

TRANSITIONAL JUSTICE

*Human Rights Brief:
Issues in Criminal Prosecutions of War Crimes*
CROATIA 2016



YOUTH INITIATIVE FOR HUMAN RIGHTS
INICIJATIVA MLADIH ZA LJUDSKA PRAVA
NISMA E TË RINJVE PËR TË DREJTAT E NJERIUT

1. INTRODUCTION

The Youth Initiative for Human Rights – Croatia (hereinafter: YIHR Croatia) is a human rights organization advocating reconciliation, transitional justice and democracy with a view of contributing to sustainable peace in the country and the region of former Yugoslavia. It is a part of the Regional YIHR Network (hereinafter: YIHR) with member organizations also in Bosnia and Herzegovina, Kosovo, Montenegro and Serbia. YIHR works through three programs: (a) Reconciliation, (b) Participation and (c) Justice. Due to its thematic focus and methodological approach, it is an organization well positioned to critically assess the work of the institutions through the lens of their contribution to reconciliation and justice. YIHR also has a specific perspective looking into trans-generational potential/influence of these measures. Thus, sustainability in promoting and supporting reconciliation and justice is the focus of YIHR's monitoring and research.

2. GENERAL BACKGROUND

In 1990s the SFR Yugoslavia dissolved violently in a series of conflicts in Slovenia, Croatia, Bosnia and Herzegovina, Kosovo and later in Macedonia. The conflicts were extremely violent and, according to the relevant data, over 120.000 people were killed with millions more being displaced. In many areas of former Yugoslavia, the conflicts brought extreme ethno-demographic changes that still affect the political and social life in the region. The international community responded to the conflict with supporting the establishment of an ad hoc UN criminal tribunal that indicted 161 persons under its mandate to prosecute those most responsible for the atrocities. However, it had been clear that the states in the region will also have to deal with prosecutions in order to contribute to bringing justice to victims of atrocities and violations. This is why the international community still expects the states in the region to prosecute violations of international humanitarian law at the local courts.

3. CROATIAN CONTEXT

Croatian judicial system started prosecuting violations of international humanitarian law during the conflict, though in a very politically charged manner. The local prosecutions slowly professionalized over the years and specifically under the pressure of the EU accession criteria related to the matter. The EU's pressure was focused on supporting full cooperation of Croatia with the International Criminal Tribunal for the former Yugoslavia. To a lesser extent was the EU focused on exercising pressure on local prosecutions. However, prior to the Croatian accession, the EU states put additional pressure on Croatia, which resulted in further professionalization that included, most relevantly: (i) the transfer of war crime cases to the 4 large courts (Zagreb, Osijek, Rijeka and Split) and (ii) adoption of the war crimes prosecution strategy by the State Attorney's Office. YIHR assessed at the time that this was progress, but still not enough to guarantee sustainability of the prosecution process in Croatia. After the accession of Croatia into the EU, we saw a decline in the pace of war crimes prosecution. The situation today remains mostly stagnant.

4. TRANSITIONAL JUSTICE BRIEF 2016

YIHR Croatia publishes this human rights brief on transitional justice issues with a focus on criminal prosecutions of war crimes to provide concrete information to the relevant stakeholders in the country and abroad on the current situation and as a basis for advocacy. This brief is published alongside a YIHR Croatia's Human Rights and Democracy Report *Towards Illiberalism* that provides a broader picture on the current political situation in relation to (i) deteriorating civil rights and liberties, and (ii) concerns in relation to the process of reconciliation.

4.1. CONCERNS RELATED TO WITNESS PROTECTION PROVISION SYSTEM

In 2014, YIHR Croatia analyzed the system of witness protection in Croatia with specific relation to protection of witnesses of war crimes. Witness protection in Croatia is defined by the *Law on Witness Protection* (official gazette 163/03, 18/11). The most relevant actors in witness protection system, as defined by the law, are the Protection Unit (Croatian: *Jedinica za zaštitu*) at the General Police Directorate of the Ministry of Interior Affairs and the Commission (Croatian: *Povjerenstvo*) comprised of representatives of the Supreme Court, State Attorney's Office, Administration for Prison System of the Ministry of Justice, General Police Directorate of the Ministry of Interior Affairs and the Head of the Protection Unit.

YIHR Croatia's analysis found two main concerns in the system. The first concern has to do with providing protection to witnesses in pre-investigation and investigation stages. At these stages, the witnesses are left without the protection, as it is provided only in the stage when the process reaches the court. This especially results in fear among potential witnesses of crimes committed by the Croatian forces, due to occasionally existent personal and collegial relations

between the perpetrators and the investigators. In 2011, YIHR delivered several statements from family members of victims of crimes committed in 1991 (murder and enforced disappearances) against Serb civilians from Vukovar area to the State Attorney's Office in 2011. A day after the delivery of statements, the then Deputy Speaker of Croatian Parliament Vladimir Šeks publicly disclosed in a TV program at the Croatian National Television the name of a witness mentioning him (in his capacity of Head of Crisis Headquarters in Osijek in 1991) in her statement related to an enforced disappearance of her husband. This information was provided to him at the State Attorney's Office.

The second concern has to do with the lack of jurisprudence in terms of prosecution of violations of the secrecy of identity of witnesses. YIHR particularly refers to a case of Branimir Glavaš who, during trial for war crimes against him publicly disclosed the name of a protected witness of the prosecution both in the courtroom (showing a sign with the witness' name to the press) and in his website. YIHR pressed charges against him in May 2012, but the State Attorney's Office failed to prosecute him to date, even though his violation is well documented. Glavaš's supporters from his party even held a press-conference in Osijek, denouncing YIHR Croatia as *anti-Croatian* element as a response to the charges pressed.

YIHR organized a meeting in coordination with UNDP and UN ICTY in Zagreb in March 2014 with the representatives of relevant institutions about the matter of witness protection. At the meeting, another concern was recognized, having to do with the lack of coordination among the actors in the system of witness protection. A representative of the Ministry of Defenders, Ivan Grujić announced at the meeting that a strategy for witness protection will be adopted. The strategy, according to information available to YIHR Croatia, was never adopted.

Conclusion: The following concerns still remain unaddressed today: (i) the failure on behalf of the witness protection system to provide protection to witnesses in pre-investigation and investigation stages, (ii) the failure of the State Attorney's Office to prosecute violations such as public disclosure of identity of protected witnesses and (iii) the lack of coordination among the actors in the witness protection system.

4.2. CONCERNS RELATED TO PROSECUTION OF SEXUAL CRIMES

Since 2013, YIHR Croatia analyzed the process of prosecution of sexual crimes in Croatia. YIHR Croatia assesses, as other NGOs, that there is a lack of prosecution of these crimes. YIHR Croatia found that the main issue in this regard is the faulty legal framework resulting in a deficient jurisprudence. The Croatian criminal proceedings Law and jurisprudence request that a victim of sexual crimes provide such evidence that are most often unattainable. The courts find medical reports and witnesses as compulsory part of the body of evidence to corroborate the victim's statement. However, given that these crimes were committed in a state of war and often during imprisonment or military attacks, many victims do not have medical records and additional witnesses. This is why the State Attorney's Office actually does not start new cases, even though there are victims' reports, knowing that the body of evidence will not satisfy the courts requiring additional corroboration of victims' statements.

YIHR Croatia closely analyzed the procedures related to prosecution of sexual crimes at the ICTY in order to provide a comparative analysis. The analysis found that the ICTY jurisprudence is effective due to the Rule 96 in the Rules on Procedure and Evidence. This rule provides two particularly significant principles: (i) no additional corroboration of the statements of victims are required and (ii) the consent of the victim can not be used as a defense in cases where the victim was threatened, exposed to violence and pressure or when the victim had reasons to believe that the lack of consent could expose her/him or someone else to the sexual crime or threats.

Conclusion: A concern remains that both the legal framework and the jurisprudence disallow adequate prosecution of sexual crimes committed during the war at the courts in Croatia.

4.3. CONCERNS RELATED TO PROSECUTION OF COMMAND RESPONSIBILITY

Command responsibility standard is the backbone of the prosecution process when addressing the responsibility of military and political commanders for violations and atrocities committed in the conflict. The ICTY prosecuted numerous individuals in line with this principle when responding to its mandate to prosecute those holding the highest responsibility for crimes against values protected by international humanitarian law.

The command responsibility standard is also integrated in the Croatian local legal system which thus allows the prosecution of commanders from crimes committed by their subordinates. However, there are very few cases prosecuted in Croatian courts on the basis of this standard. Essentially, Croatian judiciary completely failed to prosecute commanders of at least the most massive atrocities committed on the territory of Croatia, and particularly those committed by the Croatian forces. YIHR Croatia assesses that this has to do with a sort of *de facto* immunity that the former military and political leaders in the 1990s have, due to political pressure of the lack of political will to prosecute those most responsible for atrocities.

YIHR noticed that the failure to prosecute commanders also have to do with a defective approach by the State Attorney's Office. In 2011 and 2012, after YIHR Croatia delivered statements from families of victims of crimes committed in Vukovar in 1991 to the State Attorney's Office, asking to prosecute the commanders who planned or allowed

for these crimes to be committed or failed to prevent them or failed to suspend the perpetrators, the State Attorney's Office failed to include in the investigation any persons who would have the knowledge and information about the commanders. The State Attorney's Office merely questioned those who are direct witnesses of crimes, thus having only the knowledge about the direct perpetrators.

Further, in 2012, YIHR Croatia and the Zagreb-based Serbian Democratic Forum (SDF) implemented a research into torture of prisoners during and after the military operation *Flash* of 1995. YIHR Croatia and SDF collected statements of some of the victims of torture who were captured after they surrendered to the Croatian forces on May 3rd 1995 in Pakrac and taken to the sports hall in Varaždin. YIHR Croatia and SDF pressed charges with the State Attorney's Office and did so directly to the then Chief State Attorney, Mladen Bajić, in his office. YIHR Croatia and SDF provided plentiful information about these crimes, including statements from victims and witnesses, medical records, photographs of injuries and documentation supporting the claims on capture. Regardless, the State Attorney's Office failed to produce an indictment to date.

Conclusion: A concern remains that the Croatian judiciary is *de facto* impotent to prosecute high-ranking political and military commanders who hold responsibility for atrocities and crimes committed in the 1990s, particularly those within the Croatian forces or then Croatian political establishment.

4.4. CONCERNS RELATED TO THE FAILURE TO FOLLOW-UP ON ICTY PROCEEDINGS

The ICTY was the key justice institution for the crimes committed in the former Yugoslavia until the local courts in the former Yugoslav states started prosecuting persons responsible for war crimes in a more professional manner. Today, as the ICTY is approaching its closure, more responsibility; virtually all of it, remains on the local judiciaries in the countries in the region. Understanding that the evidence and findings collected by and used before the ICTY, particularly by the Office of the Prosecutor, can be an invaluable asset for local judiciaries to continue prosecuting those holding responsibility for crimes committed during the conflicts, the ICTY OTP enabled the national prosecutions in the mandate countries to send liaisons to the OTP and use the evidence and findings. This information is not well known publicly in Croatia and YIHR Croatia itself had been informed on this by the ICTY Prosecutor, Serge Brammertz. Further, it was expected that the findings in the judgments rendered at the ICTY will provide many information relevant for further prosecutions before the local judiciaries.

Even though there is a liaison of the Croatian State Attorney's Office at the ICTY OTP, to the best of YIHR Croatia's knowledge, there have not been any cases started on the basis of information and evidence from the ICTY OTP archives. Further, there are two cases particularly important for this analysis that Croatia failed to prosecute to date: (i) Vukovar crimes against Serb civilians in 1991 and (ii) crimes committed during and after the operation *Storm* of 1995. In the first case, the ICTY delivered some documentation to the State Attorney's Office, and YIHR Croatia delivered more statements from witnesses. To date, the State Attorney's Office failed to produce an indictment for these crimes. In the case of operation *Storm*, the ICTY had prosecuted three persons in the *Gotovina at al.* case. The three men were acquitted, but the judgments (Trial and Appeals judgments) provide an extremely extensive body of evidence about the crimes committed. The Appeals judgment in this case was rendered in 2012 and the State Attorney's Office failed to provide any large-scale cases against those responsible for these crimes.

Conclusion: A concern remains that the local judiciary failed to adequately follow-up on the ICTY prosecutions by studying and analyzing evidence and findings and using them to prosecute persons responsible for crimes against values protected by the international humanitarian law.

4.5. CONCERNS RELATED TO INSTITUTIONAL CONCEALMENT OF CRIMES-RELATED INFORMATION

The Belgrade based Humanitarian Law Center, a leading transitional justice NGO in the region, opens its 2016 report on right to truth with the assertion that *Open access to archives which contain documents that can assist in determining the facts about past human rights violations is a key prerequisite for the establishment of transitional justice processes and mechanisms. In societies (...) which have experienced periods marked by systematic violence, access to information regarding human rights violations is an essential element of the right of victims and society as a whole to know the truth* (HLC: "Access to documents related to crimes against international law in the possession of Serbian institutions: State Secret prevails over Right to the Truth", Belgrade, Serbia, 2016).

Croatia is a party of the International Covenant on Civil and Political Rights and has a Law on the Right to Access to Information (official gazette 25/13, 85/15). However, YIHR Croatia's experience so far shows that the institutions holding information about the perpetrators of crimes do not provide open insight to them. We note that this is not based on a wide research, but rather on the experience of YIHR Croatia when researching about the cases of crimes. On several occasions, YIHR Croatia requested information from the Ministry of Interior Affairs and the Ministry of Defense. Mostly, YIHR Croatia requested information about units (military and police), institutions, bodies and persons who were responsible for planning or implementing specific actions or operations that led to crimes, or requested information on locations of particular units on particular days when the crimes were committed. Entirely, this information was denied to YIHR Croatia, claiming either that (i) they do not satisfy the definition of information as stated in the Law due to requirements for additional research or analysis or that (ii) they are related to an ongoing investigation.

YIHR Croatia firmly believes that this assessment by the institutions is based on an erred interpretation of Law on the Right to Access to Information and are instead withheld from the public access in an attempt to protect the members of the Croatian forces from prosecution. YIHR is currently preparing a brief on this issue specifically for the Office of the Information Commissioner in order to request assistance with this matter.

Conclusion: A concern remains that the institutions, mainly the Ministry of Interior Affairs and the Ministry of Defense are purposefully withholding the information about the actions of members of Croatian forces in relation to commitment of war crimes.

4.6. CONCERNS RELATED TO OBSTRUCTION OF PROSECUTION OF PERSONS RESPONSIBLE FOR CRIMES COMMITTED BY HV AND HVO FORCES IN BOSNIA AND HERZEGOVINA

Between 1992 and 1994, the forces of Bosnian Croats (HVO) supported by the Croatian forces (HV) committed numerous crimes against Bosniaks and Serbs in and around areas of the self-proclaimed Croatian Republic of Herzeg-Bosnia. Several key persons have been prosecuted before the ICTY in cases that found the conflict to be of international nature due to Croatia's participation (Aleksovski (IT-95-14/1), Blaškić (IT-95-14), Bralo (IT-95-17), Furundžija (IT-95-17/1), Kordić & Čerkez (IT-95-14/2), Kupreškić et al. (IT-95-16), Naletilić & Martinović (IT-98-34)). The major case related to these crimes (joint criminal enterprise) against Prlić et al. (IT-04-74) is still ongoing at the Tribunal, with the Appeals judgment expected in 2017.

The Prosecution and the Court of Bosnia and Herzegovina also deal with prosecution of these crimes and, through the established regional cooperation in criminal matters, occasionally request collaboration of Croatian judicial authorities. However, the Croatian Government and political leadership are refusing to acknowledge the political and military participation of Croatia and its forces in the operations in Bosnia and Herzegovina. Thus, the Government directly obstructs this cooperation in criminal matters. So far, both the left and the right governments were consistent in obstructing this cooperation and ignoring the provisions of the Agreement with Bosnia and Herzegovina.

Conclusion: A concern remains that the Croatian Government is politically obstructing legal, legitimate and lawful criminal processes against perpetrators of war crimes and crimes against humanity committed in Bosnia and Herzegovina between 1992 and 1994 by the cooperating HV and HVO.

5. RECOMMENDATIONS

YIHR Croatia urges the competent Croatian institutions:

Ad 4.1.

- To immediately ensure the provision of witness protection in pre-investigation and investigation stages, specifically related to crimes against values protected under international humanitarian law.
- To immediately initiate prosecutions of persons who publicly disclosed the identity of protected witnesses.
- To adopt a Strategy on Improvement of the Witness Protection Provision System, with a particular view of supporting more effective coordination among the competent actors.

Ad 4.2.

- To immediately task the working group currently preparing amendments on the Law on Criminal Proceedings to integrate provisions introducing principles and standards of the ICTY Rules of Procedure and Evidence that would allow for an adequate legal framework for prosecution of sexual crimes committed during conflict.

Ad 4.3.

- To adopt a new Strategy on Prosecution of Persons Responsible for Violations of International Humanitarian Law and integrate in it prosecution of persons holding command responsibility, particularly for mass crimes.

Ad 4.4.

- To immediately start using the ICTY OTP archives, documentation and findings to initiate additional indictments against persons responsible for violations of international humanitarian law.

Ad 4.5.

- To adopt principles for handling crimes-related information in the possession of state institutions based on the understanding and respect of the right to truth as a guiding principle.

Ad 4.6.

- To immediately start full implementation of the Agreement between Bosnia and Herzegovina and Croatia on cooperation in criminal and civic matters by ensuring the division of powers and the principle of non-interference of executive in judicial branch.
- To respect and acknowledge the findings and established facts of the judgments of ICTY, specifically related to Croatia's participation in the conflict in Bosnia and Herzegovina.

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