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Conflict of Laws Conventions and their Reception in National Legal Systems:

The Croatian National Report

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INTRODUCTION

This paper is written as the Croatian National Report for the Intermediary Conference of the International Academy of Comparative Law on the topic of the conflict of laws conventions and their reception in national legal systems. It is beyond doubt that international unification efforts often inspire national legislators and *vice versa*. The same is true for the field of private international law. One of the certainly most influential set of international instruments is the body of conventions concluded under the auspices of the Hague Conference on Private International Law. Hence, the analysis here focuses on the Hague conventions, in particular those to which the Republic of Croatia is a party. On the other hand, the CIDIP conventions, also at the attention of the General Report, are *per se* not relevant to Croatia; therefore they are not addressed in this Report.

At the outset, this Report offers information on the status of the individual Hague conventions in the Republic of Croatia, as well as discusses the Croatian participation at the sessions organised by the Hague Conference. The next chapter deals with the interrelation at the substantive level between the conflicts conventions and domestic conflicts law, and attempts to identify the patterns in which the Hague conventions influence Croatian domestic conflicts rules. Further scrutinized is the issue of potential divergences between

conflicts conventions and domestic law which, if they arise, are ordinarily resolved by virtue of the hierarchical order of legal instruments in the legal system in question. The final chapter is dedicated to a detailed analysis of the ways in which the Hague conventions are implemented in Croatia, as well as the ways in which they are applied in Croatian case law, with specific emphasis put on the child abduction cases.

A. STATISTICAL DATA

The first part of the paper deals primarily with statistical data and other matters related to the Hague conventions on private international law from the Croatian perspective. First, the conventions in force in the Republic of Croatia are enumerated, and subsequently, the issue of the succession of treaties following the Croatian independence is given some attention due to the relevance in this context and certain controversies it caused. Third subsection explains in details the Croatian membership in the Hague Conference and its participation at the sessions, while the last one addresses the issue of the signed and not ratified Hague conventions to the extent this is relevant to Croatia.

1) The Hague conventions in force in Croatia

The Republic of Croatia is a contracting party to eight Hague conventions. These are the following:

Convention of 1 March 1954 on Civil Procedure (*Konvencija od 1. ožujka 1954. o građanskom sudskom postupku*),[1]

Convention of 5 October 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions (*Konvencija od 5. listopada 1961. o sukobu prava u predmetu oporučnih raspolaganja*),[2]

[1] Službeni list FNRJ: Konvencije i drugi međunarodni sporazumi 5/1954; Decision on publication of multilateral international conventions to which the Republic of Croatia is a party based on the notification on succession, Narodne novine RH: Međunarodni ugovori 4/1994. The Convention was ratified/acceded by the former Yugoslavia on 12 March 1962 and it entered into force on 11 December 1962 It is applicable in Croatia on the basis of succession: on 5 April 1993, the Republic of Croatia declared itself to be bound by the Convention and no objection has been received from the Contracting States. The designated competent authority is the Ministry of Justice. On the Convention see, TRIVA, Siniša, Nova Haška Konvencija o građanskom postupku [New Hague Convention on Civil Procedure], Naša zakonitost, Vol. 17, 1963, pp. 114-132.

Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (*Konvencija od 5. listopada 1961. o ukidanju potrebe legalizacije stranih javnih isprava*),[3]

Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (*Konvencija od 5. listopada 1965. o dostavljanju u inozemstvo sudskih i izvansudskih pismena u građanskim i trgovačkim stvarima*),[4]

Convention of 4 May 1971 on the Law Applicable to Traffic Accidents (*Konvencija od 4. svibnja 1971. o zakonu koji se primjenjuje na prometne nesreće*),[5]

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[2] Službeni list FNRJ: Konvencije i drugi međunarodni sporazumi 10/1962, Decision on publication of multilateral international conventions to which the Republic of Croatia is a party based on the notification on succession, Narodne novine RH: Međunarodni ugovori 4/1994. The Convention was signed by the former Yugoslavia on 5 October 1961, ratified/acceded on 25 September 1962 and it entered into force in regard to the former Yugoslavia on 5 January 1964. It is applicable in Croatia on the basis of succession: on 5 April 1993, the Republic of Croatia declared itself to be bound by the Convention and no objection has been received from the Contracting States.

[3] Službeni list FNRJ: Konvencije i drugi međunarodni sporazumi 10/1962, Decision on publication of multilateral international conventions to which the Republic of Croatia is a party based on the notification on succession, Narodne novine RH: Međunarodni ugovori 4/1994. The Convention entered into force in regard to the former Yugoslavia on 24 January 1965 and is applicable in Croatia on the basis of succession: on 5 April 1993, the Republic of Croatia declared itself to be bound by the Convention and no objection has been received from the Contracting States. The designated competent authority is the Ministry of Justice.

[4] Narodne novine RH, Međunarodni ugovori 10/2005. The Convention was acceded by Croatia on 28 February 2006 and it entered into force on 1 November 2006. Declarations: Article 5 of the Convention (The Republic of Croatia declares that documents served pursuant to Article 5, paragraph 1, should be accompanied by a translation into the Croatian language.); Article 6 of the Convention (The Republic of Croatia declares that municipal courts according to residence, abode, and headquarters of the addressee of documents are competent for the completion of the certificate of reception of documents.); Article 8 of the Convention (The Republic of Croatia declares that is opposed to direct service of judicial documents upon persons within its territory through foreign diplomatic or consular agents, unless the document is to be served upon a national of the State in which the document originate.); Article 9 of the Convention (The Republic of Croatia declares that the documents served in accordance with Article 9 of the Convention are forwarded to the Ministry of Justice of the Republic of Croatia for the purpose of service to parties.); Article 10 of the Convention (The Republic of Croatia declares that it is opposed to the mode of service specified in Article 10 of the Convention.); Article 15 of the Convention (The Republic of Croatia declares that Croatian courts may give a judgement if all the conditions set out in paragraph 2 of Article 15 of the Convention are fulfilled.); Article 16 of the Convention (The Republic of Croatia declares that applications for relief set out in Article 16 of the Convention will not be entertained if they are filed after the expiration of a period of one year following the date on which the judgement was given.)

[5] Službeni list SFRJ: Konvencije i drugi međunarodni sporazumi 26/1976. The Convention was signed and ratified/acceded by the former Yugoslavia on 17 October 1975 and it entered into force on 16 December 1975. It is applicable in Croatia on the basis of succession: on 5 April 1993, the Republic of Croatia declared itself to be bound by the Convention and no objection has been received from the Contracting States. On the Convention see, Hrvoje BILIĆ-ERIĆ, Haška konvencija o mjerodavnom pravu za prometne nezgode [The Hague Convention on Law Applicable to Traffic Accidents], in: Zbornik 16. savjetovanja o obradi i likvidaciji automobilskih šteta, Hrvatski ured za osiguanje, Opatija, 2008, pp.153-162; Marijan ĆURKOVIĆ, Novo EU kolizijsko pravo za odgovornost za šete u cestovnom prometu [The New EU Conflict of Laws concerning Liability for Damages in Road Traffic], Hrvatska pravna revija, Vol. 8, No. 3, 2008, pp. 33-39; Ivo GRBIN, Napomene u vezi Konvencije koja se primjenjuje na prometne nezgode [Notes on the Convention that Applies to Traffic Accidents], Privreda i pravo, No. 10, 1976, pp. 57-59; Branko JAKAŠA, Nekoliko napomena uz Konvenciju koja se primjenjuje na prometne nesreće [Several Notes on the Convention Applicable to Traffic Accidents], Privreda i pravo, No. 5, 1977, pp. 7-19; Mihajlo JEZDIĆ, Koliziono regulisanje objektivne odgovornosti sopstvenika motornog vozila za štetu prouzrokovanu u drumskom saobraćaju [Conflits de lois concernant la responsabilité objective du propriétaire de l'automobile pour le dommage causé dans le trafic routier], Jugoslovenska revija za međunarodno pravo, Vol. 1, 1969, pp. 28-40; Željko MATIĆ, Međunarodno privatno pravo vanugovorne odgovornosti za štetu kod saobraćajnih nezgoda na cestama [Droit

Convention of 2 October 1973 on the Law Applicable to Products Liability (*Konvencija od 2. listopada 1973. o zakonu koji se primjenjuje u slučajevima odgovornosti proizvođača za svoje proizvode*),[6]

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (*Konvencija od 25. listopada 1980. o građanskopravnim vidovima međunarodne otmice (odvođenja) djece*)[7] and

Convention of 25 October 1980 on International Access to Justice (*Konvencija od 25. listopada 1980. o olakšanju međunarodnog pristupa sudovima*).[8]

As evident from the list and details above, the majority of the Hague conventions to which the Republic of Croatia is a contracting party, date back to the time of the former Socialist Federative Republic of Yugoslavia (hereinafter: the former Yugoslavia of the SFRY). One convention, the 1980 Hague Convention on the Civil Aspects of International Child Abduction, has been acceded to by the former Yugoslavia, while it entered into force in regard to Croatia after Croatia became an independent state. Subsequent to declaring its independence, the Republic of Croatia acceded to only one Hague convention, the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. This is not to say that the Croatian Government did not consider

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international privé de la responsabilité extra-contractuelle en matière d'accidents de la circulation routière et le projet de Convention de La Haye du 26 octobre 1968], Zbornik Pravnog fakulteta u Zagrebu, Vol. 22, Nos. 1-2, 1972, pp. 27-36; ID., Međunarodno privatno pravo – Posebni dio [Private International Law – Special Part], Zagreb, 1982, pp. 85-96.

[6] Službeni list SFRJ: Konvencije i drugi međunarodni sporazumi 8/1977. The Convention was signed and ratified/acceded by the former Yugoslavia on 15 December 1976 and it entered into force on 1 October 1977. It is applicable in Croatia on the basis of succession: on 5 April 1993, the Republic of Croatia declared itself to be bound by the Convention and no objection has been received from the Contracting States. Interestingly, this Convention is not listed in the Decision on publication of multilateral international conventions to which the Republic of Croatia is a party based on the notification on succession, Narodne novine RH: Međunarodni ugovori 4/1994, which contains references to all other Hague Conventions applicable on the basis of succession.

[7] Službeni list SFRJ: Međunarodni ugovori 7/1991; Decision on publication of multilateral international conventions to which the Republic of Croatia is a party based on the notification of succession, Narodne novine RH: Međunarodni ugovori 4/1994. The Convention was signed and ratified/acceded by the former Yugoslavia on 27 September 1991 and it entered into force on 1 December 1991. It is applicable in Croatia on the basis of succession: on 5 April 1993, the Republic of Croatia declared itself to be bound by the Convention and no objection has been received from the Contracting States. The competent authorities are: the Ministry of Health and Social Welfare and the Ministry of Justice. On the Convention see, Dubravka HRABAR, Porodično pravna zaštita djece državljana SFRJ odvedene u inozemstvo protivno odluci suda o njihovu čuvanju i odgoju [Family Law Protection of Children Citizens of the SFRY Taken Abroad Contrary to the Custody Court Decision], Zbornik Pravnog Fakulteta u Zagrebu, Vol. 39, No. 1, 1989, pp. 45-54.

[8] Službeni list SFRJ: Međunarodni ugovori 4/1988; Decision on publication of multilateral international conventions to which the Republic of Croatia is a party based on the notification on succession, Narodne novine RH: Međunarodni ugovori 4/1994. The Convention was signed and ratified/acceded by the former Yugoslavia on 12 July 1988 and it entered into force on 1 October 1988. It is applicable in Croatia on the basis of succession: on 5 April 1993, the Republic of Croatia declared itself to be bound by the Convention and no objection has been received from the Contracting States.

the option of ratifying/acceding to other Hague conventions. On the contrary, the Government requested expert opinions to be delivered by some Croatian private international lawyers. In addition, Croatian scholars have also monitored developments in the work of the Hague Conference and expressed their personal views on whether it would be desirable for Croatia to become a contracting party to a respective Hague convention.[9] However, the outcome of the assessment made by the Government so far was not in favour of any other Hague convention, but the aforementioned one that was already signed,[10] in addition to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, the accession to which is currently taking place.[11] Furthermore, in 2006 the Government stated that it was considering the possibility of becoming a Party to the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement

[9] See, e.g., Dijana JAKOVAC-LOZIĆ, Haška konvencija o nadležnosti, primjeni, prihvaćanju i izvršenju (odluka), te o suradnji s obzirom na roditeljsku odgovornost i mjere dječje zaštite kao još jedan prilog na putu zaštite prava djeteta [The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children as Another Contribution on the Way of Protecting the Rights of the Child], Pravni vjesnik, Nos. 3-4, 1997, pp. 170-178; Ivana KUNDA, Haška konvencija o pravu mjerodavnom za određena prava u pogledu vrijednosnih papira koje drže posrednici [The Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary], in: Gašo KNEŽEVIĆ/Vladimir PAVIĆ (eds.), Državljanstvo i međunarodno privatno pravo/Haške konvencije, Zbornik radova s 3. međunarodne konferencije iz međunarodnog privatnog prava održane u Beogradu, 5. i 6. listopada 2005. godine, Pravni fakultet u Beogradu/Službeni glasnik, Beograd, 2007, pp. 294-336; Željko MATIĆ, Revizija Haške konvencije od 12. lipnja 1902. o uređenju sukoba zakona o predmetu braka [Revision of the Hague Convention of 12 June 1902 Relating to Settlement of the Conflict of Laws Concerning Marriage], Godišnjak PF Sarajevo, Vol. 21, No. 21, 1973, pp. 217-224; ID., Međunarodno privatno pravo vanugovorne odgovornosti za štetu kod saobraćajnih nezgoda na cestama, op. cit., pp. 34-35; Ines MEDIĆ MUSA, Haška konvencija o izvođenju dokaza u inozemstvu u građanskim ili trgovačkim predmetima, od 18. ožujka 1970. godine [The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters], in: Gašo KNEŽEVIĆ/Valdimir PAVIĆ (eds.), Državljanstvo i međunarodno privatno pravo/Haške konvencije, Zbornik radova s 3. međunarodne konferencije iz međunarodnog privatnog prava održane u Beogradu, 5. i 6. listopada 2005. godine, Pravni fakultet u Beogradu/Službeni glasnik, Beograd, 2007, pp. 264-293; Krešimir SAJKO, Haška konvencija o nadležnosti, mjerodavnom pravu i priznanju odluka o usvojenju od 1965. i jugoslavensko pravo [The 1965 Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Related to Adoptions and Yugoslav Law], Naša zakonitost, Vol. 34, No. 10, 1980, pp. 47-52; Krešimir SAJKO/Iva PERIN, Konvencija o nadležnosti, mjerodavnom pravu, priznanju, ovrsi i suradnji u predmetu roditeljske odgovornosti i mjerama za zaštitu djece od 19. listopada 1996 – opća rješenja i neke napomene [The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children of 19 October 1996 – general Solutions and Some Remarks], in: Gašo KNEŽEVIĆ/Valdimir PAVIĆ (eds.), Državljanstvo i međunarodno privatno pravo/Haške konvencije, Zbornik radova s 3. međunarodne konferencije iz međunarodnog privatnog prava održane u Beogradu, 5. i 6. listopada 2005. godine, Pravni fakultet u Beogradu/Službeni glasnik, Beograd, 2007, pp. 172-188; Željko MATIĆ, Neki problemi sukoba zakona kod oblika oporuke i Prednacrt Konvencije predložen IX. Konferenciji za MPP u Haagu [Some problems of Conflict of Laws concerning the Form of Will and Preliminary Draft of the Convention proposed to the 9th Conference for PIL], Naša zakonitost, Vol. 14, 1960, p. 481.

[10] See, infra A. 4).

[11] Data available at the official web page of the Ministry of Justice of the Republic of Croatia, accessible at <http://www.pravosudje.hr/default.asp?jezik=&ru=251&sid=> (last visited on 22.3.2008).

and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children.[12]

2) Succession of treaties following the Croatian independence

Unquestionably, the international conventions and treaties concluded by the Republic of Croatia subsequent to 8 October 1990, the date when Croatia declared independence and became a sovereign state, are part of the Croatian internal legal order if ratified and published according to the prescribed rules. However, this begs the question as to whether, besides those conventions and treaties, are the conventions and treaties to which the former Yugoslavia was a party also still in force in Croatia. The latter category includes both the bilateral conventions with other states, as well as multilateral conventions to which the former Yugoslavia became a contracting party before the Republic of Croatia on 8 October 1990 declared independence.

The answer should be searched for in the Conclusion and Implementation of International Treaties Act,[13] which regulates issues of succession, as well as other matters such as negotiations, signing, ratification, entering into force, publication, registration, revision, execution and termination of the international treaties. Furthermore, the following international treaties, to which Croatia is a Contracting Party, regulate this subject matter: the Convention on the Law of International Treaties (Vienna, 23 May 1969),[14] the Convention on the Law of International Treaties between the States and International Organisations or between the International Organisations (Vienna, 21 March 1986),[15] the Convention on Consular Relations (Vienna, 24 April 1963)[16] and the Convention on

[12] Reply to the Questionnaire concerning the practical operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (2006) by the Ministry of Health and Social Welfare of the Republic of Croatia, accessible at <http://www.hcch.net/upload/abd_2006_hr.pdf> (last visited on 20.3.2008), p. 7. See, infra C. 2).

[13] Narodne novine RH 28/1996. Prior to 1996, the former Conclusion and Implementation of International Treaties Act was in force, Narodne novine RH 53/1991. It provided that the international treaties concluded by or accessed by the former SFRY were applicable in the Republic of Croatia on the basis of the international law on the succession of States, if not contrary to the Constitution and legal order of the Republic (Article 33).

[14] Službeni list SFRJ, Međunarodni ugovori i drugi sporazumi 30/1972; Decision on publication of multilateral international conventions to which the Republic of Croatia is a party based on the notification on succession, Narodne novine RH, Međunarodni ugovori 12/1993, 16/1993 and 9/1998.

[15] Narodne novine RH, Međunarodni ugovori 1/1994.

[16] Službeni list SFRJ, Međunarodni ugovori i drugi sporazumi 5/1966; Decision on publication of multilateral international conventions to which the Republic of Croatia is a party based on the notification on succession, Narodne novine RH, Međunarodni ugovori 12/1993.

Succession of States in Respect of Treaties (Vienna, 23 August 1978).[17] Article 29 of the Conclusion and Execution of International Treaties Act expressly provides that succession in respect to the international treaties of the predecessor state of the Republic of Croatia is governed by the respective norms of the international law unless these international treaties are contrary to the Constitution of the Republic of Croatia and its legal order. Along the same lines is also the Constitutional Decision on Sovereignty and Independence of the Republic of Croatia of 1991.[18] According to the cited Constitutional Decision, international conventions to which Yugoslavia was a party remain applicable in the Republic of Croatia under the condition that their provisions are not contrary to the Constitution and legal order of the Republic of Croatia. Consequently, until the issue of the succession of international treaties is settled, based on the Constitutional Decision, all international conventions to which the former Yugoslavia was a party, are deemed applicable and binding for Croatia as well, under the reservation determined therein, and provided that the other contracting parties accept the succession either expressly or tacitly.[19]

The same derives from the rules of international law on the succession of states with regard to the international treaties and, in particular, Article 34(1) of the 1978 Vienna Convention.[20] According to the interpretation of the cited provision in the Croatian doctrine, multilateral conventions, which are open to any party from any state, are automatically applicable in the successor-states without any notification needed. Consequently, those conventions should remain and incessantly be in force in the territory of the "newly independent states", such as Croatia, irrespective of their international recognition, or membership in international organizations.[21] Following on from the opinion of Professor Degan, the United Nations practices deviated from this provision since the

[17] Službeni list SFRJ, Međunarodni ugovori i drugi sporazumi 1/1980; Decision on publication of multilateral international conventions to which the Republic of Croatia is a party based on the notification on succession, Narodne novine RH, Međunarodni ugovori 12/1993, 16/1993 and 9/1998.

[18] Narodne novine RH 31/1991.

[19] Krešimir SAJKO, Međunarodno privatno pravo [Private International Law], Zagreb, Informator, 1996, p. 34.

[20] This Article provides:

When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

(b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

[21] Vladimir Đuro DEGAN, Međunarodno pravo, Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2000, p. 200.

"newly independent states" were required to notify to which of the treaties they wanted to be parties. The same author pointed out the particular problem of determining the status of those treaties in the period between the date of declaration of independence and the date of notification on succession subsequent to becoming a member of the United Nations.[22]

Based on the mentioned principles, a number of international conventions and treaties are in force in Croatia. Particularly with respect to the Hague conventions, to which the former Yugoslavia was a party, Croatia declared itself to be bound by them and other contracting states have tacitly shown their acceptance. These conventions continue to be in force in Croatia without any interruptions.

3) Croatian participation and delegations to the diplomatic conferences

Croatia has a long tradition in participating in the work of the Hague Conference in Private International Law, first within the former Yugoslavia as one of the federal republics, and subsequently as an independent state. On 9 October 1958 the former Yugoslavia acceded to and ratified the Statute of the Hague Conference.[23] Almost a half century later, on 1 October 1995, it was established that Croatia had become a Member of the Conference on that date with a retroactive effect from 12 June 1995. In addition, Croatia accepted the Amendments to the Statute of the Hague Conference, the amended version being in force as of 1 January 2007.[24]

The question naturally arises concerning the legal relevance of the time gap between the date of the Croatian declaration of independence and the date the Croatian membership in the Hague Conference took effect. Although this lapse in membership may indeed produce effects such as the possibility of enjoying membership rights and obligations, it may not affect the status of a contracting party to the respective Hague conventions. Thus, the applicability of the Hague conventions, as explained above, was uninterrupted following the dissolution of the former Yugoslavia due to Croatia's declarations that it considers itself

[22] In respect to bilateral treaties the customary international law is that they remain applicable between the newly formed states and the third party, unless the objection has been raised and until the parties reach an agreement on that particular treaty. DEGAN, op. cit., pp. 200 and 201.

[23] Službeni list FNRJ, Dodatak 11/1958. Already at the Seventh Session of the Conference on Private International Law in October 1951 the Yugoslavian Government was present as an observer.

[24] Narodne novine RH, Međunarodni ugovori 11/2005.

bound by each of the conventions on the basis of succession and, in the absence of objections, by any of the other Contracting States.

Returning to the issue of Croatian delegations participating at the actual sessions of the Hague Conference, it has to be pointed out that the practice seems to be that Croatia rarely appoints more than one delegate to the preparatory and diplomatic conferences. Often the representatives are selected from the academics in the field of private international law. Thus, the Croatian delegation, of which Professor Sajko was a member, participated in the diplomatic conference that led to the signing of the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children, as well as at some earlier sessions.[25] Professor Tomljenović, one of the authors of this report, more recently participated in the sessions at which the Hague Convention of 30 June 2005 on Choice of Court Agreements and the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance was on the agenda. Particularly with respect to the latter Convention, this report seems a proper place for commenting on the negotiations regarding the duties of the Central Authorities under this Convention. In the course of the drafting process, an enthusiastic approach, according to which the Central Authorities should have a large number of duties under the Convention in order to facilitate the recovery of the due sums, dominated the negotiations. Although this was surely the aspiration shared by the delegates from all Member States, the reality sometimes requires that the duties imposed by a specific convention are not as burdening. Without questioning the desire of all Member States to create the most efficient solution for the problem of unpaid maintenance, some smaller or less-developed countries, such as the Republic of Croatia, might lack sufficient resources to implement the Convention rules if they entail the utilization of substantial financial and institutional capacities in addition to the existing ones. For this reason, it might be advisable to sometimes adapt the standards to a greater number of Member States; in turn they would be more likely to become contracting parties to the new Hague conventions. This having been said, it would certainly not be the proper approach to lower the legal standards excessively as the interests underlying the efforts of the Hague Conference would be frustrated. The right way would

[25] This conference was held in October 1999. K. SAJKO/I. PERIN, op. cit., p. 175, n. 13.

be to find the correct balance between the quantity of the Member States and the quality of the convention rules, such as finding the golden mean which is, of course, always a delicate task, but not at all impossible as the achievement of the Hague Conference patently confirms.

4) The case of the Hague conventions which were signed but not ratified

An important point in the national reports seems to be the statistical data on the Hague conventions that were signed, but not ratified. According to Croatian law, signing an international treaty is within the competence of the executive branch, whereas its ratification basically falls under the competences of the legislative branch.[26] Such division of powers, coupled with the possible extended time difference between signing and ratifying may, hypothetically speaking, cause differences in positions that the competent bodies take in regard to a certain treaty. This having been said, there are no such cases at present in Croatia where a Hague convention is pending ratification upon being signed. Croatia, as well as the former Yugoslavia, ratified all the Hague conventions that it signed. Thus, there are no such cases of politically or otherwise influenced adjustments of positions in the context of these conventions.

The most recent example is the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters which was signed by the former Yugoslavia not long before Croatia declared independence. The Croatian accession occurred on 28 February 2006, and the Convention entered into force in respect of Croatia on 1 November 2006. The legislative procedure in the Parliament was fairly short, the Convention barely provoked any debate and it was ratified by unanimous vote. The only related matter discussed concerned the suggestion that this accession should be seen in the broader context of the harmonization of Croatian law with the legal standards and law in the EU, as well as of the ratification/accession of an international treaty whereby the state formally expresses its readiness to be bound by the previously signed international treaty.[27]

[26] See, Articles 13-20 of the Conclusion and Execution of International Treaties Act.

[27] This was the comment by a Member of the Croatian Parliament during the parliamentary discussion on adoption of the Act concerning the ratification of this Convention which corresponds to the official explanations in the Proposal for this Act. See, Izvješća Hrvatskog sabora, Vol. 17, No. 433, 8 February 2006, accessible at <www.sabor.hr/fgs.axd?id=4285> (last visited on 29.2.2008), p. 52; Prijedlog Zakona o

The latter justification indicates that significant weight tends to be ascribed to the signature put on an international treaty when deciding on its ratification in the Croatian Parliament.

B. CONFLICTS CONVENTIONS AND DOMESTIC CONFLICTS LAW – A SUBSTANTIVE COMPARISON

The sources of Croatian private international law are twofold, domestic and international. The hierarchy of the legal norms is dealt with in the next chapter, while here the intention is to compare the solution in the domestic law with those of the Hague conventions. Besides the option to become a party to a certain Hague convention, the states may also find inspiration in their rules when drafting domestic private international laws. Thus, it is important to research into the relationship involving these two sources of law. Previous to that, however, a short overview of the Croatian legislation in this field seems necessary.

1) Sources of domestic private international law in Croatia

The basic internal source is the Resolution of Conflict of Law with the Laws of Other Countries in Certain Relations Act (to avoid this unusual name it is hereinafter referred to as the Croatian PIL Act).[28] This Act dates back to early 1980s and was only marginally modified when incorporated in the Croatian law in 1991.[29] This is the codification of both the conflicts and procedural rules relevant to the matters having an international element. It applies whenever international treaties in force in Croatia or special domestic laws do not provide a specific rule. There is a number of *lege specialis* which contain rules regulating only limited number of legal relations, in particular: the Maritime Code,[30] the Obligations

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potvrđivanju Konvencije o dostavi u inozemstvo sudskih i izvansudskih dokumenata u građanskim ili trgovačkim stvarima, PZ-319, accessible at <www.sabor.hr/fgs.axd?id=4527> (last visited on 20.3.2008).

[28] Službeni list SFRY 43/1982 and 72/1982, Narodne novine RH 53/1991.

[29] Although there has been an initiative to draft a new legislation, it has been loosing its ambition probably due to due to the anticipation of membership in the European Union when the acquis communautaire on private international law would become directly applicable. The discussion, nevertheless, yielded the proposal on the conflicts rules and partial response, as well as some sporadic opinions. See, Krešimir SAJKO/Hrvoje SIKIRIĆ/Vilim BOUČEK/Davor BABIĆ/Nina TEPEŠ, Izvori hrvatskog i europskog međunarodnog privatnog prava [Sources of Croatian and European Private International Law], Informator, Zagreb, 2001, pp. 259-340; Petar ŠARČEVIĆ/Vesna TOMLJENOVIĆ, Primjedbe na teze za zakon o međunarodnom privatnom pravu, autora prof. dr. Krešimira Sajka, prof. dr. Hrvoja Sikirića i doc. dr. Vilima Boučeka [Remarks to the Thesis for the Private International Law Act Proposed by Prof. Dr. Krešimir Sajko, Prof. Dr. Hrvoje Sikirić and Doc. Dr. Vilim Bouček], Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 22, No. 2, 2001, pp. 655-675.

[30] Narodne novine RH 118/2004 and 76/2007.

and *In Rem* Relations in Air Traffic Act,[31] the Bill of Exchange Act,[32] the Cheque Act,[33] the Legalization of Documents in International Relations Act,[34] the Civil Procedure Act,[35] the Enforcement Act,[36] the Insolvency Act,[37] and the Arbitration Act.[38]

2) Similarities between the texts of the Hague conventions and norms in Croatian domestic legislation

It is beyond doubt that international unification processes regularly produce certain effects in the domestic sphere and influence national legislators when amending the laws or adopting new ones. However, degrees to which national legislators find the rationale underlying the unified rules compelling enough to incorporate them in their domestic laws may differ. Thus, the national legislator may opt for precise copying of a certain rule in order to make it applicable not only to relations under the territorial or personal scope of the respective convention, but also to all legal relations of that sort. In addition, the national legislator may draw inspiration from the unified rule at the same time modifying it to the extent to which it may better serve the specific national purposes intended. There are of course different nuances of inclination towards the model of the unified solution or departure from it. In both mentioned cases, the likelihood of copying fully or partially the convention rules when drafting domestic norms is greater if the respective convention is in force in the state in question. Finally, the unified rules may be regarded as unacceptable, in which case the legislator would be sure to avoid such a solution being incorporated into the domestic law. The usual scenario then would also involve unwillingness to join the convention. For obvious reasons, only the first two situations will be explored here.

The most prominent illustration of replicated unified conflicts rules concerns the form of the will. The former Yugoslavia, being the first state to ratify the 1961 Hague Convention

[31] Narodne novine RH 132/1998.

[32] Narodne novine RH 74/1994.

[33] Narodne novine RH 74/1994.

[34] Službeni list SFRY 6/1973, Narodne novine RH 53/1991.

[35] Službeni list SFRY 47/1977, 36/1977, 36/1980, 69/1982, 58/1984, 74/1987, 57/1989, 20/1990, 27/1990 and 35/1991, Narodne novine RH 53/1991, 91/1992, 58/1993, 112/1999, 88/2001 and 117/2003.

[36] Narodne novine RH 57/1996, 29/1999, 173/2003, 151/2004 and 88/2005.

[37] Narodne novine RH 44/1996, 161/1998, 29/1999, 129/2000, 123/2003, 197/2003, 187/2004 and 82/2006.

[38] Narodne novine RH 88/2001.

on the Conflicts of Laws relating to the Form of Testamentary Dispositions, was also the one that inbuilt the exact provision on the laws applicable to that issue into its domestic legislation which is still in force in Croatia. This is the provision of Article 31 of the Croatian PIL Act which, besides the applicable laws referred to alternatively in Article 1 of this Hague Convention, adds additional alternatively applicable law – the *lex fori*. This supplementation is actually encouraged by the very Convention whose provisions do not affect any existing or future domestic rules of law recognizing testamentary dispositions made in compliance with the formal requirements of a law other than the laws enumerated in this Hague Convention.[39] Adding additional connecting factor actually reinforces the principle of *favor testamenti* which strongly underlies the Convention. The cited conflicts provision contained in the Croatian PIL Act is the most evident example of the impact that the status of the party to the 1961 Hague Convention had on domestic Croatian law.

With respect to this provision, an interesting issue has been raised concerning the role of *renvoi*. On the one hand, the notion of "internal law" in the Article 1 of this 1961 Hague Convention has been interpreted to mean that this is a direct reference to the substantive law. Thus, in all cases falling under the scope of the Convention, the substantive rules of the first law to which the connecting factors refer will be applied. On the other hand, the domestic Croatian private international law allows for the reference to also include the conflicts rules of the applicable law.[40] The fact that the cited provision is contained in the Croatian PIL Act may justify the use of the *renvoi* technique in determining the law applicable to the form of the will. In consequence, despite the exact transposition of conflicts rules from the Convention into the domestic law, the outcome of the conflicts method under the domestic rules would not be in line with the one under the Convention rules. On the other hand, this result may be avoided since the provision on *renvoi* has been interpreted in the legal doctrine as non-obligatory, giving the court discretionary right to resort or not to *renvoi* depending on the circumstances. Moreover, the Croatian legal

[39] Article 3 of the 1961 Hague Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions.

[40] Article 6 of the Croatian PIL Act provides:

If, according to the provisions of this Act, the law of a foreign state applies, its rules on determining applicable law shall be taken into consideration.

If the rules of a foreign state on determining applicable law remit back to the law of the Republic of Croatia, the law of the Republic of Croatia shall apply not taking into consideration the rules on determining the applicable law.

doctrine is in agreement that *renvoi* is not appropriate in cases in which the form of a legal act or deed is in question.

Convergence between the conflicts rules of the Croatian domestic law and those in the Hague conventions is at an exceptionally low level when it comes to family relations due to the predominance of nationality as a connecting factor in Croatian domestic law, as opposed to habitual residence in the Hague conventions. Nevertheless, formal validity of marriage is one of the meeting points, despite the fact that Croatia is not a party to the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages. Both, Article 33 of the Croatian PIL Act and Article 2 of this 1978 Hague Convention provide that formal requirements for marriage are subject to the *lex loci celebrationis*.

Similarities also exist for the sales contracts, again in the field where Croatia is not party to any of the Hague conventions. The Croatian PIL Act provides that the primary governing law is the *lex autonomiae*. If the parties fail to make their choice, and if the special circumstances of the case do not refer to a different law, the law of the state in which the seller has his place of business at the time of the conclusion of the contract governs the sales transaction.[41] The 1955 Hague Convention on the Law Applicable to International Sale of Goods allows primarily the selection of applicable law, and provides for application of the *lex venditoris* as a default rule. Apart from some particularities, the difference still remains regarding the natural persons' domicile adopted in Croatian domestic law, and the natural persons' habitual residence used in this 1995 Hague Convention.[42] Croatian scholarship notes that it was only a matter of time before the national legislators would follow the conflicts rules set by the "international, i.e. the Hague legislator".[43] It is reasonable to conclude that the principles underlying the 1995 Hague Convention had an influence over the Croatian legislator too, both directly and indirectly, through the comparative legislation. Interestingly, the later adopted Articles 7 and 8 of the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods adopt a general scheme of chosen law, characteristic performance criterion and escape clause, which is similar to the Croatian PIL Act, except that the Convention rules, when compared

[41] Articles 19 and 20 of the Croatian PIL Act.

[42] Articles 2 and 3 of this 1995 Hague Convention.

[43] Renata CVRČIĆ, Mjerodavno pravo za ugovore s međunarodnim obilježjem (supsidijarni statut) [The Law Applicable to International Contracts (Subsidiary Statute)], Zakonitost, Vol. 47, Nos. 8-12, 1993, (pp.684-699) p. 692.

to the Croatian law, are subject to a number of exceptions for specific situations or types of sales contracts. This variation may be explained by the focus of the Convention on the specific type of contracts, while the PIL Act, for practical reasons, may hardly regulate legal relations with such a sensibility to the need for a differentiation in the conflicts' treatment.

Scholars have also shown a desire for strict replication of the unified conflicts rules in the domestic legislation. For instance, besides recommending ratification of the 1971 Hague Convention on the Law Applicable to Traffic Accidents, Professor Matić strongly advocated the enactment of domestic conflicts rules which would be identical to those of the then Draft Convention. He believed that this was opportune since the unified rules reflected general tendencies in the field and would have enabled a painless switch to the Convention regime once it had entered into force.[44] In the end, this solution was not accepted in the Croatian PIL Act and traffic accidents are resolved under the general conflicts rules for non-contractual obligations.[45]

It may also be noted that some unified conflicts rules that regulate basic institutes of private international law have also affected Croatian domestic norms. A case in point is the provision on public policy contained in the Obligations and *In Rem* Relations in Air Traffic Act which, for the first time in 1998, introduced into the Croatian domestic legislation the phrase "manifestly contrary to the public policy".[46] This terminology fully corresponds to the style used in the Hague conventions in recent decades and its intention is to advise the courts on applying this provision on an exceptional basis, and only in cases of patent contrariness to domestic conceptions. Another Croatian domestic rule on public policy, seen in Article 4 of the Croatian PIL Act, employs different phraseology.[47]

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[44] Ž. MATIĆ, Međunarodno privatno pravo vanugovorne odgovornosti za štetu kod saobraćajnih nezgoda na cestama, op. cit., p. 35.

[45] General rule of Article 28 of the Croatian PIL Act designates as applicable the lex loci actus or lex loci damni, depending on which of them is more favourable to the person claiming compensation of damages.

[46] Article 184(1) of the Obligations and In Rem Relations in Air Traffic Act.

[47] The cited Article states:

The law of the foreign county shall not apply if its effect would be contrary to the foundations of the social organisation defined by the Constitution of the Republic of Croatia.

Interestingly, the scholarly proposal on the new Croatian conflicts rules, does not follow this pattern and omits the word "manifestly" from the working of the clause. K. SAJKO/H. SIKIRIĆ/V. BOUČEK/D. BABIĆ/N. TEPEŠ, op. cit., pp. 265 and 327.

C. CONFLICTS BETWEEN CONFLICTS CONVENTIONS AND DOMESTIC LAW

1) Precedence of domestic law or international conventions according to the Croatian Constitution

The Constitution of the Republic of Croatia[48] is the fundamental and principal legal source in the Croatian legal system. The hierarchy of legal sources in the Croatian legal order is determined by two constitutional provisions: Article 5(1) and Article 140. According to the former provision, Croatian laws shall conform to the Constitution, and other rules and regulations shall conform to the Constitution and laws. This equally applies to those laws and regulations which regulate the field of private international law. As for the international conventions and the treaties, they constitute an important category of the direct sources of Croatian law, including private international law. With respect to these legal sources, the Croatian Constitution accepts a monistic approach[49] and prescribes four basic conditions for a certain international treaty to become part of the domestic legal system of Croatia. First, it has to be concluded, i.e. signed. Second, the treaty has to be ratified. Ratification is an act whereby Croatia, at an international level, expresses its will to be bound by the provisions of a certain treaty. Third, the treaty has to be published in the Croatian official journal – *Narodne novine Republike Hrvatske*. And final, the treaty has to be in force according to its own provisions or rules of international law of the treaties.[50] If all these conditions are met, an international treaty shall be binding and shall have a stronger legal force than the domestic, Croatian laws.[51]

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[48] Constitution of the Republic of Croatia, Narodne novine RH 41/01 (consolidated version) and 55/01 (corrigendum). This consolidated version of the Constitution of the Republic of Croatia is a compilation of texts including: text of the Constitution of the Republic of Croatia, Narodne novine RH 56/90; text of the Constitutional Act on Revisions and Amendments of the Constitution of the Republic of Croatia, Narodne novine RH 135/97 (consolidated version, Narodne novine RH 8/98); text of the Amendments to the Constitution of the Republic of Croatia, Narodne novine RH 113/00 (consolidated version, Narodne novine RH 124/00); and text of the Amendments to the Constitution of the Republic of Croatia, Narodne novine RH 28/01.

[49] Siniša RODIN, Ustavnopravni aspekti primjene Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda [Constitutional Law Aspects of Application of the European Convention on Human Rights and Fundamental Freedoms], Zbornik Pravnog fakulteta u Zagrebu, Vol. 48, No. 1-2, 1998, (pp. 85-116) p. 94.

[50] *Article 140 of the Croatian Constitution read as follows:*
International agreements concluded and ratified in accordance with the Constitution and made public, and which are in force, shall be part of the internal legal order of the Republic of Croatia and shall be above law in terms of legal effects. Their provisions may be changed or repealed only under conditions and in the way specified in them or in accordance with the general rules of international law.

[51] This understanding is confirmed in legal scholarship. See, e.g., RODIN, op. cit., p. 108.

Hence, combining the two aforementioned constitutional provisions, it may be concluded that in the hierarchy of legal norms within the Croatian legal order, the international treaties are positioned below the Constitution and, above all, laws (and regulations). The precedence is thus always of the international conventions, rather than of the domestic laws. A good illustration is offered in a case brought before the County Court in Osijek in which an application for enforcement of a decision rendered by the German court in Darmstadt of 30 July 1984 was submitted.[52]

The German decision in question concerned the payment of the costs of proceedings to the German defendants by the Croatian plaintiff, and it was recognized in Croatia. On appeal, the Supreme Court of the Republic of Croatia affirmed the first-instance decision based on the provisions of Articles 18 and 19 of the 1954 Hague Convention on Civil Procedure because, at the time, the first-instance decision was rendered, on 19 November 1986, the state from which the decision originated (the FR Germany) and the state of recognition (the SFRY) were both contracting parties to this Convention, and the Republic of Croatia became a party to this Convention on 8 October 1991 upon declaring its independence. The Supreme Court further reasoned that this was consistent with the provision of Article 3 of the Croatian PIL Act. According to the cited Article, the provisions of the Croatian PIL Act are not applicable if any of the legal relations under its scope are regulated under another special domestic act or an international convention, as in the case at hand where the issue of recognition of the decision concerning the costs of proceedings were regulated under the cited Hague Convention.[53] Particularly disputable in this case was whether the German decision may be recognized if there was no hearing of the parties in the original proceedings during which the foreign decision in question was rendered. The Croatian party, as the debtor, relied on the precondition prescribed in Article 88 of the Croatian PIL Act claiming that he was prevented from participating in the original proceedings due to the procedural irregularity. The Supreme Court reaffirmed that this matter was not relevant since under the applicable Hague Convention, such precondition did not exist. The Court concluded that additional protection was afforded under the 1954 Hague Convention by

[52] County Court in Osijek (Okružni sud u Osijeku), R-115/86, 19.11.1986. (unpublished).

[53] The Supreme Court also added that the first-instance court unnecessarily conducted verification of decision on the basis of the preconditions for recognition and enforcement of a foreign judicial decision set in the Croatian PIL Act.

virtue of an appeal and the debtor may submit against the domestic decision enforcing a foreign one on the costs.[54]

2) Resolving inconsistencies between domestic law and the Hague conventions

Inconsistencies between Croatian domestic conflicts rules and the Hague conventions may be observed from at least two angles. First, the interaction between the convention rules and the domestic rules may be examined in cases where the conventions are in force in Croatia. Moreover, one may search for answers to the question of the bearing that the rules of the Hague conventions not in force in Croatia have on the domestic Croatian rules and *vice versa*.

With respect to the Hague conventions, to which Croatia is a contracting party, and the way that they interact with the domestic rules, a short explanation as a follow-up to the previous section on the hierarchy of legal norms, will suffice. Because the Croatian legal system regards the international treaties, including the Hague conventions, as having a stronger legal force than domestic laws, the cases of inconsistencies should not pose many difficulties. Possible problems may concern the determining of the conventions' scope of application since it is only outside this scope that the domestic laws apply. Consequently, one has to first establish with certainty the scope of application *ratione materiae*, *ratione loci*, *ratione personae* and *ratione temporis* of a certain Hague convention, then verify whether the case at hand falls within its ambit. If so, the rules of the convention will apply, rather than the domestic conflicts norms. Inconsistencies between the domestic conflicts norms and unified conflicts norms in the convention have no bearing over the application of the latter when they are applicable. This having been said, there are certain instances in which domestic laws may affect the operation (not the application) of the Hague conventions rules. Those are the cases envisaged in the very conventions, when the reference is made to the domestic laws of the forum. A classical example is the *ordre*

[54] The Supreme Court of the Republic of Croatia (Vrhovni sud Republike Hrvatske), Gž-21/1992-2, 11.11.1993., accessible at <http://sudskapraksa.vsrh.hr/supra/> (last visited on 26.3.2008).

public exception where the Hague conventions allow for the refusal to apply the law applicable by virtue of their provisions.[55]

The second type of inconsistency arises between the domestic conflicts rules and the Hague convention rules when these conventions are not joined by Croatia. This is the case where, due to domestic rules which essentially depart from the convention rules, a state chooses not to become a party to a certain convention. In Croatia, such situations involve the Hague conventions which regulate protection of children, since among several conventions only the 1980 Hague Convention on the Civil Aspects of International Child Abduction is in force in Croatia. As noted in the scholarly writings, the reasons for the reluctance to join these Hague conventions are principally concerned with dichotomy between the domestic private international law and the convention rules.[56] While the provisions of the domestic law that regulate relations between a child and its parents rely heavily on the nationality as the primary connecting factor,[57] and domicile as a secondary, the Hague conventions are using habitual residence for that purpose.[58] Likewise, in the field of international jurisdiction for these sorts of matters, Croatian rules also extensively use the criterion of the nationality of the parents, of a child, or of a parent and a child cumulatively.[59] On the other hand, the Hague conventions contain a reference to the law of the habitual residence thus consuming, in as many cases as possible, the issue of applicable law in the issue of international jurisdiction.[60] Just as the rules themselves, the value concepts underlying the Croatian conflicts rules date back thirty or more years. Modern development has changed various circumstances that were then influencing the selection of jurisdiction criteria and connecting factors. Hence, the Croatian rules are considered inapt to meet the contemporary needs of child protection. In order to overcome these problems it is necessary to import to

[55] See, e.g. Article 7 of the 1961 Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, Article 10 of the 1971 Convention on the Law Applicable to Traffic Accidents and Article 10 of the 1971 Convention on the Law Applicable to Traffic Accidents.

[56] Reply to the Questionnaire concerning the practical operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (2006) by the Ministry of Health and Social Welfare of the Republic of Croatia, <http://www.hcch.net/upload/abd_2006_hr.pdf> (last visited on 20.3.2008), p. 7.

[57] See, Article 40 of the Croatian PIL Act.

[58] See, e.g. Articles 15-17 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children and Article 1 of the 1956 Convention on the Law Applicable to Maintenance Obligations towards Children.

[59] See, Articles 66, 67 and 69 of the Croatian PIL Act.

[60] See, e.g. Chapter II of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children.

Croatian law the modern perceptions of the private international mechanisms for effective protection of the interests of a child. One of the means to achieve this modernisation would be joining the Hague conventions that have been adopted. In fact, there are calls for accessing the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children.[61] As already stated, the Croatian Government has expressed its intention to consider the possibility of becoming a party to this Hague Convention.[62] Another way in which these inconsistencies may be resolved is by amending the domestic conflicts rules. Such scholarly proposals have been put forward, *inter alia*, with regard to the conflicts rules for the relations between parents and children and general child protection. These *de lege ferenda* rules, however, do not closely follow the models of the Hague conventions.[63]

D. IMPLEMENTATION AND APPLICATION OF CONFLICTS CONVENTIONS

This section first focuses on the issues related to the implementation of the Hague conventions in force in Croatia. Furthermore, it explores in more detail the case law applying these conventions, with particular emphasis on the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

1) Implementation of the ratified Hague conventions

It has been previously stated that international treaties produce full legal effects in Croatia upon their entry into force consequent to their ratification or accession. The rules contained therein become directly applicable as if they were domestic legal rules and no implementing measures are needed, except where such measures are required because the respective treaty expressly provides so, or due to the phraseology of the legal rules (if they

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[61] This is advocated in the legal scholarship by both family law experts and private international lawyers. See, D. JAKOVAC-LOZIĆ, op. cit., str. 178; K. SAJKO/I. PERIN, op. cit., str. 187.

[62] Reply to the Questionnaire concerning the practical operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (2006) by the Ministry of Health and Social Welfare of the Republic of Croatia, accessible at <http://www.hcch.net/upload/abd_2006_hr.pdf> (last visited on 20.3.2008), p. 7.

[63] See, K. SAJKO/H. SIKIRIĆ/V. BOUČEK/D. BABIĆ/N. TEPEŠ, op. cit., str. 321-322s.

are not self-executory). In regard to the majority of the Hague conventions to which Croatia is a contracting party there are no implementing laws or regulations. However, there are some examples of the different practice. One of them is the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents. In order to, *inter alia*, enable the operation of the cited Hague Convention, the Legalisation of Documents in International Transactions Act was passed in 1973.[64] Article 8 thereof determines the courts and administrative bodies competent to issue an apostille pursuant to this 1961 Hague Convention.

Regarding the 1980 Hague Convention on the Civil Aspects of International Child Abduction, a few years ago the Government launched an initiative for enacting the legislation that would provide for the detailed procedures envisaged in the Convention itself.[65] The aim was to achieve more efficiency since the application of this Convention proved to be very difficult and unsatisfactory hitherto. These issues are analysed more thoroughly under the section specifically devoted to the Convention in question.[66]

2) Overview of the selected case law applying the Hague conventions

The Croatian legal system is generally experiencing certain difficulties related to the courts' disregard for an international element of the cases before them. More often than not the cases with an international element are resolved by directly applying domestic laws, without previously resorting to private international law rules.[67] The situation seems to be changing for the better in the past decade, which above all is the result of the corrective decisions by the Supreme Court of the Republic of Croatia. These circumstances also affect

[64] Službeni list SFRJ 6/1973, Narodne novine RH 53/1991.

[65] Response to the Questionnaire concerning the practical operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (2006) by the Ministry of Health and Social Welfare of the Republic of Croatia, accessible at <http://www.hcch.net/upload/abd_2006_hr.pdf> (last visited on 20.3.2008), p. 5. Additionally, in recent year the Guide to Good Practice has been translated into the Croatian language as a result of the cooperation between the Permanent Bureau of the Hague Conference, the Croatian central authority and the German Foundation for International Legal Cooperation (Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit).

[66] See, infra D. 3).

[67] The unanimous position in Croatian jurisprudence is that the conflicts rules are to be applied ex officio, and not on facultative basis. See, e.g. N. KATIČIĆ, Ogledi o međunarodnom privatnom pravu [Reflexions on the Private International Law], Narodne novine, Zagreb, 1971, p. 404; K. SAJKO, Međunarodno privatno pravo [Private International Law], 4th ed., Narodne novine, Zagreb, 2005, pp. 222-223; H. SIKIRIĆ, Primjena kolizijskih pravila i stranog prava u sudskom postupku [Application of Conflicts Rules and Foreign Law in Judicial Proceedings], Zbornik Pravnog fakulteta u Zagrebu, Vol. 56, Nos. 2-3, 2006, (pp. 617-686) p. 672.

the Hague conventions case law in Croatia. A typical case that reaches the Supreme Court involves, for instance, a car accident that occurred abroad in which the lower-instance courts have applied Croatian law, absent any conflict of laws considerations. The Supreme Court then remedies this *error in judicando* and remits back the proceedings to the court of lower instance for deciding on the basis of the 1971 Hague Convention on the Law Applicable to Traffic Accidents.[68] In recent judgements this Hague Convention has been applied already by the lower-instance courts what speaks of the progress made in that respect.[69]

One of the decisions where the 1971 Hague Convention on the Law Applicable to Traffic Accidents was applied raised an interesting question as to the interpretation of the notion of "victim" contained in Article 4 thereof. The car accident occurred in Slovenia and it involved a single vehicle which was registered in Croatia. The plaintiffs were close relatives of the person who lost her life in a car accident. The Municipal Court applied Croatian law and ruled in favour of the plaintiffs. The defendant appealed and the County Court in Vukovar upheld the appeal and remitted the case back to the first-instance court for deciding anew. In its instructions the County Court stated that the provision of Article 4 of the 1971 Hague Convention allowed the application of the *lex registrationis* but only when determining liability towards, *inter alia*, the victim who was a passenger or who was outside the vehicle at the place of the accident. Given that the plaintiffs were neither the passengers nor outside the vehicle, the Court held they did not have the status of the victim in these proceedings. The status of the victim belonged only to the deceased person who lost her life in the car accident, while the plaintiffs were the victim's close relatives. The County Court additionally emphasised that the plaintiffs do not derive their right to compensation for damages from the right of the deceased, but independently. The final Court's conclusion was that Article 4 was inapplicable in cases where the victim is deceased and the victim's close relatives are suing for damages on independent legal grounds, such as the pain and suffering due to the loss of a close person and funeral

[68] See, e.g. Supreme Court of the Republic of Croatia (Vrhovni sud Republike Hrvatske), Rev-1513/1990, 16.1.2004, accessible at <http://sudskapraksa.vsrh.hr/supra/> (last visited on 26.3.2008).

[69] See, e.g. Supreme Court of the Republic of Croatia (Vrhovni sud Republike Hrvatske), Rev-1166/04-2, 14.6.2006; County Court in Vukovar (Županijski sud u Vukovaru), Gž-1710/2003, 12.11.2003, both accessible at <http://sudskapraksa.vsrh.hr/supra/> (last visited on 26.3.2008).

expenses.[70] Comments on this and another decision state that the applicable law determines not only the types of damages available to the plaintiffs, but also the criteria for awarding damages and the amounts to be awarded.[71] This seems to be in line with Article 8 of this Hague Convention. It is further clarified that the law designated by the Convention applies, irrespective of the person sued, be it the wrongdoer or the insurer.[72] Although these comments are correct, they fail to notice the crucial problematic aspect of the cited Court decision. The interpretation of the County Court that the word "victim", as referred to in Article 4(a)(3), limits the scope of that Article only to the persons injured in the car accident, and does not include the persons possibly suffering damages as a result of the injury sustained by the person directly participating in the car accident, is not consistent with the 1971 Convention legislative history. It has been explicitly stated in the preparatory acts that the *lex registrationis* in such cases should govern not only the claims raised by the "directly" injured party, but also those raised by possibly "indirectly" aggrieved parties such as the family of the pedestrian killed in the accident.[73] Therefore, assuming that all conditions for application of Article 4(a)(3) were met, the Courts should have applied Slovenian law as the *lex registrationis*.

In matters of procedure, the application of the Hague conventions is perhaps more frequent due also to the nature of the conventions rules which apply in all civil proceedings regardless of the nature of the disputed issue. Thus, according to the available information for the Municipal Court in Zagreb, in 2007 there were 4397 proceedings that concerned the application of the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, and 3740 proceedings that concerned the application of the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Despite these figures, the interviews with judges have revealed that problems in applying the latter Convention are not at all simple or uncommon.

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[70] County Court in Vukovar (Županijski sud u Vukovaru), Gž-1710/2003, 12.11.2003, accessible at <http://sudskapraksa.vsrh.hr/supra/> (last visited on 26.3.2008).

[71] See, County Court in Zagreb (Županijsku sud u Zagrebu), Gžn-2572/05-2, 13.2.2007, cited in H. BILIĆ-ERIĆ, op. cit., p. 158.

[72] Marijan ĆURKOVIĆ, Međunarodna karta osiguranja motornog vozila [International Motor Insurance Card], 2. ed., Croatia osiguranje, Zagreb, 1990, p. 141, n. 397.

[73] Željko MATIĆ, Međunarodno privatno pravo: Posebni dio (Izabrana poglavlja) [Private International Law: Special Part (Selected Issues)], Pravni fakultet u Zagrebu, Zagreb, 1982., p. 89.

These problems arise as a result of the protracted periods of time needed for the diplomatic delivery of court documents, sometimes caused by the addressee's evading of the receipt.

Thus, in the case before the Municipal Court in Rijeka, concerned with the claim for unpaid debt between an individual of Croatian nationality as the plaintiff and the Bosnian and Herzegovinian insolvent company as the defendant, the diplomatic delivery of the court documents and its confirmation took unreasonably long time.[74] From the outset of the proceedings, the Bosnian and Herzegovinian party had a Croatian attorney, but on 11 December 2006 the power of attorney was cancelled. The next hearing was scheduled for 31 January 2007 but the registered mail delivery of the Court summons was not orderly. The hearing was postponed until 28 May 2007 and the summons and a Court decree ordering the Bosnian and Herzegovinian party to appoint an attorney in Croatia for receiving documents (otherwise, the Court would make this appointment), was directed to the Croatian Ministry of Justice for further delivery. By the date of the second hearing there was no return information on the delivery so the hearing had to be postponed again. The subsequent date for the hearing was 28 January 2008 when the Court, rather than receiving the confirmation of the delivery for that date, received the confirmation for the delivery for the previous hearing. The confirmation made it clear that the defendant was informed of the previous hearing on 10 April 2007, that is to say, in time, but it took half a year for the confirmation to reach the Croatian court.

Although in this case the Croatian judge used the delivery confirmation as basis for appointing a Croatian attorney for receiving court documents on behalf of the defendant, the problem with unreasonable delay and uncertainties in operation of the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters remained. For this reason, Croatian judges sometimes resort to delivery abroad by means of registered mail with an (orange) return receipt. According to their experience, this method has in some cases broken the deadlock of diplomatic delivery and enabled normal conduct of the proceedings. The problem with such a method is that it is not prescribed either by the domestic law on procedure or by the international conventions, and for the latter reason it may rightly be viewed as offensive by the country

[74] Municipal Court in Rijeka (Općinski sud u Rijeci), P-2233/00 (unpublished). The authors are grateful to the Municipal Court judge Mrs. Ksenija Dimec for the information she shared and the access to the cited file.

in which the addressee is located. Nonetheless, it is used for the reasons of procedural efficiency and economy and is considered a sufficient safeguard for the defendant's right to be heard.

Also in the field of procedural law, the 1954 Hague Convention on Civil Procedure plays an important role and its rules may even be decisive for the outcome of the dispute. In the case before the Commercial Court in Rijeka, the lawsuit was rejected because the statement of claim and the accompanying documentation were not translated into the official language of country in which defendant had its domicile. The obligation of translation to the language of the requested state derives from the provision of Article 10 of the 1954 Hague Convention and this should have already been known to the plaintiffs before the submission of the lawsuit. Despite the Court's warning that the lawsuit would be rejected if the plaintiff in the fixed period of time failed to submit to the Court the translation of the statement of claim and accompanying documentation by the official court interpreter for the language spoken in the country of defendant's domicile or seat, so that they may be delivered to the defendant through diplomatic channels, the plaintiff still did not abide by the Convention rules and the Court ruled that it had the right to reject the lawsuit. Furthermore, the plaintiff's request for an extension of the period for translation, submitted after the initially fixed period of time had already expired, was not grounded under Croatian procedural rules. Hence, in cases of failure to submit the needed translations within the fixed reasonable period of time, the lawsuit is considered as if it had not been brought before the court at all.[75]

Issues such as obligation to post the *cautio iudicatum solvi* in favour of the defendant, i.e. a security for costs guaranteeing the successful defendant with the reimbursement of the costs of the proceedings also fall within the ambit of the 1954 Hague Convention on Civil Procedure. Although it is stated above that the Hague conventions to which the former Yugoslavia was a party, continued to be in force in Croatia without any interruptions because Croatia declared itself to be bound by them and other contracting parties tacitly expressed their acceptance, some court decisions rendered in the years subsequent to independence indicate otherwise. For instance, the Municipal Court in Zagreb imposed

[75] Commercial Court in Rijeka (Trgovački sud u Rijeci), P-9398/92, 1.7.2003., confirmed on appeal by the High Commercial Court (Visoki trgovački sud), Pž-5452/03, 30.9.2003. The lawsuit in this case was aimed at setting aside the arbitration award.

upon the plaintiff, a natural person of Slovenian nationality and domicile, the obligation of payment of security for the costs of the proceedings possibly incurred by the Croatian defendant.[76] Similarly, in 1995 the Commercial Court in Zagreb ordered the plaintiff, a legal person having its seat in Bosnia and Herzegovina, to pay the security, otherwise the statement of claim would have been considered withdrawn. The reasons state that the request for ordering payment of the security was founded on the provisions of Articles 82-84 of the Croatian PIL Act.[77] Such interpretation was contrary to the scholarly opinions in the given period, including that which was specifically concerned with the 1954 Hague Convention and the foreign defendant's obligation to pay the security for the plaintiff's costs of proceedings.[78]

3) Specifically on the case law applying the 1980 Hague Convention on the Civil Aspects of International Child Abduction

Specific attention in the report should be given to the case law applying the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption. Given that Croatia is a contracting party only to the former, the following pages are dedicated to that Convention only.

Over the last three years, there were total of 85 proceedings for the return of children initiated before the Croatian authorities, 20 of which have been instigated by foreign applicants concerning children taken to Croatia, and in 65 cases where the Croatian Central Authority has transmitted the applications for return of children wrongfully removed from Croatia to foreign authorities. The length of this report does not allow for an analysis of all cases in which the Croatian courts were asked to decide upon the application for the child's

[76] Municipal Court in Zagreb (Općinski sud u Zagrebu), P-1450/93, 5.4.1993., unpublished), cited according to Tin MATIĆ, Aktorska kaucija i Haška konvencija o građanskom postupku od 1.3.1954. [Cautio Iudicatum Solvi and the Hague Convention on Civil Procedure of 1 March 1954], Odvjetnik, Vol. 68, Nos. 9-10, 1995, pp. 47-56, p. 49.

[77] Commercial Court in Zagreb (Trgovački sud u Zagrebu), P-753/92, 5.1.1995. (unpublished), cited according to T. MATIĆ, op. cit., pp. 48-49.

[78] Vlasta BIRIN, Međunarodna pravna pomoć u građanskim stvarima i neka druga pitanja međunarodnoga privatnog prava nakon uspostave političkog suvereniteta Republike Hrvatske [International Legal Assistance in Civil Matters and Some Other Issues of Private International Law Following the Establishment of the Political Sovereignty of the Republic of Croatia], u: Ivica CRNIĆ (ed.), Građanskopravni aspekti državnopravnog osamostaljenja Republike Hrvatske, Zagreb, 9. i 10. travnja 1992. godine [Civil Law Aspects of Independence of the Republic of Croatia, Zagreb, 9 and 10 April 1991], Organizator, Zagreb, 1991, (pp. 29-42) p. 37.

return or the reasons why the courts on some occasions took more time to close the proceedings. Nonetheless, the first of the following cases represents a rather extreme situation of inefficiency of the Croatian authorities in applying the 1980 Hague Convention. The second case is intended to describe the background against which the proposed implementing legislation, explained at the end of this section, was drafted, while the third case might serve as an illustration of the average course of the proceedings in Croatia in recent years.

a. The 1998 Austrian incoming return case

As may be expected, the application of the 1980 Hague Child Abduction Convention was especially difficult and problematic in the past. Difficulties from the very beginning were due, among other, to the lack of implementing legislation and clear indications of the Croatian Central Authority's competencies, in particular their legal standing in initiating the court proceedings. Although the Croatian Government formally entrusted the role of the Central Authority to the Ministry of Labour and Social Welfare, by the very same Decision the Government nominated the Ministry of Justice as the authority intended "to assist" the Central Authority under the 1980 Hague Abduction Convention.[79] Consequently, applications for the return of wrongfully removed or retained children coming from abroad have very often been sent through the requesting Central Authorities directly to the Ministry of Justice instead of to the Ministry of Labour and Social Welfare and have caused delays in initiating court or administrative proceedings for the return of child. Moreover, the Ministry of Labour and Social Welfare sometimes caused confusion when, upon receiving the application for child's return, forwarded the application to the Ministry of Justice. This was done believing that the Ministry of Justice, being an "assisting agency", had the authority to initiate the proceedings for the return of a child. In some of these cases applications were unfortunately misplaced in the corridors of ministerial administration.

An illustrative example of the detrimental consequences which the confusion concerning the authorities of the two Ministries in initiating proceedings has in the application of the 1980 Hague Child Abduction Convention is the case involving H.A., an Austrian father

[79] This information appears at the Hague Conference official web site <htt://www.hcch.net> (last visited 10.9.2008.).

who applied for the return of his children from Croatia. H.A.'s children were allegedly wrongfully removed from Austria to Croatia by their Croatian mother. In May 1998, H.A. sent the application for the return of his two children to the Croatian Ministry of Labour and Social Welfare through the Austrian Ministry of Justice. Although the application was received by the Ministry of Labour and Social Welfare, which was the Central Authority within the framework of the 1980 Hague Child Abduction Convention, the application was conveyed to the Municipal Court in Zagreb by the Ministry of Justice.[80] All the more, it was sent to this Court on 5 November 1999 more than a year subsequent to its receipt in the Ministry. Upon receiving the application, the Municipal Court in Zagreb remitted the application back to the Ministry of Health and Social Welfare.[81] According to the Court's reasoning, the latter was empowered to act as the Central Authority pursuant to Article 6 of the 1980 Hague Abduction Convention, and therefore conveying the application to the Court could not have been done by the Ministry of Justice. Unfortunately, following this bureaucratic ping-pong, the Ministry of Health and Social Welfare remained idle until 2004 when the Minster himself, sent the letter to the Municipal Court in Zagreb inquiring as to why the proceedings for the return of the children had not been initiated. Despite the fact that the Court had received the written application formally in compliance with the 1980 Hague Child Abduction Convention, the Municipal Court in Zagreb responded that it could not have proceeded with it.[82] In the Court's opinion, the only competent body which could have taken an appropriate measure in order to assure the voluntary return of the children was the Ministry of Health and Social Affair. The Court further stated that this Ministry failed to take any measure whatsoever to assure the return of the children, while the Ministry of Justice lacked *locus standi* to initiate the proceedings. Meanwhile, in May 1999, the Croatian mother had initiated the proceedings before the Zagreb Social Welfare Centre claiming custody of her children. The Centre rendered a preliminary decision to appoint the mother as temporary guardian of the children. Interestingly enough, when in 2004 the Municipal Court in Zagreb inquired about the status of the case, the *temporary* decision was still in force, a full five years after it was rendered (!).

[80] The Ministry of Justice, Decision no. Su-812/99.

[81] Due to the structural and functional reorganization of the Government of the Republic of Croatia, the Ministry of Labour and Social Welfare as of 22 December 2003 exists under the name and with changed competences the Ministry of Health and Social Welfare. See, the Internal Structure and Competencies of the Ministries and the State Administrative Organization Act, Narodne novine RH 199/2003.

[82] Municipal Court in Zagreb (Općinski sud u Zagrebu), Communication no. 534-06-03-04-1, 4 March 2004.

This case clearly demonstrates the way in which the inefficiency of the Croatian judicial and administrative authorities in applying the 1980 Hague Child Abduction Convention can be detrimental to the parent from whom the children were wrongfully removed and brought to Croatia. In a nutshell: the Austrian application for the return of children was received by the Croatian Central Authority during 1998. It was conveyed to the Municipal Court in Zagreb a year later, and the Court sent it back to the Ministry of Labour and Social Welfare. It took the Ministry of Health and Social Welfare half a decade to inquire about the application and as to why procedure for the return of the children was not initiated. During these five years, the Ministry of Labour and Social Welfare took no action whatsoever to make sure the decision on children's return is rendered, or to offer assistance with their voluntary return. The Municipal Court in Zagreb offered justification as to why no proceedings were initiated upon the receipt of the application stating that neither the Ministry of Health and Social Welfare, as the Central Authority, nor the Ministry of Justice, as the "assisting authority", had explicit legal standing to initiate judicial proceedings for the return of children. However, the fact that the Ministry of Health and Social Welfare lacked an explicit legal standing for initiating the proceedings for the return of children cannot excuse the Ministry's absolute inactivity. The Ministry, being the Central Authority, was authorized to take other actions to enable the institution of such proceedings. By filing to do so, the Ministry of Health and Social Welfare deprived the applicant, the Austrian father, of the rights granted to him directly by the 1980 Hague Child Abduction Convention.

b. The 2001 German incoming return case and the related ECHR judgement

In cases where the proceedings for the child's return have been initiated relying on the mechanisms provided by the 1980 Hague Child Abduction Convention, ineffectiveness of the Croatian authorities resulted in unreasonably lengthy proceedings, often giving rise to a violation of the basic human rights, in particular, the right to family life as declared by Article 8 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: the European Convention on Human Rights).[83] An extreme example

[83] Article 8 of the European Convention on Human Rights reads as follows:

of inefficient application of the 1980 Hague Child Abduction Convention, which was considered equal to its non-application and thus amounted to a deprivation of human rights, was the 2001 German incoming return case. This case was eventually brought before the European Court of Human Rights (hereafter referred to as the ECHR) in 2004 as *Karadžić v. Croatia*.[84] The facts of the case as presented in the ECHR decision were as follows.

Edina Karadžić, national of Bosnia and Herzegovina had lived with her son and his father in Germany. Under German law she had sole custody of her son. In 1999, the father fled Germany and from then he lived in Croatia. As a consequence of a long fight between the parents over who would be the custodian of the child, the father finally, on 18 September 2000, kidnapped the child in Germany and took him to Croatia. The *Amtsgericht Freudenstadt* rendered the decision on 25 of April 2001 that the child was wrongfully taken to Croatia within the meaning of Article 3 of the Hague Abduction Convention, and whose decision was confirmed by the Stuttgart Court of Appeal on 28 of January 2003. Meanwhile, relying on the Hague Abduction Convention, Edina Karadžić, requested on 21 April 2001 that the German Central authority (the Chief Federal Prosecutor) help her to return her son. The Chief Federal Prosecutor immediately contacted the Croatian Ministry of Health and Social Welfare as the Croatian Central Authority.

In 2001, the Croatian Ministry of Health and Social Welfare instructed the Poreč Social Welfare Centre (having jurisdiction since the father's and child's domicile were in Poreč) to order the father to return his son to his mother in Germany, which he refused to do. Consequently, on 21 October 2001 the Poreč Social Welfare Centre instituted proceedings for the child's return before the Poreč Municipal Court and the letter rendered its decision on 6 May 2002 ordering the father to return the child to his mother. The County Court quashed the first-instance decision and remitted the case to the Municipal Court, which in the new proceedings, on 12 May 2003, decided in favour of the child's mother and ordered

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Everyone has the right to respect for his private and family life, his home and his correspondence.
There shall be interference by a public authority with the exercise of his right except such as in accordance with the law and is necessary in a democratic society in the interest 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.
More about Article 8 of the European Convention on Human Rights see in D.J. HARRIS/M. O'BOYLE/C. WARBRICK, Law of the European Convention on Human Rights, London/Dublin/Edinburgh, 1995, pp. 302 et seq.

[84] ECHR, Karadžić v. Croatia, Final 15.3.2006, Application no. 35030/04.

the child's return to Germany. This decision was affirmed by the County Court on 18 August 2003.

Subsequent to Edina Karadžić request, the Poreč Municipal Court issued the enforcement order on 29 September 2003, ordering immediate execution of the Court decision on the child's return to Germany. A month later, a court bailiff attempted to enforce the decision but without success since the child was not in the father's house. The father did not want to reveal the child's location, and the police were asked to locate the child. After an unsuccessful police inquiry, in May 2004, the Poreč Municipal Court imposed a sanction of thirty-day detention on the father for failing to comply with the Court order for the child's return. Furthermore, the Poreč police filed a criminal complaint against the father and he was taken into custody, but managed to escape. The said truth for Edna Karadžić was that even two years after the Municipal Court in Poreč rendered its decision ordering the child's return, she was not reunited with her son. This also had adverse consequences for Croatia in the case before the ECHR.

In her application to the ECHR, Edina Karadžić claimed that the Croatian authorities had been extremely slow in all the actions undertaken to reunite her with her child, particularly taking into consideration the obligations imposed on the Croatian requested authorities by the 1980 Hague Child Abduction Convention. She further claimed that such inadequate actions resulted in a violation of her right to family life as declared in Article 8 of the European Convention on Human Rights. She based her claim on the following circumstances. First, it took the Social Welfare Centre almost six months to institute the proceedings for the child's return before the Municipal Court in Poreč. And second, the Croatian authorities not only had the obligation to inform the person concerned of the reasons for any delay longer than six weeks, but also had to interpret the six-week period prescribed by the 1980 Hague Child Abduction Convention to mean the period within which the requested state is obliged to render the decision on child's return. These deadlines were not followed in this case. One year passed from the request from the competent German authorities to the first-instance decisions of the Municipal Court in Poreč. Moreover, twenty-eight months passed from the request for return until the final decision of the Croatian court. Such delays, according to Edna Karadžić's claim, amounted to a violation of Article 8 of the European Convention for Human Rights. In addition to

being extremely slow when proceeding upon Edna Karadžič's return request, her application stated that the Croatian authorities had violated the 1980 Hague Child Abduction Convention by not taking all the necessary steps that could have reasonably been expected in the case, i.e. the Ministry of Health and Social Welfare had remained passive and failed to inform the competent German authority expeditiously or fully on the developments in the case. Moreover, the police's failure, first to locate the father or the child, and later to prevent the father from twice escaping their custody, delayed the enforcement proceedings.

When deciding on this case, the ECHR had to examine whether there was a breach of Article 8 of the European Convention on Human Rights, namely, whether the national authorities had taken all the necessary steps to facilitate execution as can reasonably be expected under the circumstances of the case. Before *Karadžić*, the EHCR had several opportunities to consider under which circumstances an inefficient performance of the judicial and administrative authorities, in relation to obligations imposed on them by the 1980 Hague Child Abduction Convention, represented a violation of the right to family life.[85]

The ECHR concluded that in the case of Edna Karadžić the Croatian authorities had failed to make adequate and effective efforts to reunite her with her son as required by the positive obligations arising from Article 8 of the European Convention on Human Rights. In the context of the Hague Child Abduction Convention, the ECHR restated its previously taken position concerning the application of the European Convention on Human Rights, and in particular the application of Article 8. The ECHR stated that the question as to whether the non-enforcement of a court order for child's return amounted to a lack of respect for Edna Karadžić's family life, had to be answered in accordance with the rules of international law. Positive obligation imposed by Article 8 of the European Convention on Human Rights requires the contracting states to act according to the obligations prescribed by the Hague Child Abduction Convention, with respect to reuniting parents with their children. Having said that, the Court reemphasized that the positive obligation of national authorities to take such measures was not absolute. If a child had lived for some time with

[85] See, Ignaccolo-Zenide v. Romania, no. 31679/96, EHCR 2000-I; Hokkanen v. Finland, judgment, 23.9.1994, Series A no. 299; Sylveste v. Austria, nos. 36812/97 and 40104/98, 24.4.2003.

one parent, sometimes the child's reunion with the other parent may not take place immediately and may require the taking of preparatory measures. Therefore, the nature and extent of the needed measures depend on the circumstances of each case. Considering the facts in *Karadžić*, the ECHR noted that the Croatian authorities were in possession of the request for the child's return which had been sent by the German competent authorities, a full five months before they instituted the court proceedings for the child's return. Then, the County Court in Pula took an additional five months to render its decision on the appeal against the first-instance enforcement order, having taken no procedural actions in the meantime. Additionally, in the reassumed proceedings, it took the Municipal Court in Poreč another seven months to render its new decision. With respect to the enforcement proceedings, which lasted for year and a half, the ECHR again invoked the 1980 Hague Child Abduction Convention. Since, competent authorities have an obligation to act expeditiously, according to Article 11 of the 1980 Hague Child Abduction Convention, it was the ECHR's opinion that despite the fact that the police attempted three times to enforce the Court order, it did not show the necessary diligence in locating the father, on the one hand, and on the other, it was not cautious enough to prevent the father from twice escaping their custody. In addition, the ECHR pointed out that in such difficult cases coercive measures, which were not usually welcome in delicate family cases, were necessary here to sanction unlawful behaviour by the parent who had abducted a child. Despite the fact that the Croatian court ordered payment of the fines and the father's detention, the problem was also in the lack of enforcement of these sections. According to the ECHR, the measures themselves were not sufficient; the efficiency and promptness in their enforcement was crucial. In the ECHR's own words, the utmost importance is to be ascribed to the "urgent handling of the measure as the passage of time and change of circumstances can have irreparable consequences for relation between children and parent who does not live with them".[86] In *Karadžić*, the ECHR found that the Croatian authorities have violated Article 8 of the European Convention on Human Rights and it awarded Edna Karadžić with non-pecuniary damages of EUR 10,000 for her distress as a result of the lengthy period of non-enforcement of the return order and EUR 8,000 to cover the costs and expenses incurred in the proceedings before the ECHR.

[86] Karadžić v. Croatia, judgment of 15.12.2005, Final 15.3.2006, p. 9.

c. The 2003 United States incoming return case

This relatively recent case aptly portrays the present state of developments related to the proceedings before the Croatian authorities began the application for return of a child under the 1980 Hague Child Abduction Convention. The facts were as follows: through the competent American Central Authority, R.H.R, an American citizen sent the request to the Croatian Central Authority, the Ministry of Health and Social Welfare, for the return of his son who was wrongfully removed from the United States to Croatia by the child's mother. In the application for the return of his son, the father enclosed the Order for temporary custody and the child's return to the United States as rendered by the District Court of 11th Circuit, Dade, Florida of 18 September 2002 along with the Order for taking the child away from the mother which was rendered by the same Court. The Ministry of Health and Social Welfare received the application for the return of the child in January 2003 which had been sent on 9 December 2002. The Ministry of Health and Social Welfare then contacted the Social Welfare Centre requesting the latter to take the necessary measures to obtain a voluntary return of the child. Although summoned several times by the Centre to give the statement and to return the child,[87] the mother refused to do either. Not being able to obtain voluntary child's return, the Ministry of Health and Social Welfare conveyed the application for the return to the Municipal Court in Zadar where the mother and child were located.

At the hearing before the Municipal Court in Zadar on 24 March 2003, the mother opposed the application for the child's return to the United States arguing that the return would seriously endanger the child, both physically and mentally. She asked the Court not to grant the child's return to the United States on the basis of Article 13(1). In her statement, the mother emphasized that she had never received Orders rendered by the United States Court, that she and her son were Croatian nationals, and that they have lived together from the day the child was born. She emphasized that the father had not been living with them all the time and that they had lived together for a short period but he had then he left them and

[87] The Zadar Social Welfare Centre acted in accordance with Article 7 of the 1980 Hague Abduction Convention and attempted to secure the voluntary return of the child or to assist in amicable resolution of the dispute.

remarried. Moreover, she claimed that by releasing the information about this case to the Croatian media, the father had acted against the best interests of their child, and she initiated criminal proceedings against him. In March 2003, she also initiated judicial proceedings before the same Municipal Court in Zadar requesting that custody be granted to her. However, on 28 May 2003 the Court dismissed the claim stating that it lacked the international jurisdiction to hear the custody matter.

At the beginning of the proceedings, the Court had to determine whether the child was wrongfully taken from the United States to Croatia. Unfortunately, the Municipal Court in Zadar misunderstood its task under the 1890 Convention and believed that in order to characterize the mother's conduct as wrongful; it first had to recognize the abovementioned United States court Orders, which is what, in fact, the Zadar Court did in its decision of 30 April 2003.[88] Unsurprisingly, the mother filed an appeal before the County Court in Zadar challenging the Municipal Court's decision which recognised the United States Court Orders. On 16 July 2003, the Country Court ruled in her favour,[89] and remitted the case back to the Municipal Court for deciding anew. In the renewed proceedings, the Municipal Court in Zadar, relying on Article 14 of the 1980 Hague Child Abduction Convention, took notice and directly considered the United States court Orders for the purpose of determining whether the child was wrongfully taken from the United States to Croatia.[90] Considering all relevant circumstances of the case, and above all, taking into consideration that the mother acted against the United States court Orders, the Zadar Court decided that the mother violated the father's custody right, which he had had at the time the child had been taken to Croatia. Consequently, the Court decided that, according to Article 3 of the 1980 Hague Abduction Convention, the removal of the child to Croatia was wrongful. Before reaching this decision, the Municipal Court in Zadar conducted a detailed procedure for taking the evidence in order to establish whether the child's return to the United States would expose it to physical or psychological harm. This was necessary due to mother's

[88] Recognizing the United States court orders for temporary custody and the child's return to the United States the Municipal Court in Zadar carried out applying the rules on the recognition and enforcement of foreign court decisions contained din the Croatian Private International Law Act, Narodne novine RH53/1991.

[89] The County Court in Zadar (Županijski sud u Zadru), Gž-690/03, 16 July 2003.

[90] The Municipal Court in Zadar decided that the United States Orders have to be recognized in accordance with the Croatian Private International Law Act reasoning that, because Article 14 of the Hague Abduction Convention has priority over Croatian national law, it can take notice of foreign court decision without recourse to the recognition of foreign decisions which would have been otherwise applicable.

allegations stated at the onset of the proceedings which could not have been simply ignored by the Court. After having heard parents and several witnesses, the Zadar Court ordered a medical and psychological examination of both parents and the child. On the basis of the thorough examination, the expert witness concluded that there were no serious obstacles or risks for the return of the child to his father in the United States, so the Municipal Court in Zadar rendered the order granting the applicant's request for the child's return to the United States. This was on 27 August 2004.

By simple calculation, one may see that it took the Court some 18 months to render a final decision granting the child's return. This was due, in part, to the unnecessary recognition proceedings with respect to the United States court orders. Once it rendered the decision on the recognition of the two Orders, the Municipal Court in Zadar opened the door for the use of buying-time tactics by launching the appeal proceedings. In the renewed proceedings nevertheless, the Municipal Court in Zadar became aware that the Hague Child Abduction Convention allowed it to take notice of those court Orders without recognizing them first. Although the Zadar Court's clearly made an error in applying the Convention when recognizing the United States court Orders, which prolonged the proceedings for half a year. However, it cannot be blamed for spending a year trying to reach the best possible decision. In order to reach the best possible decision, the Court heard both parents and several witnesses, including the expert witness on the circumstances of the medical and psychological conditions of the parents and the child. This was the only way the Zadar Court could have made sure that by ordering child's return to the United States, the child's best interests would be protected.

d. The proposed implementing legislation

Regardless of the improvements which are evident from the chronological presentation of the three selected cases, the problems with effective application of the 1980 Hague Child Abduction Convention have not been completely eliminated to date. Even before the judgement in *Karadžić*, there was awareness in Croatia that something had to be done in order to facilitate the application of the 1980 Hague Child Abduction Convention. However, the ECHR's judgment in this case cleared any doubts that extremely protracted

proceedings for the return of child were a direct consequence of the lack of implementing legislation to the 1980 Hague Child Abduction Convention. In order to avoid further violations of human rights, especially the right to respect for private and family life and to ensure a more efficient application of the 1980 Hague Child Abduction Convention, in 2007, the Croatian Government established a Working Group with the task of drafting *de lege ferenda* implementing legislation for the 1980 Hague Child Abduction Convention.[91] The new legislation has to meet several objectives. First, it has to explicitly regulate and precisely determine the competences and duties of the state authorities having any sort of involvement in the mechanisms envisaged in the context of the 1980 Hague Child Abduction Convention, and second, it has to ensure that state authorities act promptly and effectively in honouring deadlines provided by the same Convention. In this sense it is important to note that the Working Group is composed of experts from different ministries: the Ministry of Justice, the Ministry of Internal Affairs, the Ministry of Health and Social Welfare and the Ministry of the Family, Veterans' Affairs and Intergeneration Solidarity. The purpose of including experts working in different state bodies was to ensure better and more efficient coordination between the Croatian authorities who have a certain role in cases of child's custody and abduction.

Taking into consideration that the work of competent authorities in implementing the 1980 Hague Child Abduction Convention mostly interferes with their competences already covered by the Family Act,[92] the Working Group was of the opinion that the proposed implementing legislation should be incorporated into the existing Family Act in order to achieve the best result. For this reason, the Working Group prepared the 2008 Draft Proposal for the Amendments of the Family Act (hereafter: the Draft Proposal), containing the implementing rules for the 1980 Hague Child Abduction Convention, and their explanations.[93] The main purpose of the proposed amendments was the establishment of the institutional and legislative framework for efficient resolving of the child abduction cases, and the cases concerned with the right of access to children.[94]

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[91] Croatian Government, Decision no. 022-03/07-02/19, 7.12.2007.

[92] Narodne novine HR 116/2003, 17/2004, 136/2004 and 107/2007.

[93] Ministry of Justice, Draft Proposal for the Amendments to the Family Act, April 2008.

[94] Draft Proposal, p. 5.

Problems associated with ineffective implementation of the 1980 Hague Child Abduction Convention do not derive solely from the lack of implementing legislation to the Convention, but also from inadequately developed internal organization of the Central Authority. There is no specialised office within the Ministry of Health and Social Welfare in charge solely of the cases within the scope of the 1980 Hague Convention. The Office in charge for the Convention implementation generally deals with all issues concerning children (adoption, custody, etc.), hence the 1980 Hague Child Abduction Convention is only a part of their everyday duties. The judgment in *Karadžić* drew the Government's attention to the problem of the underdeveloped institutional capacities handling the Convention cases and to the adverse consequences associated therewith. While the Working Group was preparing the Draft Proposal, it suggested that the Government establish a separate state agency that would assume the role of the Central Authority, not only for the Hague Child Abduction Convention, but for all Hague Conventions in force in Croatia.[95] The Government considered this suggestion as financially burdensome, nonetheless it accepted to undertake an internal reorganization within the Ministry of Health and Social Welfare by establishing within this Ministry an office solely focused on the implementation of the 1980 Hague Child Abduction Convention. Such internal reorganization would surely bring about a more efficient application of the 1980 Convention.

New legislative framework for the implementation of the 1980 Hague Child Abduction Convention in the form of the Draft Proposal regulates, *inter alia*, the following issues: appointment of the body competent to act as the Central Authority, the right of the Central Authority to initiate the court proceedings for the child's return, the right of the Central Authority to transfer its legal standing to a representative, the competencies of the Central Authority relevant to the functioning of the 1980 Hague Child Abduction Convention, the police's role in the proceedings concerning the child's return, the precise time frame and deadlines which courts and administrative authorities have to follow in the course of the proceedings for the child's return and the court jurisdiction in cases for the child's return, among others.

[95] Vesna Tomljenović, Legal opinion for the Government of the Republic of Croatia, May 2008.

As confirmed in the previously described cases, one of the main reasons for inefficient application of the 1980 Hague Child Abduction Convention was unclear delimitation of competences between two Ministries, the Ministry of Justice and the Ministry of Health and Social Welfare. In order to speed up the proceedings initiated on the basis of the request for the child's return and to eliminate duplication and confusion of competences between the two Ministries, the Draft Proposal nominates the Ministry of Health and Social Welfare as the only body having the competences of the Croatian Central Authority.[96]

Very detailed provisions of the Draft Proposal list the measures which the Central Authority has to take upon receipt of an application for the child's return from the requesting Central Authority or directly from the person claiming that a child has been wrongfully taken to or retained in Croatia.[97] The Ministry of Health and Social Welfare shall have the duty to notify the requesting Central Authority or the applicant of the receipt of an application by the following day of receipt. To ensure an improved communication between the Central Authorities involved in a particular case, and to accelerate the exchange of information essential for the proceedings concerning the child's return, the Draft Proposal lists certain data which the notification, sent to confirm the receipt of an application, has to contain. This data includes the name of the person within the Ministry who is in charge of the application, his or her telephone number and e-mail address.[98]

Furthermore, the Draft Proposal is intended to eliminate the existing problem of the lack of a Central Authority's legal standing due to which the Authority is unable to initiate the court proceedings for the child's return when the case falls within the scope of the 1980 Hague Child Abduction Convention. For this reason, Article 332e is to be inserted in the Family Act by the Draft Proposal and expressly provides that the Ministry of Health and Social Welfare, acting as the Central Authority, shall have legal standing to initiate the proceedings before the competent court by filing the application for child's return. The

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[96] The proposed Article 332a, as it stands now, reads:

1. The Central Authority which shall perform the duties imposed by the Convention on the civil aspects of international child abduction (hereafter: the Convention) upon such authorities is the Ministry competent for social welfare.

2. The Central Authority shall receive and discharge applications for the return of wrongfully removed or retained child, applications to make arrangements for organizing or securing the effective exercise of child' rights of access and contacts with persons to whom such rights are granted, and to perform other tasks and activities provided by the Convention.

[97] The proposed Article 332b.

[98] Ibid.

application may be filed either by the Ministry itself or through its representative. Although the Draft Proposal does not explicitly prescribe which representative that would be, the Working Group's explanations of the Draft Proposal state that, being the Croatian Central Authority, the Ministry of Health and Social Welfare shall exercise its *legitimatio ad processum* by virtue of the Social Welfare Centres.[99] This comes as a logical consequence of the Family Act provisions, according to which the Social Welfare Centres have legal standing in initiating different types of court proceedings in family matters, including the proceedings concerning child custody or child support.[100] In addition, the Social Welfare Centres seem to be the most appropriate choice, because they may issue preliminary measures with the purpose of protecting the best interests of a child and the parent from whom a child is wrongfully removed, as well as because the Centres themselves have to determine whether the necessary conditions for issuing a certain preliminary measure are fulfilled.[101]

In order to create a more efficient legal structure than that at present, within which the court proceedings for the return of wrongfully removed or retained children will be conducted, the Draft Proposal introduces specific procedural provisions regulating a number of issues, such as the courts' subject-matter jurisdiction, the type of proceedings initiated for the child's return, the taking of evidence, very short and strict time-limits within which the competent bodies have to act or render their decisions, the *ex lege* enforceability of the court order for child's return and the summary appeal proceedings.

With the aim of ensuring a more effective decision-making process and uniformity in court decisions ordering a child's return, the Draft Proposal introduces the specialization of courts by means of a concentrated jurisdiction for child abduction cases. Thus, only the municipal courts having their seats at the location of the county courts[102] are competent to decide upon the application for a child's return.[103]

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[99] The Daft Proposal, p. 12.

[100] Article 274 et seq. of the Family Act.

[101] The Draft Proposal, p. 11.

[102] In these matters the county courts act as the second-instance courts deciding on the appeals against decisions rendered by the municipal courts.

[103] The proposed Article 332g.

Moreover, in order to expedite the proceedings in which decision has to be made concerning the child's return, the Draft Proposal expressly provides that these proceedings are non-contentious, and more importantly, that they have to be conducted with a high level of urgency.[104] In addition to the explicit abstract rule proclaiming urgency of the proceedings, the Draft Proposal contains specific provisions imposing strict requirements concerning the transmission, receipt and processing of applications by the Central Authority, thus ensuring that the proclaimed urgency is actually put into practice. Accordingly, the first hearing before a competent court has to be held within eight days following the receipt of the application for child's return, while the court must render and deliver its decision to the parties within eight days subsequent to completing the procedure for taking evidence.[105]

There are also important procedural novelties intended to facilitate efficiently. Summoning the parties by phone, fax or telex is one of the tools at the court's disposal. This is one of the rather revolutionary aspects of the new system which implements the Hague Abduction Convention.[106] Adding less formal communication methods to the classic ones is expected to significantly improve the speediness of the proceedings. Moreover, a competent court can render the decision on a child's return even if the applicant, or his or her representative, is not present at the hearing, provided that the court considers their presence as not necessary under the circumstances.[107] Another provision of the Draft Proposal, which departs from the general rules of civil procedure with the purpose of assuring urgency in the proceedings, provides that the court can reach its decision on the basis of evidence which was not taken before the same court that decides upon the application.[108] Consequently, written testimonies of the parties, as well as of other persons relevant to the case in question, can be relied on by the court, removing the need to always take their oral statements.[109]

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[104] The proposed Article 332g paragraphs 2 and 5.

[105] The proposed Article 332g paragraph 9.

[106] The proposed Article 332g paragraph 6.

[107] The proposed Article 332g paragraph 7.

[108] Ibid.

[109] The proposed Article 332g paragraph 8.

Another important provision clearing the way to expedite proceedings for a child's return prescribes that the court decision ordering a child's return shall become automatically enforceable from the moment it is rendered.[110] This novelty in the Croatian procedural law is proposed in view of the discouraging experience with the enforcement proceedings, which were frequently, but with little success, resorted to after the court decisions ordering a child's return were not complied with. As a rule, the enforcement of orders for a child's return in Croatia proved to be extremely time-consuming and likely to unnecessarily prolong the return of a child. Therefore, as an exception to the ordinary rules of procedure, the Draft Proposal envisages that the courts have to determine, in the decision ordering a child's return, the mode and time of the child's return and the manner in which enforcement, if required, is to be conducted.[111] It was the opinion of the Working Group that the parent who wrongfully removed or retained a child, need not be given an additional period to voluntarily comply with the order.[112]

With the same purpose of making the Convention implementation scheme more efficient, short time-limits dictate the pace of the proceedings before appellate courts. Namely, parties to the proceedings wishing to appeal against the court decision may do so only within three days.[113] To avoid the misuse of an appeal as a delay tactic, the Draft Proposal explicitly provides that an appeal has no suspension effect on the enforceability of the first-instance decision which is appealed.[114] Here again the urgency of procedure is ensured by prescribing a very short period of time in which an appellate court has to render its decision on the appeal; this cannot take more than fifteen days.[115]

In addition to the specific procedural improvements guaranteeing more efficiency in the proceedings for child's return, the Draft Proposal contains provisions establishing institutional framework and modes of mutual coordination among the courts and the different administrative authorities potentially involved in a child abduction case. Taking into consideration the experience of some other states parties to the 1980 Hague Child

[110] The proposed Article 332h paragraph 3.

[111] The proposed Article 332h paragraph 1.

[112] The Draft Proposal, p. 11.

[113] The proposed Article 332i paragraph 1. Although this provision does not state clearly, it seems logical that three-day period runs as of the day the decision is received

[114] The proposed Article 332i paragraph 1.

[115] The proposed Article 332i paragraph 2.

Abduction Convention, the Working Group decided to propose the assigning of a special role to the Ministry of Internal Affairs, in particular to its Police Directorate (hereafter referred to as the Police). An important addition which should facilitate the implementation of the 1980 Hague Child Abduction Convention concerns the coordination between the Central Authority, the Police, and the Social Welfare Centres. The proposed new Article 332d expressly provides that, upon the request of the Central Authority, the Police must take all appropriate measures to locate a child if the child's temporary residence is not known to the Ministry of Health and Social Welfare. The Police must act with promptness. Any information concerning a child's temporary location has to be *promptly* reported to the Central Authority along with all circumstances related to the child's wrongful removal or retention. Moreover, if the Police become aware of any circumstance demanding specific measures for the protection of the best interests of an abducted child, it has to inform the competent Social Welfare Centre thereof. The Centre will then commence the court proceedings in order to establish whether such measures are needed and, if so, to undertake the measures necessary for the child's protection. In the same time, the Police have the duty to inform the Central Authority of the communication with the Centre and of the special need for child protection.[116] All enforcement measures needed in the course of the proceedings for the child's return fall within the competence of the special Police departments dealing exclusively with children and youth.[117]

The awareness about the importance of creating a friendly legal environment which would facilitate proceedings against abducting parents located in Croatia, is evident not only from the determinateness in setting an efficient legislative scheme, but also from the political efforts to that effect. The Amendments to the Family Act, containing the provisions implementing the 1980 Hague Child Abduction Convention, will be discussed and hopefully adopted in the Croatian Parliament under the special accelerated legislative procedure.[118] Once the Amendments are adopted, they will enter in force the same day and will be published in the Official Gazette.

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[116] The proposed Article 332d paragraph 4.

[117] The proposed Article 332d.

[118] This fast-track procedure is regulated under Article 159 of the Rules of Procedure and Conduct in the Croatian Parliament, Narodne novine RH 6/2002, 41/2002, 91/2003 and 58/2004.

It is to be hoped that the proposed implementing legislation in the hands of the specialised judges and other competent bodies will successfully serve the purposes of the 1980 Hague Child Abduction Convention and, minimise the incidence of human rights violations, and in particular, the right to family life. Some of the cases presented above reveal grave inadequacies in the application of the Hague Child Abduction Convention, which resulted in the deprivation of rights granted to parents of abducted children. This having been said, it has to be emphasised that in the majority of cases initiated on the basis of the 1980 Hague Abduction Convention, the Croatian courts and administrative authorities working together managed to surpass the existing institutional or legislative obstacles and to, more or less successfully, complete the proceedings for the child's return.

The common problem in all these cases is the lack of promptness and resoluteness in applying the 1980 Convention provisions. On average, the procedure for child's return lasts for a year and a half or more. However, it would be unfair to say that the courts, by taking more than one year to decide on the child's return, acted slowly. Because of the very complex fact patterns which surround almost all cases of children abduction, the courts in fact need time to make a proper decision. According to Article 12 of the 1980 Hague Child Abduction Convention, the authority concerned can order the return of the child forthwith only in cases when less than one year has elapsed from the date of the wrongful removal or retention. In all other cases, where the mentioned period is longer than a year, the Convention does not impose on the courts the duty to order automatic return of the child. This is so in cases where the abducting parent opposes the return of the child alleging that this could create a great risk to the child's best interests and that the child could be exposed to physical or psychological harm or be placed in an intolerable situation, or in cases where the abducted child is already settled in its new environment. Since, in most cases before the Croatian courts the abducting parents opposed the children's return, the courts had to establish whether the requests for the return were justifiable or not, in the sense of Articles 12 and 13 of the Convention. In particularly complex cases of a child's wrongful removal or retention, which are not rare, the courts need more time to establish, in the interest of children and parents, all relevant circumstances. Quite frequently, an expert testimony is needed which also requires additional time. Resolute and speedy application of the 1980 Hague Child Abduction Convention is not without difficulty because this might often entail

a choice between paying attention to, or disregarding the Article 13 defences. Strict application of the Convention rules might prove too drastic a remedy where the abducting parent is the primary caretaker or the mother with a joint custody,[119] which is precisely the reason why the courts have to avoid deciding hastily on the return of child. The desirable (just) decision takes into account the best interest of the child and both parents, which sometimes has to be done at the expense of a quick return in order to prevent the possibility of more severe consequences in the future.

It is beyond any doubt that, if adopted in the proposed text, the new legislation implementing the Hague Child Abduction Convention will not only put an end to such ineffective proceedings as were carried out in the 1998 Austrian incoming return case and the 2001 German incoming return case, but also oblige the courts and other administrative authorities to act more expeditiously than the Zadar Court did in the case involving the Croatian abducting mother and the United States father claiming their son's return. However, the latter case shows that putting the legislative framework in place will not be sufficient for the effective application of the 1980 Hague Child Abduction Convention.

Proper understanding by the judiciary members of the provisions and the underlying objectives of the 1980 Hague Child Abduction Convention is one of the key factors to its successful operation. That is why the proposed implementing legislation has to be welcomed. Among other things, it envisages the concentration of court jurisdiction on making only some courts competent in deciding on child abduction cases. This concentrated jurisdiction will enable judges to develop a higher degree of knowledge and appreciation for the Convention rules. This of course cannot be expected to be achieved without systematic training which these judges will have to take. Hence, the Working Group explicitly points out in the explanations to the Draft Proposal introducing the implementing legislation that, within the assessment of the financial means needed for the proper implementation of the new legislation, the Government has to ensure sufficient funds are made available specifically for the continuous training of judges, and also for

[119] William DUNCAN, Action in Support of the Hague Child Abduction Convention: A View from the Permanent Bureau, NYU Journal of International Law and Politics, Vol. 33, 2000-2001, p. 104.

administrative staff working with cases within the scope of the 1980 Hague Child Abduction Convention.[120]

[120] The Draft Proposal, p. 3.