

**INTERNATIONAL CRIMINAL LAW
& PRACTICE**

TRAINING MATERIALS

**DOMESTIC
APPLICATION OF
INTERNATIONAL
LAW**

*Supporting the Transfer of Knowledge and Materials
of War Crimes Cases from the ICTY to National
Jurisdictions, funded by the European Union*

Developed by International Criminal Law Services



1. INTRODUCTION

2. WHAT IS ICL?

3. GENERAL PRINCIPLES

4. INTERNATIONAL COURTS

5. DOMESTIC APPLICATION

6. GENOCIDE

7. CRIMES AGAINST HUMANITY

8. WAR CRIMES

9. MODES OF LIABILITY

10. SUPERIOR RESPONSIBILITY

11. DEFENCES

12. PROCEDURE & EVIDENCE

13. SENTENCING

14. VICTIMS & WITNESSES

15. MLA & COOPERATION

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MODULE 5: DOMESTIC APPLICATION OF INTERNATIONAL CRIMINAL LAW

Part of the OSCE-ODIHR/ICTY/UNICRI Project “Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions”

Developed by International Criminal Law Services

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CONTENTS

5.	Domestic application of ICL	1
5.1.	Introduction	1
5.1.1.	Module description	1
5.1.2.	Module outcomes.....	1
5.2.	Sources of criminal legislation and international law in domestic jurisdictions	3
5.2.1.	SFRY	3
5.2.2.	BiH.....	6
5.2.3.	Croatia	10
5.2.4.	Serbia	11
5.3.	Temporal applicability and principle of legality	14
5.3.1.	SFRY	14
5.3.2.	BiH.....	21
5.3.3.	Croatia	32
5.3.4.	Serbia	39
5.4.	Further reading.....	46
5.4.1.	Books	46
5.4.2.	Articles	46

5. DOMESTIC APPLICATION OF ICL

5.1. INTRODUCTION

These training materials have been developed by International Criminal Law Services (ICLS) as a part of the OSCE-ODIHR-ICTY-UNICRI “War Crimes Justice Project”, funded by the European Union. An introduction to how to use the materials can be found in Module 1, which also includes a case study and hypotheticals that can be used as training tools, and other useful annexes. The materials are intended to serve primarily as training tool and resource for legal trainers in Bosnia and Herzegovina (BiH), Croatia and Serbia, but are also envisaged for adaptation and use in other jurisdictions of the region. Discussion questions, tips, and other useful notes for training have been included where appropriate. However, trainers are encouraged to adapt the materials to the needs of the participants and the particular circumstances of each training session. Trainers are also encouraged to update the materials as may be necessary, especially with regards to new jurisprudence or changes to the criminal codes in their relevant jurisdiction.

Each Module provides a general overview of the international criminal law relevant to the Module’s topic before discussing the relevant law and jurisprudence for BiH, Croatia, and Serbia, respectively. The materials make use of the most relevant and available jurisprudence. It should be noted that where a first instance judgement has been cited, the drafters have taken special care to ensure that the part referred to was upheld on appeal. It may be useful for trainers to discuss additional cases that might also be relevant or illustrative for each topic, and to ask participants to discuss their own cases and experiences.

5.1.1. MODULE DESCRIPTION

This Module is different from the others in that it has no international component. It focuses only on the manner in which international criminal law is incorporated into and applied in the domestic legal systems of BiH, Croatia and Serbia. The discussions of each of the domestic jurisdictions are considered together, rather than in separate sections as in the other Modules. Participants are thus encouraged to consider the position not only in their own jurisdictions, but also in comparison to other jurisdictions in the region.

The main aim of the Module is for participants to understand and debate the extent to which international law is incorporated into their domestic systems and the manner in which such incorporation takes place.

5.1.2. MODULE OUTCOMES

At the end of this Module participants should understand:

- International law incorporation and application under the SFRY system, since the laws that were applicable before its dissolution may have a relevance to current domestic prosecutions.

- The current applicable laws in each domestic jurisdiction regarding the incorporation and application of international law in BiH, Croatia and Serbia.
- The application of the principle of legality insofar as the application of international law or its use in the region is concerned.
- The principle according to which the defendant should benefit from the most favourable law and/or sentence.
- Ways in which violations of international law will be charged and prosecuted in the future in each domestic jurisdiction.

Notes for trainers:

- This Module is of crucial importance for participants because it provides the framework to use international law in domestic cases. It is an area in which there is much debate, and trainers should harness the potential to encourage participants to consider how their domestic laws can be applied so as to be able to prosecute and try international crimes to the full extent while respecting the principle of legality and other fair trial rights.
- Participants must address the extent to which international case law and precedent can be relied upon before national courts and what the value of such jurisprudence would be in domestic jurisdictions.
- One of the main issues is to identify the law applicable to crimes arising out of the conflicts in the former Yugoslavia. In particular, there are issues over whether to apply the SFRY code, which was in force at the time of the events, or the new national laws, which are currently in force, as well as over which law is most favourable to the accused.
- Participants should discuss how genocide and crimes against humanity could be charged in their domestic jurisdictions, as well as the extent to which modes of liability which have been recognised by international courts, such as JCE and superior responsibility, could be relied upon in national trials.
- The issue of sentencing is vital and participants should debate the principles and rules that should apply when determining the most appropriate sentence. However, please note that sentencing is dealt with in depth in Module 13.

5.2. SOURCES OF CRIMINAL LEGISLATION AND INTERNATIONAL LAW IN DOMESTIC JURISDICTIONS

Notes for trainers:

- The first issue that is addressed are the sources of criminal law in each of the jurisdictions. Next, the application of the principle of legality in each of the domestic jurisdictions will be examined.
- This first section considers the position in the SFRY and is followed by an overview of the sources of criminal laws in BiH, Croatia and Serbia.

5.2.1. SFRY

National statutory laws were the only direct source of criminal law in the SFRY. Other sources, such as the constitution and international treaties and agreements, were generally considered indirect sources of law. However, as explained below, they could also constitute a direct source of law.

Jurisprudence and legal authorities were not considered sources of law, but they were regarded as being of persuasive value in both the application and development of criminal legislation.

5.2.1.1. THE SFRY CONSTITUTION AND INTERNATIONAL LAW

According to the 1974 SFRY Constitution, the SFRY is committed to “respecting the generally recognised international law provisions”.

According to the 1974 SFRY Constitution, one of the basic principles of the SFRY was that it “abides by the UN Charter principles, fulfils its international obligations and actively participates in the work of international organizations to which it belongs”.¹ The SFRY was also committed to “respecting the generally recognized international law provisions”.² Article 210 provided that the courts directly apply international treaties that were

ratified and published.³

The Constitution of the SFRY also included an article on the principle of legality.⁴

¹ The Constitution of the Socialist Federative Republic of Yugoslavia, SFRY Official Gazette, No. 9, Belgrade, 21 February 1974, Basic Principles, VII.

² *Ibid.*

³³ *Ibid.* at Art. 210.

⁴ SFRY Constitution, Art. 211.

5.2.1.2. THE SFRY CRIMINAL CODE AND INTERNATIONAL LAW

In the SFRY Criminal Code, most of the crimes defined in Chapter 16 (dealing with criminal acts against humanity and international law) contained a blanket provision stating “whoever, in violation of the rules of international law [...]”. This blanket provision, as noted by the Commentary on the SFRY Criminal Code, permitted legal recognition of every new development in international law without requiring a change in the SFRY legislation. This secured a permanent harmonization of domestic criminal legislation with international criminal law, as set out below.⁵ This is also discussed in more detail below, in section 5.3.1.3.

The SFRY Criminal Code enabled legal recognition of every new development in international law without requiring a change in the SFRY legalisation.

The Commentary on the SFRY Criminal Code considered “international law” to be:

[P]rinciples and provisions of international law prohibiting certain conduct and defining them as criminal acts whose perpetrators need to be called to criminal responsibility and punished accordingly.⁶

The Commentary defined “international criminal law” as a:

[G]roup of legal rules established by international treaties and other agreements, as well as by international custom, violation of which represents a criminal act and results in individual criminal responsibility and application of a criminal sanction.⁷

International customary law, although not a direct source of law, was also applicable in the domestic legal system, at least insofar as it was referred to in the treaties ratified by the SFRY.

The binding character of international treaties and agreements ratified by the SFRY was undisputable.⁸

International customary law, although not a direct source of law, was also applicable in the domestic legal system, at least insofar as it was referred to in the treaties ratified by the SFRY.⁹

Moreover, the Commentary on the SFRY Criminal Code,

⁵ Komentar krivičnog Zakona Socijalističke Federativne Republike Jugoslavije, Savremena administracija, 1978, str. 494 (Commentary of the SFRY Criminal Code, Savremena administracija, 1978, p. 494) (unofficial translation of the quote).

⁶ *Ibid.* at p. 493 (unofficial translation of the quote).

⁷ *Ibid.* at p. 488 (emphasis added) (unofficial translation of the quote).

⁸ *Ibid.* at p. 494.

⁹ Such as Article 2 of the GC AP I, which provides that “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience”.

noting that international treaties were not able to follow the rapid development of war technology, emphasised the importance of the Martens clause, which “enables filling in the obvious holes in international law provisions” banning certain methods and means of warfare.¹⁰ The Commentary stressed that when dealing with the crime of making use of forbidden means of warfare, it would be necessary to take account of the Martens clause as well as the intentions behind the relevant international documents.¹¹

The Commentary also noted that in order to implement its constitutional principles, the SFRY respected generally recognised norms of international law.¹² Provisions contained in other chapters of the SFRY Criminal Code also included references to international law and respecting the “general legal principles recognised by the international community”.¹³

In accordance with Article 100 of the 1977 SFRY Criminal Code,¹⁴ a criminal prosecution and the execution of a sentence are not subject to the statute of limitations for criminal acts referred to in Articles 141 to 145 of the SFRY Criminal Code, as well as for other criminal acts which pursuant to international agreements are not subject to the statute of limitations.

¹⁰ *Ibid.* at p. 510.

¹¹ *Ibid.*

¹² *Ibid.* at p. 492.

¹³ SFRY Criminal Code, Art. 108(4); for more on this see section 5.3.1.2 below.

¹⁴ Criminal Code of the SFRY, Official Gazette of the SFRY No. 44/76, 36/77, 34/84, 74/87, 57/89, 3/90, 38/90.

5.2.2. BIH

In BiH, criminal law is strictly statutory law. Indirect or additional sources of criminal law include international agreements.

In Bosnia and Herzegovina, criminal law is strictly statutory law. Indirect or additional sources of criminal law include the constitution and international agreements. However, these sources can also constitute a direct source of criminal law, as explained below.¹⁵

Jurisprudence and legal authorities are not considered a source of criminal law, although they are considered to be “of immeasurable importance for the criminal law implementation”.¹⁶

5.2.2.1. THE BIH CONSTITUTION AND INTERNATIONAL LAW

Article II of the BiH Constitution guarantees the respect for human rights and fundamental freedoms, which are based on internationally recognised standards:

**Constitution of Bosnia and Herzegovina Article II:
Human Rights and Fundamental Freedoms**

1. Human Rights

Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement.

2. International Standards

The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

The Constitution of Bosnia and Herzegovina sets out in Article II/2 that “the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina” and “shall have priority over all other law”.¹⁷

¹⁵ See, e.g., Komentar Krivičnog/ kaznenog zakona Bosne i Hercegovine, Savjet/Vijeće Evrope / Evropska komisija, 2005, str. 60 (Commentary of the BiH Criminal Code, Council of Europe / European Commission, 2005, p. 60).

¹⁶ *Ibid.*

Jurisprudence and legal authorities are not considered a source of criminal law, although they are considered to be “of immeasurable importance for the criminal law implementation”.

Under Article II/6 of the Constitution, “Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms” set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.¹⁸

In addition, under Article II/7 and Annex I of the Constitution, certain international human rights agreements must be applied in Bosnia and Herzegovina:

- 1948 Convention on the Prevention and Punishment of the Crime of Genocide;
- 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II;
- 1951 Convention relating to the Status of Refugees and the 1966 Protocol;
- 1957 Convention on the Nationality of Married Women;
- 1961 Convention on the Reduction of Statelessness;
- 1965 International Convention on the Elimination of All Forms of Racial Discrimination;
- 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols;
- 1966 Covenant on Economic, Social and Cultural Rights;
- 1979 Convention on the Elimination of All Forms of Discrimination against Women;
- 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
- 1989 Convention on the Rights of the Child;
- 1990 International Convention on the Protection of the Rights of All Migrant Workers; and Members of Their Families;
- 1992 European Charter for Regional or Minority Languages; and
- 1994 Framework Convention for the Protection of National Minorities.¹⁹

Under Article VI/3(c):

[T]he Constitutional Court has jurisdiction over issues referred to it by any court in Bosnia and Herzegovina concerning whether a law, on whose validity the Constitutional Court’s decision depends, is compatible with the Constitution, the

¹⁷ The General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 4: Constitution of Bosnia and Herzegovina (1995).

¹⁸ *Ibid.*

¹⁹ *Ibid.*

European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina.²⁰

The Constitutional Court also has jurisdiction over cases referred to it concerning the existence or scope of a general rule of public international law relevant to the court's decision.

International law is thus an important source of law in the legal system of Bosnia and Herzegovina. The Court of BiH panels, noting that the domestic statutory provisions on genocide, war crimes, crimes against humanity and other crimes against international law are derived from international law, have held that the relevant domestic provisions bring with them “as persuasive authority [their] international legal heritage, as well as the international jurisprudence that interprets and applies [them]”.²¹

International law is an important source of law in the legal system of Bosnia and Herzegovina.

The courts in BiH have relied on international jurisprudence and academic commentary as persuasive authorities.

Although not bound by the ICTY/ICTR/ICC jurisprudence and legal authorities, the courts in BiH have relied on such international jurisprudence and academic commentary as persuasive authorities.²² The courts in BiH rely, in particular, on international jurisprudence as it relates to the general principles of international law, the customary status of certain international law provisions, and the interpretation of international law

provisions.²³

The principle of legality is not explicitly referred to in the BiH Constitution. However, since the BiH Constitution provides for direct application of the ECHR, Article 7 of the ECHR is directly applicable as well:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

²⁰ *Ibid.*

²¹ See e.g., Court of BiH, Stupar et al., Case No. X-KR-05/24, 1st Instance Verdict, 29 July 2008 p. 53 (p. 56 BCS); Court of BiH, Petar Mitrović, Case No. X-KR-05/24-1, 1st Instance Verdict, 29 July 2008, p. 44 (p. 47 BCS); Court of BiH, Miladin Stevanović, Case No. X-KR-05/24-2, 1st Instance Verdict, 29 July 2008, p. 43 (p. 41 BCS); Court of BiH, Milorad Trbić, Case No. X-KR-07/386, 1st Instance Verdict, 16 October 2009, ¶ 173.

²² See, e.g., Court of BiH, Kurtović, Case No. X-KRZ-06/299, 2nd Instance Verdict, 25 March 2009, fn 19, pp. 4-5; Court of BiH, Momčilo Mandić, Case no. X-KRZ-05/58, 2nd instance verdict, 1 Sept. 2009, fn 7-17.

²³ See, e.g., Stupar et al., 1st inst., p. 53 (p. 56 BCS); Court of BiH, Zijad Kurtović, Case No. X-KRZ-06/299, 2nd Instance Verdict, 25 March 2009, ¶¶ 57, 124; Mitrović, 1st inst., p. 44 et seq (p. 47 et seq BCS); Petar Mitrović, Case No. X-KRZ-05/24-1, 2nd Instance Verdict, 7 Sept. 2009, ¶ 260; See generally, Court of BiH, Mitar Rašević et al., Case No. X-KR/06/275, 1st Instance Verdict, 28 Feb. 2008.

This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

These principles are reflected in Articles 3, 4 and 4a of the BiH Criminal Code, which are also discussed below in section 5.3.2.2.²⁴

²⁴ BiH Official Gazette, No. 03/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 08/10, consolidated version, available at www.sudbih.gov.ba.

5.2.3. CROATIA

The 1990 Republic of Croatia Constitution and the 2010 amendments of Republic of Croatia Constitution²⁵ are the primary sources for determining the status of international law in Croatian law.

5.2.3.1. THE CROATIAN CONSTITUTION AND INTERNATIONAL LAW

Article 134 of the 1990 Constitution provided that international treaties form part of the country's domestic legal system, and have higher legal force than the laws, if they are concluded and ratified in accordance with the Constitution and subsequently published.²⁶ The provisions of such treaties can be amended or abolished only according to the treaty's requirements or in accordance with the general principles of international law.²⁷ Article 141 of the amended 2010 Constitution retains this provision, and adds the requirement that such treaties need to be in force.²⁸

International treaties form part of the country's domestic legal system, and have higher legal force than the laws.

Moreover, Article 117(3) of the amended 2010 Constitution states that the courts try cases "on the basis of the Constitution, laws, international treaties and other valid source of law".²⁹

Article 31(1)³⁰ provides for the principle of legality:

Constitution of the Republic of Croatia, Article 31(1):

[N]o one can be punished for an act which, before it was committed, was not established by law or international law as a criminal act, and a sentence which was not established by law cannot be pronounced.

The amended 2010 Constitution retained this provision, adding to it a new paragraph on the non-applicability of statutes of limitations for crimes for which statutes of limitation are not applicable under international law.³¹ This is also discussed in section 5.3.3.3.

²⁵ Croatian Constitution, Official Gazette of Croatia „Narodne Novine“ No. 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10 (1990).

²⁶ Croatian Constitution, Art. 134 (Official Gazette of Croatia „Narodne Novine“ No. 56/90).

²⁷ *Ibid.*

²⁸ *Ibid.* at Art. 141 (Official Gazette of Croatia „Narodne Novine“ No. 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10).

²⁹ *Ibid.* at Art. 117(3) (Official Gazette of Croatia „Narodne Novine“ No. 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10).

³⁰ *Ibid.* at Art. 31(1) (Official Gazette of Croatia „Narodne Novine“ No. 56/90)(emphasis added).

5.2.4. SERBIA

The 2006 Constitution of the Republic of Serbia³² includes references to international law, as did the 1992 Constitution of the Federal Republic of Yugoslavia (FRY).

Under the 1992 FRY Constitution:

- Article 10 provided that the FRY recognised and guaranteed the human and citizens' rights and freedoms recognised by international law.³³
- Article 16(1) provided that the FRY "fulfils in good faith its obligations stemming from international treaties to which it is a contracting party"³⁴ and that "international treaties that have been confirmed and published in accordance with the constitution, as well as the generally accepted rules of the international law represent an integral part of the internal legal system".³⁵

The 2003 Constitutional Covenant of the State Union of Serbia and Montenegro³⁶ provided for the harmonization of regulations and practice with European and international standards.³⁷

- Article 10 stated that provisions of international treaties on human and minority rights and citizens' freedoms in force for the territory of Serbia and Montenegro shall be directly applicable.³⁸
- Article 16 provided that "ratified international treaties and generally recognised rules of international law have primacy over the laws of Serbia and Montenegro and the laws of the member states".³⁹

³¹ *Ibid.* at Art. 31(4) (Official Gazette of Croatia „Narodne Novine“ No. 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10).

³² Serbian Constitution, Republic of Serbia Official Gazette No. 98/2006.

³³ Federal Republic of Yugoslavia Constitution, FRY Official Gazette, Year I, No. 1, Belgrade, 27 April 1992.

³⁴ *Ibid.* at Art. 16(1).

³⁵ *Ibid.* at Art. 16(2).

³⁶ The Constitutional Covenant of the State Union of Serbia and Montenegro, Official Gazette of Serbia and Montenegro, Year I, No. 1, Belgrade, 4 Feb. 2003.

³⁷ *Ibid.* at Art. 3.

³⁸ *Ibid.* at Art. 10.

³⁹ *Ibid.* at Art. 16.

5.2.4.1. THE SERBIAN CONSTITUTION AND INTERNATIONAL LAW

Constitution of the Republic of Serbia 2006
Article 16: International relations

The foreign policy of the Republic of Serbia shall be based on generally accepted principles and rules of international law.

Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly.

Ratified international treaties must be in accordance with the Constitution.

The current 2006 Constitution of Serbia provides that “generally accepted rules of international law and ratified international treaties represent an integral part of the Republic of Serbia legal system and are to be applied directly”.⁴⁰ International treaties need to be ratified in accordance with the Constitution.⁴¹

Generally accepted rules of international law and ratified international treaties represent an integral part of the Republic of Serbia legal system and are to be applied directly.

Article 18(2) of the Constitution guarantees respect for and direct application of human and minority rights guaranteed by generally accepted rules of international law, ratified international treaties and national laws.⁴² Article 18(3) of the Constitution also includes a provision that human and minority rights are to be interpreted in accordance with international standards and practice.⁴³

The Constitution also affirms that obligations stemming from international obligations cannot be subject to a referendum.⁴⁴

The Constitution states that:

- The courts in the Republic of Serbia try cases “on the basis of the Constitution, laws and other general acts when it is provided by the law, generally accepted principles of international law and ratified international treaties”.⁴⁵
- Court decisions are “based on the Constitution, law, ratified international treaties and regulations enacted on the basis of the law”.⁴⁶
- The Public Prosecutor’s Office exercises its function “on the basis of the Constitution, law, ratified international treaty and a regulation enacted on the basis of the law”.⁴⁷

⁴⁰ Serbian Constitution, Art. 16(2) (Official Gazette No. 98/2006).

⁴¹ *Ibid.*

⁴² *Ibid.* at Art. 18(2).

⁴³ *Ibid.* at Art. 18(3).

⁴⁴ *Ibid.* at Art. 108(2).

⁴⁵ *Ibid.* at Art. 142(2).

⁴⁶ *Ibid.* at Art. 145(2).

As far as the hierarchy of domestic and international legal acts is concerned, the Constitution provides that “[r]atified international treaties and generally accepted rules of international law represent a part of the Republic of Serbia legal system”,⁴⁸ and that ratified international treaties cannot be contrary to the Constitution.⁴⁹ It also affirms that laws and other general acts cannot be contrary to ratified international treaties and generally recognised rules of international law.⁵⁰

Under Article 34 of the Serbian Constitution, criminal prosecutions or the execution of punishment for war crimes, genocide, or crimes against humanity are not subject to the statute of limitations.

⁴⁷ *Ibid.* at Art. 156(2).

⁴⁸ *Ibid.* at Art. 194(4).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.* at Art. 194(5).

5.3. TEMPORAL APPLICABILITY AND PRINCIPLE OF LEGALITY

Notes for trainers:

- Under this section, the principle of legality and its application within each of the domestic jurisdictions is examined. The section starts with an overview of the SFRY criminal code, and then proceeds to analyse the position in BiH, Croatia and Serbia.
- The principle of legality is defined for each domestic jurisdiction, as well as the principle of applying the most lenient law to the perpetrator, both for substantive crimes and for sentencing purposes.
- The case law, as far as it is known, is cited. Participants should consider whether the decided cases have properly applied the laws and observe the principle of legality.
- A key issue for participants to consider throughout the section is the debate between those who would insist on the national laws explicitly making reference to the crimes charged and who thus favour a more restrictive application of the principle, and those who would adopt a more expansive interpretation. A possible exercise is to divide the group of participants in half, asking one side to debate in favour of a narrower approach and the other to argue for a wider interpretation that would permit international crimes to be prosecuted, even if not expressly provided for in national laws.

5.3.1. SFRY

5.3.1.1. THE PRINCIPLE OF LEGALITY

The principle of legality is the well-known principle of *nullum crimen, nulla poena sine lege*.

The principle of legality was set out in SFRY Criminal Code⁵¹ Article 3:

**SFRY Criminal Code
Article 3**

No punishment or other criminal sanction may be imposed on anyone for an act which, prior to being committed, was not defined by law as a criminal act, and for which a punishment has not been prescribed by statute.

⁵¹ Criminal Code of the SFRY, Official Gazette of the SFRY no.44/76, 36/77, 34/84, 74/87, 57/89, 3/90, 38/90.

Article 3 contains three elements:

- (1) A criminal act can be established only by law;
- (2) Only law can set out a punishment for a criminal act; and
- (3) A criminal act needs to be determined by law prior to its commission before a criminal sanction can be imposed.⁵²

5.3.1.2. THE PRINCIPLE OF LEGALITY AND APPLICATION OF INTERNATIONAL LAW

The Commentary on the SFRY Criminal Code explained that the principle of legality in criminal law required that criminal acts must be provided by law, and not in some other normative act. The Commentary also stated that the SFRY parliament, as well as the parliaments of the republics and autonomous regions, were authorised to pass criminal law provisions, but could do so only by passing acts having the formal value of law. Criminal law provisions could not be in the form of decisions, resolutions, instructions or other acts.⁵³

The Commentary also referred to international law. It relied on Article 11(2) of the Universal Declaration on Human Rights, which states: “no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or *international law*, at the time when it was committed”.⁵⁴

The 1977 SFRY Criminal Code also provided for the application of the principle of legality for criminal acts in accordance with Article 15(2) of the ICCPR. The Commentary noted that Article 15 of the ICCPR contains an identical provision and an additional statement that the rule shall not “prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the *general principles of law recognized by the community of nations*”.⁵⁵

“General principles recognised by the international community” should be understood as “international criminal law in the sense of a system of criminal law provisions valid independently of the existence of the national criminal laws, therefore even when such national laws and international criminal law are conflicting”.

The Commentary also stated that the “general principles recognized by the international community” should be understood as “international criminal law in the sense of a system of

⁵² Commentary of the SFRY Criminal Code, p. 15.

⁵³ *Ibid.* at p. 16.

⁵⁴ *Ibid.* at p. 17 (emphasis added).

⁵⁵ *Ibid.* (emphasis added).

criminal law provisions valid independently of the existence of the national criminal laws, therefore even when such national laws and international criminal law are conflicting”.⁵⁶

According to one view, the principle of legality would not be violated if an act or omission constituted a penal offence under international law and the general principles of law recognised by the community of nations at the time it was committed, even though it was not envisaged by the national legislation.⁵⁷ This view is supported by Article 211(3) of the SFRY Constitution, which states that punishable acts are to be proscribed and sentences for such acts pronounced in accordance with the law *and other regulations in force at the time when the act was committed* unless some other law or regulation is more lenient for the perpetrator.⁵⁸

Articles 107(2) and 108(4) of the SFRY Criminal Code provide for the principle of universality:

- Article 107(2) of the Code proves that SFRY criminal legislation is applicable to criminal acts committed abroad by a foreign citizen towards a foreign country or another foreign citizen.
- Article 108(4) provides that a criminal prosecution can be undertaken in the SFRY in cases set out in Article 107(2) of the Code “regardless of the law of the country in which the criminal act has been committed, if at the time of the commission the act in question was considered a criminal act in accordance with the general legal principles recognized by the international community”.⁵⁹

5.3.1.3. THE BLANKET DISPOSITION

Furthermore, as noted above, in a chapter dealing with criminal acts against humanity and international law, the Commentary underscored the importance of the blanket disposition (“whoever, in violation of the rules of international law [...]”) included in most of the crimes defined in Chapter 16 (dealing with criminal acts against humanity and international law). The Commentary stated:

Such [a] blanket disposition [...] enables that without changing the law every further development of international law is recognized, hence securing a permanent harmonization of our criminal legislation with international criminal law.⁶⁰

However, when dealing with blanket dispositions, it is important that the elements of the crime are established by international law in a manner that leaves no doubt regarding what acts constitute criminal

It is important that the elements of the crime are established by international law in a manner that leaves no doubt regarding what acts constitute criminal offences.

⁵⁶ *Ibid.* at p. 390 (unofficial translation of the quote).

⁵⁷ See, e.g., V. Kambovski in Commentary of the BiH Criminal Code, p. 72.

⁵⁸ SFRY Constitution, Art. 211(3) (emphasis added).

⁵⁹ SFRY Criminal Code, Articles 107(2) and 108(4).

⁶⁰ Commentary of the SFRY Criminal Code, p. 494 (unofficial translation of the quote).

offences.⁶¹ If the description of a criminal act is not clear and precise enough, it may violate the principle of legality.⁶² The principle of legality also excludes the application of analogy.⁶³

5.3.1.4. THE ANDRIJA ARTUKOVIĆ CASE

A 1984 decision of the Zagreb County Court seems to confirm that the principle of legality would not be violated when a criminal act was not envisaged in the Criminal Code, but was envisaged as such under international law.

In that case, the accused Andrija Artuković was found guilty and sentenced to the death penalty for war crimes against civilians and war crimes against prisoners of war committed during World War II in the period from 1941-1943.⁶⁴ The chamber found that war crimes committed during World War II represented a violation of the rules of international law during war, armed conflict or occupation, even though they were not envisaged explicitly in the national criminal legislation at the time.⁶⁵

The chamber noted that the protection of the civilian population was regulated by the 1907 Hague Convention IV, the 1907 Regulations Concerning the Laws and Customs of War on Land (the 1907 Regulations) and the IMT Statute, and the protection of prisoners of war was regulated by the 1907 Regulations and the 1929 Geneva Convention,⁶⁶ and that sanctions for these acts existed in both international and national laws.⁶⁷ The chamber concluded:

Therefore, war crimes and punishing war crimes have been clearly and explicitly determined at the time when the accused committed the acts described in the [...] verdict, and the defence claim that the accused in these proceedings have been tried for the criminal offences which at the time of the commission of the crimes have not been determined as war crimes cannot be accepted.

⁶¹ *Ibid.* at p. 15.

⁶² *Ibid.*

⁶³ *Ibid.* at p.16.

⁶⁴ Zagreb County Court, Artuković, Case No. K-91/84-61, 1st Instance Verdict, 14 May 1986 (verdict upheld on appeal).

⁶⁵ See *ibid.* at pp. 30-32; Croatian Supreme Court, Artuković, Case No. Kz-706/1986, 2nd Instance Verdict, 24 July 1986 pp. 30-35; *Pravna praksa*, addendum to *Pravni život*, 10/86, 131-132, prema Praktikumumu, Commentary of the BiH Criminal Code, p. 73.

⁶⁶ *Artuković*, 1st inst. pp. 38-39; *Artuković*, 2nd inst., p. 31.

⁶⁷ *Ibid.* For instance, the chamber noted that the 1941 Atlantic Charter, London declaration, Moscow Declaration and the statements by the highest U.S., Great Britain and the SSSR state officials all pointed out that the perpetrators of war crimes would be punished, while the 1943 Moscow Declaration established that all the war criminals would be returned to the countries in which they committed the crimes in order to be tried and punished in accordance with the laws of those countries.

Hence, the defence claim that the acts of the accused [...] could only be correctly designated in accordance with Article 167(1), items 1 and 2, of the 1929 Kingdom of Yugoslavia CC, is unfounded.⁶⁸

The defence appealed, claiming that the trial chamber erred when it applied the SFRY Criminal Code to the charges in question, instead of the 1929 Kingdom of Yugoslavia Criminal Code. The defence argued that this was a violation of the principle of legality and the ban on the retroactive application of the laws.⁶⁹ Moreover, the defence claimed that the statute of limitations under the 1929 Kingdom of Yugoslavia Criminal Code was applicable and that the court should therefore dismiss the charges.⁷⁰

The Supreme Court dismissed this ground of appeal, holding that the 1929 Kingdom of Yugoslavia Criminal Code had ceased to be applicable at the critical time due to the 1945 AVNOJ (Anti-fascist Council of the Peoples' Liberation of Yugoslavia) "Decision on the Abolishment and Invalidity of all Laws Issued by the Occupation Forces and their Aiders during the Occupation, on the Validity of Decisions Issued at that Time and on the Abolishment of Laws in Force at the Time of the Occupation".⁷¹ The Supreme Court referred to the 1946 "Law on the Invalidity of Laws Issued Before 6 April 1941 and During the Occupation".⁷² The Supreme Court also noted that the 1929 Kingdom of Yugoslavia Criminal Code could not have been applied to acts of war crimes from the moment the 1943 AVNOJ decision to establish the "National Commission for the Investigation of Crimes Committed by the Occupiers and their Helpers".⁷³ The Supreme Court held that this new regulation dealt with the issue of war crimes prosecution in a different manner, setting out, *inter alia*, retroactive punishment of their perpetrators.⁷⁴

The appellant argued that even if the elements of war crimes existed under international law at the critical time (1941-1943), the criminal sanctions for these crimes as such did not exist in the national legislation.⁷⁵ The Supreme Court dismissed this appeal, as the argument only considered the 1929 Kingdom of Yugoslavia Criminal Code provisions, which it had held were not applicable.⁷⁶ The Supreme Court noted the following:

- The AVNOJ Decision, which provided for retroactive punishment of war criminals "regardless of the fact that, at the time, the term war crime had not been legally defined in more detail".⁷⁷

⁶⁸ *Ibid.*

⁶⁹ Artuković, 2nd inst., p. 30.

⁷⁰ *Ibid.*

⁷¹ *Ibid.* at p. 32, referring to the Official Gazette of the DFY /Democratic Federative Yugoslavia/ No. 4/45.

⁷² Artuković, 2nd inst., p. 30, referring to the Official Gazette of the FPRY /Federative Peoples' Republic of Yugoslavia/ No. 86/46.

⁷³ *Ibid.*, referring to the Official Gazette of the DFY No. 1/45.

⁷⁴ Artuković, 2nd inst., p. 32.

⁷⁵ *Ibid.* at pp. 32-33.

⁷⁶ *Ibid.* at p. 33.

⁷⁷ *Ibid.*

- The 1944 Decree on Military Courts, which provided for retroactive punishment of the perpetrators of such acts.⁷⁸
- The 1945 Law on Criminal Offences against the State, which also provided for punishment for war crimes, including ordering murders and inhuman treatment of prisoners of war, as well as for “the offences committed prior to entering into force of this Law and for which the judgment was not final, if the provisions of this Law are more lenient than the earlier legal regulations”.⁷⁹ It was this provision from which the Supreme Court drew its conclusion that not only was there a possibility of retroactive punishment for war crimes, but also that prior to this law, there were other legal regulations of the new Yugoslavia that regulated the issues at hand.⁸⁰

Unlike the first instance chamber in this case, the Supreme Court referenced national legislation established during and after World War II that dealt with war crimes in general terms. However, all the essential elements of the war crimes, as well as their sanctions, were specified by the national criminal codes established long after the commission of the crimes in question. These criminal codes were applied by the courts in this case, rather than any of the legislation existing at the time of the commission of the crimes. Such retroactive application of the criminal code was not, however, considered to be in violation of the principle of legality.

5.3.1.5. *TEMPUS REGIT ACTUM* AND MANDATORY APPLICATION OF A LESS SEVERE CRIMINAL LAW (*LEX MITIOR*)

Article 4(1) of the SFRY Criminal Code provides that the law that was in force at the time a criminal act was committed shall be applied to the perpetrator of the criminal act.⁸¹

This provision reflects a well-known rule of *tempus regit actum*.

This general rule has one important exception, set out in Article 4(2) of the SFRY Criminal Code:

If the law has been altered one or more times after the criminal act was committed, the law which is less severe in relation to the offender shall be applied.⁸²

The obligatory application of the less severe law requires an assessment of which version of a law is considered more favourable to the perpetrator.⁸³

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ SFRY CC, Art. 4(1).

⁸² *Ibid.* at Art. 4(2).

⁸³ Commentary of the SFRY Criminal Code, p. 21.

The obligatory application of the less severe law requires an assessment of which one, between two or more laws, shall be considered more favourable to the perpetrator.

The Commentary on the SFRY Criminal Code states that such an evaluation cannot be performed as an abstract or objective comparison of the laws in question. Rather, the evaluation needs to be determined on a case-by-case basis.⁸⁴ It is not sufficient that the less severe law is more lenient in abstract terms and overall; it must be less severe “in relation to the offender” in the particular case.⁸⁵

In order to determine which law is more favourable to the offender, the court must take into account various elements and differences between the laws, as they relate to the offender in question. Thus, it is possible to conclude that a law providing for a more severe sentence would be more favourable to the defendant if, in its overall application, that law puts the defendant in a more favourable position.⁸⁶

It is not sufficient that the less severe law is more lenient in abstract terms and overall; it must be less severe “in relation to the offender” in the particular case.

In other words, it is possible that a law is objectively more severe, but at the same time is less severe in relation to a particular perpetrator and a particular crime.⁸⁷ For example, if a new law sets out a different type of a criminal sanction, a court will evaluate whether this new sanction is more or less severe in relation to the perpetrator in question in that particular case.⁸⁸

It is possible that a law is objectively more severe, but at the same time is less severe in relation to a particular perpetrator and a particular crime.

In the *Artuković* case, the Supreme Court concluded that the SFRY Criminal Code, applicable at the time of the trial, was more favourable to the accused than the FPRY Criminal Code and the interim laws.⁸⁹ The Supreme Court, however, did not explain why it found the SFRY Criminal Code to be more favourable to the accused.⁹⁰

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* at p. 23.

⁸⁹ *Artuković*, 2nd inst., pp. 34-35.

⁹⁰ *Ibid.* at p. 35.

5.3.2. BIH

The law in BiH has changed several times in recent years.⁹¹

- After the disintegration of SFRY, BiH took over the criminal legislation of the former SFRY, the SFRY Criminal Code.⁹² Chapter XVI prescribed criminal acts against humanity and international law (war crimes). Therefore, during the 1992-1995 war in BiH, the SFRY Criminal Code was the applicable law.
- In 1998, after the war, the Federation of BiH passed its own Criminal Code.⁹³ Chapter XVI of that code prescribed criminal acts against humanity and international law.
- In 2000, Republika Srpska passed its own Criminal Code,⁹⁴ in which criminal acts against humanity and international law were prescribed in Chapter XXXIV.
- Brčko District also passed its own Criminal Code, which prescribed criminal acts against humanity and international law in Chapter XVI.⁹⁵

These pieces of legislation were in force until 2003, when the new Criminal Codes of Bosnia and Herzegovina, the Federation of BiH, Republika Srpska and Brčko District were passed.⁹⁶ The BiH Criminal Code (and the only one of the new 2003 codes to do so) regulates criminal acts against humanity and international law. The jurisdiction for the enforcement of this law was assigned to the Court of BiH.

The new 2003 criminal codes of Republika Srpska,⁹⁷ the Federation of BiH⁹⁸ and the Brčko District BiH⁹⁹ no longer prescribe war crimes.

⁹¹ See also M. Kreso, Problemi vremenskog važenja zakona u predmetima ratnih zločina, (Ne)jednakost pred Zakonom, u: Pravda u Tranziciji, Jul 2006 – broj 5. Available at <http://www.pravdautranziciji.com/pages/article.php?id=1222>.

⁹² Decree with the Power of Law was passed; Official Gazette of RBiH, No. 2/92, 11 April 1992; Decree with the Force of Law on Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialist Federative Republic of Yugoslavia taken over as the republic law during the imminent war danger or during the time of war (RBiH Official Gazette No. 6/92); Law on Confirmation of Decrees with the Force of Law (RBiH Official Gazette No. 13/94); Law on Changes and Amendments of the SFRY Criminal Code (Republika Srpska Official Gazette No. 12/93) changing the title of the SFRY Criminal Code into the Criminal Code of Republika Srpska.

⁹³ Official Gazette of the Federation of BiH, No. 43/98.

⁹⁴ Official Gazette of Republika Srpska No. 22/00.

⁹⁵ Official Gazette of Brčko District BiH, No. 6/00, 1/01 and 3/03.

⁹⁶ Criminal Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 3/03 and 37/33; Criminal Code of the Federation of Bosnia and Herzegovina, FBiH Official Gazette No. 36/03 and 37/03; Criminal Code of Republika Srpska, RS Official Gazette No. 49/03; Criminal Code of Brčko District of Bosnia and Herzegovina, Brcko District of Bosnia and Herzegovina Official Gazette No. 10/03.

⁹⁷ Official Gazette of Republika Srpska, No. 49/03.

⁹⁸ Official Gazette of the Federation of BiH, No. 36/03.

⁹⁹ Official Gazette of Brčko District BiH, No. 10/03.

5.3.2.1. LAW IN FORCE AT THE TIME OF THE CRIME AND SUBSEQUENT CHANGES

These significant changes have given rise to an issue of interpretation of the temporal applicability of laws. War crimes cases in BiH are tried both on the state (Court of BiH) and the entity level courts.

The entity level courts and Brčko District may assume jurisdiction for war crimes in three cases:

- if the war crimes cases were in process at those courts before the Criminal Code of BiH entered into force (*i.e.*, before 1 March 2003), and if the indictment was legally in force;¹⁰⁰
- if the war crimes cases were in process at those courts before the Criminal Code of BiH entered into force, and even if the indictment was not legally in force, the Court of BiH decides not to take the case under its own jurisdiction unless the Court, *ex officio* or upon the reasoned proposal of the parties or defence attorney, decides to take such a case after considering the gravity of the criminal offence, the capacity of the perpetrator and other circumstances important to assessing the complexity of the case;¹⁰¹ or
- if the BiH Prosecutor finds, pursuant to the “Rules of the Road”, that the war crimes cases sent by cantonal and district prosecutor offices and agencies from BiH are not “very sensitive”, and decides, in agreement with the Court of BiH, to delegate them to the cantonal and district prosecutor offices or the prosecutor of the Brčko District.¹⁰²

There are significant differences between the approach of the entity level courts and district courts and the Court of BiH regarding which law is more favourable to the accused:

- Entity level courts and Brčko District courts generally try war crimes cases arising out of the conflicts in the former Yugoslavia on the basis of the SFRY Criminal Code, as the *in tempore criminis* law and as the law more favourable to the accused.
- The Court of BiH has applied mostly the BiH Criminal Code in relation to war crimes committed during the same period.¹⁰³
- Recently, however, the Court of BiH appellate panels acknowledged that, when determining which of the laws—the SFRY Criminal Code or the BiH Criminal Code—were more lenient to the accused with regards to sentencing, consideration should be given to whether the trial panel intends to impose a sentence closer to the minimum or closer to maximum sentence prescribed. In one case, the Court of BiH appellate panel decided that the SFRY Criminal Code should have been applied because its provisions were more

¹⁰⁰ BiH Criminal Procedure Law, Art. 449(1), Official Gazette of Bosnia and Herzegovina No. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09.

¹⁰¹ *Ibid.* at Art.449(2), Official Gazette of Bosnia and Herzegovina No. 3/03.

¹⁰² Report on the work of the Prosecution of Bosnia and Herzegovina for 2005, *available at* http://www.tuzilastvobih.gov.ba/files/docs/IZVJESTAJ_ORADU_TUZILASTVA_BIH_2005_BOS.pdf.

¹⁰³ It seems that the OSCE Mission to Bosnia and Herzegovina took a position in favour of the BiH Criminal Code application (See “Moving Towards a Harmonised Application of Law in War Crimes Proceedings”, OSCE, 2009).

favourable to the accused in the particular case (see section 5.3.2.4 below, and Module 13 on sentencing).

In particular, the issue of the temporal applicability of the laws arises in relation to:

- the applicability of crimes against humanity;
- the applicability of some modes of liability, such as superior responsibility and participation in a JCE; and
- sentencing.

A more detailed analysis of the temporal applicability of the laws in relation to these topics will be dealt with in the corresponding Modules 7 (Crimes Against Humanity), 9 (Modes of Liability) and 10 (Superior Responsibility), respectively.

5.3.2.2. PRINCIPLE OF LEGALITY AND THE APPLICATION OF INTERNATIONAL LAW

The principle of legality is set out in Article 3 of the BiH Criminal Code:¹⁰⁴

**BiH Criminal Code
Article 3**

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

Notably, in contrast to Article 2 of the SFRY Criminal Code, this provision explicitly refers to international law. This highlights the status and importance of international law in the law of BiH.

For discussion on this principle under the SFRY Criminal Code, see above, sections 5.3.1.1 and 5.3.1.2.

5.3.2.3. NON-APPLICABILITY OF THE STATUTE OF LIMITATIONS

In accordance with Article 19 of the BiH Criminal Code, criminal prosecution and execution of a sentence are not subject to the statute of limitations for criminal offences of genocide, crimes against humanity and war crimes, or for other criminal offences that, pursuant to international law, are not subject to the statute of limitations

¹⁰⁴ BiH CC, Art. 3, (emphasis added).

5.3.2.4. *TEMPUS REGIT ACTUM* AND MANDATORY APPLICATION OF THE LAW MORE FAVOURABLE TO THE PERPETRATOR (*LEX MITIOR*)

The principle of *tempus regit actum* and the principle of applicability of the law more lenient to the accused are set out in Article 4 of the BiH Criminal Code:

**BiH Criminal Code
Article 4**

- (1) The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence.
- (2) If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

The debate over which criminal code to apply (the SRFY Criminal Code or the BiH Criminal Code), and in what circumstances, is a live issue. Two main issues arise for consideration:

1. The question of which law is more lenient to a perpetrator must be decided *in concreto*.
2. When determining a sentence for a perpetrator, a court must take into account both the general and special purposes of the punishment as set out in the law.¹⁰⁵

These will be discussed in more detail below.

5.3.2.4.1. DETERMINING WHICH LAW IS MORE LENIENT

It is widely accepted, by both legal doctrine and jurisprudence, that only one law in its entirety can be applied to any given case—the law most favourable to the defendant in that particular case.¹⁰⁶ It is not possible to combine the old and new laws,¹⁰⁷ as the court cannot apply a combined law that does not exist.¹⁰⁸

The question of which law is more lenient in a specific case cannot be decided *in abstracto*, that is, by a general comparison of the two or more laws in question. It must be decided *in concreto*, by comparison of the laws in question in relation to a particular case.¹⁰⁹ In doing so, it is

¹⁰⁵ See BiH CC, Arts. 6 and 39; see generally Module 13 on sentencing; see also M. Kreso, *supra* note 91.

¹⁰⁶ Commentary of the BiH Criminal Code, p. 67.

¹⁰⁷ *E.g.* because the old one is more favourable regarding the minimum sentence envisaged for that criminal act, and the new one is more favourable regarding the maximum sentence envisaged for that criminal act.

¹⁰⁸ Commentary of the BiH Criminal Code, p. 67.

¹⁰⁹ *Ibid.* at p. 66; see also Commentary of the SFRY Criminal Code; Court of BiH, Stupar et al., Case No. X-KRZ-05/24, 2nd Instance Verdict, 9 Sept. 2009, ¶¶ 494 and 518; Zijad Kurtović, Case No. X-KRZ-06/299, 2nd Instance Verdict, 25 March 2009, ¶¶ 115 and 130.

necessary to establish all of the relevant circumstances before making an assessment of which law would represent a truly more favourable outcome for the accused.¹¹⁰

A comparison of the text of the laws may only provide a reliable answer if the new law decriminalises conduct which was a criminal offence under the old law, which makes the new law more lenient.¹¹¹ In all other cases, when the criminal offence is punishable under both laws,

When the criminal offence is punishable under both laws, the solution is complex, and it is necessary to establish all of the circumstances which may be relevant when selecting the more lenient law.

the solution is complex, and it is necessary to establish all of the circumstances which may be relevant when selecting the more lenient law.¹¹² It is not important which of the two or more laws provides more possibilities for a more favourable judgement, but which one of them truly provides a better outcome for the given perpetrator.¹¹³ If both laws lead to the same result, the law that was in force at the time of the commission of the crime will be applicable.¹¹⁴

When comparing the laws, different outcomes are possible, depending on several circumstances that may affect a decision on which law is the more lenient law, including:¹¹⁵

- provisions on sentencing and reduction of sentences (which of the laws is more lenient in this regard);
- measures of warning;
- possible accessory punishments;
- alternative sentencing provisions (for example, community service);
- security measures;
- legal consequences of conviction; and
- provisions pertaining to the criminal prosecution, including whether it was conditioned by an approval.¹¹⁶

It is possible that a law providing a more severe sentence is considered more lenient to the accused, because the application of its other provisions leads to a more favourable result for the accused.

Thus, it is possible that a law providing a more severe sentence is considered more lenient to the accused, because the application of its other provisions leads to a more favourable result for the accused (e.g. if it envisaged a new or more favourable basis for excluding

¹¹⁰ Commentary of the BiH Criminal Code, p. 66.

¹¹¹ *Ibid.*; see also *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶ 495; *Zijad Kurtović*, 2nd inst. ¶ 116.

¹¹² Commentary of the BiH Criminal Code, p. 66; see also *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶ 496; *Zijad Kurtović*, 2nd inst. ¶ 116.

¹¹³ Commentary of the BiH Criminal Code, p. 66.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.* at p. 66.

¹¹⁶ *Ibid.* at p. 66; see also *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶ 497; *Zijad Kurtović*, 2nd inst. ¶ 117.

criminal responsibility or release from punishment etc.).¹¹⁷

As noted above, the court must apply one law in its entirety, and cannot combine two different laws. Therefore, challenges may arise when determining how to sentence an accused when faced with two different laws. This is discussed below.

5.3.2.4.2. DETERMINING A SENTENCE

When determining a sentence for an accused, a court needs to follow not only the general sentencing rules, but it also has to take into account both the general and special purposes of the punishment as set out in the law.¹¹⁸

When determining a sentence for an accused, a court needs to follow not only the general sentencing rules, but it also has to take into account both the general and special purposes of the punishment as set out in the law.

When a sentence prescribed by two or more laws differs, the court will determine whether it is considering a sentence closer to the minimum or the maximum prescribed sentence.¹¹⁹ If it is leaning more towards the minimum sentence, it will apply the law that includes a more favourable minimum sentence.¹²⁰ However, if the court is leaning towards the maximum sentence, it will apply the law that includes a more favourable maximum sentence.¹²¹

When a sentence prescribed by two or more laws differs, the court will determine whether it is considering a sentence closer to the minimum or the maximum prescribed sentence.

The Court of BiH has adopted this approach in its recent judgements, which is discussed below.¹²² The Constitutional Court of BiH has also rendered an important decision on this issue in the *Maktouf* case, also discussed below.

5.3.2.4.2.1. MAKTOUF CASE BEFORE THE CONSTITUTIONAL COURT

In the *Maktouf* case (pending before the ECtHR at the time of writing), the Constitutional Court held:

In practice, legislation in all countries of the former Yugoslavia did not provide a possibility of pronouncing either a sentence of life imprisonment or long-term

¹¹⁷ Commentary of the BiH Criminal Code, p. 66.

¹¹⁸ See BiH CC, Arts. 6 and 39; see generally Module 13 on sentencing. The inclusion of provisions on the purposes of punishment is common in the former SFRY. These provisions represent guidelines for determining the sentence. Commentary of the BiH Criminal Code, p. 244; see also M. Kreso, *supra* note 91.

¹¹⁹ Commentary of the BiH Criminal Code, p. 67.

¹²⁰ *Ibid.* at p. 67.

¹²¹ *Ibid.* at p. 66.

¹²² See e.g. *Stupar et al.*, 2nd inst. of 9 Sept. 2009; *Zijad Kurtović*, 2nd inst.

imprisonment, as often done by the International Criminal Tribunal for the former Yugoslavia (the cases of Krstić, Galić, etc.). At the same time, the concept of the SFRY Criminal Code was such that it did not stipulate either long-term imprisonment or life sentence but death penalty in case of a serious crime or a 15 year maximum sentence in case of a less serious crime. Hence, it is clear that a sanction cannot be separated from the totality of the goals sought to be achieved by the criminal policy at the time of application of the law.

In this context, the Constitutional Court holds that it is simply not possible to ‘eliminate’ the more severe sanction under both earlier and later laws, and apply only other, more lenient sanctions, so that the most serious crimes would in practice be left inadequately sanctioned.¹²³

This reasoning seems to be in line with the SFRY jurisprudence.¹²⁴

5.3.2.4.2.2. STUPAR ET AL. CASE

In the *Stupar et al.* case, the accused were charged with genocide and sentenced by the trial panel on the basis of the BiH Criminal Code. The defence appealed, arguing that the SFRY Criminal Code was more lenient because the maximum sentence was lower than under the BiH Criminal Code. The defence argued that the SFRY Criminal Code included a 20 year prison sentence as a substitute for the death penalty (which was abolished in Bosnia and Herzegovina)¹²⁵ as well as a general provision that the maximum prison sentence could be 15 years’ imprisonment. The defence asserted that the maximum penalty under the SFRY Criminal Code, although previously the death penalty, would be a term of imprisonment of either 20 or 15 years, which is less than the 45 years’ sentence for genocide under the BiH Criminal Code.

The appellate panel upheld the trial panel’s sentence and rejected arguments from the defence that the SFRY Criminal Code should have been applied as the more lenient law. The appellate panel noted the importance of determining the temporal applicability of laws *in concreto* for every specific case. The appellate panel noted that the SFRY Criminal Code prescribed the punishment of a minimum of 5 years’ imprisonment or the death penalty for genocide, while the BiH Criminal Code prescribed a prison term of no less than 10 years or long-term imprisonment (20¹²⁶ – 45 years) for the same criminal offence.¹²⁷

¹²³ BiH Constitutional Court, *Maktouf*, Case No. AP-1785/06, Decision on Admissibility and Merits, ¶¶ 68-69, in *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶ 521.

¹²⁴ See, e.g., *Artuković*, 1st inst.; *Artuković*, 2nd inst., p. 36.

¹²⁵ There are several different opinions as to when exactly death penalty was actually abolished in Bosnia and Herzegovina – this is explained in more depth in Module 13.

¹²⁶ Note that the long-term imprisonment was changed to 21 to 45 years imprisonment by the Law on Amendments and Additions to the BiH CC, BiH Official Gazette No. 08/10.

¹²⁷ *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶ 505. The appellate panel held that because both the SFRY Criminal Code and the BiH Criminal Code identically defined the criminal offence of genocide, the

When determining the punishment, having balanced all the relevant mitigating and aggravating circumstances, the trial panel had concluded that the necessary and proportionate penalty for the commission of the crime was 40 to 42 years' imprisonment.¹²⁸ Considering that the maximum punishment for the criminal offence of genocide is long-term imprisonment of 45 years under the BiH Criminal Code, the appellate panel held it was evident that the intention of the trial panel was to impose a severe punishment and that it was therefore oriented towards that particular maximum.¹²⁹

In comparing the maximum sentences under the two codes, the appellate panel noted that the SFRY Criminal Code prescribed the death penalty as the maximum punishment, while the BiH Criminal Code prescribed long-term imprisonment and that therefore "in this specific situation, the BiH Criminal Code is more lenient to the accused as it prescribes the term of imprisonment which is, by all means, more lenient than the death penalty".¹³⁰

The appellate panel held that the defence submission was unacceptable because at the time of the commission of the offence the death penalty was imposed by the SFRY Criminal Code for that criminal offence, and the defence was implying that the referenced sanction could simply be eliminated from the provision of Article 141 of SFRY Criminal Code.¹³¹ The appellate panel concluded that eliminating one sanction and substituting it with another, without any explicit legal provision, would mean that a law which actually did not exist would be applied.¹³²

5.3.2.4.2.3. ZIJAD KURTOVIĆ CASE

The Court of BiH appellate panel applied the same reasoning from the *Stupar et al.* in the *Zijad Kurtović* case.¹³³ In this case, the accused was charged with war crimes under the BiH Criminal Code and found guilty and sentenced by the trial panel. However, the appellate panel found that the SFRY Criminal Code should have been applied.

The appellate panel stressed the importance of determining the temporal applicability of laws *in concreto*.¹³⁴ The appellate panel assessed which of the laws was more lenient to the perpetrator by comparing the prescribed sentencing under each of the codes, and found that the SFRY Criminal Code envisaged a lower minimum sentence for the crimes in question.¹³⁵

prescribed punishments for the crime should be analysed, not the elements of the crime itself. *Ibid.* ¶¶ 494, 502.

¹²⁸ *Ibid.* at ¶ 515.

¹²⁹ *Ibid.* at ¶ 516.

¹³⁰ *Ibid.* at ¶ 517-518.

¹³¹ *Ibid.* at ¶ 519.

¹³² *Ibid.* at ¶ 520.

¹³³ *Kurtović*, 2nd inst., ¶¶ 115-126. See also *Mitrović*, 2nd inst. ¶ 175 *et seq.*

¹³⁴ The appellate panel first found that both the SFRY Criminal Code and the BiH Criminal Code envisaged the same legal requirements to try and punish the perpetrator for this conduct. *Kurtović*, 2nd inst. ¶¶ 115-126.

¹³⁵ *Ibid.* at ¶¶ 127-129.

The appellate panel noted that, when determining the punishment for the accused, and after taking into account all of the mitigating and aggravating circumstances, the trial panel had imposed the minimum sentence under the BiH Criminal Code for each of the offences.¹³⁶ The appellate panel concluded that the intention of the trial panel, in this particular case, was to impose a more lenient punishment on the accused.¹³⁷ The appellate panel found that the SFRY Criminal Code was more lenient to the accused because it carried a more lenient minimum for the relevant offences (five years and one year). Accordingly, the appellate panel modified the trial panel's judgement so as to apply the SFRY Criminal Code.¹³⁸

5.3.2.5. TRIAL AND PUNISHMENT FOR CRIMES UNDER INTERNATIONAL LAW

In 2004, the BiH Criminal Code was amended to include Article 4(a) which deals with the trial and punishment for criminal offences pursuant to the general principles of international law.¹³⁹

BiH Criminal Code: Article 4(a)

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

The BiH Court has relied on Article 4(a) when dealing with cases where accused were charged with crimes against humanity.¹⁴⁰

The BiH Court panels, for example, acknowledged that crimes against humanity were not set out in the SFRY Criminal Code.¹⁴¹ Therefore, because crimes against humanity were part of customary international law at the relevant time, the Court of BiH applied the BiH Criminal Code, which explicitly envisages crimes against humanity as criminal acts, rather than applying the SFRY Criminal Code which did not contain such a provision.¹⁴²

Perpetrators should not be permitted to evade trial and punishment in cases where specific conduct constituting a criminal offence according to the general principles of international law was not criminalised.

¹³⁶ *Ibid.* at ¶ 130.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.* at ¶ 131.

¹³⁹ This accords with Article 3(2) of the BiH CC. See above, section 5.3.2.2.

¹⁴⁰ See discussion below and references therein.

¹⁴¹ See discussion below.

¹⁴² See, e.g., *Rašević et al.*, 2nd inst., pp. 30-31 (pp. 32-33 BCS); Paunovic, Case No. X-KRZ 05/16, 2nd Instance Verdict, 27 Oct. 2006, p. 7 *et seq* (p. 8 *et seq* BCS).

In the *Zijad Kurtović* case, the appellate panel held that Article 4(a) of the BiH Criminal Code was applicable to crimes against humanity committed at the time when the SFRY Criminal Code was still in force, as the SFRY Criminal Code did not regulate such crimes.¹⁴³ The panel noted that if Article 4(2) of the BiH Criminal Code were applied (mandating the application of the more lenient law), then it would follow that the SFRY Criminal Code was more lenient for the perpetrator because it did not criminalise the act committed by the accused at all, and, accordingly, the perpetrator could neither be tried nor punished for this criminal offence.¹⁴⁴ The panel held that it was therefore necessary to either apply Article 4(a) of the BiH Criminal Code or to directly apply Article 7(2) of the ECHR, which, pursuant to Article 2/II of the BiH Constitution, is directly applicable in the BiH and has primacy over other laws.¹⁴⁵ These articles bar perpetrators from evading trial and punishment in cases where specific conduct constituting a criminal offence according to the general principles of international law was not criminalised.¹⁴⁶ The panel concluded:

[...] Article 4a of the CC B-H provides for an exceptional departure from the principles under Articles 3 and 4 of the CC B-H in order to ensure the trial and punishment for such conduct which constitutes criminal offense under international law, that is, which constitutes a violation of norms and rules that enjoy general support of all nations, that are of general importance and/or are considered or constitute universal civilization achievements of the modern criminal law, where such conduct was not defined as criminal in national criminal legislation at the time of perpetration.¹⁴⁷

The same reasoning was applied by the appellate panel in other cases, such as in the *Stupar et al.* case, the *Petar Mitrović* case, and the *Rašević and Todović* case.¹⁴⁸

It should be noted that according to one view, trial and punishment for any act or omission considered as criminal pursuant to the general principles of international law at the time of the commission of the crime could not be undertaken if the punishment for that crime was not clearly set out by law at the time of the commission of the crime. In line with this reasoning, even if it were accepted that crimes against humanity were considered as criminal under international law at the time of their commission, such crimes could not be tried either under the SFRY Criminal Code or the BiH Criminal Code, as the punishment for crimes against humanity was not set out by law at the time of the commission of the crimes. However, it needs to be noted here that it seems that this view was not even accepted by the former SFRY jurisprudence,

¹⁴³ *Kurtović*, 2nd inst., ¶ 120.

¹⁴⁴ *Ibid.*

¹⁴⁵ Article 7(2) of the ECHR is nearly identical to Article 4(a) of the BiH CC.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.* at ¶ 121.

¹⁴⁸ *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶¶ 509-512; *Mitrović*, 2nd inst., ¶¶ 202-205; *Rašević et al.*, 2nd inst., pp. 30-31 (pp. 32-33 BCS).

as the trials were held and persons convicted for war crimes even though punishment for such crimes were not set out by law at the time of their commission.¹⁴⁹

¹⁴⁹ See above, under .3.1.2, 5.3.1.3., 5.3.1.4. and discussion regarding the *Artuković* case.

5.3.3. CROATIA

War crimes cases in the Republic of Croatia have been tried on the basis of the law that was in force in the Republic of Croatia at the time when the crimes charged were committed.

5.3.3.1. LAW IN FORCE AT THE TIME OF THE CRIME AND SUBSEQUENT CHANGES

On 26 June 1991, the Parliament of the Republic of Croatia passed the Law on Adoption of the SFRY Criminal Code as the Republic Code, which entered into force on 8 October 1991.¹⁵⁰ This law removed the death penalty provided for in Article 37 of the SFRY Criminal Code and amended Article 38(2) of the SFRY Criminal Code¹⁵¹ to provide that a 20 year imprisonment sentence can be imposed only for the most serious criminal acts.¹⁵² This amendment was in accordance with the 1990 Croatian Constitution, which prohibited the death penalty in the Republic of Croatia.¹⁵³ The crimes envisaged by the Chapter XVI of the SFRY Criminal Code (Criminal Acts against Humanity and International Law) remained unchanged.

In 1993 the Parliament of the Republic of Croatia adopted a Consolidated text of the Basic Criminal Code of the Republic of Croatia (OKZ RH)¹⁵⁴ incorporating the Criminal Code of the Republic of Croatia (KZ RH)¹⁵⁵ along with its changes and amendments.¹⁵⁶ OKZ RH was subsequently amended several times,¹⁵⁷ but none of the amendments concerned the crimes enshrined in the chapter dealing with criminal acts against humanity and international law.

On 1 January 1998, a new Criminal Code of the Republic of Croatia entered into force and was subsequently amended several times (“the 1998 Criminal Code”).¹⁵⁸ An amendment in 2004 incorporated new articles into the 1998 Criminal Code dealing with crimes against humanity, superior responsibility, recruiting mercenaries, preparation of criminal acts against the values protected by international law and subsequent assistance provided to a perpetrator of criminal acts against values protected by international law.¹⁵⁹

¹⁵⁰ Official Gazette of Croatia „Narodne Novine“ No. 53/91 and 39/92.

¹⁵¹ SFRY Criminal Code, Art. 38(2): “The court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty”.

¹⁵² Official Gazette of Croatia „Narodne Novine“ No. 53/91, Zakon o preuzimanju Krivicnog zakona SFRJ.

¹⁵³ Croatia Constitution, Art. 21.

¹⁵⁴ Official Gazette of Croatia „Narodne Novine“ No. 31/93 (Criminal Code of Republic of Croatia - Consolidated text (Official Gazette No. 32/93)).

¹⁵⁵ Official Gazette of Croatia „Narodne Novine“ No. 53/91

¹⁵⁶ Official Gazette of Croatia „Narodne Novine“ No. 39/92 and No. 91/92.

¹⁵⁷ *Ibid.* at No. 35/93, 108/95, 16/96, 28/96.

¹⁵⁸ *Ibid.* at No. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 71/06, 110/07, 152/08.

¹⁵⁹ *Ibid.* at No. 105/04.

5.3.3.2. PRINCIPLE OF LEGALITY AND THE APPLICATION OF INTERNATIONAL LAW

The principle of legality is set out in Article 2 of the 1998 Criminal Code:

1998 Criminal Code Article 2

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

Accordingly, the principle of legality is satisfied if the incriminated conduct constituted a criminal offence under international law at the time it was committed.

The principle of legality is satisfied if the incriminated conduct constituted a criminal offence under international law at the time it was committed.

Although such wording was not explicitly used in the OKZ RH (the OKZ RH reflected the adopted SFRY Criminal Code) this inclusion should not be regarded as novel. As explained above in section 5.3.1.2, the Commentary of the SFRY Criminal Code referred to the provisions of Article 11(2) of the Declaration on Human Rights and Article 15 of the ICCPR and emphasised the harmonisation of the SFRY Criminal Code with international criminal law. These articles

expressly recognised that criminal prosecution can be undertaken in certain cases “regardless of the law of the country in which the criminal act has been committed, if at the time of the commission the act in question was considered a criminal act in accordance with the general legal principles recognized by the international community”.¹⁶⁰

The same applies to the OKZ RH.¹⁶¹ This is in line with Article 31 of the 1990 Constitution of the Republic of Croatia, which provided that “no one can be punished for an act which, before it was committed, was not established by law or international law as a criminal act, and a sentence which was not established by law cannot be pronounced”.¹⁶²

¹⁶⁰ SFRY CC, Art. 108(4); see also Commentary of the SFRY Criminal Code, p. 17.

¹⁶¹ OKZ RH, Art. 103(4) (identical to Article 108(4) of the SFRY CC).

¹⁶² Croatian Constitution, Art. 31(1), Official Gazette of Croatia „Narodne Novine“ No. 56/90.

Like the SFRY Criminal Code, Article 120(1) of the OKZ RH states “whoever, in violation of the rules of international law [...]”, which, in turn, represents a part of war crimes against civilians, prohibited by Article 120(1).¹⁶³

The Republic of Croatia Supreme Court has held that this provision must be defined, as it must contain the elements of the criminal act.¹⁶⁴ The Supreme Court found that the trial chamber’s referral to provisions of Articles 3(2)(a) and 33(2) of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and Articles 51(1), (2) and (6) of the Protocol I in the first instance judgement represented a clear and sufficient definition of the rules of international law.¹⁶⁵

When dealing with blanket dispositions, a provision referred to by the blanket provision needs to be clearly defined and to contain the elements of the crime. Moreover, it must be clear which violation of international law the definition covers.

It could, therefore, be argued that a crime that was considered as such in accordance with the general principles recognised by the international community, even though not explicitly listed in the OKZ RH, could still be tried under the OKZ RH, and not only under the 1998 Criminal Code, if:

- (i) the underlying acts of that crime and the existing OKZ RH provisions laid down in Chapter XV correspond; and
- (ii) the other elements of the crime covered by the provision of the blanket disposition (“by violating the rules of international law”) are defined in a clear manner.

This is also supported by Article 31 of the 1990 Constitution of the Republic of Croatia.¹⁶⁶ In that case, the law more lenient to the perpetrator would again need to be determined in every specific case.¹⁶⁷

According to another view, such an interpretation of the OKZ RH cannot be accepted, because:

- (i) it is of crucial importance that the elements of a crime are established in such a manner that there is no doubt regarding what acts constitute criminal acts,¹⁶⁸ and
- (ii) the principle of legality excludes the application of laws by analogy.¹⁶⁹

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ Croatian Constitution, Art. 31(1), Official Gazette of Croatia „Narodne Novine“ No. 56/90.

¹⁶⁷ See below, section 5.3.3.5.

¹⁶⁸ Commentary of the SFRY Criminal Code, p. 15.

¹⁶⁹ *Ibid.* at p. 16.

5.3.3.3. NON-APPLICABILITY OF THE STATUTE OF LIMITATIONS

As noted above, the Croatian Constitution provides that the statute of limitations shall not apply to crimes for which statutes of limitation are not applicable under international law. The OKZ RH, applicable for the crimes committed during the conflicts in the former Yugoslavia, also provided that the statute of limitations shall not apply to the criminal offences specified as such under international agreements.¹⁷⁰

In addition, Croatia has ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.¹⁷¹ Consequently, the statute of limitations did not apply to crimes specified as such under international law committed during the armed conflict in former Yugoslavia, regardless of the fact that the Constitution did not contain such a provision at the time.

5.3.3.4. THE *DINKO ŠAKIĆ* CASE

In October 1999, the Zagreb County Court convicted accused Dinko Šakić for war crimes against civilians committed during World War II.¹⁷² Discussing whether there was a violation of international rules, the chamber first noted that all the belligerent parties were obliged to respect “the rules of international law of war that existed at the time both during the clashes and in relation to [the] civilian population”.¹⁷³ The chamber then turned to the Hague Convention (IV) respecting the Laws and Customs of War on Land and the Martens clause contained therein and the Regulations concerning the Laws and Customs of War on Land, annexed to the Convention.

The chamber found that all the acts of the accused committed against the prisoners of the Jasenovac camp

undoubtedly represent not only a violation of the cited provisions of the Convention setting out the necessity of respecting the life of individuals and forbidding collective punishments, but they also represent acts contrary to all the customs of civilized peoples and generally accepted laws of humanity and public consciousness.¹⁷⁴

¹⁷⁰ Croatia Basic Criminal Code - OK ZRH, Art. 95 (Official Gazette of Croatia „Narodne Novine“ No. 31/93).

¹⁷¹ Decision on publication of multi-lateral international agreements to which Croatia has become a party based on succession (Official Gazette of Croatia „Narodne Novine“ – International Agreements 12/93).

¹⁷² Zagreb County Court, Dinko Šakić, Case No. V K-242/98-257, 1st Instance Verdict, 1 Oct. 1999.

¹⁷³ *Ibid.* at p. 125.

¹⁷⁴ *Ibid.* at pp. 125-126.

The court, therefore, found that the acts of the accused amounted to a violation of the cited principles and provisions of the Hague Convention (IV), and were in violation of the international law applicable during a war.¹⁷⁵

The court noted:

Considering the blanket character of the elements of the criminal act in question, and considering the fact the court is bound by the indictment, the Court did not [evaluate] whether the proven acts of the accused represent violation of some other provisions of international law.¹⁷⁶

However, “in order to give a full picture of the international legal aspect of the act in question”, the court referred to the Statute of the International Military Tribunal and its classification of crimes against peace, war crimes and crimes against humanity. The court noted that “These provisions constituted a legal basis for trials of war criminals in 1945 and 1946 in Nuremberg, as well as in 1948 in Tokyo. The UN General Assembly in its session of 1946 affirmed the principles of international law recognized by the Nuremberg tribunal Statute as well as its verdict.”¹⁷⁷

It could thus be argued that if certain crimes that were not explicitly provided for by the OKZ RH, such as crimes against humanity, they could be tried under the 1998 Criminal Code, provided that:

- (i) the 1998 Criminal Code included all the necessary elements of such crimes; and
- (ii) such crimes represented crimes under international law at the time of their commission.

Support for this view could be found in the 1984 *Artuković* case where the court found the accused guilty for war crimes committed during the World War II under the Criminal Code in force at the time of the trial, *i.e.* the Criminal Code that was in force in 1984.¹⁷⁸

5.3.3.5. *TEMPUS REGIT ACTUM* AND MANDATORY APPLICATION OF A LESS SEVERE CRIMINAL LAW (*LEX MITIOR*)

War crimes cases in the Republic of Croatia have so far been tried on the basis of OKZ RH as the law in force in the Republic of Croatia at the times when the crimes were committed.

¹⁷⁵ *Ibid.* at p. 126.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ Although the Zagreb County Court and the Supreme Court of Croatia in this case stressed that, at the time of the commission of the crimes, the acts of the accused were considered prohibited and punishable under both international and national law, it is important to note that it was only after the commission of the crimes that such acts were explicitly envisaged by the national law as war crimes setting out all the elements and the envisaged punishment. For more on *Artuković* case, see above, section 5.3.1.4.

Article 3(1) of the 1998 Criminal Code¹⁷⁹ provides that:

1998 Criminal Code Article 3(1)

The law in force at the time the criminal offense is committed shall be applied against the perpetrator.

This provision reflects the well-known rule of *tempus regit actum* and which is identical to Article 3(1) of the OKZ RH.

However, this general rule has one important exception set out in Article 3(2) of the 1998 Criminal Code, which is identical to Article 3(2) provision of the OKZ RH:

If, after the criminal offense is committed, the law has been altered one or more times, the law that is more lenient to the perpetrator shall be applied.¹⁸⁰

The obligatory application of the less severe law requires an assessment of which one, between two or more laws, shall be considered more favourable to the perpetrator.

The obligatory application of the less severe law requires an assessment of which one, between two or more laws, shall be considered more favourable to the perpetrator.¹⁸¹

The Commentary on the SFRY Criminal Code, upon which the OKZ RH is based, states that such an evaluation cannot be performed as an abstract or objective comparison of the laws in question. Rather, the evaluation needs to be determined on a case-by-case basis.¹⁸² It is not sufficient that the less severe law is more lenient in abstract terms

and overall. It must be less severe “in relation to the offender” in the particular case.¹⁸³

In order to determine which law is more favourable to the offender, the court must take into account various elements and differences between the laws, as they relate to the offender in question. Thus, it is possible to conclude that a law providing for a more severe sentence would be more favourable to the defendant

It is not sufficient that the less severe law is more lenient in abstract terms and overall; it must be less severe “in relation to the offender” in the particular case.

¹⁷⁹ Croatian CC, Art. 3(1) (1998).

¹⁸⁰ *Ibid.* at Art. 3(2); see also OKZ RH, Art. 3(2).

¹⁸¹ Commentary of the SFRY Criminal Code, p. 21.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

if, in its overall application, that law puts the defendant in a more favourable position.¹⁸⁴

In other words, it is possible that a law is objectively more severe, but at the same time, it is less severe in relation to a particular perpetrator and a particular crime.¹⁸⁵ For example, if a new law sets out a different type of a criminal sanction, a court will evaluate whether this new sanction is more or less severe in relation to the perpetrator in question in that particular case.¹⁸⁶

It is possible that a law is objectively more severe, but at the same time, it is less severe in relation to a particular perpetrator and a particular crime.

This was an issue in the *Šakić* case. At the time of the trial, the new 1998 Criminal Code in Croatia was in force. The prosecution, however, charged the accused with war crimes against civilians of the OKZ RH Article 120(1). Upon finding the accused guilty, the court applied the law more favourable to the accused: for this crime, the 1998 Criminal Code prescribed a minimum of 5 years' imprisonment or

long-term imprisonment (20 — 40 years). However the court applied the OKZ RH as the law more favourable to the accused, which prescribed a minimum of 5 years' imprisonment or more than 20 years of imprisonment.¹⁸⁷

In a hypothetical case where an accused is charged for crimes against humanity for acts committed during WWII, it is probable that the earliest applicable law would be the 1998 Criminal Code, since—according to the strict legalist interpretation of the codes preceding the 1998 code—no such provision regarding crimes against humanity existed. This would raise questions as to whether the earlier codes would be more favourable to the accused as they did not envisage crimes against humanity as crimes in Croatia. Two issues should be considered:

- (i) crimes against humanity existed under international law at the time when the crime was committed—they were not codified as such by the national law; and
- (ii) when determining a sentence for a particular perpetrator in relation to a particular criminal act, a court needs to follow not only the general rules on determining a sentence, but it also has to take into account both the general and special purposes of sentencing set out in the law.¹⁸⁸

For example, a sentence that is in line with the purpose of special prevention, but which neglects the purpose of general prevention (or *vice versa*), would not be in accordance with the purpose of sentencing as set out in the law.¹⁸⁹

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.* at p. 23.

¹⁸⁷ *Šakić*, 1st inst., pp. 126-127.

¹⁸⁸ Commentary of the SFRY Criminal Code, p. 174.

¹⁸⁹ *Ibid.*

5.3.4. SERBIA

War crimes cases arising out of the conflict in the former Yugoslavia have been tried in the Republic of Serbia on the basis of the laws that were in force in the Republic of Serbia at the time when the crimes have been committed, *i.e.* either the SFRY Criminal Code or the Criminal Code of the FRY.

5.3.4.1. THE LAW IN FORCE AT THE TIME OF THE CRIME AND SUBSEQUENT CHANGES

There have been various changes to those laws over time. On 27 April 1992, the Constitution of the Federal Republic of Yugoslavia (FRY) prohibited the death penalty for criminal acts defined by the federal law.¹⁹⁰ At that time, the SFRY Criminal Code was in force.¹⁹¹

Article 37 of the SFRY Criminal Code (Death penalty) was removed from the Serbian criminal legislation on 16 July 1993, when the Law on Changes and Amendments of the Criminal Code of the Federal Republic of Yugoslavia was passed.¹⁹² This Law provides that for the most serious crimes, a sentence of 20 years' imprisonment can be imposed.¹⁹³

The Law on Changes and Amendments of the FRY Criminal Code of 2001 incorporated the possibility of a sentence of 40 years' imprisonment for certain crimes, including the crimes from the chapter dealing with war crimes.¹⁹⁴

The new Criminal Code was passed in 2005 (but is commonly referred to as the 2006 Criminal Code).¹⁹⁵ This law incorporated crimes against humanity and other modes of liability, such as superior responsibility, not previously included in the SFRY or FRY Criminal Codes.

5.3.4.2. PRINCIPLE OF LEGALITY AND THE APPLICATION OF INTERNATIONAL LAW

Article 1 of the 2006 Criminal Code provides that:

2006 Criminal Code Article 1

No one may be punished or other criminal sanction imposed for an offence that did not constitute a criminal offence before it was committed, nor may punishment or other criminal sanction be imposed that was not applicable before the criminal offence was committed.

¹⁹⁰ FRY Official Gazette, No. 1/92.

¹⁹¹ See, *e.g.*, WCC, Belgrade County Court, Zvornik, Case No. K.V. 5/2005, 1st Instance Verdict, 29 May 2008 pp. 174-175.

¹⁹² FRY Official Gazette, No. 37/93; see also *Zvornik*, 1st inst., pp. 174-175.

¹⁹³ Article 38(2); see also *Zvornik*, 1st inst., p. 175 and Module 13 on Sentencing.

¹⁹⁴ FRY Official Gazette No. 61/2001; WCC, Belgrade County Court, Škorpioni, Case No. K.V.6/2005, 1st Instance Verdict, 5 April 2007, p. 110.

¹⁹⁵ Serbia Official Gazette, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009.

This provision is identical to the provision in the SFRY Criminal Code.¹⁹⁶ In the part dealing with the principle of legality, the Commentary on the SFRY Criminal Code refers to international law as well. It relies on Article 11(2) of the Universal Declaration on Human Rights, setting out that “no one shall be held guilty of any penal offence on account of any act or omission which did not

“General principles recognised by the international community” should be understood as “international criminal law in [...] a system of criminal law provisions [which are] valid independently of the existence of the national criminal laws, [...] even when such national laws and international criminal law are conflicting”.

constitute a penal offence, under national *or* international law, at the time when it was committed”. It also relies on Article 15 of the ICCPR, which is identical apart from an addition that this rule shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal

“according to the general principles of law recognized by the community of nations”.¹⁹⁷

According to one view,¹⁹⁸ it would follow that the principle of legality would not be violated if an act or omission constituted a penal offence under international law and the general principles of law recognised by the community of nations at the time it was committed, even though it was not envisaged by the national legislation.

As with the SFRY Criminal Code,¹⁹⁹ Article 9(2) of the 2006 Criminal Code provides that if the act at time of commission was considered a criminal offence under general legal principles recognised by international law, prosecution may be undertaken in Serbia with the permission of the Republic Public Prosecutor, regardless of the law of the country where the offence was committed.²⁰⁰

Articles 108(4) and 107(2) of the SFRY Criminal Code are almost identical to Articles 10(3) and 9(2) of the 2006 Criminal Code. They deal with the application of the principle of universality of criminal law applicability. The Commentary on the SFRY Criminal Code included an exception to that principle with regard to criminal acts considered as such under “general principles recognized by the international community”.²⁰¹ This is the same rule provided in Article 15(2) of the ICCPR. The Commentary also states that the “general principles recognised by the international community” should be understood as “international criminal law in [...] a system of

¹⁹⁶ See above sections 5.3.1.1., 5.3.1.2.

¹⁹⁷ Commentary of the SFRY Criminal Code, p.17.

¹⁹⁸ See, e.g., Commentary of the BiH Criminal Code, p. 72.

¹⁹⁹ See above 5.3.1.2.

²⁰⁰ 2006 Criminal Code, Art. 10(3).

²⁰¹ Commentary of the SFRY Criminal Code, pp. 389-390.

criminal law provisions [which are] valid independently of the existence of the national criminal laws, [...] even when such national laws and international criminal law are conflicting”.²⁰²

Furthermore, the Commentary underlines the importance of the harmonisation of the SFRY Criminal Code with international criminal law vis-à-vis the blanket disposition “whoever, in violation of the rules of international law [...]”.²⁰³

According to one view, crimes against humanity could not be tried today, because punishments for such crimes were not clearly set out by law at the time of their commission during the armed conflict in the SFRY.

On the other hand, the SFRY war crimes jurisprudence seems to suggest that the principle of legality is not violated in case of retroactive application of the law in force at the time of the trial which, unlike the existing laws at the time of the commission of the offence, explicitly set out specific elements of the crimes and their sentences, provided that such crimes were, at the time of their commission, recognized under international (and national) law as crimes.²⁰⁴

A 2009 Decision of the Belgrade County Court seems to be in line with this view, as it confirmed a decision of the investigative judge to undertake investigation relating to crimes of genocide and war crimes although such crimes were not envisaged by law at the time of their commission in 1945.²⁰⁵ The chamber in this case found that the principle of legality was not violated, considering the provisions of Article 15(2) of the ICCPR and Article 7(2) of the ECHR.

5.3.4.3. NON-APPLICABILITY OF THE STATUTE OF LIMITATIONS

As noted above, the Serbian Constitution provides that statutes of limitations shall not apply to war crimes, genocide or crimes against humanity. This is also reflected in the 2006 Criminal Code, which provides in Article 108 that:

There shall be no statute of limitation for criminal prosecution and enforcement of penalty for offences stipulated in articles 370 through 375 hereof, and for criminal offences that pursuant to ratified international treaties cannot be subject to limitations.

²⁰² *Ibid.* at p. 390 (unofficial translation of the quote).

²⁰³ *Ibid.* at (unofficial translation of the quote) p. 494

²⁰⁴ See above, under 5.3.1.3., *Artuković* case.

²⁰⁵ Decision of the Belgrade County Court Crime Chamber, Case No. Ki V 8/08 – KvV 23/09, 24 March 2009.

5.3.4.4. *TEMPUS REGIT ACTUM* AND MANDATORY APPLICATION OF A LESS SEVERE CRIMINAL LAW (*LEX MITIOR*)

Article 5(1) of the 2006 Criminal Code provides that:

The law in force at the time of committing of criminal offence shall apply to the offender.²⁰⁶

This provision reflects the well-known rule of *tempus regit actum* and is identical to Article 4(1) of the SFRY Criminal Code.

However, there is one important exception, as set out in Article 5(2):

If after the commission of a criminal offence, the law was amended one or more times, the law most lenient for the offender shall apply.²⁰⁷

If after the commission of a criminal offence, the law was amended one or more times, the law most lenient for the offender shall apply.

The 2006 Criminal Code also envisages the application of so-called inter-temporal laws:

A person who commits an offence prescribed by a law with a definite period of application shall be tried under such law, regardless of the time of trial, unless otherwise provided by such law.²⁰⁸

The obligatory application of the less severe law requires an assessment of which one, between two or more laws, shall be considered more favourable to the perpetrator.

The obligatory application of the less severe law requires an assessment of which one, between two or more laws, shall be considered more favourable to the perpetrator.²⁰⁹

The Commentary on the SFRY Criminal Code states that such an evaluation cannot be performed as an abstract or objective comparison of the laws in question. Rather, the evaluation needs to be determined on a

case-by-case basis.²¹⁰ It is not sufficient that the less severe law is more lenient in abstract terms and overall. It must be less severe “in relation to the offender” in the particular case.²¹¹

²⁰⁶ Serbian Criminal Code, Art. 5(1) (2005).

²⁰⁷ *Ibid.* at Art. 5(2); *c.f.* SFRY CC, Art. 4(2).

²⁰⁸ *See also Škorpionj*, 1st inst., p. 110.

²⁰⁹ Commentary of the SFRY Criminal Code, 1978, p. 21.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

In order to determine which law is more favourable to the offender, the court must take into account various elements and differences between the laws, as they relate to the offender in question. Thus, it is possible to conclude that a law providing for a more severe sentence would be more favourable to the defendant if, in its overall application, that law puts the defendant in a more favourable position.²¹²

It is not sufficient that the less severe law is more lenient in abstract terms and overall; it must be less severe "in relation to the offender" in the particular case.

In other words, it is possible that a law is objectively more severe, but at the same time it is less severe in relation to a particular perpetrator and a particular crime.²¹³ For example, if a new law sets out a different type of a criminal sanction, a court will evaluate whether this new sanction is more or less severe in relation to the perpetrator in question in that particular case.²¹⁴

It is possible that a law is objectively more severe, but at the same time it is less severe in relation to a particular perpetrator and a particular crime.

A court needs to follow not only general rules on determining a sentence, but it also has to take into account both the general and special purposes of sentencing set out in the law.²¹⁵ For example, a sentence that is in line with the purpose of special prevention, but which neglects the purpose of general prevention (or *vice versa*), would not be in accordance with the

purpose of sentencing as set out in the law.²¹⁶

When concerned with the applicability of a law more favourable to the accused, the War Crimes Chambers of the Belgrade District Court have followed the view that if the crime was committed after 27 April 1992 and prior to the entry into force of the Law on Changes and Amendments of the FRY Criminal Code of 16 July 1993, the applicable law would be the SFRY Criminal Code.²¹⁷ The reasoning behind this was that the Constitution of 27 April 1992 provided that the death penalty cannot be imposed for criminal acts proscribed in the federal law and that after this date the SFRY Criminal Code was in force but without the option of imposing the death penalty.²¹⁸

The Chambers have held that if the crime was committed after the entry into force of the Law on Amendment and Changes of the FRY Criminal Code of 16 April 1993, the 1993 FRY Criminal Code was applicable as the article on the death penalty was removed and Article 38(2) set out the maximum sentence for the most serious crimes of 20 years' imprisonment. The Law on Changes

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Ibid.* at p. 23.

²¹⁵ *Ibid.* at p. 174.

²¹⁶ *Ibid.*

²¹⁷ See, e.g., WCC, Belgrade County Court, Zvornik, 1st inst., pp. 174-175.

²¹⁸ See, e.g., *ibid.*

and Amendments of the FRY Criminal Code of 2001, as well as the current Criminal Code, contain higher maximum sentences for the criminal acts.²¹⁹

In several cases, however, the War Crimes Chambers have applied the 1993 FRY Criminal Code for crimes committed prior to its entry into force because it established lower maximum sentences for the crimes charged and was therefore more favourable to the accused.²²⁰

5.3.4.5. TRIAL AND PUNISHMENT FOR CRIMES UNDER INTERNATIONAL LAW

In the *Peter Egner* case, the defence appealed the investigative judge's decision to open a criminal investigation against a former Schutzstaffel officer for genocide, war crimes and organising a group to commit such crimes. This investigation took place under the FRY Criminal Code. Egner had allegedly participated in the incarceration, deportation and killing of Jewish persons in Belgrade in 1942. The appellant submitted that he could not be charged with the aforementioned crimes as they were not enumerated as crimes at the time of their commission.

The pre-trial panel of the Belgrade District Court's War Crimes Chamber dismissed the appeal, and upheld the judge's decision to conduct the investigation.²²¹ The court first acknowledged that in 1950 the former Yugoslavia ratified the Genocide Convention, which stated the elements of the offence of genocide.²²²

The court then established that the charges did not violate the principle of legality contained in Article 1 of the FRY Criminal Code, because the retroactive application of the criminal code is justified based on Article 15(2) of the 1966 International Covenant on Civil and Political Rights (ratified by the SFRY in 1971) which provides that:

Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.²²³

The court invoked a similar provision, from Article 7(2) of the European Convention on Human Rights, ratified by the FRY, which also allowed for "the trial and punishment of any person for any

²¹⁹ See, e.g., *Škorpioni*, 1st inst. p. 110; see also, WCC, Belgrade County Court, *Lekaj*, Case No. K.V.br. 4/05, 1st Instance Verdict, 18 Sept. 2006, p. 37; see also WCC, Belgrade County Court, *Zvornik*, Case No. K. Po2 br.28/2010, Judgement, 22 Nov. 2010, p. 288.

²²⁰ See, e.g., *Ovčara* case, *Pane Bulat* case, *Španović* case.

²²¹ WCC, Belgrade District Court (pre-trial panel), *Peter Egner*, Case No. Ki.V. 8/09, Kv.V. 23/09, Judgement, 24 March 2009, p. 2.

²²² *Ibid.*

²²³ International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967), Art. 15(2).

act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations”.²²⁴

The court concluded that the acts charged—genocide and war crimes—were “crimes that are recognized as criminal offences by all the civilized nations”, and therefore, under the ICCPR and the ECHR it was possible to prosecute them even before the national law that is the basis for their prosecution was adopted.²²⁵

The investigation against the defendant was opened but it did not result in an indictment or trial as the defendant died before the case could proceed any further.

²²⁴ *Egner*, Judgement, pp. 2-3.

²²⁵ *Ibid.* at p. 3.

5.4. FURTHER READING

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