



Policy Brief

# How the European Union

Can Contribute to the Reconciliation

of Post-Yugoslav Countries





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## RECONCILIATION IN THE CONTEXT OF THE RENEWED EUROPEAN PERSPECTIVE OF THE WESTERN BALKANS COUNTRIES

In theory, the notion of reconciliation implies a complex set of processes that, after massive violations of human rights, build and renew relationships at the interpersonal, socio-political or/and institutional levels<sup>1</sup>. There is widespread understanding<sup>2</sup> that reconciliation is a precondition for lasting peace, a process through which grave issues from the past are addressed.

The notion of reconciliation used in this text refers to the socio-political and institutional levels – the reconstruction and renewal of relations between post-Yugoslav countries, political and ethnic groups and communities, as well as the establishment of trust in new institutions.

Transitional justice is closely related to the concept of reconciliation. Its basic instruments – the establishment of criminal responsibility for crimes committed in the past, the discovery and telling of the facts about victims, reparations and institutional reforms – encourage reconciliation, to the extent that transitional governments are willing to accept the punishment of those responsible for the crimes committed, the need for official recognition of victims, democratization, and the restoration of trust in institutions as a way of establishing the rule of law and preventing new conflicts.

Regarding the status of transitional justice and reconciliation in post-Yugoslav countries, Nils Muižnieks, the Council of Europe Commissioner for Human Rights, expressed great concern in December 2017, warning of the stalled reconciliation and “mounting ethnic divisions and polarisation in the region.” He pointed in particular to the denial of genocide, glorification of war crimes and their perpetrators, historical revisionism, inflammatory discourse and ethnic segregation in education<sup>3</sup>.

In his recent statements, Serge Brammertz, the former Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the current Chief Prosecutor of the Mechanism for International Criminal Tribunals (MICT), warned that there seems to be “no true will in the region to accept the facts about the atrocities committed”, and “a shocking glorification of war criminals and denial of war crimes”<sup>4</sup>; included in this

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1 According to: Seils, P. (2017), *The Place of Reconciliation in Transitional Justice – Conceptions and Misconceptions*, ICTJ Briefing, ICTJ.

2 According to: Fischer, M. (2011), *Transitional Justice and Reconciliation: Theory and Practice*. Advancing Conflict Transformation: The Berghof Handbook II, eds., Opladen/Framington Hills.

3 Human Rights Comment, CoE, <https://www.coe.int/en/web/commissioner/-/reconciliation-stalled-in-the-western-balkans>.

4 E.g., BIRN report, June 22, 2017, Balkan Insight, <http://www.balkaninsight.com/rs/article/glorifying-war-criminals-impedes-justice-says-brammertz-06-22-2017>.

is “the denial of genocide and ethnic cleansing” and “denial of the individual guilt of senior political and military leaders”<sup>5</sup>.

Non-governmental organizations dealing with human rights and transitional justice have assessed that the end of the ICTY mandate (December 2017) was welcomed in post-Yugoslav countries, especially in Serbia and Croatia, as exemption from the obligation to prosecute war crimes further.

Hence, the *EC’s Western Balkans Strategy for a credible enlargement perspective*<sup>6</sup> (February 2018) represents a strong EU response to problems in the region of the former Yugoslavia, created, in part, by the EU’s mistakes. In addition to the rule of law and competitiveness, the document acknowledges reconciliation and regional cooperation as one of the three areas in which “comprehensive and convincing reforms are necessary.” Among the six initiatives that will contribute to the implementation of this strategy, the European Commission provides for initiatives that will support reconciliation, inter alia, through support for transitional justice mechanisms.

The strategy takes into account reconciliation at the political and institutional levels, as clarified by David Hudson, senior expert of the European Commission’s Directorate-General for Neighbourhood and Enlargement Negotiations<sup>7</sup>, who pointed to the “regional ownership” of the reconciliation process, whereby no one outside the region can determine the approach to reconciliation. He emphasized the responsibility of political leaders, and that any progress in the reconciliation process was “an index of democratic and political maturity<sup>8</sup>.” However, as a general document, the Strategy does not define the indicators of progress in this area, which require rigorous specification in action documents.

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5 Address of Mr Serge Brammertz, Prosecutor for the International Criminal Tribunal for the Former Yugoslavia and the Mechanism for the International Criminal Tribunal, to the Security Council, New York, 7 June 2017.

6 COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, A credible enlargement perspective for and enhanced EU engagement with the Western Balkans.

7 At the panel discussion of the 11th Forum for Transitional Justice in post-Yugoslav Countries, on January 29, 2018 in Sarajevo; more in: Balkan Insight report, January 29, 2018, <http://www.balkaninsight.com/en/article/recom-announces-state-forming-agreement-soon-01-29-2018>.

8 Hudson, *ibid*.

## PREREQUISITES FOR RECONCILIATION

The prerequisites for progress in reconciliation are to be found through criminal justice and the discovery and telling of the facts (truth-telling) about the past, with a particular focus on the victims. Therefore, in this text, special attention is paid to the prosecution of war crimes, especially in the light of the ICTY ending its work, as well as the state of affairs related to the initiative of the regional civil society coalition to set up an official (intergovernmental) Regional Commission for *the establishment of the facts* about the war crimes and other serious human rights violations in the territory of the former SFRY from 1 January 1991 to 31 December 2001 (RECOM).

## WAR CRIMES TRIALS

As the ICTY ended its work in December 2017 and the Kosovo Specialist Chamber will be dealing with the prosecution of war crimes committed by the KLA members, the prosecution of war crimes committed by citizens of Serbia, Croatia and BiH is exclusively within the jurisdiction of the domestic judicial authorities. In this regard, in his final report submitted to the Security Council as the Chief Prosecutor of the ICTY concerning the end of the work of this court in December 2017<sup>9</sup>, Serge Brammertz warns that “many challenges remain in ensuring accountability for war crimes, crimes against humanity and genocide in the national courts of the countries of the former Yugoslavia, with negative trends overshadowing the positive”. Brammertz further cites key challenges in individual countries. With a general assessment that there has been progress in Bosnia and Herzegovina, especially in complex cases, he points out that “there remains a large backlog of war crimes cases”, and that “justice for such crimes is heavily politicised”; in Croatia, he states there is “a blatant political interference in the justice process continues, as Croatian authorities are not providing effective judicial cooperation in relation to a large number of suspects and accused living openly in Croatia today”; and he has qualified the progress in war crimes trials in Serbia as “distinctly unsatisfactory”, stressing that “impunity for many well-established crimes remains the norm.”

During 2017, the prosecution of crimes in the countries of the former Yugoslavia was additionally marginalized – there has been a smaller number of indictments, insufficiently developed in the context of facts established before the ICTY, and a smaller number of

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<sup>9</sup> Final Report by Serge Brammertz, Prosecutor of the International Tribunal for the Former Yugoslavia, provided to the Security Council under paragraph 6 of SC Resolution 1534 (2004), p. 82.

accused, mainly direct perpetrators, with a smaller number of victims covered; followed by more witnesses giving up on providing direct testimony (owing partly to their age and poor health, but mostly to mistrust of the court of the state they consider responsible for their suffering), the rescinding of first instance judgments involving a large number of victims, frequent postponements of main hearings, the increasing anonymization of court judgments and indictments, and limited access to information, footage, photographs and other evidence in the possession of the courts, in connection with war crimes committed. This is evidenced by the data on trials in 2017:

- The Court of BiH issued 15 non-final judgments in the proceedings against 28 war crimes indictees, with more than 60 victims. The Court issued acquittals of sixteen indictees, to which the Prosecution responded by lodging an appeal. The Trial Chambers issued a total of five final judgments, in cases against seven war crimes indictees, with more than 45 victims. One accused, who admitted the criminal offense, was sentenced to one year in prison<sup>10</sup>. During 2017, 14 indictments were filed against 32 persons for crimes involving at least 59 victims. Several trials began in 2017, among others, for war crimes against prisoners of war in Orasje.
- In Croatia, eight indictments were filed against 25 defendants, which included more than 120 victims. Seven non-final judgments against 12 defendants were passed, which included more than 60 victims, and 11 final judgments against 25 defendants, which included more than 150 victims. In the first instance procedure for the crime in the villages near the River Una, near Croatian Kostajnica, after the trial which began in February 2010, a final acquittal was issued on 9 November 2017. Four trials, three retrials, before two courts and three judgments of conviction preceded. The initial trial began before the County Court of Sisak. The trial for war crimes against Serbs in Pakračka Poljana and at the Zagreb Fair was completed 26 years after the commission of the crimes. On 2 February 2017, the Supreme Court modified the first instance judgment and increased the sentence of five and a half years to seven years in prison for the accused Tomislav Merčep. In 2017, about 100 hearings were scheduled.
- In Kosovo<sup>11</sup> until 2016, international prosecutors and judges were responsible for the prosecution of war crimes. During 2017, four indictments were filed: three against one defendant (Zoran Vukotić, a Serb) for war crimes involving 110 Albanian victims. One indictment was filed by the EULEX Prosecutor, and two were filed jointly by the EULEX

<sup>10</sup> Miroslav Perić sentenced to 1 year (confession of a criminal offense).

<sup>11</sup> In the period 2000-2017 international prosecutors filed a total of 48 war crimes indictments against 120 persons: 61 Albanians, 48 Serbs, 2 Montenegrins and one RAE member. The International and Mixed Trial Chambers pronounced 48 first instance judgments.

Prosecutor and the domestic Prosecutor. The EULEX Prosecutor filed an indictment against Skender Bislimi (an RAE member<sup>12</sup>) for a war crime against one person - the physical maltreatment of a civilian who was abducted, and later killed. There were no first instance or final judgments. In 2017, there were 59 court days.

- On the basis of the cases provided to him by the Special Department for War Crimes of the Prosecutor's Office of Bosnia and Herzegovina, the War Crimes Prosecutor filed three indictments against four persons (unknown number of victims). The Trial Chamber of the High Court in Belgrade acquitted two defendants of the murder of five people by a first instance judgment. There were two trials before the Appellate Court: the first was the trial of 24 accused of war crimes against prisoners and wounded ("Ovčara" Case), which began in 2004 and ended with another final judgment on 24 November 2017 - 11 were convicted, nine were acquitted, two accused died, while two had the status of cooperating defendant; the second trial was the trial of eight indictees for war crimes against Roma (the "Skočić" Case, 32 victims) which commenced in 2010. A trial of 14 defendants charged with war crimes against Croatian civilians is ongoing before the High Court in Belgrade (the "Lovas" Case, 50 victims), which started in 2008, as well as the trial of 13 persons charged with war crimes against Albanian civilians ("Ćuška" Case, 48 victims), which began in 2010. In addition to the final judgment in the "Ovčara" Case, in 2017, two final judgments were issued, both acquittals - in the "Gradiška" Case (one accused, one victim) and the "Bosanski Petrovac" Case (two accused, one victim). In 2017, there were 70 court days.

In addition, the prosecution of war crimes has been politically marginalized in other ways. The Prosecutor's Office of BiH still does not have a Chief Prosecutor, as was the case with Serbia too, which only got its War Crimes Prosecutor in May 2017. The Prosecutor's Office of the Republic of Serbia still does not have a strategy for investigating and prosecuting war crimes (although its adoption has been announced for June 2018). On the other hand, 2017 saw the setting up of the work group for drafting amendments to the BiH War Crimes Strategy for prosecuting war crimes cases. The State Attorney's Office of the Republic of Croatia (DORH) has a strategy for the prosecution of war crimes, but it is not recognized in practice.

Trials before the Court of Bosnia and Herzegovina are being held under strong criticism from institutions and veterans associations of the Republika Srpska, as well as from the Croatian community, who believe that the existing Strategy of the Prosecutor's Office of BiH marginalizes Serb and Croat victims. In Kosovo, the Government and Parliament, as

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<sup>12</sup> A member of the Roma, Ashkali and Egyptian communities.

well as the entire Albanian public, share the view that the establishment of the Kosovo Specialist Chamber to hold trials for the members of one ethnic community is an unfair solution and a sign of non-recognition of Albanian victims. In Serbia and Croatia, in December 2017, the ICTY's closure was received with great relief by the governments, parliaments and a large part of the public, and seen as the agreement of the United States and the EU as to the completion of the prosecution of war crimes.

## BILATERAL DISPUTES

The prosecution of war crimes in Serbia is conducted pursuant to the *Law on the Organization of Competences of State Authorities in War Crimes Proceedings* of 2003 (according to which the Republic of Serbia has jurisdiction to prosecute all persons who committed war crimes in the territory of the former SFRY - the principle of universal jurisdiction). The implementation of this law resulted in the arrest of two Croatian nationals in 2011, who were then indicted and convicted of war crimes against Serbs, triggering turbulent political reactions in Croatia. In response to the trial of Croatian citizens (Croatian "defenders"), on 22 October 2011, the Parliament of the Republic of Croatia passed the *Law on the Invalidity of Certain Legal Acts of Judicial Bodies of the former JNA, the former SFRY and the Republic of Serbia*, which, according to legal experts, denied Croatian defenders the right to defence through legal aid from the institutions of the Republic of Croatia, and imposed a sense of insecurity on their travels abroad.

In order to overcome the problems that had arisen, the then Presidents of Croatia and Serbia, Ivo Josipović and Boris Tadić, launched an initiative in February 2012 to sign a bilateral agreement, according to which war crimes issues would be resolved on the basis of the defendant's domicile. In accordance with this principle, the bilateral agreement would prevail over the Serbian law on universal jurisdiction, as well as over the Croatian law on the invalidity of legal acts produced in Serbia. The BiH Presidency, also invited to sign this bilateral agreement, did not accept the proposed solution, advocating the application of the principle of territorial jurisdiction i.e. of holding trials in the state in whose territory a war crime was committed. As the Ministries of Justice and Prosecutor's Offices of Croatia and Serbia were working toward the signing of the bilateral agreement, the presidential elections in Serbia, and then the presidential elections in Croatia, brought a change of direction in the relations between Serbia and Croatia, and the results were reversed. Nevertheless, a step forward in improving bilateral cooperation in the prosecution of war crimes is present in the recent (February 2018) expressions of readiness by the Serbian President Aleksandar Vucic and Croatian President Kolinda Grabar Kitarević to have the

institutions of Croatia and Serbia continue the interrupted work on the signing of the bilateral agreement on war crimes prosecution on the basis of the defendant's domicile.

## **AN EXTRAJUDICIAL FACT-FINDING AND TRUTH-TELLING BODY (RECOM)**

The regional intergovernmental commission for the establishment of the facts about victims and the circumstances of their death (RECOM), should by its seal prevent the political manipulations and interpretations that jeopardize connectivity and cooperation. This would reduce room for lies, denial, and the production of nationalist narratives about the wars, and contribute to the humanization of the other, the stability and security of the region and the sustainability of economic cooperation, and at the same time enable reforms of educational programs in those parts concerning recent history.

In 2008, non-governmental organizations from the former Yugoslavia established the Coalition for RECOM, which today includes more than 2,100 organizations and individuals and advocates the establishment of a Regional Commission for the Establishment of the Facts on War Crimes and Other Serious Violations of Human Rights Committed in the Territory the Former Yugoslavia (RECOM). The initiative for the establishment of the Commission has been supported by the signatures of over 580,000 citizens from the entire region, and, following a broadly inclusive, four-year consultation process (during which 128 debates were held with 6,700 representatives of civil society), the goals, tasks, competence, duration and procedures of the future intergovernmental commission have been formulated. Starting from this foundation, the final version of the Draft Statute of RECOM was agreed in 2014 by the Special Envoys of the Presidents of Croatia, Serbia, Montenegro, Kosovo and Macedonia, and the Bosniak and Croat members of the Presidency of Bosnia and Herzegovina.

In the meantime, two new members of the Presidency (2014) were elected in BiH, with which the Coalition for RECOM has not yet managed to hold a meeting, while the Bosniak Presidency member has continued to support the establishment of RECOM. A new President was elected in Croatia in 2015 who believes that support for the establishment of RECOM is outside the scope of the competence of the President. In this situation, in which some newly elected politicians have ceased to support civil initiatives that enjoyed the support of their predecessors, the Coalition for RECOM has created a new strategy, which starts from the affirmation of the Berlin Process as being an appropriate platform for the agreement of post-Yugoslav leaders to launch an intergovernmental project for reconciliation. The first step is to be the signing of the Agreement on the Establishment of RECOM at the Berlin Process Summit in London in July 2018, by which the post-Yugoslav

countries' Prime Ministers, whose support would remain unchangeable (independent of elections), would demonstrate the willingness of their states to initiate procedures for the establishment of RECOM, in accordance with Article 48 of the Draft Statute. An equally important step is to re-engage Croatia in the RECOM process, in which it played a leading role until the beginning of 2015.

## CONCLUSIONS AND RECOMMENDATIONS

The progress in the reconciliation of post-Yugoslav countries requires the following:

1. Strengthening of the domestic judiciaries and their cooperation in the prosecution of war crimes:
  - Support for the Mechanism for International Criminal Tribunals (MICT) becoming the engine of regional cooperation in the prosecution of war crimes - to assist in the creation of a regional prosecutorial strategy, to provide easier access to evidence and facts established before the ICTY, and to provide expert support in investigations and in the preparation of indictments against individuals who participated in the planning of mass crimes but today hold positions that protect them from criminal responsibility.
  - Resolving bilateral disputes between Serbia and Croatia by signing a bilateral agreement on the prosecution of war crimes, according to which the trials would be held on the basis of the defendant's domicile, thus in practice eliminating the possible harmful consequences of the application of the universal jurisdiction principle contained in the law of the Republic of Serbia and the Croatian Law on the invalidity of legal acts produced in Serbia.
  - The relinquishment by the BiH Presidency of the principle of territorial jurisdiction and acceptance of the standard whereby each state holds trials of its citizens, since this approach contributes the most to critical re-examination within the society and facing its own responsibility towards others.
2. Signing a political agreement by which the post-Yugoslav countries will undertake to create the conditions for the establishment of RECOM within a reasonable time frame:
  - Signing of the agreement under the auspices of the Berlin Process, at the London Summit in July 2018. The agreement should include the possibility of later accession, as well as an invitation to the other countries in this regard.
  - Increasing the visibility of the objectives and tasks of the future Commission, especially the importance of the list of war victims in the context of the humanization of the victims and the public recognition of all 130,000 victims.

3. The action plan of the *European Commission's Western Balkans Strategy for a credible enlargement perspective* should provide for explicit measures:
  - To support the establishment and operation of the Regional Commission for the establishment of facts on war crimes and other serious human rights violations in the territory of the former SFRY in the period from 1 January 1991 to 31 December 2001 (RECOM), and to define the establishment and commencement of the work of this commission by the end of 2019 as an indicator of progress in the process of reconciliation;
  - To support the cooperation of the domestic prosecutors' offices with the MICT in the creation and implementation of the regional prosecutorial strategy, and define the development of the strategy by mid-2019 as an indicator of progress in establishing the rule of law and contribution to the reconciliation process.
4. The European Parliament should provide strong support to reconciliation in the region through a resolution that would support the establishment and operation of the regional intergovernmental commission - RECOM.
5. The European Commission and the European Parliament should organize a donor conference and the establishment of the *Post-Yugoslav Reconciliation Fund*, which would finance regional projects focusing on peace-building and common issues and include all post-Yugoslav countries.







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