

REGIONAL COOPERATION IN THE PROSECUTION OF WAR CRIMES AS AN EU ACCESSION BENCHMARK

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Abstract

While the EU Enlargement Strategy and the Strategy for a credible enlargement perspective for and enhanced EU engagement with the Western Balkans, open the door for Western Balkans countries, the same strategic documents introduce the pretty vague set of criteria for the evaluation of achievements made in order to strengthen the Rule of Law and to promote regional cooperation and stability. Considering turbulent historical background and heritage of conflicts that resulted in war crimes and other serious human rights violation, the authors analyse the scope, objectiveness and influence of reform benchmarks defined by European Commission in the field of prosecution of war crimes. Having in mind differences in EU accession progress and/or integration status of countries in the Region, authors approaching this issue from the perspective of uniformity, clarity and objectiveness of criteria applied by the European Commission when evaluates reform progress, but also preservation of achievements in the Rule of Law. In parallel, they are observing the attitudes of populism vs. real commitment to regional cooperation in prosecution of war crimes as a precondition of reconciliation.

Keywords: EU accession, EU integration, rule of law, war crimes, regional cooperation, reconciliation

EX-YUGOSLAVIA- BETWEEN ARM CONFLICTS AND RECONCILIATION

Two decades have past since last armed conflicts in the ex-Yugoslav region finished. Armed conflicts in the former Socialist Federal Republic of Yugoslavia were characterized by grave, large-scale and systematic violations of international humanitarian law. According to estimates by various organizations during the wars in Slovenia (June-July 1991), Croatia (1991-95), Bosnia and Herzegovina (1992-1995), in Kosovo and Metohija and during the bombing of the Federal Republic of Yugoslavia (1999), as well as in the Former Yugoslav Republic of Macedonia

(February-August 2001) - more than 130,000 people lost their lives, with civilians accounting for the majority of them. More than 10,755 people are still missing¹¹. In addition to wilful killing of civilians in these conflicts numerous cases were registered of enforced displacement of the civilian population, unlawful imprisonment, torture, sexual violence, inhumane treatment, as well as looting and destruction of property, economic assets, cultural and religious buildings on a large scale. War crimes were committed by all parties to the armed conflicts.¹²

Having in mind that war crimes constitute *delicta contra juris gentium* and their prosecution is a concern of the international community as a whole, not just national judicial systems. Moreover, the adequate response on such a grave, large-scale and systematically committed war crimes needs to be driven on three parallel tracks:

- 1) Efficient prosecution of war crimes before domestic courts;
- 2) Continuous cooperation with United Nations Residual Mechanism for Criminal Tribunals (as successor of the International Criminal Tribunal for the Ex-Yugoslavia)
- 3) Regional Cooperation in order to foster prosecution before domestic courts and contribute reconciliation.

An ultimate goal of these processes is well defined in the Serbian National Strategy for the Prosecution of War Crimes as a need that all war crimes “are investigated and the perpetrators punished in accordance with international standards, regardless of national, ethnic and religious affiliation or status of the offender and the victim, and to promote policy of reconciliation, tolerance, regional cooperation and good neighbourly relations, as a prerequisite for lasting stabilization and prosperity of the entire region.”¹³

From given definition, it is obvious that Serbian authorities decided to follow the core elements of the definition of transitional justice, as defined by the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence in 2012. Namely, the Special Rapporteur defined the transitional justice as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecution, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.”¹⁴

As further elaborated in the *The EU’s Policy Framework on support to transitional justice*¹⁵, it incorporates the four essential elements of transitional justice, namely:

¹¹ According to the data of the International Committee of the Red Cross of October 2015

¹² The National Strategy for the Prosecution of War Crimes, “The Official Gazette”, No. 19/2016.

¹³ *Ibidem*.

¹⁴ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 9 August 2012, A/ HRC/21/46 p.5

¹⁵ This document forms part of the implementation of the EU Action Plan on Human Rights and Democracy –2015 - 2019, which outlines in action 22 (b) the commitment to develop and implement an EU policy on Transitional Justice. The objective is to provide a framework for EU support to transitional justice mechanisms and processes and enhance the EU’s ability to play a more active and consistent role, both in our engagement with partner countries and with international and regional organisations. *The EU’s Policy Framework on support to transitional justice*, available at:

- criminal justice;
- truth;
- reparations;
- guarantees of non-recurrence/institutional reform.

“A transitional justice process which combats impunity, provides recognition to victims, establishes the rule of law and fosters trust also aims to contribute to a process of reconciliation. Reconciliation seeks to redesign the relationship between individuals and enable society to move from a divided past to a shared future. Legal and institutional measures alone will not be sufficient. Initiatives that target the more personal dimension of a transition may also be required, such as official apologies, memorials and the reform. However, reconciliation must not be conceived as an alternative to justice, or a goal that can be achieved independently of the comprehensive implementation of the four elements of transitional justice discussed in detail below. Furthermore, while transitional justice is a core part of the reconciliation process, other components, such as security and development, are equally important.”¹⁶

It’s needs to be emphasized that the three earlier mentioned tracks can show in their full capacity only if their synergy exists. Without an efficient regional cooperation, investigation and prosecution before national courts is almost impossible, having in mind the need to ensure access to witnesses and material evidences placed in neighboring countries. In parallel, the ICTY archives are an important source of data for national prosecutors’ offices. Finally, due to the end of the ICTY mandate, efficient work of the national judicial systems in this field becomes even a more important.

In addition to what already been said, the countries in the Region need to find additional ways to foster transitional justice mechanisms.

As visible from abovementioned definition, there are numerous steps that need to be made between grave and massive crimes committed during 1990s in ex-Yugoslavia and reconciliation as final goal. Moreover, if we consider reconciliation as process, not as a final goal, it is obvious that it should be continuous and long term based, future oriented process, expected to result in “peaceful and just relations”.¹⁷ Theorists of reconciliation generally recognize that reconciliation is a “scalar” concept, which allows for minimal and maximal versions of improved relationships (Crocker 1999, Griswold 2007). Each of the categories along which relationships might improve (behaviour, beliefs, attitudes or emotions) admits of degree. (Radzik & Murphy: 2015) These improvements could be considered differently from the angle of different sides that trying to reconcile.

In this sense, there is an open issue of objectiveness in assessment of progress made in this regard from all sides, but also cumulatively. Which authority and based on

http://eeas.europa.eu/archives/docs/top_stories/pdf/the_eus_policy_framework_on_support_to_transitional_justice.pdf, last accessed on March 9th 2019

¹⁶ *Ibidem*.

¹⁷ See more in: Radzik, Linda and Murphy, Colleen, "Reconciliation", *The Stanford Encyclopedia of Philosophy* (Summer 2015 Edition), Edward N. Zalta (ed.), available at: <https://plato.stanford.edu/archives/sum2015/entries/reconciliation/>, last accessed on March 9th 2019.

what criteria should assess both- one side, but also bilateral and multilateral steps and measures taken in order to punish perpetrators, support the truth, apologize and memorials to past conflicts?

THE ROLE OF THE REGIONAL COOPERATION IN EU ACCESSION PROCESSES

In parallel with prosecution of dozens of war crimes cases before national authorities in the Region, ICTY and the United Nations Residual Mechanism for Criminal Tribunals, the ex-Yugoslav republics have started (and some of them already finished) their EU accession process. As the accession negotiations with EU imply continuous and comprehensive reforms, assessed among others, through the lens of the Rule of Law as a horizontal principle and closely monitored by European Commission (hereinafter: EC), there are several questions that could be opened in this regard:

- Is the EC this authority that should assess progress made within the regional cooperation and reconciliation processes in general?
- If answer is positive, there is a further question that tackles criteria and mechanisms to do it so.
- Finally, there is an issue of uniformity in approaching evaluation of achievements made by the candidate countries and the Member States.

In attempt to answer these questions, we should start from the core principles on which EU was established, including the Rule of Law principle. Furthermore, we should focus on standards, criteria and procedures established to assess their fulfilment, both- during the accession negotiations, but also later on.

Having this in mind, it could be said that there are three levels of influence of the regional cooperation in the field of prosecution war crimes on the EU accession processes:

- 1) Through the general obligation of strengthening the Rule of Law as a core horizontal principle of modern democracies;
- 2) Measuring the progress made by the candidate countries in the field of transitional justice, access to justice and judicial efficiency;
- 3) Monitoring the preservation of achieved standards in the Member States.

As the first and the last one goes for both- Member States and candidate countries, the second is reserved for candidate countries. Having in mind that ex-Yugoslav territory affected by arm conflicts or relevant in sense of collecting evidences is now in the scope of Serbia, Montenegro, Croatia, North Macedonia and Bosnia and Herzegovina, based on their status/progress in the accession processes, they can be selected in three different groups:

- 1) Member States, where only Croatia belongs to, so far;
- 2) Candidate countries- Serbia, North Macedonia and Montenegro;
- 3) Potential candidates -Bosnia and Herzegovina.

It is also important to mention that issue of prosecution of war crimes and cooperation in this regard is, due to affection by armed conflicts and/or participation of national armies, of the particular interest for EU accession processes and /or EU Membership status of Bosnia and Herzegovina, Croatia and Serbia, three regional countries with in different accession statuses.

An obligation to achieve and uphold certain level of the Rule of Law in EU

The Rule of Law became the main horizontal principle, shaping justice reform processes. Moreover, the principle of the Rule of Law has progressively become a predominant organisational model of modern constitutional law and international organisations (including the United Nations and the Council of Europe) to regulate the exercise of public powers. It makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.¹⁸ However, this trend has contributed also to uniform understanding of the Rule of Law concept through defining its core elements, common to various different concepts of this principle all around a World.¹⁹

Despite what Kochenov stated, that the 'Rule of Law', the meaning of it is probably much less articulated than one might presuppose at first glance, because the popularity and functionality of legal concepts do not go hand in hand (Kochenov, 2012: 9), some progress in defining the core elements of the Rule of Law has been made.²⁰ In this sense, the Venice Commission plays an important role, having in mind its efforts to analyse the definitions proposed by various authors coming from different systems of law and State organisation, as well as diverse legal cultures. The Commission considered that the notion of the Rule of Law requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures.²¹

According to the EC,²² the Rule of Law is the backbone of any modern constitutional democracy and one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU and, as such, one of the main values upon which the Union is based. This statement of the EC is the logical consequence of the fact that the Article 2 of the Treaty on European Union (TEU), as well as by the Preambles to the Treaty and to the Charter of

¹⁸ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, A new EU Framework to strengthen the Rule of Law, Strasbourg, 11.3.2014, p. 3.

¹⁹ See more about evolution and unification of the Rule of Law principle in: Kolaković-Bojović, M. (2018) The Rule of Law Principle: The EU Concept vs. National Legal Identity, *Universally and particularity at law*, Vol. I, Faculty of Law-University of Priština, pp. 137-160.

²⁰ The definition of the rule of law given in the Report of the UN Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, for instance, incorporates both human rights and democracy as necessary elements of the rule of law. For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, UN SC, UN Doc. S/2004/616 at 4)

²¹ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL A new EU Framework to strengthen the Rule of Law, Strasbourg, 11.3.2014, par. 15-16.

²² COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, A new EU Framework to strengthen the Rule of Law, Strasbourg, 11.3.2014, COM(2014) 158 final, 2.

Fundamental Rights of the EU, recognize the Rule of Law as the of one the pillars. This is also why, under the Article 49 TEU, respect of the Rule of Law is a precondition for EU membership. Additionally, the Commission is the guardian of the Treaties and has the responsibility of ensuring the respect of the values on which the EU is founded and of protecting the general interest of the Union. It must therefore play an active role in this respect.²³

In order to ensure monitoring of reform processes in candidate countries but also to prevent and react upon regressive actions in the field of Rule of Law in the Member States (e.g. cases of Hungary and Poland and their reforms in the field of judiciary and media laws)²⁴, the EU but also the CoE bodies²⁵ trying to identify the core common standards, values, elements and principles of the Rule of Law. Attempt to formulate uniform definition of the Rule of Law is based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded' (EU:C:2014:2054: §§ 167-168).

In order to establish and uphold certain level of the Rule of Law in the Member states, the EU has made numerous steps: In 1997, Amsterdam Treaty was signed, bringing the Article 7 sanctioning mechanism for violation of rule of law, fundamental rights and other basic principles is established. In 2000, bilateral sanctions against Austria were imposed in response to the arrival in government of the Freedom Party (FPÖ). In the period 2010-2012, a several Member States were under scrutiny for possible rule of law violations (France, Romania, Hungary). In March 2013, the Commission presented the EU Justice Scoreboard, including statistics on the justice systems in the Member States and data on the relationship between compliance with the rule of law and the functioning of the internal market. In March 2013, the Letter from the Foreign Affairs Ministers of Denmark, Finland, Germany and the Netherlands to the Commission President, was sent calling for a new mechanism to safeguard fundamental values in the EU. In March 2014, the Commission adopts a Communication on a Rule of Law Framework as an earlier phase, complementary to the Article 7 TEU mechanisms. In December 2014, the Council decides to hold an annual 'dialogue' in the General Affairs Council on the 'rule of law' in Member States. In January 2016, the European Commission launches structured dialogue with Poland and open the new era of monitoring regressive process in the field of Rule of Law in the Member States, that is still ongoing.²⁶

However, intensity and wide spreading of the regressive processes throughout of EU show the lack of an effective mechanisms developed in order to continuously

²³ See more in: Kolaković-Bojović, M. (2018) The Rule of Law Principle: The EU Concept vs. National Legal Identity, *Universally and particularity at law*, Vol. I, Faculty of Law-University of Priština, pp. 137-160.

²⁴ See more in: Kochenov, D., Magen, A. & Pech, L. *Introduction: The Great Rule of Law Debate in the EU*, Journal of Common Market Studies, Vol. 54, 5/2016, pp. 1045-1049 available on: https://www.academia.edu/29810031/Introduction_The_Great_Rule_of_Law_Debate_in_the_EU, last accessed on January 10th 2018.

²⁵ The case law of the Court of Justice of the European Union ("the Court of Justice") and of the European Court of Human Rights (ECtHR), as well as documents drawn up by the Council of Europe, especially by the Venice Commission.

²⁶ See more on: https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/rule-law/rule-law-framework_en, last accessed on January, 14th 2018.

monitor situation in the Member States, at least compared to comprehensive mechanisms established for monitoring of candidate countries. Reasons for that could be found in basically wrong preposition that upholding achieved level of the Rule of Law is more or less question of routine, once that level is achieved. This wrong hypothesis has its repercussions not only from the point of evaluation of the Rule of Law in individual Member States, but also considering comparison of the situation and efforts made by the Member States and the candidate countries on the same issues. This goes also for the field of regional cooperation in prosecution of war crimes.

Measuring progress in regional cooperation in prosecution of war crimes for (potential) candidates

The negative experiences of the European Commission with some recently joined Member States resulted in publishing of the revised Enlargement Strategy²⁷. The main idea was to make the reform processes that precede accession more substantial rather than formal. That has reflected also on Serbian accession negotiations through the introduction of pretty vague final criteria for the membership in the EU, formulated as “once it fulfills the necessary conditions”. However, assessment of fulfillment of a “necessary conditions” is not completely free of criteria. For that purpose, the EC introduced opening, interim and closing benchmarks. The starting point when assessing a progress is state of play of legislation, administrative and institutional capacities on the bilateral screening day. Beside these novelties related to accession procedure, the significant change was introduced in the last years in relation with strengthening influence of reforms relevant for the Rule of Law that became some kind of criteria for assessing an overall reform context in candidate countries. On the practical level, that means an early opening and late closing negotiations for chapters 23 and 24 dealing with justice reform.

Additionally, through the Country reports mechanism (former progress reports), the EC closely monitors progress made by candidate countries and potential candidates. On the practical level, it means that:

- Achievements and progress/regress of the Member States are monitored only through the general, above described mechanisms, that results in lack of concrete reports and data in particular fields, including regional cooperation in prosecution of war crimes and related issues;
- Achievements and progress of candidate countries that opened accession negotiations are monitored through:
 - reporting on progress made in order to fulfil interim and/or closing benchmarks (mostly through the implementation of the action plans for chapter 23);
 - country reports that cover all negotiation chapters as defined in Stabilization and Association Agreements.

²⁷ Enlargement Strategy and Main Challenges 2006 – 2007, available on: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2006/nov/com_649_strategy_paper_en.pdf, last accessed on January 5, 2018.

- Achievements and progress of candidate countries not opened accession negotiations and potential candidates are monitored through the country reports.

Consequently, among three abovementioned countries the most affected with war crimes issue, only two (BiH and Serbia) are effectively monitored in the field of regional cooperation.

Country reports

Having in mind standardized methodology and structure of the country reports, we decided to compare the same, relevant parts of the country reports for BiH and Serbia in the period 2015-2018.²⁸

Table 1: Comparative preview of country reports in part dealing with regional cooperation in prosecution of war crimes and reconciliation

Year	Serbia	BiH
2015	„In the area of domestic processing of war crimes , cooperation between the special prosecutors of Serbia and Bosnia and Herzegovina continued on an upward course. The first joint investigative team worked successfully in December, leading to the indictment of five suspected perpetrators of war crimes. Cooperation and exchange of information with Croatia and EULEX continued but needs to be stepped up. It is important that these regional cooperation efforts continue to be strengthened.“... „Serbia, Bosnia and Herzegovina, Croatia and Montenegro have continued to closely cooperate under the Sarajevo Declaration Process , which aims to find sustainable solutions for some 74.000 persons who became refugees and displaced persons as a result of the armed conflicts in the former Yugoslavia during the 1990s. All countries need to further step up efforts to deliver on the implementation of the agreed housing solutions. In Serbia from the	“Bosnia and Herzegovina, Serbia, Croatia and Montenegro have continued to closely cooperate under the Sarajevo Declaration Process , which aims to find sustainable solutions for 74.000 28 people who became refugees and displaced persons as a result of the armed conflicts in the former Yugoslavia during the 1990s. All countries need to further step up efforts to deliver on the implementation of the agreed housing solutions. Bosnia and Herzegovina made some progress on implementing the regional housing programme with the delivery of 19 housing solutions out of the 1,868 approved so far. Efforts are needed to further ensure a quality beneficiary selection process conducive to a speedy implementation of the housing projects.” “It continued to actively support the RECOM (Coalition for Reconciliation Commission) and Igman initiatives on regional reconciliation.” “On regional

²⁸ It is important to mention that, due to changes in the EC methodological approach and reporting schedule, there were no 2017 reports.

	<p>4,153 housing solutions approved thus far worth EUR 71.5 million, the first 123 were delivered. The issue of refugees' pensions between Croatia and Serbia is still unresolved.“...“</p> <p>Regional cooperation and good neighbourly relations form an essential part of Serbia's process of moving towards the EU. Serbia has shown a constructive commitment to good neighbourly relations.“...“ It continued to actively support the Coalition for Reconciliation Commission (RECOM) and Igman initiatives on regional reconciliation.“²⁹</p>	<p>judicial cooperation, the fight against impunity in the area of war crimes resulted in its first arrests and issuing of indictments in line with the Protocol of the Prosecutor's Office of Bosnia and Herzegovina and the Office of the War Crimes Prosecutor of the Republic of Serbia on Cooperation in Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide. Similar Protocols signed with the Croatian and Montenegrin Prosecutor's Offices are yet to produce concrete results.”³⁰</p>
2016	<p>„Serbia's commitment to working towards regional cooperation and reconciliation should include preparedness to face its recent past and to do all it can to establish an atmosphere conducive to deal with all war crimes.” “In line with the bilateral agreements between the prosecutors' offices, the War Crime Prosecutor's Office has continued its cooperation with other countries in the region as showed by the steady increase of items of evidence and information exchanged. The most significant developments concern the number of cases referred to prosecution services in Bosnia and Herzegovina (16 cases) and Croatia (44 cases). The Office did not however participate in the Brijuni regional conference of war crime prosecutors held in September 2016. A liaison officer programme is</p>	<p>“Bosnia and Herzegovina, Serbia, Croatia and Montenegro continued to closely cooperate under the Sarajevo Declaration Process, which aims to find sustainable solutions for 74 000 people who became refugees and displaced persons as a result of the armed conflicts in the former Yugoslavia during the 1990s. All countries need to further step up efforts to deliver on the implementation of the agreed housing solutions. Some progress was made on implementing the regional housing programme in Bosnia and Herzegovina, with a number of housing solutions provided. Efforts are needed to further ensure a quality beneficiary selection process conducive to a speedy implementation of the housing projects.”</p>

²⁹ *Serbia 2015 Report* Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2015 Communication on EU Enlargement Policy, p.19.

³⁰ *Bosnia and Herzegovina 2015 Report* Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2015 Communication on EU Enlargement Policy, pp. 27-28.

	<p>operational with Bosnia and Herzegovina, but remains pending with Croatia. A more precise database needs to be established to improve the timely exchange of information. It is important that these regional cooperation efforts continue to be strengthened.”³¹</p>	<p>“In April, Bosnia and Herzegovina ratified the Protocol on cooperation with Serbia in the search for the missing persons.”</p> <p>“On regional judicial cooperation, the Protocol signed between the Prosecutor’s Office of Bosnia and Herzegovina and the Office of the War Crimes Prosecutor of Serbia on cooperation in prosecution of perpetrators of war crimes, crimes against humanity and genocide continued to provide results, with two additional indictments for war crimes filed and further confirmed during the reporting period in Bosnia and Herzegovina, one indictment confirmed and a guilty plea agreement reached in Serbia and one case transferred to Serbia from Bosnia and Herzegovina. The two protocols signed with the Croatian and Montenegrin Prosecutor’s Offices are yet to produce concrete results.”³²</p>
2018	<p>„Serbia continues to co-operate on war crimes cases at the regional level. Stronger efforts are required by all parties to ensure that regional co-operation effectively supports the fight against impunity.</p> <p>In 2017, some positive steps were taken to improve regional institutional cooperation in search for the missing persons, accounting for 10 332. A prosecution liaison officer programme is operational with</p>	<p>No data on regional cooperation in handling war crimes cases.</p>

³¹ *Serbia 2016 Report* Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2016 Communication on EU Enlargement Policy, p.57.

³² *Bosnia and Herzegovina 2016 Report* Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2015 Communication on EU Enlargement Policy, pp. 28-29.

	Bosnia and Herzegovina, but remains pending with Croatia. ³³	
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From selected parts of the country reports it is clear that the EC is focused on several main aspects of regional cooperation:

- Regional judicial cooperation in line with protocols on cooperation, within the scope of domestic prosecution of war crimes;
- Cooperation in searching for missing persons;
- Cooperation in housing of refugees and internally displaced persons;
- Cooperation in resolving various status and financial issues related to refugees and internally displaced persons;
- Participation in regional reconciliation and cooperation initiatives (eg. RECOM, Brijuni process).

Methodology and language used to assess current situation is more or less unison. However, it is interesting that some issues related to negative trends in cooperation of both countries with Croatia are addressed in these reports, without any explanation of reasons and/or obstacles that prevents from improvements, including explanation of who is responsible for such situation.

In parallel, developments or absence of them in establishing the Regional Commission (RECOM) are selectively in focus.

A special curiosity is fact that the last country report for BIH does not contain any assessment of facts relevant for regional cooperation in prosecution of war crimes and reconciliation.

Fulfilment of accession benchmarks

As it has been said earlier, since Serbia opened accession negotiations, its progress is monitored also through fulfilment of interim benchmarks. Moreover, adoption of the National Strategy for Prosecution of War Crimes (2016-2020) was one of opening benchmarks together with adoption of the Action Plan for Chapter 23³⁴. However, contrary to recommendations from the Screening Report for Chapter 23³⁵ addressed in the Action Plan for the same negotiation chapter, the interim benchmarks given in the Common Negotiation Position³⁶ are more concrete, tackling the regional cooperation in prosecution of war crimes in two ways- directly and indirectly.

³³ *Serbia 2018 Report* Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2018 Communication on EU Enlargement Policy, pp. 18-19.

³⁴ Action Plan for Chapter 23, available on: <http://mpravde.gov.rs/files/Action%20plan%20Ch%2023.pdf>, last accessed on October 30th 2016.

³⁵ Screening Report for Chapter 23, available on: http://seio.gov.rs/upload/documents/eu_dokumenta/Skrining/Screening%20Report%2023_SR.pdf, last accessed on July 26th 2016.

³⁶ Common Negotiation Position for Chapter 23, available at: <https://www.mpravde.gov.rs/tekst/13244/pregovaracka-pozicija-.php>, last accessed on April 4th 2109.

Table 2: List of Interim benchmarks in Chapter 23 relevant for regional cooperation in prosecution of war crimes and reconciliation

No	Interim Benchmarks	Type of relevance for the regional cooperation
16	Serbia implements effectively the measures in its National strategy in support of investigation, prosecution and adjudication of war crimes. Serbia monitors its implementation, assesses its impact and revises the strategy in parallel.	Direct
		National Strategy contains the whole chapter with numerous measures in the field of regional cooperation.
17	Serbia adopts and implements effectively a Prosecutorial strategy for the investigation and prosecution of war crimes; Serbia monitors its implementation and assesses its impact, as necessary and appropriate.	Indirect
		Efficient domestic war crimes proceedings depend on regional cooperation among Prosecutors' offices in the Region.
18	Serbia strengthens its investigative, prosecutorial and judicial bodies including ensuring a more proactive approach and the confidentiality of investigations, providing for training for new and current staff members, improving its witness protection and victim support system and ensuring victims' rights and access to justice without discrimination.	Indirect
		Efficient Witness protection system includes regional cooperation of WPU's. Exchange of experiences and good practices in the Region is of the key importance for competence.
19	Serbia effectively demonstrates adequate investigations of allegations and equal treatment of suspects avoiding giving the impression that anyone is above the law, regardless of their nationality or ethnicity or that of the victims; Serbia provides an initial track record of investigation, prosecution and adjudication of a higher number of cases including against high level suspects as well as of cases transferred from ICTY to Serbia. Serbia ensures proportionality of sentences and a sentencing policy in line with international criminal law standards.	Indirect
		Non selectiveness in prosecution is precondition of reconciliation.
20	Serbia cooperates constructively with neighbouring states in tracing and identifying/ascertaining the fate of missing persons or their remains, including through swift exchange of	Direct
		The IBM covers the most of key elements of efficient regional cooperation.

	information. Serbia engages in meaningful regional cooperation and good neighbourly relations in handling of war crimes by avoiding conflicts of jurisdictions and ensuring that war crimes are prosecuted without any discrimination. All outstanding issues in this regard must be fully resolved.	
21	Serbia fully co-operates with the International Criminal Tribunal for the former Yugoslavia (including by fully accepting and implementing its rulings and decisions), and with the Mechanism for International Criminal Tribunals.	Indirect Denial of war crimes is obstacle to reconciliation.

When it comes to EC monitoring mechanisms established in order to measure level of fulfilment of the benchmarks, it is important to mention that there are two parallel tracks:

- Reporting on implementation of the Action plan for Chapter 23 and the National Strategy for the Prosecution of War Crimes;
- Submitting track record tables.

Both mechanisms ensure detailed data – quantitative, but also qualitative.

POPULISM VS. REAL COMMITMENT TO REGIONAL COOPERATION

Aware of EU expectations, the governments in the Region trying to keep up with recommendations and benchmarks. However, it is not unusual to see (sometimes obvious) discrepancy between commitments clearly stated in the policy documents dealing with prosecution of war crimes³⁷ or at the meetings with the EU officials, on one side, and populist speeches, especially during election campaigns, on other side. Also, political dissonance among members of political coalitions (majority and/or from opposition) in (non)supporting prosecution of war crimes, became standard part of the Regional political scene. These dissonances are sometimes visible even among ministries in the same government and go from clear judgment of all acts that are subject of war crime proceedings, to the complete denial of crimes and direct support to convicted perpetrators. Consequently, the second option has significantly negative impact on the regional cooperation and reconciliation processes, especially when it comes from ruling majority.

While different approaches to prosecution of war crimes and treatment of convicted perpetrators of local politicians could be found in all states in the Region, it is important to notice that reaction of the EU bodies and EU officials on these public statements opposite to official state commitments are not unison, too. That is clear from relevant country reports, too: *“When it comes to assessment of Serbian commitment to Regional cooperation and prosecution of war crimes, the EC clearly*

³⁷ Even more, the National Strategy for the Prosecution of War Crimes (Serbia), includes, obligation of the highest officials (prime minister and minister of justice) to publicly support adoption and implementation of the Strategy.

stated that "such comments are not helpful for the broader respect of the rule of law, for Serbia's international obligations or for creating an environment in which war crimes cases can be processed calmly and effectively" ... "Overall, Serbia needs to demonstrate firmer commitment at all levels in this area, fostering mutual trust and reconciliation, to establish an atmosphere conducive to meaningful regional cooperation and to effectively address all war-crimes related issues. Statements made by, in particular, high-level officials and the actions of state bodies have a significant impact on the creation of such an atmosphere."³⁸

Or, in case of BiH, "Bilateral relations with Serbia remained relatively stable, despite internal tensions triggered by the initiative, in early 2017, by a member of the Presidency and SDA leader to appeal the 2007 International Court of Justice genocide case against Serbia."

As earlier explained, since Croatia is already Member State, the same populist language in this country could be frequently heard, but it is not followed by appropriate reaction of the EU officials and not recorded in reports as it case with (potential) candidate countries.

However, the detailed assessments of this kind of speech in relation with deviation from official dedication could be found in some other reports in the field submitted by bodies out of EU institutional scope.³⁹ Comparison of these reports with the EC reports (and lack of them from the Member States) provides for a clear picture about the seriousness of existing gaps in EU monitoring mechanisms in the field of Rule of Law, including aspects of regional cooperation and reconciliation.

ESTABLISHMENT OF *RECOM* AND PERSPECTIVES OF REGIONAL COOPERATION

As mentioned earlier, the acronym RECOM stands for the Regional Commission which establishment is initiated in order to tasked it with establishing the facts about all victims of war crimes and other serious human rights violations committed on the territory of the Former Yugoslavia from 1 January 1991 to 31 December 2001. The main idea of RECOM was to establish an official, intergovernmental commission to be jointly established by the successors of the former SFRY. In its legal nature, the RECOM is predicted to be an extra-judicial body, allowed:

- to establish the facts about all the war crimes and other serious war-related human rights violations;

³⁸ *Serbia 2018 Report* Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2018 Communication on EU Enlargement Policy, pp. 18-19. Similarly, in 2015 Serbia Country Report, the EC emphasized that „*The provisional release of ICTY detainee Vojislav Šešelj and his subsequent public statements prompted sharp reactions in Zagreb. Serbia declared 5th August, commemorating the "operation Storm" in Croatia, a day of mourning and protested for hate speech and display of fascist symbols during Croatian commemorations. The decision of Vukovar's local authorities to remove bilingual signboards prompted acute reactions in Belgrade. Tensions following temporary restrictions of border crossings in September have been overcome*“, p. 21.

³⁹ Visible discrepancies between official commitments and individual populist statements are more visible in reports of the US Department of State. See: Serbia 2016 Human Rights Report pp. 2-3 available at: <https://rs.usembassy.gov/wp-content/uploads/sites/235/2017/07/Serbia-2016-human-rights-report.pdf>, last accessed on March 16th 2019; Serbia 2017 Human Rights Report, page 21, <https://www.state.gov/documents/organization/277459.pdf>, last accessed on March 17th 2019.

- to list all war-related victims, and to determine the circumstances of their death;
- to collect data on places of detention, on persons who were unlawfully detained, subjected to torture and inhuman treatment, and to draw up their comprehensive inventory;
- to collect data on the fate of the missing, as well as to organize public hearings of victims' testimonies and the testimonies of other persons concerning war-related atrocities.⁴⁰

From above listed tasks of the RECOM, it is obvious that the scope of RECOM process is more directed not only to regional cooperation, but also to reconciliation mechanisms in general.

The RECOM Process began in May 2006 with a comprehensive debate⁴¹ in the Region and resulted in draft RECOM Statute, adopted on 26 March 2011 by the Assembly of the Coalition for RECOM. Adoption of the Statute served as a starting point for the next stage of the Process—the institutionalization of the RECOM Initiative through the transfer of the RECOM Initiative from the level of civil society to the political level – the domain of institutions.⁴² This resulted in the decision of the Presidents and the Presidency of BiH to appoint Personal Envoys for RECOM. The Personal Envoys were assigned to analyse the RECOM Statute proposed by the Coalition for RECOM, and to examine the constitutional and legal possibilities for the establishment of RECOM in each individual country. In October 2014, the Personal Envoys for RECOM submitted the Amendments to the RECOM Statute- consolidated document which should present the legal framework for the establishment of RECOM. After elections in BIH and Croatia in 2014 RECOM lost support in these countries⁴³, so continuation of consultative process in April 2019, started without participation of these countries.

Having in mind limited progress made so far, but also absence of support from BIH and Croatia, there are still a few opened issues:

- Does the RECOM have a capacity to streamline regional cooperation processes and contribute to monitor them in more systematic manner?
- If answer on the first question is positive, it is obvious that in absence of two countries, institutionalization of RECOM is impossible and its abovementioned capacity is wasted.
- In parallel, there is a still issue of the EC role in RECOM process. A decision to support the process and participate in the meetings of Personal Envoys shows undoubted recognition of the capacity that RECOM Process

⁴⁰ See more: <http://recom.link/about-recom/what-is-recom/>, last accessed on March 27th 2019.

⁴¹ In the period between May 2006 and 26 March 2011, the Coalition for RECOM organized a comprehensive social debate (**consultative process on the RECOM mandate**). The process saw the participation of 6,700 representatives of civil society, including human rights organizations, victims, families of victims and the missing, refugees, veterans/defenders, former detainees, lawyers, artists, writers, journalists, and other distinguished individuals. A total of 128 local and regional summits and eight international forums on transitional justice were held. According to: <http://recom.link/about-recom/what-is-recom-process/>, last accessed on April 8th 2019.

⁴² To obtain public support for the establishment of RECOM, the Coalition organized a petition for the establishment of RECOM in May and June 2011 which was signed by **555,000 citizens** from all post-Yugoslav countries. A Public Advocacy Team was formed and the RECOM for the Future action launched. According to: <http://recom.link/about-recom/what-is-recom-process/>, last accessed on April 8th 2019.

⁴³ Except Bosniak member of the Presidency.

has in the field of regional cooperation. However, it remains unclear how decision of individual country from the Region to take part in process or to decline that is going to be evaluate in the context of EU accession processes. While it can appear in country reports and/or among accession benchmarks for candidate countries, it is still not clear how it can influence position of Croatia as a Member State, in the absence of an efficient monitoring mechanism aim at preservation of the Rule of Law.

Considering all of this, it is pretty clear that the only acceptable approach of the EC to this issue is uniform approach, regardless of the EU accession status of every single country in the region. The nature of reconciliation process requires efficient and continuous bilateral, but also multilateral actions of the all states in the region. This goes for cooperation in prosecution of war crimes, but also in other segments of reconciliation. The role of the EC in this regard should not be limited only on support and declarative statements. It should include concrete and uniform reaction in all cases where obvious discrepancy among country engagements exists. In contrary, regional cooperation should not be considered as a part of the EU accession/membership benchmarks.

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