CHAPTER III
STANDARDS FOR THE JUDICIARY, LAWYERS AND PROSECUTORS

A) Judiciary and lawyers

1) Application of UN standards in national legislation

General remarks

Basic principles and standards in the judiciary are now well-established in Croatian legislation. After several incidents in the 1990s, when certain legislative provisions opened up the possibility of some of the principles governing the independence of the judiciary being violated, the legislation governing the legal profession has now, to a large extent, been streamlined and brought into line with international standards.

This part of the report deals principally with the implementation of the following UN documents:

- Basic Principles on the Independence of the Judiciary - hereinafter BPIJ (with the Procedure for the effective implementation of the Basic Principles on the Independence of the Judiciary - hereinafter PEI);
- Basic Principles on the Role of Lawyers - hereinafter BPRL.

We will not deal here with the implementation of other instruments, although Croatia has ratified a

number of international conventions that touch upon, inter alia, substantial issues regarding the independence of judges and lawyers *(e.g. the European Convention on Human Rights)*. Apart from the work of the UN, Croatia also participates in the work of other international standard-setting organizations, which have issued a number of documents *(recommendations, best practices etc.)* in this area - most notably the Council of Europe. These documents will not be discussed in this report, although they do have a complementary relationship with UN standards.

Standards relating to courts and judges

The independence of the judiciary is now enshrined as a constitutional principle, together with other basic principles of democracy, such as the principles of separation of powers, checks and balances and the rule of law. The judicial branch of government is a separate branch of government under the Constitution. As mentioned earlier, a whole chapter of the Constitution *(Ch. 4., Arts. 117 to 123)* outlines basic constitutional guarantees applying to the judiciary. Constitutionally, the judicial branch of enjoys independent status, and judicial power is exercised by the courts. Under the Constitution, the establishment, jurisdiction, composition and organization of courts and court proceedings is regulated by law. Every citizen and every person under national jurisdiction has the right to a fair trial by an independent and impartial tribunal (Art. 29, Constitution). The courts must administer justice on the basis of the Constitution and the law.

The principle of the independence of the judiciary is also enshrined at the statutory level. The main legislative act that deals with the organization of the courts is the Law on Courts - hereinafter LC. While reasserting constitutional guarantees, the LC expressly prohibits inappropriate interference with the judicial process and provides that only courts have the authority to review and change decisions that are within their jurisdiction, under the proceedings defined by law. Everybody must respect final and binding judicial decisions and obey them *(Art. 6, LC)*.

Based on these principles, derived inter alia from the BPIJ *(see nos. 1-6)*, a number of acts and

statutes regulate the functioning of the judicial branch of government and further regulate their implementation. Most prominently, the constitutional guarantees of fair judicial proceedings are further elaborated in the basic procedural codes *(Criminal Procedure Act, Code of Civil Proceedings, the Administrative Proceedings Act etc.)*.

The role and status of judges is extensively regulated by legislation. Some insufficiencies in the previous laws that were causing problems (see Uzelac, 2000) have now, by and large, been removed. Judges enjoy freedom of expression and association compatible with their office *(see BPIJ no. 8-9)*. They may be members of professional associations, such as the judges' associations, but they are not allowed to be members of political parties, and they may not engage in political activities *(Art. 60, LC)*.

The law states that the process for appointing and removing judges must guarantee the professional ability, independence and integrity of the candidates for judicial office *(Art. 8, LC)*. The conditions for appointment to judicial office include a law degree, a period of practice in courts or other legal services and a bar exam *(judicial exam - see Arts. 49-51, LC)*. During the process of appointment, the professional ability of the candidates is evaluated by judicial councils, which are composed of judges, mostly those in the higher ranks of the judiciary. Discrimination among candidates is prohibited by general constitutional rules that proclaim equal rights in law regardless of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, education, social status or other characteristics *(Art. 14-15, Constitution)*. Yet, in compliance with the BPIJ, no. 10, the provision that a candidate for judicial office must be a national of Croatia is maintained *(Art. 49, LC)*. Judges are appointed by the State Judicial Council. This is a special body, which is constitutionally defined *(see Art. 123, Constitution)*, and the majority of whose members are judges.

Once appointed, judges hold tenure until the fixed retirement age *(BPIJ, no. 11-13)*. Since 2000, the mandatory retirement age of judges has been constitutionally defined - the judges retire when they reach the age of 70 *(see Art. 122, Constitution)*. As far as conditions of service are concerned, judges

enjoy legal guarantees of immovability - as a rule, a judge cannot be transferred to another court without his permission. The allocation of cases to judges within the court to which they belong should be done by the judicial administration, in compliance with an annual schedule provided in advance. The exceptional redistribution of assigned cases can be ordered only by the President of the Supreme Court *(Art. 10, LC)*.

With regard to professional secrecy *(see BPIJ, no. 16)*, judges are obliged to keep secret all facts that were not made public during the trial. They also have to keep secret other personal data divulged to them *(Art. 59, LC)*. They have the right to refuse to testify under all such circumstances, or as a result of the deliberations of the judicial panel *(Art. 9, LC)*. Judges also enjoy immunity *(see BPIJ, no. 16)*. Any criminal proceedings against them may be commenced only with the permission of the SJC. If judges cause damage by improper actions undertaken in their judicial function, those who suffered damages may request monetary compensation from the State, but not from the judge personally. The State may seek reimbursement from the judge who caused the damage only if the damage is caused willfully or by gross negligence *(Art. 67, LC)*.

The proceedings regarding discipline and the suspension and removal of judges *(BPIJ, no. 17-20)* are regulated by the Law on the State Judicial Council *(hereinafter LSJC)*. Discipline and the removal of judges fall within the jurisdiction of the SJC, but judges who are for any reason removed from office may also make a special appeal against that decision to the Constitutional Court *(Art. 122, Constitution)*. During disciplinary proceedings, the judge against whom proceedings are conducted is entitled to a full hearing both at the initial stage and in later proceedings. In the initial stage, before the formal commencement of disciplinary proceedings, the proceedings are not open to the public, unless so requested by the judge *(Art. 25, LSJC)*. Later proceedings are generally held in public (except for deliberations and voting), and the decisions must always be publicly pronounced *(Art. 28, LSJC)*. Judges may be suspended from office either because of the criminal proceedings against them or because they have undertaken activities incompatible with their judicial duties *(Art. 31, LSJC)*.

According to statistical data from the Ministry of Justice, at the end of the 2003 there were 129 courts of general jurisdiction in the Republic of Croatia, 12 commercial courts and 111 courts for petty offenses, employing in total 1878 judges and 8274 court staff.

Standards relating to lawyers

The legal profession are also covered by the Constitution. Under Article 27 of the Constitution, the Bar, as an independent service, provides all persons with assistance in legal matters, in conformity with the law. Access to lawyers and legal services *(BPRL, no. 1-4)* is therefore, in principle, constitutionally guaranteed. More detailed regulation of the legal profession is contained in the Law on Attorneys - hereinafter LA. Lawyers carry out their job freely and independently, as a free profession. They are members of the independent national Bar *(Art. 2, LA)*. They have the right to represent parties in court proceedings and to provide legal advice and assistance. They also enjoy a broad monopoly in exercising these activities on a permanent basis and for the purposes of remuneration *(Art. 5, LA)*.

Everybody has the right of access to a lawyer. There should be no discrimination in receiving clients: lawyers have a duty to provide legal advice and assistance to any party that turns to them. They may refuse to provide legal services to parties only on the limited grounds provided by law and in accordance with the rules of professional ethics *(Art. 9, LA)*. In order to provide independent and competent services to their clients, lawyers enjoy a number of other guarantees, which involve rules on professional secrecy *(lawyer-client privileges)*, rights of access to information etc. *(Art. 13-17, LA)*.

The right to enter into legal professions *(BPRL, no. 9)* is granted without discrimination to all those who fulfill the legal conditions. These conditions include Croatian citizenship, holding a law degree, passing a judicial exam and a period of practice prior to registration as a lawyer with the national Bar Association *(Art. 48, LA)*.

Safeguards for the proper practice of lawyers *(BPRL, no 16-22)* are now well-established in national

legislation. The rights and interests of lawyers are also protected by their professional organization - the Croatian Bar Association, hereinafter CBA. This organization also sets appropriate standards of professional ethics (see *Attorneys' Code of Ethics of the CBA - ACE).*

The costs of legal services are set by the national Bar, except for cases where a lawyer is assigned to the accused ex officio in criminal proceedings, where the fee is set by the Ministry of Justice (Art. 18, LA). The national Bar provides pro bono legal services to less well-off people according to its own rules (Art. 21, LA).

Special rules under Croatian procedural codes allow a lawyer to be assigned by the court free of charge to parties who are unable to pay for their services. In criminal proceedings, the court or other competent body has to inform the parties of their right to a lawyer (Art. 5, Criminal Procedure Act - hereinafter CPA). Anyone arrested on suspicion of having committed a crime possesses procedural rights, inter alia the right to be promptly informed of the reasons for their arrest, the right to remain silent and the right to engage a lawyer of their own choice (Art. 6, CPA). The right to defense in criminal proceedings is regulated in detail, in compliance with the standards set by the BPRL, in Art. 62 to 70, CPA (more detail in *Krapac, 2000; Horvatić/Krapac, 2001*).

The right to a lawyer assigned by the court free of charge also exists in other procedural codes, e.g. in Art. 174, Code of Civil Procedure - hereinafter CCivP (see *Uzelac, Access*).

As for the right of professional association (BPRL, no. 24), practicing lawyers must be the members of the Croatian Bar Association. Although established by law, the CBA is a self-governing professional organization, and its principal internal bodies are composed exclusively of CBA members. In line with the LA, the basic rules regarding the organization and functioning of the CBA are contained in its Statute, and are carried out by its members (see Statute of the CBA - hereinafter SCBA). The SCBA also sets out the procedure and conditions under which disciplinary proceedings against lawyers are conducted

(see BPRL, no. 26-29). In line with the principle of the independence of the Bar (see *Uzelac, Independence, 2004*), the internal bodies of the CBA are competent to make disciplinary charges against lawyers. Such charges are decided upon by the internal disciplinary committees of the CBA, which are composed of members of the Bar (see Art. 78-90, SCBA).

2) Practical issues regarding the application of UN standards

Croatian legislation presently applies UN standards on the independence of the judiciary and legal profession in a more or less satisfactory manner. However, the practical implementation of normative regulation in this area is still not in full compliance with the high ideals proclaimed in the Constitution and the applicable laws - one may still note "a gap between the vision [...] and the actual situation" (BPIJ, Preamble). However, improvements in the current situation are particularly noticeable when we look back at some events in the last decade (see *Krapac, 1997; Uzelac, 2000*). In particular, improvements have been made in the area of the independence of the judiciary, where attempts at improper interference with judicial decision-making occur on a much smaller scale and, if they do occur, they are usually responded to vigorously. Judicial appointments made through overtly improper motives are not a regular occurrence. Nevertheless, some important problems still remain.

The independence of the judiciary is not a value in itself - it safeguards the basic rights of the citizen and contributes to the realization of the principles of equality before the law and the right to a fair and public trial by a competent, independent and impartial tribunal established by law (see BPIJ, Preamble). Therefore, one of the main objectives of establishing standards of independence for the judiciary is to build public trust in the courts and in judges, and in their ability to resolve social conflicts and dispense justice. The level of public trust is currently very far from being satisfactory: some surveys demonstrate that courts are among the least trusted social institutions (see *IDEA Survey 2002*). In the public perception, the problem of corruption in the judiciary is high on the agenda (see *Kregar, 2002*). Media reporting on the judiciary is frequently negative, and often raises suspicions about the correctness of

judicial decisions, criticizing events in and around the judicial branch of government. Although it is hard to substantiate this public distrust with concrete evidence (cases of proven incompetence and corruption in the judiciary are rare) and while some of the public criticisms may be illegitimate, this lack of trust among the users of the justice system points to some real problems regarding the application by judges of the human right to a fair, competent, impartial and prompt trial. In this context, the efficiency of the judiciary, the public image of its competence and the quality of its decisions are all problem areas that have to be addressed.

Various reform projects are currently focusing on issues around the inefficiency of judicial procedures. This inefficiency has already been recognized as one of the stumbling blocks in the process of accession to the European Union *(see Uzelac, Delays, 2004)*. The backlog of court cases is increasing every year, and has now reached the level of about 1.3 million unresolved cases. A significant number of cases are pending before the European Human Rights Tribunal, in which citizens have raised allegations of violations of their right to a hearing within a reasonable time. In a considerable number of cases, the court in Strasbourg or the national Constitutional Court have found breaches of this right, and have awarded compensation. Taking into account the available statistics and negative trends, such cases are perhaps only the tip of the iceberg.

A number of attempts to ameliorate this situation have been undertaken or announced in the past few years. Most notably, the financial resources available to the judiciary and the salaries of judges were substantially raised, and the numbers of courts and judges were significantly increased. All these actions were undertaken with a view to fulfilling the duty of the State to provide adequate resources to enable the judiciary to perform its functions properly *(BPIJ, no. 7)*. Comparative surveys demonstrate that the resources invested in the judiciary are now not low, especially taking into account the economic strength of the country. In 2002, public expenditure on courts in the Republic of Croatia was about € 30 per inhabitant - comparable to the level of expenditure per capita in France, and considerably higher than in

most other transition countries, both in Central and South-Eastern Europe *(CEPEJ Report 2005)*. In the meantime, the budget of the judiciary has further increased. In a comparative sense, the figures on the numbers of courts and judges are also high: in 2002 there were 23.4 general jurisdiction courts per 1 million inhabitants *(50.2 for courts of specialized jurisdiction)*; and 41 judges and 136 otherjudicial employees per 100,000 inhabitants - all these figures being among the highest in Council of Europe countries.

All the efforts to increase the efficiency of the courts have so far not managed to reverse negative trends, except in limited areas. It may be the case that certain reforms will only show results in the long run. However, one can safely assume that the resources for justice are still not spent in the optimal manner, and that there is vast potential for increasing their effectiveness. In particular, it seems that court delays and the inefficiencies of judicial procedures can only be effectively tackled through a far-reaching reorganization of the court system, with fundamental reforms to court administration and case management, the establishment of an integral court management system, the outsourcing of unnecessary tasks, the effective use of information technology, streamlining of court procedures etc. *(see more infra at III.)*.

As to the competence, user-friendliness and quality of work in the judiciary, improvements are also very necessary in order to reach a reasonable level of satisfaction among the users of the justice system. A proliferation of new legislation in recent years has not been accompanied by adequate mechanisms to ensure an understanding of legislators' intentions and/or provide the means and necessary training for the effective implementation of the law. In general, the training of judges, judicial personnel and other justice professionals is still far from being satisfactory. Projects have been initiated in permanent judicial training *(e.g. the Judicial Academy)*, but they still do not operate on a large scale, and the effects and quality of such projects will need to be proven in the future. A proper system of permanent education and training for improving the competence of other judicial employees *(registrars, bailiffs, clerks, court reporters* etc.*)* will have to be found.

Given the experience of the past, special efforts are required to ensure that the criteria of excellence and proven professional ability prevail *(and are being seen to prevail)* in the selection process for candidates to be future judges and other court officials. The current selection process does not guarantee the implementation of fully objective criteria, and cannot guarantee, in the eyes of the public, that the very best candidates are always attracted and then selected to discharge their honorable duties. The transparency of the process, the appropriateness of the tools for evaluating candidates and the objectiveness of all the relevant criteria need to be further strengthened. This would include reforms to the current selection methods for court trainees, to their in-court and out-of-court training, the methods used for their evaluation (as well as the evaluation of other prospective candidates for jobs in the judiciary), and the restructuring of the current judicial *(bar)* exams.

As for the regulation of the legal profession, the current problem area is the effective implementation of the human right of access to court, i.e. the right of effective access to a qualified lawyer, and the obligation of the government to ensure the provision of sufficient funding and other resources for legal services to the poor *(BPRL, no. 3)*. In the past decade, the cost of legal services has increased dramatically, as have court fees. Although free legal aid is provided by the courts and the Croatian Bar Association, the criteria for awarding such aid are not fully transparent. The system is inflexible and often not sufficiently accessible to the users of the justice system *(see Uzelac, Access)*. Therefore, a comprehensive reform of the system of legal aid is needed, especially in civil cases.
Certain steps have already been commenced in that direction - the drafting of the new Legal Aid Act has started, but work on this topic is still in its early stages.

3) Proposals for future reform

At a basic level, it can be argued that the UN standards and principles in the area of the judiciary *(including the role of lawyers)* have now been implemented to a level compatible with the minimum requirements of the rule of law. Still, many more efforts are needed to establish a truly competent,

independent and efficient judiciary in which the users of the system have full confidence. In order to attain these goals, we would support several lines of action, derived from various sources. These include research *(see Uzelac, Delays, 2004)*, the adoption of documents by national bodies and/or the results of international and multilateral programs of cooperation and assistance. Support for these lines of action would not exclude other reform efforts, some of which have already been initiated and planned, and some of which already comply with our proposals. The proposed lines of action are the following:

1. Enabling strategic planning and action on the efficiency of the legal system. A primary objective should be to establish reliable empirical methods for monitoring the problems that exist in the judiciary. For this reason the government and non-governmental sectors should support permanent and systematic research into the problems of the functioning of the judiciary on a scientific and professional basis, conducted impartially and without any undue interference. The monitoring of the work of the judicial system, in both qualitative and quantitative aspects, should be reformed, taking into account the fact that today's statistics are not well adjusted to modern demands. If a new methodology is to be adopted, it is necessary to define criteria for the efficient work and evaluation of judicial services. Finally, the legislative process should be linked with the requirements of future implementation. The missing links between ideas and their feasibility should be sought. These include ways properly to inform the bodies that apply the law of the desired aims and results that the new legal instruments seek to achieve.

2. Reorganization and restructuring of judicial bodies and services according to rational criteria. The current, partly irrational organization and structure of judicial bodies and services should, according to new empirical methodology, be adjusted to meet demands for efficiency and high-quality work. Recommendations in this area relate to, for example, the adjustment of the number and type of judicial bodies and reform of their territorial and subject jurisdiction in such a way as to facilitate the

efficient operation of the system as a whole. There should be a clear delimitation of the work of courts and judges (adjudication) as opposed to other, mainly administrative, services and professions. The framework criteria for legal services should be adjusted to match European criteria and national requirements. The current roles and functions of certain judicial services and professionals *(judges, court advisers, attorneys, notaries and so on)* should be subject to a re-examination. As a part of that re-examination, a policy of outsourcing some of the tasks currently undertaken by the courts may be considered, following the practice of other transition countries. Adequate services for encouraging the voluntary settlement of cases, e.g. through mediation, would have to be set up, both within and out of court.

3. Systematic monitoring of proceedings, avoidance of delaying tactics, repetition and periods of inactivity and a general increase in the speed and efficiency of legal procedures. Efficiency is inconceivable without appropriate case management. Much of the existing backlog can be ascribed to obsolete methods of court administration, which needs to be comprehensively overhauled. For this purpose, information technology should be used to its full potential, in particular for the centralized monitoring of legal proceedings and the management of court cases. Such a system, which would require a competent body at a national level, would need to be able to facilitate a rapid and appropriate reaction to emergencies (for example, a sudden influx in a particular type of case because of a change in legislation or other reasons). In addition, this would enable further concentration and acceleration of legal proceedings in routine or "formulaic" situations (which would be more or less automated, with a minimum input of work by senior judicial officials, particularly judges). This work should cover not only first instance proceedings, but also hearings at appeal and other superior levels - which is actually the area in which the current reform of litigation proceedings has done and achieved least.

4. Increasing ability, motivation and responsibility for efficient work among all court professionals involved in judicial proceedings. The way in which judges and other judicial employees have

been recruited, promoted and motivated to date has not led to a striving for excellence and efficient work. A system should be established to motivate judges and judicial employees to achieve efficiency. The measures used could range from taking more responsibility for inefficient work or work of poor quality to rewards for exceptional achievement *(e.g. rapid promotion)*. In addition, measures could be undertaken to reduce the contribution made by other participants, particularly attorneys and forensic experts, to delays in legal proceedings. These measures may include a restructuring of the rules on lawyers' fees and specific penalties for expert witnesses who do not submit their findings and opinions in an orderly way and on time.

5. Ensuring a high level of competence among all people who work in the judiciary. Citizens will have confidence in the judiciary only if it is clear that its highest functions are performed by individuals of the highest quality. Without high-quality personnel in the judiciary, it is hardly possible to expect efficient and just decision making. In order to turn current trends around, it is necessary to bring about a new system for the selection and promotion of judges and other employees in the judiciary. The basic feature should be a high level of objectivity in recruitment and the avoidance of all discretionary decisions that, because of the long tradition of nepotism and political influence, have marked practice to date. In this context, it is particularly necessary to carry out a thorough reform of the current bar exam, introducing strictly anonymous testing. This should result in the precise ranking of candidates, the success of whom should be monitored using a Gauss curve. An obligatory training program for further professional education and the training of judges and court staff would also be included. These essential structural changes should shape the contours of a new Croatian judiciary, which requires new people, who are prepared for the judiciary to function differently, and who are willing to carry out efficient work of a high quality. For the successful performance of duties on the bench, it is necessary to have an adequate combination of experience and enthusiasm. For this reason,

mobility in the legal profession needs to be stimulated. The recruitment of new personnel and retirement for those who have difficulties adjusting to new requirements should also be encouraged.

6. Alleviating and promoting access to justice through reform of the legal aid system and other means. The reform of the legal aid system is urgently needed, in both civil and criminal matters. The budget for legal aid should be transparent, adequate and separated from the court budget. The criteria for granting legal aid should be clearly regulated, but should also be flexible enough to ensure access to justice for the very poor as much as for the middle class. In the latter case, the costs of legal proceedings may be partly or gradually subsidized, depending on the level of need and the extent of funding available. A wide range of legal aid and assistance should be offered, including information, advice and representation, in a swift and efficient manner. At the same time, appropriate mechanisms for preventing abuse of the system should be created.

B) Standards relating to prosecutors

1) Application of UN standards in national legislation

General remarks

The first Law on State Attorneys was enacted in 1995 *(OG 75/95)* following Croatia's independence. This Law included standards set out in the UN Guidelines on the Role of Prosecutors of 1985 (hereinafter GORP). At the same time, the Law on the State Solicitor was enacted, defining a body whose duty was to represent the Republic of Croatia in property disputes before domestic and foreign courts.

Changes to the Constitution of the Republic of Croatia in 2000, as stipulated under Article 174, stated: "The State Attorney's office is an independent judicial body authorized and obligated to prosecute perpetrators of criminal and other punishable acts as well as to protect the property of the Republic of Croatia and to submit legal remedies for the protection of the Constitution and laws."

In the new Law on State Attorneys of 2001 *(hereinafter LSA; OG 51/2001)*, State Attorneys and the

The Eleventh United Nations Congress
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Bangkok, 18-to 25 April 2005

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UNITED NATIONS

The Eleventh United Nations Congress
on Crime Prevention and Criminal Justice

A/CONF.203/G/CROATIA/1 english

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