HRCC GUIDELINES #4 GUIDELINES FOR AUTHORITIES, January 31, 2000

HRCC GUIDELINES #4 GUIDELINES FOR AUTHORITIES

Guidelines on the Prosecution of Authorities for Failing to Properly Execute their Duties

Table of Contents

HRCC GUIDELINES #4

Guidelines to local Authorities

The following guidelines have been drafted by the OSCE. In that these guidelines express the joint policy of the member organisations of the HRCC in relation to the present subject matter, personnel should treat them as such. This document is an amended version of the Guidelines # 4 issued on December 17, 1999 directed to Field Officers. This document was amended to be directed specifically to local authorities.

GUIDELINES ON THE PROSECUTION OF AUTHORITIES FOR FAILING TO PROPERLY EXECUTE THEIR DUTIES

1. Introduction

It has been reported that authorities and responsible officials are obstructing the implementation of GFAP. The most significant example is housing authorities who fail to execute their duties regarding the repossession of property which in turn obstructs return. However, this initiative is not restricted to housing authorities; it includes anyone considered an official or responsible person who fails to execute his or her duty properly or prevents return. Examples include housing authorities and mayors.

The discussion below is restricted to criminal proceedings in the Federation and the Republic of Srpska [hereinafter, “RS”] and does not cover every possible provision that may apply to every set of circumstances but rather indicates those considered most important. Furthermore, it is important to note that the criminal law of the RS cited below is in the process of being amended and therefore may change in the next few months.

2. DEFINITIONS

1. **Criminal Code of the Federation of Bosnia and**

Herzegovina [hereinafter, "Fed CC"]

"prosecuted automatically": all crimes but for those for which private prosecution is expressly indicated; note that the prosecutor has no discretion in deciding whether or not to prosecute he/she must take action.

"official": Art. 136(2) Fed CC: persons elected or appointed to legislative, executive and juridical offices within Bosnia and Herzegovina and the Federation, cantons, municipalities, cities and other governmental and administrative institutions or services which perform particular administrative, expert and other duties, within the rights and liabilities of the authority which has founded them; person who continuously or occasionally executes official duty in the mentioned administrative bodies or institutions, authorized person in a company or another legal person who has been legally entrusted with the execution of public authorities, who performs certain duties within the frame of the said authority; other persons who are performing official duty stipulated by law or other regulations based on the law; as well as military persons, if the criminal offence is defined as criminal offences perpetrator of which is an official, and at the same time is not defined as criminal offence of military personnel, or criminal offence against armed forces of the Federation.

"responsible person": Art. 136(5) Fed CC: the person in a company or another legal person who, in the line of duty or on the basis of specific authorization, whose portfolio related to implementation of law or regulations based on law, or general act of the company or another legal person in managing and administrating the property, or is related to managing a productive or other economic process or supervision of such process. Officials as defined in paragraph 2. of this Article are

also considered responsible persons when the actions whose perpetrator is the responsible person are at issue, and at the same time are not stipulated by provision of the chapter dealing with criminal offenses against official and other responsible duty, or as criminal offenses of an official stipulated under some other chapter of this Code. Examples: Director/Manager of a socio-legal person (company), any official within the meaning of "official" above including the Head of the Housing Authority or his or her subordinate or the Mayor

2. **Criminal Code of the Republic of Srpska Special Part [hereinafter, "RSCC-SP"]**
   "official": RSCC-SP Art. 35(1) "a person selected, named or appointed to the assembly of a socio-political community and its executive bodies, managing bodies and organizations which carry out certain management, expert and other activities within the rights and duties of a socio-political grouping; a person executing an official duty on a regular or temporary basis in the foregoing management bodies or organizations; an authorized person from an organization of associated labor or from another socio-legal person who has been entrusted by the law or by a decision of an assembly of municipalities made on the basis of the law with carrying out public authorized activities, and other persons executing certain official duties on the basis of authority provided by the law or other regulations made on the basis of the law, as well as a military person in the case of criminal acts in which an official has been identified as the offender. The term "official," within the meaning of this Code, does not include officials mentioned in paragraph 4 of Article 113 of the Criminal Code of the Republic of Srpska if they have been identified as the perpetrators of criminal acts".

“competent person”: RSCC-SP Art. 35(3) “a person is a socio-legal person who has, due to his title or on the basis of special authorization, been entrusted with a certain area of work that relates to the execution of the law or regulations based on the law, or to the execution of a self-management general act of a socio-legal person as to the management and disposition of social property, or that relates to the management of the process of production or some other economic process or to its supervision. A competent person is also a person within the meaning of paragraph 1 of this article when it comes to activities in which a competent person has been identified as an offender, and are not referred to in the Chapter on criminal acts in relation to official and other responsible duties, or criminal acts by an official referred to in some other chapter of this Code. Examples: Director/Manager of a socio-legal person (company), any official within the meaning of “official” above including the Head of the Housing Authority or his or her subordinate or the Mayor.”

3. LAW

The crimes referred to in this section are automatically prosecuted.

1. **Abuse of Office or Official Authority (Art.358 FedCC[1] , Art.226 RSCC-SP[2])**
   There are several provisions available in the entity criminal codes that could be applied to the particular situation of an authority failing to execute her/his duties and each set of circumstances must be assessed individually. However, the most appropriate provisions under which to pursue the prosecution of a housing authority will often be Art. 358 of the FedCC and 226 of

the RSCC-SP, both of which deal with the abuse of office or official authority. There are several advantages to proceeding under Art. 358 or 226 when pursuing the prosecution of a non-compliant official. Paragraph one encompasses a very broad set of illegal acts by officials and responsible persons. Phrases such as “fails to execute his/her official duty” and “seriously violates the rights of another person” are sufficiently broad to capture most of the behaviour of authorities observed in the country for prosecution purposes. As well, there is the option of holding responsible an official **or** a responsible/competent person.

When choosing cases to use as evidence, it is important that they demonstrate a clear violation of law or clear obstruction. Specific cases and acts will most likely be necessary for going forward with a prosecution. A general trend of no return will be difficult if not impossible to prove without individual cases.

In considering the cases to put forward for prosecution, bear in mind the excuses that will be presented by the offending official and the ability of the Prosecutor to counter those excuses. For example, in Jajce, IPTF presented a test case in which the complainant applied for the return of his property and had received no answer in a year. He had meticulously documented about 400 visits to the Housing Office. When the municipality heard that a prosecution was being initiated, the housing authorities immediately issued a decision.

However, the occupant in this case was clearly entitled to alternative accommodation and the municipality claimed to have none. The Prosecutor, who has been very co-operative and eager to prosecute a case, decided that she could not pursue this particular case further at this time. She decided that it would be very difficult to prove that the municipality has alternative

accommodation available and that the municipalityąs probable claim that they are unable to issue decisions within 30 days because of their extremely large caseload would be difficult to counter.

It is clear that the law was violated and it would be possible to show that the municipality has issued practically no decisions since the law was passed but the Prosecutor thought it would be too difficult and risky. Instead, a group of cases wherein there is no right to alternative accommodation was amassed e.g. illegal occupant or Double Occupant, and cases in which the decisions issued are illegal for example clauses in the decision saying that return of the property is contingent upon an agreement between the current occupant and the owner.

2. **Lack of Commitment/Misfeasance in Office (Art.366 FedCC/Art.234(1) RSCC-SP)**
   Another applicable provision to consider in prosecuting an authority deals with the lack of commitment by officials in working[3]. In the Federation, an offence can be committed in two ways: by consciously violating the law or other regulations or by failing to exercise due supervision.

   "Misfeasance in office" under the RS law[4] contains essentially the same wording as that of the FedCC. In addition, the RS provision actually holds accountable not only the official who had knowledge, as in the Federation provision, but he or she who, "was obliged to be [aware] and could have been aware" that a violation of rights might occur as a consequence of his or her behaviour.

   "Prevention of Return" (Art.186(1) Fed CC): The "Prevention of Return of Displaced Persons and Refugees"

is a useful provision particularly because it applies to "whoever" and not just officials. Unfortunately, currently it is found only in the Federation Criminal Code. Further, it requires proving force, serious threat or other illegal means in preventing a displaced person, refugee or any other person from going back to where they lived before[5]. Other illegal means could be interpreted to include for example failure to process property claims or eviction orders.

This article was specifically designed to address obstructionist behaviour regarding return and therefore should be seriously explored by the Prosecutor and police when dealing with a potential violation by anyone allegedly obstructing return. We do not know how the courts will apply this new provision however, many of the long standing provisions such as abuse of office have not been widely applied by the courts either. Therefore, the Prosecutor should be encouraged to apply Art. 186(1) in the Federation to situations involving obstructive housing authorities. Although currently such a provision only exists in the Federation, a virtually identical provision has been included in the proposed amendments to the RS Criminal Code.

3. **Duty to Report (Articles 140 FedCCP and 148 YCP, Articles 324 FedCC and 187 RSCC-SP)**
   Even if a responsible official has passively allowed a violation to occur, he/she may be criminally liable. You should consider the duty of responsible officials of government bodies and agencies, the Ombudsmen of the Federation, public enterprises and public institutions to report crimes[6]. In other words, these persons are obligated to report crimes that are automatically prosecuted for example, Arts. 358 and 186 Fed CC (Abuse of Office or Official Authority and Prevention of Return of Displaced Persons and Refugees) and 226 RSCC-SP

(Abuse of office or official authority).

Furthermore, whoever knows about the preparations to commit an offence which attracts five years of imprisonment or a harsher punishment, and fails to report it at the time when the commission of the offence could still be averted and the offence gets committed or attempted, will receive a jail sentence not exceeding one year[7].

The duty to report directly above applies to:

Fed CC

- Article 186 (Preventing Return),
- Article 366(2) (Lack of Commitment in Working: serious violation or damage exceeding 10,000 KM), and
- Article 358 (Abuse of Office or Official Authority).

RSCC-SP

- Article 234(2) (Misfeasance in Office: serious violation or damage exceeding 1,000 new dinars), and
- Article 226 (Abuse of Office or Official Authority).

These two provisions do not restrict the obligation to report to officials or responsible persons but rather place the responsibility on **whoever** knows about the illegal activity. NOTE: the obligation to report under FedCC Art. 324(1) and RSCC-SP Art. 187 does not apply to the perpetrators' spouse, cohabiting partner, first-line blood relative, brother or sister, adoptive parent or adopted child and their spouses or cohabiting partners.

Even if a violation of the law is recognized and the appropriate charges identified, getting someone to investigate and prosecute is obviously the key. The

following articles lend some assistance in persuading the police and the prosecutor to investigate, draw up charges and initiate proceedings where appropriate.

4. **Role of the Police**
    1. ***Gathering of Evidence***

        On a general level, where there is a suspicion – any level of probability – that a crime which is automatically prosecuted has been committed, law enforcement agencies (police) must take steps necessary to, among other things, detect and preserve the clues to the crime and articles which might serve as evidence and to gather all information which might be of use to effective conduct of criminal proceedings[8].

        The police may, among other things:

        - Take necessary information from citizens as well as summon them to give information;
        - Organize a search to locate an individual or things being sought;
        - Do a search in the presence of a responsible person of specified structures and premises of government agencies, enterprises and other legal entities, to examine specified documents belonging to them, and to take other necessary steps and actions (the police have to keep notes of the actions they take and the objects they confiscate).

        A written court order will almost always be necessary for the police to search the premises of a housing authority; exceptions exist only where armed resistance is assumed or if it is necessary to perform the search immediately and by surprise or if the search is to take place in a public place[9]. In the RS, one example of when the police

can conduct a search without a court order is if it is obvious that evidence cannot be obtained in any other way[10]. However, application of this provision is restricted to the dwelling or other premises of a person and therefore will probably rarely be of use when conducting an investigation into the conduct of authorities for example, a housing authority.

2. ***Criminal Charge***
   The police shall draw up a criminal charge in which they shall cite the evidence they learned of in the gathering of information. The evidence cited must contain all the information (except the contents of the statements of individual citizens) collected in the gathering of information including that which is in the suspectąs favour. The criminal charge shall be submitted to the competent prosecutor[11].

3. ***Preliminary Investigation***
   Some of the powers the police used to have, which still exist in the RS, have been restricted under the new criminal law in the Federation. For example, the Investigative Judge, who must also perform other necessary investigative actions (for example, search of a dwelling and persons, temporary confiscation of articles, interrogation of the accused, hearing of a witness) related to those he or she has been ordered to perform, can do so without prior consent by the court. The police, on the other hand, now must obtain prior written consent of the Investigative Magistrate/Judge to perform other necessary investigative actions (investigative actions beyond those that they were ordered to perform)[12].

Article 156 Fed CCP places tighter controls on what the police can do in an investigation (meaning once the Investigative Judge has been engaged in the process) on their own without prior judicial authority.

5. **Role of the Prosecutor**

The most important parts of the Prosecutor's role are the Prosecutor's basic right and obligation to, among other things:

- prosecute perpetrators of criminal offences;
- guide preliminary criminal proceedings;
- in the Federation only, supervise the activities of the law enforcement agencies;
- draft and defend an indictment or indicting proposal before the competent court; and
- take other steps as specified by law[13].

The Prosecutor must initiate proceedings if there is evidence that a criminal act has been perpetrated[14]. The obligation of the Prosecutor goes so far as to include that even when he/she has only heard a rumour that a crime was committed, she/he shall demand that law enforcement agencies gather the necessary information and take other steps to discover the crime and perpetrator[15].

NOTE: The Prosecutor shall reject a charge if:

- it is evident from the charge that the act committed is not a crime which is automatically prosecuted;
- the statute of limitations has expired;
- if the act is covered by amnesty or pardon;
- there are other circumstances that preclude prosecution (for example accused dies).

If the Prosecutor rejects the charge, he or she shall

inform the injured party of the rejection and the grounds for it within 8 days. If the police filed the charge, they shall also be informed of the rejection[16].

Therefore, the Prosecutor has the authority and the responsibility to ensure that crimes and their perpetrators are identified and criminal proceedings are initiated accordingly for example, the preliminary examination.

6. **Role of the Investigative Judge**

The principal role of the Investigative Judge is to conduct the preliminary examination at the request of the Prosecutor[17].

Some further basic duties and obligations of the Investigative Judge are the following:

- renders a decision on and terminates the preliminary examination (investigation);
- undertakes investigative actions prior to deciding on preliminary investigation (for example, search of a dwelling and persons, temporary confiscation of articles, hearing a witness, on the spot inquest);
- conducts the investigation (once the preliminary examination has begun);
- entrusts the undertaking of some investigative actions to the police or an investigative judge from another court;
- decides to suspend or dismiss the inquiry;
- orders and terminates pre-trial custody.

As above, the Investigative Judge has the authority to perform other necessary investigative actions related to those he or she has been ordered to perform without prior consent of the court.

If the housing authorities refuse to provide the

documents to the Prosecutor, a warrant can be obtained from the Investigative Judge and executed by the police.

NOTE: The national professionals must do their jobs rather than relying on the international community to build the cases. The Prosecutor has the duty to carry forward criminal proceedings and must be encouraged to do so.

4. CONCLUSION

Each case must be assessed individually to determine which provisions of the criminal codes apply. In both entities, the Prosecutors have important duties to fulfill to ensure a crime is properly investigated and sent through the criminal process. Therefore, use her or him as the focal point to direct cases through the system.

HRCC has also produced guidelines on three other issues. If you would like copies, please contact the HRCC at: 387-71-447-275, or by e-mail at: lene.madsen@ohr.int, eric.frejabue@ohr.int, or sirpa.rautio@ohr.int.

Guidelines to the Field #1 – Residence Registration & Issuance of ID Cards (Federation). These guidelines are an excerpt from a UNHCR report – Registration of Repatriates in the Federation of Bosnia and Herzegovina and Entitlement to Identity Documents, Food Assistance and Medical Care – November 1998.

Guidelines to the Field #2 – Guidelines for Dealing with Foreign Citizens Seeking Asylum in Bosnia and Herzegovina. These guidelines have been drafted by UNHCR for the attention of international organisations approached by foreign citizens seeking asylum in Bosnia and Herzegovina. December 1998.

Guidelines to the Field # 3 – Overview of Educational Problems in BiH and Guidelines for Intervention. These guidelines were drafted by the OSCE in cooperation with OHR, UNHCR and the

Council of Europe. September 1, 1999.

1 Art.358 Fed CC:

1. An official or responsible person who, by taking advantage of his/her office or official authority, exceeds the limits of his/her official authority or fails to execute his/her official duty, and thereby acquires a benefit to himself or to another person, or causes damage to a third person or seriously violates the rights of another person, or causes damage to a third person or seriously violates the rights of another, shall be punished by imprisonment for a term of between six months and five years.
2. If a property gain acquired through the commission of an act referred to in paragraph 1 of this Article exceeds 3,000 KM, the perpetrator shall be punished by imprisonment for a term between one year and ten years.
3. If a property gain acquired through the commission of an act referred to in paragraph 1 of this Article exceeds 10,000 KM, the perpetrator shall be punished by imprisonment for not less than three years.

2 Art.226 RSCC-SP:

1. An official or a competent person, who, by exploiting his office or official authority, by exceeding the bounds of his official authority, or by failing to carry out his official duty, procures for himself or for another a benefit, causes damage to a third person or seriously violates his rights, shall be punished by imprisonment for a term exceeding six months but not exceeding five years.
2. If by committing an act referred to in paragraph 1 of this article a benefit in terms of property has been procured in an amount exceeding 250 new dinars, the offender shall be punished by imprisonment for a term exceeding one year but not exceeding 10 years.

3. If by committing an act referred to in paragraph 1 of this article a benefit in terms of property has been procured in an amount exceeding 1,000 new dinars, the offender shall be punished by imprisonment for not less than three years.

3 Art.366 Fed CC:

1. An official who, being aware of what he/she is doing, breaches law or other regulations or general acts, fails to exercise due supervision or in any other way manifestly acts in a clearly unconscientious manner in the discharge of his/her duties, and such action of his/her results with a violation of rights of another or a property damage whose value exceeds 1,000 KM, shall be punished by imprisonment for a term not exceeding three years.
2. If a serious violation of another man’s right or damage to property exceeding 10, 000 KM has occurred as a result of the act referred to in paragraph 1 of this Article, the perpetrator shall be punished by imprisonment for a term between six months and five years.

4 RSCC-SP Art. 234.

1. An official who, by breaching laws or other regulations or self-management general acts, by failing to carry out his duties of supervision or in some other way acts in a clearly unconscientious manner in the discharge of his official duties, although he was aware or was obliged to be and could have been aware that as a consequence of such behaviour a serious violation of civic rights or substantial damage to property might occur, and such violation or damage actually occurs in an amount exceeding 100 new dinars, he shall be punished by imprisonment for a term not exceeding three years.
2. If a serious violation of civic rights or damage to

property that exceeds 1000 new dinars has occurred as a result of an act referred to in paragraph 1 of this article, the offender shall be punished by imprisonment for a term exceeding six months but not exceeding five years.

5 Fed CC Art. 186

1. Whoever by use of force, serious threat or another illegal means or in other illegal way prevents a displaced person, refugee or any other person to come back to the place where they had lived before, or to some other place within the Federation, or to use his/her property, shall be sentenced to one to ten years in prison.
2. Whoever participates in a group of people who commit the act from paragraph 1. of this Article shall be punished with at least three years in prison.
3. The leader of the group of people who commit the act described in paragraph 1. of this Article shall be punished with at least five years in prison.

6 Fed CCP Art. 140

1. Responsible officials of government bodies and agencies, the Ombudsmen of the Federation, public enterprises and public institutions have a duty to report crimes which are automatically prosecuted of which they have been informed or which they have learned of in some other manner. YCP, Art. 148
2. All government bodies and agencies, organizations of associated labour and other self-managed organizations and communities have a duty to report crimes which are automatically prosecuted of which they have been informed or which they have learned of in some other manner.
3. Working people in government bodies and agencies, organizations of associated labour and other self-

managed organizations and communities have a duty to report crimes whereby damage is inflicted on public property or which constitute an abuse of work duties official duties in that body, agency or organization.

7 Fed CC Art. 324(1) and RSCC-SP Art.187.

8 Article 143(1) of the FEDCCP and Article 151(1) of the YCP

9 Fed CCP Art. 196(1).

10 Yugoslav Law on Criminal Procedure [hereinafter "YCP"] Art. 210.

11 Fed CCP Art. 143(6) and YCP Art. 151(6).

12 Fed CCP Art. 156 and YCP Art. 164(1).

13 Fed CCP Art. 41 and YCP Art. 45

14 Fed CCP Art.16 and YCP Art. 45.

15 Fed CCP Art. 145(2) and YCP 153(2).

16 Fed CCP Art. 145(1) and YCP Art. 153(1).

17 Fed CCP Art. 150(1) and YCP

Back to the Human Rights/Rule of Law home page