WAYS TOWARDS JUSTICE

LEGAL POSSIBILITIES FOR CRIMINAL PROSECUTION OF PERPETRATORS OF WAR CRIMES IN THE TERRITORY OF THE REPUBLIC OF CROATIA DURING CONFLICTS IN FORMER YUGOSLAVIA

Accessibility, but not an automatic one

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It will be assessed whether or not available evidence really creates reasonable doubt that a certain individual has committed a crime. Before deciding whether or not to file a request for initiating investigation, the prosecutors would have the possibility to independently or through a relevant prosecutor's office in Croatia or in Serbia collect additional evidence which might prove necessary for deciding on possible initiating of criminal proceedings.

During long-lasting armed conflicts, which started in the territory of the Republic of Croatia while she still was within SFRY and then continued also after the Republic of Croatia gained independence, those participating in these conflicts committed numerous war crimes. They acted either within regular military units, or as parts of para-military Serb or Croatian military forces.

Ever since conflicts occurred and up to the present times, the relevant state organs in both SFRY, i.e. FR Yugoslavia, namely the Republic of Serbia, and in the Republic of Croatia, have been collecting evidence on committed war crimes and their perpetrators, which resulted also in numerous criminal proceedings. However, due to certain historical events certain difficulties emerged which in many proceedings made it impossible to achieve their purpose – to establish without any doubt whether certain prosecuted persons have really committed some of the war crimes, and to reach an adequate verdict for the perpetrators and enforce the sanction.

Namely, after the armed conflicts a number of persons who at the time of conflict had Yugoslav and simultaneously Croatian citizenship, and whom the relevant organs of the former SFRY (later of FR Yugoslavia and eventually the Republic of Serbia) had been prosecuting, were exchanged; as Croatian citizens, they are now in the territory of the Republic of Croatia and therefore in fact are not available to the relevant courts in the Republic of Serbia, since the Croatian Constitution bans extradition if the Croatian citizen is to stand criminal trial in other states. On the other hand, after armed conflicts in the Republic of Croatia, a big number of ethnic Serbs left the Republic of Croatia and acquired citizenship of the Republic of Serbia. Among them is also a number of persons against whom there are pending criminal proceedings in front of relevant courts in the Republic of Croatia, which cannot be efficiently conducted for the same reasons since the legal system in the Republic of Serbia also does not envisage the possibility of extradition of its citizens to foreign states for the purpose of criminal prosecution.

The question is how to solve these mentioned problems in the spirit of the existing legislature in the Republic of Serbia and the Republic of Croatia having in mind the provisions of the ratified Treaty between FRY and the Republic of Croatia on Legal Assistance in Civil and Criminal Matters, the provisions of the Memorandum on Understanding in the realization and promotion of cooperation in the fight against all forms of serious crimes and the Agreement on Cooperation in Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide which were concluded between the Public Prosecutor of the Republic of Serbia and the War Crimes Prosecutor of the Republic of Serbia, and the State Attorney of the Republic of Croatia, in the situation when the perpetrators are in the territory of one of the states, and the evidence for these crimes is in the other state. In order to answer these question three types of situation should be considered – when for some war crimes certain evidence on the crime and the perpetrators has been collected but no proceedings were instituted up to now; also, when the criminal proceedings started, but could not be brought to an end because the accused person is in another state which does not allow extradition; and, finally, when criminal proceedings were conducted in one state and were ended with a final judgment in absentio, which, however, for the afore mentioned reason cannot be enforced.

INSTITUTING NEW CRIMINAL PROCEEDINGS

According to Art. 106 of the Criminal Code of SFRY which was in force at the time when some of the war crimes were committed in the territory of the Republic of Croatia, and also according to the provisions of

Art. 106 of the Basic Criminal Law of the Republic of Serbia, and to identical provisions of Art. 8 of the present Criminal Code of the Republic of Serbia, the criminal legislature of Serbia applies to Serbia's citizens also when they committed a crime abroad, and there is an identical provision regarding citizens of the Republic of Croatia in Art. 101 of the Basic Criminal Law of the Republic of Croatia in Art. 101. Accordingly, there are no legal obstacles either in the Republic of Serbia or in the Republic of Croatia for prosecuting their own citizens in case that these persons committed war crime in the territory of the other state.

In order to also implement this legal possibility, it is necessary that the state organs of the state in which the perpetrator is resident and whose citizenship he has, first of all the Prosecutor, acquire evidence which is in the territory of the other state and which would be essential for proving reasonable doubt that certain persons committed the crimes in question. Acquiring such evidence is possible upon Art. 22, para. 1, and Art. 23 to 27 of the Treaty between the Federal Republic of Yugoslavia and the Republic of Croatia on Legal Assistance in Civil and Criminal Matters (Act on Ratification of the Treaty between the Federal Republic of Yugoslavia and the Republic of Croatia on Legal Assistance in Civil and Criminal Matters – Official Journal – International Treaties No. 1/98), as well as on the bases of the mentioned Memorandum, namely Agreement.

In regard to the Memorandum it should be stressed that the signatories committed themselves to mutual cooperation in accordance with the provisions of the Memorandum, and to assist each other upon request or upon own initiative in accordance with the provisions of both the Memorandum, as well as by respecting laws and regulations of their states, international and bilateral and multilateral treaties, and that the essence of this cooperation, as stated in para. 2a of the Memorandum is reflected in collecting and exchanging information, reports and documents when this does not require any force, including pre-investigation statements of accused or other persons. On the other hand, the Agreement on Cooperation envisages exchange of evidence and other facts between relevant war crimes prosecutors in the Republic of Croatia and the Republic of Serbia..

PLURALITY IN INSTITUTING CRIMINAL PROCEEDINGS OR TRANSFER THEREOF

When in one state criminal proceedings are instituted against a person who is standing trial for the same crime in the other state there are no legal obstacles to conduct this proceedings, because the legal rules which existed at the time when the war crimes in question were committed and are existing today both in the Republic of Serbia and the Republic of Croatia envisage an exception to the rule neb is in idem. This issue is regulated in an identical way by Art. 108 of the Criminal Code of SFRY, namely the Basic Criminal Law of FRY and the Republic of Serbia, and Art. 103. of the Basic Criminal Law of the Republic of Croatia through provisions which relate to the application of the criminal legislature to special conditions for criminal prosecution of a crime committed abroad; the respective rule says that criminal prosecution will not be instituted if the perpetrator has served full time to which he was convicted abroad, also if the perpetrator was acquitted abroad by a final judgment, or his punishment is subject to the statute of limitations or was pardoned and if the foreign law requires that prosecution for such crime can be initiated upon request of the damaged side and such request was not filed, which further means that criminal prosecution for these crimes can be initiated also in cases when for these very same crimes there are criminal proceedings in another contracting state if these proceedings were not brought to an end in one of the described ways. Here should be added that obstacles for prosecution do not exist in such situations either in the procedural criminal legislature of the Republic of Croatia or the Republic of Serbia, because in regard to criminal proceedings which are stopped during the investigation and after charges were filed upon objection the wording of the almost identical provisions of the Criminal Procedure Code of the Republic of Serbia (Art. 254 and 274) and the Law on Criminal Procedure of the Republic of Croatia (Art. 214 and 292) says that the criminal proceedings can be stopped if there are reasons which exclude prosecution, which could imply only above mentioned particular conditions contained in both legislatures related to criminal prosecution of a crime committed abroad.

In a similar way the exception of the rule ne bis in idem is envisaged also in the provisions of international law contained in the European Convention dealing with the transfer of proceedings in criminal matters (Act on the Ratification of the European Convention on the Transfer of Proceedings in Criminal Matters, Sluzbeni list SRJ (Official Journal of FRY) – International Treaties No. 10/2001, which entered into force on December 31, 2002 for FRY, i.e. the Republic of Serbia, and which applies to crimes committed after the Convention entered into force in the Republic of Serbia) in whose part V under the title Ne bis in idem, in Art. 35, it is said that the person in regard to which the final judgment was rendered cannot be prosecuted, convicted or submitted to enforcement in another contracting state only if: a) he was acquitted; b) in case the sanction was imposed which: I. has been completely enforced or is being enforced; II. has been completely or in the part that was not enforced subject of a pardon or amnesty, or; III. can no longer be enforced due to the lapse of time; or, c) in case the court convicted the perpetrator without imposing a sanction. Hence, even in legal provisions of international law the criminal proceedings in one state do not represent an obstacle for instituting criminal proceedings against

this person for the very same crime.

Apart from parallel criminal proceedings, on the basis of the Agreement between the Federal Republic of Yugoslavia and the Republic of Croatia on Legal Assistance in Civil and Criminal Matters it is possible to overtake criminal proceedings upon request of one of the signatories if the citizen of one state signatory or a person who is resident on her territory has in the territory of the other state signatory committed a crime which is subject to court proceedings in both state-signatories, as envisaged in Art. 28 of the same Treaty. The advantage in dealing with problems in this manner is that the criminal proceedings with the perpetrator present could continue very efficiently since according to provisions of this Treaty the court of one state would directly transfer the case to the court of the other state which would be authorized to rule a verdict, and for further proceedings it would be necessary only to have the prosecutor declare whether he accepts further criminal prosecution. Of course, even before the whole process would start the authorized prosecutor could on the basis of the mentioned Agreement on Cooperation of prosecutors get information on documents in the case and declare in the spirit of the Agreement itself whether or not he will accept criminal prosecution, so that the prosecutor in the requesting state would have the ground to propose to the court in his own country to file a request with the authorized court in the requested state to overtake criminal prosecution. The advantage of dealing with these issues in such a manner is that in case that prosecution would be overtaken all proofs collected up to then in the requesting state would be accepted if they were not contrary to the legal system of the requested state. .

Since both legislatures (Art. 530 of the Criminal Procedure Code of the Republic of Serbia and the Art. 1 of the Act on International Legal Assistance of the Republic of Croatia) envisage priority of international law in rendering legal assistance, there would be no legal obstacles or limitations to overtaking criminal prosecution on the basis of the Treaty on Legal Assistance in Civil and Criminal Matters in question.

However, the deficiency of this Treaty is that it did not envisage to have transfer of criminal prosecution also when the defendant has dual citizenship, of both the Republic of Croatia and the Republic of Serbia, and because of that the relevant organs in state-signatories of the Treaty do not treat these persons as foreigners, but as domestic citizens, which represents a legal obstacle to filing requests for transferring the criminal proceedings.

OVERTAKING PROSECUTION AFTER A FINAL AND ENFORCEABLE JUDGMENT WAS DECLARED IN ABSENTIO

When a person is convicted in absentio for a war crime, or for any other type of crime for instance in Croatia, the question is whether against such a person – if this person is in the Republic of Serbia – can be criminally prosecuted for the same crime also in the Republic of Serbia, namely whether there is a legal obstacle, i.e. a reason which excludes criminal prosecution envisaged in Art. 254, para. 1, pt. 4 of the Criminal Procedure Code because this would be a matter which has already been ruled.

As explained above, in this case, too, our Act and legal rules of international law envisage an exception from the rule ne bis in idem, because a person which by this ruling would be convicted abroad did not serve the ruled time. Namely, according to legal provisions of Art. 106 and 108, para. 2, of the Criminal Law of SFRY related to the applicability of criminal legislature when a citizen of SFRY commits crime abroad, there will be no criminal prosecution if: 1. the perpetrator has completely served his time as ruled by the court abroad; 2. if the perpetrator was acquitted by final judgment or his punishment became subject to limitation or was pardoned; and, 3. if this crime is prosecuted by foreign law upon request of the damaged, and such request was not filed. Such very same provision remained later in force in Art. 108, para. 2, in connection with para. 1 and in connection with Art. 106 of the Basic Criminal Law of the Republic of Serbia, and in Art. 10, para. 1, in connection with Art. 8 of the Criminal Code of the Republic of Serbia, and this very same provision exists also in the Republic of Croatia in Art. 103, para. 2, in connection with Art. 101 of the Basic Criminal Law of the Republic of Croatia.

Apart from the above mentioned, as said already in the previous part, these same solutions are envisaged by international criminal law, concretely by the European Convention on the Transfer of Proceedings in Criminal Matters in its Art. 35, para. 1.

Hence, in case that the authorized Croatian prosecutor delivered to the War Crimes Prosecutor's Office of the Republic of Serbia the copy of the final judgment (together with certified copies of the evidence and the court documentation) by which a person was in absentio convicted in Croatia because of a war crime, and this person of course did not serve the ruled time, there would be no legal obstacles for the War Crimes Prosecutor's Office of the Republic of Serbia to file the request for conducting investigation against such person and for the investigative judge to act upon this request and decide on conducting the investigation. Of course, it has to be stressed that this could not be a matter of automatism; rather, the War Crimes Prosecutor of the Republic of Serbia would evaluate the evidence contained in the documentation of the Croatian court, which the relevant prosecutor of the Republic of Croatia would

transfer upon the Agreement on Cooperation. On this basis the Serbian prosecutor's office shall assess whether or not available evidence really creates reasonable doubt that a certain individual has committed a crime. Before deciding whether or not to file a request for initiating investigation, the prosecutors would have the possibility to independently or through a relevant prosecutor's office in Croatia or in Serbia collect additional evidence which might prove necessary for deciding on possibly instituting criminal proceedings

Everything here said on the problem of criminal prosecution of perpetrators of war crimes who are in one state, whilst the evidence relevant for this crime is in the other, does not apply only to these crimes but also to all other crimes and their perpetrators in similar situations, and not only in the territory of the Republic of Serbia and the Republic of Croatia, but also in the broader territory of former Yugoslavia, because there are a number of individuals and perpetrators of various crimes who have citizenship of two, or even as much as three former Yugoslav republics and upon committing the crime in one of the former republics they often go to another republic, i.e. state, in which they also have the status of the citizen, wherefrom due to existing regulations they cannot be extradited.