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Prosecuting War Crimes and Meeting Obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms at the Same Time – the Case of Croatia

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Abstract

This article aims to give an overview of how human rights violations that occurred during the Homeland War in Croatia are redressed by conducting criminal prosecution in the Republic of Croatia. Namely, criminal prosecution as one of the elements of transitional justice is essential not only for establishing the accountability of war crime perpetrators, but also as a warning that such violations shall not be tolerated in the future. Moreover, drawing on the jurisprudence of the European Court of Human Rights, this article examines how the efforts made by national prosecution bodies to investigate war crimes are assessed by this court. It concludes with the idea that both prosecution of war crimes and protection of human rights, as guaranteed by The Convention for the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights, seek to achieve the same goal, i.e. protecting the most basic human rights of the war crimes victims and other individuals.

KEY WORDS:

war crimes, transitional justice, criminal prosecution, human rights, The Convention for the Protection of Human Rights and Fundamental Freedoms, European Court of Human Rights

Introduction

This paper seeks to give an overview of national war crimes prosecutions, notably the efforts of the Croatian prosecution bodies to bring to justice those responsible for gross human rights violations. In addition, it aims to assess the relationship between the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) and jurisprudence of the European Court of Human Rights (hereinafter: ECtHR) on the one hand, and national war crimes prosecution on the other. Thus, this paper first provides an overview of the main features of the prosecution processes of Croatian national war crimes. Secondly, by drawing on the jurisprudence of the ECtHR, it will seek to outline how the ECtHR questions and reviews the work of national attempts to prosecute war crimes. It concludes with a thought that the Convention should be understood as being interrelated with national rights–protecting processes. Investigation, prosecution and, particularly, trials for war crime offences contribute significantly to establishing the facts about these crimes, the circumstances under which they occurred and those responsible for committing them. In such a way, investigation, prosecution and adjudication of war crimes play an important role in coming to terms with past events. It could be said that dealing with the past is inevitable for regaining the trust of the society in the rule of law and democracy. As every segment of a particular society has its own responsibility and role in transitional justice, the responsibility and obligation of state attorneys—prosecutors—is the investigation and prosecution of war crime offences. Facing the past in that sense stands as a contribution toward eliminating the consequences of armed conflicts and abuses of human rights that occurred during these conflicts, which could cause future human rights violations. By trying perpetrators of war crimes, society as a whole and individuals are confronted with the fact that murder, torture, unlawful detention and deportation of civilians, as well as other forms of committing war crimes—even if these crimes are committed by members of the military or police forces of the Republic of Croatia—are not in any way allowed and cannot be committed in the "defence from the aggressor". According to Ivo Josipović (2007), the concept of war crime can be used as a technical term for several criminal offences and is defined as a violation of domestic and international criminal law related to the armed

conflict for which sanctions are prescribed. Accordingly, the term war crime in a broader sense may be used to include not just war crimes but also crimes of genocide and crimes against humanity. Conversely, the term may be used *stricto sensu* in a way that includes only war crimes. This paper, when referring to "war crimes", shall denote war crimes against civilian populations and war crimes against prisoners of war, as stipulated in Articles 120 and 122 of the Basic Criminal Code of the Republic of Croatia.[1]

Efforts of the National Bodies in Prosecuting War Crimes

At the outset, it is crucial to pinpoint some basic features of the prosecution of war crime offences in the Republic of Croatia. Firstly, it has to be underlined that work on these offences is complex and mostly depends on the quality of data and evidence, notwithstanding international and internal obligations to prosecute these crimes. Secondly, a large number of people have already been prosecuted in Croatia. For instance, through 31 December 2014, proceedings against 3,553 persons for war crimes were initiated in the Republic of Croatia. State attorneys desisted from prosecuting some of these individuals after the investigation was conducted, either because it had been established that the said act was not a war crime offence or because sufficient evidence (regarding the criminal offence or the perpetrator's guilt) was not collected. By the same date, investigations were conducted against 220 persons. Based on the indictments raised by the competent State Attorneys' Offices,[2] first-instance criminal proceedings against 642 persons are still ongoing and convictions were rendered against 589 persons.[3]

It must also be noted that at the beginning of the 1990s, the initiation of war crime proceedings was very widespread in the sense that criminal

1 Published in the Official Journal of the Republic of Croatia, see http://narodne-novine.nn.hr/clanci/sluzbeni/1993_04_31_569.html, accessed on 12 June 2015.

2 County State Prosecutors' Offices are competent for the prosecution of these cases in Croatia.

3 Data is from 1991 to the referenced date.

proceedings were commenced without sufficient criticism and without necessary standards. For example, one is able to find a case in which an entire unit of 50 soldiers was reported to have committed a war crime (and consequently indicted and convicted) against three civilians who were murdered and who, according to autopsy reports, were killed with three bullets from one rifle. However, the Supreme Court acted as a corrective to such prosecution and pointed out in its judgements that such fact-finding does not include all necessary elements of the crime as defined in the applicable law.[4] Fact-finding in these indictments was on a very poor level, but at the time competent county courts recognised these offences as valid because the prosecution of these crimes started in parallel with the ongoing fighting. Without any attempt to justify this practice, the general circumstances must also be taken into consideration, especially the fact that the majority of police forces at that time were engaged in the defence of the country. Therefore, their primary tasks, such as detection of criminal offences and perpetrators, prevention of crime and collection of evidence were very limited. During that period of ongoing combat, even prosecutors dealing with war crime cases did not have sufficient knowledge of how to build such a case and prosecute war crimes (Perković 2014). Bearing in mind all these aggravating circumstances and the fact that heavy fighting was still present in the Republic of Croatia, prosecution of war crime offences was conducted with great difficulty. It could even be argued that the above-mentioned circumstances present at least one of the reasons why statutes of limitations are not applicable to war crime offences. It is not realistic to expect perfect prosecution during shelling.

Improvements in the investigation and prosecution

With the passage of time and the gaining of more experience, the practice was improving. As a consequence, certain standards in prosecution started to apply. First, thorough analyses were conducted by the Chief State Prosecutor's Office. These analyses were mostly carried out in the cases where judgements were rendered *in absentia*. The next step was the internal instruction of the Chief State Prosecutor's Office to the competent

4 See, for example, Decision of the Supreme Court of the Republic of Croatia, IKž-1295/1992-3, 28 January 1993, available at http://sudskapraksa.vsrh.hr/supra/OdlukaTekst.asp?docID=3D21307C8DEE&Anonimizirano=3D&Title=5A4255079C93FF69AA73E75C8FD4769A43E68C1791, [accessed 10 June 2015].

prosecutors to oppose *in absentia* trials for numerous reasons.[5] *In absentia* trials could be obstacles and barriers for the commencement of criminal proceedings in the countries where defendants are present. Furthermore, although there are some exceptions to the *ne bis in idem* principle, the final judgement *in absentia* may be the reason that prosecution will not be initiated in another country. In addition, many of the international and bilateral agreements on mutual legal assistance in criminal matters preclude enforcement of judgements rendered *in absentia*. Likewise, reopening of proceedings to the prejudice of the defendant who was finally acquitted is not possible. Thus, a situation may occur in which new evidence is collected, confirming with complete certainty that the referenced defendant committed a war crime, but criminal proceedings cannot be initiated because of this initial acquittal. Having all this in mind, the Chief State Attorney initiated amendments to the Criminal Procedure Act proposing that the defendant, under certain conditions, be allowed to ask for the reopening of the final proceedings without making such a request dependent on his or her presence. On the basis of the amended Article 497 of the Act, competent state attorneys asked for the reopening of *in absentia*–conducted proceedings and have filed such a request with respect to 100 persons. Thirty-three *in absentia* convicts themselves requested the reopening of the proceedings, and in three cases the court ordered the reopening of proceeding. After reopening, proceedings were discontinued against 106 persons, eight persons were convicted again, the courts have rejected requests for the reopening of the cases for six persons and currently the proceedings against 16 persons are pending after a decision granting reopening was delivered.

During the pre-accession and accession process to the European Union, Chapter 23[6] was very significant, and within that chapter war crimes, set as a special benchmark, were under special examination. During that period,[7] standards for prosecution crucially improved. Concerning standards themselves, the Chief State Attorney's Office introduced another internal instruction called "Standards and Criteria for Prosecution of War Crimes". This instruction gave guidelines to the prosecutors asking them to focus primarily on fact-finding and crucial evidence for better

5 Instruction from 8 February 2006; instructions form a part of internal rules for prosecutors and are not published in an Official Journal of the Republic of Croatia (*Narodne novine*) or made public in another way.

6 The *acquis* was divided into 35 chapters that formed the basis of the accession negotiations.

7 2003–2013. On 1 July 2013, the Republic of Croatia became a full-fledged member of the EU.

proof. This instruction cannot remedy the existing law or international rule on humanitarian and war law, but obliges prosecutors to assess the basis of criminal prosecution in existing cases and to assess this basis in future cases. It also directs prosecutors to consider every single case file they are working on in order to determine whether all necessary elements of criminal offence of war crime are met and if not, to conduct additional investigations and take necessary measures to improve evidence material.

Future work

Regarding the cases in which perpetrators are still not known, prosecutors were instructed to intensify conducts of criminal investigations to discover the perpetrators, by taking actions themselves or ordering police officers involved in the cases to do so. What was to be achieved (and the practice already has shown that it had) was the uniform application of standards for prosecution of war crimes, the removal of different approaches to similar crimes, the guarantee of adequate legal assistance by courts and the application of measures necessary for the protection of witnesses. All these changes were also needed in order to meet the standards of the human rights protection as set out in the Convention. Prosecution on command responsibility[8] was also introduced and applied for the first time in acase transferred to the Croatian judiciary from the International Criminal Tribunal for the former Yugoslavia, where confirmed indictment was given to Croatian competent authorities.

Agreements with other prosecutors' offices on the cooperation in war crime cases

Another distinctive feature of the work on war crime cases in Croatia is unavailability of suspects, very often of witnesses and of evidence material in general. As already mentioned, many of the indictments were raised or judgements rendered despite the defendants' absence and thus beyond the reach of the competent judicial institutions. Due to the need for more efficient actions in prosecution, the need for collection and exchange of evidence material which in many cases is outside the territory of Croatia and in neighbouring countries, and—maybe most important—the need for

8 While it is worth exploring the notion and the application of command responsibility, such an analysis extends beyond the scope of this work.

absent perpetrators to be convicted and serve their sentences, the Chief State Attorney's Office signed agreements with the prosecutors' offices of neighbouring countries for cooperation in war crime cases. Two types of agreements were signed: general and specialised agreements.[9] These agreements enable efficient cooperation in regard to the exchange of data, documents and regulations. In addition, they provide various types of assistance which have resulted in expedient and successful criminal proceedings. The field of application of such agreements extends to cooperation in prosecution of perpetrators of war crimes, crimes against humanity and genocide. They were signed with the main aim of prosecution of perpetrators located in neighbouring countries who have become nationals of those countries. Namely, citizenship of neighbouring country constitutes a main obstacle for extradition to the Republic of Croatia. These agreements are the Memoranda of Understanding signed with the Office of the War Crimes Prosecutor of the Republic of Serbia, the Supreme State Prosecutor's Office of Montenegro and the Prosecutor's Office of Bosnia and Herzegovina. The main focus of these agreements are data and documents which enable initiation of proceedings against persons who committed war crimes against citizens of the Republic of Croatia under condition that perpetrators reside in these neighbouring countries. Specifically, because they have obtained citizenship of another country, they could not be extradited for prosecution, but in this way, data and information are delivered to the prosecutor's office in the country where they reside. Then the competent prosecutor's office of that country makes a decision on whether to prosecute or not. It can be said that this is an efficient way to fight impunity, because the most important goal—i.e. "no crime should go unpunished"—is at least partly achieved. It can be argued that regional cooperation is a crucial condition for the prosecution of these crimes. In this way, a strong statement is made that punishing perpetrators of war crimes is possible regardless of many legal obstacles and regardless of who actually carries out the prosecution, sending a message that perpetrators cannot escape justice. Results were achieved through actions conducted in line with these agreements. For example, based on current cooperation with the Office of the War Crimes

9 The General Agreements are as follows: Memorandum of Understanding in establishment and improvement of mutual cooperation in the fight against all forms of serious crime signed with the Supreme State Prosecutor's Office of Montenegro; Memorandum of Understanding in establishment and improvement of mutual cooperation in the fight against all forms of serious crime signed with the Republic Public Prosecutor's Office of the Republic of Serbia; and Protocol on realisation and enhancement of mutual cooperation in the fight against all forms of serious crime with the Office of the War Crimes Prosecutor of the Republic of Serbia and Prosecutor's Office of Bosnia and Herzegovina. Available at: http://www.dorh.hr/Default.aspx?sec=649, [accessed 9 June 2015].

Prosecutor of the Republic of Serbia, data and documents in 44 cases referring to 84 defendants were exchanged. Of that number, indictments were raised against 21 defendants in the Republic of Serbia. To date, 18 persons were convicted. However, only 14 of those judgements became final. Regarding these agreements, it should be noted that the proceedings initiated in the Republic of Croatia are not discontinued until the final decision is rendered in the Republic of Serbia, to safeguard the independence of the judiciary in conducting criminal proceedings.

Strategic approach to future prosecution

The next issue state attorneys were faced with were unprosecuted crimes. As mentioned above, there is a great need for efficient prosecution and pronounced importance of the continuous detection and prosecution of offenders of these serious crimes, but even more important, there is also the need to put to an end to impunity when it comes to unresolved crimes. This is very important for dealing with the past and for reconciliation. As long as there are still unsolved cases, one could always manipulate the "history". Hence, "judicial truth" and elucidating these crimes are of the utmost importance. Taking into account the fact that in a number of war crimes, perpetrators were not detected (and hence not prosecuted), in July 2010, the Chief State Attorney's Office of the Republic of Croatia requested from competent County State Attorneys' Offices reports on all the cases in which perpetrators were still unknown. This was also important since keeping statistics and presenting data on the number of defendants did not enable complete overview and analysis. For that reason, competent state attorneys' offices designated "crimes" in their areas of competence. This was also important since, on the basis of the existing statistics and overview of the files, it was not possible to determine the real state of affairs. In addition, an important part of denoting the "crimes" was the possible prosecution on the basis of command responsibility for crimes in which it would not be possible to establish every single immediate perpetrator for every single victim. For better understanding, it was determined that "crime" denotes events determined by the characteristic time period, mode and place of the commission of crime, which simultaneously contains all features of criminal offence of war crime pursuant to applicable law. As a result, the notion of "crime" may contain only case files (cases) against known perpetrators or case files (cases)

against known and unknown perpetrators. After intensive analyses were conducted, some of these crimes were designated as priorities, some were chosen to be war crime priorities at the national (state) level and some chosen as priorities at the regional (local) level. Prioritisation was conducted according to several criteria, such as the severity of the case, number of victims and sensitivity of the case. This was done with the aim of systematic investigation of unprosecuted and yet unexplored crimes. When the complete list was made, it was delivered to the Ministry of Internal Affairs and Police Chief Directorate for purposes of drafting an "action plan" for the investigation, and at the same time for the intensification of the criminal inquiries to detect and prosecute the perpetrators of these crimes. It was also crucial to conduct some additional activities in the investigation of all war crimes committed in the territory of the Republic of Croatia or against its citizens, and therefore the "Strategy Defining Obligations of Certain Authorities in the Investigation and Prosecution of War Crimes Committed from 1991 to 1995" was issued in February 2011. The strategy outlined parameters of the factual context at the time; defined prioritisation; and established capacities and future activities for police officers, prosecutors and the Ministry of Justice. In the Chief State Attorney's Office, an operative program was adopted to provide support and implement the above-mentioned strategy. This operative program prescribes in detail immediate obligations of state attorneys working on these cases, also setting deadlines for some of their actions as well as the main obligation for them to work together with police officers on these cases. It also provides for the obligation to establish task forces in the most complex cases. No less important, systematic delivery of progress reports in regard to chosen priorities was set. Consequently, task forces were formed speedily and commenced with the implementation of prescribed obligations. In the meantime,[10] the Act on the Implementation of the Statue of the International Criminal Court and Prosecution of Crimes against International Law of War and Humanitarian Law[11] was amended, prescribing that the four largest County Courts in Croatia (Osijek, Rijeka, Split, Zagreb), and therefore the four largest County State Attorneys' Offices seated in those cities, are competent for war crime cases. Consequently, special War Crimes Sections were established

10 During 2011.

11 Published in the Official Journal of the Republic of Croatia (*Narodne novine* no. 175/03, 29/04, 55/11, 125/11); available at: http://narodne-novine.nn.hr/, [accessed 12 June 2015].

in these four specialised courts and state attorneys' offices. Since the implementation of the strategy, progress was achieved in regard to the crimes in which perpetrators were unknown and some of the war crimes chosen to be priorities were "resolved", by the detection and prosecution of its perpetrators. According to data from the State Attorney's War Crime database, a total of 490 crimes were registered. Currently, according to the War Crime database data,[12] there are 319 crimes involving known perpetrators and 171 crimes involving unknown perpetrators.

War Crime Cases and the ECtHR

Status of the ECHR in the Croatian legal order

Following the end of the Homeland War in the Republic of Croatia and the peaceful reintegration of the eastern part of the country in 1998, the country was faced with a pressing need to prosecute individuals for international crimes. In the meantime, on 5 November 1997, the Convention entered into force in the Republic of Croatia. Its internal legal status within Croatian legal framework is very strong; it is directly applicable and can be relied upon before Croatian courts. Moreover, it is hierarchically superior to all other national laws.[13] Accordingly, this means that Croatia follows the monist approach in the application of the Convention, which has a quasi-constitutional status in the Croatian internal legal order (Omejec 2013: 64).

Right to life and the meaning of positive obligations

Taking into account that in the context of war crimes and its victims most applications brought to the ECtHR allege a breach of the right to

12 In August 2015.

13 Article 134 of the Croatian Constitution reads as follows: *International treaties which have been concluded and ratified in accordance with the Constitution, published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law.* Article 115, Paragraph 3 of the Croatian Constitution reads as follows*: Courts shall administer justice according to the Constitution, law, international treaties and other valid sources of law.*

life guaranteed by the Article 2[14] of the Convention, this paper focuses on the positive obligations of the state to secure this truly fundamental right.[15] The question arises how the ECtHR assesses whether the state has met its obligations under the Convention. Before going into this analysis, it might be helpful to elaborate on a few main issues. Firstly, it is important to note that the right to life entails negative and positive obligations. The negative obligation or the "obligation to respect" requires from the state "not to take life". Thus, Article 2 prohibits the taking of life, except in the situations listed in the text of the Article.[16] On the other hand, the positive obligation is "obligation to protect and to implement". It demands that the state protect the addressees of this right against third party interference and also entails the duty of the state to put in place measures necessary for the complete realisation of the right (Akandji-Kombe 2007). Positive obligations have developed through the case law of the ECtHR.[17] Namely, in order to secure the rights and freedoms defined negatively in the text of the Convention, the ECtHR started to interpret the Convention in a way that guarantees full recognition of these rights. In the case LCB v UK, (1998) the ECtHR acknowledged for the first time that the obligation contained in the first sentence of Article 2(1) encompasses a positive obligation to take "appropriate steps to safeguard the lives of those within their jurisdiction"(*ibid.)*. Thus, in addition to the state obligation to refrain from the interference into the rights of persons under their jurisdiction, the Convention calls for the state obligation to take steps to prevent the breach of the right to life as well as to protect it, in relations between private parties as well as between a state and a private party. Secondly, the dichotomy exists not only as regards positive and negative obligations. The ECtHR also makes a distinction between "substantive"

14 Article 2 of the Convention reads as follows: *(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
(2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

15 Article 2 cannot be derogated from in the time of war or other public emergency, see Article 15(2) of the Convention, see McCann v UK [GC], no. 18984/91, §147, ECHR 1995 Series A, No 324.

16 As regards the first exception, i.e. the death penalty, it is necessary to note that the death penalty is almost completely absent in the Member States of the Council of Europe. Also, Protocol No. 6 to the Convention requires the abolition of the death penalty in peacetime, and the Thirteenth Protocol the abolition of the death penalty in time of war. For more information on Protocols, ratifications and reservations of particular states, see: http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG, [accessed 10 June 2015].

17 Positive obligations first developed in the context of Article 3 (prohibition of torture) and Article 8 (right of respect for private and family life).

and "procedural" obligations. Substantive obligations are those which require the proper framework for full realisation of the particular right. To give an example, a substantive obligation would be an obligation of the state to enact laws that enable effective investigation and prosecution or an obligation of putting in place rules that effectively govern police intervention. Since this paper's focus is on the latter obligation—that is, the procedural obligation to investigate suspicious deaths—it will examine this obligation in more depth. Procedural obligation is the obligation to undertake a series of measures establishing the circumstances in which someone was deprived of life. Thus, in McCann v UK (1995), the Court held as follows:

> The obligation to protect right to life under this provision (Article 2) read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in the Convention" requires by implication that there should be some form of effective investigation when individuals have been killed as a result of the use of force, inter alios, agents of the State.

What is the ECtHR's reasoning behind establishing this procedural obligation? Concluding that any general legal protection of life would be ineffective in practice in the absence of a procedure for establishing the accountability of those responsible for unlawful killings, the ECtHR interpreted Article 2 as requiring contracting parties to undertake effective investigations in situations of suspicious deaths. Ovey and White (2006) point that the t "requirement (to conduct effective investigation) has formed a useful part of the Court's artillery". The ECtHR examines the variety of steps taken by the national bodies to find those responsible as well as steps taken to establish their accountability. In some cases, the actions taken by the contracting state have been found to be adequate, while not in others. To illustrate this point with a Croatian example, in three cases[18] against Croatia that concern crimes committed during the Homeland War, the ECtHR found that investigation into the death of applicants' relatives did not meet the requirements of effective investigation. In two of those cases, the ECtHR delivered its judgements on the same date and

18 Jularić v Croatia, no. 20106/06, ECHR 2011; Skendžić and Krznarić v Croatia, no. 16212/08, ECHR 2011; Jelić v Croatia, no. 57856/11, ECHR 2014.

found violation of Article 2 in its procedural aspect in both of those cases. The Jularić case (2011) as well as the Skendžić case (2011) concern events that took place before the Convention entered into force in Croatia. Thus, in the context of this paper, it is important to address the issue of how and in what way a state can be responsible for the acts that took place before the entry into force of the Convention in that state.[19] As a general rule of international law, states can be held accountable for events that occur after they have ratified the Convention. However, due to a specific character of procedural obligation under Article 2, the ECtHR held in numerous cases that this obligation is a separate obligation capable of binding the state even when the death took place before the critical date. This argumentation on temporal jurisdiction was first introduced in the Šilih v Slovenia judgement (2009). Principles set out in the Šilih judgement are summarized in the following paragraph.

When the death took place before the entry into force of the Convention in a contracting party against which the case was brought, but the shortcomings or errors in the conduct of the investigation occurred after that date, the ECtHR will have temporal jurisdiction to review whether the state has complied with its obligation to conduct an effective investigation. Nonetheless, there are still certain limitations of temporal jurisdiction in such cases. Firstly, only procedural acts and/or omissions occurring after the critical date can fall within the ECtHR's temporal jurisdiction (*Ibid.* § 162) Secondly, the ECtHR stresses that in order for the procedural obligations to come into effect there must be a genuine connection between the death and the entry into force of the Convention in respect to the respondent state. Hence, for such connection to be established, two criteria must be met: (1) the lapse of time between the death and the entry into force of the Convention must have been reasonably short, and (2) it must be established that a significant proportion of the procedural steps were or ought to have been carried out after the ratification of the Convention by the state concerned.[20] There are also situations in which the ECtHR might rule that there is a need to secure that the guarantees and the underlying

19 It would be interesting to examine the application of the six-month rule in which application to the ECtHR can be brought with regard to alleged violations of procedural obligation of the State to investigate suspicious deaths, but it would go beyond the scope of this paper. For example, see decisions on inadmissibility in the cases against Croatia where applications were rejected as being lodged out of time: Gojević-Zrnić and Mančić v. Croatia(dec.), no. 5676/13, ECHR 2015; Blečić v Croatia (dec.), no. 59532/00,ECHR 2006; Bogdanović v Croatia, (dec.), no. 72254/11, ECHR 2014.

20 A practical guide on admissibility criteria, Council of Europe/European Court of Human Rights, 2014, is available at: http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf, [accessed 15 June 2015].

values of the Convention are protected in a real and effective manner ("Convention values test") (Šilih v. Slovenia 2009).

Judgements against Croatia

It is indisputable that all cases against Croatia concerned with events during the Homeland War in which alleged violations of Article 2 took place, occurred before Croatia ratified the Convention. Thus, in those cases, a substantive aspect of Article 2 is considered by the ECtHR to be outside the period covered by its jurisdiction. On the other hand, the subsequent procedure that occurred within its temporal jurisdiction is subject to its review. Thus, the ECtHR in a way extends its temporal jurisdiction by interpreting Article 2 as encompassing a procedural obligation to investigate. One of the three above-mentioned war crime cases in which the ECtHR found a violation of the Convention right is the Jularić case, which concerns the killing of the applicant's husband in Vukovar in 1991. According to the applicant, three men dressed in Yugoslav People's Army uniforms took her husband from his house and shot him dead. The applicant argued that the national authorities had failed to comply with their duty to conduct an effective and thorough investigation capable of identifying the perpetrators and bringing them to justice. Before considering the particular facts of the case, the ECtHR made general comments on its interpretation of Article 2. Namely, it repeated the requirements that need to be met in order for the ECtHR to conclude that the investigation had been effective. First of all, it noted that the obligation to protect life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (Jularić v. Croatia 2011). It then went on to explain what form of investigation will achieve the purpose of effective implementation of the domestic laws which protect the right to life and ensure accountability.[21] First, the investigation must be capable of leading to the identification and punishment of those responsible. In particular, the authorities must take the reasonable steps available to them to

21 It is important to note that despite a framework the ECtHR gives for establishing whether investigation was effective, this will still depend on the circumstances of the specific case.

secure evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible may risk falling foul of this standard. There must also be an implicit requirement of promptness and reasonable expedition.[22] Secondly, the ECtHR did accept that national authorities can face obstacles in the investigation, but still required a prompt response in order to maintain the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts. Thirdly, it noted that there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory (*Ibid.)*. Having set out the general requirements, the ECtHR analysed the facts of the particular case and found that investigation had substantial shortcomings as it had long periods of complete inactivity of investigative bodies.

In the Skendžić and Krznarić case, the ECtHR took the same approach of first setting out general notions of procedural obligations and afterwards examining in detail the steps taken by authorities. By doing so, it concluded that inexplicable delays occurred in the undertakings of the State aimed at obtaining evidence. In addition, the ECtHR separately addressed the issue of independence of investigation and found that the investigation was not conducted by the independent police officers since "the inquiry was entrusted to the same police station of which the police officers had arrested M.S. and then transferred him to Gospić" (Skendžić and Krznarić v. Croatia 2011 § 90). Some of the police officers who had arrested M.S., were still working at the same police station at the time of the inquiry. (Skendžić and Krznarić v. Croatia 2011). Accordingly, the ECtHR found a breach of procedural aspect of Article 2.

The third case against Croatia, Jelić v Croatia (2014), is somewhat different. In this case, concerning the death of the applicant's husband in 1991 in Sisak, Croatian authorities not only conducted a thorough investigation, but also a person responsible under command responsibility for acts committed in Sisak in 1991–1992 was found guilty by the competent court. The applicant's husband was one of the victims for whose killings this person

22 Jularić v Croatia, no. 20106/06, § 42, 43, ECHR 2011.

was indicted and subsequently found guilty under command responsibility. However, going through the same examination as in previously mentioned cases, the ECtHR was not satisfied with the efforts Croatian authorities made to bring to justice those who commanded the killings of people in Sisak in 1991–1992. On the contrary, the ECtHR found the investigation to be inadequate and found that Croatia violated its procedural obligation to investigate suspicious deaths. This judgement raises concerns not only about its execution and supervision by the Committee of Ministers but also about future cases in which a command responsibility was established but the evidence did not provide sufficient basis for indicting those directly responsible or in which the direct perpetrators remained unknown.

To sum up, the requirements of effective investigation are the following. First, authorities must act on their own motion once a matter has come to their attention. They cannot leave it to the initiative of the next of kin to lodge a formal complaint. Second, it must be carried out by someone who is fully independent of those implicated in the events. Third, it must be capable of leading to an identification and punishment of those responsible. Fourth, it must be carried out promptly. Fifth, it must, to a certain degree, be open to public scrutiny. Sixth, the relatives of the deceased must always have the opportunity to become involved.

To end this part of the paper on a more positive note, the ECtHR has recently delivered three judgements and found that Croatia met its procedural obligation in investigating killings during the Homeland War. These are Nikolić v Croatia (2015), Mileusnić and Mileusnić-Espenheim v Croatia (2015), and Nježić and Štimac v Croatia (2015). These judgements can be seen as an additional incentive for Croatian authorities to take all the possible steps in investigating war crimes.

Conclusion

Although some might see the ECtHR and the Convention as state enemies, thwarting national sovereignty, this article concludes with a quite opposite suggestion. Namely, the tasks accorded to national bodies—investigation, prosecution and adjudication of those responsible for gross human rights violations—protects the rights of the victims and their families. Thus, the protection of human rights is granted at the national level and can be efficiently achieved. In addition, the primary responsibility for enforcing the Convention falls upon the state parties (Harris, O'Boyle and Warbrick 2009: 23), which is in line with one of the core principles of the Convention system, namely, the principle of subsidiarity. Becoming aware that their actions and decisions could be scrutinised by the ECtHR, and according to Convention standards, national bodies have one more incentive to continue in their efforts in establishing accountability for those responsible for war crimes. Consequently, in promotion of human rights values, the task of national bodies goes hand in hand with the task of the ECtHR.

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