



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



Strasbourg, 19 March 2012

CommDH/IssuePaper(2012)1
Original version

POST-WAR JUSTICE AND DURABLE PEACE IN THE FORMER YUGOSLAVIA

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Summary

This Issue Paper deals with the process of post-war justice and the efforts aiming to establish durable peace in the region of the former Yugoslavia, following the armed conflicts in the 1990s characterised by “ethnic cleansing” and atrocities unseen in Europe since the Second World War. The paper focuses on four major components of post-war justice: the necessary measures for the elimination of impunity; provision of adequate and effective reparation to war victims; the need to establish and recognise the truth concerning the gross human rights violations and serious violations of international humanitarian law that occurred in the region; and the guarantees of non-repetition through necessary institutional reforms.

Measures for the elimination of impunity. This section provides an overview of the work of the International Criminal Tribunal for the former Yugoslavia (ICTY) whose groundbreaking work has focused on the prosecution and trial of the most senior leaders involved in war-related crimes. It highlights the ICTY’s subsidiary role and the need to establish and enhance efficient national judicial systems to enable them to work effectively towards the elimination of impunity in the region, a persistent problem despite the fact that most of the countries of the former Yugoslavia have reformed their judicial systems and established specialised war-crime courts. Many of the war-related criminal cases are still unresolved, while those trials held *in absentia* should be in principle reviewed and appropriate remedies should be ensured for those wrongfully convicted. Kosovo* is still the weakest in this sense, notably characterised by a weak witness protection system.

Provision of adequate and effective reparation to all war victims. Despite the efforts made to date there are still about 438 000 refugees and other displaced persons, including many stateless Roma, due to the wars in the 1990s. Durable solutions for these persons are necessary. Recent regional efforts to address forced migration and statelessness, with the support of the United Nations High Commissioner for Refugees (UNHCR), provide a basis for hope. Another specific group of post-war period victims are the approximately 25 000 “erased” in Slovenia. Efforts made so far by the government to tackle the issue have not met with much success and more human rights centred efforts are needed. In addition, the estimated 20 000 women who have suffered sexual violence during the wars in the region require particular attention from states and measures aimed at reparation, including

* Throughout this text, all reference to Kosovo, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 (1999) and without prejudice to the status of Kosovo.

rehabilitation. This section also focuses on various forms that war victims' reparation has taken or may take: provision of compensation (including through a victims' trust fund promoted by the ICTY); satisfaction through public apology or official declaration; and satisfaction through tributes and commemorations.

The need to establish and recognise the truth. Establishing and recognising the truth is one of the most important components of the transitional justice process. More efforts are necessary to counter the ignorance and denial of gross human rights violations, which is still prevalent in public and political discourse in the region. This section addresses the truth-finding initiatives through various Truth and Reconciliation Commissions and Commissions for Missing Persons, as well as the catalytic role played by civil society, media and culture. Efforts in this area have been seriously hampered to date by persistent ethnic polarisation and divisions among politicians and populations, a situation which has been compounded by weak media activity on the matter. The region's governments need to effectively support truth-seeking initiatives and co-ordinate their action through a widely agreed-upon plan of action.

Need for institutional reforms to guarantee non-repetition. The countries of the former Yugoslavia have had to go through two major historic transitions: one following the demise of the former federal socialist republic and the subsequent tragic years of the wars in the 1990s. In order to ensure genuine post-war justice and durable peace in the region, the states concerned must carry out institutional reforms, starting with their systems of justice on which the rule of law is based. The reinforcement of the independence and effectiveness of the existing national human rights institutions (human rights commissions, ombudsmen and comparable institutions) is also necessary. Lastly, education is noted as a vital sector that should be overhauled by the states in the region, drawing upon the expertise of the Council of Europe, in order to promote pluralism and combat persisting ethnic polarisation and discrimination.

The Issue Paper ends with concluding remarks and certain recommendations which include ratification or accession by all states concerned to the following Council of Europe treaties: the 1974 European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes; the 2010 Third Additional Protocol to the European Convention on Extradition; the 1997 European Convention on Nationality; and the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession. In addition, states of the region which have not yet done so should accede to the 2008 Convention on Cluster Munitions and the 2003 Protocol V on Explosive Remnants of War to the Convention on

Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (“Protocol V on Explosive Remnants of War to the Conventional Weapons Convention”).

Introduction

The declarations of independence by Croatia and Slovenia in 1991 were the beginning of the end of the Socialist Federal Republic of Yugoslavia, which was accompanied by three major armed conflicts: in Croatia (1991-1995), Bosnia and Herzegovina (1992-1995) and Kosovo (1998-1999). In addition, there were two smaller-scale, shorter conflicts in Slovenia (June-July 1991) and in “the former Yugoslav Republic of Macedonia” (January-August 2001). These conflicts were marked by gross violations of human rights and serious violations of international humanitarian law that had not been witnessed in Europe since the Second World War. They were notably linked with the worldwide establishment of the term “ethnic cleansing” (from “etničko čišćenje”)¹ and left behind hundreds of thousands of victims, many of whom still remain today without reparation for the harms they have suffered.

The legacy of the violent past still lingers on in the region, endangering the full enjoyment of human rights, democracy and rule of law. Until recently, lack of political vision and determination by states in the region to redress the past abuses of human rights has resulted in an individual pursuit of truth and reparation by thousands of victims, causing domestic proceedings for war crimes to dysfunction while some of the accused war criminals are still at large.

Genuine inter-ethnic reconciliation and durable peace in the region of the former Yugoslavia cannot be achieved without justice. Post-war justice is not only judicial and retributive, aimed at punishing those who have committed crimes through fair proceedings. It is above all restorative and preventive, aiming to provide redress to victims and to eliminate impunity and ensure that all people in the region come to terms with the past, and live in peace and security in cohesive, pluralist democratic societies. The tools that may be used to these ends are both judicial and non-judicial, such as prosecution initiatives, truth-seeking processes, reparation programmes, institutional reforms, or a combination of all of these tools.²

This Issue Paper aims to contribute to the efforts under way to tackle the painful experience of the wars in the former Yugoslavia and to provide reparation to all the victims of gross human rights violations. It is structured around four major constitutive elements of post-war justice: the necessary measures for the elimination of impunity; provision of adequate and effective

1. Petrović D. (1994), “Ethnic cleansing – an attempt at methodology”, *European Journal of International Law*, No. 5 (1), pp. 342-359.

2. See UN General Assembly, Human Rights Council, “Analytical study on human rights and transitional justice”, A/HRC/12/18, 6 August 2009, p. 4, paragraph 3.

reparation to all war victims; the need to establish and recognise the truth; and the reorganisation and establishment of efficient and accountable state institutions in order to avoid recurrence of gross human rights violations. The final section contains concluding remarks and certain recommendations aimed at assisting the states concerned in their efforts to attain post-war justice and reconciliation, in full and effective compliance with international and European human rights standards.



1. Measures for the elimination of impunity

Impunity encourages committal and repetition of crimes, inflicts additional suffering on victims and has adverse effects on the rule of law and public trust in the justice systems, especially in cases where there is a legacy of serious human rights violations.³ Perpetrators of gross violations of human rights or serious violations of international humanitarian law should be subject to effective investigations, prosecutions and fair trials.

3. See Council of Europe Committee of Ministers, “Guidelines on eradicating impunity for serious human rights violations”, adopted on 30 March 2011.

National war-related crime proceedings in most countries in the region of the former Yugoslavia have been slow overall so far and presented serious shortcomings. Photo © Council of Europe.

Given that international justice is subsidiary by nature, the fight against impunity should in principle be carried out at national level. Unfortunately, this has been very difficult, if not impossible, to achieve in most post-conflict societies, including the former Yugoslavia. Weak judicial systems, lack of appropriate laws, partiality, sometimes strong support for violators from radical groups within countries and unstable political and economic conditions are some of the elements that serve to harm or halt the process. The judiciary in the former Yugoslav countries was not capable of handling and prosecuting complex cases immediately after the war. New governments were neither willing nor able to deal with the past abuses of human rights. Therefore, the establishment of the ICTY was the best attainable solution. While it was a new international court which developed its expertise over time, and while it was located far away from the *loci delicti*, the ICTY contributed substantially to the redress of victims, as well as to the development of international law.

1.1. The International Criminal Tribunal for the former Yugoslavia (ICTY)

The ICTY was established in 1993 by UN Security Council Resolution 827. As of September 2011 the ICTY had indicted 161 persons. The indictments address crimes committed between 1991 and 2001 in Bosnia and Herzegovina, Croatia, Serbia, Kosovo and “the former Yugoslav Republic of Macedonia”. The ICTY has focused on the most senior leaders suspected of being responsible for crimes within the Tribunal’s jurisdiction and has transferred cases against intermediate and lower-level suspects to competent national jurisdictions. The case transfers have been accompanied by training by the ICTY of legal professionals in the former Yugoslavia, notably through the War Crimes Justice Project which was completed in October 2011.⁴

As of January 2012, there were 35 persons in custody at the UN ICTY Detention Unit, and proceedings were ongoing with regard to 35 defendants. Of the 126 defendants for whom proceedings have been concluded, 13 have been acquitted, 64 sentenced, 13 referred to a national jurisdiction in Bosnia and Herzegovina, Croatia and Serbia, and 36 have had their indictments withdrawn or are deceased.⁵

The ICTY contributed considerably to the shift from denial and impunity to establishment of the facts and accountability for the crimes committed in the 1990s in the former Yugoslavia. It offered to war victims a sense of

4. UN ICTY press release, 26 October 2011.

5. UN ICTY, “Key figures of ICTY cases”, 13 January 2012, www.icty.org/sections/TheCases/KeyFigures.

justice by holding individuals responsible for crimes and being a forum where their voices were heard, in spite of its limitations. One of the major achievements of the court was a gender-based approach. Sexual violence was recognised as a grave breach of the Fourth Geneva Convention. In this context it is worthy to note the Tribunal's initiative aiming to establish a system, through a trust fund similar to that of the International Criminal Court, for providing assistance and support to victims of crimes falling under its jurisdiction. This initiative needs to be firmly supported by the UN and all member states.

ICTY judgments were occasionally seen in the region in merely numerical terms, by counting which "side" received more years of prison but without a critical and honest approach to victims' human rights. Some of those who served their sentences were welcomed back into their societies as heroes and defenders of the national interest. For example, on her return from prison in 2009, Biljana Plavšić⁶ arrived in Belgrade in a Serbian government airplane rented by officials of Republika Srpska⁷ for the occasion. Such incidents show that despite the important subsidiary role played (which will continue until the conclusion of its "completion strategy"⁸) by the ICTY in combating and eliminating impunity in the former Yugoslavia, serious impunity-related challenges still need to be tackled effectively at the domestic level. States of the region should work on processes that incite those who have committed war crimes to recognise and accept their responsibility and thus help society as a whole to be aware of the impact of certain events which have affected it. Such processes should allow those who have committed war crimes to show evidence of regret and give them the opportunity to ask for forgiveness.

1.2. Domestic criminal proceedings

Regional co-operation, an important factor for the effective prosecution and punishment of war-related crimes at national level,⁹ has improved in recent years. The improvement of co-operation between national prosecutors, including agreements on bilateral extradition and recognition of foreign judgments, has contributed to the fight against impunity in the region. In

6. Biljana Plavšić was a leading Bosnian Serb political figure in Bosnia and Herzegovina. In 2003 she was convicted by ICTY of crimes against humanity and sentenced to 11 years' imprisonment.

7. Republika Srpska is one of two entities in Bosnia and Herzegovina created under the 1995 Dayton Peace Agreement, which ended the war in this country.

8. By Resolution 1966 (2010) the UN Security Council requested the ICTY to take all possible measures to expeditiously complete all its remaining work no later than 31 December 2014.

9. See Council of Europe Parliamentary Assembly Resolution 1785 (2011) on the obligation of member and observer states of the Council of Europe to co-operate in the prosecution of war crimes.

February 2010 bilateral agreements were signed between the Ministers of Justice of Bosnia and Herzegovina, Croatia and Serbia to prevent the abuse of dual citizenship in extradition procedures. However, concerns remained about reports indicating that Bosnia and Herzegovina and Serbia have barred extraditions of their own nationals. It is also to be noted that a number of states in the region have not as yet acceded to the 1974 European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes,¹⁰ or to the 2010 Third Additional Protocol to the European Convention on Extradition, the provisions of which aim to enhance efficiency and speed in the criminal justice field and reduce to a minimum the delays when the person sought consents to extradition.¹¹

Of particular concern is the inadequate co-ordination among certain countries in the region in order to solve the problem of war crime fugitives reportedly travelling between countries. One such example is the case of Radovan Stanković, who was transferred from the ICTY and sentenced to 20 years' imprisonment by the Court of Bosnia and Herzegovina. He escaped from prison in Foča, in Republika Srpska, in May 2007. The ICTY Prosecutor has expressed his concern at the "little co-ordinated action" between Bosnia and Herzegovina, Montenegro and Serbia to apprehend this war crime fugitive.¹² Stanković was finally arrested on 21 January 2012. The ICTY Prosecutor welcomed this arrest and noted his hope that this arrest reflects an increased commitment of the authorities of Bosnia and Herzegovina to support the process of bringing to justice those responsible for the war-related crimes committed on their territory in the early 1990s.

Even though war-related prosecutions in some of the countries of the region took place during or just after the wars, as was the case in Bosnia and Herzegovina and Croatia in 1993 and 1996 respectively, systematic attempts to deal with the past before national courts only started after the establishment of specialised war crimes chambers in Bosnia and Herzegovina (2005), Croatia (2003) and Serbia (2003). The UN Interim Administration Mission in Kosovo in 2000, and after 2008 the European Union Rule of Law Mission in Kosovo (EULEX), permitted international judges, prosecutors and lawyers to serve alongside local professionals in individual war crimes cases before the local courts.

10. As of December 2011 the following three states in the region had ratified this treaty: Bosnia and Herzegovina, Montenegro and Serbia.

11. As of December 2011 this Protocol had been ratified by Serbia and signed by "the former Yugoslav Republic of Macedonia".

12. Report of the ICTY Prosecutor to the UN Security Council, UN Doc S/2011/716, 16 November 2011, p. 33, paragraph 67.

So far national proceedings in most countries in the region have been slow overall and have presented serious shortcomings. They have not had full political support and there have been certain outright obstructions by some political parties. This atmosphere has also created serious difficulties for the protection of witnesses. The safety of witnesses has been a major concern with regard to the 1998-1999 war in Kosovo, particularly in the context of investigations into the serious allegations of organ transplants, illegal detentions and killings which occurred there mostly from 1999 onwards.¹³

The justice system in Bosnia and Herzegovina has shown its ability to try complex war crime cases transferred from the ICTY in a fair and efficient manner, as confirmed by the ICTY and the Organization for Security and Co-operation in Europe (OSCE) which have monitored these proceedings.¹⁴ Notwithstanding these positive evaluations, there are serious concerns about the lack of progress in the implementation of the National War Crimes Processing Strategy (National Strategy)¹⁵ mainly due to insufficient coordination between the various justice sector institutions at the state level, in the entities and the Brčko District, and the lack of funds for the strategy's implementation. The National Strategy was adopted in December 2008 by the Council of Ministers of Bosnia and Herzegovina and refers to an estimated 10 000 suspects, of whom about 1 300 are under active investigation. It set seven years as the time needed to prosecute the most complex and highest priority cases, and 15 years the time required for other cases. The Strategy provides for the establishment of a unique, centralised database containing information on all incomplete cases. Verbal attacks on the justice system and denial of war crimes by some senior politicians in the country have been of equally serious concern. Such instances undermine the country's efforts to achieve post-war justice and reconciliation.

As regards Croatia, the Law on Application of the Statute of the International Criminal Court and Prosecution of Criminal Offences against the International Law of War and International Humanitarian Law provided, *inter alia*, for the establishment of specialised chambers within the county courts in Zagreb, Osijek, Rijeka and Split, to adjudicate on war-related criminal cases. One of the main aims of this initiative was to protect witnesses from

13. See Council of Europe Parliamentary Assembly Resolution 1784 (2011) on the protection of witnesses as a cornerstone for justice and reconciliation in the Balkans, and Resolution 1782 (2011) on the investigation of allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo.

14. ICTY press release, 1 November 2011, available at: www.icty.org.

15. OSCE BiH, "Delivering justice in BiH: an overview of war crimes processing from 2005 to 2010", May 2011, available at: www.oscebih.org/documents/osce_bih_doc_2011051909455767eng.pdf, accessed 26 January 2012.

pressure and intimidation. The first transfer to a specialised chamber took place in 2006 based on the Chief State Prosecutor's concerns over impartiality and witness intimidation in the local jurisdiction.

During the Commissioner's visit to Croatia in 2010 the Ministry of Justice informed him that, in the previous five years, proceedings for war-related crimes had been conducted before 21 county courts, in the environment and the community where the crime had been committed. However, a number of courts lacked the expertise and infrastructure for witness protection and support. For example, they did not have separate entrances for the public, the accused and the witnesses. The courts with specialised chambers have been equipped to protect witnesses and use videoconferences. A positive development was also the adoption of the 2009 Criminal Procedure Act providing for the reopening of cases concerning war-related crimes, which were tried *in absentia*. The cases can be reopened upon the presentation of new evidence by either the defendant or the prosecutor. Importantly, the defendant is no longer required to be present, as used to be the case.

However, a serious setback occurred on 21 October 2011 when the Croatian Parliament passed a law that proclaimed null and void all legal acts relating to the 1991-1995 war in which Croatian nationals are suspected, indicted or sentenced for war crimes. This followed the receipt by Croatia of Serbian war crime indictments against Croatian nationals. The passing of the above law was publicly criticised by the Croatian President Ivo Josipović as one that put in doubt Croatia's commitment to prosecute war crimes.

In Kosovo the independent Kosovo Judicial Council (KJC) and the Ministry of Justice were established in 2005. Despite the structures in place, the Kosovo judicial system remains weak at all levels. Kosovo's justice system and the ICTY have identified and punished perpetrators of war crimes from the 1998-99 conflict; however, many cases remain unresolved.¹⁶ As from December 2008 war crime investigations have been carried out by the War Crimes Investigation Unit of EULEX, comprised of international investigators. EULEX judges have competence over war-related criminal trials. In 2009 and 2010, respectively, ten and four such judgments were delivered.¹⁷ In 2011 among the persons charged by EULEX with war crimes concerning the 1998-1999 war was the Kosovo senior politician and parliamentarian, Fatmir Limaj.

16. See Commissioner Hammarberg's Report on Kosovo, 2 July 2009, CommDH(2009)23, section III and Resolution 1784 (2011) of the Council of Europe Parliamentary Assembly on the protection of witnesses as a cornerstone for justice and reconciliation in the Balkans.

17. Annual Report on the Judicial Activities of EULEX Judges 2010, p. 23, available at: www.eulex-kosovo.eu/en/justice/judicial-functions.php, accessed 27 January 2012.

The 2011 report by the Council of Europe Parliamentary Assembly concerning inhuman treatment of people and illicit trafficking in human organs in Kosovo¹⁸ from summer 1999 onwards has shed more light on the serious difficulties confronting justice in Kosovo. The most significant issues with regard to Kosovo appear to be inadequate witness protection and a lack of willingness among people to testify against ethnic Albanians who were allegedly involved in war crimes. EULEX has its own Witness Security Programme but major improvements are still necessary in this crucial area of criminal justice.¹⁹ Threats and murders are key obstacles for proceedings concerning war-related crimes committed in Kosovo. This situation has grave spill-over effects at the level of international justice, as shown for example in the ICTY case of *Ramush Haradinaj et al.*, which concerns three former leading members of the Kosovo Liberation Army, charged, *inter alia*, with crimes against humanity committed in Kosovo in 1998. In April 2010 the Tribunal's Appeals Chamber ordered the partial retrial of the three defendants, given the context of "serious witness intimidation" that had occurred during the proceedings before the Trial Chamber.

Serious problems that persist in the judicial system of "the former Yugoslav Republic of Macedonia" make the fight against impunity for war-related crimes particularly difficult. The country's judiciary has been described by both national and international stakeholders as weak. To come to terms with shortcomings in the judicial sphere, in 2004 the government adopted both a strategy and an action plan for the reform of the judiciary. The aim was to strengthen the independence and efficiency of the judiciary through substantial legal reforms and to bring their work more in line with international human rights standards. Since then, a number of reform measures have been implemented. Of particular concern has been the parliament's decision of 19 July 2011 to have the 2002 Amnesty Law applied to all cases returned from the ICTY in 2008 to this state for prosecution in this country. If this parliamentary decision is finally applied, it will lead to the termination of proceedings related to four war-crime cases, which would be a serious blow to the ongoing efforts towards achieving justice in the region.

In Montenegro war-related proceedings have been handled by specialised departments established in 2008 in the Podgorica and Bijelo Polje Superior Courts. In 2010 and 2011 there were four war-crime cases under way. In all these cases only the immediate perpetrators were indicted. One of these

18. Doc. 12462, 7 January 2011; see also Council of Europe Parliamentary Assembly Resolution 1782 (2011) on the investigation of allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo.

19. See EULEX, "Open letter on witness protection", press release of 30 November 2011, available at: www.eulex-kosovo.eu, accessed 27 January 2012.

cases concerned Bosnian Muslim refugees, who were arrested in 1992 by the police in Montenegro and handed over to Bosnian Serb forces in Bosnia and Herzegovina, where most of them were killed. A number of survivors and relatives of victims initiated proceedings and in 2008 received compensation from the Montenegrin authorities. Criminal investigations and proceedings, initiated by the state prosecution office in 2005 finally targeted only five low-level security force officers. The verdict rendered in March 2011 by the Podgorica Superior Court acquitted the defendants and was subsequently appealed by the state prosecutor and two mothers who had lost their sons.²⁰

Lastly, as regards Serbia, the War Crimes Chamber of the District Court in Belgrade and the Office of the War Crimes Prosecutor of the Republic of Serbia were established by law in 2003. Their competence extends to the prosecution and trial of perpetrators of war crimes, genocide, and crimes against humanity committed on the territory of the former Yugoslavia since 1 January 1991. Commissioner Hammarberg's Office has received reports indicating slow progress in war-related criminal proceedings. According to the War Crimes Prosecutor's Office, 383 persons have been prosecuted for war-related crimes as of June 2011. Twenty-two final judgments were delivered involving 53 convicted persons, while in three cases involving 15 accused the appeal proceedings are pending.

Reports have also shown that the War Crimes Prosecutor and his deputies are operating in an atmosphere of threats and intimidation from some members of the public. Reportedly this situation is aggravated by limited political support and even obstruction by some political parties.

The capacity of the witness protection system in Serbia is limited and the system suffers from a reported lack of trust on the part of witnesses. Insufficient human and financial resources have also been reported, as well as the lack of adequate equipment. Lack of co-ordination and co-operation between the Witness Protection Unit, the War Crimes Prosecutor's Office and the War Crimes Chamber has also been noted. However, the Serbian authorities have shown determination to improve the witness protection system by transferring the relevant competence to the Ministry of Justice. The full transfer of this competence is planned to be completed in two years since it requires the enhancement of national expertise and the allocation of significant financial resources.²¹

20. Human Rights Action (2011), "Human rights in Montenegro 2010-2011", Podgorica, pp. 566-590.

21. See Commissioner Hammarberg's Report following his visit to Serbia, 22 September 2011, CommDH(2011)29, section I.



2. Provision of adequate and effective reparation to all war victims

The violent conflicts on the territory of the former Yugoslavia had particularly adverse, material and mental effects on thousands of persons who lived through them. A study based on interviews carried out in 2005-2006 of more than 4 000 persons who had survived the wars in the region showed that a significant part of the participants (22.8%) suffered from post-traumatic stress disorder and major depression.²²

22. Priebe S. et al. (2010), "Experience of human rights violations and subsequent mental disorders – a study following the war in the Balkans", *Social Science & Medicine* No. 71, pp. 2170-2177.

As the 2005 UN Basic Principles and Guidelines have underlined, adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law and serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered.²³

Reparation, in the various possible forms mentioned below, must be based on the principles of non-discrimination, fairness and impartiality. While the primary duty lies with the states concerned, the international community, including Europe, should effectively support justice by all possible means, which cannot be attained without adequate reparations for victims. There are three particularly vulnerable groups of victims of the war period in the former Yugoslavia which require particular attention and are referred to in the sub-sections below: refugees and internally displaced persons (IDPs), including Roma; women victims of sexual violence during the conflicts; and the “erased” in Slovenia.

2.1. Refugees and IDPs

The conflicts that took place in the 1990s caused the forced migration of over three million persons within and outside the region of the former Yugoslavia. Although the majority of those originally uprooted have been able to return or have found reasonable alternatives, as of November 2011 there were still about 438 000 refugees and other displaced persons whose legitimate claims have not yet been met, and for whom durable solutions have not been found.

Among the most vulnerable members of the displaced population in and out of the region remain the Roma who are among the groups which are most discriminated against. Deep-rooted prejudices against Roma and lack of political will have prevented the finding of durable solutions to the serious, long-standing human rights issues concerning this population in the former Yugoslavia, as in the rest of Europe. Of particular concern have been forced returns of Roma refugees from western European countries to Kosovo, a post-conflict society still struggling to come to terms with the consequences of the armed conflict. A number of expelled Roma have returned to the lead-contaminated camps of Česmin Lug and Osterode in northern Mitrovica, inhabited by Roma families, including children, who suffer from very serious effects to their health.²⁴

23. “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”, paragraph 15, UN GA Res. 60/147, 16 December 2005.

24. See “Children victimised when families are forced to return to Kosovo”, Human rights comment by Commissioner Hammarberg, 9 July 2010.

The first regional agreement on durable solutions for displaced persons after the 1995 Dayton Peace Accords was the Sarajevo Declaration of 31 January 2005, signed by Bosnia and Herzegovina, Croatia and (then) Serbia and Montenegro, following a “regional ministerial conference on refugee returns”. This was followed up notably on 7 November 2011 by a joint ministerial declaration “on ending displacement and ensuring durable solutions for vulnerable refugees and internally displaced persons” signed by the Ministers of Foreign Affairs of Bosnia and Herzegovina, Croatia, Montenegro and Serbia. These commendable efforts aimed at ending protracted displacement in the region have been backed by international organisations, including the UNHCR, the Council of Europe and the European Union.

Of particular importance are the following major undertakings made by the four states under the 2011 Belgrade Joint Declaration: to ensure that all refugees accommodated in collective centres will be provided with adequate housing; to address the housing needs of vulnerable persons, including vulnerable ex-Occupancy/Tenancy Rights holders; to facilitate procedures concerning civil documentation for all displaced persons; and to guarantee a free and informed choice of durable solutions for all displaced persons. A “Joint Regional Multi-Year Program” is expected to be presented at an international donor conference in early 2012 and to be implemented over a five-year period.

One of the major, long-standing obstacles to the return of refugees and IDPs to their homes is the contamination of extensive areas, including fertile agricultural lands, by landmines and cluster munitions, as well as conventional weapon explosive remnants of the wars in the 1990s. Expert reports indicate that landmines and cluster munition remnants still affect hundreds of thousands of people and their communities in the region, especially in Bosnia and Herzegovina, Croatia, Serbia and Kosovo.²⁵ The states and authorities concerned are bound to act in order to clear the contaminated areas and protect human lives, in accordance with the standards contained in the 1997 Mine Ban Treaty, the 2008 Convention on Cluster Munitions,²⁶ the 2003 Protocol V on Explosive Remnants of War to the Conventional

25. See country mine action reports available at: www.the-monitor.org, accessed 27 January 2012.

26. These treaties prohibit the use, stockpiling, production and transfer of anti-personnel mines and cluster munitions respectively, and provide for deadlines within which states parties should clear affected areas and destroy these arms, as well as provide assistance to victims thereof. As of December 2011 all states in the region were parties to the former; only Serbia had not acceded to the latter.

Weapons Convention²⁷ and, not least, Article 2 of the European Convention on Human Rights (right to life).

It is to be noted that protracted displacement from and inside the former Yugoslavia is directly linked to the issue of statelessness. According to UNHCR estimates, more than 18 000 persons are stateless or at the risk of statelessness in South-Eastern Europe. Many of the stateless individuals are Roma. In Italy it has been estimated that there are 15 000 stateless Roma originating from the former Yugoslavia. A number of regional efforts are ongoing and aim to effectively address these issues. One of the latest initiatives has been the Zagreb Conference on the Provision of Civil Status Documentation and Registration in South-Eastern Europe, hosted by Croatia and organised by UNHCR and OSCE. Through the Zagreb Declaration adopted on 27 October 2011 the participants, including all states in the region of the former Yugoslavia, proposed and recommended a number of useful measures at local and regional level, to be followed up at the March 2012 meeting of the Roma Decade in Skopje.

Lastly, it is to be noted that not all states in the region have as yet acceded to the 1997 European Convention on Nationality and the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession.²⁸ Both treaties contain rules and procedures of utmost importance for the effective enjoyment of the human right to a nationality in Europe. Some of their core provisions provide for: the overarching principle of non-discrimination in law and practice; the special protection that must be provided by states to children born on their territories and who do not acquire at birth another nationality; restrictive conditions on which someone may lose his or her nationality *ex lege*; the duty of the states to explain and provide in writing their nationality-related decisions.

2.2. The “erased”

On 24 February 1992 the Slovenian government erased 25 671 citizens of the former Yugoslavia from the register of permanent residents of the Republic of Slovenia. This measure was a result of the application of the 1991 Aliens Act which provided that citizens of the former Yugoslav republics who were

27. Protocol V provides notably for the marking, clearance, removal or destruction of explosive remnants of war coming from conventional weapons, not covered by the Mine Ban Treaty and the Convention on Cluster Munitions. It also provides for co-operation in this domain among states parties and other states and organisations. As of December 2011 all states of the region, except for Montenegro and Serbia, were parties to Protocol V.

28. As of December 2011, the former had been ratified by Bosnia and Herzegovina, Montenegro and “the former Yugoslav Republic of Macedonia”, while the latter had been ratified only by Montenegro.

not citizens of Slovenia could acquire Slovenian citizenship if they met three requirements: they had acquired permanent resident status in Slovenia by 23 December 1990 (the date of the plebiscite on independence); they were in fact residing in Slovenia; and they applied for citizenship within six months after the 1991 Citizenship Act entered into force. All those who failed to submit their requests for citizenship pursuant to the 1991 Aliens Act within the three months' time limit were erased from the register of permanent residents.

According to the official statistics of the Slovenian government on 24 January 2009, of the 25 671 erased persons, 13 426 have not settled their status in the Republic of Slovenia and their current residence is unknown.

The “erasure” has had a serious negative impact on the enjoyment of basic human rights by the “erased” persons, including the right to respect for private and family life, and economic and social rights.²⁹ Many families became divided, with some of their members in Slovenia and others in one of the other successor countries of the former Yugoslavia. Reportedly, a certain number of minors were among those “erased”. Some of the “erased” persons who remained in Slovenia have been pushed to the margins of social life. They have not been able to leave the country because they cannot re-enter without valid documents. Difficulties in keeping their jobs, driving licences and obtaining retirement pensions are some of the problems that the “erased” persons faced after the “erasure”. Reports have indicated various physical and mental health problems that the “erased” persons have endured due to their lack of health insurance, but also because of the social marginalisation that they are faced with as a result of the “erasure”.

In 1999 the Constitutional Court of Slovenia (“Constitutional Court”) issued its first decision on the issue, finding the “erasure” unlawful and the pertinent provisions of the 1991 Aliens Act unconstitutional. As a consequence of this decision, in July 1999 the parliament adopted the Act Regulating the Legal Status of Nationals of Other Successor States of the former Yugoslavia in the Republic of Slovenia (Legal Status Act). Under this law, residence permits were granted *ex nunc* to those fulfilling the conditions. In 2003 the Constitutional Court issued its second decision on this matter. It found that the Legal Status Act was unconstitutional on various grounds, one of which was that it did not ensure that the statuses that the “erased” persons would acquire in accordance with this law would have a retroactive effect. In March 2010 the Slovenian Parliament adopted amendments to the Legal

29. See European Court of Human Rights, judgment in the case of *Kurić and others v. Slovenia*, 13 July 2010.

Status Act (“the amended Law”), in order to fully implement the decisions of the Constitutional Court.

As of May 2011 only 120 “erased” persons had submitted their requests under the amended law. The reasons for the low number of applications appear to be related to the substantive provisions of the amended law and certain shortcomings in its implementation. Of particular concern has been the provision in the amended law according to which the “erased” persons, who have been absent from Slovenia for longer than 10 years after they had left Slovenia and who are not able to prove that they have tried to return to Slovenia with the aim to live there permanently, shall not be qualified to receive permanent residence. Also, some categories of “erased” persons have not been included in the law, such as children of the “erased” persons who were born abroad and whose “erased” parent(s) is (are) deceased.

The “erased” persons have to pay an administrative fee amounting to €80 in order to initiate proceedings under the amended law. Those who fulfil certain social status criteria can request an exemption from paying the administrative fees as in all other administrative proceedings. It has been reported that generally few people succeed in being exempted. The above administrative fee is very high by regional standards and may discourage the “erased” persons who live in the countries of the former Yugoslavia from applying.

Lastly it is noted that the law does not provide for any reparation, including in the form of compensation, to the “erased” persons. The cases of compensation brought before the domestic courts all appear to have resulted in negative decisions. Difficult access to justice and to effective remedies makes reparation to the “erased” persons impossible, which raises an issue of incompatibility with human rights standards. In June 2011 the Slovenian Prime Minister affirmed his government’s firm determination to redress the injustice suffered by the “erased” persons.³⁰

2.3. Women victims of wartime sexual violence

An often ignored group of war victims are the women who suffered sexual violence. It has been estimated that more than 20 000 Bosniac, Croat and Serb women were raped and sometimes sexually enslaved and forcibly impregnated in “rape camps”, by armies and paramilitary groups.³¹

30. See Commissioner Hammarberg’s letter to Mr Borut Pahor, Prime Minister of Slovenia, 10 May 2011, and the latter’s reply of 2 June 2011, available at: www.coe.int/t/commissioner/Activities/countryreports_en.asp, accessed 27 January 2012.

31. See Council of Europe Parliamentary Assembly Resolution 1670 (2009) on sexual violence against women in armed conflict, and relevant report, section IV.

The 1994 “Bassiouni Report” produced for the United Nations Security Council indicated that there were 162 detention sites in the former Yugoslavia where people were detained and sexually assaulted. Out of the 1 100 cases reported to the UN Commission of Experts about 600 had occurred in places of detention. These cases indicated “a policy of at least tolerating rape and sexual assault or the deliberate failure of camp commanders and local authorities to exercise command and control over the personnel under their authority”.³²

The extent of the sexual violence that occurred during the wars in the former Yugoslavia is made clear also by the fact that as of mid-2011, 78 individuals, or 48% of the 161 accused by the ICTY, had charges of sexual violence included in their indictments. Twenty-eight individuals were convicted for their responsibility in crimes of sexual violence; four of them were additionally convicted for failing to prevent or punish the perpetrators of the crimes.³³

In the 1998 judgment in the case of *Furundžija*, the first ICTY judgment to concentrate entirely on charges of sexual violence, the Tribunal stated that rape may not only constitute a crime against humanity, as expressly provided for by the ICTY Statute, but may also be prosecuted as a grave breach of the Geneva Conventions and as a violation of the laws and customs of war. In addition the ICTY confirmed that rape may be used as a tool of genocide if the requisite elements are met.

In its Resolution 1670 (2009) on sexual violence against women in armed conflict, the Parliamentary Assembly of the Council of Europe expressed its concern about persisting impunity in the region of the former Yugoslavia and victims’ inability thus far to gain access to justice to receive reparation. It appears that the number of cases prosecuted so far in Bosnia and Herzegovina is extremely low compared to the alleged number of these crimes which amounts to several thousand.³⁴ Many perpetrators of war-related crimes of sexual violence often live in the same communities as their victims. Reports indicate that many women, who are victims of war-related crimes of sexual violence, have continued to live in poverty, being unable to find a job and still suffering from the physical and psychological consequences of their war-time experience.

Many survivors of war-related sexual violence suffer post-traumatic stress disorder and other psychological and physical problems. Provision of

32. UN Doc. S/1994/674/Add.2(Vol. V), 28 December 1994, Annex IX, sections I.A and I.D.

33. ICTY, Crimes of sexual violence, statistics available at: www.icty.org/sid/10586, accessed 27 January 2012.

34. See Commissioner Hammarberg’s report following his visit to Bosnia and Herzegovina, 29 March 2011, CommDH(2011)11, section III.

psychological support to survivors of war-related sexual violence is inadequate and many of the women victims have not been able to gain access to the health-care system. Local NGOs, such as Medica Zenica in Bosnia and Herzegovina, appear to be the only institutions offering psychological support to victims. Their work needs to be supported by the states in the region.

To change this situation, women's voices must be heard. It is characteristic that only about 18% of the witnesses who appeared before the ICTY between 1996 and 2006 were female.³⁵ States in the region need to initiate systematic work, possibly in the context of national human rights action plans and/or Truth and Reconciliations Commissions, and adopt effective measures aimed at highlighting the particular vulnerability of women victims of war, providing them with rehabilitation, and enhancing their socio-political position. As noted by the UN Security Council Resolution 1820 (2008) on Women and Peace and Security, women should participate in discussions pertinent to the maintenance of peace and security, and post-conflict peace-building. States should also facilitate the equal and full participation of women in decision-making processes.

2.4. Provision of compensation to war victims

Victims of crimes committed during the armed conflicts in the former Yugoslavia should have effective access to justice in order to claim and obtain compensation for the unlawful harms they have suffered. The ICTY has called for the creation of a trust fund for victims of crimes falling within its jurisdiction, similar to the one existing in the International Criminal Court. The ICTY has liaised with the International Organisation for Migration in order to examine the means through which an appropriate and feasible victim-assistance system may be established.³⁶ As regards possible compensation proceedings at the domestic level, the examples provided below indicate that despite the efforts made so far, national systems in certain countries in the region have shown the existence of serious shortcomings.

In Bosnia and Herzegovina there has been a failure on the part of the authorities to establish an effective mechanism that would ensure reparation for all victims of war-related crimes and their families. The existing system of complicated individual payments through the social protection and disability scheme in the Federation of Bosnia and Herzegovina does not effectively

35. Henry N., (2009), "Witness to rape: the limits and potential of international war crimes trials for victims of wartime sexual violence", *International Journal of Transitional Justice*, Vol. 3 (1), pp. 114-134 at p. 120.

36. See ICTY President's address to the UN General Assembly, 11 November 2011, available at: www.icty.org, accessed 27 January 2012.

address the needs of the victims of war-related crimes. The relevant legislation at the level of the entities and cantons aimed at providing reparation to the victims of the war is significantly more favourable to war veterans than to civilian victims. Furthermore, the authorities have so far failed to provide adequate reparation to the survivors of war crimes of sexual violence in order to enable them to rebuild their lives.

Under the 2005 War Damages Act the Republika Srpska authorities developed a general compensation scheme for war damages. However, the non-existence of a “formal reparation scheme” prompted many war victims from 1999 to 2005 to initiate ordinary civil proceedings in which they requested compensation for pecuniary and non-pecuniary damages. During this period, the courts in Republika Srpska rendered around 9 000 judgments ordering the Republika Srpska to pay some €70 million in total plus default interest to the plaintiffs. Their enforcement has been pending since 2002 pursuant to the legislation which provided for the settlement scheme and the payment of the principal debt and default interest in annual instalments.³⁷

Croatian legislation provides the possibility for war victims and their families to file compensation claims against the state. The Law on the Responsibility for Damage Caused by Acts of Terrorism and Public Demonstrations, as well as the Law on the Responsibility of the Republic of Croatia for Damage Caused by Members of Croatian Armed and Police Forces during the Homeland War, entered into force in 2003. However, it appears that although some victims have obtained compensation for war crimes,³⁸ attempts by many victims’ families to receive compensation for damage caused by the loss of their family members through private lawsuits against the state have failed.³⁹

In Serbia a reparation mechanism for all victims of war-related crimes is still lacking. The laws in force provide for administrative compensation for a limited group of war victims, excluding victims whose injuries or loss of life resulted from actions of Serbian state agencies. Those entitled to administrative compensation are war-related disabled persons and families of persons killed in an armed conflict or deceased as a result of injuries suffered in connection with the conflict. Former camp detainees, victims of sexual violence,

37. See Commissioner Hammarberg’s report following his visit to Bosnia and Herzegovina, CommDH(2011)11, 29 March 2011, section III.

38. See European Court of Human Rights, *Skendžić and Krznarić v. Croatia*, judgment of 20 January 2011.

39. See Commissioner Hammarberg’s report following his visit to Croatia, CommDH(2010)20, 17 June 2010, section II; European Court of Human Rights, *Popara v. Croatia*, judgment of 15 March 2007 and seven other cases pending for supervision of execution by the Committee of Ministers, available at: www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp, accessed 28 January 2012.

and victims of torture may not benefit from administrative compensation unless the abuses against them resulted in bodily infirmity above a certain threshold. Victims from the excluded categories can seek compensation for pecuniary and non-pecuniary damages before the courts. In practice a high standard of proof applied by domestic courts and the statutes of limitations has prevented victims from obtaining compensation for physical or psychological harm in many cases. In 2004 the Serbian Supreme Court took the position that claims against the state must be brought within five years of the event that caused the alleged harm. The five-year deadline has expired for victims of the gross human rights violations which were committed in the 1990s.⁴⁰

2.5. Satisfaction to war victims through public apology or official declaration

Public apology, including acknowledgment of the facts and acceptance of responsibility, is one of the forms of satisfaction that may comfort victims. Despite their great political and moral importance, public apologies are often not pronounced or are pronounced long after the fact.

Recognition of past atrocities by state officials leads to changes in people's attitudes and helps reconciliation by signalling that governments are able to break with past policies of their states. Among the wider population, such recognition is perceived as a request for forgiveness, which changes the perception of the other ethnic groups. Apologies have been pronounced by a number of state officials in the region's countries.

For example, an apology on behalf of Serbia was expressed in 2004 by President Boris Tadić in Sarajevo. In 2006, Svetozar Marović, of Montenegro, former President of the State Union of Serbia and Montenegro, apologised to Bosnians and Croats during his visit to Srebrenica, following an apology to Serbians by the Croatian President Stjepan Mesić.⁴¹ In 2007 while in Croatia the Serbian President Tadić publicly expressed his apologies on behalf of the Serbian people. However, these commendable apologies have not been accompanied by any measures such as a public campaign which would raise public awareness and sensitise the population at large.

Reactions from politicians and the public following apologies are indicative of the need to act in a systematic manner in order to make the public

40. See Commissioner Hammarberg's report following his visit to Serbia, CommDH(2011)29, 22 September 2011, section I.

41. Central & Eastern Europe Watch, available at: www.despiteborders.com/clanok_an.php?subaction=showfull&id=1192819244&archive=&start_from=&ucat=35,36,41&, accessed 27 January 2012.

aware of the importance of such acts for peace and social cohesion in the region. To date they have rather failed to attain acceptance by the victims and wide-ranging awareness of the population in whose name state officials make declarations. Unfortunately, apologies are not mentioned in school text books, nor is there a plan aiming to include them in educational material at all levels.

As regards parliaments, the Croatian Parliament adopted in June 2006 the Declaration on “Oluja” (“Operation Storm”).⁴² Although the declaration contained a condemnation of all crimes that took place before and after the military operations, the latter were presented as just and in accordance with international law.

Lastly, following the European Parliament’s Resolution of 15 January 2009 on Srebrenica, almost all the states of the former Yugoslavia adopted relevant resolutions. Bosnia and Herzegovina has been the only exception, reportedly due to strong opposition by politicians from Republika Srpska.

2.6. Satisfaction to war victims through tributes to them and commemorations

Throughout the former Yugoslavia, memorials of the conflicts which began in the 1990s only pay tribute to victims of the majority groups. None of the countries has sponsored a memorial or similar tribute to the victims of their own armed forces. None of the capital cities has a memorial dedicated to the victims of other nationalities.

In November 2010, for the first time, the presidents of Serbia and Croatia visited the memorial for the Croatian victims in Vukovar together, where they pronounced their apologies. This was a historic visit which caused different reactions in Croatia and Serbia,⁴³ as in the case of the Serbian President’s visits to Srebrenica in 2005 and 2010.

Non-governmental organisations in the whole region are organising memorial events, exhibitions or round tables in order to raise public awareness and remember the victims and events from the past. Not infrequently, they have been interrupted or attacked by extreme nationalist organisations. In recent years these events have been seen as a high security risk and the national police appear to be ready to protect them. This situation attests to the fact

42. See Subotic J. (2009), *Hijacked justice, dealing with the past in the Balkans*, Cornell University Press, New York, pp. 97-100.

43. See BBC News Europe, “Serb leader Tadić apologises for 1991 Vukovar massacre”, 4 November 2010, available at: www.bbc.co.uk/news/world-europe-11689153, accessed 27 January 2012.

that despite the commendable efforts of civil society justice mechanisms in the region, they are still “bottom-bottom” efforts, unable so far to pierce and influence the majority of the population and the wide political leaderships.⁴⁴

44. See Simić O. and Daly K. (2011), “‘One pair of shoes, one life’: steps towards accountability for genocide in Srebrenica”, *International Journal of Transitional Justice*, Vol. 5, pp. 477-491.



3. The need to establish and recognise the truth

Establishing and recognising the truth for the war-related gross human rights violations is one of the most important components of the post-war justice process. This part of the process could finally give a chance to those whose voices have not been heard to speak up, to be recognised as victims and to be given a chance for social re-integration. Moreover, surviving witness accounts are an exceptional opportunity to collect evidence in order to fight impunity and to structure recommendations for the meaningful transformation of societies.

Little girl holding the photo of a family member who went missing during the war. Photo © CICR/Pellegrini, Paolo

Truth and Reconciliation Commissions (TRCs) have been established in various countries around the world with the aim of investigating, establishing and acknowledging the truth. For example, in South Africa, a TRC⁴⁵ which was established by law in 1995 after the abolition of apartheid served almost as a substitute for judicial bodies. Aiming at the promotion of national unity and reconciliation, it created a programme of witness protection, limited its investigation to a certain period of time and to the investigation of gross violations of human rights committed on all sides of the conflict. The South African TRC offered a forum where people had a chance, for the first time, to relay their experiences, often in public hearings, and to represent those who were not able to speak any more. In 1998 a five-volume report was presented to President Mandela, which included the TRC's analyses, findings and recommendations aimed at enhancing the post-conflict reconciliation process in the country.⁴⁶

One of the latest TRCs is the “National Truth Commission” established by law in November 2011 in Brazil. This TRC, which was provided for in Brazil's 2010 National Human Rights Programme, is mandated to promote the right to truth and public knowledge and understanding of human rights violations that occurred in Brazil from 1946 to 1988. It is noted that the law establishing this TRC was accompanied by a Law for Public Access to Information aiming to enable the TRC to make facts and information available to the public.⁴⁷

The need to establish and recognise the truth, and make it accessible to the public is not yet a fully accepted principle in the region of the former Yugoslavia. The following two cases illustrate the need to establish an appropriate body with the mandate to establish the truth.

3.1. The Srebrenica genocide

Srebrenica was a “safe area” where more than 40 000 Bosnian Muslims were under the protection of the UN peace forces. In July 1995, in just ten days, approximately 8 000 of them were executed by the Bosnian Serb army. In a unanimous landmark ruling in 2004, in the *Prosecutor v. Krstić* case, the Appeals Chamber of the ICTY affirmed that the Srebrenica massacre was an act of genocide. This ruling was confirmed by the International Court

45. www.justice.gov.za/trc/, accessed 27 January 2012. Chairperson of this TRC was Archbishop Desmond Tutu.

46. Phelps T.G. (2004), *Shattered voices*, University of Pennsylvania Press, Philadelphia, p. 114. See also other examples of TRCs in the world in UN General Assembly, Human Rights Council, cited above, pp. 6-9.

47. See press release on this issue by UN OHCHR, 18 November 2011, available at: www.ohchr.org.

of Justice (ICJ). In 2007 the ICJ delivered a judgment in the case of *Bosnia and Herzegovina v. Serbia*, which determined, *inter alia*, that Serbia was not directly responsible for the genocide in Srebrenica, but responsible for not preventing the crime, as well as for failing by then to transfer to the ICTY General Ratko Mladić, indicted for genocide and complicity in genocide.

Despite the confirmation given by relevant international judicial bodies, there has been a lack of will among certain politicians to recognise this atrocity. Although high officials in Serbia, including President Boris Tadić, have clearly recognised and condemned what happened in Srebrenica, other politicians have demeaned and relativised war-related crimes, including the genocide in Srebrenica.

3.2. “Operation Storm”

Ante Gotovina is a former Colonel General of the Croatian army who took part in the 1991-95 war. He was indicted in 2001 by the ICTY for crimes against humanity and violations of the laws or customs of war, committed by his troops during the military offensive in the Krajina region, known as “Operation Storm” (“Oluja”) in 1995. Ante Gotovina, along with Mladen Markač, former Assistant Minister of the Interior in charge of Special Police matters, stood trial as alleged participants in a joint criminal enterprise with the intention of permanently removing the Serb population from the Krajina region by force or threat of force, which amounted to and involved deportation, forcible transfer, persecution through the imposition of restrictive and discriminatory measures and unlawful attacks against civilians and civilian objects. Gotovina was arrested in December 2005 in the Canary Islands. On that occasion, a rally of an estimated 40 000 Croatian veterans and citizens was organised in the city of Split.⁴⁸

The Croatian Prime Minister Ivo Sanader welcomed the arrest, saying that no one was exempt from justice and that the retired general should stand trial. However, in January 2006, the Croatian Prime Minister met with all the ICTY defence lawyers of the accused Croats in order to agree on “joint measures” for their defence.⁴⁹ The Parliament of Croatia adopted a Declaration on “Oluja” in June 2006 qualifying it as “victorious” and emphasising the imperative to preserve its memory.⁵⁰

48. International Center for Transitional Justice (2006), “Croatia: Selected developments in transitional justice”, p. 10.

49. Subotic J. (2009), *Hijacked justice, dealing with the past in the Balkans*, Cornell University Press, New York, pp. 97-100.

50. Declaration available at: <http://zakon.poslovna.hr/public/deklaracija-o-olujji/396204/zakoni.aspx>.

In April 2011 the ICTY Trial Chamber convicted Ante Gotovina and Mladen Markač of crimes against humanity and violations of the laws or customs of war committed by the Croatian forces during “Operation Storm”.⁵¹ However, some of the highest level politicians in Croatia at the time were widely reported to have expressed their opposition to this verdict. Public demonstrations against this judgment also took place in Croatia.

3.3. Attempts to establish Truth and Reconciliation Commissions (TRCs) in the former Yugoslavia

There were several attempts to establish TRCs at national level. In 2001, the President of the Federal Republic of Yugoslavia, Vojislav Koštunica, established a TRC by Decree.⁵² However, due to the lack of public participation in the process, three of the most prominent members of the TRC immediately submitted their resignations.⁵³ Until the end of 2002, no public hearing was held by the Commission which was ultimately dissolved in 2003.

Several attempts to establish TRCs were also made in Bosnia and Herzegovina. Two commissions were established: the Commission for the Investigation of the Events in and around Srebrenica between 10 and 19 July 1995, and the Commission for the Investigation of the Siege of Sarajevo established in 2006. The work of the former has led to the identification of 32 mass graves and of approximately 1 500 bodies.⁵⁴ The latter ended its work in 2007 without any result.

The Srebrenica Commission, after many disruptions and personnel changes, finally succeeded in stopping denials and minimisation of the genocide in Srebrenica by officials of the Republika Srpska. Even though officials in the Republika Srpska were still not willing to use the term “genocide”, they recognised the fact that mass atrocities happened in Srebrenica. One of the major outcomes was a public apology by officials of the Republika Srpska in 2004 following the completion of the Commission’s report. The report produced by the Commission listed 17 342 suspect soldiers involved in the siege of Srebrenica and the atrocities that followed it.⁵⁵ However, in 2010 it

51. Both convicts have lodged an appeal which was pending as of December 2011.

52. Published in Sl. List SRJ, 30 March 2001.

53. See Belgrade Center for Human Rights, Human Rights in Yugoslavia 2002, available at: www.english.bgcentar.org.rs/images/stories/Datoteke/human%20rights%20in%20yugoslavia%202002.pdf.

54. www.justiceinperspective.org.za/images/bosnia/Srebrenica_Report2004.pdf.

55. Bideleux R. and Jeffries I. (2007), *The Balkans: a post-communist history*, Routledge, New York, p. 392.

was reported that the Republika Srpska government questioned the impartiality of this Commission and the validity of its report.⁵⁶

3.4. The initiative aimed at establishing a regional truth commission (RECOM)

In 2008 a regional coalition of non-governmental organisations (Coalition) launched an initiative aimed at establishing a regional truth commission (RECOM). The Coalition consists of a network of about 1 500 non-governmental organisations, associations, and individuals. The initiative was created by civil society representatives from Serbia, Bosnia and Herzegovina and Croatia with extensive experience in post-war justice.

On 26 March 2011 the Coalition adopted a draft statute for an international agreement which the former Yugoslav states have been asked to ratify in order to make it part of their national legal systems. The statute also provides that an official, independent commission shall be established to proactively investigate all alleged war crimes and human rights abuses committed during the wars of the 1990s. At the end of its three-year mandate, the commission would issue a report containing the facts established and recommendations in terms of reparations, non-recurrence and further steps to be taken. It would also create an archive, open to the public.

The Coalition has sought to collect one million signatures from citizens in the region in support of establishing the above commission. As of mid-2011 the Coalition had collected about half a million signatures, which were handed over to the President of Croatia, the Presidency of Bosnia and Herzegovina and a State Secretary of the Slovenian government.

As of February 2011 support for the Coalition had been expressed by the Parliament of Montenegro, the Presidents of Serbia and Croatia, the European Commission, the Subcommittee for Human Rights of the European Parliament and the Serbian Parliamentary Committee for European Integration. In April 2011 a number of political parties represented in the Parliament of Serbia and the Prime Minister of Montenegro expressed their support for the establishment of RECOM. In May 2011 the Slovenian President, Danilo Türk, and the Parliament Speaker, Pavel Gantar, also expressed their support for the initiative. However, reports have indicated that there are other leading politicians in the region who oppose this initiative.

56. B92, "Dodik on number of killed in Srebrenica", 19 April 2010, available at: www.b92.net/eng/news/region-article.php?yyyy=2010&mm=04&dd=19&nav_id=66584, accessed 28 January 2012.

The RECOM initiative is the only regional initiative that has gathered such wide support from a significant number of representatives of civil society, victims' associations and individuals from all countries in the former Yugoslavia. A number of awareness-raising campaigns in the region have been organised by the initiators. The campaigns have been intensified during the collection of signatures for the RECOM statute and have no doubt contributed to the understanding by the region's peoples of the importance of the reconciliation process. This in itself is a most welcome and needed contribution.

3.5. Missing persons

Almost 40 000 persons went missing during the conflicts in the 1990s. As of December 2011, there were still 13 439 persons missing: 9 309 persons related to the conflict in Bosnia and Herzegovina; 2 335 related to the conflict in Croatia; and 1 795 related to the conflict in Kosovo.⁵⁷

There is a need to resolve, through prompt and effective investigations, the pending cases of missing persons from the wars on the territory of the former Yugoslavia and end the acute anxiety of their families. States in the region have an obligation to adopt a proactive policy in this domain, in accordance with the standards contained in international humanitarian law, and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, as well as by virtue of Articles 2 and 3 of the European Convention on Human Rights.⁵⁸

Even though each of the states in the region has declared its commitment to resolving the cases of missing persons from the conflicts in the 1990s, politicisation and lack of regional co-operation have acted as obstacles to this endeavour. Commissions and institutions established in Bosnia and Herzegovina, Croatia, Serbia and Kosovo are working to clarify the fate and whereabouts of the missing persons, as well as to locate and identify their remains. Several recent meetings between the presidents of Serbia and Croatia, with the issue of missing persons high on their agenda, are very encouraging developments. The ICRC-chaired Working Group on Missing Persons in Kosovo, bringing to the table representatives of authorities from Pristina and Belgrade, is also working towards these aims. These efforts can and should be strengthened by the accession of all states which have not yet done so to the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (in force as from December 2010), and

57. Information provided by ICRC to Commissioner Hammarberg's Office, updated as of December 2011.

58. See judgments delivered by the European Court of Human Rights on 20 January 2011 in the cases: *Jularić v. Croatia*, and *Skendžić and Krznarić v. Croatia*.

by the national implementation of the relevant domestic legal frameworks and the adoption of appropriate by-laws.

3.6. Civil society and truth telling

A vibrant civil society in the region of the former Yugoslavia with groups of professionals and victims has been initiating truth-seeking and clarifying the fate of missing persons since the end of the conflicts. Non-governmental organisations have collected evidence, revealed stories which were hidden for a long time, organised round tables and debates, and offered fora where victims have had a chance to publicly tell their stories. Three of the most prominent human rights organisations dealing with the past – the Humanitarian Law Center in Belgrade, the Research and Documentation Centre in Sarajevo, and the Documenta in Zagreb, in co-operation with and with financial support from other local and international organisations – have been working for more than a decade gathering information, revealing evidence, co-operating with national and international institutions, organising educational campaigns, giving support to victims and promoting accountability and reconciliation.

3.7. Media and truth telling

Free, independent and pluralist media are the cornerstone of a vibrant democratic society. They have the potential to play a pivotal role in promoting intercultural understanding and reconciliation. However, the implementation of liberal media law in the region remains problematic. Moreover, violence, ranging from murders to harassment and intimidation, against journalists has been a common phenomenon in certain countries of the former Yugoslavia, jeopardising freedom of expression and the public's right to be informed about all matters of interest to them.⁵⁹ All states need to commit themselves to treating violence against journalists as crimes aimed at undermining public order and democratic governance.

After the wars there appeared to be no systematic effort from the media in the region to contribute to the truth-seeking process. After Slobodan Milošević was ousted from power, in 2001, Serbian national television broadcast a BBC documentary about Serbian crimes in Srebrenica which provoked a negative reaction from the wider public. A similar response was provoked in Croatia when in 2005 the issue of war crimes committed by Croatsians

59. Council of Europe Commissioner for Human Rights, Issue Paper, "Protection of journalists from violence", 4 October 2011, CommDH/IssuePaper(2011)3; OSCE Representative on Freedom of the Media, First OSCE South East Europe Media Conference, Declaration "On the Road to Media Freedom", Sarajevo, 14 October 2011.

and the role of late president Tudjman in it was tackled in one of Croatia's most popular talk shows.⁶⁰

Bosnian and Serbian national television services have been broadcasting the ICTY trials. But even such broadcasts were not a guarantee that the public would gain necessary information about the past war atrocities and the role of the ICTY. Biased information, offered through news, left the public with a lack of basic knowledge about the cases, the ICTY and the past. The news mostly discussed the length of the sentences, rather than the cruelty of the human rights violations, the human rights of victims and the duties on behalf of the societies involved in the conflict.

3.8. The truth through cultural events

Culture was a bridge between peoples in the former Yugoslavia; this link has largely survived the crisis. It is therefore one of the most valuable assets that may be used to build connections and mutual understanding of the past. Linguistic similarities make this co-operation logical and easier. There have been many regional cultural projects which have worked successfully. Co-operation in such projects mostly depended on individual initiatives and has functioned well on that level, especially in the film and music industries. Culture is definitely a promising avenue that needs to be used as a part of the transitional process. But the lack of the respective governments' strategic and systematic support in this field has so far left this cultural potential largely untapped.⁶¹

60. International Center for Transitional Justice (2006), "Croatia: Selected developments in transitional justice", p. 9.

61. Balkaninsight, "Sound of music heals wounds in former Yugoslavia", December 2007, available at: www.balkaninsight.com/en/article/sound-of-music-heals-wounds-in-former-yugoslavia, accessed 28 January 2012.



4. Need for institutional reforms to guarantee non-repetition

Institutional capacity-building is pivotal for attaining post-war justice and sustainable peace and security. The countries of the former Yugoslavia have had to go through two major historic transitions, both entailing Herculean efforts: one following the demise of the former federal socialist republic and another after the tragic years of the wars in the 1990s. They all acceded to the Council of Europe between 1993 and 2007.

The European Court of Human Rights in Strasbourg. Photo © Council of Europe

In order to prevent the recurrence of human rights abuses, conclude the transitional justice process and forge social cohesion and durable peace, the states concerned have had to carry out institutional reforms, starting with their justice systems on which the rule of law is based. This is an arduous, but necessary, long-term task whose successful completion will require time.⁶²

In all countries in the region justice appears to be perceived by the general public as affected by corruption. Also in almost all of them the majority of the general public has assessed the government actions in the fight against corruption in general as ineffective.⁶³ Some states in the region benefit from significant assistance to improve the rule of law, in particular from the European Union or other international organisations. They have allocated relatively high proportions of their budgets to the development of their court systems. This has been the case for example in Bosnia and Herzegovina, Montenegro and “the former Yugoslav Republic of Macedonia”.⁶⁴

Despite the reforms that have taken place, judicial systems in many states in the region show serious weaknesses. The first of these countries acceded to the European Convention on Human Rights in 1994. The European Court of Human Rights started delivering judgments against these states in 2000. By the end of 2010 the Court had rendered a total of 509 judgments against the six countries in the region, finding at least one violation of the European Convention on Human Rights with respect to each country.

A significant number of these judgments concern violations of the right to a fair trial: Bosnia and Herzegovina: 7 (out of a total of 14), Croatia: 51 (out of a total of 154), Montenegro: 1 (out of a total of 3), Serbia: 14 (out of a total of 46), Slovenia: 2 (out of a total of 220), “the former Yugoslav Republic of Macedonia”: 16 (out of a total of 72). The other significant number of judgments concerned excessively lengthy judicial proceedings (and lack of effective domestic remedies), which is a specific category of violations of the right to a fair trial: Croatia: 80, Serbia: 18, Slovenia: 211, “the former Yugoslav Republic of Macedonia”: 47.⁶⁵ A number of these cases have also exposed the existence in some countries of the systemic problem of non-execution

62. “It took the 20 fastest reforming countries in the 20th century between 15 and 30 years – a generation – to raise their institutional performance from very fragile to more resilient levels”, see World Bank, World Development Report 2011, Facts and Figures, p. 2, available at: wdr2011.worldbank.org/fulltext, accessed 28 January 2012.

63. Transparency International, Global Corruption Barometer 2010, pp. 43-47; see also UNODC (2011), “Corruption in the Western Balkans”, especially figures on p. 44.

64. Council of Europe, European Commission for the Efficiency of Justice (CEPEJ), “Evaluation report of European judicial systems”, (Edition 2010; 2008 data), p. 22, available at: www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp, accessed 28 January 2012.

65. European Court of Human Rights, Annual Report 2010, statistics at pp. 156-157.

of domestic judicial decisions which constitutes a serious threat to the rule of law and to justice. This has been the case particularly in Bosnia and Herzegovina and in Serbia. Both states have recognised this systemic dysfunction and are co-operating with the Council of Europe Committee of Ministers in order to eliminate the relevant shortcomings.⁶⁶

Equally important for the promotion and protection of human rights, social cohesion and justice in the region is the development of independent, efficient and effective national human rights institutions (human rights commissions, ombudsmen or comparable institutions).⁶⁷ All states concerned have established a wide range of national human rights institutions. However, they have had to overcome major obstacles from their inception. In certain cases budgets have been reduced; a situation that has led to the reduction of the efficiency of these institutions. The lack of implementation of decisions of national human rights institutions is another obstacle to their effectiveness. To this end these institutions need wide political support notably from national leaderships that should recognise the former as valuable contributors to their efforts to ensure full respect and protection of the rule of law and human rights.

Lastly, education is another vital sector where reforms are necessary in order to achieve post-conflict justice and peace. Given the persisting ethnic polarisation in the region, the extensive expertise of the Council of Europe in this sector may be well used by all states concerned in order to enhance human rights, democratic citizenship and cultural diversity in their education systems. In this context it is worth recalling the Council of Europe Parliamentary Assembly Recommendation 1880 (2009) on history teaching in conflict and post-conflict areas, which stresses the significant role of history teaching for reconciliation in post-conflict situations. Genuine knowledge of history facilitates understanding, tolerance and trust between individuals, especially the younger generation, and peoples. All countries concerned should realise the vital need to teach history without resorting to one single interpretation of events. It is only through an open dialogue, knowledge of the truth and deep reflection that members of post-conflict democracies in Europe may attain social cohesion and preserve their inherent, valuable pluralism.⁶⁸

66. On Bosnia and Herzegovina see Memorandum CM/Inf/DH(2010)22, 20 May 2010; on Serbia see Memorandum CM/Inf/DH(2010)25, 20 May 2010, available at: www.coe.int/cm, accessed 28 January 2012.

67. See Council of Europe Committee of Ministers Recommendation No. R (97) 14 on the establishment of independent national institutions for the promotion and protection of human rights.

68. See also Council of Europe Committee of Ministers Recommendation CM/Rec(2011)6 on intercultural dialogue and the image of the other in history teaching.

Concluding remarks

More than a decade has passed since the end of the armed conflicts that ravaged the region of the former Yugoslavia. It is regrettable that society in a number of countries in this region remains extremely polarised along ethnic lines, and that many victims of the wars have still not received adequate reparation for the harm they have suffered.

Justice is key, and it must be justice without distinction. Europeans have learned from history that peace and security not based on the principle of justice are extremely fragile and short lived. Post-war justice aimed at inter-ethnic reconciliation and social cohesion is a long-term and complex process whose success depends upon a supportive, mature political climate that should be characterised by will and determination on the part of political leaders. This is particularly important in the region in question where a number of states are directly implicated and need to co-operate in an open and constructive manner.

Despite efforts and progress achieved, impunity for war-related crimes has not been eliminated, and there are still some 13 500 missing persons whose fates have not yet been clarified. Thousands of women who have suffered sexual violence still remain with inadequate assistance. There are also still approximately 438 000 refugees and other displaced persons whose legitimate claims for reparation have not yet been met and are without long-term solutions. In addition, the thousands of stateless persons, especially Roma, in and out of the region pose serious human rights and humanitarian questions that need to be effectively answered. Recent regional initiatives, with the support of the UNHCR, aimed at addressing forced migration and statelessness in the former Yugoslavia provide hope for further progress in the near future.

One should not forget that behind all these facts there is protracted human suffering and agony. The remaining serious challenges require, above all, wise vision and determined political leadership. Constructive steps already taken by governments in the region, supported by the international community, have been important and created hopes. They have demonstrated the courage to offer formal apologies and exchange essential information in order to establish the truth, overcome the violent legacy of the past, and build sustainable democratic societies. Such initiatives deserve wide support, and Europe has a special, supportive role to play in this.

Recommendations

Measures for the elimination of impunity

- All states within and outside the region of the former Yugoslavia should give priority to, and effectively co-operate for, the elimination of impunity for serious human rights violations. They are urged to draw upon, effectively implement and widely disseminate, particularly among all competent authorities, the Council of Europe Committee of Ministers Guidelines on eradicating impunity for serious human rights violations, adopted on 30 March 2011.
- Domestic courts should be reinforced, if necessary, in order to carry out further trials for war-related crimes.
- All states should facilitate the prosecution and extradition of all persons charged with war-related criminal offences without any distinction.
- Domestic witness protection systems in the region should be enhanced by allocating appropriate human and financial resources under the supervision of an autonomous authority offering safeguards of independence from the police or crime investigators, drawing upon the guidance provided by the Council of Europe Parliamentary Assembly Resolution 1784 (2011) on the protection of witnesses as a cornerstone for justice and reconciliation in the Balkans.
- States in the region that have not done so should accede to the 1974 European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes and ratify the 2010 Third Additional Protocol to the European Convention on Extradition which aims to enhance efficiency and speed in the criminal justice field.
- In order to prevent similar events in the future, extremists inciting ethnic or other hatred and intolerance must be prosecuted in accordance with international law.
- Media in the region should assume their responsibilities and promote inter-ethnic tolerance and all victims' right to access to justice. Firm action against hate speech coming from the media should be undertaken by all states.

Provision of adequate and effective reparation to all war victims

- All states in the region should take appropriate measures in order to ensure adequate and effective reparation to the victims and should continue with the efforts to enhance reparation mechanisms available

to the victims and their families, including legal aid that would make effective access to justice and provision of compensation possible.

- All states are called upon to actively support the ICTY's efforts to create a trust fund for victims falling within the Tribunal's jurisdiction.
- States in the region are called upon to step up their efforts, in collaboration with UNHCR, in order to end the protracted displacement of refugees and other displaced persons and provide them with fair, long-term solutions.
- States concerned should step up their efforts aimed at clearing the extensive areas still contaminated by landmines and cluster munitions as well as conventional-weapon explosive remnants of the wars, in accordance with the standards contained in the 1997 Mine Ban Treaty, the 2008 Convention on Cluster Munitions, the 2003 Protocol V on Explosive Remnants of War to the Conventional Weapons Convention and Article 2 of the European Convention on Human Rights (right to life).
- States in the region should enhance their efforts aimed at eliminating statelessness. Those that have not done so should accede to the 1997 European Convention on Nationality and to the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, as well as to the relevant UN treaties. In this context, Slovenia is called on to redress in a fair and speedy manner the injustice suffered by the “erased” persons.
- Reparations should be gender sensitive. Recalling the UN Security Council Resolution 1820 (2008) on Women, Peace and Security, states in the region are urged notably to support the development and strengthening of the capacities of national institutions, in particular those concerning justice and health, and of national civil societies in order to raise awareness and provide effective assistance to all victims of sexual violence during the armed conflicts.
- Judgments of the international and domestic courts must be fully and effectively respected and implemented.
- Public apologies should be followed by systematic awareness-raising campaigns.

The need to establish and recognise the truth

- The states of the region should support the establishment of a regional truth and reconciliation commission and provide it with the necessary human and financial resources to operate effectively. An appropriate context for such efforts may be supported by and expressly provided for by national human rights action plans seeking to address the

human rights situation in a coherent manner, in accordance with the Commissioner's Recommendation on systematic work for implementing human rights protection at the national level (CommDH(2009)3).

- A regional truth and reconciliation commission could issue a report containing the established facts and present recommendations on reparations and steps to be taken to prevent future conflict. The report would also serve as a basis for objective history lessons in schools.
- States in the region have an obligation to be proactive and pay particular attention to the significant number of remaining cases concerning missing persons. Families have a right to know the fate of their missing members. The search for gravesite locations should be intensified, while state archives should be opened and screened for information on the missing persons. States in the region should also exchange information unconditionally on this issue and ensure the necessary financial and human resources to the national commissions and institutions tasked with clarifying the fate and whereabouts of the missing persons.
- States which have not yet done so should accede to the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.
- Effective protection and support should be given to the media and journalists in order to enable them to inform and educate the public in a responsible, free and impartial manner, as well as to civil society organisations dealing with the past and war victims.

Need for institutional reforms to guarantee non-repetition

- Political leaderships in the countries of the former Yugoslavia should draw upon recent good practices of rapprochement in the region and promote post-war justice and durable peace and security through necessary institutional reforms in accordance with the Council of Europe standards.
- Reforms aimed at the creation of independent and efficient judicial systems should be one of the highest priorities in all states in the former Yugoslavia, drawing upon the useful guidance of the European Commission for the Efficiency of Justice.
- Given the multi-ethnic nature of all countries in the region, states are particularly urged to promote the participation of persons belonging to national minorities in the judiciary and the administration of justice.
- The educational systems of the states in the region should be overhauled in order to promote pluralism and objective history teaching, and to

combat ethnic polarisation and discrimination, in accordance with Council of Europe standards.

- All these efforts could be framed in national human rights action plans drafted and implemented by states in co-operation with national human rights institutions whose independence, efficiency and effectiveness should be supported and fully guaranteed by all states.