Humanitarian Law Center

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WRITTEN INFORMATION FOR THE EXAMINATION OF SERBIA'S SECOND PERIODIC REPORT

For Consideration by the United Nations Committee against Torture at its 54th Session

The Humanitarian Law Center (HLC) is a regional non-governmental organization dealing with issues of human rights and international humanitarian law. It was founded in 1992 in connection with the armed conflicts in the former Yugoslavia. By way of interviewing witnesses and victims since its establishment, the HLC has researched the murders, enforced disappearances, concentration camps, torture of prisoners of war and the pattern of ethnic cleansing during the armed conflicts. The HLC is the largest documentation center on war crimes and human rights violations committed during the wars in the former Yugoslavia. The HLC also represent victims in criminal proceedings before the War Crimes Chambers and in civil proceedings for compensation. To date, the HLC has represented over a thousand victims of grave violations of human rights and international humanitarian law.

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i. Lack of political support and interference of the executive branch of government

Public statements made by the highest officials of the current government show that there is no political support for national war crimes trials or the work of the special judiciary and prosecution for war crimes. Moreover, the political statements show an outright attempt to undermine the efforts of these institutions. An illustrative example was when, just after the election of the new government, the newly appointed Minister of Justice, Nikola Selaković, visited 11 Serbian prisoners in the UN International Criminal Tribunal for the former Yugoslavia (ICTY) in January 2013 and announced stronger support for "Serbian citizens in The Hague".[1] Moreover, whenever the Office of the War Crimes Prosecutor initiates a case against an alleged Serbian war criminal, the Minister of Justice criticizes them publicly for not prosecuting "people responsible for crimes against Serbs".[2] Recent developments are particularly worrisome. Namely, in November 2014, an MP (member of the ruling Serbian Progressive Party) started a series of attacks through the media against the Office of the War Crimes Prosecutor, accusing one of the Deputy Prosecutors of having been unlawfully appointed. The ongoing attacks also include accusations that the Prosecutor is spying for the U.S. government.[3]

Furthermore, in January 2015 the HLC published the Dossier "Rudnica" which analyzes evidence (ICTY evidence, testimony of survivors and eyewitnesses, etc) on four crimes committed in April and May 1999 in Kosovo by members of the Yugoslav Army and the Ministry of the Interior, the victims of which were Kosovo Albanian civilians whose bodies were exhumed in 2013 from the mass grave in Rudnica, southern Serbia. All the evidence

[1] "Selaković all day with detainees" ["Selaković ceo dan sa pritvorenicima"], B92, January 18th 2013. Available at: http://www.b92.net/info/vesti/index.php?yyyy=2013&mm=01&dd=18&nav_category=64&nav_id=678489

[2] See e.g. Marija Ristic, "Serbia, Bosnia Arrest 15 in War Crimes Swoop", *BIRN*, 5 December 2014, available at http://www.balkaninsight.com/en/article/serbia-bosnia-arrest-14-for-strpci-war-crime

[3] Jovana Gec, "Serb War Crimes Prosecutor: We Stirred up Hornet's Nest", *Associated Press*, 8 January 2015, available at http://abcnews.go.com/International/wireStory/serb-war-crimes-prosecutor-stirred-hornets-nest-28080235

presented in the Dossier points to the current Chief of Staff of the Serbian Army as responsible for these crimes. After the publication of the Dossier, the Office of the War Crimes Prosecutor announced that it will investigate the claims made in the Dossier.[4] Referring to the announcement of the Prosecutor for War Crimes, the Serbian President Mr. Tomislav Nikolic stated in a TV interview that "He'd better think about what he is digging up in Serbia."[5] Prominent law school professors reacted to this President's statement saying that it "is an obvious, public attempt at pressure aimed at intimidating not only the prosecutor Vukcevic, but others as well" and that using the word "dig" was not accidental.[6] After the publication of the Dossier Rudnica, the President decorated the Army Chief suspected for war crimes with a high-profile medal which is awarded for exceptional contributions to building or commanding the military.[7]

The lack of political support for the national prosecution of war crimes has repercussions on the effectiveness of the prosecutions and of war crimes trials. For instance, individuals responsible under the doctrine of command responsibility have so far completely eluded justice, because of the unwillingness of the Office of the War Crimes Prosecutor to apply this doctrine.[8]

As the European Commission noted in its 2014 and 2013 Progress Report, the number of persons indicted for war crimes is low and no progress has been made with regard to the prosecution of high-ranking officers involved in war crimes.[9]

Furthermore, unlike its neighboring countries (Bosnia and Herzegovina and Croatia), Serbia has not adopted a strategy for the prosecution of war crimes. The lack of a **national strategy**

[4] „Prosecution Demands Documentation from the HLC", *B92*, 30 January 2015, available in Serbian at http://www.b92.net/info/vesti/index.php?yyyy=2015&mm=01&dd=30&nav_category=12&nav_id=952739

[5] Antonela Riha, "Serbia's Deaders Find New 'Enemies Within'", *Balkan Insight,* 23 February 2015, available at http://www.balkaninsight.com/en/article/serbia-s-leaders-find-new-enemies-within

[6] Antonela Riha, "Serbia's Deaders Find New 'Enemies Within'", *Balkan Insight,* 23 February 2015, available at http://www.balkaninsight.com/en/article/serbia-s-leaders-find-new-enemies-within

[7] Ivana Nikolic, "State Honour for Serbian Army Chief Condemned", *Balkan Insight,* 9 February 2015, available at http://www.balkaninsight.com/en/article/honouring-controversial-army-chef-sparks-anger-in-serbia

[8] Amnesty International Report, Serbia: Ending Impunity for Crimes Under International Law, June 17th, 2014, available at http://www.amnesty.org/en/library/info/EUR70/012/2014/en

[9] European Commission's Serbia 2014 Report, October 8th 2014, p. 42, 2013 Progress Report, October 16th, 2013, p. 12

for the prosecution of war crimes, which would set objectives, priorities and resources for the coming period, reinforces the impression of an institutional indifference as regards this important segment of dealing with the past. This impression acquires further substantiation when one takes into account that, at the moment, Serbia has over 200 national strategies dealing with a variety of issues of national importance.

ii. Need for urgent adoption of legislation and policy for protection of witnesses[10]

The protection of witnesses and victims in the trials of war crimes has procedural and non-procedural elements. Their application in practice is often insufficient or completely absent, which negatively affects the prospects of bringing the perpetrators of war crimes to justice. Among other things, in situations where witnesses and victims are being threatened and insulted, the reactions of the court and the prosecution are not always adequate. The court and the prosecution are at present under no obligation to seek police protection for the witnesses who complain of being threatened during a trial.[11]

If there are circumstances indicating that a witness, by testifying or answering certain questions, would endanger his own life, health, freedom or property or that of their loved ones, the court may grant to this witness the status of a protected witness.[12] Most often, this pertains to members of the military, paramilitary and police units that participated in the commission of the crime, and also often the case that they themselves were involved in the commission of the crime. The primary purpose of witness protection measures is to

[10] Humanitarian Law Center, Ten Years of War Crimes Prosecutions: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia, 2004-2013, September 2014, p 65-76, available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf

[11] Criminal Procedure Code, Official Gazette of the Republic of Serbia, nos. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 102, Para. 5, and the Criminal Procedure Code, Official Gazette of the FRY, nos. 70/2001 and 68/2002 and Official Gazette of the Republic of Serbia, nos. 58/2004, 85/2005, 115/2005, 85/2005 – other law, 49/2007, 20/2009 –other law, 72/2009 and 76/2010, Article 109, Para. 13

[12] Criminal Procedure Code, Official Gazette of the Republic of Serbia [Zakonik o krivičnom postupku, Službeni glasnik Republike Srbije], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 105.

protect their identity, and prevent it from becoming public. By the end of 2013, 54 witnesses had been granted such protection measures.[13]

The identity of protected witnesses had been disclosed in several cases, and the courts did not react in accordance with the law. The most extreme example was in the Zvornik I case, in which the president of the judicial panel herself revealed the identity of the witness, and then failed to take adequate steps to mitigate the consequences of her mistake (e.g. removal of the name of the protected witness from the transcript).[14]

The witness protection program is totally ineffective when it comes to former members of the Serbian forces who are willing to testify about the crimes of their former colleagues. Unlawful actions committed by members of the Protection Unit, which is responsible for the implementation of the protection program, against former members of the armed forces under the Unit's protection, remain without any reactions from the relevant institutions.

A witness in the Leskovac Group case, B.Z., spoke of the threats, insults, humiliation and psychological harassment to which members of the Protection Unit subjected him and his family. The many acts carried out made life impossible for him and his family. According to B.Z. members of the Protection Unit, including the Unit Head, his associate and deputy, openly encouraged him to cease testifying. After two years in the Protection Program, witness B.Z. and his family abandoned the Program and returned to their home town. There, B.Z. was subjected to constant threats and harassment, and eventually sought, and received, asylum in a foreign country. The case in which he was to testify is pending.[15]

Zoran Rašković, a witness in the Ćuška case, describes an almost identical treatment. He spoke publicly, during his testimony at the trial on January 25th, 2012, of having been directly threatened by a high-ranking police official in charge of his security, because of his

[13] Written response of the Higher Court in Belgrade, Department of War Crimes, to the HLC's inquiry, May 19th, 2014

[14] Transcript of the trial from May 31st, 2006, p. 2. Available in Serbian at: http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/ srbija/Zvornik%20I%20za%20sajt/transkripti/27-31.05.2006..pdf. Accessed: May 12th, 2014.

[15] Humanitarian Law Center, Report on War Crimes Trials in Serbia for 2010, "Remarks by the HLC's protected witness," available at: http://www.hlc-rdc.org/wp-content/uploads/2012/03/Reports-on-war-crimes-trials-in-the-Republic-of-Serbia-2010.pdf

decision to testify against members of the Serbian forces.[16] While involved in the Program, Rašković was housed in extremely poor conditions, in an apartment with no heating during the fall and winter.[17]

Slobodan Stojanović another witness in The Leskovac Group case was also included in the Protection Program. His involvement in the Program was terminated after four months, following his repeated attempts to alert the authorities' to the poor standard of his living conditions and to the unprofessional treatment he was being subjected to by the Unit.[18]

The lack of reaction by state authorities to documented incidents and threats by the members of the Protection Unit directed against the protected persons in the Program, points to the shortcomings of the existing legal framework with regard to the control and supervision of the implementation of protection programs.[19]

The Law on the Protection of the Participants of Criminal Proceedings has failed to establish a mechanism for the verification of individual complaints filed by persons protected by the Program, or for checking the circumstances of their decision to leave the Program. The only form of verification of these allegations is an internal investigation into allegations of wrongdoing by individual members. However, this is a non-transparent and deficient process, because it is not public and because the Unit itself examines complaints of unprofessional conduct filed against its members. Moreover, it is unclear whether this procedure is even prescribed by any legal act, since the Protection Unit, when asked, failed to specify the act in which this procedure is laid out.

The Commission for the implementation of the Protection Program submits its annual reports to the National Assembly of the Republic of Serbia – this constitutes the only form of

[16] Transcript of the trial in Ćuška/Qushk, January 25th, 2012, Available in Serbian at: http://www.hlc-rdc.org/wp-content/uploads/2012/02/35-25.01.2012. pdf. Accessed: 13th.May 2014

[17] "Threats from the police, humiliation from the Prosecution," E-novine, February 4th, 2012, Available in Serbian: http://www.e-novine.com/mobile/srbija/srbijatema/58452-Pretnje-policije-ponienja-Tuzilatva.html. Accessed April 9th, 2014.

[18] Humanitarian Law Center, Report on illegalities in war crimes trials in Serbia (Belgrade, September 2011), 57.

[19] Humanitarian Law Center, Ten Years of War Crimes Prosecutions: Contours of Justice, Analysis of the Prosecution of War Crimes in Serbia, 2004-2013, September 2014, p 65-77, available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf

oversight of this body.[20] However, the specified procedure is vague and does not identify the competent committee, nor does it prescribe further procedures and responsibilities to be undertaken by the competent committee with regard to the report. In practice, this legal framework has therefore led to a complete lack of oversight of the work of the Commission. As of 2006, the Commission has been submitting its annual reports to the Committee on the Judiciary, Public Administration and Local Self-Governance, as well as to the Committee on Security and Internal Affairs of the National Assembly of the Republic of Serbia (these were previously the Committee on Justice and Administration, and the Committee for Defense and Security). According to the National Assembly's interpretation of the Law on the Protection of Participants in Criminal Procedure, the competent committees are not obliged to consider the reports of the Commission.[21]

The current legal framework has to be amended in order to strengthen the overseer functions of the Parliament, to introduce a procedure for the investigation of the complaints of persons in the protection program, to introduce stricter rules for recruitment of the members of Protection Unit, by making sure that no former members of special forces who were involved in war crimes are employed in the Protection Unit, and finally, to adopt the by-laws required for changing the identities of protected persons.

iii. Protection of victims of sexual abuse

The Code of Criminal Procedure does not contain specific measures for the protection of victims of sexual violence, hence, only the usual procedural protection measures apply. In practice the courts fail to implement even the usual measures for protecting victims of sexual abuse.

When war crimes trials began in Serbia, the only available measure the courts had at their disposal was closed sessions to protect victims of sexual abuse. However, during the

[20] The Law on the Protection of Participants in Criminal Proceedings, Official Gazette of the Republic of Serbia [Zakon o programu zaštite učesnika u krivičnom postupku, Službeni glasnik Republike Srbije], no. 85/05, Article 11.

[21] Response of the National Assembly of the Republic of Serbia to HLC's request for access to public information, November 17, 2013, No. 9-4147/13.

testimony of S.T. (in the Lekaj case), who was raped as a 14-year-old girl, even this measure was omitted. The state in which S.T. testified was corroborated by the court transcript, which stated that the witness was crying during her testimony.[22]

The status of protected witnesses was granted to victims of sexual violence in two cases – Skočići and The Gnjilane Group. In the Skočići case, the status was given to three victims, who testified from a separate room in a closed session. Two victims in The Gnjilane Group also testified under pseudonyms and in a closed session. During the examination, one of the defense attorneys offensively alluded to the witness's previous sex life, and the presiding judge described the manner of cross-examination as impermissible and issued an informal reprimand. In the same case, the defense counsel insulted the protected female witness, telling her that she was "a well-prepared witness," that she had to read her statement, and that someone was helping her to do that. After several warnings, the president fined the defense counsel 200,000 dinars – not for insulting the witness but for violation of the dignity of the court.[23]

A positive example was recorded in the Bijeljina case. The court applied the maximum protective measures by removing the defendants from the courtroom, and by examining one of the witnesses in her home town. Another victim of rape in the same case, H.A. due to the trauma she experienced during the commission of the crime, did not want to meet with the accused or to see their photographs. The presiding judge questioned her on the premises of the Embassy of the Republic of Serbia, in Vienna, where the victim resided.

Serbia needs to adopt special protective measures for victims of sexual abuse. Croatia and BiH have adopted such rules, e.g. a rule rejecting reference to the victims' past sexual life as defense evidence, in line with the ICTY's Rules of Procedure and Evidence.

iv. Funding of Office of the War Crimes Prosecutor (OWCP)[24]

[22] Lekaj Case, the Belgrade District Court, case No. K.V. br. 4/05; witness S.T. testified on December 20th, 2005.
[23] Humanitarian Law Center, Report on War Crimes Trials in Serbia for 2010, p. 30.
[24] See Humanitarian Law Center, Analysis of the Prosecution of War Crimes in Serbia 2004-2013, pp. 13-29, available in English at http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf

In their interviews with the HLC, representatives of the OWCP said they believed that all employees had adequate working conditions. Each OWCP deputy prosecutor has their own office, while other employees have sufficient working space. The OWCP is sufficiently equipped with the necessary information technology and other technical equipment, mostly obtained using grants from the US Embassy. All OWCP employees have at their disposal professional books and studies, and all of them have access to relevant electronic databases and other information. However, the OWCP has only three vehicles – an insufficient number, considering the number of OWCP deputies working in the field and the obligation to conduct independent investigations under the provisions of the Criminal Procedure Code (CPC), which entered into force on January 15, 2012 in war crimes cases. Due to this situation, some deputies use their own cars. Another obstacle to the OWCP's efficiency is the shortage of deputy prosecutors. OWCP representatives emphasized that with an adequate number of staff, the OWCP would be able to open 30 new cases within six months. The OWCP also emphasized the need for more associate experts. Instead of the current two, the OWCP should employ at least eight associate experts, in order that each deputy prosecutor can work with an associate expert. Furthermore, a larger number of investigators would greatly contribute to the OWCP's efficiency. OWCP representatives mentioned that the number of staff working for the ICTY Prosecutor (as liaison officers) should also be higher, in order for the OWCP to better use the evidence collected by the ICTY. OWCP representatives especially stressed the need to hire an analyst trained in database research. Furthermore, OWCP representatives stated that the number of employees working as technical or administrative staff (drivers, transcribers, employees at the registry office, office secretaries) was inadequate. The small number of employees in these positions often prevents specific tasks being carried out within the statutory deadline. As one examples of this problem, OWCP representatives say that the transcripts of witness statements, which must be submitted to the judge by a particular deadline, are often submitted late, due to the heavy workload and a lack of transcribers. The limited funds available to OWCP are an obstacle for hiring more staff into technical and administrative positions.

The OWCP receives its funding directly from the budget of the Republic of Serbia.[25] For each fiscal year, the OWCP submits a request for funding approval to the Ministry of Finance's Department for Budget Preparation. The Ministry of Finance then forwards the OWCP's proposal to the Government of the Republic of Serbia, which approves funding for the OWCP's operation.

The funds allocated to the OWCP are inadequate for the jobs and tasks that fall under the OWCP's remit, as stipulated by the law. In addition to the scarcity of human resources, the lack of resources is reflected in the performance of everyday activities, especially since the entry into force of the new Code of Criminal Procedure (CPC), which has significantly increased the prosecutorial responsibilities, primarily through the implementation of prosecutorial investigation (in the past, this task was carried out by an investigating judge). In this regard, the OWCP lacks funds for the work of its deputies when they need to take action in preliminary and investigative proceedings – i.e. the examination of witnesses, victims and suspects who more often than not reside outside Serbia. The OWCP does not have sufficient funds to pay the costs of ex officio defense attorneys, although under the new CPC this became the OWCP's responsibility. There is also a lack of resources to cover expenses related to visits to the headquarters of the ICTY in The Hague, and consequently, OWCP deputies and their associates are often forced to cancel or shorten their visits to the ICTY.

v. Funding of Court Departments for War Crimes[26]

The Higher Court Department for War Crimes is located in a building of the Higher Court in Belgrade, together with the Special Department for Organized Crime of the Higher Court in Belgrade. The Judges of these two departments have at their disposal a total of only four courtrooms. The number of courtrooms is inadequate given the total number of cases handled by the two departments, and the number of defendants in each of these cases. Due

[25] HLC interview with deputies of the Prosecutor, May 8th and 9th, 2013.
[26] See Humanitarian Law Center, Analysis of the Prosecution of War Crimes in Serbia 2004-2013, pp. 36-47, available in English at http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf

to an insufficient number of courtrooms some war crimes trials, such as the Lovas case were held in the Palace of Justice, a courthouse inadequately equipped for a trial of this kind in terms of its physical characteristics and its technical and security capacities. Lack of courtrooms greatly affects the efficiency of trials because, as they have just the four overcrowded courtrooms available to them, the judges are unable to schedule hearings at short notice.

The Appeal Court Department for War Crimes is housed in a recently renovated building of the Court of Appeal in Belgrade. Each of the judges of the War Crimes Department has his/her own office. Judicial assistants generally have adequate working conditions, although several judicial assistants share the same office. The Higher Court Department has standard IT equipment which, although it generally meets the basic requirements for the Department's operation, is relatively old. Judges of the Higher Court Department have asked the President of the Court to hire a full-time military expert, i.e. a professional trained in the issues of military organization and methods, and techniques of military action. Despite the fact that war crimes cases are, by their nature, closely related to issues of military and police organization and operation, and that the judges may have no specific training or knowledge about such issues, this request was denied due to a lack of funds.

The War Crimes Departments don't have their own budgets. Instead, their work is funded through the allocation of funds from the budget of the Higher Court or the Court of Appeal. The cost structure of the Higher Court Department for War Crimes is far more complex than the budgetary structure of the Appeal Court's Department, as the latter includes almost exclusively judges' salaries. The cost of the Higher Court Department, in addition to judges' salaries, includes the costs of court-appointed experts, translation, interpreting, court-appointed defense counsel and other expenditures. At the same time, the Higher Court's Department additionally funds the Service for the Support and Assistance to Victims and Witnesses of the Department for War Crimes of the Higher Court in Belgrade (Support and Assistance Service), which, due to the nature its activities, may be in need at short notice, of additional funding, often in cash, to pay the costs of persons who travel to the court as

witnesses. Employees in the Higher Court Department claim that the current budget is one third of what is needed, and that this court therefore has "huge debts to its creditors."

vi. The Ovcara case[27]

The final judgment in the Ovcara case was rendered by the Court of Appeal's Department for War Crimes on 23rd June, 2010. The presiding judge was Siniša Važić. The sentences imposed range from 5 to 20 years of imprisonment.

However, in December 2013 the Constitutional Court of Serbia issued a decision adopting the constitutional appeal of Saša Radak who was convicted of war crimes against prisoners of war in the Ovčara case, and **reversed the decision** previously issued by the Court of Appeal. The Constitutional Court found that the judgment of the Court of Appeal in Belgrade injured the complainant's right to an impartial tribunal, an integral part of the right to a fair trial, guaranteed by the Constitution of the Republic of Serbia. **The judgment of the Constitutional Court was that Radak's case is to be sent back to the Court of Appeal in Belgrade, for the court to re-examine his appeal against the first-instance judgment of the District Court in Belgrade in the Ovčara case**. The decision of the court was that its ruling to send the case back to the Court of Appeal **should apply to the cases of all other persons convicted in this case** and in the same legal situation as Radak.

More precisely, on 15th October, 2010, Saša Radak, submitted a constitutional appeal against the judgment of the Court of Appeal Department and the verdict of the Belgrade District Court War Crimes Chamber, which had sentenced him to 20 years in prison. The appeal was filed on the grounds that the courts' decision had violated his right to life, his right to bodily and psychological integrity, his right to liberty and security, his right to a fair trial, the defendant's special rights under Article 33 of the Constitution, his right to legal certainty under the criminal law, all of which are guaranteed by the Constitution of the Republic of Serbia, as well as his right to a fair hearing as envisaged by the European

[27] See Humanitarian Law Center, Report on War Crimes Trials in Serbia in 2013, pp. 92-97, available in English at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-on-war-crimes-trials-in-Serbia-in-2013-ff.pdf

Convention for the Protection of Human Rights and Fundamental Freedoms. The applicant's key argument regarding the alleged violation of his right to a fair trial was that judge Siniša Važić, the presiding judge of the panel that issued the second-degree judgment, ought to have been excluded from the court panel because he had participated in the decisions of the trial court that had directly affected the first-instance judgment.

Examining the allegations put forward in the constitutional appeal about alleged bias of judge Siniša Važić, the Constitutional Court adjudicated on two exclusion requests that had been filed against judge Važić at various stages of the proceedings in the Ovčara case. The first request for exclusion was submitted by Saša Radak's defense counsel against Siniša Važić, in his capacity as President of the District Court in Belgrade (and against the judges in the trial chamber). The reason given for the exclusion request was that judge Važić had participated in the pre - trial chamber of the District Court in Belgrade in the Ovčara case, as President of that chamber, and that when acting in this capacity he had ruled on a motion for the exclusion of the investigating judge, as well as two requests for the exclusion of the President and members of the trial chamber. The Supreme Court rejected this request for the exclusion of judge Važić, saying that in the opinion of the court, the circumstances specified in the request from the defense counsel were not of a nature that could bring into question the impartiality of President's decision-making. Another request for exemption of judge Siniša Važić in his capacity at the Court of Appeals in Belgrade was filed by the defense counsel on suspicion of his impartiality. The stated reason for the request for his exemption was that judge Važić, as the President of the Belgrade District Court War Crimes Chamber, had decided that defendant S.P. also a defendant in the Ovčara case, be given the status of a cooperating witness, and that, whilst serving on the Belgrade District Court War Crimes Chamber, he issued a decision which extended the custody of all of the accused, including Saša Radak. This request was rejected on 2nd June, 2010 as unfounded by the Deputy President of the Court of Appeals in Belgrade. The explanation of this decision stated that the request was not justified because the participation of the President and members of the Chamber in their capacity as the chairman and members of the pre-trial chamber, which extended the detention of the accused and decided to grant the status of cooperating

witness to individual defendants, could not be a reason for their exemption, and that the judge "in accordance with his function and according to the law, should at all times maintain confidence in his own independence and impartiality."

The Constitutional Court found that the complainant's right to a fair trial or the right to have the charges against him be decided on by an impartial court had been violated because the judge, Siniša Važić, had been involved in the judgment of the Court of Appeals in Belgrade, which confirmed the conviction against the applicant. In the opinion of the Constitutional Court, the judge's engagement in several roles in the first instance trial and the decisions he made on those occasions raised doubts as to his impartiality when serving as the President of the Appeals Chamber. When considering the decisions of the Supreme Court of Serbia, and that of the Court of Appeal separately, the Constitutional Court found nothing wrong with the decisions to reject requests for the exemption of judge Važić. However, in considering the decisions cumulatively, the Constitutional Court found that the right to a fair trial had been violated. In the opinion of the Constitutional Court, the participation of judge Važić in the decision to confer the status of cooperating witness and the extension of detention for the accused took on a new relevance when one considered that he, as a judge of the Court of Appeals in Belgrade, was the President of the Appeals Chamber that issued the second-instance verdict. The Constitutional Court pointed out that the participation of a judge in any decision of the lower court in the same case did not necessarily have to result in his exclusion from proceedings before the Appeal Court. However, the court added that the multiple roles that judge Važić had played in the first instance procedure could not be justified in the manner that the Court of Appeal in Belgrade had done, when it had rejected the request for the exclusion of judge Siniša Važić. The Constitutional Court's rationale for this decision, stated that "in accordance with his function and according to the law, the judge shall at all times maintain confidence in his own independence and impartiality," eliminating 'objective' doubt in the impartiality of the judge in this particular case was not enough. The Constitutional Court finally concluded that the multiple involvement of judge Važić during the first-instance trial and in the decisions made on that occasion were circumstances that raised doubt as to his impartiality as the President

of the Appeals Chamber in the same case. Since it found a violation of the right to a fair trial and accordingly **ordered the Court of Appeal to once again hear the appeal that had been filed against the first-instance judgment**, the Constitutional Court did not recognize any of the other complaints filed by the applicant.

In this case, the Constitutional Court was dealing with the interpretation of the Criminal Procedure Code rules on the exclusion of judges and the evaluation of the circumstances that cast doubt on the impartiality of the judge. However, the Constitutional Court did not offer any reasons for its interpretation of the rules of the CPC, explaining the basis for its doubts about the impartiality of the judge Važić, but without elaborating concluded that the reasoning of the Court of Appeal was not sufficient "to eliminate the existence of an objectively justifiable concern about the impartiality of judge Vazic." Furthermore, the Constitutional Court has failed to provide any explanation as to how a number of facts, which alone are not grounds for exemption, cumulatively lead to such a decision. Such an unjustified decision of the Constitutional Court, which after a judicial process lasting more than three years, revoked the final judgment in one of the most important and most complex war crimes cases, is certainly not conducive to the establishment of legal certainty, nor can it serve as the basis for the confidence of victims in the justice system of the Republic of Serbia.

It is also concerning that the Constitutional Court has restricted access to information which should be available to the public. Apart from its having 'anonymized' the names of the complainant and his attorneys, the court anonymized the names of lower court judges, including the name of the judge whose conduct led to the reversal of the judgment in the Ovčara case, and thus denied the public the opportunity to inspect the work of state officials. Moreover, contrary to the rules of personal data protection, the Constitutional Court in this decision also crudely anonymized the place of the war crime – "S.R. was sentenced to a term of imprisonment of 20 years for war a crime against prisoners of war [...] carried out on 21st and 22nd November 1991, on the farm 'O.' in V. …"

II. Redress and compensation for victims

The rights of victims of human rights violations during the nineties in Serbia are below the minimum international standards, whether the victims are Serbian citizens or citizens of other countries in the region. The legal framework for the exercise of the rights of victims who are Serbian citizens, is the Law on Civilian Invalids of War, dating from 1996.[28] The rights that the Law provides for civilian victims and their families can be divided into three groups: (1) monetary compensation; (2) healthcare; and (3) reduced prices of public transport tickets.

Pursuant to this law, **the right to the assistance and support of the state is denied to the families of missing persons, victims of sexual violence, victims who suffer from the psychological consequences of the violence sustained, victims with physical disabilities of less than 50%, victims who perished on the territory of another country and those who perished as a result of the crimes committed by the Serbian armed forces**.

Namely, according to Article 2: "A civilian invalid of war is a person who has become physically damaged *by at least 50%* on account of wounds or injuries that have left visible traces, sustained by harassment or detention *by the enemy* during the war, conducting military operations, or injuries sustained from leftover war materials or enemy sabotage or terrorist acts."

By defining a victims as a victims of "the enemy," the Law explicitly excludes from the circle of potential beneficiaries all victims who suffered violence or were injured by formations that the Republic of Serbia does not consider as an enemy, such as the Yugoslav National Army (JNA), the Yugoslav Army (VJ), the Ministry of the Interior (MUP), or the Republic of Srpska Army (VRS) and their subordinate formations. This provision thus prevents thousands of Serbian citizens, especially ethnic minorities who were targeted by Serbian forces during the 90's, from obtaining any kind of social support from the State.

[28] Law on Civilian Invalids of War ("Republic of Serbia Official Gazette" no. 52/96), Article 2, available in English at http://www.hlc-rdc.org/wp-content/uploads/2014/03/The_Law_on_Civilian_Invalids_of_War.pdf

Furthermore, the condition on minimum physical damage excludes all victims that have suffered serious and life-long psychological consequences of torture and violence.

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

The legal framework for victims' right to compensation, as well as the Law on Civilian Invalids of War, has already been criticized by the Committee against Torture,[29] the UN Human Rights Committee,[30] the UN Committee on Enforced Disappearances,[31] and the Commissioner for Human Rights of the Council of Europe.[32] The deficiency of this system has been recognized in the European Commission's 2014 Progress Report for Serbia - "the

[29] Committee against Torture, Consideration of reports submitted by State parties (CAT/C/SRB/CO/1), Forty-first session, pp. 7-8, available at http://www.mfa.gov.rs/en/images/stories/human%20rights/CAT%20Srbija%20zakljucci.pdf

[30] Report of the Human Rights Committee A/66/40 (Vol. I), p. 56, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f66%2f40(VOL.I)&Lang=en

[31] Committee on Enforced Disappearances, Concluding observations, 135th meeting held on 12 February 2015, para. 26, available at http://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/SRB/INT_CED_COC_SRB_19624_E.pdf

[32] Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Serbia on 12-15 June 2011 (CommDH(2011)29), paras. 25/27, available at https://wcd.coe.int/ViewDoc.jsp?id=1834869 ;

system of awarding compensation to victims of crime through criminal or civil proceedings is not functional."[33]

A recent development in this area particularly reveals the unwillingness of Serbia to tackle this issue. Namely, in December 2014, the Ministry of Labour, Employment, Veteran and Social Policy prepared a Bill on the Rights of War Veterans, Disabled War Veterans, Civilian Victims of War and their Family Members. Despite the aforementioned criticism by the EU and international human rights bodies, the Bill was prepared without any consultation with victims' associations or other relevant stakeholders. In essence, the Bill improves the position of war veterans only, and simply takes over and adopts the existing discriminatory legal framework relating to civilian victims of war.[34]

i. Can victims be compensated despite the perpetrator not being identified?

Although there are no formal obstacles in laws for victims to obtain compensation when the perpetrator is not identified, the Law of Contract and Torts is interpreted by courts in such a way that it effectively demands such identification.

Compensation lawsuits are based on the provisions of the Law of Contract and Torts which explicitly stipulates the responsibility of the State for illegal conduct of State employees. The regular statute of limitations for claiming damages is three to five years; however, in cases of damage resulting from crimes, it is longer. Namely, Article 377 of the Law of Contract and Torts states: "When damage is caused by a criminal act with a longer statute of limitations period, the statute of limitations on the compensation lawsuit against the responsible party only expires at the time when the statute of limitations for prosecuting that criminal act expired."

In cases of torture, considering that Serbia still hasn't abolished the statute of limitations, it means that victims can seek compensation as long as the statute of limitation for the prosecutions of the crime hasn't expired. On the other hand, in cases of war crimes, it

[33] European Commission, 2014 Progress Report – Serbia, 8 October 2014, p. 41
[34] See HLC's Press Release: "Bill on Rights of Civilian Victims of War should be Withdrawn", 26 December 2014, available at http://www.hlc-rdc.org/?p=27883&lang=de

should mean that victims may seek compensation at any point in time, as there is no statute of limitations for war crimes. This, however, is not the way Serbian courts interpret this provision of the law.

Namely, in their rationale for rejecting compensation claims, Serbian courts most often invoke a legal interpretation of the Supreme Court of Serbia from 2004 that interprets this provision in a manner unfavorable for the victims, thus providing permanent immunity for the State, for the crimes committed in the past by State employees in their official capacity. According to this interpretation, the longer statute of limitations provided by Article 377 of the Law of Contract and Torts can only be applied *if compensation is claimed directly from the perpetrator of the criminal act* and not from the State as the legal subject, i.e. with the State being responsible for the criminal acts committed by its employees in their official capacity. Speaking in practical terms, this interpretation instructs victims seeking compensation to undertake actions to identify, on their own, persons who, for example, beat them in a police station or fired their weapon at them from a firing squad, because in the vast majority of cases the state authorities have not identified perpetrators of war crimes or human rights violations.

In the opinion of the HLC even if the identity of the perpetrators is revealed, it should not relieve the State from the responsibility for human rights violations conducted systematically, on a large scale, and with impunity. According to the above-mentioned interpretation of the law by the Supreme Court, the standard statute of limitations is applied in cases when plaintiffs seek compensation from the State – three years from the moment the plaintiff learned about damages (the subjective cut-off date), while the ultimate expiry of the statute of limitations is determined to be five years from the moment damage occurred (the objective cut-off date). That means that the victims of war crimes and other human rights violations committed during the wars in Croatia and BiH were eligible to file their compensation claims up until the year 2000, and for those crimes committed in Kosovo, no later than 2004, in a period of time marked by complete lack of confidence in state institutions due to their responsibility for those crimes.

The issue of the statute of limitations on the right to seek reparations was also debated by international organizations monitoring the human rights situation in Serbia. The Council of Europe Commissioner for Human Rights[35] and the United Nations Human Rights Committee[36] have both expressed concern over the fact that victims are unable to obtain financial reparations beyond a five-year deadline.

ii. Extremely low compensation amounts

In the last ten years, in lawsuits filed by the HLC, Serbian courts have awarded minimal compensation amounts to victims of violations of fundamental human rights committed by members of Serbian armed forces. On average, Bosniak victims who were abused in police stations or ethnic Albanians who were arrested in 1999 and held in illegal detention in extremely inhumane conditions for many months were awarded compensation amounts of between RSD 200,000 and 300,000 (around 1,500 – 2,500 euros).

The European Court has on several occasions reiterated that the responsibility for remedying violations of the European Convention rests with national governments. In order to determine whether the redress is appropriate and sufficient, the Court takes into account all the circumstances of the case, in particular the nature of the violation of the Convention concerned. In cases of violation of the prohibition of torture, the European Court found that the redress encompasses two measures. First, the state is required to conduct a thorough and effective investigation capable of leading to the identification and punishment of those responsible. Secondly, it is necessary to provide compensation to the victim. The European Court stressed however that not just any amount will suffice, but that the sum must be adequate. According to the standards of the European Court, the amount of compensation will not be adequate, and therefore the violation will not be remedied, if the compensation

[35] Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Serbia on 12-15 June 2011 (CommDH(2011)29), para. 27, available at https://wcd.coe.int/ViewDoc.jsp?id=1834869

[36] Report of the Human Rights Committee A/66/40 (Vol. I), p. 56, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f66%2f40(VOL.I)&Lang=en

awarded is less than that which this Court awarded against Serbia in similar cases for the same violations.[37] Therefore, the average amount of compensation granted by Serbian courts of 1,500 - 2,500 euros should be compared with the amount of 10 - 13,000 euros which the European Court has been awarding as compensation for non-pecuniary damages in similar cases against Serbia.[38] It is thus obvious that the amount of compensation accorded by Serbian courts to victims of torture and other cruel, inhuman or degrading treatment or punishment does not remedy the violation suffered.

iii. The case of Munir Šabotić

Sandžak is an underdeveloped region in southwest Serbia, bordering Bosnia and Herzegovina (B&H). Most of its population is Muslim minority. At the beginning of the armed conflict on the territory of B&H in 1992, the already hard life in this area was further complicated by the arrival of the Yugoslav Army (VJ). This is when the local Muslim population was being mistreated, their homes searched, property stolen and the Muslim population massively arrested for police interrogation on suspicion of hiding weapons.[39]

In August 1994, three inspectors from the State Security Agency (SSA) from Novi Pazar, Radivoje Ilić, Mile Gerić and an unidentified man, coerced Munir Šabotić into signing a statement concerning the alleged participation of 25 Muslims in the establishment of a military headquarters of the Party of Democratic Action (SDA). After this, Šabotić was summoned to testify in the criminal trial of these persons, but during the trial he stated that he was a victim of torture by SSA inspectors, and that they had given him a pre-prepared statement which he was supposed to repeat before the court. After leaving the courthouse, Šabotić, went to the police station, on the orders of Inspector Ilić. There, the Inspectors Ilić,

[37] *Ciorap v. Moldova*, application no. 7481/06, judgment of 31 August 2010, paras. 24-25.
[38] See e.g. *Petrović v. Serbia*, application no. 40485/08, judgment of 15 July 2014, para. 105; *Hajnal v. Serbia*, application no. 36937/06, judgment of 19 June 2012, para. 149; *Stanimirović v. Serbia*, application no. 26088/06, judgment of 18 October 2011, para. 59; *Milanović v. Serbia*, application no. 44614/07, judgment of 20 June 2011, para. 107.
[39] The Humanitarian Law Center, *Under Spotlight – Violation of Human Rights in the former Yugoslavia, 1991-1995* (Belgrade, 1996), p. 117-126; The University of Tuzla and the Research and Documentation Center of Sarajevo, *Mazowiecki Reports, 1992-1995*, p. 81. (partitally available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G93/856/23/PDF/G9385623.pdf?OpenElement).

Gerić and an unidentified man kicked and punched him and demanded that he withdraw the statement given before the court. He suffered a fractured rib as a consequence of the beating. Two days after he left the police station, Mr. Šabotić was once more apprehended by the police, who demanded that he withdrew the criminal complaint he had filed on that day. On this occasion, all medical records showing the injuries sustained were taken away from him.

A year after this event, criminal proceedings against the police officers responsible were initiated before the Municipal Court in Novi Pazar. But they were subsequently aborted in September 2004, after 10 whole years, because of the effects of the Statute of Limitations.

In 2006, the HLC filed a lawsuit against the Republic of Serbia claiming compensation for the torture of Munir Šabotić. In 2007, the First Municipal Court in Belgrade granted Mr. Šabotić RSD 300,000 (around 2,500 euros) for the torture he suffered by members of the SSA. In 2011 the Court of Appeal accepted the appeal filed by the Office of the Attorney-General of the Republic of Serbia, denied Mr. Šabotić the right to compensation and had ordered him to pay for litigation expenses. Even though the Court of Appeals established that Munir Šabotić was tortured by SSA inspectors in 1994, it claimed that there was no causal connection "between the traumatic events of 1994 and the illness of the plaintiff, which occurred in 2006". In effect, the Court of Appeal considered the fact that Munir Šabotić does not have the medical records that proved he had received medical treatment as a consequence of torture as decisive. The Court of Appeal did not accept the opinion of the court medical expert that the post-traumatic stress disorder that Munir Šabotić was diagnosed with in May 2004 by a neuropsychiatrist was a consequence of the torture suffered and did not accept the statements given by Munir Šabotić and his wife that police took away all of his medical records on the abovementioned occasion of his apprehension.

The HLC filed a constitutional complaint in 2011, and the judgment of the Constitutional Court was rendered in 2014 in which the Constitutional Court found no violation of the right to a fair trial. The rationale of the Court was based on the principle of free evaluation of

evidence by courts, claiming that the Court of Appeal was free to disregard the opinion of the expert witness and the testimony of the victim and his wife.

The HLC will file an application with the European Court of Human Rights in 2015.

III. Prosecution and sanctioning of other war crimes and past human rights violations

i. Vetting and lustration

Institutional reforms in the form of lustration and vetting have not been carried out in Serbia. As a result, many members and officers of the Serbian police and military who had an important role in organizing, conducting and concealing war crimes committed in Croatia, and Bosnia-Herzegovina, still hold positions in the institutions and actively obstruct investigations into war crimes, undermining the efforts to re-establish the rule of law.

Vetting of members of the security services has neither been implemented nor made possible, because the current legal framework does not provide background checks of the wartime past of members of the army and the police, nor can it be used as grounds for permanent removal from service. The fact that about **15% of those indicted for war crimes in Serbia were, at the time of indictment, in active police or military service**, illustrates the need for background checks of active members of the army and the police, as well as civil servants. The laws on the army and police do not at present require removal from service of a person against whom criminal proceedings are taking place.[40]

[40] See Article 77 of the Law on the Army of Serbia ("Official Gazette of the RS", nos. 116/2007 and 88/2009) and Article 165 of the Law on Police ("Official Gazette of the RS", nos. 101/2005, 63/2009 – Ruling of the Constitutional Court and 92/2011)

The Law on Lustration, which was supposed to carry out an assessment of the eligibility of state officials to hold top government positions, ceased to exist in 2013, without ever having been applied.[41]

ii. Searching for missing persons

According to the International Committee of the Red Cross (ICRC), during the wars in the former Yugoslavia, 34,883 people disappeared. Nearly 12,000 people are still missing. According to the ICRC, nearly 8,000 people are missing in Bosnia and Herzegovina[42] and around 2,000 are still missing from the armed conflict in the Republic of Croatia.[43] The total number of missing persons from the conflict in Kosovo is 1,770.[44]

Over 900 bodies of missing Kosovo Albanians have been exhumed on the territory of the Republic of Serbia. These people were killed during the armed conflict in Kosovo and their bodies were transferred and buried in secret locations in Serbia, in order to conceal evidence of crimes. Secret mass graves were found in the training facility of the Special Antiterrorist Unit (SAJ) of the Serbian Interior Ministry (MUP) in **Batajnica** (on the outskirts of Belgrade); the training ground of the Special Operations Unit (JSO) in **Petrovo Selo**, near Kladovo; and near Lake **Perucac** at Bajina Basta.

For the concealment of bodies, the ICTY convicted nearly the entire political, military and police leadership of the Republic of Serbia from 1999 - Nikola Sainovic, Dragoljub Ojdanic, Nebojsa Pavkovic, Vladimir Lazarevic and Sreten Lukic. Furthermore, the ICTY has

[41] Law on responsibility for human rights violations (Official Gazette of the RS nos. 58/2003 and 61/2003 - corrections)

42 ICRC, „Bosnia and Herzegovina: Families of missing persons pursue their quest“, 28/08/2013, available at https://www.icrc.org/eng/resources/documents/feature/2013/09-28-bosnia-herzegovina-disappeared-missing.htm

[43] ICRC, „Croatia: seventeen years on, missing persons list still contains more than 2000 names“, 18/07/2012, available at https://www.icrc.org/eng/resources/documents/news-release/2012/croatia-news-2012-07-18.htm

[44] ICRC, “For persons unaccounted for in connection with the crisis in Kosovo”, available at http://familylinks.icrc.org/kosovo/en/Pages/background-information.aspx

determined that the Serbian army and police were responsible for the collection of bodies in Kosovo, and that the police were responsible for their concealment.[45]

The laws on the military and military courts (in force during the 90's), as well as official military orders, required that all cases of crimes, discovery of bodies and their treatment be documented by special organs within the military. Irrefutable evidence exists that these cases were indeed documented.[46] However, the State has thus far been unwilling to open its archives in order to locate the mortal remains of those persons still missing. Moreover, the State has been concealing these documents, not only from the public, but even from the Office of the War Crimes Prosecutor.[47]

In 2013, a new mass grave was found in Serbia (in **Rudnica**, Raska), containing 52 bodies of Kosovo Albanian civilians. This is the first mass grave discovered in Serbia that will not be taken up by the ICTY, owing to the completion of its mandate. Therefore, the investigation of this mass grave falls under the exclusive jurisdiction of the Serbian authorities.

So far, no one in Serbia has been charged for the concealment of bodies of Kosovo Albanians in the period 1999-2002.

Serbia's inaction in the search for missing persons and punishment of those responsible for war crimes constitutes inhuman treatment of the victims' family members.[48]

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

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

[47] Omer Karabeg, "Are Dikovic and Guri untouchable?", 14 September 2014, available in Serbian at http://www.slobodnaevropa.org/content/da-li-su-dikovic-i-guri-nedodirljiviji/26581902.html

[48] See e.g. *Kurt v. Turkey*, application no. 15/1997/799/1002, judgment of 25 May 1998, para. 134; *Cyprus* v. Turkey, application no. 25781/94, judgment of 10 May 2001, para. 157.