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**Comments of the Humanitarian Law Center (HLC) on the
Draft Prosecutorial Strategy for Investigation and Prosecution
of War Crimes in the Republic of Serbia
in the period 2018 to 2023

(Prosecutorial Strategy)**



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I General Comments

There are three general comments that the HLC would like to make: the first relates to the methodological shortcomings of the Draft Prosecutorial Strategy, and the second refers to the language and style of the Draft Prosecutorial Strategy; while the third comment focuses on the expected assistance and support through the provision of financial resources for the implementation of activities foreseen by the Prosecutorial Strategy.

1. Methodological shortcomings in the Draft Prosecutorial Strategy

As the subject of the Prosecutorial Strategy, the draft text states it is “defining the goals, principles, *activities, performance indicators, deadlines and monitoring mechanisms* [HLC cursive] for capacity building and more effective prosecution of war crimes” (page 12).

1.1. Defining the activities of the Prosecutorial Strategy

It is not possible to clearly identify from the Draft Prosecutorial Strategy what activities the Office of the War Crimes Prosecutor (OWCP) will take exactly to improve the efficiency of the prosecution of war crimes. In that sense, it is necessary to change the text of the Prosecutorial Strategy by clearly defining the activities, which should be aimed at achieving the goals and affirmation of the principles of the Prosecutorial Strategy. Defining the specific activities will also facilitate later monitoring of the implementation of the Prosecutorial Strategy.

Recommendation:

- In the final text of the Prosecutorial Strategy, it is necessary for the OWCP to clearly define the activities it plans to carry out in the period 2018-2023.
- The activities should be formulated as binding.
- For each activity, the activity carrier needs to be precisely defined.

1.2. Defining deadlines for the implementation of activities

Defining the deadlines refers to the period of time in which each individual activity envisaged by the Prosecutorial Strategy is to be realized. As the precisely defined deadlines for the implementation of the activities are one of the most important indicators for measuring the effectiveness of the Prosecutorial Strategy in practice, they need to be precisely defined in advance.

In the specific parts of the draft, the OWCP has failed to determine the deadlines for the implementation of each envisaged activity.



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Thus, no deadline is set by which the OWCP will determine the criteria that will be taken into account when determining the priorities in the processing by which an expert meeting will be organized to establish clear criteria for prioritization, by which the five-year investigation plan will be determined, by which the list of cases of general prosecutor's offices will be finished, etc.

Examples: "... The Office of the War Crimes Prosecutor will initiate a Record of events that may be qualified as war crimes, and Records of unresolved cases, by which it will determine priority cases in the work and create a special five-year plan of investigation" (page 18) - the deadline by which the activity will be realized needs to be determined; "The OWCP and the War Crimes Investigation Service of the Ministry of the Interior of the Republic of Serbia will form a joint team whose task will be the improvement of the access of authorized employees at the Prosecutor's Office to the mentioned database" (page 18) - the deadline by which the activity will be implemented needs to be determined; "The War Crimes Prosecutor will start negotiations with its partners in neighbouring countries on the establishment of a unified database on all war crimes trials" (page 18) - the deadline by which the activity will be implemented needs to be determined; "The list and classification of the cases and documentation of the Committee according to the territorial principle is in progress, after which they will be made available to the teams" (page 18) - the deadline by which the activity will be implemented needs to be determined.

In the whole Draft, only for one activity is the deadline by which it will be implemented set - the initiation of the introduction of the electronic case management system in the OWCP, with the first half of 2018 envisaged as the deadline for the realization of this activity (page 22). In other examples, we find such deadlines as "in the upcoming period"- for instance: "The Office of the War Crimes Prosecutor will *in the following period* [HLC cursive] initiate the organization of round tables with the aim of exchanging experiences and harmonizing the joint work of the Office of the War Crimes Prosecutor and the Protection Unit" (page 27).

Recommendation:

- It is necessary that the OWCP in the final text of the Prosecutorial Strategy envisages a deadline in which each individual activity will be implemented.

1.3. Defining indicators for assessing the performance of the implementation of activities

The Draft Prosecutorial Strategy is characterized by the absence of indicators that measure the realization of activities, as well as the quality of work. Also, the Draft Prosecutorial Strategy lacks a key indicator of success i.e. of the expected quantitative and qualitative progress in the prosecution of war crimes. Without such guidelines, it is not possible to monitor the effectiveness of the Prosecutorial Strategy, or the effectiveness of the OWCP's work.

Recommendations:



- It is necessary to formulate precise, measurable indicators in the Prosecutorial Strategy, on the basis of which the efficiency and quality of the implementation of the Prosecutorial Strategy can be monitored.
- Activities, deadlines and indicators should be shown in tables.

2. Language and writing style of the Draft Prosecutorial Strategy

The second general comment on the Draft Prosecutorial Strategy refers to the **language and style in which the draft is written**. The Draft Prosecutorial Strategy is largely declarative and descriptive, which is not in accordance with the function of such a document. The Prosecutorial Strategy literally transmits the parts of the Action Plan for Chapter 23 and the National War Crimes Prosecution Strategy, which seems to be an unnecessary burden on the text.¹

The Prosecutorial Strategy should provide a brief, basic analysis of the current situation and set up precise tasks and guidelines for the future work of the OWCP, so its language should be concise, and written in the imperative and the active voice.

For example, in the part of the Draft that refers to increasing the efficiency of the work of the OWCP, “the War Crimes Prosecutor *should* [HLC cursive] carry out the following activities in order to increase the efficiency of the work” (page 13). If there is a wording in the Draft that the War Crimes Prosecutor “should” carry out activities, this means that he can carry out these activities, but he does not have to.

In the part of the Draft that refers to the criteria for determining the priority of the processing’s, it is stated that “the effect to the local community of a certain criminal offence which is the subject of the processing’s *should* [HLC cursive] also be taken into account” (page 14). Part of the draft text should be replaced to read “the effect of a certain part of the proceedings being the subject of processing’s to the local community”.

In the part of the Draft that refers to one of the criteria for determining priority cases, it is stated, “*Certainly* [HLC cursive], the War Crimes Prosecution will first and foremost prosecute crimes with serious consequences, including criminal offenses with a large number of victims” (page 17). Replace part of the text in the Draft to read, “The War Crimes Prosecution first and foremost prosecutes crimes with serious consequences, including criminal offenses with a large number of victims.”

¹The Action Plan for Chapter 23 is available at the official website of the Ministry of Justice: <https://www.mpravde.gov.rs/files/Action%20plan%20Ch%2023.pdf>, accessed: 12.03.2018. Part of the Action Plan for Chapter 23 on War Crimes Prosecution is at the following pages: 105-126; National War Crimes Prosecution Strategy is available at the official web site of the War Crimes Prosecution: http://www.tuzilastvorz.org.rs/upload/HomeDocument/Document_en/2016-05/p_nac_stragetija_eng.PDF, accessed: 12.03.2018.



In the part of the Draft that refers to the securing of the full confidentiality of the investigation process, it is stated: “Securing the confidentiality of investigations and testimonies is one of the goals and priorities in the area of war crimes prosecution envisioned by the National War Crimes Prosecution Strategy, and ensuring the full confidentiality of an investigation is an activity that *should* [HLC cursive] be conducted by a war crimes prosecutor [...] “(page 24). Replace part of the text in the Draft to read “Securing the confidentiality of investigations and testimonies is one of the goals and priorities in the area of war crimes prosecution envisioned by the National War Crimes Prosecution Strategy, and ensuring the full confidentiality of an investigation is an activity that is conducted by a war crimes prosecutor [...] “(page 24).

Recommendation:

- The final text of the Prosecutorial Strategy should be written proactively and decisively, and in particular should avoid indefinite formulations such as “*should*”, “*certainly*”, “*unnecessarily formal*”, “*expected*”, “*should be*”, “*will endeavour*”, “*within a future project*” and the like.

3. Provision of financial resources for implementation of activities envisaged by the Prosecutorial Strategy

Another controversial issue of the Draft Prosecutorial Strategy is the provision of financial resources for the implementation of the activities envisaged by the Prosecutorial Strategy.

As the OWCP states at the beginning of the Prosecutorial Strategy, the War Crimes Prosecutor, four deputies and seven assistants are currently employed within the OWCP (page 14). As the Action Plan for Chapter 23 foresees, the increase in the number of deputies and assistants in the OWCP should be carried out gradually, so that by the end of 2018, seven deputies and seven assistants are engaged within the OWCP.² It is already clear at the moment that three other deputy public prosecutors are missing; but it remains unclear why it is stated in the Prosecutorial Strategy that the OWCP will “subsequently request” funds for the salaries of deputy prosecutors, prosecutors’ assistants and experts, in order to strengthen the capacities of the OWCP, from the Ministry of Finance (page 48), rather than calling for the prompt implementation of the Action Plan for Chapter 23.

It is particularly worrying to expect that “the international community should provide funding through projects and support to the War Crimes Prosecution” (page 6).

The responsibility for providing financial resources for the work of the OWCP should belong primarily to the Government of the Republic of Serbia, which should provide the necessary financial resources.

²Action Plan for Chapter 23, Item 1.4.1.2, pp. 107-108.



In this regard, the expectations that the international community will provide financial resources for the work of the OWCP are inappropriate, as the OWCP is part of the Serbian justice system, and therefore financial resources have to be defined within the budget, while donor funding should only be complementary.

Recommendation:

- Expectations regarding international actors should be omitted from the text of the Prosecutorial Strategy.

II Special comments

The HLC's comments relating to specific areas foreseen by the Prosecutorial Strategy:

1. INCREASING EFFICIENCY OF THE OFFICE OF WAR CRIMES PROSECUTOR

1.1. Criteria for determining priorities in the processing

The Draft Prosecutorial Strategy in the part referring to the criteria for determining priorities in the processing's refers to the criteria for determining the priorities in the processing's determined by the National Strategy for the Prosecution of War Crimes (National Strategy).³ However, it must be borne in mind that the National Strategy is a document of a general nature, that is to say, *lex generalis*, which states in its text that the **OWCP in the Prosecutorial Strategy is obliged to define the criteria for the selection of war crimes and to create a list of priorities and important war crimes cases.**⁴ In other words, the Prosecutorial Strategy as *lex specialis* must contain specific criteria that will guide the OWCP in determining a priority in the processing. In relation to this, it is unclear why the Draft Prosecutorial Strategy refers to the criteria for determining priorities in processing set out in the National Strategy, when the criteria set in the Draft Prosecutorial Strategy have to be determined at this stage.

In support of the above stated, the fact is that the Action Plan for Chapter 23 in point 1.4.1.3. has already anticipated a certain categorization of cases (category 1-3 of cases), and therefore the Prosecutorial Strategy needs to elaborate them further.⁵

On the other hand, the author of the Draft Prosecutorial Strategy states that it is important to have defined and clear criteria in the processing, but he nevertheless further states that "insisting on a consistent application of criteria and rigidity in the application of criteria can have a very negative impact on fairness and efficiency in processing". Such a formulation of priorities in processing is subject to criticism for several reasons. First of all, one of the goals of the adoption of the National

³National Strategy for the Prosecution of War Crimes, Objective 1. pp. 21-22.

⁴*Ibid.*

⁵Action Plan for Chapter 23, Item 1.4.1.3, pp. 108-110.



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and Prosecutorial Strategy for the Prosecution of War Crimes is the processing of priority war crimes cases.⁶ The absence of criteria for determining priority cases and selective application of such criteria creates confusion as to the ways in which the OWCP will determine which case is a matter of priority, and which one not, and in what manner the processing of cases, marked as priorities according to predetermined criteria, can affect equity and efficiency in processing.

Also, the Draft text states that “priorities in processing’s, as well as the dynamics of work, are variable, on account of many factors”, and that “deviation from the set priorities may prove necessary in case of occurrence or change of the stated circumstances. In such a case, the list of priority cases will be reviewed [...]”.

If such a flexible attitude of the OWCP is accepted in relation to the processing of priority cases whereby the priority in processing is a variable category, and a certain deviation may be necessary - then the very concept of priority cases would be relativized, thus continuing the prior practice of processing cases with small numbers of victims, and in which only one person was charged. Such a practice would also make meaningless the goal to adopt both the National and Prosecutorial Strategies, in which the priorities in the processing would be determined, taking into account the fact that it is not possible to prosecute all those responsible for all committed crimes.

If we ignore the fact that the Prosecutorial Strategy must provide clear criteria for determining the priority in the processing, the author of the Draft - **without prescribing the deadline by which these activities will be implemented** -, states that the OWCP will carry out the selection of war crimes cases and create a list of priorities, and that it will organize expert meetings in cooperation with the Republic Public Prosecutor's Office in order to specify the criteria and their application (page 17). Such an arbitrary assertion only further prolongs the period before which the prosecution of the priority cases will commence. If we bear in mind that the adoption of the Prosecutorial Strategy is two years behind at the moment, further delay with the creation of the list of priority cases is unnecessary, as it also further wastes valuable time for prosecution.

Thus, the Draft Prosecutorial Strategy contains several controversial solutions. In the first place, the Prosecutorial Strategy at this stage has to have clearly defined criteria for determining priority cases. Those criteria should not be flexible and subject to change. On the other hand, if those clear criteria have not been already defined, a deadline must be set in which they must be established, in order to begin their application as soon as possible.

Recommendations:

- The Prosecutorial Strategy should provide clear criteria for determining the priorities in the processing’s.

⁶*National Strategy for the Prosecution of War Crimes, Priorities and Objectives in War Crimes Prosecution*, pp. 19-20.



- The Prosecutorial Strategy should define the deadline by which it will carry out the selection of war crimes cases and create a list of priorities.

1.2. Proceedings in absentia

In the part of the Draft Prosecutorial Strategy that refers to the criteria for determining the priority in the processing's, it is stated that "the Government provides full support to the practice of avoiding trials in absentia" (page 14).⁷ It is true that this quote was transferred to the Prosecutorial Strategy from the text of the National Strategy for the Prosecution of War Crimes. However, owing to the possible disadvantages that trials in absentia could bring, it is necessary to completely remove from the text of the Prosecutorial Strategy the formulation which indicates that there will be trials in absentia for war crimes cases.

It is true that the Criminal Procedure Code (CPC) provides for the possibility of a trial in absentia (Article 381), but it must not be forgotten that a trial in absentia is an exception to the rule that the main trial cannot be held without the presence of the accused.⁸ In order to be tried in absentia, the conditions required by Article 381 of the CPC must be met. The CPC generally formulates the reasons why someone would be tried in absentia, stating that it must be for *exceptionally justified reasons*, without entering into details in the analysis what those justified reasons are, but leaving the Trial Chamber to indicate them in their decision.⁹ Bearing in mind that war crimes do not become obsolete, the prosecutor could not appeal to the prevention of obsolescence as an *exceptionally justified reasons* for the trial of an accused war criminal in absentia.

In addition, proceedings in absentia would require the unnecessary spending of the already very limited resources of the OWCP, especially considering that persons convicted in absentia can apply for the reopening of criminal proceedings, beyond ordinary conditions.¹⁰ Instead of improving the efficiency of war crimes prosecution, the OWCP and the competent court would be burdened with cases that would have to be prosecuted again, if the accused were at some point available to the judiciary in Serbia.

Finally, the Prosecutorial Strategy should follow the commitment set forth in the National Strategy: "... in the forthcoming period, the Republic of Serbia will continue to do everything in its power to investigate all grave, large-scale and systematically committed war crimes, which have to be investigated and the perpetrators punished in accordance with international standards, regardless of the national, ethnic and religious affiliation or status of the offender and the victim, as well as to promote the policy of reconciliation, tolerance, regional cooperation and good neighbourly relations

⁷National Strategy for the Prosecution of War Crimes, Objective 1. pp. 21-22.

⁸Criminal Procedure Code ("Official Gazette" of the Republic of Serbia, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014), Article 381.

⁹*Ibid.*, Article 381, paragraph 1.

¹⁰*Ibid.*, Article 479.



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as a prerequisite for permanent stabilization and progress throughout the region”[HLC cursive]¹¹. In this regard, a possible future attempt by the War Crimes Prosecution to propose a trial in absentia would be in no way consistent with the stated determination to promote good neighbourly relations, since trials in absentia, as a rule, are those trials in which the accused persons are nationals of other states, and unavailable to domestic judicial organs.¹² Trials in absentia appear to be even less justified, given the possibility of transferring the prosecution to a foreign state,¹³ as the Draft Prosecutorial Strategy itself states (pp. 41-42).

Recommendations:

- The Prosecutorial Strategy should reiterate the commitment expressed in the National Strategy for the Prosecution of War Crimes, which specially focuses on promoting a policy of reconciliation, tolerance, regional cooperation and good neighbourly relations, as a prerequisite for permanent stabilization and progress throughout the region.
- It is necessary to completely remove from the text of the Prosecutorial Strategy the formulation which indicates that there will be trials in absentia in war crimes cases.

2. INCREASING THE INSTITUTIONAL CAPACITIES OF THE OFFICE OF WAR CRIMES PROSECUTOR

In the part of the Draft which relates to the professional development of employees in the OWCP, it is stated that “a group for norms and practices will be formed” with the task to monitor regulations and jurisprudence, and to inform the Prosecution's collegium (page 21). In addition to the issue of its being necessary to determine who will be members of this group, it is unclear why the formation of such a group is necessary, given that it is the duty of both the War Crimes Prosecutor and the deputy prosecutors to monitor changes in the regulations and jurisprudence.

The part relating to the professional development of employees and deputy public prosecutors contains a provision that the trainings will be carried out continuously, without stating what this specifically implies (page 22) – including whether it will be organized quarterly, semi-annually or annually. On the other hand, it is stated, among other things, that the trainings will be organized in cooperation with the Judicial Academy.

As a result of an insight acquired into the Curriculum of the Judicial Academy, the HLC found that certain areas of international humanitarian law and international criminal law are not included in the training programmes being implemented.

¹¹*National Strategy for the Prosecution of War Crimes*, 1.3. The Commitment of the Republic of Serbia, p. 5. See example given in the *National Strategy for the Prosecution of War Crimes* regarding the number of trials in absentia in Croatia, p. 17.

¹³ Law on Mutual Legal Assistance in Criminal Matters (*“Official Gazette of the Republic of Serbia”*, No. 20/2009), Article 2; Articles 49-55.



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At this point, we recall that the Action Plan for Chapter 23, section 1.4.1.2. as regards improving the capacities of the OWCP, also envisages “the potential engagement of military experts in accordance with the Prosecutorial Strategy”.¹⁴ Since the Prosecutorial Strategy should rely on the documents that preceded it, it remains unclear why the Draft Prosecution Strategy does not already envisage the engagement of military experts.

Recommendations:

- It is necessary that the OWCP and the Judicial Academy sign the Protocol on Cooperation, in which it will be explicitly stated that specialized training will be organized for the employees and deputy public prosecutors at the OWCP.
- It is necessary to anticipate the engagement of the military experts.

3. AFFIRMATION OF THE APPLICATION OF THE PLEA AGREEMENT INSTITUTE

The HLC considers that the affirmation of the application of the Plea Agreement institute is a good solution envisaged by the Prosecutorial Strategy. However, in relation to the Draft, which reads as follows: “The Prosecutor will issue an internal instruction that foresees the obligation to call the injured party for the purpose of making the property claim prior to the conclusion of the agreement, and the obligation to deliver the judgment to the injured party given on the basis of the agreement, in order to obtain a property claim in civil proceedings” (page 24), the HLC considers it is more appropriate to initiate an amendment to paragraph 1 of Article 319 of the CPC, since only the CPC can oblige the court to deliver the judgment rendered on the basis of a plea agreement, in order to realize the property claim in the civil proceedings.

Recommendations:

- The OWCP should initiate an amendment to Article 319 of the CPC, so that it reads as follows: “The court's decision on the plea agreement shall be delivered to the public prosecutor, the defendant and his defense attorney, the injured party and his representative.”
- It should be stressed that the OWCP will in particular take into account the conclusion of an agreement with the defendant, which may lead to the clarifying of the fate of missing persons.

4. PROTECTION OF WITNESSES AND VICTIMS

In the part of the Draft Prosecutorial Strategy that refers to the protection of witnesses and victims, the HLC has the following comments:

¹⁴Action Plan for Chapter 23, Item 1.4.1.2, pp. 107-108.



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“The Office of the War Crimes Prosecutor will in the following period initiate the organization of round tables with the aim of exchanging experiences and harmonizing the joint work of the Office of the War Crimes Prosecutor and the Protection Unit” – determine the deadline for the activity to be realized;

“The OWCP will request the Protection Unit to support the education of employees who are coming into or are expected to be in contact with the witnesses in the protection programme” (page 27) - It is unclear why the OWCP will require education from the Protection Unit since the Draft Prosecutorial Strategy states that the OWCP, together with representatives of the Protection Unit, participates in training programmes and seminars in the field of witness protection.

Similarly, the formulation that workshops with the Protection Unit should be “exempted from unnecessary formalities” (page 27) should in no way be found in the final text of the Prosecutorial Strategy, because the attitude of the members of the Protection Unit toward persons in the witness protection programme is most often criticized, both by international organizations and bodies, and by the domestic public. In this regard, any “unnecessarily formal” conduct should not be foreseen by the Prosecutorial Strategy.

Recommendation:

- In the final text of the Prosecutorial Strategy, the activity which foresees for workshops with the Protection Unit the requirement that the workshops be “exempted from unnecessary formalities” should be omitted.

5. SUPPORT TO VICTIMS AND WITNESSES

The Draft Prosecutorial Strategy does not provide for a change in the systematization of job positions in the OWCP, so it is necessary to engage a psychologist who will work with victims and witnesses. Namely, the Action Plan for Chapter 23 in point 1.4.4.4. explicitly foresees the engagement of a psychologist “in accordance with the Prosecutorial Strategy”; however, in the draft strategy submitted, engaging a psychologist is not mentioned.¹⁵

The Draft Prosecutorial Strategy recognizes the need to establish cooperation between the Service for the Informing and Support of Witnesses and Victims at the OWCP and relevant services in the region, but does not define how this cooperation will be established.

Recommendations:

¹⁵Action Plan for Chapter 23, Item 1.4.4.4, p. 123.



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- The text of the Prosecutorial Strategy should envisage the engagement of psychologists who will work with victims and witnesses.
- The text of the Prosecutorial Strategy should envisage the signing of a Cooperation protocol between the Service for the Informing and Support of Witnesses and Victims at the OWCP and the relevant services in the region.

6. WAR CRIMES TRIALS AND THE ISSUE OF MISSING PERSONS

Part of the Draft Prosecutorial Strategy regarding the cooperation between the OWCP and the Commission for Missing Persons is quoted very indefinite: “Cooperation needs to be improved and simplified by ensuring continuity in the exchange of data and information, the coordination of activities, and the establishment of the procedures in accordance with which the cooperation would take place” (page 32). The text of the Draft does not specify in which ways the continuity of the data exchange would be simplified and improved, nor which specific activities and procedures would characterize the cooperation.

Recommendations:

- Envisage Joint activities between the Office of the War Crimes Prosecutor and the Commission for Missing Persons of the Government of the Republic of Serbia should be envisaged, with regard to the conduct of public campaigns aimed at encouraging individuals in possession of information on the locations of secret graves to communicate this information to the institutions.

7. COOPERATION WITH THE MICT

In the part of the Draft Prosecutorial Strategy referring to cooperation with the MICT, it is stated that “it is realistic to expect cases of rape and other forms of sexual violence to be represented as forms of war crimes, in the proceedings that the OWCP will process in the coming period” (page 36). It is not clear why the author of the Draft has decided that the issue of prosecuting rape and sexual violence is dealt with in the part of the document referring to the cooperation with the MICT.

The prosecution of rape and sexual violence in war should be recognized as one of the priorities for prosecution, especially since the OWCP has only filed eight indictments for rape and sexual violence during the war since its inception.¹⁶

Recommendations:

- From the text of the Prosecutorial Strategy, in the part relating to cooperation with the MICT, the parts referring to the prosecution of rape and sexual violence should be

¹⁶Those are the following cases: *Gnjilane Group*, *Lekaj*, *Bijeljina*, *Bijeljina II*, *Zvornik III*, *Zvornik IV*, *Čuška*, *Skočić*, *Bratunac*.



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omitted. These parts of the text should be inserted in the part of the Prosecutorial Strategy which refers to the definition of priority cases for prosecution.

8. INTERNATIONAL AND INTERINSTITUTIONAL COOPERATION

Bearing in mind that almost all successor countries of the former Yugoslavia forbid the extradition of their citizens to other states, the prosecution of war crimes committed in the former Yugoslavia is inconceivable without the effective cooperation of the relevant institutions in the region.¹⁷ In that sense, additional efforts need to be made to regulate the issues that have been a stumbling block since 2003 right up until 2018, such as the conflict of jurisdiction, the conduct of “parallel investigations”, or the application of the principle of universal jurisdiction.¹⁸

In the Draft Prosecutorial Strategy, particularly noticeable is the absence of strategic activities related to the improvement of cooperation with the European Union Rule of Law Mission in Kosovo (EULEX) or provisional institutions of self-government in Priština, or to the establishment of cooperation with the Kosovo Specialist Prosecutor's Office in The Hague (pp. 42-44). The Draft Strategy recounts the previous cooperation with the EULEX Mission, but does not mention any activity that would lead to the promotion of cooperation. Failure to identify the problems that exist in cooperation is particularly worrying, since the last indictment for crimes in Kosovo was raised in 2014.¹⁹

Recommendations:

- The Office of the War Crimes Prosecutor should initiate the improvement of the normative framework with Croatia, Bosnia and Herzegovina and Montenegro, by concluding an interstate agreement that would determine the regional rules on the allocation of jurisdictions for dealing with war crimes cases and the improvement of the handling of requests.
- The Office of the War Crimes Prosecutor should define the way in which it will cooperate with the Kosovo Specialist Prosecutor's Office, based in The Hague.

8.1. Transfer of criminal prosecution to a foreign state

In the part of the Draft referring to the transfer of criminal prosecution, it is rightly stated that the Law on Mutual Legal Assistance in Criminal Matters does not foresee the obligation to

¹⁷Ten Years of War Crimes Prosecution in Serbia – *Contours of Justice*, HLC 2014, p. 24; *Model Strategy for the Prosecution of War Crimes Committed during and in relation to the Armed Conflicts in the Former Yugoslavia 2015-2025*, HLC. 2015. p. 17.

¹⁸See: *Initial Report on the Implementation of the National Strategy for War Crimes Prosecution*, HLC, 2017, pp.62-66.

¹⁹The last indictment for crimes in Kosovo is dated April 07, 2014 - the *Ljubenčić Case*.



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transfer criminal prosecution.²⁰ However, the possibility of transferring the prosecution provided by the said Law should not be interpreted as an option, but as an opportunity to prosecute those accused persons who would otherwise be inaccessible to the domestic judicial authorities.

In this regard, the statement from the Draft Prosecutorial Strategy remains unclear that reads: “The Office of the War Crimes Prosecutor of the Republic of Serbia will initiate a procedure for the transfer of criminal prosecution, or initiate it when, on the basis of its own assessment of the integrity of the prosecution of the alien, it is established that, in view of the factual circumstances in a concrete situation as it presents itself, *there is no social interest in the prosecution*” [HLC cursive] (page 41). This assertion is contradictory to the following assertion, stating in which situations the OWCP will initiate the procedure for the prosecution of criminal prosecutions.

Recommendations:

- The text of the Prosecutorial Strategy should clearly state the circumstances under which the OWCP will initiate the procedure for the transfer of criminal prosecution, in accordance with the Law on Mutual Legal Assistance in Criminal Matters and the circumstances stated on pp. 41-42 of the Draft Prosecutorial Strategy.
- The text of the Prosecutorial Strategy needs to be relieved of vague and indefinable notions, such as “social interest in prosecution”.

9. IMPROVEMENT OF THE OVERALL ATTITUDE OF SOCIETY TOWARDS THE QUESTION OF WAR CRIMES

In the part relating to the transparency of its work, the Prosecutorial Strategy envisages several activities that can lead to the improvement of the attitude of the society regarding the issue of war crimes trials. It is thus determined that the OWCP will “truthfully, fully and timely inform the public regarding prosecution in specific cases” (page 45), without specifying in which ways it will do this (whether through press releases after every main hearings, or invitations to the media to monitor particular main hearings, or organizing regular press conferences, etc.).

Recommendations:

- To add the following activity: the Office of the War Crimes Prosecutor will initiate the establishment of a working group to be composed of representatives of the Ministry of Justice, the Republic Public Prosecutor, the OWCP, the Supreme Court of Cassation, the Departments of the Higher and Appellate Courts, the Office of the Commissioner for Information of Public Importance and Protection of Personal Data, and experts with the

²⁰ Law on Mutual Legal Assistance in Criminal Matters (“Official Gazette of the Republic of Serbia”, No. 20/2009).



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appropriate profiles, who will formulate a uniform rulebook on the anonymization of judgments in war crimes cases.

- To establish a Public Relations Service at the Office of the War Crimes Prosecutor.
- To foresee the regular organization of press conferences.
- To improve the updating of the Office of the War Crimes Prosecutor website with more informative press releases and more up-to-date documents.

10. MONITORING AND EVALUATION OF IMPLEMENTATION OF THE PROSECUTORIAL STRATEGY

In the Draft Prosecutorial Strategy, it is not clear which state authority monitors the implementation of the Prosecutorial Strategy, as the text states that the OWCP submits a report quarterly to the Republic Public Prosecutor's Office and the Council for the Implementation of the Action Plan for Chapter 23 (page 46). The text does not specify the measures that the monitoring authority can apply in the event that the Prosecutorial Strategy is not being implemented. Also, the Draft Prosecutorial Strategy does not anticipate a public disclosure of a report on the implementation of the Prosecutorial Strategy.

Recommendations:

- The Prosecutorial Strategy should anticipate the regular quarterly publication of the Report on the Implementation of the Strategy, on the web site of the Office of the War Crimes Prosecutor.
- The Prosecutorial Strategy should anticipate the organization of media conferences, where it will present reports on the implementation of the Strategy.

The Draft Prosecutorial Strategy provides that the evaluation of the implementation of the Prosecutorial Strategy will be conducted in accordance with the performance indicators outlined in the National Strategy for the Prosecution of War Crimes (page 47). In this sense, one of the parameters for evaluating the success of implementation is “an increase in the number of legally terminated proceedings in relation to the number of indictments” (page 47). As the HLC has elaborated in detail in the Initial Report on the Implementation of the National Strategy for War Crimes Prosecution, an indicator that envisages an increase in the number of legally finalized proceedings in relation to the number of indictments cannot provide a realistic overview of the effectiveness of the work of the authorities responsible for the prosecution of war crimes.²¹ Increasing the number of indictments, regardless of their outcome, gives only the appearance of productivity, and therefore the HLC believes that this indicator should be reformulated to “an

²¹See: *Initial Report on the Implementation of the National Strategy for War Crimes Prosecution*, HLC, 2017, p. 12.



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increase in the number of convictions in relation to the number of indictments”, as only in this way can the quality and the success of the work of the OWCP be assessed.