Third-Party Submission Of the Office of the High Representative for BiH In the Joined Cases Maktouf and Damjanović v. BiH Pursuant to the Applications Nos. 2312/08 and 34179/08

Introduction:

1. This submission seeks to provide the Grand Chamber with a review of the historical facts and context surrounding the adoption of the 2003 Criminal Code of Bosnia and Herzegovina and the establishment of the War Crimes Chamber of the state-level Court of Bosnia and Herzegovina as well as the role of the High Representative and the International Community in the process of judicial and wider legal reforms in Bosnia and Herzegovina. These reforms were driven by the necessity, after the end of the hostilities, to establish the rule of law as a prerequisite for lasting peace in Bosnia and Herzegovina and the capacity to effectively prosecute and try war crimes as fundamental to the reconciliation process. We invite the Court to consider the cases at stake against that background. This issue is developed in the first part of our submission.

2. In the second part of our submission, we focus on the presence of international members in the Court of Bosnia and Herzegovina and their role in promoting independence and impartiality. The lack of local expertise for complex cases at a time when the complete judiciary was being subject to re-organisation as well as the perception of bias due to the

division of the society along ethnic lines constituted the rationale behind the presence of foreign judges in the Court of Bosnia and Herzegovina.

3. In addition, we clarify how the High Representatives' involvement in the process of appointment of international judges is more accurately characterized as a redeployment of foreign judicial officials as part of a program of international assistance for processing of war crimes in Bosnia and Herzegovina. We will also argue that these appointments reflected the common approach of the International Community and were expressly endorsed by the Peace Implementation Council (PIC) Steering Board, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1992 (ICTY) and the United Nations Security Council (UNSC).

4. In the third part of our submission, we argue that the prosecution and punishment of crimes against international humanitarian law committed in the territory of Bosnia and Herzegovina during the war fall fully within the scope of the exception to Article 7(1) contained in paragraph (2) of Article 7 of the ECHR.

5. Nevertheless, we submit that, should the Grand Chamber decide to consider the case under Article 7(1), then the following should be considered:

1) The criminal law provisions taken over from the 1976 Yugoslav Code, considered as being in force at the time of war, prescribed the harshest penalties;

2) The later criminal codes in force prior to the 2003 Code (the interim codes, for the territory of the Federation of Bosnia and Herzegovina it being the 1998 FBiH Code) do not necessarily yield the most lenient result for the

perpetrator;

3) the application of the 1976 Code or the 1998 FBiH Code would require in certain cases a direct application of international law insofar as they contained important shortcomings as to the codification of offences that were already punishable under international law at the time of their commission; and

4) the application of the 1976 Code or the 1998 FBiH Code would result in punishments that would be inconsistent with both domestic law and international law, as punishments would not reflect the seriousness of the offences, as well as it would lead to discrepancies in sentencing.

6. We also submit that distribution of war crimes cases between the state court and other courts in the country is regulated by law and subject to reasoned judicial decision that can be appealed, and therefore is not discriminatory on any personal ground.

7. Each of them will be addressed in turn.

I. Background

8. Following the 1992-1995 war in Bosnia and Herzegovina, the UN Security Council authorized the establishment of an international administrator for Bosnia and Herzegovina (the High Representative) by an informal group of States actively involved in the peace process (the Peace Implementation Council; PIC) as an enforcement measure under Chapter VII of the UN Charter (UNSC Resolution 1031 of 15 December 1995). UNSC Resolutions subsequent to the initial UNSC Resolution endorsed the Conclusions of the Peace Implementation Conferences, which further elaborated on the mandate of the High Representative (e.g. UNSC Resolution 1144 endorsing the Conclusions of the Bonn Peace Implementation Conference).

9. After the end of the hostilities, the adherence to the rule

of law has not only been recognized as a constitutional requirement (Article I.2. of the Constitution of Bosnia and Herzegovina as contained in Annex 4 to the General Framework Agreement for Peace, which states that Bosnia and Herzegovina *shall operate under the rule of law*) but also as a prerequisite and instrument for long-standing peace in the country. There has been broad consensus that justice and rule of law are critical to successful implementation of the Peace Accords. Paragraph 12.1 of the Declaration of the Peace Implementation Council, which met in Madrid on 15 and 16 December 1998, made clear that the Council considered that "the establishment of the rule of law, in which all citizens had confidence, was a prerequisite for a lasting peace".

10. On the other hand, when the war came to a close in 1995, the country's justice system was in disarray. Because of many deficiencies, the justice system has had a limited impact on putting an end to the widespread impunity for violations of international humanitarian law.

11. These considerations led the successive High Representatives to undertake a comprehensive legal reform with an aim of giving the judicial system the tools to overcome its main weaknesses: its absence of independence and impartiality, its division along ethnic lines, and its lack of adherence to legal standards of a democratic society based on rule of law.

12. It became increasingly evident that a reinforced judicial reform was needed following the Presidential Statement S/PRST/2002/21 of 23 July 2002, in which the UN Security Council endorsed the broad strategy for the transfer of cases involving intermediary and lower-level accused to competent national jurisdictions as the best way for the ICTY to achieve the objective of completing all trial activities at first instance by 2008. The UN Security Council further invited States and relevant international and regional organizations to contribute as appropriate to the strengthening of national judicial systems of the States of the former Yugoslavia in

order to facilitate the implementation of this policy. Especially, the UN Security Council took note of the recommendations of the ICTY with regard to the creation, as proposed by the High Representative, of a specific Chamber, within the State Court of Bosnia and Herzegovina, to deal with serious violations of international humanitarian law.

13. In the light of all the above, the Steering Board of the Peace Implementation Council, at its meeting held on 30-31 July 2002, supported a comprehensive package of measures related to judicial reform. These reforms included the enactment of the Law on Court of Bosnia and Herzegovina that prescribed the criminal jurisdiction of a state-level court and the Law on Prosecutors Office, as well as the introduction of the state-level criminal and criminal procedure codes, the former of which regulated criminal offences against values protected by international law, including international humanitarian law.

14. In February 2003 the OHR and ICTY issued Joint Conclusions on the development of war-crimes trial capacities in Bosnia and Herzegovina, which were also introduced into discussions between the OHR and the authorities of Bosnia and Herzegovina on the development of the state-level Court and Prosecutors Office. The OHR-ICTY working group concluded that those institutions should be domestic institutions operating under the laws of the state, but that there should be a temporary international component in its judiciary and court management.

15. On 28 August 2003 the UN Security Council in its Resolution 1503 (2003) noted that an essential prerequisite to achieving the objectives of the ICTY Completion Strategy is the expeditious establishment under the auspices of the High Representative, and an early functioning of a special war crimes chamber within the State Court of Bosnia and Herzegovina and the subsequent referral of cases by the ICTY to the Chamber. It called on the donor community to support the work of the High Representative in creating a special

chamber within the State Court to adjudicate allegations of serious violations of international humanitarian law.

16. On 8 October 2003 the High Representative briefed the UN Security Council on the establishment of the War Crimes Chamber within State Court of Bosnia and Herzegovina (Press Release SC/7888), as a joint initiative of the OHR and the ICTY. The Tribunal's President reported to the UN Security Council on the tremendous work that remained, from construction and renovation of buildings to enactment of laws and rules, to the hiring of local and international judges and prosecutors, and asked for full engagement of the international community.

17. The Peace Implementation Council Steering Board, at its meeting held in Sarajevo on 3 December 2004, reiterated its full support for the work of national and international judges and prosecutors in Bosnia and Herzegovina, called on the Bosnia and Herzegovina authorities to show resolve in their efforts to tackle endemic corruption, and called on all countries to assist in the rule of law effort by deploying international judges and prosecutors. At its meeting held in Vienna on 15 March 2006, the Peace Implementation Council Steering Board issued a communiqué expressing its continuing support for the State Court to enable the Bosnia and Herzegovina authorities to effectively prosecute domestically war crimes indictees, and encouraged international contributions to help sustain the Court and its operations, which it deemed an essential part of the overall justice sector reform.

18. On 30 June 2009 the President of the ICTY sent a letter to all executive and legislative authorities of Bosnia and Herzegovina supporting the extensions of international judges and prosecutors in the War Crimes Chamber of the BiH Court. On 29 and 30 June 2009 the Steering Board of the Peace Implementation Council adopted a declaration whereby it encouraged the authorities of Bosnia and Herzegovina to

confirm their dedication to strengthening the rule of law by taking those actions that are necessary to extend the mandates of international judges and of international prosecutors by positively considering the recommendations of the ICTY, and taking into account the views of the local judicial institutions. On 22 July 2009 the EU High Representative Mr Javier Solana issued a communication calling on the authorities of Bosnia and Herzegovina to positively consider the recommendation of the Court and of the Prosecutor's Office of BiH to take all necessary steps to extend the mandates of international judges and international prosecutors, while he reminded that strengthening the rule of law was important for the long term stability, economic and democratic development of Bosnia and Herzegovina and its European integration.

II. International Judges of the Court of Bosnia and Herzegovina

II.A. The rationale behind the presence of international judges in the State Court

19. The presence of international judges in tribunals dealing with war crimes is not unique to Bosnia and Herzegovina, but reflects a common practice, as seen in the examples of hybrid domestic-international tribunals in Cambodia and Sierra Leone or in Kosovo. The rationale behind their presence in the BiH Court derived from two broad sets of considerations: the lack of local expertise for complex cases at a time when the complete judiciary was being subject to re-organisation; and, the perception of judicial bias due to the division of the society along ethnic lines. The presence of international judges was to provide objectivity and impartiality, enhancing the independence and legitimacy of the court in order for war crimes trials to be conducted in accordance with international standards.

20. This international membership of the BiH Court, foreseen for a transitional period, was a reflection of the reality

prevailing in Bosnia and Herzegovina at that time. Due to the consequences of the most bitter and bloody war fought in Europe since the Second World War, and to the widespread discrimination practised by all levels of authorities in the country, the level of trust between members of ethnic and religious groups which form the majority of the population in Bosnia and Herzegovina was effectively non-existent. At stake was the confidence which the Court inspired in the public, in the accused, and in the victims. Besides the lack of domestic expertise in application of international humanitarian and human rights law, and the huge number of reported war crimes cases, the ethnic sensibilities attached to such serious and egregious criminal cases and the reluctance of witnesses to testify in front of domestic officials were issues of particular concern.

21. These concerns were well reflected in a Report by the Organization for Security and Co-operation in Europe (OSCE) – Mission to Bosnia and Herzegovina of December 2009 titled *Independence of the Judiciary: Undue Pressure on BiH Judicial Institutions*, which provides: "In that same vein, the Mission welcomes the decision of the High Representative extending international judges and prosecutors working on war crimes cases and the statement by the Steering Board Ambassadors of the Peace Implementation Council supporting that extension. In the current situation, international judges and prosecutors working on such sensitive cases provide a bulwark against the intimidation and political pressures which have been described in this report."

22. In short, the presence of legally qualified international members in the State Court aimed at promoting independence and impartiality, as well as transfer of required legal knowledge. The presence of international members was a guaranty against outside pressures and reinforced the perception of independence and professionalism of the Court.

II.B. The manner of appointment of international judges

23. In December 2004 the *Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organised Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina*[1] was signed. According to Article 2 of the Agreement, the Registry was administering the recruitment and selection process of international judges, and it was recommending qualified candidates to the High Representative for appointment. The recommendations of the Registry were done pursuant to prior recommendations of the President of the BiH Court and of the BiH High Judicial and Prosecutorial Council, after the candidates were interviewed.

24. Therefore, the decisions of the High Representative on appointments of international judges came as the final formal stage of appointments of candidates officially recommended by the Registry of the Court. The decisions of the High Representative were a formality due to the fact that no domestic authority had competency to appoint judicial officials that were not nationals of Bosnia and Herzegovina. The candidates recommended by the Registry were judicial officials in their countries of origin, and thus the High Representative was not appointing them to the judicial career. The High Representative decisions, rather than "appointments", were redeployments of foreign judicial officials as a part of the program of international assistance for processing of war crimes in Bosnia and Herzegovina. In this regard the OHR submits that none of the international members of the BiH Court were in a subordinate position, in terms of their duties and the organisation of their service, *vis-à-vis* one of the parties or the High Representative, nor the establishment of the State Court with its international composition was

influenced by motives suggesting an attempt to influence the outcome of any cases (*Leo Zand v. Austria*, report of the Commission adopted on 12 October 1978).

25. The High Representative was not acting under his mandate to substitute for any executive or other authority, but under his international mandate exercising powers delegated by the UN Security Council. The exercise of the powers of the High Representative to appoint international judicial officials was expressly endorsed by the Peace Implementation Council Steering Board through declarations issued at its meeting held in Sarajevo on 3 December 2004 and on 29 and 30 June 2009.

26. With the advancement in establishment and functioning of the BiH High Judicial and Prosecutorial Council, which was established by law only in June 2004, and with a view to gradually replace the internationals by nationals, the new *Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Registry for Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina, as well as the establishment of the Transitional Council, Replacing the Registry Agreement of 1 December 2004 and the Annex Thereto* was signed in September 2006.[2] Article 8 provided that international judges are appointed by the independent and autonomous body otherwise competent for appointments of judges in Bosnia and Herzegovina – the High Judicial and Prosecutorial Council of Bosnia and Herzegovina – for a period of two years. The Agreement has also provided for gradual replacement of international judges by national judges.

27. The reason for a renewable mandate of two years was due to funding restrictions in redeployments of foreign judicial officials that were subject to international donors' funds.

The funding of positions needed to be secured at the time of appointment, while budgetary projections and restrictions disallowed the funding guarantee for a longer period. Donors' funds were being secured in advance for the number of needed positions. Under the Registry Agreements funding for international judges' positions was managed by the Registry of the Court. The Peace Implementation Council encouraged international contributions to help sustain the Court and its operations (for example Communiqué adopted in Vienna on 15 March 2006).

28. The judges' appointed for a limited term of office was not seen as upsetting the principles enshrined in Article 6 of the ECHR. Their term was defined by regulations, and the authorities could not dismiss them arbitrarily or on inappropriate grounds (judgment of 16 July 1971, *Ringeisen*, A.13). In addition, such a duration of mandate was not alien to the system in Bosnia and Herzegovina, as the Law on High Judicial and Prosecutorial Council recognises a possibility for retired judges and prosecutors to be appointed on a temporary basis to act as reserve judges, in order to assist courts in reducing case backlogs, or where the prolonged absence of a judge in a court requires additional judicial resources. Since the retirement age is 70 years of age and reserve judges may serve until they reach 72 years of age, that is a mandate of two years.

III. Applicable Substantive Law

III.A. The principle of legality

29. In this regard, it is submitted that the prosecution and punishment of crimes against international humanitarian law committed in the territory of Bosnia and Herzegovina during the 1992-1995 war fully fall under paragraph (2) of Article 7 of ECHR. Both applicants in these cases were convicted of war crimes against civilians, in violation of Article 3(1)(b) of the IV Geneva Convention, respectively under Article 173 § 1

(c) and Article 173 § 1 (c) of the 2003 Criminal Code of BiH. These crimes were already prohibited and criminalized in 1992 by both national legislation but also by "general principles of law recognized by civilized nations" within the meaning of Article 7(2) of the ECHR, and were sufficiently accessible and foreseeable at the time when they were committed.

30. Following the call of the UN Security Council to strengthen the national judicial system in order to prosecute violations of international humanitarian law in light of the exit strategy of ICTY, and under the UNSC Resolution 1503(2003), the ICTY, the OHR and domestic working groups composed of domestic legal professionals held extensive discussions regarding the legal framework in Bosnia and Herzegovina under which the war crimes' trials would proceed, with a special view of fighting impunity. The obligations of Bosnia and Herzegovina under international law and under its own constitutional law, especially the ECHR and the Geneva Conventions, were considered. While Article 2 of the ECHR also enjoins States to take appropriate steps to safeguard the lives of those within their jurisdiction and, to do so, to have in place effective criminal law provisions to deter the commission of offences which endanger life, the Geneva Conventions, which are also directly applicable in Bosnia and Herzegovina, require the High Contracting Parties to enact the legislation necessary to provide effective penal sanctions.[3]

31. Such an approach was later confirmed by the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* developed in 2005 by the UN Commission on Human Rights in order to assist post-conflict countries to deal with the problem of impunity. Principle 19 established a duty of states to investigate and prosecute war crimes. It stipulates that: "States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators,

particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished."

32. The OHR notes that the jurisprudence of the European Court of Human Rights is consistent in this regard. In the cases of *Kolk and Kislyiy v. Estonia* and *Penart v. Estonia* that concerned the 2003 trials for crimes against humanity committed in 1949 and 1953, whereas these crimes became punishable under the Estonian law only in 1994, the Court applied the exception contained in Paragraph (2) of Article 7 and found no violation of article 7(1) as these crimes existed under international law at the time they were committed. The Court did not at all contest the punishments pronounced in 2003 that clearly had not been prescribed by the Estonian law at the time of the commission. In *Šimšić Bosnia and Herzegovina* the Court observed that the applicant was convicted in 2007 of persecution as a crime against humanity with regard to acts which had taken place in 1992. The Court further pointed out that although the impugned acts had not constituted a crime against humanity under domestic law until the entry into force of the 2003 Criminal Code, it was evident that the impugned acts constituted, at the time when they were committed, a crime against humanity under international law. The Court then concluded that the applicant's acts, at the time when they were committed, constituted an offence defined with sufficient accessibility and foreseeability by international law. It therefore rejected the complaint as manifestly ill-founded. In *Naletilić v. Croatia* the applicant complained under Article 7 of the ECHR that he might receive a heavier punishment by the ICTY than he might have received by domestic courts. The Court concluded that, even assuming Article 7 to apply to the present case, the specific provision that could be applicable to it would be paragraph (2) rather than paragraph (1).

33. Regarding the issue of punishment, the OHR observes that

penalties in these cases fall within the ranges of prescribed punishment under all the codes in force since the time of perpetration until the time of adjudication.

III.B. The Criminal Code of 1976

34. The *1976 Criminal Code* is often referenced as the substantive criminal law that should be applied in processing of violations of international humanitarian law committed on the territory of Bosnia and Herzegovina during 1992-1995 conflict, as the law considered in force at the time of perpetration. However, that Code, at the same time differently referred to in different parts of Bosnia and Herzegovina as either the *Criminal Code of the Socialist Federal Republic of Yugoslavia Taken Over as the Republic's Law*; the *Criminal Code*; or the *Criminal Code of SFRY or Criminal Code of the Republika Srpska*[4], did not fully incorporate international humanitarian law at the time of conflict. Not all actions and omissions that were not successfully disputed as being crimes under international law were properly defined in that Code.

35. In this regard we note the UN Human Rights Committee's *Concluding observations on the second periodic report of Bosnia and Herzegovina, adopted by the Committee at its 106th session, on 15 October to 2 November 2012*[5]**, which in its paragraph 7 state:** "The Committee is also concerned at the lack of efforts to harmonise jurisprudence on war crimes among entities, and that entity-level courts use the archaic criminal code of the former Socialist Federal Republic of Yugoslavia (SFRY) that does not, inter alia, define crimes against humanity, command responsibility, sexual slavery and forced pregnancy. The Committee is concerned that this might affect consistency in sentencing among entities (arts. 2 and 14)". It concludes that the State party should ensure that "charges for war crimes are not brought under the archaic criminal code of the former SFRY which does not recognise certain offences as crimes against humanity."

36. Regarding the punishment, the 1976 Criminal Code prescribed the harshest penalties for the commission of acts of genocide or war crimes against the civilian population, as it punished them by a prison term of a minimum of five years and a maximum of 15, or by a death sentence. Pursuant to the same code, a 20-year prison term may be imposed instead of a death sentence. The Code was never amended in order to abolish the death penalty. It is logical to think that the imposition of a harsh sentence for such crimes was therefore foreseeable at the time of perpetration of the offence. The 2003 Code which prescribes a maximum of 45 years rather than death penalty is clearly more lenient than the SFRY code.

37. The application of the 1976 Code by the entities conflicts with the constitutional framework of Bosnia and Herzegovina as interpreted by the Constitutional Court. In its March 2007 decision on the *Maktouf* case, the BiH Constitutional Court established that the application of different criminal codes by the state and the entities seriously undermined the rule of law and the equal treatment of citizens before the law. It urged entity courts to use the 2003 Criminal Code of BiH in their war crimes proceedings.

38. The principle set forth in *Kononov v. Latvia* also applies insofar as the ECtHR makes a balance between the core principles on which the Convention system is built (such as the protection to the right to life) and the rule of law. It illustrates the continuing tension between ending impunity for mass atrocities and upholding the legal principles which distinguish criminal justice:

> “241. It recalls that it is legitimate and foreseeable for a successor State to bring criminal proceedings against persons who have committed crimes under a former regime and that successor courts cannot be criticised for applying and interpreting the legal provisions in force at the material time during the former regime, but in the light of the principles governing a State subject to the rule of law and

having regard to the core principles on which the Convention system is built. It is especially the case when the matter at issue concerns the right to life, a supreme value in the Convention and international hierarchy of human rights and which right Contracting parties have a primary Convention obligation to protect. As well as the obligation on a State to prosecute drawn from the laws and customs of war, Article 2 of the Convention also enjoins the States to take appropriate steps to safeguard the lives of those within their jurisdiction and implies a primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences which endanger life (see Streletz, Kessler and Krenz, §§ 72 and 79-86, and K.-H.W. v. Germany, cited above, §§ 66 and 82-89). It is sufficient for present purposes to note that the above-cited principles are applicable to a change of regime of the nature which took place in Latvia following the declarations of independence of 1990 and 1991 (see paragraphs 27-29 and 210 above).

212. Finally, where international law did not provide for a sanction for war crimes with sufficient clarity, a domestic tribunal could, having found an accused guilty, fix the punishment on the basis of domestic criminal law."

III.C. The FBiH Code of 1998

39. The *Criminal Code of the Federation of Bosnia and Herzegovina from 1998*[6] prescribed for criminal offences of genocide and of war crimes a punishment of imprisonment of not less than five years, with a general maximum of 15 years, or long-term imprisonment with maximum duration of 40 years (e.g. Art 154). As in the 1976 Code, crimes against humanity and command responsibility were not codified in line with international law, resulting in no specific prescribed sanction for these. In addition, it still envisaged the death penalty, on exceptional basis, for the more severe forms of criminal offences punished with long term imprisonment during

the state of war or of imminent war danger (Art 34). Furthermore, this code did not envisage the possibility for a person convicted to long-term imprisonment to be paroled (Art 107).

III.D. The Criminal Code of Bosnia and Herzegovina of 2003

40. The chaotic legal situation regarding war crimes prosecution in Bosnia and Herzegovina, and the failure of Bosnia and Herzegovina to meet the rule of law requirements and expectations of justice of its own citizens, as well as its international obligations, led to the enactment of the Criminal Code of Bosnia and Herzegovina in 2003. It is the legislation by which Bosnia and Herzegovina assumed its responsibility for enforcement of inter-entity and international crime in accordance with its Constitution. While war crimes under the Geneva Conventions and genocide were already criminalized in 1992 by both domestically applied legislation and by "general principles of law recognized by civilized nations" within the meaning of Article 7(2) of the ECHR, the Criminal Code of 2003 was the first statute in Bosnia and Herzegovina that codified all violations of international humanitarian law in line with international law.

41. As to the penalties, the 2003 Criminal Code complies with Bosnia and Herzegovina constitutional order, including directly applicable international obligations. It completely abolishes death penalty, while it secures the right to life under the ECHR by putting in place effective criminal law provisions to deter the commission of offences which endanger life, or are torturous. It also provides for effective penalty in line with Geneva Conventions. The prescribed punishment is imprisonment of not less than 10 years, meaning the maximum prison sentence may be 20 years, or long-term imprisonment that may last up to 45 years. Such prescribed punishment may however be reduced to five years imprisonment. Parole is possible even if long-term imprisonment was imposed.

42. In cases of mentally incapacitated persons, the Criminal Code of 2003 is indisputably the most lenient, since it abolishes their quilt. As they are not criminally responsible, they may not be punished by any sanction envisaged under criminal law. Under all the other codes, even mentally incapacitated persons may be sanctioned under criminal law.

43. The application of the 1976 Code or the 1998 FBiH Code instead of the 2003 Code would lead to the imposition of lower punishments for the crime of genocide than for crimes against humanity, for example. Such a situation would also miss the general prevention purpose of criminal law. In future it would become possible for authorities to provide by a statute for evidently offensive and ineffective punishment of for example several months of prison for a crime of genocide, and for atrocities committed while such a law was in force a proper and effective punishment under domestic law would for ever be barred. Such a formalistic possibility would also highlight the issue of statutory injustice, where the obviously unjust legal source takes precedence over justice, regardless of a question whether an obviously unjust legal construct may have a quality of law in a society governed by rule of law.

44. On the other hand, an important element of article 7(2) relates to changes to the law (foreseeability properly understood). The ECtHR has consistently held that it does not undermine the foreseeability of the law if it is adapted to reflect changing social circumstances. This change may be gradual,[7] or in certain circumstances may be abrupt[8]. Gradual change is demonstrated in *SW v. United Kingdom*. There, the ECtHR held that the removal of the marital rape exception by common law development was foreseeable. In the German reunification cases, the Court noted that changes to the law may be more dramatic. The Court held it legitimate for the unified German courts to convict based on GDR law, even where the organs of the former state would not have done so. The Court also commented on the foreseeability of the applicants'

prosecution. It reiterated that the criminal law must be adapted to "changing circumstances". Whereas this usually happens gradually, the Court held it was "wholly valid where, as in the present case, one State has succeeded another". The reasons offered to sustain this conclusion were that: a) it was consistent with the system of the Convention, b) the GDR Parliament has expressed such a wish, and c) due to the pre-eminence of the right to life in international human rights instruments.[9] If foreseeability is paramount, then retrospective changes to the criminal law (i.e. as appeared to occur in *SW*) are permissible, so long as they could reasonably be predicted.

IV. Jurisdiction for War Crimes

45. With the entry into force of the Criminal Code of BiH of 2003, war crimes cases fell within the exclusive jurisdiction of the Court of BiH. On the same date the *Criminal Procedure Code of Bosnia and Herzegovina of 2003*[10] entered into force, which provided for the possibility that the Court of BiH transfers cases from its jurisdiction to courts competent pursuant to the place where the crime was committed. The BiH Court may make such a decision ex officio or at the request of the parties (Art 27). This possibility of transfer was envisaged because thousands of cases had been reported at that time and it would have been impossible for one court to deal with them in a timely manner.

46. Cases falling under the jurisdiction of the Court of BiH but which were already pending in front of other courts were dealt with by transitional provisions of the 2003 Procedural Code. The Code prescribed that they should be finalised by those courts if indictments were already in front of those courts. If indictments were not already in effect, as a rule it was envisaged that even such cases should be finalized by those courts, but the Court of BiH could decide to take such a case, including upon the reasoned proposal of the parties or defence attorney (Art 449).

47. Each and every decision of the Court of BiH must be duly reasoned. The Court of BiH developed a body of law through its jurisprudence as to the criteria to be considered for transferring cases. Strong reasons for such decisions stem from severity or sensitivity of cases through a need for witness' protection and/or witness' support service to procedural efficiency regarding proximity of evidence. Furthermore, as the Prosecutor's Office of BiH is a party to proceedings, it can propose a transfer of case to the Court. In line with the Strategy for War Crimes Prosecution, the Prosecutor's Office of BiH developed its criteria for deciding which cases to propose for prosecution on the state level, and for which to ask for a transfer to entity levels. These criteria were developed pursuant to criteria used by ICTY.

48. The allocation of cases between the state court and the courts in the entities is not arbitrary or discretionary, but responds to rules and criteria pre-established by law based on territorial, temporal and procedural considerations. Different jurisdictions and thus possible different treatment of persons in similar situations is not done without objective and reasonable justification.

49. At the present time the Court of BiH has adjudicated approximately 90 cases and more than 100 perpetrators were tried and punished under the Criminal Code of 2003. Additional cases are ongoing.

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Sarajevo, 7 November 2012

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[1] Official Gazette of BiH, International Treaty Series, Nos.

12/04 of 8.12.2004, 7/05 of 1.9.2005, 9/05 of 7.10.2005, and 8/06 of 11.8.2006 (Addendum).

[2] Official Gazette of BiH, International Treaty Series, Nos. 2/07 of 27.4.2007, 3/07 of 4.7.2007.

[3] For example, the Geneva Convention III, Article 129 and the Geneva Convention IV, Article 146: “The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.“

[4] Official Gazettes of Republic of BiH, Nos. 2/92, 6/92, 8/92, 11/92, 16/92, 21/92, and 28/94. The Code that was taken over was the SFRY Code published in the Official Gazette of SFRY, Nos. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, and 45/90. The Law Amending the Criminal Code of SFRY of OG SFRY 44/76, 34/84, 74/87, 57/89, 3/90, and 38/90 was published in the Official Gazette of Republika Srpska, No. 12/93.

[5] Doc. CCPR/C/BIH/CO/2.

[6] Official Gazette of FBiH, No. 43/98 of 20.11.1998, corrections in Nos. 2/99 and 15/99, and amendments in 29/00 and 59/02.

[7] *SW,* para 36.

[8] *K.-H.W.; Streletz & Others*.

[9] *K.-H.W.* paras 82-90.

[10] Official Gazette of BiH, Nos. 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, and 93/09.