

CRIMES AGAINST HUMANITY AND WAR CRIMES IN SLOVAKIA?

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ABSTRACT

The negative impact of the COVID-19 pandemic on global society both during the crisis and in its aftermath was tremendous. Governments chose various methods to cope with the deadly virus. While some were highly effective, others were not. In Slovakia, the government conducted mass testing of its population. The mass testing was free of charge performed by the government. The testing, using antigen tests, was conducted four times during weekends in buildings housing hospitals, schools, or administrative offices. Although testing was not explicitly obligatory, certain restrictions were applied to those who did not undergo testing. For instance, it prevented free movement of the untested; they were banned from visiting places that the government deemed not necessary or not of fundamental need, such as workplaces, libraries, banks, car service stations, opticians, dry cleaners, post offices, or the gas station. However, groceries, drug stores, or shops selling essential household products could be visited without a certificate of having tested negative for COVID-19.

In April 2021, a group of Slovak citizens, calling themselves 'Order of the Law Fellowship', filed a complaint with the International Criminal Court stating that the mentioned mass testing conducted by the government, was allegedly part of an involuntary experiment done on the population of Slovakia. The group claimed that the government must be held responsible for allegedly committing crimes against humanity and war crimes, stipulated in the Rome Statute as core international crimes. This article aims to analyse their claims regarding the charges against the government, keeping in mind the character and severity of the core international crimes.

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1. Introduction

The COVID-19 pandemic led to many severe casualties worldwide. From causing the death of almost seven million people to a million others suffering from several protracted and long-lasting health issues, it became an invisible enemy that countries fought using different methods to save the lives of their citizens. Some were effective, others were less so. The Slovak Republic, like almost all European countries, besides introducing restrictions, introduced a novel scheme of mass testing its population. The mass testing was free of charge performed by the government. The testing was conducted four times during weekends in buildings housing hospitals, schools, or administrative offices. Antigen test was the type of testing conducted. Although testing was not explicitly obligatory, certain restrictions were applied to those who did not undergo testing. For instance, it prevented free movement of the untested; they were banned from visiting places that the government deemed not necessary or not of fundamental need, such as workplaces, libraries, banks, car service stations, opticians, dry cleaners, post offices, or the gas station. However, groceries, drug stores, or shops selling essential household products could be visited without a certificate of having tested negative for COVID-19.

The anniversary of the Velvet Revolution is regularly an occasion for protests and demonstrations for the dissatisfied population in Slovakia. This was the case during the pandemic in 2020 as well, when thousands of protesters gathered in main squares and in front of government buildings. Their frustration was regarding the COVID-19 restrictions imposed by the government. People raised slogans for reducing the limitations on freedom of movement, freedom of association, as well as for stopping the mass testing. However, it is worth mentioning, that before the protest began, news about the organisational activities of the opposition to gather these people had already spread.³

In April 2021, a group of Slovak persons, calling themselves 'Order of the Law Fellowship', represented by three prominent Slovak lawyers, filed a complaint with the International Criminal Court claiming that the mass testing conducted by the government was allegedly part of an involuntary experiment performed on the population of Slovakia. Their claim rested on several arguments that are analysed below. Two main claims pointed out alleged perpetration of crimes against humanity and war crimes by the Slovak Government. This article therefore aims to identify the misunderstandings of the complainants considering the basis of

international criminal law. To elaborate it, the first section deals with laws applicable by the International Criminal Court (hereinafter ICC or the Court). The Rome Statute of the International Criminal Court (hereinafter Rome Statute) regulates this aspect of the ICC functioning. The second section focuses on crimes against humanity and their alleged violation by the acts of the Slovak Government. In the third section, war crimes and their alleged perpetration by the Slovak Government are analysed. The conclusion summarises the most important findings in relation to the allegations that crimes have been committed under international law in Slovakia.

2. Law applicable by the International Criminal Court

Art. 21 of the Rome Statute precisely determines the law that the ICC shall apply. First, it is to be emphasised that any interpretation and application of a law must be consistent with internationally recognised human rights and without any discrimination.⁴ Only within this area can the principal legal framework for the functioning of the ICC be applied. Nevertheless, in the Rome Statute itself, Elements of Crimes and Rules of Procedure and Evidence are determined as primary sources of law applicable by the Court.⁵ It means that the ICC is expressly instructed to follow first this troika of legal norms. Only where appropriate, applicable treaties and principles and rules of international law can be applied as the second option. One may ask whether the Nuremberg Code might be found somewhere in these options of law application by the ICC as it was submitted by the members of the 'Order of the Law Fellowship'. In fact, they began their complaint by referring to the Nuremberg Code and related international treaties and later linked it with the Rome Statute.

The authors of the complaint claim that mass testing falls under the category of human experimentation, for which conditions have been stipulated in the ten points of the Nuremberg Code and later incorporated in the binding document of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: the Convention on Human Rights and Biomedicine, also called the Oviedo Convention.⁶ Later, all the arguments of an alleged violation of the Rome Statute, explicitly Art. 7 para. 1 sec. f) and h) and Art. 8 para. 2 sec. a (II), a (III), and b (XXI), rest on this concept of mass testing as a human experimentation, although such a term is not included in the Rome Statute, establishing the International Criminal Court as such.

However, an important question arises in this context: What does constitute human experimentation? Could it be incorporated into another definition of a crime included in the Rome Statute? Unfortunately, no exact definition for this is mentioned in the Oviedo Convention either. Additionally, in seeking for a

4 | Compare Art. 21 para. 3 of the Rome Statute.

5 | Compare Art. 21 para. 1 of the Rome Statute.

6 | Complaint of the Order of the Law Fellowship, 2021, paras. 2.2–2.5.

definition of such a crime in any legally binding document, one needs to consider the Geneva Conventions stipulating prohibition of human experiments. The Third Geneva Convention in its Art. 13,⁷ the Fourth Geneva Convention in its Art. 32,⁸ the Additional Protocol I in its Art. 75,⁹ or the Additional Protocol II in its Art. 4¹⁰ clearly mention the prohibition of mutilation and medical, scientific, or biological experiments; however none of them define the concept of experimentation as such. It is the same case with the Rome Statute and its wording.

Since the issue under discussion is related to the pandemic situation, it is necessary to mention another legally binding treaty, particularly Art. 12 of the International Covenant of Economic, Social and Cultural Rights,¹¹ which requires countries to prevent, treat, and control epidemic, endemic, occupational, and other diseases to achieve the full realisation of the highest attainable standards of physical and mental health. A pandemic situation therefore demands even stronger promotion of medical research and health education as well as fostering the recognition of factors that favour positive health results. Yet, this definitely has restrictions: a certain space is needed to apply innovative methods in situations of emergency, such as the pandemic.¹²

First, one must ask, What was the reason for setting up the mass testing including such strict rules? The answer is obvious: the daily news informed the public of the situation in the hospitals, where the medical staff was under extreme pressure from the number of severely sick COVID-19 patients. The percentage of

7 | Article 13 of the Third Geneva Convention relative to the Treatment of Prisoners of War reads as follows: 'In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest ...'

8 | Art. 32 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in time of War reads as follows: 'This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.'

9 | Art. 75 sec. 2 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, Protocol I, reads as follows: 'The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: a) violence to the life, health, or physical or mental well-being of persons, in particular: i) murder; ii) torture of all kinds, whether physical or mental; iii) corporal punishment; and iv) mutilation ...'

10 | Art. 4 sec. 2 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflict, Protocol II, reads as follows: 'Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever: a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment ...'

11 | Art. 12. sec. 2 of the International Covenant of Economic, Social and Cultural Rights, reads as follows: 'The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:... (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases...'

12 | General Comment of the Committee on Economic, Social and Cultural Rights No. 14, The Right to the Highest Attainable Standard of Health, 2000.

the sick population was overburdening the healthcare systems of many countries, and Slovakia was no exception. The government was facing a challenge they had never encountered before. Measures had to be taken to stop the spread of the virus by detecting the infected people before the infection spread to public spaces. The measures had to be quick and efficient. According to the authors, the pandemic led to many tardy as well as hasty decisions. On the one hand, international organisations, such as the World Health Organization or the European Union, were tardy and failed to provide quick measures when the situation demanded it. On the other hand, countries were hasty in taking decisions without a proper estimation of whether the measures would be effective.

A general rule for any medical intervention is that it must be carried out only with the concerned person's free and informed consent. The claimant argues that this consent was missing during the first rounds of testing. However, it must be mentioned that the citizens of Slovakia went to the testing centres and got themselves tested voluntarily, with no public body exercising any coercive measures. Additionally, in restricting the movement of those who did not get tested, the government had to consider the aim of the tests as well as make certain exceptions. The aim was to stop the spread of the virus and exceptions were provided for those who were medically disabled and had a certificate from their doctor (e.g. oncological patients, autists, or people who had issues related to their nose).¹³

3. Crimes against humanity

When moving to establishing the treaty of the ICC, the complaint argued that mass testing was in fact a violation of Rome Statute Art. 7 para. 1 secs. f) and h). Art. 7 is devoted to the statutory elements of the crime of torture, representing the commission of explicit criminal and individual acts in a widespread and systematic attack against a civilian population. Therefore, for a certain action to fall under the scope of crimes against humanity, it has to fulfil some statutory elements: 1) the act itself has to be part of an attack, which is a course of conduct including perpetration of acts of violence, not just accidental violence; 2) the object of the attack has to be the civilian population; 3) the attack has to be widespread or systematic, which implies that an applied policy underlies the act; 4) a causal nexus must be established between the act and attack, which would lead to the conclusion that the offender is aware of the link, although it is not necessary for the offender to know all the specificities of the attack; and 5) the act itself has to be intentional.¹⁴

13 | Zverejnili informácie k plošnému testovaniu. Presné pokyny, výnimky a postup (+ zoznam opatrení), eng. They have published information on extensive testing. Exact instructions, exceptions and procedure (+ list of measures) [Online]. Available at: <https://www.tyzden.sk/politika/68374/zverejnili-detaily-plosneho-testovania-presne-pokyny-vynimky-a-postup--zoznam-opatreni/> (Accessed: 22 July 2023).

14 | Bartkó and Sántha, 2022, pp. 307–308.

In the complaint, it was argued that mass testing should be considered an act of torture. The right to health is closely related to and dependent on the realisation of other human rights, such as prohibition of involuntary human experimentation and prohibition of torture. The prohibition itself is included in international humanitarian law as well as international human rights law. Many binding international documents stipulate the prohibition of torture.¹⁵ Prohibition has undoubtedly evolved into a *jus cogens* norm, which enjoys a special high position in the international hierarchy of norms.¹⁶ Thus, the international society demands the most profound protection of the values of human dignity and wellbeing of an individual, by prohibiting torture. The jurisprudence has in the matter evolved significantly. The development in human rights has proven that the definition of torture accepted before international tribunals after the World War II has over time changed in a way, that it tends to be more broad and inclusive. Mental pain, such as trauma from losing a family member or being threatened, became sufficient grounds to satisfy the mandatory aspects of the crime of torture. However, the practice of states sadly does not follow the trends of broadening the framework of protection.¹⁷ The complaint argued that the act of testing breached this peremptory norm, which is defined in the Rome Statute in its Art. 7. sec. 2 e) in the following manner:

'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

The definition stipulates those elements that the ICC considers as the preconditions for the fulfilment of the factual essence of the crime of torture. The act have to be done intentionally and during the offender's control over the victim. The act itself is mentioned as an act of causing severe pain or suffering, and, as explicitly stated in the articles, that the term includes physical as well as mental attacks. The Rome Statute is generally vague regarding the specific acts and methods of torture. The pain as well as suffering must be cruel, but the article does not exactly distinguish the intensity of pain from other forms of ill-treatment. However, the most striking fact is the absence of a reference to the purpose and goal of such an action.¹⁸ The Preparatory Commission for the ICC in connection with torture also explicitly confirmed that the ICC does not require proof of a specific purpose for the purposes of fulfilling the concept of torture. Although the Preparatory Commission based its definition on the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Convention against Torture, by omitting the purpose, it reflected the international customary law with regard to international humanitarian law.¹⁹

15 | Derby, 1999, p. 705.

16 | Case of *Prosecutor v Furundžija* (ICTY No. IT-95-17/1-T), Judgment. 10 December 1998. para. 152.

17 | Schabas, 2005-2006, p. 363.

18 | See Dörmann, 2003.

19 | Report of the Preparatory Commission for the International Criminal Court on the finalised draft text of the Elements of Crimes. Art. 7(1)(f), 2000, p. 12.

The first core element when dealing with possible situations of torture is the act itself, which has to be violent and inflict severe pain or suffering, physical or mental. However, in relation to the COVID-19 testing, no criminal complaints were filed by individuals; nor did the prosecutor file any claims. Further, no ombudsman nor any non-governmental human rights organisation reported about any alleged ill-treatment. The act of testing for detecting the virus infection was conducted similarly in many countries and nowhere was it observed as causing severe physical or mental pain.²⁰

In relation to the nature of the act, the subjective element of the crime of torture has to be analysed as well. In every case, the perpetrator has to be aware of the criminal act that is perpetrated on the victim. In the pertinent case, it is cumbersome to apply this factor, since the act of testing was on the one hand part of an intentional measure, and on the other its intent was not to inflict suffering or pain on the alleged victims but to prevent the possibility of future suffering and pain resulting from the spread of the virus. In this sense, one cannot conclude that the situation of mass testing was aimed to intentionally cause pain.

Furthermore, when analysing cases of torture, victims are always vulnerable. There are several cases connected to people in police custody, prisons, medical institutions, or in similar situations, where they are in a vulnerable position with no possibilities to escape the authority.²¹ Although many known cases connected to indirect mental suffering caused by different situations (e.g. forced disappearance of a family member) can be cited,²² the claim at hand is not mentioning indirect mental suffering as a form of torture during the mass testing. On this basis, one cannot conclude testing was conducted on people in a vulnerable position from which they had no option to escape.

The complaint also argued that the mass testing should be considered as persecution of the untested population against the tested one. According to the Elements of Crimes, six obligatory parts constitute an act of persecution. Persecution means deprivation of the fundamental rights of the targeted persons owing to the identity of a group with common political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law.²³ Additionally, the conduct must be perpetrated as part of a widespread or systematic attack against civilians. The text of the definition sets the requirement of discrimination, nevertheless it raises questions whether the discriminatory nature has to be applied to the attack itself or it constitutes an additional element of the crime.²⁴

20 | See Joined Greek Case: *Denmark v Greece* (ECHR Application No. 3321/67), *Norway v Greece* (ECHR Application No. 3322/67), *Sweden v Greece* (ECHR Application No. 3323/67), *Netherlands v Greece* (ECHR Application No. 3344/67), Report of the Sub-Commission, 5 November 1969.

21 | Numerous cases connected to torture when dealing with refugees and the principle of non-refoulement exist. However, in the present case, it is not connected to the issue at hand.

22 | *Kurt v Turkey* (ECHR Application No. 24276/94). Judgment, 25 May 1998.

23 | Report of the Preparatory Commission for the International Criminal Court on the finalised draft text of the Elements of Crimes, Art. 7(1)(f), 2000, p. 15.

24 | Chesterman, 2000, p. 326.

The list of reasons for persecution is non-exhaustive. The Rome Statute left room for customary international law to finalise the grounds of the prohibited acts, when it included 'other grounds that are universally recognised as impermissible under international law'. The relevant situation can therefore, at the first glance, reach for this justification under the term 'other grounds' as a reason for the acts. Although, the mentioned grounds can be interpreted rather broadly, it is more than questionable whether the grounds based on testing would suffice for the requirement of the elements of the crime.²⁵

One of the obligatory parts of the crime is the causal link between the act and the introduced policy of the authority. Nonetheless, the creators knew that the notion of persecution is a vague term itself, with the potential to far outweigh the desired focus on the criminal aspect of the time.²⁶ Thus, the requirement of the causal link was established to emphasise the criminal element of the crime of persecution. Hence, the crime must be committed in connection with any enumerated act in Art. 7 or in connection with any other crime declared as prohibited in Art. 5 of the Rome Statute.²⁷ The complaint explicitly mentions the nexus in this relation to the crime of torture. Yet, based on the analysis above, the statutory aspects of the crime of torture were not satisfied.

Seemingly, some of the aspects of the article related to the persecution are in the case of mass testing fulfilled. Nevertheless, it would be far-fetched to consider all differentiation as constituting grounds for discrimination, not to mention establishing the crime of persecution. For instance, during the pandemic, many countries established rules for crossing their borders, which enhanced the necessity to provide either proof of a negative test or a vaccination certificate. Similarly, free movement even within countries was regularly restricted; only those who tested negative or were vaccinated could travel. The reason for this, the protection of public health, is based on the government's aim to stop the spread of the virus. All these cases could be therefore (mis)understood as the persecution of the non-tested or non-vaccinated by those tested and vaccinated, respectively. Overall, the health measures established on the right to life, prevailed over freedom of movement.

The ICC should prosecute crimes of most serious concern to the international community committed on grounds of language, colour, social origin, property, birth, as well as mental or physical disability, economic or age-related reasons of discrimination if they otherwise amount to crimes of persecution. The differential treatment of people, being possibly subjects spreading a virus in an emergency situation such as the pandemic, can hardly qualify as a crime of persecution of the untested population.²⁸

Therefore, when analysing the case of mass testing and the mentioned elements of the crimes against humanity, we come across several issues. As indicated in the beginning of this section, the crimes against humanity have five

25 | Boot and Hall, 1999, p. 150.

26 | Robinson, 1999, p. 54.

27 | Witschel and Ruckert, 2001, p. 95.

28 | See Chella, 2004, p. 159; Boot, 2002, p. 521.

elements which must be fulfilled to constitute a crime. The first element is the course of a conduct including the perpetration of acts of violence. In this case the complaint is based on acts allegedly being acts of torture and allegedly being acts of persecution. The analysis proves that the obligatory aspects of the crime of torture were not satisfied. Further, when examining the notion of persecution, the view of the authors' is that neither the act of persecution was sufficiently satisfied in the situation of mass testing. Although all the other elements of the crime against humanity are satisfied (civilian population, widespread and systematic measure, causal nexus, and intention) in the relevant situation, the first and foremost element is lacking. Therefore, in the present case of mass testing, there is no possibility to speak about action which constitute crimes against humanity.

4. War Crimes

On reading the complaint regarding the alleged violation of the Nuremberg Code by the Government of the Slovak Republic in conducting mass testing of its population, one might be surprised at calling it a crime against humanity and as persecution, more so when it is called a war crime. This section aims to analyse this aspect of the complaint filed.

War crime as a concept has been known since time immemorial. The first known records of laws and customs governing warfare can be traced to ancient times.²⁹ Over time, a set of standards was developed and specified through national codes,³⁰ until finally, thanks to one person in particular (Henri Dunant), it has been standardised at the international level.³¹ Since then, international humanitarian law has developed gradually, also called 'international law of armed conflicts', which is fundamental to the concept of war crimes, since the *sine qua non* of the definition of a war crime is the existence of an armed conflict and a connection with it. In relation to the present complaint, it is important to understand this concept of war crime interlinked with armed conflicts.

By the end of the 19th century, and especially at the beginning of the 20th century, international treaties were adopted that regulated the means and methods of conducting wars were adopted. Therefore, when preparing the Charter of the Nuremberg Tribunal after World War II, there were no concerns about this tribunal conflicting with the principle of *nullum crimen sine lege*, and Art. 6 letter b) of the Nuremberg Charter was adopted without controversies. Coming back to the complaint filed with the ICC, it is remarkable that ill-treatment mentioned in the Nuremberg Charter could be considered closest to the alleged perpetration

29 | Cryer et al., 2010, p. 267.

30 | E.g. Lieber code.

31 | Regarding the role of Henri Dunant and his experience with the suffering of soldiers after the Solferino battle in 1859, see e.g. Ondřej et al., 2010, pp. 96 et subq.

submitted by the Order of the Law Fellowship.³² In the Nuremberg judgment, the International Military Tribunal stated that war crimes resulting from violation of the so-called Hague Law, that is, from the adjustment of means and methods of warfare, specifically from Arts. 46, 50, 52, and 56 of the Hague Convention from 1907 and arts. 2, 3, 4, 46, and 51 of the Geneva Convention of 1929, are a criminal offense.³³

Despite this clearly defined concept of war crimes, it was problematic for states to use the term 'war crimes' as per the Geneva Conventions of 1949, which regulates the protection of victims of war, the so-called Geneva law.³⁴ Instead of the concept of war crimes, the concept of grave breaches of the Geneva Conventions was introduced, and only in 1977 in the Additional Protocol I to the Geneva Conventions was an explicit provision adopted on the basis of which grave breaches are considered war crimes.³⁵

The concept of war crime was understood differently from the point of view of the development of the doctrine of international law.³⁶ On the one hand, the existence of armed conflict has always been an inherent element of war crimes. On the other hand, the other features depend on whether the term war crime meant only a grave breach of the Geneva Conventions of 1949 or any violation of international humanitarian law. Nevertheless, the second understanding did not find support in the acts of states, and currently, only specified serious violations of international humanitarian law are considered war crimes.³⁷ These undoubtedly include grave breaches of the Geneva Conventions, the estimation of which is concluded in each of the Geneva Conventions of 1949. In every one of these conventions, grave breaches include intentional killing, torture or inhuman treatment, and intentional infliction of great suffering or serious injury.

The development of concept of war crimes after the Nuremberg Charter and judgment was reflected in the ICTY Statute, namely, the fact that a split appeared in international humanitarian law emphasising the difference between customary international humanitarian law and international humanitarian treaty law.³⁸

32 | According to Art. 6 letter b) of the Nuremberg Charter, the following violations of laws or customs of war are considered war crimes. Such violations shall include, but are not limited to, murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder, or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

33 | International Criminal Tribunal, *United States of America, Republic of France, United Kingdom of Great Britain and Northern Ireland and Union of Soviet Socialist Republics v. Göring et al.*, 1 October 1946. Judgment available online at: <https://www.legal-tools.org/doc/f21343/pdf/> (Accessed: 19 July 2023), hereinafter Nuremberg Judgment, p. 253.

34 | The Nuremberg Charter was based on the so-called Hague Law, which regulates methods and means of warfare, and the Geneva Conventions, which regulate the so-called Geneva law, i.e., protection of victims of war. See also Schabas, 2011, p. 123.

35 | Art. 85 sec. 5 of the Additional Protocol I of 1977.

36 | See also Solis, 2010, pp. 301 et seq.

37 | Cassese, 2008, pp. 84–85.

38 | This distinction, more strictly than in other areas of international law, was sought to be diminished by the Study of the International Committee of the Red Cross concerning customary international humanitarian law, which focused on national codes and activities

The Statute of this tribunal regulates war crimes in its arts. 2 and 3, distinguishing between treaty and customary international humanitarian law. Art. 2 of the ICTY Statute is based on grave breaches of the Geneva Conventions of 1949 and conducts investigation and prosecution of wilful killing, torture, or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war or a civilian to serve in the forces of a hostile power, wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement of a civilian, taking civilians as hostages for the ICTY's jurisdiction *ratione materiae*. Art. 3 of the ICTY Statute adds 'violations of the laws and customs of war' to these crimes, that is, customary international humanitarian law.

In connection with the regulation of war crimes, it is important to state that international humanitarian law applies for all armed conflicts regardless of whether it is international, that is, occurring between two or more states, or non-international, that is, occurring on the territory of one state. However, this division of conflicts is important, because a different set of norms of international humanitarian law apply for international conflicts and another set to non-international. Moreover, real situations are not so easily defined, and determining the dividing line between international and non-international conflicts can be a complicated task.³⁹ Due to the rich history of international conflicts, the legal norms regulating these conflicts are much more sophisticated and more detailed than the norms regulating non-international conflicts. Until recently, non-international armed conflicts were regulated by national law, and international law began to deal with them only after World War II.⁴⁰

Moreover, it is important to point out that no contractual definition of an armed conflict is found. However, according to the generally accepted definition of an armed conflict, which was adopted in the ICTY decision,⁴¹ an armed conflict is said to have occurred when, first, armed violence was used and second, its time aspect. In addition to the long-term perspective, other circumstances must also be considered when involving the armed forces of several states. If two states are common parties to a conflict, the opposite party of which is an armed opposition group to the state or states, it is a non-international armed conflict. However, if it

of armed forces of individual states and resulted in a list of principles and norms that, according to the study, already have a customary character. For further information see: International Committee of the Red Cross: Study on customary international humanitarian law: all language versions of the summary article and list of rules [Online]. Available at: <https://www.icrc.org/en/doc/resources/documents/misc/customary-law-translations.htm> (Accessed: 19 July 2023).

39 | Dinstein, 2010, p. 26.

40 | The situation during the Nuremberg process was specific since it was clearly determined that the prosecution of the top perpetrators of war crimes during the World War concerned an international conflict, i.e., a conflict among states.

41 | International Criminal Tribunal for Ex-Yugoslavia, *Prosecutor v Tadić*, IT-94-1, Decision of the Appeals Chamber on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, para. 70.

were a state that is a party to Additional Protocol I, and it is a national liberation movement, it would be an international armed conflict, and this Protocol and the Geneva Conventions of 1949 would apply.

The qualification of non-international armed conflicts and the determination of the legal norms applicable during their duration are even more complicated. The Geneva Conventions of 1949 deal with non-international armed conflicts in only one article, common Art. 3 of the Geneva Conventions from 1949 according to which, each of the parties to the conflict shall at least treat persons *hors de combat* humanely and non-discriminatorily. This positively determined obligation is concretised in a negative way. In relation to these persons, the common Art. 3 of the Geneva Conventions does not list specific measures, but prohibited actions, namely, (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment, and (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees that are recognised as indispensable by civilised peoples.

Since the Geneva Conventions of 1949 apply only during international armed conflicts, the very concept of grave breaches of the Geneva Conventions would not be possible to establish in non-international armed conflicts. This was also the initial position within the case-law of the ICTY.⁴² However, a few years later, the Appeals Chamber of the same judicial body decided that to maintain a legal distinction between the two legal regimes and their legal consequences in relation to similar acts because of differences in the nature of the conflict would ignore the very purpose of the Geneva Conventions.⁴³ Theodor Meron, ICTY president at the time, added that there was no moral justification and indeed no compelling legal case for treating perpetrators of horrors in domestic conflicts more leniently than those who committed those horrors during international armed conflicts.⁴⁴

International humanitarian law does not specify who determines whether it is a non-international armed conflict. This is one of the peculiarities of international law; it lacks a central decision-making body. However, in its decision, the ICTY states that the intensity of the conflict and its organisation are qualifying prerequisites that help to determine whether common Art. 3 Geneva Conventions is applicable.⁴⁵ The common Art. 3 of the 1949 Geneva Conventions is thus applied in the event of a conflict involving organised elements on the one hand from the state and on the other hand from anti-government warring groups or between warring groups, and it is not a matter of short-term and isolated acts of violence.

According to the wording of Art. 1 of Additional Protocol II, this protocol develops and complements common Art. 3 Geneva Conventions. However, this Protocol

42 | *Ibid.*, para. 84.

43 | International Criminal Tribunal for Ex-Yugoslavia, *Prosecutor v Delačić et al.*, IT-96-21-A, judgment, Appeals Chamber, 20 February 2001, para. 172.

44 | Compare Meron, 1995, p. 561.

45 | International Criminal Tribunal for Ex-Yugoslavia, *Prosecutor v Tadić*, IT-94-1-T, judgment, Chamber, 7 May 1997, para. 562.

applies only to those armed conflicts that occur between armed forces and dissident armed forces, not between different armed groups. Another limitation is the control of a part of the state's territory, which allows armed groups to conduct sustained and coordinated military operations. Common Art. 3 of the Geneva Conventions also requires organisation but does not establish the necessity of control over the territory.⁴⁶ However, the positive aspect of Additional Protocol II is the explicit exclusion of its application vis-à-vis internal disturbances and tensions, such as rebellions, isolated and sporadic acts of violence, and other acts of a similar nature, which are not considered armed conflicts.⁴⁷

It is submitted that a war crime is said to be committed only if it involves an armed conflict, that is, when armed violence takes place for a longer period, a situation that certainly did not occur during mass testing. This qualifying assumption of the connection between the criminal proceedings and the armed conflict was decisively interpreted by the ICTY in the *Kunarać* case, which, among other things, explained that this connection is not related to the specific place of the actual fighting but to the territory under the control of the parties to the conflict.⁴⁸ The ICTY also pointed out that an armed conflict need not have been the cause of the commission of the act itself, but the existence of an armed conflict must at least play a substantial role in the perpetrator's ability to commit the crime, his decision to commit it, the way by which it was committed, or the purpose for which it was committed. Therefore, if it is possible to prove that the perpetrator acted in furtherance of or under the guise of the armed conflict, and it would be sufficient to conclude that his actions were closely connected with the armed conflict.⁴⁹

Art. 8 of the Rome Statute that has also been referred to in the analysed complaint is based on the experience with the above-mentioned decisions of the ICTY. Despite its complexity (it is the longest Art. of the Rome Statute), it did not connect and bridge the division of war crimes based on whether they were committed during an international or non-international armed conflict and on whether they were governed by international customary or international treaty law. Art. 8 of the Rome Statute thus divides prosecution of war crimes into four categories: the first category lists grave breaches of the Geneva Conventions of 1949, the second group consists of other serious violations of laws and customs applicable during international armed conflict, the third group regulates serious violations of common Art. 3 of the Geneva Conventions of 1949, and the fourth category lists other serious violations of laws and customs applicable in non-international armed conflicts. In relation to war crimes and the Rome Statute, it is necessary to recognise that the Rome Statute, as the first international treaty, has established the applicability of the concept of war crimes even during a non-international armed conflict. However, the existence of an armed

46 | In relation to the issue of control, the International Court of Justice applied the so-called effective control concept (see e.g. his decision in the Case of Military and Paramilitary Activities in and against Nicaragua), the International Criminal Tribunal for the Ex-Yugoslavia, so-called overall control (see e.g. his decision in the Tadić case).

47 | Compare Art. 1 of Additional Protocol II.

48 | International Criminal Tribunal for Ex-Yugoslavia, *Prosecutor v Kunarać et al.*, IT-96-23/1-A, judgment, Appeals Chamber, 12 June 2002, paras. 57–59.

49 | *Ibid.*

conflict is inevitable to establish that a war crime has been allegedly committed. This was the biggest surprise on reading the complaint: the complainants have submitted that breaches of the Nuremberg Code shall be also considered as war crimes at least but not limited to Art. 8 para. 2 sec. a(II), a(III) b(XXI) of the Rome Statute,⁵⁰ that is, they have selected for their complaint war crimes that might be committed only during an international armed conflict without considering at all whether elements for an international armed conflict have been fulfilled.

Due to the fundamental principle of criminal law, *nullum crimen sine lege*, it was considered necessary during *travaux préparatoires* to adopt Elements of Crimes. Art. 9 of the Rome Statute stipulates that the Elements of Crimes, which must be in accordance with the Statute, assist the ICC in the interpretation and application of arts. 6, 7, and 8 and 8 *bis* of the Statute. In September 2002, a two-third majority of the members of the Assembly of State Parties adopted the Elements of Crimes, and although they are not legally binding for judges, the State Parties included them in the applicable law in the Rome Statute.⁵¹

The general introduction of the Elements of Crimes reflects the fact that neither the Rome Statute nor the Elements of Crimes define some terms, such as armed conflict, civilian, combatant, etc. These terms are defined in international humanitarian law or in the jurisprudence of ad hoc tribunals. Moreover, in relation to war crimes and the Elements of Crimes, it is necessary to point out its opening provision, according to which legal evaluation of the existence of an armed conflict and its nature is not essential for the investigation and prosecution of a perpetrator of war crimes. The only requirement is the knowledge of the factual circumstances that establish the existence of an armed conflict, as this is inherent in the very qualification of the factual nature of war crimes. The armed conflict must play a substantial role in the offender's decision, in his ability to commit the crime, or in the way the action was ultimately carried out.⁵² On the contrary, it is not necessary that armed conflict be seen as the ultimate reason for criminal proceedings, nor that such proceedings need take place in the middle of a battlefield.⁵³

To summarise, the elements required by Elements of Crimes to establish a war crime allegedly committed during an international armed conflict, the regulation of which is based on the Geneva Conventions of 1949, are listed as shown:

1. actus reus: wilful killing, *torture* or inhumane treatment, including *biological experiments* (italics added by the authors), wilfully causing great physical or psychological suffering or serious injury, large-scale destruction and appropriation of property carried out without justification by military necessity and unlawfully and arbitrarily, compelling service in hostile forces, intentionally depriving a prisoner of war or other protected person of the right to a fair and proper trial, unlawful deportation or transfer, or unlawful restraint, taking hostages,

50 | Complaint of the Order of the Law Fellowship, 2021, para 3.7.

51 | See Art. 21 of the Rome Statute.

52 | ICC, *Prosecutor v Lubanga*, ICC-01/04-01/06, 29 January 2007, para. 287; ICC, *Prosecutor v Katanga et al.*, ICC-01/04-01/07, 30 September 2008, para. 380.

53 | *Ibid.*

2. the relevant person/persons or property are protected under one or more Geneva Conventions from 1949,
3. the perpetrator is aware of the factual circumstances that establish that protected status (this note also includes knowledge of nationality, but in this context, it is sufficient if the perpetrator knew that the victim belonged to the other side of the conflict),
4. and again: the act is conducted in the context of and is associated with an international armed conflict, and finally
5. the perpetrator is aware of factual circumstances that establish the existence of an armed conflict.

In the case of the COVID-19 pandemic, No. 4 does not apply. Even though mass testing was a novelty and not accepted by the entire population, it does not satisfy the conditions of an armed conflict as indicated by the International Criminal Tribunal for the Former Yugoslavia in the Tadić case. Although this act was repeated several times, it does not include the use of armed violence as one of the preconditions to prove a war crime.

5. Conclusion

This article aimed to analyse the complaint submitted by the Order of the Law Fellowship represented by prominent Slovak lawyers in the matter of allegedly committed crimes against humanity and war crimes by the Government of the Slovak Republic when it introduced mass testing of the population during the COVID-19 pandemic and to point out why the reasonable basis in relation to persecution of both of these crimes under international law was lacking ground although violation of the Nuremberg Code was put forward.

The article began by explaining the applicable law based on Art. 21 of the Rome Statute which obliges ICC judges to apply the Rome Statute, Elements of Crimes and Rules of Procedure and Evidence first, and only in the second place, where appropriate, applicable treaties and principles and rules of international law, including the established principles of the international law of armed conflict. Analysis of the Nuremberg Code, which is a non-legally binding document, is therefore not an appropriate basis for a decision of the International Criminal Court. As for the crimes against humanity, it has been submitted that although most elements of crimes against humanity have been fulfilled, the element requiring perpetration of acts of violence (specifically in case of alleged torture and persecution) has not been satisfied in the case of mass testing. To conclude alleged perpetration of a war crimes, it has been pointed out through an analysis of the development of this concept and related issues that the *sine qua non* condition of establishing perpetration of a war crime is the existence of an armed conflict, which is a missing element in the case of the mass testing in Slovakia during the COVID-19 pandemic, and thus the grounds for a war crime or a crime against humanity are not justified.

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