

Lunds Universitet
Statsvetenskapliga institutionen

STVK11
Vt 2011
Handledare: Ted Svensson

The Quest for Retributive Justice

A study of the international community's efforts in punishing war criminals in
Bosnia-Herzegovina

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Abstract

The war crimes committed between 1992 and 1995 in Bosnia-Herzegovina have mainly been under the jurisdiction of the legal systems set up by the international community. To solve the atrocities of the past, institutions like the ICTY and the WCC were set up. But to this day there is estimated to be thousands of direct perpetrators still walking free in and around Bosnia-Herzegovina. The purpose of this study is to see exactly how this search for justice is progressing and what is preventing it to operate more efficiently sixteen years after the signing of the Dayton Peace Agreement. By analyzing the main international strategies in dealing with retributive justice, namely the ICTY in The Hague and the WCC in Sarajevo, I conclude that there have been consequences to the internal legal structure of Bosnia-Herzegovina and a general negative perception among the victims of the war on the attributes of retributive justice.

Key words: transitional justice, retributive justice, the ICTY, the WCC, Bosnia-Herzegovina

Words: 9002

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Abbreviations

BiH	Bosnia and Hercegovina
CPC	Criminal Procedure Code
DPA	Dayton Peace Agreement
EU	European Union
HRW	Human Rights Watch
ICTY	International Criminal Tribunal for the former Yugoslavia
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OHR	Office of the High Representative
OSCE	Organization for Security and Co-operation in Europe
PIC	Peace Implementation Council
RS	Republika Srpska
SCR	Security Council Resolution
UN	United Nations
UNDP	United Nations Development Programme
WCC	War Crimes Chamber

1. Introduction

In 1995 the Bosnian war came to an end when the leaders of Croatia, Bosnia-Herzegovina (Bosnia) and the former Yugoslavia signed the Dayton Peace Agreement (DPA). The peace agreement was initiated and created by the international community led primarily by the UN Security Council, the Peace Implementation Council (PIC) and NATO but the majority of the annexes that constitute the DPA, were not related to the ending of hostilities but rather the political project of democratizing Bosnia. The eleven annexes gave effective power over the Bosnian state to institutions of the international community; these powers cover the entire range of government functions usually associated with an independent state, including the highest levels of military, political, judicial and economic regulation (Chandler, 2000, p.43ff).

Accordingly then, the formal decisions to refer Bosnian war criminals to the ICTY in The Hague (UN SCR 808), and later to the WCC in Sarajevo (UN SCR 1503) were made by the international community. The consensus among the contributing parties, as well as a large part of the civilian population in the Balkans, was that the atrocities committed during the war need accountability if justice and respect for the rule of law is to be established in Bosnia (HRW, 2006, p.1). The strategy that was outlined dictated that the international trials in The Hague prosecute high-ranking perpetrators while delegating to the WCC in Sarajevo and the entity courts of Bosnia the authority to prosecute the lower ranking suspects (Subotic, 2009, p.135).

While the Dayton peace process did bring an end to the war it also wanted the Bosnian state to remain more or less intact (Subotic, 2009, p.156f, Chandler, 2000, p.39f). This decision meant that practically all the wartime institutions of legal force (police officers, military personnel and intelligence services) remained unchanged (ICG, 2005, p.i) to only be reformed if the Office of the High Representative (OHR) finds it necessary (DPA, Annex 10). By an estimate this could implicate that thousands of war crime suspects walk around freely in Bosnia. In the Srebrenica massacre list alone are the names of more than 17 000 Bosnian Serb soldiers, police officers and officials suspected of involvement in the killings who still have not been taken into questioning (HRW, 2006, p.14). This has not gone unnoticed as one Bosnian Serb human rights activist sums up: “We live with the former war criminals; we see them every day in the streets” (Quoted in Subotic, 2009, p.156f).

The challenge of dealing with the violent past in Bosnia touches on different aspects of justice and human rights; how to bring criminals to justice, how to give war victims and survivors justice, how to build a war torn society and how to build trust among the public.

The framework in which these questions are managed is called transitional justice and includes more concrete mechanisms such as war tribunals, truth commissions, financial compensation and memorials for victims but also by establishing democratic institutions in order to avert future conflicts (UNDP, 2009, p.4).

Transitional justice can thus be explained as a justice specially adapted for societies going through social changes after a period marked by grave breaches to human rights, the transitional justice mechanism that specifically handles the punishment of perpetrators is called retributive justice (Teitel, 2000, p.27f) and its practice in Bosnia will be the focal point of this study.

1.1 Aim and Questions

The aim of this study is to analyze the efforts and activities implemented by the international community on retributive justice in Bosnia-Herzegovina in order to understand the disrupters in the retribution process. Since the country is governed according to the Dayton Peace Agreement, the effects of this document on post-war criminal law are at the core of this analysis. By looking at the most prominent and controversial of these, namely trials of domestic, international and hybrid character I aim to answer the following question:

What formal institutional problems exist in Bosnian retributive justice and how do they constrain the justice process?

1.2 Delimitations

The search for justice in post-conflict regions can be administered through many different procedures and routes. There are activities by civil groups and strictly national ventures that also are available in dealing with the past. However, in this study I have chosen only to concentrate on official initiatives and government institutions activities, whereas the bulk of

de facto judicial power lies with the international actors such as the OHR in Sarajevo and the ICTY in The Hague. The state of Bosnia-Herzegovina is thus differently managed than its neighbors and acknowledgment of this fact is important as it constitutes a change in perspective of analysis. In a study like this the most preferable method would have been to directly observe and perform interviews with the involved parties, victims, civilian groups and legal staff on location. As this path has not been available, I have had to rely on other sources for this task.

1.3 Method and material

This study uses qualitative methodology and will focus on case studies of the ICTY and the WCC in Bosnia which were created by the international community to bring retributive justice to the former Yugoslavia. According to Robert K Yin, case studies are preferable when one is analyzing contemporary processes and when one cannot control the relevant variables. A case study is an empirical research that analyzes a contemporary phenomenon within its real context, where the boundaries between phenomenon and context are diffuse and where different sources are being used. A study like this is non-experimental so the researcher cannot separate the variables from the context or from the current situation (1994, p.13ff).

Is it sufficient to draw any conclusions on retributive justice in Bosnia by simply analyzing the ICTY and the WCC? I believe that so may be the case since so much effort and resources by the international community have been put on these courts and that they clearly constitute the only serious options to date to deal with war criminals in Bosnia (Subotic, 2009, p.163f).

Although the thesis in large parts can be seen as judicial it still has relevance to the field of political science, as the study of power lies in the heart of the political field (Hay, 2002, p.64f). The decisions and top-down structure of the international community's presence on Bosnian retributive justice thus becomes highly relevant for a political scientist.

The research relies heavily on the theory of transitional justice and from there are the international norms and mechanisms of retributive justice that influence the forces in charge utilized. Results of a scientific analysis that uses a theory as its main tool can be generalized into applying on other cases and this is certainly true with theory testing analyses where the

theory is at the centre of the study. However, here the case of Bosnian retributive justice is at the centre of the analysis with the transitional theory only having a supplementary role, giving understanding to a specific situation that cannot sufficiently be generalized further (Esaiasson et.al, 2005, p.98).

The theoretical framework is then used in the empirical research to understand the factors in charge of implementing the judicial systems in place. The idea of transitional justice itself is a multifaceted one which has four dimensions; retributive, restorative, truth commissions and reparation (Bloomfield ed, 2003, p.94f). Among these the trend, in the Western world especially, has been towards a retributive position where the centrality of it is that perpetrators must receive fitting punishments (Bloomfield ed, 2003, p. 97). Since the line of retribution has been the main approach of the international efforts in dealing with war crimes in Bosnia, it will quite naturally be the most interesting and relevant one to focus my attention towards. The practice of an intensive study allows for greater depth to be made on the chosen variables and research of their different aspects can become more thorough (Teorell and Svensson, 2007, p.80).

The empirical research will depend on secondary sources in form of official reports by among others Human Rights Watch, Amnesty International, UNDP in Bosnia, OSCE and scientific articles by various authors in the transitional field. One might question the use of reports by the UNDP in Bosnia and the OSCE in an analysis that studies the international community's effects on Bosnian retributive justice, but it shall also be noted that these institutions conduct valuable research with a mix of international and domestic analysts. Their main strength is their direct access to the judicial institutions where they conduct research on the standard and complaints of the courts. This has been done for example by interviewing Bosnian judges and prosecutors in Sarajevo and in the cantonal and entity courts. This direct access to the individuals within Bosnian law who practice the retributive principles regularly comprises as a very important source of knowledge.

One author in particular shall also be mentioned, Jelena Subotic, a political science professor at Georgia State University in the U.S.A with roots in the Balkans. She has had useful input on this subject with her book "Hijacked Justice" which is a comparative analysis between Croatia, Serbia and Bosnia with much of the research being carried out in the region. Her interviews in contrast to the majority of the UNDP's and the OSCE's have been

conducted with the civilian population. In addition, trial cases directly from the ICTY and the WCC have been used in order to concretize the principles of retributive justice.

I have also chosen to include quotes from war victims themselves when I have found it to be suiting in the context to further understand the complaints towards specific judicial situations and mechanisms. Due to language restrictions I am confined to the quotes and translations of others and the voices of the highly observed NGO "Women of Srebrenica" have therefore been used for this cause.

In order to understand how the Bosnian war crime judicial system operates it is also important to clarify the relevant structures which it adheres to. It is therefore necessary to present the Dayton Annexes that have contributed to the shaping of Bosnian retributive justice, in particular the principles of Annex 10 article II, which gives immense authority to a single representative of the international community.

1.4 Disposition

The last page of this thesis consists of an appendix with the relevant formal authorities of the OHR and the political structure of Bosnia-Herzegovina which is included to further detail the rather complex nature of the Bosnian state. Chapter 2 is a theoretical introduction to the concept of retributive justice and the mechanisms attached to it. The judicial analysis will then start in chapter 3 with a detailed look of the ICTY in The Hague and how it functions and is perceived by the victims. The same line of approach is then taken in chapter 4 with the WCC in Sarajevo and the local entity courts. In Chapter 5 the thesis ends with a discussion and conclusion on the findings of the analysis.

2. Theoretical Introduction

The principle of transitional justice is based on procedures that are carried out when a society is aiming to surpass a recent violent past (Kaminski and Nalepa, 2006, p.295). By implementing transitional justice the injustices of the past are highlighted and thus function as a collective memory for a society in rebuilding and remembering (Ahtisaari, 2004, p. xv). This can be done by both formal and informal actors to bring war criminals to justice and bring justice to their victims (Kaminski and Nalepa, 2006, p.295). The retributive aspect of transitional justice brings up questions that post-conflict societies may find uncomfortable yet essential to deal with; should one punish or give amnesty? Who is directly responsible for the atrocities done? To what extent is responsibility for war-crimes given to the individual in contrast to the collective (Teitel, 2000, p.27)?

There are some important questions that ascend once the path of retroactive criminal law is taken; does one take the civilian or military court options? International or domestic trials? How far back in the chain of command must the prosecution go? (Teitel, 2000, p.27). There are no exact blueprints for these types of situations and as Martti Ahtisaari points out; “the path from the opening of a mass grave to proving a political leader responsible is long and complex and success is by no means ensured” (2004, p. xv).

2.1 Retributive Justice

In order to restrict the possibility of victims taking the law into their own hands criminal prosecution can ease social and political disturbance and in doing so the return to power of war-time perpetrators can also be protected (Bloomfield ed, 2003, p.98). This implicates that societies that are trying to get rid of their evil heritage are benefited by post conflict trials because they assist in laying the foundation of a democratic road (Teitel, 2000, p.28).

On a normative basis transitional retributive justice functions as a morally corrective mechanism against perpetrators who have done unacceptable actions against the society in question (Hoogenboom and Vieille, 2008, p.17).

However, Ahtisaari argues that the purpose of a trial is not simply to prosecute and sentence a suspect. Trials must include the possibility that the suspect may be acquitted otherwise the trial just becomes a symbolic gesture aimed to ratify an already pre-determined

opinion (2004, p. xvi). It is also believed that for the sense of justice being done it is not fully sufficient that the suspect is guilty of the charges he/she stand on trial for. It is almost equally important to have proven this guilt without a reasonable doubt by implementing the rule of law mechanisms such as collecting and presenting evidence while allowing the defense to take part in these and cross-examine potential witnesses (Thakur, 2004, p.279).

Teitel writes that it is essential that trials are performed accordingly with the level of lawfulness that exists in consolidated democracies. If they are not performed in a visibly just way the same trials may risk sending out the wrong signals of political injustice and threaten the wobbling first steps of the new state (2000, p.30). How essential the public confidence in the state is, can be seen in many Latin American countries where the choice to not prosecute the past wrongdoings of the 1970's and 80's have created public feelings of distrust toward their respective political systems (Bloomfield ed, 2003, p.98).

2.2 The Question of Impunity

It is not always certain that the pursuit of peace and reconciliation is in line with the pursuit of justice (Teitel, 2000, p.51). So how does one unite the goal of securing peace with the goal of achieving justice?

One of the harsher facts about justice in most post-conflict societies is that gross atrocities have a tendency to go unpunished and unacknowledged (Bloomfield ed, 2003, p.108). But the use of punishment or the lack of gets a different significance than it would in a "normal" lawful state. To punish someone for a crime is the correct thing to do in stable society but is not always the evident thing to do in a post conflict society (Teitel, 2000, p.28).

This kind of dilemma between peace and justice takes on many faces whether they are associated with war, other forms of conflict or a regime change. The Balkan-conflict highlighted one of the problems that arise when peace and justice are sought to be united in post-conflict societies. The paradox became evident when international prosecutions were charged against the Bosnian-Serb leader Radovan Karadzic and his highest commander Ratko Mladic at the same time that their cooperation was sought after during the U.N peace negotiations. On one hand the international community could not let it seem as justice succumbed to politics, thereof the prosecutions, on the other hand if the negotiations had culminated in amnesties it would not have been a strong democratic start to the transitional process (Teitel, 2004, p.51).

The most used cause of impunity, as was the case with most post-transitional Latin American countries, is what is referred to as amnesty legislation which states impose as an act of forgiving and moving on (Bloomfield ed, 2003, p.108). But this is a very uncertain mechanism for post-conflict states to use as it often obstructs the healing process. It is said to be avoided to the last minute, however if circumstances require it to be used to reach a fragile peace settlement then it becomes the final option on the table (Bloomfield ed, 2003, p.110). Impunity may also be an act of conformity. Criminal courts are not adapted with the resources for the sheer numbers of prosecutions that war crimes bring with them. There is the risk that only a small amount of offenders will be prosecuted which may jeopardize the transitional justice process (Bloomfield ed, 2003, p.105).

Thus, the use of plea bargains becomes theoretically motivated with its time-saving function as judicial processes can move on to trials of higher ranking perpetrators. Also, if a plea bargain can reduce an indicted person's sentence it is believed that this may work as an incitement for other suspects to step forward and cooperate with the tribunals. In using this controversial method societies can get a sense of closure as guilt is admitted and adds to the healing process in the form of the necessary step of truth-telling (Meernik, 2003, p.152).

The normative claim that punishment advances the rule of law does not necessarily justify punishing every perpetrator according to Teitel. She explains that the democratic principles can be defended and the rule of law maintained even through the use of selective prosecutions (2000, p.40). In this way one can imagine that a certain level of selection is beneficial but it is indeed a very thin line. The risk is that through selection undermine the democratic mechanisms of fair trials and instead convey an almost indifferent feeling towards political justice (Teitel, 2000, p.40).

2.2.1 Individualization of Guilt

The importance of not judging an entire ethnicity for the wrongdoings of certain individuals can have a major impact on the reconciliation process; therefore some theorists argue that it is of the uttermost importance to create a judicial environment where guilt is individualized (Hoogenboom and Vieille, 2008, p.17). The shift from state-centered responsibility to an individual one in international human law has indeed become more than a

theoretical vision and individuals can no longer use the state sovereignty as a judicial shield (Wladimiroff, 2004, p.111).

In an effort to prevent future abuses of human rights, prosecutions can serve as the most liable option to break the cycle of impunity (Bloomfield ed, 2003, p.98). Others see the primary purpose of a trial as the standard setters of a new establishment of rules which value democratic principles such as fairly conducted trials. Although individualization of guilt is admitted as an important feature to consider, in this perspective the procedure of the trial becomes more important than who is prosecuted, no matter the rank of that individual (Sa'Adah, 2006, p.308).

2.3 National vs. International

Should the next step in retributive justice be in the national or the international forums?

The core of this question is how one perceives justice in the context of a massive normative shift. The problem, according to Teitel, can become less of a burden within international law because this forum offers a level of continuity in law and especially in accountability. The establishment of international legal norms after World War II is assumed to offer a legal foundation that goes beyond that what the domestic transitional law can offer (2000, p.34).

Traditionally the prosecution of criminals has been in the realm of the national state but the type of grave violations that humanitarian law deals with has made war crimes a universal matter (Wladimiroff, 2004, p.111) Therefore many post-conflict societies rather turn to external actors during the critical transitional period and the strength in doing so Teitel explains lays in its all-embracing capacity to understand and evaluate political violence outside the frames of normal law and order. This is best suited in the external forum but at the same time it is said that the very same strength also can be its weakness due to its framework operating outside the conventional law and thus creating a liability for the acceptance of the rule of law in a democratic transition (2000, p.30f).

The internationalization of transitional law may obstruct the norm changing process of a war-torn society because the venues for the tribunals are usually located far away from the actual location of the crimes in question. Added to this may be the unwillingness of the international judiciary to adapt in some measures the general political and cultural law

traditions of the country in focus. What this entails is that it is considered beneficial to include the victim's culture and customs, to certain degrees, in the international rule of law (Sa'Adah, 2006, p.308).

The international forums are credited for supporting the rule of law while at the same time striving to uphold a high degree of justice and impartiality (Teitel, 2000, p.34), but others are not equally assured that international justice is the winning way for peace and reconciliation. The critique is not against the benign legal results that can be obtained at trials such as in Nuremberg 1945-46 and The Hague but rather if these events can create the rule of law within a nation. The proceedings by the ICTY in the Netherlands, although in the service of humanitarian law, are said to not singlehandedly be able to create a Bosnian rule of law as this should be preserved for Bosnian institutions themselves (Hoogenboom and Vieille, 2008, p.11).

To be followed:

The study proceeds in the next chapter to analyze the retribution process as it is conducted by the ICTY in The Hague. An overview of the perceptions and mechanisms of the Tribunal's work in dealing with the highest ranking perpetrators will be the focal point.

3. International Retributive Justice

3.1 The ICTY

The ICTY has been the main apparatus of contesting the culture of impunity in post-war Bosnia (Zupan, 2007, p.338) and it has been of major importance in creating individual responsibility for war crimes (UNDP, 2009, p.17). One can look no further than to the words of the first ICTY president Antonio Cassese to understand their standpoint on this issue:

“If responsibility for the appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminals” (icty.org¹).

The conviction of the high profile military commander Radovan Karadzic demonstrated the actual implementation of guilt individualization as he was indicted as an individual responsible for atrocities committed towards Bosniaks, instead of the condemnation of the entire Bosnian Serb population (Hoogenboom and Vieille, 2008, p.17).

By eradicating negative stereotypes one takes away the collective guilt that might be perceived on a whole community (Bloomfield ed, 2003, p.98). Instead the responsible individuals are prosecuted which in theory at least should prevent any ethnic group to be blamed or vengeance being sought (Meernik, 2003, p.151).

It is generally considered, even within Bosnia, that without the ICTY the transitional justice process by the Bosnian government would not have initiated any serious attempts at war crime prosecution. Thus it is generally credited for its catalyst effect and certainly this is a belief that the Bosnian elites and victims groups hold more than any other in the country. Due to this group's exposure to the highest number of war-crimes committed against it was no surprise that the ICTY was greeted with enthusiasm among the majority of Bosniaks (Subotic, 2009, p.132). But this feeling would not last as the Tribunals work, among other things, has been plagued by a lack of informative outreach to the broader population leaving room for media distortion by each ethnic grouping who wish to put forward their own agendas (Zupan, 2007, p.338).

3.2 Ethnicity and its impact on the ICTY

As one of the main catalysts of the war, ethnicity remains at the heart of the complaints against the ICTY. While the Croats and Bosniaks with time have become increasingly disillusioned with the international justice process, the same cannot be said about the Bosnian-Serbs. This group has from the start been very suspicious towards the ICTY and have accused the institution of discrimination (Meernik, 2003, p.147) and as the high numbers of Serbs indicted and prosecuted (over 60 % of total indictments) can show there is a point to this claim (icty.org²). Having in mind that the same actors who intervened in the war against the Serbs are the same actors who are behind the creation of the ICTY, it is stressed by them that the good and the bad sides have already been decided (Meernik, 2003, p.147).

The neutrality of the international community may be questioned due to their above mentioned role in the war, as the principle of fair and balanced trials may be experienced as complex and diffuse (Zupan, 2007, p.339). Although a valid point as Subotic points out, the vast amount of civilian casualties were Bosniaks (2009, p.132), and a closer look at the ICTY system show that measures have been taken to at least present a balanced and impartial legal system. For example, of the 28 permanent and ad litem (refers to a judge who participates in only a particular case or a limited set of cases) judges at The Hague who currently serve only 12 are from NATO countries with the president and vice-president being from Jamaica and South Korea respectively, making claims of bias hard to support (icty.org³). The ICTY statute Article 13 even requires that:

“The permanent and ad litem judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law” (icty.org⁴)

There is said to exist a great deal of suspicion between the two entities in Bosnia and this fact has not been positive for the way the ICTY’s work has been perceived. In addition to the previously mentioned media’s sometimes inadequate or negative portrayal of the ICTY’s work, there is also the involvement of the political elites in the country, who depending on

their loyalties are not strangers to either diminish crimes against them or claim that they are being persecuted (UNDP, 2009, p.17).

The rift between the two entities has further widened due to this window of transitional opportunity, political elites find it easier to attack each other and denounce each other's credibility at the expense of the ICTY. The Bosniak leadership, for example, has often done this by pointing out the Republika Srpskas inability to do their part in the justice process and thereby pushing for their own claim of bringing the justice process to Sarajevo (Subotic, 2009, p.136).

The RS on the other hand are quick to use any backset as an excuse to break out of the Federation and call for independence, as the prime minister of the entity Milorad Dodik told BBC in February 2010: "I still believe this is a virtual, pointless country, only sustained by the international community....if we can't find ways of making this a functional country, we shouldn't rule out peacefully talking about partition." (BBC, 2010).

3.3 Trial Mechanisms

The model for the international community in administering retributive justice has been based on a Western liberal approach (Hoogenboom and Vieille, 2008, p.18). But in a society that is to a large part conformed by ethnicity there is a sense of great disappointment with the ICTY, especially among local transitional justice activists and victims in Bosnia (Subotic, 2009, p.132). The critique has primarily been with the use of the Anglo-Saxon trial system that seems unaccountable to the Bosnian population in general. The core of suspicion towards this system lies with the involvement of appeals and guilty-pleas that are legal terms which many victims and survivors have found offensive (IWPR, 2010).

3.3.1 Appeals

The Trial of Radislav Krstic

The Bosnian-Serb Army's Chief of Staff during the war, Radislav Krstic, initial sentence by the ICTY was set to 46 years in prison. The charges against him included genocide and complicity to commit genocide in conjunction to the Srebrenica massacre. After taking his case to the Appeals Chamber in The Hague the conclusion would turn out to be a different one. Although the Appeals Chamber admitted to the severity of the crimes committed and

acknowledged that genocide did in fact occur, it would overrule the initial sentence by altering the level of responsibility ascribed to Krstic. The Chamber concluded that Krstic was not a principal perpetrator, or rather “he lacked genocidal intent” (icty.org⁵), but he was instead guilty of aiding the genocide, basically meaning that a reduction of sentence would follow.

The verdict was reduced by 11 years, a verdict the Appeals Chamber justified with having put into account the sentencing practice of the former Yugoslavia where the judicial praxis was that a person who aided a principal perpetrator to commit a crime, could be given a lesser sentence than the principal perpetrator (icty.org⁵).

A member of a victims group by the name of the Srebrenica Womens Association explained how she felt towards the decision, a sentiment that is considered to be rooted among many Bosniaks in particular:

”Any sentence shorter than a life sentence for a criminal such as Krstic is unacceptable for us. Of course no one listens to us. We are so disappointed with the Hague Tribunal and unhappy with their sentences” (Quoted in Saxon, 2005, p.564).

But there are those who disagree. Theorists like William Schabas argue that sentences like Krstic’s are even harsher than those enforced in the former Yugoslavia’s penal code where the maximum prison sentence was 20 years, “anything longer being considered cruel, inhuman and degrading” (2004, p.162).

The controversy that the often reduced sentences bring about could be explained partly by the fact that the ICTY did not prioritize to educate the Bosnian society about the way it works and about international war crimes jurisprudence. An effort to translate and explain its legislative act and rulings into the local language took several years during which time the informative duties on the ICTY’s work were in the hands of the local media (Subotic, 2009, p. 133).

3.3.2 Plea Bargains

The use of plea bargains involves two factors; a retributive and a restorative. The purpose of the retributive aspect is to punish a committed crime in order to prevent such criminal behavior in the future and in so doing, impose a moral balance in society (Bloomfield ed, 2003, p.97). Meanwhile restorative justice is based on three principles, namely that the convicted person fully understands and accepts the consequences of the criminal acts he has committed, that the convict show remorse and is willing to assist in repairing the harm afflicted and that he fully accepts the punishment. If these principles are fulfilled then he can be entitled to reach a bargain for an earlier release as these types of cooperation is thought to benefit the reconciliation process (UNDP, 2009, p.17).

The Trial of Zelenovic

Dragan Zelenovic, a commander in the Bosnian-Serb Army, was prosecuted by the ICTY on charges of torture and rape under the classification of crimes against humanity, of which he pleaded guilty to. The severity of Zelenovic's crimes was taken into consideration in determining the appropriate sentence, as a commander with a great level of responsibility he who took direct part in multiple rapes and acts of various tortures on the civilian population. But the trial also acknowledged the fact that Zelenovic had admitted his guilt and readiness to take full responsibility for his actions (icty.org⁶).

The Trial Chamber, in its verdict, went on to explain the effects a guilty plea has on establishing the truth and thereby contributing to the reconciliation process, while also saving the victims from the pain of having to testify and thus reliving their trauma. The time and effort that Zelenovic had saved by pleading guilty was also acknowledged including the importance that his evidence and cooperation on other cases would bring (icty.org⁶).

The general practice of law in the former Yugoslavia was once again mentioned in the verdict as also having played a part in figuring out the appropriate punishment and subsequently in 2007 Dragan Zelenovic was sentenced to 15 years in prison for crimes against humanity according to article 5 of the ICTY Statute (icty.org⁶).

However, article 28 of the same statute explains that:

“If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned

shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law” (icty.org⁶).

Zelenovic was sentenced to serve his time in Belgium, a state that gives its prisoners the right to file for an early release once a third of the sentence has been served. Since he was in custody from 2005 and that time is included in the total time of the verdict, he was eligible for such an approach in May of 2010. The state of Belgium informed the Tribunal, according to the Statute, and as the final authority on the matter the Tribunal's President in June of 2010 decided against an earlier release on this occasion. Although it shall be noted that nothing in the local law of Belgium restricts Zelenovic from trying again (Bim, 2010).

The general feeling towards plea bargains have mostly been negative among the majority of all Bosnians (UNDP, 2009, p.17, Subotic, 2009, p.132), noting that the Tribunal does not implement a fair level of balance in weighing admission of guilt with the seriousness of the criminal offenses, suffering of the victims and the level of responsibility of the offenders. The degree to which an admission of guilt can assist in restorative justice is believed to not justify the sentences to date where a plea bargain has been taken into account. Neither have the perpetrators manifested in any satisfactory way their remorse or willingness to participate in any trust and reconciliation activities after completed sentence, according to the victims (UNDP, 2009, p.17).

The Srebrenica Women's Association once again have put into words the general feeling of discontent in a striking way:

“If a criminal who is being tried just admits that he committed crimes, he is forgiven for half and gets a minimum sentence. Thus, we really do not expect justice from them” (Quoted in Saxon, 2005, p.564).

To be followed:

The strategy of the international trials has been to prosecute high-ranking perpetrators. The strategy for the courts in Bosnia however has been to let them handle the low-ranking (although sensitive) cases, a move that has proved to be unpopular among survivors of the war as the next chapter will discuss.

4. International/National Retribution

The war had seriously damaged the Bosnian legal system as it left the country with a loss of skilled members of the judiciary and the destruction of necessary facilities, making the courts duties even harder to fulfill. Within the domestic trials there were reports of bias of judges and prosecutors, unprofessional case preparation and a very limited witness protection system (UNDP, 2009, p.18). As a clear and apparent flaw in the quest to end the widespread impunity of war crimes, the leading actors in charge realized something had to be done on the domestic front (HRW, 2006, p.7).

Thus in 2005 the step taken by The Hague Tribunal and the OHR, under instructions from the UN's Security Council, was to create a special War Crimes Chamber, an institution designed for serious war-crimes cases in Bosnia and operating within the State Court of Bosnia and Herzegovina (UN SCR 1503).

The new institution was presented as serving as both a way of dealing with war crime cases and as part of the international community's exit strategy while emphasizing that accountability and responsibility eventually would come to be in the hands of the Bosnian people (UNDP, 2009, p.18ff). The resolution also pointed out that rebuilding the judicial capacities in the region was part of The Hague Tribunals responsibility, letting the ICTY focus on high level perpetrators so that national judicial systems could focus on mid- and lower level war crime suspects (UN SCR 1503).

This action proved to be a welcomed one by a large section of the international justice organizations to come to terms with the malfunctioning domestic trials and the seemingly remote ICTY events. Having the proceedings close to home also meant concurring with the victims in Bosnia and their call to focus more on mid- and low-level direct perpetrators of war-crimes in their own backyards (HRW, 2007, p.21). The international community would also provide the newly created institution with its expertise in the pursuit of an efficient Bosnian transitional law structure (Subotic, 2009, p.144).

As part of the transition strategy in 2005, the ICTY started transferring mid and lower level war crime cases to the WCC according to specific conditions set out by the ICTY Rules of Procedure and Evidence (OSCE*, 2010, p.8). Interestingly enough the conditions for the transition included that the receiving country should have an adequate judicial system to handle these issues and that the country could provide a fair trial or the cases would be withdrawn back to the ICTY. The international community found the Bosnian legal framework adapted to deal with sensitive war crimes (OSCE*, 2010, p.8f).

Since the ICTY is supposed to be a temporary institution its closure has always been expected and with a weak Bosnian justice system the international community has more or less been forced to accept the WCC as a necessity (Subotic, 2009, p.144). The majority of criticism however has been pointed towards the international community, accusing the whole project to be based on short-term planning with the main purpose of achieving the quickest and cheapest possible international withdrawal. The countries behind the resolution that created the WCC are said to find the Tribunal too costly while wrongly accrediting the countries of the former Yugoslavia with the skills and knowledge needed to run retributive justice on their own (Amnesty, 2003, p.2). Cynical voices argue that should the WCC fail with its objectives the international actors can claim they did their best but due to domestic incompetence the institution failed (Subotic, 2009, p.144).

4.1 Division of Jurisdiction

As part of the State Court of Bosnia the WCC have been given authority to handle serious war crime cases in Bosnia (HRW, 2006, p.8). In accordance with the National War Crimes Prosecution Strategy that was introduced in late 2008 by the Ministry of Justice in Sarajevo, the WCC will be managing cases of higher level sensitivity the so-called “very sensitive cases”, while the five district and ten cantonal courts (also known as entity courts) will manage cases of lower level sensitivity, the so-called “sensitive cases” (UNDP, 2009, p.16). Since the WCC is a limited mandate institution it means that it is only transferred a limited amount of high sensitive war crime cases from The Hague. The majority of transferred war crime cases are classified as sensitive and will therefore be processed by the cantonal and district courts in the two Bosnian entities (HRW, 2007 p.56).

The ranking of a case sensitivity, however, is in the hands of the prosecutor in charge. Bearing in mind that the mandate also included mid- and low-level crimes to take into account the whole classification process causes somewhat of a great confusion in Bosnian society and among the victims in particular. The media in Bosnia has been very aware of this confusion in strategy and has had very critical reviews of the WCC (Subotic, 2009, p.143f).

Many voices within the Chamber and the civil society on a whole, therefore recommend the department to inform on how cases are categorized as it is believed to be a necessary step in getting the public involved in the justice process (HRW, 2007, p.11). Factors that rank a case as highly sensitive however include the allegations of genocide, multiple murders and persecution but factors such as if additional investigations is required, finding the suspect and or witnesses can affect the ranking (HRW, 2007, p.11).

4.2 Internationalization of the WCC

The planned outline was that this would be a national Bosnian institution but due to it being the creation of the OHR and ICTY the whole process is reportedly overstuffed by international lawyers, judges, prosecutors, experts in witness protection etc, and with very few legal experts of Bosnian origins (Subotic, 2009, p.142) . The OHR in 2004 wrote that the WCC would in fact be a strictly Bosnian institution working under the laws of the State of Bosnia but that the initial phase requires the temporary assistance of international judicial staff handling most cases (OSCE, 2005, p.10).

The involvement of this myriad of international judicial staff in Sarajevo is intended to make sure that fair trial standards are met in the WCC and to work with the local legal staff so that the same level of rule of law can be maintained once they leave (HRW, 2006, p.10). By also holding training sessions for the locals on judicial fields like International Human Law, the Geneva Conventions and war crimes investigations, they hope to build a sustainable legal praxis (HRW, 2006, p.13).

There have been quite a few reports on the judicial standard of the WCC and they all conclude that the institution does indeed conduct fair trials, where the defendants have all the basic rights on the same level with the standard Western judicial processes (UNDP, 2009, p.20).

4.2.1 The New Criminal Procedure Codes

The establishment of the WCC is one of many changes to the national justice system that the OHR was partly or fully responsible for introducing to Bosnia. The reform of the Criminal Procedure Code (CPC) in 2003 can be included to that list (UNDP, 2009, p.23). Quite simply, a CPC is the way a trial is performed and to what conduct and rules it follows. Most war crime cases including the ones at the WCC follow the new 2003 CPC but if the indictments were made pre-2003 they will be operating under the CPC of the former Yugoslavia, which are very different in praxis (HRW, 2006, p.8). According to this older system the judge is granted the authority to act as the investigative figure in the trial, basically given full responsibility of the criminal investigation (OSCE, 2005, p.12).

The 2003 CPC however, strips the role of the judge as the central character, and lets the prosecutor and the defense attorney present their cases and evidence while allowing the cross-examination of witnesses as in standard Western European trials (OSCE, 2005, p.12).

However, the existence of two very different procedure codes poses some more problematic issues. The Republika Srpska still operates under the pre-2003 CPC while the Court of BiH employs the new procedure code leaving implications in the sentencing of war criminals in respective entity.

If a suspect is indicted and found guilty in the RS, according to the CPC of the former Yugoslavia, he cannot be sentenced to more than 20 years in prison, regardless of the crime being a war crime or not simply because the pre-2003 does not acknowledge war crimes. The same criminal, if found guilty in the Court of the Federation, could be sentenced to a maximum of 45 years in prison (UNDP, 2009, p.23). This lack of uniformity in application of the law is a serious concern for prosecutors as they repeatedly have called for a change on this matter (UNDP, 2008, p.18).

Adding to this is the occurrence of plea bargains which as explained in the previous chapter grants benefits to suspects in exchange for their testimonies. The OHR at the time (Paddy Ashdown, serving between 2002-2006) introduced this phenomenon to Bosnian law in 2003 influenced by the ICTY's method of legal application, with it being a totally unfamiliar concept in the country's legal history prior to that (HRW, 2007, p.14).

Similar to how the victims perceived the use of amnesties in The Hague the feeling towards

its use within Bosnia was no different by Bosnian war victims and human rights groups (Subotic, 2009, p.143).

A survey conducted amongst the civilian population in Bosnia in 2009 established that a majority of the public have not been adequately informed about the work of the WCC and other courts that manage war crime cases. If changes like the CPC for example are not reached to the average citizen it can counteract the judicial development that the international community proclaims it want to achieve (UNDP, 2009, p.20).

4.3 Too Much Focus on the WCC?

What has suffered from the international attention given to the WCC are the district and cantonal courts where several thousand cases still wait to be processed (Subotic, 2009, p.145). While it is wrong to say that there has been a total lack of effort in improving the work of all Bosnian judicial institutions, there are still numerous problems with war crimes prosecution in the district and cantonal courts (UNDP, 2009, p.25).

Among other serious complaints, there is a shortage of prosecutors to deal with the increasing number of sensitive cases and additionally they must themselves investigate the cases as there is even a shorter supply of specially trained legal staff to assist them (UNDP, 2008, p.18).

In the trials there are countless reports of malfunctioning witness and victim protection. Although it is a constitutional obligation to protect witnesses testifying in a court of law, little effort is taken by the local courts to investigate allegations of threats against witnesses (OSCE, 2010, p.11). The prosecutors are aware of this critique and they admit in a survey that they do not have the resources to provide protection and support for witnesses (UNDP, 2008, p.15). This deficiency in supportive structures has led to an increasing number of witnesses unwilling to testify and collaborate with the legal forces, out of fear for their own lives. Sadly, many victims have even lost hope that the trials can deliver justice (OSCE, 2010, p.8). Things are not made easier throughout the whole retributive justice process in Bosnia when the exact number of perpetrators, identity of victims, potential witnesses and number of ongoing war crime cases still are unknown (UNDP 2009, p.25).

5 Closing Discussion and Conclusion

The notion that the retribution process has been unwieldy in Bosnia-Herzegovina is rather established. Consequently, the purpose of this study has been to analyze the reasons for this inefficiency by reviewing the institutional activities implemented in the field of retributive justice. Due to these activities, brought on primarily by the international community, the country has developed a war crime justice system where prosecutions occur in The Hague and in Sarajevo, while at the same time the lower-ranked cases are being handled by the district and cantonal courts.

The theoretical principles of retributive justice that have been implemented in Bosnia by the international community have been based on the rule of law tradition of Western Europe. Mechanisms such as plea bargains, numerous appeals and selective prosecution have been introduced to the legal praxis of Bosnia-Herzegovina, albeit performed largely by international judicial staff, both in the ICTY and the WCC. Training of local legal staff is a priority but is in large restricted to the WCC in Sarajevo meaning that the district and cantonal courts of the two entities have not been as equipped to comply with the fair standards of the justice process.

The primary strategy of the apprehension of war criminals in the ICTY and the WCC has been almost entirely concentrated to the highest ranked individuals in the chain of command. In the case of the ICTY, the location of the Tribunal being where it is, while dealing with violations thousands of miles away have had negative perceptions on the legitimacy of its work by the civilian population. The WCC on the other hand, has had to deal with questions of below par legal training, judicial praxis and its capacity to handle war crimes.

In the case of the trial mechanisms the definition of justice comes to a crossroad. The transitional theory mentions that an inclusion of the targeted country's penal tradition is beneficial but the Bosnian case has shown this strategy to be unpopular amongst the majority of the victims. Despite the prosecutors' and judges' efforts to combine the legal praxis of the former Yugoslavia with that of modern Western ones, the punishments are still not seen as severe enough. The argument is that the penal codes of the former Yugoslavia were not

created to handle war crimes and it is questionable whether any comparisons are justifiable between a penal system that was constructed for serious crimes within the boundaries of the state and even more serious crimes such as exterminating an entire race of people. For many victims, the bargaining and appealing rights attained for perpetrators in matters such as genocide and rape have shown to be strange and hurtful, especially when this type of operation is totally unknown in the prior rule of law.

The way the ICTY conducts its work may be controversial at times but it should however be credited for its efforts not to escalate matters between ethnicities in the region. The principle of individualization of guilt has done just that. Bosnia is affected by ethnic distrust and this fact has not aided The Hague as politicians from both entities seem to pursue the cancellation of the individualization policy in advantage of own agendas. Balancing the wishes of the victims and political elites with the judicial mechanisms that allow war crime perpetrators to serve lower time in prison than expected have had a negative impact on the healing process and a negative perception on the work of the Tribunal. The strategy of selective prosecutions has not been appreciated by a large section of the victims and civilian population as calls for indictments of mid and lower-level ranked perpetrators were made.

The creation of the WCC which brought retributive justice to Sarajevo had thus been a long sought move by the Bosnians themselves. With a mix of international and national legal staff the WCC has demonstrated to be a fully operating court with a fair standard while educating the domestic staff on standard Western styled rule of law. However, the consequences of the numerous cases that have been dealt to the district and cantonal courts as part of the transition deal have been somewhat counterproductive. The local courts do not receive the same attention and know-how as the WCC in Sarajevo but have to process far more cases, albeit being ranked lower. This has led to numerous direct perpetrators of the war not receiving punishment and any eventual trial witnesses not being dealt proper legal protection. An overwhelming risk resulting from this deficiency in retribution is a normalization of the perpetrators in society, where daily life persists as always between victims and unpunished criminals.

Dealing with the violent past in Bosnia-Herzegovina is by no means an easy task, there are many voices to consider and no simple solution should be expected to fully satisfy all parties. But according to political philosopher John Rawls, the principles of truth and justice cannot

be politically bargained with as they are the ultimate virtues of human interaction. Therefore according to him, no matter how elegant and beneficial a theory or a law is, it has to be rejected if it is in any way unjust (2004, p.86).

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Appendix

There are eleven annexes in the DPA each giving effective power over the Bosnian state institutions to the international community (Chandler, 2000, p.44). The authority to coordinate and supervise the civilian aspects of the agreement is given to the Office of the High Representative through:

Dayton Peace Agreement Annex 10 article II:

1. The High Representative shall:
 - a. Monitor the implementation of the peace settlement;
 - b. Maintain close contact with the Parties to promote their full compliance with all civilian aspects of the peace settlement and a high level of cooperation between them and the organizations and agencies participating in those aspects.
 - c. Coordinate the activities of the civilian organizations and agencies in Bosnia and Herzegovina to ensure the efficient implementation of the civilian aspects of the peace settlement. The High Representative shall respect their autonomy within their spheres of operation while as necessary giving general guidance to them about the impact of their activities on the implementation of the peace settlement. The civilian organizations and agencies are requested to assist the High Representative in the execution of his or her responsibilities by providing all information relevant to their operations in Bosnia- Herzegovina.
 - d. Facilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation.

The actual civilian implementation (where the judiciary is included) is divided between the OHR, the Organisation for Security and Cooperation in Europe (OSCE), the UN Mission in Bosnia and Herzegovina (UNMIBH), the UN High Commissioner for Refugees (UNHCR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), which was established by the UN Security Council (ICTJ, 2004, p.1).

The country is divided into two entities: Republika Srpska and the Federation of Bosnia and Herzegovina. The entities were formally established by the Dayton Peace Agreement and house the majority of the three main ethnicities in the country, Serbs in Republika Srpska and Bosniaks and Croats in the Federation (DPA, Annex 4).

The third level of Bosnia and Herzegovina's political subdivision is manifested in cantons. They are unique to the Federation of Bosnia and Herzegovina entity, which consists of ten of them. All of them have their own cantonal government, which is under the law of the Federation as a whole (DPA, Annex 4).