

**INTERNATIONAL CRIMINAL LAW
& PRACTICE
TRAINING MATERIALS**

PROCEDURE & EVIDENCE

*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

1. INTRODUCTION
2. WHAT IS ICL?
3. GENERAL PRINCIPLES
4. INTERNATIONAL COURTS
5. DOMESTIC APPLICATION
6. GENOCIDE
7. CRIMES AGAINST HUMANITY
8. WAR CRIMES
9. MODES OF LIABILITY
10. SUPERIOR RESPONSIBILITY
11. DEFENCES
- 12. PROCEDURE & EVIDENCE**
13. SENTENCING
14. VICTIMS & WITNESSES
15. MLA & COOPERATION



Project funded by the EU



Implemented by:



MODULE 12: BASIC PROCEDURAL AND EVIDENTIARY ISSUES

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

The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations, the ICTY or the OSCE-ODIHR concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

Copyright © ICLS – OSCE-ODIHR

CONTENTS

12. Basic procedural and evidentiary issues	5
12.1. Introduction	5
12.1.1. Module description	5
12.1.2. Module outcomes	5
12.2. International law and jurisprudence.....	7
12.2.1. Procedural issues	7
12.2.2. Evidentiary issues.....	26
12.3. Regional law and jurisprudence.....	29
12.4. BiH.....	30
12.4.1. Procedural issues	30
12.4.2. Evidentiary issues.....	62
12.5. Croatia.....	78
12.5.1. Procedural issues	79
12.5.2. Evidentiary issues.....	89
12.6. Serbia	94
12.6.1. Procedural issues	94
12.6.2. Evidentiary issues.....	113
12.7. Further reading	123
12.7.1. Books.....	123
12.7.2. International Tribunals: Rules of Procedure and Evidence.....	123

12. BASIC PROCEDURAL AND EVIDENTIARY ISSUES

12.1. 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 Commission. An introduction on 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 as a training tool and resource for legal trainers in Bosnia and Herzegovina (BiH), Croatia and Serbia. 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.

12.1.1. MODULE DESCRIPTION

This Module first provides a brief overview of the main issues of procedure and evidence before international courts. The Module is not a comprehensive guide to these issues, as the focus of the training manual is on practical aspects of the substantive law, including jurisprudence. Participants should however be provided with an analysis of the key concepts so as to be able to understand how the substantive law is put into practice before international courts.

Thereafter in the regional section of this Module, an outline of the procedural and evidentiary systems that are relevant to prosecutions of war crimes, crimes against humanity and genocide in BiH, Croatia and Serbia will be provided.

12.1.2. MODULE OUTCOMES

At the end of this Module, participants should understand:

- The basic structure and provisions of the procedural and evidentiary system before the ICTY and ICTR, as well as the ICC;
- The various roles of the parties in proceedings before international criminal courts;
- The fair trial rights of an accused before both the international and national courts;
- The requirements for indictments at the ICTY and ICTR, as well as the ICC;
- When cases against different accused can be joined;

- Cumulative charging;
- How guilty pleas and plea bargaining are dealt with before both international and national courts;
- Basic evidentiary rules as they are applied before both international and national courts; and
- The ways in which evidence gathered by the ICTY and findings of the ICTY can be introduced into evidence in the courts of BiH, Croatia, and Serbia.

Notes for trainers:

- The procedural and evidentiary system before international courts comprises a mixture of the common law “adversarial” system and the civil law “inquisitorial” system.
- The particular system in place at the state level should be compared and contrasted with the system applied before the international courts.
- It is important for participants to understand the manner in which the procedural and evidentiary systems before international courts have been designed and have evolved to meet the challenges of proving international crimes, and in particular, guaranteeing the rights of the accused in such proceedings.
- It is not necessary for participants to delve into the details of how these systems work. They should develop an understanding of the way in which the systems work in practice so that they are able to apply the international standards where appropriate within their domestic systems.
- It is imperative that participants appreciate that the international systems have been fashioned to most effectively facilitate the prosecution of international crimes which are very often widespread and complex, and which involve the admission of large quantities of oral and written evidence.
- 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 make references to the parts of the case study that are relevant and identify practical examples to apply the legal issues being taught.

12.2. INTERNATIONAL LAW AND JURISPRUDENCE

12.2.1. PROCEDURAL ISSUES

12.2.1.1. OVERVIEW

International criminal courts have adopted a mixed system of procedure for the prosecution of international crimes. A major difference between the “adversarial” and “inquisitorial” systems is the role played by the different parties in the proceedings.¹

In the adversarial system:

- The prosecution and the defence each bring their case to court, to be heard by the judges;
- The parties do their own investigations;
- The judges neutrally manage the proceedings and decide on procedural and evidentiary issues as they arise at trial; and
- In adversarial systems where juries are assigned to cases, the jury will be the finder of fact, and in all other cases, the judge will be the finder of fact.

In an inquisitorial system:

- A state agency undertakes an objective investigation into the case as a whole;
- In general, a judge may supervise the investigation, and together with the prosecutor and investigators, creates a case file;
- The trial judge plays an active role during the trial in an effort to “seek the truth”; and
- The judge is the finder of fact.

The differences in these systems have led to the development of distinct procedures and rules.

The international system has sought to blend the two systems. Different courts have adopted procedures from the two systems to varying degrees. The ICTY and ICTR Statutes include very few procedural rules, but the judges created rules of procedure and evidence to reflect “concepts that are generally recognised as being fair and just in the international arena”.² A trend in the Statutes and Rules of the ICTY and ICTR is that they are more adversarial than inquisitorial. However, the rules do provide judges with the ability to intervene more frequently in the proceedings than in typical adversarial systems. For example, the ICTY and ICTR judges are permitted to call their own witnesses. This is not permitted in traditional common law systems.

With regard to the ICC, State parties to the Rome Statute adopted rules of procedure and evidence. The ICC Rules permit the judges to oversee the prosecutor’s investigations and

¹ For a discussion of the two systems, see ROBERT CRYER, et al., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 425 – 430 (2010).

² Annual Report of the ICTY, UN Doc. A/49/342-S/1994/1007, ¶ 53.

For all international courts, the prosecutor is appointed as an independent party responsible for the investigation and prosecution of international crimes. It is the prosecutor who brings and prosecutes the cases.

charges can only be confirmed following a contested hearing between the prosecution and defence. As will be explained below, such a procedure does not exist before the ICTY and ICTR.

Key components of procedure

include:

- For all international courts, the prosecutor is appointed as an independent party responsible for the investigation and prosecution of international crimes. Unlike the inquisitorial system, for all international courts, it is the prosecutor who brings and prosecutes the cases. The prosecutor bears the burden of proof, and must prove all crimes beyond a reasonable doubt.
- The defence does not have to prove its case beyond a reasonable doubt. The onus lies on the prosecution throughout the proceedings to establish its case. The defence is entitled to investigate the allegations made against the accused and call its own evidence if it so wishes. The accused can testify in his case, but there is no requirement to do so.
- Each party, as well as the judges, can call witnesses to testify. Witnesses, often victims, play an important role at the international tribunals. Some witnesses testify as “experts” on areas of specialization that can assist the court understand a particular issue. Witnesses may apply to be granted security measures for their testimony, such as closed sessions, voice and facial distortion, or pseudonyms. If the circumstances necessitate, witnesses may also apply to be part of relocation protection programmes.³
- It is only before the ICC that victims can directly participate in the proceedings as a party to the proceedings when they fulfil the requirements under the Rome Statute.⁴ They are entitled to be represented separately in the proceedings, and can apply for reparations at the conclusion of proceedings.

³ See below, section 14.2 **Error! Reference source not found..**

⁴ See below, section 14.3 14.3.

12.2.1.2. FAIR TRIAL RIGHTS

Notes for trainers:

- One of the most important issues in this Module for participants to discuss is the way in which fair trial guarantees are recognised and implemented before international courts.
- In the regional section that follows, participants will receive an overview of how these guarantees are applied in their own domestic systems.
- In order to stimulate discussion about these issues, participants could be asked to consider how each of the guarantees that are recognised before international courts are implemented in their national systems. Participants should be actively encouraged to consider whether all necessary fair trial guarantees are recognised both before international and national courts and what improvements could be made.
- Another way of ensuring that participants engage with the issues would be to ask them whether they believe that the accused in the case study could get a fair trial in their national courts, and what steps would need to be taken to ensure that his rights were protected. Is this a case that should rather be referred to the ICC?

Fair trial rights are core principles of international criminal law. International courts follow the fair trial provisions contained in treaties, and have used the provisions on fair trial rights contained in the ICCPR⁵ as a model in their proceedings.⁶

The basic fair trial standards applied by the international courts are the:

- Presumption of innocence;
- Right to trial before an independent and impartial tribunal;
- Right to be informed promptly and in detail in a language they understand of the nature of the charge(s) against them;
- Right to adequate time and facilities to prepare a defence;
- Right to communicate with counsel of one's own choosing;
- Right to self-representation;
- Right to be tried without undue delay;
- Right to a public trial;
- Right to be tried in his or her own presence;
- Right to legal assistance;

⁵ International Covenant on Civil and Political Rights ("ICCPR"), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, (Mar. 23, 1976).

⁶ The ICTR has also recognised that customary international law is reflected in the ICCPR. See *e.g.*, Juvénal Kajelijeli, Case No. ICTR-98-44A, Appeal Judgement, May 23, 2005, ¶ 209.

- Right to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them; and
- Right not to be compelled to testify against him/herself or to confess guilt.

In particular, these rights are reflected by Article 21 of the ICTY Statute, Article 20 of the ICTR Statute and Article 67 of the Rome Statute.

These rights can be grouped into categories of fair trial issues, including three which are considered below:

- Equality of arms;
- Self-representation; and
- Public and speedy trials.

The 2003 BiH Criminal Procedure Code,⁷ the 1998 Croatian Criminal Procedure Code⁸ and the Serbian Criminal Procedure Code⁹ also provide for many fair trial rights for suspects and accused, which are discussed in the relevant regional sections below.

12.2.1.2.1. EQUALITY OF ARMS

Equality of arms encompasses several rights that ensure that the defence has the same opportunity to prepare and present its case as the prosecution. In some cases, defence counsel have argued that it is unfair that they do not have the same resources as the prosecution, which has a large staff and significant financial and human resources to prepare its case over a number of years.

Equality of arms refers to procedural equality, and not equal resources.

The ICTY and ICTR have held that equality of arms refers to procedural equality, and not equal resources.¹⁰ The judges are required to provide everything they practically can when a party asks for assistance in presenting its case.¹¹ The court must ensure that the defence is not at a significant disadvantage.¹² The defence is always free to

raise any violation of this right before the trial chamber on the facts of the case.

A common complaint from the accused is a violation of the right to sufficient time or facilities to prepare a defence. The judges will evaluate claims of insufficient time or insufficient facilities on

⁷ See, e.g., Bosnia and Herzegovina CPC, Arts. 14 (equality of arms) (2003), 7 (defence), 39 – 40 (defence counsel), Komentari Zakona o krivičnom/kaznenom postupku u Bosni i Hercegovini, Zajednički projekat Vijeća Evrope i Evropske komisije, Sarajevo 2005., p. 43 (Commentary on the Criminal Procedure Code in Bosnia and Herzegovina, Joint project of the Council of Europe and the European Commission, Sarajevo, 2005, p. 43; available in BCS only).

⁸ See, e.g., Official Gazette of Croatia „Narodne Novine“ No. 110/97, Art. 4(2).

⁹ See, e.g., Republic of Serbia, CPC, Official Gazette, No. 46/06, Art. 4.

¹⁰ Ferdinand Nahimana, Case No. ICTR-96-11A, Appeal Judgement, 28 Nov. 2007, ¶ 220; Dario Kordić et al., Case No. IT-95-14/2-A, Appeal Judgement, 17 Dec. 2004, ¶ 69.

¹¹ Nahimana, AJ ¶ 220; Duško Tadić, Case No. IT-94-1-A, Appeal Judgment, 26 Jan. 2000, ¶ 52.

¹² Clément Kayishema et al., Case No. ICTR-95-I-A, Appeal Judgement, 1 June 2001, ¶¶ 67 – 69.

a case-by-case basis, considering whether the defence as a whole—not just an individual counsel—was deprived of time or facilities.¹³ The concept of adequate time and facilities is abstract, and must be evaluated by looking at the circumstances of each case.¹⁴

Other rights that fall under this category include the rights:

- to defence counsel;
- to be informed promptly and in detail about the charges against them;
- to disclosure of exculpatory evidence by the prosecution; and
- to examine and call witnesses.¹⁵

12.2.1.2.2. SELF-REPRESENTATION

The right to self-representation is not absolute. For complicated trials, such as those before the international tribunals, an accused may lack the ability to conduct their own case—which may obstruct the accused’s right to a speedy trial. Moreover, at times, accused have taken the opportunity of self-representation to engage in disruptive behaviour or otherwise obstruct the trial. In such situations, a trial chamber can assign legal counsel or legal assistance to an accused.¹⁶

The right to self-representation is not absolute.

12.2.1.2.3. PUBLIC AND SPEEDY TRIAL

The international tribunals allow for public trials, but also recognise exceptions to this right.

The right to a public and speedy trial is widely recognised, but is sometimes difficult for the tribunals to guarantee in light of the types of cases they hear. The right to a public trial, in which the public can follow and analyse the trial, helps protect against unfair or arbitrary decisions by the judges.

The international tribunals allow for public trials, but also recognise exceptions to this right. Closed or private sessions are allowed at the ICTY and ICTR for reasons of public order, morality,

¹³ *Nahimana*, AJ ¶ 220; Aloys Ntabakuze, Case No. ICTR-98-41-AR72(C), Decision (Appeal of the Trial Chamber I “Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses” of 9 Sept. 2003), 28 Oct. 2004, p. 4.

¹⁴ *Nahimana*, AJ ¶ 220; see also Paul Kelly v. Jamaica, Communication No. 253/1987 (10 April 1991), UN Doc. CCPR/C/41/D253/1987, ¶ 5, 9; see also Aston Little v. Jamaica, Communication No. 283/1988 (19 Nov. 1991), UN Doc. CCPR/C/43/D/283/1988 (1991), ¶ 8.3; General Comment No. 13, UN Doc. HRI/GEN/1/Rev.1, 13 April 1984, ¶ 9.

¹⁵ See e.g., Statute of the International Tribunal for the Former Yugoslavia, Art. 21(4) (1993); Statute of the International Criminal Tribunal for Rwanda, Art. 20(4); Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90, Art. 67(1).

¹⁶ See, e.g., Radovan Karadžić, Case No. IT-95-5/18-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on Adequate Facilities, 7 May 2009, ¶¶ 13 – 14; Momčilo Krajišnik, Case No. IT-00-39, Decision on Krajišnik request and on Prosecution motion, Appeals Chamber, 11 Sept. 2007, ¶ 41, citing Vojislav Šešelj, Case No. IT-03-67-AR-73.3, Decision on Appeal against the Trial Chamber’s Decision on Assignment of Counsel, 20 Oct. 2006, ¶ 20.

safety, security, non-disclosure of the identity of a protected witness or victim or protection of the interests of justice.¹⁷ At the ICC, closed or private sessions are allowed to protect the accused, victims, witnesses or confidential or sensitive evidence.¹⁸ The judges must balance the interests of a public hearing against the interests listed above. As a result, there are frequent closed or private sessions, usually because of witness protection issues (see Module 14). These are issues that have also arisen in war crimes trials in BiH, Croatia and Serbia. They are discussed in more depth in Module 14.

12.2.1.3. ICTY AND ICTR

Notes for trainers:

- This section will consider the basic procedural steps that apply in prosecutions before the ICTY and ICTR. These procedures are similar before both tribunals; however, there are certain differences with the procedures that apply before the ICC.
- In the next section, basic procedural steps applied before the ICC will be considered.
- In both of these sections, the participants should be encouraged to consider the differences between the procedures of the international courts and those that apply before their own national courts.
- The case study can also be used to consider how the indictment should be drafted and confirmed before an international court, and whether the same procedure would need to be followed in their domestic systems.
- Participants could be asked to discuss the advantages and disadvantages of the different procedural steps that are followed from their own experience. A useful way of stimulating discussion is to ask participants what changes they think should be made to their national procedure, drawing on the experiences of the international courts.

The processes and procedures at the ICTY, ICTR and SCSL are very similar. Below is a very brief summary of procedural issues dealt with at trial. For a more in-depth look at practice and procedural issues, refer to the ICTY Manual on Developed Practices.

12.2.1.3.1. INVESTIGATIONS

¹⁷ ICTY Rules of Procedure and Evidence (“ICTR RPE”), Rule 79; ICTR RPE, Rule 79; ICCPR Art. 14(1); Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), 4 Nov. 1950, ETS 5, available at <http://www.unhcr.org/refworld/docid/3ae6b3b04.html> (accessed 29 June 2011), Art. 6(1).

¹⁸ Rome Statute, Art. 64(7).

The first step in any trial is the prosecutor initiating an investigation within the limits of the court's jurisdiction. The prosecutor can start an investigation based on information received from sources or *ex officio*.¹⁹

Key issues include:

- The prosecutor does not need to get permission from a judge to proceed with an investigation or investigate crimes within the jurisdiction of the court.
- The prosecutor is not required to investigate or collect evidence that is favourable to the suspect or defence. However, if such information emerges, the prosecutor must disclose it.
- During the investigation, the prosecution team interviews suspects, witnesses, victims, experts and others, and collects and reviews documentary evidence. Sometimes there will be forensic evidence taken as well, for example, in the case of mass graves or being present at the sites of killings.

12.2.1.3.2. THE INDICTMENT

Key issues regarding the initial indictment include:

- Once the investigation is complete, only the prosecutor can decide whether to apply for an indictment to be issued.
- The prosecutor is responsible for the content of the indictment.
- Once the prosecutor has determined "that a *prima facie* case exists"²⁰ the indictment will be sent to a judge.
- The judge will determine whether there are reasonable grounds for the issuance of an indictment.²¹

The indictment is the document upon which the entire case will be based. It must be precise and inclusive, since the trial chamber cannot convict a defendant for a crime he or she has not been charged with (unless they convict for a lesser and included crime to one charged).

The indictment is critical to informing the accused of the charges he or she faces. Important considerations include:

- The accused will use the indictment to prepare a defence. An accused cannot mount a proper defence if the indictment does not adequately inform him or her of the charges.

The indictment must be precise and inclusive. The trial chamber cannot convict a defendant for a crime he or she has not been charged with (unless they convict for a lesser and included crime to one charged).

¹⁹ ICTY Statute, Art. 18(1); ICTR Statute, Art. 17(1).

²⁰ ICTY Statute, Art. 18(4); ICTR Statute, Art. 17(4).

²¹ ICTY RPE, Rule 29(A).

- An indictment must not violate the rights of the accused to be informed in detail of the nature and cause of the charges and to adequate time and facilities to prepare a defence.
- The “nature” of the charge is its legal characterization, or the specific alleged offence and the alleged mode of liability.
- The “cause” of a charge includes the facts it is based on.

There are certain basic requirements for indictments, including:

- The material facts of the prosecution’s case must be set out with “enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence”.²²
- The prosecutor does not have to include the evidence intended to prove the material facts.
- Which facts are “material” is determined on a case-by-case basis according to the nature of the charges. For example, a charge of directly perpetrating a crime requires more specific material facts in the indictment than a charge of aiding and abetting.

The material facts of the prosecution’s case must be set out with “enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence”.

Fundamental defects in the indictment can lead to the trial chamber throwing out a charge or the appeals chamber reversing a conviction.²³ At the ICTY, the focus of the indictment is on the offence, as opposed to the conduct of the accused. Therefore, how an offence is characterised in an indictment is binding on the trial chamber and they cannot convict for a crime not charged, even if they find one was committed.

There is a set process for how the indictment is issued. Important steps in this procedure include:

- The indictment must be issued by a single judge before the proceedings can begin. This is usually done before the suspect is arrested or surrenders.
- The prosecutor must provide evidence, either documentary or a summary of evidence, which will be called during trial, to support the charges in the indictment.
- This evidence must establish *prima facie* that the suspect committed the crimes.
- The court must determine that the prosecutor has met the evidentiary requirements for bringing the case to trial.
- Each charge must be confirmed.

²² Tihomir Blaškić, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, ¶ 209.

²³ Milorad Krnojelac, Case No. IT-97-25-A, Appeal Judgement, 17 Sept. 2003, ¶¶ 138 – 42; Mikaeli Muhimana, Case No. ICTR-95-1-A, Appeal Judgement, 21 May 2007, ¶¶ 217 – 18, 224 – 6 (J. Schomburg, dissenting).

As long as it does not unfairly prejudice the accused, an indictment can be amended at any time, even during the trial proceedings, but only with the approval of the court.²⁴

12.2.1.3.3. CUMULATIVE CHARGES AND CONVICTIONS

Cumulative charges arise because, in the context of genocide, crimes against humanity and war crimes, the same act can qualify as several different crimes.

The ICTY and ICTR also accept cumulative charges, which are quite common. These arise because, in the context of genocide, crimes against humanity and war crimes, the same act can qualify as several different crimes. For example, a rape could be considered a crime under any of

those characterizations, and could be charged as three different crimes.

Important considerations regarding cumulative charges include:

- Cumulative charges can lead to cumulative convictions.
- A cumulative conviction must be entered if both statutory provisions charged have a “materially distinct” element not included in the other.
- A materially distinct element requires proof of a fact that is not required by another element.²⁵ If this test is not met, a single conviction must be entered, with the more specific crime taking precedence.
- The court will also take into consideration the contextual elements of the crimes when deciding on a cumulative conviction.

Cumulative charges can lead to cumulative convictions if both statutory provisions charged have a “materially distinct” element not included in the other.

A number of examples are discussed below.

- A single act can be charged as two different crimes against humanity. For example, an accused that has killed a person can be convicted of persecution as a crime against humanity and with murder as a crime against humanity—even though the underlying act, killing a person, was the same.

A single act can be charged as two different crimes against humanity.

These types of convictions are allowed as long as each offence has a materially distinct element not contained in the other.²⁶ The ICTY has found that this test is met for persecution and murder, other inhumane acts, or imprisonment as crimes against humanity.²⁷

²⁴ Jean-Paul Akayesu, Case No. ICTR-96-4-A, Appeal Judgement, 1 June 2001, ¶ 120.

²⁵ *Kordić et al.*, AJ ¶ 1033.

²⁶ *Ibid.* at ¶ 1040.

²⁷ *Ibid.* at ¶¶ 1041 – 1043.

- There are also alternative charges for various forms of criminal liability. For example, an accused might be charged with direct perpetration, or in the alternative, aiding and abetting, planning, or superior responsibility.

An accused might be charged with direct perpetration, or in the alternative, aiding and abetting, planning, or superior responsibility.

The accused would not have to serve two terms of imprisonment for the same unlawful act.

Even if convicted of cumulative charges, an accused will not be sentenced cumulatively for these charges. In other words, an accused convicted of both killing as a war crime and killing as a crime against humanity would only be sentenced once for the same underlying act of killing. The accused would not

have to serve two terms of imprisonment for the same unlawful act.

12.2.1.3.4. PRE-TRIAL PROCEEDINGS

After an indictment is issued, the accused will be transferred to the court, either under arrest or voluntarily. As soon as an accused is brought before the court, there is a formal first hearing. The judge will ensure that the accused's rights have been respected, formally read out the charges to the accused and allow the accused to enter a plea (the plea can also take place at a later hearing). If the accused pleads not guilty, a date for trial will be set.

Challenges to jurisdiction, evidentiary issues and protective measures will usually be dealt with before trial.²⁸

12.2.1.3.5. JOINDER

The court may allow for the trials of several defendants to be joined into one when the crimes were all committed within the "same transaction".

The court may, at its discretion, decide to join the trials of several defendants into one trial, providing that there is no prejudice to the accused. This is allowed when the crimes were all committed within the "same transaction".²⁹ The "same transaction" means that the factual allegations in the indictment support a finding that the alleged acts or omissions form part of a common scheme, strategy or plan.³⁰ The acts or omissions charged against the various accused could have taken place at different times or different places.³¹

²⁸ See ICTY and ICTR RPE, Rules 54, 72 and 73.

²⁹ ICTY and ICTR RPE, Rule 2; Ante Gotovina et al., Case No. IT-06-90, Appeals Chamber Decision on Joinder, 25 Oct. 2006 ¶ 21; see also Slobodan Milošević, Case No. IT-02-54-D, Appeals Chamber Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ¶ 20; Popović et al., Case No. IT-05-88, Decision on Joinder, 21 Sept. 2005, ¶ 7.

³⁰ Gotovina et al., Decision on Joinder, 25 Oct. 2006, ¶ 21, citing Popović et al., Decision on Motion for Joinder ¶¶ 7, 17.

³¹ Ibid. citing Pandurević Decision on Joinder, ¶ 13.

Joining similar trials promotes more efficient trials, avoids duplicating evidence and means witnesses will not have to testify multiple times.

12.2.1.3.6. DISCLOSURE

There are rules relating to what each party must disclose to the other.

Prosecution rules include, *inter alia*:

- The prosecution must disclose to the defence evidence that is favourable to the accused.³² The prosecution's obligation to disclose this material is continuous, lasting throughout the trial.
- During the pre-trial phase, the prosecution must disclose material that supports the indictment, statements from witnesses the prosecution intends to call to testify, and statements that are entered into evidence instead of oral testimony (see discussion about Rule 92*bis*, below in section 12.2.2.2).³³
- Some material is exempt from disclosure, and in some circumstances the trial chamber can allow some information to remain undisclosed.³⁴

The prosecution must disclose to the defence evidence that is favourable to the accused.

Defence rules include:

- The defence has to provide an outline of its defence before the commencement of the trial, but does not have to provide the evidence that it will rely upon until the commencement of its case.
- The defence must disclose information if it will rely on an alibi or other special defence (such as lack of mental capacity) before the commencement of the trial. However, if the defence fails to disclose this information, it will not be prohibited from raising the defence or evidence.³⁵

12.2.1.3.7. PLEAS, ADMISSIONS OF GUILT, AND PLEA BARGAINING

Guilty pleas and plea bargaining are critical issues for both international and national courts. Key considerations regarding this practice are described below.

The ICTY and ICTR apply simplified proceedings when an accused pleads guilty.³⁶ These proceedings include the following steps:

- The judges must first review a guilty plea, and be satisfied that the plea is voluntary, informed and unequivocal.

³² ICTY RPE and ICTR RPE, Rule 68.

³³ See ICTY RPE and ICTR RPE, Rules 66, 92*bis*, and 94*bis*.

³⁴ ICTY RPE and ICTR RPE, Rule 70; see also CRYER, *supra* at p. 463.

³⁵ CRYER, *supra* at p. 463.

³⁶ *Ibid.* at p. 467.

- If the plea is accepted by the judges, they will enter a finding of guilt and schedule a sentencing hearing.³⁷
- There must be a sufficient factual basis indicating that the crime occurred and that the accused participated in its commission.³⁸ Usually, the parties will negotiate a set of agreed facts underlying the charges to which the accused will plead guilty. The parties can also submit other relevant information that may assist the trial chamber determine a sentence.
- The judges will review the accepted facts and determine whether it comports with the crimes admitted.³⁹
- On the basis of the facts and additional information, the chamber will use its discretion to determine a sentence. The chamber does not need to make specific findings on the facts—if the chamber references the facts, it indicates that it accepts the facts are true.⁴⁰

The parties may also come to an agreement regarding the recommended sentence for the accused. This “plea bargaining” may be attractive to defendants because they could obtain a reduced sentence.⁴¹

However, the trial chambers are not bound to any agreements by the parties and they are not obligated to accept sentencing recommendations.⁴² The trial chamber is required to take a plea agreement into consideration and give it due consideration when determining a sentence.⁴³ In many cases such recommendations have been followed by the trial chamber. If the recommendation is not followed, the chamber must provide reasons.⁴⁴

Trial chambers are not bound to any agreements by the parties and are not obligated to accept sentencing recommendations.

Plea bargains are also possible in BiH (see section 12.4), Croatia (see section 12.5), and Serbia (see section 12.6).

³⁷ ICTY RPE, Rules 62*bis* and 63*ter*; ICTR RPE, Rules 62 and 62*bis*.

³⁸ Milan Babić, Case No. IT-03-72-A, Appeal Judgment, 18 July 2005, ¶ 18; CRYER, *supra* at p. 467.

³⁹ Babić, AJ ¶¶ 8 – 10; 18.

⁴⁰ *Ibid.* at ¶ 18.

⁴¹ CRYER, *supra* at p. 468.

⁴² ICTY Rules, Rule 62*ter*(B).

⁴³ Babić, AJ ¶ 30, citing Dragan Nikolić, Case No. IT-94-2, Judgement on Sentencing Appeal, ¶ 89.

⁴⁴ Babić, AJ ¶ 30.

12.2.1.3.8. TRIAL AND JUDGEMENT

International criminal trials are usually very long and complicated. Both the prosecution and the defence have the opportunity to present a case and control the evidence they each present. Judges control the proceedings to ensure fair and efficient trials. Trials are in principle to be open to the public, unless there is a need for closed or private sessions due to security or other reasons.

The trials follow a basic format:

- opening statements;
- presentation of evidence;
- closing arguments;
- deliberations; and
- judgement.

Usually the prosecution presents its evidence and then the defence presents its evidence.⁴⁵ The prosecution may present additional evidence in rebuttal, and the defence additional evidence in rejoinder. The trial chamber can also call evidence, and can hear evidence to determine a sentence.⁴⁶

For each witness called, the following procedure is followed:

- the witness is first examined by the party calling it; then
- cross-examined by the other party; and finally
- re-examined by the calling party.

The judges may ask questions at any time.

Cross-examination is limited to the subject matter of the evidence-in-chief, matters affecting the credibility of the witness, and the subject matter of the case of the cross-examining party.⁴⁷

The trial chamber has ultimate control over the presentation of evidence and calling witnesses, and is required to make the testimony both efficient and effective for finding the truth.⁴⁸

The trial chamber may enter a judgement of acquittal on some or all charges, if, at the end of the prosecution's case, there is insufficient evidence to sustain a conviction. The defence can request such a judgement or the trial chamber can make the judgement of its own accord. The test for an acquittal at this stage is "whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond a reasonable doubt of the guilt of the accused on the particular charge in question".⁴⁹

⁴⁵ See CRYER, *supra* at p. 469, for a discussion of how the ICC could depart from this model.

⁴⁶ ICTY RPE, Rules 84 – 7; ICTR RPE, Rules 84 – 8; Rome Statute, Art. 64(8); ICC RPE, Rules 140 – 2.

⁴⁷ ICTY RPE, Rule 90(H)(i).

⁴⁸ ICTY RPE, Rule 90(F).

⁴⁹ See, e.g., *Zejnir Delalić et al. (Čelebići)*, Case No. IT-96-21-A, Appeal Judgment, 20 Feb. 2001, ¶ 434.

An accused may appear as a witness in his or her own case. At the ICTY and ICC, a defendant can make unsworn statements at trial.⁵⁰

Judgements must be reasoned, to allow a later review of the legal and factual findings of the trial chamber. A judgement by the majority is allowed, and minority opinions can be included.⁵¹

12.2.1.3.9. TRIALS IN ABSENTIA

No trials *in absentia* are allowed before the ICTY, ICTR, SCSL, ECCC or the ICC.

Article 247 of the BiH Criminal Procedure Code provides that an accused shall not be tried *in absentia*.

In Croatia, however, an accused may be tried in his absence if he has fled or is otherwise not amenable to justice, provided that particularly important reasons exist to try him although he is absent.⁵² There have been many trials *in absentia*,⁵³ which often lead to obligatory re-trial in cases where the defendant later appears before the Croatian judiciary and requests a re-trial.

Serbia also allows for trials *in absentia*.⁵⁴ Trials *in absentia* will be re-tried if the convicted person and his defence counsel so request within six months of when it becomes possible to try him in his presence or if his extradition is approved by a foreign state on the condition that the trial be renewed.⁵⁵

12.2.1.3.10. APPEAL

All of the current international tribunals allow appeals. Key considerations about appeals include:

- Appeals extend to convictions, sentences and acquittals.
- Either party can appeal.
- The appeals chamber may affirm, reverse or revise a trial chamber decision. It may also dismiss the entire judgement and order a re-trial before a different trial chamber.⁵⁶

⁵⁰ ICTY RPE, Rule 84*bis*; ICC RPE, Rule 140.

⁵¹ ICTY Statute, Art. 23; ICTY RPE, Rule 98*ter*; ICTR Statute, Art. 22; ICTR RPE, Rule 88; Rome Statute, Art. 74; ICC RPE, Rule 144.

⁵² CPA 1998, Art. 332(5); Official Gazette of Croatia „Narodne Novine“ No. 110/97.

⁵³ Amnesty International is concerned that the vast majority of these cases are those in which the proceedings have taken place in absentia, which raises the issue of the defendants' right to a fair trial. According to the OSCE Office in Zagreb there are approximately 400 cases in which the accused were convicted in absentia; see ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE MISSION TO CROATIA, BACKGROUND REPORT, DEVELOPMENTS IN WAR CRIMES PROCEEDINGS JAN. – OCT. 2007, 3 (2007).

⁵⁴ CPC, Art. 304, Official Gazette of the FRY No. 70/2001, 68/2002, and Official Gazette of the Republic of Serbia No. 58/2004, 85/2005, 115/2005, 49/2007, 72/2009.

⁵⁵ *Ibid.* at Art. 413.

⁵⁶ ICTY Statute, Art. 25(2); ICTR Statute, Art. 24(2); Rome Statute, Art. 81(2).

At the ICTY and ICTR, appeals are meant to correct errors made by the trial chamber; they are not new trials. The errors can be errors of law, or errors of fact that result in a “miscarriage of justice”. The following are important issues relating to appeals:

- To change a finding of law, the appeals chamber must find that “no reasonable trier of fact”⁵⁷ could have reached the factual conclusion, and the conclusion led to a “grossly unfair outcome in judicial proceedings, as when the defendant is convicted despite a lack of evidence on an essential element of the crime”.⁵⁸
- The appeals chamber can also correct an error of law on its own accord, if the interests of justice so require.⁵⁹
- A sentence can be revised if the trial chamber has committed a “discernable error” or has failed to follow the law correctly.⁶⁰
- In appealing the trial chamber judgement, the parties must identify the alleged error, present arguments, and explain how the error invalidates the decision.⁶¹

If the interests of justice so require, the appeals chamber may correct an error of law on its own accord.

Interlocutory appeals (appeals of trial chamber decisions made during the course of trial proceedings) are also allowed at the ICTY, ICTR and ICC. Interlocutory appeals are subject to the following considerations:

- Jurisdiction, and at the ICC, admissibility, are always subject to appeal.⁶²
- In order to appeal any other decision made by the trial chamber, the party seeking appeal must get permission from the trial chamber.
- Leave to appeal will be granted if the party shows that the decision “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial” and for which “an immediate resolution by the Appeals Chamber may materially advance the proceedings”.⁶³

The appeals chamber is fairly restrictive when evaluating matters that the trial chamber has the discretion to decide. It limits its review to whether the trial chamber correctly exercised its discretion, not to whether the appeals chamber agrees with the substantive decision.⁶⁴

⁵⁷ *Tadić*, AJ ¶ 64; *Akayesu*, AJ ¶ 178.

⁵⁸ *Anto Furundžija*, Case No. IT-95-17/1-A, Appeal Judgment, 21 July 2000, ¶ 37.

⁵⁹ *See, e.g., Čelebići*, AJ ¶ 16.

⁶⁰ *Tadić*, AJ ¶ 22.

⁶¹ *Krnjelac*, AJ ¶ 10.

⁶² The ICC also allows appeals for provisional release and some pre-trial chamber orders during investigation. *See CRYER, supra* at p. 473.

⁶³ ICTY RPE and ICTR RPE, Rule 72(B)(ii); ICC Statute, Art. 82(1)(d).

⁶⁴ *See, e.g., Slobodan Milošević*, Case No. IT-02-54-D, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, 1 Nov. 2004, ¶¶ 9 – 10.

12.2.1.4. ICC

The ICC has some different pre-trial and trial procedures than the ICTY and ICTR. This section discusses the areas where there are significant differences between the ICC, ICTY and ICTR.

12.2.1.4.1. INVESTIGATIONS

There are several steps involved in an investigation. These include the following:

- First, the prosecutor will make a preliminary examination of a situation, based on a decision of the prosecutor, a referral from a Rome Statute State Party or the UN Security Council, or a declaration of a state that is not a party to the Rome Statute under Rule 12(3).⁶⁵ Once the prosecutor has identified the situation, a preliminary examination must establish that there is a reasonable suspicion of a crime within the court's jurisdiction, the case would be admissible and the case would be in the interests of justice.⁶⁶
- Next, after these factors have been determined, the prosecutor can decide to open an investigation. If a situation is referred to the ICC, the prosecutor's decision to open an investigation is not subject to judicial review. With no referral, the prosecutor must get approval from the pre-trial chamber before starting an investigation. The pre-trial chamber will approve an investigation after an initial analysis of jurisdiction and when there is a "reasonable basis to proceed".⁶⁷
- After an investigation has commenced, the pre-trial judge may make such orders as may be required for the purposes of an investigation and for the protection of victims and witnesses.⁶⁸ The ICC prosecutor is obligated to investigate "exonerating circumstances" to the same extent as incriminating circumstances.⁶⁹

The ICC prosecutor investigates "situations" which can cover entire countries, or a part of it. Within situations, particular cases against individuals are then identified by the prosecutor. Thus, the investigations are quite broad. For example, the ICC is currently investigating the situation in the Democratic Republic of Congo, but has opened four cases within that situation.

12.2.1.4.2. ARREST WARRANTS/SUMMONSES AND CONFIRMATION OF CHARGES

After the prosecutor has investigated a situation and determined that a specific case should be prosecuted, he or she must make an application to the pre-trial chamber to issue an arrest warrant or a summons to appear. Key considerations regarding this process include:

⁶⁵ Rome Statute, Art. 12(3).

⁶⁶ *Ibid.*, Art. 53(1); ICC RPE, Rule 48.

⁶⁷ Rome Statute, Art. 53(3).

⁶⁸ *Ibid.* Arts. 57(3) and 56.

⁶⁹ *Ibid.* Art. 54(1)(a).

- If the pre-trial chamber is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the court, he or she will issue the arrest warrant or summons.
- The charges in the arrest warrant must be confirmed by the pre-trial judge.
- This is scheduled to take place after a suspect has been brought to court, but if the suspect cannot be apprehended or does not surrender, a confirmation hearing can take place *in absentia*. If the confirmation of charges takes place *in absentia*, the pre-trial chamber may decide to assign counsel to represent the interests of the accused.⁷⁰

At the ICC, the confirmation of charges is an adversarial process and the defence and prosecution have an opportunity to present arguments about the charges. Witnesses can be called and the confirmation hearing can last several days. As at the other international courts, the prosecutor must support each charge with evidence. The test is that there are “substantial grounds to believe” that the suspect committed the crimes charged.⁷¹ Once charges have been confirmed, the trial is transferred to a trial chamber.

At the ICC, the confirmation of charges is an adversarial process. The defence and prosecution both have an opportunity to present arguments about the charges, but the prosecutor has the additional obligation of supporting each charge with evidence.

12.2.1.4.3. PRE-TRIAL AND PREPARING FOR TRIAL

During the first hearing, it is not necessary to enter formal charges against the suspect. The focus is on setting a date for the confirmation of charges hearing.

In addition to challenges to jurisdiction, evidentiary issues and protective measures, the ICC will also deal with admissibility issues that have been raised before trial.

12.2.1.4.4. JOINDER

Trials of several accused may also be joined at the ICC.⁷² Important issues include:

- If persons are accused jointly, they will be tried together unless the trial chamber decides otherwise.
- The joinder can be decided by the pre-trial chamber during the confirmation of charges hearing.⁷³
- In deciding on the joinder of charges, the pre-trial chamber can consider whether the crimes allegedly committed arose out of the same facts, whether the supporting

⁷⁰ *Ibid.* Art. 61(2) and ICC RPE Rules 123 – 6.

⁷¹ Rome Statute, Art. 61(6)-(7).

⁷² *Ibid.*, Art. 64(5); ICC RPE, Rule 136.

⁷³ Germain Katanga et al., Case No. ICC-01/04-01/07-573, Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases, AC, 9 June 2008, ¶¶ 5 – 9.

documentation provided by the prosecution relates to both alleged perpetrators, and whether the prosecution has requested the joinder.⁷⁴

12.2.1.4.5. DISCLOSURE

Rules relating to prosecutorial and defence disclosure are somewhat different at the ICC than at the ICTY. Key differences in the disclosure rules are listed below.

Prosecution rules:

- The prosecutor is required to disclose any material that is exculpatory, mitigating, or which affects the credibility of the prosecution's evidence.⁷⁵
- Before the trial begins, the prosecution must also disclose a list of witnesses it intends to call to testify and copies of witness statements.⁷⁶

The prosecutor is required to disclose any material that is exculpatory, mitigating, or which affects the credibility of the prosecution's evidence.

Defence rules:

- The defence must disclose information if it intends to raise the defence of an alibi or other defences.
- However, if the failure to disclose this information will not prohibit the defence from raising the intended defence or presenting evidence.⁷⁷

Both parties have the right to inspect materials in control of the other party, both before the confirmation of hearings and during trial.⁷⁸

There are some exceptions to disclosure rules, including confidential information or information that if disclosed could create a risk to witnesses, victims, and their families.⁷⁹

The chambers have considerable power in ordering disclosure both during the confirmation of hearings and during trial.⁸⁰

12.2.1.4.6. PLEAS, ADMISSIONS OF GUILT, AND PLEA BARGAINING

The ICC also allows for expedited proceedings if an accused admits his guilt.⁸¹ However, the trial chamber will focus more on the submitted facts and evidence in assessing the admission of guilty than at the ICTY and ICTR.

⁷⁴ Katanga et al., Case No. ICC-01/04-01/07-307, Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, PTC, 10 March 2008; *Katanga et al.*, AC, 9 June 2008.

⁷⁵ Rome Statute, Art. 67(2).

⁷⁶ ICC RPE, Rule 76.

⁷⁷ ICC RPE, Rule 79.

⁷⁸ ICC RPE, Rules 77 – 8.

⁷⁹ See, e.g., ICC RPE, Rules 81 – 2.

⁸⁰ Rome Statute, Arts. 61(3) (pre-trial chamber) and 64(3)(c) (trial chamber).

The judges can also decide, in the interests of justice, to order the prosecution to provide more information or to hold a normal trial. The ICC Statute does not prohibit plea bargaining, but this practice as of yet has not been relied upon at the ICC.

Plea bargains are also possible in BiH (see section 12.4), Croatia (see section 12.5), and Serbia (see section 12.6).

⁸¹ Rome Statute Art. 65; ICC RPE Rule 139.

12.2.2. EVIDENTIARY ISSUES

12.2.2.1. ESSENTIAL RULES OF EVIDENCE

Notes for trainers:

- Participants should receive an overview of the essential rules of evidence that apply before the international courts.
- They should not be expected to discuss the detailed application of these rules, but should be able to discuss the key principles and the way in which they are either incorporated or not followed within their domestic systems.
- Trainers should explore with participants the particular rules of evidence related to cases involving sexual violence. It is important to understand the rationale behind these rules and whether participants believe that they are put into practice in their courtrooms.
- Participants should also be reminded that specific practice issues relating to evidence for particular crimes or modes of liability are discussed in the relevant Modules.
- The case study can be used as a means of stimulating discussion on this topic by considering whether any of the statements made by the accused to the national police and the ICC could be admitted before both international and national courts.
- Another example from the case study which could be considered is whether the telephone intercept would be admissible before national and international courts, as well as the weapons that were discovered during the search of the accused's premises.

International courts have established flexible rules of evidence which are discussed below.

- The courts must apply evidentiary rules that “will best favour a fair determination of the matter” and “are consonant with the spirit of the Statute and the general principles of law”.⁸²
- The primary standard of evidence is relevance. Any evidence that is relevant and has a probative value can be admitted. The evidence must be relevant to an issue in trial or an allegation. It must also go to the proof of an issue. Evidence must also be *prima facie* reliable in order to determine its relevance and probative value.⁸³

The primary standard of evidence is relevance. Any evidence that is relevant and has a probative value can be admitted.

⁸² ICTY and ICTR RPE, Rule 89(B).

⁸³ Jadranko Prlić et al., Case No. IT-04-74, AC, Reconsideration of Appeal Decision, 3 Nov. 2009, ¶ 33.

- The trial chamber can exclude evidence “if its probative value is substantially outweighed by the need to ensure a fair trial”.⁸⁴ Evidence can also be excluded based on the means it was obtained.⁸⁵
- Hearsay evidence may be admitted.⁸⁶
- The international courts have also created rules to allow for more efficient trials. One of these rules allows for written witness statements in lieu of oral testimony, as long as it does not go to proof of the acts and conduct of the accused as charged in the indictment.⁸⁷ The trial chamber can decide to call the witness for cross-examination if a written statement is entered into evidence.⁸⁸ Rule 92*quarter* allows for the introduction of written witness statements where the witness is unable to appear in court because he or she is deceased or because of a physical or mental impairment.⁸⁹
- Evidence of witnesses who have been intimidated can be introduced if the requirements of Rule 92 *quinquies* are met, even if such evidence goes to the acts and conduct of the accused.⁹⁰

The trial chamber can exclude evidence “if its probative value is substantially outweighed by the need to ensure a fair trial”.

12.2.2.2. EVIDENCE IN CASES INVOLVING SEXUAL VIOLENCE

In cases involving sexual assault or sexual violence, special rules of evidence apply:

- No corroboration of the victim's testimony shall be required;
- Consent shall not be allowed as a defence if the victim
 - has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
 - reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- Before evidence of the victim's consent is admitted, the accused shall satisfy the trial chamber in camera that the evidence is relevant and credible; and

In cases involving sexual assault or sexual violence, special rules of evidence apply.

⁸⁴ ICTY RPE, Rule 89(C)-(D).

⁸⁵ ICTY and ICTR RPE, Rule 95; Rome Statute, Art. 69(7).

⁸⁶ *Nahimana*, AJ ¶ 509, citing Sylvestre Gacumbitsi, Case No. ICTR-01-64-A, Appeal Judgement, 7 July 2006, ¶¶ 115 and 133; Mladen Naletilić et al., Case No. IT-98-34-A, Appeal Judgement, 3 May 2006, ¶ 217; Semanza AJ, ¶ 159; *Kordić et al.*, AJ ¶ 281; Georges A. N. Rutaganda, Case No. ICTR-96-3-T, Appeal Judgement, 26 May 2003, ¶ 34; *Akayesu*, AJ ¶¶ 284-287.

⁸⁷ ICTY and ICTR RPE, Rule 92*bis*.

⁸⁸ ICTY RPE Rule 92*bis*(E).

⁸⁹ ICTY RPE, Rule 92*quarter*; Jadranko Prlić et al., Case No. IT-04-74, Decision on Admission of Transcript, 23 November 2007, ¶ 48.

⁹⁰ ICTY RPE, Rule 92 *quinquies*.

- Prior sexual conduct of the victim shall not be admitted in evidence.⁹¹

The ICC RPE gives further instruction to judges dealing with cases of sexual violence:

- Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence; and
- Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.⁹²

Moreover, prior or subsequent sexual conduct of a victim or witness is not allowed, but the prohibition is subject to the trial chamber's authority under Article 69(4) of the ICC Statute.⁹³

⁹¹ *Ibid.*

⁹² ICC RPE, Rule 70.

⁹³ ICC RPE, Rule 71; ICC Statute, Art. 69(4).

12.3. REGIONAL LAW AND JURISPRUDENCE

Notes for trainers:

- The Module now shifts to focus on the national laws and procedures 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 and procedures with practitioners who will be implementing them in their domestic courts.
- The Module deals with the laws and procedures applicable in BiH, Croatia and Serbia in separate sections so that participants from any of these countries need only focus on their jurisdiction. The most relevant jurisprudence available has also been cited. Participants should be encouraged to use their own cases to discuss the application of the laws and procedures being taught.
- As the focus of the manual is on the practical application of the substantive law, participants should be aware that this Module on procedure and evidentiary issues is only an overview. It does not purport to deal with all procedural and evidentiary matters in detail. Should there be a need for such training, this Module can serve as a foundation, but would need to be supplemented with further materials.
- **Tip to trainers:** One effective method to engage the participants is to ask them to analyse one of the most important cases that has occurred in their domestic jurisdiction. Some cases have been cited below, but others may be raised by the participants themselves or provided by the trainers. Given that procedural and evidentiary issues arise on a daily basis in the cases that the participants will be familiar with in their courts, there will be sufficient scope in this Module to ask participants to provide practical examples of the issues they have encountered in prosecuting their cases.
- Please note that the case study has highlighted a few procedural and evidentiary problems and can therefore be used to engage the participants in discussion.

Notes for trainers:

- This section focuses on BiH law and procedure as well as the available jurisprudence. It will be useful for participants to compare the rules and jurisprudence of BiH courts with that of the ICTY, especially given that the BiH procedural rules at the state level are largely based on the ICTY's system.
- This section is structured in a similar way to the section on international procedure and evidentiary issues. It is divided into two parts.
 - Procedural issues, the following topics are addressed:
 - Fair trial rights applicable in BiH;
 - Disclosure rules in criminal cases; and
 - The procedure in relation to guilty pleas.
 - Evidentiary issues, the following topics are addressed:
 - Admissibility and evaluation of evidence for BiH courts; and
 - The introduction of evidence obtained by the ICTY.
- Participants should be encouraged to discuss the strengths and weaknesses of the procedural and evidentiary approaches that have been adopted by the BiH courts for the prosecution of war crimes. In particular, the following topics could be addressed:
 - What measures should be adopted by prosecutors and the courts to ensure that fair trial rights are respected in the prosecution of war crimes?
 - An evaluation of the use of plea agreements and plea bargaining, and in particular whether the procedures ensure that the conduct as charged is adequately reflected in the final findings of the court.
 - An assessment of the discretion that the courts in BiH to rely upon evidence that was admitted before the ICTY. What factors should be taken into account in the exercise of this discretion? Should evidence be admitted that goes to the acts and conduct of the accused, and if so, in what circumstances should it be admitted?
 - How best can experts be relied upon in the prosecution of war crimes? Discuss the extent to which expert opinion can assist in the determination of questions of fact such as political and military command structures.

12.4. BIH

12.4.1. PROCEDURAL ISSUES

12.4.1.1. INTRODUCTION

The criminal procedure in Bosnia and Herzegovina is provided for in its Criminal Procedure Code. The new criminal procedure legislation in Bosnia and Herzegovina was enacted in 2003⁹⁴ and has subsequently been amended.⁹⁵

Prior to 2003, the procedure was based on the SFRY's "inquisitorial" legal tradition. The new procedure resembles the system before the ICTY, consisting of a mixture of the "adversarial" and "inquisitorial" systems.

The 2003 BiH Criminal Procedural Code is based on experiences in this field from other relevant legal systems, the application of international human rights instruments in domestic legal systems and experiences of other countries in the application of international conventions.⁹⁶

The Commentary to the BiH Criminal Procedure Code stresses that "the procedural and legal aspect of the international criminal law and on human rights law is well developed and has an extraordinary influence on domestic procedural criminal legislation".⁹⁷ Moreover, the Commentary includes in its list of international regulations the ICTY Statute, the ICTY Rules of Procedure and Evidence, as well as the ICC Rome Statute.⁹⁸ The ICTY Rules of Procedure and Evidence were the primary influences on the new Criminal Procedure Code.

⁹⁴ The first criminal procedure code in BiH to adopt the "mixed" system was the Brčko District, which passed its new procedure in 2000. Brčko District BiH, Official Gazette, No. 7/00.

⁹⁵ Bosnia and Herzegovina Criminal Procedure Code (CPC), BiH Official Gazette No. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09; In 2003, the new Criminal Procedure Codes were also enacted for the entities (Federation of Bosnia and Herzegovina and Republika Srpska) as well as for Brčko District, as part of the criminal procedure harmonization at all levels of Bosnia and Herzegovina.

⁹⁶ Commentary of the BiH CPC, p. 18.

⁹⁷ *Ibid.* at p. 39 (Chapter I – the Basic Principles).

⁹⁸ *Ibid.* at p. 28.

Notes for trainers:

- This section discusses each of the fair trial rights which have been incorporated into the procedural law of the courts of BiH. It is important for participants to discuss the manner in which these rights have been implemented in the national court system, bearing in mind that the procedural regime is of a mixed character combining the common law and civil law systems.
- Some of the relevant case law is referenced and it may be helpful for participants to discuss the different approaches taken by the trial panels, especially in relation to the right to confrontation.
- Participants should be encouraged to give examples of cases they have been involved in where challenges have been made by the defence relying on fair trial guarantees.
- The following discussion topics could be raised with participants:
 - To what extent could the prosecution rely on these guarantees? Could the prosecution, for example, rely on any of these rights if it was restricted in the time permitted to present its case in court?
 - Is the jurisprudence of the courts consistent with regard to fair trial rights, for example with regard to the defence right to call witnesses and tender evidence?
 - How might the right to confrontation be interpreted differently, considering the old inquisitorial SFRY legal system and an adversarial system and Articles 6(2) and 262(1) of the BiH Criminal Procedure Code?
- The case study can be used to get the participants to consider whether the evidence that has been gathered in the investigation should be admitted or excluded on the basis of any of the fair trial guarantees.

12.4.1.2. FAIR TRIAL RIGHTS

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) guarantee the right to a fair trial in criminal proceedings as one of the basic human rights and freedoms.⁹⁹ These provisions set out the most important requirements for the courts to meet as part of the criminal procedure.¹⁰⁰

⁹⁹ In this sense, see *also* Commentary of the BiH CPC, p. 43.

¹⁰⁰ *Ibid.*

The Commentary on the 2003 Criminal Procedural Code in Bosnia and Herzegovina lists some of those rights, namely, the:

- Right of every person that an independent and impartial court established by the law decides on the charges against him/her;
- Right to a public trial and public pronouncement of the judgement;
- Right to be tried in reasonable time;
- Principle of the equality of parties or “equality of arms”;
- Presumption of innocence;
- Rights of the suspect and accused persons;
- Principle of *in dubio pro reo*; and
- Right to defence.¹⁰¹

It is stated in the Commentary that a fair criminal proceeding:

- (a) bans discrimination, *i.e.* differentiation between the parties which would without any justification limit their procedural rights (equality before the court),
- (b) ensures that pronouncing criminal sanctions are pronounced in accordance with accepted legal standards (principle of legality),
- (c) ensures that the criminal procedure is conducted before a state body which has elements of an independent and impartial court (the right to judicial protection), and
- (d) ensures basic procedural guarantees to a suspect and an accused without which efficient defence would not be possible (legal guarantees in the criminal proceedings).¹⁰²

The Commentary also stresses that “when delivering a decision, the court is bound by international documents, the Constitution and the law” and that it “needs to take into account the interpretation of international law regulations on human rights in the ECHR practice, considering the fact it correctly influences the understanding of the ECHR, the protection of basic human rights and freedoms and harmonization of the criminal legislation”.¹⁰³ This obligation stems from Article II/2 of the BiH Constitution, which provides for the direct application of the ECHR in the domestic legal system.¹⁰⁴

When delivering a decision, the court is bound by the international documents, the Constitution and the law. Additionally, the court must take into account the interpretation of international law regulations on human rights.

The fair trial rights are set out in various provisions of the BiH Criminal Procedure Code provisions including:

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.* at p. 44 (unofficial translation of the quotes).

¹⁰⁴ *See ibid.*

- Article 2 (principle of legality);
- Article 3 (presumption of innocence and *in dubio pro reo*);
- Article 4 (*ne bis in idem*);
- Article 5 (rights of a person deprived of liberty);
- Article 6 (rights of a suspect or accused);
- Article 7 (right to a defence);
- Article 8 (language and alphabet);
- Article 9 (sending and delivery of documents);
- Article 10 (unlawful evidence);
- Article 11 (right to compensation and rehabilitation);
- Article 12 (instruction on rights);
- Article 13 (right to trial without delay);
- Article 14 (equality of arms);
- Articles 29-34 (disqualification);
- Articles 39-40 (right to a defence attorney);
- Article 45 (mandatory defence);
- Article 46 (appointment of defence attorney for an indigent person);
- Article 47 (right of a defence attorney to inspect files and documentation);
- Article 48 (communication of a suspect or accused with a defence attorney); and
- Article 50 (conduct of defence attorneys).

Each of these rights will be considered in turn below.

12.4.1.2.1. EQUALITY OF ARMS

Article 14 (equality of arms) of the BiH Criminal Procedure Code provides:

Article 14 of the BiH Criminal Procedure Code

(1) The Court shall treat the parties and the defence attorney equally and shall provide each with equal opportunities to access evidence and to present evidence at the main trial.

(2) The Court, the Prosecutor and other bodies participating in the proceedings are bound to study and establish with equal attention facts that are exculpatory as well as inculpatory for the suspect or the accused.

This article must be read in conjunction with other provisions contained in the BiH Criminal Procedure Code, namely Article 47 (right of a defence attorney to inspect files and documentation), Article 50 (defence attorney actions), Article 5 (rights of a person deprived of liberty), Article 6 (rights of a suspect or accused), Article 261 (presentation of evidence), Article

262 (direct examination, cross-examination and re-direct examination of witnesses), Article 270 (examination of experts), and other relevant provisions.

12.4.1.2.2. PRESUMPTION OF INNOCENCE AND *IN DUBIO PRO REO*

Article 3 of the BiH Criminal Procedure Code

(1) A person shall be considered innocent of a crime until his/her guilt has been established by a final verdict.

(2) A doubt with respect to the existence of facts constituting elements of a criminal offence or on which the application of certain provisions of criminal legislation depends shall be decided by the Court verdict in the manner more favourable for the accused.

Article 3 of the BiH Criminal Procedure Code provides:

12.4.1.2.2.1. PRESUMPTION OF INNOCENCE

Until a judgement enters into force, the presumption of innocence is to be respected.

Article(3)(1) incorporates the principle of the presumption of innocence. The presumption of innocence is to be respected during the entire criminal proceeding, until a judgement enters into force, including all the phases preceding the trial, and it covers all the actions of the state bodies directed towards collecting data and information on the commission of a criminal

act.¹⁰⁵

The presumption also applies to media coverage regarding a suspect or an accused. Sensationalist media coverage could violate the presumption of innocence.¹⁰⁶

A suspect or an accused does not bear the burden of proof and enjoys the privilege against self-incrimination.¹⁰⁷

A suspect or an accused is not obliged to defend himself or to give evidence for his defence.

A suspect or an accused is not obliged to defend himself or to give evidence for his defence (as enshrined in Article 6 of the BiH Criminal Procedure Code).¹⁰⁸

¹⁰⁵ *Ibid.* at p. 47.

¹⁰⁶ *Ibid.* at p. 49.

¹⁰⁷ *Ibid.* at p. 47.

¹⁰⁸ *Ibid.* at p. 57.

The Commentary on the Criminal Procedure Code in Bosnia and Herzegovina states that characterising a suspect during the investigation phase as a perpetrator of a criminal act could violate the presumption of innocence. Information given to the public on criminal proceedings needs to be provided in an objective manner, without prejudging the guilt of the suspect or accused or judicial verdict.¹⁰⁹

Informing the public on criminal proceedings needs to be done objectively and without prejudging the guilt of the suspect or accused or judicial verdict.

12.4.1.2.2.2. IN DUBIO PRO REO

Article(3)(2) incorporates the *in dubio pro reo* principle, which stems directly from the presumption of innocence.¹¹⁰ In accordance with this principle, in case of any doubt regarding either facts forming the elements of a criminal act or facts relating to the application of criminal legislation, the court will have to render a decision that is most favourable to the accused.¹¹¹ The Court of BiH panels have held:

The Court is obliged to render an acquitting verdict, not only in the case of proven innocence of the Accused, but also in the case of reasonable doubt as to the guilt of the Accused as well. Any doubt in the existence of some legally relevant fact must undoubtedly favour the Accused. The facts *in peius* in relation to the Accused must be established with absolute certainty and beyond any reasonable doubt. If any doubt does exist these facts cannot be considered as proven, and should be deemed unproven instead and consequentially ignored.¹¹²

Furthermore, relying on the Commentary on the Criminal Procedure Code in Bosnia and Herzegovina, the Court of BiH panels also considered other aspects of *in dubio pro reo* principle as follows:

Another rule concerns the facts which militate in favour of the Accused, that is, the facts *in favorem*. These facts are considered to be proven even if they are only probable, in other words even if their existence is doubtful, but tend to favour the Accused. It follows that, pursuant to Article 281(2) of the CPC of BiH, the Court is obliged to, conscientiously, evaluate each piece of evidence in isolation and in conjunction with the rest of the presented evidence and, based on such an evaluation, to conclude whether a fact has been proven or not.¹¹³

¹⁰⁹ *Ibid.* at p. 49, referring to the SFRY Supreme Court decision Kz. 47/65.

¹¹⁰ *Ibid.* at p. 49.

¹¹¹ *Ibid.* at p. 50.

¹¹² Court of BiH, Milos Stupar et al., Case No. X-KRZ-05/24, 2nd Instance Verdict, 28 April 2010, ¶ 21; Milos Stupar et al., Case No. X-KRZ-05/24, 2nd Instance Verdict, 9 Sept. 2009, ¶ 56; *see also* Commentary of the BiH CPC, p. 50.

¹¹³ *Stupar*, 2nd inst. of 28 April 2010, ¶ 22 (footnotes omitted); *see also* Commentary of the BiH CPC, p. 50.

12.4.1.2.3. RIGHTS OF PERSONS DEPRIVED OF LIBERTY

Article 5 of the BiH Criminal Procedure Code provides that:

Article 5 of the BiH Criminal Procedure Code

(1) A person deprived of liberty must, in his native tongue or any other language that he understands, be immediately informed about the reasons for his apprehension and instructed on the fact that he is not bound to make a statement or answer questions, on his right to a defence attorney of his own choice as well as on the right that his family, consular officer of the foreign state whose citizen he is, or another person designated by him be informed about his deprivation of liberty.

(2) A person deprived of liberty shall be appointed a defence attorney upon his request if according to his financial status he cannot bear the expenses of his defence.

This article reflects the principles enshrined in Article 5 of the ECHR and Article 9 of the ICCPR.¹¹⁴

12.4.1.2.4. RIGHTS OF A SUSPECT AND ACCUSED

Article 6 of the BiH Criminal Procedure Code provides that:

Article 6 of the BiH Criminal Procedure Code

(1) The suspect, at his first questioning, must be informed about the offence that he is charged with and grounds for suspicion against him and that his statement may be used as evidence in further proceedings.

(2) The suspect or accused must be provided with an opportunity to make a statement regarding all the facts and evidence incriminating him and to present all facts and evidence in his favour.

(3) The suspect or accused shall not be bound to present his defence or to answer questions posed to him.

¹¹⁴ See also Commentary of the BiH CPC, p. 52.

The rights enshrined in this article, as well as in Article 7, represent a minimum of the procedural guarantees that need to be given to a suspect or accused in order to have a fair trial.¹¹⁵ Procedural guarantees representing the minimum rights of the accused are listed in Article 6(3) of the ECHR.¹¹⁶

12.4.1.2.4.1. DETAILED AND PROMPT INFORMATION OF THE ACCUSATION

According to Article(6)(1), a suspect or accused needs to be informed of both the offence with which he is charged and the grounds of suspicion against him:

- Information about the offence charged includes information about the factual description of the offence, as well as its legal description.¹¹⁷
- Information about the grounds of suspicion includes information about the facts and evidence upon which a suspicion is based.¹¹⁸
- Information about the offence and the grounds of suspicion need to be provided “at the first questioning”, reflecting the ECHR standard of the “prompt” provision of information on the nature and cause of the accusations.¹¹⁹

A suspect or accused needs to be informed of both the offence with which he is charged and the grounds of suspicion against him.

The Commentary on the Criminal procedure Code in Bosnia and Herzegovina states that this provision is one of the basic rights recognised. This provision cannot be interpreted or applied to permit the questioning of a suspect at the end of the investigation.¹²⁰

Article 227(1) of the BiH Criminal Procedure Code reads as follows:

¹¹⁵ Commentary of the BiH CPC, pp. 54-55.

¹¹⁶ See also Commentary of the BiH CPC, p. 55.

¹¹⁷ Commentary of the BiH CPC, p. 55.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

Article 227(1) of the BiH Criminal Procedure Code

The indictment shall contain:

- a) the name of the Court;
- b) the first and the last name of the suspect and his personal data;
- c) a description of the act pointing out the legal elements which make it a criminal offense, the time and place the criminal offense was committed, the object on which and the means with which the criminal offense was committed, and other circumstances necessary for the criminal offense to be defined as precisely as possible;
- d) the legal name of the criminal offense accompanied by the relevant provisions of the Criminal Code;
- e) proposal of evidence to be presented, including the list of witnesses and experts or pseudonyms of protected witnesses, documents to be read and objects serving as evidence;
- f) the results of the investigation;
- g) evidence supporting the charges in the indictment.

Article 227(1) of the BiH Criminal Procedure Code sets out obligatory elements for every indictment in order to provide a suspect with detailed information about the charges against him. This obligation is subject to a judge's review in a preliminary hearing in accordance with Article 228 of the BiH Criminal Procedure Code.

In the *Božić* case, the prosecution charged the accused with "knowing participation" in a joint criminal enterprise (JCE – see more on this in Module 9) and argued that they were criminally responsible for their own acts and omissions, as well as those which were natural and foreseeable consequences of the common purpose, plan or operation (in other words, both JCE I and JCE III).¹²¹ The trial panel found that the prosecutor "inconsistently incorporated and referred to legal elements of different forms of JCE liability without specifying clearly which form of liability is being alleged" in the amended indictment.¹²²

The trial panel outlined a legal standard of pleading of JCE liability pursuant to various articles of the BiH Criminal Procedure Code as well as ICTY jurisprudence, which required a certain level of precision to ensure a fair trial. In particular, the trial panel held that the prosecutor was required:

¹²¹ Court of BiH, *Božić Zdravko et al.*, Case No. X-KRZ-06/236, 2nd Instance Verdict, 5 Oct. 2009, ¶ 131, referring to amended indictment, p. 2.

¹²² *Ibid.* at ¶ 132, referring to 1st inst., p. 65 (p. 63 BCS).

- To “clearly identify in the Indictment which form of JCE liability is being alleged, and not simply rely on his factual allegations” to demonstrate which form of JCE is alleged.
- To define as precisely as possible the criminal offense, including the object and means with which the crime was committed and any other circumstances necessary to define the offense.
- To set out a concise statement of the facts of the case.
- To “include a strict definition of common purpose when using the concept of joint criminal enterprise to define an individual’s responsibility for crimes physically committed by others”.
- To identify as precisely as possible the principal perpetrators of the crimes, which constitute the common purpose or a foreseeable consequence of it”.¹²³

The trial panel found that the prosecutor failed in his duty to properly plead JCE.¹²⁴ The trial panel concluded that it would contravene the rights of the accused for the trial panel to cure the prosecutor’s mistake and find a suitable form of JCE liability in order to convict the accused.¹²⁵

The appellate panel in this case upheld the trial panel's finding and held that the prosecution must adequately plead and specify the basis on which it considered responsibility of the accused may be incurred.¹²⁶ The appellate panel reiterated that it would also contravene the rights of the defence if the trial panel, seized of a valid but partially defective indictment, chose a theory not clearly or defectively pleaded by the prosecution.¹²⁷

The prosecution must adequately plead and specify the basis on which it considered responsibility of the accused may be incurred.

The appellate panel concluded that if the form of the indictment does not give the accused sufficient notice of the legal and factual reasons for the charges against him, then no conviction may result because the accused’s right to a fair trial is compromised.¹²⁸

If the form of the indictment does not give the accused sufficient notice of the legal and factual reasons for the charges against him, the accused’s right to a fair trial is compromised, and no conviction may result.

In addition, the appellate panel, like the trial panel, noted that it was unclear how the prosecution came to a conclusion that the term “knowing participation” in the JCE gave sufficient notice to the accused of a specific form of JCE alleged.¹²⁹ The appellate panel noted that “knowing participation” was not a legal element of either

¹²³ Court of BiH, Božić Zdravko et al., Case No. X-KRZ-06/236, 1st Instance Verdict, 6 Nov. 2008, pp. 65-66 (p. 63 BCS).

¹²⁴ 2nd inst., ¶ 132, referring 1st inst., pp. 65-66 (p. 63 BCS).

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* at ¶ 133.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.* at ¶ 137.

¹²⁹ *Ibid.* at ¶ 139.

basic or extended JCE.¹³⁰ Furthermore, the appellate panel held it was also uncertain how “unidentified members of VRS” met the specificity and clarity requirement to establish identity of those engaged in criminal enterprise.¹³¹ Therefore, the appellate panel found that the prosecution failed to properly inform the accused about which form of JCE was being alleged.¹³²

12.4.1.2.4.2. RIGHT TO BE HEARD AND RIGHT TO DEFENCE

A suspect or accused must be provided with an opportunity to make a statement regarding all the facts and evidence incriminating him (*in peius*) and to present all facts and evidence in his favour (*in favorem*), as enshrined in Article 6(2) of the Criminal Procedure Code. This provision reflects the principle of the right to be heard which must be respected during entire criminal proceedings.¹³³ However, as set out in Article 6(3), a suspect or accused needs to be informed that this right to be heard is only a right, not an obligation.¹³⁴

12.4.1.2.4.3. RIGHT TO SILENCE AND PRIVILEGE AGAINST SELF-INCRIMINATION

A suspect or accused is not obliged to present his defence or to answer questions. He enjoys the right to silence or privilege against self-incrimination, which stems from the presumption of innocence and the corresponding burden of the prosecution to prove its case.¹³⁵ A suspect or accused is not obliged to defend himself or to provide evidence for his defence.¹³⁶ Moreover, negative inferences harmful to the interests of defence may not be drawn from the silence of the suspect or accused.¹³⁷

The police are required to provide the necessary information about this right to a suspect as soon as they deprive him of liberty.¹³⁸ In the course of criminal proceedings, this obligation to inform the accused of this right rests upon the prosecutor, the preliminary hearing judge and the judge or presiding judge of a chamber.¹³⁹

The right to silence and the privilege against self-incrimination must be respected during the questioning of a suspect or an accused.¹⁴⁰ The right extends to the examination of witnesses and presentation of evidence by the accused. An accused has a right to examine witnesses and present his evidence, but is not obliged to do so.

These rights are supported by the wording of Article 6(3)(d) of the ECHR which states that “everyone charged with a criminal offence has [...] rights [...] to examine or have examined

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ Commentary of the BiH CPC, p. 56.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.* at p. 57.

¹³⁷ *Ibid.* at p. 673.

¹³⁸ *Ibid.* at p. 56.

¹³⁹ *Ibid.*

¹⁴⁰ See, e.g., Commentary of the BiH CPC, pp. 56-57.

witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.¹⁴¹

These rights are also set out in Article 261(1) of the BiH Criminal Procedure Code: “Parties and the defence attorney are entitled to call witnesses and to present evidence”.¹⁴² These provisions accord with the ICTY’s jurisprudence.¹⁴³

Some trial panels in Bosnia and Herzegovina have allowed the defence to tender evidence during the prosecution’s case and to cross-examine prosecution witnesses to the full extent of the scope defined by the BiH Criminal Procedure Code. Other trial chambers have not permitted the defence to tender documents into evidence during the prosecution case or to exercise the right to cross-examination in an effective manner.¹⁴⁴ This latter approach is usually explained by reference to the ability of the defence to call witnesses and tender evidence during the defence case.

The defence in the *Mensur Memić et al.* case, pending before the Court of BiH at the time of writing, filed a motion alleging a violation of the accused’s rights, including the right to silence and the privilege against self-incrimination, arising from a search of his prison cell.¹⁴⁵ Referring to the ECtHR jurisprudence in *Funke v. France* and *JB v. Switzerland*, the defence noted that the privilege against self-incrimination is not limited to the oral presentation of a defence, but also extends to a suspect or accused being compelled to present or submit documents.¹⁴⁶ The defence argued that the right to silence and the privilege against self-incrimination was closely connected to the right to confidentiality of communication between the defendant and his defence counsel:

If the right to confidentiality of such communication is violated in a manner that includes reviewing, reading and/or seizure of the confidential communication between a defendant and his counsel which, for the purpose of preparing defence, includes the comments of the defendant or instructions that he provides to his counsel or the comments of the counsel, it inevitably results in violation of the right to silence and the privilege against self-incrimination.¹⁴⁷

12.4.1.2.5. RIGHT TO ADEQUATE TIME AND FACILITIES

This right stems from several articles of the BiH Criminal Procedure Code. In particular, the right to adequate time to prepare for a defence is stipulated in Article 7(3) of the Code: “The suspect or accused must be given sufficient time to prepare a defence”.

¹⁴¹ ECHR, Art. 6(3)(d).

¹⁴² BiH CPC, Bosnia and Herzegovina Official Gazette, No. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, Art. 261(1).

¹⁴³ See, e.g., Slobodan Milošević, Case No.IT-02-54-T, Trial Chamber’s Order of 19 Feb. 2002, Annex A.

¹⁴⁴ See below, 12.4.1.2.8. and 12.4.1.3.

¹⁴⁵ Court of BiH, *Mensur Memić et al.*, Case No. X-KR-09/786, Nihad Bojadžić Defence Motion Regarding Serious Violation of Suspect Nihad Bojadžić Right to Defence, 30 March 2010.

¹⁴⁶ *Ibid.* at p. 6.

¹⁴⁷ *Ibid.*

Although this provision refers to “sufficient time” only, the Commentary on the Criminal Procedure Code in Bosnia and Herzegovina states that it needs to be interpreted as referring to “adequate facilities” as well.

Although this provision refers to “sufficient time” only, the Commentary on the BiH Criminal Procedure Code states that it needs to be interpreted as referring to “adequate facilities” as well, considering the fact that it reflects the protections of Article 6(3)(b) of the ECHR and Article 14(3)(b) of the ICCPR.¹⁴⁸ Moreover, this conclusion is supported by the provisions of Articles 6(2), 14(1), 47 and 50(1):

Article 6(2) of the BiH Criminal Procedure Code

The suspect or accused must be provided with an opportunity to make a statement regarding all the facts and evidence incriminating him and to present all facts and evidence in his favour [...].

Article 14(1) of the BiH Criminal Procedure Code

The Court shall treat the parties and the defence attorney equally and shall provide each with equal opportunities to access evidence and to present evidence at the main trial;

¹⁴⁸ Commentary of the BiH CPC, p. 59.

Article 47 of the BiH Criminal Procedure Code

(1) During an investigation, the defence attorney has a right to inspect the files and obtained items that are in favour of the suspect. This right can be denied to the defence attorney if the disclosure of the files and items in question would endanger the purpose of the investigation.

(2) Notwithstanding Paragraph 1 of this Article, together with a motion for custody the Prosecutor shall submit to the preliminary proceedings judge or the preliminary hearing judge evidence relevant to establish the lawfulness of custody and also for the purpose of informing the defence attorney.

(3) After the indictment is issued, the defence attorney, the suspect or the accused shall have the right to inspect all files and evidence.

(4) Upon obtaining any new piece of evidence or any information or facts that can serve as evidence at a trial, the preliminary hearing judge, the judge, or the Panel, as well as the Prosecutor, shall make them available for inspection to the defence attorney, the suspect or the accused.

(5) In cases referred to in Paragraphs 3 and 4 of this Article, the defence attorney, the suspect or the accused may make copies of all files or documents;

Article 50(1) of the BiH Criminal Procedure Code

The defence attorney in representing a suspect or an accused must take all necessary steps aimed at establishment of facts and collection of evidence in favour of the suspect or accused as well as protection of his rights.

For example, in the defence motion in *Mensur Memić et al.* case, cited above, the defence also claimed that the right to adequate facilities had been violated.¹⁴⁹ Referring to ECtHR jurisprudence, the defence stressed that the “facilities” or “means”, in light of Article 6(3)(b) of the ECHR, include the possibility of familiarization with the results of the investigation led during

¹⁴⁹ Court of BiH, *Mensur Memić et al.*, Case No. X-KR-09/786, Nihad Bojadžić Defence Motion Regarding Serious Violation of Suspect Nihad Bojadžić Right to Defence dated 30 March 2010, pp. 2-4 (available in BCS only; unofficial translation of the quote).

the proceeding for the purpose of preparing a defence.¹⁵⁰ The defence also stressed that the right to adequate facilities included:

- the right to access documents and materials, including legal materials;
- the right of the defence to conduct its own investigation necessary for the preparation of a defence; and
- the right to present the factual and legal arguments in an effective manner.¹⁵¹

Referring to the Council of Europe Committee of Ministers' Recommendation Rec(2006)13 to the Council of Europe member states, the defence emphasised the need to ensure that persons kept in custody are able to prepare their defence.¹⁵²

12.4.1.2.6. RIGHT TO DEFENCE COUNSEL AND RELATED RIGHTS

The right to defence counsel reflects the provisions of Article 6(3)(c) of the ECHR and Article 14(3) of the ICCPR.¹⁵³ The BiH Criminal Procedure Code establishes this right as well as the related rights in several articles:

Article 5 of the BiH Criminal Procedure Code

In accordance with Article 5 of the BiH Criminal Procedure Code, every person deprived of liberty has the right to a defence attorney of his own choice and the right to a defence attorney being appointed to him in the event that he cannot bear the expenses of his defence.

Article 7 of the BiH Criminal Procedure Code

(1) The suspect or accused has a right to present his own defence or to defend himself with the professional assistance of a defence attorney of his own choice.

(2) If the suspect or accused does not retain a defence attorney, a defence attorney shall be appointed to him as stipulated by this Code.

(3) The suspect or accused must be given sufficient time to prepare a defence.

¹⁵⁰ *Ibid.* at p. 4.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *See also* Commentary of the BiH CPC, p. 58.

Article 39 of the BiH Criminal Procedure Code

(1) The suspect or accused shall be entitled to have a defence attorney throughout the course of the criminal proceedings.

[...]

(3) If the suspect or accused does not himself hire a defence attorney, a defence attorney may be engaged for him by his legal representatives, spouse or extramarital partner, blood relatives in a direct line to any degree whatsoever, adoptive parents, adopted children, brothers, sisters or foster parents, if the suspect or the accused does not explicitly oppose it.

Other relevant BiH Criminal Procedure Code provisions with respect to accused are the:

- Right of the accused to communicate freely with his defence counsel (Article 48);
- Right to have defence counsel present during the questioning (Article 78(2)(b));
- Right of defence counsel to inspect files and documentation (Article 47); and
- Duty of defence counsel to undertake all necessary steps aimed at the establishment of facts and the collection of evidence in favour of the suspect or accused as well as the protection of his rights (Article 50).¹⁵⁴

In accordance with Articles 5, 78 and 39, the accused needs to be informed of his right to defence counsel and that this right exists throughout the course of the criminal proceedings.¹⁵⁵

As far as the right of the accused to communicate freely with his defence counsel is concerned, it is provided for in Articles 48 and 144(5) of the BiH Criminal Procedure Code.

Article 144(5) states that a detainee “shall be entitled to free and unrestrained communications with his defence attorney”.¹⁵⁶ In relation to this right, in the above-mentioned motion¹⁵⁷ in the *Mensur Memić et al.* case, the defence counsel noted that:

[The defendant] had in his possession in the detention cell only documents relating to the investigation against him, delivered to him by his defence team, whereby the defence team requested his instructions with regard to directions of defence investigations and his commentaries on documents and witness statements. Furthermore, in his possession he had his own notes relating to the

¹⁵⁴ See *ibid.*

¹⁵⁵ See *ibid.*

¹⁵⁶ BiH CPC, Art. 144(5).

¹⁵⁷ See above 12.4.1.2.4.3 and 12.4.1.2.5; *Memić et al.*, Nihad Bojadžić defence motion.

preparation of defence as well as the analysis of the witness statements he received from the defence team containing notes and the suspect's instructions. Acting upon the aforementioned order of the judge, authorised SIPA members conducted a review of documentation, including the defence documentation, reading the suspect's notes and analysis of the statements prepared for the purpose of defence, as well as the personal notes of the accused also prepared for the purpose of instructing his defence team.¹⁵⁸

The defence then referred to the ECHR cases, namely *S. v. Switzerland*, *Petra v. Rumania*, *Peers v. Greece* and *Lanz v. Austria*, and concluded that the conduct of the state authorities in the present case amounted to a violation of the right to confidentiality of communication between the suspect and the counsel:

[T]he preliminary proceedings judge's order, in its points 7 and 9 which do not exclude review and making a list of documents which are protected by the right to defence and a confidential relationship between the counsel and the defendant, is contrary to the law and represents a serious violation of the rights enshrined in Articles 48 and 144(5) of the BiH CPC. Bearing in mind the fact that the material reviewed and listed by the SIPA members on 27 March 2010 contains the notes and material protected by the confidential relationship between the counsel and the defendant, such search seriously violated the right to confidentiality of communication between the suspect and the counsel.¹⁵⁹

Article 45 of the BiH Criminal Procedure Code sets out certain situations when having a defence counsel is mandatory.¹⁶⁰

¹⁵⁸ *Memić et al.*, Nihad Bojadžić defence motion, p. 2 (unofficial translation of the quote).

¹⁵⁹ *Ibid.* at p. 3 (unofficial translation of the quote).

¹⁶⁰ The practice of Banja Luka District Prosecutor's Office (BLDPO) is always to appoint a defence counsel for the interest of justice, given the complexity of the case.

Article 45 of the BiH Criminal Procedure Code

- (1) A suspect shall have a defence attorney at the first questioning if he is mute or deaf or if he is suspected of a criminal offence for which a penalty of long-term imprisonment may be pronounced.
- (2) A suspect or accused must have a defence attorney while deciding the proposal for ordering pre-trial custody, throughout the pre-trial custody.
- (3) After an indictment has been brought for a criminal offence for which a prison sentence of ten (10) years or more may be pronounced, the accused must have a defence attorney at the time of the delivery of the indictment.
- (4) If the suspect, or the accused in the case of a mandatory defence, does not retain a defence attorney himself, or if the persons referred to in Article 39, Paragraph 3, of this Code do not retain a defence attorney, the preliminary proceeding judge, preliminary hearing judge, the judge or the Presiding judge shall appoint him a defence attorney in the proceedings. In this case, the suspect or the accused shall have the right to a defence attorney until the verdict becomes final and, if a long-term imprisonment is pronounced for proceedings under legal remedies.
- (5) If the Court finds it necessary for the sake of justice, due to the complexity of the case or the mental condition of the suspect or the accused or the other circumstances, it shall appoint an attorney for his defence.
- (6) In the case of appointing a defence attorney, the suspect or the accused shall be asked to select a defence attorney from the presented list himself. If the suspect or the accused does not select a defence attorney from the presented list himself, the defence attorney shall be appointed by the Court following the order of the list of attorneys.
- (7) If the requested attorney is unable to take over the defence, the Court shall request the next attorney from the list of attorneys. The Court shall inform the relevant bar association about the refusal of the requested attorney to assume the *ex officio* defence.

Most war crimes, crimes against humanity and genocide cases involve a sentence of over ten years of imprisonment. Defence counsel is therefore mandatory in those cases.

12.4.1.2.7. RIGHT TO A TRIAL WITHOUT DELAY

This right is set out in Article 13 of the BiH Criminal Procedure Code and reflects the right to a hearing within a reasonable time as enshrined in Article 6(1) of the ECHR. Article 13 of the BiH Criminal Procedure Code provides:

Article 13 of the BiH Criminal Procedure Code

- (1) The suspect or accused shall be entitled to be brought before the Court within the shortest reasonable time period and to be tried without delay.
- (2) The Court shall also be bound to conduct the proceedings without delay and to prevent any abuse of the rights of any participant in the criminal proceedings.
- (3) The duration of custody must be reduced to the shortest necessary time.

12.4.1.2.8. RIGHT TO EXAMINE WITNESSES AND RIGHT TO CONFRONTATION

Article 6(3)(d) of the ECHR and 14(3)(e) of the ICCPR provide for the right of the accused to examine, or have examined, witnesses testifying against him (as well as to obtain the attendance and examination of witnesses on his behalf under the same condition as witnesses testifying against him).

12.4.1.2.8.1. RIGHT TO EXAMINE WITNESSES – SCOPE OF CROSS-EXAMINATION

Article 6(2) of the BiH Criminal Procedure Code provides that:

The suspect or accused must be provided with an opportunity to make a statement regarding all the facts and evidence incriminating him and to present all facts and evidence in his favour.

In accordance with Article 261(1) and 262(1) of the BiH Criminal Procedure Code:

Parties and the defence attorney are entitled to call witnesses and to present evidence.¹⁶¹

And:

Direct examination, cross-examination and redirect examination shall always be permitted. The party who called a witness shall directly examine the witness in question, but the judge or the presiding judge and members of the Panel may at

¹⁶¹ BiH CPC, Art. 261(1).

any stage of the examination ask the witness appropriate questions. Questions on cross-examination shall be limited and shall relate to the questions asked during the direct examination and to the questions in support of the statements made by the party which is cross-examining that witness. Questions on redirect examination shall be limited and shall relate to questions asked during cross-examination. After examination of the witness, the judge or the presiding judge and members of the Panel may question the witness.¹⁶²

The goal of cross-examination is to eliminate or reduce the factual and legal importance of direct examination, and should be used as a means to verify the credibility, veracity and reliability of witness testimony by searching for errors, inaccuracies, motives, etc.

With regard to “the questions in support of the statements made by the party which is cross-examining that witness”, in accordance with the ICTY jurisprudence, such questions may encompass:

- questions relating to the credibility of a witness;¹⁶³
- questions relevant to the general context of the case;¹⁶⁴ and
- questions relating to the cross-examining party’s case.¹⁶⁵

The Commentary of the BiH Criminal Procedure Code supports the ICTY jurisprudence in this regard. It states that the goal of cross-examination is to eliminate or reduce the factual and legal importance of direct examination, and should be used as a means to verify the credibility, veracity, and reliability of witness testimony by searching for errors, inaccuracies, motives, etc.¹⁶⁶ The commentary also emphasizes that discrediting a witness requires a thorough analysis of all information regarding the personality of the witness, such as his:

- family, business and social relationships;
- prior convictions;
- partiality;
- reliability;
- motives;
- inclinations;
- prejudice;
- orientation in time and space;

Questions on cross-examination shall be limited and shall relate to the questions asked during the direct examination and to the questions in support of the statements made by the party which is cross-examining that witness.

¹⁶² BiH CPC, Art. 262(1).

¹⁶³ See, e.g., Slobodan Milošević, Case No. IT-02-54, Trial Chamber’s Order, 19 Feb. 2002, Annex B.

¹⁶⁴ See, e.g., Enver Hadžihasanović, Case No. IT-01-47-T, Decision on Defence Motion Regarding Cross-Examination of Witnesses by the Prosecution, 9 Dec. 2004, p. 4.

¹⁶⁵ See, e.g., Milošević, Trial Chamber’s Order, 19 Feb. 2002, Annex B.

¹⁶⁶ Commentary of the BiH CPC, p. 675.

- ability to observe;
- personal interests; and
- consistency.¹⁶⁷

The approach of BiH panels to the scope of cross-examination has varied. Some have allowed questions to be posed in support of statements made by the cross-examining party, while others have refused on the basis that the party cross-examining the witness could re-call the witness in its case and examine the witnesses.

12.4.1.2.8.2. RIGHT TO CONFRONTATION

As noted above, the BiH Criminal Procedure Code provides that the accused must have an opportunity to make a statement regarding all the facts and evidence incriminating him, to present all facts and evidence in his favour, and to present evidence and cross-examine witnesses. It follows that the BiH Criminal Procedure Code recognises the “right to confrontation” as understood and interpreted in adversarial systems. The BiH Criminal Procedure Code uses the term “confrontation” in two articles:

The BiH Criminal Procedure Code recognises the “right to confrontation” as understood and interpreted in adversarial systems.

Article 85(2) of the BiH Criminal Procedure Code reads:

At all times during the proceedings, witnesses may be confronted with other witnesses or with the suspect or accused.

Article 86(9) of the BiH Criminal Procedure Code provides that:

Article 86(9) of the BiH Criminal Procedure Code

Witnesses may be confronted if their testimony disagrees with respect to important facts. The confronted witnesses shall be examined individually about each circumstance that their testimony disagrees about and their answer shall be entered into records. Only two witnesses at a time may be confronted.

¹⁶⁷ *Ibid.* at p. 677.

In relation to Article 85(2), it is stated in the Commentary on the BiH Criminal Procedure Code that “confrontation” represents a procedural possibility and is conducted “if there are inconsistencies in a witness statement in relation to a statement of another witness and a suspect or accused regarding essential facts (decisive facts, factual indicia, and verification facts)”.¹⁶⁸ It is stated that this procedural action can be undertaken as a full confrontation (in relation to the entire statement) or a partial confrontation (in relation to certain parts of the statement containing contradictory information or explanations).¹⁶⁹

“Confrontation” represents a procedural possibility and is conducted “if there are inconsistencies in a witness statement in relation to a statement of another witness and a suspect or accused regarding essential facts”.

In relation to Article 86(9), the commentary notes that one of the obligations of a witness is to confront the other witness if there is a need for that, and that a witness cannot, without justifiable reasons, refuse to be confronted by another witness.¹⁷⁰

The courts in Bosnia and Herzegovina have taken different approaches to whether a witness can be presented during cross-examination with:

- information that another witness testified in a different manner;
- another witness’ testimony before the court in relation to the same fact or circumstance; and
- evidence or the transcript page containing the testimony of another witness.

Some chambers have allowed such evidence to be put to a witness in cross-examination, others have refused.

These differences in approach might be the result of different understandings of what “confrontation” means in the inquisitorial systems, such as the old SFRY system, and in adversarial systems.

In the old SFRY system, “confrontation” involved two witnesses giving testimony at the same time about differences in their factual accounts.¹⁷¹ Only two persons could have been confronted at the time, namely: a witness with another witness, the accused with another accused and the accused with the witness.¹⁷² The confrontation could have been conducted during the investigation and during the trial.¹⁷³

¹⁶⁸ *Ibid.* at p. 262 (unofficial translation of the quote).

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.* at p. 267.

¹⁷¹ Pravna enciklopedija, O-Z, 2, Savremena administracija, Beograd, 1989., p. 1639-1640 (Legal encyclopaedia, O-Z, 2, Savremena administracija, Beograd, 1989, p. 1639-1640).

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

In adversarial systems, “confrontation” means the right of an accused to be confronted with the witnesses and evidence against him. This is similar to the concept of “examination” in Article 6(3)(d) of the ECHR.¹⁷⁴ In accordance with the ECtHR interpretation of the term and the principles of the adversarial system, the right to “confrontation” represents the right of an accused to confront a witness with facts and evidence contrary to the claims of the witness. ICTY jurisprudence, for example, provides that “the right of the accused to confront the witness” is not violated in the case of witness testimony via video-link, as with a video-link “counsel for the accused can cross-examine the witness and the Judges can put questions to clarify evidence given during testimony”.¹⁷⁵

In adversarial systems, “confrontation” means the right of an accused to be confronted with the witnesses and evidence against him.

Apart from the right to cross-examine the witnesses, the right to confrontation in an adversarial system also encompasses the right to confront the witness with previous statements.¹⁷⁶ The ECHR assumption is that the procedure for challenging a witness with his or her prior statements brings them into the “confrontational arena”.¹⁷⁷

12.4.1.3. DISCLOSURE

Notes for trainers:

- This section deals with the disclosure regime that applies in the courts of BiH. Some of the relevant case law is cited below and could serve as a basis for discussion with the participants about the various approaches that have been taken by trial chambers to disclosure issues.
- The issue of disclosure is often a contentious one and it is therefore likely that participants will have had their own experiences, which they should be encouraged to share during the training.

Article 47 of the BiH Criminal Procedure Code and the corresponding Articles of the entities’ and Brčko District Criminal Procedure Codes sets out the disclosure obligations of the parties. This article must be read in conjunction with Articles 5, 6, 7, 12, 13(2), 14 and 50 of the BiH Criminal Procedure Code.

¹⁷⁴ See STEFANO MAFFEI, THE EUROPEAN RIGHT TO CONFRONTATION IN CRIMINAL PROCEEDINGS, *Confrontation of Adverse Witnesses as a Fundamental Right of the Accused Person, European and International Criminal Law Series* (1), 17-18 (Groningen: Europa Law Publishing, 2006).

¹⁷⁵ Zejnil Delalić et al., Case No. IT-96-21, Trial Chamber Decision on the Motion to Allow Witnesses K, L and M to Give their Testimony by Means of Video-Link Conference, 28 May 1997, ¶ 15.

¹⁷⁶ See MAFFEI, *supra* at p. 77.

¹⁷⁷ See *Camillieri v. Malta* in MAFFEI, *supra* at p. 77.

BiH Criminal Procedure Code**Article 47**

(1) During an investigation, the defence attorney has a right to inspect the files and obtained items that are in favour of the suspect. This right can be denied to the defence attorney if the disclosure of the files and items in question would endanger the purpose of the investigation.

(2) Notwithstanding Paragraph 1 of this Article, together with a motion for custody the Prosecutor shall submit to the preliminary proceedings judge or the preliminary hearing judge evidence relevant to establish the lawfulness of custody and also for the purpose of informing the defence attorney.

(3) After the indictment is issued, the defence attorney, the suspect or the accused shall have the right to inspect all files and evidence.

(4) Upon obtaining any new piece of evidence or any information or facts that can serve as evidence at a trial, the preliminary hearing judge, the judge, or the Panel, as well as the Prosecutor, shall make them available for inspection to the defence attorney, the suspect or the accused.

(5) In cases referred to in Paragraphs 3 and 4 of this Article, the defence attorney, the suspect or the accused may make copies of all files or documents.

Some of the courts and prosecutors in BiH grant full access to the documents, as required by the Criminal Procedure Code, in accordance with the rights of a person charged with a criminal offence. However, the interpretation of this rule is not uniform. Some courts and prosecutors do not allow the defence to inspect the files in other cases before the same or a different court which are relevant and exculpatory to the accused.

Participants should be encouraged to compare and contrast the following cases:

In the *Mensur Memić et al.* case, currently pending before the Court of BiH, the defence requested several times to be allowed to inspect documents and materials in the possession of the prosecution in accordance with Article 47 of the BiH Criminal Procedure Code. Such materials included exculpatory statements and materials from other cases relevant to the case

in question. The trial panel refused the defence's request on the grounds that the prosecution had disclosed to the defence all the documents in its possession.¹⁷⁸

In the *Stupar et al.* case, the defence claimed, as part of the appeal grounds, that the panel's decision not to disclose to the defence transcripts from the cross-examination of a witness conducted in separate proceedings resulted in a violation of the right of the accused to a fair trial.¹⁷⁹ The appellate panel dismissed this ground of appeal, noting that:

The Defence failed to state in their Appeals a single circumstance which would indicate the relevance of delivering transcripts of that same witness's cross-examination in another case and the Appellate Panel itself fails to see a realistic need for that taking into account that the Defence had already directly exercised their right to cross-examine this witness.¹⁸⁰

The trial panel in the *Milorad Trbić* case acknowledged that testimonies from other cases might be used if relevant to the case in question:

As for the testimony of witness PW-5, the Panel notes that this witness gave evidence before the trial panel of the Court of BiH in the *Kravica case* [...] This testimony constitutes evidence collected in accordance with the CPC of BiH, and is *both authentic and relevant to the current proceedings*, and thus the Panel *admits it to be used at trial*. Furthermore, it is important to note that if this type of evidence is acceptable under the standards provided for in Article 5 of the LOTC for witness testimonies delivered at the ICTY it is certainly equally acceptable, if not even more so, when the evidence is established at the Court of BiH, in line with the rules of evidence stipulated in the BiH CPC.¹⁸¹

In the *Operta et al.* case, before the Cantonal Court in Zenica, the defence requested the Cantonal prosecutor to be allowed to inspect the entire file of evidence obtained by the prosecution during its investigation and all previous statements of the accused and witnesses given to the police, war crimes commissions, media etc., stressing that it was aware of the existence of potentially exculpatory evidence in possession of the prosecution. The Cantonal Prosecutor in Zenica refused the defence request. The defence then turned to the Federal Prosecutor who granted the defence request to inspect the files.¹⁸²

¹⁷⁸ Court of BiH, Mensur Memić et al., Case No. X-KR-09/786, Transcript of 28 Sept. 2010; Transcript of 20 Sept. 2010; Transcript of 9 Nov. 2010.

¹⁷⁹ *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶ 166.

¹⁸⁰ *Ibid.* at ¶ 167.

¹⁸¹ Court of BiH, Milorad Trbić, Case No. X-KR-07/386, 1st Instance Verdict, 16 Oct. 2009, p. 369 (pp. 369-370 BCS) (1st Instance Verdict upheld by the appellate panel).

¹⁸² Office of the Prosecutor of Federation of Bosnia and Herzegovina, Re: *Sabahudin Operta et al.*, Case No. KT-05/01 (case led by the Zenica Cantonal Prosecutor's Office).

In the *Mittal* case, during the investigation the Zenica Cantonal Prosecutor's Office disclosed to the defence all the materials the defence had requested, including the materials which were only partially exculpatory (e.g. expert reports).¹⁸³

In the *Orić* case, the defence requested that the prosecutor provide the defence with all the criminal reports and other documents in relation to certain prosecution witnesses in accordance with Article 61 of the FBiH Criminal Procedure Code.¹⁸⁴ After some exchanges of correspondence the defence was granted access to the requested documents.¹⁸⁵

12.4.1.3.1. ISSUES RELATING TO DEFENCE ACCESS TO EVIDENCE

12.4.1.3.1.1. ACCESS TO ICTY DOCUMENTATION

The BiH prosecutor's office has direct access to the ICTY EDS¹⁸⁶ for the purpose of searching for the documents relevant for the prosecution case. Defence teams in BiH, however, do not have such access. The defence can only get access to the EDS through the Criminal Defence Section (OKO) and only in cases before the Court of BiH.

12.4.1.3.1.2. ACCESS TO DOCUMENTS IN THE POSSESSION OF STATE BODIES AND MILITARY ARCHIVES

Defence teams before the courts in BiH do not have direct access to the archives of state bodies. Defence teams first need to make a request to OKO with a list of documents the defence wishes to obtain. Then a request can be made to the relevant authorities.¹⁸⁷ The practice differs at the entity level, where the defence can make a request to the court directly to obtain the documentation concerned. The court would then request the relevant authority to produce the documentation.

There is an issue about whether defence teams could be aware of documents in the relevant archives before having the opportunity to go through such documents. Additionally, one case before the Court of BiH seems to suggest that prior to making a request for documents through OKO, the court first needs to assess the relevancy of documents the defence has not an opportunity to see, review, or assess the with regards to the relevancy to the defendant.¹⁸⁸

¹⁸³ Zenica Cantonal Prosecutor's Office, *Mittal*, Report of the Expert Team in the Case No. KTA 67/07, Oct. 2007, disclosed to the defence during the investigation.

¹⁸⁴ Sarajevo Cantonal Prosecutor's Office, Letter of 26 Jan. 2009, No. KT-2757/08.

¹⁸⁵ Sarajevo Cantonal Prosecutor's Office, Letter of 2 Feb. 2009, No. KT-2757/08.

¹⁸⁶ ICTY Electronic Disclosure System.

¹⁸⁷ Defence Counsel V. Vidovic and E. Residovic Requests for delivery of documents sent to OKO, 21 and 28 Dec. 2010, regarding Case No. X-KR-09/786-1.

¹⁸⁸ BiH Ministry of Defence Letter to E. Residovic through OKO, Re: Information – Approval from the Court regarding the documents relevancy for the trial, No.13-04-1-240-101/10, dated 30 Dec. 2010, regarding Case No. X-KR-09/786-1.

12.4.1.3.1.3. ACCESS TO DOCUMENTS FROM OTHER STATES

The cooperation of the states with the ICTY made it possible for the defence teams before the ICTY to conduct its investigation in other states that were inclined to cooperate with the ICTY. However, cooperation in domestic cases is not governed by the same regime and depends on specific arrangements between states (see Module 15). However, these specific arrangements relate only to prosecutor, not the defence. The defence does not have similar means to access another state's archives.

12.4.1.4. GUILTY PLEAS AND PLEA BARGAINING

Guilty pleas and plea bargaining are dealt with in Articles 229-231 of the BiH Criminal Procedure Code. They are also discussed in Module 13.

12.4.1.4.1. GUILTY PLEAS

Article 229 of the BiH Criminal Procedure Code sets out in the relevant parts:

Article 229 of the BiH Criminal Procedure Code

(1) A plea of guilty or not guilty shall be entered before the preliminary hearing judge in the presence of the Prosecutor and the defence attorney. Before entering a plea of guilty or not guilty, the accused shall be informed about all possible consequences of the plea in terms of Article 230(1) of this Code. In case the accused does not have a defence attorney, the preliminary hearing judge shall check whether the accused understands the consequences of the plea and whether the conditions are met for the appointment of defence attorney in accordance with Article 45(5) and Article 46 of this Code. The Plea and the instructions given shall be entered into the record. If the accused fails to enter a plea, the preliminary hearing judge shall, ex officio, note for the record that the accused has entered a plea of not guilty.

(2) If the accused enters a plea of guilty, the preliminary hearing judge shall refer the case to the judge or the Panel for scheduling a hearing to determine whether the conditions referred to in Article 230 of this Code are met.

(3) A plea of not guilty shall not be held against the accused in fashioning a sentence if the accused is found guilty at the trial or subsequently changes his plea from not guilty to guilt.

In the event that the accused pleads guilty, a hearing is held in accordance with Article 230 of the BiH Criminal Procedure Code:

Article 230 of the BiH Criminal Procedure Code

(1) In the course of deliberation on the plea of guilty, the Court must ensure the following:

- a) that the plea of guilty was entered voluntarily, consciously and with understanding,
- b) that the accused was informed and understood that by his guilty plea he waives the right to trial,
- c) that there is enough evidence of the guilt of the accused,
- d) that the accused was informed of and understood the possible consequences in relation to the claim under property law and the forfeiture of property gain obtained by commission of the criminal offence,
- e) that the accused was informed of the decision on the reimbursement of the expenses of the criminal proceedings and that the accused may be relieved of the duty to reimburse as referred to in Article 188(4) of this Code.

(2) If the Court accepts the plea of guilty, the plea of the accused shall be entered into the record and the Court shall continue with the hearing to pronounce the sentence.

(3) If the Court rejects the plea of guilty, the Court shall accordingly inform the parties to the proceedings and the defence attorney, and enter for the record that the plea was rejected. The statement on the admission of guilt shall be inadmissible as evidence in the further course of the criminal proceedings.

In the case against *Vlatimir Golijan*, before the Court of BiH, the accused Golijan was charged with genocide and pleaded guilty. However, during the hearing, the accused stated:

I do not understand what genocide is. My Defence attorney told me about it, but I do not know what genocide is. [...] I admit I went to Srebrenica on July 11 and I stayed overnight and left the town on the following day. I never went back to

the town. I admit I participated in the murder of civilians in the Branjevo region on July 16. I feel sorry for those people.¹⁸⁹

Accordingly, the trial panel rejected the guilty plea, holding that “A guilt admission statement must be complete and the accused has to admit to the factual description and the legal qualification of the crime”.¹⁹⁰

A guilt admission statement must be complete and the accused must admit to the factual description and the legal qualification of the crime.

12.4.1.4.2. PLEA BARGAINING

Plea bargaining provisions are set out in Article 231 of the BiH Criminal Code:

Article 231 of the BiH Criminal Procedure Code

- (1) The suspect or the accused and the defence attorney may negotiate with the Prosecutor about the conditions of admitting guilt for the criminal offence with which the suspect or the accused is charged, until the completion of the main trial or the appellate proceedings.
- (2) A plea agreement shall not be entered into if the accused pled guilty at the plea hearing.
- (3) In plea bargaining with the suspect or the accused and his defence attorney on the admission of guilt pursuant to Paragraph 1 of this Article, the Prosecutor may propose an imprisonment sentence below the legally prescribed minimum or a more lenient criminal sanction for the suspect or accused in accordance with the Criminal Code.
- (4) The plea agreement shall be made in writing and shall be delivered along with the indictment to the preliminary hearing judge, the judge or the Panel. After the confirmation of the indictment, the preliminary hearing judge shall take the agreement under advisement and pronounce the criminal sanction, until the case has been submitted to the judge or the Panel for the purpose of scheduling the main trial. After the case has been submitted for the purpose of scheduling the main trial, the judge or the Panel shall decide on the agreement.

¹⁸⁹ BIRN, Vlastimir Golijan’s Guilt Admission Rejected, 23 Sept. 2010, <http://www.bim.ba/en/237/10/30704/>; BIRN, Odbijeno priznanje krivnje Vlastimira Golijana, 23. Sept. 2010, <http://www.bim.ba/bh/237/10/30704/>.

¹⁹⁰ *Ibid.*

Article 231 of the BiH Criminal Procedure Code (continued)

(5) The preliminary hearing judge, the judge or the Panel may accept or reject the agreement.

(6) In the course of deliberation about the plea agreement the Court must examine the following:

- (a) whether the plea agreement was entered voluntarily, consciously and with understanding, and that the accused has been informed of the possible consequences, including satisfaction of the claims under property law, forfeiture of property gain obtained by commission of the criminal offence and reimbursement of the expenses of the criminal proceedings;
- (b) whether there is enough evidence of the guilt of the accused;
- (c) whether the accused understands that by the agreement on the admission of guilt he waives his right to trial, and that he may not appeal the criminal sanction imposed,
- (d) whether the imposed sanction is in accordance with Paragraph 3 of this Article,
- (e) whether the injured party was given an opportunity before the Prosecutor to state his position regarding the claim under property law.

(7) If the Court accepts the plea agreement, the statement of the accused shall be entered into the record and the Court shall continue with the hearing for the pronouncement of the sentence foreseen by the agreement.

(8) If the Court rejects the plea agreement, the Court shall accordingly inform the parties to the proceedings and the defence attorney and enter for the record that the plea was rejected. At the same time, the date of the main trial shall be determined. The main trial shall be scheduled within 30 days. The admission of guilt from this plea agreement shall be inadmissible as evidence in the criminal proceedings.

(9) The Court shall inform the injured party about the results of the plea bargaining.

During the trial in the *Gordan Đurić* case, before the Court of BiH, the BiH Office of the Prosecutor filed the Agreement on Admission of Guilt, which was concluded between the Prosecutor's Office of BiH and the accused Gordan Đurić.¹⁹¹

Under the stated agreement, the accused admitted his guilt for crimes against humanity.¹⁹² The agreement stipulated that the accused must testify on behalf of the prosecution against the other accused in the case.¹⁹³ Following this testimony, the trial panel rejected the plea agreement on the basis that the accused's testimony departed from the factual allegations contained in the indictment.¹⁹⁴

The prosecution filed a new Agreement on Admission of Guilt.¹⁹⁵ After the new plea hearing was held, the accused again testified as a prosecution witness, as required by the new Agreement on Admission of Guilt, and again gave evidence about the events alleged in the charges against the other six accused in the case.¹⁹⁶ Following this testimony, the panel accepted the agreement. The panel found that the accused had signed the agreement voluntarily and understood the legal consequences of the plea of guilty, particularly that he waived his right to a trial and the right to appeal the criminal sanction pronounced against him. The panel also found that there was sufficient evidence of the guilt of the accused.¹⁹⁷ The agreement was accepted and the accused was sentenced as proposed in the agreement.¹⁹⁸

12.4.1.5. TRIALS IN ABSENTIA

Article 247 of the BiH Criminal Procedure Code sets out that an accused shall not be tried *in absentia*.

In the *Stupar et al.* case, the appellants alleged a violation of Article 247 in that the panel had conducted trial proceedings in the absence of the accused, who had refused to attend court and were on a hunger strike.¹⁹⁹ The appellants also invoked Article 246 of the BiH Criminal Procedure Code, which provides that if the accused was duly summoned but fails to appear and does not justify his absence, the judge or the presiding judge shall postpone the main trial and order that the accused be brought to attend the next session.²⁰⁰ The appellate panel rejected the defence argument.²⁰¹ The appellate panel concluded that if the accused was held in custody, then the most stringent measures to secure his presence had already been applied and, therefore, the

¹⁹¹ Gordan Đurić, Case No. X-KR-08/549-2, Verdict, 10 Sept. 2009, p. 4 (p. 4 BCS).

¹⁹² *Ibid.* at p. 5 (p. 4 BCS).

¹⁹³ *Ibid.* at p. 5 (p. 5 BCS).

¹⁹⁴ *Ibid.* at pp. 5-6 (p. 5 BCS).

¹⁹⁵ *Ibid.* at p. 6 (p. 5 BCS).

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.* at p. 6 (pp. 5-6 BCS).

¹⁹⁹ *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶¶ 107-108.

²⁰⁰ *Ibid.* at ¶ 108.

²⁰¹ *Ibid.* at ¶ 118.

accused was considered to be under the court's custody, *i.e.* the accused was not beyond reach or "*in absentia*".²⁰²

12.4.2. EVIDENTIARY ISSUES

Notes for trainers:

- This section covers the essential rules and practices relating to the admissibility of evidence before the courts of BiH.
- It is only an outline, and does not purport to cover all of the national practices that are prevalent in BiH.
- Participants should be encouraged to discuss practical examples from their cases in which evidence has been admitted or excluded.
- An essential part of this section is the one dealing with the admissibility of evidence gathered by the ICTY or heard before the ICTY in the courts of BiH.
- Participants should be encouraged to consider the case law on this subject and to discuss how they anticipate the rules governing admissibility will be applied and interpreted in future cases.

12.4.2.1. INTRODUCTION

Evaluation of evidence is performed on the basis of a free evaluation of the evidence.

The BiH Criminal Procedure Code does not set out any detailed rules regarding evidentiary matters, such as admissibility of evidence or tendering documents into evidence. Evaluation of evidence, in accordance with the BiH criminal Procedure Code, is performed on the basis of a free evaluation of the evidence. Admission of evidence

from the ICTY is covered by the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by the ICTY in Proceedings before the Courts in BiH.

12.4.2.2. ADMISSIBILITY OF EVIDENCE

The BiH Criminal Procedure Code is silent when it comes to rules regarding the admissibility of evidence. No rules are provided for in the code with regard to issues of relevancy, authenticity or probative value of the evidence. Article 10 of the Criminal Procedure Code, however, does provide that:

²⁰² *Ibid.* at ¶ 121.

Article 10 of the BiH Criminal Procedure Code

(1) It shall be forbidden to extort a confession or any other statement from the suspect, the accused or any other participant in the proceedings.

(2) The Court shall not base its decision on evidence obtained through violation of human rights and freedoms prescribed by the Constitution and international treaties ratified by Bosnia and Herzegovina, or on evidence obtained through essential violation of this Code.

(3) The Court may not base its decision on evidence derived from the evidence referred to in Paragraph 2 of this Article.

This article does not discuss admissibility of such evidence, it only states that “the Court shall not base its decision” on such evidence. The Commentary on the BiH Criminal Procedure Code notes, however, that although the code does not provide for such evidence to be excluded from the file, the meaning of the ban on use of such evidence entails the exclusion of such evidence from the file.²⁰³ The commentary also notes that the fair trial principles require that the collection and introduction of evidence is conducted with respect for the basic human rights provisions of the Criminal Procedure Code.²⁰⁴

In practice, some panels tend to admit all of the evidence the parties tender and evaluate the evidence later in accordance with Article 15 of the Criminal Procedure Code (free evaluation of evidence). Other panels take into account the issue of the admissibility of the evidence. For example, in the *Trbić* case, the trial panel instructed both the prosecution and defence that when the admissibility of the tendered documentary evidence is questioned, “objections may be raised as to relevancy, authenticity or probative value” of the evidence tendered.²⁰⁵ The panel also noted that, for the sake of efficiency, it may evaluate and decide on the relevancy and authenticity of the evidence while leaving the decision on probative value for final deliberations and the verdict.²⁰⁶

12.4.2.3. TENDERING DOCUMENTS INTO EVIDENCE

Both the prosecution and defence can tender documents into evidence during their respective cases (*i.e.* the prosecution during the prosecution case and defence during defence case). However, when it comes to tendering defence evidence during the prosecution case, *i.e.* during the cross-examination of the prosecution witnesses, the panels do not have a harmonised approach.

²⁰³ Commentary of the BiH CPC, p. 65.

²⁰⁴ *Ibid.* at pp. 65-66.

²⁰⁵ *Trbić*, 1st inst., ¶ 54.

²⁰⁶ *Ibid.* at ¶ 53.

12.4.2.3.1. TENDERING DOCUMENTS USED BY DEFENCE DURING CROSS-EXAMINATION

Some panels allow the defence to tender into evidence documents used during the cross-examination of prosecution witnesses.²⁰⁷ Other panels, however, do not, on the basis that the defence should only present documents into evidence while presenting its own case, after the prosecution has presented its case. For instance, in the *Mensur Memić et al.* case, pending before the Court of BiH, the panel allowed the defence the use of documents during the cross-examination of the prosecution witnesses, but prohibited tendering such documents into evidence at that stage.²⁰⁸

12.4.2.3.2. PRIOR NOTICE REGARDING DOCUMENTS TO BE USED DURING CROSS-EXAMINATION

As far as the use of documents by the defence during cross-examination is concerned, some panels do not require the defence to inform the prosecution of which documents it will use or submit such documents to the prosecution. Other panels, however, require the defence to submit to the prosecution in a timely manner all of the documents it will use that do not originate from the prosecution.²⁰⁹

12.4.2.3.3. USE OF THE PREVIOUS STATEMENT OF THE WITNESS TESTIFYING

Article 273(1) of the BiH Criminal Procedure Code provides that:

Article 273 (1) BiH Criminal Procedure Code

Prior statements given during the investigative phase are admissible as evidence at the main trial and may be used in direct or cross-examination or in rebuttal or in rejoinder and subsequently tendered as evidence. The person must be given the opportunity to explain or deny a prior statement.

The panels in BiH mostly interpret this provision to mean that statements have to be tendered into evidence by the party that used them. Issues may arise where the panel relies on parts of such evidence that has not been used by the parties during the examination of the witnesses and remains untested. Moreover, parties should provide a clear statement about why such statements are being used, *e.g.* solely for the purpose of discrediting the witness and not to prove the veracity of the statement itself.²¹⁰

²⁰⁷ See, *e.g.*, Sarajevo Municipal Court, *Orić*, Case No. 65 0 K 064513 08 K.

²⁰⁸ Court of BiH, *Mensur Memić et al.*, Case No. X-KR-09/786-1, Transcript of 28 Sept. 2010 (unofficial translation).

²⁰⁹ *Mensur Memić et al.*, Transcript of 12 Nov. 2010.

²¹⁰ Sarajevo Municipal Court, *Orić*, Case No. 65 0 K 064513 08 K, defence submission of 19 Feb. 2009.

12.4.2.4. EVALUATION OF EVIDENCE

In accordance with Article 15 of the BiH Criminal Procedure Code (free evaluation of evidence):

The right of the Court, Prosecutor and other bodies participating in the criminal proceedings to evaluate the existence or non-existence of facts shall not be related or limited to special formal evidentiary rules.

Moreover, in accordance with Article 281(2) of the BiH Criminal Procedure Code:

Article 281(2) of the BiH Criminal Procedure Code

The Court is obligated to conscientiously evaluate every item of evidence and its correspondence with the rest of the evidence and, based on such evaluation, to conclude whether the fact(s) have been proved.

When taken together, these provisions create an obligation for the court to conscientiously evaluate every item individually and cumulatively with all other evidence during deliberations in order to decide whether a certain fact is proven or not.

When taken together, these provisions create an obligation for the court to conscientiously evaluate every item individually and cumulatively with all other evidence during deliberations in order to decide whether a certain fact is proven or not.²¹¹ The principle of free evaluation of evidence is also limited by Article 10 of the BiH Criminal Procedure Code, which provides that the court shall not base its decision on evidence obtained in violation of human rights and freedoms prescribed by the Constitution and international treaties ratified by Bosnia and Herzegovina, or on evidence obtained in violation of the

Code.²¹²

As stressed by the Court of BiH appellate panel, one of the most important statutory obligations of the court in the course of the criminal procedure is that in the interest of fairness, and particularly in the interest of the accused, the court must take sufficient time to carefully review the evidence before making its decision.²¹³

The court shall not base its decision on evidence obtained in violation of human rights and freedoms.

The task of the trial panel is to establish both inculpatory and

²¹¹ Commentary of the BiH CPC, p. 76.

²¹² See, e.g., *Trbić*, 1st inst., ¶ 51; Commentary of the BiH CPC, p. 77.

²¹³ See, e.g., *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶ 150.

exculpating facts.²¹⁴ The standard to be applied is whether a reasonable trier of fact would reach that conclusion beyond reasonable doubt.²¹⁵

The appellate panel will substitute the findings of the trial panel with its own findings only if a reasonable trier of fact could not have established the contested facts.²¹⁶ The appellate panel shall revoke the first instance verdict if a factual error has resulted in a miscarriage of justice which has been defined as a grossly unfair outcome in the court proceedings, such as when an accused is convicted despite a lack of evidence on an essential element of the criminal offence.²¹⁷

In order to prove that a miscarriage of justice has occurred, an appellant must demonstrate that the alleged errors of fact made by the trial panel raise a reasonable doubt about the guilt of the accused.²¹⁸ In order for the prosecution to prove a miscarriage of justice, it must demonstrate that, considering the errors of fact made by the trial panel, any reasonable doubt of the accused's guilt is eliminated.²¹⁹

In order to prove that a miscarriage of justice has occurred, an appellant must demonstrate that the alleged errors of fact made by the trial panel raise a reasonable doubt about the guilt of the accused.

²¹⁴ See, e.g., *Trbić*, 1st inst., ¶ 67.

²¹⁵ See, e.g., *ibid.*

²¹⁶ See, e.g., *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶ 325.

²¹⁷ *Ibid.* at ¶ 327.

²¹⁸ *Ibid.* at ¶ 328.

²¹⁹ *Ibid.*

12.4.2.5. EVIDENCE FROM THE ICTY

Notes for trainers:

- A very important issue for participants to consider is the law on the admissibility of evidence from the ICTY. This section highlights the main provisions of this law and summarises some of the leading cases on the admission of ICTY evidence, witness statement and expert reports.
- This section considers both admission of evidence that has been presented before the ICTY and evidence that has been gathered during the prosecutor's investigations but not relied upon in court.
- The rights of the accused to examine evidence already presented before the ICTY is considered, and it would be useful for participants to discuss the extent to which such evidence can be relied upon as a basis for a conviction.

Admission of evidence and adjudicated facts from the ICTY is governed by the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by the ICTY in Proceedings before the Courts in BiH (LOTC).²²⁰

According to Article 3 of the LOTC:

Article 3 of LOTC

(1) Evidence collected in accordance with the ICTY Statute and ICTY Rules on Procedure and Evidence (RPE) may be used in proceedings before the courts in BiH.

(2) The courts shall not base a conviction of a person solely or to a decisive extent on the prior statements of witnesses who did not give oral evidence at trial.

Admission of the facts established by the ICTY is set out in Article 4 of the LOTC:

At the request of a party or *proprio motu*, the courts, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings.

²²⁰ BiH Official Gazette, No. 61/04, 46/06, 53/06, 76/06. Note that from the available information, this law is seldom applied at the entity level.

Admission of evidence provided to the ICTY by witnesses is laid down in Article 5 of the LOTC:

Article 5 of LOTC

(1) Transcripts of testimony of witnesses given before the ICTY and records of depositions of witnesses made before the ICTY in accordance with Rule 71 of the ICTY RoPE, shall be admissible before the courts provided that that testimony or deposition is relevant to a fact in issue.

(2) The courts may exclude evidence given by a witness with protective measures where its probative value is outweighed by its prejudicial value.

(3) Nothing in this provision shall prejudice the defendant's right to request the attendance of witnesses as referred to in Paragraph 1 of this Article for the purpose of cross-examination. The decision on the request shall be made by the court.

Article 6 of the LOTC sets out the rules for admission of statements by expert witnesses made before the ICTY:

Article 6 of LOTC

(1) The statement of an expert witness entered into evidence in any proceedings before a Trial Chamber of the ICTY shall be admissible as evidence in domestic criminal proceedings, whether or not the person making it attends to give oral evidence in those proceedings.

(2) The statement of an expert witness falling under paragraph 1 above, when admitted, shall be evidence of any fact or opinion of which the person making it could have given as oral evidence.

(3) Pursuant to article 3 of this Law, the courts shall admit an expert witness' testimony by using the transcript of the testimony he/she gave before a Trial Chamber of the ICTY in any other case, providing that he/she had been previously warned about his rights and obligations regarding his testimony, and providing the testimony relates to the existence or non-existence of facts which themselves relate to the case in question.

(4) Nothing in this provision shall prejudice the defendant's right to request the attendance of an expert witness as referred to in Paragraph 1 of this Article for the purpose of cross-examination or to call an expert witness of his own to challenge the statement of an expert witness given before the ICTY. The decision on the request shall be made by the court.

With regard to evidence provided to ICTY officials, Article 7 of the LOTC states:

A transcript of the testimonies given during the investigation in terms of Article 273, paragraph 2 of the BiH CPC and the relevant provisions of the criminal procedure codes of the Republika Srpska, the Federation of BiH and the Brčko District can be read out. In addition, the relevant investigator of the ICTY may also be examined with regard to the circumstances of the conducted investigative activities and information obtained during those activities. The examination of the investigator is expressly subject to the Convention of Privileges and Immunities of the United Nations, which provides that UN staff are not subject to legal process unless the UN Secretary General has waived the immunity provided by the Convention.

Use of documents and forensic evidence collected by the ICTY is provided for in Article 8 of the LOTC:

Article 8 of LOTC

- (1) Original documents, certified copies, certified electronic copies and copies authenticated as unaltered in comparison to their originals and forensic evidence collected by the ICTY shall be used in proceedings before the courts and shall be treated as if they were obtained by competent national authorities.
- (2) The authentication and/or certification of electronic copies, in the sense of paragraph 1 herein, may be performed jointly for more documents or more pages of a single document, and may be performed electronically.
- (3) Certification and authentication in the sense of paragraphs 1 and 2 herein shall be performed by the ICTY.

As held by the Court of BiH:

It is inferred from the cited legal provisions that the LOTC is a *lex specialis* so as to eliminate the risk of inadmissibility of evidence collected by the ICTY pursuant to the CPC BiH. *Lex specialis* is a set of special regulations overriding the CPC BiH in both substance (evidence collected by the ICTY) and application (rules on admissibility and use). Being a *lex specialis*, the LOTC either derogates or takes precedence over the CPC BiH in matters where the two are not aligned, or evokes the CPC BiH in matters that are not specifically addressed by the LOTC (Article 1 (3) of the LOTC).²²¹

It is inferred from the cited legal provisions that the LOTC is a lex specialis so as to eliminate the risk of inadmissibility of evidence collected by the ICTY pursuant to the CPC BiH.

12.4.2.5.1. ADMISSION OF ICTY EVIDENCE, WITNESS AND EXPERT STATEMENTS

The LOTC clearly provides that the defendant is entitled to request to cross-examine the witnesses whose statements the court decided to use in accordance with Article 5.²²²

In the event that the witness cannot be cross-examined, then the statement, if admitted, shall be subject to Article 3 (2) of the LOTC, meaning that the courts shall not base a conviction of a person solely or to a decisive extent on the prior statements of witnesses who did not give oral evidence at trial.²²³

The LOTC clearly provides that the defendant is entitled to request to cross-examine the witnesses whose statements the court decided to use in accordance with Article 5.

In the *Stupar et al.* case, the appellants disputed the lawfulness of the trial panel's decision to admit Miroslav Deronjić's statement given to the ICTY OTP because they did not have an opportunity to cross-examine the witness.²²⁴ At the time Miroslav Deronjić was summoned to testify, he had been seriously ill and passed away.²²⁵

²²¹ *Trbić*, 1st inst., p. 365 (p. 365 BCS) (verdict upheld on appeal).

²²² *See, e.g., ibid.* at p. 367 (p. 367 BCS) (verdict upheld on appeal).

²²³ *See, e.g., ibid.* at p. 367 (p. 367-368 BCS) (verdict upheld on appeal).

²²⁴ *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶¶ 263-264.

²²⁵ *Ibid.* at ¶ 265.

The appellate panel noted that in accordance with paragraph 2 of Article 273 of the BiH Criminal Procedure Code, and if a judge or panel of judges so decides, records of testimony given during the investigative phase may be read or used as evidence at the main trial only if the persons who gave the statements are dead, affected by mental illness, cannot be found or their presence in the court is impossible or very difficult due to important reasons.²²⁶ The appellate panel concluded that on the basis of this provision, the trial panel's decision to admit the testimony of Miroslav Deronjić was lawful and that no procedural violations had occurred.²²⁷ The appellate panel, however, stressed that the probative value of this testimony, along with the other pieces of evidence, including evidence going to credibility of that witness, needed to be reviewed by the appellate panel.²²⁸

Records of testimony given during the investigative phase may be read or used as evidence at the main trial only if the persons who gave the statements are dead, affected by mental illness, cannot be found or their presence in the court is impossible or very difficult due to important reasons.

With regard to the admission of the reports of Richard Butler and Dean Manning, as well as testimony of Dean Manning and Jean Rene Ruez by the trial panel in the *Stupar et al.* case, the appellants sought their exclusion on the basis that the witnesses were not expert witnesses and had not produced expert witness findings.²²⁹ The appellate panel noted, however, that these reports were not admitted into evidence by the trial panel on the basis of Article 6 of the LOTC (statements by expert witnesses made before the ICTY), but on the basis of Article 4 in conjunction with Article 8 of the LOTC.²³⁰ The appellate panel also noted that the trial panel clearly stated that "the reports contain three types of information: argument, first-hand information and compilation of the list of other evidence. The first-hand information and the lists of other evidence are accepted by the Court under Article 4 of the LOTC. However, the arguments, in the form of opinion, are not".²³¹

²²⁶ *Ibid.* at ¶ 266.

²²⁷ *Ibid.* at ¶ 267.

²²⁸ *Ibid.* at ¶ 268.

²²⁹ *Ibid.* at ¶¶ 252-254.

²³⁰ *Ibid.* at ¶ 255.

²³¹ *Ibid.* at ¶ 257.

Furthermore, the appellate panel noted that the trial panel made a clear distinction between the opinions contained in the proffered reports (that it did not accept) and the first-hand information (that it did accept) contained in a document admitted before the ICTY. The appellate panel gave the same probative value to this information as it did to any other piece of evidence in the proceeding. The same was the case with the testimonies of Dean Manning and Jean Rene Ruez.²³² The appellate panel stressed that in accordance with Article 5 of the LOTC “transcripts of testimony of witnesses given before the ICTY and records of depositions of witnesses made before the ICTY in accordance with Rule 71 of the ICTY RPE, shall be admissible before the courts provided that that testimony or deposition is relevant to a fact in issue”.²³³ Noting that the appellants did not prove that the report of Jean Rene Ruez was not given in accordance with Article 5 of the LOTC, the appellate panel dismissed this ground of appeal.²³⁴

Transcripts of testimony of witnesses given before the ICTY and records of depositions of witnesses made before the ICTY in accordance with Rule 71 of the ICTY RPE, shall be admissible before the courts provided that that testimony or deposition is relevant to a fact in issue.

12.4.2.5.2. ADMISSION OF PRIOR STATEMENTS OF THE ACCUSED GIVEN TO ICTY OTP INVESTIGATORS

In the *Milorad Trbić* case, six prior statements of the accused were admitted into evidence, all taken by the OTP ICTY.²³⁵ The accused stated in his appeal that the trial panel erred when it admitted those statements into evidence, claiming, *inter alia*, that he was not warned that he was a suspect in an investigation before giving the statements, that he was not familiar with the incriminatory facts and that even if he was warned, such warnings were not given in accordance with Article 6(3)(a) of the ECHR.²³⁶ The accused also claimed that he gave statements under duress, that he was “blackmailed” and that he had been promised his family would go to Australia in exchange for his cooperation with the investigators.²³⁷ The prosecution argued that the appellant’s claims should be rejected, as the accused failed to object to the admission of these statements during the trial, that he did not contest that he had been adequately warned prior to every interview, that he waived his right prior to giving statements and that there was no evidence regarding the existence of duress.²³⁸

The appellate panel concluded that the accused waived his rights in timely manner, talked to the investigators on a voluntary basis and that, therefore, the trial panel did not err when it admitted his prior statements into evidence in accordance with the LOTC.²³⁹

²³² *Ibid.* at ¶¶ 258-259.

²³³ *Ibid.* at ¶ 260.

²³⁴ *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶¶ 261-262.

²³⁵ Court of BiH, Milorad Trbić, Case No. X-KR-07/386, 2nd Instance Verdict, 21 Oct. 2010, ¶ 15.

²³⁶ *Trbić*, 2nd inst., ¶ 16.

²³⁷ *Ibid.*

²³⁸ *Ibid.* at ¶ 18.

²³⁹ *Ibid.* at ¶ 21.

The appellate panel considered whether the trial chamber erred when it concluded that the statements were taken in accordance with Rules 42 and 43 of the ICTY Rules of the Procedure and Evidence.²⁴⁰

The appellate panel established that the accused was warned about, *inter alia*:

- his right not to give a statement or to answer questions;
- whatever he said could be used as evidence during the trial;
- his right to legal assistance and presence of defence counsel during the interview;
- in case he voluntarily waived his right to defence counsel, he could stop answering the questions at any time of interview;
- other rights; and
- during the first interview, which was conducted in the U.S., the accused was given a “Miranda” warning, similar to the warnings required by the ICTY.

Based on these findings, the appellate panel concluded the trial panel did not err in holding that the relevant ICTY rules had been satisfied.²⁴¹

The appellate panel then turned to establishing whether the accused had been warned that he had the status of a suspect. The appellate panel noted that prior to every interview, the accused was warned that he was suspected for the events in Srebrenica and that during one of the interviews, he was informed by the prosecutor that a decision would be made on whether his case would be held in The Hague or would be transferred to Bosnia and Herzegovina.²⁴² The appellate panel concluded that the trial panel did not err in holding that the accused was warned in accordance with the ICTY requirements.²⁴³

Turning to the appellant’s claim that, in violation of Article 78 of the BiH Criminal Procedure Code, he had not been informed about what criminal act he had been charged with, the appellate panel noted that Article 78 of the BiH Criminal Procedure Code deals with admissibility of a statement taken by the prosecutor or other authorised official person from Bosnia and Herzegovina.²⁴⁴ The appellate panel held that the accused did not show that Article 78 is to be applicable to anyone else apart from the prosecutor or another authorised official person from Bosnia and Herzegovina, nor did he explain why an investigator from a foreign jurisdiction would be obliged to obey BiH Criminal Procedure Code provisions. This was especially true in cases where similar warning had been given and no BiH Prosecutor’s Office representative had been present during the interview.²⁴⁵ In doing so, the appellate panel referred to the ICTY finding in the *Mrkšić et al.* case where statements of the accused were taken by Belgrade authorities. The *Mrkšić* chamber held that although two ICTY OTP officials were present during such interviews, the persons taking the statements had been investigators of the military security bodies / military investigative judge in Serbia that had not acted under the directives of the ICTY OTP. The

²⁴⁰ *Ibid.* at ¶ 30.

²⁴¹ *Ibid.* at ¶¶ 31-32.

²⁴² *Ibid.* at ¶ 33.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.* at ¶¶ 34-36.

²⁴⁵ *Ibid.* at ¶ 37.

Mrkšić chamber held, therefore, that the ICTY Statute and RPE had not been applicable to the interviews of the accused.²⁴⁶

The Court of BiH appellate panel concluded that the statements in this case had been lawfully taken in situations in which Article 78 had not been applicable and in situations in which the ICTY OTP investigators acted in accordance with the ICTY rules relating to the questioning of the suspects.²⁴⁷ The appellate panel further concluded²⁴⁸ that the accused did not present evidence that his statements had not been given on a voluntary basis and that each of his six statements had been taken under circumstances that could be characterised as direct and fair, whereby the investigators had been taking care of the rights of the accused.²⁴⁸

12.4.2.5.3. ADMISSION OF FACTS ESTABLISHED BY ICTY JUDGEMENTS

In the *Stupar et al.* case, the trial panel accepted as proven some facts established in the proceedings before the ICTY in accordance with Article 4 of the LOTC, but not others.²⁴⁹

These findings were challenged on appeal. Some appellants claimed that this amounted to a violation of the rights to defence and to a fair trial, while other appellants claimed this amounted to an essential violation of the provisions of the BiH Criminal Procedure Code under Article 297(1)(i).²⁵⁰ The appellants also challenged the use of ICTY-established facts in general, explaining that the application of accepted facts violated the presumption of innocence and shifted the burden of proof from the prosecution to the defence.²⁵¹ The appellants challenged the fact that an immediate interlocutory appeal of the decision was not allowed, amounting to violations of the BiH Criminal Procedure Code and the right to a fair trial.²⁵² Some appellants also argued that some of the facts were irrelevant and that certain facts were unsuitable because they were vague in nature and taken out of context.²⁵³

The appellate panel noted that the trial verdict, and in particular, the separate decision rendered about the accepted facts, clearly indicated that the trial panel had only accepted those facts that:

- were distinct, concrete and identifiable;²⁵⁴
- were not conclusions, opinions or verbal testimonies;²⁵⁵
- were not legal characterizations;²⁵⁶
- contained essential findings of the ICTY which were not significantly changed;²⁵⁷

²⁴⁶ *Ibid.* at ¶ 38 and references given therein.

²⁴⁷ *Ibid.* at ¶ 39.

²⁴⁸ *Milorad Trbić*, 2nd inst., ¶ 46 *et seq.*

²⁴⁹ *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶¶ 270-271.

²⁵⁰ *Ibid.* at ¶ 269.

²⁵¹ *Ibid.* at ¶ 273.

²⁵² *Ibid.* at ¶ 272.

²⁵³ *Ibid.* at ¶ 274.

²⁵⁴ *Ibid.* at ¶ 285.

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

- did not directly or indirectly confirm the criminal liability of the accused;²⁵⁸
- were either affirmed or established on appeal or were not contested on appeal and no further opportunity to appeal was possible;²⁵⁹ and
- were not the subject of a plea agreement or voluntary admission but were derived from the proceeding in which the accused had legal representation and the opportunity to defend themselves.²⁶⁰

The appellate panel concurred with the trial panel finding that the accepted facts entirely met the acceptance criteria and in no way violated the right of the accused to a fair trial and their presumption of their innocence.²⁶¹ In addition to this, the appellate panel stressed that it was especially true because in the course of the proceeding, these established facts had been treated as a piece of evidence that the defence had an opportunity to challenge and to question by counterarguments and through defence evidence.²⁶²

As a confirmation of this conclusion, the appellate panel noted that the same trial panel decision denied a prosecution motion to accept as proven other facts established in ICTY judgements, as it concluded that some of the proposed facts represented legal conclusions or directly or indirectly incriminated the accused.²⁶³ The appellate panel held that this indicated that the trial panel had made a clear and correct distinction between the facts that can be established and the facts which, if accepted, would jeopardise the right of the accused to a fair trial.²⁶⁴

The appellate panel also noted that one of the defence counsel had filed motions seeking to accept facts established by the ICTY in the *Krstić* and *Blagojević and Jokić* cases, concluding that these circumstances reflected that the defence was in an equal position to the prosecution with respect to the availability and use of the established facts.²⁶⁵

Moreover, the appellate panel held that the purpose of a decision to accept established facts was to contribute to judicial economy, to promote the accused's right to a speedy trial and to establish a balance between the right of the accused to a fair trial with the need to minimise the number of appearances of witnesses who must repeat their testimony in several cases.²⁶⁶ The appellate panel concluded that a decision regarding established

A decision to accept established facts contributes to the judicial economy, promotes the accused's right to a speedy trial and establishes a balance between the right of the accused to a fair trial with the need to minimise the number of appearances of witnesses who must repeat their testimony in several cases.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.* at ¶ 286.

²⁶² *Ibid.*

²⁶³ *Ibid.* at ¶ 287.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.* at ¶¶ 288-289.

²⁶⁶ *Ibid.* at ¶ 290.

facts came down to a purely procedural action of admitting evidence in the proceedings, under the condition that the evidence met the acceptance criteria.²⁶⁷ Due to the fact that this was a procedural decision, it may be challenged on appeal from the final verdict, but not in an interlocutory appeal.²⁶⁸

The appellate panel found that the decision regarding the acceptance of established facts essentially represented a decision to admit exhibits into evidence.²⁶⁹ The appellate panel found it was entirely proper to admit evidence by procedural decisions.²⁷⁰ The contents and the probative value of that evidence, the appellate panel stressed, are weighed following the end of the main trial when the trial panel has received all of the presented evidence and, pursuant to Article 15 and Article 281(1) and (2) of the BiH Criminal Procedure Code, the panel is able to freely evaluate every piece of evidence and its correspondence with the rest of the evidence.²⁷¹ The appellate panel also noted that if the appellants' position regarding the admissibility of an immediate appeal of a decision on established facts in the proceedings was accepted, that same principle would have to be applied to the admission of every other piece of evidence, which would mean that proceedings would be delayed until each such decision becomes final.²⁷²

With regard to one appeal indicating that some of the facts were irrelevant to the case and the others were indistinct and useless, the appellate panel noted that the mentioned facts were not used in the trial verdict for the ruling.²⁷³

Based on the foregoing, the appellate panel concluded that the admission of the above established facts did not result in a violation of the provisions of the BiH Criminal Procedure Code or in a violation of the right of the accused to a fair trial.²⁷⁴

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

- “armed conflict broke out after the European Community recognised BiH as a sovereign state on 6 April 1992”;²⁷⁵
- “armed conflict in Sarajevo broke out with fierce shooting and an attack on the Academy of the Ministry of Interior in Vraca”;²⁷⁶ and

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.* at ¶ 284.

²⁶⁹ *Ibid.* at ¶ 291.

²⁷⁰ *Ibid.* at ¶ 292.

²⁷¹ *Ibid.*

²⁷² *Ibid.* at ¶ 293.

²⁷³ *Ibid.* at ¶ 296.

²⁷⁴ *Ibid.* at ¶ 298.

²⁷⁵ Court of BiH, *Momčilo Mandić*, Case No. X-KRZ-05/58, 2nd Instance Verdict, 1 Sept. 2009, ¶¶ 37, 46, referring to 1st Instance Verdict and Stanislav Galić, Case No. IT-98-29-T, Trial Judgement, 5 Dec. 2003, ¶ 199.

²⁷⁶ *Ibid.* at ¶ 38, referring to Court of BiH, *Momčilo Mandić*, Case No. X-KRZ-05/58, 1st Instance Verdict and *Galić*, TJ ¶ 199.

- “on 8 April 1992 and armed conflict between the Serb and Muslim forces broke out in Foča”²⁷⁷.

The appellate panel primarily noted that these accepted facts should not have been accepted, since it concerned a legal characterization—the existence of an armed conflict was an essential element of the criminal offence charged.²⁷⁸ However, since the parties themselves proposed the acceptance of the facts and did not contest the trial panel’s decision on this matter in the appeal, the appellate panel did not review this error.²⁷⁹

²⁷⁷ *Ibid.* at ¶ 46, referring to *Mandić*, 1st inst., and Milorad Krnojelac, Case No. IT-97-25-T, Trial Judgement, 15 March 2002, ¶¶ 567, 570.

²⁷⁸ *Ibid.* at ¶¶ 40, 47.

²⁷⁹ *Ibid.* at ¶ 40.

12.5. CROATIA

Notes for trainers:

- This section focuses on Croatian law and procedure as well as the available jurisprudence. It will be useful for participants to compare the rules and jurisprudence of Croatian courts with that of the ICTY.
- The Module will have to be adapted according to new criminal procedure legislation.
- This section is structured in a similar way to the section on international procedure and evidentiary issues. It is divided into two parts:
 - Procedural issues; and
 - Evidentiary issues.
- Participants could be asked to discuss the usefulness of the ICTY's OTP collection of evidence under the current Croatian Criminal Procedure Act, and what challenges it raises.
- Participants should be encouraged to discuss the strengths and weaknesses of the procedural and evidentiary approaches that have been adopted by the Croatian courts for the prosecution of war crimes. In particular, the following topics could be addressed:
 - What measures should be adopted by prosecutors and the courts to ensure that fair trial rights are respected in the prosecution of war crimes?
 - An evaluation of the use of plea agreements and plea bargaining, and in particular, whether the procedures ensure that the conduct as charged is adequately reflected in the final findings of the court.
 - An assessment of the discretion that the courts in Croatia use to rely upon evidence that was admitted before the ICTY. What factors should be taken into account in the exercise of this discretion? Should evidence be admitted that indicates the acts and conduct of the accused, and if so, in what circumstances should it be admitted?
 - How can experts best be relied upon in the prosecution of war crimes? Discuss the extent to which expert opinion can assist in the determination of questions of fact such as political and military command structures.

12.5.1. PROCEDURAL ISSUES

12.5.1.1. INTRODUCTION

In Croatia, the relevant sources of domestic law relating to punishment of war crimes are the:

- Basic Criminal Code of Republic Croatia (identical with the Criminal Code of the Socialist Federal Republic of Yugoslavia taken over by the Croatian legal system as a Croatian law with certain modifications and amendments);²⁸⁰
- Criminal Code, which came into force on 1 January 1998, and its amendments;²⁸¹
- Constitutional Act on Co-operation of the Republic of Croatia with the International Criminal Tribunal;²⁸²
- Act on Application of the Statute of the International Criminal Court and Prosecution of Criminal Offences against International Laws of War and International Humanitarian Law (“Application Act”);²⁸³
- The 1997 and 2008 Criminal Procedures Acts (“CPA”);²⁸⁴
- Law on Protection of Witnesses;²⁸⁵
- Law on International Legal Assistance in Criminal Matters;²⁸⁶ and
- Law on International Restrictive Measures.²⁸⁷

Criminal procedure in Croatia is governed by the provisions of the Criminal Procedure Act(s). The Criminal Procedure Act(s) are based on the principles and rules of the civil law system. Certain of the main rules of the system discussed hereunder, including the:

- Presumption of innocence;
- *In dubio pro reo*;
- The right to remain silent;
- *Ne bis in idem*;
- More lenient law and principle of legality;
- Right to detailed and prompt information of the accusation;
- Right to be heard and right to defence;
- Right to silence and privilege against self-incrimination;
- Right to adequate time and facilities;
- Right to a defence counsel and related rights;

²⁸⁰ Official Gazette of Croatia „Narodne Novine“ No. 31/93.

²⁸¹ Official Gazette of Croatia „Narodne Novine“ No. 110/97 (27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06 and 110/07, 152/08).

²⁸² Official Gazette of Croatia „Narodne Novine“ No. 32/1996; Although the Constitutional Act itself does not contain substantial provisions on war crimes, it regulates co-operation between Croatia and the ICTY.

²⁸³ Official Gazette of Croatia „Narodne Novine“ No. 175/03, 55/11.

²⁸⁴ Official Gazette of Croatia „Narodne Novine“ No. 110/97, 27/98, 58/99, 112/99, 58/202, 143/02, 62/03, 178/04, 152/08 and 76/09.

²⁸⁵ Official Gazette of Croatia „Narodne Novine“ No. 163/03.

²⁸⁶ Official Gazette of Croatia „Narodne Novine“ No. 178/04.

²⁸⁷ *Ibid.*

- Right to a trial without delay;
- Right to a public trial; and
- Right to examine witnesses and right to confrontation.

12.5.1.2. FAIR TRIAL RIGHTS

The main fair trial rights under the Croatian Criminal Code are discussed hereunder.

12.5.1.2.1. PRESUMPTION OF INNOCENCE

The presumption of innocence is to be respected during the entire course of the criminal proceedings including all the phases preceding the trial.

The presumption of innocence is to be respected during the entire course of the criminal proceedings including all the phases preceding the trial. A person is innocent and no person may hold this person culpable until his culpability is established by a final judgement.²⁸⁸ This principle is supported by two further principles: *in dubio pro reo* and “the right to remain silent”.

12.5.1.2.1.1. IN DUBIO PRO REO

Pursuant to Article 3 of the CPA, any doubt regarding the existence of the facts which constitute the elements of the definition of the criminal offence, or which are conditions for the implementation of a certain provision of the criminal law, shall be decided in favour of the defendant.²⁸⁹

12.5.1.2.1.2. “THE RIGHT TO REMAIN SILENT”

The defendant is not obliged to present his defence or any other statement or answer any question. It is forbidden and punishable to extort a confession or any other statement from the defendant or any other person participating in the proceedings.²⁹⁰

12.5.1.2.2. NE BIS IN IDEM

The principle is enshrined both in the Croatian Constitution and CPA. The CPA stipulates that no one shall be tried again for an offence for which he has already been convicted by a final court's decision and that criminal proceedings against a person who was acquitted by a final court's decision may not be reopened.²⁹¹

The CPA further extends the application of the principle of *non bis in idem* to all criminal proceedings that have been completed with a final court decision or final verdict, providing that the criminal proceedings could be reopened only under the conditions set forth in the law.²⁹²

²⁸⁸ CPA 1998, Art. 3(1); Official Gazette of Croatia „Narodne Novine“ No. 110/97.

²⁸⁹ *Ibid.* at Art. 3(2); Official Gazette of Croatia „Narodne Novine“ No. 110/97.

²⁹⁰ *Ibid.* at Art. 4(3); Official Gazette of Croatia „Narodne Novine“ No. 110/97.

²⁹¹ *Ibid.* at Art. 11 (1)(2); Official Gazette of Croatia „Narodne Novine“ No. 110/97.

²⁹² CPA 2008, Arts. 497 – 508; Official Gazette of Croatia „Narodne Novine“ No. 152/08, 76/09.

The importance of this rule in war crimes cases is highlighted in situations where Croatian courts applied an amnesty to acts that could be qualified as crimes against international law. The court decisions on amnesty became final and the Croatian judiciary still does not have consistent jurisprudence as to whether such cases could be reopened and tried again.

In the *Janković case*, the court convicted the defendant to six years of imprisonment for war crimes against civilians. He had already been convicted by the Military Court in Banja Luka (BiH) to two years and two months imprisonment for robbery and had already served the sentence. The Supreme Court dismissed the defendant's appeal, which raised a violation of the *non bis in idem* rule. The court noted that the application of Croatian criminal legislation has a priority if a criminal offence was committed in the territory of the Republic of Croatia and that regardless of the conviction rendered abroad, the defendant could be tried again in Croatia provided that the Chief State Attorney gives his approval for prosecution.²⁹³ The defendant was given credit for the sentence he had already served based on the earlier conviction.²⁹⁴

Judicial bodies in Croatia have also been trying to deal with the problem of double convictions arising from earlier *in absentia* convictions rendered in Croatia and new convictions for the same crimes rendered before Serbian courts with the presence of the defendants. To that effect, in two war crimes cases, the Croatian courts set aside *in absentia* convictions of two defendants after they had been tried and convicted in Serbia. In the *Trbojević case* (see the example given in the section for Serbia), the state attorney requested the renewal of the trial based on the final conviction in Serbia, taking the verdict rendered by the Serbian court as a new fact in evidence. The court granted the renewal. In the following retrial, the court invalidated the *in absentia* verdict and rejected the charges after the state attorney stopped further prosecution.²⁹⁵ In the *Pašić case*, the court decided to grant the renewal and to invalidate the *in absentia* conviction applying the principle of *non bis in idem*,²⁹⁶ after Pašić had been convicted in Serbia for the same crime.

Pursuant to Article 20 of the Application Act,²⁹⁷ an indicted person whose guilt has been decided by the International Criminal Court cannot be tried for the same crime in the Republic of Croatia, nor can a previous national adjudication in the same matter be enforced. It further stipulates that at the request of the Public Attorney or the person indicted who has been tried by the International Criminal Court, the adjudication of a court in the Republic of Croatia concerning the same crime shall be altered through the appropriate implementation of the provisions of the Criminal Procedure Act related to the alteration of adjudication with the rules on the renewal of proceedings.

²⁹³ Supreme Court of Republic of Croatia, *Croatia v. Nedjeljko Janković*, I Kz 363/10-6, 20 October 2010, p. 4. (As provided by the Article 15 (1) of the Criminal Code, Official Gazette of Croatia „Narodne Novine“ No. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08.

²⁹⁴ *Ibid.* at Art. 17.

²⁹⁵ County Court Bjelovar, *Boro Trbojević*, Case No. K-39/2011-11, 12 April 2011, 1st Instance Verdict, final – no appeal filed.

²⁹⁶ County Court Karlovac, *Zdravko Pašić*, Case No. 6 K-2/01-85; Kv-29/10, 03 May 2010, 1st Instance Verdict, final – no appeal filed.

²⁹⁷ The Application Act, Art. 20; Official Gazette of Croatia „Narodne Novine“ No. 175/03.

12.5.1.2.3. PRINCIPLE OF LEGALITY AND PRINCIPLE OF MANDATORY APPLICATION OF A MORE LENIENT LAW

No one shall be punished for an act which, before its perpetration, was not defined by law or international law as a punishable offence, nor may he be sentenced to a punishment which was not defined by law. If after the perpetration of an act a less severe punishment is determined by law, such punishment shall be imposed. This principle is also enshrined in the Croatian Criminal Code: no one shall be punished, and no criminal sanction shall be applied, for conduct which did not constitute a criminal offence under a statute or international law at the time it was committed and for which the type and range of punishment by which the perpetrator can be punished has not been prescribed by statute.²⁹⁸

No one shall be punished for an act which, before its perpetration, was not defined by law or international law as a punishable offence, nor may he be sentenced to a punishment which was not defined by law.

12.5.1.2.4. RIGHTS OF A SUSPECT AND ACCUSED

This section describes various rights of suspects and accused before Croatian courts.

12.5.1.2.4.1. DETAILED AND PROMPT INFORMATION OF THE ACCUSATION

At his first interrogation, the defendant shall be informed of the charge against him and of the grounds for the charge.

Pursuant to Article 4 of the CPA, at his first interrogation, the defendant shall be informed of the charge against him and of the grounds for the charge.²⁹⁹ A person arrested under suspicion of having committed an offence shall be promptly informed of the reasons for his arrest, that he is under no obligation to testify, that he is entitled to the

legal assistance of a defence counsel of his own choice and that the competent authority shall, upon his request, inform his family or other person designated by the defendant that he is under arrest.³⁰⁰

12.5.1.2.4.2. RIGHT TO BE HEARD AND RIGHT TO DEFENCE

The defendant shall be given the opportunity of being heard on all incriminating facts and evidence and to present all facts and evidence favourable to him.³⁰¹

²⁹⁸ Croatian Criminal Code Arts. 2 and 3, Narodne Novine, Official Gazette; No. 110/97.

²⁹⁹ CPA 1998, Art. 4(1); Official Gazette of Croatia „Narodne Novine“ No. 110/97.

³⁰⁰ *Ibid.*, Art. 6; Official Gazette of Croatia „Narodne Novine“ No. 110/97.

³⁰¹ *Ibid.*, Art. 4(2); Official Gazette of Croatia „Narodne Novine“ No. 110/97.

12.5.1.2.4.3. RIGHT TO SILENCE AND PRIVILEGE AGAINST SELF-INCRIMINATION

The defendant need not testify or answer any questions. It is forbidden and punishable to extort a confession or any other statement from the defendant or any other person participating in the proceedings.³⁰²

12.5.1.2.4.4. RIGHT TO ADEQUATE TIME AND FACILITIES

The defendant must be accorded adequate time and opportunity to prepare his defence.³⁰³ A summons shall be served on the accused in such a manner that between it being served and the day of the trial there is sufficient time to prepare a defence (a minimum of 8 days).³⁰⁴

12.5.1.2.4.5. RIGHT TO A DEFENCE COUNSEL AND RELATED RIGHTS

The defendant shall have the right to defend himself in person or be assisted by a defence counsel of his own choice. Subject to the provisions of the CPA, if the defendant does not retain defence counsel in order to provide for his defence, defence counsel shall be appointed to the defendant. The court or other authorities participating in criminal proceedings must inform defendant of his right to legal assistance and to unimpeded communication with his defence counsel at the first interrogation.³⁰⁵

12.5.1.2.4.6. RIGHT TO A TRIAL WITHOUT DELAY

The defendant shall have the right to be brought before a court in the shortest period of time and to be acquitted or convicted in accordance with law. The time of detention shall be reduced to the shortest possible time.³⁰⁶ The court shall be bound to carry out proceedings without delay and prevent any abuse of the rights of the procedural participants.³⁰⁷ The CPA further provides for the duty of the courts to proceed with urgency in cases in which a person has been detained.³⁰⁸

12.5.1.2.4.7. RIGHT TO A PUBLIC TRIAL

Trials must be public and adult persons may be present in the courtroom during the trial.³⁰⁹ The court may decide at any time *proprio motu* or on the motion of the parties to close either a part or the whole trial to the public if it is necessary on the following grounds:

- The protection of the security and defence of the Republic Croatia;

³⁰² *Ibid.*, Art. 4(3); Official Gazette of Croatia „Narodne Novine“ No. 110/97.

³⁰³ *Ibid.*, Art. 5(4), Official Gazette of Croatia „Narodne Novine“ No. 110/97.

³⁰⁴ *Ibid.*, Art. 286(3), Official Gazette of Croatia „Narodne Novine“ No. 110/97.

³⁰⁵ *Ibid.*, Art. 5, Official Gazette of Croatia „Narodne Novine“ No. 110/97.

³⁰⁶ *Ibid.*, Art. 10(1), Official Gazette of Croatia „Narodne Novine“ No. 110/97.

³⁰⁷ *Ibid.*, Art. 10(2), Official Gazette of Croatia „Narodne Novine“ No. 110/97.

³⁰⁸ *Ibid.*, Art. 101 (4), Official Gazette of Croatia „Narodne Novine“ No. 110/97.

³⁰⁹ CPA 1998, Arts. 291 (1 and 2), Official Gazette of Croatia „Narodne Novine“ No. 110/97, 27/98, 58/99, 112/99, 58/02, 143/02, 115/06.

- The protection of a secret that may be prejudiced with a public trial;
- The maintenance of public order and peace;
- The protection of the personal and family life of the defendant, injured party or other participant in the trial; and
- The protection of the interests of minors.³¹⁰

The exclusion of the public does not pertain to the parties, injured party, their lawyers or the defence attorney. The court panel may decide to allow the presence of individual civil servants, scientific and public figures and, upon the request of the defendant, the presence of his spouse, common-law spouse or other close relatives. The president of the court panel would notify the persons present in the closed sessions of their duty to protect the confidentiality of the information they have learned at the closed session and that its disclosure constitutes a criminal offence.³¹¹

The court may close the session to the public only subject to the conditions prescribed in the CPA.³¹²

12.5.1.2.4.8. RIGHT TO EXAMINE WITNESSES AND RIGHT TO CONFRONTATION

The defendant shall be given an opportunity to be heard on all incriminating facts and evidence and to present all facts and evidence favourable to him.³¹³ The defendant may be confronted with a witness or co-defendant if their statements relating to important facts diverge. The confronted persons shall be examined on each circumstance in which their statements diverge and their answers shall be entered into the minutes.³¹⁴ The parties, the president and the members of court panel could directly ask questions during the testimony of a witness or an expert witness. Unless agreed otherwise, the party who proposed the witness or expert witness asks the question first and then the opposite party proceeds. The president and the members of the court panel ask the questions after the parties.³¹⁵

³¹⁰ *Ibid.* at Art. 293.

³¹¹ *Ibid.* at Art. 294 (1, 2 and 3).

³¹² *Ibid.* at Art. 374(5), Official Gazette of Croatia „Narodne Novine“ No. 110/97.

³¹³ *Ibid.* at Art. 4(2), Official Gazette of Croatia „Narodne Novine“ No. 110/97.

³¹⁴ *Ibid.* at Art. 227 (1 and 2).

³¹⁵ *Ibid.* at Art. 326 (1).

12.5.1.2.5. REGIT TEMPUS ACTUM RULE

Criminal proceedings in Croatia shall be conducted under the provisions of the law in force at the time at the time proceedings commence. It does not matter if the crime was committed before the CPA entered into force, but that the assumptions for undertaking and the validity of some of the procedural steps are defined by the law in force at the time of the crime's commission. When new legislation enters into force, there is always the question of its application to proceedings which are pending. As a general rule, the old regulations apply up to the end of certain stages of pending criminal proceedings, while the new regulations apply afterwards as well as to all new criminal proceedings.

Criminal proceedings in Croatia shall be conducted under the provisions of the law in force at the time at the time proceedings commence.

12.5.1.2.6. THE ACCUSATORIAL PRINCIPLE

The accusatorial principle refers to the initiation of criminal proceedings. Both the Croatian Constitution and the CPA³¹⁶ provide that criminal proceedings may only be instituted and conducted upon the request of the authorised prosecutor (which generally may be the State Attorney, the injured person as prosecutor or a private prosecutor).

Criminal proceedings may only be instituted and conducted upon the request of the authorised prosecutor.

12.5.1.3. THE STAGES OF THE PROCEEDINGS

This section examines each of the stages of the criminal proceedings.

War crimes proceedings have particular jurisdictional requirements before the courts. In October 2003, Croatia passed a law that provided for the creation of a War Crimes Council in each existing county court.³¹⁷ Apart from the courts authorised generally according to the CPA, there are four County Courts (Osijek, Rijeka, Split and Zagreb) that have jurisdiction over war crimes cases.³¹⁸ The 2011 Amendments to Application Act provided for the exclusive jurisdiction of those four courts in all future war crimes cases.³¹⁹ The judgements of these courts can be appealed to the Supreme Court.

To start the proceedings within one of these courts, unless they are authorised generally, the President of the Supreme Court must approve the request of the state attorney general. The

³¹⁶ CPA 1998, Art. 2 (1); Official Gazette of Croatia „Narodne Novine“ No. 110/97.

³¹⁷ Act on the Application of the Statute of the International Criminal Court and on the Prosecution of Criminal Acts against the International Law on War and Humanitarian Law, Official Gazette of Croatia „Narodne Novine“ No. 175/03, Nov. 4, 2003, Art. 13 (2).

³¹⁸ Nonetheless, despite the establishment of four research centres for war crimes (Osijek, Rijeka, Split and Zagreb), investigations and court proceedings are taking place at the county courts pursuant to the place where the crime committed. The largest number of trials is therefore held before the county court in Vukovar, Osijek, Zadar, Sibenik, Sisak, and Karlovac.

³¹⁹ Amendments to the Act on the Implementation of the ICC Statute, Official Gazette of Croatia „Narodne Novine“ No. 55/2011.

president may grant the request if it is appropriate to the “circumstances under which the crime was committed and the exigencies of the proceedings”.³²⁰

In June 2005, the Supreme Court President granted the first such request for a case³²¹ to be transferred from Vukovar to Zagreb, and later the *Branimir Glavaš* case was also transferred to Zagreb to avoid possible bias from the Osijek court. The number of transferred cases significantly increased in 2010 and the beginning of 2011, with more than a dozen cases being transferred during that period. In spite of the new legislation granting exclusive jurisdiction to four county courts over future war crime cases, the procedure for transfer could still be applied on a case by case basis to a significant number of the war crime cases in which the criminal proceedings have already been initiated.

12.5.1.3.1. PRE-INVESTIGATIVE PROCEDURE

Pre-investigative proceedings are activities of the organs of criminal prosecution, primarily the police and state prosecutor, who aim to detect criminal acts and perpetrators. The proceedings begin with criminal charges or information given to a competent public prosecutor with regard to the committed crime.

12.5.1.3.2. INVESTIGATION

Criminal proceedings are commenced with an investigation which aims to gather all the necessary evidence that can inform the public prosecutor’s decision on whether to bring charges or not. The investigation is not a public stage of the criminal proceedings and it is not possible to monitor it. One of the aims of the investigation is to gather evidence if there is a danger that it cannot be preserved until the end of the trial.

For cases transferred to the Croatian judiciary under Rule 11*bis* of the ICTY, only certain national investigative actions are permitted once ICTY has issued an indictment.

12.5.1.3.3. INDICTMENT AND THE CONTROL OF THE INDICTMENT

After the investigation has been completed, the state attorney makes a decision on whether to drop charges or file an indictment. If an indictment has been filed, the defendant has the right to file an objection. The extraordinary chamber of the county court decides on whether to confirm the indictment or not. If the indictment is confirmed, the criminal proceedings will enter into the trial stage.

As noted above, in contrast to purely domestic proceedings, cases that are transferred from the ICTY to Croatia can be based on an indictment without an investigation. Furthermore, where the ICTY OTP has issued an indictment, the parties to the case are not allowed to file a complaint against such an indictment.

³²⁰ The Application Act, Art. 12, Official Gazette of Croatia „Narodne Novine“ No. 175/03.

³²¹ The case against Slobodan Davidović, suspected of war crimes in Bosnia and Herzegovina. See OSCE Mission to Croatia, “Background Report on Domestic War Crimes Prosecutions, Transfer of ICTY Proceedings and Missing Persons”, Aug. 12, 2005, p. 4.

12.5.1.3.4. THE MAIN TRIAL PROCEEDINGS

This phase of the trial is distinct with regards to general rules of the CPA concerning the composition of the County Court Trial Chambers. The trial chambers in war crimes trials consist of three professional judges with experience in complex criminal cases, as opposed to the usual mixed composition of two professional and three lay judges.

12.5.1.4. ACCESS TO DOCUMENTS IN POSSESSION OF STATE BODIES AND MILITARY ARCHIVES

Access to documents in the possession of state bodies and military archives is regulated by the Ordinance on the Protection and use of Archives and Records of the Ministry of Defence and Armed Forces of the Republic of Croatia (“the Ordinance”).³²² The Ordinance regulates the collection, storage, method and storage conditions, processing, selection and extraction, protection and use of archives and records that was created, received or used in the operations of the Ministry of Defence, the Croatian Armed Forces and their predecessor, as well as the surrender of the relevant archive material.³²³

12.5.1.5. GUILTY PLEAS AND PLEA BARGAINING

After the indictment, a private charge or motion to indict is read or its contents are orally presented, and the president of the panel shall establish whether the accused understands the charge.³²⁴ If the president of the panel is convinced that the accused has not understood the charge, he shall once again present its contents so that the accused understands.³²⁵ Thereafter, the accused shall be asked to enter his plea on each count of the charge.³²⁶ If the accused pleads guilty to all counts of the charge, the president of the panel shall instruct him that he may give statements on all the circumstances tending to incriminate him and present all facts favourable to him.³²⁷ Thereafter, the accused may be interrogated.³²⁸ The statement of the accused does not exempt the court from its obligation to examine further evidence. If the confession of the accused is complete and in accordance with the evidence already gathered, the court shall examine only those pieces of evidence which are related to the decision on the sentence.³²⁹ If the accused pleads not guilty to all or some counts of the charge, he shall be interrogated at the end of the presentation of evidence, unless otherwise requested by the accused.³³⁰

Plea agreements are only possible for crimes which carry a maximum penalty of up to ten years of imprisonment. In war crimes cases, the maximum sentence possible is 20 years, and sentences generally vary between five (the minimum allowed) and 20 years of imprisonment.

³²² Official Gazette of Croatia „Narodne Novine“ No. 18/05.

³²³ Ordinance, Art. 1

³²⁴ CPA 1998, Art. 320(1), Official Gazette of Croatia „Narodne Novine“ No. 110/97.

³²⁵ *Ibid.*

³²⁶ *Ibid.*, Art. 320(3), Official Gazette of Croatia „Narodne Novine“ No. 110/97.

³²⁷ *Ibid.*, Art. 320(4), Official Gazette of Croatia „Narodne Novine“ No. 110/97.

³²⁸ *Ibid.*

³²⁹ *Ibid.*, Art. 320(6), Official Gazette of Croatia „Narodne Novine“ No. 110/97.

³³⁰ *Ibid.*

Consequently, plea agreements are generally not possible in war crimes cases. In cases where plea agreements are possible, if the investigative judge does not agree with the agreement, it is then sent to an extra-trial panel for a final determination.

However, under the Chapter “Crimes against Humanity and International Law”, of the OKZ RH (the criminal code applicable for crimes committed arising out of the conflicts in the former Yugoslavia), there are crimes related to war and punishable with a maximum sentence of up to ten years of imprisonment. In theory, plea agreements would be possible in crimes with the below qualifications:

- Instigation for the commission of genocide and war crimes - punishable with one to ten years of imprisonment (*inter alia* - genocide, war crimes against civilians, war crimes against the wounded and sick, war crimes against POWs) (Article 123(4)).
- Unlawful appropriation of property from killed and wounded in the battlefield - punishable with imprisonment from one to ten years (Article 125(1)-(2)).
- Violation of the status of a mediator - punishable with imprisonment of six months to five years (Article 127).
- Cruel treatment of the wounded, sick and POWs - punishable with six months to five years (Article 128).
- Unjustified delay in the repatriation of POWs - punishable with imprisonment of six months to five years (Article 129).

12.5.1.6. TRIALS IN ABSENTIA

The accused may be tried in his absence only if he has fled or is otherwise not available to the Croatian authorities, provided that particularly important reasons exist to try him although he is absent.

The accused may be tried in his absence only if he has fled or is otherwise not available to the Croatian authorities, provided that particularly important reasons exist to try him although he is absent.³³¹ The high number of trials *in absentia* is to some extent the result of the fact that a large number of accused have been out of reach of Croatian judiciary.³³² Trials *in absentia* leads to

obligatory retrial in cases where the defendant was later made available to the Croatian judiciary and asked for a retrial.

³³¹ CPA 1998, Art. 305(5), Official Gazette of Croatia „Narodne Novine“ No. 110/97. See, e.g., Goran Hadzic, Case No. K-57/95; Rebraca et al., Case No. K-61/93 and Kz-92/96; Kozlina, Case No. K-50/96; Lora (partly in absentia), Case No. K-93/04; Mikluševci, Case No. Kž-683/09-8.

³³² Amnesty International is concerned that the in absentia trials raise the issue of the defendants’ right to a fair trial. According to the OSCE Office in Zagreb there are approximately 460 cases in which the accused were convicted in absentia; see Organization for Security and Co-operation in Europe, Office in Zagreb, Background Report: War Crimes Proceedings 2007, 31 July 2008. p. 3.

12.5.2. EVIDENTIARY ISSUES

Notes for trainers:

- In this section, the ways in which evidence is admitted in the courts in Croatia is discussed. In particular, the admission of evidence gathered by the ICTY is included.
- Participants should be encouraged to consider how effective the rules are on admissibility for the conduct of war crimes cases.
- The case study can also be used to encourage participants to discuss what evidence from the case summary should be admitted by the court and, if there are any problems that could arise, should the prosecutor seek to rely on such evidence.

12.5.2.1. FREE EVALUATION OF EVIDENCE

The right of a court and other authorities participating in the criminal proceedings to assess the existence or non-existence of facts shall not be subjected to or restricted by formal rules of evidence.

The right of a court and other authorities participating in the criminal proceedings to assess the existence or non-existence of facts shall not be subjected to or restricted by formal rules of evidence.³³³

According to Article 28, paragraph 3 of the Application Act, the evidence gathered by the organs of the International Criminal Court can be used in

criminal proceedings in the Republic of Croatia under conditions that the evidence is derived in the manner envisaged by the Statute and Rules of Procedure and Evidence of the International Criminal Court and can be used before the ICC. The existence or nonexistence of facts which are proved by that evidence is evaluated by the Croatian courts according to Article 8 of the CPA.

In the *Marino Selo* case, the Supreme Court interpreted Article 28 paragraph 4 in such way that evidence collected by the ICTY could be used in Croatian Courts only in the cases transferred under ICTY Rule 11 *bis*.³³⁴ Consequently, in that case, the Supreme Court ruled that the evidence collected by the ICTY and used by the County Court in Pozega was illegal evidence and quashed the verdict.

The 2011 Amendments of the Application Act aimed to overcome the problem created with the Supreme Court's interpretation of the Article 28, paragraph 4. Article 5 of the Amendments changed Article 28, making clear that the evidence collected by the ICTY could be used in all war crimes cases. The application of the new rules for use of evidence collected by the ICTY in domestic war crimes proceedings remains to be seen.

³³³ CPA 1998, Art. 8(2).

³³⁴ *Marino Selo*, Case No. Kz 585/09, 2nd Instance Verdict, 23 March 2010, p. 4.

12.5.2.2. THE FORM OF THE INDICTMENT

An indictment must contain:

- the defendant's personal data, whether he is in detention, and if so, for how long;
- the description of the criminal offence and its legal characteristics, time and location of the perpetration of the crime, the object of the crime and the instruments used for its perpetration and other circumstances necessary to define the criminal offence in exact manner;
- the legal qualification of the crime and a citation of the provisions of the Criminal Code that according to the prosecutor's opinion should be applied;
- the name of the court competent to try the case;
- a list of evidence to be tendered during the trial, names of witnesses and expert witnesses, documents to be read and items to be used for establishing relevant facts; and
- an explanation of the status of the case after the investigation, pieces of evidence that prove decisive facts, the defendant's defence and the view of the prosecutor related to that defence.³³⁵

The detention of the defendant may be requested in the indictment if he is not detained, or the release if he is detained.³³⁶

One indictment may encompass more criminal offences or more defendants only if, in accordance with the Article 29 of the Criminal Procedure Act, one trial can be conducted and one verdict rendered in that case.³³⁷

In order to avoid any legal problems in processing the cases taken over from the ICTY, the Croatian judiciary needed to convert the ICTY indictments into indictments which, in content and form, are in compliance with indictments provided for by the Croatian CPA. Accordingly, in the only case transferred under Rule 11*bis* tried in the Republic of Croatia, the Croatian prosecutor compiled the indictment in accordance with Croatian law, but on the basis of facts contained in the ICTY indictment.³³⁸ However, as a ground for the indictment the prosecutor could, by rule, only present evidence collected by the ICTY Office of the Prosecutor. It should be noted that the transfer of cases based on Rule 11*bis* have finished, and the 2011 Amendments to Application Law do not contain provisions on transfer under Rule 11*bis*.

Proceedings before the Croatian courts must be governed by domestic law. Article 28 of the Act on the Implementation of the ICC Statute also provides that in the procedures transferred from the ICTY, Croatian courts shall apply domestic substantive and procedural law.

³³⁵ CPA 1998, Article 268 (1), Official Gazette of Croatia „Narodne Novine“ No. 110/97, 27/98, 58/99, 112/99, 58/02, 143/02, 115/06.

³³⁶ *Ibid.* at Art. 268 (2).

³³⁷ *Ibid.* at Art. 268 (3).

³³⁸ See *Ademi and Norac*.

Article 28 paragraph 4 of the Application Act stipulates that the Croatian court can use all the evidence that is consistent with the Regulations of Procedure and Evidence of the ICTY and brought in by the prosecution.

Article 5 of 2011 Amendments to the Application Act changed the Article 28, but without affecting the substance of the above statements.

12.5.2.3. ADMISSION OF ICTY EVIDENCE

The Application Act³³⁹ prescribes that all evidence derived by the ICTY and its Prosecution Office according to the Rules of Procedure and Evidence can be used before a Croatian court. The Supreme Court in Croatia interpreted that the rule could be applied only in the cases transferred from the ICTY under ICTY RPE Rule 11*bis* (see above the *Marino Selo* case). The 2011 Amendments to the Law on the Implementation of the ICC Statute aimed to expand the use of evidence to all war crime cases.

12.5.2.4. PROHIBITION OF CERTAIN EVIDENCE

According to Croatian law, some sources of information cannot be used in evidence, because the CPA explicitly rules out the use of that evidence owing to the manner in which it has been obtained or derived. The general provision on illegal evidence is Article 9 paragraph 2, which states that:

[E]vidence obtained by violating the right to defence, dignity, respect, and honour and inviolability of personal and family life guaranteed by the Constitution, the law or international law, as well as evidence obtained by violating provisions governing criminal proceedings and explicitly laid down by this Law and other evidence derived therefore, is illegal.

The Criminal Procedure Act explicitly defines certain forms of evidence as illegal.³⁴⁰

These are:

- sources of information obtained by illegal application of secret surveillance measures;³⁴¹
- records of illegal searches;³⁴²
- records of interrogation of the accused in a prohibited manner;³⁴³ and
- records of witness interrogations which, because of the content or circumstances of interrogation, the law disqualifies from the court's decision-making process. For

³³⁹ The Application Act, Art. 28(4); Official Gazette of Croatia „Narodne Novine“ No. 175/03.

³⁴⁰ See also Ivo Josipović, *Responsibility for war crimes before national courts in Croatia*, International Review of the Red Cross, Volume 88, No. 861, April 10, 2011 available at http://www.icrc.org/eng/assets/files/other/irrc_861_josipovic.pdf.

³⁴¹ CPA 1998, Art. 182(6); Official Gazette of Croatia „Narodne Novine“ No. 110/97.

³⁴² CPA 1998, Art. 217; Official Gazette of Croatia „Narodne Novine“ No. 110/97.

³⁴³ CPA 1998, Art. 225(9); Official Gazette of Croatia „Narodne Novine“ No. 110/97.

example, records of interrogation of a witness carried out by the police or the state prosecutor during pre-investigation must be removed from the case file and not used as evidence in criminal proceedings.³⁴⁴

Nonetheless, in the *Ademi and Norac* case, minutes of the testimony of a protected witness who was examined by investigators of the ICTY and later died were read out loud with the consent of the parties.³⁴⁵

The parties did not consent to read the testimony of protected witnesses 3, 9, 11, 14 and 29. Counsel for the accused opposed the reading of the testimony, suggesting it would violate the right to a fair trial of the accused. Specifically, defence counsel argued that the testimony was taken by the prosecutor outside of the courtroom without the knowledge or presence of the defence, who was thus unable to question the witness. The defence objected to admission of such testimony because in this situation it would not be admitted before the ICTY since, according to the ICTY RPE, there were no conditions for its admission and the rights of defendants would have been injured. The defence further elaborated that according to Article 28 paragraph 4 of the Application Act, the evidence gathered by the ICTY can be admitted if the same would be allowed in the proceedings before the ICTY.

However, the chamber concluded that the statements of other protected witnesses were given voluntarily, that the witnesses and an interpreter had signed the appropriate certificate and that they contained a declaration of accuracy in accordance with the ICTY RPE. The statements were translated by qualified translators whose work is approved by the ICTY Registry. Furthermore, the circumstances under which those witnesses testified were the same circumstances under which other witnesses were interviewed directly and via videoconference link in the *Ademi and Norac* trial. The defence had the opportunity to propose and present the evidence regarding the same facts these witnesses had testified to. Furthermore, the chamber confirmed that the testimony of these witnesses was taken in accordance with the ICTY RPE. The evidence of these witnesses did not relate directly to the acts and conduct of the accused, but possibly to their subordinates. Therefore, the chamber ruled that reading the statements of these witnesses did not violate the right to a fair trial, and thus did not represent any violation of the RPE.

Further, the chamber established that the protected witness No. 3 had died. For witnesses 9, 11, 14 and 29, the chamber received the medical records indicating that they could not appear before the court due to their poor health condition. Finally, the chamber concluded that the statements of four witnesses were taken in accordance with the ICTY RPE (satisfying the requirement for their validity under the Article 28 paragraph 4 of the Application Act). The reading of their statements in court was also in compliance with Article 331(1)(1) of the CPA.³⁴⁶

³⁴⁴ CPA 1998, Art. 78 (3) in conjunction with Arts. 174 (4) and 177 (3).

³⁴⁵ *Ademi and Norac*, 1st inst. p. 19 (upheld on appeal).

³⁴⁶ This reads “the court may decide to read the statements of witnesses without consent of the parties if the witnesses have died or become mentally ill or due to the illness or old age could not come to testify before the court”.

Consequently, the chamber concluded that reading their statements was in compliance with the law.³⁴⁷

In the same case, the defence of the second accused, Norac, objected to the tendering of five documents into evidence.³⁴⁸ Norac argued that the documents were biased, as they contained personal reflections, observations, perception and conclusions of police officers and military personnel and even suggestions on how the trial should look and were therefore biased. Moreover, Norac maintained, the documents contained information about operations that were not the subject of the trial. The chamber concluded that all five documents were obtained by the ICTY in accordance with the ICTY RPE and therefore could be tendered as evidence based on the Application Act.

However, the parts of the documents that contained summaries of witness statements that were taken by UNPROFOR personnel, not by ICTY investigators, were not admitted. According to the chamber, the CPA provides that only a court may examine a person as a witness. The exception under the Application Act was not applicable in this case because the summaries of statements were not collected by the ICTY.

³⁴⁷ *Ademi and Norac*, 1st inst., pp. 19-20 (upheld on appeal).

³⁴⁸ *Ibid.* at pp. 46-47 (BCS) (upheld on appeal).

12.6. SERBIA

Notes for trainers:

- This section focuses on Serbian law and procedure as well as the available jurisprudence. It will be useful for participants to compare the rules and jurisprudence of Serbian courts with that of the ICTY.
- The Module will have to be adapted according to new criminal procedure legislation.
- This section is structured in a similar way to the section on international procedure and evidentiary issues. It is divided into two parts:
 - Procedural issues; and
 - Evidentiary issues.
- Participants should be encouraged to discuss the strengths and weaknesses of the procedural and evidentiary approaches that have been adopted by the Serbian courts for the prosecution of war crimes. In particular, the following topics could be addressed:
 - What measures should be adopted by prosecutors and the courts to ensure that fair trial rights are respected in the prosecution of war crimes?
 - An evaluation of the use of plea agreements and plea bargaining, and in particular, whether the procedures ensure that the conduct as charged is adequately reflected in the final findings of the court.
 - An assessment of the discretion that the courts in Serbia use to rely upon evidence that was admitted before the ICTY. What factors should be taken into account in the exercise of this discretion? Should evidence be admitted that goes to the acts and conduct of the accused, and if so, in what circumstances should it be admitted?
 - How can experts best be relied upon in the prosecution of war crimes? Discuss the extent to which expert opinion can assist in the determination of questions of fact such as political and military command structures.

12.6.1. PROCEDURAL ISSUES

The Criminal Procedure Code is generally applicable to war crimes trials in Serbia. However, given that the prosecution of war crimes proceedings is more complex than for ordinary crimes, and in light of the fact that they involve a larger number of perpetrators, victims and witnesses, some specific procedural rules are required.

The “Law on the Organization and Competence of Government Authorities in War Crimes Proceedings” (“Law on War Crimes”) was thus passed to address the particular issues and problems that arise in war crimes trials.

Serbian Constitution

Article 18: Direct implementation of guaranteed rights

Human and minority rights guaranteed by the Constitution shall be implemented directly.

The Constitution shall guarantee, and as such, directly implement human and minority rights guaranteed by the generally accepted rules of international law, ratified international treaties and laws. The law may prescribe manner of exercising these rights only if explicitly stipulated in the Constitution or necessary to exercise a specific right owing to its nature, whereby the law may not under any circumstances influence the substance of the relevant guaranteed right.

Provisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation.

This Module is structured to first consider the procedural rules envisaged in the Serbian Criminal Procedure Code and thereafter, will discuss the specific rules from the Law on War Crimes that are applied in cases concerning war crimes.

12.6.1.1. GENERAL CRIMINAL PROCEDURE CODE RULES RELEVANT TO THE WAR CRIMES CASES

The Criminal Procedure Code of Serbia is based on the “inquisitorial” legal tradition. Today, the general procedural rules envisaged by the Criminal Procedure Code are similar to the SFRY procedure rules that were in force before and during the armed conflict in the former Yugoslavia.

12.6.1.2. FAIR TRIAL RIGHTS

12.6.1.2.1. FAIR TRIAL RIGHTS PROVISIONS IN THE CONSTITUTION

Fair trial rights, as well as other human rights enshrined in the Constitution, are directly applicable in Serbia, as stated in Article 18 paragraph 1 of the Constitution.

Human rights provided for in international treaties (including the European Convention on Human Rights) are considered generally accepted rules of international law. They are directly applicable in Serbia, as stated in Article 18 paragraph 2 of the Constitution.

Human rights provided for in international treaties are considered generally accepted rules of international law and as such are directly applicable in Serbia.

Moreover, the Constitution sets forth that provisions on human and minority rights shall be interpreted to the benefit of promoting the values of a democratic society, pursuant to valid international standards in human and minority rights as well as the practice of international institutions which supervise their implementation, as stated in Article 18 paragraph 3 of the Constitution. The latter would certainly include the

jurisprudence of the European Court of Human Rights.

The Constitution also provides for a number of fair trials rights, grouped into articles, including:

- Treatment of persons deprived of liberty (Article 28);
- Special rights in case of arrest and detention without a court decision (Article 29);
- Detention (Articles 30 and 31); and
- Special rights of persons charged with criminal offence (Article 33).

12.6.1.2.1.1. *NE BIS IN IDEM & RES IUDICATA: PROTECTION FROM DOUBLE JEOPARDY*

Serbian Constitution

Article 33: Special rights of persons charged with criminal offense

Any person charged with criminal offense shall have the right to be informed promptly, in accordance with the law, in the language which this person understands and in detail about the nature and cause of the accusation against him, as well as the evidence against him.

Any person charged with criminal offense shall have the right to defend himself personally or through legal counsel of his own choosing, to contact his legal counsel freely and to be allowed adequate time and facilities for preparing his defense.

Any person charged with criminal offense without sufficient means to pay for legal counsel shall have the right to a free legal counsel when the interests of justice so require and in compliance with the law.

Any person charged with criminal offense available to the court shall have the right to a trial in his presence and may not be sentenced unless he has been given the opportunity to a hearing and defense.

Any person prosecuted for criminal offense shall have the right to present evidence in his favour by himself or through his legal counsel, to examine witnesses against him and demand that witnesses on his behalf be examined under the same conditions as the witnesses against him and in his presence.

Any person prosecuted for criminal offense shall have the right to a trial without undue delay.

Any person charged or prosecuted for criminal offense shall not be obligated to provide self-incriminating evidence or evidence to the prejudice of persons related to him, nor shall he be obliged to confess guilt.

Any other natural person prosecuted for other offences punishable by law shall have all the rights of a person charged with criminal offense pursuant to the law and in accordance with it.

The Constitution provides protection from double jeopardy in national criminal law. No person may be prosecuted or sentenced for a criminal offense for which he or she has been acquitted or convicted by a final judgement, for which the charges have been rejected or criminal

proceedings dismissed by final judgement, nor may a court decision be altered to the detriment of the defendant in a proceeding upon extraordinary legal remedy (Article 34, paragraph 3 of the Constitution).

This protection, however, is limited to situations where a person has been previously convicted for the same offence by a Serbian court. A defendant who has already been convicted in a foreign country for the same offence may be prosecuted before a Serbian court, unless the sentence that he had been convicted of has been served completely, or he has been acquitted, pardoned or his sentence or offence are subject to the statute of limitations (Article 108, paragraph 2 of the FRY Criminal Code).

A defendant who has already been convicted in a foreign country for the same offence may be prosecuted before the Serbian court, unless the sentence that he had been convicted of has been served completely, he has been acquitted or pardoned, or his sentence or offence are subject to the statute of limitations.

For example, in the *Boro Trbojević* case, the War Crimes Chamber of the Belgrade District Court convicted the defendant, who had already been convicted *in absentia* for the same crime by a Croatian court. However, he had never served his sentence. In its judgement, the court emphasised that such exemption from *ne bis in idem* is in line with Article 6 of the European Convention on the International Validity of Criminal Judgements.³⁴⁹

Although the court referred to Article 6 of the Convention, it is Article 53 of the European Convention on the International Validity of Criminal Judgements³⁵⁰ that regulates *ne bis in idem* effects of foreign judgements, and to which this decision and the provision of the FRY Criminal Code correspond (whereas Article 6 refers to situations where one state party requests enforcement of a judgement by another state party).

12.6.1.2.1.2. NE BIS IN IDEM AND THE ICTY

No person can be tried before a Serbian court for crimes for which he has already been tried by the ICTY.³⁵¹ Such prosecution is barred by the ICTY Statute, which, as a document adopted by the UN Security Council under Chapter VII of the UN Charter, takes precedence over any national legislation. This bar to prosecute persons already tried by the ICTY for the same crime is also recognised in the Serbian Law on Co-operation with the ICTY.³⁵² Proceedings could be initiated, however, for acts that are not or have not been tried before the ICTY.

³⁴⁹ War Crimes Chamber of the Belgrade District Court, *Boro Trbojević* (Velika Peratovica), Case No. K.V.5/08, 1st Instance Verdict, 27 May 2009, p. 10 (upheld on appeal).

³⁵⁰ Council of Europe, European Convention on the International Validity of Criminal Judgments, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/070.htm>.

³⁵¹ ICTY Statute, Art. 10, ¶ 1.

³⁵² Law on Co-operation of Serbia and Montenegro with the International Criminal Tribunal for the former Yugoslavia, Official Gazette of the FRY, 18/2002 and 16/2003, Art. 16.

12.6.1.2.2. FAIR TRIAL RIGHTS PROVISIONS IN THE CRIMINAL PROCEDURE CODE

Fair trial rights are implemented and applied in criminal proceedings through their more detailed elaboration in the Criminal Procedure Code, and must be applied in accordance with the Constitution and the European Convention on Human Rights.

The Criminal Procedure Code does not explicitly envisage the fair trial rights in one article, but there are several articles that ensure different aspects of the fair trial for the accused. For example, Article 1 provides that:

The present Code contains rules whose aim is that no innocent person is convicted and that perpetrators of criminal offences are sanctioned in accordance with requirements provided by the Criminal Code and based on the lawfully conducted proceedings.³⁵³

One of the main components of a fair trial is encompassed in Article 3, which states that everybody “is considered innocent until proven guilty by a final decision of a competent court”.³⁵⁴ The Criminal Procedure Code also prescribes a positive obligation imposed on government authorities, the information media, citizens’ associations, public figures and other persons to adhere to this rule and “to refrain from violating with public statements on the on-going criminal proceeding other rules of the proceeding, rights of the accused person and aggrieved party, the independence, authority and the impartiality of the court”.³⁵⁵

Article 4 of the Criminal Procedure Code ensures that every accused or suspected person has certain rights in criminal proceedings. Article 4 reads:

³⁵³ See CPC, Art. 1.

³⁵⁴ See *ibid.* at Art. 3(1).

³⁵⁵ See *ibid.* at Art. 3(2).

Article 4(1) of the Serbian Criminal Procedure Code

Any accused person or suspect is entitled:

- a. to be informed about the offence with which he is charged, as soon as possible and no later than at the first interrogation, in detail and in a language he understands, about the nature and grounds for the accusation and the evidence collected against him;
- b. to defend himself alone or with the professional assistance of a defence counsel of his own choosing from list of lawyers;
- c. to have his defence counsel present at his interrogation;
- d. to be brought before the court as soon as possible and tried in an impartial and fair manner and within a reasonable period of time;
- e. to be provided enough time and facilities to prepare his defence;
- f. to declare himself on all the facts and evidence against him and to present facts and evidence in his favour, either alone or through his counsel, to question prosecution witnesses and request that defence witnesses are questioned under the same conditions as the prosecution witnesses, in his presence;
- g. to be provided with a translator and interpreter if he does not understand and speak the language used in the proceedings.

Article 4(2) of the Serbian Criminal Procedure Code

(2) The court or any other state authority is required to:

- a. To ensure that an accused person or suspect exercises all his rights, as provided for in paragraph 1 of the present Article;
- b. Prior to the first interrogation, to warn the accused person or suspect that any statement he makes may be used as evidence against him and instruct him about the right to engage a defence counsel and the right to have the defence counsel attend his interrogation.
- c. If the accused person or the suspect does not engage a defence counsel, the court shall appoint him a defence counsel where so prescribed by this Code.
- d. An accused person who cannot afford a counsel, shall be, at his request, assigned a defence counsel at the expense of the Court's budget in accordance with this Code.
- e. An accused person that is accessible to the court can be tried only in his presence, except where *in absentia* trials are explicitly permitted by this Code.
- f. An accused person who is accessible to the court cannot be punished if he is not allowed to be heard and to defend himself.

The Criminal Procedure Code regulates the rights of persons deprived of liberty by the police without a court decision. Article 5 prescribes:

Article 5(1) – 5(2) of the Serbian Criminal Procedure Code

(1) A person deprived of liberty without a court decision shall immediately be advised that he is not obliged to make any statement, that any statement he makes may be used as evidence against him, and that he has the right to be interrogated in presence of a defence counsel who shall be appointed at the expense of budget funds, if he cannot afford one.

(2) Any person deprived of liberty without a court decision, must, without delay and not later than within 48 hours, be handed over to the competent Investigating judge, failing which he shall be released.

Article 5(3) – 5(4) of the Serbian Criminal Procedure Code

(3) In addition to the rights pertaining to accused persons and suspects pursuant to Article 4 of this Code, a person deprived of liberty shall have the following additional rights:

1. that at his request the time, location and any change of location of deprivation of liberty is communicated without delay to a family member or another person close to him, as well as to a diplomatic-consular representative of the state whose citizen he is, i.e. an international organisation representative if the person is a refugee or a person without citizenship;
2. to have undisturbed communication with his defence counsel, diplomatic-consular representative, representative of international organisation and the Protector of Citizens (Ombudsman);
3. to be examined, at his own request and without delay, by a physician of his own choosing, and if that is not possible, by a physician designated by the authority in charge of deprivation of liberty, or the investigating judge;
4. to initiate proceedings before a court or lodge an appeal with a court, which is required to decide without delay on the legality of his detention.

(4) any violence against persons deprived of liberty or persons with limited freedom is prohibited and punishable. Such persons must be treated humanely, respecting the dignity of their person.

As far as obtaining statements from the accused, the Criminal Procedure Code contains further prohibitions in Article 12, which states that “[a]ny form of violence and extortion of confessions or other statement from an accused person or other persons participating in proceedings is prohibited and punishable”.

Article 15 of the Criminal Procedure Code also places an obligation upon the court and other government authorities participating in the proceedings to protect the rights of the accused. This article obliges the court to advise in due time “the accused person or other participants in proceedings, who are likely to omit to perform an action or fail to exercise their rights, of the rights to which they are entitled under this code as well as the consequences of such omission”.³⁵⁶

³⁵⁶ See CPC, Art. 15.

One of the main obligations inherited from the old SFRY criminal system is the doctrine of

Article 17 of the Serbian Criminal Procedure Code

- (1) The court and the public authorities participating in criminal proceedings are required to truthfully and fully establish the facts essential for rendering a lawful decision.
- (2) The court and public authorities are required to afford equal treatment in examining and establishing both incriminating and exculpatory facts.

material truth. This is regulated in Article 17 of the Code that provides:

Article 71 is also relevant to war crimes proceedings. It deals with mandatory provision of defence counsel. It stipulates that a suspect who is charged for a crime punishable by a term of over ten years imprisonment must already have a mandatory defence during the first interrogation.³⁵⁷ Considering that in war crimes proceedings the envisaged maximum penalty³⁵⁸ is twenty years of prison, this article always applies to war crimes cases in practice. If the suspect does not retain a defence attorney himself, “the president of the court shall assign to them a defence counsel *ex officio* for the further course of the criminal proceedings until the judgement becomes final”.³⁵⁹

Article 71 of the Code stipulates that a suspect who is charged for a crime punishable by a term of over ten years of prison must already have a mandatory defence during the first interrogation. This Article always applies in war crimes cases in practice.

In reference to the mandatory defence, for clarity it should be noted that the Law on War Crimes as *lex specialis* envisages that the president of the court shall appoint a war crimes suspect a defence attorney without specifying the phase of the proceedings. The Law on War Crimes also prescribes that the defence attorney in war crimes proceedings must be an attorney with at least ten years of professional experience in criminal law and certain knowledge and experience in the field of humanitarian and human rights law.³⁶⁰

Disclosure of evidence is also regulated in the section dealing with the rights of defence lawyers. Article 74 prescribes:

³⁵⁷ See *ibid.* at Art. 71, ¶ 1. Other reasons are if an accused person is mute, deaf or unable to conduct his own defence successfully.

³⁵⁸ See *generally* Module 13.

³⁵⁹ See CPC, Art. 71, ¶ 4.

³⁶⁰ See Law on Organisation and Competence of Government Authorities in War Crimes Proceedings, Art. 14v.

After a ruling on conducting an investigation or immediately following the issuance of the indictment (Article 244), and even prior to them, if the suspect has been interrogated in accordance with provisions relating to the interrogation of accused persons, the defence counsel shall be entitled to examine case documentation and objects collected which will serve as evidence.

Immediately prior to the first interrogation of a suspect, the defence counsel shall be entitled to read the criminal complaint, the record of the crime scene inspection, the findings and opinions of expert witnesses, and the request to conduct an investigation.

The Criminal Procedure Code also provides detailed regulations on the reasons and procedure for the detention of the accused. Article 142(5) is of particular importance for war crimes cases and has been extensively applied by the War Crimes Chambers. It states that detention can be prescribed “where it is justified by the particularly serious circumstances of the criminal offence”.³⁶¹ The War Crimes Chambers has ruled that the commission of serious war crimes fall within this provision.

The court’s failure to inform defence counsel about the date and time of the hearing of a witness in the investigation is an incorrect application of the Criminal Procedure Code, but is not sufficiently severe to lead to a quashing of the verdict.³⁶²

12.6.1.2.3. REGIT TEMPUS ACTUM RULE

In the *Lekaj* case, the defence argued on appeal that the Law on Organisation and Competence of State Authorities in War Crimes Proceedings was applied retroactively and that the law was less favourable for the accused. The Supreme Court rejected this argument and confirmed that the application of this law, as a procedural law, is not barred by the retroactivity principle or *lex mitior* principle. Procedural laws, the court held, can be applied as of the date of their entry into force or any other date specified in that law as the date of its application.³⁶³

The Supreme Court held that procedural laws can be applied as of the date of their entry into force or any other date specified in that law as the date of its application.

12.6.1.3. RULES OF PROCEDURE THAT APPLY TO WAR CRIMES TRIALS

In light of the distinct features of war crimes cases, special provisions of the Criminal Procedure Code governing organised crimes cases are applied, in addition to the Law on War Crimes.³⁶⁴ These special rules enable the application of specific measures for discovering and proving

³⁶¹ See CPC, Art. 142(5).

³⁶² War Crimes Department of the Appellate Court in Belgrade, Damir Sireta, Case No. Kž1 Po2 2/2010, 2nd Instance Verdict, 24 June 2010, p. 8.

³⁶³ Supreme Court of Serbia, Anton Lekaj, Case No. Kz. I RZ 3/06, 2nd Instance Verdict, 26 Feb. 2007, p. 4.

³⁶⁴ CPC (Chapter XXIX a).

criminal offences of organised crime, and are also applicable to war crimes investigations. The first special measure is the supervision and recording of telephone and other communications, provided for by Article 504e:

Acting on a written and substantiated proposal of the public prosecutor, the investigating judge may order supervision and recording of telephone and other communications by other technical means and optical recording of person suspected of having committed a criminal offence referred to in Article 504a of this Code, if there is no other manner of collecting evidence for criminal prosecution or the collection thereof would be extremely difficult.³⁶⁵

Such an order from the investigating judge will be substantiated and, according to Article 504e paragraph 1 of the Criminal Procedure Code, will be implemented by the police, Security and Information Agency, and Military Security Agency.³⁶⁶

12.6.1.4. SIMULATED SERVICES AND CONTROLLED DELIVERY

Another special measure that can be applied when investigating cases of war crimes deals with rendering simulated services that should assist in revealing a suspect. Article 504(i) of the Criminal Procedure Code provides that:

Where there are grounds for suspicion that a criminal offence referred to in Article 504(a) of this Code has been committed, the investigating judge may, at the request of the public prosecutor, authorise the provision of simulated business services or the conclusion of simulated legal contracts, if it is not possible to collect evidence required for criminal prosecution in another way, or if their collection would be very difficult.³⁶⁷

In both cases, the prosecutor shall initiate a criminal proceeding within six months from the day he receives the material.

Furthermore, the prosecutor may approve a controlled delivery of illegal and suspicious consignments for the purpose of collecting evidence and identifying the person involved in the commission of a criminal offence³⁶⁸ and to further propose an automated computer search of personal and other data and related information.³⁶⁹

Article 504(m) provides that:

The investigating judge may, at the request of the public prosecutor, order the engagement of an undercover operative where there exist grounds for suspicion that a criminal offence referred to in Article 504a paragraph 3 of this

³⁶⁵ *Ibid.* at Art. 504e.

³⁶⁶ *Ibid.* at Art. 504ž.

³⁶⁷ *Ibid.* at Art. 504(i).

³⁶⁸ *Ibid.* at Art. 504l.

³⁶⁹ *Ibid.* at Art. 504lj.

Code has been committed, if it would not be possible to collect evidence for criminal prosecution in another way or their collection would be very difficult.

In exceptional cases, the undercover agent may be examined as a witness in a criminal procedure, but a court decision cannot be based solely on the statement made by the concerned undercover agent.³⁷⁰

However, because war crimes cases before Serbian courts have already been committed, it is not likely that this article would be applied in practice.

12.6.1.5. WITNESS COLLABORATOR (INSIDER WITNESS)

Article 540(o), which is regularly applied in war crimes proceedings involving insider witnesses (witness collaborators), provides that:

The public prosecutor may propose to the court that with certain privileges a member of an organised criminal group be examined as a witness who has admitted belonging to the group, against whom criminal proceedings are being conducted in connection with the criminal offence referred to in Article 504(a) paragraph 3 of this Code (organised crime, corruption and other particularly serious offences), provided that he has fully confessed to the commission of the criminal offence, and that the significance of his testimony for detecting, proving and preventing other criminal offences by the organised criminal group outweighs the consequences of the criminal offence he had committed.³⁷¹

The testimony of the cooperating witness shall not be open to the public, “unless the chamber decides otherwise, acting on a motion of the public prosecutor and with the consent of the cooperating witness”.³⁷² In return, the cooperating witness who gave his statement to the court, pursuant to the obligations set out in Article 504(p) of the Criminal Procedure Code, will be given the minimum sentence prescribed by the Criminal Procedure Code for the criminal offence that he has confessed to and half of the sentence for those crimes that have been proven, during the proceedings, to have been committed by him (granted that it is not less than 30 days’ incarceration).³⁷³

The latter provision was introduced by the 2009 amendments to the Criminal Procedure Code. For a witness collaborator who had been granted that status before the 2009 amendments, even if the trial continued after the amendments, a previous provision from the Criminal Procedure Code that exonerated him completely from criminal responsibility applied.

It should also be noted that the Law on War Crimes, specifically Article 13(a), further envisages that the war crimes prosecutor may propose to the court that the member of an armed formation, state organ or political organization should be examined as a witness collaborator.

³⁷⁰ *Ibid.* at Art. 504nj.

³⁷¹ *Ibid.* at Art. 504o.

³⁷² *Ibid.* at Art. 504s,1.

³⁷³ *Ibid.* at Art. 504t,1.

This is provided that he completely admitted to committing the criminal offence, and that the importance of his statement—for proving the involvement of others in the criminal offence or initiation or proving other criminal offences in Article 2 of the Law on War Crimes—is of more importance than the consequence of the criminal offence he has committed.³⁷⁴ The rationale for this provision, introduced by the 2009 amendments to the Law on War Crimes, is to provide an exception to the condition, applicable in all other criminal cases, that the witness collaborator is a member of an organised criminal group. This is because in a large number of war crimes cases, witness collaborators are or may be from the police or army or other otherwise legal groups or formations. The witness collaborator, however, cannot be a member of the armed formation, state organ or political organization for whom there is a reasonable suspicion that he was first in the hierarchy and as such ordered, planned, instigated or in some other way committed a criminal offence under Article 2 of the Law on War Crimes, or had a lead role in the commission of a criminal offence.³⁷⁵

The status of witness collaborator was granted to two defendants in the *Ovčara* case. This was done under the terms of Criminal Procedure Code before the 2009 amendments, and the witness collaborators were completely exonerated from criminal liability.

12.6.1.6. GUILTY PLEAS AND PLEA BARGAINING

The recent amendments to the Criminal Procedure Code provide that plea agreements are also possible. Furthermore, after the 2009 amendments to the Law War Crimes, plea agreements can be made in war crimes cases without the limitations for general crimes (that the crime in question is punishable for up to 12 years).³⁷⁶

The concept envisaged by the Criminal Procedure Code is to a certain extent different than the plea bargain found in the ICTY RPE. Namely, it is envisaged that the agreement on the admission of guilt must always be made in writing and that the accused person will fully admit to committing the criminal offence for which he is charged.³⁷⁷

The prosecutor has the discretion to abandon the criminal prosecution even for criminal offences that are not included in the agreement on the admission of guilt.³⁷⁸

In general, the punishment agreed between the prosecutor and the accused cannot be below the statutory minimum for the criminal offence with which the accused is charged.³⁷⁹ Only by exception, can the punishment be below the statutory minimum:

In general, the penalty agreed between the prosecutor and the accused cannot be below the statutory minimum for the criminal offence with which the accused is charged.

³⁷⁴ See Law on organisation and competence of Government authorities in War Crimes proceedings, Art. 13a(1).

³⁷⁵ See *ibid.* at Art. 13a(2).

³⁷⁶ CPC, Art. 282a and the Law on organisation and competence of Government authorities in War Crimes proceedings, Art. 13b.

³⁷⁷ CPC, Art. 282a.

³⁷⁸ *Ibid.* at Art. 282b.

³⁷⁹ *Ibid.* at Art. 282b(2).

[W]here it is obviously justified by the significance of the confession of the accused person for clearing up the criminal offence with which he is charged and where proving the offence without such confession would be impossible or very difficult, or for the prevention, detection or successful prosecution of other criminal offences, or due to the existence of the especially extenuating circumstances from Article 54 paragraph 2 of the Criminal Code.³⁸⁰

On its face, it can be seen that this possibility can be of great importance in war crimes cases.

As before the ICTY, “[the] court shall decide on the agreement on the admission of guilt, and may issue a ruling dismissing, upholding or rejecting the agreement”.³⁸¹ Such a decision by the court will be made at a hearing which will be attended by the prosecutor, the accused and defence counsel that will be assigned by the court *ex officio* if not retained by the accused.³⁸² During the a hearing, the court, as one of the conditions, must have established that the accused is fully aware of all the consequences of the agreement, and in particular, that he fully understands that he waives the right to be tried and to lodge an appeal against the decision of the court issued on the basis of the agreement.³⁸³

As before the ICTY, “[the] court shall decide on the agreement on the admission of guilt, and may issue a ruling dismissing, upholding or rejecting the agreement”.

Article 282(a)(4) indicates that before an indictment is raised, a plea agreement is to be submitted to the presiding judge of the pre-trial chamber, while after the indictment is raised, the agreement must also be submitted to the trial chambers. This article suggests, therefore, that a plea agreement can be concluded before the trial, during the investigation phase.

Plea-bargaining during the investigation phase could raise concerns about the disclosure of evidence because, in general during this phase of the proceedings, it is much harder in practice for defence lawyers to obtain approval for review of the case file because such disclosure is connected with the first interrogation of the accused.³⁸⁴

The plea agreement can be submitted to the court until the end of the first session of the main hearing.³⁸⁵

The president of the pre-trial or trial chamber, depending on which phase of the proceedings the plea agreement has been concluded between the parties, decides on the plea agreement.³⁸⁶

Article 282v(8)-(9) of the Criminal Procedure Code provides that:

³⁸⁰ *Ibid.* at Art. 282b(3).

³⁸¹ *Ibid.* at Art. 282v(1).

³⁸² *Ibid.* at Art. 282v(5).

³⁸³ *Ibid.* at Art. 282v(8).

³⁸⁴ See CPC, Art. 74.

³⁸⁵ *Ibid.* at Art. 282(a)(3).

³⁸⁶ *Ibid.* at Art. 282(v)(2) – (3).

Article 282v(8) of the Serbian Criminal Procedure Code

(8) The court shall accept the plea agreement in a reasoned ruling and pass a decision that corresponds to the contents of the agreement if it determines:

- 1) that the defendant knowingly and voluntarily admitted to the offense or offenses that are subject to prosecution and the defendant's confession was not given in error;
- 2) that the agreement was made in accordance with Article 282b para. 2 and 3 of this Code;
- 3) that the defendant was fully aware of the consequences of the agreement, (Article 282b, paragraph 1), and in particular fully understood that the agreement waived his right to trial and appeal against a court decision made under the agreement;
- 4) that there is other evidence supporting defendant's guilty plea;
- 5) that the plea agreement did not violate the rights of injured parties or that it is not contrary to considerations of fairness.

Article 282v(9) of the Serbian Criminal Procedure Code

(9) When one or more of the conditions of paragraph 8 this article are not met, or when the sentence or other criminal sanctions set forth in the plea agreement clearly does not match the severity of the offense to which the defendant confessed, the court shall issue a reasoned decision that the plea agreement is rejected, and the defendant is given the recognition that the agreement cannot be evidence in criminal proceedings.¹

12.6.1.6.1. APPEALING THE COURT'S DISMISSAL OF A PLEA AGREEMENT

After a court's decision to uphold the agreement becomes final, the agreement must be incorporated into the indictment. Then the judge will render a guilty verdict and impose the penalty or other criminal sanction provided for in the plea agreement.

As provided for in Article 282(g), the public prosecutor or defendant may appeal a decision rejecting the plea agreement within eight days. An injured party can appeal the court's acceptance of a plea agreement, also within eight days.³⁸⁷

After a court's decision to uphold the agreement becomes final, the agreement must be incorporated into the indictment. Then the judge will render a guilty verdict and impose the penalty or other criminal sanction provided for in the plea agreement.³⁸⁸

Plea agreements have yet to be implemented in war crimes cases, and their usefulness in future war crimes cases is still uncertain. The only example of plea bargaining in a war crimes case was in May 2011 for the offence of aiding the perpetrators after the crime. This offence, arising under Article 333 of the 2006 Criminal Code of Serbia, is under the jurisdiction of the War Crimes Prosecutor and the War Crimes Department if the perpetrators assisted someone who has committed or is suspected of having committed a war crime, crimes against humanity and genocide.³⁸⁹ This particular case concerned charges brought by the War Crimes Prosecutor of the Republic of Serbia against six individuals for helping the ICTY fugitive Stojan Župljanin to hide, in the period from 2002 to 2008, before his arrest and transfer to the ICTY.

At a hearing session, the court examined whether the conditions from the Criminal Procedure Code for upholding a plea agreement had been fulfilled. The court concluded that the defendants had knowingly and voluntarily admitted to the commission of the crimes charged, that this admission was not given in error, that they were fully aware of the consequences of the agreement and that they fully understood that they had waived their rights to a hearing and appeal against a court decision made on the basis of the agreement.³⁹⁰

The court accepted the plea agreements of each of the accused, concluding that there was evidence in the case files corroborating the guilty pleas and that other conditions from Article 282(8) of the Criminal Procedure Code were met.³⁹¹

The court sentenced the accused to the penalties stipulated in the plea agreements. One of the accused was sentenced to one year of house arrest, and the other five accused to suspended prison sentences of one year.³⁹²

³⁸⁷ CPC, Art. 282(g).

³⁸⁸ *Ibid.* at Art. 282(d).

³⁸⁹ Law on Organisation and Competence of Government Authorities in War Crimes Proceedings, in War Crimes Case, Art 2, ¶ 3.

³⁹⁰ War Crimes Department of the High Court in Belgrade, Lovre et al. (Zupljanin Supporters), Case No. K.Po2 52/10, 13 May 2011, p. 10.

³⁹¹ *Lovre et al.*, pp. 10-11.

12.6.1.7. TRIALS IN ABSENTIA

The accused may be tried in his absence only if he has fled or is otherwise not available to the authorities and if there are particularly important reasons to conduct the trial in absentia.³⁹³ As soon as a chamber makes the decision to hold a trial in absentia, the accused must have defence counsel.³⁹⁴ Trials *in absentia* will be re-tried if the convicted person and his defence counsel so request within six months of when it becomes possible to try him in his presence or if his extradition is approved by a foreign state on the condition that the trial be renewed.³⁹⁵

The accused may be tried in his absence only if he has fled or is otherwise not available to the authorities and if there are particularly important reasons to conduct the trial in absentia.

³⁹² *Ibid.*

³⁹³ CPC, Art. 304, Official Gazette of the FRY No. 70/2001, 68/2002, and Official Gazette of the Republic of Serbia No. 58/2004, 85/2005, 115/2005, 49/2007, 72/2009.

³⁹⁴ CPC, Art. 71(3), Official Gazette of the FRY No. 70/2001, 68/2002, and Official Gazette of the Republic of Serbia No. 58/2004, 85/2005, 115/2005, 49/2007, 72/2009.

³⁹⁵ *Ibid.* at Art. 413.

12.6.2. EVIDENTIARY ISSUES

Notes for trainers:

- In this section, the ways in which evidence is admitted in the courts in Serbia is discussed. In particular, the admission of evidence gathered by the ICTY is included.
- Participants should be encouraged to consider how effective the rules are on admissibility for the conduct of war crimes cases.
- The case study should also be used to encourage participants to discuss what evidence from the case summary should be admitted by the court and, if there are any problems that could arise, should the prosecutor seek to rely on such evidence.

In the Republic of Serbia, one of the main principles of criminal procedure is that the court will evaluate freely all the evidence adduced before it. This is explicitly stated in the Criminal Procedure Code, Article 18 that provides:

Article 18 of the Serbian Criminal Procedure Code

(1) Evidence which has been adduced and is of significance for rendering a decision shall be assessed by the court freely. The court shall base its judgments or decisions corresponding to judgments solely on those facts of whose certainty it is completely convinced.

(2) Courts may not base their decisions on evidence which is *per se* or by the method of its collection contrary to the provisions of the Constitution or ratified international treaties, or is explicitly prohibited by this Code or other law.

(3) Where there exists doubt in respect of decisive facts which represents elements of a criminal offence or on which depends the application of another provision of the Criminal Code, in its judgment or decision corresponding to a judgment the court shall rule in favour of the accused.

However, despite Article 18's broad rule of giving weight to the evidence, the Criminal Procedure Code does regulate the process for obtaining evidence, such as:

- Searches of person and premises (Articles 77 – 81);
- Seizure of objects (Articles 82 – 86);
- Taking actions with suspicious objects (Articles 87 – 88);
- Interrogation of accused persons (Articles 89 – 95);

- Examination of witnesses (Articles 96 – 109);
- Crime scene inspection (Articles 110 – 112); and
- Expert Analysis (Article 113 – 132).

These specific evidentiary processes are regulated in detail as to what they encompass, who conducts them and what can be adduced by them.

In relation to witness statements and their introduction when a specific witness is not testifying *viva voce*, the Criminal Procedure Code states:

Except for cases especially prescribed in this Code, records of the statements made by witnesses, co-defendants or participants in the criminal offence who have already been convicted, as well as records or other documents in connection with the findings and opinions of expert witnesses, may if so decided by the chamber be read out only in the following cases:

1) if persons who were interrogated or questioned have died, are suffering from a mental illness or cannot be found, or where advanced age, poor health or other reasons make their appearance before the court impossible or very difficult;

2) if witnesses or expert witnesses decline to give testimony at the trial without statutory reasons.³⁹⁶

12.6.2.1. USE OF ICTY DOCUMENTARY MATERIALS

The trial chambers in Serbia have relatively broad discretionary power to give weight to any evidence presented before them.

The trial chambers in Serbia have relatively broad discretionary power to give weight to any evidence presented before them. An important question concerns the procedural possibility to use ICTY evidence in the domestic procedures. This was enabled by Article 14(a) of the Law on War Crimes as a *lex specialis* provision to Criminal Procedure Code. Article 14(a) envisages:

The evidence collected by and presented before the International Criminal Tribunal for the Former Yugoslavia may upon its transfer be used as evidence in the criminal proceedings before the local court, provided that it was collected and presented in a manner envisaged by the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia. The existence or non-existence of the facts that this evidence seeks to prove the

³⁹⁶ See CPC, Art. 337.

court shall judge in accordance with Article 18 of the Criminal Procedure Code.³⁹⁷

The Criminal Procedure Code Commentary explains further that the court is not bound to prove certain facts with certain types of evidence.³⁹⁸ The courts in Serbia have wide discretion with respect to what evidence they will rely on.

This was clarified by the Supreme Court of Serbia in *Branko Grujić et al.* (Zvornik II) case. The question was whether witness statements taken by the ICTY OTP fell within the ambit of the Article 14a of the Law on War Crimes. The Supreme Court found that the decision of the first instance court to take out such statements from the case file was a breach of Article 14a of the Law on War Crimes. The Supreme Court found:

In this concrete case, the first Instance Court found that the evidence – witness statements [...] taken by the prosecution of the ICTY and by the persons authorised by the ICTY prosecutor were taken in accordance with Articles 16 and 18 of the ICTY Statute and Rule 39 of the ICTY Rules on procedure and evidence, hence, that this evidence is gathered in a manner that satisfies the only condition for the usage of the evidence in the domestic procedure, envisaged by the aforementioned legal provision (in Art 14(a)). Therefore, the statements in question are not illegal evidence, and should not be taken out of the case file and can be used in proceedings, while the question of its evidentiary weight is a completely different question that will be evaluated by the Court in accordance with Article 18 of the Criminal procedure Code, which is also envisaged in Article 14a of the Law on War Crimes, namely in accordance with the principle that the evidence will be assessed by the court freely.

All these arguments were noted in the Appeals that points to the unacceptable position of the first instance Court according to which the use of the controversial evidence that was not directly shown to the witness during his testimony, having in mind the limitations incorporated in rules 89f and 92bis of the ICTY Rules on procedure and evidence, would be more liberal in a domestic Court proceeding than in the ICTY proceeding. This opinion of the first instances Court is wrong, as pointed out in the Appeal by the prosecution, because the evidence in issue is gathered in the ICTY pre-trial proceeding and not during the trial to which the cited Rules actually apply.³⁹⁹

This reasoning was later followed by several trial chambers. For example, the trial chamber in the *Suva Reka* case, in evaluating whether the witness statements received from the ICTY were taken in accordance with the ICTY procedure, inquired whether the ICTY possessed the authentic statements of those witnesses. The chamber found from a letter from the ICTY OTP that the OTP

³⁹⁷ Law on organization and competence of Government authorities in War Crimes proceedings (“Law on War Crimes”), Art. 14(a).

³⁹⁸ Commentary of the BiH CPC, Tihomir Vasiljević and Momčilo Grubac, 2010.

³⁹⁹ Supreme Court of Serbia, Branko Grujić et al., Case No. KZ.II P3 22/08, Decision, 14 April 2008, p. 3.

was in possession of the authentic statements of the witnesses interrogated by their investigators. When those statements were delivered in 2005, they did not have electronic authentication because that specific process began in mid-2006. The statements were taken in accordance with the standard ICTY OTP procedure: they were taken in English while the witness had simultaneous translation in Albanian. At the end of the interrogation, the statements were read to the witnesses and they signed the copy in English. The trial chamber finally found that the statements were taken in accordance with the Statute and RPE by the ICTY prosecutor and organs authorised by him.⁴⁰⁰ The trial chamber's decision was confirmed on appeal.

The trial chamber found that the statements of those witnesses that did not appear before the trial chamber were permissible evidence. The trial chamber also found that those witness statements obtained by the ICTY investigators were read to those witnesses during their examination in court and that the trial chamber considered these statements as part of the witness testimony.⁴⁰¹

Nevertheless, if one takes into account the above cited decision of the Supreme Court, it seems that the only legal element that has to be fulfilled according to Article 14a of the Law on War Crimes is that evidence is gathered in accordance with the ICTY Statute and RPE. It seems that if the evidence is taken in accordance with ICTY rules, such evidence should be admitted by the court regardless of the fact of whether the specific ICTY evidence is envisaged in Serbia's Criminal Procedure Code. However, evidentiary weight of such evidence will be subsequently evaluated by the court in each specific case.

12.6.2.2. EXPERT TESTIMONY

Serbia's Criminal Procedure Code prescribes that expert analysis shall be ordered where the establishment or assessment of important facts requires findings or opinions of persons with the requisite professional knowledge.⁴⁰² The Criminal Procedure Code also prescribes that where there exists a professional institution competent for performing a certain type of expert analysis, or where expert analyses may be performed within a public authority, such expert analyses, especially where they are of a complex nature,

Serbia's Criminal Procedure Code prescribes that expert analysis shall be ordered where establishment or assessment of important facts requires findings or opinions of persons with the requisite professional knowledge.

⁴⁰⁰ Belgrade District Court, WCC, Suva Reka, Case No. K.V. 2/2006, 1st Instance Verdict, 23 April 2009, p. 74; It should be noted that the Court also wrote that the witness statements of the witnesses taken by the ICTY investigators were read into the record according to Article 337 column 1 count 1 and 2 of the Criminal Procedure Code but it seems that this was not intended as a separate conditions for the use of ICTY witness statements. This especially having in mind that Article 14a is part of the Law on War Crimes that is *lex specialis* in relation to the Criminal Procedure Code.

⁴⁰¹ *Suva Reka*, 1st inst., p. 74.

⁴⁰² See CPC, Art. 113.

shall as a rule, be entrusted to such institutions or authorities.⁴⁰³ Moreover, the criminal system in Serbia prescribed that for most topics, such experts are to be given license to appear before the court as the trial chamber's witnesses, and not as the parties' experts.

In the *Suva Reka* case, the court ordered several different types of expert reports. Expert reports were conducted by a psychiatrist and a psychologist of witnesses to determine whether witnesses were able to testify in the following situations:

- it was noticed that a witness communicated with problems and seemed frightened;
- at the time of events a witness was under the influence of alcohol; and
- at the time of events a witness was a young adult.

The court has also sought expert opinions from the Military institute as to the distance between certain objects on the maps in the case file.

The court has also sought expert opinions from the Military institute as to the distance between certain objects on the maps in the case file.

The posthumous examination of remains was conducted in this case by a Serbian medical expert, but this was done from electronic materials received from the ICTY. The domestic medical expert evaluated whether the expert forensic report from the ICTY was done in accordance with the medical rules of Serbia.

In the *Nenad Malić* case, a forensic medicine expert provided a report about the level of alcohol intoxication of the accused at the time of the crime. A psychiatrist reported on his expertise of the psychiatric profile of the accused, his mental state at the time of the commission of the crime, and the influence of alcohol intoxication on his ability to understand and control his acts.⁴⁰⁴ The chamber accepted the expert witness reports and testimony in their entirety, evaluating them as objective, detailed and in line with the rules of the profession; the parties raised no objections.⁴⁰⁵

Ballistic experts testified in *Sireta* case, reporting on the type and number of weapons used for killing at the Ovčara site and attesting to the reliability of an expert report, concerning the same issues, from a ballistics laboratory that was in the case files.⁴⁰⁶

From these cases, it is obvious how much weight is given to expert reports in war crimes proceedings. As in other criminal law cases, it is possible to conduct the expert examination of the bodies or documents even today following an order of the domestic court, either from the original samples or from electronic format as it was done in the *Suva Reka* case.

⁴⁰³ *Ibid.* at Art. 114 (2).

⁴⁰⁴ War Crimes Chamber of the Belgrade District Court, *Nenad Malić* (Stari Majdan), Case No. KV 3/2009, 1st Instance Verdict, 7 Dec. 2009, pp. 25-26.

⁴⁰⁵ *Malić*, 1st inst., p. 27.

⁴⁰⁶ *Sireta*, 1st inst., p. 32.

12.6.2.3. TESTIMONY OF PROTECTED WITNESSES

According to the Criminal Procedure Code, the judgement cannot be based only on the testimony of a protected witness.⁴⁰⁷ If a witness enjoys any protective measures (e.g. testimony in closed session, facial or voice distortion, use of pseudonym, etc.), even though the defence knows the identity of the witness—which has to be disclosed to them at least one month before the main hearing—the judgement cannot be based solely in the testimony of such a witness.

The judgement cannot be based only on the testimony of a protected witness.

The War Crimes Department of the Appellate Court in Belgrade, accepting a defence appeal based on this provision, quashed the judgement in the *Podujevo II (Željko Đukić et al.)* case in relation to one defendant, and ordered a re-trial, because the only evidence that was the basis for the first instance conviction against one of the defendants was the testimony of a witness who testified under protective measures. The appellate court held that the judgement can be founded on the testimony of a protected witness, but there must be some other corroborating evidence.⁴⁰⁸ After re-trial and inclusion of additional evidence in relation to the accused's guilt, the appellate court's war crimes division upheld the conviction.⁴⁰⁹

12.6.2.4. ADMISSIBILITY OF INFORMATION AND STATEMENTS FROM THE PRELIMINARY INVESTIGATION

The Criminal Procedure Code allows for statements and information collected by the prosecutor during his preliminary investigation (before the investigative judge's investigation starts) to be admitted by the court as evidence in the criminal proceeding, but the court's decision cannot be based solely on this evidence.⁴¹⁰ This may include statements taken by the police in the preliminary investigation at the request of the prosecutor. Such evidence has often been used in war crimes trials.⁴¹¹

⁴⁰⁷ CPC, Art. 109d.

⁴⁰⁸ Belgrade Appellate Court, WCD, Podujevo II, Case No. Kž1 Po2 3/2010, 2nd Instance Verdict, 25 May 2010, ¶ 18; available at <http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-3-2010.html>.

⁴⁰⁹ Belgrade Appellate Court, WCD, Podujevo II (Đukić), Case No. Kž1 Po2 2/2011, 2nd Instance Verdict, 11 Feb. 2011; available at <http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-2-2011.html>.

⁴¹⁰ CPC Art. 504d, ¶ 4 (after 2009 amendments, previously it was Art 504j).

⁴¹¹ For example, War Crimes Department of the Appellate Court in Belgrade, Suva Reka, Case No. Kž1 Po2 4/2010, 2nd Instance Verdict, 30 Jun 2010, Section 2.2.1; 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>.

12.6.2.5. WITNESSES

Used in lieu of documentary evidence, witness testimony is regulated in the Law on War Crimes.

First, if the case is ceded to a local court from the ICTY, the measures for the protection of witnesses or injured persons which were ordered shall remain in force.⁴¹² Second, in the domestic case, it is prescribed that “the Court may rule, following a reasoned motion of an interested party, to protect personal information of the witness or victim”.⁴¹³

Such protection is further developed in the Criminal Procedure Code and the law on the protection program for participants in criminal proceedings that is discussed in detail in Module 14.

The War Crimes Chamber rejected a defence proposal in the *Sireta* case to hear a witness or read a statement of that witness from another case. The chamber rejected the proposal on the ground that the proposed witness had the status of defendant in that case (and therefore, according to the criminal procedure code, was not obliged to tell the truth).⁴¹⁴

In the *Lekaj* case, the chamber rejected a defence motion to question three police officers to whom a witness gave statements, regarding what he had told them at the time, since statements of police officers regarding what the victim told them during pre-trial procedure cannot be used as evidence.⁴¹⁵

The courts, including the War Crimes Chamber, do not give significant weight to testimony of witnesses that have “only indirect or subsequent, and not actual and direct knowledge about the circumstances of the event” (hearsay witnesses), as seen, for example, in the *Nenad Malic (Stari Majdan)* case.⁴¹⁶

12.6.2.6. VIDEO LINK

The Law on War Crimes provides that:

When the presence of a witness or victim at the main hearing cannot be ensured, their questioning may be conducted via video conference link.

⁴¹² See Law on organisation and competence of Government authorities in War Crimes proceedings, Art. 14a, 5.

⁴¹³ See the Law on organisation and competence of Government authorities in War Crimes proceedings, Art. 15.

⁴¹⁴ *Sireta*, 1st inst., p. 50.

⁴¹⁵ Belgrade District Court, WCC, *Lekaj*, Case No.K.V.br. 4/05, 1st Instance Verdict, 18 Sept. 2006, p. 45 (unofficial translation)

⁴¹⁶ „U kontekstu gore utvrdjenog činjeničnog stanha, sud nije posebno cenio ni iskaz svedoka XY , takođe saslušanog u postupku istrage, a čiji je iskaz pročitana na glavnom pretresu..jer isti tvrdi da su njegova saznanja o predmetnom slučaju naknadna i posredna“. *Malić*, 1st inst., p. 27.

Questioning of a witness or victim in the manner specified in paragraph 1 of this Article may be conducted through international legal aid.⁴¹⁷

The jurisprudence emphasises that the use of video link testimony depends on balancing the court's obligation to establish the factual circumstances of the case with its obligation to conduct a fair trial. From the jurisprudence, if the testimony of the witness is very important for establishing the factual circumstances of the case and there is a clear unwillingness of the witness to appear in person, the court will allow video link examination of the witness.

The use of video link testimony depends on balancing the court's obligation to establish the factual circumstances of the case with its obligation to conduct a fair trial.

This video conference hearing is also foreseen in the Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters (Article 9); Serbia is a party to this protocol. The grounds that should be satisfied in order to use a video link examination of a witness are not provided for in the law. However, such reasons are set out in the judgements of different trial chambers.

In the *Suva Reka* case, the trial chamber noted that the use of video link is included in the Law on War Crimes and that the purpose of this rule is to overcome the inability to secure the physical presence of the witness during⁴¹⁸ the main hearing.⁴¹⁹ The trial chamber noted that while the use of video link examination is a deviation from the important principle that the witness should be immediately present in the courtroom this principle is respected because the examination is conducted through a technical connection during the trial, wherein all participants are able to establish the same procedural communication with the witness as if he were present in the courtroom.⁴²⁰ The court also considered that the testimony of the witness who refused to appear in the courtroom was very important to establish the factual circumstances of the case and, in the opinion of the court, all the criteria to accept this kind of testimony were fulfilled.

The trial chamber in *Zvornik* similarly found that examination through video link was conducted according to the rules envisaged in European Convention on Mutual Cooperation in Criminal Matters and Article 9 of the Second Additional Protocol to this Convention.⁴²¹ The chamber found that this was an exception to the principle provided for in Article 352 of the Criminal Procedure Code, which states that witnesses must be present during proceedings. The court found this was acceptable since the parties were given the opportunity to ask questions and witnesses were allowed to confront the accused. Furthermore, the persons in question were witnesses who were living abroad that refused to come to Belgrade because of security concerns

⁴¹⁷ See the Law on organisation and competence of Government authorities in War Crimes proceedings, Art. 14.

⁴¹⁸ Belgrade District Court, WCC, *Suva Reka*, 1st inst., p. 77.

⁴¹⁹ *Ibid.*

⁴²⁰ *Ibid.*

⁴²¹ Belgrade District Court, WCC, *Zvornik*, Case No. K.V. 5/2005, 1st Instance Verdict, 29 May 2008, p. 50 (BCS). For more on this convention, see Module 15.

and would only testify through video link. The chamber found that the testimony of these witnesses was very important to establish the factual circumstances of the case and that all of the criteria required to accept this kind of testimony were fulfilled.⁴²²

In the *Boro Trbojević* case, the War Crimes Chamber found hearing witnesses from Croatia via video link was justified because of the importance of their testimony and the fact that this was the only manner in which they wanted to testify.⁴²³

In the *Nenad Malic (Stari Majdan)* case, the court decided to hear a witness who was a surviving victim of the crime via video link with Sweden. The witness had expressed his wish to give testimony in that way, because it was uncertain whether the witness would travel and appear before the court, and his travel would entail considerable hardship and expenses. The video link hearing was conducted from a court in Sweden, in the presence of a Swedish judge and upon the confirmation of the identity of the witness by the Swedish judge.⁴²⁴

12.6.2.7. ADMISSIBILITY OF EVIDENCE FROM FOREIGN JURISDICTIONS

The records of testimony given before the courts of foreign states are admissible before the War Crimes Chamber.

The records of testimony given before the courts of foreign states are admissible before the War Crimes Chamber. In the *Nenad Malic* case, the first instance court admitted the records of testimony given before the courts in BiH (Banja Luka Military Court and Bihac Cantonal Court). This was due to the fact that the testimony was given before a competent court and judge, who warned witnesses about their rights and duties; such testimony was given in accordance with the Serbian Criminal Procedure Code.⁴²⁵ The War Crimes Department of the appellate court upheld this decision on admission of evidence from BiH, relying on a general Criminal Procedure Code rule allowing for the court, under certain conditions, to read the records of the previous testimony of witnesses instead of having the witness be directly heard before the court.⁴²⁶

In the *Zvornik I (Slavković et al.)* case, the defence appealed the admission of witness testimony given before the prosecutors in Bosnia and Herzegovina because the Serbian Criminal Procedure Code requires that witness statements can only be given before a court or an investigative judge, and that witnesses should first take an oath. The Supreme Court confirmed that witness statements, taken by a foreign state, following a letter rogatory based on an international agreement on mutual legal assistance, and taken in line with that state's law, are admissible even if they do not comport with the Criminal Procedure Code requirement as long as they have been taken by a competent organ of the requested state and in line with the requested state's procedure. The court also accepted as permissible evidence the identification of defendants by witnesses on the basis of a photograph, even though the Serbian Criminal Procedure Code does

⁴²² *Ibid.*

⁴²³ *Trbojević*, 1st inst., p. 6.

⁴²⁴ *Malić*, 1st inst., p. 29.

⁴²⁵ *Ibid.* at pp. 29-30.

⁴²⁶ *Ibid.* at pp. 2-3.

not envisage such form of identification of defendants, because the identification vis-à-vis the photography is permissible under the law of the requested state (BiH).⁴²⁷

In the *Boro Trbojević* case, where a witness was not able to come to Serbia or to be heard via video link due to illness, the court admitted and read, at the main hearing, records from the testimony that the witness had given before a Croatian court. The testimony before the Croatian court was obtained pursuant to the letter rogatory from Serbia, and, as provided in Article 4 of the European Convention on Mutual Legal Assistance in Criminal Matters, in the presence of the Serbian investigative judge and deputy war crimes prosecutor.⁴²⁸ The *Trbojević* case is also an example of the court reading the statement of a deceased witness previously given to a Croatian court.⁴²⁹

In the *Damir Sireta* case, an interview with a witness conducted over the phone by the Norwegian police was excluded from case files by a decision of the court (accepting the parties' motion for such exclusion), because such evidence was collected in a manner contrary to the Criminal Procedure Code and could not be admitted.⁴³⁰

A foreign judgement, even the final one, cannot *per se* constitute evidence in criminal proceedings in Serbia. The appellate court in the *Kesar* case quashed the first instance verdict because the trial chamber, at the main hearing, read judgements delivered earlier by two BiH courts: the Banja Luka District Court and the Supreme Court of Republika Srpska. The appellate court held that this was not in line with the Criminal Procedure Code and the principle that evidence needs to be presented at the main hearing. The trial chamber read some of the statements and evidence from the trial before the court in Banja Luka, but the appeals chamber did not find that evidence to be sufficient.⁴³¹ The appellate chamber considered that the trial chamber, instead, should have read the statements of the witnesses and written evidence presented at the trial before the foreign court.

A foreign judgement, even the final one, cannot per se constitute as evidence in criminal proceedings in Serbia.

For more on mutual legal assistance, see Module 15.

⁴²⁷ Belgrade District Court, WCC, Zvornik I (Vlajković M. Slavković et al.), Case No. KV 5/05, 29 May 2008, p. 4.

⁴²⁸ *Trbojević*, 1st inst., p. 8.

⁴²⁹ *Ibid.*

⁴³⁰ *Sireta*, 1st inst., p. 50.

⁴³¹ War Crimes Department of the Appellate Court in Belgrade, Duško Kesar, Case No. Kž1 Po2 11/2010, 28 Feb. 2011, ¶¶ 6 and 7 (online version); 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>.

12.7. FURTHER READING

12.7.1. BOOKS

- Boas, G., INTERNATIONAL CRIMINAL PROCEDURE (Cambridge University Press, 2011).
- Cryer, R., Friman, H., Robinson, D., and Wilmshurst, E., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE (2d ed.) (Cambridge University Press, 2010).
- Khan, K. and Dixon, R. ARCHBOLD INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE AND EVIDENCE (Thomson Reuters, 2009).
- J. May, R. and Wierda, M., INTERNATIONAL CRIMINAL EVIDENCE (Transnational Pub, 2003).
- Schuon, C., INTERNATIONAL CRIMINAL PROCEDURE: A CLASH OF LEGAL CULTURES (T.M.C. Asser Press, 2011).
- Sluiter, G., INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW (CAMERON MAY INTERNATIONAL LAW AND POLICY, 2009).
- Wald, P. TYRANTS ON TRIAL: KEEPING ORDER IN THE COURTROOM (Open Society Institute, 2009).
Available at:
http://www.soros.org/initiatives/justice/focus/international_justice/articles_publication_s/publications/tyrants_20090911/tyrants_20090911.pdf.
- UNICRI and ICTY, *Investigation in ICTY MANUAL ON DEVELOPED PRACTICES*, p. 11 (2009).
Available at:
http://www.icty.org/x/file/About/Reports%20and%20Publications/manual_developed_practices/icty_manual_on_developed_practices.pdf.
- *Indictment in ICTY MANUAL OF DEVELOPED PRACTICES*, p. 35.
- *Trial Management in ICTY MANUAL OF DEVELOPED PRACTICES*, p. 77.

12.7.2. INTERNATIONAL TRIBUNALS: RULES OF PROCEDURE AND EVIDENCE

- International Criminal Court, *Rules of Procedure and Evidence*, CC-ASP/1/3 (Part.II-A), entered into force Sept. 9, 2002. *Available at:* http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf.
- International Criminal Tribunal for the former Yugoslavia, *Rules of Procedure and Evidence*, 14 March 1994. Revisions and Amendments. *Available at:* <http://www.icty.org/sid/136>.
- International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence (ICTR)*. *Available at:* http://www.legal-tools.org/en/go-to-database/record/lttdetails/22376/1b0b5e780b47b4d9d41252ee3a17935d665915877cd_a2ec46481b7334bf1be3a/.
- Special Court for Sierra Leone, *Rules of Procedure and Evidence*. *Available at:* <http://www.legal-tools.org/en/go-to->

database/record//ltdetails/22691/e37ff2ded4eb389bfb7e2f9e19c6b4fcb3834eae74ebecf1f7dced161819aac/.