

IMPLEMENTATION OF THE WAR CRIMES INVESTIGATION STRATEGY OF THE STATE PROSECUTOR'S OFFICE OF MONTENEGRO 2021–2022



Implementation of the War Crimes Investigation Strategy of the Special State Prosecutor's Office 2021 – 2022

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Human Rights Action (HRA)

Address: Bulevar Svetog Petra Cetinjskog 130/VII

81 000 Podgorica, Montenegro

Tel: 020/232 348, 232 358; Fax: 020/232 122

hra@t-com.me

www.hraction.org

For the publisher

Tea Gorjanc-Prelević

Prepared by

Bojana Malović

Tea Gorjanc-Prelević

Editor

Tea Gorjanc-Prelević

Proofreading

Nadja Durković

Design and print

Artbuk d. o. o.

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Other chapters are available in the Montenegrin version of the report at:
<https://www.hracion.org/wp-content/uploads/2023/02/Primjena-strategije-single-page.pdf>

INTRODUCTION

Prosecution of war crimes is necessary for the establishment of the rule of law in Montenegro. It has to do with suppressing impunity for the most serious crimes of a wider, regional significance. Montenegro has an obligation to prosecute war crimes in line with domestic and international law, and was continuously reminded on that by the United Nations committees¹ and the European Commission.²

The European Union (EU) in its strategic documents on foreign policy and expansion to the Western Balkans in 2015 highlighted transitional justice as a priority for candidate states, and the prosecution of war crimes as an issue requiring urgent resolution.³

The need for strategic approach to the investigation of war crimes in Montenegro has been recognised in the EU accession process.⁴ The interim benchmarks for negotiations in Chapter 23 required Montenegro to “effectively demonstrate the capacity of law enforcement bodies and courts to handle war crimes cases impartially, in line with international humanitarian law and the jurisprudence of the International Criminal Tribunal for former Yugoslavia (The Hague Tribunal), and to take effective action to address issues of impunity...”⁵ Accordingly, implementing the measure 1.5.1.1. from the Action Plan for Chapter 23, in May 2015 the Supreme State Prosecutor Ivica Stanković adopted the War Crimes Investigation Strategy, whereby the Supreme State Prosecutor's Office (SSPO) undertook to strengthen the fight against impuni-

1 Concluding remarks of the Committee against Torture on the third periodic report of Montenegro, 10 May 2022, item 23; Report of the Working Group on Enforced or Involuntary Disappearances, UN General Assembly, 10 September 2018, paragraphs 31, 79 and 81; Committee on Enforced Disappearances, Concluding observations on the report submitted by Montenegro under article 29 (1) of the Convention*, 16 October 2015

2 Montenegro Progress Report for 2013, European Commission, October 2013, p. 10; Montenegro Progress Report for 2014, European Commission, October 2014, p. 48; Report on Montenegro for 2015, European Commission, November 2015, p. 61; Report on Montenegro for 2016, European Commission, November 2016, p. 70; Report on Montenegro for 2016, European Commission, November 2016, p. 70; Report on Montenegro for 2018, European Commission, April 2018, p. 19; Report on Montenegro for 2019, European Commission, May 2019, p. 20 and Report for Montenegro for 2020, European Commission, October 2020, p. 24.

3 The EU's Policy Framework on Support to Transitional Justice, 2015, https://eeas.europa.eu/archives/docs/top_stories/pdf/the_eus_policy_framework_on_support_to_transitional_justice.pdf, str. 17.

4 Government of Montenegro, Action Plan for Chapter 23 - Judiciary and Fundamental Rights, area of Judiciary, measure 1.5.1.1, p. 64

5 D. Lukić, Analysis of the benchmarks for Montenegro through comparison with Croatia and Serbia, Ministry of European Affairs, 2018, p. 90: "Montenegro effectively demonstrates the capacity of law enforcement bodies and courts to handle war crimes cases impartially, in line with international humanitarian law and the jurisprudence of the International Criminal Tribunal for former Yugoslavia, and takes effective action to address issues of impunity, in particular by accelerating progress with investigations and prosecutions of these crimes, and by ensuring civilian victims' access to justice and reparations".

ty for war crimes “through more effective investigation, prosecution, trials and punishment in line with international standards.”⁶

However, the results of the work of the competent SSPO showed that this obligation was not respected and that war crimes were not investigated proactively. The Human Rights Action (HRA) concluded the same in its first report on the implementation of the Strategy from September 2015 to 1 June 2021, which contained recommendations for supplementing the Strategy and improving its effective implementation in practice.⁷

In this, second report, HRA highlights the results and failures in the implementation of the Strategy from 1 June 2021 to the end of 2022.

6 “The fight against impunity for war crimes must be intensified through more effective investigation, prosecution, trial and punishment...”, Strategy for the Investigation of War Crimes, Supreme State Prosecutor's Office of Montenegro, Tu. no. 96/15 of 8 May 2015

7 “Implementation of the War Crimes Investigation Strategy of the State Prosecutor's Office of Montenegro 2015-2021”, Human Rights Action, Podgorica, June 2021

SUMMARY

In the past 26 years, Montenegro has sentenced 11 persons for war crimes committed on the territory of former Yugoslavia during the wars of the 1990s, that is, less than one third of those who were indicted. In three cases (“Bukovica”, “Deportation” and “Kaludjerski laz”), all the defendants were acquitted even though the victims of those crimes are indisputable and deserve justice. Of the five persons who were convicted in the “Klapuh” case, only one had served a sentence. Despite the explicit recommendations of European Commission expert Maurizio Salustro, made in 2014, the crimes committed on the Dubrovnik battlefield and the actions of the so-called ‘weekend warriors’ were never thoroughly investigated.

Although the War Crimes Investigation Strategy from 2015 obliged the State Prosecutor’s Office to fight impunity in a more effective manner, the Special State Prosecutor’s Office (SSPO) has since then prosecuted only two persons based on two cases that were ceded to it by the Prosecutor’s Offices of the Republic of Serbia and Bosnia and Herzegovina. One of those cases, against defendant Slobodan Ćurčić, was processed in the last year and a half. Despite 9 years of continuous criticism from the European Commission and the obligations from the Strategy, no proceedings have been initiated using the criminal law institutes of command responsibility, complicity, aiding and abetting. The expected proactive approach has not been demonstrated. SSPO’s communication with the public about work on war crimes cases has not improved in the last year and a half. The obligation of periodic reporting to the Supreme State Prosecutor (SSP) was however consistently respected, in contrast to the previous period. There is some openness when it comes to cooperation with non-governmental organisations.

The Human Rights Action is aware of the fact that the SSPO has initiated several extremely demanding cases involving corruption and organised crime in 2022, but is warning that one must not lose sight of the obligation to effectively prosecute war crimes, which requires proactivity. Although criminal prosecution for war crimes never falls under the statute of limitations, the passage of time and the death of witnesses, victims and perpetrators make it difficult, or even permanently impossible, to achieve justice.

In the first report on the implementation of the 2021 Strategy, we pointed out that the document lacked an action plan with deadlines for the implementation of activities, indicators for the evaluation of success, obligation to report on problems in the processing of war crimes and actions that have been taken to overcome them. It is quite possible that these shortcomings

also led to inadequate reporting on the implementation of more than half of the activities that were planned in the reporting period (55.6%), as well as to ineffective implementation of the Strategy as a whole.

The SSP is responsible for adopting and revising the Strategy. It is a fact, however, that the Parliament of Montenegro has not been able to elect the SSP since October 2019, and that said office has been discharged by acting officials for more than three years (three persons so far, while the election of the fourth is expected). However, the acting officials could have reviewed the actions of the SSPO and set deadlines for the implementation of the activities that were envisaged in the Strategy.

No visible progress has been achieved in relation to the three main strategic tasks - the identification of events in which Montenegrin citizens participated, the identification of Montenegrin citizens who may have been members of paramilitary groups during the war, and the revision of old cases (see 2.1).

The possibility of restarting proceedings in the context of already processed cases has not been thoroughly examined, although there is a suspicion that in the cases of "Bukovica" and "Deportation" there was an intentionally incorrect qualification, that is, wrong application of the law. As early as 2014, a European expert strongly criticised the processing of these cases by both the state prosecutor's office and the courts, while the European Commission noted in all its reports since 2013 (for 9 consecutive years) that verdicts that were handed down in war crimes cases contained legal mistakes and shortcomings in the application of international humanitarian law. The competent state prosecutor said that there was no political will to prosecute war crimes.⁸ There is no information that the SSPO has taken measures to identify some more suspects in old cases, considering all models of criminal responsibility and criminal acts in line with Article IV of the Strategy. However, in the case that was opened based on a letter rogatory of the District Public Prosecutor's Office in Trebinje, which requested to take over criminal prosecution against several Montenegrin citizens, the data related to the "Bukovica" case, submitted to the SSPO by the United Nations' International Residual Mechanism for UN Criminal Tribunals (International Residual Mechanism), is currently being examined.

Although 26 years have passed, three persons convicted in Montenegro of war crimes against the civilian population for the murder of the Klapuh family have not been brought to justice because they are inaccessible to Montenegrin judicial authorities. The Republic of Serbia has not extradited

⁸ There was no political will to punish war crimes", portal *Vijesti*, 1 July 2021, <https://www.vijesti.me/vijesti/politika/552617/vukceviceva-bez-politicke-volje-za-kaznjavanje-ratnih-zlocina>

Zoran Vuković to Montenegro for seven years now, while BiH is not interested in prosecuting Radomir Kovač and Zoran Simović.

The SSPO cooperates with the International Residual Mechanism, which submitted a case to Montenegro in November 2020 in relation to at least 15 Montenegrin citizens who are suspected of having committed war crimes in the 1990s, including sexual violence. That case is still in the pre-investigative phase and there are problems with accessing some of the witnesses.

There is the impression that the SSPO cooperated best with the Prosecutor's Office of Bosnia and Herzegovina when it comes to acting upon letters rogatory, while actions of the Prosecutor's Office of the Republic of Croatia require additional requests.

A positive step forward was made in relation to the domestic legal framework for the prosecution of war crimes. The current proposals of the Ministry of Justice to amend the Criminal Procedure Code should enable the use of evidence produced before the International Criminal Tribunal for former Yugoslavia (Hague Tribunal) and the International Residual Mechanism⁹ in domestic courts; on the other hand, once the Criminal Code of Montenegro is amended, the institute of command responsibility will also include the absence of punishing a subordinate as an element of the criminal act.¹⁰

9 Article 2 of the Draft Law on Amendments to the CPC stipulates the following: "Under the conditions from paragraph 2 of this Article, evidence obtained or produced in accordance with the Statute and the Rules on Procedure and Evidence of the International Criminal Court and the International Residual Mechanism may be used in criminal proceedings in Montenegro in the manner in which it could be used before these bodies". Article 3 of the Draft provides the definition of the term International Residual Mechanism: "The International Residual Mechanism is the International Residual Mechanism for Criminal Courts, i.e. the term that serves as a general name for the International Tribunal for the Criminal Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the territory of former Yugoslavia after the year 1991 and the International Residual Mechanism for Criminal Courts".

10 Article 440 of the Criminal Code stipulates that the following will be punished by applying the institute of command responsibility: "(1) A military commander or a person who actually performs this function or a superior civilian person, who, knowing that the forces he commands or controls are preparing or have started the commission of a criminal offence from Article 426-430, Articles 432, Articles 434-437 and Article 439 of this Code, does not take the necessary measures he could have taken and was obliged to take to prevent the commission of the crime, and the crime is committed as a result..." The aspect related to the responsibility of the superior for not punishing his subordinates for the committed criminal acts according to international humanitarian law as prescribed by the Statute of the Hague Tribunal in Article 7, paragraph 3, was unjustifiably omitted from the description of the crime. In August 2022, the Ministry of Justice accepted the proposal of the Human Rights Action to supplement the act of committing this criminal act.

STATISTICAL PRESENTATION OF THE SPECIAL STATE PROSECUTORS' OFFICE WORK RESULT IN THE PERIOD FROM 1 JUNE 2021 TO 31 DECEMBER 2022

1. Three new cases were opened, one was archived, while in one, which was ceded by Bosnia and Herzegovina, there was an indictment. At the end of 2022, there were 7 cases in the pre-investigation phase.
2. The SSPO has questioned one person in the capacity of defendant and one in the capacity of witness-victim of a war crime.
3. Action has been taken in response to 14 letters rogatory that were submitted by countries of the region requesting provision of international legal assistance. The requested data and documents were collected based on 8 letters rogatory, four persons were questioned as suspects based on four, and two persons were questioned as witnesses based on two.
4. The SSPO dispatched 9 letters rogatory to the prosecutor's offices of the region. As reported, four of these letters referred to the questioning of several persons in the capacity of witnesses and injured parties, one concerned submission of data, while the subject of four letters rogatory was not specified.
5. Three prosecutor-police teams were formed to work on three war crimes cases.
6. Of the 54 announcements that the SSPO published on its website in the last year and a half,¹¹ only one had to do with war crimes; more precisely, it concerned a regional meeting that was held on that topic.
7. The SSPO participated in 10 trainings and conferences on war crimes issues.
8. The SSPO participated in five meetings with representatives of prosecutor's offices from the region, on a bilateral (3) and multilateral basis (2), and in one meeting with representatives of the International Residual Mechanism from The Hague.

¹¹ Out of 54 announcements, SSPO issued 36 during Milivoj Katnić's mandate as SSP, i.e. from June 2021 to February 2022, while 18 were issued since the time GST Vladimir Novović took office (March 2022 until the end of the year).

RECOMMENDATIONS

Since none of the 7 HRA's recommendations from the previous report were implemented from June 2021 until the end of 2022, we repeat them here, adding several new ones.

To the Assembly of Montenegro

- Elect the Supreme State Prosecutor for a full term, without delay.

To the Supreme Prosecutor's Office

- If necessary, after the election of the Supreme State Prosecutor, revise the Strategy based on the analysis of the SSPO's actions.
- Until the election of the new Supreme State Prosecutor, the acting Supreme State Prosecutor should review the actions of SSPO in the light of criticisms, comments and recommendations submitted to Montenegro by international organisations and their experts, and - based thereon - envisage deadlines for the effective implementation of strategic activities.
- The new Strategy or Action Plan should contain deadlines for implementing the activities, as well as the obligation to report on the implementation of each activity individually, the obligation to report on problems in the processing of war crimes, actions taken to overcome said problems, and indicators for the evaluation of success.
- In addition to the Supreme State Prosecutor, supervision of the implementation of the Strategy should also be carried out by the Prosecutorial Council, which would analyse the results in relation to the Strategy on an annual basis.

To the Special State Prosecutor's Office

- Review unsuccessfully processed cases such as “Bukovica”, “Depotration” and “Kaludjerski laz” with the help of experts in international humanitarian law, and thoroughly consider the initiation of new proceedings in relation to the already processed persons, as well as others, bearing in mind all possible forms of criminal liability.
- Review the dismissal of all criminal charges related to war crimes based on the reasoning contained in the decisions to dismiss them, if such reasoning exists. Respond to the criminal report that was filed 7.5 years ago by attorney Velija Murić in relation to the “Kaludjerski laz” case.
- In the case of dismissal of criminal charges, provide a decision with a detailed reasoning in which it will be explained what actions the prosecution took to investigate the allegations from the report, and with what outcome, along with an instruction about a legal remedy.
- Provide training and specialisation to new state prosecutors who will be responsible for war crimes in the SSPO; they could be trained by prosecutors who had worked in the Prosecutor's Office of the Hague Tribunal, especially on the ways for prosecutors to act independently (proactively). Include in the training prosecutors from Bosnia and Herzegovina who are experienced in the application of international humanitarian law and criminal law institutes in the context of war crimes such as command responsibility, complicity, aiding and abetting, and joint criminal enterprise, which the State Prosecutor's Office of Montenegro has not been applying.
- Ensure better communication with the public regarding work on war crimes cases.
- Report to the Supreme State Prosecutor on the implementation of all tasks and activities provided for in the Strategy, on problems encountered in the implementation of the Strategy, and measures that have been taken to solve them.

To the High Court of Montenegro

- In all cases of sexual violence in which witnesses and victims have a protected status, testimony should be provided via video link. In these cases, it is necessary to decide on the property claim in criminal proceedings, so that victims do not have to reveal their identity in litigation.

To the Ministry of Justice of Montenegro

- Take all the necessary steps to improve regional cooperation in the area of processing war crimes cases, or more precisely, to bring to justice war criminals who have been finally convicted in Montenegro but reside in the countries of the region.

To the Ministry of European Affairs of Montenegro

- Amend the success indicator in the Action Plan for addressing key priorities in order to meet the interim benchmarks for Chapter 23 from 2022, so that it includes an analysis and e.g. the number of cases instigated at the initiative of the SSPO, unresolved cases pending at the prosecutor's office, the rate of conviction of the accused, indictments filed for command responsibility, etc., instead of just work on a single pending case.