Humanitarian Law Center

ACCESS TO DOCUMENTS RELATED TO CRIMES AGAINST INTERNATIONAL LAW IN THE POSSESION OF SERBIAN INSTITUTIONS:

STATE SECRET

PREVAILS OVER RIGHT TO THE TRUTH

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Abbreviations used in text

37th mtbr YA	37th Motorized Brigade of the Prishtina Corps of the Yugoslav Army
Commissioner	Commissioner for Information of Public Importance and Personal Data Protection of the Republic of Serbia
Đorđević	The case before the International Criminal Tribunal for the Former Yugoslavia IT-05-87/1-T, the Prosecutor vs. *Vlastimir Đorđević*
ECHR	The European Convention on Human Rights
ECtHR	The European Court of Human Rights
EU	The European Union
HLC	The Humanitarian Law Center
ICTY	The International Criminal Tribunal for the former Yugoslavia
MoD	The Ministry of Defence of the Republic of Serbia
MoI	The Ministry of the Interior of the Republic of Serbia
OWCP	The Office of the War Crimes Prosecutor of the Republic of Serbia
Šainović et al.	The case before the International Criminal Tribunal for the Former Yugoslavia IT-05-87, the Prosecutor vs. *Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević* and *Sreten Lukić*
SPU	Special Police Units of the Ministry of the Interior of the Republic of Serbia
UN	The United Nations
YA	The Yugoslav Army

Content

Summary

Open access to archives which contain documents that can assist in determining the facts about past human rights violations is a key prerequisite for the establishment of transitional justice processes and mechanisms. In societies like the Serbian, which have experienced periods marked by systematic violence, access to information regarding human rights violations is an essential element of the right of victims and society as a whole to know the truth.

The right to know the truth about what happened in a period marked by large-scale human rights violations is a human right too, a part of the right to freedom of expression which is guaranteed by the International Covenant on Civil and Political Rights. The Covenant, which is binding upon Serbia and its citizens, states that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to *seek, receive* and impart information"[1][italics added]. It constitutes a basis for the enjoyment of several other human rights and enables public oversight of government authorities' operations and an effective citizens' participation in democratic processes.

Despite the fact that Serbia is a state party to the International Covenant on Civil and Political Rights and a sponsor of the Resolution on the Right to the Truth adopted by the UN Human Rights Committee, and contrary to its domestic legal framework that guarantees free access to information of public importance, Serbian institutions systematically obstruct public access to documents and also to the government bodies responsible for prosecuting war crimes.

This report draws on the HLC's extensive experience in researching crimes and publishing publicly available evidence regarding as yet unpunished crimes, which also includes using information and documents contained in the archives of the Ministry of the Interior (MoI) and the Ministry of Defence (MoD).

Over the last few years, the MoI and MoD have been unlawfully obstructing access to information of public importance essential for shedding light on past events, including the facts relating to crimes and enforced disappearances. As a rule, these two institutions deny access to the information and documents requested by the HLC, especially where the documents concern crimes regarding which there are strong indications that they were committed by police or army officers. In their attempt to keep these documents out of public view, the MoI and MoD use a variety of arguments and procedures which often run contrary to the relevant laws.

The MoI has refused most HLC's requests, using the unpersuasive rationale that it does not hold the information requested. The MoD, for its part, refuses the requests by invoking data secrecy or personal data provisions. This MoD practice is based upon its arbitrary interpretations of the relevant

1 Article 19 (2), International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 9**,** Official Journal of the SFRY (International Treaties) No. 7/1971.

provisions, and involves non-compliance with the decisions of the Commissioner for Information of Public Importance and Personal Data Protection ordering the MoD to disclose documents and information of public importance.

The main aim of this report is to stress the need for providing public access to archives that contain documents relating to crimes and gross human rights violations committed during the wars of the 1990s in the former Yugoslavia which would enable the victims, their families, and society as a whole, to exercise their right to the truth and help to combat impunity.

I. Introduction

About the HLC

Since its foundation in 1992, the HLC has investigated and documented crimes against international humanitarian law and other gross human rights violations committed during and in connection with the wars fought on the territory of the former Yugoslavia (1991-2000). The HLC has filed criminal complaints against persons suspected of committing these crimes and published dossiers on crimes that have gone unpunished, drawing on available evidence which points to certain units or individuals as participants in the crimes. At the same time, the HLC has represented victims in domestic war crimes trials, and victims who pursue reparation through civil and administrative proceedings.

The HLC's research is based upon evidence drawn from two main sources: witnesses – survivors, victims' next of kin, eye-witnesses, insider witnesses who gave statements to the HLC or testified before courts about crimes and perpetrators; and official documents held by the Republic of Serbia and other countries in the region, that have been used in trials at the International Criminal Tribunal for the Former Yugoslavia (ICTY) and are available *online* at the ICTY court records database.[2]

As the ICTY online court records database does not include the entire archives of government bodies (but just documents – the evidence adduced during trials before this tribunal), the HLC often contacts Serbian government institutions seeking access to as yet undisclosed documents, under the Law on Free Access to Information of Public Importance. In the period mid-2013 to the end of 2015, the HLC submitted more than 400 such requests to the MoD and MoI.

Socio-Political Context

For a society like Serbia that has emerged from periods of large-scale human rights violations, democratization is inconceivable without the implementation of transitional justice mechanisms as prerequisites for reconciliation and a successful democratization. These mechanisms include holding perpetrators accountable for their wrongdoing; finding, revealing and acknowledging the facts about crimes; the provision of reparations to victims; and a comprehensive institutional reform which would guarantee non-recurrence of crimes. The success of all these mechanisms largely depends on the accessibility of archives that contain records on past human rights violations.

Where Serbia is concerned, only one transitional justice mechanism – war crimes trials - has been implemented to date. However, this mechanism has failed to deliver its full potential, largely owing to the lack of political support and will. The obstruction of the work of the bodies responsible for war

2 ICTY court records database, available at : http://icr.icty.org/bcs/defaultb.aspx

crimes prosecution makes this evident.[3] In fact, despite being legally obliged to provide the Office of the War Crimes Prosecutor (OWCP) with information as required by the OWCP,[4] public authorities refuse to do so. The Deputy War Crimes Prosecutor has drawn attention to this problem:

> It happens to us too, that when we investigate the involvement of a senior government official, we are told that the very document we want to see was destroyed in the bombardment. And then the document pops up at The Hague, and we need to go through a long and gruelling procedure to obtain the document, such are the rules of the Hague Tribunal. We are unpleasantly surprised to find at the Hague Tribunal some documents that our government bodies say do not exist, or were destroyed in the bombardment, or something to that effect. This must be addressed at the state level.[5]

He has also pointed out that:

> […] the problem we face is inaccessibility of documents […] it is no secret that the State Security archives were burning after the 5th of October to conceal evidence [and] it is no secret that some government officials who feel responsible for certain crimes are reluctant to cooperate. Whenever you investigate war crimes committed by the police, for instance, you hit a wall of silence.[6]

The concealment of documents relating to crimes with a view to shielding those responsible comes as no surprise, if one knows that many individuals who, as members of the military or police, participated in the events that the authorities responsible for war crimes prosecution focus on, are still working for the authorities that hold the key archives. That is because institutional reforms which would include lustration or *vetting* have not been implemented in Serbia to date. The so-called Law on Lustration, which was to enable assessing the suitability of the highest-ranking government officials to hold public office, expired in 2013, without ever having been implemented.[7]

3 For more information on war crimes trials, see: HLC, „Analysis of the war crimes prosecution in Serbia 2004-2013", available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf and HLC, „Report on War Crimes Trials in Serbia in 2014 and 2015", available at: http://www.hlc-rdc.org/wp-content/uploads/2016/03/Report_on_war_crimes_trials_in_Serbia_during_2014_and_2015.pdf

4 Article 7 of the Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings [Zakon o organizaciji i nadležnosti državnih organa u postupku za ratne zločine]: "All state authorities shall, at the request of the Office of the War Crimes Prosecutor or the War Crimes Investigation Service: 1) without delay allow them to use every technical means they have; 2) secure that their members, employees, including supervisors in state authorities and organizations, be available, in a timely manner, to provide information or to be questioned or questioned as private citizens, suspects or witnesses; 3) without delay hand over any letter or other piece of evidence they possess, or otherwise provide information that can help detect war crimes perpetrators."

5 Omer Karabeg, "Are Diković and Guri Untouchable?" [Da li su Diković i Guri nedodirljivi?], *Radio Free Europe,* 14 September 2014, available (in Serbian) at http://www.slobodnaevropa.org/content/da-li-su-dikovic-i-guri-nedodirljiviji/26581902.html accessed 22 January 2016.

6 Marija Ristić, "Vekarić: regional cooperation key to war crimes prosecution" [Vekarić: Regionalna saradnja ključ za procesuiranje ratnih zločina], *BIRN,* 21 November 2013, available at http://www.balkaninsight.com/en/article/vekari%C4%87-klju%C4%8Dno-regionalno-procesuiranje-ratnih-zlo%C4%8Dina accessed 23 March 2016.

7 Law on Responsibility for Human Rights Violations, (Official Gazette of the RS" Nos. 58/2003 and 61/2003 – corr.).

Vetting of lower-ranking government officials – members of security sector agencies – i.e. assessment of whether or not officials who were involved in past human rights violations are suitable for public office,[8] neither has nor can be carried out, because current legislation governing the armed forces does not provide for checking the wartime backgrounds of members of the military and police, nor does it envisage that a person may be permanently removed from service because of his wartime past.[9] That there is a need to conduct background checks on active-duty members of the military and police is borne out by the fact that about 10 percent of war crimes indictees in Serbia were serving as active-duty members of the police or army at the moment of the filing of charges against them.

As a consequence, high-ranking war crime suspects today hold senior positions at the relevant government institutions and make decisions regarding public access to the archives that hold information on the basis of which they could face prosecution. For example, the Army of Serbia is headed by Ljubiša Diković, the ex-commander of the 37th Motorized Brigade of the YA, which was involved in war crimes (killings, rapes, expulsions and other criminal offences) against thousands of civilians during the war in Kosovo.[10] Momir Stojanović, the former Head of the Security Department of the YA Prishtina Corps, chairs the Serbian Parliamentary Committee for Security Services Control, which has access to classified data and oversees them. Plenty of credible evidence has been made public that indicate Stojanović's responsibility for crimes committed against Albanian civilians.[11]

As part of the process aimed at building the rule of law and implementing institutional reforms, Serbia in 2004 passed the Law on Free Access to Information of Public Importance. The passing of the Law was a precondition for Serbia's membership in the Council of Europe.[12] Today, twelve years on, it can be said that the concerns voiced by the Council of Europe, the EU and the OSCE Missions to Serbia and Montenegro upon the adoption of the Law, that some of its provisions were designed to restrict the rights of citizens and give broader powers to government authorities, have proven to be well-founded.[13] The same holds true for the Commissioner's concerns that the Law would not prevail over

8 See, e.g., ICTY, "Vetting", available at https://www.ictj.org/our-work/research/vetting, accessed 16 March 2016.

9 See Article 77 of the Law on Armed Forces of Serbia (Official Gazette of the RS" Nos. 116/2007 and 88/2009), and Article 165 on the Law on Police (Official Gazette of the RS" Nos. 101/2005, 63/2009 – CC decision and 92/2011).

10 See HLC, "Ljubiša Diković" Dossier (2012), available at http://www.hlc-rdc.org/wp-content/uploads/2012/10/Ljubisa-Dikovic-Dosije-and-Prilog.pdf, and HLC, "Rudnica" Dossier (2015), available at http://www.hlc-rdc.org/wp-content/uploads/2015/01/Dosije_Rudnica_eng.pdf, accessed 16 March 2016.

11 See HLC, "Operation Reka" Dossier (2015), available at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Dossier-Operation_Reka.pdf, accessed 16 March 2016.

12 Council of Europe, Report on compliance with obligations and commitments and implementation of the post-accession co-operation programme (SG/Inf(2004)33) of 16 December 2004, available at https://wcd.coe.int/ViewDoc.jsp?id=795439&Site=COE . Commissioner for Information of Public Interest, "Guide to the Law on Free Access to Information" [Vodič kroz Zakon o slobodnom pristupu informacijama], p. 1, available in Serbian at http://www.poverenik.rs/images/stories/Dokumentacija/16_ldok.pdf , accessed 12 March 2016.

13 Joint Statement of the OSCE Mission to Serbia and Montenegro, the Council of Europe Office in Belgrade and the Delegation of the European Commission to Serbia and Montenegro of 15 November 2004, available at http://www.osce.org/serbia/56947 , accessed 13 March 2016.

the "the social atmosphere where the monopoly over information, 'secrets' and mystifications work as powerful levers for controlling social processes."[14]

In his latest annual report (2014), the Commissioner for Information of Public Importance stated the following:

> [Y]ear after year, including in 2014, the most frequent reason public authorities use to deny access to information to requesters is confidentiality of information. What is particularly worrying is the fact that in 2014 the number of such cases increased by as much as 12.2% compared with 2013.[15]
>
> [..]
>
> When they deny information by invoking data confidentiality, public authorities mostly do not even provide proof that the documents or information are actually properly classified as confidential in accordance with the Data Secrecy Law, and as a rule, they rarely bother to provide a substantive reason and evidence for their decisions to deny access to information. They tend to *a priori* reject a request without applying the so-called prejudice test and public interest test, which are necessary for determining the overriding interest – whether the public's right to know prevails over another right or public interest protected as secret, that could be seriously jeopardised through disclosure of information.[16]

Content of state archives

The importance of MoI and MoD archives cannot be overstated, because these archives contain the documentation necessary to shed light on wartime and war-related events in the former Yugoslavia during the 1990s. That conclusion is primarily based on the ICTY's work and the importance this court attached to that particular documentation in its evidence procedures and judgements. As noted above, the ICTY has taken over a significant amount of information from MoI and MoD archives for the purpose of investigating violations of international humanitarian law and prosecuting those responsible.

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14 Commissioner for Information of Public Importance, "Guide to the Law on Free Access to Information", p. 1, available in Serbian at http://www.poverenik.rs/images/stories/Dokumentacija/16_ldok.pdf, accessed 12 March 2016.

15 Commissioner for Information of Public Importance and Personal Data Protection, 2014 Report on Implementation of the Law on Free Access to Information and the Law on Personal Data Protection, p. 26, available at: http://www.poverenik.rs/images/stories/dokumentacija- nova/izvestajiPoverenika/2015/engg%20 izvestaj2014.pdf accessed 23 March 2016.

16 Ibid.

An analysis of the publicly available documents that are stored in MoD and MoI archives and the ICTY online database has shown that these documents have an exceptional legal and historical importance. They contain a wealth of information about the participants in and circumstances of certain events which occurred during the period of the armed conflicts that can **help to identify those responsible for crimes and locate persons who were forcibly disappeared during the conflicts**.

At the same time, it should be pointed out that an objective interpretation of these documents requires that one bear in mind the socio-political context in which they were created, i.e. the fact that their authors were institutions suffering from a serious "democratic deficit", with a track record of shielding government officials from being held responsible for human rights violations. That is why these documents should be assessed together with other sources of data too relating to human rights violations in the 1990s.

The MoI and MoD archives contain documents referring to such matters as orders for carrying out military and police operations during the conflicts, daily and combat reports, distribution of units, information relating to assignments given to their members, command structure, re-subordination of units, treatment of civilians, relationships with the civilian authorities and international institutions, etc. Thanks to the information found in these documents and to crosschecking with statements of witnesses, survivors and other witnesses of crimes, it is possible to piece together a rather clear picture of how the critical events unfolded and who took part in them. At the very least, it can be established which army or police units were present at a certain location at the time of the commission of a crime.

Particularly valuable documents obtained from MoD and MoI archives are those relating to the activities undertaken by members of these institutions with regard to the bodies of crime victims. There is no doubt that the army and police, as supreme authorities in the war-affected areas, were formally responsible and had a hands-on role in recovering and burying human bodies during the armed conflicts, through a procedure termed "clearing-up the battlefield". The Geneva Conventions lay down the rules for the treatment of the mortal remains of people who have been killed during an armed conflict, which include recording all available particulars of dead persons which could help in their subsequent identification. During the war in Kosovo, the YA and MoI were responsible for carrying out this task.[17] However, according to the ICTY's findings, the MoI and YA used the procedure of "clearing-up the battlefield" for the unlawful purpose of concealing the evidence of crimes.[18]

That the MoD and MoI documented the procedures of dealing with the bodies of victims is indicated not only by the bureaucratic nature and strong hierarchical structure of these institutions, but also by a number of documents that have been used in proceedings before the ICTY. The ICTY database

17 ICTY Trial Chamber Judgment in *Đorđević* case of 23 February 2011, paras. 553, 985, 988, 2118, 2119 and 2121; ICTY Trial Chamber Judgment in the *Šainović et al.* case, dated 26 February 2009, Vol. 4, paras. 1356 and 1357; PrC order for the cleaning up of the battlefield, 31 March 1999, exhibit No. 5D00352, *Šainović et al.*

18 For more details about the concealment of bodies, see the ICTY Trial Chamber Judgment in *Šainović et al.* of 26 February 2009, pp. 428-460, also the ICTY Trial Chamber Judgment in *Đorđević* of 23 February 2011, pp. 474-520.

includes documents such as orders for the establishment of squads for clearing-up the battlefield and their responsibilities,[19] reports of army and police commissions on the clearing-up operations conducted,[20] MoI reports on crime scene investigations and examinations relating to clearing-up operations,[21] etc.

From the documents available so far, it is evident that all army brigades had to set up so-called squads for clearing up the battlefield tasked with gathering data on dead persons, making lists of buried persons and dealing with the personal possessions of dead persons.[22] Although this procedure was often conducted with the view to destroying evidence of crimes, it was nevertheless organized in accordance with the formal rules of war, so the documentation gathered during the process (and preserved to date) is invaluable in tracing missing persons.

That the documentation on victims who are today referred to as missing persons is held in MoD and MoI archives can be concluded from the fact that YA and MoI investigative bodies used that documentation and that it was on the basis of this documentation that a MoI Task Force discovered in 2001 the mass graves in Batajnica, Perućac and Petrovo Selo that contained the bodies of Kosovo Albanians.[23] Nevertheless, the MoD and MoI refused to provide the documentation used by the above-mentioned investigative bodies to the HLC [see more in section - Practices of Serbian government bodies].

What is more, the available information about the mass gravesite at Rudnica, where the mortal remains of victims of war crimes committed by the Serbian forces during the war in Kosovo were discovered in 2014, proves that the MoD and MoI do indeed hold information about the location of the bodies of victims who still remain unaccounted for. In fact, the documents available so far confirm the following: the YA 37th Motorised Brigade was responsible for clearing up the battlefield at the crime scenes;[24] the brigade's clearing-up squad was formed on the day when the first of four crimes was committed (the bodies of victims were hidden later in the mass grave at Rudnica);[25] the

19 See, e.g., PrC order for the clearing-up of the battlefield, 31 March 1999, exhibit No. 5D00352, *Šainović et al.*; PrC order for the clearing-up of the battlefield – addition, 8 April 1999, exhibit No. 5D00179, *Šainović et al.*; Order for the clearing-up of the battlefield issued by the Command of the YA 125th MtBr, 4 April 1999, exhibit No. P01246, *Šainović et al.*; Order for the clearing-up of the battlefield issued by the Command of the YA 37th MtBr, 5 April 1999, exhibit No. 5D01028, *Šainović et al.*

20 See, e.g., Application of the rules of the international law on armed conflict, p. 95, exhibit No. P01011, *Šainović et al.*; Information from the Working Group, 25 May 2001, p. 3, exhibit No. P00567, *Šainović et al.*

21 MoI's overview of the criminal offences registered and steps taken on the territory of Kosovo and Metohija in the period 1 July 1998 to 20 June 1999, p. 17, exhibit No. 6D00614; MoI, report on crime scene investigation in Izbica, 2 June 1999, exhibit No. 6D116; MoI, Note on the visit to Izbica, 27 May 1999, exhibit No. 6D115, *Šainović et al.*

22 For more on the "clearing-up" procedure see HLC's „Rudnica" Dossier, pp. 11-13, available at http://www.hlc-rdc.org/wp-content/uploads/2015/01/Dosije_Rudnica_eng.pdf, accessed 9 February 2016.

23 For more information on these investigative bodies, see HLC, "Rudnica" Dossier, pp. 13-14, available at http://www.hlc-rdc.org/wp-content/uploads/2015/01/Dosije_Rudnica_eng.pdf, accessed 9 February 2016.

24 Order for the clearing-up of the battlefield issued to the YA 37th MtBr, 5 April 1999, exhibit No. 5D01028, *Šainović et al.*

25 Ibid.

clearance squad of this brigade notified the local authorities about the victims' bodies at the crime scene in the village of Rezala;[26] an investigative judge arrived at the scene of the crime and established the presence of the dead bodies;[27] the military investigative authorities were notified about the crime in Rezala;[28] the clearing-up squads had the duty to inform brigade commanders on their activities on a daily basis;[29] the lot of land on which the mass grave at Rudnica was discovered belonged to the YA,[30] etc. All the above-mentioned documents, as well as many others, are held by the state authorities of the Republic of Serbia.

There is no doubt that government institutions and their current and former members, at the time of the commission of crimes and afterwards, possessed information regarding the whereabouts of the bodies that were found in the mass grave at Rudnica, but refused to disclose it or assist in locating the bodies. Indeed, the mass grave at Rudnica was not discovered owing to any activities on the part of the Serbian government authorities or information provided by them, but thanks to the EULEX, which revealed that such a mass grave existed and provided information as regards its location.[31]

Apart from this documentation held in the official archives which are clearly essential for the search for missing persons, there are many other documents as well that could serve that purpose. For instance, in order to detect mass graves, the ICTY used documentation pertaining to the use of heavy duty mechanical equipment (bulldozer excavators, loaders and trenchers), utilization records, fuel disbursement and consumption logs, travel orders or orders for the utilization of trucks, and similar evidence.[32]

The importance of providing access to official archives for the purpose of searching for missing persons was underlined by the European Parliament and the UN Committee on Enforced Disappearances in their respective 2015 reports on Serbia [see Section - International legal framework].

Nearly 11,000 victims of the wars in the former Yugoslavia still remain unaccounted for.[33] Most of the 20,000 missing persons who have been found to date were found in clandestine mass graves many years or even a couple of decades after the armed conflicts. Whether the remaining missing persons who at the time of disappearance were in the hands of the army or police will be found or not, depends on the availability of MoD and MoI archives for public access - that is, on the willingness of all state authorities to actively assist in the search for secret mass graves.

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26 MoI's overview of registered criminal offences and measures taken on the territory of Kosovo and Metohija in the period 1 July 1998 to 20 June 1999, p. 17, exhibit No. 6D00614, *Šainović et al.*

27 Ibid.

28 Communication of the Office of the District Prosecutor in Kosovska Mitrovica to the Military Prosecutor's Office of 26 April 1999.

29 Order for the clearing-up of the battlefield issued to the YA 37th MtBr, 5 April 1999, exhibit No. 5D01028, *Šainović et al.*

30 See "Rudnica" Dossier, para. 28.

31 Ibid, par. 18.

32 See, e.g., ICTY Trial Judgment in *Krstić* (IT-98-33-T), pp. 97-98.

33 International Committee of the Red Cross, Missing persons in the Western Balkans, 2 June 2015, available at https://www.icrc.org/en/document/missing-persons-western-balkans, accessed 9 February 2016.

II. A historical and comparative overview of legal practices

Evolution of the right to the truth

Historically, the right to the truth was linked primarily to enforced disappearances. The right to the truth was first formulated in international humanitarian law, specifically in the Protocol 1 Additional to the Geneva Conventions of 1949. Its Article 32 stipulates that "the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by *the right of families to know the fate of their relatives*"[34] [italics added]. The right to the truth is explicitly recognized by the Convention on the Protection of All Persons from Enforced Disappearance.[35]

Over time, this right has evolved to include reference to other forms of gross violations of human rights. The right to the truth is explicitly mentioned in numerous reports and resolutions of various UN bodies. In its 2006 report on the right to the truth, the UN High Commissioner for Human Rights concludes as follows:

> The right to the truth about gross human rights violations and serious violations of humanitarian law is an inalienable and autonomous right, recognized in several international treaties and instruments as well as by national, regional and international jurisprudence and numerous resolutions of intergovernmental bodies at the universal and regional levels.[36]

Following numerous UNHCHR resolutions, the General Assembly of the UN adopted a resolution on the right to the truth which stresses "the importance for the international community to endeavour to recognize the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations, to the fullest extent practicable, in particular, the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred."[37] Also, the UN General Assembly proclaimed 24 March as International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims.[38]

In 2012, Serbia and 30 other countries proposed to the UN Human Rights Council a resolution on the

34 Protocol I Additional to the Geneva Conventions of 12 August 1949 on the protection of victims of international armed conflicts, Article 32.
35 Convention on the Protection of All Persons from Enforced Disappearance (Official Gazette of the RS – International Treaties, No. 1/2011), Article 18.
36 Office of the United Nations High Commissioner for Human Rights, *Study on the Right to the Truth*, 8 February 2006, para. 55.
37 UNGA Resolution 68/165 (A/RES/68/165), 18 December 2013.
38 UNGA Resolution 65/196 (A/RES/65/196), 21 December 2010.

right to the truth, which was shortly afterwards adopted.[39] The Resolution recognises the importance of preserving the memory of gross and serious violations of human rights through maintaining and preserving archives and other documents pertaining to such violations. The proposal also states the conviction that countries need to preserve their archives and other evidence regarding gross violations of human rights and provide access to effective remedies for the victims in accordance with international law.

As regards its content, the right to the truth entails two equally important elements: 1) the individual right of the victims, their families and relatives to know the truth about the causes of the violations of their rights and the circumstances in which they occurred, and, in the event of disappearance or death, to know the victims' fate; 2) the collective right of a society to know the truth about the circumstances of and motives behind systemic violations of human rights and international humanitarian law.[40] It should particularly be emphasized that the right to the truth is in effect a form of reparation for the victims of gross violations of human rights and a guarantee of non-recurrence of such crimes.[41]

In revisiting their violent past, countries use different transitional justice mechanisms, including the prosecution of perpetrators, institutional reforms as guarantees of non-recurrence, truth-seeking and reparations initiatives. Every one of these mechanisms relies on archives containing documents on human rights violations. This is why the UN has recognised the fundamental importance of archives to the fulfilment of some fundamental obligations of states, such as the search for missing persons. Archives are also crucial to the exercise of every society's right to an "undistorted written record" i.e. the right to know the truth about the past.[42]

In the UN Human Rights Commission's view, and in the context of the right to the truth, archives are understood to be collections of documents pertaining to violations of human rights and humanitarian law from sources including, (a) national governmental agencies, particularly those that played significant roles in relation to human rights violations; (b) local agencies, such as police stations, that were involved in human rights violations; (c) state agencies, especially those responsible for protecting human rights, including the office of the prosecutor and the judiciary; and (d) materials collected by truth commissions and other bodies that investigate human rights violations.[43]

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39 UN Human Rights Council, proposal of a resolution on the right to the truth (A/HRC/21/L.16), 24 September 2012; UN Human Rights Council Resolution (A/HRC/RES/21/7), 10 October 2012, available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G12/173/61/PDF/G1217361.pdf?OpenElement , acessed on 19 January 2016.

40 See the Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, Principle 2, as well as in the judgment of the Inter-American Court of Human Rights in the case of *Myrna Mack Chang v. Chile*.

41 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by U.N. General Assembly Resolution 60/147 of 16 December 2005, Principle 22(b).

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

43 Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), 8 February 2005; http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement. accessed 23 March 2016.

International legal framework

A. UN Instruments

The International Covenant on Civil and Political Rights, which is binding upon Serbia and its agencies, defines the freedom of expression as follows: "Everyone shall have the right to freedom of expression; this right shall include freedom to *seek, receive* and impart information"[44] [italics added]. The UN Human Rights Council, the body authorized to interpret the provisions of this Covenant, in its general comment on Article 19 relating to the freedom of expression, emphasized that freedom of expression is a necessary condition for the implementation of the principles of transparency and accountability, which principles are, in turn, essential for the promotion and protection of human rights.[45] It further requires from States Parties to proactively make information of public importance available and to make every effort to ensure easy, rapid, effective and practical access to such information.[46]

The Updated Set of Principles for the protection and promotion of human rights through action to combat impunity of the UN Human Rights Council provides for a set of principles relating to access to and preservation of archives pertaining to human rights violations as safeguards of human rights.[47]

Principle 2 specifies that "every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations".

Principle 3 obliges the states to preserve their archives – "A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in in particular, at guarding against the development of revisionist and negationist arguments."

Principle 4 establishes the victims' right to know – "irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate."

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44 Article 19 (2), International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 9**,** Official Journal of the SFRY (International Treaties) No. 7/1971.

45 UN Human Rights Committee, General Comment No. 34, 12 September 2011, para. 3, available at http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf accessed 23 March 2016.

46 Ibid, para. 19.

47 Updated Set of Principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), Commission Resolution 2005/81; http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement accessed 23 March 2016.

And Principle 5 concerns guarantees to give effect to the right to the truth: "[...] Societies that have experienced heinous crimes perpetrated on a massive or systematic basis may benefit in particular from the creation of a truth commission or other commission of inquiry to establish the facts surrounding those violations so that the truth may be ascertained and to prevent the disappearance of evidence. Regardless of whether a State establishes such a body, *it must ensure the preservation of, and access to, archives concerning violations of human rights and humanitarian law*"[italics added].

Lastly, Principle 14 emphasizes: "The right to know implies that archives must be preserved. Technical measures and penalties should be applied to prevent any removal, destruction, concealment or falsification of archives, especially for the purpose of ensuring the impunity of perpetrators of violations of human rights and/or humanitarian law."

In 2004, the UN Special Rapporteur on freedom of opinion and expression, the OSCE Representative on freedom of the media, and the Organization of American States Special Rapporteur on freedom of expression adopted **a joint declaration on access to information and secrecy legislation**, which underlines, among other things, the following: that the right to access information held by public authorities is a fundamental human right; that public authorities should be required to publish, even in the absence of a request, information of public interest; that in the event of any inconsistencies, the freedom of information act must prevail over other acts; and that sanctions should be imposed on those who wilfully obstruct access to information. The declaration also underlines that a state must precisely define its secrecy legislation and indicate clearly the criteria which should be used in determining whether or not information can be declared secret, so as to prevent abuse of the label "secret" for purposes of preventing disclosure of information which is in the public interest.[48]

The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence in his recent report has said that archives containing data on large-scale human rights violations can contribute to prevention. Access to well-preserved and protected archives is an educational tool against denial and revisionism, ensuring that future generations have access to primary sources, which is of direct relevance to history teaching. Opening archives contributes directly to the process of societal reform.[49]

The Special Rapporteur has published a set of recommendations regarding archives emphasising that many post-authoritarian and post-conflict societies are faced with enormous challenges in the preservation and disposition of records containing information on gross human rights violations and serious violations of international humanitarian law. "In many cases, secrecy, national security

48 Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the Organization of American States Special Rapporteur on Freedom of Expression, 6 December 2004, available at http://www.osce.org/fom/38632?download=true accessed 27 January 2016.

49 Report of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (A/HRC/30/42), 7 September 2015, para. 96.

concerns, and poor archival practice stands in the way of guaranteeing the right to know the truth", says the Special Rapporteur.[50]

In its Concluding Observations, **the United Nations Committee on Enforced Disappearances** expressed concern over the fact that Serbia has not yet identified those responsible for the concealment of the hundreds of bodies found in mass graves in Batajnica, Petrovo Selo, Lake Perućac and Rudnica.

The Committee has therefore recommended that Serbia ensure a thorough and impartial investigation of all cases of enforced disappearances that may have been committed by agents of the state or by persons acting on their orders, or with their support or acquiescence, **including guarantees for free access to the relevant archives**.[51]

B. European Union Instruments

EU Guidelines on Freedom of Expression of 2014 emphasize the following:

> The right to freedom of expression includes freedom to seek and receive information. It is a key component of democratic governance as the promotion of participatory decision-making processes is unattainable without adequate access to information. For example ***the exposure of human rights violations may, in some circumstances, be assisted by the disclosure of information held by State entities. Ensuring access to information can serve to promote justice and reparation, in particular after periods of grave violations of human rights***. [52] [emphasis added].

The Guidelines further emphasize that freedom of expression is a priority for candidate countries; that the European Commission will monitor the situation in this area; that the issue of freedom of expression should be raised at an early stage during accession talks regarding Chapter 23 on the rule on law and fundamental rights, and that the EU will condemn any restrictions on freedom of expression. [53]

The European Parliament Resolution on the 2014 Progress Report for Serbia calls upon Serbia

50 UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Set of general reccommendations for truth commissions and archives (A/HRC/30/42), para. 1, available at http://www.recom.link/wp-content/uploads/2015/10/Annex-Set-of-general-recommendations-for-truth-commissions-and-archives-.pdf accessed 27 January 2016.

51 Committee on Enforced Disappearances, Concluding observations on the report submitted by Serbia under article 29, paragraph 1, of the Convention, advanced unedited version, 12 February 2015; n. 9, paras. 13-14. http://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/SRB/INT_CED_COC_SRB_19624_E.pdf accessed 23 March 2016.

52 Council of the European Union, EU Human Rights Guidelines on Freedom of Expression Online and Offline, adopted on 12 May 2014, p. 3, available at http://eeas.europa.eu/delegations/documents/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf

53 Ibid, pp. 14 and 7.

to step up its cooperation with neighbouring countries and strengthen its efforts in the search for missing persons, and to enable full access to all relevant data. In the same vein, it calls on the Serbian authorities to open up the archives of the Yugoslav People's Army in order to ascertain the truth about past tragic events and obtain information, and encourages the authorities to open up national archives and facilitate unimpeded access to them and the archives of its former intelligence agency (UDBA), and make them available to interested governments.[54] The European Parliament made the same request regarding the state archives in the 2015 Progress Report for Serbia.[55]

C. Council of Europe Instruments

The European Convention on Access to Official Documents of 2009 provides that each state party shall guarantee the right of everyone, without discrimination on any grounds, to have access, on request, to official documents held by public authorities.[56] The Convention, which is the first binding international treaty that recognises the general right of access to official documents held by public authorities, has not yet taken effect in Serbia. Namely, Serbia has signed it but not yet ratified it. Nevertheless, Serbia, being a signatory thereto, is obliged under the Vienna Convention on the Law of Treaties to refrain from actions which would defeat the objects and the purpose of the Convention.[57]

The **European Convention on Human Rights and Fundamental Freedoms**, Article 10, provides for freedom of expression for everyone. This right includes freedom to hold opinions and to *receive* and impart information and ideas. This right may be subject to restrictions in exceptional cases, but only if such restrictions (1) are prescribed by a law, which must be formulated with precision; (2) are necessary in a democratic society; and (3) are in the interests of national security, territorial integrity or public safety, or for the protection of the rights of others, etc.[58] Additionally, a restriction must be proportionate to a legitimate aim pursued by the state,[59] and must be justified by "sufficient and relevant reasons".[60]

The Guidelines of the Council of Europe's Committee of Ministers on Eradication of Impunity for Serious Human Rights Violations provide for the following key measures to combat impunity:

54 European Parliament Resolution (T8-0065/2015) of 11 March 2015.
55 European Parliament Resolution (2015/2892(RSP) of 4 February 2016, para. 24.
56 European Convention on Access to Official Documents, 18 May 2009, Article 2, available at http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680084826
57 Vienna Convention on the Law of Treaties, Article 18, signed on 23 March 1969 in Vienna, United Nations Treaty Series, vol. 1155, p.331, ratified and published in the Official Journal of the SFRY- International Treaties and other Agreements, No. 30/72, entered into force on 27 January 1980.
58 Article 10, para. 2, European Conevntion on Human Rights and Fundamental Freedoms; Article 19, para 3, International Covenant on Civil and Political Rights.
59 ECtHR, *Bladet Tromsø and Stensaas v. Norway* [GC], No. 21980/93, judgment of 20 May 1999, Reports 1999-III; *Roemen and Schmit v. Luxembourg*, No. 51772/99, judgment of 25 February 2003, Reports 2003-IV.
60 ECtHR, *Perna v. Italy* [GC], No. 48898/99, judgment of 6 May 2003, Reports 2003-V; Application No. 10746/84, *Verein Alternatives Lokalradio Bern and Verein Radio Dreyeckland Basel v. Switzerland*, decision of 16 October 1986, DR49, p. 126; *Marlow v. the United Kingdom* (decision), No. 42015/98, 5 December 2000.

provision of information to the public concerning human right violations, preservation of archives, and facilitating access to them.[61]

On 2 October 2013, the **Parliamentary Assembly of the Council of Europe** adopted **Resolution 1954**, which stipulates that access to information held by state authorities may be denied on national security grounds *for only as long as is necessary* to protect a legitimate national security interest. The Resolution further states that authorities overseeing public archives containing secret information should periodically review whether the legitimacy of secrecy still exists on national security grounds. The Resolution underlines that "**information about serious violations of human rights or humanitarian law should not be withheld on national security grounds in any circumstances**"[62] [emphasis added].

The Resolution of the Parliamentary Assembly of the Council of Europe on Abuse of State Secrecy and National Security states as follows: "The Assembly recognises the need for states to ensure effective protection of secrets affecting national security. It considers, however, that information concerning the responsibility of state agents who have committed **serious human rights violations, such as murder, enforced disappearance, torture or abduction, does not deserve to be protected as secret**. Such information should not be shielded from judicial or parliamentary scrutiny under the guise of 'state secrecy'"[63] [emphasis added].

In his report on his visit to Serbia in 2015, **the Commissioner for Human Rights of the Council of Europe** expressed concern about the lack of information on potential gravesites and difficulties in identifying the already exhumed human remains, which continue to hamper progress in this area. In this context, the Commissioner stressed the importance of opening army and police archives that contain valuable information.[64]

- **European Court of Human Rights**

In the case of the *Youth Initiative for Human Rights v. Serbia,* this organisation requested the Serbian Intelligence Agency, under the Law on Free Access to Information of Public Importance, for information concerning the number of people who were subjected to electronic surveillance by that agency in 2005. The Agency refused to disclose the information, claiming initially that the information

61 Guidelines of the Committee of Ministers of the Council of Europe on Eradication of Impunity for Serious Human Rights Violations of 30 March 2011, p. 9, available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Impunity_en.pdf accessed 23 March 2016.

62 Resolution 1954(2013) of the Parliamentary Assembly of the Council of Europe on National security and access to information, 2 October, 2013; http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20190&lang=en accessed 23 March 2016.

63 Parliamentary Assembly of the Council of Europe, Resolution 1838 (2011). http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18033&lang=en accessed 23 March 2016.

64 Council of Europe Commissioner for Human Rights, Report after visit to Serbia (16-20 March 2015), 8 July 2015, para. 37, available at https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2779015&SecMode=1&DocId=2277394&Usage=2 accessed 23 March 2016.

sought was secret, but to say later that it was not in possession of it. The European Court found Serbia in breach of the right to freedom of expression guaranteed by the Convention.

In their joint concurring opinion, the judges pointed out that "the case raises the issue of the positive obligations of the State, which arise with respect to the accessibility of data controlled by the Government. The authorities are responsible for storing such information, and **loss of data cannot be an excuse**, as the domestic authorities erroneously claimed in the present case" [65] [emphasis added].

D. Other relevant documents and practices

In 2009, the **International Council on Archives** published a study "Archival Policies in the Protection of Human Rights", which provides an overview of the archival policies of oppressive regimes. The study states as follows: "Given the aforementioned prominence of archives in the political transition process, they become essential in validating collective and individual rights. The effectiveness of the methods used to offer reparation and compensation to the victims of the repression, as well as actions taken to purge those responsible or whatever the processes of transition might be, will be largely conditioned by the use of the documents of the repressive institutions. Support for their preservation and the promotion of the institutions charged with their custody in the new political era will be determining factors in the process of consolidation of the democracy."[66]

The study offers a series of recommendations to states, including:

1) Documents concerning grave human rights violations should be preserved;

2) Documents which bear witness to human rights violations should be made publicly available to facilitate the exercise of human rights in a democratic society; […]

6) Solutions should be sought for the preservation of the archives of justice tribunals which were created to try war crimes and crimes against humanity; […]

8) Archives which hold documents relative to repression should be subject to the same legal protection as goods of cultural interest; […]

11) Archives of public bodies involved in the violation of human rights should be located and listed […]

65 *Youth Initiantive for Human Rights v. Serbia*, judgment No. 48135/06, European Court of Human Rights, 25 September 2013; http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-120955#{"itemid":["001-120955"]} accessed 23 March 2016.

66 International Council on Archives, „Archival Policies in the Protection of Human Rights," 2009, p. 56, available at http://www.ica.org/download.php?id=971 accessed 23 March 2016.

The Global Principles on National Security and the Right to Information (the Tshwane Principles) were adopted in 2013.[67] More than 500 experts from over 70 countries were involved in their drafting. While recognising some exceptions to the right of access to information of public interest, these principles stress that in some cases there is a strong presumption that there is an overriding interest of the public to know such information. These cases include violations of international human rights and humanitarian law. The parts of **Principle 10A** relating to violations of international human rights and humanitarian law sets forth the following:

1) There is an overriding public interest in disclosure of information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law [...]. **Such information may not be withheld on national security grounds in any circumstances**.

2) Information regarding other violations of human rights or humanitarian law is subject to a high presumption of disclosure, and in any event **may not be withheld on national security grounds in a manner that would prevent accountability for the violations or deprive a victim of access to an effective remedy**.

3) When a state is undergoing a process of transitional justice during which the state is especially required to ensure truth, justice, reparation, and guarantees of non-recurrence, **there is an overriding public interest in disclosure to society as a whole of information regarding human rights violations committed under the past regime** [...]

4) Where the existence of violations is contested or suspected rather than already established, this Principle applies to information that, taken on its own or in conjunction with other information, would shed light on the truth about the alleged violations [...]

6) Information regarding violations covered by this Principle includes, without limitation, the following:

   a) A full description of, and any records showing the acts or omissions that constitute the violations, as well as the dates and circumstances in which they occurred, and, where applicable, the location of any missing persons or mortal remains.

   b) The identities of all victims, so long as consistent with the privacy and other rights of the victims, their relatives, and witnesses; and aggregate and otherwise anonymous data concerning their number and characteristics that could be relevant in safeguarding human rights.

67 Global Principles on National Security and the Right to Information (Tshwane Principles), 12 June 2013, https://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf accessed 23 March 2016.

Note: [...]This Principle should be interpreted, however, bearing in mind the reality that various governments have, at various times, shielded human rights violations from public view by invoking the right to privacy, including of the very individuals whose rights are being or have been grossly violated, without regard to the true wishes of the affected individuals.

c) The names of the agencies and individuals who perpetrated or were otherwise responsible for the violations, and more generally of any security sector units present at the time of, or otherwise implicated in, the violations, as well as their superiors and commanders, and information concerning the extent of their command and control

d) Information on the causes of the violations and the failure to prevent them.[68]

The UN Special Rapporteur on freedom of opinion and expression, the Organisation of American States' Special Rapporteur on freedom of expression and access to information, and the Special Rapporteur on freedom of expression and access to information in Africa supported the Principles,[69] as did the Parliamentary Assembly of the Council of Europe in its Resolution 1954(2013).[70]

The African Model Law on Free Access to Information, Article 30, stipulates as follows:

(1) An information officer may refuse to grant access to information where to do so would cause substantial prejudice to the security or defence of the state.

(2) For the purpose of this section, *security or defence* of the state means:

(a) military tactics or strategy or military exercises or operations undertaken in preparation for hostilities or in connection with the detection, prevention, suppression, or curtailment of subversive or hostile activities;

(b) intelligence relating to

(i) defence of the state; or

(ii) the detection, prevention, suppression or curtailment of subversive or hostile activities;

(c) methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in paragraph (b);

68 Ibid, pp. 21-23.

69 Support to the Global Principles, http://www.opensocietyfoundations.org/press-releases/new-principles-address-balance-between-national-security-and-publics-right-know accessed 23 March 2016.

70 Resolution 1954(2013) of the Parliamentary Assembly of the Council of Europe on National security and access to information, 2 Ocotober, 2013; http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20190&lang=en accessed 23 March 2016.

(d) the identity of a confidential source; or,

(e) the quantity, characteristics, capabilities, vulnerabilities or deployment of anything being designed, developed, produced or considered for use as a weapon or such other equipment, excluding a nuclear weapon [...][71]

This model further specifies what subversive or hostile activities imply and so forth.

- **Inter-American Court of Human Rights**

Within the human rights protection system and in the American Convention on Human Rights, as well as in some domestic legal systems of South American countries, the concept of the right to the truth was initially linked to enforced disappearances, and came to be gradually extended to other grave human right violations.[72]

The Inter-American Court of Human Rights has recognised the right of victims and their families, and also of society as a whole, to know the truth in a number of cases.[73] In the *Myrna Mack Chang v. Chile* case the Court stressed that

> every person, including the families of the victims of grave human rights violations, has the right to the truth. Therefore, the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with the said violations.[74]

According to the jurisprudence of the Inter-American Court of Human Rights, the right to the truth refers to a wide range of information: the fate of a victim and, where appropriate, and the time and place of his/her death;[75] the location of the mortal remains. Often, if a state does not have such information, the Court requires it to take appropriate steps to obtain it.[76] Information concerning the circumstances surrounding a crime may include the facts about the events that led to the commission of the crime, the number of persons responsible for it, their respective roles in the planning, on whose behalf they acted and so forth.[77]

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71 African Commission on Human and Peoples' Rights, Model Law on Access to Information for Africa, Article 30, available at http://www.achpr.org/files/news/2013/04/d84/model_law.pdf, accessed 5 February 2016.

72 Office of the United Nations High Commissioner for Human Rights, *Study on the Right to the Truth*, 8 February 2006, para. 8.

73 This court dealt with this matter for the first time in the *Velásquez Rodríguez v. Honduras* case, where it established the obligation of the state to inform the victim's family about the circumstances of the crime. *Velásquez Rodríguez v. Honduras,* Judgment, IACtHR, 29 July 1988, para. 181; http://www.refworld.org/docid/40279a9e4.html . In the case of *Bámaca Velásquez v. Guatemala,* the Court derived the right to the truth of the families of victims from the right to a fair trial (Article 8 of the ACHR) and the right to judicial protection (Article 25 of the ACHR). *Bámaca Velásquez v. Guatemala*, Judgment, Merits IACtHR, 25 November, 2000, paras. 197-202; http://www.corteidh.or.cr/docs/casos/articulos/seriec_70_ing.pdf accessed 23 March 2016.

74 *Myrna Mack Chang v. Chile,* Judgment, Merits, Reparations and Costs, IACtHR, 25 November 2003, para. 274; http://www.corteidh.or.cr/docs/casos/articulos/seriec_101_ing.pdf accessed 23 March 2016.

75 *Trujillo-Oroza v. BoliviaI,* Judgment, Reparations and Cost, 27 February 2002, para. 114, http://www.corteidh.or.cr/docs/casos/articulos/Seriec_92_ing.pdf accessed 23 March 2016.

76 *Bámaca Velásquez v. Guatemala*, para. 83.

77 Ibid, para. 73; *Trujillo-Oroza v. BoliviaI,* 32, para. 100; *Myrna Mack Chang v. Chile,* para. 275.

Gomes Lund et al. v. Brazil[78] is the first case in which the Inter-American Court of Human Rights explicitly acknowledged the linkage between the right to the truth and the provisions regarding freedom of expression which include the right of free access to information. The Court found that by denying access to information about gross human rights violations (specifically, enforced disappearances), Brazil violated the right to freedom of expression, the obligation to respect human rights, the right to a fair trial and the right to judicial protection.[79]

The Court affirmed the importance and the existence of a regional consensus on both the right to the truth and the right of free access to information of public importance.[80] Also, the Court recalled that "in a democratic society, it is indispensable that state authorities be governed by the principle of maximum disclosure, which establishes the presumption that all information is accessible, subject to a restricted system of exceptions."[81] In the context of the right to the truth, the Court established that "all persons, including the families of the victims of gross human rights violations, have the right to know the truth. [As a consequence,] the families of the victims and society must be informed of all that occurred in regard to the said violations."[82]

Additionally, the Court issued a set of important guidelines on the question of free access to information concerning gross human rights violations. They include, first and foremost, the duty of a public body which claims that it does not hold the information sought, to justify such a claim by demonstrating that it has taken all the steps within its power to prove that the information sought does not exist. The Court stressed that

> [i]t is essential that, in order to guarantee the right to information, the public authorities act in good faith and diligently carry out the necessary actions to assure the effectiveness of this right, particularly when it deals with the right to the truth of what occurred in cases of gross violations of human rights [...] To argue in a judicial proceeding […] the lack of evidence regarding the existence of certain information, without at least noting what procedures were carried out to confirm the nonexistence of said information, allows for the discretional and arbitrary actions of the State to provide said information, thereby creating legal uncertainty regarding the exercise of the said right.[83]

78 *Gomes Lund et al. v. Brasil, Judgment*, Preliminary objections. Merits, Reparations and Costs, IACtHR, 24 November, 2010; http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf accessed 23 March 2016.
79 Ibid, para. 325(5).
80 Ibid, para. 198.
81 Ibid, para. 199.
82 Ibid, para. 200.
83 Ibid, para. 211.

Moreover, the Court took the position that when it comes to investigations into criminal offences, the decision to classify information as confidential or to refuse to hand it over cannot be made solely by the public authority whose members are charged with committing the said acts. In the same sense, the final decision on the existence of the requested information cannot be left to its discretion.[84]

In the Court's view, the state's offer to allow the public prosecutor and judges access to certain documents in a hearing closed to the public is not sufficient to comply with the requirements of Article 13 of the ACHR (freedom of expression), because such a hearing cannot effectively fulfil the right to the truth of the families of victims.[85]

The Court reiterated its conclusion from its previous case-law that where human rights violations are concerned, the state cannot resort to mechanisms such as state secrecy or confidentiality of information to refuse to supply the information requested.[86]

Practices of other post-conflict countries

A. Constitutional Court of Colombia

A relevant excerpt of the judgment c-872/03 concerning the constitutional review of the data secrecy rules pertaining to the procedure for evaluation of armed forces officers proposed for promotion and the decisions of review boards with regard to military officers' worthiness for promotion states:[87]

> The latest trends in the international law of human rights and international humanitarian law, closely link the fundamental right of access to public information to the rights of victims of crimes against humanity, genocide, war crimes, to justice, reparation and especially, to the truth.
>
> The basic source of these rights is the fulfilment of international treaties in good faith – that states should refrain from violating these rights (negative obligations); but also they should guarantee the exercise of these rights (positive obligation) – which implies punishments proportionate to the gravity of the crimes, investigation, prosecution and conviction of those responsible, as well as full reparations for the victims.
>
> Therefore, every one of the fundamental human rights is different content- and scope-wise, and every one of them strives to prevent impunity [...]

84 Ibid, para. 202.
85 Ibid, para. 215.
86 Ibid, paras. 202 and 230.
87 Judgment C-872/03, Constitutional Court of the Republic of Colombia, 30 September 2003; http://www.corteconstitucional.gov.co/relatoria/2003/C-872-03.htm; Summary: http://www.right2info.org/cases/plomino_documents/r2i-c-872-03 accessed on 23 March 2016.

In that context, the right to the truth, and the rights to justice and to reparation derive from the general duty of states to guarantee respect for human rights as enshrined in various international treaties. Moreover, all those rights form an indivisible and inseparable whole, as only a serious and impartial investigation resulting in the punishment of those responsible can reveal what happened and guarantee the right to adequate reparation for the victims.

In this respect, it should be specified that the right to the truth has a twofold meaning, a collective dimension and an individual dimension. The former refers to the right that helps every people to know their history, to know the truth about past events, including the circumstances and reasons that led to the commission of systematic and massive violations of human rights and international humanitarian law. This right is aimed at preserving the collective memory in order, among other things, to prevent the development of revisionist and negationist arguments.

As a collective right, the right to the truth requires certain guarantees for its exercise, including, especially, PUBLIC CONSULTATION of relevant official archives. Some precautionary measures must be taken to prevent the destruction, alteration of falsification of archives holding records on past violations, and public authorities cannot invoke reasons of confidentiality or national security in order to deny the courts or victims access to these archives.

The subjective dimension of the right to the truth implies that, irrespective of any legal proceedings, victims and their families have the right to know the truth about the circumstances in which crimes took place and, in the event of death or disappearance, the victims' fate. [...] The very possibility of access to public documents containing information about past crimes is a guarantee of this individual dimension of the right to the truth.

In short, a general rule in a democratic society is that of allowing access to all public records. This gives rise to the constitutional obligation of public authorities to provide, on request, clear, complete, timely, accurate and up-to-date information about any state activity. In addition to that, all public bodies must have a policy on retention and maintenance of such records, especially those directly relating to systematic and massive violations of human rights and international humanitarian law."[88]

88 Ibid, pp. 32-34.

B. Constitutional Court of Guatemala

GENOCIDE TRIAL OF GUATEMALA'S FORMER PRESIDENT EFRAIN RIOS MONTT[89]

Article 30 of the Constitution of Guatemala guarantees the right of the public to access information held by the state, except when military or diplomatic matters relating to national security or information supplied by individuals under a pledge of confidence is involved. Guatemala's Freedom of Information Law, adopted in 2008, prohibits classification of information relating to investigations of gross human rights violations or crimes against humanity.[90]

The defence counsel lodged an appeal to the Constitutional Court against the ruling of the Court of Appeal that ordered the Ministry of National Defence to supply reports on relevant military operations to the public prosecutor, which the Ministry had declined to do, invoking confidentiality.

In a ruling the constitutionality of which was challenged, the Court of Appeal held that as the documents requested **were in no way related to the policies of safeguarding the physical integrity of the nation**, nor was there any imminent threat to the state's integrity and security, nor did the appellant provide clear reasons that would justify keeping the documents requested secret, there existed no reasons whatsoever for the court not to order the delivery of the aforementioned documents to the public prosecutor.[91]

The Constitutional Court denied the appeal, recalling that public authorities refusing to disclose information requested on grounds of confidentiality, national security, or other grounds, must prove that disclosure of such information would harm the state's interests, which was not done in this case.[92]

C. Argentina

On 4 January 2010, the Argentinian President signed the Decree 4/2010,[93] lifting the classification of all records and information related to the activities of the armed forces between 1976 and 1983, and of other information and documentation produced afterwards also related to this period.

The Decree stresses that keeping the information classified would run counter the policy of memory, truth and justice that Argentina had been pursuing since 2003, and that after 25 years of democratic

89 Judgment of the Constitutional Court of Guatemala (2290-2007), 5 March, 2008; http://www.right2info.org/resources/publications/case-pdfs/guatemala_rios-montt . Summary: http://www.right2info.org/cases/plomino_documents/r2i-the-prosecution-in-the-trial-of-rios-mont-v.-ministry-of-national-defense accessed on 23 March 2016.

90 Article 24, Freedom of Information Act, 2008; http://www.minfin.gob.gt/laip_mfp/docs/decreto_5708b.pdf accessed on 23 March 2016.

91 Judgment of the Constitutional Court of Guatemala (2290-2007), 5 March, 2008, Part II(E), pp. 2-4.; http://www.right2info.org/resources/publications/case-pdfs/guatemala_rios-montt, accessed on 23 March 2016.

92 Ibid, pp. 7-8.

93 Decree 4/2010 of the President of Argentina, 5 January 2010; http://www.mindef.gov.ar/pdf/decretos/2010/Decreto-4(2010).pdf accessed on 23 March 2016.

governance in Argentina, withholding such information could not possibly be justified by the need for secrecy, if it prevents the people from confronting their past and violates their right to know the truth. The Decree further states that the classification of information did not serve to protect the legitimate interest of a democratic state but to cover up the illegal activities of the then government. Finally, Argentina is obliged under international law to ascertain the circumstances surrounding past crimes and to prosecute and punish those responsible,[94] and any restrictions on access to information relating to these crimes would hinder the thorough investigations that must be conducted in order to do this.

Information pertaining to the Falklands conflict was exempt from declassification under the Decree 4/2010, only to be declassified by President Kirshner in April 2015.[95]

D. Mexico

Vicente Fox, President of Mexico at the time, issued a decree[96] declassifying records held by the Federal Security Directorate and the General Directorate of Political and Social Investigations,[97] pertaining to the period before 1985 (the so-called "Dirty war period").

One of the arguments supporting declassification, as stated in the decree, is that the demands for justice for disappeared persons require a strong and clear response by the authorities, in order to uncover the truth and, especially, to bring reconciliation which will respect the memory and deliver justice. Any act that violates human rights must not only be investigated in order to ascertain the facts but also subjected to a judicial scrutiny.

Furthermore, Article 14 of the Mexican Freedom of Information Act prohibits invoking secrecy as a reason for withholding the information needed to investigate grave human rights violations and crimes against humanity.

94 That obligation is specifically laid down for states members of the Organization of American States in decisions of the Inter-American Court of Human Rights upon which the Decree relies.

95 Decree 503/2015, 1 April 2015; http://www.infoleg.gob.ar/infolegInternet/anexos/245000-249999/245527/norma.htm accessed on 23 March 2016.

96 Agreement by which to adopt measures to promote justice for crimes committed against persons linked to social and political movements of the past, Diario Official de la Federación, 27 November 2001; http://dof.gob.mx/nota_detalle.php?codigo=758894&fecha=27/11/2001 accessed on 23 March 2016.

97 Mexican intelligence agency. The Federal Security Directorate (Dirección Federal de Seguridad) was created in 1947 and reorganized into the General Directorate of Political and Social Investigations (Dirección General de Investigaciones Políticas y Sociales) in 1967. Today it is called the Center for Research and National Security (Centro de Investigación y Seguridad Nacional). It was during the Fox administration that the Center underwent a reform aimed at bringing its operations in line with the freedom of information law.

E. Brazil

The Brazilian Law on Free Access to Public Information stipulates that access to information or documents that point to human rights violations by state agents cannot in any circumstances be restricted at the orders of public authorities.[98]

F. Peru

The Peruvian Law on Transparency and Access to Information provides that no information concerning violations of human rights or the 1949 Geneva Conventions is to be considered secret, irrespective of the circumstances or who the perpetrators were.[99]

III. Relevant Serbian laws and problems in their implementation

The relevant Serbian legal framework governing the right of public access to the archives pertaining to the crimes of the 1990s comprises three laws: the Law on Free Access to Information of Public Importance, the Data Secrecy Law and the Law on Personal Data Protection. Generally speaking, these laws provide a solid normative framework for public access to information. In practice, however, their effectiveness is substantially weakened because of discretionary interpretations of some of its provisions by the relevant public authorities and the absence of an efficient mechanism for the enforcement of its provisions.

1. Law on Free Access to Information of Public Importance

The Law on Free Access to Information of Public Interest regulates the rights of access to information of public importance held by public authorities[100] "with a view to exercising and safeguarding the public interest to know and in attaining a free democratic order and an open society." The Law defines information of public interest as "information held by a public authority, created during the operation of a public authority or relating to its operation, which is contained in a document and concerns anything the public has a reasonable interest in knowing."

The Law guarantees the following rights of citizens with respect to public authorities: (1) the right

98 Art. 21, Law Nº 12.527/2011, 18 November 2011; http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12527.htm accessed on 23 March 2016.

99 Article 15, Law on Transparency and Access to Information, 2002; http://www.minedu.gob.pe/normatividad/leyes/Ley27806.php accessed on 23 March 2016.

100 Under Article 3 of the Law on Free Access to Information of Public Importance, a public authority means: "1) a central government body, a territorial autonomy body, a local self-government body, or an organization vested with public powers; 2) a legal entity founded by or fully or predominantly funded by a government body."

to be informed whether a public authority holds a piece of information of public interest; and (2) the right to have information communicated to them. If a public authority fails to process a request in accordance with the Law, the requester is entitled to lodge a complaint with the Office of the Commissioner for Information of Public Importance.

The Law provides that these rights may be, in exceptional circumstances, subject to limitations "to the extent necessary in a democratic society to prevent a serious violation of an overriding interest based on the Constitution or the Law." The Law further specifies these limitations as follows:

> A public authority shall not grant access to information of public importance if the disclosure of such information would:
>
> 1) Expose to risk the life, health, safety or other vital interest of a person;
>
> 2) Jeopardize, obstruct or impede the prevention or detection of a criminal offence, indictment of a criminal offence, pre-trial proceedings, a trial, enforcement of a sentence or punishment, any other legal proceeding, or unbiased treatment and a fair trial;
>
> 3) ***Seriously threaten national defence, national and public safety or international relations;***
>
> 4) Substantially undermine the government's ability to manage the national economic processes or significantly impede the achievement of justified economic aims;
>
> 5) ***Make available information or a document classified by regulations or an official document based on the law, such as a state secret, official secret, trade secret or other secret, i.e. if such a document is accessible only to a specific group of persons and its disclosure could seriously legally or otherwise prejudice the interests that are protected by the law and override the interest in access to information*** [italics added by way of emphasis].[101]

Paragraphs 3 and 5 of the cited law are particularly relevant to the subject of this report, because it is these paragraphs that the public authorities often invoke to withhold information of public interest.

In addition to the cited paragraphs which provide for restrictions on access to information on purported national interests and secrecy grounds, state authorities often invoke Article 14 of the Law on Free Access to Information of Public Interest, which allows for denial of access to information if disclosure of such information would violate the right to privacy.

101 Article 9 of the Law on Free Access to Information of Public Importance.

However, state authorities in their decision notices invariably tend to overlook the exemptions to these restriction set out in the very same article, namely, that access to personal information will be granted if „such information relates to a person, event or occurrence of public interest, especially in the case of holders of public office or political figures, insofar as the information bears relevance to the duties performed by that person". The application of this exemption in practice will be discussed in more detail in section "Practices of Serbian government bodies".

1.1. Problems in practice

a. Inadequate control over public authorities

A public authority has a duty under the Law to inform a requester whether it holds the information requested, grant the requester access to the document containing the information requested or supply him/her with a copy of it. If a public authority fails to do so, the requester can lodge a complaint with the Commissioner.[102] If the Commissioner finds the complaint to be well-founded, he will issue a decision ordering the public authority concerned to grant the requester free access to the information sought.[103]

The biggest problem, though, concerns those situations where **a public authority, in order to obstruct access to certain information or a document, informs the applicant, within the time limit prescribed by the Law, that it does not hold the information requested or that such information does not exist.**

The Commissioner drew attention to this problem in his latest annual report:

> **It should be particularly emphasized that authorities increasingly claim they do not hold the information requested** and that such **claims are, as a rule, neither substantiated nor supported by evidence,** e.g. of expiration of the statutory retention period for a document, or of destruction of a document, or of evidence that a case has been referred to a higher authority for decision-making, etc. Quite rightly, this raises doubts among the requesters as to the veracity of such claims. Situations such as these call for supervision by the competent authority, i.e. the Administrative Inspectorate, which should involve actual verification of the facts on the spot, i.e. on the premises of the authorities concerned, rather than just so-called indirect inspection of written statements supplied by the authorities, as has been the practice of the Administrative Inspectorate so far; as well as taking measures

102 Ibid, Articles 16 and 22.
103 Ibid, Article 24.

to determine responsibility for giving false information or creating documents containing false information.[104]

While there is no doubt that it is the public authorities' duty to monitor the implementation of the Law on Free Access to Information of Public Importance, the Commissioner, as a watchdog body, should also use all the powers conferred upon him by the Law in such "suspicious" cases. Namely, as set out in Article 26 of the Law on Free Access to Information of Public Importance, the Commissioner is to take steps to find any fact necessary for reaching a decision on a complaint. This article further states that "**in order to determine the facts, the Commissioner shall be allowed access to any information carrier covered by this Law"**.

According to this Article, whenever there is a reasonable suspicion that a public authority holds the information requested but refuses to disclose it to the public, the Commissioner is authorized to gain access to the information carrier or to verify whether or not the public authority concerned holds that information. The Commissioner, however, does not use this authority in practice (for more information on this see Section - Practice of Serbian government bodies).

b. Circumventing the obligations assumed under accession negotiations

The EU Guidelines on Freedom of Expression stress that freedom of expression (which includes disclosure of information which can assist the revealing of human rights violations) is a priority for candidate countries, and that the European Commission will monitor the situation in this field[105] [see Section - International legal framework for more information about the Guidelines]. According to the cited guidelines, in the Screening Report for Serbia and the Action Plan for Chapter 23, Serbia made a commitment to "improve the free access to information of public importance rules and their implementation".[106] This also includes "adopting amendments to the Law on Free Access

104 Commissioner for Information of Public Importance and Personal Data Protection, Report on implementation of the Law on Free Access to Information of Public Importance and the Law on Personal Data Protection for 2014 p. 28, available at http://www.poverenik.rs/images/stories/dokumentacija-nova/izvestajiPoverenika/2015/g.izvestaj2014.pdf The Administrative Inspectorate is an administrative body under the Ministry of Public Administration and Local Self-Government, created pursuant to the Law on Administrative Inspection (Official Gazette of the RS, No. 87/11). The Administrative Inspection is a body responsible for the supervision of the implementation of laws and other regulations and the conduct of public administration bodies, services with courts, public prosecutor's offices, the Office of Serbia's Public Attorney, the National Assembly, the President of the Republic, the Government, the Constitutional Court and services within those bodies whose members are elected by the National Assembly, territorial autonomy bodies and local self-government bodies discharging delegated public administration functions, as well as other public office holders whose scope and limit of authority are determined in the Law on Administrative Inspection and special laws. For more information visit: http://www.mduls.gov.rs/latinica/upravni-inspektorat.php

105 Council of the European Union, EU Human Rights Guidelines on Freedom of Expression Online and Offline, adopted on 12 May 2014, pp. 14 and 7, available at http://eeas.europa.eu/delegations/documents/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf accessed on 23 March 2016.

106 Activity 2.2.5., final text of the Action Plan for Chapter 23, adopted by the European Commission, not adopted by the Council of the European Union, available at http://www.mpravde.gov.rs/files/Akcioni%20plan%20PG%2023%20Treci%20nacrt-%20Konacna%20verzija1.pdf accessed on 23 March 2016.

to Information of Public Importance based on an analysis of the implementation of the Law on free access to information of public importance to date, **in line with the National Assembly Conclusion for 2014**."[107]

However, the said Conclusion of the competent committee of the National Assembly contains only three paragraphs and a page-long explanation, but not a single concrete recommendation for remedying the numerous serious problems in the implementation of the Law on Free Access to Information of Public Importance pinpointed in the Commissioner's annual report. The process that preceded the adoption of the final text of the Conclusion clearly demonstrated that there is no willingness on the part of the Government to implement unreservedly and in accordance with EU norms the activity specified in the Action Plan.

Namely, out of the three proposed versions of the Conclusion, the one that was least critical was adopted. The final text adopted states in paragraph 1 that the Commissioner presented the activities of his office in the field of access to information. Paragraph 2 merely repeats a commonplace remark i.e. the fundamental legal principle that "it is the duty of the executive agencies to implement provisions related to the right of free access to information of public importance". Paragraph 3 recommends the Government, without specifying any time limit, to inform the Parliament how many of the recommendations that the Commissioner made to government bodies have been implemented, and how many have not.[108]

Unlike the final version, the other versions of the conclusion used an imperative style and imperative wording rather than recommendations, specified the deadlines within which the Government had to take further steps, and stressed the duty to comply with the law and the Commissioner's decisions and the obligation to punish behaviour that is contrary to the Law. Paragraph 2 of the initial version contained concrete recommendations for the Government on how to substantively improve the Law. One of the recommendations was that the Commissioner should be authorized to provide his opinion during the legislative process and file misdemeanour charges against those who had violated the right of free access to information of public importance. It also recommended that a method for compulsory enforcement of the Commissioner's decisions should be developed and prescribed".[109]

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107 Activity 2.2.5.2., final text of the Action Plan.

108 The final version of the Conclusion adopted at the Culture and Information Committee's meeting to discuss the 2014 Report by the Commissioner for Information of Public Importance and Personal Data Protection. Transparency Serbia, press release: "Parliamentary Committee vague on access to information – absence of will to perform proper supervision over executive authority", available at http://www.transparentnost.org.rs/index.php/sr/59-srpski/naslovna/7636-skupstinski-odbor-neodredeno-o-pristupu-informacijama-odsustvo-zelje-da-se-vrsi-stvarni-nadzor-izvrsne-vlasti accessed 5 February 2016.

109 Transparency Serbia, press release: "Parliamentary Committee vague on access to information – absence of will to perform proper supervision over executive authority", available at http://www.transparentnost.org.rs/index.php/sr/59-srpski/naslovna/7636-skupstinski-odbor-neodredeno-o-pristupu-informacijama-odsustvo-zelje-da-se-vrsi-stvarni-nadzor-izvrsne-vlasti, accessed 5 February 2016.

2. Data Secrecy Law

The Data Secrecy Law lays down a system for the classification and protection of secret data, access to secret data, their declassification, responsibilities of relevant authorities and supervision of the implementation of this Law, as well as accountability for failure to implement obligations arising from this Law. According to the Law, "classified data are any data of interest for the Republic of Serbia, which have been classified and for which a level of secrecy has been determined by law, other regulations or decisions of a competent authority passed in accordance with the law".[110] The Ministry of Justice and the Office of the National Security and Classified Data Protection Council supervise the implementation of the Law and secondary regulations passed under the Law.[111] Within their supervisory function, the Council Office is mostly responsible for security clearances and certificates for access to classified data,[112] while the Ministry of Justice is responsible for monitoring the situation in this field, proposing regulations and imposing punishment for violations of the provisions of the Law, etc.[113]

The Law specifies **which data cannot be considered classified**:

> Data marked as classified ***with a view to concealing a crime***, exceeding authority or abusing office, or with a view to concealing some other illegal act or actions of a public authority, shall not be considered classified (emphasis in italics added).[114]

The Law provides for four levels of data classification (see the table below). Levels of classification are determined by an authorised person[115] in accordance with the criteria established by the Government.[116]

110 Article 2, para. 1, sub-para. 2 of the Data Secrecy Law.
111 Ibid, Articles 86-87 and 97.
112 Ibid, Article 87.
113 Ibid, Article 97.
114 Ibid, Article 3.
115 According to Article 9 of the Data Secrecy Law, the authorized persons are: 1) Speaker of the National Assembly; 2) President of the Republic; 3) President of the Government; 4) head of a public authority; 5) elected, appointed or nominated public authority officials, authorised to classify data by law or regulation adopted in accordance with the law, or authorised in writing by the head of a public authority; 6) persons employed by a public authority who have been authorised in writing for data classification by the head of the public authority.
116 Article 14 of the Data Secrecy Law.

Levels of classification	Purpose of classification
"Top secret"	To prevent grave and irreparable damage to the interests of the Republic of Serbia
"Secret "	To prevent grave damage to the interests of the Republic of Serbia
"Confidential"	To prevent damage to the interests of the Republic of Serbia
"Restricted"	To prevent damage to the operation or performance of tasks and activities of the public authority which determined them.

Right to declassify data

The Law stipulates that data may be declassified "***by a decision of the Commissioner*** for Information of Public Importance and Personal Data Protection, in appeals procedures or on the basis of the ruling of the competent court in proceedings upon complaint, in accordance ***with the law regulating free access to information of public importance and the law regulating personal data protection***." [emphasis in italics added].[118]

The law further stipulates that "the National Assembly, the President of the Republic and the Government may declassify specific documents, regardless of the level of classification, ***should that be in the public interest or in order to fulfil international obligations***" [emphasis in italics added].[119]

2.1. Drawbacks of the normative framework and problems in its implementation

The lack of transparency of the most important procedures laid down in this Law, which leaves room for misuse and significantly restricts access to documents of public importance, is the major drawback of this Law.

a. Imprecise criteria for assigning classification levels

According to the Data Secrecy Law, the Government is to define more detailed criteria for determining the level of classification of a document or data.[120] However, the by-laws that the Government adopted under this provision do not precisely define such criteria, thus leaving ample room for discretionary

117 Ibid.
118 Ibid, Article 25.
119 Ibid, Article 26.
120 Article 14 of the Data Secrecy Law.

decisions by public authorities.[121] For example, the Decree defining detailed criteria for designating the TOP SECRET and SECRET classification levels does not define the meaning of the phrase "grave threat to the Republic of Serbia's international position" or "grave damage to the Republic of Serbia's medium-term economic interests", although these are used as grounds for assigning the highest level of classification to information.[122]

However, public authorities' discretion is limited, at least theoretically, by the Data Secrecy Law, which requires an assessment, on a case-by-case basis, as to whether the public interest in disclosure overweighs the interests of the Republic of Serbia which are protected by data classification. Article 8 of the Data Secrecy Law is relevant in this regard:

> [d]ata that may be classified as secret shall be any data of interest to the Republic of Serbia, whose disclosure to an unauthorised person would result in damage, ***if the need to protect the interests of the Republic of Serbia prevails over the interest in having free access to information of public importance*** (emphasis in italics added)

The Law requires the persons authorized to classify information to balance the two interests – data protection against the public interest in disclosure – before making any decision on classification. Such an assessment should be a part of the explanation accompanying decisions to assign a level of classification to a piece of data - the explanation which every authorised person must provide to support his decision; without it, he would be guilty of a minor offence.[123] A linguistic interpretation of this provision may suggest that it favours disclosure of information of public importance. In practice, however, public authorities have not interpreted it in such a way.

121 See: the Government of RS's Decree defining detailed criteria for assigning the "TOP SECRET" and "SECRET" classification levels entered into force on 1 June 2013. **See Appendix 3**; the Government of RS's Decree defining detailed criteria for assigning the "CONFIDENTIAL" and "RESTRICTED" classification level at the Ministry of Defence, available at http://www.nsa.gov.rs/doc/domz/Propisi%20sluzbeni%20glasnik%20-%20srpski/22%20-%20Uredba%20POV%20i%20INT%20MO.pdf ; the Government of RS's Decree defining detailed criteria for assigning the "CONFIDENTIAL" and "RESTRICTED" classification levels at the Security-Information Agency, available at http://www.nsa.gov.rs/doc/domz/LEGISLATION/16%20-%20Decree%20on%20the%20detailed%20criteria%20for%20designating%20the%20CONFIDENTIAL%20%20RS%20and%20RESTRICTED%20RS%20classification%20level%20at%20the%20SIA.pdf; the Government of RS's Decree defining detailed criteria for assigning the "CONFIDENTIAL" and "RESTRICTED" classification levels at the Ministry of the Interior, see Appendix 2; (All by-laws passed under the Data Secrecy Law are available in Serbian at http://www.nsa.gov.rs/domace-zakonodavstvo.php)

122 Government of RS's Decree defining detailed criteria for assigning the "TOP SECRET" and "SECRET" classification levels entered into force on 1 June 2013. See Appendix 3.

123 Article 99, para. 1, sub-para. 4 of the Data Secrecy Law.

b. Problems concerning the records of classified data

The records of classified data are kept by the same public authority which has classified it,[124] while some other institutions perform external controls of their compliance with the law. As has been said above, the Ministry of Justice and the Office of the National Security and Data Secrecy Protection Council supervise the implementation of the Law, while the Commissioner has partial authorities - that is, authority to declassify data by issuing a decision to that effect.[125] However, the mere existence of formal procedures for external controls is not sufficient to guarantee that data classification will not be misused, especially the classification of sensitive information concerning the widespread violations of human rights and humanitarian law in the 1990s. Namely, when processing a complaint, the Commissioner for Information of Public Importance and Personal Data Protection is authorised to have access to classified information and even to order its declassification.[126] But despite these broad powers of the supervisory authorities, the external control is anything but effective, since the authorities who are supposed to perform it do not know what information public authorities hold and mark as classified.

3. Law on Personal Data Protection

The Law on Personal Data Protection lays down the conditions for personal data collection and processing, the rights of persons whose data are collected and processed and the protection of such data, and the limitations to personal data protection. The implementation and enforcement of this Law are supervised by the Commissioner for Information of Public Importance and Personal Data Protection.[127]

"Personal data" means any information relating to an individual, regardless of the form in which it is presented or the medium used (paper, tape, film, electronic media, etc.) Data processing includes: collecting, searching, granting access, disclosure, publication, withholding and so forth.[128]

Personal data may be processed only if the data subject has given his/her consent to it. However, the law provides for four exemptions, two of them being relevant to this report. Namely, personal data may be processed without the consent of the data subject if processing is necessary "***in order to pursue or protect the vital interests of the data subject or some other individual***" and "***in order to pursue the overriding justified interest of the data subject, data handler or data user"*** specified in the Law.[129]

124 Articles 32-35 of the Data Secrecy Law; Article 10 of the Decree on the manner of and procedure for marking classified information or documents, Official Gazette of the RS, No. 8/2011 (although the form used for keeping records of classified data is a constituent part of the Decree, this form is clearly left out in the electronic version of the Decree available on the Office of National Security website).
125 Article 25 of the Data Secrecy Law.
126 Ibid.
127 Article 54 of the Law on Personal Data Protection.
128 Ibid, Article 3, para. 1, sub-para.
129 Ibid, Article 12.

3.1. Problems

a. Ambiguities with regard to the scope of the two laws

Both the Law on Free Access to Information of Public Importance and the Law on Personal Data Protection lay down the procedure relating to access to information held by public authorities where the information requested concerns an individual. But neither specifies which of the two laws is a *lex specialis*, that is, which one will be given primacy in case of overlaps.

On the face of it, the Law on Personal Data protection seems more rigorous in preventing access to information of a personal nature. Which is why public authorities invariably rely on it to deny access to information of public importance. Such conduct by the public authorities contravenes both the Law on Personal Data Protection and the Law on Free Access to Information of Public Importance.

As has already been mentioned, processing personal data without the consent of the data subject is permitted, under the Law on Personal Data Protection, only in a few exceptional circumstances, the most important being that where processing is necessary in order to pursue the **overriding justified interests of other persons, which interests are specified in the law**.[130] One of these interests specified in the law is "**to protect rights and freedoms and other public interests**."[131]

As regards the cited exemptions to the rule prohibiting processing personal data, the interest to "protect rights and freedoms and other public interests" can definitely be understood as referring both to international conventions and standards concerning the right of the public to know and the provisions of the Law on Free Access to Information of Public Importance. And the latter specifies the situations where the right of the public to know outweighs the personal data protection interests:

> A public authority shall not grant a requester the right of 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** […] such information relates to a person, event or occurrence of public interest, **especially if that person is a holder of public office or a politician, insofar as the information bears relevance to the duties performed by that person** […][emphasis added][132]

It is clear from the foregoing discussion that the Law on Personal Data Protection and the Law on Free Access to Information of Public Importance unambiguously uphold and guarantee the right of access to certain information relating to the protection of rights and freedoms and other public interests, such as the right of access to information about public office holders or political office holders relevant to the duties they perform. Information relating to former or active-duty members

130 Ibid.
131 Ibid, Article 13.
132 Ibid, Article 14.

of the MoI or MoD and their wartime activities certainly belongs to this category, because it can help clarify the circumstances surrounding the massive human rights violations which took place during the conflicts.[133]

IV. Practices of Serbian government bodies

Researching past crimes, the HLC regularly approaches the MoD and MoI to request access to information of public importance, because it was members of these institutions who were mainly involved in war operations, and also because these institutions possess archives which are crucial to clarifying the circumstances of the crimes.

In defiance of both the international and domestic legal frameworks that guarantee the right of the public to know the truth about past violations of international law and the fact that this right prevails over the right of the state to withhold information, the MoI and the MoD adhere to their unlawful practice of denying requests for access to documents contained in their archives.

In handling the HLC's requests for access to information contained in their archives relating to the period of the armed conflicts, the MoI and MoD use different and, as a rule, baseless arguments, to evade their legal obligations. Furthermore, these public bodies refuse to comply with the final and binding decisions of the Commissioner for Information of Public Importance ordering them to grant the HLC access to the documents requested, thus holding themselves above the rule of law.

The following pages will discuss the practice of the MoI and MoD and the reasons they typically give for denying requests for access to their archives under the Law of Free Access to Information of Public Importance. They will also discuss the practice of the Commissioner for Information of Public Importance and his decisions in relation to the HLC's complaints against MoI and MoD decisions.

Ministry of the Interior

In researching the crimes committed during the wars in the former Yugoslavia, the HLC regularly contacts the MoI requesting access to information of public interest that concerns the involvement of MoI units and members in police operations during which crimes were committed. These requests mainly concern the activities of some MoI units during the Kosovo wars, especially the Special Police Units (SPU), their structure, commanders and the like. Additionally, the HLC regularly requests information about MoI members for whom there are grounds to believe that they participated in the said operations, specifically about: (1) the positions they held at the time of the crime; (2) the positions they held after the crime, whether they were promoted or continued to work at government

133 This conclusion coincides with the Decision of the Commissioner for Information of Public Importance No. 07-00-04185/2013-03 of 19 May 2014.

institutions; and (3) their names, if the HLC only knows the position they held at the time of an alleged crime (e.g. commander of a SPU unit, etc.).

Researching war crimes for its war crimes dossiers or criminal complaints, the HLC hass so far **made about 300 requests to the MoI for access to information of public importance**. In the vast majority of cases, the MoI has replied that the requested information was not in its possession, or that the requests did not provide sufficient details, in which cases it has asked the HLC to clarify them.

1. RESPONSE: MoI DOES NOT HOLD THE INFORMATION REQUESTED

While researching into the activities of the SPU detachments during the war in Kosovo, the HLC has made more than 30 requests for information to the MoI. Information has been sought in order to determine the manner in which the detachments were formed, their structure, responsibilities, number, how long they existed, who their commanders and deputy commanders were, and whether the individuals who were the subjects of the requests were still employed by the MoI.

The MoI has invariably responded that it did not hold information relating to these units, that is, their number, formation, how long they existed and when they were disbanded.[134] The MoI has given the same response when requested to disclose the names of commanders of the SPU detachments during the war in Kosovo.[135]

More precisely, the MoI has claimed that it did not hold the documentation requested or did not know the answers to any of the following questions:

1) How many SPU detachments were there during 1998 and 1999?

2) What were the names of SPU detachments during 1988 and 1999?

3) How did the detachments get their names?

4) Did a change of name mean a change of structure?

5) Decision of the Minister of the Interior to form SPU detachments[136]

6) When were the SPU detachments specified in the request formed?[137]

134 See, e.g., MoI, Response No. 4275/14-3 of 13 May 2014; Response No. 9144/14-2 of 15 September 2014; Responses Nos. 3480/14-4, 3475-14-4 and 3473/14-4, all of 23 April 2014.

135 The requests concerned the engagement of Borislav Josipović, commander of the SPU 23rd Detachment, and Branko Prljević, commander of the SPU 35th Detachment; see MoI, Response No. 1465/14-6 of 4 April 2014; MOI, Response No. 3474/14-4 of 23 April 2014.

136 MoI, Decision No. 4275/14-3 of 13 May 2014; MoI, Decision No. 9022/14-2 of 15 September 2014.

137 MoI, Decision No. 3480/14-4 of 23 April 2014; MoI, Decision No. 3475/14-4 of 23 April 2014; MoI, Decision No. 3473/14-4 of 23 April 2014; MoI, Decision No. 7160/14-3 of 22 August 2014.

7) When were the SPU detachments specified in the request disbanded? [138]

8) What were the areas of responsibility of each of the SPU detachments specified in the request?[139]

9) Who were the commanders of the SPU detachments specified in the request; when were they appointed; until when did they serve in this position? [140]

10) Who were the deputy commanders of the SPU detachments specified in the request; when were they appointed; until when did they serve in this position? [141]

11) How many members did each of the SPU detachments specified in the request have? [142]

12) From which MoI departments were members of the SPU detachments specified in the request recruited? [143]

13) How many troops, platoons and departments did each of the SPU detachments specified in the request have? [144]

14) What were the names of the troops, platoon, department commanders under the SPU detachments specified in the request, when were they appointed and until when did they serve in these positions? [145]

15) Where were the command posts of each of the SPU detachments specified in the request? [146]

16) Which ranks did commanders of the SPU detachments specified in the request hold at the time of serving as their commanders?[147]

17) When were the SPU disbanded (and the supporting documents)?[148] etc.

It is important to note that SPU detachments were regular MoI formations formed back in 1993.[149] In addition to the YA, the SPU, with several thousand policemen, was the largest Serbian force operating

138 Ibid.
139 Ibid.
140 MoI, Decision No. 4095/14-4 of 4 August 2014; MoI, Decision No. 7160/14-3 of 22 August 2014.
141 MoI, Decision No. 3480/14-4 of 23 April 2014; MoI, Decision No. 3475/14-4 of 23 April 2014; MoI, Decision No. 3473/14-4 of 23 April 2014; MoI, Decision No. 7160/14-3 of 22 August 2014.
142 Ibid.
143 Ibid.
144 Ibid.
145 Ibid.
146 Ibid.
147 MoI, Decision No. 4095/14-4 of 4 August 2014.
148 MoI, Decision No. 9144/14-2 of 15 September 2014.
149 Decision on the formation of special police units, exhibit No. P58, *Đorđević.*

in Kosovo during the conflict. It should also be mentioned that Serbia handed to the ICTY a large amount of documentation relating to the SPU, some of which is available online from the ICTY court records database. And lastly, the MoI is obliged under a number of laws and its own regulations to keep records of their employees and all official documents concerning its work.[150]

So it clearly follows that the MoI's claims that it does not hold documents relating to the SPU are **unpersuasive and aimed at evading its obligations under the Law** on Free Access to Information of Public Importance, and at shielding possible perpetrators of crimes who were or still are employed by the MoI.

The final judgment issued by the European Court of Human Rights in *Youth Initiative for Human Rights v. Serbia* must also be taken into account when assessing the MoI's compliance with the Law and its responses and reasons given for refusing the HLC's requests. The European Court judges held that the authorities are responsible for storing information held by the state and that the loss or destruction of information cannot be an excuse and exonerate the state [see Section - International legal framework for more information on this case]. [151]

1.1. Evidence pointing to concealment of documentation

As there were strong indications that the MoI's claims that it does not hold the information requested are not true but rather aimed at concealing documentation relating to individuals and units involved in serious crimes, the HLC has tested their veracity.

Namely, the HLC has made a series of requests to the MoI for **access to information which the HLC knew for certain was held by the MoI** (the information that the MoI had already handed to the ICTY, which posted them on its online court records database). In November 2014, the HLC made seven requests to the MoI for access to seven dispatches sent by the MoI of the Republic of Serbia regarding the deployment of police forces in Kosovo in 1999. The requests stated with precision the number, the date and the addressee of each of the dispatches.

The MoI gave the same response to all these requests – that it **does not hold the documents requested**[152] (examples of the HLC' requests, the MoI's refusal notices and the documents requested in Appendix I).

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150 Law on Police (Official Gazette of the RS, Nos. 101/2005, 63/2009 - Constitutional Court decisions No. 92/2011 and 64/2015), Art. 110; Directive on the manner in which meeting the eligibility criteria for the Director of Police position is to be determined and the selection of candidates for Director of Police, accessed 21 January 2016 http://www.MoI.gov.rs/domino/zakoni.nsf/prdirektorl.pdf

151 *Youth Initiative for Human Rights v. Serbia*, Judgment No. 48135/06, European Court of Human Rights, 25 September 2013; http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-120955#{"itemid":["001-120955"]} accessed on 23 March 2016.

152 MoI, Decision No. 12312/14-2 of 05.12.2014; MoI, Decision No. 12311/14-2 of 05.12.2014; MoI, Decision No. 12305/14-3 of 05.12.2014; MoI, Decision No. 12316/14-2 of 05.12.2014; MoI, Decision No. 12307/14-2 of 05.12.2014; MoI, Decision No. 12314/14-2 of 05.12.2014; MoI, Decision No. 12315/14-2 of 05.12.2014.

1.2. Practice of the Commissioner for Information of Public Importance

The HLC lodged a number of complaints with the Commissioner against MoI decisions refusing its requests, and pointed to their obvious lack of foundation. In its complaints, the HLC urged the Commissioner to use the powers conferred on him by the Law on Free Access to Information of Public Importance to ascertain whether the MoI really does not hold the documents requested. As has already been pointed out, Article 26 of the Law stipulates that the Commissioner is to take steps to determine any facts necessary for reaching a decision on a complaint, and that **for the purpose of fact-finding he will be allowed access to any information carrier covered by the Law**.

According to this Article, whenever a reasonable doubt arises as to whether a public authority holds the information requested and refuses to disclose it, the Commissioner is authorised to view the information carrier in order to determine whether the public authority holds the information concerned.

However, in none of these cases has the Commissioner used his legal powers. Instead, he has rejected the HLC's complaints as unfounded and concluded as follows: "The fact that the complainant has raised doubts as regards the response of the public authority concerned [...] could not lead to a different decision in this administrative matter because any **provision of false information could amount to a minor offence or some other form of liability**, irrespective of the decision reached in the administrative proceedings at hand"[153] [emphasis added]

Giving the reasons on which his decision was based, the Commissioner stated that the very fact that the MoI had responded to the HLC's request meant that it had complied with the Law on Free Access to Information of Public Importance.

1.2.1. Proceedings against the decision of the Commissioner for Information of Public Importance

In December 2015, the HLC filed seven appeals with the Administrative Court against the above Commissioner's decisions, seeking that the Commissioner's decisions be annulled and the cases be returned to him for a reconsideration which will include using his legal powers to view the MoI's archives.

153 Commissioner for Information of Public Importance, Decision Notice No.07-00-04850/2014-03 of 05.11.2015; Commissioner for Information of Public Importance, Decision Notice No.07-00-04846/2014-03 of 04.11.2015; Commissioner for Information of Public Importance, Decision Notice No.07-00-04851/2014-03 of 04.11.2015; Commissioner for Information of Public Importance, Decision Notice No.07-00-04849/2014-03 of 04.11.2015; Commissioner for Information of Public Importance, Decision Notice No.07-00-04848/2014-03 of 05.11.2015; Commissioner for Information of Public Importance, Decision Notice No.07-00-04853/2014-03 of 04.11.2015; Commissioner for Information of Public Importance, Decision Notice No.07-00-04852/2014-03 of 04.11.2015.

In its appeals, the HLC also pointed to, among other things, breaches of the principle of truthfulness and of the principle of free assessment of evidence, as the Commissioner, in deciding on the HLC's complaints, was under a duty to properly and fully find all the facts relevant to reaching a decision and take all the steps he is under the Law authorised to take, in order to find the facts, that is, to ascertain whether the documents sought existed in the MoI's archives. Furthermore, in his decision notice the Commissioner was silent on the HLC's demands that he should take all the steps he is authorised to take under Article 26 of the Law, namely, to view the information carrier in order to properly find all the facts relevant to reaching a decision on a complaint.

Lastly, the HLC emphasized in its appeals that the very fact that the MoI's response to the HLC's requests, irrespective of the content of these responses, means that the MoI formally fulfilled its obligations under the Law, does not mean that the public authority in question complied with its substantive obligations under the Law. Should such a way of handling requests by a public authority be deemed lawful, then the very purpose of the Law and the intention of its drafters would be rendered pointless.

At the date of the publication of this report, the Administrative Court has delivered only two judgments relating to the seven appeals filed by the HLC against the Commissioner's decisions. Namely, in January and February 2016, the Administrative Court rejected the HLC's appeal as ill-founded.[154] The HLC will lodge a constitutional appeal against this judgment.

2. RESPONSE: ADDITIONAL INFORMATION REQUIRED

In addition to claiming that it does not hold the information sought, the MoI often responds to the HLC's requests for access to information relating to the deployment of MoI members in Kosovo with counter-requests for additional information.

Namely, the MoI often requests that the HLC provide additional pieces of information needed for the identification of MoI officers concerned. These include: **the date, year and place of birth, a parent's name or the officer's unique personal identification number**.[155] Explaining these requests, the MoI claims that "several individuals with the exact same first name and surname are registered in the MoI's Single Information System".[156] However, the MoI seeks additional information **even when the HLC provides the name of a person and his position in the MoI during a precisely defined period**.[157] So, even if there were several persons with the same first name and surname, they could not possibly hold the same position during the same period.

154 Administrative Court in Belgrade, Judgment No. 26 U. 16888/15 of 28 January 2016, p. 3; Administrative Court in Belgrade, Judgment No. 6 U. 16889/15 of 11 February 2016.
155 MoI, Responses Nos.6714/15-2, 6713/15-2, 6712/15-3, 6711/15-3, 6710/15-3, all of 2 July 2015.
156 MoI, Conclusions No. 6455/15-3 of 6 July 2015, and 5517/15-2, 5459/15-2, 5863/15-2, all of 7 July 2015; 4090/2014-2 of 20 May 2014, etc.
157 HLC, Request No. 170-F111063 of 29 May 2015; FHP, Request No. 170-F110511 of 14 May 2015.

As the HLC does not have any legal means to obtain personal data, such as the date and place of birth, a parent's name or the unique personal identification number of an individual, the MoI regularly rejects its requests.[158]

2.1. Practice of the Commissioner for Information of Public Importance

The HLC complained to the Commissioner about all these conclusions of the MoI which made access to the information requested contingent upon the supply of additional information. Deciding on the HLC's complaints, the Commissioner annulled the MoI's conclusions and sent the case back to the MoI for reconsideration. Stating the reasons for so deciding, the Commissioner said that "the [HLC's] request as it is contains sufficient data about the individual who is the subject of the request, and, as such, it is not a request that could not be complied with".[159]

Even though the Commissioner ordered the MoI to reconsider the HLC's requests, the MoI, upon reconsidering them, informed the HLC that it "does not hold documents containing information about professional engagement of the individuals who are the subjects of the request".[160]

The responses that the MoI gave in defiance of the Commissioner's decision have cast serious doubt as to their veracity. If the MoI really did not hold information on these people, one would logically expect the MoI to state it straightaway, instead of seeking additional information from the HLC.

It is quite clear that these are the tactics the government authorities use to evade their legal duties. In the *Youth Initiative for Human Rights v. Serbia* Case, a similar thing happened. The Serbian Intelligence Agency (BIA) initially refused the request, stating that the information sought was confidential. After the Commissioner had rejected this argument and ordered reconsideration of the request, the Agency claimed that it actually did not hold the information. The European Court held that such a "defence" was not valid, because the authorities are required to store documents held by the state and that the absence of documents, whatever the reason, cannot be an excuse [see Section - International legal framework above].[161]

Lastly, it should be borne in mind that a number of laws and MoI regulations impose an obligation on this government institution to preserve the information relating to its staff and performance; so it seems most unlikely that the documents relating to the engagement of members of this institution in war operations, in the course of which numerous illegal activities took place, were absent/destroyed/lost.

158 MoI, Conclusions Nos. 6455/15-3 of 6 July 2015, 5517/15-2, 5459/15-2, 5863/15-2, all of 7 July 2015; 4090/2014-2 of 20 May 2014, etc.

159 Commissioner for Information of Public Importance and Personal Data Protection, Decisions Nos. 07-00-02661/2015-03, 07-00-02929/2015-03, 07-00-02922/2015-03 and 07-00-02924/2015-03, all of 23 November 2015.

160 MoI, Response No. 6451/15-5 of 17 November 2015; MoI, Response No. 6455/15-5 of 18 November 2015; MoI, Response No. 6714/15-6 of 30 November 2015; MoI, Response No. 5862/15-5 of 14 December 2015.

161 *Youth Initiative for Human Rights v. Serbia*, Judgment No. 48135/06, European Court of Human Rights, 25 September 2013: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-120955#{"itemid":["001-120955"]} accessed on 23 March 2016.

Ministry of Defence

In addition to the MoI, most of the HLC's requests for access to information of public importance have been directed to the MoD. The requests have mainly been concerning the activities of certain YA units during the wars in the former Yugoslavia, their areas of responsibility, and their command structure.

The HLC has submitted more than 100 requests for access to information of public importance to the MoD. As a rule, the MoD has refused to provide the information requested, stating four different reasons, which are discussed below. None of these reasons are compatible with the positive law of the Republic of Serbia or international norms that guarantee the right of public access to archives containing information on human rights violations.

1. RESPONSE: INFORMATION IS CLASSIFIED AS SECRET

The MoD has regularly relied on data secrecy provisions as the grounds for refusing the HLC's requests for access to information of public importance. Along with invoking personal data protection provisions as a basis for non-disclosure (see section - Personal data protection below), the MoD regularly invokes data secrecy provisions at the same time, stating, for example, that "data concerning professional military personnel is contained in personnel records which are labelled 'confidential.'"[162]

In its refusal notices, the MoD invokes the Law on Free Access to Information of Public Importance provision, which stipulates that access to information of public importance may be denied if disclosure of such information would:

> make available information or a document classified by regulations or an official document based on the law as state secret, official secret, trade secret or other secret, i.e. if such a document is accessible only to a specific group of persons and its disclosure could seriously legally or otherwise prejudice the interests that are protected by the law and override the access to information interests.[163]

According to the MoD's interpretation, granting the HLC access to the information requested could "seriously prejudice" national defence interests. In the vast majority of its refusal notices, the MoD states that it cannot communicate the information requested because it would "cause prejudice to the operative and functional readiness of the Army to perform its tasks and missions laid down by law and the Constitution of the Republic of Serbia, that is, its disclosure would cause

162 MoD, Decision No. 5869-4 of 15 September 2015; MoD, Decision No. 4157-2 of 18 September 2014; MoD, Decision No. 316-4/15 of 17 March 2015.

163 Article 9, para.1, sub-para. 5 of the Law on Free Access to Information of Public Importance.

prejudice to national defence interests of the Republic of Serbia, which interests outweigh the public interest in disclosure."[164]

Judging by the above cited MoD responses, disclosure of the following documents would cause prejudice to national defence interests:

Documents requested (examples)	Level of classification
Name of the commander of a YA brigade	"top secret"[165]
Post-war career history of servicemen – whether they have been promoted, whether they are still employed by government bodies	"top secret"[166]
The YA Third Army Command's report on clearing up battlefields in Kosovo of 18 May 2001; the Prishtina Corps Command's report on clearing up battlefields in Kosovo of 16 May 2001	"secret"[167]
Names of commanders of YA brigades, battalions and barracks	"confidential"[168]
Was an army barracks located in the immediate vicinity of uncovered mass graves in operation at the time of the burial of the bodies?	"top secret"[169]
Combat reports of YA brigades	"secret"[170]

The MoD neglects its legal duty under the Law on Free Access to Information of Public Importance (Article 9) to specify in its refusal notices how disclosure of the information sought could harm the Serbian national defence interests that are being protected and that override the public interest in favour of disclosure.[171] None of the MoD's refusal notices explained how disclosure of information about an army unit which has ceased to exist could prejudice the interests of the present-day Army of Serbia, or how it seriously prejudices national defence interests.

164 MoD, Decision Notices Nos. 3582-2 and 3581-2, 3585-2 of 10 August 2015, 316-4/15 of 17 March 2015; Office of the Chief of the VS General Staff, Decision Notices Nos. 6421-3 of 1 October 2015, 6967-4 of 4 November 2015, and 6420-4 of 7 October 2015.

165 MoD, Decision Notice No. 837-4/14 of 10 October 2014.

166 MoD, Decision Notice No. 560-3/14 of 31 July 2014; MO, Decision Notice No. 4157-2 of 18 September 2014; MoD, Decision Notice No. 4350-9 of 12 December 2014; MoD, Decision Notice No. 4347-2 of 27 October 2014.

167 MoD, Decision Notices Nos. 1148-5/14 and 1146-5/14 of 12 February 2015.

168 MoD, Decision Notice No. 5869-4 of 15 September 2015; MoD, Decision Notice No. 4157-2 of 18 September 2014; MoD, Decision Notice No. 316-4/15 of 17 March 2015.

169 MoD, Decision No. 5869-4 of 15 September 2015.

170 MoD, Decision No. 553-6/14 of 31 July 2014; MoD, Decision No. 958-4/14 of 17 November 2014.

171 Law on Free Access to Information of Public Importance (Official Gazette of the RS, Nos. 120/2004, 54/2007, 104/2009 and 36/2010), Art. 9.

Such arbitrariness by the MoD in interpreting the relevant legal provisions runs counter to the very purpose of the Law on Free Access to Information of Public Importance. At the same time, the fact that the Law allows the MoD to establish, on its own and without any external control, the existence of a highly abstract criterion such as a threat to national defence in situations where it has a clear interest in concealing documents, severely undermines the right of the public to have free access to information held by the authorities. In practice it means that the MoD may, on the pretext of protecting "national security" interests, withhold information about its involvement and the involvement of its members in systematic violations of human rights. As can be seen from the HLC's practice, the MoD indeed does exactly this.

The MoD also claims, contrary to the Data Secrecy Law, that both names of soldiers and combat reports of army units fall into the category of classified information, although a great deal of such data is already available to the public through the ICTY or the media. As stipulated in the Data Secrecy Law, "the classification of data terminates if the data have been made available to the public."[172] The refusal of the MoD to comply with the HLC's request and disclose the name of the commander of the 63rd Parachute Brigade of the YA in the period 14 March to 20 June 1999 is an illustrative example of this.[173] Even after the media had published[174] the biography of Colonel Ilija Todorov (the wartime commander of the 63rd Parachute Brigade, who later became the commander of the Special Brigade of the Army of Serbia), the MoD refused the HLC's request concerning this individual, stating that the information sought was classified as both "top secret" and "confidential".[175] The MoD further explained that the information had been classified as "top secret" because it concerns "wartime postings which include, among other things, information on the wartime duties of each formation and the names of career military personnel to whom these duties were assigned", and "confidential" because it belongs to the personal data records that are being kept on career military personnel.[176]

In response to the HLC's request for access to reports on the clearance of battlefields, the MoD for the first time and only once made a reference to the possibility of data declassification. As has already been mentioned, under the Data Secrecy Law, an authorised person with a public authority may "declassify data or documents containing secret data, and enable the requester […] to exercise his/her rights in accordance with the law regulating free access to information of public importance and

172 Article 16 of the Data Secrecy Law.

173 HLC's request No. 170-F100338 of 19 September 2014.

174 "Colonel Todorov commander of special forces", *Politika,* 12 September 2006, available in Serbian at http://www.politika.rs/scc/clanak/14996/%D0%9F%D1%83%D0%BA%D0%BE%D0%B2%D0%BD%D0%B8%D0%BA-%D0%A2%D0%BE%D0%B4%D0%BE%D1%80%D0%BE%D0%B2-%D0%BA%D0%BE%D0%BC%D0%B0%D0%BD%D0%B4%D0%B0%D0%BD%D1%82-%D1%81%D0%BF%D0%B5%D1%86%D0%B8%D1%98%D0%B0%D0%BB%D0%B0%D1%86%D0%B0

175 MoD, Decision No. 837-4/14 of 10 October 2014.

176 Ibid.

the law regulating personal data protection".[177] The Law gives this power to a public authority where "the facts and circumstances arise because of which a piece of data ceases to be of interest for the Republic of Serbia".[178] The HLC believes that the only reason why the MoD in this case did elaborate on this possibility was the fact that the time period for declassification of the document to which access was requested expires as early as May 2016. Despite that, and the fact that parts of the report have been published in the magazine *Vojska*[179] and that the report could be of significant help in the search for persons who went missing during the wars [see Section - Introduction], the MoD found that there was no reason to declassify the said document marked as "secret" before the time period for its declassification expires [180]

1.1. Practice of the Commissioner for Information of Public Importance

Upon examining the HLC's complaints against MoD's decisions invoking data secrecy provisions, the Commissioner declared these decisions and the rationale behind them unlawful:

> The first-instance authority [MoD] failed to provide a valid justification for restricting access to the information sought in the case at hand, that is, failed to show what particular foreseeable prejudice to the operational and functional readiness of the Army to perform its missions laid down in the Constitution of the Republic of Serbia would occur if the information relating to the members of the Army of Serbia specified in the requests were made available. The Commissioner finds that the information sought is not of such a nature as to be exempt or require restricted access […][181]

Non-compliance with Commissioners' decision

Despite the decision of the Commissioner being final and binding, the MoD failed to comply with it. Furthermore, the MoD continues to refuse requests made by the HLC, putting forward the very same arguments that the Commissioner has declared unlawful.

The MoD has failed to comply with the Commissioner's decisions in four cases so far.[182]

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177 Article 25 of the Data Secrecy Law: "An authorised person with the public authority shall declassify data or documents containing secret data, and enable the requester, i.e. the applicant, subject to the decision of the Commissioner for Information of Public Importance and Personal Data Protection, in appeal procedures or based on the ruling of a competent court in proceedings upon complaint, to exercise his/her rights, in accordance with the law regulating free access to information of public importance and the law regulating personal data protection."

178 Article 21, para. 2 of the Data Secrecy Law: "A decision on declassification shall be made based on the facts and circumstances because of which a piece of data ceases to be of interest for the Republic of Serbia."

179 Yugoslav Army and Kosovo and Metohija 1998-1999, "The Application of Rules of the International Law of Armed Conflicts", ed. Ivan Marković, *Vojska*, 2001, available as exhibit No. P01011 in *Šainović et al.*

180 MoD, Decisions Nos. 1148-5/14 and 1146-5/14 of 12 February 2015.

181 Decision of the Commissioner for Information of Public Importance No. 07-00-04185/2013-03 of 19 May 2014.

182 Decisions of the Commissioner for Information of Public Importance Nos.: 07-00-04223/2014-03 of 19 February 2016; 07-00-03528/2014-03 of 19 February 2016; 07-00-02970/2014-03 of 4 December 2015; 07-00-04185/2013-03 of 19 May 2015.

1.2. Data secrecy provisions serve to protect tainted Army units

Particularly alarming examples of misuse of data secrecy rules can be found in MoD decisions to keep the entire archives of some YA units out of public view. In 2014, Serbia's Defence Minister Bratislav Gašić issued two decisions by which he declared the entire archives pertaining to the 125th and 37th Motorised Brigade of the YA "top secret", that is, information requiring the highest possible level of protection.

The Minister's decisions contravene both procedural and substantive provisions of the Data Secrecy Law.[183] Namely, the Law, when declaring a piece of data "top secret", as was the case here, states it is necessary to specify why and how disclosure of that piece of data could cause *grave irreparable damage* to the interests of the Republic of Serbia.[184]

The decisions of Minister Gašić, however, do not state any reasons, nor do they explain how disclosure of the combat reports of the two brigades and the names of their commanders could cause *grave irreparable damage* to the interests of the state.[185] As the data sought concern events that took place 17 years ago and an army that does not exist anymore, and a great amount of similar data has already been made available online at the ICTY court records database, it is quite clear that the MoD has lacked any persuasive arguments to prove the likelihood of the occurrence of any grave irreparable damage.

As the Defence Minister's decisions to declare the archives pertaining to the two brigades "top secret" coincided with the HLC's public demands for investigation into the roles of some members of these brigades in crimes against thousands of civilians during the war in Kosovo, it is clear that the real intention was to conceal documents that are essential for reconstructing the crimes.[186] One of the commanders of these brigades is already under investigation by the Office of the War Crimes Prosecutor (OWCP)[187], and preliminary investigations are being conducted into the activities of several soldiers and officers of the 37th Motorised Brigade.[188]

183 See Articles 3 and 11, para. 4, Article 99, para.1, sub-para. 4 of the Data Secrecy Law.
184 Ibid, Art. 14.
185 MoD, Decision on the protection of the archival material created during the operations of the disbanded Command of the YA 37th Motorised Brigade marked with „E" No, 553-5/14 of 31 July 2014.
186 See HLC's „Dossier: 125th YA Motorised Brigade", available at http://www.hlc-rdc.org/wp-content/uploads/2013/10/Dossier-125th-mtbr.pdf, HLC's „Dossier: Ljubiša Diković", available at http://www.hlc-rdc.org/wp-content/uploads/2012/11/Ljubisa-Dikovic-File-and-Annex.pdf, and HLC's Dossier "Rudnica", available at http://www.hlc-rdc.org/wp-content/uploads/2015/01/Dosije_Rudnica_eng.pdf
187 OWCP, Press Release of 5 August 2014, available at http://tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2014/VS_2014_08_05_CIR.pdf, accessed 7 May 2015.
188 OWCP, Press Release of 11 November 2015, available at http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2015/VS_2015_11_11_CIR.pdf accessed 9 February 2016. Letter OWCP, Ktr No. 77/15, 12 October 2015.

1.2.1. Misdemeanour charges against Defence Minister Bratislav Gašić

Immediately before the decision to declare the archive relating to the YA 37th MtBr secret was issued, and during its research for the "Rudnica" Dossier, the HLC had requested access to documents relating to the YA 37th MtBr (its war diaries, combat reports and names of MtBr battalions' commanders), from which it was evident that the HLC was enquiring into the circumstances surrounding the killings of Kosovo Albanians and subsequent transport of their bodies to the mass grave at Rudnica (Serbia). It was almost immediately after these requests had been made that the Defence Minister issued his decision to declare the entire archive of the YA 37th MtBr "top secret". From then on, the MoD quoted this decision as the basis for refusing all HLC requests relating to this unit.[189]

The timing of the Minister's decision and the fact that he declared secret only documents relating to the YA 37th MtBr suggest that the Minister wanted to block investigation into the war crimes, acting contrary to Article 3 of the Data Secrecy Law which stipulates that "data marked as classified with a view to concealing crime […] shall not be considered classified".

The fact that should be taken into account when discussing the reasons for the issuing of this patently unlawful decision is that the incumbent Chief of the VS General Staff, Ljubiša Diković, was the commander of the YA 37th MtBr during the war in Kosovo.

On 12 June 2015, the HLC filed misdemeanour charges against Defence Minister Bratislav Gašić for unlawful marking the archive of the YA 37th MtBr as documents requiring the highest level of classification.[190] Namely, the Minister in his decision failed to provide reasons for his decision, despite being obliged under the Data Secrecy Law to explain in what way disclosure of these documents would cause "grave irreparable damage" to the interests of the state.[191]

The HLC filed misdemeanour charges with the First Basic Prosecutor's Office and the Ministry of Justice as a supervisory authority under the Data Secrecy Law. The Ministry of Justice never responded. The Prosecutor's Office in July 2015 notified the HLC that there were "no grounds for instituting misdemeanour proceedings", after which the HLC filed an objection with the Office of the Public Prosecutor of the Republic of Serbia. No response has been received as regards the objection at the time of the publication of this report.

Therefore, in September 2015 the HLC filed a petition to institute misdemeanour proceedings with the Misdemeanour Court. In its decision of 30 November 2015, this court dismissed the petition, citing the statute of limitations. The HLC appealed against this decision. Namely, the Law on Misdemeanours provides that misdemeanour proceedings cannot be instituted if one year has passed

189 MoD, Decision No. 1145-5/14 of 5 February 2015.
190 HLC Press Release „Minister of Defence Declared Documents on Activities of the 37th Motorized Brigade of the Yugoslav Army in Kosovo Top Secret", 12 June 2015, available at http://www.hlc-rdc.org/?p=29345&lang=de
191 Data Secrecy Law, Article 11, para.4.

from the date when the misdemeanour took place[192]. The HLC, admittedly, filed its petition after this time limit had expired, but the Court completely disregarded the fact that the HLC had *reported* the misdemeanour to the competent body within the statutory time limit by filing objections and emergency petitions. The HLC filed the petition to institute misdemeanour proceedings only after seeing that the competent authorities had shown no interest in taking any action, and this was after the statute of limitations had expired.

The Court's decision is unlawful also because it completely disregards a provision of the Law on Misdemeanours which explicitly provides that in a case of inactivity of the competent authorities (which was the case here), misdemeanour proceedings may be instituted after the limitation period has expired: "A misdemeanour charge filed by the injured party before the competent authority may, under the conditions provided hereunder, be deemed a petition to institute misdemeanour proceedings unless the competent authority itself had filed the petition to institute misdemeanour proceedings."[193]

In January 2016, the Misdemeanour Court of Appeals rejected the HLC's appeal against the first instance judgment in this case.[194] The HLC will file a constitutional complaint against this judgment and the Prosecutors Office for its inaction. **The absolute limitation period for the misdemeanour committed by the Defence Minister expires in July 2016**.

1.3. Data secrecy as a means of protecting tainted individuals

In November 2013, the Office of the War Crimes Prosecutor raised an indictment against Pavle Gavrilović and Rajko Kozlina**, active-duty members of the Army of Serbia** (VS) and former members of the YA 549th MtBr. Gavrilović and Kozlina were charged with committing a war crime against civilians in the village of Ternje/Trnje (Suva Reka municipality, Kosovo) on 25 March 1999, during which at least 27 Kosovo Albanians were killed.[195] The indictment states that Pavle Gavrilović ordered that "there shall be no survivors" in the village and Rajko Kozlina shot an old man in the head to show other soldiers how to kill the civilians.[196]

Immediately following the indictment, the HLC urged the VS Chief of General Staff, Ljubiša Diković, to suspend the accused from service in accordance with the Law on the Serbian Armed Forces.[197] The Law envisages that a member of career military personnel may be removed from duty if criminal

192 Law on Misdemeanours (Official Gazette of the RS, No. 65/2013) Article 84, para.1.
193 Ibid, Article 180, para. 5.
194 Judgment of the Misdemeanour Court of Appeals No. 12 Prz. 994/16 of 22 January 2016.
195 OWCP. Indictment KTO No. 7/2013 of 4 November 2013, available at: http://www.hlc-rdc.org/wp-content/uploads/2014/06/Optuznica_Trnje.pdf
196 OWCP. Indictment KTO No. 7/2013 of 4 November 2013, available at: http://www.hlc-rdc.org/wp-content/uploads/2014/06/Optuznica_Trnje.pdf
197 HLC Press Release "Officers Indicted of Crimes Against Civilians in Trnje Should Be Suspended from Serbian Army", 20November 2013, available at http://www.hlc-rdc.org/?p=25527&lang=de

charges have been brought against him/her and the crime is "of such a nature that it would be harmful to the interests of the service that such an individual should remain on duty."[198] The HLC has not received any response to this request to date.

The HLC then requested the MoD, under the Law on Free Access to Information of Public Importance, to provide it with information as to whether or not the accused were still active-duty members of the VS. The Ministry rejected the request, stating that the information requested is protected, as it constitutes personal information and information "relevant for the defence of the state."

1.3.1. Practice of the Commissioner for Information of Public Importance

Upon examining the complaint filed by the HLC against the above decision, the Commissioner for Information of Public Importance rejected the arguments put forward by the Ministry and ordered it to provide the HLC with the information sought within five days. Explaining his decision, the Commissioner stated that the MoD failed to specify "what particular foreseeable damage disclosure of the information requested would cause to the operational and functional readiness of the Army", and that the HLC requested information relating to the professional activities of career military personnel, not their private lives, and such information is not exempt from disclosure [see response below - personal data protection]. The Commissioner also pointed out that:

> In the instant case the information concerns a criminal prosecution launched by the Office of the War Crimes Prosecutor, e.g. indictments against the individuals who are the subjects of the request, which have already been published in the media. Namely, online editions of *Politika* and *Kurir* on 6 November 2013 published the texts "VS officer and non-commissioned officer charged with war crime in Kosovo" and "VS ranking officers suspected of committing a war crime" respectively, in which they reported that the Serbian Office of the War Crimes Prosecutor had raised an indictment against the individuals concerned over the killing of civilians in the village of Trnje, near Suva Reka, on 25 March 1999.[199]

Non-compliance with Commissioner's decision

The MoD did not release the information requested, even though the deadline for giving effect to the Commissioner's decision expired nearly 18 months ago. Therefore, the Commissioner on 22 September 2015 issued an enforcement notice, ordering the MoD to communicate the requested information to the HLC within two days or else face a fine.[200] The HLC has not yet received any response from the MoD.

198 Law on the Serbian Armed Forces (Official Gazette of the Republic of Serbia, Nos. 116/2007, 88/2007, 101/2010, - other law, 10/2015 I 88/2015 – Constitutional Court Decision, Article 77).

199 Decision of the Commissioner for Information of Public Importance No.07-00-04185/2013-03 of 19 May 2014.

200 Commissioner for Information of Public Importance and Personal Data Protection, enforcement notice No. 07-00-02047/2014-03 of 22 September 2015.

2. RESPONSE: PERSONAL DATA PROTECTION

During its research into the crimes committed during and in connection with the armed conflicts in the former Yugoslavia, the HLC regularly approaches the MoD requesting information on military servicemen with respect to whom there are grounds to believe or evidence that they were involved in past crimes. The information sought by the HLC concerns (1) the positions they held at the time of the crimes; (2) the positions they held after the armed conflicts, and whether they have been promoted or continued to work for government agencies; and (3) their names, in those cases where the HLC only knows the positions they held at the time of the crimes (e.g. brigade commander, battalion commander, platoon commander, etc.).

The MoD regularly turns down HLC requests, invoking personal data protection provisions and claiming that they cannot process the requests without the consent of the subjects of the data. According to the MoD, all types of data listed below are protected as personal:

1) Position and career history within the military of a member of career military personnel;[201]

2) Name of a commander of a YA brigade;[202]

3) Name of a commander of a YA battalion;[203]

4) Name of a military barracks commander;[204] et al.

In processing the HLC's requests, the MoD tends to completely disregard the provisions of the Law on Free Access to Information of Public Importance which allow access to personal data without the consent of the data subject if such data relates to **an individual, event or occurrence of public interest, especially if the data subject is a public office holder or politician, insofar as the information concerns the duties performed by that person"**[205] [see Section 3.1.a above – Ambiguities with regard to the scope of the two laws].

Information relating to the professional activities of former or active members of the MoD cannot be protected as being personal, because this kind of information is exempt from non-disclosure under the Law on Personal Data Protection, and the public is therefore entitled to have access to it. This conclusion is consistent with the Commissioner's practice as well.

201 MoD, Decision No. 4350-9 of 12 December 2014; MoD, Decision No. 4347-2 of 27 October 2014.
202 MoD, Decision No. 837-4/14 of 10 October 2014.
203 MoD, Decision No. 4157-2 of 18 September 2014; MO, Decision No. 316-4/15 of 17 March 2015.
204 MoD, Decision No. 5869-4 of 15 September 2015.
205 Article 14 of the Law on Free Access to Information of Public Importance.

2.1. Practice of the Commissioner for Information of Public Importance

Upon examining the HLC's complaints about the MoD's refusal to provide information, the Commissioner declared the MoD's decisions and reasons for refusal unlawful:

> In view of the fact that the information requested relates to members of the Army who, as members of career military personnel, work for the Army, and that the complainant [HLC] has not sought access to any other personal data on the data subjects, such as address, personal identification number and the like, and as the information requested concerns military activities they carried out as career Army soldiers, the Commissioner finds that in the instant case the conditions have been met […] to make the requested information available. Accordingly, the consent of the data subjects is not necessary […][206]

Non-compliance with Commissioner's decision

The cited Commissioner's decision is final and the MoD is under legal obligation to give the HLC access to the information requested. However, the MoD has been refusing to comply with this decision for almost two years now. Furthermore, continuing to use the same reasons that the Commissioner declared not legally valid in the above cited decision, the MoD has refused another 30 requests that the HLC has subsequently made to it.[207]

3. Response: Information is not held By the MoD

Unlike the MoI, the MoD scarcely ever responds to the HLC's request for information by saying that the information is not held. However, it did it once, claiming that it did not hold information regarding the areas of responsibility of YA brigades during the war in Kosovo;[208] which is hard to credit, because this Ministry, as the body exercising control over the Yugoslav Army in 1998-99, played a major role in combat operations in Kosovo. This response of the MoD should be interpreted in the context of the final judgment of the European Court in *Youth Initiative for Human Rights v. Serbia,* in which the judges held that the authorities were responsible for storing information held by the state and that the non-existence of data (due to loss or destruction, etc.) could not be an excuse [see Section -International legal framework]. [209]

206 Decision of the Commissioner for Information of Public Importance and Personal Data Protection No.07-00-04185/2013-03 of 19 May 2014.

207 MoD, Decision No. 316-4/15 of 17 March 2015; 116-2 of 19 January 2016; 114-3 of 19 January 2016; 4345-2 of 27 October 2016; 4342-2 of 27 October 2016; 4343-2 of 27 October 2016; 4351-2 of 27 October 2016; 4347-2 of 27 October 2016; 4156-5 of 27 October 2016; 4344-2 of 27 October 2016; 4346-2 of 27 October 2016; 837-47/14 of 10 October 2014; 4350-9 of 12 December 2014, etc.

208 MoD, Decision No. 837-5/2014 of 14 October 2014.

209 *Youth Initiative for Human Rights v. Serbia*, Judgment No. 48135/06, European Court of Human Rights, 25 September 2013; http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-120955#{"itemid":["001-120955"]} accessed on 23 March 2016.

The Commissioner has not yet issued a decision as regards this argument of the MoD.

4. Response: Request is transferred to "right address"

The Law on Free Access to Information of Public Importance states as follows: "Where a public authority does not hold a document containing the requested information, it shall refer the request to the Commissioner and inform accordingly the Commissioner and the requester which public authority it believes holds the document."[210] The Commissioner then transfers the request to that authority or advises the requester to contact it.[211] In practice, public authorities themselves sometimes transfer requests to another authority to expedite the procedure, and **inform the requester about it**.[212] However, the HLC's interactions with the MoD have shown that the MoD grossly misuses this procedure.

Namely, the public authorities' practice of transferring HLC's requests to the persons who are the very subjects of the requests is a blatant example of how the Law on Free Access to Information of Public Importance is being abused with the view to protecting tainted state officials. While enquiring into the role of the Chief of the VS General Staff, Ljubiša Diković, and his unit in certain crimes, the HLC directed all its requests for information to the MoD, but received responses from Diković's office.[213]

Not surprisingly, all the requests were rejected. The responses of the Office of the Chief of General Staff were always the same: that it "does not hold the information requested",[214] or that "the information described in the request has not been found in the archival material available",[215] or that "disclosure of the information requested would cause damage to operational and functional readiness of the Army to carry out its tasks and missions laid down by law and the Constitution of the Republic of Serbia, and therefore it would damage the national defence interests of the Republic of Serbia which override the interests of access to information of public importance."[216]

210 Article 19 of the Law on Free Access to Information of Public Importance.
211 Ibid, Article 20.
212 MoD's notification that the HLC's request for information was transferred to the competent government body – Security Intelligence Agency, 1765-2 of 22 September 2014.
213 The Office of the VS Chief of General Staff responded to nine of the 13 requests made to the MoD.
214 Office of the VS Chief of General Staff, response notices Nos. 6875-4 and 6871-5, both of 4 November 2015.
215 Office of the VS Chief of General Staff, response notices Nos. 6876-6 and 6877-6, both of 3 November 2015 and response notice No. 6873-6 of 4 November 2015.
216 MoD, Decisions Nos. 3582-2, 3581-2, 3585-2 of 10 August 2015, 316-4/15 of 17 March 2015; Office of the VS Chief of General Staff, decisions Nos. 6421-3 of 1 October 2015, 6967-4 of 4 November 2015 and 6420-4 of 7 October 2015.

V. Conclusion

The aim of this report is to highlight the need for opening official archives that contain documents relating to gross human rights violations committed during the wars in the former Yugoslavia in the 1990s, so as to enable the next of kin of the victims and society as a whole to exercise their right to the truth and help to reduce the impunity gap.

The report has identified the numerous and serious deficiencies of the legislative framework that governs access to these archives. Also, it has pointed to the non-compliance with and arbitrary application of the relevant laws by the relevant institutions, which impede the exercise of the right to the truth and accountability for past crimes.

Generally speaking, there are two solutions to these problems: 1) changing the current legislative framework, so as to eliminate all possibility of arbitrary interpretation of legal norms or discretionary decision-making, and defining penalties for non-compliance with the law; 2) establishing a new institutional mechanism aimed at making the archives containing materials essential for finding the facts about the events of the 1990s available for public inspection.

The HLC believes that changes in the legislative framework alone would not facilitate the exercise of the right to the truth and contribute to reducing impunity. The current practice of the relevant institutions and the absence of procedures for checking the wartime backgrounds of their personnel bear this out. As could be seen from some concrete examples provided in this report, the MoD and MoI would do anything, even blatantly violate the law, to shield their members from criminal accountability. Furthermore, some individuals with tainted backgrounds who face the prospect of being prosecuted for war crimes still work for government agencies.

That is why toughening misdemeanour penalties or any similar measures cannot be effective with respect to individuals faced with the prospect of being held accountable for the most serious criminal offences. Unless and until legislators acknowledge the reality of the existence of a "code of silence" among members of the above-mentioned institutions, and the fact that individuals who have a direct and personal interest in withholding documentation work at the bodies responsible for enforcing the law, the public's right to know the truth about what happened in the past will not outweigh the interests and powers of these institutions, and that right will remain illusory and unrealizable in practice.

Therefore, the HLC recommends that a special mechanism be put in place to enable access to those archives held by state authorities that contain records on crimes committed during the wars in the former Yugoslavia. This mechanism should be established with strong and genuine political support, and taking into account all the specificities and delicate elements of the process. With this in mind, and in the interest of the victims' families and society as a whole and their right to know the truth, the HLC calls on the National Assembly, the Prime Minister and the President of the Republic to

declassify, under Article 26 of the Data Secrecy Law,[217] all documents held by the MoI and MoD relating to the involvement of members of these two institutions in the armed conflicts in the former Yugoslavia.

217 „The National Assembly, the President of the Republic and the Government may declassify specific documents, regardless of the level of classification, should that be in the public interest or in order to fulfil international obligations."

VI. Appendices

Humanitarian Law Center

HIcIndexOut: 170-F102649

Belgrade, 18 November 2014

Ministry of Interior

Republic of Serbia

REQUEST

to access information of public importance

Pursuant to Article 15, item 1 of the Law on free access to information of public importance ("Official Gazette of the Republic of Serbia" No. 120/04, 54/07, 104/09 and 36/10), we hereby request the deliverance of Dispatch No. 567 of Public Security Department of the Ministry of Interior of the Republic of Serbia dated 18 March 1999.

The Humanitarian Law Center (HLC) is a non-governmental organization which documents human rights violations that occurred during the armed conflicts in the former Yugoslavia, represents victims of human rights violations in exercising their right to truth and justice, monitors war crimes, killings and other crimes regarding the armed conflicts and encourages institutions and society to deal with the past on the basis of the rule of law and respect for human rights.

Sincerely,

Milica Kostic /signed/

Legal adviser

Round seal of the Humanitarian Law Center

Republic of Serbia
MINISTRY OF INTERIOR
Minister office
Bureau for information of public importance
01 No. 12307/14-2
5 December 2014
Belgrade

HUMANITARIAN LAW CENTER

Milica Kostic, legal adviser

11000 Belgrade

Decanska St. 12

Dear Ms,

Regarding your request to free access to information of public importance, which you sent to the Ministry of Interior of the Republic of Serbia on 19 November 2014 asking for the delivery of Dispatch No. 567 from the Public Security Department of the Ministry of Interior of the Republic of Serbia dated 18 March 1999, we hereby inform you on the following:

The Ministry of Interior of the Republic of Serbia does not have the document you requested.

Sincerely,

Dragan Popovic /signed/

Authorised person

Round seal of the above mentioned ministry

Translation

MUP /Ministry of the Interior/ OF THE REPUBLIC OF SERBIA
Public Security Department
Dispatch number: 567
18 March 1999
B e l g r a d e

To:
The SUP /Secretariat of the Interior/ in BELGRADE, NOVI SAD and PRI[TINA - Chief
COMMAND of the 21st and 22nd DETACHMENT of the PJP /Special Police Unit/ in Belgrade - Commander
MUP HEADQUARTERS in PRI[TINA - Head
SECONDARY SCHOOL in SREMSKA KAMENICA - Director

For the purpose of carrying out special security tasks in Kosovo and Metohija AP /Autonomous Province/, it will be necessary to send two companies from the 21st and 22nd Detachment of the PJP (each of them six platoons in strength) from the Secretariat in Belgrade to help out the Secretariat in Pri{tina on 19 March 1999.

The PJP personnel will stay as long as 40 days to carry out the task, without any right to leave the unit for the duration of this rotation.

Send the PJP personnel in their urban intervention uniforms (they are to take their field intervention uniforms with them), with their joint weapons according to the decision of the Detachment Commander, short and long-barrelled weapons with two b/k /combat sets/ of ammunition for each, policemen's nightstick, restraints, flak jacket, gas mask, helmet, groundsheet, shoes, boots, weapons and ammunition cleaning kits, along with other prerequisite winter field equipment.

64

Buses of the Secretariats in Belgrade and Novi Sad (1), and the S[UP /Secondary School of Interior Affairs/ (1), along with hired transport will take the units to Pri{tina, so that they arrive at their destination at 1700 hours on 19 March 1999.

Instruct the drivers to be in Belgrade with their buses by 0730 hours on 19 March 1999.

At the Secretariat in Belgrade, provide two meals for the PJP personnel, pay ten per diems to each before sending them and the rest when they return. Requisition the money needed for this from the Joint Affairs Administration of the Ministry.

Excuse the PJP personnel being sent on the mission from their regular service as of 0700 hours on 18 March 1999.

Report by dispatch the departure time, travel route, number of workers and vehicles, any workers (by name) who did not show up for the mission and the reason, to the PJP Command of the Ministry.

ASSISTANT MINISTER
/Handwritten: for/ **CHIEF OF PUBLIC**

Translation

SECURITY DEPARTMENT
Colonel-General
Vlastimir \OR\EVI]
/signed/

"Official Gazette of the Republic of Serbia" No. 105/2013

Pursuant to Article 14, paragraph 4 of the Law on Data Confidentiality ("Official Gazette of the RS" No. 104/09) and article 42, paragraph 1 of the Law on Government ("Official Gazette of the RS" No. 55/05, 71/05 - correction, 101/07, 65/08, 16/11, 68/12 - CC and 72/12), the Government hereby issues

DECREE

on more detailed criteria for determining the labels of secrecy "CONFIDENTIAL" and "RESTRICTED" at the Ministry of Interior

Article 1

This Decree regulates more detailed criteria for determining the secret data of the degree of secrecy "CONFIDENTIAL" and "RESTRICTED" at the Ministry of Interior (hereinafter: the Ministry).

Article 2

Secret data referred to in Article 1 of this Decree shall be determined and marked by the degree of secrecy "CONFIDENTIAL" or the degree of secrecy "RESTRICTED", depending on the assessment of possible damage to the interests of the Republic of Serbia, that is, the possible damage to the work and performance of tasks within the statutory jurisdiction of the Ministry in case the data is revealed to an unauthorized person, is misused or destroyed.

Article 3

Secret data referred to in Article 1 of this Decree can be determined and indicated by a degree of secrecy "CONFIDENTIAL" if its exposure to an unauthorized person, its misuse or destruction could cause damage to the interests of the Republic of Serbia, which can result in the following:

1) endangering the territorial integrity and sovereignty of the Republic of Serbia;

2) endangering the constitutional order and democratic principles of the Republic of Serbia;
3) endangering the public order, endangering emergency response and providing assistance in case of an emergency;
4) immediate threat to life or health of people and the protection of property;
5) damage to the economic interests of the Republic of Serbia;

6) threat to national security and public safety;
7) threat to the implementation of police measures and activities in the fight against crime, suppression of violations and other offenses;
8) threat to international police cooperation and involvement of the police in the performance of police duties and other peacetime duties abroad;
9) endangering the control and securing the state border, control of border crossings, causing border incidents and violation of regulations regarding the foreigners, the exercise of their rights and the rights of asylum seekers;
10) endangering the jobs of regulation, supervision and control of road traffic;
11) endangering the securing of public gatherings;
12) endangering the exercise of security checks;
13) endangering the functioning and operational usefulness of information system, radio communication system and telecommunication system in performing police tasks.

Article 4

Secret data referred to in Article 1 of this Decree can be determined and indicated by the degree of confidentiality "RESTRICTED" if its exposure to an unauthorized person, its abuse or destruction could cause harm to operation or performance of the duties and tasks of the Ministry, which can result in the following:

1) threat to life or health of people and the protection of property;
2) harm to work and performance of tasks and activities of the Ministry;
3) obstruction of police enforcement activities in fight against crime, suppression of violations and other offenses;
4) obstruction of the implementation of measures and activities in emergencies and providing assistance in case of emergency;
5) obstruction of international police cooperation and involvement of police in the performance of police duties and other peacetime duties abroad;
6) obstruction of control and securing of the state border, control of border crossings, causing border incidents and violation of regulations regarding the foreigners, the exercise of their rights and the rights of asylum seekers;
7) obstruction of activities of regulation, supervision and control of road traffic;
8) reducing the operational and functional capabilities of the Ministry.

Article 5

The authorized person of the Ministry in accordance with the law governing the data confidentiality, based on the criteria of Article 3 and 4 of this Decree, shall make a decision on determining the degree of secrecy of the data at the Ministry, subject to prior assessment of possible damage to

the interests of the Republic of Serbia and possible damage to the work and performance of duties and tasks of the Ministry.

The decision referred to in paragraph 1 of this Article shall be periodically reviewed in accordance with the law in the following manner: the data marked by the degree of secrecy "CONFIDENTIAL" shall be reviewed at least once in three years and the data marked by the degree of secrecy "RESTRICTED" at least once a year.

Article 6

This Decree shall enter into force on the eighth day after it is published in the "Official Gazette of the Republic of Serbia", and will be applicable after three months from the date of entry into force.

05 No. 110-9911/2013
In Belgrade, 25 November 2013
Government
First Deputy Prime Minister
Aleksandar Vucic /signed/

"Official Gazette of the Republic of Serbia" No. 46/2013

Pursuant to Article 14, paragraph 3 of the Law on Data Confidentiality ("Official Gazette of the RS" No. 104/09) and article 42, paragraph 1 of the Law on Government ("Official Gazette of the RS" No. 55/05, 71/05 - correction, 101/07, 65/08, 68/12 - CC and 72/12),

The Government hereby issues

DECREE

on more detailed criteria for determining a degree of secrecy "STATE SECRET" and "STRICTLY CONFIDENTIAL"[218]

Article 1

This Decree regulates more detailed criteria for determining the secret data of a degree of secrecy "STATE SECRET" and "STRICTLY CONFIDENTIAL".

Article 2

Secret data referred to in Article 1 of this Decree shall be determined and indicated by the level of secrecy "STATE SECRET" or the level of secrecy "STRICTLY CONFIDENTIAL", according to the assessment of the seriousness of possible damage to the interests of the Republic of Serbia in case the data is revealed to an unauthorized person, misused or destroyed.

For the purposes of determining the degree of secrecy of classified data referred to in paragraph 1 of this Article, the assessment of the seriousness of the occurrence of possible damage to the interests of the Republic of Serbia ranges from serious irreparable damage to severe damage to the territorial integrity and sovereignty of the Republic of Serbia, protection of the constitutional order, human and minority rights and freedoms, national and public security, defense, interior and foreign affairs.

218 Decree was published in the "Official Gazette of RS" No. 46/13 (24 May 2013), entered into force on 1 June 2013

Article 3

Secret data referred to in Article 1 of this Decree can be determined and marked by the degree of confidentiality "STATE SECRET" if its disclosure to an unauthorized person, its misuse or destruction could cause irreparable serious harm to the interests of the Republic of Serbia, which can result in the following:

1) direct and extremely serious violation of the territorial integrity and sovereignty of the Republic of Serbia;

2) direct and extremely serious violation of the constitutional order and democratic principles of the Republic of Serbia;

3) massive loss of lives or an extremely serious threat to life, health or property to a large extent;

4) an extremely serious and long-term damage to the economic interests of the Republic of Serbia;

5) an extremely serious threat to national and public security, defense or activities of security and intelligence services;

6) very serious violation of the interests of criminal prosecution, suppression of crimes and functioning of the judiciary;

7) an extremely serious violation of operational and functional capabilities of the Serbian Army and other defense forces of the Republic of Serbia;

8) an extremely serious violation of the international position of the Republic of Serbia and its cooperation with other countries, international organizations and international entities.

Article 4

Secret data referred to in Article 1 of this Decree can be determined and indicated by the degree of secrecy "STRICTLY CONFIDENTIAL" if its disclosure to an unauthorized person, its misuse or destruction caused severe damage to the interests of the Republic of Serbia, which can result in the following:

1) an extremely serious violation of the territorial integrity and sovereignty of the Republic of Serbia;

2) an extremely serious violation of the constitutional order and democratic principles of the Republic of Serbia;

3) greater loss of lives or a threat to human life or health or other important good of a large number

of persons;

4) severe damage to the medium-term economic interests of the Republic of Serbia;

5) serious violation of activities of security and intelligence services;

6) serious violation of interests of criminal prosecution, suppression of crimes and functioning of the judiciary;

7) serious violation of operational and functional capabilities of the Serbian Army and other defense forces of the Republic of Serbia;

8) serious violation of the international position of the Republic of Serbia and cooperation with other countries, international organizations and international entities;

9) serious deterioration of the situation caused by international tensions.

Article 5

The authorized person of the state in accordance with the law governing the data confidentiality, based on the criteria of Articles 3 and 4 of this Decree, shall make a decision on determining the degree of secrecy of data in the state, subject to prior assessment of possible damage to the interests of the Republic of Serbia.

The decision referred to in paragraph 1 of this Article shall be reviewed in accordance with the periodical assessment of confidentiality.

Article 6

This Decree shall enter into force on the eighth day after it is published in the "Official Gazette of the Republic of Serbia", and will be applicable after three months from the date of entry into force.

05 No. 110-4119/2013 in Belgrade,
20 May 2013
Government
Prime Minister,
Ivica Dacic /signed/

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1. Humanitarian Law Center (Belgrade)

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