



# THE IMPACT OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS IN THE CONTEXT OF WAR CRIMES TRIALS IN BOSNIA AND HERZEGOVINA

BY DR SILVIA BORELLI

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# ABOUT DOMAC

**THE DOMAC PROJECT** focuses on the actual interaction between national and international courts involved in prosecuting individuals in mass atrocity situations. It explores what impact international procedures have on prosecution rates before national courts, their sentencing policies, award of reparations and procedural legal standards. It comprehensively examines the problems presented by the limited response of the international community to mass atrocity situations, and offers methods to improve coordination of national and international proceedings and better utilization of national courts, *inter alia*, through greater formal and informal avenues of cooperation, interaction and resource sharing between national and international courts.

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# EXECUTIVE SUMMARY

The present paper assesses the impact of the European Convention on Human Rights and the jurisprudence of the European Court upon the domestic prosecution and trial of individuals accused of international crimes before the courts of Bosnia and Herzegovina.

Following the end of the Balkan conflict, there has been a steady stream of prosecutions of individuals for international crimes before the domestic courts in Bosnia and Herzegovina, including through the referral back of cases from the ICTY. Those trials have regularly raised issues of the right to fair trial as well as questions implicating the principle of legality and non-retroactivity of criminal law.

The European Convention has a particularly strong status within the constitutional law of Bosnia and Herzegovina, being directly applicable and hierarchically superior to all other laws, and has been applicable, as a matter of domestic law, since the entry into force of the Constitution in 1995. However, the Convention formally entered into force for Bosnia and Herzegovina – and the European Court therefore acquired jurisdiction – somewhat later, in 2002.

Despite the relatively large number of domestic prosecutions for international crimes, no applications have been made to the European Court against Bosnia and Herzegovina in relation to domestic war crimes trials alleging violations of either the right to a fair trial, or of the principle of legality. Although the delay in ratification of the Convention may to some extent explain the initial absence of cases, it does not explain the fact that no applications relating to trials for international crimes have been brought in the intervening eight years.

Even though there has been no judgment of the European Court directly implicating the way in which domestic war crimes trials have been conducted in Bosnia and Herzegovina, the influence of the European Convention and the Court's jurisprudence on the legal framework applicable to such trials (and more generally) has been vast. This is evident both in the formulation of the new Criminal Procedure Code, adopted in 2003, and subsequent amendments, as well as in the manner in which the domestic courts in trials of war crimes have dealt with arguments by defendants of breach of the principles of legality and non-retroactivity, or breach of the right to fair trial.

In that latter regard, decisions of the European Court have often been referred to and invoked in ruling on particular objections raised by defendants.

The principal reasons underlying the strong influence which the Convention and jurisprudence of the European Court have exerted would appear to be the strong position which the European Convention occupies within the Bosnian legal system, resulting in an advanced internalisation by Bosnia and Herzegovina of its obligations under the Convention, which have allowed the domestic courts to resort to and rely upon the Court's jurisprudence in resolving issues implicating Convention rights.

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## LIST OF ABBREVIATIONS

BiH .....	Bosnia and Herzegovina
CC.....	Criminal Code of Bosnia and Herzegovina
CPC.....	Code of Criminal Procedure
ECHR.....	European Convention for the Protection of Human Rights and Fundamental Freedoms
ICTY.....	International Criminal Tribunal for the Former Yugoslavia
OHR.....	Office of High Representative
OSCE.....	Organization for Security and Cooperation in Europe
SFRY.....	Socialist Federal Republic of Yugoslavia
UN.....	United Nations

## 1. INTRODUCTION

The aim of the present paper is to provide an overview of some aspects of the impact of the European Convention on Human Rights<sup>1</sup> and the jurisprudence of the European Court of Human Rights (“the European Court” or “the Court”) arising out of the prosecution before the domestic courts in Bosnia and Herzegovina (“BiH”) of war crimes and other atrocities in violation of international law committed during the Balkan conflict (hereafter for convenience, “war crimes”). This paper is based on research conducted for a wider study for the DOMAC project the aim of which is to assess the impact of the European Convention and of the jurisprudence of the European Court upon domestic prosecutions of mass atrocities.

The focus of the paper will be on two specific aspects which are particularly germane to the domestic prosecution of war crimes and other atrocities: the first relates to the relevance of the principle of legality/the *nullum crimen sine lege* principle enshrined in Article 7 of the European Convention to the domestic prosecution of international crimes. The second relates to the applicability of fair trial guarantees as enshrined in Article 6 of the Convention.

## 2. THE STATUS OF THE EUROPEAN CONVENTION IN BOSNIA AND HERZEGOVINA

By way of background to the assessment of the impact of the European Convention and the jurisprudence of the European Court, it is useful to provide a very brief sketch of the particular status of the Convention in BiH.

BiH signed the European Convention on 24 April 2002 and ratified it on 12 July 2002; the Convention entered into force for it on the latter date.<sup>2</sup> However, the Convention had been applicable for some considerable time as a matter of domestic constitutional law even prior to ratification by BiH. The current Constitution of Bosnia and

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<sup>1</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), CETS No. 5 (hereinafter “the European Convention” or “the Convention”. The text of the Convention is available at <http://conventions.coe.int/treaty/en/treaties/html/005.htm>.

<sup>2</sup> Source: Council of Europe Treaty Office, at <http://conventions.coe.int>.

Herzegovina originated as Annex 4 of the General Framework Agreement for Peace in Bosnia and Herzegovina (the “Dayton Peace Agreement”),<sup>3</sup> and came into force upon signature of that Agreement on 14 December 1995.<sup>4</sup>

The status of the Convention as a matter of domestic law is governed by Article II of the BiH Constitution. Pursuant to Article II(2), the European Convention was rendered directly applicable within BiH, and given a hierarchical status such that it prevails over all other laws.<sup>5</sup> By way of implementation of that direct applicability of the European Convention and its Protocols, Article II(6) of the Constitution makes clear that:

Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in [Article II(2)].

It bears emphasizing that the European Convention was and is directly applicable within BiH by virtue of its express incorporation by reference in Article II(2), independent of BiH’s ratification of the Convention. In that regard, the BiH Constitutional Court, in a case involving a challenge to various provisions of the Constitution itself on the basis that they were not compatible with the European Convention, has held that the European Convention does not prevail over the terms of the Constitution itself, of which it forms a part, and accordingly has only infra-constitutional status.<sup>6</sup>

<sup>3</sup> General Framework Agreement for Peace in Bosnia and Herzegovina (initialled at Dayton on 21 November 1995, and signed in Paris on 14 December 1995); the full text of the agreement and of the Annexes thereto is reproduced in ILM, vol. 35 (1996), p. 75. The text of the Constitution is also available at [http://www.ccbh.ba/public/down/USTAV\\_BOSNE\\_I\\_HERCEGOVINE\\_engl.pdf](http://www.ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf). On the BiH Constitution, see P Szasz, “The Bosnian Constitution: the Road to Dayton and Beyond”, *ASIL Proceedings*, vol. 90 (1996), p. 479; S Yee, “The New Constitution of Bosnia-Herzegovina”, *EJIL*, vol. 7 (1996), p. 176; P Szasz, “The Protection of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia”, *AJIL*, vol. 90 (1996), p. 301; Z Pajic, ‘A Critical Appraisal of Human Rights Provisions of the Dayton Constitution of Bosnia and Herzegovina’, *Human Rights Quarterly*, vol. 20 (1998), p. 125; M Cox, ‘The Dayton Agreement in Bosnia and Herzegovina: A Study in Implementation Strategies’.

<sup>4</sup> BiH Constitution (above n. 3), Art. XII.

<sup>5</sup> Art. II(2) of the BiH Constitution provides: “The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.”

<sup>6</sup> Case U-5/04 *Tihic*, Constitutional Court of Bosnia and Herzegovina, decision of 31 March 2006, p. 8. On the other hand, the European Court has held that the application of particular constitutional provisions in relation to eligibility to stand as a candidate for election violate the prohibition of discrimination under Article 14 of the European Convention see e.g. *Sejdic and Finci v. Bosnia and Herzegovina* (Apps Nos 27996/06 and 34836/06), Judgment of 22 December 2009 [GC]; ECHR Reports 2009-\_\_\_. The Constitutional Court of Bosnia has also denied that it is competent to assess the constitutionality of the Dayton Peace Agreement itself under the Constitution: see Case U-7/97 *Croatian 1861 Law Party and Bosnia-Herzegovina 1861 Law Party*, Constitutional Court of Bosnia, Decision of 22 December 1997, where the Court observed “the Constitution of Bosnia and Herzegovina was adopted as Annex IV to the [Dayton

Other provisions of Article II of the BiH Constitution are also of particular relevance to the implementation and protection of human rights in BiH. In particular, Article II(3) provides that “All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2” and then proceeds to enumerate a non-exhaustive list of the protected rights and freedoms. Further, Article II(7) provides that Bosnia and Herzegovina “shall remain or become party” to a number of international human rights agreements listed in Annex I to the Constitution.<sup>7</sup> Although the list contained in Annex I includes all of the most important human rights treaties of a general scope, by contrast to the European Convention, those treaties are not formally rendered directly applicable within the Bosnian legal system as a matter of Constitutional law.

### 3. THE DOMESTIC PROSECUTION OF WAR CRIMES IN BOSNIA AND HERZEGOVINA

There has been a relatively steady stream of domestic prosecutions of war crimes and other atrocities before the courts of Bosnia and Herzegovina since the end of the Balkan conflict (indeed, some prosecutions took place even whilst the conflict was ongoing).<sup>8</sup>

For present purposes, the focus will be on prosecutions at the State level before the Court of Bosnia and Herzegovina,<sup>9</sup> rather than on war crimes trials taking place before the judiciary of the two constituent Entities and that of the District of Brcko. Statistics compiled by OSCE indicate that a total of 11 prosecutions were started in 2004

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Peace Agreement], and consequently there cannot be a conflict or a possibility for controversy between this Agreement and the Constitution of Bosnia and Herzegovina”.

<sup>7</sup> Annex I (entitled “International Human Rights Agreements to be applied in Bosnia and Herzegovina”) includes a relatively comprehensive list of international instruments relating to human rights and international humanitarian law, including, *inter alia*, the 1948 Genocide Convention, the 1949 Geneva Conventions and the 1977 Additional Protocols, the 1951 Refugee Convention, the Convention on the Elimination of Racial Discrimination, the two International Covenants, the Convention of the Elimination of Discrimination Against Women and the UN Convention Against Torture; however, the European Convention is not included in the list.

<sup>8</sup> See e.g. OSCE, *War Crimes Trials before the Domestic Courts of Bosnia and Herzegovina; Progress and Obstacles* (March 2005), at p. 14, which notes that in 1993 Sretko Damjanović was found guilty of genocide and crimes against the civilian population by the District Military Court in Sarajevo and sentenced to death (later commuted to 20 years imprisonment). The Human Rights Chamber subsequently ruled in 1997 that the trial court had lacked a “sufficient appearance of independence”: see Human Rights Chamber, Decision No. CH/96/30 *Sretko Damjanović*, Decision on the Merits of 5 September 1997; in addition to ordering that the death penalty imposed not be carried out and be lifted (paras. 46 and 49(3)), the Human Rights Chamber, having observed that proceedings in relation to the applicant’s request for a renewal of the criminal proceedings were pending, observed that a retrial “would constitute an appropriate remedy” (*ibid.*, at para. 47).

<sup>9</sup> For background information on the structure and functioning of the Court of Bosnia and Herzegovina, see generally, the Court’s official website at <http://www.sudbih.gov.ba>.

before all courts within BiH, whether at the State or Entity level, 16 prosecutions were commenced in 2005, 37 in 2006, 29 in 2007, 33 in 2008 and 7 in the first four months of 2009.<sup>10</sup> Following the creation in 2004 of Section I for War Crimes within the Criminal Division of the Court of Bosnia and Herzegovina and the corresponding Departments of the Prosecutor's Office,<sup>11</sup> a rapidly growing number of those prosecutions have been undertaken in the Court of Bosnia and Herzegovina at the State level rather than before the courts at Entity level. In particular, although only one prosecution was commenced before the Court of Bosnia and Herzegovina in the course of 2004,<sup>12</sup> in 2005, after the Trial Panels within Section I had actually started functioning, 6 prosecutions were commenced before the Court of Bosnia and Herzegovina, and that figure rapidly increased to 19 in 2006, 18 in 2007 and 26 in 2008; a further 4 prosecutions were commenced in the first four months of 2009.<sup>13</sup> In assessing those figures, it should of course be realized that a number of the prosecutions before the Panels within Section I have concerned individuals whose cases have been transferred from the ICTY pursuant to Rule 11bis of the ICTY's Rules of Procedure in the context of the ICTY Completion Strategy.<sup>14</sup>

For prosecutions in the future, the National War Crimes Prosecution Strategy,<sup>15</sup> adopted in December 2008, has been developed with a view to tackling the backlog of domestic war crimes cases in BiH. In November 2009, a law containing amendments to

<sup>10</sup> OSCE, "War crimes cases started in January 2004–April 2009", available at [http://www.oscebih.org/images/WC\\_Started\\_0409.jpg](http://www.oscebih.org/images/WC_Started_0409.jpg).

<sup>11</sup> See *Law on the Amendments to the Law on the Court of Bosnia and Herzegovina* (Official Gazette of BiH, 61/04, available at [http://www.sudbih.gov.ba/files/docs/zakoni/en/Izmjene\\_zakona\\_o\\_sudu\\_61\\_04\\_-\\_eng.pdf](http://www.sudbih.gov.ba/files/docs/zakoni/en/Izmjene_zakona_o_sudu_61_04_-_eng.pdf)), which reformed the Criminal Division of the Court of Bosnia and Herzegovina into three sections, covering War Crimes (Section I), Organized Crime, Economic Crime and Corruption (Section II) and other crimes within the Court's jurisdiction (Section III); the law also created corresponding sections within the Appellate Division. See also the *Agreement between the High Representative and Bosnia Herzegovina* relating to the establishment of the Registry for Sections I and II of the Court of Bosnia and Herzegovina and the Special Department within the Prosecutor's Office, Sarajevo, 1 December 2004 (Official Gazette of BiH, 12/04). On the Special Department for War Crimes of the Prosecutors' Office, see the information and documents available at <http://www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=2&id=4&jezik=e>.

<sup>12</sup> I.e. the proceedings against Abduladhim Maktouf, which resulted in a decision convicting the accused of war crimes against civilians in July 2005: see Case KPŽ-32/05 *Prosecutor v. Maktouf*, Trial Panel, Section I, Decision of 1 July 2005. That conviction was subsequently partially revoked by the Appellate Panel on 24 November 2005 and a retrial before the Appellate Panel took place, resulting in conviction. On the proceeding before the Appellate Panel, see below, Section 6(a).

<sup>13</sup> OSCE, "War crimes cases started in January 2004 – April 2009" (above n. 10).

<sup>14</sup> On the ICTY Completion Strategy, see, generally, the summary available at <http://www.icty.org/sid/10016>, which also provides links to further documents (including the ICTY's Completion Strategy Reports submitted to the Security Council).

<sup>15</sup> The text of the Strategy is available at <http://www.adh-geneva.ch/RULAC/news/War-Crimes-Strategy-f-18-12-08.pdf>.

the Criminal Procedure Code was adopted by the Parliamentary Assembly. The law aims to implement the National War Crimes Prosecution Strategy by providing mechanisms for the allocation and transfer of prosecutions between the Court of Bosnia and Herzegovina and the judiciary of the Entities and the District of Brčko according to the gravity of the crimes in question.<sup>16</sup> The “most responsible perpetrators” will normally be prosecuted before the Court of Bosnia and Herzegovina.<sup>17</sup> A central register of all war crimes cases within BiH will be established at the level of the Court of Bosnia and Herzegovina and the Office of the Prosecutor of Bosnia and Herzegovina.<sup>18</sup>

## 4. ASSESSING THE IMPACT OF THE EUROPEAN CONVENTION UPON DOMESTIC PROSECUTIONS FOR WAR CRIMES

In assessing the impact of the European Convention on war crimes proceedings in BiH, a preliminary point which bears emphasizing is that, to date, there have been no decisions of the European Court concerning such proceedings.. The protections, including fair trial guarantees, afforded to defendants in the context of those trials have therefore never been the subject of scrutiny by the Court. Accordingly, the Court has had no opportunity to have any *direct* impact in the domestic legal system, in the sense of forcing the State to adopt measures in compliance with Article 46 of the Convention following a finding of a violation.

The lack of any decision of the European Court relating to war crimes trials in BiH could be interpreted as strong evidence of the impact of the Convention and the jurisprudence of the Court in BiH, insofar as it may be seen as indicating that the modifications to the Bosnian legal system following the Dayton Peace Agreement have in general resulted in that legal system in general complying with the requirements of the Convention; we will briefly return to the possible reasons for and causes of the absence of any such cases in the conclusions. However, the absence of any relevant decisions of

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<sup>16</sup> See *Law on Amendments to the Criminal Procedure Code of Bosnia and Herzegovina* (Official Gazette of BiH, 93/09, available at [http://www.sudbih.gov.ba/files/docs/zakoni/en/izmjena\\_zakona\\_o\\_krivicnom\\_postupku\\_-\\_93\\_09\\_-eng.pdf](http://www.sudbih.gov.ba/files/docs/zakoni/en/izmjena_zakona_o_krivicnom_postupku_-_93_09_-eng.pdf)).

<sup>17</sup> See the press release of the Ministry of Justice, 7 September 2009, available at <http://www.mpr.gov.ba/en/str.asp?id=403>.

<sup>18</sup> Ibid.

the European Court has certain consequences in terms of the methodology to be adopted in assessing the impact of the Convention and of the Court's jurisprudence. It is not possible to simply assess the impact of, and extent of compliance with, individual decisions of the European Court, as has been the approach adopted in other parts of the research conducted as part of the DOMAC project.<sup>19</sup> Rather, it is necessary to search beyond the decisions of the European Court for other, more *indirect*, influence exerted by the Convention and the jurisprudence of the Court.

On the one hand, the impact of the Convention can be seen in the extent to which new legislation adopted domestically has been designed to be Convention-compliant, as well as in the extent to which domestic legislation has been amended to deal with problems that have been identified in the course of domestic prosecutions. On the other hand, the Convention has also had a clear impact insofar as some domestic courts within BiH (in particular at the State level) have relied upon the relevant case-law of the European Court in resolving arguments of defendants who have complained of violations of their rights under the Convention, as rendered applicable by the BiH Constitution.

The impact of the Convention, from both perspectives, is clear. However, a number of points should be made. First, self-evidently, the impact of the Convention in either regard is not limited solely to prosecutions for war crimes, but applies far more generally in relation to the procedures applicable to the prosecution and trial of all crimes, and beyond. Second, the two indicators of the impact of the Court outlined above are, to a certain extent, inter-linked – in particular, the identification by the domestic courts of an issue relating to compliance with fair trial standards under the Convention in an individual case (whether or not concerning prosecutions of individuals for war crimes or other atrocities) may lead to the adoption of legislation amending the relevant problematic provisions of the law. This is so whether or not the provision identified has led to an acquittal or the quashing of a conviction.

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<sup>19</sup> See in particular S. Borelli, *Compliance with judgments of the European Court concerning serious violations of human rights committed by state agents and their impact on domestic investigations and prosecution* (DOMAC Report, forthcoming, 2010), examining the influence of decisions of the European Court in ensuring the effective investigation and prosecution of atrocities committed in the conflicts in Chechnya and Northern Cyprus, Turkey's conflict with the PKK and the Troubles in Northern Ireland.

## 5. THE IMPACT OF THE EUROPEAN CONVENTION UPON DOMESTIC LEGISLATION APPLICABLE TO THE PROSECUTION OF WAR CRIMES

Turning to the first area identified above for study of the *indirect* influence or impact of the European Convention – the adoption of Convention-compliant legislation or amendment of domestic legislation – a particularly striking example is provided by the adoption of the new Criminal Procedure Code, and to a lesser extent, of a new Criminal Code, in 2003. Given that the two Codes were adopted only a relatively short period after the entry into force of the Convention for BiH, their adoption cannot be attributed solely to the ratification of the Convention; rather, the influence of the Convention would appear to be indirect and derive from the Convention's status under the Constitution.

The draft Criminal Procedure Code was produced by a working group comprised of the most distinguished legal experts in the law of criminal procedure drawn from both the constituent Entities of BiH and the Brčko District; it was submitted to the BiH Council of Ministers in September 2002.<sup>20</sup> The Criminal Procedure Code envisaged a wholesale revision of the procedural rules relating to all criminal trials, adopting an approach which has been described as a “hybrid”, ‘adversarial’ or ‘mixed’ system”,<sup>21</sup> involving the elimination of the role of the investigative judge and a move towards a more adversarial trial format.<sup>22</sup>

Together with the new draft Criminal Code, the new draft Criminal Procedure Code was adopted by the BiH Council of Ministers on 19 December 2002. However, the Parliamentary Assembly of Bosnia and Herzegovina failed to proceed to enact the texts with sufficient speed. As a result of that delay, both texts were imposed by Decisions of the High Representative adopted on 24 January 2003 under the powers conferred upon

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<sup>20</sup> See the preamble to *Decision Enacting the Criminal Procedure Code of Bosnia and Herzegovina*, HR Decision 100/03, 24 January 2003 (Official Gazette of BiH, 3/03); see also OSCE, *Trial Monitoring Report on the Implementation of the New Criminal Procedure Code in the Courts of BiH*, 17 December 2004, at p. 1. The draft Criminal Code was drafted by the Ministry of Civil Affairs and Communications: see preamble to the *Decision Enacting the Criminal Code of Bosnia and Herzegovina*, HR Decision 101/03, 24 January 2003 (Official Gazette of BiH, 3/03).

<sup>21</sup> OSCE, *Trial Monitoring Report on the Implementation of the New Criminal Procedure Code in the Courts of BiH*, 17 December 2004, at p. 1.

<sup>22</sup> Ibid., at p. 2; see also p. 27.

him by the Dayton Peace Agreement.<sup>23</sup> Both codes entered into force on 1 March 2003.<sup>24</sup> During the course of 2003, new Criminal Procedure Codes, based on that applicable at State level, were adopted in each of the Entities.<sup>25</sup>

It is noteworthy that, in the preamble to the Decision imposing the new BiH Criminal Procedure Code, the High Representative stressed the need for

[...] criminal procedure at the state level of Bosnia and Herzegovina which shall be in conformity with modern internationally recognized standards in the field of criminal procedure and which shall comply with guarantees enshrined under the European Convention on Human Rights which itself forms part of the Constitution of Bosnia and Herzegovina and enjoys priority over all other law in Bosnia and Herzegovina.<sup>26</sup>

## (A) FAIR TRIAL GUARANTEES

The BiH Criminal Procedure Code as originally adopted contains provisions implementing many of the major fair trial guarantees contained in Article 6 of the European Convention.<sup>27</sup> Particular provisions give effect to:

- the right to a public hearing under Article 6(1) ECHR (see Articles 234 and 235 CPC);<sup>28</sup>
- the right to have judgment pronounced in public under Article 6(1) ECHR (see Article 286 CPC);<sup>29</sup>

<sup>23</sup> See the preamble to *Decision Enacting the Criminal Procedure Code of Bosnia and Herzegovina*, HR Decision 100/03, 24 January 2003 (Official Gazette of BiH, 3/03), annexing the Criminal Procedure Code; and the preamble to *Decision Enacting the Criminal Code of Bosnia and Herzegovina*, HR Decision 101/03, 24 January 2003 (Official Gazette of BiH, 3/03), annexing the Criminal Code. Both texts were subsequently adopted by the Parliamentary Assembly on 18/27 June 2003: see Official Gazette of BiH, 36/03 and 37/03. Both instruments have since been frequently amended, both by the Parliamentary Assembly, as well as by Decisions imposed by the High Representative, many of which have then been enacted by the Parliamentary Assembly.

<sup>24</sup> See art 451, Criminal Procedure Code and art 252, Criminal Code.

<sup>25</sup> OSCE, *Trial Monitoring Report on the Implementation of the New Criminal Procedure Code in the Courts of BiH*, 17 December 2004, at p. 1.

<sup>26</sup> Preamble, *Decision Enacting the Criminal Procedure Code of Bosnia and Herzegovina*, HR Decision 100/03, 24 January 2003 (Official Gazette of BiH, 3/03). In relation to the Criminal Code, the High Representative considered that it was necessary that "the criminal legislation standards existing in international law are incorporated into the criminal legislation of Bosnia and Herzegovina, which would ensure legal certainty and protection of human rights throughout Bosnia and Herzegovina": preamble, *Decision Enacting the Criminal Code of Bosnia and Herzegovina*, HR Decision 101/03, 24 January 2003 (Official Gazette of BiH, 3/03).

<sup>27</sup> In addition, provisions implementing other guarantees under the European Convention are also prominent, in particular those regulating deprivation of liberty under Art. 5 of the Convention.

<sup>28</sup> Art. 365 CPC provides that trials of juveniles are to be held in private.

- the right to trial within a reasonable time under Article 6(1) ECHR (see, e.g., Article 13 CPC);
- the presumption of innocence and the privilege against self-incrimination under Article 6(2) ECHR (see, e.g., Articles 3, 5, 78 CPC);
- the right of the accused to be informed promptly and in detail of the nature and cause of the accusation against him in a language which he or she understands under Article 6(3)(a) ECHR (see Articles 6, 8(2) and (3) CPC);
- the right to adequate time and facilities for the preparation of the defence under Article 6(3)(b) ECHR (see, e.g., Article 7(3) CPC);
- the right of the accused to defend himself in person or to legal representation of his own choosing under Art. 6(3)(c) ECHR (see Article 7(1) CPC; although cf. Article 45 CPC);
- the right of an accused to free representation if indigent under Article 6(3)(c) ECHR (see Articles 7(2) and 46 CPC);
- the right to examine or cross-examine witnesses under Article 6(3)(d) ECHR (see Article 262 CPC);
- the right to free assistance of an interpreter in court under Article 6(3)(e) ECHR (see Articles 8(2) and 78(2)(e) CPC); and
- the right to equality of arms (see Article 14 CPC).<sup>30</sup>

Although the Criminal Procedure Code, taken as a whole, generally reflects the requirements of the fair trial guarantees contained in the Convention, the modifications to the Code adopted in 2008 are of greater interest for present purposes.<sup>31</sup> Many of these modifications appear to have been intended to remedy problems which had arisen in the course of the first proceedings governed by the new Criminal Procedure Code and to

<sup>29</sup> See also Art. 286(4) CPC which makes clear that even if the public have been excluded from the trial, the verdict must be read in a public session.

<sup>30</sup> As noted below, Art. 14 CPC was subsequently substantially amended; for recognition of the principle of equality of arms by the Constitutional Court (albeit not in a war crimes case), see e.g. Case U 146/03, Ž.C, Constitutional Court of Bosnia and Herzegovina, decision of 26 March 2004.

<sup>31</sup> These modifications were introduced by the Law on Amendments to the Criminal Procedure Code of Bosnia and Herzegovina (Official Gazette of BiH, 58/08, not available online). See the unofficial consolidated version of the Criminal Procedure Code, available at [http://www.sudbih.gov.ba/files/docs/zakoni/en/Criminal\\_Procedure\\_Code\\_of\\_BH\\_-\\_consolidated\\_version\\_dec2009.pdf](http://www.sudbih.gov.ba/files/docs/zakoni/en/Criminal_Procedure_Code_of_BH_-_consolidated_version_dec2009.pdf).

ensure that the Code fully reflected the fair trial standards contained in the European Convention.

A particularly striking example is the amendment to Article 14 CPC, relating to the general principle of equality of arms. The European Court has held that the principle of equality of arms is “only one feature of the wider concept of fair trial by an independent and impartial tribunal”,<sup>32</sup> and is “inherent in the notion of fairness” under Article 6(1) of the Convention.<sup>33</sup> In general, according to the Court, “even in the absence of a prosecuting party, a trial would not be fair if it took place in such conditions as to put the accused unfairly at a disadvantage”.<sup>34</sup> Further, the Court has observed that it is

[...] a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.<sup>35</sup>

Article 14 CPC (entitled “Equality of Arms”), in the version originally adopted, simply provided that:

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

Although in part embodying certain key aspects of the European Court’s jurisprudence on equality of arms, the original formulation of Article 14 CPC clearly did not go far enough insofar as it only explicitly dealt with equality in the assessment of evidence. The

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<sup>32</sup> *Delcourt v. Belgium* (App. No. 2689/65), Judgment of 17 January 1970, ECHR Series A, No. 11, at para. 28.

<sup>33</sup> *Monnell and Morris v. United Kingdom* (App. Nos 9562/81; 9818/82), Judgment of 2 March 1987, ECHR Series A, No. 115 (1987), para. 62.

<sup>34</sup> *Delcourt v. Belgium* (above n. 32), at para. 31; *Monnell and Morris v. United Kingdom* (above n. 33), para. 62.

<sup>35</sup> See *Edwards and Lewis v. United Kingdom* (App. Nos. 39647/98 and 40461/98), Judgment of 24 October 2004 [GC]; ECHR Reports 2004-X, paras 46 and 48, approving the observations of the Chamber, judgment of 22 July 2003, para. 52; see also *Jasper v. United Kingdom* (App. No. 27052/95), ECHR, Judgment of 16 February 2000 [GC] (unreported), para. 51.

amendment adopted in 2008 appears substantially to address this shortcoming in the original formulation, by expanding the scope of the principle of equality of arms to all aspects of the trial. The amendment in question introduced a new sub-paragraph (1) (the previously existing paragraph becoming paragraph (2)) which provides:

The Court shall treat the parties and the defence attorney equally and shall provide each with equal opportunities to access evidence and to present evidence at the main trial.<sup>36</sup>

The new formulation appears to indicate a clear intent to bring domestic law in line with the requirements of Article 6 of the European Convention as interpreted by the European Court. That said, given that Article 6 of the Convention was in any case directly applicable under the Constitution and, accordingly, could be relied upon independently of Article 14 CPC, it is important not to over-state the importance of the deficiencies of the original formulation of Article 14.

Similarly, a number of modifications adopted in 2008 may be seen as designed to remove problems relating to the presumption of innocence and/or the privilege against self-incrimination. Paragraph 1 of Article 6 CPC (“Rights of a Suspect or Accused”), as originally adopted, provided, substantially reflecting the requirements of Article 6(3)(a) of the European Convention, that:

The suspect, at his first questioning, must be informed about the offense that he is charged with and grounds for suspicion against him.

In 2008, that provision was amended in order to give effect to the privilege against self-incrimination, adding the words “and that his statement may be used as evidence in further proceedings”.<sup>37</sup>

In parallel, Article 78(2) CPC, which stipulates the rights of which a suspect must be informed at the beginning of questioning, was amended. As originally adopted it listed:

- the right of the accused not to present evidence or answer questions;

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<sup>36</sup> Art. 14(1) CPC as added by Art. 2, Law on Amendments to the Criminal Procedure Code of Bosnia and Herzegovina (Official Gazette of BiH, 58/08).

<sup>37</sup> See Art. 6(1) CPC, as amended by Art. 2, Law on Amendments to the Criminal Procedure Code of Bosnia and Herzegovina (Official Gazette of BiH, 58/08).

- the right of the accused to retain a lawyer of his own choice who may be present during questioning;
- the right of the accused, under certain circumstances, to the provision of a lawyer at no cost;
- the right of the accused to comment on the charges against him, and to present all facts and evidence in his favor;
- the right of the accused to view any materials collected during the investigation which are in his favour; and
- the right to an interpreter at no cost if he does not understand the language used for questioning.

What was noticeably missing was any requirement to inform the accused that if he or she did respond to questions or made a statement, then such statements could be used against him at trial. That gap was remedied by the 2008 amendment, which added that, if a suspect commented upon the charges against him or put forward facts and evidence in his defence in the presence of his lawyer, that statement would be admissible as evidence and could be read out and used without his consent at trial.<sup>38</sup>

Other modifications undertaken in 2008, rather than aimed at remedying major problems with the Criminal Procedure Code, may be seen rather as designed to fine-tune imperfect pre-existing formulations so as to bring them more into line with the wording of the Convention. For instance, Article 6(1)(a) of the Convention refers to the right of an accused to be informed “in a language which he understands” of the charges against him, while Article 6(1)(e) provides for the right of the accused to the free assistance of an interpreter if he cannot understand or speak the language used in court”. Article 8(2) of the Criminal Procedure Code, as originally adopted provided that:

Parties, witnesses and other participants in the proceedings shall have the right to use *their own language* in the course of the proceedings.<sup>39</sup>

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<sup>38</sup> See Art. 78(2) CPC, as amended by Art. 2, Law on Amendments to the Criminal Code of Bosnia and Herzegovina, (Official Gazette of BiH, 58/08).

<sup>39</sup> Emphasis added.

The amendment adopted in 2008 deleted the reference to the party, witness' or other participants' "own language", and substituted instead a reference to their "native language or a language they understand".<sup>40</sup>

## (B) PRINCIPLE OF LEGALITY

Modifications have also been made to the BiH Criminal Code since its adoption in 2003, most relevantly for present purposes as regards the principle of legality. The Criminal Code, as originally adopted, contained provisions enshrining the principle of legality (*nullum crimen, nulla poena sine lege*) and non-retroactivity of criminal penalties, as embodied in Article 7 of the European Convention. Article 7 provides:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations.

The relevant provisions of the Criminal Code, as originally enacted (Articles 3 and 4), provided:

### *Article 3 – Principle of Legality*

- (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.

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<sup>40</sup> See Art. 8(2) CPC, as amended by Art. 2, Law on Amendments to the Criminal Code of Bosnia and Herzegovina, (Official Gazette of BiH, 58/08).

#### *Article 4 – Time Constraints Regarding Applicability*

- (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.

Although, to a large extent, those provisions transpose into BiH law the norm contained in Article 7, it is notable that, despite the reference in Article 3(2) of the Criminal Code to the fact that punishment may be imposed for conduct which was defined as criminal either by “[domestic] law or *international law*” (which parallels the wording of Article 7(1) of the Convention), the Criminal Code as originally enacted contained no provision directly corresponding to the “without prejudice” clause contained in Article 7(2) as regards trial and punishment of individuals for crimes under international law.

That situation was remedied by an amendment adopted in 2004, by which a new Article 4a was inserted in the Criminal Code.<sup>41</sup> That provision provides as follows:

#### *Article 4a – Trial and punishment for criminal offences pursuant to the general principles of international law*

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

As discussed further below, a number of individuals prosecuted for war crimes, crimes against humanity or genocide have attempted to challenge their convictions on the basis of violation of Article 7(1) of the European Convention on the grounds that they had been sentenced on the basis of the 2003 Criminal Code, rather than the Criminal Code of the SFRY which had been in force at the relevant time, and which, so they argued, provided for less strict penalties.

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<sup>41</sup> Added by Art. 2, Law on Amendments to the Criminal Code of Bosnia and Herzegovina (Official Gazette of BiH, 61/04), available at [http://www.sudbih.gov.ba/files/docs/zakoni/en/izmjene\\_krivicnog\\_zakona\\_61\\_04\\_-\\_eng.pdf](http://www.sudbih.gov.ba/files/docs/zakoni/en/izmjene_krivicnog_zakona_61_04_-_eng.pdf).

## 6. THE IMPACT OF THE CASE-LAW OF THE EUROPEAN COURT ON THE DECISIONS OF DOMESTIC COURTS

Given the direct applicability of the European Convention under domestic law, it is unsurprising that the jurisprudence of the European Court has been extremely influential in shaping the approach of the courts of BiH, not only with relation to prosecutions for war crimes and other atrocities, but also more generally.<sup>42</sup> Nevertheless, a study of domestic decisions delivered in the context of war crimes prosecutions reveals the full extent to which the European Convention has permeated the domestic legal system, or, at the least, the decisions of the Court of Bosnia and Herzegovina. The relevant decisions, as well as the issues involved, are numerous; an attempt will be made here to provide examples of only a few issues relating to fair trial which have provoked reference to the European Convention and the case-law of the European Court. The following subsection will then briefly discuss a number of cases which have considered challenges under Article 7 of the Convention to the application of the 2003 Criminal Code in prosecutions relating to war crimes committed prior to its entry into force.

### (A) THE INFLUENCE OF THE JURISPRUDENCE OF THE EUROPEAN COURT WITH REGARD TO THE RIGHT TO FAIR TRIAL

Particular issues have arisen in relation to measures adopted for the protection of witnesses. In the retrial of *Maktouf*, the Appellate Panel of the Court of Bosnia and Herzegovina concluded that, although the identity of one of the principal witnesses who had been a co-perpetrator of the alleged offences together with the accused had been concealed, that fact did not violate the right of the accused to a fair trial under Article 6.<sup>43</sup>

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<sup>42</sup> For instance, the Constitutional Court has essentially adopted the approach of the European Court in assessing whether a complaint of violation of the Convention or of the Constitution is manifestly ill-founded within the meaning of Article 16(6) of the New Amended Text of the Rules of Court, 19 December 2003 (Official Gazette of BiH, no. 2/04) (and see now Article 16(6) of the Rules of the Constitutional Court, 25 July 2005 (as amended 8 July 2008) (Official Gazette of BiH, nos. 60/05 and 64/08); see e.g. Case AP-1785/06 *Maktouf*, Constitutional Court of Bosnia and Herzegovina, decision of 30 March 2007, para. 30, citing *Vanek v. Slovakia* (App. No. 53363/99), judgment of 31 May 2005. Similarly, the Constitutional Court has taken an approach paralleling that of the European Court in relation to the quality of conclusions of the ordinary courts regarding the assessment of evidence, holding that it cannot interfere if the assessment does not seem to be evidently arbitrary: *Maktouf*, at para. 57; in this regard, it has followed the approach of the Human Rights Chamber: Case no. CH/01/4128, “*Trgosirovina Sarajevo (DDT)*” v. *Federation of Bosnia and Herzegovina*, Human Rights Chamber, Decision on Admissibility of 6 September 2000.

<sup>43</sup> See Case KPŽ-32/05 *Prosecutor v. Maktouf*, Appellate Panel, Decision of 4 April 2006, p. 12. The argument was not subsequently pursued as a separate ground of appeal before the Constitutional Court (see Case AP-1785/06 *Maktouf*, Constitutional Court of Bosnia and Herzegovina, decision of 30 March 2007).

The Appellate Panel emphasized that, although the identity of the witness had been withheld from the general public, the accused and his defence team had been fully aware of his identity, and the witness in question had testified both before the War Crimes Panel and before the Appellate Panel. In support of its conclusion, the Appellate Panel referred to a decision of the BiH Constitutional Court.<sup>44</sup> The relevant decision of the Constitutional Court had in turn referred to the jurisprudence of the European Court in order to conclude that reliance by a court on the evidence of anonymous witnesses in convicting a defendant would only give rise to an issue under Article 6 where the verdict was exclusively based on testimony of anonymous witnesses and where the accused or his counsel had not been given the possibility of challenging the testimony of anonymous witnesses during the proceedings.<sup>45</sup>

Article 6(3)(c) of the European Convention stipulates the right of anyone charged with a criminal case “to defend himself in person or through legal assistance of his own choosing”. Although Article 7 of the Criminal Procedure Code provides that an accused has “a right to present his own defense or to defend himself with the professional assistance of a defense attorney of his own choice”, that right is qualified by Article 45 of the Criminal Procedure Code, which makes provision for various instances in which a defendant must be represented by defence counsel, and stipulates the circumstances under which the court may appoint a defence attorney for a defendant.

In the course of the trial of *Radovan Stanković*, the War Crimes Panel refused the request of the accused that he should be permitted to defend himself in person and appointed defence counsel on his behalf.<sup>46</sup> In its verdict convicting the accused of crimes against humanity, the War Crimes Panel further explained the basis of the decision. It noted that the accused had no professional qualifications of the type necessary to defend himself adequately in such a complex case and that, according to the jurisprudence of the European Court, there was no violation of Article 6 of the Convention where a court appointed a defence attorney against the will of the accused “if

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<sup>44</sup> Ibid., referring to Case No. AP-506/04 *Kopić*, BiH Constitutional Court, Judgment of 25 September 2005.

<sup>45</sup> Ibid., paras 23-25, citing *Dooson v. The Netherlands* (App. No. 20524/92), Judgment of 26 March 1996, ECHR, Reports 1996-II and *Kostovski v. The Netherlands* (App. No. 11454/85), Judgment of 20 November 1999, ECHR Series A, No. 166. See also Case AP-2238/05 *Tomić*, BiH Constitutional Court, Decision of 17 November 2006, paras 19-22.

<sup>46</sup> Case X-KRŽ-05/70 *Radovan Stanković*, War Crimes Panel, decision of 14 November 2006, p. 13.

it is done in the interest of justice and adequate defence".<sup>47</sup> Specifically, the Panel made reference to the decision of the European Court in *Croissant v. Germany*,<sup>48</sup> in which the Court had held that a requirement under domestic law that an accused be represented by counsel at certain stages in the proceedings was not inconsistent with Article 6,<sup>49</sup> and that the right to be represented by a lawyer of his own choosing could not be considered to be absolute and was "necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them."<sup>50</sup> Having regard to the circumstances of the case, including the need to protect the right of the accused to an adequate defence, as well as the need to protect vulnerable witness-victims, the Panel concluded that the appointment of counsel to represent the accused had been necessary and did not breach Article 6.<sup>51</sup> The Appellate Panel subsequently rejected the accused's appeal on that ground and upheld the reasoning of the War Crimes Panel, although it did not explicitly refer to the jurisprudence of the European Court.<sup>52</sup>

A number of other issues implicating Article 6 arose during the same trial. For instance, following the disruptive conduct of the accused at preliminary hearings, his refusal to attend hearings, and his threat that, if brought before the Court by force, he would attend wearing only his underwear, the War Crimes Panel ordered on 4 July 2006 that the trial should proceed without the presence of the accused (although his defence counsel were present). The accused was kept informed of the course of the proceedings and was provided with recordings of the hearings every day. The Panel, relying on the jurisprudence of the European Court on Article 6 of the Convention and the prohibition of trials *in absentia*, held that that order did not breach the right to a fair trial of the accused.<sup>53</sup> An appeal based on the absence of the accused from the trial was rejected by the Appeal Panel, *inter alia*, on the basis that the prohibition of trial *in absentia* contained in Article 247 CPC was restricted to situations where it was not possible to

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<sup>47</sup> Ibid., p. 13.

<sup>48</sup> *Croissant v. Germany* (App. No. 13611/88), Judgment of 25 September 1992, ECHR, Series A, No. 237-B.

<sup>49</sup> Ibid., para. 27.

<sup>50</sup> Ibid., para. 29.

<sup>51</sup> Case X-KRŽ-05/70 *Radovan Stanković*, War Crimes Panel, decision of 14 November 2006, pp. 13-14.

<sup>52</sup> Case X-KRŽ-05/70 *Radovan Stanković*, Appellate Panel, decision of 28 March 2007, p. 11.

<sup>53</sup> Case X-KRŽ-05/70 *Radovan Stanković*, War Crimes Panel, decision of 14 November 2006, p. 14-15.

secure the attendance of the accused at the trial because he was hiding or on the run, or where there had been difficulties in informing the accused of the proceedings; according to the Appeal Panel, the prohibition had no application to situations in which the accused was in custody but refused to attend trial.<sup>54</sup> It likewise held that continuation of the trial in the absence of the accused under such circumstances was compatible with Article 6 of the European Convention (although it did not explicitly refer to the case-law of the European Court in that regard).

Serious issues relating to the right to fair trial have also arisen under the legislation governing transfer of cases to the Bosnian criminal justice system from the ICTY (the so-called “Law on Transfer”).<sup>55</sup> Pursuant to the legislation in question, the domestic BiH courts are permitted to accept as proven facts held to be established by the ICTY in its judgments,<sup>56</sup> as well as to admit into evidence materials collected by the ICTY in accordance with its Statute and Rules of Procedure,<sup>57</sup> including testimony given by witnesses before the ICTY.<sup>58</sup> As for the latter power, the right to admit ICTY evidence is expressly stipulated to be without prejudice to the defendant’s right to request the attendance of the witnesses for cross-examination.<sup>59</sup> Further, pursuant to Article 3(2) of the Law on Transfer, a conviction may not be based “solely or to a decisive extent on the prior statements of witnesses who did not give oral evidence at trial”.<sup>60</sup>

Both of those issues arose in the trial of *Gojko Janković* before the War Crimes Panel, a case which had been referred to the domestic BiH courts by the ICTY.<sup>61</sup> As for the acceptance of findings of fact made by the ICTY pursuant to Article 4 of the Law on Transfer, the accused objected to a number of specific matters upon which the prosecution sought to rely. In an interlocutory ruling, the Panel upheld a number of those objections on the basis that non-acceptance of some of the findings of fact made by the ICTY was necessary in order to protect the right of the accused to be presumed innocent

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<sup>54</sup> Case X-KRŽ-05/70 *Radovan Stanković*, Appellate Panel, decision of 28 March 2007, p. 8.

<sup>55</sup> Law on Transfer of Cases from the ICTY to the Prosecutor’s Office of BiH and the use of evidence collected by ICTY in proceedings before the courts in BiH (Official Gazette of BiH, 61/04) (as subsequently amended), available at [http://www.sudbih.gov.ba/files/docs/zakoni/en/BH\\_LAW\\_ON\\_TRANSFER\\_OF\\_CASES\\_-\\_Consolidated\\_text.pdf](http://www.sudbih.gov.ba/files/docs/zakoni/en/BH_LAW_ON_TRANSFER_OF_CASES_-_Consolidated_text.pdf).

<sup>56</sup> Ibid., Art. 4.

<sup>57</sup> Ibid., Art. 3.

<sup>58</sup> Ibid., Art. 5.

<sup>59</sup> Ibid., Art. 5(3).

<sup>60</sup> Ibid., Art. 3(2).

<sup>61</sup> Case X-KRŽ-05/161 *Gojko Janković*, War Crimes Panel, Decision of 16 February 2007.

and his right to a fair trial under Article 6 of the European Convention.<sup>62</sup> As the Panel subsequently explained in its convicting the accused, the facts established by the ICTY which it had refused to accept as established were

[...] too specific and too closely connected with the individual factual allegations against the Accused and as such tend to indirectly attest to his criminal responsibility. For this reason, and in order not to infringe on the defendant's right to a fair trial, the Panel does not admit these facts into evidence [...].<sup>63</sup>

As for the admission of evidence of witnesses, the prosecution had filed a motion requesting that statements of certain witnesses made before the ICTY, who were not available to give evidence before the domestic courts, should be read out in court. The defence objected on the basis that, pursuant to Article 6(3)(d) of the European Convention, the accused had the right to have the witnesses against him cross-examined at a public trial and to challenge that evidence. The War Crimes Panel upheld the prosecution's motion in part, relying on the express terms of the Law on Transfer, which it held constituted *lex specialis* as compared to the BiH Criminal Procedure Code. However, the Panel recognized that, even if such evidence could be admitted under either the BiH Criminal Procedure Code or the Law on Transfer, it was still subject to evaluation “[...] for fairness, reliability, authenticity and probity as defined in the overriding requirements of the European Convention which is directly applicable before this Court.”<sup>64</sup> In that regard, the Panel noted that its task under the European Convention was to ascertain whether “the proceedings in their entirety (*taken as a whole*), including the way in which evidence was taken, were fair” and that the Law on Transfer did not remove the obligation of the Panel to assure fairness in the proceedings.<sup>65</sup>

The Panel, having noted that Article 6(3)(d) of the Convention guaranteed a defendant the right to cross-examination of witnesses against him or her and the right to secure attendance of witnesses under condition of equality with the other side, went on to refer to various decisions of the European Court holding that the right to a fair trial included

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<sup>62</sup> See *ibid.*, p. 19, referring to the Panel's earlier written decision of 4 August 2006 (unpublished).

<sup>63</sup> Case X-KRŽ-05/161 *Gojko Janković*, War Crimes Panel, Decision of 16 February 2007, p. 20.

<sup>64</sup> *Ibid.*, p. 23.

<sup>65</sup> *Ibid.*, p. 23.

the right to be confronted with witnesses and the evidence at a public hearing and the right to have a meaningful opportunity to challenge that evidence or cross-examine the witnesses.<sup>66</sup> The Panel continued:

[...] in principle, all evidence relied on by the prosecution must normally be produced in the presence of the Accused at a public hearing with a view to adversarial argument. However, the use as evidence of statements obtained at the stage of the police inquiry and the judicial investigation (in the same case) is not in itself inconsistent with Article 6(3)(d) ECHR, provided that the rights of the Defendant have been respected.

As a rule these rights require that the defendant be given an adequate and proper opportunity challenge and question a witness against either when he was making his statements or at a later stage of the proceedings [...] However, Article 6 ECHR does not grant the accused an unlimited right to secure appearance of witnesses in Court.

Problems will therefore arise if the Prosecution introduces written statements by a person who does not appear as a witness in the main trial and the Defence wants to cross-examine the witness. Only exceptional circumstances will permit the prosecution to tender into evidence statements from the witness that the Accused has been unable to cross-examine. The general principle is therefore that the Accused persons must be allowed to call or examine any witness whose testimony they consider relevant to their case, and must be able to examine any witness who is called, or whose evidence is relied, by the Prosecutor.

The European Court of Human Rights will review whether the use of evidence accepted in violation of the rights of the Accused deprived him of a fair trial. In case the testimony of a witness is either solely or to the decisive extent the sole basis of a conviction of the Accused and neither at the stage of the investigation nor during the trial the applicant

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<sup>66</sup> Ibid., p. 23, citing *Barberà, Messegué and Jabardo v. Spain* (App. No. 10590/83), Judgment of 6 December 1988, ECHR, Series A, No. 146; *Asch v. Austria* (App. No. 12398/86), Judgment of 26 April 1991, ECHR, Series A, No. 203; *Lüdi v. Switzerland* (App. No. 12433/86), Judgment of 15 June 1992, ECHR, Series A, No. 238; and *Luca v. Italy* (App. No. 33354/96), Judgment of 27 February 2001, ECHR Reports 2001-II.

was able to (cross-)examine or have examined the witness concerned, the lack of any confrontation will deprive him in certain respects of a fair trial [...].<sup>67</sup>

On the basis of that synthesis of the approach of the European Court to the general right to a fair trial and the specific right to examine or have examined witnesses under Article 6(3)(d), the War Crimes Panel concluded that the statement of a witness who had alleged in her testimony before the ICTY that she had been raped by the accused could not be admitted.<sup>68</sup> The Panel reasoned that, in the circumstances, it would have been impermissible to admit her earlier testimony as evidence, given that the accused would not have a chance to cross-examine her and her evidence would have been the sole evidence against the accused in relation to the alleged crime.<sup>69</sup>

Other statements which the Prosecution sought to rely upon had been given by witnesses in the course of proceedings before the ICTY in which the accused had originally been a co-defendant, and which had involved facts closely related to those for which the accused was on trial before the War Crimes Panel. The indictment against the accused before the ICTY had subsequently been severed for separate trial, and his case had then been transferred to the domestic BiH courts. The Panel ruled that statements made by witnesses at the trial before the ICTY of the accused's former co-defendants were inadmissible, since the accused was not able to cross-examine the witnesses, while his co-defendants had had such an opportunity and might have tried to exculpate themselves by incriminating the accused.<sup>70</sup> On the other hand, other statements which did not suffer from the same problems, and were corroborated by other evidence, were ruled to be admissible, despite the fact that the accused was not in a position to be able to cross-examine the witnesses.<sup>71</sup>

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<sup>67</sup> Case X-KRŽ-05/161 *Gojko Janković*, War Crimes Panel, Decision of 16 February 2007, pp. 23-24, citing *Delta v. France* (App. No. 11444/85), Judgment of 19 December 1990, ECHR Series A, No. 191; *Windisch v. Austria* (App. No. 12489/86), Judgment of 27 September 1990, ECHR Series A, No. 186; and *Saidi v. France* (App. No. 14647/89), Judgment of 20 September 1993, ECHR Series A, No. 261-C.

<sup>68</sup> Case X-KRŽ-05/161 *Gojko Janković*, War Crimes Panel, Decision of 16 February 2007, p. 25.

<sup>69</sup> *Ibid.*, p. 25.

<sup>70</sup> *Ibid.*, p. 25.

<sup>71</sup> *Ibid.*, p. 26. The Appellate Panel upheld and endorsed the ruling of the War Crimes Panel in this regard: see Case X-KRŽ-05/161 *Gojko Janković*, Appellate Panel, Decision of 23 October 2007, p. 7.

## (B) THE APPLICATION OF ARTICLE 7 IN RELATION TO PROSECUTIONS OF WAR CRIMES

As noted above, a number of prosecutions for war crimes applying the 2003 BiH Criminal Code have raised issues relating to the compatibility of a prosecution based on a subsequent law with the principle of legality and the principle of non-retroactivity of criminal sanctions (*nullum crimen, nullem poena sine lege*) contained in Article 7 of the European Convention.

The decision of the BiH Constitutional Court in *Maktouf* arose out of the first prosecution for war crimes brought before the War Crimes Panel of the Court of Bosnia and Herzegovina.<sup>72</sup> The accused had been convicted of the offence of war crimes against civilians under Article 173(1)(e) of the 2003 Criminal Code by both the War Crimes Panel of the Court of Bosnia and Herzegovina,<sup>73</sup> and, following the partial quashing of that decision,<sup>74</sup> upon retrial before the Appellate Panel.<sup>75</sup> Both the War Crimes Panel and the Appellate Panel rejected the arguments of the accused based upon Article 7 of the European Convention. Upon his further appeal to the Constitutional Court, the defendant complained, *inter alia*, that the 2003 Criminal Code had been applied, rather than the relevant provisions of the Criminal Code of SFRY, which had been applicable at the time of commission of the offence for which he had been convicted, and which, so he claimed, had provided for a more lenient sentence. He further argued that the difference in the rules applicable at the level of the State and of the Entities, which applied the SFRY Criminal Code, had resulted in discrimination against him.<sup>76</sup>

The Constitutional Court first made a number of general observations as to the scope of application of Article 7 of the European Convention. It noted, in particular, that the term “criminal offence” was to be understood as closely connected to the term “criminal charge” in Article 6 of the Convention; that Article 7 applied also to

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<sup>72</sup> Case AP-1785/06 *Maktouf*, Constitutional Court of Bosnia and Herzegovina, decision of 30 March 2007.

<sup>73</sup> Case KPŽ-32/05 *Prosecutor v. Maktouf*, War Crimes Panel, Decision of 1 July 2005.

<sup>74</sup> Case KPŽ-32/05 *Prosecutor v. Maktouf*, Appellate Panel, Decision of 4 November 2005.

<sup>75</sup> See Case KPŽ-32/05 *Prosecutor v. Maktouf*, Appellate Panel, Decision of 4 April 2006.

<sup>76</sup> Case AP-1785/06 *Maktouf*, Constitutional Court of Bosnia and Herzegovina, decision of 30 March 2007, para. 12; see also para. 60; according to the first instance decision of the War Crimes Panel in *Vuković*, the Criminal Code of the SFRY had been in force until 20 November 1998 in the Federation of BiH, until 31 July 2000 in Republica Srpska and until 2001 in Brčko District: see Case X-KRŽ-06/217 *Radmilo Vuković*, decision of 16 April 2007, p. 13. For discussion by the Appellate Panel of the applicant’s arguments in this regard, see Case KPŽ-32/05 *Prosecutor v. Maktouf*, Appellate Panel, Decision of 4 April 2006, pp. 16-18.

administrative or disciplinary decisions falling within the scope of Article 6; that the term “penalty” was to be interpreted autonomously in order to ensure effective protection; and that the penalty had to be imposed following conviction for a “criminal offence”.<sup>77</sup> Having noted that the principle enshrined in Article 7 was “one of the fundamental factors of the rule of law” and that it had “a prominent place” within the system of protection of rights under the European Convention, the Constitutional Court stated that the provision “ought to be interpreted and applied in a way providing for a successful protection against arbitrary prosecution, conviction and punishment”.<sup>78</sup> It then referred to jurisprudence of the European Court to the effect that the scope of Article 7 was not limited to prohibition of a retroactive application of the criminal law to the detriment of individuals, but more generally embodied the principles that the existence of a criminal offence or a punishment can only be prescribed by law (*nullum crimen, nulla poena sine lege*) and that provisions of the criminal law should not be interpreted extensively against an accused.<sup>79</sup>

The accused’s argument that the sanctions foreseen by the SFRY Criminal Code had been more lenient than those under the 2003 BiH Criminal Code was based on the fact that the relevant provision of the former had provided for the death penalty in relation to the most serious instances of war crimes against civilians, and for a maximum period of only 15 years imprisonment in relation to less serious offences.<sup>80</sup> The accused noted that, although the death penalty clearly constituted a more serious penalty than the punishment of ten years or long-term imprisonment foreseen under the 2003 Criminal Code, the death penalty had in fact been abolished in BiH in 1998 and, as a result, the sanctions under the law previously applicable had in fact been more lenient. In that regard, the Court commented that:

[...] it is clear that a sanction cannot be separated from the totality of goals sought to be achieved by the criminal policy at the time of application of the law.

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<sup>77</sup> Case AP-1785/06 *Maktouf*, Constitutional Court of Bosnia and Herzegovina, decision of 30 March 2007, para. 61.

<sup>78</sup> Ibid., para. 62.

<sup>79</sup> Ibid., para. 63, citing *Kokkinakis v. Greece* (App. No. 14307/88), Judgment of 25 May 1993, ECHR Series A, No. 260-A, para. 52.

<sup>80</sup> Case AP-1785/06 *Maktouf*, Constitutional Court of Bosnia and Herzegovina, decision of 30 March 2007, para. 68.

In this context, the Constitutional Court holds that it is simply not possible to “eliminate” the more severe sanction under both earlier and later laws, and apply only other, more lenient, sanctions, so that the most serious crimes would in practice be left inadequately sanctioned.<sup>81</sup>

The Court then turned to examine the exception to the general principles contained in Article 7(1) of the European Convention constituted by the “without prejudice” clause contained in Article 7(2) of the Convention. In that regard, the Constitutional Court had regard to the text of the BiH Constitution, which itself, in its Article III(3)(b), stipulates that “the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities”, and expressed the view that those general principles include those contained in the Statute of the ICTY.<sup>82</sup> The Court next observed that the Constitution was itself part of an international agreement, the result of which was that international law had a special position within the BiH legal system and that instruments such as the Genocide Convention, the four 1949 Geneva Conventions and the 1977 Additional Protocols “have a status equal to that of constitutional principles and are directly applied in Bosnia and Herzegovina”.<sup>83</sup>

The Constitutional Court reasoned that Article 7(1) of the European Convention was limited to the situation in which an individual was convicted of a criminal offence, and that it “prohibits neither the retrospective application of laws nor does it exclude the *non bis in idem* principle”.<sup>84</sup> It further noted that, given that the appeal was concerned with offences primarily under international law and not with “the application of one or another criminal law, irrespective of their contents or stipulated sanctions”, it was relevant that Article 7(1) of the Convention referred to conviction for acts which had not been criminalized “under national or international law” at the time they were committed.<sup>85</sup> In that regard, the Constitutional Court emphasized that the language of “general principles of law recognized by civilized nations” contained in Article 7(2) of the

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<sup>81</sup> Ibid., paras. 68-69.

<sup>82</sup> Ibid., para. 70.

<sup>83</sup> Ibid., para. 71; in that regard, in support the Court noted that the SFRY had been party to all those instruments and that Bosnia had succeeded to them upon its independence.

<sup>84</sup> Ibid., para. 72.

<sup>85</sup> Ibid., para. 73.

Convention derived from Article 38 of the Statute of the International Court of Justice, enumerating the formal sources of international law. As a consequence, the Constitutional Court held that the standards in question had to be sought on the international plane, rather than within the domestic legal framework.<sup>86</sup>

Although acknowledging that the *travaux préparatoires* of the European Convention indicated that Article 7(2) had been adopted with the particular aim of permitting the passing of domestic legislation retroactively criminalizing specific conduct in the aftermath of the Second World War (in particular, conduct amounting to war crimes, treason and collaboration with enemy), the Constitutional Court held that the wording of Article 7 was not to be read in a restrictive fashion and had to be “construed dynamically so to encompass other acts which imply immoral behavior generally recognized as criminal according to national laws”.<sup>87</sup>

As a consequence, the Constitutional Court was of the view that application of the 2003 Criminal Code fell within the exception constituted by Article 7(2) of the Convention, given that the conduct in question clearly constituted “crimes according to international law”.<sup>88</sup> In that regard, it made reference to the decision of the European Court in *Naletilić v. Croatia*, in which the applicant, who had been indicted before the ICTY on counts of crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws and customs of war, had attempted to resist his transfer from Croatia to the ICTY for trial.<sup>89</sup> The applicant in that case had, *inter alia*, relied on Article 7 of the Convention and the fact that, if convicted, he risked receiving a heavier punishment from the ICTY than he might have received if he had been tried and convicted by the Croatian courts. In finding the applicant’s complaint in that regard to be manifestly ill-founded, the European Court had very briefly concluded that:

[...] even assuming Article 7 of the Convention to apply to the present case, the specific provision that could be applicable to it would be paragraph 2 rather than paragraph 1 of Article 7 of the Convention.

<sup>86</sup> Ibid., para. 74.

<sup>87</sup> Ibid., para. 75.

<sup>88</sup> Ibid., para. 76.

<sup>89</sup> Ibid., citing *Naletilić v. Croatia* (App. No. 51891/99), decision on admissibility of 4 May 2000; ECHR Reports 2000-V.

This means that the second sentence of Article [7(1)] of the Convention invoked by the applicant could not apply.<sup>90</sup>

In conclusion, the Constitutional Court held that, in the circumstances, and having regard to Article 4(a) of the Criminal Code, the application of the 2003 Criminal Code in the applicant's case had not constituted a violation of Article 7(1) of the European Convention.<sup>91</sup>

As for the argument alleging discrimination on the basis that the Entity courts were still applying the SFRY Criminal Code to prosecutions before them (on the basis that it was the legislation in force at the time at which the acts in question had been committed), the Constitutional Court held that the defendant's claim was misconceived. The Court reasoned that the 2003 Criminal Code was constitutional, and the mere fact that other laws were being applied by Entity courts did not render its application in prosecutions for war crimes at the State level a difference in treatment in violation of Article 14 of the Convention; rather, it would have been for the Entity courts to apply the BiH Criminal Code so as to ensure uniformity.<sup>92</sup>

Similar arguments based on Article 7 of the European Convention have been put forward in a large number of other cases, both before and after the decision of the Constitutional Court in *Maktouf*. All such arguments have been rejected.<sup>93</sup> Recently, in *Stupar and Others*, the applicants, who had been charged with genocide, argued that the

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<sup>90</sup> Ibid., para. 2.

<sup>91</sup> Ibid., para. 78.

<sup>92</sup> Ibid., paras. 89-92.

<sup>93</sup> See e.g. Case X-KRŽ-05/16 *Dragoje Paunović*; War Crimes Panel, decision of 26 May 2006; and Appellate Panel, decision of 27 October 2006, pp. 8-9; Case X-KRŽ-05/165 *Nenad Tanasković*, War Crimes Panel, decision of 29 September 2006; Appellate Panel, decision of 26 March 2007, pp. 34-36; Case X-KRŽ-05/70 *Radovan Stanković*, War Crimes Panel, decision of 14 November 2006, pp. 31-34; Appellate Panel, decision of 28 March 2007, pp. 13-14; Case X-KRŽ-05/42 *Nikola Andrun*, War Crimes Panel, decision of 14 December 2006, pp. 38-40; Appellate Panel, decision of 19 August 2009, pp. 40-41; Case X-KRŽ-05/51 *Dragan Damjanovic*, War Crimes Panel, decision of 15 December 2006, pp. 55-59; Appellate Panel, Decision of 13 June 2007, pp. 12-13; Case X-KRŽ-05/161 *Gojko Janković*, War Crimes Panel, Decision of 16 February 2007, pp. 32-33; Appellate Panel, Decision of 23 October 2007, p. 13; and Case X-KRŽ-06/217 *Radmilo Vuković*, War Crimes Panel, decision of 16 April 2007 (upon retrial before the Appellate Panel the point appears not to have been pursued: see Appellate Panel, Decision of 13 August 2008). See also the decision in Case X-KR-08/549-1 *Damir Ivanković*, War Crimes Panel, Decision of 2 July 2009, where the accused had pleaded guilty to crimes against humanity. The Panel noted that crimes against humanity had not been explicitly criminalised under the Criminal Code of the SFRY, but held that, in light of Article 4a of the Criminal Code and Article 7 ECHR and the fact that crimes against humanity had constituted a criminal offence at the relevant time (implicitly under international law), it was sufficient that the offence was criminalized in the Criminal Code of Bosnia; see similarly Case X-KR-06/200-1 *Dušan Fuštar*, War Crimes Panel, Decision of 21 April 2008, p. 9. In a number of those decisions, reference was made to the later decisions of the European Court in relation to Article 7, including *Karmo v. Bulgaria* (App. No. 76965/01), ECHR, decision on admissibility of 9 February 2006 (unreported) and *Kolk and Kislyiy v. Estonia* (App. No. 23052/04 and 4018/04), decision on admissibility of 1 January 2005, ECHR Reports 2006-I.

Criminal Code of the SFRY (which had provided for a punishment consisting of either the death penalty – subsequently abolished in BiH – or 5 years imprisonment, upon conviction for genocide), should have been applied instead of the 2003 BiH Criminal Code (which foresees a minimum penalty of ten years imprisonment or long-term imprisonment for the same offence).<sup>94</sup> The reasoning of the War Crimes Panel in *Stupar*, although containing many of the same elements as that of the Constitutional Court in *Maktouf*, is far more incisive, and relies far more explicitly on Article 4a of the Criminal Code as legitimating the application of later laws criminalizing international crimes.<sup>95</sup> Having referred to the *nullum crimen* principle contained in Article 3(2) of the 2003 BiH Criminal Code, the Panel noted that it was beyond doubt that the law of the SFRY had imposed criminal liability for genocide, and that the issue was rather whether the Criminal Code of the SFRY should be applied as being more lenient than the 2003 BiH Criminal Code. In that regard, it observed:

Nonetheless, Article 4a) of the CC of BiH speaks of “general principles of international law”. As neither international law nor the European Convention have an identical term, this term represents the combination of “principles of international law” on the one hand, as recognized by the UN General Assembly and International Law Commission, and “general principles of law recognized by the community of nations” contained in the Statute of the International Court of Justice and Article 7(2) of the European Convention. Principles of international law, as recognized in the Resolution of the General Assembly No. 95(1) (1946) and International Law Commission (1950) pertain to the “Charter of the Nuremberg Trial and the judgment of the Tribunal”. “Principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal” were adopted in 1950 by the International Law Commission and submitted to the General Assembly. Principle I reads: “Any person who commits an act which constitutes a crime under international law is

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<sup>94</sup> Case X-KRŽ-05/24 *Prosecutor v. Miloš Stupar and Others (“Kravice”)*, War Crimes Panel, Decision of 29 July 2008.

<sup>95</sup> Ibid., pp. 185-187. See also the discussion of Article 7 ECHR in relation to the applicability of the doctrine of command responsibility under customary international law, ibid., at pp. 139-140, citing, inter alia *Strelitz, Kessler and Krenz v. Germany* (Apps. Nos. 34044/96, 35532/97 and 44801/98), Judgment of 22 March 2001 [GC]; ECHR Reports 2001-II.

responsible therefore and liable to punishment.” Principle II provides: “The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.” Thus, regardless of whether we view it from the customary international law point of view or the “principles of international law” viewpoint, there is no doubt that genocide constituted a crime in the period relevant to the Indictment, that is, the principle of legality has been satisfied.<sup>96</sup>

The Panel then went on to discuss the extent to which crimes under international law could nevertheless be tried on the basis of subsequently enacted legislation by way of exception to the *nullum crimen* principle contained in Article 3 of the Criminal Code and the principle contained in Article 4 that the law in force at the time of the conduct in question governs criminal liability; it observed:

Legal grounds for trial and punishment for criminal offenses under the general principles of international law are provided for in Article 4a [...] which prescribes that Articles 3 and 4 of the Criminal Code of BiH shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law. This Article took over the provisions of Article 7(2) of the European Convention in their entirety and allows for exceptional derogations from the principles set forth in Article 4 of the Criminal Code of BiH, as well as derogations from the mandatory application of a more lenient law in the proceedings for a criminal offense under international law, such as the proceedings against the Accused, because these charges specifically include violation of the rules of international law. In fact, Article 4a of the Law on Amendments to the BiH Criminal Code is applied to all criminal offenses falling within crimes against humanity and values protected by international law, because those offenses (including the offense of Genocide) are contained in Chapter XVII of the BiH Criminal

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<sup>96</sup> Case X-KRŽ-05/24 *Prosecutor v. Miloš Stupar and Others (“Kravice”)*, War Crimes Panel, Decision of 29 July 2008, p. 186.

Code, titled as Crimes against Humanity and Values Protected by International Law. The provisions concerning the crime of Genocide have been accepted as part of the customary international law and they constitute a non-derogating provision of international law.<sup>97</sup>

The Panel then analysed the relationship between Articles 3, 4 and 4a of the Criminal Code and Article 7 of the Convention. In that regard, it observed:

[...] the principle of legality under Article 3 of the CC BiH is included in the first sentence of Article 7(1) of the European Convention, while the second sentence of Article 7(1) of the European Convention bans imposition of a heavier penalty than the one that was applicable at the time the criminal offense was committed. Therefore, this provision bans imposition of a heavier penalty but it does not stipulate a mandatory application of a more lenient law to the perpetrator as compared to the punishment that was applicable at the time of commission of the criminal offense. However, Article 7(2) of the European Convention contains an exception to paragraph (1) allowing for the trial and punishment of any person for any act or omission which, at the time when it was committed or omitted, was criminal according the general principles of law recognized by civilized nations. The same principle is embodied in Article 15 of the International Covenant on Civil and Political Rights. This exception has been incorporated with a specific objective to allow for application of national and international war crimes legislation which came into effect during and after the World War II. The case law of the ECHR [...] has accordingly emphasized the applicability of paragraph (2) rather than paragraph (1) of Article 7 of the European Convention when dealing with these offenses, additionally warranting the application of Article 4a of the Law on Amendments to the Criminal Code of BiH in these cases.<sup>98</sup>

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<sup>97</sup> Ibid.

<sup>98</sup> Ibid., citing *Naletilić v. Croatia* (above n. 89), and *Kolk and Kislyiy v. Estonia* (above n. 93).

Having briefly referred to and quoted from the decision of the Constitutional Court in *Maktouf*,<sup>99</sup> the Panel concluded that

[...] the principle of mandatory application of a more lenient law is excluded in prosecuting those criminal offenses which at the time of their commission were absolutely foreseeable and generally known to be in contravention of general rules of international law.<sup>100</sup>

The reasoning underlying the War Crimes Panel's decision in *Stupar*, in particular its reliance on Article 4a of the BiH Criminal Code, was subsequently criticised by the Appellate Panel in a decision delivered on 9 September 2009 following an appeal by the accused.<sup>101</sup>

As to the issues raised under Article 7 of the Convention, the Appellate Panel held that the trial court had erred in relying upon Article 4a of the 2003 BiH Criminal Code in order to justify application of the penalties applicable to genocide under the 2003 BiH, Criminal Code, rather than those applicable under the Criminal Code of the SFRY.

The essential basis of Appellate Panel's reasoning was that genocide had undoubtedly been criminalized under the Criminal Code of the SFRY at the relevant time. It accordingly framed the issue for decision solely in terms of whether the pre-existing law had been more lenient. As to the reasoning of the War Crimes Panel, it observed:

Article 4a) [of the Criminal Code], being an exception from the application of a more lenient law, is only applicable if the more lenient law would prevent the trial or punishment for the acts which are criminal according to the general principles of international law.<sup>102</sup>

The Appellate Panel further noted in passing that recourse to Article 4a of the 2003 Criminal Code was only appropriate in relation to those international crimes, in

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<sup>99</sup> Ibid., quoting Case AP-1785/06 *Maktouf*, Constitutional Court of Bosnia and Herzegovina, decision of 30 March 2007, at paras. 68 and 69 (quoted above, text accompanying note 81).

<sup>100</sup> Ibid., p. 187; see also Annex B, ibid., pp. 242-245 (summarizing the Chamber's decision 15 March 2007 dismissing the Defence Motion for referral for constitutional review of the Criminal Code to the Constitutional Court).

<sup>101</sup> Case X-KRŽ-05/24 *Prosecutor v. Miloš Stupar and Others ("Kravice")*, Appellate Panel, Decision of 9 September 2009.

<sup>102</sup> Ibid., para. 507.

particular, crimes against humanity, which had not previously been criminalized under the Criminal Code of the SFRY.<sup>103</sup>

Nevertheless, the Appellate Panel concluded that the accused had been validly convicted. It reasoned, in terms echoing the decision of the Constitutional Court in *Maktof* that, given that the Criminal Code of the SFRY had originally provided for the death penalty in relation to genocide, it could not be regarded as providing a for more lenient punishment, notwithstanding the subsequent abolition of the death penalty.<sup>104</sup>

## 7. CONCLUSIONS

The preceding brief sketch clearly demonstrates the huge impact which the European Convention and the case-law of the European Court have had upon the prosecution of war crimes in BiH. Given the direct applicability of the Convention as a matter of domestic law, it is entirely unsurprising that the Convention has had such an evident impact upon the procedure for the trial of war crimes (as well as upon the trial of other, less serious crimes) within BiH. Nor is it surprising that the domestic courts have made reference to the relevant jurisprudence of the European Court so frequently. The impact of the European Convention within the BiH legal system is clearly general, and extends far beyond the specific realm of prosecutions for war crimes.

Nevertheless, the impact upon war crimes prosecutions is a particularly fruitful area for assessing the impact of the Convention and the Court's jurisprudence, if only because some issues (for instance, the issues which have arisen relating to Article 7 of the Convention) are to a large extent peculiar to war crimes trials, while other issues (i.e. those under the Law on Transfer) arise specifically due to the mechanisms adopted in order to deal with crimes which also fall under the jurisdiction of an international tribunal, and which have been transferred back to the domestic system for prosecution.

As noted above, not only there have been no decisions of the European Court finding BiH to have *breached* the Convention as regards respect for fair trial guarantees

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<sup>103</sup> Ibid., para. 509.

<sup>104</sup> Ibid., paras. 502-504.

in domestic war crimes proceedings, but it would appear that there have not even been any applications dealing with such issues.<sup>105</sup>

A clear explanation for the absence of any relevant applications arising out of domestic war crimes prosecutions which took place in the immediate aftermath of the Balkan conflict relates to the temporal applicability of the Convention and the consequential limitations on the jurisdiction *ratione temporis* of the European Court. However, given that the Convention entered into force in 2002, this temporal factor obviously cannot have had any effect in relation to more recent prosecutions, including all of those before the War Crimes Panels.<sup>106</sup>

As to prosecutions and trials which commenced after 2002, or were pending at the time that the Convention entered into force for BiH, a relatively plausible explanation for the absence of any relevant applications to the European Court is the privileged constitutional status of the European Convention under BiH law. As discussed above, the Convention is expressly incorporated by reference and thus forms an integral part of the BiH Constitution; further, as a matter of domestic BiH law the Convention is directly applicable and is hierarchically superior to all other norms other than the Constitution itself. This special constitutional status of the Convention has in fact existed since the entry into force of the Constitution in 1995 and is formally independent of the ratification of the Convention by BiH.

An additional important element contributing to the strong influence of the Convention and the jurisprudence of the European Court within the BiH legal system is the continuing “internationalisation” of the principal institutions. In this regard, a particularly significant element is the presence of international judges both on the Court of Bosnia and Herzegovina (including within Section I on War Crimes) and on the Bosnian Constitutional Court, as well as the presence of international staff within the

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<sup>105</sup> Although *Rodić and Others v. Bosnia and Herzegovina* (App. No. 22893/05), judgement of 27 May 2008 was brought by four individuals who had been convicted of war crimes, their complaints related to the conditions of their detention following conviction and the absence of an effective remedy in that regard, rather than the fairness of the trials. As of 1 November 2009, a search of the Communicated Cases database on the web-site of the Court reveals no pending cases against Bosnia in relation to alleged violations in the context of prosecutions for war crimes.

<sup>106</sup> The first decision in a case brought against Bosnia and Herzegovina was delivered in October 2005 (*Hadžić v. Bosnia and Herzegovina* (App. No. 1123/04), decision, 11 October 2005), although the decision adopted by the Court struck the application out of the list following a friendly settlement. The first decision on admissibility in a case against Bosnia and Herzegovina was rendered a little over a month later (*Jeličić v. Bosnia and Herzegovina* (App. No. 41183/02), decision on admissibility, 15 November 2005; ECHR Reports 2005-XII) and the first substantive decision on the merits of a complaint was delivered in the same case in October 2006 (*Jeličić v. Bosnia and Herzegovina* (App. No. 41183/02), judgment of 31 October 2006, ECHR Reports 2006-\_\_).

Special Department for War Crimes within the Prosecutor's Office.<sup>107</sup> The presence of such international judges and prosecutors has certainly contributed to the elaboration of a jurisprudence which looks to external sources, including in particular the jurisprudence of the European Court.

Similarly, the existence of the Office of the High Representative, with its extraordinary powers of intervention would undoubtedly appear to have played a role in ensuring the conformity of the domestic procedural rules and norms with the standards required by the European Convention. For instance, in this regard, it is telling that the new Criminal Code and Criminal Procedure Code were imposed by decision of the High Representative immediately after the prospect of delays in their adoption by the Bosnian parliamentary institutions became apparent.<sup>108</sup>

In conclusion, the European Convention and the case-law of the European Court have undoubtedly played a significant role in shaping the domestic procedural rules applicable to the prosecution of war crimes. However, given the absence of relevant decisions by the Court directly implicating domestic war crimes trials, the impact has necessarily been an indirect one, which has been made possible by the particular institutional framework elaborated by the international community for BiH in the aftermath of the Balkan conflict, the special position and status accorded to the European Convention under the Constitution, and the receptive attitude which has been displayed by the domestic judiciary.

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<sup>107</sup> For discussion as to the process of international appointments to the Section I on War Crimes of the Court of Bosnia and Herzegovina and to the office of the Prosecutor, together with relevant references, see R. Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away*, (Oxford University Press, 2008), pp. 80-82; as to appointment of judges to the Constitutional Court of Bosnia and Herzegovina, see *ibid.*, p. 72.

<sup>108</sup> See above, text accompanying n. 23.



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