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“Transitional Justice in Former Yugoslavia

The Influence of the ICTY on the development of the rule of law in Bosnia and Herzegovina, Croatia, and Serbia”

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I. INTRODUCTION

This doctoral thesis will explore the influence of the United Nations International Criminal Tribunal for the Former Yugoslavia (***ICTY***) on states of the Socialist Federal Republic of Yugoslavia (***Former Yugoslavia***), in particular, Bosnia and Herzegovina (***BiH***), Republic of Croatia (***Croatia***) and Republic of Serbia (***Serbia***). The factors influencing these countries will be taken from international relation theories on compliance, which try to explain the factors that made these countries comply and implement ICTY's international justice mechanism.

The first part of this thesis will examine international relations theories which explain the reasons why states comply with international law. At the core of the first section is the question of what makes comply with and implement international law (see at **II**. *First Part: Theories of Compliance with International Law – Focus on international criminal justice*).

Louis Henkin said that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[1] In other words, states follow international law although it is usually not enforced. This is the reason why many international legal scholars and practitioners assume that just because there is law, states will comply with it. At the same time, international relations scholars are more sceptical towards the power to persuade states to comply with international law and argue with the words of Thucydides "[t]he strong do what they can and the weak suffer what they must," irrespective of what international law prescribes them to do.[2] In order to confront and analyse the questions of efficacy and compliance with international law a new and "most exciting scholarship in

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[1] LOUIS HENKIN, HOW NATIONS BEHAVE 47 (1979); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 THE YALE LAW JOURNAL 1935, 1935-1045 (2002); Andrew Guzman, *A Compliance Based Theory of International Law*, 90 CALIFORNIA LAW REVIEW 1823 (2002).

[2] THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 394 (1920) in Hathaway, *supra* note 1, at 1935.

international law"[3] emerged; an interdisciplinary field between international relations and legal studies.

The end of the Cold War and its bipolar regime marked the emergence of interstate cooperation and growth of international law. The question whether this growing amount of international law will be effective became the focus of international relations and legal theorists. Both began to analyse the reasons why states would obey powerless international rules and how international law should be designed to be most effective.

Analysing the factors that states take into consideration when deciding whether to obey international law can help us understand their intentions and ultimately create an effective international law regime that states would follow. Understanding the functions, origin and meaning of rules including institutions may aid us in designing institutions capable of affecting states behaviour in desirable ways.[4] Thus, it is necessary to understand the reasons for international criminal justice and why institutions like the ICTY were designed.

Prosecuting the ones responsible for the conflict including those initiating, directing, aiding and abetting mass atrocities was thought to help end the political acceptability of massive human rights abuses.[5] The ICTY was created *inter alia* with the goal to stop an ongoing war in the region of Former Yugoslavia by threatening war crimes prosecution. However, the threat of punishment alone has a limited impact in societies where "post-conflict justice was diluted by unwillingness to intervene in a timely way to stop ongoing atrocities."[6]

What international criminal prosecution accomplished, however, was to slowly bring an end to the culture of impunity that has long prevailed in the community of nations.[7]

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3 Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 361, 363 (1999).

4 ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995).

5 Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 7 (2001).

6 Id. at 30-31.

7 Id. at 28.

Even in those cases where the perpetrators may still be supported by the public, international war crimes prosecution could ensure that the perpetrators' prospect of political rehabilitation and/or escape are lowered.[8] Ending impunity through prosecution in the long run can help achieve reconciliation in the society.[9]

Through the establishment of the ICTY the traditional national jurisdiction of a nation state over its nationals for crimes committed on its territory had to be given up and transferred to an international institution. The jurisdiction over war crimes prosecution is shared between the ICTY and the countries of Former Yugoslavia. This shared responsibility bears an inherent potential of mutual influence between national and international actors if only both actors are incentivized to share their knowledge.

In the second part of this doctoral thesis, I will analyse the factors and the incentives that facilitated the influence of the ICTY and its case law on the behaviour of BiH, Croatia, and Serbia in terms of implementation of adequate war crimes prosecution mechanisms and application of international criminal law principles.[10] (see at **III**. *Second Part: From the ICTY to the Western Balkan a Case Study*).

The countries of Former Yugoslavia offer an interesting case-study for analysing how the ICTY and international adjudication influenced the institutional and normative development in BiH, Croatia, and Serbia and what factors contributed to the development of the national legal system including case law. Understanding these factors and mechanics can provide insights on how international law and international institutions can induce state compliance, change state behaviour, and so improve the rule of law.

In sum, the questions that should be explored and answered by this thesis are the following:

- Have the ICTY and its international justice mechanism had an impact on the institutional and normative capacity to prosecute international war crimes in BiH, Croatia, and Serbia? and

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8 Id. at 7.

9 Id. at 13.

10 Abbott, *supra* note 3.

- What factors facilitated this development and made BiH, Croatia, and Serbia implement an adequate international justice mechanism?

In order to provide a framework for this analysis the following introductory sections will provide the context in which the influence of international law shall be analysed and in particular provide an overview of the difference between international law and national law and (see at **A**.), an overview of international criminal and its application (see at. **B.**), the reasons for war crimes prosecution as an transitional justice mechanism (see at **C**.) and an overview of the methodology, that will be used to analyse the impact of international criminal law adjudication in BiH, Croatia, and Serbia (see at **D.**).

A. INTERNATIONAL LAW *VS.* NATIONAL LAW

Before the birth of sovereign states, international law as much as any law, public or private, was believed to come from the same universal natural law or „*jus naturae et gentium*". This universal source made international law and national law equally binding to all man.[11] Thus, both international and national law was equally enforced through national institutions.[12] However, this began to change with the emergence of sovereign states in the Treaty of Westphalia (1648) and even more so with the birth of nation states in the 19th century.[13] Sovereign states, which defined their nation territorially, rejected the idea of natural law or universal law and instead viewed the law among nations as a law of custom and treaties.

This idea was particularly advanced by some prominent early positivists such as *Hobbes* and *Zouche*,[14] and initiated the era of dualism – the separation of national and international law.

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[11] Gaius first termed jus gentium as a law that was common to all men, which throughout the Middle Age was known as natural law that was binding to all mankind. This started to change in the 14th century with Grotius, who can be seen as the father of the traditional international law n Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 THE YALE LAW JOURNAL 2599, 2605-2606 (1997).

[12] Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 26, 26-27 (1952); ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 58-59 (1947).

[13] *See* e.g. Koh, *supra* note 11.

[14] NUSSBAUM, *supra* note 12.

The separation of international and national legal orders derived from different sources and was intended to address different subjects.[15] While international law derived its power from the will of different states which governed the relationship between states, national law derived its power from the will of one state and governed the relationship between the state and its people.[16] Dualists argued that international law could not directly regulate individuals and in order for international law to be directly applicable to individuals it needed to be transformed into national law.[17] Some scholars, such as John Austin, even argued that those international norms were not really *law* because they could not be enforced.[18]

This view was opposed by the monist conception of the relationship. One of the most prominent monists, *Kelsen*, saw international law and national law as part of the same fundamental norm and therefore as part of the same system.[19] According to *Kelsen*, international law was the superior law and legal systems needed to act in conformity.[20] Although not all states would comply with international law, *Kelsen* perceived the compliance with international law as ethical and moral preference.[21]

Nonetheless, the dualist's theory prevailed and international law has had little influence over nation states and their institutional and legal framework. Moreover, international law could not have been enforced through national law enforcement mechanisms, which made it practically ineffective.

This traditional perspective started to change recently. After the end of the Cold War, international law started to play a bigger role in national legal systems.[22] Up until then, it was believed that the only reason why international law would be complied

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15 *See* ANTONIO CASSESE, INTERNATIONAL LAW 214 (2nd ed.2005); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 406 (2003).

16 CASSESE, *supra* note 15, at 214.

17 Id. at 214.

18 Koh, *supra* note 11, at 2608-2609.

19 *See* KELSEN, *supra* note 15.

20 Id. at 15.

21 Id. at 587-588; CASSESE, *supra* note 15, at 216.

22 *See* ANDRÉ NOLLKAEMPER & JANNE ELISABETH NIJMAN, NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW (2007).

with was due to the bipolar system, in which the smaller states had to comply with international law in order not to be overrun by the two main powers during the Cold War.[23] This changed after the Cold War, the lack of two great powers that held the world in an order, prompted states to intensify the implementation of international treaties that would directly influence individuals, private parties and non-state actors through international criminal and civil law.

Sir *Jennings* noted:

> „In fact the place of international law in municipal court cases amounts today to a quiet and often unnoticed revolution in the nature and content of international law. It means that the strictly dualistic view of the relationship between international law and municipal law is becoming less serviceable and the old-well defined boundaries between public international law, private international law and municipal law are no longer boundaries but grey areas.“[24]

Allott characterises the emergence of a universal legal system and the end of strict dualism as „a tectonic shift in the relationship of the law phenomena“.[25]

The aim of this thesis is to provide a better understanding of one aspect of this „*tectonic shift*“, namely what factors influenced the national legal systems into applying and complying with international criminal law and how international criminal law adjudication, through the ICTY, may have influenced national legal systems.

B. INTERNATIONAL CRIMINAL LAW

According to *Cassese*, „international criminal justice is one of the few major achievements for the world community we may observe in the last 20 years“[26]

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23 Id.

24 R. Y. Jennings, *The Judiciary, International and National, and the Development of International Law*, 45 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 4 (1996).

25 NOLLKAEMPER & NIJMAN, *supra* note 22.

26 Antonio Cassese, *Reflections on International Criminal Justice*, 9 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 271, 272 (2011).

This, he found, was because international criminal law responded to atrocities by making accountable those who committed grave human rights breaches and would have otherwise been shielded by the sovereignty of nation states.[27] In addition, international criminal law brought a shift in thinking about sovereignty and 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 „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 punished for violating international criminal norms even if these acts were not punishable under national laws or if those individuals were not prosecuted in their own country.

For Bassiouni, universal application of international criminal law and state sovereignty have been in constant tension.[31] He argues that universal application of international criminal law is necessary as in a world of states that value sovereignty more than human rights, international criminal law cannot be effective.[32] Cassese points out that international criminal law can only be effective if states gave up certain aspects of their sovereignty to allow effective prosecution of war crimes.[33] Nuremberg and Tokyo Tribunals were only possible because Germany and Japan were completely defeat and had not rights to invoke their sovereignty. Any other scenario might not

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27 Id. at 272-273.

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

29 Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis [hereinafter: Nuremberg Charter], Article 6(c) (1945).

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

31 Bassiouni, *supra* note 28.

32 Bassiouni, *supra* note 28.

33 CASSESE, *supra* note 15, at 17.

have led to the establishment of the criminal tribunals. As an example, the Allies avoided to submit their conduct to international criminal law scrutiny.[34]

The development of international criminal law was on pause during the Cold War and resumed again in 1990, when the western world witnessed yet again systematic atrocities that escalated to war crimes, crimes against humanity and ultimately genocide. In response to reports of atrocities in Former Yugoslavia and Rwanda, the international community established two international ad-hoc criminal tribunals with the assignment to investigate war crimes and prosecute perpetrators.[35] Following this, tremendous effort was invested to expand the jurisdiction of international criminal law and ultimately the Rome Statute of the International Criminal Court (ICC Statute) was adopted in July 1998. On 1 July 2002, with the entry into force of the ICC Statute also the International Criminal Court was established.[36]

For the first time, international bodies were shaking-up the Westphalian model of state sovereignty by directly affecting individuals and formulating a universal duty to prosecute individual perpetrators for war crimes, crimes against humanity, and genocide.[37]

C. TRANSITIONAL JUSTICE

Those who commit crimes should not go unpunished irrespective of the sovereign national shield that protects them. This overall acceptance has led to a normative shift towards international law and a proliferation of directly applicable norms and legal instruments to address human rights abuses and war crimes.[38] The amount of international organisation that deals with human rights abuses and war crimes is growing. With them also the transitional justice industry grows and provides solutions to post-conflict societies on how to come to terms with past abuses.

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34 Bassiouni, *supra* note 28.

35 Christopher Rudolph, *Constructing an Atrocity Regime: the Politics of War Crimes Tribunals*, 55 INTERNATIONAL ORGANIZATION 655, 656 (2001).

36 Rudolph, *supra* note 35, at 656.

37 Cassese, *supra* note 26, at 272.

38 JELENA SUBOTIĆ, HIJACKED JUSTICE: DEALING WITH THE PAST IN THE BALKANS 123 (2009).

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]

Among different models addressing how to deal with the past the most prominent models include reparations to victims, institutional vetting of those affiliated with the abusive regime, truth commissions, and international justice systems (ICC, ICTY, etc.).[40] They are set up to achieve the ultimate goal of transitional justice; reconciliation.

Most transitional justice literature argues that reconciliation can be achieved in many ways most importantly, truth and justice. It argues that justice needs to be achieved in order to promote peace and reconciliation. This can be accomplished by providing victims the possibility to be heard and by punishing the abusers for their wrongdoings.[41].

However, there are also those voices in the transitional justice literature who believe that leaving the past behind may be the only way to move forward. Truth commissions and international trials may de-stabilize a fragile new transitional country and a lasting peace may only be achieved if amnesties are granted to perpetrators, who have public support.[42]

Supporters of international criminal justice defend prosecution of war crimes as a tool to hold perpetrators of atrocities accountable and argue that at the same time it provides peace by giving a voice to the victims.[43] To put it in the words of the former

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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).

40 KRITZ, *supra* note 39.

41 Catherine Turner, *Delivering Lasting Peace, Democracy and Human Rights in Times of Transition: The Role of International Law*, 2 INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE 126, 142 (2008).

42 Jack L. Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INTERNATIONAL SECURITY 5 (2003).

43 Rudolph, *supra* note 35, at 657.

U.S. Secretary of State Madeline Albright, „[…] it is very difficult to have peace and reconciliation without justice."[44]

Although, a lot has been written on transitional justice, there are still a lot of open questions; does prosecution of war crimes or truth commissions or other methods of international justice actually succeed in promoting reconciliation.

1. The creation of the International Criminal Tribunal for the Former Yugoslavia (*ICTY*)

The wars in the Former Yugoslavia, not only led to the dissolution of the Former Yugoslavia but were also accompanied by wide scale atrocities that breached international humanitarian law, and escalated to war crimes, crimes against humanity, and genocide.[45]

In response to the atrocities in BiH, Kosovo, and Rwanda the international community established international ad-hoc criminal tribunals to investigate crimes and prosecute perpetrators.[46] This lead to the formation of the ICTY, which was born in an attempt to provide justice and the hope to stop atrocities in the region.

Under Chapter VII of the UN Charter, the UN Security Council unanimously passed the Resolution 827, formally establishing the International Criminal Tribunal for the former Yugoslavia on 25 May.[47] The ICTY was created for the purpose of prosecuting four clusters of offenses: (***i***) Grave breaches of the 1949 Geneva Conventions (Article 2), (***ii***) violations of the laws or customs of war (Article 3), (***iii***) genocide (Article 4), and (***iv***) crimes against humanity (Article 5).[48] The procedural norms of the ICTY were based on those established at the Nuremberg Tribunals, which contained norms similar to civil and common law system.

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[44] Norman Kempster, *Albright Queries Sierra Leone Peace*, LOS ANGELES TIMES, 19 October 1999, available at http://articles.latimes.com/1999/oct/19/news/mn-23834 (last accessed 3 July 2017).

[45] *Prosecutor v. Krstic*, Case No. IT-98-33, Appeals Chamber Judgment, para. 39 (19 April 2004).

[46] Rudolph, *supra* note 35, at 656.

[47] Security Council Resolution 827, UN Doc. S/RES/827 (May 23, 1993).

[48] United Nations International Criminal Tribunal for the former Yugoslavia, *About the ICTY*, available at http://www.icty.org/en/about (last accessed 19 April 2017).

Despite the existence of the Nuremberg and Tokyo Tribunals, the ICTY was the first tribunal of its kind to try individuals for war crimes, crimes against humanity, and genocide. Although the Resolution 827 which established the ICTY, passed unanimously, it was confronted with challenge and political resistance particularly from the Former Yugoslavia.[49] Critics argued that these international ad-hoc criminal tribunals were too remote from the people to whom they were supposed to deliver justice. The ICTY and ICTR were accused to have had very little impact on the domestic development of law and justice and were criticised for consuming a lot of money and resources that could have otherwise been invested in domestic development.[50]

Distancing the ICTY from the region was intended. Any cooperation between that national authorities of Former Yugoslavia and the ICTY was impossible during the conflict between 1993 and 1995 and thereafter it was reduced to a bare minimum for fear of accusation of bias. Cooperation or exchange of information could have hampered the work of the ICTY, including the investigation and evidence and jeopardized victims or witnesses.[51] This was also convenient to domestic governments, as they could avoid cooperation with the ICTY and refused to confront the public with war crimes prosecution for fear of negative reactions in the region.

As a result, the ICTY was detached from the region and was „physically and normatively" separated.[52] Its seat is in The Hague and the Statute of the ICTY (as updated from time to time – ***ICTY Statute***)[53] made no reference to the domestic law

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49 Rudolph, *supra* note 35, at 660.

50 William W. Burke-White, *Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia and Herzegovina*, 46 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 279, 281 (2007-2008). UNDP Belgrade, et al., *Transitional Justice: Assessment Survey of Conditions in the Former Yugoslavia* UNITED NATIONS DEVELOPMENT PROGRAMM UNDP BELGRADE, 21 (2006).

51 Keren Michaeli, *The Impact of the International Criminal Tribunal for Yugoslavia on War Crime Investigations and Prosecutions in Croatia*, 10 DOMAC 36 (2011).

52 Ivana Nizich, *International Tribunals and their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal*, 7 ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 353, 362-364 (2000-2001).

53 Statute of the ICTY adopted by Security Council Resolution 827, UN Doc. S/RES/827 (23 May 1993) and amended from time to time, Article 7(3), available at

and only implemented international law.[54] In addition, the domestic jurisprudence of the local courts was not binding to the ICTY.[55] Most notably, the ICTY's mandate did not include any requirements to cooperate with the local authorities and contribute to domestic capacity to prosecute war crimes.[56] As a result no resources were assigned to address fostering domestic judicial authorities.

Ex-post research on the influence of the ICTY also seems to suggest that it was exactly this distance of the ICTY that prevented institutional and legal development of the domestic rule of law and the domestic capacity to prosecute war crimes.

Although in 1999, the ICTY started an outreach program, began translating documents into the local language and opened liaison offices in the region, a real change in policy did not happen before 2003; only 10 years after the ICTY's establishment. The pressure of the donor states urging the ad-hoc international criminal tribunals to complete their missions grew to which the UN Security Council eventually gave in.

In 2003 and 2004, the UN Security Council endorsed the Resolution 1503 and 1534 which set forth the completion strategy for the international ad-hoc criminal tribunals (***Completion Strategy***).[57] Despite the ICTY's concerns that the the domestic institution might not be yet capable to conduct adequate war crimes prosecution, the strategy foresaw that (i) the ICTY complete its work by 2010, (ii) the countries in the region intensify the cooperation with the ICTY, and (iii) the international community provides all the necessary assistance to domestic jurisdictions to improve their capacity to try war crimes cases including those transferred from the ICTY. Also the ICTY was encouraged to improve their outreach program and contribute to the

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http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb08-e.pdf (last accessed 30 April 2017) [hereafter ***ICTY Statute***].

54 Michaeli, *supra* note 51, at 36: noting that the only exception Article 24 of the ICTY Statue providing that "In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia".

55 ICTY Rules of Procedure and Evidence, Rule 12:"Subject to Article 10, paragraph 2, of the Statute, determinations of courts of any State are not binding on the Tribunal."

56 David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER FORUM OF WORLD AFFAIRS 5, 12-16 (2002).

57 Security Council Resolution 1503, UN Doc. S/RES/1503 (28 August 2003); Security Council Resolution 1534, UN Doc. S/RES/1534 (26 March 2004).

regional capacity development.[58] The UN Security Council required the ICTY's Office of the Prosecutor to review the case load of the ICTY and determine the cases that should proceed before the ICTY and those that would be transferred to domestic authorities making sure to only process the „most senior suspected of being most responsible for crimes"[59]

The ICTY was required to transfer cases and ongoing investigations of intermediate and lower level offenders to the domestic prosecution, provided they had the ability to conduct fair trials.[60] This was when the international attention finally started to shift to the domestic level. In order to prepare the ICTY for the transfer of cases the ICTY Statue and the ICTY Rules of Procedure and Evidence had to be adapted. First, Prosecutors' wide range of discretion on initiating investigations and issuing indictments was limited and second ICTY Rules of Procedure and Evidence, amended Rule 11 by allowing a transfer of cases to national jurisdictions if they were willing 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:
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> (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 […]"

Since then, the ICTY and ICTY's Office of the Prosecutor have assigned resources and provided assistance to local authorities in order to assist them in establishing an adequate institutional and legal framework and prepare them for the referral of

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58 Security Council Resolution 1503, UN Doc. S/RES/1503, para 1, 2 and 7 (28 August 2003).

59 Security Council Resolution 1534, UN Doc. S/RES/1534, para. 5 (26 March 2004).

60 Security Council Resolution 1503, UN Doc. S/RES/1503 (28 August 2003).

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

cases.[62] In order to be able to transfer war crimes cases to domestic courts, the ICTY needed to be assured that by independent and professional judges would conduct war crimes proceedings fairly that would adhere to internationally accepted standards. This required effective judicial institutions and appropriate legislation.[63] Consequently, BiH, Croatia, and Serbia reformed their war crimes prosecution system and national criminal law to facilitate trials.

Despite special legislation and institutional development designed for war crimes prosecutions, domestic courts continue to face many problems. These included (i) ethnic bias, (ii) nor prosecuting high-ranking officials in accordance with the established international criminal law principles, (iii) conducting trials *in absentia*; (iv) initiating trails unsubstantiated, and (v) failing to respect the norms of due process.[64]

2. Prosecuting war crimes as means to reconcile war-torn societies

What is the purpose of the ICTY? More generally, international war crimes prosecution is an attempt to help war-torn societies to come to terms with a legacy of large-scale past abuses, and achieve reconciliation.[65] The ICTY has jurisdiction over individuals for a narrow set of substantive criminal offences that occurred on the territory of the Former Yugoslavia which prompts the question if such a narrow jurisdiction can promote reconciliation.

Is the purpose of an international criminal tribunals the same as for domestic criminal courts, which is to deter individuals from re-committing criminal offences

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62 United Nations International Criminal Tribunal for the former Yugoslavia, *Working With The Region*, available at http://www.icty.org/sid/96 (last accessed 2 May 2017); Id.UNDP Belgrade, et al., *supra* note

63 Ivo Josipović, *Responsibility for War Crimes before National Courts in Croatia*, 88 INTERNATIONAL REVIEW OF THE RED CROSS 145, 161 (2006).

64 UNDP Belgrade, et al., *supra* note

65 The Secretary-General, *Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 1, delivered *to the Security Council*, U.N. Doc. S/2004/616 (23 August 2004) [hereinafter *The Secretary-General Report on Transitional Justice*]

(*Spezialprävention*) and others from committing the same crimes (*Generalprävention*).[66]

The ICTY was established by the UN Security Council under Chapter VII of the Charter of the United Nations.[67] Measures under Chapter VII aim at the restoration of peace and security. Thus, the establishment of the ICTY was a measure that was targeted at providing peace and security. ICTY's effectiveness and success was hence initially measured based on its contribution to peace and security.

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 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]

Against this background, almost 25 years after ICTY's establishment, it is worth noting the rhetorical change in assessing the ICTY's legacy. The discussion whether international prosecution may contribute to reconciliation of war-torn societies seems to have been entirely dismissed from the ICTY's official language. The ICTY President, Judge Agius, at the recently held ICTY Legacy Conference in Sarajevo[70] noted that the ICTY delivered „a comprehensive set of proven facts about the 1990s wars […] We are giving you the truth about what happened." He further emphasized „[w]e are not offering reconciliation, because it has not been the mandate of this court

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66 Burke-White, *supra* note 50, at 291-292.

67 ICTY Statute, Preamble (1993 as amended).

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

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

70 United Nations International Criminal Tribunal for the former Yugoslavia, *Legacy Conference Held In* Sarajevo on 22-24 June 2017, available at http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTYDigest/2017/icty_digest_160_en.pdf (last accessed 25 June 2017).

to do it."[71] This comment deviated from the initial purpose of the ICTY, its establishment as a Chapter VII measure and the mandate to deliver justice and peace.

But it is not surprising, its mandate to deliver justice and peace put a burden on the ICTY, that could not have been achieved solely through adjudication of war crimes. The ICTY failed to deliver peace upon its establishment and critics argue that it fell short of providing effective reconciliation in the region.[72]

Against this background and the contradictory statements on its purpose, it is worth examining what did the ICTY's achieved, what impact had it actually have in the region. Resonating with Judge Agius, the ICTY did contribute to the establishment of the truth in the region, sought justice and prevented impunity. However, one aspect still remains under-researched, which is the impact of the ICTY on the development of the rule of law in the region of the Former Yugoslavia. This thesis shall therefore shed some light on the effect the ICTY on the development of domestic prosecutorial mechanisms in the region of Former Yugoslavia the impact on the society in BiH, Croatia, and Serbia.

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71 Balkan Insight, *We Offered Truth, Not Reconciliation* (21 June 2017) available at https://www.balkaninsight.com/en/article/hague-tribunal-president-we-offered-truth-not-reconciliation--06-21-2017 (last accessed at 25 June 2017).

72 Akhavan, *supra* note at 8

D. METHODS OF MEASURING THE INFLUENCE OF INTERNATIONAL CRIMINAL LAW JURISPRUDENCE ON THE DEVELOPMENT OF THE NATIONAL LEGAL SYSTEM

This study shall analyse what factors facilitated the influence of the ICTY and contributed to the development of the rule of law in the region of Former Yugoslavia. Through the application of the international relations theory on compliance, I seek to identify the factors that made BiH, Croatia, and Serbia comply and implement ICTY's international justice mechanism.

The first part, will provide an overview of the most relevant international relation compliance theories with international law. These theories provide an overview of the reasons of why states might comply with and adopt international law.

The second, will analyse the impact of international war crimes prosecution on the institutional and normative capacity development in BiH, Croatia, and Serbia with an emphasis on the domestic capacity to prosecute war crimes. The analysis will focus on the influence of the ICTY on this development and the factors that contributed to this influence and induced BiH, Croatia and Serbia to implement ICTY's international justice mechanisms.

The analysis will focus on three countries of the Former Yugoslavia; BiH, Croatia, and Serbia. I have chosen these three countries as most of the war crimes committed during the conflict in the 1990s happened on the territory of BiH, Croatia and Serbia, with Serbia's Milošević regime considered predominantly responsible for the war crimes.[73] All three countries are independent countries with an independent legislative, executive and judicial branch of government. Although BiH can be considered as under *de facto* rule of international community, due to the vast powers of the Office of the High Representative in Bosnia (***OHR***) – these powers include the power to adopt binding decisions when local parties seem unable or unwilling to act or to remove from office public officials who violate legal commitments.

Unlike the Republic of Kosovo, BiH is not under international supervision. This is the reason why I have chosen not to consider the Republic of Kosovo in my study, as the

[73] Excluding The Republic of Slovenia, the Former Yugoslav Republic of Macedonia and the Republic of Kosovo.

analysis might be distorted due to rule of the international community and the not yet independent status of Republic of Kosovo.

To provide a basis for the inquiry it is worth providing a short definition of what is understood by the term capacity development in order to accurately depict the object of ICTY's influence. This thesis follows the definition of capacity development as provided by the OECD. The OECD understands the term *capacity* as „the ability of people, organisations and society as a whole to manage their affairs successfully".[74] And *capacity development* is understood as the „process whereby people, organisations and society as a whole unleash, strengthen, create, adapt and maintain capacity over time."[75] Unlike capacity *building* which implies something new being erected based on a predesigned plan, the term development emphasizes that most of the transitioning societies have already some capacity in place that requires further 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-how, the development of the right infrastructure that is able to adequately and effectively address war crimes prosecution.[77]

Therefore, I will look at the development of judicial institutions designated to prosecute war crimes in BiH, Croatia, and Serbia and the development of the relevant criminal law in these countries. In addition, I will look at how domestic courts have applied international criminal law and how they have implemented concepts such as command responsibility and some other significant international criminal law examples into their practice. The case of command responsibility is particularly interesting because the domestic judges and prosecutors were not familiar with this concept and thus any application of command responsibility might have been due to the ICTY's case law.

The analysis will also include a short overview of the domestic political conditions in particular in Croatia, and Serbia as they are relevant for the determination of factors

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

75 Id.

76 Id.

77 Id. at 11.

that contributed to the implementation of the international justice mechanisms. As BiH was under a de facto international protectorate, the domestic political conditions did not play such a decisive role in shaping the institutional and normative framework mostly due to the international community pushing the reforms through the domestic parliament. Any full analysis of BiH, should include a glance into the difference of the Federation of BiH and Republika Srpska and their development in comparison to the state-level.

Consequently, the thesis will provide an analysis factors that supported, catalysed and facilitated the capacity development of the domestic justice mechanism in BiH, Croatia, and Serbia.

II. FIRST PART: THEORIES OF COMPLIANCE WITH INTERNATIONAL LAW – FOCUS ON INTERNATIONAL CRIMINAL JUSTICE

A. INTRODUCTION

The following section of this thesis will provide an overview of international relations theories, that try to explain why states comply with international law. These theories are also known as compliance theories.

Understanding the factors that induce international law compliance can help scholars and international lawyers understand how to design an effective international criminal law enforcement system. This knowledge will help to implement compliant criminal justice mechanisms in post-war societies. Effective prosecution of those responsible for war crimes in a post-war society strengthens national prosecutorial and judiciary institutions and in turn strengthens the rule of law.

It was only three decades ago, that international lawyers first started to analyse international relation theories from an angle of international law compliance. This multidisciplinary approach therefore still needs to be further explored and analysed. An understanding of what makes international law effective, can help encourage governments and states to comply with it.

The international relations theories can be divided in two parts. The first part argues that state compliance with international law strongly correlates with state interest (*see* at **B.** *Interest-based theories of state compliance*) and the second part considers states' belief and conviction as the main driver for compliance with international norms (*see* at **C**. *Norm-based theories of state compliance*).

B. INTEREST-BASED THEORIES OF STATE COMPLIANCE

At the core of the interest-based theories of state compliance is the self-interest of states and governments. The „interest-based compliance theories share the idea that states and individuals that guide them are self-interested actors that comply with

international law if it furthers their self-interest.“[78] Consequently, the states and governments calculate the costs and benefits of either compliance or non-compliance with international law.[79] Depending on the outcome of this calculation, states comply with international law in those cases where the benefit of compliance outweighs the cost of non-compliance states. If there are no benefits to compliance states prefer not to comply with international law as non-compliance better serves their self-interest. With regards international criminal law prosecution, interest-based theorists emphasize the that any compliance with it is the result of power politics.[80]

International based theories can be divided in three main categories: (i) realism and neoliberalism; (ii) institutionalism; and (iii) liberalism. These theories have in common their conviction that states are driven by self-interest. Although these theories differ in their motivation and the type and source of the interest that influences their decision making, there are no strict lines between these theories.

The realist theory assumes that states are entirely motivated by their desire for power.[81] Hence, realists are of the opinion that states only comply with international law if it is in the interest of the most powerful states. The more powerful states coerce the less powerful states into compliance (see at **1.**).[82] Institutionalism promotes, as the name suggests, institutions which coerce or influence states into a compliant behaviour. Together with international law institutions can help countries maximize their long-term power (see at **2.**).[83] The liberal theory differs in that it focuses on domestic politics and interest and domestic institutions to define the self-interest of state.[84] According to the main argument one can understand state decisions only by understanding domestic politics (see at **3.**).[85]

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78 OONA ANNE HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS (2005). at 26.

79 Id. at. at 26.

80 Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS, 48 (2003).

81 HATHAWAY & KOH, *supra* note 78, at 26.

82 Id. at 26.

83 Id. at 27.

84 Id. at 27.

85 Id. at 27.

1. Realism and Neorealism

Realism has established itself as one of the leading theories in the US and has been in the centre of theoretical debates for a long time. Although classical realism dates to Niccolo Machiavelli and Thomas Hobbes, the realist theory became prominent only after World War II.[86]

The basic premise behind realism is that states are motivated to act only if it serves their own (geopolitical) interests.[87] As a consequence, realists understand that states only comply with international law if it serves the interests of few powerful states that then compel the other weaker states to comply.[88]

The classical realism was revived after the Second World War and was a response to the failure of the so called idealists (dominated by Woodrow Wilson, hence also called Willsonianism) to prevent the next disaster.[89] The Second World War reinforced the notion that world politics was based on power politics and self-interest of states and thus global rules can only be enforced where a strong state supports the decision of an international body.

Carr and *Morgenthau* are two of the most prominent scholars who not only shaped the theory of realism but also influenced US foreign policymakers, such as Henry Kissinger and George Kennan.[90]

They described the world as an anarchy where power politics rather than international law influences state behaviour.[91] They relied on the following four assumptions:

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

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86 Hathaway, *supra* note 1, at 1944.

87 Id. at 1944-1945; Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARVARD INTERNATIONAL LAW JOURNAL 487 (1997); EDWARD HALLETT CARR & MICHAEL COX, THE TWENTY YEARS' CRISIS, 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS 43 (2001); HANS J. MORGENTHAU & KENNETH W. THOMPSON, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (6th ed.1985).

88 Hathaway, *supra* note 1, at 1945, 1935.

89 HATHAWAY & KOH, *supra* note 78, at 27

90 Peter J. Katzenstein, et al., *International Organization and the Study of World Politics*, 52 INTERNATIONAL ORGANIZATION 645 (1998).

91 CARR & COX, *supra* note 87; MORGENTHAU & THOMPSON, *supra* note 87, at 8.

(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]

Morgenthau in his book „*Politics Among Nations*" argues that state policies, both domestic and international, follow three basic patterns, i.e. to keep power, to increase power or to demonstrate power.[93] One of the main issues with international law, as he saw it, was that although international law has mostly been observed, the violations thereof were not always enforced and even if they were enforced, the enforcements were not effective.[94] The decentralised structure of international law renders it a „primitive type of law".[95] Lacking a central enforcement authority that would legislate, adjudicate and enforce international law, it was left to be ruled and enforced by power politics. Hence, it was only enforced if it was aligned with identical and complementary interests of individual states and the distribution of power among them.[96] As argued by Morgenthau „where there is neither community of interest nor balance of power, there is no international law."[97]

Neither *Carr* nor *Morgenthau* saw international adjudication as an effective tool to ensure compliance with international law. For *Carr* international courts are not suitable for resolving fundamental political disputes without a political consensus among the international community.[98] *Morgenthau* concludes that serious disputes over the distribution of power could never be resolved by an international court.[99]

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

93 MORGENTHAU & THOMPSON, *supra* note 87, at 8.

94 Id. at 295.

95 Id. at 295-296.

96 Id. at 297-313. at 297-313.

97 Id. at 296.

98 CARR & COX, *supra* note 87.

99 MORGENTHAU & THOMPSON, *supra* note 87, at 312-313.

Even Oppenheim, who was labelled as the father of the modern notion of international law, states that the balance of power is „an indispensable condition of the very existence of international law".[100] According to him, only a balance of power between the nations may guarantee that international law is being complied with, as there is no central political authority."[101]

The extreme form of realism was relaxed during the Cold War and was most prominently advanced by *Waltz* in his influential book „*Theory of International Politics*", arguing that states do not only pursue dominance over others.[102] According to the theory of *neorealism*, Waltz explained, that states „at a minimum, seek their own preservation and, at a maximum, drive for universal domination"[103]:

> „If states wished to maximize their power, they would join the stronger side, and we would see not balances forming but a world hegemony forged. This does not happen because balancing, not bandwagoning, is the behaviour induced by the system"[104]

For neorealist, international institutions are a mere reflection of preferences of powerful states that can induce compliance on the part of a weaker state.[105] A neorealist would argue that the only reason why the countries of Former Yugoslavia would follow international institution and comply with its orders, is because they were either coerced by more powerful global actors or because they are pursuing self-interest.

The prospect of gaining international financial assistance or membership in international organisations often incentivized the countries of Former Yugoslavia to

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100 LASSA OPPENHEIM, 1 INTERNATIONAL LAW, A TREATISE 193 cited in Id. at 296.

101 Id.

102 KENNETH NEAL WALTZ, THEORY OF INTERNATIONAL POLITICS (1st ed.1979); HATHAWAY & KOH, *supra* note 78, at 28; Hathaway, *supra* note 1, at 1943 (note 14).

103 WALTZ, *supra* note 102, at 118.

104 Id. at 11-119.

105 Kenneth Neal Waltz, *Structured Realism after the Cold War*, 25 INTERNATIONAL SECURITY 5, 26-30 (2000); John J. Mearsheimer, *The False Promise of International Institutions*, 19 INTERNATIONAL SECURITY 5, 13 (1994); CHRISTOPHER K. LAMONT, INTERNATIONAL CRIMINAL JUSTICE AND THE POLITICS OF COMPLIANCE 11 (2010).

cooperate with the ICTY.[106] The former president of the ICTY, Cassese emphasised that the ICTY relied on the cooperation between states, without which, he claimed, „the Tribunal will turn out to be utterly impotent“[107]

However, the (neo)realist theory is not without criticism. Realpolitik has been accused of promoting impunity. It was criticized that Realpolitik promote impunity where the more powerful states aim to incentivize violating actors in complying with certain laws – at both the international and national level. In these cases, impunity has been granted at the expense of the more complex task to confront responsibility.[108] Most prominently Bassiouni, accused realists of trading accountability for political stability:

> „[T]he pursuit of realpolitik may settle the more immediate problem of a conflict, but, as history reveals, its achievements are frequently at the expense of long-term peace, stability, and reconciliation.“[109]

2. Institutionalism

Another interest-based theory is the so called (neoliberal) institutionalism. This theory is very similar to the realist or neorealist view, as it also believes that the underlying motivation of state behaviour is the pursuit of their own self-interest.[110] It diverges only in the assumption that international institutions are capable of constraining state behaviour, are thus a significant factor in state behaviour, and play an active role in compliance with international law.[111] *Keohana*, one of the most notable institutionalists argues that self-interested states form institutions in order to maximize their expected gains.[112] It is through institutions that states try to engage in activities

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106 Id. at 11-13.

107 Fourth Annual Report of the ICTY, UN Doc. A/52/375 S/1997/729, 44 (1997).

108 Bassiouni, *supra* note 28, at 191; LAMONT, *supra* note 105, at 13.

109 Bassiouni, *supra* note 28, at 191.

110 *See* generally HATHAWAY & KOH, *supra* note 78, at 51; Hathaway, *supra* note 1, at 1948; *See also* LISA L. MARTIN, COERCIVE COOPERATION (1992);

111 Robert O. Keohane, *The Demand for International Regimes*, 36 INTERNATIONAL ORGANIZATION 325, 141 (1982); HATHAWAY & KOH, *supra* note 78, at 49-51; LAMONT, *supra* note 105, at 14-15; Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INTERNATIONAL ORGANIZATION 185 (2009).

112 *See* generally, Robert O. Keohane, *International Institutions: Two Approaches*, 32 INTERNATIONAL STUDIES QUARTERLY 379 (1988); Robert O. Keohane, *Reciprocity in international*

and cooperation in order to confine short-term power maximisation in exchange for long-term goals that otherwise could not be achieved through unilateral or bilateral activities.[113]

This explained the significant increase in international institutions from 100 international institutions in 1945 to 600 in 1980.[114] After the Cold War and the fall of the bipolar regime, the realists argued that as a consequence of the multipolar competition and everyone seeing the chance to position itself as the dominant power, international institutions would decline.[115] Instead, the exact opposite happened. Institutionalists predicted an increase in inter-dependence between the different states that would require more control, rules and therefore also international institutions. Thy can confine self-interested co-operation, stabilise expectation and reduce uncertainty.[116]

During the 1990s, international relations and legal scholars started to analyse international law as a tool that confines short-term power maximisation and incentivise cooperation in the same way as international institutions. *Guzman*, was one of the first scholars to comprehensively analyse states' compliance with international law from an institutionalist perspective with a focus on power and interests as opposed to legitimacy or ideology.[117] He argued that states would violate international law „[i]f the direct and reputational costs of violating international law are outweighed by the benefits thereof."[118] In his opinion, it would make no sense for governments to invest resources to negotiate international legal conventions, establish

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relations, 40 INTERNATIONAL ORGANIZATION 1 (1986); ROBERT O. KEOHANE, INSTITUTIONALIST THEORY AND THE REALIST CHALLENGE AFTER THE COLD WAR (1992); HATHAWAY & KOH, *supra* note 78, at 51.

113 HATHAWAY & KOH, *supra* note 78, at 51; KEOHANE, *supra* note 112.

114 DAVID A. BALDWIN, NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE (1993).

115 Realists such as *Mearsheimer* expected that after the Cold War the European Union would became weaker as the peaceful period after the stabilising period of the Cold War ended, while *Keohana* on the other hand expected a grow in cooperation between the European states and European institutions cited in Id. at 289-291.

116 BALDWIN, *supra* note 114, at 288.

117 Guzman, *supra* note 1, at 1823; Hathaway, *supra* note 1, at 1949.

118 Guzman, *supra* note 1, at 1823; Hathaway, *supra* note 1, at 1948-1949.

international dispute resolution mechanisms and try to justify their behaviour under international law.[119] He argues that much like in the „prisoner's dilemma game" the rational self-interested states, due to lack of trust, would end up violating international rules. This outcome, however, could be changed by adding incentives to the game that would make compliance more likely.[120] Such is the case in a domestic environment where a judicial system and an effective enforcement mechanism makes co-operation the better option for individuals.[121]

Institutionalists argue that any effective international law model that has the potential to change state behaviour, requires the implementation of an effective sanctioning system.[122] According to *Guzman*, functioning and effective international law provides for possibilities to choose between different commitment levels, with centralised and efficient sanctioning mechanisms that may impose direct sanctions by third countries, which may including reputational costs.[123] The institutionalists see the international tribunal system as a tool which can help facilitate cooperation among states and foster compliance with international criminal law.[124]

However, if one is to assume that states comply with international institutions because they have created and consented to an international instrument then the ICTY seems an exception to the rule. The ICTY was created by the UN Security Council and imposed on the countries of the Former Yugoslavia.[125] Neither did they consent to it nor were they involved in its creation. Institutionalists, also have a difficult time explaining why states not involved in the conflict were behind the enforcement of the ICTY Statute and exerted pressure on the countries of the Former Yugoslavia to induce compliance and cooperation with ICTY. Those third-party states were neither harmed by the non-compliant countries of Former Yugoslavia nor did they have any

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119 Guzman, *supra* note 1, at 1844.

120 Id. at 1842-1844.

121 Id. at 1845.

122 Id. at.

123 Guzman argues that "the absence of an explanation for why states obey international law in some instances but not in others threatened to undermine the very foundation of the discipline." in Id. at 1855-1857.

124 Abbott, *supra* note 3; Rudolph, *supra* note 35.

125 LAMONT, *supra* note 105, at 15.

costs inflicted upon them.[126] Still, they got active in pressuring BiH, Croatia and Serbia in implementing an effective international criminal law mechanism.

3. Liberalism

The third of the interest-based theories is the so called liberal theory. The liberal theory is built up on the work of Immanuel Kant. In his essay „*Perpetual Peace*", Kant argues that „the civil construction in every nation should be republican".[127] This is because in his view, republican states (i.e. democracies) require the consent of their citizen before going to war, and most citizens would not engage in war as it is costly and risky.[128] This was later taken up by international relations scholars most notably *Doyle*, who argues that although liberal states engage in war, they do not engage in war with one another.[129]

Liberal theory looks at domestic preferences to explain how a state will behave, interact with other states and comply with international norms. Contrary to institutionalists and realists, liberals do not see the state as one unique actor but rather as a „sum of different parts".[130] The foundation of the liberal theory is the relationship between states, their domestic constituencies and stakeholders that constantly influence state behaviour.[131] According to *Moravcsik*, different stakeholders and individuals through political exchange and collective actions seek to pursue their self-interest.[132] Democracies are a reflection of these interests and demands which are reflected on an international level, where the different preferences meet each other. The states meet on the international level where they can determine whether their

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126 *See also* Robert O. Keohane, *Reciprocity in international relations*, 40 INTERNATIONAL ORGANIZATION 1 (1986); Abbott, *supra* note 3; Rudolph, *supra* note 35; LAMONT, *supra* note 105, at 16.

127 Immanuel Kant, *Perpetual Peace*, in PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 107 (Hackett Co., Ted Humphrey trans., 1983) (1795); HATHAWAY & KOH, *supra* note 78, at 78.

128 Id.

129 Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHILOSOPHY AND PUBLIC AFFAIRS 205 (1983).

130 HATHAWAY & KOH, *supra* note 78, at 78

131 Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INTERNATIONAL ORGANIZATION 513, 516 (1997).

132 Id. at 517.

preferences will be harmonious, difficult or impossible.[133] The similar the countries are, the more aligned are they interests.[134]

Slaughter in her extensive research attempts to show that liberal states (i.e., representative government with a commitment to the rule of law), are more likely to follow international law.[135] She argues that liberal states are deeply committed to rule of law and that they respect international laws as a mean to an end (although the states might disagree „with their specific policy choices).[136]

By the same token, it is more likely that liberal democratic governments that include both an independent judiciary and adequate protection follow supranational legal judgments than others. This is because, domestic interest groups may be mobilized by international legal obligations and can help pressure their own governments to comply with international rules. [137] Thus, international criminal justice creates international legal obligations that may be used by domestic interest groups to mobilise and pressure their domestic institutions.[138] It is more likely that this might happen in liberal democracies because their domestic system allows domestic interest groups to take action.[139]

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133 Id. at 520-522.

134 Id. at 518-531.

135 *See* Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUROPEAN JOURNAL OF INTERNATIONAL LAW 503 (1995); Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations*, 4 TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS 377 (1995); Anne- Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 205 (1993); Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 367 (1998).

136 Anne-Marie Burley [now Slaughter], *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUMBIA LAW REVIEW 1907, 1920 (1992).

137 Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE LAW JOURNAL 273, 331-334 (1997); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 7 (1991).

138 LAMONT, *supra* note 105, at 14.

139 LAMONT, *supra* note 105, at 14.

The presumption that „democracies do law better – especially with each other“ is often criticised.[140] Critics argue that for example, the United States often being portrayed as the prime example of a liberal nation, is also well known for violating international legal obligations or openly rejecting the jurisdiction of international courts and tribunals.[141] Looking at the countries of Former Yugoslavia, Croatian cooperation with the ICTY, for example, deteriorated after a more democratic government in 2000.[142]

Political influence and interference with domestic war crimes adjudication can prevent effective war crimes prosecution in countries where the institutions are weak and not embedded in the rule of law.[143] Although prosecution of human rights violation decreases the probability that states would commit human rights violations in the future,[144] international war crimes adjudication before the ICTY did neither stop the ongoing war in the Former Yugoslavia nor did it deter any subsequent war crimes in the region (i.e., Kosovo).[145]

Liberals and among them specifically *Slaughter* draw parallels to the European Court of Justice and emphasize that the success of international criminal law and its institutions depends on the international judges and lawyers. They engage with domestic societies and thereby create a criminal responsibility system. They operate in transnational knowledge-based networks, frame and address the issues and persuade other states to help induce state compliance.[146]

Slaughter argues that compliance with international law is a bottom-up phenomenon and is most effective if international law and its adjudication mechanisms directly

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140 Anne-Marie Slaughter & Jose E. Alvarez, *A Liberal Theory of International Law*, 94 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 240, 250 (2000).

141 Id. at 252.

142 LAMONT, *supra* note 105, at 14.

143 Snyder & Vinjamuri, *supra* note 42.

144 Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 INTERNATIONAL STUDIES QUARTERLY 939 (2010).

145 Snyder & Vinjamuri, *supra* note 42.

146 Abbott, *supra* note at 373-377.

impacts the behaviour of individuals and groups.[147] This works best in liberal democracies, where citizens can pursue their interests independently and where domestic government institutions are committed to the rule of law and may be may be influenced by such groups.[148]

In order to improve the rule of law on a national level, one has to look at domestic interactions with international bodies, which is almost only possible in democracies and liberal societies:

> „[T]he function of public international law is not to create international institutions to perform functions that individual states cannot perform by themselves but rather to influence and improve the functioning of domestic institutions.“[149]

Slaughter looks at the best practice examples and concludes that the best impact on domestic society have those institutions where individuals get the possibility to initiate disputes before international courts and tribunals such as the European Court of Justice, European Courts of Human Right.[150] These international judiciary institutions influence domestic judiciary institutions. This has an immense impact on the domestic society. So for example, the European Court of Justice (***ECJ***), that has the potential to shape national court's jurisprudence because of its compelling nature and clear legal logic.[151] The informed and trained national judges embrace that logic and generally follow the ECJ. This aids to influence the national jurisprudence and application of European law.[152]

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147 Slaughter & Alvarez, *supra* note 140, at 240-242.

148 Helfer & Slaughter, *supra* note 137, at 333-334.

149 Slaughter & Alvarez, *supra* note 140, at 246.

150 Id. at 248.

151 ANNE-MARIE SLAUGHTER, et al., THE EUROPEAN COURTS AND NATIONAL COURTS--DOCTRINE AND JURISPRUDENCE : LEGAL CHANGE IN ITS SOCIAL CONTEXT 230 (1998). Anne-Marie Burley & Walter Mattli, *Europe before the Court: A Political Theory of Legal Integration*, 47 INTERNATIONAL ORGANIZATION 41 (1993).

152 Karen Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in THE EUROPEAN COURT AND NATIONAL COURTS DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT (Anne-Marie Slaughter, et al. eds., 1998).

Critics say that this view ignores the national interest of European states and political views on legal integration and judicial behaviour and focuses on a strict legalist view,[153] suggesting that the research fails to explain the different legal integration in different countries. *Slaughter*, admits that although it is possible to find support for the neo-realist approach and explain the impact of ECJ jurisprudence with the arguments of political interest, there is also „sufficient evidence that proves that despite political interference the national jurisprudence did not follow the national and political interest.“[154] National courts did pass judgement that run against their state interests or political establishment, which according to *Slaughter* suggests that political support was not needed for legal integration to succeed.[155]

The question arises whether the research on the European Court of Justice and its interaction and influence over the national courts in Europe can be generalised and applied to other countries and areas of law. What factors could facilitate transnational legal consensus on principles of international law?[156] The European example suggests that the right institutional framework can lead to a convergence of the legal norms and the emergence of transnational international consensus on issues of international (criminal) law – independent of political support.[157]

The same argument can be used for international criminal tribunals. They are more effective when they convince people of their arguments instead of exerting political pressure. Although embedded in the liberal approach, which strictly speaking is an interest-based theory, the arguments are similar to constructivism and thus can be viewed as situated between these two theories (see Chapter **C.1**).[158]

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153 SLAUGHTER, et al., *supra* note 151, at 230.

154 Id. at 236.

155 Id. at 248.

156 Id. at 249.

157 Id. at 249-250.

158 LAMONT, *supra* note 105, at 17; Helfer & Slaughter, *supra* note 137, at 334.

C. NORM-BASED THEORIES OF STATE COMPLIANCE

In contrast to the interest-based theories, which focus on geopolitical, economic or political interest, the norm-based theories[159] share the conviction that it is the „persuasive power of legitimate legal obligations" that make states comply with international law.[160]

Norm-based theories argue that ideas and international norms influences state behaviour through persuasion: „Persuaded actors internalize new norms and rules of appropriate behaviour and redefine their interests and identities accordingly."[161] These theories can again be separated into three different models that differ in how states are persuaded to follow international norms.

As will be described below, the constructivists argue that international ideas and norms create a social environment that can shape the behaviour of states through 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 and fair norms that persuade actors to follow international norms and the legal process theory (see at **3**) adds to that, the power of a the process of developing and enforcing international law as a relevant factor in determining whether states will follow international norms.[163]

1. Constructivists

The norm-based scholarship settles around what is called „constructivism". Constructivists view interests of states as something that is changing, and is being formed or constructed through interaction with each other.[164] In their view, power

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159 The term was coined by Hathaway in her article Hathaway, *supra* note at 1955.

160 Id. at.at 1955.

161 Ryan Goodman & Derek Jinks, *How To Influence States: Socialization And International Human Rights Law*, 54 DUKE LAW JOURNAL 621, 635 (2004); *see also* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS : ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 89-97 (1998); HATHAWAY & KOH, *supra* note 78, at 111.

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

163 Id. at 111.

164 Id. at 112.

politics does not manage to explain the origin of the states' interest to seek power. Although constructivists agree with realists that states follow their own self-interests, constructivists in addition explain how states form these interests.

According to *Finnemore*, international actors are part of a transnational social network that shapes the states' perception of the world and with it their interests and preferences.[165] States are socialised by the norms and values of the international society, which helps them to form their own values and preferences.[166] The actors evaluate and eventually accept the validity of the international norm as a legitimate part of the actor's legal system. This process is called the internalisation of an international norm.[167] Constructivists argue that internalisation of international rules is the reason why states comply with international law.

In an uncertain international world, states – much like individuals – look for solutions to their problems by looking and imitating other successful actors.[168] The international system and neighbouring states have an inherent power to change the behaviour of states.[169] *Goodman* and *Jinks* refer to this phenomenon as acculturation and explain with it the process by which actors adopt beliefs and behavioural patterns, of their neighbouring states' and institutional culture.[170]

States change their behaviour not by being pressurized of the more powerful states, but rather through the pressure to assimilate to the surrounding social environment.[171] They change their behaviour by mimicry, identification and status maximization.[172] Thus, if one wants to change the behaviour of the targeted actor, either the actor's social environment needs to change or its perception that the group to which it

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165 MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 2 (1996).

166 Id. at 5-6.

167 Goodman & Jinks, *supra* note 161, at 642-643.

168 FINNEMORE, *supra* note 165, at 5-6.

169 Id. at 5-6; John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INTERNATIONAL ORGANIZATION, 879 (1998).

170 Goodman & Jinks, *supra* note 161, at 625.

171 Id. at 638.

172 *See* Alastair Iain Johnston, *Treating International Institutions as Social Environments*, 45 INTERNATIONAL STUDIES QUARTERLY 487, 499-502 (2001).

belongs, has a belief or engages in a certain practice.[173] Consequently, the actor complies with certain practices out of cognitive pressure to conform with others and the desire to justify its own actions.[174] As will be discussed in more details below, all three study states, BiH, Croatia, and Serbia experienced some sort of regime change and efforts to reform its legal and judiciary system around the same time at the turn of the millennial.

A familiar aspect of this effect is the perceived or imagined social pressures that comes from shaming or shunning, or social-psychological benefits like public approval (e.g. media, back-patting).[175] Empirical evidence suggests that actors being confronted with such form of external social pressure tend to change their behaviour under the right factual circumstances, in order to conform with the group.[176] The probability that the state actor will comply increases with the strength of the group, its importance and size.[177]

Proponents of acculturation advocate that through changing the „individual's connection to the wider cultural community" or changing „the content of culturally legitimated practices,"[178] the state's behaviour can be changed. Transnational legal integration follows socialization.[179] Countries whose neighbouring countries have incorporated an international legal principle might do that as well due to the peer pressure exerted by its neighbours.[180]

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173 Goodman & Jinks, *supra* note 161, at 642.

174 *See* ELLIOT ARONSON, ET AL., SOCIAL PSYCHOLOGY 173-212 (4th ed. 2002) cited in Goodman & Jinks, *supra* note 161, at 640.

175 Thomas Risse-Kappen & Kathryn Sikkink, *The Socialization of International Human Right Norms into Domestic Practices: Introduction*, *in* THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 11-35, (Thomas Risse-Kappen, et al. eds., 1999).

176 Goodman & Jinks, *supra* note 161, at 641.

177 Goodman & Jinks, *supra* note 161, at 642.

178 Goodman & Jinks, *supra* note 161, at 647; *see also* Francisco O. Ramirez, et al., *The Changing Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights, 1890 to 1990,* 62 AMERICAN SOCIOLOGICAL REVIEW 735, 740-742 (1997)..

179 SLAUGHTER, et al., *supra* note 151, at 250.

180 Id. at 250.

Even the liberalist, Slaughter suggests that these same acculturation processes are visible if looking beyond the veil of the state and observing various political actors. The dialogue between policy makers, lawyers and judges across nations can facilitate a convergence of legal interpretation across borders at least in liberal democratic countries that facilitates integration.[181]

This was taken up by *Finnemore* and *Sikkink* whose research focuses on the reasons why international norms are being internalised and describes the life cycle of a norm before it becomes part of a legal system.[182] They argue that the lifecycle of a norm consists of three stages. The first stage is the stage of norm emergence, where „norm entrepreneurs" attempt to convince a critical mass to adopt a specific rule.[183] During the second stage or the stage of the norm cascade, states that have adopted the norm and have become norm leaders aim to convince other states to accept the new rule. At the final stage the new norm is characterised as being „taken for granted".[184] The international nor ultimately becomes a common practice that is considered law among its member (*opinio juris*).[185]

Keck and *Sikkink* argue that the emergence of transnational advocacy networks could instigate changes through mobilising transnational groups which in turn can help pressure government into compliance. They termed this effect the „Boomerang Pattern."[186] These networks operate in two ways; where a government violates an international rule, domestic groups may seek international groups to express their concern. These international networks could influence other governments and international organisations to take actions and pressure, persuade or coerce the violator into compliance.[187]

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181 Id. at. at 250.

182 Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INTERNATIONAL ORGANIZATION 887, 917 (1998).

183 Id. at 895.

184 Id. at 895-896.

185 FINNEMORE, *supra* note 165, at 139-143

186 KECK & SIKKINK, *supra* note 161, at 3.

187 Id. at 3-4.

For example, Argentina's execution of political opponents, was made known to the public because transnational actors such as Amnesty International raised awareness of the human rights violations in Argentina.[188] Governments were mobilized and they started pressuring Argentina to stop that behaviour.

The international criminal tribunals may form a constituency that has the potential to pressure domestic leaders into cooperating with international war crimes prosecutions. Initially, outside international pressure may be necessary, to set-up and initiate international war crimes adjudication mechanism, but the tribunals constituency including their judges and prosecutors may help spread the international norms and internalize them into domestic societies, which can induce voluntary compliance as suggested by *Sikkink* and *Risse's* spiral model.[189]

Burke-White argues that international criminal tribunals can enhance their influence on states not only by monitoring states behaviour but also by socialising and interacting with domestic institutions including judges and prosecutors.[190] They can be instrumental in helping states to acculturate international norms and accept them. In this way international criminal tribunals can achieve greater influence and compliance with international criminal adjudication.[191]

2. Theory of Fairness and Legitimacy

The theory of fairness and legitimacy, as the name reveals, claims that international regimes would be complied with if their norms and rules are perceived as fair and legitimate.[192]

Legal scholars often find that legitimacy of a norm is the source of its effectiveness. Thus, also international law's effectiveness depends on its legitimacy, i.e., the process that establishes the rule as international law. The legal philosopher *Hart* links the question about compliance with international law to the origin of legal obligation. Accepting the value of the rule as legitimate leads to compliance with international

188 Id. at 3.

189 LAMONT, *supra* note 105, 22; Risse-Kappen & Sikkink, *supra* note 175, at 11-35.

190 Burke-White, *supra* note 50, at 291.

191 Burke-White, *supra* note 50, at 291.

192 Hathaway, *supra* note at 1935 (1958).

law.[193] He argues, that international law is observed, because its formation and content is generally accepted by and applicable to the society. Thus, the legitimacy of the rule and its formation that gives the law a binding character, and is the reason why it is observed.[194]

Contrary to the claim that the only reason why law is complied with is because non-compliance entails a threat. Unlike national law, international law lacks a central legislature and a court with compulsory jurisdiction that can impose sanctions. Thus, international law lacks a serious threat that would induce compliance. *Hart*, on the other hand, rejects that thesis and argues that law is not an expression of sanctions but an expression of the rule's legitimacy through its formation and content.[195]

Generally, law is being followed for mainly three reasons.[196] *First*, the law is followed due to the fear of punishment; *second*, because it is in the actors' self-interest to comply; and *third*, because of the rule's normative structure and legitimacy.[197] Where the rule is legitimate, the actors or states internalise the content of the rule and comply with it out of a moral obligation and the belief that the rule is proper and compliance is desirable.[198]

In addition, legal scholars such as *Franck*, emphasize the fairness of the rules as one of the reasons why international treaties are being adhered to.[199] The questions to ask before deciding if a rule will be complied with is not „do nations comply?," but rather „[i]s international law fair?"[200] *Franck* argues that in order to be binding rules must be both substantively and procedurally fair, and should the procedure to set up the rule should be accepted by both parties as correct and due.[201]

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193 HATHAWAY & KOH, *supra* note 78, at 135.

194 H. L. A. HART, THE CONCEPT OF LAW 213-232 (1961).

195 Id. at. at 213-232.

196 Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INTERNATIONAL ORGANIZATION 379, 379 (1999).

197 Id. at 379-381.

198 Id. at 387-388.

199 THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 7-8 (1995).

200 Id. at 7.

201 Hathaway, *supra* note at 1935 (1958).

If a rule is enacted by the common agreement on procedure and interpreted by the same firm rules, the law is perceived as fair which encourages compliance with such rules.[202] Also, if the content of the law is perceived as just, the rules is also more willingly accepted because it adheres to the party's moral obligations and applies to everyone in an equal way.[203] *Franck* admits that common substantive and procedural fairness will more likely be identified in a community where the values and moral obligation are shared. Thus, in order to enact international law that everyone complies with, the community should aim to identify common values that are fair and just to everyone.[204] In sum, rules that are both legitimate and fair encourage voluntary compliance.[205]

In order to get post-war societies to comply with international criminal law mechanism, victims and perpetrators need to come to terms and achieve social piece that is fair and just to everyone. *Vinjamuri* and *Snyder* consider that emotions need to be appeased in order to have lasting peace.[206] This can be done by eliminating the conditions that led to the violence in the first place through achieving an „emotional catharsis in the community of victims and an acceptance of blame by the perpetrators."[207]

This task can be taken up by either an institutionally structured truth telling mechanism or a punishment instrument, such as international criminal tribunals. International criminal tribunals can provide accountability for the atrocities committed during the time of conflict, and establish a historical record for the society that might help preventing atrocities from happening again. By serving justice it may help to heal

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202 FRANCK, *supra* note at 7-8.

203 Id. at 8.

204 Id. at 14-15.

205 Id. at 8.

206 Jack L. Snyder & Leslie Vinjamuri, *Advocacy And Scholarship In The Study Of International War Crime Tribunals And Transitional Justice*, 7 ANNUAL REVIEW OF POLITICAL SCIENCE 345, 357 (2004).

207 Id.

wounds and prevent opening wounds from past atrocities for the means of influencing people.[208]

3. Legal Process Theories

The theory of transnational legal process focuses on the role of legal interaction in order to explain compliance with international rules.[209] It focuses on horizontal legal process including intergovernmental coordination but also on the vertical legal process that includes diffusion of norms from the international level down into the domestic law.[210]

Abram and Antonia Chayes, argue that international cooperation and international management are crucial for states' treaty adherence.[211] They regard that *pacta sunt servanda* (agreements are to be obeyed) as the foundation of international law compliance and claim that states would obey the obligations they signed up to. As a result, most cases of non-compliance are caused by inconvenient factors, such as a lack of resources needed for compliance or insufficient information on the requirements or temporary social, economic or political change.[212] These inconveniences can in part be pre-empted by „managing" compliance, such as ensuring transparency or developing capacity for compliance.[213] Creation of dispute resolution mechanism may help resolve uncertainties of applicable rules.[214]

This view is sometimes regarded as too optimistic.[215] Although the complete disregard of sanction is misleading, states do enter into agreements and comply with its rules even where those rules do not have strict enforcement mechanisms.[216] And international law might not be the decisive factor in ensuring compliance, it has to be

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208 LAMONT, *supra* note 105, at 22.

209 HATHAWAY & KOH, *supra* note 78, at 173.

210 Id. at 173.

211 CHAYES & CHAYES, *supra* note 4, at 8

212 Id. at 8-10.

213 Hathaway, *supra* note 1, at 1957.

214 CHAYES & CHAYES, *supra* note 4, at 9-17.

215 George W. Downs, et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INTERNATIONAL ORGANIZATION (1996). at 384, 387.

216 Id. at 397-398.

considered that states would follow international rules just because they signed up to it.[217]

The various norm-base compliance theories are not mutually exclusive but complementary. They all agree that the key to better compliance with international law is internationalization of international rules.[218] It follows from the above that this can happen in three stages; *first*, transnational actors interact with domestic actors and provoke discussion on the correct interpretation of applicable norms. Through interaction and interpretation of international norms the norm can be internalized „into the other party's international normative system" and eventually becomes part of the domestic actor's value set.[219]

A norm-based theories recognize the influence of international society in shaping states' interests. While the sole existence of the transnational community may not be enough, regular interaction between the actors of the society may help to internalize common interpretation of norms:[220] „It is thus through transnational legal process, the repeated cycle of interaction, interpretation and internalization that international law acquires its 'stickiness', that nation-states acquire their identity, and that nations come to 'obey' international law out of perceived self-interest."[221] International community can transform the personal identity of states and thus make countries obey international rules without having recourse to coercion.[222]

This can be observed in human rights treaties; although they lack strong enforcement mechanisms, they are not completely irrelevant. There are several factors that can influence compliance. For example, strong domestic institutions or the country's international reputation can increase compliance. A study conducted by Hathaway has

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217 ABRAM CHAYES, et al., INTERNATIONAL LEGAL PROCESS; MATERIALS FOR AN INTRODUCTORY COURSE (1968); Mary Ellen O'Connell, *New International Legal Process*, 93 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 334, 336-337 (1999).

218 Koh, *supra* note 11, at 2645.

219 Id. at 2646.

220 Id. at 2651.

221 Id. at 2655.

222 Hathaway, *supra* note 1, at 1935.

shown that states with strong domestic institutions are less likely to sign on to human rights treaties for fear of change in the states behaviour.[223] Interestingly, also dictatorships that do not have a record of torture, signed up to the international convention against torture. Hathaway explained this, that these states do not fear any change in their behaviour and thus they signed up to the conventions in the hope to earn the benefits that arise from the increased reputation.[224]

223 Id. at.1, at 1935.

224 HATHAWAY & KOH, *supra* note 78.

D. CONCLUSION

The above theories aim to explain why states follow international law and try to analyse the factors that influence the compliance.

The interest-based theories explain compliance with international law by looking at the reasons for compliance; they all have in common the assumption that any compliance with international law is a rational choice and that compliance is either coerced or induced by more powerful states. As a result, states calculate the cost-benefit of compliance and comply with international law if the benefits outweigh the costs.

Instead of focusing on the reasons why states follow their self-interest, the norm-based theories focus on the reasons why sates form these self-interests. The theories explain that the persuasive power of a norm is the driver for compliance with international rules. Constructivists point out that it is the social power of the community of states that makes individual state actors develop certain interests and aspirations to align their practices with their social community and comply with international law. This is particularly true, where states consider international norms just and fair and where the transnational actors engage with each other to interpret these norms. The three norm-based theories, explained above, are not exclusive but rather add additional aspects of why norms have the power to persuade states into compliance.

The ICTY with its rules and jurisprudence provides for an interesting case-study to test the influence of the ICTY and the factors that contributed to BiH, Croatia, and Serbia's compliance with and implementation of an adequate domestic international justice mechanisms.

III. SECOND PART: FROM THE ICTY TO THE *WESTERN BALKAN* – A CASE STUDY

A. INTRODUCTION

The second part will provide an overview of the impact of international war crimes prosecution on BiH, Croatia, and Serbia. Prosecution of war crimes was for a long time the only transitional justice method applied in the region of Former Yugoslavia. This, therefore allows to test what specific impact this transitional justice tool had on the domestic capacity development and what factors influenced the development of the international justice mechanism of BiH, Croatia, and Serbia.

This part will therefore focus on two aspects of capacity development. It will first analyse the impact of the ICTY on the establishment of domestic institutions capable of adjudicating international war crimes cases and what factors influenced such impact (see at **B.**), and the impact it had on the implementation of the international criminal law and domestic war crimes prosecutions (see at **C.**).

B. THE ICTY'S CONTRIBUTION TO INSTITUTIONAL DEVELOPMENT IN THE REGION OF THE FORMER YUGOSLAVIA

The development of judicial institutions forms a relevant part of the development of the rule of law. Developing the capacity in this area provides the country with the possibility to conduct fair and effective trials.

The following sections will therefore provide an overview of the development of the institutional framework enabling domestic war crimes prosecution and the factors that favoured this development in BiH (*see* at **1**.), Croatia (*see* at **2**.), and Serbia (*see* at **3**.).

1. Bosnia and Herzegovina

The ICTY's jurisdiction in prosecuting genocide, crimes against humanity, violations of the laws and customs of war, and grave breaches of the Geneva Convention (***war crimes***)[225] is not exclusive. Article 9 of the ICTY Statute[226] provides for concurrent

[225] The term "***war crimes***" will be used to include all international law crimes committed during the conflict in Former Yugoslavia during 1991-1995.

jurisdiction over war crimes cases. This provision, therefore, makes BiH, like the other countries of the Former Yugoslavia, also responsible for war crimes prosecution. Hence, BiH continued to prosecute war crimes during and after the war.[227]

The post-war governance structure of BiH led to "perhaps the most layered and complex arrangement for prosecuting perpetrators of grave violations of international 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 binding effect on the lower courts from the other entity.

Throughout and after the conflict nationalist parties appointed unqualified and politically manipulative judges and police officers which facilitated the growth of organised crime. That in turn helped to finance and sustain nationalist movements with close links to criminal organisations.[229] There was a strong correlation between the outcome of war crimes cases and the ethnicity of the accused and ethnicity of the

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226 Article 9 of the Statute of the ICTY: (1) The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991; and (2) The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

227 For example, between 1993 and 1995 in the military court of the Municipality of Orašje in the Federation of BiH, 47 suspects were convicted *in absentia,* with several receiving the death sentence; for further details, *see also* Alejandro Chehtman, *Developing Bosnia and Herzegovina's Capacity to Process War Crimes Cases: Critical Notes on a 'Success Story'*, 9 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 547, note 1 (2011); Organization for Security and Co-operation in Europe, *War Crimes: Trials Before the Domestic Courts of Bosnia and Herzegovina Progress and Obstacles,* OSCE MISSION TO BOSNIA AND HERZEGOVINA 1, 4 (2005) [hereinafter: OSCE, Trials before the Domestic Courts].

228 Organization for Security and Co-operation in Europe, *Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005 to 2010*, OSCE MISSION TO BOSNIA AND HERZEGOVINA, 11 (2011) [hereinafter: OSCE, Delivering Justice in BiH].

229 Michael W. Doyle, *Too Little, Too Late? Justice and Security Reform in Bosnia and Herzegovina* in CONSTRUCTING JUSTICE AND SECURITY AFTER WAR 231, 237 (2007).

judge.[230] And in those cases where the victims achieved justice, enforcement of their rights was even more difficult.[231]

As a result, local trials were perceived as biased and arbitrary and sometimes served as a tool for political and ethnic revenge. Those who attempted to return to their pre-war homes, feared arbitrary arrests for alleged war crimes and unfair trials. This led to the implementation of the Rules of the Road under the Rome Statement issued on 18 February 1996 (***Rules of the Road***).[232]

Under the Rules of the Road, arrests and indictments of alleged perpetrators of war crimes undertaken by the BiH authorities were to be independently reviewed by ICTY's Office of the Prosecutor.[233] A person could only be arrested or indicted by BiH authorities if they were already indicted by the ICTY's Office of the Prosecutor or if „*a previously issued order, warrant, or indictment […] has been reviewed and deemed consistent with international legal standards by the International Tribunal.*"[234] Only after the ICTY's Office of the Prosecutor reviewed the case file could someone be arrested on the suspicion of war crimes. Under the Rules of the Road, the decisions of the ICTY's Office of the Prosecutor were binding on local prosecutors.[235]

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230 International Crisis Group, *Courting Disaster: The Misrule of Law in Bosnia and Herzegovina,* 127 BALKANS REPORT I (25 March 2002).

231 Id.

232 United Nations International Criminal Tribunal for the former Yugoslavia, *Office of the Prosecutor*, available at http://www.icty.org/en/about/office-of-the-prosecutor/working-with-the-region#rules (last accessed 26 April 2017); See also Rome Statement; Operation Joint Endeavour (IFOR), *Agreed Measures* signed on 18 February 1996, available at http://www.nato.int/ifor/rome/rome2.htm.

233 Id; OSCE, Delivering Justice in BiH, *supra* note 228, at 11.

234 "*Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal*" in Operation Joint Endeavour (IFOR), *Agreed Measures* signed on 18 February 1996, available at http://www.nato.int/ifor/rome/rome2.htm (last accessed 26 April 2017).

235 Id.

This procedure of the ICTY was applied from 1996 until 2004. During this time, the ICTY exercised primacy over the jurisdiction of national courts in prosecution of war crimes in BiH (unlike in Croatia or Serbia, as will be seen below).

The Rules of the Road, severely limited the role of justice in BiH. The ICTY was notoriously slow in reviewing these cases. It took years to review the thousand case files transmitted to the ICTY by the local authorities. This can be attributed to limited staff assigned to review the cases as other priorities more relevant. Another reason for the slow review was also that most of the evidence gathered by the local authorities was in the local language and organised in a way that the ICTY was not familiar with.[236] Of about 5,700 case files sent to the ICTY for review, about 2,300 case files were not even looked at.[237] From those files reviewed, 1,419 files were sent back to the local authorities,[238] and out of those only 54 cases reached trial stage in the local courts by 2005.[239]

Despite the need to stop arbitrary indictments and arrests following the conflict, the Rules of the Road procedure did not encourage local institutions to develop their own capacity to fairly and effectively prosecute war criminals.[240] Instead, the BiH authorities had to give up the responsibility to investigate and prosecute war crimes. This discouraged national authorities to invest in war crimes investigations and establish effective war crimes enforcement institutions. Policy makers saw no benefits from investing and developing these capacities. Any efforts by the BiH government to use the tool of war crimes justice to remove war criminals from powerful post-war

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236 Yael Ronen, *The Impact of the ICTY on Atrocity-Related Prosecutions in the Courts of Bosnia and Herzegovina*, 3 PENN STATE JOURNAL OF LAW & INTERNATIONAL AFFAIRS 113, 141 (2014).

237 Burke-White, *supra* note 50, at 313-314.

238 United Nations International Criminal Tribunal for the former Yugoslavia, *Office of the Prosecutor*, available at http://www.icty.org/en/about/office-of-the-prosecutor/working-with-the-region#rules (last accessed 26 April 2017).

239 Burke-White, *supra* note 50, at 314.

240 *See* Burke-White, *supra* note 50; Diane F. Orentlicher, *That Someone Guilty be Punished: The Impact of the ICTY on Bosnia*, INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE & OPEN SOCIETY JUSTICE INITIATIVE 1, 110-111 (2010); Michael W. Doyle, *Too Little, Too Late? Justice and Security Reform in Bosnia and Herzegovina* in CONSTRUCTING JUSTICE AND SECURITY AFTER WAR 231, 237 (2007); Ronen, *supra* note 236.

positions was undermined by the ICTY itself.[241] Consequently, the relationship between the ICTY's legal professionals and their counterparts at the national level was rather hostile than engaging.[242]

The Rules of the Road procedure not only discouraged domestic prosecution also the number of indictment decreased significantly during that time in both political entities of BiH, the Federation of Bosnia and Herzegovina (***Federation of BiH***) and Republika Srpska.

This procedure of the ICTY ended in 2004 and was taken over by Prosecutor's Office of Bosnia and Herzegovina (***BiH Prosecutor's Office***). All the cases that were not (or only partially) reviewed, were sent back to local authorities and the BiH Prosecutor's Office decided whether those indicted should be prosecuted at state- or the entity-level.

(a) The Completion Strategy spurred domestic capacity development

The following will provide an overview of the influence of the Completion Strategy on the institutional capacity development in BiH.

With the turn of the millennium, strengthening local institutions became a priority for the international community. Although the ICTY was established as a temporary institution, ten years into its existence, it was still working at full capacity with no end in sight. Domestic institutions were nowhere ready to take over the case files as the reality in the region did not provide the conditions under which efficient and fair war crimes proceedings could be conducted. To enable the ICTY to transfer the lower level perpetrators to the region, it became necessary to establish functioning domestic judiciary and prosecution.[243] At the same time, transferring ICTY's cases to national

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241 Paul R. Williams & Patricia Taft, *The Role of Justice in the Former Yugoslavia: Antidote or Placebo for Coercive Appeasement?*, 35 CASE WESTERN RESERVE JOURNAL INTERNATIONAL LAW 219, 253-254 (2003).

242 Chehtman, *supra* note 227, at 556.

243 In 2001, Former President of the ICTY, Judge Jorda emphasised that national courts lacked the capacity to try the ICTY's cases, and the judicial systems of the Former Yugoslav Republics would have to be "*reconstructed on democratic foundations' before cases could be transferred from the ICTY*" in Chehtman, *supra* note 227, at 548.

institutions was the only possible solution for the ICTY to complete its mandate and bring those who were responsible for war crimes justice.[244]

As a result, the UN Security Council developed a plan for the ICTY to complete its work and despite ICTY's resistance it enacted the Completion Strategy under the UN Resolutions 1503 and 1534. The Completion Strategy foresaw that the ICTY was to complete its work in three phases: *first*, investigations were to be completed by 2004; *second*, the first instance trials were to be completed by 2008; and *finally*, all work was to be completed by 2010.[245] The complexity of certain first instance proceedings and the late capture of the remaining fugitives (Goran Hadžić was the last one captured only in 2010), made it impossible for the ICTY to meet the target dates. Only the first target date was completed by the designated time, the last step will be completed by the end of 2017.

In order to comply with the Completion Strategy, it became essential to invest resources into domestic legal institutions to adequately prepare them for the transfer of cases.

To enable the transfer of the cases to national authorities the ICTY Rules of Procedure and Evidence were amended. Under Rule 11 *bis* of the ICTY Rules of Procedure and Evidence, the referral bench was to decide whether a case can be transferred to 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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244 Security Council, *Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts*, UN Doc. S/2002/678, (19 June 2002), available at http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/judicial_status_report_june2002_en.pdf (last accessed 20 May 2017).

245 Security Council Resolution 1503, UN Doc. S/RES/1503 (28 August 2003); Security Council Resolution 1534, UN Doc. S/RES/1534 (26 March 2004); *See also* United Nations International Criminal Tribunal for the former Yugoslavia, *Office of the Prosecutor*, available at http://www.icty.org/en/about/office-of-the-prosecutor/working-with-the-region#rules (last accessed 20 May 2017).

In addition, the judges would consider the gravity of the alleged crimes and the level of responsibility of the accused, when deciding whether the case should be referred to the national courts.[246]

(b) Fostering local judiciary institutions – Establishing a hybrid court

The following will provide an overview of the capacity development on the state-level of BiH.

The Completion Strategy provided the incentive to support the establishment of a functioning national judiciary. As the cantonal and district courts did not have the capacity to process such cases, the momentum was there to establish a new judicial and prosecutorial institutions.[247] As a result, the Court of Bosnia and Herzegovina (***BiH Court***) and the BiH Prosecutor's Office were established in 2000.[248] Prosecution of war crimes was assigned to a special chamber within the BiH Court, Section I (***War Crimes Chamber***)[249] and a special department in the BiH's Prosecutor's Office. Both institutions resumed work in March 2005.

The reform of the judicial system was a result of the working group between ICTY and the OHR.[250] Their action plan involved the establishment of a specialised War Crimes Chamber (Section I) within the BiH Court that would have be supported from the international community.[251] Although the proposal of the ICTY and the OHR did

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246 ICTY Rules of Procedure and Evidence, Rule 11 *bis* (C).

247 Id.

248 OSCE, Delivering Justice in BiH, *supra* note 228, at 13.

249 The Court of BiH is divided in three divisions: criminal, administrative, and appellate. The criminal division is again subdivided into three sections: Section 1 for war crimes; Section 2 for organised crime, economic crime, and corruption; and Section 3 for general Crimes; *see also* The Court of Bosnia and Herzegovina, *Organisational Structure of the Court of BiH*, available at: http://www.sudbih.gov.ba/stranica/40/pregled (last accessed 26 April 2017).

250 "The Office of the High Representative […] is an ad hoc international institution responsible for overseeing implementation of civilian aspects of the Peace Agreement ending the war in Bosnia and Herzegovina" in The Office of the High Representative, *General Information*, available at http://www.ohr.int/?page_id=1139 (last accessed on 11 May 2017).

251 Michael Bohlander, *The Transfer of Cases from International Criminal Tribunals to National Courts*, paper presented at the Prosecutors' Colloquium in Arusha from 25 – 27 November 2004, 3-4, available at www.ictr.org/ENGLISH/rules/240404/240404.pdf (last accessed 11 May 2017); *see also* Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE 1, 6 (2008).

not involve victim groups or civil society in BiH, they did not oppose the establishment of the BiH Court as it was clear to all stakeholders that the ICTY was not capable of processing all if not most of the war crimes cases, and accountability for war crimes could not have been processed by the local judiciary that was still perceived as biased.[252] The BiH Court and the BiH Prosecutor's Office were among the first institutions established at the state-level.

The BiH Court has jurisdiction over war crimes throughout the whole territory of BiH and its jurisdiction was later extended to also include organised crimes, economic crimes and corruption.[253]

The BiH Court is organised in a Trial Chamber and an Appellate Chamber. The Appellate Chamber reviews the decisions of the BiH Court's Trial Chamber. However, as BiH has no Supreme Court, the Appellate Chamber remains the second and last instance for BiH Court's decisions. If the Chambers violate any constitutional norms, there is the possibility to challenge the Appellate Chamber's decisions before the Constitutional Court of BiH.[254]

The BiH Court was established as a hybrid court that consisted of international and national judges. At the outset, the international judges dominated each panel of the War Crimes Chamber. In 2007, the number of international judges was at its highest.[255] In order to prepare the transfer the ownership of the war crimes proceedings to BiH's, the national judges were gradually to replace the international judges. In 2009, the panels were already dominated by national judges and the last international judge left the BiH Court in 2012.[256] This was the time when, the BiH Court eventually transitioned from a hybrid court into a national institution.

The ICTY would only transfer cases to national courts if it was satisfied that the cases transferred would be fairly tried (i.e., in accordance with internationally recognised

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252 Ivanišević, *supra* note 251, at 6-7.

253 OSCE, Delivering Justice in BiH, *supra* note 228, at 13.

254 Ivanišević, *supra* note 251, at 30.

255 The Court of Bosnia and Herzegovina, *Strategic documents of the BiH Court*, available at http://www.sudbih.gov.ba/stranica/97/pregled (last accessed on 27 April 2017).

256 The Court of Bosnia and Herzegovina, *The Brochure of the BiH Court* (2012), available at http://sudbih.gov.ba/files/docs/Brosura_o_Sudu_BiH_ENG_2012.pdf (last accessed 9 May 2017).

standards of human rights and due process).[257] Thus, several additional reforms that were pushed through by the OHR were aimed at securing an impartial and professional judiciary for BiH. Judges and prosecutors were vetted and reappointed to ensure professional prosecution and adjudication of war crimes cases.[258] A new BiH Criminal Code and a BiH Code of Criminal Procedure were adopted to oversee the crimes to be tried at the state-level.[259] In addition, also new criminal codes and codes of criminal procedure were enacted at the BiH entity-level, i.e., the Federation of BiH and Republika Srpska. War crimes were excluded from these codes, as war crimes were to be tried exclusively at the state-level away from the entity judiciary.[260]

The BiH Court in many ways mirrors the structure of the ICTY, in both substantive as well as procedural way. Given that both institutions have a common aim, their interaction and transfer of knowledge is extensive. The reforms and the establishment of the BiH Court proved crucial for the ICTY's Completion Strategy as envisioned by the UN Security Council.[261] Under the Rule 11 *bis* of the ICTY Rules of Procedure and Evidence, six cases with ten suspects were transferred to the BiH Court.[262] More than anything, this was perceived as recognition of the professional work of the BiH Court and compliance with the high standards of international criminal proceedings.

Since its creation in 2000, the BiH Court has tried a total of 249 individuals for war crimes. Out of these, 185 were sentenced by a final judgement and 64 of those indicted were acquitted.[263] This provides solid evidence of the positive record of the BiH Court and the implementation of internationally recognized standards to successfully try war crimes cases.

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257 Orentlicher, *supra* note 240, at 115.

258 Id. at note 7.

259 BiH Criminal Code, Articles 171-173 (2003).

260 OSCE, Delivering Justice in BiH, *supra* note 228, at 13.

261 Security Council Resolution 1503, UN Doc. S/RES/1503 (28 August 2003); Security Council Resolution 1534, UN Doc. S/RES/1534 (26 March 2004).

262 The Court of Bosnia and Herzegovina, *Mid-term Strategic Plan of the Court of Bosnia and Herzegovina*, available at http://www.sudbih.gov.ba/stranica/97/pregled (last accessed on 27 April 2017).

263 The Court of Bosnia and Herzegovina, *Statistic at the website of the BiH Court*, available at http://www.sudbih.gov.ba/app_dev.php/stranica/31/pregled (last accessed; 27 April 2017).

It is regarded to date as the most sophisticated model of a hybrid criminal justice system that includes a plan to re-establish a national judiciary.[264] It provided the legal community with experience of a hybrid court in which international and national judges served together.[265] Contrary to international criminal courts and tribunals, the hybrid courts offer the opportunity to overcome the defects of international institutions. *First*, they are closer to the community where they promote justice. This allows them to leave a lasting impact in the community and the legal system.[266] *Second*, they are cheaper than international tribunals.[267] *Third*, they provide significant support for international personnel in building the reputation of domestic courts and domestic personnel.[268] As opposed to only a national court, the international judges render the impression of impartiality in the eyes of BiH's nationals as it seems more resistant to political pressure.[269]

(c) Fostering local judiciary institutions – Capacity development at cantonal and district courts

The following will provide an overview of the capacity development in the entities of BiH. War crimes jurisdiction was divided based on territorial jurisdiction among ten cantonal courts,[270] five district courts,[271] and one basic court in Brčko District.

Each entity adopted their own criminal codes and codes of criminal procedure. Although following the establishment of the BiH Court, war crimes related offences

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264 OSCE, Delivering Justice in BiH, *supra* note 228, at 13.

265 Ivanišević, *supra* note 251, at 1.

266 Burke-White, *supra* note 50, at 335 et seq.

267 Burke-White, *supra* note 50, at 339.

268 Ivanišević, *supra* note 251, at 5.

269 David Tolbert & Aleksander Kontić, *The International Criminal Tribunal for the Former Yugoslavia: Transitional Justice, the Transfer of Cases to National Courts, and the Lessons for the ICC*, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 44-47 (Carsten Stahn & Göran Sluiter, eds., 2009); E-Mail Interview conducted with Meddzida Kreso, President of Court of BiH, Sarajevo, 27 January 2010.

270 Federation of BiH is divided in ten independent cantons, the cantonal courts have jurisdiction over more serious crimes and act an appellate court for the lower level municipality courts of which there are 28.

271 Republika Srpska is divided into five districts and 19 basic courts. The district courts also act as appellate courts and have own jurisdiction over more serious crimes.

were removed from the entity's criminal codes, the regional courts continued to prosecute war crimes. Since 2003, the BiH Court had primacy over war crimes and was solely responsible for war crimes prosecution in BiH.

Given the large number of individuals that were awaiting war crimes trials before the BiH Court, an absolute primacy was not possible to implement at the BiH Court. Thus, the BiH Code of Criminal Procedural was amended to authorise the BiH Court to transfer cases to the competent cantonal or district court upon a motion filed by the BiH Prosecutor's Office. This was done mostly because the BiH Court was unable to try the large amount of cases that was pending or was to be tried.[272]

The district and cantonal courts were allowed to try those war crimes cases that were considered to be non-highly sensitive, as well as the cases that were transferred to them by the ICTY before 2003.[273] The BiH Prosecutor's Office was to review all war crimes cases investigated at entity-level and retain the very sensitive ones. The criteria to transfer cases to the entity-level courts mirrored Rule 11 *bis* ICTY Rules of Procedure and Evidence. Article 27a of the BiH Code of Criminal Procedure provided for the transfer of war crimes cases under BiH Court's jurisdiction:[274]

Article 27a

> Transfer of jurisdiction for the criminal offences referred to in Chapter XVII of the CC of BiH:
>
> (1) If the proceedings are pending for the criminal offences referred to in Articles 171 through 183 of the Criminal Code Bosnia and Herzegovina, under its decision, the Court may transfer the proceedings to another court in whose area the criminal offence was attempted or committed, no later than by the

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272 Criminal Procedure Code of BiH, Article 27(1) (2003): "*The Court may transfer conduct of the proceedings for a criminal offense within its jurisdiction to the competent Court in whose territory the offense was committed or attempted.… (2) The decision in terms of Paragraph 1 of this Article may also be rendered on the motion of the parties or the defense attorney for all the offenses falling within the jurisdiction of the Court except for the offenses against the integrity of Bosnia and Herzegovina*." (2003)

273 Prosecutor's Office of Bosnia and Herzegovina, *Book of Rules on the Review of War Crimes Cases*, Article 7(5) (2004).

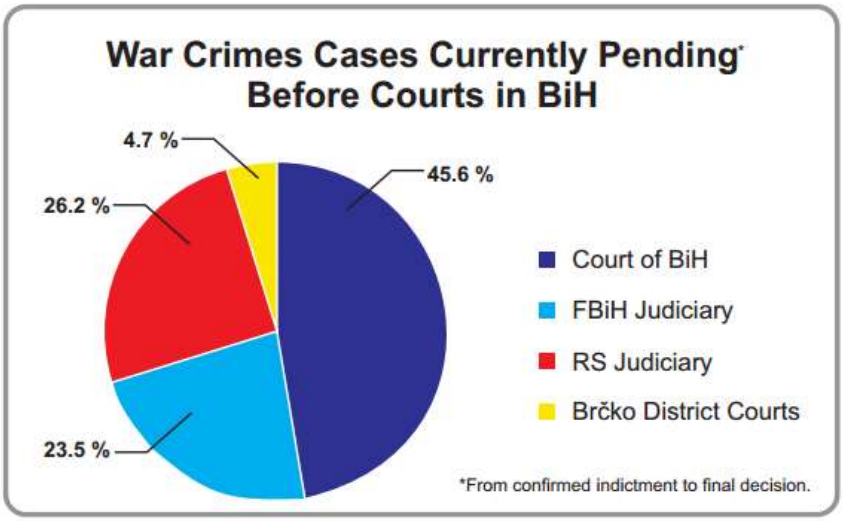
274 BiH Code of Criminal Procedure, Article 27a (2003), available at http://sudbih.gov.ba/app_dev.php/stranica/82/pregled (last accessed on 10 May 2017)

time of scheduling the main trial, while taking into account the gravity of the criminal offence, the capacity of the perpetrator and other circumstances of importance in assessing the complexity of the case.

(2) The Court may render the decision referred to in Paragraph 1 of this Article also upon the motion of the parties or defence counsel, while at the stage of investigation, only upon the prosecution motion.

(3) The decision referred to in Paragraph 1 of this Article shall be rendered by the Panel referred to in Article 24(7) of the Code, composed of three Judges. No appeal from the decision of the Panel shall be allowed.

Despite their modest jurisdiction, the cantonal courts were very active in trying war crimes. In 2006, for example, the War Crimes Chamber at the BiH Court issued eight first instance judgments, while the number of judgments tried by the cantonal and district courts (including Brčko District) was 16.[275] Although war crimes prosecution before the entity courts decreased, there are still many lower level individuals or direct perpetrators that are being prosecuted at the entity court level. This is demonstrated by the below chart:



Graph 1: These statistics are based on information gathered by the OSCE Mission to BiH through 31 March 2013 available at https://www.osce.org/bih/106868?download=true (last accessed on 7 Mai 2017)

Despite the primary competence of the BiH Court, even where the case was transferred to the entity courts, the interaction between the BiH Court and entity

275 Ivanišević, *supra* note 251, at 29.

courts was limited. The BiH Court has neither a superior jurisdiction to the cantonal courts in the Federation of BiH or district courts in Republika Srpska, nor is its jurisprudence binding on the local courts.[276] Thus, any recommendation issued by the BiH Court were not binding on the entity courts and prosecutors

The first instance judgements of the cantonal courts are reviewed by the Supreme Court of the Federation of BiH and those before the district court of Republika Srpska are reviewed by the Supreme Court of the Republika Srpska. There is no direct appeal or complaint to the BiH Court.[277]

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 knowledge transfer.

According to Article 7 (3) of the law on the BiH Court the BiH Court shall have the following competence with regards to entity courts:[279]

> „The Court shall have further jurisdiction as follows:
>
> (a) to take a final and legally binding position on the implementation of Laws of Bosnia and Herzegovina and international treaties on request by any court of the Entities or any court of the Brčko District of Bosnia and Herzegovina entrusted to implement the Law of Bosnia and Herzegovina;
>
> (b) to issue practice directions on the application of the substantive criminal law of Bosnia and Herzegovina falling within the competence of the Court on genocide, crimes against humanity, war crimes and violations of the laws and practices of warfare and individual criminal responsibility related to those crimes, *ex officio* or at the request by any court of the Entities or of the Brčko District of Bosnia and Herzegovina."

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276 *See* The Court of Bosnia and Herzegovina, *Frequently Asked Questions*, available at http://sudbih.gov.ba/stranica/91/pregled (last accessed 10 May 2017).

277 Ivanišević, *supra* note 251, at 29.

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

279 Law on the BIH Court, Article 7 (3) (2002), available at http://sudbih.gov.ba/app_dev.php/stranica/81/pregled (last accessed 10 May 2017).

Based on the above, the BiH Court does not have the competence to issue legally binding recommendations on entity courts. According to the Constitution of BiH the central BiH institutions have no competence of the judicial branch, because it is not listed as part of the central institutions.[280] As a result, law enforcement and judiciary are independent from each other.

On the level of prosecutors, interactions between the BiH Prosecutor's Office and the prosecutors at the entity-level are also scarce.[281] The BiH Prosecutor's Office cannot issue binding instruction to the prosecutors at the entity-level and is merely seen as a "'clearing house' sorting the huge caseload of thousands of criminal reports."[282] The head of the BiH's Prosecutor's Office for War Crimes noted in an interview that "generally our cooperation with the ICTY prosecutor and the prosecutors in the neighbouring countries is better developed than the cooperation with the cantonal and district prosecutors."[283]

Consequently, the local courts' independent actions mean that the courts differ in many ways, and in particular, in the application of laws. The application of different laws and the resulting inconsistent case law between the state and entity-levels, as well as the missing institutions that would consolidate the different applications, is still a major concern.[284] While the BiH Court applies the BiH Criminal Code, district and cantonal courts use the Criminal Code of Socialist Federal Republic of Yugoslavia (***SFRY Criminal Code***) as the law applicable to the atrocities committed during the Bosnian war between 1992 and 1995.[285] This will also be discussed further in this report.

Reforming domestic institutions was crucial for providing people with the genuine possibility of effectively enforcing their rights. An impartial security sector and

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280 Interview with Medžida Kreso, President of Court of BiH, Sarajevo, 28 September 2007 in Ivanišević, *supra* note 251, at 30.

281 Interview with Medžida Kreso, President of Court of BiH, Sarajevo, 28 September 2007 in Ivanišević, *supra* note 251, at 30.

282 Ivanišević, *supra* note 251, at 29.

283 Interview conducted in September 2007 in Ivanišević, *supra* note 251, at 29.

284 OSCE, Delivering Justice in BiH, *supra* note 228, at 70.

285 OSCE, Trials before the Domestic Courts, *supra* note 227, at 12.

judiciary is needed for effective criminal prosecution on a local and national level. Reforming public institutions and rendering them more efficient and transparent enhances public trust in governance and ensures the establishment of an effective democracy.[286]

[286] *See generally* Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post Conflict States, Vetting: an operational framework*, 2006 [hereinafter UNHCHR Rule of Law]; United Nation Development Programme, *Vetting Public Employees in Post-conflict Settings, Operational Guidelines*, 2006, *available at* http://www.ictj.org/static/Vetting/UNDPVettingGuidelines.pdf [hereinafter UNDP Guidelines].

2. Republic of Croatia

A significant number of war crimes cases was also tried in Croatia. In Croatia, the ICTY exercised concurrent jurisdiction. Thus, Croatia was also responsible for prosecuting war crimes.[287] According to a report of the Croatian Chief Prosecutor's Office, 3,553 individuals were indicted for war crimes from 1991 until 2014,[288] out of these individuals 589 were convicted, and the remaining were either acquitted or the cases have not yet been completed.[289] Up until today, Croatia still has not processed many war crimes cases. Of the 490 recorded war crimes in Croatia, in 34% of the cases the individual perpetrators are still at large or remain unknown.[290]

War crimes prosecution in Croatia started at the same time as the war broke out and was not a result of the establishment of the ICTY. This early war crimes prosecution was characterised by arbitrary indictments, corrupt judges, and a strong bias against Serbs. One of the main problems during and in the aftermath of the war, was that „war crimes proceedings resembled more an act of national vendetta than an even-handed exercise of criminal justice."[291]

Between 1991 and 2004, among the 1,400 individuals who were indicted for war crimes, only twelve members of Croatian units were indicted.[292] Although the number of Croatians indicted increased over the years, the number of the former Serb military and paramilitary members indicted and also convicted remain was significantly

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287 Article 9 of the Statute of the ICTY.

288 Lara Barberić et al., *Prosecuting War Crimes and Meeting Obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms at the Same Time – the Case of Croatia*, 21 CIRR 41, 43 (2015).

289 The Office of the Prosecutor in Croatia, *Report About The Work Of Croatian Prosecutors in 2009*, 108 table 27 (2010), available at www.dorh.hr/Default.aspx?art=8357 (last accessed 22 May 2017).

290 Teršelič et al., *Monitoring War Crimes Trials: Annual Report for 2016*, DOCUMENTA – CENTER FOR DEALING WITH THE PAST CENTRE FOR PEACE, NONVIOLENCE AND HUMAN RIGHTS 1 (2017), available at https://www.documenta.hr/en/monitoring-war-crimes-trials-2016-annual-report.html (last accessed on 20 June 2017).

291 Michaeli, *supra* note 51, at 26.

292 Stojanović et al., *Monitoring of War Crimes Trials: Annual Report for 2009,* DOCUMENTA – CENTER FOR DEALING WITH THE PAST CENTRE FOR PEACE, NONVIOLENCE AND HUMAN RIGHTS, note 5 (2010), available at https://www.documenta.hr/assets/files/Izvjestaji%20sudjenja/Annual%20Report%202009.pdf (last accessed 27 May 2017).

higher. According to a study conducted by the OSCE, between 2002 and 2005, approximately 84% of the Serbs were convicted while only 20% to 30% of the Croats that were indicted were also convicted.[293] This trend continued up until 2009, where nearly 76% of all cases against Serbs resulted in convictions. At the same time, cases against ethnic Croats have received very little attention. Very often, and in particular in the first years following the war criminal proceedings were commenced without sufficient evidence.[294]

An additional problem of the Croatian domestic proceedings was that a lot of judgements were issued without the accused participating at these proceedings. Approximately 80% of judgments were issued *in absentia*, most of which were against Serb defendants. Serbs were usually unavailable to Croatian authorities as most of them escaped to either Serbia or other countries.[295]

Croatian capacities for war crimes prosecutions were insufficient as judges and prosecutors lacked the required know-how, which was criticized by Amnesty International:

> "The overwhelming majority of war crimes proceedings in Croatia take place before county courts, where trial panels are rarely formed exclusively of criminal judges, and panel judges all too often lack sufficient expertise in international criminal law and other relevant international standards."[296]

From the investigation all the way up to the proceedings, none of the stages of war crimes prosecution was without flaws. There was no adequate witness protection mechanism in place. In war crimes proceeding particularly before Croatian county courts and when local heroes where on trial, witnesses were pressured and

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293 Organization for Security and Co-operation in Europe, *Background Report: Domestic War Crimes Proceedings 2006*, OSCE MISSION TO CROATIA, 53 (2007).

294 Organization for Security and Co-operation in Europe, *Background Report: Domestic War Crimes Proceedings 2004*, OSCE MISSION TO CROATIA, 31-36 (2005).

295 Michaeli, *supra* note 51 at 24; Stojanović et al., *Monitoring of War Crimes Trials: Annual Report for 2009,* DOCUMENTA – CENTER FOR DEALING WITH THE PAST CENTRE FOR PEACE, NONVIOLENCE AND HUMAN RIGHTS 1, note 5 (2010).

296 Amnesty International, *Behind the Wall of Silence Prosecution of War Crimes in Croatia*, AMNESTY INTERNATIONAL PUBLICATIONS, 6 (2010), *available at,* http://www.amnesty.eu/content/assets/Doc2010/Croatia_BehindWallofSilence.pdf (last accessed 28 May 2017) [hereinafter: Amnesty International, Behind the Wall of Silence]

intimidated.[297] The appointment of judges and prosecutors was politically motivated and influenced by the executive branch.[298] In the immediate aftermath of the war, many vacant positions of people who disappeared or left the country needed to be filled, among those, police, prosecutors, and judges. This resulted in slow administration of justice including a large backlog of cases.

Croatia lacked a clear strategy for war crimes prosecution. This often resulted in a random selection of cases targeting low-level perpetrators accused of low-level crimes to satisfy the international demand for war crimes prosecution.[299]

The UN Human Rights Committee urged Croatia to "promptly identify the total number and range of war crimes committed, irrespective of the ethnicity of the persons involved" and to prosecute the remaining cases expeditiously. [300] This would aid Croatia in effectively addressing war crimes prosecution. Only upon recommendations and pressure from EU Member States, did the Croatian Chief State Prosecutor's Office issue a "Strategy Defining Obligations of Certain Authorities in the Investigation and Prosecution of War Crimes Committed from 1991 to 1995" in February 2011 and eventually established a war crimes database in 2012. This mapping of war crimes helped identify perpetrators and prevent impunity.[301]

With the help of the European Union and ongoing accession process, Croatia was set to improve its was crimes prosecution.[302] The international community in particular the EU and some of its Member States were responsible for the end of impunity and for establishing an effective judiciary.[303] If Croatia were to join the EU, the outstanding issues with regards to war crimes needed to be addressed.[304]

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297 Amnesty International, Behind the Wall of Silence, *supra* note 296, at 6.

298 Michaeli, *supra* note 51, at 24.

299 Amnesty International, Behind the Wall of Silence, *supra* note 296, at 31.

300 United Nations Human Rights Office of the High Commissioner, *Croatia: Concluding observations of the Human Rights Committee*, CCPR/C/HRV/CO/2, para 10a (29 October 2009).

301 Documenta, Monitoring War Crime Trials for 2013, at p. 40.

302 The Accession process lasted from 2003 till 2013. Croatia became a full-fledged member of the EU on 1 July 2013.

303 Amnesty International, Behind the Wall of Silence, *supra* note 296, at 31.

304 Amnesty International, Behind the Wall of Silence, *supra* note 296, at 12.

Although, Croatia was supporting the establishment of the ICTY, its attitude towards the ICTY changed when it became functional. In 1993, the Serb Republic of Krajina held large Croatian territories and Croatia hoped that the ICTY would end the ongoing war. At the time when the ICTY started operating, the situation on the ground was different. Croatia was no longer just a victim of the war, but its military leaders were themselves implicated in war crimes for atrocities committed during "Operation Storm" and "Operation Flash."[305]

Immediately after the ICTY issued its first indictment against a military general of the Croatian Defence Council, the Bosnian Croat *Blaškić*, for crimes committed in BiH, Croatia stopped cooperating with the ICTY and started questioning its jurisdiction.[306] The war time nationalist leader, *Tuđman* fiercely rejected the subpoena issued by the ICTY and refused to cooperate in the ongoing investigations of the Operation Storm. In protest, he even appointed *Blaškić* as a general of the Croatian Army.[307]

Despite the fierce internal resistance, Croatia had to comply with its obligation towards the ICTY and in 1996 enacted the „Constitutional Law on the Co-operation of the Republic of Croatia with the International Criminal Tribunal" (***Law on Cooperation***).[308] The Law on Cooperation enabled investigations on Croatian soil, included the transfer and extradition of Croatian citizen indicted by the ICTY; it made cooperation with the ICTY possible. Although the Law on Cooperation was challenged before the Croatian Constitutional Court, it was eventually upheld.[309]

After *Tuđman*'s death, the authoritarian regime was replaced by a pro-Western government that was elected in 2000. Following the election, the cooperation with the ICTY improved. The ICTY could establish a liaison office in Zagreb and in April

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305 Michaeli, *supra* note 51, at 51 et seq.

306 *See* also *Prosecutor v. Blaškić*, Case No. IT-95-14, Appeals Chamber Decision on the Appellant's Motion for the Production of Materials, Suspension of Extension of the Briefing Schedule, and Additional Filings (26 September 2000).

307 Michaeli, *supra* note 51, at 52.

308 Josipović, *supra* note 63, at 155.

309 Case No. U-III-854/1999, Decision of the Croatian Constitutional Court (21 October 1999).

2000 a declaration was adopted that recognised the ICTY's jurisdiction for the Operations Storm and Flash.[310]

The newly elected centre-left Croatian government, led by *Račan* as prime minister and *Mesić* as president, was often confronted with Croat nationalists who were obstructing attempts to reform the Croatian legal system, enhance cooperation with the ICTY and improve returns of Serb refugees.[311] The Croatian attitude towards investigations against Croats was still negative.[312] Indictments issued by the ICTY that involved former Croat military leaders fuelled negative sentiments towards the ICTY.

Direct confrontations with Croatian justice opponents which included members of the HDZ (Croatian Democratic Union – the conservative centre right-wing party founded by *Tuđman*) and other nationalist parties including the military, the Catholic Church, and most of the Croatian media, were common.[313]

In February 2001, the County Court in the city of Rijeka based on ICTY's evidence indicted *Norac*, a retired army general, for war crimes against Serbian civilians during the Gospic massacre in 1991.[314] In June 2001, two additional indictments were issued

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310 Organization for Security and Co-operation in Europe, *Progress Report To The Republic Of Croatia On Croatia's Progress In Meeting International Commitments Since September 1999,* OSCE MISSION TO CROATIA 8 (2000) available at http://www.osce.org/zagreb/13177?download=true (last accessed 19 June 2017).

311 Human Rights Watch, *World Report 2002: Human Rights And Armed Conflict* (2002), available at http://pantheon.hrw.org/legacy/wr2k2/europe7.html (last accessed on 19 June 2017).

312 In Croatia the war in 1990s was called "domovinski rat" that can be translated as "homeland war"; According to Subotić, this term hindered fair international justice: "The very character of the Croatian war as understood locally has made accepting international justice difficult for Croatia. The 1991–1995 war is referred to as the 'homeland war' in Croatia – a war of independence, or a state-building war. It is the war that finally made Croatia independent from communist rule, but more importantly from the Yugoslav federation, historically perceived in Croatia as a Serb-dominated autocracy that crushed Croatian national interests" in Jelena Subotić, *The Paradox of International Justice Compliance*, 3 INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE 362, 376 (2009).

313 Subotić, *supra* note 312, at 376.

314 The only reason for his initial indictment before the Croatian courts, was an agreement with the ICTY prosecutor Carla Del Ponte, who agreed not to investigate Norac for the time being and instead defer the case to the national courts for fear to weaken the new pro-Western government in Subotić, *supra* note 312, at 378.

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]

This prompted ten thousand Croatians to protest against these indictments and strengthening the right-wing nationalist leaders.[317] These protests weakened the reign of the pro-Western government and its administration.

These events led to a landslide win for the HDZ – the war time ruling party – in the 2003 elections. The new government under HDZ appeased public protesters. The international community raised concerns over the return of HDZ, and cooperation with Croatia was expected to become more difficult.[318] However, its leader Ivo Sanader, surprised everyone in Croatia and abroad by taking an efficient approach toward leading the country to accomplish its goals to become a member of the EU and the North Atlantic Treaty Organization (NATO). His approach worked well; on the surface he would affirm the Croatian nationalist rhetoric but in the background, would work together with the ICTY and lead Croatia towards the EU.

The newly issued indictments of Croatian generals *Čermak* and *Markač*, for crimes against humanity during the Operation Storm, resulted in voluntary surrenders to the ICTY of both generals. Voluntary surrenders have proved to work relatively well in Serbia in keeping the public protests to a minimum, which was the strategy adopted by *Sanader* as well.[319] Several others followed these example and also surrendered voluntarily to the ICTY without provoking any expected public outcry.

(a) Existing Institutional Framework

The following section will provide an overview of the institutions in Croatia that were already conducting war crimes trials.

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315 *See Prosecutor v. Ademi*, Case No. IT-01-46-I. and *Prosecutor v. Gotovina*, Case No. IT-01-45-I.

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

317 Michaeli, *supra* note 51, at 55.

318 Subotić, *supra* note 312, at 379.

319 Subotić, *supra* note 312, at 379.

Although the Croatian judicial system was prone to political interference, including ineffective and biased prosecution of war crimes cases, it was still relatively functional. Thus, subsequent institutional reforms have not significantly changed the original organisation of criminal prosecution.

The judicial structure has been divided up hierarchically in three instances.[320] The municipality courts are the lowest courts, a level above them are the county courts, and the Croatian Supreme Court serves as the highest judicial institution in the country.

Municipal courts act as first instance courts for smaller crimes with a maximum punishment of ten years.[321] The regional courts or county courts, act either as first instance courts for crimes exceeding a punishment of ten years, which included war crimes offences or as second instance courts on appeals of municipal court judgments.[322] The county courts are competent to conduct investigations and *inter alia* decide upon appeals of the investigative judge's decision.[323] Appeals of judgement of the county courts go directly to the Supreme Court of Croatia.[324]

The Constitutional Court of Croatia decides upon individual complaints over decisions of governmental and legal entities in those cases where decisions violate the Constitution, human rights or fundamental freedoms.[325]

From the very beginning, 21 county courts have had jurisdiction over war crimes cases. The respective county prosecutors have been responsible for initiating these cases. The prosecution is also hierarchically organised, with municipal prosecutors' responsible for prosecution of crimes at the municipal court. The county prosecutors' offices are regional prosecutors responsible for prosecution before county courts, and on the top, is Chief State Prosecutors' Office with responsibility over the entire

320 Croatian Constitution, Chapter IV, Part 4 (2010).

321 Law on Courts, Article 16 (1) (2003); Code of Criminal Procedure, Article 17 (1) (1997)

322 Code of Criminal Procedure, Article 19 (2) (1997).

323 The institution of an investigative judge existed also in BiH before the new BiH Criminal Code and BiH Code of Criminal Procedure was implemented in 2003.

324 Code of Criminal Procedure, Article 21 (1) (1997).

325 Croatian Constitution, Article 128 (2010).

Croatian territory. The Chief State Prosecutors' Office supervises the work of the 21 county prosecutors.

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 to decide whether further evidence was required or if an indictment could be filed.[327]

In 2009, the Croatian Code of Civil Procedure was substantially reformed and the investigative judge was abolished. His or her competencies were transferred to the prosecution.[328]

(b) Developing the capacity of the institutional framework

This section will provide an overview of the few reforms that took place to develop the capacity of the Croatian judiciary to conduct efficient and fair war crimes trials.

War crimes prosecution in Croatia was handled by local courts which had jurisdiction over the area where the crimes occurred. Most local courts did not have sufficient capacity and know-how to prosecute complex war crimes cases. Particularly troubling was that these courts very often found themselves under strong pressure from local communities to either issue a conviction against Serbs or acquit Croatian military members.

The military court in Osijek, for example, convicted 24 individuals for war crimes committed against three civilians. Although the autopsy reports showed that three civilians were killed with three bullets from the same gun, the Court held that all 24 individuals committed war crimes. The Croatian Supreme Court corrected the judgement emphasising that in order to find someone liable for war crimes, the acts committed by each perpetrator had to be individualised and each of the perpetrator's individual responsibility needed to be established.[329]

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

327 Code of Criminal Procedure, Article 216 (1997).

328 Michaeli, *supra* note 51, at 76.

329 Case No. IKž-1295/1992-3, Judgment of the Croatian Supreme Court (28 January 1993).

During the first ten years of its existence, the ICTY did not adequately address domestic war crimes prosecution. Instead of establishing a link between international and domestic war crimes prosecution and improving the capacity of domestic institutions, it was focused on legitimising its own existence by bringing war criminals to justice, as this was its measurement of success. Critics argued that the ICTY served as a tool for the international community to affirm to the world that it was committed to the rule of law.[330] Although it was clear that due to the large amount of mass atrocities the majority of cases would have to be handled by the domestic institutions, domestic war crimes prosecution and capacity development was not a priority of the ICTY. The Completion Strategy changed ICTY's attitude. Yet, in order to bring domestic prosecution up to speed a lot had to be done. Croatia's political war narrative and its inefficient justice system posed significant difficulties in conducting fair and efficient war crimes trials.[331]

ICTY's new role to develop war crimes prosecution in the region came at right moment when the regime changed in Croatia. Following Tuđman's death, in 2000, Croatia transitioned from a quasi-authoritarian regime to a liberal democracy under the Presidency of Stjepan Mesić. This significantly facilitated cooperation with the ICTY and transfer of know-how to the national, legal professionals.

In addition to the ICTY, a particularly strong source of influence on the Croatian judicial capacity was the EU. As of June 2004, when Croatia was granted the status of an official candidate country, the EU's influence increased significantly. Any accession negotiations were conditioned upon cooperation with the ICTY and this immensely contributed to the country's capacity to prosecute war crimes.[332]

The EU's efforts to enhance the Croatian legal system included a reform that would address the concerns raised regarding the independence and impartiality of the judiciary, and improving competence and efficiency. The EU's annual progress

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330 Varda Hussain, *Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts in War Crime Tribunals*, 45 VIRGINIA JOURNAL OF INTERNATIONAL LAW 547, 562 (2005).

331 Michaeli, *supra* note 51, at 56.

332 European Commission, *Presidency Conclusions – European Council 17 and 18 June 2004*, PE 346.553, 11-12 (21 June 2004); European Council, *Decision on the principles, priorities and conditions contained in the Accession Partnership with Croatia and repealing Decision*, O.J, (L 55), 30 (2006).

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]

Against this background, Croatia's way was paved for a more substantial reform of its 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 Law established specialised War Crimes Chambers at the four largest county courts: Osijek, Split, Rijeka and Zagreb. The respective country prosecutors were also equipped with specialised war crimes prosecution departments. The four county courts did not have exclusive jurisdiction over war crimes. Article 12(2) of the ICC Law provided that other county courts could prosecute war crimes:

> "In addition to the courts specified in the foregoing paragraph, competence is also vested in courts as specified in the general regulations on criminal procedure competence […]."

According to Article 12 (3) of the ICC Law, the war crimes case shall be tried at the county court where the competent state prosecutors file the indictment. Before the prosecutor filed the case at the specialised county court, the Chief State Prosecutor had to request approval from the President of the Supreme Court of Croatia. The President of the Supreme Court of Croatia would grant such approval if the request of transfer would suit the circumstances of the offence and meet the requirements of proceedings.[335]

Regardless of where the war crimes trial took place, a war crimes case had to be heard before a bench of three professional judges experienced in handling complex cases.[336]

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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)

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).

335 ICC Law, Article 12 (3) (2003).

336 ICC Law, Article 13 (2) (2003).

Pursuant to Article 13 (1) of the ICC Law, a special investigative judge may be appointed in a war crimes case before the special county courts. This is not an obligatory requirement, thus making investigations also possible by a regular investigative judge.

The ICC Law also assigned a specialised State Prosecutor for War Crimes, who is appointed by the Chief State Prosecutor as one of his deputies pursuant to Article 14 of the ICC Law. He or she who is coordinating the work of responsible public prosecutor, can also assign county prosecutor to a war crimes case and is competent to undertake all necessary steps regarding war crimes investigations and prosecutions, in addition to the generally competent county prosecutor.

Despite the establishment of the four specialised War Crimes Chambers, with the aim to bundle war crimes know-how, the new institutions proved to be less effective than expected. As most of the war crimes during the 1990s occurred in Osijek, Zadar, Sisak, Vukovar and Šibenik most of the war crimes cases took before the respective regular courts. The procedure to transfer war crimes cases to the specialised courts was too burdensome, and prosecutors who were investigating the cases from the beginning, preferred to keep their cases at their courts. As a result, only two cases were transferred to a special War Crimes Chamber from the Zagreb County Court.

This changed in 2011, when the ICC Law was reformed, and the four designated War Crimes Chambers were declared exclusively competent to try war crimes.[337] As a result, war crimes competence was concentrated to four chambers. Taking into account that the county courts also have general competencies, judges appointed into these specialised county courts are also dealing with other criminal cases – including corruption and organised crimes cases. Consequently, rendering judgments in war crimes cases was further delayed due to a lack of resources.

(c) Factors influencing Croatia's institutional capacity

The following will provide a short analysis of the factors that contributed to the capacity development of institutions for war crimes adjudication.

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337 Mladen Stojanović & Milena Čalić Jelić, *Monitoring War Crimes Trials: Annual Report for 2013*, DOCUMENTA – CENTER FOR DEALING WITH THE PAST CENTRE FOR PEACE, NONVIOLENCE AND HUMAN RIGHTS 1, 32 (2014), available at https://www.documenta.hr/en/izvje%C5%A1taj-o-pra%C4%87enju-su%C4%91enja-za-2013.-godinu.html (last accessed 28 May 2017).

The ICTY only embraced the possibility of positively influencing capacity development in Croatia once it was tasked with it and once the political landscape changed in Croatia.

The initial detachment of the ICTY and the missed opportunity to involve Croatian authorities in their investigations made it difficult for Croatia to build up expertise in investigating and prosecuting war crimes. Involving ICTY's investigators with the national authorities in gathering evidence could have enhanced their capacity to prosecute war crimes.[338]

Evidence gathered in investigations was initially only available to the ICTY.[339] In addition, up until 1999, ICTY's documents, including indictments and decisions, were not available in the local language.

The possibility of access to European Union prompted Croatia to reform its judicial system. Since 2002, Croatia has continuously reformed its justice system, and provided trainings of judges, prosecutors and police officers.[340] The EU served as substantial motivation for Croatia and significantly spurred reforms. The EU's scrutiny, as well as immense financial and professional contribution aimed at developing Croatia's justice system, were the primary influencing factors.

After Tuđman's death and the election of the central-left opposition into government and *Stjepan Mesić*, left-wing opposition as president, Croatia began to receive generous rewards and international recognition for its efforts to deal with its violent past and address the legacy of war.[341] It was expected that unlike in Serbia, Croatia would not require „straightforward coercion" and would voluntarily cooperate with the ICTY.[342]

The international community and in particular the EU achieved great results and thus managed to exert influence on Croatia by working on the conditionality principle: If you do this, you will get this. The threats, however, were more symbolic and would

338 Michaeli, *supra* note 51, at 73 et seq.

339 Michaeli, *supra* note 51, at 73 et seq.

340 Michaeli, *supra* note 51, at 74 et seq.

341 Subotić, *supra* note 312, at 375.

342 Subotić, *supra* note 312, at 375.

fall short of issuing an ultimatum or withholding financial aid, and could be classified as „toothless conditionality". Despite criticism that Croatia failed to cooperate with the ICTY, financial aid was approved in order to help it integrate into the EU.[343] This reflected an understanding among international actors of the need to be sensitive to domestic politics in fear of destabilising the pro-Western government and empowering the HDZ nationalists.[344]

Croatia welcomed this approach and undermined any efforts to seriously address its violent legacy. However, this approach protected the Croatian reformists and helped them to smoothly lead the country towards EU integration, without fearing harsh sanctions that would reaffirm nationalist rhetoric.

Against this background, the involvement of ICTY may seem irrelevant. However, it's indirect influence should not be ignored. The EU took the ICTY as an example for formulating goals and include those in its progress reports.

ICTY's preparation to transfer cases was incentivising Croatia to improve war crimes prosecution capacities and prove to the international community that Croatia was ready to adjudicate international war crimes transferred to it by the ICTY.[345] In order to take on prosecution of war crimes transferred under the Rule 11 *bis* Croatia had to show that it was „willing and adequately prepared to accept such [cases]"[346] (emphasis added).

The Croatian Ministry of Justice organised additional war crimes trainings for judges and prosecutors in Spring 2004 „in recognising the need to enhance the capacity of the judiciary for purposes of dealing with cases that may be referred from the ICTY."[347] Despite these efforts, it was difficult to reach all the relevant members of

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343 Subotić, *supra* note 312, at 375 et seq.

344 Subotić, *supra* note 312, at 376.

345 Michaeli, *supra* note 51, at 77.

346 ICTY Rules of Procedure and Evidence, Rule 11 *bis*.

347 Organization for Security and Co-operation in Europe, *Background Report: Domestic War Crimes Trials 2003*, OSCE MISSION TO CROATIA, 3-4 (2004), available at http://www.osce.org/documents/mc/2004/06/3164_en.pdf (last accessed on 27 May 2017); European Commission, Croatia 2005 Progress Report, COM (2005) 561 final, SEC (2005) 1424, 24 (9 November 2005).

the justice system because war crimes prosecution was decentralised which resulted in a larger amount of necessary trainings.

In ICTY's referral hearing of Norac and Ademi, Croatia acted as *amicus curiae* and in an effort to convince the ICTY that it could transfer the cases to Croatia submitted extensive information about the applicable legislation and trustworthy judicial institutions.[348]

In sum, the influence of the ICTY can be described as indirect and has only been possible because of a positive political climate in Croatia and strong involvement of other actors, such as the EU.

[348] *Prosecutor v. Ademi & Norac*, Case No. IT-04-78, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11bis (14 September 2005).

3. Republic of Serbia

The relationship between the ICTY and Serbia was the most complex in the region. Serbia's clearly negative attitude towards the ICTY and its destructive policy posed significant challenges to ICTY's legitimacy and efficiency. ICTY struggled for years to obtain evidence and suspects from Serbia, which Serbia refused to hand over.[349]

During the 1990s, the two ICTY's presidents, *Cassese* and *Kirk McDonald*, complained to the UN Security Council that Serbia (at that time Federal Republic of Yugoslavia – ***FRY***) refused to arrest and transfer indicted persons to the ICTY.[350] In the ICTY's 1997 Annual Report, the ICTY complained that Serbia did not enact the required legislation to cooperate with it.[351]

This attitude toward the ICTY was supported by the general public's attitude supported by the anti-ICTY propaganda of the Milošević regime and its state-owned media. Public opinion polls that were conducted during that period exposed public suspicion that the ICTY was anti-Serb institutions.[352] The ICTY itself may also have contributed to that perception, because it failed to engage with the region up until

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349 The only exception was Dražen Erdemović, a Bosnian national, who was arrested and transferred by Serbia to the ICTY in March 1996. He had not been indicted by the ICTY, but was sought by the OTP as a witness in the Srebrenica massacre. He was transferred to the ICTY so Milošević could get promised financial support in http://www.ceu.hu/news/2009-11-03/transcript-ceremonial-address-of-justice-richard-j-goldstone-at-john-shattuck-inaugu. Serbia emphasized that the legal basis for such extradition was among other things his lack of Serbian citizenship and the temporary nature of the transfer, this was necessary because Serbia did not believe that compliance with the ICTY was necessary in LAMONT, *supra* note 105, at 67; Erdemović was later indicted by the Tribunal and pleaded guilty in *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgment of the Appeals Chamber (7 October 1997) in Keren Michaeli, *The Impact of the International Criminal Tribunal for Yugoslavia on War Crime Investigations and Prosecutions in Serbia*, 13 DOMAC, 41 (2011).

350 Security Council, *Letter dated 24 April 1996 from the President of the ICTY addressed to the President of the Security Council*, UN Doc. S/1996/319 (25 April 1996) (concerning the refusal to execute arrest warrants against the "Vukovar three" (Mrksić, Radić and Šljivančanin); Security Council, *Letter dated 22 May 1996 from the President of the ICTY addressed to the President of the Security Council*, UN Doc. S/1996/364 (22 May 1996) (concerning the failure to execute an arrest warrant against Mladic when attending a funeral in Belgrade); Security Council, *Letter dated 16 July 1996 from the President of the ICTY addressed to the President of the Security Council*, UN Doc. S/1996/556 (16 July 1996) (concerning the refusal to execute arrest warrants against Mladić and Karadžić).

351 Fourth Annual Report of the ICTY, UN Doc. A/52/375 S/1997/729, 148 (1997).

352 LAMONT, *supra* note 105, at 69-71.

2003. This lack of a strong counter-narrative legitimised the negative image presented by the state-owned media. This negative stance was also projected to domestic war crimes prosecutions and hindered any meaningful cooperation with domestic institutions. [353]

(a) Political context and the institutional framework

This section will provide a short overview of the political context in which the reforms took place and their relationship with the ICTY.

The Serbian judiciary functioned under an authoritarian and corrupt regime. The executive branch heavily influenced judges and prosecutors. The government frequently intervened in proceedings and undermined the authority of judges. Judges who did not agree with these dealings left their posts, and others were appointed who favoured the regime and accepted government meddling. The judicial branch also lacked the necessary resources to efficiently administer and conduct war crimes trials.[354]

Cooperation with police proved difficult. The Serbian police, who during the 1990s were instrumental in maintaining the political regime, were highly corrupt and an effective tool of the regime.[355] Many of the crimes investigated in Serbia, in particular those committed in Kosovo, were committed by the police. After the war, prosecutors had to rely on the very same police to investigate and obtain evidence.[356] Thus, their incentive to investigate war crimes cases was at best limited.

In 2000 the Corruption Perception Index published by Transparency International 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

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353 Michaeli, *supra* note 349, at 43.

354 Michaeli, *supra* note 349, at 26 et seq.

355 Michaeli, *supra* note 349, at 25.

356 Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, BiH, and Serbia and Montenegro*, 15 (2004), *available at* https://www.hrw.org/ report/2004/10/13/justice-risk/war-crimes-trials-croatia-bosnia-and-herzegovina-and-serbia-and (last accessed 1 June 2017) [hereinafter: Human Rights Watch, Justice at Risk]

357 Transparency International, *Corruption Perception Index*, available at https://www.transparency.org/research/cpi/cpi_2000/0/ (last accessed 1 June 2017).

administration, and had great opportunities to flourish.[358] In such an environment fair and professional war crimes prosecution was an illusion. Even the president of the Serbian Supreme Court stated in 2000 that it was the „principle of utilitarianism [that] dominated, instead of the principle of legality," which in his opinion led to the „worst possible consequence for the legal system."[359]

Investigations were further aggravated as the majority of war crimes occurred in BiH, Croatia, and Kosovo. The investigations were difficult because a legal framework for cooperation did not exist (in 1998 a cooperation agreement with Croatia was entered into and only in 2005 with BiH).

Much like in the neighbouring countries, the beginning of the millennium was marked 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]

The regime change was imperative for any improvement in cooperation with the ICTY. Although cooperation with the ICTY did increase, it was the result of international pressure and incentives that brought compliance, rather than a genuine shift in Serbia's attitude.[361] The anti-ICTY narrative did not change and any institutional or legal reforms that took place immediately following the regime change were limited. The regime change in Serbia had a far less impact than in neighbouring Croatia.

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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.

359 Address of Judge Karamarkovic to the society of judges in Serbia translated and reproduced in Eric D. Gordy, *Postwar Guilt and Responsibility in Serbia: the Effort to Confront It and the Effort to Avoid it*, in SERBIA SINCE 1989: POLITICS AND SOCIETY UNDER MILOŠEVIĆ AND AFTER 166, 171 (Ramet & Pavlkaovic eds., 2005).

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

361 LAMONT, *supra* note 105, at 69-71.

Milošević's transfer to the ICTY was only made possible because the U.S. threatened to withhold financial assistance.[362] He was eventually arrested in 2001 on corruption charges and not on war crimes or because of the indictment issued by the ICTY. In order to extradite Milošević to the ICTY, necessary laws needed to be in place that would allow transfers of Serbian nationals to an international body. Serbia's (back then FRY) parliament resisted passing any such law, making extradition difficult.[363] Only Đinđić's intervention helped transfer Milošević to the ICTY, almost overnight.[364] Although this intervention lead to a political crisis it did not result in a public uprising.[365]

Pressure from the U.S. and the EU led Serbia's to eventually implement the Law on Cooperation of the Federal Republic of Yugoslavia with the ICTY (***Law on Cooperation***), in 2002 (compare to Croatia that implemented a law on cooperation already in 1996).[366] The Law on Cooperation provided rules on legal assistance for the transfer of indicted Serbian nationals to the ICTY.[367] Thereafter, eight additional individuals were transferred to the ICTY.[368] Evidently, these transfers of lower level individuals served a political purpose to reinforce the perception of political change in Serbia and bring the country closer to Europe. Still, this change happened only on the surface, the more important individuals that were embedded in the political and military spheres, were neither captured nor transferred.

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362 PAUL R. WILLIAMS & M P SCHARF, PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 232 (2002).

363 *See* Michaeli, *supra* note 349, at 44; *See also* Konstantinos D. Magliveras, *The Interplay between the Transfer of Slobodan Milošević to the ICTY and Yugoslav Constitutional Law*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 661(2002).

364 WILLIAMS & SCHARF, *supra* note 362, at 234.

365 Diane F. Orentlicher, *Shrinking the Space of Denial*, OPEN SOCIETY INSTITUTE 30 (2008).

366 Law on Cooperation of the Federal Republic of Yugoslavia with the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, (11 April 2002) [hereinafter ***Law on Cooperation***].

367 Law on Cooperation with subsequent amendments in 2003 (available at http://www.tuzilastvorz.org.rs/html_trz/PROPISI_ZAKONI/ZAKON_O_SARADNJI_SRBIJE_I_CRNE_GORE_CIR.pdf (last accessed on 5 June 2017).

368 Dragoljub Ojdanić (Former VJ chief of Staff), Nikola Sainović (former FRY deputy prime minister), Momčilo Gruban, Milan Martić and Mile Mrkšić, all surrendered. Dušan Knežević, Nenad and Predrag Banović in Michaeli, *supra* note 349, at 45.

In 2003, the FRY dissolved and instead the Union of Serbia and Montenegro was established. Following the dissolution, the then president of Serbia *Milan Milutinović*[369] and the radical opposition leader *Vojislav Šešelj*[370] even voluntarily surrendered to the ICTY. Upon establishment of the Special Council for Cooperation with the ICTY, further high-ranking army and police generals[371] were urged to voluntarily surrender to the ICTY.

Serbia profited on two fronts from these surrenders. First, cooperation with the ICTY was rewarded by international political support or membership prospects in international institutions. Second, voluntary surrenders were less aggressive and produced fewer political costs than government's arrest of high-ranking officials. Many of these voluntary surrenders were used by the Serbian government as „public spectacles" that were interpreted as „patriotic sacrifices". The families of those who surrendered were generously compensated by the government.[372]

Still, international incentives were not sufficient to transfer the two most wanted men to the ICTY; *Radovan Karadžić* and *Ratko Mladić*. They resided peacefully in Belgrade and Mladić even enjoyed a full military pension in Serbia.[373]

However, this did not help change the public perception that the ICTY was an anti-Serb institution. The ICTY continued to be unpopular and any cooperation with the ICTY further destabilised the country.[374] The military and secret police were infiltrated by individuals prone to the old regime and well connected to organised crimes networks, which still dominated public and political life. This took a toll on the new administration and culminated in the assassination of Đinđić on 12 March 2003.

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369 ICTY Press Release, *Milan Milutinović Transferred to the International tribunal for the Former Yugoslavia* (20 January 2003), available at http://www.icty.org/sid/8310 (last accessed 1 June 2017).

370 ICTY Press Release, *Vojislav Šešelj Transferred to the ICTY Detention Unit* (24 February 2003), available at http://www.icty.org/sid/8297 (last accessed 1 June 2017).

371 Among them Nebojša Pavković and Vladimir Lazarević surrendered themselves while Sreten Lukić for their campaign in Kosovo

372 Michaeli, *supra* note 349, at 47.

373 International Crisis Group, *No Mladic, No Talks* (21 March 2007), available at http://www.crisisgroup.org/en/regions/europe/balkans/serbia/no-mladic-no-talks.aspx (last accessed on 2 June 2017).

374 Michaeli, *supra* note 349, at 44.

His assignation was an attempt to prevent him from pursuing progressive reform and implementing measures that targeted organised crimes and war crimes.[375] He was assassinated by members of a special operation unit the „Red Berets," that evolved out of several paramilitary units that emerged during the war in the 1990s and were aiding the FRY's secret police.[376]

The public outrage that followed made it possible to implement even more progressive reforms against members of the security forces and organised crimes networks.[377] However, a society that was not ready for these changes produced counter-pressure to these progressive reforms which led to a re-emergence of Vojislav Šešelj's radical Serb Party that was later elected as the largest party in Serbian Parliament.[378] Years of political volatility followed, with political power being shifted back and forth between Koštunica, who was closely linked to the old Milošević regime, and *Boris Tadić*, a more liberal politician who wanted to push a more pro-European agenda.[379]

During this time, cooperation with the ICTY and reforms aimed at implementing international justice staggered. Any reforms were only made possible through incentives and pressure exerted by the EU or the US.

Although the EU linked the negotiations of the Stability and Association Agreement to cooperation with the ICTY it did not yield immediate results. For Serbia the more powerful factor was the immediate and direct pressure exercised by the US. The US threat to block financial assistance or promise to grant immediate benefits proved more effective.[380]

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375 Slobodan Antonić, *Serbia after Djindjic*, 12 EAST EUROPEAN CONSTITUTIONAL REVIEW 113, 115 (2003).

376 The investigation in the assassination resulted in twelve men convictions by the Organised Crime Chamber at the Belgrade District Court on 23 May 2007 in N. Wood, *12 Serbs Guilty in Killing of Prime Minister*, NEW YORK TIMES (24 May 2007).

377 This action resulted in the arrest of over 13.000 persons including the heads of the Special Operations Unit and the resolution of the Counter-Intelligence Unit in Miller, *supra* note 358,at 249.

378 Michaeli, *supra* note 349, at 46.

379 Michaeli, *supra* note 349, at 20.

380 LAMONT, *supra* note 105.

The EU determined whether certain conditions, like arrest and extradition of wanted war criminals, have been met by analysing the status reports issued by the ICTY. It linked its financial and technical assistance and down the road eventually also membership prospects to cooperation with the ICTY and necessary institutional and legal reforms. Thus, it was the US and the EU that linked the cooperation with the ICTY to necessary reforms that were the influencing factors in Serbia.

After a large pro-European coalition was elected in 2008, cooperation with the ICTY improved. In July 2008, Karadžić was arrested and transferred to The Hague.[381] In December 2008, the ICTY Prosecutor *Brammertz* reported to the UN Security Council that the relationship with Serbia had significantly improved:

> "Since my last report to the Security Council, Serbia's cooperation with my Office has significantly improved. The changed general political environment has led to a more decisive and proactive approach to cooperation by authorities at the political, judicial and operational levels.
>
> The assistance provided by Serbia during the reporting period in terms of access to archives and the provision of documents has improved. Serbia has provided timely responses to the majority of requests for assistance and provided significant assistance in the provision of important documents relevant for trials. Serbia's National Council for Cooperation with the ICTY has played a key role in this area."[382]

The positive cooperation with Serbia was reiterated by the then President of the ICTY, Patrick Robinson.[383]

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381 UN Center Press Release, *Radovan Karadzic transferred to UN war crimes tribunal in The Hague,* (30 July 2008), available at http://www.un.org/apps//news/story.asp?NewsID=27525&Cr=Radovan&Cr1= (last accessed 2 June 2017)

382 ICTY Press Release, *Address of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the former Yugoslavia to the United Nations Security Council* (12 December 2008), available at http://www.icty.org/sid/10029 (last accessed 2 June 2017).

383 Security Council, Letter dated 12 November 2009 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, UN Doc. S/2009/589 available at http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_13nov2009_en.pdf (last accessed on 2 June 2017).

The EU's central condition for accession plans were the arrests of the last fugitives Mladić and Hadžić, which eventually bore fruit. Mladić was transferred to the ICTY in May 2011 and Hadžić in July 2011.[384] The former prosecutor of the ICTY, Carla Del Ponte noted, that it was the EU's insistence to condition the status of EU membership on capturing all the fugitives, that eventually brought over 14 indicted war criminals to the ICTY.[385]

Although the cooperation improved, the public opinion of the Tribunal did not change. Instead, the ICTY lost political significance and cooperation was regarded as a necessary precondition for EU accession.[386]

(b) Developing the capacity of the institutional framework

This section will provide an overview of the necessary reforms that took place to make the Serbian judiciary ready to conduct efficient and fair trials including war crimes trials and foster Serbian judicial capacity and infrastructure.

The political context described above was one of the driving factors to the development of domestic courts. Up until 2003, criminal jurisdiction was characterised by multiple layers of courts that were divided up between the federal court system (on the level of the FRY) and the republican court system (on the level of the then republics Serbia and Montenegro).[387]

The federal system also included military courts for federal legislations and with jurisdiction over civilian and military personnel. These military courts were responsible for prosecuting war crimes committed in the region of Former Yugoslavia (from 1991 to 1999).

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384 European Commission, Commission Opinion on Serbia's Application for Membership of the European Union, SEC (2011) 1208, COM (2011) 668, 8 (12 October 2011), available at http://www.europa.rs/upload/Report%202011.pdf (last accessed on 2 June 2017): "Since 2008, Serbia substantially stepped up its cooperation to a now fully satisfactory level as it responded to a total of 46 requests from the ICTY for handing over indictees, including the arrests and handovers of Radovan Karadžić in July 2008, Ratko Mladić in May 2011 and Goran Hadžić in July 2011."

385 CARLA DEL-PONTE, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY 455-459 (2009).

386 Michaeli, *supra* note 349, at 48.

387 Michaeli, *supra* note 349, at 21.

The first war crimes investigations were conducted for war crimes committed by Croatian armed forces, upon Croatia's declaration of independence. The Serbian military court convicted 17 individuals for war crimes for which the majority were Croatian armed forces.[388] Some of them were charged with armed rebellion and war crimes against civilian populations and were sentenced to death by the Belgrade military tribunal.[389] These sentences were never executed because Serbia and Croatia concluded an agreement in July 1992 for exchange of prisoners and the prisoners were exchanged.[390] These trials and many others raised serious fair trial concerns. Unlike in Croatia, war crimes trials in absentia were prohibited under Article 29 (2) of the FRY Constitution.[391]

Serbian courts were divided into municipal courts, district courts, and the Serbian Supreme Court.[392] The district courts had general jurisdiction over war crimes cases. The first institutional reforms were initiated in 2003, when the first reforms were made possible following the assassination of Đinđić.

In 2003, Serbia enacted the Law on the Organization and Competences of the 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

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388 Organization for Security and Co-operation in Europe, *War Crimes Proceedings in Serbia (2003-2014), an Analysis of the OSCE Mission to Serbia's Monitoring Results*, OSCE MISSION TO SERBIA1, 21 (2015) [hereinafter OSCE, War Crimes in Serbia].

389 Michaeli, *supra* note 349, at 24

390 *Prosecutor v. Sabljic,* Case No. IK 108/92 (14 July 1992); Prosecutor *Sipos & Cibaric*, Case No. IK 112/92 (26 June 1992) (Serbian Military Court).

391 Michaeli, *supra* note 349, at 24.

392 Legal Department World Bank, *Federal Republic of Yugoslavia: Legal and judicial Diagnostic* 35 (2002).

393 Law on the Organization and Competences of the Government Authorities in War Crimes Proceedings, Official Gazette of Republic of Serbia No 67/2003 as subsequently amended (135/2004, 61/2005, 101/2007 and 104/2009).

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

established institutions with exclusive jurisdiction to investigate, prosecute, and try war crimes cases within the police, prosecution, and the courts.[395]

This led to the establishments of a War Crimes Chamber in the Belgrade District Court and a Special Prosecutors Office.

These reforms included the establishment of a special War Crimes Department (which initially was called War Crimes Chamber) at the Belgrade District Court (***War Crimes Department***) and a special office for war crimes prosecution (***War Crimes Prosecutor's Office***). The Law on War Crimes also established a war crimes investigative service and Serbia's National Council for Cooperation with the ICTY received more competences.[396]

The exclusive jurisdiction for war crimes was transferred to the Belgrade District Court. Centralised and exclusive jurisdiction for war crimes was unique in the region, as neither Croatia nor BiH prosecuted war crimes in only one court. Critics viewed this as a sign that Serbia's refused to invest more resources into war crimes cases.[397] Despite the limited amount of resources, since its establishment the War Crimes Department indicted 184 individuals. Up until now 45 cases that included 110 individuals, have been finally adjudicated.[398]

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 idea that Serbia would be receiving cases from the ICTY did – at least during the later stages of the drafting the Law on War Crimes – influence the framework of the specialised war crimes system.[400] Given that for Serbia the ICTY was a biased

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395 Law on War Crimes, Article 3 (2003) regulates that certain institutions have jurisdiction over war crime related offences (Articles 370-384, 385 and 386 of the Criminal Code); OSCE, War Crimes in Serbia, *supra* note 388, at 21

396 Law on War Crimes, Articles 4-8 (2003).

397 Michaeli, *supra* note 349, at 66.

398 Statistics on war crime cases in Serbia are published by the War Crimes Prosecutor's Office, available at http://www.tuzilastvorz.org.rs/sr/predmeti/statistika (last accessed 3 June 2017).

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

400 Michaeli, *supra* note 349, at 66.

institution the attitude prevailed was that if war crimes adjudication was necessary then the trials should take place in Serbia.

For many practitioners, domestic developments and regime changes were the predominant factors that contributed to the development of specialised institutions and tackling of organised crimes and war crimes. Still, they commonly acknowledge that without the ICTY's legitimising effects, the War Crimes Department and war crimes prosecution would not exist in Serbia.[401]

Up until 2010, the last and second instance for war crimes cases was the Serbian Supreme Court. The Serbia Supreme Court was criticised for its practice of annulling first instance judgements on a regular basis and sending them back for retrial, which 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 expertise among the Serbian Supreme Court judges as one of the main reasons for why the majority of the first instance judgements were repealed.

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 Appellate Courts and a new Court of Cassation.[404] The reform aimed at reducing the complexity in the judicial system and at making it more efficient.

The War Crimes Department was transferred into the Belgrade High Court, which had a specialised War Crimes Panel that inherited the exclusive jurisdiction of war crimes. Appeals to the first instance war crimes judgments were dealt with at the special department of the newly established Appellate Court in Belgrade.[405]

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401 Orentlicher, *supra* note 365, at 46.

402 Michaeli, *supra* note 349, at 70.

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

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

405 Michaeli, *supra* note 349, at 71.

The special war crimes panel at the Appellate Court in Belgrade included judges that had an international humanitarian law training. In order to avoid frequent re-trials, Article 449 of the Law on Criminal Procedure was introduced providing that before a case is returned for re-trial the second instance court may remedy "incorrect or incomplete findings of fact to examine or to repeat evidence examined or denied by the court of first instance."[406] It was intended to cut down the length of the proceedings by conducting a hearing also before the second instance court instead of immediately sending the case back for re-trial.[407]

Serbia also revised its Code of Criminal Procedural and introduced adversarial aspects to criminal investigations in order to bring its system closer to the procedural system of the ICTY. This was done by abolishing the investigative judges, and transferring the competence to investigate crimes to the prosecutors, with the police under the direct supervision of the public prosecutors.[408]

Serbia has been regularly criticised by the European Commission over political interference in the judicial branch.[409] Thus, in order to minimize influence and increase capacity at the war crimes institutions, the job requirements and the salaries of judges at the War Crimes Department increased.[410] The judges assigned to the War

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406 Criminal Code of Civil Procedure, Article 449 (2011) available at http://www.mpravde.gov.rs/files/Criminal%20Procedure%20Code%20-%202012.pdf (last accessed 4 June 2017).

407 Organization for Security and Co-operation in Europe, *Judicial Institutions in Serbia*, OSCE MISSION TO SERBIA (2011) [hereinafter: OSCE, Judicial Institutions in Serbia] available at http://www.osce.org/serbia/82759?download=true (last accessed 17 June 2016) [hereinafter: OSCE, Judicial Institutions in Serbia].

408 Michaeli, *supra* note 349, at 82.

409 In 2015, the European Commission observed that there was some progress towards merit-based review of judges, that followed the adoption of rules for evaluating judges and prosecutors. However the European Commission also noted that " The independence of judges and prosecutors is laid down in the Constitution and framework legislation. However, the Constitution and laws allow political influence. Parliament appoints the Supreme Court President and all court presidents, the State Prosecutor and all prosecutors." European Commission, Commission Staff Working Document Serbia 2015 Report, SWD (2015) 211 Final, 11 (November 2015), available at https://ec.europa.eu/neighbourhood-enlargement/countries/package_en (last accessed 1 July 2017).

410 Law on War Crimes, Articles 5, 10, 10a and 17 (2003).

Crimes Department are appointed for a period of six years to ensure a minimum standard of stability and independence.[411]

However, the appointment of officers to these institutions follows the regular procedures, which is exactly the reason why there still are possibilities for the government to exert influence. *First*, judges and prosecutors are appointed by the Serbian Parliament.[412] *Second*, judges assigned to the war crimes panel at the War Crimes Department or the Appellate Court in Belgrade are appointed by the presidents of these institutions. They have the utmost discretion to appoint judges to the war crimes panel among those assigned to their respective courts. There have even been some cases where judges – without any reason – have been replaced by the president of the Court of Appeals before their term expired.[413]

Thus, judges and prosecutors remain susceptible to political influence.

(c) Factors influencing Serbia's institutional capacity

The following section will provide a short analysis of the factors that contributed to the development of new institutions for war crimes adjudication.

The driving factors in establishing the specialised institutions for war crimes adjudication was certainly the political climate in 2003. Any direct influence of the ICTY was rather limited. Instead, reforms and changes towards cooperation and implementation of war crimes institutions can mostly be attributed to EU's insistence and conditionality of cooperation with the ICTY. Conclusion and implementation of the Stabilization and Association Agreement only began after the president of the ICTY confirmed that Serbia was complying with its obligations to the ICTY.[414]

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411 Law on War Crimes, Article 10(4) and 10a(4) (2003).

412 Constitution of the Republic of Serbia, Article 147 (2006).

413 OSCE, War Crimes in Serbia, *supra* note 388, at 23.

414 Council of the the European Union, *Press Release 3023rd Council meeting Foreign Affairs, Council Conclusions on the Western Balkans*, 11022/10 Presse 175, 12 (14 June 2010).

The EU's insistence on cooperation with the ICTY as well as persistent efforts by the Organization for Security and Cooperation in Europe (OSCE) to assist the Serbian Government in creating its own war crimes capacity, made reforms possible[415].

The EU's insistence did not immediately focus on the capacity building. Only ICTY's Completion Strategy made it realize that supporting domestic institutional development and war crimes capacities was a necessity. As a result, war crimes prosecution became regularly one of the topics of the European Commission Progress Reports.[416]

In order to best meet these expectation, Serbia took the ICTY as a model to establish an efficient war crimes prosecution model.

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 process was an independent act and not part of any official initiative.[418] These individual participation considerably benefitted Serbia's judicial war crimes capacity and development.[419]

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415 Organization for Security and Co-operation in Europe, *Strategy Paper, On Support to the National Judiciary in Conducting War Crimes Trials*, OSCE MISSION TO SERBIA AND MONTENEGRO (2003); Mark S. Ellis, *Coming to Terms with Its Past - Serbia's New Court for the Prosecution of War Crimes*, 22 BERKELEY JOURNAL OF INTERNATIONAL LAW 165, 166 (2004).

416 *See* e.g. European Commission, Commission Staff Working Document Serbia 2015 Report, SWD (2015) 211 Final, 11 (November 2015); European Commission, Serbia and Montenegro Progress Report 2005, SEC (2005) 1428, COM (2005) 561 final, 15 (November 2005); European Commission, Commission Staff Working Document Serbia 2007 Report, SEC (2007) 1435, COM (2007) 663 final, 10 (November 2007), available at https://ec.europa.eu/neighbourhood-enlargement/countries/package_en (last accessed 3 July 20017).

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.

418 Michaeli, *supra* note 349, at 85.

419 Michaeli, *supra* note 349, at 85.

Despite these individual efforts, the ICTY and the Serbian Government were disconnected, and any influence thus remained limited. The greatest success is owed to professional relationships between individuals at international and domestic levels, whereby the needs of domestic professional bodies could be identified and direct assistance provided.[420]

Despite anti-ICTY sentiments in the public, war crimes prosecutions became a political reality because the ICTY had to transfer cases to domestic institutions due to the Completion Strategy. Thus, Serbia, under close scrutiny by the EU and the US, had no choice but to adopt a framework that would be sufficient to pursue adequate war crimes proceedings.[421]

The judicial system has been reformed in order to address the major problems that the European Commission, the OSCE and many others pointed out over and over again, among them judicial efficiency, transparency, independence, and suitability of personnel and the appointment processes.[422]

The reforms bore fruits as the ICTY decided to transfer one case to Serbia under the 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 2006, decided that it was „satisfied that the laws applicable to proceedings against the Accused in Serbia would provide an adequate basis to ensure compliance with the requirements of a fair trial.“[423] Despite all hopes, shortly after the transfer, the War Crimes Department decided that the accused was not fit for trial because of a terminal illness and the trial was terminated.

Ever since its establishment the War Crimes Department has been politically pressured. One year after the establishment of the War Crimes Department, even the

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420 For further information, *see infra* at III.C.3.

421 Michaeli, *supra* note 349, at 68.

422 Michaeli, *supra* note 349, at p.83.

423 *Prosecutor v. Kovačević,* Case No. IT-01-42/2, Decision on Referral of Case Pursuant to Rule 11 *bis*, para. 21 (17 November 2006).

Ministry of Justice, called for its closure.[424] It has constantly been criticised – much like the ICTY – for prosecuting members of the former Serb forces.[425] Because Serbian institutions refrained from trying persons *in absentia*, the non-Serb defendants were usually not tried in Serbia.[426] And since most of the former members of Serb forces were residing in Serbia the impression that only Serbian forces were tried in war crimes cases was reinforced.

Despite the political pressure and negative public opinion, the institutions survived to date.

C. THE ICTY'S CONTRIBUTION TO THE NORMATIVE DEVELOPMENT IN THE COUNTRIES OF THE FORMER YUGOSLAVIA

The beginning of the 1990s was marked by mass atrocities and war crimes committed on the territory of the Former Yugoslavia. At that time the SFRY Criminal Code of 1 July 1977, was in force.[427] The SFRY Criminal Code consisted of a general section of criminal law and included crimes for which the Federation of the Former Yugoslavia had jurisdiction. Each Republic had their own criminal code, which was applied to those crimes for which the Republics had their own jurisdiction.

After the break-up of the Former Yugoslavia, the SFRY Criminal Code remained in force because the new countries – BiH, Croatia, and Serbia – first adopted the old code and then consequently amended it. Later, the countries issued their own new criminal codes that were in line with European criminal law standards. This closed the gaps between the SFRY Criminal Code and the standards in international humanitarian law.

BiH, Croatia, and Serbia still continued to apply the SFRY Criminal Code to crimes committed during the war in Former Yugoslavia that lasted from 1991 to 1995. This

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424 *Kurir*, *Treba ukinuti specijalni sud* (30 March 2004) cited in OSCE, War Crimes in Serbia, *supra* note 388, at 24.

425 OSCE, War Crimes in Serbia, *supra* note 388, at 25.

426 OSCE, War Crimes in Serbia, *supra* note 388, at 25.

427 SFRY Criminal Code, Official Gazette SFRJ No. 44, 1976, English translation available at http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode_fry.htm (last accessed 1 Mai 2017).

was because these countries are bound to the legality principle of *nullum crimen sine lege*,[428] which safeguards the rights of the accused and was and still is embedded in the constitution of each country. Thus, the SFRY Criminal Code is the applicable code in the countries of the Former Yugoslavia for the acts committed during the war in 1990s.[429]

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

Article 141 (Genocide); Article 142 (War crime against the civilian population); Article 143 (War crime against the wounded and sick); Article 144 (War crime against prisoners of war); Article 145 (Organising a group and instigating the commission of genocide and war crimes); Article 146 (Unlawful killing or wounding of the enemy); Article 147 (Marauding), Article 148 (Making use of forbidden means of warfare); Article 149 (Violating the protection granted to bearers of flags of truce); Article 150 (Cruel treatment of the wounded, sick and prisoners of war criminalised war crimes); Article 151 (Destruction of cultural and historical monuments); Article 152 (Instigating an aggressive war); Article 153 (Misuse of international emblems).

The SFRY Criminal Code does not distinguish between international conflict and non-international conflict, as most of them apply to times of „war and armed conflict,“[430] And although, Chapter 16 of the SFRY Criminal Code is entitled „Criminal acts against humanity and international law,“ there is not provision that covers the offence of „crimes against humanity“. Also, a provision covering necessary modes of individual responsibility, such as command responsibility or any form of commission under a joint criminal enterprise, cannot be found in the SFRY Criminal Code.[431]

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428 No punishment without law: It means that no one should be punished for an act that was not prohibited by the law at the time when the offence was committed unless the subsequent law is more favorable for the accused. It also prohibits that a penalty be applied to a criminal act that is heavier than at the time the offence was committed.

429 The SFRY Criminal Code was adopted by BiH in 1992 and the then self-proclaimed Republika Srpska in 1993.

430 SFRY Criminal Code, Article 142, 143, 146, 148, 149, 151 (1977).

431 Michaeli, *supra* note 51, at 21.

It is noteworthy that the Constitution of the Former Yugoslavia provided for a direct application of international treaty law, which could be used for war crimes prosecution in the countries of Former Yugoslavia, which were:

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]

Thus, the following chapters will analyse how BiH (see *infra* at **B.1**), Croatia (see *infra* at **B.2**), and Serbia (see *infra* at **B.3**) have dealt with the shortcomings of the SFRY Criminal Code, how they have applied principles of international law when adjudicating war crimes cases, and whether they have relied on the precedents established at the ICTY.

1. Bosnia and Herzegovina

The criminal code in force during the war in Bosnia and Herzegovina, where most war related crimes were committed, was the SFRY Criminal Code. The majority of domestic legal practitioners called for an application of the SFRY Criminal Code for the crimes committed during the war because the retroactive application of criminal law was prohibited. International institutions and practitioners, however, feared that this principle could hinder effective local war crimes prosecution and thus, endanger

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[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).

the transfer of cases from the ICTY to domestic institutions. Therefore, the domestic criminal law needed to be reformed.

This need to reform domestic law prompted BiH to implement international criminal law into the domestic system in the expectation that it would facilitate the adjudication of war crimes and secure the transfer of cases from the ICTY to domestic institutions. The ICTY, together with international legal experts, played a crucial role in pressuring BiH to implement international criminal law that would reflect international standards for effective war crimes prosecution (see below at **(a)**). The ICTY and its jurisprudence provided useful guidance to local institutions in interpreting international criminal law (see below at **(b)**).

(a) Impact of the ICTY on the implementation of international criminal law

(i) State level – Bosnia and Herzegovina

Following the general reform of the judicial system, including the vetting of personnel in BiH, the OHR together with international experts, including the ICTY initiated a reform of domestic legislation.[436]

Spearheaded by the OHR, the new BiH Criminal Code was adopted in 2003. The ICTY's influence on the BiH Criminal Code was particularly noticeable as the new code included offences and modes of liability that were not part of the previous criminal code. It contained crimes against humanity,[437] provisions for prosecuting crimes under the theory of command responsibility,[438] and sentences were increased compared to the previous criminal code.[439]

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436 Michael Bohlander, *Last Exit Bosnia – Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts*, 14 CRIMINAL LAW FORUM 59, (2003); Christopher DeNicola, *Criminal Procedure Reform in Bosnia and Herzegovina: Between Organic Minimalism and Extrinsic Maximalism,* 1 EXPRESSO, 32 (2010).

437 BiH Criminal Code, Article 172 (2003).

438 BiH Criminal Code, Article 180 (2003).

439 BiH Criminal Code, Article 42 b (2003) provides that for case where the criminal offence provides for a long-term imprisonment, such as for genocide, crimes against humanity and war crimes, a term between twenty-one and forty-five years may be imposed.

The then applicable Code of Criminal Procedure of the Socialist Federal Republic of Yugoslavia (***SFRY Code of Criminal Procedure***) was also significantly reformed.[440] Although the new BiH Code of Criminal Procedure followed the standards developed by the European Court of Human Rights, it took the ICTY Rules and Procedure of Evidence as template. The civil law inquisitorial system was replaced by a mixed inquisitorial-adversarial system that, much like at the ICTY, contains civil law and common law elements.[441]

The international community concluded that a system similar to the ICTY would enhance effectiveness and provide for a more efficient way to try the large volume of war crime cases.[442] By 2000, the United Nations Mission in Bosnia and Herzegovina even argued that the main reason for an inefficient adjudication system was BiH's civil law oriented procedure.[443] They argued that, „the obligation to find the material truth sends [the] first instance courts on a seemingly endless quest for evidence, much of which will clearly contribute little to the resolution of the case"[444] Thus, they advised for the abolishment of BiH investigative judges and instead recommended that the parties lead the proceedings and bear the burden of producing evidence in criminal cases.[445] Other international institutions soon followed suit and endorsed its recommendation.

The OHR commissioned the drafting of a new code on criminal procedure that eventually resulted in a significant departure from the civil law system.[446] Although

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440 Decision of the High Representative, *Official Gazette of Bosnia and Herzegovina*, 37/03, available at http://www.tuzilastvobih.gov.ba/files/docs/zakoni/izmjene_zakona_o_tuzilastvu_-_37_03_-_eng.pdf (last accessed 28 April 2017).

441 OSCE, Trials before the Domestic Courts, *supra* note 227, at 12.

442 Organization for Security and Co-operation in Europe, *Moving towards a Harmonised Application of the Law: Applicable in War Crime Cases before the Courts in Bosnia and Herzegovina*, OSCE MISSION TO BOSNIA AND HERZEGOVINA 1, 6 (2008) [hereinafter: OSCE, Moving towards a Harmonized Law]; Ivanišević, *supra* note 251, at 13; Chehtman, *supra* note 227, at 564.

443 DeNicola, *supra* note 436, at 32 et seq.

444 UN Mission in BiH, *Judicial Assessment Programme, Thematic Report X: Serving the Public*, UNMBIH 6 (2000).

445 Id.

446 BiH's Code on Criminal Procedure before it was amended was based on the Austrian system and had some aspects of a socialism.

the working group hired by the OHR to re-draft the code of criminal procedure also included a group of BiH legal professionals, the group was guided by the ICTY Rules of Procedure and Evidence, and the newly adopted Brčko's code on criminal procedure that mirrored the ICTY.[447] The positive experience of some of the drafters with the criminal procedure in Brčko led the group to implement an ICTY influenced criminal procedure.[448] As a result, the working group was influenced and persuaded by either international colleagues or national colleagues who had exposure to the ICTY. Thus, the product was a code of criminal procedure that was drafted in accordance with the ICTY.

The new code inserted many common law features into BiH's criminal justice system transforming it from a civil law country into a mixed system that resembled the ICTY: "It abolished investigative judges, introduced plea bargaining, made the presentation of evidence more adversarial, authorised cross-examination, and banned subsidiary and private prosecutions."[449]

As it was met with heavy domestic resistance, and could not be adopted before parliament, the OHR exercising its legislative power eventually had to impose BiH's Code of Criminal Procedure.[450]

The local legal professionals had not been substantially involved in the process of integrating the law into the legal system.[451] Thus, the code not only prompted resistance among local practitioners, but also caused confusion with BiH's judges, prosecutors, and attorneys in applying the code. As a result, the new code slowed down the proceedings. Domestic professionals argued that the domestic legal system

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447 David Tolbert & Aleksander Kontić, *The International Criminal Tribunal for the Former Yugoslavia: Transitional Justice, the Transfer of Cases to National Courts, and the Lessons for the ICC*, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 147 (Carsten Stahn & Göran Sluiter, eds., 2009).

448 DeNicola, *supra* note 436, at 36.

449 DeNicola, *supra* note 436, at 39.

450 OHR was granted broad powers through the Dayton Agreement in 1995. It had the power to impose legislation, veto domestic legislation, and remove domestic officials.

451 Chehtman, *supra* note 227, at 564.

was disregarded by international institutions who imposed a foreign system almost overnight.[452]

The use of evidence gathered by the ICTY was also an issue. In the first decade of war crimes trials before BiH courts, only evidence gathered by the BiH institutions 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]

This was demonstrated in the trial of Bosnian Croat *Dominik Ilijasević-Como* before the Zenica Cantonal Court that began on 16 December 2002. The trial demonstrated shortcomings in the BiH justice system. It, however, did not show an apparent ethnic 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 with an eye witness carried out by the ICTY relating to massacres in central Bosnia into evidence. The Zenica Cantonal Court rejected the motion, declaring that kind of evidence inadmissible in part because "the evidence was not obtained pursuant to the provisions of the law on criminal procedure in Federation Bosnia and Herzegovina."[455]

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

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452 UN Mission in BiH, *Judicial Assessment Programme, Thematic Report X: Serving the Public*, UNMBIH 43 (2000).

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

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).

455 *Prosecutor v. Ilijasević*, Case No. KT.1/2000, Minutes from the Trial Hearings at Cantonal Court in Zenica, 141-142 (8 September 2003) in 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).

was not possible before the BiH Court, the subsequent judgment cannot rely solely or primarily on the statement obtained from the ICTY.[456]

(ii) Entity Level – Federation of BiH and Republika Srpska

Prior to the establishment of the BiH Court, prosecution of war crimes cases was conducted exclusively at the cantonal courts of the Federation of BiH or the district courts in the Republika Srpska.

In the aftermath of the war, new criminal codes were adopted first at entity-level and only later at state-level. The new pre-2003 criminal procedural codes were based on the procedural system of the Former Yugoslavia and thus resembled the SFRY Code of Criminal Procedure, with judges having the leading investigative function. The trials conducted at the entity-level were perceived as partial and ethnically motivated, which was the reason why the ICTY and OHR aimed to remove war crimes prosecution from entity courts.

Following the desire to harmonize prosecution of war crimes and establish a primacy over war crimes prosecution in 2003, the entity-level criminal codes were again reformed. The exclusive jurisdiction of the entity-level courts for crimes "was removed on 24 January 2003, when the [OHR] imposed a new criminal code establishing state-level criminal jurisdiction over certain crimes, predominantly crimes against the state and crimes of an international/trans-border nature, including war crimes."[457]

Following the transfer of exclusive war crimes jurisdiction to the BiH Court, the entity-level criminal codes did not contain war crimes offences any more. In addition, new criminal procedural codes were enacted in 2003. Both codes were almost

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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.

457 OSCE, Trials before the Domestic Courts, *supra* note 227, at 9.

identical and much like the legislation on the BiH level they presented a departure from the civil law system introducing adversarial elements to the procedural code.[458]

At the same time, the entity courts did not stop prosecuting war crimes. *First*, it was agreed that the entity courts should continue to prosecute war crimes in those cases where the indictment was already confirmed by 1 March 2003.[459] *Second*, for cases that have not been confirmed before 1 March 2003, the entity prosecutor has an obligation to report the case to the BiH prosecutor and continue working on it before the BiH Court decides whether the case was to be prosecuted at the BiH state-level.[460] Based on Article 449 (2) of the BiH Code of Criminal Procedure, the BIH Court would decide on whether the case should be tried before the BiH Court or transferred to the entity court by "taking into account the gravity of the criminal offence, the capacity of the perpetrator and other circumstances of importance in assessing the complexity of the case."

In addition, the entity prosecutors were obliged to report all new war crimes cases to the BiH Prosecutor.[461] The BiH Prosecutor had – such as the ICTY under the Rules of the Road procedure – the obligation to review the potential indictment and (i) determine whether it was ripe for trial and (ii) whether it was a sensitive case and thus should be tried before the BiH Court.[462]

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458 OSCE, Trials before the Domestic Courts, *supra* note 227, at 12.

459 BiH Code of Criminal Procedure, Article 449 (1) (2003): "Cases falling under the competence of the Court that are pending before other courts prior to the entry into force of this Code shall be finalised by these courts if the indictment is confirmed or in legal effect in these cases."

460 BiH Code of Criminal Procedure, Article 449 (2) (2003): "Cases falling within the competence of the Court which are pending before other courts or prosecutor's offices and in which the indictment is not legally effective or confirmed, shall be finalised by these courts the courts which have territorial jurisdiction unless the Court, ex officio or upon the reasoned proposal of the parties or defense attorney, decide to take such a case while taking into account the gravity of the criminal offence, the capacity of the perpetrator and other circumstances of importance in assessing the complexity of the case."

461 *See* the obligation of the prosecutors to report the case to the BiH Prosecutor in BiH Code of Criminal Procedure, Article 215 (3) (2003): "If the report is filed with the [BiH Court], authorised official or some other court or prosecutor in Bosnia and Herzegovina, they shall accept the report and shall immediately submit the report to the [BiH] Prosecutor"

462 OSCE, Trials before the Domestic Courts, *supra* note 227, at 12.

(iii) Potential violation of the principle of legality

In BiH war crimes were tried at three different *fora;* at the international level at the ICTY, at the national state-level at the War Crimes Chamber of the BiH Court; and at the entity-level in the Federation of BiH and Republika Srpska. This posed some unique problems:

The question arose as to which law should be applied to war crimes committed between 1992 and 1995. This questions was not answered consistently throughout the country. Instead, it prompted confusion and disagreement between law practitioners and remains unresolved to date.

The international community, including those involved in the creation of the BiH Criminal Code, advocated for a uniform application of criminal law across the entity courts. However, the majority of prosecutors, argued that the correct code to apply to the atrocities committed between 1992 and 1995 was the SFRY Criminal Code.

In accordance with the BiH Constitution and Article 7 of the European Convention of Human Rights (***ECHR***),[463] the legality principle prohibits a retroactive application of criminal law for crimes committed before the law entered into force. However, if the new law is more lenient to the accused, the new law should apply.[464]

This principle is also reflected in Article 4 of the BiH Criminal Code.[465] Pre-empting the discussion over retroactive application of the new code, the BiH Criminal Code, included a provision that mirrored the provisions of Article 7 (2) of the ECHR. Article 3 (2) of the BiH Criminal Code provides an exception in those cases where the offence was already defined as a criminal offence by international law:[466]

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463 European Convention of Human Right is directly applicable as part of BiH's Constitution, Article II: Human Rights and Fundamental Freedoms.

464 OSCE, Trials before the Domestic Courts, *supra* note 227, at 20.

465 BiH Criminal Code, Article 4 (2003): (1) The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence. (2) If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.(emphasize added)

466 BiH Criminal Code, Article 3 (2) (2003): "No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law.

Principle of Legality
Article 3

(1) Criminal offences and criminal sanctions shall be prescribed only by law.
(2) No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law.

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]

Despite this provision, the clear majority of cases at cantonal and district courts are tried under the SFRY Criminal Code when prosecuting war crimes.[468]

The application of different codes, different principles, different sentencing ranges, and different qualifications for the same acts certainly weakens the principles of equality of the citizen under the law in BiH.[469]

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 criminalising crimes against humanity and which contains command responsibility as a mode for liability. The missing offence of crimes against humanity and the lack of command responsibility in the SFRY are posing significant problems, which exposes BiH to different laws for the same criminal act.

The entity-level courts argue that the sentences imposed by the BiH Criminal Code are harsher for international war crimes than those in the SFRY Criminal Code and thus their application would violate the legality principle. They argue that an

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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].

468 Some entity courts in the Federation in limited circumstances have applied the BiH Criminal Code in OSCE, Moving towards a Harmonized Law, *supra* note 442; OSCE, Delivering Justice in BiH, *supra* note 228, at 70;

469 OSCE, Delivering Justice in BiH, *supra* note 228, at 70.

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

application of the harsher sentences on the accused whose criminal acts stems from a time when the code with more lenient provisions was in force should be prohibited.[471]

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, defendants charged with similar crimes could face up to 45 years imprisonment.[473] This resulted in the unequal treatment of citizens in BiH depending on where they faced trial - either in entity-level courts or the BiH Court. It was the BiH Prosecutors' decision whether he or she would consider a case not sensitive enough for the BiH Court. The BiH Prosecutors' decision could not be appealed.

This issue was also addressed in the case of *Prosecutor v. Adbuladhim Maktouf*.[474] In its first instance judgment, the BiH Court held that in cases of serious violation of international standards in a time of war, the deviation of the legality principle and the application of a more stringent law and sentence was justified.[475] The BiH Court based its' analysis on the relevant case law of the European Court of Human Rights (***ECtHR***) and confirmed the exemption to the legality principle. The BiH Court argued that the accused must have been aware that a violation of international standards during the time of war which carries with it serious consequences.

The accused called on the Constitutional Court of BiH and argued *inter alia* that the conviction for war crimes under Article 173 of the BiH Criminal Code violated his constitutional rights. The code applicable during the time when the crimes was

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

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).

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

474 *The Prosecutor v. Abduladhim Maktouf*, Case No. K-127/04, First Instance Judgment Court of BiH (1 July 2005).

475 Id, at 25-26.

committed should have been the SFRY Criminal Code.[476] The penalty range for the crimes he was convicted of were lower than before the BiH Criminal Court and thus the SFRY Criminal Code was more lenient for the accused and should be applied.[477]

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 of the national criminal code was not in violation of Article 7 of the ECHR in cases where the offences constituted a violation of customary international law at the time 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 imposed prison sentences that were longer than those under the SFRY Criminal Code.[481]

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 Court to the entity courts should carry the BiH Criminal Code with them and should hence apply at the entity-level.[483]

The prevailing opinion of law practitioners in the entities was that this decision by the BiH Constitutional Court was not binding on the Federation of BiH or Republika

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

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

483 Id.; *See also* Aida Alić, *Courts Urged to Stick to Bosnia's Own Law Code*, PUBLIC INTERNATIONAL LAW POLICY GROUP (2011), available at: http://www.publicinternationallawandpolicygroup.org/wp-content/uploads/2011/04/wcpw_vol04issue21.html#bih1 (last accessed 27 April 2017).

Srpska. They argued that the BiH Constitutional Court recommendation did not compel the entity courts to comply with it because it was not directly related to war crimes cases conducted at the entity-level.[484] This view was confirmed by the Constitutional Court, which emphasised that the case was about protecting the human rights of the accused and not about „the legal arrangements or the case law applied at the level of the entities.“[485] As a result, the entity courts continued to use the SFRY Criminal Code most of the time,[486] which further exacerbated the situation.

Lacking a central institution such as a supreme court at the BiH state-level that could have enforced a uniform interpretation and application of criminal law, the application and interpretation of criminal law in BiH is still inconsistent and poses a problem up to today.[487] Even the Council of Europe Parliamentary Assembly pointed to that issue in their Resolution 1564 (2007) on ”Prosecution of offences falling within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY).” The Resolution urged the authorities of BiH *inter alia* to “ensure the harmonisation of case law, consider setting up a supreme court or grant the powers of a supreme court to an existing jurisdiction so as to guarantee legal certainty by harmonising the interpretation of the law.”[488]

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484 OSCE, Moving towards a Harmonized Law, *supra* note 442, at 10.

485 *Maktouf* Constitutional Court; *See also* Aida Alić, *Courts Urged to Stick to Bosnia's Own Law Code*, PUBLIC INTERNATIONAL LAW POLICY GROUP (2011), available at: http://www.publicinternationallawandpolicygroup.org/wp-content/uploads/2011/04/wcpw_vol04issue21.html#bih1 (last accessed 27 April 2017); *See also* OSCE, Moving towards a Harmonized Law, *supra* note 442, at 10.

486 Some entity courts have applied the BiH Criminal Code in certain cases.

487 OSCE Delivering Justice in BiH, *supra* note 228, at 70.

488 Parliamentary Assembly of the Council of Europe, Prosecution of offences falling within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY), Assembly debate (28 June 2007) available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17563&lang=en (last accessed 28 April 2017).

(b) Impact of the ICTY on the domestic adjudication of war crimes at the state-level in Bosnia and Herzegovina

The lack of law harmonization between the entity courts and between the BiH Court was only one aspect of fragmentation. Many cantonal and district courts also failed to follow international precedents; including those of the ICTY.[489]

In 2002, the OHR Report recommended that the jurisprudence of the ICTY should have persuasive authority in procedural and substantive matters.[490] Although no regulation was adopted that would make ICTY's case law binding, it was accepted by the BiH Court and BiH prosecutors that reliance on the ICTY jurisprudence would help them to apply international criminal law principles and standards.[491]

In order for the ICTY to complete its mandate, the BiH Court and domestic prosecution needed to be ready to prosecute war crimes cases. Both institutions therefore had a common goal, namely to efficiently and fairly prosecute war crimes. This common aim resulted in an unparalleled collaboration between the international and domestic institutions in the region.

War crimes adjudication before the BiH Court thus benefitted immensely from the 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 and state-level prosecutors often refer to international instruments in their briefs and judgments.[493] In this respect the BiH Court differs from all other courts in the territory of Former Yugoslavia which did not rely so heavily on ICTY and its precedents.

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

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

491 Ibro Bulić, *State Prosecutor, Application of International Sources of Law in BiH*, Presentation at the International Conference on the Implementation of International Humanitarian Law in National Systems, Budapest, 3, available at: www.tuzilastvobih.gov.ba/files/docs/Primjena_medjunarodnih_izvora_prava_u_BiH.pdf (last accessed 14 Mai 2017).

492 Ivanišević, *supra* note 251, at 41

493 Ivanišević, *supra* note 251, at 41

Former ICTY staff members joined the BiH Court and brought their expertise to the War Crimes Chamber and BiH War Crimes Prosecution. ICTY judges conducted working visits to BiH while national judges visited the ICTY to discuss and exchange views on the substantive and procedural law.[494]

This significantly influenced the BiH Court's war crimes adjudication:[495]

(i) The BiH Court accepted the use of already adjudicated facts at the ICTY allowing it to focus on the role and liability of the accused.[496] This saved time and money.[497]

(ii) The BiH Court accepted the use of evidence already presented or gathered at the ICTY. Witness statements delivered at the ICTY were admitted to the BiH Court proceedings if the accused was provided with the possibility to cross-examine the witness.[498] If this was not possible, the witness statement would only be accepted in exceptional cases and would only serve as corroborating evidence. As a result BiH Court findings could not rely solely on the witness testimony.[499]

(iii) The BiH Court relied on the ICTY for substantive law or procedural issues.[500] The ICTY served as guidance on how to resolve certain issues in international

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494 Ivanišević, *supra* note 251, at 24-25

495 Ivanišević, *supra* note 251, at 24-25

496 *See Prosecutor v. Marko Samardžija*, Case No. X-KRŽ-05/07, Judgment of the BiH Court, 18–19 (3 November 2006), *Prosecutor v. Gojko Janković*, Case No. X-KRŽ-05/161, Judgment of the BiH Court, 19-20, (16 February 2007).

497 *Prosecutor v. Momčilo Mandić,* Case No. X-KR-05/58, Judgment of the BiH Court, 51-103 (18 July 2007).

498 *See Prosecutor v. Božić et al.,* Case No. X-KRŽ-06/236, Judgment of the BiH Court: the BiH Court approved cross-examination of Robert Alexander Franken, the deputy commander of the Dutch battalion stationed in the area in 1995; *See also* Justice Report, *Božić et al.: Cross-examination Approved*, *BIRN* (18 July 2007) available at http://www.justice-report.com/en/articles/bozic-et-al-court-expert-s-opinion (last accessed 6 May 2017).

499 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."

500 *Prosecutor v. Momčilo Mandić*, Case No. X-KR-05/58, Judgment of the BiH Court, 112 (18 July 2007) (admissibility of evidence); *Prosecutor v. Radovan Stanković*, Case No. X-KRŽ-05/70, Judgment of the BiH Court, 13-14 (14 November 2006) (self-representation); *Prosecutor v. Boban Šimšić*, Case No. X-KRŽ-05/04, Judgment of the BiH Court, 12–14 (11 July 2006) (disclosure of evidence).

criminal law, such as the definition of certain terms, like „*civilian*“, or the elements of crimes against humanity, inhumane acts, torture, determining the elements of *actus reus* and *mens rea*, while also including determination of individual and command responsibility.[501]

The BiH Court was dealing with complex issues of international humanitarian law in 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]

Some of the more complex issues, among others, are certainly proving elements of genocide, command responsibility, and joint criminal enterprise. The BiH Court addressed these issues in a sophisticated manner and in accordance with internationally accepted standards. As will be addressed below command responsibility (see below at **(i)**) and joint criminal enterprise (see below at **(ii)**) closely followed the ICTY jurisprudence. Certainly, the regular exchange between the ICTY and the BiH Court officials, training sessions, and study visits contributed to this positive development and efficient transfer of know-how.

(i) Command responsibility

Command responsibility is a form of personal responsibility that determines the liability of a superior. The criminal liability of a superior arises from his or her failure to prevent his or her subordinates from committing international crimes or from the

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501 *Prosecutor v. Nikola Andrun*, Case No. X-KRŽ-05/42, Judgment of the BiH Court, 15 and 25 (14 December 2006) (definition of "civilian" and elements of torture); *Prosecutor v. Dragan Damjanović*, Case No. X-KRŽ-05/51, Judgment of the BiH Court, 15, 23, 44, 47-48 (15 December 2006), definition of "civilian", definition of "other inhuman acts", elements of a crime against humanity, and elements of persecution); *Prosecutor v. Momčilo Mandić*, Case No. X-KR-05/58, Judgment of the BiH Court, 129-130, 143-144 and 145-147 (18 July 2007), (definition of "other inhuman acts", forms of individual criminal responsibility, and command responsibility); *Prosecutor v. Marko Samardžija*, Case No. X-KRŽ-05/07, Judgment of the BiH Court, 22-23 (3 November 2006) (forms of individual criminal responsibility); *Prosecutor v. Boban Šimšić*, Case No. X-KRŽ-05/04, Judgment of the BiH Court, 40, 42-42, 29, (11 July 2006), (forms of individual criminal responsibility, elements of persecution, and elements of rape); *Prosecutor v. Radmilo Vuković*, Case No. X-KRŽ-06/217, Judgment of the BiH Court, 10, 10-11, (16 April 2007), (act related to armed conflict, elements of a crime against humanity, and elements of rape; *See also* Ivanišević, *supra* note 251, at p. 25.

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

failure to punish his or her subordinates where they have committed such offences:[503] "if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[504]

The doctrine has already been part of the generally accepted international practice that emerged in the aftermath of the Second World War.[505] This was confirmed by the ICTY Appeal Chamber in the case of *Prosecutor v. Hadzihasanovic et al*. The ICTY held that at the time the war crimes in the Former Yugoslavia were committed, customary international law included the concept of command responsibility for war crimes committed in both international and internal armed conflict.[506]

In applying the doctrine of command responsibility, the ICTY refined and clarified the elements of command responsibility by interpreting and applying those to the conflict in the Former Yugoslavia.

The ICTY applied the following criteria to establish command responsibility:

i. the superior must have had **effective control over** his subordinate

j. he **must have known or have had reason** to know that his subordinate was about to commit a crime or had done so

k. he must have **failed** to take the necessary and reasonable measures to prevent the crime committed by his subordinate or to punish him[507]

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503 Bert Sward, *Mode of International Criminal Liability*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 88 (Antonio Cassese ed. 2009).

504 ICTY Statute, Article 7(3) (1993 as amended).

505 *See* GUÉNAËL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY (2009).

506 *Prosecutor v. Hadzihasanovic et al.*, Case No. IT-01-47, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 13 (16 July 2003): "Likewise, at all times material to this case, customary international law included the concept of command responsibility in relation to war crimes committed in the course of an international armed conflict. Thus, the concept would have applied to war crimes corresponding to the prohibitions listed in common Article 3 when committed in the course of an international armed conflict. It is difficult to *see* why the concept would not equally apply to breaches of the same prohibitions when committed in the course of an internal armed conflict."

507 Sward, *supra* note 503, at 88.

Command responsibility should not be confused with accomplice responsibility or co-perpetration, which is individual responsibility that arises under direct participation in an international crime:[508] "The superior who had reason to know or should have known but did not actually know that a subordinate was about to commit an international crime and who failed to take measures to prevent the crime is **not an accomplice** to that crime,"[509] this superior can be held liable under the doctrine of command responsibility.

Although command responsibility was part of customary legal practice it was not explicitly mentioned in BiH's national law. Thus, command responsibility can be taken as a good example of how the ICTY contributed to the development of criminal law in the region.

(a) BiH Court application

The SFRY Criminal Code does not include command responsibility as a form of individual responsibility. This changed with the judiciary reform and the introduction of the BiH Criminal Court in 2003. Command responsibility was then explicitly codified in BiH's legal system.[510]

As the SFRY Criminal Code did not contain command responsibility as a form of criminal responsibility at the time of war crimes commission, the BiH Court first needed to address whether the application of command responsibility would violate the principle of legality.

The BiH Court dealt with this question in the *Prosecutor v Miloš Stupar et al.*, a case concerned with crimes committed in Srebrenica in July 1995. In order to apply command responsibility as a mode of commission without violating the legality principle, the BiH Court needed to show that at the time of the commission of the crimes the accused could have been held liable under such principle.[511]

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508 Sward, *supra* note 503, at 271

509 Sward, *supra* note 503, at 91

510 BiH Criminal Code, Article 180 (2003).

511 *Prosecutor v. Stupar et al*, Case No X-KR-05/24, Judgment of the BiH Court, 136, 138-139, 141 (29 July 2008).

The BiH Court referred to the ECtHR and its interpretation of Article 7 of the ECHR. It reiterated that (i) the accused must be subject to the law at the time of the commission of the crime, and (ii) it was reasonably foreseeable for the accused that he or she would be subject to prosecution for commission of those crimes.[512]

The BiH Court held that at the time the accused had committed the crime of genocide in July 1995, the principle of command responsibility was not only part of international customary law, but also domestic law.

It argued that a presidential order issued by the president of the then Republika Srpska, Radovan Karadžić, had the effect that international rules were directly applicable to the Army of Republika Srpska: "[the] Army of the Serb Republic of Bosnia and Herzegovina […] and the Serb Ministry of the Interior shall apply and respect the rules of international laws of war."[513] The accused *Miloš Stupar* was subject to these rules.

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]

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 international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom […]"[515]

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512 *Prosecutor v. Rašević & Todović*, Case No X-KR-06/275, Judgment of the BiH Court, 106 (28 February 2008).

513 Karadžić Order 01-53/92, Official Gazette of the Serb People in BiH No. 9, (13 June 1992) in cited in *Prosecutor v. Stupar et al*, Case No X-KR-05/24, Judgment of the BiH Court, 136, 138-139, 141 (29 July 2008).

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

515 Id.

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]

As a result, BiH Courts support that the constitutionally expressed provision regarding treaty law should also include "*general principles of law recognised by civilised nations*,"[518] because international customary law is an integral part of international law and as such was directly applicable in the Former Yugoslavia[519] and consequently also BiH.[520]

To establish that command responsibility was part of the customary international law and thus directly applicable international law, the BiH Court cited international criminal cases before the Nuremberg Military Tribunal and the ICTY. It established that command responsibility was defined in cases arising out of the Second World

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516 Id.

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).

518 Statute of the International Court of Justice, Article 38(1)(b) (1946).

519 SFRY Constitution, Article 210 (1977): "Treaties shall be applied as of the date of their entry into force, unless otherwise determined by a ratification act or by a contract signed pursuant to the powers of an authorised body. The courts shall directly apply the treaties that have been published."

520 The "Martens Clause", as part of applicable treaty law, expressly places civilians and combatants under the authority of customary international humanitarian law.

War.[521] It argued that by 1992, at the time when the war started in BiH it was already "*anchored firmly*" in customary international law.[522]

Not only was it an established international law at the time of the commission of the crime, the BiH Court also found that it was foreseeable for the accused that he or she could be prosecuted under the theory of command responsibility.[523]

Therefore, the BiH Court concluded that at the time the war crimes were committed, the principle of command responsibility was applicable under domestic law. It applied command responsibility in accordance with Article 180 (2) of the BiH Criminal Code.

While direct individual criminal responsibility is regulated in Article 180 of the BiH Criminal Code, command responsibility is defined in in Article 180 (2):

> "The fact that any of the criminal offences referred to in Article 171 through 175 and Article 177 through 179 of this Code was perpetrated by a subordinate does not relieve his superior of culpability if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

Article 180 (2) of the BiH Court almost *verbatim* mirrors Article 7 of the ICTY Statute. When an international norm is copied into national law, interpretation of such norm should consider international interpretation. This is a well-established principle of international law "[d]omestic Courts must consider the parent norms of

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521 *Trial of Wilhelm List and others* ("*Hostage Case*"), Judgment of 19 Feb 1948, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. XI cited in *Prosecutor v. Stupar et al*, Case No X-KR-05/24, Judgment of the BiH Court, 138 (29 July 2008).

522 "The principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law. The standard of control reflected in Article 87(3) of Additional Protocol I may be considered as customary in nature." in *Prosecutor v. Mucić, et. al*, Case No. IT-96-21, Appeals Chamber Judgment, 195 (20 February 2001) in *Prosecutor v. Stupar et al*, Case No X-KR-05/24, Judgment of the BiH Court, 138 (29 July 2008).

523 *Prosecutor v. Stupar et al*, Case No X-KR-05/24, Judgment of the BiH Court, 136, 138-139, 141 (29 July 2008).

international law and their interpretation by international courts."[524] However, it is not a mandatory principle, rather it depends on how national courts interpret the law.

The BiH Court in *Prosecutor v Miloš Stupar et al.*[525] followed this international principle arguing that: "[w]hen Article 7 was copied into the law of BiH, it came with its international origins and its international judicial interpretation and definition." As a result, the BiH Court relied on international interpretation including the ICTY's judicial interpretation when interpreting the norm.

The BiH Court recognised that command responsibility was already established in customary international law at the time of the commission of the criminal act, but was refined by the ICTY.[526] This is because the ICTY had "several occasions to apply the concept of command responsibility to crimes occurring in the conflicts of the former Yugoslavia between 1992 and 1995."[527]

The BiH Court emphasised, however, that it was not bound by the decision of the ICTY. The only reason the BiH Court followed the ICTY's case-law and interpretation is because "[it] is persuaded that the ICTY's characterization of command responsibility" is correct and properly reflects customary international law as it existed at the time when the war crimes were committed.[528] The BiH Court also considered it helpful to apply the factors and evidentiary standards established by the ICTY and other international courts in order to determine the burden of proof under the principle of command responsibility.[529]

Various training session and exchanges with the ICTY established the relevant capacity of the BiH Court judges and state-level prosecutors. Initially, the application of command responsibility posed a lot of problems for BiH Court judges and

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524 GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 80 (2005) in *Prosecutor v. Stupar et al*, Case No X-KR-05/24, Judgment of the BiH Court, 141 (29 July 2008).

525 *Prosecutor v. Stupar et al*, Case No X-KR-05/24, Judgment of the BiH Court, 138-139, 141 (29 July 2008).

526 Id. at 140.

527 Id.

528 Id. at 141.

529 Id. at 141.

prosecutors, leading to incomplete and contradictory reasoning.[530] For example, in 2009, the appellate division of the BiH Court found in the *Alić* case that the first 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]

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 second instance judgment found the accused guilty of co-perpetration instead.

Still, the BiH Court relied on ICTY judgments for establishing elements of command responsibility in accordance with international standards. In *Mandić*, the BiH Court reiterated the definition given at the ICTY that effective control is the power and ability to take effective steps to prevent and punish crimes which others have committed or are about to commit[533]

The BiH Court not only relied on the ICTY jurisprudence but some judges also felt comfortable to cite case law from the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda (***ICTR***).[534] The BiH Court, therefore,

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530 OSCE Delivering Justice in BiH, *supra* note 228, at 50.

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.

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.

533 *Prosecutor v. Orić*, Case No. IT-03-68, Trial Chamber Judgement, para. 311 (30 June 2006); *Prosecutor v. Mucić, et. al*, Case No. IT-96-21, Trial Chamber Judgment, para 354 (16 November 1998); *Prosecutor v. Kordić &Čerkez,* Case No. IT-95-14/2, Trial Chamber Judgement (26 February 2001) (*"Lašva Valley")* in *Prosecutor v. Momčilo Mandić*, Case No. X-KR-05/58, Second Instance Judgment of the BiH Court, 106-107 (1 September 2009) (establishing the definition of effective control).

534 *Prosecutor v. Brima*, Case No. SCSL-04-16-T, Trial Judgment of the Special Court For Sierra Leone, para 1656 (20 June 2007) in *Prosecutor v. Momčilo Mandić*, Case No. X-KR-05/58, Second Instance Judgment of the BiH Court, 109 (1 September 2009); *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-T, Trial Judgment of the Special Court For Sierra Leone, para. 248 (2 August 2007) ("CDF Case") in *Prosecutor v. Stupar et al*, Case No X-KR-05/24, Judgment of the BiH Court, 156 (29 July 2008).

applied the concept of command responsibility and used the ICTY's jurisprudence to interpret the elements of command responsibility.

(ii) Joint criminal enterprise

When several people act together to commit an international crime, each of them is "individually responsible" for the crime.[535] Although participation of an individual in a joint criminal enterprise was not explicitly mentioned as a form of criminal responsibility in the ICTY Statute, it was developed in the case law of the ICTY. The ICTY based its definition on the Second World War jurisprudence that became part of international customary law.[536] The ICTY determined that the doctrine of joint criminal enterprise was a "fully fledged legal construct of modes of criminal liability."[537]

The ICTY Appeals Chamber in the *Prosecutor v. Tadić* case first described and developed this form of commission, which is based on the assumption that an individual participated in a joint criminal enterprise.[538]

Actions perpetrated by a collective of persons advancing a common criminal design should be held liable under international criminal responsibility to reflect "the degree of responsibility of those who in some way made it possible for the perpetrators to physically carry out the criminal acts."[539] The Appeals Chamber in *Prosecutor v. Tadić*, specifically held that:

> "to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to

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535 WERLE, *supra* note 524, at 120; *See also* CASSESE, INTERNATIONAL CRIMINAL LAW 181 et seq (2003); AMBOS, DER ALLGEMEINE TEIL DES VÖLKERSTRAFRECHTS 548 et seq. (2002).

536 WERLE, *supra* note 524, at 120 et seq.

537 CASSESE, INTERNATIONAL CRIMINAL LAW 191 (2003).

538 *Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Chamber Judgment, para 194 et seq (15 July 1999).

539 *Prosecutor v. Brđanin*, Case No. IT-99-36, Appeals Chamber Judgment, para 405 (3 April 2007); *Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Chamber Judgment, para 193 (15 July 1999).

> hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility."[540]

This justified the implied form of participation.

Joint criminal enterprise is not explicitly set out in Article 7 (1), but it was deducted from the term "*perpetrated*" as a form of individual criminal responsibility.[541]

In order to prove criminal responsibility under the theory of joint criminal enterprise, it has to be shown that a crime has actually been perpetrated, "that its perpetration was achieved by those operating together in a joint criminal enterprise, and that the elements necessary to establish the Accused's liability for that perpetration have been met." [542]

The ICTY established three different categories of joint criminal enterprise:

> (i) The first category, includes cases where a group of people shares a common intention to commit crimes in furtherance of the common purpose, and where each of them carries out a significant and causal contribution to the accomplishment of the design;[543]
>
> (ii) The second category is a variation of the first category and involves typical concentration camp cases, that includes commission of crimes by several persons as part of a "system of ill-treatment" where the perpetrator actively participates in the implementation of the repressive system;[544] and
>
> (iii) The third category, the so called "extended joint criminal enterprise," is the broadest category and involves a common purpose to commit crimes but one or more members of the group commits a criminal offence in excess of the

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540 *Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Chamber Judgment, para 192 (15 July 1999).

541 WILLIAM SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE 309 (2008).

542 *Prosecutor v. Rašević & Todović*, Case No X-KR-06/275, Judgment of the BiH Court, 111 (28 February 2008).

543 WERLE, *supra* note 524, at 122 (2005); *Prosecutor v. Krnojelac*, Case No. IT-97-25, Appeals Chamber Judgement, 100 (17 September 2003).

544 *Prosecutor v. Tadić* Case No. IT-94-1, Appeals Chamber Judgment, para 202-205 (15 July 1999); *See also* WERLE, *supra* note 524, at 122.

> common plan. Under this category, the people participating in the criminal enterprise may be held liable for that crime if the commission of the crime was (i) foreseeable that such a crime might be perpetrated by one or more members of the group and (ii) the accused willingly took that risk.[545]

The *actus reus* of all three categories is the same. The prosecution needs to show that there is (i) a plurality of person; (ii) a common plan, design or purpose, which amounts to or involves; (iii) the commission of a crime; and (iv) the participation of an accused in the agreement, which does not need be previously agreed upon.[546] The involvement of the accused could also be mere assistance or contribution to the common purpose.

The three categories differ in the subjective element of the form of liability, the *mens rea*;

> (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]

While this legal concept of joint liability seems similar to co-perpetration (*Mittäterschaft*), there is a significant difference which predominantly lies in the subjective sphere.[548] The joint criminal enterprise responsibility arises under a "common plan, design or purpose" that is aimed at committing crimes against international law. There does not have to be a concrete plan to commit certain crimes

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545 *Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Chamber Judgment, para 204, 206 (15 July 1999).

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

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

548 WERLE, *supra* note 524, at 121.

before the commission of the act. The plan to commit crimes against international law can also be formed spontaneously, and the common purpose may "be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise."[549]

Critics of the joint criminal enterprise theory argue that it should be replaced by co-perpetration, as the joint criminal enterprise, particularly the third category, may be designed to just convict anyone.[550] As will be seen below, the difference between co-perpetration and joint criminal enterprise was also discussed by the BiH Court.

(a) BiH Court application

The BiH Court was also confronted with the application of joint criminal enterprise and had to decide whether it should follow the jurisprudence of the ICTY and apply it as a form of responsibility. This led to few particularly interesting questions that the BiH Court had to address before applying the doctrine: (i) the difference between co-perpetration and joint criminal enterprise and (ii) whether this form of personal responsibility could apply to the crimes committed between 1992 and 1995.

The SFRY Criminal Code and the BiH Criminal Code both have a provision under which a co-perpetrator can be held liable for an act that a direct perpetrator committed. Under the SRFY Criminal Code several individuals who jointly commit a criminal act by participating in the act of commission or in some other way shall each be punished for the criminal offence.[551]

Article 29 of the BiH Criminal Code also provides for liability of a co-perpetrator:[552]

> "If several persons who, by participating in the perpetration of a criminal offence or by taking some other act by which a decisive contribution has been made to its perpetration, have jointly perpetrated a criminal offence, shall each be punished as prescribed for the criminal offence."

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549 *Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Chamber Judgment, para 227 (15 July 1999).

550 Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 109, 115 et seq. (2007).

551 SFRY Criminal Code, Article 22 (1977).

552 BiH Criminal Code, Article 29 (2003).

The BiH Criminal Code, in contrast to the SFRY Criminal Code, requires the contribution to be "*decisive*" in order for the individual to be held liable under Article 29 of the BiH Criminal Code. This high degree of contribution is not required 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]

The BiH Criminal Code includes a more specific form of individual responsibility that should be applied where international crimes – genocide, crimes against humanity, and war crimes – have been committed.

Article 180 of the BiH Criminal Code was incorporated in order to mirror Article 7 of the ICTY Statute. According to Article 180 (1) of the BiH Criminal Code a person is personally responsible for a crime if he or she:

> „… planned, ordered, perpetrated or otherwise aided and abetted in the planning, preparation or execution of a criminal offence referred to in Article 171 (Genocide), 172 (Crimes against Humanity), 173 (War Crimes against Civilians), 174 (War Crimes against the Wounded and Sick), 175 (War Crimes against Prisoners of War), 177 (Unlawful Killing or Wounding of the Enemy), 178 (Marauding the Killed and Wounded at the Battlefield) and 179 (Violating the Laws and Practices of Warfare) of this Code…."[554] (emphasis added)

As the provision was incorporated almost verbatim from the ICTY Statute, the term "*perpetrated*" could also provide a basis to find an individual who participated in a joint criminal enterprise criminally liable for crimes committed by the members of the group.

Joint criminal enterprise doctrine was mentioned by the BiH Court for the first time in the *Mandić* case. The BiH Court acknowledged that joint criminal enterprise as a mode of individual criminal responsibility was covered by Article 180 (1) of the BiH

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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).

554 BiH Criminal Code, Article 180 (1) (2003): expressly provides that an official position of any individual, whether as Head of State or Government or as a responsible Government official person would not relieve such person of culpability nor mitigate punishment.

Criminal Code.[555] The trial chamber refrained from further elaborating the doctrine and its applicability, explaining that the indictment did not attempt to prove elements under this form of responsibility.

Joint criminal enterprise was again discussed in *Vuković & Vuković*. In this case, the trial chamber of the BiH Court bizarrely found that joint criminal enterprise was a form of co-perpetration. It came to that conclusion by referring to Article 29 of the BiH Criminal Code: "The Court finds in this particular case that the accused persons participated in the commission of the crime as co-perpetrators, whereby several persons with a common purpose participate in a criminal activity and execute it jointly."[556]

The appellate division of the BiH Court dismissed this argument in *Vuković & Vuković* stating that „the contested Verdict places joint criminal enterprise in parallel with co-perpetration, which the Appellate Panel finds unacceptable, since these two concepts are mutually exclusive and their coexistence is not possible."[557] The appellate division clarified that in order to prove co-perpetration the court needs clearly to establish (i) individual culpability for each of the accused, and (ii) to differentiate each of their acts separately. These steps are not necessary where the accused was part of a joint criminal enterprise. Following the jurisprudence of the ICTY, the appellate division of the BiH Court noted that the concept of joint criminal enterprise implies a common intent to all group members for the perpetration of the crime.[558]

A more thorough discussion on joint criminal enterprise as a mode of criminal liability under BiH law and customary international law was discussed in the *Rašević*

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555 *Prosecutor v. Momčilo Mandić*, Case No. X-KR-05/58, Judgment of the BiH Court, 162 (18 July 2007).

556 *Prosecutor v. Vuković & Vuković*, Case No X-KR-07/405, Judgment of the BiH Court, 19 (4 February 2007).

557 *Prosecutor v. Vuković & Vuković*, Case No X-KR-07/405, Second Instance Judgment of the BiH Court, 6 (2 September 2008) (emphasis added).

558 *Prosecutor v. Tadić* Case No. IT-94-1, Appeals Chamber Judgment, para 189 (15 July 1999), in *Prosecutor v. Vuković & Vuković*, Case No X-KR-07/405, Second Instance Judgment of the BiH Court, 6 (2 September 2008).

& Todović.[559] The BiH Court reiterated that domestic courts must interpret domestic law in accordance with any parent norms of international law and then rely on their interpretation by international courts.[560]

The BiH Court then argued that crimes under Chapter 17 of the BiH Criminal Code ("*Crimes Against Humanity And Values Protected By International Law*"), can be committed under the modes of commission set out in Article 180 of the BiH Criminal Code.[561] To interpret Article 180 (1) of the BiH Criminal Code, the BiH Court cites ICTY judgments and their interpretation of the "mother norm" in Article 7 (1) of the ICTY Statute.

Following the arguments established at the ICTY in *Prosecutor v. Tadić*, it held that "joint criminal enterprise [is] a mode of co-perpetration by which personal criminal liability would attach."[562] In *Rašević & Todović* the BiH Court reiterated that international judicial interpretation of the term "*perpetrated*" allowed it to derive the 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

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559 *Prosecutor v. Rašević & Todović*, Case No X-KR-06/275, Judgment of the BiH Court, 102 et seq (28 February 2008).

560 Gerhard WERLE, *supra* note 524, at 80 in *Prosecutor v. Rašević & Todović*, Case No X-KR-06/275, Judgment of the BiH Court, 102 et seq. (28 February 2008).

561 *Prosecutor v. Rašević & Todović*, Case No X-KR-06/275, Judgment of the BiH Court, 102 (28 February 2008).

562 *Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Chamber Judgment, para 185-226 (15 July 1999) in *Prosecutor v. Rašević & Todović*, Case No X-KR-06/275, Judgment of the BiH Court, 102 et seq. (28 February 2008).

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.

- That the elements of joint criminal enterprise are established in customary international law.

For joint criminal enterprise to be applicable, the BiH Court had to satisfy itself that the legality principle would allow the accused to be held criminally liable under the theory of joint criminal enterprise.

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]

In determining that joint criminal enterprise doctrine was part of international customary law, the BiH Court followed ICTY jurisprudence.[565]

In *Rašević & Todović* the BiH Court determined that joint criminal enterprise was part of customary international law at the relevant time between 1992 and 1995.[566]

Former Yugoslavia and its successor states were parties to international humanitarian law treaties which were directly applicable in the Former Yugoslavia through Article 210 of the Constitution of Former Yugoslavia.[567] Given that International customary law is an integral part of international law and as such directly applicable in the Former Yugoslavia and in BiH.[568]

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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).

565 *Prosecutor v. Tadić* Case No. IT-94-1, Appeals Chamber Judgment, para 185-226 (15 July 1999) in *Prosecutor v. Rašević & Todović*, Case No X-KR-06/275, Judgment of the BiH Court, 104 (28 February 2008).

566 *Prosecutor v. Tadić* Case No. IT-94-1, Appeals Chamber Judgment, para 195, 220 (15 July 1999); *Prosecutor v. Vasiljević*, Case No. IT- 98-32-A, Trial Chamber Judgment, para. 95, 96 (25 February 2004); *Prosecutor v. Krnojelac*, Case No. IT-95-25-A, Trial Chamber Judgment, para. 29, 30 (17 September 2003).

567 SFRY Constitution, Article 210 (1974): "Treaties shall be applied as of the date of their entry into force, unless otherwise determined by a ratification act or by a contract signed pursuant to the powers of an authorised body. The courts shall directly apply the treaties that have been published."

568 *See supra*, at III.C.1(b)(i).

The BiH Court further analysed whether it was sufficiently foreseeable for the accused that he or she would be criminally liable for his or her acts. To satisfy the foreseeability requirement, the BiH Court based its argument on Article 26 of the SFRY Criminal Code, which resembled joint commission under joint criminal enterprise. Article 26 of the SFRY Criminal Code establishes criminal responsibility under the following circumstances:

> "Anybody creating or making use of an organisation, gang, cabal, group or any other association for the purpose of committing criminal acts is criminally responsible for all criminal acts resulting from the criminal design of these associations and shall be punished as if he himself committed them, irrespective of whether and in what manner he himself directly participated in the commission of any of these acts."

According to this law, the intent to commit criminal acts can be inferred from the known goal of the group and their criminal design. The goal of the group makes it possible to determine the acts that are covered by the plan, even though they are not specified or individualised.[569]

Based on this Article 26 of the SFRY Criminal Code and the direct applicability of customary international law, the BiH Court found that when the accused began commission of the first category ("*general*") and second category ("*systematic*") of joint criminal enterprise, it had already crystallised into a theory of liability applicable to the accused. The accused also had sufficient notice that he or she could have been prosecuted for his participation in the common plan.[570]

The BiH Court did not analyse whether the third category ("*extended*") of joint criminal enterprise liability was applicable in BiH as it was not requested to do so.[571]

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569 FRANO BAČIĆ ET AL., COMMENTARY ON THE CRIMINAL CODE OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA, 143-144 (1978) in *Prosecutor v. Rašević & Todović*, Case No X-KR-06/275, Judgment of the BiH Court, 107 (28 February 2008).

570 *Prosecutor v. Brđanin*, Case No. IT-99-36, Appeals Chamber Judgment, para. 405 (3 April 2007); *Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Chamber Judgment, para 220 (15 July 1999) in *Prosecutor v. Milorad Trbić*, Case No X-KR-07/386, Judgment of the BiH Court, 77 et seq. (16 October 2009).

571 *Prosecutor v. Rašević & Todović*, Case No X-KR-06/275, Judgment of the BiH Court, 107 (28 February 2008); *Prosecutor v. Milorad Trbić*, Case No X-KR-07/386, Judgment of the BiH

As a result of this analysis, the BiH Court found that the accused was subject to the principles of customary international humanitarian law at the time the crimes were committed.[572]

In *Božić et al*., case the BiH Court also clarified "that joint criminal enterprise should be reserved only for those who conceived and executed the plan, while the common soldiers should only be held responsible for the crimes they perpetrated."[573] This significantly limited the application of the joint criminal, which was in line with the internationally voiced criticism that joint criminal enterprise might be used to convict everyone.

In sum, the BiH Court including its appellate division developed a good grasp of international criminal law. At the beginning, prosecution at the state-level had a difficult time issuing indictments based on the concept of different modes of liability, and the BiH Court had difficulties understanding the theory of command responsibility. However, training sessions with both judges and prosecutors aided to that capacity and application of international criminal law in BiH. The close cooperation between international judges and prosecutors from the ICTY contributed immensely to the domestic application of international criminal law

(c) Impact of the ICTY on the domestic adjudication of war crimes at the Entity-level in Bosnia and Herzegovina

Since the war in BiH, entity courts have not stopped prosecuting war crimes. Although they lost exclusive jurisdiction over prosecution of war crimes in 2003, the BiH Court has had the option to transfer less sensitive cases to the entity courts. Given the large amount of lower-level direct perpetrators that were awaiting war crimes

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Court, 77 et seq. (16 October 2009); *Prosecutor v. Stupar et al*, Case No X-KR-05/24, Judgment of the BiH Court, 138 (29 July 2008).

572 *Prosecutor v. Rašević & Todović*, Case No X-KR-06/275, Judgment of the BiH Court, 105 (28 February 2008); *Prosecutor v. Milorad Trbić*, Case No X-KR-07/386, Judgment of the BiH Court, 77 et seq. (16 October 2009); Alfredo Strippoli, *National Courts and Genocide: The Kravica Case at the Court of Bosnia and Herzegovina*, 7 *JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE* 577, 581 (2009).

573 OSCE Delivering Justice in BiH, *supra* note 228, at 51.

prosecution, BiH institutions also made use of the possibility to transfer war crime cases to the entity courts. Some of these entity courts are more active than others; among the most active ones are Banja Luka district court in Republika Srpska and the Sarajevo and Mostar Cantonal Courts.

However, war crimes adjudication at the entity-level not only did not follow the BiH Criminal Code in most of their cases (as shown above), many cantonal and district 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]

Although over time the quality of interpretation and application of international criminal law has significantly improved at the entity-level, there are still issues that need to be addressed. Problems arose to a large extent because either the prosecution was not describing these elements sufficiently or the entity court judges were relying on inconsistent case law within the entity.[576]

This was due to the lack of training and transfer of knowledge at the entity-level. While the state court judges and prosecutors received regular training, and have intensively collaborated with judges and prosecutors from the ICTY, the entity court prosecutors and judges did not have such intensive working relationship with both their international and state-level counterparts.[577]

Before the establishment of the BiH Court's War Crimes Chamber, capacity development throughout the region was sporadic and lacking a systematic approach. Only in 2003, did the first study visit take place with judges from the Brčko District travelling to the ICTY.[578] Furthermore, only in 2005, when the War Crimes Chamber

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

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

576 OSCE Delivering Justice in BiH, *supra* note 228, at 73.

577 OSCE Office for Democratic Institutions and Human Rights, *Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer Final Report*, 79 (2009).

578 Id.

became operative, did capacity-development increase and become systematic, unfortunately it occurred only at the state-level.[579]

A more systematic and widespread approach addressing both state- and entity-levels could have resolved many of the still existing issues. Also, a better and more intensified exchange of legal know-how between state and entity-levels could have contributed to a harmonised application of law in war crimes cases.[580] In addition, increasing the resources available at the entity-level could have provided for more skilled prosecutors' and judges and help them take on war crimes cases.

Another striking observations is that most of the indictments or judgments at entity-level fail to cite any international case law sources, such as the ICTY or other international criminal law sources. This failure to rely upon international precedents, leads to inconsistent approaches and reasoning. This was due to the fact that for a long time the ICTY's judgments and documents were not available in the local language. This also included general resources on international criminal law that were not available to the judges.[581]

All of these shortcoming were reflected in the quality of indictments, judgments and legal arguments.[582]

The disharmonised approach was exacerbated by the two systems – the state and entity-level – running in parallel. While the decisions of the BiH Court at the state-level are reviewed by the appellate chamber of the BiH Court and before the Constitutional Court of BiH, in cases where constitutional law is in question, entity-level decisions follow a different channel.

The decisions of local-entity courts are reviewed by the respective entity Supreme Courts. The Supreme Courts at both the entity- and state-level would have the power

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579 Id.

580 OSCE Delivering Justice in BiH, *supra* note 228, at 74.

581 Organization for Security and Co-operation in Europe, *War Crimes Trials Before the Domestic Courts of Bosnia And Herzegovina: Progress and Obstacles*, OSCE MISSION TO BOSNIA AND HERZEGOVINA 1, 21-22 (2005) [hereinafter: OSCE, Domestic War Crimes Trials].

582 OSCE, Domestic War Crimes Trials, *supra* note 581, at 21-22.

to unify and harmonize the application of law at the entity-level. However, they have failed to relieve this situation by delivering clear and comprehensive jurisprudence.[583]

The courts at the entity-level have in most cases applied the SFRY Criminal Code, while the BiH Court have applied the BiH Criminal Code. Although the application of the SFRY Criminal Code is not a problem *per se*, the application of different codes throughout the country is violating the constitutionally protected principle of equal treatment of citizens before the law. This contributed to a fragmented application of international criminal law standards in the BiH legal system, which became apparent on different occasions. At the outset, the entity-courts often qualified the crimes committed during the war as regular criminal acts instead of war crimes, crimes against humanity or genocide. Even today, the entity prosecutors are hesitant to charge crimes against humanity (see at **(i)**); and or prosecute crimes under the concept of command responsibility (see at **(ii)**), which poses a problem at entity-level.

(i) Qualification as war crimes and crimes against humanity

During the conflict and in the immediate aftermath, cases initiated by entity courts against soldiers were often classified as ordinary crime cases, such as murder or rape, rather than as war crimes or crimes against humanity.[584]

After the judiciary was vetted and the judicial reform implemented, the problem, albeit not very common, persisted. One of the more prominent cases where this happened even after the judiciary was reformed, was the *Radanović* case conducted before the District Court of Trebinje. Although the first instance court in Trebinje determined that the accused committed war crimes by participating in the illegal detention of civilians, the Supreme Court of the Republika Srpska acquitted him of all war crimes charges in 2007. The Supreme Court in its final judgment determined that according to the SFRY Criminal Code, the crimes committed by the accused did not amount to war crimes.[585]

One of the main reasons for this acquittal was the incorrect wording the prosecutors used in their indictment. The prosecution charged the accused with „*illegal detention*

583 OSCE, Delivering Justice in BiH, *supra* note 228, at 71.

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

585 OSCE, Moving towards a Harmonized Law, *supra* note 442, at 14.

of civilians“ basing the charges on the Common Article 3 of the Geneva Convention, war crimes against civilians. However, neither the Common Article 3 nor Article 142 of the SFRY Criminal Code (that corresponded to Common Article 3 of the Geneva Convention), contained the term „*illegal detention of civilians*.“ The correct wording for the act would have been „*taking hostages*“.[586]

It is unclear why the prosecution based their case on an offence with a wording that was not part of Article 142 of the SFRY Criminal Code or the Common Article 3 of the Geneva Convention. It is particularly unclear why the Supreme Court of Republika Srpska did not re-qualify the charges. According to the principle *iura novit* curia, contained in Article 289(2) of the Republika Srpska Code of Criminal Procedure, judges have the right to re-qualify the charges and apply the correct law. The description of the events could have easily been qualified as taking hostages. Instead, the Supreme Court of Republika Srpska held that the „illegal detention of civilians [was] not included in the list of prohibited acts under Common Article 3 and that this act cannot therefore constitute a war crimes on the basis of that provision.“[587] This was either unwillingness to prosecute the specific person with war crimes or insufficient know-how of international humanitarian law.

In 2001, the Mostar Cantonal Court in the *Čupina* case, held that the accused committed the offence he was indicted for, namely holding a knife against the neck of his victim. However, it qualified that an „isolated incident perpetrated against one

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586 SRFY Criminal Code, Article 142 (1977): "Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy's army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty." (emphasis added)

587 OSCE, Moving towards a Harmonized Law, *supra* note 442, at 14

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 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.

A similar situation occurred before the Sarajevo Cantonal Court in the *Tadić* case.[590] In 2004, the Sarajevo Cantonal Court acquitted *Duško Tadić* of war crimes against 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]

The nature of the conflict was also of relevance in the *Radanović* case. In this case the Supreme Court of Republika Srpska held that the prosecution failed to show that the conflict in BiH had an international character, which the Court considered a prerequisite for finding the accused guilty of war crimes charged under the Fourth Geneva Convention. As a consequence, it concluded that it could not find the accused guilty of war crimes committed in *Foča* in April 1992.

At the same time, the Supreme Court of the Federation of BiH found that it was not necessary for the Court to establish whether the armed conflict was international or internal. In 2006, the Supreme Court of the Federation of BiH held in the *Smajlović* case that the Court was not obliged to establish the nature of the conflict, because the existence of an international armed conflict caused by the aggression of Serbia and Montenegro in the territory of BiH was „a notorious fact."[593] This case reiterated the

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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.

590 Not to be confused with *Prosecutor v. Tadić* Case No. IT-94-1.

591 OSCE, Domestic War Crimes Trials, *supra* note 581, at 22 and 53.

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

593 OSCE, Moving towards a Harmonized Law, *supra* note 442, at 11, note 22.

Court's finding in the *Stanković* case, which was issued by the Supreme Court of the Federation of BiH in 2002.

By contrast, the issue of whether the conflict was of an international character played no role before the BiH Court. This is because all of the accused were charged with crimes against humanity under Article 172 of the BiH Criminal Code. Article 172 makes „gross and fundamental human rights violation a crime regardless of the nature of the armed conflict."[594] For example, in the *Janković* case, the BiH Court found the accused guilty of crimes against humanity for detaining civilians in Foča in April 1992. It did not go into details about the nature of the crimes.

As a result, the Supreme Court of Republika Srpska, the Supreme Court of the Federation of BiH, and the BiH Court, all reached different conclusions for crimes committed between 1992 and 1995.

In the period between 2005 and 2010, the OSCE Mission in BiH identified very few of these cases where war crimes were charged as regular crimes.[595] This shows the readiness of local prosecutors to press war crimes charges and re-qualify charges that were transferred to them. At the Banja Luka District Court, in at least two cases, the indictment was changed to include the international aspect of these crimes.[596] As observed by the OSCE, the reason for the steady increase of compliance with international criminal law adjudication may have been the result of increased transfer of know-how of international criminal law, increased training and exchange sessions, and a stronger international surveillance of war crimes adjudication.

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[594] OSCE, Moving towards a Harmonized Law, *supra* note 442, at 18.

[595] *Prosecutor v. Jarić et al*. Judgment of the Brčko District Court: three of the four accused have been sentenced to light prison terms (respectively three years and ten months, two years, and six months) for the rape of two female civilians, although the fact that the perpetrators took the victims from a detention camp and were wearing uniforms seems to strongly indicate that the rapes in question constituted a war crime; *Prosecutor v. Sretko Đurić,* Judgment of the Bihać Cantonal Court: the accused was convicted for "ordinary" murder although it was committed during the war by a member of the military who was of a different ethnicity to the victim. *Prosecutor v. Samir Grahovac & Gojko Pilić,* Judgment of the Bihać Cantonal Court in OSCE Delivering Justice in BiH, *supra* note 228, at 70, note 201.

[596] *Prosecutor v. Drago Radaković*, et al., Case No. K-50/01, Judgment of the Banja Luka District Court (17 November 2005); *Prosecutor v. Drago Vujanović*, Case No. K-99/00, Judgment of the Banja Luka District Court (9 March 2006).

In the majority of cases at the entity-level, the accused was charged under the SFRY Criminal Code. As this Criminal Code does not specifically define crimes against humanity as a criminal offence, most prosecutors refrained from filing an indictment trying to prove „crimes against humanity," but rather filed charges of war crimes. Therefore, the entity-level courts in the majority of cases considered an application of crimes against humanity as not possible under the SFRY Criminal Code.

One of the first cases at entity-level, where this was done differently was before the Tuzla Cantonal Court. The Court confirmed an indictment for crimes against humanity under the BiH Criminal Code in the case of *Trifković et al*.[597] In order to be able to charge the accused under „crimes against humanity" the prosecution decided to charge under the BiH Criminal Code. This indictment and the decision in *Trifković et al.* could become a precedent and „open the door for entity prosecutors to file indictments for crimes against humanity and for the Court of BiH to transfer less complex cases of crimes against humanity to entity courts."[598] The case is currently pending before the Supreme Court of the Federation of BiH.

In 2009, the BiH Court referred two cases to Mostar Cantonal Court (*Bukvić*) and Banja Luka District Court (*Jurinović*). Although these individuals were indicted on the bases of the BiH Criminal Code, the judges in both Courts eventually decided to re-qualify the offences and apply the SFRY Criminal Code. It was argued that the latter had more lenient sentences and was hence compatible with the legality principle.[599]

Also the Doboj District Court rejected ten indictments filed under the BiH Criminal Code because it argued that only the BiH Court was competent to apply the BiH Criminal Code.[600] It proceeded to apply the SFRY Criminal Code on the indictments.

Only on very few occasions did the qualification happen the other way around. One of the rare examples is the case *Vlahovljak et al*. When tried at the first instance court in

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597 *Prosecutor v. Trifković et al.*, Judgment of the Tuzla Cantonal Court in OSCE Delivering Justice in BiH, *supra* note 228, at 70

598 OSCE Delivering Justice in BiH, *supra* note 228, at 71.

599 OSCE Delivering Justice in BiH, *supra* note 228, at 71.

600 *See* e.g. *Miroslav Kopljar*, *Mladen Kurdija*, *Nihad Hamzić* in OSCE Delivering Justice in BiH, *supra* note 228, at 71.

Mostar Cantonal Court "the Supreme Court of the [Federation of BiH] changed the qualification of the offence from war crimes under the SFRY Criminal Code to war crimes under the BiH Criminal Code, seemingly adopting the practice of the Court of BiH." This case remained a unique exception and was not applied in other cases."[601]

The BiH Court was not inclined to transfer more cases to the cantonal courts, because the cantonal courts did not apply the BiH Criminal Code and qualified the war crimes correctly. As a unified treatment of war crimes cases remains an issue the BiH Court, only transfers the lowest level of perpetrators to the cantonal courts, keeping most of the cases for the BiH Court to resolve, which leads to a large case load that still has to be resolved.

This is only an additional prove of the fragmented application of law and the inconsistency war crimes judgements throughout BiH. The decision to apply either the BiH Criminal Code or the SFRY Criminal Code at both the entity-level and state-level would have ensured a unified judicial application of law, which is more than necessary.

(ii) Command responsibility

One of the most notable examples of a lack of harmonised approach to war crimes prosecution in BiH is the doctrine of command responsibility.

As demonstrated above, the BiH Court has accepted that command responsibility was part of customary international law and that the theory of command responsibility as applied at the ICTY reflects customary international law. Nevertheless, in the majority of cases cantonal and district courts rejected the idea that an individual can be guilty of war crimes by virtue of command responsibility.

Of particular controversy is the question of whether the concept of command responsibility is foreseen under the SFRY Criminal Code.

The SFRY Criminal Code does not contain a standard definition of command responsibility like Article 7 of the ICTY Statute. However, Article 144 of the SFRY Criminal Code criminalizes someone who „*orders*" the offence; it provides:

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601 OSCE Delivering Justice in BiH, *supra* note 228, at 71.

„Whoever, in violation of the rules of international law, orders murders, tortures or inhuman treatment of prisoners of war, including therein biological experiments, causing of great sufferings or serious injury to the bodily integrity or health, compulsive enlistment into the armed forces of an enemy power, or deprivation of the right to a fair and impartial trial, or who commits some of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.“ (emphasis added)

As very few cases at entity-level have been tried that could be based on the concept of command responsibility, there is no settled approach at this level. *Čupina* is one case where the application of Article 144 of the SFRY Criminal Code regarding command 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 committed against the prisoners. The Mostar Cantonal Court held that while the SFRY Criminal Code covers the criminal acts of ordering to commit a crime, the failure to prevent the criminal offence should also be read into law. The Court argued for invoking Article 30 of the SFRY Criminal Code, which provides that an omission to act can also constitute a crime. Based on the SFRY Criminal Code this approach would be consistent with the understanding of the international law concept of command responsibility.[603]

However, the first instance decision was overturned by the Supreme Court of the Federation of BiH. The Supreme Court held that only a positive act and not the failure to act is covered under the SFRY Criminal Code. This argument by the Supreme Court significantly narrowed the possibility of trying individuals under the theory of command responsibility before cantonal courts.[604]

In some other cases the Supreme Court of Federation of BiH held that command responsibility can be read into the SFRY Criminal Code and thus revoked the

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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.

603 Id.

604 *Prosecutor v. Mirsad Čupina*, Case No. K-455/01, Second Instance Judgment of the Supreme Court of Federation BiH, (11 September 2003); Human Rights Watch, Still Waiting, *supra* note 467.

judgments of lower courts, arguing the Mostar Cantonal Court erred in ruling that the SFRY Criminal Code does not foresee command responsibility.[605] Sarajevo and Zenica Cantonal Courts took the stance that command responsibility is a form of responsibility under the SFRY Criminal Code.[606]

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]

In conclusion, it could be observed that over the years the quality of interpretation and application of international criminal law has improved over time, also at the entity-level. However, problems remain in particular with regards to proving elements of international war crimes. This is either due to the prosecution that often does not have the capacity or know-how to clearly distinguish elements of the alleged crimes or the inconsistent case-law at the entity-level.[608] The reason for this is that "the exposure of judges and prosecutors to ICTY case law and training in [international humanitarian law] has been much higher at the state-level than for those at the entity-level."[609] This leads to a level of uncertainty and inconsistency that is much higher at the entity-level than at the state-level.[610]

This problem was addressed by increased training sessions that contributed to a better flow of information, shared practice and case law between the entity and state-level. Over the years it has been argued that a joint appellate court with appellate jurisdiction over first instance war crimes cases across BiH (state- and entity-level)

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605 *Prosecutor v. Dzidić et al*., Judgment of the Mostar Cantonal Court; *Prosecutor v. Kresić & Matić*, Judgment of the Mostar Cantonal Court in OSCE Delivering Justice in BiH, *supra* note 228, at 72.

606 *Prosecutor v. Berjan*, Judgment of the Sarajevo Cantonal Court; *Prosecutor v. Operta et al*., of the Zenica Cantonal Court in OSCE Delivering Justice in BiH, *supra* note 228, at 72.

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

608 OSCE Delivering Justice in BiH, *supra* note 228, at 73.

609 OSCE Delivering Justice in BiH, *supra* note 228, at 74.

610 OSCE Delivering Justice in BiH, *supra* note 228, at 73.

could resolve the inconsistencies. The agreement followed only recently and the implementation of such an appellate court might start by the end of the year.

2. Republic of Croatia

Croatia set all its efforts to reform its institutions and law in order to receive a case from the ICTY under the Rule 11 *bis*. In order to appease the domestic protests, the Croatian government was determined to have the indictment of the generals *Ademi* and *Norac* transferred for trial before the Croatian courts.[611] Both generals were considered national heroes in Croatia.

From the thirteen persons indicted by the ICTY and eventually transferred to the region under the Rule 11 *bis*, only one case was transferred to Croatia; the case agains two accused *Ademi* and *Norac*.

Following the conclusion of ICTY's investigations, the ICTY began transferring its case files to the region at the beginning of 2005.[612] Additional investigations were to be conducted by the local investigators and the indictments had to be completed by domestic prosecutors. These cases usually involved lower level perpetrators connected to the higher level leadership cases tried at the Tribunal.[613] In 2011, the transfer of investigative material was completed and a total of 17 case files involving 43 suspects were transferred to the prosecutor's offices in BiH, Croatia, and Serbia.[614] Out of those, two were transferred to Croatia.[615] The ICTY did not monitor or supervise the cases that were transferred to the region. However, a special team among the ICTY's Office of the Prosecutor was assigned to provide consultations and deal with requests from the region.[616]

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611 *See supra* at Section III.B.2.

612 United Nations International Criminal Tribunal for the former Yugoslavia, *Transfer of Cases* available at http://www.icty.org/en/cases/transfer-cases (last accessed on 21 June 2017).

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

614 Security Council, Biannual Report of the ICTY to the Security Council, Annex II: Report of Serge Brammertz, Prosecutor of the International Tribunal for the Former Yugoslavia, provided to the Security Council under paragraph 6 of Security Council Resolution 1534 (2004), UN Doc. S/2009/252, 38 (May 2009).

615 Security Council, Biannual Report of the ICTY to the Security Council, Annex II: Report of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council under paragraph 6 of Security Council resolution 1534 (2004), UN Doc. S/2008/326, 17 (May 2008).

616 Michaeli, *supra* note 51, at 48.

At the initiative of the Croatian Chief State Prosecutors, members of the ICTY's Office of the Prosecutor met with their Croatian counterparts. These meetings helped the domestic prosecutor and the international prosecutors to identify the area of necessary cooperation. This helped the domestic prosecutors to deal with the massive amount of evidence and documents gathered and stored at the archive of the ICTY.[617]

The ICTY not only possessed a massive amount of know-how in processing war crimes cases, but also had knowledge in managing evidence and the protection of witnesses. The outreach program developed by the ICTY, included, among other 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]

The few training seminars organised by the ICTY and the Croatian Ministry of Justice 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 compare the Croatian law to international rules applied at the ICTY and in that way prepare the Croatian justice system to take on the transferred case files and effectively continue adjudication of the remaining war crimes cases.[621]

These seminars proved indispensable to the Croatian justice system the relationship established between the national officials and their international counterparts. These relationships proved to be extremely valuable when international law questions needed to be addressed.

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617 Michaeli, *supra* note 51, at 49.

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

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

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

621 Michaeli, *supra* note 51, at 49 et seq.

Problems also arose regarding admissibility of evidence at war crimes proceedings that were gathered by international institutions which deemed not compliant with Croatian law.[622]

Over the years this has changed. Since 1999, ICTY's decisions have been translated. The ICC Law allowed Croatia to directly use evidence gathered by the ICTY under the condition that the evidence was established in accordance with the ICTY Statue and ICTY Rules of Procedure and Evidence.[623] Prosecutors were allowed to issue an indictment based on the evidence gathered by the ICTY, without the Croatian law requirement to conduct investigations and obtain approvals of an investigative judge.[624]

Despite, the above capacity development workshops and the reform of law, problems persist until today.

The vast majority of cases was conducted against Serbs accused. Many of those trials have been conducted *in absentia* based on insufficient evidence. Up until 2004, from the total amount of the completed trials, 80% of those convictions were sentenced *in absentia*.[625] In order to make up fro this inconsistencies, Croatian law on criminal procedure was amended to provide for the possibility to re-open cases that were tried *in absentia* in order to provide a fair trial to the accused or in cases where new evidence was found, to find the individual guilty for war crimes (amended Article 497 of the Act). Many NGO's active in Croatia urged the country to re-open the cases and conduct a fair trial.[626]

Croatian ethnic bias in war crimes trials is still visible. Croatian courts apply mitigating factors to Croatian perpetrators. This undermines the Croatian ability to conduct a fair trial in accordance with international standards. Croatian defendants

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622 Michaeli, *supra* note 51, at 73 et seq.

623 ICC Law, Article 28 (4) (2003); Although Article 28 is applicable to the ICC, ICC Law, Article 49 (2) makes the provision also applicable to the ICTY.

624 ICC Law, Article 28 (3) (2003).

625 Stojanović et al., Monitoring of War Crimes Trials: Annual Report for 2009, DOCUMENTA – CENTER FOR DEALING WITH THE PAST CENTRE FOR PEACE, NONVIOLENCE AND HUMAN RIGHTS, note 5 (2010).

626 Amnesty International, Behind the Wall of Silence, *supra* note 296, at 62.

receive lower sentences because they acted in "patriotic enthusiasm" or served in the Croatian Army or because the crimes committed were in the context of a war situation.[627]

Even the EU Progress Reports on Croatia were monitoring Croatian bias against Serbs: "[...] impunity for war crimes remains a problem, especially where the victims were ethnic Serbs or the alleged perpetrators were members of the Croatian security forces. The majority of crimes have not been pursued in court."[628]

(a) Impact of the ICTY on the implementation of international criminal law

The Croatian legal framework was inadequate for war crimes prosecution because it was not ready to apply internationally recognised standards.[629]

Upon Croatia's independence in 1991, the SFRY Criminal Code was in use and was adopted into Croatian law.[630] As described above, this SFRY Criminal Code does provide rules for war crimes prosecutions. In 1993, the Croatian parliament enacted the Basic Criminal Code of the Republic of Croatia (***1993 Basic Criminal Code***), which consolidated several amendments and replicated the war crimes provision from the SFRY Criminal Code.[631]

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627 Amnesty International, Behind the Wall of Silence, *supra* note 296, at 23 et seq.

628 European Commission, Commission Staff Working Paper Croatia 2011 Progress Report, COM (2011) 666 final, SEC (2011) 1200, 7 (9 November 2005).

629 Amnesty International, Behind the Wall of Silence, *supra* note 296, at 5.

630 Official Gazette of the Republic of Croatia, Nos. 53/1991, 39/1992 and 91/1992: Article 119 (Genocide); Article 120 (War crime against the civil population); Article 121 (War crime against the wounded and sick); Article 122 (War crime against prisoners of war); Article 123 (Organising a group and instigating the commission of genocide and war crimes); Article 124 (Unlawful killing or wounding of the enemy); Article 125 (Marauding); Article 126 (Making use of forbidden means of warfare); Article 127 (Violating the protection granted to bearers of flags of truce); Article 128 (Cruel treatment of the wounded, sick and prisoners of war); Article 129 (Unjustified delay of the repatriation of prisoners of war); Article 130 (Destruction of cultural and historical monuments); and Article 131 (Instigating an aggressive war).

631 Official Gazette of the Republic of Croatia, No. 39/1993.

The 1993 Basic Criminal Code was significantly revised in 1997 (***1997 Criminal Code***).[632] The 1997 Criminal Code in Chapter 13 included "Criminal offences against values protected by international law" that codified war crimes.[633] The new code, however, like the previous criminal codes, did not include the offence crimes against humanity or the command responsibility as a mode of commission. The failure to punish crimes under the doctrine of command responsibility, or prosecution of crimes against humanity poses significant threats to effective war crimes prosecution and may foster impunity.[634]

In 2004, through amendments and supplements, the 1997 Criminal Code was amended to harmonise Croatian law with the ICC Statute.[635] The new code introduced the offence of crimes against humanity[636] and the principle of command responsibility[637] into the national law.[638] The new amendments had to be presented twice to the Croatian parliament, as it did not find that all of the provisions that were taken from the ICC Statute were in line with the Croatian Constitution. After the constitutional concerns were taken care of, the law was finally implemented.

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632 Official Gazette of the Republic of Croatia, No. 110/1997; 1997 Criminal Code entered into force on 1 January 1998.

633 Provisions relevant to the prosecution of war crimes are: Article 156 (Genocide); Article 157 (War of Aggression); Article 158 (War Crimes Against the Civilian Population); Article 159 (War Crimes Against the Wounded and Sick); Article 160 (War Crime Against Prisoners of War); Article 161 (Unlawful Killing and Wounding the Enemy); Article 162 (Unlawful Taking of the Belongings of those Killed or Wounded on the Battlefield); Article 163 (Forbidden Means of Combat), Article 164 (Injury of an Intermediary); Article 165 (Brutal Treatment of the Wounded, Sick and Prisoners of War); Article 166 (Unjustified Delay of the Repatriation of Prisoners of War); and Article 167 (Destruction of Cultural Objects or of Facilities Containing Cultural Objects).

634 Amnesty International, Behind the Wall of Silence, *supra* note 296, at 5.

635 Josipović, *supra* note 63, at 157.

636 1997 Criminal Code, Article 157a (Crimes against humanity) (2004).

637 1997 Criminal Code, Article 167a (Command Responsibility) (2004).

638 Official Gazette of the Republic of Croatia, No. 111/03 and No. 105/04; Michaeli, *supra* note 51, at p.59: "The amendment was first struck down by the Constitutional Court in November 2003 as it attracted only 58 votes out of 151 in Parliament in breach of the Constitution's provision requiring the majority of votes with respect to laws affecting human rights and fundamental freedoms. Still, the above-mentioned provisions were re-introduced in July 2004."

The new provision of command responsibility followed the example of German law.[639] Article 167a provides that:

> (1) A military commander or another person acting in effect as a military commander or as a civilian in superior command or any other person who in a civil organisation has the effective power of command or supervision shall be punished for the criminal offenses referred to in Articles 156 through 167 of this Code if he knew that his subordinates had committed these criminal offenses or were about to commit them and failed to take all reasonable measures to prevent them. The application of this Article excludes the application of the provision contained in paragraph 3, Article 25 of this Code.[640]
>
> (2) The persons referred to in paragraph 1 of this Article who had to know that their subordinates were about to commit one or more criminal offenses referred to in Articles 156 through 167 of this Code and failed to exercise the necessary supervision and to take all reasonable measures to prevent the perpetration of these criminal offenses shall be punished by imprisonment for one to eight years.
>
> (3) The persons referred to in paragraph 1 of this Article who do not refer the matter to competent authorities for investigation and prosecution against the perpetrators shall be punished by imprisonment for one to five years.

Article 167a (1) of the 1997 Criminal Code limits command responsibility to the military or civilian superiors who knew that his or her subordinates committed or are about to commit war crimes. They are to be punished for the war crimes the subordinates committed. This form of command responsibility was not disputed under Croatian law as it was also considered covered by the old criminal codes.

The other two forms of command responsibility that did not exist in such form were disputed. However, the Croatian legislator opted to include them into the 1997

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639 Josipović, *supra* note 63, at 156.

640 1997 Criminal Code, Article 25 (3) (2004): "The punishment of a perpetrator who commits a criminal offense by omission can be mitigated, except in the case of a criminal offense which can be committed only by failure to act."

Criminal Code. The first form included the case where a commander did not know that his or her subordinates were about to commit a crime but should have known, and thus should be held liable for war crimes of subordinates, i.e., in such a case the commander acted negligently. This was included in Article 167a (2) of the 1997 Criminal Code and was drafted as a criminal offence and not a mode of liability, that can be punished from one to eight years. The other form of command responsibility is the responsibility to punish or report the war crimes committed. Even if the commander has undertaken all reasonable measures to prevent the crime, if the war crimes were still committed, the commander might be punished for failing to refer the matter to competent authorities. Under Article 167a (3) of the 1997 Criminal Code this has been made a criminal offence that can be punished from one to five years.[641] This provision requires neither intent nor negligence and it is a form of strict liability.

The Croatian courts have not applied the new 1997 Criminal Code (including its subsequent amendments) to cases involving war crimes committed between 1991 and 1995, because of the constitutionally prohibited retroactive application of criminal law to crimes committed before the law was enacted.[642] Instead, the courts applied the SFRY Criminal Code or the 1993 Basic Criminal Code for war crimes committed during the 1990s.

Albeit this prevailing opinion expressed by the Croatian courts, the argument can also be made that international law applied by the ICTY should also apply to domestic prosecution in Croatia. The Croatian Constitution provides for a direct application of international agreements and thus principles, such as command responsibility, joint criminal enterprise, or crimes against humanity. They were already part of the Croatian law at the time when the war crimes were committed. Article 140 (1) of the Croatian Constitution provides that:

> International agreements concluded and ratified in accordance with the Constitution and made public, and which are in force, shall be part of the

641 Elizabeta Ivičević, *Criminal Command Responsibility*, in RESPONSIBILITY FOR WAR CRIMES (CROATIAN PERSPECTIVE-SELECTED ISSUES) 121-140 (Ivo Josipović ed. 2005).

642 Josipović, *supra* note 63, at 153.

internal legal order of the Republic of Croatia and shall be above [the] law in terms of legal effects.[643]

However, unlike in BiH, legal scholars argued that although Article 140 of the Constitution provides that international agreements should be part of the legal order, the specific wording of the Constitution excludes international customary law.[644]

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, states that "this Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations." (emphasis added)

The fear was that, because the SFRY Criminal Codes and the 1993 Basic Criminal Code did not contain the offence of crimes against humanity[648] or the possibility to indict superiors under the principle of command responsibility, a lot of perpetrators would go unpunished.

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643 Official Gazette of the Republic of Croatia, No. 41/2001; International Agreements ratified and applicable in Croatia included the four Geneva Conventions of 1949, and the 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.[643]

644 Josipović, *supra* note 63, at 158.

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.

648 It should be noted that the Chapter XV of the 1993 Basic Criminal Code was entitled: "Criminal Acts against Humanity and International Law" although there was not provision entitled crimes against humanity.

Given that neither, the 1997 Criminal Code (as amended in 2004) nor the customary international law principles that were elaborated by the ICTY, were applied to the war crimes committed during the 1990s, it is difficult to determine what direct impact the ICTY had on the substantive provision of the criminal code and its content pertaining to the international prosecution of crimes committed during this war.[649] It is notable that the new legislation copied the provisions of the ICC Statute and not the ICTY Statute.

It, however, should be noted that the pressure from the international community and the EU was instrumental to the enactment of law that was in line with international humanitarian principles. Under the EU negotiations framework, one of the key aspects was the scrutiny of Croatia's entire legal system, which included the monitoring of normative and institutional frameworks. Croatia, therefore, had to implement laws that were in line with the EU *acquis* which *inter alia* included adoptions of the relevant international humanitarian law and the necessary procedural reforms to safeguard the right to a fair trial.[650]

It was the EU's and certain Members States' expressed desire that the outstanding issues regarding war crimes prosecution and the issues of impunity for war crimes be dealt with before Croatia joined the EU.[651]

(b) Impact of ICTY's jurisprudence on the domestic war crimes jurisprudence

Croatian courts, judges, and prosecutors are generally unwilling to rely on ICTY's jurisprudence or quote its judgments. Thus, determining what influence the ICTY had on the application of international criminal law is therefore particularly difficult.

The Croatian courts are obligated to substantiate precisely the provisions of the applicable international law that the accused has violated. It would have been easiest for the Croatian courts to refer to the case law of the ICTY, that already precisely

649 Michaeli, *supra* note 51, at 59 et seq

650 Negotiating Framework, *Principles governing the negotiations* (3 October 2005), available at http://www.esiweb.org/pdf/croatia_ec_negotiation_framework_2005.pdf (last accessed 19 June 2017).

651 Amnesty International, Behind the Wall of Silence, *supra* note 296, at 12.

determined what international law is applicable to the crimes. Despite that, the Croatian courts preferred not to refer to the ICTY.

Yet, the reasoning of the Croatian court's judgements sometimes reveals that the court has followed the ICTY's arguments despite explicitly referring to it. This makes it difficult to establish any direct link between the ICTY and the Croatian courts.[652] One of the main reasons is that important decisions relevant to war crimes prosecution have already been issued by the Croatian Supreme Court before the ICTY handed down its first judgement in 1999.[653]

With regards to crimes against humanity, legal scholars argued that, although crimes against humanity were not covered under the applicable criminal codes, an impunity gap can hardly emerge. The reason being that the acts that might have qualified as crimes against humanity could be covered under the Croatian definition of war crimes.[654] Croatian law in its relevant articles criminalises anyone who is "violating the rules of international law on war in times of war or armed conflict."[655] (emphasis added). These provisions, make therefore no difference whether the acts were committed during an international conflict or a non-international conflict. It therefore makes no difference whether the crimes were committed by a military commander or a civilian superior.[656] Thus, a crime that can be tried as crimes against humanity can be charaged as war crimes under Croatian law.

The following two chapters shall provide an overview of some of the most controversial issues before the domestic courts, i.e., command responsibility (see at **(i)**) and joint criminal enterprise (see at **(ii)**). The section shall provide an overview of how the courts dealt with these two concepts applied by the ICTY.

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652 Michaeli, *supra* note 51, at 61.

653 *Prosecutor v. Tadić* Case No. IT-94-1, Appeals Chamber Judgment (15 July 1999) in Case No. IKZ -381/94, Judgment of the Croatian Supreme Court (7 September 1994).

654 Josipović, *supra* note 63, at 157.

655 *See* Article 156 (Genocide); Article 157 (War of Aggression); Article 158 (War Crimes Against the Civilian Population); Article 159 (War Crimes Against the Wounded and Sick); Article 160 (War Crime Against Prisoners of War); Article 161 (Unlawful Killing and Wounding the Enemy).

656 Josipović, *supra* note 63, at 157.

(i) Command Responsibility

Croatian practitioners, like their Serbian counterparts, viewed the application of the doctrine of command responsibility as a violation of the legality principle. Although the new 1997 Criminal Code (as amended in 2004), defines command responsibility it is therefore not applied to the war crimes committed during the 1990s.[657] The criminal codes that applied at that time, i.e. the SFRY Criminal Code and the 1993 Basic Criminal Code, did not expressly include the principle of command responsibility.[658]

Thus, any application of the doctrine of command responsibility can be seen as influence of the ICTY jurisprudence or international law influence, if any, on the domestic war crimes adjudication.

In 2002, the Croatian Supreme Court recognised that command responsibility was a concept applicable at the time when the war crimes were committed.[659] The Supreme Court based this on the „general domestic theories of criminal liability for failure to act in conjunction with Articles 86 and 87 of the Additional Protocol I“[660] However, the Croatian Supreme Court only recognised the principle in those cases where the commander explicitly knew that his or her subordinates are going to commit war crimes. It did not extend the concept of command responsibility to cases where the commander should have known the misbehaviour of his or her subordinates.[661]

The issue of command responsibility played a significant role in the only case transferred from the ICTY to Croatia under the Rule 11 *bis*. The accused, *Ademi* and *Norac*, were tried before the Zagreb County Court. In the Court's decision of May 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

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657 Id. at 15.

658 Amnesty International, Behind the Wall of Silence, *supra* note 296, at 14.

659 *Prosecutor v. Milan Strunjas*, Case No. I-Kz 588/02-9, Judgment of the Croatian Supreme Court, (17 October 2002); Organization for Security and Co-operation in Europe, *Supplementary Report: War Crimes Proceedings in Croatia and Findings from Trial Monitoring*, OSCE MISSION TO CROATIA, 3-4 (2004), available at http://www.osce.org/documents/mc/2004/06/3165_en.pdf (last accessed on 20 June 2017).

660 Id.

661 Id.

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]

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 developed by the ICTY under the concept of command responsibility and thus did not analyse whether *Norac* should have known that the crimes were going to be committed. The Croatian Supreme Court also did not analyse whether he failed to punish the perpetrators for their actions.

Ademi, on the other hand was acquitted of war crimes because the Zagreb County court held that *Ademi* had no actual or operational (*de facto*) command authority over the troops in the Gospić District. *Ademi*'*s* defence submissions are particularly relevant because *Ademi* relied on the *Čelebići* judgment of the ICTY to argue that *de jure* authority was not sufficient to establish command responsibility.[664]

This is unusual because it is established practice in Croatian courts that prosecutors would cited only to domestic case law. As noted above, this practice was established already during the 1990s at a time when the ICTY's jurisprudence was not yet available in the local language and Croatia was resisting ICTY's influence.[665]

The Croatian Supreme Court confirmed both judgments and reduced the sentence of *Norac* from seven to six years.[666]

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

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].

664 Ademi/Norac Judgment, *supra* note 663, at note 522.

665 Ademi/Norac Judgment, *supra* note 663, at 60 et seq.

666 Ademi/Norac Judgment, *supra* note 663.

It should be noted here, that the Zagreb Cantonal Court and the Croatian Supreme Court found it was not *Ademi* but *Janko Bebetko* and *Davor Domazet-Lošo* who had *de facto* command during the *Međak Pocket* operations. Despite both courts confirming the *de facto* control of both individuals, the Croatian prosecutors to date have not submitted or examined a potential indictment.[667]

This case was certainly a landmark decision that allowed some aspects of the ICTY practice to make its way into the Croatian domestic system. It opened the door to international influence. This influence was facilitated by the structure of the case. The indictment and case files were transferred to Croatia; the structure of the indictment was originally drafted by the ICTY's Office of the Prosecutor and the Croatian prosecution was obligated to follow it. Thus, it was natural that both offices would work closely together issuing an indictment in Croatia.

Before the case was transferred to Croatia the ICTY's Office of the Prosecutor had to ensure *inter alia* that the accused will be tried for war crimes based on the doctrine of command responsibility. This was particularly important as both of the accused (*Ademi* and *Norac*) were commanders of troops and not direct perpetrators.

Before the Referral Bench of the ICTY, Croatia tirelessly advocated that Croatia and the Chief State Prosecutors embraced the doctrine of command responsibility, due to a "series of seminars prepared by the ICTY for [the] Croatian judiciary."[668] Croatia argued that the principle of command responsibility under the applicable criminal codes was based on Article 28 (2) of the 1993 Criminal Code (same provision also under the SFRY Criminal Code). This provision based the responsibility of the commanders on their omission to act in accordance with their duties that they had

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667 Amnesty International, Behind the Wall of Silence, *supra* note 296, at 29.

668 Michaeli, *supra* note 51, at 49-50: "With respect to assistance in training of judges, prosecutors and defense 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. The aim of the entire seminar was to compare the rules found in the Croatian legal system with the rules that apply at the ICTY, so as to better identify all the relevant issues for conducting war crimes trials in Croatia. The seminar was organised by the Croatian Ministry of Justice."

undertaken as commanders of a unit. Thus, by failing to prevent war crimes from happening, they are by omission not fulfilling their duties as commanders.[669]

Article 28 of the 1993 Criminal Code provides:

> 1) Criminal act may be committed by commission or omission;
>
> 2) A criminal act may be committed by omission only when the perpetrator has failed to perform the act which he was obligated to perform."

Thus, Article 28 of the 1993 Criminal Code, according to Croatian courts, provides a legal basis of an application of command responsibility for the crime committed during the war in Former Yugoslavia:[670]

> "A position was reached through discussion at the seminars […] command responsibility […] can […] be substituted for the most part by the application of Article 28 of the criminal code from 1993, which regulates the perpetration of a criminal offence by omission. Following this, it is the opinion of the public prosecution service that the provision mentioned of Article 28 of this criminal court with the application of the Geneva Conventions and additional Protocols could for the most part substitute the institution of command responsibility in the manner contained in Article 7(3) of The Hague Tribunal Statute."

The strong desire of Croatia to have the cases of Ademi and Norac referred to it and its commitment to follow the doctrine of command responsibility paved the way for the ICTY's jurisprudence into the Croatian case-law.

The doctrine of command responsibility, as applied by Croatian courts, was narrower than the doctrine established before the ICTY. Article 28 (2) of the 1993 Basic Criminal Code, can serve as a basis for prosecution of war crimes under command responsibility in cases where a commander or superior knew that the direct perpetrators were about to commit a crime but did not take any necessary and reasonable steps to prevent such crimes: "in failing to take action to prevent a crime

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669 Michaeli, *supra* note 51, at 22.

670 *Prosecutor v. Ademi & Norac*, Case No. (IT-04-78), Pleading by Mr. Horvatic in the Transcripts of the Referral Hearing Pursuant to Rule 11bis (17 February 2005).

he knew was about to be committed, the commander obviously agreed to the prohibited consequence."[671] However, Article 28 (2) of the 1993 Basic Criminal Code cannot be applied to those cases where the commander had reason to know, but actually did not know that his subordinates were about to commit crimes (negligence). It also cannot be applied to cases where the commander had no causal link to the crime, but he or she failed to live up to his responsibility to punish the crimes committed by the subordinates.[672]

Experts argue that the cases of *Ademi* and *Norac* "legitimised the use of the command responsibility doctrine by the Prosecutor's office and paved the way for similar proceedings to take place."[673] Indeed, following the cases of *Ademi* and *Norac* several indictments were filed based on the doctrine of command responsibility.

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]

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 with the two Croatian commanders. The Croatian Court considered "mitigating circumstances" such as the commission in a war situation, or their present family situation and the fact that they "[were] obviously led by patriotic enthusiasm" at the

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671 Josipović, *supra* note 63, at 165.

672 Id. at 165-166; Michaeli, *supra* note 51, at 63.

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

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.

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

time when the crimes were committed.[676] The Croatian Supreme Court annulled the judgement and there was a retrial in 2010.[677]

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]

The examples mentioned above and many other suggest that the close connection between the Croatian authorities and the ICTY contributed to the application of the command responsibility under Croatian law and was thus directly influenced by the ICTY.[679] Application of command responsibility is the area where a direct influence of the jurisprudence of the ICTY can be detected.[680]

(ii) Joint Criminal Enterprise

Croatia has refused to incorporate joint criminal enterprise, the form of commission developed by the ICTY, into the Croatian criminal codes. Thus, the 1997 Criminal Code (as amended in 2004) does not contain the concept of joint criminal enterprise.

The Croatian Courts have refused to apply the concept of joint criminal enterprise, as it was not part of the Croatian law at the time the war crimes were committed.

Also, the cases before the Croatian courts did not require the application of joint criminal enterprise. The majority of defendants were direct perpetrators and a very small part of the defendants before the Croatian courts had served a mid-level rank during the war in the 1990s. Therefore, most of the defendants were accused of direct

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676 Amnesty International, Behind the Wall of Silence, *supra* note 296, at 23.

677 *Prosecutor vs. Kufner et al.,* Case No. I Kz 585/09-11, Decision of the Croatian Supreme Court.

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

679 Michaeli, *supra* note 51, at 63.

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

perpetration or co-perpetration, or in only a few cases they were indicted based on command responsibility.

Joint Criminal Enterprise played no role in the adjudication of the Croatian war crimes cases, *first* because it was not recognised as part of domestic law and *second* in all of the cases where the defendant had not directly committed the crime, he did provide a substantial enough contribution to qualify as a co-perpetrator.

Croatian courts – like in Serbia, relied on the civil law concept of co-perpetration. Co-perpetration was part of the SFRY Criminal Code and the 1993 Basic Criminal Code.

Under the heading Complicity, Article 22 of the SFRY Criminal Code provides that "[i]f several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act." (emphasis added).

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 local courts have followed this interpretation of the Croatian Supreme Court that was in line with the interpretation of the court in Former Yugoslavia.[682]

Although Croatia did not incorporate the concept of joint criminal enterprise into its domestic law, a provision that is similar to "complicity" was incorporated into the Croatian domestic law under the heading of "The Principal and Accomplices" in Article 35 of the 1997 Criminal Code (as amended in 2004), that reads:

> (2) Co-principals of a criminal offence are two or more persons who, on the basis of a joint decision, commit a criminal offense in such a way that each of them participates in the perpetration or, in some other way, substantially contributes to the perpetration of a criminal offense.

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

682 Case No. K-15/95, Judgment of the Split County Court (26 May 1997); Case No. Kz-791/02-6, Judgment of the Split County Court (6 May 2003) in Michaeli, *supra* note 51, at 61.

Under Croatian law anyone who does not contribute to the commission of the crime in an "substantial" way, but has some sort of contribution, may be either and instigator or and aider or abettor.

In order to distinguish the instigator and aider or abettor from a co-perpetrator the Croatian legislator has decided that the first ones are those who do not have control over the perpetration of a criminal offence and contribute to the perpetration by instigation or by aiding and abetting.[683] Following the *argumentum a contrario*, this means that the co-perpetrator has control over the commission and can stop it at any time.

This provision is similar to the first two modes of joint criminal enterprise, where two or more reach an agreement over a common goal ("joint decision") and in full awareness that he or she is acting with others to jointly participate in committing the crime.

683 1997 Criminal Code, Article 35(3) (2004).

3. Republic of Serbia

The sole existence of the ICTY made war crimes adjudication a reality in Serbia and was the main reason why domestic war crimes prosecution was possible at all:

> "Domestic war crimes proceedings were initiated either as a response to the distrusted ICTY or as a result of external players, primarily the EU, which were inspired by the ICTY's work to exert pressure on Serbia to develop similar domestic processes. In this sense, domestic war crimes proceedings can be viewed as a reaction to ICTY proceedings."[684]

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 total, 17 case files involving 45 individuals were transferred to the local authorities in BiH, Croatia, and Serbia.[686] It was expected that domestic institutions would complete the investigations and issue an indictment.

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] 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

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684 Michaeli, *supra* note 349, at 62.

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

686 Michaeli, *supra* note 349, at 55.

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).

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).

quickly resulted in indictments that ended up being the biggest cases before the Serbian courts.[689]

In addition to the cases and case files transferred to Serbian domestic judicial institutions, the ICTY also opened its archive to national prosecutors who had access to evidence collected by the ICTY and the ICTY's Office of the Prosecutor opened up liaison offices in the region to support national investigations.[690]

Many of the cases initiated before domestic institutions were cases linked to prosecutions before the ICTY. The Ovčara case was built on the case that concerned the same events as in *Mrksić* and *Šljivančanin*;[691] The trials Scorpions I[692] and Scorpions II[693] were initiated following the videotape that was shown during the Milošević trial before the ICTY and are linked to the cases against *Stanišić & 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

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689 OSCE, War Crimes in Serbia, *supra* note 388, at 32.

690 OSCE, War Crimes in Serbia, *supra* note 388, at 32-33.

691 *Prosecutor v. Mrkšić et al*., Case No. IT-95-13/1 ("Vukovar Hospital").

692 *Prosecutor v. Medić et al.,* Case No. Kž1 r.z. 2/07, Second Judgment of the Appellate Court in Belgrade (after retrial) (23 November 2009) ("Scorpions I": Indictment was filed on 7 October 2005).

693 *Prosecutor v. Pašić,* Case No. Kž1 r.z. 2/08, Judgment of the Appellate Court in Belgrade (19 February 2009) ("Scorpions II": Indictment was filed on 7 November 2007).

694 *Prosecutor v. Stanišić & Simatović*, Case No. IT-03-69, Trial Chamber Judgment (30 May 2013) (now under the jurisdiction of the United Nations Mechanism for International Criminal Tribunals new Case No. MICT-15-96).

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).

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]

Following the Completion Strategy and the transfer of cases, the ICTY implemented the outreach program that aimed *inter alia* at familiarising the domestic professionals with the international criminal law and the handling of war crimes cases.[703]

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 personal relationships between international and domestic professionals working at the same level. This created exchange opportunities and proved incredibly successful. Although most of the Serbian judges' know-how stems from their day-to-day work and training provided by the Serbian national academy of judges (which has also collaborated with the ICTY), value created through personal relationships between international and domestic judges resulted in the acceptance of the ICTY case law on the level of the judiciary. They began implementing arguments developed by the ICTY into their work. This was mostly true for the Appellate Court, who albeit rarely cited ICTY case law, and the arguments often followed the ICTY case law in the later stages of its existence.[705]

Also, the prosecutors profited from the personal interactions with their international counterparts and the trainings provided for the use of the ICTY archives. Evidence obtained by the ICTY was used in most local trials in Serbia and interactions between the War Crimes Prosecutor's Office and the international prosecutors occurred regularly.[706] Due to the implementation of Article 14(a) of the War Crimes Law, the War Crimes Prosecutor's Office was allowed to use this evidence. It was provided that the evidence "collected […] by the [ICTY] may, upon referral, be used as evidence in

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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.

703 Michaeli, *supra* note 349, at 56.

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

705 Michaeli, *supra* note 349, at 89.

706 Michaeli, *supra* note 349, at 56

the criminal proceedings before the domestic court, provided that they have been collected or adduced in the manner provided for by the Statues and Rules of Procedure and Evidence of the [ICTY]."[707]

(a) Impact of the ICTY on the implementation of international criminal law

The following section will analyse what impact the ICTY had on the implementation of the international criminal law.

Serbian national law that was applicable during the wars in the 1990s – like in BiH and Croatia – was the SFRY Criminal Code. As mentioned above, the SFRY Criminal Code had some laws relevant to war crimes adjudication, but it had significant shortcomings. It did not include the definition on crimes against humanity or did not provide for the possibility to hold someone accountable under the doctrine of command responsibility.

In 1992, Serbia adopted the Basic Criminal Code of the Republic of Serbia (***1992 Basic Criminal Code***) that relied on the provisions of the SFRY Criminal Code. In Chapter XVI, it included the "Criminal offences against values protected by international law."[708]

In addition, the then applicable SFRY Constitution provided for direct application of ratified international treaties.[709] These included the four Geneva Conventions of 1949, and the Additional Protocols, the 1948 Convention on the Prevention and Punishment

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707 War Crimes Law, Article 14(a).

708 Provisions relevant to the prosecution of war crimes are: Article 141 (Genocide); Article 142 (War crimes against the civilian population); Article 143 (War Crimes Against the wounded and sick); Article 144 (War Crime Against Prisoners of War); Article 145 (Organising a group and instigating the commission of genocide and war crimes); Article 146 (Unlawful killing or wounding of the enemy); Article 147 (Marauding); Article 148 (Making use of forbidden means of warfare); Article 149 (Violating the protection granted to bearers of flags of truce); Article 150 (Cruel treatment of the wounded, sick and prisoners of war); Article 151 (Destruction of cultural and historical monuments); Article 153 (Misuse of international emblems); and Article 152 (Instigating an aggressive war).

709 SFRY Constitution, Article 210 (1974).

of the Crime of Genocide, and the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[710]

In 2005, the 1992 Basic Criminal Code was reformed to address *inter alia* the shortcomings in international humanitarian law (***2005 Criminal Code***). The new law incorporated the provisions from the ICC Statute. They included a broader range of war crimes related offences[711] as well as the provision of command responsibility.[712]

Under the heading "Failure to Prevent Crimes against Humanity and other Values 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:

> (1) A military commander or person who in practice is discharging such function, knowing that forces under his command or control are preparing or have commenced committing offences specified in Article 370 through 374, Article 376. Articles 378 through 381 and Article 383 hereof fails to undertake measures that he could have taken or was obligated to prevent commission of such crimes, and this results in the actual commission of that crime, shall be punished by the penalty prescribed for such offence.
>
> (2) Any other superior who knowing that forces under his command or control are preparing or have commenced committing of offences specified in Article 370 through 374, Article 376, Articles 378 through 381 and Article 383 hereof fails to undertake measures that he could have taken or was obligated to take to prevent commission of such crimes, and this results in the actual commission of that crime, shall be punished by the penalty prescribed for such offence.

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

711 Official Gazette of Serbia, Nos. 85/2005, 88/2005, 107/2005, amended on 29 December 2009 and 24 December 2012: The law included among others also an adaption of the definition of Genocide (Article 370); Crimes against Humanity (Article 371); War Crimes against the Civilian Population (Art 372); and Failure to Prevent Crimes against Humanity and other Values Protected under International Law (Article 384).

712 2005 Criminal Code, Article 384 (2005) (emphasis added).

> (3) If the offence specified in paragraphs 1 and 2 of this Article is committed from negligence, the offender shall be punished by imprisonment of six months to five years.

Interestingly, Article 384 is not a mode of responsibility but a criminal offence in and of itself. In addition, a commander who also failed to refer his or her subordinates for prosecution for the crimes they committed, should be criminally liable. This was codified in a separate provision Article 332 of the 2005 Criminal Code.[713]

The Serbian legislator opted to also criminalise negligent "command responsibility" under Article 384 of the 2005 Criminal Code. It remains to be seen whether the negligent commission of this offence will cover the cases where a commander did not know but should have known or only the commander who knew but negligently failed to undertake the necessary measures to prevent the crimes. But the new 2005 Criminal Code will be applicable in the future and is not applicable to the war crimes in the 1990s.

Serbia, like Croatia, incorporated the ICC Statute and not the ICTY Statute into its current criminal codes. The rationale behind this was that there was simply no reason to do so. Due to the legality principle, the crimes committed during the war in the 1990s were to be tried under the old criminal codes – the SFRY Criminal Code or the 1992 Basic Criminal Code.

This is further supported by the prohibition of the retroactive application of criminal law stipulated in Article 1 of the 2005 Criminal Code which states:

> "No one may be punished or other criminal sanction imposed for an offence that did not constitute a criminal offence at the time it was committed, nor may punishment or other criminal sanction be imposed that was not applicable at the time the criminal offence was committed."

Therefore, the new 2005 Criminal Code was to be applied to crimes committed after the new code was issued.

In addition to the substantive law, Serbia also implemented several laws that directly impacted its cooperation with the ICTY, which was already described in Section

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713 2005 Criminal Code, Article 332 (2005).

III.B.3(a). In 2003, the Law on Cooperation was enacted to ensure legal assistance to ICTY. The new Law on Cooperation enabled the ICTY to conduct investigations (including the collection of testimonies, physical evidence, and documents)[714] and established the National Council for Cooperation with the ICTY.

Additional reforms in 2004, provided for better cooperation with Serbian courts and the ICTY.[715] The Law on War Crimes was amended in 2004 and allowed evidence that was gathered by the ICTY in accordance with its Statute of and its Rules of Procedure and Evidence in domestic war crimes proceedings to be used in domestic proceedings.[716]

As evident from above, the ICTY and its case law did not have an immense influence on the development of Serbian law. In particular, since the newly implemented substantive legislation follows the ICC Statute, it was largely a result of the prospect to bring the Serbian legislation closer to the EU standards. Despite some effort of individuals, which was described in Section III.B.3, ICTY's influence was limited.

(b) Impact of ICTY's jurisprudence on the domestic war crimes jurisprudence

Once the war crimes institutions were set in place and reforms were under way, the domestic war crimes prosecution gradually improved. Serbian courts – like Croatian courts – have generally not referenced ICTY jurisprudence, or at least in limited instances. The reasoning of the Serbian court judgements in particular of those in

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714 Law on Cooperation, Article 9 (2003).

715 Law on War Crimes, Article 2 (2003): "This law shall apply to the detection, prosecution and trying of (1) criminal offences referred to in Articles 370 through 384 and Articles 385 and 386 of the Criminal Code; (2) serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991 specified in the Statute of the International Criminal Tribunal for the Former Yugoslavia; (3) the criminal offence of aiding and abetting an offender after the commission of a criminal offence referred to Article 333 of the Criminal Code, if committed in connection with criminal offences referred in sub –paragraphs 1) and 2) of this Article."

716 Law on War Crimes, Article 14a (2003): "The evidence collected or adduced by the International Criminal Tribunal for the Former Yugoslavia may, upon referral, be used as evidence in the criminal proceedings before the domestic court, provided that they have been collected or adduced in the manner provided for by the Statues and Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia. The existence or non-existence of the facts being proved by such evidence shall be considered by the court in accordance with the provisions of the Criminal Procedure Code."

more recent years reveals that although the ICTY case law may not be specifically referenced to, the reasoning seems to be informed by the ICTY jurisprudence.

In the *Suva Reka* case (regarding the atrocities committed in Kosovo),[717] for example, the Appellate Court confirmed the reasoning of the first instance court arguing that the accused cannot be held responsible for a regular crime under the criminal code, because there was sufficient nexus of the crime and the armed conflict. The Appellate Court did not take personal motives, such as revenge, into account because the accused was aware of the armed conflict and used the situation of the armed conflict to commit the crime.[718] The accused were found guilty under Article 142 (war crimes against the civilian population) of the SFRY Criminal Code.

The arguments from the Appellate Court followed the reasoning established in the ICTY's *Kunarac* Appeals decision.[719]

In a few other instances the link to the ICTY jurisprudence is even stronger. In the *Ovčara* I case (regarding the atrocities committed in Vukovar) the defendants were charged with Article 144, war crimes against prisoners of war, for executing 200 imprisoned soldiers.[720] The *Ovčara* case is significant because it was filed in December 2003 and was the first indictment issued shortly after the establishment of the specialised war crimes prosecution office. Even to date, this is one of the largest war crimes cases prosecuted in Serbia.[721]

The Appellate Court rejected the defence's argument that the soldiers should not be considered prisoners of war as at that time there was no international armed conflict.

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717 *Prosecutor v. Mitrović et al.,* Case No. Kž1 Po2 4/10, Second Judgment of the Appellate Court in Belgrade (after retrial) (6 June 2011).

718 *Prosecutor v. Mitrović et al.,* Case No. Kž1 Po2 4/10, Second Judgment of the Appellate Court in Belgrade (after retrial), Section 2.2.2 (6 June 2011).

719 *Prosecutor v. Kunarac*, Case No. IT-96-23, Appeals Chamber Judgment, paras 58 et seq. (12 June 2002).

720 *Prosecutor v. Vujović et al.*, Case No. Kž1 Po2 1/10, Judgment of the Appellate Court in Belgrade (23 June 2010).

721 *Prosecutor v. Vujović et al.*, Case No. Kž1 Po2 1/10, Judgment of the Appellate Court in Belgrade, para 22 (23 June 2010).

The Appellate Court followed the reasoning of the ICTY in the *Mrkšić*[722] case, albeit not citing it, arguing that the Third Geneva Convention[723] applied to the executed prisoners because on many occasions they were treated like prisoners of war.[724]

In the same decision the Appellate Court cited the *Blaškić* Appeals Judgment, to argue that although some civilians may have been present among the prisoners executed, that does not prevent the qualification of the crimes as war crimes against prisoners of war.[725] The Appellate Court also followed the ICTY's Appellate decision in *Kupreškić*[726] that it is for the Trial Chamber to determine whether a witness is credible and to decide which witness is more reliable. According to the Appellate Court, the court of first instance is under no obligation to explain every reason why it believed a certain witness.[727]

In the Lekaj case, the War Crimes Chamber also relied on the ICTY[728] to define that the armed conflict existed in certain parts of Kosovo. While it was not necessary to find that there was fighting in the specific area, the Court held that as long as there was fighting between the Army of the Federal Republic of Yugoslavia and the Kosovo Liberation Army somewhere in Kosovo, and "armed conflict" persisted.[729]

The War Crimes Chamber in Belgrade refrained from creating a distinction between international and non-international conflict. The reason for this was that the War

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722 *Prosecutor v. Mrkšić et. al.,* Case No. IT-95-13, Appeals Chamber Judgment, para 69 (5 May 2009).

723 Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135 (12 August 1949).

724 *Prosecutor v. Vujović et al.*, Case No. Kž1 Po2 1/10, Judgment of the Appellate Court in Belgrade, paras 74 et seq. (23 June 2010).

725 *Prosecutor v. Vujović et al.*, Case No. Kž1 Po2 1/10, Judgment of the Appellate Court in Belgrade, paras 113-114. (23 June 2010).

726 *Prosecutor v. Kupreškić*, Case No. IT-95-16, Appeals Chamber Judgment, para. 32 (23 October 2001).

727 *Prosecutor v. Vujović et al.*, Case No. Kž1 Po2 1/10, Judgment of the Appellate Court in Belgrade, paras 68 (23 June 2010).

728 *See Prosecutor v. Tadić,* Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para 70 (2 October 2005).

729 *Prosecutor v. Anton Lekaj,* Case No. Kž1 r.z. 3/06, Judgment of the Appellate Court in Belgrade (6 April 2007).

Crimes Chamber did not want to provoke political resistance in Serbia, on the one hand, and on the other hand, had war crimes been committed under the SFRY Criminal Code or the 1992 Basic Criminal Code this distinction was legally irrelevant.[730]

Yet, these direct references are very scarce, thus the extent of the influence of ICTY's jurisprudence on the war crimes adjudication in Serbia is difficult to establish. However, given that the reasoning of some judgements of the War Crimes Department or the Appellate Court follow the ICTY indicates that the judges have been looking at the relevant ICTY cases while drafting their judgments.

(i) Command Responsibility

The application of the doctrine of command responsibility provides an interesting case to test the impact of ICTY. Serbia's legal practitioners viewed the application of the doctrine of command responsibility as a violation of the legality principle. This doctrine of criminal responsibility was not part of the SFRY Criminal Code or the 1992 Basic Criminal Code.

Still, the War Crimes Prosecutor's Office had been under pressure from international and domestic players to indict the higher level accused based on the doctrine of command responsibility.[731]

In contrast to Croatia, Serbia has been resilient towards cooperation with the ICTY or implementation of its norm. Even in the *amicus curie* submission before the ICTY's Referral Bench during the *Kovačević's* and *Mrkšić's* referral proceedings, Serbia did not attempt to argue that command responsibility was part of the applicable domestic law.

Although, the Constitution of the Former Yugoslavia provided for a direct application of international treaty law which was also adopted in the 1992 Constitution of FRY, Serbia – contrary to BiH – rejected the notion that international customary provisions on command responsibility should be directly applicable.[732]

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730 Michaeli, *supra* note 349, at 76.

731 Michaeli, *supra* note 349, at 76.

732 OSCE, War Crimes in Serbia, *supra* note 388, at 62.

Similar to the arguments in Croatia, Serbian legal scholars, viewed the doctrine of command responsibility as partially covered under Article 30 of the SFRY Criminal Code. Article 30 of the SFRY Criminal Code criminalises omission, in cases where the individual has an obligation to act and failed to live up to that obligation.

Article 30 of the SFRY Criminal Code provides that:

> (1) A criminal act may be committed by a positive act or by an omission.
>
> (2) A criminal act is committed by omission if the offender abstained from performing an act which he was obligated to perform.

In connection with the war crimes offences established under the SFRY Criminal Code, this provision may allow to charge superiors for criminal offences committed by his or her subordinates for failure to prevent them. However, Article 30 of the SFRY Criminal Code is narrower than the doctrine of command responsibility established before the ICTY.

Article 30 of the SFRY Criminal Code could only be invoked in situations where the commander had actual knowledge of the crimes committed by his or her subordinates. It did not work in cases where the commander had no knowledge of the crimes committed (but should have known) or where the commander failed to punish the direct perpetrators after learning of the crimes. Thus, Serbian courts would only accept the responsibility of a superior if the mental element, the knowledge of the commander is proven.[733]

The first cases involving the charge of higher level perpetrators under the theory of command responsibility were issued in 2010.

The Appellate Court addressed command responsibility for the first time in the *Suva Reka* case in June 2010.[734] When the Court was discussing that the "*order"* to kill the civilians as a form of commission of the crimes charged under Article 142 of the SFRY Criminal Code had to be issued in a clear and unambiguous manner, the Appellate Court also addressed the doctrine of command responsibility. Although

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733 Michaeli, *supra* note 349, at 77.

734 *Prosecutor v. Mitrović et al.,* Case No. Kž1 Po2 4/10, Second Judgment of the Appellate Court in Belgrade (after retrial) (6 June 2011).

command responsibility was not part of the indictment, the Appellate Court perceived it as necessary to clarify that the notion of a clear and unambiguous order was not necessary to establish individual responsibility under the doctrine of command responsibility, under which the "[…] the commander can be held liable for failing to prevent or punish the perpetrators."[735]

Yet, the Appellate Court confirmed the first instance judgment and acquitted the police officer in charge of the special police unit *Mitrović* and his deputy *Jovanović* because the Court did not find that they ordered the killings and thus were not liable for war crimes[736] The six other indictees were convicted for war crimes because they acted as co-perpetrators or direct perpetrators. The domestic outcome in this case is controversial in particular because the ICTY found *Mitrović's* commander *Lukić* guilty for war crimes for *inter alia* the same crimes in *Suva Reka* and sentenced him to 22 years of imprisonment.[737]

The indictment is also peculiar in particular because the War Crimes Prosecutor's Office refrained from invoking command responsibility and instead tried to prove that the accused was liable for directly ordering the crimes. This reluctance of the prosecutors to charge and convict mid-level perpetrators based on principles under international criminal law led to impunity not only in Serbia but also in the neighbouring countries in the instances the court proved hesitant to charge mid-level perpetrators under the command responsibility doctrine

Despite the outcome of the case, the Appellate Court's mentioning of the command responsibility was taken as an indication that the principle of command responsibility was applicable in Serbia. In November of the same year, the Belgrade War Crimes Chamber issued a judgment in the *Zvornik II*, against *Popović* for crimes committed under his command in the BiH's municipality Zvornik. *Popović* was convicted

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735 *Prosecutor v. Mitrović et al.,* Case No. Kž1 Po2 4/10, Second Judgment of the Appellate Court in Belgrade (after retrial), para. 2.4.1 (6 June 2011) (Convenience translation).

736 *Prosecutor v. Mitrović et al.,* Case No. Kž1 Po2 4/10, Second Judgment of the Appellate Court in Belgrade (after retrial), para. 2.4.1 et seq. and 2.5.1. et seq (6 June 2011) (Convenience translation).

737 *Prosecutor v. Milan Milutinović* et al., Case No. IT-05-87-A, Trial Chamber Judgement (After acquittal of Milutinović the case was renamed *Prosecutor v. Sainović et al*.).

because he failed to prevent his subordinates from abusing prisoners.[738] The War Crimes Chamber held that by ordering the detention of the victims, *Popović* assumed a guarantee for their protection. He was held responsible for the beating and executions of the civilians who were detained in his camp. The Court argued:[739]

> "In theory and jurisprudence of international criminal law this duty exists based upon legal act or previous act of a guarantor which created a dangerous state, specifically detention of civilians which imposes an obligation for their protection and establishes responsibility of [a] general nature, which is not even limited to the control of units under his direct command. […] In this case, the defendant committed crimes by omission by consciously abstaining to issue the order and take actions to protect the lives and bodily integrity of prisoners in the facilities where they were held captive and to the guards that were guarding them, murders and violating bodily integrity occurred due to omission and he consented to those consequences."

Popović's responsibility derives from the guarantee he has undertaken towards the prisoners. Although the indictment did not specifically refer to this as command responsibility, the prosecution presented all elements of this form of liability and the War Crimes Chamber at the Belgrade High Court based its findings on responsibility on these criteria. The Appellate Court confirmed the judgment of the War Crimes Chamber at the Belgrade High Court.

Although not many Serbian judgments followed that example, the case provided for the possibility to convict superiors for the acts of their subordinates. This judgments illustrated above provide a first opening of the Serbian courts towards acknowledging the doctrine of command responsibility.[740]

Still, contrary to BiH or Croatia, Serbia has not clearly shown the willingness to try individuals under the doctrine of command responsibility.

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738 Michaeli, *supra* note 349, at 77-78.

739 OSCE, War Crimes in Serbia, *supra* note 388, at note 169.

740 OSCE, War Crimes in Serbia, *supra* note 388, at 64.

(ii) Joint Criminal Enterprise

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

Also, there were no trials before the domestic Serbian Courts that had to deal with joint criminal enterprise in the form as developed under the ICTY. The Serbian Court rather relied on the civil law concept of co-perpetration that was already part of the SFRY Criminal Code and the 1992 Criminal Code. Under the heading of Complicity, Article 22 provides that "[i]f several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act." (emphasis added).

A similar provision was incorporated into the Serbian domestic law under the heading Co-perpetration in Article 33 of the 2005 Criminal Code:

> „If several persons jointly take part in committing a criminal offence, or jointly commit an offence out of negligence, or by carrying out a jointly made decision, by other premeditated act significantly contribute to committing a criminal offence, each shall be punished as prescribed by law for such offence.

This provision is similar to the first two modes of joint criminal enterprise, where two or more reach an agreement over a common goal ("joint decision") and in full awareness that he or she is acting jointly with other participates to commit the crime.

Under joint criminal enterprise, there seems to be no formal requirement that the level of contribution reaches a certain level.[742] Although in practice, the ICTY did require a certain degree of contribution in order to establish that the accused shared the intent to pursue the common purpose.[743] The 2005 Criminal Code, when implementing the new

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

742 *See* e.g. *Prosecutor v. Kvočka*, Case No. IT-98-30, Appeals Chamber Judgment, para 97 (28 February 2005): "The Appeals Chamber notes that, in general, there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise. However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the joint criminal enterprise. In practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose."

743 *Prosecutor v. Kvočka*, Case No. IT-98-30, Appeals Chamber Judgment, para 97 (28 February 2005); *See* Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of*

provision of co-perpetration specifically required that "substantial contribution" for a co-perpetrator to be held liable for the crimes committed by the direct perpetrator.

Also, the co-perpetrator provision in the SFRY Criminal Code does not require a degree of perpetration and thus seems broader than the complicity provision in the 2005 Criminal Code.

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 accused in order to find him/her liable for war crimes and clearly determine the actions set by the co-perpetrator. The Serbian Court would require that the accused acts with direct or indirect intent towards the execution of the joint plan, mere "*dolus eventualis*" for finding liability under joint criminal enterprise at the ICTY is not sufficient for finding someone liable under the concept of co-perpetration in Serbian Courts.[745]

The War Crimes Prosecutor has charged some individuals with co-perpetration of the war crimes.[746] Out of a total of 54 war crimes cases, co-perpetration was charged in a total of 36 cases.[747] Many of these cases were repealed by the Appellate Court in Belgrade in particular because the Court of first instance failed to individualise the action of the co-perpetrator which was necessary under Article 25 of the SFRY Criminal Code.[748]

Joint Criminal Enterprise, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 109, 127 et seq. (2007).

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 […]."

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

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

747 Gojko Pantović, *Co-Perpetration in the War Crimes Cases in Serbia* in OSCE MISSION TO SERBIA: ANALYSIS OF CURRENT ISSUES IN WAR CRIMES PROCEEDINGS 54 (M. Kostić, G. Pantović and K. Todorović eds., 2016).

748 *Prosecutor v. Popović & Stojanović*, Case No. Kž1 Po2 5/12, Second Judgment of the Appellate Court in Belgrade (after retrial) (18 January 2013); *Prosecutor v. Bačić et al.,* Case No. Kž1 K Po2 22/2010, Judgment of the Appellate Court in Belgrade (judgment annulled and sent for retrial) (9 December 2013); *Prosecutor v. Duško Kesar*, Case No. Kž1 Po2 1/12, Second Judgment

Serbian courts continued to apply the criteria for co-perpetration established in the practice of the courts in the Former Yugoslavia. In the appellate decision in the case of *Lovas*, the Appellate Court decided to annul the first instance decision and sent the case for retrial because the War Crimes Chamber failed to establish the criteria for co-perpetration. The Appellate Court established that for those perpetrators who were not directly involved in the commission of the crimes, the following criteria needed to be met: (i) a joint decision, (ii) concrete actions undertaken by the perpetrator or co-perpetrator with intent, and (iii) significant contribution to the commission of the criminal offence by the co-perpetrator.[749]

The Courts established that the commission in the form of co-perpetration required the satisfaction of objective criteria, i.e., the actual participation in the offence and subjective criteria, i.e. the awareness of the joint action by the co-perpetrator.[750]

Similar to the arguments of the ICTY,[751] whether the subjective criteria is satisfied is reflected in the connection to the action. Where the action of the co-perpetrator is closely connected to crimes and significantly contributes to the commission of the criminal offence, then the subjective criteria is satisfied.[752] So, for example, if the accused brings the victims to the locations where the victims would be executed and

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of the Appellate Court in Belgrade (after retrial) (30 November 2012); *Prosecutor v. Vukšić et al.,* Case No. Kž1 K Po2 9/13, Judgment of the Appellate Court in Belgrade (judgment annulled and sent for retrial) (29 March 2013); *Prosecutor v. Miladinović et al.,* Case No. K Po2 6/14, Judgment of the Appellate Court in Belgrade (judgment annulled and sent for retrial) (31 March 2015); *Prosecutor v. Devetak et al.,* Case No K Po2 22/2010, Judgment of the Appellate Court in Belgrade (judgment annulled and sent for retrial) (9 December 2013); *Prosecutor v. Alić et al.,* Case No. K Po2 11/2014, Judgment of the Appellate Court in Belgrade (judgment annulled and sent for retrial) (14 May 2015).

749 *Prosecutor v. Bačić et al.,* Case No. Kž1 K Po2 22/2010, Judgment of the Appellate Court in Belgrade, para 15 (9 December 2013).

750 *Prosecutor v. Duško Kesar*, Case No. Kž1 Po2 1/12, Second Judgment of the Appellate Court in Belgrade, para 5 (30 November 2012) Appellate Court in Kž1 Po2 1/12 from 30 November 2012..

751 *Prosecutor v. Kvočka*, Case No. IT-98-30, Appeals Chamber Judgment, para 97 (28 February 2005).

752 *Prosecutor v. Alić et al.,* Case No. K Po2 11/2014, Judgment of the Appellate Court in Belgrade (judgment annulled and sent for retrial) (14 May 2015): "the accused person had acted as co-perpetrator it was necessary for it to clearly explain, besides the existence of the joint decision, specific "other actions" undertaken by the co-perpetrator with intention, which significantly contribute to the commission of the criminal offence"; *Prosecutor v. Miladinović et al.,* Case No. K Po2 6/14, Judgment of the Appellate Court in Belgrade (judgment annulled and sent for retrial) (31 March 2015); Pantović, *supra* note 747, at note 188.

shares the intent to kill the victims,[753] the accused provides *significant contribution* to the killing, is aware of the joint action, and wants the crime to happen.[754]

As can be seen, the criteria that established co-perpetration are similar to those required for the first and second category of the joint criminal enterprose at the ICTY.

The third category of joint criminal enterprise, where an individual can be held liable for acts committed outside the common plan as long as it was foreseeable, was however clearly rejected by the Serbian legislator and can not be deducted from the new legislation.

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753 *See Prosecutor v. Anton Lekaj,* Case No. Kž1 r.z. 3/06, Judgment of the High Court in Belgrade, para 34 (14 December 2006).

754 Pantović, *supra* note 747, at 63.

IV. CONCLUSION AND SUMMARY OF RESULTS

Prosecution of war crimes was one of the most important forms of transitional justice applied in the region of Former Yugoslavia. For a long time, it remained also the only one. Therefore, the countries of Former Yugoslavia provide a unique opportunity to test the impact of war crimes prosecution on the domestic society.

To what extent does war crimes prosecution advance the rule of law in a transitional justice society?

The transitional justice scholarship has recognised that absence of accountability may leave the desire for retribution unsatisfied. War crimes prosecution makes it possible to individualize the guilt of horrendous crimes and so help prevent putting the blame on one entire group of people.[755]

The Former Chief Prosecutor of the ICTY Carla Del Ponte noted: "Peace without justice cannot be sustainable. It is a terrible mistake to believe that people will simply forget. Even after a hundred years, sometimes even after several hundred years, unpunished crimes continue to represent huge stumbling blocks in establishing peaceful, normal relations between some states."[756]

This connection between justice and peace was one of the leading motives for the establishment of the ICTY. The initial focus of the ICTY to stop the atrocities in the Former Yugoslavia and achieve peace, neglected the rule of law function of the ICTY and its engagement with domestic courts.[757]

The ICTY's initial task to stop the atrocities and achieve reconciliation exposed international justice and the ICTY to all sort of criticism for failing to achieve this and overly ambitious task.

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755 *See* Teitel, *supra* note 39, at 75 et seq.; Ruti G. Teitel, *The Law and Politics of Contemprary Transitional Justice*, 38 CORNELL INTERNATIONAL LAW JOURNAL 837 (2005).

756 Keynote Speech by Carla Del Ponte, *European Values and National Interests in the enlarging Europe*, INTERNATIONAL CONFERENCE: VALUES AND INTERESTS IN INTERNATIONAL POLITICS, 30 October 2006, available at http://www.riigikogu.ee/public/Riigikogu/Valissuhted/del_ponte301006.doc (last accessed 29 June 2017).

757 Teitel, *supra* note 755, at 357 et seq.

Due to ICTY's failure to cooperate with the region for fear of being perceived as biased missed the opportunity to empower local judiciary and build up their capacity allowing them to take on war crimes adjudication. Only after the focus of the ICTY shifted to the region and the Completion Strategy was implemented, was the ICTY requested to actively engage in the development of capacity and strengthening of the domestic rule of law in the countries of the Former Yugoslavia.

This shift in interest and focus of the ICTY was the tipping point for the influence of international criminal adjudication. Through its involvement in establishing or reforming domestic institutions, domestic law and providing assistance to judges and prosecutor in war crimes cases the ICTY started to leave an impact in the region.

A. SUMMARY OF THE DIFFERENT OUTCOMES IN THE FORMER YUGOSLAV REPUBLICS

The influence of the ICTY through its policies and case law has been reflected in the judicial activity and practice in BiH, Croatia, and Serbia. As will be summarized below the ICTY did have an influence on the institutional and normative framework and through informing the judicial practice of BiH, Croatia, and Serbia. And although all three countries had a legal obligation to cooperate with the ICTY and follow its orders,[758] the extent of ICTY's influence was not the same in BiH, Croatia or Serbia. This was due to the different domestic set up and the engagement of the international community.

The following sections will provide a summary of the case study and will particularly highlight the factors that made BiH, Croatia, and Serbia to implement ICTY's case law.

1. Bosnia and Herzegovina

The war in BiH was one of the most brutal conflicts in recent history. BiH suffered more than any other neighbouring country. Half of its population either disappeared or was displaced. Besides the horrendous amount of human suffering, violence, and death, what made Bosnia memorable is that Bosnia "had been a functioning multi

[758] Fourth Annual Report of the ICTY, UN Doc. A/52/375 S/1997/729, 132 (1997), Article X of Annex 1-A, article II (8) of annex 4 and article XIII (4) of annex 6

ethnic society. It prided itself on a long history of multiculturalism, with the region's four major religions – Islam, Christian Orthodoxy, Catholicism, and Judaism – coexisting in peace with even a degree of mutual appreciation."[759] People in Europe and world-wide saw the horrendous crimes, where neighbours turned against neighbours, as proof that multi-ethnic societies did not work and saw proof that these wars were part of Huntington's "clash of civilization"[760]

Following the bloodbath and destruction of BiH, its population was in dire need of justice. Thus, an international justice mechanism was set up, to prosecute and punish wrongdoers and so deliver justice to the region. Despite the criticism the ICTY faced 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]

Although the cooperation and compliance with the ICTY including the most relevant legislative reforms should be viewed from the perspective of a country that was *de facto* under international control. The 1995 General Framework Agreement for Peace (***Dayton Peace Agreement***) prompted the international community to engage in the most extensive state building process since the Second World War.[763] BiH was formed and shaped under the auspices of the international community which significantly limited its sovereignty.[764]

The classical international relation theories on compliance build on a traditional Westphalian model assume that a state sovereign has control and power to decide its own policy. This is not the case for BiH. The international community represented by the OHR has substantial power over the domestic political life in BiH. It has the power to remove individuals form their state posts, prohibit political parties, impose

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759 SUBOTIĆ, *supra* note 759, at 123.

760 SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996).

761 SUBOTIĆ, *supra* note 759, at 122.

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

763 LAMONT, *supra* note 105, at 111.

764 Id. at.105, at 111.

legislation and ban local media outlets.[765] Thus, any analysis of international law influence in BiH should be viewed from the perspective of a semi-independent state.

Cooperation with the ICTY, normative and institutional reforms and an acceptance of the ICTY jurisprudence characterized ICTY's influence in the country and BiH's readiness to implement follow international law. This influence was greater than in any other country in the region, i.e., Serbia or Croatia.

This influence was obviously facilitated by a weak state government on the BiH level and the presence of strong international bureaucrats, including the OHR, who pushed through even unpopular reforms.

For the first decade of its existence, the ICTY exercised primacy jurisdiction and had primary jurisdiction in war crimes. This was not the case in Croatia or Serbia. The so-called Rules of the Road, made an indictment for war crimes possible only in those cases that were approved by the ICTY. This not only hindered any independent judicially development in BiH but also overwhelmed the ICTY.[766] The ICTY could not handle the amount of cases transferred to it, and only very few war crimes indictments reached a trial stage. With the end of the Rules of the Road procedure in 2004, the development of the local judiciary became possible. The implementation of the ICTY's Completion Strategy required capable national courts to continue the work of the ICTY, was the turning point in the relationship between the ICTY and its influence in the region.[767] This spurred the building of new institutions and implementation of the necessary legislative reforms.

The BiH Court and BiH Prosecutor's Office were established in 2000 following a reform plan that was designed by the international community, i.e., the ICTY and the OHR.[768] The BiH Criminal Code and the BiH Code of Criminal Procedure were heavily influenced by the OHR. The unwillingness of the BiH Parliament to implement the new rules required the OHR to exercise its legislative powers to enact the laws.

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765 Office of the High Representative, available at http://www.ohr.int/?page_id=1139 (last accessed 3 July 2017).

766 *See supra*, at III.B.1.

767 Burke-White, *supra* note 50, at 283.

768 *See supra*, at III.B.1(b).

This was also the reason why the newly established BiH Criminal Code implemented the ICTY Statute instead of the ICC Statute as was the case in Croatia and Serbia. This was done to facilitate the transfer of the majority of cases and case files from the ICTY to the courts in BiH. To facilitate international war crimes prosecution, the BiH Code of Criminal Procedure was also reformed in accordance with the ICTY and included elements of the adversarial procedural system that were alien to the civil law tradition of the country.[769] Both codes were new in the region and required a substantial adaption of the domestic law practitioners.

The decisions to include international judges for war crimes prosecution at the BiH Court not only ensured the perception of objective war crimes adjudication but also increased the influence of the international community on the war crimes judgments. Thus, the BiH Court readily applied the newly enacted criminal law in accordance with the practice established at the ICTY.

The BiH Court's practice closely followed the ICTY jurisprudence, it recognised customary international law, and accepted crimes against humanity and modes of liability, like command responsibility, or even joint criminal enterprise. While Serbia and Croatia were reluctant to apply these concepts, the BiH Court argued – following the argumentation at the ICTY – that crimes against humanity and the doctrine of command responsibility were punishable under customary international law already at the time when they were committed between 1991 and 1995.[770] This is unique in the region because neither Serbia nor Croatia agreed with ICTY in this specific argument.

Unlike the Croatian and Serbian courts, the BiH Court has extensively cited the ICTY jurisprudence to support international humanitarian law. The BiH Court's devoted reliance on and application of the ICTY jurisprudence hindered it however to independently develop its own jurisprudence. The reason for this was also that the BiH Court used the ICTY as a justification for its judgments and decisions. Any decisions that did not follow the ICTY, could have provoked an outcry in the fragile society.[771]

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769 *See supra*, at III.C.1(a).

770 Antonietta Trapani, *Assessing The Impact Of The International Ad-Hoc Tribunals On The Domestic Courts Of The Former Yugoslavia*, 11 DOMAC, 70-71 (2011).

771 Trapani, *supra* note 770, at 70-71.

As a result, the ICTY jurisprudence has played an important role in the BiH Court. Any compliance analysis involving the central government of BIH should, however, not omit to analyse the local compliance with international legal requirements and behaviour of entity-level institutions as these differ significantly from the state-level.

BiH's sovereignty was constraint by international actors and powerful sub-state entities, the Republika Srpska and the Federation of BiH. Both entities maintained their own independent law enforcement mechanism, independent judiciary, and independent legislators.

As a result, the reforms that were made possible on the level of BIH, were usually not as easy to undertake on the entity-level. This is most prominently evident in the country's jurisprudence. While the BiH Criminal Code integrated ICTY's jurisprudence into its own decisions, the entity courts neither applied the relevant international law to war crimes cases nor did they cite to ICTY jurisprudence. As a result, the applicable law standards and jurisprudence varied across BiH and led to serious inconsistencies in the applicable law standards in BiH.

Although entity courts are trying cases involving the lowest level of perpetrators, they usually prosecute under the SFRY Criminal Code sometimes also under the BiH Criminal Code and they are more reluctant to recognise customary international law.[772] As a result, the prosecution of war crimes in BiH lacks harmonisation in prosecutions for crimes that stem from the same events.[773] The application of command responsibility for example is not always recognised before the entity courts. As a result, the BiH Court hesitates to transfer cases involving mid-level perpetrators to the entity courts.[774]

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772 *See supra*, at III.C.1(c).

773 Trapani, *supra* note 770, at 71.

774 LAMONT, *supra* note 105.

2. Republic of Croatia

After the war, years of tense relationships between Croatia and the international community followed. Cooperation with the ICTY has been selective, reluctant and insufficient.[775]

Throughout the 1990s, war crimes prosecution was insufficient in Croatia. Not only was the judicial branch susceptible to political influence, also other groups exerted direct or indirect influence on the court proceedings, such as different right-wing groups, the war veterans, or even the Catholic Church. Although Croatia's reputation improved following Tuđman's death in 1999, it still was not enough.

Croatia was criticized for conducting trials that were biased against Serb defendants. This contributed to the impression that, war crimes prosecution was conducted for retribution purposes only, rather than bringing justice to the victims and dealing with the past. Although the number of Croatians indicted increased over the years, the amount of indictments for members of the Serb military and paramilitary formations remained high. Until 2004, from all of the 1,400 individuals who were indicted for war crimes, only twelve were Croats. Approximately 80% of the verdicts that were issued, were conducted *in absentia*.[776] Trials commenced due to the pressure of the local communities but without sufficient evidence.

This was tolerated up until 2004, because the international community focused on war crimes prosecution before the ICTY and neglected domestic institutions. Only upon the implementation of the Completion Strategy, did the international community and the ICTY pay attention to domestic war crimes prosecution in Croatia because it became necessary to prepare domestic courts to continue the work of the ICTY.

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775 Subotić describes Croatian commitment towards transitional justice in the following manner: "Croatia's commitment to transitional justice has for many years been best described as one step forward, two steps back. […] The pressures exerted by the ICTY and by the US and the EU have created deep divisions within the Croatian state, with the issue of the tribunal dominating domestic political debates and pitting strong domestic interest constituencies against one another" in Subotić, *supra* note 312, at 377.

776 Michaeli, *supra* note 51, at 24; Stojanović et al., *Monitoring of War Crimes Trials: Annual Report for 2009,* DOCUMENTA – CENTER FOR DEALING WITH THE PAST CENTRE FOR PEACE, NONVIOLENCE AND HUMAN RIGHTS, note 5 (2010).

The delayed involvement of the ICTY in the region alienated Croatia from ICTY's practice. Croatia resisted any involvement of the ICTY in its own judicial affairs. One of the reasons was that the ICTY's refused to share investigation and case materials with Croatia but at the same time the ICTY requested Croatia's cooperation. The ICTY's lack of outreach and failure to inform the public about its activities provided perfect conditions for the Croatian nationalists to disseminate their narrative and their version of the "homeland war" story to the Croatian public.[777]

Therefore, unlike in Bosnia, the ICTY had little influence in Croatia over the country's normative and institutional framework. The judicial institutions in Croatia were relatively functional after the war and thus were only marginally reformed. The normative framework though did require a reform. The negative public stance against the ICTY made alignment with the ICTY law or jurisprudence a high political cost. Thus, the biggest driver for the Croatian legal development was not the ICTY but the EU. EU's thorough scrutiny of Croatian legal framework, and the motivation of Croatia to implement the required changes, spurred the legal reform and implementation of the international criminal law in Croatia.

Like Serbia, Croatia has chosen to implement the ICC Statute instead of the ICTY Statute into its 1997 Criminal Code (as amended in 2004). This was mainly for two reasons *first,* the timing was right because the ICC Statute has just been ratified by the Croatian government and this sparked the implementation of the ICC Statute into Croatian law; and *second*, the ICTY Statute was considered irrelevant for future trials, and for the war crimes committed during the 1990s, the courts consistently applied the SFRY Criminal Code or the 1993 Basic Code. Thus, the ICC Statute was considered more relevant for any future war crimes prosecution.

The ICTY's impact on the Croatian jurisprudence was also limited. Given that ICTY's decisions and materials were not translated into the local language until 1999, the Croatian judicial authorities focused on their own jurisprudence and did not bother to translate and refer to ICTY's jurisprudence. Moreover, by the time the ICTY started to actively engage with the Croatian justice sector, the Croatian Supreme Court had already dealt with the most pertinent issues arising in war crimes prosecution.

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777 Michaeli, *supra* note 51, at 83 et seq.

Thus, Croatian prosecutors and judges rather referred to the Croatian Supreme Court judgments than to the ICTY case law.

ICTY's only obvious contribution to the Croatian war crimes jurisprudence was in the area of command responsibility. The transfer of the cases of *Ademi* and *Norac* to the Croatian courts was an important step. Not only did Croatia promise the ICTY's Referral Bench that it would apply the concept of command responsibility, but also international pressure urged Croatia to prosecute this case in accordance with international criminal law standards.

The Zagreb County Court and the Croatian Supreme Court confirmed the concept of command responsibility for cases where the commander knew that his or her subordinates were committing war crimes. Following this precedent, the Croatian prosecutors started issuing indictments against mid-level commanders based on command responsibility and courts started to apply this concept. Until *Ademi* and *Norac* most of the cases tried in Croatia were only low level direct perpetrators, as most prosecutors failed to indict higher level perpetrators for fear that they could not be found liable – they simply did accept courts to apply the concept of command responsibility.[778]

Another area where the ICTY did leave an indirect impact in Croatia was the development of domestic capacity through judicial networks and relationships which provided for exchange opportunities and legal assistance of international officials for 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 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]

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778 *See supra* III.C.2(b)(i).

779 Michaeli, *supra* note 51, at 83.

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

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

Ever since the regime change, Croatia had continuously reformed its justice system, trainings and seminars have contributed to the professional development of the judges, prosecutors, and police officers. EU's scrutiny coupled with its immense financial and professional contribution aimed at developing Croatia's justice system 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.

Croatia's main goal was to enter the EU and NATO and this motivation spurred a reform process. For the international community Croatia was the new hope in the region. Measured international pressure and favourable international environment helped the reformists to reach their goals to enter the EU and NATO.[782]

3. Republic of Serbia

In the immediate aftermath of war, war crimes prosecutions were biased and insufficient. They only demonstrated that there was no real attempt to address war crimes perpetrators. Apart from the trial against several members of the Croatian army in 1992 for war crimes, and a show trial against 14 foreign leaders for the war of aggression (in connection with the NATO bombing of Belgrade), there was no real attempt to deal with the past.[783]

Serbia's stance towards the ICTY was extremely negative and any confrontation with war crimes was avoided. The ICTY was viewed as an anti-Serb institution and the political rhetoric re-affirmed the feeling of victimhood in Serbia. Thus, any cooperation with the ICTY was met with public hostility which limited any influence of the ICTY.

It did not help that police and military leaders who were complicit in war crimes in the 1990s still continued to dominate the political life. The judiciary was corrupt and

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782 Subotić, *supra* note 312, at 381.

783 Vesna Peric Zimonjic, *Belgrade Begins Show Trial of NATO War Criminals*, THE INDEPENDENT (19 September 2000) available at http://www.independent.co.uk/news/world/europe/belgrade-begins-show-trial-of-nato-war-criminals-699504.html (last accessed 18 June 2017).

susceptible to political influence making it unable to render fair and balanced war crimes judgements.

With the change of political climate in Serbia and the impact of the Completion Strategy, changes to domestic war crimes adjudication were possible. In addition, it was also EU's and US' assistance that influenced the reform in Serbia mainly through conditioning their funding and membership prospect to cooperation with the ICTY. The EU followed the status reports issued by the ICTY to determine whether certain conditions, like arrest and extradition of wanted war criminals, have been met. Thus, the ICTY indirectly through the EU and the US influenced the reforms.

Serbia implemented the ICC Statute instead of the ICTY Statute into its current criminal code. This was a logical consequence as the ICTY Statute was not considered relevant. The Serbian courts applied the SFRY Criminal Code to the war crimes committed during the 1990s and any war crimes that would happen after the new code was enacted should be tried under the ICC Statute.

Despite this limited influence of the ICTY, one should not undermine the role of leading ICTY's figures in drafting and implementing the criminal law and law on criminal procedure in Serbia in 2003. Their contribution significantly influenced Serbia's judicial and legal capacity.

Once the legal and institutional framework was in place and Serbian courts were adequately equipped to take on war crimes prosecution, the ICTY influenced the selection of cases that were adjudicated before Serbian national courts.

Most war crimes cases tried before Serbian courts stem from the ICTY case law or its investigative material.[784] Although the ICTY only transferred one case to Serbia under the Rule 11 *bis* and only a limited number of investigative materials reached Serbian domestic institutions, the biggest cases before Serbian courts were a result of this material.

Serbian prosecutors and judges are reluctant to indict commanders and mid-level perpetrators. On average, only 10-15% of the defendants indicted had a mid-level

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784 *See supra*, at III.C.3.

function. In recent years, almost no mid-ranking defendant was indicted.[785] Also, it is not clear whether Serbia will apply the principle of command responsibility. Although recently, Serbian courts have opened up towards acknowledging the doctrine of command responsibility, it is still not clear whether they will continue to try individuals under the doctrine of command responsibility.

Like in Croatia, the ICTY did leave an indirect impact on the Serbian judiciary that was achieved through trainings, seminars, and conferences. These exchange opportunities established judicial networks that created possibilities for exchange and assistance by international officials in exchange with their local counterparts. These networks designed for international and national judges and prosecutors helped the Serbian judiciary system to effectively take on war crimes prosecution.

These interactions between international officers and their Serbian counterparts benefitted both and so indirectly influenced local judges and prosecutors who started to implement the arguments developed at the ICTY. Only in rare occasions Serbian courts explicitly referred to ICTY judgements.[786] Despite the modest influence, the ICTY's legacy is striking if taking into account the complex and difficult relationship between the ICTY and Serbia at the outset.

The benefits offered by international community were conditioned on the arrest and extradition of war criminals and not on broader reforms and transitional justice attempts.[787] Although, Serbia eventually complied with the requests of the international community a deeper understanding of the violent past that could have resulted in a positive outcome towards transitional justice was not achieved. This makes Serbia a great example for demonstrating how the international community could have achieved better results, if it had taken a more holistic approach to international justice instead of only requiring extraditions and numbers of those indicted.

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

785 OSCE, War Crimes in Serbia, *supra* note 388, at 45.

786 Michaeli, *supra* note 349, at 95.

787 Subotić, *supra* note 312, at 382.

B. APPLICATION OF THE CASE STUDY TO INFLUENCE THEORIES

International criminal tribunals are international institutions that can impact state behaviour.

Due to their special function and limited operation, international criminal tribunals only have a limited scope of influence, i.e., on domestic war crimes prosecution. Although this scope is limited, the impact may spread into other fields of the judicial system and ultimately positively influence the rule of law.

The international judicial institutions may aid domestic actors in drafting national laws or establishing functioning institutions that limit political influence on the judiciary. They can also have a positive impact on the capacity of judiciary institutions, through establishing networks and trainings for judges and prosecutors.

Another field of impact can be detected on the war crimes jurisprudence. BiH, for example, openly cited to international jurisprudence, and applied the concepts of law developed by the ICTY. In this way, international jurisprudence can enter national case law. Croatia and Serbia, on the other hand used the arguments developed internationally but do not cite international jurisprudence in their case law.

Thus, international war crimes adjudication may find its way into national case-law but in a subtler and not always systematic way. The impact of the international criminal tribunals varies and can be influenced by several factors:

One of the more prominent factors that impacts the influence of international criminal tribunals is the intensity of the international community's costs inflicted on the domestic societies, be it in the form of incentives or threats. Coercing states into adopting an international justice model can happen through promising material or symbolic benefits or incorporate a normative and institutional framework through promising international legitimacy.

Non-compliance with international criminal tribunals may get the international community to influence the target country. The ICTY for example had the possibility to monitor compliance and cooperation and report any irregularities to the UN Security Council. Following these reports, the international community, could decide how to react to these reports. Where costs of non-compliance with the legal regime of international criminal tribunal inflicted through the international community were

greater than the benefits of non-compliance, domestic actors would generally seek to comply with the international norms (see at **1.** *The relevance of international coercion*).

Another factor that impacts the influence of international criminal tribunals is their institutional design. An institutional set up that incentivizes international institution to engage with their domestic counterparts, promotes collaboration between domestic and international institutions and as such can increase the influence of the international institutions. As seen above, the implementation of the Completion Strategy changed the ICTY's attitude towards the region and increased the interaction between those two institutions (see at **2.** *The relevance of the ICTY's institutional design*).

An additional factor that impacts the influence of international criminal tribunals is the ability of the international institutions is to promote norm socialization. Constructivists explain that one of the reasons why states adopt certain norms or international practices is that they imitate and aspire to become like other states. Thus, they learn from proactive international organisation and networks, how other countries handled similar situations.[788]

Compliance with international norms and international institutions is usually first taken up by domestic civil societies who promote socialization with international norms, who raise awareness domestically and internationally through international advocacy networks. These networks may persuade state actors to comply with international rules. In war torn societies it is usually the international institution that can act as norm promoters and establish networks which may help disseminate international norms.

Through seminars and trainings, international institutions can transfer valuable know-how to domestic judges and prosecutors. These seminars and trainings provide an opportunity for domestic judges and prosecutors to meet and establish networks, which provide a valuable source of influence from international on their domestic counterparts, such as judges and prosecutors. Consequently, international norms get applied also even where domestic politics rejects cooperation with international

788 Burke-White, *supra* note 50, at 290 et seq; SUBOTIĆ, *supra* note 759, at 27.

institutions, such as with the ICTY in Croatia or Serbia. These international norms are applied and accepted form the bottom up and may lead to acculturation of these norms and values up to the domestic governments (see at **3.** *The relevance of norm entrepreneurs*).

1. The relevance of international coercion

Transitional states that emerge from conflict are not yet ready to comply with international norms, reform their institutions and prosecute those responsible for war crimes. Missing internal actors that create and facilitate the change from within the country require additional aid from international actors that either coerce or induce compliance with international law and standards.

This section will summarize the coercive factors and the role of the international community identified in this study that made BiH, Croatia, and Serbia comply with the ICTY and implement a normative and institutional framework required to adjudicate war crimes domestically.

Where the benefits obtained through compliance are greater than the disadvantage suffered in case of non-compliance with the legal regime of the international criminal tribunal, domestic actors would obviously choose to comply.[789] Croatia and Serbia present two perfect examples for these interest-based scenarios. In an attempt to coerced and incentivize into adopting international justice mechanisms and cooperation with the ICTY, the US and EU were still far more successful in Croatia than in Serbia. Although both countries refused to cooperate with the ICTY, the difference was that the domestic political circumstances were far more favourable in Croatia than in Serbia.

In Croatia, the domestic elites that assumed power after *Tuđman*‘s death, were determined to enter the EU even if that meant that they had to cooperate with the ICTY – which at that time was an unpopular decision. Serbia did not have such elites. After Milošević’s was extradited to the ICTY, those close to the regime change

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

continued to be in power. Serbia's political elite was not sure whether they really wanted to enter the EU.[790]

In Croatia compliance with the ICTY was achieved through US or EU pressure. While initially, any compliance with the ICTY was linked to military and financial assistance by the US, Croatia's prospect to enter the EU, increased significantly following the election of a liberal government in 2000.[791] The EU conditioned its membership prospects on necessary reforms of the legal and institutional framework. EU conditioned membership negotiations on full cooperation with the ICTY. The membership negotiations were suspended due to Croatia's poor cooperation with the ICTY and failure to arrest and transfer wanted war crimes fugitives.[792] As a result, Croatia multiplied its efforts and within months arrested and transferred *Gotovina* to the ICTY and complied with several other extradition.

This, made the EU the most relevant driving factor in Croatia's implementation of criminal justice mechanisms. The domestic elites were faced with a cost-benefit dilemma. Although the negative attitude of Croatia towards the ICTY may have provoked negative political costs, the benefits obtained through EU membership outweighed the potential costs. Also, the dedication of EU's member states to get Croatia into the EU, gave domestic elites the required confidence to comply with the requirements.

Unlike Croatia, Serbia only achieved full cooperation with the ICTY in 2011 when the last fugitives were arrested and transferred to the ICTY. The collapse of the Milošević regime, unfortunately did not transform the political elites that had the potential to lead the country towards the EU integration. Instead, the old criminal 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]

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790 Id. at 60.

791 Id. at. 47.

792 Id. at 47.

793 Id. at 65.

After the regime change in 2000, the cooperation with the ICTY improved slightly but did the attitude towards the ICTY did not change.[794] The ICTY was facing significant challenges from the civil society who viewed the ICTY as an anti-Serb institution. The ICTY invested no efforts to engage with the public to change this opinion. The ICTY missed the opportunity to mobilize public support for dealing with the past and for war crimes trials, and so to contribute to the judicial development.

Cooperation of Serbia with the ICTY had a clear motive with pragmatic reasons behind it, such as gaining or not losing international financial assistance provided by the US and/or the EU. Also cooperating with the ICTY and arresting wanted fugitives, sometimes only served domestic political purposes, such as getting rid of political opponents.[795]

In Serbia, EU conditionality did not achieve the same results as in Croatia. EU accession was not only too remote for the Serbian society, there was also the missing consensus among the Serbian elites whether the country should pursue the path of EU accession. As a result, EU's incentives to link the EU negotiations of the Stability and Association Agreement to cooperation with the ICTY did not yield immediate results. Instead, direct pressure exercised by the US with immediate and significant threats to block Belgrade's access to financial assistance, worked immediately. These threats imposed immediate costs and outweighed non-compliance tilting the cost-benefit calculation towards compliance.[796]

As evident from above, the realists' theory emphasizes that states would only comply with international norms if it is in the interest of the more powerful states, which then coerce the less powerful state into compliance. This is certainly one of the dominating factors that made Croatia and Serbia comply with the ICTY and implement international justice mechanism. Both countries were driven by their interest to receive international recognition or material offered by the more powerful states.[797]

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794 *See supra* at III.B.3(a)

795 For example Stanišić and Simatović former security chiefs of Milšoević were extradited to the ICYT following Đinđić's assassination, as they were a threat to the post-Đinđić government *see* LAMONT, *supra* note 105, at 47.

796 Id. at 82-83.

797 *See supra* at II.B.1.

2. The relevance of the ICTY's institutional design

Although war crimes prosecution is one of the tools of transitional justice, the ICTY, was said to have had relatively little impact on capacity development or reconciliation efforts in the region. It was even argued that the international ad-hoc criminal tribunals would take the money away from the desperately needed domestic reform process.[798]

As seen in this study, this is certainly true for the first decade of the ICTY's existence (1993-2002). The ICTY's focused on its own prosecution rates to legitimize its existence. It refused to engage with the region for fear to be perceived as biased by one or the other group and any focus on capacity development in the region would deviate resources from its mandate to prosecute those "responsible for serious violations of international humanitarian law committed in the Former Yugoslavia since 1991."[799] To put it simple, the ICTY had no incentives to invest in domestic development. For the ICTY "there was only one overwhelming, all-encompassing and [...] life threatening issue for the ICTY as it had been conceived: arrests."[800]

Consequently, domestic judicial development was on halt during that period. In BiH where the ICTY exercised absolute international jurisdiction over war crimes.[801] The Rules of the Road Agreement prevented domestic prosecution of war crimes until the ICTY's Office of the Prosecutor approved domestic prosecution. This demoralized domestic institutions to pursue effective war crimes prosecution. A lot of those indictments were difficult to analyse due to lack of resources at the ICTY for inspecting all the material at the ICTY. This played well into the hands of right-wing domestic politicians who avoided effective war crimes prosecutions for fear to suffer political costs. It can even be argued that the interest of international and national

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798 *See* e.g. Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons From Rwanda,* 24 YALE JOURNAL INTERNATIONAL LAW 365, 414 (1999).

799 United Nations International Criminal Tribunal for the former Yugoslavia, *Mandate and Crimes under ICTY Jurisdiction*, available at http://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction (last accessed 4 July 2017).,

800 Louise Arbour, *The Crucial Years*, 2 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 396, 397 (2004).

801 Burke-White, *supra* note 50, at 310.

officials was aligned and did not contribute to the development of domestic judicial institutions.[802]

This changed in 2002, when it became necessary for the ICTY to complete its mandate. It was recognised that domestic institutions were necessary to bring war crimes adjudication to an end. All of a sudden, it was in the interest of the ICTY and the international community to activate and invest into the capacity of national institutions in BiH, Croatia, and Serbia. As a result, the ICTY was tasked with transferring cases and investigative material to the region, provide assistance, and monitor the prosecutions.[803] This set-up changed the relationship between the ICTY and the institutions in BiH, Croatia, and Serbia. The relationship became complementary as both had an interest to work together.

The ICTY issued clearer guidelines under which cases would be referred to national courts, which encouraged the courts in BiH and Croatia to meet those requirements and effectively prosecute war crimes.[804] The domestic institutions increased their quality of work and started to cooperate with the ICTY, which was monitored and reported to the UN Security Council. Good results were acknowledged making the reputation of the countries dependent on the performance of their courts.

Workshops and trainings were organised to facilitate the knowledge transfer from the ICTY to domestic courts. As is evident from the study, establishment of effective war crimes institutions and legal reforms were encouraged and supported in BiH, Croatia, and Serbia, due to this institutional change of the ICTY.[805]

This approach of positive complementarity of the ICTY with domestic institutions, influenced the domestic capacity to prosecute war crimes and with it enhanced international criminal justice.[806] Empowering the local war crimes process made the

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802 Burke-White, *supra* note 50, at 318-319.

803 Security Council Resolution 1503, UN Doc. S/RES/1503, para 1, 2 and 7 (28 August 2003); Burke-White, *supra* note 50, at 320.

804 Burke-White, *supra* note 50, at 323.

805 Burke-White, *supra* note 50, at 325.

806 *See supra* at II.B.2.

domestic authorities the owner of transitional justice process, enhanced the institutional and legal framework and with it the development of the rule of law.[807]

3. The relevance of norm entrepreneurs

The drivers for domestic reform can be manifold. One factor identified in this study is the impact of constructivism. Persuasion and norm socialization may change the behaviour of states, their interest which makes them follow international values norms.[808]

Transnational social networks can shape the perception of national interests and preferences of state actors.[809] Through interaction with international actors and with the help of transnational social networks states can adopt the values and preferences of the international society, which has the potential to make certain international norms a legitimate part of the state's legal system.[810] The process is also called norm internalisation.[811]

Domestic civil society is usually at the forefront of this process of norm internalization because it is the first to accept international norms as fair and legitimate and through activities and persuasion may alter the behaviour of the state.[812] Civil society act as norm entrepreneurs.[813] Domestic civil societies can mobilize international networks and international players who can exert influence and induce compliance of the state through shaming, social pressure, and reputation.

War-torn societies usually do not have a strong domestic civil society that might have the capacity or authority to spur a reform from within the country. Thus, international

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807 *See supra* at II.B.2.

808 *See supra* at II.C.

809 FINNEMORE, *supra* note 165, at 5-6.

810 Goodman & Jinks, *supra* note 161, at 642-643; For the theory of legitimacy *see supra* at II.C.2; and the legal process theory *see supra* at II.C.3.

811 *See supra* at II.C.3.

812 Risse-Kappen & Sikkink, *supra* note 175, at 11-35.

813 *See supra*, at II.C.1; Finnemore & Sikkink, *supra* note 182, at 895.

social networks need to be more proactive to persuade states and national actors to implement appropriate changes.

A local pro-justice civil society was missing in both, Croatia, and Serbia. In Croatia, the non-governmental organizations such as the war veterans, the Catholic Church and the media, rejected war crimes prosecution and cooperation with the ICTY.[814] Also in Serbia, the civil society requesting war crimes prosecution was almost non-existent. The state-owned media and the Orthodox Church disseminated the feeling that the Serbs were the most victimized group in the Former Yugoslavia, which did not help in dealing with the past. Media outlets focused on war crimes committed by non-Serbs ignoring those committed by Serbs and at the same time portrayed the overwhelming majority of indictments and proceedings against Serbs. This contributed to the de-legitimization of the ICTY. In Serbia, there was almost no pressure form the civil societies to investigate war crimes.[815]

The fact that a lot of indictments in Serbia targeted political leaders and public figures reinforced this attitude. In Croatia, there were fewer indictments and those did not target top government leaders. This made it easier for the Croatian public to accept the ICTY.

As a result, the civil society neither in Croatia nor in Serbia was ready to change the existing preferences, deal with the past and promote cooperation with the ICTY. Domestic non-governmental actors could have helped to mobilize and active transnational civil society which in turn may have pressured the government of Serbia and Croatia to comply with the ICTY's norms and further international war crimes prosecution.[816] Instead, they hindered the cooperation with the ICTY and threatened with protests if the governments were to cooperate with the ICTY.[817]

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814 *See supra*, at III.B.2.

815 LAMONT, *supra* note 105, at 75.

816 *See supra*, at II.C.1; and KECK & SIKKINK, *supra* note 186, at 3.

817 *See* in particular Croatian's attitude with regards to the indictments of their war heroes (*see supra* at III.B.2) or Serbian's politics of voluntary surrenders rather than arrests of war criminals (*see supra* III.B.3).

Thus, it remained necessary to establish other coalitions of norm entrepreneurs who can collaborate with the state elites and induce compliance.[818]

The transnational judiciary networks established as a side effect of different seminars and trainings organized for the international prosecutors and judges working at the ICTY and their domestic counterparts. They took over the function of norm-entrepreneurs. Not only were they indispensable for local judicial capacities the know-how transfer, technical assistance and training on international law helped the judges and prosecutors understand the concepts of international criminal law and apply them in war crimes cases.

The need to transfer the cases and case materials to the domestic courts, created the necessity to exchange expertise between domestic and international actors. The national actors considered it prestigious to take on these case files and continue the work of the ICTY. This motivated national institutions to increase performance and adopt international norms essential for effective prosecution of war crimes.[819] At the same time, also international actors had an interest to ensure that the national institutions were capable of taking case materials and effectively prosecuting war crimes so that the ICTY could complete its mandate.

The trainings and exchange opportunities set up to transfer know-how positively influenced those who applied international criminal law. Even without political will, the ICTY together with its case law found its way into the national law system of BiH, Croatia, and Serbia.

Prosecutors and judges started to apply the relevant law. Established relationships and judicial networks helped to transfer know-how, exchange policies and practices among judicial institutions at different levels of governance. This interaction with international officials made international norms enter the normative system of BiH, Croatia, and Serbia.

The influence of these networks as the so-called norm entrepreneurs can be best explained with the norm-based theories.

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818 SUBOTIĆ, *supra* note 759, at 7.

819 *See also* Burke-White, *supra* note 50, at 307-308.

However, also some liberalists accept parts of this theory but arguing that this works best in liberal democracies, where citizens can pursue their interests independently and where domestic government institutions are committed to the rule of law.[820] This effect is not unique in international war crimes prosecution and can be observed also in other international judicial institutions. *Slaughter* analysed the influence of the European Court of Justice on national courts and observed a very similar behaviour. She detected that the "exchange of information, development of collective standards, provision of training and technical assistance, ongoing monitoring and support, […] can give government officials in weak, poor, and transitional countries the boost they need. Their counterparts in more powerful countries, meanwhile, can reach beyond their borders to try to address problems that have an impact within their borders."[821]

In sum, where domestic civil society is not ready to deal with the past, international criminal tribunals can help to establish relevant transnational networks between national and international actors and which can help establish efficient domestic war crimes prosecution. This relationship facilitates the exchange between international and local professionals. Domestic actors may use these relationships to look into best practices, discuss ideas and innovations with their international counterparts. This in turn makes it possible for international norms to enter domestic legal framework.[822]

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820 Helfer & Slaughter, *supra* note 137, at 333-334.

821 ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65-103 (2004).

822 Burke-White, *supra* note 50, at 307- 308; *See also* the theory of liberalism *supra* at II.B.3.

C. CONCLUSION

This thesis identifies three factors that are responsible for the influence of the ICTY in the region of the Former Yugoslavia, i.e. BiH, Croatia and Serbia.

First, the intensity of the international community's influence in BiH, Croatia, and Serbia played a prominent and constant role in incentivizing these countries to implement changes in accordance with international criminal law practice and the ICTY. Material or symbolic benefits promised by the international community made Croatia and Serbia adopt an adequate international justice models and cooperate with the ICTY. Thus, the influence of more powerful states or state unions, such as the EU, should not be undermined when determining whether states will comply with international criminal justice mechanisms.

Second, the institutional design of international institutions shapes their influence on and interaction with domestic institutions. The ICTY can be portrayed as a textbook example of such influence. The adoption of the Completion Strategy in 2003, changed the ICTY's interaction and relationship with the region. This relationship influenced not only the institutional development but also normative changes in the region and as such had significant impact across the countries of the Former Yugoslavia.[823]

Third, jurisdictional relationships between domestic and international courts and actors are can explain the influence of international criminal tribunals on national institutions. This influence can only be achieved where the governance structure of the international institution offers the possibility to establish a positive network of international and domestic actors, and that incentivizes both to engage with each other, transfer know-how and provide assistance. This enables the establishment of transnational networks that can help the international criminal institutions exert norm leadership and influence lawyers, judges or prosecutors to comply with international practice.

The different political realities present in these three countries of the Former Yugoslavia, i.e. BiH, Croatia, and Serbia makes a comparison difficult. But, as seen above, in analysing the factors that contributed to the influence of the ICTY in the region of Former Yugoslavia, one common trait can be singled out; the influence is

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823 Burke-White, *supra* note 50, at 283.

not home-grown but requires external factors to facilitate the impact of international criminal justice in domestic societies.

Where these factors are applied early in the process of implementing an adequate international justice model the post-conflict society might get involved in transitional justice, war crimes prosecution, reform of institutions and normative framework early on. This in turn helps provide accountability for past atrocities, prevent an impunity gap and help the society come to terms with its violent past.

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VI. APPENDIX

A. ABSTRACT – ENGLISH

This doctoral thesis explores the influence of the United Nations International Criminal Tribunal for the Former Yugoslavia (***ICTY***) on states of the Socialist Federal Republic of Yugoslavia (***Former Yugoslavia***), i.e. Bosnia and Herzegovina (***BiH***), Republic of Croatia (***Croatia***), and Republic of Serbia (***Serbia***).

To analyse the factors influencing these countries I examine international relations theories on compliance in the first part of the thesis. They explain the reasons why states comply with and implement international law. In this thesis, I analyse the interest-based theories, i.e. realism, institutionalism and liberalism and norm-based theories which are constructivism, theory of fairness and legitimacy and the legal process theory.

In the second part of this doctoral thesis, I examine the impact of international criminal law and internaitonal war crimes adjudication on the institutional and normative capacity development to prosecute war crimes in BiH, Croatia, and Serbia. The focus lies on the influence of the ICTY. Thereby I attempt to extract those factors that are relevant and contributed to the development of the national war crimes institutions, criminal law and domestic war crimes cases.

This thesis identifies three factors that are responsible for the influence of the ICTY in BiH, Croatia and Serbia.

First, the international community's influence in BiH, Croatia, and Serbia played a prominent and constant role in either incentivizing or coercing these countries to implement changes in accordance with international criminal law practice and the ICTY. Material or symbolic benefits promised by the international community made Croatia and Serbia adopt an adequate international justice models and cooperate with the ICTY. Thus, the influence of more powerful states or state unions, such as the EU or the US is a relevant factor when determining whether states will comply with international criminal justice mechanisms.

Second, the institutional design of international institutions is a relevant factor in determining whether these institutions may exert influence on domestic politics and

institutions. The ICTY can be portrayed as a textbook example of such influence. While between 1993 and 2003 the ICTY had almost no influence at all in the region, its impact changed with the adoption of the Completion Strategy in 2003. The Completion Strategy forced the ICTY to cooperate with domestic institutions in order to prepare for its own closure. This influenced not only the institutional development but also normative changes in the region and as such had significant impact across the countries of the Former Yugoslavia.[824]

Third, relationships between domestic and international courts and their actors are the third relevant factor when analysing the influence of international institutions and international law. This influence can only be achieved where the governance structure of international institutions offers the possibility to establish positive networks of international and domestic actors. These networks can help transfer know-how, provide assistance. Through these transnational networks international criminal institutions may exert influence over lawyers, judges or prosecutors and so influence domestic compliance with international practice.

The different political realities present in these three countries, BiH, Croatia, and Serbia makes a comparison difficult. But in analysing the factors that contributed to the influence of the ICTY in the region of Former Yugoslavia, one common trait can be singled out; the influence in war-torn societies is not home-grown but requires external factors to facilitate the impact of international criminal justice in domestic societies. Applying the right factors early in the process of implementing an adequate international justice can help achieve transitional justice goals earlier than this was the case in BiH, Croatia and Serbia.

824 Burke-White, *supra* note 50, at 283.

B. ABSTRACT – DEUTSCH

Diese Doktorarbeit untersucht den Einfluss des Internationalen Strafgerichtshofs der Vereinten Nationen für das ehemalige Jugoslawien (***ICTY***) auf Staaten der ehemaligen Sozialistischen Föderativen Republik Jugoslawiens (***Ehemaliges Jugoslawien***), wie Bosnien und Herzegowina (***BiH***), die Republik Kroatien (***Kroatien***) und die Republik Serbien (***Serbien***).

Um internationale Einflussfaktoren auf diese Länder zu analysieren, untersuche ich im ersten Teil der Arbeit politikwissenschaftliche Theorien über das Verhalten von Staaten und die Faktoren, die die Bereitschaft dieser Staaten dem Völkerrecht und internationalen Institutionen Folge zu leisten untersuchen. Diese Theorien, die auf dem Gebiet der internationalen Beziehungen angesiedelt sind, erklären die Gründe, warum Staaten das Völkerrecht einhalten und auch umsetzen. In dieser Arbeit analysiere ich die interessensbasierten Theorien, das sind Realismus, Institutionalismus und Liberalismus sowie die normbasierten Theorien, wie den Konstruktivismus, die Fairness- und Legitimitätstheorie sowie die Prozesstheorie.

Im zweiten Teil der Dissertation untersuche ich die Auswirkungen des Völkerstrafrechts und der Rechtsprechung des ICTY auf die institutionelle und normative Entwicklung im Bereich des Völkerstrafrechts zur Verfolgung von Kriegsverbrechen in BiH, Kroatien und Serbien. Der Fokus dabei liegt auf dem Einfluss des ICTY. Dabei untersuche ich insbesondere jene Faktoren, die zur Entwicklung des Strafrechts, sowie staatlicher Institutionen zur Prozessierung von Kriegsverbrechen und der staatlichen Rechtsprechung in diesem Zusammenhang beitragen.

Diese Arbeit identifiziert drei Faktoren, die für den Einfluss des ICTY in BiH, Kroatien und Serbien verantwortlich sind.

Erstens spielt der Einfluss der internationalen Gemeinschaft in BiH, Kroatien und Serbien eine maßgebliche und konstante Rolle. Es zeigt sich, dass der Einfluss der internationalen Staatengemeinschaft mit ihren finanziellen oder symbolischen Möglichkeiten diese Länder angehalten hat, institutionelle und normative Entwicklungen voranzutreiben. Dies hat auch die Zusammenarbeit dieser Länder mit dem ICTY wesentlich verbessert. Zusammenfassend kann man festhalten, dass der Einfluss von mächtigeren Staaten oder Staatengemeinschaften, wie der EU oder den

USA, ein nicht vernachlässigbarer Faktor bei der Beantwortung der Frage darstellen, warum Staaten dem Völkerrecht folgen.

Zweitens, das Design internationaler Institutionen ist ebenso ein entscheidender Faktor, um zu bestimmen, ob völkerrechtliche Institutionen Einfluss auf die nationale Politik und nationale Institutionen ausüben können. Der ICTY ist exemplarisch für die Auswirkungen der Ausgestaltung einer Institution auf mögliche regionale Institutionen und Akteure. Während der ICTY zwischen 1993 und 2003 in der Region des ehemaligen Jugoslawiens fast keinen Einfluss hatte, änderte sich sein Einfluss mit der Implementierung der Abschlussstrategie des ICTY. Durch die Implementierung der Abschlussstrategie wurde der ICTY angehalten, mit inländischen Gerichten und der inländischen Staatsanwaltschaft zusammenzuarbeiten, um die Schließung der eigenen Fälle voranzutreiben. Diese Zusammenarbeit beeinflusste nicht nur die institutionelle Entwicklung, sondern führte auch zu zahlreichen und notwendigen rechtlichen Reformen in BiH, Kroatien und Serbien und hatte somit erhebliche Auswirkungen auf die Länder des ehemaligen Jugoslawiens.

Drittens, ein weiterer relevanter Faktor bei der Analyse des Einflusses völkerrechtlicher Institutionen und des Völkerrechts sind die informellen Beziehungen zwischen nationalen und internationalen Gerichten, sowie der Staatsanwaltschaft und ihren Akteuren. Transnationale Netzwerke von in- und ausländischen Akteuren können diesen Einfluss erheblich beeinflussen. Wenn die Governance-Struktur einer internationalen Institution die Möglichkeit bietet oder es notwendig macht, diese Netzwerke aufzubauen, dann können diese Netzwerke nicht nur relevantes Know-how übertragen, sondern auch den regionalen Akteuren Unterstützung leisten. Durch diese transnationalen Netzwerke können internationale Institutionen Einfluss auf Anwälte, Richter oder Staatsanwälte üben und so indirekt für die nationale Einhaltung internationaler Normen sorgen.

Die unterschiedliche politische Realität in BiH, Kroatien und Serbien, macht einen Vergleich zwischen diesen drei Ländern schwierig. Bei der Analyse der Faktoren, die zum Einfluss des ICTY in der Region des ehemaligen Jugoslawien beigetragen haben, kann jedoch ein gemeinsames Merkmal herausgearbeitet werden; um Kriegsverbrecher vor Gericht zu bringen und für Gerechtigkeit zu sorgen, müssen entsprechende Strukturen und rechtliche Reformen durchgeführt werden. Diese

Reformen sind in kriegszerrütteten Ländern oftmals nicht möglich und erfordern gezielte externe Maßnahmen. Der frühzeitige und gezielte Einsatz von Maßnahmen, kann bei der Verwirklichung angemessener *Transitional Justice* Ziele notwendig sein, um diese früher zu erreichen, als dies in BiH, Kroatien und in Serbien der Fall war.