

**INVESTIGATION
MANUAL FOR
WAR CRIMES,
CRIMES AGAINST
HUMANITY AND
GENOCIDE IN
BOSNIA AND
HERZEGOVINA**



Ambasada
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TO THE READER

This manual is intended to provide an introduction to the broad areas of knowledge, skills, and techniques necessary to conduct field investigations into war crimes, crimes against humanity and genocide. It is aimed at prosecutors, investigators and other investigation staff; all those whose duties bring them into contact with criminal investigations of this nature.

The manual is not intended to be an exhaustive presentation of every technique or skill used in such investigations, nor is it meant to supply or supplant basic training in criminal investigation. Rather, it supposes that the reader brings a certain level of experience and expertise as an investigator to the study of the manual.

Investigation of war crimes, crimes against humanity and genocide is a complex and team-based discipline employing a wide range of experts, and touching upon multiple areas of knowledge, any one of which is at once wide and deep. It is an ever-evolving field; this manual will no doubt be expanded and amended many times in the years to come. The reader should bear this in mind in absorbing the material here.

GLOSSARY

AAAS	American Association for the Advancement of Science
<i>Ad hoc</i> Tribunals	Refers to the ICTY, ICTR and the Special Court for Sierra Leone.
B/C/S	Bosnian/Croatian/Serbian (language)
COMINT	Communications Intelligence
DNA	Deoxyribonucleic acid
FUP	Forming up Place
HITS	Homicide Information Tracking System
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IO	Intelligence Officer
IO's	International Organizations
IT	Information Technology
JCE	Joint Criminal Enterprise
MSF	Medecins Sans Frontiers or Doctors Without Borders
NATO	North Atlantic Treaty Organization
NGOs	Non-Governmental Organizations
OAS	Organization of African States – now replaced by the African Union
OSCE	Organization for Security and Co-operation in Europe
OTP	Office of the Prosecutor
PCE	Post-Conflict Environment
PfP	Partnership for Peace

PHOTINT	Photo Intelligence
PHR	Physicians for Human Rights
PKO	Peace Keeping Operation
POW	Prisoner of War
PSO	Peace Support Operations
PTSD	Post-Traumatic Stress Disorder
ROPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
SIGINT	Signals Intelligence
SOP	Standard Operating Procedures
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNNY	United Nations New York
UNPROFOR	United Nations Protection Force
War Crimes	In this manual the term “War Crimes” is often used as a generic term for all serious violations of international humanitarian law.

CHAPTER ONE – ORIGINS AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

INTRODUCTION

WAR CRIMES

The concept of a war crime is broad and encompasses many different acts committed during an armed conflict. It is synonymous in many people's minds with ethnic cleansing, mass killings, sexual violence, recruitment of child soldiers, deliberately targeting civilian objects such as cities and towns, and similar atrocities. It is important at the outset to understand the terminology associated with war crimes. Among the equivalent and interchangeable expressions – the “Laws of War”, the “Law of Armed Conflict”, and “International Humanitarian Law”, the first is the oldest. War crimes come under the general umbrella of International Humanitarian Law (IHL), and may be defined as the branch of international law limiting the use of violence in armed conflicts.

While the expression “laws of war” dates back centuries, today the term “armed conflict” is used in place of “war”. While the military tend to prefer the term “laws of armed conflict”, the International Committee of the Red Cross and other commentators prefer the expression IHL to cover the broad range of international treaties and principles applicable to situations of armed conflict. The International Committee of the Red Cross is the world's leading organization concerned with the promotion of IHL. Its work is specifically mentioned in the Geneva Conventions and its delegates are to be found in most of the world's conflict zones.

The fundamental aim of IHL is to establish limits to the means and methods of armed conflict, and to protect non-combatants, whether they are the wounded, sick or captured soldiers, or civilians. War crimes may be defined as a serious violation of the rules or principles of IHL – for which persons may be held individually responsible.

Individual criminal responsibility is a fundamental principle of IHL. It is the reason we need to conduct international criminal investigations i.e. to establish the facts and gather relevant evidence in order to prosecute perpetrators.

SOURCES OF INTERNATIONAL HUMANITARIAN LAW

IHL is comprised of two main branches, often referred to as Hague law and Geneva law. “Hague Law” regulates the means and methods of warfare. It is codified primarily in the Regulations respecting the Laws and Customs of War on Land (“the Hague Regulations”) annexed to the 1907 Hague Convention IV. These govern the actual conduct of hostilities and how damage may be inflicted on enemy forces. It includes rules relating to the selection of targets and weapons permissible during armed conflict. Examples of these are the prohibition on the use of “dum-dum bullets” and on poisonous gas;

“Geneva Law” is codified primarily in four conventions adopted in 1949, and these are also known collectively as the Geneva Conventions for the Protection of War Victims. These contain rules designed to protect civilians and other “protected persons” during armed conflict. An example of Geneva law is the Fourth Geneva Convention of 1949 governing the protection of civilians. The overall aim of Geneva Law is to protect certain categories of persons, including civilians, the wounded, prisoners of war and to limit human suffering during armed conflict.

Historically, the roots of this area of law can be traced to the “laws and customs of war” as they developed during the Middle Ages. These in turn drew on standards going back to the Greek and Roman era, and some would say, on rules developed in ancient India. The starting point of the modern law is the first Geneva Convention adopted in 1864. This branch of public international law became more important and received a major boost with the adoption of the Hague Conventions and Rules of 1907, some elements of which remain important today.

The experience of the Second World War led to the adoption of four new Geneva Conventions in 1949:

- Geneva 1: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.
- Geneva 2: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea.
- Geneva 3: Geneva Convention Relative to the Treatment of Prisoners of War.
- Geneva 4: Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

These conventions had certain articles, which were common to all four (see for instance, “common article 3” below), and others, which while different, applied similar humanitarian principles to the different factual situations to which the conventions were to apply.

The Conventions and Hague Regulations are the foundation upon which IHL is based. There are a great number of other IHL treaties, many of which limit the production or use of particular weapons and means of warfare. There are also customary rules of international law based on state practice and legal obligation. In recent years, the International Committee of the Red Cross has conducted an analysis of existing rules of customary IHL applicable in international and non-international armed conflicts. The study does not purport to be an exhaustive assessment of all rules in this area of law, but is a significant contribution to sources of IHL rules and principles. In fact, the International Committee of the Red Cross website provides a range of accurate and up to date data on IHL.¹ The databases in relation to treaties and customary rules in particular are most useful.

Distinguishing armed conflict from civil unrest

In order to prove that a war crime has been committed, it must be established that there was an armed conflict taking place and that the crime is linked to, or somehow associated with, this conflict. Ascertaining when an armed conflict actually exists is often problematic. Such a determination will be made by the appropriate tribunal or court when examining a particular case. It will rely on facts collected in the course of an investigation of a particular crime. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) established the following test for determining the existence of an armed conflict in one of its early judgments: “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.²

A later judgment of the ICTY Trial Chamber in the *Haradinaj* case expanded upon what this might mean in practice.³ It emphasized two criteria – “protracted armed violence” and “organization”. In regards to armed conflict, it concluded:

Trial Chambers have relied on indicative factors relevant for assessing the “intensity” criterion, none of which are, in themselves, essential to establish that the criterion is satisfied. These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict. (para. 49)

The Trial Chamber went on to consider the matter of organization and concluded that an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means:

1 <http://www.icrc.org/eng/resources/ihl-databases/index.jsp>

2 *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, Case No. IT-94-1-AR72, para. 70.

3 *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgment, April 3, 2008, Case No. IT-04-84-T.

Trial Chambers have relied on several indicative factors, none of which are, in themselves, essential to establish whether the “organization” criterion is fulfilled. Such indicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, co-ordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords. (para. 60)

This decision provides important insights for what investigators should look for when assessing a situation with a view to establishing whether it constitutes an armed conflict or civil unrest, albeit serious. The important thing to remember is that the court or tribunal will rely on the facts ascertained and presented as evidence as to the existence of an armed conflict.

INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS

These four conventions were almost exclusively concerned with international “armed conflicts” (wars between States). The only provisions in relation to non-international armed conflicts were contained in common article 3 of the Geneva Conventions, the provisions of which are often referred to as a mini-convention. As the 1950s and 1960s progressed, it became obvious that most of the fighting taking place in the world did not approximate to international armed conflicts, but consisted of civil wars, or of guerrilla conflicts arising from processes of de-colonization. Since the only rules governing such conflicts were the limited provisions of common article 3, the gap in the legal regulation of this area was becoming more obvious. As a consequence, a diplomatic conference was convened in Geneva in the early 1970’s and the result was the adoption of two new protocols or amendments to the Geneva Conventions in 1977.

Protocol I:

- Expanded the definition of international armed conflicts to include “wars of national liberation” defined as “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”;
- Set out certain new rules and procedures governing international armed conflicts (including wars of national liberation).

Protocol II:

- Set out new rules governing civil wars. These were in addition to those in common Article 3 of the Geneva Conventions.

IHL can now be divided into 2 parts:

- Those rules governing international armed conflicts (including wars of national liberation). These are found primarily in the 1907 Hague Conventions and Rules, the four Geneva Conventions of 1949 and Protocol I of 1977;
- Those rules governing non-international armed conflicts. These are found primarily in common Article 3 of the Geneva Conventions and Protocol II of 1977.

KEY CONCEPTS AND PRINCIPLES

Armed Conflict: This can be defined relatively easily in cases of international conflicts but is more difficult to define in non-international armed conflicts or what is more commonly referred to as civil wars.

In international disputes an “armed conflict” is said to exist once fighting breaks out between the armed forces of two States or when the armed forces of one State invade the territory of another State, irrespective of the scale of the fighting, or indeed, in the case of an invasion, whether a formal “declaration of war” has been made by either party. Nowadays the applicability of humanitarian law is triggered by the existence of factual circumstances irrespective of whether or not there has been an actual declaration of war. Territory under military occupation is also deemed to constitute a situation of international armed conflict under IHL.

In non-international violent disputes, an armed conflict is said to exist once the violence reaches a certain level of intensity and organization. It is difficult to define these levels with precision and situations must be assessed on a case-by-case basis.

Principle of Distinction: The essence of this principle is that a distinction must always be drawn between combatants and non-combatants.

Combatants have the right lawfully to take part in armed conflict and kill other combatants. They too may be targeted or killed.

Non-combatants have no right to take part in armed conflicts and may not be made the objects of attack. Non-combatants consist chiefly of civilians and medical and religious personnel attached to the armed forces. A major challenge in contemporary armed conflicts is distinguishing combatants and those taking an active part in hostilities (making themselves legitimate targets) and ordinary civilians.

Collateral Damage: This refers to the incidental damage to protected persons (e.g. civilians) or protected objects (e.g. religious buildings) which is unavoidable during the course of lawful attacks against military objectives.

Principle of Proportionality: This requires a commander or superior to weigh the military advantage of targeting a lawful military objective against the collateral damage most likely to be caused to non-combatants or civilian objects. When an attack will result in collateral damage, this damage to non-combatants (e.g. civilians) must not be excessive in relation to the direct and concrete military advantage to be gained.

The military commander or superior must consider the likely collateral damage against the military necessity to adopt a certain course of action while taking into consideration the principle of humanity.

Protected Persons: Generally those persons not taking part in the hostilities, including:

- Wounded & sick soldiers (Art 13, Geneva Convention I)
- Shipwrecked members of armed forces (Art 13, Geneva Convention II)
- Prisoners of war (Art 4, Geneva Convention III)
- Civilians (Art 4, Geneva Convention IV)
- Medical and religious personnel

Protected objects: Generally those objects used for civilian purposes which do not effectively contribute to the war effort and whose destruction does not offer a definite military advantage.

Military objective: Those objects which by their nature, location, purpose or use, make an effective contribution to military action. Their total or partial destruction, capture or neutralization must offer a definite military advantage in the circumstances at the time.

Principle of humanity: This forbids the infliction of suffering, injury or destruction that is not actually necessary for legitimate military purposes. The principle of humanity is applicable to military purposes and choice of weapons. Weapons or tactics which cause unnecessary suffering or superfluous injury are prohibited. This is an important consideration when a commander applies the principle of proportionality.

Military necessity: All combat activity must be justified on military grounds; activity that is not militarily necessary is prohibited. Attacking peaceful civilians or those out of combat is prohibited because there is no military advantage to be gained by doing so. Military necessity cannot be invoked as an excuse to suspend the application of IHL.

Command or superior responsibility: Establishes that under certain circumstances a superior officer may be criminally responsible for failing to prevent or punish the criminal acts of their subordinates if they knew or had reason to know of them. A superior officer can be a military, police or civilian person. Command responsibility refers to military or quasi-military organizations while superior officers refer to civilians. The crucial question is not the civilian status of the accused, but the degree of authority that they exercised over subordinates.

Protecting Powers: These are neutral States who agree to act as honest brokers between the parties to a particular conflict, with a view to enhancing respect for IHL. Thus the Geneva Conventions are to be applied “with the co-operation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the parties to the conflict”. If it proves impossible to appoint Protecting Powers, an impartial and neutral body such as the International Committee of the Red Cross may be entrusted with the work of the Powers.

DIFFERENCES FROM HUMAN RIGHTS LAW

IHL and international human rights law are closely linked. They are both concerned with the protection of human beings in times of war and peace. IHL applies in wartime, and is triggered by the existence of an “armed conflict”. Human rights law applies primarily in peacetime. However, the outbreak of armed conflict does not suspend the application of human rights law. Unlike IHL, certain human rights protections may be suspended during times of national emergency or serious threat to the State. Other fundamental human rights may never be suspended; these include the right to life, the prohibition on torture and violations of due process or fair trial procedures.

IHL can bind individuals, groups and States whereas human rights law binds only States. Human rights law has specialized permanent enforcement machinery (e.g. the European Court on Human Rights), while IHL does not have such permanent machinery, though the International Criminal Court covers certain breaches of IHL. Instead IHL relies on States and a system of “Protecting Powers”, and *ad-hoc* machinery for punishment of breaches. In recent years, the establishment of the Ad Hoc Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone and the Extraordinary Chambers in Cambodia, have enhanced the enforcement of IHL.

INTERNATIONAL CRIMINAL LAW

The term international criminal law is used to describe certain international crimes. These are breaches of international rules that entail individual criminal responsibility. While most agree that a recognizable body of international criminal law exists, it is difficult to define as it may include a myriad of acts under various treaties or customary law. It includes war crimes, crimes against humanity, genocide and aggression. Unlike war crimes, genocide and crimes against humanity do not need to be committed in the context of or be linked to an armed conflict.

THE INTERNATIONAL CRIMINAL COURT (ICC)

“A person stands a better chance of being tried and judged for killing one human being than for killing 100,000”. - José Ayala Lasso, former United Nations High Commissioner for Human Rights.

The establishment of a permanent international court to deal with a range of international crimes, including war crimes, is the most significant development in achieving international accountability in recent years. The ICC is located at The Hague in the Netherlands. The jurisdiction and functioning of the ICC is governed by an international treaty known as the Rome Statute, which came into effect on 1 July 2002. States that have ratified the Rome Statute are referred to as State Parties.

Although it is funded primarily by States Parties, it may also receive contributions from governments, international organizations, individuals, corporations and other entities.

The ICC is a permanent independent international institution and it is not part of the United Nations system. It investigates and prosecutes persons accused of the most serious or gravest crimes of international concern, including genocide, crimes against humanity and war crimes. The Court is composed of four organs. These are the Presidency, the judicial Divisions, the Office of the Prosecutor and the Registry.

There are a number of significant differences between the ICC and the Ad Hoc Tribunals. The Tribunals were established by the UN Security Council under the binding provisions of Chapter VII of the UN Charter. Although they are not permanent institutions, the Tribunals have compulsory jurisdiction and take priority over domestic or national courts. The ICC, on the other hand, operates according to the principle of “complementarity”. It is a court of last resort. It will only prosecute individuals when a State is unable or unwilling to do so.

The purposes of the ICC include the achievement of justice for all, to end impunity, to take over when national systems are unable or unwilling to act, deterrence, and to help end conflicts. The ICC is intended to prosecute high-ranking personnel responsible for the gravest crimes. Investigating senior officials implicated in such crimes, especially when they were not present at the scene of the crime and are deemed “remote perpetrators”, requires special training and skills among an interdisciplinary team of investigators. It also takes time and patience. As only a relatively small number of cases can be dealt with by the ICC, it is hoped that national or domestic courts and tribunals will deal with other perpetrators.

See ICC Statute at <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.

See also Elements of ICC Crimes at <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

CONCLUSION

Today, war crimes may be committed in both international and non-international armed conflicts. Article 8 of the Rome Statute of the ICC defines war crimes according to the classification of the conflict in which they occurred. In this way, the distinction between both types of conflict is still relevant.

Breaches of IHL can be divided into two kinds:

- i. Simple breaches; and
- ii. Grave breaches.

Simple breaches can be less serious; they are intended to be punished primarily by a country’s own court or courts-martial system. Grave breaches cover the most serious breaches of the Geneva Conventions that may be committed in the course of an

international armed conflict; examples include killing prisoners and torturing civilians in occupied territories. All States have criminal jurisdiction to try those accused of “grave breaches” whatever their nationality, or wherever the crimes were committed. This is known as “universal criminal jurisdiction”. Today the distinction between grave and simple breaches is less significant, and this is reflected in Article 8 (War Crimes) of the Statute of the ICC.

The most effective way to enforce IHL is through national courts or tribunals. Unfortunately, such mechanisms are not always in place or functioning, especially in conflict and post-conflict environments. For this reason, the international community has on occasion acted to create machinery to repress breaches of IHL. Two leading examples are the Nuremberg War Crimes Trials (under which the Nazi leadership was tried), and the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). In more recent years, the adoption of the Rome Statute and the establishment of the ICC, specifically tasked with adjudicating on some breaches of IHL marks a significant advancement in the implementation process. The challenge is to investigate and prosecute these crimes. This is where the role of international criminal investigators is crucial, as ultimately the decision to prosecute and the outcome of the process will be dependent on the evidence gathered.

Useful sources

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W. Schabas, *Introduction to the International Criminal Court*, 3 rd., Cambridge, (2011).

A. Roberts & R. Guelff, *Documents on the Laws of War* (3 edn.), Oxford: Oxford University Press, (2000).

Web sites

International Committee of the Red Cross (ICRC) at www.icrc.org and www.icrc.org/eng/customary-law

International Humanitarian Law Research Initiative, Program on Humanitarian Policy and Conflict Research, Harvard University at www.ihlresearch.org/

TMC Asser Instituut, The Netherlands at www.wihl.nl/

Crimes of War – www.crimesofwar.org

International Criminal Court - <http://www.icc-cpi.int/Menus/ICC>

CHAPTER TWO - EVIDENCE

INTRODUCTION

Evidence is the essential work product of any investigation and the raw material that judges will work with in their quest to ascertain the truth. Obtaining the best and most reliable evidence in a balanced and fair manner is the objective of every investigation. This chapter will review the different types of evidence; some basic legal concepts governing the collection and use of evidence; and explore the types of evidence that are especially informative in the investigation of senior government officials.

OVERVIEW OF EVIDENCE

THE ROLE OF EVIDENCE

The collection of evidence is the primary objective of any investigation. Unless an investigator is able to discover and collect evidence, they cannot uncover the truth regarding the event being investigated. Evidence can be anything that provides information about the incident under investigation. It may include: physical objects; the investigator's observations; the testimony of witnesses and suspects; documents; and scientific analysis.

The word "anything" should be emphasized because evidence comes in many forms from a wide variety of sources. It is often impossible to determine the ultimate probative value a piece of evidence may have early in the investigation. As more evidence is gathered and analysed the significance of each piece becomes more apparent and yields a better understanding of the events being investigated. The investigator must carefully and methodically gather as much relevant evidence as possible in the hope that it will be sufficient to reliably determine the truth about the event being investigated.

One of the most important principles an investigator must adopt in their quest is that there is always evidence in a case. It is impossible to commit wrongdoing and leave

no identifiable trace. The task for the investigator is to identify it, document it and collect it. If an investigator fails to turn up evidence in a case, it is not because there was no evidence; it simply means that the investigator could not find it. In some cases it may be impossible for the investigator to gain access to where evidence is because of on-going conflict or a hostile government. If evidence is not presently available, the investigator should still attempt to identify it and exhaust all reasonable efforts to document its existence. Even when perpetrators take great care to “cover their tracks” by destroying or concealing evidence, they will leave evidence of this deception. An experienced investigator embarks on an unrelenting search for evidence cognizant that evidence must exist and that many different things can have evidential value.

DIRECT AND INDIRECT EVIDENCE

Each piece of evidence proves a fact either directly or indirectly. Evidence that directly proves a fact without the need for drawing an inference is called direct evidence. For example, a woman sees the rain fall on the footpath outside her house. Her observation is considered direct evidence that it rained. Indirect evidence is commonly referred to as circumstantial evidence. This evidence does not directly prove a fact, but when considered in light of our universal experience and common sense, it indirectly proves a fact. For example, the same woman awakes one morning to see her footpath wet. Using her experience and reasoning she concludes that it rained during the night.

In most cases, there will be both direct and circumstantial evidence. The investigator should try to gather all the evidence regardless of which category it falls into. An investigator should be mindful however that before circumstantial evidence has any real value to a case the investigator must gather evidence which excludes all other reasonable inferences that can be drawn from the evidence. Reconsider the woman who, after observing her wet footpath, concluded that it rained the night before. Her conclusion would be uncertain and of little value if her neighbour regularly wet her footpath when watering his lawn. Whenever an investigator is faced with only circumstantial evidence regarding an important fact in the investigation great care must be taken to check for other reasonable explanations besides the one pointing to a suspect’s guilt. These other reasonable possibilities must be investigated to determine whether in fact any reliable inference can be drawn from the circumstantial evidence in question.

TYPES OF EVIDENCE

All evidence can be classified into three groups. These groups are physical evidence, testimonial evidence, and documentary evidence.

Physical evidence refers to any physical object that can provide information about an event. It may include weapons that were used, the condition of the victim’s body, or the area where an attack took place. It may include computers containing data, communications equipment, video and audiotapes. Physical evidence includes objects and traces of materials that can only be detected with scientific testing. Because

physical evidence is not subject to human perception, exaggeration, or deception it is inherently reliable. Physical evidence, if properly preserved, retains its probative value and is not subject to fading over time like a witness's memory.

Testimonial evidence is a broad term that includes the statements of all victims, witnesses, and suspects. It is different from physical evidence in that testimonial evidence is only as reliable as the witness who gives it. The accuracy of the information depends completely on the honesty, perception, and communication skills of the witness.

The last category of evidence, documentary evidence, refers to forms, documents, or letters. Documentary evidence is a combination of physical and testimonial evidence in that although the document itself is a piece of physical evidence, the information contained in the document is testimonial in nature. Some documents are business records or official records that are routinely generated during the normal operations of an organization. As a general rule documents created closely in time to the events they refer to are more reliable and valuable from an evidential point of view than documents created long after the events.

Documents are a very significant and important source of evidence in large international criminal investigations because it is in documents that the details of military, police and government operations are recorded. Documents, if authentic, provide one of the most reliable and complete sources of information of what occurred during times of chaos and conflict.

As technology permeates more and more of our daily activities, including warfare, investigators must consider whether valuable information ordinarily found in documents has been recorded electronically. Electronic mail, databases and digital communications systems may harbour important evidence about the matter being investigated.

It is important to recognize that although evidence falls into these three different categories there will be relationships and interaction between each type of evidence during the course of an investigation. Witnesses can assist investigators in understanding the significance of physical evidence. Physical evidence recovered from a crime scene will often have greater meaning when an eyewitness explains how that object was used. Witnesses can often help an investigator interpret the meaning of documents collected as evidence. Conversely, documents can often be used to refresh the recollection of witnesses who may no longer have a clear memory of precise dates and details of events they witnessed.

THE ROLE OF EVIDENCE PRIOR TO A TRIAL

While evidence's most important role will be played during a trial, it has other important roles during the investigative phase of a case. Long before a trial commences an investigation can benefit from the evidence collected over the course of the investigation. Investigators should be mindful of the different ways that evidence can assist them in their work.

Good investigations are always guided and driven by the evidence that is collected in the investigation. The ultimate course and direction of an investigation is dictated by the evidence and not by the initial impressions or conclusions of the investigator. Good investigators always remain open to identifying new evidence that may cause them to re-evaluate their previous conclusions about an event. It is not uncommon for newly-discovered evidence to significantly alter earlier beliefs about what occurred and who was involved.

Investigations are often commenced based upon an unfounded allegation that a crime occurred. At the outset and during the early stages of an investigation evidence serves to objectively orient the investigator about the case, what investigative problems will be encountered, and what investigative avenues should be part of an investigation plan. The investigator's understanding of a case should evolve in a way that reflects the reliable evidence gathered in the course of the investigation.

Not all of the evidence gathered will be eventually used in court. In fact, in most cases a significant amount of the evidence gathered is not used. This does not mean that such evidence, despite not being tendered in court, is not a valuable part of the case. One useful role evidence may play over the course of an investigation is to assist investigators in refining the investigative plan and focusing more precisely on the critical evidence in the case. It is important that the investigation plan includes a process whereby evidence is analysed after it is collected and the plan itself is re-examined and re-evaluated in light of new evidence as it is gathered.

Another important role evidence can play during the investigation is in testing the credibility and reliability of witnesses. Long before an investigation may result in an indictment or a trial, evidence can play an important role in helping investigators decide how much weight to place upon the evidence provided by a particular witness. Credibility is a measure of the truthfulness of a witness's testimony while reliability is a measure of the accuracy of a witness's testimony. These two concepts help an investigator distinguish between the truthful witness who is honestly mistaken and the witness who knows the truth and is being intentionally deceptive. This distinction between honesty and accuracy is an important one. Evidence can assist the investigator in identifying those witnesses whose evidence is both honest and accurate.

Another important function of evidence at the investigative stage is to assist investigators in preparing for the questioning of insiders and suspects. In any complex investigation a great deal of preparation must be undertaken before an investigator can effectively interview an insider or a suspect in a case. An investigator must become knowledgeable of the evidence the insider or suspect is likely to be familiar with. This evidence will form the basis of many of the questions the investigator will pose during the interview.

GENERAL LEGAL PRINCIPLES REGARDING EVIDENCE

There is an entire body of jurisprudence that has evolved regarding evidence. Although it is not within the scope of this chapter to summarize all the law that may apply to evidence collected in international criminal investigations, there are some fundamental concepts that every investigator must be familiar with and keep in mind when identifying and collecting evidence.

RELEVANCE

Relevance is the relationship between the evidence and matter being investigated. If evidence is relevant it is, “Logically connected and tending to prove or disprove a matter in issue”.⁴ A seemingly unimportant object becomes relevant when it provides information about the matter being investigated. There is an important distinction between relevancy during the investigative phase of a case and after an indictment has been issued. The concept of relevancy is much broader during the investigative stage of a case. A determination of what is relevant after an indictment is issued will always be controlled by the allegations in an indictment. At the investigative stage, where no formal conclusions have been drawn about an event, an investigator should adopt a definition of relevance that considers all evidence which tends to prove or disprove a material fact related to the event being investigated as relevant. Relevance at this stage of a case is certainly not confined to that evidence which supports an investigator’s hypothesis or early conclusions about what happened.

DIRECT VS. HEARSAY EVIDENCE

Hearsay is another legal concept investigators need to be familiar with. This is especially important in evaluating the evidence provided by witnesses. One key element in evaluating a witness is identifying the source of the witness’s information. Is the information provided by the witness from their own observations or is it second-hand information? Hearsay testimony is second-hand information. Whenever the person providing the information is not the same person who personally witnessed it, that information is hearsay. To people unfamiliar with investigations or courtroom procedure, relying on hearsay information does not seem to be problematic. In fact, we rely on hearsay information every day. Each of us gets most of our information from hearsay sources and we depend upon it quite successfully. The television news is hearsay; the newspaper is hearsay.

While hearsay evidence is generally not admissible in common-law jurisdictions absent special circumstances there is no prohibition against hearsay evidence in civil law jurisdictions or in international tribunals. The rationale for this distinction is that professional judges possess the training and experience to properly evaluate hearsay evidence and place the appropriate weight on it during deliberations. While international courts have and are likely to continue to admit hearsay evidence, such evidence will never be considered to have the weight that direct, personal observations

⁴ *Black’s Legal Dictionary, 8th ed.*, West Publishing Company, St Paul, 2004.

of a witness will have. This is particularly true when such hearsay evidence concerns acts and conduct of a person accused of a crime.

Most evidence regarding an event initially comes to investigators in the form of hearsay evidence. Experienced investigators take this “second-hand” information and work to locate and interview the witness who personally made important observations.

Hearsay evidence is never as reliable as evidence based upon a witness’s personal knowledge. A professional, ethical journalist has a duty to investigate and report the news based on non-hearsay sources, from people with personal knowledge of the event being reported. If the journalist does this consistently, along with the other reporters on their newspaper, then the newspaper earns a reputation for reliability and people trust the information they read. Similarly, it is the duty of the investigator to seek out and gather information from those people with personal knowledge of an event. The information eyewitnesses provide is always more reliable than that provided by a hearsay source.

Another way of looking at the problem of hearsay evidence is to consider the effect of these “additional witnesses” coming between the investigator and the eyewitness. In the case of hearsay, the investigator must not only assess the credibility and reliability of the eyewitness, but also the person whom the eyewitness spoke to. The investigator must now assess just how accurately this second witness is reporting the eyewitness’s account. Additionally, the investigator must assess the credibility and reliability of the eyewitness without ever meeting them. The investigator should, whenever possible, avoid relying on hearsay witnesses and should be reluctant to base any conclusions or accusations on hearsay evidence.

Having said this, there is a role for hearsay evidence in an investigation. Hearsay information can lead to eyewitnesses and physical evidence. Very often the first people an investigator will come into contact with are not eyewitnesses but people who spoke to the eyewitnesses. This hearsay information is valuable because it helps to identify possible eyewitnesses and gives the investigator some idea about what they know.

Recognizing hearsay evidence is not always easy. If the investigator did a good job interviewing a witness they will have repeatedly asked each witness, “How do you know that?” This question should reveal whether or not the witness has personal knowledge about that part of their testimony or if they are reporting something that someone else told them. When evaluating a witness’s statement it is important to know what portions of the statement are based on personal knowledge and what portions are based on hearsay evidence.

AUTHENTICITY

Frequently before admitting evidence in a trial, and certainly before placing any weight on an exhibit, a court will inquire about and consider the provenance of the exhibit. If the exhibit is a physical exhibit the court will inquire about the circumstances of its collection and where it has been kept between the time it was collected and

its introduction in court. If the exhibit is a document the court will expect that the party tendering it can demonstrate that it is authentic. Each piece of evidence may be subject to a small “trial” to determine if it is sufficiently reliable to be accepted as a piece of evidence. It is therefore important the investigation have the proper procedures and records to be able to account for each exhibit.

Authenticating documentary exhibits can be particularly difficult in the context of international crimes. These crimes most often occur during times of chaos and conflict and documents may have been seized under conditions that did not permit the care and record keeping that an investigator would use under ordinary circumstances. In many instances, investigators may be given documents by people not associated with the investigation and who themselves are unsure about the provenance of the documents.

In these instances investigators will often be required to identify and gather evidence about a document’s authenticity after the document has come into their possession. There are several ways to do this and the particular method employed by an investigator will largely depend upon the circumstances of the particular document. Investigators should consider the following:

- i. Identify witnesses who created the original document or may have been present during its creation or saw it soon after its creation who can establish whether or not the document is in the same condition.
- ii. If the document is one of several copies locating some of those other copies and collecting them following established protocols will authenticate the initial document.
- iii. Forensic testing including handwriting analysis may be sufficient to establish the authenticity of a document.
- iv. If the document bears a date or identification number locating similar documents prepared before and after it will help establish its authenticity.
- v. If the document is one that was prepared by a suspect or one the suspect would have personal knowledge about then such document should be presented during any interview of the suspect.

EVIDENCE THAT IS PROVIDED CONFIDENTIALLY

The ICC, ICTY and ICTR have special provisions to protect the privacy of persons or states that provide evidence confidentially. There are no similar provisions in Bosnia and Herzegovina (BiH). Investigators must exercise extreme caution if agreeing to accept evidence confidentially. Any decision to accept evidence confidentially should be in writing and should reflect a uniform policy established by those ultimately responsible for the investigation. Serious problems are created when witnesses are given vague oral assurances of confidentiality regarding a particular item of evidence which then becomes an essential part of a prosecution or after review is determined to contain exculpatory information regarding an accused. Any undertaking given to a provider of evidence must be done with consultation at the highest levels prior to investigators receiving the evidence.

EXCULPATORY EVIDENCE

As every investigation begins to focus on particular individuals as suspects there will be evidence that not only inculpates that suspect but also evidence that will be considered “exculpatory” and require its eventual disclosure to the suspect if they are charged with a crime. The legal concept of the term “exculpatory” is broader than its common usage and does not only include evidence which would exonerate an accused but also includes evidence that would be relevant as a mitigating factor in sentencing or might cast doubt on a prosecution witness.

Just as it is impossible for an investigator during the early stages of an investigation to know the inculpatory import of each piece of evidence it is also impossible to know whether a piece of evidence may ultimately prove to be exculpatory. It is for this reason that all evidence should be carefully collected and recorded. Once an investigation identifies particular suspects there must be a systematic review of the evidence collected to identify exculpatory evidence and that designation should be recorded prominently in the record keeping system.

Experienced investigators will already appreciate the wisdom in thoroughly investigating exculpatory information. The ultimate goal of any properly conducted investigation is to establish the truth by collecting the most reliable evidence possible. Any investigation that intentionally or accidentally overlooks an investigative lead that may be contrary to the current view of the evidence is seriously flawed in its methodology. There can only be confidence in the results of an investigation if all investigative avenues have been properly pursued. An investigation must always be balanced and always cognizant of the presumption of innocence that protects all suspects and all accused.

BURDEN OF PROOF

Universal principles of criminal justice protect those being investigated or who have been accused of crimes with the presumption of innocence. This protection of a presumption of innocence remains in place until such time as the court deliberates upon and is satisfied, based upon the evidence before it, that the guilt of the accused has been demonstrated beyond a reasonable doubt.

Reasonable doubt is a very high standard and requires the trier of fact to be satisfied not by the quantity of statements or physical evidence that a person did in fact commit a crime but by the quality of that evidence. This burden of proof imposes upon the court the obligation to consider other possible explanations for the accused’s conduct which could be reasonably consistent with innocence and acquittal unless the court is satisfied that the evidence is sufficient to eliminate all reasonable doubts.

From an investigative point of view this burden imposes upon the investigator the obligation to consider all reasonable explanations for a suspect’s conduct as well as the possibility that others are responsible and gather probative evidence from which a court can make a reliable determination.

EVIDENCE THAT IS COLLECTED IMPROPERLY

Most courts have provisions dealing with evidence that is tainted by the way in which it was collected. These provisions are intended to protect the proceedings from unreliable evidence or illegally obtained or obtained in such a manner that admitting it would jeopardize the integrity of the trial itself.

Article 10 of the BiH Criminal Procedure Code (CPC) incorporates the protection of the proceedings from illegally collected evidence, which also serves to protect the suspect/accused from being indicted or convicted on the basis of such evidence:

Article 10 the BiH CPC

(Article 10 of the RS CPC and BD BiH CPC, Article 11 of the FBiH CPC)

Legally Invalid Evidence

- (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.

IMPORTANCE OF LEGAL INPUT IN AN INVESTIGATION

Most investigations into international crimes are vast undertakings that require substantial resources. There are many factors which distinguish international criminal investigations from domestic investigations. Such investigations ordinarily include a large number of individual crimes that have occurred in an area in which a conflict is possibly still ongoing. The witnesses are very often traumatized refugees who may be now living in countries around the world. Because the crimes occur in the midst of a conflict it is difficult, if not impossible, to collect evidence using the procedures employed during peacetime. These factors and others combine to make such investigations a daunting and expensive undertaking.

In many jurisdictions there traditionally has been a division between the investigative work of the police and the legal work of the prosecutor. Without getting into the merits and problems of this approach, experience has demonstrated that in the case of international crimes it is essential that the investigation incorporate and integrate legal input and analysis from experienced prosecutors at all stages of the process. Investigators and experienced prosecutors should and must work closely over the course of the entire investigation to ensure that the investigation will reliably answer fundamental questions about the event investigated and that the evidence collected will be sufficient to sustain any future prosecutions. International criminal law is still

a relatively new branch of the law that is changing continually. It is important that a prosecutor familiar with these developments be involved in investigation.

INVESTIGATIONS INTO THE CONDUCT OF SENIOR OFFICIALS

International and internationalized domestic courts often seek to focus their resources on holding accountable those individuals most responsible for violations of international criminal law. These individuals are most often senior political, military and police officials engaged in acts designed to perpetrate some of the most serious crimes on a large scale. Their acts, although knowing and intentional, are most often remote in time and place from where the crime actually takes place. These individuals are unlikely to have direct contact with victims although their contribution to the crime is tangible and intentional.

These senior officials often misuse State institutions, domestic legislation and national resources with criminal intent to achieve a criminal purpose. The mechanisms employed in the commission of a crime are at least as complex and intricate as the workings of the State's government. International criminal investigations must consider and develop investigative strategies that are reasonably directed toward gathering evidence of this criminal use of otherwise legitimate legal institutions.

MULTI-LEVEL INVESTIGATION

The investigation of a senior official for international crimes will always involve a multi-level approach. The number of levels will largely depend upon how far the suspect is removed from the physical perpetration of the crime and the complexity of the structures and institutions employed by the perpetrator. At the very least, a clear distinction can be made between the primary level of direct physical perpetration and other levels which concern conduct that despite being remote and indirect nonetheless amounts to a significant contribution to the crime.

The investigation of the primary level involves the investigation of the direct physical perpetration of the crime. In many ways, this investigation will mirror the type of comprehensive investigation undertaken by skilled law enforcement personnel in their own jurisdictions. To the extent that surrounding conditions and circumstances permit, the investigation should collect all available evidence of a crime as soon as possible after the crime has been discovered.

This chapter will not go into detail about the specific steps that should be taken other than to reiterate the importance of detailed and comprehensive investigative work at this stage and to emphasize that even when the suspects in an investigation are senior-level officials this does not diminish the importance of competent work at the primary level. Compelling evidence connecting a senior official to a crime will not be sufficient to assign criminal liability if evidence of the crime itself was not gathered properly at the primary level. The importance of this first vital link in the chain of all those responsible for the commission of a crime cannot be overstated. Every

investigative avenue which may yield information regarding this initial link must be thoroughly explored and documented.

DIFFERENT PEOPLE INVOLVED IN THE COMMISSION OF COMPLEX INTERNATIONAL CRIMES

Prior to describing how such an investigation should be undertaken it will be helpful to identify the different categories of people involved in the complex chain required for such crimes. Some of these people are knowing participants in the crime while others will be unknowing instruments co-opted by perpetrators to assist in the commission of a crime.

The first category of perpetrator is the direct perpetrator – the person or persons who engage the victim and physically perpetrate a crime against that person. This group also includes the immediate superiors of the direct perpetrators if they were directly involved in the planning, ordering, inciting or commission of the crime. The second category of perpetrators consists of the intermediate perpetrators. This group includes those remote perpetrators that are not part of the highest level of perpetrators yet knowingly participate in the commission of crimes by the direct perpetrators. If the direct perpetrators are soldiers, these intermediate perpetrators are those superiors who are aware of the criminal conduct and who may support the crimes logistically or by failing to prevent or punish the criminal conduct. In the case of direct perpetrators who are not members of the military these intermediate perpetrators may be any upper level police or civilian authority who has abused their authority or participated in the commission of a crime in some other way.

The last category consists of senior members of military, police and political institutions who exercise their authority to initiate and participate in the crimes committed by the direct perpetrators. Their participation is often through complex institutional channels under their control. These are the people deemed by the UN Security Council and the ICC as those “most responsible”. While these senior-level remote perpetrators may initiate and participate in the crimes committed by the direct perpetrators and are aware of the types of crimes that are being committed, as well as the types of people that are being victimized, they themselves may not be aware of the specific crimes or victims ultimately selected as victims by the direct perpetrators.

The last group of people that may be involved in the complex operational chain that results in serious international crimes are those people who, in fulfilling their ordinary legal duties, unwittingly form some link in the chain necessary for the commission of a crime. These people are used as instruments by the perpetrators of the crime. A simple example of such a person would be a military truck driver who in the course of making routine deliveries delivers weapons and ammunition that have been designated for direct perpetrators for use in a campaign of ethnic cleansing. As long as the truck driver has no knowledge regarding how the weapons and ammunition are being used and delivers such in the ordinary course of their daily work the driver is not a perpetrator but is an “instrument” being used by those seeking to perpetrate a crime.

GENERAL LEGAL PRINCIPLES

Before discussing the identification and gathering of evidence in investigations into senior military, police and political officials it is important to understand some fundamental principles about criminal law. Investigators should have a good understanding of these concepts and how they impact on the investigation of international crimes.

ELEMENTS AND *ACTUS REUS* AND *MENS REA*

Every crime in both domestic and international criminal law is comprised of a number of elements which seek to articulate with specificity the illegal conduct prohibited by the particular norm. In order for a person to be found guilty of a crime there must be sufficient reliable evidence to satisfy the court that the prosecution has proven each element of a crime beyond a reasonable doubt. When determining whether a crime has been proved a court will examine the evidence introduced with respect to each of the elements of the crime charged. These elements seek to particularize the acts and circumstances under which those acts are performed which characterize a crime as well as the mental state of the actor at the time the crime was committed. Most jurists (as well as prosecutors and defence counsel) will use these elements to structure their analysis of the evidence presented in a trial. Experienced investigators will also become familiar with the elements of the crimes they are investigating and structure their analysis of the evidence around the elements.

The elements of crimes have traditionally been divided into two categories: the *actus reus* and the *mens rea*. The *actus reus* describes the prohibited conduct that an accused engaged in. *Actus reus* also describes the results of that conduct which make that conduct a crime. For example, throwing a rock would not be a crime unless it resulted in the injury or death of a person. In certain circumstances an omission to perform an act a person was legally obliged to perform can constitute the *actus reus* of a crime. For example, a camp commander who continues the unlawful confinement of civilians where they have the authority to release the detainees may be found guilty for crimes arising out of the failure to exercise the authority to release.⁵

Actus reus also describes the required conditions under which particular conduct occurred in order for it to be a crime. For example, in the case of war crimes one element may be that the particular crime (murder, rape, etc.) was committed as part of an armed conflict.

The *mens rea* elements of a crime concern the state of mind of the person who engaged in the *actus reus* of the crime. Criminal law does not impose criminal sanctions on genuine accidents and seeks to distinguish between conduct that unknowingly and unintentionally results in harm from deliberate acts performed with criminal intent. The *mens rea* elements of a crime typically concern the culpable state of mind of an accused and set forth the criminal state of mind which must exist at the time the criminal acts were engaged in.

5 See *Prosecutor v. Delalic, et al.* Case No. IT-96-21-A, App. Ch., 20 February 2001. Para. 378.

Paragraph 1 in Article 30 of the Rome Statute requires that the *actus reus* elements of a crime must be committed “with intent and knowledge” unless otherwise provided in the statute. This definition of the mental state required makes clear that unless expressly provided to the contrary crimes within the ICC’s jurisdiction must be perpetrated with the highest level of intent. Lesser criminal states of mind such as criminal negligence are insufficient unless specifically provided for in the statute.

Another way of distinguishing the *actus reus* elements from the *mens rea* elements is that the *actus reus* elements describe conduct which can be objectively observed while the *mens rea* elements describe that which cannot be seen – the inner workings of the human mind – the subjective. Evidence of *mens rea* is always inferential because we cannot read the human mind. Even in the clearest cases in which an accused during the *actus reus* expresses their state of mind (“I want to kill you”) we must necessarily infer that this statement is an accurate reflection of the actor’s state of mind and not an expression of rage in which the real intent was simply to injure and not kill the person.

Unguarded expressions of intent by the perpetrator of a crime are compelling evidence of what their state of mind was during the commission of a crime. Such expressions can occur before, during or after a crime and evidence of them can be from witnesses, intercepted communications or a confession by the perpetrator. Evidence of *mens rea* typically is more difficult to obtain than objective evidence establishing the *actus reus*. The chaos in which war crimes ordinarily occur, as well as the fact that perpetrators do not ordinarily express their criminal intentions, present challenges for the investigator.

In the case of crimes that are committed by multiple perpetrators, including both direct and remote perpetrators, investigators should consider whether the same criminal intent existed in each perpetrator’s mind. In such cases, while it is necessary for each perpetrator to have a clear awareness that their acts will lead to the commission of a crime it is not necessary that all perpetrators have precisely the same state of mind.⁶

It is impossible for an investigator to proceed without a clear understanding of the elements comprising the possible crimes that were committed. The investigation must discover and gather evidence that will determine with certainty the element of each crime being investigated. Evidence indicating an element of the crime did not occur is equally important in a balanced investigation. This clear understanding of the elements of the possible crimes must be clearly articulated in the investigation plan and reflected in the investigative activities engaged in. Investigators should become familiar with the elements for crimes within the jurisdiction of the courts of BiH as they pertain to particular investigations and ensure that the planned investigative activities are designed to gather evidence regarding all of them. A successful prosecution will require proof beyond reasonable doubt for each element. If proof falls below this standard for any one element of the crime the court is obliged to acquit the accused.

⁶ See *Prosecutor v. Kayishema and Ruzindanda*, Judgment, Case No. ICTR-95-1-T, 21 May 1999, paras. 203-207.

KNOWLEDGE

One of the most difficult areas to gather evidence about is what a suspect or perpetrator “knew” at the time (s)he engaged in criminal activity. Article 30 of the Rome Statute requires evidence beyond reasonable doubt regarding the knowledge and intent of a person charged with a crime. It defines knowledge in paragraph 3 of the Article: “‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly”. Demonstrating what a person knew is important no matter how the person participated in a particular crime.

There are three ways of approaching the investigative problem of establishing what a suspect knew or may have known at the time they engaged in potentially criminal activity. The first is to identify direct evidence of their knowledge. The second is to gather indirect or circumstantial evidence regarding their knowledge and third is to gather evidence that would establish what a reasonable person in their position would have known.

The first category of evidence concerns direct evidence of what a senior official knew at times relevant to the investigation. This evidence would include written and verbal reports that the senior official received. Statements made by the suspect, either publicly or privately may also provide evidence of what the person knew at a particular time. The second category of evidence involves evidence which indirectly establishes what a suspect knew at a critical time. Did the senior official take a particular action which demonstrates that they must have been aware of a crime or other important facts?

The last category of evidence describes evidence which establishes what a reasonable person in the suspect’s position would have or should have known. Such evidence, if sufficiently compelling, would allow a court to infer that such senior official could not have been unaware of a particular event given the evidence establishing their ready access to information regarding it. Such evidence might be testimonial evidence from a member of the official’s staff that they regularly watched international media on a television in their office and that international papers in which crimes were reported were placed on the official’s desk every morning.

MODES OF PARTICIPATION

In addition to understanding the elements of the crimes being examined investigators should be familiar with the different ways senior officials can participate in criminal activity. A person can perpetrate a crime in a number of ways. In cases in which a crime is committed by a multiple of perpetrators, each may have had a different mode of participation. This is particularly true in the case of international crimes which are very often the result of not only those physically perpetrating a crime but also of others who order, instigate or aid and abet the crime. The particular mode or method a perpetrator may use to engage in criminal conduct may vary depending upon their position and the particular crime committed.

Under the ICTY and ICTR Statutes a person can be criminally responsible for crimes (s)he planned, instigated, ordered or committed or aided and abetted the planning, instigation, ordering or commission of. Chapter three of this manual will set out the laws applicable in BiH. While for the most part these terms enumerating the modes of participation are consistent with their ordinary meaning they have developed as legal concepts within the jurisprudence of international law.

The planning of an offence has been defined to mean that one or more persons designed the commission of a particular crime at both the preparatory and implementation phases of the crime and that the crime was in fact committed within that planned framework.⁷ The planning of a criminal offence encompasses preparations for the offence as well.⁸ Planning is broadly defined and can include different activities characteristic of planning and preparation of a crime.

What constitutes planning may vary depending upon the level of the perpetrator you are investigating. In the case of a group of direct perpetrators who enter a town and commit several crimes planning will include their activities prior to the attack during which they discussed and agreed on how they would attack the town. In the case of senior officials it is probable that they were not aware of the precise details of how and when the direct perpetrators would enter the town. Perhaps their “planning” activity was to discuss with the leader of the direct perpetrators what supplies would be needed for the attack and when in general terms the attack would occur.

The mode of instigation includes both direct and public aspects involving prompting another to commit a criminal offence.⁹ Instigation can include conduct by commanders that fosters an environment that is permissive of criminal behaviour by subordinates.¹⁰ Under ICTY jurisprudence the *mens rea* requirement is that the accused intended to induce the commission of the crime or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of their acts.¹¹ While instigation can be committed by an omission (as in the case of a superior officer consistently failing to take any action in response to criminal conduct by subordinates) there must be a clearly demonstrable link between the instigation and the actual perpetration of the crime.¹²

“Ordering” as a mode of participation in a crime envisages that there is some superior-subordinate relationship between the person who orders a crime and the direct perpetrator of that crime.¹³ The required *mens rea* would be that the person ordering some act that resulted in the commission of a crime intended the commission of that crime or was aware of the substantial likelihood that the commission of that

7 *Prosecutor v. Stanislav Galic*, Judgment and Opinion, Case No. IT-98-29-T, 5 December 2003, para. 168; *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 480.

8 See *Prosecutor v. Kordic and Cerkez*, Decision on Joint Defence Motion to Dismiss All Allegations of Planning and Preparation under Art. 7(1) as Outside the Jurisdiction of the Tribunal or as Unenforceable, Case No. IT-95-14/2-PT, 1 March 1999.

9 *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998, paras. 481-482.

10 *Prosecutor v. Galic*, Judgment and Opinion, Case No. IT-98-29-T, 5 December 2003, para. 168.

11 *Prosecutor v. Naletilic*, Judgment, Case No. IT-98-34-T, 31 March 2003, para. 60.

12 *Prosecutor v. Brjanin*, Judgment, Case No. IT-99-36-T, 1 September 2004, para. 269.

13 *Prosecutor v. Kordic*, Judgment, Case No. IT-95-14/2-T, 26 February 2001, para. 388; *Prosecutor v. Strugar*, 98 bis Decision, Case No. IT-01-42-T, 21 June 2004, para. 85.

crime would be the result of their orders.¹⁴ There is no requirement that the order be written or even oral and the existence of an order may be proven with either direct or circumstantial evidence.¹⁵ There is no requirement to demonstrate that absent the impugned order the crime would not have been committed.¹⁶

Once again the actual evidence that is probative on this point will depend upon the level of the suspect that is being investigated. Using the same example (direct perpetrators attacking a town) the commands given by their immediate superior would constitute ordering as defined here. For remote perpetrators such as senior officials conduct constituting “ordering” would not be as specific but might involve more general commands or directives to ethnically cleanse a particular region. While orders given by remote perpetrators will necessarily be less specific they must nonetheless be clearly intending and ordering illegal conduct. At this high level it is likely that the superior is giving orders regarding legal activity as well. Sufficient evidence must be gathered to clearly demonstrate the illegal nature of the order and distinguish it from other legal orders.

The mode of participation encompassed by the term “committed” includes not only the direct physical perpetration of crimes but also the concept of joint criminal enterprise (JCE). With respect to direct physical perpetrators of crimes this mode of participation is defined as “physically and personally perpetrating a crime or engendering a culpable omission in violation of a rule of criminal law. There can be several perpetrators regarding the same crime as long as each of them fulfils the requisite elements of the crime”.¹⁷ This mode of participation most closely resembles how perpetrators commit crimes under domestic criminal law.

Conspiracy – JCE

One of the more recent developments in international criminal law has been the emergence of “JCE” as a mode of participation. It has been used in several cases to reflect the criminal conduct of senior officials that have no direct connection to crimes or crime victims. It was first described in the Tadic appeals decision as “Common Purpose Doctrine” in which the court found that the term “commission” encompassed conduct by a group of people engaged in implementing a common criminal plan.¹⁸ This theory of culpability is applicable when a group of people act together in the commission of a crime. While each member in the group may share the same intent regarding the commission of the crime each may have a very different but significant role to play in the actual commission of the crime.

One of the important features of this mode of liability is that under certain circumstances members of the JCE are not only criminally liable for the actual crime

14 *Prosecutor v. Kordic*, Judgment, Case No. IT-95-14/2-A, 17 December 2004, para. 30; *Prosecutor v. Galic*, Judgment and Opinion, Case No. IT-98-29-T, 5 December 2003, para. 172; *Prosecutor v. Strugar*, Judgment, Case No. IT-01-42-T, 31 January 2005, para. 332; *Prosecutor v. Strugar*, 98 bis Decision, Case No. IT-01-42-T, 21 June 2004, para. 85.;

15 *Prosecutor v. Galic*, Judgment and Opinion, Case No. IT-98-29-T, 5 December 2003, para. 168; *Prosecutor v. Strugar*, Judgment, Case No. IT-01-42-T, 31 January 2005, para. 331.

16 *Prosecutor v. Strugar*, Judgment, Case No. IT-01-42-T, 31 January 2005, para. 332.

17 *Prosecutor v. Naticic*, Judgment, Case No. IT-98-34-T, 31 March 2003, para. 62 (footnotes omitted).

18 *Prosecutor v. Tadic*, Judgment, Case No. IT-94-1-A, 15 July 1999.

that was intended but are also liable for crimes which are the foreseeable result of the JCE. For example, if a group of people engage in a JCE to forcibly deport a large group of people they would be responsible for deaths that occur during that forcible deportation. Although the deaths might not have been expressly intended by the group, deaths would be a foreseeable result of forcibly removing a large group of people from their homes.

JCE, if used properly, is a particularly important and valuable mode of participation in the case of remote perpetrators that may have little or no direct contact with the direct perpetrators of a crime. It is valuable because it properly examines the intent and individual acts of participation of the members of the group and the role that those acts of participation had in the commission of specific crimes. Of all the modes of participation, it often most accurately reflects the illegal conduct the senior official engaged in.

A person can be held criminally responsible if they assist another to commit a crime even if they do not share the same criminal intent as principal perpetrator. A person who intends to assist another in the commission of a crime and does make a significant contribution to the commission of that crime may be held criminally responsible. This particular mode of participation is distinguished from the others in that a person who aids and abets does not necessarily share the intent to commit the crime but simply has the intent to aid in the commission of the crime. While it is not necessary that the aider and abettor have knowledge of the specific details of the crime (s)he is aiding (s)he must have some general knowledge about the type gravity of the crime (s)he seeks to assist.

Under certain circumstances a superior may be criminally liable for crimes committed by their subordinates if they fail to prevent or punish those criminal acts. Under this mode of liability a commander is criminally responsible for their omission or failure to act when faced with the knowledge of an impending crime or a crime that has already occurred.

The superior's responsibility lies in their effective control over the direct perpetrators of the crime. In an organizational structure with several levels it may be that several people are criminally responsible if they knowingly failed to exercise their effective control over subordinates who intended to commit a crime or who had committed a crime.

INVESTIGATING THE DIFFERENT LEVELS OF PERPETRATION

Against this backdrop of general evidentiary principles and the different modes that a perpetrator can participate in in a crime we can turn to the types of evidence that will be probative of the perpetrators in each of the categories discussed. There is considerable overlap in that evidence will often be probative for more than one category of perpetrator. This discussion is meant as a general guide and catalyst to help investigators develop investigation plans likely to identify relevant evidence in the particular circumstances of a specific case.

DIRECT PERPETRATOR

One of the most important questions to be answered at this primary level is the identity of the direct perpetrators and what if any group they were working with to commit the crime. This is often a difficult question to answer because such perpetrators may not want victims or witnesses to know their true identity and thus wear disguises or remove identifying features of their uniforms and equipment. Victims and witnesses who survive or witness such serious crimes may be too frightened or preoccupied with escaping to make detailed observations that can reliably identify the perpetrators and any organization they may belong to. Despite the trauma of having survived serious crimes, victims and witnesses often demonstrate a remarkable recollection about their attackers and are able to provide detailed information that should assist the investigation. Detailed interviews should be conducted promptly to ensure that as much information as possible is gathered from these witnesses. Even if such evidence cannot conclusively identify a perpetrator it may provide significant leads that can assist the investigation. Witnesses should be queried about any information they can provide regarding the identity of individual perpetrators including their clothing, the names they used to refer to each other and whether or not they spoke with a regional accent. Careful analysis of statements made during the commission of the crime can often reveal, when considered in light of other information, important clues regarding the group to which an individual perpetrator belonged. Similarly, careful descriptions of uniforms, even absent insignias, when analysed in the context of evidence, can reveal reliable information about the perpetrators of a crime.

There may come a time during the course of the investigation when a member of the group who perpetrated the crimes co-operates with investigators. In those cases, seemingly insignificant information gathered from witnesses regarding nick-names, clothing and the vehicles used may become significant with the assistance of an insider who can explain the inner workings of the group.

Investigators should consider exploring logistics records, daily reports and border records that may reveal what units were in the area where crimes were committed. Experience has shown that although these groups disguise their identity from victims and witnesses their true identity is often recorded in official records. Government personnel guarding the borders, who are not participants in any criminal activity, may be willing to provide detailed information about the units that crossed the border at times significant to the investigation. If steps were taken to conceal the movement of these units (i.e. from international monitors) then it is possible that such efforts were unusual and memorable to the border officials, local police or civilians who witnessed them.

Investigators gathering evidence at this primary level should in addition to following standard protocols of investigation (for the specific crime such as murder, rape, etc.) find and collect evidence likely to disclose the participation of any upper-level perpetrators or groups that may have participated in the crimes. If a forensic examination of physical evidence is not part of these protocols consider whether analysis of shell casings, bullet fragments and other physical evidence may help establish the identity of the units involved.

Any evidence which might indicate what group or unit the perpetrators belonged to is important. This evidence can be in the form of observations made by witnesses regarding the direct perpetrators. Consider locating witnesses who were in the area of the crime prior to its commission. If perpetrators were there preparing their crimes they may have taken less effort to disguise their identity at that time. These witnesses may be able to provide detailed information which helps establish the identity of the perpetrators.

Examine official records that document the movements of different units and groups in the area where the crime occurred. Such records may be found in logistics documents, or logs kept at border posts and checkpoints. Try to locate and review the daily reports generated by all units that might have been in the area. With the proliferation of mobile phones it is becoming more common for such phones to be used during operations and crimes; explore what records are available to assist in establishing the identity of the direct perpetrators. Identify and collect any evidence regarding communications that is available, keeping in mind that you may have to approach governments that may have had a reason to collect such evidence through their intelligence services.

Some governments may be in possession of satellite imagery or photographs taken from manned and unmanned aerial surveillance vehicles. Countries surrounding the conflict have an interest in obtaining reliable information about the fighting to prepare for the possibility that it may impact them. Consider approaching these countries to determine if they possess relevant intelligence and whether they are willing to share it. If international observers are present in the conflict area they should be interviewed and their logs reviewed for evidence. If local or international relief workers were present they should be interviewed regarding their observations.

Investigators should consider identifying and interviewing members of the perpetrator groups that may have been involved. An insider in the organization will know information outsiders could not and can be an efficient way of gaining important information (although biased) about the group. Such co-operation can yield important investigative leads that can lead to more objective sources of evidence.

Videos and DVDs

Today, even in the most remote places video cameras are available and are used regularly to record events. Videos, once authenticated, provide some of the most reliable evidence regarding what happened at a particular time.

Although it is rare, it has also happened that the direct physical perpetrators of a crime have recorded the crimes themselves as a trophy or souvenir or perhaps a way to ensure that all participants in the crime remain silent about their deed. Given the high degree of reliability associated with authentic video-tapes it is important to consider and explore all investigative avenues which may yield the existence of such evidence. Query whether or not members of the group kept official or unofficial diaries of their activities or whether a video was made of some part of the operation or crime.

If there is information that some of the perpetrators of the crime were injured or killed in the process consider checking hospital records or obituaries for an indication of the identity of some of the perpetrators. There is usually some public record of the death of a perpetrator belonging to the army, the police or a paramilitary group even if they were killed during a clandestine operation.

Once the investigation begins to gather evidence indicating which units or groups were involved in a crime investigators should begin exploring who had authority over those perpetrators and what information these people would have had regarding crimes committed by that group.

INTERMEDIARY LEVELS

The number and complexity of other levels employed by a senior official to commit a crime will vary greatly depending upon the institutions and mechanisms employed by that person to participate in the commission of crimes. Once a direct perpetrator's organization has been identified the investigation must explore the structure of that organization itself. The most important initial step in investigating an organization is to develop a clear understanding of its organizational structure. The investigation must be able to accurately set out all of the people with authority and the parameters of their authority. The investigation must learn how the different people in the organization shared information and interacted with each other. National laws and regulations will dictate and define these relationships. In addition to understanding the legal relationship investigators must be aware that the legal authority of officials may have been circumvented by individuals who are not part of the legal structure but have exercised *de facto* authority over an institution.

Investigators should develop a detailed organizational diagram of each institution being investigated. All key positions of authority should be represented as well as their relationship to other key positions. The people who hold these positions will change over time and the diagram should indicate the time period that each person held a particular position. Information about the organizational structures may come from several sources including laws and regulations; witnesses (both inside and outside the organization); internal correspondence indicating the relationship between units within the organization.

Most organizations and institutions will have record keeping systems documenting their employees and their activities. Such systems are necessary for the essential tasks of calculating the pay and benefits due each member. The investigation should understand these systems and examine any records likely to contain information about the activities of a perpetrator group. Investigators should become familiar with the types of forms and paperwork that are generated and seek copies of such documents likely to contain relevant information. All possible relevant communications (phone, radio, computer, written) should be considered and explored. Investigators should consider examining an organization's records of citations and awards. While it is unlikely that such citations or awards will refer to criminal activity they may help establish a unit's presence in an area where crimes were committed.

INVESTIGATION OF SENIOR LEVEL OFFICIALS

Once an investigation has established the identity of the direct perpetrators of a crime and has established their legal and *de facto* relationship to military, police and political institutions the investigation must then consider which, if any, senior officials should be investigated to determine whether or not they bear responsibility for the crimes committed by the direct perpetrators.

The determination to investigate a particular senior official may be the result of careful legal analysis of a country's laws and regulations which make clear that the official had some authority over and responsibility for the direct or intermediate perpetrators. In some cases, absent any legal relationship between the senior official and direct and intermediate perpetrators, evidence may establish that the senior official nonetheless participated in activities which may have contributed to the commission of the crime. The investigation must now consider the question of whether such participation constitutes a criminal act.

The investigation at this juncture must focus on three areas:

- i. What was the senior official's participation that furthered the crime?
- ii. What did the senior official know about the crime and the impact of their participation in the crime?
- iii. What authority did the senior official have with respect to the direct and intermediate perpetrators of the crime?

At this highest level an investigator must have a clear understanding of the legal and *de facto* relationship the senior official being investigated had with the intermediary units and direct perpetrators. Evidence of the legal relationship will be found in national laws and regulations. If there exist *de facto* chains of authority that circumvented legal relationships then it will be important to identify insider witnesses who can credibly and reliably provide information about this.

Consider interviewing members of the international community who met with the officials under investigation. Their recollection, notes and memos to their government may provide valuable evidence regarding what the suspect knew and what, if any, authority they had over the direct perpetrators of the crime.

The investigation plan of any investigation of senior governmental officials should identify and seek to interview those international diplomats who had contact with senior-level suspects. Countries routinely express their concerns regarding possible violations of international law to each other. These important events are often documented in letters between the governments as well as in the internal communications of the governments. It is important to identify and conduct detailed interviews of these officials.¹⁹ These interviews can yield some of the most reliable and detailed information indicating what a senior governmental official knew about the commission or likely commission of crimes.

¹⁹ Some countries will require official requests to interview present or former officials regarding their official duties and meetings.

The investigation should systematically obtain and review all of the public statements by the senior-level suspect that may be of relevance to the investigation. These public statements, when analysed in the context of other public statements and evidence about other events may support inferences about what a senior official knew at a time relevant to the investigation.

Investigators should gain access to the communications between the senior official and the intermediate perpetrators. Consider whether meetings between the official and the intermediary groups were recorded or whether minutes were taken. If evidence suggests that the senior official was but one of several people engaged in a JCE consider what evidence might exist regarding their communication with each other.

It is likely that senior government officials involved in the perpetration of crimes will discuss among themselves those crimes or the situations they hope to change with the commission of those crimes. High-level government meetings may have been recorded either with audiotape or by a note taker. While it is unlikely that there will be clear expressions of criminal intent or activity contained in the minutes these minutes can provide reliable information about what certain officials knew at times relevant to the investigation.

INVESTIGATING THE INSTRUMENTALITIES

It is likely that somewhere along the complex chain employed by senior level officials to commit a crime there are people who were used as an instrumentality. Depending upon how significant a role a particular person played in the chain, they may be an important and valuable witness in establishing some of the links in the chain. Consider a logistics officer who kept detailed records about the many times they were regularly ordered to provide military supplies to a particular unit that was engaged in criminal activity. This witness as well as the detailed records may help establish a link between the person ordering the distribution of the materials and the unit engaged in criminal activity.

For obvious reasons these people make attractive witnesses because they are not engaged in criminal conduct themselves and do not have “blood on their hands”. They are “insider” witnesses with no personal culpability. They do not have the credibility and reliability problems that culpable or possibly culpable insiders bring with them.

INVESTIGATING DIFFERENT LEVELS AT ONCE

Once a rudimentary understanding of how the particular perpetrator group fits into the overall government structure is reached it may be appropriate to develop an investigation plan that seeks to gather evidence at several different levels of that government. For example, once it has been sufficiently determined that police have been involved in the commission of a crime in a country in which the police answer to the Minister of the Interior who in turn reports to the President, it may be

appropriate to develop simultaneous prongs of the investigation to explore what the Minister of the Interior and the President knew about the crimes and what, if any, involvement they had in the perpetration of those crimes.

EVIDENCE REGARDING POSSIBLE DEFENCES

Once an investigation has identified individuals as suspects the investigation should begin to consider what, if any, defences these suspects may have. In keeping with the goal of conducting a balanced investigation steps should be taken to explore the viability of these defences and gather evidence that either supports or contradicts them.

The defences that may be available to a suspect will depend upon the case and can be numerous. One common defence for senior officials alleged to be criminally responsible as superiors is that they did take some steps, albeit unsuccessful, to prevent and punish crimes committed by their subordinates. Investigators should consider what disciplinary mechanisms were available to these superior officers and investigate what, if any, action was initiated by or on behalf of the suspect.

DOCUMENTING THE INVESTIGATION

As a final word on evidence it is important for investigators to always remain cognizant that their work on a case may be the subject of an inquiry by a court. Investigators may be called to establish the “chain of custody” of physical evidence, or to authenticate documentary evidence. In some cases investigators may be called to testify about an investigation when there has been an allegation directed at the competency or integrity of the investigation. It is therefore important the investigation has procedures and record keeping systems that will preserve “evidence” of the investigation itself should it become the subject of a future inquiry.

CHAPTER THREE - APPLICABLE LAW - WAR CRIMES INVESTIGATIONS

INTRODUCTION

Investigations are largely viewed as an operational activity that gathers the necessary evidence upon which criminal prosecutions are based. These investigations must take place within a legal framework for the evidence to be both relevant and admissible. For the efficient use of resources the investigation must be focussed on the elements of the crimes included in that legal framework and the modes of liability for individuals under that framework. For war crimes, crimes against humanity and genocide this is a complex matter. At the international level you have treaty law and customary law. Different courts, such as the ICTY, the ICTR or the ICC in certain circumstances have different elements or modes of liability for the same offences. In BiH it can be argued that understanding the legal framework is even more complex. This is particularly so when you take into account SFRY laws and the various laws that have been enacted since the '92-'95 war.

As a result of this complexity it is clear that investigations should be carried out by multi-disciplinary teams comprised of prosecutors and/or other legal experts, investigators, analysts and other experts such as forensic experts as required by particular cases.

Fortunately, the OSCE – through the ODIHR/ICLS/ICTY/UNICRI- has prepared excellent materials titled, “Domestic Application of International Criminal Law - Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions” that provide an extensive and exhaustive digest of the legal framework applicable in BiH. For prosecutors preparing cases it is recommended they use that source. It is more comprehensive than the materials reproduced here.

It is important for all personnel involved in an investigation to have an understanding of the laws they are operating under, the elements of the crimes they are looking at and how the individual can be held responsible for those crimes. This manual includes extracts of the materials referred to above for that purpose.

This chapter then, commences with a discussion of origins of the laws applicable in BiH and outlines those crimes that may be investigated under the rubric of war crimes, i.e. “Genocide”, “Crimes against Humanity” and “War Crimes”. This is followed by an outline of the various “Modes of Liability” that may be applied and “Defences and other grounds for excluding liability”.

BOSNIA AND HERZEGOVINA - DOMESTIC LAW

In BiH, criminal law is strictly statutory law. Indirect or additional sources of criminal law include the constitution and international agreements. However, these sources can also constitute a direct source of criminal law, as explained below.²⁰ Jurisprudence and legal authorities are not considered a source of criminal law, although they are considered to be “of immeasurable importance for the criminal law implementation”.²¹

THE CONSTITUTION OF BOSNIA AND HERZEGOVINA AND INTERNATIONAL LAW

Article II of the BiH Constitution guarantees the respect for human rights and fundamental freedoms, which are based on internationally recognized standards: The Constitution of BiH sets out in Article II/2 that “the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina” and “shall have priority over all other law”²².

Constitution of Bosnia and Herzegovina Article II: Human Rights and Fundamental Freedoms

1. Human Rights

Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement.

2. International Standards

The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

20 See, e.g., Komentar Krivičnog/kaznenog zakona Bosne i Hercegovine, Savjet/Vijede Evrope/Evropska komisija, 2005, str. 60 (Commentary of the BiH Criminal Code, Council of Europe/ European Commission, 2005, p. 60).

21 Ibid.

22 General Framework Agreement for Peace in BiH, Annex 4: Constitution of BiH (1995).

Under Article II/6 of the Constitution:

Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms” set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.²³

In addition, under Article II/7 and Annex I of the Constitution, certain international human rights agreements must be applied in BiH:

- 1948 Convention on the Prevention and Punishment of the Crime of Genocide;
- 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II;
- 1951 Convention relating to the Status of Refugees and the 1966 Protocol;
- 1957 Convention on the Nationality of Married Women;
- 1961 Convention on the Reduction of Statelessness;
- 1965 International Convention on the Elimination of All Forms of Racial Discrimination;
- 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols;
- 1966 Covenant on Economic, Social and Cultural Rights;
- 1979 Convention on the Elimination of All Forms of Discrimination against Women;
- 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
- 1989 Convention on the Rights of the Child;
- 1990 International Convention on the Protection of the Rights of All Migrant Workers; and Members of their Families;
- 1992 European Charter for Regional or Minority Languages; and
- 1994 Framework Convention for the Protection of National Minorities.²⁴

Under Article VI/3(c):

[T]he Constitutional Court has jurisdiction over issues referred to it by any court in Bosnia and Herzegovina concerning whether a law, on whose validity the Constitutional Court’s decision depends, is compatible with the Constitution, the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina.²⁵

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

The Constitutional Court also has jurisdiction over cases referred to it concerning the existence or scope of a general rule of public international law relevant to the court's decision.

International law is thus an important source of law in the legal system of BiH. The Court of BiH panels, noting that the domestic statutory provisions on genocide, war crimes, crimes against humanity and other crimes against international law are derived from international law, have held that the relevant domestic provisions bring with them “as persuasive authority [their] international legal heritage, as well as the international jurisprudence that interprets and applies [them]”²⁶.

The courts in BiH have relied on international jurisprudence and academic commentary as persuasive authorities.

Although not bound by the ICTY/ICTR/ICC jurisprudence and legal authorities, the courts in BiH have relied on such international jurisprudence and academic commentary as persuasive authorities. The courts in BiH rely, in particular, on international jurisprudence as it relates to the general principles of international law, the customary status of certain international law provisions, and the interpretation of international law provisions.²⁷

The principle of legality is not explicitly referred to in the BiH Constitution. However, since the BiH Constitution provides for direct application of the European Convention on Human Rights (ECHR), Article 7 of the ECHR is directly applicable as well:

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed”.

This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

These principles are reflected in Articles 3, 4 and 4(a) of the BiH Criminal Code, which are also discussed below.²⁸

26 See, e.g., Court of BiH, *Kurtovic*, Case No. X-KRZ-06/299, 2nd Instance Verdict, 25 March 2009, fn 19, pp. 4-5; Court of BiH, *Momčilo Mandić*, Case no. X-KRZ-05/58, 2nd instance verdict, 1 Sept. 2009, fn 7-17.

27 See, e.g., Stupar et al., 1st inst., p. 53 (p. 56 BCS); Court of BiH, *Zijad Kurtovic*, Case No.X-KRZ-06/299, 2nd Instance Verdict, 25 March 2009, paras. 57, 124; *Mitrović*, 1st inst., p. 44 et seq (p. 47 et seq BCS); *Petar Mitrović*, Case No.X-KRZ-05/24-1, 2nd Instance Verdict, 7 Sept. 2009, para. 260; See generally, Court of BiH, *Mitar Rašević et al.*, Case No. X-KR/06/275, 1st Instance Verdict, 28 Feb. 2008

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

BOSNIA AND HERZEGOVINA - TEMPORAL APPLICABILITY OF PRINCIPLE OF LEGALITY

The law in BiH has changed several times in recent years.²⁹

- After the disintegration of SFRY, BiH took over the criminal legislation of the former SFRY, the SFRY Criminal Code³⁰. Chapter XVI prescribed criminal acts against humanity and international law (war crimes). Therefore, during the 1992-1995 war in BiH, the SFRY Criminal Code was the applicable law.
- In 1998, after the war, the Federation of BiH (FBiH) passed its own Criminal Code³¹. Chapter XVI of that code prescribed criminal acts against humanity and international law.
- In 2000, the Republika Srpska (RS) passed its own Criminal Code³², in which criminal acts against humanity and international law were prescribed in Chapter XXXIV.
- Brčko District of BiH (BDBiH) also passed its own Criminal Code, which prescribed criminal acts against humanity and international law in Chapter XVI³³.

These pieces of legislation were in force until 2003, when the new Criminal Codes of BiH, the FBiH, the RS and BDBiH were passed³⁴. The BiH Criminal Code (and the only one of the new 2003 codes to do so) regulates criminal acts against humanity and international law. The jurisdiction for the enforcement of this law was assigned to the Court of BiH.

The new 2003 criminal codes of the RS³⁵, the FBiH³⁶ and BDBiH³⁷ no longer prescribe war crimes.

29 *See also* M. Kreso, Problemi vremenskog važenja zakona u predmetima ratnih zločina, (Ne)jednakost pred Zakonom, u: Pravda u Tranziciji, Jul 2006 – broj 5. Available at:<http://www.pravdautranziciji.com/pages/article.php?id=1222>.

30 Decree with the Power of Law was passed; Official Gazette of RBiH, No. 2/92, 11 April 1992; Decree with the Force of Law on Application of the Criminal Code of the Republic of BiH and the Criminal Code of the SFRY taken over as the republic law during the imminent war danger or during the time of war (RBiH Official Gazette No. 6/92); Law on Confirmation of Decrees with the Force of Law (RBiH Official Gazette No. 13/94); Law on Changes and Amendments of the SFRY Criminal Code (RS Official Gazette No. 12/93) changing the title of the SFRY Criminal Code into the Criminal Code of the RS.

31 Official Gazette of the FBiH, No. 43/98

32 Official Gazette of the RS No 22/00

33 Official Gazette of BDBiH, No. 6/00, 1/01 and 3/03.

34 Criminal Code of the FBiH, Official Gazette of BiH, No. 3/03 and 37/33; Criminal Code of the FBiH, FBiH Official Gazette no. 36/03 and 37/03; Criminal Code of the RS, RS Official Gazette No. 49/03; Criminal Code of BDBiH, BDBiH Official Gazette No. 10/03.

35 Official Gazette of the RS, No. 49/03

36 Official Gazette of the FBiH, No. 36/03

37 Official Gazette of BDBiH, No. 10/03.

LAW IN FORCE AT THE TIME OF THE CRIME AND SUBSEQUENT CHANGES

These significant changes have given rise to an issue of interpretation of the temporal applicability of laws. War crimes cases in BiH are tried both on the state (Court of BiH) and the entity level courts.

The courts in the entities and BDBiH may process war crimes in three cases:

- War crimes proceedings pending before the BiH Court, pursuant to the court decision, may be transferred to another court in whose area the criminal offence was attempted or committed, no later than by the time of scheduling the main trial, while taking into account the gravity of the criminal offence, the capacity of the perpetrator and other circumstances of importance in assessing the complexity of the case. The BiH Court may render the aforementioned decision also upon *ex officio* and pursuant to any of the parties or defence counsel's motion, while at the stage of investigation, only upon the prosecution motion. If the war crimes cases were pending before those courts prior to the entry into force of the Criminal Code of BiH (*i.e.*, before 1 March 2003), if the indictment is confirmed or legally in force;³⁸
- War crimes cases pending before other courts or prosecutors' offices in BiH and in which the indictment is not legally effective or confirmed, are finalized by the courts which have territorial jurisdiction unless the BiH Court, *ex officio* or upon the reasoned proposal of the parties or defence attorney, decides to take over such a case while taking into account the gravity of the criminal offence, the capacity of the perpetrator and other circumstances of importance in assessing the complexity of the case;³⁹ or
- War crimes proceedings pending before the BiH Court, pursuant to the court decision, may be transferred to another court in whose area the criminal offence was attempted or committed, no later than by the time of scheduling the main trial, while taking into account the gravity of the criminal offence, the capacity of the perpetrator and other circumstances of importance in assessing the complexity of the case. The BiH Court may render the aforementioned decision also upon *ex officio* and pursuant to any of the parties or defence counsel's motion, while at the stage of investigation, only upon the prosecution motion.⁴⁰
- There are significant differences between the approach of the entity level courts and district courts and the Court of BiH regarding which law is more favourable to the accused:
 - Entity level courts and BDBiH courts generally try war crimes cases

38 BiH Criminal Procedure Law, Art. 449(1), Official Gazette of BiH 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

39 Ibid. at Art.449 (2), Official Gazette of BiH No. 3/03.

40 Report on the work of the Prosecution of BiH for 2005, available at:http://www.tuzilastvobih.gov.ba/files/docs/IZVJESTAJ_ORADU_TUZILASTVA_BIH_2005_BOS.pdf.

arising out of the conflicts in the former Yugoslavia on the basis of the SFRY Criminal Code, as the *in tempore criminis* law and as the law more favourable to the accused.

- The Court of BiH has applied mostly the BiH Criminal Code in relation to war crimes committed during the same period.⁴¹
- Recently, however, the Court of BiH appellate panels acknowledged that, when determining which of the laws—the SFRY Criminal Code or the BiH Criminal Code—were more lenient to the accused with regards to sentencing, consideration should be given to whether the trial panel intends to impose a sentence closer to the minimum or closer to the maximum sentence prescribed. To date, in six proceedings the Court of BiH appellate panel decided that the SFRY Criminal Code should have been applied because its provisions were more favourable to the accused *in concreto*.

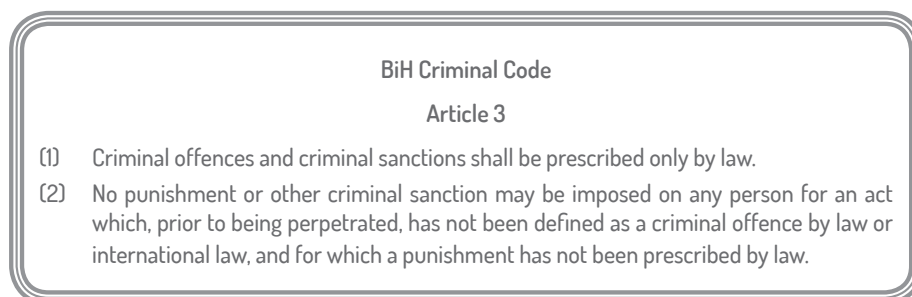
In particular, the issue of the temporal applicability of the laws arises in relation to:

- The applicability of crimes against humanity;
- The applicability of some modes of liability, such as superior responsibility and participation in a JCE; and
- Sentencing.

A more detailed analysis of the temporal applicability of the laws in relation to these topics will be dealt under the headings Crimes against Humanity, Modes of Liability and Superior Responsibility, respectively.

PRINCIPLE OF LEGALITY AND THE APPLICATION OF INTERNATIONAL LAW

The principle of legality is set out in Article 3 of the BiH Criminal Code:⁴²



Notably, in contrast to Article 2 of the SFRY Criminal Code, this provision explicitly refers to international law. This highlights the status and importance of international law in the law of BiH.

⁴¹ It seems that the OSCE Mission to BiH took a position in favour of the BiH Criminal Code application (See “Moving towards a Harmonized Application of Law in War Crimes Proceedings”, OSCE, 2009).

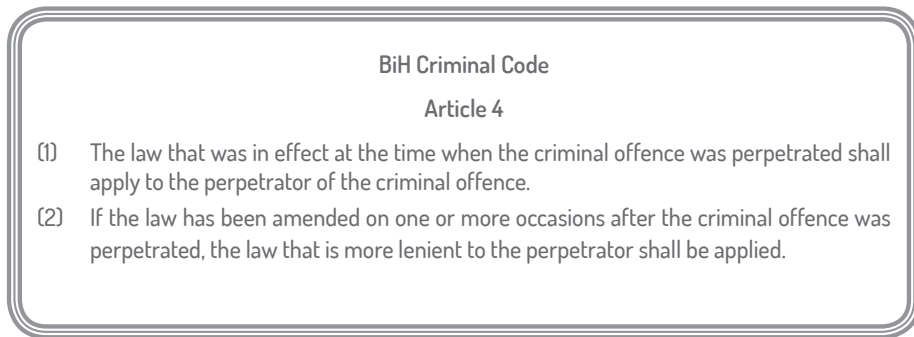
⁴² BiH Criminal Code, Art. 3, (emphasis added).

NON-APPLICABILITY OF THE STATUTE OF LIMITATIONS

In accordance with Article 19 of the BiH Criminal Code, criminal prosecution and execution of a sentence are not subject to the statute of limitations for criminal offences of genocide, crimes against humanity and war crimes, or for other criminal offences that, pursuant to international law, are not subject to the statute of limitations.

***TEMPUS REGIT ACTUM* AND MANDATORY APPLICATION OF THE LAW MORE FAVOURABLE TO THE PERPETRATOR (*LEX MITIOR*)**

The principle of *tempus regit actum* and the principle of applicability of the law more lenient to the accused are set out in Article 4 of the BiH Criminal Code:



The debate over which criminal code to apply (the SFRY Criminal Code or the BiH Criminal Code), and in what circumstances, is a live issue.⁴³ Two main issues arise for consideration:

1. The question of which law is more lenient to a perpetrator must be decided *in concreto*.
2. When determining a sentence for a perpetrator, a court must take into account both the general and special purposes of the punishment as set out in the law.⁴⁴

DETERMINING WHICH LAW IS MORE LENIENT

It is widely accepted, by both legal doctrine and jurisprudence, that only one law in its entirety can be applied to any given case—the law most favourable to the defendant

⁴³ The issue is also incidental to the proceedings *Maktouf and Damjanovic v. BiH* decided by the Grand Chamber of the ECtHR on 18 July 2013. The decision of the Grand Chamber in fact found that the Court of BiH violated Article 7 of the European Convention on Human Rights (ECHR) when it sentenced Maktouf and Damjanovic, who were convicted of war crimes against civilians, under the 2003 BiH Criminal Code sentencing provisions instead of the SFRY Criminal Code sentencing provisions. The Court found that in the particular circumstances of this case, the SFRY Criminal Code was the more lenient law. The ECtHR reiterated that in cases involving war crimes, which are proscribed under both Criminal Codes, the Court is obliged to determine on the basis of the concrete factual circumstances which law is more lenient to the defendant. It is also worth noting that the ECtHR reiterated that the application of the 2003 Criminal Code provisions on crimes against humanity does not constitute a violation of the ECHR because crimes against humanity were not included in the SFRY Code, but they did constitute criminal offences under international law at that time. *Maktouf -AP-1785/06*. The BiH Constitutional Court followed the case law of the ECtHR in case No. AP 325/08 issued on 27 September 2013, sending the case back to the Court of BiH which, on 4 October 2013 issued the decision No. S1 1 K 013410 13KRL, “reopening the proceedings against the defendant”

⁴⁴ See BiH Criminal Code, Arts. 6 and 39; see generally Module 13 on sentencing; see also M. Kreso, *supra* note 91.

in that particular case.⁴⁵ It is not possible to combine the old and new laws,⁴⁶ as the court cannot apply a combined law that does not exist⁴⁷.

The question of which law is more lenient in a specific case cannot be decided *in abstracto*, that is, by a general comparison of the two or more laws in question. It must be decided *in concreto*, by comparison of the laws in question in relation to a particular case.⁴⁸ In doing so, it is necessary to establish all of the relevant circumstances before making an assessment of which law would represent a truly more favourable outcome for the accused.⁴⁹

A comparison of the text of the laws may only provide a reliable answer if the new law decriminalizes conduct which was a criminal offence under the old law, which makes the new law more lenient⁵⁰. In all other cases, when the criminal offence is punishable under both laws, the solution is complex, and it is necessary to establish all of the circumstances which may be relevant when selecting the more lenient law.⁵¹ It is not important which of the two or more laws provides more possibilities for a more favourable judgment, but which one of them truly provides a better outcome for the given perpetrator.⁵² If both laws lead to the same result, the law that was in force at the time of the commission of the crime will be applicable.⁵³

When comparing the laws, different outcomes are possible, depending on several circumstances that may affect a decision on which law is the more lenient law, including⁵⁴:

- Provisions on sentencing and reduction of sentences (which of the laws is more lenient in this regard);
- Measures of warning;
- Possible accessory punishments;
- Alternative sentencing provisions (for example, community service);
- Security measures;
- Legal consequences of conviction; and
- Provisions pertaining to the criminal prosecution, including whether it was conditioned by an approval.⁵⁵

When the criminal offence is punishable under both laws, the solution is complex, and it is necessary to establish all of the circumstances which may be relevant when selecting the more lenient law.

45 Commentary of the BiH Criminal Code, p. 67.

46 *E.g.* because the old one is more favourable regarding the minimum sentence envisaged for that criminal act, and the new one is more favourable regarding the maximum sentence envisaged for that criminal act.

47 Commentary of the BiH Criminal Code, p. 67.

48 *Ibid.* at p. 66; *see also* Commentary of the SFRY Criminal Code; Court of BiH, Stupar et al., Case No. X-KRZ-05/24, 2nd Instance Verdict, 9 Sept. 2009, paras. 494 and 518; *Zijad Kurtovic*, Case No. X-KRZ-06/299, 2nd Instance Verdict, 25 March 2009, paras. 115 and 130.

49 Commentary of the BiH Criminal Code, p. 66.

50 *Ibid.*; *see also* Stupar et al., 2nd inst. of 9 Sept. 2009, para. 495; *Zijad Kurtovic*, 2nd inst. para. 116.

51 Commentary of the BiH Criminal Code, p. 66; *see also* Stupar et al., 2nd inst. of 9 Sept. 2009, para. 496; *Zijad Kurtovic*, 2nd inst. para. 116.

52 Commentary of the BiH Criminal Code, p. 66.

53 *Ibid.*

54 *Ibid.* at p. 66.

55 *Ibid.* at p. 66; *see also* Stupar et al., 2nd inst. of 9 Sept. 2009, para. 497; *Zijad Kurtovic*, 2nd inst. para. 117

It is possible that a law providing a more severe sentence is considered more lenient to the accused, because the application of its other provisions leads to a more favourable result for the accused.

Thus, it is possible that a law providing a more severe sentence is considered more lenient to the accused, because the application of its other provisions leads to a more favourable result for the accused (e.g. if it envisaged a new or more favourable basis for excluding criminal responsibility or release from punishment etc.).⁵⁶

As noted above, the court must apply one law in its entirety, and cannot combine two different laws. Therefore, challenges may arise when determining how to sentence an accused when faced with two different laws.

TRIAL AND PUNISHMENT FOR CRIMES UNDER INTERNATIONAL LAW

In 2004, the BiH Criminal Code was amended to include Article 4(a) which deals with the trial and punishment for criminal offences pursuant to the general principles of international law.⁵⁷

BiH Criminal Code

Article 4 (a)

Articles 3 and 4 of this Code shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law.

The BiH Court has relied on Article 4(a) when dealing with cases where accused were charged with crimes against humanity.⁵⁸

Perpetrators should not be permitted to evade trial and punishment in cases where specific conduct constituting a criminal offence according to the general principles of international law was not criminalised.

The BiH Court panels, for example, acknowledged that crimes against humanity were not set out in the SFRY Criminal Code.⁵⁹ Therefore, because crimes against humanity were part of customary international law at the relevant time, the Court of BiH applied the BiH Criminal Code, which explicitly envisages crimes against humanity as criminal acts, rather than applying the SFRY Criminal Code which did not contain such a provision.⁶⁰

In the *Zijad Kurtovic* case, the appellate panel held that Article 4(a) of the BiH Criminal Code was applicable to crimes against humanity committed at the time when the SFRY Criminal Code was still in force, as the SFRY Criminal Code did

⁵⁶ Commentary of the BiH Criminal Code, p. 66

⁵⁷ Ibid. at p130 (*Kurtovic* case; *Mitrovic* case)

⁵⁸ Ibid.

⁵⁹ Ibid. at p131

⁶⁰ This accords with Art.3 (2) of the BiH Criminal Code.

not regulate such crimes.⁶¹ The panel noted that if Article 4(2) of the BiH Criminal Code were applied (mandating the application of the more lenient law), then it would follow that the SFRY Criminal Code was more lenient for the perpetrator because it did not criminalize the act committed by the accused at all, and, accordingly, the perpetrator could neither be tried nor punished for this criminal offence.⁶² The panel held that it was therefore necessary to either apply Article 4(a) of the BiH Criminal Code or to directly apply Article 7(2) of the ECHR, which, pursuant to Article 2/II of the BiH Constitution, is directly applicable in the BiH and has primacy over other laws.⁶³ These Articles bar perpetrators from evading trial and punishment in cases where specific conduct constituting a criminal offence according to the general principles of international law was not criminalized.⁶⁴ The panel concluded:

“[...] Article 4a of the CC B-H provides for an exceptional departure from the principles under Articles 3 and 4 of the CC B-H in order to ensure the trial and punishment for such conduct which constitutes criminal offense under international law, that is, which constitutes a violation of norms and rules that enjoy general support of all nations, that are of general importance and/or are considered or constitute universal civilization achievements of the modern criminal law, where such conduct was not defined as criminal in national criminal legislation at the time of perpetration”.

The same reasoning was applied by the appellate panel in other cases, such as in the *Stupar et al.* case, the *Petar Mitrovic* case, and the *Rašević and Todovic* case.⁶⁵

It should be noted that according to one view, trial and punishment for any act or omission considered as criminal pursuant to the general principles of international law at the time of the commission of the crime could not be undertaken if the punishment for that crime was not clearly set out by law at the time of the commission of the crime. In line with this reasoning, even if it were accepted that crimes against humanity were considered as criminal under international law at the time of their commission, such crimes could not be tried either under the SFRY Criminal Code or the BiH Criminal Code, as the punishment for crimes against humanity was not set out by law at the time of the commission of the crimes. However, it needs to be noted here that it seems that this view was not even accepted by the former SFRY jurisprudence, as the trials were held and persons convicted for war crimes even though punishments for such crimes were not set out at the time of their commission.

61 Kurtovic, 2nd inst., p120

62 Ibid.

63 Art. 7(2) of the ECHR is nearly identical to Art. 4(a) of the BiH Criminal Code.

64 Ibid.

65 Stupar et al., 2nd inst. of 9 Sept. 2009, paras. 509-512; Mitrovic, 2nd inst., paras. 202-205; Rašević et al., 2nd inst., pp. 30-31 (pp. 32-33 BCS).

GENOCIDE

THE GENOCIDE CONVENTION

Genocide was described by the UN General Assembly as “a denial of the right of existence of entire human groups, as homicide is the denial of the right to life of individual human beings”.⁶⁶

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

- Committing a prohibited act
- With intent to destroy, in whole or in part
- A protected group, as such.

The Genocide Convention, ratified by BiH, Croatia and Serbia⁶⁷, obligates states to prevent and punish the crime.

The core provisions of the Convention, including the definition of the crime, also exist as customary international law, which is also reflected in the jurisprudence of the Court of BiH⁶⁸.

The Statutes of the ICTY and the ICTR copy the definition of the crime verbatim from the Genocide Convention⁶⁹.

ICTY Statute Article 4: Genocide

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

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

The following acts shall be punishable:

- (a) *genocide*;
- (b) *conspiracy* to commit genocide;
- (c) direct and public incitement to commit genocide;

⁶⁶ G.A. RES. 96/1 U.N. DOC. A/RES/96/1 (Dec. 11, 1946).

⁶⁷ The Genocide Convention was ratified by the SFRY and therefore BiH, Croatia and Serbia are also parties to this convention. United Nations, U.N. Treaty Collection, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en (accessed 6/13/2011).

⁶⁸ See, e.g., ICJ Advisory Opinion on Reservations to the Genocide Convention, and UN Secretary-General's Report on the establishment of the ICTY, 3 May 1993, S/25704.

⁶⁹ The Rome Statute applies a somewhat different definition. See below, sections 6.3.7 and 6.3.2.

- (d) attempt to commit genocide;
- (e) complicity in genocide

KEY CONSIDERATIONS

In light of this definition, key considerations when investigating and prosecuting possible cases of genocide include:

- However serious the crime, it is very narrowly defined, and many mass killings cannot *per se* be considered genocide.
- Genocide is a crime against a group, even if it involves harming individuals.
- Genocide requires that the perpetrator have a very specific mental state while committing the crime: a specific intent to destroy a protected group. It is a *jus cogens* crime⁷⁰ and its prohibition is an *erga omnes* obligation that all states owe to the international community.⁷¹

BOSNIA AND HERZEGOVINA - DEFINITION OF GENOCIDE

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

The text of the BiH Criminal Code defines genocide exactly as it is defined in international criminal law.

BiH Criminal Code

Article 171

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

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group,

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

⁷⁰ Case concerning Armed Activities on the Territory of the Congo (DRC v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, ICJ Judgment of 3 Feb. 2006, para. 64.

⁷¹ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion (1951) ICJ Rep 15, 23.

This provision of the BiH Criminal Code is identical in most respects to Article 141 of the SFRY Criminal Code and Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide⁷². However, Article 141 of the SFRY Criminal Code includes forcible dislocation of the population as a prohibited act. This could be analogous to the prohibited act of systematic expulsion from homes, considered by the international criminal tribunals as a method of deliberately inflicting conditions of life calculated to bring about the physical destruction, in whole or in part, of the protected group.

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

- The *actus reus* of the offence, which consists of one or several of the acts enumerated under Article 171 [see text box above];
- The *mens rea* of the offence, which is described as the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.⁷³

RECOGNITION OF THE CUSTOMARY STATUS OF THE CRIME OF GENOCIDE

The Court of BiH has held that although the application of BiH Criminal Code Article 171 need not be premised on the customary status of the crime of genocide, it is indisputable that genocide is recognized as a crime under customary international law.⁷⁴ In this holding, the Court of BiH relied on the ICJ Advisory Opinion in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Secretary General's Report pursuant to Security Council Resolution 808 and Security Council Resolution 827, as well as jurisprudence from the ICTY and the ICTR⁷⁵.

The trial panel also stressed that:

- BiH Criminal Code Article 171, as well as SFRY Criminal Code Article 141 before it, were adopted as domestic law in order to meet the State's obligation under the Genocide Convention;
- The SFRY took an active role in the drafting of the Genocide Convention and
- The SFRY ratified the Genocide Convention in 1950⁷⁶.

The trial panel concluded that Article 171 was “domestic law [...] derived from international law” and therefore brings with it “international legal heritage [and] the international jurisprudence that applies it” as persuasive authorities⁷⁷.

⁷² See above 6.4.1.1; see also Stupar et al., 1st inst., p. 52 (p. 54 BCS); Trbic, 1st inst., para. 168; Stevanovic, 1st inst., p. 42, (p. 39 BCS); Mitrovic, 1st inst. p. 43 (p. 45 BCS); Vukovic, 1st inst., para. 547.

⁷³ Trbic, 1st inst., para. 191.

⁷⁴ See Stupar et al., 1st inst., p. 53 (p. 55 BCS); Mitrovic, 1st inst. p. 44 (p. 46 BCS); Stevanovic, 1st inst., p. 43 (Eng.), p. 40; Trbic, 1st inst., para. 171.

⁷⁵ See, e.g., Stupar et al., 1st inst., p. 53 (p. 55 BCS); Mitrovic, 1st inst. p. 44 (p. 46-47 BCS) and references therein; Stevanovic, 1st inst., p. 43 (Eng.), p. 40; Trbic, 1st inst., para. 171.

⁷⁶ See, e.g., Stupar et al., 1st inst., p. 53 (p. 56 BCS); Mitrovic, 1st inst. p. 44 (p. 47 BCS) and references therein; Stevanovic, 1st inst., p. 43 (Eng.), p. 41; Trbic, 1st inst., para. 173.

⁷⁷ Ibid.

SPECIFIC INTENT

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

“Genocide is distinct from many other crimes because it includes a [...] specific intent, included as an element of the crime, which requires the perpetrator to clearly seek to produce the act charged. [...] A person may only be convicted of genocide if he/she committed one of the enumerated acts with the specific intent. The offender is culpable if he/she intended the act committed to extend beyond its actual commission, for the realization of an ulterior motive, which is to destroy, in whole or part, the group of which the victims are part of”⁷⁸.

Genocidal intent is:

- 1) The aim to destroy
- 2) In whole or in part
- 3) A national, ethnic, racial or religious group.

Relying on international practice and jurisprudence, the Court of BiH defined in Article 171 genocidal intent as the aim to destroy, in whole or in part, a national, ethnic, racial or religious group⁷⁹.

“THE AIM TO DESTROY”

The Court of BiH has also held that the destruction, in whole or in part, of a protected group must be the deliberate and conscious aim of the underlying crime(s).⁸⁰ Referring to Article 2 of the Genocide Convention, the court further held that the term ‘aim’ encompasses the intent to destroy the group ‘as such’, and noted that:

[T]he evidence must establish that ‘the proscribed acts were committed against the victims *because of* their membership in the protected group,’ although they need not have been committed ‘*solely* because of such membership’.⁸¹

According to the Court of BiH, the “destruction” element is established if the perpetrator intended to achieve the physical or biological destruction of the group—i.e. the destruction of its material existence.⁸²

This destruction can be accomplished through many means, which constitute the prohibited acts listed in Article 171 of the BiH Criminal Code, the Genocide Convention and the Geneva Convention.⁸³

Genocidal intent can be established even if there is no proof that the group was in fact destroyed.⁸⁴ While destruction in fact may certainly provide evidence of genocidal intent, it is not necessary to establish that the perpetrator, alone or together with others, successfully realized their aim to destroy the group.⁸⁵

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

Note: Failed attempts at genocide do not relieve the perpetrators of responsibility for their acts of genocide.⁸⁶

78 *Trbic*, 1st inst., para. 192,

79 *See, e.g., Stupar et al.*, 1st inst., p. 56 (p. 59-60 BCS) and references therein; *Mitrovic*, 1st inst. p. 47 (p. 50 BCS) and references therein; *Trbic*, 1st inst., para. 186.

80 *Stupar et al.*, 1st inst., p. 56 (p. 60 BCS); *Mitrovic*, 1st inst. p. 47 (p. 51 BCS); *Trbic*, 1st inst., para. 187; *See also Vukovic*, 1st inst., para. 568.

81 *Ibid.*

82 *Stupar et al.*, 1st inst., p. 56-57 (p. 60-61 BCS); *Mitrovic*, 1st inst. p. 48 (p. 51-52 BCS); *Trbic*, 1st inst., para. 188; *See also Vukovic*, 1st inst., para. 569.

83 *Ibid.*

84 *Mitrovic*, 1st inst., p. 96 (p. 114 BCS) and references therein.

85 *Ibid.*

86 *Ibid.*

“IN WHOLE OR IN PART”

Regarding the element “in whole or in part”, the Court of BiH concurred with the reasoning of the ICTY appeals chamber and the ILC that the intention to destroy a group “in part” requires the intention to destroy a “substantial part of that group”.⁸⁷

The specific intent to destroy a part of the group may extend only to a limited geographic area.⁸⁸

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

- Numeric size;
- The relative size of the part to the total size of the group;
- Its prominence within the group;
- Whether the part of the group is emblematic of the overall group;
- Whether the part is essential to survival of the group; and
- The beliefs and perceptions of the perpetrator regarding the substantiality of a part of the group.⁸⁹

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

However, the Court of BiH also noted that the part of the group in question must objectively be a substantial part of the group at large.⁹⁰

In *Milos Stupar et al.* case, the defence argued that the group of Muslims in Kravica did not constitute a substantial or essential part of the overall group of 40,000 men, women and children which was the total number of the Muslim population in the territory of the Municipality of Srebrenica, according to the 1991 Census.⁹¹ The appellate panel held:

[T]he element of *substantiality* does not necessarily refer to the quantitative aspect, as claimed by the defence [...]. One of the aspects pointed out in the trial Verdict is that the element of *substantiality* implies: *a substantial part of a protected group*. The trial panel found that, in the circumstances surrounding the relevant time, given the roles of men and women in the community, the destruction of the male population would have a greater impact on the ultimate destruction of the group than the killing of the female population. The Appellate Panel finds these arguments to be reasonable.⁹²

“A NATIONAL, RACIAL, ETHNICAL, OR RELIGIOUS GROUP”

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

87 *Stupar et al.*, 1st inst., p. 57 (p. 61 BCS); *Mitrović*, 1st inst., p. 48 (p. 52 BCS); *Trbić*, 1st inst., para. 189; *Vuković*, 1st inst., para. 556.

88 *Stupar et al.*, 1st inst., p. 57 (p. 61 BCS); *Mitrović*, 1st inst., p. 48 (p. 52 BCS); *Trbić*, 1st inst., para. 189.

89 *Ibid.*

90 *Ibid.*

91 *Stupar et al.*, 2nd inst. of 9 Sept. 2009, para. 375.

92 *Ibid.* at para. 376 (emphasis in original).

Whether a group is a protected group should 'be assessed on a case-by-case basis by reference to the *objective* particulars of a given social or historical context, and by the *subjective* perceptions of the perpetrators'. The protected group can be subjectively identified 'by using as a criterion the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics'.⁹³

HOW DO YOU PROVE SPECIFIC INTENT?

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

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

- A case-by-case basis, from
- A certain number of presumptions of fact; and
- The circumstances surrounding the accused's acts,
- As demonstrated by the material evidence submitted to the court.⁹⁴

A general intent to commit a prohibited act combined with an overall awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient to establish the crime of genocide.⁹⁵

Genocidal intent can be inferred from presumptions of fact.

Even assuming that the accused knew that the underlying act would lead to a result connected to a genocidal plan of others, the evidence must be reviewed to determine whether the accused possessed the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.⁹⁶

Regardless of the extent of the atrocity that occurred, the court cannot enter a conviction for the crime of genocide without sufficient evidence of specific genocidal intent as required by law.⁹⁷

TEST FOR PROVING SPECIFIC INTENT

In order to examine the existence of the genocidal intent, the trial panel in *Milorad Trbic* case used a test developed by the panel in *Miloš Stupar et al. (Krnica)* case and expanded it to include a review of evidence regarding:⁹⁸

- The general context of events in which the perpetrator acted including any plan to commit the crime;
- The perpetrator's knowledge of that plan; and
- The specific nature of the perpetrator's acts including the following:

⁹³ *Stupar et al.*, 1st inst., p. 57-58 (p. 61-62 BCS); *Mitrović*, 1st inst., p. 49 (p. 52-53 BCS); *Trbic*, 1st inst., para. 190.

⁹⁴ *Trbic*, 1st inst., para. 193, 197, 201; *Stupar et al.*, 1st inst., p. 58 (p. 62 BCS); *See also Mitrović*, 1st inst., p. 49 (p. 53 BCS).

⁹⁵ *Trbic*, 1st inst., para. 194 and references therein

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.* at para.202; *Stupar et al.*, 1st inst., p. 118 *et seq.* (p. 140 *et seq.* BCS).

- o No acts to the contrary for genocidal intent (*Kravica* case, Second Instance Verdict);
- o Single mindedness of purpose;
- o Efforts to overcome resistance of victims;
- o Efforts to overcome the resistance of other perpetrators;
- o Efforts to bar escape of victims;
- o Persecutory cruelty to victims;
- o Ongoing participation within the act itself;
- o Repetition of destructive acts i.e. more than one act or site;
- The acts themselves (The *Kravica* test):
 - o The number of victims;
 - o The use of derogatory language toward members of the targeted group;
 - o The systematic and methodical manner of killing;
 - o The weapons employed and the extent of bodily injury;
 - o The methodical way of planning;
 - o The targeting of victims regardless of age;
 - o The targeting of survivors; and
 - o The manner and character of the perpetrator's participation.

As held by the trial panel in *Milorad Trbic*, when taken together, an analysis of these factors can either establish the perpetrator's intent beyond a reasonable doubt or develop evidence that would mitigate and/or negate this finding.⁹⁹

CREATING REASONABLE DOUBT ABOUT SPECIFIC INTENT

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

For example, the court should consider whether the accused:

- Showed any resistance to the plan;
- Engaged in any deliberate acts which could interfere with the plan or assist in its failure;
- Tried to save a life;
- Showed any lack of awareness as to what the plan was for;
- Showed remorse; and
- Took any action to seek reconciliation.¹⁰⁰

The panel also noted that these last factors would not necessarily *preclude* possessing the requisite intent at the time, but could raise issues as to the certainty of the intent at the time the crime was committed.¹⁰¹

Moreover, it must be understood that the totality of the evidence is what is decisive—there is no one controlling factor, nor are all factors necessary or even relevant.¹⁰²

⁹⁹ *Trbic*, 1st inst., para. 202.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.* emphasis added.

¹⁰² *Ibid.*

CASE STUDY: KNOWLEDGE OF PLAN TO COMMIT GENOCIDE NOT ENOUGH

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

- They had knowledge of a genocidal plan;
- They had participated in killing members of the group with intent; and
- They shared genocidal intent.¹⁰³

However, the appellate panel held that, although the trial panel reasonably found that the accused possessed knowledge of the genocidal plan and intended to kill members of the protected group, the trial panel had erroneously found that the accused also acted with a specific intent to destroy in part or in whole the national, ethnic, racial or religious group of people.¹⁰⁴ Such specific intent was not proven beyond a reasonable doubt from the established state of facts.¹⁰⁵ The appellate panel stressed:

“[T]he Accused’s knowledge of the genocidal plan and the genocidal intent of others is not sufficient to find them guilty of the criminal offence of Genocide. Entering a conviction for Genocide, one of the most severe crimes against mankind, requires evidence that the Accused themselves possessed the genocidal intent, rather than the mere knowledge of such an intent of others”.¹⁰⁶

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

- The accused persisted in performing the task started;
- The assignment of tasks set beforehand (who was to keep guard, who was to shoot, by which turn, who was to refill [...]);¹⁰⁷
- Their commitment to the execution of the task they were assigned;
- The number and age of the victims;
- The weapons employed; and
- The slurs used.

According to the appellate panel, these factors indicated that although the accused eagerly performed their task, they could not be equalled to others who took the unlawful actions with the specific aim to destroy in part or in whole the protected group.¹⁰⁸

103 *Stupar et al.*, 2nd inst. of 9 Sept. 2009, paras. 531-535.

104 *Ibid.* at para. 538.

105 *Ibid.* at para. 552.

106 *Ibid.* at p. 548; See also Court of BiH, *Petar Mitrović*, Case No.X-KRZ-05/24-1, Second Instance Verdict, 7 Sept. 2009, para. 239.

107 *Stupar et al.*, 2nd inst. of 9 Sept. 2009, para. 552.

108 *Ibid.*

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

This witness stated in his testimony that, upon reaching Bratunac and when searching the terrain, they realized that their task would be to “kill the men and separate those infirm”. According to this witness, even while in Srednje, some of the members of the Detachment protested against their transfer to Bratunac. This witness himself was thinking of running away and he stated that the reason for their protests was the fact that they did not want to meet with people they knew, as they supposed that they would be killed.

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

The Appellate Panel finds the foregoing facts important in determining the non-existence of the genocidal intent of the Accused [...].¹⁰⁹

The appellate panel also stressed the importance of the *in dubio pro reo* principle and concluded that certain presented facts (protests against leaving for Bratunac, concerns about what had been done and in which manner) raised doubts about the reasonableness of the finding of the trial panel that the accused possessed the requisite genocidal intent.¹¹⁰

The appellate panel in this case found that, based on the evidence presented and the established facts, it was not possible to find that the accused held the intent required beyond a reasonable doubt.¹¹¹

A similar conclusion was reached by the appellate panel for the accused, Petar Mitrovic. In that case, the appellate panel concurred with the trial panel’s finding on the existence of the intent of the accused to kill members of the protected group and that the accused was aware of the existence of the genocidal plan which was subsequently executed.¹¹²

¹⁰⁹ Ibid. at para. 553-555.

¹¹⁰ Ibid. para. 555-556, 561; see also *Mitrovic*, 2nd inst., para. 246-247.

¹¹¹ *Stupar et al.*, 2nd inst. of 9 Sept. 2009, para. 562 (in this case, the appeals chamber found the accused guilty as accessories to genocide, not as co-perpetrators).

¹¹² *Mitrovic*, 2nd inst., paras. 228-230, 235.

The trial panel had inferred that the accused, apart from having knowledge of the genocidal plan and the intent to kill the members of the protected group, also possessed a special intent to destroy in part or in whole the national, ethnic, racial or religious group of people. The appellate panel, however, found that this inference had not been proven beyond a reasonable doubt on the basis of the established facts.¹¹³

The trial verdict states that:

- More than 1000 persons were executed in the Kravica warehouse;
- The accused took part in those killings;
- He knew that people he was shooting at were Bosniacs who had lived in the protected zone of Srebrenica; and that
- There were verbal exchanges between the prisoners and the shooters containing ethnic and religious slurs and curses.¹¹⁴

The trial panel emphasized:

The killing proceeded in a methodical manner. Three, including Mitrovic, were assigned to keep guard at the back of the warehouse to prevent any of the victims from escaping through the window openings along the back wall. Other members of the Detachment, who had marched the column to the warehouse, were ordered to make a semi-circle in front of the warehouse. The right section of the warehouse, where the column was deposited and which was not secured, was the side first targeted; while the left side, which was secured, was targeted second. Between the massacre in the right side and the massacre in the left, the shooters took a break. The manner in which they targeted the rooms was also organized. In the first room, the first to fire was the operator of the M84 machine gun, shooting from the side of the door opening. He was followed by the other shooters who cross-fired from both sides of the opening into and through the room of dying men. The shooters would change places at the doorways in order to reload their weapons. Clips were being refilled by one person designated for this task from additional ammunition supplies on the site. At the conclusion of the shooting, the Accused Džinic and at least one other man threw hand grenades into the room full of dead and dying men. The grenades came from two boxes that had been supplied to the site. After a break during which the men relaxed, the Accused resumed the killing and commenced firing on the Bosniacs held in the left side of the warehouse, in the same order and in the same manner. Throughout, the three Accused, Mitrovic together with Branislav Medan and Slobodan Jakovljevic, at the rear of the warehouse continued to ensure that no prisoner escaped death. The task was undertaken in a calculated and thorough way. The Accused, together with others, remained at the warehouse until officially relieved by another unit sent for that purpose.¹¹⁵

113 Ibid. at paras. 228-230, 235.

114 Ibid. at para. 231 (appellate panel's reference to the trial verdict).

115 Ibid. at para. 232 (appellate panel's reference to the trial verdict).

The trial panel found:

From the manner and character of their participation, it is apparent that the Accused did not simply intend to kill the victims; they intended to destroy them. The acts in which the Accused participated for around an hour and a half were the most physically destructive acts imaginable, committed and experienced at close range, within the sight and smell of the carnage and of the sounds of the dying. Trifunovic and Radovanovic, members of the Second Detachment, stood at the entrance of the rooms and emptied one clip after another into the mutilated bodies of the dying men piled on the floor. The Accused and members of the Second Detachment, Mitrovic, Jakovljevic and Medan, stood at their stations at the open windows at the other side of the rooms witnessing the slaughter, guns ready to prevent any attempts by the victims to escape. The Platoon member, Džinic, lobbed grenade after grenade at close range into the masses of dying human beings. All persisted in their task for a total of around an hour and a half, in a systematic and methodical way, and even took a break after the first room, before starting all over again to reduce the living men in the second room to the condition of those in the first. To persist in imposing this level of devastation for the length of time that they did manifests a determination to destroy that has few equals.¹¹⁶

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

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

The evidence of the Accused's knowledge of the genocidal plan and genocidal intent of others is not sufficient to find him guilty of the criminal offence of genocide. Entering a conviction for genocide, one of the most severe crimes against mankind, requires evidence that the Accused himself possessed the genocidal intent, rather than the mere knowledge of such intent by others.¹¹⁷

TWO TYPES OF MENS REA

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

- The specific intent to commit genocide and the nature of the group targeted; and
- The elements of the underlying prohibited acts.¹¹⁸

¹¹⁶ Ibid. at para. 234 (appellate panel's reference to the trial verdict).

¹¹⁷ *Mitrovic*, Appellate verdict, paras.228-230, 235, 239; *See also, Vukovic*, 1st inst., para. 577.

¹¹⁸ *See, e.g., Stupar et al.*, 1st inst., p. 54 (p. 56 BCS); *Mitrovic*, 1st inst., p. 45 (p. 47 BCS); *Trbic*, 1st inst., para. 174.

The Court of BiH trial panel has held that while the underlying acts of genocide can be characterized as the *actus reus* of genocide, these underlying acts also have both *actus reus* and *mens rea* elements.¹¹⁹

Thus, according to the Court of BiH:

- Genocide requires distinct inquiries into the general elements of genocide AND the elements of the underlying act.
- The crime of genocide requires proof of two distinct *mens rea*, the *mens rea* of the underlying act and the genocidal *mens rea*.¹²⁰

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

According to the Court of BiH, prohibited genocidal acts are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences are likely to result.¹²¹

The individual underlying acts do not require premeditation. The only consideration is that the act should be done in furtherance of the genocidal intent, so that for the crimes of genocide to occur, the *mens rea* must be formed *prior to* the commission of the prohibited genocidal acts.¹²²

IF SPECIFIC INTENT CANNOT BE PROVEN

If the specific intent required for genocide cannot be proven, an accused could be found guilty as an accessory to genocide in accordance with Article 31 of the BiH Criminal Code,¹²³ and not as co-perpetrator.¹²⁴

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

PROHIBITED ACTS

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

The Court of BiH has noted that the physical or biological destruction of a protected group can be accomplished through a variety of means, including but not limited to killings, which are outlined in the Geneva Convention and the laws of BiH.¹²⁵ The court also noted that these means can be committed singly or in combination.¹²⁶

119 See, e.g., *Stupar et al.*, 1st inst., p. 54, fn 26 (p. 56, fn26 BCS); *Mitrovic*, 1st inst., p. 45 fn 25 (p. 47 fn 25 BCS); *Trbic*, 1st inst., para. 171, fn 93.

120 See, e.g., *Stupar et al.*, 1st inst., p. 54, fn 26 (p. 56, fn26 BCS); *Mitrovic*, 1st inst., p. 45 fn 25 (p. 47 fn 25 BCS); *Trbic*, 1st inst., para. 174, fn 93, para. 194.

121 *Trbic*, 1st inst., para. 194.

122 *Ibid.* at para. 196

123 BiH Criminal Code, Art. 31.

124 *Stupar et al.*, 2nd inst. of 9 Sept. 2009 para. 565; see also *Mitrovic*, 2nd inst., paras. 256, 261; *Trbic*, 1st inst., para. 792; *Vukovic*, 1st inst., paras. 580-581.

125 *Stupar et al.*, 1st inst., p. 56-57 (p. 60-61 BCS); *Mitrovic*, 1st inst., p. 48 (p. 51-52 BCS); *Trbic*, 1st inst., para. 188; See also *Vukovic*, 1st inst., para. 569.

126 *Stupar et al.*, 1st inst., p. 56-57 (p. 60-61 BCS); *Mitrovic*, 1st inst., p. 48 (p. 51-52 BCS); *Trbic*, 1st inst., para. 188; See also *Vukovic*, 1st inst., para. 569

KILLING MEMBERS OF THE GROUP

Pursuant to Article 171(a) of the BiH Criminal Code, the *actus reus* of genocide includes “killing members of the group”. The Court of BiH trial panel concluded that, at a minimum, “killing members of the group” includes acts of murder as otherwise defined in domestic law.¹²⁷

In particular, the trial panel concluded that Article 171(a) prohibits “depriving another person of his life” as also prohibited as a crime against humanity and a war crime pursuant to Articles 172(1)(a), 174(a) and 175(a) of the BiH Criminal Code.¹²⁸

The Court of BiH trial panel identified the elements of the crime of murder as:

- The deprivation of life; and
- The direct intention to deprive of life, as the perpetrator was aware of their act and wanted the act to be perpetrated.¹²⁹

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

The qualification “members of a group” does not imply *per se* that the number of victims must be large or significant.¹³⁰ Relying on ICTR jurisprudence, the Court of BiH trial panel held that, in theory, the killing of only one victim can still amount to an act constituting the *actus reus* of the crime of genocide.¹³¹ The qualification “members of the group” requires that the victims of the killings must be members in fact of the national, ethnical, racial or religious group that the perpetrator sought to destroy in whole or in part.¹³²

Concealment of killings can also be a part of this crime. As found by the trial panel in the *Milorad Trbic* case, burying and re-burying victims of a mass execution can also comprise “killing members of a group”.¹³³ The panel endorsed the finding of the

ICTY that burial of victims of mass executions right after they are killed comprises part of the killing operation.¹³⁴ The court went on to find that re-burials also comprise killing:

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

The Panel [...] regards the further reburials as part of the killing operation as well. Indeed, in the present case, the only difference between the burials of July 1995 and the reburials of September 1995 is one of time; for the remaining part, the acts and the intent are the same.¹³⁵

127 See, e.g., *Stupar et al.*, 1st inst., p. 54 (p. 56 BCS); *Mitrovic*, 1st inst., p. 45 (p. 47 BCS); *Stevanovic*, 1st inst., p. 44 (p. 41); *Trbic*, 1st inst., para. 176.

128 See, e.g., *Stupar et al.*, 1st inst., p. 54 (p. 56-57 BCS); *Mitrovic*, 1st inst., p. 45 (p. 47 BCS); *Stevanovic*, 1st inst., p. 44 (p. 41 BCS); *Trbic*, 1st inst., paras. 176, 778.

129 See, e.g., *Stupar et al.*, 1st inst., p. 54 (p. 57 BCS); *Mitrovic*, 1st inst., p. 45 (p. 48 BCS) and references therein; *Stevanovic*, 1st inst., p. 44 (p. 41 BCS); *Trbic*, 1st inst., paras. 177, 778.

130 See, e.g., *Stupar et al.*, 1st inst., p. 54 (p. 57 BCS); *Mitrovic*, 1st inst., p. 45 (p. 48 BCS); *Stevanovic*, 1st inst., p. 44 (p. 41 BCS); *Trbic*, 1st inst., paras. 178, 780.

131 See, e.g., *Stupar et al.*, 1st inst., p. 54 (p. 57 BCS) and references therein; *Mitrovic*, 1st inst., p. 45 (p. 48 BCS) and references therein; *Stevanovic*, 1st inst., p. 44 (p. 41 BCS) and references therein; *Trbic*, 1st inst., paras. 178, 780.

132 See e.g. *Stupar et al.*, 1st inst., p. 54 (p. 57 BCS) and references therein; *Mitrovic*, 1st inst., p. 45 (p. 48 BCS) and references therein; *Stevanovic*, 1st inst., p. 44 (p. 42 BCS) and references therein; *Trbic*, 1st inst., paras. 179, 780.

133 *Trbic*, 1st inst., para. 180.

134 Ibid.

135 Ibid.

CAUSING SERIOUS BODILY OR MENTAL HARM TO MEMBERS OF THE GROUP

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

Relying on ICTY jurisprudence, the trial panel in *Milorad Trbic* case held that whether or not the harm allegedly caused by the perpetrator is “serious” should be assessed on a case-by-case basis and with due regard for the particular circumstances.

Moreover, the panel held that the harm need not be permanent or irremediable, but it must be harm that results in a “grave and long-term disadvantage to [a] person’s ability to lead a normal and constructive life”.¹³⁶

Bodily harm refers to harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses.¹³⁷

Mental harm refers to more than minor or temporary impairment of mental faculties.¹³⁸

The panel in that case also relied on ICTY and ICTR jurisprudence to find that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury and that the harm must be inflicted intentionally.¹³⁹

.....
Burial of
victims of mass
executions right
after they are
killed comprises
part of the
killing operation.
.....

FORCIBLE TRANSFER

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

The forcible transfer must be “conducted in such a way that the group can no longer reconstitute itself”.¹⁴⁰

MODES OF LIABILITY

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

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

136 Ibid.

137 Ibid.

138 Ibid.

139 Ibid.

140 *Stupar et al.*, 1st inst., p. 56-57 (p. 60-61 BCS); *Mitrović*, 1st inst., p. 48 (p. 51-52 BCS); *Trbic*, 1st inst., p. 188; see also, *Vuković*, 1st inst., para. 569.

ORGANIZING/JOINING GROUP OR INSTIGATING GENOCIDE

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

- “organizing” a group of people for the purpose of perpetrating genocide;
- “becoming a member” of such a group; as well as
- “calling on or instigating” the perpetration of genocide.¹⁴¹

This provision encompasses some of the various criminal modes of liability found in international criminal law, including instigating and possibly JCE.

The same Article provides for a lower sentence for or pardoning from punishment a person who exposes the group before a criminal offence is perpetrated in its ranks or on its account.¹⁴²

Article 176 is almost identical to SFRY Criminal Code Article 145.

PLANNING, ORDERING, PERPETRATING AND AIDING AND ABETTING

Under Article 180, a person who planned, ordered, perpetrated or otherwise aided and abetted in the planning, preparation or execution of genocide shall be guilty of the criminal offence.¹⁴³

Although no such specific provision existed in the SFRY Criminal Code, some forms of participation, such as ordering and perpetrating, were already incorporated into Article 141 of the SFRY Criminal Code, which defined genocide. Other forms of participation such as planning and aiding and abetting were to be found in the general provisions dealing with co-perpetrators and accessories to a crime (Articles 22-24 of the SFRY Criminal Code).

ACCESSORY LIABILITY

An accessory, as a form of complicity, represents the intentional support of a criminal offence committed by another person.¹⁴⁴ That is, it includes actions that facilitate the perpetration of a criminal offence by another person.¹⁴⁵

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

If a person is only aware of the genocidal intent of the perpetrator, but the person did not share the intent, the person is an accessory to genocide. In the present case, considering that all of the essential elements of the criminal offence of Genocide have been satisfied, except for the genocidal intent (as stated above), the Appellate Panel finds that the actions of the Accused constituted the acts of aiding/accessory in the perpetration of the referenced criminal offence.¹⁴⁶

141 BiH Criminal Code, Art. 176.

142 BiH Criminal Code, Art. 176(3).

143 BiH Criminal Code, Art. 180(1).

144 See *Stupar et al.*, 2nd inst. of 9 Sept. 2009 para. 567; see *Mitrovic*, Appellate Verdict, para. 258; see also *Vukemic*, 1st inst., para. 579.

145 *Stupar et al.*, 2nd inst. of 9 Sept. 2009, para. 567; see also *Mitrovic*, Appellate Verdict, para. 258.

146 *Stupar et al.*, 2nd inst. of 9 Sept. 2009, paras. 570-571, 573.

The appellate panel reached a similar conclusion for accused *Petar Mitrovic*, holding that “A person who does not share the intent to commit genocide, but who intentionally helps another to commit genocide, is an accessory to genocide”.¹⁴⁷

OFFICIAL CAPACITY

The official position of any individual, whether as head of State or government or as a responsible government official person, shall not relieve such person of culpability nor mitigate punishment.¹⁴⁸

The fact that a person acted pursuant to an order of a government or of a superior shall not relieve them of culpability, but may be considered in mitigation of punishment if the court determines that justice so requires.¹⁴⁹

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

If a person is charged for genocide as a superior, in accordance with Article 180(2) of the BiH Criminal Code, all three elements required for responsibility of a superior must be proven beyond reasonable doubt.¹⁵⁰

STATUTE OF LIMITATIONS

Under Article 19 of the BiH Criminal Code, criminal prosecution and execution of a sentence for the crime of genocide are not subject to the statute of limitations.¹⁵¹ This provision is also similar to SFRY Criminal Code Article 100 setting out non-applicability of the statute of limitations for the crime of genocide.

¹⁴⁷ *Stupar et al.*, 2nd inst. of 9 Sept. 2009, paras. 261-262, 264.

¹⁴⁸ BiH Criminal Code, Art. 180(1).

¹⁴⁹ BiH Criminal Code, Art. 180(3).

¹⁵⁰ *Milob Stupar*, Case No.X-KRZ-05/24-3, Second Instance Verdict, 28 April 2010, paras. 39-40

¹⁵¹ BiH Criminal Code, Art. 19 (Criminal Offences not subject to the Statute of Limitations): Criminal prosecution and execution of a sentence are not subject to the statute of limitations for criminal offences of genocide, crimes against humanity and war crimes, or for other criminal offences that, pursuant to international law, are not subject to the statute of limitations.

CRIMES AGAINST HUMANITY

Genocide and war crimes have been codified in treaties, whereas crimes against humanity have evolved under customary international law.¹⁵² Crimes against humanity were first charged under the Nuremberg Tribunal Charter.¹⁵³ The definition of crimes against humanity was set out in the Charter and the Nuremberg judgment. The UN General Assembly endorsed the concept of crimes against humanity in 1946.¹⁵⁴ The content of crimes against humanity has evolved since WW II through the jurisprudence of the ICTY, ICTR and ICC.

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

Article 5/3 of the ICTY/R Statute

Crimes against Humanity

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

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

152 See Robert Cryer *et al.*, *An introduction to International Criminal Law and Procedure*, 230 – 233 (2010); or *Commentary on the Rome Statute of the Criminal Court*, 121 – 122 (Otto Triffterer ed., 1999) for a background to the development of crimes against humanity.

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

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

ELEMENTS OF CRIMES AGAINST HUMANITY UNDER INTERNATIONAL LAW

A crime against humanity is committed when:

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

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

The ICTY Statute requires that the attack be committed in the context of an armed conflict,¹⁵⁵ and the ICTR Statute requires that the attack have a discriminatory element.¹⁵⁶ Neither of these elements are required by the definition of crimes against humanity under customary international law. At the ICC neither of these additional elements is required.¹⁵⁷

CONTEXTUAL ELEMENTS

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

AN ATTACK

A person commits a crime against humanity when they commit a prohibited act that forms part of an attack.¹⁵⁸

A person commits a crime against humanity when they commit a prohibited act that forms part of an attack.

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

- Were there discriminatory measures imposed by the relevant authority?
- Was there an authoritarian takeover of the region where the crimes occurred?
- Did the new authority in fact establish “governmental” structures?
- Did summary arrests, detention, torture, rape, sexual violence or other crimes take place?
- Did massive transfers of civilians to camps take place?
- Was the “enemy population” removed from the area?¹⁵⁹

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

156 See *infra*, section 7.2.2.1.7. International Criminal Law & Practice Training Materials ICLS

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

158 See, e.g., *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 Sept. 1998, para. 205.

159 *Dragan Nikolic*, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, TC, IT-94-2-R61, 20 Oct. 1995, para. 27.

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

The concepts “attack” and “military attack” differ. A crime against humanity can occur when there is no armed conflict.¹⁶⁰ Thus, an attack is not limited to the conduct of armed hostilities or use of armed force. Crimes against humanity can include mistreatment of a civilian population. The attack could also precede, outlast or continue during an armed conflict, without necessarily being part of it.¹⁶¹ The attack does not need to involve the military or violent force.¹⁶²

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

ICTY and ICTR jurisprudence, and the Rome Statute, provide that there must be at least “multiple” victims or acts to be considered an attack directed against a civilian population.¹⁶³ The acts can be of the same type or different.¹⁶⁴

At the ICC, an attack is “a campaign or operation carried out against the civilian population”.¹⁶⁵

DIRECTED AGAINST ANY CIVILIAN POPULATION

“Directed against” requires that the civilian population must be the primary target of the attack, not just an incidental target.¹⁶⁶ Thus, the primary object of the attack is “any civilian population”¹⁶⁷.

“Any” highlights the fact that crimes against humanity can be both committed against enemy nationals and crimes by a State’s own subjects.¹⁶⁸

“Civilian” refers to non-combatants.

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

“Population” refers to a larger body of victims and crimes of a collective nature.¹⁶⁹ It is not required that an entire population of an area be targeted. It is enough to show that a certain number of individuals were targeted in the course of the attack, or that individuals were targeted in such a way that demonstrates that the attack was in fact directed against a civilian “population”, rather than against a small and randomly selected number of individuals.¹⁷⁰

¹⁶⁰ Except at the ICTY, where crimes against humanity must be committed “in armed conflict, whether international or internal in character”. ICTY Statute, Art. 5. This requirement was abandoned in the ICTR and ICC Statutes.

¹⁶¹ *Dragoljub Kunarac et al.*, Case No. IT-96-23-A, Appeal Judgment, 12 June 2002, para. 86.

¹⁶² *Akayesu*, TJ paras. 676 – 684.

¹⁶³ Rome Statute of the International Criminal Court, Art. 7(2) (a); *Dragoljub Kunarac et al.*, Case No. IT-96-23-T, Trial Judgment, 22 Feb. 2001, para.415; *Milorad Krnojelac*, Case No. IT-97-25-T, Trial Judgment, 15 March 2002, para. 54.

¹⁶⁴ *Clément Kayishema et al.*, Case No. ICTR-95-I-T, Trial Judgment, 21 May 1999, para. 122.

¹⁶⁵ “ICC Elements of Crimes” ICC-ASP/1/3 (adopted 9 Sept. 2002, entered into force 9 Sept. 2002), Introduction to Art. 7 (ICC Elements of Crimes).

¹⁶⁶ *Tihomir Blaskić*, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, para.106.

¹⁶⁷ *Kunarac et al.*, AJ para. 91.

¹⁶⁸ CRYER, *supra* at p. 241.

¹⁶⁹ *Duško Tadić*, Case No. IT-94-1-T, Trial Judgment, 7 May 1997, para. 644.

¹⁷⁰ *Kunarac et al.*, AJ para. 90; *Stanislav Galić*, Case No. IT-98-29-T, Trial Judgment, 5 Dec. 2003, para. 143; *Krnojelac*, TJ para.56; *Kunarac et al.*, TJ paras. 424-425; *Mladen Naletilić et al.*, Case No. IT-98-34-T, Trial Judgment, 31 March 2003, para. 235; *Akayesu*, TJ para. 582; *Georges A. N. Rutaganda*, Case No. ICTR-96-3-T, Trial Judgment, 26 May 2003, para. 71; *Kayishema*, TJ para. 128.

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

- the means and methods used in the course of the attack;
- the number of victims;
- the status of the victims;
- the discriminatory nature of the attack;
- the nature of the crimes committed in the course of the attack;
- the resistance to the assailants at the time; and
- the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.¹⁷¹

The ultimate objective—such as restoring democracy—of a fighting force can be no justification for attacking a civilian population. Rules of IHL apply equally to both sides of a conflict, irrespective of who is the “aggressor”, and the absolute prohibition under international customary and treaty law on targeting the civilian population precludes military necessity or any other purpose as a justification.¹⁷²

At the ICC, “civilian population” refers to people who are civilians, and not members of armed forces or other legitimate combatants.¹⁷³ The civilian population must be the primary target of the attack, not a secondary victim.¹⁷⁴

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

RELATIONSHIP BETWEEN ANY CIVILIAN POPULATION AND MILITARY TARGETS

Since the primary object of the attack must be any civilian population, attacks that are directed primarily at military targets are excluded. To determine whether an attack was aimed at civilian or military targets, the court may consider whether or not the relevant party complied with the laws of war¹⁷⁵ (this does not mean that targeting civilians is lawful when justified by military necessity—there is an absolute prohibition on targeting civilians under international law¹⁷⁶).

For example, in the *Mrkšić* case at the ICTY, crimes were directed against a group of people based on their perceived involvement in the armed forces and therefore were treated differently than the civilian population. The facts of this case involved wounded combatants being selected for execution and killed. These crimes were not crimes against humanity, however, even though they were committed just two

¹⁷¹ *Blaskić*, AJ, para. 106; *Kunarac et al.*, AJ para. 90.

¹⁷² *Moinina Fofana et al.*, Case No. SCSL-2003-11-A, Appeal Judgment, 28 May 2008, para. 247.

¹⁷³ Geneva Conventions 1949 (adopted 12 Aug. 1949, entered into force 21 Oct. 1950) (GC I-IV), Common Art. 3, and Additional Protocol I (adopted 8 June 1977, entered into force 7 Dec. 1978) (AP I) Arts. 43 and 50; *Situation in the Republic of Kenya*, Case No. ICC-01/09, Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, 82 (fn 74), citing *Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-424, Decision Pursuant to Art. 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009 para. 78; *Kunarac et al.*, TJ para. 425.

¹⁷⁴ *Situation in the Republic of Kenya*, Decision Pursuant to Art. 15 of the Rome Statute, para. 82(fn 73), citing *Bemba Confirmation Decision* para. 77; *Kunarac et al.*, AJ paras. 91-2; *Milomir Stakić*, Case No. IT-97-24-T, Trial Judgment, 31 July 2003, para. 624; *Mitar Vasićević*, Case No. IT-98-32-T, Trial Judgment, 29 Nov. 2002, para. 33.

¹⁷⁵ *Kunarac et al.*, AJ para. 91; *Dragomir Milošević*, Case No. IT-98-29/1-A, Appeal Judgment, 12 Nov. 2009, paras. 54, 96, 127 – 128, 250.

¹⁷⁶ *Blaskić*, AJ para. 109.

days after the perpetrators had participated in a major attack on civilians in the same region. Since the perpetrators acted with the understanding that their victims were members of the armed forces, they did not intend for their acts to form part of the attack on the civilian population and therefore no nexus existed.¹⁷⁷

RELATIONSHIP BETWEEN ANY CIVILIAN POPULATION AND COMBATANTS

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

Members of the civilian population are people who are not taking any active part in the hostilities.¹⁷⁸ The presence within that population of some individuals who do not come within the definition of civilians does not deprive the population of its civilian character. “Civilian population” describes the overall character of the population. A population is still considered “civilian” even if there are armed police or isolated soldiers in the group.¹⁷⁹ The population must be “predominantly” civilian.

The presence within a population of members of resistance groups, or former combatants who have laid down their arms, and of other non-civilians does not alter the civilian character of that population, as long as the population is “predominantly civilian”.¹⁸⁰

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

Who are non-civilians? Article 50 of Additional Protocol I to the Geneva Conventions (AP I) contains a definition of civilians and civilian populations; its provisions “may largely be viewed as reflecting customary law”¹⁸¹ and are used to determine who is a civilian and the civilian character of populations for the purposes of crimes against humanity.

Persons placed *hors de combat* remain members of the armed forces of a party to a conflict and are not civilians.¹⁸² Members of the armed forces, and members of militias or volunteer corps forming part of such armed forces, cannot claim civilian status, even when not armed or in combat. Further, members of other militias and members of other volunteer corps (other than those forming part of the armed forces, mentioned above), including organized resistance groups cannot claim civilian status, provided that:

- they belong to a party of the conflict;

¹⁷⁷ *Mile Mrksic et al.*, Case No. IT-95-13/1-A, Appeal Judgment, 5 May 2009, para. 42.

¹⁷⁸ See generally CRYER, *supra* at p. 241 – 3; *Tadic*, TJ para. 638; *Blaskic*, AJ paras. 110, 113-5; *Pavle Strugar* (“Dubrovnik”), Case No. IT-01-42-T, Trial Judgment, 31 Jan. 2005, para. 282; *Milan Martić*, Case No. IT-95-11-A, Appeal Judgment, 8 Oct. 2008, paras. 302-6, 308, 311, 313, 318-319, 346, 355.

¹⁷⁹ *Kordic et al.*, AJ para. 50; *Stanislav Galic*, Case No. IT-98-29-A, Appeal Judgment, 30 Nov. 2006, 136 – 137, paras. fn 437; See also *Vidoje Blagojevic et al.*, Case No. IT-02-60-T, Trial Judgment, 17 Jan. 2005, para. 544.

¹⁸⁰ *Blaskic*, AJ paras. 113 – 115; *Mrksic*, AJ para. 35; *Martić*, AJ para. 313; *Blagojevic et al.*, TJ, para.544.

¹⁸¹ *Blaskic*, AJ para. 110.

¹⁸² *Mrksic*, AJ para. 35; *Blaskic*, AJ paras. 110, 113-114; *Dario Kordic et al.*, Case No. IT-95-14/2-A, Appeal Judgment, 17 Dec. 2004, para. 97; *Galic*, AJ, fn 437.

- they are commanded by a person responsible for their subordinates;
- they have a fixed distinctive sign recognizable at a distance;
- they carry arms openly; and
- they conduct their operations in accordance with the laws and customs of war.¹⁸³

However, non-civilians, such as persons placed *hors de combat*, can still be the victims of an act amounting to a crime against humanity if all other necessary conditions are met and in particular the act in question is part of a widespread or systematic attack against any civilian population. In other words, there is no requirement nor is it an element of crimes against humanity that each victim of the underlying crimes be a civilian.¹⁸⁴

WIDESPREAD OR SYSTEMATIC

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

“Widespread” refers to the large-scale nature of an attack, primarily reflected in the number of victims. There is no set number of victims that makes an attack “widespread”. “Widespread” may include a massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.¹⁸⁵

“Systematic” refers to the organized nature of the acts of violence and the recurrence of similar criminal conduct on a regular basis.¹⁸⁶ It involves “a pattern or methodical plan”¹⁸⁷ that is “thoroughly organized and following a regular pattern”.¹⁸⁸

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

Only the attack as a whole, not the accused’s individual acts, must be widespread or systematic.¹⁸⁹ In other words, the separate underlying prohibited acts do not need to be widespread or systematic (i.e. there is no requirement that the murders must be widespread or systematic under a charge of murder as a crime against humanity), as long as the prohibited acts form part of an attack that is widespread or systematic.

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

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

The requirement that the attack be “widespread” or “systematic” is disjunctive: only one must be proven. Only the attack as a whole, not the accused’s individual acts, must be widespread or systematic.

183 International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Art. 4., 12 August 1949, 75 UNTS 135, available at <http://www.unhcr.org/refworld/docid/3ae6b36e8.html> (accessed 27 June 2011).

184 *Martić*, AJ paras. 306, 313.

185 *Akayesu*, TJ paras. 579-580; *Rutaganda*, TJ paras. 67-69; *Alfred Musema*, Case No. ICTR-96-13, Trial Judgment, Jan. 27 2000, para. 204.

186 *Tadić*, TJ para. 648; *Kunarac et al.*, TJ, para. 429; *Elizaphan Ntakirutimana et al.*, Case No. ICTR-96-10-T and ICTR-96-17-T, Trial Judgment, 21 Feb. 2003, para. 804.

187 *Tadić*, TJ paras. 646 and 648.

188 *Akayesu*, TJ para. 580.

189 *Blaskić*, AJ para. 101; *Kunarac et al.*, AJ paras. 93-96; *Radoslav Brđanin*, Case No. IT-99-36-T, Trial Judgment, 1 Sept. 2004, paras. 135-6.

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

- number of criminal acts;
- existence of criminal patterns;
- logistics and resources involved;
- number of victims;
- existence of public statements related to the attacks;
- existence of a plan or policy targeting the civilian population;¹⁹⁰
- means and methods used in the attack;
- foreseeability of the criminal occurrences;
- involvement of political or military authorities;
- temporally and geographically repeated and co-ordinated military operations leading to the same result;
- alteration of ethnic, religious, racial or political composition of overall population;
- establishment of new political or military structures in region; and
- adoption of various discriminatory procedures.¹⁹¹

POLICY/ORGANIZATIONAL REQUIREMENT

Before the ICTY, it has been held that as a matter of customary law that it is not required to show that the attack was carried out as part of a policy or plan.¹⁹² The existence of a policy or plan can be relevant to establish that the attack was widespread or systematic, or directed against a civilian population.¹⁹³

However, at the ICC, the attack must be committed “pursuant to or in furtherance of a State or organizational policy to commit such attack”, and requires that “the State or organization actively promote or encourage such an attack against a civilian population”.¹⁹⁴ It is not required that the policy be adopted by the highest level of the State; policies adopted by regional or local State organs could be sufficient.¹⁹⁵

One trial panel at the Court of BiH has held that Article 172(2) (a) of the BiH Criminal Code required that an attack be committed “pursuant to or in furtherance of a State or organizational policy to commit such attack”.¹⁹⁶ However, another trial

¹⁹⁰ Previous ICTR jurisprudence held that a systematic attack encompassed acts done pursuant to a policy or plan; this was later rejected by the Appeals Chamber. *Laurent Semanza*, Case No. ICTR-97-20-A, Appeal Judgment, 20 May 2005, paras. 268-269; *Kunarac et al.*, AJ para. 98 (existence of policy or plan may be evidence pointing to other elements of the crime, but is not an independent legal element).

¹⁹¹ *Semanza*, AJ paras. 268-269; *Kunarac et al.*, AJ para. 98; *Galic*, TJ para. 147; *Brdanin*, TJ para. 137; *Goran Jelisić*, Case No. IT-95-10T, Trial Judgment, 14 Dec. 1999, para. 53.

¹⁹² *Kunarac et al.*, AJ para. 98; *Blaskić*, AJ para. 100.

¹⁹³ *Kunarac et al.*, AJ para. 98; *Blaskić*, AJ para. 100; *But see Situation in the Republic of Kenya*, Case No. ICC-01/09-01/1, Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing, Pre-Trial Chamber II, 06 March, 2011; *William Samoei Ruto et al.*, Case No. ICC-01/09-01/11, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, 15 March, 2011.

¹⁹⁴ Rome Statute, Art. 7(2), ICC Elements of Crimes (n 85), Introduction to Art. 7.

¹⁹⁵ *Situation in the Republic of Kenya*, Decision Pursuant to Art. 15 of the Rome Statute, para. 89 (fn 81), citing *Tihomir Blaskić*, Case No. IT-95-14-T, Trial Judgment, 3 March 2000, para. 205.

¹⁹⁶ Court of BiH, *Momir Savić*, Case No. X-KR-07/478, 1st Instance Verdict, 3 July 2009, p. 36 (p. 32 BCS) (relevant part upheld on appeal).

panel noted that there is no requirement that the acts of the accused were supported by any form of “policy” or “plan” at the ICTY or in customary international law.¹⁹⁷

NEXUS

The acts of the accused must be “part of”—and not simply coincide with—the widespread or systematic attack directed against a civilian population.¹⁹⁸ Except for extermination, the underlying offence need not be carried out against multiple victims in order to constitute a crime against humanity.¹⁹⁹ Thus an act directed against a limited number of victims, or even against a single victim, may suffice, provided it forms part of a widespread or systematic attack against a civilian population.²⁰⁰

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

The nexus requirement has two elements the prosecution must prove:

- The commission of an act that, by its very nature or consequences, is liable to have the effect of furthering the attack.
- Knowledge on the part of the accused that there is an attack on the civilian population and that their act is part of the attack.²⁰¹

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

- The characteristics;
- Aims;
- Nature; and
- Consequences²⁰² of the act;
- The similarity between the accused’s act and the other acts forming the attack;
- The time and place of the acts, and how they relate to the attack;²⁰³ and in particular
- How the acts relate to the attack or further any policy underlying the attack.

The accused’s act must be *related to* the attack. A crime which is committed before, after or away from the main attack against the civilian population could still, if sufficiently connected, be part of that attack.²⁰⁴

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

The prohibited act must not, however, be an isolated act. An act would be regarded as an isolated act when it is so far removed from the attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack.²⁰⁵

The acts of the accused need not be the same as other acts committed during the

197 Ibid. (p. 32 BCS) (relevant part upheld on appeal) referring to *Kumarac et al.*, TJ para. 98.

198 *Tadić*, AJ paras. 248, 255; *Kumarac et al.* TJ para. 417; *Kumarac et al.*, AJ para. 99.

199 But the attack must include multiple acts.

200 *Ferdinand Nahimana*, Case No. ICTR-96-11A, Appeal Judgment, 28 Nov. 2007, para. 924; *Blaskić*, AJ para. 101; *Kumarac et al.*, AJ para. 96.

201 *Mrksić*, AJ para. 41; *Kumarac et al.* TJ para. 418; *Kumarac et al.*, AJ para. 99.

202 *Laurent Semanza*, Case No. ICTR-97-20-I, Trial Judgment, 15 May 2003, para. 326.

203 See, e.g., *Tadić*, TJ paras. 629 – 633.

204 *Mrksić*, AJ para. 41; *Krnjelac*, TJ para. 127.

205 *Mrksić*, AJ para. 41; *Kumarac et al.*, AJ para. 100.

attack. For example, if an attack results in killings, and a person commits sexual violence as part of the attack, the person is guilty of a crime against humanity of sexual violence, when the necessary contextual elements and nexus are satisfied.²⁰⁶

MENS REA/KNOWLEDGE OF THE ATTACK

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

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

- Know of the attack directed against the civilian population, and
- Know that their criminal act comprises part of that attack or at least take the risk that their acts are part of that attack.²⁰⁷

An absence of such knowledge may suggest an ordinary crime or, depending on the circumstances, a war crime. Usually, a crime against humanity will be committed in the context of an attack that is well known, and an accused could not credibly deny knowing about the attack. Thus, knowledge can be proven by drawing inferences from relevant facts and circumstances.²⁰⁸

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

The *mens rea* relates to knowledge of the context, not motive.²⁰⁹ A crime against humanity may be committed for purely personal reasons.²¹⁰ The accused need not share the purpose or goal behind the attack:

It is irrelevant whether the accused intended their acts to be directed against the targeted population or merely against their victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that their acts are part thereof. At most, evidence that they committed the acts for purely personal reasons could be indicative of a rebuttable presumption that they were not aware that their acts were part of that attack.²¹¹

MENS REA IN RELATION TO DISCRIMINATORY GROUNDS

The ICTY Appeals Chamber has ruled that discrimination is not a requirement for crimes against humanity in general—only in the case of persecution.²¹² The ICTR Statute requires that crimes against humanity be committed because of discriminatory grounds. However, the ICTR Appeals Chamber has held that the discriminatory grounds restriction in the ICTR Statute applies only to that court and is not a requirement in customary international law.²¹³

206 *Kayishema*, TJ para. 122

207 *Kunarac et al.*, AJ para. 102; *Brdanin*, TJ para. 138; *Galić*, TJ para. 148; *Krnjelac*, TJ para. 59; *Kunarac et al.*, TJ para. 434.

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

209 *Tadić*, AJ paras. 271-2.

210 *Ibid.* at paras. 252, 272-305. 62 *Tadić*, AJ paras. 282-305 (holding “[C]ustomary international law [...] does not presuppose a discriminatory or persecutory intent for all crimes against humanity”); *See also Blaskić*, AJ paras. 224, 260.

211 *Blaskić*, AJ para. 124; *Kunarac et al.*, AJ para. 103.

212 *Tadić*, AJ paras. 282-305 (holding “[C]ustomary international law [...] does not presuppose a discriminatory or persecutory intent for all crimes against humanity”); *See also Blaskić*, AJ paras. 224, 260.

213 *Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Appeal Judgment, 1 June 2001, paras. 461-9.

DIFFERENCES BETWEEN CRIMES AGAINST HUMANITY AND WAR CRIMES

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

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

CRIMES AGAINST HUMANITY IN BOSNIA AND HERZEGOVINA

The BiH Criminal Code is generally applied only by the Court of BiH for crimes arising from the conflicts in the former Yugoslavia. When trying war crimes cases arising out of the conflicts in the former Yugoslavia, the BiH entity level courts and BDBiH courts generally apply the adopted SFRY Criminal Code. To date, no cases involving crimes against humanity have been delegated to the entity level courts or BDBiH courts. The SFRY Criminal Code does not contain any provisions relating to crimes against humanity. Crimes against humanity cases are, therefore, tried only before the Court of BiH.

Article 172 of the BiH Criminal Code²¹⁴ includes provisions on crimes against humanity:

Article 172, Paragraph 1 of the BiH Criminal Code

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

- a) Depriving another person of his life (murder);
- b) Extermination;
- c) Enslavement;
- d) Deportation or forcible transfer of population;
- e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f) Torture;
- g) Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape), sexual slavery, enforced prostitution, forced

²¹⁴ BiH Official Gazette, No. 03/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 08/10, consolidated version, available at: www.sudbih.gov.ba.

pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity;

- h) Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognized as impermissible under international law, in connection with any offence listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of Bosnia and Herzegovina;
- i) Enforced disappearance of persons;
- j) The crime of apartheid;
- k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health,

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

Article 172(2) provides the relevant definitions:

Article 172, Paragraph 2 of the BiH Criminal Code

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

- a) *Attack directed against any civilian population* means a course of conduct involving the multiple perpetrations of acts referred to in paragraph 1 of this Article against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.
- b) *Extermination* includes the intentional infliction of conditions of life, especially deprivation of access to food and medicines, calculated to bring about the destruction of part of a population.
- c) *Enslavement* means the exercise of any or all of the powers attaching to the right of ownership over a person, and includes the exercise of such power in the course of trafficking in persons, in particular women and children.
- d) *Deportation or forcible transfer of population* means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.
- e) *Torture* means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under control of the perpetrator except that torture shall not include pain or suffering arising only from, or being inherent in or incidental to, lawful sanctions.
- f) *Forced pregnancy* means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
- g) *Persecution* means the intentional and severe deprivation of fundamental rights, contrary to international law, by reason of the identity of a group or collectivity.
- h) *Enforced disappearance of persons* means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a

political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with an aim of removing them from the protection of the law for a prolonged period of time.

- i) *The crime of apartheid* means inhumane acts of a character similar to those referred to in paragraph 1 of this Article, perpetrated in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and perpetrated with an aim of maintaining that regime.

WAR CRIMES

The laws prohibiting war crimes are a subset of International Humanitarian Law (IHL) (also known as the law of war or the law of armed conflict).²¹⁵ IHL is a set of rules that seeks to limit the effects of armed conflict, protect persons who are not participating in hostilities and restrict the means and methods of warfare.

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

ESSENTIAL PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW

The essential principles of IHL include:

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

²¹⁵ See the IHL section on the ICRC website (www.icrc.org) for more on IHL. The ICRC commentaries on the Geneva Conventions and APs are particularly useful sources when interpretation of the provisions of those treaties is required; these are available at: www.icrc.org/ihl.nsf.

VIOLETIONS OF INTERNATIONAL HUMANITARIAN LAW

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

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

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

Grave breaches of the Geneva Conventions:

- Each of the four Geneva Conventions includes “grave breaches” provisions that expressly criminalize the most serious grave violations of the rules provided in the Conventions.
- The list of grave breaches in the Geneva Conventions was expanded in AP I.
- Grave breaches provisions are regarded as part of customary international law.²¹⁶
- Grave breaches provisions only apply to violations committed during an international armed conflict and against persons who are protected by the Geneva Conventions.
- Protected persons under the Geneva Conventions include civilians and combatants.
 - o Protected civilians are those persons who are in the hands of the adversary.
 - o Protected combatants are those persons who qualify as prisoners of war.

Common Article 3 of the Geneva Conventions:

- By contrast, Article 3 common to the four Geneva Conventions sets out certain fundamental protections that also apply during armed conflict “not of an international character”.
- The ICTY has held that Common Article 3 set forth a minimum core of mandatory rules applicable to any armed conflicts, whether the conflict is of an international or non-international character.²¹⁷ The character of the conflict is therefore irrelevant.

²¹⁶ See, e.g., International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, paras.79, 82. Geneva Convention, Additional Protocol I, Art. 85 contains additional grave breaches, but there is debate over whether all these breaches also constitute custom.

²¹⁷ *Duško Tadić*, Decision on the Defence Motion for Interlocutory on Jurisdiction, Appeal Chamber, 2 Oct. 1995, para. 102. See also ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, Merits Judgment, 27 June 1986, para. 218.

- The ICTY has held that violation of Common Article 3 provisions give rise to criminal responsibility.²¹⁸ Violations of Common Article 3 are expressly criminalized in the ICTR and ICC Statutes.

Other serious violations of IHL:

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

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

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

Depending on the circumstances war crimes in BiH may either be dealt with as a violation of the SFRY Criminal Code or the BiH Criminal Code.

²¹⁸ *Tadić*, Decision on the Defence Motion for Interlocutory on Jurisdiction, para. 134.

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

This Article sets out punishment for war crimes against the civilian population:

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

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

The 2003 criminal codes of the entities do not deal with war crimes. Only the BiH Criminal Code includes such provisions. Relevant provisions from the BiH Criminal Code²¹⁹ include:

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

BiH Criminal Code Article 173: War Crimes against Civilians

- (1) Whoever, in violation of rules of international law in time of war, armed conflict or occupation, orders or perpetrates any of the following acts:
 - a) Attack on civilian population, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damaging of people's health;
 - b) Attack without selecting a target, by which civilian population is harmed;
 - c) Killings, intentional infliction of severe physical or mental pain or suffering upon a person (torture), inhuman treatment, biological, medical or other scientific experiments, taking of tissue or organs for the purpose of transplantation, immense suffering or violation of bodily integrity or health;
 - d) Dislocation or displacement or forced conversion to another nationality or religion;
 - e) Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape) or forcible prostitution, application of measures of intimidation and terror, taking of hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to

²¹⁹ BiH Criminal Code, BiH Official Gazette No. 03/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 08/10, consolidated version, available at: www.sudbih.gov.ba.

fair and impartial trial, forcible service in the armed forces of enemy's army or in its intelligence service or administration;

- f) Forced labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic money or the unlawful issuance of money,

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

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

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

(3) Whoever, in violation of the rules of international law applicable in the time of war, armed conflict or occupation, orders or carries out as an occupier the resettlement of parts of his civilian population into the occupied territory,

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

ELEMENTS COMMON TO ALL WAR CRIMES

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

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

The *chapeau* elements of a war crime are:

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

- The accused must have ordered or perpetrated the act.

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

INDIVIDUAL WAR CRIMES

In addition to the common elements set out above, the elements of the individual war crimes set out below also have to be proved. These crimes are:

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

MODES OF LIABILITY COMMISSION AND PARTICIPATION

The ICTY/ICTR Statutes have incorporated modes of liability that are recognized under customary international law. It is noteworthy that the Rome Statute of the ICC departed from the law and jurisprudence on modes of liability established by the ICTY and ICTR. In particular, the ICC does not recognize JCE, *per se*. Rather, the Rome Statute has incorporated a different form of common purpose liability called co-perpetration (Article 25(3)(a)), indirect co-perpetration (Article 25(3)(a)) and other forms of common purpose liability (Article 25(3)(d)).

ICTR Statute Article 6(1) and ICTY Statute Article 7(1) are identical. They form the general basis of the various modes of liability applied at those and some other international and hybrid criminal courts.

ICTY/ICTR Statutes

Article 7(1)/6(1)

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime [...] shall be individually responsible for the crime.

As with the bulk of the substantive law of the ICTY and ICTR, the definitions of the modes of liability are those found in customary law at the relevant time.²²⁰

The statutes cover those persons who plan, instigate, order, directly perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. They also include those modes of participating in crimes that occur when a group of people, who all share a common purpose, undertake criminal activity that is then carried out either jointly or by some members of the group.²²¹

At the ICTY and ICTR, as at some other international criminal courts, the legal basis of individual criminal responsibility is customary international law.²²²

FORMS OF INDIVIDUAL CRIMINAL RESPONSIBILITY

The forms of individual criminal responsibility applying to genocide, crimes against humanity and war crimes at the ICTY, ICTR and ICC are:

The elements of each mode of liability must be proved in addition to the elements of the particular substantive crimes being charged and their chapeau requirements.

- Planning;
- Instigating;
- Ordering;
- Committing (direct perpetration);
- Aiding and abetting in the planning, preparation or execution of a crime;
- JCE (which is considered to be a form of commission)
- Superior/command responsibility (see Module 10);
- Co-perpetration (joint perpetration);
- Indirect perpetration; and
- Indirect co-perpetration.

The accused does not have to directly or physically commit the crime planned to be found guilty of planning.

The modes of liability covered here stem mainly from the ICTY and ICTR Statutes and case law. Some of these modes of liability overlap to varying degrees.

It is important to recall that the elements of each mode of liability described in the following sections must be proven in addition to the elements of the particular substantive crimes being charged and their chapeau requirements.

Modes of liability can be proven “by circumstantial or direct evidence, taking into account evidence of acts or omissions of the accused”²²³

²²⁰ *Enver Hadžihasanović*, Case No. IT-01-47, Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 44; *Duško Tadić*, Case No. IT-94-1-T, Trial Judgment, 7 May 1997, paras. 666-9; *Duško Tadić*, Case No. IT-94-1-A, Appeal Judgment, 26 Jan. 2000, paras.188-192.

²²¹ *Tadić*, AJ paras.188-192.

²²² *Tadić*, TJ paras. 666-669.

²²³ *See, e.g., Stanislav Galić*, Case No. IT-98-29-A, Appeal Judgment, 30 Nov. 2006, paras. 177-8.

PLANNING

Planning means that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.²²⁴

Actus reus – One or more persons designs a criminal action, procedure or arrangement for a particular crime that is later perpetrated.²²⁵ It is sufficient to show that the planning was a factor substantially contributing to the crime.²²⁶

- The accused does not have to directly or physically commit the crime planned to be found guilty of planning. The accused does not even have to be at the crime scene, as long as it is established that the direct perpetrators were acting according to the accused's plan.²²⁷
- It is not necessary to identify by name the direct perpetrator(s) of the crime planned by the accused person.²²⁸

Mens rea – The accused intended to plan the crime, or at a minimum, was aware of the substantial likelihood that a crime would be committed when the planned acts or omissions occurred.²²⁹ The accused's presence at the scene of the crime can be a factor used by the judges in determining their *mens rea*.²³⁰

A person convicted of having committed a crime cannot be convicted of having planned the same crime, even though their involvement in the planning may be considered an aggravating factor.²³¹

INSTIGATION

Actus reus – Instigation is “prompting”²³² or “urging or encouraging”²³³ someone to commit a crime.

- It is sufficient to show that the instigation was a factor substantially contributing to the conduct of another person committing the crime.²³⁴
- Instigation can be express or implied and involve acts or omissions.²³⁵
- It is not necessary to specifically identify the person instigated (*i.e.* the direct/physical perpetrator) by name.²³⁶

224 *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 Sept. 1998, para. 480; *Georges A. N. Rutaganda*, Case No. ICTR-96-3-T, Trial Judgment, 26 May 2003, para. 37; *Stanislav Galic*, Case No. IT-98-29-T, Trial Judgment, 5 Dec. 2003, para. 168.

225 *Dragomir Milošević*, Case No. IT-98-29/1-A, Appeal Judgment, 12 Nov. 2009, para. 268; *Laurent Semanza*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 380; *Dario Kordić et al.*, Case No. IT-95-14/2-A, Appeal Judgment, 17 Dec. 2004, para. 26.

226 *Milošević*, AJ para. 268; *Kordić et al.*, AJ para. 26.

227 *Ljube Bošković et al.*, Case No. IT-04-82-A, Appeal Judgment, 19 May 2010, para. 125.

228 *Bošković et al.*, AJ para. 75, citing *Kordić et al.*, AJ paras. 26, 29, 31.

229 *Milošević*, AJ para. 268; *Kordić et al.* AJ para. 29.

230 *Bošković et al.*, AJ para. 132.

231 *Milošević*, AJ para. 268; *Milomir Stakić*, Case No. IT-97-24-T, Trial Judgment, 31 July 2003, para. 443; *Mladen Naletilić et al.*, Case No. IT-98-34-T, Trial Judgment, 31 March 2003, para. 59; *Radoslav Brđanin*, Case No. IT-99-36-T, Trial Judgment, 1 Sept. 2004, para. 268.

232 *Tibomir Blaškić*, Case No. IT-95-14-T, Trial Judgment, 3 March 2000, para. 280.

233 *Ignace Bagilishema*, Case No. ICTR-95-1A, Appeal Judgment, 3 July 2002, para. 30.

234 *Ferdinand Nahimana*, Case No. ICTR-96-11A, Appeal Judgment, 28 Nov. 2007, para. 480.

235 *Blaškić*, TJ para. 270.

236 *François Karera*, Case No. ICTR-01-74-A, Appeal Judgment, 2 Feb. 2009, para. 318.

Instigation is different from “ordering”. It is not necessary to demonstrate the existence of a formal superior-subordinate relationship between the accused and the direct perpetrator.

The prosecution must establish a causal link between the instigation and the *actus reus* of the crime.²³⁷ However, it is not necessary to demonstrate that the crime would not have occurred but for the accused’s involvement.²³⁸

The accused does not need to be physically present when the material elements of the instigated crime are committed.²³⁹

Instigation is more than merely facilitating the commission of the direct offence (as “mere” facilitation may suffice for aiding and abetting).²⁴⁰ It requires influencing the direct perpetrator by inciting, soliciting or otherwise inducing them to commit the crime. Even if the direct perpetrator was already thinking about committing a crime, the final determination to do so can still be brought about by persuasion or strong encouragement of the instigator. However, if the principal perpetrator has definitely decided to commit the crime, further encouragement or moral support may “merely” qualify as aiding and abetting.

Instigation is different from “ordering”. Although exerting influence usually means the person can impress others, instigation, as opposed to “ordering”, does not assume or require a superior-subordinate relationship between the accused and the direct perpetrator(s).

Mens rea – The accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of their acts.²⁴¹

ORDERING

Actus reus – Someone in a position of *de jure* or *de facto* authority uses that authority to instruct another person to commit an offence.²⁴²

- The person ordered must commit the material elements of the crime(s).²⁴³
- Ordering does not require the physical presence of the accused at the site of the crime.²⁴⁴

It is not necessary to demonstrate the existence of a formal superior-subordinate relationship between the accused and the direct perpetrator. It is sufficient that the accused possessed the authority to order the commission of an offence and that this authority can be reasonably implied.²⁴⁵ The order does not need to be given in any particular form,²⁴⁶ nor does it have to be given by the person in a position of authority directly to the person committing the offence.²⁴⁷

237 *Bagilishema*, AJ para. 30; *Moinina Fojana et al.*, Case No. SCSL-2003-11-A, Appeal Judgment, 28 May 2008, para. 54.

238 *Sylvestre Gacumbitsi*, Case No. ICTR-01-64, Appeal Judgment, 7 July 2006, para. 129; *Kordić et al.*, AJ para. 27.

239 *Nabimana*, AJ para. 660.

240 This paragraph rests on *Naser Orić*, Case No. IT-03-68-T, Trial Judgment, 30 June 2006, paras. 271-2.

241 *Kordić et al.*, AJ paras. 29, 32; *Brdanin*, TJ para. 269; *Naletilić et al.* TJ para. 60.

242 *Kordić et al.*, AJ para. 28; *Galić*, TJ para. 168; *Radislav Krstić*, Case No. IT-98-33-T, Trial Judgment, 2 Aug. 2001, para. 601; *Akayesu*, TJ para. 483; *Rutaganda*, TJ para. 39.

243 *Nabimana*, AJ para. 481.

244 *Milošević*, AJ para. 290.

245 *Gacumbitsi*, AJ paras. 181-3.

246 *Jean De Dieu Kamuhanda*, Case No. ICTR-99-54A-A, Appeal Judgment, 19 Sept. 2005, para. 76.

247 *Blaskeić*, TJ para. 282.

Mens rea – The accused must have been aware of the substantial likelihood that the crime committed would be the consequence of the execution or implementation of the order.²⁴⁸ The *mens rea* of the person who was ordered and the direct perpetrators of the crime are irrelevant.²⁴⁹

Like any other mode of liability, ordering can be proven by circumstantial or direct evidence, taking into account evidence of acts or omissions of the accused.²⁵⁰

An accused cannot be convicted of ordering and committing the same crime.²⁵¹ Ordering can be considered an aggravating circumstance for sentencing.²⁵²

The Court of BiH has followed the reasoning of the ICTY with regards to ordering.

COMMISSION/PERPETRATION

“Commission” is often used interchangeably with “perpetration”.

“Commission” as a mode of liability includes JCE, as discussed below.

Actus reus – Physically perpetrating the relevant criminal act or a culpable omission in violation of a rule of criminal law.²⁵³

Mens rea – The accused must have the intention for a crime to occur as a consequence of the accused’s conduct.²⁵⁴

COMMITTING A CRIME BY OMISSION

In order to be guilty of committing a crime by omission, the following elements must be established:

- (1) the accused must have had a legal duty to act;
- (2) the accused must have had the ability to act;
- (3) the accused failed to act, intending the criminally sanctioned consequences or with awareness and consent that the consequences would occur; and
- (4) the failure to act resulted in the commission of the crime.²⁵⁵

• The *actus reus* of commission by omission requires an elevated degree of “concrete influence”.

It is not clear whether this duty to act must derive from *criminal* law or whether *any* legal obligation to act is sufficient.²⁵⁶

At a minimum, the *actus reus* of commission by omission requires an elevated degree of “concrete influence”.²⁵⁷

248 *Tibomir Blaškić*, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, para. 42; *Kordić et al.*, AJ para. 30.

249 *Blaškić*, TJ para. 282; *Dario Kordić et al.*, Case No. IT-95-14/2-T, Trial Judgment, 26 Feb. 2001, para. 388.

250 *Galić*, AJ paras.177-8.

251 *Stakić*, TJ para. 445.

252 *Ibid.* 914.

253 *Nahimana*, AJ para. 478.

254 *Naletilić et al.*, TJ para. 62; *Krstić*, TJ para. 601; *Galić*, TJ para. 168; *Rutaganda*, TJ para. 43.

255 *André Ntagerura et al.*, Case No. ICTR-96-10T, Trial Judgment, 1 Sept. 2009, para.659 as cited in *André Ntagerura et al.*, Case No. ICTR-96-10A, Appeal Judgment, 7 July 2006, para.333.

256 *Ntagerura et al.*, AJ paras. 334-5.

257 *Blaškić*, AJ para. 664; *Naser Orić*, Case No. IT-03-68-A, Appeal Judgment, 3 July 2008, para.41.

AIDING AND ABETTING

Actus reus – Providing practical assistance, encouragement or moral support to a principal offender of a crime, which substantially contributes to the perpetration of the crime.²⁵⁸

The assistance may:

- Consist of an act or omission;
- Occur before, during, or after the act of the principal offender; and
- Be removed in time and place from the actual crime.²⁵⁹

The principal offender does not need to be aware of the accomplice's contribution.²⁶⁰

The material elements of the crime committed by the direct perpetrator, the commission of which have been aided or abetted by the accused, must be established.²⁶¹

Mens rea – Knowledge or awareness that the acts or omissions performed by the aider and abettor assist in the commission of a crime by the principal offender.²⁶²

The aider and abettor must be aware of the essential elements of the crime committed by the principal offender. The act of assistance need not have caused the act of the principal offender, but it must have had a substantial effect on the commission of the crime by the principal offender.

- The aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender's state of mind. However, they need not share the intent of the principal offender.²⁶³
- In addition, the aider and abettor need not have knowledge of the precise crime that was intended or that was actually committed, as long as they were aware that one of a number of crimes would probably be committed, including the one actually perpetrated.²⁶⁴

In cases of specific intent crimes such as genocide or persecution, the aider and abettor must know of the principal perpetrator's specific intent.²⁶⁵

Aiding and abetting generally involves a lesser degree of direct participation in the crime than "committing".²⁶⁶ Some examples of aiding and abetting at the international tribunals include:

- Standing near victims while armed to prevent the victims from escaping;²⁶⁷
- Providing weapons to a direct perpetrator;²⁶⁸
- Taking a direct perpetrator to the scene of a crime and pointing at people to be killed;²⁶⁹ and
- Sending excavators after the killing of prisoners, which it was found

258 *Zejnil Delalic et al.* ("Celebici"), Case No. IT-96-21-T, Trial Judgment, 16 Nov. 1998, para. 327; *Nahimana*, AJ para.482.

259 *Vidoje Blagojevic and Jokic*, Case No. IT-02-60-T, Appeal Judgment, 9 May 2007, para.127; *Blaškić*, AJ para.48; *Naletilic et al.*, TJ para. 63; *Fofana*, AJ para. 72.

260 *Tadić*, AJ para.229.

261 *Zoran Kupreskic et al.*, Case No. IT-95-16-A, Appeal Judgment, 23 Oct. 2001, para.254.

262 *Mitar Vasiljevic*, Case No. IT-98-32-A, Appeal Judgment, 25 Feb. 2004, para.102; *Blaškić*, AJ para.49.

263 *Zlatko Aleksoski*, Case No. IT-95-14/1-A, Appeal Judgment, 24 March 2000, para. 162. 2

264 *Blaškić*, AJ para. 50; *Anto Furundžija*, Case No. IT-95-17/1-A, Appeal Judgment, 21 July 2000, para. 246. He need not have intended to provide assistance. *Blaškić*, AJ para. 49.

265 *Blagojevic and Jokic*, AJ para.127; *Radislav Krstić*, Case No. IT-98-33-A, Appeal Judgment, 19 April 2004, paras.140-1.

266 *Celebici*, Case No. IT-96-21-A, Appeal Judgment, 20 Feb. 2001, paras.342-3; *Blagojevic and Jokic*, AJ para.192.

267 *Vasiljevic*, AJ para. 134.

268 *Elzgyphan Ntakirutimana et al.*, Case No. ICTR-96-10-A and ICTR-96-17-A, Appeals Judgment, 13 Dec. 2004, para.530.

269 *Ibid.* para.532.

substantially contributed to the crime because the perpetrators knew they could rely on this logistical support.²⁷⁰

SUBSTANTIAL CONTRIBUTION

The act of assistance need not have caused the act of the principal offender, but it must have had a substantial effect on the commission of the crime by the principal offender.²⁷¹ The question of whether a given act constitutes substantial assistance requires a fact-based inquiry.²⁷²

Where the accused knowingly participated in the commission of an offence and their participation substantially affected the commission of that offence, they can still be found guilty even if their participation amounted to no more than their “routine duties”.²⁷³

TACIT APPROVAL AND ENCOURAGEMENT

An accused can be convicted for aiding and abetting if it is established that their conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime.²⁷⁴ For example, if a superior is at the scene of the crime but does not interfere with the commission of a crime by their subordinate, this could be considered tacit approval.

Liability for aiding and abetting by tacit approval is based on the encouragement and support that an omission might provide the principals of the crime. It is not based on an existing duty to act.²⁷⁵ In such cases the combination of a position of authority and physical presence at the crime scene may allow the inference that non-interference by the accused actually amounts to tacit approval and encouragement.²⁷⁶

AIDING AND ABETTING BY OMISSION

As discussed above, not acting when there is a legal duty to act can lead to individual criminal responsibility.²⁷⁷ A person may aid and abet a crime through an omission, which requires that the accused had the ability and legal duty to act but failed to do so.²⁷⁸ The *mens rea* and *actus reus* requirements for aiding and abetting by omission are the same as for aiding and abetting by a positive act.²⁷⁹

In relation to aiding and abetting by omission, an officer may be required, within the limits of their capacity to act, to go beyond their *de jure* authority to counteract an illegal order.²⁸⁰

The *actus reus* of aiding and abetting may be satisfied by a commander permitting the use of resources under their control, including personnel, to facilitate the perpetration of the crime. JCE is not a crime in itself.

270 *Vidoje Blagojević and Jokić*, Case No. IT-02-60-T, Trial Judgment, 17 Jan. 2005, paras.766-67

271 *Blagojević and Jokić*, AJ para.187; *Vasiljević*, AJ para.102; *Aleksoski*, AJ para. 162.

272 *Blagojević and Jokić*, AJ para.134.

273 *Ibid.* para.189.

274 *Radoslav Brđanin*, Case No. IT-99-36-A, Appeal Judgment, 3 April 2007, para.273.

275 *Brđanin*, AJ para.273.

276 *Ibid.*

277 *Orić*, AJ para.43; *See also Mile Mrkšić et al.*, Case No. IT-95-13/1-A, Appeal Judgment, 5 May 2009, para. 134.

278 *Blaškić*, AJ para.47, 663; *Nahimana*, AJ para.482; *Ntagerura et al.*, AJ paras. 335, 370; *Brđanin*, AJ para. 274.

279 *Orić*, AJ para. 43; *Blaškić*, AJ para. 47.

280 *Mrkšić et al.*, AJ, para.94.

AIDING AND ABETTING BY COMMANDERS/SUPERIORS

The *actus reus* of aiding and abetting may be satisfied, for example, by a commander permitting the use of resources under their control, including personnel, to facilitate the perpetration of crime.²⁸¹ An individual's position of superior authority does not suffice to conclude from their mere presence at the crime scene that they encouraged or supported the crime; however, the presence of a superior can be perceived as an important indication of encouragement or support.²⁸²

In the section that follows, JCE is discussed. It should be noted that the trial chamber in the *Dorđević* case found that the conduct of the accused both unlawfully aided and abetted the crimes charged as well as established that the accused was responsible under the JCE as charged. The trial chamber held that the modes of responsibility under Article 7(1) of the ICTY Statute are not mutually exclusive and it is possible to convict on more than one mode of liability in relation to a crime if it reflects the totality of the accused's conduct.²⁸³

JOINT CRIMINAL ENTERPRISE

The individual criminal responsibility provisions of the ICTR Statute (Article 6(1)) and ICTY Statute (Article 7(1)) do not include explicit references to JCE. However, JCE is viewed as a form of "commission" of a crime under these provisions.²⁸⁴

Individual criminal responsibility can arise when several individuals with a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons.²⁸⁵ Anyone who contributes to the criminal activity in order to carry out a common criminal purpose²⁸⁶ may be held criminally liable.²⁸⁷ This mode of liability is referred to as JCE. The group of persons must be identified. However, it is not necessary to identify every person by name. It is not necessary that the people in the group know one another. Circumstances permitting, it can be sufficient to refer to categories or groups of persons (such as "members of the ABC armed forces" or "members of Unit X of the police force").²⁸⁸

There are
three distinct
categories of
JCE.

281 *Krstić*, AJ paras. 137, 138, 144; *Blagojević and Jokić*, AJ para. 127.

282 *Anto Furundžić*, Case No. IT-95-17/1-T, Trial Judgment, 10 Dec. 1998, para.209; *Zlatko Aleksovski*, Case No. IT-95-14/1-T, Trial Judgment, 25 June 1999, paras. 64-5, 87; *Čelebići*, AJ paras.357-9, 364.

283 *Vlastimir Dorđević*, Case No. IT-05-87/1-T, Trial Judgment, 23 Feb. 2011, paras. 2193 – 2194.

284 See, e.g., *Tadić*, AJ para.190; *Vasiljević*, AJ para. 95; *Milorad Krnojelac*, Case No. IT-97-25-A, Appeal Judgment, 17 Sept. 2003, paras. 28-32, 73; *Ntakerutimana*, AJ para. 468; *Momčilo Krajišnik*, Case No. IT-00-39-A, Appeal Judgment, 17 March 2009, paras.655, 659, 662. Other hybrid and international criminal courts, including the SCSL and ICC, also apply JCE or variants thereof.

285 *Fatmir Limaj et al.*, Case No. IT-03-66-A, Appeal Judgment, 27 Sept. 2007, para.99; *Brdanin*, AJ para.430. But see *Momčilo Krajišnik and Biljana Plavšić*, Case Nos. IT-00-39 & 40-AR73.3, Appeals Chamber Decision on Interlocutory Appeal by Momčilo Krajišnik, Appeals Chamber, 14 Feb. 2002, para.157 (*Krajišnik* AC decision) for impermissibly vague identifications in relation to some JCE members.

286 The existence of common criminal plan must be shown. It can be specified in terms of both the criminal goal intended and its scope (e.g.the temporal and geographic limits of this goal, and the general identities of the intended victims). Existence can be expressed or inferred, and can be contemporaneous.

287 *Tadić*, AJ para.190. For rationale of JCE and response to some criticism of JCE see,e.g. *Tadić*, AJ paras. 188-192, 226; *Brdanin*, AJ paras.371, 431-2.

288 *Limaj*, AJ para.99; *Brdanin*, AJ para. 430. But see *Krajišnik*, AC decision para. 157 for impermissibly vague identifications in relation to some JCE members.

It is important to note that JCE is not a crime in itself. It is a form of individual criminal responsibility for crimes. Therefore, it is not possible to be convicted, for example, for aiding and abetting a JCE. JCE has been relied upon by the Court of BiH, but not by other courts in BiH, Croatia or Serbia. Instead, these courts have relied upon the doctrine of co-perpetration. It is important for participants to consider the similarities and differences between JCE and co-perpetration.

The actus reus of JCE:

1. A plurality of persons
2. The existence of a common plan that involves the commission of a crime
3. Participation in the plan

THREE CATEGORIES OF JCE

There are three distinct categories of JCE that, according to ICTY and ICTR jurisprudence, reflect customary international law.²⁸⁹

JCE I

The first category is a “basic” form of JCE.²⁹⁰ It is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intent. An example is a plan formulated by multiple individuals to kill, where, although each of them carries out a different role, each has the intent to kill.

JCE II

The second category is a “systemic” form of JCE.²⁹¹ It is characterized by:

- The existence of an organized system of ill-treatment;
- The accused’s awareness of the nature of that system; and
- His active participation in the enforcement of the system.

An example of this systemic form of JCE is in concentration camp situations where detainees are killed or mistreated pursuant to the JCE.

JCE III

The third category is an “extended” form of JCE.²⁹² This arises where a plurality of persons has agreed on a JCE and a member of the JCE commits a crime that, although outside of the common purpose, is a natural and foreseeable consequence of carrying out the common purpose.

An example is when a group has a common purpose to forcibly remove, at gunpoint, members of one ethnicity from a village. In the course of doing so, one or more of the victims is shot and killed. While murder may not have been an explicit part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might result in one or more of those civilians being killed.

The appeals chamber at the Special Tribunal for Lebanon has held that an accused

²⁸⁹ *Tadić*, AJ paras. 195-226; *Krnjelac*, AJ paras. 83-4; *Ntakirutimana*, AJ para. 462; *Stakić*, AJ paras. 64-5.

²⁹⁰ See, e.g., *Tadić*, AJ para.196; *Ntakirutimana*, AJ para.463.

²⁹¹ See, e.g., *Tadić* AJ paras.202-3; *Krnjelac*, AJ para. 89; *Vasiljević*, AJ para. 98; *Ntakirutimana*, AJ para.464.

²⁹² See, e.g., *Tadić*, AJ paras.195-6, 204; *Vasiljević*, AJ paras. 95-101; *Ntakirutimana*, AJ para. 465; *Krujišnik*, AJ paras.171-7. See *Brdanin*, AJ para.432; *Milan Martić*, Case No.IT-95-11-A, Appeal Judgment, 8 Oct. 2008, para.83 regarding punishment for various levels of participation in JCE III.

cannot be found guilty of international crimes that require special intent, such as genocide and terrorism, under JCE III.²⁹³

ACTUS REUS

The contribution to the commission of the crime does not need to be necessary or substantial, merely significant.

The JCE categories have common *actus reus* requirements:

- i A plurality of persons. An accused must act with other persons pursuant to a common plan amounting to or involving the commission of one or more crimes. They need not be organized militarily, politically or administratively.
- ii The existence of a common plan, design or purpose which amounts to or involves the commission of a crime. The common plan need not itself amount to a crime, but its execution must involve the commission of crimes. There is no need for the criminal purpose to have been previously arranged or formulated. It may materialize extemporaneously and be inferred from the facts.
- iii Participation of the accused in the execution of the common design involving the perpetration of a crime. The accused can participate directly or indirectly. The participation in the execution of the JCE does not need to involve the commission of a specific crime under one of the statutory provisions of the ICTY and ICTR (such as murder, extermination, torture, rape, etc.). It could be assistance in, or contribution to, the execution of the common purpose.²⁹⁴

Thus, the participation of an accused in the JCE need not involve the physical commission of the material elements of a crime, as long as the accused contributes to the execution of the common objective involving the commission of crimes. Although the contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes charged.²⁹⁵

It is not required that the participation be a necessary precondition for the offence to be committed, or that the offence would not have occurred but for the accused's participation.²⁹⁶ However, it must be shown that the accused's involvement in the crime formed a link in the chain of causation.²⁹⁷

MENS REA

The three JCE categories have different *mens rea* requirements:

- JCE I:²⁹⁸ It must be shown that the accused and the other participants intended to perpetrate the crime or crimes that were part of the common plan. All of the participants or co-perpetrators must have shared the same criminal intent to commit these crimes. The accused must have intended to participate in a common plan aimed at the commission of the crime.

²⁹³ Special Tribunal for Lebanon, Case No. STL-11-01/I/AC/R176bis, Appeals Chamber Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 Feb. 2011, paras. 248-49.

²⁹⁴ *Tadić*, AJ para.227.

²⁹⁵ *Brdanin*, AJ para.430; See also *Miroslav Kvočka*, et al., Case No. IT-98-30/1-A, Appeal Judgment, 28 Feb. 2005, para. 97; *Momčilo Krajišnik*, Case No.IT-00-39-T, Trial Judgment, 27 Sept. 2006, para.883.

²⁹⁶ *Tadić*, AJ para.199.

²⁹⁷ *Blagojević and Jokić*, TJ para. 702.

²⁹⁸ See, e.g., *Brdanin*, AJ paras. 365, 430-1; *Vasiljević*, AJ para. 101.

JCE II:²⁹⁹ The accused must have personal knowledge of the system of ill-treatment and the intent to further this system of ill-treatment are required. The personal knowledge may be proven by direct evidence or by reasonable inference from the accused's position of authority.

JCE III:³⁰⁰ As with JCE I, it must be shown that the accused intended to perpetrate a crime within the common purpose. It is not required to establish that the accused had the intention to commit crimes committed in furtherance of the JCE that were outside the common purpose. The accused can be liable under JCE III if they intended to further the common purpose of the JCE and the crime was a natural and foreseeable consequence of that common purpose. Thus, liability attaches if:

- (1) The commission of the crime or crimes outside of the common purpose was a *natural and foreseeable* consequence of the execution of the JCE;
- (2) The accused *willingly took that risk*.

The JCE *mens rea* test is whether the accused was subjectively reckless or had *dolus eventualis*. It is not a negligence standard.³⁰¹

JCE III does not require a “probability” that a crime would be committed. It does, however, require that the possibility of a crime being committed is substantial enough that it is foreseeable to the accused. Implausibly remote scenarios are not acceptable.³⁰²

LIABILITY FOR CRIMES COMMITTED BY A PRINCIPAL PERPETRATOR WHO IS NOT A MEMBER OF THE JCE

Members of a JCE could be held liable for crimes committed by principal perpetrators who were not members of the enterprise if:

- (1) The crimes could be imputed to at least one member of the enterprise.
- (2) This member, when using the principal perpetrator(s), acted in accordance with the common plan.³⁰³

Such a link is established by showing that the JCE member used the non-JCE member to commit a crime pursuant to the common criminal purpose of the JCE.³⁰⁴

For example, if the commander of a group of soldiers was part of a JCE to kill members of one ethnicity in a village but ordered his soldiers (who were not part of the JCE) to do the killings, criminal liability for the killing would extend not only to the direct perpetrators, but also to the commander as well as to the other

An individual can be liable if they intended to further the common purpose of the JCE and the crime was a natural and foreseeable consequence of that common purpose.

The non-JCE member need not have shared the *mens rea* of the JCE member or have known of the JCE's existence. JCEs are not static. A new JCE can arise out of an already existing JCE.

299 See, e.g., *Tadić*, AJ paras. 202, 220, 228; *Ntakirutimana*, AJ para. 467.

300 See, e.g., *Stakić*, AJ paras. 65, 87; *Brdanin*, AJ para.411; *Tadić*, AJ paras.228, 204, 220; *Ntakirutimana*, AJ para. 467.

301 *Tadić*, AJ para. 220; *Stakić* AJ paras. 99 – 103.

302 *Radovan Karadžić*, Case No. IT-95-5/18-AR72.4, Appeals Chamber, Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability on JCE, 25 June 2009, para. 18.

303 *Karadžić*, AJ para. 168.

304 *Brdanin*, AJ para. 413.

members of the JCE. If, in carrying out the killings, one of the soldiers also raped a woman, and it was not a part of the common JCE plan but a foreseeable consequence of it, the rape could be imputed to the commander and all members of the JCE could be guilty of rape.

In order to convict a member of a JCE for crimes committed by non-JCE members, the commission of the crimes by the non-members must have formed part of a common criminal purpose (JCE I), or of an organized criminal system (JCE II), or was a natural and foreseeable consequence of a common criminal purpose (JCE III).³⁰⁵

Establishing a link between the crime and a member of the JCE must be assessed on a case-by-case basis.³⁰⁶ Indications of such a link include evidence that the JCE member explicitly or implicitly requested the non-JCE member to commit such a crime, or instigated, ordered, encouraged or otherwise availed themselves of the non-JCE member to commit the crime.³⁰⁷ The non-JCE member need not have shared the *mens rea* of the JCE member or have known of the JCE's existence; what matters is whether the JCE member used the non-JCE member to commit the *actus reus* of the crime forming part of the common purpose.³⁰⁸

EXPANDING OR NEW JCE

In international law, the crime of conspiracy only exists in relation to genocide.

JCEs are not static. A new JCE can arise out of an already existing JCE. If a common criminal purpose or plan is fundamentally altered, then there is a new common plan and therefore a new JCE. It is not merely a continuation of the old JCE.³⁰⁹ An accused who may have agreed to the old JCE is not necessarily part of the new JCE and may not be guilty for crimes related to it.³¹⁰ If the accused agrees to the new JCE, then they can be guilty of crimes related to the new JCE. This agreement can be explicit or can arise spontaneously and be implicitly inferred from circumstantial evidence.³¹¹

³⁰⁵ *Brdanin*, AJ paras.410-1, 418; *Karadžić*, AJ para. 171.

³⁰⁶ *Brdanin*, AJ para.413, *Karadžić*, AJ para.169.

³⁰⁷ *Krajišnik*, AJ para.226.

³⁰⁸ *Brdanin*, AJ para.410.

³⁰⁹ *Blagojević and Jokić*, TJ para. 700.

³¹⁰ *Krajišnik*, TJ para. 1903.

³¹¹ *Krajišnik*, AJ para. 163.

GENERAL EXAMPLES

The table below provides examples of the three types of JCE:

Scenario	JCE Category
Six men surround a disarmed combatant and kick him to death. Accused tied combatant's hands.	JCE I – all co-perpetrators intend the killing of the combatant and significantly contribute to it.
Accused is logistics officer of prisoner-of-war camp in which prisoners are summarily executed.	JCE II – military or administrative unit collectively committing crimes in a concentration camp scenario.
Three drunken militia members rape a woman while the accused watches the door and keeps would-be rescuers at bay.	JCE I – all co-perpetrators intend the rape of the woman and significantly contribute to it.
The accused funds or illegally arms militia groups, which include persons convicted for serious crimes liberated for the military operation, in order to gain control of a territory. The militia then commits unlawful killings and plunder of property against the civilian population.	JCE III – the crimes were a natural and foreseeable consequence of the accused's participation.

BOSNIA AND HERZEGOVINA

The Court of BiH generally applies the BiH Criminal Code of 2003 when trying crimes against humanity, war crimes and genocide arising from conflicts in the former Yugoslavia. The BiH entity level courts generally apply the SFRY Criminal Code when trying war crimes cases in respect to these conflicts.

The BiH Criminal Code³¹² sets out modes of liability applicable to all the crimes listed in the Code. These are not discussed in detail here, but include:

- Perpetration/Co-perpetration (Article 29);
- Incitement (Article 30); and
- Accessory liability (Article 31).

Chapter XVII of the BiH Criminal Code deals with criminal offences against humanity and values protected by international law. Each Article pertaining to a specific crime also includes the modes of liability applicable for that crime, in addition to the general modes of liability discussed above.

Article 180 also provides for individual and superior modes of liability,

³¹² BiH Criminal Code, BiH Official Gazette No. 03/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 08/10, consolidated version, available at: www.sudbih.gov.ba.

applicable to many atrocity crimes included in the BiH Criminal Code.³¹³ Article 180(1) provides for the following modes of liability:

- Planning;
- Instigating;
- Ordering;
- Organizing a group for commission of crimes;³¹⁴
- Perpetration/Co-perpetration; and
- Aiding and abetting.

Article 180 of the BiH Criminal Code:

- (1) A person who planned, ordered, perpetrated or otherwise aided and abetted in the planning, preparation or execution of a criminal offence referred to in Article 171 (Genocide), 172 (Crimes against Humanity), 173 (War Crimes against Civilians), 174 (War Crimes against the Wounded and Sick), 175 (War Crimes against Prisoners of War), 177 (Unlawful Killing or Wounding of the Enemy), 178 (Marauding the Killed and Wounded at the Battlefield) and 179 (Violating the Laws and Practices of Warfare) of this Code, shall be guilty of the criminal offence. The official position of any individual, whether as Head of State or Government or as a responsible Government official person, shall not relieve such person of culpability nor mitigate punishment.
- (2) The fact that any of the criminal offences referred to in Article 171 through 175 and Article 177 through 179 of this Code was perpetrated by a subordinate does not relieve his superior of culpability if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
- (3) The fact that a person acted pursuant to an order of a Government or of a superior shall not relieve him of culpability, but may be considered in mitigation of punishment if the court determines that justice so requires.

Article 180(1) of the BiH Criminal Code is almost identical to Article 7(1) of the ICTY Statute.

The modes of liability included in Article 180 generally correspond with the provisions of the BiH Criminal Code dealing with co-perpetration, accessory and incitement for all crimes (Articles 29, 30 and 31, respectively). However, the legislators intended Article 180 to broaden the possible modes of liability for atrocity crimes and were guided by the principles of criminal liability in international criminal law and the ICTY Statute provisions.³¹⁵ Article 180(1) is almost identical to Article 7(1) of the ICTY Statute.³¹⁶

³¹³ BiH Criminal Code, Art. 180 applies to Art. 171 (Genocide), 172 (Crimes Against Humanity), 173 (War Crimes against Civilians), 174 (War Crimes against the Wounded and Sick), 175 (War Crimes against Prisoners of War), 177 (Unlawful Killing or Wounding of the Enemy), 178 (Marauding the Killed and Wounded at the Battlefield) and 179 (Violating the Laws and Practices of Warfare).

³¹⁴ Note that this is both a crime and a mode of liability. *See, e.g.*, Commentary of the BiH Criminal Code, p. 584.

³¹⁵ Commentary of the BiH Criminal Code, p. 594

³¹⁶ *Ibid.* at p.593.

The acts listed in Article 180(1) are sometimes hard to differentiate, as perpetrators usually undertake several mutually overlapping actions when committing a crime.³¹⁷ Some of these acts create or affirm decisions of other persons to commit a criminal act (e.g. instigation), while others are acts preceding the perpetration of a criminal act (e.g. planning and aiding and abetting).³¹⁸ It is therefore important to understand the differences between these modes of liability and how they can interact.

It is also important to remember that individual criminal liability for the above-mentioned conduct under Article 180 is only applicable for crimes specifically enumerated in Chapter XVII of the BiH Criminal Code,³¹⁹ namely:

- Genocide (Article 171);
- Crimes against Humanity (Article 172);
- War Crimes against Civilians (Article 173);
- War Crimes against the Wounded and Sick (Article 174);
- War Crimes against Prisoners of War (Article 175);
- Unlawful Killing or Wounding of the Enemy (Article 177);
- Marauding the Killed and Wounded at the Battlefield (Article 178); and
- Violating the Laws and Practices of Warfare (Article 179).

Article 180(2) sets out provisions on superior responsibility.

Article 176 of the BiH Criminal Code

- i Organizing a group for purpose of committing
 - a. genocide,
 - b. crimes against humanity,
 - c. war crimes against civilians,
 - d. war crimes against the wounded and sick; and
 - e. war crimes against prisoners of war; and
- ii Becoming a member of such a group.

SUPERIOR RESPONSIBILITY

Superior responsibility is a form of liability at the international level that does not have a parallel general principle of liability in most national systems.³²⁰ Superior responsibility is a form of liability for omissions. It covers situations when a commander fails to take action.

The rationale of superior responsibility is to enhance and ensure compliance with IHL.³²¹ The implementation of IHL depends on those in command and

Individual criminal liability under Article 180 is only applicable for crimes enumerated in Chapter XVII of the BiH Criminal Code.

Anyone who "calls on or instigates the perpetration" of genocide, crimes against humanity, or war crimes is liable for instigating.

Superior responsibility does not impose strict liability on a superior for the offences of subordinates.

³¹⁷ Ibid. at p. 594.

³¹⁸ Ibid.

³¹⁹ Ibid. at p. 595.

³²⁰ ROBERT CRYER, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 387 (2d ed. 2010).

³²¹ Geneva Convention Additional Protocol I, Arts. 86(1) and 87.

it is therefore necessary to hold commanders criminally liable for failing to ensure that the law is respected. The purpose of superior responsibility is to hold superiors responsible for failure to prevent a crime, deter the unlawful behaviour of their subordinates or punish their unlawful behaviour.

The principle that military and other superiors (including civilian leaders) may be held criminally responsible for the acts of their subordinates is well established in treaty and customary law.³²² The principle applies in international and non-international armed conflicts.³²³

Superior responsibility does not impose strict liability on a superior for the offences of subordinates.³²⁴ An accused is not charged with the crimes of their subordinates—they are liable for their failure to carry out their duty as a superior to prevent or punish them.³²⁵

The doctrine of superior responsibility is provided for in ICTY Statute Article 7(3), ICTR Statute Article 6(3) and Rome Statute Article 28. The ICTY and ICTR provisions are identical. The differences between these provisions and the Rome Statute are discussed below.

In order to invoke criminal responsibility under ICTY Statute Article 7(3) (identical to ICTR Statute Article 6(3)) on the basis of superior responsibility, three elements must be satisfied:³²⁶

- (1) The existence of a superior-subordinate relationship between the superior (the accused) and the perpetrator of the crime;
- (2) The accused knew or had reason to know that the crime was about to be or had been committed; and
- (3) The accused failed to take the necessary and reasonable measures to prevent the crime or punish its perpetrator.

The doctrine of superior responsibility has been directly incorporated into the law applicable before the Court of BiH, but not in the laws applied by other courts in BiH, Croatia and Serbia for the crimes committed during the conflicts in the former Yugoslavia. However, the courts in Croatia have found commanders liable for acts committed by their subordinates under Croatia's laws.

INDIVIDUAL CRIMINAL RESPONSIBILITY VIS-À-VIS SUPERIOR RESPONSIBILITY

Individual responsibility and superior responsibility connote distinct categories of criminal responsibility.

³²² *Zejnül Delalic* (“*Čelebići*”), Case No. IT-96-21-A, Appeal Judgment, 20 Feb. 2001, para.195. Several other national, hybrid and international jurisdictions apply the principle. The ICC Statute, Art. 28, definition is stricter in some respects than the definition under customary law and in some other jurisdictions.

³²³ *Enver Hadžić Hasanović*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Appeal Chamber, 16 July 2003, paras. 13, 31.

³²⁴ *Celebići*, AJ paras. 239, 313.

³²⁵ *Milorad Krnojelac* Case No. IT-97-25-A, Appeal Judgment, 17 Sept. 2003, para.171.

³²⁶ *Celebići*, AJ paras.189-198, 225-226, 238-239, 256, 263; *Zlatko Aleksoski*, Case No. IT-95-14/1-A, Appeal Judgment, 24 March 2000, para. 72; *Andri Ntagerura*, Case No. ICTR-99-46-A, Appeal Judgment, 7 July 2006, para.26.

Individual criminal responsibility arises when a person directly commits or contributes to the commission of a crime.

Superior responsibility is distinct, and arises where a superior failed to prevent or punish the commission of a crime by one of their subordinates. Thus, the commander is not charged with committing the crime—but can be responsible for their omission relative to their subordinates who did commit the crime.

Where an accused is charged with both types of liability for a particular crime, any conviction should be entered pursuant to individual criminal responsibility, with the accused's command/superior position being regarded as an aggravating factor in sentencing.³²⁷ For example, where a military commander ordered a crime perpetrated by their subordinates, they should be convicted for “ordering” the offence and not for superior responsibility for failing to prevent or punish that offence.

An accused may be held responsible as a superior not only where a subordinate physically committed a crime, but also where a subordinate planned, instigated or otherwise aided and abetted in the planning, preparation or execution of such a crime.³²⁸

Superior responsibility is distinct, and arises where a superior failed to prevent or punish the commission of a crime by one of their subordinates. The commander is not charged with committing the crime.

Effective control is the material ability to prevent or punish the commission of the offence.

SUPERIOR-SUBORDINATE RELATIONSHIP

A superior-subordinate relationship is characterized by a hierarchical relationship between the superior and subordinate.³²⁹ The hierarchical relationship may exist by virtue of a person's *de jure* or *de facto* position of authority.³³⁰ The superior-subordinate relationship need not have been formalized or determined by formal status alone.³³¹ Both direct and indirect relationships of subordination within the hierarchy could suffice.³³²

The definitions of *de jure* and *de facto* control, as adopted by the ICTY, are the following: *De Jure*: formal “authority to command and control their subordinates; superiors with control over subordinates”.³³³

De Facto: “Informal authority and command and control; however in order for the court to consider a *de facto* exercise of authority, the perpetrator of the underlying offence must be the subordinate of the person of higher rank and under his direct or indirect control”.³³⁴

327 *Čelebići*, AJ para. 745; *Tibomir Blaškić*, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, paras.89, 91.

328 *Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Appeal Judgment, 9 May 2007, para.280; *Ferdinand Nahimana*, Case No. ICTR-99-52-A, Appeal Judgment, 28 Nov. 2007, paras.485-6; *Naser Orić*, Case No. IT-03-68-A, Appeal Judgment, 3 July 2008, para.21.

329 *Čelebići*, AJ para.303.

330 *Čelebići*, AJ para. 193; *Aleksovski*, AJ para. 76.

331 *Čelebići*, TJ para. 370.

332 *Čelebići*, TJ para.252; see also *Sefer Halilović*, Case No. IT-01-48-A, Appeal Judgment, 16 Oct. 2007, para.59.

333 *Čelebići*, TJ para. 354.

334 *Čelebići*, AJ para. 193.

IDENTIFICATION OF SUBORDINATES

The existence of culpable subordinates must be established³³⁵ and identified with a degree of specificity.³³⁶ However, a superior need not necessarily know the exact identity of their subordinates who perpetrate crimes.³³⁷ If the prosecution is unable to identify those directly participating in such events by name, it will be sufficient to identify them at least by reference to their “category” (or their official position) as a group.³³⁸

EFFECTIVE CONTROL

Critically, the prosecution must establish the superior’s effective control over the persons committing the offence.³³⁹ Effective control is the material ability to prevent or punish the commission of the offence.³⁴⁰

A superior who has effective control but fails to exercise it bears superior responsibility.³⁴¹

A superior who only had temporary control bears superior responsibility when that control coincided with the *actus reus* of the underlying crime.³⁴²

If two or more superiors have effective control, they can both be found criminally liable. It is not a legal defence that someone else had effective control.³⁴³

Effective control is different from substantial influence. Substantial influence over subordinates that does not meet the threshold of effective control is insufficient.³⁴⁴

Moreover, even “official” commanders or superiors may not have actual effective control over their subordinates. A superior vested with *de jure* authority who does not actually have effective control over their subordinates would not be liable under the superior responsibility doctrine, whereas a *de facto* superior who lacks formal letters of appointment or commission but does, in reality, have effective control over the perpetrators of offences, might incur such responsibility.³⁴⁵

In general, the possession of *de jure* power in itself, like legal authority to issue orders alone, may not suffice for the finding of superior responsibility if it does not manifest in effective control.³⁴⁶ However, a court may presume that the possession of such power *prima facie* results in effective control unless proof to the contrary is produced.³⁴⁷

335 *Oric*, AJ para.35.

336 *Blagojevic and Jokic*, AJ para.287.

337 *Ibid.* at para.287.

338 *Hadzihasanovic*, TJ para.90. The *Oric* Appeal Judgment serves as good example of the specificity of identification required.

339 *Celebici*, AJ para.197.

340 *Ibid.* at para.256.

341 *Ibid.* at para.266.

342 *Dragoljub Kunarac*, Case No. IT-96-23-T, Trial Judgment, 22 Feb. 2001, para.399.

343 *Krnjelac*, TJ para.93.

344 *Ibid.* at para.266.

345 *Ibid.* at TJ para.197.

346 *Oric*, AJ para.91.

347 *Krnjelac*, TJ para. 197; *Halilovic*, AJ para. 85. This does not shift the burden of proving effective control to the defence, but simply acknowledges that the possession of *de jure* authority constitutes evidence which goes to show a superior’s effective control over their subordinates. *Oric*, AJ paras.91-2; *Hadzihasanovic*, AJ para.21.

REMOTENESS OF CONTROL

An accused can still incur criminal responsibility as a superior when the link to the perpetrators of the crimes at issue is remote. For example:

Whether the effective control descends from the superior to the subordinate culpable of the crime through intermediary subordinates is immaterial as a matter of law; instead, what matters is whether the superior has the material ability to prevent or punish the criminally responsible subordinate. The separate question of whether – due to proximity or remoteness of control – the superior indeed possessed effective control is a matter of evidence, not of substantive law. Likewise, whether the subordinate is found to have participated in the crimes through intermediaries is immaterial as long as their criminal responsibility is established beyond reasonable doubt.³⁴⁸

FACTORS RELEVANT TO THE DETERMINATION OF EFFECTIVE CONTROL

Criteria indicating the existence of authority relevant to effective control include:

- The formality of the procedure used for the appointment of a superior;
- The power of the superior to issue orders or to take disciplinary action;
- Proof that the members of the group or unit involved in crimes reported to the accused;
- Control over the finances and salaries of perpetrators;
- The fact that in the superior's presence subordinates show greater discipline than when they are absent;
- The capacity to transmit reports to competent authorities for the taking of proper measures;
- The capacity to sign orders provided that the signature on a document is not purely formal or merely aimed at implementing a decision made by others, but that the indicated power is supported by the substance of the document or that it is obviously complied with;
- An accused's high public profile, manifested through public appearances and statements or by participation in high-profile international negotiations;³⁴⁹ and
- Proof that an accused is not only able to issue orders but that their orders are actually followed; conversely, if orders were not followed this may undermine a finding of effective control.³⁵⁰

An ICTY trial chamber found that Delic, as commander within the BiH Army (ABiH), had effective control over a group of foreign fighters (the El Mujahedin Detachment, or EMD) for certain conduct based on the following factors:

- EMD compliance with ABiH orders in general;
- Participation of the EMD in ABiH combat operations and its compliance with ABiH combat orders;

³⁴⁸ *Oric*, AJ para.20.

³⁴⁹ *See, e.g., Hadzihasanovic*, TJ para.83; *Oric*, TJ para. 312.

³⁵⁰ *Halilovic*, AJ para. 207.

- EMD compliance with ABiH procedure concerning the handling of captured prisoners;
- Access to EMD premises and captured enemies;
- Recruitment of locals by the EMD and replenishment with ABiH soldiers;
- Mutual assistance between ABiH and EMD;
- Procedure of reporting followed by the EMD;
- EMD relationship with ABiH units and soldiers;
- Relationship between the EMD and authorities outside the ABiH;
- The ability to investigate and punish EMD members;
- Appointments and promotions of, and awards to, EMD members by the ABiH; and
- Disbandment of the EMD.³⁵¹

The material ability to punish and its corresponding duty to punish can only amount to effective control over the perpetrators if they are premised upon a pre-existing superior-subordinate relationship between the accused and the perpetrators.³⁵²

A showing that an accused is in overall control of combat operations is not an express requirement of this mode of liability. However, if such a fact is pleaded it will be considered as a way of showing or disproving that a superior-subordinate relationship existed.³⁵³

EXAMPLES OF EFFECTIVE CONTROL

Proving effective control is highly dependent on the facts of each case, and is thus a critical aspect of any case involving superior responsibility. Specific examples at the ICTY and ICTR of persons who were found to have effective control over their subordinates include:

- The *prefect* of a *prefecture* in Rwanda who had *de jure* authority over the *bourgmestre*, the communal police and members of the *gendarmierie nationale* by virtue of a general power of supervision over the communal authorities, and who had an overarching duty to maintain public order and security and a specific power of direct control over the communal police.³⁵⁴
- A *de facto* prison camp commander who had the powers to discipline or remove guards and to take measures to ensure the maintenance of order.³⁵⁵
- A *de facto* warden of a military prison, who had the power to give the guards orders and initiate disciplinary or criminal proceedings against guards who committed abuses, by reporting to the military police commander and the president of the military tribunal. The guards obeyed the accused's instructions and were answerable to him for their acts.³⁵⁶

351 *Rasim Delic*, Case No. IT-04-83-T, Trial Judgment, 15 Sept. 2008, paras.364 -8.

352 *Halilovic*, AJ para.210

353 *Ibid.* at para.69.

354 *Clement Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras.479-489.

355 *Celebici*, TJ paras. 722-767.

356 *Aleksovskic*, TJ paras. 90-106.

EXAMPLES OF NO EFFECTIVE CONTROL

Specific examples at the ICTY of persons who were found to have no effective control over their subordinates include:

In *Hadžihasanovic*, the appeals chamber found that the accused, a senior officer of the Army of BiH, had no effective control over the foreign EMD forces operating in the same area as the Bosnian forces between August 13 and November 1, 1993, and reversed his convictions for crimes committed by this unit during that period.³⁵⁷ The trial chamber had based its finding on three *indicia* of effective control:

- the power to give orders to the EMD and have them executed,
- the conduct of combat operations involving the EMD, and
- the absence of any other authority over the EMD.

The appeals chamber found that the trial chamber's findings confirmed that the EMD forces took part in several combat operations during the relevant time, but that was not sufficient to show effective control. The appeals chamber found, in relation to the above *indicia*:

- The power to give orders and have them followed is an *indicia* of effective control, but the evidence relied on by the trial chamber was not sufficient to establish the existence of effective control.³⁵⁸
- Although the EMD co-operated and fought alongside the accused's detachment, the EMD maintained a significant degree of independence, which belied the trial chamber's conclusion that the accused had effective control.³⁵⁹
- "[E]ffective control cannot be established by process of elimination. The absence of any other authority over the El Mujahedin detachment in no way implies that Hadžihasanovic exercised effective control in this case".³⁶⁰
- In *Blagojevic and Jokic*, the appeals chamber upheld a trial chamber finding that the accused, a commander with *de jure* control over a brigade, did not have effective control over his subordinates because they were acting under the control of Main Staff security organs.³⁶¹

KNEW OR HAD REASON TO KNOW

There are two forms of knowledge in superior responsibility cases:

- Actual knowledge, established through either direct or circumstantial evidence, that subordinates were about to commit or had committed crimes.
- Constructive or imputed knowledge, meaning that the superior possessed information that would at least put them on notice of the present and real risk of such offences and alert them to the need for additional investigation to determine whether such crimes were about to be committed or had been committed by their subordinates.³⁶²

Knowledge may be presumed if a superior had the means to obtain the relevant information of a crime and deliberately refrained from doing so.

³⁵⁷ *Hadžihasanovic*, AJ, para. 231.

³⁵⁸ *Ibid.* at paras.198–201.

³⁵⁹ *Ibid.* at paras.202–214.

³⁶⁰ *Ibid.* at paras.215–217.

³⁶¹ *Blagojevic and Jokic*, AJ para.303.

³⁶² *Čelebić*, AJ paras.223, 241.

ACTUAL KNOWLEDGE

The superior's actual knowledge, in terms of awareness that their subordinates were about to commit or have committed crimes, cannot be presumed.³⁶³ Absent direct evidence, however, actual knowledge may still be established by way of circumstantial evidence.

CONSTRUCTIVE KNOWLEDGE

Having “reason to know” is a form of imputed or constructive knowledge, which can be proved through direct or circumstantial evidence. Showing that a superior had “some general information in their possession, which would put them on notice of possible unlawful acts by their subordinates, would be sufficient to prove that they ‘had reason to know’”.³⁶⁴ The information does not need to provide specific details about unlawful acts committed or about to be committed by subordinates.³⁶⁵

This “reason to know” determination does not require the superior to have actually acquainted themselves with the information in their possession, nor that the information would compel the conclusion of the existence of crimes. It is sufficient that the information was available to them and that it indicated a need for additional investigation in order to ascertain whether offences were being committed or about to be committed by subordinates.³⁶⁶

It is important to note that criminal negligence has been rejected by the ICTY and ICTR as a basis for superior responsibility.³⁶⁷ A higher standard—reason to know—must be proven. As noted by the ICTR Appeals Chamber in *Bagilishema*:

References to ‘negligence’ in the context of superior responsibility are likely to lead to confusion of thought [...]. The law imposes upon a superior a duty to prevent crimes which he knows or has reason to know were about to be committed, and to punish crimes which he knows or has reason to know had been committed, by subordinates over whom he has effective control. A military commander, or a civilian superior, may therefore be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or wilfully disregarding them.³⁶⁸

Knowledge may be presumed if a superior had the means to obtain the relevant information of a crime and deliberately refrained from doing so (*i.e.*, they were wilfully blind to the offence). However, what must be shown is the superior's factual awareness of information which, due to their position, should have provided a reason to avail themselves of further knowledge.

Although the information may be general in nature (be it in written or oral form), it must be sufficiently specific to demand further clarification. This does not necessarily

³⁶³ *Halilović*, TJ para.66.

³⁶⁴ *Orić*, TJ para.322; *Čelebići*, AJ paras.223, 241.

³⁶⁵ *Ignace Bagilishema*, Case No. ICTR 95-1A-A, Appeal Judgment, 3 July 2002, para.42.

³⁶⁶ *Orić*, TJ para. 322.

³⁶⁷ *Bagilishema*, AJ para. 34; *Blaškić*, AJ para. 63.

³⁶⁸ *Bagilishema*, AJ para. 35; see also *Blaškić*, AJ para. 63; *Hadžijahasanović*, TJ para.96.

mean that the superior may be held liable for failing to personally acquire such information in the first place. However, as soon as the superior has been put on notice of the risk of illegal acts by subordinates, they are expected to inquire about additional information, rather than do nothing or remain “wilfully blind”.³⁶⁹

A superior cannot be presumed to have knowledge by virtue of their position alone³⁷⁰.

RELATIONSHIP TO INCITEMENT TO GENOCIDE

The *mens rea* of superior responsibility does not require direct personal knowledge of what is being said when the subordinate is involved in the crime of direct and public incitement to genocide.³⁷¹ It is not required that the accused had direct personal knowledge, or full and perfect awareness of the criminal discourse, to establish their superior responsibility for a subordinate’s incitement to genocide.³⁷²

FACTORS TO ESTABLISH KNOWLEDGE

Chambers at the ICTY and ICTR have relied on the following categories of evidence to establish superiors’ knowledge:³⁷³

- The number, type and scope of illegal acts;
- The time during which they occurred;
- The number and type of troops or militia members involved;
- The logistics involved, if any;
- The geographical location of the acts, and their widespread occurrence;
- The tactical tempo of operations;
- The *modus operandi* of similar illegal acts;
- The officers and staff involved and their character traits;
- The location of the commander at the time;
- Oral evidence of subordinates, third-party international observers, opponents and foreign politicians stating that they discussed the commission of crimes in the superior’s area of control or troops with the accused;
- International and national press reporting the commission of mass crime;
- The reporting and monitoring systems of a military commander; and
- Prior similar conduct (not preventing or punishing earlier crimes).³⁷⁴

The more physically distant a superior was from the scene of the crime, the more evidence may be required to prove that they had actual knowledge of the crimes.³⁷⁵

As a general rule, the circulation of rumours or general press reports are insufficient to establish the required knowledge.³⁷⁶

³⁶⁹ *Oric*, TJ paras. 321-3.

³⁷⁰ See GUENAELE METTRAUX, THE LAW OF COMMAND RESPONSIBILITY, (English edition) section 10.3.2.

³⁷¹ *Nahimana*, AJ para. 791.

³⁷² *Bagilishema*, AJ paras. 28, 42; *Čelebići*, AJ paras. 223, 238, 241.

³⁷³ *Halilović*, TJ para. 66; *Hadžić/Hasanović* TJ para. 83; *Oric* TJ para. 319; *Ntagerurwa*, TJ para. 648; *Nahimana*, AJ para. 840.

³⁷⁴ See, e.g., *Hadžić/Hasanović*, AJ 267.

³⁷⁵ *Halilović*, TJ para.66.

³⁷⁶ *Hadžić/Hasanović*, TJ para.1223.

FAILURE TO PREVENT OR PUNISH

The superior must have failed to take the necessary and reasonable measures to prevent or to punish the crimes of their subordinate.

NECESSARY AND REASONABLE MEASURES

Necessary measures are the measures appropriate for the superior to discharge their obligation, showing that they genuinely tried to prevent or punish. Reasonable measures are those reasonably falling within the material or actual powers of the superior.³⁷⁷

The measures required of the superior are limited to those within their power. They have a duty to exercise the measures reasonably possible in the circumstances, including those that may be beyond their formal powers.³⁷⁸ What constitutes such measures is not a matter of substantive law but of evidence.³⁷⁹

The kind and extent of measures to be taken by a superior ultimately depend on the degree of effective control over the conduct of subordinates at the time a superior is expected to act.³⁸⁰ They must undertake all measures which are necessary and reasonable to prevent subordinates from planning, preparing or executing the prospective crime. The more grievous and/or imminent the potential crimes of subordinates appear to be, the more attentively and more quickly the superior is expected to react.³⁸¹ However, a superior is not obliged to do the impossible.³⁸²

DUTY TO PREVENT

A superior's duty to prevent arises from the moment they acquire knowledge or have reasonable grounds to suspect that a crime is being or is about to be committed, while the duty to punish arises after the commission of the crime.³⁸³ Therefore, if a superior has knowledge or has reason to know that a crime is being or is about to be committed, they have a duty to prevent the crime from happening and are not entitled to wait and punish it afterwards.³⁸⁴ The duty to prevent exists at any stage before the commission of a subordinate crime if the superior acquires knowledge or has reason to know that such a crime is being prepared or planned.³⁸⁵

Given the seriousness of international crimes, the superior must act with some urgency from the time of learning of the crime or intended commission of the crime.³⁸⁶

377 *Halilović*, AJ para.63.

378 *Čelebići*, TJ para.395.

379 *Blaskeić*, AJ para.72.

380 *Orić*, TJ para.329.

381 *Ibid.*

382 *Ibid.*

383 *Paoli Strugar*, Case No. IT-01-42-T, Trial Judgment, 31 Jan. 2005, para.373.

384 *Ibid.*

385 *Halilović*, TJ para. 79; *Orić*, TJ para. 328.

386 *Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Trial Judgment, 2 Nov. 2001, para. 317.

PUNISHMENT NO SUBSTITUTE FOR PREVENTION

The failure to take the necessary and reasonable measures to prevent a crime cannot be remedied simply by later punishing the subordinate for the crime.³⁸⁷ The obligation to prevent or punish does not provide a superior with two alternative options, but contains two distinct legal obligations to prevent the commission of the offence and to punish the perpetrators.

DUTY TO PUNISH

The duty to punish commences only if, and when, the commission of a crime by a subordinate can be reasonably suspected.³⁸⁸ Under these conditions, the superior has to order or execute appropriate sanctions or, if not yet able to do so, they must at least conduct an investigation and establish the facts in order to ensure that offenders under their effective control are brought to justice.

The superior need not conduct the investigation or dispense the punishment in person, but must at least ensure that the matter is investigated and transmit a report to the competent authorities for further investigation or sanction. As in the case of preventing crimes, the superior's own lack of legal competence does not relieve them from pursuing what their material or actual ability enables them to do. Since the duty to punish aims at preventing future crimes of subordinates, a superior's responsibility may also arise from failure to create or sustain, amongst the persons under their control, an environment of discipline and respect for the law.

EXAMPLES OF BREACHES OF DUTIES TO PREVENT AND PUNISH

Breaches of commanders' duties have been found by the military tribunals set up in the aftermath of WW II to include the failure to:

- Secure reports that military actions have been carried out in accordance with international law;
- Issue orders aiming at bringing the relevant practices into accord with the rules of war;
- Protest against or to criticize criminal action;
- Take disciplinary measures to prevent the commission of atrocities by the troops under their command; and
- Insist before a superior authority that immediate action be taken.³⁸⁹

A superior's duty may not be discharged by issuing routine orders; more active steps may be required.³⁹⁰ Thus, necessary and reasonable measures may include giving special orders aimed at bringing unlawful practices of subordinates in compliance with the law and to secure the implementation of these orders. Where information indicates unlawful practices, a superior may be required, for example:

- to investigate whether crimes are about to be committed;

³⁸⁷ *Blaskic*, AJ paras.78-85.

³⁸⁸ *Orie*, TJ para.336; see also *Halilovic*, AJ para. 182.

³⁸⁹ *Strugar*, TJ para.374.

³⁹⁰ *Ibid.*

- to protest against or criticize criminal action; or
- to take disciplinary measures against the commission of atrocities.³⁹¹

PROOF OF CAUSATION NOT NECESSARY

Causation is not a necessary condition for superior responsibility.³⁹² Hence, it is not necessary that the commander's failure to act caused the commission of the crime. The essence of this form of criminal responsibility is the participation in or contribution to the alleged crime by failing to act in breach of the superior's duty to prevent and punish the crimes of subordinates.

APPLICABILITY TO MILITARY AND CIVILIAN LEADERS

Superior responsibility applies to both military and civilian leaders, be they elected or self-proclaimed, once it is established that they had the requisite effective control over their subordinates.³⁹³ Hence the term "superior" responsibility, which indicates that responsibility is not limited to military commanders.

As with military superiors, civilian superiors will only be liable under the doctrine of superior criminal responsibility if they were part of a superior-subordinate relationship, even if that relationship is an indirect one. A showing that the superior was merely an influential person will not be sufficient. However, it will be taken into consideration, together with other relevant facts, when assessing the civilian superior's position of authority.

The concept of effective control for civilian superiors is different in that a civilian superior's sanctioning power must be interpreted more broadly. It cannot be expected that civilian superiors will have disciplinary power over their subordinates equivalent to that of military superiors in an analogous command position.

For a finding that civilian superiors have effective control over their subordinates, it suffices that civilian superiors, through their position in the hierarchy, have the duty to report whenever crimes are committed, and that, in light of their position, there is the likelihood that those reports will trigger an investigation or initiate disciplinary or criminal measures. A civilian superior may, under some circumstances, discharge their obligation to punish an offending subordinate by reporting to the competent authorities when a crime has been committed, provided that this report is likely to trigger an investigation or initiate disciplinary or criminal proceedings.³⁹⁴ However, this is subject to the facts and circumstances of an individual case—if the superior knows, for example, that the appropriate authorities are not functioning or knows that a report was likely to trigger a sham investigation, such a report would not be sufficient to fulfil the obligation to punish offending subordinates.³⁹⁵

³⁹¹ *Orić*, TJ para.331.

³⁹² *Čelebići*, TJ para.398.

³⁹³ See generally *Čelebići*, TJ paras.355-363; *Čelebići*, AJ para.387; *Kayishema*, TJ paras.213-224; *Kayishema*, AJ paras.35, 51; *Nahimana*, TJ paras.976-7; *Nahimana*, AJ para.605; *Radoslav Brđanin*, Case No. IT-99-36-T, Trial Judgment, 1 Sept. 2004, para.281; *Mladen Naletilić*, Case No.IT-98-34-T, Trial Judgment, 31 March 2003, para. 68.

³⁹⁴ *Ljube Bošković et al.*, Case No. IT-04-82-A, Appeal Judgment, 19 May 2010, para.231; See also *Blaškić*, AJ para.72.

³⁹⁵ *Bošković*, AJ para.234

In situations of armed conflict, it is often the case that civilian superiors assume more power than that with which they are officially vested. In such circumstances, *de facto* authority may exist alongside, and may turn out to be more significant than *de jure* authority. The capacity to sign orders will be indicative of some authority. However, it is necessary to look to the substance of the documents signed and whether there is evidence of them being acted upon.

There is no requirement that the *de jure* or *de facto* control exercised by a civilian superior must be of the same nature as that exercised by a military commander: every civilian superior exercising effective control over their subordinates, that is, having the material ability to prevent or punish the subordinates' criminal conduct, can be held responsible.

A pertinent example of civilian superior responsibility arose before the ICTR, which held that a civilian tea-factory manager, Alfred Musema, was a superior who was responsible for his employees who participated in genocide.³⁹⁶

SFRY

When trying war crimes cases arising out of the conflicts in the former Yugoslavia, the BiH entity level courts and BDBiH courts apply the adopted SFRY Criminal Code as the law applicable at the time of the commission of the crimes. These courts, as well as the Court of BiH, can also apply the SFRY Criminal Code as the law more favourable to the accused.

It is necessary, therefore, to note the manner of perpetration of the crimes as set out by the SFRY Criminal Code. The 1977 SFRY Criminal Code³⁹⁷ did not contain an explicit provision on superior responsibility. However, Article 30, dealing with the manner of perpetration of crimes, applicable to all the crimes contained in the Code, set out as follows:

Article 30 of the SFRY Criminal Code

- (1) A criminal act may be committed by a positive act or by an omission.
- (2) A criminal act is committed by omission if the offender abstained from performing an act which he was obligated to perform.

³⁹⁶ *Alfred Musema*, Case No. ICTR-96-13-A, Trial Judgment, 27 Jan. 2000.

³⁹⁷ SFRY Criminal Code, Official Gazette of the SFRY No. 44/76, 36/77, 34/84, 74/87, 57/89, 3/90, 38/90.

BOSNIA AND HERZEGOVINA

The concept of superior responsibility is expressly part of the BiH Criminal Code and has been since Article 180(2) of the Criminal Code of BiH incorporated Article 7(3) of the ICTY Statute.³⁹⁸ The BiH Criminal Code³⁹⁹ is applied almost exclusively by the Court of BiH in respect of the conflicts in the former Yugoslavia, although there are some cases at the entity level where the BiH Code was also used.⁴⁰⁰

The fact that any of the criminal offences referred to in Article 171 through 175 (*genocide, crimes against humanity, war crimes against civilians, war crimes against wounded and sick, war crimes against prisoners of war*) and Article 177 through 179 (*unlawful killing or wounding of the enemy, marauding the wounded and killed at the battlefield, violating the laws and practices of warfare*) of this Code was perpetrated by a subordinate does not relieve their superior of culpability if they knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Superior responsibility is set out in Article 180(2) of the BiH Criminal Code:

Article 180(2) sets out the ways in which personal liability for the crimes of subordinates is incurred by a superior who fails to prevent or punish subordinates who commit particular crimes set out in Chapter XVII.⁴⁰¹

Article 180(2) is derived from and identical to Article 7(3) of the ICTY Statute.⁴⁰²

As held by the trial panel in *Rašević et al.*, Article 180(2) should be interpreted in the same way that the ICTY interprets its Article 7(3).⁴⁰³

DEFENCES AND OTHER GROUNDS FOR EXCLUDING LIABILITY

IMMUNITIES AND AMNESTIES

Immunities and amnesties are not a bar to prosecution before international criminal courts. However, immunities and amnesties may be defences before national courts.

IMMUNITIES

Under international law, two types of immunity are broadly recognized: functional immunity and personal immunity. These immunities are recognized on the basis of

398 Court of BiH, *Rašević et al.*, Case No. X-KRZ-06/275, 1st Instance Verdict, 28 Feb. 2008, p. 104 (p. 115 BCS) (upheld on appeal).

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

400 Among others see *Vlahorljuk et al.* (2008), FBiH Supreme Court, Art. 173(1)(c); *Stipio Zulji* (2011), FBiH Supreme Court, Art. 177(1) BiH Criminal Code; *Sead Hakalović* (2011), FBiH Supreme Court, Art. 173(1); *Ivan Koler* (2013), FBiH Supreme Court, Art. 175(1).

401 *Rašević et al* 1st inst., p. 104 (p. 115 BCS) (upheld on appeal).

402 Ibid.

403 Ibid.

the sovereignty of states, and therefore only apply to prosecutions in national courts. Neither functional nor personal immunities are a bar to trials before the international or hybrid criminal courts.

ICTY/ICTR Statutes Articles 7(2)/6(2)

Irrelevance of official capacity

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

Immunity law, as a ground for exclusion or limitation of the application of criminal legislation, applies for some persons based on their official status (e.g. diplomatic and consular representatives, other international officials, heads of foreign States and their escorts while they are on the territory of BiH, heads of diplomatic missions and members of their family, diplomatic staff and their family, unless they are BiH nationals) or when performing certain public functions (e.g. members of parliament, judges, etc.)⁴⁰⁴. As far as procedural immunity is concerned, such immunity relates to and influences only the commencement of criminal proceedings or conducting criminal proceedings and is terminated once the mandate is over.⁴⁰⁵ The issue of immunities is regulated by the BiH Criminal Code provisions,⁴⁰⁶ as well as BiH, FBiH, RS and BD laws on immunity.⁴⁰⁷

In accordance with BiH, FBiH, RS and BD laws on immunity, immunity can be a defence in criminal proceedings involving members of both houses of the BiH/FBiH/RS Parliament, members of the FBiH cantonal legislative bodies and members of the BD Assembly. However, this immunity is granted to the above-mentioned persons *only* in relation to “acts carried out within the scope of their duties”, *i.e.* conduct that stems from the duties which an individual has in relation to the above-mentioned institutions.⁴⁰⁸ The immunity can be invoked at any time, but it cannot represent a general bar to the criminal prosecution.⁴⁰⁹

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

BiH Criminal Code provisions from Chapter XVII (criminal offences against humanity and values protected by international law) regarding immunity are based on the corresponding provisions from the ICTY and the ICC Statutes.⁴¹⁰

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

405 Ibid. at p. 82.

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

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

408 BiH Law on Immunity, Art. 3.

409 Ibid. at Art. 4.

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

Article 180(1) of the BiH Criminal Code provides that:

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

It is irrelevant whether the immunity or special procedural rules are based on provisions of domestic legislation or international law.⁴¹¹ Therefore, when trying war crimes cases, such immunities do not represent a bar to criminal prosecution nor grounds for relieving such persons of culpability or mitigating the punishment.⁴¹²

AMNESTIES

Amnesties are laws that preclude criminal prosecutions (and sometimes civil claims) in the state in which they are issued.⁴¹³ Amnesties have a long history.⁴¹⁴ The status of amnesties in international law is unclear. There is some indication that amnesties are no bar to prosecution for some crimes, such as torture.⁴¹⁵ The SCSL Appeals Chamber has stated that a “norm that a government cannot grant amnesty for serious violations of crimes under international law [...] is developing under international law”.⁴¹⁶ The Inter-American Court of Human Rights has stated that:

This Court considers that all amnesty provisions, provisions on the prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.⁴¹⁷

Article 101 of the SFRY Criminal Code provides that:

Persons covered by an act of amnesty are granted immunity from prosecution, complete or partial exemption from the execution of punishment, substitution of the imposed punishment by a less severe one, expunging of the conviction, or annulment of legal consequences incident to conviction.⁴¹⁸

Article 103 provides that granting amnesty or pardon shall in no way affect the rights of third parties emanating from the judgment.⁴¹⁹

411 Ibid. at p. 595.

412 Ibid.

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

414 See *Robert Cryer et al., An Introduction to International Criminal Law and Procedure* 563 (2d ed. 2010) for a discussion of amnesties and their various applications and formats.

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

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

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

418 Ibid. at Art. 101.

419 Ibid. at Art. 103.

The Criminal Codes of BiH, FBiH, RS and BD⁴²⁰ provide for several types of amnesty, including:

- A release from criminal prosecution (abolition);
- Complete or partial release from the execution of punishment;
- Substitution of the imposed punishment by a less severe one;
- Repealing the conviction; or
- Repealing any legal consequences related to the conviction.

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

The 1999 FBiH Law on Amnesty,⁴²¹ 2005 RS Law on Amnesty,⁴²² and 2001 BD Law on Amnesty⁴²³ abolished and completely released from punishments (both pronounced punishments and remaining terms of punishment) all persons who committed any crimes included in the criminal codes applicable on the territory of FBiH and RS, respectively, from 1 January 1991 to 22 December 1995. However, the amnesty granted by these laws did not cover the most serious criminal offences committed during that period (*e.g.* murder, rape, serious cases of robbery, etc.), including:

- Crimes defined by the ICTY Statute;
- Criminal offences against humanity and international law from Chapter XVI of the adopted SFRY Criminal Code.⁴²⁴

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

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

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

The conduct may constitute another crime if, as alleged and proven, it contains essential elements of another criminal offence. For instance, if persecution was not committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, it could not constitute the crime of genocide as set out in Article

⁴²⁰ BiH Criminal Code, Art. 118; FBiH Criminal Code, Art. 122; RS Criminal Code, Art. 116; and BD Criminal Code, Art. 122.

⁴²¹ FBiH Law on Amnesty, FBiH Official Gazette No. 48/99.

⁴²² RS Law on Amnesty, RS Official Gazette No. 95/05.

⁴²³ BD Law on Amnesty, BD Official Gazette No. 10/01, 16/01, 19/07.

⁴²⁴ FBiH Law on Amnesty and BD Law on Amnesty refer to both the criminal offences under Chapter XVI of the adopted SFRY Criminal Code and the crimes envisaged by the ICTY Statute, while the RS Law on Amnesty refers only to the crimes envisaged by the ICTY Statute.

171 of the BiH Criminal Code. However, if all other requirements were met, it could constitute a crime against humanity as set out in Article 172(1)(h) of the BiH Criminal Code.⁴²⁵ Or, for example, if the conduct of the accused did not violate the rules of international law, or was not committed during war, armed conflict or occupation, the conduct could not constitute a war crime, but it could constitute another crime (e.g. murder, rape, severe bodily injury, etc.) if all other necessary elements have been proven.⁴²⁶

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

SPECIFIC DEFENCES

OFFICIAL CAPACITY

Before the ICTY, ICTR and ICC, official capacity cannot be claimed to excuse the commission of war crimes.⁴²⁷ It is neither a defence nor a mitigating circumstance.⁴²⁸ Official capacity is not a bar to personal jurisdiction and prosecution before the ICC.⁴²⁹

SUPERIOR ORDERS

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

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

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

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

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

426 See, e.g., *ibid.* at pp. 572-573.

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

428 Rome Statute, Art. 27(1).

429 *Ibid.* at Art. 27(2).

DURESS AND NECESSITY

The ICTY Statute does not include a provision on duress and necessity. However, the jurisprudence of the ICTY has dealt with this matter. The majority of the ICTY Appeals Chamber has held that duress does not afford a complete defence to a soldier charged with crimes against humanity or war crimes in international law when the taking of innocent lives is involved, but it may be taken into account in mitigation of punishment.

SELF-DEFENCE

Although not expressed in its Statute, the ICTY considers self-defence to be an applicable defence under customary international law, finding that the ICC Statute definition reflects provisions found in most national codes and as such constitutes customary international law.⁴³⁰ However, self-defence cannot be used to excuse a deliberate attack upon a civilian population.⁴³¹

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

Under the Rome Statute, defence of yourself, another person, or property can be grounds for excluding criminal liability. There must be a threat of an “imminent and unlawful use of force”.⁴³² The accused must have acted reasonably and proportionately to the threat. Defence of property can only be raised as a defence to a war crime, and only with regards to property that is essential for the survival of the accused or another person, or for accomplishing a military mission.⁴³³

Article 9 of the SFRY Criminal Code and Article 24 of the BiH Criminal Code provide for necessary defence as a ground for excluding criminal liability:

Article 9 of the SFRY Criminal Code:

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

Article 24 of the BiH Criminal Code:

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

⁴³⁰ *Dario Kordić*, Case No. IT-95-14/2-T, Trial Judgment, 26 Feb. 2001, paras. 449-451.

⁴³¹ *Milan Martić*, Case No. IT-95-11-A, Appeal Judgment, 8 Oct. 2008, para.268.

⁴³² Rome Statute, Art. 31(1) (c).

⁴³³ Statute for the International Criminal Court, Art. 31(1) (c).

be reduced, and if the excess occurs due to strong irritation or fright caused by the attack, the punishment can be remitted.

In the *Stupar et al.* case, defence argued that killings of prisoners had been committed in self-defence.⁴³⁴ The appellate panel found that this argument was contrary to the facts of the case.

The appellate panel noted that it was true that the killings of the prisoners in Kravica were preceded by an incident in which one of the prisoners grabbed the rifle of a Skelani platoon member and killed him, while the other person, deputy commander of the detachment, was injured trying to prevent the prisoner from continuing to shoot at others.⁴³⁵ The panel also noted that the prisoner was killed immediately and that, soon after, fire was opened upon the other prisoners, first from an M84 machine gun and then from automatic rifles, followed by hand-grenades.⁴³⁶ Furthermore, the panel noted that the killings of the prisoners in the warehouse lasted for about an hour and a half whereupon the detachment left the location to be replaced by members of other units who continued shooting and throwing hand-grenades long into the night.⁴³⁷

Taking into account the overall circumstances of the entire event, the appellate panel found that no prisoner in the warehouse was culpable of the Skelani platoon member's death and stressed that the prisoners had been unarmed, exhausted and some had been wounded and injured, while the accused had been heavily armed.⁴³⁸ Moreover, the warehouse was a completely closed area except for the windows on the back which were guarded by the accused.⁴³⁹ Consequently, the appellate panel concluded that the prisoners had not been a threat of any kind to the armed soldiers, and there had been no indication of acting in self-defence.⁴⁴⁰

The appellate panel concluded:

[T]here was no “attack” as that term is used in Article 24, and [...] the response of the Accused was clearly and indisputably massively disproportionate to any threat from the unarmed prisoners, who were unquestionably well-secured in the warehouse.⁴⁴¹

EXTREME NECESSITY

Under Article 10 of the SFRY Criminal Code, extreme necessity could be a ground for excluding criminal liability where the perpetrator committed a crime in order to prevent an immediate danger to himself or another where:⁴⁴²

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

435 Ibid. at para.475.

436 Ibid.

437 Ibid.

438 Ibid. at para.476.

439 Ibid.

440 Ibid.

441 Ibid. at para.474.

442 SFRY Criminal Code, Arts. 10(1) – (2).

- The perpetrator was not the cause of the danger;
- The danger could not have been avoided except by committing the acts; and
- The wrong-doing of the perpetrator's acts cannot exceed that of the threat.⁴⁴³

If the offender negligently caused the danger or exceeded the limits of extreme necessity, the court could mitigate the punishment or, if they exceeded the limits under especially mitigating circumstances, it may refrain from imposing a punishment.⁴⁴⁴

Importantly for war crimes cases, Article 10(4) provides that “there is no extreme necessity if the offender was under an obligation to expose himself to the danger”.⁴⁴⁵

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

- Forcible deportation of the civilian population from the occupied territory performed in order to protect the civilians or due to imperative military needs (in which case the occupation force needed to secure the accommodation, food and hygiene conditions necessary);⁴⁴⁶
- Forced labour conducted in the interest of the civilian population of the occupied territory;⁴⁴⁷
- Requisition of food supplies, clothing, means of transportation or providing services in the form of work force required for the needs of the occupation army, as long as it was on a local scale and took into account the economic strength of the country and the needs of civilian population.⁴⁴⁸

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

Article 25 of the BiH Criminal Code

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

443 Ibid. at Art. 10(2).

444 Ibid. at Art. 10(3).

445 Ibid. at Art. 10(4).

446 Ibid. at p. 499.

447 Ibid. at p. 499.

448 Ibid.

LACK OF MENTAL CAPACITY AND DIMINISHED MENTAL RESPONSIBILITY

The relevant principle of law upon which both the common law and the civil law systems are based is that the defendant's *diminished* mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal.⁴⁴⁹

On the other hand, if the defendant raises the issue of *lack* of mental capacity, they are challenging the presumption of sanity by entering a plea of insanity. This constitutes a complete defence to the charge. In raising this defence, the defendant bears the onus of establishing that at the time of the offence they were labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of their act or, if they did know it, that they did not know that what they were doing was wrong. Such a plea, if successful, is a complete defence to a charge and it leads to an acquittal.⁴⁵⁰ Rule 67(B)(i)(b) of the ICTY RPE provides for special defences including diminished or lack of responsibility.⁴⁵¹

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

- They could not comprehend the meaning of their act or
- They could not control their actions
- Due to permanent or temporary mental disease, temporary mental disturbance or mental retardation.

In such a case, there is no criminal liability.

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

However, the offender shall be criminally liable if:

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

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

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

⁴⁴⁹ See, e.g., *Zejnil Delalic et al. (Čelibić)*, Case No. IT-96-21-A, Appeal Judgment, para.590; see also para. 839.

⁴⁵⁰ Ibid. at para. 582.

⁴⁵¹ ICTY Rules of Procedure and Evidence, Rule 67(B) (1)(b).

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

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

INTOXICATION

Intoxication can also exclude criminal liability at the ICC. If the accused, at the time of conduct, was intoxicated to the point that they could not understand the lawfulness of or control their behaviour, they cannot be held guilty. It is notable that the intoxication must destroy the accused's mental capacity—impairment, even if extreme, is not enough. The defence does apply if the accused was voluntarily intoxicated and knew, or disregarded the risk, that they would be likely to commit a crime under the jurisdiction of the ICC if intoxicated.⁴⁵²

ALIBI

If a defendant raises an alibi, they are denying that they were in a position to commit the crime. By raising that issue, the defendant requires the prosecution to eliminate the reasonable possibility that the alibi is true.⁴⁵³ The purpose of an alibi is to cast reasonable doubt on the prosecutor's allegations; the burden is on the prosecution to prove all aspects of the case beyond reasonable doubt, notwithstanding the alibi raised by the defence.⁴⁵⁴

A successful alibi does not require conclusive proof of an accused's whereabouts.⁴⁵⁵ There is no requirement that an alibi excludes the possibility that the accused committed a crime; the alibi need only raise reasonable doubt that the accused was in a position to commit the crime.⁴⁵⁶

Where an alibi is properly raised, the prosecution must establish that, despite the alibi, the facts alleged are nevertheless true.⁴⁵⁷ For example, the prosecution may demonstrate that the alibi does not in fact reasonably account for the period when the accused is alleged to have committed the crime. Where the alibi evidence *prima facie* accounts for the accused's activities at the relevant time, the prosecution must "eliminate the reasonable possibility that the alibi is true".⁴⁵⁸ For example, the prosecution could demonstrate that the alibi evidence is not credible. There is no obligation on the prosecution to investigate the alibi.⁴⁵⁹

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

452 Rome Statute, Art. 31(1) (b).

453 *Célibici*, AJ para.581.

454 *Clement Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para.234; *Protais Zigiranyirazo*, Case No. ICTR-01-73-A, Appeal Judgment, 16 Nov. 2009, para. 17.

455 *Zigiranyirazo*, AJ para. 42.

456 *See ibid.* at para. 43.

457 *Ibid.* at para.19

458 *Juvénal Kajelijeli*, Case No. ICTR-98-44A-A, Appeal Judgment, 23 May 2005, para.41; *Kayishema*, AJ para.106.

459 *Ferdinand Nahimana*, Case No. ICTR-99-52-A, Appeal Judgment, 28 Nov. 2007, paras.417-8.

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

Alibis have been used as a defence in a number of cases in BiH.⁴⁶⁰ In the *Damjanovic Goran et al.* case, the defence appealed the trial panel's decision not to give credibility to defence witnesses who tried to provide alibis for both accused, stating that the accused Goran and Zoran were not present at the critical location and time.⁴⁶¹

The appellate panel, upholding the trial panel, held that there was only a small probability that two men fit for military service (accused Goran Damjanovic and alibi witness Zdravko Jovid), members of the Army of RS, had been free to go and pay a visit to a hospital in Koran during an extensive military operation and attack on Ahatovici.⁴⁶² The panel continued to state that this alibi was largely refuted by the evidence of prosecution witnesses who recognized the accused at the crime scene, and was based on inconsistent and contradictory testimony of defence witnesses.⁴⁶³

In relation to the accused Zoran Damjanovic, the appellate panel upheld the trial panel's holding, and noted that the alibi was unreliable because of inconsistencies.⁴⁶⁴ The appellate panel observed that, compared to the prosecution witnesses, the defence witnesses who testified about the alibi were unconvincing and appeared to have adjusted their testimonies to the needs of the alibi for the accused.⁴⁶⁵

In the *Kurtovic Zijad* case, the appellate panel also upheld the trial panel's findings that the defence of alibi was unsuccessful due to the credibility of defence and prosecution witnesses.⁴⁶⁶ According to the appellate panel, statements from defence witnesses indicating that the accused was serving at the front lines during the period when the crimes had been committed did not establish an effective alibi.⁴⁶⁷ Specifically, the appellate panel held that the accused could have travelled to the place relevant to the charges on his own initiative during the evening hours (which was when the crimes occurred) and returned to the command for assignments in the morning, since the command was located only three kilometres away.⁴⁶⁸

MISTAKE OF LAW AND FACT

Under the Rome Statute, a mistake of fact excludes criminal liability if it negates the mental element required by the alleged crime.⁴⁶⁹ A mistake of law may exclude criminal liability if it negates the mental element required by the alleged crime.⁴⁷⁰ A mistake about whether an act is a crime is not a defence at the ICC.⁴⁷¹

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

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

462 *Damjanovic Goran et al.*, 2nd inst. p. 9 (p. 9 BCS).

463 Ibid.

464 Ibid. at p. 10 (p. 9 BCS).

465 Ibid.

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

467 Ibid. at para.79.

468 Ibid.

469 Rome Statute, Art. 32(1).

470 Ibid. at Art. 32(2).

471 Ibid.

According to Article 17 of the SFRY Criminal Code, the court may reduce the punishment of a perpetrator who had justifiable reasons for not knowing that their conduct was prohibited. It was not required that the perpetrator be aware that they were violating rules of international law by their conduct.⁴⁷²

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

In accordance with Article 38 of the BiH Criminal Code, a perpetrator of a criminal offence, who had a justifiable reason for not knowing that their conduct was prohibited, may be released from punishment. It is not required that the perpetrator was aware that they were violating rules of international law by their conduct.⁴⁷³

Article 37(1) of the BiH Criminal Code provides that a perpetrator is not guilty of the criminal offence committed under an irreversible mistake of fact. According to Article 37(2) of the BiH Criminal Code, mistake of fact is irreversible if, at the time of the perpetration of a criminal offence, the perpetrator was not aware of one of its elements defined by law, or if they mistakenly believed that circumstances existed which, if they had actually existed, would render such conduct permissible.

MILITARY NECESSITY

The ICTY Appeals Chamber has held that military necessity is not a defence for attacks on civilians.⁴⁷⁴ The appeals chamber, moreover, has held on various occasions that the absolute prohibition against attacking civilians “may not be derogated from because of military necessity”.⁴⁷⁵

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

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

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

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

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

474 *Parle Strugar*, Case No. IT-01-42-A, Appeal Judgment, 17 July 2008, para.275 citing *Stanislav Galic*, Case No.IT-98-29-A, Appeal Judgment, 30 Nov. 2006, para.132, fn 706.

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

freedom and rights of the civilian population.⁴⁷⁶ For example:

- Requisitioning or taking property away from the enemy is permitted, but only within the scope determined by the economic strength of the population and the local regulations.⁴⁷⁷
- In order for resettlement of the population by the occupying force to represent a war crime against civilians, it is required, *inter alia*, that such resettlement is conducted in violation of the rules of international law.⁴⁷⁸
- Destruction of property or appropriation of property that is justifiable by military needs would not constitute a war crime against civilians.⁴⁷⁹

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

TU QUOQUE

The *tu quoque* defence has no place in contemporary IHL.

The *tu quoque* argument posits that breaches of IHL, being committed by the enemy, justify similar breaches by the other party to the conflict. However, the *tu quoque* defence has no place in contemporary IHL, as it implies that humanitarian law is based upon a narrow bilateral exchange of rights and obligations. In contrast, the bulk of humanitarian law declares absolute obligations that are unconditional and not based on reciprocity.⁴⁸⁰

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

[M]ay amount to saying that breaches of international humanitarian law, being committed by the enemy, justify similar breaches by a belligerent. However, the *tu quoque* defence has no place in contemporary humanitarian law.⁴⁸¹

REPRISALS

Under the jurisprudence of the ICTY, reprisals against civilians are forbidden in all armed conflicts.⁴⁸² Reprisals consist of unlawful acts that are undertaken in response to unlawful acts committed by the opposing armed force in an effort to persuade this

Reprisals against civilians are forbidden in all armed conflicts.

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

476 Ibid. at p. 572.

477 Ibid.

478 Ibid. at p. 573.

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

480 *Zoran Kupreškić et al.*, Case No. IT-95-16-T, Trial Judgment, 14 Jan. 2000, paras.515-520; *Martić*, AJ para.111.

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

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

IRRESISTIBLE FORCE AND THREAT

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

Article 25a of the BiH Criminal Code:

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

ATTEMPT

Article 26 of the BiH Criminal Code:

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

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

Article 28 of the BiH Criminal Code:

- (1) A perpetrator, who voluntarily abandons the execution of a punishable attempt, may be released from punishment.
- (2) In the event of voluntary abandonment of an attempt, the perpetrator shall be punished for those acts that constitute other separate criminal offences.

Article 27 of the BiH Criminal Code:

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

CHAPTER FOUR - INVESTIGATION PROCEDURES IN BOSNIA AND HERZEGOVINA

INTRODUCTION

A sound knowledge of investigation procedures is certainly a significant part of what makes an investigator qualified and experienced to carry out investigative actions. Acquiring a relevant understanding of the legal framework relevant for the conduction of the investigation and procedures is an absolute necessity for each investigator. First, this ensures that the application of uniquely developed investigative skills and techniques is lawful, and second, that investigative activities will result in admissible evidence that can be successfully presented at the court and relied upon in reaching judgment. However, before the investigator's hard work gets a satisfactory epilogue at the court in any criminal case and especially in war crimes⁴⁸³ cases, there are many procedural steps to be carefully taken and followed up on.

For this investigation manual to serve as a complete guide for present and future war crimes investigators in BiH requires an explanation of domestic investigation procedures provided in criminal procedural law and practice.

⁴⁸³ When referring to "war crimes cases" in this chapter, the crimes of genocide and crimes against humanity are also included.

Domestic investigation procedures apply also to war crimes investigations and prosecution, which may be conducted before the Prosecutor's Office of BiH and the Court of BiH, district prosecutors' offices and district courts in the Republika Srpska,⁴⁸⁴ cantonal prosecutors' offices and cantonal courts in the Federation of BiH,⁴⁸⁵ and the Prosecutor's Office and the Basic Court of the Brčko District of BiH. The jurisdictional structure in BiH is specific in relation to war crimes proceedings, and it provides, since 1 March 2003, the Court of BiH with exclusive jurisdiction over war crime proceedings, while district/cantonal courts and prosecutor's offices and the Prosecutor's Office and the Basic Court of the Brčko District of BiH may handle war crimes cases initiated before 1 March 2003.⁴⁸⁶ The BiH Court may also transfer the conduct of proceedings to territorially competent courts and prosecutor's offices pursuant to Articles 27 and 27a of the BiH CPC.

Article 27 of the BiH CPC
Transfer of Jurisdiction

- (1) If there are strong reasons, the Court may transfer the conduct of the proceedings for a criminal offense falling within its jurisdiction to the competent Court in whose territory the offense was committed or attempted. The conduct of the proceedings may be transferred no later than the day the main trial is scheduled to begin.
- (2) The decision in terms of Paragraph 1 of this Article may also be rendered on the motion of the parties or the defence attorney for all the offenses falling within the jurisdiction of the Court except for the offenses against the integrity of Bosnia and Herzegovina.

Article 27a of the BiH CPC
Transfer of jurisdiction for the criminal offences referred to in
Chapter XVII of the CC of BiH

- (3) If the proceedings are pending for the criminal offences referred to in Articles 171 through 183 of the Criminal Code of Bosnia and Herzegovina, under its decision, the Court may transfer the proceedings to another court in whose area the criminal offence was attempted or committed, no later than by the time of scheduling the main trial, while taking into account the gravity of the criminal offence, the capacity of the perpetrator and other circumstances of importance in assessing the complexity of the case.
- (4) The Court may render the decision referred to in Paragraph 1 of this Article also upon the motion of the parties or defence counsel, while at the stage of investigation, only upon the prosecution motion.
- (5) The decision referred to in Paragraph 1 of this Article shall be rendered by the Panel referred to in Article 24(7) of the Code, composed of three Judges. No appeal from the decision of the Panel shall be allowed.

484 There are five district prosecutors' offices and five district courts in the RS (Banja Luka, Doboj, Bijeljina, Trebinje and Istočno Sarajevo).

485 There are ten cantonal prosecutors' offices and cantonal courts in the cantons of the FBiH – Una-Sana Canton in Bihac, Posavina Canton in Orašje, Tuzla Canton, Zenica-Doboj Canton in Zenica, Bosnia-Podrinje Canton in Goražde, Central Bosnia Canton in Travnik, Herzegovina-Neretva Canton in Mostar, West Herzegovina Canton in Ljubuški, Sarajevo Canton and Canton 10 in Livno.

486 See Art. 449 (2) of the BiH CPC: Cases falling within the competence of the Court which are pending before other courts or prosecutors' offices and in which the indictment is not legally effective or confirmed, shall be finalized by the courts which have territorial jurisdiction unless the Court, *ex officio* or upon the reasoned proposal of the parties or defence attorney, decide to take such a case while taking into account the gravity of the criminal offence, the capacity of the perpetrator and other circumstances of importance in assessing the complexity of the case.

This chapter will elaborate on the flow of a war crime investigation, starting from receipt of allegations that the crime has been committed to commencing an investigation, then turning to the roles of different participants in the investigative proceedings. Specific duties of investigators, prosecutors, judges and other participants will be explained by analysing these roles as individual and as parts of multidisciplinary teams. Having in mind that witness statements in war crimes are still considered the most important pieces of evidence, this chapter will devote special attention to the topic of taking a witness protocol in accordance with the requirements of domestic procedures. An overview of the court process in BiH will also be provided. This will include discussion of the procedure for reaching and confirming the indictment (indictment procedure), main trial⁴⁸⁷ proceedings,⁴⁸⁸ evidentiary procedure, and the completion of criminal proceedings, including appellate proceedings. This chapter will also provide an introduction into the legal protection of rights of victims and witnesses, as well as the rights of an accused.

It should also be noted that the rules governing the investigation procedures are the same for every criminal case. The investigation procedures in BiH are regulated in the criminal procedure legislation in force in BiH, including the BiH CPC,⁴⁸⁹ the RS CPC,⁴⁹⁰ the FBiH CPC,⁴⁹¹ and the BDBiH CPC.⁴⁹² These codes were adopted in 2003 as a result of criminal procedure reform in BiH, which introduced predominantly adversarial elements into criminal proceedings conducted before the courts in BiH. Prior to 2003, criminal procedure in BiH predominantly relied upon the “inquisitorial” legal tradition that was valid in the former SFRY. The criminal procedure that was introduced in 2003 combines the features of the “adversarial” and “inquisitorial” systems. The CPCs adopted in the entities (FBiH and RS) as well as for BDBiH were harmonized with the BiH CPC. For this reason, reference to the BiH CPC will be primarily used in this chapter.

The war crimes investigations and prosecutions that are conducted by the prosecutor’s office and before the Court of BiH have some specific characteristics, which differentiate them from proceedings in other criminal cases. As a rule, a prosecution team working on war crimes cases in the BiH Prosecutor’s Office consists of a prosecutor, a legal officer and an investigator. Therefore, when referring to the role of investigator in this chapter, it will pertain to the role of the investigator working in the BiH Prosecutor’s Office. However, because the roles of legal officers and investigators are identical and their status of authorized officials is based on the same provisions of the criminal procedure law, the references to the role of investigators in this chapter will include both: investigators working in the Prosecutor’s Offices in BiH, as well as any other authorized officials working for the various law enforcement

487 “Main trial” is a direct translation of the BSC term “glavni pretres” for a trial.

488 The term “main trial” used in this chapter stands for Bosnian/Croatian/Serbian translation of the term “glavni pretres”.

The concept of main trial proceedings in BiH corresponds to the concept of trial in adversarial system of criminal trial.

489 CPC of BiH, 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.

490 CPC of the RS, Official Gazette of the RS No. 53/12.

491 CPC of the FBiH, Official Gazette of the FBiH No. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 09/09, 12/10 and 08/13.

492 CPC of the BDBiH, Official Gazette of the BD BiH, No. 10/03, 48/04, 6/05, 14/07, 19/07, 21/07, 2/08 and 17/09.

agencies at the levels of State, entity, cantons and the BDBiH. In addition, the references to the practice in this chapter will primarily indicate the practice developed at the Prosecutor's Office and the Court of BiH.

Other cantonal/district prosecutors' offices and the BDBiH Prosecutor's Office only incorporate a small number of legal officers in their structures. The positions of investigators and analysts are not included in their internal organograms.

Having in mind that the role of prosecutors is identical in all war crimes proceedings, regardless of the fact which prosecutors' offices in BiH investigate or prosecute the war crime case, the reference to prosecutor/prosecutors in this chapter will relate to the prosecutor(s) of the BiH Prosecutor's Office, cantonal/district prosecutors' offices in the entities, and the BDBiH Prosecutor's Office.

RECEIPT OF ALLEGATIONS

Investigation in any criminal case, including war crime cases, formally starts at the moment of conducting a first investigative action and lasts until they are formally completed. It may result in raising an indictment or closing an investigation. However, before the investigation is open, it is necessary that that the prosecutor is notified of the existence of grounds of suspicion that the criminal offence has been committed. The prosecutor may learn in a number of ways that the criminal offence has been committed; a citizen may report a crime;⁴⁹³ officials and responsible persons may inform the prosecutor or the authorized officials⁴⁹⁴ of the crime committed and potential perpetrator;⁴⁹⁵ or the prosecutor may learn that the offence has been committed from the newspapers or other broadcast media.

In essence, reporting a crime and its perpetrator does not mean that the investigative procedure is automatically instigated. Though, it does represent an initiative for conducting an investigation.

493 See Art. 214 of the BiH CPC and BDBiH CPC, Art.222 of the RS CPC, Art. 229 of the FBiH CPC.

494 Notion of authorized official is set in Art. 20g) of the BiH CPC, Art. 20ž) of the RS CPC and BDBiH CPC, Art. 21g) of the FBiH CPC. "An authorized official person" is a person having an appropriate authorization within the police authorities in Bosnia and Herzegovina, including the State Investigation and Protection Agency, the State Border Service, the Judicial Police, the Financial Police, as well as within the customs authorities, tax authorities and military police authorities in Bosnia and Herzegovina. Expert associates as well as investigators working for the Prosecutor's Office of Bosnia and Herzegovina under the authorization of the Prosecutor shall also be considered as authorized officials".

495 See Art. 213 of the BiH CPC and BDBiH CPC, Art. 221 of the RS CPC, Art. 228 of the FBiH CPC.

Article 215 of the BiH CPC

(Article 223 of the RS CPC, Article 230 of the FBiH CPC, Article 215 of the BDBiH CPC)

Filing a Report

- (1) The report must be filed with the Prosecutor in writing or orally.
- (2) If a person files an oral report concerning a criminal offence, such person shall be warned of the consequences of providing a false report. The minutes shall be taken concerning oral report and if the report is communicated by telephone, an official note shall be made.
- (3) If the report is filed with the Court, authorized official or some other court or prosecutor in Bosnia and Herzegovina, they shall accept the report and shall immediately submit the report to the Prosecutor.

These are common methods of reporting criminal offences to the prosecutor and, under normal circumstances, the report would follow shortly after the commission of the offence. However, the peculiarity of war crimes investigations in BiH is that, in addition to the ordinary reporting channels, there are some specific ways through which criminal offences may be brought to the attention of the special department for war crimes of the BiH Prosecutor's Office.

The special department for war crimes was established in March 2005, 10 years after the end of the conflict. Therefore, at the time it started operating, the majority of offences had already been reported to: the existing investigative bodies (centres of public and State security, former police agencies); the Agency for Information and Documentation; and the ICTY - which investigated a number of war crimes committed during the 1992-95 war. At the same time, national bodies were also directly engaged in investigations, including investigative judges, military prosecutors, cantonal and district prosecutors' offices, etc. The legal framework in force at the time of the events,⁴⁹⁶ both procedural and substantive, was amended several times up to 2003, and this further increased the complexity of the system by impacting on the "rules" of the investigation and jurisdiction. Consequently, allegations of war crimes in this chapter are divided into: information received from citizens in BiH; reports from victims and witnesses; information and reports filed by authorized officials; information received from other perpetrators; referrals from the ICTY or the War Crimes Chamber of the BiH State Court; and other sources - cases processed by the former investigative bodies.

⁴⁹⁶ Apart from the SFRY Criminal Code that was taken over by the Republic of BiH and in force during the 1992-95 war, new Criminal Codes were adopted in the RS in 2000 and in the FBiH in 1998.

INFORMATION RECEIVED FROM CITIZENS IN BOSNIA AND HERZEGOVINA

Article 214 of the BiH CPC

(Article 222 of the RS CPC, Article 229 of the FBiH CPC, Article 214 of the BDBiH CPC and)

Citizens Reporting a Criminal Offence

- (1) A citizen shall be entitled to report that a criminal offence has been committed.
- (2) All persons must report commission of a criminal offence in those instances where failure to report such a criminal offence itself constitutes a criminal offence.

Citizens also report war crimes to the prosecutor or the authorized officials by submitting written information to the prosecutor or law enforcement agencies in BiH. If the information of a war crime is filed with the authorized officials, they are obliged to immediately forward such information to the prosecutor.⁴⁹⁷ On rare occasions, citizens orally or by phone inform the prosecutor of a war crime. The prosecutor or investigator will register an oral or telephone allegation via an official record for oral allegation and an official note if the allegation is received by phone.

Information on war crimes received from citizens is called a “report” (*loc. prijava*). BiH Criminal procedure allows reports from private citizens to be submitted in any form and to contain any sort of criminal allegation.

The report is considered as a “source” of information for the prosecutor that a crime has been committed, and it is not technically “evidence”. Still, the form and content of a charge should follow the principles of logic and contain information on a particular incident, a fact or circumstance which may indicate that there are grounds for suspicion that a crime may have been committed. Other documents or annexes can be attached to information on war crimes, as constituent parts of the charge.

In practice, the prosecutor treats allegations of war crimes from citizens as *indicia* that often require further verification before there is sufficient information to establish the existence of grounds for suspicion that a crime has been committed by a certain perpetrator. Once received by the prosecutor’s office, these allegations are usually registered in so called KTA-RZ cases,⁴⁹⁸ while allegations received from other sources (e.g. reports from victims and witnesses; information and reports filed by authorized officials; information received from other perpetrators; referrals from ICTY or the War Crimes Chamber of the BiH State Court; Other sources - Cases processed by the former investigative bodies) are largely registered in KT-RZ cases.⁴⁹⁹

⁴⁹⁷ See Art.215 (3) of the BiH CPC and BDBiH CPC, Art. 223(3) of the RS CPC and Art.230 (3) of the FBiH CPC.

⁴⁹⁸ KTA-RZ denotes the cases in which the existence of the criminal offence of war crimes has not been established with certainty, as well as different criminal cases related to war crimes cases.

⁴⁹⁹ KT-RZ denotes the war crimes cases where the perpetrator is known and in which an order to conduct an investigation may be issued.

REPORTS FROM VICTIMS AND WITNESSES

Reports from victims and witnesses belong to a subtype of sources of information on war crimes that are received from citizens. Victims and witnesses of war crimes were personally affected by the criminal offence and experienced specific traumatic experience as result of crimes such as: rape, imprisonment and torture in detention centres, and/or the murder or disappearance of family members. Victims and witnesses may develop a special bond among themselves because of a common traumatic experience, also a dominant cohesive element for establishing various victim and witness associations and groups. These associations and groups allow victims and witnesses to represent their rights and realize their interests in an organized and synchronized manner. Hence, there are different victim and witness associations in BiH, such as:

- concentration camp survivors;
- women victims of war;
- civilian victims of war;
- child victims of war;
- associations of missing persons, etc.

Several associations possess catalogues of information or have developed databases that contain detailed and searchable accounts of their members, the crimes committed, the perpetrators, the locations of crimes, and victim and witness statements. Since 2005, these associations have filed numerous war crimes reports to the prosecutor's office. Some of these reports include very detailed records of the experiences of victims and witnesses, and descriptions of the crimes themselves - often providing a very valuable source of information for the prosecutor.

INFORMATION AND REPORTS FILED BY AUTHORIZED OFFICIALS

Article 213(1) of the BiH CPC

(Article 221(1) of the RS CPC, Article 228 1) of the FBiH CPC, Article 213(1) of the BDBiH CPC)

Obligation to Report the Criminal Offence

Official and responsible persons in all the governmental bodies in Bosnia and Herzegovina, public companies and public institutions shall be bound to report criminal offences of which they have knowledge, through information provided to them or learned by them in some other manner. Under such circumstances, the official and responsible person shall take steps to preserve traces of the criminal offence, objects upon which or with which the criminal offence was committed, and other related evidence, and shall notify an authorized official or the Prosecutor's Office without delay.

Information and reports filed by authorized officials are the most common source of information that a criminal offence has been committed. The regular duties of authorized officials include various operative actions for preventing and uncovering

crimes. When authorized officials, as a result of these actions, gather information which constitutes grounds for suspicion that a crime has been committed, they are bound to inform the prosecutor either immediately or within a certain time frame.⁵⁰⁰ In a war crimes case that carries a prison sentence of more than five years, upon learning that a war crime has been perpetrated, the authorized officials have a duty to immediately inform the prosecutor.⁵⁰¹ Then, under the prosecutor's supervision, the authorized officials take steps to gather information relating to the circumstances of the crime and its perpetrator, including:⁵⁰²

- statements from potential witnesses and victims;
- medical and photographic documentation;
- documentary evidence on the role and position of the perpetrator;
- steps to establish the identity of persons and objects;
- search to locate an individual or items;
- search of specified structures and premises of State authorities;
- examination of specified documents belonging to State authorities or institutions.

All of the actions taken by authorized officials or investigators to gather information, are formalized into records, reports, statements and official notes, which are attached to the war crime report. Based on the report's findings, the prosecutor will then assess the facts of the case and the evidence presented. This assessment will serve to establish whether the report indicates sufficient grounds to issue an order to conduct an investigation. Should an investigation be opened, the prosecutor may prepare a plan of investigation and issue an order for authorized officials to complete the report with additional investigative actions. Alternatively, the prosecutor may carry out investigative actions aimed at the completion of the investigation.

The duty of the authorized officials or the investigator is to follow the war crimes case after the report is filed. If the authorized officials learn any new and relevant facts, evidence or traces of the crime after the submission of the report, their duty is to collect this information and forward it to the prosecutor as a supplement to the previous report.

When reporting a war crime, the authorized officials working for the State Investigation and Protection Agency and the Ministries of Internal Affairs of the FBiH and the RS submit to the prosecutor's office a report on the war crime substantiated with documentation that may be used as evidence – statements from potential witnesses and victims, documentary evidence, profiles on potential perpetrators.

500 See Art. 218 of the BiH CPC and BDBiH CPC, Art. 226 of the RS CPC, and Art. 233 of the FBiH CPC.

501 See Art. 218 (1) of the BiH CPC and BDBiH CPC, Art. 226(1) of the RS CPC, and Art. 233(1) of the FBiH CPC.

502 See Art. 219(1) of the BiH CPC and BDBiH CPC, Art. 227(1) of the RS CPC, and Art. 234(1) of the FBiH CPC.

REFERRALS FROM THE ICTY OR THE COURT OF BOSNIA AND HERZEGOVINA

ICTY REFERRALS

The completion strategy of the ICTY was endorsed by UN Security Council Resolutions 1503 (August 2003) and 1534 (March 2004)

Resolution 1503 (2003)

Adopted by the UN Security Council at its 4817th meeting, on 28 August 2003

1. Calls on the international community to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY and the ICTR and encourages the ICTY and ICTR Presidents, Prosecutors, and Registrars to develop and improve their outreach programmes;
5. Calls on the donor community to support the work of the High Representative to Bosnia and Herzegovina in creating a special chamber, within the State Court of Bosnia and Herzegovina, to adjudicate allegations of serious violations of international humanitarian law;
7. Calls on the ICTY and the ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (the Completion Strategies);

The completion strategy meant that the ICTY would concentrate on the prosecution and trial of the most senior leaders and would refer cases involving lower-ranked accused to the national courts of the Former Yugoslavia. This would include (a) cases in which there is a confirmed indictment and in which the ICTY Office of the Prosecutor (ICTY OTP) has filed a motion under Rule 11bis of the ICTY Rules of Procedure and Evidence; and (b) cases in which the ICTY OTP has conducted an investigation, but has not resulted in the issuance of an indictment (referred to as Category “2” Cases).

Following a decision of the ICTY Referral Bench, cases in which an indictment has been confirmed are referred to the BiH authorities pursuant to Rule 11bis of the ICTY Rules of Procedure and Evidence.

Rule 11bis cases that were referred to the BiH Prosecutor’s Office consisted of six cases involving ten accused (Radovan Stanković, Gojko Janković, Mitar Rašević and Savo Todović, Željko Mejakić and three others and Paško Ljubičić). The BiH Prosecutor’s Office adapted the ICTY indictments in accordance with domestic law and presented them before the Court of BiH.⁵⁰³ Criminal proceedings in all of the Rule 11bis cases have now been completed. The Court of BiH rendered final and binding verdicts, convicting the accused and sentencing them to imprisonment.

⁵⁰³ Law on the transfer of cases by 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, BiH Official Gazette No. 61/04, 46/06, 53/06, 76/06.

Under its completion strategy, the ICTY OTP was required to refer cases, in which an indictment had not been confirmed by the end of 2004, to the BiH Prosecutor's Office. Between 2005 and 2009, all of the Category "2" cases were transferred to the BiH Prosecutor's Office. The Category "2" cases,⁵⁰⁴ as well as the Rule 11bis cases, were to be given priority by the BiH Prosecutor's Office.

REFERRALS FROM THE COURT OF BIH

Besides cases directly referred to the BiH court from the ICTY, the Court may also take over cases pending before cantonal/district courts or prosecutors' offices or the BDBiH Prosecutor's Office pursuant to Article 449 of the BiH CPC. Before entry into force of new criminal legislation in March 2003, which introduced exclusive jurisdiction over war crimes to the Court of BiH, war crimes cases were received and processed by all courts and prosecutors' offices in BiH.

Some of these cases had previously been subject to an assessment of their sensitivity by the BiH Prosecutor's Office in accordance with its Book of Rules procedure adopted in 2005. For a certain number of these cases, those deemed "very sensitive", the BiH Prosecutor's Office filed a proposal that the Court of BiH take over the case, pursuant to Article 449, paragraph 2 of the BiH CPC, and if the proposal was upheld, the case would be processed at State level. Cases assessed as "sensitive", as well as cases not reviewed by the BiH Prosecutor's Office were to be returned and worked on by the cantonal and district courts and prosecutors' offices, and the BDBiH Court and Prosecutor's Office. The Book of Rules procedures were in force until the adoption of the National War Crimes Strategy in December 2008, which introduced a new system for the distribution of proceedings before State and entity levels, on the basis of the "complexity" of cases, to be determined in line with the Strategy's criteria. The Strategy divides war crimes proceedings into two groups:⁵⁰⁵

- i. group includes war crimes cases that were reported after the entry into force of the new criminal legislation, on 1 March 2003. All such cases, in accordance with the law, fall under the exclusive jurisdiction of the Court and the Prosecutor's Office of BiH and can be transferred to other courts and prosecutors' offices only in accordance with Article 27 or 27a of the BiH CPC (by transfer of jurisdiction). Up until 1 October 2008, the Prosecutor's Office of BiH had 565 such cases on the record.
- ii. group, comprising most of the backlog, includes war crimes cases that were received to be worked on by the courts and prosecutors' offices in the entities and Brčko District of BiH before the entry into force of the BiH CPC in 2003 and which do not have a confirmed indictment. The territorially competent entity level jurisdiction is responsible for finalizing those cases unless the Court of BiH takes them over pursuant to Article 449 BiH CPC".

⁵⁰⁴ Fourteen Category "2" cases (involving around 40 suspects) were referred to the BiH Prosecutor's Office.

⁵⁰⁵ National War Crimes Strategy, adopted by the Council of Ministers of BiH on 28 December 2008, p. 11-12.

The National War Crimes Strategy also introduced case complexity criteria (i.e. the gravity of the criminal offence, the capacity of the perpetrator and other circumstances of importance in assessing the complexity of the case), which served for the selection and assessment of the complexity of cases and deciding on the handover of war crimes cases in accordance with Article 449 (2) of the BiH CPC and transfer of proceedings in accordance with Article 27a of the BiH CPC. According to Article 449, paragraph 2 of the BiH CPC, the courts with territorial jurisdiction are obliged to finalize these cases, unless the Court of BiH decides to take the case over. If the Court of BiH decides to take over such a case, it is submitted for further investigation to the BiH Prosecutor's Office.

In a small percentage of war crimes cases, the cantonal and district prosecutors' offices finish the investigation and submit the indictments for confirmation to the cantonal and district courts. If the Court of BiH decides to accept such an indictment, the case is also submitted to the BiH Prosecutor's Office. Once registered with the BiH Prosecutor's Office, this case is considered to be in the investigative phase, during which the BiH Prosecutor's Office will conduct additional investigative actions and reach a prosecutorial decision.

OTHER SOURCES - CASES PROCESSED BY THE FORMER INVESTIGATIVE BODIES

A large number of pending war crimes cases were extensively investigated during and immediately after the war by the former investigative judges, military prosecutors' offices and courts, cantonal and district prosecutors' offices and other BiH investigation agencies. These old investigative files may contain:

- numerous witness statements;
- criminal charges;
- documentary evidence;
- decisions on conducting an investigation;
- transcripts from the trial proceedings;
- international arrest warrants;
- decisions on custody;
- summaries of the case files; and
- assessments and transmission letters from the ICTY Rules of the Road Unit,⁵⁰⁶ etc.

⁵⁰⁶ The ICTY Rules of the Road Unit was established on the basis of the Agreement between the parties to the General Framework Agreement for Peace in BiH actions to strengthen and advance the peace process that was made in Rome on 18 February 1996. Under the agreed measures, contained in the second subpara. to para. 5 of the Rome Agreement under the heading "Co-operation on War Crimes and Respect for Human Rights", the parties agreed that the prosecutor of the ICTY would review domestic war crimes investigations in order to advise whether or not the evidence was sufficient by international standards to justify either the arrest or indictment of a suspect or continued detention. Under the auspices of the ICTY Rules of the Road Unit a large number of war crimes cases were assessed and transmission letters on assessments were submitted.

The information in the old files represents a vast source of information for the prosecutor in the new investigation. Investigative actions taken in accordance with former criminal procedure legislation, valid prior to 2003, are not directly used in the proceedings before the Court of BiH. The praxis is for the prosecutor to use this evidence as grounds for conducting follow-up investigative actions, which mostly consist of renewing all the relevant testimonial evidence. Investigative actions include obtaining relevant documentary evidence in line with the requirements of the new BiH CPC in order for the investigation results to be presented and accepted as evidence at court.

There are two exceptions to the use of the evidence produced by the former investigative bodies, which are also exceptions from the principle of direct presentation of evidence:

First, the information contained in the old investigative files, particularly witness statements, may be read or used in the main trial proceedings before the Court of BiH if the witnesses who provided the statements are dead, mentally ill, cannot be found or their presence in court is impossible or very difficult to arrange due to important reasons.⁵⁰⁷

The Appellate Panel of the Court of BiH in the *Marko Radić et al.* case accepted that prior witness statements be read out and tendered as prosecution evidence:

“Upon a review of the Register of Deaths of the Municipality Novo Sarajevo number 10780 dated 23 June 2010 concerning witness JH, the Court established that this witness died on 5 October 2009. A direct hearing of witness JH before the Court is therefore impossible. The Appellate Panel concludes that thereby the requirements set forth in Article 273(2) of the CPC of BiH, to read out and use the investigation records as evidence at the main trial, were undoubtedly satisfied and that there are no earlier-existing dilemmas as the appeals indicated. In this respect, the Appellate Panel accepted the statement of witness JH given in the BiH Prosecutor’s Office number: KT-RZ-95/05 dated 18 May 2006, and the statement given before the Higher Court”.⁵⁰⁸

Also, earlier statements are admissible as evidence at the main trial and may be used in direct or cross-examination of witnesses or experts and subsequently tendered as evidence.⁵⁰⁹ In practice, old statements are usually used in the cross-examination of prosecution witnesses with the intention of discrediting those witnesses and questioning the authenticity and accuracy of their statements given at the main trial.

507 Art. 273 (2) of the BiH CPC, Art. 288 (2) of the RS CPC and the FBiH CPC, Art. 280 (2) of the BDBiH CPC.

508 Court of BiH, *Marko Radić et al.*, Case No. X-KR-05/139, 2nd Instance Verdict, 9 March 2011, para. 79.

509 Art. 273(1) of the BiH CPC, Art. 288(1) of the RS CPC and the FBiH CPC, Art.280 (1) of the BDBiH CPC.

PROCESS FOR COMMENCING AN INVESTIGATION

The conduct of a war crime investigation subsumes several phases:

1. Issuing an order to conduct an investigation
2. Planning of an investigation
3. Management and supervision of an investigation

ISSUING AN ORDER TO CONDUCT AN INVESTIGATION

Article 216(1) of the CPC of BiH

(Article 224(1) of the RS CPC, Article 231(1) of the FBiH CPC, Article 216(1) of the BDBiH CPC):

The Prosecutor shall order the conduct of an investigation if grounds for suspicion that a criminal offence has been committed exist.

This legal formulation stipulates that the standard of proof needed for opening an investigation is: "...grounds for suspicion that a war crime has been committed". There is no standard or fixed rule as to what are reasonable grounds for suspicion which can be set down as applicable to all cases. The existence of grounds for suspicion that a war crime has been committed does not need to be based on direct evidence. They may exist when the prosecutor learns or concludes that there are certain facts and circumstances indicating that a crime has been committed. These facts and circumstances could be connected with the logical hypothesis deriving from some direct or indirect evidence.

The prosecutor will always issue an order to conduct an investigation if there is probability that a war crime has been committed. The order to conduct an investigation does not have to include other information related to the manner of perpetration, the consequences of the criminal offence, information on the perpetrator(s), and relevant facts and circumstances, which may be discovered only upon supplemental investigative actions.

The practice of the BiH Prosecutor's Office is to always issue a written order to conduct an investigation in war crimes cases. The order to conduct an investigation is considered an internal prosecutorial decision, which usually remains a confidential part of the case file.

Some prosecutors of the BiH Prosecutor's Office will not share the order with any of the bodies involved in investigation, while others choose to attach the order to conduct an investigation to their instructions to the law enforcement agencies to conduct investigative actions.

The contents of the order to conduct an investigation shall include the following elements:

- Data on perpetrator, if known;
- Descriptions of the act, pointing out the legal elements which make it a crime;
- Legal classification of the criminal offence (e.g. Crimes against Humanity from Article 172 of the Criminal Code of BiH);
- Circumstances that confirm grounds for suspicion for conducting an investigation and existing evidence; and
- Circumstances that need to be investigated and which investigative measures need to be undertaken.⁵¹⁰

The BiH CPC conceived the role of the prosecutor in the investigation as an investigator manager, who, together with investigators and authorized officials, undertakes measures to plan and manage the investigation and supervise the investigative activities undertaken by the investigators and other bodies involved. This managing role is particularly important in the investigation of a complex war crimes case that includes a number of perpetrators with different commanding positions, multiple and systemic nature of actions of perpetration, a large volume of documentary evidence, and so on. In a complex war crimes case, it is recommended that the investigation be carried out by a multidisciplinary team consisting of a prosecutor heading the team, an investigator, a legal officer and an analyst. The specific roles of each team member are discussed below.

PLANNING OF AN INVESTIGATION

Article 216(2) of the CPC of BiH

(Article 224(2) of the RS CPC, Article 231(2) of the FBiH CPC, Article 216(2) of the BDBiH CPC):

“...The Prosecutor shall list in the order which circumstances need to be investigated and which investigative measures need to be undertaken”.

The planning of a war crime investigation starts with the issuance of an order to conduct an investigation and lasts throughout the whole investigation as a dynamic process of creating and adapting the investigation to the new factual and procedural situations that arise. The investigation plan is a key element which largely influences the success and efficiency of the investigation, besides the fact that it is a methodologically vital step for the successful conduct of such a complex and multidisciplinary activity as war crimes investigation.

The investigation plan includes several phases:

- Establishing the known facts and circumstances, as well as the known direct or indirect evidence related to the war crimes and perpetrators;
- Setting hypothesis (or legal theory);

⁵¹⁰ See Art. 216(2) of the BiH CPC and the BDBiH CPC, Art. 224(2) of the RS CPC, Art. 231(2) of the FBiH CPC.

- Setting the investigation objectives;
- Establishing whether it is necessary to apply measures for securing the presence of a suspect/accused and the successful conduct of the criminal proceedings;
- Establishing which facts and circumstances are necessary and useful to ascertain during investigation;
- Establishing which evidentiary means should be applied to prove specific facts and circumstances;
- Establishing which investigative actions should be taken, and whether judicial authorization would need to be obtained for any of the investigative actions;
- Identifying who will carry out the specific investigative actions (investigators, authorized officials, legal officers, other prosecutors);
- Identifying sequencing for investigative actions;
- Setting time frames for each investigative action and all of the actions taken together;
- Setting time frames and communication methods between the prosecutor, investigators, authorized officials and analysts involved in the investigation.

In practice, a good investigation plan should answer all questions relevant to the investigation, including: are there any witnesses or eye-witnesses to the crime?; how many potential witnesses are there?; are the potential witnesses alive, healthy and willing to testify?; how many witnesses should be questioned in order to prove the specific count of the indictment?; is it necessary to enter into plea agreement with the suspect/accused in order to prove the criminal offence or a particular count of the indictment?; what documentary evidence is needed to prove the existence of the conflict or the wide-spread and systematic attack?; is there a need to produce an analytical report of documentary evidence found in the ICTY databases?, etc.

SETTING OF HYPOTHESIS

The setting of a hypothesis is the next methodological step in the planning process that follows after an analysis has been made of the known facts and circumstances, which brought the opening of the investigation. This step enables focusing on the relevant facts and circumstances that should be investigated in order to prove the war crime, as well as to identify evidence which proves the case. In complex cases, several alternative hypotheses should be set and simultaneously explored. For example, in a case where members of a military unit committed the war crimes and the role of the commanding officer in the commission of the crime is dubious, two alternative hypotheses could be set: that the commander planned the crime and ordered the subordinate soldiers to commit the crime (direct perpetration or individual responsibility theory)⁵¹¹; or that the commander did not know that the subordinate was about to commit the crime or had known, but failed to take reasonable measures

⁵¹¹ Art. 180(1) of the Criminal Code of BiH: “(1)A person who planned, ordered, perpetrated or otherwise aided and abetted in the planning, preparation or execution of a criminal offence referred to in Art. 171 (*Genocide*), 172 (*Crimes against Humanity*), 173 (*War Crimes against Civilians*), 174 (*War Crimes against the Wounded and Sick*), 175 (*War Crimes against Prisoners of War*), 177 (*Unlawful Killing or Wounding of the Enemy*), 178 (*Marauding the Killed and Wounded at the Battlefield*) and 179 (*Violating the Laws and Practices of Warfare*) of this Code, shall be guilty of the criminal offence. The official position of any individual, whether as Head of State or Government or as a responsible Government official person, shall not relieve such person of culpability nor mitigate punishment”.

to prevent the crime or to punish the perpetrators (command responsibility theory).⁵¹² The evidence collected in the course of the investigation will demonstrate which one of the theories has more merit.

The practice of the Court of BiH showed that most of the cases indicted and tried under command responsibility theory, as set out in Article 180(2) of the Criminal Code of BiH, resulted in acquittals.⁵¹³

In the *Predrag Kujundžić* case, the Court, in dismissing the command responsibility charge, held that:

“...In the case at hand, in the operative part of the Indictment, it should have been indicated under this count in which manner the accused knew or could have known about the commission of the criminal offences by his subordinates (information about the surrounding, his presence, details about his behaviour that could be related to his knowledge of the incident but also his failure to punish the perpetrators, etc.), which would, categorized as a legal standard, constitute all the elements of the required criminal offence based on the command responsibility pursuant to Article 180(2) of the CC BiH”.

SHARING OF INFORMATION AND THE DYNAMICS OF PLANNING

The planning of an investigation should be conducted in co-ordination and co-operation with the investigator and legal officer assigned to carry out the specific investigative activities in accordance with the plan. The implementation and the results of each investigative activity must be reported to the prosecutor, as investigation co-ordinator. The prosecutor will then consider the effectiveness of the investigative activity, how it impacted the investigation objective and decide as to whether the investigation plan should be modified and whether different investigative measure should be taken.

The investigation is a dynamic and interactive activity that requires continuous adaptation to new and unpredictable situations that arise during the course of the investigation and the timely sharing of information is extremely important to achieving success. The process of investigation planning is covered in a separate chapter of this manual.

512 Art. 180(2) of the Criminal Code of BiH: “(2) The fact that any of the criminal offences referred to in Article 171 through 175 and Art. 177 through 179 of this Code was perpetrated by a subordinate does not relieve their superior of culpability if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof”.

513 Court of BiH, *Lalović Radoje et al.*, Case No. X-KRŽ/05/59, 2nd Instance Verdict, 11 July 2011; *Momčilo Mandić*, Case No. X-KRŽ/05/58, 2nd Instance Verdict, 1 September 2009; *Stupar Miloš*, Case No. X-KRŽ-05/24-3, 2nd Instance Verdict, 28 April 2010; *Predrag Kujundžić* was acquitted of the charge that he committed the war crime under command responsibility, Case No. X-KRŽ-07/442, 2nd Instance Verdict, 4 October 2010, para. 197. Acceptance of command responsibility at the Court of BiH happened only in a handful of cases which were concluded through plea agreements, e.g. Case No. X-KR-09/684-1 (*Dragan Rodić* case), 26 October 2010, Case No. X-KR-09/662 (*Stojan Perkonić* case), 24 December 2009, Case No. X-KR-07/341 (*Enes Handžić et al.*), 25 May 2011.

ROLE OF THE PROSECUTOR

The prosecutor has a central role in any war crimes investigation, as they are authorized to direct and carry out the investigation in accordance with the law, while all other involved bodies are bound to inform the prosecutor of any actions taken. The prosecutor is authorized to independently take any investigative action *ex officio* or pursuant to a court order,⁵¹⁴ but at the same time, the prosecutor may order that some actions are taken by the investigators or legal officers. This role of the prosecutor is fully justified, bearing in mind that the prosecutor is the only institutional figure responsible for deciding if there is sufficient evidence to open an investigation, to file an indictment and to litigate the case before the court.

The kind of investigative actions to be undertaken primarily depend on the type, importance and complexity of the war crime being investigated, as well as on cooperation and trust between the prosecutor and the investigator, the legal officer and other team members during the investigation.

The main role of the prosecutor within the planning process is to co-ordinate and manage all investigative activities. This management and supervisory role starts at the early stage of the planning process, from the point investigation is opened, until it is completed. This managing duty requires that the prosecutor directly and actively participates in the conduct of the investigative actions and their analysis. The supervisory role also entails a somewhat more passive mode of participation in the investigation, where the investigator takes initiatives and controls the investigation dynamic, and the prosecutor oversees the work of the investigator, the analyst and the legal officer in terms of its legality and efficiency. The sequence of investigative actions should be defined at the outset of the investigation. However, due to new events and findings, the sequence of actions may be amended in the course of the investigation. Also, the prosecutor should hold regular meetings with members of the prosecution team involved in the investigation, which will serve to:

- Present the results of the investigative actions (e.g. the questioning of suspect(s); the testimony of victim(s) and witness(es); crime scene investigation; reconstruction of events; undertaking special witness protection measures; and any necessary expert evaluation),⁵¹⁵
- Discuss issues arising from the investigation;
- Evaluate the state of the investigation in terms of its dynamics and efficiency;
- Explore additional investigative actions to resolve problems with the current investigation plan;
- Take decisions on the further course of the investigation.

The prosecutor's management and supervisory functions are directed to ensure optimal engagement of human and technical resources throughout the course of the investigation, as well as to ensure that any actions by the investigators and other

⁵¹⁴ The court also may order conducting of investigative actions; for example, the court will issue orders for exhumation and special investigative actions.

⁵¹⁵ Art. 217(1) of the BiH CPC and the BDBiH CPC, Art. 225(1) RS CPC, Art. 232(1) of the FBiH CPC provides for investigative actions taken by the prosecutor.

authorized officials are in accordance with the law and the investigation plan. In conducting these functions the prosecutor may be required to:

- a) ensure legal support to the work of the investigator and interpret the norms of criminal procedural and substantive law (e.g. explain the crimes of persecution), as well as making sure that human rights standards are applied;
- b) issue orders and instructions for collecting information and evidence to the investigators to ensure that the evidence collected is admissible in court;
- c) take part in the procedural actions needed for the conduct and engagement of the investigator.

ROLE OF THE INVESTIGATOR

An investigator has an active role during the investigative phase of a war crimes case. However, the role of investigators is specific due to the fact that they do not only perform investigative actions, but take more operational duties. Investigators' activities in operational terms include their regular crime prevention duties, inspections, and information gathering.

In the course of their operational work, investigators may collect information from citizens and institutions and, based on that activity, prepare official notes, operational and intelligence reports. The information gathered in the course of operational work may lead to knowledge that a war crime has been committed, as well as the facts and circumstances of the crime and its potential perpetrator(s). In this case, the investigator's duty is to notify the prosecutor who then may decide to open an investigation. Therefore, the operational activities of the investigators are equally important for commencing an investigation as their role in the conduct of the investigative actions.

The investigators will have the following duties and responsibilities in the investigation:

- a. carry out investigations at the direction of the prosecutors;
- b. interview witnesses, victims and suspects in accordance with procedures as set out in the BiH CPC;⁵¹⁶
- c. provide advice to the prosecutors with regard to investigation, planning and strategy;
- d. provide analysis and guidance for the investigation;
- e. take notice of those witnesses that may require protective measures;
- f. maintain a list of contacts within BiH that can be utilized during investigations;
- g. maintain liaison with relevant law enforcement agencies within BiH, the FBiH, the RS, BDBiH and other national and international institutions.

The investigator has an essential function in the course of the investigation to the point where there is sufficient evidence or information to take a final prosecutorial decision to indict or close the investigation. If the decision to indict has been taken, the investigator acquires a different role. During the main trial, the investigator at the BiH Prosecutor's Office mainly helps by contacting and preparing witnesses

⁵¹⁶ Arts. 218-221 of the BiH CPC and BDBiH CPC, Arts. 226-229 RS CPC and Arts. 233-236 of the FBiH CPC.

before the main trial. The investigator also performs background checks of defence witnesses in order to find information or facts on the testimony of those witnesses and the relationship between the witnesses and the defendants.

ROLE OF THE ANALYST

Analysts have a particular responsibility prior to the opening of an investigation and during the investigation itself, which usually starts as soon as the order to conduct an investigation is issued. They have the following responsibilities:

- Perform research (search for relevant information and evidence) on war crimes and on military and civilian organizations and leadership suspected of involvement in war crimes in State, military and other relevant archives and document collections, including the ICTY's Electronic Disclosure Suite (EDS).
- Produce analytical reports on topics identified by the prosecutor or at the request of the prosecutors.
- When appropriate, take part in interviews of witnesses, victims and suspects together with prosecutors or investigators, in accordance with the BiH CPC.
- Provide advice to prosecutors with regard to investigation, prosecution, planning and strategy.

Analysts may also make requests for information to other agencies (national and international). It is recommended that requests be made well in advance of any deadline. Such requests should include:

- Names of suspect(s) and a summary of what is known about them;
- Description of the crime(s) with as much detail as is appropriate;
- Documentary and witness evidence available (ideally, by access to an electronic copy of the case file);
- Any areas or issues where attention is especially needed;
- Any security issues; and
- Deadlines.

Likewise, the prosecutor may request an *analytical report* on topics of their choice in the same way as with research requests (possibly at the same time). If an analytical report is requested, the prosecutor should indicate the desired scope and degree of detail (from a few pages up to a full expert report) and whether or not the report is to be tendered as evidence. Analytical reports are not required in every case. As a rule, they should be considered primarily in complex cases.

The role of the Analyst and analysis processes is further discussed in a separate chapter of this manual.

OVERVIEW OF COURT PROCESS

Although the Court of BiH may have a role in the investigation, for example when the court (preliminary proceedings judge) is required to issue orders for the search of dwellings, other premises, movable property and persons,⁵¹⁷ seizure of objects,⁵¹⁸ special investigative actions,⁵¹⁹ witness protection measures⁵²⁰ or pre-trial custody,⁵²¹ the main function of the court in the BiH criminal procedure starts with filing an indictment by the prosecutor. Submission of the indictment is the first step in the court process, which can be divided into three stages:

- 1) Indictment procedure
- 2) Main trial
- 3) Verdict

INDICTMENT PROCEDURE

The prosecutor may issue an indictment after the investigation reveals that there is sufficient evidence for grounded suspicion that the suspect committed a criminal offence.

Article 226 of the BiH Criminal Code

(Article 241 of the RS CPC and the FBiH CPC, Article 226 of the BDBiH CPC)

Issuance of the Indictment

- (1) If during the course of an investigation, the Prosecutor finds that there is enough evidence for grounded suspicion that the suspect has committed a criminal offence; the Prosecutor shall prepare and refer the indictment to the preliminary hearing judge.

⁵¹⁷ Arts. 51 -53 of the BiH CPC, Arts. 115 -117 of the RS CPC and BDBiH CPC, Arts. 65 -67 of the FBiH CPC.

⁵¹⁸ Arts. 65-74 of the BiH CPC and the BDBiH CPC, Arts. 129-139 of the RS CPC, Arts. 79-88 of the FBiH CPC.

⁵¹⁹ Chapter IX of the BiH CPC (Arts. 116-122) and the FBiH CPC (Arts. 130-136), Chapter XVII (Arts. 234-240) of the RS CPC and Chapter XIX (Arts. 226-232) of the BDBiH CPC.

⁵²⁰ Art. 6 of the BiH Law on protection of witnesses under threat and vulnerable witnesses, BiH Official Gazette No., 3/03, 21/03, 61/04, 55/05, the RS Law on protection of witnesses under threat and vulnerable witnesses, RS Official Gazette No. 48/03, the BDBiH Law on protection of witnesses under threat and vulnerable witnesses, BDBiH Official Gazette No.10/03, 8/07 and 19/07, Art. 7 of the FBiH Law on protection of witnesses under threat and vulnerable witnesses, FBiH Official Gazette No. 36/03.

⁵²¹ Section 6 (Pre-trial Custody) of the Chapter X of the BiH CPC and the BDBiH CPC (Arts. 131-136), Section 6 (Pre-trial Custody) of the Chapter X of the FBiH CPC (Arts. 145-150), Section 6 (Pre-trial Custody) of the Chapter XIV of the RS CPC (Arts. 196-201).

The BiH CPC, in Article 227, sets out the requirements as to the contents of the indictment:

Article 227 of the BiH CPC
(Article 242 of the RS CPC and the FBiH CPC, Article 227 of the BDBiH CPC)

Contents of the indictment

(1) 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 offence, the time and place the criminal offence was committed, the object on which and the means with which the criminal offence was committed, and other circumstances necessary for the criminal offence to be defined as precisely as possible;
- d) the legal name of the criminal offence 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.

(2) An indictment may cover more than one criminal offence or more than one suspect.

(3) If the suspect is not detained, it may be proposed in the indictment that he be detained, and if the suspect is already detained, it may be proposed to extend the detention or that he be released.

Once filed, the indictment is subject to review and confirmation procedure by the court. The court (preliminary hearing judge) will first examine whether it has the jurisdiction to try the case, whether the indictment was properly drafted and then proceed with dismissing or confirming the charges on all or some of the counts of the indictment. The deadline for deciding on the indictment confirmation is eight days in less complex cases, and 15 days in complex cases.⁵²² The court will also inform the accused that, within 15 days of delivery of the indictment, they have the right to submit preliminary motions, which may include challenges to jurisdiction, to allege formal defects in the indictment, challenge the lawfulness of evidence, seek joinder or separation of proceedings, challenge the refusal of a motion to appoint a defence attorney, etc.⁵²³ The fact that the indictment has been confirmed changes the status of the suspect who now becomes an accused.

The next phase in the indictment procedure is the plea hearing, in which the accused is required to enter a guilty or not guilty plea in the presence of the prosecutor and the defence attorney. The accused may enter a plea of guilty, not guilty or refuse to enter a plea. The consequence of entering a plea of guilty means that the case will be completed by referring it to the judge or the panel for scheduling hearings for

⁵²² Art. 228 of the BiH CPC and the BDBiH CPC, Art. 243 of the RS CPC and the FBiH CPC.

⁵²³ Arts. 228 (5) and 233 of the BiH CPC and the BDBiH CPC, Art. 243 (5) and 248 of the RS CPC and the FBiH CPC.

deliberation on the plea of guilty and pronouncement of sentence, in which case main trial proceedings will not take place. In terms of procedure, the consequences of entering a not guilty plea or failing to enter a plea are the same, the main trial will be scheduled within 30 to 60 days of the day the accused entered or refused to enter their plea.⁵²⁴

It is significant to note that, throughout the investigation, indictment procedure, main trial and appellate proceedings; the suspect/accused and the defence attorney may negotiate with the prosecutor regarding the conditions of admitting guilt for the criminal offence with which they are charged.

Article 231 of the BiH CPC

(Article 246 of the RS CPC and the FBiH CPC, Article 231 of the BDBiH CPC)

Plea Bargaining

- (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.
- (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.

⁵²⁴ Art. 229 of the BiH CPC and the BDBiH CPC, Art. 244 of the RS CPC and the FBiH CPC.

- (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.

Before the main trial is opened, the presiding judge may decide to schedule a conference hearing, at which organizational issues are discussed. The prosecution and the defence are invited to present the following issues at the conference hearing:

- How many witnesses the prosecution and the defence party intend to call to testify at trial;
- Whether there are any witnesses who may require protection;
- Explain which counts or parts of the counts of the indictment will be proved with the testimony of a particular witness or an expert;
- The time needed for direct and cross-examination of each witness;
- The amount of documentary evidence intended for presentation;

In a complex war crime case, the court usually holds two conference hearings during the main trial, one prior to the presentation of evidence by the prosecution and another before the defence party presents its case.

Article 233a. of the BiH CPC

(Article 249 of the RS CPC, Article 248a. of the FBiH CPC, Article 233a. of the BDBiH CPC)

Pre-trial Hearing

During the preparation for the main trial, the judge or the presiding judge may hold a hearing with the parties to the proceedings and the defence attorney to consider issues relevant to the main trial.

MAIN TRIAL

Main trial proceedings formally commence with an act of reading the indictment and presenting the opening remarks by the prosecutor.

Article 260 of the BiH CPC

(Article 275 of the RS CPC and the FBiH CPC, Article 260 of the BDBiH CPC)

Reading the Indictment and Opening Arguments

- (1) The main trial shall commence by reading the indictment. The indictment shall be read by the Prosecutor.
- (2) After the indictment has been read, the judge or the presiding judge shall ask the accused whether he has understood the charges. If the judge or the presiding judge finds that the accused has not understood the charges, the judge or the presiding judge shall summarize the content of the indictment in a manner understandable to the accused. The Prosecutor shall then briefly state the evidence he will rely upon in his case.
- (3) The accused or his defence attorney may then present a summary of the defence plan.

The court panel consists of three judges who preside over the main trial proceedings in war crimes case, with one of the judges serving as the presiding judge.⁵²⁵

The presiding judge has the following obligations and duties during the main trial:

Obligations:

- Direct the main trial;
- Ensure that the subject matter is fully examined and that everything is eliminated that prolongs the proceedings but does not serve to clarify the matter;
- Rule on the motions of the parties and the defence attorney, with the decision being announced and entered in the main trial record with brief reasoning.⁵²⁶

Duties:

- Ensure the maintenance of order in the courtroom and the dignity of the court;
- May order that all persons present at the main trial as observers be removed from the main trial if the presiding judge finds that they disrupt the main trial;
- If filming of the trial is approved, the presiding judge may order that certain parts of the main trial will not be filmed.⁵²⁷

⁵²⁵ Art. 24(1) of the BiH CPC and the RS CPC, Art. 25(1) of the FBiH CPC and Art. 23(2) of the BDBiH CPC.

⁵²⁶ Art.239 of the BiH CPC and the BDBiH CPC, Art.254 of the RS CPC and the FBiH CPC.

⁵²⁷ Art. 241 of the BiH CPC and the BDBiH CPC, Art. 256 of the RS CPC and the FBiH CPC.

In principle, the main trial is public. Circumstances which may be utilized to exclude the public and provide exceptions to the publicity of the main trial may include, among others:

- The interests of national security, or;
- Preservation of a national/military/official secret;
- Protection of the public peace and order;
- Protection of the personal and intimate life of the accused or the victim;
- Protection of the interest of a minor/witness.⁵²⁸

Article 247 of the BiH CPC (Article 262 of the RS CPC and the FBiH CPC, Article 247 of the BDBiH CPC) provides for a ban on the conduct of the main trial *in absentia* of the accused. This rule is followed by a series of measures which the presiding judge may take to secure presence of the prosecutor, defence party, witnesses and the accused at the main trial and impose sanctions on those participants who do not appear at the main trial and do not excuse their absence.⁵²⁹

The Court of BiH in *Marko Radić et al.* ruled that the waiver of the right to be present at the trial does not amount to a trial *in absentia*:

“...Panel concluded that the Accused Damir Brekalo is indisputably entitled to be present at the trial. However, even though the Accused was duly informed and was aware of the consequences of his non-appearance, he waived this right of his having justified it with subjective reasons. In such a situation, the Court used its discretion and continued the trial without the Accused’s presence, as supported with the foregoing arguments. This is not considered a trial *in absentia* in terms of Article 247 of the BiH or a trial in violation of Article 6 of the European Convention on Human Rights”.⁵³⁰

The evidentiary proceedings symbolize the heart of the main trial, where both parties present their evidence and have the opportunity scrutinize the evidence presented by the opposite party.

The evidence presented at the main trial in war crimes cases may involve:

- Witnesses;
- Experts;
- Documentary evidence;
- Court transcripts or statements given in the investigative phase; facts that are established by legally binding decisions in any other proceedings by the ICTY and documentary evidence from the related proceedings of the ICTY.⁵³¹

528 Art. 235 of the BiH CPC and the BDBiH CPC, Art. 251 of the RS CPC and Art. 250 of the FBiH CPC.

529 Art. 245 of the BiH CPC and the BDBiH CPC, Art.260 of the RS CPC and the FBiH CPC (Failure of the Prosecutor or His Substitute to Appear at the Main Trial); Article 246 of the BiH CPC and the BDBiH CPC, Art. 261 of the RS CPC and the FBiH CPC (Failure of the Accused to Appear at the Main Trial); Art. 248 of the BiH CPC and the BDBiH CPC, Art. 263 of the RS CPC and the FBiH CPC (Failure of the Defence Attorney to Appear at the Main Trial); Art. 249 of the BiH CPC and the BDBiH CPC, Art. 264 of the RS CPC and the FBiH CPC (Failure of the Witness or the Expert Attorney to Appear at the Main Trial).

530 Court of BiH, *Marko Radić et al.*, Case No. X-KR-05/139, 2nd Instance Verdict, 9 March 2011, para. 118.

531 Art. 4 of the Law on the Transfer of Cases from the ICTY to the Prosecutor’s Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in BiH, BiH Official Gazette, No. 61/04, 46/06, 53/06, 76/06).

The prosecution has the burden of proof and it first presents the evidence, unless the court decides that the evidence should be presented in a different order. The order of presentation of evidence is set out in Article 261 (2) of the BiH CPC (Article 276 (2) of the RS CPC and the FBiH CPC, Article 261 (2) of the BDBiH CPC):

Article 261 of the BiH Criminal

(Article 276 of the RS CPC and the FBiH CPC, Article 261 of the BDBiH CPC)

Presentation of Evidence

(1) Parties and the defence attorney are entitled to call witnesses and to present evidence.

(2) Unless the judge or the Panel, in the interest of the justice, decides otherwise, the evidence at the main trial shall be presented in the following order:

- a) evidence of the prosecution;
- b) evidence of the defence;
- c) rebutting evidence of the prosecution;
- d) evidence in rejoinder to the Prosecutor's rebutting evidence;
- e) evidence whose presentation was ordered by the judge or the Panel;
- f) all evidence relevant to the pronouncement of the criminal sanction.

(3) During the presentation of the evidence, direct examination, cross-examination and redirect examination shall be allowed. The party who called a witness shall directly examine the witness in question, but the judge or the Panel may at any stage of the examination pose questions to the witness.

Even if the BiH CPC indicates the order in which the different parties shall present their evidence, it does not provide an order in relation to the different categories of evidence – testimonial, expert, documentary, etc. In practice, the evidence is regularly categorized as follows:

- witnesses - direct and cross-examination of witnesses;
- experts - direct and cross-examination of experts;
- court transcripts or investigative statements - reading of court transcripts or investigative statements;
- documentary evidence – tendering of documentary evidence;
- facts adjudicated before the ICTY – decision to accept the adjudicated facts, etc.

The provisions set out in Article 261(3) of the BiH CPC (Article 276(3) of the RS CPC and the FBiH CPC, Article 261(3) of the BDBiH CPC) are generally applied in a way that the court panel poses questions to the witnesses or the experts immediately after the prosecution and the defence finish with their examinations.

After the presentation of evidence, the presiding judge may ask the prosecution and defence party to file additional evidentiary motions.⁵³²

If the presented evidence warrants a change of the facts referred to in the original

⁵³² Art. 276 of the BiH CPC and the BDBiH CPC, Art. 291 of the RS CPC and the FBiH CPC (Supplement to the Evidentiary Proceedings).

indictment, the prosecutor may decide to amend the indictment at the main trial.⁵³³ The amended indictment is submitted before the evidentiary proceedings are closed and it is not subject to confirmation procedure. The defence party must be given adequate time to prepare its case in relation to the amended indictment.

The main trial proceedings will be completed as soon as the prosecution, victim, defence attorney and accused present their closing arguments.⁵³⁴

Article 278 of the BiH CPC

(Article 292(3) of the RS CPC, Article 293 of the FBiH CPC, Article 278 of the BDBiH CPC)

Closing the Main Trial

Once all closing arguments are completed, the judge or the presiding judge shall declare the main trial closed and the Court shall retire for deliberation and voting for the purpose of reaching a verdict.

VERDICT

The BiH CPC recognizes two types of verdicts: meritory and procedural verdicts.⁵³⁵

The court will pronounce a procedural verdict dismissing the charges in the following instances:

- if the court lacks the competence to reach a verdict;
- if the prosecutor drops the charges between the beginning and the end of the main trial;
- if there was no necessary approval or if the competent State body revoked approval;
- if the accused has already been convicted or acquitted, by a legally binding decision, of the same criminal offence;
- if there are circumstances that permanently preclude criminal prosecution, such as pardon or amnesty.⁵³⁶

Meritorious verdicts include the court decision to acquit the accused and pronounce the accused guilty of the criminal offence with which they have been charged.

A verdict acquitting the accused may be pronounced if:

- The offence with which they are charged does not constitute a criminal offence;
- There are circumstances which exclude criminal responsibility;
- It is not proved that the accused committed the criminal offence with which they are charged.⁵³⁷

⁵³³ Art. 275 of the BiH CPC and the BDBiH CPC, Art. 290 of the RS CPC and the FBiH CPC (Amendment of the Indictment).

⁵³⁴ Art. 277 of the BiH CPC and the BDBiH CPC, Art. 292(1) and (2) of the RS CPC and Art. 292 of the FBiH CPC (Closing Arguments).

⁵³⁵ Art. 282 of the BiH CPC and the BDBiH CPC, Art. 296 of the RS CPC and Art. 297 of the FBiH CPC (Meritorious and Procedural Verdicts).

⁵³⁶ Art. 283 of the BiH CPC and the BDBiH CPC, Art. 297 of the RS CPC and Art. 298 of the FBiH CPC.

⁵³⁷ Art.284 of the BiH CPC and the BDBiH CPC, Art. 298 of the RS CPC and Art. 299 of the FBiH CPC.

A guilty verdict will be pronounced if the panel is convinced that the evidence presented proves beyond reasonable doubt that the accused committed the criminal offence with which they are charged.

The contents of the guilty verdict are given in Article 285 of the BiH CPC:

Article 285 of the BiH CPC

(Article 299 of the RS CPC, Article 300 of the FBiH CPC, Article 285 of the BDBiH CPC)

Guilty Verdict

(1) In a guilty verdict, the Court shall pronounce the following:

- a) the criminal offence for which the accused is found guilty along with a citation of the facts and circumstances that constitute the elements of the criminal offence and those on which the application of a particular provision of the Criminal Code depends;
- b) the legal name of the criminal offence and the provisions of the Criminal Code that were applied;
- c) the punishment to which the accused is sentenced or released from punishment under the provisions of the Criminal Code;
- d) a decision on suspended sentence;
- e) a decision on security measures and forfeiture of property gain and a decision on return of objects (Article 74) if such objects have not been returned to their owner or the possessor;
- f) a decision crediting pre-trial custody or time already served;
- g) a decision on costs of criminal proceedings and on a claim under property law, and the decision that the legally binding verdict shall be announced in the press, or radio or television.

(2) If the accused has been fined, the verdict shall indicate the deadline for payment, or way to substitute the fine in case the accused fails to pay.

TAKING OF A WITNESS PROTOCOL

When it is considered that a witness may provide valuable information concerning an offence, perpetrator or any other important circumstances, the prosecutor may decide to summon the witness to give a statement in the investigation.

The BiH CPC and the ECHR regulate the manner in which witness interviews are to be conducted and how such testimony may be tendered as evidence in court. If such regulations are not fully adhered to, the admission of this evidence may be challenged by counsel and the witness evidence may be lost in court.

Witness statements represent one of the most important evidentiary means in war crimes processing before the courts in BiH. For this reason, prosecutors, investigators and legal officers must take all necessary measures consistent with the BiH CPC to preserve this evidence and make it admissible in court, including:

- Preserve professional confidentiality and not improperly disclose information which may jeopardize the safety of injured parties, witnesses and victims;
- Take all reasonable measures to protect the privacy and ensure the safety of victims, witnesses, their families, and injured parties; to treat victims with appropriate compassion, and to make reasonable efforts to minimize inconvenience to witnesses and injured parties;
- Consider the views, legitimate interests and possible concerns of victims, witnesses and injured parties, in accordance with the requirements of a fair trial, when their personal interests are, or might be, affected, and seek to ensure that injured parties, witnesses and victims are informed of their rights and of the progress of the case;
- Be sensitive to the need not to re-victimize injured parties;
- Obtain consent of victims prior to seeking protective measures, testimony facilitation, or other special measures to protect the mental or physical well-being of victims or witnesses as required by the BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses;
- ⁵³⁸Not require any witness to make any statement that might incriminate themselves - unless immunity is granted-, or the accused person - if the witness falls in the category of “privileged witnesses”- nor offer the witness any monetary or other incentive for their testimony;⁵³⁹
- Provide the witness with the opportunity to obtain legal advice if they so request;⁵⁴⁰
- Victims are entitled to address the BiH Prosecutor’s Office, in accordance with Article 216 paragraph 4 of the BiH CPC.

Prosecutors should also take steps to ensure that witness questioning is carefully prepared and all relevant questions are asked and clarified in order to avoid repeated summoning of the same witness. Prosecutors should use the joinder of criminal proceedings and prosecution⁵⁴¹ of so called “grouped cases” more frequently to reduce instances where a witness is repeatedly called to testify on identical factual backgrounds. Situations where the same witness testifies in a number of trials before national courts and the ICTY should be generally avoided.

The procedure for taking a witness statement is set out in Articles 81-91 of the BiH CPC (Articles 146-156 of the RS CPC, Articles 95-105 of the FBiH CPC, Articles 81-91 of the BDBiH CPC) and practically presented in the following template:

538 Exceptions to the above general principle include privileged witnesses (Arts. 82 and 83 of the BiH CPC and the BDBiH CPC, Arts. 147 and 148 of the RS CPC, Arts. 96 and 97 of the FBiH CPC), informants as well as witnesses who were granted immunity by the decision of the chief prosecutor (Art.84 (3) of the BiH CPC and the BDBiH CPC, Art. 149(3) of the RS CPC, Art. 98(3) of the FBiH CPC).

539 Art. 84(1) of the BiH CPC and the BDBiH CPC, Art. 149(1) of the RS CPC, Art. 98(1) of the FBiH CPC.

540 Art. 84(5) of the BiH CPC and the BDBiH CPC, Art. 149(5) of the RS CPC, Art. 98(5) of the FBiH CPC.

541 Art. 25 of the BiH CPC and the BDBiH CPC, Art. 30 of the RS CPC, Art. 32 of the FBiH CPC.

BOSNIA AND HERZEGOVINA**PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA****SARAJEVO****Number:**

Sarajevo,2013

WITNESS EXAMINATION RECORD

written on in the premises of the BiH Prosecutor's Office in Sarajevo, in the criminal case number against the suspect for the criminal offence of war crimes.

ATTENDEES:

Prosecutor:

Witness:

Record-taker:

Witness examination commenced at hrs.

Based on Article 8 of the BiH Criminal Procedure Code you are hereby informed that official languages of Bosnia and Herzegovina – Bosnian, Croatian and Serbian, as well as both scripts Latin and Cyrillic, are in equal official use before this Prosecutor's Office. If you do not understand the official language of the Prosecutor's Office, provisions shall be made for oral translation of your statement and translation of official documents and other pieces of written evidence.

Do you understand the official language of the Prosecutor's Office and in which script would you like this Record to be kept?

I (do) (do not) understand the official language of the Prosecutor's Office and I would like this record to be kept in script.

Based on Article 86, paragraph 2, you are called upon to tell the truth and not withhold anything. You are cautioned that giving false statement constitutes a criminal offence provided for in Article 235 of the BiH Criminal Code, the punishment for which is imprisonment for a term between six months and five years.

Based on Article 86, paragraph 3 of the BiH Criminal Code, the witness provides the following personal data:

*Last name and name:**Name of father or mother:**Date of birth:*

Place of birth:

Ethnicity:

Citizenship:

Educational background:

Occupation:

Are you employed and where:

Marital status:

Do you have any children:

Are you related to the suspect:

Correct address of your residence where you may receive writs:

You are cautioned that it is your duty to inform the Court and Prosecutor's Office of any change of address or place of residence.

Based on Article 81, paragraphs 5, 6 and 7 of the BiH Criminal Code it is your duty to respond to summons served upon you by the Court or Prosecutor's Office. If you are not able to attend upon being summoned, you must inform the Court and Prosecutor's Office of reasons for your absence. Should you fail to act upon this warning, a fine may be imposed upon you in the amount of up to 5,000 KM and your apprehension shall be ordered.

You are under the obligation to testify. If you refuse to testify, the Court may impose a fine upon you in the amount of up to 30,000 KM.

Based on Article 83 of the BiH Criminal Code, you may refuse to testify only if you are a spouse or a relative of the suspect.

Based on Article 84 of the BiH Criminal Code, you may refuse answering such questions with respect to which a truthful reply would expose you to criminal prosecution.

Based on Article 91 of the BiH Criminal Code, you may request to be heard as a protected witness pursuant to the Law on Protection of Witnesses under Threat and Vulnerable Witnesses.

Do you understand these instructions?

Yes.

Signature of the witness

STATEMENT:

Completed at hrs.

Record-taker

Witness

Prosecutor

RIGHTS OF AN ACCUSED (INCLUDING FAIR TRIAL RIGHTS AND PRESUMPTION OF INNOCENCE)

The suspect or the accused against whom the investigation is being conducted has a number of individual rights, which are set out in various provisions of the BiH CPC:

- 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 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); and
- Article 48 (communication of a suspect or accused with a defence attorney).

EQUALITY OF ARMS

In accordance with Article 14 (equality of arms) of the BiH CPC, the RS CPC and BDBiH CPC, Article 15 of the FBiH CPC, the court, the prosecutor and other bodies participating in the criminal proceedings are obliged to ascertain with equivalent consideration the facts that are inculpatory, as well as exculpatory for the defendant.

Article 14 of the BiH CPC

(Article 14 of the RS CPC and the BDBiH CPC, Article 15 of the FBiH CPC)

Equality of Arms

(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.

These provisions should be read in conjunction with other provisions contained in the BiH CPC, 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), 262 (direct examination, cross-examination and re-direct examination of witnesses), Article 270 (examination of experts), and other relevant provisions.

In relation to the equality of arms principle, the Appellate Panel in the *Predrag Kujundžić* case found that:

“...the objection by the defence (is) justifiable in stating that, by refusing to allow the defence expert witness to examine Witness 2 in person, the trial panel violated the principle of equality of arms, and the Appellate Panel therefore disagrees with the arguments stated in the Verdict that the examination of the witness would not be justified given the circumstances of the case, regardless of her condition. In this manner, the defence was put in an unequal position in terms of the collection of evidence”.⁵⁴²

PRESUMPTION OF INNOCENCE AND *IN DUBIO PRO REO*

Article 3 of the BiH CPC provides:

Article 3 of the BiH CPC
(Article 3 of the RS CPC, the FBiH CPC and the BDBiH CPC)
Presumption of Innocence and *In Dubio Pro Reo*

(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.

The Appellate Panel in the *Šefik Alić* case concluded:

“Article 3 of the CPC BiH mandates a presumption of innocence according to which an accused shall be considered innocent of a crime until his guilt has been established by a final verdict. That is why the burden of evidence lies with the prosecution. The prosecution must prove it beyond any reasonable doubt. Any obscurity or doubt shall be resolved in favour of the accused in accordance with the *in dubio pro reo* principle”.⁵⁴³

PRESUMPTION OF INNOCENCE

Article 3(1) of the BiH CPC (Article 3(1) of the RS CPC, the FBiH CPC and the BDBiH CPC) enshrines the principle of the presumption of innocence. The presumption of innocence must be respected during the whole criminal proceeding,

⁵⁴² Court of BiH, *Predrag Kujundžić*, Case No. X-KRŽ-07/442, 2nd Instance Verdict, 4 October 2010, para. 49.

⁵⁴³ Court of BiH, *Šefik Alić*, Case No. X-KRŽ 6/294, 2nd Instance Verdict, 20 January 2011, para. 19.

until a judgment becomes final and binding, including all phases preceding the trial, and pertaining to all actions of State bodies directed towards collecting data and information on the commission of a criminal offence. Until a judgment is final and binding, the obligation to respect the presumption of innocence is in force.

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

A suspect or an accused is not obliged to defend themselves or to give evidence for their defence (as set out in Article 6 of the BiH CPC, the RS CPC, FBiH CPC and the BDBiH CPC).

A suspect or an accused is not obliged to defend themselves or to give evidence for their defence.

IN DUBIO PRO REO

Article 3(2) of the BiH CPC (Article 3(2) of the RS CPC, the FBiH CPC and the BDBiH CPC) provides for the *in dubio pro reo* principle, which derives from the presumption of innocence. Consistent 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.

By applying the *in dubio pro reo* principle, the Appellate Panel in the *Predrag Kujundžić* case concluded that:

“...the Prosecution evidence adduced in relation to this Count of the Indictment and also the facts ensuing from this evidence were not of such a quality that they can prove beyond a reasonable doubt the actual act/omission of the accused regarding these actions. Because of this, no decision on his guilt can be rendered with certainty. Therefore, having applied the *in dubio pro reo* principle, the Appellate Panel decided to acquit the accused on this count of the Indictment...”⁵⁴⁴

⁵⁴⁴ Court of BiH, *Predrag Kujundžić*, Case No. X-KRŽ-07/442, 2nd Instance Verdict, 4 October 2010, para. 143.

RIGHTS OF PERSONS DEPRIVED OF LIBERTY

Article 5 of the BiH CPC provides that:

Article 5 of the BiH CPC
(Article 5 of the RS CPC, the FBiH CPC and the BDBiH CPC)

Rights of a Person Deprived of Liberty

(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.

RIGHTS OF A SUSPECT AND ACCUSED

Article 6 of the BiH CPC provides that:

Article 6 of the BiH CPC
(Article 6 of the RS CPC, the FBiH CPC and the BDBiH CPC)

Rights of a Suspect or Accused

(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.

DETAILED AND PROMPT INFORMATION OF THE ACCUSATION

According to Article 6(1) of the BiH CPC (Article 6(1) of the RS CPC, the FBiH CPC and the BDBiH CPC), a suspect or accused needs to be informed of both the offence with which they are charged and the grounds for suspicion against them.⁵⁴⁵

- Information about the offence charged includes the factual description of the offence, as well as its legal description.
- Information about the grounds for suspicion includes the facts and evidence upon which a suspicion is based.

⁵⁴⁵ Commentary of the BiH CPC, p. 55.

- Information about the offence and the grounds for 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.

In the *Trifunović Milenko et. al. (Kravica)* case, the Court of BiH concluded that the accused’s right to information on his rights as a suspect and the grounds for suspicion against him, was violated:

“The trial panel concluded correctly that all three statements were taken unlawfully, which constituted a violation of the rights of the Accused under Article 6 of the European Convention on Human Rights (ECHR), as well as a violation of the statutory procedures intended to protect the rights prescribed in Article 78 CPC BiH. [...]The trial panel correctly concluded that the Accused Matić was not properly informed of the grounds for suspicion against him, prior to giving a statement at the Prosecutor’s Office, contrary to the procedure set forth in the law. The statement made during the reconstruction is a follow-up to the two unlawful statements. Pursuant to Article 10 (3) CPC BiH, the Court was not able to base its decision on such a statement”.⁵⁴⁶

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 them (*in peius*) and to present all facts and evidence in their favour (*in favorem*), as enshrined in Article 6(2) of the BiH CPC (Article 6(2) of the RS CPC, the FBiH CPC and the BDBiH CPC). This provision reflects the principle of the right to be heard which must be respected during the entire criminal proceedings. However, as set out in Article 6(3) of the BiH CPC (Article 6(3) of the RS CPC, the FBiH CPC and the BDBiH CPC), a suspect or accused needs to be informed that this right to be heard is only a right, not an obligation.

RIGHT TO SILENCE AND PRIVILEGE AGAINST SELF-INCRIMINATION

A suspect or accused is not obliged to present their defence or to answer questions. They enjoy 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.

A suspect or accused is not obliged to defend themselves or to provide evidence for their defence. Moreover, negative inferences harmful to the interests of defence may not be drawn from the silence of the suspect or accused.

Police are required to provide the necessary information about this right to a suspect as soon as they are deprived of liberty. 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.

⁵⁴⁶ Court of BiH, *Trifunović Milenko et. al. (Kravica)*, Case No. X-KRŽ-05/24, 2nd Instance Verdict, 9 September 2009, paras. 25 and 26.

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

The Appellate Panel of the Court of BiH in the *Milorad Trbić* case held that the accused waived his rights to remain silent and against self-incrimination and voluntarily spoke with investigating authorities:

“...The Accused also argues that he was subjected to repeated questioning over the course of several years, each time for many hours, and each time was told to tell the truth and to alter his statements so that they would be consistent with the statements of other individuals. He claims that he was not given the opportunity to remain silent. The Accused also complains that whether he received warnings prior to making the statements cannot be verified because no records exist of interviews prior to August 19, 2002, on which date the prosecutor told the Accused that he had been advised of his rights

[...] The Prosecutor contends that the Appellate Panel should dismiss the issues raised by the Accused because he (1) failed to object to the admission of the statements into evidence; (2) does not deny that proper warnings were given prior to each interview; and (3) properly waived his rights prior to giving each statement. The Prosecutor further argues that there is no evidence supporting the allegations of the Accused regarding coercion and that the trial panel’s judgment was reasonable and supported by the evidence”.⁵⁴⁷

RIGHT TO ADEQUATE TIME AND FACILITIES

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

Although this provision refers to “sufficient time” only, the Commentary on the BiH CPC 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.⁵⁴⁸

Moreover, this conclusion is supported by the provisions of Articles 6(2), 14(1), 47 and 50(1) of the BiH CPC (Articles 6(2), 14(1), 55 and 58 (1) of the RS CPC, Articles 6(2), 15(1), 61, 64 (1) of the FBiH CPC, Articles 6(2), 14(1), 47 and 50(1) of the BDBiH CPC):

⁵⁴⁷ Court of BiH, *Milorad Trbić*, Case No. X-KRŽ-07/386, 2nd Instance Verdict, 21 October 2010, paras. 17 and 18.

⁵⁴⁸ Commentary of the BiH CPC, p. 59.

Article 6(2) of the BiH CPC

(Article 6(2) of the RS CPC, the FBiH CPC and the BDBiH CPC)

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 CPC

(Article 14(1) of the RS CPC and the BDBiH CPC, Article 15(1) of the FBiH CPC)

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.

Article 47 of the BiH CPC

(Article 55 of the RS CPC, Article 61 of the FBiH CPC, Article 47 of the BDBiH CPC)

Right of a Defence Attorney to Inspect Files and Documentation

- (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 CPC

(Article 58(1) of the RS CPC, Article 64(1) of the FBiH CPC, Article 50(1) of the BDBiH CPC)

Defence's Attorney Actions

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.

RIGHT TO DEFENCE COUNSEL AND RELATED RIGHTS

The right to defence counsel reflects the provisions of Article 6(3)(c) of the ECHR.⁵⁴⁹ The BiH CPC establishes this right as well as the related rights in several Articles:

Article 7 of the BiH CPC

(Article 7 of the RS CPC, the FBiH CPC and the BDBiH CPC)

Right to Defence

- (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.

Article 5 of the BiH CPC

(Article 5 of the RS CPC, the FBiH CPC and the BDBiH CPC)

Rights of a Person Deprived of Liberty

In accordance with Article 5 of the BiH CPC, 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 39 of the BiH CPC

(Article 47 of the RS CPC, Article 53 of the FBiH CPC, Article 39 of the BDBiH CPC)

Right to a Defence Attorney

- (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 CPC provisions with respect to accused are the:

- Right of the accused to communicate freely with their defence counsel (Article 48 of the BiH CPC and the BDBiH CPC, Article 56 of the RS CPC, Article 62 of the FBiH CPC);

⁵⁴⁹ Commentary of the BiH CPC, p. 58.

- Right to have defence counsel present during questioning (Article 78(2)(b) of the BiH CPC and the BDBiH CPC, Article 143(2)(b) of the RS CPC, Article 92(2)(b) of the FBiH CPC);
- Right of defence counsel to inspect files and documentation (Article 47 of the BiH CPC and the BDBiH CPC, Article 55 of the RS CPC, Article 61 of the FBiH CPC); 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 their rights (Article 50 of the BiH CPC and the BDBiH CPC, Article 58 of the RS CPC, Article 64(1) of the FBiH).

In accordance with Articles 5, 78 and 39 of the BiH CPC (Articles 5, 143 and 47 of the RS CPC, Articles 5, 92 and 53 of the FBiH CPC, Articles 5, 78 and 39 of the BDBiH CPC), the accused needs to be informed of their right to defence counsel and that this right exists throughout the course of the criminal proceedings.⁵⁵⁰

As far as the right of the accused to communicate freely with their defence counsel is concerned, it is provided for in Articles 48 and 144(5) of the BiH CPC (Articles 56 and 209(5) of the RS CPC, Articles 62 and 158(5) of the FBiH CPC, Articles 48 and 144(5) of the BDBiH CPC).

Article 144(5) states that a detainee “shall be entitled to free and unrestrained communications with his defence attorney”.

Article 45 of the BiH CPC sets out certain situations when having a defence counsel is mandatory:

Article 45 of the BiH CPC

(Article 53 of the RS CPC, Article 59 of the FBiH CPC, Article 45 of the BDBiH CPC)

Mandatory Defence

- (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.

⁵⁵⁰ Commentary of the BiH CPC, p. 58

- (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.

As most war crimes cases involve a sentence of over ten years of imprisonment, defence counsel is mandatory in those cases.

In the *Miloš Stupar et al.* case, the defence raised the violation of the right to defence as related to the fact that the costs of preparation of the defence were reimbursed after the evidence was admitted in court. This appeal ground was dismissed:

“...Due to the complexity of the case and gravity of the offence, the Court assigned two *ex officio* Defence Counsels to each Accused in the instant case with a view to ensuring adequate defence. In the course of the first instance proceeding, the Defence Counsels were regularly paid their representation fees, and all costs they actually incurred in the process of obtaining evidence were also reimbursed.

[...] The Appellate Panel finds that the trial panel was correct when they decided to reimburse costs actually incurred in the process of obtaining only the evidence that was presented at the trial since any other practice would have resulted in a situation where the Court would not have any control over whether the costs of the Defence have indeed been incurred. In the manner described above, the Defence obtained all evidence they used in the main trial using the Court budget, and in addition to that, they were paid representation fees for the entire course of the proceedings, as well as fees for submissions filed with the Court. The Appellate Panel finds that the right of the Accused to defence was fully respected in this aspect as well”.⁵⁵¹

RIGHT TO A TRIAL WITHOUT DELAY

This right is incorporated in Article 13 of the BiH CPC (Article 13 of the RS CPC and BDBiH CPC, Article 14 of the FBiH CPC) and reflects the right to a hearing within a reasonable time as guaranteed in Article 6(1) of the ECHR. Article 13 of the BiH CPC provides:

⁵⁵¹ Court of BiH, *Miloš Stupar et al.*, Case No. X-KRŽ-05/24, 2nd Instance Verdict, 9 September 2009, paras. 169 and 170.

Article 13 of the BiH CPC

(Article 13 of the RS CPC and the BDBiH CPC, Article 14 of the FBiH CPC)

Right to a Trial Without Delay

- (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.

In the *Zdravko Božić et al.* case, the Court of BiH found that the procedure of accepting the facts adjudicated at the ICTY did not violate the right of the accused to fair trial:

“The Appellate Panel recalls that the procedure of judicial notice is primarily intended to ensure the expediency of the proceedings. The discretionary power to take judicial notice of facts, however, has to be exercised on the basis of a careful consideration of the Accused’s right to a fair and expeditious trial which is in accordance with the principle of a fair trial enshrined in Article 6(1) of the ECHR and Article 6(2) and Article 13 of CPC BiH [...].

It is a well-established and consistent practice of the Court of BiH to accept previously adjudicated facts as long as they satisfy legal criteria which safeguard the rights of the Accused to a fair trial yet promote the efficiency and economy of the proceedings. In accepting those facts, the Court has consistently stated that the accepted adjudicated facts do not amount to *presumptio juris et de jure*, i.e. irrebutable presumptions, since the Accused can always challenge and refute the truthfulness of the admitted facts in accordance with the principle of free evaluation of evidence contained in Articles 6(2) and 15 of the CPC BiH and the right of fair trial pursuant to Article 6(3) (d) of the ECHR”.⁵⁵²

RIGHT TO EXAMINE WITNESSES AND EXPERTS

Article 6(3)(d) of the ECHR provides for the right of the accused to examine, or have examined, witnesses testifying against them (as well as to obtain the attendance and examination of witnesses on their behalf under the same condition as witnesses testifying against them).

RIGHT TO EXAMINE WITNESSES AND EXPERTS – SCOPE OF CROSS-EXAMINATION

Article 6(2) of the BiH CPC (Article 6(2) of the RS CPC, the FBiH CPC and the BDBiH CPC) provides that:

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

⁵⁵² Court of BiH, *Zdravko Božić et al.*, Case No. X-KRŽ-06/236, 2nd Instance Verdict, 5 October 2009, paras. 28 and 29.

In accordance with Articles 261(1) and 262(1) of the BiH CPC (Articles 276(1) and 277(1) of the RS CPC and the FBiH CPC, Articles 261(1) and 262(1) of the BDBiH CPC):

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

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 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.

The Commentary of the BiH CPC 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.⁵⁵³ 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;
- Ability to observe;
- Personal interests; and
- Consistency.⁵⁵⁴

The BiH CPC provides that the accused must have an opportunity to make a statement regarding all the facts and evidence incriminating them, to present all facts and evidence in their favour, and to present evidence and cross-examine witnesses.

Article 85(2) of the BiH CPC (Article 150(2) of the RS CPC, Article 99(2) of the FBiH CPC, Article 85(2) of the BDBiH CPC) reads:

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

⁵⁵³ Commentary of the BiH CPC, p. 675.

⁵⁵⁴ Commentary of the BiH CPC, p. 677.

Article 86(9) of the BiH CPC provides that:

Article 86(9) of the BiH CPC
 (Article 151(9) of the RS CPC, Article 100(9) of the FBiH CPC, Article 86(9) of the BDBiH CPC)
Course of the Examination of a Witness

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.

The jurisprudence of the European Court of Human Rights (ECtHR) had found that the general principles of a fair trial also encompass the right of the defendant to confront the witnesses against them in a public hearing, as well as the important right to contest evidence and cross-examine the witnesses.⁵⁵⁵

In the *Miloš Stupar et al.* case, the Court of BiH dismissed the defence motion for additional cross-examination of an expert and limited the scope of the cross-examination:

“In the reasoning of their Decision, the trial panel noted that the Indictment in this case was confirmed in December 2005, after which time the Defence was in possession of all the evidence on which the Indictment was based, including Richard Butler’s Report. In the course of the proceedings, both parties had an opportunity to tender evidence related to the Report and to cross-examine Richard Butler about all circumstances they found relevant. The trial panel then concluded that the Defence actually sought to examine Richard Butler about certain circumstances which were not the subject of his analysis, or more precisely, about evidence that was not the subject of Richard Butler’s observations and opinion in the making of his Report. Taking all of that into account, the trial panel dismissed the Defence Motion for Additional Cross-Examination”⁵⁵⁶.

DISCLOSURE

Article 47 of the BiH CPC (Article 55 of the RS CPC, Article 61 of the FBiH CPC, Article 47 of the BDBiH CPC) sets out the disclosure obligations of the parties and must be read in conjunction with Articles 5, 6, 7, 12, 13(2), 14 and 50 of the BiH CPC (Articles 5, 6, 7, 12, 13(2), 14 and 58 of the RS CPC, Articles 5, 6, 7, 13, 14(2), 15 and 64 of the FBiH CPC, Articles 5, 6, 7, 12, 13(2), 14 and 50 of the BDBiH CPC).

⁵⁵⁵ See *Messegne and Jabardo*, Judgment dated 6 Dec 1988, para. 78; *Kostovski v. The Netherlands*, Judgment dated 20 Nov 1989, para. 41-45; *Asch v. Austria*, judgment dated 26 April 1991, para. 26-31; *Unterpertinger v. Austria*, Judgment dated 24 Nov 1991; *Ludi v. Switzerland*, Judgment dated 15 June 1992, para. 43-50; *Luca v. Italy*, judgment dated 22 Jan 2001, para. 39-45.

⁵⁵⁶ Court of BiH, *Miloš Stupar et al.*, Case No. X-KRŽ-05/24, 2nd Instance Verdict, 9 September 2009, para. 163.

The issue relating to the defence's right to disclosure was contested in an appeal lodged against the first-instance decision in the *Predrag Kujundžić* case. The Appellate Panel of the Court of BiH dismissed this ground for appeal. The arguments of both parties are given below:

“The defence brings up an essential violation of the provisions of Articles 14 and 47 of the CPC of BiH, because the Prosecution did not disclose the statements of the witnesses to the defence. This concerns the statement of Witness 32 who stated at the main trial that he had made a statement before the Investigative Judge of the Cantonal Court in Zenica, which statement remained undisclosed to the defence. Also, the defence states that the Court grounded its findings on the statement of Witness 6, while the Prosecution disclosed to the Defence the statements this witness gave to the BiH Ministry of Security. However, this witness also made a statement before the Higher Regional Court in Dusseldorf, in the case against Nikola Jorgić, which testimony is relevant for the defence.

[...] In its response to the appeal, the Prosecution noted that the grievance in the defence's appeal was incorrect in stating that the referenced statements had not been disclosed to them. According to the Prosecution, after the Indictment was confirmed, the defence was enabled to review the entire Prosecution file, and all of the statements made by the referenced witnesses were forwarded to the defence along with the Indictment”.⁵⁵⁷

RIGHTS OF VICTIMS AND WITNESSES

VICTIMS⁵⁵⁸

Victims in criminal proceedings enjoy limited protection in accordance with the BiH CPC, which mainly pertains to the right of victims/injured parties to file a claim under property law, and in relation to this right, to lodge an appeal against the court judgment. The prosecutor is obliged to collect information and facts relating to claims under property law that could be filed by victims in a particular criminal case, while the court will decide on claims under property law if this would not prolong proceedings.⁵⁵⁹

⁵⁵⁷ Court of BiH, *Predrag Kujundžić*, Case No. X-KRŽ-07/442, 2nd Instance Verdict, 4 October 2010, paras. 58 and 59.

⁵⁵⁸ The term “victims” in this sub-chapter shall be considered as synonymous of “injured party” as stipulated in the procedural legislation.

⁵⁵⁹ Art. 193 of the BiH CPC and the BDBiH CPC, Art. 104 of the RS CPC and 207 of the FBiH CPC.

Article 197 of the BiH CPC

(Article 107 of the RS CPC, Article 211 of the FBiH CPC, Article 197 of the BDBiH CPC)

Duties of the Prosecutor and the Court in Relation to the Establishment of Facts

- (1) The Prosecutor has a duty to gather evidence regarding claims under property law relevant to the criminal offence.
- (2) The Prosecutor or the Court shall question the suspect or the accused in relation to the facts relevant to the petition of the authorized person.

Article 198 of the BiH CPC

(Article 108 of the RS CPC, Article 212 of the FBiH CPC, Article 198 of the BDBiH CPC)

Ruling on the Claims under Property Law of the BiH CPC

- (1) The Court shall decide on claims under property law. The Court may propose mediation to the injured party and the accused or the defence attorney in accordance with the law if it concludes that the claim under property law may be settled through mediation. A proposal for mediation can be initiated before the completion of the main trial by both the injured party and the accused or the defence attorney.
- (2) In a verdict pronouncing the accused guilty, the Court may award the injured party the entire claim under property law or may award him part of the claim under property law and refer him to a civil action for the remainder. If the data of criminal proceedings do not provide a reliable basis for either a complete or partial award, the Court shall instruct the injured party that he may take civil action to pursue his entire claim under property law.
- (3) If the Court renders a verdict acquitting the accused of the charge or dropping the charges or if it decides to discontinue criminal proceedings, it shall instruct the injured party that he may pursue his claim under property law in a civil action.

Article 293 of the BiH CPC

(Article 307 of the RS CPC, Article 308 of the FBiH CPC, Article 293 of the BDBiH CPC)

Subjects of the Appeal

- (4) The injured party may contest the verdict only with respect to the decision of the Court on costs of the criminal proceedings and with respect to the decision on the claim under property law.

WITNESSES

The protection of witnesses in proceedings conducted before the courts in BiH is regulated by the BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses (Law on Witness Protection), the RS Law on the Protection of Witnesses under Threat and Vulnerable Witnesses, the FBiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses and the BDBiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses. However, it should be noted that witness protection measures are only regularly applied in proceedings before the Court of BiH in accordance with the BiH Law on Witness Protection, mainly due to existing technical limitations which limit the concrete implementation of the measures foreseen under the law.

Article 91 of the BiH CPC (Article 156 of the RS CPC, Article 105 of the FBiH CPC, Article 91 of the BDBiH CPC) provides that with respect to protected witnesses in proceedings before the Court of BiH, the provisions of the special law shall be applied. Therefore, the Laws on the Protection of Witnesses under Threat and Vulnerable Witnesses of BiH, the RS, the FBiH and the BDBiH represent a *lex specialis* to the BiH CPC.

Given the unique role of witnesses, it is necessary to create an atmosphere and conditions which ensure they can freely testify without adverse influence from threats and intimidation. Therefore, witness protection and support before, during and after the main trial is crucial to ensuring the safety and well-being of witnesses and promoting effective trials.

It is important to bear in mind that protective measures may only be instituted with the consent of the witness.⁵⁶⁰ The Witness Protection Support Unit works closely with the witness throughout the process to ensure that the appropriate protection measures are in place. The Witness Support Unit of the Court of BiH together with psychologists from the BiH Prosecutor's Office provide administrative, organizational and psychological assistance to witnesses with the intention of facilitating the experience of testifying in as painless a way as possible, and without consequence for the mental well-being of witnesses. For the purpose of providing adequate support, the psychological stability of each witness is assessed throughout the proceedings, as well as emotional reactions that may be caused by the testimony.

In order to promote the safety and well-being of witnesses who provide testimony, the Court of BiH also constructed separate entrances for defence and prosecution witnesses to the court to minimize the possibility of contact before proceedings, as well as separate waiting areas for use prior to providing testimony in proceedings. Each courtroom within the Court of BiH has a link room fitted with the equipment necessary to allow the transfer of video and sound from a testimony, when this measure is ordered by the Court.

⁵⁶⁰ Art. 5a) of the BiH Law on Witness Protection, while similar provision does not exist in the RS Law on Witness Protection, the FBiH Law on Witness Protection and the BDBiH Law on Witness Protection.

During the investigative phase, the prosecutor may order protective measures for a witness.⁵⁶¹

In the main trial proceedings, there are several protective measures that could be provided to the witness:

Testimony by using technical means for image and sound distortion

Article 9 of the BiH Law on the Protection of Witnesses provides:

Article 9 of the BiH Law on the Protection of Witnesses

(Article 9 of the RS Law on the Protection of Witnesses and the BDBiH Law on the Protection of Witnesses, Article 10 of the FBiH Law on the Protection of Witnesses)

When determining whether there are justified reasons for examining a witness using technical means for transferring image and sound in such manner as to permit the parties and the defence attorney to ask questions although not in the same room as the witness, the need to provide for the protection of witnesses under threat and vulnerable witnesses shall also be taken into account.

Removal of the accused

Article 10 of the BiH Law on the Protection of Witnesses provides:

Article 10 of the BiH Law on the Protection of Witnesses

(Article 10 of the RS Law on the Protection of Witnesses and the BDBiH Law on the Protection of Witnesses, Article 11 of the FBiH Law on the Protection of Witnesses)

- (1) Where there is a justified fear that the presence of the accused will affect the ability of the witness to testify fully and correctly, the Court may, either *ex officio* or upon the motion of the parties or the defence attorney, and after hearing the other party and the defence attorney, order that the accused be removed from the courtroom.
- (2) If removed from the courtroom the accused shall be enabled to follow the testimony through technical means for transferring image and sound, or the testimony shall be recorded and presented to the accused.
- (3) The defence attorney shall be present at the hearing. After the testimony has been presented to the accused but before the witness is released, the defence attorney and the accused shall have the opportunity to consult.
- (4) A decision pursuant to paragraph 1 of this Article is subject to appeal by the parties and the defence attorney. The Panel of the Appellate Division shall consider the appeal within 72 hours following the day the appeal is received.

⁵⁶¹ Art. 217(1) of the BiH CPC (Article 225(1) of the RS CPC, Art. 232(1) of the FBiH CPC and Art.217 (1) of the BDBiH CPC).

Exception to the direct presentation of evidence by a witness

Article 11 of the BiH Law on the Protection of Witnesses provides:

Article 11 of the BiH Law on the Protection of Witnesses

(Article 11 of the RS Law on the Protection of Witnesses and the BDBiH Law on the Protection of Witnesses, Article 12 of the FBiH Law on the Protection of Witnesses)

When determining whether the records on testimony given during the investigative phase may be read or used as evidence at the main trial, the Court shall also take into account the need to provide for the protection of a witness under threat who would expose himself or his family to great personal danger and the protection of a vulnerable witness who would expose himself to significant emotional distress by appearing at the main trial.

Limitation of the right of an accused and their defence attorney to inspect files and documentation

Article 12 of the BiH Law on the Protection of Witnesses provides:

Article 12 of the BiH Law on the Protection of Witnesses

(Article 12 of the RS Law on the Protection of Witnesses and the BDBiH Law on the Protection of Witnesses, Article 13 of the FBiH Law on the Protection of Witnesses)

- (1) In exceptional circumstances, if revealing some or all of the personal details of a witness or other details would contribute to identifying a witness, and would seriously endanger the witness under threat, the preliminary proceedings may, upon the motion of the Prosecutor, decide that some or all of the personal details of a witness, may continue to be kept confidential after the indictment is issued.
- (2) The Prosecutor shall immediately notify the accused and his defence attorney of the submission of the motion referred to in paragraph 1 of this Article.
- (3) If possible, the preliminary proceedings judge shall hear the accused and his defence attorney prior to issuing the decision referred to in paragraph 1 of this Article. The decision of the preliminary proceedings judge must be issued within 72 hours following the day the motion is received.
- (4) No appeal shall be permissible against the decision referred to in paragraph 1 of this Article.
- (5) If the preliminary proceedings judge was unable to hear the accused and his defence attorney prior to the decision referred to in paragraph 1 of this Article, the Court shall hear them immediately upon receiving the indictment.
- (6) The Court may revoke the decision referred to in paragraph 1 of this Article, either *ex officio* or upon the motion of the accused or his defence attorney.
- (7) Upon the motion of the Prosecutor, the Court shall revoke the decision referred to in paragraph 1 of this Article.
- (8) The Court shall at all stages in the proceedings be mindful of the need to release, as soon as possible, the information to which the decision referred to in paragraph 1 of this Article pertains. Sufficient details shall be released for the defence to prepare for examination of a witness. The information must be released at the latest when the witness testifies at the main trial.

Additional measures to provide for the non-disclosure of the identity of the witness

Article 13 of the BiH Law on the Protection of Witnesses provides for additional measures for protecting the identity of witnesses.

In specific instances during main trial proceedings, testimony can be provided from behind a screen and/or technical means for voice distortion may be used to prevent the disclosure of a witness's identity to the public.

Article 13 of the BiH Law on the Protection of Witnesses

(Article 13 of the RS Law on the Protection of Witnesses and the BDBiH Law on the Protection of Witnesses, Article 14 of the FBiH Law on the Protection of Witnesses)

- (1) In exceptional circumstances, where there is a justified fear that if some or all of the personal details of the witness are released it would seriously endanger the personal security of a witness or his family, and the danger would persist after the testimony is given, the Court may, either *ex officio* or upon the motion of the parties or the defence attorney, decide that the personal details of the witness shall remain confidential for such period as may be determined to be necessary, but in any event not exceeding thirty years, following upon the day the decision became final.
- (2) The Court may, after hearing the parties and the defence attorney, decide that the identity of the witness is not disclosed by allowing the witness to testify behind a screen or utilizing electronic distortion of the voice of the witness or the image of the witness, or both the image and the voice, by using technical means for transferring image and sound.
- (3) The Court may, at any time, revoke the decision from paragraph 1 of this Article, either *ex officio* or upon the motion of the parties or the defence attorney.

Witness protection hearing

If there is an imminent and manifest risk to the personal security of a witness, which is not likely to be diminished after testimony is given, or will be aggravated by the testimony, the court may schedule and conduct a protection hearing either *ex officio* or upon a motion of the prosecutor, defendant, or defence counsel.⁵⁶² A protected witness provides testimony at the protection hearing, a record of which is later read out at the main trial. During the protection hearing, the identity of the protected witness is only revealed to members of the court and the minute taker of the hearing, and a pseudonym is assigned to the witness in order to be entered into the trial record. The defence is not allowed access to the witness's identity. The defendant, however, cannot be convicted solely or to a decisive extent on testimony provided by a protected witness.

The court may conduct a witness protection hearing in accordance with Articles 14 to 23 of the BiH Law on the Protection of Witnesses, the RS Law on Witness Protection and the BDBiH Law on Witness Protection, Articles 15 to 24 of the

⁵⁶² Arts. 11, 14 and 15 of the BiH Law on Witness Protection, the RS Law on Witness Protection and the BDBiH Law on Witness Protection, Arts. 12, 15 and 16 of the FBiH Law on Witness Protection.

FBiH Law on Witness Protection. Following the motion of a party,⁵⁶³ the court will determine whether such a hearing is justified⁵⁶⁴ based on its determination on the facts presented in the motion and the documentation before the court. The decision of the court is subject to appeal.⁵⁶⁵ The hearing is conducted in accordance with Article 19 of the BiH Law on the Protection of Witnesses, the RS Law on Witness Protection and the BDBiH Law on Witness Protection, Article 20 of the FBiH Law on Witness Protection.

The record of the hearing is confidential, and regulated by Article 20 of the BiH Law on the Protection of Witnesses, the RS Law on Witness Protection and the BDBiH Law on Witness Protection, Article 21 of the FBiH Law on Witness Protection.

The use of the protected witness's testimony is governed by Article 21 of the BiH Law on the Protection of Witnesses, the RS Law on Witness Protection and the BDBiH Law on Witness Protection, Article 22 of the FBiH Law on Witness Protection:

At the main trial of the criminal case, the court shall have the testimony of the protected witness read out loud from the record of the witness protection hearing.

The court shall not need the agreement of the parties in the case to have the testimony read out loud.

With the consent of the prosecutor and the accused and his defence attorney, the judge or the panel may waive the reading of the testimony out loud.

The witness may not be called to give testimony other than the testimony at the witness protection hearing as prescribed under Article 19(2)c) of the BiH Law on the Protection of Witnesses, the RS Law on Witness Protection and the BDBiH Law on Witness Protection, Article 20(2)c) of the FBiH Law on Witness Protection.

Article 22 of the BiH Law on the Protection of Witnesses, the RS Law on Witness Protection and the BDBiH Law on Witness Protection, Article 23 of the FBiH Law on Witness Protection provides as follows:

1. The court may, either *ex officio* or upon the motion of the prosecutor or of the accused or his defence attorney, decide that the protected witness be heard on additional questions:
 - a) to clarify previously given testimony; or
 - b) relating to information that was not covered by the previously given testimony and which is material to the case.
2. The court shall conduct such additional witness protection hearing, in the manner provided for in Article 18 – 20 of the BiH Law on the Protection of Witnesses, as is necessary for the full and proper establishment of facts. The questions and the answers are recorded and read out in the manner provided for in Article 21 of the law.

⁵⁶³ Art. 15 of the BiH Law on the Protection of Witnesses, the RS Law on Witness Protection and the BDBiH Law on Witness Protection, Art. 16 of the FBiH Law on Witness Protection.

⁵⁶⁴ Art. 16 of the BiH Law on the Protection of Witnesses, the RS Law on Witness Protection and the BDBiH Law on Witness Protection, Art. 17 of the FBiH Law on Witness Protection.

⁵⁶⁵ Art. 17 of the BiH Law on the Protection of Witnesses, the RS Law on Witness Protection and the BDBiH Law on Witness Protection, Art. 18 of the FBiH Law on Witness Protection.

In accordance with Article 23 of the BiH Law on the Protection of Witnesses, the RS Law on Witness Protection and the BDBiH Law on Witness Protection, Article 24 of the FBiH Law on Witness Protection, the court shall not base a conviction either solely or to a decisive extent on evidence provided according to Articles 11, or 14 through 22 of the BiH Law on the Protection of Witnesses, the RS Law on Witness Protection and the BDBiH Law on Witness Protection, Articles 12, or 15 through 23 of the FBiH Law on Witness Protection.

The Court of BiH applied the principle from Article 23 of the BiH Law on Witness Protection in the *Željko Lelek* case:

“...In addition, when seeking a balance between the effects of anonymity and the right to cross-examination, the trial panel bore in mind that the Accused’s right to a fair trial would be breached if the Defence were not given a possibility to observe the witness during direct-and cross-examination or the possibility of confrontation (*Van Mechelen et. al*). This is all under the assumption that the decision is to be based on such evidence “to a decisive extent”.

[...]It was exactly for these reasons that the trial panel rightly limited the role of the testimony of the protected witness by attaching it the importance of corroborating evidence, as noted in par. 2 on page 25 of the contested Judgment, pursuant to Article 23 of the Law on Protection of Witnesses. With such assessment the trial panel properly noted that where there is no other decisive Prosecution evidence that could be corroborated by a testimony of an anonymous witness, it is to be concluded that the prosecution failed to prove beyond a reasonable doubt the allegations in Count 1 of the Indictment, and therefore the Accused was cleared of these charges”.⁵⁶⁶

Exclusion of the public

Article 235 of the BiH CPC reads:

Article 235 of the BiH CPC

(Article 251 of the RS CPC, Article 250 of the FBiH CPC, Article 235 of the BDBiH CPC)

From the opening to the end of the main trial, the judge or the Panel of judges may at any time, *ex officio* or on motion of the parties and the defence attorney, but always after hearing the parties and the defence attorney, exclude the public for the entire main trial or a part of it if that is in the interest of national security, or if it is necessary to preserve a national, military, official or important business secret, if it is to protect the public peace and order, to preserve morality in the democratic society, to protect the personal and intimate life of the accused or the injured party or to protect the interest of a minor or a witness.

⁵⁶⁶ Court of BiH, *Željko Lelek*, Case No. X-KRŽ-06/220, 2nd Instance Verdict, 12 January 2009, paras. 110 and 111.

Article 237 of the BiH CPC

(Article 251 (2)(3) of the RS CPC, Article 253 of the FBiH CPC, Article 237 of the BDBiH CPC)

- (1) The judge or the Panel of judges shall issue a decision on exclusion of the public. The decision in question must be explained and publicly announced.
- (2) The decision on exclusion of the public may be contested only in the appeal against the verdict.

In the *Marko Radić et al.* case, the Appellate Panel concluded that the right to defence was preserved despite the fact that the public was excluded during the main trial:

“During the examination of the protected witness AM, and the reproduction of the testimony of the foregoing witnesses pursuant to Article 235 of the CPC of BiH, the Appellate Panel decided to exclude the public from the main trial. While reproducing the testimony of each protected witness individually, the Appellate Panel concluded it was necessary and justified to exclude the public. In this respect, it should be noted that in deciding to exclude the public, the Panel primarily had in mind that in addition to the already granted protective measures, the interests of the witnesses, most of them being themselves victims of the critical incidents, should be additionally ensured and protected. [...] Finally, the Panel concludes that the rights of the Defence teams to a defence of the Accused were in no way deprived or violated by granting the protective measures and excluding the public from the main trial. This is so because the Defence Counsels and the Accused were given possibilities to cross-examine these witnesses during the first instance proceedings. Also, sufficient information was disclosed to the Defence teams prior to the examination to prepare themselves for cross-examination”.⁵⁶⁷

⁵⁶⁷ Court of BiH, *Marko Radić et al.*, Case No. X-KR-05/139, 2nd Instance Verdict, 9 March 2011, paras. 58 and 59.

Special evidentiary rules when dealing with cases of sexual misconduct

There are special evidentiary issues related to victims of sexual violence.

Article 264 of the BiH CPC

(Article 279 of the RS CPC and the FBiH CPC, Article 264 of the BDBiH CPC)

- (1) It shall not be allowed to ask an injured party about any sexual experiences prior to the commission of the criminal offence in question. No evidence offered to show the injured party's involvement in any previous sexual experience, behaviour, or sexual orientation shall be admissible.
- (2) Notwithstanding Paragraph 1 of this Article, evidence offered to prove that semen, medical documents on injuries or any other physical evidence may stem from a person other than the accused, is admissible.
- (3) In the case of the criminal offence against humanity and values protected by the international law, the consent of the victim may not be used in a favour of the defence.
- (4) Before admitting evidence pursuant to this Article, the Court must conduct an appropriate hearing in camera.
- (5) The motion, supporting documents and the record of the hearing must be sealed in a separate envelope, unless the Court orders otherwise.

It is interesting to note an observation in relation to a victim of sexual violence, which was made in the *Predrag Kujundžić* case. In this case, the Court of BiH convicted the accused of Crimes against Humanity under Article 172 of the BiH Criminal Code, finding the defendant liable, among other offences, for the rape of a minor. The appellate panel in this case specifically addressed the trial panel decision not to allow the expert witness to re-examine and interview the protected witness, concluding that this violates the equality of arms principle regardless of the fact that the witness was a victim of sexual violence:

“Upon the examination, the team inferred that the witness suffered from a serious and complicated form of post-traumatic stress disorder which was manifested through extremely intensified psychological alertness, constant reliving of serious traumatic experiences, a sense of humiliation, inferiority, distrust in people and destroyed sexual identity. With regard to the events that Witness 2 experienced and which were the subject matter of the Court's decision the expert witness Dr. Alma Bravo Mehmedbašić noted that the aggrieved party – Witness 2 behaved in a manner characteristic for the victims of rape. She also noted that the experienced trauma took place in 1992 and 1993, however she began to undergo medical treatment only after the war when she felt free. [...] The trial panel states its reasons for not allowing the expert witness Stojaković to re-examine and interview Witness 2 in the Verdict paragraphs 103-106 according to which the defence motion to examine Witness 2 was dismissed because yet another interview and psychological analysis would expose the witness to additional and further trauma, which it found unjustified given the circumstances of the case”.⁵⁶⁸

⁵⁶⁸ Court of BiH, *Predrag Kujundžić*, Case No. X-KRŽ-07/442, 2nd Instance Verdict, 4 October 2010, paras. 45 and 47.

CHAPTER FIVE - INVESTIGATION PLANNING

INTRODUCTION

Sound investigations proceed on the basis of good investigation planning. Investigation plans for complex investigations are usually prepared after a preliminary research phase where all available information is carefully researched, analysed and evaluated.

Research and analysis at this stage into the nature and extent of the alleged activities, and identification of who appears to be involved is a priority and consideration of these factors at this stage facilitates the decision-making and investigative process.

At this point the preparation of an investigation plan that outlines the strategic objectives of the investigation, the information required to meet those objectives, possible information sources and how it is proposed that the investigation should proceed is extremely useful. It consolidates and communicates details of the investigation to all personnel involved.

Further, the investigation plan is prepared as a management tool and used as an overall guide for the conduct of an investigation. In most cases it is prepared by a prosecutor together with a lead investigator and the case analyst. It is a fluid document that must be updated and revised as an investigation progresses.

THE INVESTIGATION PLAN

It is a document that:

- Articulates the overall objectives and strategy;
- Details the nature of the allegations being investigated;
- Identifies potential subjects or suspects and their position, titles etc. at the time of the alleged offence;
- Lists the laws the alleged conduct violates and the elements of those offences. (These are often included as an evidence matrix that individually lists the

elements to prove together with a list of the possible types of information that would prove the element, and a list of possible sources for this evidence);

- Includes information regarding potential subjects and critical witnesses for the investigation;
- Identifies tasks to be completed in the investigation and the resources that will be required; and
- Includes an assessment of risks the investigation, the investigation team and potential witnesses may face.

PHASES

Consideration needs to be given to the timing of the various investigation activities. Many factors may impact on timing, including resource availability, the gravity of the conduct, the availability and accessibility of critical witnesses, whether other agencies or authorities are investigating the matter, and security. To deal with these considerations a phased approach is often used. Basic phases that apply to most investigations include:

- Research and planning
- Information collection/investigation
- Review of evidence (and further investigation if necessary)
- Indictment
- Arrest and trial

Each of these headings may be broken down further, the information collection or investigation phase may include, for example:

- Interview of eye witness phase
- Interview of victims phase
- Crime scene examination phase
- Surveillance of offenders phase
- Interview of offenders
- Search of premises used by offenders

The timing of each phase will depend on the particular investigation and how a particular phase is carried out may depend on information obtained in an earlier phase of the investigation.

A phased approach assists investigators and decision makers to remain flexible and attuned to new information and changes in circumstances - and to review objectives, strategy and resource implications at critical stages.

ADVANTAGES OF USING AN INVESTIGATION PLAN

An investigation is a fluid process and may even involve the re-writing of the objectives and outcomes as further evidence and information becomes available. Nothing prevents the planner from re-writing the tasks or resource allocation for newly identified offences as the investigation progresses – but finding evidence to prove the elements of the alleged violations must remain central to the investigation plan to ensure that the investigation remains effectively focussed. The investigation plan is most useful when maintained as a living document:

- Defining and communicating the direction of an investigation, and
- Providing up-to-date status of the investigation, further inquiries proposed and resources necessary to conduct the investigation (in the current climate it has become even more important to forecast costs).

CONTENTS OF AN INVESTIGATION PLAN

Experience tells us that every investigation is different and sections to be included in an investigation plan may vary. There are some sections that are applicable to most plans. As a guide, inclusion of the following sections should be considered when preparing an investigation plan:

THE ALLEGATION

A clear statement of the actual allegations made and how the information was received. All members of the investigation team should clearly understand what has been alleged and what you are seeking to establish in the investigation.

THE PERSON/PEOPLE WHOSE CONDUCT IS TO BE INVESTIGATED

In order to ensure that investigations remained focused, the identity of those possibly responsible for the alleged crimes should be determined at the earliest opportunity. This may be an individual or several people. If the investigation is of senior officials, details of the structure of the organization, their position, role and responsibilities, as far as they are known, need to be included in the plan.

Details that would be relevant to this section may include:

- Biographical data (including name, date and place of birth, occupation, rank, title, rules of engagement etc., if relevant).
- Complete criminal record of the perpetrator (from the police station located in the place of their birth).
- Confirmation of the position that the perpetrator held during the war. This may require an investigation by the appropriate military authorities to confirm that the perpetrator was in a particular position.

- Knowledge of the current whereabouts of the individual (it is unlikely that you will be able to effectively finalize the investigation if the location of the subject cannot be established).
- Prior interviews by the alleged perpetrators regarding alleged conduct or matters involving similar allegations. Prior interviews provided to law enforcement agencies, statements to the media or testimony from other civil, criminal or administrative court proceedings may provide valuable information, evidence and insights into the allegations and the person/people under investigation. Has the perpetrator given prior statements, and if so, where are the originals. To whom was the statement provided?
- Whether the perpetrator appeared in some documentaries or news articles? If so, those should be obtained. Are these statements acceptable to the Court of BiH?
- Public records, open source and internet and information database research.
- Links to others under investigation. International crimes often involve multiple parties. It is important to identify these connections, so that all personnel involved in the investigation have an understanding of the case and its linkages.
- Whether the perpetrator has given evidence before any other court or tribunal in connection with the matter under investigation?
- Are there any questions about the credibility of the perpetrator?
- What evidence was collected to support the guilt?
- Does the ICTY have evidence in its possession regarding the perpetrator?
- Consider immunity from prosecution for co-operative lower-ranked perpetrators.

Availability of the perpetrator

- The current location of the perpetrator.
- Is there an arrest warrant pending and who issued it?
- What kind of assistance is required from BiH police, EUFOR or European police to arrest the perpetrator?

If already in custody

- Confirm the status in relation to custody.
- Arrangements for access to the perpetrator if they have already been remanded in custody.
- Ascertain whether the perpetrator may still have evidence relevant to the investigation.
- Can the perpetrator substantiate the existing evidence?
- Communicate with other agencies for investigation in criminal cases. This may include requests for assistance.

ASSESSMENT

Details of the assessment undertaken, the *prima facie* evidence available, and any initial assessment of the credibility of the initial report (for example, is corroboration available). You should consider:

- What is known/what has been established about the events.
- What information and evidence has already been obtained, and
- What is not known and what further information is required to make a reliable assessment.
- What is known about the possible offender/s.

Some of the elements to be considered in the initial assessment phase include:

- Evidence available, including:
 - Whether it is original evidence.
 - Does the court address its attention to the evidence given at the ICTY?
 - Statements and witness testimony.
 - Photographic and video evidence.
 - Other evidence.
- The crime scene
 - Record the geographical location, including GPS co-ordinates.
 - Was the crime scene examined by forensic experts? If yes, obtain reports/records.
 - Is the scene documented by other investigators? If yes, obtain reports/records.
 - Are there photographs of the crime scene?
 - If so, where are they?
 - Is it necessary to re-photograph the crime scene?
 - Where are items related to the crime scene located?
 - What are the conclusions that have been reached in the review?
 - Can the witness confirm the crime scene?
- Witness and Victim
 - The identity of the witness.
 - Has the witness given statements previously and, if so, where are the originals?
 - To whom were the statements provided?
 - Are these statements acceptable to the Court of BiH?
 - Is the witness subject to certain protective measures?
 - What kind of support is offered to the witness as a victim?
 - Medical examination or a psychologist's evaluation (notes)
 - Has the witness given evidence before any court or tribunal regarding the matter under investigation?
 - Are there any questions regarding the credibility of the witness?
 - Does the witness have some other evidence relevant to the investigation in their possession?

- Consider the possibility of searching the area to locate other witnesses who have not been interviewed yet.
- Availability of witnesses
 - The current location of the witness.
 - Whether the witness is willing to give evidence at the hearing that will follow?
 - Whether the ICTY has made available all correspondence relating to the evidence that the witnesses have given?
 - Does the witness request to be re-examined?
 - What are the requirements of the witness in connection with protection, as protection issues are transferable from the Trial Chambers of the ICTY?
- Co-operation with other agencies
 - What kind of co-operation is currently needed?
 - Preparation of Requests for assistance.

Potential offences and the elements of those offences

A legal analysis of the alleged conduct and information should identify the nature of offences that have potentially been committed and what are the specific elements or ‘proofs’ that have to be covered if a prosecution is to be successful. It is essential that the investigators have a clear understanding of what needs to be proved before they set out to interview witnesses and to collect evidence.

Resources

An investigation plan should consider the resources that will be required to complete the investigation. This includes the number and type of staff required, for example, people with specialist skills and other resources such as equipment, motor vehicles, communications equipment etc.

It should include details of the roles and responsibilities of each staff member involved. A clear outline of the role of each person involved in the investigation is important to avoid duplication of activities or disputes over who carries out particular tasks.

Information Management

The volume of information collected in a war crimes investigation grows very quickly and will become unmanageable unless a carefully thought out information management system is put in place at the outset of the investigation. The investigation plan should include a section outlining the information management system that is to be applied.

There are a range of information management systems ranging from spread sheets and word documents, and ‘in house’ developed databases to sophisticated investigation and analysis software that can be utilized.

Before any information management system can be useful, however, there needs to be comprehensive investigation planning and strategic analysis of the case and the surrounding circumstances.

Review and reporting

It is necessary to continually reassess the investigation plan as new information is received, particularly to ensure that the original assumptions remain valid. If not, the plan may need to be revised – or perhaps the investigation reconsidered. Reassessment is also necessary to determine:

- What additional work is required as a result of the new information collected?
- Whether additional resources be applied to particular areas of your investigation, or conversely, can some resources be redeployed (if enough evidence has been obtained on some areas of the investigation, resources are better used to pursue other avenues of inquiry)?
- If the investigation outcomes can be achieved in the estimated time frames?
- Does the investigation plan need to be modified?
- Are there any newly identified obstacles to completing any aspect of the investigation?
- Whether other expertise and specialized participation should be sought (law enforcement, forensic auditors/accountants) to assist in the investigation?

Special considerations

Identify anything else which affects the focus of the investigation such as political sensitivity, file security needs, possible legal restrictions on securing necessary evidence (i.e. financial/bank records), potential defences, etc.

Security Assessment

The investigation plan should include a detailed assessment of any potential threats to the investigation, the people conducting it and potential witnesses and also an assessment of the likelihood that those threats will be carried out. Wherever possible, mitigation strategies to minimize any threat or risk that may occur should be outlined.

Phases

This section of the plan sets out the logical sequence of investigation activities. Do you intend to carry out field investigations? Are you going to interview witnesses; interview the suspect, seek to obtain documentary records and evidence from witnesses, third parties, other entities, including other organizations? In what order will these activities be conducted?

If internal guidelines do not exist on activities such as evidence collection and witness management, then the investigation plan will need to address the methodology to be used.

Specific tasks

This section should list the initial tasks that are to be undertaken by the investigation team. Future versions of the investigation plan will be developed as tasks are completed and new tasks identified.

Cost

Where necessary, include an estimate of costs of the investigation taking into account travel, specialized staff, equipment costs, document storage and handling costs. Consideration has to be given as to whether the investigation can be completed with available resources. It may be necessary to reduce the scope of an investigation so that it can be realistically completed. Costing those activities in the investigation plan will ensure that a team does not make the mistake of embarking on a major case without the required resources.

Evidence collection plan

On the basis of the above – in particular, the potential offences and the elements of those offences: what evidence is required; what does that evidence ‘look like’; where is the evidence located; and how can it be obtained? The most common types of evidence include witnesses, documents, official records, photographs, video material, etc. Open sources such as news reports, documentaries and journals should not be overlooked but reliability of the information may be an issue.

INVESTIGATION PLAN TEMPLATE

It is useful to have a template that can be used for preparing written investigation plans. The template will include the various headings listed above to guide those planning the investigation through the process. Attached to this document (Appendix 1) is an example of an Investigation Plan Template. It is important to note that not every heading needs to be completed for every investigation. Similarly, different investigations may require the inclusion of additional topics.

Reviewing an investigation plan

Investigations often change in direction and scope as they proceed. Investigation plans should, therefore, be constructed in a way that makes them easy to update as the investigation progresses. It is useful for an investigator to plan in advance when the findings should be reviewed and incorporated into a new plan (e.g. after interviews with key witnesses).

OTHER CONSIDERATIONS

Those staff members responsible for planning an investigation should consider the following:

- Preparing an evidence matrix: an evidence matrix individually lists the

elements of the offence(s) or violation of international humanitarian or criminal law (or such other legal framework that you may be operating under). Alongside each element is a list of the possible types of information or evidence that would support the element, and a list of possible sources for this evidence.

- Training: consider providing training to staff involved in more complex cases - especially if they have not worked on such cases previously - to make staff more aware of the elements to prove and the evidence required or most likely to be available in the type of case and instructions on how to analyse and weigh the evidence. This training should also include the ability to identify and review evidence and the need to disclose exculpatory evidence, along with any appropriate investigation and analysis of obvious defences or exculpatory material.
- Mission planning and evidence collection: what evidence is available, its location and how it may be obtained. Interview planning: the development of clear and detailed interview plans, identifying the appropriate witnesses to be interviewed, and in what order, outlining the information to be obtained from each witness, the questions/topics to be put to subjects, the documents to be shown to the witness or subject during interviews and the manner in which to present them.
- Interviewing skills: how will interviews be monitored and statements reviewed to ensure that investigators:
 - o Obtain all relevant evidence.
 - o Seek corroboration where appropriate.
 - o Record testimony accurately.
 - o Obtain acknowledgement of the accuracy of statements, and
 - o Allow subjects an adequate opportunity to respond to material allegations.
- Evidence theory and practice: are discussions with the team necessary, or should training be provided, on the collection and handling of evidence? Discussions or training should include procedures in collecting certain types of evidence (i.e. electronic or IT evidence), potential challenges to the admissibility of evidence in courts of law, authenticity, practical considerations in the handling, storage and chain of custody of evidence, (including the types of evidence which require a chain), requests by witnesses for confidentiality and limits on the use of information, promises or consideration to witnesses for providing information.
- Special considerations in the collection and handling of IT or documentary evidence.

There is often a considerable gap between the resources you would like to deploy in an investigation and the resources actually available. Therefore, another consideration at this point is how the investigation can be completed with the available resources. If consideration is not given to the possible limitation of existing resources, then the strategy outlined in the investigation plan may not be possible to implement.

APPENDIX 1 – THE INVESTIGATION PLAN

COVER SHEET

INVESTIGATION PLAN	
File/investigation number:	
Operation name:	
Case Management System Reference:	
Subject/Person of Interest:	
Referral Source:	
Complexity:	
Team Appointments:	
	Prosecutor: _____
	Investigator/s: _____
	Specialist/s: _____
Key Stakeholders:	

1. Allegation

[State the full particulars of the allegation(s) as a narrative. Also include details of how the allegations came to be reported. Include any witness sensitivity issues or other relevant points that the team should be aware of].

2. The person / people/company whose conduct is to be investigated

[If the investigation is of senior officials, the alleged mode of liability needs to be outlined].

Name	
Date and place of birth	
Work address	
Home address	
Telephone numbers	Work
	Home
	Mobile
Position/Work Title	
Other Background Data	

3. Assessment

[Details of the assessment undertaken, the *prima facie* evidence available, and any initial assessment of the credibility of the initial report (for example, corroboration available)].

4. Potential Offences

If true, the allegations are violations the following:

- Article 171 BiH Criminal Code – Genocide
 - Specifically:
 - a) ...
 - b) ...
 - c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Article 172 BiH Criminal Code – Crimes Against Humanity
 - Specifically:
 - b) Extermination;
 - h) Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognized as impermissible

under international law, in connection with any offence listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of BiH;

5. Elements to prove

[In order to establish the above offences, what are the elements you have to prove? What does that evidence 'look like'? Where is the evidence? How is it going to be obtained? This is best placed in an evidence matrix or as part of a separate spreadsheet].

6. Resources

[Staff and the roles of each staff member. Other resources required. Specialist expertise required (for example, a forensic expert, or a document expert)].

7. Review & Reporting

[To whom are members of the team to report, what form is the reporting to take, how often, where is the material (electronic and hard-copy) to be stored].

8. Special Considerations

[Identify anything else which affects the focus of the investigation such as political sensitivity, other agency issues, file security needs, duration of the investigation, problematic case law, issues and obstacles to obtaining necessary documents (financial records), use of team members outside the core team with specialist skills, etc.]

9. Security Assessment

[List any threats to the investigation that may exist – with brief description of the threat and assessment of impact and likelihood (risk)]

10. Phases

Following is an example of the first phase of a phased investigation plan.

Phase 1

- 1) Using draft evidence matrix, assess and collate information currently held to –
 - a) Identify and confirm current location of key witnesses.
 - b) Determine availability of documentary records, etc. and methods to obtain such information.
- 2) Make contact with eye witnesses to determine if they are prepared to deliver formal witness statements – and extent of evidence they can provide. Consider potential witness security issues, including possible (often likely) requests for witness protective measures.

Other phases may include, for example:

Phase 2:

Further witness interviews; document examination; working with national authorities on the collection of physical evidence, documentary evidence, IT evidence, etc.;

Phase 3:

Final determination of charges; disclosure to the defence, brief of evidence preparation.

11. Evidence / Information Collection Plan

[On the basis of the above – in particular, the potential offences and the elements of those offences – what evidence is required, what does that evidence ‘look like’, where is the evidence, and how can it be obtained].

12. Specific Tasks

[This section should list the initial tasks that are to be undertaken by the investigation team. Future versions of the investigation plan will be developed as tasks are completed and new tasks identified].

Task	Tasked to	Due date	Date completed	Result & file reference.
To be developed by case officer				

13. Cost

[Where necessary, include an estimate of costs of the investigation taking into account travel, specialized staff, equipment costs, document storage and handling costs, shared agency arrangement details, etc.]

Consideration	Description	Estimated Cost
<i>Interpreters</i>		
<i>Expert Witnesses</i>		
<i>External premises (use of)</i>		
<i>Travel (domestic)</i> <ul style="list-style-type: none"> ▪ <i>Vehicles</i> ▪ <i>Accommodation, Meals</i> 		
<i>Specialist external services</i>		
<i>Other expenses</i>		

14. Recommendations

- The investigation be undertaken in accordance with the plan highlighted above;
- That the necessary resources be made available; and
- That a case review be conducted on xxx (date) to assess the evidence collected and to determine further investigative action.
- Attached is an evidence matrix, which forms part of this investigation plan.

Case Manager:	
Signed:	Date:
Prosecutor	I agree with the above recommendations and hereby authorize the investigation team to action them accordingly.
Signed:	Date:

APPENDIX 2 – EVIDENCE MATRIX

Investigation Case Name:		File Number:	Other reference:
Case Officer:			
Date Matrix prepared/last updated:			
Allegation	That xxxxx has		
Offence	<p>For example:</p> <p>Article 171 (c) Genocide –</p> <p>c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;</p> <p>Article 172 Crimes Against Humanity</p> <p>b) Extermination;</p> <p>h) Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crimes within the jurisdiction of the Court;</p>		
Specific Subjects/ Offenders	<ul style="list-style-type: none"> o Individual/s o Senior official/position 		
Proofs/Elements of the Offence	Mens rea/ intent	Actus Reus/ Physical Element/s	Evidence Required
Element 1. The perpetrator inflicted certain conditions of life upon one or more persons;	Specific intent	Directed that group be held confined in location “x” and denied food and medical assistance.	<ul style="list-style-type: none"> o Official decision o Evidence of position o Denial of food and medical assistance as consequence of official decision. The subject intended to gain the benefit that did accrue.
Proof 2.			o
Proof 3.			o
			Avenues of Enquiry

CHAPTER SIX - MANAGING STRESS IN THE FIELD

Stress is a normal part of life. On occasions in a demanding work environment stress can become a complicating and destructive factor that has a negative effect upon a person's mental health and the quality of the work they are performing. For this reason it is necessary to be able to identify stress within oneself and take actions to ameliorate its effects and to reduce its intensity. When working as part of a team it is also advisable to be able to recognize stress in one's colleagues and to tactfully reduce their stress levels and aid them with their difficulties. By controlling and recognizing operational stress a team can function at a higher level than it might otherwise have done. It is also beneficial to the individual members of the team and will aid in their adjustments after the mission and strengthen the team member's personal robustness to be able to undertake further demanding and stressful work in the future.

WHAT IS STRESS?

Stress manifests itself by signs and symptoms that are primarily associated with anxiety. The usual initial sign that a person is under stress is sleeping difficulties. People under stress normally have problems initiating sleep and staying asleep. These symptoms can be missed if the work creates marked physical exhaustion that compensates to induce sleep. An inner feeling of anxiety can arise. This can manifest itself by excessive talking and physical restlessness. People under stress can fluctuate between excessive eating and going without food for long periods of time due to a poor appetite. With the feeling of anxiety there is a loss of self-confidence. This can lead to social withdrawal. With stress there is a heightened sense of emotional arousal. This can lead to irritability and a more confrontational interactive style in dealing with one's colleagues or with others. Stress interferes with the ability to assess your environment accurately. This can lead to misjudgements in ascertaining the level of security precautions required.

When stress becomes more severe, obtaining a normal night's sleep becomes more difficult. This can lead to daytime exhaustion. Concentration can be impaired. A person under stress can move from one job to another, without bringing a piece of

work to completion. This can be a cause of frustration for their colleagues. It can result in conflict within the team with a resultant further increase in the person's feelings of anxiety. Short-term memory can be affected, which can have a detrimental effect upon the quality of the work that is performed. With increasing irritability a person under stress may be inclined to take offence where no offence was meant.

As stress becomes more severe, the feelings of anxiety can become disabling. A person in this situation can have periods of rapid heartbeat (palpitations); sometimes it is associated with facial flushing, tremor, profuse sweating and difficulties breathing. These physical manifestations normally occur when the person is faced with specific situations, but they can also occur suddenly when the person is in a more relaxed environment. In these circumstances the term "panic attack" is more appropriate. People suffering severe stress often withdraw socially from others. They find social contact overwhelming and so they avoid it. If severe stress continues for a protracted period of time it can lead to a pattern of fluctuating periods of depressed mood.

COPING STRATEGIES

No one is immune from stress. It is a natural part of life. In order to function to our optimum a level of stress is required, but it is destructive when it is overwhelming. The goal is to keep stress at a level that is healthy and when this is unavoidable to have techniques to reduce its intensity. Keeping physically fit and physically active during a mission is an excellent way of burning up any excess nervous energy. Eating well and regularly is essential. Monitoring caffeine intake is important. A high intake of caffeine, whether it is by drinking tea, coffee or cola increases feelings of anxiety and can lead to an inner sense of agitation. People differ markedly in how much caffeine they can tolerate. But for all individuals a maximum of six cups of coffee a day is advisable. It is important to avoid significant alcohol intake as it can have a depressing effect on mood and a sense of increased anxiety for about three days after a large intake.

On occasions, work such as the exhumation of human bodies can lead to a falloff in appetite. Despite this it is important to eat regularly. It is well recognized for obvious reasons that such investigators can become reluctant to eat meat. When this occurs, an adequate intake of fruit, vegetables and other protein sources should be substituted.

The handling of dead bodies is an unpleasant task. It used to be recommended that in order to deal with the smell of decaying human flesh that a strong perfume or a Vicks cotton wool plug be inserted into the nose. This advice is now rejected and it is recommended that the body handler covers the nose with a mask while they perform their work. The reasoning behind this change in advice is that after the investigation is over, a person is more likely to experience the smell of the perfume or of the Vicks than they are to experience the smell of decaying human flesh upon their return home. As smell is one of the most emotionally charged senses, the re-experience of the smell of the perfume or of Vicks has a higher potential of reminding a person of their unpleasant experiences and of inducing an adverse emotional response.

For investigators a recognized stressful factor is that of identifying with a witness. This is a normal human response. Victims of torture, rape and human trafficking can evoke a strong sense of compassion from the investigator. When the investigator is far from their normal home environment there is an increased risk that the boundary between the investigator and witness, essential for the proper functioning of the legal system, can become blurred. This can cause all kinds of difficulties both for the investigator and the witness. This can be aggravated when the witness goes missing. It is important that the investigator is compassionate, but that they maintain a professional distance from the witness and personal boundaries are not crossed. This serves the witness in their attempt to obtain justice and the investigator in their emotional ability to perform their investigation in a professional manner.

Experience has demonstrated that even in the most demanding and hostile environment, it is interpersonal relations within the team that is often the largest contributor to stress. For this reason the concept of unit cohesion is essential to understand and to maintain. Unit cohesion is also important in order to maintain issues of confidentiality that are required during an investigation and prevent inappropriate leakage of confidential information.

MAINTAINING UNIT COHESION

When embarking upon a mission it is important to remember several essential issues in relation to getting on well with your colleagues. It has been demonstrated in military units that unit cohesion is the most effective protection against stress despite the horrors that a team may have to face. For this reason getting unit cohesion right at the start is important. Many teams are multi-national in nature and a degree of sensitivity to the culture of your colleagues is vital. Members of a team will bring a mixture of different belief systems and approaches to dealing with work related issues and to how they interact socially with each other. At the same time just because a colleague belongs to a nationality or an ethnic group, do not automatically presume that they will conform to the national or ethnic stereotype. Because you are a member of a team it does not mean that the other members of the team have to like you or that you have to like them. Never take it personally. What is happening is that you are working with a diverse part of humanity. What is important is that all members of the team work as a team and support each other. To do this the team members should look after each other. Be polite to each other at all times and facilitate other members of the team when appropriate. Never become involved in a clique within the team. This leads to fractionation and a decrease in the quality of the work performed. It is a major cause of stress for all individuals involved. The team needs to be all inclusive and mutually supportive. Also remember that humour normally does not cross cultural lines easily. So when making jokes it is wiser to make them at your own expense rather than at the expense of other members of the team. Avoid personal comments and try to include all members of the team in whatever social activities are occurring. Keep a watch for team members that may be isolating themselves. They are often the most vulnerable to the effects of work related and other stresses.

After a day's work it is useful for all team members to discuss their experiences. If any team members had an adverse experience, it is advisable to allow them to ventilate their experience and it is important that the other team members respond in a supportive, but non-patronizing manner. Never dismiss their experiences, even if it appears to be of a minor nature to you.

Social activities within the unit are important and should be availed of if time allows. This aids different members of the unit to understand the more personal aspects of their colleagues and it allows for an understanding and an acceptance of their strengths and frailties. Accepting the human limitations of others is part of maturation. As time goes on we become less judgemental. By socializing with your colleagues we form a bond that helps each of us get through what can often be difficult and demanding work. Make time for social events and partake in these events when they arise, even if you are initially reluctant to. Constructive social interaction is an important part of your work.

TRAUMATIC EVENTS

When a person is involved in a traumatic event it is normal for their emotional arousal to increase. It can take six to eight weeks for a return of the increased arousal to normal. Investigations and missions differ greatly. Conflict zones and post-conflict zones are tense and difficult places to be in. Many of the people in the area are jumpy and can have a tendency to overreact. This can cause major problems at checkpoints, dealing with the local authorities, the local police, military and militias. The issue of dealing with child soldiers is even more fraught with danger, due to their increased unpredictability and the personal emotions that they may engender. On occasions, it is possible to have a series of traumatic events all occurring on the same day. The ideal coping mechanism is to suppress your emotions while the event or events are occurring and to feel the emotions at a later stage, shortly after the events, when it is safe to do so. This is known as going into "automatic pilot". It is facilitated by training in how to respond in crisis situations. The more training that is done the greater the ability to assume this role during the crisis. This training is optimized by role playing various difficult and demanding situations that one may encounter when on an investigation. Better results are obtained by more realistic type training. The greater the amount of familiarity a person has with a situation the more likely they are to respond in a positive manner. An example would be in dealing with a hostile and threatening road block. Even when the situation is artificial and safe, the more opportunities someone has to deal with various scenarios, the greater their confidence and ability to cope with the real event.

Unfortunately, experience has taught us that during a severe traumatic event, such as being caught up in an explosion; about a third of individuals will go into "automatic pilot" mode and be able to cope effectively with the crisis. Another third will become chaotic in their behaviour and will perform erratic and futile actions. Another third will be immobilized and be in a state of shock. Those who cope in these situations may find themselves performing purposeful actions without even thinking about what

they are doing. This behaviour is normally the result of repetitive training for such an eventuality. Later, when the crisis is over many, but not all, of these individuals will have delayed reactions. These reactions include tremor, nausea and vomiting, rapid heart rate and an inability to sleep. This normally lasts for several days, but if it continues for more than a week, medical help should be sought.

When a person responds with chaotic behaviour, their actions can impede the proper resolution of the crisis. This is particularly difficult if the person is in a leadership role. A person can respond appropriately during one traumatic event and decompensate and respond chaotically on the next occasion. These factors are not fully predictable. It is recognized that the better trained an individual is to cope with difficult events the greater the probability that they will cope in a positive manner when faced with real traumatic events in the future. Those that are immobilized during the trauma are at greatest risk of having subsequent mental health difficulties, though this is not inevitable.

Some individuals are energized and become elated when they experience traumatic events. Frequently, they will express that they felt intensely alive during the danger. These individuals will seek out dangerous experiences and are likely to quickly volunteer for another mission after they return home. Basically, these are individuals who like adventure and will actively seek it out. They get a “rush” when exposed to danger. There is nothing wrong with this. But, it is essential that individuals with these characteristics are careful that they do not behave in a reckless manner and put their own lives, the lives of others and the investigation in jeopardy. There is a downside for such people. They frequently adjust poorly when they return home. They are easily bored, drink heavily away from the mission area and become irritable and frustrated when they are in a functioning normal society. In short they are addicted to the adrenaline rush of being in an area of potential danger.

SUBSTANCE ABUSE

In conflict and post-conflict areas there is frequently a lot of substance abuse. The substance abuse can occur among the local population who may have undergone significant emotional and physical trauma, displacement and loss. It can also be problematic among the expatriate community of members of NGOs, international organizations, bureaucrats, medical and nursing personnel as well as other aid personnel.

The commonest form of substance abuse among the expatriate community is alcohol abuse. Though, abuse of illicit drugs also occurs and illicit drugs are easily obtainable in an environment where there has been a breakdown in the rule of law. Utilizing alcohol to help deal with feelings of inner stress with its associated anxiety is unwise and eventually counter-productive in nature. The reasons why people in such environments can drink to excess are manifold. One of the reasons is to induce sleep in a foreign and possibly dangerous and hostile environment. Alcohol is taken, usually in the evening to lower the level of emotional arousal and to aid sleep.

Unfortunately, alcohol induced sleep is of a poor quality and it is associated with a rebound increase in the level of emotional arousal the subsequent day. It can also lead to increased irritability. The taking of alcohol to ensure a night's sleep can continue when the person has returned home and it has the potential of leading to dependency. It is important that, when on a mission, alcohol intake is kept to a moderate level. The utilization of drink or drugs can lead to verbal and other indiscretions that can compromise the project and lead to further complications for the results of the investigations at a later stage. It is important to remember that it may be in the interest of those that you are dealing with to sabotage the investigation and the free availability of alcohol or drugs will aid them in their goal. The wisest approach is not to take any mind altering substance when you are partaking in an investigation. The investigation is a time limited experience. Maintaining a focus on home life, friends, personal interests and those things that we enjoy in life will help offset the impulse to become intoxicated. Becoming intoxicated can lead to all kinds of complications, that can be personal, cause difficulties for our colleagues and be compromising to the mission. By keeping ourselves grounded in the life we had before we arrived in the mission area, the less likely that we will become intoxicated out of boredom and loneliness. The responsibility lies with each individual member of the team to remain sober.

THE RETURN HOME

In the 21st Century we are in the strange situation where due to modern travel, you can be dealing with a life or death situation in the morning and be in the peaceful tranquility of your own home that evening. This can be a cause for a dramatic emotional adjustment in a very short period of time. In the conflict or post-conflict area a certain level of vigilance and responsiveness is required. This heightened level does not become automatically switched off just because you are at home. It takes time for the re-adjustment to occur. There is normally an initial "honeymoon" period that can last for up to a week. It is after this period of time that complicating factors can arise. You may find yourself irritable and jumpy for several weeks. Sleep may be difficult to obtain, despite the fact that you may have had no difficulty while you were on your mission. Exercise is a good method in coping with these difficulties. The level of exercise you partake in should depend upon your age, fitness and general health. It is not unknown for people who have returned home from a conflict or post-conflict zone to binge drink alcohol despite being abstemious while they were away. Again, it appears that such persons are trying to reduce their level of emotional arousal to that which is normal for them in a safe and secure place. Unfortunately, this can lead to domestic strife and to difficulties with ones friends. The best coping mechanism is moderation in alcohol intake and awareness that it takes time to make the full emotional adjustment after the return home, especially if you have been away for a long time.

If you have been away for a long period of time, your spouse or partner has probably learned to cope without you. They have assumed roles that you once occupied. This

can lead to an increased sense of self-worth on their behalf. They may be unwilling to surrender these responsibilities back to you when you return. They may like the sense of increased independence that they have obtained and it is unwise to challenge them on this. Instead, it is wiser to respect the changes that have come about and to adjust your life around them. By keeping contact with your family at home when you are partaking in an investigation, the easier it will be to accept the changes that will await you on the return home. For communication and logistical reasons this may not be as frequent as you would like, but take the opportunities that arise to keep in contact with your home.

Several factors can arise that can lead to relationship difficulties. You may have been looking forward to the travel you were about to embark upon, but it may have been perceived as abandonment by your loved one. They may intellectually realize that you have to travel, but emotionally they may have resented you for it. Events and difficulties may have arisen while you were away that placed stress on your spouse or partner that to you may be of a minor nature. They may resent you for not being around to aid them. This may be particularly difficult for you to understand especially if you had endured traumatic experiences and witnessed gross human rights violations while you were partaking in your investigations. This can result in domestic conflict. It is advisable that you do not allow these issues become a source of conflict. It is wiser to accept these kinds of emotional responses that can arise soon after your homecoming as possible and not to react in a negative way. Be supportive of your spouse or partner, avoid a row and accept it as a human response on their behalf.

Spouses and partners react to your homecoming in different ways. There is no standard reaction. You may be fortunate if they are supportive and are willing to listen in detail to your experiences. But this is frequently not the case. The reality is that many partners and spouses are unable to fully conceptualize your experiences and understand the nature of what you may have endured.

There is another reason for unwillingness to listen to you on their behalf. At one level they are aware that you are travelling to what may be a dangerous place. Yet, if they were to think about what you were doing they would not be capable of functioning while you are away. In order to cope with their anxiety they emotionally deny your possible experiences. They know that by the nature of your work such travel is a recurring necessity. If they listen to the details of your experiences they are forced to accept the nature of some of the dangers that you may have been exposed to and may be exposed to again in the future. The best way for them to cope is denial. By telling the stories of your experiences you are challenging this denial. As a result you may observe that they get irritable with you when you start to tell your stories of what happened during the investigation. Accept this situation. It is arising out of the fact that they care for you and find it difficult to accept that you can be exposed to dangerous and difficult circumstances.

You are fortunate when your partner and spouse is willing to listen to the stories of your mission and this is a good source of ventilation and it helps you to obtain a perspective on what you have been through.

When you were away the children got older. They also became more independent and hopefully more self-assured. Things will not be as they were before you travelled. You have to make allowances for their increased maturity and the greater degree of personal freedom they have obtained. Your spouse or partner may have made decisions in relation to the children and as they were the person who was present at the time the decision were made, it is advisable for you to accept the outcome if it is not too extreme. Things will never be the way they were before you travelled. In all likelihood you have also changed. Indeed your personality may have changed a lot

PERSONALITY CHANGES

Our personalities develop until we are about 25 years. After that the changes are usually small in nature. This is not always the case. Some individuals are capable of major personality changes throughout their life. These are usually people who have a capacity to increase their level of maturity, understanding and wisdom on an ongoing basis. These individuals are the exception rather than the rule.

Another way for a mature personality to change is when an individual has been through major emotionally traumatic experiences. These changes can be positive or they can be negative. Or the changes in personality can be a mixture of both. The changes that occur reflect the underlying personality traits. A person may become more serene and accepting of humanity with all its strengths and weaknesses. They can develop a sense of pride that they were able to help their fellow man and woman and help bring law and justice to an area where there was none. Or a person may become disillusioned with human beings as a species and develop an anger and sense of disgust towards their fellow man or woman. These negative changes can lead to moodiness, irritability and an emotional distance from loved ones. This is destructive both for the investigator and for their family.

In reality when one is faced with the consequences of war crimes and crimes against humanity one is observing human beings at their worst. Yet, if you look closely in the middle of all this horror there are frequent examples of human beings performing amazing sacrifices for their fellow man and woman. It is by refusing to be blinded to the goodness within humankind that disillusionment can be avoided.

PATHOLOGICAL RESPONSES TO TRAUMATIC EXPERIENCES

What is traumatic for one person is not necessarily traumatic for another. People vary in their level of resilience and personal robustness for this kind of work. It does not suit everyone. In reality there is only a minority who are capable of dealing with war crimes investigations on an ongoing basis. Sometimes a person can be an active investigator and human rights worker for several years and eventually they can reach a stage where they have to acknowledge that they are better off ceasing working at the coalface before their mental state starts to become impaired. It takes a mature man and woman to acknowledge when their time has come to move away from dealing

directly with the horror of war crimes, genocide and crimes against humanity. All human beings have a certain point beyond which it is advisable for them to either retire from this kind of work or to pull back to a more facilitatory role.

When the work is of a traumatic nature and a person starts to decompensate the commonest mental health problems that can develop are anxiety and depression. Though post-traumatic stress disorder is more often spoken of, it is a rarer reaction to adverse events than anxiety and depression. In reality a person can have elements of all three of these conditions. Their definitions are imprecise and do not accurately reflect what happens on an individual basis.

It is often the partner or spouse who first notices that something is wrong. Sometimes the reactions are delayed and can present as illness after the mission is over. There is a noticeable deterioration in a person's mood. As noted above irritability is a frequent problem. As well as irritability a person can lose any sense of enjoyment in life. They can withdraw socially and despite coping effectively with very difficult and dangerous circumstances, they can suffer from a marked deterioration in their self-esteem. There is a tendency to wake early in the morning. They can dread the forthcoming day. Everything can appear overwhelming. There can be a loss of motivation and energy. A sense of hopelessness can arise. Sex drive is normally impaired. Appetite can deteriorate with weight loss. Thought of being better off dead can arise. Feeling of anxiety can be intense. Memory and concentration are poor. They may have unjustified feelings of intense guilt. Such symptoms are indicative of an underlying depressive illness. Medical help should be sought.

Others can present with symptoms more reflective of anxiety. They can have an agitated mind. There can be an inability to relax. Due to a sense of nervousness when talking to others, they try to avoid social contact. At times they can have periods of rapid heartbeat, profuse sweating, tremor and difficulties breathing. It is common in such individuals who have developed anxiety following a major traumatic incident to have concerns about their physical health. This can deteriorate into hypochondria. As with depression there is sleep disturbance and a reduction in the sex drive. Due to an agitated mind they have difficulty concentrating and with poor concentration the short term memory is poor. Again, medical help should be sought.

Pure post-traumatic stress disorder is relatively rare. Often a person has many of the symptoms as outlined above. There is much talk about "flashbacks". In reality pure hallucinatory flashbacks are very rare and are seen in those who have been exposed to severe torture or rape. What are more common are frequent reminders of the unpleasant event. Also, a person may have frequent violent nightmares that can result in physical restlessness while they are asleep. The nightmares are varied in nature. A person suffering from post-traumatic stress disorder is hyper-vigilant and emotionally over aroused. Unlike the hyper-vigilance and increased arousal that occurs after the traumatic event, in post-traumatic stress disorder it does not fade away. Normally the person avoids talking about the traumatic experiences and avoids exposure to reminders of what they have been through. Again it is important that medical help is sought.

DEBRIEFING

There has been a lot of controversy in relation to the value of emotional debriefing following a traumatic event. This is not to be confused with operational debriefing which is an essential part of most missions. The current accepted view is that Critical Incident Stress Debriefing is inadvisable. There is some argument that it may be counter-productive.

What is of greater value is a group environment where individuals can freely express their emotions about their experiences. For such an environment to function group cohesion is vital. When major incidences do occur, sometimes outside help is useful. This help has to be non-intrusive and provide a source of information on the range of possible emotional reactions to the event. The availability of an experienced and professional confidante within the group or from outside the group can be a good emotional resource for the team after they have been through a difficult time. Such a person should have a good understanding of what is a normal and what is an abnormal emotional reaction to the trauma.

Management has an important role to play in ensuring that a mission is successful and that all of its team members are looked after to the best of their ability. This requires management being available to the team members 24 hours a day and 7 days a week once a team has embarked on a mission. A clear mode of communication needs to be maintained. Management should maintain a full awareness of any major difficulties that a mission is encountering. Difficulties can arise if there is a fear that communications are being intercepted. Within this parameter management should let the investigators know that they are available to intercede when required and that they will provide whatever support is necessary. It is also important that management has a clear line of contact with the investigator's family and can keep them aware of any difficulties that may have arisen. It is better for the family to have personal contact from management than to hear of difficulties arising in a country where the investigators are working, through the media.

SUMMARY

Stress is not unusual on a demanding mission. It is advisable to be able to recognize it in yourself as well as in others. The best defence against stress is group cohesion and the mutual support of each other within the group. Be aware that things may have changed a lot while you were away from home. Do not try to force your family back into the way things were before you went away. Though major traumatic events can lead to mental health problems, they generally do not and most people find they have more emotional resilience than they realized. Demanding missions can be a source of personal development and can be rewarding both emotionally and professionally.

ANNEX A

POST MISSION CHECKLIST

The following checklist is a collection of questions that should be asked by each mission member after they have returned from a mission. It is an unvalidated guide to prompt mission members to come to a decision as to whether they need to seek out some form of mental health intervention. To date there is no specific validated questionnaire that is specific for the type of work performed by a war crimes investigator. This checklist is to be used purely as a guide as to whether help is necessary.

INDICATOR	NOT AT ALL	RARELY	SOMETIMES	OFTEN
I keep obsessing about my experiences.				
I am having problems sleeping				
I have become very irritable.				
I am drinking more alcohol than normal for me.				
I have become disgusted by humanity.				
I feel very isolated from others.				
I wish at times I was dead.				
I feel jumpy and anxious.				
My mood can be low.				
I am having nightmares about my experiences.				
I have sudden outbursts of tearfulness.				
My emotions have become numb.				
People say I have changed.				
I am finding it difficult to concentrate.				
My memory has deteriorated.				
I keep thinking I am back in the mission area.				

ANNEX B

The following are questions that management should ask of itself about its care of the personnel that it has sent out into a mission area.

	Yes	No
I keep in weekly contact with the people in the mission area.		
I check on a daily basis that we have a line of communication.		
I am responsive to their requests even though at times they may seem marginally unreasonable.		
I am keeping myself aware as to how they are functioning together as a team.		
I am paying attention as to how they are doing both physically and mentally.		
I am keeping their families informed as to how they are doing and making the organization responsive to help the mission member's family when they are in difficulty.		
I am keeping in contact with other sources of information of the level of threat the mission members may be facing within the mission area.		

CHAPTER SEVEN - FIELD OPERATIONS

INTRODUCTION

The purpose of this chapter is to provide a framework for planning field operations. Many field activities, away from your office can take place with a minimum of organization and do not require formal planning. From time to time in the course of investigations, some operations will require the co-ordination of several people or several groups of people over a limited time frame and across several geographic locations. In these instances detailed planning is required to ensure that all involved in the operation know what their tasks are; know when and where they are required to carry out those tasks; have the equipment necessary to complete the operation and properly assess any risks that might arise as a result of the operation. For these operations it is useful to prepare an “Operation Plan”.

Examples of when an “Operation Plan” might be required include when search and seizure of evidence operations are carried out simultaneously at several locations or where multiple offenders are to be arrested at the same time.

The conduct of field operations is a crucial component of any investigation. To get best results operations must be properly planned. By preparing a “Operation Plan” you are in a better position to ensure that all the requirements for operation success are addressed. Except in the most urgent situations, no field operation should proceed until a formal “Operation Plan” has been completed and approved.

Before embarking on a field operation it is important to consider and define the aim/s and objectives of the operation early in the planning stage, and communicate this to operation participants. You should identify possible sources of information, before you depart. Particular attention should be given to the security of all persons involved in the operation; your own team, victims, witnesses, sources, alleged perpetrators, government officials and the general community. Understanding the area you intend to visit is important. Before departing, for example, you should be able to:

- Establish who your contacts in the area will be;
- Highlight existing safety concerns; and
- Identify the location of facilities such as hospitals or clinics for quick reference should any one be injured in the operation.

Operations will be carried out, as far as possible, in accordance with legal requirements that may apply to your activities and also any operational guidelines that may apply to you.

If the operation is to collect evidence for judicial proceedings, then the operation must be planned in accordance with the provisions of the relevant Rules of Procedure and Evidence.

Already it can be seen that embarking on a field operation requires more than just deciding to get in a car and go somewhere to ask questions. In order to obtain optimum results it is essential that all operations are well planned and efficiently executed. How do we do this? Today many civilian organizations have adopted a framework used by the military to plan activities requiring the co-ordinated movement of people and material to achieve objectives. This framework is often called an “Operation Order” or “Operation Plan”.

The framework suggested for preparing a “Operation Plan” can be recalled by using the mnemonic SMEACS. SMEACS provides us with the following headings to be addressed in preparing an “Operation Plan”:

S	Situation
M	Mission
E	Execution
A	Administration & Logistics
C	Communications & Command
S	Security

A operation planning template is attached. The paragraphs below will explore those headings in more detail.

S**Situation**

Matters under this heading include general information or the information necessary to give a background summary of the operation to be embarked upon. Policy matters can also be outlined if required. It may include information on the current security situation in the area, any contacts in the area and importantly, anything that is known about alleged perpetrators who may be in the area.

M**Mission**

The purpose of this section of your “Operation Plan” is to outline the ‘Who, What, When, Where and Why’ aspects of the plan. It needs to be a clear and concise statement of the aims and objectives of the operation and the task or tasks to be accomplished in the proposed operation. For example:

- “To interview possible witnesses to attack on civilians in location XXX on 20 Sep 1993”.
- “Visit former detention facility camp at Location Y to examine and document the location and features of alleged torture room described by witnesses”.

OR

- “The purpose of this operation is to travel to the region of XX, for the purpose of investigating alleged violations of Articles 172 & 173 of Criminal Code of BiH during an armed conflict in XX between *dd/mm/yyyy* and *dd/mm/yyyy*”.

The clarity of the mission statement serves to ensure that all members involved in the operation know the purpose of the operation and what they are to achieve.

E**Execution**

Paragraphs under this heading answer the ‘How’ aspects of an operation. In addition to outlining the concept of the operation, this section should also include specific instructions explaining how you intend to carry out the activities required to accomplish your operation.

In general three sub-paragraphs are used:

- General Outline
- Group Tasks
- Co-ordinating Instructions

GENERAL OUTLINE

The general outline provides the concept of how the operation will proceed. It is a broad statement on how you intend the operation to be carried out.

“On arrival the team will interview local inhabitants in order to properly characterize the events that occurred and determine the extent of alleged crimes against humanity and war crimes that occurred between *dd/mm/yyyy* and *dd/mm/yyyy*. Sites where it has been alleged that prisoners were interrogated and tortured have been identified. An alleged mass grave site has also been identified. The team will be split into two sub-teams to examine these sites. One team will conduct an examination and search of the interrogation and torture site, the other will conduct an assessment of the alleged mass grave site”.

If phases are to be used you should mention how they will be implemented and how many staff will be employed in each phase of the operation.

GROUP TASKS

It is here that every person whose presence is necessary to conduct the operation will be mentioned. A set sequence that can be used is:

- Team name, team leader and composition of staff.
- Tasks.
- Locality and/or area of responsibility.

CO-ORDINATING INSTRUCTIONS

This sub-paragraph contains all those details necessary to co-ordinate the operation such as routes, timings, and procedures.

A

Administration & Logistics

Matters under this heading should include everything needed to support the operation and keep it going once it has commenced.

Those matters should be mentioned in clearly defined sub-paragraphs. By addressing each of the headings below you can avoid overlooking important logistical details.

LEGAL REQUIREMENTS

Depending on the nature of the operation it may be necessary to gain court approval for activities such as entry on to private property, or possibly warrants of arrest to detain suspected offenders. These administrative procedures should be addressed in this section of the “Operatin Plan”.

TRANSPORT

Matters to be addressed under this heading include:

- Availability of vehicles locally and the necessity to hire vehicles.
- Vehicle allocation, including any transport arrangements.
- Any specific transport requirements, for example: if it is an operation to seize physical evidence, will a special type of vehicle be needed to transport it?

EQUIPMENT

Many operations will take place in areas where it is not possible to acquire equipment that you have overlooked taking to the operation area. It is also possible that some equipment may not operate in the operation area because of the absence of a power supply or sufficiently charged battery packs (always a problem with video cameras). On other occasions, equipment such as printers may require back-up ink or batteries to keep it operating during the operation that cannot be purchased in the operation area. It is important therefore to:

- Prepare an inventory of equipment you will need to accomplish your operation, e.g. laptops, tape recorders, evidence kit⁵⁶⁹, camera, satellite telephones, radios, mobile telephones, GPS Navigation equipment, crime scene kits, food, sleeping bags...
- Detail equipment or supplies such as batteries, inks and other perishables that may require replacement during the operation.
- It is essential to have accurate current maps of the area in which the investigations are being undertaken. Tourist maps may not be sufficient since they do not always show the level of detail you require.
- Check suitability of the frequency of the radios being taken on operation and the availability of assistance in the location to synchronize the radio frequency.

Identify:

- Who on your team is responsible for acquiring the equipment, and
- Who is responsible for transporting the equipment to the operation area, and
- Determine how you will secure it while in the operation area.

FINANCIAL ARRANGEMENTS

Field operations often require significant financial expenditures to keep them running. The more predictable expenses include paying for meals, accommodation and fuel for vehicles. There may be other expenditures you will be required to make during a operation. Some additional expenditure might include the hire of rooms to interview witnesses and reimbursement of expenses incurred by witnesses to attend your interview. If you are to be reimbursed for these expenditures in most cases it will be necessary to have obtained approval for the expenditure, prior to embarking on the operation. Therefore it is necessary to determine the nature and extent of expenditures will you have to make on operation.

ACCOMMODATION

Accommodation during field operations can be problematic. It can also be a source of discontent for team members if it is not suitable and thereby affects the overall

⁵⁶⁹ An evidence kit normally contains bags, tags, envelopes, pens, evidence logs and other materials used for the seizure, documentation and safe and secure preservation and storage of items of evidence.

viability of the operation. Wherever possible suitable accommodation arrangements should be planned for and if possible booked in advance. Consider whether the accommodation meets your security requirements. Details of accommodation, addresses, costs, and facilities should be identified and included in your “Operation Plan”.

Not only do you have to consider accommodation for team members, in the planning stage you need to consider where you will be able to conduct interviews and whether you will have to arrange overnight accommodation for witnesses. These details should also be included in your plan.

LOCAL REQUIREMENTS

The “Operation Plan” should detail any local requirements that will have an impact on the effectiveness of your operation. There are many considerations here, starting with the availability of the people you are hoping to meet with and interview. For example, are there any special customs, religious festivals such as Ramadan or other events that will affect your operation? If it is a holiday period, will public officials be available? Are there any particular dress requirements for operation participants, e.g. headscarves for women.

Availability of food items, water, toiletries or other personal items for purchase should also be included.

OTHER LOGISTICS

Many of the questions asked above with regard to planning the logistic elements of a operation will be difficult to answer. A useful practice in planning operations to conflict areas, post-conflict environments, or areas where no operation activity has previously occurred is to dispatch security and logistics persons in advance of the operation to assess the logistical support security situation on the ground and to make necessary security and logistical arrangements.

C

Communications & Command

Effective communication is a basis for successful operations, as are clear command arrangements. Field

operations, particularly in potentially hostile environments require sound leadership and clear lines for communication and decision-making. These arrangements should be outlined under this section. The “Operation Plan” should state clearly who is the team leader for the operation and who, at headquarters, the team leader should be reporting to. It should also spell out individual roles where applicable, e.g.: who is responsible for maintaining security and who is responsible for communication equipment.

Any special communication arrangements, including times for reporting between teams and headquarters should be stated.

Some of the details that need to be listed in this section include:

- The Team Leader
- The Field Controller (at Headquarters)
- Location of Team/s
- Contact telephone/fax numbers (of all personnel involved in operation and also contact arrangements with headquarters)
- Radio call signs for teams and team members
- Radio protocols
- General communications
- Contact details for Security component

S

Security

Many investigations will take place in a potentially hostile environment. There can be a wide range of threats to staff operating in these environments. These threats may extend to the people they contact and the information they collect. The security requirements will differ from location to location. In some places there will be a strong security presence, in others it will be minimal. The security arrangements you make will depend significantly on this presence and local requirements. Nonetheless, an essential part of operation planning relates to security. Each “Operation Plan” should include, as a minimum, a statement of the threat assessment for the operation and the level of risk of any threat occurring. The threat assessment should address any threat to operation personnel, witnesses, information and equipment. Where threats are identified, the measures taken to manage the risk associated with the threat must be outlined.

Security of information is important. How you will secure information you have collected, and how you will transport it, needs to be given careful consideration. For example, there is probably little point in gathering significant information for an investigation if you are going to have to hand it over at a hostile check point, or even worse, it could create a security threat for people who provided the information. Further information on security appears under the heading Strategic Security Assessments below.

OTHER OPERATION RELATED MATTERS

OPERATION DIARY

Personnel on operation should ensure that a comprehensive operation diary is compiled detailing all relevant events that occur during the operation. This should ideally be kept by the team leader, but individuals may also keep a diary, particularly if several team members are working at different locations.

OPERATION REPORTS

The operation leader is responsible for compiling and submitting a Operation Report (separate from the report on the investigations), in a timely manner, on completion of the operation. The operation report should contain an outline of the activities undertaken on the operation, the results of those activities and importantly, what went right, and what did not. Any security related incidents or information relevant to assessment of the security situation in the operation area should also be included.

SOME NOTES ON EQUIPMENT:

It is a good idea for investigators who frequently go on operations, to requisition and maintain an “Investigation Kit”. Some of the essentials that can be included in a modern investigation kit include:

- Communications equipment, mobile telephone, satellite telephone, radio and a Bgan (or similar) antenna that can be used to establish secure communications (both voice and data) with headquarters.
- Laptop computer equipped with common word and data processing software, communications software and mapping and GPS software.
- Digital audio recording device that can be used to record interviews, record oral notes of investigation activities or observations at a crime site. It should be capable of data download that can be transmitted back to headquarters for storage.
- Digital storage media (thumb drives, memory sticks etc) that is capable of secure encryption of information that you must maintain with you in the operation area.
- Digital still and video camera – high quality compact dual still and video camera equipment is now available and extremely useful for recording images, particularly of sites of human rights violations.
- Global Positioning System navigators (and maps) essential for finding and recording locations of relevance to investigation activities and a compass in case it does not work.
- Notebook and pencil.

STRATEGIC SECURITY ASSESSMENTS

When planning operations, investigators need to ensure that a strategic security assessment is prepared. Otherwise they may, perhaps inadvertently, take actions that threaten their own security, or the security of the people they interact with. Further, compromise of the information they carry on operation may put lives at risk or have an adverse effect on the whole investigation.

There are a range of matters that may be included in a strategic threat assessment depending on the particular environment where a operation will take place.

SECURITY CULTURE

A *security awareness culture or paradigm* needs to be adopted. The security awareness paradigm revolves around the following points:

- Security responsibility
- Security threat and risk assessment
- Risk counter measures
- Risk mitigation
- Security clearances
- Compliance audits.

SECURITY RESPONSIBILITY

Headquarters – for most investigations, your official headquarters is responsible for facilitating safety and security prior to and during the investigation and arrangements, where necessary, for emergency evacuation plans and other security resources. This may include prior reconnaissance to operation area to identify and make provision for indigenous hazards, briefing and training of teams and providing safety equipment procurement.

The individual is responsible for their own psychological and physical fitness; awareness of security procedures and how to use the various forms of security equipment.

SECURITY THREAT AND RISK ASSESSMENT

A security risk assessment is an important foundation of the *security paradigm*. It involves making an assessment of identified threats for operation personnel, witnesses and investigation product. It also involves an assessment of risk, the likelihood that an identified threat will occur and vulnerabilities – an assessment of danger points for staff. Security assessments have been discussed above. At a more tactical level, there can be many points where staff or the information they have collected can be compromised, thereby putting staff, witnesses and entire investigations at risk. Below are some of the major potential danger points:

- Airports – represent a significant threat to the security of your information as you are required to pass through a range of security procedures before being allowed on an aircraft. At many points in these procedures information you are carrying may be accessed. Material packed in checked luggage may also be insecure.
- Hotel rooms – are never to be considered a secure place for the storage of sensitive information.
- Check points – regardless of your mandate and stated rights, when passing through checkpoints, the person in control of the check point, particularly if armed, has the ability to compromise information you are transporting.

- Telephones, telecommunications and electronic storage and retrieval equipment – the old adage is that there are always three people involved in a telephone (or radio for that matter) conversation, the caller, the recipient and the person who is eavesdropping. Telephones are not secure and should not be used to convey sensitive information.
- Electronic devices - the greater preponderance of the security breaches occurring in operation areas today are caused by the loss, theft or compromising of electronic devices. Devices such as laptops, mobile phones and USBs must always be presumed to be insecure and backup hard copies or other means should be in place to protect sensitive information. It is also incumbent on the owner/users of these devices to be aware that they may, when using them in certain circumstances, compromise their own security and that of others.
- Meetings in the field – when different groups operating in a particular environment meet; often they relax security concerns regarding their activities. The first impulse is to discuss with your colleagues what you have been doing or the results of your activities. These discussions can often be overheard by others in the vicinity and it is common practice for intelligence services to place operatives in known meeting places such as cafes and airport lounges for the purpose of listening in on such conversations.
- Interpreters (particularly those engaged locally) may be targeted by individuals or organizations seeking information about the operation.

RISK COUNTER MEASURES

This involves a determination of measures you can take to counter risks identified in your threat and risk assessment, for example: how will you maintain the information collected and how you will transport it? how will you make secure or confidential contact with witnesses? how will you ensure the safety of operation staff while examining sites of alleged crimes?

RISK MITIGATION

Not all threats and risks are foreseeable, therefore you should consider what action can be taken to minimize damage or compromise, either in the event that a foreseeable or unforeseeable event occurs. Examples of such actions are the daily transfer of information obtained, securely, to headquarters then the destruction of any notes or copies held in a hostile operational environment.

Consider!

If safety considerations are attended to PRIOR to an investigation, the great proportion of the hazards that may be encountered in a post-conflict environment will have been addressed.

OPERATION PLAN TEMPLATE

OPERATION PLAN - OPERATION TITLE.

1. SITUATION

Include information necessary to give a background summary of the operation to be embarked upon. Policy matters can also be outlined if required.

2. MISSION

Proposed dates and location of operation and a clear concise statement of the task or tasks to be accomplished.

3. EXECUTION

Matters under this heading explain how you intend to carry out the Operation

to accomplish your operation.

3.1 General Outline

Gives a concept of operations. It is a broad statement on how you intend the operation to be carried out. If phases are to be used you should mention how they will be implemented and how many staff will be employed in each phase

of the operation.

3.2 Group Tasks

It is here that every person whose presence is necessary to conduct the operation and their role will be mentioned. A set sequence that can be used is:

- Group name, Team Leader and composition of team.
- Tasks.
- Locality and / or area of responsibility.

3.3 Co-ordinating Instructions

This sub-paragraph contains all those details necessary to co-ordinate the operation such as routes, timings and procedures.

4. ADMINISTRATION & LOGISTICS

Matters under this heading should include everything to support the operation and keep it going once it has commenced. Those matters should be mentioned in clearly defined sub-paragraphs.

4.1 Mandate

4.2 Transport

- Flight arrangements.
- Vehicle allocation, including any transport arrangements.
- Legal requirements for driving, e.g. UN, international or local drivers licence.
- Is it necessary to hire a driver?

4.3 Equipment

Prepare an inventory of equipment you will need and who is responsible for arranging it, e.g. maps, laptops, tape recorders, search kit, camera, satellite telephones, radios, mobile telephones, GPS navigation equipment, sleeping bags, first aid ...

4.4 Financial Arrangements

- What payments will you have to make on operation?
- Drivers
- Local interpreters
- Vehicle hire
- What is an acceptable method of payment?
- Are credit cards accepted?
- Are international banking facilities available?

4.5 Accommodation

- What is available? Does it have to be booked in advance?
- Where will you conduct interviews?
- Do you have to arrange accommodation for witnesses?

4.6 Local Requirements

- Are there any special customs, religious festivals or other events which will affect your operation, e.g. Ramadan, Vidovdan?
- Are things such as replacement ink for printers, toiletries or other personal items available for purchase?
- Availability of food items, water ...?

4.7 Other Logistics

- Pre-operation deployment of logistics personnel

5. COMMUNICATIONS & COMMAND

Under this heading ALL control arrangements for the operation are nominated. The list should include:

- The Team Leader.
- The Field Controller.
- Location of team/s.
- Contact telephone / fax numbers.
- General communication arrangements.
- Security contact details

6. SECURITY

As a minimum the following should be addressed:

- Threat assessment – for operation personnel, witnesses and investigation product.
- Measures taken to meet threat assessment.
- Security of information – how will you maintain what you collect?
- How will you transport it?
- Security clearance obtained?
- Preoperation deployment of security personnel
- Special security measures required for high-level personnel

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CHAPTER EIGHT - COLLECTION OF PHYSICAL EVIDENCE

The principles of collection of physical evidence in criminal investigations differ little from jurisdiction to jurisdiction, however the practices and procedures used vary greatly. Further, few in a national jurisdiction will encounter a crime scene of the scale experienced in war crimes investigations. Nor will they be likely to have experienced the severe resource limitations and hazardous environment they will be confronted with.

This chapter focuses on two areas. The first will provide guidelines to be followed by investigators when searching for and seizing evidence.

The second area gives guidance for decision-making when confronted with large-scale crime scenes and minimal resources.

Article 15 of the BiH CPC provides for the general principle for evaluating the evidence collected in criminal proceedings, which also implicates the manner of evidence collection and its admissibility in court. Evaluation of evidence in domestic proceedings is performed on the basis of a free evaluation of the evidence, which is a general principle involving the application of the rules of logic. In deliberating whether a certain fact is proven or not, courts in BiH are obliged to carefully assess every piece of evidence individually and taken together with all other evidence and reach a conclusion on proving the relevant facts of the case and accepting the evidence presented to the court.⁵⁷⁰

Article 15 of the BiH CPC

(Article 15 of the RS CPC and the BDBiH CPC, Article 16 of the FBiH CPC)

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.

⁵⁷⁰ Commentary of the BiH CPC, p. 76.

In relation to the admissibility of evidence in war crimes cases, the Law on the Transfer of Cases from the ICTY to the BiH Prosecutor's Office and the Use of Evidence Collected by the ICTY in Proceedings before the Courts in BiH (BiH Law on Transfer of Cases) regulates the admission of evidence from the ICTY.⁵⁷¹ The BiH Law on Transfer of Cases in Article 3 sets out a general rule concerning the admissibility of evidence.

Article 3 of the BiH Law on Transfer of Cases

General Principle

- (1) Evidence collected in accordance with the ICTY Statute and Rules of Procedure and Evidence 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.

The following types of evidence collected by the ICTY may be admissible in BiH courts:

- i. Facts established by legally binding decisions by the ICTY;⁵⁷²
- ii. Evidence provided to ICTY by witnesses;⁵⁷³
- iii. Statements by expert witnesses made before ICTY;⁵⁷⁴
- iv. Evidence provided to ICTY officials;⁵⁷⁵ and
- v. The rule governing the authentication and/or certification of electronic copies of documents and forensic evidence collected by the ICTY and their use in proceedings before the courts in BiH.⁵⁷⁶

Further, depending on the status of the case, the national jurisdiction may also apply. These guidelines are prepared with reference to the ICC Statute. Investigators should ensure however, before embarking on an investigation that they are familiar with the laws and particular Rules of Procedure and Evidence applicable to the investigation.

INTRODUCTION

Along with testimonial evidence obtained from witnesses, physical evidence is the basis of any truly successful investigation. Physical evidence collected from crime scenes, general areas, victims and suspects and their clothing or equipment, can provide corroboration of witness or victim accounts as well as clarification of what actually happened.

⁵⁷¹ Law on the Transfer of Cases from the ICTY to the BiH Prosecutor's Office and the Use of Evidence Collected by the ICTY in Proceedings before the Courts in BiH, Official Gazette of BiH, No. 61/04, 46/06, 53/06, 76/06.

⁵⁷² Art. 4 of the BiH Law on Transfer of Cases.

⁵⁷³ Art. 5 of the BiH Law on Transfer of Cases.

⁵⁷⁴ Art. 6 of the BiH Law on Transfer of Cases.

⁵⁷⁵ Art. 7 of the BiH Law on Transfer of Cases.

⁵⁷⁶ Art. 8 of the BiH Law on Transfer of Cases.

There are as many types of physical evidence as there are ways of collecting it. Where possible, full use should be made of appropriate experts. Science and technology improvements present new opportunities to the investigator. Blood or other bodily fluids collected only a few short years ago might never have been used to link an offender to the crime or victim. Now the use of DNA technology is an almost routine aspect of crime scene investigations. Effectively anything that can be collected, measured or examined may prove to be valuable evidence.

The major points to consider in the collection and handling of evidence are:

- i. Protection of the evidence to be collected;
- ii. Recording of the evidence prior to any disturbance by the investigative team;
- iii. Documentation of the collection process including the unique identification of all items collected;
- iv. Creating and ensuring a strong documentation of the handling, transportation and storage of the items collected, also known as “chain of custody” or continuity.

CHAIN OF CUSTODY

For a physical exhibit to be accepted in a tribunal or court and given the highest value or weight by that court, an unbroken chain of custody is essential. For the court to accept the item you must be in a position to prove that the item was indeed that which was taken from a particular person or place. This proof is provided by written or oral testimony, which identifies the item as having been taken from that person or place, and tracing custody of the item from the time it was taken until it is presented in evidence. This latter evidence is necessary to avoid any claim of substitution or tampering. It must also be shown that the item was correctly secured and stored to prevent accidental or deliberate tampering or contamination.

Chain of custody is essentially a document or a record of the collection and handling of the item from start to present. It is most often represented by a table of signatures, receiver to receiver, accompanied by the purpose of the transfer, date/time and signatures of the parties involved. This chain of custody document or form may accompany the item itself but should reflect every change of custody or control of the item. It is important however to note that the chain of custody document does not become the focus of the chain - it is simply the record of the status of the evidence. The evidence itself is the thing which must be controlled and protected.

Example of a Chain of Custody Form:

EVIDENCE MOVEMENT REGISTER (or CHAIN OF CUSTODY REGISTER)

ITEM #	DATE/TIME	RELEASED BY (name/ signature)	RECEIVED BY (name/ signature)	REASONS FOR MOVEMENT

BASIC COMPONENTS FOR THE COLLECTION AND RETENTION OF EVIDENCE

Set out below are basic principles regarding the collection and retention of evidence:

- v. Protect the evidence. This effectively means what it says. This may be as simple as taping off an area so the scene will not be disturbed, or covering footprints and tire tracks to protect them from the rain;
- vi. Evidence should be photographed or video recorded *in situ* before collection begins, if possible. The location and position of the evidence should also be recorded in diagrams and notes;
- vii. Evidence should be collected in a formalized and systematic manner. The method of collection may vary for agency or evidence type but consistency is the key. Advice should be sought from relevant experts as to the correct method of collection, or arrangements for the direct assistance of the relevant expert should be made. Some types of evidence, such as gunpowder or bodily fluids, must be collected in a specific way or in a specific type of container, free from contamination and/or degradation to ensure accurate testing and identification;
- viii. A contemporaneous record of the collection process and the identification of each individual item must be made. This can be in the form of a log, but the record should contain detailed notes, including where, when and by whom the item was collected. These notes should accompany each individual item as it is transported, stored and processed. This will form part of the “chain of custody” record, which allows the reliable presentation of the item to courts;
- ix. The collection and handling of evidence should be recorded using both still and video photography. This can be easily done using a digital camera. Notes should also be taken documenting the process. Notes are even more important when camera equipment is not available;
- x. Items should be individually packaged with a unique designation (number or letter, or a combination of both) and securely sealed. Efforts should be made to protect evidence from contamination by using clean unused storage containers;
- xi. Items collected must be stored in a secure condition, both from the point of view of continuity, and physical security. It is of little use collecting evidence from a crime scene which may later be stolen, tampered with or the subject of degradation from the physical surroundings. This is particularly important when dealing with more modern evidence types such as human tissue or fluid samples;
- xii. A detailed report may also be prepared summarizing the collection, examination and storage of the items of evidence. Often this will take the format of a police or witness statement to be presented in court and should refer to the relevant videos, photographs, logs and documents produced during the collection process.

COLLECTING EVIDENCE

When collecting evidence:

- i. One person must be designated as the receiver of the items collected as evidence, often referred to as the “Property Officer”. It becomes this person’s responsibility to receive, label, record and retain possession of all items seized;
- ii. Prior to beginning the collection process it is often a good idea to walk through or examine the overall crime scene (leave your hands in your pockets - this way you can’t inadvertently move vital evidence). Make a note of the layout and obvious evidence so as to form a plan as to how the scene should be processed. This will also assist in prioritizing the collection of evidence - this is particularly important in areas where the security of the site may be threatened or time is limited due to security considerations;
- iii. Prepare a detailed sketch including direction north, associated buildings, locations, roads, etc. with a grid or other labelling system. This will allow the location of items seized to be clearly indicated on the diagram, as well as on the individual items label or bag. Like all paperwork produced at the crime scene it should be signed, dated and adopted by the author(s);
- iv. Prepare detailed notes of the location and the collection process. These notes should include reference to the evidence collection logs (chain of custody forms), photographic as well as evidentiary logs and importantly the people who enter and leave the scene;
- v. Don’t include opinion or conjecture in the notes or recordings. The examination of the scene and items is best done without pre-conceived ideas. Let the scene and the evidence tell their story.

INVESTIGATOR’S NOTES

A reliable record of what happens at a crime scene or evidence collection area is essential and should be completed by the investigator as a matter of course. Whilst other records, such as evidence collection or photographic logs, will be made the investigator’s notes represent an overall and more complete record of the operation. These notes will form the basis of evidence presented to the court by the investigator, therefore they must be correct, detailed and above all professional. The format of these notes will vary but the following should be considered as key points:

- i. Notes should be made at the time of the occurrence or as soon as possible thereafter. The greater the delay in noting the incident then the less reliable the record will be considered. An acceptable delay should be considered in hours rather than days;
- ii. Notes should be made in a bound and consecutively numbered book, notepad or similar. This ensures that pages cannot be torn out and re-written. This will assist in establishing the authenticity of the notes;
- iii. If notes are made electronically, e.g. on a laptop or personal digital device, a

printed copy should be made as soon as possible and signed by the maker and witnessed. This document protects against allegations that notes were altered at a later date;

- iv. Mistakes will be made in the notes. If this happens mark a single line through the error and record the correct entry. This ensures complete transparency of the record;
- v. The note taker should initial all corrections, or additions to the notes;
- vi. Notes should commence with the date and time and where appropriate time should be recorded throughout the notes (this places a verifiable sequence to the record). A description of the task, location and persons involved should also be made;
- vii. The notes should be written clearly and if abbreviations are used they must be easily explained;
- viii. The notes must be signed after the last entry by the note taker including their full name, title, date and time. The notes may also be signed or adopted by appropriate members of the teams. Pages other than the final can be signed or simply initialled;
- ix. No large blank spaces should be left in the notes;
- x. Protect and secure the notes.

The notes essentially become evidence and therefore must be protected. If a later witness statement is made, based on the notes, then the notes may be required to verify the contents of the statement or witness testimony. Remember the notes may also be presented to the court and defence.

An alternate to written notes could be video or audio recordings of the investigator describing the process. Whilst this is perhaps easier it has a number of disadvantages such as technical failure and the difficulty in reviewing and checking previous entries. Audio (or video) recordings however can be a valuable time saving measure and also a useful adjunct to written notes.

CRIME SCENE SKETCH

A sketch of the scene should also be made; the level of detail in the sketch is dependent on time, resources and the size of the area. The sketch should be in the form of an overhead view. For instance, if the scene is a house the sketch should be a floor plan of the dwelling. The drawing should include a scale and measurements, indicate key features, and detail how different areas are identified, labelled and described. These labels and descriptions should be reflected in the labelling of the exhibits themselves as well as search/seizure notes and video/photographic logs. Again the sketch should be treated as evidence in itself, signed and dated by the author, as it can become the basis of a written or oral statement to the court or a detailed report.

VIDEO/PHOTOGRAPHIC RECORDING OF SCENE/COLLECTION OF EVIDENCE

A video camera is an ideal tool for collecting a large amount of information quickly. It does however have its limitations, and should be used more as an overview tool with close-up, detailed recording done via still or digital camera. Importantly, a video recording can be helpful in capturing the methodology used when collecting evidence and demonstrating the transparency and correctness of the evidence collection procedures.

One of the major problems with video recordings is the distortion of dimension and distance. However, video recording can provide a more natural perspective of the area and put into reference the surrounding area and the connections between parts of the crime scene. The video record will also assist in determining what was actually at the scene, what was disturbed or changed during the examination/collection process. It is also a valuable source of information of the crime scene and its contents, which can be referred to as the investigation progresses. On occasion an item may not be collected or thoroughly examined that later becomes pivotal to the case. The video recording will have recorded the existence and location of that item.

As with any task preparation is the key, therefore before using the video check that the batteries are fully charged including as many spare fully charged batteries as you might need, and ensure that you have sufficient digital memory available to meet your needs. The date and time display of the video should be set and displayed. This ensures a permanent record of the date and time the film was made.

In some circumstances it may be appropriate to video a scene more than once, with and without the time/date display visible. Some modern videos have a title generator with which to mark the start of the tape. It is often more convenient to use a typed or hand written title card. This title card should, as a minimum, include the date, time and place as well as the person photographing and collecting evidence.

When using a video camera warn people you are commencing the recording or turn off the audio. Using the audio track allows for the photographer to explain in detail what is being shown, what aspects of the crime scene may have been altered or highlight areas of particular interest. Care should be taken to move the camera slowly and the use of zoom should be limited. The film is a record of the scene and the actions taken; it does not need to be entertaining or technically perfect.

PHOTOGRAPHY (STILL)

Every investigator should carry with them a small automatic camera (35 mm or APS format) to record crime scenes and associated points of evidence at short notice or where formal recording systems are not available.

Even where a video recording is made, comprehensive still photographs should still be taken. Still photographs are capable of capturing far, far more detail than video

recordings. This allows for more detailed close-ups and the direct comparison of evidence such as fingerprints, blood patterns or similar. The use of a still camera also ensures a second or backup record of the scene. Where possible a professional scene of crime photographer should be used, although if this is not possible then a systematic approach should be adopted to photograph overall scenes and panoramic style shots followed by close-ups. Use a scale or ruler and appropriate labelling (often the item number or description) as well as a north indicator or other location indicator. Where possible, use a tripod and a flashgun. It is often appropriate to take several photographs of the same item/scene using different settings and with/without labelling. Remember that photographs may represent the best record of the scene or examination to be presented to the court.

TREAT PHOTOGRAPHS AND VIDEOS AS EVIDENCE

Digital memory cards should be treated in a similar way as the other evidence collected. Practices vary. Some jurisdictions demand the original memory card be retained as evidence. Elsewhere an acceptable practice is to download the images onto a non-erasable Digital Video Disc (DVD) that becomes the primary evidence. Each memory card or DVD should be marked and sealed and the “chain of custody” details commenced.

The memory card or DVD becomes a primary piece of evidence and the prints and copies made from it, secondary evidence. It is therefore necessary to ensure the memory card or DVD is protected. It is also important to consider the consequences of airport screening or other security systems on this type of evidence.

- A photographic log or similar notes should also be made, consisting of date, time and place as well as each photograph number and a description of the area or item photographed. The log may also include appropriate comments, which will allow sense to be made of the photographs at a later time. Again this log becomes evidence in itself and should be treated appropriately. There are computer programmes that will provide a photo log from your series of downloaded photographs e.g. <http://landscapeimage.com/thumbhtml>

No	Filename	Size	Make	Model	Date Orig	Time Orig	Date Mod	Time Mod	Width	Height	Exposure	Focal Length	Aperture	ISO	EXIF Version	Comment
1	IMG_1260.JPG	4586K	Canon	Canon EOS 600D	18/07/2012	16:13	18/07/2012	16:13	5184	3456	1/500s	250.0mm	f8.0	100	x30,	
5	IMG_1264.JPG	5957K	Canon	Canon EOS 600D	18/07/2012	16:14	18/07/2012	16:14	5184	3456	1/2000s	250.0mm	f5.6	250	x30,	
6	IMG_1267.JPG	5134K	Canon	Canon EOS 600D	18/07/2012	16:15	18/07/2012	16:15	5184	3456	1/500s	250.0mm	f7.1	100	x30,	
9	IMG_1273.JPG	4731K	Canon	Canon EOS 600D	19/07/2012	15:38	19/07/2012	15:38	5184	3456	1/125s	55.0mm	f16.0	100	x30,	
10	IMG_1274.JPG	4759K	Canon	Canon EOS 600D	19/07/2012	15:38	19/07/2012	15:38	5184	3456	1/125s	55.0mm	f22.0	100	x30,	
19	IMG_1286.JPG	4687K	Canon	Canon EOS 600D	19/07/2012	15:42	19/07/2012	15:42	5184	3456	1/500s	250.0mm	f8.0	100	x30,	
28	IMG_1295.JPG	3542K	Canon	Canon EOS 600D	19/07/2012	15:58	19/07/2012	15:58	5184	3456	1/200s	250.0mm	f18.0	400	x30,	
31	IMG_1298.JPG	4951K	Canon	Canon EOS 600D	19/07/2012	15:59	19/07/2012	15:59	5184	3456	1/80s	55.0mm	f4.0	125	x30,	
32	IMG_1299.JPG	4391K	Canon	Canon EOS 600D	19/07/2012	15:59	19/07/2012	15:59	5184	3456	1/2500s	55.0mm	f4.5	100	x30,	
81	IMG_1348.JPG	4775K	Canon	Canon EOS 600D	21/07/2012	15:52	21/07/2012	15:52	5184	3456	1/200s	55.0mm	f11.0	400	x30,	
82	IMG_1349.JPG	7161K	Canon	Canon EOS 600D	21/07/2012	15:52	21/07/2012	15:52	5184	3456	1/200s	18.0mm	f8.0	100	x30,	
92	IMG_1359.JPG	8407K	Canon	Canon EOS 600D	22/07/2012	7:10	22/07/2012	7:10	5184	3456	1/200s	18.0mm	f20.0	400	x30,	
126	IMG_1393.JPG	10818K	Canon	Canon EOS 600D	22/07/2012	7:22	23/07/2012	8:26	3456	5184	1/250s	23.0mm	f10.0	100	x30,	
127	IMG_1394.JPG	10516K	Canon	Canon EOS 600D	22/07/2012	7:22	22/07/2012	7:22	5184	3456	1/250s	18.0mm	f10.0	100	x30,	
149	IMG_1416.JPG	8535K	Canon	Canon EOS 600D	22/07/2012	7:33	22/07/2012	7:33	5184	3456	1/250s	18.0mm	f10.0	100	x30,	
150	IMG_1417.JPG	8308K	Canon	Canon EOS 600D	22/07/2012	7:33	22/07/2012	7:33	5184	3456	1/250s	18.0mm	f10.0	100	x30,	
151	IMG_1418.JPG	4172K	Canon	Canon EOS 600D	23/07/2012	5:56	23/07/2012	5:56	5184	3456	1/60s	18.0mm	f5.0	100	x30,	
152	IMG_1419.JPG	4859K	Canon	Canon EOS 600D	23/07/2012	5:56	23/07/2012	5:56	5184	3456	1/40s	18.0mm	f4.0	100	x30,	
153	IMG_1420.JPG	4775K	Canon	Canon EOS 600D	23/07/2012	5:57	23/07/2012	8:26	3456	5184	1/60s	18.0mm	f5.0	100	x30,	
154	IMG_1421.JPG	4859K	Canon	Canon EOS 600D	23/07/2012	5:57	23/07/2012	8:26	3456	5184	1/60s	18.0mm	f5.0	100	x30,	

Highlighted area records images that have been modified.

LARGE-SCALE CRIME SCENES AND MINIMAL RESOURCES

One of the problems that may confront war crimes investigators is the scale of crimes and crime scenes. In all probability available resources will be insufficient to deal with the task in the systematic manner advocated above. Yet, adherence to these same principles will assist in ensuring that the best possible evidence is available to the subsequent tryer of fact.

The worst possible scenario is one where the scale of the task leads the investigator to ignore the principles of systematic collection of evidence. Below are some guidelines, which will assist in determining priorities and allocating resources in these situations.

INFORMATION HANDLING

It is vital when demands are many and resources are few to collect the best information possible to assist in deciding where investigators or scene of crime specialists should be deployed. The following steps are recommended:

- i. Establish a command post for collection of information and monitoring of staff.
 - o Probably the most important step, since you will not be able to gather or record all the information available yourself. There will be a plethora of people, witnesses, organizations and officials wanting to pass information to you. If to avoid duplication only, this information needs to be funnelled into one place, your command post. Here the information can be collated, compared and prioritized for follow-up.
- ii. Establish a system or database for recording and collating information.
 - o In information rich scenes you may quickly become overwhelmed with information. The establishment of a detailed system, preferably a database to store this information is essential. Databasing is recommended as this will allow you to manage the data at a later stage when the parameters of your investigation have become clearer. It will also assist in the collation process and facilitate exploitation of the data.
- iii. Establish protocols for information collection. Maximize the quality of information available from all sources.
 - o Prepare a checklist or a *pro forma* setting out the categories of information you want collected and the manner in which you want it recorded.
 - o Establish common terms for describing locations, gravesites, crime scenes and co-ordinates. For example, insist that all reported scenes are accompanied with a photograph of the site, sketch plan and GPS or map co-ordinates. This will assist in avoiding duplicate recordings of sites and also allow the investigator to find the site on a subsequent occasion.

- In some places towns and villages may be known by different names, depending on which entity your witness comes from. Wherever possible record both.
- iv. Monitor media reports and liaise with journalists.
 - Similarly, you can rest assured there will be a media presence. Experience tells us that in most cases where you are examining alleged crime scenes, the media will become aware of your presence and wish to report it. Journalists will go about their reporting whether you co-operate with them or not. By establishing a rapport with them you can gain early access to vital information and have some control over how this information is collected.

ASSESSMENT

Having collected a wide variety of information, an assessment needs to be made as to which sites will be further examined, and how they will be treated. This will often be a balancing test between the number of reported sites and the amount of resources available to you. There will also be humanitarian concerns that will have to be considered, e.g. identification of human remains for relatives.

For the war crimes investigator, the assessment will focus on elements of crimes (s)he may later have to establish in a prosecution. Any early assessment of likely violations to be prosecuted, and thus need to be supported by crime scene evidence, is vital.

Perhaps the most crucial test is to ask what evidence will disappear, irretrievably, if it is not collected immediately. Examples of this include human remains of victims lying on top of the ground, physical evidence such as shrapnel or cartridge cases, or movable physical characteristics of sites, as described by witnesses. As these types of evidence are likely to disappear if not dealt with they should be examined at the earliest possible opportunity. Alternatively, a mass grave, left untouched, will still yield vital evidence if exhumed long after the event.

Having determined this, you must ask the question, “If the evidence does disappear, what effect would it have on a subsequent case?” The answer to this question will assist in prioritizing efforts to recover evidence.

MINIMUM REQUIREMENTS FOR TREATMENT OF SITES

Along with carrying out an assessment and setting priorities for which sites will be examined, you should also establish a minimum requirement for recording of information relating to sites which are not to be subjected to a full examination.

These minimum requirements could include:

- i. Still photography;
- ii. Measurements of scene;

- iii. GPS co-ordinates or map reference;
- iv. Sketch plan;
- v. Particulars and contact points of any witnesses to the alleged event.

These steps can be taken by staff with a minimum amount of training and can be extremely useful. For example, a photograph of a victim recorded in this manner, whilst not yielding the same quality of evidence as a full forensic examination, may none the less suffice to corroborate witness evidence of a murder.

DEBRIEFING AND COMPARISON OF INFORMATION

The progress and direction of investigations are dynamic. They may change quickly, particularly in the early stages. It is therefore essential to conduct daily debriefings with all staff involved in the investigation and to compare this information with material from other sources.

ANNEX A TO CHAPTER EIGHT

EVIDENCE HANDLING PROCEDURES

MAINTAINING THE CHAIN OF CUSTODY

- The evidence shall be accounted for at all times.
- Unless an item is in the evidence vault of the tasking organization or an approved security container, the item should be held in the possession of the collector, designated property officer or individual authorized to have possession of the item, at all times.
- In the event that large amounts of evidence need to be collected in the field, an investigator or recognized official shall be appointed to guard the evidence until it is transported to the tasking organization.

PACKAGING

- Handle every item with care to protect its original condition.
- Where applicable, use protective clothing such as gloves, masks and eye protection when handling evidence (for example, items which are wet with biological fluids.)
- Seal and package items separately to avoid cross-contamination. Additional packing material should be used if an item could break during transport and/or contaminate other evidence.
- If examination of the item is needed before packaging, do so over clean paper. Include that paper in the packaging. Liquids or pastes should be retained in their original containers, sealed and marked.
- Retain evidence in original packaging and seal with new material.
- Label the package.
- Wrap in paper when in doubt of the type of packing material to use.

LABELLING

Include the following information on both outer wrapper and any evidence log:

- Date, time and name of collector;
- Name of suspect, if applicable;
- Description of the item;
- Location and/or individual releasing item;
- Case file number, if applicable.

SEIZURE OF DOCUMENTS

- Handle original documents with cotton gloves. Do not fold, crease, cut, or mark the document.
- If the document is damaged (for example, charred), transport it in the container in which it was found. In such cases, do not unfold, etc. If fragments cannot be placed in the original container, pack them separately with absorbent cotton material. Place all documents in a sturdy container for transportation. Pack with additional cotton material or paper, without crushing it, to prevent the document from moving.
- Place the document flat in a paper envelope. Note: if plastic bags or sleeves are used, environmental conditions may promote the development of moisture within the plastic bag and destroy or damage the contents. (For example, moving an item from a cold environment to a warm environment may cause condensation to form inside a plastic bag.)
- Make two photocopies (one will be your working copy) of each document. Initial, and record the date and time on the reverse of each working copy. Do not use the photocopier's automatic feeding process as it may destroy indented writing. Place the document directly on the glass, then copy.

AUDIO AND VIDEO MEMORY CARDS

- At the start of each video or audio recording, the investigator should state the names of those present during the recording (if appropriate), the date, time, and location of the recording.
- Download the recording onto a non-re-writable digital disc (CD or DVD) at the earliest opportunity and make copies of it to use as working copies.
- If necessary seal and secure the original digital recording for later production as evidence.
- Do not play original recordings. Make and use working copies.

COMPUTER EQUIPMENT

- Do not touch any equipment before thoroughly examining the set-up.
- If the equipment is on, attempt to save the documents before exiting. Wherever possible, consult with a computer expert before touching any equipment, which is turned on.
- If the computer is not turned on, carefully unplug the computer and label the parts and connection ports.
- Examine the room/building from which the computer will be removed. Beware that magnetic devices may be placed in doorways, etc. These magnetic devices may erase the data banks in the computer.
- Seize all the computer equipment (including the keyboard), disks and any instruction manuals. Seize the material no matter what condition it is in (disks can be restored in some cases).
- Consider taking the computer printers, if necessary. Arrange for a computer crime investigator to examine the equipment.

CLOTHING

- Separate all items and place on separate paper sheets.
- Examine clothing surfaces for its evidentiary values, including tread patterns on shoes.
- Ensure clothing is dry before packing. If clothing is wet lay flat to dry.
- If the clothing is heavily stained put paper between the layers.
- Avoid folding the clothing in areas of evidentiary value (for example, through a bloodstain or damaged area) to prevent stains from flaking.
- Wrap, seal and label.
- Items should be kept separate from other victims' or suspects' clothing, even when packaged.

BALLISTICS AND TRACE METALS

- Handle with gloves or material that will not scratch metal surfaces.
- If wet, dry before packaging.
- Do not attempt to remove foreign matter adhering to the metal's surface. Collect any material that has fallen off and place it in a paper envelope.
- Package cartridge cases and bullets separately with soft cushioning material.
- Protect against moisture or chemicals that could cause corrosion. Package in a plastic or paper bag. If environmental conditions are likely to produce moisture inside the plastic bag, use a paper bag or container.
- Place in a protective container to prevent any further damage.

FIREARMS

- Confirm the weapon is safe (unloaded, etc.).
- Handle on the chequered/grooved part of the butt. Wear cotton gloves.
- Do not remove any foreign material on or in the weapon.
- Collect any material that has fallen off the weapon and place in a paper envelope.
- Ensure firearm is dry and free from moisture and chemicals.
- Record identifying data: make, model, serial number (depending on the weapon, this may be found on the barrel, body and or on the slide or breech-block) and distinguishing characteristics.
- Secure inside a rigid container to prevent the weapon from moving or rubbing against the container's surface

PHOTOGRAPHING VICTIMS OR SUSPECTS

- Take overall, mid-range and close-up photos in colour and black and white.
- Close-up photos should include wounds or any unusual marks. Take the photo with and without a scale. The scale should be labelled with the time, date and case file number.
- Log photos as they are taken. Include the date, time, and location, type of film and camera settings on the log. Give a brief description of each frame.
- Photographing other items of evidence can be handled on an as needed basis. The same procedures should be followed.

CHAPTER NINE - FORENSIC DEATH INVESTIGATIONS AND MASS GRAVES

This module will focus on the investigation of death from a forensic standpoint. It will provide a brief overview of the related disciplines of forensic pathology, forensic anthropology and forensic archaeology. Issues involving mass graves, of particular relevance to investigations of war crimes, crimes against humanity and genocide, are presented. The objective is to provide the reader with basic knowledge and some awareness of the difficulties and methods involved in forensic death investigations in the human rights field. The term “human remains” as used below refers to the dead human body, in whole or part, regardless of condition, whether the remains are fleshed, decomposed or skeletonized.

INTRODUCTION

The forensic documentation of human rights abuses provides an irrefutable documentation of the historic record, preventing historical responses later claiming that the abuses never occurred, were not as extreme as stated, or were only a measured response to a national emergency. In addition to providing a record that is resistant to historical revisionists, scientists are able to collect narrative and physical evidence that can be presented in court and information that assists in the identification of victims so they might be returned to their families. A final inducement for such investigations is that they affirm the human dignity of victims and for survivors, the hope that such investigations serve as a deterrent to repetitions in the future.

FORENSIC PATHOLOGY

This section sets out some of the basic definitions and concepts utilized in forensic pathology. It will concentrate on the major goals of a post-mortem examination (autopsy or skeletal examination) and gives a brief overview of the contributions of the forensic pathologist and what they entail.

Forensic investigations of death are undertaken by various specialists who have specialized training beyond that of regular specialists in their field. For example the forensic pathologist is not only a pathologist like those routinely working in hospitals, but they have added training that involves trauma relating to death and legal aspects of forensic medicine. Two of the most important functions of the forensic pathologist are the determination of the cause and the manner of death (Di Maio and Di Maio 2000). The cause of death is any injury or disease that results in the individual dying. The manner of death is a legal definition, it refers to how the death came about, and usually falls into one of five categories: natural, accident, suicide, homicide, undetermined. Most often, the pathologist's major area of experience is with fleshed remains.

Estimation of time since death is another important function of the forensic pathologist. For criminal investigators this can support or refute an alibi. Time of death may be used to prove if insurance coverage is in force. Following death, except for unique environmental conditions such as freezing, the body begins to decompose. Methods of estimating time of death are based on various aspects of the decomposition process. Unfortunately most methods are unreliable to various degrees and are usually given as ranges such as four to eight hours or a matter of weeks, months, or years. For fresh bodies, three observations for estimating time since death have been in long use: *liver mortis*, *rigor mortis*, *algor mortis*. *Liver mortis* is when the heart stops and blood ceases to be circulated throughout the body. The position of blood is determined by gravity and blood is moved to blood vessels that are most dependent ("lowest" parts of the body). *Rigor mortis* is the stiffening of the body after death and is the result of ATP (adenosine triphosphate), a chemical that is responsible for muscle contraction. *Rigor mortis* is apparent 2-4 hours after death and fully developed in 6-12 hours. Stiffening becomes most apparent in smaller muscle masses such as the lower jaw, hands and feet. It disappears as early as 36 hours after death. Onset and departure of *rigor mortis* is affected by factors such as size and composition of the body and whether a person was physically active before death. *Algor mortis* is the change of temperature of the body, from normal body temperature to the temperature of the surrounding air. If the air temperature is cooler than the body, the body will cool; if hotter, the body temperature will rise. Cooling of the body in ideal circumstances is fairly predictable, however the rate of cooling can be affected by many variables such as if the body is lean or fat, if it is covered, for instance, by clothing or near heaters or air currents.

Decomposition of the body, evidenced by foul odour, bloating, and discolouration involves two separate processes: putrefaction (decomposition caused by bacteria), and autolysis (decomposition caused by natural body enzymes). Both processes modify and destroy soft tissue. When the body is in environments of extreme heat, mummification, the drying out of the body occurs. In wet, cool environments, soft tissues of the body may undergo a process known as saponification. This involves hydrolysis of body fats and results in formation of a substance known as adipocere. Bodies in mass graves are often saponified.

The autopsy (post-mortem examination) is the basic “tool” of the pathologist. A complete autopsy includes an external examination of the body that documents, for example, clothing: its size, contents of labels, colour, and tears or stains it has sustained. Potential identification features such as scars, tattoos, birthmarks and circumcision are also documented. Detailed narrative and photographic documentation of injuries such as bite marks, gunshot wounds, blunt trauma or sharp force injuries are a crucial part of the autopsy. The internal examination of the body includes review of internal organs, documentation of trauma and collection of basic samples for toxicological examination.

FORENSIC ANTHROPOLOGY AND ARCHAEOLOGY

This section reviews some of methods utilized and explains their application, with a focus on mass graves, in the field of international criminal and human rights investigations.

DEFINING “MASS GRAVE”

There is no agreement on the minimum number of individuals that comprise a mass grave (Haglund *et al.* in press). Mant (1987) in his discussion of post-World War II exhumations defines a mass grave as containing two or more bodies that are in contact with each other. The UN Special Rapporteur interprets a mass grave as a location where three or more victims are buried and who are victims of extra-judicial, summary, or arbitrary executions, not having died in combat or armed confrontations (*Bulletin: International Criminal Tribunal for The Former Yugoslavia, 1996*). Skinner (1987) suggests a mass grave contains at least half a dozen individuals.

It should be noted that each of these definitions introduces a qualifier that incorporates the particular interests of its author. Mant’s stricture that the bodies must be in physical contact with each other incorporates his interest in variables that affect decomposition of buried remains. The burden of the Special Rapporteur’s definition (above) that the grave occupants must be victims of a particular type (*Bulletin: International Criminal Tribunal for The Former Yugoslavia, 1996*) serves the Tribunal’s legal concerns regarding how the grave occupants died (Haglund *et al.* in press). Another qualifier, introduced by Skinner *et al.*, suggests a functional distinction between single graves, group graves in which bodies are laid out in parallel, and mass graves in which bodies are disordered. Although not meant as a precise definition, Skinner *et al.* introduces the distinction of organized “group graves”, in which individuals lie parallel to one another, versus “mass graves” in which placement of the dead is disorganized. Disorganization of buried victims, though not a strict rule for mass graves, reflects the lack of dignity given to disposal of mass grave occupants (Skinner, personal communication).

Mant’s definition, while using the minimum number of individuals needed to comprise the mass grave, recognizes a salient taphonomic character of mass graves. Essentially Mant suggests that a major characteristic that affects the nature of decomposition in a mass grave is the contact that bodies have with each other. Some other examples of

factors that affect the rate and character of the decomposition process are the time elapsed between death and burial, whether or not the bodies have been autopsied, have received major wounds or are clothed. A “mass” grave involves remains in contact with each other. It is this contact that creates the unique grave environment in which the rate and character of decomposition departs from patterns in graves containing a single individual. It is for that reason that this discussion revolves around graves containing a mass or aggregate of individuals, whether organized or disorganized.

WHY EXHUME MASS GRAVES? THE SOCIAL CONTEXT

Forensic experts often play an irreplaceable role in investigating human rights abuses and crimes against humanity. Often, perpetrators ignore or mischaracterize these crimes in order to cover up their violations of human rights. Multiple goals may be accomplished in the exhumation and investigation of contemporary mass graves. First, in the human rights context, is to collect narrative and physical evidence that will assist in establishing accountability for those responsible and bring them to justice. Second is the process of collecting evidence to identify the victims in order that their remains might be returned to their survivors. Third, the investigative process creates a document that should stand up to historical revisionists. Fourth is to expose atrocities to world opinion and to establish an international standard to prevent such crimes from occurring in the future. A fifth inducement for investigation of mass graves involves a basic dignity for the victims and for human life. If victims remain buried along with the secrets of their deaths, their deaths will have been in vain, threatening a similar fate for future generations. Exhumation of a particular mass grave may or may not address all of these objectives. Some mass grave exhumations are performed for purely humanitarian reasons, that of identifying the dead and returning them to next of kin, with no goal of prosecutions in mind.

ISSUES INVOLVED IN MASS GRAVE INVESTIGATIONS

Exhumation of mass graves is a complex process that requires the balancing of many simultaneous goals, issues, and activities. It also requires processing large numbers of bodies and volumes of evidence over a matter of days, weeks, or even months. This is a process that requires continual re-checking of procedures and data. Procedures of a field operation are frequently carried out either in temporary or sub-standard facilities. Often the exhumations and examinations are part of an evolutionary process and adaptation of procedures not only to address the goals of the mission, but also to generate pragmatic solutions to the many problems and to resource limitations encountered.

The following paragraphs provide an overview of exhumation processes and guidance concerning matters to be considered when arranging an exhumation project. The chapter outlines the role of the investigator in the process and the basic preconditions that must be in place for an exhumation to occur.

There are essentially two types of staff involved in a project of this nature, the forensic scientists whose role it is to scientifically gather and interpret the evidence,

and the remainder of the team whose essential role is to create the environment for the scientists to carry out their work and ensure that systems are in place to document the process, maintain evidentiary chains and, last but not least, to ensure the scientific work is linked to the overall investigative process.

WHEN DO YOU CONDUCT AN EXHUMATION?

The primary reason for embarking on the process in a war crimes investigation is to collect evidence to assist in the prosecution of the offence - the first point above. In view of the intensive resource requirements involved, if there is no requirement to gather evidence for use in a proposed prosecution, then the work is best left to others. That is not to say that you would ignore other reasons for conducting an exhumation, rather, these considerations should not unduly influence your decision to get involved.

WHAT DO YOU EXPECT TO ACHIEVE?

It is important to assess at the outset what you expect to achieve, evidence-wise, by exhuming a mass grave. What will it add to your evidence base, what will it corroborate or what will it prove?

It is important for the investigator to conduct this assessment together with the prosecutor who will be responsible for the case. All known evidence in relation to the alleged mass grave should be considered to ensure that important clues are not overlooked. Ideally before exhuming an alleged grave you should have either evidence or intelligence, which tells you what to expect to find. This evidence or intelligence should establish that an alleged war crime has occurred, and that by taking this next step you will obtain further evidence of the alleged offences that will assist ultimately in providing evidence against those responsible.

THE PROCESS

IDENTIFY POTENTIAL SITE

Not surprisingly the first step is to identify the potential site. This can be done in many ways, some of the most useful include:

- Witnesses;
- Aerial or satellite imagery;
- Search for disturbed earth;
- Reports from open sources, e.g. the press or television;
- Intelligence gathered by the military or government officials.

EXPERT ASSESSMENT

Prior to exhumation, large graves should be assessed by personnel experienced in mass grave exhumations and attendant logistical needs. Such an on-site visit officially confirms the presence of human remains. Equipment and potential security concerns, such as mine clearing, can be evaluated. Logistical requirements of the work, such as transportation of remains, morgue facilities, and staff housing, are assessed at this time. The assessment phase typically entails notification of local authorities and determination of local cultural and religious sensitivities.

Once you are satisfied that you have gathered all available information regarding the location of an alleged mass grave you should conduct an on-site investigation to confirm its presence, or determine whether the evidence you have fits with the physical characteristics of the site.

As nobody can dig a hole and then replace the soil in the same manner as nature laid it down, you can never hide a hole in the ground. The trick is knowing where to look. Those experienced in archaeology will recount many stories of how they missed a particular site by just a few metres. The importance therefore of gathering as much data as possible, and cross-checking it, before conducting on-site examinations cannot be overstated. Similarly, you should not embark on a full-scale exhumation process until you are satisfied that the alleged grave exists.

There are several tests, which can be used to determine whether an alleged site is in fact a mass grave. Two of the most effective are in fact the least elaborate: the first, having matched the potential scene with geographical features described by witnesses or contained in imagery, conduct a small test dig to determine soil disturbance and/or the presence of human remains; alternatively, pressing a long thin steel spike into the ground can indicate ground disturbance, consistent with excavation of a mass grave, and may give off odours, which confirm the presence of human remains. In either process care should be taken to not to interfere unduly with the overall integrity of the site.

SITE PREPARATION

This will normally involve:

- Identification of grave site;
- Survey for unexploded ordnance and removal;
- Examination for physical evidence prior to commencement of work;
- Erection of perimeter fencing;
- Establishing site office and washing and toilet facilities;
- Creating a staging area for vehicles and heavy equipment;
- Establishing a media control point.

EXHUMATION

Having carried out the above preliminary steps it is likely that an exhumation would include the following steps:

- Trenching to determine perimeters and depth;
- Removal of overburden;
- Archaeological location;
- Exposure, delineation and removal of remains;
- Documentation and extraction
 - Video and still photography of location and removal process;
 - Mapping of remains and other evidence *in situ*;
- Forensic pathological and anthropological examination of the remains (either in a temporary field mortuary or after remains have been transported to a more permanent mortuary facility);
- Identification of remains (this occurs during the various stages above);
- Return of remains to next of kin or identified officials.

EXPOSURE AND DELINEATION

The first step in actually preparing bodies for removal is their exposure. This requires removing fill that covers the topmost layer of the bodies and then cleaning the area so they can be clearly delineated. The presence of clothing can be beneficial on several counts. It provides protection to bodies from damage during excavation. Garments can be an asset in exposing remains as they can be very gently manipulated and shaken to dislodge soil. Done gently, this is less damaging to soft tissue and quicker than using tools. Clothing also serves as an envelope for the remains. As bodies are exposed, it is prudent to secure bags around unclothed hands, feet, and crania. This minimizes the potential for loss or displacement of teeth, bones, fingernails, and other remains or evidence (Haglund 1995). If there is no clothing over exposed areas of soft tissue, often the hands and the face, great care is necessary so as not to damage the soft tissue of fleshed remains. Although soft materials, such as wooden chopsticks and brushes, are useful for many excavations, when one is working in damp soggy environments, brushes may prove next to useless. Decomposed soft tissue, however, can be marred even by soft brushes. In these situations consideration should be given to more detailed cleaning at the time of post-mortem examination.

EXTRACTION OF FLESHED REMAINS

Frequently, not a single individual will be completely exposed at the time the initial overburden is removed. Portions may extend horizontally to be overlain by surrounding remains or parts of the body may extend to lower areas of the grave to be entrapped by other bodies. This situation usually demands exposure of an area encompassing several surrounding individuals.

Fortunately, in larger, more recent graves, especially where moisture content has been trapped, ground water is prevalent, or drainage poor, the remains may be well preserved, fleshed and pliable. This flexibility allows adjacent remains to be rolled or lifted in order to facilitate freeing trapped body parts from their surroundings.

Extraction of a particular individual often requires manipulating several surrounding remains in order to remove the one that is potentially most free. Prior to removal it is critical to have an overall knowledge where all the parts of the body are. When the majority of a body is visible, and perhaps a leg or an arm still beneath surrounding remains, there is a tendency to want to pull it free. There is the danger that weakened articulations, especially the knee joint, ankles, wrists or fingers, may separate, leaving the disarticulated body portion trapped beneath other remains. The level of the grave harbouring the separated body part may not be reached for hours or days, thus increasing problems of re-associating body parts to appropriate individuals. Inability to re-associate such body parts can potentially confound the identification. For example, rings that could potentially lead to identification might stay on a finger that has been left behind. There is also the negative perception of not being able to repatriate the most complete remains once they have been identified.

Prioritizing remains for removal requires a good spatial sense. Where bodies are partly covered by another body, experience assists in determining which bodies should next be manipulated so that they may be extracted. Care needs to be taken, however, that parts do not become detached while being manipulated. This might necessitate sliding an excavator's arm between bodies to the point where the end of the limb can be held and pushed gently back, freeing the limb from the mass. The excavator needs to ensure that all the digits at the end of the limb are held in place as this occurs, or those digits might be left behind when the limb is moved. Once hands or feet are exposed, if they are in any way disarticulated or vulnerable to disarticulation, they should be placed inside a bag tied to the nearest long bones, to ensure that the digits or phalanges do not detach when the body is moved. A bag might also be placed over the head, as the cervical vertebrae are frequently loose. This also ensures that hair and teeth are not lost during transport.

DOCUMENTATION AND EXTRACTION

Prior to removal, a case number is assigned and the documentation team can begin photographing, mapping, and describing the body. An overall photograph is taken showing the position of the body, as well as any detail shots deemed necessary. Close-ups might include tattoos, obvious trauma, or unusual clothing. The overall photograph is accompanied with a north arrow, scale and case number. The detail photograph also includes a scale and the case number. All photographs are entered into a photograph log. At a minimum, the horizontal and vertical positions of the crania are plotted from a point usually taken from the top of the crania. The outlines of the body might also be plotted, depending on the detail of the map or sketch plan decided on by the investigator. The description of the body is brief. The purpose of the description is to gain enough information so that the remains will not be confused with others during transport to the morgue where a full description and post-mortem is completed. Fleshed remains should be removed, so much as is possible, as intact units, with minimal disturbance. This means that sections of the remains/body known to belong together should not be separated. This allows for proper inspection in the examination area and presents the remains in the best condition for post-mortem examination.

Once photography, mapping and other documentation are complete, the body is ready for removal. Minimally the case number and date of removal are written on both ends of the body bag. The bag is unzipped, opened, and moved adjacent to the body. If the body is face up the arms are moved close to the body and placed on the chest. The legs are lifted together. One excavator is positioned at the head, one in the middle of the body, and one at the legs. As these people lift, an additional person holds open the body bag and helps to slide it beneath the body. Once the body is inside, the bag is placed to the side while the team examines the soil underneath the body to ensure that no body parts or associated evidence is left behind. Any loose disassociated portions of the remains are separately bagged and included in the body bag. Remains lying face down often can be simply supported and rolled into the body bag. Finally the bag is zipped and removed to a storage area.

LEVELS OF EXAMINATION AND DOCUMENTATION

A major question that arises in international investigations is what level of documentation and examination will satisfy both legal and professional standards? The United Nations *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (1991) is often quoted as the benchmark by which investigations (including exhumations and examination of remains) should be judged. However these are ideal standards and, as the guidelines caution, they may not be attainable for many reasons. For example, it is necessary to give recognition to the often-divergent perspectives of politics, religion and culture that pervade such investigations. Other impediments frequently encountered include lack of facilities, inadequate logistical support, limited financing, equipment and supplies, as well as inclement weather conditions, and security issues. Limitations and impediments leading to the relaxation of particular standards always should be disclosed in the final report.

CASE NUMBERING AND REMOVAL UNITS

The term *removal unit* is used here to indicate remains or groups of remains that are packaged and numbered for removal from a particular site. Removal units may or may not bear a one-to-one correspondence to case numbers. A numbering system where consecutive numbers are assigned to individuals is the most common approach when dealing with multiple fatality incidents such as mass graves. It would be ideal if each removal unit equated with a complete individual. Unfortunately this frequently is not possible. What comprises a removal unit is dependent upon the condition of the remains. Under various circumstances a removal unit could consist of complete remains, partial remains or include the remains of more than one individual. For example, infants hidden by their mother's swaddling clothing might be collected as one removal unit. A removal unit may receive one case number but may be packaged separately. A single set of remains may end up distributed among multiple body bags when remains in advanced stages of decomposition are removed from an extremely muddy environment. Partial individuals may have been placed in the primary grave originally, or partial individuals can result from tampering with the grave, such as attempts to rob or re-locate the grave.

Several operative concepts should be considered when assigning and numbering removal units. First among these is the need to enforce a uniform approach. This is critical when there is the potential of excavating multiple graves with parts of the same individuals distributed among them. It is necessary to be able to track removal units back to a relative *in situ* location at particular sites. Attempts to allocate partial remains to a single individual should not be undertaken in the field, but are best accomplished under laboratory conditions with detailed supportive documentation regarding their recovery. This process may not be possible for weeks, months or even years following the exhumations.

In addition to the problems imposed by condition or completeness of the remains or the grave, “false” totals of the number of individuals can arise at one of several junctures during the numbering, removal, and storage of remains. Error can occur in the initial assignment of numbers. For example, duplicate numbers may be given out or numbers may be skipped. Clerical errors can occur in writing numbers on body bags. Oversights can occur when placing individuals into body bags. These include placing parts of more than one individual in one body bag or the wrong body into a particular body bag. One staff member should be charged with giving out numbers for removal units. In any situation, the more staff involved in numbering and extracting of bodies, the higher the potential for error.

Another pitfall is to assign a number to a body or skeleton prematurely, before it is ready to be removed. This usually occurs when the availability of a body to be removed is misjudged. Inexperience is commonly at fault. A worker may request a number, assuming that particular remains can be extracted, only to find upon trying to remove the remains that they cannot. This can happen when one misinterprets the position of one or more limbs, either assuming an unobservable limb would be no problem to extract or mistaking a freed and observable limb of a separate individual as belonging to the remains one wishes to remove. Such problems occur when a part of the body is trapped beneath other remains or debris. In these cases it is necessary to leave the “numbered” remains in the grave until additional bodies or overburden can be removed in order to free the trapped part. The final freeing of the remains may not occur for hours or days and result in reassigning a different number to the same remains at a later period.

As an example, numbering problems were encountered in the 1996 exhumations of graves investigated under the International Tribunals. Although 154 numbers for body bags were given out during the exhumation of the Cerska site, only 150 individuals were exhumed. This discrepancy was attributed to clerical errors, numbers (21, 55 and, 56) being requested by team members but not immediately assigned to bodies or body bags. A fourth number, 93, was assigned to remains, and these remains proved impossible to remove at that time. When the body was finally freed the next day, it was inadvertently re-photographed with a new number, body number 100.

This example demonstrates that when complicated graves are involved, it is imprudent to assume that the numbers allocated or number of body bags necessarily equates with the number of individuals. The calculation of the total number of individuals

exhumed is best done after the post-mortem examinations are completed and after commingling has been addressed and reattribution of parts has been accomplished to the greatest extent possible. Prior to that point, comments about the numbers of bodies being removed should be presented as estimates only. This is especially germane in answering media demands regarding “body counts”.

IDENTIFICATION OF VICTIMS

Once remains are identified and their death has been proven the death can be legally certified which in turn allows estate settlements, remarriage and legitimate pursuit of other legal affairs. Proof of identification allows the remains to be returned to the family. Receiving the remains allows survivors to practically deal with their grief. Identification also serves to return a sense of individual dignity to the deceased by recognizing their existence and allowing them the benefit of funeral rites consistent with their lifetime beliefs.

From the expert’s point of view we must separate the methods of identification that are objective and scientifically defensible from those that are subjective and based on opinion. Positive, scientific identification can be achieved through fingerprints comparison, comparison of dental records and medical records such as x-rays or uniquely identifiable implants, through DNA sample matches between samples from the remains and blood relations. A major drawback of dental, medical, and genetic methods of identification are that each method requires a candidate for the identity to be known and that it is necessary to locate the candidates records and/or families. Visual identification, clothing and personal belongings including documents found with remains, and body marks and deformities are rarely positive proof of identification that is scientifically defensible.

The “identification” process is carried out at several levels: biological, anatomical, socio-cultural affiliation (or circumstantial), and personal. Most elemental is to distinguish human from non-human remains. Assessment of an individual’s biological characteristics (i.e., sex, age, stature, and ancestry) provides the groundwork for personal identification and constitutes the next level of identification. When multiple individuals are involved, their minimum number must be established. If body parts, individual bones or bone fragments are involved, efforts must be made to attribute them to the appropriate individual. Another level of “identification” is the assignment of an individual to a particular population segment such as a religious, cultural, or social affiliation. For example, associated artefacts or circumstances can aid in determination of individuals’ military versus civilian status, whether they were hospital patients, membership of a particular religious group, or whether they were rendered helpless at the time they were killed. Individualizing traits, such as dental characteristics, tattoos, osteological evidence of past injuries or life stresses may lead to a more specific level of identification and offer the greatest hope of unique personal identification. Geberth (1990:192) points out that in traditional homicide investigations:

“The identification of the victim is critical because in order to prove a charge of homicide, it must be established that a named or described person is in fact dead...furthermore, from an investigative point of view, identification provides a starting point and direction for the inquiry”.

In part, the rationale for this dictum is that most homicide victims are killed by someone they know. A personal motive is involved in the killing. In upwards of 75 per cent of solved homicides, the victims were murdered by someone they knew. Hence, much investigative effort is expended to confirm the personal identification of the victim. Fortunately, the potential to achieve personal identification is high in developed countries with infrastructures that allow sophisticated tracking of citizens, a level of healthcare that documents identifying features and, as a last resort, recourse to DNA technology.

By contrast, in the investigations of genocide and crimes against humanity involving mass graves there may be less emphasis placed on identifying the individuals who actually did the killing. Rather the prosecutorial focus may be to identify those individuals in positions of authority who gave the commands to the killers. Actual killing may be carried out by anonymous persons remote from the chain of command. So with regard to mass graves and prosecutions involving war crimes, genocide, and crimes against humanity, personal identification of the victim(s) may not be necessary as a “starting point” to the investigation. Particular persons became victims because of how they were perceived by the culture. For instance, they may have been singled out because of their religion or ethnicity. This “categorization” of the victim by the killers has consequences for the level of identification sought by investigators. It may be sufficient to be able to attribute “categorical” identification to the victims (such as ethnicity, religion, or political viewpoint) and to be able to show that victims were killed because of attributes perceived by their killers. This is particularly true when indictments for killings are based on genocide: the deliberate intention to exterminate a national, ethnic, or religious group. For investigators, other categorical levels of identification could rest on whether or not the victims can be identified as civilians, women, children, or combatants. If military or civilians, for example, were they bound, blindfolded, or tortured?

The foregoing does not imply that personal identification would not lend a deeper level of support to indictments, only that pursuit of positive personal identification of victims may not be a primary issue to the prosecution. Hence, there may be no resources allocated for that purpose. This legal aim does not necessarily satisfy the needs or desires of survivors to have their individual dead returned.

LEGAL REQUIREMENTS

It is important to remember that there are legal requirements to be followed if engaging in a forensic death investigation. Check to see that your investigative mandate covers the work you want to do. Find out what the legal requirements are and comply with them. Failure to do so can result in the exclusion of any evidence obtained. If necessary, negotiate with relevant officials to gain permission for your project and identify any local requirements, which must be included in the process.

PLANNING

Failure to plan has been equated with planning to fail. This old adage applies to the conduct of mass grave exhumations. All aspects of the process must be pre-planned to the extent possible. Undoubtedly there will be some unexpected surprises along the way- proper planning will minimize these.

Each location will present its own particular issues to be resolved. Notwithstanding this planning will normally fall under the following headings:

- Funding;
- Personnel;
- Logistics, including transport and equipment;
- Security;
- Facilities, including mortuary, x-ray booth;
- Equipment, including earthmoving equipment;
- Access to scene;
- Media plan;
- Meals and accommodation.

FUNDING

As the name suggests this is critical to the process. Before commencing a project prepare a detailed budget and then ensure that sufficient funding is in place to complete the project. It can be useful to develop your budget in three phases:

- Cost of initial investigations to carry out ground truthing and identify sites;
- Start-up costs, these will include: purchase or lease of equipment and premises, vehicles, petrol oil and lubricants; securing accommodation; establishing contracts with service providers, e.g; demining contractors, mortuary hire etc.; hire of Project Manager and other personnel who will be engaged for the whole of the project;
- Additional costs for each site to be exhumed, usually calculated on a per diem basis for personnel, disposable equipment and recurrent expenditures calculated against the estimated time to complete activity at the site and also related forensic examinations of bodies and other items removed.

PERSONNEL

A range of personal skill types is required to complete an exhumation project. Below are the general categories of personnel needed together with a description of each function.

Project Manager - arguably the most important member of the team. To carry out an exhumation, as will be seen below, you will have gathered together quite an eclectic team. It is important that the overall environment and management of the project allows each one of them to carry out their task in the most professional manner possible, and without having to deal with other issues such as logistics, equipment or personnel differences. It is the role of the project manager to facilitate this.

Labourers - their role is self-evident but often overlooked. Sufficient labourers need to be engaged to deal with the strenuous physical work associated with the excavation of a mass grave and the removal of human remains. Forensic students can also be engaged in this role as it provides them with invaluable experience.

Guards - the need for guards can be twofold. Firstly, you are dealing with a crime scene and sufficient steps must be taken to ensure its integrity from the start of the process until conclusion. Secondly, you must ensure there is a secure environment for the team to conduct the exhumation.

Plant operators - almost invariably the exhumation of a mass grave will involve removal of large amounts of soil or other debris. This is best done using earthmoving equipment such as a backhoe or a similar type of excavator, utilized by an experienced plant operator.

Archaeologists - obtaining evidence by exhuming a mass grave is best done using archaeological processes. To maximize the evidence obtained, a suitably experienced forensic archaeologist should be engaged, together with any specialist support staff they identify.

Anthropologist - the forensic anthropologist works both at the gravesite and in the mortuary facility to determine the nature of the human remains, particularly when skeletonized. The anthropologist will report on a variety of matters including the sex and age of the victims.

Pathologist - the forensic pathologist is responsible for conducting examinations to determine the manner and cause of death of the victim. Depending on training the pathologist may also conduct examinations to determine age and sex of victims.

Crime Scene Photographer - the end result of the exhumation process is the presentation of a report, with or without oral testimony, as evidence of what was found. Photography, both still and video, prepared by a suitably qualified crime scene photographer is crucial to this presentation.

Survey Technician - detailed mapping of the site and where bodies, body parts and other items of interest were located is crucial to the presentation of evidence of what

was found. It is also of vital assistance in unravelling the mysteries of commingled and disassociated remains.

Exhibit or Property Officer - as discussed in the chapter on gathering physical evidence, the integrity of material exhumed, when presented in evidence can be judged by the manner in which it has been handled. It is necessary therefore to have a designated member of staff to bear responsibility for collection, photographing, labelling and securing custody of exhibits.

Investigation Case Officer - the presence of an investigation case officer is necessary at all times. The purpose of the exhumation should be to obtain evidence to further an investigation. The presence of an investigation case officer will assist scientific staff in making decisions about material which is relevant and ensuring the demands of the investigation are met.

Drivers - these operations involve significant numbers of personnel and considerable equipment. Transport efficiency is key to a successful project. It can be unrealistic to expect professional staff, involved in extremely demanding work, both physically and mentally, to also be responsible for driving to and from sites.

Mine and unexploded ordnance detection staff - this will have to be assessed on a case-by-case basis. In war torn areas it is not improbable to assume that those who have sought to hide their crimes by burying their victims would also attempt to protect the site using explosive devices such as anti-personnel mines. There were certainly instances of this discovered in the former Yugoslavia. To deal with this level of risk requires a survey of sites by suitably qualified personnel for unexploded ordnance, prior to any person setting foot on the site.

LOGISTICS, INCLUDING TRANSPORT AND EQUIPMENT

A full assessment of the logistics of such an operation is required. Each individual project will have its own characteristics. Some of the more common features are listed below:

- Accommodation, and meals for all staff for duration of project;
- A range of vehicles to transport staff and equipment, e.g. a small bus for general staff transport, a vehicle for transport of earthmoving equipment, a vehicle to transport other types of equipment, refrigerated transport for removal of remains to mortuary facility;
- Tents or other shelters to facilitate work in the advent of wet weather;
- Heavy earthmoving equipment, such as a bulldozer or backhoe;
- Specialist archaeological and pathology equipment;
- X-ray equipment;
- Mortuary facilities (either establish a temporary field mortuary or utilize existing specialist facility);
- Water source and provision of toilet and washing facilities;
- Re-supply capabilities for consumable equipment such as overalls, gloves or protective clothing, scalpels, etc.;

- Camera and video recording equipment;
- Mapping or surveying equipment;
- Examination tables.

SECURITY ARRANGEMENTS

In many cases the alleged mass grave will be located within an area still controlled by people in some way responsible for the events leading to the creation of the mass grave. These people will represent a security threat. Further, as you are dealing with a crime scene, you will have to protect it from interference from the start of the process until completion.

In each case you should prepare a security threat assessment and then take appropriate action to counter each threat. Sites may be protected by security guards, perimeter fencing, lighting and devices to detect intrusion.

MORTUARY

The scientific examination of recovered human remains requires the establishment of a mortuary facility and utilization of specialist equipment. Wherever possible it is probably easier if remains can be transported to an existing mortuary facility. However, circumstances may dictate the establishment of a temporary field mortuary. Advice, preferably from the senior scientists who will be engaged should be obtained before establishing such a facility.

MEDIA

There will be considerable media interest in your project. At times this can become unmanageable unless you have a well thought out media plan in place. It is better to establish a protocol for dealing with media at the outset than to let the arrangements develop on an *ad hoc* basis. It has proven more effective to allow some controlled access either to or near the site, and provide a pre-arranged daily briefing than to try to prohibit media access.

CONCLUSIONS

Exhumation and examination of victims of a medium to large mass grave is a huge undertaking in terms of resources: financing, staffing, expertise, logistical support, and often security. For both the exhumations and examinations, basic infrastructure that is taken for granted in industrialized countries, such as working facilities, storage for remains, water and electrical utilities, are often non-existent. In areas plagued by war and civil disobedience, suitable equipment and supplies need to be ordered and shipped from other countries. Authority to carry out the work may depend upon changes of government or international will. These complexities translate into the necessity for careful and flexible planning. With the burgeoning amount of forensic experience in mass grave exhumation, we can expect more accounts of exhumations to appear in peer-reviewed published literature. It is only through sharing of

experience by mass grave investigators that we will learn how to better accomplish these investigations.

Ultimately, you will have to plan and design your own project. The foregoing material is provided as a basic check list of matters to be considered in the planning process, and is designed to assist you when deciding whether to go ahead with an exhumation and in the planning process.

Table 9.1 Overview of major contributions of the forensic pathologist

<p>Cause of death</p> <ul style="list-style-type: none"> – Manner of death (natural, accidental, suicide, homicide, undetermined); – Estimation of time of (since) death; – <i>Liver mortis, rigor mortis, algor mortis</i>; – Decomposition; – Putrefaction (decomposition caused by bacteria), autolysis (decomposition caused by body enzymes), mummification, saponification.
<p>Post-mortem examination (autopsy)</p> <ul style="list-style-type: none"> – External examination; – Internal examination; – Report; – Testimony.

Table 9.2 Contributions of the anthropologist and archaeologist

<p>Contributions to the scene</p> <ul style="list-style-type: none"> – Search strategy; – Distinguish human from non-human bones; – Recovery of human remains; – Provide skeletal inventories; – Resolve taphonomic issues (factors that affect the post-mortem fate of remains). 	<p>Locating of graves</p> <ul style="list-style-type: none"> – Witness testimony; – Visual clues; – Probing; – Skimming; – Aerial imagery; – Trenching/test trenching; – Remote sensing.
<p>Contributions in the laboratory</p> <ul style="list-style-type: none"> – Determination of minimal number of individuals; – Determination of sex; – Estimation of age; – Estimation of stature; – Determination of ancestry (race); – Analysis of trauma; – Reconstruction of damaged bones. 	<p>Excavation and exhumation of mass graves</p> <ul style="list-style-type: none"> – Reconnaissance/assessment; – Surface evidence; – Exposure and recovery of remains. <p>Additional expertise</p> <ul style="list-style-type: none"> – Forensic odontology (dentistry).

Table 9.3 Overview of the exhumation process for a mass grave

- Exhumation process for a mass grave
- Assessment;
 - Staging, equipment, supplies;
 - Site preparation, surface evidence and clearing of ground cover;
 - Initial overview site mapping;
 - Establish grave boundaries;
 - Exposure and removal of overburden;
 - Delineation in preparation for removal;
 - Documentation: photography, mapping, completion of field forms;
 - Extraction;
 - Storage/transport to location of examination;
 - Clean-up.

Table 9.4 Major taphonomic factors affecting the condition of remains in mass graves

<p>Grave characteristics</p> <ul style="list-style-type: none"> - Depth; - Compaction; - Inclusions; - Intervening fill. 	<p>Temporal factors</p> <ul style="list-style-type: none"> - Post-mortem interval prior to burial; - Duration of burial; - Season.
<p>Body characteristics</p> <ul style="list-style-type: none"> - State of decomposition; - Cause of death; - Body habitus; - Clothing or other wrapping. 	<p>Soil characteristics</p> <ul style="list-style-type: none"> - Ph.; - Drainage; - Compaction; - Coarseness and type of soil; - Contaminants.
<p>Body assemblage characteristics</p> <ul style="list-style-type: none"> - Thickness and extent; - Position relative to core and perimeter. 	<p>Other characteristics</p> <ul style="list-style-type: none"> - Temperature during pre-burial period; - Moisture; - Post-burial exposure of remains; - Atmosphere; - Disturbance; - Oxygen content.

Table 9.5. Methods of human identification

<p>Subjective (a matter of opinion)</p> <ul style="list-style-type: none"> - Visual; - Clothing and personal effects; - Body deformities and scars; - Scars tattoos; - Circumstantial. 	<p>Objective (subject to fact)</p> <ul style="list-style-type: none"> - Fingerprints; - Dental documentation (charting, x-rays, models, mould); - Medical imagery (usually x-rays); - DNA
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Figure 9.1
Three
mass grave
configurations
in cross-
section

The body masses each consist of core or *inner taphonomic zone*, an outer margin or *peripheral taphonomic zone*, and the outermost edge or the *mass/fill taphonomic interface*.



-  = Core of the body mass or inner taphonomic zone
-  = Margin of the body mass or peripheral taphonomic zone

Figure 9.1.A
Single,
contiguous
body mass

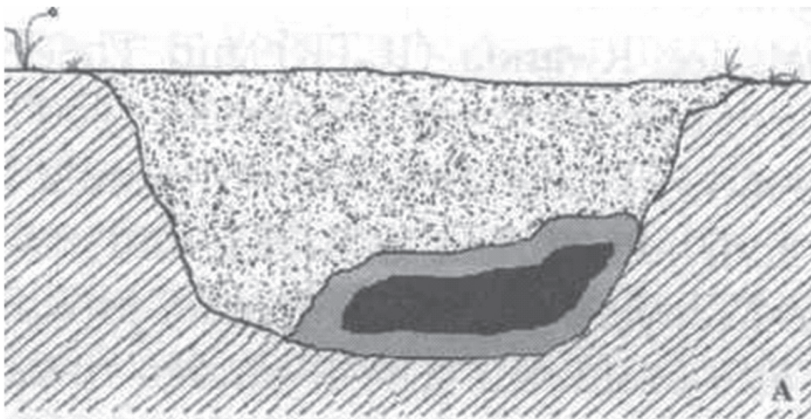


Figure 9.1.B
Multiple discrete
body masses in
a single grave

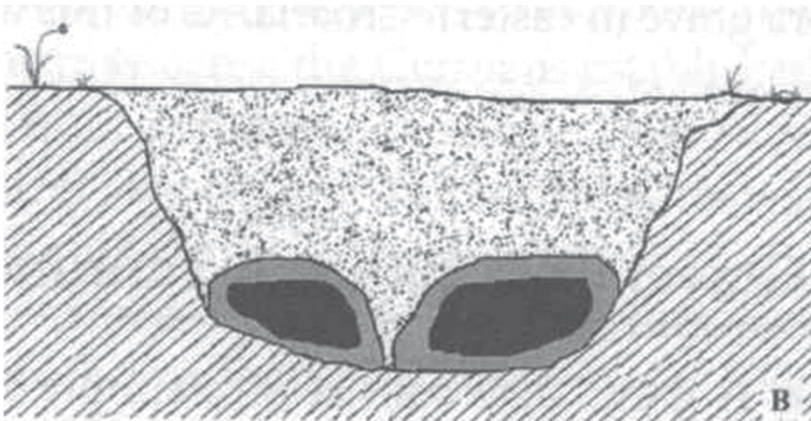


Figure 9.1.C
Multiple, layered
configuration
with intervening
fill, indicative of
separate bouts
of entry

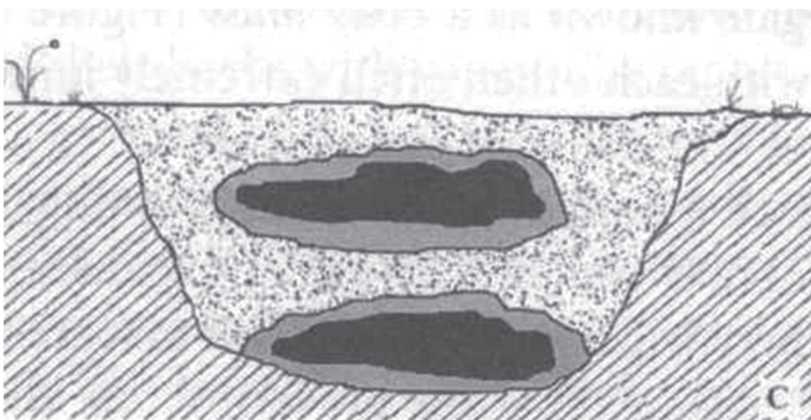


Figure 9.2
Large body mass with complex positioning of individuals, viewed from above



Post-mortem interval is one year; same site as Figure 9.3 and Figure 9.5. Note that portions of one individual may extend horizontally to be overlain by surrounding remains; or, parts of an individual body may extend to higher or lower areas of the grave to be entrapped by other bodies. Decomposition and skeletonization are accelerated for individuals on the periphery. (Photograph courtesy of Gilles Peress).

Figure 9.3
Portion of body mass viewed in cross section illustrating interrupted bouts of entry with further deposition of remains



Note layering of bodies with sediment and plants. Post-mortem interval is one year; same site as Figure 9.2 and Figure 9.5. (Photograph courtesy of Gilles Peress).

Figure 9.4
Three individuals in satellite position relative to larger body mass, illustrating the effect of relative position within the grave on preservation.



Least preservation, in this case full skeletonization, is encountered for satellite individuals and for individuals located at the periphery of the body mass, especially those interfacing with the fill. Post-mortem interval is five years. (Photograph courtesy of Gilles Peress).

Figure 9.5

Bound hands of an individual found within the core of a body mass, illustrating the effect of relative position within the grave on preservation



Most preservation, in this case all of the soft tissue, is encountered for individuals located within the core of the body mass. Post-mortem interval is one year; same site as Figure 9.2 and Figure 9.3. (Photograph courtesy of Gilles Peress).

Reading

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CHAPTER TEN - INFORMATION, ANALYSIS AND INTELLIGENCE

OVERVIEW

This chapter details the use of information, analysis and intelligence within the field of investigation of war crimes, crimes against humanity and genocide.

It will explore processes for utilization of information with specific reference to:

- Analysis and the role of analysts;
- Intelligence and the intelligence cycle;
- Forms of dissemination; and
- Databases;

The chapter discusses the use of various types of research specialists, including political and historical researchers, military analysts, criminal analysts and the use of demography.

The final section of the chapter identifies key aids to producing analysis or synthesizing large volumes of data into a product that can assist decision makers in major investigations.

ANALYSIS

Analysis is the heart of the intelligence process and consists of a set of activities designed to produce inferences such as hypothesis, conclusions, estimates and predictions which will aid law enforcement at the tactical, operational and strategic levels.⁵⁷⁷

Historically it is the military that have used analysts to come to grips with vast quantities of information from a wide range of sources. Their role has been to synthesize this data, enhance it and provide their commanders with the material necessary to make decisions.

⁵⁷⁷ NSW Police Analyst Course – Training Standard.

In criminal investigations, the role of analyst was largely unheard of until about twenty years ago. Up until then any form of analysis was done by investigators themselves and by prosecutors when preparing their cases. Failures in this process, and the inability to properly deal with vast data sources in major investigations led to the introduction of the trained analyst into criminal investigations. Police services and law enforcement bodies in the United Kingdom, Netherlands, Scandinavia, Australia, the United States of America and Canada now utilize various types of analysts as an integral part of their operations.

At the strategic level analysts can advise on emerging trends and widespread patterns of interest, which will assist in determining the overall focus of an organization. At the tactical or operational levels analysts are an integral part of investigations, preparing analytical products, which will assist in determining the direction of an investigation, and preparing assessments of material already gathered. Importantly, it is the analyst who is often in the best position to identify information gaps in an investigation.

An analyst does not become so simply by claiming to be one. A skilled analyst is a product of years of training, study and experience combined with a logical and organized approach.⁵⁷⁸

In major cases the analyst should be included in the investigation team at the outset. For an analyst to be an asset to the investigation, immediate access to the information flow is imperative. To put an analyst in a catch-up situation detracts from potential benefit to an investigation.⁵⁷⁹

War crimes investigations occur in an environment where there is a large volume of information, some valuable, some not. To fully exploit this data requires a well-managed and well-structured system. A trained analyst is best placed to do this.

In a criminal case analysts are not only involved in the investigation stage, they also provide other support, such as research into trends and patterns to help with operational deployment, crime prevention, crime market research, future threat assessments and other predictive tasks.

In war crimes cases analysts find themselves looking backwards to try and interpret the significance of events and their relevance to prosecutions. There are several phases in the process in which analysts are involved:

- i. Preliminary research phase - one of the most significant issues the prosecutor has to address is where to focus resource. In the preliminary research phase the analyst is involved in characterizing the nature of violations, identifying those involved, recommending targets and assessing the likelihood of success of a particular investigation.
- ii. Investigation phase - the analyst is involved, together with the team leader and prosecutor in ensuring that investigations remain focused, determining

⁵⁷⁸ RCMP Major Case Management Manual, 4th Edition.

⁵⁷⁹ RCMP op cit.

any adjustments in the direction of an investigation, collating new data and identifying new avenues of investigation as they arise.

- iii. Indictment preparation - while not traditionally a role for analysts, there are various aspects of drafting an indictment where experience has shown us analysts can make a significant contribution. These include writing and compiling background material, specific perpetrator detail and liability theories, crime based data, incident schedules and annexes and compilation of supporting materials.
- iv. Pre-trial phase - in the pre-trial phase analysts are heavily involved in identifying material for disclosure. Rules of Evidence and Procedure often place a heavy burden on the prosecution to disclose information to be relied upon in trial and also the existence of evidence, which may be exculpatory.
- v. Prosecution phase - in the prosecution phase analysts are involved with maintenance of witness lists, identification and preparation of expert witnesses, matching of witness information to counts in the indictment or to specific points in the indictment, document management and charting and presentational aids. Analysts are also involved in assisting attorneys in preparation for witness cross-examination and rebuttal of defence arguments.

Having identified these tasks, what skills are required? Analysts engaged in war crimes investigations may fall into the following core skill groups:

- i. Criminal analysts: typically from a police or law enforcement environment, they are situated in the investigation teams and are involved in identifying alleged violations, identifying individuals and groups of individuals involved, determining those who bear the most responsibility, picking the key individuals, identifying sources of evidence and assisting investigators and prosecutors determine investigation strategies.
- ii. Military analysts: typically drawn from the military with unique training with regard to military formations, military doctrines and analysis processes in a military context, their role is to assist in determining whether an armed conflict existed in a particular area under investigation, determining the nature of that conflict, identifying the forces involved, and detailing orders of battle and chains of command.
- iii. Research officers/historians: this group requires skills not normally found in a criminal investigation environment. War crimes occur either as a result of, or at the same time as, a breakdown of constitution law and order. In order to determine just who is in control of groups such as emerging regimes, paramilitary formations, the police and the military when they were alleged to have committed crimes requires detailed study of the structures of these new regimes. These studies not only focus on the *de jure* aspects of power, but also how power was exercised *de facto*.
- iv. Demographers: important elements of offences of war crimes, crimes against humanity and genocide include being able to determine the nature of a group, be it defined by race, ethnicity, religion or nationality. To do this, the skills of a professional demographer are vital.

When the product of these groups is brought together the investigation will have identified:

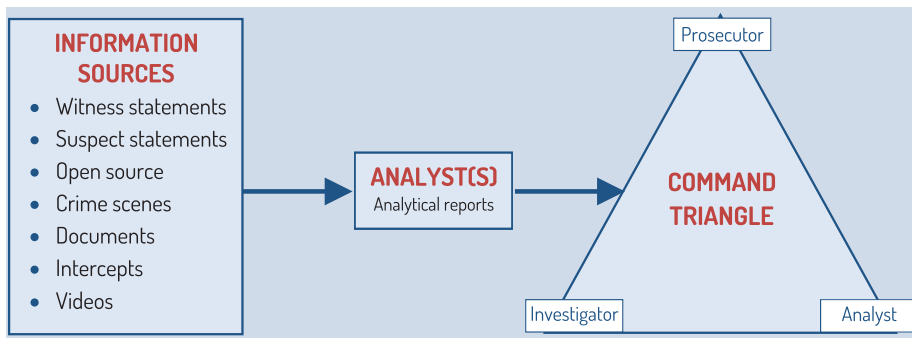
- i. The existence or otherwise of criminal conduct warranting;
- ii. Individuals and groups involved;
- iii. Those allegedly responsible for planning, organizing or implementing the conduct;
- iv. Those individuals against whom the investigative resources should be focused.

ANALYST'S ROLE

In an investigation team the analyst can perform various significant roles. Firstly, it should be the role of the analyst to advise those with primary responsibility for the investigation on the current position concerning information, what is known and what is not known - what has been collected and what needs to be collected. The lead investigator and case prosecutor need this information for decision-making. Without co-operation and trust in this leadership group the analyst's job would be very difficult and largely ineffective. This is sometimes referred to as the command triangle:

COMMAND TRIANGLE

The command triangle and analyst's role is probably best represented by the diagram below:



Within an investigation team, the number of analysts involved will largely depend on the size of the investigation. A smaller investigation may get by with one analyst performing all analytical tasks. A larger investigation may have several analysts, some working on specific projects focused on a particular element of the investigation, with a lead analyst pulling together the various products of their work.

WHAT TO EXPECT FROM YOUR ANALYST

There are numerous product types you can expect from an analyst. These include:

- Overview or projects reports - including graphic illustrations;
- Information collection plans;
- Analysis of links and relationships and events within an investigation - it may be in the form of a link chart, but there are many other forms of dissemination;
- Assistance with devising investigation plans - directions for further investigation;
- Detailed project analysis;
- Interview assistance, e.g. possible questions or topics to cover;
- Potential sources for exploitation;
- Selection of witnesses;
- Historical/political/military appraisal of intelligence/evidence value.

POPULAR MISCONCEPTIONS

Prosecutor's and investigation leaders often believe it is their role, in building prosecution cases, to read and analyse all data collected in an investigation to build a prosecution. This may be possible in a small-scale investigation. In a large investigation, involving widespread violations this is simply not possible. Having a skilled professional identify the material that investigation leaders and prosecutors should focus on, is crucial to efficiently building a case.

In most situations it becomes apparent quite early that the analyst, by virtue of their in-depth knowledge of material collected and ability to organize data, is adept at finding and filing information. While this may be correct, if this is all you use your analyst for you are wasting a resource. Similarly, if the analyst is overburdened with these two tasks, they will not be in a position to provide you with the analytical products, which would enhance your investigation.

ANALYSTS DRAW CHARTS.

Whilst a graphical illustration of an event or situation is one example of an analytical product, and linkage charts such as those provided for by the technology of companies such as i2, are techniques and tools utilized by the analyst, they do not represent the function of an analyst.

ANALYSTS USUALLY DO THE DATA INPUTTING.

This is not the role of analyst. Though through the nature of their work the analyst will be a frequent user and be very familiar with any data storage/retrieval systems used, and may even be involved in devising specifications for a database, any usage of an analyst for data inputting detracts from their analytical function.

INVESTIGATORS ANALYSE AS WELL, WHY DO WE NEED ANALYSTS?

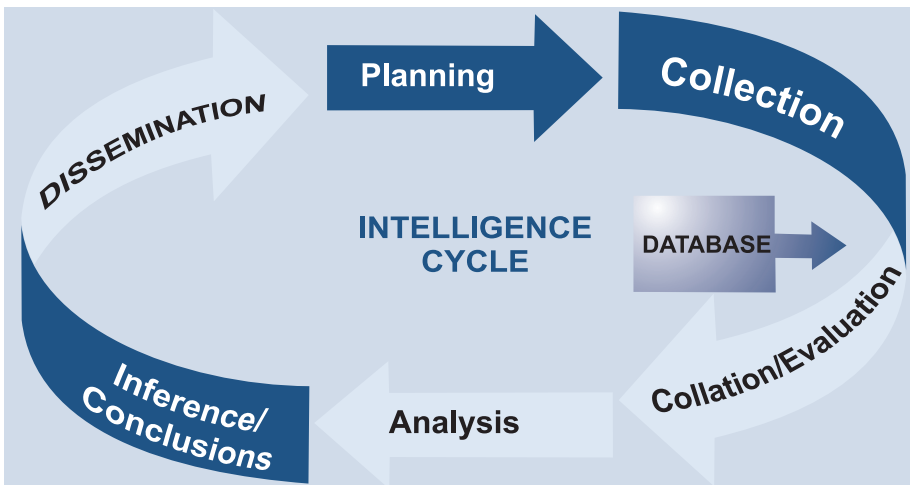
Everyone performs analysis to some extent in their work. Specialist analysts are highly trained and experienced professionals engaged for analysis of information, to progress the investigation further by enabling thorough and comprehensive analysis of all intelligence from an overview perspective, to enable a more focused investigation by highlighting gaps and gluts in intelligence/evidence. Such a specialist role enables the investigators to concentrate more on the collection of evidence, and provides a further source for the investigator to utilize.

INTELLIGENCE AND INFORMATION

What do we mean by intelligence? Intelligence in our context means taking a lot of separate information, some of which may on its own not appear to be particularly significant, amalgamating it, assessing it, comparing it, contrasting it, and reassessing it to see if any further conclusions can be drawn to assist the investigation. One piece of seemingly irrelevant information may hold a vital key when placed in the mix with other forms of information. Put simply, intelligence is usually a value added product obtained by analysis of information. Information sources may willingly provide you with information, however they will jealously guard their intelligence product.

Effective investigation of violations should be intelligence led. Intelligence led investigations are seen as the key in the efforts of many law enforcement agencies to tackle criminal activities. In war crimes investigations, the amount of information involved is enormous, far too much for accurate assessments of information to be made by individuals on an *ad hoc* basis.

THE PROCESS FOR UTILIZING INFORMATION



Intelligence organizations utilize an *intelligence cycle* to assist in the handling of their information, and it is equally applicable to war crimes investigations.

It is a process broken down into several stages:

- Planning;
- Collection;
- Collation and evaluation;
- Analysis;
- Conclusions and Recommendations;
- Dissemination.

However, all these stages are inter-related and continuous, and thus the cycle might be seen as a process. Whatever the name handed to the process, each step is as vital as the next.

Planning

It is essential to know before going to collect any information:

- What do we already know?
- What is it that we are trying to establish?
- How are we going to try and obtain more information?

The planning stage is vital and is one that is often neglected in favour of the more exciting and active nature of being out in the field on mission. However, the scale of investigations conducted regarding war crimes, and the eclectic nature of the sources available to the investigation make it vital that the planning stage is conducted routinely and thoroughly. This applies to the investigation both on a management level and on an individual mission/project level. Given the resource intensive nature of our investigations, it is vital that the investigation is focused and this can only be achieved through planning, both at the outset of an investigation and during regular reassessments of the progress.

On an individual basis, each investigator has the responsibility for their planning, whether for projects in the office or on mission in the field. Investigators in both circumstances need to be aware of the background information to the case, the nature of the information they are hoping to collect and the reasons for this. It is their responsibility to make sure they utilize all the resources available to them, including databases, other team members, sensitive sources, and to prepare fully before embarking on a project/mission.

Collection

This stage refers to the actual physical collection of the information, and is the area that the investigator is most traditionally involved with. Many sources exist for the investigator to follow up on. In addition to more traditional sources such as eyewitnesses, victims, sources, forensic evidence from crime sites, and documentation, for international investigations, the investigator must consider additional sources

such as NGOs, international peacekeeping forces, political experts and of course, open sources such as the media or the internet.

Collection of information may be in the form of a physical piece of documentation or a video, or it may be by word of mouth with an individual who does not want to provide a formal witness statement. In all cases, the collection of information, similar to that of evidence, needs to be recorded fully and accurately, as this information needs to be assessed and if possible turned into useful intelligence and ultimately evidence. Physical pieces of evidence and witness statements can be more readily recorded into a system, but random and seemingly disparate pieces of intelligence can easily slip through the collection net. It is therefore imperative that systems of recording are adhered to.

One method of recording information gathered is through a written report, which may relate to one particular piece of information, or to the results of a particular mission with several pieces of information. Whichever method is ultimately utilized, there are several rules that must be followed if the information is to be of use to the investigation.

Collection Reports

Written reports of intelligence gathered in the field or from other appropriate sources may be the only way of preserving the information. It is important to consider several factors in report preparation:

- Recording of basic details such as your identification details, locations, dates, names of sources, addresses for further contact;
- An assessment of the reliability of the information obtained and the source from which it came;
- Accurate recording of as many details provided by the source as possible;
- Lateral thinking when asking questions. Do not stick to the most obvious line of questioning, or merely to those areas that relate to your direct area of interest. Remember to always think beyond the immediate perpetrator, to levels of political, military or police leadership for example;
- A list of recommendations for further action relating to this information.

Ensure that there is compatibility with other team members when identifying a crime site or sensitive source, and provide a key for any individual codes used. This seems obvious, but when identifying a crime site in the field, GPS or street names and house numbers are not always available. It is therefore imperative that you describe a site or decide to refer to it as “K1” for example, so that everyone is clear on the exact location you refer to, and that everyone refers to the site using the same code.

Once a collection report is written and entered into the system it is preserved not only for your own reference but also for the rest of the team, allowing for its analysis along with other sources of information or evidence.

Collation and Evaluation

The collation of the information refers to the stage where the information collected is handed to a central point for integration with all the other information. Investigators are required to submit appropriate reports of their findings to the designated collection point for processing. The scale of the investigations again means that gone are the days when investigators findings can be keep in a little notebook, or even worse, in their head!

Both the previous stage and these two factors, provide the melting pot for all of the information gathered. With large-scale investigations it is impossible for investigators to spread all their papers out on the coffee table, sift through and match up random pieces of evidence. The pool of information is enormous. It is here that the use of a database is absolutely vital.⁵⁸⁰

The evaluation of a source is an essential part of the collection and collation process. Your decisions regarding the reliability of both a source and the information they are providing must be recorded for future reference. This is used not only in the analytical process, but also by other investigators. The grading of a source can be achieved in many ways including a written assessment in the report. However, it provides for more continuity if the source/information is graded using a standardized procedure so that everyone understands the meaning of a grading. Gradings used in some national police forces are the 4X4 or more recently the 5X5 system, as can be seen in Annex “A” to this chapter. Whichever method is preferred; it should be used with continuity throughout the investigation team.

Analysis

Despite all the assistance of a database, the human brain does the actual analysis. If the database is populated with all the necessary information, reports can be generated to illustrate all the relevant pieces of information for a particular subject matter. It is still a human function to make sense of that information, to weigh the information, to make a story. This part of the process develops the investigation by turning previously unimportant pieces of information into vital evidence, by providing leads for further investigation, by highlighting gaps in evidence or intelligence which need to be followed up, and, equally important, by establishing when a piece of the puzzle is solved.

Most large criminal investigations have a least one criminal analyst to assist with this process. For the analyst to be able to play their part properly, it is vital that the investigators who are actually collecting the information ensure that all the data is submitted to the central point. If this simple rule is followed, then the analyst can and should play a central role in any investigation.

⁵⁸⁰ Databases are covered separately.

Dissemination

In the strictest sense of the intelligence cycle, this phase applies to the dissemination of the analytical product by the analyst, either orally or in written format. The aims of this process are to advance the investigation, and to pass the newly acquired knowledge, leads or information to other relevant members of the team.

It is essential that an investigator considers all the available information to them before embarking on a new course of action. In addition to discussing action with the team leader, other investigators and prosecutors, they should take into account analytical product and the views of the analyst by talking to them before going on mission. The analyst is often in a unique position of having an overview of the entire investigation, and can provide the investigators with additional angles to explore whilst collecting information.

However, dissemination is also within the remit of the investigator. Sometimes within an investigation, an investigator may become a specialist in a given area, or for a particular theme - for example, the role of the police in the crimes committed. As part of the dissemination process it is also therefore imperative that the investigator is proficient and comfortable in writing reports and giving oral briefings to a variety of audiences.

FORMS OF DISSEMINATION

ANALYTICAL PRODUCT

Working with analysts means that they are able to exploit a far greater array of information than would normally be available to the investigator. It is therefore probable that the analyst will provide an additional source of information for the investigator and the investigation. The product of the analyst available to an investigator may vary, but would include forms such as graphical charts or illustrations of intelligence, written reports and perhaps most importantly, oral briefings. As a rule, before going on a mission to the field the investigator should approach the team analyst(s) and seek any input from them into areas which need further investigation, particular questions or areas of interest for a witness, etc.

SITUATION REPORTS/ASSESSMENT

These would usually be more comprehensive than a collection report, and provide for an overall assessment of a situation in the field, a particular subject area or an amalgamation of other sources of information. However, it is clear here that a collection report and situation assessment may become amalgamated providing for both collection and dissemination of information at the same time. This overlap is not a problem, as long as all of the information is ultimately included in melting pot.

As with the collection reports, it is imperative that these reports are sourced fully and accurately, that you are identified as the creator and that the information is as full as

possible. Whilst there is no definitive structure for such reports, standardization to a certain level provides for ease of reading and helps to maintain a certain level of quality within a team.

Sections usually included in such a report are:

- i. Title, Author, Date;
- ii. Aims and objectives - what is the report about;
- iii. Detail - remember sources, locations. Include your own comments and observations but make it clear that they are that;
- iv. Conclusions;
- v. Recommendations.

An alternative format, which is also common, is:

- i. Issue;
- ii. Background;
- iii. Current position;
- iv. Discussion;
- v. Conclusions and recommendations.

ORAL BRIEFINGS

In addition to providing written reports for inclusion into the planning and processes of an investigation, the investigator may also be required to provide an oral briefing to a variety of audiences, including other team members, management, outside audiences. The format of an oral briefing will vary depending on the audience, the circumstances and whether it is informal or formal, but the basic parameters are the same.

- i. Introduce yourself and explain your role;
- ii. Explain what the briefing is about and give an overview of the investigation to date;
- iii. Present your information;
- iv. Explain your conclusions;
- v. Present your recommendations.

This section will be covered in greater detail during the practical sessions for report writing and oral briefing.

DATABASES

There is an onus on investigators and prosecutors to retain and document the information they collect in the course of an investigation. In order to efficiently exploit or recover information we use databases. They are perhaps the most useful and malleable tool for the collation and manipulation of information, assisting in the generation of useful intelligence in the investigation. They can be utilized to:

- i. Store and allow access to the particular information and evidence you are looking for;

- ii. Generate reports to assist with the investigation, both in terms of managing the data, and in management issues;
- iii. Provide target/theme specific information. The database should therefore be designed to reflect the particular targets, categories and themes required for the investigation;
- iv. Provide witness management: an essential component of the investigation and trial is to track witnesses and their relevant information;
- v. Assist with the preliminary stages of pre-indictment investigation, post-indictment investigation and trial phase work.

It is essential that the investigator becomes familiar with and routinely utilizes the search and report capabilities of the database when preparing for mission and assessing particular areas of the investigation.

CONCLUSION

In this chapter then we have taken the information collection process from the beginning to end, firstly identifying useful sources of information, then dealing with the type of expertise required to exploit this information and finally outlining the processes used.

In conclusion we have outlined some of the specific requirements applicable to existing international criminal tribunals, which must be taken into account when investigating war crimes, crimes against humanity and genocide.

ANNEX A TO CHAPTER TEN

4X4 INTELLIGENCE EVALUATION SYSTEM

SOURCE RELIABILITY		INFORMATION VALIDITY SCALE	
A	<ul style="list-style-type: none"> No doubt of authenticity, trustworthiness and competency History of complete reliability 	1	<ul style="list-style-type: none"> Known to be true without reservation
B	<ul style="list-style-type: none"> History of reliable information most of the time 	2	<ul style="list-style-type: none"> Information known personally to the source but not to the reporting officer
C	<ul style="list-style-type: none"> History of unreliable information most of the time 	3	<ul style="list-style-type: none"> Information is not known personally to the source but is corroborated by other information already recorded
X	<ul style="list-style-type: none"> Cannot be judged Previously untried sources 	4	<ul style="list-style-type: none"> Cannot be judged Information is not known personally to the source and is not corroborated by other information

5X5 INTELLIGENCE EVALUATION SYSTEM

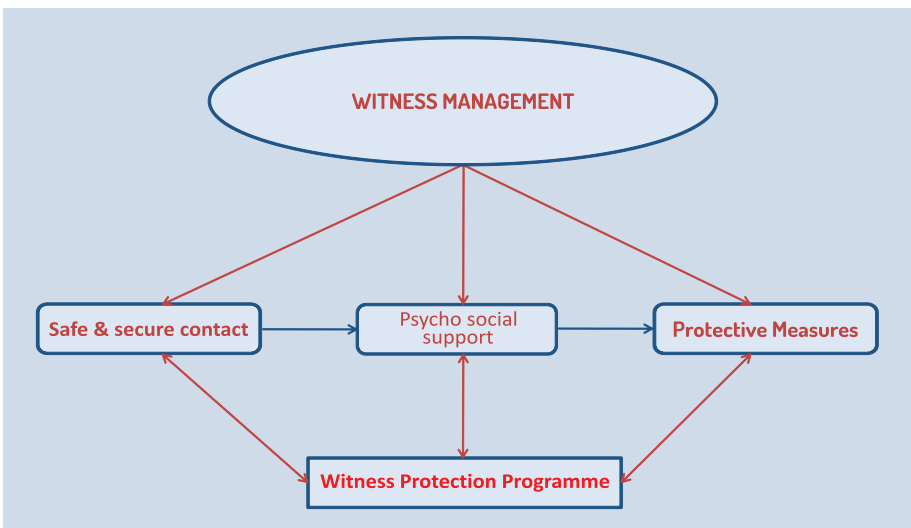
SOURCE EVALUATION		INTELLIGENCE EVALUATION	
A	<ul style="list-style-type: none"> Always reliable 	1	<ul style="list-style-type: none"> Known to be true without reservation
B	<ul style="list-style-type: none"> Mostly reliable 	2	<ul style="list-style-type: none"> Information known personally to the source but not to the reporting officer
C	<ul style="list-style-type: none"> Sometimes reliable 	3	<ul style="list-style-type: none"> Not known personally to source but corroborated
D	<ul style="list-style-type: none"> Unreliable 	4	<ul style="list-style-type: none"> Cannot be judged
X	<ul style="list-style-type: none"> Untested Source 	5	<ul style="list-style-type: none"> Suspected to be false or malicious

Source: NCIS, UK

CHAPTER ELEVEN - WITNESSES: APPROACHES AND PROTECTIVE MEASURES

Investigators must give utmost priority to the safety of and respect for victims and witnesses. It is no exaggeration to say that a mistake can cost a life, or to note that effective prosecutions have often rested on the courageous testimony of victims. In addition, the reputation of the organization, and our ability to further the cause of justice through our work, bears a direct relationship to how we treat all witnesses.

The safety and security of witnesses is commonly referred to as witness protection. It must be understood that witness protection is a part of a larger process of witness management. Witness management has several layers as indicated in the graphic below:



Most importantly it must be recognized that witness protection is a risk driven process. Guidelines for witness protection tend to follow several broad areas of generally accepted international practice:

- Development of a **security culture**.
- **Operational protective measures** - Ensuring the safety of witnesses is generally in the hands of the investigator until prosecution phase commences. The focus is on protecting the identity of people who have spoken to investigators, effectively ensuring that it is not widely known that the person has been interviewed; protecting the information they have provided and management and mitigation of the risks that witnesses may face.
- **Procedural protective measures** - Once the judicial process takes over from the investigation stage, protective measures will generally be the subject of an order from the court. In the pre-hearing phase, this involves measures such as non-disclosure of the name and address of the witness until shortly before proceedings; orders not to interfere with witnesses and orders for defendants and their legal counsel not to disclose the identity of witnesses. In the hearing phase the emphasis is on measures to reduce fear through avoidance of face-to-face confrontation with the defendant; measures to make it difficult or impossible for the defendant or organized criminal group to trace the identity of the witness and measures to limit the witness's exposure to the public and psychological stress.
- **Victim and witness support measures** - At all stages various measures to address physical and social well-being of victims and witnesses may be implemented. These can be operational or procedural.

In some cases, where there are no other viable alternatives:

- **Witness protection programme** - Entry into a witness protection programme traditionally involves assessment, physical protection, relocation, change of identity or measures of disguising identity and ownership, resettlement, integration into a community and a pathway out of the programme once testimony is completed and/or the threat has diminished.

A legislative basis for a witness protection programme is recommended but not essential. The United Kingdom, for example, operated a witness protection programme for ten years before enacting legislation. Many successful programmes have operated through the establishment of internal standard operating procedures.

The **process** for implementation of any of these measures needs to be based on a thorough assessment of **threat** and **risk**. Threat relates to the possibility of adverse consequences for a witness or associated person as a result of their assistance to an investigation or their decision to testify in court proceedings. It includes some form of danger to the witness or associated persons. The seriousness of the consequences of the threat will have an impact on the type of response considered. Risk on the other hand refers to the likelihood that the threat will occur. Carrying out these assessments is the first step in the process of witness protection. The next is to identify what options are available to mitigate, reduce or deal with the threat. Once options are decided implementation is the challenge.

Investigators may be faced with these issues on a daily basis. Some cases will be more serious than others. In each case the recommendation is that they follow this process: assess the threat; assess the risk; identify available options; decide upon a course of action (e.g. prepare an individual protection plan) and implement it.

Standard operating procedures need to be established for the implementation of the range of operational and procedural protection measures referred to above and expanded upon in these guidelines.

SECURITY CULTURE

Providing a secure environment in which witnesses can testify in confidence starts within the institutions involved. If everyone in the organization takes security issues seriously, understands their security obligations and acts with security in mind then the risks potential witnesses will face are minimized.

SECURITY OF PREMISES

Security culture starts with security of premises used by investigation and prosecution staff and by the court. This involves a range of factors, designed to prevent infiltration of the premises by persons with malicious intent and to prevent leakage of information about the investigation. As a minimum the following should be considered:

- Ensure premises are secure from infiltration.
- Control ingress and egress.
- Secure areas where witnesses are interviewed.
- Provide for secure storage of information.
- Control access to offices within premises – ensuring that only those people who have a need to be in a particular area can access those areas.
- Regular security surveys of premises to ensure that they are secure and intact or that potential breaches of security are identified.
- Premises used for hearings or trials should be secure and provide a secure environment for witness testimony. A security standard for these premises should be established and then premises surveyed to see that they meet these standards.

Where at risk witnesses are brought to an official, an additional security survey of the premises should be conducted prior to the arrival of the witness to ensure that security procedures have not been compromised.

INFORMATION SECURITY

The investigation must make procedural and physical provisions for the secure storage, retention and retrieval of information. Staff members also have a significant obligation also with regard to information security.

In the course of an investigation it is clear that a considerable amount of sensitive information will be collected. This is particularly the case with regard to information concerning witnesses and information supplied by witnesses. This information must be handled securely and discretely. Access to investigation files and materials should in all cases be limited, as a minimum, to those who have a “need to know”.

Each staff member is responsible for ensuring that files that fall within their responsibility are kept securely when not in use. When the files are in use the staff member responsible for them must ensure that details are not inadvertently disclosed.

Great care should be undertaken with regard to information about, and provided by, witnesses. Confidential information regarding witnesses, including personal, financial and sensitive details about the witnesses themselves, and their statements or information provided, should be maintained separately in a secure space, accessible only to the relevant staff members and supervisors.

Additional care must be taken when operating in the field as the normal safeguards you rely on in headquarters in all probability will not exist. Staff members will have limited ability to secure the information they take with them or the work product created while on mission.

For highly sensitive witnesses, their statements, etc. should be kept in a secure cabinet and access restricted to the absolute minimum number of staff with a current requirement for access. This information should remain in a secure, locked space when it is not being used. Special care should be taken to ensure that such information remains secure after working hours.

An important feature of judicial proceedings relates to their transparency. Widespread reporting and outreach are vital; however this must be balanced with the security needs of the people who are involved. The use of measures such as redacted disclosure, removing any information that may be possibly used to establish the identity or whereabouts of a sensitive or at risk witness, is crucial to successful conclusion of cases.

PHOTOCOPIERS AND PRINTERS

One major area of potential vulnerability for information security relates to networked printers and photocopiers. Often, people will send sensitive documents to a printer, only to lose track of them because of other distractions. The sensitive document may then remain at the printer for days before being collected. Alternatively, printers and photocopiers may often jam. The jammed documents may remain on the printer or

photocopier for days until it is repaired. In many organizations this is a significant source of document compromise.

Caution: The best of security measures are only as effective as the people implementing them. All staff should adopt as practice responsibility for identifying potential security breaches and notifying them to management.

VETTING OF STAFF

Developing a security culture includes the vetting of staff to ensure that individuals with aims to compromise the integrity of an organization, its operations or the information it possesses are not employed or given access to facilities or information. Vetting, as a minimum, involves background checks with previous employers, requirements for applicants for positions to supply a detailed and verifiable personal history, financial disclosure and declaration obligations and fingerprint checks with appropriate criminal records repositories.

SECURE COMMUNICATIONS

Communication devices such as telephones, mobile telephones or radio devices or fax machines are inherently insecure. It is often said there are three people present in any such conversation, the caller, the receiver and the person who is eavesdropping. Sensitive information about at risk witnesses should not be communicated over such devices. Encrypted telephones, fax machines, radios and satellite antennas for encrypted internet transmissions are now readily available and should be procured and utilized.

SAFE HOUSES AND REFUGES

When discussing issues relating to witness protection the use of safe houses is often mentioned. In a witness management context the term “safe house” is used to refer to premises that have been identified for use for a particular witness (and perhaps their family), usually on a temporary basis until a permanent relocation solution can be found. It is normally acquired or leased in a name that cannot be connected to the witness or the person or organization managing the witness. It gains its safety by its anonymity and a physical security presence is not usually required. It has the advantage also of allowing the person(s) relocated to adopt some semblance of normal life patterns. Once a safe house has been used once it is considered to be compromised and is no longer suitable for use as a safe house.

“Refuges” are used to provide interim secure environment for witnesses. They are different from safe houses. They will normally have a range of facilities required for witnesses who are transiting – either on an emergency basis or while they are testifying. Often they will have a support person, medical staff and perhaps a psychologist living

in-house. The premises will have been adapted to include security features such as grills over windows, alarms, heavy duty doors and windows, etc. to make them a harder target should they be subject to attack. Importantly, there will be some form of physical security, often in the form of guards to protect the people taking refuge there. Refuges are definitely only an interim measure but because of their heightened security features can be used more than once.

WITNESS SUPPORT MEASURES

WITNESS WELFARE AND SUPPORT

The need to determine support needs of witnesses and the requirement to address them, starts before initial contact with a witness and continues until long after court or other proceedings have concluded. In particular:

- Needs will differ depending on individuals.
- Assessment, which covers logistic, security and psychosocial support needs.
- These assessments should be carried out by specialist staff.
- Investigation staff can assist by collection of information necessary to make assessment.
- Assessment of special measures needed to facilitate testimony of vulnerable witnesses.
- This can include psychosocial support, support persons, special questioning techniques, provision of remote rooms and electronic transmission of testimony to court room, use of pseudonyms, screens to block witness from defendant, etc.

Support for witnesses or the lack of it can be just as significant a factor in securing their testimony as providing for their physical safety and security. As well as having specialist protection staff, there should be specialist support staff to provide for some of the more mundane matters that effect witness's well-being and also to attend to any psychosocial support needs.

In determining support needs it is necessary to look at the causes for witness reluctance. There can be many reasons why a witness may be reluctant to testify. Some of the reasons leading to a reluctance of witnesses to testify include:

- Intimidating court procedures.
- Physical fear – witnesses are often in a weaker position than the accused (and sometimes the victim) and therefore their testimony can be manipulated. When testifying it helps if they were screened from the accused or vice versa.
- Economic hardship – people cannot afford to come to court and pay for their accommodation; they need remuneration for this and lost income.
- Witnesses may be subject to various forms of direct and indirect influence, e.g. bribes or pressure to change testimony. The absence of formal witness support makes these influences more attractive.
- A range of fears, or uncertainties brought about through lack of knowledge of the judicial system can inhibit witnesses from testifying.
- Fear of undue exposure.
- Fear of readjustment into society.
- For sexual and gender-based violence cases, stigmatization.

Many of these concerns can be addressed by establishing adequate support mechanisms. Some features of support for witnesses include:

- Inconspicuous witnesses transport.
- Investigators should be dressed in plain clothes when meeting with potentially vulnerable witnesses and when interacting with them subsequently.
- There should be frequent visits to maintain contact with witnesses and to ensure that all their needs are being met.
- A secure facility with good living conditions to house witnesses when they are testifying.
- Witnesses should not be required to be absent from their homes for extended periods to testify.

In short, more than protection is required – there is need for an assistance package (reimbursement for travel, etc.). A support component, if fully funded, could address each of these needs.

WITNESS SUPPORT AND PROTECTION IN INVESTIGATION OF CASES OF SEXUAL AND GENDER-BASED VIOLENCE (SGBV)

Many of the measures outlined in this paper are applicable in cases of victims and witnesses of sexual and gender-based violence (SGBV). However much needs to be done before you get to that point. Investigators need to build trust and confidence in their approach if they are to achieve any sort of productive co-operation with victims and witnesses in this area. Without this trust it is unlikely that they will tell their stories.

Investigators may need to utilize community structures in a very strategic way and ensure that women working with victims at this level are properly trained. In some cases women will have to be moved, together with their children. This relocation plan needs to be carefully developed. There will be a need to establish or strengthen a safety net in every community.

INVESTIGATION PHASE

Ensuring the safety of witnesses is generally in the hands of the investigator until prosecution phase commences – ***operational protective measures***. From that stage on, protective measures will generally be the subject of an order from the court or tribunal – ***procedural protective measures***.

Key stakeholders in this phase are investigators (be they police, defence counsel or prosecutors); individuals, local officials and civil society groups in the community the witness is drawn from; and a range of non-governmental, and human rights and civil society organizations who may have a presence or role in the particular community or the judicial process. The manner of initial contact is crucial to ongoing assistance of the witness. The investigator must safely establish and maintain contact with witnesses; be fair and frank in dealings with witnesses and take responsibility for the

confidentiality of their identity, the information they provide and their protection in this phase. Important principles to remember are:

- From the outset all possible steps should be taken to avoid placing witnesses at risk.
- Investigators' actions do not endanger witnesses.
- Handle information regarding witnesses appropriately.
- Witnesses need to be fully informed of what is expected of them, the dangers they may face and whatever support may be available to them.
- Victims/witnesses are fully informed regarding obligations relating to the release of information to the court, including the provision of information to the defence, while at the same time informing victims/witnesses of measures that will or may be taken by investigators and the court to protect confidentiality and witness/victim identity.
- Consideration and respect for witness needs and requests.
- Provision of information to victims and witnesses outlining the protection measures available to them (as provided by the proposed legislation) and the limitations of those measures.
- Liaison with prosecutors and officers of the court or judicial body to ensure that any actions taken comply with statutory requirements, court rules and directions and will not impact on the admissibility of the witness's evidence.

The investigation process usually commences with research to identify potential witnesses and to assess the possible evidence they may be able to give. In cases involving conflict related crimes it can be expected that even initial contact may place a witness at risk or give rise to the need for some type of support. Therefore before contact with a victim or witness the following should occur:

- An assessment of the potential evidence the witness may be able to give and its usefulness in proving (or disproving) the matters under investigation and a determination whether it is necessary to approach the witness at all.
- Research to determine the current state of well-being of the witness and to identify potential vulnerabilities of the witness.
- A threat and risk assessment as to determine whether contact with the witness will place them in physical danger.
- Implementation of whatever measures are necessary to mitigate any risk that is identified.
- In the case that a group of witnesses who because of their nature may be considered more vulnerable, "potentially vulnerable witnesses", assess whether psychosocial assessment is needed before the interview process commences (child witnesses, former child soldiers, victims of SGBV or witnesses or victims who have suffered severe trauma as a result of their experiences may fall in this category). Assess also what other support measures may be necessary in order for the witness to be properly prepared for interview (and any subsequent testimony).

THE INVESTIGATION PHASE – OPERATIONAL PROTECTIVE MEASURES

Measures taken in the investigation phase are often called “Operational Protective Measures”. This is because they can be implemented by taking operational measures without being underpinned by legislative or formal procedural frameworks. As stated above, operational measures are normally based on three principles:

- The focus is on protecting the identity of people who have spoken to investigators, effectively ensuring that it is not widely known that the person has been interviewed.
- Protecting the information they have provided, and
- Management and mitigation of the risks that witnesses may face.

A fourth element to consider is the adoption of an investigation strategy that has at its centre a principle of minimal use of witnesses.

ASSESSMENT OF THREAT, RISK AND POTENTIAL VULNERABILITY

The starting point in determining what actions are necessary is to carry out an assessment of threat, risk and potential vulnerability. **Threat** relates to the possibility of adverse consequences for a witness or associated person as a result of their assistance to an investigation or their decision to testify in court proceedings. It includes some form of danger to the witness or associated persons. **Risk** on the other hand refers to the likelihood that the threat will occur. **Vulnerability** refers to special measures that victims or witnesses may need because of factors such as their age, gender, the nature of the crimes they were a victim of, whether they have experienced trauma and other individual circumstances.

The level of *threat* is determined by assessing the nature of the threat, whether actual, perceived or implied together with the consequences if the threat is carried out. A threat and risk assessment matrix, similar to the one below may be used to determine the level of threat and risk.

THREAT				
CONSEQUENCES	RISK: Determined by assessing the likelihood that the threat will be carried out			
	Certain	Highly likely	Possible	Remote
Death or serious injury	Major	Major	Major	Minor
Violence – some injury	Major	Major	Serious	Minor
Damage to property	Serious	Serious	Minor	Minor
No physical injury	Minor	Minor	Minor	Insignificant
No damage to property	Minor	Minor	Insignificant	Insignificant

In the examples in the above matrix, where the consequences of a threat would be death or serious injury, and the threat is certain to be carried out, then this represents a major risk warranting immediate action. Conversely, where the threat involves no physical injury or damage to property and the likelihood of it being carried out is remote, then the risk would be insignificant and it may be that no further action is warranted.

With regard to vulnerability, it is important to assess potential vulnerability at the outset and take measures to deal with the possible impact an interview will have on a vulnerable witness. Where the assessment indicates potential vulnerability then measures such as providing psychological or other support mechanisms should be implemented.

SECURE AND CONFIDENTIAL CONTACT WITH WITNESSES

This is normally addressed by adhering to well thought out operational procedures designed to eliminate or minimize any potential risk to the witness. It is recommended that staff members:

- Exercise extreme care when contacting witnesses and determine how to safely contact witnesses in the locality they are working in.
- Assess threat, risk and also vulnerability and the potential need for psychosocial support before initial contact with victims or witnesses.
- Provide witnesses with contact numbers so that they can call for emergency intervention if necessary.
- Do not assume that communication lines (particularly telephone and internet) are secure or that all contacts, even recommended ones, are trustworthy.
- Consider making initial contact through a third party such as a trusted local person or a representative of an established international organization.
- Consider carefully the location of the meeting, vehicles to be used; dress appropriately.
- Select interpreters carefully.
- Make arrangements with witnesses, after initial contact, as to method of contact and venue for further meetings. The witness may be able to suggest a method of communication that does not arouse suspicion.
- Ask the witness if they are comfortable with any contact via the telephone/ internet and establish a communications protocol.
- Be sure that the witness is aware of the limitations of protective measures. Victims/witnesses may be under the impression that your ability to protect them is much greater than it is in reality.
- Inform witnesses that even if they choose not to sign a statement or to testify, the investigator may be required to reveal the witness's identity and particulars to the court.
- Consider carefully the implications of providing a witness with a copy of their witness statement (*often, witnesses are interviewed in the vicinity of where the crimes were committed and it is not in the interest of the witness to have in their possession a document that clearly indicates that assistance relating to a prosecution has been provided*).

- Advise the witness not to inform other witnesses or persons about their contact with investigators. Witnesses have in the past placed themselves at risk by making it known that they provided information to investigators.
- Inform the witness about the course of action the witness should take if they receive a threat or become fearful.

RESPONSE TO A THREAT TO A WITNESS

Where a witness reports that they have received a threat with regard to their cooperation consider the following:

- Determine the basis for victim/witness concerns about their safety.
- Assess the threat to the witness – the nature of the threat, the author of the threat, the means suggested to carry out the threat, its consequences and the likelihood of it being carried out.
- Ascertain if others have been threatened as well.
- Determine if any actions have been taken by any persons to address the threat source.
- Evaluate the threat source's capacity to find out information about the witness's contact with the investigating organization, court or tribunal (i.e. find out the intelligence-gathering capacity and methods of the suspected perpetrator of the threat).
- Where possible, seek corroborating evidence of the threat. Identify and interview any witnesses, try to obtain telephone records if threats were made over the telephone, etc.
- Strongly discourage the witness from taking any action to confront/address the perpetrator or suspected perpetrator of the threat outside the court if possible.
- Discuss with witnesses steps for self-protection.
- Inform witnesses about the protective measures that can be taken by others.
- If circumstances permit *and* the investigator believes that there will be an appropriate reaction, the witness should be encouraged to report the threat to the local authorities or to organizations set up to receive such concerns. This is important because the investigator may only be in the area for a short time and, therefore, may not be in a position to respond in a timely or realistic manner to any threat or perceived threat.
- If a report is made to local authorities, obtain a copy of that report and the local authorities should be made aware that the investigator and tasking body plan to follow the case.
- Avoid unrealistic promises.
- Research situation-specific threats to safe communications, guidelines and the intelligence-gathering capacity of the suspected perpetrators and others.
- Take care when making direct contact of any kind.
- Utilizing local police officers or community organizations to provide interim protection may be an option.
- Temporary measures, such as physical security or temporary relocation are another.
- Participation in a Refugee Resettlement Programme may be an option.

OPTIONS FOR PROTECTION AT THE INVESTIGATION STAGE

In the investigation stage the range of protection options available can generally be grouped under the following headings:

- Self-protection.
- Protective accompaniment.
- Local mechanisms.
- Target hardening.

Where these measures are considered insufficient, measures such as temporarily distancing the witness from the source of the threat or in extreme cases entry into a witness protection programme may be utilized.

SELF-PROTECTION

- Adopting different and unpredictable routines.
- Measures to secure home and work place, such as installing superior locks on doors and windows, intruder alarms, lighting gardens and surrounding areas at night.
- Hiring personal security guards to provide personal protection or security for homes and workplaces.
- Arranging regular patrols of police or other officials.
- Provision of a mobile telephone with an emergency link to a designated official/community liaison officer who will have their phones switched on 24 hours daily, to maintain regular contact with their beneficiaries and who are ready to intervene with the assistance of relevant mechanisms (security guard, military, police) should the beneficiary come under imminent threat.
- Static protection by the police or security guards.
- Have a list of important telephone numbers of the authorities (CDO, relevant SP, NHRC and others) to seek emergency physical protection if needed.

PROTECTIVE ACCOMPANIMENT

- Escorting an individual 24 hours a day.
- Being present at an office of a threatened witness.
- Accompanying witnesses returning to their home communities.
- Other organizations (CSOs, IOs and NGOs) may assist in ensuring witness safety through providing introductions, premises and other forms of logistical support.
- Care should be taken if using this as an option, to ensure that the CSO, IO or NGO is not violating any national laws, its mandate or its permissions to be present in a country by providing such assistance.

LOCAL MECHANISMS

- A different approach is to set up local response mechanisms, train and equip local officials to intervene and to provide security and extraction if required.
- Presence (patrolling) by community officials, organizations, human rights defenders or other community based officials as appropriate at the location where the protection beneficiary lives or works, in order to indicate to potential perpetrators that they benefit from community support and surveillance.
- Use of visibility of international agencies.
- Publicity to expose the sources of threat.
- Temporary shelter in private (civil society) shelter facilities or facilities linked to any CSO or HRO that may be present. (NB: Shelter is provided only as a very last resort and for a very limited period in a situation of imminent threat until an alternative safe shelter is identified or the threat is no longer imminent.)
- Relocation, or separating the witness and the threat by distance can often suffice for protection.
- Provision of tickets, travel costs and run money for the witness to move somewhere else.
- Provision of transport to a “safe haven” by vehicle or aircraft provided by police, civil society or other organization.

TARGET HARDENING⁵⁸¹

- Temporary change of residence to a relative’s house or a nearby town.
- Close protection, regular patrolling around the witness’s house, escort to and from work and other engagements, and provision of emergency contacts.
- Arrangement with the telephone company to change the witness’s telephone number or assign them an unlisted telephone number.
- Monitoring of mail and telephone calls.
- Installation of security devices in the witness’s home (such as security doors, alarms or fencing).
- Provision of electronic warning devices and mobile telephones with emergency numbers.
- Minimizing of public contacts with uniformed police.
- Use of discreet premises to interview and brief the witness.
- Information security.
- Establishing a community alarm system.
- Monitoring of movement of the people.

LIMITED WITNESS STRATEGY

In keeping with the principle of not placing witnesses at risk at all in the investigation phase, establishing a limited witness strategy may reduce the number of witnesses

⁵⁸¹ UNODC, *Witness Protection Manual 2008*.

potentially placed at risk. In a limited witness strategy detailed research and analysis is conducted to establish patterns of conduct, identify potential offenders and the command and control structures they operate under. (For example, a structure that established superior responsibility, command responsibility or facilitates a JCE.) From the initial research and analysis a programme of document collection and collection of physical evidence is established to fill identified information gaps. At this point you would also consider if potential evidence is to be gained by using electronic surveillance, intercepted communications (mobile telephones in particular) and physical surveillance. Using these methodologies it is either the documents or physical evidence produced, or the investigators testimony that becomes the vital evidence, rather than the statements of victims and witnesses.

When it comes to assessing victim or witness testimony then you look at the threat and risk assessment and the potential value of the witness testimony, whether you can gain similar evidence elsewhere from a non-threatened source and then make a judgment call as to whether you need to contact the witness at all.

TRIALS

PRE-TRIAL STAGE

The pre-trial stage refers to the period of time after the investigator has filed their report and preparations are made to bring a witness before a court to hear their testimony. As is the case in the investigation phase, the main objective at this point is ensuring that it is not widely known that a witness has participated in an investigation, or will be involved in any hearing.

Procedural orders to protect witnesses in the pre-hearing stage are normally the subject of a formal application to the court, outlining the reasons why the protective measures are necessary and the nature of the protective measures sought. This is seen as a necessary step to ensure a balance between the rights of an accused and the rights of a victim or witness. Examples of protective measures that have been granted in international courts include:

- Non-disclosure of the name and address of the witness until shortly before proceedings.
- Orders not to interfere with witnesses.
- Orders for parties involved in the proceedings not to disclose the identity of witnesses.
- Notification of local police officials that a witness is under threat and that they have protection obligations.
- Use of electronic devices within the witness's home or work place, to alert police in cases of emergency.
- Assessment of special measures to facilitate testimony of vulnerable witnesses. This can include psychosocial support, support persons, special questioning techniques, provision of remote rooms and electronic transmission of

testimony to court room, use of pseudonyms, screens to block witness from defendant, etc.

- Accompaniment by international agencies.
- Close personal protection in extreme cases.
- Various forms of relocation (temporary or permanent) until the threat subsides.

TRIAL STAGE

Protective measures at the trial stage are also subject to procedural requirements. They are normally granted by virtue of an order of the court upon the application of the party bringing the witness to the proceedings. The application must demonstrate good reasons why the protective measures are required and how the measures sought will address the particular concerns set out in the application. There can be many reasons behind a request for protective measures or support for witnesses at this point. Some of the more common reasons are as follows:

- Fear of retaliation by the defendant or people associated with them.
- Concern that the witness will be unable to return home if the testimony becomes public knowledge.
- Psychological consequences.
- Sense of shame, e.g. SGBV victims.
- Trauma of reliving difficult, painful experiences.
- Fear of having to face the accused.
- Cross-examination.
- Medical problems.
- Care for relatives required while witness is at court.
- Reimbursement of lost wages.
- Availability of emotional, psychological and medical support.
- Post-hearing risk or harassment.
- An overall climate of fear of parties to the conflict.
- An environment where threats can be made with impunity.
- Physical fear.
- Propensity for witness manipulation because of their social position vis-a-vis an accused.
- Lack of support mechanisms to secure witnesses.
- Economic hardship.
- Direct and indirect influence (e.g. bribes or social pressure to change testimony).
- Lack of people's trust in the State authorities and their functioning.

In many instances these fears can be addressed through the implementation of **procedural measures**.

PROCEDURAL MEASURES⁵⁸²

Procedural measures can be grouped into four general categories depending on their purpose:

- Measures to reduce fear through avoidance of face-to-face confrontation with the defendant, including the following measures:
 - Procedural revision of questions.
 - Use of pre-trial statements (either written or recorded audio or audio-visual statements) as an alternative to in-court testimony.
 - Removal of the defendant or accused from the courtroom.
 - Testimony via closed-circuit television or audio-visual links, such as videoconferencing.
- Measures to make it difficult or impossible for the community, a defendant or organized criminal group to trace the identity of the witness, for example:
 - Shielded testimony through the use of a screen, curtain or two-way mirror;
 - Anonymous testimony.
- Measures to limit the witness's exposure to the public and psychological stress:
 - Change of the hearing venue or hearing date.
 - Removal of the public from the courtroom (in camera session).
 - Presence of an accompanying person as support for the witness.
- Support measures to deal with economic issues, health issues and psychological issues.

Those measures may be used alone or in combination to produce a greater effect (for example, videoconferencing with shielding or anonymity with face distortion).

APPLICATIONS FOR PROCEDURAL PROTECTIVE MEASURES⁵⁸³

The elements typically taken into account by courts when ordering the application of procedural measures are:

- The assessment of threat and risk.
- Nature of the crime (organized crime, sexual crime, family crime, etc.).
- Type of victim (child, victim of sexual assault, co-defendant, etc.).
- Relationship with the defendant (relative, defendant's subordinate in a criminal organization, etc.).
- Degree of fear and stress of the witness.
- Importance of the testimony.

⁵⁸² UNODC, *Witness Protection Manual 2008*.

⁵⁸³ UNODC, *Witness Protection Manual 2008*.

EXAMPLES OF PROCEDURAL MEASURES

- Redacted disclosure, delayed disclosure, disclosure in summary form.
- Order for non-disclosure of witness details, including all personal identification information such as name, date of birth, address, occupation, place of employment and any other family identifiers.
- Suppression of a witness's identification details until a certain point in time in proceedings (this offers the least protection to the witness, but has the advantage that it is the least oppressive on the witness).
- Measures to prevent disclosure to the public or the media of the identity of the witness or victims and identifying details.
- Expunging names and identifying information from the courts public records
- Non-disclosure or limitations on the disclosure of information (such as details of the witnesses presence in a particular location at a specific time) concerning the identity and whereabouts of witnesses.
- Assignment of a pseudonym. (e.g. "*witness A*")
- Include in a court order for non-disclosure of a witness's identity, the use of voice and facial distortion equipment to mask the identity of a witness when testifying, or use of a pseudonym when testifying.
- Closed court testimony.
- Closed court (where the testimony is heard *in camera* and not reported to the public).
- Testimony via closed-circuit television, videoconferencing or satellite link.
- Voice distortion and distortion of facial features via camera.
- Positioning of witness so that they can only be seen by judges, counsel and accused.
- Delayed disclosure (of unredacted statements and identifying details).
- Rules that prevent the prosecutor, the defence or any other participant in the proceedings, from disclosing such information to a third party.
- Measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.
- Use of audio-visual recording of statements made by witnesses during the preliminary phase of the procedure.
- Use of out of court statements given during the preliminary phase of the procedure as evidence in court or use of witness's pre-hearing statement instead of in-court testimony.
- Presence of an accompanying person for psychological support.
- Removal of the defendant or the public from the courtroom.
- A useful practice, prior to testimony is to take the witness into the empty court room to familiarize them with the courtroom, the witness box and surroundings and to explain how proceedings are conducted.
- In some exceptional circumstances granting anonymity to a witness in criminal proceedings.
- Witness relocation and change of identity.
- Where relocation of witnesses is considered necessary to ensure their physical safety, this should occur before the disclosure of evidence to the defence.

Protective measures are considered as the preferred option, subject to them providing adequate security for the witness.

POST-TRIAL PHASE

While in many instances the need for protective measures may end when a hearing ends, this is not necessarily the case and should not be taken for granted. Surveys of witnesses who have given evidence in judicial proceedings with regard to serious crimes indicate that further support may be needed in the post-hearing phase. As a minimum there should be arrangements in place for:

- Further threat and risk assessment.
- Observation of witnesses in order to detect and address negative consequences.
- Consideration of whether long-term support is needed.
- Follow-up with results of cases and also mechanism to implement further support if required.

WITNESS PROTECTION PROGRAMMES

Traditionally a witness protection programme involves assessment, physical protection, relocation, change of identity or measures of disguising identity and ownership, resettlement, integration into a community and a pathway out of the programme once testimony is completed and/or the threat has diminished.

Eligibility for witness protection is in most cases limited to situations where the testimony is essential to successful prosecution of people responsible for serious or organized criminal activity. A credible and a real threat to the witness and/or associated persons must exist for them to enter a witness protection programme.

DESIGN OF A WITNESS PROTECTION PROGRAMME

The following table, prepared for the Canadian Department of Justice⁵⁸⁴ provides a checklist to be considered when establishing a witness protection programme.

NEED	Are there certain types of crime that are being targeted? Can a witness protection programme satisfactorily contribute to the fight against these types of crime? Are there other means to protect the witness?
ORGANIZATION AND OPERATION	
Legal status	Should the programme be created by legislation or by some other means?
Administration	Should the programme be administered: <ul style="list-style-type: none"> - By an existing law enforcement agency? - By a new agency created specifically for this purpose? What training should witness protection personnel receive? Is there a need for a network of contacts in other governmental agencies to help facilitate the protection of witnesses? Can such a network of contacts be established and remain confidential?
Financial resources	What should be the level of funding? Who should provide the necessary financial resources?
Admission	Who should be eligible or ineligible for the programme? What factors should be considered when evaluating a candidate for the programme? How early in the investigation process should witness protection issues be considered? Who should be responsible for assessing candidates for the programme? Who makes the final decision on admission to the programme? Should the final decision be subject to appeal?
Benefits	What should be the extent of the benefits granted under the programme?
Obligations	What should the obligations of the protecting agency and the witness be? Should these obligations be in writing and signed by both parties?
Protection	What forms of protection should be available? What should the duration of the protection be? Should protection be possible for foreign nationals? How can protection be terminated?
Security	Should any aspect of the programme be public knowledge? Should there be penalties for those who compromise the security of a protected witness or the integrity of the programme?

584 Gary Lacko, "The Protection of Witnesses" for the Canadian Department of Justice, International Co-operation group. 2004. http://www.justice.gc.ca/en/ps/inter/protect_witness/WitnessProtection-EN.pdf

ENTRY INTO A WITNESS PROTECTION PROGRAMME

In some cases, resettlement of the witness and victim under a new identity in a new, undisclosed place of residence in the same country or even abroad may be the only viable alternative. Where this is necessary it is best facilitated under the auspices of a formal witness protection programme. Relocation should only be used as a last resort when all other options have been explored, tried and exhausted. Entry into a programme requires, as a minimum:

- Informed consent.
- Safe location.
- Secure transportation and accommodation.
- Follow-up.

The process for entry into a programme involves:

- Threat and risk assessment for each specific case.
- Identifying the source of concern and the actors.
- Investigation of available processes to mitigate risk.
- Development of a protection plan.
- Establishing a single line of communication with those at high risk.

SOME FEATURES OF WITNESS PROTECTION PROGRAMMES

- A secure housing facility.
- Safe and fast communication.
- Safe transportation.
- Security protection and accompaniment services.
- Immunity from criminal prosecution and guarantees not to be subjected to any penalty or forfeiture for any transaction, matter or aspect concerning one's testimony.
- Assistance in obtaining a means of livelihood if a person needs to be relocated.
- Reasonable travelling expenses and subsistence allowance while acting as a witness to the criminal courts.
- Free medical treatment, hospitalization and medicine for any injury or illness incurred or suffered whilst acting as a witness.
- Provision of education from primary to college level for a minor or dependent child of a witness who dies or is permanently incapacitated as a result of their testimony.
- Relocation within the country or to a 3rd country if required.
- In some extreme cases, the provisions include the right of the witness or the victim to a new identity.

Officials operating witness protection programmes need to establish a close working relationship with agencies dealing with⁵⁸⁵:

- Personal identification (passport agency, driver's licence).
- Public housing.
- Social security.
- Prisons (in the case of incarcerated witnesses).
- Rehabilitation of formerly convicted offenders.
- Education.
- Health, dental and psychological care.
- Banks and other financial institutions.

RESPONSIBILITIES OF THE PARTIES

- For the protection authority:
 - Making arrangements to protect the lives of the witness.
 - Relocating participants and issuing new personal documentation.
 - Providing financial support for a finite period of time.
 - Providing initial assistance with job training and finding new employment.
 - Providing counselling and other social services, including appropriate education (for example, in cases involving international relocation or children).
 - Extending protection and benefits to persons accompanying the witness in the programme.
- For the witness:
 - The obligation not to compromise, directly or indirectly, any protection or assistance provided.
 - Complying with the protection authority's instructions regarding the assistance provided.
 - The obligation not to commit any crimes.
 - Fully disclosing information on their past criminal history and on all financial and other legal obligations.
 - The obligation to provide true testimony.
- Complying with restrictions on disclosure of information related to the investigation of the crimes concerned.

The type and number of documents provided to witnesses vary from country to country and may include:

- Passport.
- Identification card.
- Medicare or health insurance card.
- Tax number.

⁵⁸⁵ UNODC, *Witness Protection Manual 2008*.

- Citizenship certificate.
- Driver's licence.
- Birth certificate.
- Trade and professional qualifications.
- Educational qualifications.

WITNESS PROTECTION TIMELINE

The timeline below was prepared to provide a sense of the decision-making process and what happens operationally when a threat to a witness occurs.

THREAT/ RISK	<ul style="list-style-type: none"> - Possible existence of threat/ risk to witness is recognized or reported - Complete <i>pro forma</i> witness details, details of threat - Carry out assessment of threat and risk. This can be done on the spot, but will also probably require a formal internal assessment process by management.
OPTIONS	<ul style="list-style-type: none"> - No action required – identity unknown, appropriate measures have been taken during contact and interview phases to mitigate threat and risk - Self protection measures - Formal protective measures - Entry to witness protection programme
EXISTENCE OF THREAT AND RISK IDENTIFIED	<ul style="list-style-type: none"> - Is witness already at risk? - Is threat immediate? - Does it require immediate action, or - Will risk arise at some foreseeable time or event in the future? - Can witness remain <i>in situ</i> until witness protection programme process is activated?
IMMEDIATE RISK EXISTS	<ul style="list-style-type: none"> - Plans must be made to remove witness from threat until full options can be assessed - Requesting organization must have the capability to do their own extraction - Requesting organization must have their own transitional facility in which to place witness and associated persons until formal process can be implemented - Requesting organization must be prepared to maintain these interim arrangements for long periods, in some instances years, before the witness is accepted into a programme
FUTURE RISK	<ul style="list-style-type: none"> - Prepare timeline of risk and actions to mitigate risk

PARTICIPANT	<ul style="list-style-type: none"> - Agreement to participate - Associated persons identified - Travel documents secured - Commitment to secrecy - Non-contact agreement with relatives, etc.
EXTRACTION	<ul style="list-style-type: none"> - Removal of witness from hostile environment - National or international relocation - Travel arrangements – air, vehicle, train, other - Arrangements with each country the witness will transit through for security, passage through airports, visa arrangements, safe houses if needed - Decision on whether transit will be overt or covert - Interim placement in safe house until formally accepted into programme - Psychological testing, medical & other support mechanisms - Possible further assessment processes/interviews - Preparation of emergency travel documents - Rearrange financial and business affairs
RELOCATION TO PROGRAMME	<ul style="list-style-type: none"> - Placed in a community - New identity - No further contact with family friends or former community - No further contact with requesting organization - All contacts are through the witness protection programme host - Re-education - Vocational training - Financial support - Language training - Access to health, welfare and social security services - Education for children
TESTIMONY	<ul style="list-style-type: none"> - Witness meets obligations to testify
PATHWAY	<ul style="list-style-type: none"> - Assessment mechanism to determine whether level of risk has diminished - Appropriate training to allow total integration into new community (if this has not already occurred) - Competency in self-protection measures

ELIGIBILITY

Because of the serious disruption to the participants' life, the extensive obligations of both participants and operators of the programme, and the expensive nature of witness protection, eligibility for entry into a witness protection programme is often limited to:

- Cases of extreme danger to witness.
- Cases where the evidence cannot be found elsewhere.
- Co-offenders who have negotiated immunity from prosecution in return for testimony.
- Cases of extreme importance and impact on the community.
- Cases where the administration of justice may be significantly advanced by the testimony of co-offenders who themselves have “blood on their hands”. It is rare that States will accept entrants into their programmes who fall in this category.
- Cases involving insider witnesses.
- Rare cases where the individual has provided significant information in the investigation phase that will provide significant assistance in the administration of justice AND the giving of that information has placed the individual at risk.

The type of information required to assess eligibility includes:

- Identification details (name, address, date and place of birth, sex, race, citizenship).
- Significance of the case(s).
- Details of the offences and persons charged or likely to be charged.
- Expected testimony of the witness, evaluation of the testimony, its importance and the witness's credibility.
- Hearing dates.
- Other witnesses.
- Details of the threat and assessment of the actual danger to the witness.
- Members of witness's household, listed by name, date and place of birth, and relationship to the witness.
- Medical report.
- The possible danger the witness and/or family members pose to other persons or property in the relocation area if placed in the programme, with complete explanation.
- Whether or not the need for the witness's testimony outweighs the risk of danger the witness or family members may pose to the public and why?
- What alternatives are there to programme placement? Why won't they work?
- Child custody problems associated with the relocation of the witness or associated persons.
- If the witness is a co-offender, are they going to be prosecuted and what are the details of how those matters will be disposed of?
- Is the witness in prison or on probation or parole?
- Any other information relevant to the application.

DEFINITIONS

Investigators	Includes any individual whose official function is to conduct investigations in support of transitional justice processes. It may include police officers, prosecutors, defence counsel, human rights officers and human rights defenders.
Operational Protective Measures	Operational measures are generally taken at the administrative level by a court, commission of inquiry; investigative office and/or the competent witness protection authority, following an assessed level of risk relating to an identified source of threat.
Procedural Protective Measures	Procedural protection measures are granted by judge(s) or the applicable judicial authority. In most circumstances these measures aim at shielding the identity of a witness from the public during court proceedings.
Victims	A person who has had a crime committed against them. Victims can also be witnesses.
Witnesses	Any person who has relevant and reliable information that relates to a matter under investigation or proceedings in a judicial process. In these guidelines wherever the term witnesses is used it can be taken to include victims.
Safe Houses	Safe and anonymous premises that have been secured for use for a particular witness (and perhaps their family), usually on a temporary basis until a permanent relocation solution can be found.
Refuges	Secure premises operating as facilities for witnesses who are in transit – either on an emergency basis or while they are testifying.
Threat	Relates to the possibility of adverse consequences for a witness or associated person as a result of their assistance to an investigation or their decision to testify in commission or court proceedings. It includes some form of danger to the witness or associated persons.
Risk	Risk on the other hand refers to the likelihood that the threat will occur.
Vulnerability	Refers to special characteristics of victims or witnesses such as their age, gender, the nature of the crimes they were a victim of, or whether they have experienced trauma and other individual circumstances that may make them more vulnerable to adverse circumstances if called to testify.

Hearings	Refers to any type of formal judicial hearing, whether in a criminal court or in a commission of inquiry.
Non-disclosure	In most judicial proceedings there are requirements to disclose information to any person who may be adversely affected by the testimony. Non-disclosure refers to exceptions to these provisions.
Redaction	The blanking out or removal of certain information from documents, testimony or other forms of recording people's testimony.
Witness Protection Programme	A programme specifically designed to provide physical and psychosocial protection to participants in justice processes.
Witness Protection Unit	A unit or team designed to operate a witness protection programme.

READING

- UNODC, *Protection of Witnesses in Criminal Proceedings Involving Organized Crime*.
- Commonwealth Secretariat (Report And Guidelines), *Best Practice Guide For The Protection Of Victim/Witness In The Criminal Justice Process* (The Guide)

CHAPTER TWELVE - SEXUAL AND GENDER-BASED VIOLENCE

INTRODUCTION

Crimes involving sexual violence and exploitation are committed with great frequency around the world, in all societies. Most (but not all) victims of sexual violence are women and children. Rape and other forms of sexual violence are rampant in times of war but occur at a high rate any time there is a breakdown of society or community.

Sexual violence in war has historically been seen as an inevitable part of war and has not been treated as seriously as other war crimes. The purpose of sexual violence in armed conflict - to punish, humiliate or destroy a perceived enemy through the attack on women seen as 'belonging' to (in essence, the property of) the enemy group - has often gone unacknowledged.

Importantly, rape and other forms of sexual violence can be prosecuted not only as war crimes and as grave breaches of the Geneva Conventions, but as torture, crimes against humanity and in some cases, as constituent acts of genocide.

It is only in recent years that sexual violence committed in the context of armed conflict and other situations of mass violence has been recognized as demanding special legal treatment and requiring special investigative skills.

Proving these crimes, however, is often difficult given the reluctance of victims to come forward due to stigmatization or fear of retaliation, the scope of the crimes and the difficult challenge of proving linkages to political or military leaders.

Exposure and public outcry about the use of rape as a weapon of war in the former Yugoslavia and widespread sexual violence during the genocide in Rwanda led the ICTY and ICTR to place charges of sexual violence on a more equal footing with other offences.

The decision by the ICTR in the *Jean-Paul Akayesu* case (the first conviction in an international court for genocide) contributed to the acceptance of the idea that sexual

violence can be prosecuted as a form of genocide when it is demonstrated that it occurs with the intent to physically *or psychologically* destroy a certain group. Acts of genocidal intent were committed solely against *Tutsi* women, the court found, and it noted that measures to prevent births within the group (a prohibited act under the Genocide Convention) could be mental as well as physical in the sense that rape could be so traumatic that it would have the effect of causing a person to refuse subsequently to procreate in the same way that members of a group can be intimidated due to threats or trauma not to procreate.⁵⁸⁶

The effect of this decision is reflected in the adoption of this principle in the ICC Rome Statute, Elements of Crimes, Article 6 (b):

Genocide by causing serious bodily or mental harm to a person or persons (belonging to a particular national, ethnical, racial or religious group, when the behaviour was intended to destroy in whole or in part members of the group and takes place in the conduct of a manifest pattern of similar conduct directed against that group or was conduct that could itself affect such destruction).

The ICC Statute notes that the phrase serious bodily or mental harm “includes (but is not restricted to,) acts of torture, rape, sexual violence, inhuman or degrading treatment”.

Another important precedent set in the Akayesu trial was the finding of the ICTR that “Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact”, including, for example, forced nudity.⁵⁸⁷

It should be noted, however, that Akayesu was not initially charged with rape, and that according to Human Rights Watch and others, “A lack of political will among some high-ranking Tribunal officials as well as faulty investigative methodology by some investigative and prosecution staff at the ICTR accounted for this omission initially”.⁵⁸⁸

In *Prosecutor v. Furundzija* (ICTY) the defendant was found guilty as a co-perpetrator of torture and of aiding and abetting an “outrage upon personal dignity, including rape” for the confinement and repeated rape of a woman by his subordinates. The objective elements of rape were defined in the Furundzija case as:

“Sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis or the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator”.

Torture, frequently used as a method of control and terror by oppressive regimes and armed forces, often involves sexual violence or the threat of sexual violence and the humiliation of victims through sexually related acts. Importantly, rape was also

⁵⁸⁶ See Jose Alvarez, “Lessons from the Akayesu Judgment”, <http://www.nsulaw.nova.edu/student/organizations/ILSAJournal/5-2/Alvarez%205-2.htm>.

⁵⁸⁷ *Akayesu Judgment*, Case No. ICTR-96-4-I.

⁵⁸⁸ Human Rights Watch, “Human Rights Watch Applauds Rwanda Rape Verdict: Sets International Precedent for Punishing Sexual Violence as a War Crime”, Press Release, September 1998.

defined as a form of torture by the court and formed the basis for the conviction of Furundzija on torture. In other words, it is now recognized that sexual violence, depending upon circumstances, can be considered an explicit form of torture with all the legal implications.

Despite the positive implications of the Furundzija case for women's rights, strong protest from human rights and women's organizations resulted when the defence demanded, and was granted, the right to review medical, psychological and rape counselling records of the victim, an order upheld on appeal.⁵⁸⁹ (This incident resulted, however, in the protection of such information in the Rules of Procedure for the ICC, which states that "the Court shall give particular regard to recognising as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor, in particular those related to or involving victims..." (Rule 73, Privileged communications and information).

The decision by the ICTY to convict defendants of rape, torture and enslavement in the *Foča* case (February 2001) was a 'landmark verdict' as it was the first time that an international tribunal had brought charges solely for crimes of sexual violence against women and the first time the ICTY found rape and enslavement as crimes against humanity.⁵⁹⁰

The sexual exploitation and enslavement of women and children often occurs during armed conflict and other situations of mass violence. The motive for these crimes may be political, economic and/or psychological. The trafficking of women and children has become a major problem that requires much more attention. The Statute of the ICC includes sexual slavery as war crime. Trafficking is included in the Rome Statute under the crime against humanity of enslavement.

THE PSYCHOLOGICAL AND PHYSICAL CONSEQUENCES OF SEXUAL VIOLENCE

PSYCHOLOGICAL CONSEQUENCES

Women who have suffered sexual violence are often regarded as helpless victims, their individual strengths unrecognized or disregarded. In the early years of the conflict in the former Yugoslavia, one heard countless references to "the raped women" as if that was their primary identity. Even people who intended to assist women who had been raped have contributed to their stigmatization by focusing solely on their rape experience or by disregarding their desire for privacy or need for services other than rape counselling.

At the same time, the psychological consequences of sexual violence are very real.

589 See Joanna Birenbaum, Dina Bogecko and Elizabeth Bowker, "ICTY's Furundzija Decision Troubling", Human Rights Tribune, April 1999, Vol. 6, No. 2.

590 Human Rights Watch, "Bosnia: Landslide Verdicts for Rape, Torture and Sexual Enslavement, Press Release", February 22, 2001.

Victims often not only suffer the trauma of the rape itself but may suffer exclusion by their communities or family members afterward.

In some cases, a victim of sexual violence may experience long-term feelings of humiliation and despair and may develop Post Traumatic Stress Disorder (PTSD):

PTSD (Post Traumatic Stress Disorder, or PTSD, is a psychiatric disorder that can occur following the experience or witnessing of life-threatening events such as military combat, natural disasters, terrorist incidents, serious accidents, or violent personal assaults like rape. People who suffer from PTSD often relive the experience through nightmares and flashbacks, have difficulty sleeping, and feel detached or estranged, and these symptoms can be severe enough and last long enough to significantly impair the person's daily life.

PTSD is marked by clear biological changes as well as psychological symptoms. PTSD is complicated by the fact that it frequently occurs in conjunction with related disorders such as depression, substance abuse, problems of memory and cognition, and other problems of physical and mental health.⁵⁹¹

Some victims of sexual violence have committed suicide rather than live with the shame and humiliation they experienced.

Note: It is important to remember that people who have suffered traumatic experiences are in most cases people who have shown no psychiatric symptoms prior to the trauma, and should not be made to feel that they are 'pathological' - there is unfortunately a stigma associated with mental illness, seeing psychiatrists, etc. in many societies. The survivor of sexual violence may well need psychological assistance but wants to be seen as a whole human being and does not want to be 'labelled'.

PHYSICAL CONSEQUENCES

A victim of sexual violence or exploitation may become pregnant. In some cases, women were detained by those who raped them, and forced to carry pregnancies to term. A victim of rape in armed conflict may well have experienced gang rape.⁵⁹²

A victim of sexual violence may be seriously injured due to rape or other form of sexual violence.

A victim of sexual violence may be killed after the attack or may die as a result of injuries or disease subsequent to the attack (i.e. HIV AIDS).

⁵⁹¹ National Centre for Post-Traumatic Stress Disorder, <http://www.ncptsd.org/facts/>. Website offers definitions, symptoms, general information and resources.

⁵⁹² Human Rights Watch found that the cases documented by the organization in Kosovo, with few exceptions, involved gang rape.

PROBLEMS AND PROGRESS – THE DEVELOPMENT OF APPROACHES TO SEXUAL VIOLENCE

Attitudes to the investigation and prosecution of offenders for sexual violence in armed conflict have undergone considerable adjustment. In many cases there seemed to be a reluctance to engage in sexual violence investigations. A range of excuses were proffered for these attitudes, *“How can I prosecute a commander when it was an individual soldier? The victims won’t testify; There was no medical examination after the event so how can I prove penetration?”*

In answer, it is useful to remember that courts have accepted the evidence of eye witnesses to prove murder in instances when the victim’s body could not be found and ask the question-- *“Why not accept witness evidence as sufficient in sexual violence prosecutions?”* As noted in the introduction, important legal precedents have been set by the ICTR and the ICTY relating to the treatment of sexual violence under international law. The tribunals have recognized that other evidence, aside from that given by the victim and obtained through medical examination, can be sufficient.

However, outside the tribunals many of the old attitudes persist. As a war crimes investigator you must be mindful to give due attention to these types of violation.

THE INVESTIGATOR’S ROLE IN CASES OF SEXUAL VIOLENCE AND EXPLOITATION

Some general points:

Investigators who have worked with sexual violence and other crimes in their home countries and even highly experienced investigators of international crimes of sexual violence will encounter new challenges given the different cultural mores and practices that exist in other countries.

The investigation of crimes of sexual violence demands a lot from investigators. Investigators must:

- Become aware of their own attitudes so that they don’t interfere with the investigative process;
- Develop excellent interviewing skills;
- Understand the cultural implications of sexual violence in the particular society in which it occurs;
- Demonstrate sensitivity to the psychological trauma that victims have experienced;
- Respond appropriately to the victim if they become distressed in an interview or during the investigative process;
- Become knowledgeable about counselling and other services that may be available to victims/witnesses and how to refer to those services;
- Determine the precise nature of the sexual violence, perceiving the ‘big

picture' but not losing sight of the individual victim or the importance of the individual case;

- Evaluate potential risks to witnesses and respond appropriately; and
- Understand that the investigator has an obligation to ensure that the witness is never left worse off as the result of the investigation. If this seems likely to happen, then the investigative process with that witness must end. There must be a 'do no harm' approach to witnesses/victims.

General recommendations about investigations of sexual violence:⁵⁹³

- Diligent and independent investigations into the incidence and use of rape and other forms of sexual violence must occur in situations of mass violence (crimes of sexual violence must never be treated as "side issues");
- It is key for investigators and others they come into contact with (especially victims/witnesses) to understand that individuals can be convicted not only for committing acts of sexual violence, but for participation in the planning, instigation or ordering of crimes that involved sexual violence. Under the doctrine of command and control, they can be held responsible for failing to prevent or punish acts of sexual violence, committed by those under their authority if they knew or had reason to know that such crimes occurred or if such crimes were foreseeable, even if they did not intend to permit such crimes. Again, only recently has the issue of command responsibility been addressed, and false assumptions (i.e. that command responsibility pertains to military conduct alone) persist. In other words, it is not necessary in all cases to prove who the individual rapist was. It can be more important to prove command responsibility;
- Gender-integrated teams investigating rape and other forms of sexual violence should have competence in investigating rape and in conducting interviews with rape victims;
- Examinations for evidence of rape should be included in autopsies conducted by forensic teams;
- Training in recognizing patterns of trafficking and other forms of sexual slavery should be provided to investigators;
- Whenever possible, interviews of rape victims should be conducted by investigators with training in rape investigations, paying special attention to gender. (However, it should not be assumed that female victims will not speak to male investigators, and vice versa. Male investigators should also be trained in how to conduct an interview with a woman who has experienced sexual violence). The ability of the investigator to make the victim feel comfortable enough to talk about what happened is what matters most;
- It will be important in future cases of widespread sexual violence to consider ways that investigators for international judicial bodies and researchers for human rights groups might work together to reduce the numbers of interviews conducted with the same victims.

⁵⁹³ Adapted in part from the recommendations that appear in Human Rights Watch, *Kosovo: Rape as a Weapon of "Ethnic Cleansing"*, Vol. 12, No. 3 (D) - March 2000.

INITIAL CONTACTS WITH WITNESSES AND VICTIMS

Some precautions about assumptions:

- Don't assume that women have experienced sexual violence;
- Don't assume they haven't – rape can happen to anyone regardless of age, sex and/or physical appearance;
- Don't assume that men have not experienced sexual violence, especially those who have been in detention;
- Don't assume that the interpreter assigned to you is comfortable interviewing victims of sexual violence or has experience doing so;
- Don't assume that the victim of sexual violence will not be willing to share information with a person of the opposite gender.

Example: An experienced investigator told a human rights researcher that he was apprehensive when it became necessary in one case for him to interview a rape victim because no female investigator or prosecutor was available. He wanted the witness to feel comfortable and thought through how he might approach her. He explained to her that since he was a police officer, he had heard many stories about things that had happened to people and could not be shocked or surprised by anything. He encouraged her to tell him whatever she wanted about what had happened to her, and found that she was able to tell him about the rape in detail. He believed that she was able to talk to him because he had let her know that the door was open to discussing difficult topics. He noted that he tried to be professional but not so serious that she couldn't relax and talk about more light-hearted subjects when she felt like it - in other words, she could 'be herself'.

- Don't assume that victims of sexual violence/exploitation do not have knowledge of other types of crimes (don't forget to ask other questions pertinent to the wider investigation).

INTERVIEWING VICTIMS AND WITNESSES OF SEXUAL VIOLENCE

The need for sensitivity on the part of the investigator is not limited to conducting an empathic interview - it applies to the whole cycle from the identification of witnesses to the first contact to the interview to post-interview support to indictment and to post-trial support.

Victims of sexual violence/exploitation have demonstrated incredible courage in coming forward with their stories, voluntarily signing statements and testifying. At times, however, victims have been further exploited by authorities or others who wish to use their suffering to further a political aim. Stories of rape in the former Yugoslavia, for example, sometimes became propaganda tools. Women who had been raped became 'the raped women', as if that was their primary identity. They were sometimes put up on a pedestal as 'war heroes', a fact that interfered with the perception of them as whole human beings. Journalists were astoundingly insensitive at times, barging into refugee camps asking to interview "raped women". Some mental health professionals set up programmes that made it obvious participants had been

raped or assumed that women who had suffered sexual violence were dysfunctional and damaged human beings. After a time, many women ‘went underground’ with their stories and pain, not wishing to experience exploitation or to risk stigmatization. This was unfortunate as it then became more difficult to identify and assist women who were traumatized.

Notwithstanding this, it should not be assumed that victims do not want to tell their story. Each person will feel differently about how they want to proceed. Many victims of sexual violence very much want to talk about what happened and to play a part in bringing perpetrators to justice. Those who choose not to come forward generally also want to see the perpetrators brought to justice but may be fearful of retaliation or prefer to maintain their privacy.

It is important to be supportive of witnesses in a way that allows them to ‘be themselves’ and opens the door to discussion of their concerns and fears. As stated in the witness protection module, the mental and physical well-being of the victim/witness comes first, regardless of how much pressure there is to get a statement and to pursue a case.

PREPARATION FOR INTERVIEWS

- Prior to the interview, the investigator should discuss thoroughly with the interpreter how the interview will be conducted. Together, they should try to anticipate potential issues. They should discuss how they will proceed with the witness should they become distressed, how they will address questions and concerns, what particular issues might arise in the interview, and what kind of information the investigator plans to focus on. Too often, investigators and interpreters have proceeded with interviews assuming that they both understand the process in the same way. It is always important to discuss the upcoming interview, even if both the investigator and interpreter are experienced, but is even more important when one or the other is less experienced. Investigators should be open to learning from interpreters and vice-versa;
- Investigators who are new to the job may assume competence on the part of the interpreters. Often, this is true, but investigators should take the time to learn about the interpreter’s experience and to talk through the process accordingly. Not only is this important for the witness, but for the interpreter, as an interpreter without experience may be psychologically unprepared for what they will hear and may be very troubled by it;
- Even experienced interpreters (and investigators) may be subject to vicarious traumatization and burn-out. Training on the symptoms of burn-out is important for all members of the investigative team as burn-out can negatively affect everyone, including the witness;⁵⁹⁴

⁵⁹⁴ Team members who are ‘burned out’ may become cavalier about risk or overly-concerned about risk; may lose trust in team members; may cease to believe victims’ statements (having reached their psychological limit for hearing about atrocities); may experience insomnia or nightmares; engage in drug or alcohol abuse, etc. The team member who is experiencing burn-out should be offered support and counselling and should not be made to feel as if they have ‘failed’ by not holding up to the pressure. Management needs to be sensitive enough to step in and protect the person from being overused.

- Find out what services (rape crisis centres, women's organizations, human rights groups, etc.) might be available for victims of sexual violence in the area where the victim lives and if appropriate and safe for victims to do so, make contact. These groups may be able to assist persons interviewed by the investigator, may help identify potential witnesses, etc.;
- Ensure that there is an appropriate place available to hold interviews. Interviews should not be conducted in police stations or other intense environments if it can be avoided;
- Consider how to locate the witness six months or a year from the time of the interview and how to maintain contact between the tasking body and the witness;
- Be aware that since criminal investigators may be the last to arrive at the scene, many victims may have been interviewed already. The investigator should try to determine what other interviews have taken place and whether it is appropriate to ask the victim is able to give another statement. If it is not necessary to ask someone to recount traumatic events, there is no point in doing so. Further, the problems created when multiple statements have been taken from one victim must be considered;
- Consider what facts are critical to the case and whether the victim can provide the necessary information. If not, there is no point in asking someone to go through an entire interview. If the person cannot identify the perpetrator by face, name, unit, place of origin, etc., or does not have information that corroborates another testimony, etc. then the investigator may wish to terminate the interview. The investigator should consider whether it is feasible to ask those sorts of questions early on so as to avoid unnecessary stress for the victim;
- Investigators should be prepared to stop the interview if it becomes too painful or traumatic for the victim to continue. It may be possible to return at another time, or it may not be possible, but the needs of the victim must come first. In some cases, it may be possible to amend an indictment later if it is not possible to take a complete statement relating to rape charges.

CONDUCTING INTERVIEWS

- During the interview the investigator should always behave in a professional but relaxed manner. Help the witness feel that they are in competent hands and that you care about what happens to them. Never comment on a witness's appearance in a manner that could be construed as too personal, ask a witness for a date (yes, it has happened) or behave in too casual a manner. A balance must be struck between adopting a very serious tone but also allowing for 'lighter' moments so that tension can be released;
- Always be honest with the victim/witness. Make it clear that it will be necessary to release their name at some point; that it is likely that they will have to face the alleged perpetrator in court, etc. The fact that it may be a long time until trial or that a case may never come to trial must be made clear. The victim/witness must also be told what is possible or not possible in terms

of protection measures. (See Chapter on Approaches to Witnesses/Witness Protection);

- It is important not jump to conclusions about the veracity of a statement; reserve judgment until there is sufficient information to make a determination about the credibility of the witness;
- Take your time. Allow the story to unfold. Help the witness put things in chronological order, but allow the witness to tell in her/his own words what happened first. Come back to those points that need clarification. Avoid asking questions immediately about sexual violence unless the witness opens the topic first;
- The investigator should endeavour to understand how the implications of sexual violence/rape/exploitation in the particular culture in which the witness/victim lives might be affecting the interview process;
- Remember that a victim of sexual violence is a normal human being who has been through a terrible experience. Avoid ‘assigning pathology’ to the victim, but be aware of signs of psychological stress/traumatic stress (refer to materials on Traumatic Stress for further information);
- Realize that there may be expressions of speech witnesses use to indicate rape has occurred or particular topics that hint at rape. For example, a witness may say, “He disrespected me”, “He used me”, “He humiliated me”. Women may refer to being taken away, or taken out of the sight of their children. While assumptions should not be made, the investigator should be aware of indicators, especially culturally specific ones;
- Do not overlook older women as witnesses - they may in some cases be more willing to talk about sexual violence than younger women.
- It is important to remember that rape as a war crime is an act of sexual violence often motivated by rage or the desire to dehumanize the victim rather than by sexual desire.

WITNESS PROTECTION IN CASES INVOLVING SEXUAL VIOLENCE⁵⁹⁵

The investigator should always ask about concerns the victim/witness has about her/his own security. It is the responsibility of the investigator to gauge the level of risk to the witness. The investigator should trust the witness’s own assessment of safety concerns. At the same time, the investigator must always be straightforward with the witness about what is or is not possible or realistic.

Never make promises that you cannot keep or that may not be possible for others to keep.

⁵⁹⁵ Refer to Module, Approaches to Witnesses/Witness Protection.

**ENSURING THAT VICTIMS/WITNESSES OF SEXUAL VIOLENCE
RECEIVE NEEDED ASSISTANCE DURING THE INVESTIGATIVE PHASE**

- *Ask* what assistance the witness/victim might need; don't assume;
- Find out what medical and psychological services may be available to assist witnesses/victims in the community where they live (important for the pre- and post-trial periods) and at the court during the trial phase;
- Encourage the provision of services requested by witnesses/victims when possible and appropriate, i.e. health/mental health services.

Reading

- Bedont, Barbara and Martinez, Katherine Hall, “Ending Impunity for Gender Crimes under the International Criminal Court”, *The Brown Journal of World Affairs*, Vol. VI, Issue 1: 65-85.
- Human Rights Watch, “Bosnia: Landmark Verdicts for Rape, Torture and Sexual Enslavement”, Press Release, 22 February 2001.
- Human Rights Watch, *Kosovo: Rape as a Weapon of “Ethnic Cleansing”*, Vol. 12, No. 3 (D) - March 2000.
- Institute for International Criminal Investigations, “Articles and Rules of Procedure for the ICTY, ICTR, ICC and Special Court for Sierra Leone Relevant to the Protection of and Assistance to Victims and Witnesses; Sexual Violence/ Sexual Exploitation; Compensation to Victims and Disclosure, Communication and Notification” (compiled by Diane Paul).
- United Nations Commission of Experts, *Annex IX. A. Sexual assault investigation, Part I, Report of Phase I, Section II., Methodology*. United Nations, S/1994/674/Add.2 (Vol. V), 28 December 1994.
- Walsh, Connie, *Witness Protection, Gender and the ICTR*, Report of investigation in Rwanda, June-July 1997 for the Centre for Constitutional Rights (CCR), International Centre for Human Rights and Democratic Development (CHRDD), International Women’s Law Clinic (IWLC) and MADRE. See also, *Letter to Louise Arbour, Chief Prosecutor of the ICTY and ICTR*, NGO Coalition on Women’s Human Rights in Conflict Situations, October 1997. These documents set out a very useful description of the needs of witnesses for assistance and protection during the investigative process, etc. (through specific recommendations) as well as clarification of concepts such as rape as torture, command responsibility, and enslavement.⁵⁹⁶

Recommended Reading

- *Human Rights Watch, Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (New York: Human Rights Watch, 1996).
- Lt. Col Dave Grossman, “Killing at Sexual Range: The Primal Aggression, the Release and the Orgasmic Discharge”, Chapter 7 in *On Killing* (Boston: Little, Brown and Company), 1996, pgs. 134-137. See also page 77, pages 210-211, and Chapter Four, “A Case Study in Atrocity”, pgs. 217-221.

⁵⁹⁶ Note: This is also required reading for the Witness Management and Witness Protection Module.