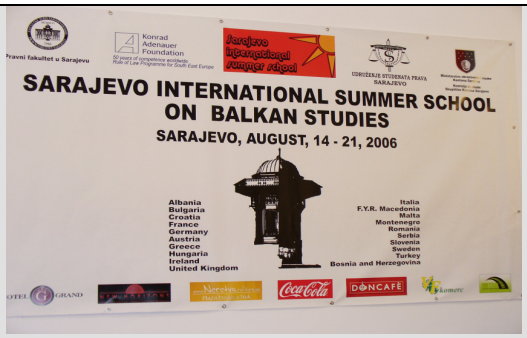

Summer School Lecture
on

"RECONCILIATION WITH THE PAST BY LEGAL MEANS IN SOUTH EAST EUROPE"

Sarajevo, 17th August, 2006

by
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"It is a basic principle that we must base reconciliation on the effort to realize justice for the entire society, especially for the victims. … Given the spiritual injury experienced by society, the healing process must be gradual. This reconciliation is inevitably tied to the nature of the legal process. Only if there is justice can true reconciliation, or social healing, occur."
Aniceto Guterres Lopes, Director, Yayasan HAK

A. OUTLINE

I. Introduction

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- Distribution and filling out of questionnaires

II. The functions and aims of legal reconciliation

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VI. Case Studies

- Case Study No. 1: "Reconciliation through Lustration – The Romanian Case of Delayed Lustration: Better late than never?"
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B. LECTURE

I. Introduction to the Lecture

1. Structure and content of the lecture

Welcome to the Summer School lecture on "Reconciliation with the past by legal means in South East Europe"!

I have handed you out an outline of the lecture. From this you can see the topics which I would like to cover within the following fourty-five minutes, i.e. I would like to

- briefly introduce you to the topic,
- introduce you to the basic functions and aims of legal reconciliation,
- provide you with an overview of the different types, mechanisms, and means of legal reconciliation,
- talk about the limits of and obstacles to legal reconciliation,
- and finally address some aspects of legal reconciliation as a condition for the countries of the former Yugoslavia to join the European Union (*EU*).

I have divided this lecture into two parts: I will be speaking for most of the first part, and I have prepared some case studies for the second part. These case studies will give you a chance to apply and further consider the issues about which I will be speaking.

It goes without saying that a single lecture can only introduce you to such a complex issue. My hope is that through this lecture, I will be able to inspire some of you to further reflect upon the issues raised, to do further research on those issues, or to get involved in practical work related to legal reconciliation.

Before I will start my lecture, I would like you to take ten minutes to think about the questions listed on the questionnaire which you have already received.[1] This should help you to follow my lecture, and to gauge your understanding of the topic at this point.

[1] *See* Attachment I at the end of the document.

2. Introduction to the topic

Why did I choose the topic "Reconciliation with the past by legal means in South East Europe" for my Summer School lecture?

The countries of South East Europe are in a unique transition from communist totalitarian or authoritarian regimes to pluralist democracies based on the rule of law and respect for human rights and diversity.

As far as the countries of the former Yugoslavia are concerned, the transition process is even more unique and challenging. It involves not only dismantling former communist/socialist systems, but also overcoming the legacy of the most recent hostilities. Those hostilities play a much more dominant role in the transition process of the countries of the former Yugoslavia than do the countries' communist/socialist pasts. When talking about reconciliation with the past by legal means in South East Europe we do, therefore, have to differentiate between two distinct phases in the region's past, or rather between two distinct heritages which the countries of the region have to dismantle: These are the socialist past or heritage of the former communist authoritarian/totalitarian systems in South East Europe, on the one hand, and the war in the former Yugoslavia in the 1990s, on the other hand.

I will try to explain throughout my lecture why – from my point of view – the transition to pluralist democracies, based on the rule of law and respect for human rights and diversity, can only be successfully completed if the countries in question have overcome the legacies of their communist past and the recent wars, respectively.

The question which needs to be answered first in this regard is why *legal* reconciliation with the past, as compared to moral and political reconciliation, is essential for the transition process to be completed successfully.

I would like to answer this question first in a rather general way, and second, by explaining the functions and aims of legal reconciliation.

II. The Functions and Aims of Legal Reconciliation – Rule of Law Reasons for Legal Reconciliation with the Past

1. Meaning of legal reconciliation

Why ist legal reconciliation important in the countries of the region in order for the transition to democratic societies based on the rule of law to be completed successfully?

Under the communist/socialist regimes of the region, and during the war in the former Yugoslavia, all kinds of human rights abuses and injustices happened. These various forms of oppression and injustice resulted in extraordinary physical and spiritual suffering. There was usually no effective legal protection in this context that could have brought about the form of legal justice that is a fundamental right of each human being. The ongoing transition process from authoritarian to democratic rule in each of the region's countries can, however, only be succesful if it results in a society that is freed from a past full of oppression, human rights violations, and injustice. It must be a society that inspires the entire population to respect the law, human rights, democracy, and social justice.[2]

Though being only one element in the general transformation process and in the specific realization of justice for all, *legal* reconciliation with the past is an important element thereof. Historical examples such as post-war Germany have shown that legal reconditioning (*juristische Vergangenheitsaufarbeitung*) has become a fundamental pillar in the stable democratic development of post-authoritarian countries. As *Joachim Gauck*, the former East German secret police files administrator (*Bundesbeauftragter für Stasi-Unterlagen*) has stated recently in the context of lustration in Bulgaria, there are moral and political reasons for the need to reconcile with the past, and there are reasons based on the rule of law (i.e., there are not only legal means for reconciling with the past, but legal justifications therefore).[3] This argument has been shared by others working on reconciliation in other regions of the world. *Aniceto Guterres Lopes*, an East Timorese has stated:

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[2] *Cf. Aniceto Guterres Lopes*, in: The La'o Hamutuk Bulletin, Vol. 1, No. 1: 21 June 2000.

[3] "Neben diesen moralischen und politischen Gründen gibt es .. noch Gründe der Rechtsstaatlichkeit. Denn in der Diktatur werden den Bürgern individuelle Rechte geraubt, sie werden ihnen völlig oder partiell vorenthalten oder es wird ihre Würde nicht akzeptiert. Deshalb soll ein demokratischer Staat diesen Schaden wiedergutmachen. Er soll Menschen helfen sich zu rehabilitieren oder auch Wiedergutmachung zu erlangen." *Joachim Gauck*, in: Fokus Ost-Südost, Deutsche Welle, 7. Juli 2006.

> "Efforts at reconciliation must be located in the context of problems of the past. Only by coming to terms with these problems will we be able to create a base to develop a new society consistent with people's hopes. In this matter, reconciliation is more than a political effort shaped by apologies, handshakes, and embraces. Shaping an administration similar to the previous one will only serve to institutionalize impunity. Reconciliation such as this actually disavows the values of human rights and justice that must be an important element in the building of a new society."[4]

2. Functions of Legal Reconciliation

Now, what are the individual functions of legal reconciliation?

Legal reconciliation is one way to advance the overall process of national reconciliation, to prevent future human rights abuses or the return to violence, and to confront past crimes. It is part of official truth seeking and truth telling. As such, it plays an important role in conflict resolution and prevention. Legal reconciliation is one way to render justice for the entire society, which includes retributive justice.

Legal reconciliation can support a healing process in society, in particular the healing of victims of political violence: "It is a basic principle that we must base reconciliation on the effort to realize justice for the entire society, especially for the victims. … Given the spiritual injury experienced by society, the healing process must be gradual. This reconciliation is inevitably tied to the nature of the legal process. Only if there is justice can true reconciliation, or social healing, occur."[5]

Last but not least, legal reconciliation supports the transformation process in the countries of the region, which again is a condition for the countries to join the EU.

III. The types, mechanisms and means of legal reconciliation

What are the types, mechanisms and means of legal reconciliation with the past?

There are various types and mechanisms or, rather, means through which legal reconciliation can be achieved. These are:

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[4] *Aniceto Guterres Lopes*, in: The La'o Hamutuk Bulletin, Vol. 1, No. 1: 21 June 2000.
[5] *Aniceto Guterres Lopes*, ibid.

- the prosecution of perpetrators, in particular war criminals, in national and international courts, i.e. reconciliation through criminal law proceedings/court trials;
- material (i.e. financial) or nonmaterial compensation and reparation for victims of human rights violations, in particular legal rehabilitation of political repression victims and necessary measures by the respective governments as well as by other parties to compensate those persons for the damage inflicted on them during the communist/socialist regime and to grant them the necessary social benefits;
- administrative measures, in particular lustration or purges (i.e. the exclusion from political parties) of those affiliated with a previous authoritarian or totalitarian regime, respectively – in particular through lustration laws;
- official truth seeking, usually in the form of temporary investigative bodies that have acquired the generic name of „truth commission"

1. Legal reconciliation through criminal law proceedings/court trials

For purposes of introduction, I would like to mention a few examples of legal reconciliation by means of prosecuting perpetrators, in particular war criminals, i.e. of legal reconciliation through criminal law proceedings in the region:

- On July 10th, 2006, former Serb President Milan Milutinović went on trial before the International Criminal Tribunal for the Former Yugoslavia (*ICTY*) in The Hague with five other high-ranking politicians and members of the military on charges of war crimes, crimes against humanity, and genocide with regard to the murder and persecution of ethnic Albanians in Kosovo between January and July 1999. This is just one of numerous crininal law proceedings before the ICTY, probably the most prominent of which was the trial against Slobodan Milosević which was left unfinished by Milosević´s early death. On July 25th, 1995, Ratko Mladić and Radovan Karadzić were indicted. The trial against them is still pending, as neither of them has been arrested or surrendered to the Tribunal – a problem to which I will return later.

- War crimes tribunals are also conducted on the national level in the countries of former Yugoslavia. In Bosnia and Herzegovina (*BiH*), for example, war crimes are dealt with by the War Crimes Chamber of the Court of BiH. This is necessary, as the ICTY is to finish its work by 2010 at the latest, and the countries of the region will have to take over and finish the Tribunal´s work.

We will have a lecture on the work of the War Crimes Chamber of the Court of BiH on Friday.

- This year, relatives of victims massacred in Srebrenica on July 11th, 1995 by Serbian forces will file a lawsuit against The Netherlands on the grounds that Dutch soldiers did not sufficiently protect their murdered relatives.

The list goes on and on.

Once again, the decisive question is how criminal proceedings/trials can possibly contribute to reconciliation with, or rather with successfully overcoming, the past?

The primary purpose of prosecution is to establish criminal offenses and crimes, to locate the perpetrators, and to convict them. Through criminal proceedings, the identity of victims will be determined. Due to the conviction, they might be adjudged compensation. What is most important, though, is that they will be officially recognized as victims, i.e. their suffering will be officially reconized, which is an important element in the reconciliation process.

Through criminal proceedings, various values can be promoted, such as retributive justice, truth telling - trials are crucial for legally establishing what has happened -, and political reconciliation.

Retributive justice can provide justice for victims of war crimes, e.g. through reparation payments (*cf.* the Srebrenica law suit). The provision of justice is one of the most important functions/ends of legal reconciliation through prosecution. This can be illustrated by public reaction to the death of Slobodan Milosević. I would like to quote from a news article which appeared in Swissinfo on July 10th, 2006:

> "Ethnic Albanians were angry that Milosevic's death robbed them of a verdict on the crimes he was accused of in Kosovo. They hope the trial of Milutinovic and his co-accused will help provide justice for victims of war crimes in the province."

Truth telling is an equally important end which criminal investigations and trials serve. The ICTY and national war crimes tribunals, for example, can help clear up the historical record through its investigations. The Chief Prosecutor of the International War Crimes Tribunal for the Former Yugoslavia, *Carla del Ponte*, who has in the past been repeatedly accused of writing political and overlong indictments, has only recently emphasized that "the function of the war

crimes trials is to bring forward the truth about what has happened in the past; to bring forward the truth about the facts".[6] This – according to *Del Ponte*, is extremely important as past leaders, foremost Milosević, have been spreading misinformation for more than ten years.

In the following segment, I would like to share an academic and a political assessment of the importance of legal reconciliation through criminal investigations and proceedings with you. In a scholarly article on transitional justice in the former Yugoslavia, legal reconciliation through criminal investigations and proceedings is evaluated as follows:

> "Of the numerous means that (...) new regimes could use in overcoming a bad past, a court investigation does not give neither the fastest nor the most reliable results. Although political clashes may occur in the context of legal proceedings, there is a general consensus that legal reconciliation of justice still represents one of the most consistent methods in institutional overcoming of the past and in establishing the rule of law."[7]

A report to the Council of Europe by a Romanian author entitled "Measures to dismantle the heritage of former communist totalitarian systems" comes to a similar conclusion:

> "Criminal acts committed by individuals during the communist totalitarian regime should be prosecuted and punished under the regular criminal code. Some people advocate 'wiping the slate clean', by issuing a general pardon for all the crimes committed under the former regime. I do not agree with this approach: It seems to me to be very unfair to the victims of those crimes. Besides, a general pardon could even de-stabilise the new society, if victims of their families should decide to take justice in their own hands. Thus it seems clear that crimes should be prosecuted and punished."[8]

As a final note on criminal proceedings as a means of legal reconciliation, I would like to emphasize that one should always keep in mind that prosecution is only one means of promoting reconciliation. There is a wide range of tools for accomplishing this, and one should always consider carefully which of those tools serves the purpose in an individual situation best.[9]

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[6] *Cf.* original quote from Frankfurter Allgemeine Zeitung, July 28, 2006, Nr. 173, p. 4: „Ich glaube, daß wir eine ganz wichtige Aufgabe haben, nämlich in diesen Prozessen die Wahrheit ans Licht zu bringen. Zehn Jahre lang hat Milosevic Desinformationenen verbreitet. Durch diese Prozesse kommt nun die Wahrheit heraus, die Wahrheit der Fakten."

[7] Transitional Justice in Former Yugoslavia, Ethics of Responsibility: The Role of Justice in Transition, http://www.czkd.org.yu/english/tranyicijasaope.htm.

[8] *Severin*, Measures to dismantle the heritage of former communist totalitarian systems, Doc. 7568, 3 June 1996 p. 10, para. 23.

[9] *Cf.* quote from Opinio Jurist, Srebrenica: Justice, Peace and Reconciliation, July 14, 2005: "Retributive justice, truth telling, and political reconciliation are additional values that can be promoted through prosecution. But

2. Legal rehabilitation and material compensation for victims of human rights violations

Another important method of legal reconciliation is the material, i.e. financial, and the non-material compensation for victims of oppressive regimes, in particular of human rights violations committed during both the period of the communist regimes and the civil wars in the region.

One of the most important means of compensation is **legal rehabiliation** of the victims of political repression which may include necessary measures by governments and other relevant parties to compensate these persons for the damage inflicted on them. Legal rehabiliation is complementary to the prosecution of individual crimes which I have just mentioned. The prosecution of individual crimes has to go hand-in-hand with the rehabilitation of people who were convicted of "crimes" which in a democratic society based on the rule of law and respect for human rights do not constitute criminal acts, and for those people who were unjustly sentenced.

The questions which need to be answered with regard to legal rehabilitation, and with which some of the countries in the region are confronted, are:

- How should rehabilitation be handled?
- Should each person who has been unjustly sentenced have to apply to have his judgment individually overturned in a special proceeding?
- Or should specific types of political-judicial ruling be generally overturned?

Currently, legal rehabilitation constitutes a particular challenge for Serbia: In contrast to other post-communist systems, legal rehabilitation in Serbia represented the most neglected method for legally overcoming the past. A Rehabilitation Act was passed by the Parliament in April 2006, but it hardly covers legal rehabilitation. Political analysts argue that this is due to a lack of political will to legally overcome the authoritarian past.

As far as **material compensation** is concerned, I would simply like to mention that from my point of view, material (i.e. financial compensation) should, generally speaking, be extended to the victims of totalitarian justice. This compensation should not be (much) lower than the compensation accorded to those who had been unjustly sentenced for ordinary crimes. The challenge with

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sometimes the latter two values are better promoted through non-prosecutorial mechanisms (truth commissions, peace agreements, institutional power-sharing, post-conflict education). Retribution is often all that is left."

this option is where the money for compensation shall come from, given that all countries in the region are currently facing major economic problems.

3. Lustration or purges (i.e. exclusion from political parties) of those affiliated with a previous authoritarian/totalitarian regime

I had mentioned earlier that lustration was one of the means to overcome the authoritarian past in the countries of the region. Let me first explain what lustration means and what its aim is.

Lustration is, literally, "a sacrifice, or ceremony, by which cities, fields, armies, or people, defiled by crimes, pestilence, or other cause of uncleanness, were purified" […]. During the period after the fall of the various European Communist states in 1989–1991, the term came to refer to the policy of limiting participation of former communists (and, especially, informants of the communist secret police) in the successor governments or even in civil service positions.[10]

The declared **aim of lustration** is to exclude persons from exercising governmental power if they cannot be trusted to exercise this power in accordance with democratic principles. Put differently: "[L]ustration is meant to create a breathing space for democracy, where it can lay down roots without the danger that the people in high positions of power will try to undermine it."[11]

If one describes the aim of lustration as such, it follows logically that the lustration methods applied have to be in accordance with the same principles with which the persons in power are expected to exercise their power. Among those principles are the fundamental tenets of the rule of law. The Council of Europe, in its abovementioned report on measures to dismantle the heritage of former communist systems, has summarised this as follows:

> "To be compatible with a state based on the rule of law, lustration laws must fulfill certain requirements. Above all, the focus of lustration should be on threats to fundamental human rights and democratisation process; revenge may never be a goal of such laws, nor should political or social misuse of the resulting lustration process be allowed. The aim of lustration is not to punish

[10] *Cf. Wikipedia, http://en.wikipedia.org/wiki/Lustration*.

[11] *Cf. Severin*, Measures to dismantle..., p. 12, Para. 29: "The aim of lustration is to exclude persons from exercising governmental power if they cannot be trusted to exercise it consistently with democratic principles, as they have shown no commitment to or belief in them in the past and have no interest or motivation to make the transition to them now. Thus lustration is meant to create a breathing space for democracy, where it can lay down roots without the danger that the people in high positions of power will try to undermine it."

> people presumed guilty – this is the task of prosecutors using criminal law – but to protect the newly-emerged democracy."[12]

I will return to the limits of lustration and other means of legal reconciliation later.

Over the past decade, a number of countries in South Eastern Europe have adopted laws and regulations under the general heading of measures to dismantle communism. I would like to mention a few examples:

- **Albania** has adopted so-called "decommunisation laws" (this occurred in 1995, rather early compared to other countries of the region).[13]

- In **Bulgaria** the Parliament adopted a lustration law on 9 December 1992 called "Additional Requirements Toward Scientific Organisations and the Higher Certifying Comission". This so-called "Panev law" on the temporary introduction of some additional requirements for the members of the executive bodies of scientific institutions and for the Higher Certifying Commisison ceased to be valid in 1995. The main problem with this law was that it did not provide for examination of individual cases by an independent body, nor did it allow for a judicial review. It appears likely that some fundamental rights were thus violated by the law, notably the right to due process and the right to be heard.[14]

- **Romania** is one of the few Eastern European countries that, 16 years after the collapse of the former communist regime, has not yet passed a Lustration Law. Up to now, there were several attempts to pass a Lustration Law, i.e. in 1996, 1999 and 2005, but none of them was successful: The draft laws have always been stopped in the Parliament. Currently, a new draft law is under debate in the Chamber of Deputies after having been passed by the Senate. The draft law proposes that persons who held certain public offices during the communist regime (e.g.: leading positions in the Romanian Communist Party, leading positions in the communist students' unions, editors of the media-agencies, rectors and deans from the political educational system, prosecutors, presidents of the Supreme Court) should be banned, for a period of 10 years, from holding certain public offices (president of the state, member of the government, senator or deputy, prefect, mayor, judges and prosecutors, member of the diplomatic corps).

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[12] *Cf. Severin*, Measures to dismantle..., p. 12, Para. 16.
[13] As to the content of this law, see *Severin*, ibid., p. 17, para. 50
[14] *Cf.* ibid.

Some of the countries in the region still face major challenges when it comes to lustration. Among those countries is **Bosnia and Herzegovina**: The Parliament of BiH has not yet passed a lustration law which would prevent former party members or political functionaries from holding public office; the public is not exerting pressure on the Parliament to pass such a law; news about current political leaders' past membership in the communist security service do not draw much public attention; the public is – somehow understandably – much more concerned about the recent war and its consequences.

The situation in **Serbia** is not much different. One expert on lustration in Serbia summarized the current challenges in Serbia as follows:

> "Serbia is still not ready for lustration. Moreover, regarding the absence of the will of the political elite and the indifference of the people in Serbia, there are no good prospects even for a regular disqualification. Obvious continuity of Milosevic's regime is still acting, and it cannot contribute in forming a decision to open a question of overcoming the evil of authoritative past from aspect of disqualification procedures (even less lustration)." (*Ph.D. Jovica Trkulja*)

I will ask some of you to deal with the issue of lustration in more detail later in one of the case studies which I have prepared.

4. Official truth seeking in the form of temporary investigative bodies

Finally, the establishment of an investigative committee on the history of communist dictatorships, authoritarian regimes, or wars can be beneficial in overcoming the past. Strictly speaking, this is not a legal means of overcoming the past. I would, nevertheless, like to draw your attention to a Commission which – in December 2003 – was established to examine the events which took place in Srebrenica in July 1995. The independent investigation has shown that thousands of Bosnians were killed during the Srebrenica events.

As a final note on the mechanisms and means to legally overcome the past, I would like to mention that these means are not mutually exclusive. Rather, there can be a positive interplay between the different structures or processes in place. A number of states have, for example, attempted to prosecute perpetrators while also creating a truth commission.

IV. The limits of and obstacles to legal reconciliation

In the questionnaire which I have distributed to you at the beginning, I have asked you to, *inter alia*, think about the possible limits of and obstacles to legal reconciliation.

In your opinion: What are the limits to legal reconciliation with the past? Which are the obstacles to succesfully overcoming the past by legal means?

1. Limits to legal reconciliation

The requirements of a state based on the rule of law itself

I have explained earlier that one of the functions, or aims, of legal reconciliation is to create justice because justice is a condition for the transition process to be successful. If one keeps in mind that the goal of transition is the creation of a democratic, constitutional state based on the rule of law, however, it becomes clear that there is a "limit" to the creation of justice, i.e. the measures taken to create justice (in our case, measures of legal reconciliation) must themselves comply with the requirements of a state based on the rule of law.

The Parliamentary Assembly of the Council of Europe in a 1996 resolution on measures to dismantle the heritage of former communist totalitarian systems has poignantly explained why this is so:

> "[A] democratic state based on the rule of law must, in dismantling the heritage of former communist totalitarian systems, apply the procedural means of such a state. It cannot apply any other means, since it would then be no better than the totalitarian regime which is to be dismantled. A democratic state based on the rule of law has sufficient means at its disposal to ensure that the cause of justice is served and the guilty are punished – it cannot, and should not, however, cater to the desire for revenge instead of justice. It must instead respect human rights and fundamental freedoms, such as the right to due process and the right to be heard, and it must apply them even to those people who, when they were in power, did not apply them themselves."[15]

What does that mean for the reconciliation measures which I have described earlier?

I would like to illustrate this using the example of lustration laws, and I would – once again – like to make reference to the Council of Europe report mentioned earlier in which the rule of law limits of lustration measures are described in

[15] Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems.

detail. According to this report, lustration is only compatible with a democratic state under the rule of law if several criteria are met. The two most important criteria are:

- "First, guilt, being individual, and not collective, must be individually proven – this highlights the need for the individual, and not collective, application of lustration laws.
- Second, the right of defense, the presumption of innocence until proven guilty, and the possibility of a proper judicial review of the decision taken must be guaranteed."[16]

The aim of lustration is not to punish people who are presumed guilty, but to protect the newly-emerged democracy. From this aim, further limitations can be logically derived as listed in the Council of Europe report:

- "Revenge may never be a goal of lustration laws, nor should political or social misuse of the resulting lustration process be allowed." (*para. 16*)
- "Lustration may only be used to eliminate or significantly reduce the threat posed by the lustration subject to the creation of a viable free democracy by the subject´s use of a particular position to engage in human rights violations or to block the democratisation process." (*para. 16 b*)
- "Lustration may not be used for punishment, retribution or revenge; punishment may be imposed only for past criminal activity on the basis of the regular Criminal Code and in accordance with all the procedures and safeguards of a criminal prosecution."

I will distribute photocopies of the report to you at the end of the lecture in which you will find further limitations.

2. Current Obstacles to legal reconciliation

So far, I have only spoken about rule of law limitations to legal reconciliation. The second question to be asked is:

Which <u>obstacles</u> to legal reconciliation exist?

When we talk about legal reconciliation with the socialist/communist past today, we have to bear in mind that the process of dismantling the socialist/communist

[16] *Severin*, Measures to dismantle..., p. 12, para. 30.

past has already lasted for more than fifteen years. From this stem the following obstacles to lasting or current attempts to legally overcome the past, i.e.:

- ***Nostalgia for the past as a result of the inability of post-communist governments to manage the people´s expectations***

With time, the negative images of the authoritarian/totalitarian past have faded away, and let a certain nostalgic attitude emerge in many of the countries of the region:

> "People wish for – and sometimes, elect back into office – such 'values' as equality (unconditional equality isntead of equality of chances), collectivism, paternalist protectionism, stability without progress (stagnation), a preordained certain future and other trappings of the conformism specific to the communist totalitarian model. The reason for this nostalgia for the past, for this apparent failure of transition, can be found – amongst other reasons – in the inability of post-communist governments to manage the people´s expectations. [...] As a result, in some former communist totalitarian societies, the initial consensus for change is collapsing, and the old system is becoming an alternative again, against which the ideals of democracy must compete. This cannot be right; especially when one considers the crimes that were committed under the former regimes, some of them as horrific as those committed by the nazis during the second world war, it must be clear that communist totalitarian system cannot be an alternative."[17]

- ***Lack of political will to legally overcome the past by the political elite***

The political elite often lack the political will to seriously overcome the past by legal means. This is not surprising: The current political elite are often identical with the former political elite; at the very least they are often closely linked. The former political elite often fear revenge or rejection from the new society:

> "It could be dangerous to marginalise this elite, who might then challenge the democratic foundations of the new state. Those members of the former elite who are willing and able to integrate into and support the new democratic society should be given a fair chance to do so."[18]

Reconciliation with the past is a big challenge for all countries in the region. One has to keep in mind that reconciliation does not only have a rhetorical content, but that the real meaning of this term must be realized.

[17] *Severin*, ibid., p. 8, para. 8.
[18] *Severin*, ibid., p. 8, para. 9.

V. Legal reconciliation as a condition for joining the EU

Last but not least, I would like to address a special issue regarding legal reconciliation with the past, i.e. the question of whether the arrest and surrender of war criminals should be a condition for the continuation of association and accession talks between the EU and the countries of the region. As one of my case studies deals with this question, I will keep it short and provide you with some background information only, leaving the rest up for discussion at the end of this session.

As you probably know, in order to join the European Union, a state needs to fulfill the economic and political conditions generally known as the Copenhagen criteria (after the Copenhagen summit in June 1993). That basically requires a secular, democratic government, *rule of law,* and corresponding freedoms and institutions.

The Copenhagen criteria do not explicitly list legal reconciliation with the past as one of the conditions for joining the EU. In the reports of European institutions such as the European Parliament, the topic of reconciliation with the past by legal means does not appear as such. That is surprising, given that there are good rule of law reasons for legal reconciliation, and that the rule of law is a condition for EU accession. The EU does, however, through its policy, treat at least part of legal reconciliation as a precondition for EU accession, i.e. the arrest and surrender of prominent war criminals. I would like to illustrate this using the example of the arrest and surrender of Ratko Mladić.

Ratko Mladić, the former Bosnian Serb military commander, was indicted in 1995 by the ICTY for genocide, crimes against humanity, and war crimes perpetrated during the siege of Sarajevo, during the war in Bosnia and Herzegovina 1992 – 1995, and during the massacre at Srebrenica. The EU insists on arresting and surrendering Mladić to the ICTY – so far in vain.

On May 3rd, 2006, the EU broke off talks on closer ties with Serbia over its failure to arrest and transfer Mladić to the ICTY, i.e. the EU called off the negotiations on the Stabilisation and Association Agreement. The negotiations will resume when Serbia proves complete cooperation with the ICTY.

In July of this year, Serb Prime Minister Koštunica presented an action plan regarding co-operation with the ICTY in Bruxelles. The primary goal of the action plan is the arrest and surrender of Mladić. In reaction to the action plan, European Enlargement Commissioner *Olli Rehn* refrained from declaring a new

date for the resumption of the association talks. He instead announced: "Much more important than the action plan itself is its implementation. Full co-operation with The Hague means the arrest and surrender of Ratko Mladić and alike suspected war criminals."

The EU reasoning behind breaking off its talks with Serbia is - simplified: Serbia failed to keep a pledge that Mladić – alledged to be hiding there, protected by renegade army and intelligence officers – would be handed over to the ICTY by the end of April, a deadline set by the EU. *Olli Rehn* argues that the issue is about the rule of law: Serbia must show that nobody is above the law. The armed forces and security services must be fully under democratic control.

The EU policy has been criticized. I will distribute one criticism by an American scholar who has worked for the ICTY in the past, and which appeared in the New York Times, later on.[19] Before I do so, however, I would like some of you to think about whether the arrest and surrender of prominent war criminals should be a condition for the continuation of accession talks or not, and whether – from your point of view – it supports the process of legal reconciliation of the past or not.

This brings me to the end of my lecture and to the introduction of the case studies.[20] I would like to thank you for your attention.

[19] *Timothy William Waters*, Why Insist on the Surrender of Ratko Mladic?, The New York Times, May 12, 2006.
[20] *See* Attachments II and III at the end of the document.

Attachment I

Lecture on

"Reconciliation with the past by legal means in South East Europe"

Sarajevo, 17th August, 2006

QUESTIONNAIRE

by

Stefanie Ricarda Roos, Director, Rule of Law Programme for South East Europe

I. The functions and aims of legal reconciliation

- Why is legal reconciliation with the past important in the countries of South East Europe?/Why is it so important that the communist totalitarian/authoritarian, and the war past is legally overcome?
- What are the functions and aims of overcoming the past by legal means?

II. The types, mechanisms and means of legal reconciliation

- What are the types and mechanisms of legal reconciliation?
- Which are the means through which legal reconciliation can be achieved?

III. The limits and obstacles to legal reconciliation

- In your opinion: What are the limits to legal reconciliation with the past?
- Which are the obstacles to successfully overcoming the past by legal means?

Attachment II

Case Study No. 1:

RECONCILIATION THROUGH LUSTRATION –
THE ROMANIAN CASE OF DELAYED LUSTRATION:
Better late than never?

A. Case Study

Remember that lustration laws are among the numerous means of protecting the newly emerging democratic societies in South Eastern Europe from the negative influences of former authoritarian/totalitarian communist regimes. The aim of lustration laws is to eliminate or significantly reduce the threat posed by the lustration subject (i.e. a person who had in the past been affiliated with a communist regime) to the creation of a viable, free democracy by the subject's use of a particular position to block the democratisation process.

In Romania, the national debate about how to best (further) dismantle the former communist totalitarian system is still ongoing, regardless of the fact that 16 years have already passed since the collapse of the communist regime.

Let's imagine that you are in a position to exercise political decision-making power in Romania:

- Which steps – if any – would you take to further dismantle the former communist totalitarian system?
- In particular, which measures – if any – would you apply to those persons who had in the past been affiliated with the Romanian communist regime, especially informants of the communist secret police, and who are now active in the successor government or civil service positions?
- Would you opt for the passing of a lustration law?

Bring forward arguments, both for and against the passing of a lustration law.

The following questions may help you to develop such arguments:

- Can persons who hold public offices or civil service positions, and who had been affiliated with the communist regime in the past, be considered to pose a threat to the emerging Romanian democracy? – Support your respective answer with examples.

- Does a country still need transitional justice when the political transition process is officially considered to be ended? – Bring forward arguments for your position.

B. Working definition and background information

What is understood by lustration?

Lustration is, literally, "a sacrifice, or ceremony, by which cities, fields, armies, or people, defiled by crimes, pestilence, or other cause of uncleanness, were purified" […]. During the period after the fall of the various European Communist states in 1989–1991, the term came to refer to the policy of limiting participation of people who had in the past been affiliated with the communist regime of their country, and especially informants of the communist secret police, in the successor governments or even in civil service positions. (*Cf. Wikipedia, http://en.wikipedia.org/wiki/Lustration*)

Lustration consists of legal acts and procedures for screening persons who seek to run for public offices using their affiliation with a previous authoritarian/totalitarian regime as a screening principle.

The aim of lustration is to exclude persons from exercising governmental power if they cannot be trusted to exercise this power in compliance with democratic principles, as they have shown no commitment to or belief in such principles in the past and have no interest or motivation to make the transition to them now. (*Cf. Severi*n, Measures to dismantle the heritage of former communist totalitarian systems, Doc. 7568, 3 June 1996, Report [1])

What is the current status quo with regard to lustration in Romania?

Romania is one of the few Eastern European countries that, 16 years after the collapse of the former communist regime, has not yet passed a lustration law.

Up to now, several attempts have been made to pass a lustration law in Romania, i.e. in 1996, 1999 and 2005, but these efforts have not been successful: The draft laws have always been stopped in the Parliament.
Currently, a new draft law is under debate in the Chamber of Deputies after having been passed by the Senate.

The draft law proposes that **persons that have held certain public offices during the communist regime** (e.g.: leading positions in the Romanian Communist Party, leading positions in the communist students' unions, editors of the media-agencies, rectors and deans from the political educational system, prosecutors, presidents of the Supreme Court) **should be banned, for a period of 10 years, from holding certain public offices** (president of the state, member of the government, senator or deputy, prefect, mayor, judges and prosecutors, member of the diplomatic corps).

Some further support for reasoning:

- **Report[1] on Measures to dismantle the heritage of former communist totalitarian systems** (Doc. 7568, 3 June 1996, Rapporteur: Mr. Severin, Romania, Socialist Group, p. 5, para. g) states that:

  "[L]ustration measures should preferably end no later than 31 December 1999, because the new democratic system should be consolidated by that time in all former communist totalitarian countries."

  Do you agree with this position?

- According to the **jurisprudence of the European Court of Human Rights** (*ECHR*) the application of lustration measures after a long period of time (e.g. a decade) can be discriminatory. The belated timing of lustration laws must in any event be taken into consideration when deciding whether a lustration measure is proportional with regard to its limitation on specific human rights.

  In the *Case of Sidabras and Džiautas v. Lithuania* (Applications nos. 55480/00 and 59330/00, 27/10/2004), the ECHR held with regard to a possible violation of the principle of non-discrimination in the light of the right to respect for private life (Art. 8):

  > "[T]he Court observes that the KGB Act came into force in 1999, that is, almost a decade after Lithuania declared its independence on 11 March 1990; in other words, the restrictions on the applicants' professional activities were imposed on them thirteen years and nine years respectively after their departure from the KGB. The fact of the KGB Act's belated timing, although not in itself decisive, may nonetheless be considered relevant to the overall assessment of the proportionality of the measures taken." (Para. 60)

- Romanians have had the highest level of co-operation with the communist regime from the entire region: 18% of the population have been members of the communist party (more than 3.800.000 members out of 22.000.000 people) and 1 out of 8 Romanian was a collaborator for the state security apparatus, "Securitatea".

Attachment III

Case Study No. 2:

RECONCILIATION THROUGH CRIMINAL PROCEEDINGS/TRIALS – THE CASE OF RATKO MLADIC et al: Surrender failed, EU accession denied?

A. Case Study

Remember that criminal proceedings are among the numerous means that the newly emerging democratic societies in South East Europe could use in overcoming their past. These criminal proceedings would be initiated against those individuals who have committed criminal acts during the communist totalitarian/authoritarian regime, and/or the wars in the former Yugoslavia respectively.
The European Union links the entry of the countries of the former Yugoslavia into the EU with the arrest and surrender of prominent war criminals to the International Criminal Tribunal for the Former Yugoslavia (see below).

Let's imagine that you are in a position to exercise political decision-making power with regard to Serbia´s accession to the European Union (EU):

- How would you go about the issue of non-surrender of prominent war criminals in former Yugoslavia in the context of negotiations for the respective countries' accession to the European Union?
- Would you link the entry of the countries of the former Yugoslavia into the EU with the arrest and surrender of prominent war criminals, or would you plead for continuing accession negotiations despite the failed surrender of war criminals such as Mladic?

Bring forward arguments, both for and against linking the entry into the EU with the arrest of prominent war criminals.

The following questions may help you to develop such arguments:

- What would best serve the process of democratization of the respective country?
- Can any method used to legally overcome the past and to create justice reach its aim if adopted as a result of external pressure?
- Does the lack of criminal justice impose such a big danger to the process of democratization/stabilization/normalization that external pressure must be used in order to ensure that justice will be done?

B. Background information

The state of accession negotiations between Serbia and the EU

The European Union (EU) insists on arresting Ratko Mladić, the Bosnian Serb general (former Bosnian Serb military commander) accused of war crimes. It treats the surrender of prominent war criminals as one of its political criteria for accession (according to the so-

called Copenhagen criteria, the political conditions for EU-accession are: Stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities).

On May 3rd, 2006, the EU broke off talks on closer ties with Serbia over its failure to arrest and transfer fugitive genocide suspect Ratko Mladić to the International Criminal Tribunal for the Former Yugoslavia (*ICTY*), i.e. the EU called off the negotiations on the Stabilisation and Association Agreement. The negotiations are unlikely to resume until Serbia demonstrates complete cooperation with ICTY.

Ratko Mladić was indicted in 1995 by the ICTY for genocide, crimes against humanity, and war crimes perpetrated during the siege of Sarajevo, during the war in Bosnia and Herzegovina 1992 – 1995, and during the massacre at Srebrenica.

In July of this year, Serb Prime Minister Kostunica presented an action plan regarding co-operation with the War Crimes Tribunal for the Former Yugoslavia (ICTY) in Bruxelles. The primary goal of the action plan is the arrest and surrender of Ratko Mladić. In reaction to the action plan, European Enlargement Commissioner Rehn refrained from declaring a new date for the resumption of the association talks. He instead announced: "Much more important than the action plan itself is its implementation. Full co-operation with The Hague means the arrest and surrender of Ratko Mladic and alike suspected war criminals."

The European Commission's argument runs as follows:

Serbia failed to keep a pledge that Mladić – alledged to be hiding in Serbia protected by renegade army and intelligence officers – would be handed over to the ICTY by the end of April, a deadline set by the EU.

Olli Rehn, European Enlargement Commissioner:

> "This issue is about the rule of law. Serbia must show that nobody is above the law, and that anyone indicted for serious crimes will face justice. It is also about achieving democratic maturity."

Serbia argues as follows:

Serbian Prime Minister Vojislav Kostunica stated that, for the first time in their history, the entire country suffers because one former officer, i.e. Ratko Mladić, is doing great harm to the state and national interest by not surrendering himself.
According to Kostunica, the entire network of Ratko Mladić's accomplices has been discovered, and therefore discovering Mladić's hiding place is a technical question only.

Reactions after the death of Slobodan Milosević:

Quote from Swissinfo, July 10, 2006: "Ethnic Albanians were angry that Milosevic's death robbed them of a verdict on the crimes he was accused of in Kosovo. They hope the trial of

Milutinovic and his co-accused will help provide justice for victims of war crimes in the province."