"This brochure was made possible with financial support provided by the United States Agency for International Development (USAID) through the Institute for Sustainable Communities (ISC). The opinions expressed herein are those of the author(s) and do not necessarily reflect the views of ISC, USAID and/or the US Government."

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.

3/2014

[★] Victims' Rights in the EU: What Impact Should this Have for the Accession Process in the Former Yugoslavia?

Carla Ferstman, Director of *REDRESS*

The European Union has agreed the Copenhagen criteria and Stabilisation and Association Process (SAP) for South East Europe, for entry of future Member States into the EU. In combination, these criteria are said to reflect the values on which the EU is founded: democracy, the rule of law, respect for fundamental rights, as well as the importance of a functioning market economy. Conditionality continues to play a critical role in fostering reforms in accession states. Surprisingly however, despite the centrality of the rule of law in the conditionality process, there has been

little emphasis on the need for former Yugoslav countries seeking accession to

address the significant needs and rights of victims of mass atrocities which occurred during the conflicts in the 1990s. This is so, even though it is clear that adequately responding to past crimes – to counter impunity and afford justice to victims - is an important precursor for the rule of law.

The EU Status reports for Kosovo, Serbia and Bosnia and Herzegovina all note the importance for these countries to cooperate with the International Criminal Tribunal for the former Yugoslavia (ICTY) in the investigation of war crimes and other crimes coming within its purview. Without detracting from the critical importance of this particular condition, international law, including the law of the EU, has progressively recognised that justice should not only be retributive; it should also be reparative. Adoption and implementation of the EU acquis (the collective laws and court decisions which constitute the body of EU law) is in principle an accession requirement, yet these international law developments relating to victims' rights do not seem to have made their way into the EU's dialogue with accession states.

This is not because these issues are unproblematic or have somehow been resolved and thus do not require the attention of the EU accession dialogue. To the contrary, victim and witness protection remains a serious concern in all former Yugoslavia states seeking accession and causing a serious impediment to criminal prosecutions and victims' access to justice. Prosecution of high level suspects for wartime crimes remains politicised and beyond reach in most cases and there has been next to no progress on the issue of reparations for victims of war crimes, crimes against humanity and genocide in these countries. Neither Bosnia and Herzegovina, Kosovo or Serbia has ratified the Council of Europe's Convention on the Compensation of Victims of Violent Crimes. By not making these issues an integral part of the accession process, the EU gives the false impression even if only inadvertently that these failings are not important, that they do not constitute state obligations that the international community considers vital to uphold.

But yet, the EU acquis on victims' rights is comprised of a robust body of law; and thus accession states cannot avoid these issues. In October 2012, the European Parliament and Council of the EU adopted the Directive 2012/29/EU on minimum standards on the rights, support and protection of victims of crime (the Directive). The Directive applies to all victims of crimes in the EU. It recognises victims' right to information, the right to victim support, the right to review decisions not to prosecute, the right to legal aid and the right to an effective remedy and a fair hearing. The Directive is the latest in a series of EU instruments which deal with crime victims; earlier ones include the 2001 Framework Decision on the standing of victims in criminal proceedings and the 2004 Directive on Compensation for Crime Victims. The 2012 Directive is legally binding on all Member States, whereby it is left to each State to decide how best to transpose the rules/provisions into their individual legal system. As such, the Directive becomes part of the EU acquis and all Member States must bring into force any laws, regulations or administrative provisions necessary to comply with the Directive by 16 November 2015. From that point in time, the Directive will be consid-

ered "fully" in force because it will be justiciable before the Court of Justice of the European Union. The European Commission will also be able to bring infringement proceedings against any Member States in breach of all or part of the Directive in accordance with the Treaty on the Functioning of the European Union (TFEU).

This European Law is buttressed by the extensive jurisprudence of the European Court of Human Rights, which has repeatedly affirmed victims' right to justice and reparation, to be free from intimidation and reprisals and to be treated with dignity and respect throughout the justice process. This is underscored by regional and international human rights treaties and by their official interpretive bodies and a range of declarative texts. It is also reflected in international humanitarian law treaties, the main provisions being Article 3 of the Hague Convention IV, largely reproduced in Article 91 of Protocol I. Central to such standards are that remedies should be fair and non-discriminatory, there should not be unreasonably short deadlines to file claims and reparation awards should reflect the actual harm caused. Importantly, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law underscore that victims' right to reparation takes several forms, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, and is not contingent on the conviction of a particular perpetrator; its existence is separate and distinct from the criminal justice process and cannot be extinguished by the decisions of prosecutors not to proceed with a particular criminal case.

The accession process provides an important avenue for the EU to encourage accession states to meet their obligations towards victims of the most heinous crimes. This would bring a much needed consistency to the EU's common foreign and security policy concerning impunity in other parts of the world: what it promotes abroad should be promoted at home. And, given the coming into force of the EU Directive on minimum standards on the rights, support and protection of victims of crime, an emphasis on victims' rights is also a clear part of the EU acquis that accession countries will need to confront and fully comply with. Clearly, much more can, and should, be done, both by the EU in its dialogues, and by the accession states themselves, in these areas.

Send us your comments
twitter.com/@FHPHLC #towardsJUSTICE
towardsJUSTICE@hlc-rdc.org

[news]

HLC participates in the preparation of the EU's 2014 Serbia Progress Report

At the invitation of the Delegation of the European Union to Serbia, the Humanitarian Law Center (HLC) participated in the preparation of the 2014 Progress Report on Serbia by sending written contrubutions. Among the key areas that need to be improved or aligned with the EU *acquis*, the HLC highlighted the need for more comprehensive processing of war crimes and the creation of a suitable system for the protection of victims of the crimes committed in the 1990s. At a meeting with representatives of the EU Delegation, the HLC received assurances that these areas will be included in the first version on the Report which will be delivered to the European Commision.

War crimes processing

Just three of the fourteen persons indicted for war crimes in 2013, were mid-ranking army or police officials. This reinforces the misleading perception that the crimes committed during the conflicts of the 90s, were not planned or organized, but committed by individual members of the army and police, acting alone, and not on orders of their superiors. Further, it reinforces the perception that only members of paramilitary units, who were not under the command of official security sector agencies, are to blame for the crimes.

Victims' rights

Where victims' rights are concerned, the HLC pointed out that the Law on the Rights of Civilian Victims of War[1] is not in line with the EU Directive (Directive 2012/29/EU) on the minimum standards on the rights, support and protection of victims of crime[2]. The discriminatory provisions of this law deprive numerous categories of victims of their right to receive protection, including the families of the missing, victims of sexual violence, victims of crimes committed by Serbian forces and Serbian citizens who have suffered on the territories of other states.

The HLC also pointed out that no significant progress had been made in 2013 with respect to the right to compensation for victims. Judicial processes remain unreasonably prolonged, thus denying the victims the right to a hearing within a reasonable time, something guaranteed by the Article 6 of the European Convention on Human Rights. Furthermore, courts interpret the provisions relating to statute of limitations inconsistently, and often allowing longer limitation periods in cases where army or police members or family members of killed army and police members seek compensation for harm suffered or death. In doing so, the courts in Serbia discriminate against the victims of grave human rights violations and deny them the right to an effective remedy, which is contrary to Articles 13 and 14 of the European Convention on Human Rights.

Directive 2012/29/EU, in contrast, requires that victims receive equal treatment and that they are not discriminated against on any grounds. Further, it 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 both at a national level and between countries. Furthermore, victim protection is a sub-area of the negotiations in Chapter 23 – Judiciary and Fundamental Rights, which requires Serbia to align its legislation with the Directive before signing a Treaty of Accession to the EU. In 2012, the HLC launched an initiative to amend this law, but the Ombudsman, the Office for Human and Minority Rights and the Commissioner for Protection of Equality, after initially supporting the initiative, eventually decided not to set in motion the necessary procedure to amend the law.

★ ★ ★

In its contribution, the HLC also pointed out two examples of good practice, in the areas of *vetting* and 'truth-telling' about the past.

Vetting

Following a request submitted by the HLC to the Gendarmery in December 2013, Vladan Krstović, a serving officer of the unit who was indicted by the Office of the War Crimes Prosecutor in the *Ljubenić* case, has been suspended from duty

1 Official Gazette of the RS, no. 52/96.

2 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

until the completion of the criminal proceedings against him. However, despite a request from the HLC, the Serbian Army (SA) and the Ministry of Defense failed to do the same in the case of SA officer Pavle Gavrilović and serviceman Rajko Kozlina, who are standing trial for a crime against civilians committed in the village of Trnje in March 1999.

Establishing the facts about the past

The political support for the initiative to set up a Regional Commission for Establishing the Facts about War Crimes and Other Gross Violations of Human Rights Committed on the Territory of the Former Yugoslavia (RECOM) is another example of good practice. The President of the Republic of Serbia, Tomislav Nikolić, has appointed Judge of the Appellate Court in Belgrade, Siniša Važić, as his personal envoy to RECOM's Regional Expert Group. The expert group is tasked with reviewing the Draft RECOM Statute and providing its legal opinion on the provisions of the Statute regulating the establishment and the mandate of RECOM and the obligations of the states in the context of their respective national constitutions and legislation. The group is composed of personal envoys of the Presidents of all of the states from the region, except Slovenia and Bosnia and Herzegovina, which have yet to appoint their representatives.

HLC pushes Ministry to ban the promotion of genocide-denying book

The Ministry of Defense canceled a promotional event for the book, *The Srebrenica Hoax,* written by Ratko Škrbić, that was to be held at the Serbian Army Centre on 10th April 2014, following calls for action from the HLC.[3] The book denies the Srebrenica genocide and the facts established in the judgments of the International Criminal Tribunal for Former Yugoslavia and the judgment of the International Court of Justice in the *Bosnia and Herzegovina vs. Serbia* case. The HLC urged the Ministry of Defense and the Chief of the Serbian Army General Staff, Ljubiša Diković, to ban the event from being held on the premises of a state institution, and thus, not only show respect for the victims of the most serious crime committed on the territory of the former Yugoslavia during the wars fought in the 1990s, but also demonstrate that the Republic of Serbia respects its international obligations. The Ministry banned the event on the same day that the HLC raised its objections.[4]

3 See HLC's press release: "Srebrenica Genocide Denial Under Auspices of Serbian Army and Ministry of Defense", dated 9th April 2014. http://www.hlc-rdc.org/?p=26552&lang=de

4 Promotion eventualy took place on 23rd April 2014, in a hall of the Belgrade Church of the Ascension, with the blessing of the parish priest: http://www.koreni.rs/tribina-srebrenicka-podvala/

Advocacy for 'dealing with the past' as part of the EU accession process – experience from civil initiatives in Croatia

Vesna Teršelič, director, *Documenta*

What impact does a country's membership of the EU have on improving the position of civilian victims of war? Not much it seems, judging from the Croatian experience. The situation of civilian victims of war remains poor. The latest wave of bigotry, most evident in the smashing of Cyrillic signs in Vukovar, reveals that Croatia has only partially taken advantage of the opportunity it had to recognise the sufferings of all victims of war, by focusing on increasing the efficiency of the war crimes trials process. Much more could have been accomplished by swifter processing of the, as yet uninvestigated, crimes committed by Yugoslav Army members in Bogdanovci, for example, or those committed by Croatian forces during Operation Storm. Yet, some progress has been made. Some investigations and trials are underway and final judgments in the *Osijek* and *Medački džep* cases have been delivered.

Why did calls for for the right to a fair trial in war crimes cases, the right to learn the truth, and the right to redress fail to produce the expected results? Why did this advocacy not become a part of the framework of the EU negotiating process? Why were efforts to clarify the fate of the missing not stepped up? Why did the negotiations not have any positive impact whatsoever on bringing redress to civilian victims of war or contribute towards improving their status?

For a variety of reasons. The first is that the legacy of war crimes and grave human rights violations did not constitute a separate negotiating chapter, because neither the European Union, the government institutions of the Republic of Croatia, or those of other post-Yugoslav countries proposed that it should be. Our government did not suggest it, because the political will to confront the past was lacking then, as is still lacking today. As for the European Union, it still does not have a policy on dealing with the past, because it has yet to recognise the specific needs related to the legacy of the wars. The talks on EU transitional justice strategies, which are currently underway in Brussels, are exploring meausres for Africa, Asia and South Africa, but fail to recognise the specific problems related to the wars in Europe. For this reason, the processing of war crimes has long been the only theme regularly covered in the EU progress reports, issued every autumn since 2005 to nearly all post-Yugoslav countries. The complex issue of acknowledging

the facts and sufferings of all civilian victims of war in a society could not be so easily and briefly encapsulated, as could calls to increase the efficiency of war crimes trials, so better results were not achieved. It is only in the last few years that the regional initiatives for determining the facts about all crimes, including the RECOM Initative, have gained visibility.

Thus civil society organizations were excluded from the negotiations until the relatively late stages. It is not that we did not want to be involved: it is that in 2007, when the negotiations started to gain momentum, we certainly did not know as much about public advocacy as we do today. The doors of the Government of Croatia and the EU Delegation remained shut to us for a long time. Not during the initial phase of negotiations, which started in autumn of 2005, in which the main emphasis was on the analytical screening of Croatian legislation and its alignment with EU law, nor during 2006, when the conditions were examined under which Croatia would adopt, start to implement and enforce the *acquis communautaire*, did we have access to the negotiations.

At the time we started publishing our first annual reports on war crimes trials, we established communication with State Attorney's Offices and competent courts. The EC Delegation then also began to open their doors to us: in mid 2007, for the first time, the Delegation sent their Deputy Head to a meeting of civil society organizations. From that moment on, our communication intensified. On 26th March, 2008, Vincent Degert, Head of EC Delegation, Mladen Bajić, Croatian State Attorney General, and Branko Hrvatin, Chief Justice of the Supreme Court, spoke for the first time at a round table discussion on war crimes monitoring, organised jointly by *Documenta, the Centre for Peace, Non-violence and Human Rights-Osijek* and the *Civil Committee for Human Rights*. It was on that occasion that the Head of EC Delegation thanked the Ministry of Justice for the comprehensive dialogue they had had, as members of a working group which also featured their colleagues from the OSCE and the ICTY, but to which we were not invited. We had contacts with the Ministry of Justice, at meetings dedicated to specific issues concerning witness and victim support and increasing the efficiency of war crimes trials by prescribing the mandatory jurisdiction of four major county attorney offices and courts. We continuously insisted that compensation should be awarded to all civilian victims of war, but to no avail. Of all the institutions responsible for EU accession negotiations, we only had good cooperation with the Croatian Parliament's National Committee for monitoring the negotiations on the accession of the Republic of Croatia to the European Union, led by Vesna Pusić.

From 28th June, 2008, we participated in joint meetings between the OSCE, ICTY and the EC Delegation. Those meetings were used to exchange information on war crimes trials. From 2009 onwards, we stepped up discussions with OSCE, and after they left Croatia, we inherited their copies of court documents. We were never invited to participate in any of the joint meetings held between international organizations and our government institutions, which helped to define benchmarks for the negotiations. And so, instituting a more efficient and thorough search process for missing persons, or the remission of court fees for all those who

Send us your comments
twitter.com/@FHPHLC #towardsJUSTICE
towardsJUSTICE@hlc-rdc.org

have lost a civil case against the Republic of Croatia, were never discussed as possible benchmarks. It was only on the opening of negotiations on Chapter 23 – Judiciary and Fundamental Rights – on 30th June 2010, that the EU finally welcomed other organizations into the discussions.

Only in May 2011, we participated for the first time in consultations with the European Commission dedicated to exchanging opinions with civil society organizations regarding the annual progress report. In May 2012 we again participated in another round of consultations. In both instances, we sent a delegation of 3 or 4 people, to Brussels, with the support of the Open Society Institute.

At the beginning of 2011, together with a group of other civil society organizations, we began a participatory analysis of the judiciary and fundamental rights issues in Croatia. On 11th November 2001 we went public under the name 'Platform 112' and presented our 112 demands for a Croatia governed by the rule of law. We announced that we would closely monitor the work of our next government throughout its period in office, and keep the domestic and international public regularly informed of any improvements and setbacks in the relevant areas, while calling the government to account in relation to its commitments under international treaties and its pre-election pledges. We put forth our demands, which were broken down into five interrelated high-priority areas as follows:

- Stable, accountable and democratic government institutions and equal access to justice
- High quality democracy
- A fight against corruption and for the public interest
- Equality and dignity for all people
- Legacy of war, dealing with the past and peace building

In order for our society to truly start focusing on the challenges that lie ahead, instead of clinging to the unresolved traumas and divisions from our painful past, it is necessary to deal with the past in a responsible, prudent and consistent dealing way, as a fundamental social process and a precondition for confronting all of the key issues in Croatian society.

If back in 2007, when David Hudson, the then Deputy Head of the EC Delegation, came to our meeting at the Centre for Human Rights, we had had such consolidated list of demands, coupled with joint advocacy efforts and regular reporting, we could probably have accomplished more. A joint advocacy for the right to a fair trial and compensation, at both national and international levels, is key to the recognition of the suffering of all civilian victims of war. I would like to believe that all stakeholders, including civil society organizations, governmental and international organizations and institutions, are at least slightly more mature today than they were when the EU accession talks opened in 2005.

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 Office of the War Crimes Prosecutor (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.

A preliminary hearing opened on 4th Marh 2014. Over the course of the hearing, the court ruled that criminal proceedings against one of the accused should be withdrawn, after a medical expert found him permanently unable to follow the proceedings. The OWCP began the process of proposing evidence to be presented during the trial. The next preliminary hearing session is scheduled to take place on 12th May 2014.

Memorial to the civilians murdered in a minefield in Lovas

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).

A Yugoslav Army tank in an ethnic Albanian village in Kosovo

The preliminary hearing could not be held as scheduled because one of the accused had not been duly served with a summons.

The victims in this case are being represented by two lawyers from Kosovo. The Presiding Judge challenged their right to represent the victims because they are members of the Kosovo Bar Association. The court sought the Serbian Bar Association's opinion on this matter, but this has yet to be delivered.

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 Higher Court in Belgrade

Following the decision of the trial chamber to re-open the main hearing, the court re-examined a medical expert and a ballistics expert. Both agreed that there were no parameters which could be used to accurately determine the time of killing, the number of projectiles fired, the direction from which shots were fired at the victims, or the position of victims at the moment of shooting. They also agreed that a reconstruction of events would not reveal anything that is not already known and that witness statements could not be verified by a reconstruction.

Deputy war crimes prosecutors amended the indictment and handed it in written form to the accused and their defense counsels at the hearing. The hearing had to be adjourned to give the defense counsels time to acquaint themselves with the amended indictment. The HLC does not know the content of the amended indictment, as it was handed to the accused and their defense counsels without being read out in court.

Tenja II

Božo Vidaković and Žarko Čubrilo, former members of Tenja Territorial Defence Force, are being tried for a war crime against prisoners of war and a war crime against the civilian population, committed during July and August 1991 in Tenja (Croatia). An OWCP indictment charges Božo Vidaković with the murder of a prisoner of war, a member of the Croatian Ministry of the Interior, and the unlawful imprisonment of seven Croatian civilians. Žarko Čubrilo is charged with the unlawful imprisonment and murder of 11 Croatian civilians.

The proceedings against Božo Vidaković were temporarily withdrawn because he is currently unable to attend the trial for health reasons. In the ongoing evidentiary proceedings, the court will examine witness, Sofija Čubrilo, and decide on motions by the parties for the presentation of evidence.

Tenja – Memorial to the civilians and soldiers killed in the war

Humanitarian Law Center

12 Decanska St.
Belgrade 11000, Serbia

Tel: +381-11-3349-600
+381-11-3349-766
+381-63-210-536

e-mail: office@hlc-rdc.org
www.hlc-rdc.org

Social networks:

@FHPHLC #towardsJUSTICE

fond.za.humanitarno.pravo

presshlc