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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.

1/2014

[editorial]

Confronting legacy of wars must be part of Serbia's EU membership talks

Sandra Orlović, HLC executive director

The opening of EU accession negotiations with Serbia has rightly been called a historic event by local politicians. Our society and institutions have now embarked on the path of the most substantial reforms in Serbian history. As was expected, the EU will open the negotiation process with chapters 23 and 24, under which Serbia will have to harmonize its legislation with the EU *acquis* in the areas of judiciary, human rights, security, freedom and justice. The purpose of negotiations under these chapters is to transform Serbia into a stable country governed by the rule of law, intolerant of corruption and crime and committed to the efficient protection of the human rights of each and every individual.

Since the fall of the Milošević's regime, human rights have become a ubiquitous social theme. Institutions have been

formed and laws have been adopted which are to improve human rights practices and eradicate arbitrariness in institutions. Progress in the field of human rights is a prerequisite not only for Serbia's accession to the EU but also for restoring the country's international credibility, especially in organisations such as the Council of Europe. Human rights terminology has entered the vocabulary of local politicians. Even the members of extreme nationalist parties and organizations have often invoked freedom of speech, opinion or association...

Regrettably, the rights of the victims of the crimes committed in the 1990s have never made their way into the human rights discourse in Serbia. The obligation to punish the persons responsible for those crimes has been presented by politicians in power either as a requirement imposed by the West (cooperation with the ICTY), or as an effort made by institutions to "clear the name of the Serbian people and state" (domestic war crimes trials). When it comes to the obligation of institutions to secure just satisfaction, rehabilitation and other measures aimed at providing support to victims or showing solidarity with them, Serbia's practice is unprecedented in the region – victims' rights are denied by both the Government and courts in unison. Even institutions like the Office for Human and Minority Rights, Ombudsman or the Commissioner for Protection of Equality, which would appear to "understand" the problem, claim that it does not fall within their competence.

The greatest number of crimes during the wars in the former Yugoslavia were committed by the Serbian police and army. Whether Serbia - as the country most responsible for systematic crimes committed in the course of the latest wars - will be able to rebuild its image, will therefore largely depend on its ability to reform these two institutions. Strengthening civilian control over the army has been played up as an important result of the reforms so far, but this has had little, if any, impact on the aforementioned image. This is because, as we should bear in mind, the crimes did not occur as a result of the army or police escaping from civilian control, but because they were part of a coordinated system which designed and carried out a politics of crime. Many individuals who at the time of the commission of these crimes were members of some infamous units, or held senior positions in the military and police hierarchy, remain in the army and police force. This conclusion is borne out by data showing that 10 percent of war crimes inductees in Serbia were serving as active-duty members of the police or army at the moment of the filing of charges against them. Thus human rights, justice and democracy have become mere empty words, in view of the ghastly wartime pasts of some individuals still wearing police or army uniforms.

In all likelihood, the negotiations under chapters 23 and 24 will be the last chance for our society to start speaking through concrete actions that will demonstrate that Serbia is sincere about accepting EU values, instead of merely offering apologies, empty political rhetoric and euphemisms when referring to the legacy of the war. For the establishment of the rule of law and a commitment to human rights means, above all, the commitment to respect and uphold the human rights of the thousands of victims of the crimes committed during the 1990s and to effect a substantial reform of the institutions involved in these crimes. In that regard, the EU is indeed presented with a historic opportunity, through the EU accession process, to assist for the first time in the establishment of transitional justice mechanisms in a society that is burdened with a grave legacy from the past, and thus in the long term to help shape the future of this region.

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[news]

Participation in EU accession talks

The first intergovernmental conference between the European Union and Serbia, held on 21 January in Brussels, marked the official commencement of the Republic of Serbia's EU accession talks. Before the conference, the screening for Chapters 23 and 24, related to the judiciary, fundamental rights, justice, freedoms and security, had been completed. The screening included presentation of the EU *acquis* and determining the level of harmonization of Serbia's legislation with the EU law.

At the invitation of the Negotiating Group on the Judiciary and Fundamental Rights, chaired by the Ministry of Justice and State Administration, non-governmental organizations participated in the explanatory screening and preparations for the bilateral screening. The Humanitarian Law Center provided data relating to the following seven areas: free legal aid, non-discrimination, reparations, freedom of expression, freedom of religion, efficient legal protection and assistance and support to crime victims.

Anonymization of judgments

The HLC appealed to the Commissioner for Information of Public Importance against the decision of the Higher Court in Belgrade to deny the HLC access to the full text of the court judgments delivered in the *Beli Manastir* and *Gnjilane Group* cases. The Serbian courts' practice of judgment "anonymization" in war crimes cases by blacking out parts of their text is contrary to the Serbian Constitution and other national and also international regulations, especially the European Convention on Human Rights (Article 6) and the International Covenant on Civil and Political Rights (Article 14), which guarantee public access to court proceedings and judgments. The European Convention on Human Rights is part of the Community *acquis*, with which Serbia must align its domestic legislation prior to becoming a member of the European Union.

Failure to recognize war crimes victims' right to redress

The First Basic Court in Belgrade passed a judgment dismissing the compensation claim against the Republic of Serbia filed by the HLC in November 2007 on behalf of 12 Croatian citizens for the torture they endured in the Yugoslav People's Army's prison camps in Sremska Mitrovica and Begejci in 1991. The court dismissed the claim on statute of limitation grounds, as the former prisoners of these camps failed to bring their claim for damages within the statutory time-limit, which expired five years after the end of their imprisonment. This judgement denied the victims of severe crimes their right to obtain just compensation, which is guaranteed by both domestic and international law, including the European Convention on Human Rights.

Serbia's dealing with the past in new Context

Jelko Kacin, European Parliament member and special rapporteur for Serbia

With great fanfare and political pageantry, the long-awaited negotiations on Serbia's EU membership were launched on 21 January, during the first intergovernmental conference between Serbia and the European Union. Although the conference itself lasted for little more than an hour, its symbolic meaning was most evident. After 13 years of wavering, internal disturbances which included the assassination of the first democratic Prime Minister, a frustratingly slow economic recovery, many grand announcements and little implementation, Serbia has finally come to a decision to embark on the European path, a path from which there is no (or hardly any) going back. The question now arises as to how the process of Serbia's dealing with the past will now unfold within this new context?

First and foremost, although it carries a great deal of symbolic weight and brings about economic advantages and betterment in the eyes of investors, EU membership in itself should not be the final goal. The reforms that go along with EU membership are crucial; if carried through, these reforms will transform Serbia into a stable and consolidated democracy, and into an economy with a strong potential for speedy economic growth.

What reforms need to be carried out? In Serbia's case, two key criteria have emerged, on which the pace of Serbia's accession to the EU will largely depend: Kosovo and the rule of law. The issue of transitional justice has to do with both criteria. Dealing with the past will therefore be a decisive part of

the EU accession negotiations with Serbia.

The EU Council has adopted a negotiating framework for accession negotiations with Serbia, which, under item 12, clearly requires "full normalisation of relations with Kosovo .... in the form of a legally binding agreement". Leaving aside the content of this agreement, one thing is certain: Belgrade and Pristina will have to resolve once and for all the issue of missing persons, prosecute war crimes suspects, and also become proactive in addressing the needs of victims and their family members.

At the same time, the opening of the negotiations on chapter 23 (judiciary and fundamental rights) will inevitably bring into focus the issues relating to transitional justice, at both national and international level, as well as at the level of the European Commission experts who will be conducting the negotiations on behalf of the EU Council.

Even though the *acquis communautaire* does not directly prescribe the ways in which a post-conflict society has to reckon with its past, one thing is clear: the efficient processing of war crimes will be the ultimate litmus test of the independence, professionalism and efficiency of the Serbian judiciary.

Judicial processes against war crimes suspects will be among the main formal requirements for successful negotiations and the closing of Chapter 23. The rule of law is formally one of the four political criteria set out in the Copenhagen Accession Criteria: democracy, stability of institutions, the rule of law, human rights and respect for and protection of minorities. These criteria have been without exception applied to all 13 EU member states that have joined the EU since 2004.

However, the EU experience with Bulgaria and Romania, whose accession to the EU in 2007 is considered premature in certain quarters, and also the problems besetting Croatia, prompted the Commission to adopt a new draft Enlargement Strategy, which has put increased focus on the reforms in the areas covered by chapters 23 and 24. This Strategy, adopted in October 2012, envisages careful monitoring of judicial and law enforcement related reforms from the very beginning of accession negotiations, in order to ensure the consistent, timely and full implementation of the law by fulfilling short-term, mid-term and long-term objectives.

War crimes processing will play a central role in establishing the so-called 'track record' of high profile cases that have resulted in final judgments. Serbia is expected not only to process these cases in accordance with international humanitarian law and the practice of the Hague Tribunal, but also to consistently apply domestic criminal legislation.

The Office of the War Crimes Prosecutor has succeeded in bringing the proceedings in the *Ovčara* and *Zvornik* cases to a close, which is a significant achievement. However, it is evident that only the perpetrators of crimes were prosecuted, not those who organised or ordered the commission of those crimes. At the same time, the number of persons being indicted has been decreasing year by year, as was emphasized in the EU Commission's report on Serbia in October 2013.

Equally important is the question of the treatment of victims of crimes and their family members by the Serbian state. The legislation regulating this area still does not recognise the families of missing persons and rape victims as subjects who are entitled to receive government assistance. Under current law, the assistance may be provided only to those who „suffered at the hands of enemy forces", which is inconceivably narrow a definition.

The questions raised by transitional justice pose a serious challenge to the political elite of every post-conflict society. In a situation of political turmoil and a difficult, at times even hopeless economic situation, the much needed reckoning with the past and provision of assistance to the victims seem to be impossible tasks. The dominant discourse in post-Milosevic Serbia has rarely allowed for an open and sincere debate on these topics. Thus far, only some rare and brave civil society activists have brought up the question of Serbia's responsibility for the wars of the 1990s.

Given all the above, I believe that the proper response of Serbia to the question of responsibility for war crimes and assistance to victims is yet to come. By concluding an agreement with Pristina in April this year, the first and most difficult step towards normalisation of relations with Kosovo was made, and, even more importantly, the Serbian political elite finally departed from the all-pervading nationalist narrative. Only with this step has it become possible to address the issue of transitional justice with honesty and dedication.

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That is why I am looking forward with hope and high expectations to the opening of EU accession negotiations with Serbia. The difficult and demanding negotiation process constitutes an excellent framework within which the above-mentioned issues will have to be raised. In the course of the negotiations on chapter 23 (judiciary and fundamental rights), which will be the first opened and last closed, the Commission will set the specific criteria which will have to be met in this area. The two-fold pressure, from Brussels on one side, and the general public in Serbia on the other, may finally bear fruit, but only if accompanied by hard work and persistence on the part of the civil society.

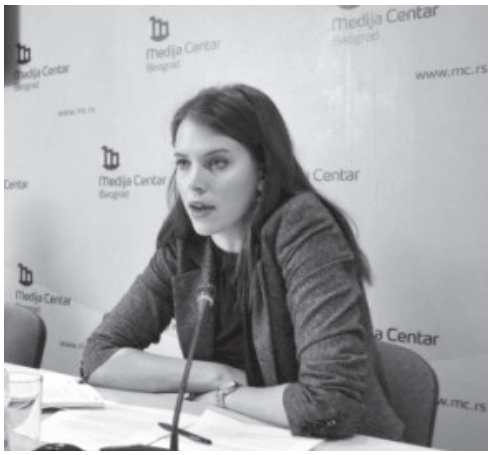
One thing is clear: as soon as it starts to address transitional justice issues, Serbia will facilitate its accession negotiations and its EU accession process, and thus accelerate its return to the European family of nations.

[★] Army and law enforcement personnel should undergo background checks

Milica Kostić, HLC Legal Advisor

Those societies burdened by the legacy of war crimes and severe human rights violations must have various mechanisms in place in order to secure accountability for past crimes, if they are to successfully complete their transition to democracy and the rule of law. Some basic mechanisms include criminal trials, determining the truth and telling the truth about the past crimes, and reparations to victims for the harm suffered. Another important transitional justice mechanism is institutional reform through lustration or vetting, that is, the assessment of public servants' suitability for public office, on the basis of the role they played in the period when massive human rights violations took place.

According to some estimates, between 400 and 700 thousand participants in the wars fought in the former Yugoslavia live in Serbia.[1] Many of them have continued



to work at institutions after the end of the wars. Are those who were involved in crimes, by act or by omission to act, or by condoning and/or covering them up, among them? The experiences of post-conflict societies in our neighbourhood,

1 The National Assembly of the Republic of Serbia, Public Hearing before the Committee on Labour, Social issues, Social Inclusion and Poverty Reduction, on 21 March 2013 - statement by Branislava Vajagić, Executive Director of the War Trauma Centre from Novi Sad.

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the fact that 15 individuals indicted for war crimes in Serbia were at the moment of indictment active-duty members of the Serbian Ministry of the Interior or the Army of Serbia, and the chilling fact that the man who executed the murder of Prime Minister Djindjic was a public servant, a member of the notorious Red Berets, who were responsible for crimes committed across the former Yugoslavia, all indicate that the answer to that question can only be in the affirmative. It follows logically that no environment would seem to be safer for the wartime wrongdoers than government institutions and positions of power. How many of them are still working for the military, the police, the secret services, the ministries? Have they been, thanks to the inherently slow and selective criminal proceedings, *de facto* pardoned?

Following the latest indictments brought against commissioned and non-commissioned serving officers of the Army of Serbia and one officer of the Gendarmery, the Humanitarian Law Center publicly demanded from the competent authorities that these officers be removed from the Army of Serbia and the Ministry of Interior, pursuant to Article 77 of the Law on the Army of Serbia and Article 165 of the Law on Police, respectively, which stipulate that persons who are under investigation or accused of offences that may harm the interests of their office, may be temporarily suspended from duty. In early January 2014, the Commander of the Gendarmery suspended Vladan Krstović from the Gendarmery pending completion of the criminal proceedings against him.

Krstović's suspension showed that institutions, when facing public pressure, do recognise the need to remove or at least temporarily suspend the persons accused of serious crimes. This should be done for a number of reasons. First and foremost, allowing members of army and police who are prosecuted for war crimes to remain in their positions as active duty officers hinders the very work of the authorities responsible for war crimes processing. One may reasonably assume that the Prosecutor's Office and the police unit in charge of investigation would face obstacles when trying to provide evidence, especially witnesses. Potential witnesses would be reluctant and feel less than encouraged by the fact that they would have to testify against a public servant. Moreover, allowing criminal suspects to remain in their positions symbolically sends a negative message to war crimes victims. Members of the military and the MUP committed dozens of massive crimes during the wars in the former Yugoslavia. It will take time for these institutions to regain the trust of the victims, but it will also take honest and effective gestures that deliver a message different from the messages sent during the 1990s. A clearly demonstrated attitude of "zero tolerance" towards persons responsible for crimes is therefore essential.

However, the removal of persons accused of war crimes from work only after criminal proceedings against them have been instigated is an ad hoc mechanism. Not only because it can take place only in cases where criminal proceedings have formally commenced, but also because it has no social or symbolic significance whatsoever. Rather, it allows the vast majority of persons responsible for crimes to keep enjoying the privileges granted by the state.

The imperative of restoring the public's trust in institutions and establishing the rule of law requires systematic wartime background checking of members of army, police and other security sector agencies. A good example can be found in neighbouring Bosnia and Herzegovina (BiH), where a large number of members of the Serbian security sector were involved in wartime activities. Under a 1999 UNMIBH (UN Mission in BiH) plan, 23,751 serving police officers underwent such checks. For the initial screening, law enforcement officers were required to meet only minimum standards, such as: age, citizenship, minimal training requirements, absence of criminal record or indictment. Officers who met these criteria were granted pro-

visional authorisation to perform policing functions, after which they had to undergo additional, more extensive checks. This next screening phase included checks on the possible existence of the following: serious dereliction of duty or serious breach of law, material misrepresentation to the UNMIBH, violation of property legislation, and "acts and/or omissions, and/or functions performed during the period April to December 1992, which demonstrated their inability or unwillingness to uphold internationally recognised human rights standards." The last criterion has a central role in the context of transitional justice. It was based on information drawn from four principal sources: the databases of the International Criminal Tribunal for the Former Yugoslavia, statements of victims and witnesses, information from nongovernmental organisations and data in the forms completed by police officers undergoing checks. Police officers who were not certified were barred from employment within any executive branch agency.

Current Serbian legislation does not envisage any kind of check of their wartime past for the Army of Serbia or Ministry of Interior personnel. Under the law currently applying, they are required to undergo "security and psycho-physical checks", but only as part of the hiring process. There are no retroactive checks on persons who participated in armed conflicts as members of the police and army. Not even the Ministry of Interior members in charge of investigating war crimes and ensuring the security of protected witnesses are required to undergo background checks relating to their wartime activities.

In the aftermath of its changeover to democracy, Serbia passed the Law on Accountability for Human Rights Violations (the so-called Law on Lustration), which became ineffective in 2013 without ever having been implemented. Under this law, a Commission was set up to conduct checks into high-ranking officials of security sector agencies, but only for those criminal acts for which the statute of limitations had expired. Before appointing a head of a security sector agency, the bodies in charge of their appointment were required to "promptly submit a request for checking human rights violations to the Commission". But not even this law envisaged checks into lower-ranking army and police officers.

Serbia's commitment to establishing accountable institutions and the rule of law, through reforms to be carried out in the context of its EU accession, means, among other things, that in these institutions there should be no room for those who have committed, condoned or covered up crimes. In this respect, introducing a procedure for continuous screening of all members of law enforcement agencies and the military is imperative. The screening must include looking into any engagement, that is, actions, covering up crimes, as well as any omissions and failures to prevent human rights violations during the armed conflicts in the former Yugoslavia. The authority that would conduct such checks should, in addition to applying the criteria applied in BiH, also draw information from the records of the Serbian Security Information Agency and other agencies, and from court records, records of other government bodies and organisations vested with public authority.

The establishment of a procedure for assessing the suitability of a person to hold a public office on the basis of his/her wartime activities is a major challenge that Serbian institutions and the society as a whole are facing nowadays, because some of the most senior positions within the army and law enforcement are held by the very people whose biographies are sullied by the existence of strong evidence indicating their implication in crimes. For this reason, the way in which the Serbian political elite will deal with this challenge, will demonstrate how sincerely they are committed to establishing democratic values in Serbia.

[War crimes trials – overview]

Sanski Most

Miroslav Gvozden stands trial for a war crime against a civilian population. In the indictment filed by the Office of the War Crimes Prosecutor (OWCP), it is alleged that on 5th December 1992, Gvozden, together with four members of the Army of Republika Srpska, killed six and wounded one civilian in the villages of Tomašica and Sasine (Sanski Most municipality, BiH) in retaliation for the murder of his brother.

The hearing, which had been scheduled for 10th January, did not take place for various procedural reasons. A panel of judges deciding on an objection ordered that the indictment be returned to the OWCP for investigation.

The OWCP, however, considers the order to be contrary to the law, because an already confirmed indictment cannot be referred back to the investigation stage, especially since an investigation had already been carried out on the instructions of the Cantonal Prosecutor's Office in Bihać. Therefore the OWCP sent the case and its opinion thereon back to the Belgrade Higher Court's panel for a new ruling.

Bihać

Đuro Tadić stands trial for a war crime against a civilian population. According to the OWCP indictment against him, Tadić, on 23rd September 1992, as a member of the Army of Republika Srpska and together with seven other members of the army or police, participated in the murder of 18 Bosniak civilians and the attempted murder of another civilian, in the village of Duljci (Bihać municipality, BiH) where the civilians were picking plums, fulfilling their work duty.

Bihać streets during the war

The parties presented their closing arguments on 28th January 2014. The prosecutor, after stating that Đuro Tadić was beyond reasonable doubt found to have committed the crime he was charged with in the manner described in the indictment, asked the court to sentence him to 15 years in jail. The defence counsel and the defendant alleged that Tadić's guilt had not been proven in the course of the proceedings, claiming that the defendant's brother Jovica and cousin Zoran Tadić had shifted the blame onto him after entering a plea agreement reached during the proceedings against them before the Bihać court.

On 6th February 2014, the court delivered a judgment finding Đuro Tadić guilty, since the evidence presented during trial proved his guilt beyond doubt, and sentenced him to 10 years in jail. Tadić's family circumstances, the lack of previous convictions and his old age (he is 65) were assessed as mitigating factors in determining the sentence; the severity of the consequences,

that is, the number of victims, mostly women and elderly people, and including a 13-year-old girl, were held to be aggravating factors.

Ćuška/Qyshk

Toplica Miladinović and 12 other persons accused stand trial for a war crime against civilians. According to the indictment the OWCP has filed against them, the accused, during April and May 1999, as members of the Yugoslav Army's 177th Military Territorial Detachment, killed at least 109 Albanian civilians in the villages of Ljubenić, Ćuška, Pavljan and Zahać (Peć municipality, Kosovo).

Throughout January, the prosecution, the injured parties' representatives and the defence counsel presented their closing arguments. The prosecution asserted that it was proven beyond doubt that the defendants had committed the crime they were accused of, and called the court to sentence them to prison terms ranging from five to 20 years. The HLC lawyers – as legal representatives of the injured parties – asserted in their closing arguments that the proceedings had failed to determine the whole truth of the case, because the role of the officers who held more senior ranks in the hierarchy than Toplica Miladinović, as well as the role of the police in these crimes, had been completely ignored.

Ćuška cemetery

The Higher Court in Belgrade on 11 February 2014 pronounced a judgment finding nine members of the Yugoslav Army's 177th Military Territorial Detachment guilty of a war crime against a civilian population and sentenced them to prison terms ranging from five to 20 years. Two of the accused persons were acquitted, and three were each given a maximum 20-year jail sentence. When pronouncing judgment, the Presiding Judge said that the court had established that the accused were not paramilitaries, but regular members of the Yugoslav Army.

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