This bulletin is made possible by the support of the of the American people through the United States Agency for International Development (USAID) under the "Civil Society Forward" program, implemented by the Institute for Sustainable Communities (ISC). The contents of this bulletin are the responsibility of the Humanitarian Law Center and do not necessarily reflect the views of USAID, the United States Government or ISC.

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.

6/2014

[★] Covering up the cover-up?

Sian Jones, Researcher, Amnesty International

As the bodies of ethnic Albanians killed in Kosovo in 1999 continue to be exhumed at Raška, Amnesty International keeps asking why the Office of the War Crimes Prosecutor (OWCP) has not yet adequately investigated those suspected of criminal responsibility for coordinating and implementing the plan to conceal those war crimes by transporting the bodies of ethnic Albanians killed in Kosovo by Serb forces, and reburying them or destroying their remains in Serbia.

Sian Jones

The bodies of almost 900 Kosovo Albanians disappeared by Serb forces have been exhumed in Serbia. By 2002, some 744 mortal remains had been found in mass graves on Ministry of Interior land at Batajnica and 70 at Petrovo Selo; another 84 were found in Lake Perućac. These bodies have been returned to their families. Others are believed to have been destroyed in industrial furnaces in Surdulica and Trepča. Some 45 bodies – again thought to be Kosovo Albanians – have already been exhumed from the Rudnica quarry near Raška, and another two areas of the quarry were opened up for investigation in August. In Kosovo, the relatives of those still missing are waiting to find out if their family members are amongst the recovered bodies.

Amnesty International has long urged that the investigation and prosecution of the cover-up operation should have been a priority for the OWCP. Indeed, more than 10 years ago, on 24 June 2003, Vladan Batić, then Minister of Justice, referring to investigations at Batajnica and Petrovo Selo, indicated in a media interview that these would be amongst the first cases to be prosecuted under the law which entered into force in July 2003, creating the OWCP.

Child's clothes found in Batajnica mass grave

In 2004 UN Human Rights Committee (HRC) urged the authorities to investigate and prosecute; but in 2011 the same committee, in their concluding observations, found that, "no significant progress has been made to investigate, prosecute, and punish those responsible for the killing of more than eight hundred persons whose bodies were found in mass graves in and near Batajnica, and to compensate the relatives of the victims".

In July 2012, in their response to the HRC, the government confirmed that the investigation had been a priority for the OWCP since its inception, and that more than 80 witnesses had been interviewed. Yet, despite an investigation into all the available evidence, the War Crimes Investigation Service (WCIS), a Ministry of Interior police department, had not been able to provide the OWCP with a "reliable conclusion" on the identity of any of the alleged perpetrators.

In February 2011, Vlastimir Đorđević, former Assistant Minister of Interior and Chief of the Public Security Department (RJB), responsible for all RJB units in Kosovo, was convicted on three counts of crimes against humanity and two counts of war crimes. He had been indicted for his responsibility for participation in "the joint criminal enterprise [including that] with [Vlajko] Stojiljković and others, he took a lead role in the planning, instigating, ordering and implementation of the programme of concealment by members of the RJB and subordinated units of the crime of murder, in coordination with persons in the RDB [state security] and in the VJ." With the exception of Vlastimir Đorđević, not one member of the RJB, nor any of the police or military commanders, who coordinated and implemented the

cover-up operation, has been brought to justice, despite the ample evidence provided in proceedings at the ICTY.

In May 2013, the OWCP issued a press release stating that two police officers, one allegedly a serving officer in the gendarmerie, had been arrested on suspicion of committing war crimes against at least 65 Albanian civilians, and of the "deportation and transportation of the bodies of those killed in the village of Ljubenić to the police centre in Batajnica".

They were among five individuals charged with participation in the murder of at least 65 Kosovo Albanian civilians in Ljubenić village in Kosovo, during April and May 1999. They were also charged with the deportation and transfer of the victims' remains from Ljubenić to the MoI training ground in Batajnica, for burial in a mass grave.

Amnesty International hopes that this is part of a wider indictment, hinted at in the OWCP's 2013 report, and in a media interview in October 2013 when Chief Prosecutor Vladimir Vukčević, stated that the Batajnica case had been processed, that unnamed persons were under investigation, and that indictments would be filed on completion of the investigation.

However, on 22 November 2013, when the Prosecutor announced that an indictment had been raised in the Ljubenić case, no reference was made to the transfer of remains to Batajnica. When proceedings opened on 8 September 2014 the indictment had still not been made public, but Amnesty International has been reliably informed that charges relating to the transfer of remains to Batajnica are not included in the indictment. While some of those responsible for the killing of Kosovo Albanians in 1999 have been or are being prosecuted, there is still no indication that any senior officials responsible for the cover-up operation will be indicted.

Serbia ratified the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) and recognized the competence of the Committee on Enforced Disappearances to receive and consider communications from or on behalf of victims in 2011. Although the enforced disappearance of Kosovo Albanians took place in 1999, under international law, they are considered as a continuing crime as long as the fate and whereabouts of the individual remain unclarified. The CPED places an obligation on Serbia to investigate and prosecute, and to ensure that the relatives of the missing are provided with adequate reparation, including the right to know what happened to their family members, and to compensation.

In addition, the failure of the authorities to inform family members of the fate and whereabouts of a person subjected to enforced disappearance, and their failure to conduct prompt, impartial, independent and thorough investigations into cases of enforced disappearance can amount to a violation of family member's right not be subjected to inhuman or degrading treatment (under Article 7 of the ICCPR and Article 3 of the ECHR). Under the Rome Statute of the International Criminal Court, to which Serbia is a state party, enforced disappearances may also amount to crimes against humanity, "when committed as part of a widespread or systematic attack, directed against any civilian population".

How long will it be before the senior of-

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

ficials who are suspected of covering up the evidence and members of the RDB who participated in the deportation and transfer of the bodies of Kosovo Albanians to Serbia are prosecuted for crimes against humanity? If the police department responsible for investigating these crimes is unable, after 10 years, to identify the suspects, then surely it is time to provide the OWCP with additional investigators and analysts, or to reform the WCIS into an impartial and professional unit, with the capacity to carry out prompt, independent, thorough and effective investigations?

[A Serbian translation of Amnesty International's report, *Serbia: Ending impunity for crimes under international law*, will be launched in Belgrade in October.]

[news]

Screening Report for Chapter 23

On July 30th, 2014 the European Commission published the Screening Report for Chapter 23 – Judiciary and fundamental rights. The report contains findings on the legal and institutional framework in the areas of justice, the fight against corruption and fundamental rights, the capacities for the implementation of regulations, the assessment of the degree of alignment with the acquis communautaire and the recommendations of the European Commission (EC) relating to the acceptance of the *acquis* in the areas mentioned above.

The Screening Report treats war crimes as a separate sub-area. Serbia was the first country in the region to be asked, in the early stages of the negotiation process, to consider the war crimes issues as a separate area. The findings of the EC within the field of war crimes are that "Serbia has an adequate procedural legal framework to investigate, prosecute and adjudicate war crime cases"; but also, that the prosecution of war crimes still requires special attention, particularly regarding "avoiding a perception of impunity" for war crimes.

The EC's recommendations for improving the prosecution of war crimes rely largely on the requirements which the HLC asked for before the European institutions and before the institutions of the Republic of Serbia years back. However, criminal justice is only one element in the process of dealing with the past, and does not by itself provide a guarantee for the non-recurrence of crimes or for the building of a sustainable and secure post-conflict society. In addition to criminal justice, it is necessary to ensure just compensation for victims, provide a platform for public debate on crimes, reform institutions in order not to provide shelter for the perpetrators, organizers and the commanders of crimes, and to establish memorials and remembrance days that will ensure a collective memory of the suffering to which citizens of states in the

EC recommendations for further improvement of war crimes prosecutions:

- Ensure that all allegations are properly investigated and subsequently prosecuted and tried;
- Ensure proportionality of sentences;
- Ensure equal treatment of suspects, including in cases of high level officers allegedly
- involved in war crimes;
- Step up security of witnesses and informants and improve witness and informant support
- services;
- Ensure confidentiality of the investigation including witness and informant testimony.
- Ensure adequate judicial and prosecutorial resources.

region were exposed to.

With regard to the above-mentioned issues, it is of particular concern that the Screening Report does not contain recommendations on victims' rights to material compensation and other forms of reparations. At the beginning of the screening for Chapter 23 in September 2013, the victims' right to reparations was presented as a relevant regulation with which the candidate country must comply.[1]

1 European Council Directive on compensation to victims of crimes, "Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims ", Sites visited 02/09/2014, http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_terrorism/l33174_en.htm

After the publication of the Screening Report, the HLC demanded that the rights of victims to reparations be included in Chapter 23 of the accession negotiations.[2]

Participation in the drafting of the Action Plan for Chapter 23

At the invitation of the Office for Cooperation with Civil Society of the Government of Serbia, the HLC participated in the drafting of the Action Plan for Chapter 23 - Judiciary and Fundamental Rights. The Action Plan defines the activities for fulfilling the EC recommendations from the Screening Report, the time frame and the necessary financial resources for their implementation. The HLC has formulated the activities and the expected results for all the recommendations in the area of war crimes, as well as in other areas which relate to the compliance with the Directive on minimum standards on the rights, support and protection of victims of crimes and the consistency of jurisprudence.

2 Humanitarian Law Center, "Include victims' rights to reparation in Chapter 23," press release August 15, 2014, http://www.hlc-rdc.org/?p=27309&lang=de

According to announcements made by the Ministry of Justice, which is the institution with responsibilities regarding this chapter, the Action Plan for Chapter 23 should be released in October 2014.

Reconciliation as a priority during Serbia's Chairmanship of the OSCE

In 2015, Serbia is to chair the Organization for Security and Cooperation in Europe (OSCE). In its capacity as the Chair, Serbia has an opportunity to create the priority topics of international significance which the OSCE will deal with during the year of Serbia's chairmanship. The Delegation of Serbia, led by the Minister of Foreign Affairs Ivica Dačić, presented these topics at a special session of the Permanent Council of the OSCE on July 15th, 2014 in Vienna. Among others, the topics included regional cooperation in the Western Balkans and reconciliation.

The Minister in his speech said that "the past cannot be forgotten, particularly when it comes to the victims of war," and that "for future needs, it is necessary we learn the lessons from the past in order to overcome wrong perceptions and shattered illusions, and to avoid future mistakes." Great importance is given to reconciliation in the region owing to the fact that it is a region which, "during the past many years, has faced [...] wars, hostilities [...] human suffering and serious violations of human rights."

Several non-governmental organizations, including the HLC, have formed a coalition with the aim to monitor and participate in Serbia's chairing of the OSCE. The Coalition has established a proposal of topics that should be a national priority and has introduced them to the Head of the Working Group of the Ministry of Foreign Affairs of Serbia chairing the OSCE, Dejan Šahović, at a meeting held on July 16th in Belgrade. Among the suggested topics are regional cooperation, reconciliation, non-discrimination, freedom of the media, freedom of expression and assembly, rights of asylum seekers and prevention of torture.

Is it possible in Serbia to prosecute for command responsibility and crimes against humanity?

Ivan Jovanović, consultant for International Criminal and Humanitarian Law and a Ph.D. candidate at the Faculty of Law in Geneva

While advocating accountability for crimes committed during the 1990's wars we must often, unfortunately, refer to the EU accession process. I say 'unfortunately', because in our society arguments stating that establishing responsibility for such atrocities is a legal obligation (very clearly determined by both international and domestic law even before these wars), as well as a moral obligation (which, like the legal obligation, does not admit of excuses such as, "Are we to judge our own, and 'they' not to judge their own?"), are all too often insufficient. These obligations would exist even if the EU did not. The accession process entails constant assessment in many areas, including the commitment to punishing those responsible for war crimes, genocide, and crimes against humanity, which is part of one of the political criteria for EU accession – fulfillment of the general international obligations of candidate countries. These criteria also include cooperation with the countries in the region, which is most certainly affected by the prosecution of war crimes. The punishing of those responsible for crimes is also being addressed through the negotiation of Chapter 23, which refers to human rights and independent and efficient judiciary.

Responsibility for war crimes includes not only the responsibility of direct perpetrators, but also of those who orchestrated or made those crimes possible, meaning persons in middle and higher positions in the army and police chains of command, as well as civilians who had formal or *de facto* power of command or control over direct perpetrators. So far, in Serbia, the accountability of people in such positions substantially has not taken place. The EU came to this conclusion in its Serbia 2013 Progress Report, together with the UN Committee Against Torture, OSCE and local (primarily the Humanitarian Law Center), as well as international civil society organizations (such as Amnesty International and others). Besides this more apparent and more emphasized problem, what is also lacking is the establishment of responsibility for some crimes occurring after the end of the armed conflict, which therefore could not

be subsumed under the definitions of war crimes. Such are the cases of the *Bytyqi Brothers* and the so-called *'Gnjilane Group'*, as well as other crimes, particularly those committed against non-Albanians after the end of the NATO bombing. These crimes could fall under the definition of crimes against humanity - a criminal offence involving acts such as murder, torture, rape, persecution, expulsion and others when committed as part of a widespread or systematic attack against a civilian population. Prosecution of crimes against humanity cannot be barred by statute of limitation, just like war crimes, but unlike them, can be committed in times both of peace and of war.

The responsibility of those in command of the direct perpetrators can, to put it simply, be determined in two ways. One is to charge them with ordering or instigating war crimes, which, as practice has shown, is hard to prove, even when indications exist that something like that really did occur: the orders were, most probably, not written (because it was very clear that the things that were being done were forbidden), and among the people who could testify about the occurrence of a verbal order, there has usually been a conspiracy of silence - either voluntarily (out of "patriotic" or other reasons) or caused by threats or fear. The other way is to prosecute military, police or civilian superiors for having failed to prevent the persons under their effective command and control from committing crimes if they had the information that such crimes were being prepared, or if they had failed to undertake measures within their authority against perpetrators after such crimes were committed, therefore giving them a 'green light' in regard to the crime. The second approach refers to what is called 'command responsibility', but it has not yet been applied in Serbia; just as the prosecution for the said crimes against humanity has not yet been undertaken (also noted by the Committee Against Torture).

The most common reason given for the absence of command responsibility and crimes against humanity proceedings in Serbia has been the legal argument that they were not prescribed by domestic criminal law at the time of commission. However, this argument is not valid, since both command responsibility and crimes against humanity have been applicable in Serbia in accordance with international, as well as domestic law.

Command responsibility charges can be raised on several grounds. One of them would be through direct application of international treaties and customary international law, which is allowed according to the Serbian Constitution. However, these grounds are encountering the utmost resistance. Therefore, I will focus on the one that I believe would be the most acceptable for the domestic prosecutor's office and the majority of judges. This basis for prosecution is the perpetrator's failure to act, or, in other words, the omission of a duty that the defendant was obliged to carry out. Such basis is provided for in Article 30 of the Criminal Code of the Federal Republic of Yugoslavia which is applicable law in trials for these crimes. The duty that the defendant failed to carry out refers precisely to the aforesaid prevention of wrongdoings by subordinates and taking measures against the subordinate perpetrators, for whose behavior the defendant was bound to guarantee. The commander's duty to act in such cases exists, and it existed during

the commission of the crimes in the 1990s, according to international law - *Protocol I Additional to the Geneva Conventions* issued in 1977 (Articles 86 and 87), which was ratified by our country, and which defines command responsibility in international conflicts. The duty also exists according to *customary international law* (or the *generally accepted rules of international law*, as it is termed in the Serbian constitutional terminology), which provides for command responsibility in internal conflicts and binds all states and individuals. It existed on the basis of the domestic *Regulations on the Application of International Laws of War in the Armed Forces of the SFRY,* 1988, which incorporated command responsibility. Croatia, which has a nearly identical legal framework to that of Serbia, is widely applying this basis for prosecution; Bosnia and Herzegovina is also prosecuting cases arising from command responsibility, but in a manner specifically prescribed by the criminal law, which follows international law, as well as the EULEX courts in Kosovo. Command responsibility is therefore well-known to prosecutors and judges; and it was - most importantly - also known to the perpetrators of the war crimes, particularly in the case of the officers. The only thing remaining has been to apply it. Of course, one must understand that this does not mean an immediate indictment or verdict only due to the fact that someone was a commanding officer - which is often, and wrongly, attributed to command responsibility in many discussions in Serbia. Each situation requires specific evidence of command, of knowledge of the crimes and of failure to prevent. Here we are talking about the fact that there is a legal model for bringing to trial those whose rank is above that of the direct perpetrators, not of automatic responsibility of those high raking individuals. The order for conducting an investigation on this basis, against the former commander of one of the brigades of the Army of (FR)Yugoslavia in Kosovo, recently issued by the Deputy War Crimes Prosecutor Dragoljub Stanković, is a long-awaited step in the right direction by this prosecution office

The legal situation is somewhat more complicated when it comes to crimes against humanity. Since the Nuremberg trial, this type of crime is provided for by the generally accepted rules of international law, which are not written. Although all countries have been obliged to prosecute this crime, the Criminal Code in Serbia - as in most countries - did not specifically provide for this offence until 2006 (and it cannot be applied retroactively to past events), and the Constitution of Serbia provides that both offense and penalty shall be prescribed by the laws applicable at the time of the commission of the offense (the principle of legality, Article 34 of the Constitution). Therefore, the prevailing opinion in the lawyers' community in Serbia is that trials for crimes against humanity are impermissible because they would violate the principle of legality. This view, however, neglects the fact that the principle of legality is defined by international law and ignores recent changes in the interpretation of this principle, as well as the supremacy of international law over the Serbian law. The solution is to prosecute crimes against humanity on the basis of their existence within what the local legal terminology calls the generally accepted rules of international law (customary international law), but to pronounce sentences within the scope of the

general minimum and maximum in force at the time of the offense (that is to say, from between 15 days and 15 years, with 20 years for the most serious types of offenses). The practice of the ICTY, which has dealt with this issue extensively, may be helpful for determining the content of these rules. This approach, although it would be considered as legally blasphemous by many domestic criminal lawyers, has been unquestionably accepted in international law and practice in many countries, and approved by the European Court of Human Rights.

The European Convention on Human Rights (Article 7) and the International Covenant on Civil and Political Rights (Article 15) stipulate that crimes can be provided for not only by national law, but also by international law - which, in addition to international conventions, includes the aforementioned generally accepted unwritten rules, such as those defining crimes against humanity, as well as the general principles of law recognized by civilized nations. Both of these international instruments require that a penalty heavier than the one applicable at the time of the offense must not be imposed, but do not demand that the exact penalty be prescribed in advance. These provisions of the European Convention and the International Covenant have themselves become part of the customary international law. They are contained in the EU Charter of Fundamental Rights too. It is interesting to observe that during the drafting of the Covenant in the 1960's, the representative of the SFRY was the one who declared that the aforementioned Article 15 of the Covenant means that "crimes against humanity should always be punished wherever and whenever they are committed," and that this Article would deprive criminals of the opportunity "to evade justice on the grounds that their crimes were not provided for in domestic law"! It is as if the state representative of the country of which Serbia is a successor, was thinking of the precise current situation which we are discussing at this point.

As for the sentence, according to the jurisprudence of the European Court of Human Rights, it is essential that the offender be able to predict what the prohibited act is and the fact that it is punishable. International law, as well as the constitutions, laws and practices of a range of countries, allow for an exception from the requirements of the pre-prescribed punishment according to the law when it comes to international crimes. So far this has been confirmed by the most extensive academic studies of the topic of the principle of legality (by Kenneth Gallant, in 2009) and of the application of international law in national courts (by Ward Ferdinandusse, in 2005).

Most importantly, the European Court of Human Rights has confirmed, explicitly in the case of *Kolk and Kislyiy v. Estonia* (from 2006) and *Šimšić v. Bosnia and Herzegovina* (from 2012), and implicitly in some others, that the state can convict someone for a crime against humanity regardless of the fact whether the national law provided for this crime at the time of its commission. During the past two decades, several countries have also taken such a position, including France, Hungary, Slovenia, Argentina and Colombia, as well as - this should be particularly emphasized, since it directly addresses the crimes committed in the 1990's – Bosnia and Herzegovina, and most recently

Montenegro (the "Bukovica" Case).

The Constitution of Serbia allows for such a procedure to be applied by our courts. The Constitution, in fact, apart from the aforementioned Article 34, which requires regulation of the offense and the punishment according to the law, contains other relevant norms. Thus, the generally accepted rules of international law (customary international law), in addition to international treaties, are an integral part of the internal legal order and are directly applicable (Article 16); and the Constitution is placed above international treaties (Article 194), but not above the customary international law. This is due to the fact that the rules of customary international law are established according to international practice, and are frequently independent of the will of individual countries, while a specific country can choose whether to accept a treaty or not. The Constitution also states (Article 18) that the provisions on human rights are interpreted in favour of promoting the values of a democratic society, in accordance with international standards (hence – including those of the European Convention on Human Rights and the International Covenant on Civil and Political Rights) and in accordance with the practice of the international institutions which supervise their implementation (i.e. the European Court of Human Rights).

Finally, even the Serbian judiciary has itself made a precedent with respect to essentially the same issue. The Office of the War Crimes Prosecutor requested in 2008 to open an investigation against Peter Egner, a Nazi, (who passed away subsequently), for genocide during World War II, although at the time of that war genocide did not exist as a criminal offense under domestic law, and was not even defined in international law. The Court approved it by referring to the aforementioned Articles 7 and 15 of the European Convention and the International Covenant, in particular to the general principles of law recognized by civilized nations.

Compliance with international legal obligations - both as a precondition for the EU accession and regardless of it - sometimes requires taking a bypass, which differs from the usual route taken. There is no reason for the Serbian judiciary not to take this bypass, since it was established by international law and its way paved by the practice of the European Court of Human Rights and several countries. What is more, the Serbian judiciary has in some cases demonstrated that it knows where the bypass is located. Especially if that is the only way to serve at least some justice for victims of crimes, whatever their nationality may be.

[In the period July 14th – September 2nd there were no war crimes trials]

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

through ACCESSION
towards JUSTICE