Mitrović*, 1st inst. p. 48 (p. 51-52 BCS); *Trbić*, 1st inst., ¶ 188; See also *Vuković*, 1st inst., ¶ 569.

acts listed in Article 171 of the BiH Criminal Code and the Geneva Convention.<sup>162</sup>

Genocidal intent can be established even if there is no proof that the group was in fact destroyed.<sup>163</sup> While destruction in fact may certainly provide evidence of genocidal intent, it is not necessary to establish that the perpetrator, alone or together with others, successfully realised his aim to destroy the group.<sup>164</sup>

**Note:** Failed attempts at genocide do not relieve the perpetrators of responsibility for their acts of genocide.<sup>165</sup>

#### 6.6.3.2. “IN WHOLE OR IN PART”

Regarding the element “in whole or in part”, the Court of BiH concurred with the reasoning of the ICTY appeals chamber and the ILC that the intention to destroy a group “in part” requires the intention to destroy a “substantial part of that group”.<sup>166</sup>

The specific intent to destroy a part of the group may extend only to a limited geographic area.<sup>167</sup>

Factors indicating the ‘substantiality’ of the part of the group include:

- Numeric size;
- The relative size of the part to the total size of the group;
- Its prominence within the group;
- Whether the part of the group is emblematic of the overall group;
- Whether the part is essential to survival of the group; and
- The beliefs and perceptions of the perpetrator regarding the substantiality of a part of the group.<sup>168</sup>

*The part of the group in question must objectively be a substantial part of the group at large*

However, the Court of BiH also noted that the part of the group in question must objectively be a substantial part of the group at large.<sup>169</sup>

In *Milos Stupar et al.* case, the defence argued that the group of Muslims in Kravica did not constitute a substantial or essential part of the overall group

<sup>162</sup> *Ibid.*

<sup>163</sup> *Mitrović*, 1st inst., p. 96 (p. 114 BCS) and references therein.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Stupar et al.*, 1st inst., p. 57 (p. 61 BCS); *Mitrović*, 1st inst., p. 48 (p. 52 BCS); *Trbić*, 1st inst., ¶ 189; *Vuković*, 1st inst., ¶ 556.

<sup>167</sup> *Stupar et al.*, 1st inst., p. 57 (p. 61 BCS); *Mitrović*, 1st inst., p. 48 (p. 52 BCS); *Trbić*, 1st inst., ¶ 189.

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

of 40,000 men, women and children which was the total number of the Muslim population in the territory of the Municipality of Srebrenica, according to the 1991 Census.<sup>170</sup> The appellate panel held:

[T]he element of *substantiality* does not necessarily refer to the quantitative aspect, as claimed by the defense [...] One of the aspects pointed out in the trial Verdict is that the element of *substantiality* implies: *a substantial part of a protected group*. The Trial Panel found that, in the circumstances surrounding the relevant time, given the roles of men and women in the community, the destruction of the male population would have a greater impact on the ultimate destruction of the group than the killing of the female population. The Appellate Panel finds these arguments to be reasonable.<sup>171</sup>

#### 6.6.3.3. “A NATIONAL, RACIAL, ETHNICAL, OR RELIGIOUS GROUP”

Protected groups include national, ethnical, racial or religious groups. The Court of BiH relied on the ICTY and the ICTR jurisprudence in holding that whether a group amounts to a protected group should be determined on a case-by-case basis. It held:

Whether a group is a protected group should ‘be assessed on a case-by-case basis by reference to the *objective* particulars of a given social or historical context, and by the *subjective* perceptions of the perpetrators.’ The protected group can be subjectively identified ‘by using as a criterion the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics’.<sup>172</sup>

#### 6.6.3.4. HOW DO YOU PROVE SPECIFIC INTENT?

Concurring with the findings in *Akayesu* and other ICTR and ICTY cases, the Court of BiH trial panel has noted that intent constitutes a mental factor that is very difficult to establish.

Thus, without a confession from the accused, intent can be inferred on:

- A case-by-case basis, from
- A certain number of presumptions of fact; and
- The circumstances surrounding the accused’s acts,

<sup>170</sup> *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶ 375.

<sup>171</sup> *Ibid.* at ¶ 376 (emphasis in original).

<sup>172</sup> *Stupar et al.*, 1st inst., p. 57-58 (p. 61-62 BCS); *Mitrović*, 1st inst., p. 49 (p. 52-53 BCS); *Trbić*, 1st inst., ¶ 190.

- As demonstrated by the material evidence submitted to the court.<sup>173</sup>

*Genocidal intent can be inferred from presumptions of fact.*

A general intent to commit a prohibited act combined with an overall awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient to establish the crime of genocide.<sup>174</sup>

Even assuming that the accused knew that the underlying act would lead to a result connected to a genocidal plan of others, the evidence must be reviewed to determine whether the accused possessed the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.<sup>175</sup>

Regardless of the extent of the atrocity that occurred, the court cannot enter a conviction for the crime of genocide without sufficient evidence of specific genocidal intent as required by law.<sup>176</sup>

#### 6.6.3.4.1. TEST FOR PROVING SPECIFIC INTENT

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In order to examine the existence of the genocidal intent, the trial panel in *Milorad Trbić* case used a test developed by the panel in *Miloš Stupar et al. (Kravica)* case and expanded it to include a review of evidence regarding<sup>177</sup>:

- The general context of events in which the perpetrator acted including any plan to commit the crime;
- The perpetrator's knowledge of that plan; and
- The specific nature of the perpetrator's acts including the following:
  - No acts to the contrary for genocidal intent (*Kravica* case, Second Instance Verdict);
  - Single mindedness of purpose;
  - Efforts to overcome resistance of victims;
  - Efforts to overcome the resistance of other perpetrators;
  - Efforts to bar escape of victims;
  - Persecutory cruelty to victims;
  - On-going participation within the act itself;
  - Repetition of destructive acts *i.e.* more than one act or site;
- The acts themselves (The *Kravica* test):
  - the number of victims;

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<sup>173</sup> *Trbić*, 1st inst., ¶ 193, 197, 201; *Stupar et al.*, 1st inst., p. 58 (p. 62 BCS); See also *Mitrović*, 1st inst., p. 49 (p. 53 BCS).

<sup>174</sup> *Trbić*, 1st inst., ¶ 194 and references therein.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.* at ¶ 202; *Stupar et al.*, 1st inst., p. 118 *et seq.* (p. 140 *et seq.* BCS).

- the use of derogatory language toward members of the targeted group;
- the systematic and methodical manner of killing;
- the weapons employed and the extent of bodily injury;
- the methodical way of planning;
- the targeting of victims regardless of age;
- the targeting of survivors; and
- the manner and character of the perpetrator's participation.

As held by the trial panel in *Milorad Trbić*, when taken together, an analysis of these factors can either establish the perpetrator's intent beyond a reasonable doubt or develop evidence that would mitigate and/or negate this finding.<sup>178</sup>

#### 6.6.3.4.2. CREATING REASONABLE DOUBT ABOUT SPECIFIC INTENT

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Apart from these factors, however, there are also questions that the court needs to examine in order to look at the commission and the intent "from an opposite view". This includes an analysis of, *inter alia*, actions that would tend to create reasonable doubt as to the intent of accused.

For example, the court should consider whether the accused:

- showed any resistance to the plan;
- engaged in any deliberate acts which could interfere with the plan or assist in its failure;
- tried to save a life;
- showed any lack of awareness as to what the plan was for;
- showed remorse; and
- took any action to seek reconciliation.<sup>179</sup>

The panel also noted that these last factors would not necessarily *preclude* possessing the requisite intent at the time, but could raise issues as to the certainty of the intent at the time the crime was committed.<sup>180</sup>

Moreover, it must be understood that the totality of the evidence is what is decisive—there is no one controlling factor, nor are all factors necessary or even relevant.<sup>181</sup>

#### 6.6.3.4.3. CASE STUDY: KNOWLEDGE OF PLAN TO COMMIT GENOCIDE NOT ENOUGH

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The trial panel in *Stupar et al.* found some of the accused guilty of genocide as co-perpetrators, because:

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<sup>178</sup> *Trbić*, 1st inst., ¶ 202.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*, emphasis added.

<sup>181</sup> *Ibid.*

- they had knowledge of a genocidal plan;
- because they had participated in killing members of the group with intent; and
- they shared the genocidal intent.<sup>182</sup>

However, the appellate panel held that, although the trial panel reasonably found that the accused possessed knowledge of the genocidal plan and intended to kill members of the protected group, the trial panel had erroneously found that the accused also acted with a specific intent to destroy in part or in whole the national, ethnic, racial or religious group of people.<sup>183</sup> Such specific intent was not proven beyond a reasonable doubt from the established state of facts.<sup>184</sup> The appellate panel stressed:

[T]he Accused's knowledge of the genocidal plan and the genocidal intent of others is not sufficient to find them guilty of the criminal offence of Genocide. Entering a conviction for Genocide, one of the most severe crimes against mankind, requires evidence that the Accused themselves possessed the genocidal intent, rather than the mere knowledge of such an intent of others"<sup>185</sup>

The appellate panel acknowledged that the accused participated in the killings committed in an extremely cruel and inhumane manner and noted the following factors:

- The accused persisted in performing the task started;
- The assignment of tasks set beforehand (who was to keep guard, who was to shoot, by which turn, who was to refill[...].);<sup>186</sup>
- Their commitment to the execution of the task they were assigned;
- The number and age of the victims;
- The weapons employed; and
- The slurs used.

According to the appellate panel, these factors indicated that although the accused eagerly performed their task, they could not be equalled to others who took the unlawful actions with the specific aim to destroy in part or in whole the protected group.<sup>187</sup>

The appellate panel then turned to assessing the evidence of the relevant witnesses:

This witness stated in his testimony that, upon reaching Bratunac and when searching the terrain, they realized that their task would be to "kill the men and separate those infirm". According to this witness, even while in Srednje, some of

<sup>182</sup> *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶¶ 531-535.

<sup>183</sup> *Ibid.* at ¶ 538.

<sup>184</sup> *Ibid.* at ¶ 552.

<sup>185</sup> *Ibid.* at ¶ 548; See also Court of BiH, Petar Mitrović, Case No.X-KRZ-05/24-1, Second Instance Verdict, 7 Sept. 2009, ¶ 239.

<sup>186</sup> *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶ 552.

<sup>187</sup> *Ibid.*

the members of the Detachment protested against their transfer to Bratunac. This witness himself was thinking of running away and he stated that the reason for their protests was the fact that they did not want to meet with people they knew, as they supposed that they would be killed.

Both witness S4 and the Accused Mitrović similarly confirmed that, in the evening on that day there was a rotation, that is, their platoon was replaced, as Mitrović alleged, by volunteers from Serbia. This is important because it was found in the course of the proceedings that the killing of the Bosniaks detained in the warehouse lasted throughout the night which means that the Accused participated only in the first part of the execution, lasting for one hour and a half and then other persons continued to kill the remaining survivors. Furthermore, witness S4 also stated that, before they left the location, their commander Trifunović said that what had happened was terrible, that many people got killed and that, eventually, they would be the ones to “pay”. The witness confirms that he was present at the funeral of Krsto Dragičević and the lunch after the funeral, and he stated that those present commented on what had happened saying that it was regrettable, that it should not have happened and that someone would have to be held accountable for that.

The Appellate Panel finds the foregoing facts important in determining the non-existence of the genocidal intent of the Accused [...].<sup>188</sup>

The appellate panel also stressed the importance of the *in dubio pro reo* principle and concluded that certain presented facts (protests against leaving for Bratunac, concerns about what had been done and in which manner) raised doubts about the reasonableness of the finding of the trial panel that the accused possessed the requisite genocidal intent.<sup>189</sup>

The appellate panel in this case found that, based on the evidence presented and the established facts, it was not possible to find that the accused held the intent required beyond a reasonable doubt.<sup>190</sup>

A similar conclusion was reached by the appellate panel for the accused Petar Mitrović. In that case, the appellate panel concurred with the trial panel’s finding on the existence of the intent of the accused to kill members of the protected group and that the accused was aware of the existence of the genocidal plan which was subsequently executed.<sup>191</sup>

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<sup>188</sup> *Ibid.* at ¶ 553-555.

<sup>189</sup> *Ibid.* ¶ 555-556, 561; see also Mitrović, 2nd inst., ¶ 246-247.

<sup>190</sup> Stupar et al., 2nd inst. of 9 Sept. 2009, ¶ 562 (in this case, the appeals chamber found the accused guilty as accessories to genocide, not as co-perpetrators, see below: 6.3.3.2.3.3.).

<sup>191</sup> Mitrović, 2nd inst., ¶¶ 228-230, 235.

The trial panel had inferred that the accused, apart from having knowledge of the genocidal plan and the intent to kill the members of the protected group, also possessed a special intent to destroy in part or in whole the national, ethnic, racial or religious group of people. The appellate panel, however, found that this inference had not been proven beyond a reasonable doubt on the basis of the established facts.<sup>192</sup>

The trial verdict states that:

- More than 1000 persons were executed in the Kravica warehouse;
- The accused took part in those killings;
- He knew that people he was shooting at were Bosniaks who had lived in the protected zone of Srebrenica; and that
- There were verbal exchanges between the prisoners and the shooters containing ethnic and religious slurs and curses.<sup>193</sup>

The trial panel emphasised:

The killing proceeded in a methodical manner. Three, including Mitrović, were assigned to keep guard at the back of the warehouse to prevent any of the victims from escaping through the window openings along the back wall. Other members of the Detachment who had marched the column to the warehouse, were ordered to make a semi-circle in front of the warehouse. The right section of the warehouse, where the column was deposited and which was not secured, was the side first targeted; while the left side, which was secured, was targeted second. Between the massacre in the right side and the massacre in the left, the shooters took a break. The manner in which they targeted the rooms was also organized. In the first room, the first to fire was the operator of the M84 machine gun, shooting from the side of the door opening. He was followed by the other shooters who cross-fired from both sides of the opening into and through the room of dying men. The shooters would change places at the doorways in order to reload their weapons. Clips were being refilled by one person designated for this task from additional ammunition supplies on the site. At the conclusion of the shooting, the Accused Džinić and at least one other man threw hand grenades into the room full of dead and dying men. The grenades came from two boxes that had been supplied to the site. After a break during which the men relaxed, the Accused resumed the killing and commenced firing on the Bosniaks held in the left side of the warehouse, in the same order and in the same manner. Throughout, the three Accused Mitrović, together with Branislav Medan and Slobodan Jakovljević, at the rear of the warehouse continued to ensure that no prisoner escaped death. The task was undertaken in

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<sup>192</sup> *Ibid.* at ¶¶ 228-230, 235.

<sup>193</sup> *Ibid.* at ¶ 231 (appellate panel's reference to the trial verdict).

a calculated and thorough way. The Accused, together with others, remained at the warehouse until officially relieved by another unit sent for that purpose.<sup>194</sup>

The trial panel found:

From the manner and character of their participation, it is apparent that the Accused did not simply intend to kill the victims; they intended to destroy them. The acts in which the Accused participated for around an hour and a half were the most physically destructive acts imaginable, committed and experienced at close range, within the sight and smell of the carnage and of the sounds of the dying. Trifunović and Radovanović, members of the Second Detachment, stood at the entrance of the rooms and emptied one clip after another into the mutilated bodies of the dying men piled on the floor. The Accused and members of the Second Detachment, Mitrović, Jakovljević and Medan, stood at their stations at the open windows at the other side of the rooms witnessing the slaughter, guns ready to prevent any attempts by the victims to escape. The Platoon member, Džinić, lobbed grenade after grenade at close range into the masses of dying human beings. All persisted in their task for a total of around an hour and a half, in a systematic and methodical way, and even took a break after the first room, before starting all over again to reduce the living men in the second room to the condition of those in the first.

To persist in imposing this level of devastation for the length of time that they did manifests a determination to destroy that has few equals.<sup>195</sup>

The appellate panel, however, found that all of the foregoing facts and circumstances indicated that there actually existed a genocidal plan to destroy in part or in whole a group of the Bosniak people and that the accused did possess knowledge of the existence of the referenced plan. The appellate panel concluded:

Based on the evidence presented with regard to his state of mind and his mental attitude towards the action, the Appellate Panel finds that, based on the presented evidence, it is not possible to conclude beyond a reasonable doubt that the Accused possessed or shared the special intent to destroy in part or in whole the protected group of Bosniaks. [...]

The evidence of the Accused's knowledge of the genocidal plan and genocidal intent of others is not sufficient to find him guilty of the criminal offence of genocide. Entering a conviction for genocide, one of the most severe crimes

<sup>194</sup> *Ibid.* at ¶ 232 (appellate panel's reference to the trial verdict).

<sup>195</sup> *Ibid.* at ¶ 234 (appellate panel's reference to the trial verdict).

against mankind, requires evidence that the Accused himself possessed the genocidal intent, rather than the mere knowledge of such intent by others.<sup>196</sup>

#### 6.6.3.5. TWO TYPES OF MENS REA

The crime of genocide under BiH Criminal Code Article 171 incorporates two distinct sets of elements:

- The specific intent to commit genocide and the nature of the group targeted; and
- The elements of the underlying prohibited acts.<sup>197</sup>

*Genocide requires proof of two distinct mens rea, the mens rea of the underlying act and the genocidal mens rea.*

The Court of BiH Trial Panel has held that while the underlying acts of genocide can be characterised as the *actus reus* of genocide, these underlying acts also have both *actus reus* and *mens rea* elements.<sup>198</sup>

Thus, according to the Court of BiH:

- Genocide requires distinct inquiries into the general elements of genocide AND the elements of the underlying act.
- The crime of genocide requires proof of two distinct *mens rea*, the *mens rea* of the underlying act and the genocidal *mens rea*.<sup>199</sup>

According to the Court of BiH, prohibited genocidal acts are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences are likely to result.<sup>200</sup>

The individual underlying acts do not require premeditation. The only consideration is that the act should be done in furtherance of the genocidal intent, so that for the crimes of genocide to occur, the *mens rea* must be formed *prior* to the commission of the prohibited genocidal acts.<sup>201</sup>

<sup>196</sup> *Mitrović*, Appellate Verdict, ¶¶ 228-230, 235, 239; See also, *Vuković*, 1st inst., ¶577.

<sup>197</sup> See, e.g., *Stupar et al.*, 1st inst., p. 54 (p. 56 BCS); *Mitrović*, 1st inst., p. 45 (p. 47 BCS); *Trbić*, 1st inst., ¶ 174.

<sup>198</sup> See, e.g., *Stupar et al.*, 1st inst., p. 54, fn 26 (p. 56, fn26 BCS); *Mitrović*, 1st inst., p. 45 fn 25 (p. 47 fn 25 BCS); *Trbić*, 1st inst., ¶ 171, fn 93.

<sup>199</sup> See, e.g., *Stupar et al.*, 1st inst., p. 54, fn 26 (p. 56, fn26 BCS); *Mitrović*, 1st inst., p. 45 fn 25 (p. 47 fn 25 BCS); *Trbić*, 1st inst., ¶ 174, fn 93, ¶ 194.

<sup>200</sup> *Trbić*, 1st inst., ¶ 194.

<sup>201</sup> *Ibid.* at ¶ 196.

#### 6.6.3.6. IF SPECIFIC INTENT CANNOT BE PROVEN

*If the specific intent required for genocide cannot be proven, an accused could be found guilty as an accessory to genocide*

If the specific intent required for genocide cannot be proven, an accused could be found guilty as an accessory to genocide in accordance with Article 31 of the BiH Criminal Code,<sup>202</sup> and not as co-perpetrator.<sup>203</sup> See section 6.6.5.3, below.

#### 6.6.4. PROHIBITED ACTS

The section below includes interpretation by the Court of BiH of prohibited genocidal acts. Only killing members of a group, causing serious bodily or mental harm to members of the group and forcible transfer as a method of material destruction are discussed, as there was no available jurisprudence on other prohibited genocidal acts.

The Court of BiH has noted that the physical or biological destruction of a protected group can be accomplished through a variety of means, including but not limited to killings, which are outlined in the Geneva Convention and the laws of BiH.<sup>204</sup> The court also noted that these means can be committed singly or in combination.<sup>205</sup>

##### 6.6.4.1. KILLING MEMBERS OF THE GROUP

Pursuant to Article 171(a) of the BiH Criminal Code, the *actus reus* of genocide includes “killing members of the group”. The Court of BiH Trial Panel concluded that, at a minimum, “killing members of the group” includes acts of murder as otherwise defined in domestic law.<sup>206</sup>

In particular, the trial panel concluded that Article 171(a) prohibits “depriving another person of his life” as also prohibited as a crime against humanity and a war crime pursuant to Articles 172(1)(a), 174(a) and 175(a) of the BiH Criminal Code.<sup>207</sup>

The Court of BiH Trial Panel identified the elements of the crime of murder as:

- the deprivation of life; and

<sup>202</sup> BiH CC, Art. 31.

<sup>203</sup> Stupar et al., 2nd inst. of 9 Sept. 2009 ¶ 565; see also Mitrović, 2nd inst., ¶¶ 256, 261; Trbić, 1st inst., ¶ 792; Vuković, 1st inst., ¶¶ 580-581.

<sup>204</sup> Stupar et al., 1st inst., p. 56-57 (p. 60-61 BCS); Mitrović, 1st inst., p. 48 (p. 51-52 BCS); Trbić, 1st inst., ¶ 188; See also Vuković, 1st inst., ¶ 569.

<sup>205</sup> Stupar et al., 1st inst., p. 56-57 (p. 60-61 BCS); Mitrović, 1st inst., p. 48 (p. 51-52 BCS); Trbić, 1st inst., ¶ 188; See also Vuković, 1st inst., ¶ 569.

<sup>206</sup> See, e.g., Stupar et al., 1st inst., p. 54 (p. 56 BCS); Mitrović, 1st inst., p. 45 (p. 47 BCS); Stevanović, 1st inst., p. 44 (p. 41; Trbić, 1st inst., ¶ 176.

<sup>207</sup> See, e.g., Stupar et al., 1st inst., p. 54 (p. 56-57 BCS); Mitrović, 1st inst., p. 45 (p. 47 BCS); Stevanović, 1st inst., p. 44 (p. 41 BCS); Trbić, 1st inst., ¶¶ 176, 778.

- the direct intention to deprive of life, as the perpetrator was aware of his act and wanted the act to be perpetrated.<sup>208</sup>

*The qualification “members of a group” does not imply *per se* that the number of victims must be large or significant.*

The qualification “members of a group” does not imply *per se* that the number of victims must be large or significant.<sup>209</sup> Relying on ICTR jurisprudence, the Court of BiH trial panel held that, in theory, the killing of only one victim can still amount to an act constituting the *actus reus* of the crime of genocide.<sup>210</sup> The qualification “members of the group” requires that the victims of the killings must be members in fact of the national, ethnical, racial or religious group that the perpetrator sought to destroy in whole or in part.<sup>211</sup>

Concealment of killings can also be a part of this crime. As found by the trial panel in the *Milorad Trbić* case, burying and re-burying victims of a mass execution can also comprise “killing members of a group”.<sup>212</sup> The panel endorsed the finding of the ICTY that burial of victims of mass executions right after they are killed comprises part of the killing operation.<sup>213</sup> The court went on to find that re-burials also comprise killing:

The Panel [...] regards the further reburials as part of the killing operation as well. Indeed, in the present case, the only difference between the burials of July 1995 and the reburials of September 1995 is one of time; for the remaining part, the acts and the intent are the same.<sup>214</sup>

#### 6.6.4.2. CAUSING SERIOUS BODILY OR MENTAL HARM TO MEMBERS OF THE GROUP

Pursuant to Article 171(b) of the CC of BiH the *actus reus* of genocide includes “causing serious bodily or mental harm to members of the group”.

Relying on ICTY jurisprudence, the trial panel in *Milorad Trbić* case held that whether or not the harm allegedly

*Inhuman treatment, torture, rape, sexual abuse and deportation are among the acts that may cause serious bodily or mental injury.*

<sup>208</sup> See, e.g., *Stupar et al.*, 1st inst., p. 54 (p. 57 BCS); *Mitrović*, 1st inst., p. 45 (p. 48 BCS) and references therein; *Stevanović*, 1st inst., p. 44 (p. 41 BCS); *Trbić*, 1st inst., ¶¶ 177, 778.

<sup>209</sup> See, e.g., *Stupar et al.*, 1st inst., p. 54 (p. 57 BCS); *Mitrović*, 1st inst., p. 45 (p. 48 BCS); *Stevanović*, 1st inst., p. 44 (p. 41 BCS); *Trbić*, 1st inst., ¶¶ 178, 780.

<sup>210</sup> See, e.g., *Stupar et al.*, 1st inst., p. 54 (p. 57 BCS) and references therein; *Mitrović*, 1st inst., p. 45 (p. 48 BCS) and references therein; *Stevanović*, 1st inst., p. 44 (p. 41 BCS) and references therein; *Trbić*, 1st inst., ¶¶ 178, 780.

<sup>211</sup> See e.g. *Stupar et al.*, 1st inst., p. 54 (p. 57 BCS) and references therein; *Mitrović*, 1st inst., p. 45 (p. 48 BCS) and references therein; *Stevanović*, 1st inst., p. 44 (p. 42 BCS) and references therein; *Trbić*, 1st inst., ¶¶ 179, 780.

<sup>212</sup> *Trbić*, 1st inst., ¶ 180.

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*

caused by the perpetrator is “serious” should be assessed on a case by case basis and with due regard for the particular circumstances.

Moreover, the panel held that the harm need not be permanent or irremediable, but it must be harm that results in a “grave and long-term disadvantage to [a] person’s ability to lead a normal and constructive life”.<sup>215</sup>

Bodily harm refers to harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses.<sup>216</sup>

Mental harm refers to more than minor or temporary impairment of mental faculties.<sup>217</sup>

The panel in that case also relied on the ICTY and ICTR jurisprudence to find that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury and that the harm must be inflicted intentionally.<sup>218</sup>

#### 6.6.4.3. FORCIBLE TRANSFER

The Court of BiH has also found, relying on ICTY jurisprudence, that forcible transfer is a method of causing the physical or biological destruction required to prove genocide.

The forcible transfer must be “conducted in such a way that the group can no longer reconstitute itself”.<sup>219</sup>

#### 6.6.5. MODES OF LIABILITY

This section describes the various modes of liability for genocide under the BiH Criminal Code. There is no available jurisprudence from the courts in BiH to illustrate how these modes of liability are interpreted by judges. However, reference to the modes of liability under the Genocide Convention and how they are interpreted by the international tribunals could be helpful. See section 6.3.5 for more information on modes of liability for genocide under ICL and Module 9 for more information on modes of liability in general.

*Committing, ordering, organizing/joining a group to commit genocide, instigating, planning, and aiding and abetting genocide are all punishable modes of liability*

<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid.*

<sup>217</sup> *Ibid.*

<sup>218</sup> *Ibid.*

<sup>219</sup> *Stupar et al.*, 1st inst., p. 56-57 (p. 60-61 BCS); *Mitrović*, 1st inst., p. 48 (p. 51-52 BCS); *Trbić*, 1st inst., ¶ 188; see also, *Vuković*, 1st inst., ¶ 569.

#### 6.6.5.1. ORGANISING/JOINING GROUP OR INSTIGATING GENOCIDE

Apart from “ordering perpetration” or “perpetrating” any of the acts constituting the crime of genocide, the following are also punishable under BiH Criminal Code Article 176:

- “organizing” a group of people for the purpose of perpetrating genocide;
- “becoming a member” of such a group; as well as
- “calling on or instigating” the perpetration of genocide.<sup>220</sup>

This provision encompasses some of the various criminal modes of liability found in international criminal law, including instigating and possibly joint criminal enterprise. For more on this see Module 9, as well as discussion above in Section 6.4.1.2.

The same article provides for a lower sentence or pardoning from punishment a person who exposes the group before he has perpetrated a criminal offence in its ranks or on its account.<sup>221</sup>

Article 176 is almost identical to SFRY Criminal Code Article 145<sup>222</sup> (see section 6.5.2). See also Module 9.

#### 6.6.5.2. PLANNING, ORDERING, PERPETRATING AND AIDING AND ABETTING

Under Article 180, a person who planned, ordered, perpetrated or otherwise aided and abetted in the planning, preparation or execution of genocide shall be guilty of the criminal offence.<sup>223</sup>

Although no such specific provision existed in the SFRY Criminal Code, some forms of participation, such as ordering and perpetrating, were already incorporated into Article 141 of the SFRY Criminal Code, which defined genocide (see section 6.5.1.). Other forms of participation such as planning and aiding and abetting were to be found in the general provisions dealing with co-perpetrators and accessories to a crime (Articles 22-24 of the SFRY Criminal Code). See Module 9 for a discussion of how these modes of liability are defined in ICL.

#### 6.6.5.3. ACCESSORY LIABILITY

An accessory, as a form of complicity, represents the intentional support of a criminal offence committed by another person.<sup>224</sup> That is, it includes actions that facilitate the perpetration of a criminal offence by another person.<sup>225</sup>

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<sup>220</sup> BiH CC, Art. 176.

<sup>221</sup> BiH CC, Art. 176(3).

<sup>222</sup> See above, under 6.4.1.2.

<sup>223</sup> BiH CC, Art. 180(1).

<sup>224</sup> See *Stupar et al.*, 2nd inst. of 9 Sept. 2009 ¶ 567; see *Mitrović*, Appellate Verdict, ¶ 258; see also *Vuković*, 1st inst., ¶ 579.

<sup>225</sup> *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶ 567; see also *Mitrović*, Appellate Verdict, ¶ 258.

As the appellate panel in *Stupar et al.* case concluded:

If a person is only aware of the genocidal intent of the perpetrator, but the person did not share the intent, the person is an accessory to genocide.

In the present case, considering that all of the essential elements of the criminal offence of Genocide have been satisfied, except for the genocidal intent (as stated above), the Appellate Panel finds that the actions of the Accused constituted the acts of aiding/accessory in the perpetration of the referenced criminal offence.<sup>226</sup>

The appellate panel reached a similar conclusion for accused *Petar Mitrović*, holding that “A person who does not share the intent to commit genocide, but who intentionally helps another to commit genocide, is an accessory to genocide.”<sup>227</sup>

#### 6.6.5.4. OFFICIAL CAPACITY

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.<sup>228</sup>

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.<sup>229</sup>

The fact that a subordinate committed genocide does not relieve his or her superior of culpability if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

If a person is charged for genocide as a superior, in accordance with Article 180(2) of the BiH Criminal Code, all three elements required for responsibility of a superior must be proven beyond reasonable doubt.<sup>230</sup>

For more on superior responsibility, see Module 10.

<sup>226</sup> *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶¶ 570-571, 573.

<sup>227</sup> *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶¶ 261-262, 264.

<sup>228</sup> BiH CC, Art. 180(1).

<sup>229</sup> BiH CC, Art. 180(3).

<sup>230</sup> Miloš Stupar, Case No.X-KRZ-05/24-3, Second Instance Verdict, 28 April 2010, ¶¶ 39-40

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#### 6.6.6. STATUTE OF LIMITATIONS

Under Article 19 of the BiH Criminal Code, criminal prosecution and execution of a sentence for the crime of genocide are not subject to the statute of limitations.<sup>231</sup>

This provision is also similar to SFRY Criminal Code Article 100 setting out non-applicability of the statute of limitations for the crime of genocide (see section 6.5.3.)<sup>232</sup>

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<sup>231</sup> BiH CC, Art. 19 (Criminal Offences not subject to the Statute of Limitations): Criminal prosecution and execution of a sentence are not subject to the statute of limitations for criminal offences of genocide, crimes against humanity and war crimes, or for other criminal offences that, pursuant to international law, are not subject to the statute of limitations.

<sup>232</sup> See above, 6.4.1.3.

## 6.7. CROATIA

*Notes for trainers:*

- The following sections describe how the Criminal Code of the Republic of Croatia<sup>1</sup> defines the crime of genocide, including the elements and modes of liability, and sets the sentencing limits for each form of participation.
- A review of the elements of the crime of genocide as interpreted by the courts in Croatia in the cases *Koprivna*, tried *in absentia*, and *Mikluševci*, partially tried *in absentia*, is also given below (other cases were reviewed but are not included in the materials because they were still pending before first instance courts at the time of writing).
- These two decisions provide good comparative case studies for participants to examine with respect to specific intent.

### 6.7.1. DEFINITION OF GENOCIDE

Article 156 of the Special Part of Criminal Code of the Republic of Croatia<sup>233</sup> defines the crime of genocide, its elements, forms of participation in the perpetration of the crime, and it sets the sentencing limits for each form of participation.

The text of the Criminal Code of the Republic of Croatia defines genocide generally as it is defined in international criminal law. Therefore, reference to Section 6.2 will be useful in reviewing the elements of this crime, especially with regards to the specific intent requirement.

#### Croatian Criminal Code, Article 156

Whoever, with intent to destroy in whole or in part a national, ethnical, racial or religious group, orders the killing of members of such a group, or orders serious bodily injury to be inflicted on them, or orders the physical or mental health of the members of such a group to be impaired, or orders the forcible displacement of the population, or conditions of life to be inflicted on the group which are calculated to bring about its physical destruction in whole or in part, or orders measures to be imposed which are intended to prevent births within the group, or orders the forcible transfer of children of the group to another group, or whoever with the same intent commits any of the foregoing acts, shall be punished by imprisonment for not less than ten years or by long-term imprisonment.

<sup>233</sup> Republic of Croatia Criminal Code, Official Gazette, No. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 71/06, 110/07, 152/08, consolidated version, taken from [www.legalis.hr](http://www.legalis.hr).

This provision of the Criminal Code of the Republic of Croatia is identical to Article 141 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (“SFRY”).<sup>234</sup>

## 6.7.2. SPECIFIC INTENT

This section provides a good comparative case of how the Croatian courts have dealt with specific intent for genocide. *Koprivna* is an example where the court entered a conviction of genocide apparently without making a finding on specific intent. This case can be contrasted with genocide cases at the ICTY, where the elements of specific intent are discussed at great length, and participants can discuss their views of the courts’ cursory approach. *Mikluševci* is an example of a case where the Supreme Court upheld the acquittal of two accused because the accused did not have specific genocidal intent. The trial panel also changed its verdict of a charge of genocide to a charge for war crimes. The findings and rationale of this court should be compared with the *Koprivna* judgement.

### 6.7.2.1. KOPRIVNA CASE

In the *Koprivna* case,<sup>235</sup> the trial panel inferred the existence of a plan of ethnic cleansing from objective elements of the accuseds’ behaviour, which the panel relied on due to lack of direct evidence. The court added that, regardless of the evidence, the existence of such a plan was “a notorious, generally known fact”.<sup>236</sup>

From this inference, the panel further inferred that:

With regard to their subjective relationship towards the committed act, it was established that [the accused], being aware of their act and wanting it to be committed, acted in the aforementioned manner only because their aim was to make survival impossible for the Croatian and other non-Serb ethnicity inhabitants of the occupied territory of the Republic of Croatia, in the specific case in the villages of Sodolovci and Koprivna.

On the basis of the above-mentioned, therefore, stems that the accused Stojan Živković, Milan Miljković, Zoran Stojčić and Srecko Radovanović, with the intent to destroy certain ethnic group in part, met all the substantial elements (of objective and subjective nature) of the crime of genocide as set out in Art. 119

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<sup>234</sup> For text of Art. 141 of the SFRY CC see *above*, under 6.4.1.1.

<sup>235</sup> Osijek County Court of the Republic of Croatia, Koprivna (Stojan Živković et al.), Case No. I Kz-865/01-3, First Instance Verdict, 12 Dec. 1994; Supreme Court of the Republic of Croatia, Koprivna (Stojan Živković et al.), Case No. I Kz-865/01-3, Second Instance Verdict, 14 Jan. 2004.

<sup>236</sup> Živković et al., 1st inst., p. 9.

of the OKZ RH, and in connection to Art. 20 of the OKZ RH committed the crime as co-perpetrators [...].<sup>237</sup>

The trial panel dismissed the defence arguments that the accused did not have “some special genocidal intent” because their acts were conducted exclusively for the safety of the allegedly targeted group.<sup>238</sup> Without elaborating on the issue of intent, the panel dismissed the arguments on the grounds “it was a notorious fact that on 3 January 1992 a truce came into force and that in that part of the occupied territory of the Republic of Croatia (villages Sodolovci and Koprivna) there were no more war operations”.<sup>239</sup>

The appellate panel concurred with the trial panel’s inferences, supporting the conclusion of the trial panel that one accused was aware of the existence of the ethnic cleansing plan in part because the accused did not “appeal the fact that the trial panel found the plan to be a notorious fact, and notorious is something known to all.” The appellate panel also neglected to make any findings on specific intent, but based its conclusion that an accused acted “not only in awareness, but with a will for the acts containing elements of genocide” on the fact that the accused:

- had been aware of the fact that a co-accused had been arrested for a week and removed from his position for disagreeing with the establishment of camps for Croats and Hungarians; and
- the displacement was not enacted to protect Croat and Hungarians because not all civilians had been displaced and those that had were displaced without secure travel and accommodation conditions but under the threat of arms through a mined territory.<sup>240</sup>

#### 6.7.2.2. MIKLUŠEVCI CASE

In the *Mikluševci* case, the state attorney charged the accused with the crime of genocide. In its initial indictment in *Mikluševci* case, the Osijek county State Attorney’s Office charged 35 accused with the crime of genocide.<sup>241</sup> The indictment was amended several times, including the amendment of 20 March 2007, by which the legal qualification of the crime charged was modified into war crimes against civilians instead of the crime of genocide.<sup>242</sup> It was again

<sup>237</sup> *Ibid.* (unofficial translation of the quote).

<sup>238</sup> *Ibid.* at p. 10.

<sup>239</sup> *Ibid.*

<sup>240</sup> *Ibid.* at p. 5-6 (unofficial translation of the quote).

<sup>241</sup> *Mikluševci* case, Osijek county State Attorney’s Office Indictment No. KT-37/93 of 29 April 1996, available at Center for Peace, Non-Violence and Human Rights, [http://www.centar-za-mir.hr/index.php?page=article\\_sudjenja&trialId=22&article\\_id=48&lang=en](http://www.centar-za-mir.hr/index.php?page=article_sudjenja&trialId=22&article_id=48&lang=en)

<sup>242</sup> *Mikluševci* case, Vukovar county State Attorney’s Office Indictment no. K-DO-71/01 of 20 March 2007, available at Center for Peace, Non-Violence and Human Rights, [http://www.centar-za-mir.hr/index.php?page=article\\_sudjenja&trialId=22&article\\_id=48&lang=en](http://www.centar-za-mir.hr/index.php?page=article_sudjenja&trialId=22&article_id=48&lang=en)

amended on 13 April 2007, when the legal qualification of the crime charged was changed back into the crime of genocide.<sup>243</sup>

On 5 February 2009, the War Crimes Council of the Vukovar County Court acquitted two accused of charges of genocide, while the other accused (some of whom were tried *in absentia*) were found guilty of war crimes against civilians, even though they had been charged with genocide.<sup>244</sup>

The Supreme Court of the Republic of Croatia upheld the first-instance court verdict in its entirety.<sup>245</sup> With regard to finding the accused guilty of war crimes against civilians, the Supreme Court stressed that the court was not bound by the legal qualification of the crime charged and that the first instance court did not overstep the description of the acts of the accused as charged.<sup>246</sup>

On appeal, the state attorney had argued that the first instance court erred in its factual findings, as the crime in question amounted to genocide and not a war crime against civilians.<sup>247</sup> The Supreme Court disagreed with the state attorney:

[A] genocide concerns every criminal enterprise which, by using certain means, aims to destroy a certain group of people, in its entirety or in part. It is decisive that the act or acts have to be directed against a national, ethnic, racial or religious group. Therefore, the perpetrator of this crime chooses its victims primarily on the basis of their affiliation to one of the above-mentioned groups which he/she wants to destroy. It is the group as such that is targeted, not the individual members of that group. Of course, individuals are always the victims of a crime, but the ultimate victim of a genocide is the group and the group is the primary aim. As a destruction of a group necessarily demands committing the crime against its members, *i.e.* individuals who are the members of the group, the acts against the individuals represent the means to accomplish the primary aim which is contained in [the] destruction of [a] national, ethnic, racial or religious group. That is what makes genocide different from a crime against [a] civilian population. Although there are highly set out elements of discrimination within both crimes, in the case of a crime against humanity a

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<sup>243</sup> *Mikluševci* case, Vukovar county State Attorney's Office Indictment no. K-DO-71/01 of 13 April 2007, available at Center for Peace, Non-Violence and Human Rights, [http://www.centar-zamir.hr/index.php?page=article\\_sudjenja&trialId=22&article\\_id=48&lang=en](http://www.centar-zamir.hr/index.php?page=article_sudjenja&trialId=22&article_id=48&lang=en)

<sup>244</sup> *Mikluševci* case, War Crimes Council of the Vukovar county court Verdict no.K-7/01, available at Center for Peace, Non-Violence and Human Rights, [http://www.centar-zamir.hr/index.php?page=article\\_sudjenja&trialId=22&article\\_id=48&lang=en](http://www.centar-zamir.hr/index.php?page=article_sudjenja&trialId=22&article_id=48&lang=en)

<sup>245</sup> SC of Croatia, *Mikluševci*, Judgment No. I Kz 683/09-8 of 17 Nov. 2009, available at Center for Peace, Non-Violence and Human Rights, [http://www.centar-zamir.hr/index.php?page=article\\_sudjenja&trialId=22&article\\_id=48&lang=en](http://www.centar-zamir.hr/index.php?page=article_sudjenja&trialId=22&article_id=48&lang=en)

<sup>246</sup> *Mikluševci*, Case No. I Kz 683/09-8, 2nd Instance Verdict, 17 Nov. 2009, p. 4.

<sup>247</sup> *Ibid.* at p. 7.

perpetrator commits crimes against an individual whose affiliation to a group is neither decisive nor a qualifying element as it is the case with genocide.”<sup>248</sup>

The Supreme Court found the first instance court did not err when it held that inhuman treatment towards Mikluševci inhabitants and their forcible displacement had not been committed with the aim to destroy in whole or in part the ethnic group of Rusyns.<sup>249</sup>

The trial panel had found that the inhabitants were expelled because some members of their families left Mikluševci immediately prior to the occupation of the village, thereby expressing their view they were against that government, or they declared their affiliation to a different political option.<sup>250</sup>

The Supreme Court held those were inhuman acts that culminated in displacement of the civilians in violation of the rules of international law and not the acts aimed at the destruction of Rusyns group.<sup>251</sup> Furthermore, the Supreme Court agreed with the first instance court’s reasoning that one of the facts supporting the view that it was not genocide was the fact that some of the accused were Rusyns who, despite their ethnicity, were not expelled because they declared their affinity to the new government and, as a result, held various functions in the village during the occupation.<sup>252</sup>

In relation to the state attorney’s appeal regarding the acquittal of two of the accused, the Supreme Court upheld the first instance court finding that there were no firm, clear and undoubtful indicators that the two accused committed the crime of genocide.<sup>253</sup>

### 6.7.3. PROHIBITED ACTS

A review of the elements of the crime of genocide as interpreted by the courts in Croatia in the cases of *Koprivna*, tried *in absentia*, and *Mikluševci*, partially tried *in absentia*, is given below.

#### 6.7.3.1. GENOCIDE BY FORCIBLE DISLOCATION

In the *Koprivna* case,<sup>254</sup> tried *in absentia*, the accused were found guilty as charged in accordance with Article 119 OKZ RH for committing genocide by forcible dislocation of population of Croatian and Hungarian ethnicity.<sup>255</sup>

<sup>248</sup> *Ibid.* at p. 7-8 (unofficial translation of the quote).

<sup>249</sup> *Ibid.* at p. 8.

<sup>250</sup> *Ibid.*

<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid.*

<sup>253</sup> *Ibid.* at p. 12.

<sup>254</sup> Živković *et al.*, 1st inst.; Živković *et al.*, 2nd inst.

<sup>255</sup> Živković *et al.*, 1st inst., p. 2.

Referring to Article 119 of the Criminal Code, the trial panel noted that the *acts reus* consists of violation or endangering bio-psychological integrity of the protected group members. Even one of the enlisted acts against a single group member was sufficient for all necessary elements of genocide to be met, provided those were committed with intent to destroy a protected group in whole or in part.<sup>256</sup>

The trial panel found that the accused were guilty of genocide by forcible dislocation of 22 Croatians and one Hungarian.<sup>257</sup>

The appellate panel, relying on Article 119 of the OKZ RH and the Genocide Convention, concurred with the trial panel's findings and concluded:

[G]enocide encompasses not only the acts of torture and mental or physical abuse, but also other inhumane humiliating conducts, including with certainty persecution as well.<sup>258</sup>

The appellate panel also held that it is not important if not all of the participants in the crime were accused and tried for genocide.<sup>259</sup>

The appellant argued that according to Article 17 of the Additional Protocol II of the Geneva Conventions, displacement of the population from the zone of combat activities was allowed if it is conducted for the safety of the civilian population.<sup>260</sup> In relation to that, the appellate panel noted:

The appellant's reference to Art. 17 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) is arbitrary and out of contents of the presented evidence, established decisive facts and other important facts, considering that the Protocol sets out a ban on dislocating civilian population for reasons connected to the conflict, unless it is justified by the reasons of security of the population or imperative military reasons, and in case when such dislocation needs to be conducted, a duty to undertake measures for giving shelter to the population under satisfactory conditions of accommodation, hygiene and health protection, security and food, while paragraph 2 of that Art. sets out a ban on forcing the population to leave their territory for reasons in relation to the conflict. The established state of facts shows that members of Croatian and Hungarian ethnicity were displaced, not the members of Serb ethnicity, which was in connection with the established general plan of so-called

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<sup>256</sup> *Ibid.* at p. 9.

<sup>257</sup> *Ibid.*

<sup>258</sup> Živković et al., 2nd inst., p. 5 (unofficial translation of the quote).

<sup>259</sup> *Ibid.*

<sup>260</sup> *Ibid.* at p. 3.

ethnic cleansing of temporary occupied territory of the Republic of Croatia and annexation of that territory to territory of co-called “Greater Serbia”. Therefore, the appellant based the appeal on a different view of decisive facts than those established in the impugned judgement.<sup>261</sup>

#### 6.7.4. MODES OF LIABILITY

The Croatian Criminal Code includes several provisions on modes of liability for genocide, including organising/joining a group with the purpose of committing genocide, instigating genocide, and aiding and abetting. These provisions are similar to provisions in the SFRY Code and other codes from the region. Croatia also includes a unique provision on modes of liability for genocide, accessory liability.

The Croatian Criminal Code provides for superior responsibility for the commission of genocide, and one court has commented on the distinction between genocide by commission and by omission.

##### 6.7.4.1. ORGANISING/JOINING GROUP OR INSTIGATING GENOCIDE

Article 187<sup>262</sup> is similar to Article 145 of the SFRY Criminal Code, in that it criminalises “organising” a group for the purpose of perpetrating genocide, “becoming a member of such a group and “calling or instigating” the perpetration of such crime.<sup>263</sup>

This provision encompasses some of the various criminal modes of liability found in international criminal law, including instigating and possibly joint criminal enterprise. For more on this, see Module 9, as well as discussion above, section 6.5.2.

##### 6.7.4.2. AIDING AND ABETTING

Article 187(a)<sup>264</sup> of the Croatian Criminal code criminalises aiding and abetting genocide. The *actus reus* includes removing obstacles, making a plan or arrangement with others or creating conditions to enable the direct perpetration of genocide. These acts are punishable for one to five years in prison.

This article also criminalises directly or indirectly providing or collecting means with the intent that they will be used to commit genocide. This crime is punishable for one to five years in

<sup>261</sup> Živković *et al.*, 2nd inst., p. 4 (unofficial translation of the quote).

<sup>262</sup> This article relates not only to the crime of genocide, but also to other criminal offences against the values protected by international law referred to in the Criminal Code.

<sup>263</sup> For text of Art. 145 of the SFRY CC, see *above*, under 6.5.2.

<sup>264</sup> This article relates not only to the crime of genocide, but also to other criminal offences against the values protected by international law referred to in the Criminal Code.

prison, regardless of whether the means were actually used or whether genocide was attempted.

Although this specific provision was not set out in the SFRY Criminal Code, it was envisaged in the general part of the SFRY Code, namely provisions dealing with an accessory to a crime. For example, Article 24 of the SFRY Criminal Code sets out that aiding a crime could consist of:

- giving advice or instructions as to how to perpetrate a criminal offence;
- supplying the perpetrator with means for perpetrating the criminal offence;
- removing obstacles to the perpetration of criminal offence; and
- promising, prior to the perpetration of the criminal offence, to conceal the existence of the criminal offence, to hide the perpetrator, means used for perpetrating the criminal offence traces of the criminal offence, or goods acquired by perpetration of the criminal offence.

This article, however, did not limit the forms of aiding to the mentioned acts only; it only set out some of the most common examples.<sup>265</sup>

See Module 9 for a discussion of how these and other similar modes of liability are defined in ICL.

#### 6.7.4.3. ACCESSORY LIABILITY

Article 187(b)<sup>266</sup> criminalises being an accessory to genocide.

The SFRY Code in its general part provided for the punishment of concealing the existence of the criminal offence, hiding the perpetrator, means used for perpetrating the criminal offence, traces of the criminal offence, or goods acquired by perpetration of the criminal offence, in the event that these actions were promised prior to the perpetration of the crime or during the perpetration of the crime.<sup>267</sup> Actions undertaken after the completion of the crime and without prior promise, to be punishable under the SFRY Criminal Code, need to be provided for in the special part of the SFRY Code, as was the case with criminal acts against the foundations of the socialist self-managing social system and the security of the SFRY.<sup>268</sup>

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<sup>265</sup> Commentary of the SFRY Criminal Code, pp. 136-137.

<sup>266</sup> This article relates not only to the crime of genocide, but also to other criminal offences against the values protected by international law referred to in the Criminal Code.

<sup>267</sup> See above, Art. 24 of the SFRY Criminal Code; See also Commentary of the SFRY Criminal Code, p. 137.

<sup>268</sup> Ibid. at pp. 137-138.

**Croatian Criminal Code**  
**Article 187(b)**

Whoever conceals, gives food, clothing, money or in some other way takes care of the perpetrator of the crime of genocide of this Code in order to make it more difficult to discover and arrest the perpetrator shall be punished by imprisonment to six months to three years.

This provision does not relate to a person married to the perpetrator, person living with the perpetrator in an extramarital cohabitation, lineal relatives, siblings, adoptive parent and adoptee or their spouses or persons living in an extramarital cohabitation.

Inasmuch as Article 187(b) of the Republic of Croatia Criminal Code envisages punishment for these acts without prior promise to the perpetrator of genocide, it differs from the SFRY Criminal Code regulation which did not envisage in its special part punishment for acts in relation to the crime of genocide.

#### 6.7.4.4. SUPERIOR RESPONSIBILITY

Article 167a<sup>269</sup> provides for superior responsibility for, *inter alia*, the crime of genocide.<sup>270</sup>

For more on this in relation to the SFRY Criminal Code, see relevant parts of sections on domestic application of international criminal law, Module 5, and superior responsibility, Module 10.

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<sup>269</sup> This article relates not only to the crime of genocide, but also to crimes against humanity, war crimes, war of aggression and other crimes laid down in articles 156-167 of the Criminal Code.

<sup>270</sup> Command Responsibility - Art 167a:

(1) A military commander or another person acting in effect as a military commander or as a civilian in superior command or any other person who in a civil organization has the effective power of command or supervision shall be punished for the criminal offences referred to in Articles 156 through 167 of this Code if he knew that his subordinates had committed these criminal offences or were about to commit them and failed to take all reasonable measures to prevent them.

(2) The persons referred to in paragraph 1 of this Art who had to know that their subordinates were about to commit one or more criminal offences referred to in Articles 156 through 167 of this Code and failed to exercise the necessary supervision and to take all reasonable measures to prevent the perpetration of these criminal offences shall be punished by imprisonment to one to eight years.

(3) The persons referred to in paragraph 1 of this Art who do not refer the matter to competent authorities for investigation and prosecution against the perpetrators shall be punished by imprisonment to one to five years.

#### 6.7.4.5. GENOCIDE BY COMMISSION AND OMISSION

*Genocide can be perpetrated by both active conduct (commission) and by failing to meet a duty to act (omission).*

In the *Koprivna* case, the trial panel and appellate panel both held that genocide can be perpetrated by both active conduct (commission) and by failing to meet a duty to act (omission).

The findings relating to omission resemble superior responsibility, although neither court seemed to rely on the elements of superior responsibility. See Module 10 for more information of superior responsibility.

The trial panel held that this act, as well as any other criminal act, can be perpetrated both by an active conduct (commission) and by omitting to undertake an act for which a person had a duty to undertake (omission).<sup>271</sup> With regard to two of the accused, the trial panel inferred their participation in displacement from their omission to prevent such acts.<sup>272</sup> The panel reached this conclusion on the basis of civilian and political positions of the accused in Sodolovac and Koprivna, respectively.<sup>273</sup> The panel appeared to rely on the *de jure* position alone to establish superior responsibility.

On appeal, the appellants argued that the crime of genocide cannot be perpetrated by omission. The appellate panel noted that Article 119, as part of Chapter XV of the Criminal Code—criminal acts against humanity and international law—has a blanket character as it relies on international law, including the UN General Assembly Resolution on the Crime of Genocide of 1946 and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.<sup>274</sup>

The appellate panel noted that Article 3 of the Convention envisaged as punishable the crime of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide, while Article 4 of the Convention envisaged that persons committing genocide shall be punished regardless of whether they are constitutionally responsible rulers, public officials or private individuals.<sup>275</sup>

Without further linking the Convention provisions to the appeal argument, the appellate panel went on to say that under Article 20 of the Criminal Code, a crime can be committed by co-perpetration, that it was undisputedly established there existed a plan of ethnic cleansing, that the two accused were “*via facti*” the highest local military and civilian authority bodies and that as such they had the authority and duties of managing the police and paramilitary units on their territory. The appellate panel concluded that “by omitting to control and knowing about the

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<sup>271</sup> Živković *et al.*, 1st inst., p. 8.

<sup>272</sup> *Ibid.*

<sup>273</sup> *Ibid.*

<sup>274</sup> Živković *et al.*, 2nd inst., p. 3-4.

<sup>275</sup> *Ibid.*

existence of the aforementioned plan of cleansing and its purpose, they have undoubtedly participated in the realization of such a plan, and therefore met all the required objective and subjective elements of the crime of genocide set out in Article 119 of OKZ RH".<sup>276</sup>

#### Croatian Criminal Code

##### Article 174(4)

Whoever with the aim from paragraph 3 of this Art. (spreading racial, religious, sexual, national and ethnic hatred or hatred based on color or sexual orientation or with the aim of disparagement) distributes through a computer system or in some other way makes available to the public materials by which he/she denies, considerably mitigates, approves or justifies the crime of genocide or crime against humanity shall be punished by imprisonment of six months to three years.

#### 6.7.5. MITIGATING, APPROVING, OR JUSTIFYING GENOCIDE

Although no such specific provision existed in the SFRY Criminal Code in relation to the crime of genocide, the SFRY Criminal Code was familiar with the crime of racial and other forms of discrimination.<sup>277</sup> As part of that SFRY Criminal Code provision, a punishment was envisaged for any person who violates the basic human rights recognised by the international community on the basis of racial, skin colour and national differences as well as ethnic background.<sup>278</sup> Moreover, a punishment was provided for any person spreading ideas on superiority of one race over another or advocating racial hatred or instigating racial discrimination.<sup>279</sup>

#### 6.7.6. STATUTE OF LIMITATIONS

Under Articles 18<sup>280</sup> and 24<sup>281</sup>, the statute of limitations regarding the application of the criminal legislation and the execution of punishment does not apply to the crime of genocide.

This provision is also similar to Article 100 SFRY Criminal Code provision setting out non-applicability of statute of limitations for the crime of genocide.<sup>282</sup>

<sup>276</sup> *Ibid.*

<sup>277</sup> SFRY Criminal Code, Art. 154.

<sup>278</sup> *Ibid.*, Art. 154(1).

<sup>279</sup> *Ibid.*, Art. 154(3).

<sup>280</sup> This article relates not only to the crime of genocide, but also to other crimes set down in Articles 157, 157a, 158, 159, 160 and other criminal acts for which statute of limitations is not applicable under international law.

<sup>281</sup> This article relates not only to the crime of genocide, but also to other crimes set down in Articles 157, 157a, 158, 159, 160, 167a and other criminal acts for which statute of limitations is not applicable under international law.

## 6.8. SERBIA

### Notes for trainers:

- This section describes genocide as defined by the Criminal Code of the Republic of Serbia. To date, there have been no charges of genocide brought before a Serbian court, and hence no relevant Serbian jurisprudence on genocide is available.

### 6.8.1. DEFINITION OF GENOCIDE

In its special part, the Criminal Code of the Republic of Serbia defines the crime of genocide, its elements and sets the sentencing limits.

#### **Serbian Criminal Code Article 370**

Whoever with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such, orders killing or causing serious bodily or mental harm to members of the group, or deliberately inflicts on the group conditions of life calculated to bring about its extinction in whole or in part, or imposes measures intended to prevent births within the group or forcibly transfers children of the group to another group or who with same intent commits one of the aforementioned acts, shall be punished by minimum five years imprisonment or thirty to forty years' imprisonment.

Article 370 of the Criminal Code of the Republic of Serbia, which defines the crime of genocide, is identical in most respects to Article 141 of the Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY") and is similar to Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.<sup>282</sup>

However, Article 141 of the SFRY Criminal Code includes forcible dislocation of the population as a prohibited act. This could be analogous to the prohibited act of systematic expulsion from homes, considered by the international criminal tribunals as a method of deliberately inflicting on the group conditions of life calculated to bring about the physical destruction, in whole or in part, of the protected group.

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<sup>282</sup> See above under 6.4.1.3.

<sup>283</sup> For text of Art. 141 of the SFRY Criminal Code see above, under 6.4.1.1.

## 6.8.2. MODES OF LIABILITY

Article 375<sup>284</sup> also criminalises:

- conspiracy with another to commit genocide (paragraph 1);
- organizing a group in order to commit genocide as well as becoming a member of such a group (paragraphs 2 and 4);
- organizing an organised criminal group in order to commit genocide as well as becoming a member of such a group (paragraphs 3 and 5); or
- calling for or inciting to commission of genocide (paragraph 7).

The offender specified in paragraphs 1, 4 and 5 of this article who discloses the conspiracy, the group or the organised criminal group prior to committing genocide as part of the group or for the group, or an offender specified in paragraphs 2 and 3 of this article who prevents commission of genocide, may receive mitigation of punishment.

This provision is similar to a provision from the SFRY Criminal Code, namely article 145, which set out as punishable “organising” a group for the purpose of perpetrating genocide, “becoming a member of such a group and “calling or instigating” the perpetration of such crime.<sup>285</sup>

See Module 9 for a discussion of how these and other similar modes of liability are defined and applied in international criminal law.

### 6.8.2.1. SUPERIOR RESPONSIBILITY

Article 384 provides for superior responsibility for, *inter alia*, the crime of genocide.<sup>286</sup>

<sup>284</sup> This article relates not only to the crime of genocide, but to the other crimes set down in Articles 370-374 of the Criminal Code.

<sup>285</sup> For text of Art. 145 of the SFRY Criminal Code see above, under 6.5.2.

<sup>286</sup> Failure to Prevent Crimes against Humanity and other Values Protected under International Law – Art. 384:

(1) A military commander or a person *de facto* exercising such function, knowing that forces which he commands and control are preparing or have commenced committing offences specified in article 370 through 374, article 376, articles 378 through 381 and article 383 of this Code, fails to undertake measures that he could have taken and was obliged to undertake to prevent commission of such crimes, and this results in actual commission of that crime, shall be punished by the penalty prescribed for such offence.

(2) Any other superior who knowing that persons subordinated to him are preparing or have commenced committing of offences specified in article 370 through 374, article 376, articles 378 through 381 and article 383 of this Code, fails to undertake measures that he could have taken and was obliged to undertake to prevent commission of such crimes, and this results in actual commission of that crime, shall be punished by the penalty prescribed for such offence.

With regard to the relationship between this Article and the SFRY Criminal Code provisions, see Module 10, as well as relevant parts of Module 5 regarding domestic application of international criminal law and superior responsibility.

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#### 6.8.3. STATUTE OF LIMITATIONS

Under Article 108<sup>287</sup>, the statute of limitations regarding the application of the criminal legislation and the execution of punishment, does not apply to the crime of genocide.

This provision is similar to Article 100 SFRY Criminal Code provision setting out non-applicability of statute of limitations for the crime of genocide.<sup>288</sup>

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(3) If the offence specified in paragraphs 1 and 2 of this article is committed by negligence, the offender shall be punished by imprisonment of six months to five years.

<sup>287</sup> This article relates not only to the crime of genocide, but to the other crimes provided for in Articles 370-375 of the Criminal Code.

<sup>288</sup> See above under 6.4.1.3.

## 6.9. FURTHER READING

### 6.9.1. BOOKS

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