



Humanitarian Law Center

COMMENTS BY THE HUMANITARIAN LAW CENTER
**on the Draft National Strategy for the Prosecution of War Crimes for the Period
2016–2020**
(December 2015)

1. GENERAL COMMENTS AND RECOMMENDATIONS	2
1. Addressees of the Draft Strategy's	2
2. Language and Nature of the Draft Strategy	2
3. Background of the Draft Strategy.....	3
2. SPECIFIC COMMENTS.....	5
1. Enhancing Efficiency of War Crimes Proceedings Before Authorities of the Republic of Serbia	5
1.1 Investigations and Filing of Indictments.....	5
2. Service for Discovering War Crimes of the Serbian MUP	9
3. Courts (trials)	9
4. Witness and Victim Protection	10
5. Victim Support	11
6. Defence.....	12
7. War Crimes Trials and the Issue of Enforced Disappearances	12
8. Cooperation with the International Criminal Tribunal for the Former Yugoslavia	12
9. Improving the general position of the society towards the issue of war crimes trials	13

1. GENERAL COMMENTS AND RECOMMENDATIONS

1. Addressees of the Draft Strategy's

The National Strategy, like any other act directed at the authorities of the Republic of Serbia, can only impose obligations on public authorities. In that sense, it is not appropriate for this type of document to contain directions and guidelines addressed at some other stakeholders and, therefore, they should be left out from the Draft Strategy. For instance, the Draft Strategy speaks about the obligations of the media (page 17); the Draft Strategy calls upon the institutions of the European Union and other international organizations and non-governmental organizations to monitor war crimes trials (page 35); the Draft Strategy defines the objective of harmonizing judicial practices on the territory of the former Yugoslavia (page 23), and so on.

Recommendations:

- 1) Leave out directions addressing stakeholders other than state authorities; or
- 2) Clearly define activities of state authorities which can influence the work of other stakeholders (for instance, *the Ministry of Justice shall organize a conference on the importance of monitoring war crimes trials for representatives of the European Union, other international and non-governmental organizations*).

2. Language and Nature of the Draft Strategy

The Draft Strategy is to a great extent declaratory and descriptive, which is not in line with its purpose. Namely, the Government's Strategy represents a binding act, the objective of which should be to offer specific tasks and guidelines to the institutions in relation to their work, therefore, the language used therein should be imperative. There are a number of activities for which the Draft Strategy does not envisage a responsible carrier of the activity or specific and mandatory tasks for the carriers. Without such guidelines, it is not possible to monitor the effectiveness of the Strategy or the efficiency of work of the responsible authorities. This way the Strategy loses its binding character and it thus loses its purpose. For instance, on page 20 the Strategy speaks about the maintaining of OWCP's independence "through the **provision of adequate capacities**" without stating who is the subject responsible or what specifically he or

she is responsible for. It is stated on page 21 that the OWCP will “**intend** to register and take over the cases”. By using the word *intend* (instead of *will*), this activity loses its binding character and the possibility to evaluate the work of the OWCP is lost. A series of OWCP’s activities are listed under *Objective 3* on the same page together with deadlines in which the OWCP “**should** implement” these activities. A series of “subjectless” activities are provided on page 33 meaning the activities for which carriers have not been specified: “Complete Access and Inspection of Archives”, „Identification of Documents and Evidence“. On page 37, an activity was envisaged without specifying its carrier, but also without any content: “Periodical organization of courses, seminars, and trainings for journalists who report on war crimes trials”. The Draft Strategy also envisages the publication of “necessary information” regarding judgments (page 37); the provision of “a sufficient amount of relevant information about the conflicts” for students (page 38), the publication of “substantial” reports on the work of the judiciary (page 37), and so on, without explaining the real substance of these obligations. The Draft Strategy also envisages “periodic” organization of various trainings, without specifying any time frames in which they should be organized. The deadlines defined, as well as the entire Strategy, are impossible to implement without having specific obligations set for clearly defined activity carriers.

Recommendations:

- 1) specify each activity and set an assessable result for each of these activities; and
- 2) Specify a public authority, or an activity carrier, for each of the activities.

3. Background of the Draft Strategy

Since the addressees of the Strategy are state authorities *in Serbia* and the Strategy is aimed at the enhancement of the prosecution of war crimes *in Serbia*, the background and reasons for the adoption of the Strategy should also refer to the situation relating to the judiciary in Serbia, not in the region or before international courts. The statement that not a single UN country has executed as many arrest warrants as Serbia has (page 13); “that it is well-known that the Government of the Republic of Serbia cannot be satisfied with the penal policy implemented by the ICTY Office of the Prosecutor, and with certain controversial rulings rendered by certain trial

chambers” (page 14); that “a far lesser number” of non-Serb perpetrators have been prosecuted in Bosnia and Croatia (pages 15-16), and so on.

As opposed to comments addressing the work of the authorities of other countries, the Draft Strategy only superficially analyses the work of the authorities which are in fact the addressees of the Strategy, therefore, the reasons for certain activities envisaged remain unknown or the Strategy did not define any activities necessary for the improvement of the work of these institutions.

Examples:

- As part of the analysis of the out-of-court protection of witnesses, the Draft Strategy identifies only consequences of a number of problems (such as witnesses leaving the Witness Protection Program, the disclosure of identities and location of witnesses), but not the real causes of these problems, which need to be addressed (unprofessional behaviour of the Witness Protection Unit); moreover, the procedural protection of witnesses and victims of sexual violence have not been analysed at all (page 16, 17);
- When analyzing the problems occurring in the regional cooperation, only problems noted by the OWCP are stated, but not the omissions made by the OWCP as part of the regional cooperation, which led to the serious breaches of the achieved cooperation agreements (Bosanac case, Divjak case, Orić case, Purda case, and so forth) (page 15);
- When speaking about the commendations made by the UN Committee on Enforced Disappearances regarding the application of the Convention, a serious critical aspect of the Committee's Report, which relates to the cases of war crimes in particular, is completely neglected (page 12);
- “Provision of adequate capacities” for the OWCP has been envisioned without analyzing the existing shortages in the OWCP's capacities (page 20);

- The provision of “appropriate technical equipment” for courtrooms in which war crimes trials are being held without stating or analyzing the shortcomings of the existing equipment (page 24), and so forth.

Recommendations:

- 1) Leave out statements not relating to the addressees of the Strategy;
- 2) For all objectives and activities first explain the reasons for their inclusion in the Strategy.

2. SPECIFIC COMMENTS

1. Enhancing Efficiency of War Crimes Proceedings Before Authorities of the Republic of Serbia

1.1 Investigations and Filing of Indictments

i. OWCP Strategy

The OWCP Strategy represents the backbone of the future state strategy for the prosecution of war crimes in Serbia. The quality and quantity of OWCP's activities in the period covered by the national Strategy will have a decisive impact on its success because this is the institution, which initiates criminal proceedings and triggers the engagement of other institutions in the prosecution of war crimes. In that sense, the National Strategy, as a paramount strategy for the prosecution of war crimes, has to determine the qualitative and particularly the quantitative elements and objectives of the future OWCP Strategy in a more precise manner. Without concrete and quantifiable objectives of the OWCP Strategy, the national strategy will also remain without the essential and measurable indicators of success made in the prosecution of war crimes in Serbia in the period 2016-2020.

The current Draft Strategy does not contain either concrete or quantifiable guidelines for the drafting of the OWCP Strategy. The Draft Strategy envisages that the future strategy should

achieve two ultimately fluid, unmeasurable and abstract objectives. As stated on page 9 of the Strategy, the OWCP Strategy should:

- 1. Enhance the efficiency of investigations and the process of raising indictments, and*
- 2. Approach the phase in which it will complete its work, taking into account the passage of time and the age of witnesses and suspects.*

One cannot make a clear determination based on this definition of anticipated objectives of OWCP's work of what would be considered success and what would be considered failure in the prosecution of war crimes in Serbia at the end of 2020, or what are the focus and priorities in the prosecution of war crimes in this period. Finally, the objectives of the OWCP's Strategy defined in this manner make any attempt of precise definition of the resources needed by the OWCP and other institutions in order to provide satisfactory results in the application of the national strategy impossible. In other words, the Draft Strategy lacks the key indicator of success – the anticipated quantitative and qualitative progress in the prosecution of war crimes.

In addition, one may conclude from the Strategy that the objectives of the national strategy (Chapter 1.6.), or positions of the Government of Serbia regarding the prosecution (Chapter 1.3.), are substantially limited by the austerity measures introduced by the Government of the Republic of Serbia (see Risks of Implementation, page 39) and that the emphasis is put on the “use of the existing resources” and “optimal use of the new expanded resources *in so far as possible*” [italics added by the HLC]. Moreover, when it comes to one of the most important elements of the Draft Strategy – the strengthening of human resources in the OWCP – the Draft Strategy refers to the Action Plan for Chapter 23, which was not only created before the production of the Draft Strategy and a deeper analysis of the problems and objectives of the prosecution of war crimes in the period 2016-2020, but it also is a non-definite document, susceptible to changes. This practically means that the increase in the number of Deputy Prosecutors for War Crimes will not represent a measure laid down by the future National Strategy, but it will rather be in the power of the Ministry of Justice to make a decision, in subsequent revisions of the Action Plan, to decrease the planned and so much needed

enhancement of the OWCP's capacities if it is in accordance with the austerity measures or some other reasons.

In this sense, it is necessary to underline that the announcement of austerity measures and the transfer of the key role to the Ministry of Justice when it comes to the strengthening of capacities of the key institutions, is not appropriate to the challenges in the prosecution of war crimes in Serbia, particularly in the context of the number of cases that have not yet been prosecuted and constant political pressures on the OWCP. As already mentioned earlier in the text, bearing in mind the fact that the Draft Strategy does not set key qualitative and quantitative indicators of success, a justified fear that the Strategy will not bring about the anticipated quantitative and qualitative progress in the prosecution of war crimes emerges. The fact that the Draft Strategy does not provide for the increase in the number of judges and trial chambers in special war crimes departments of the Higher Court and the Court of Appeal also points out that a substantial increase in the number of cases is hardly possible (Chapter 1.2.).

Recommendations:

- a) Set concrete quantitative guideline regarding the number of initiated cases, and in the context of priority and high-profile cases which the OWCP will prosecute in the period 2016-2020;
- b) The establishing of precise record of cases and case prioritization as well as taking over cases from prosecution offices of general jurisdiction should precede the drafting of the OWCP Strategy;
- c) Draft Strategy should contain concrete guidelines regarding the enhancing of capacities of all institutions, starting with the OWCP, in order to avoid the reference to the Action Plan for Chapter 23;
- d) Erase Criterion 5 (equal regional distribution of investigations) from the prioritization criteria because it is, or it might be, contradictory to the Criterion 3 and activities in the area of regional cooperation.

- e) Considering that there are over 10,000 persons who are still reported as missing as a result of the wars on the territory of the former Yugoslavia, the cases in which victims are reported as missing should be taken as priority for the purpose of finding them. This criterion is in line with the Declaration on the Role of the State in Addressing the Issue of Persons Missing as a Consequence of Armed Conflict and Human Rights Abuses signed by the Presidents of Serbia, Montenegro, Croatia, and BiH in 2014. In Article 7 of the Declaration, Serbia took over an obligation to prosecute perpetrators responsible for forcible disappearance of people and their subsequent hiding in priority proceedings.
- f) Insert the criterion of priority prosecution of criminal offences in which victims are members of vulnerable groups, in particular victims of sexual violence and children. The estimate is that at least 50,000 women and girls were raped during the wars in the former Yugoslavia; half of all ICTY indictees have also been charged with the commission of sexual violence; more than 100 cases of wartime sexual violence have been prosecuted in BiH to date. There are only two cases of wartime sexual violence, which have been finally completed before the Departments for War Crimes in Serbia.
- g) Change the language used in Objectives 2 and 3. Instead of saying “The Office of the War Crimes Prosecutor will intend to register”, it should be said “will register”. Instead of saying “The War Crimes Prosecutor should” it should be said “The War Crimes Prosecutor will”. The deadlines foreseen should be adjusted to the activity which is defined in a precise manner.
- h) Change Objective 2 as follows: after the words “The Office of the War Crimes Prosecutor will intend to take over all of the cases of war crime” add “*whether or not they are qualified as war crimes.*”
- i) Add in Objective 2 that the list of war crimes cases pending before courts of general jurisdiction will be published on the web page of the Republic Public Prosecutor's Office or the Office of the War Crimes Prosecutor.

2. Service for Discovering War Crimes of the Serbian MUP

The Draft Strategy stipulates that the enhancement of the work of the Serbian MUP Service for Discovering War Crimes (SDWC) shall be based on the analysis of the legal and factual situation and the needs of the SDWC which will be prepared by the Serbian MUP. An expert analysis as a cornerstone of the future reform of this Service is a good method. However, to designate MUP as the sole carrier of this activity is not a good idea because it does not provide guarantees that this analysis will have a comprehensive and impartial character, particularly bearing in mind the fact that in the current SDWC's practice, it appears that MUP systematically failed to provide sufficient support for the work of this Service.¹ In that sense, it would be good to have experts for police work on cases of war crimes who are not employed in the MUP participate in the drafting of this analysis. In practice, the work of the SDWC, in accordance with the Criminal Procedure Code (CPC), greatly depends on the actions of the OWCP. Therefore, it would be good to have a representative of the OWCP together with representatives of MUP and experts, in the process of the drafting of this analysis.

Recommendation:

- a) When drafting the analysis of the legal and factual situation and the needs of the SDWC, include a representative of the OWCP and an expert with the experience in police work in cases of war crimes, should be included.

3. Courts (trials)

The objectives of the Strategy, which relate to the courts, failed to address some of the very important problems and challenges, without which significant progress in the prosecution of war crimes cannot be expected. Above all, this means the increasing of material and human resources (the number of judges and court officers) and the establishing of the system for the appointment of judges in the Special Department for War Crimes of the Higher Court in Belgrade by which the permanence of judges in these chambers would be provided thus

¹ *10 Years of War Crimes Prosecution in Serbia – Outlines of Justice*, Humanitarian Law Center, September 2014, page 31-36.

preventing the frequent repetition of trials due to the changes made in the composition of trial chambers, as well as increased specialization of judges.

Recommendations:

- a) Provide in the Draft Strategy for the strengthening of material and human resources of courts, which would correspond to the increased number of cases of war crimes.
- b) Adopt necessary amendments to the laws and by-laws guaranteeing greater permanency of judges in the Special Department for War Crimes of the Higher Court in Belgrade.

4. Witness and Victim Protection

As stated earlier, the analysis pertaining to the situation relating to the protection of witnesses and victims does not offer a clear insight into the causes of some of the serious problems occurring in the area of procedural and particularly out-of-court protection. With this regard, some of the activities planned remain ambiguous and incomplete.

Recommendations:

- a) Within Objective 1, add the following activity: the Ministry of Justice shall establish a working group comprising representatives of the Ministry, the Republic Public Prosecutor's Office (RPPO), the OWCP, and the Departments for War Crimes of the Higher Court and the Court of Appeals and experts in the area of criminal and criminal procedure law, which would propose amendments to the CPC introducing special rules relating to establishing proof of acts of sexual violence: i) prohibition of the acceptance of victim's past sexual behaviour as evidence in the proceedings; ii) the rule of evidence according to which establishing the act of rape need not be corroborated by other evidence; iii) the rule that consent by the victim does not represent a basis for acquittal if this consent was given out of fear for one's self or a close person.
- b) Considering the unbreakable relations between the provisions of the Law on the Protection of Participants in the Criminal Proceedings and the Protection Unit, a mixed working

group comprising representatives of the Ministry of Justice, the MUP and the OWCP, with the participation of one expert with experience in the implementation of protection programs (working groups stipulated in Objectives 1 and 2 should be integrated) should produce an analysis of the current implementation of this law and the problems occurring in the functioning of the Unit.

c) Include among issues that the aforementioned working group would deal the issue of establishing a formal procedure for objections being filed by persons included in the program addressed against members of the Unit.

d) Specify the following: the improved cooperation between the Unit and the OWCP. Name the carrier of the activity and define in a more precise manner the problem which this activity would address.

5. Victim Support

Recommendations:

a) As part of the activity, which prescribes the adoption of by-laws that would regulate the mandatory provision of information to victims, possible amendments to the CPC should also be foreseen, considering the fact that the obligations of the court and the Prosecutor's Office cannot be established by by-laws.

b) Add the following activity: the Ministry of Justice shall launch an initiative for the signing of an inter-state agreement with the successor countries of the former Yugoslavia on the uninterrupted acting of representatives of injured parties in cases of war crimes, regardless of their membership in different Bar Associations.

6. Defence

Recommendations:

- a) Add the following activity: the Ministry of Justice shall launch an initiative for the signing of an inter-state agreement with the successor countries of the former Yugoslavia on the facilitated procedure of evidence requisition by the defence counsel in cases of war crimes.
- b) As part of the activity, which prescribes a continuous and professional training for defence counsel, amendments to the Law should be foreseen, which would make this training mandatory.

7. War Crimes Trials and the Issue of Enforced Disappearances

Recommendations:

- a) Include the following objective: Improvement of visibility of the right of missing persons and their families to truth in public.
- b) In order to achieve this objective, it is necessary to stipulate an activity of the Commission for Missing Persons relating to the implementation of public campaigns aimed at encouraging individuals, who have information on the locations of concealed graves to share this information with the institutions.

8. Cooperation with the International Criminal Tribunal for the Former Yugoslavia

Recommendation:

- a) Define carriers for activities provided in this Chapter.

9. Improving the general position of the society towards the issue of war crimes trials

Recommendations:

- a) Define carriers for activities provided in this Chapter.
- b) Modify Activity 1, in changing the expression “to publish necessary information about the judgments” “to to publish *judgments*”.
- c) Modify Objective 3. Instead of enabling students to receive “sufficient amount of relevant information”, specify the principles on which the curriculum will be based. For example, add: “the curriculum shall be based the facts established in final judgments delivered by domestic, international, and courts in the region.”
- d) Modify the activity stipulated in Objective 3. Include experts and relevant stakeholders, who have already been included in various initiatives for the purpose of drafting the amendments to history textbooks, as project carriers.
- e) Add the following activity: the Ministry of Justice shall establish a working group comprising representatives of the Ministry, the RPPO, the OWCP, the Supreme Court of Cassation, the Departments of the Higher Court and the Court of Appeals, the Office of the Commissioner for the Information of Public Importance and Protection of Personal Data and experts of relevant professions, which will define a unique rulebook for anonymization of judgments in cases of war crimes.
- f) Add the following activity: Make audio and video recordings of main hearings in cases of war crimes available to public through the media – the Ministry of Justice shall initiate the amendment of Article 60 Paragraph 1 of the Court's Rules of Procedure to match Article 16 of the Law on the Prosecution of War Crimes for the purpose of harmonizing the rules on the recording of main hearings in cases of war crimes in the Court’s Rules of Procedure with this Law.

g) Add the following activity: Outreach offices shall be established in the War Crimes Departments in the Higher Court and the Court of Appeals.

h) Specify the following activity: the presence of representatives of the OWCP in the meetings of the Negotiation Group for Chapter 23 with the National Convent for the EU.