ATTACKS ON JUSTICE – REPUBLIC OF CROATIA

Highlights

During the period 2003-2004, Croatia continued to experience significant changes under the new Government of Prime Minister Sanader, particularly in its bid for accession to the EU. Sanader, along with President Mesic, continued the reform process begun in 2000 which brought Croatia out of the international isolation that it suffered under Tudjman's previous regime. Croatia introduced judicial reform in 2003 but the implementation has been relatively slow, and the judiciary continues to suffer from perceived political bias and significant backlogs. Croatia had increased cooperation with the ICTY in the surrender of suspects and in responding to requests for information. But in domestic cases, certain judges have demonstrated ethnic bias against Serbs. In 2003, Croatia sought to harmonize its domestic criminal law with international standards so that domestic courts would be competent to prosecute cases transferred from the ICTY.

BACKGROUND

In **June 2003** Croatia was granted official **EU candidate status** following recent developments in strengthening democracy. But accession negotiations stalled in **March 2005** because of the **International Criminal Tribunal for the Former Yugoslavia** (ICTY) Prosecutor's negative report regarding Croatia's lack of cooperation with it. The slow pace of judicial reform is also one of the fundamental impediments to Croatia's membership (European Council Presidency Conclusions, **17-18 June 2004**), http://ue.eu.int/cms3_applications/applications/newsRoom/loadBook.asp?BID=76&LANG=1&cmsID=347). In its attempt to achieve standardization with EU regulatory and legislative norms, Croatia signed 10 and ratified 12 legal instruments of the Council of Europe (see http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?PO=CRO&MA=999&SI=3&DF=&CM=3&CL=ENG for Treaties signed but not ratified, and http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?PO=CRO&MA=999&SI=2&DF=&CM=3&CL=ENG for treaties signed and ratified or having been the subject of an accession, as of **12 April 2005**).

In **November 2003**, parliamentary elections brought the reformed HDZ party back into power and its head, **Ivo Sanader**, became Prime Minister. Voter turnout was lower than the 2000 elections. An unemployment rate of about 15 per cent remains one of the country's major problems.

Though Croatia was previously criticized for its lack of cooperation with the **ICTY**, this recently changed. In **June 2004**, **Chief ICTY Prosecutor Carla del Ponte** announced that Croatia was cooperating fully, and its Ministry of Justice had given access to documents, witnesses and interviews. However, as at **October 2004,** former

general **Ante Gotovina** remained at large since being indicted by the ICTY nearly three years earlier.

On **17 June 2004**, **Croatia**, **Albania** and **Macedonia** submitted a joint application for **NATO membership.**

In **October 2004**, amendments to the *Criminal Code* came into force. They introduce, *inter alia*, the criminal offences of "crimes against humanity", and "subsequent assistance to a perpetrator of a criminal act against values protected under international law". The amendments also indicate three forms of command responsibility as a basis for individual criminal liability. It is unclear if the new provisions will have retroactive effect, and thus whether they will apply to proceedings stemming from the Homeland War. Croatia ratified the *Rome Statute of the International Criminal Court* in **May 2001** but refused to sign the *bilateral immunity agreement* with the USA (http://www.osce.org/documents/mc/2004/06/3164_en.pdf).

Since becoming president in **February 2000**, **Stjepan Mesic** has been able to bridge the gap between political parties, and has successfully promoted Croatia's bid for EU candidacy. Re-elected in a close race in **January 2005**, the office of President Mesic has become one of the most trusted and transparent institutions in the country ("Nations in Transit 2004: Croatia", http://www.freedomhouse.org/template.cfm?page=47&nit=330&year=2004).

JUDICIARY

The judiciary continued to suffer from a number of serious problems such as allegations of a lack of judicial independence and impartiality, a backlog of cases (see Access to Justice), delays in execution of judgments, as well as shortfalls in funding and training.

Judicial reforms

In **November 2002**, the Ministry of Justice unveiled a far-reaching reform plan ("**The Reform of the System of Justice**", the so-called **"Reform Plan"**), which proposed radical civil and criminal legislative amendments with the goal of establishing an efficient and unbiased judicial system. This was followed by the **Operational Plan of June 2003** (http://www.osce.org/documents/mc/2003/12/1976_en.pdf).

Following the Reform Plan, Parliament adopted amendments to the *Law on Courts* at the **end of 2003** allowing for the redistribution of certain cases to less burdened courts, and the territorial distribution of courts. Amendments to the *Law on Civil Procedure* of **December 2003** increased the frequency of trials conducted by an individual judge, shortened time limits for necessary actions in cases, shifted responsibility for collecting evidence from the court to the parties, and extended the Supreme Court's jurisdiction. The amendments also tightened requirements for seeking the recusal of judges. In **October 2004**, the government repealed measures in the *Law on Execution* which had been sponsored by the former government and were intended to speed execution of final court decisions.

However, the Reform Plan, despite its intentions, does not go far enough to relieve judges of all their non-judicial functions in order to allow them to focus on the court. The judiciary remains responsible for the organization and supervision of constituency, city and municipal elections. Domestic and international observers have suggested that a **permanent State Election Commission (SEC)** could enhance both election supervision and judicial reform. A draft law for the creation of such a Commission has yet to be tabled.

In **May 2004**, the Ministry of Justice of the newly-elected Sanader government issued a concrete outline of these plans and committed itself to their implementation by 2007 ("Croatian Justice Reform Update (Initial Report)", Ministry of Justice, Newsletter No. 1, **15 May 2004**). This was followed by an update in **October 2004** of the technical measures needed to further implement the judicial reforms.

Broadening of domestic jurisdiction to prosecute war crimes from ICTY
In **October 2003**, Parliament adopted the *Law on the Implementation of the Statute of the International Criminal Court and Criminal Prosecution for Acts Against War and Humanitarian International Law*, with a view to increasing the capacity of domestic jurisdictions to prosecute cases transferred from the ICTY. This law mainly regulates Croatia's cooperation with the **International Criminal Court** (ICC), but also governs proceedings transferred from the ICTY and domestic war crime trials. It further creates four special war crime chambers (Osijek, Zagreb, Rijeka and Split) and establishes a mechanism for moving cases to these courts. In **2004,** however, over 80 per cent of all cases were tried by courts other than these special chambers. To date, no cases have been referred to these special chambers, while some cases are heard in these courts as courts of general jurisdiction.

Independence of the Judiciary
Lack of Impartiality
The alleged **lack of judicial impartiality**, particularly in handling war crimes cases is an ongoing reality and is not addressed in the Reform Plan. The ethnicity of defendants and victims allegedly continue to affect the decisions of Croatian courts. According to the OSCE Mission, Serbs are more likely to be convicted than Croats. The alleged bias is also seen in the difference in the type of charges brought against Serbs and Croats. An example is the use of the crime of genocide to prosecute Serbs although the gravity of their acts is not so great as that of the crimes usually addressed in the context of genocide by international tribunals (http://www.db.idpproject.org/Sites/IdpProjectDb/idpSurvey.nsf/wViewCountries/01DB784A630702D4C1256E93005264D0, **June 2004**). Perceived judicial partiality is also an obstacle to minority return.

A significant precedent was set in **March 2003** when the **Rijeka County Court** convicted three high-ranking Croatian military officers (the "**Gospic Group**") and imposed significant sentences for war crimes committed against Serb civilians during the Homeland war. In the **first six months of 2004,** there were fewer trials in absentia, mainly against Serbs.

Judicial Appointments
Judges are appointed by the **National Judicial Council (NJC)** taking into consideration the opinion of an authorized Parliamentary committee (Article 123 of

the *Constitution*, 2001, http://www.usud.hr/default.aspx?Show=ustav_republike_hrvatske&Lang=en). A similar Council exists for nominating **Public Prosecutors** (Article 124 of the Constitution). Although the NJC's composition and procedure appear independent, there is a lack of clearly defined objective criteria guiding the appointment procedure. This raises fears that appointments of court presidents, made by the Ministry of Justice, may be used to advance the Minister's political agenda. The Parliamentary Committee on the Judiciary thus announced in **2003** its intention to seek legislative changes to ensure standardized screening procedures. Many senior judges appointed in the previous era, particularly those in high-ranking positions, are still in office and this raises concerns about judicial independence and political bias. For instance, of the 242 court presidents named under Tudjman, 192 remained in office as of **October 2004**.

Some have alleged that judicial posts remained unfilled in instances in which Serbs were the only candidates to be considered by the NJC. If this is true, it violates not only Article 22§2 of the *Constitutional Law on the Rights of National Minorities* (entered into force **23 December 2002**, http://www.minelres.lv/NationalLegislation/Croatia/Croatia_MinRights2002_English.htm, Article 22), which ensures minority representation in state administration and judicial bodies but also Principle 10 of the *UN Basic Principles on the Independence of the Judiciary* (http://www.unhchr.ch/html/menu3/b/h_comp50.htm). According to the OSCE Mission in Croatia, the NJC stated that it applies the principle of equality in the selection of judges and thus could not use set criteria to give priority to a certain category of persons (OSCE Background Report: "Implementation of the *Constitutional Law on the Rights of National Minorities (CLNM)* and Related Legislation", 12 May 2003, http://www.osce.org/croatia). To date, the state has not developed any plan or prospective criteria for implementing the CLNM's guarantee of appropriate representation of minorities in the judiciary. Government information released in **December 2004**, indicates that Serbs continue to be significantly under-represented in the judiciary.

Judicial Training

In **2002**, the Canadian section of ICJ began implementing a "Project to Support the Independence and Impartiality of Judges in the Southeast Adriatic Countries", a collaborative endeavour undertaken jointly by Canadian and Croatian judges. Its aim is to make recommendations on judicial reform, and to promote judicial and legal education and training (http://www.icjcanada.org/en/projects/proj_2002-11.htm). A delegation from ICJ-Canada was in Croatia in **May 2003** to participate in the first conferences on Court Efficiency in two pilot courts in Pula and Varazdin. They also met with relevant judicial authorities and lectured at local law faculties.

The **2002** the **Reform Plan** suggested changes to university law curricula but reportedly no significant changes have yet been made. In **March 2004,** the **Judicial Academy** was appointed to train legal actors on new legal reforms, regulations and current issues. The Judicial Academy is the successor to the Center for the Professional Training of Judges and Other Court Officials, and was established as an Institute of the Ministry of Justice.

In **May 2004**, the EU launched a pilot project entitled **"Reform of the Judiciary – Support to the Training Centre for Judges"** which included funding for the Judicial Academy and the Ministry of Justice. Further, in May two pilot programs in the form of Regional Training Offices were established at the County Courts of Zagreb and Rijeka, but little training has been offered with priority being given to city courts.

In **May - June 2004**, the **Ministry of Justice and the ICTY** began a series of training sessions for all sectors of the Croatian judiciary, designed to deal with comparative aspects of the ICTY and Croatian law and practice regarding war crimes. The OSCE recommended that reform and training be extended to cover domestic war crimes cases to promote impartiality of domestic tribunals. However, according to the OSCE, as of **May 2005**, no further training has been conducted under this program.

The high rate of reversal in war crime trials, ranging from 55 to 95 per cent over the past three years, primarily for errors in findings of fact, indicates significant professional deficits and a need for training.

Cases

In **February 2003**, **Vladimir Gredelj,** President of the Croatian Judges' Association, sued **Mario Ivekovic,** leader of New Union (a labour union), for public comments regarding a ruling ordering workers to stop blocking premises of a bus transport company. Ivekovic had said: "rulings passed by corrupt judges are not binding on the workers." Justice Gredelj claimed that Ivekovic's statements constituted an open attack on the judiciary. The case was still pending as of **October 2004**.

Lack of judicial impartiality

Allegations of judicial bias were made against **Justice Slavko Lozina** during the high-profile Lora war crimes trial. In **November 2002**, Justice Lozina's panel acquitted eight Croatian soldiers accused of torturing ethnic Serb prisoners in the Lora military prison. On appeal in **August 2004**, the Supreme Court returned the case for retrial before a new panel of judges on grounds of wrongly and incompletely established facts, and failure to admit crucial evidence. In **October 2004**, the Supreme Court however ordered the eight defendants into detention as they had been left at liberty by the trial court, with four among them fugitives. The trial is expected to start in **September 2005**.

The impartiality of the judiciary has also been tested at the regional level before the **European Court of Human Rights (hereinafter ECHR)** in *Meznaric v. Croatia* on **11 December 2003** (www.osce.org/documents/mc/2004/03/2225_en.pdf). The applicant complained that he was deprived of his right to a fair hearing by an impartial tribunal because his complaint before the Constitutional Court was decided by a judge who had previously represented the opposing party. Croatia argued that judicial independence is guaranteed in the Constitution and further, that the domestic law did not foresee the recusal of the judge in such a case. The ECHR declared the claim admissible, and has yet to decide on the merits.

On **6 February 2004**, the **Supreme Court** of Croatia reversed the war-crime verdict of a Serb returnee, **Svetozar Karan**, and ordered a retrial before a different panel of the Gospic County Court. The Supreme Court held that trial judge **Branko Milanovic**, in issuing a guilty verdict and in criticizing the Croatian government's

support to Serb returnees, went beyond the evidence presented at the trial and applied his personal views and opinions. The written verdict contained inflammatory remarks about ethnic Serbs, such as: "the defendant and his ancestors have been sitting on Croatia's back for the past 80 years". The case before the Supreme Court was still pending as of **October 2004**, and there was no indication of disciplinary proceedings being initiated against Justice Milanovic. Reportedly, the case was not sent to a "special war crime court" but was simply transferred to another court of general jurisdiction. Judge Milanovic continues to serve on war crime panels and other related cases.

Backlog of cases

The National Judicial Council (NJC), which is in charge of the appointment, discipline and removal of judges, has also tried to address the problem of backlog. In **2003,** it **suspended** at least one judge in **Karlovac** for failure to issue nearly 30 written decisions within a reasonable time. Similar measures short of suspension were taken against judges in **Split** and **Korcula**.

LEGAL PROFESSSION

The **2003 amendments** to the *Law on Civil Procedure* provided for mandatory court representation by **licensed attorneys** in certain types of cases. This was criticized by the **OSCE Mission** as limiting the access to courts of those who cannot afford legal representation, in the absence of a generally available legal aid scheme. Minorities often rely on NGO representatives in court proceedings (http://www.osce.org/croatia/documents/reports/index.php3).

The **Bar Association** currently provides free legal aid to citizens but the demand appears to exceed its actual capacity. The **Reform Plan** (see above, Judiciary) envisages the establishment of a free legal aid regime, and the working group set up to draft the legislation began its work in **October 2004**.

Cases

New standards for membership in the Bar

In an important development in **July 2003**, the **Constitutional Court** reversed a decision of the Supreme Court in a case involving the re-admission of an Osijek lawyer to the Croatian Bar Association. The membership had been denied in **1992** on the grounds that the lawyer had been absent for more than six months during the war. The Bar Association rejected his re-admission application on the grounds that his absence demonstrated that he lacked "sufficient dignity" to practice law within the meaning of the *Law on the Legal Profession*. The **Supreme Court** later upheld the rejection, deferring to the Bar's application of the legal standard on the facts of the case.

In **July 2003**, the **Constitutional Court** reversed the decision of the Supreme Court and held that the appropriate legal standard should consider the totality of the circumstances, rather than a single act. It added that the Supreme Court should adopt a "radical and complete" change in its evaluation of the legal standard for Bar membership applications**.** The Constitutional Court required the Croatian Bar Association to re-consider its denial of membership, indicating that the Bar was in error. The **OSCE Mission** has highlighted the relevance of this case since an

individual's whereabouts during the Homeland War has also been used as a basis for rejection of minority candidates for judicial appointments.

PROSECUTORS

According to Article 124 of the *2001 Constitution* (http://www.usud.hr/default.aspx?Show=ustav_republike_hrvatske&Lang=en) "the **Office of the Public Prosecutions** is an autonomous and independent judicial body empowered to proceed against those who commit criminal and other punishable offences, to undertake legal measures for protection of the property of the Republic of Croatia, and to provide legal remedies for protection of the Constitution and law. The **Head Public Prosecutor** of the Republic of Croatia shall be appointed by the Croatian Parliament at the proposal of the Government of the Republic of Croatia and with a prior opinion of the authorized committee of the Croatian Parliament for a four-year term." **Deputy Public Prosecutors** are initially appointed for a five-year term. After the renewal of the appointment, their posts become permanent. Deputy Public Prosecutors, in conformity with the Constitution and law, are to be appointed and dismissed by the **National Council of Public Prosecutions,** which is also responsible for their discipline. The National Council of Public Prosecutions will be elected by the Croatian Parliament according to a procedure determined by law. The majority of the members of the National Council of Public Prosecutions will be drawn from the ranks of Deputy Public Prosecutors. Head officials of the public prosecutions' offices may not be elected as members of the National Council of Public Prosecutions.

Cases

On **12 June 2003**, **Krunoslav Canjuga**, a deputy state prosecutor in Zlatar and former Zagreb County Prosecutor, denied accusations that he had received bribes from Zagreb attorney **Mirlo Batarelo** in exchange for official secrets. The accusations were made by the **Office for the Prevention of Corruption and Organized Crime** (USKOK), and the investigation was still underway in **October 2004**. Canjuga was temporarily suspended from his post on the grounds that the proceedings made him unfit for duty.

ACCESS TO JUSTICE

Although Article 29 of the 2001 Constitution guarantees the right to a fair trial, Croatians continue to experience problems in this regard.

The **2003 amendments** to the *Law on Civil Procedure* provide for **mandatory court representation by licensed attorneys** in certain types of cases. However, this has been criticized by the OSCE Mission as limiting the access to courts of those who cannot afford legal representation, particularly in the absence of a generally available legal aid scheme. Minorities often rely on NGO representatives in court proceedings ("Status Report No. 13 (December 2003)" of the OSCE Mission to Croatia, http://www.osce.org/documents/mc/2003/12/1976_en.pdf, para 10; and OSCE Mission to Croatia, "Selection of Rule of Law Input to Fortnightly Reports, 15/2003"). The Bar Association (HOK) currently provides free legal aid but the need

appears to exceed its present capacity. In response to opposition to the increase in **June 2004** in attorney's fees by the HOK, the Minister of Justice announced that it was likely that fees would be regulated by amendments to the *Law on Attorneys*. These amendments were intended to be proposed by the **end of 2004.**

The Reform Plan (see Judiciary) envisages the establishment of a free legal aid regime, and the working group set up to draft the legislation began its work in **October 2004**. In **May 2005**, the Ministry of Justice took the first steps toward a free legal aid scheme for Roma by contracting private attorneys.

Excessively lengthy proceedings and delays in the execution of final court orders in the lower courts are other factors contributing to the inefficiency of the judicial system. Observers have indicated that the failure by the executive branches of the Government to adhere to court decisions has also contributed to the existing backlog of cases. As of **mid-2004**, there were approximately 1.5 million cases pending in Croatian courts, a significant percentage of which were claims relating to the failure to enforce court rulings. The extent of delays, including delays at the Supreme Court level, violates fair trial rights and has resulted in a large number of judgments and friendly settlements against Croatia by the **ECHR**. Reportedly, the Constitutional Court has become so overwhelmed by complaints of delays that its effectiveness as a human rights remedy is threatened. The Constitutional Court reported this to Parliament in **February 2005** and proposed reforms. The domestic **Ombudsman** continues to receive numerous complaints relating to court delays. As he does not have jurisdiction over the courts, he reportedly proposed that Parliament grant him some authority to supervise courts.

Cases

Wartime Damages

In **October 2003**, the **Supreme Court** of Croatia instructed lower courts to resume the over 1,400 cases of claimants seeking compensation against the Government for wartime damages. These cases had been suspended in 1996 pursuant to the amended *Law on Civil Obligations*. The **ECHR** has established repeated violations of the right of access to justice ruling on the suspension. For instance, in *Acimovic v. Croatia (Merits)* on **9 October 2003** (see also *Kutic v. Croatia,* no. 48778/99, ECHR 2002-II and *Multiplex v. Croatia*, no. 58112/00, 19 June 2003; http://www.echr.coe.int/) the court held that the suspension violated an individual's right of access to court under Article 6§1 of the European Convention on Human Rights (http://conventions.coe.int/treaty/en/Treaties/Html/005.htm).

As of **mid-July 2004**, seven more such cases have been accepted for review by the ECHR. The suspended cases will continue under two new laws adopted by the Croatian Parliament in **July 2003**: the *Law on the Responsibility for Damage Caused by Terrorist Acts and Public Demonstrations* and the *Law on the Responsibility of the Republic of Croatia for Damage Caused by Members of the Croatian Army and Police when acting in their Official Capacity during the Homeland War*. Observers have criticized the fact that these laws eliminate all claims for property damage resulting from terrorist acts, thereby retroactively limiting the extent of the government's liability for damages. In **September 2004**, the ECHR declined to review this legislative change as it found it had no jurisdiction over the "right" in question.

Lack of Access to Court

On whether the Constitutional Court is an effective domestic remedy to challenge the lack of access to court, a friendly settlement was reached in *Plavsic v. Croatia* in **October 2004** between the Government and the applicant. The **ECHR** struck the case out of its list of cases (http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=41420&portal=hbkm&source=external&table=285953B33D3AF94893DC49EF6600CEBD49). In **late October 2004**, the ECHR also accepted settlements between the Government and other applicants in similar cases (*Grubisic v. Croatia*, and *Bubas v. Croatia*). However, in **January 2005,** the ECHR concluded in *Pikic v. Croatia* that the **Constitutional Court** could be considered an effective domestic remedy regarding the lack of access to courts that must be exhausted before applying to the ECHR. However, the ECHR specified that the Constitutional Court only serves as an effective domestic remedy in respect of applications submitted after **24 March 2004** (the date the Court issued its first decision on the merits). Thus, the effective impact of a ruling such as *Pikic* appears to be small as most applications on the issue of lack of access to courts have been pending for several years. Almost 60 decisions between settlements and judgments have been reached so far by the ECHR in relation to access to the courts.

Excessive length of proceedings

In *Sahini v. Croatia* on **19 June 2003**, the **ECHR** held that civil proceedings lasting more than seven years were excessive. The ECHR accepted friendly settlements in **2004** in which the applicants complained against the decision of the Constitutional Court that court proceedings lasting seven and ten years did not amount to excessive delays and hence found no constitutional violations (Respectively, see *Ljubicic* v. *Croatia*, no.1382/03, 29 January 2004; *Hajdukovic v. Croatia*, no. 1393/03, 29 January 2004).

Delay in execution of final court orders

On several occasions in **2003,** the **Constitutional Court** determined that it had no jurisdiction to review complaints about delayed enforcement of judgments (U-IIIA-1319/2002 (NN 106/03); U-IIIA-1165/2003 (NN 156/03). In *Kostic v. Croatia* on **8 January 2004**, the **ECHR** held that the Constitutional Court is not a remedy to be exhausted in cases of non-enforcement of a decision, and thus accepted the case for review (see also *Pibernik v. Croatia*, no. 75139/01, 4 March 2004). The **OSCE Mission** reported that as a result of these decisions, the Constitutional Court has changed several aspects of its practice relating to fair trial, bringing it in line with ECHR case law (OSCE Mission to Croatia: "Status Report No. 14 on Croatia's progress in meeting international commitments since December 2003", p.11). In **October 2004**, the Constitutional Court reportedly changed its prior practice: on the merits, it denied a complaint alleging unreasonable delay in the enforcement of a final court decision, holding that a delay of one year and seven months was not excessive (particularly since the complainant had contributed to the delay) (See U-IIIA-955/2004, **6 October 2004**).

In *Cvijetic v. Croatia* on **26 February 2004**, the applicant claimed that the four-year delay in executing an eviction order in her favour violated her rights under Articles 6§1 and 8 of the *European Convention on Human Rights* (http://conventions.coe.int/treaty/en/Treaties/Html/005.htm). The **ECHR** established

that it was a violation, holding that the execution of decisions by a court constitutes an integral part of the trial. As such, States have a positive obligation to organize their judicial systems to ensure that their courts meet the requirements of the Convention.

LEGAL REFORMS DURING THE PERIOD

2003:	Amendments to the *Law on Courts*.
1 December 2003:	Amendments to the *Law on Civil Procedure*.
October 2004:	Amendments to the *Law on Execution*.
October 2004:	Amendments to the *Criminal Code*.