



ASSESSING THE IMPACT OF THE INTERNATIONAL AD-HOC TRIBUNALS ON THE DOMESTIC COURTS OF THE FORMER YUGOSLAVIA

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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

In the wake of war in the former Yugoslavia, Serbia, Croatia and Bosnia and Herzegovina faced obstacles to challenging impunity for crimes committed during the war period. All three nations were tasked with creating an effective domestic judicial system that would be well equipped to handle the prosecution of mass atrocity crimes. Faced with the many challenges of rebuilding infrastructure devastated by war, the domestic systems fell short in meeting the need of creating fully functioning judicial systems capable of trying the potentially immense postwar caseload. The United Nations responded to the need for prosecuting for such crimes by establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY). The mandate of the ICTY has allowed for primacy over the domestic courts of the three states. Consequently, the ICTY is acknowledged as the venue for the prosecution of the highest-level perpetrators, while the domestic courts are seen to be the venue for the prosecution of intermediate and lesser-ranked perpetrators.

This report examines how Serbia, Croatia and Bosnia and Herzegovina have carried out prosecutions within their own jurisdictions. The report examines how the states have implemented legal mechanisms to prosecute for genocide, crimes against humanity and war crimes, including the implementation of amended criminal codes that include the appropriate offences and the creation of specialized courts to deal with the prosecutions. Additionally, the report examines to what extent the jurisprudence of the ICTY has acted as a normative force on domestic prosecutions.

Of the three jurisdictions, Bosnia and Herzegovina allows for a more comprehensive examination in large part due to the state Court of Bosnia and Herzegovina which includes chamber within its criminal section designed to hear cases of genocide, crimes against humanity and war crimes. The state Court of Bosnian and Herzegovina has prosecuted a vast number of cases emanating from acts that took place during the war. In almost all cases, the court has applied the Criminal Code of Bosnia and Herzegovina that came into effect after the end of the war and includes a broader range of offences than the formerly active criminal code of Yugoslavia. The court has also exhibited a greater interplay with the ICTY than any of the other jurisdictions. Substantively, the court has utilized the jurisprudence of the ICTY to support its own decisions.

In addition to the state Court of Bosnia and Herzegovina, the entity and cantonal courts of the Federation of Bosnia and Herzegovina and the Republika Srpska have also carried out prosecutions for mass atrocities committed during the war. However, discrepancies exist between which laws have been applied in the various courts. The report examines how the mechanisms in place have led to a lack of harmonization in law within Bosnia and Herzegovina.

Serbia and Croatia do not have similarly lengthy records of prosecutions as Bosnia and Herzegovina. Both jurisdictions have exhibited a greater tendency to shy away from retroactive application of the law and have relied primarily upon the application of the laws of the former

Yugoslavia. The lack of available jurisprudence limits greater discovery as to the extent that the ICTY and other international tribunals have had a normative impact on the definition of the relevant offences. However, developments in both jurisdictions have uncovered a greater move toward accepting some international criminal law norms, such as command responsibility as a mode of liability, that have previously not been a part of the prior domestic code.

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LIST OF ABBREVIATIONS

BIH.....	Bosnia and Herzegovina
CC of BiH.....	Criminal Code of Bosnia and Herzegovina
CPC.....	Code of Criminal Procedure
FRY.....	Federal Republic of Yugoslavia
HLC.....	Human Rights Law Center
HRW.....	Human Rights Watch
ICC.....	International Criminal Court
ICJ.....	International Court of Justice
ICTR.....	International Criminal Tribunal for Rwanda
IMT.....	International Military Tribunal at Nuremberg
JCE.....	Joint Criminal Enterprise
NGO.....	Non-Governmental Organization
OHR.....	Office of High Representative
OSCE.....	Organization for Security and Cooperation in Europe
RS.....	Republika Srpska
SFRY.....	Socialist Federal Republic of Yugoslavia
UN.....	United Nations
VRS.....	Army of the Republika Srpska
WCC.....	War Crimes Chamber

1. INTRODUCTION

The following paper presents an analysis of whether and to what extent international law, particularly through the guise of the case law of international tribunals, acts as a normative influence upon domestic proceedings for war crimes. The report focuses on proceedings in Bosnia and Herzegovina (BiH), Croatia, and Serbia, confining examination to the qualitative influence of international criminal law over procedural and substantive issues. These procedural issues include, inter alia, the right to fair trial, the right to counsel, and transfer of evidence, whilst the substantive issues include, inter alia, the jurisdiction of the court to hear the subject matter of the case, how the court interprets and defines the offences and their elements, as well as, the inclusion into the domestic structure of concepts of criminal responsibility that have been constructed through the jurisprudence of international tribunals. The territories of the former Yugoslavia, in the aftermath of war, were faced with fundamental issues of rebuilding judicial structures severely damaged and/or dismantled during the conflicts between the nascent regimes formed in the wake of the fall of Yugoslavia. In addition, the judicial systems faced the daunting task of meeting the call to support the fight against impunity by creating forums for the prosecution of individuals for criminal acts committed during the war. The “conception of justice associated with periods of political change, characterized by legal responses to confront wrongdoings of repressive predecessor regimes” defines the notion of transitional justice.¹ In this respect, the states may be earmarked as transitional justice states. Thus, the analysis will also beg the question of how the impact of international law may be distinctive vis-à-vis certain transitional justice states.

AIM AND METHODOLOGY OF REPORT

The methodology of this report reflects the goal of WP2 to examine the normative impact of jurisprudence of international courts on the domestic prosecution of mass atrocity cases in the former Yugoslavia. The aim of WP2 is to analyze normative legal impacts, such as: how legal instruments of the domestic jurisdiction are impacted by international law; how procedure in domestic courts may be influenced by international courts; and how elements of crimes and modes of responsibility applied in domestic proceedings are impacted by the jurisprudence of international courts. To achieve that end, the report conducts case studies of the relevant jurisdictions. The report relies mainly upon an examination of legal instruments applied in the international and domestic courts, and the jurisprudence of the ad-hoc Tribunals as well as the jurisprudence of the domestic courts of the relevant case studies. One of the difficulties faced by the research project has been the lack of availability of jurisprudence from all of the courts relevant to the project aims, particularly in from the courts of Croatia and Serbia. In that regard, the case analysis is not exhaustive. The case studies reflect an illustrative example of the jurisprudence of the various jurisdictions. The jurisprudence from

¹ R G Teitel, ‘Transitional Justice Genealogy’ (2003) Harvard Hum Rights J 16, 69.

the international and national courts has been limited to judgements rendered prior to 2011. Additionally the report relies upon secondary sources such as reports by monitoring groups and Non-Governmental Organizations (NGO) working within the region, newspaper articles, and legal articles. Finally, the WP2 research paper on the former Yugoslavia was presented at a conference in Belgrade, Serbia in November 2009 and the report information gathered from discussion and interviews that took place with practitioners in the field during the conference.

2. EARLY STAGES: THE ESTABLISHMENT OF THE ICTY AND THE CONCURRENT JURISDICTION OF THE DOMESTIC COURTS

2.1 RULES OF THE ROAD AND THE PRIMACY OF THE ICTY

The difficulties facing domestic legal systems in the aftermath of an extraordinary regional upheaval and reorganization such as seen in the post-war territories of the former Yugoslavia are manifold. Faced with severely depleted ranks and resources, the judicial systems of the states of the former Yugoslavia were in no condition to fully meet the needs for challenging impunity for those accused of committing criminal acts during the war. The response to the situation was to mount an international effort to prosecute for war crimes in the territories of the former Yugoslavia. In 1993, the United Nations (UN) adopted Security Council Resolution 827 which iterated the mandate of the international community to prosecute for crimes committed in the former Yugoslavia and, to that end, established the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY).²

In the earliest years following the war, prosecutions were pursued in the domestic courts of each state. Trial monitoring and review of the proceedings revealed certain legal discrepancies in procedure and outcome of the cases.³ The presence of such questionable legal practice coupled with the multitude of capacity issues experienced by the respective governments of the former Yugoslavia furthered spurred the international community to aid in the challenge against impunity for crimes committed during the war. In 1996, Serbia, Croatia and BiH signed the Rome Agreement to advance the peace process established by the Dayton Accords. As part of the agreement, a system of review,

² UN Doc. S/RES/827 (1993).

³ Organization of Security and Co-operation in Europe (OSCE) Bosnia and Herzegovina (BiH), 'War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles', March 2005, p. 4 <http://www.oscebih.org/documents/osce_bih_doc_2010122311024992eng.pdf> accessed 16 March 2009; C. Hedges, 'Jailed Serbs' Victims' Found Alive, Embarrassing Bosnia' *New York Times* (1 March 1997), recounts the trial of Sretko Damjanovic and Borislav Herak, sentenced to death by a military court in Bosnia for genocide and other war crimes, however, after-trial inquiries and investigations revealed that the two victims the accused confessed to killing, a confession the accused claimed occurred under torture and duress, were in fact still alive.

deemed the ‘Rules of the Road’, was established.⁴ This system altered the course of prosecutions by, *inter alia*, specifically fostering international oversight over the domestic proceedings. Thus, an inherent interplay between the work of the ICTY and the national courts in the territories of the former Yugoslavia was established. Under the Rome Agreement, the ICTY was granted primacy over the domestic jurisdictions that concurrently prosecuted in their own courts and the power of the review over investigation and arrest of suspects.

Under the terms of the Rules of the Road, arrest and detention of the suspects could proceed in the national court so long as one of two conditions was met: 1. the suspect had previously been indicted by the ICTY or 2. The indictment was reviewed by the ICTY and found to be “consistent with international legal standards.”⁵ The ICTY Office of the Prosecutor carried out reviews of war crimes cases until October 2004, at which time, with the advent of the tribunals completion strategy, the review of cases was transferred to the applicable domestic prosecutors.

In terms of action and compliance from the national courts, BiH from the inception of the Rules of the Road procedure, interacted with the ICTY to a greater degree than either Croatia or Serbia. In November 1996, representative from BiH met to elaborate upon the rules set forth in the Rome Agreement, thereupon agreeing to turn over all cases to the ICTY for review.⁶ The response was not equally matched by Croatia and Serbia, both of whom failed to submit files to the ICTY in cooperation with the Agreement with the same alacrity as exhibited by Bosnian officials.⁷ Furthermore, it should also be noted that a majority of the cases referred by the ICTY involved offences committed in BiH. Thus, BiH and the ICTY, from the earliest stages of the Rules of the Road, seemingly exhibited a more substantial interplay than either Croatia or Serbia. From this perspective, the question then arises whether and to what degree this association realized a more normative influence by the Tribunal upon the BiH domestic court system?

2.2 THE ICTY COMPLETION STRATEGY AND THE SHIFT TO THE DOMESTIC COURTS

The mandate for the ICTY has always been a limited one. The goal of the tribunal, to prosecute those most responsible for the atrocities of the war, was to be met within a fixed number of years. To that end, the ICTY, in recent years, has been working towards closing its doors and handing over the

⁴ The Rome Agreement (18 February 1996). paragraph 5 states:

‘Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action.’

⁵ Ibid, part 5. Cooperation on War Crimes and Respect for Human Rights; Mark Ellis, ‘Bringing Justice to an Embattled Region: Creating and Implementing the “Rules of the Road” for Bosnia-Herzegovina’ (1999) 17 Berkeley J Int’l L 1, 7, quoting Memorandum from the Office of the High representative on file with author.

⁶ Ibid.

⁷ Ibid.

mantle of prosecution to the respective jurisdictions. The completion strategy for the ICTY was formally iterated through Security Council Resolutions 1503 and 1534, both of which called upon the Tribunal to follow through with initiatives intended to bring about the conclusion of its mandate by 2010.⁸ An integral part of the completion strategy implementation has been the systematic referral of cases to the national courts under Rule 11bis of the ICTY Rules of Procedure. The referral of cases under Rule 11bis is in keeping with the goal of the ICTY to concentrate its prosecutions on the highest ranking leaders, allowing for the intermediate and lower ranking officers to be referred to the appropriate domestic courts for trial.

3. PROCEDURAL ISSUES IN THE DOMESTIC COURTS

3.1 WHAT LAW? APPLYING THE APPROPRIATE CRIMINAL CODE

The transition to prosecuting for international crimes within the domestic courts has taken place with some measure of difficulty for each jurisdiction. In terms of application of substantive law to the crimes alleged, the breakup of the former Yugoslavia into separate states with separate judicial systems led to the a difficulty in determining which laws to apply for the offences committed throughout the duration of the war. Prior to the war, offences committed in any of the territories of the former Yugoslavia were governed by the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY), which came into power on 1 July 1977.⁹ Article 141 of the Code defined the act of genocide in keeping with the definition provided by the Genocide Convention, while Articles 142 though 144 defined war crimes against civilian populations, the wounded and the sick, and prisoners of war, respectively and in accordance with analogous rules proscribed within the Geneva Conventions. Thus, the SFRY Code conveyed subject matter jurisdiction upon the courts for offences amounting to genocide and war crimes, but not for offences that may fall within the rubric of crimes against humanity. Following the end of the war and the break up of the former Yugoslavia, the reconstruction of the territories within the guise of the newly formed states took on many facets, including the implementation of new penal legislation in each separate state. The current criminal codes of Serbia, BiH and Croatia fill in the lacunae presented by the SFRY Code vis-à-vis crimes against humanity. Despite the similar changes in the respective codes, prosecutions of mass atrocity crimes within all three states have not been in constant conformity with one another. One particularly glaring reason for this is that the jurisdictions take disparate views on the principle of *nullum crimen*

⁸ UN Doc. S/RES/1503 (2003), UN Doc. S/RES/1534 (2003).

⁹ Official Gazette SFRJ No. 44, 1976. English translation
<http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode_fry.htm> accessed 12 January 2009

sine lege in regard to the admissibility of the new criminal codes. This has given rise to inconsistencies in applicable law between the states and, in some cases, between different courts within one state.

An examination of the legislative applications in BiH, for example, reveals a particularly complex situation, in part due to the fact that the system allows for prosecution of international offences in the courts of the Federation of BiH, the Republika Srpska (RS) and the state Court of BiH. In addition, separate criminal codes exist for BiH and the RS. Cases heard before the Court of BiH are tried under the Criminal Code of Bosnia and Herzegovina (CC of BiH), adopted in March 2003,¹⁰ while the entity courts of Federation of BiH and the RS primarily try cases under the SFRY Code.¹¹ One problematic consequence of this practice is that a lack of uniformity in prosecutions exists throughout the territory of BiH. As stated previously, the SFRY Code only prescribes the offences of genocide and war crimes, while the CC of BiH contains additional provisions for crimes against humanity¹² as well as several other amendments, including, a more comprehensive definition of war crimes, inclusion of command responsibility as a mode of responsibility¹³ and the exclusion of the defence of superior orders.¹⁴

The entity courts of BiH have been urged toward applying the CC of BiH by several different sources including the Constitutional Court of BiH¹⁵ and the Parliamentary Assembly of the Council of Europe.¹⁶ In 2008 the Organization for Security and Co-operation in Europe (OSCE) Mission to Bosnia and Herzegovina issued a report urging uniformity under the law in war crimes cases and stating that the CC of BiH was better able to address the serious violations of human rights law

¹⁰ With respect to the principle of *nullum crimen sine lege*, Article 3 of the 2003 Criminal Code iterates the principle of legality, however, it does so while recognizing the place of the general principle of international law in proscribing offences under the law. An English translation of the 2003 Bosnian Code is available at <www.ohr.int/ohr-dept/legal/laws-of-bih/default.asp?content_id=31549> accessed 12 January 2009.

¹¹ In some cases the entity courts have tried cases under the interim 1998 Federation of Bosnia and Herzegovina Criminal Code and the 1993 Criminal Code of the Republika Srpska, however, both codes are identical to the SFRY Code in regard to the substantive issues of war crimes.

¹² Article 172 defines crimes against humanity along the same lines as the ICTY Statute with certain additions, including, more comprehensive definitions of rape and persecution as a crime against humanity, and the inclusion of the crime of apartheid and enforced disappearance of persons within the list of enumerated acts.

¹³ Article 180(2) states:

'The fact that any criminal code offence...was perpetrated by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators thereof.'

¹⁴ Article 180(3) states:

'The fact that a person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the court determined that justice so requires.'

¹⁵ See *The Case Against Abduladhim Maktouf* in which the Constitutional Court determined that the application of different codes in war crimes cases throughout Bosnia and Herzegovina seriously undermined the rule of law and equal treatment of citizens before the law.

¹⁶ Resolution 1564 (2007).

witnessed throughout the war in the former Yugoslavia.¹⁷ The OSCE specifically attributed the better capabilities of the CC of BiH to its acknowledgement and acceptance of the developments of the ICTY Statute and case law as well as the Rome Statute of the International Criminal Court (ICC).

In 2005, Serbia adopted its own Criminal Code.¹⁸ Like BiH, Serbia's Code incorporated definitions and modes of liability consistent with international norms including, *inter alia*, the addition of crimes against humanity¹⁹ and command responsibility as a mode of responsibility.²⁰ The Serbian courts, however, have maintained a strict and narrow adherence to the rule of *nullum crimen sine lege* as recognized in the Code.²¹ Therefore, the offences committed during the war do not fall under the subject matter jurisdiction of 2005 Code and are only prosecuted under the SFRY Code. Consequently, offences committed during the war that would fall exclusively under the ambit of crimes against humanity cannot be argued in cases brought to trial in a Serbian court.

The Criminal Code of Croatia entered into force on 1 January 1998.²² The Code, at that time, resembled the SFRY Code, directly inheriting the prescriptions of genocide and war crimes as defined in Article 156 and Articles 158-160 respectively. The Criminal Code of Croatia has been amended on many occasions since its incorporation, most notably for this study in 2004 when it was amended to incorporate Article 157a, which prescribes the offence of crimes against humanity in almost the same language as utilized by the Rome Statute. Further amendments made to the Code included, the addition of Article 167a prescribing command responsibility as a mode of responsibility punishable under the law, as well as, "planning criminal offences against values protected by international law" under Article 187a and "Subsequent assistance to the perpetrator of a criminal offence against values protected by international law" under Article 187b.²³

Application of the Croatian Criminal Code within the domestic courts is, however, bound by the relevant provisions on the principle of legality that appear in both the Constitution and the Criminal Code.²⁴ Thus, like Serbia, cases tried in Croatia for actions carried out during the war are tried under

¹⁷ OSCE BiH, 'Moving Towards a Harmonized Application of the Law: Applicable in War Crimes Cases Before Courts in Bosnia and Herzegovina' (August 2008) <http://www.oscebih.org/documents/osce_bih_doc_2010122311504393eng.pdf> accessed 12 January 2009.

¹⁸ Criminal Code, Official Gazette of RS Nos. 85/2005, 88/2005, 107/2005. English translation available at: <<http://www.osce.org/serbia/18244>> accessed 12 January 2009.

¹⁹ Article 371.

²⁰ Article 384 states that any military commander or other superior who fails to prevent subordinates from committing the offences of genocide, crimes against humanity and war crimes as defined shall be considered to have committed those offences. Note: this article deals only with the failure to prevent subordinates from committing offences, thus, the failure to punish subordinates for committing offences is not included in Serbia's concept of command responsibility.

²¹ Article 5.

²² Criminal Code: The Official Gazette of the Republic of Croatia "Narod novine" No. 110 of October 21, 1997 (entered into force on January 1, 1998). English translation available at: <http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation_Criminal-Code.pdf> accessed 12 January 2009. Although the translation notes that the 2004 changes and amendments to the Criminal Code are not included, the changes made and published in 2003, which are included, have the same substance for our purposes.

²³ Ibid.

²⁴ Article 31(1) of the Constitution states:

the SFRY Code or the 1993 Basic Criminal Code of Croatia.²⁵ The lacunae created by the court's adherence to the principle of *nullum crime sine lege* have become apparent, particularly in regard to responsibility of accused under command responsibility. Specific court response to the issue will be addressed later in this report.

3.2 AMENDMENTS TO THE CODES OF CRIMINAL PROCEDURE

In addition to the criminal codes each jurisdiction enacted a new and amended Criminal Procedure Code (CPC). The CPC's are applicable only to indictments issued after the respective code came into power. The OSCE reported changes in trial procedure created by the implementation new codes of criminal procedure. The previous SFRY Code of Procedure reflected an investigative method of trial procedure which was exemplified by the practice of having the judge lead the criminal investigations against the accused. The amended codes reflect a move toward a more adversarial approach by abolishing the role of the investigative judge and broadening the role of the prosecution and defence attorneys in presenting the case against and for the accused.

OSCE monitoring reports of war crimes trials in Serbian District Courts illustrate how amendments to the procedural code have impacted the methods of the courts, as well as, the issue of fair trial.²⁶ The OSCE noted, as an example, a case before the Belgrade District Court known as "the Sjeverin case." The trial commenced in 2003 and involved four Serbs accused of war crimes against civilians pursuant to Article 142 of the SFRY Code, for the kidnapping, torturing and killing of 17 Muslim citizens. Investigations for the case were carried out in accordance with the CPC of the SFRY. Pursuant to the investigation, statements made by the accused, as well as other witnesses, were made without the presence of a lawyer²⁷ – a practice that was allowable under the former CPC.²⁸ The CPC was amended in 2004 and changed the standing on this issue by disallowing any statements by accused or witnesses not made in the presence of a lawyer to be used in determination of the final verdict of the case.²⁹ Violations of criminal procedure such as the one

'no one shall be punished for an act which before its perpetration was not defined by law or international law as a punishable offence, nor may he be sentenced to a punishment which was not defined by law.');

Article 2 of the Criminal Code states:

'(1) criminal offences and criminal sanctions may be prescribed only by statute. (2) No one shall be punished, and no criminal sanction shall be applied, for conduct which did not constitute a criminal offence under a statute or international law at the time it was committed and for which type and range of punishment by which the perpetrator can be punished had not been prescribed by statute.'

²⁵ The 1993 Code adopted into Croatian law the provisions of the SFRY Code in full, therefore only the SFRY Code will be referred to.

²⁶ See OSCE Serbia and Montenegro, 'War Crimes Before Domestic Courts: OSCE Monitoring and Empowering of the Domestic Courts to Deal With War Crimes' (Report) (October 2003) <<http://www.osce.org/serbia/13494>> accessed 9 February 2009.

²⁷ Ibid 23.

²⁸ Article 70, para 1.

²⁹ Article 71, para 1 of CPC, 2004 states that:

described above open the door to any number of difficulties that impact the substantive nature of the case, including inequities in testimony and lack of truth and faithfulness, all of which may provide valid reasoning to challenge a judgement rendered under such a system. A similar complaint was lodged regarding the 2002 “Podujevo case,” in which one of the accused, Sasa Cvejtan, claimed that he was interrogated without his lawyer present and, consequently, tortured into signing a confession.³⁰

3.3 ESTABLISHMENT OF SPECIALIZED WAR CRIMES COURTS

The establishment of the ICTY created a venue for the prosecution of a significant number of war crimes cases. Although the domestic courts were mandated with concurrent jurisdiction, the myriad of problems plaguing the judicial systems led to diminished progress for the domestic courts. As the completion strategy of the ICTY became more of a reality, the judicial systems of Serbia, Croatia and BiH all took steps to reform their existing structures for prosecuting war crimes. Although the three jurisdictions imposed varying measures of reform, a similar theme emerged between all through their efforts to centralize the prosecutions for war crimes to discreet, specially appointed venues.

Prior to 2005, prosecutions of war crimes cases in BiH were conducted at the entity court level. Thus, exclusive jurisdiction for war crimes trials was within the purview of the cantonal courts of the Federation of BiH and the district courts of the RS. In 2003, with the implementation of the new criminal code, this jurisdiction was revoked and placed at the level of the state Bosnian court. However, with persistent difficulties in prosecuting, even at the state level, a joint initiative between the ICTY and the Office of the High Representative (OHR) was carried out in order to enable a more effective system of combating impunity for war crimes in the state courts. In 2004, the Court of BiH was established within the criminal division of the state Court of BiH for the purpose of prosecuting cases from the war that were deemed highly sensitive.³¹ The criminal codes enacted in 2003 established jurisdiction over war crimes at the state level, thus it was determined that the Court of BiH would exercise jurisdiction over the most serious cases while the entity courts would retain jurisdiction over the remaining cases.³² Note the parallel to the system implemented at the ICTY in that state Court of BiH is designated as the venue for the most serious cases in the same vein as the mandate of the ICTY. In September 2005, the Court received its first referral for the case against Radovan Stankovic.³³ While the development of the Court has been seen as a key step forward in more efficiently prosecuting for crimes in the territory of BiH, the current tripartite system that exists

‘...of the proceedings are carried out for a criminal offence punishable by imprisonment for a term of more than 10 years or by a more severe punishment, the defendant must have a defence counsel even at his first interrogation.’

³⁰ OSCE Serbia and Montenegro Report (n 26) 31.

³¹ OSCE BiH Report (n 3) 10.

³² Ibid 5. The state Court will also try the cases referred to it by the ICTY pursuant to Rule 11bis, as well as, those cases submitted by the OTP.

³³ See *The Prosecutor v. Radovan Stankovic* (Decision on Rule 11Bis Referral) ICTY-96-23/2-AR11BIS.1 (1 September 2005).

between the State Court and the entity courts pose some unique problems that will be discussed further in the report.

Similarly, in 2003, Serbia created a special War Crimes Chamber (WCC) in the Belgrade District Court.³⁴ Prior to its establishment, the jurisdiction to try war crimes cases resided with the ordinary district courts. From the period of 1996 to 2003, seven war crimes trials took place within the district courts.³⁵ However, unlike the state Court of BiH that was created with the direct involvement of the ICTY, many who have worked and advocated at the Serbian chamber claim little to no influence from the ICTY. Instead they point to the change in government following the fall of Milosevic as more influential force in the creation of the chamber.³⁶ While the state Court of BiH shares jurisdiction over war crimes proceedings with various entity courts, the Serbian WCC holds exclusive jurisdiction over such cases.³⁷

Croatia has taken a different approach than BiH and Serbia with respect to establishing courts to deal with prosecuting war crimes. In 2003, Croatia's parliament adopted the Law on the Implementation of the Statute of the International Criminal Court and on Criminal Prosecution for Acts against War and Humanitarian Law (Law on the Implementation of the ICC Statute).³⁸ The crux of the legislation was to implement the Rome Statute into the domestic penal structure, however, it also designated 4 county courts as specialized domestic chambers to assume jurisdiction over pending war crimes cases.³⁹ According to the law, the Supreme Court President is granted the power of review for the cases brought by the State Prosecutor for admission. Following review, the President administers the cases to the proper specialized chamber located in the four biggest cities in Croatia: Zagreb, Osijek, Rijeka, and Split. Despite this set up, the OSCE revealed in a 2008 report that all but four war crimes trials were conducted at the local level by courts established within the communities where the crimes took place, while only two cases were conducted before the specialized war crimes courts.⁴⁰ In addition, the Center for Peace, Non-Violence and Human Rights in Osijek has also called

³⁴ Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes (Serbian War Crimes Law) (1 July 2003) *Official Gazette of the Republic of Serbia*, no. 67/2003. English Translation available at <http://www.osce.org/documents/fr/y/2003/07/446_en.pdf> accessed 10 June 2009.

³⁵ B Ivanisevic, 'Against the Current – War Crimes Prosecutions in Serbia (2007) International Center for Transitional Justice <<http://www.ictj.org/images/content/7/8/780.pdf>> accessed 12 June 2009.

³⁶ D. Orentlicher, 'Shrinking the Space for Denial: The Impact of the ICTY in Serbia' (May 2008) Open Society Justice Initiative <http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/serbia_20080520/serbia_20080501.pdf> accessed 12 June 2009.

³⁷ Serbian War Crimes Law article 9(1).

³⁸ English translation available at: <www.nottingham.ac.uk/law/hrlc/international-criminal-justice-unit/implementation-database.php> accessed 20 June 2009.

³⁹ See Law on the Implementation of the ICC Statute Art 12(1).

⁴⁰ OSCE Croatia, 'Background Report, War Crimes Proceedings 2008' (working draft provided by the OSCE on 16 February 2009) 12. Zagreb County Court conducted two trials transferred by the President of the Supreme Court, i.e., RH v. Rahim Ademi and Mirko Norac and RH v. Branimir Glavas et al. Two other trials were transferred from Gospić to Karlovac and Rijeka based on change of venue grounds; See also, OSCE, 'Report of the Head of the OSCE Office in Zagreb Ambassador Jorge Fuentes to the OSCE Permanent Council, 6 March 2008', p. 8 <<http://www.osce.org/zagreb/31356>> accessed 29 June 2009.

into question the current system, stating that the capacity of the county courts to effectively prosecute for war crimes is not sufficient and that by not utilizing the established war crimes courts the state is not abiding by the Law on the Implementation of the ICC Statute as it was intended.⁴¹

BiH, Serbia and Croatia have maintained different approaches to establishing a core mechanism for the prosecution of war crimes cases. All three have seemingly moved toward a more hybrid approach by establishing separate specialized venues for the prosecution of war crimes cases that utilize norms of international criminal law that have been cultivated in the jurisdiction of the ICTY. However, it is clear that questions exist in each state as to the effectiveness of the system of specialized courts. In BiH, for example, not all war crimes cases are held before the designated courts, leading to issues regarding disparity in prosecutions and the capacity of non-delegated courts in dealing with prosecutions of the most serious crimes. Thus, it can be said that the international criminal courts have had an impact on the domestic courts with the creation of the specialized forums; however, the impact may be limited by the non-exclusivity of the specialized courts in prosecuting for war crimes. The report will further examine whether and to what extent the specialized courts receive the normative influence of the international courts within their respective proceedings.

4. ASSESSING PROSECUTIONS FOR INTERNATIONAL CRIMES WITHIN THE COURTS OF THE TERRITORIES OF THE FORMER YUGOSLAVIA

As illustrated above, the courts in the territories of the former Yugoslavia have set up varying systems to respond to the need to prosecute for crimes in the aftermath of war. In turn, it is useful to examine how the systems then apply the law, drawing, in some cases, not only from the domestic system in place, but also from the influence of the international courts. The following is neither an exhaustive analysis of the cases before the various courts nor a claim to be the most important. Rather, it is an analysis of the relevant and important issues that have been brought to light through the case law of the various courts. The courts responses to these issues allow a greater understanding of to what extent the jurisprudence of the international courts has been utilized in the proceedings before the domestic courts.

⁴¹ Center for Peace, Non-Violence and Human Rights, 'Monitoring of War Crimes Trials: A Report for the Period of January-June 2008' (Report)(26 September 2008) 3-4 <http://www.centar-zamir.hr/uploads/Monitoring_war_crime_trials_mid_report_2008.pdf> accessed 30 June 2009. In addition, the report claims that the Law itself should clarify its qualifications for judges to sit on the war crimes council. Article 13(1) states that judges chosen to sit on the council should be "...distinguished by the experience in working in complex cases." The Center finds fault in the law not explaining what constitutes complex cases, resulting in courts having employed before the country courts judges with experience in civil matters only.

4.1. BOSNIA AND HERZEGOVINA

In September 2008 the Prosecution of the state Court of BiH released a “war crimes catalogue” which contained an overview of the crimes committed in the period from 1992 to 1995 and the respective trials of those responsible.⁴² The catalogue indicated that from the time of the end of the war, there had been 55 people tried before local courts and indictments against 99 people handed down through the War Crimes Section of the State Prosecution. The following cases represent a small selection of the many number of cases that have been prosecuted and have been chosen to give a representative analysis of the pertinent issues that have faced both the entity courts and the State Court. Such issues have included; transfer of evidence from the ICTY, prosecuting for genocide and defining crimes such as rape in the context of war and conflict

4.1.1 JURISDICTIONAL ISSUES

THE MAKTOUF CASE: THE CRIMINAL CODE OF BOSNIA AND THE PRINCIPLES OF NULLUM CRIMEN SINE LEGE AND THE MORE LENIENT

In the earliest days of prosecutions by the Bosnian entity courts and the State court for war crimes cases, several difficulties arose regarding what law to apply and what offences were proscribed by the appropriate law in effect at the time of the war. The OSCE, in a 2005 report on the progress of war crimes trials in BiH, detailed many inconsistencies in the application of criminal law in relation to war crimes.⁴³ In 2007, the Constitutional court of BiH was faced with deciding the issue of whether the 2003 CC of BiH was applicable in war crimes cases stemming from the war in the territories of the former Yugoslavia. In the case *against Abduladhim Maktouf*,⁴⁴ the appellant argued, inter alia, that his 2006 conviction for War Crimes against Civilians under Article 173 of the CC of BiH was in violation of his constitutional rights because the SFRY Criminal Code was the code in place at the time specified on the indictment and that the code was more lenient with respect to the offences committed.⁴⁵

Article 4 of the CC of BiH and Article 7 of the European Convention on Human Rights establish the principle of *nullum crimen sine lege* and the rule that no heavier penalty than what was in place at the time an act was committed shall be applied to an offence. In the first instance verdict against Abduladhim Maktouf⁴⁶ the state Court of BiH held that the accused should have been aware of the application of international rules in a time of war and that the violations of such rules carry

⁴² BIRN, ‘State Prosecution Unveils War Crimes Catalogue’ (5 September 2008) <<http://www.bim.ba/en/131/10/12898/>> accessed 19 January 2009.

⁴³ OSCE BiH Report (n 3) 20. The OSCE conducted several surveys of members of the BiH judiciary and legal community, as well as, reviewed past, current and impending trials before the various entity and state courts. The report illustrated how the community was somewhat divided as to which laws to apply, with 13 prosecutors indicating that the former SFRY code was the applicable code in all cases and 3 stating that the current BiH code was applicable.

⁴⁴ *Case Against Abduladhim Maktouf* (Decision on Admissibility and Merits) AP 1785/06 (30 March 2007).

⁴⁵ *Ibid* para 11.

⁴⁶ *The Prosecutor v. Abduladhim Maktouf* (First Instance Verdict) Court of BiH Case No. K-127/04 (1 July 2005).

serious consequences.⁴⁷ By referring the more general concept of international law, the Court established an exemption to the obligation set by both the Criminal Code and the European Convention. The Court further determined that pursuant to the European Convention and relevant case law from the European Court of Human Rights, departure from the more lenient law was justified in cases of serious violations of international standards in a time of war.⁴⁸ On appeal, The Constitutional Court engaged in an analysis of the European Convention based upon the language of the provisions as written. The Court noted that Article 7 paragraph 1 concerns offences “under national or international law”.⁴⁹ Interpreting the Article in congruence with the European Court, the Constitutional Court stated that conviction resulting from the retrospective application of the national code for offences deemed criminal under international law at the time they were committed was not in violation of Article 7 of the European Convention as such.⁵⁰ In addition, the Court recognized the formulation of Article 7 of the Convention as encompassing the general principles of international law as recognized by “civilized nations,” the notion of civilized nations being derived from the International Court of Justice and identified as a source of law which concern even the municipal courts.⁵¹ Finally, the Court cited both national case law as well as the mandate of the Nuremberg and Tokyo War Crimes Trials as support for the acceptance of the retrospective application of laws proscribing offences under international law.⁵²

It is important to note that the verdict rendered in *Maktouf* is relevant only to the state Court of BiH, thus, it does not eradicate a pervasive problem apparent throughout all of BiH, namely, the lack of law harmonization between the various entity courts and the state Court.⁵³ Typically, the cantonal and district courts apply the SFRY Criminal Code to war crimes proceedings, while the state Court applies the CC of BiH. One prevailing issue that the discrepancy in application has produced is that, while the same offences may be tried under the varying codes, different sentences can be handed down based upon the mandate of the code. Thus, for example, a sentence of 20 years may be handed down in the Federation of BiH and the RS for an offence that could possibly merit a sentence of 45 years in the state court. The Constitutional Court, in dicta, noted the possibility of disparate sentencing practices for the same offence constituting illegal discrimination. The Court made a strong encouragement to the entity and district courts to apply the CC of BiH in future proceedings. In light of the Constitutional Court’s statements, consider that in the traditional domestic legal structure the appellate bodies play an important standardizing function; the application of the law is able to be

⁴⁷ Ibid 25.

⁴⁸ Ibid 26.

⁴⁹ *Maktouf* Decision (n 44) para 73.

⁵⁰ Ibid.

⁵¹ Ibid para 74.

⁵² Ibid paras 76-77.

⁵³ Human Rights Watch, ‘Still Waiting: Bringing Justice for War Crimes, Crimes Against Humanity, and Genocide in Bosnia and Herzegovina’s Cantonal and District Courts’ (July 2008) <<http://www.hrw.org/en/node/62137/section/1>> accessed 19 January 2009.

normalized and made universal with the judgements of the highest court. The system in BiH, and, indeed, through all of the territories of the former Yugoslavia lacks an appellate system that speaks to all the courts. Thus, the inherent normalizing function of the system is absent, making harmonization difficult through the normal course of the system.

4.1.2 PROCEDURAL ISSUES

The earliest cases before the national courts in the former Yugoslavia exhibited many procedural difficulties that would face any judicial system rebuilding after the destruction of war. This report will not go into all of the procedural difficulties the national courts of BiH faced in prosecuting for crimes from the war. The report will instead review the specific evolution in the procedure of transfer of evidence from the ICTY to the state Court of BiH. Transfer of evidence is an example of an important procedural interplay between the two courts that aims at aiding the efficiency of the national court in dealing with an exacting schedule of cases

EVIDENCE: LAW OF TRANSFER FROM THE ICTY

The 2002 case against Bosnian Croat Dominik Ilijasevic illustrates some early challenges in the relationship between the ICTY and the domestic courts in Bosnia regarding transfer of evidence. The trial began prior to the establishment of the state Court of BiH and was tried before Zenica Cantonal court in Zenica, Federation of Bosnia and Herzegovina.⁵⁴ Ilijasevic was charged with offences stemming from abuses by Bosnian Croat forces against Bosnian Muslim civilians. One of the central issues that emerged from the trial was to what extent could ICTY evidence be used to aid in establishing the case against Ilijasevic. The Cantonal Prosecutor argued for the admission of videotaped interviews from the ICTY of Ermin Curtic,⁵⁵ a former member of the Bosnian Croat army. The court, however, denied the admission of the evidence claiming that it was not obtained pursuant to the rules of procedure in accordance with the Federation of BiH and that the interview was made while Curtic was being questioned as a suspect and thus could not be considered witness testimony.⁵⁶ HRW had been monitoring the trial as part of its assessment on the capacity and ability of national courts in the former Yugoslavia to prosecute for crimes that occurred during the war. In its report, HRW criticized the decision taken by the court regarding admissibility of evidence and noted that the law on the issue of admissibility of witness statements was vague and that transfer of statements and evidence from the ICTY would help facilitate the proceedings and make more efficient an already challenged judicial system.

⁵⁴ Human Rights Watch (HRW), 'Balkans Justice Bulletin: The Trial of Dominik Ilijasevic' (Report) (January 2004) <<http://www.hrw.org/legacy/backgrounder/eca/balkans0104.htm>> accessed 10 July 2009.

⁵⁵ Curtic had given evidence prior to the trial of Ilijasevic in which he claimed that Ilijasevic took part in leading the October 1993 attack on Stupni Do. Curtic was called to the stand at trial and he ultimately changed his story, claiming that he did not know Ilijasevic and only named him during the investigation because he was tortured into a false confession. Id.

⁵⁶ Ibid.

In 2004, BiH adopted a law to set out the guidelines for the transfer of cases from the ICTY and the use of evidence collected by the ICTY in cases before the national courts of BiH.⁵⁷ The provisions of the Transfer Law provide, *inter alia*, for the use of: established facts and documentary evidence from the ICTY at the discretion of the national court;⁵⁸ transcripts of witness testimony from the ICTY in accordance with the rules of procedure and the right of the defendant to cross examination;⁵⁹ transcript of testimony made at the investigation phase;⁶⁰ and, documents and forensic evidence collected by the ICTY.⁶¹

The Court has employed the Transfer Law as a basis for accepting facts from previously adjudicated cases before the ICTY. For example, the Court has allowed proven facts from the ICTY to aid in establishing the chapeau elements of crimes against humanity.⁶² The Court has stated that the Transfer Law is inclusive of the principles of evidence set forth by the European Court of Human Rights, thus, the evidence must be presented in the presence of the accused, the accused must be given a suitable opportunity to challenge and examine a witness, however, in cases where that opportunity is not presented, the national court may not base a conviction exclusively on that evidence.⁶³ While this report does not engage into an analysis of the transfer of evidence during trial and how that may facilitate the course of the proceedings, it is clear that the law has enabled certain efficiency in establishing facts and events that have been proven at the ICTY. So long as the rights of the accused are held in tact, the law is a useful tool for the Court in cases that have been transferred from the ICTY.

4.1.3 PROSECUTING THE CRIMES IN THE STATE COURT OF BIH

The state court of BiH has prosecuted for numerous acts constituting genocide, crimes against humanity and war crimes under the CC of BiH. It is neither possible nor prudent to give a written account of every case that has been prosecuted before the court. However, it is important to examine a representative handful of cases in order to understand to what extent the work of the international

⁵⁷ Law on the Transfer of Cases From the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings Before the Courts in BiH (The Transfer Law) "Official Gazette of Bosnia and Herzegovina" No. 61/04 <http://www.sudbih.gov.ba/files/docs/zakoni/en/zakon_o_ustupanju_predmeta_-_61_04_-_eng.pdf> accessed 15 July 2009.

⁵⁸ Article 4.

⁵⁹ Article 5.

⁶⁰ Article 7.

⁶¹ Article 8.

⁶² See *Prosecutor v. Stankovic* (First Instance Verdict), Court of BiH Case No. X-KR-05/70 (14 November 2006). The Court accepted the facts agreed upon in previous ICTY jurisprudence in order to establish the requisite elements of a widespread and systematic attack against a civilian population. The Court, in response to the defence objection that admissibility of previous facts were prejudicial and violated the imminent presentation and adversarial principle, cited Article 4 of the Law on Transfer which allowed admissibility of proven facts established by ICTY decision so long as those facts do not directly or indirectly incriminate the accused. The Court determined that the facts adjudged in *Prosecutor v. Kunarac* pertaining to the systematic attack by the Bosnian Serb army against the Muslim population of Foca was general in nature and acceptable per Article 4, thus, with the evidence sufficient to prove that Stankovic knew of the attack, the general elements of crimes against humanity were met.

⁶³ See *Prosecutor v. Stupar* (First Instance Verdict), Court of BiH Case No. X-KR-05/24 (29 July 2008).

courts have impacted the state Court in its decision making process. Thus, what follows is an examination of cases based upon key substantive legal issues such as, what elements make up crimes of rape and torture and how the courts prosecute the crime of genocide. The issues were not chosen because they represent the quantitative majority of crimes prosecuted, but rather because they involve legal concepts that offer unique opportunities to the state Court. For example, rape as an international crime had not been defined prior to the proceedings of the ad-hoc tribunals, so examining how the tribunal and the state Court have defined the offence gives a window into the interplay between the international and domestic courts in defining new crimes that have little history to rely upon in the international context.

RAPE AND SEXUAL VIOLENCE CRIMES

In the aftermath of the war in the former Yugoslavia, reports of mass rapes of Bosnian women by Serb forces surfaced throughout the media, NGOs and governmental agencies. The UN General Assembly condemned the commission of wartime rape in the former Yugoslavia and stated that rape was being utilized as “...a deliberate weapon of war in fulfilling the policy of ethnic cleansing by Serbian forces...”⁶⁴

International law has been unequivocal in its prohibition of the act of rape.⁶⁵ However, lapses in enforcing the laws prohibiting rape have been prevalent throughout history. Furthermore, modern courts have faced challenges in prosecuting for rape committed during times of conflict because no real definition of rape has existed in international law. The ICTY and the state Court of BiH have prosecuted for acts of rape and sexual violence. To that end, both the ICTY and the Court of BiH have engaged in discourse about what constitutes rape under their respective statutes. Additionally, there is an inherent connection between the ICTY and the state Court of BiH in many of the cases dealing with sexual violence offence because many of those cases have evolved from related events. Thus, an analysis of cases that share a factual nexus will elucidate the similarities and subtle differences between the court in approaching the issue of prosecuting rape in war and armed conflict.

i. International Perspective: Defining the crime of rape at the ICTY

The Statute of the ICTY explicitly prescribes rape as a crime against humanity under Article 5(g). Additionally, rape is implicitly included under Article 2 grave breaches of the Geneva Conventions and Article 3 violations of laws or customs of war. In 1996 the ICTY indicted eight Bosnian Serbs for the

⁶⁴ UNGA Res 50/192 (23 February 1996) UN Doc A /RES/50/192.

⁶⁵ See T Meron ‘Editorial Comment: Rape as A Crime Under International Humanitarian Law’ (1993) 87 AJIL 424 for a historical backdrop to the prosecution of rape under international law and an argument for recognition of rape as a war crime under customary international law. Within the modern context, Judge Meron cites the prosecution of rape as a war crime at the Tokyo tribunal and the condemnation of rape as a crime against humanity under Control Council Law No. 10.

rape, torture and sexual enslavement of women in the Foca region of southeast BiH. The indictment, known as the 'Foca Indictment' was heralded as being the first indictment in international law to be exclusively based upon sexual violations and acts committed against women. It was an important step for the ICTY into the lengthy an ongoing dialogue concerning the challenge to impunity for acts of sexual violence committed against women in times of war and conflict.

Following the Foca indictment, the Trial Chamber set out to define rape for the first time within the Tribunal.⁶⁶ In the *Prosecutor v. Furundzija*, the accused was charged with violations of the laws and customs of war pursuant to Article 3 of the Statute for acts of torture and outrages upon personal dignity including rape, committed while the accused was acting commander of the "Jokers," a special unit of the armed forces of the Croatian community of Herzeg-Bosna. A witness testified before the Chamber that she was captured and interrogated by the accused and then later beaten and sexually assaulted by a soldier while the accused did nothing to prevent the acts.

Prior to the *Furundzija* judgement, the Trial Chamber at the International Tribunal for Rwanda (ICTR) faced the similar issue of defining rape under international law in the *Prosecutor v. Jean-Paul Akayesu*.⁶⁷ The ICTR Chamber's decision regarding rape was of valuable import to prosecuting sexual violence crimes but the definition provided by the Chamber was conceptual in approach and lacked authority, prompting the *Furundzija* Chamber to look to national jurisdictions for guidance in developing its definition. The Trial Chamber noted that national definitions of rape revealed a trend toward broadening the scope of the crime to include acts that had been previously accorded a less serious classification such as sexual or indecent assault.⁶⁸ The Chamber asserted that regardless of this broadening, the key element to any of the offences attached to the definition of rape is forced physical penetration.⁶⁹ Additionally, the Chamber stated that in all surveys conducted of national jurisdictions, the definition of rape included an element of force, coercion, threat, or acting without the consent of the victim.⁷⁰ In that vein, the Chamber defined the act of rape as such:

1. [T]he sexual penetration, however slight:
 - a. of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - b. of the mouth of the victim by the penis of the perpetrator;

⁶⁶ *Prosecutor v. Furundzija* (Judgement) ICTY-95-17/1-T (10 December 1998). It should be noted that prior to the *Furundzija* case, the ICTY Trial Chamber in *Prosecutor v. Delalic et al.*, ICTY-96-21, adopted the definition of rape that was established by the ICTR Trial Chamber. However, this definition was considered conceptual and did not give an objective definition of elements of the crime. In that sense, the *Furundzija* Trial Chamber was recognized as the first to establish such a definition of the crime.

⁶⁷ *Prosecutor v. Akayesu* (Judgement) ICTR-96-4-T (2 September 1998).

⁶⁸ *Furundzija* Judgement (n 66) para 179.

⁶⁹ *Ibid.*

⁷⁰ *Ibid* para 180.

2. By coercion or force or threat of force against the victim or a third person.⁷¹

The decision in *Furundzija* did not produce the last word in defining the crime of rape at the ICTY. The Trial Chamber in *Prosecutor v. Dragolub Kunarac et al.* also tackled the issue of defining rape under international law.⁷² The *Kunarac* Chamber's definition diverged to some extent from the one previously established by the *Furundzija* Chamber. The accused Kunarac had originally been indicted under the Foca Indictment but he and two other accused were severed from the original indictment and joined in a later amended indictment. The three accused were charged, *inter alia*, for rape as a violation of the laws and customs of war under Article 3 and as a crime against humanity under Article 5.

The *Kunarac* Trial Chamber adopted, for the most part, the definition of rape established by the *Furundzija* Chamber, but took issue with the requirement of the element of force or coercion as described in part (ii) of the definition. The Chamber asserted that the element of force or coercion was more narrowly stated than what was required by international law.⁷³ The *Kunarac* Chamber considered the survey of national jurisdictions conducted by the *Furundzija* Chamber and additional national jurisdiction to find that the principle common to all jurisdictions was that sexual penetration would constitute rape if it is not truly voluntary or consensual.⁷⁴ Thus, while force and coercion are certainly included within acts that constitute rape, the common principle among national jurisdiction in defining rape goes beyond that and is based upon violations of sexual autonomy.⁷⁵ It is important to note that the Chamber cited the 1991 Penal Code of BiH as defining rape in terms of force or coercion. However, the Chamber then proceeded to examine other jurisdictions that provide for other circumstances such as the vulnerability or incapacity of the victim and absence of consent or voluntary participation.⁷⁶ The Chamber's considerations led to a definition of rape based on the *Furundzija* definition but with the exclusion of element (ii) of force and coercion in favour of the element of sexual penetration without the consent of the victim.⁷⁷

The *Kunarac* Appeals Chamber upheld the Trial Chamber's definition vis-à-vis rape.⁷⁸ Underscoring the notion of violation of sexual autonomy as the essential element constructing the act of rape, the Appeals Chamber allowed that factors other than force may be utilized to render sexual

⁷¹ Ibid para 185. It should be noted that in their survey of national jurisdictions, the trial Chamber recognized that not all jurisdictions considered types of oral penetration or violation to fall under the definition of rape. Nevertheless, the Trial Chamber decided to include the sexual penetration of the mouth of the victim as a proscribed act under the definition of rape.

⁷² *Prosecutor v. Kunarac* (Judgement) ICTY-96-23-T (22 February 2001).

⁷³ Ibid para 438.

⁷⁴ Ibid para 439.

⁷⁵ Ibid para 440.

⁷⁶ Ibid paras 443-452.

⁷⁷ Ibid para 460.

⁷⁸ *Kunarac* (Appeals Chamber Judgement) ICTY-96-21-A (20 February 2001).

penetration non consensual.⁷⁹ The Chamber cited the legislative and substantive law from Germany and the United States to illustrate how certain power constructs between victim and perpetrator, such as exists between a prison guard and an inmate, can create situations whereby an inherent coerciveness exists and the absence of consent is therefore not a required element.⁸⁰ The Chamber seemingly recognized a nexus to the instant case because the victims were raped by soldiers who were holding them at the KP Dom facility. Thus, the Appeals Chamber upheld the element of lack of consent, while paradoxically putting forth the argument that certain environmental factors may be so coercive as to render the issue of consent moot.

I. NATIONAL PERSPECTIVE: DEFINING THE CRIME OF RAPE AT THE STATE COURT OF BIH

The CC of BiH includes rape and sexual violation as a crime against humanity under Article 172(1) (g) and rape and sexual violation as a war crime against civilians under Article 173(1) (g). The offences are prescribed by the chapeau elements of the Articles and the act of "...coercing another by force or threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity."⁸¹ Of the 157 cases to reach a final verdict at the state Court of BiH thus far,⁸² a handful of them have involved charges based on crimes of sexual violence.

The events of *Prosecutor v. Gojko Jankovic* share a nexus with the *Kunarac* case at the ICTY.⁸³ The accused Jankovic was originally indicted under the Foca indictment but was severed and transferred to the state Court in December 2005.⁸⁴ Jankovic had been a leader of a military unit acting within the Foca Brigade of the Serbian Army. He was charged, *inter alia*, with torture and rape as crimes against humanity pursuant to Article 172(1) for participating in acts which included the detention, physical abuse and sexual violation of non-Serb women. The Court found the accused guilty of perpetrating torture and rape, and aiding and abetting in the rape of women held in detention during the widespread and systematic attack on the Foca municipality. In assessing his responsibility for the rape of a victim, witness FWS-95, the Court determined that it was proven beyond a reasonable doubt that there existed on the part of the accused, "the intention...to effect the sexual penetration and the knowledge that it was done without the consent of the victim..."⁸⁵ Furthermore, in reference to another victim who was repeatedly raped by the accused while detained at a private

⁷⁹ Ibid para 129.

⁸⁰ Ibid para 131.

⁸¹ Note that this set of offences, absent the coercive element, is identical to Article 7(g) of the Rome Statute.

⁸² See website for Court of BiH, Statistics, <http://www.sudbih.gov.ba/files/docs/statistika/2009-06-30/Number_of_cases_before_Section_I_and_II_-_June_2009.pdf> accessed 16 July 2009.

⁸³ *Prosecutor v. Jankovic* (First Instance Verdict) Case No. x-KR-05/161 (16 February 2007).

⁸⁴ *Prosecutor v. Jankovic* (Decision on Referral of Case Under Rule 11bis) ICTY-96-23/2-PT (22 July 2005).

⁸⁵ *Jankovic* Verdict (n 83) 59

house in the municipality, the Court stated that, “Given the extreme conditions in which [the victim] found herself, she was never in a position to give true consent. She was *de facto* deprived of her sexual autonomy...”⁸⁶ Thus, the Court echoed the principle established by the *Kunarac* Chamber in recognizing that it is the violation of sexual autonomy that constructs the act of rape. In other words, lack of consent of the victim became an element of the crime. Thus, the Court defines the crime of rape in terms of force and coercion as well as consent.

The evolution of the definition of rape in international courts may have begun with a debate over whether consent or force and coercion best defined the elemental axis of the crime, but it has moved toward combining the elements in such a way to cover the environmental context of rape in war and conflict. Recent jurisprudence from the ICTR has pointed toward a definition of rape that recognizes no conceptual difference between the paradigms of consent and force and coercion. Additionally, rape as defined by the Elements of Crimes to the Rome Statute incorporates both the language of force and coercion and the language of consent.⁸⁷ The Court of BiH has followed this evolution in its own decisions.

In addition to finding the accused committed acts of rape, the Court also found that the accused committed sexual slavery pursuant to Article 172(g). A witness testified to the fact that a few chosen female detainees were removed to a private home occupied by the accused where they were kept for several months and subjected to continued acts of rape throughout their time at the house. The witness testified that despite being left alone at the house with a key, the women were held in a state of captivity. The witness recalled that “We had nowhere to escape to. We were surrounded by Serb territory and we couldn’t go anywhere...we were not there by our own will.”⁸⁸ The court concluded that the circumstances of the women’s detention amounted to sexual slavery because they were forced to stay in the house as protection against further violence by an unknown number of soldiers should they flee. The Court determined that such a scenario indicated that the accused had denied the women their free will or choice.⁸⁹

The Court’s finding that the accused committed sexual slavery may infer influence of the Rome Statute upon the CC of BiH. The codification of sexual slavery as an explicit act of crimes against humanity appears in the Rome Statute and has been adopted by the CC of BiH. The ICTY Statute, by contrast, does not explicitly mention sexual slavery; however, the crime of sexual slavery

⁸⁶ Ibid 67.

⁸⁷ Article 7(1) (g) – 1

...

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

....

⁸⁸ Ibid 65.

⁸⁹ Ibid.

has been implicitly recognized under Article 5(c) enslavement as a crime against humanity. In *Kunarac*, for example, the Trial Chamber found that one of the factors included within the definition of enslavement was the “control of sexuality.”⁹⁰ The language utilized by the *Kunarac* Chamber in establishing the definition of enslavements bears similarity to the elements of sexual slavery established by the Assembly of States Parties in reference to the Rome Statute.⁹¹ However, the Rome Statute and, in turn, the CC of BiH took a step further in specifically characterizing and defining sexual slavery as separate from enslavement.

As stated previously, the accused Jankovic was also convicted for torture as a crime against humanity for the acts of sexual violence committed against Muslim women in Foca. Pursuant to Article 172 (2) (e) of CC of BiH, torture is defined as the intentional infliction of severe pain or suffering whether physical or mental upon a person in the custody of the accused.⁹² The Court found that a cumulative conviction for torture and rape based on the same conduct was permissible because each crime carried a materially distinct element that required proof of a fact not required by the other.⁹³ For rape, the element of sexual penetration must be proved and for torture it is the element of prohibited purpose.⁹⁴ The Court determined that the acts of rape described by the

⁹⁰ *Kunarac* Judgement (n 72) para 543.

⁹¹ Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2 (2000).

The common elements for sexual slavery as a Crime Against Humanity and as a War Crime read as follows:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. [footnote: It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.]
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

The *Kunarac* Chamber was “...in general agreement with the factors put forward by the Prosecutor to be taken into consideration in determining whether enslavement was committed. These are the control of someone’s movement, control of physical environment, psychological control, measures taken to deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour, The Prosecutor also submitted that the mere ability to buy, sell, trade or inherit a person or his or her labours is a relevant factor.” *Kunarac* Judgement (n 72) para 543; See Also V. Oosterveld, ‘Sexual Slavery and the International Criminal Court: Advancing International Law (2004) 25 Mich. J. Int’l L. 605 for the background and history of the adoption of sexual slavery into the Elements of Crimes by the Assembly of States Parties. It should be noted that the discussion and adoption of sexual slavery into the Elements of Crimes was achieved before the *Kunarac* Chamber handed down its judgement.

⁹² It is important to note that the *Kunarac* Trial Chamber diverged from previous chambers in regard to the definition of the crime of torture as well. The Judgements of both *Prosecutor v. Delalic* and *Prosecutor v. Furundžija* adhered to the definition purported in the Torture Convention. The *Kunarac* Trial Chamber cited Article 1 on of the Convention as stating the definition of torture provided was limited and applicable only for the purposes of the convention. The Chamber further examined other international instruments and case law before holding that the presence of a state official or other person of authority was not mandated within the definition of torture. The CC of BiH defines torture as the “...intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under control of the accused...” Thus, the definition of torture within BiH is in line with what has been accepted by the ICTY as the international definition of the offence.

⁹³ *Jankovic* Verdict (n 83) 53.

⁹⁴ The Court listed the prohibited purposes as obtaining information or a confession, punishing, intimidating or coercing the victim or a third person, or discrimination on any ground.

witnesses caused severe pain and suffering, were intentional and included such prohibited purposes as punishing the victims and discriminating against them based on their Bosniak nationality.⁹⁵

Prior to the *Jankovic* decision, the ICTY trial chamber found in favour of cumulatively charging for rape and torture based on the same acts. The ICTY Trial Chamber originally considered the question in the *Celebici* case.⁹⁶ The Chamber determined that whenever acts of rape or sexual violence meet the enumerated elements of torture,⁹⁷ then "...they shall constitute torture, in the same manner as any other acts that meet [the] criteria."⁹⁸ Thus, the Chamber determined that rape *may* constitute torture. The *Kunarac* Appeals Chamber further elucidated the subject by stating that each crime carries an element that is materially distinct from the other – for torture it is the element of prohibited purpose and for rape it is the element of penetration.⁹⁹ Additionally, the Appeals Chamber stated that "...the physical pain, fear, anguish, uncertainty and humiliation to which the Appellants repeatedly subjected their victims elevate their acts to those of torture."¹⁰⁰ Thus, it would seem from the use of the word "elevate" that the Chamber considered that something more, such as the frequency and severity of the act, was needed to raise the sexual violation up to the threshold of torture. Nevertheless, both the Court of BiH in *Jankovic* and the ICTY in *Kunarac* determined a dividing line between the elements of the respective crime, ensuring that both sets of elements must be proved in order for a cumulative conviction.

Almost one year after the *Jankovic* verdict, the state Court of BiH handed down the first instance verdict in *Prosecutor v. Zelko Lelek*.¹⁰¹ The accused, a reserve member of the Public Security Station Visegrad, was charged, inter alia, with crimes against humanity pursuant to Article 172 of the CC of BiH for using force to coerce Bosniak women to sexual intercourse or an equivalent sexual act. The Court accepted as established fact that in April 1992, the Yugoslav National Army (JNA) entered the town of Visegrad, a municipality in the south-eastern section of BiH. The JNA organized convoys to empty the villages of all non-Serb inhabitants.¹⁰² Many non-Serb residents who did not flee after the fall in April were killed and/or disappeared.¹⁰³ Witnesses testified, inter alia, that

⁹⁵ Ibid 53, 59.

⁹⁶ *Prosecutor v. Delalic et al.* (Judgement) (*Celebici* case) ICTY-96-21-T (16 November 1998).

⁹⁷ The Chamber defined torture as such:

- (i) There must be an act or omission that causes severe pain or suffering, whether mental or physical,
- (ii) which is inflicted intentionally,
- (iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,
- iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.

⁹⁸ *Celebici* Judgement (n 96) para 496.

⁹⁹ *Kunarac* Appeals Judgement (n 78) para 179.

¹⁰⁰ Ibid para 185.

¹⁰¹ *Prosecutor v. Lelek* (First Instance Verdict), Court of BiH Case No. X-KR/06/202 (23 May 2008).

¹⁰² Ibid 6-7.

¹⁰³ Ibid.

women and children were brought to a rehabilitation center known as the Vilina Vas spa, which was turned into a female camp where detainees were systematically mistreated.¹⁰⁴ Under Count 3 (c) of the indictment, the accused was charged with going to the Vilina Spa in June 1992 and raping witness MH who was taken to the spa under threat by Milan Lukic.¹⁰⁵ The witness testified that Lelak took her to a room in the spa and coerced her to have sexual intercourse, slapping her and cursing her several times. The Court determined that the events the witness described were satisfied the elements of rape as prescribed by the CC of the BiH.¹⁰⁶ Additionally, the Court found that the events described by witness MH constituted torture because the rape necessarily gave rise to severe pain and suffering. The Court relied upon the findings of the ICTY and the ICTR in so far that customary international law establishes that for rape to be an act of torture it is necessary that the infliction of severe pain or suffering is for the purposes of “obtaining information or a confession, punishing, intimidating or coercing the victim or a third person, or discriminating, on any ground against the victim or a third person.”¹⁰⁷ The Court went on to conclude that “Some actions per se imply suffering on the part of those subjected to them. Rape is such an act; sexual violence inevitably leads to severe pain or suffering and thus the qualification of this act as torture is justified.”¹⁰⁸ Compare this to previous findings on the subject and a certain movement toward conceptualizing rape as torture is seemingly taking place. In *Jankovic*, the Court stated that the acts of rape described by witnesses caused severe pain and suffering and did not venture further to assert the same for all acts of rape. Similarly, the ICTY utilized language that allowed for a permissible understanding of rape as causing severe pain and suffering, but not an automatic one. The *Lelek* verdict seemingly goes a step further in claiming that all acts of sexual violence meet the threshold of severe pain and suffering.

The ICC recently dealt with the question of cumulative charging for the first time. In the confirmation of charges against Jean-Pierre Bemba Gombo,¹⁰⁹ the Pre-Trial Chamber rejected the cumulative charge for rape and torture advocated by the Prosecutor.¹¹⁰ The Prosecutor, under count 3 of the Document Containing the Charges, alleged torture “through acts of rape or other forms of

¹⁰⁴ Ibid 16.

¹⁰⁵ See *Prosecutor v. Lukic* (Judgement) ICTY-98-32/1-T (20 July 2009). Milan Lukic was charged and convicted to life imprisonment by the ICTY Trial Chamber for crimes against humanity and war crimes for acts committed as part of a unit of the Serb forces in the Visegrad area. Although evidence provided at court included testimony of victims alleging sexual violence and rape by the accused., including rapes committed at the Vilina spa, no charges were of sexual violence were ever brought against the accused. Victim groups and NGOs responded critically to the omission of sexual violence charges. See Also N. Ahmetasevic et al., ‘Investigation: Visegrad rape victims say their cries go unheard’ *BIRN* (20 October 2008) <<http://www.bim.ba/en/32/10/1312/>> accessed 20 July 2009; Amnesty International, ‘Bosnia and Herzegovina: No Justice For Rape Victims’ (21 July 2009) <<http://www.amnesty.org/en/for-media/press-releases/bosnia-and-herzegovina-no-justice-rape-victims-20090721>> accessed 22 July 2009.

¹⁰⁶ *Lelek* Verdict (n 101) 36.

¹⁰⁷ Ibid citing *Akayesu* Judgement, para 391; *Kunarac* Judgement, paras 183, 479.

¹⁰⁸ Ibid.

¹⁰⁹ *Prosecutor v. Jean-Pierre Bemba Gombo* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08, P. T. CH. II, (15 June 2009).

¹¹⁰ Ibid para 190.

sexual violence.”¹¹¹ The Chamber determined that a finding for a cumulative charge of rape and torture would place an undue burden on the Defence and could only be justified where distinct crimes were alleged.¹¹² Such a distinction was marked by each crime requiring at least one material element not contained in the other.¹¹³ The Chamber determined that the Prosecutor did not distinctly characterize the acts alleged and, thus, the act of torture was full subsumed by the count of rape.¹¹⁴

Despite the rejection of the cumulative charge, the Pre-Trial Chamber shed some light on the conception of rape and torture within the ICC. First, The Chamber pointed out that pursuant to the Elements of Crimes, torture as a crime against humanity does not require the element of prohibited purpose. Additionally, The Chamber recognized that an “important degree of pain and suffering has to be reached in order for a criminal act to be an act of torture.”¹¹⁵ Such a characterization echoed the sentiment of the *Celebici* Chamber that a threshold of “something more” was needed to elevate a crime to torture. The Bemba Chamber then went on to place rape firmly within that threshold by stating that “...the specific material elements of the act of torture, namely severe pain and suffering and control by perpetrator over the person, are also the inherent specific material elements of the act of rape.”¹¹⁶ However, the act of rape is distinguished by the element of sexual penetration.¹¹⁷ Thus, a certain evolution in the characterization of rape vis-à-vis torture is reflected in the decisions by the Court of BiH and the ICC; whereby rape, a crime that has not always garnered the threshold of severity owned by torture, is now perceived in similar light as possessing complementary elements and exacting the same level of pain and suffering on victims.

Developments in international jurisprudence regarding rape and torture are seemingly moving toward a conception of rape and torture as increasingly intertwined. Indeed, prior to the verdicts in the above mentioned cases, the Special Rapporteur on the issue of systematic rape, sexual slavery and slavery-like practices stated that most, if not all of the cases of rape and sexual violence described, including those emanating from the war in the former Yugoslavia, could also be prosecuted as torture.¹¹⁸ Many NGOs and monitoring groups have followed suit, urging courts to consider rape as torture. However, reactions by legal scholars are not unanimous in advocating for the latest developments that draw rape and torture ever closer to one another under international law. Arguments put forth against an understanding of rape as torture include the recognition that the crimes do actually contain distinct elements and that it is factually false to claim that all rapes will necessarily meet the elements of torture. Additionally, some scholars believe that the relabeling of the

¹¹¹ Ibid para 189.

¹¹² Ibid para 202.

¹¹³ Ibid.

¹¹⁴ Ibid para 205.

¹¹⁵ Ibid para 193.

¹¹⁶ Ibid para 204.

¹¹⁷ Ibid.

¹¹⁸ UNCHR ‘Systematic rape, sexual slavery and slavery-like practices during armed conflict: Final report submitted by Ms, Gay J McDougall, Special Rapporteur’ (1998) E/CN.4/Sub.2/1998/13.

crime from rape to torture detracts from the reality of the crime as a sexual assault, and that finding rape per se meets the suffering of threshold of torture infers an incapability of not being victimized by rape in armed conflict.¹¹⁹ Nevertheless, international courts and the Court of BiH alike have pursued a construction of the crime of rape that echoes the severe suffering of torture. Perhaps this construction has been perpetuated as a way to make the law meet the unique context and factors that are brought to light with rape in armed conflict, or perhaps it is meant to relate yet another harsh reality of armed conflict. From the legal perspective, it most certainly reflects the interplay between international criminal law and the Court of BiH in prosecuting for sexual violence crimes in armed conflict.

PROSECUTING FOR GENOCIDE: THE LEGACY OF SREBRENICA

July 1995 marked a pivotal moment in the war raging in the territory of Bosnia and Herzegovina. In the early days of July, members of the Army of the Republika Srpska (VRS) planned and carried out an offensive on the strategically located “safe area” of Srebrenica.¹²⁰ After a five day offensive ending on 11 July, the town fell to VRS forces. In the aftermath of the offensive, nearly 25,000 Bosnian Muslim residents of Srebrenica fled the area to the UN compound at the nearby town of Potocari. On 12 and 13 July, Bosnian Muslim women, children and elderly were transported out of Potocari to the territory near Kladanj. What followed has been described as the worst massacre in Europe since the Second World War. Although exact numbers have never been confirmed, according to the ICTY Trial Chamber an estimated 7,000-8,000 Bosnian Muslim men were executed by VRS forces. In 1993, BiH had made an application before the International Court of Justice (ICJ) to determine whether Serbia had perpetrated genocide against Bosnia for acts committed during the war. The ICJ ultimately found that only the events at Srebrenica constituted genocide under the law, however, Serbia could not be held responsible for committing genocide.¹²¹

I. THE INTERNATIONAL RESPONSE: SREBRENICA CASES BEFORE THE ICTY

Prosecuting individuals for the massacre at Srebrenica has been an important actual and symbolic part of the administration of justice in the wake of the war in both the international court and national courts. Srebrenica is the sight of the only acts of the war that have been deemed genocide by the international community, thus it bears a symbolic significance in the challenge of impunity for crimes committed in the former Yugoslavia. From the international court perspective, the first significant case charging individual criminal responsibility for acts of genocide in Srebrenica was *The Prosecutor v.*

¹¹⁹ See Janet Halley, ‘Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict’ (2008) MelbJIntLaw 3.

¹²⁰ UNGA ‘Report of the Secretary-General pursuant to General Assembly resolution 53/35’ (1999) Un Doc A/54/549.

¹²¹ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgement, I.C.J. Reports, p 47 2007 <<http://www.icj-cij.org/docket/files/91/13685.pdf>> accessed 6 July 2009.

Krstic.¹²² Radislav Krstic had been a general in the VRS and Chief of Staff of the Drina Corps during the time of the attacks on Srebrenica in 1995. Krstic was charged with genocide, inter alia, in relation to the mass executions of the Bosnian Muslim men in Srebrenica between 11 July and 1 November 1995. Prior to establishing whether the accused bore individual criminal responsibility for the crimes alleged, the Trial Chamber had to determine whether the actions of the VRS against the Bosnian Muslim men in Srebrenica fulfilled the elements of genocide pursuant to Article 4 of the ICTY Statute. Article 4 defines the crime of genocide in the exact terms as the Genocide Convention. The Trial Chamber found that there was evidence to establish the material elements of (a) killing members of the protected group and (b) causing serious bodily and mental harm to members of the group.¹²³

The mental elements of the crime of genocide are of paramount importance because it is precisely the specific intent underlying the crime that separates the commission of genocide from the mere commission of the individual enumerated acts. Thus, cases involving accusations of genocide usually hinge upon the proof of intent of the accused. In order to establish the mental elements required for genocide, the Trial Chamber had to determine whether the material elements were committed with the intent to destroy, in whole or in part, the protected group. The Defence had argued that the killing of military aged Bosnian Muslim men at Srebrenica was not committed with the special intent required to constitute genocide under Article 4.¹²⁴ The Trial Chamber engaged in a two-pronged analysis in order to establish the legal definition of the components of the mental elements. First, it sought to define the group, as such. Noting that the Bosnian Muslims were recognized as a nation by Serb authorities as well as the Yugoslav Constitution of 1963, The Trial Chamber determined that Bosnian Muslims were the protected group under the Statute and that the Bosnian Muslims of Srebrenica or the Bosnian Muslims of Eastern Bosnia constituted a part of that protected group.¹²⁵

The second prong of the analysis sought to define the intent to destroy the group, in whole or in part. In determining what constitutes the “intent to destroy,” the Trial Chamber noted that actual physical destruction of a group was the most obvious way to meet this goal.¹²⁶ It further reviewed sources that had argued for the inclusion of other forms of destruction – such as cultural – before recognizing that, in accordance with customary international law, the definition of genocide is limited to those acts seeking the *physical* or *biological* destruction of the group.¹²⁷ In terms of what

¹²² *Prosecutor v. Krstic* (Judgement) ICTY-98-33-T (2 August 2001). The first judgement on a case charging genocide before the ICTY was *Prosecutor v. Goran Jelusic* (Judgement) IT-95-10-T (14 December 1999). Jelusic was charged with genocide for committing systematic killings of Bosnian Muslim detainees being held in the area of Brcko. The Trial Chamber held that the Prosecutor had not established beyond a reasonable doubt that genocide was committed in Brcko and that it had not been proved that the accused had the intention to destroy members of the protected group.

¹²³ *Ibid* para 543.

¹²⁴ *Ibid* para 593.

¹²⁵ *Ibid* para 560.

¹²⁶ *Ibid* para 574.

¹²⁷ *Ibid* para 580.

constituted “in whole or part” of the protected group, it had been recognized that the intent to destroy must target at least a *substantial* part of the group, with the *substantial* part delineated by either quantitative or qualitative terms.¹²⁸ In other words, the perpetrators may target a significant part of a group rather than a substantial part. The Trial Chamber, therefore, had to determine whether the part of the group the attacks were committed against, i.e. the Bosnian Muslims of Srebrenica, could be considered a significant portion of the larger group of Bosnian Muslims as a whole. In order to reach a conclusion on the matter, it qualified how the part of the group was to be identified by the perpetrators. Thus, the Trial Chamber was of the opinion that to show the specific intent of genocide, the perpetrators must view that part of the group as distinct rather than as an accumulation of isolated individuals within the group.¹²⁹ In other words, the perpetrators “...must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such.”¹³⁰ Therefore, the killing of a large number of members of a group located throughout a broad geographic region might not qualify as genocide, whereas the killing of a lesser number of members located within a limited geographic area would qualify because the killings would show intent to annihilate the group as a distinct entity.¹³¹ Applying this understanding, the Trial Chamber concluded that the killing of military aged Bosnian men in Srebrenica did qualify as intent to destroy in part the Bosnian Muslim group and, therefore, did constitute the crime of genocide under the statute.

The verdict rendered by the *Krstic* Trial Chamber that genocide was committed in the area of Srebrenica is not undeserving of some critical response, primarily in relation to the Trial Chamber’s findings on the intent to destroy the group in whole or in part. The Defence had argued, inter alia, that the killing of only military-aged men was not evidence enough to support a finding that the threshold for intent was proved.¹³² The argument lay in the recognition of the relatively small number of Bosnian Muslims killed at Srebrenica and the fact that it was only the military aged men targeted while the women, children and elderly were transported to another area. The Chamber responded to this argument by taking the qualitative approach to its analysis. It determined that the perpetrators must have known of the lasting impact of their actions, notably that killing the men and deporting the other members of the population would inevitably result in the physical disappearance of the Bosnian Muslim group in Srebrenica. The Chamber noted the particular catastrophic impact on the survival of a group such as the Bosnian Muslims because of the traditionally patriarchal nature of the population. Prior to the *Krstic* judgement, the Trial Chamber had stated that the qualitative approach to determining the destruction of a significant portion of the population should mean that the targeted group reflected a representative fraction of the larger group, such as its leaders.¹³³ In other words,

¹²⁸ Ibid para 582.

¹²⁹ Ibid para 590.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid 593.

¹³³ *Jelusic* (n 122) para 81.

“...the important element...is the targeting of a selective number of persons who, by reason of their special qualities of leadership within the group as a whole, are of such importance that their victimization...would impact upon the survival of the group as such.”¹³⁴ It is, therefore, not unreasonable to conclude that the *Krstic* Chamber had gone beyond the subjective analysis applied in previous ICTY cases in order to draw the requisite intent from the killing of the military aged Bosnian Muslim men. It was never stated the men killed at Srebrenica were representative of anything more being military aged. They were not noted as military or societal leaders or men who would carry special qualities whose loss thereof would disproportionately impact the survival of the population. Thus, it seems that the Trial Chamber had to add the contextual argument that such a patriarchal society would be catastrophically impacted by the loss of this particular group of men. In this regard, it imposed its own special qualities upon the targeted group and, consequently, extended the meaning of “a significant portion of population” that had previously been established by the Trial Chamber.

Some legal scholars have critiqued the *Krstic* Trial Chamber for taking the definition of intent too far and ultimately broadening the notions of what constitutes genocide under the law of the ICTY. For example, distinguished genocide scholar William Schabas has deconstructed much of the *Krstic* judgement, providing critical response to the Chamber’s reasoning vis-à-vis the delineation of the killing of the military aged Bosnian Muslim men as a part of the protected group pursuant to the law.¹³⁵ Notably, he recognized that the qualification of the destruction of the group in terms of impact fell short of the full meaning of “significant portion of the group” Logically, other explanations existed that could equally explain the targeting of military aged men, such as the intent to kill potential combatants. Furthermore, he stated that, “there is a world of difference between physical destruction of a group and ‘a lasting impact’” and pointed to the fact that classic constructions of genocide are strikingly dissimilar in their inclusion of killing women and children in order to ensure destruction of the population.¹³⁶ Ultimately, Schabas concluded that while the events of Srebrenica were tantamount to crimes against humanity, the categorization of the events as genocide “...seems to distort the definition unreasonably”¹³⁷ Additionally, Alexander Zahar and Goran Sluiter noted the lack of clarity by the *Krstic* Chamber in its reasoning. They argued that, in finding that the targeting of the only the Muslim men of Srebrenica for killing fulfilled the “in part” element of the crime, the *Krstic* Chamber technically concluded that in some circumstances, the intent to destroy a part of a part of a group may be sufficient to establish the intent to commit genocide.¹³⁸ Again, such a conclusion would be deemed an expansion of the intended meaning and application of the elements.

¹³⁴ *Prosecutor v. Dusko Sikirica* (Judgement of Defence Motions to Acquit) ICTY-95-8-T (3 September 2001) para 77.

¹³⁵ See W Schabas, ‘Was Genocide Committed in Bosnia and Herzegovina? First Judgements of the International Criminal Tribunal of the Former Yugoslavia’ (2001) 25 *Fordham Int’l L.J.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ A Zahar & G Sluiter, *International Criminal Law* (OUP, Oxford 2008) 177-78.

The critical responses to the *Krstic* Trial Judgement regarding the finding for genocide in Srebrenica are important to illustrate how the interpretation of the international courts may affect the definition and application of the law. The critical responses are certainly valid and thought provoking enough to engender questions as to the proper application of the law on genocide in the ICTY, or, at the very least to merit a critical review on appeal and/or in the subsequent cases before the tribunal. However, the finding of the *Krstic* Trial Chamber was duly upheld by the Appeals Chamber and similarly relied upon in subsequent cases before the ICTY. In some cases, the findings in *Krstic* have been firmly entrenched in the jurisprudence with language that further legitimizes them.¹³⁹ Furthermore as will be discussed in the following section; the Court of BiH took cues from the ICTY and the *Krstic* Chamber specifically, in its own analysis on the question of whether genocide was committed at Srebrenica. Thus, this question provided a ripe forum for the influence of the ICTY upon the national court of BiH.

II. THE NATIONAL RESPONSE: SREBRENICA CASES BEFORE THE COURT OF BIH PROSECUTOR V. MILOS STUPAR

The state Court of BiH confirmed its first indictment charging genocide for actions committed during the summer of 1995 in Srebrenica in December 2005. The case was the first to charge genocide in a national court for acts committed at Srebrenica. The first instance verdict in the case against *Milos Stupar et al.* (the Kravica case) was handed down in July 2008.¹⁴⁰ The facts of the case primarily dealt with events which occurred between 10 and 15 July, 1995, wherein VRS soldiers in the Sekovici Detachment were sent to Srebrenica area and engaged in combat activities on 13 July at Sandici Meadow. Bosnian men in the area surrendered to the VRS forces and were taken to the warehouse of the Kravica Farming Cooperative and executed.¹⁴¹ It was concluded from the evidence provided that the number of Bosniak killed held at the Kravica warehouse on that day exceeded 1000.¹⁴²

The Panel applied Article 171 of the CC of BiH to the offence alleged. The article prescribes genocide in almost identical terms as Article 2 of the Genocide Convention.¹⁴³ The interpretation and

¹³⁹ See *Prosecutor v. Radislav Krstic* (Appeals Chamber Judgement) ICTY-98-33-A (19 April 2004). The Appeals Chamber reiterated the findings of the Trial Chamber and stated that the killing of the Bosnian Muslim men would have “severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction” para 28. See also *Prosecutor v. Vujadin Popovic et al.* (Judgement) ICTY-05-88-T (10 June 2010) Note that the Trial Chamber in *Popovic* referred the men targeted at Srebrenica as “able bodied men” as opposed to “military aged” men, thus, withdrawing any label that would serve to infer a reason behind the targeting of the men other than genocidal. Additionally, the Trial Chamber stated that the scope of killing was wider than just military aged men and included some of the civilian population of elderly and young. Therefore, the Trial Chamber held that the evidence inferred the intent to biologically destroy the entire group of Bosnian Muslim men of Srebrenica. Para 866.

¹⁴⁰ *Prosecutor v. Milos Stupar (The Kravica Case)* (First Instance Verdict) Court of BiH Case No. X-KR-05/24 (13 January 2009).

¹⁴¹ *Ibid* 37.

¹⁴² *Ibid* 39.

¹⁴³ Article 171 of the CC of BiH defines the offence of genocide as:

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

establishment of the material elements of the crime was of little discussion as the evidence proved that the accused participated to a varying extent in the underlying act of killing. As genocide is a crime that is particularly defined by its requirement of special intent, the interpretation and the establishment of the mental elements of the crime provided the heart of the analysis of the application of the law. The establishment of the special intent to destroy a protected group in part or in whole provides a particular set of difficulties, in general, because evidence is rarely provided that points directly and expressly to the accused intent or state of mind. Consequently, special intent is inferred from the acts of the accused. The Court of BiH established factors that, when examined together, would go toward establishing the requisite intent, namely: 1) The general context of events in which the perpetrator acted; 2) The perpetrator's knowledge of the context; and 3) The specific nature of the perpetrator's acts.¹⁴⁴ Both the jurisprudence of the ICTY and the Court of BiH illustrate that making a finding for the requisite intent for genocide involves a highly contextual analysis. It is obvious that overlap between the courts would exist in regard to the contextual framework of the events at Srebrenica and the evidence that goes toward establishing the requisite elements of the offence of genocide. The examination of the case against Stupar, as well as, subsequent cases alleging genocide reveal the overlap between the international and the national courts in assessing the contextual factors that the courts utilize in their findings.

Just as in the ICTY Trial and Appeal Chambers, the Panel identified the Bosnian Muslims of Srebrenica as part of the larger protected group of Bosnian Muslims. In terms of the killings charged in the indictment, they ultimately concluded that the killings at the Kravica Farming Cooperative were determinative of a substantial part of the aforementioned recognized protected group. In supporting this finding, the panel reasoned that the "substantial" nature of the population went beyond a mere quantitative analysis and included the qualitative construction of the population as an important strategic and symbolic portion of the whole.¹⁴⁵ Additionally, the panel acknowledged that the killing of women would have been a more successful plan of accomplishing genocide, but that considering the roles of men and women in the Bosnian society, especially in times of war, the perpetrators logically inferred that the killing of the men would lead to the lasting destruction of the population.¹⁴⁶ Accordingly, it also stated that as a matter of law, the genocidal plan need not be the best nor the most successful in achieving its goal. Thus, the Panel interpreted the mental element of the crime of genocide in this case in a similar vein as the ICTY by considering certain contextual factors into the analysis of the mental elements.

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

¹⁴⁴ *Stupar* (n 63) 58.

¹⁴⁵ *Ibid* 57.

¹⁴⁶ *Ibid* 61.

Additionally, the panel outlined the existence of a genocidal plan by the VRS and MUP forces.¹⁴⁷ The ICTY and the Court of BiH have recognized that there is no need to prove the existence of a genocidal plan or policy in order to prove genocidal intent, however, the existence of such a plan or policy may go toward proving specific intent.¹⁴⁸ However, the Panel provided evidence and analysis to establish that such a plan did indeed exist because it served as a relevant factor in considering the intent of the perpetrators. The Panel determined that a two-phased genocidal plan existed that included, in the first phase, the takeover of Srebrenica and, in the second phase, the eradication of the Bosnian Muslims in that area. The goal of the plan was to destroy the protected group of Bosnian Muslims through forcibly transferring the women, children and elderly from the area and killing the remaining males. This plan, as such, was similarly drawn by the ICTY in the *Krstic* and *Blagojevic* cases as well as the ICJ in *Bosnia and Herzegovina v. Serbia*. Thus, the Panel recognized the interplay between the international and national courts and, in specific terms, it relied upon the *Krstic* and *Blagojevic* Chambers in finding that the perpetrators were aware that the combination of forcible transfer of women, children and elderly along with the killing of the military aged men would inevitably result in the physical disappearance of the Bosnian Muslims of Srebrenica.¹⁴⁹

The killing of Bosnian Muslim men at the Kravica Farming Cooperative was analyzed within the contextual framework of the larger genocidal plan to destroy the Bosnian Muslims of Srebrenica. It is easy to see how the establishment of the genocidal plan aided in constructing the acts of the accused, particularly in regards to the mental elements of the crime. The existence of the larger genocidal plan and the knowledge by the perpetrators of that plan truly solidified the finding that the requisite intent was met. It stood to reason because, from a general perspective, the killing of an isolated group of Bosnian men [i.e., at the Kravica Farming cooperative] *could* be seen to be committed with the intent to destroy the group, however, if it is committed within the context of a known larger plan, the acts may be construed as a contribution to the plan and carry more significant weight in determining if the mental elements of the offence have been met. In essence, "...the perpetrator's knowledge of [the] plan or policy is a highly relevant evidentiary consideration in determining intent." Again, note that the international tribunals have held that a plan or policy is not a required element of the crime of genocide. However, both the ICTY and the ICTR have stated that proof of the existence of a specific plan or policy is strong evidence of the specific intent to commit genocide.¹⁵⁰ Additionally, it has been a recognized within international criminal law in general, that the

¹⁴⁷ Ibid 63.

¹⁴⁸ *Prosecutor v. Goran Jelusic* (Appeals Chamber Judgement) ICTY-95-10-A (5 July 2001) para 48.

¹⁴⁹ *Stupar* (n 140) 103. The Panel relied upon the *Krstic* Trial Judgement, para 595 ("[t]he Bosnian Serb forces knew, by the time they decided to kill all of the military aged men,, that the combination of those killings with the forcible transfer of the women, children, and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica.") and the *Blagojevic* Trial Judgement, para 677 ("...the Bosnian Serb forces not only knew that the combination of the killings of the men and the forcible transfer of the women, children and elderly, would inevitably result in the physical disappearance of the Bosnian Muslim population of Srebrenica, but clearly intended through these acts to physically destroy the group.").

¹⁵⁰ See *Prosecutor v. Kayishema and Ruzindana* (Trial Judgement) ICTR-95-1-T (21 May 1999) para 276.

genocide is logically perpetrated through the mechanism of a plan or policy regardless of the fact that it is not required under the Genocide Convention or relevant international court statutes. The sheer breadth and scope of the offence seemingly dictates such a set up. Considering this background, it is reasonable that the Court of BiH would adopt the finding of a genocidal plan as a means of showing proof of the requisite special intent. The Court of BiH did provide a dense analysis of the existence of a genocidal plan as a foundation for its findings regarding intent. In that sense, it legitimized within the national framework a recognized and useful practice for aiding the court in establishing the intent to commit genocide.

The Panel concluded that the accused were aware that there existed a genocidal plan.¹⁵¹ As stated previously, this awareness was not enough to prove intent to commit genocide by the accused but it did go toward establishing individual criminal responsibility. Five of the accused¹⁵² were determined to be instruments for the commission of genocide and, as such, were only liable criminally liable for the underlying acts of genocide unless intent to commit genocide was proved.¹⁵³ The prosecution had initially charged all of the accused with co-perpetrating the crime of genocide as participants in a JCE and two of the accused were additionally charged on the basis of command responsibility. Ultimately, the Panel dropped the JCE charge and found six of the accused had the requisite intent to be found guilty as co-perpetrators for the offence of genocide. A further discussion on the distinction between the modes of liability of JCE and co-perpetration applied by the Panel will be provided in (SECTION X). Four of the accused were acquitted of all charges.

The lead accused in the case, Milos Stupar, was found to be criminally liable as a commander for genocide perpetrated by others at the Kravica Farming Cooperative. Stupar had a superior-subordinate relationship with those who participated in the actus reus of the offence, knowledge of the offences committed by the accused persons, and he failed to take the measures necessary under the law to punish the offences. In determining the individual criminal responsibility of the lead accused, the court was placed in a unique position to answer a paradoxical question previously faced by international tribunals. Stupar's liability for the commission of genocide was based solely on his command responsibility as a Commander of a Special Police Detachment of the Ministry of the Interior. Thus, the Court addressed the question of "whether a commander must also possess genocidal intent in order to be held liable under the theory of command responsibility."¹⁵⁴ With little to no persuasive guidance from the international tribunals,¹⁵⁵ the Court of BiH circumvented making a

¹⁵¹ *Stupar* (n 63) 102.

¹⁵² Milenko Trifunovic, Aleksandar Radanovic, Brano Dzinic, Slobodan Jakovljevic, and Branislav Medan.

¹⁵³ *Stupar* (n 63) 117.

¹⁵⁴ *Ibid* 162.

¹⁵⁵ *Ibid* 162-163. The court points out that no final judgement has been made in either the ICTY or ICTR regarding liability for genocide based solely on command responsibility. The ICTY Trial Chamber concluded in *Prosecutor v. Stakic* that special intent would be required for responsibility under Article 7(3) command responsibility. Conversely, the Appeals Chamber in *Prosecutor v. Brdjanin*, suggested that command responsibility for genocide did not require a specific intent for liability to attach. The Trial Chamber in both *Brdjanin* and *Prosecutor v. Blagojevic* concluded that the

binding decision on the issue by finding that Stupar possessed specific intent to destroy the Bosnian Muslims from Srebrenica and stating that such a finding was sufficient only for the case at hand and did not represent the standard for all cases to appear before the Chamber. The verdict in regard to the finding of command responsibility is discussed at further length in section 5.1 of this report.

The case went before the Appeal Panel in April 2010 and the verdict against Stupar was reversed. The Appeal Panel found that there was not enough evidence to prove beyond a reasonable doubt that Stupar acted in the capacity of Commander of the 2nd Special Police Sekovici Detachment during the time of the indictment. The panel determined that based upon evidence provided, Stupar did not have either a *de jure* and/or *de facto* superior-subordinate relationship over the forces who had committed the offence.¹⁵⁶

The second genocide verdict from the Court of BiH was handed down on 16 October 2009. *The Prosecutor v. Milorad Trbic*¹⁵⁷ had originally appeared before the ICTY and was transferred to the BiH in June 2007 pursuant to Rule 11bis.¹⁵⁸ Similar to the *Stupar* verdict, the Court relied upon the findings of the ICJ and ICTY to determine that genocide was committed in the area of Srebrenica. Again, the Panel detailed the existence of a genocidal plan as evidence of the intent to commit genocide against the Bosnian Muslims in Srebrenica. The accused, Milorad Trbic, holding the rank of Reserve Captain in the VRS, Security officer in the Organ for Security and Intelligence Affairs in Zvornik Brigade, was found to have committed, *inter alia*, genocide pursuant to Article 171 (a), killing members of the group and Article 171 (b), causing serious bodily and mental harm to members of the group. The specific acts of the accused upon which the conviction was based included the coordinating and supervising of the illegal detention of Bosnian Muslim men and direct participation in the summary execution of Bosnian Muslim men from the Srebrenica enclave.¹⁵⁹ The Panel provided a thorough analysis of the elements of genocide, relying rather steadily upon the jurisprudence of both the ICTY and ICTR in defining the elements of the offence.¹⁶⁰ One key aspect of the conviction against Trbic was that the Panel found him liable for genocide through his participation in a JCE with

intent required to find liability for genocide under command responsibility was that the superior knew or had reason to know that the subordinates were about to or had committed genocide and that the subordinates possessed the requisite specific intent. The Bosnian War Crimes Chamber determined that the judgements from the international tribunals were not sufficient to be considered persuasive authority on the issue.

¹⁵⁶ The Appeal Panel re-adduced documentary and testimonial evidence presented in the first instance proceedings and determined that the evidence showed that Stupar, despite him having officially been temporarily assigned to the position of commander of the 2nd Sekovici Special Police Detachment in February 1994, he had been replaced in mid June 1995 by Rade Cuturic. Cuturic was still in command on 13 July 1995, when the unit arrived at Sandici and the Kravica warehouse.

¹⁵⁷ *Prosecutor v. Milorad Trbic* (First Instance Verdict), Court of BiH Case No. X-KR-07/386 (16 October 2009).

¹⁵⁸ *Prosecutor v. Milorad Trbic* (Decision on Referral of Case Under Rule 11bis) ICTY-05-88/1-PT (27 April 2007).

¹⁵⁹ *Trbic* Verdict (n 157) 5.

¹⁶⁰ *Ibid* paras 166-202. The Panel defined the elements in the same manner as had been seen in previous cases such as in the *Stupar* case. It cited those previous genocide cases that appeared before the Court of BiH, as well, the jurisprudence of genocide cases before the ICTY. Thus, it can be said that for the law of genocide within the BiH, the first cues had been taken from the relevant ICTY cases, and as the work of the Court of BiH has progressed, both the jurisprudence of the ICTY and the jurisprudence from the Court of BiH are being utilized as persuasive legal instruments.

the common purpose to capture, detain and summarily execute all able bodied Bosnian Muslim men from Srebrenica enclave who were brought into the Zvornik Brigade zone of responsibility.¹⁶¹ The JCE defined by the Panel was narrower in scope than what had been pled in the final amended indictment. Similar to the *Stupar* case, the Prosecution had originally pled a JCE that was broadly comprehensive JCE that included all of the crimes committed at Srebrenica. The Panel found that the JCE was overbroad and impermissibly large for the accused.¹⁶² The finding for JCE will be discussed at further in (Section V Modes of Liability) of this report. In general, the verdict relied very heavily on the jurisprudence of the international courts, particularly the ICTY and ICTR, in defining the elements of genocide and how to apply them to the facts of the case. It is very thorough in its legal analysis of the offences and offers a blueprint for how the concepts reared in the international courts fit within the domestic scheme. Thus, it can be said to reflect a normative impact of the international courts upon the application of the law in the Court of BiH.

III. FURTHER CASES PENDING BEFORE THE COURT OF BIH

As the *Stupar* and *Trbic* cases were the first to hand down verdicts regarding individual criminal responsibility for the crime of genocide and the verdicts cover much of the legal analysis and application of international crimes, subsequent genocide cases seem to utilize the cases as a starting point in their own analysis. For example, in *The Prosecutor v. Radomir Vukovic and Zoran Tomic*,¹⁶³ the Panel relied upon the findings of the *Stupar* and *Trbic* courts in their own analysis of the instant case. The accused were both members of the special police force of the RS MUP and were charged with genocide for participating in the search for and forcible transfer of Bosnian Muslim civilians from the Srebrenica area in July 1995. Additionally, both are charged with the execution of Bosnian Muslim civilians at the Kravica Farming Cooperative. The Prosecution alleged responsibility of the accused as participants in a JCE. The Panel held that the accused were guilty as accessories to the offence of genocide, pursuant to Article 171(a) and Article 31 of the CC of BiH, While the Panel found that the accused made a substantial contribution to the genocide by, inter alia, the acts of searching for and capturing Bosnian Muslim men, and participating in the summary execution of Bosnian Muslim men at the Kravica Farming Cooperative, it did not find that requisite intent for committing genocide was proved.¹⁶⁴ Additionally, the Panel held that because the accused did not possess the requisite intent, they were not liable as members of a JCE. The verdict does rely more heavily on the analysis and reasoning laid out in the previous *Stupar* and *Trbic* verdicts. In this respect, it illustrates how the normative impact of the international jurisprudence has been entrenched in the domestic jurisprudence, and now the domestic jurisprudence has a persuasive impact on subsequent cases. There are a handful of cases pending before the Court of BiH based upon the events of Srebrenica

¹⁶¹ Ibid para 750.

¹⁶² Ibid para 742.

¹⁶³ *Prosecutor v. Radomir Vukovic and Zoran Tomic* (First Instance Verdict) Case No. X-KR-06/180-2 (22 April 2010).

¹⁶⁴ Ibid para 581.

and it will remain to be seen whether the Court stays in line with the previous verdicts on relevant issues.¹⁶⁵

4.2 REPUBLIKA SRPSKA

The entity courts in the two separate political entities of BiH, the Federation of BiH and Republika Srpska, have exhibited different approaches to such issues as what laws are applicable in the courts and recognizing customary international law from the state Court of BiH. The consequence of the different approaches has been a lack of harmonization of law between the entity courts and the state Court of BiH. This is especially poignant in cases that share a nexus between facts and events. Thus, cases that are derived from the same events can have different outcomes by virtue of where they are tried and which laws will be applicable in the court. For example, in 2007, the Supreme Court of the Republika Srpska faced a case that was parallel in facts to the *Jankovic* case that was tried before the state court of BiH. The case *against Dragoje Radanovic* was first brought before the District Court of Trebinje in 2005 and resulted in a guilty verdict for the accused charged with participation in the illegal detention of civilians which amounted to war crimes against the civilian population.¹⁶⁶ The accused had been a member of the Serb paramilitary forces and had joined with others in occupying the Foca hospital, detaining medical personnel there until their eventual transfer to an internment camp. On appeal, the Supreme Court overturned the District Court's verdict, holding that the actions of the accused did not amount to a war crime.¹⁶⁷

The distinction in verdicts between the courts rested upon the issue of applicability of Common Article 3 of the Geneva Conventions and the interpretation of the nature of the conflict. The District Court of first instance relied upon Common Article 3 in determining guilt for illegal detention. The Supreme Court, however, overturned this finding, stating the Common Article 3 did not include illegal detention within its purview. In addition, the Supreme Court determined against the prosecution's argument that the actions of the accused amounted to violations of Articles 20 and 31

¹⁶⁵ *The Prosecutor v. Momir Pelemis and Slavko Peric*, Court of BiH Case No. X-KR-08/602: The case against the accused began on 10 March 2009. The accused Pelemis held the position of Deputy Commander of the 1st Battalion, Zvornik Brigade and the accused Peric held the position of Assistant commander of Security. They were charged with genocide for their participation in the killing of Bosniak detainees at the Kula School in the Zvornik municipality in the Srebrenica area. The accused are alleged to have been members of a JCE which included other members of the VRS and the RS MUP and had the common purpose to permanently and forcibly transfer the entire Bosniak civilian population from the UN safe area of Srebrenica and to capture, detain, forcibly transfer, summarily execute and bury the able-bodied men and boys.

The Prosecutor v. Zeljko Ivanovic, Court of BiH Case No. X-KR-06/180-3: The accused was a member of the Special Police Brigade of the RS MUP. He is charged with genocide for his participation in the forcible transfer of Bosniak civilians from the Srebrenica area and in the killing of Bosniak men at the Kravica Farming Cooperative. The accused is alleged to have been a member of a JCE that included other members of the VRS and the RS MUP and had the common purpose to permanently and forcibly transfer 40,000 Bosniak civilians from the UN safe area of Srebrenica and to summarily execute 7000 Bosniak men between the ages of 13 and 70.

¹⁶⁶ See OSCE BiH, 'Moving Towards a Harmonized Application of the Law: Applicable in War Crimes Before Courts in Bosnia and Herzegovina' (August 2008) <http://www.oscebih.org/documents/osce_bih_doc_2010122311504393eng.pdf> accessed 8 July 2009.

¹⁶⁷ Ibid.

of the Fourth Geneva Conventions which provide for protection of medical personnel in civilian hospitals, asserting that the facts of the case did not allow for the application of the Geneva Conventions because the breaches claimed by the prosecution did not take place in the context of an international armed conflict. Supplemental to the argument, the Supreme Court stated that even if the actions had taken place within such a context, the hospital in question was located on the front lines of the parties to the action and, thus, the actions were not in violation of international humanitarian law. Therefore, the Supreme Court implied that location on the battlefield was sufficient to render the obligation of protection moot.¹⁶⁸

The latter dicta on the location of the hospital notwithstanding, the holding of the Supreme Court is not without merit and understanding. The verdict does not reveal a flaw in reasoning of the court, but rather a flaw in the system as a whole. It reveals lacunae in prosecuting for particular crimes in courts of the RS, lacunae that do not exist in the international courts as well as the state Court of Bosnia. As stated previously, the application of the SFRY Criminal Code limits prosecuting for certain crimes that are recognized as core crimes in the international arena. In the *Radanovic* case, the application of the code of Bosnia could have opened the doors to prosecution under Article 172 for crimes against humanity, offences that are not limited by the nature of the armed conflict. Compare the facts of the *Radanovic* case with those in *Jankovic*; while the *Jankovic* case contained a wider array of offences committed by the accused, the verdict included acts of transfer and imprisonment in the area of Foca between the months of April 1992 and November 1993. Thus, the cases included similar offences that fell within the exact same temporal and geographical scope yet yielded dissimilar results.

4.3 CROATIA

Croatia, unlike BiH, does not have an extensive public and available record of cases and judgements from prosecutions for crimes committed in the war in former Yugoslavia. Thus, it is difficult to analyze all of the substantive issues of law present in the Croatian courts. In terms of its interplay with the ICTY, one case has been transferred via Rule 11bis from the ICTY to the national courts of Croatia. The referral of this case will be discussed below. Additionally, despite the lack of public record, one prescient issue has emerged that has raised concern from trial monitors and the international community – the issue of trials in absentia. Croatia has utilized trials in absentia more than any other state of the former Yugoslavia. Thus, it is discussed in terms of how the international community has influenced Croatia in regard to this practice.

¹⁶⁸ Ibid.

4.3.1 TRIALS IN ABSENTIA

Since the aftermath of the war, Croatia has prosecuted hundreds of individuals for war crimes. However, the majority of those trials occurred in absentia against Serb accused. In addition, between 1993 and 1995 there were a reported 47 convictions in absentia by the military court in Orasje.¹⁶⁹ The issue of trial in absentia for war crimes is a contentious one and the practice of such trials by the courts in the Balkan states has received much criticism by NGOs and groups monitoring the trials. The national perspective on trials in absentia is divided. Civil law jurisdictions recognize that the presence of the accused at trial is ideal: however, allowance is typically made for a trial to proceed in the face of an “unlawful absence”. In the Netherlands, for example, the Code of Criminal Procedure allows for trials in absentia providing certain formalities have been observed. Nonetheless, for those cases in which the accused faces a prison sentence, the accused must at the very least be able to, at the very least, defend himself via defence counsel.¹⁷⁰ Common law jurisdictions do not allow for trials in absentia. The United States, for example, has a constitutional foundation for the right of the accused to be present at trial, as well as, a mandate within its own federal rules of procedure.

The international approach to trials in absentia has changed over time. The Statute of the International Military Tribunal at Nuremberg (IMT) authorized trials in absentia and one such trial was, indeed, carried out. However, the inclusion of trials in absentia within the mandate of the IMT was later met with criticism. The current ad-hoc and international tribunals have roundly maintained the right of the accused to be tried in his presence. Article 21(4) of the Statute of the ICTY and Article 20(4) (d) of the Statute of the ICTR guarantee the accused the right to be tried “in his presence”. In addition, the Secretary General’s Report on the establishment of the ICTY specifically rejected the notion of trials in absentia, stating, “A trial should not commence until the accused is physically present before the international tribunal.” However, statutes from other international tribunals do include waiver of the right under limited circumstances. The Special Court for Sierra Leone allows derogation of the right to presence at trial in two clearly defined circumstances: (i) where the accused has made an initial appearance and has been afforded the right to appear at trial but refuses to do so, or (ii) where, having made an initial appearance, the accused is at large and refuses to appear in court.¹⁷¹ The Rome Statute of the ICC utilizes language that places a requirement as to the presence

¹⁶⁹ See OSCE Report (n 3) 4.

¹⁷⁰ See *Lala v. Netherlands* (App no 14861/89) ECHR 12 September 1994.

¹⁷¹ Article 17(4)(d) of the Statute of the Special Court for Sierra Leone states:

In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

...

d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.

of the accused in order for proceedings to commence, while allowing for a very limited waiver if the presence of the accused disrupts the trial.¹⁷²

Furthermore, case law from the ICTR iterated the standard of presence of the accused unless in limited circumstances of waiver. In *The Prosecutor v. Barayagwiza*, the court held that in circumstances where the accused is duly informed of the trial proceedings, neither the statute of the tribunal nor human rights law prevent the tribunal from proceeding with the trial despite the absence of the accused.¹⁷³ Thus, it can be concluded that a recognizable international norm regarding trials in absentia would be that they are not allowable but in limited circumstances, typically understood as voluntary waiver by the informed accused or obstruction by the accused that leads to removal from the proceedings. The key factor that remains constant throughout the various international positions regarding the right of the accused to be present at trial is that waiver can only be made once due notice of the accusation and impending trial is attained by the accused. In contrast to this maxim, the practice of the Balkan states in proceeding with trials in absentia throughout most of period after the war did not include a threshold of due notice of the accused before commencement of proceedings.

Croatia, in particular, has carried out a significant number of trials in absentia. In 2007 the OSCE reported that more than half of all defendants throughout the trials of the previous year were tried in absentia.¹⁷⁴ The report stated that, “in absentia convictions have left hundreds of persons, primarily Serbs, in the position of having to prove their innocence.”¹⁷⁵ In addition, trial monitors have reported on the difficulties and inequities that have plagued such trials. The general outcry against trials in absentia by international NGOs and trial monitoring bodies did not go unheeded as the Supreme Court of Croatia began a system of review of the many cases and convictions that had been made without the presence of the accused. In addition the OSCE has reported that the Supreme Court has restricted the use of in absentia trials where it has been shown that insufficient efforts were made in notifying the accused, but have allowed in absentia trials to go forward in cases where the victim-witnesses are of advanced age and the preservation of their testimony is considered paramount.¹⁷⁶ Thus, Croatia has modified its previous practice to seemingly be in step with civil law jurisdictions by allowing for trials in absentia where sufficient effort was made by the court in notifying

¹⁷² Article 63 of the Rome Statute states:

1. The accused shall be present during the trial.
2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

¹⁷³ *The Prosecutor v. Jean-Bosco Barayagwiza* (Decision on Defence Counsel Motion to Withdraw) ICTR-96-4 (2 November 2000). See also, *The Prosecutor v. Slobodan Milošević* (Assigned Counsel Submissions on Trial in Absentia) ICTY-02-54 (21 April 2005).

¹⁷⁴ OSCE Croatia, ‘Background Report: Domestic War Crimes Proceedings 2006’ (3 August 2007) <<http://www.osce.org/zagreb/28339>> accessed 8 September 2009.

¹⁷⁵ *Ibid.*

¹⁷⁶ OSCE Background Report (n 40) 9.

the accused. It is important to note, however, that the OSCE has reported that recent developments particularly associated with the sentence handed down by the ICTY in the Vukovar case have prompted some to call for the return the previous system of trials in absentia.¹⁷⁷

4.3.2 CASES BEFORE THE CROATIAN NATIONAL COURTS

The case against Ivanka Savic is a noted example of how cases before the domestic courts diverged from the practice of war crimes prosecutions within international tribunals.¹⁷⁸ Savic was tried and convicted in absentia in 1994 for war crimes against a civilian population by the County Court in Osijek. After her arrest in 2000, Savic applied for retrial and was granted the measure. Her second trial, at which she was present, began in 2003 in the County Court of Vukovar. The following year, the court found her guilty of war crimes against a civilian population for acts including aiding and abetting in the inhumane treatment of civilians, intimidation and ill-treatment against civilians and pillaging of property. HRW issued a report that described several inconsistencies with the trial proceedings leading up to the courts verdict. The HRW report stated that despite the Court finding that the prosecution proved beyond a reasonable doubt that Savic had aided and abetted in the inhuman treatment of civilians, the evidence offered at trial did not meet up to this standard. Although witness testimony regarding the denunciation and disappearance of a victim was contradictory and inconclusive, the Court accepted as credible that testimony which placed culpability on the accused for aiding and abetting in the act. In addition, the Court relied upon uncorroborated testimony of a victim whose testimony was considered wrought with inconsistencies. HRW also denounced the trial for its failure to establish certain legal norms necessary to reach a conclusion regarding the commission of war crimes. For example, the Court failed to establish any causal link between the denunciation of the victim by the accused and the disappearance of the victim. In addition, the Court did not offer any proof that the accused had the requisite mental intent for aiding and abetting, instead it simply asserted that the element was met. Most notably, the court seemingly stepped outside the boundaries of international law by holding that Savic had compelled victim Marija Blaznic to serve and cook for her and that this treatment amounted to a war crime.

4.3.3 CASES REFERRED FROM THE ICTY

In September 2005, the ICTY referred its first Rule 11bis case to the Croatian courts. The ICTY had indicted Rahim Ademi and Mirko Norac for crimes against humanity and war crimes on the basis of their individual criminal responsibility as well as their responsibility as superiors for acts carried out in the 'Medak Pocket' of Croatia in 1993.¹⁷⁹ The referral bench of the ICTY, upon request of the

¹⁷⁷ Ibid.

¹⁷⁸ Human Rights Watch, 'Croatia: The Case of Ivanka Savic' (Human Rights Watch Briefing Paper) 19 July 2004 <<http://www.hrw.org/legacy/backgrounder/eca/croatia0704/>> accessed 8 September 2009.

¹⁷⁹ *Prosecutor v. Rahim Ademi and Mirko Norac* ICTY-01-46 & ICTY-01-76 (27 May 2004).

Prosecutor, reviewed the case and determined that criteria under rule 11bis were met and ordered the transfer of the case to the authorities in Croatia.¹⁸⁰

Prior to the Ademi and Norac case, the ICTY Prosecutor sought referral to Croatia under rule 11bis for another case resulting, however, in an entirely different outcome. The ICTY had indicted three men, known as the ‘Vukovar Three’, for crimes against humanity and war crimes for acts carried out at the location of Vukovar hospital after the siege of Vukovar in November 1991.¹⁸¹ On 8 February 2005, the ICTY Prosecutor made a motion to refer the indictment to the relevant authorities of either Croatia or Serbia.¹⁸² The designated Referral bench requested submissions from the parties as well as from Croatia and Serbia. In its submission before the Court, Croatia argued for the granting of the Prosecutor’s request for transfer to Croatia, supporting its position with an outline of mechanisms by which the domestic courts could apply international treaty or customary law.¹⁸³ Croatia’s submission cited Article 140 of the Croatian Constitution which defines the primacy of international treaty law over municipal statutory law. In addition, the submission recognizes that *jus cogens* norms of international humanitarian law are directly applicable to the Croatian legal order and have primacy over statutory law.¹⁸⁴ On 9 June 2005, however, the Prosecutor withdrew the request for referral, citing a reconsideration of the facts that shed light on potential difficulties specific to the case.¹⁸⁵ Subsequently, the case against the Vukovar Three assumed its tenure before the Trial Chamber at the ICTY.

Consequently, the case against Ademi and Norac, as the only case to reach the domestic courts through referral from the ICTY, became a high profile endeavor for Croatia to prove its metal in prosecuting for war crimes and for the testing of the “...unusual and previously untried interface between the Croatian and ICTY system.”¹⁸⁶ The Zagreb County court handed down the verdict on that case against Ademi and Norac in May 2008, finding Norac guilty of war crimes and sentencing him to seven years in prison and acquitting Ademi of all charges.

In terms of normative impact of the ICTY upon war crimes proceedings in Croatia, the domestic courts have exhibited a reluctance to engage with the Tribunal in such a manner. In a marked difference from the verdicts handed down by the state Court of Bosnia, the Croatian courts do

¹⁸⁰ *Ademi and Norac*, (Decision For Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11bis) ICTY-04-78-PT (14 September 2005).

¹⁸¹ *Prosecutor v. Mile Mrksic et al.* (Third Consolidated Amended Indictment) ICTY-95-13/1-PT (15 November 2004).

¹⁸² *Prosecutor v. Mile Mrksic* (Motion by the Prosecutor Under Rule 11bis for Referral of the Indictment) ICTY-95-13/1-PT (8 February 2005).

¹⁸³ *Prosecutor v. Mile Mrksic* (Submission of the Republic of Croatia to the Court’s Decision for Further Information in the Context of the Prosecutor’s Motion Under Rule 11bis) ICTY-95-13/1-PT para 3.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Prosecutor v. Mile Mrksic* (Prosecutor’s Motion to Withdraw the Motion and Request For Referral of the Indictment to Another Court Under rule 11bis) ICTY-95-13/1-PT para 4.

¹⁸⁶ OSCE Croatia, ‘Report of the Head of the OSCE Office in Zagreb’ (6 March 2008) 7 <<http://www.osce.org/zagreb/31356>> accessed 21 September 2009.

not have a history of relying upon ICTY jurisprudence in the construction and application of the law.¹⁸⁷ This report will further examine the Ademi and Norac case with regard to the legal issue of command responsibility¹⁸⁸ in an effort to underscore the way in which Croatian courts have utilized the principles of international criminal law while skirting a more direct and normative interplay with the ICTY.

4.4 SERBIA

THE SCORPIONS CASE

In 1992, an internal security unit was formed for the Oil Industry of Krajina. The security unit was set in place as a means to guard the border area with Croatia. The following year, the unit was renamed “The Scorpions” and Slobodan Medic was given the rank of commander. The Scorpions ultimately fell under the command of the Republic of Krajina Army and belonged to the Vukovar Corps. In July 1995, near the area of Trnovo, members of the Scorpions participated in the killing of Muslim men during the massacres in the safe area of Srebrenica. The killing of six Muslim men by members of the Scorpions was caught on tape. On 7 October 2005 an indictment against five members of the Scorpions was handed down by the War Crimes Chamber of the District Court in Belgrade. The indictment alleged violations of Article 3(1) (a) of the Geneva Convention and Articles 4(2) (a) and 13 of the Additional Protocol II.

5. DEVELOPMENTS IN MODES OF RESPONSIBILITY

Crimes committed in times of war and armed conflicts have the unique component of being committed within the context of collective and systemic criminality. The work of the international tribunals has reflected an understanding that mass atrocity crimes involve complicated systems and hierarchies of commission that are difficult to encompass within the familiar domestic concepts of individual criminal responsibility. The work of the ad-hoc tribunals has solidified two very important doctrines derived from existing treaty law and adjudicated law that work to form criminal responsibility to meet the unique collective nature of mass atrocity crimes. These doctrines are command responsibility and joint criminal enterprise (JCE). Both concepts have taken hold in the work of the ad-hoc tribunals and, to varying degrees, have filtered into the work of the domestic courts in the former Yugoslavia.

¹⁸⁷ OSCE, ‘Background Report: Domestic War Crimes Trials 2004’ (26 April 2005) 34.

¹⁸⁸ See below.

5.1 THE DOCTRINE OF COMMAND RESPONSIBILITY

The ICTY Appeals Chamber stated that, “the foundation of criminal responsibility is the principle of personal culpability,”¹⁸⁹ iterating the basic premise of both national and international law. The approach taken by national and international legal traditions to the culpability principle is measured by varying histories and influences. International criminal law draws from domestic criminal law, human rights law, and transitional justice.¹⁹⁰ International criminal law may be construed broadly to incorporate the aspirational norms representative of human rights law, namely a victim oriented approach to proceedings. Domestic criminal law, mired in a more mature history of procedure and law, adheres to a defendant-centered approach in maintaining that the trier of fact must prove the acts and mental states of the accused and in committing the acts. While the overlap between the traditions is great, the distinctions merit recognition, particularly in circumstances where the international criminal trial is utilized as a tool of transitional justice. The question becomes: how does the influence of the international criminal trial affect the goals of transitional justice? The doctrine of command responsibility is an exemplary area upon which this question can be explored. The doctrine, recognized in international law, is eschewed by most domestic jurisdictions. However, in the territories of the former Yugoslavia, the line between the national theory of liability and the doctrine of command responsibility has become blurred, if not crossed, in recent trial practice and statutory amendments.

The doctrine of command responsibility in international law has a somewhat equivocal history. The recognition in international law of individual responsibility as a commander was apparent in the early part of the 20th century; however, it was primarily linked with responsibility of states to prevent violations of the laws of armed conflict.¹⁹¹ In the aftermath of WWII, the doctrine received judicial recognition despite not being explicitly proscribed in either the Nuremberg Charter or the Charter for the Far East Tribunal. The application of the doctrine remained primarily in the domestic realm and, although it had emerged as a form of individual criminal responsibility, the nature of its application diverged depending upon the jurisdiction. Canada, Britain and France, for example, legislated command responsibility as a form of accomplice liability, thus, the failure of the accused to prevent or repress violations of international law committed by subordinates was considered as assisting in the commission of the crime. The post-war jurisprudence on the issue did little to clarify the nature of the doctrine. Codification of the doctrine was established through Article 86 and 87 of the Additional Protocol I to the Geneva Conventions. As stated previously, Additional Protocol I impute liability to a commander for failing to prevent or suppress breaches of the convention by subordinates. Additionally, the commentary to the Article 86 states that liability for a failure to act is established only

¹⁸⁹ *Prosecutor v. Dusko Tadic* (Appeals Chamber Judgement) Case No. ICTY-94-1-A (15 July 1999) para 186.

¹⁹⁰ See A. Danner and J. Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law’ (2005) 93 Cal L Rev 75.

¹⁹¹ See *Prosecutor v. Sefer Halilovic* (Judgement) ICTY-01-48-T (16 November 2005).

where there is a duty to do so.¹⁹² However, codification did not provide total lucidity in understanding the nature of the doctrine, particularly as to whether the liability attaches to the superior for the crimes of the subordinates or for the dereliction of duty.

The Statute of the ICTY, like the Geneva Conventions, does not include an explicit mandate regarding the nature of command responsibility. Article 7(3) states that a superior whose subordinates commit any of the acts proscribed in Articles 2-5 of the Statute may be held liable if they knew or had reason to know the subordinate was about to commit the acts and failed to take necessary and reasonable measures to prevent the acts or punish those who committed them. What is missing from the definition is the language of “duty,” qualifying the doctrine as one that imposes liability where there is a dereliction of duty.¹⁹³ However, this concept has been accepted through the evolution of the ICTY jurisprudence. Initially, the Trial Chamber in *Prosecutor v. Delalic* held that command responsibility provided for individual criminal responsibility for the illegal acts of subordinates.¹⁹⁴ The Appeals Chamber additionally determined that responsibility was incurred where the superior exercised effective control over subordinates and the superior failed to exercise that control in the face of the commission of crimes.¹⁹⁵ The notion of the “failure to act” as a defining aspect of the doctrine of command responsibility was iterated in *Prosecutor v. Aleksovski*.¹⁹⁶ Finally, the Trial Chamber in *Prosecutor v. Halilovic* determined that Article 7(3) command responsibility is responsibility for an omission and that omission “...is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates.”¹⁹⁷ Essentially the Chamber distinguished the concept of command responsibility from that which was espoused by the *Celebici* Chamber by casting it as a separate offence of omission and stating that because the crimes were committed by the subordinates, the commander should bear responsibility for his failure to act.¹⁹⁸ The Trial Chamber further identified the scope of the liability for superiors in *Prosecutor v. Nasir Oric*.¹⁹⁹ In response to arguments put forth by defence counsel, the Trial Chamber found that the scope of liability encompassed under article 7(3) covered all modes of conduct a subordinate may be criminally responsible for under Article 7(1).²⁰⁰ Thus, command responsibility as defined in the tribunals, imputes liability to a superior for failure to prevent or punish commission of a crime; “commission” being any of the modes described under Article 7(1).

¹⁹² Commentaries Additional Protocol I to the Geneva Conventions, 8 June 1977. Available at <www.icrc.org>.

¹⁹³ G. Sluiter and A. Zahar, *International Criminal Law: A Critical Introduction* (Oxford University Press, Oxford 2008).

¹⁹⁴ *Prosecutor v. Delalic* (Judgement) ICTY-96-21-T (16 November 1998). See also H. van der Wilt, Commentary to *Prosecutor v. Delalic and Others*, Annotated Leading Cases of International Criminal Tribunals, Volume III, [eds. Kip and Sluiter], Oxford, pp. 669-683.

¹⁹⁵ *Prosecutor v. Delalic* (Appeals Chamber Judgement) ICTY-96-21-A (8 April 2003).

¹⁹⁶ *Prosecutor v. Aleksovski* (Judgement) ICTY-95-14/1-T (25 June 1999) para 67.

¹⁹⁷ *Prosecutor v. Halilovic* (Judgement) ICTY-01-48-T (16 November 2005) para 54.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Prosecutor v. Oric* (Judgement) ICTY-03-68-T (30 June 2006).

²⁰⁰ *Ibid* para 305.

The SFRY Criminal Code, the code applied in many war crimes cases undertaken in the territories of the former Yugoslavia, does not include a definition of command responsibility. The most closely related form of criminal liability recognized by the SFRY Code places criminal responsibility on one who *orders* an offence. Thus, the superior can only be held liable for a direct commission of an act. Command responsibility as recognized by international criminal institutions, conveys responsibility upon the superior for actions as well as for the failure to act. For example, the statutory definition given by the ICTY and ICTR Statutes states that an individual can be held liable for offences committed by his subordinates if he knew or had reason to know “that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”²⁰¹ Thus, according to the statutory law of the ad hoc tribunals, command responsibility is a crime of omission. Liability for serious crimes based on omission is far from a common aspect of domestic criminal law, particularly as proscribed through statutory law. As George Fletcher points out, all duties imposed on individuals that would lead to liability through omission are judicially generated, not written in statute.²⁰² The Model Penal Code provides that “liability for the commission of an offense may not be based on an omission...unless a duty to perform the omitted act is imposed by law [jurisprudence].”²⁰³

In Serbia the issue of command responsibility as a mode of liability in war crimes prosecutions is a significant aspect of an existing divide between what has been referred to as the majority and minority schools of thought regarding the influence of international law, namely the law of the ICTY, in prosecuting for offences that occurred during the war in the former Yugoslavia. The majority holds tight to the rule of legality and the application of the Code at face value, while the minority suggests that the direct application of command responsibility pursuant to Additional Protocol I of the Geneva Conventions. Additional Protocol I provides that a superior may be held criminally responsible for a subordinate’s breach of the Geneva Conventions if the superior knew or had notice that the subordinate was committing or about to commit a breach and failed to prevent it.²⁰⁴ The territories of the former Yugoslavia are bound by the Geneva Conventions as a matter of treaty obligation. However, some debate revolves around whether the provisions regarding the grave breaches are relevant. Regardless, the mode of responsibility is not formally recognized in Serbia. Nevertheless, recent developments in cases before the War Crimes Chamber in Belgrade point to a possible shift in perspective. A recent indictment issued in “the Zvornik case” alleges the commission of war crimes by the two accused individuals for failing to prevent subordinates to commit certain acts which include, inter alia, beating and killing Muslim civilians.²⁰⁵ The indictment determines that the

²⁰¹ Article 7(3) of ICTY Statute and Article 6(3) of ICTR Statute.

²⁰² G. Fletcher, *Basic Concepts of Criminal Law* (Oxford University Press, New York 1998) 48.

²⁰³ Ibid.

²⁰⁴ Phone Interview Legal Officer OSCE Belgrade.

²⁰⁵ Ibid. As this is a work in progress and information regarding the indictment and trial has not been made available in English translation, further analysis regarding this case will take place when the judgement has been reached and materials are made available.

accused are liable for the direct commission of an offence for their failure to act. It remains to be seen if the panel of judges will indeed accept this approach.

In BiH, similar concerns have been raised at the entity level regarding the lack of recognition of the doctrine of command responsibility under the law. State Court officials have voiced their concern that the doctrine has been completely ignored by the entity level courts and/or handled incorrectly. In 2001, for example, the Mostar Cantonal Court heard the case of Mirsad Cupina in regard to war crimes perpetrated against prisoners of war while Cupina was acting as a director of a prison. According to the prosecution, Cupina was aware, as director, that prisoners were being beaten and forced into performing dangerous labor, but he did nothing to stop the acts.²⁰⁶ The Mostar court, in holding that the accused was liable for his failure to prevent the acts, essentially expanded the mode of liability under the SFRY Code to cover omissions as well as orders, subsuming the general tenet of command responsibility within its reading of the law. However, a second trial was ordered by the Supreme Court and the Mostar court reversed its decision, holding that under the SFRY Code, no punishment could be granted for a failure to act by the accused.

Nevertheless, prosecuting for crimes in BiH that would fall under command responsibility has not been limited to the entity courts. The Court of BiH has taken a very different approach to the issue than the entity courts by accepting the mode of responsibility as part of BiH law under customary international law. Article 180(2) of the CC of BiH states, “The fact that any of the criminal offences... [were] perpetrated by a subordinate does not relieve his superior of criminal responsibility if he knew or has reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.” Thus, it has incorporated the definition of command responsibility directly from the ICTY statute. In terms of court practice, the *Kravica* case provides an example of the application of command responsibility as a mode of liability. The Trial Panel was faced with key decisions including, the legality of the application of the article, the construction of the elements of command responsibility, and how the mental requirements for command responsibility juxtapose with the specific mental elements of the underlying crime of genocide.

As stated previously, the Court of BiH found Milos Stupar personally criminally liable for genocide perpetrated by others at the Kravica warehouse on 13 July 1995 because, as a Commander of a Special Police Detachment of the MUP, he possessed a superior-subordinate relationship with those who participated in the actus reus of the crimes.²⁰⁷ An important distinguishing factor of the verdict in the *Kravica* case is that Stupar was convicted for the crime of genocide solely on the basis upon command responsibility. Prior to this case, only the ICTR had convicted individuals

²⁰⁶ HRW, Still Waiting: Bringing Justice for War Crimes, Crimes Against Humanity, and Genocide in Bosnia and Herzegovina’s Cantonal and District Courts (July 2008) 56 <<http://www.hrw.org/en/reports/2008/07/09/still-waiting-0>> accessed 23 February 2009.

²⁰⁷ *Stupar*, First Instance Verdict (n 140).

for genocide based solely upon command responsibility.²⁰⁸ In determining the legality of the application of the principle of command responsibility under domestic law, the Trial panel found that command responsibility was a part of domestic law and customary international law at the time as the commission of the genocide.²⁰⁹ Additionally, it found that a basis existed in domestic law whereby a similar mode of liability could be derived. The Panel stated that the position of the accused in the MUP made him subject to the rules and regulations of the VRS. At the time of the genocide, the regulations of the VRS included the “Rules on the Application of the Rules of International Laws of War in the Armed Forces of the Socialist Federal Republic of Yugoslavia”. Article 21 of these Rules imposed responsibility on military commanding officers for violations of the rules of laws of war by their subordinates. The Panel stated that the article reflected exactly the principle of command responsibility as it existed under the law of BiH.²¹⁰

The Panel iterated the foundation of command responsibility in international law, stating, in accordance with ICTY jurisprudence, that by 1992, the principle was “anchored firmly” in customary international law. The Panel traced the genesis of the command responsibility to the concept of “responsible command” as recognized as early as the Hague Conventions.²¹¹ As the Panel noted, it was the superior’s failure to affect responsible command by preventing or punishing for crimes committed by subordinates that rendered the superior liable for the commission of the underlying crimes. The Panel determined that command responsibility as set out in Article 7(3) of the ICTY Statute was the articulation of the principle as it existed at the time of the genocide and had been recognized by the UN upon adoption of the Article to the Statute as one of the “rules of international humanitarian law which are beyond any doubt part of customary international law.”²¹²

In determining the elements relevant to establishing the criminal liability of Stupar under the principle of command responsibility, the panel again looked to the ICTY as non-binding, persuasive authority on the subject. The Panel determined that Stupar held a position of authority over the five co-perpetrators of the crime of genocide and, therefore, was responsible for the perpetration of the crime. In accordance with ICTY jurisprudence, the panel stated that, regardless of whether the position of authority was held by the accused, it was essential to prove that he had effective control over the subordinates in order for liability to attach.²¹³ The Panel found that the evidence adduced proved that Stupar held de jure and de facto authority as Commander of the 2nd Sekovici Detachment Unit, with official designation by order given in February 1994, and that he held effective control over

²⁰⁸ The ICTR convicted Samuel Imanishimwe and also Aloys Ntabukuze for genocide solely based upon command responsibility. The verdict for Imanishimwe was overturned upon Appeal and the verdict for Ntabukuze is currently awaiting appeal.

²⁰⁹ *Stupar*, First Instance Verdict (n 140) 138.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Ibid.* 142. The ICTY defined effective control as “the material ability to prevent and punish the commission of these offenses...” *Celebici* Appeal Judgement, para 197 (quoting *Celebici* Trial Judgement, para 377).

the members of the detachment, including the five co-perpetrators of the crime of genocide at the Kravica cooperative.²¹⁴

One of the key questions that emerged from the case is whether, in a case of genocide, the commander who incurs liability for the acts of the subordinates must also have the requisite special intent for the crime. As recognized by the Panel, to date, none of the international tribunals had handed down final judgements holding an accused guilty of genocide on the basis of command responsibility alone. Additionally, it noted that “...none of the various pronouncements by Trial Chambers of the ICTY and ICTR are particularly persuasive authority on this issue, as their conclusions were not necessarily to resolve the guilt of the accused.”²¹⁵ Thus, the Panel was faced with a novel question of law. However, the Panel did not answer the general question of whether the specific intent is needed in all cases dealing with command responsibility over crimes of genocide and, instead, limiting their finding to only the case at hand. In this instance, the Panel missed an opportunity to distinguish itself from the international tribunals in forging applicable law on a legally imprecise point. To do so would not only legitimize the legal input of the Court of BiH, but would also, perhaps, participate in the dialogue of making international law. However, as seems to be the want of the Court of BiH, it chose not to make a distinguishing decision on an unresolved issue of law, while keeping close to the ICTY as a persuasive authority on issues already determined within international jurisprudence.

In April 2010, the Appeals Panel acquitted Stupar of the crime of genocide.²¹⁶ The Appellate Panel maintained that the five accused of carrying out the crime of genocide were not actually subordinated to Stupar at the time of the crime and that he did not have effective control over the Sekovici unit.²¹⁷ The Appeals Panel re-adduced the evidence presented at the First Instance Trial and determined that Stupar had been relieved of his command duties at the time of the killings at the Kravica warehouse.²¹⁸ Relying on the findings of the ICTY Appeals Chamber in *Prosecutor v. Hadzihasanovic*, the Panel stated that a commander can only be held liable if it is proved that he had effective control his subordinates at the exact time the acts charged within the indictment were committed.²¹⁹ The re-adduced evidence supported the finding that Rade Cuturic had taken control

²¹⁴ Ibid. It should be noted that the ICTY Appeals Chamber had stated that, “a court may presume that possession of de jure power prima facie results in effective control unless proof to the contrary is produced”. The Panel did not agree that a finding of de jure authority automatically shifted the burden of proof, however, it did note that such a finding was an important factor for establishing a superior-subordinate relationship.

²¹⁵ Ibid 162; See also Alfredo Strippoli, ‘National Courts and Genocide: The Kravica Case at the Court of Bosnia and Herzegovina’, (2009) 7 J Int Criminal Justice 577. Strippoli argues that further analysis by the Panel into case and literature to date would reveal that command responsibility is recognized as a sui generis form of liability whereby the superior is not held responsible for the crime of his subordinates but, rather, because of the crime and his dereliction of duty. Thus, the mental element for the superior will always be a different requirement than for those of the perpetrators.

²¹⁶ *Prosecutor v. Milos Stupar et al.*, (Second Instance Verdict) Court of BiH Case No. X-KRŽ-05/24-3 (28 April 2010).

²¹⁷ Ibid para 58.

²¹⁸ Ibid para 72.

²¹⁹ Ibid para 82.

over the Sekovici Detachment at the time of the killings in the Kravica warehouse and that Stupar had only taken up temporary command after 15 July and up to 18 July, past the time of the acts committed at Kravica, thus Stupar could not be held liable for his failure to prevent or punish those acts. In supporting their findings, the Panel rightly appropriated and applied the definition of effective control realized by the ICTY. This appropriation helped in defining the mode of liability in concert with the prevailing international standards. Of course, the outcome of the Appeals Panel findings leaves, as yet, no final decision within the international or national courts on the conviction of a superior for genocide based upon command responsibility alone.

The findings in the Stupar case, again, illustrate how the state court of the BiH has taken a more internationalist approach in interpreting modes of liability and individual criminal responsibility. The court has incorporated command responsibility as a valid mode of liability within their domestic legal coda, arguing that it was a recognized form of liability under customary international law at the time of the act charged in the indictment. Additionally, the court has utilized international jurisprudence to establish the requisite elements. This approach is a distinct one that is not necessarily shared to the same degree within the entity courts of the BiH or the national courts of the other states in the Former Yugoslavia. Further analysis with the practice of those courts reveals their differences in approach.

In 2004, Croatia amended its Criminal Code, incorporating as one of its changes the addition of command responsibility as a form of liability. As previously stated, the case against Ademi and Norac dealt with liability for failure to act by the commander. The Referral Bench of the ICTY addressed the discrepancies between the current Criminal Code and the codes in existence before 2004 in dealing with the issue of command responsibility.²²⁰ The Bench noted that the application of the appropriate law was a matter for the Croatian court and not for the ICTY, however, it did review the submissions made on the issue of the applicable substantive law by the parties, the Croatian Government, and two independent *Amici Curiae* in determining whether to grant referral. Both prosecution and defence submitted that the 1993 Basic Criminal Code of Croatia should be the applicable law in the case per the rule of *nullum crime sine lege*.²²¹ The crux of the issue was the fact that the 1993 code did not incorporate command responsibility in similar terms to the ICTY Statute. In light of the fact that all counts in the indictment asserted command responsibility as the exclusive or alternative form of liability, the Bench had to examine whether referral would ultimately lead to an acquittal. The defence submitted that the 1993 Code did expressly include a modified form under Article 28, which allowed for criminal responsibility for a failure to act where there is an obligation to act. In addition, both defence and prosecution submitted that responsibility was also allowed under Additional Protocol I of the Geneva Conventions. The *Amici* did raise an important distinction with respect to the elements of command responsibility as expressed by the 1993 Code. Specifically,

²²⁰ *Ademi and Norac* (n 180).

²²¹ *Ibid* paras 33-34.

under the Croatian law, liability for an omission attaches "...only if the element of causation is met, i.e., if it is established as highly probable that the actions of the accused would have averted the criminal consequences."²²² In addition, the bench recognized that application of the 1993 Code would possibly preclude criminal responsibility for a superior who had reason to know that an offence was about to be committed or had been committed.²²³ The bench acknowledged, however, that despite the possible limitations posed by the application of the 1993 Code, Croatian law did in fact cover most of the field covered by Article 7(3) of the ICTY Statute concerning command responsibility.²²⁴ It also recognized that it was within the purview of the Croatian Court to determine the law applicable and, thus, how that law will be interpreted. Thus, the possibility is present that the incumbent Croatian Court could overcome the limitations posed by the law, but it is not for the Referral Bench to decide or influence in that matter. The Referral Bench did not see the disparities between the Statute and Croatian law as considerable enough to merit precluding referral to the domestic courts in Croatia.

The case against Rahim Ademi and Mirko Norac was referred to the Zagreb County Court in. The consolidated indictment against the accused was first issued before the ICTY on 30 July 2004. The accused were originally indicted under Article 7(1) for, inter alia, the crimes against humanity of persecution and murder and violations of the laws or customs of war, and, alternatively, under 7(3) for responsibility as a superior for the criminal acts of their subordinates. The ICTY indictment was ultimately "translated" into an indictment under Croatian law with the aid of ICTY Prosecutor as well as supporting evidence and documents from the Tribunal.²²⁵ The Chief State Attorney stated that the indictment handed down by the prosecutor at the Zagreb County Court was "less harsh" than the ICTY version.²²⁶ The two noteworthy divergences between the two indictments that seemingly added to the lesser degree of the Croatian indictment were the lack of an allegation of joint criminal enterprise and the formulation of the offences primarily through the basis of command responsibility as opposed to direct physical commission of the acts.

The verdict of the Zagreb County Court was handed down in May 2008. Rahim Ademi was acquitted of all charges and Mirko Norac was sentenced to seven years in prison for failing to prevent and punish perpetrators for acts committed against Serb prisoners.²²⁷ Ademi, a general in the Croatian army and technically the higher ranking of the two accused, argued that there was a dual chain of command in place during the offensive and that he was not in command of the of the area of responsibility in which the majority of the offences were committed. The judge upheld the argument,

²²² Ibid para 41.

²²³ Ibid para 42.

²²⁴ Ibid para 45.

²²⁵ OSCE Croatia, 'News in Brief', 13 December 2006 – 09 January 2007 <<http://www.osce.org/zagreb/23645>> accessed 5 August 2009.

²²⁶ Ibid.

²²⁷ G. Jungvirth, 'Ademi Acquitted of Medak Pocket Crimes' Institute for War & Peace Reporting (30 May 2008) <<http://iwpr.net/report-news/ademi-acquitted-medak-pocket-crimes>> accessed 5 August 2009.

stating, “Ademi cannot be held responsible due to his restricted and reduced authority.”²²⁸ As support of the holding, the judge pointed to the fact that Ademi’s request for military police to be present at the operation was not granted.²²⁹ Norac, as commander of the 9th Guards Motorised Brigade, was acquitted for ordering the offences against Serb prisoners, but convicted for failing to prevent his subordinates from killing and torturing civilians and from destroying and ransacking their property.²³⁰ While legal experts in Zagreb and elsewhere commended the Zagreb County Court for carrying out a fair and equitable trial, the Human Rights Law Center (HLC) commented on the court’s failure to give a full explanation as to their holding in regard to Ademi not being a part of the relevant chain of command.²³¹ In addition, the HLC noted that Norac was only held responsible for offences committed from 10 to 19 September 1993 and not on 9 September, the day of the offensive. In support of this holding, the judge determined that one, who fails to prevent crimes, cannot be responsible for the initial crimes, but rather for crimes that followed because it was the inactivity of the defendant that supported and encouraged them.²³²

It is important to take a closer look at the last statement iterated by the Judge as it bears a subtle distinction from the application of command responsibility within international criminal law. The Zagreb Court is seemingly holding to the causation requirement recognized under Croatian law. The offences of the subordinates would not have continued but for the failure to act on the part of Norac. Thus, liability as superior in the Croatian courts illustrates a synthesized approach vis-à-vis international and national influences. The concept, derived from international criminal law, has entered into the domestic law through legislative amendments, yet the construction of the required elements reflects the national conception of the mode of liability.

5.2 THE DOCTRINE OF JOINT CRIMINAL ENTERPRISE

5.2.1 JCE AT THE ICTY

As stated previously, international crimes are unique in that they are typically collective in nature. Formulating a legal response to mass atrocities can be difficult within the context of the traditional domestic schema of individual criminal responsibility. Command responsibility has been accepted and utilized to address participation of crimes within certain hierarchical models that reflect a military-like structure of command. However, not all collective crimes on the international scale are committed by members of a group that follow a discreetly hierarchical structure. The doctrine of JCE has been

²²⁸ G. Jungvirth, ‘Norac Conviction Provokes Mixed Reaction’ Institute for War & Peace Reporting (6 June 2008) <<http://iwpr.net/report-news/norac-conviction-provokes-mixed-reaction>> accessed 5 August 2009.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Press Release, ‘Verdict on Generals Ademi and Norac brings no Justice to Victims’ Humanitarian Law Center (6 September 2008). The HLC noted that Ademi issued all of the relevant orders for the Pocket 93 operation, including the order to attack and actively participated in the operation.

²³² Ibid.

introduced as a way to fill in the lacuna in criminal responsibility that exists when traditional legal concepts are applied to international crimes. However, the doctrine has had a mixed reception at both the international and national levels. Not all international criminal tribunals have applied the doctrine as a mode of liability for acts committed by a plurality of persona while some have adopted only a limited version of the doctrine. National courts in the former Yugoslavia have showed similar divisions in applying the doctrine.

While the concept of JCE as known today had its genesis in the appeals Chamber of the ICTY, the principles upon which the doctrine were based had some foundations in national law and post-war international law. While it is not important to provide an exhaustive history of the legal concepts that provided a basis for JCE, it is important to note how lawmakers brought together legal concepts from the national and international arenas in formulating JCE.

Prosecutors at the Nuremberg Trials were intent on reaching the differing degrees of participation of the accused and therefore argued that there existed a “common plan or conspiracy” to commit the crimes proscribed within the Nuremberg Charter. The foundation of the argument lay in the conspiracy law of common law jurisdictions. The judges determined that the conspiracy must be clearly outlined in its criminal purpose and that a concrete plan had to have existed. In the Dachau Concentration Camp case, a finding for group criminality was made under the presumption that the participants acted in pursuance of a common design.

The Court was charged, upon appeal by the prosecution, to re-examine the Trial Court’s application of the standard of beyond a reasonable doubt in concluding that a group of armed men, of which the Appellant was included, were not responsible for murders alleged in the indictment.²³³ The Appeals Chamber found that upon the facts given, the only reasonable conclusion that the Trial Chamber could have drawn was that the armed group in question committed the murders.²³⁴ This finding paved the way for the determinative question: whether under international criminal law an accused can be held criminally liable under international criminal law for an offence even though there is no evidence of physical perpetration or omission by the accused? Thus, the Court had to determine whether the reach of Article 7(1) of the ICTY Statute, in outlining individual criminal responsibility, extended to participation by the accused in a common criminal plan.²³⁵

The Appeals Chamber ultimately determined that the scope of Article 7(1) did extend to participation in a common criminal plan. Citing the language of the Statute and the Secretary General’s Report as well as the manifest nature of international offences to substantiate their

²³³ *Prosecutor v. Dusko Tadic* (Appeal Judgement) ICTY-94-1-A (15 July 1999) According to the Trial Chamber, an armed group of men, including the appellant, entered the village of Jaskici and proceeded to separate, beat and forcibly remove most of the men from the village. Five men were found killed in the village after the group left. The Trial Chamber determined that the evidence could not meet the standard of beyond a reasonable doubt because it was possible that another group committed the killings.

²³⁴ *Ibid* para 66.

²³⁵ *Ibid* para 187.

interpretation,²³⁶ the Court argued that for serious violations of international humanitarian law, justice must be brought to bear “whatever the manner in which [the accused] may have perpetrated, or participated in the perpetration of those violations.”²³⁷ It is important to note that the Court distinguished inherent characteristics of international crimes, most notably crimes committed in wartime, which assume responsibility by a collectivity of persons. In addition, the Court relied upon customary international law as posited in post World War II national jurisprudence in determining the categories of collective criminality.²³⁸ The first category includes those accused of acting in furtherance of a common plan who share the same intent; the second category, or “concentration camp” category, includes those offences committed by members of a military or administrative unit such as seen running a concentration camp; and, finally, the third category which includes cases involving a common plan where one of the perpetrators commits an act outside the plan but which is considered a natural and foreseeable consequence of the plan. It is this category that presents difficulties vis-à-vis national jurisdictions in that national systems typically do not recognize liability for individuals for offences that occur outside of the scope of the common plan.²³⁹

In 2007, the Bosnian State Court for the first time acknowledged the doctrine as a part of the CC of BiH for the first time in the *Prosecutor v. Momcilo Mandic*,²⁴⁰ The State Court, in analyzing the applicable forms of criminal responsibility, stated that, although there was not enough evidence to support a finding that the accused was a part of a joint criminal enterprise, the doctrine itself was a part of the law under the ambit of Article 180(1) individual criminal responsibility. Article 180(1) states that “a person who planned, instigated, ordered, perpetrated, or otherwise aided and abetted in the planning, preparation or execution of a criminal offence...shall be personally responsible for the criminal offence. The official position of any accused person, whether as Head of State or Government or as a responsible Government official person, shall not relieve such a person of criminal responsibility nor mitigate punishment.”

5.2.2 “SYSTEMIC JCE”: PROSECUTOR V. RASEVIC AND TODOVIC

The following year, panel two of the state Court of BiH provided reasoning for finding for systemic JCE under the CC of BiH. In *the Prosecutor v. Mitar Rasevic and Savo Todovic*,²⁴¹ The accused

²³⁶ “The above interpretation is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes that are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design.” Ibid para 191.

²³⁷ Ibid para 190.

²³⁸ See Danner and Martinez (n 190). The authors argue that the cases relied upon by the ICTY Appeals Chamber were primarily cases tried before military tribunals and the proceedings at the Nuremberg Tribunal and did not support the expansive view of JCE that was defined by the Tribunal, p.110.

²³⁹ Ibid.

²⁴⁰ *Prosecutor v. Momcilo Mandic* (First Instance Verdict), Court of BiH Case No. X-KR-05/58 (18 July 2007).

²⁴¹ *Prosecutor v. Mitar Rasevic and Savo Todovic* (First Instance Verdict), Court of BiH Case No. X-KR/06/275 (28 February 2008).

Rasevic and Todovic were found guilty of crimes against humanity for acts perpetrated while engaged in their respective positions as the commander of prison guards and the deputy warden in KP Dom in Foca municipality during the period of April 1992 to October 1994. The accused incurred personal criminal liability for the crime of persecution against inmates of the KP Dom. The Court found that the acts of the accused were committed as part of a systemic JCE. The reasoning reflects the interplay between BiH domestic law and international law, with the ICTY Statute as the agent of international law. Article 180, the article within which JCE was established as a mode of criminal liability in BiH law, is a direct adoption of Article 7 of the ICTY Statute. The Court stated that Article 7 is international law “by virtue of its having been drafted pursuant to the powers of the United Nations,”²⁴² and that pursuant to well established principles of international law, “...when international law is incorporated into domestic law, ‘domestic courts must consider the parent norms of international law and their interpretation by international court’”²⁴³ Therefore, the Court concluded that, “when Article 7 was copied into the law of BiH, it came with its international origins and international judicial interpretations and definitions.”²⁴⁴ Specifically, the term “perpetrated” as it appears in both articles, provides that JCE is a form of co-perpetration by which individual criminal responsibility would attach.²⁴⁵ Additionally, the Court determined that “perpetration” as it appears in Article 7(1) of the ICTY Statute and Article 180(1) of the CC of BiH includes knowing participation in a JCE and that the elements of JCE are established in customary international law.²⁴⁶

The inclusion by panel two of the Court of BiH of the systemic form of JCE under the definition of individual criminal responsibility illustrates an explicitly recognized influence of international law upon the definition of a mode of responsibility within the Court. The Court attributed the influence to international law generally and assumed the ICTY to act as a judicial representation of that law. Moreover, it recognized that the Commentaries to the CC of BiH state, “...it is obvious that the legislator followed the basic rules of criminal liability deriving from International Law and from provisions in the ICTY Statute, as well as by the provisions in...the Rome Statute, as he significantly broadened the possible acts of perpetration and of accessory in the participation of criminal acts.”²⁴⁷ Thus, the Court acknowledged not only the influence of international law and the Statutes of the Tribunals on the Court in defining law, but attributed that influence to a broadening of the concept of perpetration within the legal system of the state Court.

The Court adopted the elements of systemic JCE as characterized by the ICTY, finding that such a characterization reflected the state of customary international law as it existed during the

²⁴² Ibid 103.

²⁴³ Ibid. The Court citing G Werle, *Principles of International Law*, Asser Press, The Hague, 2005, p.80; R. Gardiner, *International Law*, Pearson, Essex, 2003, p.156; R. Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press, Oxford, 1994, p.206.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Ibid 104.

²⁴⁷ Ibid.

temporal scope of the case. Thus, the actus reus of systemic JCE requires participation by a plurality of persons in a common purpose to commit one or more specific crimes through an organized system. The mens rea requirement is that the accused have personal knowledge of the organized system and the common criminal purpose and the intention to further that particular system. The Court further elaborated on the elements, adding that the plurality of persons need not take a particular form and that in order to incur liability under systemic JCE, the accused must make a contribution to the criminal system although participation in the underlying criminal offence is not required.²⁴⁸ The Court recalled the *Krstic* Trial Chamber's analysis of General Krstic's coordinating role in the common purpose as evidence of his level of participation as principal perpetrator to illustrate the required contribution. In terms of mens rea, the Court further additionally noted that the knowledge of the common criminal purpose requires that the accused know the type and extent of the criminal activity of the system, however, the accused need not have personal knowledge of every crime committed within the system.²⁴⁹ The Court ultimately found that a systemic JCE existed at the KP Dom wherein a plurality of persons, including the two accused, contributed to a common criminal plan to persecute non-Serb civilians in Foca by illegally imprisoning them, subjecting them to systematic and organized interrogation, and then removing them from area through murder, forcible disappearances and forcible transfer.

The Appeals Panel upheld the finding of participation in a systemic JCE at the KP Dom in Foca. While supporting the First Instance Verdict, the Appeals Panel engaged in a discussion regarding the level of contribution required pursuant to the CC of BiH to establish criminal liability as a member of a JCE. The discussion is not without some confusion in its effort to delineate the levels of contribution that may infer accessory liability compared to liability as a co-perpetrator in a JCE. Consequently, the Appeals Panel stated that, "...the ones who aid and abet JCE as accessories, can become co-perpetrators even if they do not physically commit a crime if their participation lasted for an extensive period and advanced the goal of the JCE."²⁵⁰ The Appeals Panel did try to draw some perimeters around the levels of contribution. Firstly, it did not uphold the First Instance's Panel finding that systemic JCE required a substantial contribution on the part of perpetrator. Such a contribution would, according to their reasoning, invoke participation as co-perpetrator pursuant to Article 29. The distinction between JCE and co-perpetration under Article 29 is based upon the understanding that co-perpetration requires a higher degree of contribution by the accused. It is unclear, however, as to exactly where the distinctions lay. The question of liability as a member of a JCE versus liability

²⁴⁸ Ibid 130. The Court applied evidentiary factors provided by the ICTY Trial Chamber in *Prosecutor v. Kvočka* to determine whether the accused has made the requisite contribution to the common Criminal purpose. Those factors include: the *de facto* or *de jure* position of the accused within the system, the size of the criminal enterprise. The amount of time present at the site of the system, efforts made to prevent criminal activity or to impede the efficient functioning of the system, the intensity of the criminal activity, the type of activity actually performed, and the manner in which the accused performed his functions within the system. *Prosecutor v. Miroslav Kvočka et al.* (Appeal Judgement) ICTY-98/30/1-A (28 February 2005).

²⁴⁹ *Kvočka*, Appeal Judgement, para 138.

²⁵⁰ *Rasevic and Todovic* Judgement (n 241) p. 27.

pursuant to Article 29 co-perpetration is has been discussed in judgements subsequent to the instant case and will be discussed further in relation to relevant case materials.

The reasoning in *Rasevic and Todovic* vis-a vis JCE does present a slight ambiguity in understanding. It is clear from the judgement that the reasoning is only used to answer whether systemic JCE is applicable in the instant case pursuant to Article 180(1). However, by allowing that Article 7 of the ICTY was copied into BiH law with its international judicial interpretation and definitions, the Court seemingly opened the door to the argument that all interpretations of JCE could apply in that they are included within the ICTY interpretation of the Article. While the intention was to reflect only the systemic form of JCE, the reasoning could be seen to have allowed a broader application or, at the very least, it left a vague understanding of how far its reach could extend.

5.2.3 THE KRAVICA CASE

The judgement in the *Kravica* case decided five months after *Rasevic and Todovic*, left a far less ambiguous understanding of how far the panel intended for JCE to apply in the instant case. As stated previously, the accused were charged with genocide pursuant to Article 171(a) of the CC of BiH for their participation in the detention and execution of over 1000 Bosniak men at the Kravica Farming Cooperative near Srebrenica during July 1995. The Prosecutor alleged that the accused were part of a JCE of which the purpose was to "...forcibly transfer women and children from the Srebrenica enclave [and]....to capture, to detain, to summarily execute by shooting, burying, and reburying thousands of men and young boys, Bosniaks from the Srebrenica enclave..."²⁵¹ The Prosecutor gave an extensive list of members forming the JCE, adding that "...many other individuals and military and police units who took part in the operations of the forced transferring and killing of Bosniak men..."

The Panel responded to the Prosecutor's allegations of JCE by drawing very distinct perimeters as to the application of the mode of liability. The Panel concluded that the Prosecutions construction of the JCE, which included almost all of the VRS and MUP personnel from the highest to lowest ranks deployed in the Srebrenica area between 12 and 19 July, was exceptionally broad and in violation of fundamental principles of criminal law, customary international law, and the law of war.²⁵² As previously stated, the Panel had established the existence of a genocidal plan and that the accused knew of the plan and acted to further its implementation. However, the Panel distinguished between acts by persons acting according to a common purpose and those persons acting independently of one another with the same intent. Therefore, the Panel's analysis vis-à-vis JCE hinged upon the finding of a plurality of persons acting "jointly" or in concert. The Panel relied upon

²⁵¹ Ibid.

²⁵² The Panel made the distinction in liability between those who conceived of the criminal plan and the foot soldiers that carried out the crimes of the plan. In accordance with the tenets of both national and international law, those who conceived of the plan should be liable for all of the crimes that ensued from its implementation, while those who merely carried out the plan should be liable for the crimes they participated in, and nothing more.

the *Krajisnik* Trial Judgement in finding that "...a common objective alone is not always sufficient to determine a group, as different and independent groups may happen to share identical objectives." Thus, the relevant question to pose is whether the accused *shared* a common criminal purpose and had joined together to realize that criminal purpose. The Panel further elucidated this requirement by stating that knowing participation in the common purpose or plan of JCE does not establish membership. Again, relying on the ICTY by citing the *Brdjanin* Appeals Chamber holding that a perpetrator of a crime may know of the JCE and his role in implementing the common purpose without himself sharing the requisite mental requirement to establish membership in the JCE.²⁵³ Furthermore, in accordance with the *Krajisnik* Trial Chamber, the Panel determined that proof of a joint action of the perpetrators in conjunction with their common objective is considered when determining the membership of the accused in the JCE.²⁵⁴

Considering the factors provided by the ICTY jurisprudence, the Panel found that the evidence did not establish the membership of the accused within the JCE alleged by the Prosecution. The Panel determined that joint action requires some degree of reciprocity, mutuality, or bi-directionality. The evidence did not go to prove any degree of the above but merely established that the accused had acted consistently with the design of those responsible for conceiving and directing the execution of the common plan. The accused were the instruments of the designers of the plan and used by them to carry out the crimes. Consequently, the Panel held that the accused were guilty as co-perpetrators pursuant to Article 29 and Article 180(1) of the CC of BiH, rather than as members of a JCE.

It is important to take a closer look at co-perpetration in this context. Co-perpetration under Article 29 of the CC of BiH is defined as "...several persons who, by participating in the perpetration of a criminal offence or by taking some other act by which a decisive contribution has been made to its perpetration, have jointly perpetrated a criminal offence, shall each be punished as prescribed for the criminal offence." Thus, by definition co-perpetration in a crime under the CC of BiH may include those individuals who commit the actus reus of the crime as well as those individuals who commit other acts that decisively contribute to the commission of the actus reus. From its language, it presents a narrower approach than JCE, particularly in its third form. The Court of BiH has attempted to define the relationship between the concepts of co-perpetration and JCE, however, there seems to be as of yet no commonly accepted understanding of if and how the two concepts interrelate. The Appeals Panel has stated that co-perpetration and JCE are mutually exclusive and cannot coexist.²⁵⁵ Additionally, it recognized that confusion did exist as to whether JCE was to be recognized as mode of liability or a particular criminal offence and, stipulating that if JCE were to be interpreted as a mode of liability, it was not in accordance with the traditional concept of co-perpetration recognized under

²⁵³ Ibid 174 citing *Prosecutor v. Radoslav Brdjanin* (Appeal Judgement) ICTY-99-36-T (1 September 2004) para 410.

²⁵⁴ Ibid.

²⁵⁵ *Vukovic and Another* (Second Instance Verdict) Court of BiH KRZ-07/405) (2 September 2008).

national law. Furthermore, if JCE is taken as a mode of liability, the Appellate Panel has sought to distinguish the two concepts through requisite elements. Accordingly, the Appellate Panel has emphasized the different mental elements required, stating that JCE implies a common intent between the perpetrators while co-perpetration implies the principle of limited responsibility. Additionally, co-perpetration requires a larger or more decisive degree of contribution than does JCE.²⁵⁶

Co-perpetration has also been interpreted and applied by the ICC. It is prescribed under Article 25(3)(a) of the Rome Statute and places criminal responsibility on a person who "...commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible." The ICC Pre-Trial chamber in the *Lubanga* case based the concept of co-perpetration on the control over the crime approach. In other words, the co-perpetrator is liable responsible as such if he: i. physically carrying out the objective elements of the crime; ii. controls the will of those who carry out the objective elements of the crime; iii. has, along with others, control over the crime by reason of the essential task assigned to them.²⁵⁷ It is also important to note that in terms of JCE, the Pre-Trial Chamber identified the concept as a subjective approach to distinguishing criminal responsibility of the accused and dismissed this approach as not consistent with the drafter's intentions for Article 25(3)(a).²⁵⁸ Article 25(3)(d) prescribes liability to an individual who contributes to the commission of a crime by a group of people acting with a common purpose with i. the aim of furthering the criminal activity; or ii. knowledge of the intention of the group to commit the crime. While the Pre-trial Chamber noted that this article is conceptually closest to JCE, they found that the approach was distinguishable in that it prescribes residual forms of accomplice liability that do not fall under the meaning of Article 25(3)(b) or Article 25(3)(c) respectively rather than a form of principal liability.²⁵⁹ Thus, the ICC, as yet, does not allow for a mode of principal liability that would encompass such a broad sweep as the ICTY does with the application of JCE. The Court of BiH seemingly falls somewhere in the middle by having recognized and applied both concepts of JCE and co-perpetration.

As stated previously in this report, the Court of BiH held that accused, Milorad Trbic, was guilty of committing the offence of genocide, in violation of Articles 171(a) and (b) of the CC of BiH. The mode of liability through which the accused perpetrated the offence was his participation in a JCE, specifically participation in the basic form, or category I of JCE. What distinguishes the findings by the Panel in Trbic from the previous verdicts addressing liability as a member of a JCE is the fact that the Panel, on its own, amended the scope of the alleged JCE to a narrower construct wherein the participation and acts of accused would fit. Firstly, the panel laid out the elements of the basic form of

²⁵⁶ *Rasevic and Another* (Second Instance Verdict), Court of BiH X-KRZ-06/275 (6 November 2008).

²⁵⁷ *The Prosecutor v. Thomas Lubanga Dyilo* (Decision on the Confirmation of Charges) ICC-01/04-01/06 PT Ch 1 (29 January 2007) para 332.

²⁵⁸ *Ibid* para 335.

²⁵⁹ *Ibid* para 337.

JCE as defined, primarily, by the jurisprudence of the ICTY.²⁶⁰ The actus reus of the JCE requires 1. a plurality of individuals, 2. the existence of a common purpose which amounts to or involves the commission of a crime provided for in the statute, and 3. participation of the accused in the common purpose involving the perpetration of one of the crimes provided in the state. The mens rea requires that the accused intended the commission of the crime and intended to participate in a common plan aimed at its commission. The Panel then analyzed how the facts of the participation of the accused fit into the required elements to prove membership in the JCE. It is through the analysis of these facts that the Court drew a JCE with a narrower scope than the one pled by the Prosecution in the indictment. The Panel reiterated the findings of the *Stupar* Court which stated that, “neither case law nor the literature support the proposition that a single basic JCE can stretch from the highest echelons of the military leadership to the lowliest foot soldier including persons with such disparate roles and parts and assigning them all the same level of criminal responsibility”²⁶¹

The evidence proved that there existed a plurality of persons that consisted of members in the military chain of command in the Security Organ, including the accused, Colonel Ljubisa Beara, Lieutenant Colonel Vujadin Popovic and Lieutenant Drago Nikolic. Although the Panel allowed that many unnamed individuals may be a part of the plurality, comparatively speaking, this construction is far narrower than the plurality of persons alleged in the indictment, which was inclusive of members of the VRS Main Staff, the Drina Corps, Bratunac Light Infantry, Zvornik Brigade, and other VRS and MUP RS members. The common purpose that existed between the plurality of persons was to capture, detain, summarily execute, and bury all able bodied Bosnian Muslim men from Srebrenica enclave who were brought into the Zvornik Brigade zone of responsibility. The Panel noted that the JCE alleged in the indictment covered all crimes committed during the fall of Srebrenica and was, consequently, overbroad and impermissibly large for the accused.²⁶² The ICTY Trial Chamber had emphasized that it was important to ensure that the “contours of the common criminal purpose have been properly defined.”²⁶³ Thus, the Panel determined from the evidence that there existed some divisions in structures of the various brigades that were involved in the events at Srebrenica. Notably, the Panel iterated that the various brigades, while overlapping in context, often carried out very different operations that may have been linked by a comprehensive wider criminal enterprise, but were not essential in their commonality.²⁶⁴ In keeping with the ICTY Trial Chamber’s emphasis on properly defining the contours of the common plan, the Panel delineated the Zvornik Brigade area as a finite area of operation wherein the acts of the accused and the plurality of persons of which he was a member carried out their criminal activities.²⁶⁵ Thus, the common purpose of the JCE was limited to

²⁶⁰ Ibid para 731.

²⁶¹ Ibid para 222.

²⁶² Ibid para 742.

²⁶³ Ibid para 744 citing *Prosecutor v. Radoslav Bdjaniin* (Appeal Judgement) IT-99-36-A (3 April 2007) para 424.

²⁶⁴ Ibid para 749.

²⁶⁵ Ibid para 750.

the activities carried out within the Zvornik Brigade. Furthermore, it had to be proved that the common purpose was, indeed, common to all. Relying on the finding of the Appeals Chamber of the Special Court of Sierra Leone, the Panel determined that the relevant factors to aid in determining whether the common purpose was common to all members of the JCE included, but were not limited to: “the manner and degree of interaction, cooperation and communication between those persons; the manner and degree of mutual reliance by those persons on each other’s contributions to achieve criminal objectives that they could not have achieved alone; the existence of a joint decision-making structure; the degree and character of dissension; and the scope of any joint action as compared to the scope of the alleged common criminal purpose.”²⁶⁶ The Panel found that Trbic’s interactions with the named members of the JCE were sufficient to meet the standard applied in the international courts.²⁶⁷ Additionally, the Panel noted that, in accordance with ICTY Appeals Chamber, that the criminal actions of any participant of the JCE impute guilt upon the other members of the JCE, regardless of whether they too committed the offence in question.²⁶⁸ It is merely sufficient that the participants in the JCE perpetrate acts that are in some way in furtherance of the common plan.²⁶⁹ The Panel found that Trbic aided in carrying out the genocidal plan through his participation in the executions, transfer, and capture and interrogation of Bosnian Muslim males, as well as, the facilitating of the organization and logistics of the plan, and such participation amounted to a significant contribution to the achievement of the common plan of the JCE.²⁷⁰ Additionally, Trbic possessed the requisite intent for participation in the basic JCE in that he, at the very least, knew that Bosnian Muslim men were going to be executed. “Knowledge combined with continuing participation can be conclusive as to a person’s intent”²⁷¹ thus, the requisite mens rea was achieved.

The *Trbic* trial Panel truly utilized the jurisprudence of the ICTY and other international tribunals particularly in defining the elements of the offences and the modes of liability to apply to the accused. The analysis of JCE, for example, relied quite heavily on the jurisprudence of the ICTY to define the elements. Of course, logic may dictate that the concept, whose origins are traced back to the ICTY, would best be understood through the lens of the institution whereupon it was originally defined. The use of JCE, however, does reflect an influence of the international courts and the ICTY in particular. One very interesting utilization of the domestic legal norm in the *Trbic* case was the decision by the Panel to reconstruct the JCE into a narrower scope than what was plead by the Prosecution within the indictment. The original JCE was overbroad and its application, as had been determined in previous jurisprudence, would not be within the bounds of international or national law. The resulting JCE defined by the Panel was applied and the accused was held liable as a participant.

²⁶⁶ Ibid para 754 citing *Sesay et al.* (Appeal Judgement) Case No. SCSL-04-15-A (26 October 2009) para 1141.

²⁶⁷ Ibid paras 755-57.

²⁶⁸ Ibid para 763.

²⁶⁹ Ibid.

²⁷⁰ Ibid para 765.

²⁷¹ Ibid para 770.

This practice by the Panel is reflexive of the power attributed to judges within civil law jurisdictions. Within the international courts such as the ICTY, judges findings that alter the pleadings of the Prosecution of its own accord opens up possible grounds for appeal by the defence. Thus, the use of JCE and its definition in the *Trbic* case exemplifies an intertwining of practice of the international courts and the rules of the national jurisdiction in an effort to secure prosecution.

JCE as a mode of responsibility has not been universally applied in all of its forms by international and hybrid tribunals. The Pre-Trial Chamber of the ECCC recently held that JCE III was not a mode of liability under customary international law and, therefore, could not be applied to the case at hand.²⁷² The ICC has distinguished its own approach to criminal responsibility for offences committed within a collective context. Article 25(3)(a) establishes criminal liability for committing a crime "...jointly with another..." The Pre-Trial Chamber distinguished this form of co-perpetration from JCE by establishing control over the crime as essential to the finding of liability.²⁷³ This approach has an objective element of having control over the crime and a subjective element of being aware of having that control. Thus, it is drawn narrower than the concept of JCE, particularly JCE III which allows for a more lenient subjective element of *dolus eventualis*. Additionally, the Pre-Trial Chamber expressly averred from incorporating JCE into the concept of co-perpetration. Article 25(3)(d) attaches liability to those who have committed a crime as a part of a group with a common purpose. Arguably this may open the door a wider than co-perpetration in allowing JCE to be applied by the court. Thus far, however, it seems that the ICC has adhered to the slightly narrower approach of co-perpetration in the case of collective criminality.

Comparatively speaking, the approach taken by the state Court of BiH is directly influenced by the ICTY in its application of JCE as a mode of liability for collective criminality. However, by thus far limiting its recognition to JCE I and II, the court may also be influenced by more recent developments within international and hybrid tribunals which seek to limit the broad scope of the doctrine as purported by the ICTY.

One important consequence of the doctrine of JCE being introduced into the jurisdiction of the Court is that subsequent indictments that have been handed down have charged in some cases under JCE where liability under command responsibility would be an equal if not better fit. For example, the indictment against Gojko Kllickovic²⁷⁴ charges the accused with committing crimes as part of a joint criminal enterprise with the aim to create, through military force, the so-called Serb

²⁷² *Case No 002* (Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)) 002/19-09-2007-ECCC/OCIJ (PTC38) (20 May 2010). The Pre-Trial Chamber determined that the two international cases upon which the *Tadic* Appeals Chamber relied in supporting the finding that JCE III was a part of customary international law were not sufficient to establish such a finding. Neither case provided a reasoned judgement and the Pre-Trial Chamber was not in support of the inferences of common purpose and foreseeability found by the *Tadic* Appeals Chamber. Additionally, the Pre-Trial Chamber dismissed the cases brought before Italian courts relied upon by the *Tadic* Appeals Chamber because they did not amount to international cases and, therefore did not provide proper precedents for the purpose of determining customary international law.

²⁷³ *Lubanga*, Decision (n 257).

²⁷⁴ *Prosecutor v. Gojko Kllickovic et al.* (Indictment) Court of BiH Case No. X-KR-06/213 (14 December 2007).

Municipality of Bosanska Krupa as an area populated by an absolute Serb majority. The indictment alleges that the accused, holding high official rank in many areas of the Bosanska Krupa municipality, including President of the SDS Executive Board, participated in the JCE by *inter alia* "...failing to take necessary and reasonable measures to prevent or punish the commission of criminal offences by his *de jure* or *de facto* subordinates over whom he had effective control."²⁷⁵ The language utilized by the court clearly demonstrates liability under command responsibility, however, the preferred mode of liability under the indictment is JCE. The ICTY reflects this same phenomenon, with prosecutors opting to charge under JCE where the acts of the accused better describe command responsibility liability.²⁷⁶ Arguably JCE is a more attractive option in that its association hints at a more severe offence, or perhaps a closer step to the axis of the crime and, most importantly, it encompasses the scope of collective or systematic criminality that poses such unique difficulty in challenging impunity for international crimes.²⁷⁷

6. CONCLUSIONS

The territories of the former Yugoslavia have engaged in varied responses to the challenge of fighting impunity for the atrocities that were committed on their soil throughout the war. Part of the variation is born from each states unique response to the influence of international criminal law, particularly in the guise of the rule and jurisprudence outlined by the ICTY, into their domestic structure. Examination of each states post war judicial and legislative responses presents a spectrum of implementation of international criminal law.

The state Court of BiH sits on the side of the spectrum that represents a vast influence and reliance on international law and the ICTY as an instrument of international law. It should be noted that the jurisprudence of the Court of BiH is public and available, thus, facilitating an examination of court practice far more than the other jurisdictions analyzed. Additionally, the Court of BiH has a vested interest in a recognizing the developments in international law and the ICTY because it the site of the majority of the offences committed during the war and has received the majority of the cases transferred from the ICTY. BiH, from the earliest days of the ICTY, exhibited a greater willingness to associate and comply with the ICTY in facilitating domestic prosecutions. The myriad factors at play that encouraged and perpetuated this interaction will be dealt with in other WP's, however, suffice it to say, this interaction has promoted some level of a normative impact on the proceedings of the Court of BiH.

²⁷⁵ Ibid.

²⁷⁶ Danner and Martinez, (n 190) 144-45.

²⁷⁷ See H. van der Wilt, *Joint Criminal Enterprise and Functional Perpetration*, unpublished work given by courtesy of author. Professor van der Wilt discusses the particular problem posed by the systemic criminality of international crimes and offers alternative concepts to JCE in challenging this problem, namely the use of the concept of functional perpetration. As this is a work in progress, this concept will be discussed at greater length in future drafts.

Perhaps the most significant decision made by the Court of BiH has been to recognize customary international law when applying law to the proceedings of the Court. The Court of BiH prosecutes under the CC of BiH, which came into effect after the war in the former Yugoslavia. The CC of BiH recognizes certain offences that were not proscribed under the SFRY Code which was in effect during the war. While the other jurisdictions have been reluctant to apply law that was not written directly into the SFRY Code, the Court of BiH has not followed suit, arguing that many of the crimes in questions were crimes under customary international law. The Court has relied on the arguments put forth by the ICTY in order to buttress their stance toward customary international law. The effect of this decision has been to open the door in the Court to offences and modes of liability that other jurisdictions may not acknowledge. Crimes against humanity, command responsibility and JCE are all examples of crimes and modes of liability that have been unequivocally accepted under the CC of BiH pursuant to customary international law. Furthermore, in justifying application of command responsibility and JCE, the Court of BiH has reasoned that because the article on individual criminal responsibility in the CC of BiH is a direct adoption from the similar article in the ICTY Statute, the CC of BiH must be read in accordance with the principles of international law. Therefore, because the ICTY has read the article to include command responsibility and JCE, so should the CC of BiH. No other jurisdiction analyzed has interpreted their respective codes in such a manner or has accepted the customary international law and the influence of the ICTY as freely.

Practitioners at the Court of BiH have distinguished the influence on the Court as the influence of international law and not, as such, the exclusive influence of the ICTY. Recent developments in jurisprudence exemplify the Courts evaluation of international criminal law in general and an influence from developments at the ICC as well as the ICTY. Nevertheless, it is recognized that at this stage, the ICTY stands as one of the most persuasive bodies of international criminal law for the Court to utilize in its own decision making practice. The Court has stated that the jurisprudence of the ICTY is not binding on it but acts as a persuasive authority. This is clearly demonstrated in the Court of BiH cases dealing with rape, as well as, genocide. As illustrated, the definition of rape under international law has developed over time. For example, rape under international law has become intertwined with torture in an effort to encompass the egregious nature of rape utilized as a weapon in times of war. The jurisprudence of the ICTY, as well as the ICC, illustrates how the elements of rape as a crime against humanity and torture as crime against humanity have become more enmeshed with one another. The Court of BiH has, accordingly, developed its jurisprudence on rape in a similar manner as the international courts, directly relying upon the jurisprudence of the ICTY to define the crime and establish the elements.

Similarly, the court of BiH has directly relied upon the jurisprudence of the ICTY in prosecuting for genocide. The court stopped short of answering a novel legal question; whether an accused charged with genocide under command responsibility must possess the requisite special intent for genocide in order to be found liable of the crime. The jurisprudence of the ICTY as well as the ICTR has yet to provide a final answer on the issue. The Court of BiH could have used the opportunity to

answer the question for their own national legal system, thus distinguishing themselves from the international courts. The court, however, opted to sidestep the question. It is probable that if a final determination had been made on this issue within the international courts, that the Court of BiH would have followed the tribunals in making their judgement.

Thus, in terms of substantively defining the international offences before the court, the jurisprudence of the international ad-hoc tribunals has played an important role in the state Court of BiH. In some ways the importance may limit the practice of the Court in exercising its own intrinsic law making power. Additionally, the reliance of the Court on the ICTY as the persuasive authority opened itself to over-inclusion of ICTY practice. A legal principle such as JCE, for example, is one that hasn't been accepted by all international and hybrid tribunals. Thus far the Court of BiH has allowed only the systemic form that is recognized under customary international law. However, other forms of JCE have not been so readily accepted. It will remain in future jurisprudence of the Court of BiH whether it will follow the ICTY in accepting the other forms of JCE.

The practice of the Court of BiH is also markedly different from the practice of the entity courts in BiH. While it is the Court of BiH that is designated as the venue for prosecution of the most serious cases in the BiH, the entity courts are still working and allowed to prosecute cases as well. As stated previously, the entity courts do not always prosecute under the CC of BiH and are more reluctant to recognize customary international law. The result is a lack of harmonization in prosecutions for crimes that may even stem from similar events. As example, the report noted that command responsibility as recognized by Court of BiH has not similarly been recognized by the entity courts, leading to discrepancies between the courts in finding liability for omissions by superiors.

Croatia has integrated the influence of the ICTY less overtly than Bosnia and Herzegovina. Although the Criminal Code of the country reflects the less inclusive standard presented in the SFRY Code, the state has not been entirely averse to allowing certain influence from international criminal law and the ICTY to guide its present day system. This is exemplified by the changes it has implemented in its judicial system to deal with the unique problem of international offences, namely the establishment of four key courts specific to this task, as well as the implementation of policies to review the mass prosecutions in absentia that followed the war, a move that is in keeping with the ICTY's position against trials in absentia. In addition, within the jurisprudence, reflections of the influence of the ICTY and other international tribunals is apparent with the acceptance of command responsibility as a mode of liability within the purview of the courts prosecuting for international offences, however, this mode of responsibility has been taken with Croatia's own domestic construction of the elements included within the concept.

Serbia has taken a skeptical approach to allowing the ICTY to influence trying cases stemming from the war, although it lays claim to allowing greater influence from the ICC. Serbia has steadfastly adhered to the SFRY Code in trying cases before its War Crimes Chamber, thus disallowing prosecutions for crimes against humanity that would be allowed in similar cases before

the ICTY or the State Court of Bosnia. Serbia's deflection of ICTY influence notwithstanding, recent activity in the War Crimes Chamber reveals a subtle influence of international criminal law with the potential for doctrines such as command responsibility making a presence in the courtroom through indirect means. At this point, Serbia, as well as Croatia, have much less of a record than Bosnia to draw upon, thus it remains to be seen through upcoming jurisprudence if both states go beyond the established codes to implement further norms of international criminal law into the proceedings.

The normative influence of international criminal law, particularly through the guise of the policies and jurisprudence of the ICTY has been reflected in the judicial activity of the territories of the former Yugoslavia. The degree to which the influence has extended has not been universal throughout the courts of the various states. However, it seems that the aspirations of international tribunals such as the ICTY are impacting the courts in introducing changes in practice that fall more in line with the practice of the international courts. This report has served to exemplify those changes and illustrate the differences and similarities between the states. In addition, it has served to outline how the normative influence of international criminal law on these venues has engendered a varying degree of progress, difficulties and potential pitfalls.



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