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Investigating and Prosecuting War Crimes in the Western Balkans

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Purpose:

The aim of this paper is to present the situation regarding the detection and prosecution of war crimes in the Western Balkans, as well as to point out the main specifics or, better said, problems encountered by judicial authorities while dealing with these crimes.

Design/Methods/Approach:

The article is based on the current work of the judiciary and the prosecutor of the republics of Serbia, Bosnia and Herzegovina, as well as Croatia. We chose these three countries as the spatial framework for our research because during the civil wars in the Western Balkans most war crimes were committed on their territories. Through content analysis of existing domestic literature and our own survey research, the findings were comparatively analysed. In order to obtain further empirical and relevant information regarding the investigation and prosecution of war criminals in the Western Balkans, the methods of direct observation and analysis of the content of the judicial proceedings were applied.

Findings:

The work on detecting and prosecuting war crimes in attempting to provide evidence for use in criminal war crimes proceedings in the Western Balkans is a daunting task. This is because these crimes are both factually and legally of the most complicated sort, not the least in terms of their severity. Therefore, the research started by presenting the structure of the responsible governmental bodies conducting proceedings against war crime perpetrators in Bosnia and Herzegovina, Croatia, and Serbia. Special attention was paid to legal and practical problems in this field. The authors point to the many challenges making the detection and prosecution of these crimes both difficult and complicated. Thus, the aim of this article is to examine the aforementioned problems and, on the basis of analysis, contribute to building more effective legal and criminalistics methods for detecting and prosecuting war crime offenders in the Western Balkans.

Research Limitations/Implications:

The research results for the analysis of the investigative procedure and prosecution of war criminals in the Republic of Serbia, Bosnia and Herzegovina, and Croatia focus specifically on material collected regarding crimes committed in the period 1991 to 1999 only.

Practical Implications:

The research results can be used to develop a strategy for detecting and prosecuting war crimes by suggesting improved methods for gathering quality personal and material evidence in the Western Balkans. In addition, the paper provides information for practitioners and theorists outside of the Western Balkans currently dealing with issues related to such crimes. By familiarising themselves with the research findings herein, they will be able to expand their knowledge and use it as a basis for new research in this field. Lawmakers can also benefit from the results and make necessary amendments to the legislation and regulations of criminal procedures in the Republic of Serbia, Bosnia and Herzegovina, and Croatia to enhance the efforts in the area of countering war crimes. Further, by identifying the problems of conducting and processing investigations in the region, and by stressing the restricted prosecutorial resources, including the limited number of specialised prosecutors of war crimes, crimes against humanity and genocide, the shortage of prosecutors and support staff, as well as the lack of specialisation and expertise among defence counsel the findings of this research can contribute to the curriculum for the education of future lawyers (prosecutors, investigators, judges etc.) in this field.

Originality/Value:

The originality of this paper is reflected in the empirical study of procedures related to investigating and prosecuting war criminals in the Western Balkans. This approach explores the challenges associated with a variety of issues. As such, it may also provide valuable information to be used in creating new methodologies for detecting and gathering evidence in legal and criminalistics practice. Lastly, it can serve as a basis for other research in the field.

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Keywords: war crimes, investigation, prosecution, proving, legal and practical problems

Preiskovanje in pregon vojnih zločinov na Zahodnem Balkanu

Namen prispevka:

Namen tega prispevka je predstaviti stanje na področju odkrivanja in pregona vojnih zločinov na Zahodnem Balkanu. V članku želimo poudariti temeljne posebnosti oz. težave, s katerimi se pravosodni organi soočajo pri obravnavi tovrstnih zločinov.

Metode:

Članek temelji na ugotovitvah o sedanjem delu sodišč in tožilstev v republikah Srbija, Bosna in Hercegovina ter Hrvaška. Te tri države smo izbrali v raziskovalno mrežo, ker so se največji vojni zločini zgodili na njihovih območjih. Z analizo in pregledom vsebine domače literature in svojega raziskovanja so bile ugotovitve primerjalno analizirane. V duhu nadaljnjih empiričnih raziskav in zbiranja relevantnih informacij o preiskavah in pregonu vojnih zločinov na Zahodnem Balkanu smo uporabili metodo neposrednega opazovanja in analize sodnih postopkov.

Ugotovitve:

Preiskovanje in pregon vojnih zločinov z zbiranjem dokaznega gradiva za sodne postopke zoper osumljene osebe na Zahodnem Balkanu je posebej težka naloga. Razlog za to je sama narava vojnih zločinov, ki so dejansko in pravno najzahtevnejša oblika zločinov, ne nazadnje tudi zaradi svoje krutosti. V raziskavi je najprej predstavljena struktura državnih organov, ki so na območjih Srbije, Bosne in Hercegovine (BiH) ter Hrvaške pristojni za pravne in preiskovalne postopke ter pregon. Posebna pozornost je v članku posvečena pravnim in praktičnim težavam na tem področju. Avtorja prikažeta različne izzive, ki vplivajo na to, da je preiskovanje vojnih zločinov težko in zapleteno. Namen prispevka je raziskati prej navedena vprašanja na podlagi analize, ki bo prispevala k razvoju učinkovitejših pravnih in kriminalističnih metod za preiskovanje in pregon vojnih zločincev na Zahodnem Balkanu.

Omejitve/uporabnost raziskave:

Raziskovalni rezultati vsebujejo zbrano gradivo o preiskavah in pregonu vojnih zločinov, storjenih v Srbiji, BiH in Hrvaški, za dejanja, ki so bila storjena v osredotočenem obdobju od leta 1991 do leta 1999.

Praktična uporabnost:

Rezultati raziskave, ki so bili prikazani v članku, bodo prispevali tako k razvoju strategij preiskovanja in pregona vojnih zločinov kot tudi k izboljšanju preiskovalnih metod zbiranja osebnih ter materialnih dokazov na območju Zahodnega Balkana. Poleg tega bo članek koristen tudi za strokovnjake izven območja Zahodnega Balkana, ki se ukvarjajo z naslovno problematiko. S seznanitvijo dognanj, prikazanih v članku, bodo ti strokovnjaki razširili svoje vedenje in ga lahko uporabili za nadaljnje raziskave, usmerjene v vojne zločine. Zakonodajne institucije v državah Srbije, BiH in Hrvaške bodo lahko na podlagi spoznanj iz članka izboljšale in dopolnile svoje pravne postopke, povezane z odkrivanjem in pregonom vojnih zločinov. Zaradi prepoznavanja težav, pomanjkanja znanja na obravnavanem področju in omejenega števila specializiranih strokovnjakov je članek ne nazadnje namenjen tudi izobraževanju prihodnjih pravnikov (tožilcev, preiskovalcev, sodnikov ipd.).

Izvirnost/pomembnost prispevka

Izvirnost prispevka se kaže v empirični raziskavi, usmerjeni v preiskovanje in pregon vojnih zločinov na Zahodnem Balkanu. Ta raziskovalni pristop odraža izzive, povezane z raznovrstnostjo predmetov obravnave. Kot tak v nadaljevanju zagotavlja pomembne informacije, ki se lahko uporabijo pri oblikovanju novih metodologij odkrivanja in zbiranja dokazov v pravni in preiskovalni praksi. Tak raziskovalni pristop lahko služi tudi kot osnova za druge raziskave na tem področju.

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Ključne besede: vojni zločini, preiskovanje, pregon, dokazovanje, pravne in praktične težave

1 INTRODUCTION

War crimes are the most serious violations of international humanitarian law and their perpetrators are subject to prosecution both domestically, as well as internationally by the International Criminal Court, ad hoc criminal tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The most important legal issue that defines war crimes is contained in the provisions of the four 'Geneva Conventions' pertaining to ''serious violation''. Besides the Geneva Conventions there are the Hague Conventions of 1899 and 1907 which were among the first formal statements of the laws of war and war crimes in the body of secular international law. These consist of a wide range of acts in all forms committed during armed conflict (Jović, 2011).[1] Prosecuting those responsible for these crimes in former Yugoslavia is one of the most crucial and civilising goals in the process of dealing with the horrific past events in this region.

Notwithstanding the fact that traumatised states are offered alternative ways to deal with horrors of the past, retributive mechanisms in the distribution of justice seem to prevail. This may be due to the relatively short time span that such mechanisms have been in operation at the international system level. There has always been an apparent reluctance to deal effectively with domestic horrors imposed by one's own. Lately, however, in an attempt to find alternative ways to domestically arrive at reconciliation and eventually sustainable peace, restorative justice mechanisms have been introduced as alternative or complementary means of distributing justice. The most important and a recently widely used mechanism in this respect is the 'truth commission'. In the countries of former Yugoslavia, however, such a means of arriving at reconstituted social relations has so far not been applied. It may be exactly because of this that the wars seem to still be going on, fought with different means. In this paper, we will make explicit some problems associated with investigating and prosecuting war crimes in the countries of former Yugoslavia, eventually suggesting that what we may call retributive justice should be combined with efforts more directed at reconciliation than revenge. This is, of course, not to divert attention away from the important legal processes of the ICTY or domestic courts in the region that – wholeheartedly or not– are involved in the fight against impunity. Instead, it is our view that, due to the imperfect distribution of justice by such institutions, complementary processes should be initiated and facilitated if one is to finally leave the traumas of the past behind. By no means do we bestow a restorative or reconciliatory function on the ICTY or the domestic courts. Our motive is simply to suggest that their role in distributing justice is less than perfect.

Before addressing issues related to the investigation and prosecution of crimes committed in the region during the 1990s, it is first necessary to mention the nature of the armed conflicts of the former state of Yugoslavia. There are several. First of all, there are the armed conflicts which took place between people

1 *While "serious violations", as defined by the 'Geneva Conventions', mainly relate to crimes committed in international armed conflicts, the Protocol and the Statute of the International Criminal Court expand the category of war crimes to crimes committed in national liberation wars and internal armed conflicts.*

who had until recently been living together in a unified state. Second, there are the armed conflicts characterised by interethnic and interreligious intolerance. In addition, there are inter-religious and inter-ethnic armed conflicts between the Catholic-Croats, Orthodox Christians-Serbs, and Muslim-Bosniaks which took place between 1991 and 1995 – not to mention other conflicts between Serbs and Kosovo Albanians in 1999, resulting in the intervention of NATO forces in March of that year. Due to the combination of the national, chauvinistic and clerical chauvinist ideologies of political leaders of the warring parties, these conflicts took on the cruellest of forms, resulting in the suffering of large populations and an equally large number of war crimes committed.

The prosecution of these crimes may perhaps be the most important civilizational challenge in dealing with the past not only for the countries in the region, but perhaps for Europe, as such. We will therefore point out some characteristics of this process and the challenges faced by criminal justice authorities as they attempt to detect the perpetrators and prove their guilt. An implied question to be asked and kept in mind throughout is whether or not these attempts are futile, leaving us with an impunity gap that seems to be ever growing, as the horrors of the past only gradually reveal themselves.

2 INVESTIGATING AND PROSECUTING WAR CRIMES OCCURRING IN COUNTRIES OF THE FORMER YUGOSLAVIA

War crimes that occurred in the former Yugoslavia are investigated and processed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and by the domestic courts of the former Yugoslav countries. These domestic courts may be located at the level of the entities (Republic Srpska and the Federation) or at the cantonal level in the Federation.

2.1 Investigating and Prosecuting War Crimes at the ICTY

The war in Croatia and Bosnia and Herzegovina following the disintegration of the former Yugoslavia was marked by grave violations of international humanitarian law such as crimes against humanity and genocide. In response, the United Nations (UN) Security Council established the ICTY in May 1993. The ICTY was set up as the international tribunal for the prosecution of war crimes committed in the territory of the former Yugoslavia since 1991. The court was established by Resolution number 827 of the United Nations Security Council passed on 25 May1993 (Mitić, 2006). The resolution came after numerous statements and reports that spoke of the terrors which had occurred during the war in the former Yugoslavia. It was the first international criminal tribunal established since the Tokyo and Nurnberg tribunals after the Second World War. The plan was for the ICTY to adjudicate only a relatively small number of cases involving the most serious of crimes before the body would cease and stop working. The Tribunal has accordingly tried to concentrate its investigations on the gravest of crimes and the highest-ranking persons responsible for them.

This tribunal has three independent bodies: the Chambers, that is to say, the judges; the Office of the Prosecutor (OTP); and the Registry. The OTP has two main branches, namely the Investigations Division which performs the functions normally carried out by the police in most states, and the Prosecutions Division which does the job of the prosecutors in national systems.

Proceedings at the Tribunal begin when the Prosecutor decides there is a *prima facie* case against an individual (that is, when he is satisfied there is enough evidence to suggest the suspect perpetrated the crimes). He may then draw up an indictment which he is then required to submit to one of the Tribunal's judges for confirmation. The judge responsible for the confirmation has nothing to do whatsoever with the investigation. He or she will review the indictment and the supporting evidence before deciding to either reject or confirm the indictment. The judge may only confirm the indictment if they are satisfied there is a *prima facie* case to answer. This means the OTP cannot indict people arbitrarily. Before a trial can begin, the accused has to voluntarily surrender or be arrested. He is then transferred to the ICTY detention unit in The Hague. Shortly afterwards, he is brought to court for the first appearance where they have the opportunity to plead "guilty" or "not guilty". If the accused pleads guilty, then there is no trial; there is simply a hearing to fix the sentence. Such a plea can also result from a plea agreement. If the accused pleads not guilty a trial follows. The trial is held in English or French and always accompanied by interpretation into the language of the accused, whether that be Bosnian, Serbian, Croatian, Albanian or Macedonian.

The main protagonists in the courtroom are the three judges who form the Trial Chamber, along with the Prosecutors, and the Defence Counsel. Unlike the system that existed previously in all of the former Yugoslavia, the roles played by these parties in the Tribunal are similar to those of their counterparts in the United States or the United Kingdom. The trial then begins with the Prosecution presenting its case, in which it seeks to demonstrate that the crimes did indeed happen and that the accused is criminally responsible for them. Thereafter, the Defence have their turn. It is important to note that the Defence does not have to prove anything as that burden lies on the Prosecutor. The Defence is given an opportunity to refute or cast doubt on the Prosecution's case. The Defence can then call witnesses and present evidence to this end. Every witness is first examined by the party that called him, the Prosecution or the Defence, and is then cross-examined by the other party. During cross-examination, the cross-examining party tries to cast doubt on the evidence given by the witness. The judges are also able to ask questions during this phase. The trials are open to the public, and the media can use the video and audio material available from the trial. However, the judges can order protective measures for certain witnesses, as long as they do not prejudice the rights of the accused. In some cases, witnesses have good reason to fear they will suffer negative consequences by giving testimony. Those consequences may vary depending on the situation and the evidence given by the witness. For example, in the case of a rape victim it is to be expected that the woman does not wish to speak about her suffering in front of the public. Or someone who witnessed crimes committed by members of his military unit may be afraid of retaliation by his former comrades. The reasons for this may vary, but

the principle is the same. If there is good reason, the Trial Chamber can approve protective measures.

The burden of proof is on the Prosecution and it must prove the accused party's guilt beyond reasonable doubt. The accused receives documents in their own language while they are in the courtroom in addition to receiving simultaneous interpretation services into Bosnian, Croatian or Serbian, English, French and, as required, also in Albanian or Macedonian. Trials *in absentia* are not practised in the ICTY, meaning a trial can only begin if and when the accused is brought to court. This principle was seen at work in the cases of Radovan Karadžić and Ratko Mladić. Both were indicted 14 years ago, but their trials did not begin until they had been arrested. Radovan Karadžić was arrested in October 2009 and Ratko Mladić in May 2012.

Every Defence Counsel must meet certain set requirements. They must all be members of their national bar association, have enough experience in criminal and international law and must also speak one of the Tribunal's official languages: English or French. Every defence team includes at least two lawyers, and they can engage their own investigators and assistants.. The accused can also represent himself, as was the case with Slobodan Milošević.

After the trial, the judges must make a judgement. They will only convict an accused if they are satisfied that his culpability has been proven beyond reasonable doubt. If the Trial Chamber is not satisfied of this, the accused will be acquitted and released. Quite often, an accused is convicted of some counts but acquitted of others. The judges then give the accused a prison sentence, which can be up to life imprisonment. The death penalty is not within the scope of the Tribunal's powers and such a sentence is never given. Both the Prosecution and the Defence can appeal either the judgement, the sentence or both. It is common for at least one party to appeal. In this case, the judgement does not take effect until the Appeals Chamber of the Tribunal has reviewed the appeal and made its own judgement. This, of course, is all in line with human rights requirements for a fair trial, as prescribed in both the UN Convention on Civil and Political Rights, as well as the European Convention on Human Rights and Fundamental Freedoms.

The ICTY has now finished with bringing fresh indictments and, due to this, there are no new investigations which can be initiated at The Hague. All other cases related to war crimes, regardless of whether initiated domestically or provided by the ICTY, must now be resolved by the national courts of the former Yugoslav states. Overall, the ICTY has indicted 161 persons, but until now has only convicted less than half of them with a final judgement, precisely 45.96% (see Table 1). So far, final proceedings have been made against 141 individuals, while 20 defendants are still in proceedings. In cases in which the proceedings were finished, 74 people were convicted with a final judgement, 18 were acquitted, and 13 had procedures referred to national courts. Moreover, 36 indictments against accused were withdrawn or the accused died. Of the 20 individual cases in which proceedings were still active in 2015, 16 of these were still pending to appear in the Appeals Chamber, while four defendants' proceedings are being conducted in the trial chamber.

Table 1: Status of proceedings

Description	Proceedings underway	Acquitted	Convicted with final judgement	Forwarded to the national courts	Withdrawn indictments or the accused died	Total
No. of persons	20	18	74	13	36	161
Percentage	12.42%	11.18%	45.96%	8.07%	22.36%	100%

Status of proceedings at the ICTY (source: International Tribunal for the Former Yugoslavia, 2015)

2.2 Investigating and Prosecuting War Crimes by Domestic Courts of Former Yugoslav Countries

New criminal procedure codes have been adopted in the various countries of former Yugoslavia since 2000. They have introduced a criminal justice system model that has more elements of an adversarial system, including abolishing the investigative judge function and transferring most of the investigation responsibility to the police and the prosecutors. Further, the trial is adversarial by nature, meaning that it is now the task of the prosecutor and defence counsel to present arguments, introduce evidence, cross-examine witnesses and actively raise objections. Most of the responsibility associated with promoting the right to a fair trial to the accused has been transferred to the defence counsel. These new codes have also introduced new instruments into the criminal justice systems, such as plea bargaining (which is applied by the ICTY) as well as opportunities for prosecutors to award immunity in exchange for testimony. As for the prosecution of war crimes by domestic courts, there are several variations depending on the country.

2.2.1 State-Level Investigation and Prosecution of War Crimes in Bosnia and Herzegovina

For a limited number of trials that were held by domestic courts during the war, most cases were referred to the prosecution, with convictions of accused most often belonging to opposing sides in the conflict, often in their absence. During the war and the first few years after the war in Bosnia and Herzegovina, a relatively small number of trials was conducted for crimes committed during the war. Many of these early trials took place at the Cantonal Courts (in the Federation) and before the district courts in the Serbian Republic (RS: Known as the Serb Republic, Republika Srpska or the Bosnian Serb Republic). These trials unfortunately progressed very slowly in the years after the end of the war. The problem was largely due to the lack of political will to address sensitive subjects such as war crimes, crimes against humanity and genocide, particularly in cases where the perpetrators were members of the majority ethnic or religious group of the area. In response to this situation, the government of Bosnia and Herzegovina established the "Rules of the Road Cases" in 1996. In accordance with these rules, Bosnian authorities committed themselves to all cases in which there was valid suspicion. War crime cases, however, were submitted to the ICTY. The ICTY prosecutors would then preside over them and assess whether these

cases contained sufficient evidence to warrant further investigation and possible indictment. Upon completion of the audit, the cases were returned to the local authorities with a tag labelling them with the letters "A" through "C"; the letters indicating which cases merited further investigation or trial.
Letter interpretations:

"A": Sufficient evidence regarding the defendant and the alleged crime;
"B": Insufficient evidence; and
"C": Unable to determine the sufficiency of the evidence.

Bosnia and Herzegovina is made up of the Federation of Bosnia and Herzegovina (Known as the Federation), the Serbian Republic (RS: Known as the Serb Republic, Republika Srpska or the Bosnian Serb Republic), and the Brčko District which is an independent region of local self-governance. At the end of 2004, war crimes trials in Bosnia and Herzegovina were exclusively supervised by the cantonal courts in the Federation, the district courts of the Serbian Republic, and the Court of the Brčko District. The appeals procedures in these cases were offered by the Supreme Courts of the entities (Republika Srpska and the Federation) or the Court of Appeals of the Brčko District.

In line with the strategy for terminating the ICTY's work, it is envisaged that cases classified as of small and/or medium complexity will be forwarded to a specialised War Crimes section of the State Court. This Section for War Crimes within the State Court is accountable for three types of cases:

- cases ceded by the ICTY under Rule 11 bis of the Rules of Procedure and Evidence of the Tribunal;
- cases referred by the ICTY and in which there is no present indictment; and
- highly sensitive cases which are reviewed in accordance with the "Rules of the Road".

It is important to emphasise that the Section for War Crimes within the State Court of Bosnia and Herzegovina has an international component, and that the judicial chambers at trial and on appeal are made up of two international judges and one local judge; the latter presiding over the council as its president.

At the state level, and within the B&H Prosecutor's office, in 2004 a dedicated war crimes department was established (Law on Transfer of Cases from the International Criminal Tribunal for the former Yugoslavia Prosecutor's Office of Bosnia and Herzegovina and the use of evidence obtained by the International Criminal Tribunal for the former Yugoslavia in proceedings in front of the courts in Bosnia and Herzegovina, 2004). This entity manages four categories of cases:

- cases referred to the national jurisdiction by the ICTY, pursuant to Rule 11 bis of its Book of Rules on Procedure and Evidence. In these cases, the indictments are confirmed by the ICTY;
- cases reviewed by the ICTY Rules of the Road Unit. These are cases in which the national institutions of Bosnia and Herzegovina conducted their investigations, and then referred the cases on to the Rules of the Road Unit to obtain its opinion. This is done in order to determine whether there is evidence indicating the existence of grounds of suspicion sufficient for a person to be put in custody;

- cases of the ICTY Office of the Prosecutor in which investigation was conducted by the ICTY, but no indictment was filed; and
- all cases commenced after the expiry of the Rules of the Road Unit's mandate in October 2004.

The Special Department for War Crimes began its work with seven international prosecutors. Although it is considered that this department's work is essential, the fact is that most war crimes cases are conducted by the Federation's cantonal courts in addition to the district courts of the Serbian Republic and the Brčko District court. This means that entity prosecutors continue to have the authority to research and process a large number of existing cases.

2.2.2 Challenges Associated with Investigating and Prosecuting War Crimes in the Cantonal and District Court System of Bosnia and Herzegovina

The work of the cantonal and district court system of B&H has encountered many difficulties in its first years of operation. These include:

- limited prosecutorial resources such as a limited number of specialised prosecutors to prosecute war crimes, crimes against humanity and genocide, and a shortage of prosecutors and support staff;
- lack of specialisation and expertise among the defence counsel;
- absence of witness protection and witness support;
- problems arising from a lack of ability or willingness of the police to investigate war crimes;
- poor cooperation between the police and prosecutors;
- courts across the country applying varying criminal codes;
- the failure to arrest and detain suspects;
- lack of a legal framework in neighbouring countries for the extradition of suspects;
- prosecutors not using all available sources for evidence;
- prosecutors and courts not referring to relevant international precedents, including the judgements of the ICTY and not applying them;
- low confidence among some prosecutors and victims, further exacerbated by a lack of initiative to reach out to witnesses;
- the need for increased cooperation and communication between state and entity authorities; and
- the large number of unresolved cases.

In addition to this long list of problems, there are challenges regarding the validity of the evidence collected during the war upon which an indictment can be based. Moreover, important evidence of war crimes has in some cases been destroyed by the local police. Problems with war crime evidence from this period exist in both entities. Evidence of crimes in violation of international law taken during the war was often based on national or ethnic identity, with the purpose of transferring political responsibility for the conflict onto the opposing side. The evidence from this period is so politicised that it is of little value. Complaints

lodged at the time may accuse an entire military unit as the perpetrator and contain little specific information, such as ballistic or autopsy information. Even evidence from military records cannot provide the basis for an indictment.

In post-conflict societies such as Bosnia and Herzegovina, political tensions remain high and many victims still suffer from the trauma they experienced during the war. Witnesses belonging to a minority group who were returned to their homes continue to be fearful, and are often unwilling to testify. Many of these people do not trust the local police belonging to judicial entities and authorities that may not provide adequate protection if the witnesses agree to testify. They are often suspected of sympathising with the war criminals or having even been be hired by one of them. After the war, the courts in B&H did not have the modern equipment needed to protect the identity of witnesses. For instance, there were cases in which testifying witnesses at war crime trials were housed in the same waiting room as families of the accused. For a witness who is prepared to testify about a traumatic event, this is an extremely problematic arrangement. In addition, witnesses appearing and testifying at trial must often travel on the same bus as the friends and family of the accused, not to mention the absence of a separate entrance for victims in the cantonal courts to shield them from unwanted exposure. Sadly these people are obliged to enter through the main entrance of the cantonal courthouse.

Due to the number of committed violations of international humanitarian law, the inconsistencies of case law for pending cases of war crimes in the courts of Brčko District and the state court of B&H, the unsatisfactory cooperation at regional levels to deal with cases of war crimes, the lack of support and protection of victims and witnesses in the courts and in the prosecutors' offices and other problems, there is an emerging view opposing the use of different courts regarding the same legal issues. Added to these challenges is the accumulation of pending cases, as well as the fact that many criminals remain unprosecuted. Moreover, during all this time no unique, exact and qualitative statistical database specific to the number and nature of these war crime cases has been established. Needless to say, this could serve as an indicator of the effectiveness of the investigations and prosecutions. Because of this, the Ministry of Justice for this region adopted a national strategy for processing such crimes in December 2008. The objectives of the strategy are (National Strategy for Processing War Crimes Cases, 2008):

- to have the judiciary in Bosnia and Herzegovina solve the most complex and highest priority pending cases within a period of seven years, as well as other pending cases within the next 15 years from the time of implementing this strategy;
- that at the state court and prosecutor's office levels there be centralisation and the updating of all war crime records and cases pending processing by the judiciary of said country;
- to provide a functional mechanism for managing war crimes cases and their placement in the state judiciary and in the judicial entities of the Brčko District, thus enabling efficient processing within a given period of time;
- for the B&H State Court to process the most responsible perpetrators with the help of agreed criteria for case selection and prioritisation;

- to equalise the jurisprudence in war crimes cases so that legal certainty and equality of citizens is ensured by law;
- to strengthen the capacity of the judiciary and the police in all of B&H so that they are better able to deal with these crimes;
- to establish effective cooperation with countries in the region on these cases so that these countries may also progress in terms of reconciliation or friendly relations;
- to provide protection, support and equal treatment to all victims and witnesses in these proceedings in all of courts of B&H; and
- to establish an appropriate legal framework for implementing newly adopted measures in the strategy and the achievement of their objectives.

2.2.3 Investigating and Prosecuting War Crimes in the Republic of Serbia

By the end of 2004, the Republic of Serbia's war crimes trials were conducted by Serbia's primary and high courts. Used for the appeals procedures in these cases were the Court of Appeal and the Supreme Court of the Republic of Serbia; both competent legal bodies. However, on 1 July 2003 the National Assembly of the Republic of Serbia adopted the Law on Organisation and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes (OJGAPPWC, 2003). This law was later amended on 21 December 2004 and governs the establishment, organisation, jurisdiction and powers of governmental bodies and their organisational units in the detection, prosecution and trying of criminal offences (Derenčinović, 2012).

OJGAPPWC (2003) shall apply in the detection, prosecution and trial in the following manner:

- in crimes against humanity and international law as prescribed in Chapter XVI of the Basic Criminal Code of the Republic of Serbia (2001); and
- in serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991 as stipulated in the Statute of the International Criminal Tribunal for the former Yugoslavia (1993).

The governmental authorities of the Republic of Serbia under OJGAPPWC (2003) shall have jurisdiction in proceedings for crimes against humanity and of international law committed in the territory of the former Socialist Federative Republic of Yugoslavia. Of significance is the law's applicability to these crimes regardless of the citizenship of the perpetrator or victim.

Based on its provisions, a special judicial authority to prosecute crimes against humanity, war crimes and violations of international law in the former Yugoslavia will be established and activated. The War Crimes Prosecutor's Office for the Republic of Serbia will be seated in Belgrade, established to prosecute offences of crimes against humanity and international law. The law will also establish the War Crimes Panel of the District Court of Belgrade, which will have the jurisdiction for criminal offences of crimes against humanity and international law. This panel will be known as the "Special Court". In fact, OJGAPPWC (2003)

will establish the War Crimes Investigative Service which will exist within the ministry of internal affairs. Its purpose will be to investigate the same serious offences. At the District Court level, another legal entity will be created in Belgrade to be called the Special Department for the Support and Aid of the Victims and Witnesses of the War. This department will perform both administrative and technical tasks concerning the protection of victims and witnesses in addition to ensuring the necessary conditions for correct application of the law's procedural provisions.

OJGAPPWC (2003) provides for two very important and novel processes. The first is the opportunity for victims and witnesses who cannot be physically present to be examined by video conference link or with an international assistance in criminal cases. Another novelty is that the entire trial can be audio and visually recorded.

Amendments made to the Law on Organisation and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes (2003) on 21 December 2004 provide the possibility that in a trial at a domestic court the prosecutor can use evidence collected and presented by the ICTY.

2.2.4 Investigating and Prosecuting War Crimes in Croatia

In Croatia, all district courts had jurisdiction over war crimes until 2003. In October 2003, the Law on the Application of the Statute of the International Criminal Court and Prosecution of Crimes against International Humanitarian Law (2003) was adopted. The law permitted the transfer of war crimes out of the territorial jurisdiction of the district courts of the four largest cities in Croatia – Zagreb, Osijek, Rijeka and Split. In order to justify the transfer of a case in concurrence with the law, the state prosecutor has to demonstrate that "the circumstances under which the crime was committed and the needs for conducting the proceedings" justify the transfer. In these cases, the president of the Supreme Court of Croatia must also consent to the transfer.

The Law on Amendments to the Law on the Application of the Statute of the International Criminal Court and the Prosecution of Crimes against International Humanitarian Law (2003) effective as of 26 May 2011 prescribed exclusive jurisdiction for processing war crimes for the four specialised courts of Osijek, Rijeka, Split and Zagreb. This change enabled the domestic courts to use the evidence accumulated in international criminal courts.

The law also provides for the establishment in each county court a judicial council of war crimes, composed of three judges with experience in particularly complex cases. As in Serbia, there is no international involvement in the Croatian special judicial panels. The law stipulates that the investigative department and the special panels which adjudicate on the most serious crimes must engage the most qualified judges; judges with the experience and distinctive skills to work on the most complex cases, and who have the same qualifications sought by others in the state attorney's office, including the policemen working on the investigation and the prosecution of the most serious crimes.

The law stipulates that the General State Attorney, with the prior opinion of the Collegium of the State Attorney, will appoint one of his deputies to the Office

of the State Attorney in order to prosecute the said crimes. He or she will then have the power to take any and all measures to detect, investigate and prosecute cases prescribed by the criminal procedure code. In the case a General State Attorney has not yet been assigned, one of the deputies at the office of the State Attorney will temporarily occupy the position.

3 CHARACTERISTICS OF THE INVESTIGATION, PROSECUTION AND TRIAL OF WAR CRIMES IN THE WESTERN BALKANS

When one discusses the features and specifics of the investigation, prosecution and trial of war crimes in the Western Balkans, one primarily refers to the particular problems that arise as far as these crimes are concerned.

The detection, prosecution and retrieval of evidence in criminal proceedings is extremely difficult because they are factually and legally the most complicated of crimes. Numerous challenges arise, such as the following:

- a lack of political will to prosecute the crimes;
- limited prosecutorial resources, including a limited number of specialised prosecutors and a shortage of prosecutors and support staff;
- the shocking fact that the majority of the perpetrators of war crimes belonged or continue to belong to legal structures that are performing the detection and prosecution of war crimes;
- the enormous lapse of time from the moment the crime was committed to the moment of starting an investigation;
- the circumstances in which the crimes were committed;
- the deliberate destruction and removal of evidence;
- the fact the crimes were committed in territories outside the jurisdiction of the state authorities;
- the lack of physical evidence and the unreliability of personal evidence;
- the negative influence of the media;
- complications from the great number of victims, offenders and accomplices in specific war crime cases;
- difficulties pertaining to the availability of evidence;
- problems with the intimidation of potential witnesses and the opportunities for their protection; and
- problems with victims' testimonies.

3.1 Lack of Political Will to Prosecute

All countries of the former Yugoslavia have amended their criminal legislation in an effort to create mechanisms for the effective investigation and prosecution of war crimes. They have built modern courtrooms equipped with the latest audio/visual technology so that the trials are now all recorded, significantly facilitating the work of all participants in the process. The security measures are now of the highest calibre as well. In addition, employees' salaries have improved, which

has in turn increased the quality of their work. Special prosecution assistance has been provided by international bodies and the NGOs. However, even when the justice system works relatively well, the serious ethnic and religious tensions still existing in the Western Balkans and can negatively influence the judiciary, thus contaminating the judicial process in war crime cases.

In almost all countries of the former Yugoslavia, there exists some lack of political support for prosecuting these crimes, as can be seen in the campaign attacks on judicial institutions, interference in procedures, attempts to undermine the existing reforms of the judiciary and the legislature, and in the denial of crimes as determined by final judgements. Mistrust is present despite the important judicial reforms and the lack of evidence of bias in the conducting of proceedings. This indicates a concern that adverse conditions make it difficult to defend against deliberate attempts at disinformation of the public and to carry out appropriate actions for dealing with it.

In fact, high-ranking war crimes suspects of the former Yugoslavia who are members of the police or government are considered heroes by a large share of citizens. This leads to a problem where the processing of such persons can cause resentment among the public, which then results in the authorities losing popularity or perhaps even legitimacy among the citizens. The political opposition, of course, uses this resentment for what it is worth. Accordingly, politicians in power avoid giving support to the authorities tasked with prosecuting criminals because they run the risk of losing votes.

Further, some of those suspected of war crimes made profits during the war so, by the end of the war, they had become very influential businessmen. In fact, they became so influential that they financed the campaigns of some political parties, or even formed their own political parties with great voter support. Finally, after the war some of these individuals became very influential in the field of organised crime, with a huge amount of capital at their disposal and a number of connections in the legislative, executive and judicial branches of government. Due to all of this, in certain periods there has neither been the will or courage of the leading political structures to process these persons nor to investigate their possible crimes.

3.2 Limited Prosecutorial Resources, including a Limited Number of Specialised Prosecutors of War Crimes, Crimes against Humanity and Genocide, and a Shortage of Prosecutors and Staff

A major task of prosecutors when investigating war crimes is to organise the collection of physical evidence and witness testimonies in order to remove the possibility of any suspicion of doubt before seeking an indictment. They are then to prepare an indictment for trial.

All former Yugoslav countries had have problems, especially in the initial years after the armed conflict with a shortage of prosecutors. In the war crimes context, they have a very small number of prosecutors specialising in these crimes and almost none who work exclusively on cases like these. Trials in such

cases require expertise in international law, including the Geneva Conventions, customary international law, the human rights conventions and the jurisprudence of international and hybrid courts.

Further, investigating these crimes, especially those committed years ago, requires specialist qualifications and knowledge. In the former Yugoslav countries, there is no specialisation of prosecutors by type of crime; all prosecutors involved process all types of crime. Solving this problem started with the establishment of special departments for prosecuting war crimes whose staff were trained in the field of crimes under international law. The problem of an inadequate number of prosecutors is also reflected in a universal lack of support personnel in the Office. The result of this shortage is that prosecutors are forced to do almost all aspects of work related to a case, working alone on witness interviews, the development of criminal charges and other routine administrative tasks.

3.3 The Majority of War Crime Perpetrators Belonged or Still Belong to Legal Structures Detecting and Prosecuting War Crimes

Responsibility for detecting, prosecuting and gathering war crimes evidence lies primarily in the hands of the police. However, it is difficult to expect this type of help from the police when many members of the police force are themselves perpetrators of war crimes who have either destroyed or concealed the evidence of their crimes. In fact, a significant number of individuals suspected of committing the said crimes following the former Yugoslav conflict still belong to the police, the military or the security services. Certainly some of them have retired, but they remain in contact with former colleagues and friends who exert a significant influence on the functioning of these institutions. This has all led to enormous challenges in carrying out and efficiently processing war crimes investigations. There is a reasonable suspicion that some people still in the police, the military or the security forces deliberately obstructed investigations and misdirected them. Also, it is reasonable to believe that members of these services have sabotaged the locating and arresting of war crimes suspects. These persons are tipped off in advance about suspicions and orders to arrest suspects. Further, there are reasonable grounds to suspect that members of the police, military and security services directly participate in concealing persons suspected of war crimes by providing them with shelter, transport, logistical support, false identification documents, funds, and more.

However, despite the above, it must be noted that many members of the War Crimes Investigation Service have revealed a high degree of efficiency and professionalism when acting according to the requirements of the War Crimes Prosecutor.

3.4 Large Time Lapse from the Moment of Crime Perpetration to the Initiation of Investigation

War crimes in this region took place in the period between 1991 and 1999, whereas the actual investigation of these crimes and their perpetrators is happening only

at the present time. The great lapse in time between the crimes committed and the start of the investigating these crimes provides another complication. In the detection and prosecution of crimes in former Yugoslavia time has not been a good ally because the high-ranking perpetrators at the time the crimes took place were in aged their fifties or older. In other words, many of them have died. The situation is similar with older witnesses or victims who have also died or whose paths in life have taken them on different parts around the world. Unfortunately, judicial authorities find it difficult to track the latter.

Younger perpetrators between 17 and 30 years and who were lower ranking members of the police, the military, the security or the paramilitary may have gone to South Africa and to Latin America where for work they protect narcotics bosses. Some are even mercenaries fighting in armed conflicts in Asia and Africa, making them subsequently unavailable to the state police and prosecuting authorities.

3.5 The Circumstances in Which Crimes Were Committed

War crimes committed during the armed conflict prevented the collection of physical evidence such as written reports, crime scene examinations, ballistics and other forensic reports. This caused valuable material evidence to be lost forever because the duration of the war inhibited authorised services from making it to the crime scene and taking investigative measures.

3.6 The Deliberate Destruction and Removal of War Crimes Evidence

The perpetrators of war crimes have systematically covered up evidence of their crimes, of the murder of war prisoners, civilians, the wounded and the war-time sick. Basically the perpetrators have done this by removing bodies, relocating bodies from mass graves to individual graves, burning bodies and by removing and replacing clothing and personal belongings in order to impede the identification process (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013).

For example, there are testimonies of the police and the military stating that the Yugoslav People's Army systematically transported the bodies of Albanians killed during the armed conflict in Kosovo to the Trepca mining complex near Kosovska Mitrovica, where they were burned. According to some estimates by the secret services, between 1,200 and 1,500 bodies were destroyed in this way. However, post-war investigations by the Organization for Security and Co-operation in Europe (OSCE) failed to find evidence of this on the ground. In May 2001, the Serbian government announced that a truck full of Albanian corpses (86 bodies) had been thrown into the Danube River in Serbia during the Kosovo war. In July 2001, Serbian authorities announced they had found four graves in Serbia containing a total of 1,000 Kosovo Albanian bodies. As a witness at the trial of eight police officers for crimes against Albanian civilians during the Suva Reka massacre, Dragan Karleuša, a retired inspector from the Ministry of Internal Affairs of the Republic of Serbia, testified that there are graves containing

the remains of ethnic Albanians in Lake Perućac (Republic of Serbia). So far, about 800 of the remains of Albanians in Serbian mass graves have been exhumed and returned to their families.

Covering up war crimes also occurs by transferring bodies from mass graves to several secondary mass graves, as well as by the systematic destruction of documents describing the involvement in these crimes of certain individuals from the military, the police forces or the political establishment.

3.7 Crimes Committed in Territories outside the Jurisdiction of State Authorities

The collection of evidence is especially difficult because the crimes were committed in territories actually outside the jurisdiction of the state authorities. While it would be normal for the state to exercise criminal jurisdiction for acts committed inside its territory, or for acts committed by its citizens, international humanitarian law provides universal jurisdiction for grave breaches of the notion of war crimes. Thus, this law requires all states to prosecute war criminals regardless of their citizenship, the citizenship of the victim or of where the war crimes were committed does not have its own citizenship. In this region (former Yugoslavia) war crimes occurred, as a rule, inside an area not presently under the jurisdiction of the state authorities; these authorities having the responsibility to conduct proceedings against the perpetrators of these crimes. The witnesses, on the other hand, are usually located outside the state in which the crimes are investigated. These facts point to the need for regional cooperation which would be in addition to the above, and consist of the possibility and the right of a state to carry out certain investigations in the territory of other states in the region. In this way, national authorities competent in the prosecution of war crimes would have free access to the scene, the victims and the witnesses which would be of great value for the effectively resolving these cases.

Regarding war crimes in the former Yugoslavia there is a problem of witnesses' willingness to participate in the process if it takes place in another country. There is also lack of professional support teams for such witnesses. Some countries, however, have entered into an agreement to exchange information and cooperate in the investigation of such crimes. For example, such an agreement was signed by representatives of the Republic of Croatia and the Republic of Serbia. With this agreement, they have committed themselves to exchange information, reports, documents and information assisting in the investigation of war crimes.

The largest obstacle to regional cooperation in these cases is the ban on the extradition of states' citizens between countries in the region. Hence, extradition is prohibited by the laws of Bosnia and Herzegovina, of Serbia and of Croatia. As the suspects often have dual nationality or are foreign, it is frequently impossible to ensure their presence at trial. Therefore, 'a space for impunity' has been created, which of course poses a serious obstacle to justice for many victims.

3.8 Lack of Physical Evidence and the Unreliability of Personal Evidence

The war crimes in former Yugoslavia happened 15 or 20 years ago, and the detection and prosecution of the offenders is only now underway. This has resulted in a scarcity of physical evidence. Given the passage of time, in most cases there is not enough physical evidence showing a connection between a specific person and a specific crime. Corpses are frequently found in an advanced state of decay so that it may be difficult to conclude whether a person died in legal battle or they died as a civilian or a prisoner. Yet a very small amount of physical evidence presents itself in the following forms. Various objects are found in mass graves, such as personal documents, blindfolds and wires used to bind a person's arms, personal items, canned food, and more. Also, there are certain documents that may indicate the identity of the people who were in the camp before they were killed. Then there is evidence that may appear in certain written correspondence between military leaders, as well as transcripts of intercepted conversations between military and police officers. In addition, there are sources of material evidence which can serve as images and photos. In the majority of cases, the most important pieces of evidence are eyewitness testimonies, other witnesses and witnesses who are also victims. However, it should be noted that their view of past events may be unreliable, given the passage of time and the fact that the witnesses of war crimes are often traumatised.

3.9 The Negative Influence of the Media

Many people in the countries of former Yugoslavia are against the trials by the ICTY. In addition, some believe that the suspects from their own countries are heroes or patriots; people who were simply following orders to defend their homeland and their people. They believe that judging these people makes no sense anywhere.

This sentiment is present every day, be it in print, on television, on the Internet, the radio or in other forms. Members of the media may go so far during a trial as to often express their own views and draw their own conclusions on important facts from the legal proceedings. The media may conceal or openly root for its 'candidates' and underestimate the court and the judicial organs. Very often, the media publishes biographies of suspects, depicting the honourable origins of the person's family, the difficulties he or she has had to face in life, or interviews with close relatives in which they praise the suspect as a good and honest person. These pressures and circumstances usually have a negative impact on participants in the legal process; they must resist, remain cool-headed and clear of mind, and strictly keep to the law and the relevant facts. There have also been cases in which the identity of protected witnesses has been revealed by the media. These situations have, of course, a negative influence on the acquisition of new witnesses for the legal process. Other challenges related to the detection, prosecution and trial of war crimes in the Western Balkans involve complications due to the large numbers of victims, offenders and accomplices in specific cases, difficulties pertaining to the

availability of evidence, problems related to intimidation of potential witnesses and, finally, problems with the testimony of victims themselves.

In many cases, witnesses of war crimes from former Yugoslav countries received inadequate protection and, due to intimidation, were reluctant to give their testimony in court. In fact, there have been cases where they changed previously given testimony. Naturally, victims play a crucial role in war crimes proceedings. In interviews with the investigator and by giving their testimony in court, victims contribute to the process of establishing the truth regarding war crimes. This requires considerable courage on the part of the witnesses.

Fifteen years after the war, witnesses are simply less willing to testify, and that is the main problem – many have returned to their homes and are again friendly with neighbours from the other ethnic group. Many victims are reluctant to talk about their war experiences under any circumstances and prefer to move on with their lives. More than a decade since the end of the conflict, many have died or left the country, and the testimony of the remaining witnesses is less detailed and, thus, less useful for the prosecutors. If witnesses are elderly, many have forgotten many details of their experiences; especially if the period from crime to trial is more than 20 years. In the meantime, much has happened in their lives and they choose to forget what they saw. However, it has been noted that some witnesses simply refuse to speak about what they know. Perhaps, this is one form of psychological defence mechanism. Certainly, these people do not want to remember a trauma they experienced 20 years ago and which they no longer wish to be a part of.

4 ALTERNATIVE PATHS TOWARDS JUSTICE

Dealing with a legacy of war crimes and human rights violations is a common challenge in post-conflict societies, perhaps particularly so in the countries of former Yugoslavia. The violent conflicts referred to above, the terrible legacy of human losses and material destruction have contributed to a widespread and across-the-board sense of victimhood on all sides of the different conflicts. In the aftermath of the wars, the trauma seems to live on, cemented in such institutional mechanisms that seek to render justice to the bereaved.

As we have seen, these attempts at providing justice though traditional retributive mechanisms are fraught with several problems – particularly since the ICTY's mandate is about to expire. Additional restorative mechanisms have to be sought and applied if reconciliation and the reconstituted severed relations are to provide the basis for a sustainable peace both inside as well as between countries in the region. A number of restorative justice scholars have argued that criminal justice proceedings are inherently problematic for the victims of the most serious crimes (Zacklin, 2004). They demonstrate the lack of concern in judicial proceedings for the trauma suffered by these victims. "Proceedings are deliberately and strictly centred on someone else: the alleged perpetrator – and not on those who have taken the brunt of the wrong done" (Savage, 2011: 10). Trials are often designed to establish guilt in deliberations between the prosecutor's office, the defence and a judge. In such environments, traumatised victims may find the process as such

unbearable, and perhaps resist an aggressive confrontation with a violent past. However, it should be acknowledged that the application of restorative justice mechanisms may only be possible where a confession is already established (Savage, 2011) or "documents of proven authenticity and testimony vigorously cross-examined and judicially and impartially analysed" (Robertson, 2006: 621).

Since there is no consensus on the causes and nature of the violence committed on the territory of former Yugoslav countries, it should be no surprise that agreement is difficult to find on how to best arrive at a consensus on how to build a common future. Whereas retributive justice is concerned with the past or what has already transpired, restorative justice is mostly concerned with the future. Adopting a 'bottom up' approach, civil society both domestically in the different countries as well as internationally via the efforts of NGOs such as Human Rights Watch and the Helsinki Federation has attempted to address the problem of impunity, both in cooperation with as well as complementary to traditional retributive mechanisms. As we have seen above, the increasing number of domestic prosecutions, including the transfer of cases from the ICTY, has been accompanied by several challenges: politicisation and political interference, selectivity based on the ethnicity of those indicted, together with capacity-related problems, unfair media representations and inadequate protection of witnesses. According to Kostovicova (2013: 104), "civil society has stepped in where the institutional capacity of states have been lacking while continuing to perform a watchdog function in relation to policies awarding impunity, avoiding accountability and marginalizing the victims of mass atrocities".

There is no lack of international involvement in trying to establish democracy, respect for human rights, and the rule of law in Western Balkan countries. The UN, the OSCE, the Council of Europe, and the European Union (EU) have consistently involved themselves in trying to stimulate a peaceful path towards the future. A recent change in EU policy towards the region seems to suggest a combination of 'top-down' and 'bottom-up' approaches to transitional justice and reconciliation in the Western Balkans. The EU may have come to appreciate the relevance of the restorative mechanisms of transitional justice, which prioritise reconciliation and recognition of the suffering of victims, as opposed to retributive judicial mechanisms that have been criticised for their top-down and technocratic approach to post-conflict justice. Ten years after the Thessaloniki Declaration, the debate about war crimes that was initially prompted by the ICTY has been internalised in the Western Balkans, albeit without any consensus on the causes, nature and consequences of the violence, or the redress for past wrongs within or between the states of the former Yugoslavia. This is despite a call made in 2006 by the United Nations General Assembly for verification of the facts and the full and public disclosure of the truth regarding violations of international human rights law and international humanitarian law (United Nations, 2005).

It has been said that the wars in the Western Balkans started at the universities. Nationalist propaganda in both the classroom and the libraries encouraged stigmatisation of 'the other'. All being well, new generations of hopefuls – students and non-students alike– will not inherit the hate of their parents. A combination of means to avoid that is necessary. The shortcomings of the courtroom have to

be complemented by transparent policies and a civil society empowered with the ability to move on – to create a common and inclusive future rather than perhaps dwelling too much on the horrors of the past.

5 CONCLUSION

Based on the foregoing, we may conclude that investigating and prosecuting war crimes in the Western Balkans is a complex job; work that will continue over generations in order to deal with the many war crimes cases that have occurred in the area. To avoid the infamous impunity gap, they should all be thoroughly investigated and their perpetrators adequately punished.

Even though the first investigations started more than 15 years ago, a large number of unexplored and unresolved cases remain. The reason for this is that research of this type of crime is more complicated and difficult than traditional crime investigations. Based on an analysis of the specificity of the armed conflicts in former Yugoslavia, we can conclude that none of the countries involved in the conflict has sufficient technical and human resources to effectively investigate and prosecute war crimes. As evidenced and argued elsewhere, an analysis of statistical data on prosecuted and adjudicated cases of war crimes suggests that the effective investigation and prosecution of these most serious crimes require mutual cooperation between the police and the judicial authorities of the countries of former Yugoslavia.

Considering the existence of armed conflict around the world including the Arab Spring, the conflict in Afghanistan, in Syria, Israel's recent invasion of the Gaza Strip and now the conflict currently taking place in the Ukraine, it is evident that research in the field of war crimes prosecution will continue to be of immense importance. In this regard, the experience of the former Yugoslav countries can be valuable to both domestic and international judicial bodies dealing with such investigations, and for the prosecution of possible war crimes that happened during these conflicts.

Based on the analysed problems judicial authorities face when detecting and prosecuting war crimes in the former Yugoslavia presented in this article, we can draw certain proposals and suggestions that could be underpin strategies for detecting and processing war crimes in future armed conflicts anywhere in the world. These proposals and suggestions would help reduce these factors' impact in hindering the detection and processing of war crimes and thereby make the work of judicial authorities more efficient.

The first and main aspect concerns the existence of institutional mechanisms to work on such a complex type of crimes. This includes the determination of the prosecutor's offices and courts which will be in charge of conducting investigations and proceedings in war crimes cases. Based on the experience from former Yugoslavia, we believe it is justified that for detecting and prosecuting war crimes an international *ad hoc* tribunal should be established, as happened in the case of former Yugoslavia. This is primarily because societies in armed conflict and post-conflict societies, at least in the initial period after the cessation of armed conflict, are unable to adequately respond to the problem of solving war crimes.

Therefore, we believe that in any case it is appropriate that the prosecution of persons at the highest levels of responsibility should be performed in front of an international *ad hoc* tribunal and only for as long as a stable justice system has not been established at the national level in countries where the conflict occurred, and then all the processes should be transferred to the national judiciary. We believe that the countries that were in conflict thereby demonstrate their strength and determination to punish those who committed war crimes, which is a*conditio sine qua non* for establishing reconciliation among peoples who were in conflict, and confidence in the state judiciary, which will be discussed in the second part of the conclusion. When we speak of the organisation of the judiciary dealing with the detection and prosecution of war crimes at the national level, in this paper we can see three different types: In Bosnia, where only 'sensitive' crimes are within the jurisdiction of the special court and the prosecutor's office, while the other cases of war crimes would be prosecuted at the district level. Then in Croatia where this is placed under the jurisdiction of the ordinary district courts in four cities, and in Serbia where a special court and special prosecutor's office are established whose jurisdiction relates to investigating and prosecuting all war crimes that were committed in these regions.

Each of these options has its own advantages and disadvantages. However, we consider that work on these types of crimes in post-conflict societies should in no circumstances be in the jurisdiction of the ordinary courts and prosecutor's offices; instead, a special law should establish a special prosecution office and a special court for investigating and prosecuting these crimes at the national level. This is because work on this type of crime is very demanding and requires the mobilisation of all resources, and regular courts and prosecutors are overburdened by other cases that do not fall within the scope of war crimes, and are therefore unable to engage fully in these cases. Also, we believe that the concept whereby several courts in the same country are in charge of resolving war crimes is wrong because it allows for variation in implementing the provisions of substantive criminal law on war crimes. Therefore, we suggest as the most effective solution, which is implemented in the Republic of Serbia, the adoption of a *lex specialis* law on establishing a so-called Special Prosecutor's Office and a Special Court for war crimes.

Moreover, these institutions should be technically well-equipped for such trials, especially for the protection of witnesses. In addition, the headquarters of these institutions should in no circumstances be in an area that was affected by the armed conflict, but should be located outside. In the case the entire territory of a country was affected by the armed conflict, the headquarters of these institutions should not be situated in areas where the crimes were committed, but in areas where conflicts and therefore the crimes were minor. We believe the practice of locating special courts and prosecutors' offices in the capital, as was done in Bosnia or Serbia, is wrong. We think that the seat of such specialised judicial bodies should be somewhere in the province, mostly in cities characterised by a high degree of multiculturalism and interculturalism. This is because in such places the prosecutor's office and the court should be under less public pressure and negative media influence, while in the capitals they cannot avoid that.

Specifically, the capital cities in the Balkans, as a rule, are places that carry the most votes, and all political options are competing for influence over voters in capital cities. And one of the ways is to stir up the public and incite protests and riots whenever proceedings for war crimes are initiated against someone which they are trying to present as a 'patriot' and protector of their people. We think that in smaller and more peaceful political environments the functioning of special prosecutor's offices and courts would be under less public pressure.

Another problem for the judicial systems of these states has been the lack of staff. We think that it is crucial that, even when conflicts persist, through international cooperation foreign experts with experience in investigating these types of crimes should be engaged. In this way, their direct participation in the investigations represents important expert help for domestic investigators or prosecutors. In addition, we believe that so-called special courts, especially in the case of civil armed conflicts, as happened in the former Yugoslavia, at the national level at least in first period should have an international component, or that Chambers at trial and on appeal consists of two international judges and one local judge, who is also the president of the council. This would thereby overcome the problem of the lack of judges specialising in this type of crime on the one hand, and ensuring the principle of objectivity, when the accused is a person belonging to a minority ethnic group, on the other hand.

Further, a necessary condition for the effective detection and prosecution of war crimes is the existence of a witness protection programme. Witnesses provide crucial evidence and this paper has outlined what kinds of problems can make witnesses of war crimes refuse to cooperate with domestic criminal justice authorities. In this sense, it is necessary to develop a stable system of witness protection, chiefly including secure physical protection. This means strict rules for selecting persons to work in a special unit for providing protection to witnesses should be laid down. In such units, only those persons without any involvement in the armed conflicts should be selected. Moreover, through legislation and international cooperation agreements conditions should be created for engaging members of foreign security service to provide witness protection. In addition, the necessary international cooperation would be reflected in facilitating the placement of witnesses in the territory of another country pending trial. It should also be taken into account that most witnesses of war crimes come from a small community where it is not difficult to notice someone's absence for several days, which may affect that person's labelling among the public as a protected witness. Therefore, in such cases it would be most appropriate to obtain testimony by a video link. Also, we can see there is a serious problem in connection with disclosing the identity of protected witnesses. We consider that countries *de lege ferenda* should strengthen witness protection by codifying a particular criminal offence of disclosing the identity of a protected witness and related punishment. We believe that where such an act and harsh penal policy have been prescribed, witness protection has been more effective.

In this article, we have described attempts at the post-conflict administration of justice related to the most serious violations of international humanitarian law in Bosnia and Herzegovina, Serbia and Croatia since 1992 until today. After broadly

outlining the different judicial mechanisms at play before both the ICTY and the domestic courts of former Yugoslav countries, we suggested that if reconciliation and reconstituting the severed social relations between different ethnic or religious communities are important goals, then the retributive mechanisms of administrating justice will not suffice.

Punishment and reconciliation are closely linked. As Arendt (1958: 241) put it, "men are unable to forgive what they cannot punish and are unable to punish what turns out to be unforgivable". More recently, one has come to recognise that the purposes of trials should go beyond simple retribution and vengeance (Minow, 1998).

Although essential to combat the tendency of denial, legal proceedings are, as we argued above, are insufficient. This is not least due to the identified judicial process shortcomings such as limited prosecutorial resources, deliberate destruction and removal of evidence, the negative influence of the media and, finally, perhaps the problems related to potential witness intimidation and opportunities to protect them.

In a recent policy brief note, Stahn (2015) attempts to move beyond the retributive vs. restorative divide, suggesting that a more appropriate emphasis on reconciliation by way of argument in legal discourse should depend on the context. He seems to suggest that such an emphasis should be more pronounced after identity-based conflicts of the nature we have focused on here. In such cases, the victim's suffering should be brought forward at the expense of more formal forms of accountability. By focusing more on the suffering of the victim rather on the harm done by the offender, positive community relations may be restored more easily – not on the basis of vengeance but on a platform of empathy.

Stahn (2015) demonstrates how the acknowledgement of guilt through guilty pleas has been used as means for reconciling punishment with acknowledgement of wrong as an apology to both the victim and society as such. However, as he states, such admissions should not be taken at face value: "… Mrs Plavsic's guilty plea in 2003 was initially heralded as a significant move towards the advancement of reconciliation" (Stahn, 2015: 3). However, after sentencing, she changed her mind, retracted her guilty plea and her expression of remorse. This experience demonstrates, according to Stahn (2015:3), the fragility of negotiated justice. "If an apology is offered in return for sentence leniency, it might not benefit reconciliation".

Clearly, if one is to go beyond recent practice in international criminal prosecutions, not only should the retributive vs. restorative divide be addressed, but so too should the ideological divide between 'the West and the Rest'. One should move beyond the symbolic nature of an internationalised criminal tribunal and face real challenges such as those presented, for example, by the African Union, as far as both case selection and exceptionalism are concerned.

An increasingly sophisticated application of international criminal law needs to address – like it or not– both the societal and political consequences of its administration. If not, we may see the demise of the new and still emerging international criminal order.

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