

Objective standards in processing
war crimes of the State Attorney's Office
of the Republic of Croatia

During the last decades, the issue of war crimes has become the source of interest of numerous State Prosecutors Offices worldwide. History of mankind, which, before all, is a history of war, and not of peace, resulted in development of Criminal law legislation, so that today, definitions of war crimes are clearer than ever before. Also, obligations and decisiveness of the international community in processing war crimes became one of the important goals of numerous international organizations.

The issue of war crimes is reflected differently among states: the problems which Prosecutors Offices encounter in countries which experienced war on their own territory are different than those encountered by Prosecutors Offices whose competence consists of mere reflections on certain war-like events. The burden of those Prosecutors Offices which experienced war on their territory, where there are remains of much destruction, numerous victims, witnesses and also perpetrators of criminal offences is different. On the other hand, there are countries in which, by a twist of fate, numerous witnesses, damaged persons, as well as perpetrators ended up in, and who must be prosecuted by all states pursuant to international conventions. My intention is to speak of experiences of the State Attorney's Office of the Republic of Croatia in processing war crimes and also point out the important problems we have encountered in the last almost twenty years, and our solutions to those problems.

In regard to the aforementioned, it is necessary to point to some essential facts which were important for the activities of Prosecutors Office: there was a war on the territory of the Republic of Croatia; there were numerous victims, and huge destruction. However, it should be noted that not only members of the aggressor army appeared in the capacity of perpetrators of criminal offences, but that there were members of those domestic armed forces who participated in the defence of the country – not only on the territory of the Republic of Croatia, but also of another state were taken into consideration as possible perpetrators of criminal offences.

In connection to this, it should also be taken into consideration that Prosecutors Office must act the same when it comes to war crime as it would act in regard to any other criminal offence: immediately upon receiving information on perpetration of criminal offence, it is necessary for the prosecutors to undertake certain actions. This resulted in processing many situations, raising indictments and holding trials against many perpetrators of criminal offences even during war. In such “war-time” circumstances, it is very difficult to conduct adequate criminal proceedings as it is done in period of peace. There is an issue of availability of witnesses, indicted persons, and trials *in absentia* were frequent. All that can result with problems in conducting criminal proceedings and, by that, also bring in question the rule of law.

The longer the time distance from war events, the higher the possibility to approach the processing of war crimes in a professional and more objective manner. In order to achieve this goal it was necessary to set “objective standards”, so that all prosecutors participating in prosecution of war crimes, can work on these important issues in an equally quality manner.

It is of special importance, and also “conditio sine qua non” of each act of a prosecutor, not to discriminate in the prosecution of war crime:

- on the basis of a perpetrator of a criminal offence (divide them into “them” and “us”)
- against the victims (also divide them into “them” and “us”)
- on the basis of a place (locality) of the perpetration of the crime (in “our” or “their” territory)
- and also on the basis of the country in which the crime was perpetrated.

Applying an objective approach demands objectivity and expertise. It is not easy to conduct objective criminal proceeding not only against aggressor but also against members of domestic armed forces who in the eyes of the public are perceived as heroes or deserving citizens. However, the very ability to objectively conduct criminal proceedings evaluates the maturity of the entire society, especially its judiciary.

The results we achieved in processing war crimes give us the right to claim that we have been successful in regard to objectivity and fairness in prosecution of war crimes.

In setting objective standards of processing war crime cases there are two important starting points:

- to assess whether a reported criminal offence is actually a war crime
- to assess if there is a reasonable suspicion that the reported person committed a war crime.

Although it sounds quite simple, when it comes to war crime these are very complex issues.

1. In assessing whether a reported criminal offence is actually a war crime it is necessary to take into consideration the following:
 - a) Does the event burdening the suspect contain all important characteristics of war crime or some other criminal offence? This issue is very important in the Republic of Croatia since there are a lot of criminal offences for which the enemy forces were given general amnesty, such as criminal offences of participation in enemy forces and similar.
 - b) Is the criminal quantity of non-law (illicit or punishable act) such, that it transfers from one criminal offence or other punishable act into criminal offence of a war crime? Did some criminal offences due to special complexity, proportion or consequences of the specific act develop into a war crime? (For example: were the acts of larceny or robbery or illegal usurpation of property extensive and/or against a large number of persons connected to regular military needs or not? If the latter is the case, it could be the criminal offence of war crime).

- c) What were the motives of the perpetrator? (In war times it should be taken into consideration that certain events take place in “micro environment” where victims and perpetrators know each other. We could be dealing with murder motivated by private reasons, and in that case it is not a war crime. On the contrary, if the motif of the murder was intimidation, ethnic hatred or similar we are dealing with a war crime).
- d) Is the factual description of the criminal offence (act of execution of criminal offence) sufficiently concrete in relation to the suspect, so that the factual description clearly and without any obscurity depicts the act of execution of the criminal offence?
- what did the superior military or civil person order to his subordinates, do the action he ordered contain important elements of a war crime, that is, is it a case of command responsibility, what did the responsible person omit doing to prevent war crime, or to report a war crime and perpetrator,
 - if we are dealing with the immediate perpetrator, what act of execution of war crime is he burdened with, is this act of execution depicted in the investigative request or indictment in an indisputable manner (it is not enough to say “e.g. killed together with others”, it is necessary to concretely describe who he killed and in what way, alone or with other persons etc.).

Although all these inputs appear the same as all other actions prosecutors need to conduct in other “regular” criminal offences, it should be pointed out that war crime subject is extremely complex. Namely, it is necessary to analyse the mentioned parameters, so as to be able to claim with certainty it was a war crime that was committed, or some other crime committed during the war.

It is important to differentiate between these matters, because it can easily happen that any type of participation in war events, war operations, military actions or actions undertaken immediately after the war, is proclaimed as war crime. It is not legally correct, and it can produce serious consequences: huge number of reports of war crimes which utterly diminishes the sense of prosecution of these most serious criminal offences. And not only that, but the number of criminal proceedings as well as of processed persons rises, and after a while we are faced with the paralysis of the legal system. The consequence of such action is something that everyone wants to avoid: for persons suspected for committing the most serious criminal offences to spend their life quietly without providing justice to the victims.

2. In assessing the existence of reasonable suspicion that the defendant committed criminal offence of a war crime which he is burdened with, prosecutors are obliged to objectively, competently and critically evaluate data upon which a statement on existence of such suspicion is based. In regard to that, it is necessary to evaluate:
 - a) Whether the available evidence are credible and sufficiently concrete to produce reasonable suspicion that the defendant is the perpetrator of a criminal offence. In doing so it is necessary to take into consideration:

- Whether the witnesses or future witnesses without any doubt stated what they personally know, and whether the allegations of such witnesses indicate that the suspect is the perpetrator of the criminal offence.
 - In case certain documents exist, whether they are credible and can be used as evidence in the proceedings.
 - If there are video or audio recordings it should be assessed whether these recordings are credible, whether their origin and author is known, and whether they will be usable as evidence in the criminal proceedings.
- (b) In case there is a lack of indisputable evidence or information regarding the defendant, it is necessary to assess whether there are other evidence, documents or data which indicate as to the existence of reasonable suspicion that a person is a perpetrator of a criminal offence, and assess whether it is possible to obtain such data.
- (c) Prosecutors are especially obliged to evaluate whether the procedure is initiated on the basis of a hearsay witness, i.e. witness who only possesses general knowledge on possible involvement of the defendant in the perpetration of a concrete crime. If such witnesses are in question, it is necessary to check whether it is possible to make such information concrete or not, and reach a decision on possible criminal procedure on that basis.

Such “objective standards” represent the basis of every prosecutors conduct in the issue of processing war crimes. They do not just provide good grounds for conducting quality proceedings in an objective manner towards all perpetrators, without any ethnic or other prejudice, but also provide realistic possibilities of reaching a quality decision in this procedure. By respecting such standards another quality is achieved and that is the uniqueness in criminal prosecution of the most severe criminal offences.

Those are the reasons why all prosecutors are familiar with these standards, and are obliged to follow them in processing criminal offences of war crimes.

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