

WAYS TOWARDS JUSTICE

TOWARDS AN EFFICIENT, BUT ALSO QUICKER JUSTICE

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- On the occasion of the second anniversary of the signing of the Memorandum on Understanding on the realization and promotion of the fight against all forms of sever crime between the State Attorney of the Republic of Croatia, the Public Prosecutor and War Crimes Prosecutor's Office of the Republic of Serbia -

Exactly this day two years ago, on February 5, 2005, was signed the Memorandum on Understanding in the realization and promotion of cooperation in the struggle against all types of serious crime between the State Attorney of the Republic of Croatia and the Public Prosecutor and the War Crimes Prosecutor of the Republic of Serbia. A few months later, on July 1, 2005, such a Memorandum was signed also with the State Attorney of Bosnia-Herzegovina. With the aim of an even broader and more concrete cooperation on October 13, 2006, was signed the Agreement on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide between the War Crimes Prosecutor of the Republic of Serbia and State Attorney of the Republic of Croatia.

The final provisions of both Memoranda envisage, among others, that one (namely, two years) year after their entry into force, the participants can hold a meeting to review its implementation. Our today's gathering is yet another confirmation of the successful realization of the provisions of the mentioned Memorandum.

On this occasion we do once again extend our gratitude to the OSCE Mission to Serbia, which is the co-organizer of this conference.

Did we achieve in the last years the common aims that we agreed upon, and if we did, to what extent did we achieve our common aim: to contribute in the mutual interest to a successful as possible investigation, prosecution and conviction of perpetrators of war crime?

On this occasion we shall limit ourselves only to the cooperation between the War Crimes Prosecutor of Serbia and the state Attorney of the Republic of Croatia.

Let us remind that this Memorandum relates first of all to the direct and quicker cooperation between actors in the pre-trial phase of the proceedings, hence before the criminal proceedings were instituted. Among others, the mentioned cooperation consists of collecting and exchange of information, reports and documentation when this does not require enforcement, including also statements of those accused or other persons, exchange of information which enables or contributes to investigation of these crimes, exchange of certain informative and technical data in order to have a quick as possible and successful communication, etc.

The Agreement on Cooperation in the Prosecution of Perpetrators of War Crimes, signed October 13, 2006, relates first of all to matters which have already been dealt with by the judiciary, i.e. where criminal proceedings were already instituted, regardless of the phase in which the proceedings are, and whose perpetrators are resident in, or citizens of, the Republic of Croatia or the Republic of Serbia respectively, so that due to constitutional limitations regarding extradition they are unavailable to judicial organs of the state which initiated criminal proceedings against them.

I am grateful to the colleagues from the State Attorney's Offices of Croatia and Bosnia-Herzegovina for the statistical data and concrete examples of direct cooperation, and I think there is no need to repeat all this or mention some new examples, for which I am sure to exist. I will only repeat and stress that until now, in the mentioned trilateral cooperation, no request for assistance was refused for any of the reasons mentioned in the Memoranda.

Persons authorized on behalf of the participants for coordination of cooperation make agreements over phone before they formally file the requests in regard to a concrete matter, which is exceptionally accelerating later realization of the filed request and acting upon it. However, this mentioned type of cooperation evolved in a few cases in an even more direct form of cooperation in having the deputy prosecutors be present in certain investigation procedures in the other requested contracting state.

We are all aware of the complexity of the war crimes issue, both in procedural but even more in the sense of substantive law.

We have no huge experience. Therefore, we think that the exchange of legal viewpoints in this field would be of trilateral use, it would even more contribute to mutual cooperation, even more so since our legal solutions are almost identical or very similar in regard to the time span and space to which criminal legislature applies; anyway, such type of cooperation is envisaged in the agreed Memoranda.

Cooperation among states in extending legal assistance, here we have in mind first of all criminal matters, represents a necessity and an obligation. It is the necessity because without such cooperation among respective state organs a number of criminal cases could not at all have been solved, or the solution thereof would be accompanied by significant difficulties which would, in any case, have consequences both on the national and international level. The obligation of all states which are members of the Council of Europe stems from obligations laid down in its Statute, with the aim to give maximum contribution to the protection of human rights, rule of law and democratic development of the society. States which emerged after the disintegration of the former Yugoslavia have an additional obligation in regard to the International Criminal Tribunal for former Yugoslavia in view of this court's exit strategy and the transfer of cases to local judiciaries. Our country (as a legal successor) has satisfied these obligations by passing numerous laws by which the following conventions were adopted: European Convention on Mutual Legal Assistance in Criminal Matters from 1959 (adopted and entered into force December 29, 2002), Additional Protocol to this Convention from 1978 (adopted and entered into force on September 21, 2003), Second Additional Protocol to this Convention from 2004 (adopted and entered into force in 2005), European Convention on the Transfer of Proceedings in Criminal Matters and the European Convention on Extradition (2001).

Apart from these mentioned Conventions rendering legal assistance in criminal matters is regulated also by the Criminal Procedure Code and the Treaty between the Federal Republic of Yugoslavia and the Republic of Croatia on Legal Assistance in Civil and Criminal Matters signed in September 1997, and ratified in 1998.

However, all these conventions, laws and treaties regulate cooperation in rendering assistance in criminal matters among relevant judiciary organs of states, and essentially there are three types of assistance:

- delivering various writings and procedural acts (subpoena, charges, court decisions etc.);
- implementation of certain procedural, i.e. investigatory acts (interrogation of the defendant and the witnesses, investigation on the spot, confiscation of objects, searching the premises, etc.);
- delivery of excerpts of various court and administrative records, transfer and overtaking of criminal proceedings, etc.

All these conventions were adopted by law and were ratified by respective organs as envisaged in law, hence, they were adopted and overtaken according to the procedure envisaged for the passing of laws, and in this sense they oblige the state-signatories and by this also all their organs.

The signing of the mentioned Memoranda and the Agreement on Cooperation provoked, which is understandable, certain interest of both the broader public and the professional circles. However, due to certain misunderstanding which can be noticed in public statements given by representatives of certain organs, as well as by the involved parties (potential defendants, lawyers and others), we want to point out several crucial features of the formal and legal scope of these Memoranda and the Agreement in regard to the adopted conventions and laws which regulate this field.

So, both Memoranda and the mentioned Agreement on cooperation are of a technical and legal nature, and do not represent international treaties, because they were not agreed upon according to a procedure envisaged for concluding international treaties, nor do they have such strength. They also do not require adoption, nor acceptance by authorized state organs as do other bilateral and multilateral treaties concluded among states.

The Memorandum (and the Agreement) in the chapter with the title "Scope of Implementation" say explicitly that the signatories will cooperate in accordance with the provisions of this Memorandum, and respecting their own laws and regulations as well as international bilateral and multilateral agreements which are in force among the participating states.

This literally means that no provision in these Memoranda or Agreement can be in contradiction with the existing laws, first of all the Criminal Procedure Act, the Treaty between our two countries on cooperation in civil and criminal matters, as well as adopted international conventions. Everything that would contradict them, namely any evidence or any procedure performed contrary to existing laws, could not be the basis for validly establishing the relevant facts, and particularly not for competent decisions. If someone would ask why then these Memoranda and the Agreement had to be adopted when there are

existing legal regulations, our answer would be that by this we wanted – and we also hope that we achieved it – to have a significantly quicker, more efficient, more adequate conduct and finalization of criminal proceedings for such type of crime, and all this within the framework and in accordance with the existing legal regulation in both states.

The realization of immediate cooperation in collecting and exchanging information, reports, documents, material traces, documentation in the pre-trial phase of the criminal proceedings and its renaming into substantial, relevant evidence in criminal proceedings which are to be instituted, no doubt leads to a more efficient, as well as a quicker justice, the punishment of perpetrators and a moral and spiritual satisfaction for those damaged. To be more concrete, we can consider a few situations.

One of the most severe consequences of armed conflict in the territory of former Yugoslavia is a big number of committed war crimes, with an even bigger number of damaged persons and property. Clearly, it is much easier to establish that a war crime was committed in the objective than in the subjective sense. Namely, as a rule, it is more difficult to identify the perpetrators of concrete war crimes. The reasons are manifold. At the time when these armed events took place there was very little, if any, attention paid to this. Information, data and potential evidence were either not collected at all, or, if they were, this was done sporadically and insufficiently, only to be later missing, forlorn or destroyed as time passed by. Those damaged ones remained, as a rule, in one state, the witnesses scattered around, evidence too, and potential perpetrators, as a rule, in another state, where they got new citizenship, due to which they could not be extradited to the state which has already initiated criminal proceedings against them. So, objectively speaking, we have these three situations here:

- for certain committed crimes in the objective sense some facts and information, potential evidence, possibly also related to potential perpetrators, were collected but no criminal proceedings were initiated as yet (implementation of the Memorandum);
- the instituted criminal proceedings cannot be ended because the defendant is in another state, which cannot extradite him (implementation of the Agreement on cooperation);
- criminal proceedings were instituted in one state against a certain person or persons in absentio, and were ended with a final judgment although, due to reasons mentioned above, the verdict cannot be enforced (implementation of the Agreement on cooperation).

These presented cases give ground for the conclusion that the second and third situation are generally regulated by the conventions and the legislature. Legal assistance between judiciary organs is possible in accordance with the laws and Conventions, but we are convinced that the mentioned Agreement and other similar documents make this cooperation quicker, more efficient.

The first situation (pre-trial procedure) is practically not encompassed by mentioned legal and other regulation. These Memoranda are therefore very important; their implementation is a significant contribution to a comprehensive collecting of relevant evidence, and thus to quicker and more efficient criminal proceedings, among others also because due to them requests for legal assistance on the basis of relevant laws and conventions are more efficiently dealt with.