

**INTERNATIONAL CRIMINAL LAW  
& PRACTICE  
TRAINING MATERIALS**

# **WAR CRIMES**

*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 8: WAR CRIMES

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

**Developed by International Criminal Law Services**

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## 8. WAR CRIMES

### 8.1. 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 jurisdiction 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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#### 8.1.1. MODULE DESCRIPTION

This Module covers the law applicable to prosecuting war crimes committed in both international and non-international armed conflicts. It explains the elements necessary for proving war crimes prohibited under international humanitarian law (IHL), including:

- grave breaches of the Geneva Conventions;
- violations of Common Article 3 to the Geneva Conventions; and
- other violations of the laws and customs of war.

It demonstrates the distinctions between war crimes committed in international armed conflicts and those committed in non-international armed conflict, and addresses crimes for which the classification of the conflict is irrelevant. The Module sets out the position under international law and considers the prosecution of war crimes in BiH, Croatia and Serbia by describing the laws and jurisprudence from these countries.

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#### 8.1.2. MODULE OUTCOMES

At the end of this session, participants should understand:

- The distinction between war crimes committed in an armed conflict and other domestic crimes not committed during an armed conflict.
- The distinction between grave breaches, violations of Common Article 3 to the Geneva Conventions and other violations of the laws and customs of war.
- Where to find sources of international humanitarian law (both customary and treaty provisions) for the prosecution of war crimes before international and national courts.
- The constitutive elements of proving war crimes before international and national courts.
- The difference between international armed conflicts and non-international armed conflicts.
- Factors that can be used to prove a nexus between the alleged criminal conduct and an armed conflict, including in cases of sexual violence.
- The underlying crimes, how to categorise a criminal incident as a war crime and how to prove the underlying offence was a war crime.
- The definition of a status of a victim and understand why this is important for war crimes prosecutions.
- The ways in which sexual violence and other gender-based crimes can be prosecuted as war crimes.

*Notes for trainers:*

- This Module is one of the most important for participants as the crimes discussed will be frequently prosecuted within national jurisdictions. It is critical for participants to grasp the unique elements of war crimes as compared with the ordinary national crimes. The participants should also examine the differences in the elements between war crimes, crimes against humanity and genocide.
- The elements of the offences must be thoroughly explored, and the use of practical examples from the international and domestic case law would greatly assist in illustrating how the elements are defined and implemented.
- It is imperative that participants appreciate the origins and development of IHL, as this will empower them both to understand the rationale behind the legal requirements of war crimes and to develop arguments in favour of interpretations they wish to advance in their cases.
- In order to achieve these objectives 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, 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.

Structure of this Module:

- It is important for trainers to understand that this Module is broken down into four main parts.
  - The first section (8.2) provides a definition of war crimes under international law. It includes the provisions on war crimes before the ICTY and a discussion of the main elements of war crimes charged at the ICTY.
  - It is followed by a section (0) that describes the elements that are common to all war crimes. These elements are “common” in that they have to be proved for all war crimes irrespective of the particular crimes (*i.e.* murder, torture, rape, etc.). These are the requirements that make the underlying crime a war crime as opposed to an ordinary crime.
  - After the common elements have been examined, the Module discusses each of the war crimes, such as murder, torture, rape, etc. (8.4) There is also a separate section on war crimes involving sexual violence (0).
  - Thereafter, the laws and cases on war crimes from the SFRY Criminal Code (8.7) BiH (8.8), Croatia (8.9) and Serbia (8.10) are examined.

## 8.2. DEFINITION OF WAR CRIMES UNDER INTERNATIONAL LAW

### *Notes for trainers:*

- The development of the laws prohibiting war crimes has not been straightforward. Participants should be introduced in this first section to the most significant treaties and developments in international humanitarian law (IHL).
- It is extremely important that participants understand the distinction between grave breaches of the Geneva Conventions and other violations of IHL.
- A useful way of demonstrating this would be to refer the participants to Articles 2 and 3 of the ICTY Statute, asking them to compare the provisions in each of these articles.

The laws prohibiting war crimes are a subset of IHL (also known as the law of war or the law of armed conflict).<sup>1</sup> IHL is a set of rules that seeks to limit the effects of armed conflict, protect persons who are not participating in hostilities and restrict the means and methods of warfare.

The main sources of IHL are treaties and customary international law.

### 8.2.1. ESSENTIAL PRINCIPLES OF IHL

The essential principles of IHL include:

- (1) *Distinction*: The parties to a conflict must at all times distinguish between the civilian population and combatants in order to spare the civilian population and civilian property. Neither the civilian population as a whole, nor individual civilians may be attacked. Attacks may be directed solely against military objectives (including combatants).
- (2) *Proportionality*: Attacks are prohibited if they cause civilian damage that is excessive or disproportionate when compared with the direct and concrete military advantage that is gained. In attacking military objectives, combatants must take measures to avoid or minimise collateral civilian damage and refrain from causing excessive civilian damage. There is a prohibition on employing methods and means of warfare of a nature to cause superfluous injury and unnecessary suffering.
- (3) *Protection*: Captured combatants and civilians who find themselves under the authority of the adverse party are entitled to respect for their lives, their dignity, their personal rights and their political, religious and other convictions. They must be treated humanely and without adverse distinction. They must be protected against all acts of violence or reprisal.

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<sup>1</sup> See the IHL section on the ICRC website ([www.icrc.org](http://www.icrc.org)) for more on IHL. The ICRC commentaries on the Geneva Conventions and APs are particularly useful sources when interpretation of the provisions of those treaties is required; these are available at [www.icrc.org/ihl.nsf](http://www.icrc.org/ihl.nsf).

### 8.2.2. VIOLATIONS OF IHL

All violations of IHL do not constitute war crimes. To be considered a war crime, the violation must entail, under customary or treaty law, the individual criminal responsibility of the person breaching the rule. War crimes are serious violations of IHL committed in international and non-international armed conflicts that give rise to individual criminal responsibility.

Various provisions under IHL (customary law and treaty law) prohibit the commission of war crimes:

- Grave breaches of the Geneva Conventions and of Additional Protocol I (AP I) that apply in international armed conflict;
- Common Article 3 of the Geneva Conventions that apply in all conflicts; and
- Other serious violations of international humanitarian law that apply in either international or internal armed conflicts.

Grave breaches of the Geneva Conventions:

- Each of the four Geneva Conventions includes “grave breaches” provisions that expressly criminalise the most serious grave violations of the rules provided in the Conventions.
- The list of grave breaches in the Geneva Conventions was expanded in AP I.
- Grave breaches provisions are regarded as part of customary international law.<sup>2</sup>
- Grave breaches provisions only apply to violations committed during an international armed conflict and against persons who are protected by the Geneva Conventions.
- Protected persons under the Geneva Conventions include civilians and combatants.
  - Protected civilians are those persons who are in the hands of the adversary.
  - Protected combatants are those persons who qualify as prisoners of war.

Common Article 3 of the Geneva Conventions:

- By contrast, Article 3 common to the four Geneva Conventions sets out certain fundamental protections that also apply during armed conflict “not of an international character”.
- The ICTY has held that Common Article 3 set forth a minimum core of mandatory rules applicable to any armed conflicts, whether the conflict is of an international or non-international character.<sup>3</sup> The character of the conflict is therefore irrelevant.

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<sup>2</sup>See, e.g., International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ¶¶ 79, 82. Geneva Convention, Additional Protocol I, Art. 85 contains additional grave breaches, but there is debate over whether all these breaches also constitute custom.

<sup>3</sup>Duško Tadić, *Decision on the Defence Motion for Interlocutory on Jurisdiction*, Appeal Chamber, 2 Oct. 1995, ¶ 102. See also ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, Merits Judgement, 27 June 1986, ¶ 218.

- The ICTY has held that violation of Common Article 3 provisions give rise to criminal responsibility.<sup>4</sup> Violations of Common Article 3 are expressly criminalised in the ICTR and ICC Statutes.

Other serious violations of IHL:

- Customary international law and other treaties provide for other serious violations of IHL giving rise to criminal responsibility. They set forth prohibitions that apply in:
  - International armed conflicts only;
  - Internal armed conflicts only; or
  - In both international and internal armed conflicts.

The table on the next page sets out the main areas of protection provided by the Geneva Conventions and their additional protocols.

*IHL is a set of rules that seeks to limit the effects of armed conflict, protect persons who are not participating in hostilities and restrict the means and methods of warfare.*

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<sup>4</sup> *Tadić*, Decision on the Defence Motion for Interlocutory on Jurisdiction, ¶ 134.

## 8.2.3. GENEVA CONVENTIONS AND ADDITIONAL PROTOCOLS

Treaty	Who is protected	When they are protected	Protections
Geneva Conventions I & II (GC I, II)	Civilians and military personnel who are wounded, sick or shipwrecked.	International armed conflict.	Establishes minimum standards of treatment for the dead, injured, sick and shipwrecked. It obliges parties to protect and permit medical, religious and humanitarian personnel to assist the injured.
Geneva Convention III (GC III)	Members of the armed forces who become prisoners of war.	International armed conflict.	Obliges the capturing party to ensure the observance of fundamental protections, rights and freedoms.
Geneva Convention IV (GC IV)	Civilians in occupied areas or areas affected by armed conflict.	International armed conflict.	A broad range of protections that guarantee fundamental protections, rights and freedoms.
Article 3 common to Geneva Conventions I – IV	Civilians and military personnel who are not actively taking part in hostilities.	Non-international armed conflict and international armed conflict. <sup>5</sup>	Prohibits: murder, torture, cruel treatment, hostage taking, humiliating and degrading treatment, extra-judicial punishments and executions. It imposes minimum protections of due process and an affirmative duty to collect and care of the wounded and sick.

<sup>5</sup> Geneva Convention, Common Art. 3 applies to both international and non-international armed conflicts and is part of customary international law and therefore binds all parties to a conflict: Dragoljub Kunarac et al., Case No. IT-96-23/1-A, Appeal Judgement, 12 June 2002, ¶ 68; Zejnil Delalić et al. (Čelebići), Case No. IT-96-21-A, Appeal Judgement, 20 Feb. 2001, ¶¶ 138-9, 147; *Tadić*, Decision on the Defence Motion for Interlocutory on Jurisdiction, ¶¶ 89, 98; ICJ, Nicaragua Case, ¶ 218.

Additional Protocol I to the Geneva Conventions (AP I)	All persons affected by the armed conflict.	International armed conflict including people fighting: colonial domination, alien occupation or racist regimes.	Complements the protections of GC I-IV. Provides for protections in the conduct of hostilities; prohibits the use of weapons that “cause superfluous injury or unnecessary suffering” and provides for superior responsibility.
Additional Protocol II to the Geneva Conventions (AP II)	All persons affected by the armed conflict.	Non-international armed conflict that take place on the territory of a State between the armed forces of that State and organised armed groups which, under responsible command, exercise control over a part of its territory as to enable them to carry out sustained military operations.	All of the protections offered by Common Article 3 plus: basic due process rights and prohibition against the recruitment of soldiers under the age of 15. It imposes a duty to educate children and a duty to reunite families.

#### 8.2.4. WAR CRIMES PROVISIONS BEFORE INTERNATIONAL COURTS

ICTY Statute Articles 2 and 3 give the ICTY jurisdiction over grave breaches of the Geneva Conventions and violations of the laws or customs of war,<sup>6</sup> respectively.

Violations of Article 2 can only be charged if the prosecution also alleges an international armed conflict. On the other hand, violations of Article 3 can be charged regardless of the nature of the conflict. However, the prosecution must show that the underlying conduct was prohibited in the type of armed conflict at issue. That is, if the Article 3 violation concerns a provision applicable only to international armed conflict, the prosecution must show that the conflict was international. If the Article 3 violation concerns a provision applicable in international and non-international armed conflicts, it is not necessary to prove the nature of the conflict. At the ICTY, the practice has been to charge violations of Article 3 that are prohibited in all armed conflicts in order to avoid having to prove the existence of an international armed conflict in every case.

<sup>6</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 3 is residual in nature. It gives ICTY jurisdiction over any other serious violations of IHL not covered by arts. 2, 4 or 5 of the ICTY Statute, in addition to the offences expressly listed in Art. 3. The list of crimes in Article 3 is therefore not closed; other crimes are incorporated in this Article.

Violations of Common Article 3 can be charged under Article 3 of the ICTY Statute, and as noted above, the conduct set out in the provision is prohibited irrespective of the nature of the conflict.

### **ICTY Statute Article 2: Grave breaches of the Geneva Conventions of 1949**

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Conventions:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

### **ICTY Statute Article 3: Violations of the laws or customs of war**

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

ICTR Statute Article 4 covers a non-exhaustive list of crimes based on violations of Common Article 3 and of Additional Protocol II, reflecting the UN Security Council's determination that the 1994 genocide took place in the context of a non-international armed conflict.

The ICC has jurisdiction over war crimes including:

- Grave breaches of the Geneva Conventions;
- Serious violations of the laws and customs of international armed conflict;
- Serious violations of Common Article 3 committed in a non-international armed conflict; and
- Serious violations of the laws and customs of non-international armed conflict.<sup>7</sup>

It is significant that the Rome Statute maintains a clear distinction between those war crimes that are prohibited in international armed conflict and those applicable in internal armed conflict.

#### 8.2.5. ELEMENTS OF WAR CRIMES BEFORE THE ICTY

As noted above, at the ICTY there are two separate categories of war crimes: grave breaches of the Geneva Conventions, under Article 2 of the ICTY Statute, and violations of the laws or customs of war, under Article 3.

In order to determine whether conduct constitutes a war crime—either under Article 2 or Article 3—within the jurisdiction of the ICTY, the court must establish the following:

- The violation constitutes an infringement of a rule of international humanitarian law;
- The rule is customary or, if it belongs to treaty law, all required conditions are met;
- The violation is serious, that is to say that it constitutes a breach of a rule protecting important values and involves grave consequences for the victims; and
- The violation of the rule entails, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.<sup>8</sup>

##### 8.2.5.1. GRAVE BREACHES OF THE GENEVA CONVENTIONS (ARTICLE 2 OF THE ICTY STATUTE)

The following elements must be established for an offence to be subject to prosecution as a grave breach under Article 2 of the ICTY Statute:

- The existence of an armed conflict;
- The armed conflict was international in nature;
- A nexus between the alleged crimes and the armed conflict; and

<sup>7</sup> Rome Statute of the International Criminal Court, Art. 8.

<sup>8</sup> *Tadić*, AJ ¶ 94; *Kunarac*, AJ ¶ 66.

- The victims of the alleged crimes were a “protected person” under the Geneva Conventions.<sup>9</sup>

#### 8.2.5.2. VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR (ARTICLE 3 OF THE ICTY STATUTE)

The ICTY considers Article 3, violations of the laws and customs of war, a residual clause that gives the ICTY jurisdiction over a broad range of violations. The list included in Article 3 is “merely illustrative, not exhaustive”, includes violations of both the Geneva Conventions and The Hague Conventions and could be interpreted to include other violations of IHL.<sup>10</sup> Violations of Common Article 3 of the Geneva Conventions fall within the ambit of Article 3.<sup>11</sup> The violations of the Geneva Conventions and of AP I, which are not grave breaches and that are now regarded as customary law, would also fall within the scope of Article 3 of the ICTY Statute.

The application of Article 3 of the ICTY Statute requires a determination that a state of armed conflict existed at the time of the commission of the crime and of the existence of a nexus between the alleged crimes and the armed conflict.<sup>12</sup>

If the crime alleged is an offence that applies only in international armed conflict, then the prosecution must prove the existence of such a conflict.

For charges based on Common Article 3 of the Geneva Conventions, the prosecution must prove that the victim was a person not taking an active part in the hostilities at the time of the alleged crime and that the perpetrator knew or had reason to know that the victim was taking no active part in the hostilities at the time of the alleged violation.<sup>13</sup> Under the laws of BiH, Croatia and Serbia prosecutors must prove four elements when charging war crimes:

- The criminal act is in violation of international law.
- The criminal act occurred during armed conflict, war or occupation.
- There is sufficient nexus between the act of the perpetrator and the armed conflict, war or occupation.
- The accused must have ordered or perpetrated the act.

The existence of an armed conflict and a nexus to that conflict are discussed below in sections 8.8.1 (BiH), 8.9.1 (Croatia), and 8.10.1 (Serbia).

<sup>9</sup> Radoslav Brđanin, Case No. IT-99-36-T, Trial Judgement, ¶ 121; Mladen Naletilić et al., Case No. IT-98-34-T, Trial Judgement, 31 March 2003 ¶ 176.

<sup>10</sup> *Tadić*, Decision on the Defence Motion for Interlocutory on Jurisdiction, ¶¶ 87, 89.

<sup>11</sup> *Ibid.* at ¶ 89; *Kunarac*, AJ ¶ 68.

<sup>12</sup> Vujadin Popović et al., Case No. IT-05-88-T, Trial Judgement, ¶ 739; Ante Gotovina et al., Case No. IT-06-90-T, Trial Judgement 15 April 2011 ¶ 1673.

<sup>13</sup> *Gotovina et al.*, ¶ 1673; *Popović et al.*, TJ ¶ 743; Ljube Bošković, Case No. IT-04-82-T, Appeal Judgement, 19 May 2010 ¶ 66; *Čelebić*, AJ ¶ 420.

## 8.3. ELEMENTS COMMON TO ALL WAR CRIMES

*Notes for trainers:*

- Having provided a brief introduction to the definition of war crimes under international law, it is necessary to first consider the common elements for all war crimes, and thereafter, to examine each particular war crime.
- It is imperative for participants to understand that the common elements for war crimes are those that must be proved for any particular war crime, for example, murder, torture, rape, etc. These are the jurisdictional elements which make an offence a war crime.
- These are the elements which distinguish crimes committed during war from crimes committed in times of peace.
- It is essential for the participants to understand that the distinction between international and non-international armed conflicts is not academic; the rules applicable in the different armed conflicts are not the same and, as a result, most of the provisions on war crimes apply differently depending on the nature of the armed conflict (for example, graves breaches are only applicable in international armed conflicts, whereas violations of AP II only apply in non-international armed conflicts).
- The Module will consider each of the common elements and discuss the difference between armed conflicts that are classified as international and those that are classified as internal.
- It will be a very helpful exercise to ask participants to evaluate whether the conflict described in the case study is of an international or internal character. Participants can also be requested to identify which war crimes could be charged based on the facts of the case.
- Questions that could be posed during the Module in order to focus the attention of the participants on the salient issues are:
  - What evidence is required to prove an international armed conflict, as opposed to a non-international armed conflict? For example, what level of intervention by an outside state might be required to render a conflict international?
  - What is the threshold that must be met to establish an armed conflict? For example, when does civil unrest become an armed conflict?
  - What distinguishes acts that would amount to the ordinary crime of murder from murder charged as a war crime?
  - How closely do the unlawful acts of an accused need to be related to the armed conflict in order for the conduct to be charged as a war crime?

*Hints:*

- It is vital for prosecutors to appreciate which crimes can be charged as war crimes irrespective of the nature of the armed conflict as such crimes need not burden the prosecution with proving that the conflict was international in character.

The elements listed and described below are common requirements for all war crimes. These elements are:<sup>14</sup>

- (1) *Armed conflict*: there must have been an armed conflict when and where the alleged crimes were committed. See section 8.3.1.2 for a discussion on the difference between international and internal armed conflict.
- (2) *Protected persons*: the victim must be protected under IHL.
- (3) *Nexus*: there must be a sufficient nexus between the accused's acts and the armed conflict.
- (4) *Existing IHL*: the violation must be a breach of customary or treaty IHL binding on the accused.
- (5) *Gravity*: the violation must be serious and involve grave consequences for the victim.
- (6) *Individual criminal responsibility*: the violation must entail individual criminal responsibility of persons breaching the rule.
- (7) *Awareness*: It is also necessary to prove that the accused was aware that an armed conflict existed.<sup>15</sup>

All of these elements distinguish war crimes from ordinary crimes.

*The common elements of war crimes distinguish them from ordinary domestic crimes.*

Importantly, it is not required to prove that war crimes were committed as part of a plan, policy or large-scale commission of such crimes.<sup>16</sup>

Each of these seven elements will be discussed in turn below.<sup>17</sup>

<sup>14</sup> *Tadić*, Decision on the Defence Motion for Interlocutory on Jurisdiction, ¶ 94.

<sup>15</sup> This is also a requirement before the BiH State Court. See section 8.8.1.2.

<sup>16</sup> See ROBERT CRYER, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 288 (2d ed. 2010) (discussing ICC Statute, Art. 8(1) as a signal on how ICC ought to exercise its jurisdiction, not an element of war crimes).

<sup>17</sup> The ICC Elements of Crimes states that the war crimes must be committed "in the context of and associated with" an armed conflict.

Elements of Article 8 war crimes for crimes directed against individuals generally include reference to the following requirements:

- (a) The conduct took place in the context of and was associated with an armed conflict (depending on the crime, either of an international or of a non-international character);
- (b) The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

For crimes against protected persons, the following requirements have to be met:

- (a) The victim or victims were protected under one or more of the Geneva Conventions of 1949;
- (b) The perpetrator was aware of the factual circumstances that established protected status.

## 8.3.1. ARMED CONFLICT

*Notes for trainers:*

- This section covers material which might be unfamiliar to participants.
- It considers the definitions of international and non-international armed conflicts.
- It would be very helpful for participants to consider the facts as set out in the case study in order to discuss whether the conflict between the Government of State X and the YNP is of an international or an internal character. Participants should have in mind that another state (State Z) was providing assistance to the YNP and appears to have been present on the territory of State X. The participants should discuss whether this intervention would be sufficient to render the whole conflict international, or not.
- A second issue to consider from the case study would be the stage at which an armed conflict began.

- The fundamental requirement of war crimes is that the crime occurred during an armed conflict.<sup>18</sup> For the prosecution of crimes, it must be shown that the conflict was of either international (for the purposes of the grave breach provisions) or non-international character (for the purposes of APII for instance).
- An *international armed conflict* has been defined as resort to armed force between States.<sup>19</sup>
- A *non-international armed conflict* has been defined as protracted armed violence between governmental authorities and organised armed groups or between non-government armed groups within a State.
- An armed conflict can become a *mixed conflict* which is both international *and* non-international in character if:
  - Another state intervenes with troops, or
  - Some of the participants in an internal conflict act on behalf of another State".<sup>20</sup>

The ICTY Appeals Chamber provided definitions of an armed conflict and the nexus requirement in the *Tadić* case:

The geographical and temporal frame of reference [...] is broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in [common] Article 3 [...] apply outside the narrow geographical context of the actual theatre of combat

<sup>18</sup> Unless otherwise indicated, this section's sources are: *Tadić*, Decision on the Defence Motion for Interlocutory on Jurisdiction, ¶¶ 70, 75; *Kunarac*, AJ ¶ 58; GC IV, Art. 6.

<sup>19</sup> *Tadić*, AJ, ¶ 84.

<sup>20</sup> *Ibid.*; Dario Kordić et al., Case No. IT-95-14/2-T, Trial Judgement, ¶ 66; *Brđanin*, TJ ¶ 124.

operations. [...] The nexus required is only a relationship between the conflict and the [acts], not that the [acts] occurred in the midst of battle.

[W]e find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.<sup>21</sup>

For both international and non-international armed conflicts, it is not necessary that two groups both apply force. Armed conflict includes invasions that meet no resistance, aerial bombing or an unauthorised border crossing by armed forces.<sup>22</sup>

The state of armed conflict continues until a general conclusion of peace is reached, or in the case of internal armed conflict, until a peaceful settlement is achieved.<sup>23</sup> The state of armed conflict may also end by a decisive close of military operations without an agreement.

### 8.3.1.1. TEST FOR INTERNAL ARMED CONFLICT

For internal (non-international) armed conflicts, situations involving internal disturbances and tensions, such as riots, isolated and sporadic acts of

*Internal disturbances, such as riots and unrest, do not amount to armed conflict.*

violence, or and unrest do not amount to armed conflict.<sup>24</sup> The internal disturbance must rise to the level of “protracted armed violence” for IHL to apply.<sup>25</sup>

In situations of internal disturbance, the relevant considerations for determining whether armed violence amounts to an armed conflict include:

- the protracted nature of the armed violence;
- its intensity; and
- the extent of organisation of the parties involved.<sup>26</sup>

These elements have been interpreted as follows:

<sup>21</sup> *Tadić*, Decision on the Defence Motion for Interlocutory on Jurisdiction ¶¶ 69 - 70.

<sup>22</sup> CRYER, *supra* note 16, at 279.

<sup>23</sup> *Tadić*, Decision on the Defence Motion for Interlocutory on Jurisdiction ¶ 70; *Gotovina et al.*, TJ ¶ 1676.

<sup>24</sup> See Rome Statute, Art. 8(2)(f).

<sup>25</sup> Jean Paul Akayesu, Case No. ICTR-96-4-T, Trial Judgement, 2 Sept. 1998 ¶ 603.

<sup>26</sup> Fatmir Limaj et al., Case No. IT-03-66-T, Trial Judgement, 30 Nov. 2005 ¶ 89; *Čelebići*, TJ ¶ 184; *Akayesu*, TJ ¶¶ 619-20.

- (1) *Protracted nature*: The hostilities must be extended over time and include events that occur because of the conflict. This is analysed by looking at the entire period of the conflict, from its initiation to cessation.<sup>27</sup>
- (2) *Intensity*: Relevant factors to assess the intensity of armed violence include the:
- number, duration, and intensity of individual confrontations;
  - type of weapons and other military equipment used;
  - number and calibre of munitions fired;
  - number of persons and type of forces partaking in the fighting;
  - number of casualties;
  - extent of material destruction; and
  - number of civilians fleeing the combat zones.<sup>28</sup>
- (3) *Organisation of parties*: Parties must be sufficiently organised to confront each other with military means.<sup>29</sup> Relevant factors to assess the organisation of parties include the:
- existence of headquarters;
  - existence of designated operation zones;
  - ability to procure, transport, and distribute arms;<sup>30</sup>
  - existence of a command structure and disciplinary rules and mechanisms within the group;<sup>31</sup>
  - ability to obtain access to military equipment, recruits, and military training;
  - ability to plan, coordinate, and carry out military operations;
  - ability of armed group to define a unified military strategy and use military tactics; and the
  - ability of armed group to speak with one voice and negotiate and conclude agreements.<sup>32</sup>

Lack of organisation cannot be inferred from frequent violations of IHL. It depends on whether attacks were primarily due to a military strategy by a group's leaders or individual members of the group acting alone.<sup>33</sup>

<sup>27</sup> See, e.g., Thomas Lubanga Dyilo, Case No. ICC-01-04/01-06, Decision on the Confirmation of Charges, PTC, 29 Jan 2007, ¶ 234. See also Bahia Thahzib-lic and Olivia Swaak-Goldman, *Determining the Threshold*, in MAKING THE VOICE OF HUMANITY HEARD: ESSAYS ON HUMANITARIAN ASSISTANCE AND INTERNATIONAL HUMANITARIAN LAW 248 (Liesbeth Lijnzaad et al. eds., 2004).

<sup>28</sup> Ramush Haradinaj et al., Case No. IT-04-84-T, Trial Judgement, 3 April 2008, ¶ 49; see also *Limaj*, TJ ¶ 90; Slobodan Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal Trial Chamber, 16 June 2004, ¶¶ 28 - 29.

<sup>29</sup> *Haradinaj*, TJ ¶ 60.

<sup>30</sup> *Limaj*, TJ ¶ 90.

<sup>31</sup> This element does not have to be proven to the same extent as for superior responsibility. See Module 10.2.1.1 for more information.

<sup>32</sup> *Haradinaj*, TJ ¶ 60.

<sup>33</sup> *Boškoski et al.*, TJ ¶ 205.

### 8.3.1.2. TEST FOR INTERNATIONAL ARMED CONFLICT

An armed conflict is international if it takes place between two or more states. However, an internal armed conflict may become international (or, depending on the circumstances, be international in character alongside an internal armed conflict) if:

- Another State intervenes in the conflict with troops; or
- Some of the participants in the internal conflict act on behalf of another state.<sup>34</sup>

Three tests have been established by the ICTY for determining whether, in an armed conflict which is *prima facie* internal, armed forces may be regarded as acting on behalf of another state, rendering the conflict international. These tests differ depending on the nature of the entity being considered:

- Test of overall control:
  - It applies to armed forces, militias or paramilitary units acting as *de facto* organs of a foreign state.
  - In these cases the establishment of the overall character of the control suffices. The requisite control exists when that state has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.<sup>35</sup>
- Test of *de facto* state organs:
  - It applies to a single private individual or a group which is not militarily organised.
  - In order to determine whether the individual or group has acted as a *de facto* state organ when performing a specific act, it is necessary to ascertain that specific instructions concerning the commission of that particular act had been issued by the state to the individual or group.
  - Alternatively, it must be established that the unlawful act had been publicly endorsed or approved *ex post facto* by that state.<sup>36</sup>
- Test of individuals acting in collusion with State authorities.
  - It applies to private individuals who are assimilated to State organs on account of their actual behaviour within the structure of a State, regardless of the existence of State instructions.

In order to demonstrate that they acted on behalf of another state, it must be proved that they acted “within the framework of, or in connection with, armed forces, or in collusion with state

<sup>34</sup> *Tadić*, AJ ¶ 84; *Kordić*, TJ ¶ 66; *Brđanin*, TJ ¶ 124; see also *Lubanga Dyilo*, Decision on the confirmation of charges, ¶ 209.

<sup>35</sup> *Tadić*, AJ ¶ 137; *Čelebići*, AJ ¶¶ 14, 26; *Brđanin*, TJ ¶ 124; *Naletilić*, TJ ¶ 183; see also *Lubanga Dyilo*, Decision on the confirmation of charges, ¶ 211.

<sup>36</sup> *Tadić*, AJ ¶ 137.

authorities".<sup>37</sup> The issue here is not the degree of control by the State but the behaviour of the individual.

### 8.3.2. APPLICATION OF COMMON ARTICLE 3

Common Article 3 applies in both international and non-international armed conflicts. Therefore, when charging an accused with a violation of Common Article 3, the following considerations should be remembered:

*Common Article 3 applies in both international armed conflicts and non-international armed conflicts.*

- It is sufficient to simply show that an armed conflict existed regardless of its characterisation as international or non-international.<sup>38</sup> This is also the approach of the Court of BiH. See section 8.8.1.2.
- By charging Common Article 3 crimes, a prosecutor need not prove an international armed conflict in each case.

#### 8.3.2.1. GEOGRAPHIC AND TEMPORAL LIMITATIONS OF INTERNATIONAL ARMED CONFLICTS AND NON-INTERNATIONAL ARMED CONFLICTS

Once it is determined that an armed conflict exists under the definitions described above, an armed conflict will generally be held to "exist" not only in the actual area of fighting, but in the entire territory of the warring states or the entire area controlled by one of the parties in a non-international conflict.<sup>39</sup> Therefore, even if fighting is limited to a particular village, city or region, it is usually considered that the law of armed conflict extends much further.

Furthermore, it is not necessary that the crime at issue was committed at the actual site or time of hostilities. In other words, the crime can be geographically and temporally remote from the actual hostilities.<sup>40</sup> This principle has been applied by the Supreme Court of the Republika Srpska<sup>41</sup> and the Croatian Supreme Court.<sup>42</sup>

<sup>37</sup> *Tadić*, AJ ¶¶ 141, 144; *Naletilić*, TJ ¶ 183.

<sup>38</sup> See, e.g., *Akayesu*, AC ¶ 438; *Čelebići*, AJ ¶ 150.

<sup>39</sup> *Kordić*, AJ ¶ 321.

<sup>40</sup> Tihomir Blaškić, Case No. IT-95-14-T, Trial Judgement, 3 March 2000, ¶ 69; *Kunarac*, AJ ¶ 57.

<sup>41</sup> Supreme Court of the Republika Srpska (SC of RS), Case No. 118-0-Kz-06-000-018, 18 April 2006, p. 7; SC of RS, Case No. 118-0-Kzz-07-000 008, 29 June 2007, pp. 4-5; see also SC of RS, Case No. 118-0-Kz-K-06-000 006, 22 Feb. 2007, p. 4 BCS; SC of RS, Case No. 118-0-Kz-07-000 020, 15 March 2007, p. 3.

<sup>42</sup> Supreme Court of Croatia (SC of Croatia), Cerna, Case No I Kž 910/08-10, 2nd Instance Verdict, 25 March 2009, p. 10.

### 8.3.3. PROTECTED PERSONS AND PROPERTY UNDER IHL

#### *Notes for trainers:*

- Participants should refer to the case study to consider whether the persons who were captured by the YNP and detained would be regarded as prisoners of war or civilians. It should be noted that some of them were armed, when they were captured. However, this does not automatically follow that they would be granted prisoner of war status. It is essential for the participants to consider what the requirements are to be regarded as a combatant.

Each of the Geneva Conventions sets out the conditions under which a person or property is protected by its provisions.

Generally, protected persons include:

- Civilians;
- prisoners of war; and
- combatants no longer able to fight because they are sick, wounded or shipwrecked.

Persons not entitled to protection under GC I, II and III necessarily fall within the ambit of GC IV, which applies to civilians.<sup>43</sup> In case of doubt as to the status of the person, that person is considered to be a civilian.<sup>44</sup>

Certain property and property rights are also protected in IHL treaties.<sup>45</sup> Generally, protected property includes:

- cultural property;
- other civilian objects; and
- military medical facilities and ambulances.<sup>46</sup>

Conversely, some violent acts, like the destruction of military objects or the killing of enemy forces in combat in accordance with the applicable rules of the law of armed conflict, are not war crimes.

Before the ICC, two accused have been charged with the crime of “[i]ntentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian

<sup>43</sup> *Čelebići*, TJ ¶¶ 271-276; *Brđanin*, TJ ¶ 125. See also e.g. GC, Common Art. 3 and relevant Additional Protocol II provisions.

<sup>44</sup> Stanislav Galić, Case No. IT-98-29-T, Trial Judgement, 5 Dec. 2003, ¶ 55.

<sup>45</sup> See, e.g., GC IV, Arts. 18, 19 (e.g. civilian hospitals), 21, 22, 33, 53, 57.

<sup>46</sup> A distinction can be made between civilian objects like a residential home or a children’s school, and other objects that enjoy special protection, such as cultural property and material essential for the survival of the civilian population.

assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict”.<sup>47</sup>

### 8.3.3.1. CIVILIANS IN THE HANDS OF A PARTY OF WHICH THEY ARE NOT NATIONALS (GC IV)

Geneva Convention IV defines “protected persons” as those “in the hands of a party to the conflict or occupying Power of which they are not nationals”.<sup>48</sup>

*Protected persons should not be solely defined by the strict requirement of nationality.*

The phrase “in the hands of” is used in a general sense. It does not mean being physically held prisoner, but indicates that the civilian in question is in territory that is under the control of an opposing party to the conflict.<sup>49</sup>

This could include another foreign state or an armed group that has taken control of a particular region of a country during an international conflict.

Moreover, protected status is not determined based on a strict or traditional definition of nationality. Depending on the circumstances, the phrase “of which they are not nationals” should be decided, not by formal nationality, but the more realistic bonds demonstrating effective allegiance to a party to a conflict, such as ethnicity.<sup>50</sup> The substance of the relationship is more important than legal formalities.<sup>51</sup> Thus, persons may be accorded protected status notwithstanding that they are of the same nationality as their captors.

*To establish that crimes against civilians have been committed, the prosecution must prove that the victims of the crimes were civilians and that they were not participating directly in the hostilities.*

### 8.3.3.2. CIVILIANS TAKING NO ACTIVE PART IN THE HOSTILITIES

Civilians directly participating in the hostilities are not protected from attacks under AP I. Article 51(3) of AP I suspends the protections given to civilians for the time that they directly participate in the hostilities.

Therefore, to establish that crimes against civilians have been committed, the prosecution must prove that the victims of the crimes:

- were civilians; and

<sup>47</sup> Rome Statute, Arts. 8(2)(b)(iii) and 8(2)(e)(iii). For a discussion of the elements of the crime, see Situation in Darfur, Sudan: Abu Garda, Case No. ICC-2/05-02/09, Decision on the Confirmation of Charges, Pre-Trial Chambers 8 Feb. 2010, ¶¶ 60 – 71.

<sup>48</sup> GC IV, Art. 4.

<sup>49</sup> *Čelebići*, TJ ¶ 246; *Tadić*, TJ ¶ 579.

<sup>50</sup> See, e.g., *Brđanin*, TJ ¶ 125; *Blaškić*, AJ ¶ 634; *Tadić*, Decision on the Defence Motion for Interlocutory on Jurisdiction ¶ 166.

<sup>51</sup> *Naletilić*, TJ ¶¶ 206-7; *Tadić*, AJ ¶ 168; Zlatko Aleksovski, Case No. IT-95-14/1-A, Appeal Judgement, 24 March 2000, ¶¶ 151-2; *Čelebići*, AJ ¶ 82.

- that they were not participating directly in the hostilities.<sup>52</sup>

This is also an element that must be proven for Common Article 3 crimes.<sup>53</sup>

As stated by an ICTY Trial Chamber, “A civilian who takes part in armed combat loses his or her immunity and becomes a legitimate target”.<sup>54</sup>

Chambers at the ICTY look at the specific situation of the victim at the moment the crime was committed to determine whether he or she was taking active part in the hostilities or not.<sup>55</sup>

A person takes active part in hostilities where he or she engages in acts of war which “by their nature or purpose, are likely to cause actual harm to the personnel or materiel of the enemy armed forces”.<sup>56</sup>

Factors taken into consideration when determining the status of the victim include:

- the activity of the victim;
- whether or not the victim was carrying weapons; and
- the clothing, age and gender of the victim.<sup>57</sup>

Combatants can be distinguished by wearing a uniform or some distinctive sign and by carrying weapons openly.<sup>58</sup>

Membership in the armed forces can be a strong indication that a victim is directly participating in the hostilities, but it is not determinative.<sup>59</sup> The ICTY Appeals Chamber has held that a driver for a military reservist was not a person taking direct part in the hostilities at the time of the offence.<sup>60</sup> The ICC has similarly held that the notion of active or direct participation in hostilities “means not only direct participation in hostilities, combat in other words, but also covers active participation in combat-related activities”.<sup>61</sup>

<sup>52</sup> Dragomir Milošević, Case No. IT-98-29/1-A, Appeal Judgement, 12 Nov. 2009, ¶ 57.

<sup>53</sup> *Strugar*, AJ ¶ 172; *Čelebići*, TJ ¶¶ 420, 423 – 24; see also *Lubanga Dyilo*, Decision on the confirmation of charges ¶¶ 259-63, citing Pavle Strugar, Case No. IT-01-42-T, Appeal Judgement, 17 July 2008, ¶ 173.

<sup>54</sup> *D. Milošević*, TJ ¶ 947.

<sup>55</sup> *Sefer Halilović*, Case No. IT-01-48-A, Appeal Judgement, 16 Nov. 2005, ¶¶ 33 – 34.

<sup>56</sup> *D. Milošević*, TJ, ¶ 947.

<sup>57</sup> *Halilović*, AC 16 Nov. 2005, ¶¶ 33 – 34; see also ICRC Interpretive Guidance on Direct Participation in Hostilities, examining three constitutive elements of direct participation including: threshold of harm, causality and belligerent nexus; available at <http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf>.

<sup>58</sup> *D. Milošević*, TJ, ¶ 946.

<sup>59</sup> *Halilović*, TJ ¶ 33-34. Note the lawfulness of an attack on a member of an armed force is not dependent on that person’s direct participation in hostilities. The notion of direct participation in hostilities relates to civilians, not to combatants or fighters, and civilians and combatants / fighters are two mutually exclusive categories.

<sup>60</sup> *Strugar*, AJ ¶ 185.

<sup>61</sup> *Lubanga Dyilo*, Decision on the confirmation of charges ¶ 261; Germain Katanga et al., Case No. ICC-01/04-01/07-717, Pre-Trial Chamber, 30 Sept. 2008, footnote 375 at ¶ 276; Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09-243-Red, Pre-Trial Chamber, Decision on the Confirmation of Charges, 8 Feb. 2010 ¶

It must also be established that the perpetrator knew or should have known that the victim was a civilian not taking active part in the hostilities.<sup>62</sup>

#### 8.3.4. NEXUS BETWEEN CRIME AND ARMED CONFLICT

Not all crimes committed during an armed conflict or state of occupation will necessarily be war

##### *Notes for trainers:*

- In order to explain the nexus requirement, participants should be referred to the case study and asked whether the bomb at the restaurant, which killed twelve people, none of whom were State X politicians, was sufficiently linked to the armed conflict to be considered as a war crime.

crimes. Only offences that are “closely related” to the armed conflict will constitute war crimes.<sup>63</sup>

The armed conflict does not need to have caused the commission of the crime. To determine whether the crime was closely related to the armed conflict, the prosecutor must at least prove

*The armed conflict must have played a substantial part in the accused’s decision and ability to commit the crime, and the manner in which it was committed or the purpose for which it was committed.*

that the armed conflict “played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed”.<sup>64</sup>

It is enough if the accused acted in furtherance of or under the guise of that conflict.<sup>65</sup> However, it is not enough to merely show that the crime was committed “at the same time as an armed conflict” and/or “in any circumstances created in part by the armed conflict”.<sup>66</sup>

Factors relevant to an assessment a nexus to armed conflict include:

- the status of the perpetrator (*e.g.* were they a combatant?);
- the status of the victim (*e.g.* were they a non-combatant or a member of opposing party?);

83; Abdallah Banda Abakaer Nourain et al., Case No. ICC-02/05-03/09-121-Corr-Red, Decision on the Confirmation of Charges, 08 March 2011, ¶ 66.

<sup>62</sup> *Halilović*, TJ ¶ 36.

<sup>63</sup> *Tadić*, Decision on the Defence Motion for Interlocutory on Jurisdiction, AC ¶ 70. At the ICC, the standard is that the conduct took place “in the context of and associated with” the armed conflict. ICC Elements of Crimes, Article 8(2)(a)-1. ICC courts have held that a crime has taken place in the context of, or in association with an armed conflict where “the alleged crimes were closely related to the hostilities”. See *Lubanga Dyilo*, Decision on the confirmation of charges ¶ 288; see also *Katanga*, Decision on the confirmation of charges ¶ 380.

<sup>64</sup> *Kunarac*, AJ ¶ 58.

<sup>65</sup> *Ibid.*

<sup>66</sup> George Rutaganda, Case No. ICTR-96-3-A, Appeal Judgement, 26 May 2003, ¶ 570.

- whether the act advanced a military purpose;
- whether the act was committed in the context of the perpetrator's official duties;
- whether the crime was committed with the assistance of other combatants; and
- whether the crime was committed under the guide of military authority.<sup>67</sup>

The nexus requirement *does not* require:

- that the conduct took place during actual combat or hostilities;
- that the conduct was part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict (although evidence of this can be used to establish the required nexus);
- that the conduct was in furtherance of a policy associated with the conduct of war or in the interest of a party to the conflict;<sup>68</sup> and
- that the crime was committed by a combatant—war crimes can be committed by non-combatants.<sup>69</sup>

The determination of a close relationship between particular offences and an armed conflict will usually require consideration of several factors, not just one, and particular care is needed when the accused is a non-combatant.<sup>70</sup>

The nexus requirement does not demand a strict geographical link between the alleged crime and the armed conflict. For crimes committed in areas outside the actual hostilities (*e.g.* away from the frontline), the test is whether the alleged crime was committed in furtherance of, or at least under the guise of, the situation created by the fighting.<sup>71</sup> The crimes must be “substantially related” to the area of armed conflict, which extends to the entire territory under the control of the fighting parties.<sup>72</sup> This is shown by creating a link between the geographical location and time of the crime and the armed conflict.<sup>73</sup>

The approach of the Court of BiH in determining the nexus requirement follows this jurisprudence. See section 8.8.1.3. The Supreme Court of Croatia seems to follow a similar approach. See section 8.9.1.3.

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### 8.3.5. VIOLATION OF APPLICABLE TREATY OR CUSTOMARY LAW

For conduct to constitute a war crime, it must amount to a violation of treaty or customary IHL applicable to the particular accused at the time of the offence. The prosecution therefore needs to identify which law was applicable at the time of the alleged offence, whether that is as a result of a treaty that had been ratified or a customary norm.

<sup>67</sup> *Kunarac*, AJ ¶¶ 58-9; *Rutaganda*, AJ ¶¶ 569-570.

<sup>68</sup> *See, e.g., Tadić*, TJ ¶¶ 573, 575; *Čelebići*, TJ ¶¶ 193-7.

<sup>69</sup> *Akayesu*, AJ ¶¶ 430-446.

<sup>70</sup> *See, e.g., Akayesu*, TJ ¶¶ 640 – 644 (dismissing war crimes charges for lack of connection to armed hostilities); *Rutaganda*, AJ ¶ 570.

<sup>71</sup> *Mitar Vasiljević*, Case No. IT-98-32-T, Trial Judgement, 29 Nov. 2002, ¶ 25.

<sup>72</sup> *Milomir Stakić*, Case No. IT-97-24-A, Appeal Judgement, 22 March 2006, ¶ 342.

<sup>73</sup> *Ibid.* at ¶ 342.

This is also a requirement in BiH, Croatia, and Serbia. See sections 8.8.1.1 (BiH), 8.9.1.1 (Croatia), and 8.10.1.1 (Serbia). See also Module 5 on temporal application of the various laws and how customary law applies to the individual.

### 8.3.6. GRAVITY: SERIOUS VIOLATIONS OF IHL

Both the ICTY and ICTR Statutes provide that only “serious” violations of the laws and customs of war come within their jurisdiction and that only such violations may result in individual criminal responsibility pursuant to their Statutes.<sup>74</sup>

This requirement excludes violations of many technical regulations and other elements contained in IHL.

*The ICTY only has jurisdiction over serious violations of IHL—a breach of a rule protecting important values that involves grave consequences for the victim.*

An IHL violation is serious if it constitutes a breach of a “rule protecting important values, and the breach must involve grave consequences for the victim”.<sup>75</sup> All grave breaches of the Geneva Conventions are regarded as serious violations of IHL.

### 8.3.7. INDIVIDUAL CRIMINAL LIABILITY

Whatever the violation of IHL being charged, whether customary or treaty-based, the breach of the rule must entail individual criminal responsibility.<sup>76</sup> It is not essential for treaty provisions to expressly state that breaches will result in criminal responsibility as long as customary international law supports the application of criminal responsibility. For example, Common Article 3 does not expressly provide for individual criminal responsibility. However the ICTY Appeals Chamber has found that, under customary international law, persons can be criminally charged for violations of this article.<sup>77</sup> Similarly, whereas AP II did not expressly provide for individual criminal responsibility, the serious violation of certain of its most important provisions was criminalised under the ICTR, SCSL and ICC Statutes so as to reflect international customary law.

### 8.3.8. AWARENESS OF ARMED CONFLICT AND STATUS OF VICTIM

At the ICTY, the appeals chamber has indicated that the perpetrator of the crime must be aware of the fact that an armed conflict exists.<sup>78</sup> At the ICC, the accused must be aware of the factual circumstances that established the existence of an armed conflict.<sup>79</sup>

<sup>74</sup> This is another example of an element which may not necessarily apply in all jurisdictions. In other words, in other international and non-international courts, this may not be an independent requirement to establish a war crime.

<sup>75</sup> *Tadić*, Decision on the Defence Motion for Interlocutory on Jurisdiction, AC ¶ 94.

<sup>76</sup> See, e.g., *ibid.* at ¶¶ 128-9.

<sup>77</sup> See, e.g., *ibid.*

<sup>78</sup> *Kordić*, AJ ¶ 311; *Naletilić*, AJ ¶¶ 116 – 20.

<sup>79</sup> See, e.g., ICC Elements of Crimes, 8(2)(a)(i)-5; see 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, Pre-Trial Chambers, 15 June 2009, ¶ 238.

For crimes under Common Article 3, the prosecution must also show that the perpetrator knew or should have been aware that the victim was taking no active part in the hostilities when the crime was committed.<sup>80</sup>

At the ICTY, the *mens rea* for all violations of Article 2 (grave breaches) includes both guilty intent and recklessness.<sup>81</sup> The appeals chamber has recognised that the *mens rea* includes both direct and indirect forms of intention.<sup>82</sup>

The courts in BiH, Croatia, and Serbia also seem to require that the accused knew about the victim's status as a civilian, although this requirement is not always articulated as an element of the crime by the courts. It is usually referred to in the findings, based on the evidence presented at trial. For example:

- The Court of BiH has held that knowledge of the protected status of the relevant object is required for liability. The Supreme Court of the Republika Srpska has noted the accused's knowledge that victims were civilians. See section 8.8.1.1.1.
- The Croatian courts require that an accused know of the status of the victim as a protected person. See section 8.9.1.1.1.
- The Serbian courts seem to take the accused's knowledge of the status of the victim into account, although there does not seem to be a clear enunciation of such a rule in the jurisprudence. See section 8.10.1.1.1.

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<sup>80</sup> *Boškoski et al.*, AJ ¶ 66. Cf. Elements of Crimes, Art. 8(2)(c)(i)-1 and Rome Statute, Art. 8(2)(c)(i)-3.

<sup>81</sup> *Blaškić*, TJ ¶ 152.

<sup>82</sup> *Strugar*, AJ ¶ 270.

## 8.4. INDIVIDUAL WAR CRIMES

*Notes for trainers:*

- Having examined the elements that are common to all war crimes, this section will deal with the individual crimes that are prohibited under IHL.
- It must be stressed to participants that prosecutors are required to prove both the common elements, discussed above, and the particular elements for each individual war crime that is charged.
- It is also important for participants to appreciate that there is considerable overlap between the elements for the particular grave breaches of the Geneva Conventions and the violations prohibited by Common Article 3.
- A useful distinction to highlight for participants is that war crimes can be divided into those that concern the treatment of individuals in the hands of a party during armed conflict (such as the prohibitions against torture) and those that concern the conduct of hostilities (*i.e.* the means and methods of waging warfare, such as the prohibition against unlawfully attacking civilians objects).
- This part of the Module will be structured as follows:
  - Each of the grave breaches of the four Geneva Conventions and their elements will be considered first.
  - Thereafter, each of the violations of Common Article 3 will be discussed.
  - In the final section, other violations of IHL will be examined. It should be noted that many of these violations apply in both international and internal armed conflicts.
- Immediately below this note is a table summarising the individual war crimes. This diagram could be used as a quick guide for participants as this part of the Module is discussed with them.
- The elements of the individual crimes are drawn from mainly the ICTY's jurisprudence where the case law has developed through many judgments and decisions. Where appropriate, reference is also made to the ICC Elements of Crimes, although there is limited case law from the ICC at this stage, as very few cases have been completed.
- Participants should be made aware of the different sources of the law relating to the elements of each individual war crime, and to the extent that there are any inconsistencies between the ICTY and the ICC, they should be encouraged to discuss which they consider to be the preferred approach. It is important to note that there is no hierarchy of authority between the ICTY and the ICC.

Below is a table of the underlying crimes and their classifications as a grave breach (applicable only in international armed conflicts), other serious violation of the laws and customs of war (applicable in international or non-international armed conflicts), or a violation of Common Article 3 (applicable to both international and non-international conflicts).

Crime	Type of Conflict	Basis of Protection	What is protected
Wilful killing	International	Grave breach	Protected persons
Inhuman treatment	International	Grave breach	Protected persons
Wilfully causing great suffering/injury	International	Grave breach	Protected persons
Extensive destruction of property	International	Grave breach	Protected property
Compelling military service with hostile forces	International	Grave breach	Protected persons
Deprivation of fair trial rights	International	Grave breach	Protected persons
Deportation/transfer	International	Grave breach	Protected persons
Torture	International	Grave breach	Protected persons
	Non-international	Common Article 3	Civilians or persons no longer taking active part in hostilities

Crime	Type of Conflict	Basis of Protection	What is protected
Taking of hostages	International	Grave breach	Protected persons
	Non-international	Common Article 3	Civilians or persons no longer taking active part in hostilities
Confinement of civilians	International	Grave breach	Protected persons
	Non-international	Other violation	Persons detained or interned for reasons related to the conflict
Cruel treatment	Non-international	Common Article 3	Civilians or persons no longer taking active part in hostilities
Murder	Non-international	Common Article 3	Civilians or persons no longer taking active part in hostilities
Violence to life and person	Non-international	Common Article 3	Civilians or persons no longer taking active part in hostilities
Outrages upon personal dignity	International	Other serious violation	Any persons
	Non-international	Common Article 3	Civilians or persons no longer taking active part in hostilities

Crime	Type of Conflict	Basis of Protection	What is protected
Rape	International	Other serious violation	Any persons
	Non-international		
Wanton destruction	International	Other serious violation	Immovable property
Plunder/Pillaging	International	Other serious violation	Private or public property
	Non-international		
Seizure/destruction of protected structures	International	Other serious violation	Protected buildings/structures
	Non-International		
Unlawful attack on civilians/civilian objects	International	Other serious violation	Civilian population or individual civilians not taking part in hostilities/civilian objects
	Non-international		
Unlawful labour/ Slavery	International	Other serious violation	Prisoners of War/ Protected persons in occupied territory
	Non-international		
Terrorising the civilian population	International	Other serious violation	Civilian population or individual civilians not taking direct part in hostilities
	Non-international		

Crime	Type of Conflict	Basis of Protection	What is protected
Conscripting and enlisting children (ICC/SCSL)	International	Other serious violation	Persons under the age of 15 years
	Non-international		
Mutilation (ICC)	International	Other serious violation	Persons in the power of adverse party
	Non-international		Civilians or persons no longer taking active part in hostilities
Sexual slavery, forced marriage, other gender-based violence (ICC/SCSL)	International	Other serious violation	Any persons

#### 8.4.1. GRAVE BREACHES OF THE GENEVA CONVENTIONS

##### *Notes for trainers:*

- This section discusses each of the grave breaches of the Geneva Conventions. It is imperative for participants to understand each of the elements, but in order to prevent the discussion from being too theoretical, the case study should be used.
- The participants should refer to the case study in order to discuss which particular grave breaches of the Geneva Conventions could be charged in that case. Trainers will note that in the indictment, war crimes have been charged generically, with the specific purpose in mind of getting the participants to list which particular war crimes should be specified in this indictment.
- Trainers should note that the facts of the case study involve killing, inhumane treatment/cruel treatment, unlawful confinement, and unlawful deportation or transfer and may cover other grave breaches as well.
- Participants should be encouraged to consider how the same conduct or pattern of conduct could be charged as more than one grave breach.

As noted earlier, IHL based on treaties is a primary source of war crimes law and much of it is also reflected in customary international law. Common Article 3 and the grave breaches provisions of the Geneva Conventions<sup>83</sup> are among the key treaty provisions of relevance to this section. A number of other IHL violations<sup>84</sup> are also criminalised under customary international law.<sup>85</sup>

The crimes covered in this section are all considered grave breaches of the Geneva Conventions when their commission also meets the seven elements discussed above in section 8.3. These crimes include:

- Wilful killing;
- Torture;
- Inhuman treatment/Cruel treatment;
- Wilfully causing great suffering or serious injury to body or health;
- Extensive destruction an appropriation of property;
- Compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- Wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- Unlawful deportation or transfer;
- Unlawful confinement of civilians; and
- Taking of hostages.

#### 8.4.1.1. SEXUAL VIOLENCE

Although rape and sexual violence are not listed as a grave breach in the Geneva Conventions, they have been charged before the ICTY under several of the grave breaches that are listed in the Statute. For example, sexual violence has been charged as a grave breach by way of torture, cruel treatment<sup>86</sup> and by way of wilfully causing great suffering.<sup>87</sup> A trial chamber at the ICTY also convicted accused for sexual violence involving crimes committed against men as grave breaches by way of inhuman treatment<sup>88</sup> and by way of wilfully causing great suffering.<sup>89</sup>

#### 8.4.1.2. WILFUL KILLING

“Wilful killing” as a grave breach of the Geneva Conventions means the same as “murder of all kinds”, referred to in Common Article 3.<sup>90</sup> The elements of the underlying crime of wilful killing

<sup>83</sup> Trainers should be aware that these materials do not address grave breaches found in the Additional Protocols to the Geneva Conventions.

<sup>84</sup> The grave breach provisions of the Geneva Conventions have been incorporated into the Rome Statute. By virtue of its Article 5(1)(c), the ICC has jurisdiction over war crimes, which include grave breaches of the Geneva Conventions.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Čelebići*, Indictment; Dragon Nikolić, Case No. IT-94-2-I, First Amended Indictment, 12 Feb. 1999.

<sup>87</sup> Željko Mejakić, Case No. IT-95-4-I, Amended Indictment, 2 June 1998; *Nikolić*, First Amended Indictment.

<sup>88</sup> *Čelebići*, TJ ¶ 1066.

<sup>89</sup> *Ibid.* at ¶¶ 1038-40.

<sup>90</sup> *Ibid.* at ¶¶ 421-3.

are essentially the same in treaty and customary war crimes law, and as in crimes against humanity law.<sup>91</sup>

The essential elements of these offences are:<sup>92</sup>

- the victim is dead;
- an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility, caused, that is substantially contributed to, the death; and
- the act was done, or the omission was made, with an intention to kill or to inflict grievous bodily harm or serious injury with the reasonable knowledge that the act or omission was likely to cause death.

If the killing is charged as a grave breach, the ICTY Appeals Chamber has held that an additional element applies:

- the victim was a protected person at the time he or she was killed.<sup>93</sup>

#### 8.4.1.2.1. PROOF OF DEATH

At the ICTY and ICTR it is not necessary to produce the body as proof of death. Death of the victim may be inferred from circumstantial evidence, provided that it is the only reasonable inference.<sup>94</sup>

At the ICTY, such evidence can include:

- Identification by an eye-witness that the victim was killed;
- Testimony by a witness that the victim is still missing or dead;
- Introduction of a death certificate issued by a local court naming the victim;<sup>95</sup>
- Proof of incidents of mistreatment directed against the victim;
- Patterns of mistreatment and disappearances of other detained individuals;
- The general climate of lawlessness;
- Where the acts were committed;
- The length of time which elapsed since the victim's disappearance;
- The fact that there has been no contact by the victim with others the victim would normally have been expected to contact, such as family members;<sup>96</sup>
- Local Police reports naming the victims that were killed or injured; or
- Hospital records showing admission of patients and their subsequent death.

<sup>91</sup> *Brđanin*, TJ ¶ 380.

<sup>92</sup> See, e.g., *Brđanin*, TJ ¶¶ 381-2; *Čelebići*, TJ ¶¶ 424, 909.

<sup>93</sup> See *Kordić*, AJ ¶ 38 (holding that "The definition of wilful killing under Article 2 contains a materially distinct element not present in the definition of murder under Article 3: the requirement that the victim be a protected person".)

<sup>94</sup> *Brđanin*, TJ ¶¶ 383-385; *Tadić*, TJ ¶ 240; Milorad Krnojelac, Case No. IT-97-25-T, Trial Judgement, 15 March 2002, ¶ 326.

<sup>95</sup> *Stakić*, TJ ¶ 939.

<sup>96</sup> *Krnojelac*, TJ ¶ 327.

#### 8.4.1.2.2. *MENS REA* FOR WILFUL KILLING

According to the ICTY Appeals Chamber, the *mens rea* for wilful killing as a grave breach is that the accused “intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death”.<sup>97</sup>

The intent of the perpetrator at the time of the act or omission must have been to kill the victim, or in the absence of such specific intent, the perpetrator must have acted, or failed to act, in the reasonable knowledge that death is a likely consequence. See also Module 7.2.2.1 (murder as a crime against humanity).

The *mens rea* may be inferred from direct or circumstantial evidence.<sup>98</sup> Premeditation is not required.<sup>99</sup>

#### 8.4.1.3. TORTURE

*Torture is absolutely prohibited—no one may be tortured in any circumstances.*

Torture as a grave breach of the Geneva Conventions has the same characteristics as torture under Common Article 3.<sup>100</sup> The definition of the underlying crime is also the same as that of torture as a crime against humanity. Torture is absolutely prohibited—no one may be tortured in any circumstances.

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
- the act or omission must be aimed at obtaining information or a confession, or at punishing, intimidating, or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.<sup>101</sup>

It should be noted that acts of sexual violence can constitute torture. Moreover, ICTY case law also confirms that discrimination (*e.g.* on the basis of gender) is one of the prohibited purposes of torture.<sup>102</sup>

<sup>97</sup> *Kordić et al.*, AJ ¶ 36; see also *Brđanin*, TJ ¶ 386; *Stakić*, TJ ¶¶ 587, 747; *Limaj*, TJ ¶ 241.

<sup>98</sup> *Brđanin*, TJ ¶ 387.

<sup>99</sup> *Ibid.* at ¶ 386.

<sup>100</sup> See, *e.g.*, *ibid.* at ¶ 482; see also *Čelebići*, TJ (torture as a GC grave breach and violation of laws or customs of war); Anto Furundžija, Case No. IT-95-17/1-T, Trial Judgement, 10 Dec. 1998 (as violation of laws or customs of war); *Kunarac*, TJ and Miroslav Kvočka et al., Case No. IT-98-30/1-T, Trial Judgement, 2 Nov. 2001 (as a CAH and violation of laws or customs of war); see also CRYER, *supra* note 16, at pp. 251-3 regarding purpose requirement.

<sup>101</sup> *Haradinaj et al.*, AJ ¶ 290; *Kunarac*, AJ ¶¶ 142-148 (clarifying *Furundžija*, AJ ¶ 111 and *Čelebići*, TJ ¶ 494); Milan Martić, Case No. IT-95-11-A, Appeal Judgement, 8 Oct. 2008, ¶ 74.

<sup>102</sup> See, *e.g.*, *Čelebići*, TJ ¶ 941.

#### 8.4.1.4. INHUMAN TREATMENT OR CRUEL TREATMENT

“Inhuman” treatment is treatment that is not humane.<sup>103</sup> Inhuman treatment is defined as:

- an intentional act or omission, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity
- committed against a protected person (if charged as a grave breach).<sup>104</sup>

The degree of physical or mental suffering required to prove inhuman treatment or cruel treatment is *lower* than that required for torture but at the *same level* as that for wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions.<sup>105</sup>

Practices that constitute inhumane/cruel treatment include:

- use of human shields;<sup>106</sup> or
- use of forced labour.<sup>107</sup>

The following have been held to constitute cruel treatment:

- poor prison camp conditions;<sup>108</sup> or
- shelling a civilian town.<sup>109</sup>

Inhuman and cruel treatment are related crimes falling under different provisions of the Geneva Conventions. Materially, the elements of the crimes are the same.<sup>110</sup>

“Inhuman treatment” is a grave breach of the Geneva Conventions, whereas “cruel treatment” falls under Common Article 3. Inhuman treatment is prohibited under treaty and customary ICL.<sup>111</sup>

The offence of “cruel treatment” under Common Article 3 generally means the same as “inhuman treatment” as a grave breach.<sup>112</sup>

The only distinction between inhuman treatment as a grave breach and cruel treatment under Common Article 3 is that for the former the victim is a “protected person” whereas for the latter the victim is “a person taking no active part in the hostilities”.<sup>113</sup>

<sup>103</sup> *Ibid.* at ¶¶ 516-20.

<sup>104</sup> *Naletilić*, TJ ¶ 246; *Čelebići*, AJ ¶ 426.

<sup>105</sup> *Naletilić*, TJ ¶ 246; *Kvočka*, TJ ¶ 161.

<sup>106</sup> *Blaškić*, AJ ¶¶ 653, 669; *Kvočka*, TJ ¶ 161.

<sup>107</sup> *Blaškić*, AJ ¶¶ 590 – 1, 597.

<sup>108</sup> *Limaj*, TJ ¶¶ 288 – 89.

<sup>109</sup> *Strugar*, TJ ¶¶ 264, 268 – 72, 275 – 76.

<sup>110</sup> *Naletilić*, TJ ¶ 246; Naser Orić, Case No. IT-03-68-T, Trial Judgement, 30 June 2006, ¶ 350.

<sup>111</sup> *Čelebići*, TJ ¶ 517.

<sup>112</sup> *Ibid.* at ¶¶ 442-3.

<sup>113</sup> *Ibid.* at ¶ 424; *Naletilić*, TJ ¶ 246; *see also Čelebići*, TJ ¶¶ 554-8.

#### 8.4.1.5. WILFULLY CAUSING GREAT SUFFERING OR SERIOUS INJURY TO BODY OR HEALTH

This crime is constituted by:

- an intentional act or omission that causes great mental or physical suffering or serious injury to body or health, including mental health;
- committed against a protected person.<sup>114</sup>

“Suffering” includes moral suffering, or mental suffering, as well as physical suffering.<sup>115</sup> The words “great” and “serious” in the definition require a finding that a particular act of mistreatment causes suffering or injury of the requisite level of seriousness.<sup>116</sup>

*Serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation.*

Serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation.<sup>117</sup> It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.<sup>118</sup> This issue must be decided on a case-by-case basis taking into account all of the circumstances.<sup>119</sup>

Wilfully causing great suffering or serious injury is a provision that can be used to prosecute acts that do not fulfil the elements of torture, in particular the purposive element. Acts of torture necessarily also meet the elements for this offence.<sup>120</sup>

**Note:** This crime differs from that of inhuman treatment in that it requires serious mental or physical injury. Acts where the resultant harm relates solely to an individual’s human dignity are therefore excluded from this offence.<sup>121</sup>

#### 8.4.1.6. EXTENSIVE DESTRUCTION AND APPROPRIATION OF PROPERTY

This grave breach incorporates two offences: the extensive destruction of property, and the extensive appropriation of property.<sup>122</sup> It is prohibited by Article 147 of GC IV.<sup>123</sup>

<sup>114</sup> *Naletilić*, TJ ¶ 339; *Čelebići*, AJ ¶¶ 424, 507, 509.

<sup>115</sup> *Čelebići*, TJ ¶¶ 507, 509.

<sup>116</sup> *Ibid.* at ¶ 510; *Kordić*, AJ ¶ 244; *Naletilić*, TJ ¶ 341.

<sup>117</sup> Radislav Krstić, Case No. IT-98-33-T, Trial Judgement, 2 Aug. 2001, ¶ 513.

<sup>118</sup> *Ibid.* at ¶ 513.

<sup>119</sup> *Ibid.* (defining serious bodily/mental harm as genocide); *Naletilić*, TJ ¶¶ 342-3.

<sup>120</sup> *Čelebići*, TJ ¶ 511; *Naletilić*, TJ ¶ 341; *Furundžija*, TJ ¶ 511; *Blaškić*, TJ ¶ 156.

<sup>121</sup> *Naletilić*, TJ ¶ 341; *Kordić*, TJ ¶ 245.

<sup>122</sup> *Naletilić*, TJ ¶ 574; *Brđanin*, TJ ¶ 584.

<sup>123</sup> Geneva Convention IV, Art. 127.

#### 8.4.1.6.1. DESTRUCTION OF PROPERTY

The elements of extensive destruction of property are:

- the property was destroyed extensively;
- the property was carrying general protection under the Geneva Conventions or it was situated in occupied territory;
- the destruction was not necessitated by military operations; and
- the perpetrator acted with intent to destroy this property or in reckless disregard of the likelihood of its destruction.<sup>124</sup>

##### 8.4.1.6.1.1. EXTENSIVE DESTRUCTION OF PROPERTY

Whether or not destruction or appropriation is “extensive” will be determined on a case-by-case basis.<sup>125</sup> A single act of destruction may, in exceptional circumstances, be interpreted as fulfilling the requirement of extensiveness, such as the bombing of a hospital.<sup>126</sup> The destruction must:

- Be “serious” with regards to the individual object destroyed (*i.e.* more than a broken window of a house); and
- Cover a substantial part of a city, town or village (*i.e.* more than just one house in a city must be destroyed).<sup>127</sup>

The entire city, town or village does not need to be destroyed. Partial destruction is sufficient.<sup>128</sup>

**Note:** Under the Rome Statute, the prosecution must also prove that the destruction or appropriation was “carried out wantonly”.<sup>129</sup>

##### 8.4.1.6.1.2. PROTECTED PROPERTY

The Geneva Conventions and Additional Protocols designate various types of property that are protected from attack. Property generally protected under the Geneva Conventions includes ambulances, and GC IV Article 18 provides that a civilian hospital “may in no circumstances be the object of an attack, but shall at all times be respected and protected by the parties to the conflict”.<sup>130</sup>

Whereas the grave breach of extensive destruction of property extends to immovable and movable property (such as both houses and cars), the war crime as provided for in Article 3 of the ICTY Statute (other violations of laws and customs of war) is limited to immovable property comprising cities, towns and villages.<sup>131</sup> All property in the territory involved in the conflict,

<sup>124</sup> *Naletilić* TJ ¶ 577; *Brđanin*, TJ ¶ 589.

<sup>125</sup> *Blaškić*, TJ ¶ 157.

<sup>126</sup> *Ibid*; *Naletilić*, TJ ¶ 576; *Brđanin*, TJ ¶ 587.

<sup>127</sup> *Orić*, TJ ¶ 583; *Strugar*, TJ ¶ 294.

<sup>128</sup> *Orić*, TJ ¶ 585.

<sup>129</sup> ICC Elements of Crimes, Article 8(2)(a)(iv)(3).

<sup>130</sup> See also *Naletilić*, TJ ¶ 575; *Brđanin*, TJ ¶ 586.

<sup>131</sup> *Orić*, TJ ¶ 581.

including property located in enemy territory and territory not under effective occupation, is protected.<sup>132</sup>

**Note:** Under the Rome Statute, it is required that the property be protected by one or more of the Geneva Conventions.<sup>133</sup>

#### 8.4.1.6.1.2.1. PROTECTED PROPERTY IN OCCUPIED TERRITORIES

Property which is protected in occupied territory is covered by GC IV Article 53. This includes real or personal property belonging individually or collectively to private persons, or to the state or other public authorities.<sup>134</sup>

To determine whether the authority of the occupying power has been actually established, and whether occupation exists for the purposes of this offence, the following guidelines provide some assistance:<sup>135</sup>

- The occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly.
- The enemy's forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even if successful, does not affect the reality of occupation.
- The occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt.
- A temporary administration has been established over the territory.
- The occupying power has issued and enforced directions to the civilian population.

In addition to charges of destruction of property, occupation is relevant when dealing with charges of the grave breach of forcible transfer (section 8.4.1.9) and the war crime of unlawful labour (section 8.4.3.6).<sup>136</sup>

#### 8.4.1.6.1.3. MILITARY NECESSITY

The destruction of property is allowed when it is absolutely necessary due to military operations.<sup>137</sup> The ICTY Appeals Chamber has defined "military necessity" as "the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war".<sup>138</sup>

This means it is prohibited to attack an object which does not constitute a military objective, *i.e.* an object which by its nature, location, purpose or use makes an effective contribution to

<sup>132</sup> *Orić*, TJ ¶ 582 citing *Kordić*, AJ ¶ 74.

<sup>133</sup> ICC Elements of Crimes, Art. 8(2)(iv)(4).

<sup>134</sup> See also *Naletilić*, TJ; *Brđanin*, TJ ¶¶ 586-8.

<sup>135</sup> *Naletilić*, TJ ¶¶ 216-8, 222-3.

<sup>136</sup> *Ibid.* at ¶ 210.

<sup>137</sup> *Brđanin*, TJ ¶ 588; *Blaškić*, TJ ¶ 157.

<sup>138</sup> *Kordić*, AJ ¶ 686 citing Art. 14 of the Lieber Code of 24 April 1863.

*An object cannot be attacked if it is unreasonable for the person planning the attack to believe the object makes an effective contribution to military action.*

military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage. Accordingly, an attack is prohibited when it would be unreasonable for the person planning the attack to believe that the object is being used to make an effective contribution to military action.<sup>139</sup>

Sometimes buildings may be destroyed as “collateral damage” in a legitimate military attack. This can occur when military objects are destroyed in an effective contribution to military action, but adjacent or nearby objects not related to the military objective are also destroyed.<sup>140</sup> Whether or not the destruction was of military necessity or was collateral damage will be decided on a case-by-case basis according to the specific facts of the case.<sup>141</sup>

#### 8.4.1.6.2. APPROPRIATION OF PROPERTY

The offence of the appropriation of property is committed when public or private property is unlawfully stolen or acquired.<sup>142</sup> This crime has not been widely charged as a grave breach at the ICTY. However, it is analogous to plunder or pillage, which has been charged under Article 3 of the ICTY Statute as a serious violation of the laws and customs of war. See section 8.4.3.2, below.

According to one ICTY trial chamber that considered plunder or pillage under Article 3 of the ICTY Statute:

The prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory. [...] The offence of the unlawful appropriation of public and private property in armed conflict has varyingly been termed ‘pillage’, ‘plunder’ and ‘spoliation’.<sup>143</sup>

<sup>139</sup> *Orić*, TJ ¶ 587; *Galić*, TJ ¶ 51.

<sup>140</sup> *Orić*, TJ ¶ 588.

<sup>141</sup> *Ibid.* This finding is made in the context of preventive destruction and hence addresses a very specific point. It should be analysed in accordance with the standard of excessiveness as stipulated in the principle of proportionality. Whether or not such incidental destruction is lawful depends on whether it is excessive in relation to the concrete and direct military advantage anticipated from an attack against a military objective.

<sup>142</sup> International Committee of the Red Cross Commentary to Geneva Convention IV, available at <http://www.icrc.org/ihl.nsf/COM/380-600169?OpenDocument> (accessed June 20, 2011).

<sup>143</sup> *Čelebići*, TJ ¶ 590 – 591.

#### 8.4.1.7. COMPELLING A PRISONER OF WAR OR A CIVILIAN TO SERVE IN THE FORCES OF A HOSTILE POWER

This crime includes forcing one or more protected persons, by act or threat, to take part in military operations against that person's own country or forces or otherwise serve in the forces of a hostile power.<sup>144</sup>

#### 8.4.1.8. WILFULLY DEPRIVING A PRISONER OF WAR OR A CIVILIAN OF THE RIGHTS OF FAIR AND REGULAR TRIAL

This crime comprises depriving one or more protected persons of a fair and regular trial by denying judicial guarantees as defined, in particular, in GC III and GC IV.<sup>145</sup>

#### 8.4.1.9. UNLAWFUL DEPORTATION OR FORCIBLE TRANSFER

GC IV lists the offences of unlawful deportation and forcible transfer as grave breaches. These crimes are also prohibited by GC IV Article 49, AP I Article 85 and AP II Article 17.<sup>146</sup> These treaties, and related customary law, prohibit unlawful<sup>147</sup> forced movement within the context of both international armed conflicts and non-international armed conflicts.

The grave breaches of unlawful deportation or transfer are separate offences with distinct elements related to the destination of the person or persons displaced. For unlawful deportation, the act must result in the displacement of a person across a national border, while for forcible transfer, the displacement can be within a national territory.<sup>148</sup>

For both crimes, the act leading to the displacement cannot be motivated by the security of the population or military necessity.

The *mens rea* for deportation is that the perpetrator must intend to displace a person across a national border, while for forcible transfer, the perpetrator must intend to displace the person within the national border concerned.<sup>149</sup>

It is not necessary for either crime that the perpetrator intends the displacement to be permanent.<sup>150</sup>

See also the discussion of unlawful deportation and forcible transfer as crimes against humanity in Module 7.

<sup>144</sup> ICC Elements of Crimes, Art. 8(2)(a)(v)(1) and (2).

<sup>145</sup> *Ibid.*

<sup>146</sup> Note that under GC Additional Protocol II, art. 17, this crime is not qualified as a grave breach as it is applicable only to internal armed conflicts.

<sup>147</sup> IHL permits forced displacement in some circumstances. See, e.g., GC IV, Art. 42. IHL permits forced displacement in some circumstances.

<sup>148</sup> Naletilić, TJ ¶¶ 519 – 21; Stakić, AJ ¶¶ 282, 299.

<sup>149</sup> Naletilić, TJ ¶¶ 519 – 21; Stakić, AJ ¶¶ 278, 317.

<sup>150</sup> Stakić, AJ ¶ 317.

## 8.4.1.10. UNLAWFUL CONFINEMENT OF CIVILIANS

The exceptional measure of confinement of civilians can be lawful, but only in certain circumstances. It is unlawful when:<sup>151</sup>

- There are no reasonable grounds to believe the detention was absolutely necessary for security reasons:
  - A civilian or civilians have been detained without reasonable grounds to believe that the security of the detaining power makes it absolutely necessary.
  - The mere fact that a person is a national of or aligned with an enemy party cannot be considered as threatening the security of the opposing party. Therefore, this is not a valid reason for interning him.
  - For confinement to be lawful there must be an assessment that each civilian taken into detention poses a *particular risk* to the security of the detaining power.<sup>152</sup>
- Where the procedural safeguards required by GC IV Article 43 are not complied with regarding detained civilians, even where their initial detention may have been justified.

GC IV Article 43 provides that the decision to take measures of detention against civilians (such as internment) must be reconsidered *as soon as possible* by an appropriate forum. The reasonable time which is to be afforded to a detaining power to ascertain whether detained civilians pose a security risk must be the *minimum* time necessary to make enquiries to determine whether the view that they pose a security risk has any objective foundation such that it would found a “definite suspicion” of the nature referred to in GC IV Article 5.<sup>153</sup>

If there is an allegation of unlawful confinement because the accused did not provide the obligatory procedural guarantees, it is not necessary to establish that there was knowledge that the initial detention of the relevant detainees had been unlawful. This is because the obligation to afford procedural guarantees applies to all detainees, whether initially lawfully detained or not.<sup>154</sup> However, the ICTY Appeals Chamber has held that:

Where a person who has authority to release detainees knows that persons in continued detention have a right to review of their detention and that they have not been afforded that right, he has a duty to release them. Therefore, failure by a person with such authority to exercise the power to release detainees, whom he knows have not been afforded the procedural rights to which they are entitled, commits the offence of unlawful confinement of civilians, even if he is not responsible himself for the failure to have their procedural rights respected.<sup>155</sup>

<sup>151</sup> Kordić, AJ ¶ 73; Čelebići, AJ ¶¶ 320-322, 330.

<sup>152</sup> Čelebići, AJ ¶ 327.

<sup>153</sup> *Ibid.* at ¶ 328.

<sup>154</sup> *Ibid.* at ¶ 380.

<sup>155</sup> *Ibid.* at ¶ 379.

The ICTY Appeals Chamber has held that responsibility for unlawful confinement should be placed on the person or persons responsible for the detention, but not on those who merely participate in a system of detention.<sup>156</sup>

For example, the fact that a person works at a prison where civilians are unlawfully detained is not an adequate basis to establish criminal responsibility for this crime. A guard who fails to take unauthorised steps to release prisoners has not committed the crime of unlawful confinement.<sup>157</sup>

On the other hand, those who are more directly responsible for the detention may be criminally liable.<sup>158</sup> This includes:

- Persons who place a civilian in detention without reasonable grounds to believe he or she is a security risk.<sup>159</sup>
- Someone with powers over the place of detention that accepts a civilian into detention without knowing that proper grounds exist.<sup>160</sup>
- Someone with powers to release detainees that fails to do so even though they know there is no reasonable grounds for their detention or that the reasonable grounds have ceased to exist.<sup>161</sup>

See also the elements of the crime for imprisonment as a crime against humanity, Module 7.2.2.2.6. The underlying elements are the same, except there is a difference between the respective elements of proving a crime against humanity or a grave breach of the Geneva Conventions.<sup>162</sup>

#### 8.4.1.11. TAKING OF HOSTAGES

Hostages are persons deprived of their freedom,<sup>163</sup> often arbitrarily and sometimes under threat of death. The essential element is the use of a threat concerning detainees so as to obtain a concession or gain an advantage.<sup>164</sup>

*Hostages are persons unlawfully deprived of their freedom, often arbitrarily and sometimes under threat of death.*

A situation of hostage-taking exists when a person:

- seizes or detains and threatens to kill, injure or continue to detain another person

<sup>156</sup> *Ibid.* at ¶ 342.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

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

<sup>161</sup> *Ibid.*

<sup>162</sup> Blagoje Simić et al., Case No. IT-95-9-T, Trial Judgement, 17 Oct. 2003 ¶ 63.

<sup>163</sup> For a discussion on whether this deprivation of freedom must be unlawful, see Radovan Karadžić, Case No. IT-95-5/18-T, Decision on the Accused's Application for Binding Order Pursuant to Rule 54 *Bis*, 19 May 2010 ¶¶ 23 – 26.

<sup>164</sup> *Blaškić*, TJ ¶¶ 158, 187.

- in order to compel a third party to do or to abstain from doing something as a condition for the release of that person.<sup>165</sup>

At the ICC, the prosecution must prove that the perpetrator intended to compel a state, international organization, person or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of the hostages.<sup>166</sup>

See also the crime against humanity of taking of hostages, section 8.4.1.11.

#### 8.4.2. COMMON ARTICLE 3 OF THE GENEVA CONVENTION

##### *Notes for trainers:*

- Participants should have a separate discussion on the elements of Common Article 3. It sets out the minimum guarantees for persons who do not participate in hostilities.
- In order to bring the provisions to life, the case study should be used for participants to discuss which of the particular prohibitions of Common Article 3 could be charged in this case. Participants could be asked to act as prosecutors and set out in an indictment from which violations could be charged based on the available evidence. If they were not sure whether there was sufficient evidence to charge a particular violation, participants could be asked to identify what further evidence would need to be obtained by the police or the investigators to be able to include that violation in the indictment.

As noted above, these violations are prohibited irrespective of the nature (international or internal) of the armed conflict. See discussion above section 8.2.

The crimes covered in this section are all considered violations of Common Article 3 to the Geneva Conventions when their commission also meets the seven elements discussed above in section 8.3. These crimes include:

- Murder;
- Torture;
- Rape;
- Cruel treatment;
- Violence to life and person;
- Outrages upon personal dignity; and
- Taking hostages.

<sup>165</sup> *Ibid.* at ¶ 639.

<sup>166</sup> ICC Elements of Crimes, Art. 8(2)(a)(viii).

#### 8.4.2.1. MURDER

See above, section 8.4.1.2. The elements of murder as a grave breach, war crime or crime against humanity are the same.<sup>167</sup>

When charging murder as a violation of Common Article 3, the prosecution needs to prove that the victim was taking no active part in the hostilities.<sup>168</sup>

#### 8.4.2.2. TORTURE

See above, section 8.4.1.3. The elements of torture are the same regardless of how it is charged (whether as a war crime, grave breach or crime against humanity).<sup>169</sup>

For charging torture as a violation of Common Article 3, the prosecution needs to prove that the victim was taking no active part in the hostilities.<sup>170</sup>

#### 8.4.2.3. RAPE

The ICTY Statute does not list rape as a war crime, although it is listed as a crime against humanity. However, ICTY jurisprudence has recognised that rape constitutes a recognised war crime under customary international law, which is punishable under Article 3 of the Statute.<sup>171</sup> ICTY chambers have also considered rape as a form of torture, outrages upon personal dignity, or inhuman treatment.<sup>172</sup>

The ICTR Statute expressly includes rape, enforced prostitution and other forms of sexual violence as a war crime (Article 4(e)).

*ICTY jurisprudence considers rape as a form of torture and a violation of the laws and customs of war.*

The definition of the elements of the crime of rape as a war crime are the same as for rape as a crime against humanity.

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
- the mouth of the victim by the penis of the perpetrator,<sup>173</sup>
- without the consent of the victim.<sup>174</sup>

<sup>167</sup> Vidoje Blagojević et al., Case No. IT-02-60-T, Trial Judgement, 17 Jan. 2005 ¶ 556.

<sup>168</sup> See, e.g., ICC Elements of Crimes, Article 8(2)(c)(i)-1(2).

<sup>169</sup> *Brđanin*, TJ 1 Sept 04, ¶ 482.

<sup>170</sup> See, e.g., ICC Elements of Crimes, Article 8(2)(c)(i)-4(2).

<sup>171</sup> *Kunarac*, AJ ¶¶ 194-5.

<sup>172</sup> *Čelebići*, TJ ¶ 1066; *Furundžija*, TJ ¶¶ 165, 168; *Kunarac*, AJ ¶¶ 140, 141.

<sup>173</sup> *Kunarac*, AJ ¶ 127.

The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.<sup>175</sup> Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.<sup>176</sup>

See also Module 7 (Crimes Against Humanity) for more discussion on these elements.

**Note:** The Rome Statute includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence also constituting a grave breach of the GCs to be a violation of the laws and customs of war.<sup>177</sup> This is described in more detail in Module 7.

#### 8.4.2.4. CRUEL TREATMENT

See above, section 8.4.1.4.

Charging cruel treatment as a violation of Common Article 3, the prosecution needs to prove that the victim was taking no active part in the hostilities.<sup>178</sup>

#### 8.4.2.5. VIOLENCE TO LIFE AND PERSON

The war crime of "violence to life, health and physical or mental well-being of persons" is listed in the ICTR Statute, but a trial chamber at the ICTY refused to exercise jurisdiction over the crime, holding that it is not defined with sufficient precision under customary international law.<sup>179</sup> Individuals have been convicted for this offence at the ICTR.<sup>180</sup>

#### 8.4.2.6. OUTRAGES UPON PERSONAL DIGNITY

*The humiliation must be so intense that any reasonable person would be outraged.*

The war crime of committing "outrages upon personal dignity, in particular humiliating and degrading treatment" is based on Common Article 3 and APs I and II.<sup>181</sup> Thus, it applies in international armed conflicts and non-international armed conflicts. It is broader than

torture, inhuman treatment and causing great suffering or serious injury. It is aimed at protecting persons from humiliation and ridicule, rather than harm to the integrity and physical and mental well-being of persons. The crime must meet a certain objective level of seriousness to be considered an outrage upon personal dignity.

<sup>174</sup> *Ibid.* at ¶ 129; see also CRYER, *supra* note 16, at pp. 254 – 255. The ICTY used to apply a coercion requirement, but after conducting an analysis of various legal systems, it was held that lack of consent was the correct element.

<sup>175</sup> *Kunarac*, AJ ¶ 127; *Stakić*, TJ ¶ 755; *Gacumbitsi*, AJ ¶¶ 147-157.

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

<sup>177</sup> Rome Statute, Art. 8(2)(b)(xxii).

<sup>178</sup> See, e.g., ICC Elements of Crimes, Article 8(2)(c)(i)-3(2).

<sup>179</sup> *Vasiljević*, TJ, ¶ 203; but see *Blaškić*, TJ ¶ 182.

<sup>180</sup> See, e.g., Theoneste Bagosora et al. Case No. ICTR-98-41-T, Trial Judgement 18 Dec. 2008. The underlying acts found to fall within the ambit of this crime at the ICTR were murder, torture and cruel treatment.

<sup>181</sup> See, e.g., ICTR Statute Art. 4(e); *Aleksovski*, TJ ¶ 56; *Kunarac*, TJ ¶¶ 501-4, 514.

The elements of this underlying crime are:

- the accused intentionally committed or participated in an act or omission which would cause serious humiliation, degradation or otherwise be a serious attack on human dignity;
- committed with knowledge that the act or omission could possibly have such effect.

The humiliation must be so intense that any reasonable person would be outraged.<sup>182</sup> To determine this, factors for consideration include the form, severity and duration of the violence, and the intensity and duration of the physical or mental suffering.<sup>183</sup>

The outrage must also be real and serious. However, there is no requirement that it lasts for a minimum period of time or causes lasting suffering.<sup>184</sup> Rape, enforced prostitution, indecent assault,<sup>185</sup> sexual violence,<sup>186</sup> the use of detainees as human shields or trench diggers and the constant fear of being robbed or beaten endured by vulnerable persons like detainees<sup>187</sup> were found to be “outrages upon personal dignity”.

For charging outrages upon personal dignity as a violation of Common Article 3, the prosecution needs to prove that the victim was taking no active part in the hostilities.<sup>188</sup>

**Note:** Under the Rome Statute, the humiliation can also be of dead persons—it is understood that the victim need not personally be aware of the existence of the humiliation or degradation. In determining this, the court will look at the cultural background of the victim.<sup>189</sup>

#### 8.4.2.7. TAKING OF HOSTAGES

See above, section 8.4.1.11.

It is required when charging the taking of hostages as a violation of Common Article 3, the prosecution needs to prove that the victim was taking no active part in the hostilities.<sup>190</sup>

<sup>182</sup> *Kunarac*, AJ ¶ 162.

<sup>183</sup> *Aleksovski*, TJ ¶¶ 56 – 57.

<sup>184</sup> *Kunarac*, TJ ¶ 501.

<sup>185</sup> ICTR Statute, Art. 4(e); *Musema*, TJ ¶ 285; *Bagosora*, TJ ¶¶ 2252-2254.

<sup>186</sup> *Akayesu*, TJ ¶ 688.

<sup>187</sup> *Aleksovski*, TJ ¶¶ 184-210, 229, 272.

<sup>188</sup> See, e.g., ICC Elements of Crimes, Art. 8(2)(c)(ii)-(2).

<sup>189</sup> ICC Elements of Crimes, Art. 8(2)(v)(xxi)(1), fn 49.

<sup>190</sup> See, e.g., ICC Elements of Crimes, Art. 8(2)(c)(iii)(3).

## 8.4.3. OTHER VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

*Notes for trainers:*

- Having already dealt with the grave breach provisions and Common Article 3, participants now need to turn their attention to other violations of IHL.
- The case study can be used to consider some of these crimes and whether they could be included an indictment against the accused. For example, the destruction of houses and businesses and of a church could be considered in order to determine whether they would qualify as crimes under IHL.

The crimes covered in this section are regarded as war crimes provided that the common elements discussed above in section 8.3 are established. The crimes discussed below relate more to the conduct of hostilities as opposed to the treatment of persons during an armed conflict. These crimes include:

- Wanton destruction of cities, towns, or villages;
- Plunder/Pillaging;
- Seizure of, destruction or wilful damage to protected institutions and works;
- Unlawful attacks on civilians and civilian objects;
- Unlawful confinement of civilians;
- Unlawful labour of prisoners of war/slavery;
- Terrorising the civilian population; and
- Conscripting or enlisting children into armed groups.

## 8.4.3.1. WANTON DESTRUCTION OF CITIES, TOWNS OR VILLAGES

The violation of “wanton destruction or devastation of cities, towns or villages, not justified by military necessity” is related to the grave breach of extensive destruction and appropriation of property described above.<sup>191</sup> The underlying elements are similar:

- the destruction of immovable property occurred on a large scale;
- the destruction was not justified by military necessity; and
- the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of their destruction.<sup>192</sup>

The crime of wanton destruction of cities, towns or villages or devastation not justified by military necessity is part of customary law.<sup>193</sup>

<sup>191</sup> See, e.g., GC IV, Art. 147; *Orić*, TJ ¶¶ 580-9.

<sup>192</sup> *Gotovina*, TJ ¶ 1765; *Orić*, TJ ¶ 581, *Kordić*, AJ ¶¶ 74, 76.

<sup>193</sup> *Kordić*, AJ ¶ 76.

This offence covers war crimes provided for in Articles 46, 50, 53 and 56 of the 1907 Regulations Concerning the Laws and Customs of War on Land annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land<sup>194</sup> (Hague Regulations) which are applicable to cases of occupation. However, the crime in question is more narrowly defined than Article 23(g) of the Hague Regulations, which states that it is especially forbidden “to destroy [...] the enemy’s property, unless such destruction [...] is imperatively demanded by the necessities of war”.

The Hague Regulations only require an analysis of military necessity whereas the GC law contains the additional elements of “excessive” and “wanton”.<sup>195</sup>

#### 8.4.3.2. PLUNDER/PILLAGING

Plunder covers all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under ICL.<sup>196</sup> The elements of this underlying crime are:

- all forms of appropriation of private or public property or funds;
- the act of appropriation was intentional; and
- the appropriation was unlawful.<sup>197</sup>

There is a consequential link between the monetary value of the appropriated property and the gravity of the consequences for the victim, and thus the seriousness of the offence. However, the assessment of when a piece of property reaches the threshold level of a certain value can only be made on a case-by-case basis and only in conjunction with the general circumstances of the crime.<sup>198</sup>

A serious violation could be assumed in circumstances where appropriations take place vis-à-vis a large number of people, even though there are no grave consequences for each individual. In this case it would be the overall effect on the civilian population and the multitude of offences committed that would make the violation serious.<sup>199</sup>

Plunder includes “pillaging” and “looting”.<sup>200</sup> Burning and other acts of destruction of property not amounting to appropriation are not pillage.<sup>201</sup>

<sup>194</sup> See ICRC, International Humanitarian Law - Treaties and Documents, *available at* [www.icrc.org/ihl.nsf/INTRO?OpenView](http://www.icrc.org/ihl.nsf/INTRO?OpenView).

<sup>195</sup> *Ibid.*

<sup>196</sup> “Plunder” and “pillaging” (used in *e.g.* ICTR Statute, Art. 4(f)) are synonymous.

<sup>197</sup> *Gotovina*, TJ ¶ 1777; *Kordić*, AJ ¶¶ 77-84. Under IHL, there is a general exception to the prohibition of appropriation when the appropriation is justified by military necessity. See International Humanitarian Law - Hague Convention IV, Art. 52 (1907).

<sup>198</sup> *Kordić*, AJ ¶ 82.

<sup>199</sup> *Ibid.* at ¶ 83.

<sup>200</sup> *Simić*, TJ ¶ 98.

<sup>201</sup> *Moinina Fofana et al.*, Case No. SCSL-04-14-A, Appeal Judgement, 28 May 2008 ¶ 409 (see ¶¶ 389-409 generally on pillage); *Blaškić*, AJ ¶ 79.

**Note:** Under the Rome Statute, the prosecution must prove that the perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use without the owner's consent.<sup>202</sup>

#### 8.4.3.3. SEIZURE OF, DESTRUCTION OR WILFUL DAMAGE TO PROTECTED INSTITUTIONS AND WORKS

The seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science is listed as a crime in ICTY Statute Article 3(d).<sup>203</sup>

Various treaties and custom protect cultural property. The customary protection is reflected in the prohibition on committing any act of hostility directed against cultural property in AP I Article 53 (concerning international armed conflicts) and AP II Article 16 (concerning non-international armed conflicts).

The ICTY Appeals Chamber considered that the destruction or wilful damage of cultural property under is *lex specialis* with respect to the more general offence of unlawful attacks on civilian objects.<sup>204</sup> This means that the law under Article 3(d) would override other general provisions prohibiting attacks on civilian objects.

The elements of the destruction or wilful damage of cultural property at the ICTY are:

- the act has caused damage or destruction to property which constitutes the cultural or spiritual heritage of peoples;
- the damaged or destroyed property was not used for military purposes at the time when the act of hostility directed against these objects took place; and
- the act was carried out with the intent to damage or destroy the property in question.

The *mens rea* requirement is met "if the acts of destruction or damage were wilfully (*i.e.* either deliberately or through recklessness) directed against "cultural property".<sup>205</sup>

**Note:** Under the Rome Statute, it is a crime to direct an attack against protected objects.<sup>206</sup> It is also a crime to destroy or seize the enemy's property that is not justified by military necessity.<sup>207</sup>

<sup>202</sup> ICC Elements of Crimes, Art. 8(2)(b)(xvi)(2)-(3).

<sup>203</sup> See generally, *Strugar*, TJ ¶ 229, fn 779, and ¶¶ 298-312; *Strugar*, AJ ¶ 277; *Tadić*, Decision on the Defence Motion for Interlocutory on Jurisdiction, AC ¶ 98; *Naletilić*, TJ ¶ 603; *Blaškić*, TJ ¶ 185; *Kordić*, AJ ¶¶ 89-91; *Brđanin*, TJ ¶ 599.

<sup>204</sup> *Strugar*, AJ ¶ 277; *Kordić*, AJ ¶¶ 89-91.

<sup>205</sup> *Strugar*, AJ ¶ 277.

<sup>206</sup> ICC Elements of Crimes, Art. 8(2)(b)(ix).

<sup>207</sup> *Ibid.* at Art. 8(2)(b)(xiii) and Art. 8(2)(e)(iv).

#### 8.4.3.3.1. CULTURAL PROPERTY: DEFINITION

The Hague Convention and AP I have different definitions of cultural property:

- Article 1 of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) refers to property which is “of great importance to the cultural heritage”.
- AP I Article 53 refers to objects which “constitute the cultural or spiritual heritage”.

Despite this difference in terminology, the basic concept is the same: cultural or spiritual heritage covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people.<sup>208</sup>

Important considerations for this crime include:

- Religious and educational facilities, such as mosques, churches and schools may not necessarily always fall under the definition. This issue must be considered on a case-by-case basis.
- If such institutions do not fall under this definition, their destruction could nonetheless constitute persecution as a crime against humanity or the grave breach of extensive destruction and appropriation of property.<sup>209</sup>

**Note:** Under the Rome Statute, protected objects include buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which are not military objectives.<sup>210</sup>

#### 8.4.3.3.2. RELATIONSHIP TO OFFENCE OF UNLAWFUL ATTACKS ON CIVILIAN OBJECTS

This offence overlaps with the crime of unlawful attacks on civilian objects, except that the object of the former offence is more specific.<sup>211</sup>

Institutions dedicated to religion must be presumed to have a civilian character and to enjoy the general protection provided under AP I Article 52. As general civilian objects they should not be attacked, except when they become military objectives.

*Objects of cultural property transcend geographical boundaries, are unique in character and are intimately associated with the history and culture of a people.*

Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

<sup>208</sup> YVES SANDOZ ET AL. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949 646 (1987), available at <http://www.icrc.org/ihl.nsf/COM/470-750001?OpenDocument>; Kordić, AJ ¶ 91.

<sup>209</sup> Kordić, AJ ¶¶ 90-2.

<sup>210</sup> ICC Elements of Crimes, Art. 8(2)(b)(ix)(2).

<sup>211</sup> Brđanin, TJ ¶¶ 596-8; Naletilić, TJ ¶ 604.

However, the mere fact that an institution is in the immediate vicinity of military objective does not justify its destruction.

#### 8.4.3.4. UNLAWFUL ATTACK ON CIVILIANS AND CIVILIAN OBJECTS

The distinction between civilian and military objectives<sup>212</sup> is an essential feature of treaty<sup>213</sup> and customary IHL in international armed conflicts and non-international armed conflicts. Similarly, another essential feature is the rule that the civilian population as such may never be attacked. The prohibition of attacking civilians may not be derogated from because of military necessity.

Under customary international law, parties to the conflict:

- must distinguish *at all times* between the civilian population and combatants; and
- must not attack a military objective if the attack is likely to cause civilian casualties or damage which would be excessive in relation to the military advantage anticipated.

Both the AP I and ICTY jurisprudence require that the attack actually results in harm.<sup>214</sup>

The presence of non-civilians in a civilian population does not deprive that population of its civilian character. However, the population must be predominantly civilian in nature.

For the purposes of war crimes under ICTY Statute Article 3, such an attack must have been conducted intentionally with the knowledge, or when it was impossible not to know, that civilians were being targeted.<sup>215</sup> It encompasses direct and indirect intent (recklessness). The intent to target civilians can be proved through inferences from direct or circumstantial evidence. There is no requirement of the intent to attack particular civilians. The determination of whether civilians were targeted is a case-by-case analysis, based on a variety of factors, including: the means and method used in the course of the attack; the distance between the victims and the source of fire; the on-going combat activity at the time and location of the incident; the presence of military activities or facilities in the vicinity of the incident, the status of the victims as well as their appearance; and the nature of the crimes committed in the course of the attack.<sup>216</sup>

**Note:** Under the Rome Statute this crime is considered a violation of the laws and customs of war and as such, only protects civilians not taking direct part in the hostilities and objects that are not military objects.<sup>217</sup>

<sup>212</sup> See, e.g., *Kordić*, AJ ¶¶ 47-67; *Kunarac*, TJ ¶ 426; *Kordić*, AJ ¶¶ 55-68; *Strugar*, TJ ¶ 282-3; *Blaškić*, TJ ¶¶ 180, 214. At the ICTY, this is usually charged alongside attacks on civilian objects.

<sup>213</sup> See, e.g., GC Additional Protocol I, Art. 48; GC Additional Protocol II, Art. 13.

<sup>214</sup> *Kordić*, AJ ¶ 67.

<sup>215</sup> *Blaškić*, TJ ¶ 180. In *Strugar*, TJ ¶ 283 the *dolus directus* requirement was described as an attack conducted with the intent of making the civilian population or individual civilians the object of the attack.

<sup>216</sup> *Strugar*, AJ ¶¶ 270, 271.

<sup>217</sup> ICC Elements of Crimes, Art. 8(2)(b)(i)(2) and Art. 8(2)(b)(ii)(2); see also Art. 8(2)(e)(i)(2).

#### 8.4.3.5. UNLAWFUL CONFINEMENT OF CIVILIANS

See above, section 8.4.1.10.

Article 5 of AP II also provides protection to civilians detained or interned during internal conflicts, including regulations on the conditions of internment or detention.

This is not listed in the Rome Statute as a war crime during non-international conflicts; it is only listed as a grave breach of the Geneva Conventions.

#### 8.4.3.6. UNLAWFUL LABOUR OF PRISONERS OF WAR/SLAVERY

Unlawful labour of prisoners of war is committed when an accused intentionally, by act or omission, forces a prisoner of war to perform labour that is prohibited by Articles 49, 50, 51 or 52 of GC III.

Important considerations include:

- Some forms of forced labour are lawful in international armed conflicts and non-international armed conflicts under IHL.<sup>218</sup>
- In some circumstances prisoners of war can be required to work, such as when the work is done in their own interest, taking into consideration the prisoners' age, sex, physical aptitude and rank.<sup>219</sup>
- Assuming the other elements of enslavement are satisfied, forced labour will amount to enslavement only if the perpetrator forced the victim to do some impermissible work.<sup>220</sup>

See Module 7 on elements of underlying crime of enslavement.

**Note:** These crimes are not listed in the Rome Statute but have been recognised as war crimes by the ICTY.

#### 8.4.3.7. TERRORISING THE CIVILIAN POPULATION

*Notes for trainers:*

- In order to discuss this crime, participants could be asked to consider the case study, and whether the acts of the YNP could constitute terrorising the civilian population.

<sup>218</sup> See, e.g., GC IV, Arts. 40, 51; GC Additional Protocol II, Arts. 4(2)(f), 5(1)(e).

<sup>219</sup> *Naletilić*, TJ ¶¶ 250-61.

<sup>220</sup> *Ibid.* at ¶ 261; *Kunarac*, AJ ¶¶ 116-124; *Krnjelac*, TJ ¶ 356.

Terrorising the civilian population includes “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”.<sup>221</sup> It is a crime under customary international law.<sup>222</sup> The crime falls within the general prohibition of attacks on civilians.

Its elements are:

- Acts or threats of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within that population.
- The perpetrator wilfully made that population or those civilians the object of those acts of violence.
- The intent to make that population or those civilian individuals the object of the acts of violence or threats, and the specific intent to spread terror among the civilian population. While spreading terror must be the primary purpose of the acts or threats of violence, it need not be the only one.<sup>223</sup>

*A victim of terror must have suffered grave consequences resulting from acts or threats of violence.*

Important considerations include:

- Causing death or serious injury to body or health is not an element of the offence *per se*.
- What is required is that the victims suffered grave consequences resulting from the acts or threats of violence. Such grave consequences include, but are not limited to, death or serious injury to body or health. Psychological impact can satisfy the required gravity threshold.
- This result requirement is not satisfied by a mere showing that the acts or threats were capable of spreading terror.
- The crime is “not a case in which an explosive device was planted outside of an on-going military attack but rather a case of ‘extensive trauma and psychological damage’ being caused by ‘attacks [which] were designed to keep the inhabitants in a constant state of terror’”.<sup>224</sup>
- It is not necessary to establish that the civilians felt fear, or were in fact terrorised. But, evidence of actual terrorisation may contribute to establishing other elements of the crime of terror.<sup>225</sup>

In the *AFRC* case, a trial chamber at the SCSL extended the material scope of the crime, finding that acts of terrorism are not restricted to violence, or threats of violence, targeted at protected *persons*, but may include threats of attacks on, or destruction of, people’s property or means of

<sup>221</sup> *Galić*, AJ ¶¶ 86, 102, 104, 107; *D. Milošević*, AJ ¶ 33-7; *Fofana*, AJ ¶¶ 344-357 (on acts of terrorism as violation of GC Additional Protocol II and Common Article 3 under the Statute of the Special Court for Sierra Leone).

<sup>222</sup> *Ibid.*

<sup>223</sup> *Ibid.* at ¶¶ 102, 104 ; *D. Milošević*, AJ ¶ 37. The same findings were recalled in Alex Tamba Brima et al., Case No. SCSL-04-16-T, Trial Judgement, 20 June 2007 ¶ 667.

<sup>224</sup> *Galić*, AJ ¶ 102.

<sup>225</sup> *Ibid.* at ¶¶ 102, 104 ; *D. Milošević*, AJ ¶ 35.

survival. The chamber observed, “[w]hile the trial chamber agrees that it is not the property as such which forms the object of protection from acts of terrorism, the destruction of people’s homes or means of livelihood and, in turn, their means of survival, will operate to instil fear and terror”.<sup>226</sup>

**Note:** This crime is not listed in the Rome Statute.

#### 8.4.3.8. CONSCRIPTING OR ENLISTING CHILDREN INTO ARMED GROUPS

Under the Rome Statute, it is a war crime to conscript or enlist a child under the age of 15 into the national armed forces or to use them to participate actively in hostilities.<sup>227</sup> This prohibition is also provided for in Article 77(2) of API and 43(3) of AP II.

The ICC specified that “conscripting” refers to forcible recruitment, while “enlisting” pertains more to voluntary recruitment. Both are prohibited, which means that the child’s consent is not a valid defence. It is a crime of a continuing nature: it continues to be committed as long as the child remains in the armed groups or forces and ceases only when the child leaves the group or reaches age fifteen.<sup>228</sup>

This crime was also recognised by the SCSL.<sup>229</sup>

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<sup>226</sup> *Brima et al.*, TJ ¶ 660.

<sup>227</sup> Rome Statute, Art. 8(2)(b)(xxvi).

<sup>228</sup> *Lubanga Dyilo*, Decision on the confirmation of charges, Pre-Trial Chambers, ¶¶ 246-248.

<sup>229</sup> See, e.g., *Brima et al.*, TJ ¶ 728; *Fofana et al.*, AJ ¶ 139.

## 8.5. WAR CRIMES INVOLVING SEXUAL VIOLENCE

There has been an increasing recognition that various forms of sexual violence amount to war crimes. Sexual abuses have been routinely committed against women in the time of conflicts. Although women form the majority of victims of sexual violence charged at the international tribunals, men and children were also victims of sexual violence.

Even though rape has been considered a violation of international humanitarian law for centuries, it was rarely prosecuted.<sup>230</sup> Indeed, while rape was included in GC IV (Article 27) and AP's I (Article 75(2)(b) and II (Article 4(2)(e)), it was not treated as a crime. Rape was treated as an "outrage upon personal dignity" and an attack on a woman's honour—which detracted from and trivialised the nature of the crime.<sup>231</sup>

International law explicitly recognises rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence committed in either an international or non-international armed conflict as possible war crimes. Sexual violence can be used as a "weapon of war"<sup>232</sup> and particularly targets women and girls.<sup>233</sup>

Rape was not explicitly included as a war crime in the ICTY Statute, but it was established as part of the grave breaches, such as torture and inhumane treatment. Key cases include the *Delalić*, *Furundžija* and *Kunarac* cases.

In *Delalić*, the ICTY convicted an accused for rape as torture as a grave breach of the Geneva Conventions and a violation of the laws or customs of war for the first time.<sup>234</sup>

In *Furundžija*, the ICTY first recognised a single incident of rape as a war crime. The court found the accused guilty for the rape committed by one of his subordinates, which the accused witnessed and failed to prevent. The trial chamber held "[i]t is indisputable that rape and other sexual assaults in armed conflict entail the criminal liability of the perpetrators",<sup>235</sup> and went on to note that "the essence of the whole corpus of international humanitarian law as well as human rights lies in the protection of the human dignity of every person, whatever his or her gender".<sup>236</sup>

In *Kunarac*, the charges, for violations of the laws and customs of war and grave breaches, all arose out of crimes of sexual violence. The ICTY expanded the definition of rape in this case, focusing on serious violations of sexual autonomy.<sup>237</sup>

In upholding the trial chamber's definition of rape, the appeals chamber noted:

<sup>230</sup> CRYER, *supra* note 16, at p. 292.

<sup>231</sup> *Ibid.*

<sup>232</sup> Judge Wolfgang Schomburg and Ines Peterson, *Genuine Consent to Sexual Violence Under International Law*, 101:1 AM. J. INT'L L. 121 (2007).

<sup>233</sup> UN Doc. S/RES/1820 (2008), 19 June 2008, p. 1.

<sup>234</sup> *Čelebići*, AJ ¶¶ 427; 500 – 507.

<sup>235</sup> *Furundžija*, TJ ¶ 169.

<sup>236</sup> *Ibid.* at ¶ 183.

<sup>237</sup> *Ibid.* at ¶ 457.

For the most part, the Appellants in this case were convicted of raping women held in *de facto* military headquarters, detention centres and apartments maintained as soldiers' residences. As the most egregious aspect of the conditions, the victims were considered the legitimate sexual prey of their captors. Typically, the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable. (Those who initially sought help or resisted were treated to an extra level of brutality). Such detentions amount to circumstances that were so coercive as to negate any possibility of consent.<sup>238</sup>

The ICTR Statute expressly includes rape, enforced prostitution and other forms of sexual violence as war crimes. However, these are not autonomous offences but are only considered as underlying acts of the offence of "outrages upon personal dignity".<sup>239</sup>

To prove gender based violence as a war crime, the prosecution must establish:

- The specific elements of the crime itself (rape, sexual slavery, etc.);
- Common elements of war crimes; and
- The form of individual criminal liability for the accused.

Charging and prosecuting rape in national jurisdictions can be very different from international jurisdictions. For example, in a national jurisdiction, a victim of rape might be required to obtain a medical report, file a complaint with the police or identify the perpetrator. In the context of armed conflict, these requirements might be difficult to fulfil. A victim might be unable to visit the doctor, or report the incident. The perpetrator could be a person in authority, or the victim might not have access to the appropriate agency.

There are many sources of evidence of gender based violence that have occurred during conflict. These are not limited to victims, who may be hesitant to testify. Other sources of evidence can include:

- Eye witnesses who are not themselves victims of gender based violence; and
- Evidence collected from the corpses of victims.<sup>240</sup>

Sexual violence can be charged as a war crime in many different ways, including:

- Rape as a war crime;
- Rape as torture as a war crime (either as a grave breach or a violation of the laws and customs of war);<sup>241</sup>
- Rape and/or other sexual violence can form part of outrages upon personal dignity,<sup>242</sup> persecution,<sup>243</sup> and inhumane treatment as war crimes; and

<sup>238</sup> *Kunarac*, AJ ¶ 132.

<sup>239</sup> ICTR Statute, Art. 4(2).

<sup>240</sup> See, e.g., *Bagosora et al.*, TJ.

<sup>241</sup> See, e.g., *Čelebići*, AJ ¶¶ 1, 400-427; *Kunarac*, AJ ¶¶ 150 – 151 (holding that rape and sexual violence necessarily give rise to severe pain or suffering which justifies the characterization of rape as an act of torture.); see also *Kvočka*, TJ ¶ 145.

- Rape and/or other sexual violence can be charged as war crimes under the Rome Statute, including sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and sexual violence.

**Note:** The Rome Statute has made important developments in the treatment of sexual violence as a war crime. The Rome Statute expressly criminalises various forms of sexual and gender-based violence as war crimes, both in the context of an international armed conflict and a non-international armed conflict and as grave breaches of the Geneva Conventions.

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<sup>242</sup> See, e.g., *Furundžija*, TJ ¶¶ 65, 68, 120, 262, 263 (recognizing rape as an act of torture and outrage upon personal dignity constituting war crimes.)

<sup>243</sup> See, e.g., *Stakić*, AJ ¶¶ 326, 339 (rape as a form of persecution).

## 8.6. REGIONAL LAW AND JURISPRUDENCE

### *Notes for trainers:*

- The Module now shifts to focus on the national laws of BiH, Croatia and Serbia. However, it is not recommended to discuss the regional sections in isolation while training this Module. For that reason, cross references have been included in the international section to the main regional laws and developments. The sections that follow provide a basis for more in-depth discussion about the national laws with practitioners who will be implementing them in their domestic courts.
- As the SFRY Criminal Code is still relevant to war crimes, it is important to start with the provisions in this code and for participants to discuss the relevance and applicability of these provisions.
- Trainers should bear in mind that Module 5 provides an in-depth overview of the way in which international law is incorporated within the national laws. For this reason, such issues are not dealt with in detail in this section of this Module, and it would be most helpful to have trained Module 5 in advance of Modules that deal with substantive crimes.
- After the section on the SFRY Criminal Code, the Module deals with the laws applicable in BiH, Croatia and Serbia in separate sections so that participants from any of these countries need only focus on their jurisdiction. Where available, the most relevant jurisprudence has also been cited. Participants should be encouraged to use their own cases to discuss the application of the laws and procedures being taught.
- Tip to trainers: One very effective way of engaging 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.

## 8.7. SFRY CRIMINAL CODE

Various provisions of the SFRY Criminal Code relate to war crimes. These provisions are relied upon by entity level courts in BiH and by the courts in Croatia and Serbia. Thus, it is important for participants to have access to these provisions. The full text of the provisions is not included here, but the provisions that should be referred to in training are listed.

Relevant provisions from the SFRY Criminal Code<sup>244</sup> include:

- Article 100: No statute of limitations for war crimes;
- Article 142: War crimes against the civilian population;
- Article 143: War crimes against the wounded and sick;
- Article 144: War crimes against prisoners of war;
- Article 145: Organizing a group and instigating the commission of genocide and war crimes;
- Article 146: Unlawful killing or wounding of the enemy;
- Article 147: Marauding the wounded and sick on the battlefield;
- Article 148: Making use of forbidden means of warfare;
- Article 149: Violating the protection granted to bearers of flags of truce;
- Article 150: Cruel treatment of the wounded, sick and prisoners of war;
- Article 151: Destruction of cultural and historical monuments;
- Article 152: Incitement to an aggressive war; and
- Article 153: Misuse of international emblems.

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<sup>244</sup> SFRY Criminal Code, Official Gazette of the SFRY No. 44/76, 36/77, 34/84, 74/87, 57/89, 3/90, 38/90.

**SFRY CC, Article 142: War crimes against the civilian population**

This article sets out punishment for war crime against the civilian population:

- (1) Whoever, in violation of rules of international law effective at the time of war, armed conflict or occupation, orders an attack on civilian population, settlement individual civilians or persons incapable to fight, resulting in death serious bodily injury or serious disturbance of health; attack without selecting a target by which civilian population is harmed; that civilian population be subject to killings, torture, inhuman treatment, biological, medical or other scientific experiments, taking tissues or organs for transplantation; immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy's army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.
- (2) Whoever, in violation of rules of international law effective at the time of war, armed conflict or occupation, orders: an attack to be conducted on facilities under a special protection by international law and facilities and installations with dangerous force such as dams, levees and nuclear power stations; wanton destruction of civilian facilities under a special protection by international law, undefended places and demilitarized zones; long-term and wide-range damage of the natural environment that can be harmful to health or survival of population; or whoever commits some of the aforementioned acts, shall be punished by sentence from paragraph 1.
- (3) Whoever, in violation of the rules of international law effective at the time of war, armed conflict or occupation, as an occupier, orders or commits dislocation of part of its civilian population to the occupied territory, shall be punished by imprisonment for not less than five years.

## 8.8. BIH

*Notes for trainers:*

- This section focuses on BiH law for war crimes as well as case law from the Court of BiH and the available jurisprudence from the Republika Srpska and the Federation of BiH.
- It will be useful for participants to compare the law and jurisprudence of BiH with the jurisprudence of ICTY and the provisions in the ICC Rome Statute.
- This section is structured in the same way as the previous section on war crimes under international law.
  - It will firstly address the elements that are common to all war crimes in BiH.
  - Thereafter it will focus on each individual war crime for which there is relevant jurisprudence.
- It is important for participants to understand the difference between the common elements (often referred to as the *chapeau* requirements) and the specific elements that are required to prove the individual war crimes.
- Some questions which could be asked to stimulate discussion on the topics considered would be:
  - To what extent is it necessary to prove an international armed conflict as a common element for war crimes under BiH law?
  - What is the significance of the violations of prohibitions under Common Article 3 of the Geneva Conventions in the law of BiH?
  - What distinction have the courts in BiH drawn between prisoners of war and civilians?
  - How have the courts dealt with defining inhumane or cruel treatment, and what sources have been drawn on from IHL?

The BiH entity level courts and courts of Brčko District try war crimes cases on the basis of the SFRY Criminal Code as *in tempore criminis* law. The Court of BiH generally tries war crimes cases on the basis of the BiH Criminal Code; it might apply the SFRY Criminal Code where the latter is more favourable to the accused.<sup>245</sup>

The 2003 criminal codes of the entities do not deal with war crimes. Only the BiH Criminal Code includes such provisions (see Module 5 for a discussion of the application of the various criminal codes by courts in BiH).

Relevant provisions from the BiH Criminal Code<sup>246</sup> include:

<sup>245</sup> For more on this see Module 5.

<sup>246</sup> BiH Criminal Code, 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 19: No statute of limitations for war crimes;
- Article 173: War crimes against civilians;
- Article 174: War crimes against the wounded and sick;
- Article 175: War crimes against prisoners of war;
- Article 176: Organising a group of people and instigating the perpetration of war crimes, genocide and crimes against humanity;
- Article 177: Unlawful killing or wounding of the enemy;
- Article 178: Marauding the killed and wounded at the battlefield;
- Article 179: Violating the laws and practices of warfare;
- Article 180: Individual and command responsibility for war crimes, genocide and crimes against humanity;
- Article 181: Violating the protection granted to bearers of flags of truce;
- Article 182: Unjustified delay of the repatriation of prisoners of war;
- Article 183: Destruction of cultural, historical and religious monuments;
- Article 184: Misuse of international emblems; and
- Article 193a: Forbidden arms and other means of combat.

While the text of all of the relevant provisions is not provided here, relevant case law demonstrating the application of these principles by the Court of BiH and entity level courts is included below.

**BiH Criminal Code Article 173: War Crimes against civilians**

(1) Whoever in violation of rules of international law in time of war, armed conflict or occupation, orders or perpetrates any of the following acts:

- a) Attack on civilian population, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damaging of people's health;
  - b) Attack without selecting a target, by which civilian population is harmed;
  - c) Killings, intentional infliction of severe physical or mental pain or suffering upon a person (torture), inhuman treatment, biological, medical or other scientific experiments, taking of tissue or organs for the purpose of transplantation, immense suffering or violation of bodily integrity or health;
  - d) Dislocation or displacement or forced conversion to another nationality or religion;
  - e) 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) or forcible prostitution, application of measures of intimidation and terror, taking of hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial, forcible service in the armed forces of enemy's army or in its intelligence service or administration;
  - f) Forced labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic money or the unlawful issuance of money,
- shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

(2) The punishment referred to in paragraph 1 of this Article shall be imposed on whomever in violation of rules of international law, in the time of war, armed conflict or occupation, orders or perpetrates any of the following acts:

- a) Attack against objects specifically protected by international law, as well as objects and facilities with dangerous power, such as dams, embankments and nuclear power stations;
- b) Targeting indiscriminately of civilian objects which are under specific protection of international law, of non-defended places and of demilitarised zone;
- c) Long-lasting and large-scale environment devastation, which may be detrimental to the health or survival of the population.

(3) Whoever in violation of the rules of international law applicable in the time of war, armed conflict or occupation, orders or carries out as an occupier the resettlement of parts of his civilian population into the occupied territory, shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

### 8.8.1. ELEMENTS COMMON TO ALL WAR CRIMES

*Notes for trainers:*

- This section sets out the elements that are common to all war crimes under BiH law.
- In order to stimulate discussion on these elements, the participants could be asked to imagine that the crimes alleged in the case study took place in BiH in 2005. Could they qualify as war crimes? For what reasons?
- In particular, participants should consider whether the BiH courts, whether at the state or entity level, would consider the armed conflict to be international, internal, or whether they would consider the distinction to be irrelevant?
- Participants should also consider, on the basis of the facts of the case study, what position the BiH courts would take on the date of the commencement of an armed conflict.
- The dates of the commencement of the conflict in BiH have been an important issue before the courts, and the relevant jurisprudence related to this matter has been discussed below, including the date the courts have determined as the starting point of the conflict.

War crimes are part of a specific category of crimes set out in the BiH Criminal Code. The relevant articles of the BiH Criminal Code distinguish this separate category of crimes from regular national crimes.

War crimes are distinguishable from other crimes by additional elements that characterise their nature, called *chapeau* elements. These must be proven in addition to the elements of the underlying crime.

The *chapeau* elements of a war crime are:

- The criminal act is in violation of international law;
- The criminal act occurred during armed conflict, war or occupation (although a war crime against prisoners of war can occur during peace time, up until the repatriation of the prisoners of war);
- There is sufficient nexus between the act of the perpetrator and the armed conflict, war or occupation; and
- The accused must have ordered or perpetrated the act.

For an act to be tried as a war crime, the prosecution must present sufficient evidence of these elements.

Each of these elements will now be considered in turn.

## 8.8.1.1. VIOLATION OF INTERNATIONAL LAW

The first element requires that the conduct be a violation of international law.

The BiH Criminal Code requires that acts prohibited under the relevant articles amount to violations of international law. The Court of BiH has noted that these provisions of the BiH Criminal Code are “blanket provisions”.<sup>247</sup> Identical “blanket provisions” were contained in the SFRY Criminal Code.<sup>248</sup>

The Court of BiH has held that when interpreting the provisions of the BiH Criminal Code relating to war crimes, it is not necessary that the perpetrator knows or intends to violate an international norm. It is sufficient to prove that his conduct objectively constitutes a violation of the rules of international law.<sup>249</sup>

*The Court of BiH always considers Common Article 3 a norm of customary law, binding on all parties regardless the nature of the armed conflict.*

This is in accord with the SFRY Criminal Code: a perpetrator does not have to be aware of the fact that they are violating rules of international law. The violation of international law is an objective requirement for the act to be punishable as a war crime.<sup>250</sup>

However, when assessing the perpetration of specific individual criminal acts, the subjective knowledge and intent of the perpetrator towards the perpetration of these specific underlying criminal acts must be assessed.<sup>251</sup>

The Court of BiH always considers Common Article 3 a norm of customary law, binding on all parties regardless the nature of the armed conflict.<sup>252</sup>

<sup>247</sup> See, e.g., Court of BiH, Mirko Pekez et al., Case No. X-KRZ-05/96-1, 2nd Instance Verdict, 5 May 2009 p. 14 (p. 14 BCS) Court of BiH, Andrun, Case No. X-KRZ-05/42, 2nd Instance Verdict, 19 Aug. 2008, p. 14 (p. 14 BCS); Court of BiH, Šefik Alić, Case No. X-KRŽ-06/294, 2nd Instance Verdict, 20 Jan. 2011, at ¶ 85; Court of BiH, Damjanović et al., Case No. X-KR/05/107, 1st Instance Verdict, 18 June 2007, pp. 12-16 (pp. 12-16 BCS); Court of BiH, Škrobić, Case No. X-KR-07/480, 1st Instance Verdict, 22 Oct. 2008, pp. 12-15 (pp. 14-17 BCS); Court of BiH, Idhan Sipić, Case No. X-KR-07/457, 1st Instance Verdict, 22 Feb. 2008, pp. 6-8 (pp. 5-7 BCS); Court of BiH, Vrdoljak, Case No. X-KR-08/488, 1st Instance Verdict, 10 June 2008, p. 14 (p. 12 BCS); Court of BiH, Maktouf, Case No. K-127/04, 1st Instance Verdict, 1 July 2005, pp. 23-26 (pp. 25-27 BCS).

<sup>248</sup> Komentar krivičnog Zakona Socijalističke Federativne Republike Jugoslavije, Savremena administracija, 1978, str.494(Commentary of the SFRY Criminal Code, Savremena administracija, 1978, p. 494); see also Supreme Court of FBiH (SC of FBiH), Vlahovljak et al., Case No. 070-0-KZ-07-000484, 2nd Instance Verdict, 18 Sept. 2008, pp. 13-14.

<sup>249</sup> See, e.g., Andrun, 2nd inst. p. 15 (p. 16 BCS); Vrdoljak, 1st inst., p. 15 (p. 13 BCS) (upheld by the appellate panel); Sipić, 1st inst., p. 7 (p. 6 BCS); Škrobić, 1st inst., p. 14 (p. 16 BCS) (final verdict); Court of BiH, Ramić, Case No. X-KR-06/197, 1st Instance Verdict, 17 July 2007, p. 11 (p. 9 BCS) (upheld by the appellate panel).

<sup>250</sup> Commentary of the SFRY Criminal Code, p. 501.

<sup>251</sup> See, e.g., Andrun, 2nd inst., p. 15 (p. 16 BCS); see also, Škrobić, Case No. X-KR 07/480, 2nd Instance Verdict, 22 April 2009, ¶¶ 30-31.

<sup>252</sup> Andrun, 2nd inst., pp. 14-15 (pp. 14-15 BCS); see also Vrdoljak, 1st inst., p. 15 (p. 13 BCS).

### 8.8.1.1.1. PROTECTED PERSONS, PROPERTY, OBJECTS, ETC.

To determine that the alleged criminal acts amounted to a violation of international law, it must be established that the victims, property or objects affected were protected under international law.<sup>253</sup>

Many categories of protected objects are reflected in the BiH Criminal Code. This section will discuss the categories of objects that were addressed in the Court of BiH's jurisprudence, namely:

- Civilians;
- Prisoners of War;
- Property; and
- Specific objects.

*The accused must know of the protected status of the relevant object to incur criminal liability.*

The Court of BiH has held that the accused must know of the protected status of the relevant object in order to incur criminal liability.<sup>254</sup> However, this is not always explicitly formulated as a requirement by the court. It is most often noted by the court when making findings of fact on the basis of the evidence presented.<sup>255</sup> Examples from the jurisprudence are discussed below.

#### 8.8.1.1.1.1. MENS REA WITH REGARD TO THE PROTECTED STATUS

In *Kurtović*, the appellant argued that the trial verdict did not show how the first instance panel established the accused's knowledge of the status of the captives and that it failed to establish whether he knew who was a civilian and who was a soldier.<sup>256</sup>

The appellate panel found this objection partially valid. The appellate panel held that the accused's knowledge about captives' status was a decisive fact which needed to be proven to reach a guilty verdict.<sup>257</sup>

The appellate panel concluded that Common Article 3 of the Geneva Conventions protects several categories of the population, and provides them with equal status.<sup>258</sup> The appellate panel found that it was evident that, given all the circumstances, the accused must have known and must have been aware that the captives who were "deprived of liberty" had the status of protected persons.<sup>259</sup>

The appellate panel concluded that the numerous acts of the accused against the captives were of such nature that they constituted a violation of international law regardless of the category of

<sup>253</sup> See also, *Andrun*, 2nd inst., pp. 15-16 (pp. 16-17 BCS); *Ramić*, 1st inst., p. 11 (p. 9 BCS); *Pekez*, 2nd inst. of 5 May 2009, ¶¶ 29-30; *Vrdoljak*, 1st inst., p. 16 (p. 13 BCS).

<sup>254</sup> Court of BiH, *Kurtović*, Case No. X-KRZ-06/299, 2nd Instance Verdict, 25 March 2009, ¶¶ 54-58.

<sup>255</sup> See, e.g., *Damjanović et al.*, 1st inst., p. 16 (p. 16 BCS); *Sipić*, 1st inst., p. 8 (p. 7 BCS).

<sup>256</sup> *Kurtović*, 2nd inst., ¶ 52.

<sup>257</sup> *Ibid.* at ¶ 55.

<sup>258</sup> *Ibid.* at ¶ 57.

<sup>259</sup> *Ibid.* at ¶ 58.

the population at issue and regardless of the awareness of the accused of the captives' particular category of protected persons.<sup>260</sup>

#### 8.8.1.1.1.2. CIVILIANS

The protection of civilians is found in Common Article 3(1) of the Geneva Conventions and the Articles 43(1) and 51(3) of Additional Protocol I to the Geneva Conventions. The Court of BiH has interpreted the protective status of civilians to extend to:

- every person present in a territory, who is:
  - not a member of the armed forces; and
  - not taking part in combat; and
- members of the armed forces who have:
  - laid down their arms;
  - who are placed *hors de combat*; or
  - who are incapacitated to fight.<sup>261</sup>

In the case of doubt about whether a person is a civilian or not, a person should be considered a civilian.<sup>262</sup>

Article 51(3) of Additional Protocol I provides that civilians will enjoy protection unless and for such time as they take a direct part in the hostilities. This means that civilians who take direct part in hostilities lose their protected status of civilian for as long as they take direct part in hostilities.

This raises a critical issue about the status of defence groups acting *in lieu* of an organised army. The Court of BiH has concurred with the finding of the ICTY Appeals Chamber of the *Kordić* case, which held that members of the TO (Territorial Defence) and members of armed forces retained the status of combatants at all times, even when resting in their homes or while they were armed.<sup>263</sup>

In accordance with the ICTY in the *Tadić* case, the Court of BiH has held that to determine whether a person enjoys the protection of civilian status based on their nationality, considerations should also include:

- an individual's relations to an area, rather than formal national characterizations;
- the difference in ethnicity between the victims and the perpetrators; and

<sup>260</sup> *Ibid.* at ¶ 59.

<sup>261</sup> *Vrdoljak*, 1st inst., pp. 15-16 (pp. 13-14 BCS) referring to *Blagojević*, TJ ¶ 544; see also Court of BiH, Jadranko Palija, Case No. X-KR-06/290, 1st Instance Verdict, 28 Nov. 2007, pp. 27-28 (pp. 27-28 BCS) (verdict upheld on appeal); *Sipić*, 1st inst., p. 8 (p. 8 BCS); *Andrun*, 2nd inst., p. 16 (p. 16 BCS); *Škrobić*, 1st inst., pp. 15-16 (pp. 16-17 BCS).

<sup>262</sup> *Vrdoljak*, 1st inst., pp. 15-16 (pp. 13-14 BCS); see also *Sipić*, 1st inst., p. 8 (p. 8 BCS); *Škrobić*, 1st inst., pp. 15-16 (pp. 16-17 BCS).

<sup>263</sup> *Palija*, 1st inst., p. 28 (p. 28 BCS) referring to *Kordić*, AJ ¶ 51.

- the victims' bonds with the foreign intervening state.<sup>264</sup>

In cases concerning war crimes against civilians, the Supreme Court of Republika Srpska has held that persons not taking part in hostilities and civilians, respectively, fall within the category of protected persons.<sup>265</sup>

In order to establish whether a person was a civilian, the Supreme Court of Republika Srpska, following the wording of Article 4(II) of the Additional Protocol II to the Geneva Conventions<sup>266</sup>, examines whether that person:

- was engaged in direct combat at the critical moment; or
- was a member of armed forces<sup>267</sup> that:
  - had laid down their weapons; or
  - was placed *hors de combat* by sickness, wounds, detention or any other cause.

The Supreme Court of Republika Srpska further clarified that when it concerns the application of Common Article 3, it is not necessary that the criteria in Article 4 of Geneva Convention IV are satisfied. The civilian victim does not have to be of a nationality other than the party to the conflict in whose hands they are. War crimes under Common Article 3 can thus occur against persons of the same nationality or ethnicity.<sup>268</sup>

#### 8.8.1.1.1.3. PRISONERS OF WAR

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Article 175 of the BiH Criminal Code extends protection to prisoners of war.<sup>269</sup> In the case against *Alić*, the scope of persons protected under this provision was defined in accordance with Common Article 3 of the Geneva Conventions.<sup>270</sup>

#### 8.8.1.1.1.4. PROPERTY

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Article 173(1)(f) of the BiH Criminal Code<sup>271</sup> protects property and criminalises:

- property confiscation;
- pillaging;
- illegal and self-willed destruction and large-scale theft of property that is not justified by military needs; and
- taking an illegal and disproportionate contribution or requisition.

<sup>264</sup> *Damjanović et al.*, 1st inst., p. 14 (p. 14 BCS); see also, Court of BiH, Momčilo Mandić, Case No. X-KR-05/58, 1st Instance Verdict, 18 July 2007, p. 130 (pp. 124-125 BCS) (verdict upheld on appeal).

<sup>265</sup> SC of RS, Case No. 118-0-Kz-07-000 020, 15 March 2007, p. 2.

<sup>266</sup> *Ibid.* at p. 3.

<sup>267</sup> *Ibid.*; see also., SC of RS, Case No. 118-0-Kz-K-06-000 006, 22 Feb. 2007, p. 5.

<sup>268</sup> SC of RS, Case No. 118-0-Kz-07-000 020, 15 March 2007, p. 3.

<sup>269</sup> See, e.g., *Alić*, 2nd inst., ¶ 83 *et seq.*

<sup>270</sup> *Alić*, 2nd inst., ¶ 87 *et seq.*

<sup>271</sup> Public and private property is also protected under BiH CC, Art. 179 as a violation of laws and customs of warfare.

### 8.8.1.1.1.5. OTHER PROTECTED OBJECTS

Under the BiH Criminal Code, specific objects also receive protection during armed conflicts, including:

- Cultural, historical and religious monuments (see section 8.8.2.5); and
- Objects indispensable to the survival of the civilian population (see section 8.8.2.12).

### 8.8.1.2. EXISTENCE OF WAR, ARMED CONFLICT OR OCCUPATION

The second element requires proof of the existence of war, armed conflict or occupation in the course of which the offence occurred.<sup>272</sup> This element demonstrates how war crimes against civilians and against the wounded and sick are characterised by or dependent on the context in which they are committed—the armed conflict.<sup>273</sup> The same requirement, *i.e.* the existence of war, armed conflict or occupation, was set out in the SFRY Criminal Code.<sup>274</sup>

*The laws of war apply to the entire territory under the control of the parties involved in an armed conflict.*

The Court of BiH has held that an armed conflict exists whenever there is:

- A resort to armed force between states; or
- Protracted armed violence between
  - governmental authorities and organised groups or
  - between such groups within a state.<sup>275</sup>

In relation to this element, the Court of BiH has held that:

- In order to be treated as a war crime, an individual offence does not have to coincide temporally or territorially with an armed conflict; it may be committed outside of direct combat.<sup>276</sup>
- The laws of war apply to the entire territory under the control of the parties involved.<sup>277</sup>

<sup>272</sup> It is important to note here that this element is not required when it comes to war crimes against prisoners of war (BiH CC, Art. 174). As opposed to war crimes against civilians and war crimes against wounded and sick, this crime, in accordance with IHL, can be committed not only during war or armed conflict, but also in peace time, after the war has ended, up until repatriation of the prisoners of war. See *also*, Commentary on the BiH CC, p. 580 and Commentary on the SFRY Criminal Code, Savremena administracija, 1978 p. 504.

<sup>273</sup> See, *e.g.*, *Sipić*, 1st inst., p. 8 (p. 7 BCS); *Vrdoljak*, 1st inst., p. 17 (p. 15 BCS).

<sup>274</sup> Commentary of the SFRY Criminal Code, Savremena administracija, 1978 p. 501. This element was not required under the FRY CC (as it is not required under the BiH CC) for war crimes against prisoners of war, as explained above, in footnote 277.

<sup>275</sup> See, *e.g.* *Andrun*, 2nd inst., p. 17 (p. 17 BCS); *Damjanović et al.*, 1st inst., p. 13 (p. 13 BCS); *Vrdoljak*, 1st inst., p. 16 (p. 14 BCS).

<sup>276</sup> *Vrdoljak*, 1st inst., p. 17 (p. 15 BCS) referring to ICTY cases (*Tadić, Blaškić and Kunarac*) as well as ICTR cases (*Rutaganda*) without specific reference to the relevant parts; *Sipić*, 1st inst., p. 8 (p. 7 BCS); *Paliija*, 1st inst., p. 30 (p. 30 BCS).

<sup>277</sup> *Ibid.*

- The accused must know of the existence of the armed conflict.<sup>278</sup> The same requirement was included in the SFRY Criminal Code.<sup>279</sup>

The Court of BiH has established the existence of an armed conflict on the basis of a variety of evidence, including governmental proclamations of a state of war, witness testimonies, overall evaluation of evidence, and ICTY jurisprudence.<sup>280</sup> The Court of BiH has also addressed the date the conflict began in relation to the charges in each respective case. Some examples are provided below.

In *Momčilo Mandić*, the trial panel accepted as proven the following facts from the ICTY judgements in the *Galić* and *Krnjelac* cases:

- “Armed conflict broke out after the European Community recognized BiH as a sovereign state on 6 April 1992”;<sup>281</sup>
- “Armed conflict in Sarajevo broke out with fierce shooting and an attack on the Academy of the Ministry of Interior in Vraca”;<sup>282</sup> and
- “On 8 April 1992 an armed conflict between the Serb and Muslim forces broke out in Foča”.<sup>283</sup>

In *Ramić*, the trial panel concluded that on 20 June 1992 an armed conflict existed in Visoko municipality and the neighbouring municipalities between the units of the TO (Territorial Defence) of RBiH and the Army of the Serb Republic.<sup>284</sup> The panel established this fact on the basis of material evidence including:

- The Presidency of BiH “Decision on the declaration of the imminent threat of war” of 8 April 1992;

<sup>278</sup> *Damjanović et al.*, 1st inst., p. 16 (p. 16 BCS); *Vrdoljak*, 1st inst., p. 19 (p. 17 BCS); *Palića*, 1st inst., p. 32 (p. 32 BCS).

<sup>279</sup> Under the SFRY CC, it is necessary to prove that a perpetrator of a criminal act committed during a state of war was aware that he was committing the act during a state of war: Commentary on the SFRY CC, p. 486.

<sup>280</sup> See, e.g., *Maktouf*, 1st inst., p. 8 (p. 9 BCS); *Mandić*, 1st inst., p. 131 (p. 125 BCS); *Andrun*, 2nd inst., p. 17 (p. 17 BCS); *Ramić*, 1st inst., pp. 13-14 (pp. 11-12 BCS).

<sup>281</sup> Court of BiH, *Momčilo Mandić*, Case No. X-KRZ-05/58, 2nd Instance Verdict, 1 Sept. 2009, ¶¶ 37, 46, referring to 1st inst. and ICTY *Galić*, TJ ¶ 199.

<sup>282</sup> *Mandić*, 2nd inst., ¶ 38, referring to 1st inst. verdict and ICTY *Galić* TC judgment, ¶ 199.

<sup>283</sup> *Mandić*, 2nd inst., ¶ 46, referring to 1st inst. and ICTY *Krnjelac*, TJ ¶¶ 567, 570. On appeal, the appellate panel noted that the trial panel’s acceptance of facts establishing the date of the beginning of the armed conflict was improper because it concerned a legal characterization—an essential element of the criminal offence as charged in the indictment (armed conflict). However, the appellate panel held that it would not review the omission because the parties themselves proposed the acceptance of the facts and on appeal did not contest the manner in which the trial panel decided on the admissibility of the proposed facts. Furthermore, the appellate panel held that although the two accepted facts from *Galić* (the recognition of BiH by the EC and the attack on Academy of Mol in Vraca) appeared to be contradictory, the trial panel had not committed an essential violation of the criminal procedure provisions because provided a reasoned decision on the facts. *Momčilo Mandić*, 2nd inst., ¶¶ 40, 41, 47.

<sup>284</sup> *Ramić*, 1st inst., pp. 13-14 (pp. 11-12 BCS).

- The Presidency of BiH “Decree on abolition of the existing Republic Staff of the Territorial Defence and the establishment of the Staff of the Territorial Defence of the republic of BiH” of 8 April 1992;
- The Assembly of Serb People in BiH “Decision on the establishment of the Army of the Serb Republic of BiH” of 12 May 1992; and
- The Presidency of BiH “Decision on the declaration of the state of war” of 20 June 1992.<sup>285</sup>

In *Andrun*, the appellate panel held that an armed conflict existed between the units of the Army of RBiH and the HVO during the second half of 1993 in the region of Čapljina and Stolac municipalities, and terminated on 23 February 1994 with the signing of Peace Agreement and the Annex to the Peace Agreement in Zagreb.<sup>286</sup> The appellate panel also noted that witnesses stated consistently that the conflict between the Army of RBiH and the HVO in the area of Mostar affected the entire Herzegovina, and thereby also the municipalities of Čapljina and Stolac.<sup>287</sup> The appellate panel concluded that the armed conflict between the units of the Army of RBiH and the HVO was on-going at the relevant time in the territory of those municipalities.<sup>288</sup>

In relation to Common Article 3 of the Geneva Conventions, the nature of the conflict (international or non-international) is irrelevant if all of the following conditions are met:

- The violation constitutes an infringement of a rule of international humanitarian law;
- The rule is customary in nature or, if it belongs to treaty law, the required conditions are met;
- The violation was serious, that is to say, it constitutes a breach of a rule protecting important values;
- The breach involved grave consequences for the victim; and
- The violation of the rule entails the individual criminal responsibility of the person breaching the rule.<sup>289</sup>

The BiH Criminal Code has not differentiated between international and non-international armed conflicts. However, insofar as the blanket provisions of the BiH Criminal Code refer to the violations of international law, the rules of international law regarding the distinction between international and non-international armed conflicts apply.<sup>290</sup>

*The rules of international law regarding the distinction between international and non-international armed conflicts apply to crimes involving a violation of international law.*

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

<sup>286</sup> *Andrun*, 2nd inst., p. 17 (p. 18 BCS).

<sup>287</sup> *Ibid.*

<sup>288</sup> *Ibid.*

<sup>289</sup> See, e.g., *Palija*, 1st inst., p. 29 (p. 29 BCS); *Vrdoljak*, 1st inst., pp. 16-17 (pp. 14-15 BCS); *Andrun*, 2nd inst., p. 17 (p. 17 BCS); *Damjanović et al.*, 1st inst., p. 13 (p. 13 BCS).

<sup>290</sup> *Andrun*, 2nd inst., p. 17 (p. 17 BCS); *Palija*, 1st inst., p. 29 (p. 29 BCS); *Vrdoljak*, 1st inst., pp. 16-17 (pp. 14-15 BCS); *Pekez*, 2nd inst. of 5 May 2009, p. 14 (p. 14 BCS); *Mandić*, 1st inst., p. 128 (p. 122).

Relying on jurisprudence from the ICTY, the Supreme Court of Republika Srpska held that an armed conflict exists whenever there is:

- A resort to armed forces between states; or
- Protracted armed violence between
  - governmental authorities and organised groups or
  - between such groups within a state.<sup>291</sup>

*The existence of war, armed conflict or occupation must have played a substantial part in the perpetrator's ability to commit the crime, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.*

In one of the cases before the Supreme Court of Republika Srpska, the appellants contested the existence of an armed conflict in the relevant area at the relevant time, and thus argued that an essential element of the offence they were convicted of as a war crime had not been met.<sup>292</sup> The appellants claimed the actual combat was at the time taking place some 30-50 km from the relevant area.<sup>293</sup>

The Supreme Court of Republika Srpska rejected this argument, concluding that it was not required for the actual combat to take place in a specific location for the relevant law to be applicable. This was because, from a territorial point of view, an armed conflict existed in Bosnia and Herzegovina starting at the latest from the proclamation of independence on 6 March 1992 up until the signing of the Dayton Peace Agreement in November 1995.<sup>294</sup>

The Supreme Court of Republika Srpska concluded that it was sufficient that the perpetrated acts were closely linked to hostilities which took place on a different part of the territory which was under control of one of the parties to the conflict.<sup>295</sup>

The Supreme Court of Republika Srpska has also held that the territory affected by the armed conflict should be understood as the territory on which, as a result of the armed conflict, life was not progressing as it would in a state of peace.<sup>296</sup> To establish the existence of an armed conflict on a certain territory, the following factors are relevant:<sup>297</sup>

- The proximity of direct combat activities;
- The existence of general mobilization;
- The frequency of movement of military formations; and
- Special regimes imposed on the civilian population, such as a curfew.

<sup>291</sup> SC of RS, Case No. 118-0-Kz-06-000-018, 18 April 2006, p. 7; SC of RS, Case No. 118-0-Kz-K-06-000 006, 22 Feb. 2007, p. 4; SC of RS, Case No. 118-0-Kz-07-000 020, 15 March 2007, p. 3.

<sup>292</sup> See, e.g., SC of RS, Case No. 118-0-Kz-06-000-018, p. 7.

<sup>293</sup> See, e.g., *ibid.*

<sup>294</sup> See, e.g., *ibid.*

<sup>295</sup> *Ibid.*; SC of RS, Case No. 118-0-Kzz-07-000 008, 29 June 2007, p. 4.

<sup>296</sup> SC of RS, Case No. 118-0-Kz-K-06-000 006, p. 4; SC of RS, Case No. 118-0-Kz-07-000 020, p. 3.

<sup>297</sup> SC of RS, Case No. 118-0-Kz-K-06-000 006, p. 4; SC of RS, Case No. 118-0-Kz-07-000 020, p. 4.

The Supreme Court of Republika Srpska added that an order for general mobilization was not sufficient to establish the existence of an armed conflict. However in conjunction with other evidence, such an order could establish the existence of such a conflict.<sup>298</sup>

### 8.8.1.3. NEXUS BETWEEN THE ACT OF THE PERPETRATOR AND THE STATE OF WAR, ARMED CONFLICT OR OCCUPATION

The third element requires that for an act to constitute a war crime, there must be a sufficient nexus between the specific act of the perpetrator and the armed conflict, war or occupation.<sup>299</sup> That is, the acts of the accused must be closely related to the armed conflict.<sup>300</sup>

Following the jurisprudence of the ICTY in the *Kunarac* case, the Court of BiH held that this element allows for the distinction that not all crimes committed in times of armed conflict can be automatically labelled as war crimes.<sup>301</sup>

The Court of BiH has held that in determining whether an act is sufficiently related to an armed conflict, relevant factors include:

- Whether the perpetrator is a combatant;
- Whether the victim is a non-combatant;
- Whether the victim is member of the opposing party;
- Whether the act may be said to serve the ultimate goal of a military campaign; and
- Whether the crime is committed as a part of or in the context of the perpetrator's official duties.<sup>302</sup>

What is important is that the existence of war, armed conflict or occupation played a substantial part in the perpetrator's ability to commit the crime, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.<sup>303</sup>

The nexus does not require:

- That the crime is of a "military" nature;
- That the crime was a part of a policy or officially encouraged practice, plan or similar;<sup>304</sup> or
- Any correlation between the area where the actual fighting was taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the

<sup>298</sup> SC of RS, Case No. 118-0-Kz-K-06-000 006, pp. 4-5.

<sup>299</sup> *Palija*, 1st inst., 28 Nov. 2007 p. 31 (p. 31 BCS) referring to ICTY, *Kunarac*, AJ ¶ 55; *Sipić*, 1st inst., p. 9 (p. 8 BCS), referring to ICTY, *Kunarac*, AJ ¶ 55.

<sup>300</sup> *Palija*, 1st inst., p. 31 (p. 31 BCS); *Andrun*, 2nd inst., p. 18 (p. 18 BCS); *Sipić*, 1st inst., p. 9 (p. 8 BCS).

<sup>301</sup> *Palija*, 1st inst., p. 31 (p. 31 BCS).

<sup>302</sup> *Damjanović et al.*, 1st inst., p. 13 (p. 13 BCS); *Vrdoljak*, 1st inst., p. 18 (p. 16 BCS); *Mandić*, 1st inst., p. 129 (p. 124); *Pinčić*, 2nd inst., pp. 24-25 (pp. 24-25 BCS).

<sup>303</sup> *Damjanović et al.*, 1st inst., pp. 13-14 (pp. 13-14 BCS); *Škrobić*, 1st inst., p. 17 (p. 19 BCS).

<sup>304</sup> *Vrdoljak*, 1st inst., p. 17 (p. 15 BCS) referring to *Tadić*, Decision on the Defence Motion for Interlocutory on Jurisdiction, AC, ¶ 70; *Sipić*, 1st inst., p. 8 (p. 7 BCS).

warring state, or in case of internal armed conflicts, the whole area under the control of a party to the conflict, until a peaceful settlement is achieved.<sup>305</sup>

See also Section 8.3.4 for a discussion of the nexus requirement under international law.

Relying on ICTY jurisprudence, the Supreme Court of Republika Srpska has acknowledged that it is necessary for a causal link to exist between the specific act of the accused and the armed conflict.<sup>306</sup> In doing so, the Supreme Court noted that “it is necessary to conclude that the act, which could well be committed in the absence of a conflict, was perpetrated against the victim(s) concerned because of the conflict at issue”.<sup>307</sup>

The Supreme Court of Republika Srpska concluded, however, that a firm causal link between the armed conflict and the commission of the offence was not required. Rather, the existence of an armed conflict must have influenced to a significant level the ability of the perpetrator to commit the offence, his decision to do so and the manner and the aim of the commission of the offence.<sup>308</sup> For instance, the Supreme Court of Republika Srpska held in one case that:

The arrival of five persons in military uniforms to collect the victims who were civilians in late evening hours, ignoring the police, causing death to one victim, attempting to kill the other victim, for no reason, brings to the conclusion that this course of events can hardly be imagined to have occurred without the existence of an armed conflict.<sup>309</sup>

The Supreme Court of Republika Srpska, in assessing the existence of the required nexus, took into consideration, *inter alia*:<sup>310</sup>

- The status of the accused and the capacity in which he acted;
- The status of the victims (who at the time were protected by international law); and
- Whether the perpetrator and the victim belonged to different ethnic groups who were opposing parties to the conflict.

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<sup>305</sup> *Vrdoljak*, 1st inst., p. 17 (p. 15 BCS); *See, e.g. Palija*, 1st inst., p. 30 (p. 30 BCS); *Damjanović et al.*, 1st inst., p. 14 (p. 14 BCS).

<sup>306</sup> SC of RS, Case No. 118-0-Kz-K-06-000 006, p. 5, referring to ICTY, *Aleksovski*, TJ.

<sup>307</sup> SC of RS, Case No. 118-0-Kz-K-06-000 006, p. 5, quoting ICTY, *Aleksovski*, TJ ¶ 45.

<sup>308</sup> SC of RS, Case No. 118-0-Kz-K-06-000 006, p. 5.

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

<sup>310</sup> SC of RS, Case No. 118-0-Kz-06-000-018, p. 7; SC of RS, Case No. 118-0-Kzz-07-000 008, p. 4; SC of RS, Case No. 118-0-Kz-07-000 020, p. 6; SC of RS, Case No. 118-0-Kzz-06-000 191, 7 Nov. 2006, p. 5.

## 8.8.2. INDIVIDUAL WAR CRIMES

*Notes for trainers:*

- Having examined the elements that are common to all war crimes, this section will deal with the individual crimes that are prohibited under the BiH Criminal Code and the SFRY Criminal Code.
- It must be stressed to participants that prosecutors are required to prove both the common elements, discussed above, and the particular elements for each individual war crime that is charged.
- Participants should be encouraged to compare the jurisdiction of BiH with those of Croatia and Serbia.
- Participants should be referred to the case study and asked to act as though it were being prosecuted in BiH, whether before the state court or entity level courts, to determine which crimes they would be permitted to charge under their national law. For example, participants could be asked to consider how they would charge the inhumane treatment of the persons detained in the case study in light of the BiH case law, which is referred to below.

Each of the individual war crimes will now be considered. The elements of each of these offences as set out below have to be proved in addition to the common elements set out above.

These crimes are:

- Killings;
- Torture;
- Inhuman (cruel) treatment;
- Causing immense suffering or serious violation of bodily integrity or health;
- Destruction of cultural, historical and religious monuments;
- Attack on civilian population, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damaging of people's health;
- Rape and sexual violence;
- Taking of hostages;
- Pillaging;
- Unlawful detention;
- Forcible labour;
- Destruction of objects indispensable for the survival of the civilian population;
- Unlawful detention of civilians; and
- Application of means of intimidation and terror.

### 8.8.2.1. KILLINGS

The act of wilful killing as a war crime is punishable under Article 173(I)(c) of the BiH Criminal Code and Article 142 (I) of the SFRY Criminal Code. It requires proof of the:

- Death of the victim<sup>311</sup>; and
- Intent of the perpetrator to kill the victim.<sup>312</sup>

*The Court of BiH has considered that torture is prohibited by treaty and international customary law.*

Proving death for crimes committed during armed conflict may be difficult, depending on the available evidence. In order to establish the death of the victims, the Court of BiH admits and assesses evidence both individually and cumulatively. Such evidence includes, for instance:<sup>313</sup>

- the death certificate of the victim;
- exhumation reports;
- autopsy reports;
- DNA analysis reports;
- corpse admission sheets issued by the cemetery;
- certificates of the transportation of the body;
- permits to bury;
- official notes of the public security service;
- witness testimony; or
- the accused's confession.

*In order to prove the death of a victim, the Court of BiH has relied on death certificates, exhumation reports, official records and witness testimony.*

See section 8.4.1.2.1 for a discussion of how this can be proven in international courts.

There is limited jurisprudence on the *mens rea* for wilful killings. The Court of BiH has based its conclusions on an assessment of the accused's acts at the critical moment of the commission of the killing and other evidence presented about the killing.<sup>314</sup>

For example, in *Ramić*, the trial chamber concluded that:

[The Accused] ordered the captured civilians to line up against the wall of the house. [...] The Accused called one civilian to step out, which he did. Then,

<sup>311</sup> *Škrobić*, 1st inst., p. 3 (p. 4 BCS); *Sipić*, 1st inst., p. 4 (p. 4 BCS); *Ramić*, 1st inst., pp. 7 (p. 6 BCS); *Sakić*, 1st inst., p. 18 (p. 17 BCS).

<sup>312</sup> Commentary on the BiH CC, p. 573.

<sup>313</sup> *Škrobić*, 1st inst., pp. 3, 4 (p. 4 BCS); *Sipić*, 1st inst., pp. 4, 11, 12 (pp. 4, 10, 11 BCS); *Ramić*, 1st inst., pp. 7, 24 (pp. 6, 21 BCS); *Sakić*, 1st inst., p. 18 (p. 17 BCS); *Palija*, 1st inst., p. 6 (p. 6 BCS); see also SC of RS, Case No. 118-0-Kz-07-000 020, 15 March 2007, p. 6 BCS.

<sup>314</sup> See, e.g., *Ramić*, 2nd inst., p. 5 (p. 5 BCS); *Škrobić*, 1st inst., pp. 2, 24 (pp. 2, 28 BCS); *Sipić*, 1st inst., pp. 2, 10-11 (pp. 3, 9-10 BCS); *Andrun*, 2nd inst., p. 23 (p. 23 BCS); *Sakić*, 1st inst., p. 19 (p. 17 BCS); see also SC of RS, Case No. 118-0-Kz-K-06-000-006, p. 2.

without any legally justified reason, after he had not received the requested answer, the Accused fired in the civilian's chest from a short distance. Therefore, it is beyond doubt that by this act the Accused wanted to kill the person.<sup>315</sup>

#### 8.8.2.2. TORTURE

Torture as a war crime is criminalised in Article 173(I)(c) of the BiH Criminal Code.

The Court of BiH has considered that torture is prohibited by treaty and international customary law. The prohibition is a norm of *jus cogens* and thus it enjoys a higher position in the hierarchy than treaty law or national law.<sup>316</sup>

In accordance with the ICTY in the *Kunarac*<sup>317</sup> and *Furundžija*<sup>318</sup> cases, the Court of BiH has acknowledged that under IHL, the war crime of torture includes the following elements:<sup>319</sup>

- The infliction by act or omission of severe pain or suffering, whether physical or mental;
- The act or omission must be intentional; and
- The act or omission must be aimed at obtaining information or a confession, or at punishing, intimidating or punishing the victim or a third person, or at discriminating, on any ground, against a victim or third person.

Infliction of pain or suffering can be inferred from the nature of the actions or methods used by the accused (*e.g.* beatings) as well as from the duration of these acts.<sup>320</sup>

<sup>315</sup> *Ramić*, 1st inst., p. 26 (p. 23 BCS).

<sup>316</sup> *Damjanović et al.*, 1st inst., p. 15 (p. 15 BCS).

<sup>317</sup> *Ibid.* referring to *Kunarac et al.*, AJ ¶ 142 including the ICTY's interpretation of the Universal Declaration of Human Rights of 1948, Convention against Torture and other Cruel, Inhumane and Degrading Treatment or Punishment of 1984, European Convention for the Protection of Human Rights and Fundamental Freedoms from 1950 in the *Kunarac case*; see also *Sakić*, 1st inst., p. 16 (pp. 14-15 BCS).

<sup>318</sup> *Andrun*, 2nd inst., pp. 26-27 (pp. 26-27 BCS) referring to *Furundžija*, AJ ¶ 111.

<sup>319</sup> It should be noted however that the Court in *Andrun*, 2nd inst., pp. 26-27 (pp. 26-27 BCS), unlike in *Damjanović*, 1st inst., p. 15 (p. 15 BCS), relying on *Kunarac* and *Sakić*, 1st inst., p. 16 (pp. 14-15), (also relying on *Kunarac*), relied on the findings in *Furundžija* where an additional element was discussed, namely that at least one of the persons involved in the torture must be a public official or must act in a non-private capacity, *e.g.* as a *de facto* organ of a State or any other authority-wielding entity. It should also be noted in relation to this element considered in *Andrun*, that the ICTY appeals chamber in *Kvočka* held the following: "The Appeals Chamber will next consider whether or not the Trial Chamber committed an error of law in not requiring that the crime of torture be committed by a public official or, in the case of a plurality of perpetrators, that at least one of the persons involved in the torture process be a public official. This question was resolved by the Appeals Chamber in the *Kunarac* Appeal Judgement. In that case, the Appeals Chamber concluded that the *Kunarac* Trial Chamber was correct to take the position that the public official requirement was not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention. The Appeals Chamber in the present case reaffirms that conclusion. As a result, the Appeals Chamber finds that *Kvočka's* argument that he could not be found guilty of torture for acts perpetrated by *Žigić* and *Knežević* on the ground that they were not public officials is bound to fail, regardless of the precise status of these two individuals. This sub-ground of appeal is rejected". (*Kvočka* AJ ¶ 284, footnotes omitted). For a related 2nd inst., case from the RS, without discussion of the elements of torture, see SC of RS, Case No. 118-0-Kzz-06-000 191, 7 Nov. 2006, pp. 5-6.

The subjective element requires that the act or omission is intentional. The Court of BiH assesses evidence in relation to the circumstances and behaviour of the accused in order to determine whether he was aware of the act of torture and whether he intended it to take place.<sup>321</sup>

The third element requires that the act or omission must be done with a particular subjective intent: that is, it must be aimed at obtaining information or a confession, or at punishing, intimidating or punishing the victim or a third person, or at discriminating, on any ground, against a victim or third person. This intent can be established through direct or circumstantial evidence.

For example in *Damjanović*, the Court of BiH held that the way the accused treated the prisoners demonstrated that perpetrators knew that the Bosniak prisoners were members of an ethnic group they considered obviously less worthy. Therefore, the court found that the discriminatory intent of the accused in relation to the prisoners against whom they committed these acts was clear.<sup>322</sup>

*Infliction of pain or suffering can be inferred from the nature of the actions or methods used by the accused as well as from the duration of these acts.*

### 8.8.2.3. INHUMAN (CRUEL) TREATMENT

In the *Kurtović* case, the trial panel noted that the term “inhuman treatment” focuses on the importance of ensuring humane treatment. The panel defined “inhuman treatment” as all conduct that is not encompassed by such treatment.<sup>323</sup> The court thus employed a negative definition of “inhuman treatment”.

Because of this negative definition, the various physical acts that are subsumed by the term are not specifically identified. The approach of the Court of BiH, in the jurisprudence of the *Kurtović* and *Andrun* cases, is described below.<sup>324</sup>

#### 8.8.2.3.1. THE KURTOVIĆ CASE

In the *Kurtović* case, the trial panel referred to different legal authorities for the purpose of finding a clear definition.<sup>325</sup> Based on the approach taken by the ICTY, the ECHR and HRC,<sup>326</sup> the Court of BiH held that inhuman treatment is:

- an intentional act or omission;
- committed against a protected person; that

<sup>320</sup> *Damjanović et al.*, 1st inst., p. 16 (16 BCS); see also *Andrun*, 2nd inst., pp. 27, 29-30 (pp. 27, 29-30 BCS); *Sakić*, 1st inst., p. 16 (pp. 14-15 BCS).

<sup>321</sup> *Damjanović et al.*, 1st inst., p. 16 (p. 16 BCS); see also *Sakić*, 1st inst., pp. 16-17 (p. 15 BCS).

<sup>322</sup> *Damjanović et al.*, 1st inst., p. 16 (p. 16 BCS); *Andrun*, 2nd inst., pp. 34-35 (pp. 34-35 BCS); *Sakić*, 1st inst., p. 17 (pp. 16-17 BCS).

<sup>323</sup> *Kurtović*, 1st inst., p. 31 (p. 31 BCS); *Vrdoljak*, 1st inst., p. 20 (p. 17 BCS).

<sup>324</sup> For a related 2nd inst., case from the RS, without discussion of the elements of inhuman treatment, see SC of RS, Case No. 118-0-Kzz-06-000 191, 7 Nov. 2006, p. 6.

<sup>325</sup> *Kurtović*, 1st inst., pp. 31-35 (pp. 31-35 BCS); *Vrdoljak*, 1st inst., pp. 19-21 (pp. 18-20 BCS).

<sup>326</sup> *Kurtović*, 1st inst., pp. 33-35 (pp. 32-35 BCS).

- causes serious mental harm, physical suffering, injury or
- constitutes a serious attack on human dignity.<sup>327</sup>

The Court of BiH noted some examples of acts that constitute inhuman treatment:<sup>328</sup>

- Interrogation techniques involving:
  - standing against the wall in “stress-positions”;
  - subjection to noise; or
  - deprivation of sleep and food.
- Inhuman (cruel) nature of detention, such as:
  - standing blindfolded for extensive period of time;
  - sitting motionless for several days;
  - solitary confinement for one year without any correspondence; or
  - confinement in a small, crowded cell.
- Causing serious physical, mental or moral suffering, by means such as:
  - beatings;
  - suffering by using electric shock device on prisoners;
  - causing pain;
  - causing burns;
  - causing convulsions, twitching and scaring;
  - frightening victims; or
  - reducing victims to begging for mercy.

The Court of BiH stressed, however, that when determining whether or not a particular act would qualify as inhuman (cruel) treatment, all factual circumstances must be taken into account, including:<sup>329</sup>

- the nature of the act or omission;
- the context in which it occurs;
- its duration and/or repetition;
- the physical, mental and the moral effects of the act on the victim; and
- the personal circumstances of the victim, including age, sex and health.

The Court of BiH elaborated upon the definition of “serious bodily or mental harm”. The court stated that “serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life”.<sup>330</sup>

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<sup>327</sup> For an overview of all considerations that the trial panel took into consideration in this particular case, see the section on the adopted authorities on pp. 31-35 (pp. 31-35 BCS) in *Kurtović*, 1st inst., pp. 31-35 (pp. 31-35 BCS).

<sup>328</sup> *Kurtović*, 1st inst., pp. 32-35 (pp. 31-34 BCS).

<sup>329</sup> *Ibid.* at p. 34 (p. 34 BCS) (the court relied on the ICTY in *Krnjelac* and *Krstić*).

<sup>330</sup> *Ibid.* at p. 34 (p. 34 BCS) (in accordance with the ICTY’s findings in *Krstić*).

#### 8.8.2.3.2. THE *ANDRUN* CASE

In the *Andrun* case, the appellate panel of the Court of BiH considered, *inter alia*, Article 2(b) of the ICTY Statute, ICTY jurisprudence, Article 7(k) of the Rome Statute, the Geneva Conventions and the ECHR, in order to define the offence of “inhuman treatment”. The court concluded that the definition of inhumane treatment “is both precise and flexible. Flexibility is necessary here given that it is not possible to anticipate all ways of inflicting pain and suffering that will be used by torturers”.<sup>331</sup>

The court concluded that a number of acts constitute inhumane treatment, including:

- attacks on civilians, populated areas, individual civilians or those placed *hors de combat*;
- indiscriminate attacks inflicting injuries upon civilians, that constitute the gravest violation of human rights and freedoms; and
- attacks on civilians during war, armed conflict or occupation thereby violating the rules of international law.<sup>332</sup>

The Court of BiH has found that the following elements are required to establish the subjective intent for inhuman treatment:

- the accused must be aware of his own actions;<sup>333</sup>
- the accused must desire to commit the actions;<sup>334</sup> and
- the accused’s intent must be aimed at diminishing the human dignity of the victims;<sup>335</sup> discriminating against the victims, collecting information or punishing the victims.<sup>336</sup>

#### 8.8.2.4. CAUSING IMMENSE SUFFERING OR VIOLATION OF BODILY INTEGRITY OR HEALTH

Causing immense suffering or violation of bodily integrity as a war crime is criminalised under Article 173(l)(c) of the BiH Criminal Code.

The Court of BiH trial panel in *Ramić* found that wounding civilians by shooting at them constituted a violation of Article 173(l)(c), in conjunction with Article 3(1) of the Geneva Conventions.<sup>337</sup>

The Court of BiH held that the required subjective intent could be inferred from evidence. In this case the court concluded that the accused acted with direct intent.<sup>338</sup>

<sup>331</sup> *Andrun*, 2nd inst., p. 37 (p. 38 BCS).

<sup>332</sup> *Ibid.* at p. 38 (p. 39 BCS).

<sup>333</sup> *Vrdoljak*, 1st inst., p. 32 (pp. 27-28 BCS); *Sakić*, 1st inst., p. 15 (p. 13 BCS).

<sup>334</sup> *Vrdoljak*, 1st inst., p. 32 (pp. 27-28 BCS); *Sakić*, 1st inst., p. 15 (p. 13 BCS).

<sup>335</sup> *Vrdoljak*, 1st inst., p. 32 (pp. 27-28 BCS).

<sup>336</sup> *Andrun*, 2nd inst., p. 38 (p. 40 BCS).

<sup>337</sup> *Ramić*, 1st inst., p. 25 (p. 22 BCS).

<sup>338</sup> *Ibid.*

### 8.8.2.5. DESTRUCTION OF CULTURAL, HISTORICAL AND RELIGIOUS MONUMENTS

Under the BiH Criminal Code, there are two criminal offences prohibiting destruction of cultural, religious, historical and similar institutions as war crimes:

- Article 179(2)(d): Violating the Laws and Practices of Warfare; and
- Article 183(1): Destruction of Cultural, Historical and Religious Monuments.

In the *Kurtović* case, the Court of BiH considered Article 56 of the Hague Convention on the Laws and Customs of War on Land (Hague Convention IV) of 1907, which the International Military Court of Nuremberg found to constitute part of customary international law.<sup>339</sup>

There is a difference in gravity between Articles 179 and 183. This is reflected in the length of the prescribed sentence (ten years to long-term imprisonment for Article 179, one to ten years imprisonment for Article 183(1)).<sup>340</sup> As discussed below, this distinction is important when the court assesses the application of a more lenient law under Article 4(2) of the BiH Criminal Code (see Module 5 for a more in depth discussion of this).

In the *Kurtović* case, the appellate panel of the Court of BiH had to decide whether the correct Article (179 or 183) was applied by the trial panel. The appellate panel found that the trial panel erred in applying Article 179 because the acts of the perpetrator were not serious enough to amount to a violation of the laws and practices of warfare:

The Appellate Panel notes that the criminal offence under Article 179 of the BiH CC includes criminal acts of considerable criminal quantity, placing on the same level acts such as use of poison gasses, ruthless demolition of cities, settlements and villages, [...] unlike the criminal offence under Article 183 (I) of the BiH CC which incriminates *only* the destruction of cultural, historical and religious monuments[...].<sup>341</sup>

The appellate panel also examined the appellant's objection concerning the application of a more lenient law, the SFRY Criminal Code. It concluded that although Article 151(I) of the SFRY Criminal Code does not explicitly protect religious facilities and their property, this article was a blanket norm which invoked provisions of international law. The appellate panel found that at the time of the commission of the act the provisions of The Hague Convention and Additional Protocol II to the Geneva Conventions were binding and both provided for the protection of, *inter alia*, religious objects. After comparing the sentences included in the provisions, the appellate panel re-qualified the acts as violations of Article 151(I) of the SFRY Criminal Code.<sup>342</sup>

<sup>339</sup> *Kurtović*, 2nd inst., ¶ 124.

<sup>340</sup> *Ibid.* at ¶ 106.

<sup>341</sup> *Ibid.*

<sup>342</sup> *Ibid.* at ¶¶ 97-134.

### 8.8.2.6. AN ATTACK ON CIVILIAN POPULATION, SETTLEMENT, INDIVIDUAL CIVILIANS OR PERSONS UNABLE TO FIGHT, WHICH RESULTS IN THE DEATH, GRAVE BODILY INJURIES OR SERIOUS DAMAGING OF PEOPLE'S HEALTH

Attacking civilian persons or objects resulting in death, grave bodily injury or serious damage to health as a war crime is criminalised under Article 173(I)(a) of the BiH Criminal Code.

In the *Đukić* case, the accused was charged with a violation of Article 173 (I)(a) of the BiH Criminal Code.<sup>343</sup>

The Court of BiH noted that the prohibition of attacks against civilians represented a rule of customary international law applicable to both international and non-international conflicts.<sup>344</sup>

The criminal offence of attacking civilians embodies the fundamental principle of international humanitarian law: the principle of distinction.<sup>345</sup> According to this principle, the warring parties have the obligation, at all times, to distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly must direct their operations only against military objectives. The aim of this principle, the Court of BiH held, is to protect the civilian population and civilian objects.<sup>346</sup>

*Warring parties have the obligation, at all times, to distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly must direct their operations only against military objectives.*

The elements of an attack against civilians are the following:<sup>347</sup>

- there needs to be an attack;
- against a civilian population; and
- the perpetrator must have acted with direct intent or with indirect intent (recklessness).

As held by the Court of BiH, Article 173(1)(a) of the CC of BiH requires that there be an “attack”, which is defined in Article 49 of Protocol I as “acts of violence against the adversary, whether in offence or in defense”.<sup>348</sup>

As far as *mens rea* for attacks against civilians is concerned, the Court of BiH held that the perpetrator must conduct the attack “wilfully”, which can also include recklessness, but cannot be committed with mere negligence.<sup>349</sup> Therefore, the perpetrator must have conducted the

<sup>343</sup> Court of BiH, Novak Đukić, Case No. X-KR-07/394, 1st Instance Verdict, 12 June 2009 (published on 14 September 2009) (upheld in appeal).

<sup>344</sup> *Ibid.* at ¶ 159.

<sup>345</sup> *Ibid.* at ¶ 182, referring to *Kordić and Čerkez*, AJ ¶ 54.

<sup>346</sup> *Đukić*, 1st inst., at ¶ 182.

<sup>347</sup> *Ibid.* at ¶ 183.

<sup>348</sup> *Ibid.* at ¶ 184.

<sup>349</sup> *Ibid.* at ¶ 189, referring to *Galić*, TJ ¶ 54.

attack either with the direct intent that the civilians or civilian population be hurt or by knowingly taking the risk that this would be a consequence of his act.<sup>350</sup>

#### 8.8.2.7. RAPE AND SEXUAL VIOLENCE

Rape as a war crime is criminalised under Article 173(1)(e) of the BiH Criminal Code as a war crime against civilians. It is not included in Article 175 as a war crime against POWs.

In the *Pinčić* case, the Court of BiH observed that although rape is prohibited under customary international law, there is no clear definition of rape in either international humanitarian or human rights law.<sup>351</sup> Based on a survey of various legal systems, the Court of BiH established that the definition of rape is:<sup>352</sup>

- The sexual penetration, regardless of how insignificant it may be, of:
  - The vagina or anus of the victim
    - by the penis of the perpetrator or
    - by any other object used by the perpetrator;
  - The mouth of the victim by penis of the perpetrator;
- With use of:
  - Coercion;
  - Force; or
  - With the threat of force;
- Against
  - The victim; or
  - A third person.

The Court of BiH further held that international law prohibits not only rape, but also any serious sexual assault that does not include actual penetration. All serious abuses of a sexual nature carried out against the bodily or moral integrity of a person through coercion, threat or intimidation in the manner that is degrading and humiliating for the victim's dignity are prohibited under international law. Since both rape and other sexual abuse are prohibited under international law, the difference between them is significant primarily for sentencing.<sup>353</sup>

The subjective element of this offence requires intent. In the *Pinčić* case, the court held that the accused was aware of the act and wanted to commit it.<sup>354</sup>

The Court of BiH has held that, like torture, rape is

*All serious abuses of a sexual nature carried out against the bodily or moral integrity of a person through coercion, threat or intimidation in the manner that is degrading and humiliating for the victim's dignity are prohibited.*

<sup>350</sup> *Dukić*, 1st inst., ¶ 189.

<sup>351</sup> *Pinčić*, 1st inst., pp. 29-30 (pp. 27-28 BCS).

<sup>352</sup> *Ibid.* at p. 31 (p. 29 BCS); see also Module 7.

<sup>353</sup> *Pinčić*, 1st inst., p. 32 (p. 30 BCS).

<sup>354</sup> *Ibid.* at p.28 (p. 26 BCS).

aimed at:<sup>355</sup>

- Degradation;
- Humiliation;
- Intimidation;
- Discrimination;
- Punishment; or
- Control over or destruction of a person.

In the *Pinčić* case, the Court of BiH found that the accused acted with direct intent aimed at violating personal dignity of the victim and committed the crime by particularly insulting and humiliating actions.<sup>356</sup> To establish that the accused committed the rape with a discriminatory intent, the Court of BiH held:

He knew that the witness “A” was of Serb ethnicity, with no male protection, alone with her bed-ridden mother, and he treated her accordingly. Therefore, the discriminatory intent of the accused is clearly visible with regard to the injured party against whom he committed these atrocities.<sup>357</sup>

The Court of BiH concluded that:

[B]ased on the testimonies it is clear that the victim of the critical events is a woman of Serb ethnicity and that due to her ethnicity and nationality she was exposed, namely by the use of threat of attack on her body and the bodies of other women and children who were captured in that house together with her, coercing her on several occasions to sexual intercourse while he was holding his rifle by the bed on each occasion, it clearly stems that taking the injured party, the witness “A”, into another room in the house, while other captured women and children remained in the room, represented a discriminatory measure that was applied to the person of Serb ethnicity who was not a member of Croat ethnic group which had control over the captured women and children.<sup>358</sup>

Other forms of sexual violence are charged as underlying acts of the war crimes of torture or inhumane acts. The Commentary on the Criminal Codes of Bosnia and Herzegovina says that “any other form of sexual violence” must be of a “sexual nature”, committed against one or more persons, or that the perpetrator provoked another person or persons to engage in acts of a “sexual nature”.<sup>359</sup>

For the purpose of comparison, it should also be noted that in cases concerning crimes against humanity, the Court of BiH held that rape also constitutes torture, because rape necessarily gives rise to severe pain and suffering and that cumulative convictions based on the same conduct were permitted, providing that each of the crimes contained a distinct element

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<sup>355</sup> *Ibid.* at p. 30 (p. 28 BCS).

<sup>356</sup> *Ibid.* at p. 28 (p. 26 BCS).

<sup>357</sup> *Ibid.*

<sup>358</sup> *Ibid.* at p. 32 (p. 30 BCS).

<sup>359</sup> BiH CC Commentary, vol. 1 and 2, Sarajevo: Council of Europe) 2005, p. 567.

requiring proof of fact not required by the other (for rape – sexual penetration, and for torture – prohibited purpose).<sup>360</sup> See Module 7 (Crimes Against Humanity) for more on this.

#### 8.8.2.8. TAKING OF HOSTAGES

Taking of hostages as a war crime is criminalised under Article 173(I)(e) of the BiH Criminal Code.

The status of the victim as a hostage is an important element in this offence. Relying on the International Convention against the Taking of Hostages, the Court of BiH in the *Maktouf* case held that a hostage is:

- any person seized or detained; and
- threatened to be killed, injured or continually detained;
- by another person;
- in order to compel a third party (a state, an international or intergovernmental organization, a natural or judicial person, or a group of persons);
- to do or abstain from doing any act; and
- as an explicit or implicit condition for the release of the hostage.<sup>361</sup>

In *Maktouf*, the accused was found guilty as an accessory to this offence, not as the perpetrator. Following the finding that the accused was aware that by his conduct he was assisting the kidnappers, the Court of BiH concluded that the accused, acting with direct intent, committed this offence by aiding.<sup>362</sup>

#### 8.8.2.9. PILLAGING

Pillaging as a war crime is a criminalised under Article 173 (I)(f) of the BiH Criminal Code.

In the *Pekez (son of Špiro)* case, the appellate panel of the Court of BiH noted that although pillaging is criminalised under Article 173(1)(f) of the BiH Criminal Code, the national legislation did not concretely define the offence.<sup>363</sup> Following the case law of the ICTY, the court defined pillaging as wilful and unlawful appropriation of property affecting both public and private property.<sup>364</sup>

*Pillage is a wilful and unlawful appropriation of property affecting both public and private property.*

<sup>360</sup> Court of BiH, Lelek Željko, Case No. X-KR/06/202, 1st Instance Verdict, 23 May 2008, p. 36 (p. 42 BCS) (upheld on appeal in the relevant part, ¶¶ 70-71), referring to *Kunarac*, TJ ¶¶ 149-150; Court of BiH, *Janković Gojko*, Case No.X-KR-05/161, 1st Instance Verdict, 16 Feb. 2007, p. 53 (p. 51 BCS) (upheld on appeal in the relevant part, p. 15 (p. 14 BCS), referring to *Kunarac*, AJ ¶ 142 ); For more on this, see Module 7.

<sup>361</sup> *Maktouf*, 2nd inst., p. 10 (p. 12 BCS).

<sup>362</sup> *Ibid.* at p. 15 (pp. 18-19 BCS); see also *Maktouf*, 1st inst., 1 July 2005, p.23 (p. 25 BCS).

<sup>363</sup> *Pekez*, 2nd inst. of 5 May 2009, ¶ 124.

<sup>364</sup> *Ibid.* referring to *Naletilić*, TJ ¶ 612.

The court noted that pillaging was general in scope, comprising both large-scale seizures of property within the framework of systematic economic exploitations of occupied territory, as well as acts of appropriations committed by individual soldiers for their private gain.<sup>365</sup>

*It is not necessary that plunder concern the seizure of property of significant economic value.*

Following the case law of the ICTY, the court noted that plunder includes all forms of unlawful appropriation of property in armed conflict that is prohibited under international law, including those acts traditionally described as “pillage”.<sup>366</sup> The court established that it was not necessary that the plunder concerned the seizure of property of significant economic value.<sup>367</sup>

In this case, the appellate panel established that the value of the seized property was not large.<sup>368</sup> However, reviewing the circumstances of the case and the manner in which the offence was committed, the court found a severe violation of international law where a group of helpless civilians was forced under the threat of death and with rifles pointed at them to surrender all valuables they had with them.<sup>369</sup> The court noted that its conclusion was also supported by the ICTY in the *Jelisić* case.<sup>370</sup>

#### 8.8.2.10. UNLAWFUL DETENTION

Unlawful detention as a war crime is criminalised under Article 173(l)(e) of the BiH Criminal Code.

The Court of BiH appellate panel in the *Ante Kovač* case considered the charges against the accused concerning unlawful detention, forced labour, rape and pillaging.<sup>371</sup> The appellate panel noted that all of the acts charged could be subsumed under the concept of inhumane treatment set out in Article 3 common to the Geneva Conventions.<sup>372</sup>

The appellate panel held that unlawful detention of civilians involves conduct that:<sup>373</sup>

- is intentional and planned;
- inflicts severe mental suffering; and
- represents a serious attack on human dignity.

The deprivation must be arbitrary, meaning that there was no legal ground that would justify the deprivation of liberty.

<sup>365</sup> *Ibid.*

<sup>366</sup> *Ibid.* at ¶ 125 referring to *Blaškić*, TJ ¶ 184.

<sup>367</sup> *Ibid.* at ¶ 126.

<sup>368</sup> *Ibid.*

<sup>369</sup> *Ibid.*

<sup>370</sup> *Ibid.* at ¶ 127 and reference to Goran Jelisić, Case No. IT-95-10-T, Trial Judgement, 14 Dec. 1999 ¶ 49.

<sup>371</sup> Court of BiH, *Ante Kovač*, Case No. X-KRŽ-08/489, 2nd Instance Verdict, 12 November 2010, at ¶ 65

<sup>372</sup> *Ibid.*

<sup>373</sup> *Ibid.* at ¶ 66.

The requirements of this offence will not be met in case a person deprived of liberty is not civilian, *i.e.* if a person is a soldier and thus a legitimate military target.<sup>374</sup>

Regarding the subjective element, the Court of BiH referred to the *Čelebići* case, where the ICTY appeal chamber held that in order “to establish that an individual has *committed* the offence of unlawful confinement, something more must be proved than mere knowing ‘participation’ in a general system or operation pursuant to which civilians are confined”.<sup>375</sup>

It is required that the perpetrator:

- is the person who actually placed a person in detention without reasonable grounds to believe that such person constituted a security risk or
- has some powers over the place of detention, and accepted a person into detention without knowing that such grounds existed; or
- has power or authority to release detainees, but fails to do so despite knowledge that no reasonable grounds for their detention existed.<sup>376</sup>

In the case against *Sakić*, the offence was interpreted in conjunction with Common Article 3 (I).

In line with the case law of the ICTY, the Court of BiH trial panel in *Sakić* identified the objective elements of unlawful detention:

- a person must be deprived of liberty;
- the deprivation must be arbitrary, meaning that there was no legal ground that would justify the deprivation of liberty; and
- the act or omission by which the person was deprived of liberty was committed by the accused or persons under his responsibility.<sup>377</sup>

The Court of BiH identified the subjective element of unlawful detention:

- the accused intended to commit the act or omission that deprived the person of his/her physical liberty; or
- the accused was reasonably aware that his/her act or omission might cause arbitrary deprivation of physical liberty.<sup>378</sup>

#### 8.8.2.11. FORCED LABOUR

Forced labour as a war crime is criminalised under Article 173(I)(f) of the BiH Criminal Code.

The appellate panel in the *Ante Kovač* case held that for the existence of this offence it is required that an element of coercion is proven in the conduct of the perpetrator.<sup>379</sup>

<sup>374</sup> *Ibid.* at ¶ 172.

<sup>375</sup> *Ibid.* at ¶ 111, referring to *Čelebići*, AJ at ¶ 342.

<sup>376</sup> *Ibid.*

<sup>377</sup> *Sakić*, 1st inst., p. 13 (p. 12 BCS).

<sup>378</sup> *Ibid.* at p. 13 (p. 12 BCS).

Relying on ICTY jurisprudence, the appellate panel held that forced labour was not always prohibited.<sup>380</sup> For example, the appellate panel noted that in the *Blaškić* case, the ICTY appeals chamber held that the occupying power may compel protected persons to work in certain circumstances if they are over eighteen years of age. However, that work may not involve forcing them to take part in military operations and/or lead to a mobilization of workers in an organization of a military or semi-military character.<sup>381</sup>

In order to establish whether such forced labour was unlawful, it is necessary to establish whether such labour has a character of “cruel treatment”.<sup>382</sup>

In that sense, the appellate panel noted that the *Blaškić* appeal chamber found that “the use of persons taking no active part in hostilities to prepare military fortifications [...] represents a serious attack on human dignity” and that “any order to compel protected persons to dig trenches or to prepare other forms of military installations, in particular when such persons are ordered to do so against their own forces in an armed conflict, constitutes cruel treatment”.<sup>383</sup>

Based on the presented evidence, the appellate panel in *Kovač* held that the detainees had been taken to perform unlawful forced labour and found the accused guilty under article 173(1)(f) of the BiH Criminal Code.<sup>384</sup>

In *Sakić*, the Court of BiH held that the subjective element of forced labour was that the accused must intend that the victims perform forced labour.<sup>385</sup>

#### 8.8.2.12. DESTRUCTION OF OBJECTS INDISPENSABLE FOR THE SURVIVAL OF THE CIVILIAN POPULATION

Destruction of objects indispensable for the survival of the civilian population is criminalised under Article 173(l)(f) of the BiH Criminal Code.

In the *Ljubičić* case, the Court of BiH noted that Article 14 of the Additional Protocol II prohibits attacking, destroying, removing or rendering useless objects indispensable for the survival of the civilian population, including:

- food-stuffs;
- agricultural areas for the production of food-stuffs;
- crops;
- livestock; and
- drinking water installations and supplies and irrigation works.<sup>386</sup>

<sup>379</sup> *Kovač*, 2nd inst., ¶ 148.

<sup>380</sup> *Ibid.* at ¶ 149, referring to *Simić*, TJ ¶ 88.

<sup>381</sup> *Kovač*, 2nd inst., at ¶ 149.

<sup>382</sup> *Kovač*, 2nd inst., at ¶ 149, referring to *Blaškić*, AJ ¶ 595 and *Čelebići*, AJ ¶¶ 424-426.

<sup>383</sup> *Kovač*, 2nd inst., at ¶ 149.

<sup>384</sup> *Kovač*, 2nd inst., at ¶¶ 151-168.

<sup>385</sup> *Sakić*, 1st inst., p. 20 (p. 18 BCS).

The objects listed are not exclusive. The court has also held that civilian houses fall under the protection of this article.<sup>387</sup>

#### 8.8.2.13. APPLICATION OF MEASURES OF INTIMIDATION AND TERROR

Application of measures of intimidation and terror as a war crime is criminalised under Article 142(I) of the SFRY Criminal Code.

In the *Mišković* case, the Cantonal Court in Sarajevo found the accused guilty of this war crime, where the accused opened an involuntary burst of fire and banged on the door heavily and occasionally pointed a weapon at the victims.<sup>388</sup>

On appeal, the Supreme Court FBiH ruled that the first instance court erred in law in finding the accused's actions amounted to war crimes against civilians.<sup>389</sup> The Supreme Court FBiH noted that Article 142(1) of the SFRY Criminal Code criminalised "application" of measures of intimidation and terror as opposed to merely undertaking certain activities which caused fear to certain persons.<sup>390</sup> The Supreme Court FBiH stressed the difference between facts that demonstrate that the accused "applied" such measures and those facts that only show that the accused's actions caused fear to certain civilians.<sup>391</sup>

*Each individual action causing fear to the civilian population must be undertaken in a "thought-out" manner in order to cause a feeling of fear, insecurity and humiliation within the civilian population.*

The Supreme Court FBiH held that it was necessary to establish that each individual action of causing fear to the civilian population was undertaken in a "thought-out" manner, committed in order to cause feelings of fear, insecurity and humiliation within the civilian population, and that every action was carried out in the context of a conscious application of measures of fear and terror over the civilian population.<sup>392</sup>

The Supreme Court FBiH concluded that in this case the facts and circumstances did not prove that the accused undertook those actions in the required manner, nor did the facts or circumstances demonstrate that the actions were undertaken as part of an application of "thought-out" measures of intimidation and terror.<sup>393</sup>

<sup>386</sup> Court of BiH, Paško Ljubičić, Case No. X-KR-06/241, 1st Instance Verdict, 29 April 2008, pp. 14-15 (p. 12-13 BCS) (final verdict).

<sup>387</sup> *Ibid.*

<sup>388</sup> SC of FFBiH, Mišković, Case No. 070-0-Kz-07-000225, 02 Aug. 2007, pp. 7-8 BCS.

<sup>389</sup> *Ibid.*

<sup>390</sup> *Ibid.* at p. 8 BCS.

<sup>391</sup> *Ibid.*

<sup>392</sup> *Ibid.*

<sup>393</sup> *Ibid.*

## 8.9. CROATIA

### *Notes for trainers:*

- This section focuses on Croatian law for war crimes as well as case law from Croatian courts.
- It will be useful for participants to compare the law and jurisprudence of Croatia with the jurisprudence of ICTY and the provisions in the ICC Rome Statute.
- This section is structured in the same way as the previous section on war crimes under international law.
  - It will firstly address the elements that are common to all war crimes in Croatia.
  - Thereafter it will focus on each individual war crime for which there is relevant jurisprudence.
- It is important for participants to understand the difference between the common elements (often referred to as the *chapeau* requirements) and the specific elements that are required to prove the individual war crimes.
- Some questions which could be asked to stimulate discussion on the topics considered would be:
  - Is it necessary to prove an international armed conflict as a common element for war crimes under Croatian law?
  - To what extent can the court take “judicial notice” of the existence of armed conflict and any of the other common elements for war crimes?
  - What is the significance of the violations of prohibitions under Common Article 3 of the Geneva Conventions in the law of Croatia?
  - What distinction has the court drawn between prisoners of war and civilians?

While the text of these provisions is not provided here, relevant and available case law demonstrating the application of these principles by the Croatian courts is included below.

The courts in the Republic of Croatia try war crimes on the basis of the OKZ RH, the criminal code that was in force at the relevant time. In the OKZ RH, the articles regarding criminal acts against humanity and international law, including the war crimes, were taken over from and are identical to the SFRY Criminal Code, although the numbering of the articles does not correspond to those of the SFRY Criminal Code.<sup>394</sup> See Module 5 for more information on the temporal applicability of laws.

<sup>394</sup> *E.g.* The war crimes against civilians are included in Article 120 of the OKZ RH while the war crimes against civilians were included in Article 142 of the SFRY CC.

The box below includes the 1998 Croatian Criminal Code provision on war crimes. For the text of OKZ RH Article 120, usually applied by Croatian courts in war crimes cases, see section 8.7 and the text of the SFRY Criminal Code Article 142, which is identical except with regard to provisions on punishment.

Relevant provisions from the Croatian Criminal Code– Chapter XIII – Criminal Offences against Values Protected by International Law<sup>395</sup> include:

- Articles 18 and 24: No statute of limitations for war crimes;
- Article 158: War crimes against the civilian population;
- Article 159: War crimes against the wounded and sick;
- Article 160: War crimes against prisoners of war;
- Article 161: Unlawful killing and wounding of the enemy;
- Article 162: Marauding killed or wounded on the battlefield;
- Article 163: Forbidden means of warfare;
- Article 164: Violating provisions relating to an intermediary;
- Article 165: Brutal treatment of the wounded, sick and prisoners of war;
- Article 166: Unjustified delay of repatriation of prisoners of war;
- Article 167: Destruction of cultural objects or of facilities containing cultural objects;
- Article 167(a): Command responsibility;
- Article 167(b): Recruiting mercenaries;
- Article 168: Misuse of international symbols;
- Article 187: Association for the purpose of committing criminal offences against the values protected by international law;
- Article 187(a): Preparation of criminal acts against values protected by international law;
- Article 187(b): Subsequent assistance to the perpetrator of a criminal offence against values protected by international law; and
- Article 157: War of aggression.

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<sup>395</sup> Croatia CC, NN (Official Gazette) No. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 71/06, 110/07, 152/08, consolidated version, available at [www.legalis.hr](http://www.legalis.hr) (1998 Croatian Criminal Code).

**1998 Croatian Criminal Code, Article 158: War crimes against the civilian population**

- (1) Whoever violates the rules of international law in time of war, armed conflict or occupation and orders an attack against the civilian population, settlements, individual civilians or those hors de combat resulting in death, severe bodily harm or serious damage to people's health, orders an indiscriminate attack harming the civilian population, orders the killing, torturing or inhuman treatment of civilians, orders civilians to be subjected to biological, medical or other scientific experiments, their tissues or organs taken for transplantation, orders civilians to be subjected to great suffering impairing the integrity of their bodies or health, or orders their resettlement, displacement or forceful loss of ethnic identity or conversion to another religion, orders rape, sexual oppression, forced prostitution, pregnancy or sterilization or other sexual abuse, orders measures of intimidation or terror, hostage taking, collective punishment, unlawful deportations to concentration camps or illegal detention, deprives people of the rights to a just and unbiased trial, forces them to serve in hostile armed forces or in the information services or administration of a hostile power, subjects them to forced labor, starvation, confiscates property or orders that the population's property be plundered or illegally and wantonly destroyed or its large-scale appropriation where there is no justification by military needs, or imposes illegal and disproportionately large contributions and requisitions, or decreases the value of the domestic currency or unlawfully issues it, or orders an attack against persons, equipment, materials, units or vehicles involved in humanitarian aid or a peace mission pursuant to the Charter of the United Nations, or orders that the rights and actions of the citizens of a hostile country be prohibited, suspended or pronounced unlawful in court proceedings, or injures personal dignity or orders civilians and other protected persons to be used to shield certain places, areas or military forces from military operations, or orders the recruitment of children under fifteen years of age for the national armed forces or their active participation in hostilities, or whoever commits any of the foregoing acts shall be punished by imprisonment for not less than five years or by long-term imprisonment.
- (2) The same punishment as referred to in paragraph 1 of this Article shall be imposed on whoever violates the rules of international law in time of war, armed conflict or occupation by ordering an attack against objects protected by international law, against works or powerful installations such as dams, dykes and nuclear power plants, indiscriminate attacks against civilian objects protected by international law, against undefended places and demilitarized zones or orders an attack which results in an extensive and long-lasting damage to the environment and may impair the population's health or survival, or whoever commits any of the foregoing acts.
- (3) Whoever, as an occupying power, violates the rules of international law, in time of war, armed conflict or occupation, orders or carries out the resettlement of parts of the civilian population of the occupying power to an occupied territory shall be punished by imprisonment for not less than five years.

**SFRY CC, Article 142/OKZ RH Article 120: War crimes against the civilian population**

This article sets out punishment for war crime against the civilian population:

- (1) Whoever, in violation of rules of international law effective at the time of war, armed conflict or occupation, orders an attack on civilian population, settlement individual civilians or persons incapable to fight, resulting in death serious bodily injury or serious disturbance of health; attack without selecting a target by which civilian population is harmed; that civilian population be subject to killings, torture, inhuman treatment, biological, medical or other scientific experiments, taking tissues or organs for transplantation; immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy's army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.
- (2) Whoever, in violation of rules of international law effective at the time of war, armed conflict or occupation, orders: an attack to be conducted on facilities under a special protection by international law and facilities and installations with dangerous force such as dams, levees and nuclear power stations; wanton destruction of civilian facilities under a special protection by international law, undefended places and demilitarized zones; long-term and wide-range damage of the natural environment that can be harmful to health or survival of population; or whoever commits some of the aforementioned acts, shall be punished by sentence from paragraph 1.
- (3) Whoever, in violation of the rules of international law effective at the time of war, armed conflict or occupation, as an occupier, orders or commits dislocation of part of its civilian population to the occupied territory, shall be punished by imprisonment for not less than five years.

### 8.9.1. ELEMENTS COMMON TO ALL WAR CRIMES

#### *Notes for trainers:*

- This section sets out the elements that are common to all war crimes under Croatian law.
- In order to stimulate discussion on these elements, the participants could be asked to imagine that the crimes alleged in the case study took place in Croatia in 2005. Could they qualify as war crimes? For what reasons?
- In particular, participants should consider whether the Croatian courts would consider the armed conflict to be international, internal, or would the distinction be irrelevant?
- Participants should also consider, on the basis of the facts of the case study, what position the Croatian courts would take on the date of the commencement of an armed conflict.
- The dates of the commencement of the conflict in Croatia have been an important issue before the courts, and the relevant jurisprudence related to this matter has been discussed below, including the date the courts have determined as the starting point of the conflict.

Considering that the provisions of the OKZ RH regarding war crimes are derived from the SFRY Criminal Code, the following are to be considered *chapeau* elements of war crimes:

- The act must be in violation of international law;
- The act must be committed during armed conflict / war or occupation;
- A nexus between the act and the armed conflict / war of occupation must exist; and
- The perpetrator must have ordered or committed the criminal offence or omitted to undertake an action he or she is bound to undertake (see Module 10 (Superior Responsibility), section 10.6).

The Croatian judiciary has not explicitly identified or defined in detail the required elements in its jurisprudence. It suffices for the relevant courts to note the factual circumstances based on the evidence to establish whether the common elements have been satisfied, with little discussion or analysis of the elements of the given crime.

Each of the common elements will be discussed in turn below.

#### 8.9.1.1. VIOLATION OF INTERNATIONAL LAW

*Without a violation of international law, offences under these articles cannot exist.*

Provided that the articles concerning war crimes refer to international provisions, they are labelled as blanket provisions. Without a violation of international law,

offences under these articles cannot exist.<sup>396</sup>

The Supreme Court has held that the OKZ RH, as is the case with the current 1998 Criminal Code, was applicable to the grave breaches of international humanitarian law as well as to all violations of the rules prohibiting war crimes under Croatian law.<sup>397</sup>

In relation to the subjective element of war crimes, it is not necessary for the accused to know which exact rule of international law he or she is violating:

- In the *Marguš et al. (Čepin)* case, the court held that it was sufficient that the perpetrator knew he was violating a norm of international law and that he was acting against civilians.<sup>398</sup>
- In the *Madi et al.* case, the Supreme Court held that it was not necessary for the accused to be aware of the content of the specific provision that was being violated, but it added that it was notorious and undoubted that killing of civilians was prohibited.<sup>399</sup>
- In the *Dalj 2* case, the court held that it was not important whether the accused knew exactly which rules of international law he was violating by his conduct. Rather, it was important that he knew that he was doing something that was forbidden.<sup>400</sup>

#### 8.9.1.1.1. PROTECTED PERSONS, PROPERTY, OBJECTS ETC.

In order to determine whether the prohibited act constituted a violation of international law, it is necessary to determine whether the person or the property has the status of protected persons or property in international law.<sup>401</sup>

In relation to the required subjective element, which requires that the accused be aware of the protected status of the object of the crime, in the *Marguš et al. (Čepin)* case the court held that it was sufficient that the perpetrator knew he was violating a norm of international law and that he was acting against civilians.<sup>402</sup>

The trial chamber in the *Mišćević (Novska)* case held that:

[The accused] knew and was aware of the fact that it concerned civilians who enjoyed protection under international conventions applicable in time of war

<sup>396</sup> SC of Croatia, Vlastimir Denčić et al. (*Dalj2*), Case No. I Kž 198/08-7, 2nd Instance Verdict, 4 Feb. 2009, pp. 4-5; *Cerna*, 2nd inst. p. 5; County Court in Osijek, Čepin, Case No. K-33/06-412, 1st Instance Verdict, 21 March 2007, p. 12.

<sup>397</sup> SC of Croatia, Borovo Selo, Case No. I KZ257/06-7, 2nd Instance Verdict, 24 May 2006, p. 7.

<sup>398</sup> *Čepin*, 1st inst., p. 12.

<sup>399</sup> *Cerna*, 2nd inst., p. 7.

<sup>400</sup> County Court of Osijek, *Dalj2*, Case No. K-48/06-52, 1st Instance Verdict, 29 Nov. 2007, p. 8.

<sup>401</sup> Civilians, POWs, real and personal property and the objects indispensable for survival of civilian population have been addressed in available jurisprudence.

<sup>402</sup> *Čepin*, 1st inst., p. 12.

and armed conflicts, yet regardless thereof he wanted the offence to be committed.<sup>403</sup>

#### 8.9.1.1.1.1. CIVILIANS

In the *Banović et al. (Petrinja II)* case, the trial chamber noted that the victims, even though members of organised armed groups, were to be considered as civilians as they were not taking part in any combat activity and were unarmed at the critical time.<sup>404</sup>

In the *Begović (Petrinja)* case, the Supreme Court ruled that even though one of the victims was killed while he was firing at barracks, he was nonetheless considered a civilian when the crime was committed, because at the time he was not acting in the capacity of a member of Croatian police or ZNG (National Guard Corps), but was a worker at a gas station in Petrinja.<sup>405</sup>

It seems that the above-mentioned jurisprudence differs from international jurisprudence on the distinction between civilians and combatants. For more on this see above, section 8.3.3. It also needs to be considered that a first instance court verdict in the *Čepin* case (upheld in the relevant part by the Supreme Court) held that “only persons not actively participating in hostilities can have the status of civilians”.<sup>406</sup>

In the *Madi et al. (Cerna)* case, the appellant argued that the acts committed were “crimes during the war” instead of “war crimes” when victims and perpetrators are of the same nationality, and therefore the Geneva Convention IV and Additional Protocol I could not apply.<sup>407</sup> The Supreme Court of Croatia rejected the argument that the victims were not protected by the Convention because they carried the same nationality as the perpetrators.<sup>408</sup> The Supreme Court held that:

*Victims can be considered civilians even though they were members of organised armed groups, if they were not taking part in any combat activity and were unarmed when the crime was committed.*

- The Convention protects civilian persons in a time of war.
- Protocol I supplements the Convention and expands the protection to international armed conflicts.
- It stems from Article 1(2) of Protocol I that the protection is expanded to cover all civilians, while its purpose is the protection of civilians during war from all prohibited means of war and treatment not covered by the existing Conventions.<sup>409</sup>

<sup>403</sup> County Court in Sisak, Novska, Case No. K22/08, 1st Instance Verdict, 24 Oct. 2008 p. 18 (unofficial translation of the quote); see also *Dalj2*, 1st inst., p. 8; *Čepin*, 1st inst., p. 12.

<sup>404</sup> *Petrinja II*, 1st inst., p. 13-14; see also *Vrhovine*, 2nd inst., p. 10 (court uses the formulation “did not form any threat at the time”); *Čepin*, 1st inst., p. 12.

<sup>405</sup> SC of Croatia, *Petrinja*, Case No I Kž-717/07-13, 2nd Instance Verdict, 5 March 2008, p. 6.

<sup>406</sup> *Čepin*, 1st inst., p. 12.

<sup>407</sup> *Cerna*, 2nd inst., p. 8.

<sup>408</sup> *Ibid.* at p. 9.

<sup>409</sup> *Ibid.*

The Supreme Court held that the enemy was not to be determined by the nationality, but by perception of the persons involved in the armed conflict and perception of the soldiers as to who was considered an enemy, respectively.<sup>410</sup> In the specific situation, the Supreme Court concluded that the perpetrators' (members of the Croatian Army) perception of the injured parties was decisive.<sup>411</sup> In other words, the perpetrators perceived the victims as enemies based on their ethnicity and not on their nationality.

#### 8.9.1.1.1.2. PRISONERS OF WAR

Prisoners of war are protected by Article 122 of the OKZ RH.

In the *Ćurčić et al. (Borovo selo)* case, the trial chamber defined the distinction between a "prisoner of war" and "civilian":

- In order to determine whether someone will have the status of prisoner of war or civilian, it is important to define an "armed uprising against the enemy" and "taking captives".
- An "armed uprising against the enemy" must be unambiguous in terms of adequate armament and identification of the enemy.
- Taking captives must follow immediately after the weapons have been laid down.
- The scale of the conflict, to what extent it has escalated, especially at the beginning where the parties are still being determined, etc., could be of importance.
- Every prisoner or group of prisoners presents an individual problem so a detailed analysis is required.<sup>412</sup>

*In order to determine whether someone will have the status of prisoner of war or civilian, it is important to define "armed uprising against the enemy" and "taking captives".*

The court found that the prisoners were civilians, and not prisoners of war, based on the following facts:

[The prisoners] were detained in Darda, Branjin Vrh and Belja. Subsequently, they spent several days in the barracks in Sombor for check-ups, to finally end up in the prison in Borovo with the other civilians, where they also were perceived as civilians. A long time passed between capture and departure to Borovo for imprisonment, due to which a clear distinction between the armed uprising against the enemy and immediate imprisonment after laying down of weapons could not be made. At that time, the armed conflict did not develop to a large scale. Injured parties [...] at the time of the imprisonment were without

<sup>410</sup> *Ibid.*

<sup>411</sup> *Ibid.*

<sup>412</sup> *Borovo Selo*, 1st inst., p. 32.

uniforms and unarmed and incapacitated for combat. For the reasons set out above, it can be said that the prisoners in Borovo had the status of civilians.<sup>413</sup>

In the *Pavković (Doljani)* case, the court interpreted Article 122 in conjunction with Common Article 3 of the Geneva Conventions. The trial chamber held that the victims—captured members of the village guard and members of the Ministry of Interior (police)—enjoyed the status of prisoners of war once they handed over their weapons.<sup>414</sup> The court found that members of the Serb paramilitary formations tortured the prisoners of war and treated them inhumanely and killed three of them, therefore it was beyond doubt that they acted contrary to Common Article 3 of the Geneva Conventions.<sup>415</sup>

#### 8.9.1.1.1.3. REAL AND PERSONAL PROPERTY

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In the *Ademi and Norac* case, the trial chamber of the Zagreb County Court concluded that houses and corporate facilities had been destroyed by Croatian soldiers after military operations had ceased, both immediately prior to and during the soldiers' withdrawal.<sup>416</sup>

The court concluded that the conduct of the Croatian soldiers in relation to the property constituted a war crime against the civilian population involving, *inter alia*, the unlawful and arbitrary destruction of property on a large scale that was not justifiable by military needs.<sup>417</sup> The court held that the soldiers had violated Article 53 of GC IV.<sup>418</sup> In its reasoning, the court stressed that there was no military activity at the time and noted that the destruction of property had been unnecessary and unlawful in every sense.<sup>419</sup>

#### 8.9.1.1.1.4. PROTECTION OF OBJECTS INDISPENSIBLE TO THE SURVIVAL OF THE CIVILIAN POPULATION

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In the *Ademi and Norac* case, the trial chamber of the Zagreb County Court held that pursuant to Article 54 (2) of Additional Protocol II<sup>420</sup> and under Article 120 (1) OKZ RH, it was prohibited to destroy or render useless property indispensable for the survival of the civilian population, such as livestock, drinking water installations and supplies thereof, regardless of the motive for such conduct (starvation, departure or any other motive in relation to the civilian population).<sup>421</sup>

<sup>413</sup> *Ibid.* at p. 32 (unofficial translation of the quote).

<sup>414</sup> County Court in Bjelovar, Doljani, Case No. K-3/07-147, 1st Instance Verdict, 7 Nov. 2007, p. 9.

<sup>415</sup> *Ibid.* at p. 9.

<sup>416</sup> Zagreb County Court, Medački džep (Ademi and Norac), Case No. II-K-rz-1/06, 1st Instance Verdict, 29 May 2008 (published on 30 May 2008), p. 264.

<sup>417</sup> *Ibid.*

<sup>418</sup> *Ibid.*

<sup>419</sup> *Ibid.*

<sup>420</sup> The judgment reads "Article 54 (2) of the same convention", referring to GC IV which was relevant for the charge of destruction of property without absolute necessity of a military operation earlier in that paragraph on p 264. However, this is wrong as protection of property indispensable for the survival of the civilian population is regulated in Article 54 (2) of *Additional Protocol II* (emphasis added).

<sup>421</sup> Zagreb County Court, Medački džep (Ademi and Norac), Case No. II-K-rz-1/06, 1st Instance Verdict, 29 May 2008 (published on 30 May 2008), p. 264.

### 8.9.1.2. THE ACT MUST BE COMMITTED DURING ARMED CONFLICT, WAR OR OCCUPATION

While not dealing in detail with this element,<sup>422</sup> the courts in Croatia usually note that the existence of war in Croatia at the relevant time is a notorious or a commonly known fact. A few examples are noted below.

- In the *Pupovac* case, the trial chamber relied on the Conclusion of the Republic of Croatia Parliament of 8 October 1991 stating that there was an on-going armed aggression against the Republic of Croatia.<sup>423</sup>
- In the *Glavaš* case, the trial chamber noted that during the course of 1991, armed conflict existed in Croatia between the newly formed Croatian armed forces, on one side, and paramilitary armed forces formed by the rebelled Serbs and then regular JNA armed formations, on the other.<sup>424</sup>

The Supreme Court in the *Mikluševci* case held that armed conflict in Croatia became an international armed conflict after 8 October 1991, as that was the date when the Croatian Parliament passed a decision on breaking ties with Yugoslavia and proclaimed the JNA an enemy armed force.<sup>425</sup> In the *Glavaš* case, the Supreme Court held that Croatia became independent by the 8 October 1991 decision and that from that moment, every foreign army was on notice that by conducting war operations on the territory of Croatia it conducted an aggression against the Republic of Croatia, its citizens and its territory.<sup>426</sup> The Supreme Court added that the recognition of Croatia by other states that followed in the course of 1991 and 1992, as well as the admission of Croatia to the UN, was only of declaratory character.<sup>427</sup>

*The courts in Croatia usually note that the existence of war in Croatia at the relevant time is a notorious or a commonly known fact.*

In the *Madi et al. (Cerna)* case, the trial chamber held that the term “war” refers to a relationship between States when they acknowledge being in a state of war, while an “armed conflict” refers to the existence of hostilities that is not a war.<sup>428</sup>

In the same case, appellants argued that war crimes had not been committed because the location of the acts was not on the territory covered by the armed conflict. The Supreme Court

<sup>422</sup> It is important to note here that this element is not required when it comes to war crimes against prisoners of war. As opposed to war crimes against civilians and war crimes against wounded and sick, this crime, in accordance with IHL, can be committed not only during war or armed conflict, but also in peace time, after the war has ended, up until repatriation of the prisoners of war (See also Commentary on the SFRY Criminal Code, Savremena administracija, 1978. p. 504).

<sup>423</sup> County Court in Zadar, *Pupovac*, Case No. K-64/05, 1st Instance Verdict, 19 May 2006, p. 4.

<sup>424</sup> County Court in Zagreb, *Glavaš*, Case No. X K-rz-1/07, 1st Instance Verdict, 8 May 2009, p. 42.

<sup>425</sup> SC of Croatia, *Mikluševci*, Case No. I Kz 683/09-8, 2nd Instance Verdict, 11 Nov. 2009, p. 8; see also County Court in Osijek, *Popovac*, Case No. Krz-39/08-221, 1st Instance Verdict, 7 July 2009, pp. 27-28 (upheld on appeal), where the Chamber held that a non-international armed conflict existed in Croatia in August 1991, as at that time Croatia was still part of the SFRY and the conflict never spread beyond the borders of the then SFRY.

<sup>426</sup> SC of Croatia, *Glavaš*, Case No. I Kz 84/10-8, 2nd Instance Verdict, 2 June 2010, p. 25.

<sup>427</sup> *Ibid.*

<sup>428</sup> County Court in Vukovar, *Cerna*, Case No K-5/07, 1st Instance Verdict, 12 Feb. 2008, p. 23 BCS.

of Croatia found that it was notorious that the enemy did not have to be present at the front line, but could be present behind the front lines of the armed conflict.<sup>429</sup> The Supreme Court further explained that, based on the facts, the perpetrators understood that the enemy was on the entire territory of the State, not only at the lines of combat. Referring to the findings of the trial chamber regarding the war psychosis and the presence of military and checkpoints near Cerna, the Supreme Court held that the fact that the location was not in the zone of direct military operations did not mean that a war crime could not have been perpetrated at such a location.<sup>430</sup>

### 8.9.1.3. THE NEXUS BETWEEN THE ACT OF THE PERPETRATOR AND THE ARMED CONFLICT

When dealing with war crimes cases, the courts in Croatia tend not to elaborate on the existence or essence of the nexus between the crime and the conflict. However, certain considerations of the courts can be noted, as described below.

In the *Madi et al. (Cerna)* case, the Supreme Court of Croatia considered arguments that the mere fact that a crime is committed during an armed conflict should not automatically qualify the crime as a war crime. However, the Supreme Court noted that the case at hand did not concern just any criminal offence. Rather, it concerned soldiers' conduct towards persons who, to their understanding, were recognised as enemies and whose conduct was aimed at demoralisation of the enemy by means of killing civilians of the same ethnic affiliation as the enemy.<sup>431</sup> The Supreme Court therefore rejected appellants' notion that "the killing of four unarmed civilians was no military operation".<sup>432</sup>

The Supreme Court focused on the specific context of the crimes committed to conclude that there was a nexus with the armed conflict.<sup>433</sup> Noting the understanding of the accused towards the enemy, their objective—demoralisation of the enemy—and the usage of military equipment, the Supreme Court concluded that the crime concerned a military operation of soldiers against civilians, protected by the Convention and Additional Protocol I.<sup>434</sup>

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<sup>429</sup> *Cerna*, 2nd inst., p. 10 BCS.

<sup>430</sup> *Ibid.*

<sup>431</sup> *Ibid.*

<sup>432</sup> *Ibid.*

<sup>433</sup> *Ibid.*

<sup>434</sup> *Ibid.*

### 8.9.2. INDIVIDUAL WAR CRIMES

#### *Notes for trainers:*

- Having examined the elements that are common to all war crimes, this section will deal with the individual crimes that are prohibited under the OKZ RH/SFRY CC.
- It must be stressed to participants that prosecutors are required to prove both the common elements, discussed above, and the particular elements for each individual war crime that is charged.
- Participants should be encouraged to compare the jurisdiction of Croatia with those of BiH and Serbia.
- Participants should be referred to the case study and asked to act as though it were being prosecuted in Croatia to determine which crimes they would be permitted to charge under their national law. For example, participants could be asked to consider how they would charge the inhumane treatment of the persons detained in the case study in light of the Croatian case law, which is referred to below.

Elements of each of the individual war crimes covered by the available case law will now be considered. The elements of each of these offences, as set out below, have to be proved in addition to the common elements set out above.

The crimes discussed below are:

- Killings;
- Torture;
- Inhuman (cruel) treatment;
- Causing great suffering or serious injury to body or health;
- Attacks against civilian population;
- Pillaging;
- Forcible transfer;
- Unlawful detention of civilians; and
- Applying means of intimidation and terror.

#### 8.9.2.1. KILLINGS

Killing civilians as a war crime is prohibited by Article 120(I) of the OKZ RH.

The elements of killing civilians as a war crime are:

- proof of death of the victim, and
- the intent of the perpetrator to kill the victim.

Proof of death is generally accepted by the Croatian courts on the basis of death certificates, autopsy reports, relevant expert reports, etc.<sup>435</sup> However, in the *Banović (Petrinja II)* case, the trial chamber established the death of the victim, whose body had not been found, and established that the accused perpetrated the crime, on the basis of witness testimony.<sup>436</sup> The two witnesses, sisters of one of the victims, testified under oath that the accused had told them that they liquidated two persons at a certain location and that the two witnesses immediately knew that one of the victims was their brother.<sup>437</sup>

The accused's intent is established by the courts by evaluating the evidence and circumstances of the case.<sup>438</sup> For instance, in the *Madi et al. (Cerna)* case, the court considered the following facts when determining the intent to kill:

- the perpetrators knew that they had been sent off to kill;
- they had dressed up in JNA uniforms;
- they left their documents behind;
- they learned that those present in the house were civilians upon entrance; and
- they carried equipment to destroy the house and thus the traces of the killings.<sup>439</sup>

*Proof of death is established on the basis of death certificates, autopsy reports, relevant expert reports, etc. The court has also relied on witness testimony.*

In other cases, the intent of the perpetrator is derived from the participation in the commission of the offence.<sup>440</sup>

### 8.9.2.2. TORTURE

Torture as a war crime is prohibited under Article 120(I) of the OKZ RH.

In general, the courts in Croatia do not discuss in detail the individual elements of torture. Rather, such elements can be inferred from the courts' evaluation of evidence.

The following elements of torture can be said to stem from Courts' consideration of evidence:

- the infliction of severe pain or suffering on the victim;<sup>441</sup>
- the conduct of the perpetrator must be intentional;<sup>442</sup> or
- the conduct of the perpetrator may be related to the aim of obtaining information or a confession.<sup>443</sup>

<sup>435</sup> *Novska*, 1st inst., p. 17; *Čepin*, 1st inst., pp. 9-10.

<sup>435</sup> *See, e.g., Petrinja II*, 1st inst., p. 13.

<sup>436</sup> *See, e.g., ibid.*

<sup>437</sup> *See, e.g., ibid.*

<sup>438</sup> *Novska*, 1st inst., p. 18; *Čepin*, 1st inst., p. 18.

<sup>439</sup> *Cerna*, 1st inst., p. 25; *Čepin*, 2nd inst. 19 Sept. 2007, p. 13.

<sup>440</sup> *Doljani*, 1st inst., p. 10; *see also Vrhovine*, 2nd inst., p. 9.

<sup>441</sup> *See, e.g., Doljani*, 1st inst., pp. 9-10; *Čepin*, 1st inst., p. 15.

<sup>442</sup> *See, e.g., Doljani*, 1st inst., p. 10; *Čepin*, 1st inst., p. 15.

In the *Počuča* case, the Supreme Court held that for the acts of torture and inhuman treatment of civilians and war prisoners, witness evidence is a sufficient basis of proof and that it is not necessary to support witness statements by medical data. This is because the (long and short term) consequences of such acts are not important elements to the respective offences, but may be considered important with regards to sentencing (see Module 13 on Sentencing).

*For the acts of torture and inhuman treatment, witness evidence is a sufficient basis of proof. It is not necessary to support witness statements by medical data because the consequences of such acts are not important elements to the respective offences.*

The court held that in this case, the infliction of severe suffering and injuries to body and health towards the prisoners of war had been supported by medical documentation in relation to one victim.<sup>444</sup> See sections 8.9.2.3 (inhuman and cruel treatment) and 8.9.2.4 (causing great suffering or serious injury).

### 8.9.2.3. INHUMAN (CRUEL) TREATMENT

Inhuman treatment as a war crime is prohibited under Article 120(I) of the OKZ RH.

In general, the Croatian courts do not discuss in detail the scope of the acts or elements for the existence of this offence. In order to establish whether an act constitutes a violation of the prohibition of inhuman treatment, the courts generally describe the accused's conduct as stemming from the evidence.

In the *Doljani* case, for example, the trial chamber merely listed the specific acts of the accused when it determined whether an act constituted violation of the prohibition of inhuman treatment. The trial chamber held:

[The accused] participated in such inhuman treatment against the prisoners, considering that he had beaten Vladimir Zimić, member of the village guard, to the back with the oppressor of an automatic rifle and proceeded to fire two short burst from his rifle to the legs [of the victim], injuring his left foot, and was later seen in a small group of about 20 members of the Serbian paramilitary forces who were beating the helpless and tied prisoners to the head and body with the compressors of their automatic rifles and boots and fired at them from a close vicinity.<sup>445</sup>

However, in the *Borovo selo* case, the court referred to the witness testimonies in relation to conduct of the accused as follows:

<sup>443</sup> See, e.g., *Doljani*, 1st inst. pp. 9-10; *Čepin*, 1st inst., pp. 15, 17; However, it needs to be noted that the Court in *Borovo selo* case held that "interrogation of the injured parties [...] in itself, according to the Geneva Convention of 12 August 1949 relating to the protection of victims of non-international armed conflicts (Protocol II), is not a prohibited conduct". *Borovo Selo*, 1st inst. pp. 47, 48 (unofficial translation of the quote).

<sup>444</sup> SC of Croatia, *Počuča*, Case No. I Kž 992/08-8, 2nd Instance Verdict, 16 Dec. 2008, p. 7.

<sup>445</sup> *Doljani*, 1st inst., pp. 9-10.

The actions are characterized by ultimate inhumanity in addition to cruelty, merciless and evilness, which negate the human personality and dignity, degrade a person in a manner in which the person loses properties of a human being and destroy the human nature, the essence of what makes him a human.<sup>446</sup>

In the *Marguš et al. (Čepin)* case, the trial chamber held that locking up civilians in a basement for days and not permitting them to relieve themselves constituted violation of the prohibition on inhumane treatment in conjunction with Common Article 3 and Article 4 of Additional Protocol II.<sup>447</sup>

In the *Počuča* case, the trial chamber found a violation of Article 120(I) OKZ RH in conjunction with Common Article 3 (I) (a) and (c) and Article 75(II) (a), (b) and (e) of Additional Protocol I. The court found that inhuman treatment was committed, as the accused:

[O]n a daily basis and in different ways described in the factual section, beat [civilian detainees] with his boots, fists, rubber bat, gunstock etc., [...] applied salt to their body wounds, put cigarettes out on their bodies and mouth, forced them to collect cigarettes with their tongue and clean the toilet floor, forced them to oral sex, and so in violation of the rules of international law in time of armed conflict tortured and inhumanly treated civilians thus causing different severe bodily injuries, permanent physical and mental health harms, permanent invalidity[...].<sup>448</sup>

The Supreme Court held that to establish torture and inhuman treatment of civilians and war prisoners, it was only necessary to objectively establish that such acts occurred on the basis of witness testimony. It was not decisive whether such acts were supported by medical documents as the consequences of such acts did not represent an essential element of the respective offences.<sup>449</sup>

In the *Doljani* case, the accused's subjective intent was established on the basis of his participation in the commission of this offence. The court held:

[The accused], who was connected with other perpetrators by the joint decision regarding the act, was aware that in this manner prisoners of war were being tortured and treated inhumanely, three of which were killed, and as he participated therein he precisely wanted that, is founded.<sup>450</sup>

#### 8.9.2.4. CAUSING GREAT SUFFERING OR SERIOUS INJURY TO BODY OR HEALTH

Causing great suffering or serious injury to body or health of civilians and of POWs as a war crime is prohibited under Article 120(I) and 122 of the OKZ RH.

<sup>446</sup> *Borovo Selo*, 1st inst., p. 38 (unofficial translation of the quote).

<sup>447</sup> *Čepin*, 1st inst., p. 13.

<sup>448</sup> County Court of Sibenik, Počuča, Case No. K-52/07, 1st Instance Verdict, 3 July 2008, p. 10.

<sup>449</sup> *Počuča*, 2nd inst., p. 7.

<sup>450</sup> *Doljani*, 1st inst., pp. 9-10 (unofficial translation of the quote).

In the *Počuča* case, the trial chamber found the accused guilty of violating Article 120 and 122(I) OKZ RH in conjunction with Common Article 3 (I)(a). The court found that the accused, *inter alia*, caused great suffering and injuries to the bodily integrity and health to the victims:

[D]ue to the life threatening severe physical injuries they sustained such as fractured bones, internal bleeding and different other heavy injuries, as well as psychological abuse and maltreatment, resulted in permanent damage to the physical and mental health and permanent invalidity of the [...] war prisoners.<sup>451</sup>

#### 8.9.2.5. ATTACKS AGAINST CIVILIAN POPULATION

Attacks against civilian population as a war crime are punishable under Article 120(I) of the OKZ RH.

Two forms of this offence exist:

- an attack on a civilian population, settlement, individual civilians or persons incapable to fight, resulting in death serious bodily injury or serious disturbance of health; and
- an attack without selecting a target by which a civilian population is harmed.

##### 8.9.2.5.1. ATTACK ON CIVILIAN POPULATION, SETTLEMENT OF INDIVIDUAL CIVILIANS OR PERSONS INCAPABLE TO FIGHT, RESULTING IN DEATH SERIOUS BODILY INJURY OR SERIOUS DISTURBANCE OF HEALTH

In the *Banović et al.* case, the court found a violation of Article 120(I) of the OKZRH in conjunction with Common Article 3(2) to the GC IV and Article 4(2) of AP II. The accused were found guilty of an attack on the civilian population resulting in the death of two civilians.<sup>452</sup>

Although the body of one civilian was never found, the court established the civilian's death on the basis of the testimony of witnesses: namely, the two witnesses, sisters of two dead persons, testified under oath that the accused themselves had told them they liquidated two persons at a certain location and that the two witnesses immediately knew one of the victims was their brother.<sup>453</sup>

With regard to the accuseds' subjective intent, the court concluded that:

[D]uring the trial it was not established beyond doubt which member of the paramilitary formations directly caused the death of the two victims. However, this Court considers that 1<sup>st</sup> and 2<sup>nd</sup> accused at the time of event were aware of the unlawfulness of such conduct and wanted the commission of the act which is confirmed by [...] who, in correspondence to one other's statements, stated

<sup>451</sup> *Počuča*, 1st inst., p. 2.

<sup>452</sup> *Petrinja II*, 1st inst., p. 2.

<sup>453</sup> *Ibid.* at p. 13.

that the accused, as they retold the happenings in Vinograd street, explicitly said that the two victims “really got it”.<sup>454</sup>

#### 8.9.2.5.2. ATTACK WITHOUT SELECTING A TARGET

The attacks must be performed randomly, without a specific legitimate (military) target. The accused must also be aware of the absence of a legitimate (military) target.<sup>455</sup>

In the *Begović (Petrinja I)* case, the court found a violation of Article 120(I) in conjunction with Common Article 3 to the Geneva Conventions, which explicitly prohibits violence against the life and person of civilians, and Articles 4 and 51 of Additional Protocol II to the Convention.<sup>456</sup>

The first instance court considered:

[U]pon reception of the order from the mortar platoon commander, the [accused], even though he knew that there were no members of the Croat army and police in the centre of Petrinje, proceeded to open fire on the civilian population and on residential and other structures knowing that every strike in the city would be a ‘hit’.<sup>457</sup>

The Supreme Court held that in the absence of direct evidence, undisputed circumstantial evidence demonstrated that the accused knew that the fire had been opened towards Petrinja and its inhabitants.<sup>458</sup> The Supreme Court therefore rejected the appellant’s claim that he did not know that the incriminated fire involved artillery fire on Petrinja and its inhabitants.<sup>459</sup>

#### 8.9.2.6. PILLAGING

Pillaging as a war crime is prohibited by Article 120 (I) of the OKZ RH.

In the *Madi et al. (Cerna)* case, the accused argued that their acts did not constitute pillaging in the sense of Article 33 of Geneva Convention IV, because the value of the items was insignificant and did not concern large-scale appropriation or property of vital essence to the victims. The Supreme Court held that the appellants did not take into account the fact that one accused ordered the other accused to “take valuable items”, meaning to take everything of value and everything that could be carried.<sup>460</sup> The Supreme Court concluded that the plan of the accused (that items of value should have been taken from the victims who were considered the enemy), and the subsequent conduct of the accused, constituted pillaging within the meaning of Article 33 of Geneva Convention IV.<sup>461</sup>

<sup>454</sup> *Ibid.* at p. 14.

<sup>455</sup> *See Petrinja I*, 1st inst., p. 7.

<sup>456</sup> *Ibid.*

<sup>457</sup> *Ibid.*; SC of Croatia, *Petrinja I*. Case No I KZ 717/07-13, 2nd Instance Verdict, 5 March 2008, pp. 6-7.

<sup>458</sup> *Petrinja I*, 2nd inst., p. 6.

<sup>459</sup> *Ibid.* at pp. 6-7.

<sup>460</sup> *Cerna*, 2nd inst., p. 9.

<sup>461</sup> *Ibid.* at pp. 9-10.

### 8.9.2.7. FORCIBLE TRANSFER

In the *Denčić et al. (Dalj 2)* case, the Supreme Court of Croatia discussed the offences of forcible transfer and deportation in line with the jurisprudence of the ICTY in the *Krstić* case.<sup>462</sup> The Supreme Court considered:

- deportation is defined as involuntary and unlawful evacuation of individuals outside a State's borders,
- forcible transfer is defined as involuntary and unlawful evacuation of individuals within a State's borders.<sup>463</sup>

However, the Supreme Court noted that under international humanitarian law, forcible transfer of the civilian population both within and outside a state's borders always constitutes a crime under international law, in particular under humanitarian law, in relation to war crimes against civilian population of Article 120(1) of the OKZ RH.<sup>464</sup>

In accordance with the ICTY in the *Krstić* case, the Supreme Court held that forcible transfer of civilians was prohibited, regardless of the nature of the armed conflict (international or non-international).<sup>465</sup>

*Deportation is an involuntary and unlawful evacuation of individuals outside a state's borders. Forcible transfer is an evacuation of individuals within a state's borders.*

In relation to the accused's subjective intent, the trial chamber concluded, on the basis of circumstantial evidence, that the accused had acted with direct intent and with knowledge that the victims were civilians.<sup>466</sup>

### 8.9.2.8. UNLAWFUL DETENTION OF CIVILIANS

Unlawful detention as a war crime is punishable under Article 120 of the OKZ RH.

In the *Pejnović (Vrhovine)* case, the trial chamber found a violation of Article 120 of the OKZ RH in conjunction with Articles 3(I) of Geneva Convention IV and Article 13 of Additional Protocol II to the Geneva Conventions. The trial chamber held that during an armed conflict, not every detention is unlawful. A detention is unlawful where a person acts:

- without legitimate reason;
- knowing that the civilians have no protection from the existing authorities;
- elementally and at upon his own initiative; or
- in order to deprive the civilians of their liberty.<sup>467</sup>

<sup>462</sup> *Dalj2*, 2nd inst., p. 5.

<sup>463</sup> *Ibid.* at p. 5.

<sup>464</sup> *Ibid.*

<sup>465</sup> *Ibid.*

<sup>466</sup> *Dalj2*, 1st inst., p. 8.

<sup>467</sup> *Vrhovine*, 1st inst., pp. 25-26.

Regarding the accused's subjective intent, the trial chamber held that the subjective element of this offence was contained in the description of the objective part of the offence.<sup>468</sup>

#### 8.9.2.9. APPLYING MEANS OF INTIMIDATION AND TERROR

Applying means of intimidation and terror as a war crime is punishable under Article 120(I) of the OKZ RH.

In the *Pupovac* case, the trial chamber interpreted this provision in conjunction with Article 13 of Additional Protocol II. The court noted that in accordance with Additional Protocol II, any act of violence and threats whose main purpose was to spread fear among civilian population were prohibited.<sup>469</sup>

The trial chamber concluded:

It is apparent that the accused, member of the paramilitary Serb formations, armed and in uniform, together with his brother, acted so towards the Croat inhabitants so as to cause fear and force them to leave, which happened to all the witnesses and they had to, sooner or later, flee from Rasetvica [...].<sup>470</sup>

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<sup>468</sup> *Ibid.*

<sup>469</sup> *Pupovac*, 1st inst., p. 12.

<sup>470</sup> *Ibid.* at p. 12

## 8.10. SERBIA

*Notes for trainers:*

- This section focuses on Serbian law for war crimes as well as case law from Serbian courts.
- It will be useful for participants to compare the law and jurisprudence of Serbia with the jurisprudence of ICTY and the provisions in the ICC Rome Statute. In particular, participants could be asked to discuss the differences between the Serbian court's jurisprudence as compared with the approaches adopted by the international courts.
- This section is structured in the same way as the previous section on war crimes under international law.
  - It will first address the elements that are common to all war crimes in Serbia.
  - Thereafter it will focus on each individual war crime for which there is relevant jurisprudence.
- It is important for participants to understand the difference between the common elements (often referred to as the *chapeau* requirements) and the specific elements that are required to prove the individual war crimes.
- Some questions which could be asked to stimulate discussion on the topics considered would be:
  - Is it necessary to prove an international armed conflict as a common element for war crimes under Serbian law?
  - To what extent can the court take "judicial notice" of the existence of armed conflict and any of the other common elements for war crimes?
  - What is the significance of the violations of prohibitions under Common Article 3 of the Geneva Conventions in the law of Serbia?
  - What distinction have the courts drawn between prisoners of war and civilians?

When trying war crimes committed during the conflicts in the former Yugoslavia, as a general rule, the Serbian courts apply the 1993 FRY Criminal Code as the law more favourable to the accused. In the Zvornik case, however, the court applied the SFRY Criminal Code. The SFRY Criminal Code and FRY Criminal Code provisions on war crimes are the same except for the applicable penalties. See Module 5 for more information on temporal applicability of laws.

The box below includes the current Serbian Criminal Code provision on war crimes. See section 8.7 and the text of the SFRY Criminal Code Article 142.

Relevant provisions from the Serbian Criminal Code<sup>471</sup> include:

- Article 108: No statute of limitations for war crimes;
- Article 372: War crimes against civilians;
- Article 373: War crimes against the wounded and sick;
- Article 374: War crimes against prisoners of war;
- Article 375: Organizing and incitement to war crimes and genocide;
- Article 376: Employment of prohibited means of warfare;
- Article 377: Unlawful production of forbidden weapons;
- Article 378: Unlawful killing and wounding of the enemy;
- Article 379: Marauding the dead and wounded;
- Article 380: Violation of protection granted to bearer of flag of truce/emissary;
- Article 381: Cruel treatment of wounded, sick and prisoners of war;
- Article 382: Unjustified delay of repatriation of prisoners of war;
- Article 383: Destruction of cultural heritage;
- Article 384: Command responsibility;
- Article 385: Abuse of international symbols; and
- Article 386: War of aggression.

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<sup>471</sup> Serbia Criminal Code, Official Gazette of the RS No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009.

**SFRY CC, Article 142: War crimes against the civilian population**

This article sets out punishment for war crime against the civilian population:

- (1) Whoever, in violation of rules of international law effective at the time of war, armed conflict or occupation, orders an attack on civilian population, settlement individual civilians or persons incapable to fight, resulting in death serious bodily injury or serious disturbance of health; attack without selecting a target by which civilian population is harmed; that civilian population be subject to killings, torture, inhuman treatment, biological, medical or other scientific experiments, taking tissues or organs for transplantation; immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy's army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.
- (2) Whoever, in violation of rules of international law effective at the time of war, armed conflict or occupation, orders: an attack to be conducted on facilities under a special protection by international law and facilities and installations with dangerous force such as dams, levees and nuclear power stations; wanton destruction of civilian facilities under a special protection by international law, undefended places and demilitarized zones; long-term and wide-range damage of the natural environment that can be harmful to health or survival of population; or whoever commits some of the aforementioned acts, shall be punished by sentence from paragraph 1.
- (3) Whoever, in violation of the rules of international law effective at the time of war, armed conflict or occupation, as an occupier, orders or commits dislocation of part of its civilian population to the occupied territory, shall be punished by imprisonment for not less than five years.

**Serbian Criminal Code Article 372: War crimes against civilians**

(1) Whoever in violation of international law at time of war armed conflict or occupation orders an attack on civilian population, settlement, particular civilians, persons incapacitated for combat or members or facilities of humanitarian organisations or peace mission; wanton attack without target selection harming civilian population or civilian buildings under special protection of international law; attack against military targets knowing that such attack would cause collateral damage among civilians or damage to civilian buildings that is obviously disproportionate with the military effect; ordering against civilian population inflicting of bodily injury, torture, inhumane treatment, biological, medical or other research experiments, or taking of tissue or organs for transplantation or performing other acts causing harm to health or inflicting great suffering or who orders deportation or relocation or forced change of nationality or religion; forcing to prostitution or rape; applying intimidation and terror measures, taking of hostages, collective punishment, unlawful depriving of freedom and detention; depriving of the rights to a fair and impartial trial; proclaiming the rights and acts of enemy nationals prohibited, suspended or non-allowed in court proceedings; compelling into service of a hostile power or its intelligence or administration services; compelling to military service persons under seventeen years of age; forced labour; starving of population; unlawful seizure, appropriation or destruction of property not justified by military necessity; taking unlawful and disproportionate contributions and requisitions; devaluing of local currency or unlawful issuing of currency, or whoever commits any of the above offences, shall be punished by imprisonment of minimum five years.

(2) The penalty specified in paragraph 1 of this Article shall be imposed to whoever, in violation of international law at time of war, armed conflict or occupation, orders: attack on facilities particularly protected under international law and installations and facilities with dangerous power such as dams, embankments and nuclear power plants; strikes against civilian facilities under special protection of international law, undefended places and demilitarised zones; long-term and extensive damage to environment that may be detrimental to health of persons or survival of population or whoever commits any of these offences.

(3) Whoever at time of war, armed conflict or occupation orders murder of civilian population or whoever commits such offence, shall be punished by imprisonment of minimum ten years or imprisonment of thirty to forty years.

(4) Whoever, in violation of the rules of international law at time of war, armed conflict or occupation, as an occupying power orders or undertakes relocation of part of its civilian population to occupied territories, shall be punished by imprisonment of minimum five years.

(5) Whoever threatens to commit any of the offences specified in paragraphs 1 and 2 of this Article, shall be punished by imprisonment of six months to five years.

## 8.10.1. ELEMENTS COMMON TO ALL WAR CRIMES

*Notes for trainers:*

- This section sets out the elements that are common to all war crimes under Serbian law.
- In order to stimulate discussion on these elements, the participants could be asked to imagine that the crimes alleged in the case study took place in Serbia in 2007. Could they qualify as war crimes? For what reasons?
- In particular, participants should consider whether the Serbian courts would consider the armed conflict to be international, internal, or would the distinction be irrelevant?
- Participants should also consider, on the basis of the facts of the case study, what position the Serbian courts would take on the date of the commencement of an armed conflict.
- The dates of the commencement of the conflicts in Serbia, BiH and Croatia have been an important issue before the courts, and the relevant jurisprudence related to this matter has been discussed below, including the date the courts have determined as the starting point of the conflicts.

As described above, the applicable provisions regarding war crimes that are currently applied by Serbian courts were contained in the SFRY Criminal Code and, later, the FRY Criminal Code (whose relevant provisions were derived from the SFRY Criminal Code). The *chapeau* elements to the SFRC/FRY Criminal Code prohibitions on war crimes are:

- The offence must be in violation of international law;
- The offence must be committed during armed conflict, war or occupation;
- A nexus between perpetrator's acts and the armed conflict, war or occupation<sup>472</sup> must be established; and
- The perpetrator must have ordered or committed the offence.

The Serbian judiciary has not explicitly identified or defined in detail the required elements in its jurisprudence. It suffices for the relevant courts to note the factual circumstances based on the evidence to establish whether the elements have been satisfied, with little discussion or analysis of the elements of the given crime.

In the *Suva Reka* case, the trial chamber defined war crimes in the following terms:

War crimes are considered different forms of inhuman treatment of certain categories of persons in time of war or in connection with a war in violation of international law. Regardless of what kind of war crime is concerned, several

<sup>472</sup> SC of Serbia, Lekaj, Case No. Kz I P3 3/06, 2nd Instance Verdict 26 Feb. 2007, p. 4.

elements are characteristic and that is inhuman conduct towards people which expresses itself in various acts of violence such as killing, torture, performing biological experiments, causing great suffering or serious bodily injury and so on. Other such behaviour represents a violation of the rules of international law regarding the treatment of certain categories of persons. It concerns violations of the rules contained in the Geneva humanitarian conventions of 1949 relative to the protection of civilian persons in time of war, to the amelioration of the condition of wounded and sick in armed forces in the war, to the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea and to the treatment of prisoners of war. Finally, war crimes are carried out in time of war or armed conflict or occupation. War crimes against the civilian population are one of three groups of war crimes concerning numerous and various forms, in particular of inhuman treatment of this population, but also other dangerous activities threatening the life or security of persons and property.<sup>473</sup>

In the *Medak* case, the defence argued that according to the ICTY jurisprudence the violation of international humanitarian law must be serious, must entail serious consequences for life and health of the victim. The Chamber accepted the argument of the defence and concluded that the elements of the crime charged under Article 144 of the FRY Criminal Code had been met, since the actions of the accused caused great suffering or a violation of bodily integrity to the victim, which is one of the hallmarks of a war crime against prisoners of war.<sup>474</sup>

Each of these common elements will now be discussed in turn.

#### 8.10.1.1. VIOLATION OF INTERNATIONAL LAW

The relevant provisions are considered blanket provisions, which means that a violation of one of these articles must also amount to a violation of rules of international law.<sup>475</sup>

In practice these provisions are applied as follows. In indictments, the prosecutors in Serbia do not only cite to provisions of Geneva Conventions that define various crimes, but also other rules such as Article 2 of the Geneva Conventions. Some of the Serbian courts' judgements also invoke Article 2 as relevant for the regulation of armed conflict.<sup>476</sup> However, the prevailing opinion is

<sup>473</sup> WCC, Belgrade District Court, *Suva Reka*, Case No. K.V. 2/2006, 1st Instance Verdict, 23 April 2009, pp. 184, 185 (unofficial translation of quote).

<sup>474</sup> WCD, Belgrade High Court, *Lazić et al. (Medak)*, Case No. K.Po2 36/2010, 1st Instance Verdict, 23 June 2010, p. 51.

<sup>475</sup> WCC, Belgrade District Court, *Ovčara*, Case No. K.B.1/2003, 1st Instance Verdict, 12 Dec. 2005, p. 241 (BCS) (upheld on appeal); WCC, Belgrade District Court, *Škorpioni*, Case No. K.V. 6/2005, 1st Instance Verdict, 10 April 2007, pp. 96-97.

<sup>476</sup> WCC, Belgrade District Court, *Lekaj*, Case No. K.B.br 4/05, 1st Instance Verdict, 18 Sept. 2006, p. 2.

that the *actus reus*, or the crimes themselves, must be specifically enumerated in Article 142 or other articles from the same chapter and cannot be taken from the Geneva Conventions only.<sup>477</sup>

In the *Škorpioni* case, the War Crimes Chamber noted that war crimes represent grave violations of international law provisions, in particular, international law of armed conflict and humanitarian law.<sup>478</sup> These violations are forbidden by the Geneva Conventions and the Additional Protocols, and criminal offences relating to war crimes are founded on the basis of obligations stemming from the conventions.<sup>479</sup>

The chamber also added that apart from the Geneva Conventions and the Additional Protocols, other conventions and international documents existed which were important in setting out criminal offences against humanity and international law.<sup>480</sup> The chamber stressed that, considering the importance of the values protected by these incriminations, setting out such criminal offences in domestic law was undisputed and it was not based only on the formal obligation emerging from ratification of certain international conventions.<sup>481</sup>

*It is not required to establish that the accused knew his conduct was a violation of international law.*

The chamber compared the Rome Statute to the national criminal code provisions on war crimes. Although Article 8 of the Rome Statute envisaged certain conduct as war crimes, under Serbian legislation such conduct was not envisaged as part

of the three types of war crimes. However, the chamber found that this conduct was encompassed by other criminal offences from the same chapter of the criminal code.<sup>482</sup>

In the *Zvornik* case, the trial chamber stated that war crimes are considered different forms of inhuman treatment of protected persons committed in the time of war or in connection with the war and are in violation of the rules of international humanitarian law, including both treaty and customary international law. The most important international laws involving an obligation to criminalise such violations are the 1949 Geneva Conventions and the two 1977 Additional Protocols.<sup>483</sup>

The accused must know that by his actions he committed a prohibited act, *i.e.* violated the norm prohibiting certain conduct. However, the accused does not have to know that the violated norm is a norm of international humanitarian law.<sup>484</sup> For example, in the *Škorpioni* case, one of the accused argued that he was familiar with the term “Geneva Conventions”, but that he never knew what it encompassed and that he had no chance to familiarise himself with their

<sup>477</sup> See, e.g., WCD, Appellate Court in Belgrade, Duško Kesar, Kž1 Po2 11/2010, 2nd Instance Verdict, 28 Feb. 2011, ¶ 10 (online format) available at <http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-11-2010.html>.

<sup>478</sup> *Škorpioni*, 1st inst., p. 95.

<sup>479</sup> *Ibid.*

<sup>480</sup> *Ibid.*

<sup>481</sup> *Ibid.*

<sup>482</sup> *Ibid.*

<sup>483</sup> WCC, Belgrade District Court, *Zvornik*, Case No. K.V. 5/2005, 1st Instance Verdict, 12 June 2008, p. 175.

<sup>484</sup> *Ovčara*, 1st inst., p. 134.

provisions with regard to prisoners of war, civilians and wounded persons.<sup>485</sup> The chamber held that when the case involves war crimes, it is not necessary for the perpetrators to know that their conduct violated the rules of international law, as the violation of international law represents an objective requirement for punishing the conduct in question.<sup>486</sup> In the *Medak* case, interpreting Article 144 of the SFRY/FRY Criminal Code, the trial chamber reiterated that the knowledge or the intent of the perpetrator to violate the norm of international law is not a condition for the existence of the war crime against prisoners of war. It is sufficient that the acts of the accused objectively represent a violation of international law.<sup>487</sup>

In the *Škorpioni* case, the War Crimes Chamber held that only members of military, political or administrative organisations of a party to the conflict, as well as any person in its service, could commit war crimes.<sup>488</sup> The chamber drew this inference from the fact that by definition, war crimes are committed by violating the rules of international law, which are, as held by the chamber, binding upon the active participants in war, armed conflict or occupation.<sup>489</sup>

The same requirement, that the accused was a member of the armed forces/armed group, appears in other judgements as well. For example, in the *Slunj* case, the defence argued that the accused Pašić was not a member of the armed forces of the party to the conflict. The chamber examined the evidence in order to determine his status as either civilian or a fighter, and concluded that at the time of commission of the crime the accused was member of the armed forces of the party to the conflict, “in uniform and armed”.<sup>490</sup>

#### 8.10.1.1.1. PROTECTED PERSONS, PROPERTY, OBJECTS ETC.

In order to prove that the crime committed constitutes a violation of international law, it must be established that the crime was committed against persons, property or other objects protected by international law.<sup>491</sup>

In the *Bitići* case, the trial chamber discussed the difference between the murder as “ordinary offence” and as a war crime against prisoners of war and pointed out two elements as decisive for the existence of the war crime: existence of war or armed conflict and the status of the victims as person protected by the relevant provisions of international humanitarian law.<sup>492</sup>

<sup>485</sup> *Škorpioni*, 1st inst., p. 30.

<sup>486</sup> *Ibid.* at p. 105.

<sup>487</sup> *Lazić et al. (Medak)*, 1st inst., p. 44.

<sup>488</sup> *Škorpioni*, 1st inst., p. 97.

<sup>489</sup> *Ibid.*

<sup>490</sup> WCC, Belgrade District Court, Slunj, Case No. K.V. 4/2007, 1st Instance Verdict, 8 July 2008, p. 39.

<sup>491</sup> Only civilians and POWs were discussed in the available jurisprudence, so these are the only protected elements discussed below.

<sup>492</sup> WCC, Belgrade District Court, *Popović et al.*, (*Bitići* case), Case No. K.V. 3/2006, 1st Instance Verdict, 22 Sept. 2009, pp. 43 - 44; see also *Suva Reka*, 1st inst., pp. 184, 185.

### 8.10.1.1.1.1. MENS REA WITH REGARD TO THE PROTECTED STATUS

In general, the perpetrator's knowledge of the status of the victims is not explicitly identified as a requirement for liability. However, in the *Vujović et al. (Ovčara)* case, the War Crimes Chamber noted the accused's knowledge that victims were protected:

[t]he fact that among the prisoners there were wounded and civilians, as well as the Serbs belonging to the "opposing side" [...] is beyond doubt. However, this Court believes [...] that the awareness of the accused and their intent point to the fact that those were perceived as the members of the opposing party, prisoners of war (as all those who do not acknowledge the perpetration of the offence, as well as witnesses heard and witnesses-collaborators used the term "prisoners" in relation to the injured parties). Hence, bearing also in mind such awareness of the accused, the Court qualified the act as the offence from Article 144 FRY CC.<sup>493</sup>

In the case of *Stanko Vujanović*, the chamber considered whether the accused had knowledge of the protected status of the victims. When deciding whether the accused knew that the victim was a member of the Croatian armed forces, the chamber found that the accused could not have known that the victim was a member of the Croatian armed forces because the victim was among civilians, in civilian clothes and without arms.<sup>494</sup> The chamber also noted that the victim had not participated in combat on the day the crime was committed, but was hiding from combat.<sup>495</sup> The chamber found that the victim had been separated from a group of civilians and killed outside of combat at the same time as a civilian was killed<sup>496</sup> (see also the section on civilians, below).

Knowledge of the accused about the status of the victim was also considered relevant in the *Slunj* case, where the trial chamber determined that "based on the presented evidence the court determined that the accused [...] was familiar with the fact that the victim was Croat and a civilian".<sup>497</sup>

### 8.10.1.1.1.2. CIVILIANS

In the *Zvornik* case, the War Crimes Chamber defined civilians as 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 accordance with Common Article 3 of the

*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>493</sup> *Ovčara*, 1st inst., p. 243.

<sup>494</sup> Belgrade District Court, *Stanko Vujanović*, Case No.K-Po2 – 40/2010, 1st Instance Verdict, 1 Nov. 2010, p. 20.

<sup>495</sup> *Ibid.*

<sup>496</sup> *Ibid.*

<sup>497</sup> Belgrade District Court, WCC, *Pašić*, Case No. K.V. 4/2007, 1st Instance Verdict, 8 July 2008, p. 40 (unofficial translation).

Geneva Conventions.<sup>498</sup> The chamber also took into consideration Article 4(1) of Additional Protocol II, providing that protection shall be provided to all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted.<sup>499</sup>

The court held that the fact that some of the persons were carrying weapons at the time of the capture did not indicate that they were taking part in war operations on the side of one of the parties to the conflict, which would give them the status of combatants rather than civilians.<sup>500</sup> However the court went on to explain that none of the evidence presented during the main hearing indicated that the victims were fulfilling the conditions for obtaining the status of prisoners of war as prescribed by the Third Geneva Convention. While the conclusion about the absence of POW status is correct, the application of Article 4 of the GC III in non-international armed conflict is at odds with the Convention's provisions on application.<sup>501</sup> The chamber further held that the presence of non-civilians within a population of civilians did not deprive the group of its civilian character; it sufficed that the group was generally of civilian character.<sup>502</sup>

In the *Lekaj* case, the trial chamber considered that the victims were protected because they were not directly participating in hostilities and they were civilians who did not represent any real threat to the safety of the defendant and other KLA members.<sup>503</sup>

In the *Škorpioni* case, the accused argued that six persons who had been killed were prisoners of war and not civilians.<sup>504</sup> The War Crimes Chamber concluded that the six killed prisoners were civilians.<sup>505</sup> The chamber first compared the relevant provisions relating to both war crimes against civilians and war crimes against prisoners of war and held:

None of the evidence [...] [pointed] to the conclusion that this specific case was about the prisoners of war; there is no evidence that the six persons shot were captured during combat activities, or that they had at the time they were captured military insignia, weapons or equipment with them. Defence allegation[s] that some of the captured persons had boots or military shirts does not mean in itself that those persons participated in combat activities, rather, in the opinion of this Court, it points to the war conditions and poverty due to which some of the civilians had to wear certain military clothing pieces.<sup>506</sup>

In the *Stanko Vujanović* case, the chamber considered the issue of one of the victims that was killed by the accused, where the victim was a member of the Croatian armed forces. The court, discussing the difference between civilians and combatants, found:

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<sup>498</sup> *Zvornik*, 1st inst., p. 177.

<sup>499</sup> *Ibid.*

<sup>500</sup> *Ibid.* at p. 174.

<sup>501</sup> *Ibid.*

<sup>502</sup> *Ibid.*

<sup>503</sup> *Lekaj*, 1st inst., pp. 36-37, 39.

<sup>504</sup> *Škorpioni*, 1st inst., p. 97.

<sup>505</sup> *Ibid.*

<sup>506</sup> *Ibid.* at p. 98.

During the critical day the deceased Ivan was not at his combat position, the last time he was on guard was the previous night. He was not wearing the uniform, nor he had one at all, when the attack commenced he entered unarmed into the basement of his house and he was killed. The status of combatant is defined in Additional Protocol II of the Geneva Conventions, and according to it the status of combatant is given to any person belonging to a group or unit or organized armed forces under responsible command. If the combatant does not wear the uniform he must distinguish from the civilian population when he participates in the military operation. Hence, he can change his status, he can be civilian or combatant depending from the fact whether he participates in the military operation or not. Accordingly Ivan Sever in the time of the crime had the status of civilian.<sup>507</sup>

#### 8.10.1.1.1.3. PRISONERS OF WAR

In the *Škorpioni* case, the War Crimes Chamber held that the term “war prisoner” includes not only members of armed forces of a party to the conflict, but also other categories of persons, such as militia members and members of volunteers units, including members of resistance movements and, under certain conditions, inhabitants of non-occupied territories.<sup>508</sup>

*The term “war prisoner” includes not only members of armed forces of a party to the conflict, but also other categories of persons such as militia members and members of volunteers units, including members of resistance movements and, under certain conditions, inhabitants of non-occupied territories.*

The chamber noted that protection of prisoners of war in international law is provided under Geneva Convention III and the Additional Protocols, which grant the status of ‘prisoner of war’ to combatants who find themselves in hands of the opposing party.<sup>509</sup>

The War Crimes Chamber in the *Škorpioni* case also noted that a war crime against prisoners of war differs from a war crime against civilians. The former might be committed even after the war or armed conflict ended, since the prisoners of war enjoy the status of protected persons until the moment of repatriation.<sup>510</sup>

In the *Vujović et al. (Ovčara)* case, the appeals chamber noted that the status of prisoners of war was not recognised in the context of non-international armed conflict, unless the parties to the conflict agreed to recognise this status of the persons deprived of liberty.<sup>511</sup> In the first instance

<sup>507</sup> *Stanko Vujanović*, 1st inst., pp. 3-4. It should be noted that under AP II there is no definition of “combatants” The Protocol applies to all armed conflicts between the armed forces of a party to the Protocol and “dissident armed forces or other organised armed forces which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. GC Additional Protocol II, Art. 1.

<sup>508</sup> *Škorpioni*, 1st inst., p. 97.

<sup>509</sup> *Ibid.* at pp. 97-98.

<sup>510</sup> *Ibid.* at p. 98.

<sup>511</sup> Court of Appeal in Belgrade, *Vujović et al. (Ovčara)*, Case No. Kz1 PO2-1/2010, 2nd Instance Verdict, 23 June 2010, ¶ 74.

verdict, the War Crimes Chamber established the status of the victim as a prisoner of war on the basis of witness statements and military documents in relation to the wording of Article 4 (1), (2) and (4) of Geneva Convention III.<sup>512</sup> The trial chamber further held that even though certain victims were not members of the Croat forces (some were civilians and even Serbs), the perpetrators *perceived* all victims as the “counterparty”. Pursuant to that finding, the trial chamber qualified the act as a violation of Article 144 (war crimes against prisoners of war).<sup>513</sup>

The appeals chamber upheld the War Crimes Chamber’s findings. It held that in this specific case the victims had the status of prisoners of war because of the perpetrators were aware that the victims were members of the opposing party.<sup>514</sup> Like the War Crimes Chamber, the appeals chamber based this conclusion, *inter alia*, on the fact that the accused and witnesses talked about “prisoners of war”, even though there were two women civilians (later killed) and wounded persons among the victims.<sup>515</sup> The appeals chamber concluded that the fact that the accused had been injuring and killing the victims while they themselves considered them the prisoners of war was a correct basis for a conclusion that the victims had been prisoners of war.<sup>516</sup> The appeals chamber also relied on JNA documents indicating that parties negotiated the status of the persons deprived of liberty and confirming that such persons should be considered prisoners of war.<sup>517</sup>

The appeals chamber also held that although the presence of civilians and wounded persons among the victims could amount to a violation of other Geneva Conventions, it did not affect the conclusion that it was a case of war crimes committed against prisoners of war.<sup>518</sup> The appeals chamber held that in case of doubt whether a captured person had the status of a prisoner of war, the person should have been treated as a prisoner of war until a competent court established his status.<sup>519</sup>

In the *Tenja* case, the trial chamber reiterated that the status of prisoners of war does not exist in a non-international armed conflict unless the parties to the conflict agree to recognise such status to persons deprived of liberty. Examining the presented documentation (agreements and orders) the chamber concluded that there was an agreement between the Republic of Croatia and the Yugoslav People’s Army to treat all persons deprived of liberty as prisoners of war. In addition the court found that the accused was aware that the victim had a POW status.<sup>520</sup>

In the *Bitići* case, the trial chamber discussed the status of POWs in the context of an international armed conflict and concluded that the victims fulfilled the conditions prescribed in Article 4 A paragraphs 1, 2 and 4 of the GCIII.<sup>521</sup> The chamber also explained that prisoners of

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<sup>512</sup> *Ovčara*, 1st inst., p. 132.

<sup>513</sup> *Ibid.* at p. 133.

<sup>514</sup> *Vujović et al. (Ovčara)*, 2nd inst., ¶ 74.

<sup>515</sup> *Ibid.* at ¶¶ 74, 77.

<sup>516</sup> *Ibid.* at ¶ 82.

<sup>517</sup> *Ibid.* at ¶ 75.

<sup>518</sup> *Ibid.* at ¶ 77.

<sup>519</sup> *Ibid.* at ¶ 85.

<sup>520</sup> WCD, Belgrade High Court, *Darko Radivoj (Tenja)*, Case No. K.Po2 38/2010, 1st Instance Verdict, 17 Nov. 2010, p. 36.

<sup>521</sup> *Popović et al. (Bitići case)*, 1st inst., p. 43.

war are those soldiers that have been captured by the opposing side, deprived of liberty or imprisoned, and are therefore prevented from continuing to take part in the hostilities. The chamber explained that this situation can continue for the duration of the hostilities, even after peace is achieved.<sup>522</sup>

Considering the fact that the crime in question took place after the end of the conflict between the armed forces of SRY and NATO and KLA forces when the Kumanovo Agreement was already signed, the chamber noted that war crimes against prisoners of war can be committed after the end of armed conflict “if prisoners of war are still in the power of the party which captured them”.<sup>523</sup>

#### 8.10.1.1.1.4. PROPERTY

After referral from the ICTY under its Rule 11*bis*, the War Crimes Prosecutor’s Office charged Vladimir Kovačević for committing war crimes against civilians for his acts and omissions relating to the shelling of Dubrovnik, which it was alleged targeted objects protected by international law, including historical and architectural monuments of cultural heritage.<sup>524</sup>

#### 8.10.1.2. THE OFFENCE MUST BE COMMITTED DURING ARMED CONFLICT, WAR OR OCCUPATION

The jurisprudence indicates that a war crime against civilians could be committed only during war, armed conflict or occupation.<sup>525</sup>

In the *Zvornik* case, the War Crimes Chamber held that an armed conflict existed whenever there was:

- a resort to armed force between states or
- protracted armed violence between
  - governmental authorities and organised groups or
  - between such groups within a state.<sup>526</sup>

In the *Škorpioni* case, the War Crimes Chamber defined “war” as a conflict that includes the organised use of arms and physical force by the states or other social groups.<sup>527</sup>

<sup>522</sup> *Ibid.* at p. 47.

<sup>523</sup> *Ibid.* at p. 44.

<sup>524</sup> The case was not heard due to the health conditions of the accused.

<sup>525</sup> It is important to note here that this element is not required when it comes to war crimes against prisoners of war. As opposed to war crimes against civilians and war crimes against wounded and sick, this crime, in accordance with IHL, can be committed not only during war or armed conflict, but also in peace time, after the war has ended, up until repatriation of the prisoners of war. *See also* Commentary on the SFRY Criminal Code, Savremena administracija, 1978. p. 504; *Škorpioni*, 1st inst., p. 960; *Suva Reka*, 1st inst., p. 186; WCD, Belgrade High Court, Španović, Case No. K.Po2 32/2010, 1st Instance Verdict, 25 June 2010, p. 31; and WCD, Belgrade High Court, Kesar, Case No. K.Po2 37/2010, 1st Instance Verdict, 1 Dec. 2010, p. 27.

<sup>526</sup> *Zvornik*, 1st inst., p. 176.

<sup>527</sup> *Škorpioni*, 1st inst., p. 86.

The Chamber also noted that alternative terms for “war” included: “armed conflict”, “hostilities” and “police action”.<sup>528</sup>

The term “armed conflict” includes not only international armed conflict, but also non-international armed conflict if the requirements from Additional Protocol II have been met.<sup>529</sup>

*The term “armed conflict” includes not only international armed conflict, but also non-international armed conflict if the requirements from Additional Protocol II have been met.*

In relation to non-international armed conflicts, the chamber noted that:

- A war between factions within one state represented a civil war.<sup>530</sup>
- The chamber defined “armed conflict-civil war” as armed fighting between antagonistic social groups within one state (between citizens subjected to the same state authority). This differs from armed uprising by its extended duration and better organization of the opposing parties.<sup>531</sup>

In the *Škorpioni* case, the War Crimes Chamber held that the armed conflict in Bosnia and Herzegovina was a non-international armed conflict, as the opposing parties to the conflict were members of ethnic groups living on the territory of Bosnia and Herzegovina.<sup>532</sup>

*The War Crimes Chamber has noted that the war existed in Bosnia and Herzegovina from April 1992 to the signing of Dayton Peace Agreement on 21 November 1995 and 14 December 1995, respectively.*

In the *Vujović et al. (Ovčara)* case, the War Crimes Chamber held that, given the formulation of the underlying offences in the relevant FRY Criminal Code, the nature of the conflict was irrelevant.<sup>533</sup> The chamber noted, however, that this was a case of non-international armed conflict, as at the relevant time Croatia formed part of the SFRY, because even though it had already proclaimed its independence it was not recognised by the international community until 1992.<sup>534</sup> The War Crimes Chamber held that the armed conflict in Croatia began in spring 1991.<sup>535</sup>

In the *Medak* case, the chamber restated the definition of armed conflict from the *Zvornik* case (see above) and added that “Article 144 of the SRY Criminal Code does not directly mention the existence of an armed conflict, although the Third Geneva Convention which contains rules applicable to prisoners of war, is applicable in cases of armed conflict”.<sup>536</sup>

The chamber in the *Škorpioni* case also noted that international humanitarian law should be applied from the beginning of an armed conflict, and should continue to be applied even after

<sup>528</sup> *Ibid.* at pp. 86-87.

<sup>529</sup> *Ibid.* at p. 97.

<sup>530</sup> *Ibid.* at p. 87.

<sup>531</sup> *Ibid.*

<sup>532</sup> *Ibid.*

<sup>533</sup> *Ovčara*, 1st inst., p. 242.

<sup>534</sup> *Ibid.*

<sup>535</sup> *Ibid.*

<sup>536</sup> *Pasić*, 1st inst., p. 31.

hostilities had ceased, until establishment of peace or, in case of internal conflicts, until a peaceful solution was found.<sup>537</sup>

With regard to the territorial application of international humanitarian law, the trial chamber in the *Kesar* judgement stated that international humanitarian law applies throughout the territory under the control of a party to the conflict, whether or not the crime took place at the place of the actual fighting, as long as the area where the crime took place belongs to the wider area in which fighting is taking place.<sup>538</sup>

To establish whether an armed conflict existed, the War Crimes Chamber in the *Škorpioni* case noted that war existed in Bosnia and Herzegovina from April 1992 until the signing of Dayton Peace Agreement on 21 November 1995 and 14 December 1995, respectively.<sup>539</sup> The Chamber noted that this was a generally known fact and that its sources could be found in various historical documents.<sup>540</sup>

Similarly, in the *Vujović et al. (Ovčara)* case, to establish whether an armed conflict existed at the time the crime was perpetrated, the trial chamber of the Belgrade District Court held that it was commonly known that at the relevant time an armed conflict existed in Vukovar.<sup>541</sup>

In the *Lekaj* case, the War Crimes Chamber held that two different types of armed conflict existed in parallel. A non-international armed conflict between the FRY armed forces and the armed military formation UCK in Kosovo began on 11 April 1998 in the region of Radonjičko Lake, while an international armed conflict between the FRY armed forces and the NATO armed forces began on 24 March 1999 by the NATO bombardment.<sup>542</sup> The accused argued on appeal that the criminal offences took place while a Military and Technical Agreement was in force, and therefore the armed conflict had ended. The Supreme Court rejected this argument, and concluded that the Military and Technical Agreement contained a provision setting a period of 11 days for demilitarization and retreat of Yugoslav armed forces from the territory of Kosovo and Metohija. This was completed on 20 June 1999, which was taken as the date of the end of the conflict. The retreat implied a military operation; therefore, the armed conflict ceased to exist after the determined period had expired. The court considered this approach consistent with Article 6(II) of Geneva Convention IV.<sup>543</sup>

The parallel existence of international and non-international armed conflict was established in the *Suva Reka* case as well.<sup>544</sup>

In the *Bitići* case, the trial chamber took a different approach with regard to the classification of the conflict in Kosovo. According to the trial chamber, after the NATO campaign against SRY

<sup>537</sup> *Škorpioni*, 1st inst., p. 98.

<sup>538</sup> *Kesar*, 1st inst., p. 27.

<sup>539</sup> *Škorpioni*, 1st inst., p. 51; the Chamber, however, refers to a somewhat different dates on p. 87 (6 April 1992 – 14 September 1995, although reference to September instead of December was probably a typographical error); see also, *Zvornik*, 1st inst., p. 176.

<sup>540</sup> *Škorpioni*, 1st inst., p. 51.

<sup>541</sup> *Ovčara*, 1st inst., pp. 59, 71, 131.

<sup>542</sup> *Lekaj*, 1st inst., p. 8 (upheld on appeal).

<sup>543</sup> *Lekaj*, 2nd inst., p. 4.

<sup>544</sup> *Suva Reka*, 1st inst., p. 183.

started, the pre-existing non-international armed conflict turned into an international armed conflict between “SRY – Yugoslav Army and the police forces of the Republic of Serbia, on one side and the NATO Coalition and members of the armed military formation Kosovo Liberation Army, on the other”.<sup>545</sup>

### 8.10.1.3. A NEXUS BETWEEN THE ACTS OF THE PERPETRATOR AND THE ARMED CONFLICT, WAR OF OCCUPATION MUST BE ESTABLISHED.

There must be a sufficient nexus between the act of the perpetrator and the armed conflict, war or occupation.

In the *Kesar* case, the appellate court quashed the first instance judgement because the nexus was not established. The court held that there must be a link between the acts of accused, the armed conflict and the victims, and that it must be established if the commission of the crime depended on the context of the armed conflict or was influenced by the conflict.<sup>546</sup>

In the *Španović* case, the trial chamber pointed out that for the existence of a war crime, there must be a close connection between the armed conflict and the acts of the accused.<sup>547</sup> The nexus requirement is explicitly pointed out in other judgements as well, including the *Medak* case<sup>548</sup> and the *Suva Reka* case.<sup>549</sup>

In the *Suva Reka* case, the appeals chamber pointed out the irrelevance of personal motives for the existence of war crimes, stating that the perpetrator’s motives are not an element of war crimes. What matters for the qualification of a crime as a war crime is its commission at the time of armed conflict by a person who belongs to a party to the conflict, as well as a substantive connection between the acts of the accused and the armed conflict.<sup>550</sup>

In the *Zvornik* case, the War Crimes Chamber found a nexus between the criminal act and the armed conflict, based on the following facts:

- The civilian prisoners who were taken hostage for the purpose of exchange were military-abled men, exclusively of Muslim ethnicity, most of who were separated from their wives and children in the armed conflict.<sup>551</sup>
- With authorisation of his commander, one of the accused had entered the facility where the Muslim civilians were detained and interrogated the prisoners about their possession of arms.<sup>552</sup>

<sup>545</sup> *Popović et al.*, (Bitići case), 1st inst., p. 43.

<sup>546</sup> *Kesar*, 2nd inst. ¶ 12 (online format), available at <http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-11-2010.html>.

<sup>547</sup> *Španović*, 1st inst., p. 31.

<sup>548</sup> *Lazić et al. (Medak)*, 1st inst., p. 31.

<sup>549</sup> *Suva Reka*, 1st inst., p. 183.

<sup>550</sup> *Suva Reka*, Case No. Kž1 Po2 4/2010, 2nd Instance Verdict, Section 2.2.2. Available at <http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-4-2010.html>.

<sup>551</sup> *Zvornik*, 1st inst., p. 180.

The Chamber concluded that the existence of the armed conflict influenced the accused to commit the criminal offence.<sup>553</sup>

In the *Vujović et al. (Ovčara)* case, the appeals chamber held that the accused was aware of the following facts:

- at that time a non-international armed conflict existed in Vukovar;
- combat activities ceased on the previous day by surrender of the Croatian armed forces;
- the Croatian prisoners of war had been taken to Ovčara by the JNA members and placed in a hangar; and
- the POWs had been left to TO/Territorial Defence members.

The court held that knowledge of these facts considerably influenced the accused's conduct. The accused was not a TO member, but went to the site and took advantage of the conflict situation by taking away one POW from the hangar, hitting him and eventually killing him.<sup>554</sup> The appeals chamber held that such conduct would have all the elements of a "regular" criminal offence of murder or aggravated murder, but given the circumstances, the time it was committed and the context of the events, she had committed a war crime against prisoners of war. The court found her guilty of this war crime even though she was not a member of any armed formation, and objectively and formally did not have any authority and powers over the fate of the POWs, she acted like she had such authority and powers and realised them by killing one POW.<sup>555</sup>

In the *Lekaj* case, the War Crimes Chamber did not develop a discussion of this element, but merely stated that the acts were in direct relation with the armed conflict and were carried out in order to extort a confession of the victims' collaboration with the other party to the conflict.<sup>556</sup>

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<sup>552</sup> *Ibid.*

<sup>553</sup> *Ibid.*; see also the *Golubnjača* case (accused Čeda Budisavliević et al.), in which the Chamber discussed whether the crime in question was committed in relation to the armed conflict or was committed for personal financial gain.

<sup>554</sup> *Vujović et al. (Ovčara)*, 2nd inst., ¶ 166.

<sup>555</sup> *Vujović et al. (Ovčara)*, 2nd inst., ¶ 167

<sup>556</sup> *Lekaj*, 1st inst., p 37.

### 8.10.2. INDIVIDUAL WAR CRIMES

#### *Notes for trainers:*

- Having examined the elements that are common to all war crimes, this section will deal with the individual crimes that are prohibited under the SFRY CC and the FRY CC.
- It must be stressed to participants that prosecutors are required to prove both the common elements, discussed above, and the particular elements for each individual war crime that is charged.
- Participants should be encouraged to compare the jurisdiction of Serbia with those of Croatia and BiH.
- Participants should be referred to the case study and asked to act as though it were being prosecuted in Serbia to determine which crimes they would be permitted to charge under their national law. For example, participants could be asked to consider how they would charge the inhumane treatment of the persons detained in the case study in light of the Serbian case law, which is referred to below.

Each of the individual war crimes will now be considered. The elements of each of these offences as set out below have to be proved in addition to the common elements set out above.

These crimes, generally stated<sup>557</sup>, are:

- Killing;
- Torture;
- Inhuman (cruel) treatment;
- Rape;
- Causing immense suffering or violation of bodily integrity or health;
- Unlawful detention of civilians; and
- Pillage.

#### 8.10.2.1. KILLINGS

Killing as an underlying crime was envisaged both in the SFRY Criminal Code and the FRY Criminal Code.

This offence requires that the accused intentionally deprive the victim of his life.

When establishing death of the victims, the War Crimes Chamber takes into consideration, *inter alia*, the following:<sup>558</sup>

<sup>557</sup> This is not how the crimes are classified by SFRY CC, Art. 142 of the SFRY CC, but this list is a generalised description of the underlying crimes.

<sup>558</sup> See, e.g., *Ovčara*, 1st inst., pp. 80-85; *Škorpioni*, 1st inst., pp. 9-10, 66-67, 69, 71, 73-76; *Škorpioni*, 2nd inst., p. 10. In *Lekaj*, there was no body as proof of death, but the chamber established the death of the

- exhumation reports;
- autopsy reports;
- DNA analysis reports;
- video-recording of the killings; and
- witness testimony.

In the *Vujović et al. (Ovčara)* case, the trial chamber interpreted the incriminated act of killing of Article 144 (1) in conjunction with Article 3(I)(a) of Geneva Convention IV. The War Crimes Chamber established the intent of the accused by considering all relevant evidence and assessing the acts of the accused at the relevant time. The chamber concluded that the perpetrators were conscious of the acts they were committing and the consequences thereof, holding that entering an execution platoon and shooting at the lined up prisoners using fire arms or slitting the throat with a knife, implies a will for the consequence to take place.<sup>559</sup>

In the *Zvornik* case, the Supreme Court dismissed the prosecution's appeal because the causal link between the acts of the accused and the death of two victims could not be established (due to the lapse of time between the defendants' beating of one of the victims and the victim's death and the fact that another person also inflicted grave body injuries to the victim in the meantime). Therefore the court was not able to establish beyond reasonable doubt that the *mens rea* of the accused encompassed the death of the victims as a consequence.<sup>560</sup>

#### 8.10.2.2. TORTURE

In the *Zvornik* case, the War Crimes Chamber held that torture had been committed where victims were forced to, *inter alia*:<sup>561</sup>

- watch their compatriots while the accused were inflicting severe physical suffering upon them;
- helplessly listen to their moans and screaming, both inside and outside the room;
- be present while other victims were taken away—often close relatives, causing unawareness and serious fear concerning their destiny;
- in individual cases, listen to shots being fired shortly after a person was taken away to learn that their relatives have been killed immediately after that; and
- lie on the floor while the accused was shooting above their bodies and heads.

The chamber found that the actions inflicted severe mental suffering and pain on the injured persons through the fear caused,<sup>562</sup> where in certain situations those actions were undertaken

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victim on the basis of the testimony of the witness who was present at the relevant place prior to the killing and who heard the shots being fired, as well as on the basis of the testimony of the witness who saw the body several days after the killing, while the written evidence point to the fact that the body was never found and that the victim was still considered missing. *Lekaj*, 1st inst., p 20.

<sup>559</sup> *Ovčara*, 1st inst., p. 133; *Lekaj*, 1st inst., p. 34.

<sup>560</sup> SC of Serbia, *Zvornik I (Korac and Slavković)*, Case No. Kz I RZ 3/08, 8 April 2009, 2nd Instance Verdict, p. 16.

<sup>561</sup> *Zvornik*, 1st inst., p. 179.

<sup>562</sup> *Ibid.*

with the aim of extracting information in relation to a possible possession of weapons.<sup>563</sup> These acts caused grave mental consequences to the injured parties, in some cases permanently, given that they turned mentally ill after the traumas endured.<sup>564</sup>

In the *Lekaj* case, the War Crimes Chamber found the accused guilty of torture, a violation of Article 142(I) FRY CC in conjunction with Common Article 3(I) a of Geneva Convention IV and Article 75 of Additional Protocol (I) and Article 4 (I)(II)(a) of Additional Protocol II.<sup>565</sup> The acts of the accused included beating men with rifle stocks, feet, hands and bats, with the intent to coerce confessions from them on collaboration with Serb forces.<sup>566</sup>

In order to establish the perpetrator's subjective intent, the chamber assesses the evidence and the acts of the accused.<sup>567</sup>

The appellate court in the *Medak* case, when quashing the acquittal for one of the accused and sending the case for retrial, noted that the subjective perception of the victim that the consequences of suffering were not serious did not exclude the existence of a crime of torture or inhumane and degrading treatment. It instructed the lower court to re-assess the victim's perception together with the objective circumstances of the incident (accumulation of inflicted injuries, the duration of ill-treatment, tools used, etc.) in order to determine the existence of a crime.<sup>568</sup>

### 8.10.2.3. INHUMAN TREATMENT

In the *Zvornik* case, the War Crimes Chamber concluded that all three accused inflicted inhuman treatment:

- The accused ordered individuals to line up in two categories and to fight each other with fists while the accused were laughing, encouraging and demanding that the fight be more intense.<sup>569</sup>
- The accused ordered individuals to enter abandoned houses of Muslim and Serb owners, and ordered individuals to pillage their own houses.<sup>570</sup>

The chamber found the accused acted inhumanely towards the individuals precisely in situations when human values such as honour, dignity and self-respect were in the greatest danger when the victims were deprived of their liberty.<sup>571</sup> The chamber held the accused violated Article 142(1) of the SFRY Criminal Code, and that their actions contained all elements to the violation

<sup>563</sup> *Ibid.*

<sup>564</sup> *Ibid.*

<sup>565</sup> *Lekaj*, 1st inst., p. 36 (BCS); *Zvornik*, 1st inst., p. 179.

<sup>566</sup> *Lekaj*, 1st inst., p. 36.

<sup>567</sup> *See, e.g., ibid.* at p. 37.

<sup>568</sup> *Lazić et al. (Medak)*, 2nd inst.

<sup>569</sup> *Zvornik*, 1st inst., p. 179.

<sup>570</sup> *Ibid.* at p. 180.

<sup>571</sup> *Ibid.* at p. 179.

of international humanitarian law, in particular with regard to degrading and humiliating conduct and an assault on human dignity.<sup>572</sup>

In the *Vujović et al. (Ovčara)* case, the War Crimes Chamber found a violation of Article 144 of the FRY Criminal Code in conjunction with Common Article 3 (I)(c), Article 4(A)(1), (2) and (4), and Article 4 (I) (II)(e) of Additional Protocol II. The chamber held that:

[The Accused] first inflicted bodily injuries [upon the victims] and treated them inhumanly in a way that violated human dignity (beat them while they passed the row and inside the hangar with their hands, feet, wooden and other sort of bats or weapons.) [...].<sup>573</sup>

The chamber held that the perpetrators acted with direct intent, as they were aware of the status of the victims, aware of the acts they were committing and the consequences thereof.<sup>574</sup> The chamber held that beating and kicking the prisoners with various objects implied the will to violate human dignity.<sup>575</sup>

In the *Lekaj* case, the chamber found that the accused acted inhumanly towards the victim by “confinement in inhuman conditions in dark, small cellar, without beds, with concrete floor, without food and water, forcing them to drink urine”.<sup>576</sup> The chamber assessed the evidence and the acts of the accused and found that he had acted with direct intent.<sup>577</sup>

#### 8.10.2.4. RAPE

In the *Lekaj* case, the War Crimes Chamber found an accused guilty of rape and forbidden sexual conduct—unnatural fornication, a violation of Article 142 FRY Criminal Code in conjunction with Article 3(I)(c) of Geneva Convention IV, Article 76 of Additional Protocol (I) and Article 4 (I)(II)(e) of Additional Protocol II.

Regarding the rape charge, the chamber held:

[T]he accused who was armed threatened that he would kill her if she did not undress, which she did; then he raped her, and the NN member of the KLA also [did], taking advantage of the fact that her resistance was broken down.<sup>578</sup>

The chamber also found that the accused committed the crime of forbidden sexual conduct—unnatural fornication. The chamber found the accused guilty on the basis of witness testimony that:

[The witness] was raped in the cellar by “Zifa” and “Pinco” in a manner that one of them placed his penis in his [the victim’s] mouth while the other raped him in

<sup>572</sup> *Ibid.*

<sup>573</sup> *Ovčara*, 1st inst., p. 133.

<sup>574</sup> *Ibid.* at pp. 245-246.

<sup>575</sup> *Ibid.*

<sup>576</sup> *Lekaj*, 1st inst., p. 36 (unofficial translation of the quote).

<sup>577</sup> See, e.g., *ibid.* at p. 37.

<sup>578</sup> *Ibid.* at p. 3.

the anus from the back [...]. Therefore, it follows from the testimonies of these witnesses that it is established beyond doubt that forbidden sexual conduct was committed in the cellar against the witness-injured party Bedri Salja, namely that, being beaten and swollen from the beatings, he was forced to unnatural fornication in the manner that genitalia [of the accused] were placed into his mouth and anus [...].<sup>579</sup>

The War Crimes Chamber held that the accused's conduct represented a grave violation of international humanitarian law, as he was a member of one of the opposing sides to the conflict and the victims, as civilians who did not actively participate in the hostilities, enjoyed the status of protected persons in accordance with Geneva Convention IV and Additional Protocols I and II.<sup>580</sup> The chamber added that women were to be protected from any attack on their honour, in particular from rape.<sup>581</sup>

In order to establish the accused's subjective intent, in *Lekaj*, the chamber assessed the evidence and the acts of the accused.<sup>582</sup>

#### 8.10.2.5. CAUSING IMMENSE SUFFERING OR VIOLATION OF BODILY INTEGRITY OR HEALTH

According to the War Crimes Chamber, international humanitarian law defines the violation of bodily integrity as an attack on the physical integrity of the victim by infliction of severe bodily pain or suffering, regardless of the type or degree of infliction of the bodily injury.<sup>583</sup>

The War Crimes Chamber has found accused guilty of violating the bodily integrity of victims by:

- Kicking and beating victims with their hands and other items, including bats, water pipes, and pieces of wood;<sup>584</sup>
- Beating victims with rifle stocks, feet, hands, and bats on all parts of the body;
- Cutting off a victim's ear, and making cuts on the body; and
- Making cigarette burns on the bodies of victims and forcing them to do so to each other.<sup>585</sup>

In making these findings, the chamber assessed testimony from victims about the manner and means of injuring, and the intensity and the consequences to their health of the injuries they sustained.<sup>586</sup>

<sup>579</sup> *Ibid.* at pp. 31-32, 3.

<sup>580</sup> *Ibid.* at p. 36.

<sup>581</sup> *Ibid.* at p. 37.

<sup>582</sup> *Ibid.*

<sup>583</sup> *Zvornik*, 1st inst., p. 178; *Lekaj*, 1st inst., p. 36 (finding the accused guilty of violating the bodily integrity of the victim, a violation of Article 142 SFRY in conjunction with Article 3(I) of Geneva Convention IV and Article 4 (I)(II) a) of Additional Protocol II).

<sup>584</sup> *Zvornik*, 1st inst., p. 178; see also *Španović*, 1st inst., pp. 30-31.

<sup>585</sup> *Lekaj*, 1st inst., p. 36.

<sup>586</sup> *Zvornik*, 1st inst., p. 178.

In order to establish the accused's subjective intent, the chamber assesses the evidence and the acts of the accused.<sup>587</sup>

#### 8.10.2.6. UNLAWFUL DETENTION OF CIVILIANS

In the *Lekaj* case, the War Crimes Chamber found an accused guilty for unlawful detention of civilians, a violation of Article 142(I) FRY Criminal Code in conjunction with Article 3(I) and 13 of Geneva Convention IV. The chamber concluded that persons were deprived of freedom and confined without legal proceedings, where such detention was not necessary for reasons of security or otherwise, but was committed exclusively because of their ethnicity or the presumption that they had cooperated with the other side in the armed conflict.<sup>588</sup>

In order to establish the accused's subjective intent, the chamber assessed the evidence and the acts of the accused. The chamber concluded that the accused acted with direct intent, as he was aware of his conduct and intended to commit the acts.<sup>589</sup>

#### 8.10.2.7. PILLAGE

The War Crimes Chamber has held that pillaging property of the population, as an underlying crime under Article 142 (1) of the SFRY Criminal Code, involves the unlawful appropriation of private or public property in times of armed conflict, and pillage committed by individuals for purpose of personal benefit.<sup>590</sup>

In the *Zvornik* case, the chamber based its findings on provisions of international humanitarian law, including both treaty law and customary law.<sup>591</sup> The chamber noted that the act of pillage as a violation of international law has been recognised since the IV Hague Convention of 1907.<sup>592</sup>

#### 8.10.2.8. TAKING OF HOSTAGES

In the *Trbojević* case, the War Crimes Department found the accused Trbojević guilty of war crimes against civilians committed by capturing and taking Croatian civilians hostage. The court concluded that the civilians were taken hostage because they were captured, deprived of liberty and detained for the purposes of exchange. The court's conclusion that the civilians were taken hostage was based on the following facts:

- the way in which they were captured;
- the conditions under which they were detained;
- the absence of any record about the time of capture or a list of detainees;
- uncertainty about their release; and
- and that they were captured to accomplish an aim.<sup>593</sup>

<sup>587</sup> See, e.g., *Lekaj*, 1st inst., p. 37.

<sup>588</sup> *Ibid.* at p. 36.

<sup>589</sup> *Ibid.* at p. 37.

<sup>590</sup> *Zvornik*, 1st inst., p. 180.

<sup>591</sup> *Ibid.*

<sup>592</sup> *Ibid.*

#### 8.10.2.9. DEPRIVATION OF THE RIGHTS TO A FAIR AND IMPARTIAL TRIAL

In the *Bitići* case, the prosecution charged the accused with depriving the prisoners of war of the right to a fair and impartial trial. The accused allegedly deprived the victims of their liberty and kept them detained without informing them about the reasons of arrest, without a written order issued by the competent organ and without a court's decision on detention.

The trial chamber acquitted the accused and stated that the prisoner of war was neither an accused nor a suspect which might be detained, but a belligerent combatant. As such, he could be disarmed and captured with the purpose of preventing his further participation in hostilities. The court found that it was a legitimate right of one party to capture the opposing soldiers without any explanation, but that the rights of the POW must be guaranteed as provided in the GC III and AP I.<sup>594</sup>

#### 8.10.2.10. EMPLOYMENT OF PROHIBITED MEANS OF WARFARE

In the *Tuzla Convoy* case, the trial chamber found that the accused Jurišić, by issuing an order to attack the withdrawing JNA convoy, violated Article 19 of the Geneva Convention I and Article 21 and 37(1) of Additional Protocol I, hence committing the criminal offence of Employment of Prohibited Means of Warfare, under Article 148 of the FRY Criminal Code.

The trial chamber pointed out that for the existence of the crime of employment of prohibited means of warfare, the acts of the accused must be undertaken in the course of an armed conflict.<sup>595</sup>

The appellate court quashed the first instance judgement by concluding that the first instance judgement failed in determining the existence of a confidence on behalf of the JNA that its convoy would safely leave Tuzla. The court pointed out that confidence is one of the elements of perfidious acts along with the intent of the perpetrator to betray such confidence. It further stated that lack of confidence can be deduced from the fact that the Commander of the Tuzla Territorial Defence was in the convoy as a guarantee against the attack, which indicated the existence of distrust.<sup>596</sup>

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<sup>593</sup> WCC, Belgrade District Court, Trbojević, Case No. K.V. 5/2008, 1st Instance Verdict, 27 May 2009, pp. 18-19.

<sup>594</sup> *Popović et al.*, (*Bitići* case), 1st inst., p. 47.

<sup>595</sup> WCC, Belgrade District Court, Jurišić (*Tuzla Convoy* case), Case No. K.V. 5/2007, 1st Instance Verdict, 28 Sept. 2009 p. 140.

<sup>596</sup> WCD, Appellate Court in Belgrade, Jurišić, Case No. Kž1 Po2 5/2010, 2nd Instance Verdict, 11 Oct. 2010, ¶ 16 (online format), available at <http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-5-10.html>.

## 8.11. FURTHER READING

## 8.11.1. BOOKS

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- Dörmann, K., *ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – SOURCES AND COMMENTARY* (ICRC/Cambridge University Press, 2003).
- Hagay-Frey, A. and Raker, S., *SEX AND GENDER CRIMES IN THE NEW INTERNATIONAL LAW: PAST, PRESENT, FUTURE* (MARTINUS NIJHOFF, 2011).

## 8.11.2. ARTICLES

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- Askin, K., *Crimes Against Women under International Criminal Law in* Brown, B., *RESEARCH HANDBOOK ON INTERNATIONAL CRIMINAL LAW* (Edward Elgar Publishing, 2011).
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- Öberg, M., *The Absorption of Grave Breaches into War Crimes Law*, 91 *INTERNATIONAL REVIEW OF THE RED CROSS* 873 (2009). Available at: <http://www.icrc.org/eng/assets/files/other/irrc-873-divac-oberg.pdf>.
- Stewart, J., *The Grave Breaches Regime in the Geneva Conventions: A Reassessment Sixty Years On*, 7 *JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE* (Special Issue) 4 (2008).
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## 8.11.3. REPORTS

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- Human Rights Watch, *GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: TOPICAL DIGEST OF THE CASE LAW OF THE ICTR AND THE ICTY* (2004). Available at: <http://www.hrw.org/node/12172>.
- Humanitarian Law Centre, *TRIALS FOR WAR CRIMES AND ETHNICALLY AND POLITICALLY MOTIVATED*

CRIMES IN POST-YUGOSLAV COUNTRIES (Humanitarian Law Centre, 2009).

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#### 8.11.4. INTERNET RESOURCES

- International Committee of the Red Cross: <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp>

This website provides abundant material on international humanitarian law, including both treaties and customary law. The website also includes the following databases:

- Treaty database and States Party (<http://www.icrc.org/ihl>)
- ICRC national implementation database (<http://www.icrc.org/ihl-nat>)
- Customary IHL database (<http://www.icrc.org/customary-ihl/eng/docs/home>)

The ICRC website also includes useful reference documents:

- About the international humanitarian law treaties and documents database
- About the National implementation database
- States party to the main treaties
- ICRC: 1949 Conventions and Additional Protocols, and Their Commentaries. Available at: <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>.

The ICRC website also includes valuable information on the history of the Geneva Conventions and the development of modern international humanitarian law.

Useful photos illustrating various IHL war crimes provisions can also be found on the ICRC website at: <http://www.icrc.org/eng/resources/documents/photo-gallery/additional-protocols-photos-080507.htm>.