



THE ALBANIAN REHABILITATION CENTRE
FOR TRAUMA AND TORTURE



Decorated by the President
of Republic of Albania
with the
"Medal of Honor"

Victims Without a War...

Analysis on missing standards regarding the rights of victims of communist regime, investigate disappearance, and enable decent reparations.

Nazism was condemned at an international trial in Nuremberg as a criminal ideology and it was denounced by the entire world. Its exponents were exemplarily punished and Nazi crimes are not statute-barred in order to underline their fiendish nature.

Communist ideology, which resulted in crimes being committed that were comparable with Nazi wrongdoings, was not condemned by the international community, even though its "balance sheet" is frightening 100,000,000 victims without a war.

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÷ The issue of missing persons due to crimes of the communist dictatorship remains an open call for Justice, accountability and right to truth. Despite impressive results to address the issue (the MoU that the Albanian Government signed with the ICMP; some state-run initiatives related to dedicated places of historical memories), very little progress has been done in the finalization of the lists and records of the missing persons, the search of the execution places and potential grave locations still remain not open source to public. The “secrecy” is justified by the complicated procedures of the law on information about the files of the former State’ Security”; yet, there are families extremely frustrated by that. It is becoming urgent to ensure that the process of identifying mass grave locations and burial places should come to an end (where transparencies, reliability, the right to know and access to information are fully guaranteed). As a continuous process, the exhumation of body remaining and identification of the victims should be a process with a local ownership and possibilities for the families to know what happened. Additionally, and even more importantly, some relatives of missing persons are reaching the end of their lives and risk dying without ever knowing the truth about the fate or whereabouts of their loved ones.

÷ The absence of the legal framework to address the issue of the missing persons as victims of the communist regime has been filled by initiatives or interventions which indeed call for attention: the existing legislation does not provide a definition on the missing persons. This is a call for the authorities to address the crimes terminology, typology and timeframe of the crimes happening and the process’ deadlines (when and how it will end). The existing legislation on witness protection does not impact the process, as the state institutions have granted access of archive files and information which may easily provide information of what has happened with the extrajudicial killings, deaths during investigation and in detention; and executions during the communist dictatorship.

÷ To the current developments and the information, there are no investigations, or prosecution cases requested by any governmental authority regarding the extrajudicial killings, nor a direct engagement of the General Prosecutor Office related to the opening of the archives of this institution. This reinforces the climate of impunity and lack of truth and justice for the victims.

÷ The complicated and difficult process of exhumation requires also for support dedicated to the family relatives (be it medical, moral or material/financial support). Such support has not been addressed so far by any mechanism or legislation. The missing persons’ families should demand from relevant institutions the fulfilment of this obligation and concurrently should file complaints regarding those institutions not meeting this obligation. In order for this right to be implemented the families should be entitled to request court enforcement and, as a part of the court’s decision, a determination of the responsibility of the relevant organ or institution. Compared to the missing right of complaint by the former political persecuted, the tradition of excluding courts from this important process remains a concern.

÷ Another concern remains with after- identification processes. The current practices of the last two decades have shown individual initiatives of exhumations, where family relatives paid out-of-pocket money to accomplish such process. By personal means, the family relatives have found the burial places of executed or missing relatives. And these were the only initiatives that have successfully been addressed. While there is no clear information about human remaining, kept as “unidentified” in the forensic institute of Albania.

÷ Also no clear information what will happen with the identified remaining: will they be considered veterans, heroes or martyrs? May the law on the veterans apply for their closed relatives? What other rights may be applying to the relatives?

÷ There is an immediate need for the adoption of the Rulebook on Marking the Sites of Burial and Exhumation of Missing Persons, as part of the requirements of the UN Expert Group that recall for a comprehensive approach and a national strategy on transitional Justice to deal with the crimes and gross violations of human rights committed in Albania under communism, yet remaining to be investigated and punished.

÷ There is an immediate need to address the process by drafting a law on the victims of communist dictatorship, as victims of torture (Art3.ECHR) and atrocities and as victims whose right to life was clearly violated (Art.2.ECHR).

1. A quick rewind: Repression under communist regime in Albania

Enver Hoxha was one of the last Stalinist leaders in Eastern Europe and continued to employ Stalinist techniques for controlling the population long after most other East European countries had shifted from outright terror and repression to more subtle bureaucratic-authoritarian methods. Western observers believed that no other communist country had as extensive a police and security organization relative to its size as the one that operated in Albania. Hoxha regarded the security police as an elite group, and it underpinned the power of the ACP and then the APL during the period they dominated Albania's one-party political system.

The secret police was instrumental in enabling Hoxha and the communist party to consolidate power after 1944 by conducting a campaign of intimidation and terror against prewar politicians and rival groups. Persecution of these opponents in show trials on charges of treason, conspiracy, subversion, espionage, or anti-Albanian agitation and propaganda became common. From 1948 until the early 1960s, the Ministry of Internal Affairs was involved in the search for real or alleged Yugoslav agents or Titoists in Albania, and the ministry itself was an initial battleground in the purge of Yugoslav influence. Yugoslav control of the Ministry of Internal Affairs ran deep in the years immediately following World War II. Its chief, Koci Xoxe, was part of the pro-Yugoslav faction of the party and a rival to Hoxha. In 1949, however, he was arrested, convicted in a secret trial, and executed. Hoxha maintained a Stalinist political system even after the communist regimes in the Soviet Union and China had long since moderated their totalitarian or radical excesses. In the last years of Hoxha's life, the Directorate of State Security (Drejtoria e Sigurimitte Shtetit — Sigurimi), increased its political power, perhaps to the extent of supplanting party control.

After Hoxha's death, the security forces viewed his successor, Ramiz Alia, and his modest reforms with suspicion. In the late 1980s, they reportedly supported a group of conservatives centred around Hoxha's widow, in opposition to Alia. Under Hoxha the communist regime essentially ignored internationally recognized standards of human rights.

According to a landmark Amnesty International report published in 1984, Albania's human rights record was dismal under Hoxha. The regime denied its citizens freedom of expression, religion, movement, and association although the constitution of 1976 ostensibly guaranteed each of these rights. In fact, the constitution effectively circumscribed the exercise of political liberties that the regime interpreted as contrary to the established socialist order. In addition, the regime tried to deny the population access to information other than that disseminated by the government-controlled media. The secret police routinely violated the privacy of persons, homes, and communications and made arbitrary arrests. The courts ensured that verdicts were rendered from the party's political perspective rather than affording due process to the accused, who were occasionally sentenced without even the formality of a trial.

After Hoxha's death, Alia was apparently unable or unwilling to maintain the totalitarian system of terror, coercion, and repression that Hoxha had employed to maintain his grip on the party and the country. Alia relaxed the most overt Stalinist controls over the population and instructed the internal security structure to use more subtle, bureaucratic authoritarian mechanisms characteristic of the post-Stalin Soviet Union and East European regimes. He allowed greater contact with the outside world, including eased travel restrictions for Albanians, although the Sigurimi demanded bribes equivalent to six months' salary for the average Albanian to obtain the documents needed for a passport. More foreigners were allowed to visit Albania, and they reported a generally more relaxed atmosphere among the population as well as a less repressive political and antireligious climate. Official sources admitted that social discipline, especially among young Albanians, was breaking down in the late 1980s. The

country's youth increasingly refused to accept and even openly rejected the values advanced under the official communist ideology.

Moreover, small-scale rebellions were reported more frequently after Hoxha's death. Yet these developments did not alter the regime's exclusive hold on political power after the 1980s. The dramatic collapse of communist rule in Eastern Europe in 1989 apparently had a devastating effect on the internal social and political situation in Albania despite Alia's efforts to contain it. Massive demonstrations against communist rule followed by liberalization and democratization in Eastern Europe began to affect Albania in 1990. The power of the security police was successfully challenged by massive numbers of largely unorganized demonstrators demanding reforms and democratic elections.

Unrest began with demonstrations in Shkoder in January 1990 that forced authorities to declare a state of emergency to quell the protests. Berat workers staged strikes protesting low wages in May. During July 1990 approximately 5,000 Albanians sought refuge on the grounds of foreign embassies in an effort to flee Albania. The security forces reportedly killed hundreds of asylum seekers either in the streets outside foreign compounds or after they were detained, but even such extreme measures did not stanch the unrest.

In September 1990, Alia acceded to the requirements of the Conference on Security and Cooperation in Europe, committing Albania to respect the human rights and political freedoms embodied in the 1975 Helsinki Accords. When students organized demonstrations in December 1990, their demands for political pluralism received widespread support. Attempts by riot police to break up the demonstrations failed, and the party's Central Committee, in an extraordinary meeting called by Alia to discuss the growing unrest, decided not to use further force. The following year, the security forces were not in evidence at large political demonstrations and were unable to stop thousands of refugees from boarding ships bound for Italy or from crossing the border into Greece.

However, the security forces attempted to maintain control by forcing the authorities to give the People's Army control over the ports of Vlore, Durres, Shengjin, and Sarande. The army was ordered to clear the ports of potential refugees and to establish a blockade around them.

1.1 Penal Code in Communist Albania

Prior to the reforms of the early 1990s, a politically and ideologically oriented penal code facilitated systematic violations of human rights and ensured the communist party control over all aspects of Albania's political, economic, and cultural life. Article 53 of the 1982 code, for example, broadly defined sabotage as "activity or inactivity to weaken or undermine the operations of the state and the Albanian Party of Labour, the socialist economy, and the organization and administration of the state and society" —a crime punishable by at least ten years' imprisonment or by death.

The crime of "fascist, anti-democratic, religious, warmongering, and antisocialist agitation and propaganda," as defined by Article 55, carried a penalty of three to ten years' imprisonment or, in wartime, not less than ten years' imprisonment or death. Article 47 stipulated a penalty of not less than ten years or death for "flight from the state" or for "refusal to return to the fatherland." The penal code listed a total of thirty-four offenses punishable by death, of which twelve were political and eleven were military. Although individuals accused of criminal behaviour theoretically had the right to present a defence, they could not avail themselves of the services of a professional attorney; the private practice of law in Albania had been banned in 1967.

In 1990, following serious and widespread public unrest, steps were taken to liberalize the penal code. The number of offenses punishable by death was reduced from thirty-four to eleven, women were exempted from the death penalty, the maximum prison sentence for "anti-socialist agitation and propaganda" was reduced from twenty-five to ten years, the maximum prison sentence for attempts to leave the country illegally also was reduced from twenty-five to ten

years, the legal status of lawyers was restored, and the official ban on religious activity was abolished.

1.2 Penal System

The communist regime maintained an extensive system of prisons and labour camps, including six institutions for political prisoners, nine for non-political prisoners, and fourteen where political prisoners served their sentences together with regular criminals. Inmates provided the state's vital mining industry with an inexpensive source of labour. In 1985 there were an estimated 32,000 prisoners in the country. Conditions in the prisons and labour camps were abysmal.

Maltreatment as well as physical and mental torture of political prisoners and other prisoners of conscience were common. Sporadic strikes and rebellions in the labour camps, to which the Sigurimi often responded with military force, resulted in the death of more than 1,000 prisoners as well as the execution of many survivors after they were suppressed. Many political prisoners were purged party officials and their relatives. Reflecting Hoxha's paranoia, some of them were resentenced without trial for allegedly participating in political conspiracies while in prison. Former inmates reported that they managed to survive their incarceration only through the assistance of relatives who brought them food and money. Under Alia, several amnesties resulted in the release of nearly 20 percent of the large prison and labour-camp population, although most of those released were prisoners over the age of sixty who had already served long terms.

In 1991, for example, the APL attempted to improve its popularity by pushing a sweeping amnesty law for political prisoners through the communist-dominated People's Assembly, and all such prisoners were freed by the middle of the year. The amnesty law provided for the rehabilitation of those incarcerated for political crimes, but not persons convicted of terrorist acts that resulted in deaths, or other serious consequences. Specifically, it applied to persons sentenced for agitation and propaganda against the state; participation in illegal political organizations, meetings, or demonstrations; failure to report crimes against the state; slandering or insulting the state; and absence without leave or desertion from military service. It provided for material compensation, including lost wages or pensions, for time spent in prison; for preferential access to housing, education, and employment; and gave compensatory damages to the families of political prisoners who were executed or who died in detention without trial. Finally, it established a commission that included members of the new, independent Association of Former Political Prisoners to investigate atrocities carried out by the state.

1.3 Directorate of State Security

The Directorate of State Security, or Sigurimi, which was abolished in July 1991 and replaced by the NIS, celebrated March 20, 1943, as its founding day. Hoxha typically credited the Sigurimi as having been instrumental in his faction's gaining power in Albania over other partisan groups. The People's Defence Division, formed in 1945 from Hoxha's most reliable resistance fighters, was the precursor to the Sigurimi's

5,000 uniformed internal security force. In 1989 the division was organized into five regiments of mechanized infantry that could be ordered to quell domestic disturbances posing a threat to the party leadership. The Sigurimi had an estimated 10,000 officers, approximately 2,500 of whom were assigned to the People's Army. It was organized with both a national headquarters and district headquarters in each of Albania's twenty-six districts.

The mission of the Sigurimi, and presumably its successor, was to prevent revolution and to suppress opposition to the regime. Although groups of Albanian emigres sought Western support for their efforts to overthrow the communists in the late 1940s and early 1950s, they quickly ceased to be a credible threat to the communist regime because of the effectiveness of the Sigurimi.

The activities of the Sigurimi were directed more toward political and ideological opposition than crimes against persons or property, unless the latter were sufficiently serious and widespread to threaten the regime. Its activities permeated Albanian society to the extent that every third citizen had either served time in labor camps or been interrogated by Sigurimi officers. Sigurimi personnel were generally career volunteers, recommended by loyal party members and subjected to careful political and psychological screening before they were selected to join the service. They had an elite status and enjoyed many privileges designed to maintain their reliability and dedication to the party.

The Sigurimi was organized into sections covering political control, censorship, public records, prison camps, internal security troops, physical security, counterespionage, and foreign intelligence. The political control section's primary function was monitoring the ideological correctness of party members and other citizens. It was responsible for purging the party, government, military, and its own apparatus of individuals closely associated with Yugoslavia, the Soviet Union, or China after Albania broke from successive alliances with each of those countries. One estimate indicated that at least 170 communist party Politburo or Central Committee members were executed as a result of the Sigurimi's investigations. The political control section was also involved in an extensive program of monitoring private telephone conversations. The censorship section operated within the press, radio, newspapers, and other communications media as well as within cultural societies, schools, and other organizations. The public records section administered government documents and statistics, primarily social and economic statistics that were handled as state secrets. The prison camps section was charged with the political re-education of inmates and the evaluation of the degree to which they posed a danger to society.

Local police supplied guards for fourteen prison camps throughout the country. The physical security section provided guards for important party and government officials and installations. The counterespionage section was responsible for neutralizing foreign intelligence operations in Albania as well as for monitoring domestic movements and parties opposed to Albania's communist party. Finally, the foreign intelligence section maintained personnel abroad and at home to obtain intelligence about foreign capabilities and intentions that affected Albania's national security. Its officers occupied cover positions in Albania's foreign diplomatic missions, trade offices, and cultural centres.

In early 1992, information on the organization, responsibilities, and functions of the NIS was not available in Western publications. Some Western observers believed, however, that many of the officers and leaders of the NIS had served in the Sigurimi and that the basic structures of the two organizations were similar.

1.4 Repression as an international crime with its victims...left behind!

Certainly, the violent and repressive acts of the communist regime in Albania often met the reference criteria the relevant literature, international law documents set to qualify them, in accordance to the relevant circumstances and the context, mainly as crimes against humanity (e.g., massive killings, torture and persecutions, deportations/ forced displacements). In today's Albanian society there is no doubt whether the communist regime had committed crimes of torture, persecution, and of inhuman treatment.

Ironically, since 1991 time when Communist regime failed on the territory of the Republic of Albania there is no recorded data to confirm any investigated or prosecuted case of enforced disappearance.

Elements of enforced disappearance can be identified during the communist regime and according to official data are resulting 5,157 persons as former convicted for political reasons, executed without a court decision, during the period from 30.11.1944 until 1.10.1991.

Law "On the compensation of former political convicted of the communist regime", and several bylaws for its implementation provide the compensation of former political for the following

categories: convicted with prison; capital punishment by court decision; extrajudicial killings; insulation at investigating offices; hospitalization to a medical institution; exile. Pursuant to this law is adopted the decision of the Council of Ministers (DCM) "For the determination of the administrative review procedures related the claims, and financial compensation for the families of the victims unjustly executed without trial, for political reasons, from 30.11.1944 until 1.10.1991".

Reading those data and the relevant pieces of domestic regulatory framework, the main question raised here is why 27 years after communist regime fall we do not have either sufficient or sufficiently consolidated will of Government of Albania to condemn these crimes and the extreme communist ideology? To date victims of the communist regime in Albania, well defined and identifiable through international standards, but not regulated in domestic legislation, receive unstructured and extremely low and incomplete [due to state budget restrictions] reparations which basically are calculated based on a different legal reference, i.e. unjust punishment, instead of crimes against humanity.

Assuming that the will to condemn communist crimes is inevitable, necessary and healthy for a society, investigations into human rights abuses may take various forms in different contexts, from official, well-resourced state-sponsored exhumations to unofficial searches and exhumations by family members. According to literature which refers the general best practice forensic investigations may occur immediately after mass violence or disappearances, or, alternatively, may be delayed to coincide with larger-scale investigations surrounding prosecutions or truth commissions, or may not take place until decades after crimes were committed. Adam Rosenblatt described a "growing international consensus about the moral obligation and legal authority to exhume mass graves after atrocities," which captures, in broad strokes, the arguments from scholars and practitioners about dealing with human remains following mass violence due to a moral imperative to achieve justice. Rosenblatt outlined what is frequently cited in the literature as a moral imperative for searching for and exhuming mass graves and graves of the disappeared for two sets of reasons: 1) to facilitate justice for the victims; 2) to promote healing for the survivors.

These reasons echo not only associated arguments cited in the general literature, but lay down frames for a grounded ex-ante impact analysis on relevant legal framework required: 1) exhumations are important to facilitate justice for the victims, to restore the rule of law and human rights, and to establish an objective historical narrative about what happened to individuals and what happened to the community as a whole; 2) exhumations promote the healing of families and communities.

Based similar and good practices, a set of legal instrument need to be part of domestic legislation to achieve the aforementioned objectives. The following is a non-exhaustive list of suggested actions in virtue of the international conventions and treaties, Republic of Albania has adhered to.

- ÷ Enforced disappearance should be further regulated and duly investigated as a separate offence in domestic secondary legislation. Government of Albania should continue its efforts in the search for missing persons and the identification of human remains;
- ÷ Legislation initiatives/reviews/ completion are needed to ensure efficient prosecution of crimes during the communist regime in line with international standards, namely applicable instruments/proceedings to adopt all measures necessary to combat impunity and to set up comprehensive reparation programmes.

To this extent, the purpose of this concise analysis is twofold: a) to provide a general outlook on regulatory framework enacted and applied in similar milieux with Albania, and b) to sustain application of specific rules and standards on exhumations as referred by international law and enacted in the domestic legislation. By doing this, Albanian Centre against Torture, aims to significantly contribute to an enabling environment of forgiveness and reconciliation.

After all, only the victims have the right to forgive that wrongs that they have suffered at the hands of others. Only the victims have the right to draw a thick black line under the past, and always only for the injustices that have been done to them. Nobody else has this right! And if someone appropriates this right, then accounts still remain to be settled. Biljana Plavšić, a former president of Republika Srpska who was indicted in 2001 by the International Criminal Tribunal for the former Yugoslavia, when admitting her responsibility for crimes in Bosnia – Herzegovina is remembered to have said that... anyone who deliberately thwarts the lives of others has only one life with which to pay for their actions, and even if they lay down their life, it cannot undo the death of tens of thousands, hundreds of thousands and millions. Consequently, the only thing they can do is admit the truth and humbly beg for forgiveness. No individual members of communist party/APL or their organisation have done this yet.

2. A comparative outlook on regulatory framework on enforced disappearance, related investigation, and suggested practice improvements

2.1 European context and the international law standards

The most influential European parliamentary institutions have issued a number of non-binding political resolutions directly concerning the crimes committed by the communist regimes. From the standpoint of international law these acts can be considered as subsidiary tools or sources to interpret relevant rules of international law, to assess the crimes committed by communist regimes as meeting international legal criteria of crimes against humanity, war crimes and even genocide. Ultimately they also express the authoritative opinion regarding qualification of the crimes committed by the communist regimes as well as the measures to be taken by European States with regard to these crimes (their investigation and condemnation, raising public awareness about these crimes, commemoration and remembrance of the victims, etc.).

First of all I would like to mention the recent resolution of the European Parliament on European Conscience and Totalitarianism adopted on 2 April 2009. This Resolution *inter alia* acknowledged that “millions of victims were deported, imprisoned, tortured and murdered by totalitarian and authoritarian regimes during the 20th century in Europe”; the European Parliament noted the specific historical experience of the Central European States by stating “the dominant historical experience of Western Europe was Nazism, and whereas Central and Eastern European countries have experienced both Communism and Nazism”.

The European Parliament also condemned “strongly and unequivocally all crimes against humanity and the massive human rights violations committed by all totalitarian and authoritarian regimes”. That means, that there is no question or doubts about the very fact of commission by the communist regimes of crimes against humanity, war crimes or, in some instances, even genocide. Furthermore the European Parliament underlined the importance of remembrance of the past, reconciliation, research, teaching and public awareness about the crimes committed of the communist regimes.

Secondly, there are two important resolutions of the other authoritative and wider European institution – the Parliamentary Assembly of the Council of Europe. The first resolution is more of general character, - the 27 June 1996 Resolution 1096(1996) on Measures to Dismantle the Heritage of Former Communist Totalitarian Regimes as apart the prosecution of the crimes it recommends a number of other measures to deal with the legacy of the communist regimes. As follows from the text of the Resolution, the fact of the crimes committed by the communist regimes is beyond the question; the Parliamentary Assembly is only concerned that justice should be done “without seeking revenge” in a manner compatible with democracy and rule of law, and the prosecution of individual crimes should go hand-in-hand with the rehabilitation of the victims.

With regard the crimes committed by the communist regimes, this resolution was further continued by the 25 January 2006 Resolution No. 1481(2006) on Need for International Condemnation of Crimes of Totalitarian Communist Regimes, which is, to my mind, the most

comprehensive resolution on the matter. The Parliamentary Assembly not only condemned the crimes committed by totalitarian communist regimes. It also noted that the totalitarian communist regimes “without exception, (were) characterised by massive violations of human rights. The violations have differed depending on the culture, country and the historical period and have included individual and collective assassinations and executions, death in concentration camps, starvation, deportations, torture, slave labour and other forms of mass physical terror, persecution on ethnic or religious grounds, violation of freedom of conscience, thought and expression, of freedom of the press, and also lack of political pluralism”. Thus most of the violations noted fall into the category of crimes against humanity or war crimes, if committed in relation with the armed conflict. Furthermore the Parliamentary Assembly also noted that the crimes of the communist regimes “were justified in the name of the class struggle theory and the principle of dictatorship of the proletariat. The interpretation of both principles legitimised the “elimination” of people who were considered harmful to the construction of a new society and, as such, enemies of the totalitarian communist regimes”.

This important passage can be understood as recognition, at least to some extent, of the genocidal intent of the communist regimes to eliminate a certain group of people (it was expressly stated in the Explanatory Memorandum included into the 16 December 2005 Report of the Political Affairs Committee on the Draft Resolution that “the important feature of communist crimes has been repression directed against whole categories of innocent people whose only ‘crime’ was being members of these categories. In this way, in the name of ideology, the regimes have murdered tens of millions of rich peasants (kulaks), nobles, and bourgeois, and other groups”). Therefore the Resolution can substantiate the claim that at least in respect of some national and ethnic group the crimes of the communist regimes could amount to genocide, as well as we can find additional arguments to broaden the traditional legal concept of genocide so as to include elimination of social and political groups.

The Resolution furthermore expresses concerns about poor public awareness about the crimes of the communist regimes, calls for the clear position of the international community on the past that would pave the way to further reconciliation; awareness of history and moral satisfaction of the victims are indicated among the further measures to be taken.

The last resolution I would like to mention is the Resolution of the OSCE Parliamentary Assembly on Divided Europe Reunited: Promoting Human Rights and Civil Liberties in the OSCE Region in the 21st Century, which was adopted on 3 July 2009 by the annual session of the Assembly in Vilnius. In line with the above mentioned EP and PACEResolutions this Resolution expressly acknowledged the crimes of the communist regimes by noting that “in the twentieth century European countries experienced two major totalitarian regimes, Nazi and Stalinist, which brought about genocide, violations of human rights and freedoms, war crimes and crimes against humanity”; it also stressed the need to raise public awareness about the totalitarian legacy, to open archives and to facilitate reconciliation based on truth and remembrance. All totalitarian rule from whatever ideological background was declared unacceptable and incompatible with the values of the widest European organization.

The basis for international condemnation of the crimes of the communist regimes could be the universal validity of the Nuremberg principles (the customary international law principles recognised in the Statute of the Nuremberg International Military Tribunal and the jurisprudence of this Tribunal).

The universal validity of these principles has already been recognized by the European Court of Human Rights. The Court emphasized the universal validity of the Nuremberg principles in its decision on admissibility of 17 January 2006 in the case of Kolk and Kislyiy v. Estonia and in the decision on admissibility of 24 January 2006 in the case Penart v. Estonia stating that “responsibility for crimes against humanity cannot be limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War”.

The Court also noted that the Nuremberg principles and their universal validity were perfectly known to the Republic of Albania, as member state of the United Nations since 1955.

2.2.2 Forensic investigation standards and practices

The dead body occupies a central place in the narrative of forensic investigations of mass graves. The importance of retrieving the human remains of combatants and civilians who have died as a result of armed conflict will therefore be discussed, from not only a legal, but also a psycho-social and moral viewpoint. The emergence of the practice of applying forensic expertise to the investigation of crimes in an international forensic context will be examined against the background of the development of these rules.

Specific mention of the word exhumation in international humanitarian law texts is exiguous. The reference to exhumations is predominately connected to humanitarian purposes. In response to military practice, it is permissible under the First Geneva Convention of 1949 to exhume temporary graves in order to excavate the remains of deceased soldiers for the purpose of repatriation to their country of origin or to move the bodies to permanent military cemeteries. The 1977 First Additional Protocol contains further reference to exhumation, and here the scope of application is broadened. However, there are strict limits to the range of permissible circumstances under which excavations can be carried out. Although exhumations can be conducted for investigatory purposes, such as those connected to enquiries into war crimes, the permission to carry out the activity is granted to the State on whose territory the grave is located. This represents something of a gap in this body of law in terms of the regulation of situations where an international criminal tribunal will seek to exhume the graves of victims of armed conflict. Thus the following section highlights some international standards that have developed a propos the forensic exhumation of mass graves.

In recognition of the importance of treating the dead body with respect and facilitating the grief and mourning of families and communities left behind, a number of obligations have been codified in international humanitarian law. The requirements include the obligation to search for, collect, identify, handle with dignity and dispose of the dead in a respectful manner. The imperative to implement such legal obligations pertains not just to reasons of a cultural and religious nature, but also to legal and psycho-social concerns. Failure to follow the obligations outlined in international humanitarian law can have serious consequences and, as reflected upon by Tidball-Binz, —[t]he trauma suffered by bereaved families and affected communities as a result of the neglect and mismanagement of their dead, including lack of news of missing relatives, often lasts much longer than the more conspicuous physical effects of catastrophes. Issues pertaining to the application of medical and forensic sciences in the investigation of violations of international humanitarian law have come to receive increasing attention by both practitioners and academics in the past number of years. In addition, in recognition of the value attached to utilising forensic techniques in the movement to combat impunity, a number of international bodies are currently focusing attention on how the synergy between the respective disciplines can be improved.

The Office of the United Nations High Commissioner for Human Rights is particularly important in this regard. A recent report of the Office of the United Nations High Commissioner for Human Rights on the right to the truth and on forensic genetics and human rights highlighted the significant benefits that have accompanied the application of the forensic sciences in an international legal context. Whilst this synergy has undoubtedly resulted in substantial gains in the fight against impunity, as the report also indicates the marriage of distinctive disciplines in a new area has witnessed some operational complications. One of the main difficulties in this regard extends from the lack of a binding legal framework pertaining to the practice of forensically examining human remains for the purposes of reparative measures, including criminal prosecutorial purposes, followings instances of serious violations of international human

rights and international humanitarian law. The following passage articulates perfectly the conundrum:

In a national context the application of forensic science is regulated by legislation and detailed domestic legal frameworks or domestically accepted practices that seek to ensure such conformity. At the international level, however, the rules and acceptable practices are often less clear, sometimes contradictory, or even absent altogether. That situation is rapidly changing due to an ever-increasing reliance on forensic methods and techniques, both domestically and across national borders.

Although this point may appear axiomatic, international forensic investigations of gross human rights violations, war crimes, crimes against humanity and genocide should ensure compliance with the principles and provisions of international human rights and humanitarian law. Writing nearly a decade ago, Cordner and McKelvie warn that forensic scientists themselves can —wittingly, unwittingly or by virtue of poor practice, participate in violations of human rights.

Forensic science is —one of the enabling tools to ensure the full implementation of the rule of law, and as such it needs to conform to the rule of law itself. A number of guidelines pertaining to the conduct of investigations into alleged atrocities have been advanced by the United Nations. Of note are the Guidelines for the conduct of United Nations inquiries into allegations of massacres and annexed to these Guidelines, the model protocol for a legal investigation of extra-legal, arbitrary and summary executions, known as the Minnesota Protocol. Another effort to standardise methods for the investigation of extrajudicial killings was made with the 1991 United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions. The manual was intended to supplement the —Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions following the recommendation of the Committee on Crime Prevention and Control, at a session held in Vienna in February 1990. However, these guidelines are not legally binding and investigators are under no obligation to apply these protocols. Routinely, investigators will often develop their own sets of protocols and standard operating procedures specific to the context in which they work.

In the absence of a binding legal framework to guide the practice of mass grave exhumations, the ad hoc Tribunals have been free to develop their own protocols suitable for the challenges, and sometimes idiosyncratic problems, faced in the field. There are very practical reasons why a court will need to develop its own protocols, which can encompass aspects of the United Nations protocols; however, it should be noted that the lack of standardised protocols and operating procedures have resulted in challenges made by the Defence as regard the admissibility of forensic evidence during proceedings before the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

Codes of practices that are negotiated between the legal system and scientific disciplines and validated by society provide useful non-case-specific guidelines to adjudicators. This stands in contrast to the state of play in an international context where —no such negotiated code of practice between international law, scientific disciplines and the international community exists. There is neither a standardised agreement regarding forensic exhumation practices and principles, nor an overarching ethical code for practitioners on international missions.

Overall, whilst the application of forensic science techniques to the investigations of crimes falling under the jurisdiction of the United Nations Tribunals can be seen as a very successful endeavour, the issues raised above do, nonetheless, point towards the persisting need to put in place a suitable legal framework to guide the practice of forensic work.

2.2.3 Management and due diligence rules in forensic investigations

The process of identifying human remains of missing persons begins with the recovery of those remains from their specific location. An exhumation is the disinterment of a buried body from a designated burial site, cemetery or other place that may be unmarked. Exhumation serves several important purposes, including recovery of the remains for physical examination and analysis for their identification; release of remains to relatives so as to facilitate funeral arrangements and emotional healing; documentation of injuries and other evidence for legal proceedings and to uncover human rights abuses; the search for clues that may assist in the historical reconstruction of events and revelations to create awareness; and acknowledgement that is necessary for healing and to draw lessons for the future of the community.

The entire process of exhumation is intricate and delicate, requiring well-trained and highly skilled personnel with expertise in various disciplines of forensic science. Forensic pathologists are generally conversant with these disciplines and able to work with a team of technicians with specialized training in the various fields. These include forensic archaeology, which consists of applying standard archaeological techniques modified to suit forensic crime scene processing where human remains are thought to be present.

The archaeological approach provides a rational way to recover remains and reconstruct events, ensuring that evidence is not damaged, recovery is complete and documentation adequate. Another area of expertise is forensic anthropology, which consists of applying methods and techniques from physical anthropology and forensic medicine to legal cases involving skeletal human remains. A basic exhumation team would consist of diggers, a pathologist, an investigating officer, a photographer to serve in documentation, and a transport coordinator. Additional personnel would depend on the specifics of the case, availability of trained manpower and capacity of the local Missing Persons Clearinghouse, or MPC centre. Such centres are described below.

The steps in exhumation are inter alia obtaining legal permission, depending on local jurisdiction; informing interested parties, including relatives where possible; organizing the exhumation team; identifying the site; ensuring that protective health measures are put in place; manual or mechanical excavation; documentation, preliminary examination, removal, collection and transportation of the remains and other specimens and proper identification; and finally sealing of the site for any future investigation and historical purposes, bearing in mind local legislation and cultural sensitivities. The entire exercise must respect the wishes of the communities concerned, judicial proceedings and the demands of professionalism. The remains are transported to a mortuary or designated storage centre for complete examination and analysis. Standard traditional scientific methods must be employed and all findings must be properly documented throughout the process. Specialized techniques may be required in most cases dating back a long time. Correct procedure must be followed in handling the remains and obtaining samples for identification analysis. Acceptable methods of identification include visual examination based on anthropometric characteristics such as age, gender, height and unique identifying features, identification by radiological means, identification by dental records (forensic odontology) and identification by DNA. Most of the identification methods that are particularly useful in cases of missing persons, e.g. DNA testing, are extremely specialized, calling for highly trained personnel as well as expensive equipment and facilities. These factors must be taken into consideration when establishing local and regional MPC networks.

After examination and analysis, positively identified remains must be released to the relatives if they so wish. Those that cannot be identified must be “protected” for any future re-examination and re-analysis, or for release to relatives in the event of subsequent positive identification matching; they should preferably be stored unburied in above-ground sepulchres to decrease the organic effect of soil. If that is not culturally acceptable or if there are economic or technical constraints, the remains should be buried in the hardest possible inorganic container or concrete underground storage facility that would allow future retrieval. Throughout the entire process and until the very end, the remains must at all times be accurately labelled

and catalogued, with information tracking their movements securely stored in the central database.

Whenever more information about missing or unidentified persons is received or acquired, the database is utilized to make file entries and update personal files that may lead to positive identification matches. Relatives of missing persons would be asked to give DNA samples that would be used in DNA testing.

2.3 Institutional compliance obligations

The International Convention for the Protection of All Persons from Enforced Disappearances is ratified by the Republic of Albania by the law No. 9802, dated 13.09.2007. In accordance with this law, the Republic of Albania declares that pursuant to article 31, paragraph 1 of the Convention, it recognizes the competence of the Committee on Enforced Disappearances to receive and consider communications from or on behalf of individuals subject to its jurisdiction, claiming to be victims of a violation by Albania of provisions of this Convention. Pursuant to article 32, the Republic of Albania declares that it recognizes the competence of the Committee to receive and consider communications, in which a State Party claims that another State Party is not fulfilling its obligations under the Convention.

In Albania, the international law enjoys a privileged position in relation to domestic one and it is in this sense that the Convention prevails over domestic law. The Constitution determines the obligation of the Albanian state to implement the international law. According to Article 122 of the Constitution, any international agreement ratified by the Parliament becomes part of the domestic law after its publication in the Official Journal. Article 122 of the Constitution provides that the international law applies directly, except when it is not self-executable and its application requires the promulgation of a law. International agreements ratified by the Parliament have priority over national laws that do not comply with it. Likewise, the norms issued by the international organizations prevail in case of conflict, over the domestic laws when the agreement is ratified by the Republic of Albania.

Based on general rules and principles on implementation of legal norms, it can be concluded that the subjects (individuals) may apply and require the application of only those articles of the Convention, the implementation of which is guaranteed by the current legislation and for which there is no need to establish internal mechanisms. Taking into account the obligations deriving from this Convention, in cases where a specific article of the Convention requires the adoption of internal legal provisions or establishment of internal mechanisms for its implementation, we underline the provision of “enforced disappearance” as a criminal offense. Based on Article 122 of the Constitution, this Convention is considered as part of domestic legislation, but on the other side, all provision of Convention is not self-executable. In accordance of Article 122, it is necessary to identify the provisions of the Convention that can be implemented by the domestic legislation, as well as those that can be implemented in practice by adopting concrete measures. From an overview of actual domestic legislation, it can be concluded that some provisions of the Convention are applied directly or indirectly in the domestic legislation.

2.4 Current situation and recommended measures

In 2012 the Albanian government stated to engage in taking necessary steps for creating the Disappeared Persons Section within Institute of Integration Former Politically Persecuted, aiming finding the disappeared persons during the period of communism. This section would have the following objectives:

- (a) Collection of evidence from survivors of the communist dictatorship related executions with or without trial; died persons in prisons; killed persons at investigatory offices or psychiatric hospitals; taken by police forcibly from their homes, and then disappeared without a trace or killed without warning; executed persons in border who

attempted to escape, during the period 1945-1991 and then buried in collective graves or unknown location;

(b) A database on disappeared persons including data as name and surname, sex, country, date of birth, place and date, and where is not possible the supposed year and circumstances of disappearance;

(c) To collect information, to find and monitor the return process and exhumation of disappeared persons, in close cooperation with central and local institutions.

To date there is no clear and official evidence that such steps were implemented or the quoted objectives were followed.