Humanitarian Law Center

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Public's Right to Know of War Crimes Trials in Serbia

Contents

Abbreviations Used in the Text

BiH	Bosnia and Herzegovina
EU	European Union
HLC	Humanitarian Law Center
Rules of Procedure of the Court	Rules of Procedure of the Court "Official Gazette of the Republic of Serbia" No. 110/2009, 70/2011, 19/2012, 89/2013, 96/2015, 104/2015 and 113/2015
WCPO	War Crimes Prosecutor's Office of the Republic of Serbia
Law on Prosecution of War Crimes	Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings (Official Gazette of the Republic of Serbia, No. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009)
CPC	Criminal Procedure Code (Official Gazette of the Republic of Serbia, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014)

I Summary

The report by the Humanitarian Law Center (HLC) analyzes how are the existing mechanisms for public access to trials for war crimes applied and recommends necessary changes in the legislative framework and practice. The report, therefore, relates to the mechanisms available to the public to access information on trials, but not to proactive actions mostly yet to be adopted by the national judiciary in order to inform the public about their work (so called outreach).

The public's right to know about the war crimes trials, as a minimum, includes the right to access the courtroom where trials are held and documentation of war crimes cases (indictments, judgements, transcripts and audio/video records of main hearings); the right to record a trial for the purpose of public presentation and the right to keep court records from war crimes cases.

Out of the stated rights, only the right to access the courtroom and monitor the trial is strictly adhered to in Serbia and, therefore, it is not specifically analyzed in the Report. The public's right to access relevant documents from war crimes trials is limited in practice by the refusal of courts to deliver judgments from proceedings that are not final and by excessive anonymisation of data. Such actions are based on non-harmonized interpretation of already imprecise legislative framework. The right to record war crimes trials for the purpose of public presentation has not been achieved by any media or non-governmental organization so far, and until present day the public in Serbia has not had the opportunity to see a single testimony of the victims, perpetrators and witnesses, or the pronounciation of a judgment. In practice, the person authorized to decide on the request for recording – the President of the Higher Court in Belgrade, contrary to the law, rejects such requests. Finally, the legislator failed to recognize historical and social significance of court records from war crimes cases by determining them for permanent preservation. Instead, he applied the same rules on destruction to these records as to all other criminal records.

The report is based on several years of practice of the HLC, that monitors national war crimes trials from the start, obtains relevant court documents and reports about them to the public.

II Introduction

Public knowledge on court war crimes proceedings and established facts about the crimes is one of the key prerequisites for an objective assessment of the past and creation of social memory of the crimes committed. At the same time it represents the state's obligation to ensure the public's right to know what happened in the recent past and who the key players were. The public's right to know the truth about human rights violations in the past is one of fundamental principles of transitional justice, which prevents recurrence of crimes. It has been incorporated in a number of international instruments and sets standards in the treatment of post-conflict state aiming to accept and resolve the legacy of wrongdoings from the past. The UN principles to combat impunities stipulate that "all people have the inalienable right to know the truth about the crimes committed in the past and the circumstances that led to them [...]"[1].The UN General Assembly resolution on the right to truth emphasizes "that it is of great importance to have the international community seek to recognize the right of victims of gross violations of human rights and international humanitarian law and of their families, as well as of the society as a whole, to learn the truth about these crimes, in the maximum possible extent, especially to find out the identity of perpetrators, causes and facts of the crime, as well as circumstances under which they were committed."[2]

The importance of providing objective, continuous and timely information to the public on war crimes trials has been recognized by all international criminal courts.[3] Thus, for example, the International Criminal Tribunal for the former Yugoslavia has very early developed a special program to inform the public about the facts established in judicial proceedings being conducted. Despite positive examples of this and other tribunals, the Department for War Crimes of the Higher Court and the Court of Appeal have not yet developed specific services, or programs to inform the public. Almost all decisions of the Court of Appeal may be seen through the website of the Court of Appeal, but they are, as a rule, anonimised. On the other hand, the only

1 Updated set of principles for protection and promotion of human rights through combat against impunities (E/CN.4/2005/102/Add.1), 8 February 2005; available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement, accessed on 16 May 2016.

2 Resolution 68/165 of the UN General Assembly (A/RES/68/165), 18 December 2013.

3 See, e.g. web page of the International Criminal Tribunal for the former Yugoslavia, section Outreach, available at http://www.icty.org/en/outreach/home; web page of the International Criminal Tribunal, available at https://www.icc-cpi.int/; web page of the Special Court for Lebanon, available at http://www.stl-tsl.org/en/; accessed on 19 June 2016.

thing one can see on the website of the Higher Court in Belgrade is that there is a Department for War Crimes in this court, while the trial schedule and decisions of the Panel are not available. The courts of general jurisdiction generally do not have a developed program for informing the public of their work, war crimes trials included. The most developed practice of informing the public on war crimes trials in Serbia is applied by the War Crimes Prosecutor's Office (WCPO). However, this mainly comes down to the disclosure of information via the Prosecutor's Office website, and only occasionally includes activities such as community debates, production of films and information records about cases, etc.

The stated problems have had significant impact on the low visibility of war crimes trials in Serbia. The latest opinion polls in Serbia show that most citizens are not able to list any war crimes case being processed before national courts, or to indicate any of the institutions participating in the processing of war crimes.[4]

Non-transparency of court proceedings denies the victims and their families from public recognition of their suffering. After distress and long-term painful quest for the truth and justice, the only remaining satisfaction for victims, apart from punishing the perpetrators, is social awareness and acceptance of facts of responsibility for their sufferings. Instead, they are further humiliated by the fact that information about their fates do not reach the public in Serbia.

Lack of information among citizens regarding court established facts about the past also contributes to maintaining a distorted perception of responsibility for the committed crimes. Such perception undermines already fragile inter-ethnic relations and it is suitable for various political manipulations. Therefore, rather than create conditions for judicial truth to be publicly disclosed and thus prevent revision and creation of false narratives on perpetrators and victims, with its non-transparent work the judiciary is practically participating in maintaining stereotypical and ethnically biased image of events from the recent past that at a certain point may initiate a new cycle of violence.

Finally, the court record on human rights violations presents potential for formation of collective memory of the suffering of victims and the dam against relativisation, denial and glorification of crime. Multi-year ignorant attitude of courts towards the need to inform the public about the established facts indicates that Serbia is on a good road to choose oblivion instead of remembrance.

4 Belgrade Center for Human Rights, Research of public opinion - Attitudes towards war crimes, the ICTY and the national judiciary 2011 – detailed tables, available at http://www.bgcentar.org.rs/istrazivanje-javnog-mnenja/stavovi-prema-ratnim-zlocinima-haskom-tribunalu-domacem-pravosudu-za-ratne-zlocine/, accessed on 22 July 2016.

1. Action Plan for Chapter 23

The Action Plan for Chapter 23 within Serbia's EU accession negotiations, referring to the judiciary and fundamental rights, envisages a series of commitments and activities of institutions in the field of processing war crimes to be implemented in the coming years during the accession negotiations with the EU. The Action Plan also provides for a range of activities related to the visibility of war crimes trials.

The second quarter of 2016 envisages the "establishment of clear rules of anonymisation of court decisions in different legal areas prior to their publication, relying on the rules of the European Court of Human Rights."[5] Serbia undertook to "improve access to regulations and case law by forming and improving comprehensive electronic database of regulations and case law accessible to all with adherence to regulations governing the confidentiality of data and protection of personal data."[6] Amendment of the normative framework regulating the issue of publication of court judgments has also been envisaged.[7]

The Action Plan also envisages the improvement of the War Crimes Prosecutor's Office (WCPO) website, "to allow the public to follow when and which activities the War Crimes Prosecutor's Office is carrying out in relation to specific criminal charges."[8] Also, the WCPO is obliged to prepare a report "that will be available to the public presenting what has been done in respect of all criminal charges since 2005 in order to examine and present if all charges of war crimes were adequately investigated."[9]

5 Action Plan for Chapter 23 negotiations, activity 1.3.9.2, available at http://www.mpravde.gov.rs/tekst/12647/akcioni-plan-za-pregovaranje-poglavlja-23-usvojen-na-sednici-vlade-srbije-27-aprila-2016.php, accessed on 22 July 2016.

6 Ibid, activity 1.3.9.4.

7 Ibid, activity 1.3.9.3.

8 Ibid, activity 1.4.1.9.

9 Ibid, activity 1.4.1.10.

2. National Strategy for the Prosecution of War Crimes

In accordance with the Action Plan for Chapter 23, in February 2016 the Government of Serbia adopted the National Strategy for the Prosecution of War Crimes for the period from 2016 to 2020.[10]

One of the priorities and goals in the field of processing war crimes, identified in the National Strategy for the Prosecution of War Crimes is "a raised level of awareness and an improved public attitude toward the need for war crimes trials."[11] The strategy recognizes the need to "raise the level of general public awareness about the events in the former Yugoslavia and the need to detect, investigate and prosecute war crimes, and to punish their perpetrators, regardless of their national, ethnic and religious affiliation or their ranking." It emphasizes:

> "Providing timely, impartial and objective information to citizens about war crimes trials is their right, but also a shared obligation of the education system, the media representatives and bodies engaged in the prosecution of war crimes. The obligation of state bodies, in the spirit of full respect for freedom of speech, is to provide citizens, directly but also through the media, as complete information on war crimes proceedings as possible."[12]

The strategy also envisages a number of activities that aim to facilitate the availability of information on war crimes trials:

> "The consistent actions of presidents of competent courts in accordance with Article 16a of the Law on the Organization and Jurisdiction of Government Authorities in War Crimes Proceedings (which allows recording main hearings and their publication in the media).[13]
>
> Improvement of the Higher Court in Belgrade website, which will have all of the necessary information about the judgments available, and gradually even more about the judgments in war crimes cases, (in accordance with actions to improve the availability of case law envisaged by the Action Plan for Chapter 23), with full respect for the rules on protection of personal data."[14]

10 National Strategy for the Prosecution of War Crimes of the Government of the Republic of Serbia, 20 February 2016, p. 16..

11 Ibid.

12 Ibid, p. 15-16.

13 Ibid, p. 36.

14 Ibid.

III Access to documents of war crimes cases

Documentation of war crimes cases is one of the key sources of information about the past and committed human rights violations. Public access to such documentation constitutes an essential element of the right of society to know the truth and a guarantee of undistorted historical narrative, but also a control mechanism for judicial authority's actions in the most sensitive criminal proceedings. War crimes trials cannot be considered transparent if the public has no access to key documents such as indictments, judgments and transcripts of main hearings. In Serbia, only the Court of Appeal in Belgrade and the War Crimes Prosecutor's Office (WCPO) publish the judgments, i.e. indictments on its website on their own initiative. The Higher Court in Belgrade does not, even though the first-instance judgments are the basic factual source about the events that are the subject of war crimes trials.

Even when the stated documents are published or delivered to the public upon the request for access to information, the public's right to know is being mostly limited by excessive anonymisation of data from these documents, making them incomprehensible and inaccessible. By submitting these documents without the possibility of a comprehensive insight into their contents, the state bodies only meet a mere legal form, but not substantive obligations towards the public.

The cause of this state of affairs undoubtedly lies in an insufficiently precise legislative framework. In fact, this subject matter is governed by the Law on Free Access to Information of Public Importance and the Law on Protection of Personal Data, but without specifying which one has the force of lex specialis. Also, many bodies responsible for the prosecution of war crimes have no adopted rulebooks on anonymisation, and those who have adopted such acts, do not respect them in practice. Apart from this, the Commissioner's decisions do not result in unification of practice but produce, at best, an *ad hoc* effect.

In practice, there is also an evident indifference of institutions to achieve a balance between the rights of participants in court proceedings to have their personal information be protected, on the one hand, and the public's right of access to information, on the other hand. As a rule, the interest of protection of personal data outweighs the public interest, provided that the competent authority carries out the harm test and public interest test at all. The impression is that this is due to mechanical application of the law, and that the competent authorities find it easier to completely

remove all data that are potentially person related, than to consider the public interest and the relationship between the two conflicting interests in each specific case.

The Action Plan for Chapter 23 has envisaged "setting clear rules for anonymisation of court decisions in different legal areas prior to their publication, relying on the rules of the European Court of Human Rights."[15]

1. Normative Framework

The possibility to inspect, i.e. obtain indictments, judgments and transcripts from main hearings of war crime proceedings is governed by the Law on Free Access to Information of Public Importance, the Law on Personal Data Protection and Rulebooks on Anonymisation.

1.1. Law on Free Access to Information of Public Importance

The possibility and the method for obtaining indictments, judgments and transcripts from main hearings of war crime proceedings are governed by the Law on Access to Public Information. Information of public importance is the information held by a public authority, which was created in operation or in connection with the work of the public authority. Pursuant to this legal provision, indictments, judgments and transcripts in war crimes proceedings are information of public importance. The law also envisages a presumption of justification for the interest of the public to know all information authorities have at their disposal. This right can only be "exceptionally subjected to limitations" "if this is necessary in a democratic society for the protection against a serious violation of an overriding interest based on the Constitution and the law."[16]

Article 9 of the Law specifies the cases in which the public's right to know can be limited. Among other things, the applicant will not be allowed to access information of public importance if thereby that would jeopardize, hinder or impede prevention or detection of a criminal offence, conducting of a preliminary criminal investigation,

15 Action Plan for Chapter 23 negotiations, activity 1.3.9.2, available at http://www.mpravde.gov.rs/tekst/12647/akcioni-plan-za-pregovaranje-poglavlja-23-usvojen-na-sednici-vlade-srbije-27-aprila-2016.php, accessed on 22 July 2016.

16 Article 8 of the Law on Free Access to Information of Public Importance.

conducting of a court proceedings, execution of a judgment, enforcement of a sentence or a fair treatment and a fair trial.

Also, Article 14 restricts the public's right to know if the submission of information would violate the right to privacy, the right to reputation or any other right of the person to whom the requested personal information relates, **"unless [...] if it is a person, phenomenon or event of interest for the public** [...]"

1.2. Law on Personal Data Protection

The Law on Personal Data Protection regulates conditions for collection and processing of personal data, the rights of persons and the protection of the rights of persons whose data are collected and processed, as well as limits to the protection of personal data.[17] Personal data is any information relating to a natural person, regardless of the form in which it is expressed and the information carrier (paper, tape, film, electronic media, etc.). Data processing includes their collection, search, submission for inspection, disclosure, publication, etc.[18] By virtue of things, indictments, judgments and transcripts contain numerous personal data (about the defendants, injured parties, witnesses, etc), and their collection and publication presents data processing within the meaning of the Law on Personal Data Protection.

Processing of personal data requires consent of persons whose data are processed. However, four exceptions to this rule have been envisaged, the most relevant of which for the subject of this report is the exception **"for the purpose of achieving a prevailing justified interest of the person, operator or user"**specified by the law.[19]

Apart from this, pursuant to this Law, the data **"available to anyone** and published in public media and publications or available in archives, museums and other similar organizations also have no protection."[20] Pursuant to this provision, **personal data communicated at main hearings open to the public, are not protected,** except if "opposite interests of the person to whom the data relate are clearly outweighing."[21]

17 Article 54 of the Law on Personal Data Protection.

18 Ibid, Article 3, Paragraph 1, Item 1.

19 Ibid, Article 12.

20 Ibid Article 5, Paragraph 1, Item 1.

21 Ibid, Article 5, Paragraph 1.

1.2.a. Anonymisation

Protection of personal data in indictments, judgments and transcripts provided to the public is performed by anonymisation. Anonymisation of data is the process of redacting parts of these documents aimed to protect personal data, i.e. privacy. Courts implement this process by replacing, removing or obscuring personal information so that persons to whom the information relate remain anonymous, i.e. unrecognizable.

The Republic of Serbia has no legislation on anonymisation of prosecutorial and judicial decisions, but that area is partly regulated by internal documents of courts and prosecutor's offices, i.e. rulebooks on anonymisation. Not all courts and prosecutor's offices have such rulebooks, including the War Crimes Prosecutor's Office (WCPO) and the Higher Court in Belgrade. The Supreme Court of Cassation and the Court of Appeal in Belgrade have adopted rulebooks on anonymisation.

In 2010 the Supreme Court of Cassation (SCC) adopted the Rulebook on substitution and omission (anonymisation) of data in judicial decisions, which expressly envisages that: **"No data on the defendants and convicted persons in judicial decisions made in war crimes cases shall be anonymised** [...]"[22]

Rulebook on the Minimum of Anonymisation of Court Decisions of the Court of Appeal in Belgrade[23] Rulebook on the Minimum of Anonymisation of Court Decisions of the Court of Appeal in Belgrade has been amended in 2012 to further limit the anonymisation in war crimes cases with respect to the rulebook of the SCC: "No data on the defendants and convicted persons in judgments and decisions on permanent confiscation of assets made in war crimes cases shall be anonymised [...]"[24]

The Higher Court in Belgrade, which conducts the first-instance proceedings in war crimes cases, still has no rulebook on anonymisation adopted.

The WCPO also has no adopted rulebook on anonymisation, but it has a Fact Book on Free Access to Information of Public Importance[25] which, in addition to information

22 Article4, Supreme Court of Cassation, Rulebook on Substitution and Omission (Anonymisation) of Data in Judicial Decisions (I trial303/10-1), 27 May 2010, available at http://www.vk.sud.rs/sites/default/files/PravilnikOAnonimizaciji.pdf, accessed on 12 July 2016.

23 Court of Appeal in Belgrade, Rulebook on the Minimum of Anonymisation of Court Decisions (I trial no. 2/10-82), 27 August 2010, available at http://www.bg.ap.sud.rs/images/pravilnik2010.pdf, accessed on 1 July 2016.

24 Court of Appeal in Belgrade, Rulebook on Amendments of the Rulebook on the Minimum of Anonymisation of Court Decisions (trial no.I -2 84/12), 26 April 2012, p. 178, available at http://www.bg.ap.sud.rs/images/INFORMATOR_7_2013_LAT.pdf, accessed on16 June 2016.

25 Fact Book on Free Access to Information of Public Importanceof the War Crimes Prosecutor's Office, available at http://www.tuzilastvorz.org.rs/html_trz/POCETNA/P_INFORMATOR_CIR_20130118.pdf, accessed on 16 July 2016.

about the work of the prosecutor's office, provides instructions on possibilities and method for access to information of public importance available to the prosecutor's office and at the same time provides an annual overview of responses upon requests.

The courts and prosecutor's offices of general jurisdiction dealing with cases of war crimes do not publish information on these proceedings on their websites. However, they submit the documentation required pursuant to the provisions of the Law on Access to Information of Public Importance, as a rule, with the prior anonymisation performed. The practice of anonymisation carried out by the courts and prosecutor's offices of general jurisdiction is not unified.[26]

Indictments

War crimes indictments are available to the public via the website of the War Crimes Prosecutor's Office (WCPO) on the basis of the Law on Access to Public Information. However, the WCPO has no clearly defined standard on the method for posting indictments to the website. Therefore, the WCPO most often applies the rule to publish indictments without rationales[27], but indictments with rationales can also be found.[28] The indictments do not anonymise data on defendants such as the first and last name, while data on injured parties are sometimes anonymised,[29] and sometimes not.[30] If they are anonymised, this is done in a way to leave only initials instead of the first and last name.

26 See, e.g. the second-instance judgment in the *Orahovac* case, available at http://www.hlc-rdc.org/wp-content/uploads/2015/04/Orahovac_Presuda_Apelacionog_suda.pdf; indictment in the *Orahovac* case, available at http://www.hlc-rdc.org/wp-content/uploads/2012/02/1.Orahovac-12.11.1999-optuznica1.pdf; the first first-instance judgment in *Miloš Lukić* case, available at http://www.hlc-rdc.org/wp-content/uploads/2012/04/2-Prva-prvostepena-presuda-OS-u-Prokuplju-25.06.1999..pdf; indictment in the *Miloš Lukić* case, available at http://www.hlc-rdc.org/wp-content/uploads/2012/04/1-Optuznica-14.06.1999..pdf; the second-instance judgment in *Miloš Lukić* case, available at http://www.hlc-rdc.org/wp-content/uploads/2014/12/Drugostepena_presuda_09.10.2014..pdf; the first-instance judgment in *Emini* case, available at http://www.hlc-rdc.org/wp-content/uploads/2014/05/Emini-Prvostpena_presuda_sa_obrazlozenjem_15_06_2007.pdf, accessed on 21 July 2016.

27 See, e.g. the indictment in the *Trnje* case, available at http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2013_11_04_CIR.pdf, accessed on 19 June 2016.

28 See, e.g. the indictment in the *Logor Luka* case, available at http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2014_03_31_CIR.pdf, accessed on 19 June 2016.

29 See, e.g. the indictment in the *Čelebići* case, available at http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2013_05_17_CIR.pdf, accessed on 19 June2016.

30 See, e.g. the indictment in the *Bosanski Petrovac – Gaj*, available at http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2014_10_10_CIR.pdf, accessed on 19 June2016.

Judgments and Transcripts from Main Hearings

War Crimes Department of the Higher Court in Belgrade does not publish judgments (first-instance judgments in war crimes cases), or transcripts from trials on its website. These documents are available to the public only if requested pursuant to the Law on Free Access to Information of Public Importance. Judgments and transcripts that the court provides in this way are anonymised.

The Department of War Crimes of the Court of Appeal publishes all judgments (the second-instance judgments in war crimes cases) on its website.[31] All judgments on the website of the Court of Appeal are anonymised.

Audio and Video Records of Main Hearings

According to the Law on Free Access to Information of Public Importance, the information of public importance is any information that is held by public authorities, whereby the carrier of information is irrelevant, i.e. whether it is paper, tape, film, electronic media or other.[32] Accordingly, the audio and video recording of the main hearing also presents information of public importance, which may be subject of the request pursuant to this Law.

The Criminal Procedure Code envisages as **mandatory to sound record the main hearings** in war crimes proceedings, while optical recording of a specific main hearing requires approval of the Presiding Judge.[33] According to the CPC, sound and optical recording may be publicly presented in professional and scientific purposes only after the full validity of the proceedings.[34]

On the other hand, the Law on the Prosecution of War Crimes, which is *lex specialis* in this matter with respect to the CPC, envisages that "sound recording shall be taken during the main hearing, and *if possible* video recording as well.[35] Although the

31 Web page of the Court of Appeal in Belgrade, case law: war crimes, available at http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/, on 19 June 2016.

32 Article 2, Law on Free Access to Information of Public Importance.

33 Article 236, Paragraphs 1 and 3, CPC.

34 Ibid, Paragraph 10.

35 Article16, Law on the Prosecution of War Crimes.

Department of War Crimes of the Higher Court in Belgrade *has the ability* to take video recordings of main hearings in war crimes cases, it never does.

The HLC has sent a request to the Higher Court in Belgrade for access to information of public importance containing the question whether the building of the Higher Court in Belgrade at Ustanička Street (the building of the so called *Specijalni sud* (War Crimes Chamber)), as well as the building *Palata pravde* (Palace of Justice) have devices for optical recording of the trial, i.e. are there *possibilities* to keep a video record of a war crimes trial. The Higher Court has informed the HLC that two courtrooms at the Palace of Justice have been furnished with equipment for optical recording since 2004, while **all four courtrooms of the Higher Court at Ustanička Street have been furnished with equipment for optical recording since 2006.**[36] However, although there is equipment for optical recording, the Higher Court in Belgrade does not record the main hearings. They have replied to the HLC's requests for video records of testimonies from several cases that no video recordings were made in these cases.[37] On the other hand, the Higher Court provides audio records of testimonies.

2. Problems in Practice

Non-application of the Harm Test and Public Interest Test

In several cases the Department of the Higher Court refused to provide judgments and transcripts from main hearings, upon request for access to information of public importance, in cases that were not final. When rejecting the request, the court would reference the Article 9 of the Law on Free Access to Information of Public Importance, i.e. stating that this would jeopardize the criminal proceedings. The Court, however, has never explained or showed in its rejecting decisions how the disclosure of the requested documents would actually jeopardize the criminal proceedings, i.e. did not apply the harm test and public interest test.

The HLC complained to this practice to the Commissioner for Access to Information of Public Importance, whose has repeatedly pointed out by his decisions that this practice of the courts is illegal, stating that the courts failed to provide valid evi-

36 Higher Court in Belgrade, trial no. 42/15-110 as of 13 July 2015.

37 HLC requested video records of testimony of Zoran Rašković in the Ćuška case; testimonies of Božidar Delić and Ratko Mitrović in the Suva Reka case; testimony of Goran Radosavljević in the Bytyqi case. Higher Court in Belgrade, trial no. 42/15-94 as of 8 July 2015; trial no. 42/15-98 as of 8 July 2015; trial no. 42/15-57 as of 18 May 2015.

dence on how provision of the requested data would seriously lead to the disruption of the proceedings:

> "The first-instance authority (apart from referencing in the rationale of the appellate decision the fact that the criminal proceedings in the stated case are not final, and that it is on appeal before the Court of Appeal in Belgrade) failed to provide a valid proof of justification to reject access to the requested information, i.e. did not specify how access to these, in this particular case, would seriously interfere further conduct and termination of the judicial proceedings, since **the arguments for denying access to information cannot be based solely on the assumption of the first-instance authority that 'provision of the requested information in a case where criminal proceedings is not yet final could seriously hinder further conduct and termination of the procedure.** In the specific case, the first-instance authority did not provide evidence that the interest of unhindered proceedings outweighs the interest of the appellant to know in this respect that, for example, during the arraignment or the examination of witnesses the public was excluded, which was at the same time informed through the media about the defendant, as well as crimes of which he was charged."[38]

Excessive Anonymisation

The most common way of restricting access to indictments, judgments and transcripts is performed through the process of anonymisation (sanitization, redaction) of written judgments. In some cases, courts have darkened even the names of accused, their defence attorneys, names of judges, witnesses, experts, and even entire paragraphs and pages of judgments. This way **judgments are becoming entirely illegible and unusable for legal analysis, the victims are denied of symbolic recognition of sufferings, and society is denied of knowledge about the crimes committed.**[39]

Until 2012 the courts submitted judgments upon requests for access to information of public importance to the HLC in their integral versions, and then they started with the practice of anonymisation. When rejecting the HLC's request for providing non-anonymised judgments, as a rule the courts would reference the Law on Protection of Personal Data. However, this argument of the courts cannot stand because

38 Decision of the Commissioner for Access to Information of Public Importance number: 07-00-04661/2014-03 as of 19 April 2016. See also the Decision of the Commissioner for Access to Information of Public Importance number: 07-00-01776/2012-03, 30 August 2012, Decision of the Commissioner for Access to Information of Public Importance and Personal Data Protection number: 07-00-02408/2014-03 as of 6 October 2015;

39 Humanitarian Law Center, *"Anonymization of judgments in war crimes cases contrary to national and international regulations"* (press release), 14 January 2014, available at http://www.hlc-rdc.org/?p=26065, accessed on 21 May 2016.

the law does not protect personal data when they are available to the public[40] or in cases of "protection of rights and freedoms and other public interests,"[41] as well as in cases when it comes to a person, phenomenon or event of public interest.[42]

The first exception to the protection of personal data should be particularly emphasized here. War crimes trials are public (except in few justified cases) and, therefore, all personal data communicated at main hearings – e.g. names of victims and witnesses – are "publicly available" and not protected. The absurdity of anonymisation of data communicated at public trials is especially evident if one takes into account that journalists can attend and report on all the details they learned during the hearing.

The Department for War Crimes of the Court of Appeal also regularly anonymises data on accused in war crimes cases, which is also contrary to the Rulebook on Anonymisation of this Court that explicitly prohibits anonymisation of data on the defendants and accused persons in judicial decisions made in war crimes cases.[43] In addition, the Court of Appeal anonymises names of victims, witnesses and expert witnesses.[44]

What is worrying is the practice of the Constitutional Court of Serbia, which in one of its judgments related to a war crime committed at Ovčara (Vukovar, Croatia) anonymised information in the judgment in a manner contrary both to the Law, and to the Commissioner's practice. Apart from anonymising name of the plaintiff and names of attorneys-in-fact, the court has also anonymised and names of judges of lower-instance courts, including even name of the judge whose actions led to the proceedings before the Constitutional Court, and thus prevented the public to gain insight into the work of state officials. Moreover, contrary to the rules of anonymisation aimed at protecting personal data, the **Constitutional Court has also anonimised the war crime location in this decision** –"S.R. convicted to a 20 year prison sentence for war crime against prisoners of war [...] conducted in the period from 20 to 21 November 1991, on the farm 'O.' in V..."[45]

Until present day the Commissioner has determined by his decisions that the following personal data contained in the court records of war crime cases do not present protected information: the first and last names of deputy prosecutors for war crimes,

40 Article 5, Paragraph 1, Item 1of the Law on Personal Data Protection.

41 Ibid, Article 13.

42 Ibid, Article 14.

43 See Article 4, Paragraph 3, of the Rules of Procedure of the Court of Appeal in Belgrade on amendments to the Rulebook on the Minimum of Anonymisation of Court Decisions, available at http://www.bg.ap.sud.rs/images/INFORMATOR_7_2013_LAT.pdf, accessed on 19 June 2016.

44 See, e.g. judgment of the Court of Appeal in the *Logor Luka* case, available at http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-8-15.html, accessed on 19 June 2016.

45 See judgment of the Constitutional Court of Serbia in the *Ovčara* case, available at http://www.hlc-rdc.org/wp-content/uploads/2015/06/ODLUKA_Ustavnog_suda_po_zalbi_Sase_Radaka.pdf, accessed on 19 June 2016.

defendants, i.e. the accused; the first and last names of their defence attorneys and deputy defence attorneys, expert witnesses and sworn-in-court interpreters, presiding judges and members of the chamber, professional associates of the court and prosecutor's office, lawyer trainees and holders of state and political functions..[46]

With reference to the defendants in war crime cases, the Commissioner pointed out that only the following personal data are protected: "date and place of birth, place of residence, qualifications, occupation, family status and information from criminal records."[47]

However, when it comes to victims of war crimes, the Commissioner has taken a diametrically opposed position, which is analyzed in detail in the following section.

Anonymising Names of Victims

Anonymisation of names of victims in war crime judgments is a particularly alarming action of courts in Serbia.[48] Although such practice is still not a general trend, the HLC believes that this question deserves particular attention bearing in mind that the Commissioner for Information of Public Importance has taken the stand that anonymisation of names of victims in war crime judgments is in accordance with the Law.[49] Contrary to this, the HLC believes that this view is in opposition to the relevant laws and this **makes victims of war crimes invisible to the public, which violates the right of victims and their families, but also the whole society, to the truth.**

In several cases, the courts, acting upon the HLC's requests, delivered judgments with anonymised names of victims and injured parties in the proceedings. In appeals to the Commissioner, the HLC requested judgments to be provided in an integrated, not anonymised form. The Commissioner, however, rejected the HLC's requests for

46 Decision of the Commissioner for Access to Information of Public Importance number: 07-00-01258/2014-03 as of 15 December 2015.

47 Ibid. See also the Decision of the Commissioner for Access to Information of Public Importance number: 07-00—00337/2014-03 as of 17 March 2014.

48 See, e.g. the judgment of the Court of Appeal in Belgrade in the Orahovac case, available at http://www.hlc-rdc.org/wp-content/uploads/2015/04/Orahovac_Presuda_Apelacionog_suda.pdf, accessed on 19 June 2016.

49 Decision of the Commissioner for Access to Information of Public Importance number: 07-00-04847/2014-03 as of 11 May 2016, available at http://www.hlc-rdc.org/wp-content/uploads/2016/05/Resenje_Poverenika_za_informacije_od_javnog_znacaja_doneto_po_zalbi_FHP.pdf, accessed on 22 July 2016; Decision of the Commissioner for Access to Information of Public Importance number: 07-00-01258/2014-03 as of 15 December 2015; Decision of the Commissioner for Access to Information of Public Importance number: 07-00-01088/2014-03 as of 9 December 2015 Decision of the Commissioner for Access to Information of Public Importance number: 07-00-01258/2014-03 as of 15 December 2015; Decision of the Commissioner for Access to Information of Public Importance number: 07-00-01088/2014-03 as of 9 December 2015.

de-anonymisation of names of victims, i.e. and the removal of protective actions from their names.[50]

In the rendered decisions the Commissioner has taken the stand that the data on the full name of the accused should be available to the public, *since in the specific case these are persons charged with the criminal offenses of war crimes against civilian population, the execution of which cause great social danger and which are prosecuted ex officio*, which meets the requirement for application of an exception in protection of the right to privacy envisaged by the Article 14, Paragraph 2, of the Law on Free Access to Information of Public Importance. This article has envisaged that authorities will not enable the applicant to exercise the right to access information of public importance if that will violate the right to privacy of the person to whom the requested information relates *unless it is a person, phenomenon or event of public interest*.[51]

However, when it comes to the first and last names of victims, the Commissioner considers that they should remain inaccessible to the public because their disclosure would, in the opinion of the Commissioner, *seriously jeopardize their right to privacy*.[52]

The Commissioner explained the decision to apply exemption to privacy protection of defendants by the fact that *they are charged with criminal offenses of war crimes against civilian population, the execution of which cause a great threat to society and which are prosecuted ex officio*. It remains unclear based on what the Commissioner found that the war crimes defendants are *persons of interest to the public*, while victims of war crimes are not. It is also unclear why the Law on Free Access to Information of Public Importance is applied to the defendants, while provisions of more restrictive Law on Personal Data Protection are applied to victims.

The Commissioner found that the names of victims of war crimes are *particularly sensitive data* protected by the Article 16 of the Law on Personal Data Protection, since this is the case of data on the victims of violence.[53] According to the Law, these data can be published only with the person's consent. However, the HLC believes

50 Ibid.

51 Article 14, Paragraph 2, of the Law on Free Access to Information of Public Importance: „A public authority shall not grant an applicant his/her right to access information of public importance if it would thereby violate the right to privacy, the right to protection of reputation or any other right of a person who is the subject of information, except where: [...] 2) Such information relates to a person, event or occurrence of public interest, especially in case of holder of public office or political figures, insofar as the information bears relevance on the duties performed by that person."

52 Decision of the Commissioner for Access to Information of Public Importance number: 07-00-04847/2014-03 as of 11 May2016, available at http://www.hlc-rdc.org/wp-content/uploads/2016/05/Resenje_Poverenika_za_informacije_od_javnog_znacaja_doneto_po_zalbi_FHP.pdf, accessed on 19 June 2016.

53 Article 16 of the Law on Personal Data Protection: "Data relating to ethnicity, race, gender, language, religion, political party affiliation, trade union membership, health status, receipt of social support, **victims of violence, criminal record** and sexual life shall be processed on the basis of informed consent of data subjects, save where the law does not allow the processing of such data even with the subject's consent."

that with respect to the names of victims, the Commissioner also needed to apply exemption from Article 14, Paragraph 2, of the Law on Free Access to Information of Public Importance, which envisages that personal data shall not be protected *if this is a person, phenomenon or event of interest to the public.* In addition, it should be reminded once again that publicly available personal data, such as, for example, name of the victim who publicly testified, are not protected under the Law.[54]

The fact that particularly sensitive data are subject to exemptions for public interest as well as other personal data, apparently stems from the fact that data on convicted persons in judgments of war crime cases are not anonymised, although these data are "the data on conviction for criminal offense", i.e. particularly sensitive data pursuant to the Article 16 of the Law on Personal Data Protection.[55]

Being that particularly sensitive data are subject to exemptions from the right to privacy protection, envisaged by the Law on Free Access to Information, the HLC believes that the names of victims of war crimes present *persons of interest to the public*, and that war crimes present *phenomena or events of public interest,* and that, therefore, the names of victims must be publicly available. Moreover, the systemic violation of human rights and international humanitarian law is not only a phenomenon or event of interest to the public, but the public has a right to know the truth about these events, their circumstances, motives and consequences. When it comes to war crimes against civilian population, such as in the present case, **the public has the interest and right to be informed about the identity of victims, not just the defendants.**

Legitimate public interest to know exists in relation to *particularly sensitive data.* For example, when it comes to the crime of genocide or hate crimes, it is precisely these "particularly sensitive information" on victims, such as nationality, race and religion that are of key interest to the public, since these are elements of the criminal offence. It is similar in war crime cases. It is only after publication of identities of victims that they cease to be a statistical data and that the public gets to know them as persons who, just because of their national or religious affiliation, became victims of a crime. On the other hand, revealing the victim to the public and mentioning his/her name in public is a form of redress for the victim and a prerequisite for recognition of suffering he/she underwent, primarily on the basis of his/her identity.

The Working Group for Data Protection, established pursuant to the Article 29 of the Directive 95/46/EC of the European Parliament and the Council, especially pointed in one of its opinions to the risk of "mechanical" application of rules on personal

54 Article 5, Paragraph 1, Item 1, of the Law on Personal Data Protection.

55 Ibid.

data protection, which might lead to "absurd consequences", as was done in these cases, and called for flexibility in application of these rules.[56]

One should not forget that special rules on processing of sensitive personal data, such as nationality, race and religion, have been developed from the experiences of totalitarian regimes, where individuals and groups suffered and were persecuted for these personal characteristics, as mechanism of guarantee not to have such totalitarian practices repeat in the future. However, it is absurd to use such protection mechanism when this is contrary to the interests of precisely those individuals for whom it was established, and even more absurd when it damages the aims and purpose of the trial for crimes in the past – to establish the truth about crimes (which inevitably implies the identity of victims) with exact purpose to achieve the objective of general prevention.

Such practice of absurd application of the law – contrary to the interests of people for the benefit of whom the rules have been initially developed, was pointed out in the Global Principles on National Security and the Right to Information (Tshwane Principles). The principle 10A, which refers to cases of violations of human rights and international humanitarian law, envisages that the public has the right to know "the identity of victims, while respecting privacy and other rights of victims, their relatives and witnesses." There is a special note below this right: This principle should be interpreted having in mind the reality, i.e. that different states used to conceal human rights violations from the public by referring to the right to privacy, including the right to privacy of those persons whose rights were violated or had been grossly violated, not taking into account the actual wishes of individuals concerned.[57]

3. Comparative Practice

BiH

The indictments and court decisions in Bosnia and Herzegovina are available on the basis of the Freedom of Access to Information Act in Bosnia and Herzegovina[58] and the Rulebook for Exercise of the Right to Access to Information under Control

56 Working Group for Data Protection, Opinion 4/2007 on the concept of personal data (01248/07/EN), p. 5, available at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2007/wp136_en.pdf, accessed on 20 July 2016.

57 Global Principles on National Security and the Right to Information (Tshwane Principles), 12 June 2013, available at https://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles, accessed on 19 July 2016.

58 Freedom of Access to Information Act Bosnia and Herzegovina, "Official Gazette of Bosnia and Herzegovina" No. 28/00, 45/06, 102/09 and 62/11.

of the Court of BiH and on Collaboration of the Court with the Community,[59] which envisages that the **first and last names of participants in war crime proceedings are not anonymised** in judgments for war crimes.

However, the practice of prosecutors in BiH with respect to availability and anonymisation of indictments is uneven, both between different prosecutor's offices, and practices within a single prosecutor's office. The indictments in war crime cases may be found, as a rule, on websites of the Prosecutor's Office of the Brčko District[60] and cantonal prosecutor's offices,[61] as well as on websites of competent prosecutors' offices in the Republic of Srpska.[62] The Prosecutor's Offices in the Federation of BiH usually do not anonymise names of defendants and victims in indictments on their websites, while the prosecutor's offices in the Republic of Srpska sometimes anonymise these data and sometimes do not.[63] There are no available indictments on the website of the Prosecutor's Office of BiH.

When it comes to judgments in war crime cases, the practice is uneven on websites of Cantonal Courts in the Federation and District Courts in the Republic of Srpska. In line with this, the website of the Cantonal Court in Bihać contains completely unanonymised judgments,[64] while the website of the District Court in Bijeljina contains only completely anonymised releases on passed judgments in war crime cases.[65] The website of the Court of BiH, contains, in the majority of the final war crime cases, completed first-instance and second-instance judgments and all releases related to the case, where personal data such as names of participants in the process, the defendants and the victims, are not anonymised.[66]

59 Rulebook for Exercise of the Right to Access to Information under Control of the Court of BiH and on Collaboration of the Court with the Community as of 30 May 2014, available at http://www.sudbih.gov.ba/files/docs/PIOS/Pravilnik%20BOS.pdf, accessed on 5 April 2016.

60 Web page of the Prosecutor's Office of Brčko District, special section on war crimes, available at http://jt-brckodistriktbih.pravosudje.ba/vstv/faces/kategorije.jsp, accessed on 20 July 2016.

61 See, e.g. Web page of the Cantonal Prosecutor's Office of the Middle Bosnia Canton, war crimes section, available at http://kt-travnik.pravosudje.ba/; web page of the Cantonal Prosecutor's Office of the Herzegovina-Neretva Canton, war crimes section, available at http://kt-mostar.pravosudje.ba/; web page of the Cantonal Prosecutor's Office of the Una-Sana Canton, war crimes section, available at http://kt-bihac.pravosudje.ba/, accessed on 20 July 2016.

62 See, e.g. web page of the District Prosecutor's Office in Banja Luka, war crimes section, available at http://ot-banjaluka.pravosudje.ba/; web page of the District Prosecutor's Office in Doboj, war crimes section, available at http://ot-doboj.pravosudje.ba/; web page of the District Prosecutor's Office in East Sarajevo, war crimes section, available at http://ot-istocnosarajevo.pravosudje.ba/, accessed on 20 July 2016.

63 See, e.g. web page of the District Prosecutor's Office in East Sarajevo, war crimes section, available at http://ot-istocnosarajevo.pravosudje.ba/, accessed on 20 July 2016.

64 Web page of the Cantonal Court in Bihać, available at http://ksud-bihac.pravosudje.ba/, accessed on 20 July 2016.

65 Web page of the District Court in Bijeljina, available at http://oksud-bijeljina.pravosudje.ba/, accessed on 20 July 2016.

66 Web page of the Court of BiH, available at http://www.sudbih.gov.ba/, accessed on 20 July 2016.

Croatia

The indictments and court decisions, as well as the minutes of main hearings in Croatia are available to the public under the Act on the Right of Access to Information.[67] In accordance with the Rules on Anonymisation of the Court Decisions [68] and the Instruction on the Method of Anonymisation of the Court Decisions issued by the Supreme Court of Croatia,[69] the first and last names of all the participants in criminal proceedings are anonymised by replacing them with their initials.

There are no war crime indictments on the websites of State's Attorney Offices, and there are no judgments for criminal offences of war crimes on the websites of County Courts. Only the Supreme Court of Croatia has a special section on its website with the case law, under which judgments in war crime cases can be searched.[70] The judgments of the Supreme Court anonymise names of all persons in the proceedings, as well as the determinants of locations, including crime location, thus denying the reader of almost all factual information and making the judgments incomprehensible.[71]

Only the County Court in Vukovar has a special section on its website on war crimes from the period when they had jurisdiction for war crimes cases, where it is possible to see an overview per cases and per defendants. However, only judgments from two cases are available.[72]

67 Act on the Right of Access to Information (consolidated text of the law NN 25/13, 85/15), available at http://www.zakon.hr/z/126/Zakon-o-pravu-na-pristup-informacijama, accessed on 20 July 2016.

68 Rules on Anonymisation of the Court Decisions, Supreme Court of the Republic of Croatia, available at http://www.iusinfo.hr/Appendix/DDOKU_HR/DDHR20100816N30_24_1.pdf, accessed on 20 July 2016.

69 Instruction on the Method of Anonymisation of the Court Decisions, Supreme Court of the Republic of Croatia, available at http://www.iusinfo.hr/Appendix/DDOKU_HR/DDHR20100816N30_25_1.pdf, accessed on 20 July 2016.

70 Web page of the Supreme Court of the Republic of Croatia, case law search section, available at https://sudskapraksa.csp.vsrh.hr, pristupljeno dana 20. jula 2016. godine.

71 See, e.g. judgment of the Supreme Court of the Republic of Croatia in the case I Kž 700/04-3, available at https://sudskapraksa.csp.vsrh.hr/decisionText?id=090216ba8054a0eb&q=ratni+zlo%C4%8Din; presudu Vrhovnog suda Republike Hrvatske u predmetu II-5-Kr 91/1997-2, available at https://sudskapraksa.csp.vsrh.hr/decisionText?id=090216ba80257fa7&q=ratni+zlo%C4%8Din, pristupljeno 20 July 2016.

72 Web page of the County Court in Vukovar, review of case law in war crimes cases, available at http://www.zupsudvu.hr/rz_predmet.asp, 20 July 2016.

Kosovo

The indictments and court decisions, as well as the minutes of main hearings, are publicly available in Kosovo under the Law on Access to Public Documents.[73] Public access to judgments in Kosovo is also regulated by the Administrative Instruction on Anonymisation and Publication of Final Court Judgments of Kosovo Judicial Council.[74] In accordance with the Instruction, final judgments in Kosovo are published on the websites of courts within sixty days from the date of validity.[75] The names of victims and defendants are anonymised by replacing them with their initials, while the names of judges, prosecutors and representatives of state bodies are not anonymised.[76] A large number of judgments of courts in Kosovo are available on the website of the EULEX mission.[77] Access to indictments is not regulated by a special instruction. Instead, the Law on Access to Public Documents and the Law on the Protection of Personal Data are applied to them.[78] They are not available on websites of the courts and prosecutors' offices, but delivered upon request for access to public documents, with anonymised names.[79]

73 Law on Access to Public Documents (Br. 03/L-215), available at http://www.oag-rks.org/repository/docs/LQDP-serb._693444.pdf, 20 July 2016.

74 Administrative Instruction on Anonymisation and Publication of Final Court Judgments of Kosovo Judicial Council (02/2016), available at http://www.gjyqesori-rks.org/GetDocument/2296, 20 July 2016.

75 Ibid, Article 6.1.

76 Ibid, Articles 3.2.1, 5 and 4.1.

77 Web page of the Eulex mission, court judgments, available at http://www.eulex-kosovo.eu/?page=3,8, accessed on 20 July 2016.

78 Law on the Protection of Personal Data (br. 03/L- 172), available at http://www.kuvendikosoves.org/common/docs/ligjet/2010-172-ser.pdf, accessed on 22 July 2016.

79 Telephone interview with the representative of the Humanitarian Law Center of Kosovo as of 22 July 2016.

4. Recommendations

Departments and the War Crimes Prosecutor's Office should timely post all relevant documents from war crime cases on their websites (indictments, judgments and transcripts).

Special public interest in war crime cases requires, following positive examples from the region, the anonymisation rules in this area to be regulated in a unique and unambiguous manner, so as to prevent doubts in practice.

As a minimum, the names of victims, defendants, representatives of state bodies and the names of crime locations must not be anonymised in documents from war crimes trials.

IV Recording war crimes trials for the purpose of public presentation

The right to record war crimes trials for the purpose of public presentation should be distinguished from the right of the public to access audio and video recordings of the trial, which present information in the possession of the court and an integral part of the criminal records (see section above - audio and video recordings of main hearings). This chapter speaks of the right of, primarily, the media and non-governmental organizations to use their technical equipment to record certain parts of trials for the sake of, e.g. making television reports, making documentaries, etc.

Visibility of war crimes trials, as well as informing the public in an understandable and accessible manner of the court established facts on crimes, is an indispensable element in the process of dealing with the past. The communication of the judiciary operation in cases of war crimes provides satisfaction to the communities of victims in the form of recognition of suffering on the one hand, while it reduces prospects for success of ideas for revisioning and negation on the other hand. At the same time it also sends a message of zero tolerance of crime, and in this sense has a preventive effect. In a country where television is the main source of public information,[80] the visibility of war crimes trials implies television reports from trials.

Former War Crimes Prosecutor Vladimir Vukčević has repeatedly emphasized that the public is contaminated by false images of the past through the regime media, as well as the need to sober the society from them. One way to "sober up" or deal with the past that he proposed are live broadcasts of trials, because "when one hears the testimonies of victims in the courtroom, one does not need a lot to conclude in what dark times and with what kind of crimes we have lived all these years."[81]

Despite the legislative framework that has allowed it, **for more than 12 years of prosecuting war crimes in Serbia, the public has had no opportunity to see a single testimony of victims, perpetrators and witnesses of war crimes involved in these cases, or the pronounciation of a judgment.** In fact, in practice, the person authorized to decide on the request for recording –the President of the Higher

80 See, e.g. research of media integrity in Serbia performed by Bureau for Social Research, http://www.birodi.rs/barometar-integriteta-medija-bim/, accessed on 2 July 2016.

81 NIN, 'Najvažnija – politička volja', 13 July 2006, available at the HLC, *Medijski diskursi o suđenjima za ratne zločine u Srbiji, 2003-2013*, p. 3,available at http://www.hlc-rdc.org/wp-content/uploads/2014/11/medijski-diskursi_SR.pdf, accessed on 3 July 2016.

Court in Belgrade, contrary to the law, rejects these requirements on regular bases. On the other hand, video recordings of war crimes trials in regional countries appear regularly in media reports.

The National Strategy for Prosecuting of War Crimes reflected on this problem and set forth:

"The consistent actions of presidents of competent courts pursuant to Article 16a of the Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings."[82] For this activity, however, no implementation control mechanism has been envisaged. Bearing in mind that the President of the Higher Court in the earlier practice refused to enforce the law, there are no grounds to expect that the President of the Court shall apply a non-binding strategy in the future.

1. Normative Framework

Recording trials in war crimes cases is regulated by the Rules of Procedure of the Court and the Law on the Prosecution of War Crimes.

The Article 60 of the Court's Rules of Procedure specifies that:

> "Taking photos, making audio and video recordings at hearings for the purpose of public presentation of the recording shall be performed **with the previously obtained approval of the presiding judge, the judge and written consent of the parties and participants in the recorded action."**

Pursuant to Article 16 of the Law on the Prosecution of War Crimes, which is lex specialis in this matter, it is specified that:

> "Recording of the main hearing for the purpose of public presentation may be authorized by the President of the court **upon obtained opinion** of the parties."[83]

This Law was amended in 2009 precisely to allow recording and public broadcasting of court proceedings in war crime cases, because there was a need to get the public

82 National Strategy for the Prosecution of War Crimes, p. 36, available at http://www.mpravde.gov.rs/vest/12116/-nacionalna-strategija-za-procesuiranje-ratnih-zlocina-.php, accessed on 20 July 2016.

83 Article 16a, Law on the Prosecution of War Crimes.

familiar with the facts and evidence of committed war crimes.[84] Thus, the requirement of the Court's Rules of Procedure for obtaining *consent* is relaxed by the fact that the law requires only *opinion* of the parties to be obtained.

2. Problems in Practice

Unlike in the cases of organized crime, the media did not broadcast main hearings in cases of war crimes, despite the existence of legislative provision that makes it possible. In practice, such recording is prevented, because requests of the media and non-governmental organizations are either rejected with no explanation, or more rigorous procedure envisaged by the Court's Rules of Procedure is applied to them, instead of Article 16 of the Law on the Prosecution of War Crimes.

On 26 May 2015 the HLC sent a request to the President of the Higher Court in Belgrade to grant them recording of the public declaration of judgment in the *Beli Manastir* case. In his response, Aleksandar Stepanović, the President of the Higher Court in Belgrade, stated only that recording of sentencing "shall not be approved," without any additional explanation. Similarly, the Higher Court in Belgrade rejected request of the BIRN from February 2014 for recording the judgment in the *Ćuška* case.[85]

The Law on the Prosecution of War Crimes does not require explicit explanation of the decision prohibiting recording of the trial. Still, an elaborated judicial decision is an unquestionable standard of the rule of law and the human right to a fair trial. The ECtHR stated in its practice: "Only by providing an elaborated decision can be public monitoring be ensured over the implementation of justice."[86] The CPC also stipulates that "the chamber's decision to exclude the public must be elaborated and publicly announced. "[87] Given the fact that prohibition of recording the trial, which are otherwise public, essentially presents a form of restriction of public hearings, the relevant provision of the CPC had to be applied in this case by analogy.

84 *"Uskoro izmene zakona o suđenjima za ratne zločine", (Amendments to the Law on Prosecution of War Crimes Coming Soon) Blic*, 26 September 2009, available at http://www.blic.rs/vesti/drustvo/uskoro-izmene-zakona-o-sudenjima-za-ratne-zlocine/3mzz1nx. accessed on 18 July 2016; Siniša Važić, *"Približavanje suđenja za ratne zločine javnosti: audio-video snimanje i javno emitovanje suđenja", Pravda u tranziciji – Broj 5, ("Bringing War Crimes Trials Closer to the Public: Audio and Video Recording and Public Broadcasting of Trials", Justice in Transition - Number 5)* available at http://www.tuzilastvorz.org.rs/html_trz/(CASOPIS)/SRP/SRP05/1209.pdf, accessed on 18 July 2016, accessed on 3 June 2016..

85 Mail reply of the BIRN representative to the inquiry of the HLC, 9 May 2016.

86 See, e.g. Judgment of the ECtHR in the *Suominen against Finland* case (petition no.37801/97), 1 July 2003, Par. 37.

87 Article 365, CPC.

3. Comparative Practice

Unlike Serbia, the war crimes trials in BiH, Croatia and Kosovo are regularly recorded and presented in the media.

BiH

Pursuant to the Criminal Procedure Code of BiH, all actions undertaken during the criminal proceedings are audio or audio-visually recorded and can be publicly displayed only with the written consent of parties and participants in the recorded action.[88] However, the BiH Court's Rules of Procedure for gaining access to information envisage that the President of the Court may release audio/video recordings of hearings with the right to public presentation "if it is determined in the specific case that there is an increased legitimate public interest, and that it may be derived from all the facts of the specific case that the public release of records shall not endanger the court proceedings in the case."[89] The Court's Rules of Procedure envisage a special, accelerated procedure at the request of the media for releasing parts of audio or video records in the duration of 10 minutes "being guided by the importance of timely and quality information of broader public concerning the work of the Court."[90] These requests are processed within the same day. In practice, a large number of requests for access and the public presentation of audio and video recordings of the trial is approved.[91]

Croatia

Pursuant to the Criminal Procedure Act of Croatia, the rule is that photography, film and television recordings of criminal proceedings must not be carried out. However, "when this is relevant due to public interest," the President of Higher Court may

88 Criminal Procedure Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13), Article 155.

89 Rulebook on Amendments of the Rulebook for Exercise of the Right to Access to Information under Control of the Court of BiH and on Collaboration of the Court with the Community, Article 9, available at C:\Users\Milica Kostic\Downloads\Su-197-2_Pravilnik_o_izmjenama_pravilnika_o_pristupu_informacijama_7_04_2015 (1).pdf, accessed on 4 July 2016.

90 Ibid, Article 10.

91 See, e.g. https://www.youtube.com/watch?v=0kCfnFZEf6A of sentencing of Veselin Vlahović; https://www.youtube.com/watch?v=gWHbw8gL94M on the *Dnevnik* of TV1 on sentencing of Aleksandar Cvetković; https://www.youtube.com/watch?v=qOimIRqM8iE on the Dnevnik of TV1on the arraignment in the *Naser Orić* case, etc, accessed on 9 July 2016.

authorize a television recording, and the President of the Court, before which the proceedings is led, may authorize the taking of photographs.[92] In practice, video recordings from war crimes trials in Croatia are published in the media.[93]

Kosovo

The Criminal Procedure Code of Kosovo has the most liberal rules with respect to recording of trials and their public presentation. Unlike all other laws in the region that contain the assumption of prohibition of recording, it is the other way around in Kosovo. Pursuant to Kosovo law, taking photographs, recording using a movie camera, television recording or any other recording are permitted except in cases "when a single judge or the presiding judge of the chamber limits it in the elaborated written decision."[94] In practice, recordings of war crimes trials in Kosovo are published in the media.[95]

4. Recommendations

The HLC believes that decision-making on permission to record trials for the purpose of public presentation should be transferred from the competence of the president of the court to the presiding judge, who best knows the reasons that could potentially present a barrier to public disclosure of recorded material.

In accordance with positive examples from the region, the rules on recording of the trial for the purpose of public presentation should be fully equalized with the rules on publicity of the main hearing– if the hearing is public, the recording should be allowed.[96]

92 Criminal Procedure Act of the Republic of Croatia (152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14), Article 395, Paragraph 3, available at http://www.zakon.hr/z/174/Zakon-o-kaznenom-postupku.

93 See, e.g. https://www.youtube.com/watch?v=7EBKC-48qn U *Al Jazeera Balkans*, sentencing of Tomislav Merčep before the County Court in Zagreb, accessed on 20 July2016.

94 Article 301, Paragraph 3, Criminal Procedure Code of Kosovo, available at http://www.psh-ks.net/repository/docs/Kodi_i_procedures_penale_(serbisht).pdf, accessed on 15 July 2016.

95 See, e.g. https://www.youtube.com/watch?v=gO6ChZRDiOs *Al Jazeera Balkans*, sentencing of Oliver Ivanović before the Basic Court in Mitrovica; https://www.youtube.com/watch?v=r-rYz4COkQs RTV on arraignment of Oliver Ivanović, etc, accessed on 18 July 2016.

96 Articles 362-366 of the CPC.

V Storing court records of war crime cases

Successful implementation of transitional justice mechanisms and realization of the right of society to know the truth about mass and systematic human rights violations of the past implies access to, primarily, state archives containing data on these events. Case files relating to these crimes, i.e. the court's archives, are the key source of information about the past. Nevertheless, a serious discussion on preservation of the archives of war crimes trials has still not been initiated in Serbia.

The HLC is the only organization in Serbia monitoring national war crimes trials from the start, obtaining documentation of these cases from judicial authorities, keeping them in its archives and making them available to the public through its website.[97] However, the HLC, as well as the general public, has available only the indictments, judgments and transcripts, and this is often not the integral form (see above section on anonymisation). Still, for full understanding of the subject, but also events to which they relate, it is necessary to review and keep entire records from war crime cases. Despite historical, scientific and research significance of these records, they are treated in Serbia as any other criminal cases, and the records of the war crime cases are being destroyed within the same time limits envisaged for other cases. Other states in the region have recognized the social and historical significance of these records, and they have envisaged adequate mechanisms for their protection.

1. Normative Framework

a. International Legal Framework

Each society has a collective right to the truth, i.e. the right to know the truth about the circumstances and motives of systematic violations of human rights and in-

97 See web presentations on the website of the HLC on individual cases of war crimes, available at http://www.hlc-rdc.org/?cat=234; accessed on 20 July 2016.

ternational humanitarian law.[98] Transitional societies are entitled to "undistorted historical narrative", i.e.to the right to the truth about the past.[99] However, realization of this right requires archives. The archives, in terms of right to the truth, and in accordance with position of the UN Commission on Human Rights, refer to the collection of documents on violations of human rights and humanitarian law from various sources, **"especially those in charge of the protection of human rights, such as the judicial bodies"**[100]

An updated set of principles for the protection and promotion of human rights through the fight against impunity of the UN Commission on Human Rights envisages a set of principles related to accessing and preserving archives on human rights violations as a guarantee for realization of human rights.[101] Principle number 3 obliges states to keep their archives –"knowledge of a nation on their own oppression is part of its heritage and as such must be secured by adequate measures through the performance of the **state's obligation to preserve archives and other evidence concerning violations of human rights and provisions of humanitarian law and to facilitate the acquisition of knowledge on these violations**. Such measures are aimed at preserving collective memory, and particularly preventing revisioning and negating ideas."[102] Principle 5 refers to guarantees of effectiveness of the right to the truth and emphasizes that: *"[...] the state must ensure preservation of and access to archives related to violations of human rights or humanitarian law."* Principle 14 points out: "The right to know implies that **archives must be preserved.** Technical and punitive actions should be envisaged to prevent removal, **destruction**, concealment or falsification of archives.."[103]

b. National Legal Framework

Keeping court records, including those of war crime cases, is regulated in the Republic of Serbia by the Court's Rules of Procedure and the Law on Cultural Property.

98 Office of the United Nations High Commissioner for Human Rights, Study on the right to the truth, 8 February 2006, Par. 55; Resolution 68/165 of the UN General Assembly (A/RES/68/165), 18 December 2013; Resolution 65/196 of the UN General Assembly (A/RES/65/196), 21 December 2010..

99 Report of the United Nations High Commissioner for Human Rights on seminar about experiences with archives as a means to ensure the right to the truth (A/HRC/17/21), 14 April 2011, p. 3.

100 Updated set of principles the protection and promotion of human rights through the fight against impunity (E/CN.4/2005/102/Add.1), 8 February 2005; available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement; accessed on 20 July 2016.

101 Ibid.

102 Ibid.

103 Ibid.

1.1. Rules of Procedure of the Court

Contrary to the relevant international standards, applicable rules in the Republic of Serbia on keeping court records do not treat war crime cases in a special way, that is, the records of these cases are kept and destroyed in the same manner and within the same period as well as records from other cases.

Pursuant to the provisions of the Court's Rules of Procedures, retention period for archived cases referring to criminal records with rendered sentence of imprisonment exceeding 10 years is 30 years; for those referring to criminal records with rendered sentence of imprisonment over 3 up to 10 years is 20 years;[104] for all records of second-instance - five years; and for all other records this period is 10 years.[105] Upon expiry of these deadlines, the records are to be destroyed.[106] Thus, the records of war crime cases can be kept no longer than 30 years.

Having recognized the importance of permanent storage of certain records, the Court's Rules of Procedure, however, have envisaged exceptions to these rules. In line with this, testaments, decision declaring a missing person as dead, and "criminal records in criminal cases for criminal offenses for which a sentence of imprisonment of 30-40 years was rendered" are permanently kept."[107] The logical assumption is that such an exception for sentences from 30 to 40 years of imprisonment has been envisaged because the legislator recognized the necessity of a special treatment for cases involving the most serious criminal offences. The envisaged exception for the most serious crimes, however, is not comprehensive, i.e. it ignores the fact that the previous criminal code is applied in war crimes trials under which the maximum penalty for war crimes is 20 years.[108]

Until present day no case of war crimes prosecuted before the War Crimes Chamber has achieved the legal deadline for destruction. However, **in the next two years time limits for keeping records for a series of war crime cases will start to expire and soon be eligible for destruction. Therefore, it is necessary to modify the Court's Rules of Procedure to enable permanent storage of records of war crime cases.**

104 Article 241, Paragraph 1, Items 3 and 4, Court's Rules of Procedure ("Official Gazette of the RS", No. 110/2009, 70/2011, 19/2012, 89/2013, 96/2015, 104/2015 and 113/2015 - corr.).

105 Ibid, Items 10 and 13.

106 Ibid, Paragraph 4.

107 Ibid, Article 240, Paragraph 1, Item 4.

108 Criminal Code of the Federal Republic of Yugoslavia is applied in war crimes cases (*Official Gazette of the SFRY*, No. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90 and *Official Gazette of the FRY*, No. 35/92, 37/93 and 24/94) in effect at the time the offences were committed.

1.2. Law on Cultural Property

Pursuant to the Law on Cultural Property, "cultural properties are items and creations of material and spiritual culture of general interest which enjoy special protection stipulated by this law," and they include the "archive material."[109] In accordance with the Law, cultural property must not be destroyed.[110]

According to the Law the archive holdings includes "original and reproduced written, [...] or otherwise recorded documentary material of special importance for science and culture that was created in the work of state bodies and organizations [...]"[111]"The archive and film holdings created in the work of state bodies and organizations, bodies of territorial autonomy units and local self-government, institutions,

109 Article 2, Law on Cultural Property ("Official Gazette of the RS" No. 71/94, 52/2011 – other laws and 99/2011 – other law).

110 Ibid, Article 7.

111 Ibid, Article 24.

enterprises, other legal entities and individuals, which they keep in accordance with this law, present cultural assets pursuant to this law."[112]

In accordance with the provisions of this Law, **archive holdings from war crimes trials can be protected as a "cultural asset of exceptional importance"** given that they have the following characteristics:

- they have "particular importance for the social, historical and cultural development of the nation in national history";
- they "testify on crucial historical events and persons and their actions in the national history;"
- they have "great impact on the development of society";[113]

Likewise, in accordance with the Law, **archive holdings from war crimes trials can be protected as a "cultural asset of exceptional importance"** because:

- they "testify of social conditions, i.e. the conditions of social and economic and cultural and historical development in certain periods;"
- they "testify of important events and prominent figures from national history."[114]

The fact that **the state archives keep documents related to the investigation and prosecution of crimes from World War II** confirms that the Law has envisaged keeping records of war crime cases in the competent archives as cultural assets .[115]

2. Comparative Practice

The court records from criminal cases of war and other crimes against international law are not being destroyed in BiH. The Rules on Internal Court Operation in BiH envisages that "records of criminal cases for offenses which pursuant to the law are not subject to statute of limitations for criminal prosecution and records of criminal

112 Ibid, Article 53.

113 Ibid, Article 5, Paragraph 1, Items 1, 2 and 4.

114 Ibid, Article 5, Paragraph 2, Items 2 and 3.

115 Web page of the Archives of Yugoslavia: State Commission for Determining Crimes of Occupiers and Their Abettors from World War II, available at http://www.arhivyu.gov.rs/active/sr-cyrillic/home/glavna_navigacija/izdanja/istoriografija/drzavna_komisija_za_utvrdjivanje_zlocina_okupatora.html; accessed on 18 July 2016.

cases where the sentence of long term imprisonment was rendered" are to be permanently kept in the archives."[116]

The Rules of Procedure of the Court of Croatia do not explicitly envisage keeping permanent records of criminal cases of war crimes. However, the rules of procedure do envisage keeping permanent "records that, due to their content and the people to whom they refer, have the historic, scientific or social significance, as well as records important for general or local history."[117] Precisely pursuant to this provision war crime cases are permanently kept in Croatia.[118]

Kosovo is currently having rulebooks drafted to regulate the periods of storage and destruction of court records.[119]

It is common practice in many states to have national archives permanently keep records of trials for crimes against international law.[120]

3. Recommendations

The Republic of Serbia should amend the Court's Rules of Procedure, modelled on the legislative solutions in the region, in such a way to explicitly envisage permanent storage of war crime cases, regardless of their judicial epilogue.

The Republic of Serbia should permanently keep records from war crime cases in accordance with provisions of the Law on Cultural Property.

116 Article 142(h), Rules on Internal Court Operation in BiH, available at http://www.pravosudje.ba/vstv/faces/faces/docservlet?p_id_doc=1605, accessed on 20 July 2016.

117 Article 168, Paragraph 1, Item 1, Rules of Procedure of the Court of Croatia (consolidated text N.N. 37/14, 49/14, 8/15 and 35/15 and 123/15), available at http://www.vsrh.hr/CustomPages/Static/HRV/Files/2016dok/SudskiPoslovnik_2015-123.pdf, accessed on 20 July 2016.

118 Telephone interview of the HLC with representative of the *Documenta* as of 19 July 2016.

119 Reply of the representative of secretariat of the Judicial Council of Kosovo as of 21 July 2016.

120 See, e.g. of the archives holdings on trials related to World War II of the National Archives of the United States of America, available at http://www.archives.gov/research/captured-german-records/war-crimes-trials.html; archives holdings on war crimes trials of the National Archives of Australia, available at http://recordsearch.naa.gov.au/SearchNRetrieve/Interface/DetailsReports/SeriesDetail.aspx?series_no=A471; court records from trials in France for crimes committed during World War II, permanently kept at the Institut national de l'Audiovisuel, see at Trudy Huskamp Peterson, Temporary Courts, Permanent Records, p. 57, available at https://www.wilsoncenter.org/sites/default/files/TCPR_Peterson_HAPPOP02.pdf, accessed on 18 July 2016.