Compatibility of Croatian law

with the requirements of the European Convention on Human Rights

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Directorate of Human Rights

GOVERNMENT OF THE REPUBLIC OF CROATIA

REPORT OF THE WORKING GROUP ESTABLISHED BY THE GOVERNMENT OF THE REPUBLIC OF CROATIA ON THE CONFORMITY OF CROATIAN LAW WITH THE REQUIREMENTS OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, AND ITS PROTOCOLS

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1. Elaboration of the Report

1.1. Appointment and work of the Working Group for the Examination of the Compatibility of Croatian legislation with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and its Protocols

The Government of the Republic of Croatia, according to its Decision of September 12, 1996, appointed a Working Group on the Examination of the Compatibility of the Legislation of the Republic of Croatia with the provisions of the European Convention on Human Rights (hereinafter "the Convention") and its Protocols, as well as with the practice of the European Commission of Human Rights and the European Court of Human Rights, (hereinafter "the Working Group"). The Working Group was required to submit a report to the Government on the completed process of its work.

The Government appointed Dr. Ljerka Mintas Hodak, Deputy Prime Minister, as Chairperson of the Working Group and Dr. Dubravka Šimonović from the Ministry of Foreign Affairs as Coordinator of the Working Group, as well as Mr. Miroslav Papa from the Ministry of Foreign Affairs as the Secretary of the Working Group. It was envisaged in the Government's decision on the Working Group that Parliament, the Constitutional Court[1], the Supreme Court, as well as relevant ministries and the Governmental Office for Legislation, should appoint their representatives to the Working Group. Based upon this authorization by the competent bodies, the following members were appointed: Prof. Smiljko Sokol on behalf of the Croatian Parliament; Mr. Jakob Miletić, Judge before the Supreme Court; Mr. Zlatko Gledec, Deputy Minister of Internal Affairs; Mrs. Lidija Lukina-Karajković, Assistant Minister of Justice; Julijana Grgurina Gulija on behalf of the Ministry of Education and Sport; Vera Babić, Deputy Minister of the Ministry of Labor and Social Welfare; Jurdica Alanović-Bojović, Assistant Director of the Department of Public Administration of the Ministry of Public Administration; and Agata Raćan on behalf of the Governmental Office for Legislation. The Government also appointed the following members of the Faculty of Law in Zagreb to the Working Group: Prof. Željko Horvatić, Prof. Davor Krapac, Prof. Josip Kregar, Prof. Željko Potočnjak, and Prof. Nina Vajić.

Pursuant to the Government Decision on the Establishment of the Working Group, the Ministry of Foreign Affairs was to act as a coordinator of the activities of the Working Group with the Council of Europe. Accordingly, Dr. Dubravka Šimonović, the coordinator of the Working Group, reported regularly to the Council of Europe

[1] The Constitutional Court of the Republic of Croatia did not appoint its representative to the Working Group, assessing that this would be incompatible with the role of the Constitutional Court.

through Mr. Mark Neville, Head of Section Responsible for Relations with Countries of Central and Eastern Europe.

At the same time, the Government requested all Ministries and public administration bodies to review, in cooperation with the Governmental Office for Legislation, the compatibility of laws within the areas of their competence, with the provisions of the European Convention on Human Rights and Protocols, as well as with the practice of the European Commission of Human Rights (hereinafter "the Commission") and the European Court of Human Rights (hereinafter "the Court") and to submit a report to the Working Group on their findings.

Based on the conclusions of the Government, reached at the first meeting of the Working Group on October 8, 1996, it was agreed to carry out the examination of the compatibility of legislation in two stages. During the first stage, relevant Ministries and other responsible government bodies were required to submit reports on the compatibility of laws under their competence within 90 days from the date of the Government decision, i.e. before December 12, 1996. Under the second stage it was envisaged that the members of the Working Group, particularly those appointed experts, would elaborate reports dealing with specific articles of the Convention, based on earlier reports prepared by relevant Ministries, together with an analysis of the practice of the Commission and the Court. They were requested in their conclusions to provide proposals for amendments to legislation found to be incompatible with the Convention, and in exceptional and justified cases, they could propose the possibility of making reservations to some of the Convention's provisions.

It was agreed at the first meeting of the Working Group that for the purposes of ensuring high quality and an extensive review of the compatibility of legislation, relevant non-governmental organizations should also be invited to communicate their observations as to possible incompatibilities of Croatian legislation with the Convention. Accordingly, the Croatian Bar Association and eleven major human rights organizations were contacted. Moreover, it was concluded that the Working Group could, if necessary, consult other experts in order to successfully carry out the compatibility review.

Up to February 10, 1997, numerous reports had been received, which can be divided in to the following two categories: I. Reports containing assessments by specific Ministries or public administration bodies that no relevant legislation exists within its field of competence for the purposes of the compatibility review, or assessments that laws within their scope of competence conformed with the Convention, without any detailed explanation; II. Reports reviewing the conformity of the legislation with individual provisions of the Convention and Protocols.

Reports containing assessments stated in Category I above, were received from the following: the State Hydrography Institute dated September 26, 1996; the Ministry of Culture dated December 19, 1996; the Ministry of Regional Planning, Construction and Habitation dated December 27, 1996; the Ministry of Tourism dated December

27, 1996; the Ministry of Maritime Affairs, Transport and Communication dated December 30, 1996; the Ministry of Agriculture and Forestry dated December 30, 1996; and the Ministry of Economy dated January 13, 1997.

The following reports are classified as belonging to the second group: Ministry of Justice dated December 9, 1996 and supplement of January 10, 1997; Ministry of Internal Affairs dated December 9, 1996; Ministry of Defense dated October 3, 1996; Ministry of Science and Technology dated December 30, 1996; Ministry of Health dated December 23, 1996; Ministry of Public Administration dated January 10, 1997; Ministry of Labor and Social Care dated January 10, 1996; Ministry of Education and Sport dated January 2, 1997. This group also includes the report of the non-governmental organization Civil Committee of Human Rights dated December 31, 1996. These reports analyze the conformity of the Constitution and approximately eighty laws with the provisions of the European Convention on Human Rights.

The aforementioned reports compare legal solutions and relevant Articles of the Convention and provide assessments on their conformity. Due to the fact that these reports analyze mainly the provisions of laws and relevant provisions of the Convention, without taking into consideration the practice of the Strasbourg bodies, they establish either conformity or incompatibility derived solely from legal texts. Therefore, these reports were used as basic material for further examination and elaboration in more detail, carried out at a later stage by each of the appointed experts in their respective fields of legal expertise.

At the second meeting of the Working Group, held on December 11, 1996, it was agreed to establish a scientific project of review of the compatibility of Croatian legislation under the auspices of the Faculty of Law in Zagreb which would enable further participation by various legal experts. Mr. Darko Göttlicher, Advisor to the Government of the Republic of Croatia and Ms. Ivana Goranić, Deputy Head of Department for Human Rights of the Ministry of Foreign Affairs, were appointed as associated members of the Working Group.

After the Constitutional Court of the Republic of Croatia declined appointing a representative to the Working Group, the Constitutional Court was invited to forward relevant decisions relating to the rights and freedoms protected by the Constitution of the Republic of Croatia and contained in the European Convention on Human Rights. On January 2, 1997, the Constitutional Court forwarded copies of 7 decisions on the constitutionality of laws and 16 decisions on constitutional complaints concerning rights protected by the Constitution of the Republic of Croatia and also contained in the European Convention on Human Rights.

At the third meeting of the Working Group, held on February 11, 1997, it was established that the first stage of the compatibility review had been successfully completed. The reports of the following Ministries and public administration bodies had been received: National Institute of Hydrography, Ministry of Defense, Ministry of Internal Affairs, Ministry of Justice, Ministry of Culture, Ministry of Health, Ministry of Regional Planning, Construction and Habitation, Ministry of Tourism,

Ministry of Maritime Affairs, Transport and Communication, Ministry of Science and Technology, Ministry of Agriculture and Forestry, Ministry of Education and Sport, Ministry of Public Administration, Ministry of Labor and Social Welfare, Ministry of Economy. These reports contain the analysis of a total of 81 statutes.

The invitation by the Working Group for non-governmental organizations to participate in the compatibility review was only accepted by the Civil Committee of Human Rights. It was concluded that the reports by respective Ministries, public administration bodies and the report by the Civil Committee of Human Rights, as well as the practices of the Constitutional Court, would form the basis of the second stage of the compatibility review which would, in addition to Croatian legislation, take into consideration also the practice of the Commission and the Court.

In order to carry out the analysis of all the areas of law covered by the Articles of the Convention, it was decided at the third meeting of the Working Group, to increase the membership of the Working Group and to appoint the following associated members: Prof. Mira Alinčić, Prof. Mihajlo Dika, Prof. Nikola Gavella, Prof. Dragan Medvedović, Prof. Branko Smerdel, Prof. Tanja Tumbri, Dr. Ivo Josipović, Dr. Aleksandra Korač, Dr. Ksenija Turković, all from the Faculty of Law in Zagreb and Prof. Goran Tomašević from the Faculty of Law in Split. At this meeting the methodology of drafting the reports and the individual tasks of each expert under specific Articles of the Convention were decided.

At the fourth meeting of the Working Group on May 15, 1997, it was decided to prepare the respective reports before June 30, 1997 and to translate and forward an integrated report to the Council of Europe before July 30, 1997, so that the fifth meeting could be convened with the participation of experts of the Council of Europe. The Chairperson appointed by her decision of June 16, 1997 a special Working Group on the preparation of the final report, comprising: Dr. Dubravka Šimonović, Prof. Nina Vajić, Prof. Josip Kregar, Ivana Goranić, Tania Raguž and Dr. Ksenija Turković.

The fifth meeting of the Working Group was held from September 1 to 4, 1997 in Dubrovnik under the patronage of the Government of the Republic of Croatia and with the participation of experts from the Council of Europe (Sir Basil Hall, Mr. Tamas Ban, Mrs. Donna Gomien) and representatives of the Constitutional Court of the Republic of Croatia (Dr. Belajec, Mr. Malčić).

Based on the discussions held at the aforementioned meeting, a Draft Report on the Conformity of the Legislation of the Republic of Croatia with the Provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols was set up.

At the sixth meeting of the Working Group, held on October 2, 1997 in Zagreb, the remarks of the Council of Europe experts and the Draft Report were analyzed and it was agreed to systematize it into two major parts: I. Introduction, conclusions and recommendations; and II. Analysis of the conformity of Croatian law with substantive Articles of the Convention and its Protocols. It was proposed to forward the Report in

this form to the Government, so that it should serve as the basis for conclusions by the Government of the Republic of Croatia on necessary amendments to individual legal provisions, or for making reservations, respectively, on the occasion of adopting the proposed ratification of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms.

The Council of Europe actively supported the work of the Working Group under its 1997 Cooperation Program with the Republic of Croatia. This support mainly encompassed the supply of various documentation, which proved to be valuable for the compatibility review, such as reports on the compatibility review of Hungarian, Estonian and Lithuanian legislation, Donna Gomien's et al. book on the application of the Convention, an overview of relevant practice of the Commission and the Court, and professional publications and other material forwarded to the members of the Working Group. The European Convention on Human Rights and a Short Guide to the European Convention on Human Rights were translated into Croatian, in cooperation with the Council of Europe, and distributed amongst the relevant Ministries and members of the Working Group.

The Council of Europe organized a meeting of representatives from the Working Group (Prof. Željko Horvatić, Assistant Minister of Justice Ms. Lidija Lukina Karajković and the Secretary of the Working Group Mr. Miroslav Papa) with representatives of the Ministry of Justice of the Republic of Hungary in Budapest from April 6 to 8, 1997, for the purpose of exchanging experiences.

In order to become acquainted with the role of the Governmental Agent before the Commission and the Court, the Council of Europe organized a round table for experts of the Council of Europe and members of the Working Group in Zagreb on April 28 and 29, 1997 and a study visit for certain members of the Working Group (Dr. Josip Kregar, Dr. Željko Potočnjak and Dr. Branko Smerdel) to the Council of Europe and the Court from 25 to 31 May, 1997.

After ratification of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms by the Parliament of the Republic of Croatia, and deposit of the ratification instruments with the Secretary General of the Council of Europe by the Minister of Foreign Affairs, this Report shall be forwarded to the Council of Europe in English translation.

1.2. The status of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the Croatian legal system

Pursuant to Article 134 of the Constitution of the Republic of Croatia, treaties duly concluded and ratified in accordance with the Constitution and made public, are part of the internal legal order of the Republic of Croatia, and shall have an authority superior to that of laws.

Accordingly, the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as its Protocols, shall become directly applicable by

courts and other state bodies in Croatia, once ratification by Parliament has taken place (Article 133 of the Constitution), and following its publication in the Official Gazette (hereinafter "OG"). Moreover, the Convention and Protocols take precedence over laws. Therefore, where incompatibilities exist, laws need to be harmonized with the provisions of the Convention and its Protocols.

Pursuant to Article 66 of the Convention and Article 27 of the Law on Conclusion and Implementation of Treaties, the Convention shall come into force for the Republic of Croatia at the date of the deposit of its instrument of ratification with the Secretary General of the Council of Europe.

According to Croatian legislation, the procedure of ratification of treaties is commenced by the Croatian Government upon the initiative of the Ministry of Foreign Affairs. Treaties are ratified by an act of ratification, or a similar act (most often a statute). This act contains the text of the treaty in Croatian and that of the authentic texts, if this is not Croatian, and may contain reservations and interpretative declarations, information on its entry into force, as well as other relevant information (Article 17 of the Law on Conclusion and Implementation of Treaties). The European Convention on Human Rights envisages the possibility of making reservations in Article 64.

Following ratification of a treaty by the Croatian Parliament, the instrument of ratification is signed by the President of the Republic (Article 133 of the Constitution and Articles 18 and 19 of the Law on Conclusion and Implementation of Treaties), or upon his authorization, by the Prime Minister or the Minister of Foreign Affairs (Article 25 of the Law on Conclusion and Implementation of Treaties).

The deposit of the instrument of ratification and all other activities relating to the entry into force of the Convention in the Republic of Croatia fall within the responsibility of the Ministry of Foreign Affairs (Article 26 of the Law on Conclusion and Implementation of Treaties) In the case of the Convention, this means that it shall have legal effect in the Republic of Croatia at the date of the deposit of its instrument of ratification with the Secretary General of the Council of Europe and not at the date of ratification by the Croatian Parliament, nor the date of its publication in the OG.

The Croatian Constitution does not provide for the possibility of the Constitutional Court to decide on the conformity of treaties with the Constitution prior to their ratification, more specifically, to review the conformity of a non-ratified treaty with the Constitution. This can only be carried out once the treaty has been ratified by Parliament Only then can the Constitutional Court decide on the conformity with the Constitution of the Act by which the treaty was ratified.

In the case of incompatibility between the provisions of a treaty and the Constitution, the Constitutional Court cannot revoke or annul the treaty, due to the fact that provisions of treaties may be changed or repealed only under conditions and in the manner specified in the treaties themselves, or in accordance with general rules of international law (Article 134 of the Constitution and Article 39 of the Law on

Conclusion and Implementation of Treaties). Therefore, if the Constitutional Court was to establish that a treaty did not conform with the Constitution, the following action could be taken: the Constitution could be amended or an amendment to the treaty could be sought at the international level under the conditions and in the manner specified in the treaty or in accordance with general international law, or the treaty may be denounced According to Article 41 of the Law on Conclusion and Implementation of Treaties, a treaty may be denounced or one of the parties may withdraw from a treaty pursuant to the provisions of the treaty itself, or in accordance with general rules of international law. To date, the Constitutional Court has not had to decide on any such cases. However, it should be mentioned, that a possible Constitutional Court decision on incompatibility of a treaty, in this case the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, with the Constitution, would not have any impact on the international obligations of the Republic of Croatia or on the question of international responsibility.

1.3. Harmonization of the legislation of the Republic of Croatia with the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Croatian Constitution

The Republic of Croatia became a full member of the Council of Europe on November 6, 1996. On the same day, the Minister of Foreign Affairs signed the European Convention for the Protection of Human Rights and Fundamental Freedoms with the amendments set forth in Protocols 2,3,5 and 8, and Protocols 1,4,6,7 and 11. Furthermore, verbal notes were presented containing declarations provided by Articles 25 and 46 of the Convention, Article 6, paragraph 2 of Protocol 4 and Article 7, paragraph 2 of Protocol 7. The Republic of Croatia accepted a one year term from its admission to the Council of Europe to ratify the European Convention on Human Rights and Protocols 1,4,6,7 and 11, i.e. before November 6, 1997.

Following its ratification in accordance with the Constitution, and its publication, the European Convention on Human Rights shall become part of the internal legal order of the Republic of Croatia and shall have authority superior to that of domestic law. Alongside the primary obligation of the state to ensure the protection of the rights secured by the Convention, the Convention also allows the possibility of seeking protection of these rights through the European Commission of Human Rights and the European Court of Human Rights, following the exhaustion of domestic legal remedies. It is, therefore, necessary to harmonize the legislation of the Republic of Croatia with the Convention prior to its ratification and entry into force.

The process of harmonization of Croatian legislation with the European Convention for the Protection of Human Rights and Fundamental Freedoms is part of an overall reform of Croatian legislation, which began with the adoption of the new Constitution and through the process of Croatia's independence. The Constitution of the Republic of Croatia was adopted on December 22, 1990.

The Constitution of the Republic of Croatia contains most of the civil and political rights secured by the European Convention on Human Rights, so that the harmonization of legislation with the Constitution means to a great extent to harmonize the legislation with the European Convention on Human Rights.

Pursuant to Article 5 of the Constitution of the Republic of Croatia, laws shall conform with the Constitution, and other rules and regulations shall conform with the Constitution and laws. This has required the enactment of new pieces of legislation or the harmonization of almost all existing laws.

The harmonization of legislation with the Constitution is prescribed by the provisions of the Constitutional Law on the Implementation of the Constitution. This stipulates that the provisions of the Constitution for the application of which, in accordance with the Constitution, it is not necessary to enact a constitutional law or statute, shall be directly applied as at the date of adoption of the Constitution. For those provisions of the Constitution which cannot be directly applied, legislation enabling their application shall be enacted not later than December 31, 1997.

The Constitution of the Republic of Croatia contains a total of 142 Articles, almost a third of which relates to constitutional freedoms and human rights provided for in Chapter III FUNDAMENTAL FREEDOMS AND RIGHTS OF MAN AND CITIZEN (Articles 14 to 69). The provisions in Chapter III are grouped in sub-chapters with the following titles: 1. Common Provisions; 2. Personal and Political Freedoms and Rights; and 3. Economic, Social and Cultural Rights. The harmonization of legislation with the Constitution has been under way since 1991 and is envisaged to be completed by December 31, 1997. During this period a great many new statutes have been adopted: 180 laws in 1991; 120 laws in 1992; 138 laws in 1993; 100 laws in 1994; 86 laws 1995; 108 laws in 1996 and 18 laws up to May 1, 1997. The harmonization of legislation with the Constitution is in its final stages whilst those laws, the harmonisation of which is of special importance and which also concern human rights set forth in the Convention, are already in the legislative procedure before the Croatian Government or Parliament. These include: Draft Law on Amendments to the Law on Sale of Apartments with Tenancy Rights; Draft Law on Humanitarian Organizations and Humanitarian Aid; Draft Law on Old Age Pension Insurance; Draft Law on Family Relations; Draft Law on Amendments to the Law on Maternity Leave of Self-employed and Unemployed Mothers.

The Croatian Government, furthermore, plans to prepare and submit to the legislative procedure the following laws: Draft Law on Personal Data Protection, Draft Law on Petty Offences and Delinquents, Draft Law on Publishing, Draft Law on Execution of Prison Sentences, new Draft Law on Peaceful Assembly and Public Protest and Draft Law on Internal Affairs.

An important role and position in the harmonization of legislation is held by the Constitutional Court which, according to Article 125 of the Constitution, decides on the compatibility of laws with the Constitution and the compatibility of other regulations with the Constitution and laws, and protects constitutional freedoms and

human rights. It is evident from the practice of the Constitutional Court (which is reviewed later in this report when analyzing individual Articles of the Convention), that through its activities further harmonization of Croatian legislation with the Constitution has been achieved.

Croatian legislation is systematized in the following categories: Constitution, Constitutional Laws, treaties, laws passed by a two-thirds majority vote of all representatives in the Chamber of Representatives of the Croatian Parliament (Sabor), pursuant to Article 83, paragraph 1 of the Constitution, and laws which elaborate the constitutionally defined freedoms and human rights, the electoral system etc. and are passed by the Chamber of Representatives by a majority vote of all representatives (Article 83, paragraph 2 of the Constitution).

The Constitution itself does not define the legal effect of Constitutional Laws, so that a school of thought exists, according to which all or only certain Constitutional Laws have the same legal value as the Constitution, whilst others argue that all or some of the Constitutional Laws rank below the Constitution in terms of legal effect. It is expected that the Constitutional Court could resolve this dilemma when this issue arises.[2]

A further question to be addressed is the possible incompatibility of laws with the provisions of international treaties entered into by the Republic of Croatia, thus also in relation to the European Convention on Human Rights, after its ratification.

The Constitutional Court is not competent to review the conformity of laws with international treaties, but exclusively the conformity of laws with the Constitution, so that the situation could arise that in a specific case the court has to deal with the issue of the application of provisions of laws or international treaties, which are not in conformity. Pursuant to Article 134 of the Constitution, international agreements are directly applied and are in terms of legal effect above national laws, so that in the mentioned case the regulations with the dominant legal effect should be applied.

In order to avoid situations in which the courts themselves assess the conformity of laws with international treaties, the Working Group deems that it would be useful to

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[2] According to information from the Constitutional Court, the issue of ranking of laws, including Constitutional Laws, with relation to the Constitution, will be discussed in detail by the Constitutional Court in September or October 1997. The following Constitutional laws have been passed in the Republic of Croatia to date:
- Constitutional Law on the Implementation of the Constitution of the Republic of Croatia (O.G. No. 56/90);
- Constitutional Law on the Constitutional Court of the Republic of Croatia (OG 13/91);
- Constitutional Law on Human Rights and Freedoms and Rights of Ethnic and National Communities or Minorities in the Republic of Croatia (OG 27/92, 65/91, 34/92 and 68/95)
- Constitutional Law on the Temporary Suspension of Certain Provisions of the Constitutional Act on Human Rights and Freedoms and Rights of Ethnic and National Communities or Minorities in the Republic of Croatia (OG 34/92);
- Constitutional Law on the Cooperation of the Republic of Croatia with the International Criminal Tribunal (OG 32/96).

consider the possibility of extending the competencies of the Constitutional Court so as to include the review of conformity of laws with international treaties.

Due to the fact that in practice incompatibility of laws with international treaties in most cases also constitutes incompatibility of laws with the Constitution, this problem may be solved by review of the constitutionality of laws. Of course, notwithstanding the aforementioned, it is possible that in practice also cases of incompatibility of laws with international agreements, which contain provisions that are not identical with the Constitution, will arise, so that there is a need for considering the aforementioned option of expanding constitutional review.

1.4. Exhaustion of Domestic Legal Remedies: Constitutional Complaint

Article 26 of the Convention prescribes that the Commission may only deal with a complaint after all domestic remedies have been exhausted, according to the generally recognized principles of international law, and within a period of six months from the date on which the final decision was taken.

Pursuant to the fundamental principle, according to which legal remedies for the protection of human rights and freedoms are to be regulated by national legislation, and with regard to the Court's position that one of the general principles of international law is founded on the belief that every country must be afforded the opportunity to rectify any violation of its international obligations first through domestic channels before international protection may be sought (*Guzzardi v. Italy*[3]), the constitutional complaint represents in the Croatian legal system a remedy which must be used, as a prerequisite for submission of a complaint to the Commission and the Court.

Only after the Constitutional Court passes judgment on a constitutional complaint does the complainant acquire the right to seek redress through the aforestated international bodies within a period of six months from the date the complainant learned about the decision, i.e. from the date of publication or delivery of the decision of the Constitutional Court.

Due to the compatibility of constitutional guarantees of rights and freedoms contained in the Croatian Constitution with the provisions of the Convention, this will be a regular situation in all cases where the complainant deems that one of his rights or freedoms has been violated. One has to bear in mind that the ratification of the Convention will significantly increase the burden borne by the Croatian Constitutional Court in terms of defining the limits of admissibility of constitutional complaints, in terms of the responsibility of the Constitutional Court as the last recourse for protection, and as concerns the Constitutional Court being held responsible indirectly for consequences resulting from the inefficiencies of national institutions in protecting guaranteed rights and freedoms.

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[3] *Guzzardi v Italy* judgment, 1980, Series A N°39.

Considering possible doubts, it has to be pointed out that constitutional complaint is in theory frequently referred to as an "extraordinary legal remedy". Such a position however, may be supported only in respect of the legal nature of the constitutional complaint within the domestic legal system, where the "exhaustion of all other legal remedies" is a prerequisite before turning to the Constitutional Court as the last recourse to seek protection of Constitutionally provided rights and freedoms. On the other hand, from the point of view of legal protection at the international level, protection through the Constitutional Court undoubtedly constitutes a domestic legal remedy which needs to be exhausted prior to seeking international protection. This point is supported by the Commission, whose position on extraordinary legal remedies is that the complainant is not required to make use of such remedies before bringing the case before the Commission. However, these in fact relate to certain special forms of social protection that exist in some countries, or to the submission of a petition for pardon to the executive power. Hence, it is clear that when an individual deems that his rights or freedoms as guaranteed by the Convention have been violated by certain actions within the responsibility of the Croatian State, that person is obliged to seek protection from the Croatian Constitutional Court by means of constitutional complaint. Only after such protection has been denied, can domestic legal remedies be considered exhausted.

1.4.1. The Constitutional Complaint in the Croatian Legal System

On the basis of Article 125, sub-paragraph 3 of the Constitution, the institute of constitutional complaint is regulated by Article 28 of the Constitutional Law on the Constitutional Court of the Republic of Croatia (OG 13/1991).

In accordance with Article 29 of the Constitutional Law, a constitutional complaint must be lodged within one month following the date of receiving a decision which effectively exhausts the legal remedy, i.e. this decision constitutes a precondition for lodging a constitutional complaint. These procedural rules and formal requirements for bringing a constitutional complaint are elaborated in detail in the Rules of Procedure of the Constitutional Court. Under Article 58 of the Rules of Procedure, the Constitutional Court shall reject any constitutional complaint which is brought outside the one month time limit. However, under Article 52 of the Rules of Procedure, the Constitutional Court shall allow a submission beyond the one month limit, when a person, for justified reasons, failed to lodge a constitutional complaint within the stipulated time period, and an application for reinstatement is submitted within 15 days after the grounds which caused the delay cease to exist, and simultaneously files a constitutional complaint. Even so, an application cannot be filed after the expiry of three months from the date of omission, or if the stipulated term for submitting the application has been omitted. A complainant may lodge a constitutional complaint either in person or through his or her legal representative under the complainant's specific authorization/notice of acting, (Article 30 of the Rules of Procedure). This authorization may be issued only by a competent person and exclusively for the purpose of lodging the constitutional complaint.

1.4.2. Practice of the Constitutional Court of the Republic of Croatia

1.4.2.1. The Constitutional Court protects those freedoms and rights set out in Chapter III of the Constitution, entitled "Fundamental Freedoms and Rights of Man and Citizen" and encompasses Articles 14 - 69. Numerous guarantees are also contained in the Constitutional Law on Human Rights and Freedoms and Rights of Ethnic and National Communities and Minorities in the Republic of Croatia (OG 34/1992). These norms specify several guarantees for collective minority rights, and the Constitutional Court considers the protection of these rights to be an essential part of its jurisdiction.[4]

The Constitutional Court already in the early stages of its functioning had to address the issue of the significance of the provisions under Article 3 of the Croatian Constitution. This Article defines the fundamental values of the constitutional order: Freedom, equal rights, national equality, love of peace, social justice, respect for human rights, inviolability of property, conservation of nature and the human environment, the rule of law and a democratic multiparty system. A school of thought has developed, according to which the provisions in Article 3 create an independent ground for lodging a constitutional complaint. However with time this viewpoint has been superseded by one to the effect that the Constitutional Court has to take into consideration these provisions, but only as a subsidiary factor, in terms of a constitutional principle explaining the structure and essence of the constitutional conception of human rights. This does not form an independent ground for lodging a constitutional complaint.

1.4.2.2. A constitutional complaint may be lodged by "everyone", meaning that there is no differentiation made between Croatian citizens and non-citizens. However, a constitutional complaint cannot be lodged on behalf of another person or for general benefit, but has to be submitted by the person, whose personal rights have allegedly been violated (Decision No. U-III-358/1993 of January 19, 1994). Legal entities are also entitled to file constitutional complaints (Constitutional Court Ruling No. U-III-52/92 of April 8, 1992).

1.4.2.3. The Constitutional Court has defined in a series of decisions and rulings the term "decision (judgment) of a judicial, administrative or other authority with public competence" as in Article 28 of the Constitutional Law. In view of the need for exhaustion of legal remedies requirement, the decision must be final. The conditions

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[4] Compare Jadranko Crnić: Fundamental Freedoms and Rights of Man and Citizen and their Protection before the Constitutional Court, Informator, Zagreb, No. 4187, of April 23, 1994, p. 1. Prof. Sokol claims that the Constitutional Law on Human Rights and Freedoms and Rights of Ethnic and National Communities or Minorities, according to Article 83 of the Constitution, is a basic law which elaborates constitutionally guaranteed rights and freedoms. See: S. Sokol, B. Smerdel: Constitutional Law, Informator, 1995, p. 15. There are certain dilemmas on the legal effect of these norms concerning whether they are provisions of constitutional rank or not, which has yet to be resolved by the Constitutional Court.

for admissibility of constitutional complaints in the Croatian legal system have been gradually defined in this manner.

1.4.2.4. Prior to a constitutional complaint being lodged, the right to appeal or some other legal recourse must be exhausted, as well as the judicial review of individual acts of administrative authorities and other bodies vested with public power (Article 18, Article 19 of the Constitution). As far as the judicial authorities are concerned, normal legal recourse must be exhausted, i.e. the decision of the court must be final. Moreover, the following special legal remedies must also be exhausted:
a.) Appeal, if, with respect to value or type of dispute, this is permitted in a law suit or in other legal proceedings before the courts;
b) An administrative dispute;
c) In petty offense matters, the course of judicial protection, if it is permitted.

The Constitutional Court has regulated many important substantive and procedural legal issues concerning its jurisdiction in recent years in the same manner as the Commission or, for instance, the German Constitutional Court, so that from that point of view, no difficulties are expected to arise.

In Croatia, rulings which are considered de lege ferenda, particularly those concerning determination of the admissibility of constitutional complaints in order to ease the burden borne by the Constitutional Court, can be relevant in the view of the Commission, which has stated that the provision of legal protection must be both accessible and effective.[5]

[5] A considerable increase in the case load of the Constitutional Court is revealed by figures which show that the Court received a total of 1,613 constitutional complaints up to 15 June 1995. Of these, 25 were received in 1991; 126 in 1992; 252 in 1993; 825 in 1994 and 586 in the first half of 1995.

2. Conclusions Concerning The Compatibility Of Croatian Legislation With The Provisions Of The European Convention On Human Rights And Its Protocols

Bearing in mind the extensive legislative activities of the Republic of Croatia in the period from the enactment of the Constitution of the Republic of Croatia in 1991 until now, the Working Group has been aware since the very beginning of its work that it would be impossible within the prescribed period to perform a thorough professional analysis of each and every regulation effective in the Republic of Croatia in terms of its conformity with the provisions of the Convention.

Therefore, the analysis focuses on those regulations (list enclosed), which, because of the significance of the area they regulate from the viewpoint of the Convention and their frequent and extensive application in practice, call for special attention in terms of compatibility with the principles of the Convention.

Despite a very careful analysis of the compatibility of substantive provisions of the reviewed statutes with the Convention and the practice of the Commission and Court, the Working Group is aware of the fact, and wants to point out, that its conclusions and assessments need not always and in every single case be accepted by the Strasbourg Commission and Court when these bodies will decide in specific cases. The objective of the present analysis goes more in the direction of drawing the Croatian Government's attention to the most evident cases of incompatibility of regulations, so that these can be remedied either by enactment of new laws that are compatible with the Constitution (and thus the Convention), or by improvement or amendments to the existing regulations. It needs to be borne in mind in this context that the Strasbourg bodies, deciding in individual matters, may establish a violation of some provision of the Convention even where the relevant regulation of the Republic of Croatia, which has been applied, does not contravene the Convention as such, but is imprecise, and the bodies that applied it did not sufficiently take into account the principles enshrined in the Convention or the established practice of the Commission and Court.

Taking into consideration all of the aforestated, the Working Group came, based on the analysis of Croatian regulations in light of individual provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and Protocols No. 1, 4, 6, 7, and 11 (and which is contained in the second part of this Report), to the following conclusions:

Article 1 - Obligation to respect human rights

Croatian legislation is in full compatibility with the obligation under Article 1 of the Convention to secure for everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention.

Article 2 and Protocol 6: Right to life

The protection of the right to life in the laws of the Republic of Croatia secured in Article 21 of the Constitution, international agreements and laws conforms with the protection of the right to life under Article 2 of the Convention and Protocol 6 on the abolition of the death penalty, as the Constitution of the Republic of Croatia fully abolishes the death penalty.

Croatian legislation does not contain equivalent formulations as Article 2, paragraph 2 of the Convention referring to deprivation of life when it results from the use of force which is no more than absolutely necessary. The new Criminal Act, ratified on September 19, 1997, regulates necessary self-defense and the Law on Internal Affairs in Articles 42 and 43 all other exceptions. Article 42 of the mentioned Law states that "authorized persons shall carry firearms", which can be interpreted too extensively, so that in amendments to the law it would be advisable to regulate the issue by using the formulation "may carry...". Paragraph 5, Article 42 of the Law is too broadly formulated and thus incompatible with Article 2, paragraph 2 of the Convention. The provision of Article 42 fails to include lawful arrest and quelling a riot or insurrection as a cause for the necessary use of force, which should be taken into account when amending this Law. As far as Article 43 of the Law on Internal Affairs is concerned, it would be necessary to emphasize "for the preservation of the life of this person and others".

Article 3: Prohibition of torture

The former Criminal Act of the Republic of Croatia had the shortcoming of not recognizing the criminal offence of torture and other cruel and inhuman or degrading treatment and punishment. The new Criminal Act, adopted on September 19, 1997, corrected this default by introducing the new criminal offence of torture and other cruel and inhuman or degrading treatment.

The Criminal Procedure Act (hereinafter "CPA") in force and the new CPA, adopted on September 19, 1997, do not envisage as an obstacle to extradition the danger of a long waiting period for the execution of the death sentence abroad on a person to be extradited to a foreign country (only the Minister of Justice may take into account this circumstance, because only upon his discretionary assessment may he pass a ruling, after the judicial part of the extradition procedure has been finalized, allowing extradition. However, the Republic of Croatia is a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 which in Article 3 prohibits any expulsion, sending back or extradition of a person if there is reasonable doubt that he or she could be exposed to torture in some other country. The provisions of the mentioned Convention are, pursuant to Article 134 of the Constitution, directly applicable and are, in terms of legal effect, above law.

The provisions of the Law on Execution of Sentences referring to: a) accommodation of prisoners (Article 113 insufficiently determines the minimum standard of sanitary installations and fails to provide for the possibility to allow prisoners to spend the

night in individual cells); b) transfer of prisoners (Article 161 - 162 insufficiently protect the prisoners from the public and inadequate transport from one prison to another); c) use of coercive means (Article 175 - 179 omit to subject the use of the otherwise permitted firearms to standard limitations contained in the so-called principle of proportionality) d) the disciplinary measure of solitary confinement is not in conformity with Article 3 of the Convention; these provisions must, therefore, be amended as soon as possible in the Draft Law on Execution of Prison Sentence, which is currently being drafted.

In enacting the Law on Execution of Prison Sentence the compatibility with the European Convention For the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1987, and the provisions of the European Prison Rules, should be taken into account as well.

Article 4: Prohibition of slavery and forced labor

The laws of the Republic of Croatia are generally compatible with the requirement of Article 4 of the Convention. However the Law on Execution of Sentences Passed for Criminal Offences, Economic Transgressions and Petty Offences has not been brought into conformity with the Constitution of the Republic of Croatia, nor the Convention, in terms of forced labor of convicted persons serving their prison sentence, so that in drafting the new law this fact should be taken into account.

Article 5 and Protocol 4, Article 1: Right to liberty and security

Croatian legislation is to a large extent compatible with Article 5 of the Convention. Both legislation and judicial practice abide by criteria meeting the requirements of Article 5; Croatian legislation prescribes in certain matters even more restrictive criteria than the ones under the Convention.

The regulation of deprivation of liberty as in the Preliminary Regulation Book of the Ministry of Internal Affairs does not comply with Article 5 of the Convention, because the reasons given for such deprivation are more broadly stated than the ones prescribed in the CPA. This incompatibility should be removed by enacting a new regulation, which is currently being drafted.

Moreover, the compatibility of provisions on regulation of deprivation of liberty in military disciplinary proceedings, set forth in the Disciplinary Code of the Armed Forces, with the Convention could also become disputable, bearing in mind the unjudicial character of the body deciding on the deprivation of liberty in such proceedings.

The regulation provided for in the new Criminal Procedure Act, setting forth the pronouncement of mandatory detention for severe criminal offences, could also become questionable in relation to the Convention because of the recommendation of the Council of Europe that legislators should refrain from such regulations.

What is more, the compatibility of the provision of Article 107 of the Bankruptcy Law, which envisages the coercive bringing to court of debtors if they fail to follow the summons, and detention as punishment for disregarding a court order, could become questionable. This provision formulates too broad reasons for potential deprivation of liberty of bankruptcy debtors, which allows for extensive interpretations of the possibilities of detention.

Article 6 and Protocol 7, Articles 2, 3 and 4: Right to a fair trial

Croatian legislation is generally compatible with the standards provided for by Article 6 of the Convention; the ratification itself will enhance the quality of legal regulations, such as the right that the case shall be reviewed "within a reasonable time", which would also be useful to incorporate in penal and other laws regulating the procedure.

The Law on Petty Offences is incompatible with Article 6 of the Convention, especially with regard to the following issues: a) in cases where this Law envisages the proceedings to be carried out, and the sentence pronounced, by administrative bodies; and b) in cases where the proceedings are carried out and sentence pronounced by magistrates' courts. Problem areas include the right of the defendant to be presumed innocent, the right of the defendant to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him, the right to have adequate time and facilities for the preparation of his defense, the right to a free defense lawyer, the right to examine witnesses against him and the right to free assistance of an interpreter. In this context the possibility of amendments to the mentioned provisions by enactment of a new Law on Petty Offences should be considered as soon as possible.

The regulation of the Law on Income Tax and the Law on Financial Police, allowing the pronouncement of sentences for transgressions by administrative bodies, do not satisfy the criteria of independence and autonomy of judicial bodies according to Convention practice, and they contravene the Convention and need to be amended as soon as possible.

The compatibility with Article 6, paragraph 1 of the Convention of procedures for deciding on matters entering the sphere of civil rights under the Convention, which in Croatian legislation have an administrative character, could be questioned. In those cases, the decisions are made by the Administrative Court which is not a court of full jurisdiction as prescribed in Article 6, paragraph 1 of the Convention.

Thus, the regulation contained in Article 34 of the Law on Administrative Dispute, envisaging decisions by the Administrative Court in closed sessions on initiated administrative litigation, does not conform with Article 6 of the Convention, and the provision should either be amended or reservations made in relation to Article 6 of the Convention.

Article 7: No punishment without law

Croatian law is to a large extent compatible with Article 7 of the Convention.

The Constitution and laws do not contain provisions corresponding to Article 7, paragraph 2 of the Convention, concerning the exemption from the general prohibition of retroactivity for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

The introduction of the exception provided for by Article 7, paragraph 2 of the Convention appears unnecessary for two reasons. Firstly, in Article 2 of the Criminal Act in the definition of the principle of lawfulness it is emphasized that "no-one can be punished, nor can other criminal sanctions be imposed on him, for an act which, before it was committed, was not classified as a criminal act by law or international law"; according to the prevailing theory of sources of international law in the Republic of Croatia the general principles of law recognized by civilized nations are considered to be the source of international law. Secondly, in the incrimination of criminal acts against humanity and international law, the Law invokes the rules of international law which encompass also the general principles of law recognized by civilized nations.

Article 8: Right to respect for private and family life

Croatian legislation is to a great extent compatible with Article 8 of the Convention. Restrictions on the right to respect for private and family life must be "prescribed by law" and must be necessary in a democratic society for the protection of the interests stated in Article 8, paragraph 2 of the Convention. It is these restrictions that are not sufficiently regulated by law, so that new law filling this legal gap need to be adopted and full compatibility with the Convention ensured.

The Law on Internal Affairs leaves in Article 18 the matter of eavesdropping on persons to the discretionary assessment of the governmental bodies (Ministry of Internal Affairs). The same Law leaves the issue of recording of conversations for purposes of national security unregulated. The aforementioned matters need prompt legal regulation on the basis of the regulations contained in the CPA.

The Law on Execution of Sentences Pronounced for Criminal Acts, Economic Transgressions and Petty Offences prescribes in Article 154 the obligation to organize written communication of prisoners with governmental bodies through the prison administration, although this unlawfully restricts the right to freedom of correspondence. The same law does not contain a provision on confidentiality of information. The mentioned discrepancies should be removed by enacting a new Law on Execution of Prison Sentence, and this is in the stage of drafting.

Some regulations of the Law on Temporary Take Over and Administration of Certain Property have unjustifiably, and without temporal limitation, restricted the freedom to use one's proper home, and have, therefore, not been in conformity with the right to

respect for one's home, as set out in Article 8 of the Convention. Their application has, however, been repealed according to the recent decision of the Constitutional Court dated September 25, 1997.

Article 9: Freedom of thought, conscience and religion

Croatian laws meet the standards of the Convention and its application with regard to Article 9. We emphasize that in this case a number of cases can be anticipated in which the enforcement of the Law on Service in the Armed Forces provides a basis for initiation of judicial proceedings in areas such as service of civil military duty, due to the lack of implementation regulations for cases of civil service of military duty. In order to achieve full compatibility with the Convention, the aforementioned implementation provisions need to be enacted as soon as possible.

Article 10: Freedom of expression

Having in mind the practice of the Commission and Court, we find that Croatian legislation concerning freedom of expression is mostly compatible with the provisions of the Convention, and with the judicial practice and decisions of the Commission and the Court. At the level of legal formulations, Croatian legislation accepts the criteria of the Convention, in spite of the fact that in the implementation of the law in practice problems are evident. A fundamental task is therefore the practical implementation and application of European standards of protection of human rights in this area.

Article 11: Freedom of assembly and association

The Law of Public Assembly does not contravene Article 11 of the Convention, but numerous provisions of this Law give a very broad discretion to police bodies and bodies of local self-government. For that reason the right to peaceful assembly should be more carefully legally regulated in the draft of the new Law on Public Assembly and Peaceful Protest, which needs to be brought into compliance with Article 11 of the Convention. In addition, the application of the Law on Public Assembly should be made accessible to all persons including aliens, not only Croatian citizens as prescribed by the present Law.

The Law on Service in the Armed Forces, the Defense Law and the Law on Internal Affairs do not envisage restrictions on the right to peaceful assembly, which are permitted by the Convention and which can only be prescribed by law. It would be useful to consider amendments to these laws by introducing the permitted restrictions.

As far as the right to association is concerned, due to some insufficiently precise provisions, the compatibility of the Law on Associations with the Convention could become questionable in certain cases. The interpretation and application of those provisions, as well as the degree of acquaintance of public clerks working on the registration of associations with the standards set forth by the Convention, are of special importance.

According to Articles 42 and 43 of the Constitution, the right to freedom of assembly and association in the Republic of Croatia is granted exclusively to "citizens". Bearing in mind that the rights provided for by the Convention can be exercised by all persons under the jurisdiction of the state, it is necessary in potential amendments to the Constitution to consider the possibility of extending the rights mentioned to the beneficiaries covered by the Convention.

Article 12 and Protocol 7, Article 5: Right to marry

Assessing the compatibility of Croatian family legislation with Article 12 of the Convention and Article 5 of Protocol 7, it can be concluded that the family system of the Republic of Croatia meets the requirements of the Convention.

Further and more extensive protection of the right to respect for family life will be brought by amendments in the legislation regulating procedures of medically assisted fertilization (it is in the final stage of drafting).

Article 13: Right to an effective remedy

The provisions of Croatian law are in conformity with the standards of the Convention.

Article 14: Prohibition of discrimination

Unlike Article 14 of the Convention, the non-discriminatory clause of the Constitution (Article 14) relates to all rights envisaged by Croatian legislation, but its application is limited to "citizens" only. At the same time, the clause of equality before the law (Article 14 (2) of the Constitution) includes everyone. In potential future amendments to the Constitution, we suggest that a broader formulation of the prohibited reasons for discrimination should be envisaged, which would fully comply with Article 14 of the Convention and would not limit the mentioned right to citizens only.

Article 15: Derogation in time of emergency

Croatian legislation is compatible with the standards envisaged by Article 15 of the Convention.

Article 16 and Protocol 4, Articles 2, 3 and 4 and Protocol 7, Article 1: Restrictions on political activities of aliens

The provisions of Croatian law are mainly compatible with the Convention. The too broadly formulated provision of Article 15, paragraph 1 of the Law on Public Information, which excludes foreign citizens from occupying the post of editor-in-chief of a public paper, regardless of the character of this paper (including non-political newspapers), could become questionable to a certain extent.

The provisions of the Law on Editorship prevents editorship activities of aliens (with regard to non-political newspapers) and this contravenes the Convention. Due to the fact that the provisions of this Law do not comply with the Constitution, nor with the Trade Companies Act and Law on Public Information, the enactment of a new law regulating editorship should be considered as soon as possible.

The provisions of Articles 39 - 49 of the Law on Movement and Residency of Aliens should be elaborated in more clarity so as to bring them into full compatibility with Article 1, Protocol 7, because the reasons for withdrawal and termination of residency of aliens are few and too generally stated, and therefore provide a ground for too extensive interpretations of the Law on Movement and Residency of Aliens. This Law fails also to differentiate clearly the cases in which aliens are granted residency in the Republic of Croatia until the appeal procedure is terminated, from those where the decision on withdrawal of residency (expatriation) can be promptly enforced, because it is necessary in the interest of public order or is based on reasons of national security.

Article 1, Protocol 1: Protection of property

The provisions of Articles 48 - 52 of the Constitution of the Republic of Croatia are compatible with the provisions of Article 1 of the First Protocol.

The provisions of the Law on Ownership and Other Real Rights, Law on Land Books, Law on Inheritance, Law on Legal Relations, Law on Lease of Business Space and Law on Expropriation are in conformity with the provisions of Article 1 of the First Protocol.

The provisions of Articles 8, 9, paragraph 2 and 11, paragraphs 1 and 4 of the Law on Temporary Take Over and Administration of Certain Property do not comply with the provisions of Article 1 of the First Protocol because they allow too deep an interference from the state in the right to ownership by giving sequestrated properties to other persons "to possess and enjoy", so that they possess and enjoy such properties first and foremost in their own, and not the owners' interest, by determining the invalidity of legal disposals of the property which would be undertaken by the owner during the time of sequestration, and by excluding the possibility that the owner, after abolition of sequestration, has undisturbed access to, and possession of, his property.

The provision of Article 14, paragraph 2 of the Law on Status of Displaced Persons and Refugees does not comply with the provisions of Article 1 of the First Protocol, because it prevents the owner from taking possession of his building or apartment, on the basis of a final court decision or a decision of some other relevant body.

The provision of Article 2, paragraph 2 of the Law on Amendments to the Law on Legal Relations prevents access to the court in order to realize one's right to damages incurred as a result of terrorist acts, which is an unacceptable and temporally undefined suspension of the exercise of the right to damages due to loss of property, as covered by Article 1, Protocol 1.

Article 2, Protocol 1: Right to education

The provisions of Croatian law comply with the standards set by the Convention and Protocols.

Article 3, Protocol 1: Right to free elections

The provisions of Croatian law are compatible with the standards set by the Convention and Protocols.

A new Law on Execution of Prison Sentences is in the course of enactment; it will include the necessary harmonization, by taking into account the standards of the Council of Europe with regard to the execution of prison sentences.

3. Recommendations

On the basis of the Report on Compatibility of Croatian Law with the Provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, the Working Group for Examination of the Conformity of Croatian Legislation with the Provisions of the European Convention and Protocols, proposes to the Government of the Republic of Croatia to implement its conclusions by adopting the following recommendations:

I. To initiate the proceedings of ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols 1, 2, 4, 6, 7 and 11, in pursuance of the Draft Law on Ratification, prepared by the Ministry of Foreign Affairs.

II. To adopt the Report of the Working Group of the Government of the Republic of Croatia dated October 5, 1997 and forward it to the Council of Europe in English translation.

III. a) As concerns the legal provisions which the Working Group has found to contravene the Convention and Protocols, it is suggested, on the occasion of the ratification of the Convention, to defer its application to Article 14, paragraph 2 of the Law on Status of Displaced Persons and Refugees, until this provision is harmonized with the provisions of the Convention and Protocols.

III.b) Concerning legal provisions, which have been found by the Working Group not to be compatible with the Convention, it is suggested to make reservations, pursuant to Article 64 of the Convention, to:

- Article 6 of the Convention, as regards Article 34 of the Law on Administrative Dispute, prescribing non-public sessions of the Administrative Court when deciding on administrative disputes.

III.c) Concerning the provisions of certain laws, which were found to be incompatible with the Convention by the Working Group, because they involved laws which have entered, or need to enter, legislative procedure by the end of 1997 as laws to be harmonized with the Constitution, it is suggested to bring such provisions into conformity with the Convention by adopting adequate solutions as proposed in the drafts, or immediately to enact the following new laws:

1. Law on Petty Offences

- in conjunction with Article 6 of the Convention, the immediate enactment of a new law which is fully compatible with the Constitution and the Convention is suggested, whereby the following incompatibilities of the present Law with the Convention should be removed:

a) cases where administrative bodies carry out the proceedings and pronounce punishments

b) cases where the proceedings are carried out and the punishments pronounced by magistrates' courts, concerning the right of the defendant to be presumed innocent, the right of the defendant to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him, the right to have adequate time and facilities for the preparation of his defense, the right to a free defense lawyer, the right to examine witnesses against him and the right to the free assistance of an interpreter.

2. The Law on Execution of Sentences Pronounced for Criminal Acts, Economic Transgressions and Petty Offences

- concerning Article 3 of the Convention it is proposed to enact immediately a new law which is fully compatible with the Constitution and the Convention, and especially to amend the provisions of the present law regarding a) accommodation of prisoners (Article 113. insufficiently determines the minimum standards for sanitary installations and fails to provide the prisoners with the opportunity to spend the night in individual cells); b) transfer of prisoners (Article 161-162 insufficiently protect the person of the prisoner from the public and inadequate transportation from one prison to another); c) use of coercive means (Article 175-179 fail to subject the deployment of the usually permitted firearms to the standard limitations contained in the so-called principle of proportionality; d) disciplinary measure in the form of solitary confinement.

- in conjunction with Article 4 of the Convention, it is suggested to amend the provisions of the present Law referring to the matter of compulsory labor of convicted persons serving their prison sentences.

- concerning Article 8 of the Convention, it is suggested to amend the provisions of the present Law referring to the obligation of organizing written communication of prisoners with state bodies through the prison administration, as well as the provisions dealing with data protection.

3. Preliminary Regulations Book of the Ministry of Internal Affairs

- in conjunction with Article 5 of the Convention, it is recommended to eliminate possible reasons for deprivation of liberty that are more extensive than those prescribed by the CPA or to regulate these issues by a new Law on Internal Affairs.

4. Law on Public Assembly

- as far as Article 11 of the Convention is concerned, it is recommended especially to provide for the equal treatment of all persons, citizens and aliens, in terms of the exercise of the right to peaceful assembly when enacting the new law, which needs to respect the standards of the Convention.

5. Law on Internal Affairs

- concerning Article 2 of the Convention, it is recommended urgently to pass a new law in which the formulations of Articles 42 and 43 of the Law are amended so that the phrase "authorized persons shall carry firearms" is replaced by the formulation "may carry...". Paragraph 5, Article 42 of the Law is too generally formulated and can therefore be incompatible with Article 2, paragraph 2 of the Convention. Article 42 of the Law does not contain any provision on lawful arrest and quelling a riot or insurrection as a ground for the use of force, which should be taken into account in drafting the new law. Moreover, Article 43 of the Law on Internal Affairs needs to emphasize "preservation of life of such person and others".

6. Law on Editorship

- concerning Article 16 of the Convention, it is suggested to amend the present or enact a new law as soon as possible, which fully complies with the Constitution, as well as with the Convention, especially in the sense of enabling aliens to engage in editorship.

III.d) As concerns provisions of certain laws which have been found by the Working Group not to comply fully with the Convention - and they are no longer subject to harmonization with the Constitution - it is recommended to amend them as soon as possible. They are the following:

1. Law on Movement and Residence of Aliens

- in conjunction with Article 1, Protocol 7 it is suggested to amend Articles 39 - 49 of the Law so that the impreciseness and general nature of the reasons for cancellation and termination of residence of aliens are removed. Furthermore, it is necessary to differentiate between cases where the alien is allowed to reside in the Republic of Croatia until the termination of the appeal proceedings, from cases where the decision on cancellation of residence (deportation) can be enforced immediately, because it is necessary in the interest of public order or is based on reasons of national security.

2. Law on Income Tax

- concerning Article 6 of the Convention, it is recommended to amend Article 144 of the Law so as to eliminate the possibility of pronouncement of a fine by an administrative body (Tax administration).

3. Law on Financial Police

- in conjunction with Article 6 of the Convention, the amendment of Article 12 of the Law is suggested so as to eliminate the possibility of pronouncement of a fine by an administrative body (Petty Offence Commission).

III. e) In view of insufficient or lacking regulation of certain legal relations, which in practice can lead to a breach of the provisions of the Convention, the Working Group suggests that the following regulations should be enacted immediately:

- in relation to Article 8 of the Convention, the enactment of a law filling the lacuna regarding eavesdropping and the recording of conversations on grounds of national security should be considered as soon as possible.

- concerning Article 9 of the Convention, provisions regulating civil military duty should be enacted.

- in conjunction with Article 1, Protocol 1, a special law, pursuant to the provision of Article 2, paragraph 2 of the Law on Amendments to the Law on Legal Relations should be passed.

III. f) As concerns individual regulations, which have been found by the Working Group to be potentially questionable from the viewpoint of the Convention, it is suggested to reconsider them in light of the practice of the European Court and Commission of Human Rights on the occasion of the future reenactment of those laws and statutes:

1. Criminal Procedure Act

- concerning Article 5 of the Convention, the provision prescribing mandatory detention for certain severe criminal acts would be worth reviewing on the occasion of future amendments to the CPA and in light of the recommendation of the Council of Europe in this respect.

2. Law on Administrative Dispute

- in conjunction with Article 6 of the Convention, it would be beneficial to review the regulation in Croatian legislation according to which there is administrative judicial jurisdiction in matters entering the sphere of civil rights under the Convention, but which in Croatian legislation are given an administrative character. It is the Administrative Court that decides in such matters, but it is not a court of full jurisdiction as required by Article 6 of the Convention.

3. Bankruptcy Law

- regarding Article 6 of the Convention, the regulation in Article 107 of the Bankruptcy Law envisages the coercive bringing to court of a debtor if he ignores the summons, and detention as punishment for disobeying a court order. It would be useful to formulate this provision more precisely and in respect of the principles of the Convention, because it states the reasons for deprivation of liberty of a bankruptcy debtor too generally.

4. Disciplinary Code

- in conjunction with Article 5 of the Convention, the regulation according to which the Disciplinary Court, which has not all the necessary qualities of a court, decides on deprivation of liberty, should be reviewed anew.

III. g) As concerns laws which are compatible with the Convention, but omit to contain some of the possible limitations of rights permitted under the Convention, the following amendments are suggested:

1. Law on Service in the Armed Forces, Defense Law and Law on Internal Affairs

- concerning Article 11 of the Convention, it is suggested to assess whether it would be opportune to introduce a restriction on the right to peaceful assembly in the armed forces and the police, and in conformity with the Convention.

IV. It is suggested to prolong the mandate of the Working Group of the Government of the Republic of Croatia for the Examination of the Conformity of Croatian Law with the Provisions of the European Convention on Human Rights and Fundamental Freedoms and its Protocols for one more year, with the assignment to monitor the conformity of the legislation with the legal practice of the European Commission and Court of Human Rights, and to submit a report on its activities to the Government of the Republic of Croatia upon expiry of the extended mandate.

II. COMPATIBILITY WITH SUBSTANTIVE ARTICLES UNDER THE CONVENTION

This part of the Report analyses laws which were in force in the Republic of Croatia as of September 15, 1997. All subsequent decisions of the Constitutional Court of the Republic of Croatia and new laws, adopted at sessions of the Croatian Parliament after this date, and which are relevant in relation to the compatibility of the legislation of Croatia with the Convention, and which have incorporated a major part of the observations presented in this Report, are indicated in the remarks and have been taken into account in the Introduction, Conclusions and Recommendations.

The Criminal Act, the Criminal Procedure Act and the Law on Protection of Persons with Mental Disorders have fully removed the problem areas identified by the experts in part II. of the Report.

1. Obligation to Respect Human Rights: Article 1

> *Article 1.*
> *The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.*

1.1. Article 1 talks about the application of the Convention and prescribes that the contracting parties must secure to everyone within their jurisdiction, the rights and freedoms declared by the Convention. This means that the Convention does not only protect the rights of the citizens of the contracting states, in our case Croatian nationals, but also those of non-citizens, stateless persons and legally incompetent persons, for instance children. As can be seen from the practice of the Commission and the Court, it is sufficient that the country, in this case Croatia, can exercise a certain power with respect to an individual through its government bodies.

The Republic of Croatia is responsible for the actions of its authorities even in cases when they have committed a breach of the Convention outside Croatian state territory. States are not allowed to deny their competence in respect of an act or omission committed by persons within their jurisdiction, based on the fact that such acts or omissions occurred outside their state territory, or the effect thereof occurred outside their state territory.

1.2. Personal Jurisdiction of the Commission and the Court (ratione personae)

It is the primary task of the Commission to ensure the observation of the obligations accepted by the contracting states under the Convention. The Commission and the Court, however, cannot act upon their own initiatives in reviewing the position of human rights in a given country. The opportunity to activate the control mechanisms established by the Convention, lies with the contracting states (Article 24) or individuals (Article 25). The Convention enables each contracting party to address the

Commission on every alleged violation of the provisions of the Convention committed by another party. It is not required that the state claims to be the "victim" of a violation. Natural persons, non-governmental organizations or groups of individuals may also address the Commission when claiming to be the victims of a violation of rights recognized in the Convention, and which have been committed by one of the contracting parties of the Convention.

With respect to the Convention in disputes between individuals, one should bear in mind that the Convention is directly applicable in the Croatian legal system. Based on the provisions of the Convention or Protocols, individuals may file a complaint with the Strasbourg bodies, after exhausting national legal remedies. Individuals may submit a claim only against an alleged violation, for which state authorities are responsible. They are generally not entitled to complain about the actions of other individuals (for instance physicians, attorneys etc.), for a specific country cannot be held responsible for such deeds.

1. 3. Temporal Jurisdiction of the Commission and the Court (ratione temporis)

With respect to the temporal application of the Convention, it should be mentioned at this stage that, according to general international law, treaties are not applied retroactively. In other words, they are not applied to situations which occurred before the treaties entered into force. Since the Convention does not cover the principle of retroactivity expressly, its provisions are generally applied to human rights violations committed after the Convention entered into force.

The requirements for submitting an application are set out in Article 26 of the Convention: The Commission may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognized principles of international law, and within a period of six months from the date on which the final decision was made.

The practice of the Commission and Court, however, indicates exceptions to the above stated. The Commission has dealt with cases relating to violations committed before the moment of the Convention's entry into force, in cases of continued violation of a right protected by the Convention. The Commission stated that where the consequences of a judgment, which was brought prior to the Convention entering into force and continued after the Convention's entry into force, constituted a continuing violation, such a case could not be declared inadmissable ratione temporis.

In the case of an ongoing violation, the Commission and Court will consider themselves competent ratione temporis as concerns facts which occurred before, but the consequences of which continued after the Convention entered into force. This means that in cases of complaint, based on Article 5, paragraph 3 and Article 6, paragraph 1 of the Convention, the state of the proceedings at the moment the Convention enters into force (or of making declarations according to Article 25 of the Convention) will be taken into consideration. Therefore in order to be able to decide properly on a violation after the Convention has entered into force, the Court also

considers proceedings and breaches which occurred before its entering into force, if they form part of an ongoing process, or if they are directly linked to the existing situation. After the Convention has entered into force, however, all deeds and omissions of the state must conform to the Convention and are subject to review by the Strasbourg bodies.

Concerning the exhaustion of all national legal remedies, an exception can be made when a complaint is lodged concerning unreasonable length of proceedings (Article 6, paragraph 1 of the Convention): The Commission allows the filing of the complaint in such cases while the proceedings before the national court are still pending, prior to the exhaustion of domestic remedies. This is not derived from the provisions of the Convention, but from the practice of the Commission and Court.. Such practice by the Strasbourg bodies is based on the reasoning that the protection of the rights of the individual would be rendered ineffective, due to the length of the proceedings before the national court.

Furthermore, the Commission has determined cases in which the complaint refers to proceedings carried out before the Convention entered into force but where a final decision was brought after its entry into force. In such cases, the date the Convention entered into force has a dividing effect on the legal proceedings for the specific country and with respect to the time factor: the first part, which does not form part of the competence of the Convention ratione temporis, and the second part (after the final decision) to which the jurisdiction of the Commission applies.

Finally, it needs to be emphasized that in cases of denunciation of the Convention, pursuant to Article 65, paragraph 1 and 2, the Convention remains fully applicable to the denouncing state for a term of six months. This means that a complaint filed between the date of denunciation of the Convention and the date of the denunciation entering into effect, is still subject to the jurisdiction of the Commission.

2. Right to Life: Article 2 of the Convention and Protocol 6

Article 2.
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 form the use of force which is no more than absolutely necessary:

a. in defense 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.

2.1. Right to Life According to the Convention

The right to life, according to the Convention, refers to the right to life of the individual by law. According to Article 15, paragraph 1 and 2 of the Convention, no derogation of that right shall be made in time of war or other public emergency, except in respect of deaths resulting from lawful acts of war.

2.2. Constitutional Protection of the Right to Life

In the Republic of Croatia the right to life is protected by the Constitution, by treaties entered into by the Republic of Croatia containing provisions on the protection of the right to life, as well as by legislation.

Article 21 in Chapter III of the Constitution of the Republic of Croatia, "Fundamental Freedoms and Rights of Man and Citizen" secures the right to life and prohibits the pronouncement of the death penalty.

Article 17, paragraph 3 of the Croatian Constitution excludes the possibility of restrictions to the right to life, even in the case of immediate danger to the existence of the state.

Comparing paragraph 1 of Article 2 of the Convention: *Everyone's right to life shall be protected by law* with paragraph 1 of Article 21 of the Constitution: *Every human being shall have the right to life*, we notice that the Convention uses the term *everyone* for the persons entitled to this right, while the Constitution of the Republic of Croatia, deploys the term *human being*. In spite of the fact that the content of both terms depends on their interpretation, it is felt that the expression *human being* is broader than the term *everyone*, so that the term *everyone* is fully encompassed by the expression *human being*, and the category of potential subjects according to the Convention, are also protected by the Constitution of the Republic of Croatia.

Apart from the application of the right to life at the beginning of a human life, the issue of application of this right also arises in relation to the end of life in the case of renunciation of the right to life and the performance of euthanasia.

The right to life, being a personal right, ranks as a constitutional right. This is also protected by the Constitutional Court which, by means of constitutional complaint, protects the constitutional freedoms and rights of man when these rights are violated by a body vested with public power.

As discussed earlier, according to Article 17 of the Constitution, the right to life cannot be restricted even in the event of immediate danger for the state, which corresponds to the restriction in Article 15, paragraphs 1 and 2 of the Convention.

2.3. Protection of the Right to Life Under International Agreements Entered Into By the Republic of Croatia

In addition to the constitutional provisions on protection of the right to life, in the Republic of Croatia, the Republic of Croatia is a party to various international instruments, which protect this right.

By virtue of its notification on succession, the Republic of Croatia became on October 8, 1991 a contracting party of the following treaties containing provisions on the right to life or are relevant for the interpretation of the scope of the protection of right to life: International Covenant on Civil and Political Rights; Convention on Prevention and Punishment of the Crime of Genocide; Convention on Elimination of All Forms of Discrimination Against Women; Convention on the Rights of the Child.

2.4. Protection of the Right to Life in Croatian Legislation

In addition to the Constitution and treaties, the right to life is also protected by a constitutional law and other legislation.

The Constitutional Law on Human Rights and Freedoms and The Rights of National and Ethnic Communities or Minorities in the Republic of Croatia (OG 31/1992, 68/1995) confirms in its Article 2 the protection of the right to life provided by Article 21 of the Constitution.

The right to life is, furthermore, sanctioned by a series of offences prescribed in the Basic Criminal Act (OG 31/93, 35/93, 108/95, 16/96, 28/96) and the Criminal Act of the Republic of Croatia (OG 32/93, 38/93, 28/96, 30/96). The right to life is also protected by those provisions in which, beside the basic form of a criminal offence, the fact that an act caused the death of a person appears as a qualifying circumstance.

The Basic Criminal Act protects the right to life by warning the intending perpetrators against acts violating this right, through punishment which should dissuade them from harming the life or health of persons, not only under regular circumstances but also in a state of emergency. The protection this Criminal Act is trying to achieve is a subsidiary one, because it is limited to the most important values of man and society, but it is also fragmentary, because it includes the protection of certain values and is only derived from certain forms of assaults.

2.5. The Death Penalty

> *Article 2 of the Convention*
> *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.*

Protocol 6
Article 1
The death penalty shall be abolished. No one shall be condemned to such penaltyor executed.

Comparing Article 2, paragraph 1 of the Convention and Article 21 of the Constitution, we notice that, unlike the Convention, the Constitution does not contain the possibility of intentional deprivation of life in the execution of a sentence of a court following the conviction of a crime for which this penalty is provided by law, because the Constitution explicitly states in one of its provisions that there is no death penalty in the Republic of Croatia.

The Constitution upon its entering into force on December 22, 1990 abolished the death penalty, which existed in the Criminal Act in force at the time. The abolition of the death penalty was confirmed by the Law on Takeover of the Crminal Act of the Predecessing State (OG, No 53/91), and the Basic Criminal Act of the Republic of Croatia currently in force does not provide for the death penalty. Accordingly, the protection of the right to life is more enhanced in the provision in Article 21 of the Constitution of the Republic of Croatia, than required according to Article 2, paragraph 1 of the Convention, and we can conclude that Article 21 of the Constitution of the Republic of Croatia is in conformity with Article 2, paragraph 1 of the Convention.

The constitutional provision on the abolition of the death penalty corresponds with Article 1 of Protocol 6, in so far as the death penalty is fully abolished, according to the Constitution, both in times of peace and of war, while Protocol 6, Article 2 reserves the possibility of making provision for the death penalty in respect of acts committed in time of war or of imminent threat of war. It can be concluded that the full abolition of the death penalty, as contained in the Croatian Constitution, surpasses the requirements stated in Protocol 6.

Since the Republic of Croatia abolished the death penalty, Article 6 of the International Covenant on Civil and Political Rights, referring to the passing and execution of a death sentence, is not applied. The Republic of Croatia, moreover, ratified in 1995 the Second Optional Protocol to the International Covenant on Civil and Political Rights, of December 15, 1989, for the purpose of abolishing the death penalty (OG - IT 7/1995).

2.6. Termination of Pregnancy

The constitutional provision on protection of the right to life considers the beneficiary of that right to be every *human being*, so that the question might be asked whether the term *human being* also includes unborn human beings, or the fetus, respectively, and whether it has a right to life. The Constitutional Court of the Republic of Croatia is deliberating on the matter No: U-I-60/91, concerning the interpretation of the scope of application of the right to life of every human being under the Constitution, in respect of the fetus, and concerning the law regulating termination of pregnancy: Law on

Health Measures For Realization of the Right to Free Decision on The Birth of Children (OG, No. 18/1978).

The Republic of Croatia is one of the parties to the Convention on Elimination of All Forms of Discrimination against Women from 1979, whose Article 16, paragraph 1 e) contains the right *"to decide freely and responsibly on the number and spacing of their children...."* This provision is relevant for the assessment of reproduction rights, including the termination of a pregnancy and the scope of protection as to the right to life of the fetus, but it is very broadly formulated and it is presented in more detail in the law on the termination of pregnancy: the Law on Health Measures for Realization of the Right to Free Decision on The Birth of Children .

The Republic of Croatia is a contracting party of the Convention on the Rights of the Child, which in its preamble says that *"the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."* The formulation on the legal protection before birth, is general, and is legally regulated in detail through the laws of the Republic of Croatia on the termination of pregnancy and illegal termination of pregnancies. The Criminal Act of the Republic of Croatia prohibits illegal termination of pregnancy (Article 39) and it relates to cases of termination of pregnancy which are not prescribed by law, and the Law on Health Measures for Free Decision on The Birth of Children regulates when a pregnancy may be terminated.

The Criminal Act protects, by prosecuting illegal termination of pregnancy, the life and health of the pregnant woman, but also the life of the fetus with respect to third persons performing an illegal termination of the pregnancy. The Law on Health Measures for Free Decision on The Birth of Children regulates in which cases termination of a pregnancy may be performed. The Law permits the termination of a pregnancy upon decision and request of the pregnant woman until 10 weeks after conception, and after this term, termination of a pregnancy is allowed if special requirements apply (rape, genetic malformations and danger to the health of the woman), and the approval of a special commission is obtained. A draft of the new law on the termination of pregnancy is currently being drawn up, which in terms of legal termination of a pregnancy, unlike the old one, introduces obligatory counseling before the termination is performed.

The Commission has received some complaints raising the question of protection of the right to life of the fetus and the law on the termination of pregnancies. Two of them were dismissed as inadmissible, because the complainants were not in the position of persons whose rights had been violated. The Commission reviewed the protection of the right to life according to Article 2 of the Convention with respect to the fetus and legal termination of pregnancy in the case of *Paton v. United Kingdom.*[6]

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[6] *Paton v United Kingdom* Application N°8416/79, European Commission of Human Rights: Decision and Reports, 1980, p 244 – 255.

The Commission concluded that the abortion of a ten week old fetus, performed in accordance with the law, and for reasons of protection of the physical or mental health of the pregnant woman, did not violate Article 2 of the Convention. Based on such interpretation of the right to life given by the Commission, we can conclude that the legal provisions on termination of pregnancy, as well as the provisions of the Criminal Act on illegal termination of pregnancy, are in conformity with Article 2 of the Convention.

2.7. Euthanasia

According to Croatian criminal legislation, euthanasia is an illegal deprivation of life.

The draft of the new law proscribes the criminal offence of "deprivation of life upon request" stating that "*a person who deprives someone of his life upon his explicit and serious request, shall be sentenced to jail from one to eight years.*"

This offence is a "privileged" deprivation of life, which is envisaged to be punished by a milder sentence, due to the explicit and serious request of the victim to be deprived of his life. According to the above facts, euthanasia has not been legalized in Croatia. The existing and the new draft provisions of the Criminal Act conform with the requirements of the Convention in Article 2, because they protect the life of individuals from arbitrary deprivation of life and allow, at the same time, for a different approach to cases in which the individual himself initiates the termination of his life.

2.8. Deprivation of Life Resulting From Necessary Use of Force

Neither the Constitution nor treaties signed by the Republic of Croatia provide for the exceptions in Article 2, paragraph 2 of the Convention, but they are regulated by law in the Republic of Croatia. This conforms with the fundamental requirement in Article 2, paragraph 1, according to which the right to life is protected by law.

Article 2, paragraph 2 of the Convention sets forth that deprivation of life resulting from use of force which is absolutely necessary, does not contravene the protection of the right to life, *a) in defense of any person from unlawful violence, b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained or c) in action lawfully taken for the purpose of quelling a riot or insurrection.*

Croatian legislation does not contain an equivalent formulation to Article 2, paragraph 2 of the Convention in terms of deprivation of life resulting from the use of force which is no more than absolutely necessary.

Article 7 of the Basic Criminal Act corresponds to Article 2, paragraph 2 a) of the Convention. Article 7 of the Basic Criminal Act prescribes that *necessary defense is the defense which is necessary for the perpetrator "to avert the simultaneous infliction of unlawful violence on himself or some other person"*, so that this action does not amount to a criminal offence in such cases.

Articles 42 and 43 of the Law on Internal Affairs prescribe the deployment of firearms in the performance of official assignments.

Articles 42 and 43 of the Law on Internal Affairs refer to use of means of coercion used by the police, which are clearly defined by law; it follows the same lines as the purposes prescribed by the Convention in Article 2, paragraph 2 a). and Article 6. Article 42 does not mention lawful arrest and quelling a riot or insurrection as a ground for necessary use of force, which should be taken into consideration on the occasion of reenacting this law. "To preserve the life of such person and others" should be emphasized in Article 43 of the Law on Internal Affairs. Article 42 of the aforementioned law states that "authorized officials shall carry firearms", which enables too broad an interpretation in relation to the obligation of carrying firearms, so that it seems opportune in the reenactment of the law to amend it by saying that authorized officials "may carry firearms".

Remark: The Criminal Act of the Republic of Croatia was adopted at the session of Parliament held on September 19, 1997 and will enter into force on January 1, 1998

3. Prohibition of Torture: Article 3

> *Article 3.*
> *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

3.1. Prohibition of Torture Under the Convention

The prohibition of torture, inhuman or degrading treatment and punishment is a protection of the fundamental human right to inviolability of physical integrity and human dignity, which cannot be derogated, i.e. states are not entitled to derogate from this right under any circumstances (Article 15, paragraph 2 of the Convention).

The Court differentiates between torture, inhuman and degrading treatment in the following manner:

> *"Torture: deliberate inhuman treatment causing very serious and cruel suffering.*
> *Inhuman treatment or punishment: the infliction of intense physical and mental suffering.*
> *Degrading treatment: ill-treatment designed to arouse in victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."*[7]

Distinction among these three forms of treatment actually means differences in the degree of intensity affecting the human right to inviolability of integrity, whereby the mildest degree of violation is degrading treatment, the medium degree is inhuman

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7 *Ireland v United Kingdom* judgment, 1978, Series A N° 25.

treatment and the most severe is torture. The Court also indicated in the case of Tyrer that there is a gradation in treatment by stating "the suffering has to reach a certain level before the penalty can be determined as "inhuman" in the sense of Article 3 of the Convention."[8]

3.2.1. Constitutional Protection

The rights provided in Article 3 of the Convention are referred to by a number of provisions of the Constitution of the Republic of Croatia. According to Article 23, paragraph 1 "no one shall be subjected to any form of maltreatment or, without his consent, to medical or scientific experiments"; according to Article 17, paragraph 3 "not even in the case of immediate danger to the existence of the state may restrictions be imposed on the application of the provisions of this Constitution concerning... prohibition of torture, cruel or degrading treatment or punishment...", meaning that this right was made absolute and cannot be derogated from; moreover, according to Article 29, paragraph 2, a charged and accused person "shall not be forced to testify against himself or to admit his guilt."

We see that the Constitution of the Republic of Croatia in Article 23 fails to differentiate between torture, cruel and degrading treatment, but deploys the general term "maltreatment". Thus the question arises as to what is comprised by this term. Due to the fact that the Constitution in Article 17, paragraph 3, in enumerating absolute rights, includes also "prohibition of torture, cruel or degrading treatment..." as one of the rights not to be restricted even in the case of immediate danger to the existence of the state, and that the Constitutional Act on Human Rights and Freedoms and Rights of Ethnic and National Communities or Minorities in the Republic of Croatia emphasizes in Article 2, item b, with reference to Article 23, paragraph 1 of the Constitution of the Republic of Croatia, that the Republic of Croatia specially recognizes and protects "the right of persons not to be subjected to torture or inhuman or cruel treatment", it can be concluded that the term of maltreatment encompasses the notions of torture, inhuman or degrading treatment and that as such it conforms with Article 3 of the Convention.

3.2.2. Prohibition of Torture in International Agreements Entered Into by the Republic of Croatia

The rights secured in Article 3 of the Convention are linked to treaties, such as the United Nation Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984 and the International Covenant on Civil and Political Rights, Article 7, in which additionally medical and scientific experiments are prohibited. The Republic of Croatia became a party to these treaties on October 8, 1991, pursuant to the Notification on Succession (OG - IT, No. 12/1993).

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8 *Tyrer v United Kingdom* judgment, 1978, Series A N° 26.

3.2.3. Prohibition of Torture in Croatian Legislation

The rights under Article 3 of the Convention are regulated by:
- the Criminal Act of the Republic of Croatia (CARC - final version OG 32/93, 38/93, 28/96 and 30/96); a Draft Criminal Act is in preparation (Draft CA)
- the Law on Criminal Procedure (LCP); a Draft Law on Criminal Procedure is in preparation
- the Law on the Execution of Sentences Pronounced for Criminal Offences, Economic Transgressions and Petty Offences (OG 21/74, 19/90, 66/93), a Draft Law on the Execution of Sentences is in preparation
- a Draft Law on the Protection of Persons With a Mental Disorder is in preparation

The Chapter on criminal offences against human rights and freedoms of the CARC contains three types of incrimination for the protection of the rights secured by Article 3 of the Convention. These incriminations have also been included in the Draft Criminal Act. The criminal offences are the following:
- unlawful detention (Article 46 of the CARC, or Article 124 of the Draft CA, respectively)
- extortion of statement (Article 48 of the CARC, or Article 126 of the Draft CA, respectively)
- maltreatment in performance of duty or public power (Article 49 of the CARC, or Article 127 of the Draft CA)

The Draft CA introduces also a new criminal offence of "torture and other cruel, inhuman or degrading treatment" (Article 176), punishable from six months to five years of imprisonment. This offence was included in a special section of the Draft CA in order to fulfil international obligations arising from the UN Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment of 1984, thereby expressly following Article 1 of the said Convention.

Remark: The Parliament session of September 1997 adopted: the Criminal Act, the Law on Criminal Procedure and the Law on Protection of Persons With a Mental Disorder.

3.2.4. Prohibition of Extortion of Confessions

The Law on Criminal Procedure contains legal prohibition of extortion of confessions and statements (Article 9, Article 208, Article 8, Article 218; Article 249, paragraph 3 of the LCP), which results not only in the invalidity of such statements (Article 29, paragraph 3 of the Constitution of the Republic of Croatia, Article 208, paragraph 10 and Article 218 of the LCP), but also in the obligation of the court to remove these contentions and statements from evidence material before deciding in a case (Article 78, Article 259, paragraph 4, Article 269, paragraph 3, Article 323, paragraph 3, Article 360 paragraph 5 of the LCP). All of the provisions mentioned have also been included in the Draft LCP.

The procedure concerning persons in custody is regulated by the provisions of Article 191 - 195 of the LCP currently in force.
Remark: See 3.2.3.

3.2.5. Procedure In Respect of Convicted Persons

The procedure in respect of a convicted person is regulated by the Law on the Execution of Sentences. Principles contained in this Law are elaborated in more detail in numerous regulations of the Ministry of Justice. In spite of the fact that they can be found in various places, these regulations prove that in the practice of execution of sentences, the degree of discretion in the decision of state administration has constantly decreased, and is now mainly regulated by a normative framework. According to the Law on the Execution of Sentences which is currently in force, the prisoner is entitled to minimum accommodation, hygiene-sanitary and nutritional standards, to health care and clothing; moreover, he has the right to elementary education (if it is a young adult without completed elementary school), to compensation for his work, to daily, weekly and annual rest; to unlimited and unsupervised correspondence (if he is serving his sentence in a prison of the open or semi-open type), to receive mail under supervision, to visits from members of the immediate family two to four times a month (which cannot be reduced to last less than one hour), and to receive packages from them containing laundry, items, magazines and books, as well as money (which may be spent only within the limitations provided by the house rules of the penitentiary) at least once a month; the right to visits by his attorney (which have to be approved by the head of the penitentiary if they are more frequent than once a month), as well as the right to submit applications for pardon, conditional release and complaints on violations of rights. Such submissions may be made either orally, at report (which has to be noted in minutes by the administration and forwarded to the relevant body) or in writing, in a closed envelope, through the administration of the penitentiary to the Ministry of Justice. Prisoners are, on the other hand, subject to special limitations of personal freedom when entering the penitentiary: personal search, identification procedures, including photographs and fingerprints, as well as disciplinary punishments of which the most severe is solitary confinement for up to 30 days.

3.2.6. Solitary Confinement, Medical Interventions and Accommodation of Prisoners

According to the Law on the Execution of Sentences, a convicted person may be placed in solitary confinement for up to 30 days. Such disciplinary punishment is only deployed in penitentiaries of the open type and can be imposed by the head of the penitentiary after hearing the convict and examining his defense, under the condition that the execution of the punishment is not harmful to the health of the convicted person.

In exceptional cases, if such person represents a serious threat to security due to his behavior, he can be punished by solitary confinement, which can last up to one third of the passed sentence, but in sequences of a maximum of three months. Such a convicted person may be allowed to perform certain work. The Law on the Execution

of Sentences (Article 169) stipulates that the disciplinary measure of solitary confinement "*cannot be applied if its execution endangers the health of the convicted person*", but does not provide for the regular periodical physical examination of a convicted person, which should be imposed as necessary.

Pursuant to Article 143 of the Law on the Execution of Sentences, medical interventions on convicted persons, in cases of existing medical indications, cannot be performed without the consent of the convicted person, with the exception of cases envisaged by general regulations. According to Article 145, paragraph 1 of the Law, convicted persons showing the symptoms of a mental illness while serving their sentences or showing "severe mental disorders" are sent to the psychiatric department of a prison hospital or some other adequate medical institution. The relevant decision, according to paragraph 2 of the same Article, is passed by the Minister of Justice with the consent of the Minister of Health, upon proposal of the administration of the penitentiary and the opinion of a medical team on the mental health of the convict. All the provisions abide by the requirements of Article 3 of the Convention. In spite of the fact that such a case has not come before the Commission or the Court as yet, we feel that from the point of view of human rights it would be inadmissible to fail to regulate the rights of convicted persons in view of medical experiments. The current Law on the Execution of Sentences does not regulate this issue, and the Draft of the new law must fill this lacunae.

The provisions of the Law on the Execution of Sentences relating to a) accommodation of the convicted person (Article 113 insufficiently sets the minimum standards for sanitary facilities and does not provide for the opportunity of the convicted person to spend the night in individual cells); b) transfer of convicts (Article 161-162 insufficiently protects the convicted person from the public and inadequate transport from one prison to another); c) use of coercive means (Article 175-179 on the deployment of usually permitted firearms is not subject to standard limitations based on the so-called principle of proportionality); d) disciplinary measures involving solitary confinement (Article 169 admittedly prescribes that "*it cannot be applied if its execution would endanger the health of the convicted person*", but fails to require regular and periodical physical examinations of a convicted person sentenced to this punishment).

Currently a Draft Law on the Execution of Prison Sentence is being prepared, the drafting of which was assigned to a Working Group of Experts by Decision of the Minister of Justice of March 18, 1996. The first section of this Draft, which has been completed, respects the above-mentioned principles, so it can be expected that the new law, which will replace the current Law on the Execution of Sentences, will be entirely compatible with the Convention.

3.2.7. Protection of Mentally Ill Persons

Their position of inferiority and helplessness renders mentally ill persons especially vulnerable to torture as well as to cruel or degrading treatment. The Commission and

the Court, therefore, attach special importance to their protection. The Draft Law on the Protection of Persons with Mental Disorders maintains the protection of the rights of mentally ill persons at a high level. In Article 5 the protection of persons with mental disorders from any type of maltreatment or degrading treatment is prescribed. Articles 8 and 9, relying on the European Convention on Human Rights stipulates in many details the provisions on informed consent to biomedical treatment, while Article16 sets forth the conditions for conducting biomedical research on persons with mental disorders. Electroconvulsive and hormonal treatment is envisaged only under exceptional circumstances and psycho-surgery and castration are prohibited (Article 15).

Remark: The Parliament of the Republic of Croatia adopted on September 19, 1997 the Law on Protection of Persons With a Mental Disorder.

3.2.8. Deportation or Extradition of Aliens

In respect of the extradition and deportation of aliens to other countries, and in spite of the fact that the Convention does not mention the right to asylum or the rules of the so-called extradition law, as for instance prohibition of extradition for political offences, the rule to refrain from extradition (or its administrative correlate, deportation) in cases where there is an actual danger that the extradited person could in the other country be subject to treatment contrary to Article 3 of the Convention, emerged in 1961.

Moreover, it should be mentioned that the Commission, in cases of individual complaints concerning the extradition of aliens, has consistently in its practice required the defendant country to suspend temporarily the decision on extradition or deportation (complaints have otherwise no suspensory effect). Although the Court does not regard such requests for temporary suspension as legally binding for the States Parties to the Convention, States Parties have nevertheless, without exception, acted in conformity with such requests. Thus, an amendment to the LCP is recommended so as to explicitly mention the danger of the possible pronouncement of the death penalty as an obstruction to extradition.

3.2.9. Physical Punishment

The Commission and the Court consider physical punishment to be contrary to the Convention in all circumstances (in school, army, prison), but the sole possibility that a person may be subjected to physical punishment is not considered to be sufficiently degrading to amount to a violation of Article 3 of the Convention. Physical punishment is also prohibited by Croatian law. Ill-treatment of children is punishable according to Article 97, paragraph 2 of CARC, and to Article. 213, paragraph 2 of the Draft CA.

3.2.10. Sterilization

The Commission receives a considerable number of complaints related to the procedure of sterilization. The Commission is of the opinion that sterilization can contravene Article 2 and 3 of the Convention. If the sterilization is permitted, voluntary consent is required. In the Republic of Croatia the procedure for sterilization is regulated by the Law on Health Measures for Realization of the Right to Free Decision on The Birth of Children (OG 18/78). According to this law, sterilization may be performed solely upon the request of the person who expresses his/her wish to be sterilized, if such person has reached the age of 35. On behalf of a person who does not possess contractual capacity, the parent or legal guardian may submit the application with the approval of the guardianship body. These provisions are in conformity with the requirements of the Convention.

4. Prohibition of Slavery and Forced Labor: Article 4

Article 4.
1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labor.
3. For the purpose of this article the term "forced or compulsory labor" shall not include:
a. any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
b. any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;
c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
d. any work or service which forms part of normal civic obligations.

4.1. Prohibition of Slavery Under the Convention

Article 4 of the Convention differentiates between prohibition of slavery or servitude (paragraph 1) on the one hand, and prohibition of forced or compulsory labor on the other (paragraph 2). Slavery means private ownership of human beings or, as the Slavery Convention of 1926 OG-IT 12/1993 defines this: the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised[9]. Furthermore, the Convention on Slavery stresses strongly the need to prevent forced or compulsory labor from developing into institutions and practices similar to slavery. Servitude (as compared to slavery), is a less severe degree of exploitation of the labor of another person. In defining servitude, special significance

[9] The Republic of Croatia is also a contracting party of the Protocol on Amendments to the Convention on Slavery from 1953 (accepted by the Notification of Succession, OG - IT 12/1993).

is attached to the Supplementary Convention on the Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery from 1956 OG-IT 12/93.

The Supplementary Convention specifically prohibits the following institutions or practices similar to slavery, regardless of whether they can or cannot be classified as slavery: debt bondage, serfdom, the sale or transfer of women, inheritance of women and transfer (with or without compensation) of children, in order to exploit their labor.

With respect to slavery and servitude, it needs to be emphasized that the Constitution of the Republic of Croatia in Article 3 proclaims freedom to be one of the highest values of the constitutional order of the Republic of Croatia, and determines in paragraph 1, Article 22 that man's freedom and personality shall be inviolable. Furthermore, the Constitution states in paragraph 2 of Article 22 that no-one shall be deprived of liberty, nor may his liberty be restricted, except when so specified by law, which shall be decided by a court.

The establishment of slavery or servitude and the transportation of persons in slavery or servitude is prohibited and punishable pursuant to Article 134 of the Criminal Law of the Republic of Croatia (OG 32/1993, 38/1993 and 28/1996). Pursuant to this Law, a criminal offense is committed by a person who, in violation of international law, subjects another person to slavery or servitude or keeps him in such a condition, buys, sells, hands over to some other person or mediates in the purchase, sale or handover of such person, or persuades another person to sell his freedom or the freedom of a person he supports or takes care of. These offences are punishable by a prison sentence of between one and ten years, as is the transportation from one country to another of persons in slavery. For this offense a prison sentence from six months up to five years can be imposed. If the offense committed involves minors, the minimum prison sentence is five years.

In view of the constitutional provisions on a person's freedom and prohibition of the deprivation or limitation of liberty, except in cases specified by law and based on a court decision, as well as the criminal prohibition against subjecting someone to slavery or servitude, keeping others in slavery or servitude, and prohibition of purchase, sale, cession to others, mediation in purchase, sale or cession, prohibition against persuading others to sell their freedom or the freedom of the person in their custody and care and prohibition of international transportation of persons in slavery, the Croatian legislation in this respect is in accordance with the provision of paragraph 1, Article 4 of the Convention.

4.2. Definition of Forced and Compulsory Labor

The Commission and the Court have not yet provided a definition of forced and compulsory labor. In conjunction with defining these terms, the Commission referred in its decision no. 7641/76, to the application of the International Labor Organization (ILO) Forced Labor Convention.

According to ILO Convention No. 29 (hereinafter Convention no. 29) (accepted by Croatia's Notification on Succession, OG 2/1994, and which has been applied on its territory since 1932), the abolition of forced or compulsory labor in all forms and within the shortest possible time period is envisaged. In the transitional period towards the absolute abolition of forced or compulsory labor, such labor is only permitted for public purposes and as an exceptional measure under the conditions and with the guarantees as provided in Convention no. 29. Article 2 of Convention no. 29 defines "forced or compulsory labor" to be any work or service imposed on a person under the threat of any penalty and for which the said person has not offered himself voluntarily. The definition of "forced or compulsory labor" applied in Convention no. 29 also serves as a criteria for defining forced or compulsory labor in Article 4 of the Convention, so that in interpreting the term, reference is made to the experience derived from the nature of Convention no. 29. In this respect, it needs to be stressed that the nature of Convention no. 29 within Article 4 specifically prohibits forced or compulsory labor for the benefit of individuals, communities or private legal entities. Moreover, according to Convention no. 29, the competence of introducing forced or compulsory labor is generally attributed only to state governmental bodies.

Convention no. 105 from 1957 (ratified on March 5, 1997, and the Law on Ratification of this Convention published in OG-IT 1/12/1996) intensified the importance of preventing certain types of forced labor. According to this Convention, member states undertake not to make use of any type of forced or compulsory labor: 1) as a means of political coercion or education, or as a penal sanction for having and expressing opinions which are ideologically opposed to current political, social or economic systems; 2) as a method of mobilizing and utilizing labor for economic development; 3) as a means of labor discipline; 4) as a penalty for striking; 5) as a form of racial, social or religious discrimination.

The Constitution of the Republic of Croatia prohibits in Article 23, paragraph 2 forced and compulsory labor. In interpreting the express terms of this constitutional prohibition of forced and compulsory labor, it is apparent that it is much broader than that contained in the Convention. This is due to the fact that the Croatian Constitution does not include exceptions to the term "forced and compulsory labor" as it is done in paragraph 3, Article 3 of the Convention. In implementing the Constitution to date, there are no clear standpoints as to whether the prohibition of forced and compulsory labor should be interpreted as an absolute prohibition of any forced and compulsory labor or whether certain types of labor can be exempted from the constitutional term of forced and compulsory labor. It is the opinion that following the standards of the Convention and in the interpretation of the Croatian Constitution, the prohibition of forced and compulsory labor could be interpreted as an absolute term, without however including certain types of labor which are performed against the will of the laborer. From the constitutional point of view, labor performed during military service and defense of the Republic (Article 47) can most certainly be exempted from the term of prohibited forced or compulsory labor used in the Constitution. According to the provision of paragraph 1, Article 7 of the Constitution "military service and the defense of the Republic shall be the duty of all citizens able to perform it". In the

Republic of Croatia we also have a compulsory work order pertaining to the defense duty of the Republic of Croatia.

The Constitution envisages in paragraph 2, Article 47 the possibility of conscientious objection which is allowed for those who for religious or moral reasons are not willing to enlist in military duties within the armed forces. Such persons are obliged to perform other duties specified by law. With respect to its extensive constitutional prohibition of forced and compulsory labor, the legal regulations of the Republic of Croatia are in accordance with the provision in paragraph 2, Article 4 of the Convention.

4.2.1. Exceptions from the Prohibition of Forced and Compulsory Labor

Despite an absolute prohibition of "forced and compulsory labor" in paragraph 2, Article 4 of the Convention, nevertheless paragraph 3, Article 4 provides that certain types of labor are excluded from the term "forced and compulsory labor". In defining these exceptions, it is highly important to take into account the fact that Article 4 of the Convention cannot be interpreted literally, but one has to bear in mind that the Convention is a "....living instrument to be interpreted in the light of the currently prevailing conceptions in democratic countries."[10]

4.2.2. Work of Prisoners

In the Republic of Croatia the work carried out by prisoners is regulated by the Law on the Execution of Sentences Passed For Criminal Offences, Economic Transgressions and Petty Offences (OG 21/1974, 39/1974, 55/1988, 19/1990 and 66/1993 - hereinafter: Law on Execution of Sentences). Since the provisions of the Croatian Constitution on the prohibition of forced labor entered into force (Article 23, paragraph 2 and Article 54, paragraph 1), convicted persons have not been forced to work. According to Article 118 of the Law on Execution of Sentences, convicted persons are attributed the type of work proportional to the requirements for their rehabilitation into society, their physical and mental condition, preferences, personal characteristics, options offered in the prison and disciplinary requirements. The personal wishes of the convicted person to perform a certain type of labor are taken into account within the framework of the stated limitations. Working hours of convicted persons are determined according to general labor regulations (40 hours a week, including a break of at least 30 minutes during the work day). Convicted persons must work a maximum of two hours overtime in addition to regular working hours, regardless of the type of work. Prisoners usually work in working units organized within the prison or detention center. Convicted persons may work outside a prison subject to special approval granted by the Ministry of Justice. In such cases, the prison and the legal entity employing the convicted person must sign a contract stipulating the rights and obligations of the convicted person.

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10 *Handyside v United Kingdom* judgment, 1976, Series A N°24.

The Law on the Execution of Sentences has not been brought into conformity with neither the Croatian Constitution nor the Convention.

The new Law on the Execution of Prison Sentences is in the process of being passed. Chapter twelve of the working version of the Draft law regulates the labor of convicted persons. This working version is far more compatible with the Croatian Constitution and Article 4 of the Convention than the currently valid law. In enacting this Law, special attention should be given in respect of Council of Europe standards concerning the execution of prison sentences, and especially the labor of convicted persons, in order to help their re-entry into society.

4.2.3. Civil Defense

In the Republic of Croatia, disaster or calamity threatening the life or well-being of the community are regarded as exceptional circumstances under which, according to the Defense Law, compulsory work order is introduced, or in other words the duty to participate in civil defense. In a state of emergency, the duty to participate in civil defense is equal to the above-stated duty to participate in civil defense in wartime or immediate danger to the independence and unity of the Republic of Croatia. The duty to participate in civil defense conforms with the provisions of the Constitution which exempt such labor from the term "forced and compulsory labor".

4.2.4. Fulfillment of Normal Civic Obligations

According to the provision of item d) paragraph 3, Article 4 of the Convention, "forced or compulsory labor" does not include "any work or service which forms part of normal civic obligations". This provision mainly aims at enabling the performance of obligations which include all citizens, such as the obligation to assist the helpless, to fill in official forms for tax purposes, to respect security provisions and the like.

Pursuant to Article 107 of the Law on Health Care (OG 14/1997), if the continued extension of health care services is threatened, the Minister of Health will, by temporary decision, assign a person working in health care for a period of six months to a work place corresponding to their professional qualifications and redistribute the necessary tools and equipment in order to ensure continued health care services. Due to the fact that such work is temporary (six months) and compensated, that it has to be adequate to the professional qualification of the health worker, and that such obligations may only be introduced if the continuation of health care services is endangered (according to Article 58 of the Constitution of the Republic of Croatia, every person is guaranteed the right to health care), the work in this case has no connotations of forced or compulsory labor in the sense of paragraph 2, Article 4 of the Convention. We, therefore, conclude that this provision of the Law on Health Care is congruent with the Convention.

According to Article 21 of the Law on the Bar (OG 9/1994), the Bar Association is obliged to extend free legal assistance to victims of the Homeland War and hardship cases in legal matters related to the rights of those persons based on their position, as well as in other cases envisaged by the general enactments of the Bar Association. The Code of Bar Ethics states that the member of the Bar has the honorable duty to provide legal assistance to socially endangered persons and victims of the Homeland War, and he has to perform it in a manner equally thorough and careful compared to the legal assistance he extends to paying clients. When extending free legal assistance, attorneys are not entitled to receive a reward but they have the right to receive compensation for expenses incurred for representing a person who is entitled to free legal assistance. The competent organ of the Croatian Bar Association determines the attorney who is obliged to extend free legal assistance to a certain client, following the alphabetical order. In pursuance of such a schedule, every attorney is annually assigned one to two clients from that category.

On the basis of the above-mentioned facts, we feel that the work duty of health care and legal workers, as envisaged by the regulations of the Republic of Croatia, cannot be included in the term of forced or compulsory labor as set out in paragraph 2, Article 4 of the Convention, and it can be concluded that this part of the legislature of the Republic of Croatia is in accordance with the provisions of the Convention.

5. Right to Liberty and Security: Article 5 and Protocol 4, Article 1

Article 5.
1. Everyone has the right to liberty and security of person. No one shall be deprived of this liberty save in the following cases and in accordance with a procedure prescribed by law:
a) the lawful detention of a person after conviction by a competent court;
b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

5.1. Right to Liberty and Security in the Sense of the Convention

The right to liberty in the sense of the Convention does not encompass liberty in its broadest sense, but is limited to physical liberty. The right to liberty and security of person are "two faces of the same coin", so that security of person as provided by the Convention, according to the opinion of the Commission and the Court of Human Rights and numerous analysts, means the right of citizens to be protected from arbitrary interventions by the state in their freedom, and that such intervention is only possible in cases laid down in the laws of the individual country and following the criteria set forth in Article 5 of the Convention.

The Constitution of the Republic of Croatia states in Article 16 that "freedoms and rights may only be restricted by law to protect the freedom and rights of other people and the public order, morality and health". Article 17 envisages the possibility that "during a state of war or an immediate danger to the independence and unity of the Republic, or in the event of some natural disaster, individual freedoms and rights guaranteed by the Constitution may be restricted. This shall be decided by the Croatian Sabor by a two-thirds majority of all representatives or, if the Croatian Sabor is unable to meet, by the President of the Republic. The extent of such restrictions shall be adequate to the nature of the danger, and may not result in the inequality of citizens in respect of race, color, sex, language, religion, national or social origin." Furthermore, the Constitution states in Article 22 that "man's freedom and personality are inviolable. No one shall be deprived of liberty, nor his liberty be restricted, except when so specified by law, which shall be decided by a court". This provision meets the requirements of Article 5 of the Convention on general prerequisites for the deprivation of liberty. The legislature of the Republic of Croatia, based on the cited provision, may restrict the right to liberty, but only in cases provided by law, on which a court may decide in a procedure prescribed by law.

5.2. The Convention foresees the possibility of depriving a person of his liberty, if such person "is detained after conviction by a competent court" (Article 5, paragraph 1. a). The Constitution of the Republic of Croatia envisages the option of depriving someone of his liberty, or restricting his liberty, when so specified by the law, which is decided by a court. Evidently, the deprivation of liberty refers to criminal proceedings. The legislature of the Republic of Croatia contains two types of

deprivation of liberty, based on two kinds of proceedings. First, there is penal (criminal) procedure. The Basic Criminal Law of the Republic of Croatia and the Criminal Law of the Republic of Croatia set forth the general conditions of punishment, and pursuant to the principle of lawfulness lays down the types of felonies and penalties. The Law on Criminal Offences of Subversive and Terrorist Activities Against State Sovereignty and Territorial Unity of the Republic of Croatia also includes a certain, specific group of criminal offences. Sentences are passed by a court in a criminal procedure stipulated by the Law on Criminal Procedure.[11]

Moreover, prison sentence is envisaged also for minor criminal offences. A jail sentence of up to 30 days may be pronounced in a procedure before a magistrates' court, while more severe offenses against security, public order and traffic security can be penalized by up to 60 days in jail.[12] Before the Law on Courts was passed, the prison sentence was pronounced by judges of the magistrates' court, who did not constitute part of the judicial, but of the administrative power. The fact that these judges also pronounced prison sentences was crucial when the new organizational structure was being set up, because then they were classified as constituting part of the judicial power, with all the consequences this involves in relation to their status and mode of election.

Prison sentences both in criminal and magistrates' procedure are pronounced by courts composed of judges, or judges and lay jurors. The Constitution of the Republic of Croatia determines in Articles 115-121 that the position of the judicial power shall be autonomous and independent, and prescribes accordingly the rights and position of judges. Their position and election procedures are set forth in more detail in the Law on Courts (OG 3/1994) and the Law on the High Judiciary Council (OG 58/1993).

Different from cases of deprivation of liberty based on judgments of criminal courts, is the special case of deprivation of liberty according to military regulations. The Disciplinary code of the Armed Forces (OG 103/1996, hereinafter "Disciplinary code") was passed by the President of the Republic of Croatia as the Commander in chief of the armed forces. The Disciplinary Code relies on Article 100 of the Constitution, which contains the general provision on the President of the Republic as the Commander in chief of the armed forces, as its legal basis, as well as on Article 47, paragraph 1, item 8 of the Defense Law (OG 74/1993 and 57/1996) and Article 46 of the Law on Service in the Armed Forces of the Republic of Croatia (OG 23/1995 and 33/1995).

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[11] Basic Criminal Law of the Republic of Croatia, OG 31/1993, 35/1993, 108/1995, 16/1996 and 28/1996; Criminal Law of the Republic of Croatia, OG 32/1993, 38/1993, 28/1996 and 30/1996; Law on Criminal Offences of Subversive and Terrorist Activities Against State Sovereignty and Territorial Unity of the Republic of Croatia, OG 74/1992, and the Law on Criminal Procedure, OG 34/1993, 38/1993 and 28/1996.

[12] Law on Offences, OG 2/1973, 5/1973, 21/1974M, 9/1980, 25/1984, 52/1987, 27/1988, 43/198, 9/1990, 41/1990, 59/1990, 91/1992, 22/1995, 33/1995. The provision on the limits of prison sentences can be found in Article 9.

The Disciplinary code differentiates between minor (disciplinary misdemeanor) and major (disciplinary offences) violations of military discipline. It does not provide individual descriptions of misdemeanor and offences, but only examples as to what is considered to be a violation of military discipline (Article 3). Besides other penalties, disciplinary misdemeanor may be punished by detention for up to 30 days and disciplinary offense by detention for up to 60 days (Article 9, paragraph 1 item 5 and Article 10, paragraph 1, item 3). The disciplinary procedure in the case of misdemeanor is carried out and decided upon by certain officers, while disciplinary offences are tried by a military disciplinary court. The procedure is prescribed by the Disciplinary code.

The competence of the Commander in chief to determine military discipline and disciplinary measures and punishments with relation to the Convention cannot be disputed, except in the case of a punishment which is identical to the equivalent in criminal law, which is specially regulated by the Convention. The military disciplinary measure of detention, or, in other words, the deprivation of liberty, should undoubtedly be brought to correlate with the provisions of Article 5 of the Convention, and also the Constitution of the Republic of Croatia.

From the point of view of the Convention, the following objections could be raised to the Disciplinary Code:
a) the disciplinary measure (penalty) of detention, which is deprivation of liberty, according to Article 5 of the Convention is not pronounced based upon the law, but based upon a sub-legal enactment;
b) the detention sentence is not pronounced by a court. The Disciplinary court, and especially an officer of a certain rank who, according to the Disciplinary code, passes the detention sentence, cannot be considered a court in the sense of the Constitution or the Law on Courts.

Furthermore, the Disciplinary code is questionable concerning Articles 29 and 31 of the Constitution of the Republic of Croatia in terms of the penalty of deprivation of liberty, which is envisaged by and which is essentially identical to prison sentence in a criminal and offense procedure, so that the same constitutional criteria should be applied.

5.3. The Convention offers the option of "lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law" (Article 5, paragraph 1 b).

The Constitution of the Republic of Croatia sets forth by Article 22, paragraph 2 that "no one shall be deprived of liberty, nor may his liberty be restricted, except when so specified by law, which shall be decided by a court" and thus renders possible the implementation of the cited provision of the Convention in Croatian legislation

Croatian legislation acknowledges the following most important cases of deprivation of liberty due to non-compliance with the lawful order to secure the fulfillment of an obligation prescribed by law:
a) in order to ensure that witnesses and holders of certain things in court procedures will act in compliance with their legal obligations;
b) in order to ensure the cooperation of the distrainee in a distraint procedure;
c) in order to detain a bankruptcy debtor due to non-compliance with the obligations imposed on him;
d) in order to detain a witness in an administrative procedure.

In analyzing the compatibility of the above-mentioned cases with the Convention, the following criteria always have to be taken into consideration: 1. deprivation of liberty (arrest or detention) must be based on non-compliance with a court order; 2. the obligations of the detained person, derived from the order, have to be based on law. With certain exceptions, everyone has the duty to testify in a court of law. This duty encompasses the obligation to appear in court, to make a testimony and to testify the truth. A false statement is a separate criminal offense. Non-compliance with the court order to appear in front of the court or to testify is prosecuted in a court procedure, so that the witness can be compelled to appear before the court, or punished by a fine or prison for up to 30 days if he refuses to testify. The same sentence is envisaged for a person who withholds necessary evidence from the court.

The Law on General Administrative Procedure (OG 53/1991) prescribes in Article 181 the compulsory attendance of a witness who, in spite of the fact that he has been properly notified, fails to come to the hearing. Due to the fact that compulsory attendance is a form of deprivation of liberty, and that the administrative procedures are carried out by the bodies of the state administration and not by courts, the question arises as to whether the compulsory attendance, ordered by the administrative body and not by a court, is in accordance with the Convention. Having in mind the very short period of deprivation of liberty, which lasts only until the witness is brought to the administrative body carrying out the procedure and has delivered his testimony, and considering the reasons of efficiency of the procedure, as well as comparative legal experience, such short-term deprivation of liberty should not be regarded as incompatible with the Convention. A lack of conformity could be established solely if such compulsory attendance were excessive timewise, or if it were ordered for other than legally very narrowly defined purposes (for the testimony).

The Distraint Law (OG 57/1996) envisages in Article 16, paragraph 6 the possibility that the competent court can sentence the responsible official of a legal entity or a natural person to imprisonment ranging from 15 days to three months, and in one distraint procedure up to a maximum of six months if: a) contrary to the order or prohibition of the court he undertakes certain actions aimed at concealing, damaging or destroying certain property; b) contrary to the order or prohibition of the court, he undertakes actions which could cause irreparable damage to the bailiff or insurance proponent. Moreover, the Law envisages in the stated provision a sanction which is not related to the court order, but can be interpreted as a case of special criminal law,

sui generis: The punishment of persons undertaking actions in order to obstruct distraint procedures or insurance procedures, and persons who by use of violence or other actions severely violate the rights, security and dignity of the parties in the procedure. Article 233 prescribes prison as a means of distraint, or more precisely, a mechanism compelling the distrained person to a certain tolerance or inertia. "If, based on the distraining order, the distrainee is under obligation to tolerate that certain measures are taken, or to refrain from taking them, the court shall, upon motion of the bailiff claiming that the distrainee acts contrary to his obligation, order the distrainee, by a ruling, to act in conformity with his obligations and threaten to impose a fine or prison sentence, pursuant to the provisions in Article 16 of this Law, if he should persist in his actions." All of the above-mentioned cases of detention/arrest meet the criteria laid down in Article 5, paragraph 1b of the Convention, hence they are prescribed by law, and they are enforced on the basis of a court order in a procedure prescribed by law.

The Bankruptcy Law (OG 44/1996) envisages in Article 107 the compulsory attendance of the debtor in case he fails to follow the summons (order to come at a certain time to a certain place). This law, too, acknowledges detention as a sanction for non-compliance with court orders, if the person declines to comply with the order to give certain information and to cooperate with the court, if, contrary to the court order or prohibition, he endeavors to escape or undertakes actions aiming at withholding information or cooperation, or if, in spite of the prohibition of the court, he acts in a manner so as to disable or obstruct the gathering of the necessary documentation and notifications, especially in view of the bankruptcy estate. Leaving aside the remark that the descriptions of the acts or omissions which could lead to detention of the debtor are somewhat too general, unclear and that they can endanger the legal security of the individual, the above-mentioned provisions of Article 107 of the Bankruptcy Law meet the earlier stated criteria of the Convention regarding deprivation of liberty due to non-compliance with a lawful court order. This is a new regulation, which has not been implemented to date and it can be expected that potential problems are likely to arise not due to fundamental problems of conformity with the Constitution and the Convention, but due to possible extensive interpretation concerning the grounds for detention of debtors according to Article 107 of the Bankruptcy Law.

5.4. The Convention includes the possibility of "lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offense or when it is reasonably considered necessary to prevent him from committing an offense or his escape after committing an offense" (Article 5, paragraph 1 c).

The Constitution of the Republic of Croatia regulates in Articles 24 and 25 arrest and detention. In Article 24, paragraph 1 the Constitution stipulates that no one shall be arrested or detained without a written court order based on law. Such an order shall be read and presented to the arrested person at the moment of arrest. The police are entitled to arrest a person without a court order if such a person is suspected of having

committed a serious criminal offense defined by law, and to hand him immediately to the court (Article 24, paragraph 2 of the Constitution). Any person arrested or detained shall have the right to appeal to a court, which shall without delay decide on the legality of the arrest (Article 24, paragraph 3).

Arrest and detention in a criminal procedure are regulated in the Law on Criminal Procedure (LCP). Based on this fact, the issue of "lawfulness" of arrest and detention, as required by the Convention, has been solved on an abstract level. On a concrete level, the lawfulness of deprivation of liberty shall be assessed by comparison of actions and procedures of arrest and detention in each individual case with regard to the provisions of the LCP.

A person caught in the act of committing a criminal offense, which is prosecuted ex officio, can be deprived of his liberty (arrested) by everyone, whereby he has to be handed over to the investigating body or police immediately, or if this is not possible, one of these bodies has to be notified immediately (Article 182, paragraph 4 of the LCP). The provision mentioned is problematic in view of Article 24 of the Constitution which allows only the police to make an arrest without a court order. Bearing in mind that arrest of persons caught "in flagranti" by citizens is a generally accepted option in comparative law, and that it has a great significance from the viewpoint of identification and punishment of perpetrators of criminal offences, the mentioned incompatibility of the LCP and the Constitution (which viewed from the Convention is irrelevant), is rather a weakness of the constitutional norms than of the regulation envisaged by the LCP. The authors of the Draft LCP have changed, in order to reduce the degree of incompatibility with the Constitution, the wording of the norm regulating the competence of citizens to prevent a person caught in the act of committing a criminal offense from escape. "Everyone may prevent the flight of a person caught in the act of committing a criminal offense, which is prosecuted under official duty" (Article 94 of the Draft LCP). Although much more mildly formulated, the newly proposed provision actually has the same content as the previous one.

The police may arrest a person caught in the act of committing a criminal offense and a person who is reasonably suspected of having committed a criminal offense which is to be prosecuted ex officio, and when one of the conditions for detaining this person is fulfilled.

Furthermore, the law sets out the competence of the police, according to Article 143 paragraph 1, to hand over to the investigating judge persons who are believed to possess important information for a criminal procedure, or detain such persons until the judge's arrival but not more than six hours, if their interrogation at a later stage would be impossible or obstructed. In spite of the fact that it is a form of deprivation of liberty, it is exceptionally short and can be linked to the duty of persons to testify in court. Bearing in mind this fact, as well as the legislation of other countries, it can be acknowledged that the application of Article 143 paragraph 1 does not contravene the Convention, because interventions in the liberty of individuals is not of such nature as to affect his right to liberty as a fundamental right.

The Convention expressis verbis provides in Article 5, paragraph 1, item c, the basis for arrest and detention for the purpose of criminal procedure: a) to bring a person before the competent legal authority on reasonable suspicion of having committed an offense, b) when it is reasonably considered necessary to prevent his committing a new offense or c) to prevent him from fleeing after having committed an offense. Each of the mentioned prerequisites for arrest and detention needs to be taken in conjunction with the general precondition, the suspicion that the detainee has committed the criminal offense. Beside the mentioned preconditions for arrest and detention, some other, we might call them "hidden" causae arresti, have emerged from the practice of the Commission and the Court of Human Rights: Detention based on legally invalid judgment (interpretation of Article 5, paragraph 1 a), non-compliance with some lawful court order (Article 5, paragraph 1 b) which can also apply to criminal procedure (for instance, non-abidance by a court order with guarantee and the like), preservation of public order and danger of collusion[13]

The bases for detention, as provided by the LCP, are in full conformity with those of the Convention and the practice of the Commission and the Court based thereupon. Special grounds for detention in Croatian criminal procedure law, applicable if also the general condition (reasonable suspicion that the person in question has committed a criminal offense) is given, are: danger of flight, danger of recurrence, completion or new criminal offense, danger of collusion, and detention due to the severity of the offense and danger to security (Article 282, paragraph 2 of the LCP). A special case of detention exists if a properly summoned accused person evidently avoids to appear before the court (Article 290, paragraph 2 of the LCP) which can be classified as detention due to non-compliance with obligations deriving from a lawful court order. In addition to the above-mentioned, the LCP stipulates two cases of obligatory detention in cases of the severity of felonies: These are the obligatory detention in Article 182, paragraph 1 (if the felony is punishable with a prison sentence of 20 years), and obligatory detention if the accused has been sentenced to prison for 5 or more years by a legally invalid judgment (Article 343 paragraph 1 of the LCP). Detention due to the severity of the felony is not explicitly set forth in Article 5 of the Convention, but it exists in many pieces of legislation. Such detention is most often theoretically interpreted as detention due to the danger of flight, because it is presumed that the severity of the possible sentence undoubtedly motivates the escape. Accepting such viewpoint, it can be established that the preconditions for detention in Croatian criminal procedure legislation are in accordance with those of the Convention and the practice based thereupon.

The Petty Offence Law foresees the preconditions for deprivation of liberty in the petty offense procedure, which by its nature is also a criminal procedure which

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[13] The provision of Article 35 of the Law on Internal Affairs can also be placed in the same framework, because it envisages the possibility of detention of a person in order to protect the legal order.

basically corresponds to the one set out by the LCP and this is in compatibility with the Convention. Thus, according to Article 85 of the Petty Offence Law, the magistrate's court may detain the accused in order to establish his identity, and in cases of danger of flight and danger of recurrence of a grave offense against public order and peace. The detention may last for up to 48 hours. A person under the influence of alcohol caught in the act of committing an offense and who will most likely continue to do so, may be detained until he has sobered up, at the most for 12 hours (Article 87, paragraph 1 of the Law on Offences). Such detention may be ordered by the magistrate's court and the police.

In addition to the above-mentioned regulations, the Temporary Regulation of the Ministry of Internal Affairs also contains provisions on deprivation of liberty. The Regulation was passed by the Minister of Internal Affairs, based on Article 107, paragraph 2 of the Law on Internal Affairs.[14] Articles 226 - 231 refer to detention of persons and Articles 232 - 240 to deprivation of liberty. These provisions mainly mirror the provisions of the LCP and Law on Offences as to the deprivation of liberty (arrest), elaborate on their technical details, but also surpass the mentioned framework. The best example for this fact is Article 232, item 1 establishing obligatory arrest which is not explicitly envisaged by the LCP. First of all it needs to be mentioned in such cases that the Regulation has not been published in the Official Gazette, contravening the principle that laws and regulations have to be published in the official gazette, and enactment of adequate regulations is suggested in order to regulate the matters covered by the Regulation.

Remark: The Croatian Parliament adopted at its session of September 19, 1997 the Law on Criminal Procedure, which takes into account the remarks presented in this Report in terms of compatibility with the Convention.

5.5. Deprivation of Liberty of Minors

The Convention provides the deprivation of liberty of minors, "the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority".

The Constitution of the Republic of Croatia does not specifically mention the detention of minors, but it is certainly included in the framework of Articles 24 and 25 of the Constitution.

The Criminal Law of the Republic of Croatia On Minors Criminal Offenders provides educational measures, such as: disciplinary measures, measures of enhanced supervision and accommodation in an institution, and only exceptionally imprisonment of minors. The measure of accommodation in an institution may last up

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[14] OG 29/1991, 73/1991, 19/1992, 33/1992 and 76/1994. The Regulation was passed on January 25, 1995.

to 5 years and the imprisonment of minors up to 10 years (Articles 70 - 73 of the Criminal Law).

The Law on Criminal Procedure envisages the possibility of detention of minors, in exceptional cases, for a maximum of three months (Article 461 of the LCP). All of the above-mentioned measures of deprivation of liberty of minors are in accordance with the Convention.

5.6. Deprivation of Liberty For Medical And Social Reasons

The Convention allows in Article 5, paragraph 1 e. for the deprivation of liberty for medical and social reasons: "the lawful detention of persons for the prevention of the spreading of infectious diseases, or persons of unsound mind, alcoholics or drug addicts or vagrants".

The Constitution, besides the general provision of Article 22 on deprivation of liberty, does not contain any specific provisions on this issue.

Persons of unsound mind, alcoholics and drug addicts are only deprived of their liberty if their state of mind can be qualified as mental illness endangering their lives, the lives of other citizens or property.

The legal basis of deprivation of liberty of the above-mentioned persons can be found in Article 31 of the Law on Health Care (OG 1/1977). The decision on deprivation of liberty is rendered by a court in an extra-judiciary procedure. Currently an extensive reform is under way in Croatian legislation concerning this issue, and it can be expected that the Law on Protection of Persons With Mental Disorders will be passed in the near future. Regardless of certain shortcomings of the currently valid legislative framework of deprivation of liberty of persons of unsound mind, it has to be concluded that this legislation, as well as the one in preparation, conform with the Convention.

Measures of deprivation of and restrictions on liberty for the prevention of the spreading of infectious diseases are encompassed in the Law on the Protection of the Population from Infectious Diseases (OG 60/1992). In case a person is found to have an infectious disease specifically elaborated in the said law, obligatory isolation and treatment in a health care institution is prescribed. In cases of other disease, isolation and treatment are carried out at the patient's home. If it is an epidemic, isolation and treatment can also be performed in other suitable locations, pursuant to the decision of the Ministry of Health (Articles 20 - 22 of the Law). A special form of deprivation of liberty, determined by the law, is quarantine of persons who are found or suspected to have had direct contact with persons suffering from very severe infectious disease. Quarantine consists of limitations on movement and of medical check ups (Article 47 of the Law). The cited regulations are in accordance with the Convention, because it is a lawful deprivation of liberty for the purpose of prevention of infectious disease.

Remark: The Croatian Parliament adopted at its session of September 19, 1997 the Law on Protection of Persons With A Mental Disorder.

5.7. Deprivation of Liberty For Unauthorized Entry Into the Country Or In Cases of Deportation or Extradition

The Convention permits "the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition." (Article 5, paragraph 1 f).

An alien who was sentenced to the security measure of deportation or the protective measure of expulsion or revocation of his residence permit or who resides in the country without the approval of the competent authority, is obliged to leave the territory of the Republic of Croatia within the term stipulated by the competent authority. If the alien fails to leave Croatia, he will be expelled. Should this not be possible, he will be accommodated in a reception center for aliens or, if he can financially provide for his stay, he will be assigned a place of residence. As far as unauthorized entry into the country is concerned, Croatian regulations focus on prevention and the return of persons attempting to enter the country without authorization (see Law on Supervision of State Borders, OG 34/1995). Persons who have entered the Republic of Croatia illegally are arrested and detained if, on the occasion of their entry, a criminal act or petty offense has been committed, and in terms of such arrest and detention, everything stated above on arrest and detention in criminal and petty offense procedures applies in this case as well.

The procedure of extradition is regulated by the Law on Criminal Procedure and represents a mixed, judicial-administrative procedure (Articles 511-524 LCP). Extradition of an alien may only be effected under circumstances provided by law. The Constitutional Act on Cooperation of the Republic of Croatia with ICTY envisages an arrest and surrender procedure of persons whose surrender has been required, on the basis of an indictment for war crimes, by the ICTY in The Hague (OG 32/1996). All of the above-mentioned regulations are in conformity with the Convention. Possible contraventions of the Convention (Article 5, paragraph 1 f) might occur in individual cases and have to be assessed in concreto.

5.8. Obligation To Inform Arrested Persons Of the Reasons For His Arrest

> *"Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him." (Article 5, paragraph 2)*

The Constitution of the Republic of Croatia requires that "(...) The arrested person shall be immediately informed in a way understandable to him of the reasons for arrest and of his rights determined by law" (Article 24, paragraph 2).

The Law on Criminal Procedure does not include any provision to correspond to Article 5, paragraph 2 of the Convention, or the cited part of Article 24, paragraph 2 of the Constitution, respectively. In Article 184 paragraph 1 of the LCP it is stated that the police shall notify the investigating judge of the reasons of the arrest. It does not mention information of the arrested person. The first moment of information on the charges is when the accused is interrogated before the investigating judge. The Draft LCP rectifies the shortcoming of the current LCP and requires in Article 96, paragraph 1 that the arrested person shall immediately be informed of the reasons for his arrest, except in cases where, due to the circumstances, this is impossible. The logical interpretation of the wording "inform on the reasons for his arrest" is based on the presumption that the arrested person is informed in a manner understandable to him (otherwise he is not considered informed!), and that the information of the reasons for the arrest, in view of the completeness of the procedure, includes also information of the "charge".[15] Nevertheless, it might be beneficial to improve the text of the Draft LCP, so that it says:

"(1) On the occasion of an arrest, the arrested person shall be informed promptly in a manner understandable to him of the reasons for his arrest and of any charge against him, except in cases where this is impossible to perform due to the circumstances of his arrest."

Although the Convention does not explicitly mention a deferment of information on the reasons of arrest and charges, the practice of the Commission and the Court accepts later effected information for justified reasons (resistance or other circumstances of arrest, the arrested person is an alien who does not speak the language of the country he was arrested in, deaf-mute persons etc.).

Pursuant to the above-mentioned, the provisions of the LCP in force fail to meet the requirements of the Convention in terms of information as in Article 5, paragraph 2, but a new law, which conforms with the provisions of the Constitution and the Convention, is in the procedure of being adopted.

Remark: See 5.4.

5.9. Obligation to Bring An Arrested or Detained Person Before A Judicial Body

> *"Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial." (Article 5, paragraph 3 of the Convention).*

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[15] The structure of the procedure has to be taken into account. In Croatia, a charge exists in the legal sense only from the moment the public prosecutor presses charges, which at the time of arrest is not the case.

The cited provision of the Convention contains two essential elements: On the part of the state, it appears to be an obligation, and on the part of the accused person a right. First, the arrested person must promptly be brought before a court, so that the lawfulness of the arrest or detention can be decided upon. Second, the arrested/detained person must be either a) tried within a reasonable time or b) released pending trial, which may be conditioned by guarantees to appear for trial. It has to be taken into account that the "reasonable time" in Article 5 paragraph 3 is definitely shorter than the "reasonable time" in which, according to Article 6 of the Convention, every court procedure should be carried out.

The Constitution of the Republic of Croatia states in Article 25, paragraph 2 that "anyone who is detained and accused of a criminal offense shall have the right within the shortest term specified by law to be brought before a court, and within the statutory term to be acquitted or condemned." Also relevant is the provision of Article 24, paragraph 3 of the Constitution, determining that any person arrested or detained "shall have the right to appeal in court, which shall without delay decide on the legality of the arrest."

The Law on Criminal Procedure has found solutions which are in accordance with the Convention. First, the police is obliged to bring the arrested person before the investigating judge within a term of 24 hours. Possible extensions of the stated time must be justified in writing, while experience shows that justified reasons for extension of the time limit are natural disaster, inability to transport the accused person from a remote area and so forth (see Article 186 of the LCP). After the arrested person has been brought before him, the investigating judge promptly decides on detention and must forward the detention order to the accused person within 24 hours from the moment of the arrest (Article 183, paragraph 3). The accused person has the right to appeal the detention order.

The LCP does not stipulate a certain time limit for the trial of a detained person, but provides limitations as to the length of the remand (Article 187 of the LCP), prescribes the urgency of procedure when the accused is detained (Article 181, paragraph 2 of the LCP) and the control mechanisms for the determination of his needs during the entire proceedings.

Furthermore, the LCP provides the option of a guarantee (bail) as a measure to substitute detention. Bail consists of depositing cash or other valuables as a guarantee that the detained accused person or the accused who should be detained will not flee (Articles 177 - 180 of the LCP). Although it can be assessed that the LCP meets the criteria of Article 5 paragraph 3 of the Convention, the Draft of the new LCP brings great novelties to the issue of detention, which will put Croatian legislation in the ranks of modern laws very close to the spirit of the Convention. Under item 5.12 it shall elaborate on these new solutions. It is important to emphasize that Croatian criminal procedure law acknowledges obligatory detention in cases of felonies punishable with 20 years of prison, if it is not a case where the law provides a

possibility of passing milder sentences (Article 182, paragraph 1 of the LCP). The Draft LCP contains such a solution (Article 102, paragraph 1). Obligatory detention does not explicitly contravene the Convention, but is a rare legislative option in European countries today, and contrary to the Recommendation of the Council of Europe. In addition, the option of the right to release pending trial, possibly conditioned by guarantees, is doubtful and the repealment of the provision of the LCP prescribing obligatory detention for certain severe criminal offences is suggested to be considered.

5.10. Judicial Review Of the Lawfulness of Detention

> *"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." (Article 5, paragraph 4 of the Convention).*

This provision of the Convention partially interferes with paragraph 3. The special review proceedings on arrest or detention, as defined in Article 5, paragraph 4 of the Convention, corresponds more to the tradition of accusatory procedure (Habeas corpus).

In Croatian law, as in the majority of European legal systems, the proceedings for review of the detention are implemented through appeal mechanisms regarding the decision ordering detention. The accused has a right to appeal the decision on detention or the continuation of detention (Article 183, paragraph 4, Article 187, paragraph 2) The practice of the Commission and the Court respects such situations and the requirement of the review of arrest and detention, pursuant to Article 5, paragraph 4, is fulfilled if the decision on arrest or detention was approved by a court. It should be mentioned that this procedure makes sense only if the accused is still deprived of his liberty. If he has been released in the meantime, the unlawful deprivation of liberty can be a prerequisite for receiving compensation due to unlawful deprivation of liberty. The review of detention is performed on a double lane in Croatian law: ex officio by the body responsible for the proceedings, and upon initiative of the accused or his defense lawyer by means of an appeal or motion to terminate the detention.

Even though certain objections could be raised concerning the regime of review of detention in Croatian law (i.e., the investigating judge cannot terminate detention at his own discretion if he considers the prolongation of it unnecessary, but has to seek the approval of the public prosecutor or the decision of the court panel), they are not of such a nature as to affect the compatibility of the Croatian law with the Convention in this field.

5.11. Right to Compensation For Unjustified Detention

> *"Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation." (Article 5, paragraph 5 of the Convention)*

The Constitution of the Republic of Croatia states in Article 25, paragraph 4 that "any person who has been illegally deprived of his liberty or condemned shall, in conformity with law, be entitled to damages and a public apology." The LCP proscribes in Articles 528 - 536 the procedure for realization of the right to compensation of persons unjustifiably condemned and later acquitted on the basis of legal remedies, dismissal of the charges or termination of proceedings; of persons who were detained, but were later not sentenced to prison; and of persons who were detained or held in prison longer than necessary.

The compensation is not granted to a person who, by his false confession or in some other manner, caused the condemnation or deprivation of liberty by his own acts. The compensation includes indemnity for real damage incurred, lost income and affected reputation, and includes publication of adequate information in the media and recognition of the length of service for the purpose of retirement and years of service.

In relation to the Convention, the Croatian LCP recognizes a broader right to compensation, because according to Croatian law it is envisaged not only in the case of illegal, but also unjustified, deprivation of liberty. Moreover, according to the practice of the Commission and Court of Human Rights, the justification and legality of deprivation of liberty are viewed ratione temporis, while in Croatian law, criteria for the final outcome of the procedure are also cumulatively taken into account.

6. Right to a Fair Trial: Article 6 and Protocol 7, Articles 2, 3 and 4

> *Article 6.*
> *1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles of the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
> *2. Everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law.*
> *3. Everyone charged with a criminal offense has the following minimum rights:*
> *a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*

b. to have adequate time and facilities for the preparation of his defense;
c. to defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free, when the interests of justice so require;
d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

6. 1. Aspects of Criminal Procedure

6.1.1. Rights Encompassed by Article 6 of the Convention

Article 6 of the Convention contains a number of provisions. First, in paragraph 1, the principles of court proceedings as such are established (the right to trial before an independent and impartial tribunal, established by law; the principle of indictment, the principle of publicity of hearing, the principle of fair trial). The subsequent provisions determine the principles concerning criminal procedure: In paragraph 2, the presumption of innocence is stated, and in paragraph 3 the guarantees of the right of the accused person to defense (the right to know the nature and cause of the pressed charges, the right to adequate time and facilities to prepare his defense, the right to so-called material (financial) and formal defense, the right to call witnesses and to examine witnesses of the prosecution as well as the right to free assistance of an interpreter, are set forth). The criminal procedure is also referred to in Articles 2 and 3 of Protocol 7: The rights of a convicted person to a renewal of the proceedings and compensation in the case of a mistrial, while Article 4 of the same Protocol stipulates a prohibition of double jeopardy.

In this review, we shall first assess the general principles of the regulation of court proceedings, and then we shall examine the principles concerning criminal procedure. In this context, it should be mentioned that Article 6 of the Convention epitomizes the only legal remedy given to the individual as a weapon in conflicts with predominant state power: judicial protection of his rights and freedoms. In the case of *Delcourt v. Belgium*[16], the Court expressed the opinion that the significance of the right to a fair trial, as protected in Article 6, paragraph 1 of the Convention, exceeds to such an extent the other values of a democratic society, that under normal circumstances (not covered by a state of emergency under Article 15 of the Convention) it cannot be derogated from, due to (the otherwise legitimate) "interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others." (Article 11, paragraph 2 of the Convention). Commentators also point out that the provisions of Article 6 of the Convention, together with the provisions of Article 5, are the only provisions imposing the obligation of positive action on the state, according to which the state is obliged not only to refrain from restricting certain fundamental rights as in

[16] *Delcourt v Belgium* judgment, 1970, Series A N° 11.

the remaining provisions of the Convention, but also to organize the judicial system and the relevant "infrastructure" of protection of human rights through active measures.

6.1.2.1. Relevant Institutions and Legal Provisions Elaborating the Right

The rights in Article 6 of the Convention are elaborated in numerous constitutional and legal provisions of the Republic of Croatia, as well as in the provisions contained in some treaties. The protection of those rights is realized through relevant legal provisions and, after the exhaustion of ordinary legal remedies, according to the provisions of the Constitutional Law on the Constitutional Court of the Republic of Croatia envisaging the protection of the said rights through constitutional complaint. Finally, fundamental rights and freedoms are protected, according to Article 93 of the Constitution, by the ombudsman, as an institution responsible for the protection of the constitutional rights of citizens in proceedings before public administration bodies and bodies vested with public power.

Legal guarantees of defense in criminal proceedings are provided, according to Article 29, paragraph 1 of the Constitution of the Republic of Croatia, to anyone suspected or accused of a criminal offense. He shall have the right: to a fair trial before the competent court; (within the shortest possible period of time) to be informed about the reasons for the charges brought against him and the incriminating evidence; to a defense counsel and free communication with him, and to be informed of this right; to be tried in his presence if he is accessible to the court, and to defend himself alone or with the assistance of the defense counsel chosen by him. Paragraph 2 of the same Article prohibits that the person charged and accused is forced to testify against himself or to admit his guilt, and paragraph 3 does not admit illegally obtained evidence in court proceedings. Article 4, paragraph 1 of the Law on Courts of January 6, 1994 (OG 3/1994) also states that "everyone has the right to be tried by a court competent to decide on the matter, in a procedure established by law and without unreasonable delay."

Besides the protection of the rights in Article 6 of the Convention, which in the Croatian legal order is secured by the mechanisms of judicial protection, on which we shall elaborate later, these rights are realized also through the above-mentioned protection by the Constitutional Court by means of the constitutional complaint and by the Administrative Court, pursuant to the provisions of the Law on Administrative Litigation.

The Constitutional Court of the Republic of Croatia has to date decided in few cases relating to the rights guaranteed in Article 6 of the Convention. Independently of numerous cases of review of constitutionality concerning the appointment of candidates to judicial positions, as decided by the High Judiciary Council, which will be mention later, the Constitutional Court repealed in its decision U-I-197/1992 of March 16, 1994 (OG 25/1994) Article 392 paragraph 1 item 4 and Article 393 of the LCP, which allowed the resumption of a criminal procedure to the detriment of the

convicted or acquitted person, as being in contravention of the above-mentioned constitutional prohibition in Article 32, paragraph 3 of the Constitution of the Republic of Croatia. In the decision U-I-272/92 of March 9, 1994 (OG 25/1994) the Constitutional Court repeated Article 115, paragraph 4 of the LCP relating to the calculation of terms for appeal, as contradicting constitutional rights to appeal (Article 18, paragraph 1 of the Constitution of the Republic of Croatia), and to the legal assistance of an attorney (Article 27) as a defense counsel in a criminal procedure (Article 29 paragraph 1 of the Constitution of the Republic of Croatia). On the contrary, the Constitutional Court of the Republic of Croatia dismissed by its decision U-I-179/1991 of June 24, 1992 (OG 19/1992) the motion for initiation of proceedings of review of the constitutionality of the Decree of the President of the Republic of Croatia on the application of the LCP in a state of war or immediate danger to the independence or unity of the Republic of December 27, 1991 (OG 73/1991, 25/1992). The Decree contained certain restrictions as to the procedural guarantees mentioned in Article 6 of the Convention (such as, for instance, the contradictory character of the procedure based on the appeal against the judgment), which was emphasized also in the report prepared for the Council of Europe by rapporteurs Matscher and Thune in 1994[17]. Due to the fact, however, that it has meanwhile been repealed, the Decree in question shall not be taken into account for the purposes of this report.

The legislation of the Republic of Croatia which elaborates the individual rights of Article 6 paragraph 1 of the Convention stipulates that: A) In order to establish his civil rights and obligations or in the case of **pressing charges for a criminal offense**, everyone **has the right to a fair and public examination of his case**, within a reasonable time, **by an independent and impartial court, established by law.**

a) In the Republic of Croatia the foundations of the organization of the courts are laid down by the Constitution, which, accepting the doctrine of the separation of powers, stipulates inter alia that the judicial branch shall be autonomous and independent, and that the courts shall administer justice on the basis of the Constitution and the law. The organization and competence of the courts is set forth in a more detailed manner in the Law on Courts of January 6, 1994 (OG 3/1994), while the composition of the courts in a criminal procedure is stipulated by the current Law on Criminal Procedure (OG 34/1993, 38/1993, 28/1996). Judicial function in the Republic of Croatia is permanent and the judges enjoy, according to the Constitution, other guarantees of personal independence (non-transferability to other posts, immunity, Articles 119 and 120 of the Constitution of the Republic of Croatia). The appointment, relief and disciplinary punishment of judges and public prosecutors is carried out by a special body, composed of 15 elected judges, public prosecutors, attorneys and university law professors, or the High Judiciary Council (Article 121), which is regulated by the provisions of the Law on the High Judiciary Council of June 10, 1993 (OG 58/1993) and the provisions of the Law on Courts. According to the Law on Courts, lay judges, as lay temporary judges, are generally appointed by county assemblies for a four year

[17] Parliamentary Assembly, Bureau of the Assembly, Report on the Legislation of the Republic of Croatia, prep. by Franz Matscher and Gro Hillestad Thune, Strasbourg Dec. 1994; SIV/4/a.

term, with the possibility of re-election. Court administration is regulated by the Law on Courts and elaborated in detail in the By-laws on Internal Procedure of Regular Courts (rules of procedure of courts), passed by the Minister of Justice based on the competencies derived from the law, on October 10, 1988 (OG 45/1988 and 8/1990).

b) According to Article 13 of the Law on Courts, judicial power is exercised in the Republic of Croatia by municipal, county and commercial courts, as well as by the High Commercial Court of the Republic of Croatia and the Administrative Court of the Republic of Croatia. The highest court is the Supreme Court of the Republic of Croatia. The law enables the establishment of special courts for certain legal areas by special law. Court martial, introduced by decrees of the President of the Republic during a state of emergency, has been abolished at the end of 1996.

c) Criminal Offense matters, according to the provisions on actual jurisdiction contained in the Law on Courts, are tried before **municipal and county courts** as first instance, and county courts and the **Supreme Court of the Republic of Croatia** as courts of second instance.

Accordingly, municipal courts decide in the first instance on criminal offenses punishable by prison sentences below ten years (smaller municipal courts, specified by law, may resolve only minor criminal matters penalized with fines or imprisonment for up to five years). County courts decide in the first instance on criminal offenses punishable by prison sentences exceeding ten years, conduct investigations and carry out procedures relating to the extradition of aliens or enforcement of foreign judicial decisions, and decide in the second instance on appeals against decisions of municipal courts. The Supreme Court of the Republic of Croatia decides in the second instance on appeals against first-instance judgments of county courts and decides on the so-called extraordinary legal remedies. The above-mentioned courts decide in concrete cases as regards to the provisions on territorial jurisdiction contained in the LCP. This Law differentiates among various types of territorial jurisdiction. The primary jurisdiction lies with the court on whose territory the crime was committed (forum delicti commissi).

d) In matters of petty offences, according to the provisions of the Law on Petty Offences of May 4, 1995 (OG 33/195), decisions are made by **magistrates' courts** and other **bodies of public administration,** determined by law to pronounce fines or precautionary measures (Article 2, paragraphs 2 and 3 of the Law on Petty Offences).

Magistrates' courts are, according to Article 153a of the said Law, state bodies which administer justice and exercise judicial power independently and autonomously as special courts for the legal area of punishment of petty offences and pronouncing sentencing for such offences within the framework and competencies stipulated by law. According to Article 57 of the same Law, a petty offense procedure in the first instance is carried out by a magistrates' court and in the second instance by the High Magistrates' Court, unless by special law the jurisdiction of other bodies is provided (primary jurisdiction of magistrates' courts). It needs to be emphasized that

magistrates' courts are exclusively competent to pronounce prison sentences for petty offences (which may be prescribed by law only and may last from one to thirty and exceptionally to sixty days), or prison sentences as a substitute for a fine (Article 24 a of the Law on Petty Offences).

In spite of the fact that the Law on Courts does not mention magistrates' courts, their establishment in the Law on Petty Offences is nevertheless indisputable, because the Law on Courts, as mentioned earlier, provides for the possibility of establishing special courts for certain legal areas by special law. The judges of the magistrates' court are appointed and removed from office following the same procedure as the judges of all other courts (Article 153r paragraph 1 of the Law on Petty Offences).

Public administration bodies are, according to special law, also competent to carry out petty offense proceedings (Article 51, paragraph 1 of the Law on Petty Offences).

e) The distribution of jurisdiction concerning criminal offences among municipal and county courts (for felonies), magistrates' courts (for petty offences) and public administration bodies (for petty offences) conforms with the practice of the Commission and the Court, according to which the decision on pronouncement of criminal sentences may also be entrusted to bodies of an administrative character, in order to alleviate the courts of an excessive case load. However, matters decided upon by such bodies maintain the nature of criminal matters initiated by the "indictment", which must be carried out in a procedure which fulfills all the guarantees of Article 6 of the Convention.

f) It has already been emphasized that in the opinion of the Commission and the Court, matters which are resolved before bodies of public administration maintain the nature of criminal matters, if they have been initiated on the basis of an act classified as "indictment" from the point of view of substantive law. Criminal proceedings before such bodies of the Republic of Croatia (item d) supra) meet this requirement because high fines can be pronounced as penalties as well as precautionary measures and thus substantially affect the existential basis of the accused person. Sometimes they can even be enforced without pronouncement of a sentence (Article 10 of the Law on Petty Offences). The provision of Article 44, paragraph 1 of the Law on Petty Offences stipulates that a different procedure is carried out for certain offences on the basis of a special law, which has been applied in respect of the laws on customs, tax and other transgressions. However, the alternative procedure must comply as well with the principles enshrined in Article 6 of the Convention, meaning that in each and every of such cases the accused person must have the right to a fair and public examination of his case, within a reasonable time, by an independent and impartial court, established by law.

Some of the laws mentioned, however, fail to secure this right: for instance, Article 144 of the Law on Income Tax prescribes that "the procedure for sentencing offences due to infringement of this law are initiated, carried out and decided (by an order to inflict punishment) by the Tax Administration". The same regulation can be found in

Article 12 of the Law on Financial Police stipulating that an offense procedure is initiated by "an inspector of the Financial Police before an authorized official of the Financial Police in the first instance, while in the second instance the decision-making body is the Offense Commission, appointed by the Minister of Finance". Since the bodies of the tax administration, or the offense commission appointed by the Minister of Finance, do not meet the criteria of independence and impartiality of judicial bodies according to Convention practice, the mentioned laws do not abide by the cited principle concerning the right to fair trial as mentioned in Article 6, paragraph 1 of the Convention. It is therefore necessary to amend these laws and bring them into compliance with Article 6, paragraph 1 of the Convention.

6.1.2.2. Right to a Fair and Public Trial Within a Reasonable Time

In order to establish his civil rights and obligations or in the case of an indictment for a criminal offense, everyone has the right to a fair and public examination of his case, **within a reasonable time**, by an impartial and independent court established by law.

a) The Constitution of the Republic of Croatia contains the principle of **public** hearings and pronouncement of judgments in Article 117, paragraph 1. Paragraph 2 of the same Article provides for the exceptional exclusion of the public from a hearing or part thereof if minors are being tried, or for the purposes of protecting the private lives of the parties, or in marital disputes and proceedings in connection with guardianship and adoption, or for the purposes of protecting military, official or business secrets, or for the protection of the security of the Republic's defense. It complies with Article 14, paragraph 1 of the International Covenant on Civil and Political Rights and the practice of Article 6 of the Convention, according to which the public may be excluded from all or part of the trial, but this restriction may never include the parties in the trial, nor the pronouncement of the judgment.

The principle of publicity of the main hearing in a criminal procedure and its pronouncement of judgment are set forth in more detail in the provisions of the LCP[18], pursuant to which the decision on exclusion of the public in such cases may only be passed by the court. The decision must be justified and publicly announced at the hearing; while the infringements of this principle are sanctioned as so-called "absolutely essential violations" of the provisions of criminal procedure, then resulting in a possible annulment of the judgment in cases of unlawful exclusion of the public. It should be pointed out here that the principal rule is that second instance criminal proceedings are of a closed nature, ie, open only to the parties concerned. However, criminal proceedings in the first instance are always open to the public, subject only to legally prescribed exceptions. In petty offense procedures carried out before the said magistrates' courts, the principle of publicity is limited and applies only to cases of an "oral hearing" (Article 108, paragraph 4 of the Law on Petty

[18] According to Article 278 of the current law, the court may exclude the public from the main hearing in order "to protect other special interests of community". The Draft LCP (in Article 293) no longer contains this undefined standard.

Offences). In other cases, where the magistrate may decide without a hearing - which is left to the discretion of the magistrate - the principle of publicity is not applied. This is a shortcoming of that law, which should be corrected on the occasion of its upcoming re-enactment.

b) The Constitution of the Republic of Croatia and the LCP, regulating the procedure for criminal offences, contain all the essential principles of fair trial deriving from the practice of the Convention. The LCP emphasizes among its fundamental provisions and especially in the provisions on the course of proceedings, the contradicting principles and defends the differentiation among parties, which would not be justified by the diversity of the procedural rules. The principle of "equality of arms", for instance, is realized to a high extent already in the initial procedure, where the accused and his defense counsel have the same right to propose investigations and the right to inspect the file as the prosecution (public prosecutor), and the investigating judge has to ensure to them the realization of these rights by proper notification and information of the accused person of his rights to defense.

A substantial difference in favor of the public prosecutor exists in the sense that the investigating judge cannot simply reject the motions of the public prosecutor for investigation actions, as it can reject those of the defense, but has to seek a decision of the court panel. The defense, however, may repeat its motion, which has been rejected by the investigating judge, without restrictions during the later stages of the procedure. Equality of the parties is provided for even more at the stage of the main hearing and is also applicable to the decisions of a court of appeal, where each party must be notified of the allegations of its adversary in order to be able to reply to it, and on the occasion of sessions of the court of appeal, where the parties must be called to attend and have the opportunity to present their claims, motions or opinions. The problem arises in this respect whether the provisions of the LCP are compatible with Convention practice, taking into account that according to the LCP the motion of the public prosecutor (croquis), competent to act before the court of appeal, based on the appeal of the party, is not forwarded for a reply (Article 360 paragraph 1 - 3), or according to which in the shortened procedure the parties are invited to the session of the court of appeal only if this court deems it useful for the sake of clarification. In cases where the procedure is carried out upon the motion of the public prosecutor, the public prosecutor competent for the procedure before the court of appeal may, before the session, forward his written motion (croquis) without giving the accused the opportunity to comment on it (Article 433). These issues have been discussed by the Working Group for the Reform of the Criminal Procedure Legislation of the Ministry of Justice, and enacted in the Draft Law on Criminal Procedure so that the new Article 445 introduces the option of attendance by both parties at the session of the court of appeal if, in the first instance procedure, the accused person was sentenced to imprisonment. This would also meet the principles identified in the cases Pataki[19] and Dunshirn[20], where the Commission took the view that both parties shall be given the right to attend a non-public session of a second instance court. However, in view of

[19] Appl 596/59, *Pataki v Austria*, Yearbook III (1960).
[20] Appl 789/60, *Durnshirn v Austria*, Yearbook IV (1961).

the provisions on the croquis of the public prosecutor, the Working Group of the Ministry of Justice failed to formulate an opinion, and it is necessary to recommend to the Ministry to eliminate these provisions from the Draft Law on Criminal Procedure. With respect to the other principles of fair trial (obligation to explain the judgment, opportunity of the parties to verify by contradiction the truth of the testimonies of the interrogated persons), it can be established that the existing as well as the proposed new criminal procedure legislation fully meets the criteria of the earlier mentioned (see item 5.b.c. supra) Convention practice. This, however, is not the case with the procedural and substantial part of the law referring to the procedure before magistrates' courts.

This procedure can be initiated by official duty and carried out by a single body, with the participation of only one subject (the accused person), whose rights to defense are narrowed as compared with the criminal procedure. There are, for instance, numerous cases in which an order may be passed even without prior hearing of the accused. In spite of the fact that the accused has the right to a defense council, the Law on Petty Offences does not prescribe the duty of the magistrates' court to inform him of this right, to invite the defense lawyer to the hearing, or to forward the decision to the defense lawyer. Moreover, no fixed criteria as to the deprivation of the right to review the file are prescribed, hence it is left to the free assessment of the judge "whether it obstructed the proper carrying out of the procedure". The Law on Petty Offences contains neither the right of the defendant to refuse to testify nor the duty of the judge to inform him of this right. Similarly, it does not regulate the right of the defendant to interrogate the witnesses of the prosecution.

One of the most severe shortcomings is certainly the fact that in a magistrates' procedure the implementation of an "oral hearing" is optional, meaning that the judge may order it if he deems that it is necessary "for better clarification of the matter" (whereby his negative decision in this sense is uncontrollable and incontestable by special legal remedies).

c) The Convention principle of trial "within a reasonable time" is taken into account by Article 25, paragraph 2 of the Constitution of the Republic of Croatia, which stipulates that everyone who is "detained and accused of a criminal offense shall have the right within the shortest term specified by law to be brought before a court, and within the statutory term to be acquitted or condemned" (which means that the Constitution does not only require the "shortest" possible time for bringing the detained and accused person before the court, according to the requirements of Article 5, paragraph 3 of the Convention, but also stipulates the right of the accused to be "acquitted or condemned within the statutory term", meaning that he is tried within this term), as well as Article 29, paragraph 1 of the Constitution of the Republic of Croatia, requiring that the accused has the right "within the shortest possible term to be informed of the reasons for the charges preferred against him and of the evidence incriminating him". These principles are further elaborated in the criminal procedure legislation. The Draft of the new Law on Criminal Procedure also includes and expands a group of such procedural guarantees, securing the principle of trial within a

reasonable time (for instance, by prescribing strict sanctions for disrespect of the deadline for formulating the written judgment; introduction of a special form of the so-called mandate procedure in the case of the lightest criminal offences etc.).

Notwithstanding the guarantees mentioned, the legislation of the Republic of Croatia does not contain the explicitly stated right of the individual to an examination of his case within a reasonable time, which would be useful to incorporate into the Draft LCP, and other relevant laws regulating procedural issues in civil procedure, in order to achieve the full guarantee of the rights secured by Article 6 of the Convention

The provision of Article 6, paragraph 2 of the Convention, according to which "everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law" is first and foremost confirmed in Article 28 of the Constitution, stating that "Everyone shall be presumed innocent and may not be considered guilty of a penal offense until his guilt has been proved by a final court judgment", and Article 29, paragraph 2 stating that "a charged and accused person shall not be forced to testify against himself or to admit his guilt", and also Article 14, paragraph 2 of the International Covenant on Civil and Political Rights. This provision, in a slightly altered form, is contained in Article 3 of the current LCP, while Article 3 of the new Draft LCP expands it in its paragraph 2, stating that: "The court shall resolve the doubt regarding the existence of the facts which constitute the substantial elements of a criminal offense or which form the conditions for the implementation of a certain provision of the Criminal Code, in favor of the defendant." The presumption of innocence of the defendant is not only taken into account by the LCP in terms of regulating the burden of evidence and resolving cases in which the accused person remained under suspicion at the end of the proceedings for the introduction of evidence, but on the basis of evidence not sufficient for a conviction (according to Article 340, item 3, the court must in such cases acquit the accused person), and also in terms of the provisions on the cost of the criminal procedure (which in the case of an acquittal or decision to terminate proceedings are borne by the state budget, Article 91). These provisions thus correspond to the practice of the Commission and the Court, insisting on the prohibition that decisions on the costs of procedure or termination of procedure are based on a factual assessment of the guilt of the defendant (see item 8.c. supra). The Law on Petty Offences, on the other hand, does not contain the presumption of the defendant's innocence. Its provisions on interrogation of the defendant, totally ignoring the defendant's "right to remain silent", could be found to be in contravention of the principles of Articles 28 and 29, paragraph 2 of the Constitution of the Republic of Croatia, and Article 6 of the Convention. Their positive side is that they lay down the defendant's duty to bear the costs of the case in which the defendant is punished by an administrative penalty (Article 123, paragraph 2), meaning that they lay down no such duty in cases in which he was only sentenced with precautionary measures (which is broader than the position of the Commission that the presumption of innocence does not apply in procedures in which not penalties but measures, not based on the principle of guilt, are pronounced).

6.1.2.3. Rights To Defense of the Defendant

The "minimum" rights to defense, set forth in Article 6, paragraph 3 of the Convention, are also contained in the Croatian Constitution and the LCP.

a) The right of the defendant *"to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him"* in Article 6, paragraph 3a of the Convention is almost literally contained in the provision of Article 29, paragraph 1 sub-paragraph 2 of the Constitution of the Republic of Croatia. It is supported by the provisions of Article 4, paragraph 1, Article 174, paragraph 2, Article 208, paragraph 2, Article 305 paragraph 1, Article 306, paragraph 3 and Article 307, paragraph 1 of the LCP, insisting on the preciseness of this information. The Draft LCP maintains these obligations of the procedural bodies, but extends them also to persons against whom a formal decision on the initiation of criminal procedure has not been passed yet, but against whom reasonable suspicion exists that they have committed the criminal offense so that the bodies of criminal prosecution consider them to be suspects, applying measures of restriction of freedom of the person or inviolability of residence (Article 177, paragraph 5 of the Draft) and add sanctions for their violations. Omission of such notifications would result in the invalidity of the testimony of the defendant. On the other hand, the current Law on Petty Offences prescribes in Article 88, paragraph 3, more precisely than the Law on Criminal Procedure, only that the judge will inform the defendant, after noting his personal information, of "what he is accused of" and will then "invite him to state everything in connection to the offense he is interrogated about"

b) The right of the defendant *"to have adequate time and facilities for the preparation of his defense"* in Article 6, paragraph 3 item b of the Convention is contained in the legislation of the Republic of Croatia and Article 14, paragraph 3, item b of the International Covenant on Civil and Political Rights and a series of provisions of the Law on Criminal Procedure, among which we would like to emphasize as paramount the provision of Article 10, paragraph 3 which states that "the defendant shall be ensured enough time for the preparation of his defense". This fundamental provision is subsequently confirmed in many parts of the said law.

Regulation on passing of the decision and its notification to the defendant always requires a minimum term (of at least eight days) between passing and hearing or trial (Article 271, paragraph 3), and envisages the option of interruption of the trial for the preparation of the defense in case of alteration or expansion of the bill of indictment (Article 327, paragraph 2 and 328, paragraph 2). The period for appeal against the judgment is fifteen days, but can be prolonged in case of justified delay based upon the defendant's application for return to the previous state restitutio in integrum (Articles 84-86). However, in addition to the necessary time, the defendant also must have, as required by the Convention, adequate facilities for the preparation of his defense. This mainly refers to the right to assistance from a defense counsel and the right to inspect evidence material.

The right to inspect evidence material corresponds to the right of the defendant to inspect the files concerning the case, as provided in Croatian legislation, which is, compared to similar procedural codes in Europe, regulated in a rather liberal manner: the defendant acquires this right as soon as he has been interrogated for the first time (Article 123, paragraph 5 of the LCP), i.e. at the very beginning of the preparatory procedure. He maintains this right throughout all subsequent stages of the procedure (with the exception that during investigation he may be deprived of inspection of *individual files*, if it is required by the "interests of defense and security of the country", Article 68, paragraph 2). Thus, it is deemed that all related provisions of the LCP, which will also be contained in the new LCP, are compatible with Convention practice, in which the terms "adequate time" and "facilities for the preparation of defense" are interpreted as depending on the circumstances of each case, according to the complexity of the matter itself, the amount of evidence, formal and material defense of the defendant in the specific case etc.

c) The defendant's right in Article 6, paragraph 3, item c of the Convention *"to defend himself in person or through legal assistance of his own choice or, if he does not have sufficient means to pay for legal assistance, to be provided it for free when the interests of justice so require"* is also established in Article 29, paragraph 1, sub-paragraph 3 and 4 of the Constitution of the Republic of Croatia and in Article 14, paragraph 3, item d of the International Covenant on Civil and Political Rights. Thereby it has to be said that the provisions of the Constitution of the Republic of Croatia and the Covenant are more favorable for the defendant, because, unlike the Convention, they lay down also the right of the defendant to be informed of his right to a defense counsel, i.e. they establish as correlate the duty of government bodies to inform him of this right.

Moreover, the rights of material and formal defense are defined in Croatian law by numerous provisions of the current LCP (among which all of Chapter VI is dedicated to the defense counsel) in all stages of the criminal procedure. The defendant has, in Croatian criminal procedure, the position of a procedural subject, endowed with all relevant procedural rights for the realization of the interests of his defense (right to inspect the files of the case, right to attend all procedural actions, right to propose all procedural actions in favor of his defense) from the very beginning of the procedure until its legally valid termination, and even later. As far as the so-called formal defense is concerned, which is the right to assistance by a defense counsel, the LCP repeats the constitutional principles in Article 10, paragraph 1 and 2, and then in Articles 62-70 regulates in detail the right to a defense counsel. The counsel, generally, may only be a person who is a member of the Bar. The Republic of Croatia has a long tradition of skillful performance of professional legal services, as a constitutionally guaranteed (Article 27 of the Constitution of the Republic of Croatia) independent and autonomous service, under the exclusive supervision of the professional association - the Croatian Bar Association - providing legal assistance to citizens in conformity with the law.

The law enables the defendant during all stages of the procedure, from the very beginning, to consult with a defense counsel (Article 159, paragraph 1 explicitly envisages that the interrogation of the defendant during the investigation can always be attended by the prosecutor and the defense counsel) even if he is in detention (Article 69, paragraph 2 prescribes that during the investigation, the investigating judge may order only censorship, but not prohibition of these contacts). This also applies to the so-called special procedures (extradition, committal of mentally ill perpetrators of criminal offences to adequate institutions etc.). It needs to be emphasized that the right to a defense counsel is fully granted to the defendant already during the investigation, that the investigating judge has to inform him of this right at the very first interrogation, whereby the testimony of the defendant is invalid in case of omission of such notification. In cases of so-called "mandatory defense", depending on the severity of the criminal offense, or if the defendant is "incapable of successfully defending himself" from the beginning of the investigation or in relation to crimes punishable by imprisonment above ten years after the indictment, unless the defendant takes a defense counsel himself, the court shall appoint a defense counsel "by official duty"[21]. A defendant who is acquitted does not have to bear the costs for this defense counsel (Article 91, paragraph 1 of the LCP), and if he is condemned, the court may relieve him of covering these costs, if it would endanger the "support of the defendant or of persons he is obliged to support" (Article 92, paragraph 1 of the LCP). Except in cases of mandatory defense, the court may, upon the request of the defendant, appoint a defense counsel for him if the procedure is carried out for a criminal offense punishable by imprisonment above three years, and the defendant due to his financial situation is not able to cover the defense expenses (Article 66 paragraph 1 of the LCP). Croatian courts assess each such case in a manner complying with Convention standards ("when the interests of justice so require"), or in other words depending on *de jure* and *de facto* circumstances of the case. It can therefore be concluded that Croatian criminal procedure law, both in its current form, and in the solutions contained in the Draft LCP[22], is compatible with the Convention principles, except in respect of the above-mentioned provision that a defense counsel for an indigent defendant may only be appointed in cases of severe criminal offences punishable by imprisonment of above three years, and *not always* when "the interests of justice so require", as stated in the Convention. The Draft LCP should therefore be supplemented in this respect.

d) The right of the defendant in Article 6, paragraph 3, item d of the Convention "*to examine or have examined witnesses against him and to obtain the attendance and*

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[21] The appointed defense counsel can be replaced by the defendant at any time by a defense counsel he hires himself, and the appointed defense counsel may himself request from the court his relief from duty in justified cases (Article 67, paragraphs 1 and 2).

[22] The Draft LCP attempts to improve these rights further: it introduces the right to a defense counsel also during police investigations, before the formal beginning of the criminal proceedings (this exceeds Convention standards in terms of scope); cases of mandatory defense are expanded to encompass all detention matters and all matters dealing with criminal offences punishable by prison of more than eight years; before the start of the interrogation the defendant, after he has been informed about his rights by the procedural organ, the defendant is secured the right to unrestricted communication with his defense counsel etc.

examination of witnesses on his behalf under the same conditions as witnesses against him" is derived from the principle of contradiction, which is especially developed in Convention practice, where the Commission and the Court consequently prohibit that convictions are based on evidence consisting of testimonies of witnesses (regular or special ones, under secret personal identity), which would be inaccessible to the criticism of the defendant, regardless of the fact whether it is a single or double subject proceeding.

Croatian criminal procedure implements this principle entirely in criminal procedure, where the defendant and his defense counsel, as early as after the beginning of the investigation, may attend, if they request it, all interrogations of witnesses carried out by the investigating judge (for this purpose they have to be notified of the time). The investigating judge may only exceptionally reject such a motion, if he deems that their presence would be harmful to the interests of the "defense and security of the country". After termination of the investigation, this restriction is no longer applicable, and the right of the defense to attend the interrogations of all witnesses of the prosecution, and to interrogate them, is unlimited. The Croatian Draft LCP goes even further in this respect, because instead of the so-called inquisitory interrogation of witnesses, performed by the body which carries out the procedure, it introduces the so called cross examination giving the primary right to interrogate to the parties. In view of the protection of the witnesses' identity, the current LCP has not envisaged special options for the witness not to answer questions concerning his identity; the Draft LCP, however, provides such an option, but at the same time does not exclude the right of the defense counsel to interrogate a witness who has been granted permission by the court to appear under protected personal identity. In petty offense procedures, however, this principle is respected: its provisions do not regulate the interrogation of witnesses by the defendant at all, nor do they envisage an adequate application of provisions of the LCP (Article 44, paragraph 2, Articles 91-96) of the Law on Petty Offences). As we know, the hearing before the magistrates' court is optional, because it depends on the assessment of the magistrate etc., so in this respect, with a view to ratification of the Convention, it should be conducted in the manner mentioned in item 6.1.2.2. supra.

e) The right of the defendant in Article 6, paragraph 3, item e of the Convention *"to have the free assistance of an interpreter if he cannot understand or speak the language used in the court"* is covered in Articles 5 - 8 of the current LCP. According to these provisions, the criminal procedure is carried out in the language officially used by the court - which is the Croatian language (unless the law has not introduced some other language or script in individual areas)[23]. Parties, witnesses and other persons participating in the procedure have the right to use their languages in the course of investigations.

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[23] According to Article 8 of the Constitutional Law on Human Rights and Freedoms and the Rights of National and Ethnic Communities or Minorities in the Republic of Croatia of June 3, 1992 (OG 34/1992), local self-government units may establish the official use of two or more languages or scripts taking into account the number of members of, and the interests of, ethnic and national communities or minorities.

If the court procedure is not carried out in the language of this person, the court ensures oral translation of all statements in the procedure, as well as translation of other written evidence. However, only a detained defendant has the right to translations of written notifications and court decisions. Persons entitled to translation services have to be informed of this right, which has to be noted in the minutes. Translation is performed by an interpreter, whose fees are paid by the budget if the defendant is acquitted, or if the court has relieved him of covering these expenses in spite of a conviction, because otherwise the "support of the defendant or persons he is obliged to support" is endangered. Taking into consideration the earlier mentioned position of the Court that the right to translation does not include all files, but that it has always to be free for the defendant, to the extent established by internal law (see item 14, supra), the Ministry of Justice should initiate an amendment of Article 122, paragraph 4 of the new Draft LCP along these lines.

6.1.2.4. Special Rights to Defense

The special rights to defense mentioned in Articles 2, 3 and 4 of Protocol 7 have also been accepted and elaborated in the Croatian Constitution and criminal procedure legislation.

a) Article 2 prescribes the guarantee of *right to the review of the case due to factual and legal reasons;* Croatian law does not only meet this requirement in Article 18, paragraph 1 of the Constitution, but also by envisaging in the LCP the appeals against first instance courts in second instance proceedings of full jurisdiction. Against second instance judgments in criminal procedures, there is in certain exceptional cases a right to appeal to a third instance court (Supreme Court of the Republic of Croatia). The LCP also provides for the right to appeal concerning all other important decisions on administering the criminal procedure or on the application of measures restricting fundamental rights, so that not even the option in Article 18, paragraph 2 of the Constitution, according to which the right to appeal may exceptionally be denied in cases specified by law "if other legal protection is ensured" is utilized. It can therefore be said that the defendant's right to appeal in Croatian criminal procedure has an absolute character.

Its realization is regulated by a series of provisions, from the provisions on the formal requirements for appeal (among which a very broad circle of persons are competent to lodge an appeal in favor of the defendant), the construction of the appeal as a *unique* legal remedy ensuring simple contestation of *factual and legal errors* in the judgment, to the regulation of the procedure before the second instance court, which is characterized by elements of contradiction (the right of both parties to attend the sessions of the court of appeal and to present their opinions and proposals).

b) *The right of a wrongly convicted person to compensation in the case of subsequent reversal of his conviction* in Article 3 of the Protocol has its correlate in Article 25, paragraph 4 of the Constitution of the Republic of Croatia, stipulating that

"any person who has been illegally deprived of his liberty or convicted shall, in conformity with the law, be entitled to damages and a public apology". The Croatian constitutional norm, as we can see, does not tie this right to the condition in the Protocol (and Article 14, paragraph 6 of the International Covenant on Civic and Political Rights) which provides for an exception "if it is proven that he is personally partially or fully responsible for the delayed establishment of facts until then unknown". Moreover, the fundamental provision of Article 11 of the LCP stipulates that a person who has been wrongly convicted of a criminal offense or has been unjustifiably deprived of his liberty, has the right to rehabilitation and to compensation for damages incurred from the state budget of the Republic of Croatia, as well as "other rights established by law. The provisions of Chapter XXXII of the LCP, regulating the compensation procedure, rehabilitation or realization of other rights of persons illegally convicted or unjustifiably deprived of their liberty, grant the right to damages due to a wrongful conviction to everyone who has been legally convicted to a criminal sanction (or even only pronounced guilty but relieved of punishment), if later, on the occasion of resumption of proceedings, the new procedure is legally terminated, or if this person is acquitted. A substantial restriction of this right, and to a lesser extent that of the provisions of the Protocol, is contained in Article 528 of the LCP. Besides paragraph 1 of this Article (which excludes compensation for illegal conviction in cases where the resumed proceedings have been terminated on the basis of an agreement between the injured person as the plaintiff, and the defendant), indemnification excludes also paragraph 2 of this Article, in cases where the convicted person "by his untruthful confession or in some other manner deliberately caused his conviction - except if he was forced to do so". Otherwise, the right to compensation, relating to overall - financial and non-financial - damage can be realized in a legal dispute before a regular court, after an obligatory settlement attempt with the Ministry of Justice.

c) The prohibition of renewed trial for a criminal offense *for which a person has already been convicted or acquitted in accordance with the law and general procedure of his state* in Article 4 of the Protocol is contained in Article 31, paragraphs 2 and 3 of the Constitution of the Republic of Croatia. These provisions, similarly to the provision of Article 14 paragraph 7 of the International Covenant on Civil and Political Rights, set forth that no one may be convicted again for a criminal offense for which he has already been tried, nor can the criminal procedure be repeated in which he has been acquitted by a legally valid judgment. The provisions of the Croatian Law on Criminal Procedure on the resumption of criminal procedure, after the intervention of the Constitutional Court in 1994, no longer envisage the option of resumption of criminal procedure to the detriment of the defendant (convicted person). By contrast, the Law on Petty Offences allows in Article 139, paragraph 2 the resumption of criminal procedure for petty offences and "upon request of the public prosecutor", without stating whether the resumption is to the detriment or benefit of the person penalized for the transgression, so that only through an analogous interpretation with the provisions of the LCP can it be concluded that the resumption of the magistrates' procedure to the detriment of the accused person is not allowed.

6. 2. Civil Aspects

6.2.1. Rights Encompassed by Article 6 of the Convention

In connection with the application of Article 6 of the Convention the issue has arisen whether the right to judicial protection as such is one of the fundamental human rights secured by the Convention. The provision of paragraph 1, Article 6 of the Convention, according to which everyone is entitled to "a fair and public trial by an independent and impartial tribunal established by law", has been interpreted by the Court in such a way that this provision not only secures the right to judicial protection of a certain quality if it comes to a court procedure, but also the right which exclusively enables the enjoyment of this right - the right to access to justice. According to the opinion of the Court, paragraph 1, Article 6 of the Convention needs to be interpreted in accordance with two fundamental legal principles. The first is the generally recognized legal principle that each civil law right needs to be provided the opportunity to be decided upon by court; the second is a principle of international law prohibiting denial of legal protection (*deni de justice*). The Court is of the opinion that the right to access to justice does not depend on the internal law of the individual country; if this right is not envisaged by internal law in a specific case, that is a violation of Article 6 of the Convention.

The second question is how broadly the term of "civic rights and obligations" should be understood. The Court has taken the view that *the qualification of "civil" rights and obligations does not depend on the national law of the individual country but is an autonomous term, which should be defined in accordance with general and objective principles, whereby the legal systems of other member countries also may be taken into consideration.* It is indisputable that paragraph 1 of Article 6 of the Convention is applicable to regular civil legal disputes among individuals, for instance disputes for indemnification, disputes arising from contractual relations and family relations. The Court has felt that the fact that in certain disputes among individuals, for instance in cases of establishment of paternity, also a public interest is present, does not exclude the application of Article 6 of the Convention. The key element is whether the dispute is "civil" by its nature, which a dispute for the establishment of paternity in the opinion of the Court is. The question has arisen whether, in a dispute between the state and an individual, it can be covered by the provision of paragraph 1, Article 6 of the Convention. The Court has expanded the application of Article 6 to cases where a country, by its acts, interferes with the "civil" rights and obligations of individuals.

The issue of violation of Article 6 of the Convention can also arise in a case where the protection of "civil" rights and obligations is secured in some other (extra-judiciary) procedure. According to the opinion of the Court, the sole fact that those rights are decided upon by a body other than a court does not necessarily represent a violation of the Convention. The expression "tribunal" is interpreted by the Court as an autonomous term. This is why it can assess that a body, which has the qualities of a court, may not meet the requirements of paragraph 1 Article 6 of the Convention. On

the other hand, it can term as "tribunal" a body which by internal law is not a court, if it meets the requirements of the Convention.

According to paragraph 1, Article 6 of the Convention, the right to judicial protection encompasses the right to **a fair and public hearing within a reasonable time.** Pursuant to the Convention, one of the conditions for adequate judicial protection is the publicity of the procedure. However, the public presentation of facts may in some cases contravene the interest of the individual or public interest. For this reason, according to Article 6 of the Convention, press and public may be excluded from all or part of the trial in the interests of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The Convention lays down as one of the elements of the right to judicial protection also the requirement of a prompt and efficient trial. The question, however, is when it can be established that this requirement has been violated, because the court has not decided within a "reasonable time" or "without unreasonable delay". The lengthiness of the procedure is the most frequent reason for complaints of violations of the right to judicial protection lodged with the Court. The Court has emphasized in numerous decisions that the right of everyone to receive a decision within a reasonable time is of special significance for the adequate realization of the right to judicial protection. This is why the state has to organize its legal system in such manner that courts are able to meet this requirement. Nevertheless, the Court has not formulated a general rule as to how long the procedure may take for it to consider that the decision has been rendered within a reasonable time, but it has reviewed this issue case by case, especially taking into account all the facts of the case. The Convention prescribes the content of the right to judicial review also by the requirement of a "fair" trial. It needs to be emphasized in this context that this review exclusively applies to the correctness of the procedure, and not to the correctness of the decision. The Commission has repeatedly emphasized that it is not competent to decide whether the national court committed any errors in establishing the facts and applying the law, but only to decide on the "fairness of the proceedings". Concerning the question of what constitutes a fair trial, the Court has repeatedly stressed that the principle of equality of arms is central. This principle contains also the right of the party to make a statement, the right to propose evidence and to contest the adversaries' evidence, and the requirement that the court decision must be generally justified.

6. 2.2. Some Cases of Violation of the Right to Judicial Protection

6.2.2.1. According to Article 2 of the Law Amending the Obligations Act Relations (LAOA - OG 7/1996), judicial procedures for damages initiated according to Article 180 of the Obligations Act (OA), have been stopped by the coming into force of this Law. It is envisaged that they should be continued after a special provision is passed which will regulate responsibility for damage caused by terrorist acts. By the legal interruption of the procedure in the mentioned disputes, the right to judicial protection

has actually been suspended. The issue is the incompatibility of Article 2 of the LAOA with Article 6, paragraph 1 of the Convention, endangering the right to judicial protection and also the right to have the procedure carried out within a reasonable time.

6.2.2.2. In relation to the issue of access to the courts in matters which, according to the Convention, have the status of civil, and in Croatian legal system are characterized as administrative matters (for instance, concession disputes), the question arises as to the adequacy of judicial protection through the opportunity of initiation of an administrative dispute before the Administrative Court, since it is not a court of full jurisdiction, as required in Article 6, paragraph 1 of the Convention and is therefore unable to decide on the merits of the matter (amount of compensation and the like).

7. No Punishment Without Law: Article 7

> Article 7.
> *1. No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed.*
> *2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.*

7.1. The Principle Nullum Crimen Nulla Poena Sine Lege

Paragraph 1 expresses the principle of legality, nullum crimen, nulla poena sine lege which, according to the interpretation of the Court, is realized by the prohibition against retroactive law, the prohibition of double jeopardy and the requirement of a defined prohibited form of conduct of criminal offences. The term "criminal offense" is understood in the broader sense and refers to all punishable acts, not only those stipulated by the penal law of a given country. Paragraph 2 represents an exception to the principle of legality, according to which retroactive punishment for offences, which in the majority of legal systems are perceived to be criminal, is excluded from the prohibition against retroactive law.

7.2.1. Constitutional Determination of the Principle of Lawfulness

The right in Article 7 of the Convention is expressly referred to in paragraph 1 of Article 31 of the Constitution of the Republic of Croatia, according to which:
"No one shall be punished for an act which before its commission was not defined by law or international law as a punishable offense, nor may he be sentenced to a punishment which was not defined by law. If after the commission of an act a less severe punishment is determined by law, such punishment shall be imposed"

The constitutional definition of the principle of legality follows largely paragraph 1 of Article 7 of the Convention. Even so, the Constitution does not contain any provisions corresponding to paragraph 2 of Article 7 of the Convention.

7.2.2. The Principle of Lawfulness in Other Legal Regulations

Human rights and freedoms are furthermore protected by the Constitutional Law on Human Rights and Freedoms and on Rights of National and Ethnic Communities or Minorities in the Republic of Croatia, by which Croatia additionally undertakes "*to respect and protect national and other fundamental rights and freedoms of man and citizen, among others also those guaranteed by the Convention.*"

The rights in Article 7 of the Convention are linked to various other treaties to which the Republic of Croatia is a party, for instance Article 15 of the International Covenant on Civil and Political Rights, Article 15.

The rights under Article 7 of the Convention are realized in Croatia by the application of the following laws:
- the Basic Criminal Law of the Republic of Croatia (BCL) (OG 32/1993, 38/1993, 28/1996 and 30/1996), Articles 2 and 3
- the Law on Petty Offences (OG 2/1973, 5/1973, 21/1974, 9/1980, 25/1984, 52/1987, 27/1988, 43/88, 8/1990, 41/1990, 59/1990, 91/1992, 33/1995).

A shortcoming of the BCL, which, as one of the sources of legality of criminal offences, fails to include international law, has been removed by the Draft Criminal Law (CL) (Article 2) whereby this provision has been harmonized with the Croatian Constitution and Article 7 of the Convention. Both the BCL and the Draft CL (Article 3), in accordance with the Constitution, envisage the application of the new more lenient law in case of amendments to the law after the commission of a criminal offense. However, neither the BCL nor the Draft CL provide exceptions to the prohibition against retroactive law according to the general principles of law recognized by civilized nations, as contained in paragraph 2, Article 7 of the Convention. With regard to the mentioned shortcoming it needs to be emphasized that upon ratification the Convention will become directly applicable in the national legal system, which will remove the mentioned shortcoming in practice, whilst for the purposes of achieving coherence and clarity to the legal system, the incorporation of the mentioned provisions in the Draft CL could be envisaged.

Within the framework of the Croatian legal system it is deemed that the concept of legality prohibits retroactive law, prohibits analogy, except in cases where it is favorable for the defendant and if the analogous interpretation does not contravene other criminal laws and principles, admits a broad interpretation, and in accordance with the continental perception of the principle of legality, does not consider unwritten law (case precedents and judgments) to be a source of criminal law.

Paragraph 2 of the Convention is an exception to the principle of legality, according to which punishment for an offense considered to be criminal by the majority of legal

systems is always possible (as can be seen from the travaux préparatoires). This refers to the specific conditions after World War II, when retroactive provisions were enacted in order to punish war crimes, treason, and collaboration with the enemy forces.

Neither the Croatian Constitution nor the BCL, nor the Draft CL contain a provision which corresponds to paragraph 2, Article 7 of the Convention. Even so, chapter XV of the CLRC on "Crimes Against Humanity and International Law", whose major part has been incorporated into the Draft CL, refers to the rules of international law in the punishment of criminal offences. These rules also encompass the general principles of law recognized by civilized nations.

Therefore, the problem of retroactive application of such principles concerning these offences does not arise. What is more, in Article 2 of the Draft CL in defining the principle of lawfulness, it is emphasized that "no one can be punished, nor can other criminal sanctions be imposed on him, for an offence which, before its commission, was not classified as a criminal offence by law or international law." According to the predominant theory of source of international law in the Republic of Croatia, general principles of law recognized by civilized nations are deemed to be a source of international law, and it was not considered to be necessary to introduce the exception provided for in Article 2, paragraph 2 of the Convention in domestic law.

8. Right to Respect For Private and Family Life: Article 8

> *Article 8.*
> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

8.1. Rights Encompassed by Article 8 of the Convention

Article 8 of the Convention acknowledges two fundamental human rights - the right to privacy and the right to family life, thus protecting every individual from interventions by the authorities (state and government bodies) into his private life.

The right to privacy is a prerequisite for democracy in society and is directly connected to Article 5 (right to liberty), Article 6 (right to a fair trial), Article 9 of the Convention (freedom of thought, conscience and religion), Article 10 (freedom of expression), Article 11 (freedom of assembly and association) and Article 12 (right to marry). The right to family life is not linked to the principles of democracy to such a large extent, but is more of a foundation for economic, social and cultural rights. It is

pertinent to Article 12 (right to marry and found a family), Protocol no. 1, Article 2 (parental supervision of their children's education), Protocol no. 7, Article 5 (equality of rights and responsibility of spouses during and after marriage). The protection of the family within the framework of Article 8 refers to the protection of individual members of the family, and not the family as such.

One of the fundamental issues concerning Article 8 of the Convention is whether the protection awarded is against state intervention in an individual's private and family life or whether, on the other hand, it imposes an obligation on the state to take positive measures to secure the right to respect for privacy and family life.

It seemed for a long time as if the state could avoid violations of the provisions under Article 8 by merely refraining from interventions into an individual's private and family life. However, more recently, the Commission and Court have interpreted Article 8 in the sense that it imposes on the state, under certain circumstances, the obligation to ensure, by means of adequate legislation, respect for family life.

Remark: The Criminal Act and the Law on Criminal Procedure have been adopted at a session of the Croatian Parliament and came into force on January 1, 1998.

8.2.1 Constitutional Protection

The rights under Article 8 of the Convention are directly referred to by certain provisions of the Croatian Constitution (OG 56/1990). Article 35 guarantees every citizen respect for and legal protection of his personal and family life, dignity, reputation and honor.

According to Article 34, paragraph 1 of the Constitution *"Homes shall be inviolable"*, and in its subsequent paragraphs, circumstances, under which a restriction on the inviolability of homes may be invoked, are regulated.

Article 36 secures also as inviolable the freedom and secrecy of correspondence and all other forms of communication, and exceptions to this rule may only be prescribed by law if it is necessary for the security of the Republic or for the conduct of criminal proceedings.

Article 37 guarantees the safety and secrecy of personal data. In the absence of the consent of the person concerned, personal data may be collected, processed and used only under conditions specified by law. Protection of data and supervision of the work of information systems in the Republic are regulated by law. The use of personal data contrary to the purposes of their collection is prohibited.

An additional constitutional protection of private and family life is provided by the provision concerning the participation of the public in certain court proceedings. According to Article 117, paragraph 1: *"Court hearing shall be open and judgments shall be passed publicly in the name of the Republic of Croatia"*. This rule is

supplemented by the exception in paragraph 2, whereby *"The public may be barred from a hearing or part thereof if minors are being tried, or for the purposes of protection of the private lives of the parties, or in marital disputes and proceedings in connection with guardianship and adoption"*

The constitutional protection of the right to privacy and family life follows the provisions of Article 8 of the Convention. Restrictions to the right in Article 8 of the Convention are more narrowly formulated in the Constitution of the Republic of Croatia than in the Convention itself.

8.2.2. Legal Protection Through Other Regulations of the Republic of Croatia

Human rights and freedoms are also protected by the Constitutional Law on Human Rights and Freedoms and Rights of National and Ethnic Communities or Minorities in the Republic of Croatia (OG 65/1991) by which the Republic of Croatia additionally undertakes *"to respect and protect national and other fundamental rights and freedoms of man and citizen"*. For instance, Article 2, paragraph 8 protects *"the right to respect for personal and family life, home and correspondence"* (this provision corresponds to Articles 35 and 37 of the Constitution).

These rights under Article 8 of the Convention are connected with various other treaties, to which Croatia is a party, such as the Convention on the Rights of the Child from 1989 (Article 16) and the International Covenant on Civil and Political Rights (Article 17).

Rights under Article 8 of the Convention are realized in the Republic of Croatia by the application of the following laws:
- Law on Marriage and Family Relations (LMFR - OG 51/1989 and 59/1990)
- Criminal Law of the Republic of Croatia (CLRC - OG 32/1993, 38/1993, 28/1996 and 30/1996); the Draft Criminal Law (Draft CL) is the process of being drafted
- Law on Obligatory Relations (OA - taken over from FRY 29/1978, 39/1985, 46/1985, OG 53/1991, 73/1991, 111/1993, 3/1994, 107/1995, 7/1996 and 91/1996)
- Law on Criminal Procedure (LCP); a Draft LCP is in the process of being drafted
- Law on Internal Affairs
- Law on The Execution of Sentences Passed for Criminal Offences, Economic Transgressions and Petty Offences (OG 21/1974, 19/1990, 66/1993); a Draft Law on Execution of Sentences is being drafted.

8.2.1. Criminal Legal Protection

In conjunction with Article 8, within the framework of criminal legal protection there is securement of respect for: 1) private and family life and home, 2) right to secrecy of correspondence and 3)right to protection of personal data.

In line with the fragmentary nature of criminal law these values are only protected from certain assaults. The basic aim of such protection is prevention.

a) A series of provisions both in currently valid criminal legislation (CLRC- final draft OG 32/1993, 38/1993, 28/1996 and 30/1996) and in the Draft Criminal Law protects private and family life, as well as the home. These provisions could be found under special categories of criminal offences.

The Draft CL defines to a large extent these offences, if not identically, then in a similar manner to the CLRC. However, there are also certain significant differences, as for instance in cases of rape, unauthorized taping and telephone tapping, as well as the provision on non-punishment of libel and slander.

b) The right to secrecy of correspondence is protected by Article 54 of the CLRC and Article 130 of the Draft CL, respectively (the criminal offense of tampering with letters and other mail).

c) The right to protection of personal data is observed in Article 133 of the Draft CL. It is a new criminal offense protecting the right guaranteed in Article 37 of the Croatian Constitution.

d) The protection of the inviolability of the home. The Convention does not require a search warrant to be issued in order to search a home (as well as other measures which have been standardized under the term "search", for instance telephone tapping and secret taping of conversations), as is often the case in European legal systems, and in Croatia (Article 34, paragraph 2 of the Constitution states that "*only a court may by a warrant based on law and a statement of reasons order the search of a home or other premises".)* However, the Convention bodies, in reviewing the legality of a search of a home, always establish whether the restrictions of the right to inviolability of the home, have been "necessary" in the specific case - based on the existence of a search warrant and a reasonable suspicion that a criminal offense has been committed, in order to determine whether national law contains sufficient protection against possible abuse by government authorities.

The protection of postal communication (mail, telephone and other). With respect to the freedom to conduct secret correspondence and all other forms of communication (see Article 36, paragraph 1 of the Constitution), the Court's approach is that secrecy and freedom of correspondence includes also the secrecy of telephone conversations, with the exceptions stated in Article 8, paragraph 2 of the Convention. The Court has also in some cases found the absence of legal regulation of the monitoring of telephone conversations to be a violation of the Convention.

In terms of inviolability of the home, current Croatian law contains sufficient legal guidelines for the protection of this right, and the proposed Criminal Procedure Law further expands this protection. Article 34 of the Constitution only permits a search of a home by a court warrant based on law and a statement of reasons, requiring the presence of two obligatory witnesses (so-called solemnitary witnesses); subject to conditions specified by law, Police authorities may without a court warrant or the

consent of the tenant enter his home or premises and carry out a search in the absence of witnesses, if this is necessary to enforce an arrest warrant in order to apprehend an offender, or to prevent serious danger to life or property. A search for the purposes of finding or securing evidence, where there is sufficient reason to believe this will be found in the home of a criminal offender, may only be carried out in the presence of witnesses.

The Law on Criminal Procedure regulates in detail the search of homes and person (Articles 196 - 200) stipulating that these measures may only be ordered if there is a probability that the defendant (meaning the person who is reasonably suspected to have committed a criminal offense) will be caught on the basis of the search or that evidence pertaining to the criminal offense will be found[24]. An illegal search is sanctioned by criminal law as a criminal offense against the freedoms and rights of a citizen. The Draft LCP has enhanced this protection by envisaging that the results of illegal searches must not be presented as evidence in criminal proceedings, and neither must evidence obtained from such illegal searches.

In terms of the inviolability of mail or other communication, Croatian legislation, however, only offers constitutional protection in Article 36, paragraph 1. Restrictions *"necessary for the protection of the Republic's security and the conduct of criminal proceedings"*, as applied in practice, have not yet been regulated by legal provisions and in the manner required by Convention practice. Croatian legislation has, in this respect, not distanced itself from former Yugoslav law. Under the reforms in 1976, a first step in this direction was made by introducing a substantive penal law, sanctioning breaches of the inviolability of the home, the secrecy of letters and other mail, as well as unauthorized wiretapping and sound (and optic) recording, but it went no further. Secret technical taping outside criminal proceedings has remained unregulated and its legitimization could not be derived from the provision of the then valid Article 214 of the LCP on interference with mail (which has been superseded by the currently valid LCP), because it referred either to telephone conversations, which are essentially different from letters and other mail, or to the installation of special tapping equipment in individual rooms, so called "bugging". Therefore, the question whether the results of such recording (except in cases where it has been ordered for purposes of state security and on the basis of special police laws) may be used in criminal proceedings as evidence remains open. This question has been addressed in different ways under national litigation principles, mainly based on an analogy with the regime of illegally procured testimonies.

Court practice, on the contrary, has been hesitant in a number of cases. On the one hand, it rejected such recordings due to ethical reasons, whilst on the other hand, it showed a certain tendency to admit secret recordings of persons in court proceedings (civil and criminal). Even after Croatia's independence, the situation has not improved: only one single provision under Article 18 of the Law on Internal Affairs of May 27, 1991 (OG 29/1991, with subsequent amendments) has remained the legal

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[24] This is similarly stipulated by Articles 100 – 106 of the Law on Offences.

basis for undertaking such measures. This provision, however, leaves it entirely up to the discretion of the government administration to decide on the restriction of the fundamental right of the citizen under Article 36, paragraph 1 of the Constitution. This, of course, contravenes both constitutional postulates, as well as the requirements deriving from Convention practice.

The Draft LCP prepared by the Working Group of the Ministry of Justice endeavors (based on Article 36, paragraph 2 of the Constitution), to finally resolve this issue in criminal litigation in a manner so as not to create an imbalance between the requirement of efficiency of criminal litigation and the requirement of protection of the fundamental rights of the citizen. The Draft envisages that the order for secret technical recording (supervision and technical recording of telephone conversations, or means of technical long distance communication, supervision and technical recording of premises and utilization of other methods of secret observation) could be issued only by the investigating judge, if the conditions stated in Articles 180, paragraph 1 and 181 are met: i.e. if the investigations of criminal offences "could not be effected in any other manner or would be disproportionally difficult" and if the grounds for suspicion given are that a person has participated in the commission of certain criminal offences (which are defined as: (a) offences against the constitutional order or the values protected by international law, punishable by a prison sentence exceeding five years; (b) homicide, aggravated robbery, criminal offences of counterfeit, production of and dealing with narcotics, illegal trafficking in arms, bribery, coercion, blackmail and kidnapping, as well as every criminal offense punishable by prison sentences exceeding five years - where there is reasonable doubt to believe that these offences have been committed or planned by a group or organization of criminals). The order would be issued in the form of a written ruling with explanatory provisions, specifying information concerning the person against whom such action would be taken, as well as the method, scope and duration of such action. Its maximum duration would be up to four months maximum, except in cases where it would have to be prolonged by another four months. In order to prevent certain abuses of the information obtained in cases where it is not utilized for the purposes of the criminal procedure, the Draft LCP has envisaged its destruction. This action could not be taken regarding conversations between the defendant and his defense lawyer.

The Draft especially focuses on resolving the issue of so-called "coincidental findings" during the carrying out of these measures: firstly, data and notification obtained through its application could be used in criminal proceedings only for offences from the "catalogue" and secondly, if it would reveal data and notifications relating to some other criminal offense, this part of the recording would have to be copied and forwarded to the public prosecutor only concerning criminal offences from the mentioned "catalogue". Finally, a special procedural sanction, whereby findings of an investigation used as evidence and upon which a judgment is based, will be inapplicable where the procedural guarantees have not been respected.

In doing so the new Croatian criminal procedural law would meet all the requirements arising from Convention practice. The issue, however, of harmonization of the legislation on national security, will remain open. As mentioned earlier, the Law on Internal Affairs contains in Article 18 only a general provision concerning monitoring of *telephone conversations*, according to which "the Minister of Internal Affairs may, when it is necessary for reasons of state security, order that actions be taken against certain individuals and legal entities, which do not comply with the principle of inviolability of the secrecy of letters and other means of communication, and he shall promptly notify the President of the Republic, stating the grounds". Secret recordings of conversations, however, is not resolved in this law at all. The Law on the Bureau of National Security of June 1, 1995 (OG 37/1995) also fails to mention these issues. Therefore it can be concluded that this extensive area of *preventive police activity*, which contains significant restrictions to this constitutional right, has not been regulated as yet in the manner required by the Convention, so that regulation is needed to be performed by special law, similar to the solutions to be found in the Draft LCP.

Remark: The Croatian Parliament adopted at its session of September 26, 1997 the Law on Criminal Procedure.

8.2.2. Legal Protection of the Family

In Croatia, the provisions under family legislation protect family life in the community of parents and children whenever it is possible and necessary, and they include to a certain extent also the maintenance of family relations within certain categories of close relatives.

The Law on Marriage and Family Relations (LMFR) stipulates that minors have the right to live with their parents.

If the parents (in or out of wedlock) do not live together, the LMFR recognizes their right, taking into account the interest of the children, to agree with whom the children wish to live. Divorce proceedings are preceded by a separate conciliation procedure, run by the Department of Social Services. In this procedure mediation methods are applied with the aim of achieving the willingness of both spouses to cooperate, even after their marriage has been terminated by divorce. The child not living with both parents is enabled (upon agreement of the parents or decision of the relevant body) to meet with the separated parent.

Interventions by the relevant authorities in family relations are precisely prescribed, and the authorizations of the court and Social Services Department are clearly separated. Encounters of the separated parent with the child may be restricted and even prohibited, but only for the protection of the health or some other important interest of the child.

Parents can be deprived of their right to custody and education of the child by decision of the Social Care Department for reasons specifically prescribed by law (if they have

severely neglected the upbringing of the child or its education). The duration of this measure does not need to be specified in the decision: this provision will be amended (the Law on Family Relations is in its final stage of preparation) in the interest of the family.

The action of deprivation of custody can be ordered by a court on the basis of the following strict legal prepositions: abuse of custody or severe neglect of custody obligations. The term of severe neglect is described in detail in the LMFR and deals with a parent who has abandoned his child, has not taken care of it for more than six months or has completely neglected the care or vital needs of the child, although it lives with him in the family household.

By means of the regulation of procedures for the establishment or contestation of paternity or maternity, respectively, all members of the family are provided the opportunity to harmonize the actual situation with the legal one, based on the provisions regulating in detail disputes on the parentage of the child.

The interest of the grandparents to be able to meet their grandchildren is also protected by law, in the case of the death of their son or daughter, if the surviving parent of the children unjustifiably refuses to cooperate with the family of the deceased parent.

The institution of adoption is provided for children without parental custody; this relation may only be established if it is in the interest of the child. The same criterion is applied if the adoptive parents are foreign citizens. After deprivation of custody, adoption may be carried out even without the consent of the parent. Parental consent is not required either in cases where the parent does not live with the child and has for more than six months failed to take care of the child. Whenever the parent is authorized to give his consent to adoption he participates as a party in the adoption procedure.

Legal provisions on the legal effects of cohabitation are a specific expression of the protection of the right to respect for private life. Marriage and cohabitation have not the same legal effects, but the cohabitees have the right to mutual support (based on specified conditions) and to acquire and divide joint property (which underlies the marital-property regime). It can be concluded that the provisions regulating family law in the Republic of Croatia are in accordance with the requirements in Article 8 of the Convention.

New Croatian family legislation will rely on similar principles as the LMFR. An improvement will be achieved in terms of taking into greater account the rights of the child and better protection of persons deprived of legal capacity.

a) Court practice to change the information on gender, upon request of transsexuals, in government registers has moved towards a greater observance of the rights of transsexuals. The provision of Article 38 of the Croatian Law on State Registers (OG

96/1993) provides that entries in the birth register may subsequently be changed due to facts arisen in the meantime or become known after the basic entry has been effected. According to Article 32, paragraph 5 of the Direction for the Implementation of the Law on State Registers (OG 107/1993) explicitly envisaged are entries of sex change "based on the ruling of the competent county or city authority. The ruling on entry of change of gender in the birth register is passed on the basis of adequate medical documentation." One such motion has already been resolved in favor of the applicant in Zagreb, in 1994.

b) The Commission and the Court have established that sexual identity and relations form an integral part of the right to privacy and are therefore protected by Article 8, paragraph 1 of the Convention, but that they can be restricted pursuant to the provision in paragraph 2 of the same Article. In the cases of *Dudgeon*[25] and *Norris* [26] the Court decided by a clear majority that the punishment of voluntary sexual intercourse between two adult persons above the age of 21 is contrary to the right to privacy contained in Article 8, paragraph 1 of the Convention. Yet both cases have not resolved the issue of age limit (21 is not the universal legal age in the member states of the Council of Europe) and of differences in regulating heterosexual and homosexual relations.

The Criminal Law currently in force regulates heterosexual and homosexual relations differently; the Draft CL makes no such difference. Croatian penal legislature no longer envisages penal accountability for voluntary homosexual relations between two persons of age (the legal age in Croatia is 18).

Although voluntary homosexual activity is not punished, the legal system does not provide legal effects of cohabitation of persons of the same gender, but this does not contravene Article 8 of the Convention.

c) Reviewing actions filed against refusals to perform a change of surname, as well as change of surname after the solemnization of the marriage, the Commission and Court have assessed the reasonableness and justifiability of the restrictions provided by the state. It is important for spouses that the provisions on the surname of spouses must not be discriminating (Article 14 of the Convention) with regard to gender.

Croatian family legislation offers spouses the most extensive range of choices for their last names after the act of marriage, following their agreement on the order of use of last names (Article 30 of the Law on Marriage and Family Relations).

d) In the case *Brüggemann* and *Scheuten*[27] the Commission dealt with the issue of whether a restriction of the right to abortion contravenes the woman's right to privacy. The Commission concluded that a restriction on the right to abortion is, in certain cases, not contrary to the right to privacy guaranteed by Article 8 of the Convention,

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25 *Dudgeon v UK* judgment, 1981, Series A N° 45.

26 *Norris v Ireland* judgment, 1988, Series A N° 142.

27 *Brüggemann and Scheuten v Germany*, 1978, Committee of Ministers Resolution DH(78)1.

or in other words that pregnancy as such is not only a matter of the private life of the mother. The provisions stipulating termination of pregnancy in the Republic of Croatia (Law on Health Measures for the Realization of the Right to Free Decision on Childbearing -OG 18/1978), according to which termination of pregnancy is permitted until the tenth week from the day of conception, and afterwards only upon the consent of a commission, if the life or health of the women is endangered, she is likely to have a malformed baby or the pregnancy results from a criminal act, do not contravene Article 8, paragraph 1 of the Convention. The Draft on termination of pregnancy envisages the possibility of abortion upon mandatory prior counselling of the woman.

e) The Commission and Court have made their position clear as to the gathering and utilization of personal data and the right to privacy. The utilization of data gathered by the state for any purpose, while the person is in a public function, is not considered to be contrary to the right to privacy.

The current Law on Execution of Sentences in the Republic of Croatia does not contain a provision on secrecy of data. On the occasion of a concrete case, the Commission and Court could characterize this as contravening Article 8 of the Convention, and this provision should find its place in the Draft Law on Execution of Sentences.

f) In the legal regulation of family life, the member states enjoy a high degree of autonomy.

The notion of "family life" encompasses "at least" the relations among close relatives, for instance between grandparents and grandchildren, due to the fact that kinship can have a significant role in family life. While ancestors and direct descendants have been granted more easily the protection of their family life, relatives of the lateral lineage had to provide additional proof in the procedures before the Commission and the Court.

The basic element for an assessment of whether there is a family life is factual, meaning that the persons making reference to the protection of family life already enjoy it in practice.

Croatian family law explicitly protects the right to joint (family) life of parents and the children, and if this should not be possible due to the justified interests of the children or parents, respectively, a form of family life is realized through the maintenance of personal relations between parents and children. In the case of the death of the parents also the right to personal relations with the grandparents is protected, and according to the practice of the competent administrative bodies, the grandparents are recognized as a party in the adoption procedure of their grandchildren.

g) In the practice of the Convention organs it has been indisputable that discrimination of children born out of wedlock also represents a violation of the right to family life. Since 1974 Croatia has standardized the legal position of children regardless of their

parentage also in relation to third persons (not only in relation to the parents, as it was until then).

In paternity cases, the Court has confirmed that such disputes fall within the protection of Article 8, because they are connected with the private life of the plaintiff. The parties to the Convention have the right, within a reasonable framework, to regulate differently the preconditions for initiation of a paternity suit.

Croatian family law envisages an elaborate system of prerequisites providing the right to interested persons (mother and father of the child, the child, persons deeming to be the parents of the child and the guardianship authority) to participate in proceedings of establishment of the parentage of the child. The right to appeal is limited timewise, due to legal security, but (different) terms are chosen by taking into consideration the interest of all persons, and especially the interest of the child.

The reluctance of the guardianship organ to appoint a custodian for minors in a special case, which would initiate the proceedings for establishment of the parentage of the child, is contrary to the position of the Court in the case of *Kroon*[28] according to which respect for family life requires that biological and social reality have priority over the legal requirement.

The legal regulation of the position of illegitimate children complies with Article 8 and Article 14 of the Convention, but in practice the guardianship organ does not always make use of its legal authorization to enable the child to establish its parentage through the institute of a custodian for special cases.

h) In cases where actions need to be taken for the sake of the child, or more clearly when the child has to be taken away from the parents, the Court has found that it is necessary to enable the parents to participate in the proceedings in which their parental right is limited, and that parents in principle should be given the opportunity to maintain personal contact with the child also after the pronouncement of the measures. In the Republic of Croatia parents have the legal remedies to defend themselves in administrative and court proceedings from interventions by government bodies in their parental right. Nevertheless, the understanding remains that competent bodies are reluctant to impose measures for the protection of the interest of the child, because they increasingly respect the privacy of the family and are reluctant to restrict parental rights, thereby not sufficiently protecting the interest of the child.

i) The right to respect for family life has also been considered with respect to deportation procedures, or concerning permit for stay. The Court has emphasized that there must be proportionality between a reasonable purpose, and violation of the right to family life. Yet, if there is a possibility to have a family life in the country of citizenship of the plaintiffs, there is no obligation for the defendant member state to allow immigration of the spouse into this member state.

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[28] *Kroon v the Netherlands* judgment, 1994, Series A N° 297-c.

Due to the dissolution of the former Yugoslavia and war events, there were quite a few complaints due to violations of the right to respect for family life by denial of citizenship, and also residency in the Republic of Croatia. The Constitutional Court had also to decide on some of these complaints, and its decision varied, depending on the specific case.

j) Complaints filed by prisoners regarding violations of Article 8 of the Convention are frequent. This especially applies to the right to have a married life. The Commission admits prohibition of visit of the spouse if this prohibition complies with the provision of Article 8, paragraph 2 of the Convention. Although the Commission and approves of improvements of the conditions and opportunities for maintenance of married life by convicts, it has dismissed as unjustified the complaint that by prohibiting spouses to maintain sexual relations in prison, Article 8 paragraph 1 of the Convention is being violated. Such prohibitions are also possible according to the laws of the Republic of Croatia, but as we can see, they are not regarded as contravening Article 8 of the Convention.

k) Denial by the state to issue a permit for tenancy in the complainant's own house was a violation of the right to respect for the home in the case of *Gillow*[29]. The Commission decided in the interstate case of *Cyprus v. Turkey*[30] that Turkey, by depriving the applicant of the physical opportunity to return to Northern Cyprus, had violated the right to respect for the home guaranteed in Article 8, paragraph 1 of the Convention. The Constitutional Court of Croatia repealed disputed provisions as unconstitutional by its decision of September 25, 1997.

The application of the Law on Temporary Take Over and Administration of Certain Property and the Law on Lease of Apartments on the Liberated Territory (OG 73/1995) were the source of discontent of owners of apartments who were not able to freely use their homes.

This Law prevents citizens (owners of houses or apartments and tenants in socially owned apartments) from returning to their homes which they left after August 17, 1990, because such (abandoned) residential units are used for the (temporary) enjoyment of other persons. According to the complaints, the owners or the prior tenants, respectively were not given an opportunity to participate in the procedure of establishing the circumstances which led to their abandoning the property, and this law contravenes the provisions of Article 8 of the Convention.

l) The correspondence of prisoners raises a special issue. The right of the prisoners to correspond with their lawyers and judicial bodies without censorship has been established, while correspondence of a non-judicial nature is subject to certain limitations. The question arises as to whether restrictions on the right to correspondence are derived solely from Article 8, paragraph 2 of the Convention, or also from Article 5. In the opinion of the Court the elements in Article 8, paragraph 2

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29 *Gillow v United Kingdom* judgment, 1986, Series A N°109.

30 *Cyprus v. Turkey* judgment, 1992, Series A N°168.

of the Convention calling for restrictions to the right to correspondence, are the interest of public security and prevention of riots and crime.

After the Law on Execution of Prison Sentence was amended in 1990, the provisions relating to the correspondence of prisoners in the Republic of Croatia are in accordance with Articles 6 and 8 of the Convention, as well as with the European Prison Rules.

The European Prison Rules[31] introduce as a novelty the delivery of actions, complaints and submissions to the prison administration, courts and other authorities in a protected envelope (Article 43/3). It is contrary to the right to secrecy of correspondence that prisoners in the Republic of Croatia, according to the currently valid Law on Execution of Penal Sentences, forward their petitions, complaints and other submissions, as well as actions on violations of their rights, to various authorities, including the court, via prison administration (Article 157, paragraph 1). The Prison administration should by no means be permitted to censure submissions to courts and other state and government bodies, because this would mean a violation of the constitutionally provided right to free access to these bodies (Article 46 of the Constitution of the Republic of Croatia) and of the guaranteed freedom and secrecy of correspondence, which can only be restricted by law if it is necessary for the protection of the Republic's security and the conduct of criminal proceedings (Article 36 of the Constitution of the Republic of Croatia). The court, and not the prison administration, should decide whether the submission meets all legal requirements. Due to the aforesaid, submission of the mentioned complaints via the prison administration has no purpose apart from its negative effect on the prisoners, which is not an admissible purpose. Therefore, the said provision should be eliminated from the Law on Execution of Prison Sentence.

m) Bearing in mind that individual restrictions on the right to respect of family and private life must be "prescribed by law" and necessary in a democratic society for the protection of the interests mentioned in Article 8, paragraph 2 of the Convention, it can be observed that the mentioned restriction has not been sufficiently regulated by law in the legal system of the Republic of Croatia. Therefore, the adoption of laws filling this lacuna and ensuring full compatibility of Croatian legislation with the Convention should be envisaged.

8.2.3. Constitutional Court Practice

Inspection of the decisions of the Constitutional Court of the Republic of Croatia from the period 1994-1996 shows that citizens turned to the Constitutional Court for protection of their rights under Article 8 of the Convention in only ten cases.

Without clearly separating legal qualifications of violations of rights, meaning whether the violation of the constitutional provision on respect for and protection of

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[31] Recommendation R(87)3 adopted by the Committee of Ministers of the Council of Europe on 12 February 1987.

personal and family life (Article 35 of the Constitution) is claimed, and violations of the provision on special protection of the family (Article 61 of the Constitution), part of the cases refers to the issue of citizenship (total 4): the basic reason for addressing the Constitutional Court of the Republic of Croatia was the discontent of citizens with the decisions of the relevant authorities on granting Croatian citizenship.

The petitions for naturalization were dismissed because the complainants failed to meet one of the requirements set forth in the Law on Croatian Citizenship (Article 8, paragraph 1, item 3), or in other words, they did not have a registered length of stay in the Republic of Croatia of at least five years before submitting the petition (OG 53/1991, 70/1991, 70/1991, 28/1992 and 113/1993). For reasons of improved protection of the right to respect for family life, the Law on Croatian Citizenship should state important reasons why the residency in the Republic of Croatia has not been reported. This would especially apply to cases where parents omitted to report the residence of their children, who only later, as citizens of age, found out that they have no proof of report of residence in the Republic of Croatia, in spite of the fact that they have actually resided there even more than five years. The Constitutional Court finds in its practice that in such cases, in the absence of explicit legal provisions, regulations should be applied in favor of the persons concerned.

In one case the cause for the constitutional complaint was the discontent of a parent (father) who was not given custody of his children after divorce. He felt, unjustifiably, that the court decision in "favor" of the mother violated the principle of equality of citizens before the law (Article 14 of the Constitution of the Republic of Croatia) and the principle of special protection of the family (Article 61 of the Constitution of the Republic of Croatia).

There are three examples of proceedings before the Constitutional Court of which could be stated that they were conducted for certain financial claims and that they essentially are not linked with the notion of respect for family life (the claims were the following:
- recognition of the right to additional maternity leave, apart from the legal prerequisites
- family pension of a deceased cohabitee
- exemption from paying interest concerning contributions for old age pension insurance).

The protection of the right to inviolability of the home (Article 34 of the Constitution) has been sought in two cases, but both constitutional complaints were dismissed, because the complainants did not meet the necessary requirements of tenancy legislation in order to have recognized their right to the apartment.

9. Freedom of Thought, Conscience and Religion: Article 9

Article 9.
1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

9.1. Legal Protection of Freedom of Thought, Conscience and Religion in Croatian Legislation

Modern Western societies consider tolerance, diversity and respect for personal values to be achievements of civilization. Pluralist democratic societies regard this achievement as a fundamental political principle. There is no democracy without freedom of thought and conscience, formulated in continuity from the Declaration on Human and Civil Rights (1789) to the International Covenant on Civil and Political Rights (1966) and the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981), but the European Convention on Human Rights formulates the moral and political requirement as legal provisions.

The Constitution of the Republic of Croatia incorporates the achievements of democratic freedom of thought, conscience and religion. These issues are regulated in four separate Articles. It is stated in Article 38, paragraph 1 that "Freedom of thought and expression of thought shall be guaranteed". The other three paragraphs of the same Article provide constitutional guarantees for freedom of expression of thought (which is referred to in the analysis of Article 10 of the Convention).

Article 40 of the Constitution says "Freedom of conscience and religion and free public profession of religion and other convictions shall be guaranteed", while Article 41 formulates the principle of separation of state and Church: "All religious communities shall be equal before the law and shall be separate from the state". Paragraph 2 of the same Article determines: "Religious communities shall be free, in conformity with law, publicly to perform religious services, open schools, teaching establishments and other institutions, social and charitable institutions and to manage them, and shall in their activity enjoy the protection and assistance of the state."

Croatia also recognizes conscientious objection in the performance of military duty, which is protected by a constitutional provision. The Constitution of Croatia states in Article 47: "Military service and the defense of the Republic shall be the duty of all citizens able to perform it".

Conscientious objection is allowed for all those who for religious or moral beliefs are not willing to participate in the performance of military duties in the armed forces. Such persons are obliged to perform other duties specified by law.

Defining the term conscience does at first sight not represent a legal but a philosophical issue, but both levels are insufficiently connected. It could be defined as, in philosophic terms, the right to assume an intellectual position by one's own choice, the right of every individual to think and say what he believes to be the truth. In the legal sense, the definition of the term "conscience" has logically not been precisely defined by the Court and Commission, due to the fact that the issue has not emerged as an autonomous petition - thought is an internal state of mind of the individual which is manifest only when expressed, so that usually decisions were passed based on a discussion pursuant to Article 10 of the Convention - or with respect to other provisions of the Convention. Indirectly, the term has negatively been determined in the *Belgian linguistics case*[32] when the Court refused to adopt the position that restrictions on the use of a chosen language (use of the mother tongue in official communication with the authorities) are a violation of the freedom of thought. On the other hand, the Commission and Court deem that it is not a redundant protection of the principle *"cogitacionis poenam nemo patitur"* (although this principle is also therein contained), but a broader understanding of freedom of thought, which includes the freedom to express thought, to believe and freely to manifest one's beliefs (according to Article 10 of the Convention).

Freedom of religion is a narrower, subordinated term which encompasses public worship, teaching and freedom of practice.

The Court has established in its practice three groups of specific interpretations of the term "freedom of religion", serving as a basis for the interpretation and application of Article 9 of the Convention. The first one deals with the issue of whether the individual citizen must support an official state Church. Some countries have traditionally preserved the constitutional determination of a state Church (for example, Norway and Sweden) and support, derived from this provision, the activities of the Church with funding from the state budget. The Court has established the opinion that there is no duty for the individual to declare himself as a member of a Church, or in other words, that mechanisms should be estahlished enabling the individual to leave the Church. Since in Croatia the Church is separated from the state by constitutional provision, this issue does not arise.

The second issue is whether the individual, the citizen, is obliged to make a financial contribution, some tax or fee, directly or indirectly to the state Church.

According to Article 47, paragraph 1 and 2, the legal order of the Republic of Croatia does not envisage the option of imposing Church tax. The indirect option, meaning support of certain activities of religious communities from the state budget depends

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32 *Belgian linguistics v Belgium* judgment, 1968, Series A N°6.

on the principle stated in Article 41, paragraph 1 of the Constitution, and we deem that in the legal order of the Republic of Croatia abidance by the provisions of the Convention in this respect is indisputable.

9.2. Conscientious Objection

The third important area touched by the application of Article 9 is enforcement of freedom of thought and religion defined as conscientious objection. Despite the fact that, usually, conscientious objection is connected with refusal to perform one's military duty (absolutely or relatively) it also applies to other cases (physicians refusing certain interventions, pharmacists, soldiers).

The general position of the Council of Europe (Recommendation R8 (87) is that all persons due to perform military duty shall be given the right, in the case of conscientious objection, to be enabled to perform non-military service under specified procedural conditions and conditions.

Croatian legislature permits conscientious objection pursuant to Article 47, paragraph 2 of the Constitution. The Law on National Defense (OG 57/1996) determines that exempt from military duty are priests, on the basis of a written opinion. Article 81 of the same Law provides the right to emphasize conscientious objection. The Law calls such persons conscientious objectors who undergo civilian service, which can be performed either in the armed forces without carrying and using arms (Article 82) or in other institutions (stated in the By-laws on Legal Persons In Which Civil Service in the Republic of Croatia May be Performed, OG 23/1995 and 35/1995). The petition for civilian service is submitted to a non-military instance, or the Commission for Civil Service at the Ministry of Justice, 90 days after the entry in the military register. The members of the Commission are appointed by the Ministry of Justice. The reasons of the petition must be convincing. The relevant authority is obliged according to the Law (Article 84), to inform draftees about their right to civilian service. A petition review procedure is envisaged, as well as the option to file an appeal (Article 86) with a body appointed by the Government of the Republic of Croatia. The Republic of Croatia follows a legal regulation and practice in conformity with the Convention on this issue. However, the Law and regulations envisage disciplinary and penal actions against draftees and also for conscientious objectors, which could be interpreted as contravening the practice of the Court of Human Rights, so that special enactments should be passed in order to regulate these issues specifically for conscientious objectors, or in other words implementation provisions for civilian service are lacking, which is creating a legal vacuum and uncertainty.

10. Freedom of Expression: Article 10

Article 10.
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

10.1. Rights Encompassed by Article 10 of the Convention

Freedom of expression is one of the fundamental freedoms protected in every democratic society, because such a society cannot exist without openness and tolerance of different opinions, or the preparedness and opportunity of receiving and giving information.

Due to the fact that it is a human right which forms the foundation of many other rights and freedoms, the interpretation in practice points towards an extensive interpretation of this provision, extension of the definition of freedom of expression and endeavor to use freedom of expression and information as the main mechanism in promoting the process of an open and democratic society.

Important measures in the promotion of the significance of the right to freedom of expression, especially concerning the media, have been taken also in the course of the Ministers' Conferences on Media of the member states of the Council of Europe in Vienna (1986), Helsinki (1988), Nicosia (1991) and Prague (1994), which by their resolutions (11) and recommendations (4) have stressed the crucial significance of Article 10 of the Convention.

Of special importance was the acceptance of the Declaration on Freedom of Expression and Information (April 29, 1982) by the Committee of Ministers of the Council of Europe, which said *"Recalling that through [the] Convention they have taken steps for the collective enforcement of the freedom of expression and information by entrusting the supervision of its application to the organs provided for by the Convention"*.

The Declaration and Action plan from the Ministers' Conference on Media (Prague, 1994) especially stresses the need of transparency of ownership and supervision of the

media, prevention of concentration of control, freedom of access to information held by public authorities, protection of sources of information disclosed to the press, protection of copyright and the fight against pirate use, as well as prevention of broadcasting violence in the media.

Article 10 often relates to other Articles of the Convention. Article 14, often mentioned in individual applications, concerning Article 10 has been found not to have been violated by the Commission and Court in several cases. They have deemed that if a violation of Article 10 is established, there is no need for additionally reviewing whether Article 14 of the Convention is also violated. This Article stands in an interesting relation with Article 17, whose fundamental purpose is to prevent the abuse of rights secured by the Convention. Articles 15 and 16 admit the derogation of the right to freedom of expression in cases of a state of war or emergency, and state that Article 10 does not prevent the state from restricting the political activities of aliens (which has remained undefined as yet), respectively. Connections could also be found with Articles 8 and 6, as well as Article 3 of Protocol 1. Furthermore, Articles 9 and 11 are closely linked to the purpose and goal of Article 10 in such a manner that the realization of the rights secured by these Articles is impossible if the right to freedom of expression is not respected.

10.2.1. Constitutional Protection

In the basic provisions of the Constitution of the Republic of Croatia freedom of expression is accepted as a general democratic achievement. "Freedom of thought and expression of thought shall be guaranteed. Freedom of expression shall specifically include freedom of the press and other media of communication, freedom of speech and public expression, and free establishment of all institutions of public communication. Censorship shall be forbidden. Journalists shall have the right to freedom of reporting and access to information. The right to correction shall be guaranteed to anyone whose constitutionally determined rights have been violated by public communication." (Article 38).

In the very text of the Constitution of the Republic of Croatia the right to freedom of expression is defined as freedom of thought and expression of thought, and freedom of the press and other means of communication and freedom of speech, but added are also "freedom of public expression and free establishment of all institutions of public communication", which are rights related to other provisions of the Convention. The constitutional provision, moreover, should also be interpreted in the light of Articles 14 to 20 of the Constitution, especially Article 16 of the Constitution, establishing that in the Republic of Croatia "freedoms and rights may only be restricted by law to protect the freedoms and rights of other people and the public order, morality and health", and Article 39 "Any call for incitement to war, or resort to violence, national, racial or religious hatred, or any form of intolerance shall be prohibited and punishable". These provisions, even stricter than the Convention, determine the conditions for restrictions on freedoms and rights, including the right to information and expression, because they do not mention conditions such as "necessary in a

democratic society" or "territorial integrity", prevention of "disorder or crime" and the like.

Thus, there are no constitutional obstacles in the above-mentioned sense, but on the contrary there is a constitutional requirement and prerequisite of recognition and application of Article 10 of the Convention in the legal order of the Republic of Croatia.

10.2.2. Protection of the Right to Freedom of Expression By Other Legal Regulations

The basic enactment in the Republic of Croatia regulating the mentioned area is the Law on Public Information (OG 83/1996). During the procedure of the enactment of the law there was a series of initiatives and proposals for its supplementation and reference to the European level of protection of these rights (for instance, the Croatian Journalists Society), but the proponent explicitly stated that "the law is based on the Croatian Constitution and enactments of the Council of Europe".

Article 10 does not state separately the forms and contents of the right to information and thus, does not separately name the right to free expression of political opinions and political propaganda. This refers first and foremost to the promotion of pluralism, discussion of political issues, and also political figures and other officials.

The limits of acceptable critique are broader concerning politicians than private persons. Both journalists and the public generally thoroughly examine each word and deed of politicians, who are consciously and inevitably subject to such scrutiny. Article 10, paragraph 2 in fact provides the protection of the reputation of others, which includes politicians, but in those cases the requirements of such protection need to be weighed against the importance of the interest of public discussion on political issues. As we will mention later, the Court differentiates between presentation of facts and proof of their truthfulness on the one hand, and value judgments, whose truthfulness is impossible to prove, on the other.

The Croatian Law on Public Information meets the requirement of promotion of pluralism (Article 7) and must be considered in conformity with the positions of the Ministers' Conference in Vienna (1986), Helsinki (1988), Nicosia (1991) and Prague (1994). The advantage of the Law is the thoroughly regulated procedure before the courts. The practice of the Constitutional Court of the Republic of Croatia follows the same direction.

Article 3, paragraph 2 of the Public Information Law prescribes as follows: *"Freedom of public information includes in particular freedom of expression of thoughts, freedom to gather, research, publish and disseminate information, the freedom to print and circulate newspapers and other public information, to produce and broadcast radio and television programs, the freedom to receive ideas and information, the freedom to set up legal persons whose business is the public information industry".*

The Law imposes in Article 5 on the bodies of the judicial, executive and legislative branches, and all other bodies vested with public power, as well as local self-government, the obligation to provide access for journalists, under equal conditions, to information on their work. Thereby they are responsible for the accuracy and completeness of the information extended. What is more, authorized persons are due to extend such information, and if they refuse to do so, they are obliged to give a written explanation for their refusal. Journalists have the right to appeal to a body specified by law, but such a body has not been appointed to date, and as far as we know, there are no such provisions in special laws.

The Law prohibits (Article 4) to influence by coercion or abuse of power or in any other manner the course or content of public information. Violations of the freedom of public information are decided upon by a court.

It is explicitly stated in Article 7: "The state shall encourage diversity of press, radio and television and other organs". Due to existing political circumstances, paragraph 3 of this Law is of special importance: "The state shall, in accordance with conditions prescribed by a special law, financially support publication of press and other public media, the production of broadcasting of radio and television programs in the language and script of ethnic and national communities or minorities and provide conditions for the publication of public information directed at the provision of information to persons with special needs, as well as members of other social and cultural groups".

The Law, furthermore, regulates four fundamental rights of journalists: the right to refuse to carry out an order contravening professional ethics and rules of journalists, the protection of the reputation of authors and the protection of sources of information, and the right to express his or her opinion.

The journalist has the right to refuse (Article 10) to write, or prepare or participate in the writing of a text whose content contravenes the rules of the journalist profession and ethics. In such a case the employer is not allowed to terminate his labor contracts, reduce his salary or transfer him to another position in the editor's office.

Copyrights are protected. A text whose sense has been altered may not be published under the name of the author without his consent. The responsibility is borne by the publisher, and if the reputation of the author is also violated, he is entitled to damages.

The anonymity of the information source is protected, as well. According to Article 12, the journalist is not bound to furnish any governmental body with details of the source of any information (he has) published or intends to publish.

"The journalist is entitled to express his/her opinion on all events, phenomena, persons, subjects and activities." This fundamental legal position has its restriction in the right to protection of privacy, which complies with Article 8 of the Convention.

However, some other legal solutions contradict this fundamental provision[33]. We especially refer to the Penal Law of the Republic of Croatia which, according to Article 77, protects, by penal sanction and official duty, the reputation and honor of the highest ranking state officials (President of the Republic of Croatia, President of the Parliament of the Republic of Croatia, Prime Minister, President of the Constitutional Court and President of the Supreme Court). The official criminal prosecution is carried out ex officio by the Public Prosecutor, upon written consent of the above stated officials. The Croatian Society of Journalists (CSJ) submitted a motion for review of the constitutionality of Article 77, paragraphs 2 and 3 of the Penal Law of the Republic of Croatia to the Constitutional Court of the Republic of Croatia. The CSJ deemed that this Article contravenes Articles 14, 35 and 38 of the Constitution. The Constitutional Court dismissed the motion for review of constitutionality (U-I-274/1996 of July 10, 1996).

10.2.3. Freedom of Artistic Expression

Freedom of expression relates also to freedom of artistic expression, often also in connection with freedom of political expression. The Commission and Court have not defined the term "expression" in this sense (in the cases of *Handyside*[34] and *Markt Intern Verlag*[35] this issue has been touched upon), but the Court stated in the reasons for its decision (*Muller and others v. Switzerland*)[36] that Article 10 also includes artistic expression allowing the participation in a public exchange of cultural, political and social information and ideas of all kinds, part of which undoubtedly are pieces of art.

A major difficulty in the practice of the Court, and in the future also in the Republic of Croatia, will be the definition of a standard of "pornographic content". As in the case of Handyside v. United Kingdom, the issue of standard will emerge, or in other words, when prohibition is "necessary in a democratic society" for reasons of "protection of morals". Human rights protection at the level of international law is subsidiary to national protection, whereby a recognized margin of appreciation exists. As an indication should serve the position defined in the case of Handyside from 1971, where the right to a margin of appreciation by the national court was respected, and the prohibition reaffirmed.

The Constitution of the Republic of Croatia guarantees in Article 68 freedom of scientific, cultural and artistic creativity.

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33 However, due to the fact that solutions in the Law on Public Information are similar to those in the legal practice of Austria and Great Britain, and due to the fact that also in parliamentary debate the issue of the protection of privacy of public figures has been emphasized (which is regulated in Article 6), other legislation protecting political activists, and in view of the already initiated disputes, disputes before the Court of Human Rights, are to be expected also in conjunction with these issues.

34 *Handyside v United Kingdom* judgment, 1976, Series A N° 24.

35 *Markt Intern Verlag v Germany* judgment, 1989, Series A N° 165

36 *Muller and others v Switzerland* judgment, 1988, Series A N° 133

10.2.4. Freedom of the Press

Freedom of the press is one of the most frequently involved grounds for requesting protection under the right to freedom of expression before the Commission and Court. Pursuant to this right, it is endeavored to achieve a balance between opposing requirements, namely guaranteeing the freedom of the press on the one hand, and imposing restrictions in order to protect the rights and interests set out in Article 10, paragraph 2 on the other. According to the Court, this right is applicable "... not only to *"information" and "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broad-mindedness without which there is no "democratic society" (Handyside v United Kingdom*[34]).

In the case of the journalist *Lingens v. Austria* [37], despite the fact that according to Austrian penal code libel is punishable, and the journalist did not choose his words and had no proof of truthfulness of the allegations, the Court primarily supported the freedom of the press and the right of the journalist to speak about a public personality ("Freedom of press...is at the very essence of the notion of a democratic society ... the limitations of acceptable critique are therefore broader set with respect to a politician than in the case of a private person."). The position of the Court diligently differentiates between the statement of facts and value judgments. The existence of facts can be proved, while value judgments are not subject to a review of truthfulness ("when it is a value judgment, truth cannot be proved, so that it is merely an opinion which is a fundamental part of the right secured in Article 10"). Every sanction of such freedom would violate the right to freedom of thought. The conclusion reached by the Court that imposing a sanction on the journalist in this case is a certain type of censorship, is undisputed and clear in this specific case: it is a type of censorship which would probably discourage him from being critical in the future. In the context of political debate such a judgment would probably avert journalists to keep contributing to public debate on issues related to the life of the community. At the same time such penalty restricts the press in performing its duty of supplying necessary information to the public and in its role as a defender of the public ("a public watchdog").

The Law on Public Information contains the right to protection of the information source (Article 12). The issue of protection of judges is open and incompletely regulated, but contemporary practice in the Republic of Croatia corresponds to the practice of the Court.

The most completely argued criterion of "necessary in a democratic society" has been established by the Court in the case *Informationsverein Lentia vs. Austria*[38]. First, the Court deems the freedom of expression fundamental, secondly it repeats the

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37 *Lingens v Austria* judgment, 1986, Series A N° 103.

38 *Informationsverein Lentia v Austria* judgment, 1993, Series A N°276

significance of pluralism and tolerance of opposed opinions in a democratic society, and thirdly it warns that "restrictions no longer can be justified by the number and disposable frequencies" and rejects the opinion that Austria is too small a country as to ensure technically and economically pluralism of the media. The Commission established in the case *Lokalradio Bern, Verein Radio Dreyckland Basel vs. Switzerland*[39] that "states do not have an unlimited margin of appreciation when relating to the licensing system. Although radio companies have no guarantee of the right to a concession according to the Convention, the dismissal of an application for license must by any means not seem arbitrary or discriminatory, and therefore contravene the principles in the preamble of the Convention".

The Croatian Law on Telecommunications (OG 53/1994) and Law on Radio and television (OG 43/1992, 24/1996) basically satisfy the requirements and practice of the Court. This should also be attributed to the incorporation of the suggestions of the experts from the Council of Europe. Nevertheless, we do not believe, because practice is pointing to this conclusion, that this is sufficient. To be expected are disputes concerning the use of electronic media in pre-election activities, promotion of tolerance and pluralism, disputes before the Strasbourg bodies regarding "application of criteria necessary in democratic society". In potential amendments to the Law on Telecommunications and Law on Croatian Radio Television, we feel it would be useful to take into account the standards set by the legal practice of the Strasbourg bodies.

11. Freedom of Assembly and Association: Article 11

> *Article 11.*
> *1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
> *2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restriction on the exercise of these rights by members of the armed forces, of the police or of the Administration of the State.*

11.1. Rights Secured by Article 11 of the Convention

The right to freedom of peaceful assembly and to freedom of association is guaranteed by the Convention in paragraph 1 of Article 11 according to which "everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests." In the practice of the Commission and the Court footings can be found for the differentiation between the right to assembly and the right to association. According to

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[39] Application 10746/84 *Lokalradio Bern, Verein Radio Dreyckland Basel v Switzerland.*

the Commission and Court, association is a much more formal and more organized structure than public assembly.

The Commission deems that the right to freedom of peaceful assembly is "a fundamental right in a democratic society and ....one of the foundations of such a society". However, the Commission and the Court have deliberated in only a few cases concerning the freedom of peaceful assembly.

The right to free and peaceful assembly is guaranteed by the Constitution of the Republic of Croatia, and especially guaranteed is the right to peaceful protest. According to Article 42 of the Constitution "all citizens shall be guaranteed the right to peaceful assembly and public protest". The Constitution of the Republic of Croatia thus guarantees the freedom to peaceful assembly and public protest only to "citizens", meaning Croatian citizens, not aliens.

The right to peaceful assembly and protest is regulated in the Republic of Croatia by the Law on Public Assembly (OG 22/1992, 26/1993 - hereinafter LPA), which regulates the realization of the right to peaceful assembly and public protest by Croatian citizens and aliens.

11.2. Protection of the Right to Peaceful Assembly in Croatian Legislation

Croatian legislation does not define the notion of private assemblies and does not contain restrictions on holding them.

The Constitution of the Republic of Croatia states in Article 42 that "all citizens shall be guaranteed the right to peaceful assembly and public protest". This means that the Constitution differentiates between two constitutional rights of citizens – the right to peaceful assembly and the right to public protest. These constitutional rights are regulated by the Law on Public Assembly (OG 29/1992, 26/1993).

The Law on Public Assembly regulates public assembly, understanding by the expression "public assembly" peaceful assembly and public protest.

Public assembly is "an assembly in open or closed space, organized in order to pursue entertainment, cultural, religious, humanitarian, social, sports or other interests of citizens and protest, procession, parade or other similar public assemblies organized for the purpose of public expression of thought or realization of political interest of citizens" (Article 2 of the LPA).

11.3. Restrictions on the Right to Peaceful Assembly

According to Article 11, paragraph 2 of the Convention, states are in principle not allowed to impose restrictions on the realization of the right to peaceful assembly. Only in exceptional cases, in only two groups, are restrictions permitted by Article 11, paragraph 2 of the Convention, and they have to be stipulated by law.

In the first group, restrictions are allowed if they are necessary in a democratic society, in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. The second group deals with restrictions on the right to assembly of members of the armed forces, of the police or of the administration of the State.

Furthermore, on the basis of Article 16 of the Convention, the High Contracting Parties are free to impose restrictions on the political activity of aliens. The Law on Public Assembly contains several forms of restrictions on the right to peaceful assembly.

Article 10, paragraph 1 of the LPA prescribes the obligation that citizens, meaning Croatian citizens, shall notify the competent police body of the public assembly to be held, at least 48 hours before it takes place. However, certain assemblies, which are stated in Article 3, paragraph 2, need not be reported. Some of them are: religious service, regular ethnic festivities, regular funeral processions, regular meetings and seminars held in closed rooms and with access only for authorized persons, various assemblies in closed premises etc. However, if aliens (individuals and legal entities) wish to organize public assemblies, the rules are much more restrictive. They are allowed to organize any type of assembly (peaceful assembly or public protest) only upon prior approval (Article 12). This approval must be granted for every assembly, including the ones that can be organized by Croatian citizens without notification. Aliens must submit the application for the public assembly at least five days prior to the date of the public assembly.

The competent police body - police department, or police station, respectively can prohibit by a decision the announced public assembly at a certain place at a certain time or day, if the public assembly would disturb public order and peace (Article 5, paragraph 2). The ruling may be challenged by appeal, after which administrative proceedings before the Administrative Court of the Republic of Croatia may be initiated. Such restrictions on the right of peaceful assembly is permitted by Article 11, paragraph 2 of the Convention and is accepted by the Commission and the Court.

However, the bodies of local self-government (municipality, city and city of Zagreb) are authorized to "determine a place where every public assembly may be held" (Article 3, paragraph 3). This badly formulated and unclear provision opens the possibility of substantially restricting the constitutional right to peaceful assembly and public protest by prescribing the place of assembly.

The LPA does not stipulate in a single fundamental or general provision the restrictions on the right to free and peaceful assembly and public protest, neither for Croatian citizens nor aliens.

However, Article 16 of the LPA sets forth specifically circumstances under which the police can prohibit a public assembly. Public assemblies will be prohibited in the following cases:

1) if the public assembly is organized by a person on whom has been imposed a precautionary measure or prohibition of public stand while this measure is in force;

2) if the public assembly is organized by a political organization or an association of citizens whose work is banned;

3) if there exist circumstances from which can be derived that the constitutional order will be endangered by the public assembly, or crimes committed, or public order and peace disturbed or public morals offended, or that the security of people and property will be threatened;

4) upon the request of the Ministry of Health for reasons of health protection of the population

Furthermore, authorized police officials may order the head of the public assembly to end the gathering and to invite the participants to adjourn peacefully, if, during the gathering, the above-mentioned reasons have arisen (Article 10). If the organizer of the assembly refuses to follow such an order, the authorized person will end the gathering. Both public assemblies which did not have to be announced and those who were subject to this obligation, can be terminated.

Finally, the competent police body may terminate a public assembly and ask the participants to adjourn if the assembly has not been reported, but should have been, or if it is held contrary to the notification (Article 11).

Public assemblies organized by aliens are not subject to more restrictions than those of Croatian citizens. The competent body may withhold the approval for the public assembly organized by aliens only for the same reasons as it would prohibit a public assembly of Croatian citizens (Article 12, paragraph 3).

The legal regulation of announcement of public assembly, as well as the reasons for prohibiting public assemblies organized by Croatian citizens, do not contravene Article 11 of the Convention. However, the interpretation of this Law in practice is questionable, as is its conformity with the positions of the Commission and the Court on restrictions of the right to free and peaceful assembly and public protest. This holds especially true for the assessment of disturbance of public order and peace. The legal regulation of reasons for prohibition of the public assembly of aliens is not contrary to Article 11 of the Convention. However, it is disputable whether the obligation of aliens to obtain approval for public assembly is in accordance with the Convention, or the fact that they are not allowed to assemble in public if they have been denied the approval. The competent authority may in such cases prohibit tacitly the public assembly, without passing a ruling on the petition of the aliens. The legal remedy -

appeal due to silence of the administration, will prove ineffective in practice, because the time for the assembly to be held has passed. This provision should, therefore, be reviewed and with respect to aliens a regime of announcement of the public assembly should be prescribed. There are no obstacles to introducing a regime of announcement of every public assembly for aliens.

The Law on Protection of the Population From Infectious Disease (OG 60/1992, 26/1993) stipulates that administration bodies competent to perform health inspections are authorized to "prohibit assemblies in schools, movie theaters, public premises and other public places, until the danger of an epidemic of the infectious disease, determined by this law, has ceased to exist" (Article 62, paragraphs 1 and 2). This measure is ordered by a ruling, which can be contested by appeal, but without delaying its enforcement (Article 63).

Croatian laws do not prescribe restrictions on the right on peaceful assembly and public protest of members of the armed forces, police and state administration. Such restrictions are not provided in the following laws: Law on Service in the Armed Forces of the Republic of Croatia (OG 23/1995), Law on Defense (OG 74/1993, 57/1996), Law on Internal Affairs (OG 29/1991, 73/1991, 19/1992, 33/1992, 76/1994) and the Law on Civil Servants and Employees And Salaries of Judicial Officials (OG 74/1994). Such restrictions, according to Article 11, paragraph 2 of the Convention, may be prescribed. Croatian law is, thus, very liberal. However, it should be assessed whether it is opportune to lack such restrictions in Croatian legislation: Without legally stipulated restrictions it will not be possible in specific cases to prohibit public assemblies or protests of members of the armed forces, police or state administration.

11.4. Obligations of the State Regarding the Right to Peaceful Assembly

The Convention lacks a provision which would explicitly create the obligation for the Contracting Parties to ensure the protection of the right to peaceful assembly. The LPA and other laws of the Republic of Croatia do not contain any explicit provisions on the obligation of the police to ensure the protection of the right of peaceful assembly. This obligation can only indirectly be derived from Article 1, item 2 of the Law on Internal Affairs, according to which the police is in charge of interior affairs, part of which is the protection of the lives and personal security of people, protection of property, preservation of public order and peace etc.

According to Articles 6-9, the organizer of the public assembly is due to organize the security service, which must maintain order and orderly behavior of the participants in the public gathering. The Penal Law of the Republic of Croatia protects the right to assembly, so that in Article 56 the prevention or obstruction of a public gathering is stated to be a criminal offense. According to this Article, the penal offense is committed by anyone "who by coercion, severe threat, deceit, or in some other manner prevents or obstructs the convocation or holding of a public assembly, to which citizens are entitled by law". Whoever commits such an offense will be punished by a jail sentence of up to one year. If it is committed by an official in abuse

of power or authorization, he or she shall be sentenced to jail from three months to three years.

11.5. Freedom of Association

Similarly to the Convention, the Constitution of the Republic of Croatia makes a distinction between freedom of assembly and freedom of association in trade unions and political organizations. The Constitution guarantees, within the framework of the provisions on "Personal and Political Freedoms and Rights" (Article 43), general freedom of association. What is more, the Constitution especially secures freedom of political and trade-union association.

According to Article 43 of the Constitution "citizens shall be guaranteed the right to free association for the purposes of protection of their interests or promotion of social, economic, political, national, cultural and other convictions and objectives. For this purpose, citizens may freely form political parties, trade unions and other associations, joint them or leave them. The right to free association shall be restricted by the prohibition of any violent threat to the democratic constitutional order and the independence, unity and territorial integrity of the Republic."

As is evident from Article 43 of the Constitution, the right to free association and assembly in the Republic of Croatia is exercised exclusively by citizens. In view of the fact that rights secured by the Convention are enjoyed by all persons under the jurisdiction of the member state, it is necessary, in potential amendments to the Constitution, to consider the possible expansion of the scope of subject of the mentioned right to the beneficiaries envisaged by the Convention.

Due to experience with a single-party and totalitarian system, the Constitution guarantees among its basic provisions especially the freedom of political organization. According to Article 6 of the Constitution "the formation of political parties shall be free. Political parties shall be formed according to the territorial principle. The work of any political party which by its program or activity violently endangers the democratic constitutional order, independence, unity or territorial integrity of the Republic of Croatia shall be prohibited."

In addition, the Constitution especially guarantees the right to form interest organizations for reasons of pursuing interests related to labor relations. According to Article 59 of the Constitution "in order to protect their economic and social interests, all employees and employers shall have the right to form trade unions and freely to join and leave them. Trade unions may form their federations and associate in international trade union organizations. Formation of trade unions in the armed forces and the police may be restricted by law."

11.6. Protection of the Right to Association in Croatian Legislation

The basic provision by which, in the Republic of Croatia, the voluntary nature of associations is guaranteed, is the second sentence of paragraph 1, Article 43 of the Constitution of the Republic of Croatia. According to that provision citizens are not only guaranteed the right to free association (in political parties, trade unions and other associations), but they are also secured the freedom to withdraw from such associations. The said provision can be interpreted as a constitutional guarantee of the negative aspect of freedom of association. If citizens have the constitutional right to decide, without facing any negative consequences, to withdraw from a certain association, then they are also guaranteed the freedom to decide whether they will or will not become members of an association.

The exercise of the constitutional right to free association is additionally regulated by the Law on Associations (OG 70/1997), Law on Political Parties (OG 76/1993), Labor Law (OG 38/95, 54/95 and 65/95) and Law on Religious Communities.

The Law on Associations regulates the establishment, organizational structure, legal position and termination of associations, and termination of activities of foreign associations in cases when members wish their association to become a legal person. Such associations with legal personality can be founded by ten natural or legal persons, and it receives its legal capacity through the legally prescribed registration procedure. If it is a form of association where the members do not wish their association to acquire legal personality, or if it does not meet the requirement for the registration of such an association (for instance, if there are less than ten members), there are no obstacles to the activities of such an association, based on the constitutionally guaranteed right to association.

In the course of the enactment of the Law on Associations certain critique has been expressed with regard to the text of the draft law. This text was also commented on by experts of the Council of Europe (Comments on the Proposal of the Associations Act of the Republic of Croatia - DEMO-EXP (97) 3 dated March 23, 1997). A large number of remarks of the experts from the Council of Europe has been adopted, and the text has been harmonized to a significant extent with the standard of this organization.

The most important remarks raised in conjunction with the Law on Associations regard the need for approval by the Ministry of Foreign Affairs of the work of foreign associations (without mentioning when such approval can be denied or securement of judicial protection). What is more, the required excerpt from the register of the foreign association is deemed to be disputable, because most often it is not registered anywhere and is thus unable to produce such an excerpt. The fines for omissions in respect of the activity of the association are considered to be too high. As far as transformation of property of former social organizations is concerned, the question is raised whether this is not a certain form of nationalization of property.

In terms of transformation of property of former social organizations, it needs to be pointed out that the dualism of form of association (social associations and associations of citizens) has been abolished by the new Law on Associations, and the transformation of ownership of assets in social ownership, which the social organizations were entitled to use or dispose of, respectively, has been carried out, while property in the ownership of individual organizations has not been encompassed by the law.

Pursuant to Article 38, paragraph 1 of the Law on Associations, real estate in social ownership, which the association was entitled to use and dispose of, has become real estate owned by the Republic of Croatia. Following Article 38, paragraph 2 of the law, the Government of the Republic of Croatia or an authorized ministry may, pursuant to the guidelines established by Parliament, within one year from the takeover of the real estate in state ownership, transfer the real estate to the ownership of the association which is the legal successor of the former social organization, or the ownership of a unit of local self-government and administration.

The mentioned regulations do not constitute implementation of nationalization of property, but exclusively a transfer of real estate in social ownership which was entitled to be used and disposed of by individual organizations, while the movables have become, according to the provisions of the Law on Associations, the property of the association which is the legal successor of the social organization which was entitled to use and dispose of them.

Based on the aforementioned facts, it is evident that the basic objections concerning compatibility of individual solutions in the Law on Associations with the Convention deal with the somewhat broad opportunity for discretionary assessment by administrative bodies with respect to registration procedures and termination of the activities of associations, while the provisions of the law do not question the freedom of association as a fundamental right secured by the Convention. Therefore, special attention needs to be attributed to the interpretation and application of the mentioned provisions of the Law on Associations in practice by official representative of the relevant bodies, in which respect the education of these persons in the standards established by the Convention is of special importance.

However, in spite of the constitutional guarantee of the right to freedom of association (both the positive and negative aspect of this right), in Croatia there is quite a number of laws obliging citizens to membership in certain associations (organizations). Such compulsory membership of legal persons in the Croatian Chamber of Commerce is envisaged by the Law on the Croatian Chamber of Commerce (OG 66/1991), and the obligatory membership of tradesmen in the Croatian Chamber of Trades and Crafts is prescribed by the Law on Trades (OG 77/1991).

What is more, numerous laws regulate the performance of certain free professions, such as the Law on the Bar (OG 9/1994), Law on Health Care (OG 75/1993, 11/1994 and 55/1996 and 1/1997), Law on Public Notaries (OG 78/1993), and stipulate the

compulsory association of attorneys, physicians, dentists, pharmacists, medical biochemists and public notaries with relevant chambers. Obligatory association of natural and legal persons, generating their income through catering and tourism activities is provided for by the Law on Tourism Communities and Promotion of Croatian Tourism (OG 30/1994). The Law on the Student Corps (OG 57/1996) prescribes obligatory association of all students in the student corps. Moreover, a Law on the Croatian Chamber of Constructors is in preparation, which will make obligatory the inclusion of members of professions related to construction. Such a relatively broad obligation of compulsory association in certain organizations, or associations, leads to serious doubt whether they are in fact organizations which, due to their public nature, are not included in the definition of the term of association in paragraph 1, Article 11 of the Convention, or if they are indeed restrictions on the freedom of association necessary in a democratic society for purposes of the goals set forth in paragraph 2, Article 11 of the Convention. In this context it needs to be mentioned that the Constitutional Court of Croatia has received a number of motions for initiation of proceedings for review of the constitutionality of laws stipulating obligatory association in the Croatian Chamber of Commerce, Croatian Chamber of Trades and Crafts and Tourism Communities. The Constitutional Court dismissed the motion for initiation of proceedings of constitutionality of the provision of the Law on Health Care, by which the mandatory association in health care is prescribed (a more detailed excerpt from the decision of the Constitutional Court is presented hereinafter).

According to Article 2 of the Law on the Croatian Chamber of Commerce (OG 66/1991) "all individuals and legal entities carrying out their business activities with a registered place of business on the territory of the Republic of Croatia" must be members of the Croatian Chamber of Commerce (by enactment of the Law on Trades and Crafts - Article 94 of this Law - individuals and legal entities involved in trades and crafts ceased to be members of the Croatian Chamber of Commerce). Legal entities become members of the Croatian Chamber of Commerce by entry into the court register, and individuals become members of the Croatian Chamber of Commerce via their associations or alliances. Voluntary membership in the Croatian Chamber of Commerce is open to organizations conducting social activities, professional and specialized associations and other organizations which by their activity promote the work and business performance of economic subjects.

The tasks of the Croatian Chamber of Commerce are set forth in Article 3 of the Law on the Croatian Chamber of Commerce. Since the coming into force of the Labor Law (OG 38/1995, 54/1995 and 65/1995), the Croatian Chamber of Commerce, as a compulsory organization, lost its authorization to conclude collective agreements, which can only be signed by voluntary employers' associations.

The public competencies of the Croatian Chamber of Commerce are regulated in the Trade Law (OG 11/1996) - issuance of certificates of origin of goods and other documents enclosed in import and export of goods; by the Law on Industrial Property (OG 53/1991 and 19/1992) - establishment of product identification of origin and acquisition of rights to patent registration based on the participation of exhibits at

international fairs; by the Law on Transport in International Road Traffic (OG 53/1991, 26/1993 and 29/1994) - coordination of arrivals and departures and distribution of transportation licenses in international road transports, and the Law on Domestic Transport of Goods by Road (OG 77/1992, 26/1993 and 29/1994) - coordination of timetables.

The Croatian Chamber of Commerce is funded by contributions and membership fees whose amount is determined, on the basis of legal competence, by the General Assembly of the Croatian Chamber of Commerce (0,357 percent of gross wages of workers or 0,10 percent of realized income).

In view of the fact that the establishment, activities, mandatory membership (only for legal entities), funding, public powers and other relevant issues of the Croatian Chamber of Commerce are regulated by law, paragraph 1, Article 11 of the Convention does not apply.

Mandatory membership of tradesmen in the Croatian Chamber of Trades and Crafts is stipulated by paragraph 6 of Article 60 of the Law on Crafts (OG 77/1991). According to Article 61 of this Law, "the Croatian Chamber of Trades and Crafts performs the public authority set forth in this Law."

Pursuant to Article 62 of the Law on Crafts, the activity of the Croatian Chamber of Crafts encompass: promotion of crafts and craftsmanship, representation of the interests of tradesmen with government bodies in the elaboration of an economic system, giving opinions and suggestions to government bodies in the enactment of regulations in the area of crafts, appointment of committees for examinations for master's and journeyman's diplomas, appointment of a court of honor of craftsmen, appointment of an arbitration council in compliance with the Law on Crafts, keeping the crafts register, keeping track of apprenticeship contracts, assistance to tradesmen in the establishment and activity of the craft, performance of other tasks specified by laws and Articles of Association of the Croatian Chamber of Trades and Crafts. The Croatian Chamber of Trades and Crafts is vested with important public powers, especially concerning education and training of tradesmen and supervision of the professional activities of tradesmen. The activities of the Croatian Chamber of Trades and Crafts are funded by mandatory membership fees of the members. Based on its competence provided by the law, the base and rate of the fee is determined by the General Assembly of the Croatian Chamber of Trades and Crafts.

As far as activities and competencies of the Croatian Chamber of Trades and Crafts are concerned, it combines the features of both public and private associations. However, due to the fact that the establishment of this organization, the mandatory membership, the organizational structure, the funding and the competencies are regulated by law, we feel that the features of a public organization prevail, and that the Croatian Chamber of Trades and Crafts can be considered an association to which paragraph 1, Article 11 of the Convention is not applicable.

Mandatory membership of associations by members of freelance professions is envisaged by several laws of the Republic of Croatia. These laws regulate the performance of their activities and prescribe the obligatory association of members of such free-lance professions. The Law on the Bar (OG 9/1994), for instance, provides in Article 37 for the mandatory membership of attorneys of the Croatian Bar Association as an independent and autonomous organization. Membership of the Croatian Bar Association is the prerequisite for the practice of law. The right to practice law is acquired by registration in the directory of attorneys (and upon taking an oath), which is decided by the competent body of the Association. According to Article 2 of the mentioned Law, the independence and autonomy of the legal profession is realized especially through the independent and autonomous practice of law as a freelance profession, based on the organization of the legal profession through the Croatian Bar Association as an independent and autonomous organization of lawyers on the territory of the Republic of Croatia, by the enactment of the laws and other general enactments of the Association, and by deciding on the acquisition and deprivation of the right to practice law.

The General Assembly of the Association has established a practice code for lawyers. The Practice Code, based on the fundamental values of society, sets forth a group of principles and rules which must be observed by lawyers and junior lawyers in their practice of law. The Law on the Bar prescribes in much detail the various types of accountability of the lawyer in his practice. The issue of disciplinary accountability of the lawyer for violations of his duty and the reputation of the bar could result in a condemnation for a disciplinary offence in the performance of legal practice which could be temporary (for a period of between 5 and 10 years) or permanent loss of the right to practice law. The competent bodies of the Croatian Bar Association decide on the disciplinary accountability of the lawyer, and a decision on temporary or permanent loss of the right to practice law may be challenged by appeal to the Supreme Court of the Republic of Croatia. It cannot be discerned from the relevant Law whether, or how, judicial protection in the case of pronouncement of some other disciplinary penalties (reprimand or fine) can be realized.

Having in mind the fact that the establishment of the Croatian Bar Association and its competencies are determined by law, that this Association has extensive and significant powers in terms of defining the rules of the profession, as well as an important role in ensuring supervision of the professional performance of lawyers, its public nature can be established, in spite of the unclear determination of the public or private nature of this organization. Therefore, the application of Article 11 of the Convention can be excluded concerning the association of lawyers in the Croatian Bar Association.

The Law on Health Care (OG 75/1993, 11/1994 and 55/1996 and 1/1997) prescribes the mandatory association of physicians, dentists, pharmacists and medical bio-chemists in the Croatian Medical Association, Croatian Dentists' Association, Croatian Pharmacists' Association, or the Croatian Association of Medical

biochemists, respectively. The competencies of these associations are set forth in Article 174 of the Law.

In the practice of the Constitutional Court of the Republic of Croatia the issue of freedom of association in health care has arisen in connection with a motion for initiation of proceedings for review of the constitutionality of Article 40 paragraph 1, Article 100, paragraphs 1, 2, 3 and 5, Article 121, paragraph 1, item 8, Article 149, paragraph 1, item 5 and 7, and Article 167 of the Law on Health Care (OG 75/1993 and 11/1994). The motion was submitted by the Croatian Association of Private Medical Practitioners.

The petitioner deemed that in terms of the right to freedom of association, Article 167 of the Law on Health Care, especially items 3, 5 and 6 of this Article, establishing the scope of activities of the associations in the health area, were unconstitutional. The petitioner argued that private health workers are not able to realize their proprietary legal interest due to the activities of those associations, which contravene the constitutional provisions guaranteeing the right to property (Article 48 of the Constitution). Furthermore, he believes that their entrepreneurial and market freedom is restricted by the activities of the associations (Article 49 of the Constitution), or the freedom to association (Article 43 of the Constitution) respectively.

The Constitutional Court dismissed the motion for review of the constitutionality of the aforesaid provisions (Ruling of the Constitutional Court of the Republic of Croatia no. U-I-385/1993 of April 6, 1994, published in OG 31/1994, 40/1994) and established, concerning the right to freedom of association, that "the Court finds the constitutional justification of mandatory association in health care professions in the provisions of Article 50, paragraph 2 of the Constitution, according to which entrepreneurial freedom and property rights may exceptionally be restricted by law for the purposes of protecting the interests and security of the Republic, nature, the human environment and human health, as well as in the provisions of Article 69 of the Constitution stating that everyone shall have the right to a healthy life, and citizens, government, public and economic bodies and associations shall be bound, within their powers and activities to pay special attention to the protection of human health, nature and the human environment. Due to the fact that the Constitution guarantees in Article 58 to every citizen of the Republic of Croatia the right to health care, the performance of health care activities is of special public interest. Therefore, in the opinion of this Court the establishment of associations and membership of health care workers, directly involved in activities of health care, aimed at monitoring and supervising, as well as promoting the implementation of the guaranteed health care, is based on the norms of the disputed Law. This holds true regardless of the proprietary nature of performing these activities (in government or private institutions). Moreover, associations are the institutions to which citizens have the right to turn for the protection of their rights concerning the quality, content and type of health care service extended to them. The Court is of the opinion that, due to the fact that the disputed Law determines mandatory association, citizens and legal entities are not precluded from freely associating as guaranteed by Article 43 of the Constitution. On

the contrary, members of associations founded on the basis of the provision on obligatory association may also be the members of associations whose foundation is the voluntary association and freedom of choice of association, provided that these associations carry out activities and work as registered, and are approved by the relevant authorities.

Such associations are obliged as well to respect constitutional norms on the protection of the freedoms and rights of other citizens and the legal order (Article 16 of the Constitution). Concerning the mentioned provision of Article 166 of the disputed Law, the Court expressed its opinion that the claim of the petitioner is constitutionally unjustified. Besides, the petitioner did not provide any relevant facts or evidence in order to prove his claims. Due to the aforesaid, the Court assessed that the reasons stated in the motion of the petitioner do not question the constitutionality of the mentioned provisions of the disputed Law."

Taking into consideration that associations in the area of health care are founded on the basis of law, and that the law specifies their competencies, especially their duties in terms of supervision of the professional performance of the members of freelance professions, they are subjects of public law, and the provisions of Article 11 of the Convention are not applicable.

According to the Law on Public Notaries (OG 78/1993), public notaries on the territory of the Republic of Croatia are obliged to be members of the Croatian Association of Public Notaries. The Association participates in the determination of public notaries' offices, appointment of public notaries and supervision of their work. The Law sets forth the Association bodies and their competencies. Due to the fact that the establishment of the Croatian Association of Public Notaries is provided by law, that the law prescribes their competencies, and partly also their internal organization, and that the Association plays an important role in supervision of the professional work of public notaries and acknowledgment of their disciplinary accountability, it is a subject of public law to which Article 11 of the Convention is not applicable.

The Law on the Student Corps (OG 57/1996) prescribes the mandatory membership of all students in the student corps. Members of the student corps are all students enrolled in graduate programs. Since the establishment, funding and mandatory membership in the student corps is regulated by law, and the law determines the competencies of the student corps (especially participation in the administration of colleges and universities), the student corps is a public law subject to which Article 11 of the Convention is not applicable.

A severe shortcoming of Croatian regulations relating to this issue is, in our opinion, the insufficient clarity of the public character of the above-mentioned associations (for instance, the Law on the Bar defines the Croatian Bar Association as an independent and autonomous organization which independently passes its laws and other general enactments, but the public competencies of the Association are not clearly defined). Due to the lack of clarity in the definition of legal character of these associations,

disputes could arise regarding whether they are private or public organizations, and therefore also raise some doubt in respect of the applicability of Article 11 of the Convention to this issue.

11.7. Freedom of Association in Trade Unions

In the application of Article 11 of the Convention, the Commission and Court often take into account other treaties relating to the freedom of forming and joining trade unions, especially Convention No. 87 of the International Labor Organization on Freedom of Association and Protection of the Right to Organization (Convention no. 87 on Trade Union Freedoms and Protection of Trade Union Rights, OG-IT 2/1994) and Convention No. 98 of the International Labor Organization on Application of the Principle of Right to Association/Organization and Collective Bargaining (OG-IT 2/1994). In addition, special attention is attributed to Article 6 of the European Social Charter which emphasizes the voluntary nature of the right to collective bargaining and collective agreements.

In the Republic of Croatia the right to trade union association is regulated by the Labor Law (OG 38/1995, 54/1995 and 65/1995). This Law envisages equal conditions, with some exceptions, for the establishment of trade unions and employers' associations. Thus, employees have the right, without any difference, to form and join a trade union of their free choice, abiding by the conditions set forth by the laws or rules of this trade union. Employers have equally the right to form and join an association of employers, without subject to any difference, under conditions which may be stipulated solely by the laws or rules of the association. Bodies of the executive branch may only to a restricted extent interfere with the establishment and work of these associations. Therefore, such associations may be founded without any prior approval, and their activities can neither be temporarily prohibited, nor the association dissolved by a decision of the executive branch. All rights guaranteed to associations are also secured to their alliances or other organizations at a higher level.

The law guarantees associations freedom of association and cooperation with international organizations established for the promotion of the same rights and interests. The Labor Law regulates in detail the realization and protection of the right to freedom of association in trade unions.

Since 1993 the Croatian Employers' Association has been active in Croatia, as a voluntary association of employers, and subsequently other voluntary associations of employers, were founded, being either members of the Croatian Employer's Association, or operating. There are 23 trade union centrals (confederation and federation of trade unions) currently registered in Croatia. The six largest are represented in the Economic-Social Council, and several hundreds are represented at various levels of activity (branch trade unions and trade unions organized at the levels of individual major enterprises).

The system of collective bargaining, which has been in force in Croatia since January 1, 1996, is entirely based on the concept of voluntary bargaining. For this reason, only an association, which has been founded and registered in accordance with the provisions of the Labor Law, may be party to a collective agreement. The right to strike is guaranteed to trade unions, and employers have the right to lockout under far more restrictive conditions than those under which employees are entitled to strike.

On the basis of the above-mentioned, we conclude that the provisions of the Labor Law are in accordance with Article 11 of the Convention on the right to free association in trade unions.

11.8. Restrictions on the Right to Freedom of Association

According to paragraph 2, Article 11 of the Convention in exceptional cases two kinds of restrictions may be placed on the rights provided in paragraph 1 of this Article. Firstly, as is the case with the rights in certain other Articles of the Convention, restrictions provided for by law and which are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others are allowed. Secondly, special lawful restrictions may be imposed on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

In Croatian legislation and practice it is often difficult to establish whether a certain association has the character of a subject of public or private law, so that it can be determined whether Article 11 of the Convention is applicable. The aforementioned associations (Croatian Chamber of Economy, Croatian Chamber of Trades and Crafts, Croatian Bar Association, Croatian Association of Public Notaries, Associations in the fields of health care, tourism communities, Student Corps) show prevailing public elements, so that they are not subject to Article 11 of the Convention, and therefore it is not necessary to establish if the obligation to join such associations may be justified under the conditions stated in paragraph 2 of Article 11 of the Convention.

The authorization to impose restrictions on the exercise of the rights guaranteed in paragraph 1, Article 11 of the Convention by members of the armed forces, of the police and State administration is contained in the second sentence in paragraph 2, Article 11, saying: "This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

The issue of forming and joining political associations and trade unions of the armed forces of the Republic of Croatia is regulated in the Law on Service in the Armed Forces of the Republic of Croatia (OG 23/1995) and the Law on Defense (OG 74/1993). According to Article 9 of the Law on Service in the Armed Forces of the Republic of Croatia, "active military personnel shall be prohibited from organizing trade unions or political organizations in the armed forces". According to Article 42 of

the Law on Defense "every political activity, foundation of political parties, holding of political gatherings and manifestations in the armed forces are prohibited". Active military personnel and persons performing their service in the armed forces are prohibited from participating in their uniforms in gatherings, processions and demonstrations.

According to the provisions mentioned, military persons and persons performing their service in the armed forces are prohibited from forming, and acting through, political organizations within the armed forces. Nevertheless, such persons may be members of political parties, and, apart from their duty in the armed forces, they may participate in the activities of these parties. They are, however, not allowed to wear a uniform during political gatherings, processions and demonstrations. As far as association in trade unions is concerned, professional military personnel (officers and soldiers) are forbidden to form and join trade unions. Therefore, it can be concluded that other persons in the service in the armed forces (military officials and employees) have the right to form and join trade unions. As far as the right to strike is concerned, striking is prohibited if it affects the readiness to battle of the armed forces, or the regular or prescribed performance of duties of the members of the armed forces.

Pursuant to the Law on Internal Affairs (OG 29/1991) "employees of the Ministry shall not be allowed to form political parties or be politically active in the Ministry. Employees of the Ministry shall not be entitled to strike, if the strike would prevent the performance of police activities from Article 1 of this Law" (Article 104). This means that according to the provisions in question, political organizations and activities within the Ministry are prohibited. This does not prevent employees of the police from being members of political parties, but they are not allowed to be politically active in the Ministry of Internal Affairs. Concerning trade union activities, the Law on Internal Affairs only restricts the right to strike in the police. Considering that paragraph 2, Article 104 prescribes that the strike must not prevent the performance of the duties from Article 1 of the Law on Internal Affairs, which enumerates the tasks to be performed by the organs of internal affairs, it is to be concluded that paragraph 2, Article 104 indirectly constitutes a prohibition of strikes by members of the police.

Restrictions on the right to form and join political and trade union organizations in the army and the police, contained in the relevant laws of the Republic of Croatia, are in our opinion in accordance with the second sentence of paragraph 2, Article 11 of the Convention, which admits the lawful restrictions of these rights in relation to the categories of persons in question .

As far as civil servants and employees are concerned, the Law on Civil Servants and Employees and Salaries of Judicial Functionaries (OG 74/1994) in Article 4 explicitly guarantees civil servants the right to form and join trade unions, in accordance with the general labor regulations (contained in the earlier mentioned Labor Law), unless otherwise specified by special law. Since special laws have been enacted for persons in the service of the armed forces only, all other civil servants have the right to

organize themselves in trade unions. Moreover, the provisions on civil servants entitle them to bargain collectively on issues related to labor relations, which are not regulated by law. Civil servants have the right to strike, pursuant to the general provisions of the Labor Law. The general provisions on civil servants (with the exception of the provisions concerning members of the police and in military service) do not contain provisions restricting the political organization or activity of these persons.

In view of the relatively extensive, recognized right to organization and activity of trade unions of civil servants, and the fact that there is no restriction of the political organization and activity of this category of persons (except the earlier mentioned restrictions concerning members of the armed forces and the police), we find that the provisions in this field are compatible with Article 11 of the Convention.

12. Right to Marry: Article 12 and Protocol 7, Article 5

> *Article 12.*
> *Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.*
>
> *Article 5 of Protocol 7.*
> *Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This article shall not prevent States from taking such measures as are necessary in the interests of the children.*

12.1.1. Constitutional Protection

According to the provision of Article 61 of the Constitution of the Republic of Croatia, the family enjoys special protection in the Republic, and marriage and legal relations in marriage, common-law marriage and families shall be regulated by law. It is the constitutional obligation of the Republic to protect maternity, children and young people, and it shall create social, cultural, educational, material and other conditions conducive to the realization of the right to a decent life (Article 62 of the Constitution of the Republic of Croatia).

Children with special needs shall enjoy special care, and parents have the right to decide freely on the upbringing of their children (Articles 63 and 64 of the Constitution of the Republic of Croatia).

12.1.2. Protection of the Right to Marry in Croatian Legislation

The Republic of Croatia is a party to the following treaties dealing with this issue:
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of December 10, 1962

- Convention on the Elimination of All Forms of Discrimination against Women of December 18, 1979 and
- Convention on the Rights of the Child of November 20, 1989

The rights in Article 12 of the Convention and Article 5 of Protocol 7 are implemented in the Republic of Croatia by the following laws:
- Law on Marriage and Family Relations (OG 51/1989 and 59/1990)
- Criminal Law of the Republic of Croatia (OG 32/1993, 38/1993, 28/1996 and 30/1996)
- Law on Realization of the Right to Free Decision on the Birth of Children (OG 18/1978).

The right to marry is regulated by the Law on Marriage and Family Relations. The prerequisites for marriage are clearly defined and provided for by law, and if the competent government official (registrar) deems that these prerequisites are not met, legal protection through legal remedies is envisaged. Persons, whose petition for change of the information on gender in state registers has been accepted, may after the medial change of gender, marry a person of the opposite sex.

Family legislation of the Republic of Croatia sets the same requirements for the conclusion of marriage (man and woman) as are standard in European family legislation. Should one of the requirements not be met, the competent government bodies are, as representatives of public interest, authorized to file a suit proclaiming the marriage invalid, or to annul the marriage. Such competencies are customary in the systems of family law in other countries, in accordance with the principle of legality, and it can be acknowledged that they are necessary in a democratic society and that they serve the protection of morals or rights and freedoms of other persons.

Marriage is generally concluded in person in the official premises of the competent body of public administration, but prevented persons may marry through an attorney or at a suitable place. Therefore, in the Republic of Croatia prisoners are also allowed to marry.

Croatian legislation envisages divorce. Besides providing for the mandatory procedure of conciliation in cases where the spouses have children, or in the case of a unilateral request, the Law contains relatively liberal solutions as to divorce. Due to objective difficulties in the justice system, it can be said that divorce proceedings take too long and that the costs are very high, which makes it difficult to remarry, despite the fact that divorce is provided for in the system of family law.

The right to found a family is regulated also by the provision on adoption of the Law on Marriage and Family Relations, as well as the medical-legal provisions on methods of assisting infertile couples. While there is a possibility that singles adopt a child (even though preference is given to married couples due to the interests of the child), only a married couple may seek and be granted medical assistance in the case of infertility. The legal possibility of a single adopting a child exceeds the understanding

of the Commission that in order to exercise the right to found a family, the existence of a couple is fundamental (report no. 6482/74). Unmarried couples may not realize their wish to have children through adoption or applying medical methods. The medical-legal provisions are outdated, and a new law is in preparation which will regulate this area in more detail and, therefore, enhance the legal security.

Men and women in the Republic of Croatia are at least formally equal in all areas, including family law matters. They enjoy the same personal rights, and decide upon mutual agreement on the first name of the mutual child and on the exercise of parental rights. In case of a dispute, the decision is rendered by the social care department. In practice, it cannot be expected that a large number of objections by citizens regarding violation of the principle of equality of spouses will be raised, with the exception of decisions on custody over children, which is mostly given to the mother.

12.2. Practice of the Constitutional Court

Only one decision of the Constitutional Court of the Republic of Croatia refers to the protection of the rights contained in Article 12 of the Convention. The decision was rendered in the proceedings of the review of the constitutionality and legality of Article 27 of the Law on Marriage and Family Relations (OG 51/1989).

This provision contains a prohibition on marriage in a religious ceremony before the marriage has been concluded pursuant to the provisions of the challenged law (i.e. before the representative of the relevant government body). By decision of the Constitutional Court of the Republic of Croatia (of February 16, 1994) the disputed provision has been repealed due to a lack of conformity with the constitutional provisions on free public profession of religion and equality of all religious communities before the law, and their separation from the state (Article 40 and 41 of the Constitution of the Republic of Croatia). In the reasons for the decision is also contained a reminder to citizens that only a marriage concluded in accordance with the Law on Marriage and Family Relations is considered to be valid and producing legal effects, and that such a legal position cannot be given to a marriage concluded in a religious ceremony.

In this context it needs to be emphasized that in the Republic of Croatia the option of giving a religious marriage civil legal force has not been legalized to date (the new family legislation is in its final stage of preparation). However, as far as members of the Roman Catholic Church are concerned, the Republic of Croatia accepted such a legal solution by signing and ratifying the Agreement on Legal Issues between the Holy See and the Republic of Croatia (OG-IT 3/1977).

13. Right to An Effective Remedy: Article 13

> *Article 13.*
> *Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*

The Constitution envisages in Article 18 that the right to appeal against individual legal acts made in first-instance proceedings before courts or other authorized bodies shall be guaranteed, although the right to appeal may exceptionally be denied in cases specified by law, if other legal protections is ensured.

Article 19 of the Constitution guarantees judicial review of the legality of individual acts of administrative authorities and bodies vested with public powers, and, in the sense of Article 20 of the Constitution, anyone violating the provisions of the Constitution concerning basic human rights and freedoms shall be held personally responsible and may not escape the responsibility by invoking a higher order.

The constitutionally guaranteed human rights and freedoms, pursuant to Article 125 of the Constitution, are protected by the Constitutional Court of the Republic of Croatia.

The right to file a constitutional complaint for protection of constitutional freedoms and rights of man and the citizen is regulated in Article 28 et al of the Constitutional Act on the Constitutional Court of the Republic of Croatia (OG 13/91). Article 28 prescribes that everyone can lodge a constitutional complaint with the Constitutional Court if he deems that by a decision of a judicial or administrative body, or some other body vested with public power, one of his constitutionally guaranteed freedoms and rights of man and the citizen has been violated. Such protection can only be sought after exhaustion of all other legal remedies.

The Commission and the Court have established in their decisions that national authorities are in charge of ensuring a binding and effective legal remedy. Pursuant to Article 13, the remedies do not have to be judicial, but may also be of an administrative character. The type of legal remedy is not prescribed.

Other issues related to the application of Article 13 of the Convention are discussed in the analysis of Article 6 of the Convention and section IV of the Report.

14. Prohibition of Discrimination: Article 14

> *Article 14.*
> *The enjoyment of the rights and freedom set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

14.1.1. Constitutional Protection

> Article 14 of the Constitution of the Republic of Croatia sets forth:
> *"Citizens of the Republic of Croatia shall enjoy all rights and freedoms, regardless of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, education, social status or other properties."*
>
> Article 2 of the mentioned Article prescribes equality before the law:
>
> *"All shall be equal before the law."* Article 15, paragraph 1 of the Constitution stipulates: *"Members of all nations and minorities shall have equal rights in the Republic of Croatia"*

In terms of the conformity of the constitutional provisions in question with Article 14 of the Convention, it needs to be mentioned that Article 14 of the Convention exclusively refers to the rights contained in the Convention and Protocols (pursuant to Article 5 of the First Protocol, Article 6, paragraph 1 of Protocol 4, and Article 7, paragraph 1 of Protocol 7). By contrast, the non-discrimination clause provided by the Constitution is not limited only to the rights secured by the Constitution, but also applies to all rights and freedoms envisaged by Croatian legislation. Article 14, paragraph 2 of the Constitution, guaranteeing equality of all before the law, thus exceeds the standards set by the Convention.

The prohibited grounds for discrimination envisaged by the Constitution mainly follow the ones stated in the Convention. The list of prohibited grounds for discrimination explicitly enumerated in the Convention, is supplemented in the Constitution with the prohibition of discrimination on basis of education and social status. Unlike the Convention, the Constitution omits to state association with a national minority as a forbidden ground of discrimination, but contains the clause "or other basis" which offers the possibility of expanding the non-discrimination clause also to other grounds by referring to "other basis". Important is also the fact that Article 15, paragraph 1 of the Constitution of the Republic of Croatia provides "equality of members of all nations and minorities in the Republic of Croatia", whereby it makes a clear prohibition of possible discrimination due to a person's belonging to a national minority.

14.1.2. Prohibition of Discrimination in Croatian Legislation

In addition to the Constitution of the Republic of Croatia, a non-discrimination clause is also contained in the Constitutional Law on Human Rights and Rights of Ethnic and National Communities or Minorities. Article 2 (m) of the Constitutional Law prohibits discrimination *on the grounds of sex, race, color, language, religion, political or other opinion, national and social origin, association with a national minority, property, status acquired by birth or on some other basis.*

The above-mentioned non-discrimination clause entirely follows the one of Article 14 of the Convention, and relates to the following rights provided by the Constitutional Law: the right to life, the right not to be subjected to torture or inhuman or degrading treatment, the right not to be subjected to slavery or servitude, the right to freedom and inviolability of person, the right to fair and public hearing by an impartial court and legal determination of criminal offences and sentences, the right to respect for private and family life, home, correspondence, conscience and religion, the right to freedom of expression, the right to freedom of peaceful assembly and association, the right to marry and found a family, as well as the right to an effective legal remedy specified by law and accessible to all persons whose rights are violated (Article 2 items a-1 of the Constitutional Law).

Article 6 of the Constitutional Law additionally sets forth the principle of non-discrimination with relation to members of all ethnic and national communities or minorities. The mentioned provision is in conformity with Article 14 of the European Convention, which states among the prohibited grounds for discrimination also the "association with a national minority".

The Labor Law (OG 38/1995, 54795, 65/1995) contains in Article 2 a special non-discrimination clause, by which discrimination is prohibited *on the grounds of race, color, sex, marital status, family obligations, age, language, religion, political or other affiliation, national or social origin, financial status, birth, social status, membership or non-membership in a political party, membership or non-membership in a trade union and physical or psychological difficulties.*

In order to penalize discriminating practices, the criminal legislation of the Republic of Croatia envisages three criminal offences related to discrimination. The Criminal Law of the Republic of Croatia prescribes in Article 45 the criminal offense of the infringement of the equality of citizens, of which is guilty anyone who *on the basis of nationality, race, color, religious affiliation, ethnicity, gender, education, social status, social origin or property, denies or restricts human rights or freedoms specified by the Constitution, law or other regulation, or who on such basis extends privileges or favors to citizens.* The offense is punishable by imprisonment from 3 months to five years. Besides this criminal offense, the Criminal Law also mentions in Article 240 the criminal offense of incitement to national, racial or religious hatred or intolerance, which is punishable by imprisonment from six months to five years, and for more severe forms by up to ten years.

In addition to the criminal offences envisaged by the Criminal Law, the Basic Criminal Law of the Republic of Croatia also mentions the crime of racial and other discrimination committed by anyone *who, on the basis of race, color, nationality or ethnic origin violates the fundamental human rights and freedoms recognized by the international community.* The offense is punishable by imprisonment from six months to five years.

Although the obligation of penalizing discrimination is not directly derived from the provisions of the Convention, inclusion in domestic legislation of a number of criminal offences related to discrimination is of significance for the full implementation of the principle of non-discrimination in practice. Accordingly, it needs to be emphasized that non-discrimination clauses contained in relevant international treaties to which the Republic of Croatia is a party are directly applicable, pursuant to Article 134 of the Constitution, and in terms of legal status they stand above law.

14.2. Constitutional Court Practice

The decision of the Constitutional Court of the Republic of Croatia no. U-I-697/1995 of January 29, 1997 establishing the non-conformity of the provisions of Articles 2, 4, 9, 15, 16, 50(a) (1-3), 19, 20 (1-2), 21 and 22 of the Law on Amendments to the Law on Sale of Apartments With Tenancy Rights (OG 58/1995) with the provisions of Article 14 (as well as with Articles 48 (1), 49 (2), 60 and 61 (1)) of the Constitution of the Republic of Croatia, and repeals the mentioned provisions of the said Law, is of special importance for the determination of the practical application of the non-discrimination clause provided by the Constitution.

In the above-mentioned matter the Constitutional Court took the position that the provisions on sale of apartments with tenancy rights are transitional provisions by means of which the state carries out the privatization of socially-owned property, thereby harmonizing in the same manner the legislation with the Constitution which does not know such form of property. By the provisions in question the state prescribes more favorable conditions for purchase of apartments than the market conditions, because they are purchased by tenants already occupying them on the basis of their acquired tenancy rights.

By stipulating more favorable conditions for purchase of the apartments, the state is not allowed to stipulate differences in the position of tenants, so that as a result some of them are unable to buy the apartment or the purchase is considerably obstructed. The Constitutional Court found all provisions recognizing the right to purchase of the apartment only for carriers of tenancy rights, not to be in conformity with the Constitution, because these provisions limit the rights of members of the family household who continue to occupy the apartment, and who enjoyed this right according to the provisions previously in force. This lack of conformity with the Constitution becomes evident in particular in the case of spouses who, on the basis of Article 64 of the Law on Housing Relations (OG 51/1985, 42/1986, 37/1988, 57/1988, 22/1992, 58/1993, 70/1993), became joint holders of tenancy rights. According to the previous legal text of the Law on Sale of Apartments with Tenancy Rights, they were able to buy the apartment together, or separately, with the consent of the other spouse, as were members of the family household with the consent of the holder of the tenancy rights. According to the Law on Amendments to the Law on Sale of Apartments with Tenancy Rights, these right were not granted to the persons in question, but only to the holder of tenancy rights, whereby the discrimination of

spouses and members of the family household of the holder of tenancy rights has been institutionalized. The inequality in position of the buyers of so-called "state owned apartments" and other apartments, as regards opportunities of purchase is also not in conformity with the Constitution, since it fails to guarantee the equality of citizens. The mentioned provisions have been repealed.

15. Derogation in Time of Emergency: Article 15

> *Article 15.*
> *1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*
> *2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4, (paragraph 1) and 7 shall be made under this provision.*
> *3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.*

15.1. Admissibility of Derogation Under the European Convention

The European Convention on Human Rights admits derogation from some of its provisions in times of war or emergency. The provisions of the Constitution of the Republic of Croatia (Articles 17 and 101) are fully compatible with the provisions of the Convention. The practice during the Homeland War (1991 - 1995) has entirely followed the international obligations of the Republic of Croatia, the requirements of Article 15 of the Convention, as well as the standards set by the activities of the Strasbourg bodies, although during this period Croatia was not a party to the Convention.[40]

As far as the application of Article 15 of the Convention is concerned, the Court and the Commission have introduced a practice of strict requirements to be fulfilled when a member state invokes the right to derogation. The criterion for introduction of a state of emergency has been determined by decision of the Court in the case of *Lawless v. Ireland* [41]. It is stated that the existence of a state of emergency can be derived from a combination of several factors, such as: (a) the presence of a secret army on the territory of the country; (b) the activities of this army outside its territory, endangering the relations with other countries; (c) a continued and alarming increase

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[40] The Republic of Croatia, of course did not have to comply with the obligation to notify the Secretary General, as in paragraph 3, Article 15 of the Convention.

[41] *Lawless v Ireland* judgment, 1959, Series B N°1.

in terrorist activity. In the said case, the Court determined standards for a "strictly defined need for emergency measures."

In the *Greek case* [42] the Commission defined the term of state of emergency: (a) the danger must be real and immediate; (b) the effects must threaten the entire nation; (c) the continuation of the organized life of the nation must be endangered; (d) the crisis must be exceptional, so that normal measures or restrictions admissible according to the Convention (public security, health or public order) are not sufficient to avert it. It is a known fact that Greece withdrew its membership of the Council of Europe in order not to face responsibility for the violation of the Convention, and rejoined it later, after the fall of the dictatorship in 1974.

In the case *Ireland v. United Kingdom*[43], the Commission explicitly invoked the principle of proportionality of danger and measures taken, requiring a concrete connection between the danger and the measures taken, and emphasizing the principle that not every measure may be justified simply by the sole invocation of exceptional circumstances.

15.2. Derogation of Constitutionally Guaranteed Rights in Croatian Legislation

The issue of derogation of constitutionally guaranteed human rights and freedoms is directly regulated in Article 17 of the Constitution:

> *(1) During a state of war or an immediate danger to the independence and unity of the Republic, or in the event of some natural disaster, individual freedoms and rights guaranteed by the Constitution may be restricted. This shall be decided by the Croatian Sabor by a two-thirds majority of all representatives or, if the Croatian Sabor is unable to meet, by the President of the Republic.*
>
> *The extent of such restrictions shall be adequate to the nature of the danger, and may not result in the inequality of citizens in respect of race, color, sex, language, religion, national or social origin.*
>
> *Not even in the case of immediate danger to the existence of the state may restrictions be imposed on the application of the provisions of this Constitution concerning the right to life, prohibition of torture, cruel or degrading treatment or punishment, and on the legal definitions of penal offences and punishments, and on freedom of thought, conscience and religion.*

The provisions of this Article of the Constitution of the Republic of Croatia fully complies with the requirements of Article 15 of the Convention, as well as Article 3, Protocol 6 on the abolition of capital punishment of 1983. The Constitution of the

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42 *Greek case*, 1958, Committee of Ministers Resolution 176.

43 *Ireland v United Kingdom* judgment, 1978, Series A N° 25.

Republic of Croatia even contains even more restrictive provisions if compared with Article 2, Protocol 6, because it prohibits the introduction of the death penalty both in a state of war and of immediate danger.

In relation to actions of the executive branch in exceptional circumstances, Article 101 of the Constitution concerning the so-called emergency decrees should be mentioned, even though this Article does not directly refer to the derogation in Article 15 of the Convention. Decrees with the force of law, passed by the President, may be of importance for the realization of the rights and freedoms of citizens - their primary purpose is exactly the restriction of the exercise of these rights - and therefore relevant for the assessment of the actions of state authorities in states of emergency as regards other Articles of the Convention. The difference from acts passed on the basis of Article 17 lies in the fact that it is admissible to review the constitutionality of the decrees following from Article 101, whereas this is not possible in the first case.

In the period from September 9, 1991 until December 8, 1992, the President of the Republic of Croatia passed, on the basis of the powers under Article 101 of the Constitution, a number of decrees with the force of law, which were approved by the Chamber of Representatives in a series of meetings. Since they do not refer to the situations and relations arisen before the ratification of the Convention, they will have no significance in terms of its application in the Republic of Croatia, but the practice of their enactment will be important as to the actions of government bodies in possible new states of emergency. We, therefore, only point to some potential difficulties in the possible future application of the mentioned constitutional Articles.

Part of the political and professional public questioned the constitutionality of the application of Article 101 of the Constitution, considering that the Sabor was meeting regularly at the time, so that without any doubt there was no situation in which it could not have met.

The Constitutional Court decided, upon an initiative to review the constitutionality of enactment of presidential decrees, that the President of the Republic, when passing emergency decrees, is not under an obligation to formally establish a state of emergency by the Sabor or some other government body, but he is entitled to assess whether the exceptional circumstances stated in Articles 17 or 101, respectively, of the Constitution exist.[44] Considering the fact that the Constitution, apart from declaration of war, which according to Article 80, sub-paragraph 4 lies in the competence of the Chamber of Representatives of the Sabor, does not require a formal decision on the existence of a state of emergency, we deem that invocation of the competencies from Article 101 alone has the meaning of declaring that a state of emergency is present, so that the mentioned Ruling cannot possibly be objected to. The same treatment should be given to the decision of the Sabor on the restriction of constitutionally guaranteed freedoms and rights, according to Article 17 of the Constitution. But proposals for the regulation of this area should be discussed on the

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[44] Ruling of the Constitutional Court no. U-I-179 of June 24, 1992 (OG 49/1992 and 52/1992).

occasion of a possible alteration of the Constitution, or by passing special legislation on the state of emergency.

The case is different in respect of the notification of the Secretary General of the Council of Europe about the derogation. We believe that this obligation applies in the same manner to a derogation by invocation of Article 17 of the Constitution, as well as to measures to be taken on the basis of Article 101 of the Constitution. This is derived from the position of the Constitutional Court on the beginning (and implicitly termination) of a state of emergency by the entering into force of the emergency decrees. If the passing of a decree means that there is a state of emergency, then by this action all obligations arise from the Constitution (for instance, prohibition of dissolution of the Chamber of Representatives), as well as from the Convention.

16. Restrictions on Political Activity of Aliens: Article 16 and Protocol 4, Articles 2, 3 and 4, Protocol , Article 1.

16.1.1. Scope of Restrictions on Individual Rights of Aliens in Terms of Their Political Activity: Article 16

> *Article 16.*
> *Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties form imposing restrictions on the political activity of aliens.*

This Article of the Convention does not exclude the application of the rights in Article 10 and Article 11, or the protection of Article 14, in respect of aliens. The rights in Articles 10 and 11 and the protection against discrimination (Article 14) are enjoyed by all persons regardless of their citizenship, i.e. regardless of whether they are Croatian citizens or aliens. The exercise of these rights (freedom of expression - freedom of thought, freedom of receiving and disseminating information and ideas and the freedom of peaceful assembly and freedom of association) are subject to the restrictions mentioned in Article 10, paragraph 2 and Article 11, paragraph 2 both concerning Croatian citizens and aliens.

Article 16 only enables the member states of the Convention to restrict the rights in Articles 10 and 11 of aliens, in respect of their political activity.

The expression "aliens" in this Article relates to persons who are citizens of other states parties to the European Convention, citizens of other states which are not parties to the Convention and persons without citizenship (stateless persons). The Convention does not provide for the preferential treatment of persons who are nationals of the states parties to the Convention.

In their practice to date, the Commission and Court have not taken a position as to what is considered to be "political activity", so that as for now the state parties to the Convention must evaluate themselves very carefully which activities can be qualified

as political ones, and then possibly restrict the rights of aliens. A broad interpretation of the term "political" activity, or the establishment of restrictions for aliens, also when there is no political activity at all, could easily amount to a violation of Article 16 of the Convention as interpreted by the Commission and the Court.

16.1.2. Restrictions on Political Activity of Aliens in Croatian Legislation

The Law on Public Information (OG 83/1996) places no restrictions on aliens at all in respect of the publisher. Publishing activity can be undertaken by every individual or legal entity without restrictions as to citizenship. The Law on Public Information does not utilize the possibility granted by Article 16 of the Convention to restrict the rights of aliens to publish publications of a political character.

However, the Law on Public Information sets forth that the editor-in-chief must be a Croatian citizen (Article 15, paragraph 1), so that the editor-in-chief of any publication cannot be an alien - a foreign citizen or a stateless person. This provision makes no distinction as to the content or purpose of the publication - whether it is a political one or without any political character.

It needs to be mentioned that in Article 2 of the Law on Public Information the term "publication" is very broadly defined:

- press: newspapers and other publications issued from time to time, in periods of at most six months, in editions of more than 500 copies (paragraph 4)
- radio and television
- programs of news agencies
- other publications: posters, flyers, graphics with or without text and other publications multiplied in any mechanical, chemical or electronic procedure, films, videotapes, tapes and other organs containing information on some event, phenomenon, person, matter or activity (paragraph 6) and
- electronic media

If the provision of Article 15 of the Law on Public Information is strictly adhered to, an alien cannot be the editor in chief of any magazine, other periodical publication, film, videotape or tape, not even a poster or flyer, even when it is absolutely evident that there is no political activity or intention.

Article 15 of the Law on Public Information does not conform with Article 16 of the Convention, and Article 15 of the Law on Public Information should be amended so that it states that the editor-in-chief must have Croatian citizenship only if it is a publication of a political character, while the editor-in-chief of a publication of a non-political character may be an alien, as well.

The Law on Editorship (OG 28/1983, 26/1993) is a completely outdated law which in the contemporary legal and economic system is inapplicable. The amendment to the Law (OG 26/1993) refers only to the amount of the fines. This Law is entirely derived

from the former Law on Associated Labor (LAL) and by rigid interpretation not even a domestic publishing trade company could be incorporated or activated. Aliens would be allowed to publish books or other publications only upon a very broad interpretation of the provisions of the Law on Editorship. With respect to the application of individual provisions of this law, it needs to be emphasized that some provisions of the law regulating the position of the publisher, explicitly contravene the provisions of the Law on Public Information, and that conflict needs to be settled following the principle lex posterior derogati legi priori.

In any case, a new law needs to be enacted in order to regulate publishing (editing) activities, because the current Law on Editorship cannot be improved by amendments, as it completely fails to be in line with the contemporary Croatian legal system.

The Law on Political Parties (OG 76/ 1993, 111/1996) prescribes that a political party may only be founded by Croatian citizens (Article 6, paragraph 1) and that members of political parties may only be Croatian citizens (Article 6, paragraph 2). Aliens thus cannot be founders of political parties, nor may they join them as members. This is a restriction of the right to freedom of association (Article 11 of the Convention), but since it deals with political activity, it is a restriction as specified by Article 16 of the Convention.

The Law on Movement and Residence of Aliens (OG 53/1991, 26/1993, 29/1994) sets forth that aliens are prohibited from founding political parties. This provision corresponds with Article 16, paragraph 1 of the Law on Political Parties and conforms with Article 16 of the Convention. Article 5 allows aliens with permanent residence or business visa, or who have dwelled in the Republic of Croatia for more than one year, to found associations of aliens, following the same regulations on the foundation of associations of citizens, which is compatible with the restrictions imposed by the Convention.

16.2.1. Freedom of Movement and Freedom of Choice of Residence: Protocol 4 Article 2

Protocol 4, Article 2.
1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Paragraph 1, Article 2 of Protocol 4 refers to "everyone", meaning both nationals and aliens. However, in the practice of the Commission and the Court this provision has only been applied in connection with aliens. The Constitution of the Republic of Croatia guarantees the right to move freely and choose a residence to anyone who finds himself legally on the territory of the Republic (Article 32, paragraph 1). According to the wording of the Croatian Constitution, it guarantees free movement of both Croatian citizens and aliens.

However, the Constitution allows that the right to movement within the Republic may exceptionally be restricted by law, if this is necessary to protect the legal order, or public health, or the rights and freedoms of others (Article 32, paragraph 2). This means that the right to free movement and choice of residence may be restricted exclusively by law, and only "exceptionally" if it is "necessary to protect the legal order, or the health, rights and freedoms of others".

Restrictions on freedom of movement and choice of residence, and the establishment of certain formalities concerning movement and residence (registration, notice of departure) is regulated by several laws, for instance, the Law on Dwelling and Residence of Citizens (OG 53/1991, 26/1993), Law on Supervision of State Border (OG 9/1992, 26/1993, 92/1994), Law on Movement and Residence of Aliens (OG 53/1991, 22/1992, 26/1993, 29/1994).

The restrictions established by these laws are in accordance with the restrictions allowed by paragraph 3, Article 2 of Protocol 4 of the Convention, and no harmonization is necessary.

16.2.2. Protection of Freedom of Movement and Choice of Residence in Croatian Legislation

The Constitution of the Republic of Croatia guarantees to every citizen of the Republic the right to leave the state territory at any time and to settle abroad permanently or temporarily, and to return home at any time (Article 32, paragraph 2). Nevertheless, the Constitution stipulates that the right of movement within the Republic and the right to enter or leave the country may exceptionally be restricted by law, if this is necessary to protect the legal order, or public health, or the rights and freedoms of others (Article 32, paragraph 3).

Restrictions on the right of citizens to leave the territory of the Republic of Croatia are primarily set forth in the Law on Travel Documents of Croatian Citizens (OG 51/1991, 64/1992, 26/1993, 29/1994). Article 34 names the reasons why the competent body will refuse to issue a travel document, or reasons why it may deny the issuing of a travel document. Moreover, the reasons for seizure of travel documents, which are the same ones as for denial of issuance of travel documents, are stated.

All restrictions concerning travel documents (issuance or seizure), and restrictions on the right of the citizen to leave the territory of the Republic of Croatia, are in

conformity with the restrictions allowed under paragraph 3, Article 2 of Protocol 4 of the Convention.

The Law on Travel Documents prescribes that issuance of a passport cannot be refused to a Croatian citizen (Article 34, paragraph 4). This means that a Croatian citizen, finding himself abroad without a Croatian passport or some other travel document and wishing to return to the Republic of Croatia, cannot be denied the issuance of a passport for any reason. Every Croatian citizen with a valid travel document (passport, matricula) must be granted entry into the territory of the Republic of Croatia, and there are no restrictions in this respect in Croatian regulations.

16.3. Prohibition of Expulsion of Croatian Citizens, Protocol 4, Article 3

> *Protocol 4, Article 3.*
> *1 No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.*
> *2. No one shall be deprived of the right to enter the territory of the State of which he is a national.*

The Constitution of the Republic of Croatia contains in Article 9, paragraph 2 the provision stipulating that "no citizen of the Republic of Croatia shall be expelled from the Republic nor deprived of citizenship, and may not be extradited to another state."

The Constitution thus contains a general provision on prohibition of expulsion of Croatian citizens from the territory of the Republic, comprising both individuals and groups.

Furthermore, the Constitution prevents the deprivation of Croatian citizenship regardless of whether the national is on the territory of the Republic of Croatia or abroad. Croatian laws have not elaborated on the constitutional provisions on prohibition of expulsion of Croatian nationals from the Republic of Croatia, nor the prohibition of deprivation of citizenship, because it is unnecessary. The constitutional provision on prohibition of expulsion in Article 9, paragraph 2 is fully compliant with paragraph 1, Article 3 of Protocol 4 of the Convention.

The Constitution of the Republic of Croatia contains the guarantee that "every citizen of the Republic shall have the right...at any time to return home" (Article 32, paragraph 2). Based on Article 32, paragraph 3 of the Constitution, the right to enter the Republic may exceptionally be restricted by law, if it is necessary to protect the legal order, or the health, rights and freedoms of others. However, there is not a single Croatian law restricting this right of Croatian citizens. Therefore, harmonization with Article 3, Protocol 4 is not necessary.

16.4. Prohibition of Collective Expulsion of Aliens: Protocol 4, Article 4

Protocol 4, Article 4.
Collective expulsion of aliens is prohibited.

Croatian laws contain no provisions on the basis of which collective expulsion of aliens would be permitted. Based on the Law on Movement and Residence of Aliens (OG 53/1991, 26/1993, 24/1994), as well as criminal and petty offense legislation, only the rendering of a decision (judgment and ruling) on expulsion, revocation of residency and termination of residency of individual foreigners is allowed.

In this respect, no harmonization with the Convention is necessary.

16.5. Procedural Guarantees in Expulsion of Aliens: Protocol 7, Article 1

Protocol 7, Article 1.
1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed;
a to submit reasons against his expulsion;
b to have his case reviewed; and
c to be represented for these purposes before the competent authority or a person or persons designated by that authority.
2. An alien may be expelled before the exercise of his rights under paragraph 1. a, b and c of this article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

According to Croatian law, an alien may be expelled from the Republic of Croatia only in the pursuance of a decision reached in accordance with the law.

The decision on expulsion may be rendered by courts in criminal proceedings as a safety measure, or by magistrates' courts in petty offense proceedings, as a precautionary measure. Both decisions - the judgment in the criminal proceedings and the decision in petty offense proceedings - are reached after the conduct of proceedings in which the defendant alien is given the opportunity to submit all reasons in his/her defense, including reasons against his/her expulsion. The alien has the right to appeal and the right to a defense lawyer. The court decision on expulsion of the alien is enforced after its legal effectiveness, meaning after the alien has been given the opportunity to exercise his/her rights - to be heard, to present his/her defense, to be represented by a defense lawyer and to lodge an appeal on which a second instance court will decide.

The decision on expulsion of the alien from the Republic of Croatia may also be passed, upon authorization in the Law on Movement and Residence of Aliens, by administrative bodies - police administration and police stations in the first instance, or the Ministry of Internal Affairs in the second instance, respectively. Administrative

bodies are authorized to pass a decision on revocation of residence and a decision on termination of residence. The reasons for revocation of residence and termination of residence are set forth in Articles 39, 42, 45 to 48 of the Law on Movement and Residence of Aliens.

We can acknowledge that the reasons for revocation of residence and termination of residence are few, too generally formulated, and therefore present the possibility of various interpretations and thus wrong decisions. For instance, it is possible to revoke the residence of an alien for a prolonged stay (studies, work), if "he fails to abide by the regulations or to execute the decisions of government bodies" (Article 39, item 3).

The decision on revocation of residence or decision on termination of residence, is passed in administrative proceedings regulated by the Law on General Administrative Procedure. In this procedure, the party must be given the right to be heard and to submit facts and evidence, and he has the right to present the reasons against the revocation of residence and termination of residence (expulsion).

The alien may lodge an appeal with the Ministry of Internal Affairs against the decision on revocation of residence and termination of residence. Against the decision of the Ministry an administrative dispute may be initiated before the Administrative Court of the Republic of Croatia. Against the decision of the Administrative Court, the alien can also file a constitutional complaint with the Constitutional Court of the Republic of Croatia.

The competent authority passing the decision on revocation of residence does not need to state the reasons by which he was guided in passing the decision (Article 41, Article 43, paragraph 4). Due to the fact that the body is not obliged to state the reasons for revocation of residence in the decision, the opportunity of the alien to contest the decision by appeal is significantly reduced.

The Constitutional Court of the Republic of Croatia repealed in its Decision no. U-I-248/94 of November 13, 1996 (OG 103/1996) paragraph 3, second sentence and paragraph 4, Article 209 of the Law on General Administrative Procedure, which are the provisions liberating the administrative body from stating the reasons underlying the decision, according to which the discretion is granted, in certain cases specified by law. It is only a matter of time before the Constitutional Court of the Republic of Croatia repeals also Article 41 and Article 43, paragraph 4 of the Law on Movement and Residence of Aliens.

The Law on Movement and Residence of Aliens does not clearly differentiate between cases in which the alien will be allowed to remain in the Republic of Croatia until the appeal procedure is terminated, and cases where the decision on revocation of residence (expulsion) can be enforced immediately, because it is necessary in the interest of public order or is based on reasons of state security.

We feel that Articles 39 to 49 of the Law on Movement and Residence of Aliens do not conform with Article 1, Protocol 7 of the Convention, and that the Law on Movement and Residence of Aliens needs to be harmonized with this Protocol.

17. Protection of Property: Protocol 1, Article 1

> *Protocol 1, Article 1.*
> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in an accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

17.1. Protection of Property Rights

Article 1 of the First Protocol contains a guarantee of the right to property. Property is guaranteed in its broadest sense, because all private property rights are secured. Such guarantee is extended to all natural and legal persons, regardless of their citizenship. Everyone is guaranteed inviolability ("peaceful enjoyment of his possessions") of property acquired and other property rights. This inviolability, however, is not absolute. Interventions by public authorities in private property rights are allowed, however not arbitrary ones, but within a set framework:

1) Expropriation ("to deprive someone of his possessions"), meaning deprivation of the right to property and other property rights, is only allowed if a) it is in the public interest, b) it is carried out under conditions specified by law and c) it is in accordance with general principles of international law. Respect of general principles of international law requires extension of compensation for expropriation.

2) States are allowed, in compliance with law, to "control the use of property", i.e. to restrict the manner of exercising the right to property and other property rights, their disposal etc. a) if it is necessary in order to pursue the general interest, and b) in order to secure the payment of taxes or other contributions or penalties.

Constitution of the Republic of Croatia

Relevant to Article 1 of the First Protocol are Articles 3 and 48 - 52 of the Constitution of the Republic of Croatia.

Article 3.
...inviolability of ownership ....highest value of the constitutional order of the Republic of Croatia.

Article 48.
The right of ownership shall be guaranteed.
Ownership implies obligations. Holders of the right of ownership and ist users shall contribute to the general good.
A foreign person may acquire the right of ownership under the conditions spelled out by law.
The right of inheritance shall be guaranteed.

Article 49.
Entrepreneurial and market freedom shall be the basis of the economic system of the Republic.
The state shall ensure all entrepreneurs an equal legal status on the market. Monopolies shall be forbidden.
The Republic shall stimulate economic progress and social welfare and shall care for the economic development of all regions.
The rights acquired through the investment of capital shall not be lessened by law, nor by any other legal act.
Foreign investors shall be guaranteed free transfer and repatriation of profit and the capital invested.

Article 50.
Ownership may in the interest of the Republic be restricted by law, or property taken over against indemnity equal to its market value.
Entrepreneurial freedom and property rights may exceptionally be restricted by law for the purposes of protecting the interests and security of the Republic, nature, the human environment and human health.

Article 51.
Everyone shall participate in the defrayment of public expenses, in accordance with their economic possibilities.
The tax system shall be based on the principles of equality and equity.

17.2. Protection of Property Rights in Croatian Legislation

In accordance with, and pursuant to the Constitution of the Republic of Croatia, laws regulating the area of ownership have been enacted. These laws can be systematized in three groups:

1. general laws
2. laws regulating transformation of assets in social ownership (privatization) and restitution of sequestrated property
3. special laws.

17.2.1. General Laws

The Law on Property and Other Property Rights (OG 91/1996) prescribes the equality of all subjects in terms of property and other property rights, and uniformity of ownership rights, authorizations of the owner, indemnity in the case of expropriation in public interest, or restriction on the exercise (use) of property rights due to harmonization with public interest and the rights of others.

The Law on Property and Other Property Rights also sets forth the rules on the application of its provisions to foreign citizens.

The Law on Land Registers (OG, 91/96) prescribes the manner of keeping land registers on the actual status of the real estate, which is relevant for legal affairs.

The Law on Lease of Business Premises (OG, 91/96) regulates the establishment and termination of lease of business premises, and the mutual rights and obligations of the lease-giver and the lease holder, and constitutes a special regulation in relation to the Obligations Act.

The Law on Inheritance (OG, 47/78) stipulates the rules on inheritance law and there are no remarks to be made from the viewpoint of Protocol 1, Article 1.

The Law on Obligatory Relations stipulates the principles of contractual and other obligatory relations in the trade of goods and services. When incorporating this Law in Croatian legislation, and also subsequently in a few attempts, its previous text was amended, in order to harmonize it in terms of creating equality of subjects, freedom of disposal and freedom of contracting, with the Constitution of the Republic of Croatia (in relation to Article 180 of this law see Special Laws).

The Law on Expropriation (OG 9/93) sets forth the conditions under which someone may be deprived of his right to property, of real estate (expropriation) in public interest, and of the right to indemnity. The indemnity amounts to the equivalent of the market value of the property.

The Law on Environmental Protection stipulates the restrictions on property rights regarding land located inside protected areas (national parks etc.) The owners are entitled to an indemnity prescribed by law for the restrictions stipulated by this law.

17.2.2. Laws Regulating the Transformation of Assets in Social Ownership (Privatization) and Restitution of Expropriated Property

The Law on Transformation of Public Companies (OG, 19/91) regulates the transformation of companies with public capital whose owner has been established. According to Article 5 of this Law, employees of such a company, as well as former employees, were able to acquire ownership in the company by purchasing shares of a maximum value of 20,000 DEM, as prescribed by law. The law underwent numerous

amendments, but in the text published in the official gazette, no. 27/91 there are no discriminatory provisions, nor provisions contravening Protocol 1, Article 1.

The Law on Sale of Apartments With Tenancy Rights (OG 27/91) regulates the conditions and manners of selling apartments with tenancy rights. According to this law, the right to purchase an apartment was granted to all tenants who had been occupying the apartment as holder of tenancy rights at the day of the coming into force of this Law, as well as persons to whom such rights have been transferred after the coming into force of this law (members of the family household). The law was subject to numerous amendments. However, in the text published in the official gazette no. 27/91 there are no discriminatory provisions, nor provisions violating the right to a home, or to peaceful enjoyment of property in the sense of the European Convention on Human Rights. Direct effect on the enforcement of this law was provided by Article 102a of the Law on Housing Relations.

The Law on Compensation for Property Expropriated during Yugoslav Communist Rule (OG 92/96) aims at satisfying the guarantee of the right to property by providing the right to compensation in value or to restitution of property which was taken from its previous owners by the Yugoslav Communist Authorities and turned into general property, state, socially owned or associate property by confiscation, nationalization, agricultural reform or in other ways. Compensation for such property is provided in money or securities, and in exceptional cases it is restituted in natura (this applies to undeveloped construction land). Based on the Law on Compensation, the former owners will only be granted rights, and they have no rights until the relevant body of state authority acknowledges such a right on the basis of the law.

The laws mentioned in 17.1. and 17.1.2. protect in their provisions the institute of "property rights" (right to peaceful enjoyment of property), while deprivation of and restrictions on property rights are stipulated by these laws in the interest of the Republic of Croatia (public interest), so that there are no remarks to be made on account of these laws, because they are based on the Constitution of the Republic of Croatia and comply with Protocol 1, Article 1.

17.2.3. Special Laws

In the Republic of Croatia numerous special laws have been enacted or provisions have been added to individual laws, as a result of the armed aggression on the Republic of Croatia, which restrict the right to peaceful enjoyment of property under Protocol 1, Article 1. However, the provisions of such laws ensure the accommodation of displaced persons, refugees and families of defenders in the Homeland War. The laws are stated in the order of their enactment.

The Law on Temporary Occupation of Apartments (OG 66/91, 76/93). This law sets forth the conditions and manners of temporary occupation of apartments in social ownership, or in the ownership of companies and legal persons, respectively, which

are emptied or abandoned, in order to accommodate displaced persons, refugees and persons and families of defenders in the Homeland War.

Empty, emptied or abandoned apartments were allocated by a body determined by law "for a maximum of one year from the date of the ruling, and to displaced persons only until they are able to return to their previous place of residence". By the reenacted law from 1993, the relevant body was authorized to prolong the period of temporary occupation of the apartment, while the conditions, under which displaced persons, refugees and families of defenders of the Republic of Croatia, persist.

The Law on Housing Relations (OG 51/85, 42/86, 22/92 and 79/93) stipulates in ist reenactment published in OG 22/92:

Article 102a
Tenancy rights expire to those who participated or participate in hostile activities against the Republic of Croatia.

Upon a court decision canceling a contract for occupation of an apartment, the owner of the apartment in question shall decide whether to offer the occupant's family the apartment, or some other adequate apartment.

The Law on Housing Relations became ineffective on the date of the coming into force of the Law on Rental (OG 91/96). According to Article 52 of the Law on Rental "Proceedings initiated according to the provisions of the Law on Housing Relations (OG 51/85, 42/86, 22/92 and 70/93) until the coming into force of this law shall be carried out according to that law."

The Law on Amendments to the Law on Sale of Apartments With Tenancy Rights (OG 58/95) stipulated provisions, which were repealed by the Constitutional Court decision no. U-I-697/1995 dated January 29, 1997. The provisions repealed by the Constitutional Court prescribed the prohibition against purchase of apartments by persons participating in hostile activities against the Republic of Croatia and other provisions which constituted a legal obstacle to the purchase of apartments, or the acquisition of the right to ownership of the apartment to which such persons had the tenancy rights.

The Law on Temporary Taking Over and Administering Certain Property (OG 73/95 and 7/96) prescribes sequestration of property in order to protect such property and secure the claims of creditors vis-a-vis such property. This is compatible in principle with the competence of the state to regulate, in the interest of the Republic (public interest), the use of abandoned property. However, individual provisions raise doubts as to the conformity with the Constitution of the Republic of Croatia and Protocol 1, Article 1. These are especially the following provisions:

The law prescribes sequestration of abandoned property in order to protect such property and to secure the claims of creditors vis-a-vis this property. This is in

principle in conformity with the authorization of the state to determine, in the public interest, the use of property. The contravention of the guarantee of the right to property arises as regards the provisions contained in Articles 8, 9, paragraph 2 and Article 11, paragraphs 1 and 4 of the Law, which a) allow the allocation of sequestrated property to other persons "for their possession and use" and regulates the status of these persons in a manner so that they possess and can use the property primarily in their interest, and not in the owner's best interest, b) set forth the invalidity of legal dispositions concerning the property made by the owner during the time of sequestration and c) excludes the possibility of the owner to be granted unhindered access to his/her property after termination of the sequestration.

The legal provision made by the owner in terms of his sequestrated property is null and void, with some exceptions (Article 8). It would not contravene the guarantee of the right to property ownership as set out in Article 1 of the First Protocol, if it were stipulated that the effect of the owner's legal disposition is suspended while the sequestration is in force. But by determining the owner's legal dispositions as null and void, the limit to "control the use of property in accordance with the general interest" has been exceeded and this provision is not in accordance with the guarantee of the right to property provided in Article 1 of the First Protocol.

Even after the sequestration has ended, the owner's right to property would remain encroached upon, to the benefit of the person who was given his property for "possession and use". This is due to the fact that a person whose "right to possession and use of property expired, cannot be deprived of the property before he is ensured possession and use of some other adequate property" (Article 11, paragraph 4). The owner is, therefore, unable to directly own his property, until the person who was given his property is not provided possession and use of some other adequate property. This is a severe restriction on "peaceful enjoyment of his possessions", which is not limited by any term, so that, basically, it can be permanent. The fact that sequestration of some property has ceased to be in force, and that the "right to possession and use of property" of the person who was given the property by the Commission has also expired, still does not enable the owner to regain direct possession of his property. Such restriction on the owner's rights is opposed to the guarantee of the right to property in Article 1 of the First Protocol.

The Constitutional Court repealed by its decision of September 25, 1997, Articles 8, 9, paragraph 2 and Article 11, paragraphs 1 and 4 for reasons of unconstitutionality. In its reasons the Constitutional Court stated that Article 8 was repealed because it prevented Croatian citizens from disposing of their property because they temporarily or permanently left Croatian territory. Article 9, paragraph 2 and Article 11, paragraphs 1 and 4 are repealed because they put one group of citizens in an unequal position.

The Law on Rental of Apartments on the Occupied Territory (OG 73/95). This law regulates the rent of apartments for which, according to this law, the tenancy rights have expired and which are in social ownership, state ownership, or ownership of

legal persons who acquired such a right on the basis of special regulations, and which are located in the formerly occupied and now liberated areas of the Republic of Croatia: "Tenancy rights on apartments under this law shall expire by virtue of the law if the holder of tenancy rights has abandoned the apartment and has not occupied it for more than 90 day since the date of coming into force of this law."

If members of the family household of the holder of tenancy rights have remained in the apartment, the landlord as determined by this law shall decide whether he will let them this or some other adequate apartment" (Article 2).

The Law on Amendments to the Law on Status of Displaced Persons and Refugees (OG, 39/95) stipulates in Article 2: "All procedures of forced expulsion of displaced persons shall be halted until the conditions for their return have been created or until, upon their consent, they are provided some other adequate accommodation at the place of their accommodation or some other place. The provision of this paragraph shall refer to displaced persons who have been accommodated after March 1, 1995."

The law sets forth the status of displaced persons and refugees, which in principle does not affect the guarantee of the right to property in Article 1 of the First Protocol. However, Article 14, paragraph 2 of this law is not in accordance with the guarantee of the right to property, because it excludes the possibility that the owner, through the court or some other competent state authority, regains possession of his building or apartment, where refugees have been unlawfully accommodated. This provision stipulates the interruption of all proceedings before the judicial or administrative authority concerning expulsion of displaced persons from a building or apartment belonging to others. All of these proceedings are suspended until the conditions for the return of the displaced persons have been created, or until they are provided some other adequate accommodation, which they voluntarily accept. The owner of the building or the apartment is prevented from the "peaceful enjoyment of his possessions", for a very long time, and maybe even permanently, which is contrary to the guarantee of ownership in Article 1 of the First Protocol. At the same time, the owner's right to an effective legal remedy against violation of his property (Article 13 of the Convention) is derogated from, because Article 14, paragraph 2 of the Law renders ineffective the legal remedy he would otherwise be entitled to.

The Law on Amendments to the Obligations Act (OG 7/96). This Law waivers the provision of Article 180 of the Obligations Act, which prescribed compensation for damage incurred as a result of terrorist acts. According to Article 2 of this Law: "Procedures for compensation initiated according to the provisions of Article 180 of the Obligations Act shall be halted. Procedures stated in paragraph 1 of this Article shall be resumed after a special enactment is passed which will regulate the legal liability for damage incurred as a result of terrorist acts."

It can be concluded that the general laws of the Republic of Croatia regulating the issue of property rights do not contain provisions contravening the provisions of the

Constitution of the Republic of Croatia, which guarantee the right to ownership, or Protocol 1, Article 1 regulating the right to peaceful enjoyment of possessions.

Some special laws have been enacted on the basis of the authorization in Article 50, paragraph 2 of the Constitution of the Republic of Croatia, according to which ownership may, in the interests of the Republic, be restricted by law. The mentioned provisions of the Law on Temporary Take Over and Administration of Certain Property, The Law on Amendments to the Law on Status of Displaced Persons and Refugees and the Law on Amendments to the Obligations Act meet the requirement of public interest, but not the principle of international law as set out in Article 1, Protocol 1 according to which restrictions on ownership must be compensated. And in spite of the fact that these laws meet the standard of "necessity in a democratic society", because they were enacted during the Homeland War, they are also disputable from the point of view of reasonable time during which ownership is restricted in the public interest.

18. Right to Education: Protocol 1, Article 2

> *Protocol 1, Article 2.*
> *No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.*

18.1. Constitutional Protection of the Right to Education

The provisions of the Constitution of the Republic of Croatia concerning the right to education are contained in Articles 65, 66 and 67.

Article 65 of the Constitution sets forth:

> *"Primary schooling shall be compulsory and free.*
> *Everyone shall have access, under the same conditions, to secondary and higher education in accordance with his abilities."*

Article 66 of the Constitution states that "*Under conditions specified by law, citizens may open private schools and teaching establishments.*", while in Article 67 of the Constitution it is stated that "*The autonomy of universities shall be guaranteed*"". It is emphasized in paragraph 2 of Article 67 of the Constitution that "*Universities shall independently decide on their organization and work in conformity with the law.*"

18.2. Protection of the Right to Education in Croatian Legislation

The Constitutional Law on Human Rights and Fundamental Freedoms and Rights of Ethnic and National Communities or Minorities in the Republic of Croatia, beside the mentioned Articles of the Constitution, prescribes in Articles 14, 15, 16 and 17 also

the right to upbringing and education of members of ethnic and national communities or minorities.

18.3. Treaties signed by the Republic of Croatia relating to the right to education are the International Covenant on Economic, Social and Cultural Rights (Articles 13 and 14), Convention on the Rights of the Child (Articles 28 and 29), and the UNESCO Convention Against Discrimination in Education.

The most important laws of the Republic of Croatia dealing with the mentioned rights are:
- *Law on Pre-School Upbringing and Education* (OG 10/1997) - (Article 1, paragraph 1, Article 3, paragraph 2, Article 15, paragraph 1, sub-paragraph 6);
- *Law on Social Care of Pre-School Children* (OG 18/1991, 27/1993);
- *Law on Elementary Education* (OG 59/1990, 26/1993, 27/1993 and 77/1995) - (Article 3, paragraph 2, Article 7, Article 45, paragraph 1, Article 48, Article 60, paragraph 1, Article 61, paragraph 1, Article 63, Article 64, Article 84 and Article 96);
- *Law on Secondary Education* (OG 19/1992, 26/1993, 50/1995) - (Article 3, Article 5, Article 72, paragraph 7 and Article 84);
- *Law on School Inspection* (OG 50/1995) - (Article 8, paragraph 1, items 10 and 11, Article 9, paragraph 2, Article 29, paragraph 1, sub-paragraph 1, 2 and 8);
- *Law on Recognition of Foreign School Reports and Diplomas* (OG 57/1996) - (Articles 3, paragraph 1 and 2);
- *Draft Law on Public and Adult Education Centers* (Article 1).

The Law on Elementary Education regulates by the majority of its provisions the obligation of elementary education for children and the parents' obligations in this respect, as spelled out by the Constitution.

The provisions of the Law on Elementary Education supplement the provision of the Constitution of the Republic of Croatia, according to which primary education is compulsory and free, and this right is comprehensively standardized, beginning with Article 3, paragraph 2, which stipulates that primary education is compulsory for children from the age of 6 until the age of 15. It is important to emphasize that an elementary school pupil cannot be excluded from school during the time of his compulsory schooling. Elementary education includes all children, also those with development disorders, children committed to health care or social care institutions, children suffering from chronic illness and children committed to institutions founded by the judicial bodies.

According to the Law on Secondary Education, secondary education is accessible to everyone under equal conditions, according to his/her abilities, in accordance with this Law.

The right to education is not denied to a pupil on whom has been imposed the measure of expulsion from school, because the Law grants him the right to pass his semester exams in the same or in some other school.

Secondary schooling of members of ethnic and national communities or minorities is implemented in conformity with the provisions of the Constitutional Law on Human Rights and Freedoms and Rights of Ethnic and National Communities or Minorities in the Republic of Croatia, and other laws and provisions regulating their rights.

The Law on Secondary Education regulates also the issue of adult education (Articles 25, 26, 27 and 28). In connection with Article 27 of this Law we would like to mention that the Ministry of Education and Sport has set up a Draft Law on Public or Adult Education Centers. With respect to Article 2 of the First Protocol, we would like to cite paragraph 1, Article 1:

"For performance of activities of elementary school and secondary school education of adults, activities of music and related school which do not constitute part of the regular school system, public cinematography activities, press and publishing activities, radio and television broadcasting and performance of activities related to training, improvement and retraining of young people and adults outside the system of regular education, units of local self-government shall be entitled to establish public institutions for permanent education and culture, which are to be called "public education centers" or "adult education centers".

By the provisions of the Law on School Inspection, regulating activities, rights, duties and competencies and methods of work of the school inspectorate of the Ministry of Education and Sports, the enforcement of the Law on Primary Education and Law on Secondary Education is secured, and measures for regular education and schooling are envisaged.

Pursuant to Article 3, paragraph 1 of the Law on Recognition of Foreign School Reports and Diplomas, regarding continuation of education in the Republic of Croatia, Croatian citizens and members of the Croatian people, who are not Croatian citizens, have the right to recognition of the full identity of foreign diplomas.

According to paragraph 2 of the same Article, foreign citizens may apply for the full recognition of a foreign school diploma in the Republic of Croatia, under conditions of reciprocity with the respective countries, if they have a legal interest in this recognition in the Republic of Croatia.

According to the Law on Institutions of Higher Education (OG 59/1996), both nationals and foreigners are entitled to found universities, colleges and other institutions of higher education.

Article 58 of the same Law regulates the enrolment for studies in the Republic of Croatia and states:
- the right to enrolment is equally granted to citizens of the Republic of Croatia and members of the Croatian people residing outside the Republic of Croatia, as well as foreign citizens and stateless persons permanently residing in the Republic of Croatia;

- according to criteria determined by the Ministry of Science and Technology, or on the basis of treaties, the right to enrolment for study is also granted to aliens and stateless persons without permanent residence in the Republic of Croatia.

Classes are taught in the Croatian language in higher education institutions. The institution may teach entire programs or parts thereof in one of the global languages, under conditions defined by the Articles of Association (Article 6).

As far as religious higher education institutions are concerned, if they meet the conditions set forth in this Law, and if they have been founded according to general enactments of religious communities, they have all the rights provided for universities or faculties. As concerns the position of religious establishments acting as faculties within the framework of a public university, these are regulated by contract signed between the university and the founder of the establishment (Article 18).

The Law on Professional Titles and Academic Degrees (OG 52/1971) establishes that professional titles and academic degrees obtained abroad, regardless of whether they have been obtained by Croatian citizens or aliens, are subject to validation (Article 12).

Some educational issues are regulated in the Law on Employment (OG 59/1996). The Croatian Employment Agency provides, through employment brokerage, permanent professional assistance to unemployed and other persons in their search for professions and employment adequate to their professional and other working abilities on the one hand, and the human resources of the employers on the other.

The educational activity carried out by the Croatian Employment Agency encompasses professional training, retraining and specialized training, and enables unemployed and other persons to acquire and supplement their knowledge and skills necessary for employment and change of employment (Article 7).

Professional rehabilitation enables disabled persons and persons with reduced working ability, to acquire the knowledge and skill necessary for employment, aiming at the most equal participation in the labor market (Article 9).

18.3. Constitutional Court Practice

In its Decision no. U-III-248/1992 of February 24, 1993, the Constitutional Court dismissed the constitutional complaint of M.K. from Z.

M.K. had filed a constitutional complaint with the Constitutional Court against the decision of the District Court (dismissed action against the head of the Music School in Z., related to her written notification on his son's (M.K.) loss of the right to further schooling) claiming that by the said decision his son's, a minor's, constitutional right to secondary education had been violated.

The Constitutional Court decided that the complaint was not justified, because the challenged ruling did not violate the constitutional right of D.K. to secondary education as set forth in Article 65, paragraph 1 of the Constitution of the Republic of Croatia. Due to the fact that the previous courts had established that, in the decision of the Music School professor, no elements of the criminal offense of abuse of power or position could be found, the mentioned constitutional right has not been violated.

The Constitutional Court mentioned in the Decision that this constitutional right is exercised on the basis of equal, legally stipulated conditions for individual categories of secondary education, whereby the candidates for secondary school education must meet those requirements, if they wish to obtain such an education.

It is evident from this case that no violations of constitutional or legal provisions have occurred, and the complainants have failed to interpret the constitutional or legal provisions in their spirit.

We would like to emphasize that, for the review of the compatibility of the Final Draft of Law on Education and Schooling in Languages of Ethnic And National Communities or Minorities with the provisions of the Convention and its Protocols, a special working group has been appointed which will establish whether the mentioned Draft complies with the Convention and its Protocols.

19. The Right to Free Elections: Protocol 1, Article 3

> *Protocol 1, Article 3.*
> *The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.*

19.1. Constitutional Protection of the Right to Free Elections

Article 3 of the First Protocol of the Convention prescribes the obligation to hold free elections by secret ballot under conditions ensuring the free expression of the opinion of the people in the choice of the legislature.

Based on the Constitution, Croatian election legislation fully expresses and provides the opportunity for the application of the provisions of Article 3 of the First Protocol in terms of free elections, as will be demonstrated in a concise summary.

According to the Constitution of the Republic of Croatia from 1990, suffrage is universal and equal, and granted to all citizens of the Republic of Croatia who have reached the age of eighteen years. Thus, as far as requirements are concerned, active and passive suffrage have become counterbalanced. Suffrage is exercised at direct elections by secret ballot (Article 45, paragraph 1 of the Constitution). Thus, the system of direct elections and secret ballot are constitutional categories which cannot be amended by election legislation.

In view of the extensive number of Croatian citizens residing temporarily or permanently abroad, the Constitution of the Republic of Croatia, as well as some other democratic constitutions of countries with extensive emigration, stipulates the obligation of the Republic, i.e. its competent bodies, in relation to the elections for the Croatian Parliament and the President of the Republic, to ensure suffrage to all citizens who, at the time of the elections, find themselves outside its borders. This obligation of the competent bodies of the Republic shall, according to the Constitution, be met by enabling Croatian citizens to vote in the states in which they find themselves, or in any other way specified by law. (Article 45, paragraph 2 of the Constitution).

As far as election procedure, and determination of method of distribution of mandates of representatives according to the election results, are concerned, the Constitution of the Republic of Croatia contains only general and fundamental provisions, and leaves their detailed elaboration to election legislation. It needs to be mentioned that such an approach to constitutional regulation of these issues can also be found in the majority of modern European constitutions.

Following the mentioned approach, the Constitution sets forth that representatives in the Chambers of the Croatian Sabor are elected for a term of four years, and that no one may at the same time be a representative in the Chamber of Representatives and the Chamber of Counties (Article 72, paragraph 1 and 2 of the Constitution).

According to the Constitution, the exact number of representatives, within the range stated in Article 71 of the Constitution, as well as the conditions and procedure for the election of representatives to the Chambers of the Croatian Parliament, is regulated by law.

19.2. Protection of the Right to Free Elections in Croatian Legislation

The election of representative to the Chambers of the Parliament is regulated by the Law on Election of Representatives to the Parliament of the Republic of Croatia (OG 22/1992, 1/1993, 30/1993, 11/1994, 68/1995).

The Chamber of Representatives in its current composition, elected at the elections of October 30, 1995, has 127 representatives, and the Chamber of Counties - elected on April 13, 1997 - has 68 representatives (three representatives per county from 20 counties and the City of Zagreb, which has the status of a county, and 5 representative who, according to Article 71, paragraph 4 of the Constitution, are nominated by the President of the Republic).

Representatives have no imperative mandate. (Article 74, paragraph 1 of the Constitution, Article 7 of the Act on Election of Representatives). This means that representatives are not accountable to their voters, that they are not revocable nor due to represent the positions or possible directions of their voters.

Elections for representatives are scheduled by the President of the Republic. From the day of scheduling until the day of the holding of the elections, a term of at least 30 days must pass. The date of the election is determined in the decision on scheduling the election (Article 4 of the Act on Election of Representatives).

Candidates for representatives and their substitutes may be proposed in the Republic of Croatia by registered political parties and voters, either jointly or individually. When nominating candidates, parties may form coalitions, so that two or more of them may propose one candidate and his substitute, as well as a joint list. Political parties nominate candidates for representatives and their substitutes in the manner set forth in their party laws, or based on a special decision rendered on the basis of law. When one or more parties propose a candidate, or a list of candidates, the candidacy does not need to be supported by a certain number of signatures of citizens. On the other hand, if the candidate or list of candidates is proposed by voters individually or jointly (independent candidate and independent list), a legally stipulated number of signatures must be gathered (Article 10 - 14 of the Act on Election of Representatives).

The procedure of determining the candidacies for representatives is 14 days from the day of scheduling the elections. After expiry of this term, the State Electoral Council must within 48 hours publish the list of all validly proposed candidates, or lists of candidates, for the Chamber of Representatives in all daily newspapers of the Republic of Croatia and on national television. The same obligation applies to county electoral commissions, if county lists in the individual counties for election to the Chamber of Counties (Articles 15 and 16 of the Act on Election of Representatives) are to be published.

The period of institutionalized election campaigning runs from the day of publication of the lists of individual candidates and lists until 24 hours before the day of the election. During this term, all candidates and all political parties, which support individual candidates or lists of candidates, have an equal right to present their programs and to publish their election propaganda in all means of public information in the Republic of Croatia. During this period, Croatian Radio-Television is obliged to provide all political parties and independent candidates participating in the election of representatives equal broadcasting time on radio and television in order to present their programs (Article 19 of the Act on Election of Representatives).

During the day of the election, and 24 hours prior to the election, any election campaigning, as well as anticipatory publication of results, or forecasts of election results (Article 20 of the Act on Election of Representatives), is prohibited.

Representatives of the Chamber of Counties of the Croatian Parliament are elected by a combination of proportional and relative majority of vote system, so that 92 of the total of 127 representatives are elected by proportional election system, and results are calculated according to the D'Hondt method. A prohibitive clause or minimum

percentage of 5% exists for the list of an individual party, 8% for a list of two parties and 11% for a coalition of three or more parties. 32 representatives are elected by relative majority of vote in the constituencies, in each of which one representative is elected.

Of the 92 representatives elected by proportional representation, 80 are elected from state lists (the entire state acts as one constituency) by all Croatian citizens with voting right who have their residence in the territory of the Republic of Croatia; 12 representatives are elected from special lists by Croatian citizens with voting right, residing outside the territory of the Republic of Croatia (Articles 20 - 25 of the Act on Election of Representatives). This special feature of the electoral system is based on Article 1, paragraph 2 of the Constitution, which explicitly prescribes that: "Power in the Republic of Croatia derives from the people and belongs to the people as a community of free and equal citizens", meaning all citizens regardless of the place of their residence. This constitutional provision is especially elaborated in Article 45, paragraph 1, where it is explicitly stated that:"All citizens of the Republic... shall have universal and equal suffrage...", meaning all citizens regardless of whether their place of residence is in the territory of the Republic of Croatia or abroad. Based on these provisions, due to the fact that in a mixed electoral system it is technically impossible to ensure the equality of voters who are not residents of the Republic of Croatia (because they could vote for only those representatives who are elected from federal lists, but not for those who are elected in the constituencies by relative majority), and that the share of these Croatian voters accounts for slightly over 10%, the mentioned solution of offering them special lists of 12 representatives for the Chamber of Representatives (they do not elect representatives from the state lists, nor in the constituencies by relative majority) has been introduced. By applying this method, their constitutionally guaranteed equality of suffrage can be secured.

Of 32 representatives elected by a relative majority of vote in the constituencies, 28 are elected by Croatian citizens, on the basis of universal and equal suffrage, so that the territory of the Republic of Croatia is divided in 28 constituencies with approximately an equal number of inhabitants. Four representatives are elected by Croatian citizens who declare themselves to be members of national minorities, having a share of less than 8% in the total population of the Republic of Croatia: one representative of the Italian, one of the Hungarian, one of both the Czech and Slovak, and a joint one of the German, Austrian, Ukrainian and Ruthenian Minorities. Members of the Serbian minority elect, based upon a special provision of the Act on Election of Representatives, three representatives to the Chamber of Representative of the Croatian Parliament.

Representatives of the Chamber of Counties of the Croatian Parliament are elected by taking each of the 20 counties and the City of Zagreb as a constituency. All voters casting their votes elect three representatives from the county list of each county, or the City of Zagreb, respectively. The D'Hondt method of calculation is applied to determine the number of representatives to be elected from each county list (Article 28 of the Act on Election of Representatives).

The protection of the suffrage of all participants in the election of representatives is performed by the State Electoral Commission of the Republic of Croatia and the Constitutional Court of the Republic of Croatia. The State Electoral Commission is composed of a president and four members, each of whom has a substitute, who is appointed by the Constitutional Court, among the judges of the Supreme Court and other eminent lawyers. The State Electoral Commission of the Republic of Croatia ensures the lawful preparation and implementation of elections of representatives, supervises the regularity of election campaigns and decides in the first instance on objections raised on irregularities in the candidacy procedure and the procedure of election of representatives (Articles 30 and 31 of the Act on Election of Representatives).

The Constitutional Court of the Republic of Croatia supervises the constitutionality and legality of elections of representatives and decides in the second instance in electoral disputes, or on appeals against the ruling of the State Electoral Commission of the Republic of Croatia in electoral objections (Article 53 of the Act on Election of Representatives).

Due to the fact that the President is elected in direct elections, also on the basis of universal and equal suffrage, his election should briefly be mentioned. Election of the President of the Republic is regulated in Article 95 of the Constitution, which contains not only fundamental provisions, but partly also provisions on the election procedure itself. According to that Article: "The President of the Republic shall be elected, on the basis of universal and equal suffrage at direct elections by secret ballot, for a term of five years. No one shall be President of the Republic more than twice. The President of the Republic shall be elected by a majority vote of all electors who voted. If none of the candidates has obtained such majority, a new election shall be held after 14 days. The two candidates who at the first election obtained the largest number of votes shall have the right to stand at the new election. If one of the candidates who obtained the largest number of votes withdraws his candidature, the candidate who is next in the number of votes obtained shall acquire the right to be elected. Elections for the President of the Republic shall be held no less than 30 and no more than 60 days before the expiry of his term. Before assuming duty, the President of the Republic shall take a solemn oath swearing loyalty to the Constitution. The election of the President of the Republic shall be regulated by law."

As far as more detailed elaboration on these constitutional provisions is concerned, this is provided in the Law on Election of the President of the Republic of Croatia (OG 22/1992, 42/1992). The candidate for President of the Republic can be proposed, as stated by law without any special requirements, as in the case of candidacies of representatives proposed by political parties, individually or jointly, as well as by voters, individually or jointly. The only difference is that for a candidacy for President of the Republic a minimum of 10,000 signatures of voters is required, which is not the case with candidates for representatives (Articles 7 and 8 of the Act on Election of the President). This provision has been adopted due to the fact that the President of the

Republic is the president of all Croatian citizens, and therefore, it is not enough that he is proposed by one, or more parties or by one or more voters, in order to become a candidate.

The remaining provisions of the Act on Election of the President of the Republic, concerning the determination and publication of the candidacy, election campaign and electoral silence, implementation of the election, as well as protection of electoral rights, are mutatis mutandis identical to those mentioned earlier in the context of election of representatives to the Chambers of the Croatian Parliament, and there is no need for a special analysis.

In conclusion, it has to be remarked that in a basically identical electoral system, i.e. combining proportional and relative majority, as well as following an identical procedure, also councillors for bodies of units of local self-government and administration - municipal and city councils and county assemblies - are elected (see Law on Election of Representatives to Representation Bodies of Units of Local Self-Government and Administration, OG 59/1996).

LAWS AND OTHER REGULATIONS WHOSE CONFORMITY WITH THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS HAS BEEN REVIEWED BY THE WORKING GROUP OF THE GOVERNMENT OF THE REPUBLIC OF CROATIA

1. Constitution of the Republic of Croatia (OG 60/90)
2. Constitutional Law on Human Rights and Rights of Ethnic and National Communities or Minorities (OG 34/92, 68/95)
3. Constitutional Act on the Constitutional Court (OG 13/91)
4. Constitutional Law on the Cooperation of the Republic of Croatia with the ICTY (OG 32/96)
5. Law on Criminal Procedure (OG 34/93, 38/93)
6. Law on Criminal Procedure (adopted 1997)
7. Basic Criminal Act (OG 31/93, 35/93, 108/95, 16/96, 28/96)
8. Criminal Act (OG 32/93, 28/96 and 30/96)
9. Criminal Act of the Republic of Croatia (adopted on September 19, 1997)
10. Law on General Administrative Procedure (OG 53A/91)
11. Law on the System of State Administration (OG 75/93)
12. Law on Organization and Jurisdiction of Ministries and Bodies of Public Administration (OG 72/94 and 92/96)
13. Law on Civil Servants and Salaries of Holders of Judicial Offices (OG 74/94)
14. Law on Local Self-Government and Administration (OG 90/92, 94/93 and 117/93)
15. Law on the Areas of Counties, Towns and Municipalities of the Republic of Croatia (OG 90/92, 2/93, 5/93, 58/93, 10/94, 29/94 and 10/97)
16. Law on the City of Zagreb (OG 90(92, 76/93, 69/95 and 14/97)
17. Law on Election of the President of the Republic of Croatia (OG 22/92 and 42/92 and71/97)
18. Law on Election of Representatives to the Parliament of the Republic of Croatia (OG 22/92, 1/93, 30/93, 68/95 and 108/96)
19. Law on Election of Members of Representation Bodies of Units of Local Self-government and Administration and Units of Local Administration and Self-government (OG 90/92, 65/95 and 59/96)
20. Law on Referendum and Other Forms of Personal Participation of Citizens in State Government and Local Self-government (OG 33/96)
21. Law on Constituencies for the Election of Representatives to the Parliament of the Republic of Croatia (OG 68/95, 77/95, 82/95)
22. Law on Constituencies for the Election of Members of Representation Bodies of Units of Local Self-government and Administration and Units of Local Administration and Self-government (OG 90/92, 69/95, 59/96, 63/96 and 14/97)
23. Law on Public Registers (OG 96/93)
24. Law on Voters' Lists (OG 19/92)
25. Law on Personal Name (OG 69/92, 26/79)
27. Law on Political Parties (OG 76/93 and 111/96)

28. Law on Mental Care of Children of Pre-School Age (OG 18/91, 27/93)
29. Law on Elementary Education (OG 59/90, 26/93, 27/93, 77/95)
30. Law on Secondary Education (OG 19/92, 26/93, 27/93 and 77/95)
31. Law on Recognition of Equivalence of Foreign School Diplomas and Certificates (OG 57/96)
32. Law on Textbooks (OG 3/78 and 26/93)
33. Law on Education and Schooling in Languages of Nationalities (OG 25/79)
34. Law on Sport (OG 60/92, 25/93, 11/94 and 77/95)
35. Law on Technical Culture (OG 76/93 and 11/94)
36. Law on School Inspection (OG 50/95
37. Law on Internal Affairs (OG 29/91, 73/91, 19/92, 33/92, 76/94)
38. Law on Croatian Citizenship (OG 53/91, 70/91, 28/92, 113/93)
39. Law on Personal Identification Card (OG 53/91, 9/92, 26/93)
40. Law on PIN (OG 9/92)
41. Law on Residence and Dwelling of Citizens (OG 53/91, 26/93)
42. Law on Control of National Borders (OG 34/95)
43. Law on Movement and Residence of Aliens (OG 53/91, 22/92, 26/93, 29/94)
44. Law on Travel Documents of Croatian Citizens (OG 51/91, 64/92, 26/93, 29/94
45. Law on Arms (OG 46/97)
46. Law on Public Assembly (OG 29/92, 26/93)
47. Law on Offences Against Public Order and Peace (OG 5/90, 30/90, 47/90, 29/94)
48. Law on Safety on the Road (OG 56/96)
49. Law on Protection of Fire (OG 58/93)
50. Law on Fire-Fighting (OG 58/93 and 87/96)
51. Law on Transport of Dangerous Substances (OG 97/93, 34/95)
52. Law on Petty Offences (OG 2/73, 5/73, 21/74, 9/80, 25/84, 52/87, 27/88, 43/89, 8/90, 41/90, 59/90, 91/92, 22/95, 33/95)
53. Law on Marriage and Family Relations (OG 51/89)
54. Law on Execution of Sanctions Pronounced For Criminal Offences, Economic Transgressions and Petty Offences (OG 21/74, 19/90 and 66/93)
55. Law on Defense (OG 74/93)
56. Regulations on Compensation for the Work of Convicted Persons (OG 36/75)
57. Law on Securement of Funds, Exercise of Rights and Manner of Payment of Minimum Wages and Benefits to Certain Natural and Legal Persons (OG 109/93)
58. Labor Law (OG 38/95, 54/95, 65/95)
59. Law on Service in the Armed Forces of the Republic of Croatia (OG 23/95, 33/95)
60. Regulation on Service of Military Duty and Performance of Civil Service (OG 1/97)
61. Law on Public Information (OG 59/96)
62. Law on Temporary Take Over and Administration of Certain Property (OG 73/95)
63. Law on Institutions of Higher Education (OG 59/96)

64. Law on Tax Administration (OG 75/93)
65. Law on Professional and Academic Titles (OG 52/71)
66. Employment Law (OG 59/96)
67. Law on Institutions (OG 76/93)
68. Law on the Student Corps (OG 57/96)
69. Law on Health Care (OG 75/93, 11/94, 55/96 and 1/97)
70. Law on Status of Displaced Persons and Refugees (OG 39/95)
71. Law on Rental of Apartments in the Liberated Areas (OG 73/95)
72. Law on Health Measures For the Right to Free Decision on Giving Birth (OG 18/78)
73. Law on the Bar (OG 9/94)
74. Law on Courts (OG 3/94)
75. Law on Amendments to the Law on Courts (OG 100/96)
76. Law on High Judiciary Council (OG 58/93)
77. Disciplinary Code of the Armed Forces (OG 103/96)
78. Law on Criminal Offences of Subversive and Terrorist Activities Against State Sovereignty and Territorial Integrity of the Republic of Croatia (OG 74/92)
79. Distraint Law (OG 57/96)
80. Bankruptcy Law (OG 44/96)
81. Law on Protection of the Population from Infectious Diseases (OG 69/92, 26/93)
82. Law on Financial Police (OG 89/92)
83. Rules of Procedure on Internal Affairs of Regular Courts (OG 7/96)
84. Law on Amendments to the Obligations Act (OG 7/96)
85. Law on Obligatory Relations (OG 53/91, 73/91, 111/93, 3/94, 107/95, 77/96, 91/96)
86. Law on the Office for National Security (OG 37/95)
87. Regulation on Determination of Legal Persons in which Civil Service May Be Performed in the Republic of Croatia (OG 23/95, 35/95)
88. Law on Telecommunications (OG 53/94)
89. Law on Croatian Radio-Television (OG 43/92, 24/96)
90. Law on Associations (OG 70/97)
91. Law on the Croatian Chamber of Economy (OG 66/91)
92. Law on Trades and Crafts (OG 77/91)
93. Law on Public Notaries (OG 78/93)
94. Law on Tourism Associations and Promotion of Croatian Tourism (OG 30/94)
95. Trade Act (OG 11/96)
96. Law on Industrial Ownership (OG 53/91, 19/92)
97. Law on Transport in International Road Traffic (OG 53/91, 26/93, 29/94)
98. Law on Transport in Domestic Road Traffic (OG 77/92, 26/93 and 29/94)
99. Law on Housing Relations (OG 51/85, 42/86, 37/88, 57/88, 22/92, 58/93, 70/93)
100. Law on Editorship (28/83, 26/93)
101. Law on Land Books (OG 91/96)
102. Law on Lease of Business Area (OG 91/96)
103. Law on Inheritance (OG 47/78)

104. Law on Expropriation (OG 97/93)
105. Law on Sale of Apartments with Tenancy Rights (OG 27/91)
106. Law on Compensation for Property Expropriated During Times of Yugoslav-Communist Rule (OG 92/96)
107. Law on Temporary Occupation of Apartments (OG 66/91, 76/93)
108. Law on Rent (OG 91/96)
109. Law on Preschool Education and Schooling (OG 10/97)
110. Law on Ownership and Other Legal Matters (OG 91/96).