

**INTERNATIONAL CRIMINAL LAW  
& PRACTICE  
TRAINING MATERIALS**

# **CRIMES AGAINST HUMANITY**

*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 7:

# CRIMES AGAINST HUMANITY

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”

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## 7. CRIMES AGAINST HUMANITY

### 7.1. INTRODUCTION

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

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

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#### 7.1.1. MODULE DESCRIPTION

This Module covers crimes against humanity under international law. It provides an overview of the general contextual elements of crimes against humanity as well as the specific prohibited underlying acts that constitute crimes against humanity. Thereafter, the Module outlines the ways in which crimes against humanity are prosecuted in the domestic jurisdictions of BiH, Croatia and Serbia.

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#### 7.1.2. MODULE OUTCOMES

At the end of this Module, participants should understand:

- The elements of crimes against humanity;
- The concepts of:
  - An “attack” against a civilian population,
  - A widespread attack, and
  - A systematic attack;
- The definition of a civilian population;
- How a link or nexus can be drawn between the attack on a civilian population and the acts of the accused;

- How an attack against a civilian population can be proved;
- The prohibited acts that constitute crimes against humanity;
- The distinction between the acts prohibited by the ICTY/ICTR Statutes and the ICC Rome Statute;
- The differences between genocide, war crimes and crimes against humanity;
- The difference between murder and extermination;
- The differences between sexual slavery and enforced prostitution;
- The distinction between specific intent, required for persecution, and the intent to commit all underlying acts amounting to crimes against humanity; and
- How crimes against humanity are or can be charged in national jurisdictions of BiH, Croatia and Serbia.



*Notes for trainers:*

- This Module deals with both the contextual elements for crimes against humanity and the specific prohibited underlying acts that constitute crimes against humanity. It is important for participants to understand what the general contextual requirements are for crimes against humanity, namely that these crimes are committed as part of a widespread or systematic attack on any civilian population. It is these features which distinguish crimes against humanity from war crimes and ordinary crimes. It must be emphasised that isolated acts are excluded from crimes against humanity. It is only when criminal conduct forms part of a widespread or systematic attack that it can be characterised as a crime against humanity.
- In addition to these contextual elements, participants must discuss and understand which particular prohibited acts, if committed as part of an attack against a civilian population, will constitute crimes against humanity.
- Questions to develop the participants' understanding of these matters are, for example:
  - What are the main features of a widespread or systematic attack?
  - What constitutes a civilian population? Does it make any difference if there are armed forces mixed in with the population?
  - What role does an accused need to play in relation to the widespread or systematic attack?
  - Do the underlying prohibited acts (*i.e.* murder, torture, rape, etc.) themselves have to be widespread or systematic? What relationship must there be between the underlying acts and the attack?
- In order to encourage participants to engage with these questions, they could be referred to the case study, in which a number of different acts were allegedly committed against civilians. Participants should be encouraged to discuss whether these acts could be charged as crimes against humanity and what evidence would be required to prove such crimes based on the factual summary and any other evidence that may need to be identified.
- In order to achieve these objective you will find "Notes to trainers" in boxes inserted at the beginning of important sections. These notes will highlight the main issues for trainers to address, identify questions which the trainers can use to direct the participants to focus on the important issues and to stimulate discussion and 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.

## 7.2. INTERNATIONAL LAW AND JURISPRUDENCE

### 7.2.1. OVERVIEW

Genocide and war crimes have been codified in treaties, whereas crimes against humanity (CAH) have evolved under customary international law.<sup>1</sup> Crimes against humanity were first charged under the Nuremberg Tribunal Charter.<sup>2</sup> The definition of CAH was set out in the Charter and the Nuremberg judgement. The UN General Assembly endorsed the concept of CAH in 1946.<sup>3</sup> The content of crimes against humanity has evolved since WW II through the jurisprudence of the ICTY, ICTR and ICC.

The statutes of the international tribunals generally reflect CAH as they existed under customary international law. However, there are some differences in the contextual requirements for CAH in the Statutes of the various international tribunals, which will be discussed in more detail below.

#### Article 5/3 of the ICTY/R Statute Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

<sup>1</sup> See ROBERT CRYER, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE, 230 – 233 (2010); or COMMENTARY ON THE ROME STATUTE OF THE CRIMINAL COURT, 121 – 122 (Otto Triffterer ed., 1999) for a background to the development of crimes against humanity.

<sup>2</sup> Yale Law School, Charter of the International Military Tribunal, Constitution, *available at* <http://avalon.law.yale.edu/imt/imtconst.asp> (accessed 24 June 2011).

<sup>3</sup> Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(I), UN Doc A/64/Add.1 (Dec. 11, 1946).

**Article 7 of the ICC Rome Statute**  
**Crimes against humanity**

For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

## 7.2.2. ELEMENTS OF CRIMES AGAINST HUMANITY UNDER INTERNATIONAL LAW

*Notes for trainers:*

- This section deals with the general contextual elements that apply to all crimes against humanity. These are the essential elements which must be established before any particular act can constitute a crime against humanity.
- The next section will deal with each of the particular underlying acts that may be regarded as crimes against humanity if the contextual elements are satisfied.
- The main contextual elements that are discussed in this section are:
  - The meaning of an “attack” against the civilian population;
  - The requirement of a nexus between the attack and the acts of the accused;
  - The definition of the civilian population;
  - The definition of the terms “widespread” and “systematic”; and
  - The knowledge required on the part of the accused of such an attack.
- In order to most effectively discuss these issues with participants, they should use the case study to consider whether on the facts of that case the contextual elements could be established. For example, participants could discuss whether the attack on the restaurant could be regarded as forming part of a widespread or systematic attack against a civilian population. They could also discuss whether the acts of the accused were sufficiently related to any attack against a civilian population and whether it could be shown that he knew about such an attack.

A crime against humanity is committed when:

- The accused commits a prohibited act ;
- That is part of:
  - an “attack”
  - which is “widespread or systematic” and
  - “directed against any civilian population”;
- And when there is a link or “nexus” between the acts of the accused and the attack.

The ICTY Statute requires that the attack be committed in the context of an armed conflict,<sup>4</sup> and the ICTR Statute requires that the attack have a discriminatory element.<sup>5</sup> Neither of these

<sup>4</sup> However, the ICTY has held that under customary international law, a connection with an armed conflict is not required. Duško Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 Oct. 1995, ¶ 141, *See also* Kaing Guek Eav, Case No. 001/18-07-2007/ECCC/TC, Trial Judgement, 26 July 2010, ¶ 218.

<sup>5</sup> *See infra*, section 7.2.2.1.7.

elements are required by the definition of crimes against humanity under customary international law. At the ICC neither of these additional elements is required.<sup>6</sup>

### 7.2.2.1. CONTEXTUAL ELEMENTS

*A crime against humanity involves the commission of certain prohibited acts committed as part of a widespread or systematic attack directed against a civilian population.*

A crime against humanity involves the commission of certain prohibited acts committed as part of a widespread or systematic attack directed against a civilian population. When committed within this context, what would have been an “ordinary” domestic crime, such as murder, becomes a crime against humanity.

#### 7.2.2.1.1. AN ATTACK

A person commits a crime against humanity when he or she commits a prohibited act that forms part of an attack.<sup>7</sup>

Factors to consider when determining whether an “attack” against a civilian population has taken place include:

*A person commits a crime against humanity when he or she commits a prohibited act that forms part of an attack.*

- Were there discriminatory measures imposed by the relevant authority?
- Was there an authoritarian takeover of the region where the crimes occurred?
- Did the new authority in fact establish “governmental” structures?
- Did summary arrests, detention, torture, rape, sexual violence or other crimes take place?
- Did massive transfers of civilians to camps take place?
- Was the “enemy population” removed from the area?<sup>8</sup>

<sup>6</sup> It should be noted that while the attack need not be discriminatory, the crime of persecution requires that the act amounting to persecution be carried out on discriminatory grounds.

<sup>7</sup> See, e.g., Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Judgement, 2 Sept. 1998, ¶ 205.

<sup>8</sup> Dragan Nikolić, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, TC, IT-94-2-R61, 20 Oct. 1995, ¶ 27.

The concepts “attack” and “military attack” differ. A crime against humanity can occur when there is no armed conflict.<sup>9</sup> Thus, an attack is not limited to the conduct of armed hostilities or use of armed force. CAH can include mistreatment of a civilian population. The attack could also precede, outlast or continue during an armed conflict, without necessarily being part of it.<sup>10</sup> The attack does not need to involve the military or violent force.<sup>11</sup>

*The attack does not need to involve the military or violent force.*

*There must be at least “multiple” victims or acts to be considered an attack directed against a civilian population.*

ICTY and ICTR jurisprudence, and the Rome Statute, provide that there must be at least “multiple” victims or acts to be considered an attack directed against a civilian population.<sup>12</sup> The acts can be of the same type or different.<sup>13</sup>

At the ICC, an attack is “a campaign or operation carried out against the civilian population”.<sup>14</sup>

#### 7.2.2.1.2. DIRECTED AGAINST ANY CIVILIAN POPULATION

“Directed against” requires that the civilian population must be the primary target of the attack, not just an incidental target.<sup>15</sup> Thus, the primary object of the attack is “any civilian population”.<sup>16</sup>

“Any” highlights the fact that CAH can be committed against both enemy nationals and crimes by a state’s own subjects.<sup>17</sup>

“Civilian” refers to non-combatants.

“Population” refers to a larger body of victims and crimes of a collective nature.<sup>18</sup> It is not required that an entire population of an area be targeted. It is enough to show that a certain number of individuals were targeted in the course of the attack, or that individuals were targeted in such a way that demonstrates that

*It is not required that an entire population of an area be targeted.*

<sup>9</sup> Except at the ICTY, where crimes against humanity must be committed “in armed conflict, whether international or internal in character”. ICTY Statute, Art. 5. This requirement was abandoned in the ICTR and ICC Statutes.

<sup>10</sup> Dragoljub Kunarac et al., Case No. IT-96-23-A, Appeal Judgement, 12 June 2002, ¶ 86.

<sup>11</sup> *Akayesu*, TJ ¶¶ 676 – 684.

<sup>12</sup> Rome Statute of the International Criminal Court, Art. 7(2)(a); Dragoljub Kunarac et al., Case No. IT-96-23-T, Trial Judgement, 22 Feb. 2001, ¶ 415; Milorad Krnojelac, Case No. IT-97-25-T, Trial Judgement, 15 March 2002, ¶ 54.

<sup>13</sup> Clément Kayishema et al., Case No. ICTR-95-I-T, Trial Judgement, 21 May 1999, ¶ 122.

<sup>14</sup> “ICC Elements of Crimes” ICC-ASP/1/3 (adopted 9 Sept. 2002, entered into force 9 Sept. 2002), Introduction to Art. 7 (ICC Elements of Crimes).

<sup>15</sup> Tihomir Blaškić, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, ¶ 106.

<sup>16</sup> *Kunarac et al.*, AJ ¶ 91.

<sup>17</sup> CRYER, *supra* at p. 241.

<sup>18</sup> Duško Tadić, Case No. IT-94-1-T, Trial Judgement, 7 May 1997, ¶ 644.

the attack was in fact directed against a civilian “population”, rather than against a small and randomly selected number of individuals.<sup>19</sup>

Factors to determine whether the attack was directed against a civilian population include:

- the means and methods used in the course of the attack;
- the number of victims;
- the status of the victims;
- the discriminatory nature of the attack;
- the nature of the crimes committed in the course of the attack;
- the resistance to the assailants at the time; and
- the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.<sup>20</sup>

The ultimate objective—such as restoring democracy—of a fighting force can be no justification for attacking a civilian population. Rules of IHL apply equally to both sides of a conflict, irrespective of who is the “aggressor”, and the absolute prohibition under international customary and treaty law on targeting the civilian population precludes military necessity or any other purpose as a justification.<sup>21</sup>

*The ultimate objective—such as restoring democracy—of a fighting force can be no justification for attacking a civilian population.*

At the ICC, “civilian population” refers to people who are civilians, and not members of armed forces or other legitimate combatants.<sup>22</sup> The civilian population must be the primary target of the attack, not a secondary victim.<sup>23</sup>

<sup>19</sup> *Kunarac et al.*, AJ ¶ 90; Stanislav Galić, Case No. IT-98-29-T, Trial Judgement, 5 Dec. 2003, ¶ 143; *Krnjelac*, TJ ¶ 56; *Kunarac et al.*, TJ ¶¶ 424-425; Mladen Naletilić et al., Case No. IT-98-34-T, Trial Judgement, 31 March 2003, ¶ 235; *Akayesu*, TJ ¶ 582; Georges A. N. Rutaganda, Case No. ICTR-96-3-T, Trial Judgement, 26 May 2003, ¶ 71; *Kayishema*, TJ ¶ 128.

<sup>20</sup> *Blaškić*, AJ, ¶ 106; *Kunarac et al.*, AJ ¶ 90.

<sup>21</sup> *Moinina Fofana et al.*, Case No. SCSL-2003-11-A, Appeal Judgement, 28 May 2008, ¶ 247.

<sup>22</sup> Geneva Conventions 1949 (adopted 12 Aug. 1949, entered into force 21 Oct. 1950) (GC I-IV), Common Art. 3, and Additional Protocol I (adopted 8 June 1977, entered into force 7 Dec. 1978) (AP I) Arts. 43 and 50; *Situation in the Republic of Kenya*, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ¶ 82 (fn 74), citing Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009 ¶ 78; *Kunarac et al.*, TJ ¶ 425.

<sup>23</sup> *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute, ¶ 82(fn 73), citing *Bemba Confirmation Decision* ¶ 77; *Kunarac et al.*, AJ ¶¶ 91-2; Milomir Stakić, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, ¶ 624; Mitar Vasiljević, Case No. IT-98-32-T, Trial Judgement, 29 Nov. 2002, ¶ 33.

### 7.2.2.1.2.1. RELATIONSHIP BETWEEN ANY CIVILIAN POPULATION AND MILITARY TARGETS

Since the primary object of the attack must be any civilian population, attacks that are directed primarily at military targets are excluded. To determine whether an attack was aimed at civilian or military targets, the court may consider whether or not the relevant party complied with the laws of war<sup>24</sup> (this does not mean that targeting civilians is lawful when justified by military necessity—there is an absolute prohibition on targeting civilians under international law<sup>25</sup>).

For example, in the *Mrkšić* case at the ICTY, crimes were directed against a group of people based on their perceived involvement in the armed forces and therefore were treated differently than the civilian population. The facts of this case involved wounded combatants being selected for execution and killed. These crimes were not crimes against humanity, however, even though they were committed just two days after the perpetrators had participated in a major attack on civilians in the same region. Since the perpetrators acted with the understanding that their victims were members of the armed forces, they did not intend for their acts to form part of the attack on the civilian population and therefore no nexus existed.<sup>26</sup>

### 7.2.2.1.2.2. RELATIONSHIP BETWEEN ANY CIVILIAN POPULATION AND COMBATANTS

*“Civilian population” describes the overall character of the population. A population is still considered “civilian” even if there are armed police or isolated soldiers in the group.*

Members of the civilian population are people who are not taking any active part in the hostilities.<sup>27</sup> The presence within that population of some individuals who do not come within the definition of civilians does not deprive the population of its civilian character. “Civilian population”

describes the overall character of the population. A population is still considered “civilian” even if there are armed police or isolated soldiers in the group.<sup>28</sup> The population must be “predominantly” civilian.

The presence within a population of members of resistance groups, or former combatants who have laid down their arms, and of other non-civilians does not alter the civilian character of that population, as long as the population is “predominantly civilian”.<sup>29</sup>

<sup>24</sup> *Kunarac et al.*, AJ ¶ 91; Dragomir Milošević, Case No. IT-98-29/1-A, Appeal Judgement, 12 Nov. 2009, ¶¶ 54, 96, 127 – 128, 250.

<sup>25</sup> *Blaškić*, AJ ¶ 109.

<sup>26</sup> Mile Mrkšić et al., Case No. IT-95-13/1-A, Appeal Judgement, 5 May 2009, ¶ 42.

<sup>27</sup> See generally CRYER, *supra* at p. 241 – 3; *Tadić*, TJ ¶ 638; *Blaškić*, AJ ¶¶ 110, 113-5; Pavle Strugar (“Dubrovnik”), Case No. IT-01-42-T, Trial Judgement, 31 Jan. 2005, ¶ 282; Milan Martić, Case No. IT-95-11-A, Appeal Judgement, 8 Oct. 2008, ¶¶ 302-6, 308, 311, 313, 318-319, 346, 355.

<sup>28</sup> Kordić et al., AJ ¶ 50; Stanislav Galić, Case No. IT-98-29-A, Appeal Judgement, 30 Nov. 2006, 136 – 137, ¶¶ fn 437; See also Vidoje Blagojević et al., Case No. IT-02-60-T, Trial Judgement, 17 Jan. 2005, ¶ 544.

<sup>29</sup> *Blaškić*, AJ ¶¶ 113 – 115; *Mrkšić*, AJ ¶ 35; *Martić*, AJ ¶ 313; *Blagojević et al.*, TJ, ¶ 544.



In order to determine whether the presence of soldiers or other non-civilians within a civilian population deprives the population of its “predominantly civilian” character, the number of soldiers or non-civilians, as well as whether they are on leave, may be considered.

Who are non-civilians? Article 50 of Additional Protocol I to the Geneva Conventions (AP I) contains a definition of civilians and civilian populations; its provisions “may largely be viewed as reflecting customary law”<sup>30</sup> and are used to determine who is a civilian and the civilian character of populations for the purposes of CAH.

Persons placed *hors de combat* remain members of the armed forces of a party to a conflict and are not civilians.<sup>31</sup> Members of the armed forces, and members of militias or volunteer corps forming part of such armed forces, cannot claim civilian status, even when not armed or in combat. Further, members of other militias and members of other volunteer corps (other than those forming part of the armed forces, mentioned above), including organised resistance groups cannot claim civilian status, provided that:

- they belong to a party of the conflict;
- they are commanded by a person responsible for his subordinates;
- they have a fixed distinctive sign recognisable at a distance;
- they carry arms openly; and
- they conduct their operations in accordance with the laws and customs of war.<sup>32</sup>

However, non-civilians, such as persons placed *hors de combat*, can still be the victims of an act amounting to a CAH if all other necessary conditions are met and in particular the act in question is part of a widespread or systematic attack against any civilian population. In other words, there is no requirement nor is it an element of CAH that each victim of the underlying crimes be a civilian.<sup>33</sup>

*There is no requirement nor is it an element of CAH that each victim of the underlying crimes be a civilian.*

### 7.2.2.1.3. WIDESPREAD OR SYSTEMATIC

*“Widespread” may include a massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.*

“Widespread or systematic” describes the character of the attack, particularly its scale.

“Widespread” refers to the large-scale nature of an attack, primarily reflected in the number of victims. There is no set number of victims that makes an

<sup>30</sup> *Blaškić*, AJ ¶ 110.

<sup>31</sup> *Mrkšić*, AJ ¶ 35; *Blaškić*, AJ ¶¶ 110, 113-114; Dario Kordić et al., Case No. IT-95-14/2-A, Appeal Judgement, 17 Dec. 2004, ¶ 97; *Galić*, AJ, fn 437.

<sup>32</sup> International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Art., 4., 12 August 1949, 75 UNTS 135, available at <http://www.unhcr.org/refworld/docid/3ae6b36c8.html> (accessed 27 June 2011).

<sup>33</sup> *Martić*, AJ ¶¶ 306, 313.

attack “widespread”. “Widespread” may include a massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.<sup>34</sup>

“Systematic” refers to the organised nature of the acts of violence and the recurrence of similar criminal conduct on a regular basis.<sup>35</sup> It involves “a pattern or methodical plan”<sup>36</sup> that is “thoroughly organized and following a regular pattern”.<sup>37</sup>

The requirement that the attack is “widespread” or “systematic” is disjunctive: only one must be proven. So a crime against humanity could be committed as part of a large-scale attack against a civilian population resulting in many deaths, or as part of regular and methodical violence or crimes with fewer victims.

*The requirement that the attack be “widespread” or “systematic” is disjunctive: only one must be proven.*

*Only the attack as a whole, not the accused’s individual acts, must be widespread or systematic.*

Only the attack as a whole, not the accused’s individual acts, must be widespread or systematic.<sup>38</sup> In other words, the separate underlying prohibited acts do not need to be widespread or systematic (*i.e.* there is no requirement that the murders must be widespread or systematic under a charge of murder as a crime against humanity), as long as the prohibited acts form part of an attack that is widespread or systematic.

Factors to consider when determining whether an attack is “widespread or systematic” include the:

- number of criminal acts;
- existence of criminal patterns;
- logistics and resources involved;
- number of victims;
- existence of public statements related to the attacks;
- existence of a plan or policy targeting the civilian population;<sup>39</sup>
- means and methods used in the attack;
- foreseeability of the criminal occurrences;

<sup>34</sup> *Akayesu*, TJ ¶¶ 579-580; *Rutaganda*, TJ ¶¶ 67-69; Alfred Musema, Case No. ICTR-96-13, Trial Judgement, Jan. 27 2000, ¶ 204.

<sup>35</sup> *Tadić*, TJ ¶ 648; *Kunarac et al.*, TJ, ¶ 429; Elizaphan Ntakirutimana et al., Case No. ICTR-96-10-T and ICTR-96-17-T, Trial Judgement, 21 Feb. 2003, ¶ 804.

<sup>36</sup> *Tadić*, TJ ¶¶ 646 and 648.

<sup>37</sup> *Akayesu*, TJ ¶ 580.

<sup>38</sup> *Blaškić*, AJ ¶ 101; *Kunarac et al.*, AJ ¶¶ 93-96; Radoslav Brđanin, Case No. IT-99-36-T, Trial Judgement, 1 Sept. 2004, ¶¶ 135-6.

<sup>39</sup> Previous ICTR jurisprudence held that a systematic attack encompassed acts done pursuant to a policy or plan; this was later rejected by the Appeals Chamber. Laurent Semanza, Case No. ICTR-97-20-A, Appeal Judgement, 20 May 2005, ¶¶ 268-269; *Kunarac et al.*, AJ ¶ 98 (existence of policy or plan may be evidence going to other elements of the crime, but is not an independent legal element).

- involvement of political or military authorities;
- temporally and geographically repeated and coordinated military operations leading to same result;
- alteration of ethnic, religious, racial or political composition of overall population;
- establishment of new political or military structures in region; and
- adoption of various discriminatory procedures.<sup>40</sup>

#### 7.2.2.1.4. POLICY/ORGANIZATIONAL REQUIREMENT

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Before the ICTY, it has been held that as a matter of customary law that it is not required to show that the attack was carried out as part of a policy or plan.<sup>41</sup> The existence of a policy or plan can be relevant to establish that the attack was widespread or systematic, or directed against a civilian population.<sup>42</sup>

However, at the ICC, the attack must be committed “pursuant to or in furtherance of a State or organizational policy to commit such attack”, and requires that “the State or organization actively promote or encourage such an attack against a civilian population”.<sup>43</sup> It is not required that the policy be adopted by the highest level of the state; policies adopted by regional or local state organs could be sufficient.<sup>44</sup>

By a majority, a Pre-Trial Chamber at the ICC has held that non-state organisations can, for the purposes of Article 7(2) of the Rome Statute, devise and carry out a policy to attack a civilian population.<sup>45</sup> The following elements may be considered to determine, on a case-by-case basis, whether a group qualifies as an organisation under Article 7(2):

<sup>40</sup> *Semanza*, AJ ¶¶ 268-269; *Kunarac et al.*, AJ ¶ 98; *Galić*, TJ ¶ 147; *Brđanin*, TJ ¶ 137; Goran Jelisić, Case No. IT-95-10T, Trial Judgement, 14 Dec. 1999, ¶ 53.

<sup>41</sup> *Kunarac et al.*, AJ ¶ 98; *Blaškić*, AJ ¶ 100.

<sup>42</sup> *Kunarac et al.*, AJ ¶ 98; *Blaškić*, AJ ¶ 100; *But see Situation in the Republic of Kenya*, Case No. ICC-01/09-01/1, Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing, Pre-Trial Chamber II, 06 March, 2011; William Samoei Ruto et al., Case No. ICC-01/09-01/11, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's “Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, 15 March, 2011.

<sup>43</sup> Rome Statute, Art. 7(2), ICC Elements of Crimes (n 85), Introduction to Art. 7.

<sup>44</sup> *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute, ¶ 89 (fn 81), citing Tihomir Blaškić, Case No. IT-95-14-T, Trial Judgement, 3 March 2000, ¶ 205.

<sup>45</sup> *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute, ¶ 92.

### Article 7(2) of the Rome Statute

- (i) whether the group is under a responsible command, or has an established hierarchy;
- (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population;
- (iii) whether the group exercises control over part of the territory of a state;
- (iv) whether the group has criminal activities against the civilian population as a primary purpose;
- (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; and
- (vi) whether the group is part of a larger group, which fulfils some or all of the above mentioned criteria.

One trial panel at the Court of BiH has held that Article 172(2)(a) of the BiH Criminal Code required that an attack be committed “pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>46</sup> However, another trial panel noted that there is no requirement that the acts of the accused were supported by any form of “policy” or “plan” at the ICTY or in customary international law.<sup>47</sup>

#### 7.2.2.1.5. NEXUS

The acts of the accused must be “part of”—and not simply coincide with—the widespread or systematic attack directed against a civilian population.<sup>48</sup> Except for extermination, the underlying offence need not be carried out against multiple victims in order to constitute a CAH.<sup>49</sup> Thus an act directed against a limited number of victims, or even against a single victim, may suffice, provided it forms part of a widespread or systematic attack against a civilian population.<sup>50</sup>

*The acts of the accused must be “part of”—and not simply coincide with—of the widespread or systematic attack directed against a civilian population.*

The nexus requirement has two elements the prosecution must prove:

<sup>46</sup> Court of BiH, Momir Savić, Case No. X-KR-07/478, 1st Instance Verdict, 3 July 2009, p. 36 (p. 32 BCS) (relevant part upheld on appeal).

<sup>47</sup> *Ibid.* (p. 32 BCS) (relevant part upheld on appeal) referring to *Kunarac et al.*, TJ ¶ 98.

<sup>48</sup> *Tadić*, AJ ¶¶ 248, 255; *Kunarac et al.*, TJ ¶ 417; *Kunarac et al.*, AJ ¶ 99.

<sup>49</sup> But the attack must include multiple acts, see section 7.2.2.1.3.

<sup>50</sup> Ferdinand Nahimana, Case No. ICTR-96-11A, Appeal Judgement, 28 Nov. 2007, ¶ 924; *Blaškić*, AJ ¶ 101; *Kunarac et al.*, AJ ¶ 96.

- The commission of an act that, by its very nature or consequences, is liable to have the effect of furthering the attack.
- Knowledge on the part of the accused that there is an attack on the civilian population and that his act is part of the attack.<sup>51</sup>

Factors to determine whether a prohibited act of an accused forms “part of” an attack include:

- the characteristics,
- aims,
- nature, and
- consequences<sup>52</sup> of the act;
- The similarity between the accused’s act and the other acts forming the attack;
- The time and place of the acts, and how they relate to the attack;<sup>53</sup> and in particular
- How the acts relate to the attack or further any policy underlying the attack.

*The accused’s act must be related to the attack.*

The accused’s act must be *related to* the attack. A crime which is committed before, after or away from the main attack against the civilian population could still, if sufficiently connected, be part of that attack.<sup>54</sup>

The prohibited act must not, however, be an isolated act. An act would be regarded as an isolated act when it is so far removed from the attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack.<sup>55</sup>

The acts of the accused need not be the same as other acts committed during the attack. For example, if an attack results in killings, and a person commits sexual violence as part of the attack, the person is guilty of a CAH of sexual violence, when the necessary contextual elements and nexus are satisfied.<sup>56</sup>

#### 7.2.2.1.6. MENS REA/KNOWLEDGE OF THE ATTACK

*In addition to the intent to commit the underlying crime, an accused must know of the broader context in which his actions occur.*

In addition to the intent to commit the underlying crime (such as murder, persecution, torture), an accused must know of the broader context in which his actions occur, and more particularly, he must:

<sup>51</sup> *Mrkšić*, AJ ¶ 41; *Kunarac et al.*, TJ ¶ 418; *Kunarac et al.*, AJ ¶ 99.

<sup>52</sup> Laurent Semanza, Case No. ICTR-97-20-T, Trial Judgement, 15 May 2003, ¶ 326.

<sup>53</sup> See, e.g., *Tadić*, TJ ¶¶ 629 – 633.

<sup>54</sup> *Mrkšić*, AJ ¶ 41; *Krnjelac*, TJ ¶ 127.

<sup>55</sup> *Mrkšić*, AJ ¶ 41; *Kunarac et al.*, AJ ¶ 100.

<sup>56</sup> *Kayishema*, TJ ¶ 122.

- know of the attack directed against the civilian population, and
- know that his criminal act comprises part of that attack or at least take the risk that his acts are part of that attack.<sup>57</sup>

*A CAH may be committed for purely personal reasons. The accused need not share the purpose or goal behind the attack.*

An absence of such knowledge may suggest an ordinary crime or, depending on the circumstances, a war crime. Usually, a crime against humanity will be committed in the context of an attack that is well known, and an accused could not credibly deny knowing about the attack. Thus, knowledge can be proven by drawing inferences from relevant facts and circumstances.<sup>58</sup>

The *mens rea* relates to knowledge of the context, not motive.<sup>59</sup> A CAH may be committed for purely personal reasons.<sup>60</sup> The accused need not share the purpose or goal behind the attack:

It is irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof. At most, evidence that he committed the acts for purely personal reasons could be indicative of a rebuttable presumption that he was not aware that his acts were part of that attack.<sup>61</sup>

#### 7.2.2.1.7. MENS REA IN RELATION TO DISCRIMINATORY GROUNDS

The ICTY Appeals Chamber has ruled that discrimination is not a requirement for CAH in general—only in the case of persecution.<sup>62</sup> The ICTR Statute requires that CAH be committed because of discriminatory grounds. However, the ICTR Appeals Chamber has held that the discriminatory grounds restriction in the ICTR Statute applies only to that court and is not a requirement in customary international law.<sup>63</sup>

<sup>57</sup> *Kunarac et al.*, AJ ¶ 102; *Brđanin*, TJ ¶ 138; *Galić*, TJ ¶ 148; *Krnjelac*, TJ ¶ 59; *Kunarac et al.*, TJ ¶ 434.

<sup>58</sup> Mitar Vasiljević, Case No. IT-98-32-A, Appeal Judgement, 25 Feb. 2004, ¶¶ 28, 20; International Criminal Court, Elements of Crimes, General Introduction, ¶ 3 (9 Nov. 2002) available at <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Elements+of+Crimes.htm> (accessed 27 June 2011).

<sup>59</sup> *Tadić*, AJ ¶¶ 271-2.

<sup>60</sup> *Ibid.* at ¶¶ 252, 272-305.

<sup>61</sup> *Blaškić*, AJ ¶ 124; *Kunarac et al.*, AJ ¶ 103.

<sup>62</sup> *Tadić*, AJ ¶¶ 282-305 (holding “[C]ustomary international law [...] does not presuppose a discriminatory or persecutory intent for all crimes against humanity); See also *Blaškić*, AJ ¶¶ 224, 260.

<sup>63</sup> Jean-Paul Akayesu, Case No. ICTR-96-4-A, Appeal Judgement, 1 June 2001, ¶¶ 461-9.

### 7.2.2.2. PROHIBITED UNDERLYING ACTS OR UNDERLYING

#### *Notes for trainers:*

- This section now deals with each of the specific underlying acts which could constitute crimes against humanity when committed as part of a widespread or systematic attack against a civilian population.
- It is important for participants to consider the elements of each of the acts which have to be proven in addition to having to establish the general contextual elements. Many of the elements of the specific acts are similar to the same acts when committed as war crimes, but participants need to be aware of the distinct contextual requirements for crimes against humanity.
- In order to explore the elements of the underlying acts, participants can use the case study to discuss which particular crimes against humanity could be charged on the facts of that case. One of the issues that participants could consider is whether persecution could be charged on the facts of the case study.
- Another question to be addressed is the difference between extermination and murder, and what evidence is required to prove extermination.

#### 7.2.2.2.1. OVERVIEW

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The ICTY and ICTR Statutes prohibit the following underlying offences that can constitute CAH:

- Murder;
- Extermination;
- Enslavement;
- Deportation;
- Imprisonment;
- Torture;
- Rape;
- Persecutions on political, racial and religious grounds; and
- Other inhumane acts.

The ICC has also incorporated the following acts under crimes against humanity:

- Sexual slavery;
- Enforced prostitution;
- Forced pregnancy;
- Other sexual violence;
- Enforced disappearance; and
- Apartheid.

Any of these acts can be a crime against humanity if it is part of the overall attack on civilians.<sup>64</sup> If it is committed on a very large scale, such as using biological weapons against a civilian population, it could by itself be considered the attack.<sup>65</sup>

*The underlying acts do not have to be the same as the other acts committed during the attack.*

The underlying acts do not have to be the same as the other acts committed during the attack. A person who rapes a woman during a forceful takeover of power could be guilty of the crime against humanity of sexual violence.

Some of the prohibited acts have special mental requirements, but in general, the perpetrator must have committed the act with intent and knowledge of the relevant circumstances.<sup>66</sup>

#### 7.2.2.2.2. MURDER

“Murder” is unlawfully and intentionally causing the death of a human being.<sup>67</sup>

*Mens rea* – the perpetrator intends to kill, or intends to inflict grievous bodily harm likely to cause death but is reckless as to whether death ensues.<sup>68</sup> The appeals chamber has recognised that the *mens rea* includes both direct and indirect forms of intention.<sup>69</sup>

It is not required to recover the body to prove beyond a reasonable doubt that a person was murdered. The fact of a victim’s death can be inferred circumstantially from other evidence.<sup>70</sup> One Trial Chamber also stated that circumstantial evidence is sufficient as long as “the *only* reasonable inference is that the victim is dead as a result of the acts or omissions of the accused”.<sup>71</sup>

*It is not required to recover the body to prove beyond a reasonable doubt that a person was murdered. The fact of a victim’s death can be inferred circumstantially from other evidence.*

The elements of “murder” as a crime against humanity are the same as “wilful killing” as a war crime. See Module 8 (War Crimes) for more information.

#### 7.2.2.2.3. EXTERMINATION

<sup>64</sup> *Kunarac et al.*, AJ ¶ 96; *Blaškić*, AJ ¶ 101.

<sup>65</sup> *Blaškić*, TJ ¶ 206.

<sup>66</sup> See, e.g., Rome Statute, Art. 30.

<sup>67</sup> *Akayesu*, TJ ¶ 589; *Jelisić*, TJ ¶ 35; Zoran Kupreškić et al., Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, ¶¶ 560-1.

<sup>68</sup> *Zejnir Delalić et al. (“Čelebići”)*, Case No. IT-96-21-T, Trial Judgement, 16 Nov. 1998, ¶ 439; *Akayesu*, TJ ¶ 589; Dario Kordić et al., Case No. IT-95-14/2-T, Trial Judgement, 26 Feb. 2001, ¶ 236.

<sup>69</sup> Pavle Strugar (“Dubrovnik”), Case No. IT-01-42-A, Appeal Judgement, 17 July 2008, ¶ 270.

<sup>70</sup> Moinina Fofana et al. (CDF Case), Case No. SCSL-2003-11-T, Trial Judgement, 2 Aug. 2007, ¶ 144, citing *Krnjelac*, TJ ¶ 326.

<sup>71</sup> *Brđanin*, TJ ¶ 385 (emphasis in the original).



The elements of the crime of extermination are:

- the killing of persons on a massive scale (*actus reus*); and
- the accused's intent, by his acts or omissions of either:
  - killing on a large scale; or
  - the subjection of a widespread number of people; or
  - the systematic subjection of a number of people;
- to conditions of living that would lead to their deaths (*mens rea*).<sup>72</sup>

#### 7.2.2.2.3.1. MASSIVE SCALE: DIFFERENCE BETWEEN EXTERMINATION AND MURDER

Extermination is murder on a massive scale. A person who murders someone within the context of mass killing can be guilty of extermination.<sup>73</sup> The ICTR appeals chamber has held that “[e]xtermination differs from murder in that it requires an element of mass destruction, which is not required for murder”.<sup>74</sup>

The term “mass”, which can mean “large-scale”, does not suggest a minimum number of killings<sup>75</sup> but should be determined on a case-by-case basis using a common sense approach.<sup>76</sup>

*Extermination is murder on a massive scale. A person who murders someone within the context of mass killing can be guilty of extermination.*

Extermination must also be collective, and not just directed towards singled out individuals (except, unlike in genocide, the accused does not need to intend to destroy a group or part of a group).<sup>77</sup>

The “mass” element means that evidence of the *actus reus* of extermination can be established through an accumulation of separate and unrelated incidents, or on an aggregated basis.<sup>78</sup> It is not required to precisely describe victims or designate victims by name.<sup>79</sup>

<sup>72</sup> Milomir Stakić, Case No. IT-97-24-A, Appeal Judgement, 22 March 2006, ¶ 259.

<sup>73</sup> ICC Elements of Crimes, Art. 7(1)(b)(2); *Kayishema*, TJ ¶ 147.

<sup>74</sup> Elizaphan Ntakirutimana et al., Case No. ICTR-96-10-A and ICTR-96-17-A, Appeal Judgement, 13 Dec. 2004, ¶ 516.

<sup>75</sup> *Stakić*, AJ ¶¶ 260-261; *Ntakirutimana et al.*, AJ ¶ 516; Jean De Dieu Kamuhanda, Case No. ICTR-99-54A-T, Trial Judgement, 22 Jan. 2004, ¶ 692; Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Trial Judgement, 1 Dec. 2003, ¶ 891; Ignace Bagilishema, Case No. ICTR-95-1T, Trial Judgement, 7 June 2001, ¶ 87; *Kayishema*, TJ ¶ 142.

<sup>76</sup> *Kayishema*, TJ ¶ 145.

<sup>77</sup> *Brđanin*, TJ ¶ 390.

<sup>78</sup> *Brđanin*, TJ ¶ 391; Radislav Krstić, Case No. IT-98-33-T, Trial Judgement, 2 Aug. 2001, ¶ 501.

<sup>79</sup> *Ntakirutimana et al.*, AJ ¶¶ 518-9.

### 7.2.2.2.3.2. ACTUS REUS OF EXTERMINATION; INDIRECT OR REMOTE PARTICIPATION AND SINGLE KILLING

Being involved in directly killing a person can constitute extermination. However, so can other acts or omissions. Any indirect act or omission, or cumulative acts or omissions, which directly or indirectly cause the death of the targeted group of individuals, can also constitute extermination.<sup>80</sup>

The accused's involvement in the killings can be remote or indirect participation.<sup>81</sup> Often persons with authority are therefore charged with extermination. In those cases, the accused, either because of their position or authority, could decide the fate of or had control over a large number of people.<sup>82</sup> However, it is not required that the prosecution prove that the person had *de facto* control. Also, it is important to remember that others—persons who do not have authority or control—can also be charged with extermination.<sup>83</sup>

Extermination also includes the creation of conditions of life that are calculated to cause the destruction of part of the population. That means the accused created circumstances that ultimately caused mass death, such as imprisoning a large number of people and withholding the necessities of life, food and medicine.<sup>84</sup>

*Extermination also includes the creation of conditions of life that are calculated to cause the destruction of part of the population.*

There is inconsistent case law on whether responsibility for a single or small or limited number of killings is sufficient for a finding of extermination. ICTY and ICTR trial chambers have held that “responsibility for a single or a limited number of killings is insufficient”.<sup>85</sup> In other cases, they have held that a perpetrator may be guilty of extermination if he kills, or creates the conditions of life that kills a single person, as long as he is aware that his act or omission forms part of a mass killing event.<sup>86</sup> For a single killing to form part of extermination, the killing must actually form part of a mass killing event.<sup>87</sup> A “killing event” exists when the killings have close proximity in time and space.<sup>88</sup>

For example, if numerous officers fire into a crowd killing everyone, and Officer X is a poor shot and kills only a single person, whereas Officer Y kills sixteen people, both will be guilty of

<sup>80</sup> *Rutaganda*, TJ ¶ 83; *Brđanin*, TJ ¶ 389; Athanase Seromba, Case No. ICTR-2001-66-A, Appeal Judgement, 12 March 2008, ¶ 189.

<sup>81</sup> *Rutaganda*, TJ ¶ 81; *Kayishema*, TJ ¶ 146.

<sup>82</sup> *Brđanin*, TJ ¶ 390; *Vasiljević*, TJ ¶¶ 222, 227; *Stakić*, TJ ¶ 639.

<sup>83</sup> *Stakić*, AJ ¶¶ 256-257, citing *Ntakirutimana et al.*, AJ ¶ 539.

<sup>84</sup> *Kayishema*, TJ ¶ 146; *Brđanin*, TJ ¶ 389.

<sup>85</sup> *Vasiljević*, TJ ¶ 228; Sylvestre Gacumbitsi, Case No. ICTR-01-64, Trial Judgement, 17 June 2004, ¶ 309; André Ntagerura et al., Case No. ICTR-96-10T, Trial Judgement, 1 Sept. 2009, ¶ 701.

<sup>86</sup> *Kayishema*, TJ ¶ 147; *Bagilishema*, TJ ¶ 88.

<sup>87</sup> *Kayishema*, TJ fn 49.

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

extermination because they participated in the mass killing and were both aware that their actions formed part of the mass killing event.<sup>89</sup>

At the ICC, it seems that a single killing would be sufficient.<sup>90</sup>

#### 7.2.2.2.3.3. MENS REA

As stated by the ICTY:

[T]he *mens rea* standard for extermination is the same as the *mens rea* required for murder as a crime against humanity with the difference that ‘extermination can be said to be murder on a massive scale’. The prosecution is thus required to prove beyond reasonable doubt that the accused had the intention to kill persons on a massive scale or to create conditions of life that led to the death of a large number of people. The *mens rea* standard required for extermination does not include a threshold of negligence or gross negligence: the accused’s act or omission must be done with intention or recklessness (*dolus eventualis*).<sup>91</sup>

#### 7.2.2.2.3.4. NO NEED TO PROVE PLAN OR POLICY

No proof is required of the existence of a plan or policy to commit extermination or that the killings were tolerated by the state.<sup>92</sup> The existence of such a plan or policy, or the existence of state tolerance, may be important evidence that the attack was widespread or systematic. If the accused had knowledge that his action is part of a vast murderous enterprise in which a larger number of individuals are systematically marked for killing or killed, it will be taken as

*No proof is required of the existence of a plan or policy to commit extermination or that the killings were tolerated by the state.*

evidence tending to prove the accused’s knowledge that his act was part of a widespread or systematic attack against a civilian population.<sup>93</sup> However, knowledge of a vast scheme of collective murder is not an element required for extermination as a crime against humanity.<sup>94</sup>

#### 7.2.2.2.4. ENSLAVEMENT/SLAVERY

The definition of enslavement is based in part on the 1956 Slavery Convention.

<sup>89</sup> *Ibid.* at ¶ 147.

<sup>90</sup> ICC Elements of Crimes, Art. 7(1)(b)(1).

<sup>91</sup> *Brđanin*, TJ ¶ 395; *See also Stakić*, AJ ¶¶ 252-261; *Krstić*, TJ ¶ 495; *Stakić*, TJ ¶¶ 638, 642.

<sup>92</sup> Sylvestre Gacumbitsi, Case No. ICTR-01-64-A, Appeal Judgement, 7 July 2006, ¶ 84.

<sup>93</sup> *Brđanin*, TJ ¶ 394; Radislav Krstić, Case No. IT-98-33-A, Appeal Judgement, 19 April 2004, ¶ 225.

<sup>94</sup> *Stakić*, AJ ¶ 259.

The elements of enslavement are:

- the exercise of any or all of the powers attaching to the right of ownership over a person (*actus reus*), and
- the intentional exercise of said powers (*mens rea*).<sup>95</sup>

The ICTY has held that the elements of enslavement as a crime against humanity are the same as the elements of slavery as a violation of the laws or customs of war.<sup>96</sup> For more on slavery as a war crime, see Module 8.

#### 7.2.2.2.4.1. RELATIONSHIP BETWEEN ACCUSED AND VICTIM

The nature of the relationship between the accused and victim is key to enslavement. Factors to be considered in determining the nature of the relationship include:<sup>97</sup>

- control of someone's movement;
- control of the physical environment;
- psychological control;
- measures taken to prevent or deter escape;
- force;
- threat of force or coercion;
- assertion of exclusivity;
- subjection to cruel treatment and abuse;
- control of sexuality;
- control of forced labour; and
- duration of that control.

*The nature of the relationship between the accused and victim is key in enslavement.*

It is usually insufficient just to show that a person was held in captivity. There must be another indication of enslavement, such as exploitation, forced labour, sex, prostitution or human trafficking.<sup>98</sup>

#### 7.2.2.2.4.2. DURATION NOT AN ELEMENT

The duration of enslavement is not an element of the crime, but can be evidence that a person was enslaved.<sup>99</sup>

#### 7.2.2.2.4.3. TORTURE OR ILL-TREATMENT NOT ELEMENTS

The following passage about slavery equally applies to enslavement:

<sup>95</sup> *Kunarac et al.*, AJ ¶¶ 116-124.

<sup>96</sup> *Kunarac et al.*, TJ ¶ 116; *Krnjelac*, TJ ¶ 350.

<sup>97</sup> *Kunarac et al.*, AJ ¶¶ 119-121, 356.

<sup>98</sup> *Kunarac et al.*, TJ ¶ 542.

<sup>99</sup> *Kunarac et al.*, AJ ¶¶ 121, 356.

Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. Even if all other elements which often accompany slavery, such as ill-treatment, starvation, or beatings, were not present or ignored, the fact of compulsory uncompensated labour would still constitute slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.<sup>100</sup>

#### 7.2.2.2.4.4. LACK OF CONSENT NOT AN ELEMENT

Lack of consent is not an element of enslavement. However, it can be evidence of whether enslavement was committed.<sup>101</sup> Lack of resistance does not mean a person consented.<sup>102</sup> Circumstances that make it impossible to express consent may be sufficient to presume the absence of consent.<sup>103</sup>

*Lack of consent is not an element of enslavement. However, it can be evidence of whether enslavement was committed.*

#### 7.2.2.2.4.5. SEXUAL SLAVERY

Sexual slavery<sup>104</sup> is not listed as a separate underlying crime at the ICTY and ICTR, but it is at the ICC and the SCSL (see Section 7.2.2.2.11, below). At the ICTY/ICTR, it is dealt with under enslavement.

At the ICTY and ICTR, corroboration is not legally required; corroborative testimony only speaks to weight. In terms of the intentional exercise of a power to the right of ownership, it is not required to prove that the accused intended to detain the victims under constant control for a prolonged period of time in order to use them for sexual acts.

#### 7.2.2.2.4.6. FORCED LABOUR

Forced labour can constitute enslavement, and is a factor that can be considered when determining whether enslavement was committed. The facts must establish that the victims had no real choice about whether they would work.<sup>105</sup> However, this evidence must be objective—

<sup>100</sup> *Kunarac et al.*, AJ ¶¶ 119-121, 356.

<sup>101</sup> *Ibid.* at ¶ 120.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.* at ¶¶ 122, 268. Elements of the Slavery Convention and Human Trafficking Convention are of potential relevance to any sexual enslavement charge, as they are in relation to other “kinds” of enslavement; See Alex Tamba Brima et al. (“AFRC Case”), Case No. SCSL-04-16-A, Appeal Judgement, 22 Feb. 2008, ¶¶ 175-203 on sexual slavery and forced marriage at SCSL and in ICL generally.

<sup>105</sup> *Krnjelac*, TJ ¶ 359; See also Issa Hassan Sesay et al. (RUF Case), Case No. SCSL-04-15-T, Trial Judgement, 25 Feb. 2009, ¶ 202.

the victims' perception that they were forced to work is not sufficient to establish lack of consent.<sup>106</sup>

#### 7.2.2.2.5. DEPORTATION

The elements of deportation are:

- forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* state border or, in certain circumstances, a *de facto* border, contrary to international law (*actus reus*);
- with the intent to do so (*mens rea*).<sup>107</sup>

It is not required that the perpetrator intended to displace the individuals permanently. There is no requirement that a minimum number of persons are deported or displaced.<sup>108</sup> Moreover, the return of victims does not impact the perpetrator's criminal responsibility.<sup>109</sup>

##### 7.2.2.2.5.1. DIFFERENCE BETWEEN DEPORTATION AND FORCIBLE TRANSFER

*The offence of deportation is provided for in the ICTY Statute whereas forcible transfer is prosecuted through "other inhumane acts".*

The offence of deportation is provided for in the ICTY Statute, whereas forcible transfer is prosecuted through "other inhumane acts".

Both "deportation" and "forcible transfer" consist of the forced displacement of individuals from the area in which they are lawfully present without grounds permitted under international law. The protected interests underlying the prohibition against deportation and forcible transfer are the same: the right of victims to stay in their home and community and the right not to be deprived of their property by being forcibly displaced to another location.<sup>110</sup>

The distinction between the *actus reus* of "deportation" and "forcible transfer" is the destination of displacement. The appeals chamber has found that under customary international law, deportation consists of the forced displacement of individuals *beyond* internationally recognised state borders. In contrast, forcible transfer may consist of forced displacement *within* state

*The distinction between the actus reus of "deportation" and "forcible transfer" is the destination of displacement.*

<sup>106</sup> Milorad Krnojelac, Case No. IT-97-25-A, Appeal Judgement, 17 Sept. 2003, ¶ 195; *See also Sesay et al. (RUF Case)*, TJ ¶ 202.

<sup>107</sup> *Stakić*, AJ ¶ 278, 279-307, 317.

<sup>108</sup> *Stakić*, TJ, ¶ 685.

<sup>109</sup> *Ibid.* at ¶ 687.

<sup>110</sup> *Stakić*, AJ ¶ 277.

borders.<sup>111</sup> When displacement occurs across a state border it is punishable as the CAH of deportation; when displacement occurs within a state border it is punishable as CAH of other inhumane acts through forcible transfer.<sup>112</sup>

#### 7.2.2.2.5.2. DE JURE VS DE FACTO BORDERS

As held by the ICTY:

The default principle under customary international law with respect to the nature of the border is that there must be expulsion across a *de jure* border to another country [...]. Customary international law also recognises that displacement from “occupied territory”, as expressly set out in Article 49 of Geneva Convention IV and as recognised by numerous UN Security Council resolutions is also sufficient to amount to deportation [...]. Under certain circumstances displacement across a *de facto* border may be sufficient to amount to deportation. In general, the question of whether a particular *de facto* border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law.<sup>113</sup>

#### 7.2.2.2.5.3. DEPORTATION AND FORCIBLE TRANSPORT MUST BE UNLAWFUL

Deportation and forcible transfer occur when the displacement of the civilian population is unlawful. So, lawful deportations of aliens present in the territory of a state will not qualify.

Further, Geneva Convention IV Article 49 and AP II Article 17 allow total or partial evacuation of the population if their security or imperative military reasons so demand. However, Article 49 specifies that such evacuees must be transferred back to their homes as soon as hostilities in the area have ceased. Failing that, such evacuation may amount to the CAH of deportation or forcible transfer.<sup>114</sup>

Although displacement for humanitarian reasons is justifiable in certain situations, it is not justifiable where the humanitarian crisis that caused the displacement is itself the result of the accused’s own unlawful activity.<sup>115</sup>

Assistance by humanitarian groups does not make the displacement lawful.<sup>116</sup>

<sup>111</sup> *Ibid.* at ¶ 278; See also *Krstić*, TJ ¶ 521; *Krnjelac*, TJ ¶ 474; Blagoje Simić et al., Case No. IT-9509, Trial Judgement, 17 Oct. 2003, ¶ 122; *Naletilić et al.*, TJ ¶ 670; *Brđanin*, TJ ¶ 540.

<sup>112</sup> *Brđanin*, TJ ¶ 544.

<sup>113</sup> *Stakić*, AJ ¶ 300.

<sup>114</sup> *Krstić*, TJ ¶¶ 524-7.

<sup>115</sup> *Stakić*, AJ ¶ 287.

<sup>116</sup> *Stakić*, TJ ¶ 683.

## 7.2.2.2.5.4. PROOF OF COERCION

*For deportation and forcible transfer, the displacement must take place under coercion.*

For deportation and forcible transfer, the displacement must take place under coercion.<sup>117</sup> The essential element in establishing coercion is that the displacement must be involuntary in nature,<sup>118</sup> where the persons concerned had no real choice.<sup>119</sup>

Genuine choice cannot be inferred from the fact that consent was expressed or a request to leave was made where the circumstances deprive the consent of any value.<sup>120</sup> An apparent consent induced by force or threat of force should not be considered to be real consent.<sup>121</sup> For example, fleeing in order to escape persecution or targeted violence is not a genuine choice.<sup>122</sup>

A lack of genuine choice may be inferred from, *inter alia*, threatening and intimidating acts that are calculated to deprive the civilian population of exercising its free will. These acts can include the shelling of civilian objects; the burning of civilian property; and the commission of—or the threat to commit—other crimes, including threats of a sexual nature. These crimes must be “calculated to terrify the population and make them flee the area with no hope of return”.<sup>123</sup>

*The displacement must be involuntary in nature, where the persons concerned had no real choice.*

## 7.2.2.2.6. IMPRISONMENT

Imprisonment as a CAH should be understood as arbitrary imprisonment, that is, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population.<sup>124</sup> The elements of the underlying offence of imprisonment as a CAH are the same as the elements of unlawful confinement as a war crime.<sup>125</sup> See Module 8 for more information on this.

The elements of imprisonment are:

- an individual is deprived of his liberty;
- the deprivation of liberty is imposed arbitrarily, meaning, no legal basis can be invoked to justify the deprivation of liberty;

<sup>117</sup> *Krnjelac*, TJ ¶ 475; *Naletilić et al.*, TJ ¶ 519; *Stakić*, TJ ¶ 682.

<sup>118</sup> *Krstić*, TJ ¶ 528; *Krnjelac*, TJ ¶ 475; *Naletilić et al.*, TJ ¶ 519.

<sup>119</sup> *Krnjelac*, TJ ¶ 475; *Brđanin*, TJ ¶ 543.

<sup>120</sup> *Stakić*, AJ ¶ 279; *Krnjelac*, AJ ¶ 229.

<sup>121</sup> Slobodan Milošević, Case No. IT-02-54-T, Trial Chamber Decision on Motion for Judgment of Acquittal, 16 June 2004, ¶ 73.

<sup>122</sup> *Krstić*, TJ ¶ 530.

<sup>123</sup> *Simić et al.*, TJ ¶ 126.

<sup>124</sup> *Kordić et al.*, AJ ¶¶ 115-6; See also *Kordić et al.*, TJ ¶ 302.

<sup>125</sup> *Simić et al.*, TJ ¶ 63.



- the act or omission by which the individual is deprived of his physical liberty is performed by the accused or person(s) for whom the accused bears criminal responsibility; and
- the accused has intent to deprive the individual arbitrarily of his physical liberty or has reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty.<sup>126</sup>

The Rome Statute includes the term “or other severe deprivation of physical liberty” as part of the CAH of imprisonment to demonstrate that house arrest and other forms could constitute imprisonment.<sup>127</sup>

The deprivation must be arbitrary. There are many forms of lawful arrest that would not qualify, such as:

- lawful arrest and detention;
- conviction following trial;
- lawful deportation or extradition;
- quarantine;
- assigned residence during armed conflict;
- internment on security grounds during armed conflict; and
- or internment of prisoners of war.<sup>128</sup>

The ICTY has held that the deprivation of liberty must be without due process of law,<sup>129</sup> and the ICC Statute says that it must be “in violation of fundamental rules of international law”.<sup>130</sup> However, it is recognised that small procedural errors would not be sufficient to constitute imprisonment. The ICC will evaluate the “gravity of conduct” that was in violation of fundamental rules of international law,<sup>131</sup> and the ICTY jurisprudence states that detention is arbitrary when “there is no legal basis [...] to justify [it]”.<sup>132</sup>

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<sup>126</sup> *Krnjelac*, TJ ¶ 115.

<sup>127</sup> Rome Statute, Art. 7.

<sup>128</sup> International Committee of the Red Cross (ICRC), Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, 12 August 1949, Arts. 5, 42, 43, available at <http://www.unhcr.org/refworld/docid/3ae6b36d2.html> (accessed 28 June 2011); Third Geneva Convention, Arts. 21 – 32; See also CRYER, *supra* at p. 250.

<sup>129</sup> *Kordić et al.*, TJ ¶ 302.

<sup>130</sup> ICC Elements of Crimes, Art. 7(1)(e)(1).

<sup>131</sup> *Ibid.*, Art. 7(1)(e)(2).

<sup>132</sup> *Krnjelac*, TJ ¶ 14.

### 7.2.2.2.7. TORTURE

Torture, as defined in Article 1 of the 1984 Torture Convention (CAT), is prohibited by both conventional and customary international law and constitutes a norm of *jus cogens*.<sup>133</sup> The ICL definition is based on, but is not the same as, the CAT definition.

#### 7.2.2.2.7.1. ELEMENTS

Various ICTY and ICTR judgements have considered torture as grave breaches of the Geneva Conventions, violations of the laws or customs of war (a separate category in the ICTY Statute) and as CAH.<sup>134</sup> Except at the ICC, the definition of torture remains the same regardless of the category of atrocity crime it is charged as.<sup>135</sup>

The elements of torture are:

- the infliction, by act or omission, of severe pain or suffering, whether physical or mental;
- the act or omission must be intentional; and
- it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.<sup>136</sup>

#### 7.2.2.2.7.2. SEVERE PAIN OR SUFFERING

*The seriousness of the pain or suffering sets torture apart from other forms of mistreatment.*

The seriousness of the pain or suffering sets torture apart from other forms of mistreatment.

In assessing the seriousness of any mistreatment, the objective severity of the harm inflicted must be considered, including the nature, purpose and consistency of the acts committed.<sup>137</sup>

*In assessing the seriousness of any mistreatment, the objective severity of the harm inflicted must be considered including the nature, purpose and consistency of the acts committed.*

<sup>133</sup> *Čelebići*, TJ ¶¶ 452-459; Anto Furundžija, Case No. IT-95-17/1-T, Trial Judgement, 10 Dec. 1998, ¶¶ 137-146, 153-157; Anto Furundžija, Case No. IT-95-17/1-A, Appeal Judgement, 21 July 2000, ¶ 111.

<sup>134</sup> See, e.g., *Čelebići*, TJ; *Furundžija*, TJ; *Kunarac et al.*, TJ; Miroslav Kvočka et al., Case No. IT-98-30/1-T, Trial Judgement, 2 Nov. 2001.

<sup>135</sup> *Brđanin*, TJ ¶ 482. Regarding the ICC, see *infra* note 144 and related text.

<sup>136</sup> *Kunarac et al.*, AJ ¶¶ 142-148 (clarifying *Furundžija*, AJ ¶ 111 and *Čelebići*, TJ ¶ 494; Fatmir Limaj et al., Case No. IT-03-66-T, Trial Judgement, 30 Nov. 2005, ¶¶ 234-240.

<sup>137</sup> *Brđanin*, TJ ¶ 484.

Relevant subjective criteria for assessing the gravity of the harm include:

- the physical or mental condition of the victim;
- the effect of the treatment;
- the victim's age, sex, state of health; or
- the victim's position of inferiority.<sup>138</sup>

Permanent injury is not a requirement for torture and evidence of the suffering need not be visible after the commission of the crime.<sup>139</sup>

#### 7.2.2.2.7.3. PROHIBITED PURPOSE

Under customary international law it is not settled whether torture as a CAH requires the act to be committed with a specific purpose.<sup>140</sup> The ICTY and ICTR require the purpose element. Indeed, ICTY and ICTR jurisprudence considers the purpose element as the distinguishing feature of torture as opposed to inhumane treatment.<sup>141</sup>

The CAT definition requires that the act be committed with a specific purpose, such as obtaining information or a confession from the victim or a third person, punishing the victim for an act the victim or a third person has committed or is suspected of having committed, or intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind. This is not an exhaustive list.

Moreover, the prohibited purpose does not need to be the only reason for the torture, but it must be part of the motive.<sup>142</sup> If one prohibited purpose is fulfilled by the conduct, it is immaterial if the conduct was also intended to achieve another purpose (even of a sexual nature).<sup>143</sup>

The ICC Elements of Crimes requires the "purpose" element with respect to torture as a war crime but not as a crime against humanity.<sup>144</sup>

#### 7.2.2.2.7.4. OFFICIAL SANCTION NOT AN ELEMENT OF TORTURE IN ICL

Article 1 of the CAT requires that torture be committed "with the consent or acquiescence of a public official or other person acting in an official capacity". This constitutes customary

<sup>138</sup> *Ibid.*

<sup>139</sup> *Kunarac et al.*, AJ ¶¶ 149-150; *Brđanin*, TJ ¶¶ 483-4.

<sup>140</sup> CRYER, *supra* at p. 252.

<sup>141</sup> *Akayesu*, TJ ¶¶ 593-5; *Čelebići*, TJ ¶ 459; *Furundžija*, TJ ¶ 161; *Krnojelac*, TJ ¶ 180.

<sup>142</sup> *Kunarac et al.*, AJ ¶ 155, *Kvočka et al.*, TJ ¶ 153; *Čelebići*, TJ ¶ 470.

<sup>143</sup> *Čelebići*, TJ ¶¶ 470, 472; *Brđanin*, TJ ¶¶ 486-7; *Kunarac et al.*, AJ ¶ 155.

<sup>144</sup> ICC Elements of Crimes, fn 14 (stating "It is understood that no specific purpose need be proved for this crime").

international law in so far as states and their conduct are concerned. It is based on human rights law, and the idea that human rights are violated by states or government.

However, outside the CAT framework, there is no public official requirement under customary

*There is no public official requirement under customary international law relating to the criminal responsibility of an individual for torture.*

international law relating to the criminal responsibility of an individual for torture.<sup>145</sup> There is no requirement that the perpetrator is a public official, or that torture was committed in the presence of an official. The ICC does not require a link between an official and the act of torture.<sup>146</sup> It is the nature of the act that matters, not the perpetrator's

relationship to the state.

#### 7.2.2.2.7.5. CUSTODY AND CONTROL (ICC)

At the ICC, there is an additional requirement that the victim be in the "custody and control" of the perpetrator.<sup>147</sup>

#### 7.2.2.2.7.6. ACTS CONSTITUTING TORTURE, AND RAPE AND SEXUAL ABUSE AS TORTURE

Both acts or omissions can constitute torture. Omissions may provide the requisite material element, provided that the mental or physical suffering caused meets the required level of severity and that the omission was intentional and not, when judged objectively, accidental.<sup>148</sup>

*Acts or omissions can constitute torture.*

The following acts have been found to constitute torture:<sup>149</sup>

- beatings;
- extraction of nails, teeth, etc.;
- burns;
- electric shocks;
- suspension;
- suffocation;
- exposure to excessive light or noise;
- administration of drugs in detention or psychiatric institutions;
- prolonged denial of rest or sleep;
- prolonged denial of food;

<sup>145</sup> See, e.g., *Kunarac et al.*, AJ ¶¶ 142-8; Miroslav Kvočka et al., Case No. IT-98-30/1-A, Appeal Judgement, 28 Feb. 2005, ¶ 284.

<sup>146</sup> ICC Elements of Crimes, Art. 7(2)(e).

<sup>147</sup> *Ibid.*, Art. 7(1)(f)(2).

<sup>148</sup> *Čelebići*, TJ ¶ 468.

<sup>149</sup> See, e.g., *Čelebići*, TJ ¶¶ 461-469; *Furundžija*, AJ ¶ 113.

- prolonged denial of sufficient hygiene;
- prolonged denial of medical assistance;
- total isolation and sensory deprivation;
- being kept in constant uncertainty in terms of space and time;
- threats to torture;
- the killing of relatives;
- total abandonment;
- simulated executions;
- being held incommunicado;
- rape;
- sexual aggression;
- rubbing of a knife against a woman's inner thighs and stomach, coupled with a threat to insert the knife into her vagina;
- being paraded naked in humiliating circumstances; and
- being forced to watch someone being sexually assaulted.

*Acts of torture embrace all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity.*

Acts of torture embrace all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity.<sup>150</sup>

Some acts *per se* establish the requisite level of suffering to qualify as torture. Rape is such an act.<sup>151</sup> Severe pain or suffering can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering; sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture.<sup>152</sup> It should be noted that other acts of sexual violence can be charged as either persecution or other inhuman acts.<sup>153</sup>

#### 7.2.2.2.8. RAPE

The *actus reus* of the crime of rape at the ICTY is:

- the sexual penetration, however slight
  - of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator or

<sup>150</sup> *Furundžija*, TJ ¶ 186.

<sup>151</sup> *Kunarac et al.*, AJ ¶¶ 150-1.

<sup>152</sup> *Čelebići*, TJ ¶¶ 495-496; *Brđanin*, TJ ¶ 485; *Kunarac et al.*, AJ ¶¶ 150-1; *Akayesu*, TJ ¶ 596; *Furundžija*, TJ ¶¶ 163, 171.

<sup>153</sup> *Milan Milutinović et al. ("Šainović et al.")*, Case No. IT-05-87-T, Trial Judgement, 26 Feb. 2009, ¶¶ 194 – 201.

- of the mouth of the victim by the penis of the perpetrator,<sup>154</sup>
- without the consent of the victim.<sup>155</sup>

At the ICTY, the *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.<sup>156</sup>

The ICC Elements of Crimes defines the crime of rape is defined as:

- The perpetrator invaded the body of a person by conduct resulting in penetration, however slight,
  - of any part of the body of the victim or of the perpetrator with a sexual organ, or
  - of the anal or genital opening of the victim with any object or any other part of the body.<sup>157</sup>
- By force, or
- By 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 another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.<sup>158</sup>

The *mens rea* is controlled by Article 30 of the Rome Statute. This means the perpetrator must have acted with intent and knowledge—the perpetrator must have intended to penetrate the victim’s body, and was aware that the penetration was by force or threat of force. However, nothing in the Elements or Statutes indicates that the perpetrator needed to have any knowledge regarding the consent of the victim.

The definition of the conduct is more gender-neutral and broad than at the ICTY. However, the “coercion” requirement could be more complicated to prove than the simpler requirement of lack of consent. Notably, the ICC RPE includes rules of evidence related to consent, so it is possible that the ICC judges could conclude that the Elements of Crimes do not reflect a correct reading of the Rome Statute.

The same definition of rape applies as a crime against humanity and as a war crime. See Module 8 for a discussion of rape as a war crime.

<sup>154</sup> *Kunarac et al.*, AJ ¶ 127.

<sup>155</sup> *Ibid.* at ¶ 129; See also CRYER, *supra* at pp. 254 – 255. Early ICTY jurisprudence applied a coercion requirement, but after conducting an analysis of various legal systems, it was established by the Appeals Chamber that lack of consent was the correct element.

<sup>156</sup> *Kunarac et al.*, AJ ¶ 127; *Stakić*, TJ ¶ 755; *Gacumbitsi*, AJ ¶¶ 147-157.

<sup>157</sup> ICC Elements of Crimes, Art. 7(1)(g)-1(1).

<sup>158</sup> *Ibid.*, Art. 7(1)(g)-2(2).

### 7.2.2.2.8.1. MEANING OF CONSENT

*While force or threat of force provides clear evidence of non-consent, it is not an element per se of the crime of rape.*

Consent must be given voluntarily, as the result of the victim's free will, assessed in the context of the surrounding circumstances.<sup>159</sup>

Force or threat of force may be relevant to demonstrate a clear lack of consent.<sup>160</sup> While force or threat of force provides clear evidence of non-consent, it is not an element *per se* of the crime of rape at the ICTY. A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.<sup>161</sup>

### 7.2.2.2.8.2. NO NEED TO PROVE RESISTANCE

There is no requirement that the victim provide continuous resistance in order to provide adequate notice to the perpetrator that the sexual activity is non-consensual. However, evidence of resistance could support a finding that the sexual penetration occurred without the consent of the victim and that the perpetrator knew that it occurred without consent.<sup>162</sup>

*There is no requirement that the victim provide continuous resistance in order to provide adequate notice to the perpetrator that his attentions are non-consensual*

### 7.2.2.2.9. PERSECUTIONS ON POLITICAL, RACIAL AND RELIGIOUS GROUNDS

Persecution is defined as an act or omission which:

- discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (*actus reus*); and
- was carried out deliberately with the intention to discriminate on one of the listed grounds (*mens rea*).<sup>163</sup>

At the ICTY and ICTR, grounds for discrimination can be political, racial or religious. In addition to these, the Rome Statute includes national, ethnic, cultural, or gender or "other grounds that are universally recognized as impermissible under international law".<sup>164</sup>

<sup>159</sup> *Kunarac et al.*, TJ ¶ 460; *Kunarac et al.*, AJ ¶ 128.

<sup>160</sup> *Kunarac et al.*, AJ ¶ 129.

<sup>161</sup> *Ibid.*; *Stakić*, TJ ¶ 755.

<sup>162</sup> *Kunarac et al.*, AJ ¶¶ 128-129.

<sup>163</sup> *Blaškić*, AJ ¶ 131; *Krnojelac*, AJ ¶ 185; *Brđanin*, TJ ¶ 992.

<sup>164</sup> Rome Statute, Art. 7(1)(b).

Although persecution often refers to a series of acts, at the ICTY a single act may be sufficient, as long as this act or omission discriminates in fact and was carried out deliberately with the intention to discriminate on one of the listed grounds.<sup>165</sup> However, the Rome Statute requires that the persecution be committed in connection with at least another crime against humanity or crime within the jurisdiction of the ICC.<sup>166</sup>

#### 7.2.2.2.9.1. DISCRIMINATORY INTENT

The crime of persecution derives its unique character from the requirement of a specific discriminatory intent. It is insufficient for the accused to be aware that he is in fact acting in a discriminatory way; he must consciously intend to discriminate on one of the listed bases.<sup>167</sup>

*Persecution derives its unique character from the requirement of a specific discriminatory intent.*

#### 7.2.2.2.9.2. DISCRIMINATORY NATURE OF THE ACT

A discriminatory act exists where a person is targeted on the basis of religious, political or racial considerations, *i.e.* for his membership in a certain victim group that is targeted by the perpetrator. It is not necessary that the victim belong to the group targeted by the perpetrator.<sup>168</sup> However, it must be established that the act did in fact discriminate against the person based on one of these grounds.

#### 7.2.2.2.9.3. ACTS AMOUNTING TO PERSECUTION

*Acts amounting to persecution may include any of the acts listed as CAH. However, they can also include other acts which rise to the same level of gravity or seriousness, when committed with discriminatory intent.*

Persecution as a CAH can encompass various forms of conduct. Acts amounting to persecution may include any of the acts listed as CAH. However, they can also include other acts which rise to the same level of gravity or seriousness, when committed with discriminatory intent,<sup>169</sup> including other crimes listed in the ICTY statute as well as acts which are not necessarily crimes in and of themselves. This approach is to be distinguished

from that taken at in the Rome Statute, which requires a nexus with another crime within the jurisdiction of the ICC.

Acts which have been found to amount to persecution include:<sup>170</sup>

<sup>165</sup> *Vasiljević*, AJ ¶113; *Blaškić*, AJ ¶ 135.

<sup>166</sup> Rome Statute, Art. 7(1)(h).

<sup>167</sup> *Krnjelac*, TJ ¶ 435; *Kordić et al.*, TJ ¶ 212.

<sup>168</sup> *Krnjelac*, AJ ¶ 185; *Brđanin*, TJ ¶ 993.

<sup>169</sup> *Blaškić*, AJ ¶¶ 138-9.

<sup>170</sup> See, *e.g.*, *Brđanin*, TJ ¶¶ 994, 1005, 1012, 1014, 1023, 1025, 1049; *Blaškić*, AJ ¶¶ 149, 153, 155, 159; *Stakić*, TJ ¶ 757; *Kvočka et al.*, AJ ¶¶ 323-5; *Nahimana*, AJ ¶¶ 986-7.



- deportation, forcible transfer or displacement;
- destruction of property, including religious buildings;<sup>171</sup>
- attacks in which civilians are targeted, as well as indiscriminate attacks on cities, towns, and villages;
- detention of civilians who were killed, used as human shields, beaten, subjected to overcrowding, physical or psychological abuse and intimidation, inhumane treatment or deprived of adequate food and water;
- humiliating and degrading treatment;
- any sexual assault falling short of rape, embracing all serious abuses of a sexual nature;<sup>172</sup>
- denial of fundamental rights such as the rights to employment, freedom of movement, proper judicial process and proper medical care;
- violations of human dignity such as harassment, humiliation and psychological abuses
- hate speech, on the basis that it violates the right to human dignity and the right to security; and
- forced labour, excluding work (even if forced) required or permitted in the ordinary course of lawful detention, but including forced labour assignments which require civilians to take part in military operations or which result in exposing civilians to dangerous or humiliating conditions amounting to cruel and inhumane treatment.<sup>173</sup>

*Separately or combined, the acts must amount to persecution, though it is not required that each alleged underlying act be regarded as a violation of international law*

At the ICTY, acts of persecution, considered separately or together, must reach the level of gravity of other crimes against humanity.<sup>174</sup> In determining whether this threshold is met, acts should not be considered in isolation but should be examined in their context and with consideration of their cumulative effect. Separately or combined, the acts must amount to persecution, though it is not required that each alleged underlying act be regarded as a violation of international law.<sup>175</sup> Conversely, the mere fact that an infringement of rights was committed with discriminatory intent does not mean it is grave enough to be considered persecution.<sup>176</sup> It is not clear whether the ICC will adopt this same approach or whether the Rome Statute requirements of “severe” deprivation and a connection to other crimes will be interpreted differently.

<sup>171</sup> Before the ICTY it has been held that destruction of cultural and religious property can constitute persecution even though it is not specifically listed under Art. 5 of the Statute, *See Vlastimir Đorđević*, Case No. IT-05-87/1-T, Trial Judgement, 23 Feb. 2011, ¶¶ 1770-1774; *Kordić et al.*, AJ ¶ 834.

<sup>172</sup> *See, e.g., Milutinović*, TJ ¶¶ 194 – 201.

<sup>173</sup> *See, e.g., Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 Nov. 1950, ETS 5, Art. 4(3), *available at* <http://www.unhcr.org/refworld/docid/3ae6b3b04.html> (accessed 28 June 2011); *Krnjelac*, AJ ¶ 200; Third Geneva Convention, Art. 52(2); *Simić et al.*, TJ ¶¶ 91-93.

<sup>174</sup> *Blaškić*, AJ ¶ 135.

<sup>175</sup> *Krnjelac*, AJ, Separate Opinion ¶¶ 5-7; *Brđanin*, TJ ¶ 995.

<sup>176</sup> *Ibid.* at ¶¶ 135, 138; *Naletilić et al.*, TJ ¶ 635.

#### 7.2.2.2.9.4. NO REQUIREMENT OF DISCRIMINATORY POLICY

There is no requirement that a discriminatory policy exists or that, in the event that such a policy is shown to have existed, the accused needs to have taken part in the formulation of such discriminatory policy or practice.<sup>177</sup>

#### 7.2.2.2.10. OTHER INHUMANE ACTS

The ICTY Appeals Chamber stated that ICTY Statute Article 5(i), covering other inhumane acts, was “[d]eliberately designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition”.<sup>178</sup> Other inhumane acts include those crimes against humanity that are not otherwise specified in the ICTY and ICTR Statutes, but are of comparable seriousness.

*Other inhumane acts include CAH that are not otherwise specified in the ICTY and ICTR Statutes, but are of comparable seriousness.*

The elements of other inhumane acts are:

- the occurrence of an act or omission of similar seriousness to the other enumerated acts;
- the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and
- the act or omission was performed deliberately by the accused or person(s) for whose acts and omissions he bears criminal responsibility.<sup>179</sup>

In the Rome Statute, there is a threshold that other inhuman acts must:

- be of similar character to other prohibited acts; and
- cause great suffering or serious injury to body or to mental or physical health.<sup>180</sup>

Examples of other inhumane acts are:<sup>181</sup>

<sup>177</sup> *Brđanin*, TJ ¶ 996.

<sup>178</sup> *Stakić*, AJ ¶¶ 315-6. See also *Brima*, AJ ¶ 183.

<sup>179</sup> *Kordić et al.*, AJ ¶ 117; *Galić*, TJ ¶ 152; See also *Naletilić et al.*, TJ ¶ 247; *Kayishema*, TJ ¶¶ 150-1, 154; *Akayesu*, TJ ¶ 585.

<sup>180</sup> Rome Statute, Art. 7(1)(k).

<sup>181</sup> See, e.g., *Akayesu*, TJ ¶ 697; *Simić et al.*, TJ ¶ 78; *Stakić*, AJ ¶ 317; *Brima* AJ ¶ 184.

- sexual violence (which is not limited to physical invasion of the body and may include acts which do not involve penetration or even physical contact, *e.g.* forced undressing of women in coercive and humiliating circumstances);
- forced undressing of women and marching them in public;
- beatings; and
- forcible transfer, *i.e.* the forced displacement of civilians which may occur within a state border; this displacement need not be permanent.

Some of these examples, recognised by the ICTY as “other inhumane acts”, have been specifically defined by the ICC as crimes against humanity.

#### 7.2.2.2.10.1. ASSESSING SERIOUSNESS

In order to assess the seriousness of an inhumane act or omission, consideration must be given to all the factual circumstances of the case. These may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex, and health, and the physical, mental, and moral effects of the act or omission upon the victim.<sup>182</sup>

#### 7.2.2.2.10.2. MENS REA

The offender must intend to inflict inhumane acts. At the time of the act or omission, the offender had the intention to inflict serious physical or mental suffering or to commit a serious attack upon the human dignity of the victim, or knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity.<sup>183</sup> It is not required that the accused considered his actions “inhumane”.<sup>184</sup>

*At the time of the act or omission, the offender must have the intention to inflict serious physical or mental suffering or to commit a serious attack upon the human dignity of the victim, or knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity.*

#### 7.2.2.2.11. SEXUAL SLAVERY

*Sexual slavery, although a separate crime, is a form of enslavement.*

Sexual slavery is not a separate crime at the ICTY and ICTR, although cases that could qualify as sexual slavery have been tried under charges of enslavement.<sup>185</sup> Sexual slavery, although a separate crime, is a form of enslavement. The first element of sexual slavery is therefore the same as enslavement, and the second element reflects the sexual

<sup>182</sup> *Galić*, TJ ¶ 153; *Krnjelac*, TJ ¶ 131; *Čelebići*, TJ ¶ 536; *Kunarac et al.*, TJ ¶ 501.

<sup>183</sup> *Galić*, TJ ¶ 154; *Vasiljević*, TJ ¶ 236; *Krnjelac*, TJ ¶ 132; *Kayishema*, TJ ¶ 153.

<sup>184</sup> *Čelebići*, TJ ¶ 543.

<sup>185</sup> See, *e.g.*, *Kunarac*, AJ ¶ 119; *Kunarac*, TJ, ¶ 539 – 543 .

component of the crime:

- The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
- The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.<sup>186</sup>

Sexual slavery encompasses human trafficking.<sup>187</sup> The drafters of the Rome Statute noted that sexual slavery could involve more than one perpetrator as part of a common criminal purpose.<sup>188</sup>

It was also noted that the deprivation of liberty could also include forced labour.<sup>189</sup> Sexual slavery could also include forced marriages.

The Court of BiH has referred to the Rome Statute in articulating a definition of sexual slavery.<sup>190</sup>

#### 7.2.2.2.12. ENFORCED PROSTITUTION

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The Geneva Conventions included enforced prostitution as an attack on a woman's honour (GC IV 1949) or as an outrage upon personal dignity (AP I). In the Rome Statute, it was included as a separate crime. The elements of enforced prostitution are:

- The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by 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 or such person's or persons' incapacity to give genuine consent.
- The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.<sup>191</sup>

#### 7.2.2.2.13. FORCED PREGNANCY

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Forced pregnancy is a crime against humanity in the Rome Statute. It was also recognised in the Vienna Declaration and Programme of Action and the Beijing Declaration and Platform for Action.<sup>192</sup>

<sup>186</sup> ICC Elements of Crimes, Art. 7(1)(g)-2 fn 18.

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

<sup>188</sup> *Ibid.* at 7(1)(g)-2, fn 17.

<sup>189</sup> *Ibid.* at 7(1)(g)-2 fn 18.

<sup>190</sup> See Court of BiH, Predrag Kujundžić, Case No. X-KR-07/442, 1st Instance Verdict, 30 Oct. 2009, ¶ 512 (relevant part upheld on appeal).

<sup>191</sup> ICC Elements of Crimes, Art. 7 (1) (g)-3.

<sup>192</sup> Vienna Declaration, World Conference on Human Rights, UN Doc. A/CONF.157/24 (1993) Part II, ¶ 38; Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 Sept. 1995, A/CONF.177/20 (1995) and A/CONF.17720/Add.1 (1995) Chapter II, ¶ 115.

To convict a person of forced pregnancy, the prosecutor must prove that the perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.<sup>193</sup> The law does not affect national laws relating to pregnancy and abortion,<sup>194</sup> but reflects cases where captors have impregnated women and held them until it was too late to have an abortion.<sup>195</sup>

#### 7.2.2.2.14. ENFORCED STERILIZATION

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No treaty before the Rome Statute recognised enforced sterilization as a crime against humanity and war crime. The ICC Elements of Crimes defines the crime as:

- The perpetrator deprived one or more persons of biological reproductive capacity.
- The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.<sup>196</sup>

The drafters to the Rome Statute did not mean to include non-permanent birth-control methods within the definition of this crime. They also recognised that genuine consent is not given when the victim has been deceived.<sup>197</sup>

#### 7.2.2.2.15. SEXUAL VIOLENCE

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When considering crimes against humanity, an ICTY trial chamber has recognised that “‘sexual assault’ falls within various provisions safeguarding physical integrity [...]” and could also constitute an “outrage upon personal dignity”, which the chamber considered “a violation of a fundamental right”.<sup>198</sup> The chamber also noted that “sexual assault offences may reach the requirement of gravity equal to that of other crimes against humanity enumerated in Article 5 of the [ICTY] Statute”.<sup>199</sup>

The chamber found that the elements of sexual assault as a form of persecution as a crime against humanity are:

- The physical perpetrator commits an act of a sexual nature on another, including requiring that person to perform such an act.
- That act infringes the victims’ physical integrity or amounts to an outrage to the victim’s personal dignity.
- The victim does not consent to the act.

<sup>193</sup> ICC Elements of Crimes, Art. 7 (1) (g)-4.

<sup>194</sup> ICC Rome Statute, Art. 7(2)(f).

<sup>195</sup> See, e.g., Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), transmitted to the Security Council by a letter from the Secretary-General to the President of the Security Council dated 27 May 1994 (S/1994/674), ¶¶ 248 – 250.

<sup>196</sup> ICC Elements of Crimes, Art. 7 (1) (g)-5.

<sup>197</sup> *Ibid.* at fns 19 – 20.

<sup>198</sup> *Milutinović*, TJ ¶ 192.

<sup>199</sup> *Ibid.* at ¶ 193.

- The physical perpetrator intentionally commits the act.
- The physical perpetrator is aware that the act occurred without the consent of the victim.<sup>200</sup>

“Other sexual violence of comparable gravity” is a crime against humanity in the Rome Statute. The ICC defines the crime as:

- (1) The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by 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 or such person’s or persons’ incapacity to give genuine consent.
- (2) Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute.
- (3) The perpetrator was aware of the factual circumstances that established the gravity of the conduct.<sup>201</sup>

#### 7.2.2.2.16. ENFORCED DISAPPEARANCE

*Enforced disappearance has been recognised as a crime against humanity in several international declarations and conventions.*

Enforced disappearance has been recognised as a crime against humanity in several international declarations and conventions.<sup>202</sup> These conventions helped inform the ICC definition of the crime, which is:

<sup>200</sup> *Ibid.* at ¶ 201, See also ¶¶ 194 – 201 for a discussion of these elements.

<sup>201</sup> ICC Elements of Crimes, Art. 7(1)(g)-6.

<sup>202</sup> Declaration on the Protection of All Persons from Enforced Disappearances, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992); Inter-American Convention on Forced Disappearance of Persons, 33 I.L.M. 1429 (1994); International Convention for the Protection of All Persons from Enforced Disappearance, E/CN.4/2005/WG.22/WP.1/Rev.4 (2005).

### ICC Definition of Enforced Disappearance

1. The perpetrator:
  - (a) Arrested, detained or abducted one or more persons; or
  - (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.
2. (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
  - (b) Such refusal was preceded or accompanied by that deprivation of freedom.
3. The perpetrator was aware that:
  - (a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
  - (b) Such refusal was preceded or accompanied by that deprivation of freedom.
4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.
5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.
6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.

The ICC definition does not require that the perpetrator be involved in both detaining and refusing information about the victim. A person can be guilty of enforced disappearance if they either detained a person, knowing it was likely that there would be no acknowledgment or information provided, or if they refused to acknowledge a detention or provide information about it, knowing that a detention had likely taken place.

*The underlying act of detention can include maintaining a detention that has already taken place, which could have been lawful.*

The underlying act of detention can include maintaining a detention that has already taken place, which could have been lawful. If the

perpetrator maintains a detention in these circumstances, the perpetrator would have to know that the refusal to acknowledge or give information about the arrest had already taken place.<sup>203</sup>

#### 7.2.2.2.17. APARTHEID

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The Rome Statute also includes apartheid as a crime against humanity. Although apartheid has long been recognised as a crime against humanity,<sup>204</sup> the ICC definition broadened the crime to include situations beyond that which occurred in South Africa.

#### ICC Definition of Apartheid

1. The perpetrator committed an inhumane act against one or more persons.
2. Such act was an act referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts.
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.
5. The perpetrator intended to maintain such regime by that conduct.

“Inhumane acts” in the context of apartheid can include murder, torture, arbitrary detention, persecution, conditions calculated to cause the destruction of a group or legislative measures to prevent a group’s participation in politics, society, or economic and cultural activities, etc. At the ICC, apartheid is a specific intent crime, requiring that the perpetrator intend to maintain a regime of systematic oppression through the commission of inhumane acts.

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<sup>203</sup> ICC Elements of Crimes, fns 25 – 28.

<sup>204</sup> See, e.g., Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968); UN General Assembly, International Convention on the Suppression and Punishment of the Crime of Apartheid (“Apartheid Convention”), 30 November 1973, A/RES/3068(XXVIII), available at <http://www.unhcr.org/refworld/docid/3ae6b3c00.html> (accessed 28 June 2011).



### 7.2.2.3. CONCLUDING COMMENTS: DIFFERENCES BETWEEN CAH AND WAR CRIMES

*Notes for trainers:*

- It would be useful for participants at the end of this section to consider the differences between crimes against humanity and war crimes so that they develop a holistic understanding of all of the crimes prohibited under international criminal law. The historic development of crimes against humanity should prove useful in drawing the attention of participants to some of the differences.
- Participants can be encouraged to discuss the advantages and disadvantages of charging crimes against humanity as opposed to war crimes, and vice-versa, as well as the ways in which both crimes can be charged together.
- Trainers should be aware that the next Module, Module 8, deals with war crimes, and it might be useful to have this discussion after that Module has been covered.

War crimes and CAH may overlap. For example, a mass killing of civilians can be both a war crime and CAH. The main differences between a war crime and CAH include:

- War crimes require a nexus to an armed conflict, whereas a CAH do not (despite CAH often being committed during armed conflicts), but CAH require an attack on civilian populations;
- War crimes focus on the protection of certain protected groups, including enemy nationals, whereas CAH protect victims regardless of nationality of affiliation to the conflict; and
- War crimes regulate conduct on the battlefield and military objectives, whereas CAH regulate actions against civilian populations.

## 7.3. REGIONAL LAW AND JURISPRUDENCE

*Notes for trainers:*

- The Module now shifts to focus on the national laws of BiH, Croatia and Serbia. However, it is not recommended to discuss the regional sections in isolation while training this Module. For that reason, cross references 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.
- It is important for participants to have in mind that only the Court of BiH, which applies the BiH CC, has prosecuted crimes against humanity. The entity level courts in BiH and the courts in Croatia and Serbia have not prosecuted crimes against humanity. It is for this reason that the BiH section is longer than those for Croatia and Serbia.
- 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.
- **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.

## 7.4. BIH

### *Notes for trainers:*

- This section covers the prosecution of crimes against humanity in BiH. Only the Court of BiH, which generally applies the BiH Criminal Code, has prosecuted crimes against humanity. The jurisprudence from this court is outlined in this section.
- Participants should be encouraged to assess this jurisprudence and how it will be applied in the future.
- As the BiH entity level courts have not prosecuted crimes against humanity, participants from these jurisdictions should consider whether such crimes could be prosecuted in the future and in what way.
- This section is structured in the same way as the section on the applicable international law in that the general contextual elements of crimes against humanity are discussed first, followed an analysis of each of the underlying crimes that could constitute crimes against humanity.
- In order to facilitate discussion, participants could be asked to address certain questions, such as:
  - Is it necessary to prove an underlying state or non-state policy or plan for crimes against humanity?
  - If soldiers have laid down their arms or are not fighting as soldiers, should their presence in the civilian population be taken into account when deciding whether crimes against humanity have been committed?
  - Should the crime of enforced disappearance be tried only as a crime against humanity, as a war crime, or as a separate offence?
  - Is there a distinction between the crimes of deportation and forcible transfer, and should that be taken into account in the prosecution of these crimes?

### 7.4.1. OVERVIEW

The BiH Criminal Code is generally applied only by the Court of BiH for crimes arising from the conflicts in the former Yugoslavia. When trying war crimes cases arising out of the conflicts in the former Yugoslavia, the BiH entity level courts and Brčko District courts generally apply the adopted SFRY Criminal Code.<sup>205</sup> To date, no cases involving crimes against humanity have been delegated to the entity level courts or Brčko District courts. The SFRY CC does not contain any

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<sup>205</sup> For more on this see Module 5.

provisions relating to crimes against humanity. Crimes against humanity cases are, therefore, tried only before the Court of BiH.

Article 172 of the BiH Criminal Code<sup>206</sup> includes provisions on crimes against humanity:

#### Article 172, Paragraph 1 of the BiH Criminal Code

Whoever, as part of a widespread or systematic attack directed against any civilian population, with knowledge of such an attack perpetrates any of the following acts:

- a) Depriving another person of his life (murder);
- b) Extermination;
- c) Enslavement;
- d) Deportation or forcible transfer of population;
- e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f) Torture;
- g) Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity;
- h) Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognised as impermissible under international law, in connection with any offence listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of Bosnia and Herzegovina;
- i) Enforced disappearance of persons;
- j) The crime of apartheid;
- k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health,

shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

<sup>206</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).

Article 172(2) provides the relevant definitions:

### Article 172, Paragraph 2 of the BiH Criminal Code

For the purpose of paragraph 1 of this Article the following terms shall have the following meanings:

- a) *Attack directed against any civilian population* means a course of conduct involving the multiple perpetrations of acts referred to in paragraph 1 of this Article against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.
- b) *Extermination* includes the intentional infliction of conditions of life, especially deprivation of access to food and medicines, calculated to bring about the destruction of part of a population.
- c) *Enslavement* means the exercise of any or all of the powers attaching to the right of ownership over a person, and includes the exercise of such power in the course of trafficking in persons, in particular women and children.
- d) *Deportation or forcible transfer of population* means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.
- e) *Torture* means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under control of the perpetrator except that torture shall not include pain or suffering arising only from, or being inherent in or incidental to, lawful sanctions.
- f) *Forced pregnancy* means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
- g) *Persecution* means the intentional and severe deprivation of fundamental rights, contrary to international law, by reason of the identity of a group or collectivity.
- h) *Enforced disappearance of persons* means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with an aim of removing them from the protection of the law for a prolonged period of time.
- i) *The crime of apartheid* means inhumane acts of a character similar to those referred to in paragraph 1 of this Article, perpetrated in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and perpetrated with an aim of maintaining that regime.

### 7.4.2. PRINCIPLE OF LEGALITY

In many cases the panels of the Court of BiH (both first instance and second instance) have ruled that the application of the BiH Criminal Code with regard to crimes against humanity was not in violation of the principle of legality.<sup>207</sup> Reasoning regarding this issue as provided by the trial and appeal panel in the *Rašević et al.* case will be provided here as an example.

The trial panel noted that during the conflict between 1992 and 1995, crimes against humanity were not included in the criminal codes in effect in BiH. However, the panel held, it was indisputable that in 1992 crimes against humanity were accepted as part of international customary law and constituted a non-derogative provision of international law.<sup>208</sup>

The Court of BiH found that these offences were covered by international customary law which was in effect at the time of perpetration. The court found that crimes against humanity were also defined by the then SFRY CC through individual criminal offences under the following articles:

- Article 134 (Inciting National, Racial or Religious Hatred, Discord or Hostility);
- Article 142 (War Crime against the Civilian Population);
- Article 143 (War Crime against the Wounded and the Sick);
- Article 144 (War Crimes against Prisoners of War);
- Article 145 (Organizing and Instigating the Commission of Genocide and War Crimes);
- Article 146 (Unlawful Killing or Wounding of the Enemy);
- Article 147 (Marauding);
- Article 154 (Racial and other Discrimination);
- Article 155 (Establishing Slavery Relations and Transporting People in Slavery Relation); and
- Article 186 (Infringement of the Equality of Citizens).<sup>209</sup>

<sup>207</sup> See, e.g., Court of BiH, Mitar Rašević et al., Case No. X-KRZ- 06/275, 1st Instance Verdict, 28 Feb. 2008, p. 164 *et seq* (p. 189 *et seq* BCS) (relevant part upheld on appeal); see, e.g., Court of BiH, Mitar Rašević et al., Case No. X-KRZ- 06/275, 2nd Instance Verdict, 6 Nov. 2008, p. 30 *et seq* (p. 32 *et seq* BCS); Court of BiH, Željko Mejakić et al., Case No. X-KRŽ-06/200, 2nd Instance Verdict, 16 Feb. 2009, ¶ 138 *et seq*; Neđo Samardžić, Case No. X-KRZ-05/49, 2nd Instance Verdict, 13 Dec. 2006, p. 20 *et seq* (p. 22 *et seq* BCS); Jadranko Palija, Case No. X-KR-06/290, 1st Instance Verdict, 28 Nov. 2007, p. 18 *et seq* (p. 17 *et seq* BCS) (upheld on appeal); Court of BiH, Božić Zdravko et al., Case No. X-KRZ-06/236, 1st Instance Verdict, 6 Nov. 2008, p. 91 *et seq* (p. 87 *et seq* BCS) (upheld on appeal); Court of BiH, Zoran Janković, Case No. X-KR-06/234, 1st Instance Verdict, 19 June 2007, p. 12 *et seq* (p. 11 *et seq* BCS) (upheld on appeal); Court of BiH, Gojko Janković, Case No. X-KR-05/161, 1st Instance Verdict, 16 Feb. 2007, p. 32 *et seq* (p. 31 *et seq* BCS) (relevant part upheld on appeal); Court of BiH, Gojko Janković, Case No. X-KR-05/161, 2nd Instance Verdict, 23 Oct. 2007, p. 13 (p. 13 BCS); Dragoje Paunović, Case No. X-KR-05/16, 1st Instance Verdict, 26 May 2006, p. 22 *et seq* (p. 19 *et seq* BCS) (upheld on appeal); Nikola Kovačević, Case No. X-KR-05/40, 1st Instance Verdict, 3 Nov. 2006, p. 39 *et seq* (p. 36 *et seq* BCS) (upheld on appeal); Dragan Damjanović, Case No. X-KR-05/51, 1st Instance Verdict, 15 Dec. 2006, p. 55 *et seq* (p. 51 *et seq* BCS) (relevant part upheld on appeal).

<sup>208</sup> See, e.g., *Rašević et al.*, 1st inst., p. 165 (p. 190 - 1 BCS) (relevant part upheld on appeal).

<sup>209</sup> See, e.g., *Rašević et al.*, 1st inst., p. 164 (p. 189 BCS) (relevant part upheld on appeal).

Thus, although Article 172 of the BiH Criminal Code now includes crimes against humanity, these offences also existed during the conflicts in the former Yugoslavia because they were prohibited by international standards and, indirectly, through the SFRY CC in effect at the time.<sup>210</sup>

The Court of BiH held that the UN Secretary General,<sup>211</sup> International Law Commission<sup>212</sup> as well as the case law of the ICTY and ICTR<sup>213</sup> established that the punishability of crimes against humanity represented an imperative standard of international law or *jus cogens*.<sup>214</sup> Therefore, the Court of BiH held, it appears indisputable that in 1992 crimes against humanity were part of international customary law.<sup>215</sup>

With regard to Article 4(a) of the BiH Criminal Code, which refers to “general principles of international law”, the Court of BiH held that “general principles of international law” include crimes against humanity, and demonstrated by the “Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal” that the International Law Commission submitted to the UN General Assembly in 1950.<sup>216</sup>

*The Court in BiH held that  
“general principles of  
international law” include crimes  
against humanity.*

The Court of BiH held, therefore, that regardless of whether it was viewed from the position of the customary international law or the position of “general principles of international law”, it was indisputable that crimes against humanity constituted a criminal offence in the relevant time period and that the principle of legality had been satisfied.<sup>217</sup>

Further detailed reasoning on this issue could be instructive, and can be found in the *Rašević et al.* trial panel judgement.<sup>218</sup>

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.*, referring to the UN Secretary General Report pursuant to paragraph 2 of Security Council Resolution 808 (1993) ¶¶ 33-34, 47-48, available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/25704](http://www.un.org/ga/search/view_doc.asp?symbol=S/25704).

<sup>212</sup> See, e.g., *Rašević et al.*, 1st inst., p. 164 (p. 189 BCS) (relevant part upheld on appeal), referring to the International Law Commission, Commentary on the Draft Code of Crimes against the Peace and Security of Mankind (1996), Art. 18.

<sup>213</sup> See, e.g., *Rašević et al.*, 1st inst., p. 164 (p. 189-190 BCS) (relevant part upheld on appeal), referring to *Akayesu*, TJ ¶¶ 563-577.

<sup>214</sup> See, e.g., *Rašević et al.*, 1st inst., pp. 164-165 (p. 190 BCS) (relevant part upheld on appeal), referring to the International Law Commission, Commentary to Draft Arts. on Responsibility of States for Internationally Wrongful Acts (2001), Art. 26.

<sup>215</sup> See, e.g., *Rašević et al.*, 1st inst., p. 165 (p. 190 BCS) (relevant part upheld on appeal).

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

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

<sup>218</sup> *Ibid.* at pp. 164 *et seq.* (p. 189 *et seq.* BCS) (relevant part upheld on appeal); *Rašević et al.*, 2nd. inst., p. 31 (p. 33 BCS).

### 7.4.3. GENERAL CONTEXTUAL ELEMENTS OF CRIMES AGAINST HUMANITY

The Court of BiH has held that in order for an offence to be characterised as a “crime against humanity”, it is above all necessary that the general elements be satisfied first, which include that:<sup>219</sup>

- The attack must be widespread or systematic;
- The attack must be directed against any civilian population;
- The acts of the perpetrator must be part of the attack; and
- The perpetrator must know that his acts fall within the context of numerous widespread or systematic crimes directed against civilian population, and that his acts are part of that pattern.

These elements are discussed in turn, below.

#### 7.4.3.1. EXISTENCE OF A WIDESPREAD OR SYSTEMATIC ATTACK

*The existence of a widespread or systematic attack is an alternative, and it is not necessary to prove that the attack is both widespread and systematic.*

Article 172(1) of the BiH Criminal Code, *inter alia*, requires the existence of a widespread or systematic attack.<sup>220</sup> The Court of BiH has held that this requirement presents an alternative, and that it is not necessary to prove that the attack is both widespread and systematic.<sup>221</sup> In *Momir Savić* and *Marko Samardžija* cases, the panels determined the existence of the attack that

fulfilled both requirements.<sup>222</sup>

##### 7.4.3.1.1. ATTACK

Relying on ICTY jurisprudence, the trial panel in the case against *Momir Savić* has described an attack as “the undertaking of actions including the perpetration of violent acts or the acts of

<sup>219</sup> See, e.g., *Savić*, 1st inst., p. 29 (p. 26-27 BCS) (relevant part upheld on appeal); *Marko Samardžija*, Case No. X-KRZ-05/07, 2nd Instance Verdict, 15 Oct. 2008, p. 9 (p. 9 BCS); *Paunović*, 1st inst., p. 15 (p. 13 BCS) (upheld on appeal); *Mirko Todorović*, Case No. X-KRZ-07/382, 2nd Instance Verdict, 23 Jan. 2009, ¶ 103; *Boban Šimšić*, Case No. X-KRZ-05/04, 2nd Instance Verdict, 7 Aug. 2007, p. 14-15 (p. 13 BCS); *Palija*, 1st inst., p. 25 (p. 24-25 BCS) (upheld on appeal); Court of BiH, *Željko Mejakić et al.*, Case No. X-KRŽ-06/200, 1st Instance Verdict, 30 May 2008, p. 192 (p. 180 BCS) (relevant part upheld on appeal); Court of BiH, *Krešo Lučić*, Case No. X-KRZ-06/298, 2nd Instance Verdict, 16 Dec. 2008, ¶ 31; Court of BiH, *Željko Lelek*, Case No. X-KRŽ-06/202, 1st Instance Verdict, 23 May 2008, p. 14 (p. 16 BCS) (relevant part upheld on appeal); *Kovacević*, 1st inst., p. 20 (p. 18-19 BCS) (upheld on appeal); *Z. Janković*, 1st inst., p. 15 (p. 14 BCS) (upheld on appeal); *G. Janković*, 1st inst., p. 35 (p. 34) (relevant part upheld on appeal); *D. Damjanović*, 1st inst., p. 12 (p. 11 BCS) (relevant part upheld on appeal); *Božić et al.*, 1st inst., pp. 25-26 (p. 24 BCS) (upheld on appeal); *Rašević et al.*, 1st inst., p. 39 (p. 38 BCS) (relevant part upheld on appeal).

<sup>220</sup> See, e.g., *Savić*, 1st inst., p. 30 (p. 27 BCS) (relevant part upheld on appeal).

<sup>221</sup> *Ibid.*; *Samardžija*, 2nd inst., p. 14 (p. 14 BCS).

<sup>222</sup> *Savić*, 1st inst., p. 30 (p. 27 BCS) (relevant part upheld on appeal); *Samardžija*, 2nd inst., p. 14 (p. 14 BCS).



violence”.<sup>223</sup> The trial panel further noted that Article 172(2)(a) of the BiH Criminal Code defined “attack” as “a course of conduct involving the multiple perpetrations of acts [referred to in Article 172(1)]”.<sup>224</sup>

The trial panel clarified that the notions of “attack” and “armed conflict” were not identical.<sup>225</sup> Under customary international law, the panel held, “the attack could precede, outlast or continue during the armed conflict, but it need not be part of it”.<sup>226</sup>

*The notions of “attack” and “armed conflict” were not identical. Under customary international law, the panel held, “the attack could precede, outlast or continue during the armed conflict, but it need not be part of it”.*

Furthermore, the trial panel distinguished the notion of “attack” in the context of crimes against humanity from the context of war crimes.<sup>227</sup> The panel held that “in the context of a crime against humanity, “attack” is not limited to the conduct of hostilities”<sup>228</sup> but could also “encompass situations of mistreatment of persons taking no active part in hostilities (such as keeping someone in detention)”.<sup>229</sup> However, both terms reflect the assumption that the civilian population cannot be a legitimate target during a war.<sup>230</sup>

*In the context of a crime against humanity, “attack” is not limited to the conduct of hostilities.*

#### 7.4.3.1.2. OBJECT OF THE ATTACK

The Court of BiH has held that before determining whether the attack was “widespread or systematic”, one must first identify *the population that is the object of the attack*. Then, after considering the “context of methods, resources, instruments and results of the attack against that population”, it must be determined whether the attack was widespread or systematic.<sup>231</sup>

Identifying the population subjected to the attack, the trial panel in *Momir Savić* case considered, *inter alia*:

The Panel has found that in early April 1992 an attack against and the destruction of the area of Višegrad and the surrounding villages was launched by the Serb paramilitary formations consisting of local Serbs, police and other paramilitary formations (that arrived from the Republic of Serbia). During the

<sup>223</sup> *Savić*, 1st inst., p. 30 (p. 27 BCS) (relevant part upheld on appeal) referring to *Kunarac et al.*, AJ ¶ 415.

<sup>224</sup> *Savić*, 1st inst., p. 30 (p. 27 BCS) (relevant part upheld on appeal).

<sup>225</sup> *Ibid.*

<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid.*

<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid.* referring to *Kunarac et al.*, AJ ¶ 86.

<sup>230</sup> *Savić*, 1st inst., p. 30 (p. 27 BCS) (relevant part upheld on appeal) referring to *Kunarac et al.*, TJ ¶ 416.

<sup>231</sup> *Savić*, 1st inst., p. 31 (p. 28 BCS) (relevant part upheld on appeal) (emphasis added); *Samardžija*, 2nd inst., p. 9 (p. 10 BCS), referring to *Kunarac et al.*, AJ ¶ 95.

attack, soldiers, the members of paramilitary formations, were collecting male and female Bosniaks, and took them away from their homes so that some of them disappeared without trace (especially men fit for military service).<sup>232</sup>

The trial panel held that the defence argument that the Bosniak civilians also kept sentries and that they were armed was irrelevant. The panel considered that as customary international law absolutely forbids the use of armed force against civilians, the principle of *tu quoque* was not a valid defence.<sup>233</sup> The trial panel relied on this finding of the ICTY Appeals Chamber in *Kunarac*:

*The fact that one side committed the attack against the civilian population of the other side does not justify the attack of that other side against the civilian population of the first side.*

When determining whether there was an attack against a particular civilian population, it is irrelevant that the other side also committed atrocities against the enemy's civilian population. The fact that one side committed the attack against the civilian population of the other side does not justify the attack of that other side against the civilian population of the first side, and it does not exclude the conclusion that the forces of that other side actually directed their attack precisely against the civilian population as such. Any attack on the enemy's civilian population is unlawful and the crimes committed within such an attack can be qualified as crimes against humanity, provided that all other requirements are met.<sup>234</sup>

#### 7.4.3.1.3. "WIDESPREAD"

*"Widespread" may be defined as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims".*

The appellate panel in *Marko Samardžija* held that the concept of "widespread" may be defined as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims".<sup>235</sup>

<sup>232</sup> *Savić*, 1st inst., pp. 31-32 (p. 28-29 BCS) (relevant part upheld on appeal).

<sup>233</sup> *Savić*, 1st inst., p. 38 (p. 34 BCS) referring to *Rašević et al.*, 1st. inst., p. 45; also referring to *Kunarac et al.*, AJ ¶ 88; Zoran Kupreškić et al., Case No. IT-95-16-T, Trial Judgement, 14 Jan. 2000, ¶ 517 and *Kupreškić et al.*, Case No. IT-95-16-T, Decision on Evidence on the Good Character of the accused and the Defense of "Tu Quoque", 17 Feb. 1999, pp. 3-4.

<sup>234</sup> *Savić*, 1st inst., p. 38 (p. 34 BCS) no reference to specific paragraph.

<sup>235</sup> *Samardžija*, 2nd inst., p. 10 (p. 10 BCS), referring to *Akayesu*, TJ ¶ 580; see also *Savić*, 1st inst., p. 30 (p. 28 BCS) (relevant part upheld on appeal).

#### 7.4.3.1.4. "SYSTEMATIC"

"Systematic" was defined by the Court of BiH appellate panel as "thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources".<sup>236</sup>

*"Systematic" was defined as "thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources".*

The trial panel in *Momir Savić* held that the following considerations could indicate whether an attack was "systematic":

- The organised nature of the acts of violence;
- The low probability of their random occurrence;<sup>237</sup> and
- The patterns of crimes, or "the non-accidental repetition of similar conduct on a regular basis".<sup>238</sup>

#### 7.4.3.1.5. "POLICY" OR "PLAN"

The trial panel in the *Momir Savić* noted that there is no requirement that the acts of the accused were supported by any form of "policy" or "plan" at the ICTY or in customary international law.<sup>239</sup>

However, the panel noted that Article 172(2)(a) of the BiH Criminal Code required that the attack be committed "pursuant to or in furtherance of a State or organizational policy to commit such attack".<sup>240</sup>

To prove that there was a "policy", it must be proven that:<sup>241</sup>

- There existed a State or organizational policy;
- The policy was to commit such an attack; and
- The attack was launched on the basis of or in furtherance of that policy.

The trial panel relied on Article 7 of the Rome Statute to define these elements, as follows:<sup>242</sup>

<sup>236</sup> *Samardžija*, 2nd inst., p. 10 (p. 10 BCS), referring to *Akayesu*, TJ ¶ 580.

<sup>237</sup> *Savić*, 1st inst., p. 31 (p. 28 BCS) (relevant part upheld on appeal).

<sup>238</sup> *Savić*, 1st inst., p. 31 (p. 28 BCS) (relevant part upheld on appeal) referring to *Kunarac et al.*, TJ ¶ 429; See also *Samardžija*, 2nd inst., p. 10 (p. 10 BCS), referring to *Kunarac et al.*, AJ ¶ 94.

<sup>239</sup> *Savić*, 1st inst., p. 36 (p. 32 BCS) (relevant part upheld on appeal) referring to *Kunarac et al.*, TJ ¶ 98.

<sup>240</sup> *Savić*, 1st inst., p. 36 (p. 32 BCS) (relevant part upheld on appeal).

<sup>241</sup> *Ibid.*

<sup>242</sup> *Ibid.*, (relevant part upheld on appeal). The panel considered that the Rome Statute, although not directly applicable in BiH, was relevant for the following reasons: it is accepted by many countries, and as such, it reflects the standards of customary international law; it uses almost identical meanings as the CC

- “State” is “clearly defined in international law”.<sup>243</sup>
- “Organisation” includes “a wide range of organisations”. According to the trial panel, the ability of the organisation to “devise and adopt the policy of attack against civilians in a widespread and systematic manner” was a more important consideration than the “formal characteristics and taxonomy” of the organization.<sup>244</sup>
- “Policy” should not be limited to plans or policies of state organisations<sup>245</sup> and “should be interpreted in the manner that it represents the defining of the objectives which should then be implemented through individual decision making on lower levels”.<sup>246</sup> The appellate panel in *Marko Samardžija* held that there was no requirement that the policy be a formal state policy, but held that the policy must be preconceived”.<sup>247</sup> The trial panel in *Momir Savić* also held that it is not necessary that the policy involve specific criminal offences, but should be related to committing an attack “in general terms”.<sup>248</sup>
- Nexus between the “policy” and an “attack” should be considered on a case-by-case basis.<sup>249</sup> The panel noted that “the existence of an attack does not necessarily imply the existence of a ‘policy’” and focused on the following considerations to find a nexus:<sup>250</sup>
  - joint acts of members of an organization or state;
  - individual but similar acts of the members of the organization or state;
  - preparatory activities before launching the attack;
  - activities prepared or steps undertaken during or towards the end of the attack;
  - existence of political, economic or other strategic objectives of the state or organization, which will be realised by the attack; and
  - in case of failure to undertake the acts, knowledge about the attack and intentional failure to undertake the acts.

*There was no requirement that the policy be a formal state policy, but held that the policy must be preconceived.*

*It is not necessary that the policy involve specific criminal offences, but should be related to committing an attack “in general terms”.*

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of BiH; BiH is its signatory and it has ratified it; the CC was adopted (with the wording that closely follows the Rome Statute) after the Rome Statute.

<sup>243</sup> *Savić*, 1st inst., p. 36 (p. 33 BCS) (relevant part upheld on appeal).

<sup>244</sup> *Ibid.*, referring to *Rašević et al.*, 1st inst. p. 40 (p. 39 BCS).

<sup>245</sup> *Savić*, 1st inst., p. 36 (p. 33 BCS) (relevant part upheld on appeal).

<sup>246</sup> *Ibid.*

<sup>247</sup> *Samardžija*, 2nd inst., p. 10 (p. 10 BCS), referring to *Akayesu*, TJ ¶ 580.

<sup>248</sup> *Savić*, 1st inst., p. 36 (p. 33 BCS) referring to *Rašević et al.*, 1st inst., p. 40 (p. 39 BCS).

<sup>249</sup> *Savić*, 1st inst., p. 37 (p. 33 BCS) (relevant part upheld on appeal); *Rašević et al.*, 1st inst., p. 40 (p. 39 BCS) (relevant part upheld on appeal).

<sup>250</sup> *Savić*, 1st inst., p. 37 (p. 33 BCS) (relevant part upheld on appeal).

The panel found that:

Although every individual attack must be considered widespread and systematic, the pattern of the attacks against civilians, irrespective of whether it is individually widespread or systematic, would (under certain circumstances) be proof of the policy to commit such attacks.<sup>251</sup>

#### 7.4.3.2. ATTACK DIRECTED AGAINST ANY CIVILIAN POPULATION

In *Momir Savić*, the trial panel held that “directed against any civilian population” means that “the civilian population was a primary target”.<sup>252</sup> The trial panel noted that the term “population” “did not mean that the entire population of the geographical entity in which the attack was taking place must have been subjected to that attack”.<sup>253</sup>

*“Directed against any civilian population” means that “the civilian population was a primary target”.*

In *Rašević et al.*, the trial panel added that it was “sufficient if the evidence showed that the attack was directed against enough individuals or in such a way as to demonstrate that the attack was not against a limited and random number of individuals or consisted of limited and isolated acts”.<sup>254</sup>

*Civilians are “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause”.*

In defining the category of “civilians”, the Court of BiH considered the definition provided in Article 3(1)(a) of GC VI: civilians are “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause”.<sup>255</sup> This article, the Court of BiH further held, prescribed that civilians “shall in all circumstances be treated humanely, without any

adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”.<sup>256</sup>

The trial panel in *Momir Savić* case added in this respect that:<sup>257</sup>

<sup>251</sup> *Savić*, 1st inst., p. 37 (p. 33 BCS) (relevant part upheld on appeal); *Rašević et al.*, 1st. inst., p. 40 (p. 40 BCS) (relevant part upheld on appeal).

<sup>252</sup> *Savić*, 1st inst., p. 38 (p. 34 BCS) (relevant part upheld on appeal).

<sup>253</sup> *Ibid.* referring to *Kunarac et al.*, AJ ¶190.

<sup>254</sup> *Rašević et al.*, 1st. inst., p. 41 (p. 40 BCS) (relevant part upheld on appeal), referring to *Kordić et al.*, AJ ¶ 95.

<sup>255</sup> *Savić*, 1st inst., p. 38 (p. 34 BCS) (relevant part upheld on appeal); *Samardžija*, 2nd inst., p. 14 (p. 15 BCS); *Rašević et al.*, 1st. inst., p. 41 (p. 40 BCS) (relevant part upheld on appeal).

<sup>256</sup> *Savić*, 1st inst., p. 38 (p. 34-35 BCS) (relevant part upheld on appeal); *Samardžija*, 2nd inst., p. 14 (p. 15 BCS).

- The attack “need not be directed against the enemy, it may also be directed against any civilian population, including any part of the population of the attacked country”;
- “Civilians” also “includes all those persons who were placed *hors de combat* when the criminal offence was committed”;<sup>258</sup>
- “Civilian population” also “includes individuals who might have offered resistance at a certain point”;<sup>259</sup>
- A “population may be considered as civilian even if certain non-civilians are present – it must simply be predominantly civilian in nature”.<sup>260</sup>

*A “population may be considered as civilian even if certain non-civilians are present – it must simply be predominantly civilian in nature”.*

### 7.4.3.3. NEXUS

In *Momir Savić*, the trial panel noted that according to Article 172, to establish a nexus between the crimes and the attack, both objective and subjective elements should be considered.

The panel held that this was established by the following objective considerations:<sup>261</sup>

- That the acts of the accused are sufficiently related to the attack.<sup>262</sup>
- “[T]he acts of the accused [...] need not be widespread or systematic in order to represent part of the attack”.<sup>263</sup>
- The trial panel added that the acts of an accused “need not be committed in the midst of the attack provided that they were sufficiently connected to the attack”.<sup>264</sup>
- Acts that are geographically or temporally separate from the “core of the attack” can still be considered part of the attack as long as they are connected to it.<sup>265</sup>
- The trial panel noted that the ICTY had found that “a crime committed several months after, or several kilometres away from the main attack could still, if sufficiently connected otherwise, be part of that

*Acts that are geographically or temporally separate from the “core of the attack” can still be considered part of the attack as long as they are connected to it.*

<sup>257</sup> *Savić*, 1st inst., pp. 38-39 (p. 35 BCS) (relevant part upheld on appeal).

<sup>258</sup> *Savić*, 1st inst., p. 38 (p. 35 BCS) (relevant part upheld on appeal) referring to Goran Jelisić, Case No. IT-95-10A, Appeal Judgement, 5 July 2001, ¶ 54.

<sup>259</sup> *Savić*, 1st inst., pp. 38-39 (p. 35 BCS) (relevant part upheld on appeal) referring to Mladen Naletilić et al., Case No. IT-98-34-A, Appeal Judgement, 3 May 2006, ¶ 235.

<sup>260</sup> *Savić*, 1st inst., p. 39 (p. 35 BCS) (relevant part upheld on appeal) referring to *Kordić et al.*, TJ ¶ 180.

<sup>261</sup> *Savić*, 1st inst., p. 40 (p. 36 BCS) (relevant part upheld on appeal).

<sup>262</sup> *Ibid.*

<sup>263</sup> *Ibid.* referring to *Kordić et al.*, AJ ¶ 94.

<sup>264</sup> *Savić*, 1st inst., p. 30 (p. 27 BCS) (relevant part upheld on appeal) referring to *Limaj et al.*, TJ ¶ 189.

<sup>265</sup> *Savić*, 1st inst., p. 40 (p. 36 BCS) (relevant part upheld on appeal) referring to *Brđanin*, TJ ¶ 132 and *Kunarac et al.*, TJ ¶¶ 581-592.

attack”.<sup>266</sup>

- A connection with the attack can be established by considering the manner the acts were committed, the identity of the victims, or whether the acts “were continued after the peak of the attack.”<sup>267</sup>

Regarding the subjective element, the following points are key:

- It is “necessary that the accused knew about the attack against the civilian population and that his acts represented part of that attack”.<sup>268</sup>
- However, as held by the appellate panel in *Marko Samardžija*, “the accused need not know the details of the attack or approve of the context in which his or her acts occur”;<sup>269</sup> rather, “the accused merely needs to understand the overall context in which his or her acts occur[ed]”.<sup>270</sup>
- Direct evidence that the accused knew about the relevant context and nexus is not necessary, the *Momir Savić* trial panel held.<sup>271</sup>
- The trial panel held that such proof may be established by supporting evidence such as:<sup>272</sup>
  - the status of the accused in civil or military hierarchies;
  - the fact that the accused as a member of a group or organization involved in the perpetration of crimes;
  - the scale of violence; and
  - his presence on the crime scene.

#### 7.4.4. SPECIFIC UNDERLYING CRIMES

Each of the specific underlying crimes that could constitute crimes against humanity under the BiH Criminal Code are outlined and discussed in turn, below.

##### 7.4.4.1. DEPRIVING ANOTHER PERSON OF HIS LIFE (MURDER) (ARTICLE 172 (1)(A))

Elements of the offence set forth under Article 172(1)(a) of the BiH Criminal Code are:<sup>273</sup>

- that the person was deprived of his/her life; and

<sup>266</sup> *Savić*, 1st inst., p. 30 (p. 27 BCS) (relevant part upheld on appeal) referring to *Kunarac et al.*, TJ and *Brđanin*, TJ ¶ 132.

<sup>267</sup> *Savić*, 1st inst., p. 40 (p. 36 BCS) (relevant part upheld on appeal) referring to *Brđanin*, TJ ¶ 132 and *Kunarac et al.*, TJ ¶¶ 581-592.

<sup>268</sup> *Savić*, 1st inst., p. 40 (p. 36 BCS) (relevant part upheld on appeal) referring to *Kayishema*, TJ ¶ 134 and *Bagilishema*, TJ, ¶ 94.

<sup>269</sup> *Samardžija*, 2nd inst., p. 17 (p. 17 BCS) referring to *Limaj et al.*, TJ ¶ 190.

<sup>270</sup> *Samardžija*, 2nd inst., p. 17 (p. 17 BCS) referring to *Kordić et al.*, TJ ¶ 185.

<sup>271</sup> *Savić*, 1st inst., p. 40 (p. 36 BCS) (relevant part upheld on appeal).

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

<sup>273</sup> *Mejakić et al.*, 1st inst., p. 197 (p. 184 BCS) (relevant part upheld on appeal); *Savić*, 1st inst., p. 78-79 (p. 69 BCS) (relevant part upheld on appeal); *Rašević et al.*, 1st inst., p. 61 (p. 64 BCS) (relevant part upheld on appeal), referring to *D. Damjanović*, 1st inst., pp. 53-54 (p. 49 BCS).

- that the deprivation of life was committed with intent.

In *Rašević et al.*, the trial panel held that Article 172(a)(1) corresponded with the definition of the offence under customary international law at the relevant time.<sup>274</sup>

It is not necessary to have the victim's body to prove death.<sup>275</sup> The trial panel in *Rašević et al.* concurred with the finding of the ICTY trial chamber in *Tadić* that "since these were not times of normalcy, it is inappropriate to apply rules of some national systems that require the production of a body as proof to death".<sup>276</sup> The panel held that the death of the victim could be inferred "from the totality of the circumstances established through the evidence presented, so that the victim's death from the acts charged is the only reasonable inference".<sup>277</sup> Factors that can support such an inference include:<sup>278</sup>

- proof of incidents of mistreatment directed against the victim;
- patterns of mistreatment and disappearances of other individuals in similar circumstances;
- a general climate of lawlessness where the alleged acts were committed;
- the length of time which has elapsed since the victim disappeared; and
- the fact that there has been no contact between the victim and persons the victim would be expected to contact, such as the victim's family.

The trial panel in *Savić Momir* based the proof of death on:<sup>279</sup>

- witness statements;
- report on the forensic medical expertise;
- minutes on establishing the identity;
- certificates on death for ten killed persons; and
- DNA analysis.

Although the witnesses did not witness the murder of the ten victims in that case, the trial panel analysed the following to arrive at the conclusion that the men had been deprived of their lives by the accused:

- the men were taken out of their homes;
- the men were taken to a house;
- the physical ill-treatment of the men in the house;

<sup>274</sup> *Rašević et al.*, 1st. inst., p. 61 (p. 64 BCS) (relevant part upheld on appeal), referring to *Brđanin*, TJ ¶ 381.

<sup>275</sup> *Rašević et al.*, 1st. inst., p. 61 (p. 64 BCS) (relevant part upheld on appeal).

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

<sup>277</sup> *Ibid.*, referring to *Krnjelac*, TJ ¶ 326.

<sup>278</sup> *Rašević et al.*, 1st. inst., p. 61 (p. 64 BCS) (relevant part upheld on appeal) referring to *Krnjelac*, TJ ¶ 327.

<sup>279</sup> *Savić*, 1st inst., pp. 71-78 (p. 63-68 BCS) (relevant part upheld on appeal).



- the behaviour of the soldiers towards the witnesses who asked them not to harm those men;
- shooting was heard after the column of ten men and four soldiers entered the woods;
- the fact that these men were seen alive for the last time on that date and time; and
- the fact that the bodies of all these ten men were exhumed from graves in the area.<sup>280</sup>

Regarding the required *mens rea*, the trial panel in *Momir Savić* evaluated the actions of the accused and his subordinates, concluding:

In line with the previously described actions, the accused expressed his consciousness and intention to deprive these ten Bosniak men of their lives, regardless of whether he did it personally or not.<sup>281</sup>

*Regarding the causal link between the act of the perpetrator and the death of the victim, the “perpetrator’s act must be a substantial cause of the victim’s death”.*

In *Željko Mejakić*, the trial panel noted that according to ICTY case law it was sufficient that the perpetrator had the “intention [...] to kill, or inflict serious injury in reckless disregard of human life”, which, as the panel further held, “corresponded with the level of intent required by Article 35(3) of the BiH Criminal Code (indirect intent)”.<sup>282</sup>

Regarding the causal link between the act of the perpetrator and the death of the victim, the trial panel in *Rašević et al.* held that the “perpetrator’s act must be a substantial cause of the victim’s death”.<sup>283</sup>

#### 7.4.4.2. ENSLAVEMENT (ARTICLE 172(1)(C))

The elements of the crime of enslavement pursuant to Article 172(1)(c) of the BiH Criminal Code are:<sup>284</sup>

- the exercise of any or all of the powers attaching to the right of ownership over a person; and
- the intentional exercise of such powers.

<sup>280</sup> *Ibid.* at p. 79; (pp. 69-70 BCS) (relevant part upheld on appeal).

<sup>281</sup> *Ibid.* at pp. 79-80, 88; (pp. 70, 78 BCS) (relevant part upheld on appeal).

<sup>282</sup> *Mejakić et al.*, 1st inst., p. 197 (p. 184 BCS) (relevant part upheld on appeal). It should be noted here that the trial panel in *Rašević et al.* held that Art. 172(1)(a) required direct intent of the perpetrator. However, this appears to be inconsistent with other findings of the Court of BiH. *C.f. Rašević et al.*, 1st inst., p. 61 (p. 64 BCS) (relevant part upheld on appeal) (holding that under *Dragan Damjanović*, direct intent was the required *mens rea*) and *D. Damjanović*, 1st inst., pp. 53-54 (p. 49 BCS) (holding that the facts of that specific case showed that the accused acted with direct intent).

<sup>283</sup> *Rašević et al.*, 1st inst., p. 61 (p. 64 BCS) (relevant part upheld on appeal), referring to the holding in *Čelebići* that “[T]he conduct of the accused must be a substantial cause of the death of the victim”, *Čelebići*, TJ ¶ 424).

<sup>284</sup> *Rašević et al.*, 1st inst., p. 76 (p. 82 BCS) (relevant part upheld on appeal).

Count 4 of the indictment in *Rašević et al.* alleged that the accused participated in a system of “forced labour”.<sup>285</sup> The panel held that while forced labour, standing alone, could constitute a war crime, and that the ICTY had held that it constituted the crimes of cruel treatment, inhumane treatment, persecution and other inhumane acts, forced labour could also amount to enslavement as a crime against humanity.<sup>286</sup>

*Forced labour could also amount to enslavement as a crime against humanity.*

Relying on Article 6 of the IMT Charter, Article 6(1)(c) of the Control Council Law No. 10, Article 5(c) of the of the Tokyo Charter, Principle VI(c) of the Nuremberg Principles, the 1926 Slavery Convention and the 1956 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, the trial panel in *Rašević et al.* held it was clear that “enslavement” was a crime against humanity under customary international law and that Article 172(2)(c) corresponded with the definition under international law at the relevant time.<sup>287</sup>

The trial panel in *Rašević et al.* emphasised that the offence of enslavement as a crime against humanity addressed contemporary forms of slavery, in addition to the common understanding of slavery as “chattel slavery”, *i.e.* the ownership of persons as property.<sup>288</sup>

*“Forced labour” was one of the contemporary forms of slavery under customary international law at the time the crimes were committed.*

The trial panel further noted that “forced labour” was one of the contemporary forms of slavery under customary international law at the time the crimes were committed.<sup>289</sup>

The panel referred to the Special Court of Sierra Leone *AFRC* case, where the defendants were convicted of enslavement as a crime against humanity under customary international law for forcibly abducting civilians and using them as forced labour.<sup>290</sup> The *Rašević et al.* panel concluded that none of the instances of forced labour in that case suggested that “the

<sup>285</sup> *Ibid.*

<sup>286</sup> *Rašević et al.*, 1st. inst., p. 76 (p. 82 BCS) (relevant part upheld on appeal), referring to *Blaškić*, AJ ¶ 597 (cruel treatment); *Naletilić et al.*, TJ ¶ 262 *et seq* (crime of unlawful labour under Art. 3 of the ICTY Statute for violating the provisions of Arts. 49, 50, 51 and 52 of the Third Geneva Convention, as well as inhumane treatment, cruel treatment and other inhumane acts); *Krnjelac*, AJ ¶ 199 (persecution); *Simić et al.*, TJ ¶¶ 835-837 (persecution); Momčilo Krajišnik, Case No. IT-00-39-T, Trial Judgement, 27 Sept. 2006, ¶ 818 (persecution).

<sup>287</sup> *Rašević et al.*, 1st. inst., p. 76 (p. 83 BCS) (relevant part upheld on appeal).

<sup>288</sup> *Ibid.* at p. 77 (p. 83 BCS) (relevant part upheld on appeal).

<sup>289</sup> *Ibid.*

<sup>290</sup> *Rašević et al.*, 1st. inst., p. 77 (p. 84 BCS) (relevant part upheld on appeal), referring to Alex Tamba Brima et al. (*AFRC* Case), Case No. SCSL-04-16-T, Trial Judgement, 20 June 2007.

civilians were treated as chattel in the classical sense of being bought, sold, bartered or trafficked”.<sup>291</sup>

Factors to be considered in determining whether any or all of the powers attaching to the right of ownership were exercised include:

- elements of control and ownership;
- the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator;
- the consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion, the fear of violence, deception or false promises or the abuse of power;
- the victim’s position of vulnerability, detention or captivity, psychological oppression or socio-economic conditions;
- exploitation;
- the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship, sex, prostitution and human trafficking.<sup>292</sup>

The panel also noted a consideration recognised in the jurisprudence of the US Military Tribunal at Nuremberg:

Slavery may exist even without torture. Slaves may be well fed, well clothed and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings and other barbarous acts, but the admitted fact of slavery - compulsory uncompensated labour - would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.<sup>293</sup>

The trial panel in *Rašević et al.* also referred to ICTY jurisprudence which noted that, although evidence of forced labour did not *per se* establish enslavement, “the exaction of forced or

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<sup>291</sup> *Rašević et al.*, 1st. inst., p. 77 (p. 84 BCS) (relevant part upheld on appeal), referring to *Brima, et al.* (AFRC), TJ. The *Rašević et al.* trial panel, however, also recognised that in *Siliadin v France* the ECtHR had recognised a more limited interpretation of slavery as prohibited under Art. 4 of the ECHR. While the panel in *Rašević et al.* recognised the distinction between slavery and other similar practices as human rights violations under the ECHR, the panel reiterated that, “under customary international law, particularly when applied to humanitarian law as distinct from human rights law, the offense of enslavement did not distinguish between classic and contemporary forms of slavery”. *Rašević et al.*, 1st. inst., p. 77 (p. 84 BCS) (relevant part upheld on appeal), referring to the ECtHR, App. No. 73316/01, 26 July 2005.

<sup>292</sup> *Rašević et al.*, 1st. inst., pp. 77-78 (pp. 84-85 BCS) (relevant part upheld on appeal), referring to *Kunarac et al.*, TJ ¶ 542.

<sup>293</sup> *Rašević et al.*, 1st. inst., p. 78 (p. 85 BCS) (relevant part upheld on appeal), referring to the *US. v Pohl et al.*, Judgement, 3 Nov. 1947, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 (“Green Series”), Vol. V (1950), p. 970.

compulsory labour or service is an indication of enslavement and a factor to be taken into consideration in determining whether enslavement was committed”.<sup>294</sup>

With regard to the term “forcible”, the panel in *Rašević et al.* noted that the Elements of Crimes of the Rome Statute explained that: “the term ‘forcibly’ is not restricted to physical force, but may include 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”.<sup>295</sup> “The choice to escape or ameliorate such conditions is not a free choice, but the essence of coercion and the negation of free will”, the panel held.<sup>296</sup>

*Slavery may exist even without torture. Slaves may be well fed, well clothed and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint.*

The trial panel in *Rašević et al.* held that “detainees were imprisoned at all times, in inhumane conditions and forced to labour: these factors alone, in the circumstances, establish enslavement”.<sup>297</sup> The panel also considered, *inter alia*, that:<sup>298</sup>

- the detainees could not freely volunteer for or consent to labour;
- the detainees were not merely forced to labour, but exploited for their labour, and treated accordingly;
- the improved living conditions enjoyed by those detainees who worked were not a privilege, but merely included some aspects of humane treatment that all detainees should have enjoyed as a matter of course;
- the detainee’s freedom, autonomy and independence were severely restricted by reason of their detention;
- the detainees were not free to return to their homes and communities after fulfilling their work obligation, but remained imprisoned at all times;
- the imprisonment was marked by brutally inhumane living conditions:
  - inhumane living conditions provided the means through which to compel the detainees to labour;
  - the forced labour of the detainees was intensely exploitative;
  - the detainees were not paid or otherwise remunerated for their labour;
  - the detainees performed labour that exclusively benefited others; and
  - the detainees only derived tangential, if any, benefits, and those benefits in any case should have been provided to them without their labour.<sup>299</sup>

<sup>294</sup> *Rašević et al.*, 1st. inst., pp. 77-78 (pp. 84-85 BCS) (relevant part upheld on appeal), referring to *Krnjelac*, TJ ¶ 359.

<sup>295</sup> *Rašević et al.*, 1st. inst., p. 82 (p. 90 BCS) (relevant part upheld on appeal), referring to Elements of Crimes, Art. 7(1)(d), fn. 12.

<sup>296</sup> *Rašević et al.*, 1st. inst., p. 82 (p. 90 BCS) (relevant part upheld on appeal).

<sup>297</sup> *Ibid.*

<sup>298</sup> *Ibid.* at p. 82 *et seq.* (p. 90 *et seq.* BCS) (relevant part upheld on appeal).

<sup>299</sup> *Ibid.*

The panel concluded, in light of all the circumstances and facts, that the accused had “exercised the powers attaching to the right of ownership over those detainees forced to labour”.<sup>300</sup>

Accordingly, *Rašević et al.* trial panel concluded that the forced labour of the detainees constituted enslavement as a crime against humanity.<sup>301</sup>

#### 7.4.4.3. FORCIBLE TRANSFER OF A POPULATION OR DEPORTATION (ARTICLE 172(1)(D))

Unlawful deportation together with forcible transfer is a form of forced displacement of a population, the trial panel in *Momir Savić* held.<sup>302</sup> The elements of this criminal offence are:<sup>303</sup>

- the forced displacement of the persons concerned by expulsion or other coercive acts;
- from the area in which they are lawfully present;
- without grounds permitted under international law.

Unlike the ICTY Statute and jurisprudence,<sup>304</sup> the BiH Criminal Code recognised forcible transfer and deportation together as a distinct crime, encompassing the transfer both within and outside a national border.<sup>305</sup> Thus, the relevant inquiry under the BiH Criminal Code was only whether the victim had been displaced by expulsion or by coercive acts, while the location to which they were displaced was not critical.<sup>306</sup> In *Momir Savić*, for example, it was sufficient that the persons were expelled from the area in which they were lawfully present.<sup>307</sup>

<sup>300</sup> *Ibid.* at p. 83 (p. 92).

<sup>301</sup> *Rašević et al.*, 1st inst., p. 76 (p. 83 BCS) and p. 79 *et seq* (p. 86 *et seq* BCS) (relevant part upheld on appeal).

<sup>302</sup> *Savić*, 1st inst., p. 66 (p. 58 BCS) (relevant part upheld on appeal), referring to the ICC Statute, Article 7(2)(d), *Blaškić*, TJ ¶ 234 and *Stakić*, TJ ¶ 680; *See also Rašević et al.*, 1st inst., p. 87 (p. 95 BCS) (relevant part upheld on appeal); *Nenad Tanasković*, Case No. X-KR/06/165, 1st Instance Verdict, 24 Aug. 2007, p. 62 (p. 57 BCS) (relevant part upheld in appeal); *Željko Lelek*, Case No. X-KR/06/202, 1st Instance Verdict, 23 May 2008, p. 29-30 (p. 34 BCS) (upheld in appeal in the relevant part).

<sup>303</sup> *Savić*, 1st inst., p. 66 (p. 58 BCS) (relevant part upheld on appeal); *Rašević et al.*, 1st inst., p. 87 (p. 95 BCS) (relevant part upheld on appeal).

<sup>304</sup> *See above*, section 7.2.2.2.5. *Savić*, 1st inst., pp. 66-67 (p. 58 BCS) (relevant part upheld on appeal). The trial panel pointed out that the ICTY Appeals Chamber in the *Krnjelac* case concluded that “displacements within a state or across national border, for reasons not permitted under international law, are crimes punishable under customary international law, and these acts, if committed with the requisite discriminatory intent, constitute the crime of persecution under Art. 5(h) of the Statute [...]”. Such a conclusion, as held by the panel, is a result of the fact that the ICTY Statute does not contain the criminal offense of forcible transfer as a separate offence. The ICTY trial and appeals chambers classified this offence as other inhumane acts with a distinct element that forcible transfer consists of displacement within national borders. *Rašević et al.*, 1st inst., p. 87 (p. 96 BCS) (relevant part upheld on appeal).

<sup>305</sup> *Savić*, 1st inst., p. 67 (p. 58 BCS) (relevant part upheld on appeal); *Rašević et al.*, 1st inst., p. 87 (p. 96 BCS) (relevant part upheld on appeal).

<sup>306</sup> *Savić*, 1st inst., p. 67 (p. 58 BCS) (relevant part upheld on appeal) referring to *Rašević et al.*, 1st inst., p. 87 (p. 96 BCS) (relevant part upheld on appeal).

<sup>307</sup> *Savić*, 1st inst., p. 66 (p. 58 BCS) (relevant part upheld on appeal).

The first element implies that force was used to displace people.<sup>308</sup> This force can include:<sup>309</sup>

- physical violence;
- threat of force or coercion (to the extent that it causes a fear of violence);
- duress;
- detention;
- psychological oppression or abuse of power or by taking advantage of coercive environment.

The court has held that “the essential question is whether the concerned persons had any real choice in the matter”.<sup>310</sup> In this respect, the Court of BiH referred to ICTY jurisprudence, quoting: “A civilian is involuntarily displaced if he is not faced with a genuine choice as to whether to leave or to remain in the area [...] An apparent consent induced by force or threat should not be considered to be real consent”.<sup>311</sup>

*Unlike the ICTY Statute and Jurisprudence, the BiH Criminal Code recognised forcible transfer and deportation together as a distinct crime, encompassing the transfer both within and outside a national border.*

As noted by the trial panel in *Savić Momir*, “the displacement of persons is absolutely prohibited except in specific, limited circumstances, as mentioned in the provision of Article 17 of the Additional Protocol II”.<sup>312</sup>

The Court of BiH panels added that Article 49(2) of the GC IV further provided: “Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased”.<sup>313</sup>

*Mens rea* is “the intent to remove the victims, which implies the intention that they should not return”.<sup>314</sup>

<sup>308</sup> *Ibid.* at p. 67 (p. 58 BCS) (relevant part upheld on appeal); *Rašević et al.*, 1st inst., p. 87 (p. 96 BCS) (relevant part upheld on appeal).

<sup>309</sup> *Ibid.*

<sup>310</sup> *Savić*, 1st inst., p. 67 (pp. 58-59 BCS) (relevant part upheld on appeal); *Rašević et al.*, 1st inst., p. 87-88 (p. 96 BCS) (relevant part upheld on appeal).

<sup>311</sup> *Savić*, 1st inst., p. 67 (p. 59 BCS) (relevant part upheld on appeal) referring to the ICTY, *Simić et al.*, TJ, ¶ 125; *Rašević et al.*, 1st inst., p. 88 (p. 96 BCS) (relevant part upheld on appeal), referring to the ICTY, *Simić et al.*, TJ, ¶ 125.

<sup>312</sup> *Savić*, 1st inst., p. 67 (p. 59 BCS) (relevant part upheld on appeal). Art. 17 (1) of AP II reads “The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacement have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygienic, health, safety and nutrition. Art. 17 (2) reads: Civilians shall not be compelled to leave their own territory for reasons connected with the conflict”; *Rašević et al.*, 1st inst., p. 88 (p. 97 BCS) (relevant part upheld on appeal).

<sup>313</sup> *Savić*, 1st inst., p. 67 (p. 59 BCS) (relevant part upheld on appeal); *Rašević et al.*, 1st inst., p. 88 (p. 97 BCS) (relevant part upheld on appeal); *Lelek*, 1st inst., p. 30 (p. 35 BCS) (relevant part upheld on appeal).

<sup>314</sup> *Savić*, 1st inst., p. 67 (p. 59 BCS) (relevant part upheld on appeal) referring to the ICTY, *Blagojević and Jokić*, TJ, ¶ 601; *Rašević et al.*, 1st inst., p. 88 (p. 97 BCS) (relevant part upheld on appeal), referring to the

The trial panel in *Momir Savić* considered in that respect, *inter alia*, that:

All the Prosecution witnesses heard state that on the relevant occasion the accused told them that they had to leave Drinsko taking only their basic personal belongings and that there was no more joint life there, that as of that moment that was a Serb land and that their lives were at stake and that if they stayed in their homes he could not guarantee security to them [...].<sup>315</sup>

According to the customary international law, it is necessary to prove the existence of the intent to permanently displace the population.<sup>316</sup> In this case it is undisputable that no steps were taken by the accused to ensure the return of the displaced Bosniaks. His conduct is in accordance with the conduct and activities of the Serb army and police, the aim of which was that only Serbs remain in the area of Drinsko (and wider area, the area of Višegrad municipality).<sup>317</sup>

For a discussion of the ICTY jurisprudence on deportation and forcible transfer, see section 7.2.2.2.5.1.

#### 7.4.4.4. IMPRISONMENT OR SEVERE DEPRIVATION OF PHYSICAL LIBERTY (ARTICLE 172(1)(E))

The elements of the crime of imprisonment in violation of Article 172(1)(e) of the BiH Criminal Code are:<sup>318</sup>

- imprisonment or other severe deprivation of physical liberty;
- in violation of fundamental rules of international law; and
- with direct or indirect intent.

Each of these elements will be discussed in turn, below.

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ICTY, *Blagojević and Jokić*, TJ, ¶ 601.; Court of BiH, Nenad Tanasković, Case No. X-KR/06/165, 1st Instance Verdict, 24 Aug. 2007, p. 62 (p. 57 BCS) (relevant part upheld on appeal), referring to Art. 35 of the BiH CC, the ICTY, *Blagojević and Jokić*, TJ, ¶ 601 and *Naletilić et al.*, TJ ¶ 520; *Lelek*, 1st inst., p. 31 (p. 36 BCS) (relevant part upheld on appeal), referring to Art. 35 of the BiH CC, the ICTY, *Blagojević and Jokić*, TJ, ¶ 601 and *Naletilić et al.*, TJ ¶ 520.

<sup>315</sup> *Savić*, 1st inst., p. 68 (p. 60 BCS) (relevant part upheld on appeal).

<sup>316</sup> *Ibid.* at p. 71 (p. 62 BCS) (relevant part upheld on appeal) referring to Art. 35 of the BiH CC and to the ICTY, *Blagojević and Jokić*, TJ, ¶ 601 and *Naletilić et al.*, TJ ¶ 520.

<sup>317</sup> *Savić*, 1st inst., p. 71 (p. 62 BCS) (relevant part upheld on appeal).

<sup>318</sup> *Rašević et al.*, 1st inst., p. 66 (p. 70 BCS) (relevant part upheld on appeal); *Mejakić et al.*, 1st inst., p. 198 (p. 186 BCS) (relevant part upheld on appeal); *Lelek*, 1st inst., p. 25 (p. 28 BCS) (relevant part upheld on appeal). The panel in *Rašević et al.* concluded that the legal definition of the offense of imprisonment under Art. 172(1)(e) corresponded to the legal definition of the offense under customary international law at the relevant time. *Rašević et al.*, 1st inst., p. 66 (p. 70 BCS) (relevant part upheld on appeal).

#### 7.4.4.4.1. IMPRISONMENT OR OTHER SEVERE DEPRIVATION OF PHYSICAL LIBERTY

The appellate panel in *Marko Samardžija* considered that “imprisonment” should be understood as “arbitrary imprisonment”, or “the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population”.<sup>319</sup>

*“Imprisonment” should be understood as “arbitrary imprisonment”, or “the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population”.*

The trial panel in *Rašević et al.* referred to the ICRC, which has noted that internment was the most severe form of deprivation of physical liberty.<sup>320</sup>

#### 7.4.4.4.2. IN VIOLATION OF FUNDAMENTAL RULES OF INTERNATIONAL LAW

The trial panel in *Rašević et al.* held that “fundamental rules of international law” were “international legal norms established in customary and conventional humanitarian and human rights law, including:

- Articles 42 and 43 of the GC IV;
- Article 9 of the Universal Declaration of Human Rights; and
- Article 9 of the International Covenant on Civil and Political Rights”.<sup>321</sup>

Those norms, the panel further held, “are violated when a person, regardless of the existence of a state of conflict, is arbitrarily deprived of his or her liberty”.<sup>322</sup> Thus, it must be proven that the deprivation of liberty was “arbitrary”.

The appellate panel in *Marko Samardžija* relied on the test applied by the ICTY trial chamber in *Krnjelac* to establish the crime of imprisonment as a crime against humanity:

- An individual is deprived of his or her liberty;
- The deprivation of liberty is imposed arbitrarily, that is, no legal basis can be invoked to justify the deprivation of liberty; and
- The act or omission by which the individual is deprived of his or her physical liberty is performed with the intent to deprive the individual arbitrarily of his or her physical

<sup>319</sup> *Samardžija*, 2nd inst., p. 19 (p. 20 BCS), referring to *Kordić et al.*, TJ ¶ 302.

<sup>320</sup> *Rašević et al.*, 1st inst., p. 66 (p. 70 BCS) (relevant part upheld on appeal), referring to the ICRC Commentary to Fourth Geneva Convention, Art. 41.

<sup>321</sup> *Rašević et al.*, 1st inst., p. 66 (p. 70 BCS) (relevant part upheld on appeal); *See also, Mejakić et al.*, 1st inst., pp. 198-199 (pp. 186-187 BCS) (relevant part upheld on appeal).

<sup>322</sup> *Rašević et al.*, 1st inst., p. 66 (p. 70 BCS) (relevant part upheld on appeal); *Mejakić et al.*, 1st inst., p. 198 (p. 186 BCS) (relevant part upheld on appeal), referring to *Krnjelac*, TJ ¶ 115, and the *Rašević et al.*, 1st inst., p. 66 (pp. 70-71 BCS).



liberty or in the reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty.<sup>323</sup>

This test also includes “arbitrariness” as an element.

Arbitrary deprivation is evaluated on a case-by-case basis, but includes imprisonment without due process of law.<sup>324</sup> The appellate panel in *Marko Samardžija* held that imprisonment of civilians will be unlawful where, *inter alia*:

- Civilians have been detained in contravention of Article 42 of GC IV, *i.e.*, they are detained without reasonable grounds to believe that the security of the detaining power makes it absolutely necessary;
- The procedural safeguards required by Article 43 of GC IV are not complied with in respect of detained civilians, even where initial detention may have been justified.<sup>325</sup>

Moreover, the trial panel in *Rašević et al.* noted that the ICTY trial chamber in *Krnojelac* concluded that “a deprivation of an individual’s liberty is arbitrary, and therefore unlawful, if no legal basis can be called upon to justify the initial deprivation of liberty”.<sup>326</sup>

*A deprivation of an individual’s liberty is arbitrary, and therefore unlawful, if no legal basis can be called upon to justify the initial deprivation of liberty.*

To prove that a detention was arbitrary, circumstantial evidence can be relied on, including:

- Evidence that persons deprived of their liberty were not informed of the reasons for their detention; or
- Evidence that the justification for detention was not considered in court or administrative proceedings.<sup>327</sup>

#### 7.4.4.4.3. DIRECT OR INDIRECT INTENT

The *mens rea* necessary for this crime is “the intent to deprive the victim arbitrarily of physical liberty or in the reasonable knowledge that the act is likely to cause arbitrary deprivation of physical liberty”.<sup>328</sup> The intent to deprive a victim of liberty includes not only the actual arrest of

<sup>323</sup> *Samardžija*, 2nd inst., p. 19 (pp. 19-20 BCS), referring to *Krnojelac*, TJ ¶ 115.

<sup>324</sup> *Rašević et al.*, 1st inst., p. 66 (p. 70 BCS) (relevant part upheld on appeal); *See also* Court of BiH, *Samardžija*, 2nd inst., p. 20 (p. 20 BCS), referring to the ILC 1996 Report, p. 101.

<sup>325</sup> *Samardžija*, 2nd inst., p. 19 (p. 20 BCS), referring to *Kordić et al.*, TJ ¶ 303.

<sup>326</sup> *Rašević et al.*, 1st inst., p. 66 (p. 70 BCS) (relevant part upheld on appeal), referring to *Krnojelac*, TJ ¶ 114; *See also* *Samardžija*, 2nd inst., p. 19 (pp. 19-20 BCS).

<sup>327</sup> *Rašević et al.*, 1st inst., p. 66 (p. 71 BCS) (relevant part upheld on appeal).

<sup>328</sup> *Ibid.* at p. 66 (p. 70 BCS), referring to *Krnojelac*, TJ ¶ 115; *Mejakić et al.*, 1st inst., p. 198 (p. 186 BCS) (relevant part upheld on appeal).

the person but also the on-going detention.<sup>329</sup> With regards to intent, the appellate panel in *Marko Samardžija* considered that:

- “[T]he intent to keep the camp inmates in detention has to be differentiated from any motive that the perpetrators might have had for their actions or omissions”.<sup>330</sup>
- “The fact that the camp personnel might not have had the formal power to release detainees which were arrested and brought to the camp by others, does not have any impact on the question of intent”.<sup>331</sup>

*The mens rea necessary for this crime is “the intent to deprive the victim arbitrarily of physical liberty or in the reasonable knowledge that the act is likely to cause arbitrary deprivation of physical liberty”.*

In *Marko Samardžija*, the accused was found guilty of the severe deprivation of physical liberty of an individual or a group as a crime against humanity.<sup>332</sup> The accused denied he had been aware of the fact that the persons would be imprisoned.<sup>333</sup> However, the appellate panel held:<sup>334</sup>

Regarding his intent, the Accused, primarily as an active military officer, had the knowledge that the civilians were deprived of liberty arbitrarily and unlawfully (that is, without any legal procedure) and that the deprivation of physical liberty was not an incident outside the time and geographical context of the attack, as well as that it was not justified on the grounds of military, combat or other legitimate goals. [...]

[The Accused was] aware of the fact that [the victims] were imprisoned although not charged with any criminal offense, that they were imprisoned because they were Muslims, Bosniaks, and that in the school in Biljani, given the context of the overall events, there would be no prescribed procedure based on the law against them. However, by the surrender of the aforementioned persons, the Accused also became a co-perpetrator in their imprisonment. He was aware that the civilians who had been brought there, the majority or all of them, would remain imprisoned, which shows that the Accused acted with the direct intent, that he was aware of his action and wanted its commission.

Regarding mens rea in *Rašević et al.*, the trial panel concluded:

The evidence establishes beyond doubt that the non-Serb detainees at the KP Dom were imprisoned arbitrarily and without legal justification. The evidence

<sup>329</sup> *Mejakić et al.*, 1st inst., p. 200 (p. 187 BCS) (relevant part upheld on appeal).

<sup>330</sup> *Ibid.*

<sup>331</sup> *Ibid.*

<sup>332</sup> *Samardžija*, 2nd inst., p. 22 (p. 23 BCS).

<sup>333</sup> *Ibid.* at p. 23 (p. 24 BCS).

<sup>334</sup> *Ibid.*

establishes, in fact, that the detainees were imprisoned simply on the basis of their ethnicity, without individualised suspicion and without regard to law.<sup>335</sup> [...]

Accordingly, the Panel concludes that the detainees were intentionally deprived of their liberty arbitrarily and without legal justification, and that the maintenance of this intentional and arbitrary deprivation of liberty at the KP Dom constituted the crime of imprisonment as a crime against humanity.<sup>336</sup>

#### 7.4.4.5. TORTURE (ARTICLE 172(1)(F))

The elements of the crime of torture under Article 172(2)(f) are:<sup>337</sup>

- the intentional infliction;
- of severe pain or suffering, whether physical or mental; and
- upon a person in custody or under control of the accused.<sup>338</sup>

The Court of BiH noted that these elements differed from the elements of torture existing in customary international law, as defined in the jurisprudence of the ICTY and ICTR, at the time the crimes alleged in this proceeding were committed.<sup>339</sup> Specifically, the Court of BiH held that customary international law required as an additional element that the incriminating act:<sup>340</sup>

[M]ust aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person.

These elements will be discussed below, starting with the objective elements and then moving to the intent element.

<sup>335</sup> *Rašević et al.*, 1st inst., p. 67 (p. 72 BCS) (relevant part upheld on appeal).

<sup>336</sup> *Ibid.* at p. 69 (p. 74 BCS) (relevant part upheld on appeal).

<sup>337</sup> *Ibid.* at p. 47 (p. 48 BCS) (relevant part upheld on appeal); *Mejakić et al.*, 1st inst., p. 200 (p. 188 BCS) (relevant part upheld on appeal); *Lelek*, 1st inst., p. 26 (p. 30 BCS) (relevant part upheld on appeal).

<sup>338</sup> The panel noted it read the reference in this element to the “accused” as including the accused’s co-perpetrators or other persons for whose actions the accused is found to be criminally liable.

<sup>339</sup> *Rašević et al.*, 1st inst., p. 47 (p. 48 BCS) (relevant part upheld on appeal); *Mejakić et al.*, 1st inst., p. 200 (p. 188 BCS) (relevant part upheld on appeal), noting that the ICTY thereby accepted the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Torture Convention) of 1984, 1465 U.N.T.S. 85, which entered into force on 26 June 1987, as presenting the standard of customary international law at the time the crimes in former Yugoslavia were perpetrated.

<sup>340</sup> *Rašević et al.*, 1st inst., p. 47 (p. 48 BCS) (relevant part upheld on appeal), referring to *Kunarac et al.*, AJ ¶ 142; *Mejakić et al.*, 1st inst., p. 200 (p. 188 BCS) (relevant part upheld on appeal); *Lelek*, 1st inst., p. 28 (p. 32 BCS) (relevant part upheld on appeal).

## 7.4.4.5.1. SEVERE PAIN AND SUFFERING, WHETHER PHYSICAL OR MENTAL

The trial panel in *Rašević et al.* considered the “severity standard” “necessarily imprecise and contextual”.<sup>341</sup> The panel contrasted the “severe” pain and suffering required for torture with the lesser “serious” pain and suffering required for crimes of inhuman treatment, cruel treatment and other inhumane acts.<sup>342</sup> The panel did not consider that a precise threshold between the two standards could be fixed, but held that it was “clear that the label of torture was reserved for a more limited, more odious subset of inhumane acts”.<sup>343</sup>

*The panel held that “the severity of the pain or suffering should be considered both objectively and subjectively in light of all the circumstances of the act”.*

The panel held that “the severity of the pain or suffering should be considered both objectively and subjectively in light of all the circumstances of the act”.<sup>344</sup>

The Court of BiH panels have relied on ICTY jurisprudence in identifying the following list of objective considerations to determine whether the pain and suffering was severe:

- the nature and context of the infliction of pain;
- the premeditation and institutionalization of the ill-treatment;
- the manner and method used;
- the position of inferiority of the victim;<sup>345</sup>
- the physical or mental effect of the treatment upon the particular victim; and
- in some cases, factors such as the victim’s age, sex, or state of health.<sup>346</sup>

Where mistreatment has been perpetrated over a prolonged period or involved repeated and various forms of mistreatment, severity should be assessed taking into consideration the acts as a whole, to the extent that the lasting period or the repetition of acts:

- are inter-related;
- follow a pattern; or
- are directed towards the same prohibited goal.<sup>347</sup>

<sup>341</sup> *Rašević et al.*, 1st inst., p. 49 (p. 50 BCS) (relevant part upheld on appeal); *Mejakić et al.*, 1st inst., p. 201 (p. 188 BCS) (relevant part upheld on appeal).

<sup>342</sup> *Rašević et al.*, 1st inst., p. 49 (p. 50 BCS) (relevant part upheld on appeal).

<sup>343</sup> *Ibid.*

<sup>344</sup> *Ibid.*

<sup>345</sup> *Ibid.*, referring to *Krnjelac*, TJ ¶ 132 (citing a number of European Court decisions, in particular *Soering v. United Kingdom*, Judgement, 7 July 1989, Series A No. 161, ¶¶ 106, 111, on the effect of time on the severity of the treatment); See also *Mejakić et al.*, 1st inst., p. 201 (p. 188 BCS) (relevant part upheld on appeal).

<sup>346</sup> *Rašević et al.*, 1st inst., p. 49 (p. 50 BCS) (relevant part upheld on appeal), referring to *Kvočka et al.*, TJ ¶ 143.

Permanent injury is not required for an act to cause sufficient pain or suffering to rise to the level of torture.<sup>348</sup>

The panel in *Rašević et al.* held that the ECtHR has concluded that a variety of different forms of mistreatment rise to the level of torture, including:

- threats to remove bodily limbs (constituting psychological torture);<sup>349</sup>
- suspension from the arms, which are tied behind the victim's back ("Palestinian hanging");<sup>350</sup>
- being repeatedly punched, kicked, and hit with objects;
- being invited to perform oral sex on a male police officer before being urinated upon;
- being threatened with a blowlamp and then with a syringe;<sup>351</sup>
- application of "falaka" ("falanga") and fracture of the sternum;<sup>352</sup> and
- electric shocks, hot and cold water treatment, blows to the head and psychological pressure.<sup>353</sup>

#### 7.4.4.5.2. PROHIBITED PURPOSE

This requirement of a "prohibited purpose", is not included in the definition of torture in Article 172(2)(f).<sup>354</sup> However, the trial panel in *Rašević et al.* noted that the ICTY and the ICTR had relied on international human rights conventions to determine the legal elements of torture under customary international law.<sup>355</sup> In particular, the ICTY and ICTR trial chambers concluded that Article 1 of the Torture Convention reflected customary international law.<sup>356</sup>

<sup>347</sup> *Rašević et al.*, 1st inst., p. 49 (p. 50 BCS) (relevant part upheld on appeal), referring to *Krnjelac*, TJ ¶ 132 (citing a number of European Court decisions, in particular *Soering*, Decision of 7 July 1989, Series A No. 161, ¶¶ 106, 111, on the effect of time on the severity of the treatment); see also *Mejakić et al.*, 1st inst., p. 201 (p. 188 BCS) (relevant part upheld on appeal).

<sup>348</sup> *Rašević et al.*, 1st inst., p. 49 (p. 50 BCS) (relevant part upheld on appeal), referring to *Brđanin*, TJ ¶ 484.

<sup>349</sup> *Rašević et al.*, 1st inst., p. 49 (p. 50 BCS) (relevant part upheld on appeal), referring to the "Torture and other Cruel, Inhuman or Degrading Treatment or Punishment", Report of the Special Rapporteur ("Special Rapporteur Torture Report"), E/CN.4/1986/15, 19 Feb. 1986, ¶ 35 (citing Official Records of the General Assembly, Thirty-Eighth Session, Supplement No. 40, A.38/40, annex XII, ¶ 8.3).

<sup>350</sup> *Aksoy v. Turkey* (App. 21987/93), Judgement of 18 Dec. 1996.

<sup>351</sup> *Selmouni v. France* (App. 25803/94), Judgement of 28 July 1999.

<sup>352</sup> *Salman v. Turkey* (App. 21986/93), Judgement of 27 June 2000.

<sup>353</sup> *Akkoç v. Turkey* (Apps. 22947/93 and 22948/93), Judgement of 10 Oct. 2000.

<sup>354</sup> *Rašević et al.*, 1st inst., p. 47 (p. 48 BCS) (relevant part upheld on appeal).

<sup>355</sup> *Rašević et al.*, 1st inst., p. 47 (p. 48 BCS) (relevant part upheld on appeal).

<sup>356</sup> *Rašević et al.*, 1st inst., pp. 47-8 (p. 48 BCS) (relevant part upheld on appeal), referring to 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention"), 1465 U.N.T.S. 85, entry into force 26 June 1987; 1975 United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Declaration"), adopted by General Assembly resolution 3452, 9 Dec. 1975; 1987 Inter-American Convention to Prevent and Punish Torture ("Inter-American Torture Convention"); Delalić, TJ ¶ 459; ICTY, *Furundžija*, Trial Judgement, ¶ 160, *Furundžija*, Appeal Judgement, ¶ 111, *Kunarac et al.*, TJ ¶ 483 and *Kunarac et al.*, AJ ¶ 146.

*The panel also noted that the prohibited purpose “need not be the sole or predominate purpose, but need only be part of the motivation beyond the conduct”.*

The panel in *Rašević et al.* likewise concluded that the Torture Convention reflected customary international law regarding torture as a crime against humanity at the relevant time.<sup>357</sup> With specific regard to the “prohibited purposes” element, the panel also considered the ICRC Commentary on Article 147 of the GC IV to be persuasive authority on the importance of this element.<sup>358</sup> The panel noted that the ICRC commentary focused on the purposes, rather than the severity, behind the act of torture and emphasised that what “is important is not so much the pain itself as the purpose behind its infliction”.<sup>359</sup>

The panel also noted that the prohibited purpose “need not be the sole or predominate purpose, but need only be part of the motivation beyond the conduct”.<sup>360</sup>

#### 7.4.4.5.3. INTENT TO INFLICT THE PAIN AND SUFFERING

Holding that the acts against Nurko Nišić constituted the crime of torture pursuant to Article 172(1)(f), the panel in *Rašević et al.* relied on circumstantial evidence to find the required intent, holding, *inter alia*:<sup>361</sup>

That these beatings were intended to cause Nišić severe physical pain is evident from the physical injuries described by the witnesses and the fact that Nišić was subjected to such harsh physical abuse on multiple occasions. According to the procedure in place, Nišić was taken to and returned from interrogations by KP Dom guards. Nišić was in the custody and control of KP Dom authorities and guards at the KP Dom facility. As the witnesses testified, each time he was taken out, it was in order to interrogate him for additional information. Each time he returned from interrogation he showed signs of physical assault. The beatings were committed during the course of a pattern of interrogations and were committed with the prohibited purpose of obtaining information or a confession from him.

#### 7.4.4.6. RAPE / SEXUAL VIOLENCE (ARTICLE 172(1)(G))

The elements of rape and sexual violence as a crime against humanity under Article 172(1)(g) are:<sup>362</sup>

<sup>357</sup> *Rašević et al.*, 1st inst., p. 48 (p. 49 BCS) (relevant part upheld on appeal).

<sup>358</sup> *Ibid.* p. 48 (p. 49 BCS) (relevant part upheld on appeal).

<sup>359</sup> *Ibid.*

<sup>360</sup> *Ibid.*, referring to *Brđanin*, TJ ¶ 487.

<sup>361</sup> *Rašević et al.*, 1st inst., p. 54 (pp. 56-57 BCS) (relevant part upheld on appeal).

<sup>362</sup> *Mejakić et al.*, 1st inst., p. 203 (pp. 190-191 BCS) (relevant part upheld on appeal); *Tanasković*, 1st inst., pp. 26-27 (p. 24 BCS) (relevant part upheld on appeal); *Lelek*, 1st inst., p. 36 (p. 40 BCS) (relevant part upheld on appeal).

- Coercion by force or by threat of immediate attack
- To sexual intercourse or an equivalent sexual act.

The trial panel in *Mejakić* noted that ICTY case law described the required intent as: “the intention to effect the sexual penetration, and the knowledge that it occurs without the consent of the victim”.<sup>363</sup>

The panel also noted ICTY and the ICTR jurisprudence describing rape and sexual violence as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive” and sexual violence as being “broader than rape and including such crimes as sexual slavery or molestation”.<sup>364</sup>

The appellate panel in *Samardžić* stressed that rape as a crime against humanity differed considerably from rape as a general crime, which requires corroborating evidence or direct examination of the victim. The panel reasoned that in cases of rape as a crime against humanity, “the examination of the victims themselves is very often impossible due to objective reasons, as many were killed, are unaccounted for or at unknown address”.<sup>365</sup>

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The trial panel in *Mejakić* found the accused guilty of rape and sexual violence.<sup>366</sup> The panel held that:

The severity of the acts of sexual violence is established by the specific circumstances of coercion and helplessness experienced by the victims in the camp situation as well as by the level of harassment they had to endure.

Also the subjective requirement [...] for these offences has been met. The Court is convinced beyond reasonable doubt that each of the perpetrators intended the action he took aware of its coercive character.<sup>367</sup>

<sup>363</sup> *Mejakić et al.*, 1st inst., p. 203 (p. 191 BCS) (relevant part upheld on appeal), referring to *Kunarac et al.*, AJ ¶¶ 127-129.

<sup>364</sup> *Mejakić et al.*, 1st inst., p. 203 (p. 191 BCS) (relevant part upheld on appeal), referring to *Kvočka et al.*, TJ ¶¶ 175, 180, citing *Akayesu*, TJ ¶ 688.

<sup>365</sup> *Samardžić*, 2nd inst., p. 18 (pp. 19-20 BCS).

<sup>366</sup> *Mejakić et al.*, 1st inst., pp. 203-204 (p. 191 BCS) (relevant part upheld on appeal).

<sup>367</sup> *Ibid.*

In the *Željko Lelek* case, the Court of BiH held that raping also constitutes torture because the rape necessarily gives rise to severe pain and suffering.<sup>368</sup>

*Cumulative convictions were permitted for rape and torture. For rape, the distinct element is sexual penetration and for torture, it is the prohibited purpose.*

Rape as torture was also an issue in the *Gojko Janković* case. In that case, the Court of BiH held that cumulative convictions based on the same conduct were permitted, providing that each of the crimes contained a distinct element requiring proof of a fact not required by the other.<sup>369</sup> The court noted that this was applicable for rape and torture: for rape, the distinct element is sexual penetration and for torture, it is the prohibited purpose (such as obtaining information or a confession, punishing, intimidating or coercing a victim or a third person, or discrimination on any ground).<sup>370</sup> In this case, the court found that in addition to the legal requirements for rape having been met, the legal requirements for torture were also met, as the gang-rape of the injured party caused her severe pain and suffering, was intentional and prohibited purposes were present.<sup>371</sup> The court noted that the rape was discriminatory, as it was based on the victim's Bosniak ethnicity and that the accused threatened the victim with gang-rape if she did not tell the truth.<sup>372</sup>

In the *Predrag Kujundžić* case, the accused was found guilty for sexual slavery as a crime against humanity under Article 172(1)(g) of the BiH Criminal Code.<sup>373</sup> The trial panel noted that under Article 7 of the Rome Statute, the elements qualifying sexual slavery have been established as follows:<sup>374</sup>

- The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person, or by imposing on them a similar deprivation of liberty;
- The perpetrator caused such person or persons to engage in one or more acts of a sexual nature;
- The conduct was committed as part of widespread or systematic attack directed against civilian population; and
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against civilian population.

<sup>368</sup> *Lelek*, 1st inst., p. 36 (p. 42 BCS) (relevant part upheld on appeal, pars 70-71), referring to *Kunarac et al.*, TJ ¶¶ 149-150. See also Module 12 for more information on cumulative charging.

<sup>369</sup> *G. Janković*, 1st inst., p. 53 (p. 51 BCS) (relevant part upheld on appeal, p. 15 (p. 14 BCS), referring to *Kunarac et al.*, AJ ¶ 142.

<sup>370</sup> *Ibid.*

<sup>371</sup> *Ibid.*

<sup>372</sup> *Ibid.*

<sup>373</sup> *Kujundžić*, 1st inst., (relevant part upheld on appeal).

<sup>374</sup> *Ibid.* at ¶ 512 (relevant part upheld on appeal).



The trial panel also noted that sexual slavery was also punishable under Article 2 of the Statute of the Special Court of Sierra Leone.<sup>375</sup> Moreover, the trial panel reiterated the finding of the Court of BiH appellate panel in *Gojko Janković* case that the elements constituting the crime of sexual slavery were:<sup>376</sup>

- Intentional exercise of any or all of the powers attaching to the right of ownership over a person; and
- The perpetrator subjected a victim to sexual intercourse on one or more occasions.

*The elements constituting the crime of sexual slavery were:*

- *Intentional exercise of any or all of the powers attaching to the right of ownership over a person; and*
- *The perpetrator subjected a victim to sexual intercourse on one or more occasions.*

The trial panel in this case gave credence to the testimony of the aggrieved party and her parent, and found that the conditions in which the victim found herself (force, threat and continuous physical and mental abuse) did not provide her with any possibility of offering resistance and that she was *de facto* deprived of her sexual independence over which the accused had a complete control.<sup>377</sup> The trial panel also found that a special relevance to the actions of the accused against the aggrieved party was given to his discriminatory attitude.<sup>378</sup> The panel concluded that:

[t]he aggrieved party did the described actions against her own will, bearing in mind that she was not in a situation to give any true consent, and that she was subjected to conditions constituting sexual slavery. The above described conditions clearly constitute the intentional exercise of one authority or of all authorities of the Accused in connection with the right to ownership over the person 2.<sup>379</sup>

The panel found the accused guilty as co-perpetrator (under Article 29 of the BiH Criminal Code) and an inciter (under Article 30 of the BiH Criminal Code) in keeping the aggrieved party in sexual slavery during a widespread and systematic attack on non-Serb civilians in the Municipality of Dobož and knowing of such attack.<sup>380</sup>

<sup>375</sup> *Ibid.* at ¶ 513 (relevant part upheld on appeal).

<sup>376</sup> *Ibid.* at ¶ 514 (relevant part upheld on appeal), referring to *G. Janković*, 2nd inst.

<sup>377</sup> *Kujundžić*, 1st inst., ¶¶ 544, 546, 515-546 (relevant part upheld on appeal).

<sup>378</sup> *Ibid.* at ¶ 550 (relevant part upheld on appeal).

<sup>379</sup> *Ibid.* at ¶ 556 (relevant part upheld on appeal).

<sup>380</sup> *Ibid.* at ¶¶ 551 and 557 (relevant part upheld on appeal).

## 7.4.4.7. PERSECUTION (ARTICLE 172(1)(H))

Pursuant to Article 172(1)(h) of the BiH Criminal Code, the elements of the crime of persecution as a crime against humanity are:<sup>381</sup>

- the intentional and severe deprivation of fundamental rights;
- contrary to international law;
- by reason of the identity of a group or collectivity;
- against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognised as impermissible under international law; and
- in connection with any offence listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of Bosnia and Herzegovina.

In *Mejakić*, the trial panel held that the intent required for this crime included a special “specific discriminatory intent” element. This element requires that in addition to the intent to commit the underlying criminal act, the perpetrator must also intend to commit this act against a group or a collectivity of victims based on discriminatory criteria.<sup>382</sup>

The trial panel in *Rašević et al.* noted that the definition of persecution under customary international law was reflected by the ICTY appeals chamber when it held that persecution as a crime against humanity was an act or omission which:<sup>383</sup>

- Discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law; and
- Was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics.<sup>384</sup>

*Persecution as a crime against humanity is an act or omission which:*

- *Discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law; and*
- *Was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics.*

The panel further concluded that Article 172(1)(h) and (2)(g) of the BiH Criminal Code incorporate this definition.<sup>385</sup>

<sup>381</sup> *Todorović*, 2nd inst., ¶ 173; *Rašević et al.*, 1st inst., p. 100 (p. 111 BCS) (relevant part upheld on appeal); *Mejakić et al.*, 1st inst., p. 205 (pp. 192-193 BCS) (relevant part upheld on appeal); *Lelek*, 1st inst., p. 46 (pp. 52-53 BCS) (relevant part upheld on appeal); *Kovačević*, 1st inst., p. 43 (pp. 39-40 BCS) (upheld on appeal); *Paunović*, 1st inst., p. 26 (p. 23 BCS) (upheld on appeal).

<sup>382</sup> *Mejakić et al.*, 1st inst., p. 205 (p. 193 BCS) (relevant part upheld on appeal).

<sup>383</sup> *Rašević et al.*, 1st inst., p. 100 (p. 111 BCS) (relevant part upheld on appeal), referring to *Kvočka et al.*, AJ ¶ 320.

<sup>384</sup> *Ibid.*

The panel in *Rašević et al.* held that:

- The discriminatory grounds established by the ICTY, namely racial, religious and political, are the exclusive grounds recognised by customary international law at the relevant time and are thus the exclusive grounds that the panel can consider in these proceedings.
- Although the “in connection with” element is not required under customary international law, as it is included in Article 172(1)(h), the panel is bound to apply that element.<sup>386</sup>
- The commission of multiple persecutory acts should be considered as the commission of a single criminal offence, namely persecution, even if individually those acts amount to other crimes against humanity.<sup>387</sup>

Similarly, relying on ICTY jurisprudence, the trial panel in *Božić* held that the cumulative effect of acts of persecution must be considered, and the acts should be viewed in their context, not in isolation.<sup>388</sup> The panel also noted that the act or omission constituting persecution “may assume various forms, and there is no comprehensive list of what acts can amount to persecution; the persecutory act or omission may encompass physical or mental harm or infringements upon individual freedom”.<sup>389</sup>

*The cumulative effect of acts of persecution must be considered, and then the acts should be viewed in their context, not in isolation.*

In *Mejakić*, the trial panel held that the underlying acts of murder, imprisonment, torture, rape and sexual violence and “other inhumane acts” could constitute acts of persecution if committed with the requisite specific discriminatory intent.<sup>390</sup> However, the panel did not consider that persecution formed a “legal umbrella” under which those crimes were to be grouped if committed with the requisite specific discriminatory intent.<sup>391</sup>

#### 7.4.4.8. ENFORCED DISAPPEARANCE OF PERSONS (ARTICLE 172(1)(I))

The elements of the crime of enforced disappearance pursuant to Article 172(1)(i) of the BiH Criminal Code are:<sup>392</sup>

<sup>385</sup> *Rašević et al.*, 1st inst., p. 100 (p. 111 BCS) (relevant part upheld on appeal).

<sup>386</sup> *Ibid.*

<sup>387</sup> *Ibid.* at p. 100 (p. 112 BCS); *See also Božić et al.*, 1st inst., p. 94 (p. 90 BCS) (upheld on appeal); *Lelek*, 1st inst., p. 46 (p. 53 BCS) (relevant part upheld on appeal), referring to *Rašević et al.*, 1st inst., p. 100 (p. 112 BCS), *Tanasković*, 1st inst.; *Damjanović*, 1st inst.; *Stanković*, 1st inst.; *Kovačević*, 1st inst., pp. 43-44 (p. 40 BCS) (upheld on appeal); *Paunović*, 1st inst., p. 26 (p. 23 BCS) (upheld on appeal).

<sup>388</sup> *Božić et al.*, 1st inst., p. 56 (p. 54 BCS) (upheld on appeal), referring to *Kupreškić et al.*, TJ ¶ 622.

<sup>389</sup> *Božić et al.*, 1st inst., p. 56 (p. 54 BCS) (upheld on appeal), referring to *Vasiljević*, TJ ¶ 246.

<sup>390</sup> *Mejakić et al.*, 1st inst., p. 205 (p. 193 BCS) (relevant part upheld on appeal).

<sup>391</sup> *Ibid.*

<sup>392</sup> *Rašević et al.*, 1st inst., pp. 88, 98 (pp. 97, 109-110 BCS) (relevant part upheld on appeal); *D. Damjanović*, 1st inst., pp. 26-27 (p. 25 BCS) (relevant part upheld on appeal).

- the arrest, detention or abduction of persons;
- by or with the authorization, support or acquiescence of a State or a political organization;
- followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons; and
- with the aim of removing those persons from the protection of the law for a prolonged period of time.

The panel in *Rašević et al.* held that the offence of enforced disappearance represented a relatively “new” crime, both in itself and as a crime against humanity.<sup>393</sup> The panel, however, went through a lengthy analysis of the status of customary law to conclude that enforced disappearance constituted a crime under customary international law at the time the offence occurred.<sup>394</sup>

The panel in *Rašević et al.* held that the first element of the offence was satisfied by “the secured detention, transfers, transportations and [removal] of persons from initial detention or custody locations to other locations”.<sup>395</sup>

A “refusal” involved “the failure to acknowledge the deprivation of freedom or provide information”.

According to the *Rašević et al.* trial panel, a “refusal” involved “the failure to acknowledge the deprivation of freedom or provide information”.<sup>396</sup> The panel held it was “clearly implicit that giving false information about the victim’s whereabouts or fate constitutes refusal or failure to give information and satisfied the third element of the offense”.<sup>397</sup>

With regard to the facts of the case, the trial panel in *Rašević et al.* concluded:<sup>398</sup>

[t]he Panel concludes that the elements of the offense of enforced disappearance were established beyond doubt. At least 200 non-Serb detainees were taken out of the KP Dom under guard to another, unknown location. These acts were authorized by the Foča Tactical Group, an organ of the Republika Srpska. Both the remaining detainees at the KP Dom, at the time and after their own exchanges, and the Federation Commission for Missing Persons thereafter sought and did not receive information from the KP Dom staff and the organs of the Republika Srpska regarding the whereabouts and fates of these detainees. The takings away were conducted repeatedly and systematically over a number of months and involved large numbers of detainees. In addition, there were clear attempts to hide and disguise the fates of the detainees taken away,

<sup>393</sup> *Rašević et al.*, 1st inst., p. 88 (p. 97 BCS) (relevant part upheld on appeal).

<sup>394</sup> *Ibid.* at pp. 88-90 (pp. 97-99 BCS) (relevant part upheld on appeal).

<sup>395</sup> *Ibid.* at p. 98 (p. 110 BCS) (relevant part upheld on appeal).

<sup>396</sup> *Ibid.*

<sup>397</sup> *Ibid.*

<sup>398</sup> *Ibid.* at p. 98-99 (p. 110 BCS) (relevant part upheld on appeal).

evidencing the intent from the outset to remove any possibility that these detainees' whereabouts could be properly registered or traced by agencies and organizations authorized under domestic and international law. Detainees at the KP Dom were repeatedly told that these detainees were being taken to be exchanged, while Exhibit O-I-48 shows that the Foča Tactical Group was similarly engaged in laying a false trail by describing in official documents these detainees as having been taken to be released. These detainees were and continue to be deprived of the protection of the laws for a period in excess of ten years.

#### 7.4.4.9. OTHER INHUMANE ACTS (ARTICLE 172(1)(K))

The Court of BiH has held that the specific elements of "other inhuman acts" pursuant to Article 172(1)(k), were:<sup>399</sup>

- An act or omission, whose gravity is similar to the gravity of other acts referred to in Article 172(1) of the BiH Criminal Code;
- Which caused serious mental or physical suffering or injury, that is, that they constitute a serious attack on human dignity; and
- Which was intentionally committed by the accused or a person for whose acts and omissions the accused is criminally responsible.

The Court of BiH held that to assess the seriousness of an act, consideration must be given to all factual circumstances.<sup>400</sup> Some of these circumstances may include:<sup>401</sup>

- the nature of the act or omission;
- the context in which it occurred;
- the personal circumstances of the victim including age, sex and health; and
- the physical, mental and moral effects of the act upon the victim.

The injury or suffering must be real and serious, but it is not necessary that it be long-lasting. However, the long-term effects of the act are relevant to determining its seriousness.<sup>402</sup>

*The injury or suffering must be real and serious, but it is not necessary that it be long-lasting. However, the long-term effects of the act are relevant to determining its seriousness.*

The trial panel in *Momir Savić* case presented

<sup>399</sup> *Savić*, 1st inst., p. 53 (p. 47 BCS) (relevant part upheld on appeal); *Rašević et al.*, 1st inst., p. 50 (p. 51 BCS) (relevant part upheld on appeal); *Mejakić et al.*, 1st inst., p. 204 (pp. 191-192 BCS) (relevant part upheld on appeal); *Božić et al.*, 1st inst., p. 53 (p. 51 BCS) (upheld on appeal).

<sup>400</sup> *Savić*, 1st inst., p. 53 (p. 47 BCS) (relevant part upheld on appeal); *Rašević et al.*, 1st inst., p. 50 (p. 52 BCS) (relevant part upheld on appeal).

<sup>401</sup> *Savić*, 1st inst., p. 53 (p. 47 BCS) (relevant part upheld on appeal); *Rašević et al.*, 1st inst., p. 50 (p. 52 BCS) (relevant part upheld on appeal), referring to *Blagojević and Jokić*, TJ, ¶ 627.

<sup>402</sup> *Savić*, 1st inst., p. 54 (p. 48 BCS) (relevant part upheld on appeal); *Rašević et al.*, 1st inst., p. 50 (p. 52 BCS) (relevant part upheld on appeal), referring to *Kunarac et al.*, TJ ¶ 501 and *Krnjelac*, TJ ¶ 144.

examples of inhumane acts from ICTY case law:<sup>403</sup>

- mutilation or severe bodily harm;<sup>404</sup>
- beatings and other acts of violence;<sup>405</sup>
- injuring;<sup>406</sup>
- serious injuries to physical or mental integrity;<sup>407</sup>
- serious attack on human dignity;<sup>408</sup>
- forced labour that caused serious mental or physical suffering or injury or the act constituted severe attack on human dignity;<sup>409</sup>
- deportation and forcible transfer of groups of civilians;<sup>410</sup>
- enforced prostitution;<sup>411</sup> and
- enforced disappearance of persons.<sup>412</sup>

The *mens rea* of inhuman acts requires that at the time of the act or omission, the perpetrator had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless thereto.<sup>413</sup>

<sup>403</sup> *Savić*, 1st inst., p. 53 (p. 47 BCS) (relevant part upheld on appeal).

<sup>404</sup> *Ibid.* referring to *Kvočka et al.*, TJ ¶ 208.

<sup>405</sup> *Ibid.*

<sup>406</sup> *Savić*, 1st inst., p. 53 (p. 47 BCS) (relevant part upheld on appeal) referring to *Kordić et al.*, AJ ¶ 117.

<sup>407</sup> *Savić*, 1st inst., p. 53 (p. 47 BCS) (relevant part upheld on appeal) referring to *Blaškić*, TJ ¶ 239 and *Krstić*, TJ ¶ 523.

<sup>408</sup> *Savić*, 1st inst., p. 53 (p. 47 BCS) (relevant part upheld on appeal) referring to *Vasiljević*, TJ ¶¶ 239-240.

<sup>409</sup> *Savić*, 1st inst., p. 53 (p. 47 BCS) (relevant part upheld on appeal) referring to *Naletilić et al.*, TJ ¶¶ 271, 289, 303.

<sup>410</sup> *Savić*, 1st inst., p. 53 (p. 47 BCS) (relevant part upheld on appeal) referring to *Kupreškić et al.*, TJ ¶ 566.

<sup>411</sup> *Ibid.*

<sup>412</sup> *Ibid.*

<sup>413</sup> *Savić*, 1st inst., pp. 53-54 (pp. 47-48 BCS) (relevant part upheld on appeal); *Božić et al.*, 1st inst., p. 53 (p. 51 BCS) (upheld on appeal).

## 7.5. CROATIA

### *Notes for trainers:*

- This section deals with the laws applicable in Croatia. As the courts in Croatia apply the OKZ RH for crimes arising from the conflicts in the former Yugoslavia, which does not include crimes against humanity, these crimes have not been prosecuted in Croatia to date.
- Participants should nevertheless be encouraged to discuss if there are ways in which such crimes could be prosecuted in Croatia in the future.

When trying cases arising from crimes committed during the conflicts in the former Yugoslavia, the courts in Croatia do not apply the current 1998 Criminal Code. Rather, they apply the OKZ RH, which, reflecting the SFRY Criminal Code, did not specifically provide for crimes against humanity to be prosecuted.<sup>414</sup> Therefore, no cases involving charges of crimes against humanity have been prosecuted to date.

The 1198 Criminal Code does criminalise crimes against humanity. According to Article 157a of the 1998 Criminal Code<sup>415</sup>:

Whoever violates the rules of international law within an extensive or systematic attack against the civilian population and, with knowledge of such an attack, orders the killing of another person, orders the infliction of conditions of life so as to bring about the physical destruction in whole or in part of some civilian population which could lead to its complete extermination, orders trafficking in human beings, in particular of women and children, or the enslavement of a person in any other way so that some or all of the powers originating in property rights are exercised over such person, orders the forceful displacement of persons from areas where they lawfully reside and through expulsion or other measures of coercion, orders that a person deprived of liberty or under supervision be tortured by intentionally inflicting severe bodily or mental harm or suffering, orders that a person be raped or subjected to some other violent sexual act or that a woman who has been impregnated as a result of such violent act be intentionally kept in detention so as to change the ethnic composition of some population, orders the persecution of a person by depriving him or her of the fundamental rights because this person belongs to a particular group or community, orders the arrest, detention or kidnapping of some persons in the name of and with the permission, support or approval of a state or political organization and subsequently does not admit that these

<sup>414</sup> For more on the temporal applicability of laws see Module 5.

<sup>415</sup> Republic of Croatia, Official Gazette of Croatia „Narodne Novine“ No. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 71/06, 110/07, 152/08.

persons have been deprived of their liberty or withholds information about the fate of such persons or the place where they are kept, or orders within an institutionalised regime of systematic oppression and domination of one racial group over another racial group or groups that an inhumane act described in this Article be committed or an act similar to any of these offenses so as to maintain such a regime (the crime of apartheid), or whoever commits any of the foregoing offenses shall be punished by imprisonment for not less than five years or by a life sentence.



## 7.6. SERBIA

### *Notes for trainers:*

- This section deals with the laws applicable in Serbia. As the courts in Serbia apply the SFRY CC for crimes arising from the conflicts in the former Yugoslavia, which does not include crimes against humanity, these crimes have not been prosecuted in Serbia to date.
- Participants should nevertheless be encouraged to discuss if there are ways in which such crimes could be prosecuted in Serbia in the future.

When trying cases arising from crimes committed during the conflicts in the former Yugoslavia, the Serbian courts do not apply the current 2006 Criminal Code. Rather, they apply either the SFRY Criminal Code or the FRY Criminal Code (reflecting the SFRY Criminal Code) both of which did not specifically provide for crimes against humanity to be prosecuted. Therefore, no cases involving charges of crimes against humanity have been prosecuted to date.

The 2006 Criminal Code does criminalise crimes against humanity. According to Article 371 of the 2006 Criminal Code<sup>416</sup>:

Whoever in violation of the rules of international law, as part of a wider or systematic attack against civilian population orders: murder; inflicts on the group conditions of life calculated to bring about its complete or partial extermination, enslavement, deportation, torture, rape; forcing to prostitution; forcing pregnancy or sterilisation aimed at changing the ethnic balance of the population; persecution on political, racial, national, ethical, sexual or other grounds, detention or abduction of persons without disclosing information on such acts in order to deny such person legal protection; oppression of a racial group or establishing domination or one group over another; or other similar inhumane acts that intentionally cause serious suffering or serious endangering of health, or whoever commits any of the above-mentioned offences, shall be punished by imprisonment of minimum five years or imprisonment of thirty to forty years.

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<sup>416</sup> Republic of Serbia, Official Gazette, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009.

## 7.7. FURTHER READING

## 7.7.1. BOOKS

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- Medica Mondial, *A STUDY: THE TROUBLE WITH RAPE TRIALS – VIEWS OF WITNESSES, PROSECUTORS AND JUDGES ON PROSECUTING SEXUALISED VIOLENCE DURING THE WAR IN THE FORMER YUGOSLAVIA* (2009). Available at: [http://www.medicamondiale.org/fileadmin/content/07\\_Infothek/Publikationen/medica\\_mondiale\\_and\\_that\\_it\\_does\\_not\\_happen\\_to\\_anyone\\_anywhere\\_in\\_the\\_world\\_english\\_complete\\_version\\_dec\\_2009.pdf](http://www.medicamondiale.org/fileadmin/content/07_Infothek/Publikationen/medica_mondiale_and_that_it_does_not_happen_to_anyone_anywhere_in_the_world_english_complete_version_dec_2009.pdf).
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