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Humanitarian Law Center's amendments to the European Parliament Draft Motion for Resolution on the 2016 Report on Serbia

Proposed text	Amendment
<p>22. Welcomes the fact that Serbia remains constructively committed to bilateral relations with other enlargement countries and neighbouring EU Member States; has taken positive note of the fact that Serbia has shown an increasingly constructive engagement in regional cooperation initiatives such as the South-East Europe Cooperation Process, the Regional Cooperation Council, the Central European Free Trade Agreement, the Adriatic-Ionian Initiative, the Brdo process, the Western Balkan Six initiative and its connectivity agenda and the Berlin process; calls on Serbia to implement the connectivity reform measures associated with the connectivity agenda; underlines that outstanding bilateral disputes should not have a detrimental effect on the accession process; welcomes the adoption of a national strategy for the investigation and prosecution of war crimes; notes that the mandate of the former War Crimes Prosecutor expired in December 2015; stresses that the appointment of his successor is a matter of serious concern; calls for the implementation of this strategy and the adoption of an operational prosecutorial strategy; calls for full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY); urges the authorities to continue working on the issue of the fate of missing persons;</p>	<p>22. Welcomes the fact that Serbia remains constructively committed to bilateral relations with other enlargement countries and neighbouring EU Member States; has taken positive note of the fact that Serbia has shown an increasingly constructive engagement in regional cooperation initiatives such as the South-East Europe Cooperation Process, the Regional Cooperation Council, the Central European Free Trade Agreement, the Adriatic-Ionian Initiative, the Brdo process, the Western Balkan Six initiative and its connectivity agenda and the Berlin process; calls on Serbia to implement the connectivity reform measures associated with the connectivity agenda; underlines that outstanding bilateral disputes should not have a detrimental effect on the accession process; calls on Serbia to promote a climate of tolerance and condemn all forms of hate speech, public approval and denial of genocide, crimes against humanity and war crimes through amendments of the Criminal Code; welcomes the adoption of a national strategy for the investigation and prosecution of war crimes; notes that the mandate of the former War Crimes Prosecutor expired in December 2015; stresses that the appointment of his successor is a matter of serious concern; calls for the implementation of this strategy and the adoption of an operational prosecutorial strategy; calls for effective investigation of high-profile war crimes cases, calls for improving regional cooperation in war crime cases; calls for full cooperation with the International Criminal</p>



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	<p>Tribunal for the former Yugoslavia (ICTY); urges the authorities to step up their efforts on the issue of the fate of missing persons, including by opening state archives relating to the war period; as well as on preparing a reparation scheme for victims and their families as an important precondition for reconciliation; points out that a law on civilian victims should be adopted without any undue delay bearing in mind that the existing legislation does not recognize several groups of war crime victims; reiterates its support for the initiative to establish the Regional commission for the establishment of facts about war crimes and other serious violations of human rights committed in the former Yugoslavia (RECOM) and urges the government of Serbia to take the lead on its establishment;</p>
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RATIONALE

1. Public Approval and Denial of Genocide, Crimes against Humanity and War Crimes

On 23 November 2016 the National Assembly of the Republic of Serbia adopted an amendment to the Criminal Code which prohibits public approval and denial of genocide, crimes against humanity and war crimes, **but only if those offenses have been established by a final judgment of a court in Serbia or the International Criminal Court.** The amendment excludes final judgments of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Court of Justice (ICJ).¹

Public officials stated that this change to the Criminal Code was an obligation from Serbia's EU accession process.² The Humanitarian Law Center (HLC) believes that such actions by the Serbian Government are deceitful and show lack of good faith in the implementation of Chapter 23 reforms, as well as in confronting Serbia's wartime past.

¹ Text of Article: "Anyone who publicly approves, denies the existence or significantly reduces the weight of genocide, crimes against humanity and war crimes committed against a group of persons or a member of a group determined on the basis of race, colour, religion, origin, state, national or ethnic affiliation, in a way that can lead to violence or incitement of hatred against such a group of persons or member of that group, **if those offenses have been established by a final judgment of a court in Serbia or the International Criminal Court,** shall be punished by imprisonment for six months to five years."

² "Serbia to punish genocide, war crimes denial", *Politico*, 24 Nov 2016, available [here](#).



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By excluding those crimes established by the ICTY, the Code allows for the denial and public approval of the Srebrenica genocide, the crimes at Ovčara, the mass crimes committed in Prijedor, Markale, Meja and Korenica, Izbica and many other places during the wars in the former Yugoslavia, which is contrary to Serbia's obligations under its Law on Cooperation with the ICTY. Additionally, the judgment of the International Court of Justice, which is binding for Serbia under Article 94 of the UN Charter, established that genocide has been committed in Srebrenica, adding that Serbia violated the Convention on the Prevention and Punishment of the Crime of Genocide on two grounds – firstly, because it did not do anything to prevent the Srebrenica massacre in July 1995, “although it must have been clear for Serbia that there was a serious risk of genocide”; and secondly, because it failed to punish those who participated in the crime, which it could have done.

The HLC expresses its concern, and indicates that the Code has been adopted at the time of a continuing campaign which is aimed at denying judicially established facts, with the purpose to revise the history about the 1992-1995 war in Bosnia. This entire endeavor is being implemented with the use of the state resources of the Republic of Serbia.³

The HLC believes it is necessary for the National Assembly to adopt a legal solution that would penalize the denial of facts established before all relevant international courts, thus setting an example to other institutions and initiating the process of dealing with the facts of the past, as a precondition for reconciliation. The HLC believes that the authorities of the Republic of Serbia should accept the facts established by the ICTY and the ICJ regarding the crimes committed in the former Yugoslavia during the 1990s, according to their formal obligation and declarative commitment. According to the National Strategy for War Crimes Prosecution one of its aims is to “raise the level of general public awareness of events in the former Yugoslavia and the need to expose war crimes, and have them investigated and prosecuted by punishing the perpetrators regardless of their national, ethnic and religious affiliations or their rank.”

2. High profile war crimes cases

The Office of the War Crimes Prosecutor has never indicted a high-ranking person for war crimes. All confirmed indictments from the reporting period have been filed against direct war crimes perpetrators – low ranking members of armed formations, who, as a rule, had no rank, despite the fact that the National Strategy for the Prosecution of War Crimes states that “cases against high-ranking suspects should be considered the priority in the work of the Prosecutor.” Thus, the practice of non-prosecution of senior perpetrators in the former military, police and political hierarchies of Serbia, that is, of the Federal Republic of Yugoslavia, has continued. In its practice so far, the only high ranking suspects the OWCP

³ See HLC Press Release, “Crime in Tuzla’s Kapija: Revision of the judicially established facts and putting regional cooperation to the test”, available [here](#).



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initiated proceedings against were members of the armed and civilian structures of Bosnia and Herzegovina and Republic of Croatia.⁴

The lack of prosecution of high ranking perpetrators is criticized by Trial Chamber presidents from the Higher Court's War Crimes Department. Announcing their judgments, they publicly ask why the superiors have not been charged, since evidence which indicates their responsibility was presented during the proceedings.

In the Lovas case, the Presiding Judge stated the following: "The Second Brigade of the JNA has the biggest responsibility;" in the Beli Manastir case, the Presiding Judge said: "The superiors to the defendants are also responsible for this crime;" in the Qyshk/Ćuška case, the Presiding Judge emphasized: "The rules of the military hierarchy are such that one may conclude that someone else besides Toplica Miladinović [the first defendant] was there; however, we have dealt only with the charges presented."

3. Regional cooperation in war crimes prosecution

After 12 years of contacts between prosecution offices in the region within the framework of cooperation in the prosecution of war crimes, the Office of the War Crimes Prosecutor (OWCP) of the Republic of Serbia for the first time did not participate in the regional conference of war crimes prosecutors, the tenth in the series, which began on the 5th September 2016 in Brijuni, Croatia. This is a dramatic change in long-standing practices, and it is happening at a moment of severely undermined bilateral relations between Serbia and Croatia, and a political crisis in the region. The HLC feels that this is an alarming indicator of political influence being exerted on the judiciary, and points out that the decision on non-participation by the OWCP at the conference is in direct conflict with the obligations which the Republic of Serbia committed itself to with the Action Plan for Chapter 23 and the National Strategy for the Prosecution of War Crimes.

During the past years, regional cooperation in the prosecution of war crimes has been evaluated as being, in general, slow and inefficient. The formation of joint investigative teams between the prosecutors' offices of Bosnia and Herzegovina and Serbia, whose work has resulted in indictments for the murders of hundreds of Bosniak civilians in the village of Kravica (Srebrenica) and for the torture and murder of 20 people abducted from a train at the station of Štrpci, pointed to the possible reach of this regional cooperation. By the act of non-participation in one of the most important expert meetings in the framework of regional cooperation, a sharp cut has been inflicted in relation to these achievements, and regional cooperation has again taken a few steps backwards.

⁴ Proceedings against Ejup Ganić – a member of the Wartime Presidency of B&H, Jovan Divjak – a general in B&H Army, Vesna Bosanac – a Director of the General Hospital in Vukovar, Vladimir Šeks – Vice-President of the Croatian Parliament, Naser Orić – Commander of the Bosnian Army in Srebrenica, etc



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It is because of its importance in the fight against impunity for war crimes that regional cooperation represents one of Serbia's key commitments in the framework of negotiations on accession to the European Union (EU). The 2016 Serbia Progress Report by the European Commission emphasizes that „regional cooperation and good neighbourly relations form an essential part of Serbia's European integration process and contribute to stability, reconciliation and a climate conducive to addressing open bilateral issues and the legacies of the past” and that “it is important that these regional cooperation efforts continue to be strengthened”. The Action Plan for Chapter 23 in the field of war crimes envisages joint activities of prosecutors' offices in the region (for example, activity 1.4.1.3. Development of a Prosecutorial Strategy for the Investigation and Prosecution of War Crimes „with the participation and support of regional prosecutors' offices”). Finally, the 2016 National Strategy for the Prosecution of War Crimes states as one of its goals „support to the judiciary through the promotion of regional cooperation”, and foresees a number of activities in the field of regional cooperation, including the signing of several bilateral agreements aimed at improving the prosecution of war crimes. Moreover, the Strategy explicitly provides for the OWCP's participation in the regional conferences of the war crimes prosecutors' offices, as well as for the OWCP's obligation to initiate the „organization of regular quarterly meetings between regional prosecutors, the subject of which would be a discussion about specific cases that have been delivered to them and the problems that have risen in connection with them, in the scope of the regional cooperation.”

4. Establishing the fate of missing persons and access to state archives

Over 900 bodies of missing Kosovo Albanians have been exhumed from four mass graves found on the territory of the Republic of Serbia. These people were killed during the armed conflict in Kosovo and their bodies were transferred and buried in secret locations in Serbia, in order to conceal evidence of crimes. No one in Serbia has been charged for the concealment of bodies of Kosovo Albanians in the period 1999-2002, while the ICTY has convicted nearly the entire political, military and police leadership of the Republic of Serbia for the concealment of bodies. The ICTY has determined that the Serbian army and police were responsible for the collection of bodies in Kosovo, and that the police were responsible for their concealment.⁵

The laws on the military and military courts (in force during the 90's), as well as official military orders, required that all cases of crimes, discovery of bodies and their treatment be documented by special organs within the military. Irrefutable evidence exists that these

⁵ See ICTY Trial Chamber Judgment in the case of *Vlastimir Djordjevic* (23 February 2011), paras. 553, 985, 988, 2118, 2119 and 2121; ICTY Trial Chamber Judgment in the case of *Sainovic et al* (13 September 2010) paras. 1356 and 1357



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cases were indeed documented.⁶ Therefore, the archives of the Serbian army and police represent one of the key sources of information about the circumstances relating to the disappearance of civilians in Kosovo, the locations of the remaining mass graves in Serbia and other sites containing mortal remains of victims. These archives have remained secret to date and responsible institutions have been actively opposing all efforts to make them accessible to the public as well as all initiatives directed at the establishing of responsibility of members of the army and police for crimes committed during the armed conflicts in the former Yugoslavia.⁷

In addition, Serbia has still not adopted a law on missing persons, despite the constant demands of associations of families of the missing and examples from neighboring countries where such a law has been adopted (Bosnia and Herzegovina, Kosovo).

5. Effective witness and victims' protection system

The efficient prosecution of war crimes entails adequate witness protection and victims' support. Serbia's witness protection system was subject to criticism in the European Commission's 2009, 2010, 2012, 2013, 2014, 2015 and 2016 Progress Reports and the European Parliament's Serbia 2011, 2012, 2013, 2014, 2015 and 2016 Progress Resolutions, as well as other relevant international authorities (Council of Europe, UN Committees). The latest EC Serbia 2016 Report reiterates once again that „*no concrete steps have been taken to address the serious weaknesses in the witness protection system.*“⁸ The National Strategy for War Crimes Prosecution, as well as the Action Plan for Chapter 23, foresee a number of measures needed to be implemented in order to improve the witness protection system. However, no concrete steps have been taken in over a year according to the Ministry of Justice Report 4/2016 on implementation of the Action Plan for Chapter 23.⁹ On the contrary, witnesses are being intimidated and deterred from testifying, and there is also an instance of a lawsuit filed against a former protected witness due to alleged threats he sent to the prosecutor for war crimes.¹⁰ The lack of support coming from the institutions, which are responsible for the prosecution of war crimes and the lack of adequate protection by respective bodies, send a message to other potential witnesses that the information they possess is not welcome.

⁶ See ICTY Exhibit No. P1011, Report of the Commission for the collection of materials, on the battlefield sanitization performed on the territory of Kosovo and Metohija 1998-1999, *Sainovic et al Case*

⁷ HLC, "Access to Documents related to Crimes against International Law in the possession of Serbian Institutions: State Secret Prevails over Right to the Truth", April 2016, available at: <http://www.hlc-rdc.org/?p=31572&lang=de>

⁸ Ibid.

⁹ Report 4/2016 on implementation of the Action Plan for Chapter 23, p. 110.

¹⁰ Radio Free Europe, "Former protected witness accused", November 26th 2015, available [here](#) (in Serbian language only).



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Victims' support during court proceedings is limited to procedural protection and it does not involve expert psychological support. Victims of sexual violence have not been recognized as a particularly vulnerable group and they are often deprived of the support, which is deemed necessary, prior, during and after testifying.

6. Providing the victims and their families with the right to reparations

The status of civilian victims of war has not been improved in previous year. The rights of victims of human rights violations during the nineties in Serbia are still below the minimum international standards. Retrograde and discriminative Law on Civilian Invalids of War, dating from 1996, is still in force.¹¹ Pursuant to this law, the right to the assistance and support of the state is denied to the families of missing persons, victims of sexual violence, victims who suffer from the psychological consequences of the violence sustained, victims with physical disabilities of less than 50%, victims who perished on the territory of another country and those who perished as a result of the crimes committed by the Serbian armed forces. By explicitly excluding from the circle of potential beneficiaries all victims who suffered violence or were injured by formations that the Republic of Serbia does not consider as an enemy, such as the Yugoslav National Army (JNA), the Yugoslav Army (VJ), the Ministry of the Interior (MUP), or the Republic of Srpska Army (VRS) and their subordinate formations, this law prevents thousands of Serbian citizens, especially ethnic minorities who were targeted by Serbian forces during the 90's, from obtaining any kind of social support from the State.

A recent development in this area particularly reveals the unwillingness of Serbia to tackle this issue. Namely, in December 2014, the Ministry of Labour, Employment, Veteran and Social Policy prepared a Bill on the Rights of War Veterans, Disabled War Veterans, Civilian Victims of War and their Family Members. The Bill was prepared without any consultation with victims' associations or other relevant stakeholders. The Bill itself retains the majority of discriminatory provisions from the existing Law and it does not improve the protection of civilian victims of war in any sense.¹² The Ministry has refused to provide the public with the text of the Bill as well as the composition of the working group which participated in its preparation.¹³ The text, which was subject to public debate, is in contrast with the obligations that Serbia undertook by Chapter 23 Action Plan, which envisages the harmonization of domestic legal provisions with the notion of a victim in international human rights protection agreements.

¹¹ Law on Civilian Invalids of War ("Republic of Serbia Official Gazette" no. 52/96), Article 2, available [here](#).

¹² Humanitarian Law Center, "To Withdraw Discriminatory Bill on Rights of Civilian Victims of War", press release, December 2015, available [here](#).

¹³ Humanitarian Law Center, "Bill on Rights of Civilian Victims of War Still Hidden from Public Eye", press release, December 2015, available [here](#).



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The Council of Europe Commissioner for Human Rights addressed a letter¹⁴ on September 12th, 2016 to the Minister of Labour, Employment, Social and Veterans Affairs in the Government of the Republic of Serbia, Mr. Aleksandar Vulin, in which he is seeking information about the measures taken by Serbia in order to fulfil the recommendations on comprehensive and just reparations for civilian victims of war, which the Commissioner expressed in his Report on the visit to Serbia in July 2015.

In this report,¹⁵ the Commissioner for Human Rights expressed his worries that a great number of civilian victims of war would be excluded from realizing their right to adequate and efficient reparations despite the continuous requests made by relevant international bodies. He then pointed out that the existing legal framework deprives a number of categories of civilian victims of war, including victims of Serbian army and police, families of missing persons, victims of sexual violence, and others, from the right to material and other sort of support. On this occasion, the Commissioner also reminded of a number of remarks made about the new Bill, the passing of which the Ministry initiated in December 2014.

The victims of crimes committed by Serbian forces who are nationals of other post-Yugoslav countries, in view of the fact that the previously mentioned law does not apply to them, are trying to achieve the right to material compensation in court proceedings against the Republic of Serbia before the courts in Serbia. These cases are governed by the general rules of civil procedure, in which the victim is in the position of a prosecutor who must bear the burden of proof entirely. In most cases, the courts dismiss the victims' compensation claims because of an alleged Statute of Limitations, interpreting the relevant legal norms to the detriment of the victims. In the rare cases where the claims are granted, they result in minimum compensation amounts. The procedures in these cases last on average five years. The Serbian government pays out-of-court settlements to victims of political crimes committed by the Milošević regime, but not to the victims of war crimes committed by members of the police and the army. In this sense, the victims of war who are not citizens of Serbia do not have access to effective and just compensation.¹⁶

¹⁴ Letter of the CoE Commissioner for Human Rights available [here](#)

¹⁵ Visit report of the CoE Commissioner for Human Rights available at https://www.coe.int/en/web/commissioner/country-report/serbia/-/asset_publisher/mLRlkOZweJs0/content/serbia-impunity-for-war-crimes-discrimination-and-lack-of-media-freedom-hamper-human-rights-progress?_101_INSTANCE_mLRlkOZweJs0_languageld=en_GB

¹⁶ HLC, "Victims' Right to Reparation in Serbia and the European Court of Human Rights Standards", January 2016, available at: <http://www.hlc-rdc.org/?p=31034&lang=de>



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The deficiency of this system has been recognized in the EC Serbia 2016 Report: “Only a few victims of war crimes have access to effective compensation under the current legal framework.”¹⁷

The legal framework for victims’ right to compensation, as well as the Law on Civilian Invalids of War, has been criticized by the UN Human Rights Committee,¹⁸ the Committee for the Prevention of Torture¹⁹, the Committee on Enforced Disappearances²⁰ and the Commissioner for Human Rights of the Council of Europe.²¹

7. Concrete steps towards establishment of RECOM

The RECOM Initiative advocates for the establishing of a regional fact-finding commission about war crimes and other serious violations of human rights committed on the territory of the former Yugoslavia in the period 1991-2001. The RECOM Initiative has gained the support of more than 2,000 organizations and individuals from all the successor states of the former Yugoslavia, gathered in the Coalition for RECOM. The RECOM Initiative has also been supported by the presidents of Serbia, Croatia, Kosovo, Montenegro and members of the Presidency of Bosnia and Herzegovina. In 2013 the President of the Republic of Serbia Tomislav Nikolić appointed a judge of the Court of Appeals in Belgrade Siniša Važić as his representative to the Regional Expert Group for RECOM. In July 2015 the Serbian Government officially supported the establishment of RECOM²². The final phase of the RECOM Initiative is the ratification of its Statute by all post-Yugoslav countries.

The Coalition for RECOM insists on the Presidents and Presidency members in the successor countries of the former Yugoslavia, who have given declaratory statements of support to the establishing of RECOM, to take concrete measures directed at the establishing of this body.

Considering Serbia’s crucial role during the wars of the 90’s, as well as its publicly declared standpoints that it will continue to pursue reconciliation in the Western Balkans region,²³ Serbia should effectuate this standpoint by taking the lead in ratifying the RECOM Statute.

17 EC Serbia 2016 Report, November 2015, p. 57.

18 Report of the Human Rights Committee A/66/40 (Vol. I), p. 56.

19 United Nations Committee against Torture, “Concluding observations on the second periodic report of Serbia”, June 3rd 2015

20 United Nations Committee on Enforced Disappearances, “Concluding observations on the report submitted by Serbia under article 29, paragraph 1, of the Convention”, March 16th 2015

21 Council of Europe Commissioner for Human Rights, Report by Nils Muižnieks, following his visit to Serbia from 16 to 20 March 2015, July 8th 2015

22 Government of the Republic of Serbia, “Government backs initiative to establish facts on war crimes”, press release, July 6th 2015, available at: <http://www.srbija.gov.rs/vesti/vest.php?id=109929>

23 Government of the Republic of Serbia, “Policy of reconciliation to be continued despite attack in Srebrenica”, July 13th 2015, <http://www.srbija.gov.rs/vesti/vest.php?id=110126>



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The EU has been supporting the Initiative for establishing RECOM since 2009. It has also been following the development of this Initiative in its progress reports for the last five years, in the section dedicated to the issues of regional cooperation and good-neighborly relations.²⁴

²⁴ EC Serbia 2015 Report, November 2015; EC Serbia 2014 Progress Report, October 2014; EC Serbia 2013 Progress Report, October 2013; EC Serbia 2012 Progress Report, October 2012; Analytical Report - accompanying the document Commission Opinion on Serbia's application for membership of the European Union, October 2011.