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through ACCESSION towards JUSTICE

Humanitarian Law Center

The newsletter **through ACCESSION towards JUSTICE** will address the theme of obstacles to and solutions for establishing the rule of law and accountability for the crimes committed in our recent past. Also, it will seek to affirm, in the context of the EU accession talks, individual and societal needs arising from that experience.

2/2014

[★] Transitional Justice Should Be Part of Serbia's Accession to the EU

David Tolbert, President, International Center for Transitional Justice

The European Union has played a pivotal role over the last decades to ensure respect for human rights and the rule of law in a long list of new member states running from the Baltic to the Aegean. It has done so by requiring candidate states to undertake difficult reforms, including tackling past and present human rights abuses. Serbia, which now is a candidate for EU membership, has much to do in addressing a long and troubling legacy of human rights violations before it can claim the prize of EU membership.

In order to meet the EU's high standards on the rule of law and human rights,

Serbia must take this opportunity to address the legacy of the recent past in which Milosevic's regime and the institutions under its control were involved in some of the most notorious crimes committed in Europe since the Second World War. Given Serbia's past, the European Union has an opportunity if not an obligation to ensure that transitional justice approaches are one of the key elements in the negotiations on Serbia's accession, even as the EU works to develop a comprehensive policy on transitional justice itself.

Serbia has made some progress in trying to deal with the legacy of crimes committed during the conflict in the former Yugoslavia, including in Croatia, Bosnia and Herzegovina, and Kosovo. These efforts are primarily the results of vigorous efforts by Serbian civil society and organizations such as the Humanitarian Law Center, the Helsinki Committee for Human Rights in Serbia, the Youth Initiative for Human Rights and others. It is organizations like these that have led the way in championing initiatives like RECOM – a campaign to establish a regional truth commission to establish facts about all victims of the massive crimes committed in the former Yugoslavia between 1991 and 2001.

Moreover, the tireless advocacy of these groups have led to a process in which a number of war crimes trials were held in Belgrade's District Court, including those against Serbian citizens for crimes committed across the Serbian border. The work of these civil society groups in providing support to witnesses coming from Croatia, Bosnia and Kosovo has been crucial to the success of a number of these prosecutions.

In another positive step, agreements have been reached between the state prosecutor for war crimes of Serbia and his Croatian and Bosnian counterparts, allowing for cross-border cooperation in investigation and prosecution of war crimes.

We should not gainsay these accomplishments, but there is a great deal more that needs to be done to demonstrate a genuine commitment by the Serbian government to an honest and responsible reckoning with the crimes of the past and justice for the victims.

The initial progress made in prosecuting war crimes has been undermined by serious concerns regarding witness intimidation and the influence of political factors in some cases. For example, the highly respected human rights advocate Natasa Kandic, who was supportive of, and helpful to, the prosecutor's work previously, has recently publicly accused the prosecutor's office of intimidation of protected witnesses. Earlier, an arrest warrant issued by the prosecutor against a former Bosnian government official was thrown out of a London court on grounds of being politically motivated. In addition, there is a troubling apparent lack of willingness on the part of the war crimes prosecutor to open or properly support investigations against senior officials of the former regime, who have been implicated as alleged co-perpetrators in the judgments of the International Criminal Court for the Former Yugoslavia. These are all worrying signs for all who had high hopes that Serbian judiciary has the capacity and the intent to hold war crimes trials in accordance with international standards.

The situation does not look much better on other fronts that are important for accountability and address victims. Reparations to victims of crimes committed by Serbian forces are not even on the table. On the contrary, the law that

regulates the right of victims to reparations dates back to Milosevic's reign and stipulates that only the victims of "enemy forces" are entitled to reparations. This leaves out not only scores of victims from outside Serbia who have suffered at the hand of its forces, but also Serbian citizens like the families of victims in Strpci case, for example. This hardly sends a message that Serbia is ready to abide by international principles which call for victims' right to a remedy and for reparations.

Much remains to be done in the reform of Serbian security sector and other state institutions. There are many officials who have served in the former regime in positions of power, who retain significant influence in state institutions today. One of the most blatant examples is the ongoing presence of members of the notorious Special Operations Unit (JSO) in the Witness Protection Unit, which is mandated to provide security to witnesses and insiders testifying about the crimes that JSO members, among others, have committed. What kind of protection can such witnesses expect and what justice can victims expect from institutions manned by those people?

Clearly, Serbia has much hard work to do in these areas, but it is unlikely to accomplish its tasks without the support and the pressure of the EU. The EU's continuing support for the RECOM initiative is very welcome, as is the language of support for war crimes trials in its progress report on Serbia's accession.

However, the opportunity to fully integrate transitional justice into the accession negotiations should not be missed by the EU. It is too important for both Serbia and the EU itself. The rationale for such a course of action is clear. The EU has been here before: its policy of conditionality in relation to the cooperation of Balkan states with the ICTY was the principal catalyst for all fugitives being transferred to the ICTY's and thus facing the bar of justice. This policy proved that Serbia as well as other Balkan states can deliver on justice when it is clear that the EU so requires.

From another point of view, the inclusion of transitional justice in the accession talks is important for the EU itself as it works to develop a Policy on Transitional Justice. In addition, it has an extremely important role to play in supporting transitional justice processes across the world. It should start by applying this policy in its own accession processes. This would send a clear signal of the EU's position. Moreover, it would be difficult to imagine that the EU could effectively champion these principles in other countries outside its union, such as the countries of the "Arab Spring", for example, if it chooses not to make them a priority at its doorstep.

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[news]

A state that does not care for war victims

The Ombudsman, the Office for Human and Minority Rights and the Commissioner for Protection of Equality have pulled out of the initiative for the adoption of a new Law on Civilian Victims of War, which would recognise the rights of all the citizens of Serbia who were victims of war crimes and other grave human rights abuses, committed in connection with the wars fought in the 1990s.

The Ministry of Labor, Employment and Social Policy, the authority responsible for implementation of this law, felt no need to amend the proposals, so, in 2012, the Humanitarian Law Center (HLC) launched an initiative to have it adopted. The initiative was endorsed by the Commissioner for Protection of Equality, Nevena Petrušić, and the Ombudsman, Saša Janković, who expressed their willingness to take part in promoting the initiative and suggested that the Office for Human and Minority Rights should also be invited to participate. In April 2013, representatives of the HLC, the Deputy Ombudsman and the director of the Office for Human and Minority Rights agreed to set up an expert working group in October 2013 to draft a new law, and the HLC undertook to prepare a comparative analysis of the law and proposed amendments. In July 2013, The HLC completed its analysis and submitted it to the Office and the Ombudsman. The only feedback the HLC had received by February 2014 was that a review of its analysis was under way.

At a meeting held between HLC representatives and a representative of the Ombudsman on 20th February 2014, the HLC was informed that institutions involved are no longer willing to support the initiative and that they had not been in contact with the Office for Human and Minority Rights about the initiative. The Ombudsman's representative also added that he was unable to do anything to help the initiative in a personal capacity.

The fundamental rights of civilian victims of war and civilians disabled as a consequence of the war in Serbia are regulated by the Law on the Rights of Disabled Civilian Victims of War ('Official Gazette of the Federal Republic of Yugoslavia' no. 52/96). The outdated provisions of this law discriminate against a large number of civilian victims of wars and human rights violations committed in connection with the wars, including the families of the missing, victims of sexual violence, victims of crimes committed by Serbian forces, or Serbian citizens who due to a combination of factors lost their lives on the territory of other countries. The rights guaranteed by this law to those rare victims whose victim status has been formally recognized include very modest allowances (awarded only to poor victims),

access to health care, limited access to free public transport passes and a few other largely insignificant rights. The dignity of victims is further degraded by the bureaucratic procedure put in place by the administrative authorities for necessary for the recognition of those rights.

The European Union legislation (Council Directive 2004/80/EC of 29 April 2004), in contrast, does not discriminate against victims on any grounds and stipulates that victims are entitled to compensation even if they have suffered harm in a country other than that from which they seek compensation, or if the offenders cannot be identified or prosecuted, or if the offenders lack the necessary means to compensate the victim. The Directive also stipulates the establishment of compensation schemes at a national level and between countries. The Serbian law has been criticized by both the UN Committee Against Torture and the Council of Europe Human Rights Commissioner, and, additionally, the law is not aligned with EU legislation (acquis communautaire) in the field.

It is worth bearing in mind that aligning its legislation with the EU law is one of Serbia's two main obligations under the Stabilisation and Association Agreement, which entered into force on 1st September 2013.

UN Special Rapporteur on Transitional Justice invited to visit Serbia

The Coalition for Access to Justice invited Pablo de Greiff, the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, to visit Serbia, in order to make recommendations to the Government of Serbia regarding the measures which will help achieve justice for victims of war crimes and other gross human rights violations committed during the 1990s in the former Yugoslavia.

The opening of the EU accession talks with Serbia provide a historic opportunity for Serbia to undertake comprehensive and concrete steps towards implementing transitional justice mechanisms aimed at addressing the grave legacy of the wars of the 1990s. Numerous challenges, such as the paucity of war crimes trials, the impunity enjoyed by high-ranking army and police officers, the absence of a vetting process in security sector agencies, the laws that discriminate against victims of war, and the absence of reparation mechanisms for victims, seriously undermine the prospects for transitional justice in Serbia and also the process of reconciliation in the region. The visit by the UN Special Rapporteur and his subsequent recommendations would provide a valuable guideline for Serbian and EU institutions on how to put in place an institutional framework which will promote the rights of victims and the society in respect to the legacy of crimes.

Anonymization of Judgments in Cases of War Crimes is Illegal

The Commissioner for Information of Public Importance, acting upon an appeal filed by the HLC, has found that the practice of anonymization of judgments (redacting personal information from judgments) is in violation

of the Law on Free Access to Information of Public Importance and the Law on Personal Data Protection. The Commissioner issued an order to the Higher Court in Belgrade to deliver to the HLC the judgment without unlawful anonymization.

The Commissioner, delivering his Decision, particularly stressed that this was a case of a judgment for war crimes, and that the intention of the Commissioner in the original ruling was certainly not to protect the names of the accused, but only certain items of personal information, such as unique personal identification numbers and addresses. The Commissioner also stated that the publication of the names of the accused in the judgment would not represent excessive processing of personal data, forbidden by the law.

Gendarmery officer suspended

In response to a request submitted by the HLC to the Gendarmery in December 2013, Gendarmery officer Vladan Krstović has been suspended from duty until the completion of criminal proceedings against him. Krstović, together with other members of the Yugoslav Army's 177th Military Territorial Detachment, was indicted by the Office of the War Crimes Prosecutor (OWCP) for the murder of at least 46 Albanian civilians in the village of Ljubenić (in the Municipality of Peć) on 1st April 1999 (the Ljubenić case), the forcible relocation of women, children and elderly to Albania, the burning of houses and intimidation of civilians.

Courts continue to shield state institutions from responsibility for war crimes

The Court of Appeal in Belgrade has quashed an interim judgment of the Higher Court in Belgrade, which found the Yugoslav Army (YA) responsible for a war crime that occurred in the village of Kukurovići on 18th February 1993, and remanded the case for retrial. In doing so, the court has shown that the practice of shielding state institutions from responsibility for past human rights violations continues. In its written judgment, the Court of Appeal stated that it had not been possible to clearly determine which units carried out the attack in Kukurovići because "the village is located in the tri-border area of Serbia, Montenegro and Bosnia and Herzegovina" and because the OWCP was still conducting pre-trial proceedings and collecting information concerning the perpetrators. Moreover, the Court of Appeal ignored the testimonies given by village residents and eye-witnesses about the YA attack on the village and the three camps that the YA set up in and around the village, the direction from which mortar and infantry gunfire was coming on the day in question, and about the Muslim residents of Kukurovići being exposed on a daily basis to mistreatment, physical abuse, and threats from Užice Corps members solely on the grounds of their ethnicity, in the period preceding the attack.

In its ruling, the Court of Appeal also dismissed the view of the Higher Court that the statute of limitations had been suspended in this case, a decision that would have allowed the residents of Kukurovići to claim compensation from the Republic of Serbia.

Indictments against commanding officers still on hold

Nemanja Stjepanović, Sense Agency Journalist

"Why wouldn't you let us prosecute our presidents and generals ourselves, instead of delivering them to The Hague," is the question that has been asked countless times since the establishment of the International Criminal Tribunal for the Former Yugoslavia. As time has proven, the answer is indeed very simple – because we are incapable of it. Whether it be because of the lack of political will, or deficient statutory solutions or something else, it does not really matter. What matters is that the Serbian judiciary has not yet indicted any high-ranking Serbian politician, army or police officer for war crimes offences.

Since the end of the last conflict on the territory of the former Yugoslavia in 1999, practically all political options and major parties have been in power, but none of them has shown the determination necessary to tackle the issue of prosecuting mid-ranking and high-ranking politicians and police and army officers for war crimes. Instead, one government after another overtly or tacitly signaled to the judiciary that they were satisfied with its work, as long as there were no indictments or judgments implicating Serbian state institutions' in war crimes.

It appears that the Belgrade Office of the War Crimes Prosecutor understood these signals correctly and brought charges almost exclusively against the direct perpetrators, mostly members of paramilitary units, and only rarely

against police and army members. This conveys the impression that the crimes were committed by 'renegade individuals' and 'uncontrollable groups', without orders from or the knowledge of their superiors, and, most importantly, that the country's most senior leaders played no part in them.

However, judgments from the Hague Tribunal have proved such a conclusion wrong. For example, several senior government, military and police officials – former Deputy Prime Minister of the Federal Republic of Yugoslavia (FRY), Chief of the General Staff of the Yugoslav Army, Dragoljub Ojdanić, former Deputy Minister of the Interior, Vlastimir Đorđević (who committed suicide before proceedings could be brought against him), army generals Nebojša Pavković and Vladimir Lazarević, and the Head of the Serbian Ministry of Internal Affairs Staff for Kosovo, Sreten Lukić – have been finally convicted

by the tribunal for crimes committed against Kosovo Albanians. The tribunal found that these individuals participated in the campaign of ethnic cleansing in Kosovo, which was carried out as part of a joint criminal enterprise led by the then President of the FRY, Slobodan Milošević. A completely different picture indeed to that put forward by the Serbian judiciary.

Thus we have the convictions of officials at the highest level on one side, and those of direct perpetrators on the other. And between them there exists a gap of impunity in which sit higher and mid-ranking army and police officers, in particular commanders of smaller or larger units that were involved in the commission of crimes. That gap can only be filled if the Office of the War Crimes Prosecutor brings indictments against these persons. The judgments of the Hague tribunal and the criminal complaints already filed by the Humanitarian Law Center alone, provide enough material for them to do so.

The argument that the Hague tribunal would have also indicted other politicians and officers had there been enough evidence against them is nothing but a far-fetched excuse for the failure of the Office of the War Crimes Prosecutor to take any actions to that effect. The Hague has publicly stated, time and again, that due to limited time and material resources, they have not been able to indict all those who participated in war crimes, but are willing to provide local judiciaries whatever assistance is needed, especially in terms of delivering them the evidence necessary to bring new indictments in Serbia and other countries in the region. Despite being well aware of the existence of such evidence, the Office of the War Crimes Prosecutor has not yet brought any indictments against mid-ranking officers, but instead has remained focused on direct perpetrators alone.

It is true that a few indictments have been brought in Serbia against some very senior military officers and political leaders, but those from other countries, such as, for example Bosnia and Herzegovina Army General Jovan Divjak, and a former Bosnia and Herzegovina wartime member of the Presidency, Ejup Ganić. To what extent these indictments were supported by evidence became abundantly clear when courts in Austria and Great Britain, where these two men were arrested on arrest warrants issued by Serbia and sent to Interpol, rejected war crimes allegations against them and set them free.

The indictments against Ganić and Divjak nevertheless raise interesting issues. First, they have shown that there exists a legal basis for prosecuting the most senior state officials. Further, they have proved false the claim that the Hague tribunal is the only tribunal competent to raise charges against these officials. And most importantly, they have shown that the work of the Office of the War Crimes Prosecutor in Belgrade is driven by political motives, although this does not necessarily imply that it is subject to political pressure. Rather, this can be explained by its own need to ingratiate itself with the general public and those in power structures. For, how else can one explain the fact that officials of other states have been indicted without credible evidence, while at the same time, and despite an abundance of evidence against them, not a single Serbian senior official has been prosecuted thus far?

We should, of course, always bear in

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mind that the job of the Office of the War Crimes Prosecutor is certainly not an easy one, and that each move they make, even if it is directed at the lowest rank of perpetrators, risks provoking an adverse reaction among criminal groups and individuals, who are often still part of the state apparatus. Nonetheless, the job of a prosecutor, an 'ordinary' prosecutor or a war crimes prosecutor, is to work in accordance with the law, irrespective of the resistance he or she may meet along the way. What better opportunity to demonstrate this than now, when Serbia is loudly calling for the punishment of criminals and strict adherence to the law?

Another problem faced by the Office of the War Crimes Prosecutor is the fact that many of those who could be accused of war crimes are still within the army or police forces, political parties or state institutions. But this should be seen as an additional incentive for prosecutors to purge those state institutions of individuals implicated in war crimes.

The state no longer needs to pretend, through war crimes trials or fake war crime trials, that it is capable of conducting trials at the request of The Hague. It is now facing a different challenge – to demonstrate that it has a judicial system in place that will make it eligible for joining the European Union. There are two possible paths – either to create a better and more efficient judiciary that will spare no one, or to keep haggling with the European Union indefinitely, until one side yields. If it chooses the first path, its success will surely be judged by the effectiveness of its war crimes trials and its willingness to prosecute high level perpetrators.

While the responsibility rests upon the prosecutor's office and the judicial authorities as a whole, different signals from the other two branches of power could certainly have an impact on the efficiency of war crimes processing, especially given the new political climate in which one man and one party has won overwhelming public support. A state purportedly determined to take strong actions against those responsible for stealing billions of Euros, ought not to neglect the prosecution of those responsible for the deaths of thousands and the expulsion of hundreds of thousands of people.

War crimes trials – overview

Lovas

Ljuban Devetak and another 13 persons are being retried for a war crime against the civilian population. An indictment brought by the OWCP alleges that the accused, at the time members of either the Yugoslav People's Army (JNA), the 'Dušan Silni' (Dušan the Great) paramilitary unit or local authority forces, killed 41 Croatian civilians in Lovas, Croatia, in October and November 1991.

The preliminary hearing could not be held as scheduled because some of the accused claimed to be ill and the court ruled that a medical expert should provide an assessment of the health of one of the accused, in order to determine whether he was able to follow the proceedings.

House in Lovas, destroyed during the war

Trnje

Pavle Gavrilović and Rajko Kozlina are standing trial for a war crime against the civilian population. According to the indictment filed by the OWCP, on 25th March 1999, the accused, at the time members of the JNA, killed 27 Kosovo Albanian citizens in the village of Trnje/Terrnje (in the municipality of Suva Reka/ Suharekë, Kosovo).

The residents were deported and their homes torched

The preliminary hearing could not be held as scheduled because one of the accused claimed that he was sick, so the court ruled that a medical expert provide an assessment of his health, in order to determine whether he was able to follow the proceedings.

Beli Manastir

Zoran Vukšić, Slobodan Strigić and Branko Hrnjak, former members of the Beli Manastir police department, are being retried for a war crime against the civilian population. An OWCP indictment charges them with taking part in the murder of four ethnic Croats near Beli Manastir (Croatia) on 17th October 1991.

The victims in this case are represented by two layers from Kosovo. The Presiding Judge has challenged their right to represent the victims because they are members of the Kosovo Bar Association, even though lawyers from Kosovo have previously represented victims and accused in several other cases tried before the Higher Court's War Crimes Department. The court sought the Serbian Bar Association's opinion on this matter, and on receipt of its opinion, will issue a final ruling. Should the court decide to deny Kosovo lawyers the right to represent victims, witnesses and victims could be discouraged from taking part in proceedings.

Neither party presented their closing arguments as scheduled because the trial panel decided to re-open the main hearing, to re-examine the ballistic expert and the medical expert and have them review the opinions they gave earlier.

[News from the European Union]

The European Commission (EC) has adopted a new mechanism for addressing threats to the rule of law across the European Union, which can be activated where there is a systemic threat to the rule of law in any of its member states. It is not applicable to individual cases or miscarriages of justice, but only with "systemic threats" to EU values. According to European Commission President, Jose Manuel Barroso, the new mechanism was needed because in the past, the EC did not have sufficient instruments to adequately deal with systemic threats to the rule of law in EU member states. Additionally, the EC wanted rule of law problems in EU member states, and especially the decision, to remain within its competencies, not least because the Council of Europe, which has been the basic mechanism for addressing infringements of rights, includes Russia as a member. The EC wanted to exclude non-EU countries, most notably Russia, from dealing with issues that have implications for EU member states.

The new mechanism comprises a three-stage process. As a first step, the EC collects and examines relevant information and assesses whether a systemic threat to the rule of law exists. If it finds that such a threat does exist, it sends 'a rule of law warning' to the member state

in question, giving it the opportunity to respond. In the second stage, if the problem has not been resolved, the EC issues 'a rule of law recommendation' in which it recommends that the member state concerned resolve the problem identified within a fixed time limit and inform the EC of the steps taken. In the final stage, the EC monitors the member state's follow-up to the recommendation. If it is not satisfied with the follow-up, the EC can resort to one of the mechanisms set out in Article 7 of the Treaty of the European Union, which includes, among other things, suspension of the voting rights of that member state in the EU Council of Ministers.

This new mechanism, although available only to the EU member states, is of relevance to the countries on the road to EU membership as well, as it establishes a framework for addressing problems within the community which candidate countries aspire to join. Its symbolic value may be even greater, because the EU has finally put in place a mechanism for dealing with some very disputable and legally questionable acts in member states, which have undermined the pro-European arguments advanced by supporters of the Union in prospective members. Such acts include the controversial dismantling of French Roma settlements in 2012 and the repatriation of their inhabitants; the erection of walls around Roma neighborhoods in 2013 in the Slovakian town of Košice, at the time a European Capital of Culture; the undue pressure placed on the judiciary, threats against judges and violation of the constitutional order in Romania, which led to very sharp words from the EU and even threats to suspend Romania's voting rights in the EU Council of Ministers.

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