international law. In the aftermath of World War II and in light of its terrible destruction and the Holocaust, there was great pressure on the Allies to find those accountable for that.[28] It was imperative to prosecute those responsible for those

[28] Mahmoud Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability over Realpolitik*, CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 193, 195 (2003).

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~~issue of what to do with high-ranking leaders of the fallen Nazi regime.~~ In light of the terrible destruction of the war and the public revelation of the Holocaust, there was great pressure to demand accountability, either through decree of the victors, as some advocated, or, through an adjudicative process grounded in rule of law. ~~The decision to create the~~

Mahmoud Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability over Realpolitik*, CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 193, 195 (2003).

„crimes against humanity."[29] The Nuremberg and Tokyo Tribunals constituted major historic development piercing the shield of national sovereignty and establishing individual criminal responsibility under international law.[30] Individuals were directly

30 Bassiouni, *supra* note 28, at 195.

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Originaltext:

196 CASE W. RES. J. INT'L L. [Vol. 35:191

The Nuremburg tribunal and the Tokyo tribunal constituted a major historic development in the establishment of individual criminal responsibility under international law. Through these processes, heads of

Mahmoud Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability over Realpolitik*, CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 193, 196 (2003).

Transitional justice can be defined as justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.[39]

[39] Ruti G. Teitel, *Geneology of Transitional Justice*, 16 HARVARD HUMAN RIGHTS JOURNAL 69, 69 (2003); NEIL J. KRITZ, TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (1995).

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Originaltext:

This Article proposes a genealogy of transitional justice.[1] Transitional justice can be defined as the conception of justice associated with periods of political change,[2] characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.[3] The genealogy presented in this Ar-

2. *See* GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES 6 (1998) (defining transition as the interval between one political regime and another).

3. For a helpful compilation, see TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1997).

Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (2003)

and adequately prepared to take on this responsibility (***Rule 11 bis***).[61]

The relevant parts of the Rule 11 *bis* provide:

> „(A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges […] („Referral Bench"), which solely and exclusively shall determine whether the case should be referred to the authorities of a State:
>
> (i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case […]"

[61] Michaeli, *supra* note 51, at 45.

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Originaltext:

[249] See generally S. Somers, 'Rule 11*bis* of the International Criminal Tribunal of the Former Yugoslavia: Referral of Indictments to National Courts' 30 B. C. Int'l & Comp. L. Rev. (2007) 175. Rule 11*bis* now reads in part:

> '(A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges…("Referral Bench"), which solely and exclusively shall determine whether the case should be referred to the authorities of a State:
>
> (i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case…'

KEREN MICHAELI , DOMAC 10,THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 52

The former UN Secretary-General Kofi Annan described that international criminal adjudication, in particular those of the international criminal tribunals has helped to bring justice and hope to victims, combat the impunity of perpetrators and enrich the jurisprudence of international criminal law.[68] He argued that the establishment of a

[68] The Secretary-General Report on Transitional Justice, *supra* note 65.

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Originaltext:

In some cases, international or mixed tribunals have been established to address past crimes in war-torn societies. These tribunals have helped bring justice and hope to victims, combat the impunity of perpetrators and enrich the jurisprudence of international criminal law. They have, however, been expensive and have contributed

UN Report of the Secretary-General on The rule of law and transitional justice in conflict and post-conflict societies, 2004,16, Page 1

jurisprudence of international criminal law.[68] He argued that the establishment of a wide range of special criminal tribunals advanced a number of objectives, including bringing to justice those responsible for serious violations of human rights and international humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for the victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law, and contributing to the restoration of peace.[69]

[69] The Secretary-General Report on Transitional Justice, *supra* note 65, at 13.

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Originaltext:

XII. Learning lessons from the ad hoc criminal tribunals

38. In the past decade, the United Nations has established or contributed to the establishment of a wide range of special criminal tribunals. In doing so, it has sought to advance a number of objectives, among which are bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace. To these

UN Report of the Secretary-General on The rule of law and transitional justice in conflict and post-conflict societies, 2004,16, Page 13

development. This capacity can be developed through the help of outside partners that can support, catalyse and facilitate change.[76] This consists of the transfer of know-

[74] Organisation for Economic Co-Operation and Development, *The Challenge Of Capacity Development: Working Towards Good Practice*, 12 (2006).

[75] Id.

[76] Id.

Dr. Zadic, Dissertation S.18/220

Originaltext:

"Promotion of capacity development" refers to what outside partners – domestic or foreign – can do to support, facilitate or catalyse capacity development and related change processes. This is by no

Organisation for Economic Co-Operation and Development, The Challenge of Capacity Development: Working Towards Good Practice, 2006, p. 12

law influences state behaviour.[91] They relied on the following four assumptions:

(1) states are the key actors in world politics;

(2) states can be treated as homogeneous units acting on the basis of self-interest;

(3) states act as if they were rational; and

(4) international anarchy – the absence of any legitimate authority in the international system – means that conflict between self-interested states entails the danger of war and the possible coercion.[92]

92 Katzenstein, et al., *supra* note 90.

Dr. Zadic, Dissertation S.23/220

Originaltext:

tant: (1) states are the key actors in world politics; (2) states can be treated as homogeneous units acting on the basis of self-interest; (3) analysis can proceed on the basis of the assumption that states act as if they were rational; and (4) international anarchy—the absence of any legitimate authority in the international system—means that conflict between self-interested states entails the danger of war and the possibility of coercion. The state-centric assumption was challenged by work on

Peter J. Katzenstein, Robert O. Keohane, and Stephen D. Krasner , *International Organization* and the Study of World Politics, 1998, p. 658

process of social learning. The constructivists model argue that behavioural patterns of surrounding cultures can induce behavioural changes through pressures to assimilate (see at **1**).[162] The fairness model (see at **2**) claims that it is the legitimate

[162] Goodman & Jinks, *supra* note 161, at 635; HATHAWAY & KOH, *supra* note 78, at 111.

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Originaltext:

state behavior—*acculturation*. By acculturation, we mean the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture. This mechanism induces behavioral changes through pressures to assimilate—some imposed

Derek Jinks & Ryan Goodman, How to Influence States: Socialization and International Rights Law, 2004, p. 5

humanitarian law in history."[228] Jurisdiction over war crimes was divided up amongst the cantonal courts in the Federation of BiH, district courts in the Republika Srpska, and the Basic Court of Brčko District. Each entity has its own Supreme Court with no

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Originaltext:

~~prosecutors in the two entities and in Brčko District. At that time,~~ jurisdiction over war crimes was divided on the basis of the principle of territorial jurisdiction among the ten cantonal courts in the Federation of BiH (FBiH) and the five district courts in the Republika Srpska (RS), as well as the Basic Court of Brčko District. Each entity and

OSCE BiH, Justice in Bosnia and Herzegovina, An Overview of War Crimes Processing from 2005 to 2010, 2011,p. 12

domestic courts. The Rule 11 *bis* provides that the ICTY may refer a case to a state (i) in whose territory the crimes was committed; or (ii) in which the accused was arrested; or (iii) that has jurisdiction and is willing and adequately prepared to accept such a case.

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Originaltext:

[249] See generally S. Somers, 'Rule 11*bis* of the International Criminal Tribunal of the Former Yugoslavia: Referral of Indictments to National Courts' 30 B. C. Int'l & Comp. L. Rev. (2007) 175. Rule 11*bis* now reads in part:

> '(A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges…("Referral Bench"), which solely and exclusively shall determine whether the case should be referred to the authorities of a State:
>
> (i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case…'

KEREN MICHAELI , DOMAC 10, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 52

Judges in the entity courts have refused to accept any binding instructions from the BiH Court,[278] resulting in few interactions between the judges and thus, limited

[278] Ivanišević, *supra* note 251, at 29.

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Originaltext:

which institutions of BiH have responsibility. Judges in the courts in the entities have refused to accept any binding instructions from the Court of BiH. Interview with Medžida Kreso, president of Court of BiH, Sarajevo,

Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (2008), International Center for Transitional Justice, p. 30

against Croatian national heroes, the generals Ademi and Gotovina.[315] In September 2002, another indictment against the former Croatian Chief of Staff Janko Bobetko was issued.[316]

[316] *Prosecutor v. Bobetko*, Case. No. IT-02-62.

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Originaltext:

A year later, in September 2002, another indictment relating to the attack on the Medak Pocket was issued by the ICTY against former Croatian Chief of Staff Janko Bobetko.[200] Following the issuing of an arrest warrant by the Tribunal, Croatia was asked

[199] On Racan response see ICG, 'Croatia: Facing Up to War Crimes' (Zagreb/Brussels, 16 October 2001) available at http://www.crisisgroup.org/library/documents/report_archive/A400468_16102001.pdf.

[200] *Supra* note 127.

KEREN MICHAELI , DOMAC 10,THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 54

Up until 2009, the county prosecutors initiated investigations of criminal offences by submitting a request for investigation to an investigative judge. The investigative judge would then have to investigate and gather evidence so the case could proceed to trial.[326] The file was then returned to the competent prosecutors' office again, who had

[326] Michaeli, *supra* note 51, at 23.

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Originaltext:

Republic of Croatia[32] at the top. Until 2008,[33] the State's Attorney offices initiated investigations of criminal offences by submitting to an investigative judge a request for investigation. The role of the investigative judge was then to compile the evidence

KEREN MICHAELI , DOMAC 10,THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 20

reports even reserved a special chapter dedicated to war crimes prosecution, including a review of the capacity of courts to try war crimes, standard of the trials, identity of defendants, and the appeal proceedings.[333]

[333] Annual Progress Reports are available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2011/package/hr_rapport_2011_en.pdf (last accessed 27 Mai 2017)

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Originaltext:

The reports refer to issues of capacity of courts to try war crimes, the standards of trials, identity of defendants and the appeals processes. Croatia, in turn, has been attempting

KEREN MICHAELI , DOMAC 10, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 57

judiciary system. In 2003, a new Act on the Application of the Statute of the International Criminal Court and on the Prosecution of Criminal Acts against International Military and Humanitarian Law was adopted (***ICC Law***)[334]. The ICC

[334] Act on the Application of the Statute of the International Criminal Court and on the Prosecution of Criminal Acts against International Military and Humanitarian Law [hereinafter: ICC Law] available at http://narodne-novine.nn.hr/clanci/sluzbeni/2003_11_175_2554.html (last accessed on 27 May 2017).

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Originaltext:

In 2003, Croatia enacted a new Act on the Application of the Statute of the International Criminal Tribunal and on the Prosecution of Criminal Offences against International Military and Humanitarian Law, which enables the Chief State Prosecutor to request that a case

Amnesty International, Behind a Wall of Silence, Prosecution of War Crimes in Croatia, 2010, p. 13

International Military and Humanitarian Law was adopted (***ICC Law***)[334]. The ICC Law established specialised War Crimes Chambers at the four largest county courts: Osijek, Split, Rijeka and Zagreb. The respective country prosecutors were also

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Originaltext:

implement the Rome Statute of the ICC within Croatia. The law created specialized 'war crimes' chambers in the four biggest County courts: Osijek, Rijeka, Split and Zagreb.[225] These specialized chambers do not

[225] Article 12 (1) of the ICC Law. There is no international involvement in the Croatian specialized chambers; Human Rights Watch, 'Justice at Risk', October 2004, p. 7.

KEREN MICHAELI , DOMAC 10, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 57

showed that FRY ranked 89 out of 90 surveyed countries.[357] In this corrupt post-war environment, criminal networks were closely tied to the government and public administration, and had great opportunities to flourish.[358] In such an environment fair

[358] Rober F. Miller, *The Difficult Fight against Corruption in Transitional Systems: the Case of Serbia*, II-III TRANSCULTURAL STUDIES SERIES IN INTERDISCIPLINARY RESEARCH 245 (2007) in Michaeli, *supra* note 349, at 25.

Dr. Zadic, Dissertation S.74-75 /220

Originaltext:

scoring countries out of more than 90 countries surveyed.[46] This lawless environment provided criminal elements, closely tied to the government and public administration, with the opportunity to flourish.[47] In fact, as late as 2001 the Serbian interior minister

KEREN MICHAELI , DOMAC 13, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 19

with a regime change. In September 2000, Milošević resigned from the presidency following public demonstrations and a defeat in the federal presidential elections. Vojislav Koštunica, who took over, was as much a critic of the ICTY as Milošević and a conservative himself. Following government elections that same year, the Democratic Opposition of Serbia, an 18-party coalition won the elections and formed a government that was headed by liberal *Zoran Đinđić*.[360]

[360] Michaeli, *supra* note 349, at 20 and 44.

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Originaltext:

In September 2000 Milosevic was defeated in the federal presidential elections by Vojislav Kostunica, himself a conservative nationalist, hostile to the ICTY and international intervention.[51] In December of that year the SSP lost the Serbian parliamentary elections to an 18-party coalition, the "Democratic Opposition of Serbia" (DOS), which formed the new government headed by Zoran Djindjic. The transition

KEREN MICHAELI , DOMAC 13, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 19

Government Authorities in War Crimes Proceedings (***Law on War Crimes***).[393] This Law on War Crimes gave Serbia jurisdiction over war crimes committed on the territory of the whole Former Yugoslavia, regardless of the nationality.[394] It

[394] OSCE, War Crimes in Serbia, *supra* note 388, at 29.

Dr. Zadic, Dissertation S.81 /220

Originaltext:

The **Law on War Crimes** gives Serbia jurisdiction over war crimes committed on the territory of the whole former Yugoslavia, regardless of the nationality of the suspect or

OSCE, War Crimes Proceedings in Serbia 2003-2014, p. 29

In contrast to the War Crimes Chamber of Bosnia – which was created with the direct involvement of the ICTY – the ICTY did not play a formal role in establishing the War Crimes Department or the War Crimes Prosecutor's Office.[399]. Nevertheless, the

[399] Orentlicher, *supra* note 365, at 46.

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Originaltext:

In contrast to the War Crimes Chamber of Bosnia, which was created with the direct involvement of the ICTY,[265] the ICTY did not play a formal role in establishing the Serbian WCC or the office of the War Crimes Prosecutor.[266] Nor does the War Crimes Prosecutor "think the

Orentlicher, The Impact of the ICTY in Serbia, 2008, p. 46

immensely prolonged the adjudications procedure.[402] Some argue that the reason for the Serbian Supreme Court's almost hostile attitude towards the War Crimes Department was that many of the judges on the Serbian Supreme Court were once appointed by Milošević, and were thus „deliberately obstructing the functioning of the War Crimes Department."[403] For others it was the lack of international criminal law

[403] Michaeli, *supra* note 349, at 70.

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Originaltext:

behind it. Specifically, it was contended that because many of the judges on the Supreme Court were Milosevic appointees, hostile to the idea of war crimes trials, they were deliberately obstructing the functioning of the WCC.[352] Others did not share that

KEREN MICHAELI , DOMAC 13, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 70

replaced by 26 high courts. The Serbian Supreme Court was replaced by four Appellate Courts and a new Court of Cassation.[404] The reform aimed at reducing the

[404] Michaeli, *supra* note 349, at 84.

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Originaltext:

The retrials congested the already busy schedules of the WCPO and the WCC. Until 2010 the Supreme Court was the appellate court for WCC cases. The practice of the

KEREN MICHAELI , DOMAC 13, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 70

In 2010, judicial institutions were again significantly reformed. The old network of 138 municipal courts was replaced by 34 basic courts and the district courts were replaced by 26 high courts. The Serbian Supreme Court was replaced by four

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Originaltext:

Public Prosecutors Offices, as of 1 January 2010, the old network of 138 municipal courts was reorganized into a new one consisting of 34 basic courts. Places where Municipal Courts were

OSCE, Judicial Institutions in Serbia, 2011, p. 1

Although the ICTY was not directly involved in fostering the Serbian judiciary, prominent staff members like former President *Cassese* and Prosecutor *Goldstone* participated in the expert group that assisted the Serbian Government in drafting the reform in 2003.[417] The involvement of these individuals during the consultation

[417] Other participants included Sylvia de Bertodano (defense council before the ICTY), Jonathan Cedarbaum (Deputy Chef de Cabinet, ICTY Office of the President), David Tolbert (senior legal advisor and Chef de Cabinet); and Elizabeth Santalla Vargas (associate legal officer in the ICTY Registry); *see also* International Bar Association, *Analysis of the Republic of Serbia's Proposed Law on the Prosecution of War Crime* (2003) in Michaeli, *supra* note 349, at 85.

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Originaltext:

The ICTY was not formally involved in the decision to establish the Serbian war crimes system,[429] ~~which was the initiative of the Djindjic' government as early as 2002.~~[430] ~~However,~~ prominent ICTY staff members, including President Cassese and Prosecutor Goldstone, participated in the experts group that assisted the Government (at the

KEREN MICHAELI , DOMAC 13, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 86

Rule 11 *bis* of the ICTY Rules on Evidence and Procedure. *Valdimir Kovačević* who was transferred to The Hague in 2003, was indicted for his involvement in Dubrovnik war crimes in 1991. Upon request of the Serbian prosecution, the Referral Bench in

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Originaltext:

Only one case was referred to Serbia. Vladimir Kovacevic (AKA Rambo) was indicted for his role in the attack on the Croatian city of Dubrovnik in 1991.[258] Although he was transferred to The Hague by Serbia in 2003 he was declared unfit to stand trial and

KEREN MICHAELI , DOMAC 10,THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 54

The relevant provisions of that code contained in Chapter 16, Articles 141-153, criminalise acts prohibited under the Geneva Conventions. These relevant provisions

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Originaltext:

1977 Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY).[38] The relevant provisions of that code, principally Articles 141-153, criminalise those acts prohibited under the Geneva Conventions.[39]

OSCE, War Crime Trials Before The Domestic Courts of Bosnia and Herzegovina, 2005, p. 12

The Four Geneva Conventions of 1949[432] and their 1977 Additional Protocols,[433] the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[434] and the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[435]

[432] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31 (12 August 1949); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85 (12 August 1949); Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135 (12 August 1949); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287 (12 August 1949).

[433] Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3 (8 July 1977); Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609 (8 July 1977).

[434] The Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 227 (11 December 1948).

[435] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 754 UNTS 73 (16 December 1968).

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Originaltext:

during the 1991-1995 war: the Four Geneva Conventions of 1949 and their 1977 Additional Protocols; the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; and the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

KEREN MICHAELI , DOMAC 13, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 22

was admitted to trials – excluding evidence gathered by the ICTY. Use of such evidence would have enhanced the effectiveness of war crimes trials in national courts. It would have saved resources and time, allowing the judges to benefit from the investigative expertise and resources of the ICTY.[453]

[453] Human Rights Watch, Justice at Risk, *supra* note 356, at 23.

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Originaltext:

The use of evidence held by the ICTY Office of the Prosecutor can ~~contribute to the~~ effectiveness of war crimes trials in national courts in the region. By admitting statements given

~~not need to appear at all.~~ The use of ICTY evidence would also allow judges and prosecutors in national courts to benefit from the investigative expertise and resources of the ICTY.

Human Rights Watch, Justice at Risk, War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro, 2004

bias. The main issues for that trial, were not only the limited competence of the prosecution and inadequate witness protection mechanisms, but also, and in particular, the absence of rules on the effective use of evidence gathered by the ICTY in national trials.[454] The Zenica Cantonal Prosecutor proposed to admit videotaped interviews

[454] Human Rights Watch, *Balkans Justice Bulletin: The Trial of Dominik Ilijasević* (2004), available online at http://pantheon.hrw.org/legacy/backgrounder/eca/balkans0104.htm (last accesssed on 1 Mai 2017).

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Originaltext:

~~problems identified by Human Rights Watch include: weak case preparation and~~ limited competence on the part of the prosecution, the absence of rules on the effective use of evidence gathered by the ICTY in national trials, ~~lack of cooperation between states in the region~~, and inadequate witness protection mechanisms.

Human Rights Watch, Balkans Justice: Dominik Ilijasevic-Como Tried for Abuses against Bosniac Civilians, 2004,

Following the pressure from international institutions, BiH adopted a law to permit the use of testimony before the ICTY in BiH's court proceedings in July 2004. According to that law, the trial judge has discretion to permit cross-examination of the witnesses ~~that already testified before the ICTY and if cross-examination is denied or was not possible before the BiH Court~~, the subsequent judgment cannot rely solely or primarily on the statement obtained from the ICTY.[456]

[456] The Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Admissibility of Evidence Collected by ICTY in Proceedings before the Courts in BiH, Article 3(2) of (2004): 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; Human Rights Watch, Justice at Risk, *supra* note 356, at 24.

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Originaltext:

~~legislation.~~[90] In July 2004, the government of Bosnia and Herzegovina adopted a draft law to permit the use of testimony taken before the ICTY in Bosnian court proceedings. The trial judge has discretion to permit applications by the defense to cross-examine witnesses.[91] Where the judge declines a request, the subsequent judgment cannot be founded solely or primarily on the statement obtained from the ICTY.[92] ~~At the time of this writing, the legislation has been~~

Human Rights Watch, Balkans Justice: Dominik Ilijasevic-Como Tried for Abuses against Bosniac Civilians, 2004

Thus, the application of the new BiH Criminal Code would not violate the legality principle in those cases where the crimes committed were considered violations of customary international law even before the start of the conflict in the Former Yugoslavia.[467]

[467] Human Rights Watch, *Still Waiting: Bringing Justice for War Crimes, Crimes Against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts* (2008) available at http://www.hrw.org/en/node/62137/section/1 (last accessed 30 April 2017) [hereinafter: Human Rights Watch, Still Waiting].

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Originaltext:

Thus, application of the new criminal code does not violate the ~~ban on retroactivity~~ since ~~most war crimes, crimes against humanity, and genocide~~ were considered violations of customary international law before the start of the conflict in the former Yugoslavia. This

Human Rights Watch, Still Waiting: Bringing Justice for War Crimes, Crimes Against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts (2008), http://www.hrw.org/en/node/62137/section/1

Consequently, defendants face significantly different sentencing ranges for the same crimes depending on whether they face trial before the BiH Court or before the entity courts.[470] The BiH Criminal Code is the only code in BiH that has a provision

[470] Human Rights Watch, Still Waiting, *supra* note 467.

Dr. Zadic, Dissertation S.98/220

Originaltext:

~~One of the most striking and controversial results of this is that~~ defendants face significantly different sentencing ranges for similar crimes depending on whether they face trial before the Court of Bosnia and Herzegovina or before the cantonal or district courts.

Human Rights Watch, Still Waiting: Bringing Justice for War Crimes, Crimes Against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts (2008), http://www.hrw.org/en/node/62137/section/1

The most severe punishment permitted under the SFRY Criminal Code was the death penalty. However, as this has been abolished in BiH, the courts in the Federation and in Republika Srpska simply applied the second most severe punishment under the SFRY Criminal Code which was 20 years imprisonment.[472] Yet, at the BiH Court,

[472] SFRY Criminal Code, Article 38 (1977): "The court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for death penalty"; *Prosecutor v. Milanko Vujanović*, Case No. K-99/00, First Instance Judgment Banja Luka Cantonal Court, 3 (9 March 2006); *Prosecutor v. Pušara Vlastimir*, Case No. K-127/02, First Instance Judgment Sarajevo Cantonal Court, (29 June 2004); *Prosecutor v. Pušara Vlastimir*, Case No. K-423/04, Second Instance Judgment Supreme Court of the Federation of BiH, 8 (8 December 2004).

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The SFRY criminal code, as written, permits the death penalty, but as this has been abolished in Bosnia, the courts in the Federation and in Republika Srpska allow punishments as high as 20 years' imprisonment, which was the second most severe punishment allowed under the SFRY code.[209] At the State Court, by contrast, defendants

Human Rights Watch, Still Waiting: Bringing Justice for War Crimes, Crimes Against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts (2008), http://www.hrw.org/en/node/62137/section/1

SFRY Criminal Code which was 20 years imprisonment.[472] Yet, at the BiH Court, defendants charged with similar crimes could face up to 45 years imprisonment.[473]

[473] BiH Criminal Code, Article 42 (2) (2003).

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Originaltext:

punishment allowed under the SFRY code.[209] At the State Court, by contrast, defendants charged with similar crimes may face up to 45 years' imprisonment.[210] This is especially

Human Rights Watch, Still Waiting: Bringing Justice for War Crimes, Crimes Against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts (2008), http://www.hrw.org/en/node/62137/section/1

The Constitutional Court of BiH upheld the application of the BiH Criminal Code in cases dealing with crimes committed during the war thereby following the case law established by the ECtHR.[478] Accordingly, it argued that the retrospective application

[477] *Case of Aduladhim Maktouf*, Case No. AP 1785/06, Decision on Admissibility and Merits, Constitutional Court of Bosnia and Herzegovina, (30 March 2007), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=73135 (last accessed 30 April 2017) [Hereinafter: *Maktouf* Constitutional Court]

[478] Id.

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This issue was recently addressed by the Constitutional Court of Bosnia and Herzegovina, which upheld the legality of applying the Bosnian Criminal Code in cases dealing with crimes committed during the war. In the *Maktouf* decision, the Constitutional Court noted that the ICTY

https://www.hrw.org/reports/2008/bosnia0708/9.htm#_ftn213

when the crime was committed.[479] In addition, the Constitutional Court rejected the claim that the SFRY Criminal Code was more lenient, because at the time the crimes were committed, it permitted the death penalty.[480] Furthermore, the ICTY also

477 *Case of Aduladhim Maktouf*, Case No. AP 1785/06, Decision on Admissibility and Merits, Constitutional Court of Bosnia and Herzegovina, (30 March 2007), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=73135 (last accessed 30 April 2017) [Hereinafter: *Maktouf* Constitutional Court]

478 Id.

479 Id. at para 73.

480 Id. at para 69.

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~~under the SFRY criminal code.[213]~~ Additionally, the Constitutional Court disputed the claim that the SFRY code was more lenient, since at the time the crimes were committed, it permitted the death penalty.[214] ~~The thrust of the Constitutional Court's judgment was~~

Human Rights Watch, Still Waiting: Bringing Justice for War Crimes, Crimes Against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts (2008), http://www.hrw.org/en/node/62137/section/1

were committed, it permitted the death penalty.[480] Furthermore, the ICTY also imposed prison sentences that were longer than those under the SFRY Criminal Code.[481]

477 *Case of Aduladhim Maktouf*, Case No. AP 1785/06, Decision on Admissibility and Merits, Constitutional Court of Bosnia and Herzegovina, (30 March 2007), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=73135 (last accessed 30 April 2017) [Hereinafter: *Maktouf* Constitutional Court]

478 Id.

479 Id. at para 73.

480 Id. at para 69.

481 Id. at para 68.

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that the ICTY has also imposed long-term prison sentences that would not be allowed under the SFRY criminal code.[213] ~~Additionally, the Constitutional Court disputed the~~

Human Rights Watch, Still Waiting: Bringing Justice for War Crimes, Crimes Against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts (2008), http://www.hrw.org/en/node/62137/section/1

In the same decision, the BiH Constitutional Court recommended that the application of different criminal codes and sentences to similar crimes by the state and entity courts may constitute illegal discrimination.[482] Cases that are transferred from the BiH

[477] *Case of Aduladhim Maktouf*, Case No. AP 1785/06, Decision on Admissibility and Merits, Constitutional Court of Bosnia and Herzegovina, (30 March 2007), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=73135 (last accessed 30 April 2017) [Hereinafter: *Maktouf* Constitutional Court]

[478] Id.

[479] Id. at para 73.

[480] Id. at para 69.

[481] Id. at para 68.

[482] Id. at para 80-92

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In the same case, the Constitutional Court also states that the application of different criminal sanctions to similar crimes by the state and entity courts may constitute illegal discrimination. The Constitutional Court, therefore, urged the cantonal and district courts

Human Rights Watch, Still Waiting: Bringing Justice for War Crimes, Crimes Against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts (2008), http://www.hrw.org/en/node/62137/section/1

In 2002, the OHR Report recommended that the jurisprudence of the ICTY should have persuasive authority in procedural and substantive matters.[490] Although no

[490] Michael Bohlander, *Last Exit Bosnia – Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts*, 14 CRIMINAL LAW FORUM 59, 79 (2003).

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The OHR's 2002 consultants' report recommended that the jurisprudence of the ICTY have persuasive authority in ~~the interpretation of legislation by courts at both State and Entity level, in~~ procedural and substantive matters. ~~However, it was acknowledged that~~

YAËL RONEN, BOSNIA AND HERZEGOVINA: THE INTERACTION BETWEEN THE ICTY AND DOMESTIC COURTS IN ADJUDICATING INTERNATIONAL CRIMES, 2011, p. 42

ICTY judgments. The presence of international judges and prosecutors in BiH, as well as training sessions organised for domestic practitioners, have contributed to the BiH Court's reliance on international law and jurisprudence.[492] Judges at the BiH Court

[492] Ivanišević, *supra* note 251, at 41

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The presence of international judges and prosecutors and training sessions organized for the domestic practitioners have all contributed to panels' frequent reliance on international conventions and jurisprudence. In this respect the Court of BiH differs from virtually all other

Bogdan Ivanišević, The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court, 2008, p.41

a lot of cases. The BiH Court and state-level prosecutors have had very limited experience with this law and initially there was no specialised training or resources available to them.[502]

[502] OSCE Trials before the Domestic Courts, *supra* note 227, at 20.

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Tribunal at Nuremberg and much more recently, the ICTY. However, the BiH judiciary and prosecutors have, to date, very limited experience with this law and little specialized training or resources available to them. The correct application of this body of law at cantonal and district court level is essential to ensuring

OSCE, War Crime Trials before the Domestic Courts of Bosnia and Herzegovina, 2005, p. 20

> Some of the more complex issues, among others, are certainly proving elements of genocide, command responsibility, and joint criminal enterprise. The BiH Court

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> Some of the most complex issues ~~addressed by the Court of BiH to date relate to~~ proving elements of genocide ~~perpetration~~, command responsibility, and joint criminal enterprise ~~(JCE). As of September 2010, 25 individuals have been charged~~

OSCE, Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005 to 2010; 2011, p. 48

In addition to that presidential order, the BiH Court also accepted that customary international humanitarian law has been expressly included in treaties of humanitarian law to which BiH is a party through the so-called "Martens clause."[514]

514 *Prosecutor v. Rašević & Todović*, Case No X-KR-06/275, Judgment of the BiH Court, 104 (28 February 2008).

Dr. Zadic, Dissertation S.107/ 220

Originaltext:

international law as an integral part of national law."[98] However, in addition, from 1899 onwards, customary international humanitarian law has been expressly included in treaties of humanitarian law to which BiH is a party through the so-called "Martens clause". The most

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA v. MITAR RAŠEVIĆ and SAVO TODOVIĆ, X-KR/06/275, 2008, p. 104

http://www.sudbih.gov.ba/files/docs/presude/2008/X60275_1K_RM_prvostepena_presuda_28_02_2008_eng.pdf

The Martens Clause was most recently introduced into the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (***Additional Protocol I***) to which Former Yugoslavia became a party in 1979: „~~In cases not covered by this Protocol or by other~~

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Originaltext:

~~humanitarian law to which BiH is a party through the so-called "Martens clause".~~ The most recent inclusion of the Martens clause occurred in the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Additional Protocol I"), where the following language appeared as Article 2:

> ~~In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom….~~[99]

[99] Additional Protocol I. *See also* Additional Protocol II, Preamble. Yugoslavia became a party in 1979.

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA v. MITAR RAŠEVIĆ and SAVO TODOVIĆ, X-KR/06/275, 2008, p. 104

http://www.sudbih.gov.ba/files/docs/presude/2008/X60275_1K_RM_prvostepena_presuda_28_02_2008_eng.pdf

The BiH Court further found that according to Article II (7) and Annex 1 of the BiH Constitution, BiH is a party to the Geneva Conventions of 1949 and both Additional Protocols. In addition, Article III (3) (b) of the BiH Constitution further establishes that "the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities."[516] The Constitutional Court of BiH has further confirmed that the Geneva Conventions and their protocols "have a status equal to that of constitutional principles and are directly applied in Bosnia and Herzegovina."[517]

[517] *Abduladhim Maktouf*, Case No. AP 1785/06, Decision on Admissibility and Merits, Constitutional Court of Bosnia and Herzegovina 71 (30 March 2007) (hereinafter: Maktouf Decision) in *Prosecutor v. Rašević & Todović*, Case No X-KR-06/275, Judgment of the BiH Court, 104 (28 February 2008).

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Originaltext:

Bosnia and Herzegovina is a party to the Geneva Conventions of 1949 and both Additional Protocols, as reconfirmed by the Constitution of Bosnia and Herzegovina, Article II(7) and Annex 1. Article III(3)(b) of the Constitution of Bosnia and Herzegovina establishes that "the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities." The Constitutional Court of BiH has confirmed that the Geneva Conventions and their protocols "have a status equal to that of constitutional principles and are directly applied in Bosnia and Herzegovina."[100] In addition, Article 3 of

[100] *Maktouf* Decision, para. 71.

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA v. MITAR RAŠEVIĆ and SAVO TODOVIĆ, X-KR/06/275, 2008, p. 104

http://www.sudbih.gov.ba/files/docs/presude/2008/X60275_1K_RM_prvostepena_presuda_28_02_2008_eng.pdf

instance chamber erred in the application of command responsibility. It concluded that the defendant was relieved of command responsibility only because the superior was present when the criminal offence occurred.[531]

[531] *Prosecutor v. Sefik Alić et al*, Case No. X-KRŽž-06/294, Revocation of the First Instance Judgment the BiH Court (23 March 2009); *See also* OSCE Delivering Justice in BiH, *supra* note 228, at 50.

Dr. Zadic, Dissertation S.111/ 220

Originaltext:

~~Appellate Panel found that the Trial Panel erred when~~ it concluded that the defendant was relieved of command responsibility due to the fact that his superior was present when the acts in question occurred. ~~Moreover, the Trial Panel should have considered~~

OSCE BiH, Justice in Bosnia and Herzegovina, An Overview of War Crimes Processing from 2005 to 2010, 2011,p. 50

In *Alić*, the trial chamber should have analysed whether the accused had *de facto* authority, rather than merely finding that the superior lacked *de jure* authority over his subordinates. ~~In another case, *Lazarević et al.*, the first instance judgment erroneously established that the accused had effective control over the direct perpetrators.~~[532] The

[532] *Prosecutor v. Lazarević et al*, Case No. X-KRŽ-06/243, Judgment of the BiH Court, 3-4 (29 September 2008); *See also* OSCE Delivering Justice in BiH, *supra* note 228, at 50.

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Originaltext

~~when the acts in question occurred.~~ Moreover, the Trial Panel should have considered whether the accused had *de facto* authority over his subordinate, rather than merely finding that he lacked *de jure* authority. ~~Similarly, in the *Lazarević et al.* case,[127] the~~

OSCE BiH, Justice in Bosnia and Herzegovina, An Overview of War Crimes Processing from 2005 to 2010, 2011,p. 50

(i) The first category requires "the intent to perpetrate a certain crime, this being the shared intent on the part of all co-perpetrators;"

(ii) The second category requires "knowledge of the system of ill-treatment and the intent to further this system;" and

(iii) The third category requires "the intention to participate in and further the common criminal purpose of the group and to contribute to the joint criminal enterprise or in any event to the commission of the crime by the group." In addition the crime that was committed by a member of the group needs to be foreseeable and the participant was willing to take the risk.[547]

547 Sward, *supra* note 503, at 84.

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(a) The first category of cases requires the intent to perpetrate a specific crime (this intent being shared by all co-perpetrators).

(b) For the second category, (which, as noted above, is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority) as well as the intent to further this concerted system of ill-treatment.

(c) The third category requires the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, in the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.[71]

71 - *Krnojelac* Appeals Judgment, para. 32 (citing *Tadic* Appeals Judgment, para. 204). Emphasis in original.

In Trial Chamber II, THE PROSECUTOR v. MITAR RASEVIC, 2004
https://www.icty.org/x/cases/todovic_rasevic/tdec/en/040428.htm#71

~~under the joint criminal enterprise theory~~. This is particularly relevant in cases where the accused has committed "some other act" that leads to the perpetration of the crime.[553]

553 *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, Trial Chamber Judgment (28 February 2005) ("Omarska, Keraterm & Trnopolje Camps") in *Prosecutor v. Marko Radić et al*, Case No. X-KRŽ-05/139, Judgment of the BiH Court (20 February 2009).

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Originaltext:

~~Trial Panel, this distinction~~ is only relevant in cases where the defendant did not participate ~~in the *actus reus* of the criminal offence,~~ but has committed "some other act" which led to the perpetration of the crime.[138] ~~Similarly, the Trial Panel in the~~

138 *Radić et al.*, Trial Judgment, 20 February 2009, pp. 239-241 (revoked on appeal on the basis of essential violations of criminal procedure), citing to *Prosecutor v. Kvočka et al.*, Appellate Judgment, Case No. IT-98-30-1, 28 February 2005.

OSCE BiH, Justice in Bosnia and Herzegovina, An Overview of War Crimes Processing from 2005 to 2010, 2011,p. 52

following conclusions:[563]

- That joint criminal enterprise is a form of co-perpetration that establishes individual criminal liability;
- That the term "perpetration" as it appears in Article 7 (1) of the ICTY Statute (and hence also in Article 180 (1) of the BiH Criminal Code) includes participation in a joint criminal enterprise; and
- That the elements of joint criminal enterprise are established in customary international law.

[563] The Constitutional Court of BiH held that the ICTY Statute is an "integral part of the legal system of Bosnian and Herzegovina" as it is one of the documents that regulates the application of international law to which BiH is subject under Article III(3)(b) of the Constitution of BiH, in Maktouf Decision, *supra* note 517, at para. 70.

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Originaltext:

incorporated into domestic law as Article 180(1), specifically provides: (1) that JCE is a form of co-perpetration that establishes personal criminal liability; (2) that "perpetration" as it appears in Article 7(1) of the ICTY Statute (and hence also in Article 180(1) of the CC of BiH) includes knowing participation in a joint criminal enterprise; and (3) that the elements of JCE are established in customary international law and discernable. This Panel, in

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA v. MITAR RAŠEVIĆ and SAVO TODOVIĆ, X-KR/06/275, 2008, p. 103

http://www.sudbih.gov.ba/files/docs/presude/2008/X60275_1K_RM_prvostepena_presuda_28_02_2008_eng.pdf

To comply with the principle of legality the accused can only be found guilty under a principle of personal liability if (i) it was a principle of law to which the accused was subjected to at the time of commission of the crimes, and (ii) it was reasonably foreseeable that the accused would be criminally liable under that principle.[564]

[564] *Streletz, Kessler and Krenz v. Germany,* Apps. Nos. 34044/96, 35532/97 and 44801/98, Judgment of the European Court of Human Rights, para. 105 (22 March 2001) in *Prosecutor v. Rašević & Todović*, Case No X-KR-06/275, Judgment of the BiH Court, 106, 108-111 (28 February 2008).

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through October 1994. Compliance with the principle of legality requires proof that the Accused incurred criminal liability under a principle of law to which they were at the time subject, and also that at the time of commission of the crimes, it was reasonably foreseeable that the Accused would be criminally liable under that principle.

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA v. MITAR RAŠEVIĆ and SAVO TODOVIĆ, X-KR/06/275, 2008, p. 105

http://www.sudbih.gov.ba/files/docs/presude/2008/X60275_1K_RM_prvostepena_presuda_28_02_2008_eng.pdf

courts also failed to take international precedents into account. In many cases, entity court decisions do not even mention relevant ICTY judgments.[574] This has resulted in several decisions that are significantly out of line with international precedents.[575]

574 Human Rights Watch, Still Waiting, *supra* note 467.

575 Human Rights Watch, Still Waiting, *supra* note 467.

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Originaltext:

~~of many cantonal and district courts to follow international precedent threatens to further fragment the Bosnian legal system~~. In many cases, cantonal and district court decisions do not even mention relevant ICTY verdicts. This has resulted in several decisions that are significantly out of line with international precedent. Prosecutors, defense attorneys, and judges need to take steps to bring their work in line with existing international jurisprudence.

Human Rights Watch, Still Waiting, 2008

https://www.hrw.org/reports/2008/bosnia0708/9.htm

individual did not constitute a war crimes against civilians."[588] The Court held that a „*grave breach*" of the Geneva Convention required that „*inhumane treatment*" resulted in „*great suffering or serious bodily injury*" in order to allow for a qualification as a crimes under Article 142 of the SFRY Criminal Code.[589] By

[588] *Prosecutor v. Mirsad Čupina*, Case No. K-24/99, Judgment of the Mostar Cantonal Court, (6 July 2001); OSCE, Domestic War Crimes Trials, *supra* note 581, at 21.

[589] Id.

Dr. Zadic, Dissertation S.126/ 220

Originaltext:

committed by the defendant. However, the defendant was acquitted as the judge held that such a single isolated incident perpetrated against one individual did not constitute a war crime against civilians. The judge responded that a *"grave breach"* of the Geneva Conventions requires inhumane treatment to have resulted in *"great suffering or serious bodily injury"* in order to be a crime under Article 142 of the SFRY Criminal Code.[66] He took the view that this individual incident was simply an overstepping of authority

[65] See also Art. 30 FBiH CPC (1998).

OSCE, War Crime Trials Before The Domestic Courts of Bosnia and Herzegovina, 2005, p. 21

qualification as a crimes under Article 142 of the SFRY Criminal Code.[580] By determining that the offence committed by the accused was an isolated incident, the Court, failed to take into account the surrounding circumstances of the ongoing siege and persecution in Mostar.

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by the official without taking into account the surrounding circumstances, such as the on-going siege-like situation in Mostar, the ethnic cleansing and the fact that the victim's family property was simultaneously

OSCE, War Crime Trials Before The Domestic Courts of Bosnia and Herzegovina, 2005, p. 21

civilians.[591] The Court followed the argument of the defence that there was no armed conflict in the area of Čajniće Municipality at the time of the alleged acts. It argued that because these acts were not connected to an armed conflict, they could not have been qualified as „*war crimes*."[592]

[592] OSCE, Domestic War Crimes Trials, *supra* note 581, at 22.

Dr. Zadic, Dissertation S.126/ 220

Originaltext:

In the case of *Tadić* (see case summary in the Appendix), at the Sarajevo Cantonal Court, the main thrust of the defence case was that there was no armed conflict in the area of Čajniće Municipality at the time of the alleged acts. Thus these acts had no nexus with an armed conflict and could not be classified as *"war crimes"*. Although the prosecutor engaged with these representations and attempted to prove otherwise in

OSCE, War Crime Trials Before The Domestic Courts of Bosnia and Herzegovina, 2005, p. 22

responsibility was addressed. In 2001, the Mostar Cantonal Court found *Čupina* guilty of war crimes against prisoners of war under Article 144 of the SFRY Criminal Code.[602] As a director of a prison, the Court argued, he did not prevent the crimes

602 *Prosecutor v. Mirsad Čupina*, Case No. K-24/99, Judgment of the Mostar Cantonal Court, (6 July 2001); Human Rights Watch, Still Waiting, *supra* note 467.

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Originaltext:

In *Mirsad Čupina and Others* in 2001, the defendant was found guilty by the Mostar Cantonal Court of war crimes against prisoners of war, a violation of SFRY CC Article 144. As director of a prison, he was aware that prisoners were beaten and forced

YAËL RONEN, BOSNIA AND HERZEGOVINA: THE INTERACTION BETWEEN THE ICTY AND DOMESTIC COURTS IN ADJUDICATING INTERNATIONAL CRIMES, 2011, p. 50

As a result, as well as the fear that entity courts do not even acknowledge the validity of this legal concept, the cases that may involve command responsibility are treated as highly sensitive and thus remain within the BiH Court.[607]

[607] Human Rights Watch, Still Waiting, *supra* note 467.

Dr. Zadic, Dissertation S.130/ 220

Originaltext:

One key area of concern is cases that deal with command responsibility.[222] State Court officials questioned whether the entity courts even acknowledge the validity of this important legal concept.[223] As a result, cases that may involve this legal theory tend to be treated as highly sensitive and tried at the State Court.[224]

Human Rights Watch, Still Waiting: Bringing Justice for War Crimes, Crimes Against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts (2008), http://www.hrw.org/en/node/62137/section/1

domestic prosecutors. These cases usually involved lower level perpetrators connected to the higher level leadership cases tried at the Tribunal.[613] In 2011, the

[613] Michaeli, *supra* note 51, at 55.

Dr. Zadic, Dissertation S.133/ 220

Originaltext:

a view that they would pick up where the OTP left off. They involve lower level perpetrators connected to the higher level leadership cases tried at the Tribunal. The

KEREN MICHAELI , DOMAC 10, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 55

activities, the development of the capacity of domestic professionals. Unfortunately, the transfer of expertise from the ICTY was underfunded and not institutionalised. Only very few events regarding capacity development were organised by the ICTY any other events relied on individual initiatives and donors.[618]

[618] Michaeli, *supra* note 51, at 49.

Dr. Zadic, Dissertation S.134/ 220

Originaltext:

also with respect to witness protection and case management is valuable. Unfortunately, transfer of expertise to the local jurisdictions has remained un-institutionalized and underfunded. Thus, only a small part of these activities have been funded by the Tribunal

KEREN MICHAELI , DOMAC 10, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 49

included six meetings and trainings with Croatian judges and prosecutors held in October 2004.[619] The topics included the definitions of crimes under international and local laws, forms of criminal responsibility, investigation and indictments and standards and methods of proof in war crimes trials.[620] ~~The seminars were designed to~~

[619] Michaeli, *supra* note 51, at 49 et seq.

[620] Michaeli, *supra* note 51, at 49 et seq.

Dr. Zadic, Dissertation S.134/ 220

Originaltext:

~~counsels, the most notable contribution of the Tribunal was a~~ six-meeting training seminar for Croatian judges and prosecutors held in October 2004 ~~for approximately 70 Croatian judges and prosecutors~~. The topics discussed included the definitions of crimes under international and local laws, forms of criminal responsibility ~~and association, targeting~~, investigation and charging decisions and methods of proof in war crimes trials.

KEREN MICHAELI , DOMAC 10, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 49

Croatian courts have ignored that both Article 31 (1) of the Croatian Constitution[645] and Article 2 of the 1997 Criminal Code[646] foresaw that the principle of legality does not apply to acts which were criminal offences under international law at the time they were committed.[647] Also, Article 7 (2) of the ECHR, to which Croatia is a party,

645 Croatian Constitution, Article 31 (1) (2010): "No one may be punished for an act which, prior to its commission, was not defined as a punishable offence by domestic or international law, nor may such individual be sentenced to a penalty which was not then defined by law. If a less severe penalty is determined by law after the commission of said act, such penalty shall be imposed."

646 1997 Criminal Code, Article 2 (2004): "(1) Criminal offenses and criminal sanctions may be prescribed only by statute. (2) No one shall be punished, and no criminal sanction shall be applied, for conduct which did not constitute a criminal offense under a statute or international law at the time it was committed and for which the type and range of punishment by which the perpetrator can be punished has not been prescribed by statute."

647 Amnesty International, Behind the Wall of Silence, *supra* note 296, at 13.

Dr. Zadic, Dissertation S.140/ 220

Originaltext:

~~legality.19 Instead they apply the SFRY Code or the 1993 Basic Criminal Code. This interpretation of national law, however,~~ ignores Article 31 (1) of the Constitution and Article 2 of the 1997 Criminal Code which provide that the principle of legality does not apply to acts which ~~- like war crimes and crimes against humanity -~~ were criminal offences under international law at the time they were committed.

Amnesty International, Behind a Wall of Silence, Prosecution of War Crimes in Croatia, 2010, p.13- 14

2008, the court found *Norac* guilty of war crimes against civilians and war crimes against prisoners of war under the 1993 Basic Criminal Code. ~~His criminal responsibility was based on command responsibility~~ because he knew that his subordinate officers were committing crimes but did not do anything to prevent them or to punish his subordinates for the commission of the crime in his capacity as a commander.[662]

[662] Michaeli, *supra* note 51, at 62.

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Originaltext:

~~Crimes Chamber in Zagreb and appealed to the Supreme~~ Court, Mirko Norac was convicted for war crimes against civilians and war crimes against prisoners of war under the 1993 Basic Criminal Code because he knew that his subordinated officers were committing crimes but did not do anything to prevent them from doing that in his capacity as a commander.

Amnesty International, Behind a Wall of Silence, Prosecution of War Crimes in Croatia, 2010, p. 16

On appeal, the Croatian Supreme Court narrowed the application further by finding that *Norac* could not be criminally liable for the crimes which were committed by his units under his command on the first day of the military operation because he did not know and could not have prevented his subordinates from committing war crimes on the first day. Only when he learnt that war crimes took place, could he then have taken necessary and reasonable steps to prevent the same crimes from happening the next day.[663] The Croatian Supreme Court did not consider the two other possibilities

[663] *Prosecutor v. Rahim Ademi and Mirko Norac*, Case No. I Kz 1008/08-13, Judgment of the Croatian Supreme Court (18 November 2010) [hereinafter: Ademi/Norac Judgment].

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However, the Supreme Court found that Mirko Norac could not be criminally liable for the crimes which were committed by the units under his command on the first day of the military operation "Međak Pocket" because he could not have prevented them until he learnt that those crimes took place.[23] The Court did not appear to consider whether he should have

[23] *RH vs. Rahim Ademi and Mirko Norac*, verdict of the Supreme Court of Croatia of 18 November 2010, I Kz 1008/08-13.

Amnesty International, Behind a Wall of Silence, Prosecution of War Crimes in Croatia, 2010, p. 16

The County Court in Osijek found *Jović*, guilty of mistreatment of the members of a forced labour squad, by failing to take measures within his authority in order to punish the perpetrators and thus prevent them from further unlawful actions.[674]

[674] *Prosecutor v. Čedo Jović*, Judgment of the Osijek County Court (15 March 2011); the case was appealed and quashed by the Croatian Supreme Court on 22 February 2012 and sent back to trial; Michaeli, *supra* note 51, at 64.

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~~responsibility have been opened by County courts in Croatia. In April 2009~~, the County Court in Osijek, found Cedo Jovic,[242] ~~commander of the RSK Army 35th Slavonian Brigade Military Police unit~~, guilty of mistreatment of the members of a forced labour squad comprised of non-Serbs, by failing to take measures within his authority in order to

punish the perpetrators and thus prevent them from further unlawful acting.[243] ~~At least~~

[243] The case was sent back to retrial on appeal. Jovic was once again convicted on 18 February 2010. See http://www.centar-za-mir.hr/index.php?page=article_sudjenja&trialId=74&article_id=48&lang=en.

KEREN MICHAELI , DOMAC 10, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 63-64

Furthermore, two investigations of charges based on the doctrine of command responsibility were launched in 2009 in Osijek. Another County Court in Požega, found *Kufner* and *Šimić* guilty of torturing and killing civilians in 1991 in the area of the village of Marino Selo. The two, commanders of the Military Police Squad attached to the Croatian National Guard, were convicted for failing to prevent the crimes.[675] It should be noted that the first instance judgement was extremely lenient

675 Michaeli, *supra* note 51, at 64.

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punish the perpetrators and thus prevent them from further unlawful acting.[243] At least two other investigations of charges based on the doctrine were launched in 2009 in Osijek, (both against Serbs): in April 2009 an investigation began against a JNA

KEREN MICHAELI , DOMAC 10, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 64

responsibility were launched in 2009 in Osijek. Another County Court in Požega, found *Kufner* and *Šimić* guilty of torturing and killing civilians in 1991 in the area of the village of Marino Selo. The two, commanders of the Military Police Squad attached to the Croatian National Guard, were convicted for failing to prevent the crimes.[675] It should be noted that the first instance judgement was extremely lenient

675 Michaeli, *supra* note 51, at 64.

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Originaltext:

the County Court in Požega,found Damir Kufner and Davor Šimić guilty of torturing and killing Serb civilians in 1991 in the area of village of Marino Selo. The two, commanders of the Military Police Squad attached to the Croatian National Guard, were convicted for failing to prevent the crimes.[244]

244 Details by the monitoring team are available at http://www.centar-za-mir.hr/index.php?page=article_sudjenja&trialId=66&article_id=48&lang=en.

KEREN MICHAELI , DOMAC 10, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 64

In 2009, further charges based on the doctrine were issued: One against *Taso*, a commander of the Yugoslav National Army (***JNA***) for not preventing his unit from killing Croatian soldiers captured in Vukovar; the other was against *Vasiljević*, a former commander of the JNA's Counterintelligence Agency, for war crimes committed in four Serbian camps. *Vasiljević* knew about the treatment of the prisoners but failed to do anything to improve the situation, or to prevent the physical and mental abuse or to punish the perpetrators.[678]

[678] Michaeli, *supra* note 51, at 64.

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Osijek, (both against Serbs): in April 2009 an investigation began against a JNA commander - Enes Taso - for not prevent the killing of eleven members of the Croatian army captured in Vukovar. Another investigation opened in October 2009 is of Aleksandar Vasiljevic, an ex-commander of the JNA's Counterintelligence Agency (KOS), for war crimes committed in four Serbian camps. Vasiljevic is accused of knowing in what conditions inmates lived and to what treatment they were exposed, but failed to do anything to improve the situation, prevent the physical and mental abuse or punish the perpetrators. Notably, both Vasiljevic and Taso live outside of Croatia. In March 2009

KEREN MICHAELI , DOMAC 10, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 64

ICTY.[679] Application of command responsibility is the area where a direct influence of the jurisprudence of the ICTY can be detected.[680]

[680] Michaeli, *supra* note 51, at 62.

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Originaltext:

Direct influence of the jurisprudence of the ICTY can be detected in relation to the doctrine of command responsibility. As noted above, the legislation applicable to the time

KEREN MICHAELI , DOMAC 10, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 61

The Croatian Supreme Court, found that "complicity" contained in Article 22 of the SFRY Criminal Code include not only those who "ordered" or "committed" the crime but also every person who on the basis of mutual agreement had an important contribution, of any kind, to the implementation of the crimes, even implicitly.[681] The

[681] Case No. IKZ -381/94, Judgment of the Croatian Supreme Court (7 September 1994).

Dr. Zadic, Dissertation S.149/ 220

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~~as 1994, before the first of the Tribunal's decisions were handed down.~~ Thus, the Supreme Court's interpretation of "complicity" in war crimes, as including not just those persons who "ordered" or "committed" the crimes but also every person who on the basis of mutual agreement had an important contribution, of any kind, to the implementation of the crimes, even implicitly,[231] ~~has been adhered to since 1994.~~[232]

[231] IKZ -381/94 (7 September 1994).

KEREN MICHAELI , DOMAC 10, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 61

The ICTY transferred only one case under the Rules 11 *bis* to Serbia. As the ICTY concluded its ongoing investigations, it began transferring case files that did not yet result in an indictment to national judiciaries for prosecution and trial in 2005.[685] In

685 OSCE, War Crimes in Serbia, *supra* note 388, at 20

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and genocide. In accordance with its Completion Strategy,[12] in 2004 the ICTY concluded ongoing investigations and announced that it would no longer issue indictments. In 2005, it began transferring cases to national judiciaries for prosecution and trial,[13] thus

OSCE, War Crimes Proceedings in Serbia 2003-2014, p. 20

Only two of these files were transferred to Serbia: One related to events in Vukovar on the Ovčara farm in Croatia that resulted in multiple trials against 21 defendants;[687]

687 *Prosecutor v. Vujović et al.*, Case No. Kž1 Po2 1/10, Judgment of the Appellate Court in Belgrade (23 June 2010) ("Ovčara I": Case not final; returned to the Court of Appeals for a new adjudication; Indictment was filed on 4 December 2003); *Prosecutor v. Milan Bulić*, Case No. K.V. 2/2005, Judgment of the Appellate Court in Belgrade (1 March 2007) ("Ovčara II": Indictment was filed 24 May 2005); *Prosecutor v. Damir Sireta,* Case No. Kž1 Po2 /10, Judgment of the Appellate Court in Belgrade (24 June 2010) ("Ovčara III": Indictment was filed on 17 October 2008) ; *Prosecutor v. Petar Ćirić*, Case No. Kž1 Po2 8/13, Judgment of the Appellate Court in Belgrade (3 November 2014) ("Ovčara IV": Case final; Indictment was filed 18 June 2012).

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number of these case files went to BiH authorities,[69] but only two to Serbia: the one related to events in the Ovčara farm in Croatia (transferred in 2003, which resulted in trials against 21 defendants)[70] and the one related to crimes in the town of Zvornik, in

70 "Ovčara I" case, case no. KTRZ 3/03, indictment, 4 December 2003; "Ovčara II" case, case no. KTRZ 4/03, indictment, 24 May 2005; "Ovčara III" case, case no. KTRZ 4/03, indictment, 17 October 2008; "Ovčara IV" case, case no. KTRZ 6/11, indictment, 18 June 2012.

OSCE, War Crimes Proceedings in Serbia 2003-2014, p. 32

and one related to crimes in the town of Zvornik, in BiH which resulted in two trials against ten defendants.[688] As those transferred files were close to completion, they

[688] The War Crime Prosecutor's Office conducted additional investigations and in co-operation with BiH counterparts filed three indictments: *Prosecutor v. Dragićević et al.,* Case No. Kž1 r.z. 3/08, Judgment of the Appellate Court in Belgrade (4 September 2009) ("Zvornik I": Indictment was filed on 12 August 2005); *Prosecutor v. Grujić & Popović,* Case No. Kž1 Po2 6/11, Judgment of the Appellate Court in Belgrade (3 October 2011) ("Zvornik II", Indictment was filed on 12 August 2005; *Prosecutor v. Ćilerdžić et al.,* Case No. Kž1 Po2 2/12, Judgment of the Appellate Court in Belgrade (2 November 2012) ("Zvornik III": Indictment was filed on 14 March 2008).

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Originaltext:

trials against 21 defendants)[70] and the one related to crimes in the town of Zvornik, in BiH (transferred in 2004, which resulted in trials against ten defendants).[71] This form of

71 The WCPO further investigated the case in co-operation with their BiH counterparts and filed three indictments: "Zvornik I" case, case no. KTRZ 17/04, indictment, 12 August 2005; "Zvornik II" case, case no. KTRZ 17/04, indictment, 12 August 2005; "Zvornik III" case, KTRZ 8/07, indictment, 14 March 2008.

OSCE, War Crimes Proceedings in Serbia 2003-2014, 2015, p. 32

Simatović.[694] The Braća *Bitići*[695] and Podujevo case[696] were connected to the ICTY case against *Vlastimir Đorđević* [697]; the Suva Reka[698] and Stara Gradiška"[699] cases

were linked to ICTY cases against *Šainović* et al.[700] and against *Brđanin*;[701] and the *Lekaj* case was connected to the *Haradinaj* case.[702]

695 *Prosecutor v. Popović & Stojanović*, Case No. Kž1 Po2 5/12, Second Judgment of the Appellate Court in Belgrade (after retrial) (18 January 2013).

696 *Prosecutor v. Borojević et al.*, Case No. Kž1 Po2 2/11 and Kž1 Po2 3/10, Second Judgment of the Appellate Court in Belgrade (after retrial) (11 February 2011) ("Produjevo II": Indictment was filed on 14 April 2008).

697 *Prosecutor v. Đorđević*, Case No. IT-05-87/1 (*"Kosovo"*).

698 *Prosecutor v. Mitrović et al.*, Case No. Kž1 Po2 4/10, Second Judgment of the Appellate Court in Belgrade (after retrial) (6 June 2011) ("Suva Reka": Indictment was filed on 25 April 2006).

699 *Prosecutor v. Španović*, Case No. Kž1 Po2 10/2010, Judgment of the Appellate Court in Belgrade (24 January 2011) ("Stara Gradiška": Indictment was filed on 7 November 2007).

700 *Prosecutor v. Šainović et al.* Case No. IT-05-87.

701 *Prosecutor v. Brđanin*, Case No. IT-99-36, *"Krajina"*.

702 *Prosecutor v. Haradinaj et al.* Case No. IT-04-84.

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Sljivancanin.[269] The Braca Bitici and Podujevo cases were connected to the ICTY case against Vlastimir Djordjevic;[270] the Scorpios cases in Belgrade are linked to the ICTY

cases against Stanisic and Simatovic[271] and indeed refer to ICTY documents;[272] The Suva Reka and Stara Gradiska cases are linked to ICTY cases against Sainovic et al and against Brdjanin[273] respectively; and the Lekaj case to the Haradinaj case.[274] The

270 Above note 153. The Serbian War Crime Prosecutor maintains that it was his office that connected Djordjevic to the crimes in Braca Bitici.

271 Above note 149.

272 Humanitarian Law Center, 'War Crimes Trials in Serbia' (December 2007) 7, available at http://www.hlc-rdc.org/uploads/editor/War%20Crimes%20Trials%20in%20Serbia%20Report.pdf.

273 Prosecutor v. Bradjanin, Case No. IT-99-36-T.

274 *Supra* note 156.

KEREN MICHAELI , DOMAC 13, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 56

ICTY staff attended conferences, round tables, and meetings with members of the legal community, the media, ministries, university and high school students, NGOs, etc.[704] The ICTY gradually started to provide opportunities for the creation of

[704] Michaeli, *supra* note 349, at 88.

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Originaltext:

~~professionals from the region to the work of the ICTY.~~[276] ICTY staff attended conferences, round tables and meetings with members of the legal community, the media, ministries, university and high school students, NGOs etc. Examples of

KEREN MICHAELI , DOMAC 13, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 56

ratified international treaties.[709] These included the four Geneva Conventions of 1949, and the Additional Protocols, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[710]

[710] Michaeli, *supra* note 349, at 22.

Dr. Zadic, Dissertation S.155/ 220

Originaltext:

been applied in the prosecution of crimes committed during the 1991-1995 war: the Four Geneva Conventions of 1949 [44] and their 1977 Additional Protocols; [45] the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;[46] and the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[47]

KEREN MICHAELI , DOMAC 13, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 22-23

Protected under International Law," Article 384 of the 2005 Criminal Code limits the application of command responsibility to the military or civilian superiors who knew that the forces under his command are preparing or have commenced committing war crimes and who have failed to undertake measures to prevent the crimes from happening. Article 384 of the 2005 Criminal Code reads:

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Unlike international law, Article 384 limits command responsibility to the military or civilian superior who **knew** that that forces under his command or control are preparing or have commenced committing crimes, and failed to take the measures that he could have taken and was obliged to take to prevent the commission of crime. The crime

OSCE, War Crimes Proceedings in Serbia 2003-2014, 2015, p. 61

The doctrine of joint criminal enterprise developed by the ICTY has not been incorporated into domestic Serbian law.[741]

741 Michaeli, *supra* note 349, at 78.

Dr. Zadic, Dissertation S.164/ 220

Originaltext:

Lastly, one doctrine identified with the ICTY, the doctrine of joint criminal enterprise (JCE), has not been incorporated into Serbian law, at least not its third

KEREN MICHAELI , DOMAC 13, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 78

In addition, the old Criminal Codes as well as the 2005 Criminal Code, requires that the co-perpetrator shall only be criminally responsible within the limits set by his own intention or negligence.[744] Thus, a Court must find the individual intention of the

[744] SFRY Criminal Code, Article 25 (1977); Compare also to Serbian 2005 Criminal Code, Article 36 (2005): "An accomplice is culpable for a criminal offence within the limits of his intent or negligence […]."

Dr. Zadic, Dissertation S.165/ 220

Originaltext:

Article 25.

(1) The co-perpetrator shall be criminally responsible within the limits set by his own intention or negligence, and the inciter and the aider -- within the limits of their own intention.

Yugoslavia: Criminal Code of the Socialist Federal Republic of Yugoslavia, 1977

https://www.refworld.org/docid/3ae6b5fe0.html

from all groups in the region,[761] the ICTY had a far more positive impact on domestic governance in BiH than previously assumed. It significantly influenced the capacity of the local authorities in BiH, shaped its normative landscape and informed the war crimes adjudication.[762]

762 Chehtman, *supra* note 227, at 554.

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Originaltext:

they exercise jurisdiction. This article argues that the International Criminal Tribunal for the Former Yugoslavia has had a far more positive impact on domestic governance in Bosnia & Herzegovina than previously assumed by both the academic and policy communi-

William W. Burke-White, The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina, 2008, p. 280

https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1177&context=faculty_scholarship

their local counterparts.[779] The transfer of legal and investigative expertise through seminars, conferences, court visits including the transfer of evidentiary materials and the possibility to consult the ICTY's Office of the Prosecutor's transition team, helped the Croatian judiciary to effectively take on war crimes prosecution.[780] The transfer of

[780] Michaeli, *supra* note 51, at 83.

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Originaltext:

detected from approximately 2004 onwards. It includes transfer of legal and investigational expertise through seminars, conferences and court visits as well as the transfer of evidentiary materials and consultation by the OTP Transition Team.

KEREN MICHAELI , DOMAC 10, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 82

the Croatian judiciary to effectively take on war crimes prosecution.[780] The transfer of knowledge by the ICTY members to their Croatian legal professionals „has been, for the most [part], voluntary and un-institutionalized“ but still left a lasting impact on war crimes adjudication in Croatia.[781]

781 Michaeli, *supra* note 51, at 84.

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Originaltext:

~~of the Ademi and Norac case as well as Category II cases, were of limited scope~~. The transfer of knowledge by the Tribunal to members of the Croatian legal profession has been, for the most, voluntary and un-institutionalized. ~~The ICTY's Outreach Program was~~

KEREN MICHAELI , DOMAC 10, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 84

was the main factor of influence. Improved know-how of the prosecutors and judges correlate with the improvements in the quality of the trials and attempts to reduce the blatant ethnic bias against Serbs in war crimes proceedings.

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Originaltext:

~~prosecutions against Croats.~~ Those changes correlate with improvements in the quality of trials and attempts to reduce the blatant ethnic bias against Serbs in war crime proceedings. ~~These~~

KEREN MICHAELI , DOMAC 10, THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA , 2011, p. 81

perpetrators. On average, only 10-15% of the defendants indicted had a mid-level function. In recent years, almost no mid-ranking defendant was indicted.[785] Also, it is

[785] Investigations and prosecutions in Serbia (2011), at p. 78.

Dr. Zadic, Dissertation S.178- 179/ 220

Originaltext:

first few years of the work of the war crimes institutions. Up until 2009, an average of 10-15% of the defendants indicted each year bore a mid-level type of responsibility. In recent years, almost no mid-ranking defendant was indicted: ~~in fact, all defendants indicted~~

OSCE, War Crimes Proceedings in Serbia 2003-2014, 2015, p. 43

networks remained in power for a long time. Even six years after the collapse of the Milošević regime, Carla Del Ponte noted, that the very concept of the rule of law remained alien to Serbian political culture.[793]

789 LAMONT, *supra* note 105, at 88.

790 Id. at 60.

791 Id. at. 47.

792 Id. at 47.

793 Id. at 65.

Dr. Zadic, Dissertation S.183/ 220

Originaltext:

It is of interest to note that six years after the collapse of the Milošević regime, ICTY Chief Prosecutor Carla Del Ponte argued that the very concept of the rule of law remained alien to Serbian political culture (*Del Ponte: Serbia's Painful Inability* 2006).

Christopher Kazumi Lamont, Coercion, Norms and Atrocity: Explaining State Compliance with International Criminal Tribunal for the former Yugoslavia Arrest and Surrender Orders, 2008, p. 88

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