



CARDS 2003 Twinning Light Project HR03-IB-JH-04-TL

**“Support to the Changes of Pre-Trial
Criminal Proceedings in Croatia”**

Reform of Pre-Trial Criminal Proceedings in Croatia

**Analysis, Comparison, Recommendations
and Plan of Action (2007-2012)**

November 2006



Ludwig Boltzmann
Institute of
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 An Institute of the Ludwig Boltzmann Association

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Executive summary

This document presents the main results of the Twinning light-project “Support to the Changes of Pre-Trial Criminal Proceedings in Croatia” conducted from May to November 2006 by the **Croatian Ministry of Justice** in cooperation with the Austrian **Ludwig Boltzmann-Institute of Human Rights**. It aims to

- Recall **European Standards** deriving from law and soft-law of the Council of Europe as well as from relevant EU-acquis;
- Give a brief description of the **legal situation of pre-trial criminal proceedings in Croatia**;
- Assess the **effectiveness and efficiency of resources invested in public actors** implementing pre-trial proceedings (the police, public prosecutor’s offices and the courts) and identify areas of concern;
- With regard to these areas, analyse the **situation in other EU-member states**;
- On this basis, **recommend reform measures** and
- Set out an **action plan** for the implementation of the recommended reform measures.

The recommendations focus on **four areas**:

- **The organisation of investigations:** Today investigations are implemented in two phases; the first phase is dominated by public prosecutors and the police, the second by the courts; it is recommended that the basic concept should be **investigations carried out in one single phase and entrusted to the police in cooperation with public prosecutors**; the concept of court investigations should be abolished altogether.
- **Redefining the role of courts in pre-trial proceedings:** Courts should be tasked with other functions including
 - **deciding cases** in an abbreviated procedure;
 - **assessing the indictment** before it comes to a public court trial;
 - in exceptional cases, taking and **preserving evidence**.
 - Protecting the rights of the defendant has to be adjusted to the new procedural context in order to maintain a “balance of powers” in pre-trial proceedings.
- **Implementing the rights of victims:** The rights of victims to **participate in pre-trial proceedings**, to be **protected against secondary victimisation** and to receive **compensation** need to be implemented.
- **Institutional reform of the police and public prosecutor’s offices:** In order to enhance the capacity of the police and public prosecutor’s offices as well as to safeguard public trust in the professional implementation of investigations certain organisational reform measures are recommended, such as strengthening the rights and the standing of police officers within their organisation, enhancing the **transparency and accountability of police work** and further improving the **institutional independence** of public prosecutor’s offices.

If necessary legislative amendments are decided by Croatian parliament until end of 2008, it is suggested that new **legislation** should **enter into force by January 1, 2012**. The **action plan** proposes comprehensive EU pre-accession assistance comprising **five Twinning projects** and **several assessments**, overall amounting to **14,434,000 €**.

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List of abbreviations

art	Article
ASAO	Act on the State Attorney's Office, Official Gazette no. 51/2001
CPA	Criminal Procedure Act
DV-StAG	Durchführungsverordnung zum Staatsanwaltschaftsgesetz (secondary legislation related to the Austrian Act on Public Prosecution)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
no	number
para	Paragraph
SPG	Sicherheitspolizeigesetz (Austrian Act on the Police)
StAG	Staatsanwaltschaftsgesetz (Austrian Act on Public Prosecution)
StPO	Strafprozessordnung
USKOK	Office for the Suppression of Corruption and Organised Crime

1 Introduction

1.1 The Twinning Light project

This document is the result of a EU-Twinning Light project titled “**Support to the Reform of Pre-Trial Proceedings in Criminal Matters**”. The project was jointly carried out by the **Ministry of Justice of the Republic of Croatia** and the **Ludwig Boltzmann Institute of Human Rights, Vienna**, and implemented from May to November 2006.

As Member State experts, Ray Brown, Albin Dearing,¹ Heinz Drobesh, Karlheinz Grundböck, Marianne Hilf, Vito Monetti, Uwe Stark and Harald Tieg (from Italy, Austria, Germany and the UK) were involved in implementing the project activities.

From the side of the Croatian Ministry of Justice the project was conducted by Velimir Čolović (Assistant Minister, Head of Department), Tatjana Vučetić (Head of Section), Vladimir Filipović and Ana Kordej.

1.1.1 Global and specific objectives of the project

The global objective of the project was to support the Ministry of Justice in the reform of the criminal procedure law.

Specific objectives of the project were:

- To elaborate an expert study on existing types of preliminary criminal proceedings in some EU Member States as a basis of recommendations on the legislative changes needed to reform the pre-trial proceedings in Croatian criminal procedure.
- To develop a national strategy for conducting preliminary criminal proceedings consistent with the Croatian overall accession strategy.

1.1.2 Guaranteed results

The following results were guaranteed as outcome of the project:

- A comparative study on the existing systems of preliminary criminal proceedings in some EU Member States;
- Recommendations on how to reform accordingly the existing Croatian legislation and institutional set-up;
- A plan of activities for the reform of pre-trial proceedings.

1.1.3 Aims of the pre-trial phase as defined by the project contract

Any cooperation in reforming criminal proceedings needs to be rooted in a shared understanding of the goals which such proceedings would aim to accomplish. Therefore, we would like to remember that the contract which formed the basis of this project took a step towards defining the objectives of pre-trial proceedings by stating:

¹ Under the Twinning Light-contract Albin Dearing acted as Project leader and Team leader.

“Both the assessment of the present situation and the shaping of the reform have to start with a common understanding of the tasks of the pre-trial phase. The organisation of the pre-trial phase will have to find ways to effectively and efficiently fulfil the defined tasks of this phase of proceedings. In particular, the following functions have to be taken into account:

- To quickly detect and eliminate cases of unjustified suspicions, i.e. to avoid that a person is submitted to lengthy investigations on the basis of an ill-founded suspicion;
- To prepare the decision of the public prosecutor whether to prefer an indictment, to carefully and comprehensively prepare this decision and the potential indictment, however, within reasonable time and keeping in mind, that it is left to the court to hear evidence;
- To settle the case, whenever possible and appropriate, to implement diversion procedures when available and adequate or of simplified and less costly court procedures;
- To allow the perpetrator to take responsibility and to come to terms with society as quickly as possible;
- To demonstrate determination and ability to investigate, even in cases where in the end no suspect is detected;
- To respect the victim, i.e. to allow the victim to be heard and acknowledged and to support the victim’s struggle to come to terms with the wrong done to him/her.

The pre-trial phase is shaped in the light of both the functions it has to fulfil and of limiting factors it has to take into account, in particular the right of the defendant to a fair trial and the claim of everyone to be spared of disproportionate interferences of investigations with their fundamental rights.”

These defined aims were present throughout the project and, so we believe, are clearly reflected by this document and, in particular, by the recommendations made.

1.2 Acknowledgement

1.2.1 Interviews conducted

In the course of the project Member State experts have conducted a multitude of interviews. The following list of interviewees is by no means exhaustive. Also it does not relate to the experts whom we met during workshops, round table discussions and seminars carried out.

In **Zagreb** experts had meetings among others with:

- State Secretary Snježana Bagić, Ministry of Justice
- Prof.dr.sc. Davor Krapac (faculty of law, University of Zagreb)
- Mrs. Senka Klarić Baranović, judge of the Supreme Court
- Dragan Novosel (Deputy Attorney General of the Republic of Croatia)
- Mr. Davor Dundović, Mr. Boris Spudić and Mr. Tihomir Kralj (all Ministry of Interior)
- Mr. Ivan Turudić, judge of the County Court Zagreb
- Mr. Krešimir Devčić, head of the investigative department, and Mr. Ratko Ščekić, investigative judge at the county Court Zagreb

- Višnja Lončar, Haramina Hranilović Gordana, Danijela Paić and Dunja Pavliček from the county prosecutor's office
- Željka Pokupec, Natalija Slavica, Ana Ivanišević and Silvije Sušec from the municipal prosecutor's office
- Diana Kovačević-Remenarić, state attorney at the County state attorney's office in Velika Gorica
- Dubravka Vesel, Police Directorate, head of the department for terrorism and extreme violence
- Damir Smjerc, Police Department, head of organised crime division
- Anita Jorco, Police Department, head of economic and computer crime
- Josip Lončarić, Police department, assistant head, criminal police sector
- Siniša Banak, Rade Kalaba, Pero Kuprešan, Dražen Miličević, Ankica Radoš (Police Department, Economic and Drug Crime)
- Igor Gatarić, Dario Hodak, Mr Jurić (Police Department, Violent crime, Burglaries and Robberies)
- Antelko Kontreć, Emil Frivvil (Police Department, Crime Scene Management)
- Zoran Melkić, Zoran Filipović, Boris Novak, Perica Biočić (Police Department, Terrorism and Organised Crime)
- Stepan Gluščić, Darko Skepujak, Manjan Tuljević, Joško Vukodav (Police Academy)
- Assistant Minister Štefica Stažnik (director of the judicial academy)
- Sara Mišković (ministry of justice, sector for financial planning)
- Dinko Cvitan and Nataša Đurović (head and deputy head of the state attorney's office for the prevention of corruption and organised crime - USKOK)
- Ms. Neva Tölle and Ms. Nela Pamuković (Autonomous Women's House)
- Mr. Darko Horvat, Mr. Leo Andreis and Mr. Lovro Kovačić, attorneys at law (representing the Croatian Bar Association)
- Munir Podumljak, president of PSD – Partnership for Social Development and executive director of ACTY – Anti Corruption Anti Trafficking Action

In **Rijeka** experts visited with the public prosecutor's office, with the investigative department of the county court and with the police headquarters of the county. At these occasions experts met with:

- Mr. Valentin Ivanetić, Head of the investigation centre of the county court of Rijeka
- Mr. Dusko Tišma, Head of the investigation unit USKOK of the county court of Rijeka
- Mr. Doris Hrast, Head of the county State's Attorneys Office
- Mrs. Ikonija Bogetic Levnajić
- Mrs. Blanka Persić
- Mrs. Zeljka Zubcic Sostarić
- Mr. Tomislav Dizdar, Deputy Head of the police administration of Rijeka

- Mr. Vitomir Bijelić, head of the crime police sector of the police administration
- Mr. Branimir Liker, head of the crime police combating organised crime
- Mr. Bozo Barbaric, head of the crime police combating drug crime

In **Osijek** meetings were arranged at the county court, at the public prosecutor's office and at the police headquarters. MS experts had the opportunity to consult with:

- Ninoslav Ljubojevic, President of the county court of Osijek
- Miroslav Rozak, Vice-President of the county Court of Osijek
- Ante Kvesic, President of the Investigation Centre of USKOK
- Zvonko Kuharic, Deputy of the county State's Attorney
- Stipo Rimac, Head of the Office of the Head of the Police Administration of Osijek
- Josip Adrić, Head of the Department to combat general crimes
- Dario Dasović, Head of organised crime division
- Toni Škrinjar, Head of drug subdivision
- Damir Vincelj, Head of the subdivision for organised crime surveillance

During our visits to **Split** meetings were held with the public prosecutor's office to the county court, with the public prosecutor's office to the municipal court, with the county court and with the police. Among others the experts met with:

- Ms. Inka Jurišić (county state prosecutor)
- Mr. Michelle Squiccimarro (deputy of the county state prosecutor)
- Ms. Julijana Stipišić (municipal state prosecutor)
- Mr. Igor Benzon (president of the county court)
- Ms. Marica Šćepanović (investigative judge)
- Mr. Neven Cambi (investigative judge)
- Mr. Ninoslav Čurić (Policajska Uprava Splitsko-Dalmatinska)

In **Varaždin** we talked to:

- Mr. Darko Šabijan, Ms. Biserka Šmer-Bajt, Ms. Gabrijela Tesla and Mr. Darko Galič (office of the county court prosecutor)
- Mr. Sitar Rade, Mr. Mirko Kučina and Mr. Dražen Bobek (Police Directorate)

To all our interviewees we are deeply grateful for their patience and willingness to contribute to our endeavours as well as for the kind and open atmosphere in which all meetings were conducted. As much as the responsibility for all misunderstandings remains with us the merits of this document significantly owe to the persons who readily shared their time, experience and thoughts with us.

1.2.2 The “*Novosel-Report*”

This assessment takes into account two important pieces of research. The Committee tasked to prepare “Changes and Amendments to the Criminal Procedure Act” decided to conduct two research exercises, the first related to the work of state attorneys on municipal level, exploring into practices and methods of pre-investigation **enquiries** and **dismissals**, the second related to police **arrests** and to routines following arrests. In order to present and comment on the results of this research, *Dragan Novosel*, Deputy Attorney General of the Republic of Croatia, has submitted a report titled “Results of research in respect to the work of police, state attorneys’ offices and investigating judges in the preliminary criminal (pre-investigation) procedure – arrests and dismissals of crime reports”. To the project-team an English translation of this report, which is subsequently referred to briefly as “*Novosel-report*”, was made available, which is annexed to this document.²

1.3 Strive for reform

The **Government** of Croatia in the strategic instrument named “**Reform of Judiciary**” from **November 2002** held that changes should be made to the Criminal Procedure Act in the area of pre-trial proceedings in order to put forward changes/amendments to the Criminal Procedure Act. Investigations should be entrusted to the State Attorneys and the Police Investigation Teams. In the same time, the investigating judge should be determined as a preliminary proceedings judge whose main task would be controlling of legality during preliminary proceedings. In addition, the Ministry of Justice has prepared a Draft Strategy on Judicial Reform and an Action Plan which consider some activities towards the reform of pre-trial criminal proceedings.

The Minister of Justice established in **November 2002** the **Working Group** for drafting amendments to the relevant criminal procedure legislation. Members of the Working Group are:

- Prof.dr.sc. Davor Krapac, Faculty of Law in Zagreb (head of the Working Group)
- Prof.dr.sc. Berislav Pavišić, Faculty of Law in Rijeka
- Prof.dr.sc. Goran Tomašević, Faculty of Law in Split
- Senka Klarić-Baranović, Judge of the Supreme Court
- Dragan Novosel, Deputy Attorney General
- Mr.sc. Stjepan Gluščić, Police Academy
- Tihomir Kralj, Ministry of Interior, General Police Directorate
- Boris Spudić, Ministry of Interior, General Police Directorate
- Ivan Turudić, Judge at the County Court in Zagreb
- Iztok Krbec, Judge at the County Court in Pula

In **June 2003** the Croatian Government decided on a document named “The Operational Plan for the Implementation of the Justice Reform”. With regard to criminal procedure this plan states:

“The new Law on criminal proceedings is being prepared. One of the novelties in this law shall be the termination of investigation as a part of criminal proceedings done by the court. Draft of the newly proposed criminal proceedings Law shall be forwarded into the procedure according to the article 27 para 3 by the 6th Government Agenda latest by the December 31st 2003. Because of the seriousness of the changes that it would introduce, both in State attorney’s and the Police’s authority wise, the date of enforcement of this new law should be 6 to 12 months after its announcement.”

The Stabilization and Association Agreement (SAA) between the Government of the Republic of Croatia and the European Communities, which was concluded in 2004 and entered into force by **February 2005**, stipulates that the signatory parties should cooperate in the promotion of the rule of law and that special attention should be given to independence of judiciary, improvement of its efficiency and education of judiciary personnel. According to art 80 para 2 of the **SAA**, the following measures concerning co-operation in criminal matters are defined:

- The drafting of national legislation in the field of criminal law;
- Enhancing the efficiency of the institutions competent for prevention and fighting crime;
- Staff training and the development of investigative facilities.

The **Government** on **September 22, 2005** adopted a new **Overall Strategy for the Reform of the Judiciary**. This strategy document was approved by Parliament in February 2006. The main goals are:

- strengthening the rule of law and the independence of the justice system
- creating an efficient justice system
- adjustment to the EU legal standards
- education
- suppression of crime (corruption, terrorism, organised crime)
- enhancing regional and international cooperation
- IT introduction into the justice system
- the rationalisation of the number of courts in Croatia

In **2005**, the **CARDS-project** “Support to a more efficient, effective and Modern Operation and Functioning of the Croatian Court System” was carried out. Project experts gave recommendations regarding the Croatian criminal procedure. According to these recommendations the present regulations of investigative judge and the regulations of the prosecutor-guarded police investigation should be abandoned. On the other hand, the legislation of the validity and verification of the evidence and the use of pre-trial police investigation should be enhanced. As a result of such streamlining the main hearing should be centralised and as a main rule the judgment should be pronounced orally at the end of the main hearing.

The **European Commission** gave a positive **Opinion** on the Croatian candidacy for EU membership in **April 2004**. There it is stated that Croatia needs to make **substantial improvements in the functioning of the judicial system**. Following the **decision of**

the European Council in June 2004 that Croatia is a **candidate country**, the European Council decided in December 2004 that accession negotiations would be opened on 17 March 2005 provided that there was full cooperation with the UN International Criminal Tribunal for the former Yugoslavia in The Hague (ICTY). However, in the absence of confirmation of full cooperation, the General Affairs and External Relations Council (GAERC) of 16 March 2005 decided to postpone the opening of accession negotiations. Following a positive assessment on **3 October 2005** from the ICTY Chief Prosecutor that cooperation was now full the Council concluded on the same day that Croatia had met the outstanding condition for the **start of accession negotiations**. The Commission started the so-called **screening process** on 20 October 2005 and concluded this exercise in **October 2006**. Negotiations on one chapter (science and research) were opened and provisionally closed in June 2006. A revised **Accession Partnership** was adopted in **February 2006** defining priorities for Croatia's preparations for accession.

The **Commissions Progress Report for 2006** was published on November 8, 2006.³ Here, it is briefly mentioned that “reform of pre-trial proceedings is still pending”, also that equipment of municipal prosecutors remains insufficient.⁴

³ COM (2006) 649 final.

⁴ Progress Report Croatia 2006, 50.

2 European Law: Standards and Requirements

The term “European Law” could give rise to discussions, at least among lawyers. It is used here to stress the importance of legal demands and standards which have to be met by all European countries and are evolving into more and more powerful determinants of criminal justice systems.⁵

This chapter outlines three categories of standards and requirements that jointly establish a framework into which the reform of the Croatian criminal justice system will have to fit. These categories are:

- The European Human Rights Convention and judgments of the Court in Strasbourg
- Soft-law of the Council of Europe
- Relevant parts of the EU-*acquis*.

Some of these standards are **capable of directing the reform of pre-trial criminal proceedings in Croatia**, e.g. the EU-Council Framework Decision on the Standing of Victims or the Council of Europe Recommendation Rec (1994) 12 on the independence, efficiency and role of judges, which points out the urgent necessity to unburden courts by ending cases without an adversarial court trial whenever possible.

Likewise, recent case-law deriving from the **Court in Strasbourg** provides important corner-stones for the shaping of the reform, e.g. by indicating the necessity to pay more attention to the rights of victims or by stressing the importance of an adversarial basic structure of proceedings.⁶

2.1 The European Human Rights Convention (EHRC)

In recent years, judgments of the European Court of Human Rights (ECHR) have fuelled the transformation of criminal justice systems from state-centred institutions organised around the concept of the state’s *right* to the punishment of offenders into complex human rights-sensitive organisations fulfilling the *obligation* to effectively prosecute and sanction offenders, an obligation owed to victims, to the public and, to some extent, also to offenders as far as they are entitled to come to terms with their social environment.

This development should be seen in the context of a fundamental reorientation of the court’s jurisdiction placing more emphasis on the (positive) obligation of member-states to *actively implement protection* rather than focussing on the (negative) aspect of the convention’s provisions as *restricting* state action, a development which started with judgments in 1978/79 (refer to *Tyrer v. the United Kingdom*, *Marckx v. Belgium* and *Airey v. Ireland*).

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⁵ In this sense, *Fennell et al.* (1995) xvi, when commenting on the results of their comparative analysis, have stated: «Whatever the future may bring, Member States of the Council of Europe and those of the European Union must ensure that their criminal justice systems operate in accordance with the requirements of what may be termed European law.»

⁶ This is demonstrated in subchapter 2.1.5.

2.1.1 Victims' right to reassurance as to their protection and the state's obligation to penalize, to investigate and to prosecute

The court in Strasbourg has repeatedly held that several articles of the convention (including art. 2, 3, 4 and 8 ECHR), read in conjunction with the obligation of Member States under art 1 to provide effective protection, place an **obligation on states to create and forcefully implement penal law provisions**. This obligation is violated

- By **shortcomings of substantive law** (such as a too narrow interpretation of the definition of rape, see the *M.C. v. Bulgaria* judgment of 4 December 2003, or accepting as a defence to a charge of assault on a child that the treatment in question amounted to "reasonable chastisement", see the *A. v. United Kingdom* judgment of 23 September 1998);
- By **deficiencies of procedural law** (such as the "procedural obstacle" challenged in the *X and Y v. the Netherlands* judgment of 26 March 1985); or
- By a **lack of decisiveness and effectiveness in practical implementation** of penal law provisions; indeed, **by far the largest portion** of the relevant case-law relates to a lack of determination of CoE-Member States to investigate and prosecute, an attitude which can become endemic and then lead to the **impunity** of certain (mostly state) actors.

It appears that, when there is suspicion that a basic right has been violated, the Court is prepared to take any failure of a Member State to investigate as proof that this Member State is not protecting effectively enough the rights of individuals living on that territory.

This obligation of state authorities to investigate and prosecute in the case-law of the Court takes the shape of a **right of the victim** (or in case of the death of the victim of his/her next of kin). Although, clearly everyone has some interest in an effective protection of their rights (including deterrent criminal law definitions and the vigorous prosecution of offenders)⁷ it is only the victim who is in a position to file an application with the Court in Strasbourg. Why is that?

Now, here is the question to consider: It may well be true that the criminal code, to some extent, prevents people from committing offences; and it is equally obvious that this mechanism did not work in the case of the victim. But how would an effective investigation into the crime suffered by the victim add in any way to protecting the victim against an offence that has already been committed? Obviously, for any prevention in this respect it is too late. Therefore, the only reason that would allow us to assume that the victim, *sub titulo* "protection against crime", has a right to effective investigation into the crime s/he suffered relates to **protecting the victim against repeat victimisation**.

However, this absolutely makes sense. There is little doubt that the experience of victimisation undermines the victim's feeling of security. It is highly plausible to assume that the victim will tend to wonder whether her/his prior assumption as to their

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⁷ When the Court frequently stresses that an effective prosecution of offenders is also „essential in maintaining public confidence in maintenance of the rule of law“ this in terms of criminal law doctrine would translate into an aspect of „positive general prevention“ as distinct from the deterrence-element to which the Court has related in cases under art 8 ECHR and which in law doctrine would be referred to as an element of „negative“ general prevention.

protection against crime, after all, had a realistic basis. Therefore, effective investigation and prosecution will have an effect of **reassuring victims** that state institutions, with due diligence, strive to **protect their rights** by implementing a deterrent system of criminal justice. Decisive and effective investigations demonstrate the determination of state actors to protect the rights of the victim.

2.1.1.1 The “procedural limb” of Article 2 EHRC (2+1)

The obligation to carry out effective investigations and proceedings into the death of a person is referred to as the “procedural limb” or “positive limb” of art 2 of the Convention. First, in the *McCann and Others v. the United Kingdom* judgment of 27 September 1995 (§ 161) the court found:

“The Court confines itself to noting, like the Commission, that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State.”

These considerations soon became particularly important in the context of allegations against Turkish authorities (see e.g. the *Kaya v. Turkey* judgment of 19 February 1998 and the *Güleç v. Turkey* judgment of 27 July 1998). By now, there is a firmly established jurisdiction in this respect, not only in principle but with regard to several specific aspects of this right of victims and their next of kin to an effective investigation. In the recent *Bazorkina v. Russia* judgment of 27 July 2006 the court has, in line with a long list of previous judgments, used the following extensive formula:

“117. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force... The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigatory procedures... The Court recalls that the obligations of the State under Article 2 cannot be satisfied merely by awarding damages. The investigations required under Article 2 of the Convention must be able to lead to the identification and punishment of those responsible (see *McKerr v. the United Kingdom*, no. 28883/95, § 121, ECHR 2001-III).

118. For an investigation into alleged unlawful killing by state agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events... The

investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances ... and to the identification and punishment of those responsible (*Ögur v. Turkey*, cited above, § 88). This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death... Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling below this standard.

119. In this context, there must also be an implicit requirement of promptness and reasonable expedition... It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating the use of lethal force may generally be regarded as essential in maintaining public confidence in maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”

The overall obligation to implement effective investigations and proceedings entails the following specific aspects:

- **Investigations** must be **thorough, careful** and **comprehensive**, the investigating authorities must take any reasonable step available to them in order to secure all relevant evidence (see the *Nachova and Others v. Bulgaria* judgment of 26 February 2004, § 116);
- Compensation for damages does not qualify as an effective means of protection, the investigations must be able to lead to the **punishment** of offenders;
- The actor responsible for carrying out investigations must be fairly **independent** of all persons involved in the case;
- Once the authorities have learned of a suspicion they have to **act of their own motion**;
- An additional element is the requirement of **promptness** and **reasonable expedition** of investigations;
- Investigations and prosecution must be sufficiently **subject to public scrutiny**;
- Investigations and prosecution must to an appropriate extent involve the next of kin of the person killed.

The requirement of independence implies not only a lack of hierarchical or institutional connection but also an independence in practice (see e.g. the *Ergi v. Turkey* judgment of 28 July 1998, §§ 83-84, where the public prosecutor investigating the death of a girl during an alleged clash showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident). Therefore, where police and public prosecutors closely interrelate and cooperate in criminal investigations presumably a third authority would have to conduct investigations into a suspicion of serious misconduct of the police, be it a court or a specialized prosecution body which has not been involved in the investigations under scrutiny.

The obligation under art 2 ECHR to carry out criminal proceedings is less strict in cases of unintentional killings. The recent judgment of 27 June 2006 in the case of

Byrzykowski v. Poland (§ 105) concludes with regard to the accountability of hospital staff:

“Although the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently (see *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I), the Court has stated on a number of occasions that an effective judicial system, as required by Article 2, may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged.”

2.1.1.2 Positive obligations under Article 3 EHRC

There are two lines of decisions to be remembered in this context: Several judgments aim to see to it that any form of degrading treatment be punishable under the substantive criminal law of a Member State; in particular, a series of judgments refer to corporal punishment practiced in the United Kingdom (e.g. the *Tyrer v. the United Kingdom* judgment of 25 April 1978, the *Y. v. the United Kingdom* judgement of 28 October 1992 and the *A. v. United Kingdom* judgment of 23 September 1998).

Secondly, there is a number of decisions (all stemming from the last decade) introducing a “procedural limb” to Article 3 very similar to the development referred to above in the context of art 2 EHRC (e.g. the *Assenov and Others v. Bulgaria* judgment of 28 October 1998 and the *Labita v. Italy* judgment of 6 April 2000). In the recent judgment on the case of *Khashiyev and Akayeva v. Russia* (judgment of 24 February 2005) the court has summarised his views in this regard as follows:

“177. ... In a number of judgments the Court found that where a credible assertion is made that an individual has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention”, requires by implication that there should be an effective official investigation. As with an investigation under Article 2, such investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see the *Assenov and Others* judgment cited above, p. 3290, § 102; *Labita v. Italy* [GC], no. 26772/95, p. 138, §§ 131-136, ECHR 2000-IV).

178. The procedural limb of Article 3 is invoked, in particular, where the Court is unable to reach any conclusions as to whether there has been treatment prohibited by Article 3 of the Convention, deriving, at least in part, from the failure of the authorities to react effectively to such complaints at the relevant time (see *Ilhan v. Turkey* [GC], cited above, §§ 89- 92).”

2.1.1.3 Positive obligations under Article 4 EHRC

In the *Siliadin v. France* judgment of 26 July 2005, relating to the case of the trafficking of a young woman to France, the court held that governments under art. 4 ECHR “have positive obligations, in the same way as under Article 3 for example, to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice” (§ 89). The Court considered that,

“in accordance with contemporary norms and trends in this field, the Member States’ positive obligations under Article 4 of the Convention must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in such a situation” (§ 112).

On basis of these assumptions it can be concluded that there exists an obligation of Member States to penalize all forms of forced labour or trafficking of persons with exploitive objectives and to carry out effective investigation and prosecution when a suspicion of such crime arises.

2.1.1.4 Positive obligations under Article 8 EHRC

Similarly, under art 8 the court has held that, where fundamental values and essential aspects of private life are at stake, **effective deterrence** is indispensable and can be achieved **only by criminal-law provisions** (refer to the *X and Y v. the Netherlands*-judgment of 26 March 1985 as well as to *M.C. v. Bulgaria*, judgment of 4 December 2003). This covers all cases of **sexual** and presumably **most forms of domestic violence**.

2.1.2 The victim’s right to “direct and timely redress” under Article 13 EHRC

The line of decisions which in the long run will probably have the strongest impact on criminal justice systems in Europe is the Court’s assumption of a **right of victims** of certain offences **to redress**. Over the last decade the Court has in **more than fifty cases** presumed violations of art 13 EHRC on the basis that a Member State had failed to investigate and prosecute in the face of an arguable claim that the applicant had suffered a violation of his/her rights under the convention. The entitlement of the victim of certain human rights violations to an effective remedy in the view of the Court amounts to the obligation of the pertinent Member State to instigate criminal proceedings.

The wording uniformly used by the Court in such cases (see e.g. *Aksoy v. Turkey*, judgment of 18 December 1996; *Aydin v. Turkey*, judgment of 25 September 1997; *Mentes and Others v. Turkey*, judgment of 28 November 1997; *Kaya v. Turkey*, judgment of 19 February 1998; *Anguelova v. Bulgaria*, judgment of 13 June 2002) reads:

“The notion of an “effective remedy” entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, and including effective access for the complainant to the investigatory procedure.”

Comparing these cases to the ones dealt with above in the context of the “procedural” or “positive limb” of Articles 2, 3, 4 and 8 it can easily be seen that they refer to the same situation: The **failure of a Member State to effectively investigate**

into the suspicion of serious crime. Indeed, it appears that such default **violates two fundamental rights of the victim**:

- The **right to be protected** against criminal acts, which in the case of the victim means to be protected against repeat victimisation, as well as
- The **right to redress** with regard to the recent offence.

However, while the victim will share the interest in being sufficiently protected against future victimisation with many others (as potential victims) it was only the victim who **actually** suffered the violation of her/his rights. In that sense the victim's right to **redress** is more **specifically related to the situation of victimisation** and the needs of victims to experience respect for their dignity and rights. Also it should be stressed that means of protection are not confined to criminal sanctions but, indeed, primarily refer to proactive police measures, whereas the restorative process of allowing the victim to experience respect and redress is primarily a matter of the specifically **reactive mechanism of criminal justice**.

In other words: The primarily substantive articles 2, 3 etc ECHR aim to **protect** the rights covered by these articles and therefore focus on the **prevention** of violations, while art 13 ECHR combines aspects of prevention with unique elements of **restoration and redress** (and for this reason specifically and more comprehensively deals with the situation of the actual victim). This is how we would also interpret a very recent attempt of the Court – in the case of *Koval v. Ukraine*, judgment of 19 October 2006, § 94 - to systematize its own findings:

“The Court points out that the decisive question in assessing the effectiveness of a remedy concerning a complaint of ill-treatment is whether the applicant can raise this complaint before the domestic courts in order to prevent further incidents of that kind and to obtain direct and timely redress, and not merely indirect protection of the rights guaranteed in Article 3 of the Convention.”

This formula of the victim's right “to obtain direct and timely redress” captures precisely the specific function of art 13 ECHR as well as the primary task of criminal proceedings under the Convention.

In order to fully value the meaning of this line of decisions one has to remember that art 13 ECHR recognises the right to an effective remedy of persons who claim that their rights under the Convention have been violated. If criminal proceedings are identified as a means of remedies under art 13 ECHR then this necessarily implies that the criminal offence suffered by the victim is understood as a violation of the rights of the victim under the Convention. In short:

Under art 13 ECHR, criminal proceedings aim to allow a person whose human rights have been violated to obtain direct and timely redress (next to the reassuring experience of an effective protection of their rights under the procedural limbs of articles 2, 3 etc ECHR).

To be precise: A person is considered a victim, **not because the offence has caused damage** to the victim, but because **the offence violates the rights of the victim**. An example may help clarifying the difference: If one person shoots at another person but misses him, this case of attempted murder may not have damaged the victim but it has violated the rights of the victim under art 2 ECHR. Another example: If in the course of

the investigations a person who has stolen a TV-set and other personal belonging returns all the stolen goods to the victim the damage suffered by the victim may be fully compensated for. Nevertheless, the victim remains a person whose property rights by the offence have been violated.

The question is not whether the offence has caused damage to the victim because the offence in itself is a violation of the rights of the victim.

2.1.3 The victim's right to be treated with care (art 8 EHRC)

The most significant statement in this respect is the judgment of 2 July 2002 in the case of *S.N. v. Sweden*. The Court had to deal with a case of sexual child abuse. The victim, a boy of ten years, had been interrogated by a police officer and later-on not appeared in court. A first statement had been recorded and sent to the defence counsel who had requested that additional questions be put to the victim. This happened, although again in absence of the defendant or his lawyer. The Swedish court based the conviction of the accused practically solely on the two tapes recording the statements of the victim given to the police. When deciding on the complaint that as a result of the victim's refusal to appear and (again) testify in court the defendant had not been given an opportunity to challenge the victim's statements the Court in Strasbourg sympathized with the decision of the Swedish authorities to save the victim from the "ordeal" of having to repeat his statement in court. In § 47 of the judgment the Court states:

"In the assessment of the question whether or not in such proceedings an accused received a fair trial account must be taken of the right to respect for the private life of the perceived victim."

From this judgment it can be derived in more general terms that victims of severe and traumatizing offences in the light of their particular vulnerability have a right under art 8 of the Convention to be treated with care and not to be exploited for the sake of the prosecution or the defence.

2.1.3.1 The victim as party to the criminal proceedings

As quoted above the court derives from Article 13 EHRC the right of the victim to an **effective access to the investigatory procedure**. The Court has acknowledged a similar right of the victim to participate in the proceedings under the "procedural limb" of Article 2, e.g. very recently in the case of *Cennet Ayhan and Mehmet Salih Ayhan v. Turkey* (judgement of 27 June 2006, § 86):

"Furthermore, the next of kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests ..."

Given that the Court, at least in principle, appears to be ready to view the victim as a party to the criminal proceedings it is difficult to understand why the victim should not also be seen as invoking a "civil right" in the broad sense of art 6 para 1 ECHR. In his critical appraisal of the Courts position *vis-à-vis* the victim *Trechsel* has recently commented:⁸

“Victims of crime have a legitimate interest – and the Court seems to accept this – to take part in proceedings against a suspect. Whether they do so for financial or moral motives should make no difference. There is, in my view, no convincing reason not to recognize the interest in having the perpetrator of a crime convicted as a ‘civil right’ within the meaning of Article 6 of the Convention.”

Unfortunately the Court has not (or maybe not yet) adopted this view. Without the additional specification that could be derived from art 6 ECHR the assumption that the victim has a right to “effective access ... to the investigatory procedure” remains both fundamentally important with regard to the shaping of pre-trial proceedings and clearly vague. This is where the detailed and precise regulations of the EU Council framework decision on the standing of victims come in.

2.1.4 Rights of the defendant

Compared to the rapid development of the victim’s rights under the Convention, essentially during the last decade, the rights of the defendant characterizing a liberal criminal justice system and firmly laid down in Articles 5 to 7 of the Convention are well-established and almost a matter of course. Therefore, in principle, there is not much need to deal with the defendant’s position in pre-trial proceedings nor is there enough space here to do so appropriately. Those rights however, which bear particular importance for our assessment or the reform of Croatian pre-trial proceedings, need to be mentioned.

2.1.4.1 Fair trial and due process

In a plethora of cases the Court has understood the concept of fair trial as primarily referring to three aspects, namely effective participation of the defendant, an adversarial structure or proceedings and equality of arms. Very recently the court has once more upheld this formula in the case of *Koval v. Ukraine*, judgment of 19 October 2006, § 113, by stating:

“Article 6 of the Convention, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. It is the fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence”.

In other cases the Court has linked the first and the second element, e.g. by finding in the case of *Ziliberg v. Moldova*, judgment of 1 February 2005, § 40:

“Article 6 of the Convention, read as a whole, guarantees the right of an accused to participate effectively in his criminal trial. This includes, *inter alia*, a right not only to be present, but also to hear and follow the proceedings. ... This right is implicit in the very notion of an adversarial procedure ...”

Here two aspects of this concept of a fair trial seem important, although not as clear-cut legal requisites but rather as guidelines for shaping pre-trial proceedings in a manner sensitive to the human rights at stake.

The first aspect is that, as far as an adversarial procedure is concerned, prospects are not particularly bright as long as it is the court which investigates and, therefore, collects the incriminating evidence. In order to challenge this evidence the **defendant would have to oppose the investigating judge**, the very judge who at other occasions

would take decisions interfering with fundamental liberties of the defendant. Clearly, the concepts of an adversarial procedure and of equality of arms prosper much better in a triangular setting where it is left to the police and the prosecutor to investigate and the fruits of their work can then be challenged by the defendant by turning to an **impartial judge**, indeed, much better than in a setting where the defendant can exercise his right to adversarial proceedings merely in open confrontation with the investigating court. An adversarial procedure can develop only when the **defendant is allowed the benefit of an adversary other than the court**.

With reference to the *De Cubber*-case, which dealt with the lack of impartiality of a Belgian investigative judge by the name of *Pilate*, *Trechsel* has sketched a strong and colourful picture:

“If one analyses the role of an investigating judge who acts in the manner of Mr Pilate, the image of a sleuth-hound comes to mind. The investigating judge is out to find the truth, a truth which the suspect typically tries to conceal. The suspect senses that the investigating judge is after him or her and tries, as it were, to escape. He may also find that the race is not quite fair. In fact, the investigator is equipped with a variety of coercive powers, the most far-reaching of which is that of having the accused locked up. In this situation, it is impossible to conceive that the suspect would regard the investigating judge as anything other than an adversary. ... It may be that, under domestic law, the investigating judge is regarded as an impartial officer and that the law requires him to investigate also into circumstances favourable to the defence. However, such abstract concepts cannot eliminate the psychological realities which must be decisive in this context. For this reason it seems fair to say that an investigation authority will always present an appearance of bias and cannot, therefore, ever be regarded as a fully impartial judge.”⁹

In other words, the notion of an adversarial procedure, when applied to pre-trial proceedings, contains a strong argument in favour of abolishing court investigations in order to **allow the court to play its very own role**, which is to **strike a balance between the opposing interests of prosecution and defence** and to see to it that equality of arms – in the sense of a fair balance of adverse powers – be maintained. (However, there is reason to be careful here. *Trechsel* insists that the judge he is portraying is out to find the truth. He argues that investigators will have an appearance of bias. He is not suggesting that we should accept the notion of a partisan investigator. The defendant should be allowed to oppose the investigator not because we acknowledge that investigators are partial but because they may be mistaken in spite of their intention to find the truth. We will in time come back to the important difference between a party in a merely procedural, formal sense and a party in a stronger, more material sense.)

The second aspect is even more fundamental. The stress laid on the effective participation of the defendant read in conjunction with the recently acknowledged respective right of the victim to actively participate in proceedings indicates the overall and long-term development of **a criminal justice system that promotes and encourages the involvement and communication of parties** and takes these parties seriously. Therefore, the right of parties to be heard is not just a matter of collecting all evidence available but, far beyond such utility, signals that in a democratic society it is

essential that those **affected** by a decision should be involved in the decision-making process. In this sense the right to be heard, forming the most fundamental aspect of a fair trial, “promotes the notion that the individual is a subject rather than merely an object of the process”.¹⁰

This right of the defendant, not to be treated merely as an object of proceedings, establishes a strong link between the concept of a fair trial and the right not to be subjected to degrading treatment. Recently, this showed in the case of *Jalloh v. Germany* (judgment of 11 July 2006). The (highly irritating) circumstances of the case are given as follows:

“11. On 29 October 1993 four plain-clothes policemen observed the applicant on at least two different occasions take a tiny plastic bag (a so-called “bubble”) out of his mouth and hand it over to another person in exchange for money. Believing that these bags contained drugs the police officers went to arrest the applicant, whereupon he swallowed another bubble he still had in his mouth.

12. The police officers did not find any drugs on the applicant. Since further delay might have frustrated the conduct of the investigation the public prosecutor ordered that emetics (*Brechmittel*) be administered to the applicant by a doctor in order to provoke the regurgitation of the bag (*Exkorporation*).

13. The applicant was taken to a hospital in Wuppertal-Elberfeld... As the applicant refused to take the medication necessary to provoke vomiting, he was held down and immobilised by four police officers. The doctor then forcibly administered to him a salt solution and the emetic Ipecacuanha syrup through a tube introduced into his stomach through the nose. In addition, the doctor injected him with apomorphine, another emetic that is a derivative of morphine. As a result, the applicant regurgitated one bubble containing 0.2182 grams of cocaine.”

The Court found that this treatment amounted to a violation of art 3 ECHR and also that “the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant rendered his trial as a whole unfair” as such violent treatment “is of itself a sufficient basis on which to conclude that the applicant was denied a fair trial in breach of Article 6” (§ 109).

2.1.4.2 Respecting the will of the accused: The right not to incriminate oneself

This understanding that the defendant is entitled to be treated “as a subject rather than merely an object of the process” forms the background of another crucial right under art 6 of the Convention, that is to say the **privilege against self-incrimination** which is seen by the Court as an element of the general right to a fair trial.

This right contains several important aspects:

- The right to remain silence;
- The right not to be coerced to hand over real evidence;
- In the case of *Jalloh v. Germany* (just referred to above) the Court found that “allowing the use at the applicant’s trial of evidence obtained by the forcible administration of emetics infringed his right not to incriminate himself”.¹¹

¹⁰ Trechsel (2005) 89.

¹¹ *Jalloh v. Germany*, judgment of 11 July 2006, § 122.

2.1.4.3 Rights to be tried within a reasonable time (art 6 para 1 ECHR) and to be protected against double jeopardy (ECHR Protocol no. 7 art 4)

With regard to the **right to swift proceedings**, first it should be recalled that the term “charge” in art 6 of the Convention is autonomously interpreted by the Court in Strasbourg as to include the phase of police investigations. The clock, finally deciding on the appropriate swiftness of proceedings, starts running as soon as a person officially learns of an investigation directed against him/her or has begun to be affected by it.¹² Secondly, for good reasons the Court assesses the swiftness of proceedings on a case-by-case basis, monotonously applying the formula:

“The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute”.¹³

During the past two decades the right to be tried within a reasonable time has become the most frequently asserted right under the Convention. However, while there are several cases dealing with the length of civil proceedings in Croatia, so far there are only very few Court cases reviewing the swiftness of criminal proceedings. And when in the past the Court had reason to assert that criminal proceedings exceeded the reasonable time limit this was due to the length of appellate proceedings (refer to e.g. the case of *Camasso v. Croatia*, judgment of 13 April 2005). On the other hand the findings of the present Twinning project pinpoint clear indications of structural weaknesses with regard to the swiftness of pre-trial proceedings such as the high number of time-barred prosecutions and the ping-pong-structure of interaction of public prosecutors and investigating judges. Therefore, we believe that the right of defendants (and victims under art 13 ECHR!) to speedy and efficient pre-trial proceedings has to remain a point of reference for the reform of pre-trial proceedings.

Also, it should be remembered that under the case-law of the Court in Strasbourg the question whether the guarantee of proceedings being concluded within a reasonable time span cannot be answered merely on the basis of the total duration of proceedings. Rather, it is the approach of the Court to examine whether the authorities have acted with deliberate speed within each and every stage of proceedings.¹⁴ Therefore, if e.g. a public prosecutor decides to allow a case to be resting until the time determined by a statute of limitation is near then such behaviour in itself would amount to a breach of art 6 ECHR.

Protection against double jeopardy is of particular significance in dual systems combining a branch of the criminal justice system dealing with regulatory offences and another handling in stricter sense criminal offences. Actually, several of the most important Court-cases dealt with road traffic accidents (and drunk driving) where both limbs of the criminal justice system often overlap (such as *Gradinger v. Austria*, *Franz Fischer v. Austria* and *Oliveira v. Switzerland*). Not only does this hold true with regard to the Croatian system, in addition there are “problem areas” unknown to other legal systems such as considerable overlapping in cases of domestic violence.

¹² *Kangaslouma v. Finland*, judgment of 20 January 2004, § 26.

¹³ *Case of Novina v. Slovenia*, judgment of 26 October 2006, § 25.

¹⁴ *Swart/Young* (1995) 68.

The Court in judging cases of sanctions under both branches of such a dual system has adopted a liberal (some believe: too liberal) stance. When there are two convictions based on the same facts this does not necessarily infringe Protocol no. 7 as long as both convictions deal with clearly distinctive normative aspects of the same incriminated behaviour, amounting to one single act constituting two separate offences. Nevertheless, the fact that both “Prekršajni Sudovi” (Regulatory Offences Courts) and “Općinski Sudovi” (Municipal Courts) deal with cases of domestic violence without much difference in the normative aspects they focus on calls for further attention.

The reason why here the right to speedy proceedings and the *ne bis in idem*-principle are pulled together is that these two rights merge in a more general aspect of criminal justice: The right of individuals who have committed a crime to account for their action and on this basis to be allowed to put what they have done behind them within an appropriate period of time. Perpetrators who have satisfied the law must be given the chance to again come to terms with their social environment. Or, as *Trechsel* has put it: “Once everything is on the table the person concerned is entitled to feel relieved and expect a final solution to the problem.”¹⁵ This right of offenders to have done with what they have done is significant when it comes to strengthening elements of **restoration** of social peace and, indeed, **rehabilitation** of offenders by the criminal justice system.

This is not to say that these rights would be less important with regard to mistakenly accused persons who are innocent. Yet, the rights of persons who face false accusations are more obvious and well recognised. Clearly, the effectiveness of a criminal justice system will be judged against the background of its ability to sort out wrong accusations. The very notion of a liberal criminal justice system is tied to the question whether the defendant is given the free space and tolerance needed for an effective defence. In comparison, the rights of offenders to be allowed to effectively account for what they have done and on this basis to be allowed to remain in their social environment as respected persons is less evident, although hardly less important.

Later-on we will come back to this aspect when asserting the (deficient) ability of the criminal justice system in Croatia to swiftly finalize cases on the basis of clear evidence and a comprehensive confession of the defendant.

2.1.4.4 Right to challenge a prosecution witness, the principle of immediacy and the functions of pre-trial proceedings (art 6 para 3d ECHR)

The right of the defendant to challenge the statement of a witness is of particular interest in the given context as it restricts the use of evidence gathered by the police in pre-trial proceedings. In the recent case of *Andandonskiy v. Russia* (judgment of 28 September 2006) the Court has (again) used the following formula:

“49. All evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6, provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him or her either when that witness is making a statement or at a later stage of the proceedings

(see Saïdi v. France, judgment of 20 September 1993, Series A no. 261-C, Series A no. 261-C, p. 56, § 43). In particular, the rights of the defence are restricted to an extent that is incompatible with the requirements of Article 6 if the conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial (see A. M. v. Italy, no. 37019/97, § 25, ECHR 1999-IX, and Saïdi, cited above, §§ 43-44).”

From this argument what derives with regard to the organization of pre-trial proceedings is no limitation of police inquiries whatsoever but the necessity to allow the defendant at some stage of the proceedings to challenge a witness against him or her if their statement would form a decisive element of the evidence carrying a conviction. And this confrontation has to happen within the pre-trial phase if either the witness ought to be spared having to give his or her statement in a (public and adversarial) court hearing or if it is foreseeable that the witness may be prevented from appearing in court.

However, in addition the sentence of the Court stating that “all evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument” should not be overlooked. It expresses the crucial **principle of immediacy** (in German “*Unmittelbarkeitsgrundsatz*”), meaning that evidence as a matter of principle should be produced in an adversarial court trial. When instead of the first-hand production of evidence the court recurses to the files of pre-trial proceedings there should be good reasons to do so.

Instances where such reasons exist relate to vulnerable witnesses and victims who have to be allowed to give testimony in an environment shielded against intimidation and secondary traumatisation. In the case of *S.N. v. Sweden* referred to above¹⁶ the Court has shown that it is possible to reconcile the right of the defendant to a fair trial and the right of the victim to be treated with care.¹⁷

The principle of immediacy holds the key to structuring the whole of first-instance court-proceedings and, in particular to understanding the specific functions of pre-trial proceedings. It clearly focuses court proceedings on the trial-phase and leaves to the pre-trial phase the specific function of preparing for the trial, not yet preparing for the judgment.

Yet, there is an **important exception** to this rule. It may not be overlooked that the common law system in the majority of cases does without an adversarial court trial on the basis of a **guilty-plea** of the defendant. Such a plea, obviously, can be understood as a **waiver of the right to an adversarial court hearing** including the right to challenge witnesses.

If this holds true than the specific sub-function of pre-trial proceedings must be seen as contingent on what stance the defendant takes up on the question of his/her accountability for the offences s/he is charged with. If the defendant is ready to take responsibility then in line with the common law system the court may and indeed should move on towards acknowledging this and towards deciding on appropriate sanctions. On the other hand, as long as the defendant contests the charges all the pre-trial phase of proceedings can do is, to prepare for a public adversarial court trial which will allow the court to decide on the cogency of the accusations.

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¹⁶ See 2.1.3.

¹⁷ Trechsel (2005) 322.

Apparently, this view reinforces the claim made above¹⁸ that if defendants decide to accept their accountability then they should be allowed to, without unnecessary delay, compensate for their wrongful behaviour and on this basis be enabled to put that behaviour behind them.

2.1.4.5 The right to call witnesses (art 6 para 3d ECHR)

Sometimes the second right guaranteed by that same paragraph is overlooked: The right of the defendant to call witnesses. However, this is a practically important right in the shaping of pre-trial proceedings. Already at this stage the defence should be in a position to request the hearing of witness, even more so in cases when for whatever reasons there is a risk that this witness will be prevented from appearing in court.¹⁹

Here the adversarial architecture of pre-trial proceedings is put to the test. If the investigations are left to the police and/or the public prosecutor there must be some mechanism in order to secure that in time also those witnesses are heard that support the defence. An important task of the court becomes visible, a task however, which the court will not be in a position to credibly perform as long as he investigates shoulder to shoulder with the police and the public prosecutor. Again, what is needed is an adversarial basic structure of pre-trial proceedings.

¹⁸ See 2.1.4.3.

¹⁹ *Trechsel* (2005) 323.

2.1.5 Conclusions

2.1.5.1 The need for an integrated human rights-approach

The analysis of relevant articles of the ECHR has delivered plenty of material for further consideration. This section aims to achieve a more comprehensive assessment of the significance of human rights for the construction of a criminal justice system. What precisely is needed is a concept that would allow integrating the human rights of the victim and those of the offender.

First of all, what has to be taken into account is the case-law of the ECtHR with regard to the right of victims to effective investigations and to participation in proceedings. Frankly speaking, **the Court's notion of a right of the victim** to the prosecution and, if possible, **punishment of the offender** is hardly in line with common criminal law doctrine, which has never placed the victim in the very centre of the criminal justice system and, actually, has tended to eye the victim with some suspicion.

However, the Court's decisions under art 13 ECHR not only challenge our basic views on the criminal justice system. Even more fundamentally, viewing the criminal procedure as a remedy owed to the victim pre-supposes that the **criminal offence** can be **conceptualised as an infringement of rights of the victim** under the Convention, rights to physical integrity, to property, to privacy etc. This, again, clearly collides with our traditional understanding viewing criminal offences as a violation of nothing than the criminal code.

There are reasons to believe that the concept of a right of the victim to criminal proceedings cannot be fully embraced in terms of the traditional understanding of the criminal justice system but requires a new, fresh view on this institution. There is a case for believing that what is needed is not less than a change of paradigm.

At this point it should also be remembered that the ECtHR's case-law acknowledging rights of the victim to be recognised as a victim and to experience redress does not stand alone but forms only one element in a much broader development which has challenged the traditional views on criminal justice for more than two decades. This development became very visible when in 1985 two documents were passed, that is to say the Recommendation of the Committee of Ministers of the Council of Europe of June 1985

Milestones in the development of a victim oriented model of criminal justice

- **UN-Declaration** on Basic Principles of Justice to Victims (1985)
- **Council of Europe**
 - Recommendation (85) 11 on the position of victims in criminal proceedings;
 - Recommendation (87) 21 on assistance to victims and prevention of victimisation;
 - CoE-Recom. (2006) 8 on assistance to victims
- Recent **case-law** of the European Court of Human Rights in Strasbourg under art 13 and articles 2, 3, 4 and 8 ECHR
- **European Union**: Framework Decision on the standing of victims in criminal proceedings (2001)

on the position of the victim in the framework of criminal law and procedure – No. R (85) 11 – and the “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power” decided by the General Assembly of the United Nations in November 1985.

The new awareness of a fundamental short-coming of the criminal justice system is at that time captured in a precise wording by the Council of Europe-recommendation, which indicates the basic concern in its preamble as follows:

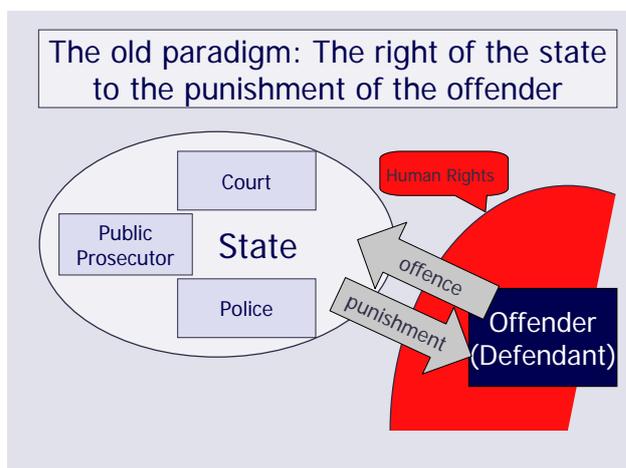
“Considering that the objectives of the criminal justice system have traditionally been expressed in terms which primarily concern the relationship between the state and the offender;

Considering that consequently the operation of this system has sometimes tended to add to rather than to diminish the problems of the victim;

Considering that it must be a fundamental function of criminal justice to meet the needs and to safeguard the interests of the victim; ...”

2.1.5.2 The “liberal” model of the criminal justice system

This wording indicates what path this analysis will have to take. Indeed, our reflections should start with considering the traditional concept of a criminal justice system viewed as a “relationship between the state and the offender”.



The traditional view, which here will be referred to as the “liberal” model, frames the criminal justice system as a bipolar antagonism of the state represented in its laws, and the offender. Similar to the mechanism of damage resulting in a claim of the damaged party to compensation, the offence, which is viewed as an infringement of the criminal code, prompts as an immediate reflex the right of the (“damaged”) state to the punishment of the offender.

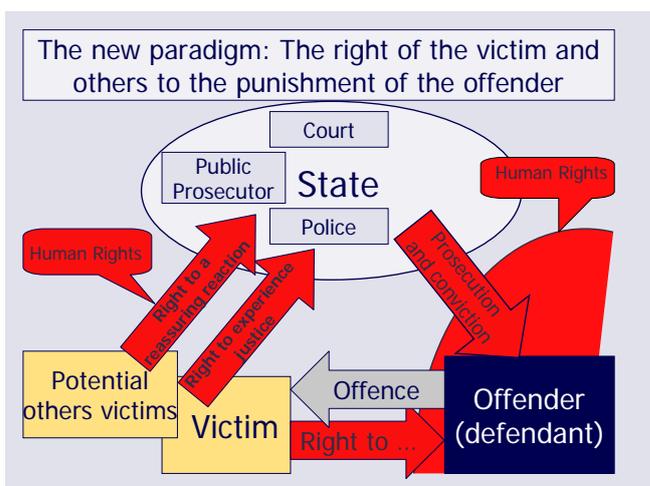
When asked to give a reason, academics would traditionally point to the necessity to **prevent further offences by the perpetrator or others**. All in all, the criminal justice system is seen as a mechanism protecting the law by teaching people to obey the law. Criminal procedure in this model is tasked with enforcing **the state’s right to punish offenders**.²⁰ Nowadays, the role of voicing the state’s claims is left to the state attorney.

In the “liberal” model the task of human rights is to shield the defendant against a disproportionate overreaction of the state. State authorities are required to balance their activities of investigating, prosecuting and sanctioning against the rights of the defendant as a human being. In this picture state interests are opposed and limited by the human rights of the defendant as an individual.

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²⁰ In Germany the underlying concept of a right of the state to the punishment of the offender (in German «öffentlicher» or «staatlicher Strafanspruch») has first been challenged by *Lüderssen* (1981); refer also to *Lüderssen* (1989).

2.1.5.3 A „human rights-model“ of the criminal justice system



In the new model, which could be named the “human rights-model” of criminal justice, laws and institutions of the state are seen as **purely instrumental**. What they reflect are not interests of the state but **rights of individuals** which they are construed to meet. The criminal justice system is no longer seen as implementing a right of the state to punish but as fulfilling obligations of the state to identify and sanction offenders.

The offence is not viewed as an infringement of state laws but as violating rights of the victim to physical integrity, property, freedom of movement etc.²¹ From the injustice done to the victim results the right of the victim to be acknowledged as a victim, to experience that justice is done and to be restored as a moral person entitled to the respect and solidarity of the legal community. This **right to redress**, as will be remembered, is the core element of the ECtHR’s judgments under art 13 ECHR.

Also, in the face of an offence, the victim - as well as other people who feel at risk - has the right to a **reassuring reaction** of the criminal justice system demonstrating the decidedness to protect the rights of individuals by deterrent sanctions, as stated by the ECtHR under articles 2, 3, 4 and 8 ECHR. These rights define the tasks and form the basis of the criminal justice system.

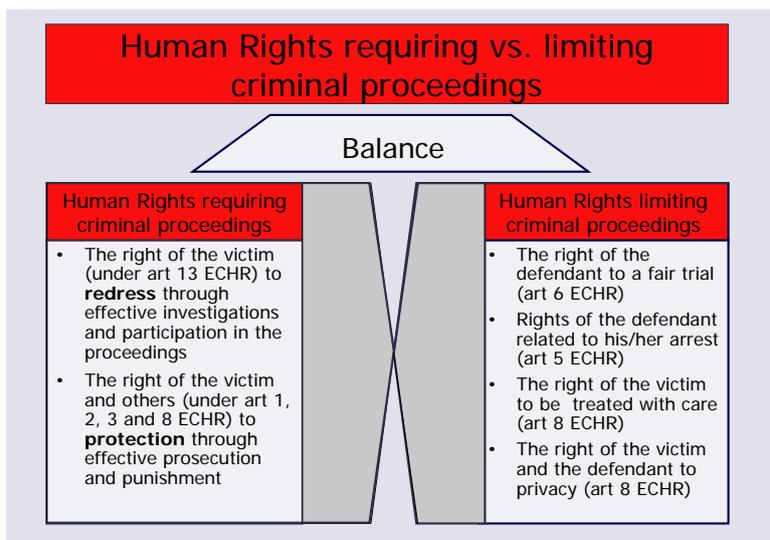
Comparison of old and new model		
	Liberal model	HR-centred model
Nature of Crime	Crime is an infringement of state laws	Crime is an infringement of human rights
Objective of criminal proceedings	To enforce the right of the state to the punishment of the offender	To implement the rights of the victim and others to effective prosecution of the offender
Reason of criminal justice	Directed into the future: Prevent <i>further</i> violations of the law	Concerned about the present: Restore peace on the basis of the recognition of the victim
Role of victim	Victim relevant only as a witness (and obliged to support public prosecution)	As a beneficiary the victim becomes a party to the proceedings
Meaning of human rights	Human rights <i>restrict</i> the criminal justice system	Human rights <i>require</i> (and shape) the criminal justice system

Whereas in the liberal model human rights of the defendant function as restrictions to the criminal justice system, in the human rights-model the rights of the victim and of others in the first place **create obligations of the state to implement an effective criminal justice system**. Human rights are the very foundation of the criminal justice system.

2.1.5.4 The need to balance the victim’s rights to an effective proceeding and the defence rights of the suspect

In the human rights-model, the right of the defendant to a fair trial stays in place as a counter-force to the rights of the victim and others to an effective investigation.

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²¹ Very similar and impressive Naucke (1999) 258.



What in the liberal model is seen as an opposition of state interests and individual rights of the defendant now appears as an **opposition of human rights**. State actors are required to strike a balance between these two sides. Most of all, it is the **responsibility of the judge to safeguard this balance**.

On two other differences between the liberal and the human rights-model we would like to comment. Firstly, it is obvious that the position of the victim changes fundamentally. Whereas in the liberal model the victim is treated as one witness among others and obliged to support the authorities in implementing the state's right to the punishment of the offender in the human rights-model the victim is seen as the main beneficiary of criminal justice and therefore is recognized as a party to the proceedings.

Secondly, what from the perspective of the human rights-model legitimizes the criminal justice system is its ability to meet the rights of the victim and others. While in the liberal model the efforts of the criminal justice system are directed into the future and aim to prevent further offences in the new model the criminal justice system is much concerned about the present. Once the offender has disrespected the law from the state's point of view it cannot become worse. However, the victim's perspective is much different. For the victim it is not over when it is done. Only when the victim has found a way to cope with the experience of victimisation s/he will arrive to the point where s/he can leave this experience behind. And that is a long way to go. However, to be acknowledged as a victim and to experience that justice is done supports the victim in finding their way back into the normality of every-day life. The criminal justice system is asked to contribute to a process of restoring the victim as an acknowledged moral person.

From these reflections on the basic functions of the criminal justice system we would like to return to assessing European standards with regard to this system but will at the end of the chapter come back to defining conclusions which will, then, serve as an indispensable basis for evaluating the current state of affairs of the Croatian system of pre-trial proceedings.

2.2 Standards defined by “soft-law” of the Council of Europe

The significant role of the Council of Europe in giving orientation for the future development of the criminal justice system in European countries, in addition to the crucial importance of the ECHR, is also manifest in a long list of highly relevant recommendations with regard to the functions of public prosecution and the courts. It should be stressed that, again, what is pinpointed here is only a narrow selection of the relevant documents.

2.2.1 Prosecution

The Recommendation Rec (2000) 19 adopted by the Committee of Ministers on 6 October 2000 on the Role of Public Prosecution in the Criminal Justice System aims to define “common principles for public prosecutors” and contains important standards with regard to the organisation and the tasks of public prosecution. The Recommendation is supplemented by an extensive Explanatory Memorandum. It deals with the following subjects:

- **Functions of the public prosecutor:**

Except for the central task of initiating and conducting prosecution, which more or less defines a public prosecutor, the Recommendation reflects the differences in the roles of public prosecutors in various member states, e.g. by stating that in certain criminal justice systems public prosecutors conduct, direct or supervise investigations, which, actually, leaves the role of public prosecutors as to the conducting of investigations wide open.

- **Safeguards provided to public prosecutors for carrying out their functions:** States are asked to ensure that public prosecutors can work effectively, that the recruitment, promotion and transfer of prosecutors are carried out according to fair and impartial rules, governed by transparent and objective criteria.

§ 7 states:

“Training is both a duty and a right for all public prosecutors, before their appointment as well as on a permanent basis. States should therefore take effective measures to ensure that public prosecutors have appropriate education and training, both before and after their appointment. In particular, public prosecutors should be made aware of:

- a. the principles and ethical duties of their office;
- b. the constitutional and legal protection of suspects, victims and witnesses;
- c. human rights and freedoms as laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms, especially the rights as established by Articles 5 and 6 of this Convention;
- d. principles and practices of organisation of work, management and human resources in a judicial context;
- e. mechanisms and materials which contribute to consistency in their activities.”

§ 9 touches on an important matter of **internal organisation** stating that the **assignment** and re-assignment **of cases** should “meet requirements of impartiality and independence and maximise the proper operation of the criminal justice system, in particular the level of legal qualification and specialisation devoted to each matter”.

- **Relationship between public prosecutors and the executive and legislative powers:** The recommendation spells out an appropriate level of independence of public prosecution countering “unjustified interference or unjustified exposure to civil, penal or other liability”. With regard to systems, where the public prosecution is part of or subordinate to the government the recommendation stresses the necessity for a strict rule of law and complete transparency.
- **Relationship between public prosecutors and court judges:** The competencies and the procedural role of public prosecutors should be established by law in a way that there can be no doubt about the independence and impartiality of courts.
- **Relationship between public prosecutors and the police:** In light of the tasks of this project the provisions on the relationship of public prosecutors and the police deserve particular attention:

“21. In general, public prosecutors should scrutinise the lawfulness of police investigations at the latest when deciding whether a prosecution should commence or continue. In this respect, public prosecutors will also monitor the observance of human rights by the police.

22. In countries where the police is placed under the authority of the public prosecution or where police investigations are either conducted or supervised by the public prosecutor, that state should take effective measures to guarantee that the public prosecutor may:

a. give instructions as appropriate to the police with a view to an effective implementation of crime policy priorities, notably with respect to deciding which categories of cases should be dealt with first, the means used to search for evidence, the staff used, the duration of investigations, information to be given to the public prosecutor, etc.;

b. where different police agencies are available, allocate individual cases to the agency that it deems best suited to deal with it;

c. carry out evaluations and controls in so far as these are necessary in order to monitor compliance with its instructions and the law;

d. sanction or promote sanctioning, if appropriate, of eventual violations.

23. States where the police is independent of the public prosecution should take effective measures to guarantee that there is appropriate and functional co-operation between the Public Prosecution and the police.”

This is to say: In any case, public prosecutors should scrutinize the performance of the police and their compliance with human rights²² and there should be mechanisms in place securing appropriate and functional co-operation, even in the absence of institutional links. In addition, where law provides for some form of subordination of the police, in particular where the

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²² The Explanatory Memorandum comments: „All public prosecutors must have at least two functions vis-à-vis the work of the police: namely scrutinising the lawfulness of police investigations before any decision to proceed with public prosecution can be taken and, at the same stage, monitoring in general terms that human rights are respected.” And adds in a footnote: “The form of words chosen represents a compromise designed to reflect the farthest that certain common law systems could agree to and the minimum that other systems could accept.”

police in implementing investigations are subject to directives or orders of public prosecutors, the Recommendations indicate what the purpose of such subordination could be, e.g. to implement priorities or to safeguard the lawfulness of police conduct.

- **Duties of the public prosecutor towards individuals:**

The Recommendation stresses the importance that public prosecutors would respect and seek to protect human rights and take proper account of the views and concerns of victims etc.

- **International co-operation:**

Direct contacts between public prosecutors of different countries should be furthered; awareness of the need for active participation of public prosecutors in international co-operation.

2.2.2 The courts

The Recommendation Rec (1994) 12 of the Committee of Ministers to Member States on the independence, efficiency and role of judges among other subjects specifies – as Principle V – the judicial responsibilities that are significant in the pre-trial phase of criminal proceedings.

The Council of Europe's Recommendation Rec (1995) 12, adopted by the Committee of Ministers on 11 September 1995 on the management of criminal justice can serve as an important point of reference when it comes to developing standards with regard to many aspects of organisation of criminal proceedings and the management of both courts and public prosecutors' offices. The Recommendation draws attention to the fact that in European societies there is a serious risk of criminal justice systems in general and public prosecutors' offices in particular being overburdened. It starts out by „considering that over recent years criminal justice systems throughout Europe have faced an increase in the number and often in the complexity of cases, unwarranted delays, budgetary constraints and increased expectations from public and staff". After one decade this description still fits the situation.

Some reasons for increasing challenges mentioned by this Recommendation are:

- more criminal regulations defining ever new forms of criminality that often are difficult to investigate such as financing of terrorism, environmental or cyber-crime;
- more cases or at least more complicated cases, e.g. an increase of organised and cross-border crime requiring specialization and costly and time-consuming international cooperation;
- rigid budgetary constraints;
- growing expectations on the side of all parties to the proceedings, e.g. more rights of the defendant, more legal safeguards, the introduction of the victim as a party to the proceedings, all in all many factors that make criminal proceedings more complicated and, again, time-consuming.

On this background strategies have to be found safeguarding the effectiveness and efficiency of criminal proceedings, such as

- Decriminalisation, whenever possible, e.g. with regard to road traffic offences;
- Diversion, i.e. the introduction of procedures that allow to finalize a case without taking it to court;
- Strategies to simplify and speed up procedures when the defendant is ready to account for the behaviour s/he is charged with;
- Delegation of work to the police to reduce the workload burdening public prosecutors;
- The restriction of costly measures such as pre-trial detention or covert surveillance to cases where they are indispensable;
- Specialization of public prosecutors in particular with regard to new forms of crime such as computer criminality or environmental crime;
- Measures to improve and professionalize the management of the criminal justice system.

It is believed that the shaping of the reform of pre-trial proceedings in Croatia will have to take the concerns voiced by the Council of Europe concerning threats to the functioning of the criminal justice system very seriously. In particular, attention should be directed towards finding means of **finalisation of cases without a costly and lengthy adversarial court hearing**.

2.2.3 The victim

Although the Council of Europe has acted as a driving force behind the development of a victim-centred perspective on criminal justice, at this point only a brief mention will be made of the pertinent documents. The reason is that much of what forms the relevant soft-law produced by the Council of Europe is now captured by the binding regulations of the EU Council Framework Decision discussed below.²³ Still, the recommendations made by the Council of Europe are of significance in particular when it comes to interpreting the (sometimes quite broad) regulations of the EU Framework Decision.

2.2.3.1 The position of victims in proceedings

Recommendation no R (85) 11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure requires the governments of member states to review their legislation and practice in accordance with certain guidelines. Here, those requirements are highlighted which bear considerable significance with regard to the organisation of pre-trial proceedings.

At police level:

- Police officers should be trained to deal with victims in a sympathetic, constructive and reassuring manner;
- The police should inform the victim of their rights and their position in proceedings;

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²³ Refer to 2.3.1.1.

- The victim should be able to obtain information on the outcome of the police investigation;
- In any report to the prosecuting authorities, the police should give as clear and complete a statement as possible of the injuries and losses suffered by the victim.

In respect of prosecution:

- A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender;
- The victim should be informed of any final decision concerning prosecution, unless s/he indicates that s/he does not want this information;
- The victim should have
 - either the right to ask for a review by a competent authority of any decision not to prosecute,
 - or the right to institute private proceedings in case of such a decision taken by the public prosecutor.

2.2.3.2 Assistance to crime victims

The Council of Europe's Recommendation No. R (87) 21 "on the assistance to victims and the prevention of victimisation", at the time of its creation intended to complement the European Convention on the Compensation of Victims of Violent Crime as well as the Recommendation on the position of victims in proceedings, has recently been overhauled and updated by Recommendation Rec(2006)8 "on assistance to crime victims", adopted by the Committee of Ministers on 14 June 2006 and replacing the Recommendation of 1987.

The new Recommendation deals, among others, with the following topics:

- **Aims and principles of assistance to victims**, the necessity to protect victims from secondary victimisation;
- The specific **role of public services**, including the criminal justice agencies; obligations of the police and other authorities to identify the needs of victims, to ensure appropriate information, protection and the availability of support;
- The specific **role of NGOs** and specialised centres; **minimum standards** for the performance of such victim support organisations;
- The necessity to provide **detailed information** as soon as the victim comes into contact with law enforcement or criminal justice agencies or with social or health care services; the content of such information;
- Compensation and insurance for victims;
- Protection of the physical and psychological integrity of victims; protection against repeat victimisation;
- **Training, in particular for the police** and personnel involved in the administration of justice;
- The need for national as well as international **coordination** of victim assistance.

2.3 Important elements of the EU *acquis communautaire*

This section aims to pinpoint those elements of the EU *acquis* that are decisive for the shaping of pre-trial criminal proceedings.

2.3.1 EU-acquis with regard to the role of victims in criminal proceedings

2.3.1.1 EU Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings

The EU Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) marks a milestone in the development of a criminal justice system that remembers its basic function to do justice to victims of crime.

The preamble (in para 5) stresses the need for a comprehensive, coordinated approach to implementing the rights of victims in order to avoid secondary victimisation. The Framework Decision even extends to measures of victim assistance before and after criminal proceedings (para 6).

The most important provisions of the Framework Decision are:

- **The right of victims to be treated with respect for their dignity:**
Why it is important in criminal proceedings to focus on the dignity and the rights of the victim is explained simply by the fact that the criminal offence implied some amount of disrespect towards the victim as a person and his/her rights; one primary aim of criminal proceedings is to attest to the victim that s/he was and always will be entitled to respect and recognition of her rights; this is so fundamentally important to the concept of criminal proceedings that the authors of the Framework Decision have rightly placed the victim's rights to respect and recognition at the very outset of the text (art 2).
- **The right of victims to participate in proceedings (including the rights to be heard and to provide evidence):**
Art 3 para 1 briefly states: "Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence." It is important to notice that the term "during proceedings" indicates that victims' participation should not be restricted to some later state of proceedings, such as the court trial; in practice the participation of victims in proceedings will only have an impact when they are allowed to be heard and to provide evidence already at the stage of police investigations as this is the time-period when the course of the following proceedings is widely decided.
- **The right of victims to receive information:**
Obviously, the victim can be expected to actively participate in proceedings only after having received some relevant information as to the course of proceedings and his/her rights to be heard and to contribute to the proceedings; therefore, art 4 takes some pain to define in detail the information rights of victims and in para 1 focuses on the initial information to be provided by the law enforcement agencies.

- **The right of victims to access to advice:**
Within limits much decided upon by domestic legislation victims should have access to legal aid and other forms of advice (art 6); national regulations in this respect will somewhat depend on the extent to which the victim is acknowledged as party to the proceedings.
- **The right of victims to understand and to be understood:**
Article 5 of the Framework Decision provides communication safeguards aimed to overcome communication difficulties, in particular caused by restricted language skills or disabilities of the victim; these safeguards apply to the victim both when acting as a witness as well as when acting as a party to the proceedings; Member States are obliged to make the same efforts to overcome communication handicaps as are foreseen with respect to such issues relating to the defendant.
- **The right to have allowance made for the disadvantage of living in a Member State different from the place of victimisation:**
Each Member State shall take appropriate measures to minimise the difficulties faced by victims who are resident of a State other than the one where the offence has occurred; art 11 elaborates in some detail on this topic.
- **The right of victims to be treated with care:**
Art 3 para 2 contains a crucial provision obliging Member States to “take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings”; this implies the obligation to prevent repetitive questioning of victims and, therefore, is a matter of paramount importance to the very structure of pre-trial proceedings; it is quite evident that an organisation of pre-trial proceedings based on police investigations which then are repeated by court investigations is incommensurate with this provision, as far as victims are concerned.
Likewise significant is the obligation of Member States to protect vulnerable victims “from the effects of giving evidence in open court” by allowing them “to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles” (art 8 para 4); in particular this refers to the option of video-taping the victim’s statement in pre-trial proceedings.²⁴
- **The right to protection at the various stages of procedures:**
Art 8 stresses the right of endangered victims and their families to be protected as regards their security and privacy; in addition, Member States are called upon to ensure “that contact between victims and offenders within court premises may be avoided, unless criminal proceedings require such contact”.
- **The right to compensation in the course of criminal proceedings;**
According to art 9 of the Framework Decision in the course of criminal proceedings victims are entitled to obtain a decision within reasonable time limits on compensation by the offender; the regulation allows for exceptions “in certain cases”; Member States shall encourage the offender to provide adequate compensation to victims.

²⁴ For the human rights-implications of this option please refer to 2.1.4.4.

- **The obligation of Member States to provide victim support systems:**
Article 1 para b provides an important definition, under which "victim support organisation" shall mean "a non-governmental organisation, legally established in a Member State, whose support to victims of crime is provided free of charge and, conducted under appropriate conditions, complements the action of the State in this area"; however, art 13 makes it clear that Member States to some extent can choose to either provide specially trained units within their public services or to fund and promote private victim support organisations; either way has to lead to a comprehensive system of services including the initial reception and information of victims as well as victim support and assistance thereafter, and in particular including accompanying victims during criminal proceedings, whenever necessary and possible;
- **The obligation of Member States to provide comprehensive training for personnel involved in criminal proceedings:**
Member States have to attend to the training of all personnel involved in criminal proceedings; this in particular applies to police officers and legal practitioners (art 14). Indeed, making the police and public prosecutors aware of the needs and rights of victims will have a strong impact on the whole of the criminal justice system.

2.3.1.2 Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims

The EU Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (Official Journal L 261, 06/08/2004 P 0015 – 0018) obliges Member States to provide a scheme for the compensation of victims of intentional violent crime. In the wording of the Directive, (7) of the considerations:

“This Directive sets up a system of cooperation to facilitate access to compensation to victims of crimes in cross-border situations, which should operate on the basis of Member States' schemes on compensation to victims of violent intentional crime, committed in their respective territories. Therefore, a compensation mechanism should be in place in all Member States.”

The Directive responds to the fact that crime victims are often not able to obtain compensation from the offender, either because the offender cannot be identified or prosecuted or because the offender lacks the means to compensate for the damage suffered by the victim. Therefore, according to art 12 para 2 of the Directive all Member States are obliged to “ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims”.

Compensation shall be paid by the competent authority of the Member State on whose territory the crime was committed (art 2). Yet, when the crime occurred in a Member State different from the one where the victim is habitually resident, the victim has the right to submit an application in the Member State of his/her residence (art 1). Every Member State, therefore, has to define two actors: One authority (or authorities) responsible for assisting victims who live on their territory but have been victimized in another Member State (“assisting authority or authorities”); and another authority (or authorities) responsible for deciding upon applications for compensation in connection with crimes committed on their territory (“deciding authority or authorities”).

Member States are called on to minimize the administrative formalities required of an applicant in order to receive compensation. The assisting authority is required to provide to all potential applicants all relevant information on the possibilities to apply for compensation and the required application forms.

2.3.2 Charter of Fundamental Rights of the European Union (CFREU) and Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the EU

The section of the Charter entitled “Justice” lays down the right to a fair trial and guarantees respect for the rights of the defence of anyone charged with a criminal offence. It provides for the presumption of innocence and proportionality of penalties. It acknowledges the principle of *ne bis in idem*.

Charter of Fundamental Rights of the European Union (2000/C 364/01)

Chapter VI

Justice

Article 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

Article 48

Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 49

Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence.

Article 50

Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

It is the Commission's intention to further elaborate on the rights foreseen in Article 47 of the Charter. On April 28, 2004 the Commission presented the proposal for a Framework Decision on certain procedural rights. Although not legally binding, this document gives some orientation as to the views of the Commission. It aims at setting common minimum standards with regard to defence rights as a means of fostering cooperation and the mutual recognition of decisions.

With regard to the correlation between the proposed Framework Decision and the ECHR the proposal states that the

“Commission's research and consultation, together with the case-law of the ECtHR, shows the ECHR is implemented to very differing standards in the Member States and that there are many violations of the ECHR. Those divergences prejudice a common protection of procedural rights within the Union, jeopardize mutual trust and affect the smooth operation of the mutual recognition principle. Furthermore, the Commission's aim is to render more efficient and visible the practical operation of ECHR rights with this proposal so that everyone in the criminal justice system is more aware of them, not only defendants but also police officers, lawyers, translators and interpreters and all other actors in the criminal justice system. This should lead to better compliance with the ECHR.”

The areas where common minimum standards are proposed are:

- Access to **legal advice**, both before the trial and at trial, dealt with by art 2 to 5, including a right to free legal advice, if the costs would cause undue financial hardship to the defendant, and the obligation of Member States to ensure effectiveness of legal advice, also by replacing a lawyer if the legal advice given is found not to be effective;
- Access to free **interpretation** and translation (art 6-9);
- Ensuring that persons who are not capable of understanding or following the proceedings receive appropriate attention (art 10-11); suspected persons handicapped by age, mental physical or emotional condition have to be given specific attention; any questioning of such a person has to be recorded by audio or video;
- The right of a detained suspect to have his family informed and to communicate, *inter alia*, with consular authorities in the case of foreign suspects (art 12-13);
- **Notifying suspected persons of their rights** by giving them a written “Letter of Rights”, which should be available in all Community languages (art 14).

2.3.3 EU-Acquis with regard to cooperation in criminal proceedings

By now, the EU-acquis with regard to cooperation in criminal proceedings has snowballed to a considerable size. As one piece of strong evidence mention shall be made of the Austrian Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union,²⁵ enacted in 2004, which contains no less than 77 Articles and deals with the European Arrest Warrant (art 3-38), the recognition and execution of other EU Member States' courts' decisions (art 39-54), as well as with various issues of mutual assistance in criminal matters, including joint investigation teams (art 60-62), Eurojust (art 63-68), the European Judicial Network (art 69-70), controlled deliveries (art 71-72) and covert investigations (art 73-74). In a way this Act can serve as a compendium displaying where the rapid development of cooperation in criminal proceedings has arrived to. (More precisely this Act serves to demonstrate what efforts are required of an EU Member State in order to incorporate the entire pertinent EU-acquis into national legislation.)

²⁵ Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union (EU-JZG), BGBl I 2004/36 in der Fassung des BGBl I 2004/164.

2.3.3.1 Convention of 12 July 2000 established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union²⁶

The most far-reaching and comprehensive document with regard to the cooperation in criminal proceedings is the Convention on Mutual Assistance in Criminal Matters. In particular – and with significance to pre-trial investigations – the Convention deals with

- The extension of mutual assistance beyond the Schengen Implementation Convention of 1985 as to include proceedings brought by administrative authorities and proceedings related to the liability of legal persons as well as the formalities and procedures in the execution of requests for mutual assistance;
- The handing back of articles obtained by criminal means with a view to their return to their rightful owners;
- The temporary transfer of persons held in custody for purpose of investigation;
- The hearing of persons by means of trans-border videoconference or by telephone conference;
- The implementation of controlled deliveries;
- The setting up of joint investigation teams;
- Mutual assistance in covert investigations;
- The implementation of interception of telecommunications in another Member State for the purpose of a criminal investigation;
- The use of personal data communicated under this Convention.

2.3.3.2 Council Framework Decision of 13 June 2002 on joint investigation teams

To bridge the time-period until the entering into force of the Convention a Council Framework Decision was taken to anticipate the regulation of art 13 of the Convention on joint investigation teams. The Council on 8 May 2003 decided on a model agreement for setting up a joint investigation team (OJ C 121 of 23 May 2003, p. 1).

In this context mention should also be made of the report from the Commission of January 2005 on national measures taken to comply with the pertinent Council Framework Decision (COM(2004) 858 final).

2.3.3.3 Joint Action of 29 June 1998 on the Creation of a European Judicial Network (EJN; OJ L 191 of 7 July 1998)

This regulation provides for the creation of a network of judicial contact points (prosecutors and judges) in charge for judicial cooperation, either generally or for certain forms of serious crime, such as organized crime, corruption, drug-trafficking or terrorism. The establishment of these contact points has to ensure effective coverage of the whole of its territory and of all forms of serious crime.

Under art 3 of the Joint Action the European Judicial Network shall operate in particular in the following three ways:

1. It shall facilitate the establishment of appropriate contacts between the contact points in the various Member States in order to carry out the functions laid down in Article 4;
2. It shall organize periodic meetings of the Member States' representatives in accordance with the procedures laid down in Articles 5, 6 and 7;
3. It shall constantly provide a certain amount of up-to-date background information, notably by means of an appropriate telecommunications network, under the procedures laid down in Articles 8, 9 and 10.

Article 4 of the Joint Action specifies the functions of the contact points as follows:

1. The contact points shall be active intermediaries with the task of facilitating judicial cooperation between Member States, particularly in action to combat forms of serious crime. They shall be available to enable local judicial authorities and other competent authorities in their own country, contact points in the other countries and local judicial and other competent authorities in the other countries to establish the most appropriate direct contacts. They may if necessary travel to meet other Member States' contact points, on the basis of an agreement between the administrations concerned.
2. The contract points shall provide the legal and practical information necessary to the local judicial authorities in their own country, to the contact points in the other countries and to the local judicial authorities in the other countries to enable them to prepare an effective request for judicial cooperation or to improve judicial cooperation in general.
3. They shall improve coordination of judicial cooperation in cases where a series of requests from the local judicial authorities in a Member State necessitates coordinated action in another Member State.

According to art 8 contact points must have permanent access to the following four types of information:

1. Full details of the contact points in each Member State with, where necessary, an explanation of their responsibilities at national level;
2. A simplified list of the judicial authorities and a directory of the local authorities in each Member State;
3. Concise legal and practical information concerning the judicial and procedural systems in the 15 Member States;
4. The texts of the relevant legal instruments and, for conventions currently in force, the texts of declarations and reservations.

2.3.3.4 Eurojust

By the “Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime” a centralized body was created with a view to help co-ordinate the investigation and prosecution of serious cross-border crime and to speed up and improve judicial co-operation. While EJN is a decentralised network, EUROJUST is a central body with legal personality combining senior lawyers, magistrates, prosecutors, judges and other legal experts seconded from every EU Member State, working as a team in the same building. Team members are expected to

know the legal system of their Member State and to engage in direct dialogue with the national authorities. They can immediately consult other team members, and advice can, if necessary, be given collectively from the whole team.

According to art 2 of the Decision Eurojust shall be composed of one member per Member State being a prosecutor, judge or “police officer of equivalent competence”. The objectives of Eurojust in the context of investigations and prosecutions are specified by art 3 as follows:

Article 3

Objectives

1. In the context of investigations and prosecutions, concerning two or more Member States, of criminal behaviour referred to in Article 4 in relation to serious crime, particularly when it is organised, the objectives of Eurojust shall be:

(a) to stimulate and improve the coordination, between the competent authorities of the Member States, of investigations and prosecutions in the Member States, taking into account any request emanating from a competent authority of a Member State and any information provided by any body competent by virtue of provisions adopted within the framework of the Treaties;

(b) to improve cooperation between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests;

(c) to support otherwise the competent authorities of the Member States in order to render their investigations and prosecutions more effective.

2. In accordance with the rules laid down by this Decision and at the request of a Member State's competent authority, Eurojust may also assist investigations and prosecutions concerning only that Member State and a non-Member State where an agreement establishing cooperation pursuant to Article 27(3) has been concluded with the said State or where in a specific case there is an essential interest in providing such assistance.

3. In accordance with the rules laid down by this Decision and at the request either of a Member State's competent authority or of the Commission, Eurojust may also assist investigations and prosecutions concerning only that Member State and the Community.

Eurojust acts either by the national members concerned by the implementation of a concrete proceeding or as a College, e.g. when the case can be expected to have repercussions at Union level or when a question of a general nature needs to be answered. Article 6 of the Decision in detail defines the tasks of Eurojust acting through its national members, whereas the tasks of Eurojust acting as a College are specified in Article 7.

In July 2004 the Commission has issued a “Report on the Legal Transposition of the Council Decision of 28 February 2002 Setting up Eurojust with a View to Reinforcing the Fight against Serious Crime” aimed to clarify questions with regard to the transposition of the Decision into national law (and complaining about the hesitancy of Member States to take necessary steps).

2.3.3.5 The Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States

The Council Framework Decision of 13 June 2002 on the European Arrest Warrant (EAW) aims to facilitate and speed up the surrender procedure between Member States: If a person is suspected of a crime in one Member State but is no longer present there, judicial authorities can demand that the (receiving) Member State to which the suspect has fled surrenders this person. The EAW implements the principle of mutual recognition, meaning that there is, as a general principle, an obligation for the Member States to execute the EAW and surrender the person.

A condition for issuing an EAW is that the offence in question is punishable by imprisonment of at least one year under the law of the issuing Member State. However, the Framework Decision exceeds the rules of International Law in so far as to some extent the execution of the EAW does not depend on the existence of a pertinent definition in the law of the receiving State (the so-called **principle of “double criminality”**). We will return to this point shortly. In addition, the EAW does not make any exceptions for **political offences** or for the surrender of a country’s **own nationals**, a much (and emotionally) disputed case.

The execution of an EAW can and, indeed, must be refused on the following grounds:

- If the offence in question is covered by an amnesty in the receiving State;
- If the requested person has been finally judged by a Member State in respect of the same acts (*ne bis in idem*); or
- Where, under the law of the receiving State, the person, owing to his age, may not be held criminally responsible for the acts in question.

The receiving Member State *may* also refuse to execute the EAW in several other cases, including where the act on which the EAW is based is not a crime under the law of the “executing” Member State (lack of “double criminality”). However, this does not apply to 32 serious offences, including participation in a criminal organisation, terrorism, and illicit trafficking in weapons, munitions and explosives. The EAW provides that the receiving Member State must execute a EAW for these 32 offences, if they are punishable under the laws of the issuing Member State by imprisonment for more than three years.

The functioning of the EAW is based on direct contacts **between local courts** in the different Member States. Strict time limits for execution and surrender apply. The final decision on the execution of the EAW must be taken within 60 days after the arrest of the person and within 10 days if the consent by the suspect has been given. These time limits can be extended by a maximum of 30 days at the request of the receiving Member State.

The physical surrender of the person must take place within 10 days after the decision on the execution of the EAW. This time limit can be extended if it cannot be met due to factors outside the control of the two Member States, or due to humanitarian reasons (e.g. the medical condition of the suspect).

The EAW is among the most challenging elements of the EU-acquis as far as pre-trial criminal proceedings are concerned. The impacts of this Framework Decision should be assessed including more indirect effects. As *Spencer* has put it, “a system

under which the criminal courts of one Member State are obliged to give effect to the decisions of another is unlikely to work unless each court has faith in the quality of those decisions – and to ensure this faith, a degree of harmonisation between the procedures of the different countries may eventually prove necessary”.²⁷ Very similarly, *Schwaighofer* has commented that the EAW presupposes an amount of trust in the legal systems of all other Member States that as of today does not yet exist. The common denominator – all Member States are governed by the rule of law and have ratified the ECHR – would not be sufficient.²⁸

What derives from this situation is a certain **pressure on Member States towards the development of common standards in criminal proceedings** strong enough to justify trust in other Member States’ decisions.

²⁷ *Spencer* (2005) 60.

²⁸ *Schwaighofer* (2004) 448.

2.4 Conclusions

Being aware that in the following chapters we will face the task of assessing the effectiveness and efficiency of pre-trial criminal proceedings in Croatia we will have to look for the means and instruments needed for tackling this task. Whereas the term **efficiency**, technically speaking, refers to the ratio of return on investments (with other words the costliness of achieving desired results) the term **effectiveness** points to the question whether defined objectives actually are achieved at all and to what degree. However, as both terms relate to objectives, any assessment of efficiency or effectiveness calls, first of all, for a clear **definition of goals**.

And there lies a problem. Any lawyer knows that the question as to the goals of the criminal justice system has been a matter of academic discourse at least since the times of Greek philosophers such as *Plato* and *Aristotle*. Questions as to the retributive or preventive *raison d'être* of criminal justice are still under dispute as well as what exactly the term prevention would refer to. And recent developments, such as the abolitionists, the just desert-movement and the various restorative justice approaches have added to the complexity of this discourse. In this situation for pragmatic reasons instead of a comprehensive theory of the criminal justice system it will have to suffice that some clearly marked points of referral are defined.

Firstly, a matter of methodology needs to be addressed. The aims of pre-trial proceedings cannot be identified independently of the overall aims of the criminal justice system. Theoretically, in order to properly identify the aims of the pre-trial phase one would have to adopt a two-step approach by first exploring into the over-all tasks of the criminal justice system and by secondly clarifying the position and the particular sub-functions of the pre-trial phase within the whole of criminal proceedings.

However, there lies a certain difficulty. One would tend to view the pre-trial phase as a merely preparatory stage. But this assumption does not stand the test of reality, as in practice many European justice systems have more and more developed means of finalizing cases without taking them to an adversarial court trial, or, as it is, to any court trial. In the German system a plethora of cases are dealt with by penal orders or divertive procedures and never arrive to a court hearing. We will try to cope with this complexity by suggesting that what is needed is differentiation. It appears that what the shortened forms of sanctioning have in common is that they cannot be forced on the suspect. With other words, they openly or implicitly require some form of **consent on the side of the defendant**. This consent marks the point of departure for developing a model of criminal justice that deals differently with disputed cases than with cases where the defendant is ready to accept his responsibility. At this point, it should be remembered that the common law system always accepted this difference depending on the plea of the suspect.

Secondly, the **ECHR** and the **case-law of the Court in Strasbourg** have to be taken into account and, actually, are quite capable of giving an orientation as to which standards a criminal justice system would have to meet today. Overall, what is needed is a **clear human rights-approach** to the reform of criminal proceedings stressing the rights of victims to experience that justice is done and is done swiftly, to be supported and involved in proceedings and to be in a position to effectively challenge any decision not to prosecute, but also stressing that defendants who dispute the charges brought against them need to be granted a fair trial just as much as defendants who willingly

account for what they have done should be enabled to do so without unnecessary delay and by that should be allowed to come to terms with their community.

Thirdly, in addition to the *acquis* of the Council of Europe there are some important parts of the **acquis of the European Union**, such as the Charter of Fundamental Rights, the Framework Decision on the standing of victims, the Council Directive on the compensation of victims and provisions aimed to foster cooperation. However, the text of the Charter reveals clearly the influence of the ECHR, and it is only fair to say that all the relevant EU *acquis* builds on the *acquis* of the Council of Europe and has there its firm basis.

Bearing this in mind, it is possible to define some objectives of criminal proceedings that will, hopefully, meet a broad consensus.

2.4.1 Objectives of the criminal justice system

1. **Objective 1: Offenders are to be held responsible** and to experience justice; this, actually, could be seen as owed to their own dignity as responsible human beings. But it is certainly owed to the rights of the victim and others to see that justice is done. Once the offence has been “straightened out” by a binding decision and its implementation the offender may expect not to be reproached with the offence any longer. In this respect a “restorative” approach would stress that the perpetrator and his/her social environment have to come to terms with the fact that a crime has been committed and that, never the less, social life will go on; in other words, social peace needs to be restored including the perpetrator in the community. Therefore, it is important that the criminal justice system offers a procedure allowing the perpetrator to acknowledge his/her wrongdoing and to „pay” for what they have done without unnecessary delay.
2. **Objective 2: Victims are to be acknowledged** and allowed to experience justice; this is owed to their dignity as persons entitled to enjoy individual rights and to experience that these rights are respected and, whenever disrespected, reinforced by public institutions. If victims receive justice this significantly supports them in coming to terms with what they have experienced. To achieve these tasks it is inevitable that victims are allowed to actively and comprehensively participate in criminal proceedings.
3. **Objective 3: By reinforcing a system of norms and rights** in the face of crimes committed the criminal justice system **restores trust** in the validity and stability of this system and promotes social cohesion and peace. After all, the awareness that criminal offences are being committed can unsettle not only victims but also other members of the community and has a tendency to weaken their feeling of security. In this respect, the first step is done by parliament when setting up a criminal code which threatens offenders with sanctions; this code, though, will be effective only if the criminal justice system is decided and able to effectively suit the action to the word by prosecuting and sanctioning offences (at least those, which come to their attention). From this point of view the regularity and reliability of effective investigations are decisive.
4. **Objective 4:** All members of the legal community are entitled to experience that the **institutional framework** needed for the implementation of the

system of human rights is **protected against impairment** (such as corruption and abuse of power). This includes preventive measures as well as effective reaction to offences endangering the criminal justice system. It should be stressed that any effective implementation of a system of human rights totally depends on state institutions capable of effectively carrying out this task. To protect the unimpeded functioning of this system is an integral element of the protection of human rights.

2.4.2 The criminal justice system developing from manipulation to participation

Focussing on the actual interests of defendants and victims draws our attention to the importance of communication in criminal proceedings. It appears that in this respect a long-term development occurs.

Sometimes it is feared that allowing the victim to fully enter the scene of criminal proceedings could adversely affect the position of the defendant. To some extent that is true. However, from a historic point of view it is also plausible to see the participation of the parties as opposed to the dominance of state actors. While for many centuries the court scene belonged to the parties, although under the auspices of a judge, it was only when courts were misused for the grandiose self-portrayal of monarchs and nationalist leaders that the parties were completely marginalized. The criminal justice system was dominated by state actors. Justice was produced in a somewhat majestic and grandiose monologue aimed to display the predominance and supremacy of the crown or the nation-state over feeble and failing human beings. Whenever individuals had a part in these proceedings this only reflected their obligation to serve the state, mainly to give testimony, in particular by confessing their guilt. The role of individuals was merely instrumental in leveraging the state's right to the punishment of the offender.

Now that this aberration is overcome it is remembered that the criminal offence, although affecting the interests of all members of the legal community, still primarily is part of the reality and biography of the offender and the victim who somehow have to come to terms with what they have done/suffered. What is understood is that for the victim to be heard and acknowledged has significant value in itself. And when the offender accepts his responsibility this is important to him/her as well as, again, to the victim. For these reasons, the criminal justice system has developed and is still developing towards an institution that allows for - and actually more and more depends on - the participation of the parties to the proceedings. To what extent the defendant and the victim are allowed to, again, take the floor, to present their views and to be acknowledged as accountable human beings and as entitled to respect today may serve as a quality indicator of criminal proceedings in a democratic society.

2.4.3 Assessing the quality of the pre-trial phase

On this basis, we can summarize some aspects that are important when it comes to assessing the pre-trial phase of criminal proceedings.

- In general, it is crucial that proceedings allow and indeed make it attractive for the defendant to take responsibility and at the same time uphold defence rights whenever a defendant denies having committed the offence. This is particularly relevant for shaping the pre-trial phase. Defendants should know that they can put the matter behind them by accepting responsibility for their action. However, if the defendant contests the accusations then the task of the pre-trial phase is to clarify the merits of the charges and to allow the public prosecutor to assess the strength and persuasiveness of the incriminating evidence before taking the case to court. In both cases what is crucial is that the dignity of the defendant as a person is fully valued.²⁹
- How to organise the pre-trial phase in order to safeguard a swift finalisation in one part of the cases and a sound preparation of the indictment in other cases is an issue of main concern.
- The victim is entitled to effective investigations capable of leading to the identification and punishment of the offender(s) and to be an active and informed party to these proceedings from the very beginning. In particular, the victim is entitled to be heard before charges are dropped, and must have a means of challenging any decision taken to that end.³⁰
- The organisation of the pre-trial phase has to reflect the necessity to effectively safeguard the rights of the defendant and the victim. It will benefit from a structure that clarifies the distinct functions of various actors and provides for a certain amount of antagonism. The court will have to perform the function of balancing opposing interests and rights.
- It is crucial that the criminal justice system displays its ability and resoluteness to investigate into any case arousing suspicion and performs its tasks in a professional, reliable and consistent manner. One factor that can heavily interfere with this aim is corruption, another, a lack of adequate professional standards.
- It should be remembered that state institutions have to strive for austerity and economic efficiency. This is owed to the people they serve and at the expenses of whom they work. Given a situation of tight state budgets any waste of resources will necessarily prevent the state from fully achieving its tasks.

²⁹ Above, this was discussed in the context of the concept of a fair trial, refer to 2.1.4.2.

³⁰ For the rights of the victim refer to 2.1.1 as well as to 2.3.1.1.

3 The legal situation of pre-trial criminal proceedings in Croatia

3.1 Historic development

The Criminal Procedure Code of Croatia may be viewed as a great-grandson of the Austrian Criminal Procedure Code of 1873, which was heavily influenced by the French Code Napoleon. According to this law system the investigating judge is the most important figure of pre-trial proceedings. As a rule, the judge is required to personally investigate into any suspicion of a criminal offence. As long as there is only a vague suspicion it is left to the public prosecutor to clarify the circumstances with the support of the investigating judge or the district court or the police (or even some other institutions). This part does not constitute formal criminal proceedings and is called pre-investigative phase.

In Croatia the Code entered into force in 1875 and later was incorporated into the legal system of the Kingdom of Yugoslavia (in the Code of 1929). Even after the Second World War the basic principles of the Criminal Code guided criminal proceedings of the relevant institutions of the Republic of Yugoslavia.³¹

In 1948 a new Criminal Procedure Act was introduced, strongly influenced by Soviet law. The investigating judge was abandoned and the public prosecutor became the “master” of pre-trial proceedings. However, in practice public prosecutors delegated the vast majority of his competences to the police. The dichotomy of the pre-investigative and the investigative phase was maintained. While pre-investigations were left to the police, investigations were conducted by investigators of the public prosecutor’s offices.³²

After the political break of the Republic of Yugoslavia with the Soviet Union, in **1953 the former system of pre-trial proceedings was reintroduced**. The investigating judge was re-established and the powers of the public prosecutor were limited. In line with the liberal idea of separating prosecution and investigation, the initiative to request criminal proceedings was left to a prosecutor. But the courts were tasked with implementing the proceedings. As *Krapac* has pointed out this led (back) to a model of criminal proceedings entrusted exclusively to the courts (“*reines Gerichtsverfahren*”).³³

Nevertheless some elements of the previous system remained. The court investigation was mandatory only in severe cases bearing at least a term of imprisonment of 15 years. In other cases the public prosecutor could base an indictment merely on the results of police enquiries (direct indictment) and, indeed, mainly left the collection of evidence to the police. The investigating judge too, could delegate certain

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³¹ *Krapac* (1993) 226.

³² *Krapac* (1993) 226.

³³ *Krapac* (1993) 225: „Eine Besonderheit des bisherigen jugoslawischen Strafprozeßrechts ist, daß die Umgestaltung seines Vorverfahrens Ende der sechziger Jahre eine Rückkehr zum ursprünglichen Modell der österreichischen StPO aus dem Jahre 1873 bedeutete. In Jugoslawien wurde die Voruntersuchung aus der StPO nicht entfernt wie z.B. in der BR Deutschland im Jahre 1975, sondern umgekehrt: nach einer jahrelangen Pause, während der es keine justizförmige Untersuchung gegeben hatte, wurde eine gerichtliche (Vor)untersuchung eingeführt, so daß eine Grundkonzeption des Strafverfahrens als reines Gerichtsverfahren entstand, welche später sogar zum Verfassungsmodell erhoben wurde“.

investigative acts to the police. In addition, the documentation of police enquiries was admitted as evidence in court trials, although the defendant in the phase of police enquiries was left without procedural guarantees. All in all, within the whole of the procedure the police acquired a determining function.³⁴

Following a conflict between President Tito and Vice-President Ranković, who controlled the police forces, in 1966, a comprehensive police reform was decided. One crucial element was a new model of the pre-trial phase provided for by amendments to the CPA, which were decided in 1967 and entered into force January 1, 1968.³⁵ Due to efforts for further democratization and an increased consciousness concerning human rights the position of the police in the field of criminal investigations was further limited and the status of the investigating judge was reinforced with enriched competences. This meant the return to a mere investigative procedure conducted by a judge who was, with certain exceptions, not allowed to delegate investigative acts to the police. Results of police enquiries served only as a basis for decisions of the public prosecutor and could in principle not be used as evidence in court trials. A support of the investigating judge by the police is, however, provided for: In cases of danger in delay the police may perform acts of search of persons and goods, seizure and crime scene inspection and order expertises.³⁶

It will be recalled that, next to a general suspicion towards the police, one important reason for reinforcing court investigations was the intention to strengthen the federalist structure of the Republic.³⁷

The Croatian CPA of 1997 was amended in 2002. According to *Pavišić*, the most important goals of amendments were:³⁸

1. To strengthen the adversarial characteristics throughout proceedings;
2. To simplify some special forms of procedure;
3. To invigorate the course of proceedings in the preliminary stage and investigations in particular by new acts of investigation;
4. To extend the application of negotiation;
5. To reform remedies and some other institutions.

³⁴ *Krapac* (1993) 227.

³⁵ *Krapac* (1993) 227.

³⁶ *Krapac* (1993) 227.

³⁷ *Krapac* (1993) 227.

³⁸ *Pavišić* (2004) XXXV, footnote 40.

3.2 Pre-trial-investigations – the legal situation as of today

The course of **pre-trial proceedings** is regulated in chapter A of part two of the Criminal Procedure Act.

The law distinguishes between a first phase of **preliminary enquiries** as “pre-investigatory proceedings” (dealt with in chapter 17 of the Criminal Procedure Act - CPA) and, as a second stage, the **investigation**, entrusted to the **court** (chapter 18 of the CPA).

3.2.1 Preliminary Inquiries

Pre-investigative proceedings aim to clarify whether or not a given initial suspicion of crime is founded. For this reason mainly the public prosecutor and - under her/his guidance - the police collect information rather informally, meaning that e.g. an interview with a witness is not signed by the latter. The public prosecutor may also perform pre-investigative inquiries in person, which, however, happens only rather exceptionally (although different regional patterns prevail).

State authorities as well as citizens (!) are obliged to report offences subject to public prosecution to the competent state attorney (art 171-173/180-182 CPA).³⁹ If the report is (by mistake) filed with the court, the police authority or a State Attorney lacking jurisdiction, they are obliged to “immediately forward it to the state attorney having jurisdiction” (art 173/182 CPA).

Under the law, the police have to immediately inform the public prosecutor of any measure taken in the face of a suspicion of crime. The public prosecutor has to determine the further proceedings by concrete instructions to the police. Only in cases of urgency the police may on their own initiative identify persons, take fingerprints and prints of other parts of the body, search persons and goods, seize goods, perform crime scene inspection and order certain expertises (art 184/196 CPA).

Evidence collected by the police, without or even on request of the public prosecutor, can in principle not be used in court trial, except “material” evidence, e.g. the results of crime scene investigations, confiscated goods, but not formal interviews with witnesses and expertises ordered by the police. As an exception to the rule, the results of an interview with a suspect which is performed in presence of a defence lawyer can later be used in court.

During this phase, the public prosecutor may also request the investigating judge to carry out certain investigating acts in order to gather evidence that may later-on be used in court trial.

Based on the results of these pre-investigative measures the public prosecutor may decide to indict directly, to drop the case or to initiate court investigations.

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³⁹ There exists a consolidated version of the CPA, which is not legally binding. (It was produced in order to arrive to a consecutive numbering but later-on invalidated because of mistakes.) Here articles are given with both numbers, first according to the official numbering, followed by the number of the non-official, consolidated version of the CPA, which has eliminated all letters and gaps; so e.g. Article 190a of the official text has turned into 203 of the consolidated version. There is no difference in numeration up to art 90a/91 CPA.

3.2.2 Court investigation

Investigative proceedings are performed by the **investigating judge** in order to decide whether to discontinue the proceedings or to collect evidence to be used in court trial. Since a recent amendment to the CPA investigative proceedings concerning a criminal offence carrying a sentence up to ten years of imprisonment can also lead to a **judgement passed by the investigation judge** if the public prosecutor and the suspect request for such a decision (art 190a/203 CPA).

The request of the public prosecutor is basically a general one but may also contain (and in practice regularly contains) **proposals** of concrete investigative measures. When there is a suspicion of an offence punishable by imprisonment for a term of more than 15 years the initiation of **investigative proceedings is mandatory**. For offences punishable with imprisonment for a term between 8 and 15 years the public prosecutor may with the consent of the investigating judge not perform investigative proceeding when the perpetrator provides sufficient support to make an indictment (art 191/204 CPA).

The investigating judge shall conclude the investigation when he finds that the case has been sufficiently clarified so that the indictment may be preferred or the proceedings discontinued. The public prosecutor may ask to supplement the investigations. If the investigating judge refuses the application of the public prosecutor he shall request that the panel of the county court decide on it (art 203/216 CPA).

If the investigating judge is not able to **finish the investigation within 6 months** he has to report to the president of the court the reasons which hinder its conclusion, If necessary, the president of the court takes measures to speed up the completion of investigations (art 204/217 CPA).

3.2.3 Distribution of functions – a second look

According to art 2 of the CPA criminal proceedings shall be instituted and conducted only upon the request of the authorized prosecutor. Already this seemingly inconspicuous sentence on second thought displays the basic model of the law: It is the **court** which **institutes and conducts criminal proceedings** upon the **request of an authorized prosecutor**. This appears again in art 188/200 CPA, which states that the investigation shall be conducted upon the request of the authorized prosecutor. As a matter of course this articles refers to court investigations. We will come back to that in a moment.

With two exceptions recently introduced by Articles 175 and 176 (184, 185) CPA, the decision whether or not to prosecute is not left to the discretion of the public prosecutor. Whenever there is reasonable suspicion that a certain person committed an offence subject to public prosecution then the state attorney is obliged to institute prosecution (principle of mandatory prosecution). (Again, it is worth noting that this regulation – art 2 para 3 CPA – only refers to a situation when the suspicion is directed against a certain person, the reason being that in the understanding of the law, much inspired by civil law, proceedings can only be instituted against a certain person.)

Once the prosecutor has filed his request and the court investigation is opened it is the judge who takes the initiative and on her/his own motion does whatever s/he deems necessary for the successful conduct of proceedings (art 196/209 CPA).

Therefore, the basic understanding of the law is that **criminal proceedings are implemented by the court and start with court investigations**; in order to separate the functions of prosecution and investigation, the (mostly public) **prosecutor** is tasked with taking the initial step of **requesting** court proceedings. And court investigations are always **directed against an identified suspect**.

In the view of the historic legislator what happens before the initiation of court proceedings does not really count as part of the criminal procedure, or is placed, so to speak, in the vestibule of proceedings and therefore was not deemed worthy of particular attention of law-makers.

In practice, however, formal court investigations became less and less frequent. Today, only in 9 % of cases court investigations are carried out. What happened was that more and more the investigating judge was, to stick to the analogy, asked to leave his living-room and work in the vestibule where it is not him but the public prosecutor who has the say as to what investigative measures should be taken.

- In proceedings before a municipal court, prior to preferring a motion to indict, the prosecutor may ask the investigating judge to carry out certain investigatory activities (art 432/449 CPA).
- As long as the perpetrator is still unknown the public prosecutor may ask the police to undertake certain investigations; if, however, the public prosecutor, for whatever reasons, believes that certain investigations should be carried out by the investigating judge, he will ask the investigating judge (art 185/197 CPA).
- The case most difficult to reconcile with the original model was recently introduced as a subsection to chapter 17 CPA (regulating pre-investigatory proceedings) under the title of “special inquiries” (art 180/190 and subsequent). It entrusts the court with powers to decide on a variety of measures, which have in common that they “temporarily restrict certain constitutional rights of citizens”, are covert and have, on an international scale, become popular for investigations related to organised crime. Why these measures – concerning heavy crime and based on a suspicion against a certain person – are regulated in the context of preliminary enquiries and not embedded in court investigation is not clear. Of course, the decision to open an investigation cannot be communicated to the defendant, if this would frustrate the investigations. But the distribution of functions among prosecutors and judges could nevertheless follow the basic model of the law.

However, what is decisive is that the position of the investigating judge in relation to the public prosecutor has gradually deteriorated. More and more judges have attuned to complying with the public prosecutor’s requests and to carry out what they are asked to do. And public prosecutors have adjusted to playing a decisive, rather than merely preparatory, role in pre-trial proceedings.

Art 42 CPA assigns to the state attorney the task of discovering the commission of criminal offences and perpetrators and to undertake inquiries into suspected criminal offences. In line with this approach, art 173/182 CPA clearly states that all crime reports shall be filed with the competent state attorney; and that the police, if someone (by mistake) reports to them, shall **immediately** forward the report to the competent state attorney. Still in line with this approach art 174/183 para 2 CPA allows the state attorney to order the police to carry out certain investigations **only if the state attorney**

cannot perform these investigations him/herself. The police, in case of such an exceptional order, are restricted to activities in accordance with the request of the public prosecutor and have to report on its execution within 30 days. All in all, certain regulations, read in conjunction, suggest that, in the wake of the decline of court investigations, the public prosecutor has emerged as *dominus litis*, as the new master of pre-trial investigations.

Yet, to the vestibule there is also a front yard. And that is where the police have (again) become powerful, a circumstance that also made its way into the legal sphere. Art 3 of the new Police Law in no. 3 and 4 assigns to the **police the tasks** of (preventing and) **revealing criminal acts** as well as **tracing offenders**. In line with this regulation art 177/186 CPA in para 1, in cases where there is reason to suspect that a crime has been committed, mandates the police to discover the perpetrator, to secure all evidence and to gather all relevant information. The police are obliged to inform the state prosecutor within 24 hours of all measures taken but this does by no means end the police investigations (and in practice, if it is done, does not evoke any reaction from the side of the public prosecutors). The last sentence of this paragraph obliges the public prosecutor to proceed according to art 174/183 para 2 CPA only **if necessary**, leaving it very unclear in what cases it would be necessary for the public prosecutor to take over investigations from the police.

Moreover, art 177/186 para 2 CPA **confers on the police extensive, if not unlimited powers** including (very vaguely) the authorization for „**other necessary measures and actions**“. And here the law obviously and openly addresses the **police as the authority responsible for carrying out investigations**.

All this adds up to a lack of a clear distribution of functions. If the question were which authority is responsible for carrying out investigations in Croatia, of the three possible answers – the police, the public prosecutor, the court – none would be wrong.

And there is more evidence in this respect. While, as just mentioned, art 174/183 para 2 CPA provides that the state attorney shall only ask the police to carry out certain investigative measures if s/he is not in a position to implement these measures himself/herself, art 185/197 para 1 CPA at the same time allows the state attorney to request police investigations with the only restriction being that the perpetrator is unknown. But the state attorney may also ask the investigative judge to perform such investigations, and again it is **left completely to the discretion of the state attorney** whether s/he would prefer that the investigative measures be carried out by the police or the judge. The law does not name one single criterion in that respect.

3.2.4 Recourse to evidence produced by the police?

There is a certain tendency of the law to, on the one hand provide a legal basis for police enquiries and on the other to declare the results inadmissible. In particular, according to art 177/186 CPA, the police have the power to summon persons and to take their statements, however, not as defendants, witnesses or expert witnesses. In other words: They may gather information but not evidence that later (under certain circumstances) could be used in court. And paragraph 6 determines that the police, on the basis of the information they have gathered, shall draw up a crime report stating the evidence discovered. But, while all material evidence is attached to this report, the statements given by individuals shall not be included. Therefore, after the police have

taken the statement of a person, the exercise has to be repeated by the investigating judge as a means of validating the work of the police. (It is believed that art 177/186 para 5 CPA makes an exception to this rules under the condition that the defence lawyer is present at the police interrogation. The text - at least in its English translation - is not all too clear in this respect, as apparently para 5 refers to the collection of information and para 6 does not know any exception either.)

The law, compared to other European codes, is very strict in this respect. If what the police do violates any procedural law provision, it may not be used in court. (This is very different under Austrian or German law.) According to art 9 CPA court decisions may not be based on illegal evidence, meaning:

- Evidence obtained by a human rights-violation,
- Evidence obtained in violation of provisions of criminal procedure law,
- Evidence obtained through illegal evidence (so-called “fruit of the poisonous tree”).

3.3 The “injured” person

Croatian procedural law distinguishes, in principle, public prosecution from private prosecution. However, public prosecution in some cases depends on the consent and sometimes even on a motion of the “injured” person. Therefore, actually three cases can be told apart:

- The by far most frequent case is unrestricted public prosecution;
- In some cases public prosecution can only be instituted on the basis of a motion of the injured person; following such a request the public prosecutor proceeds like in the other cases of public prosecution (see Art. 48 CPA);
- And sometimes prosecution is private and left to the injured person all together.

Lastly, if in a case of public prosecution the state attorney steps down from the case s/he has to inform the injured person, who then can decide to step in and to carry on prosecution (art 2 para 4 CPA). This is called subsidiary prosecution as the injured person assumes the role of the public prosecutor (at least as far as this role is defined by the CPA, not with regard to powers conferred on the prosecutor by the Law on State Attorneys).

Injured persons may, to a certain extent, participate in pre-trial court proceedings by calling attention to certain circumstances and by presenting evidence important for the determination of the offence, for discovering the perpetrator and “for adjudicating their claims for indemnification” (Art. 54 paragraph 1 CPA) as well as by inspecting files and objects which are evidence (Art. 54 paragraph 3 CPA). The investigating judge is obliged to inform the injured person of these rights (Art. 54 paragraph 4 CPA). When taking the statement of the “injured” person as a witness the investigating judge is required to ask whether (s)he intends to assert a claim for indemnification in the criminal proceedings (Art. 239/254 CPA).

Otherwise, the right of the injured person to attend investigations is limited to the taking of a view, the hearing of an expert witness and the interrogation of a witness when it is likely that the witness will not appear at the trial (art 198/211 CPA).

The problem is that regulations have not been updated. While the court investigations have lost much of their significance the participation of victims is still widely linked to this phase of proceedings. Neither the police nor public prosecutors have to include victims in their investigations, other as taking their statements as witnesses, of course. The earliest chance for an “injured” person to become involved is when the public prosecutor decides *not* to instigate prosecution.

3.4 The defendant, his/her right to rehabilitation and their plea

It is worthwhile noting how the law deals with the question of the defendant’s plea.

Art 225/237 CPA concerns itself in some detail with the interrogation of the defendant by the investigating judge. The judge is instructed to inform the defendant of the charges placed against him/her as well as of the main grounds for suspicion. Next, the judge is required to instruct the defendant that he need not present his defence or answer any question (para 2). It appears that the law at this point does not consider the possibility of the defendant wishing to take responsibility for his action (although in the UK, where this question is raised when the defendant first appears in court, approximately two thirds of all defendants plead guilty). The same regulation informs the investigating judge extensively what to ask the defendant including his ethnic group and nationality, where and when he served in the army and whether he was decorated (para 1). But it is not suggested that the investigating judge should ask whether the defendant would prefer to take responsibility for the offences s/he is charged with. Rather, the investigating judge is instructed that the defendant shall be allowed to “present all the facts supporting his defence” (para 5).

Only at the beginning of the trial the president of the panel is required to ask the accused to enter his plea on each count of the charge (art 320/337 para 3 CPA). But even if the accused pleads guilty to all counts of the charge this has very little impact on the course of the trial. The accused will be interrogated at the beginning of the taking of evidence, whereas an accused pleading not guilty will be interrogated after all evidence has been taken (art 321/338 para 2 CPA). Also, as a consequence of a guilty plea the accused has limited rights of appeal (art 363/380 para 7 and art 365/382 para 4 CPA).

All in all, the present Procedure Act, although providing for a plea of the defendant, attaches very little significance to the question whether the person charged with an offence is willing to accept responsibility or not.

However, in this context **art 9 of the Criminal Code** should be remembered which acknowledges in clear terms the **right of a perpetrator to rehabilitation**. A person, who has been sentenced by a final judgment and served his term, has “the right to be deemed a person, who has not committed a criminal offence, and his rights and liberties shall not differ from the rights and liberties of persons who have not committed a criminal offence”. The wish to arrive to again being treated as a person, who has not committed an offence, does, however, not arise only with the sentence, it starts as soon as an offender decides to account for his wrongdoing and it should be acknowledged from this very moment. **The offender should be allowed to accomplish proceedings and arrive to a fair sentence without unnecessary delay.**

3.5 Avoiding an adversarial court trial: diversion, abbreviated procedure and sentencing orders

The CPA reflects efforts taken by legislators to allow the criminal justice system to avoid taking cases to (and through) an adversarial court trial that can be finalized without a public hearing. Indeed, in this respect there are three very different tools provided for by the CPA. In effect, however, these regulations do not express an overall concept but are somewhat piecemeal and, in effect, do not achieve the results aimed at and necessary.

3.5.1 Diversion and the principle of opportunity

In criminal proceedings against adults, art 175/184 CPA enables the state attorney to decide on prosecution under the principle of opportunity. The public prosecutor may decide to postpone prosecution provided that

- The reported conduct constitutes an offence punishable by a fine or a sentence of imprisonment for a term less than three years,
- It is an offence of a lower degree of guilt,
- The amount of damage caused does not require prosecution and
- The suspect agrees to
 - Compensate the damage caused or
 - Pay a certain amount to a charitable institution or
 - Fulfil a liability for maintenance or
 - Perform community service or
 - Undergo treatment against drug abuse or another addiction or
 - Submit to psycho-social therapy in order to abandon violent behaviour provided that the suspect agrees to leave his family for the duration of the therapy.

This broad regulation is hardly implemented. Thereby, an important opportunity to avoid taking cases to lengthy and costly court trials is missed. When it comes to assessing the efficiency of pre-trial investigations this is an important factor.

In criminal proceedings against juveniles there are specific regulations providing an even wider range of divertive proceedings. It appears that these regulations are made use of to a certain extent.

3.5.2 Abbreviated procedure on the basis of an agreement of the parties

In criminal proceedings for offences carrying a sentence of imprisonment for a term of up to ten years the parties may submit a request to the investigating judge to render a judgment of up to one third of the upper limit of the prescribed sentence. The parties have to exactly state the type and the extent of the requested sentence (Article 190a/203 CPA).

However, again this provision is hardly ever applied. This lack of implementation is caused by flaws in the pertaining legislation. First of all, the regulation is placed in the context of court investigations. In summary proceedings there are no court investigations (Art. 432/449 CPA). This leaves to the scope of application of

art 190a/203 CPA only a narrow margin of maximum imprisonment terms ranging from five to ten years. Secondly, once the defendant has agreed to submit a request under this regulation (s)he may in later proceedings not present exculpatory evidence unless they can show that this evidence has only come to their knowledge subsequent to their request under art 190a/203 CPA. As the public prosecutor may at any time withdraw the request before the decision is rendered the defendant by consenting to such a request runs an incalculable risk of losing most of their means of defence.

3.5.3 Sentencing orders

On the municipal level, there exists the option of rendering penal orders by the court (Art. 446/465 CPA). This form of finalising cases in a very early stage of the proceedings may only be realized if, given that all preconditions provided for in law are fulfilled, the state attorney proposes such procedure, then the court agrees and the suspect does not object to this form of conviction. Otherwise the normal criminal procedure will continue.

3.6 Organisation

3.6.1 Court structure

Municipal Courts are courts of first instance. They have to deal with criminal offences for which a fine or imprisonment of less than ten years is prescribed and certain other explicitly stated offences regardless of the punishment provided for in law (Art. 17 CPA).

County Courts serve both as courts of first instance and as courts of appeal against decisions of Municipal Courts. At first instance the county court adjudicates crimes which may be punished by imprisonment of ten years or more as well as crimes explicitly listed in Article 19 no. 1b) CPA. Moreover, the county court conducts investigations and takes other action in pre-trial criminal proceedings (Art. 19 no. 3 CPA). All investigatory action is performed by an investigative judge at county court level (Art. 20 paragraph 4 CPA). Municipal courts may take urgent action in pre-trial criminal proceedings only if there is concern that the investigating judge would not be able to act in due time (Art. 17 paragraph 1 no. 2 CPA).

The Supreme Court is last instance court in criminal matters (Art. 21 CPA).

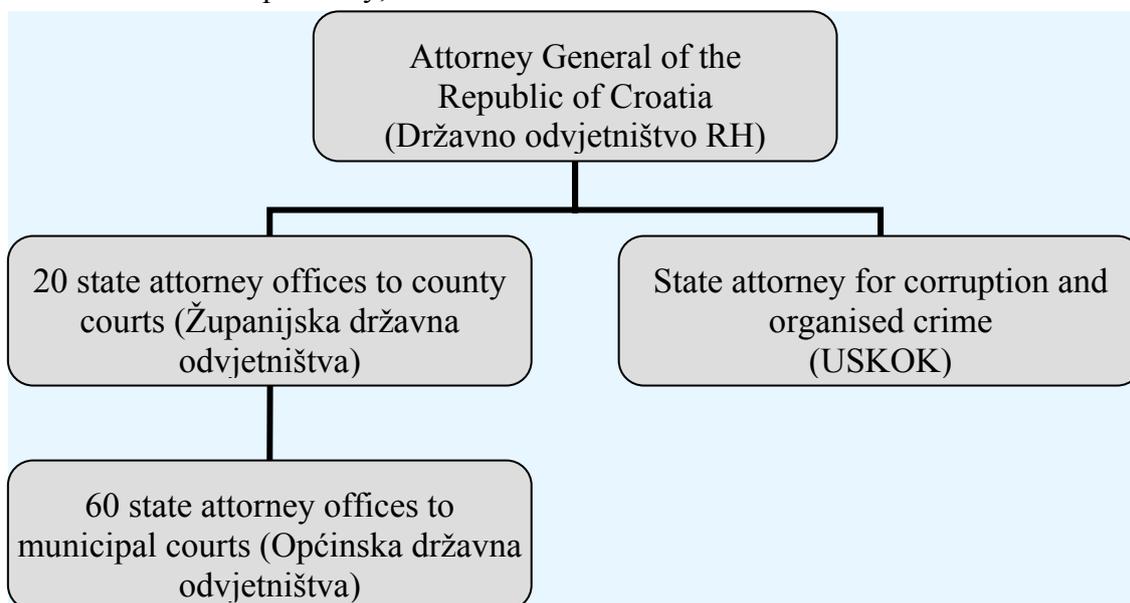
According to a recent government decision the number of municipal courts would be 114. Actually, as of today there are 108 municipal courts. All of these courts are not only dealing with criminal but also with civil-law matters.

In addition, there are 110 Regulatory Offences Courts and one Higher Regulatory Offences Court.

Since 1976 so-called investigation centres have been established at the county courts. They serve for investigations in all criminal matters according to the request of the county or municipal state attorney. The aim of this institution is the concentration of specialised investigating judges with good criminologist knowledge and better technical equipment.

3.6.2 Structure of Public Prosecution

The organisation of state attorney's offices follows the above-mentioned organisation of the courts. More precisely, the structure is as follows:



State attorneys' offices not only deal with criminal but also with certain civil matters. Public prosecutor's offices both on county and municipal level are divided into two departments, one department for criminal matters (kazneni odjel) and one department for civil-law cases (građansko-upravni odjel).

In criminal matters the main functions of the state attorneys' offices are to conduct and lead pre-investigative proceedings, to initiate investigative measures performed by the investigative judge, to file indictments and to represent the case in court trials.

4 Analysis of resources invested in pre-trial criminal proceedings – assessment of effectiveness and efficiency

4.1.1 Structure of this chapter

The present chapter looks into the organisation of pre-trial criminal proceedings in Croatia with a view to identify the resources invested by the actors involved, namely the police, public prosecutors and the courts and to assess the effectiveness and efficiency of these investments.

For this purpose it is crucial that first the aims of pre-trial criminal proceedings are defined (chapter 2). This is followed by an overall account of investments in the criminal justice system (chapter 3).

Next, with a view of analysing the output of the system and based on the interviews conducted, the institutions interacting in pre-trial criminal proceedings and their specific roles are identified and characterised (chapter 4 with regard to the police and chapter 5 concerning prosecutors' offices and the judiciary). Chapter six specifically deals with matters of interaction of these institutions in pre-trial proceedings, including the participation of victims of crime.

The last chapter (7) identifies matters of concern that call for further exploration and presumably leave room for an improvement of the present situation.

4.2 Input-analysis: overall assessment of investments

4.2.1 The police

Overall, the Croatian police at present avail of approximately 25.000 police officers, of which approximately 3.000 are mainly engaged in criminal investigations as detectives.⁴⁰ Civilian support officers are restricted to administrative posts.

The overall number of some 25.000 police officers compare to approximately 27.000 police officers in Austria. With regard to the different sizes of population for better comparison the Austrian number would have to be divided by the factor 1.86. This brings the Austrian number down to 14.500. In other words, adjusted to the size of populations, the size of the Croatian police exceeds the size of the Austrian police by no less than 72 %.⁴¹

The total budget of the Ministry of Interior for 2005 amounted to 3,230 mio HRK.

Of this, expenses for employees (salaries, contributions, bonuses and severance pays) amounted to 2,545 mio HRK. Material costs (energy, facility maintenance, maintenance of vehicles, vessels and equipment, lease of vehicles, office supplies, uniforms etc)

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⁴⁰ More precise data are not available as this kind of information is treated as qualified and not available to the public. Obviously, this creates some lack of transparency of the police administration and is not in line with the principles asserted in the strategic document of April 2004, which precisely criticizes a lack of transparency and accountability of the police organisation.

⁴¹ This, of course, is a general comparison which does not take account of features which are peculiar to Croatia and Austria and might demand more or less resources. For example, most specialist crime scene/forensic officers/admin/finance personnel seem to be police officers in Croatia. This certainly will not be the case in some other modern police services which use civilian employees in support roles.

amounted to 598 mio HRK. Budgeted capital investments into equipment (for acquisition of IT, communication and police equipment, buildings, and special projects) amounted to 86 mio HRK.

Of the total amount of expenses for employees, the non-uniformed police with costs of 298 mio HRK represent 11.7 %.

The expenses for employees working at the level of the 20 police districts amounts to 2,123 mio HRK or 83,4 %, meaning that the expenses for employees at the level of the headquarters amounts to 16,6 %. An additional amount of 191,4 mio HRK is budgeted for the work of the work of the police districts, which is distributed according to their size.

4.2.2 Resources invested in the justice system

The following pages give an overview of all resources invested in the criminal justice system, first related to all of Croatia, then with regard to Zagreb.

Overall, investments, budgeted for 2006, divide as follows:

Ministry of Justice	15 %
Prison administration	17 %
Courts	57 %
State attorneys' offices	11 %

Overall, in Croatian courts and public prosecutors' offices there are employed a total of *approximately*

- 1,900 judges,
- 570 state attorneys,
- 520 judicial advisors,
- 320 judicial trainees, and
- 6,000 court clerks.

**OVERVIEW OF PLANNED SPENDING IN 2006 FOR THE MINISTRY OF JUSTICE, COURTS
AND STATE ATTORNEYS IN THE REPUBLIC OF CROATIA**

Name of the Body	Salaries and Compen- sations	Other Expenditures for Employees	Material Expenditures (for the Ministry including capital spending)	Total Spending	% of 2005	Number of High- Ranking Officials (including magistrates)	Number of Civil Servants and Staff	Total Employed
	1	2	3	4=(1+2+3)		5	6	7 = (5+6)
Ministry of Justice	47.496.700	1.500.000	261.540.602	310.537.302	124,60%	9	508	517
Supreme Court	25.967.800	220.000	3.744.643	29.932.443	106,02%	42	64	106
High Commercial C.	11.953.500	110.000	2.283.000	14.346.500	104,86%	22	24	46
Administrative C.	18.942.900	270.000	2.256.000	21.468.900	104,84%	33	81	114
High Regul. Offences C	20.004.800	125.000	1.750.000	21.879.800	103,45%	43	46	89
County Courts	181.004.000	3.300.000	44.977.542	229.281.542	100,44%	373	820	1.193
Commercial Courts	66.202.400	1.800.000	12.400.000	80.402.400	99,70%	135	540	675
Municipal Courts	473.830.760	14.460.000	109.400.000	597.690.760	98,29%	873	4.646	5.519
Regulatory Offences Cs	151.829.100	4.000.000	31.000.000	186.829.100	99,77%	392	1.122	1.514
Total Courts	949.735.260	24.285.000	207.811.185	1.181.831.445	99,50%	1.914	7.343	9.257
Attorney General	14.367.100	170.000	2.889.000	17.426.100	102,76%	26	38	64
County State Attorneys	64.056.100	800.000	4.704.757	69.560.857	99,63%	154	194	348
Municipal State Att.	118.332.200	2.300.000	8.500.000	129.132.200	100,15%	378	634	1.012
USKOK	6.593.200	45.000	2.530.000	9.168.200	116,37%	14	11	25
Total State Attorneys	203.348.600	3.315.000	18.623.757	225.287.357	100,76%	572	877	1.449
Total (MoJ, Courts, Attorneys)	1.200.580.560	29.100.000	487.975.544	1.717.656.104	103,43%	2.495	8.728	11.223
Prison Administration	276.843.700	8.900.000	67.253.058	352.996.758	100,58%	0	2.359	2.359
Total (MoJ, Courts, Attorneys, Prisons)	1.477.424.260	38.000.000	555.228.602	2.070.652.862	102,94%	2.495	11.087	13.582
Share of Min. of Justice				15,00%	05: 12,39%			
Share of Courts				57,08%	05: 59,05%			
Share State Attorneys				10,88%	05: 11,12%			

For comparison what is shown here is the number of staff employed in the criminal justice system in Austria.

	1.1.2005	1.10.2005
Federal Ministry of Justice (central authority)		
A-officials, judges and public prosecutors (assignments included)	107,00	111,00
Other public-sector employees (assignments included)	131,80	134,05
Supreme Court and Office of the Chief State Prosecutor		
Judges (including judges assigned to the evidence office of the Supreme Court)	63,00	63,50
Public Prosecutors	15,00	14,00
Other public-sector employees	33,00	33,88
Judicial authorities in the provinces (Länder)		
Judges	1.583,00	1.604,50
Public Prosecutors	197,00	206,75
Judge candidates	256,00	275,00
Other public-sector employees	5.075,74	4.974,49
Trainees	1.024,00	970
Detention centres		
Public-sector employees in toto	3.461,08	3.613,63
Association for the assistance of persons placed on probation		
Public-sector employees in toto	88,51	89,63

Austria hosts 8.26 mio inhabitants, whereas the population of Croatia amounts to 4.44 mio. For better comparison the figures given for Austria in the last column are, therefore, divided by 1.86.

Neither the Croatian Administrative Court nor the Courts dealing with regulatory offences⁴² are included in this comparison as they handle cases which are dealt with by the police, administrative tribunals and the Administrative Court in Austria, which are not included in the statistics of the Ministry of Justice. The commercial courts are included for both countries, a difference being that in Croatia the High Commercial Court is a separate institution while in Austria the Supreme Court deals also with commercial court cases.

⁴² It is not precise to translate „Prekršajni Sudovi“ by „misdemeanor courts“ as this term could also apply to courts dealing with criminal offences. What, however, „Prekršajni Sudovi“ deal with are in principle offences of a merely regulatory nature. The situation should be traced back to the old Austrian code of 1873, which separated three levels of severity: „Verbrechen“ (felonies), „Vergehen“ (misdemeanors) and „Übertretungen“ (regulatory offences). Like in Austria, later-on the last category because of its more administrative character was separated from the ordinary criminal offences, which remained with the criminal courts.

		Croatia (2006)	Austria (A) (1/10/2005)	A adjusted by population
Ministry of Justice		517	245	132
Supreme Court (incl. High Commercial Court) and General Attorney's Office to the Supreme Court	Judges	64	64	34
	Prosecutors	26	14	8
	Other employees	126	34	18
	Total	170	112	60
Judicial Authorities on the regional level	Judges	1.381	1.605	863
	Public Prosecutors	546	201	108
	Other employees	6.845	6.220	3.344
	Total	8.772	8.032	4.318
Prison admin.		2.359	3.703	1.991
Total		11.818	12.086	6.498

It appears that overall Austria in the criminal justice employs approximately half the personnel employed in Croatia.

The Austrian Ministry of Justice has been kind enough to answer the question as to all expenses related to public prosecution in Austria. It appears that these costs overall can be estimated as amounting to 30-32 million € per year. What is precisely known is that in 2005 expenses for personnel amounted to some 25.78 million €. Another 1.7 million € are related to «material» expenses. However, some costs factors relating to accommodation can only be estimated as public prosecutor's offices are often located in court buildings.⁴³

With regard to the number of public prosecutors the Croatian government employs more than four times as many officials as compared to the Austrian situation. However, in Austria the approx. 215 public prosecutors are supported by 150 so-called municipal prosecutors (“*Bezirksanwälte*”) who are not full-fledged jurists but rather support-staff on the lowest level of court organisation (*Bezirksgerichte*). In addition, civil law cases in Austria are not dealt with by public prosecutors but by a specialized “financial prosecutors” (*Finanzprokuratur*). At present, another 42 lawyers are employed by this agency. Even if all 150 “*Bezirksanwälte*” and all lawyers working on civil cases are added to the number of public prosecutors, bringing the total number up to 407, and if then this number is (according to the sizes of populations in both countries) divided by

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⁴³ I would like to take the opportunity to express my sincere gratitude to Sektionschef Dr. Roland Miklau for his kind support.

1.86, then this amounts to a figure of 219, which still is **exceeded by the number of public prosecutors in Croatia by a factor of some 2.6.**

These differences are not accounted for by the numbers of cases. In **Germany**, in 2004 there were 5.014 prosecutors. In the same year they were confronted with some 5 million new cases (4,994,776) directed against identified suspects. This means that per prosecutor there were 996 cases of this type. In Croatia, some 570 public prosecutors in 2005 received about 52.000 cases against known suspects. This means that each prosecutor had to deal with an average of 91 new cases, amounting to **a tenth** of the workload of their German colleagues.

Recently, *CEPEJ* has published data that allow for a broader comparison of funds invested in courts and public prosecution in various European countries.⁴⁴

Country	Annual budget (2004) allocated to all courts without prosecution and legal aid per inhabitant as percentage of per capita GDP	Annual public budget (2004) spent on the prosecution system per inhabitant as percentage of per capita GDP	Annual budget (2004) allocated to all courts and prosecution (without legal aid) per inhabitant as percentage of pc GDP
Hungary	0.34	0.13	0.5
Croatia	0.58	0.11	0.7
Poland	0.41	0.11	0.5
Italy	0.20	0.09	0.3
Netherlands	0.16	0.07	0.2
Czech Republ.	0.28	0.06	0.3
England/Wales	0.03	0.06	0.1
France	0.14	0.04	0.2
Sweden	0.18	0.03	0.2
Spain	0.27	0.02	0.3
Ireland	0.07	0.02	0.1
Finland	0.14	0.02	0.2

⁴⁴ CEPEJ (2006) 20, 24 and 32. For Austria and Germany figures are only given with regard to the overall spendings of courts and public prosecution as 0.2 (Austria) and 0.4 (Germany).

These figures are very lucid. They support the view that investments in public prosecution in Croatia are quite generous and that there is reason to look for ways to reduce these spending.

The following overview indicates the number of public prosecutors per 100,000 inhabitants:

Country	Number of public prosecutors per 100,000 inhabitants in 2004
Hungary	14.4
Poland	14.1
Croatia	12.6
Czech Republic	10.4
Slovenia	8.6
Finland	6.3
Germany	6.2
England/Wales	5.3
Spain	4.1
Netherlands	3.7
Italy	3.7
France	3.0
Austria	2.6
Ireland	2.5

4.2.3 Regional Distribution

It is worth noting that approximately a fourth of all spending on county court level goes to Zagreb.

More than a fifth of all public prosecutors acting on the regional level work in the 2 state attorneys' offices in the City of Zagreb, which on first sight would suggest a slight overrepresentation as 18% of the Croatian population live in the City of Zagreb. There are 43 state attorneys working on the county court level (more precisely, 1 state attorney and 42 deputies), 6 of which deal with civil law claims representing financial interests of the State. In addition, there are 4 legal advisors, all of which work in the civil law department. On the municipal court level there are 44 public prosecutors (including 3 prosecutors at present working for USKOK and 1 prosecutor dealing with war crime) and 18 legal advisors. One explanation would be that in Zagreb more prosecutors are involved in civil law cases representing the financial interests of Croatia as by far more state bodies are placed in Zagreb. On the other hand, what is striking is that according to a view often presented to us public prosecutors in some rather small counties are less burdened with case loads. This accepted one would have to expect an under-representation of the capital city instead of a slight over-representation. All in all, the number of public prosecutors and the distribution of work-loads call for attention.

In April 2006 at the County Court in Zagreb 27 investigative judges were employed. This amounts to 31% of the number of all judges foreseen for the Zagreb County Court in the annual budget (including civil matters). At the same time 21 judges were dealing with criminal trials (24%) in first and second instance. On the municipal court level there are no investigative judges. Of 161 judges foreseen for the municipal court in Zagreb in the annual budget 35 judges (22%) were dealing with criminal trials. Therefore, at that time there were **83 judges dealing with criminal matters in Zagreb**, of which **27 were investigative judges (32.5%)**. This remarkably **high percentage of investigative judges** is worth noting and, again, draws our attention to the distribution of functions in the pre-trial phase and, more particular, to the ping-pong structure of communication and work-processing between the prosecutor's office and investigative judges.

**OVERVIEW OF PLANNED SPENDING IN 2006 FOR COURTS
AND STATE ATTORNEYS IN ZAGREB**

Name of the Body	Salaries and Compensations	Other Expenditures Employees	Material Expenditures	Total Spending	% of 2005	Number of High- Ranking Officials (incl. magistrates)	Number of Civil Servants and Staff	Total Employed
	1	2	3	4=(1+2+3)		5	6	7 = (5+6)
Supreme Court	25.967.800	220.000	3.744.643	29.932.443	106,02%	42	64	106
High Commercial C.	11.953.500	110.000	2.283.000	14.346.500	104,86%	22	24	47
Administrative C.	18.942.900	270.000	2.256.000	21.468.900	104,84%	33	81	114
High Regulatory Off.C.	20.004.800	125.000	1.750.000	21.879.800	103,45%	43	46	89
County Court	42.473	839.000	11.005.042	54.317.442	98,15%	87	207	294
Commercial Court	24.282.100	608.000	3.917.800	28.807.900	99,58%	52	185	237
Municipal Courts	86.201.993	2.844.100	20.641.888	109.687.981	94,65%	161	894	1.055
Regulatory Off. Courts	32.299.100	785.600	6.720.986	39.805.686	104,77%	90	253	343
Total Courts	262.125.593	5.801.700	52.319.359	320.246.652	99,55%	531	1.754	2.285

	Total Spending			Total Employed		
	<i>Croatia</i>	<i>Zagreb</i>	<i>%</i>	<i>Croatia</i>	<i>Zagreb</i>	<i>%</i>
County Court	229.281.542	54.317.442	23,7%	1.193	294	24,6%
Municipal Courts	597.690.760	109.687.981	18,4%	5.519	1.055	19,1%
Regulatory Offences Courts	186.829.100	39.805.686	21,3%	1.514	343	22,7%

4.3 Output-analysis I: Key figures

4.3.1 Activities of state attorneys

4.3.1.1 Received Cases

In 2005 the state attorneys' offices in Croatia received a total of **95,157 crime reports**. Of these, **51,875** were directed against **identified suspects** (54.5%) whereas **43,282** (45.5%) concerned **offences of unknown offenders**. (These categories cannot be compared as one offence can be committed by several offenders and, in contrary, one suspect may have committed several offences.) Of 51,875 reports against identified suspect 3,275 were directed against juveniles (age 14 to under 18), 4,604 against young adults (age 18 to under 21) and 43,996 against adults.

The following table shows the number of crime reports received by the state attorneys' offices in Zagreb. The categorisation of known and unknown suspects represents the situation at the end of the year.

Crime reports to state attorneys' offices in Zagreb in 2005

	Number of reports received	Unknown perpetrators	Identified suspects
County Court level	1,123	585	538
Municipal Court level	24,064	14,893	9,171
Total	25,187	15,478	9,709

USKOK within four years (from 2002 to 2005) received 1.595 reports concerning identified suspects and 2.185 reports concerning unknown perpetrators. Therefore, not less than 59 % of reports received by USKOK in this time period related to unidentified suspects.

It is remarkable that the numbers of crime reports received at County Court level have decreased during the last years. This is the case with regard to both identified and unidentified suspects but is even more significant with regard to the former. As in 2002 the number of identified suspects was 696 persons the decline since then amounts to 23%.

**Annual overview of activities of municipal and county prosecutors
concerning offences of unknown perpetrators in 2005**

Crime reports/cases	Old reports/cases (continued from previous years)		314,578
	New reports/cases		43,282
Total	(old+new)		357,860
Preliminary enquiries	Urgent court enquiries (Art. 184/196 CPA)		3,156
	Gathering of information (Art. 174/183 CPA)	Through the police	2,489
		Through other agent	115
	Investigative activities	Through the court	88
		Through the police	18
Total			5,866
Dismissals	(old and new cases)		80,017
	Dism. due to statute of limitation		79,508
Suspect identified	(old and new cases)		7,884

When it comes to reports against unknown offenders, public prosecutors in some cases ask the courts or the police for further investigations (1.6 % of all open cases, 14 % if compared only to the new cases).

By far the most cases end by being dismissed due to a statute of limitation. Almost all dismissals are based on time limitations. In this respect, one may recall that the running of the time period prescribed by statutes of limitation is interrupted by any procedural action undertaken in order to institute criminal prosecution against the offender (art 20 para 3 of the Criminal Code). After each interruption the period starts again from the beginning. The question then is in which cases public prosecutors perform an investigative activity and in which not.

Annual overview of activities of municipal and county prosecutors concerning offences of known adult perpetrators in 2005 (first instance)

Reports	Pending cases	Old (of former years)	10,450
		New (of this year)	43,996
		Total	54,446
Decisions	Dismissals		13,874
	Of these	Insignificance (art 28 CC)	694
		Opportunity (art 175/184 CPA)	131
	Motions to indict		24,488
	Of these	Request for a sentencing order (art 446/465 CPA)	6,867
	Direct indictment		330
	Motion for an investigation		3,810
Total		42,502	
unfinished			11,086
Court investigations	finished	Old cases	1,945
		New cases	2,460
		Total	4,405
	Discontinuation	(art 199-201/212-214 CPA)	208
Indictments		(following court investigations)	2,892
Court decision after indictment	Pending cases		4,276
	Dismissed		2,461
	Rejected		1,246
	Acquittals		1,875
	Convictions		22,562

At the end of preliminary inquiries, if the public prosecutor does not decide to dismiss the case but takes an action, then s/he forwards a motion either to indict or for a court investigation. (Direct indictments are a negligible quantity.) Of overall 28,628 motions 86 % are motions to indict and **13.3 % are applications for an investigation**. (About 1 % is direct indictments.)

The following table shows the motions to indict and the formal indictments against young adults and adults in 2005.

	Young adults	Adults	Total
Motions to indict	2,307	24,488	26,795
Formal indictments	484	3,222	3,706
Total	2,791	27,710	30,501

4.3.1.2 Dismissals

What is astonishing is the fact that **a fourth of all cases** where there exists a suspicion directed against an adult offender are **dismissed**. This fact calls for further attention.

Relative to the pre-investigation phase in 2005 the state attorney's office to the **Municipal Court of Zagreb** „finalized” 8.024 cases. 52% of these cases were directly taken to court by an indictment (either a formal indictment or a more informal motion to indict). In 6% of these cases a court investigation was opened. And 3.253 times (41%) a decision was taken to dismiss the case.

The „Novosel-Report”⁴⁵ in section IV.2.a indicates that the same office in 2003 finalised 9.322 cases, of which 4.494 crime reports were, dismissed (48%). This shows some variance but we conclude that the **ratio of dismissed cases all in all ranges somewhere between 40 and 50%**.

When it comes to the reasons of dismissals we owe to the „Novosel-Report” the insight that the **regional differences are striking**. Secondly, this report points to the high percentages of dismissals for the reasons that either there is no criminal offence or prosecution is **barred by limitations**.

Because of the significance of these findings we refer to **table no. 55** from the „Novosel-report”. First of all, the **differences** among counties are remarkable.

- The ratio of dismissals of cases for lack of a criminal offence is 57% in Dubrovnik but only 20% in Čakovec. If one takes into account that culpability is an element of an offence and for that reason adds the numbers of dismissals for lack of culpability to those for lack of an offence than the difference increases by another 5%.
- Similarly, dismissals on grounds barring prosecution amount to 35% in Čakovec compared to only 11% in Rijeka. (Actually, the category includes not exclusively cases of time-barred prosecution but also other cases of restrictions of prosecution such as the death of the defendant, which, however, don't account significantly for the high percentages referred to here.)

During one of our meetings with the police we were handed out statistical data covering all dismissals in 2004 relative to the counties. These statistical data show the same regional diversity. While the ratio of dismissals on behalf of statutes of limitation is given as 66.7 % (to thirds of all dismissals!) in Vukovarsko-Srijemska and as 53.1 % in

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⁴⁵ Please refer to 1.2.2.

Karlovačka these dismissals only account for 1.0 % of all dismissals in Šibensko-Kninska and are indicated as 0.0 % in Međimurska. When the percentage of cases that are either cases of private prosecution or no criminal offences at all is indicated as 19.6 % this concurs with our findings in interviews conducted with police officers. However, when this ratio is given as 47.1 % in Brodsko-Posavska, one is led to doubt these data. Of course, we were not in a position to examine the reliability of these statistics.

The high percentage of dismissals for **lack of an offence** or **lack of culpability** demands further explanation. Overall, these grounds account for **half of all dismissals**. The situation calls for analysis with a view to avoid that public prosecutors waste their time by dealing with irrelevant cases.

- Firstly, it has to be recalled that approx. 1/3 of all reports are submitted to state attorneys by private individuals or institutions other than the police. In other words: Only in 2/3 of crime reports the police are not in a position to filter the cases of relevance under criminal law.
- Secondly, the parting line between those cases who fall under the competence of regulatory offences courts and those relating to the authority of ordinary criminal courts is sometimes blurred, e.g. with regard to domestic violence cases or drug abuse.
- Thirdly, for reasons that would need further clarification the police only perform a weak function as a filtering institution. State attorneys reported that the police would sometimes have an idiosyncratic or very broad interpretation of criminal definitions. And sometimes behaviour is reported that had established an offence before its decriminalisation. Hence, short-comings in legal training of the police are probable. However, police investigators complain that they must formally investigate all matters brought to their attention even though, from the outset, they apparently are not crimes. They cite civil disputes, many of which are referred to them **by the public prosecutor**, and anonymous complaints as significant problems. One investigator from the economic crimes section in Zagreb estimates that 50% of her workload is of a civil nature which will not reveal a criminal offence. This exacerbates an already heavy burden on investigators.

As concerns the stunningly **high percentage of time barred prosecution** one has to take into account that the “Novosel-report” only refers to crime reports submitted against identified suspects. Therefore, the high ratio of cases in which prosecution is excluded because of a statute of limitation clearly indicates a **severe ineffectiveness of investigations**. However, the **reasons remain unclear**. Indeed, more than once interviewees indicated that there may be other than objective reasons accounting for this pattern of behaviour. What is evident, though, is a **lack of sufficient supervision**.

4.3.2 Court activities

4.3.2.1 Criminal Cases at Municipal and County Court level in 2004 and 2005

Municipal Courts

<i>Cases</i>	<i>Received</i>		<i>Resolved</i>		<i>Pending</i>	
	<i>2004</i>	<i>2005</i>	<i>2004</i>	<i>2005</i>	<i>2004</i>	<i>2005</i>
<i>Pre-Investigations</i>	607	171	611	170	20	21
<i>Trials (K/1)</i>	32.585	32.164	32.774	32.930	39.254	38.488
<i>Juvenile Cases</i>	1.281	1.208	1.382	1.149	1.058	1.117
<i>Total</i>	34.473	33.543	34.767	34.249	40.332	39.626

County Courts

<i>Pre-Investigations</i>	24.176	22.706	24.446	22.481	3.464	3.689
<i>Court Investigations</i>	2.924	3.092	3.466	3.172	1.585	1.505
<i>Decisions of panel of 3 judges (pre-trial, Kv)</i>	6.417	6.577	6.376	6.533	232	276
<i>Trials (K/1)</i>	1.346	1.327	1.571	1.316	1.392	1.403
<i>Trials („felonies“, K/2)</i>	9.952	10.067	9.695	9.817	2.652	2.902
<i>Trials Juvenile Cases</i>	111	136	178	153	82	65
<i>Total</i>	44.815	53.836	45.732	43.472	9.407	9.840

Municipal and County Courts – selected items

<i>Pre-Investigations</i>	24.783	22.877	25.057	22.651	3.484	3.710
<i>Court Investigations</i>	2.924	3.092	3.466	3.172	1.585	1.505
<i>Trials (K/1)</i>	33.931	33.491	34.345	34.246	40.646	39.891
<i>Trials („felonies“, K/2)</i>	1.281	1.208	1.382	1.149	1.058	1.117
<i>Total</i>	62.919	60.668	64.250	61.218	46.773	46.223

Overall the backlog of pending cases would amount to ¾ of the resolved cases (equalling the work of nine months). This is not dramatic; nor has the backlog increased from 2004 to 2005.

Concentrating on the cases resolved in 2005 it would appear that about 35.400 cases were taken to court. Some 25.800 were dealt with by the courts in pre-investigations or court investigations. As a number of cases after (pre-) investigations performed by the court are not taken to a trial court this means that on the other hand more than 10.000 cases were taken to court directly by state attorneys by “immediate” or direct indictments.

Austria – Cases 2004 and 2005								
	District Courts		Courts of 1 st Instance		Courts of Appeal		Supreme Court	
	2004	2005	2004	2005	2004	2005	2004	2005
Penal cases	80.093	80.313	65.966	66.262				
Appeals in penal cases			2.960	2.835	6.790	6.657	748	712
TOTAL	80.093	80.313	68.926	69.097	6.790	6.657	748	712

Leaving aside the appeals procedures it would appear that in Austria in 2005 some 145.000 cases were dealt with by the courts of first instance on both the district and the regional level, which is more than double the amount of cases handled by the first instance courts in Croatia.

4.3.2.2 Court investigations and the duration of detentions on remand

Arguments in favour of abolishing court investigations in Austria were, among many other aspects, fuelled by the concern that under the present system the same investigative judge would collect evidence and take decisions on pre-trial detentions. This combination of investigative and coercive functions does not put pressure on the judge to critically question the value of incriminating evidence collected by him/herself or to speed up investigations as would be the case if another actor would perform the collection of evidence and the judge could focus on the limitation of detentions on remand.

The present legal situation in Croatia likewise allots to the County Courts the functions of performing investigations and of taking decisions with regard to detentions on remand. Therefore, it is necessary to assess whether this system leads to a high amount of detentions on remand. In a comparative view the following table shows the quantity of **pre-trial detention as a percentage of all detention** enacted by a criminal justice system. In order to improve comparability also the prison rates are given.⁴⁶

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⁴⁶ All figures are taken from International Centre for Prison Studies (King's College, University of London) World Prison Brief, http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/highest_to_lowest_rates.php

Country	Prison population rate	Detention on remand, % of prison population
Italy	102	36.6%
France	88	36.1%
Belgium	88	35.9%
Croatia	81	30.1%
Netherlands	128	30.0%
Slovenia	59	29.1%
Hungary	156	25.3%
Denmark	77	25.1%
Spain	145	22.6%
Austria	105	22.6%
Sweden	78	20.3%
Germany	95	18,6%
UK: England & Wales	147	16.8%
Ireland	78	15.9%
Poland	228	15.8%
Czech Republic	185	12.8%
Finland	75	11.6%

It appears that in a European perspective Croatia scores as one of the countries with a low overall prison population rate but a **high percentage of detention on remand**. After all, Ireland has about the same prison population but only approximately half the ratio of detentions on remand. Strikingly, two of the three countries with an even higher percentage of detention on remand – namely France and Belgium – are exactly the countries with the strongest emphasis on court investigations and the concept of a *juge d'instruction*. (The Italian situation differs in that the high percentage of detention on remand there is caused by lengthy court trials and, in particular, by almost endless appeal proceedings, rather than by a lengthy pre-trial phase.)

There is reason to believe that the problem is induced by weaknesses of the police when deciding on arrests.⁴⁷ However, the judge is responsible for sorting out cases when the police have arrested a person without sufficient grounds.

The following figures relating to investigation procedures in Split suggest that the present situation is, actually, accounted for by a significant percentage of pre-trial detentions lasting for more than three months.

**County Court in Split: statistical report on
court investigations and detentions in 2005**

Investigations	Number of cases from previous years		258
	Received Cases		353
	Number of rulings to open an investigation		294
	Number of finalized cases		385
	Number of pending cases		226
	Duration of investigations	Up to 1 months	21
		1-3 months	84
		3 to 6	125
		6 months -1 year	107
		More than 1 year	48
Detentions	Number of detained persons	In investigations	148
		After indictment	130
		Total	278
	Number of detentions at the end of the period		18
	Duration of detention in investigations	To 3 days	5
3-15 days		12	
15-30 days		35	
1-3 months		193	
More than 3 months		33	

⁴⁷ Refer to 4.6.2.2.

The large group of cases where the duration of detention ranges from one to three months (70% of all detention cases) should be looked into. It appears that 82% of all detentions last longer than one month as compared to 68% in Germany.⁴⁸ One hypothesis could be that the division of functions between the prosecutor’s office on the one hand and the investigative judge on the other adds to the length of detentions. Judges in carrying out the investigations tend to follow the “suggestions” of prosecutors instead of deciding on their own what needs to be done (and done quickly in a detention case). This leads to the file going back and forth between the two actors. As a result, the rationale for placing this particularly sensitive phase of pre-trial proceedings under the control of the court is somewhat obscured. This is an issue both of effectiveness, touching heavily on the rights of the defendant, and of efficiency, given the costliness of any detention.

4.3.3 Corruption

On the Corruption Perceptions Index (*CPI*) for 2004 Croatia scored 3.5 of 10 points and thereby – among 146 countries - ranked 67th (jointly with Peru, Poland and Sri Lanka). In 2005 the situation has even slightly deteriorated. ***Croatia* now scores 3.4 and ranks 70th** (jointly with a number of countries including Burkina Faso, Lesotho and again Poland).

For comparison (2005):	Finland	9.6 (rank 2)
	Austria	8.8 (rank 9)
	UK	8.6 (rank 11)
	Germany	8.2 (rank 16)
	France	7.5 (rank 18)
	Slovenia	6.1 (rank 31)
	Slovakia	4.3 (rank 47)
	Croatia (and Poland)	3.4 (rank 70)

The **Commission’s Croatia 2006 Progress Report** on page 8 assesses current anti-corruption policies in the following terms:

“A new anti-corruption programme was adopted in March 2006. A number of sectoral actions plans were subsequently prepared and the Minister of Justice appointed as coordinator. The importance of tackling corruption is being increasingly highlighted by senior politicians. Measures have recently been taken in some hitherto uninvestigated corruption cases. The Office for the Prevention of Corruption and Organised Crime (USKOK) has been strengthened.

However, corruption remains a serious problem. Many allegations of corruption remain uninvestigated and corrupt practices usually go unpunished. Implementation of the anticorruption programme is at an early stage. Full implementation of the programme and strong political will to step up efforts are needed, especially on high level corruption. There continues to be a need for greater efforts to proactively prevent, detect and effectively prosecute corruption. Awareness of corruption as a serious criminal offence needs to be

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⁴⁸ Refer to the table ending section 5.3.

raised and codes of conduct and action plans to prevent corruption developed in the relevant law enforcement agencies. USKOK and other bodies involved in the anti-corruption programme need further strengthening and coordination among them needs to be improved. The fight against organised crime needs further attention. Progress on tackling corruption will also be an important indicator of Croatia's readiness for eventual membership.”⁴⁹

The present analysis is not a basis for assessing corruption in the context of criminal justice, but only a reminder that what the CPI reflects is trust (or lack of trust) of people in public institutions. In assessing the criminal justice system of a country we would like to stress that the public confidence it enjoys is an important factor of success. Clearly, when it comes to the motivation of victims to report crime or to the readiness of witnesses to contribute to criminal investigations by giving testimony the confidence of citizens that the criminal justice system operates in a professional, effective and objective manner becomes a crucial factor.

4.4 Output-analysis II: police organisation and police activities

4.4.1 Regulations

The Law on Police dated 19th December 2000 regulates police tasks, the organisation of the Police Force, police powers and the labour status of the police officers of the Ministry of the Interior.

The book of Rules on Police Conduct regulates the manner of police conduct and the implementation of police authorities.

4.4.2 Structure

The Minister of the Interior is a politician with ultimate responsibility for the organisation, efficiency and effectiveness of the Croatian National Police Force. To assist him in this role, there is an assistant minister, known as the Director General of Police, head of the General Police Directorate. The General Police Directorate is a department of the Ministry of the Interior and includes the Criminal Police Directorate, Border Police Directorate, Forensic Centre, Command of Special Police and the Operational-Communication Centre.

Operational policing is largely carried out from police stations situated in the twenty counties throughout the country, but there are some special units situated within the General Police Directorate, which deal with terrorism and similar grave crimes and which offer assistance to districts when required. Each territorial area is categorised according to its importance, inhabitants, threat or crime level. PD Zagrebačka is the only category 1 police district. Four districts are in category 2, six in category 3 and the nine smallest in category 4.

Each county police administration has a chief of police who is responsible for the city police stations within that district and the functions which they perform. These functions include criminal police and uniform police and, depending on the nature of the district, might also include border, maritime and airport police. The main functions within criminal policing are general crime, organised crime, drugs, economic crime and corruption, criminal records, criminal technology and crime intelligence analysis. Districts in categories 3 and 4 include terrorism and war crimes sections/groups.

The police work to the Ministry although there are some areas which are decentralised, for example, selection of heads of police stations following consultation with county and municipal councils. General communication between districts and the General Directorate is regular and particularly so for serious investigations. Quarterly, a two day seminar is held, at which all administrative heads meet with the General Directorate. Additionally, there is regular communication within separate disciplines.

Every police administration has an allocated budget but major procurements and salaries are financed and administered by the Ministry of the Interior. Only maintenance and general revenue expenditure is made by district administrations. Past experience means that most administrations ensure that they spend their budget allocation but some flexibility is preferred, in order to reward good financial management.

It is strongly felt that 20 police districts are too many. Some are quite small, have fewer demands but, equally, are unable to independently handle serious or complicated cases such as organised crime. Nevertheless, they have the same administrative staff as larger districts and are, therefore, uneconomical. The General Police Directorate meets requests for assistance with central support or coordination of support from neighbouring districts but there is some argument for regional 'squads' to deal with more serious organised crime. Rationalising the number and size of police areas would resolve these difficulties.

4.4.3 Community Relations

Senior police officers told us that they were committed to serving the public and encouraged good community relations. They receive letters from individuals and organisations and they listen to public concerns, primarily through the mass media. They conduct regular press conferences on operational policing matters and special press conferences to inform about serious crime and to appeal for assistance. A public relations officer is appointed to each district.

Article 9 of the Police Act orders police to cooperate with diverse groups of citizens and official bodies with the aim of developing partnerships and, in doing so, suggests that coordinating bodies may be established. However, the establishment of these coordinating bodies seems to be limited to those communities which have embraced community policing. Some specialist departments dealing with organised crime and economic crime have close liaison with other agencies with whom they work in close partnership to prevent and detect offences. Otherwise, examples given of partnership working were restricted to assisting civil authorities in their work and a very high level committee which comprises the chief of police, the mayor, and presidents of the criminal, county and municipal courts and senior representatives of the public prosecutors office.

4.4.4 Strategic planning

In April 2004 the Ministry of Interior adopted a **4-year-strategy plan named „Program Guidelines of the Ministry of Interior for the period 2004-2007“**. Because of its significance and remarkable contents an outline of the strategic planning document is given here:

The strategic objectives are divided into security targets and improvement of the organisation of the police.

The security targets are:

- **Prevention of crime:**

in this context the strategy plan mentions that in Croatia on average 100.000 criminal offences are reported to the police per year; it is stated that only about 1 percent of all criminal offences arouses interest of the public, who then expect the police to react efficiently and effectively; by preventing and resolving this type of crime the police increase it's reputation in the public; national programs should focus on the following crime-areas:

- a. organized crime;
- b. corruption and economic crime;
- c. drug abuse;

- d. juvenile crime and family violence;
- e. violence against minorities and vulnerable groups;
- f. prevention of trafficking of persons.

Some of these national programs exist but are not adequately implemented and therefore need to be redefined.

- **Cooperation and co-ordination between police and the judiciary:**

the document starts out by underlining the important role of the police and the judiciary in bringing suspects to justice; it recalls that the government is concerned about the current state of affairs in this area; unsuccessful outcomes of a large number of criminal proceedings have resulted in mutual public accusations among the police, state prosecutors and the courts; accusations refer to the low quality of their work, obstruction of proceedings and even corruption; in order to eliminate this negative practice the government has decided to secure full co-operation and coordination among the police, public prosecutors and the courts; the police are asked to contribute to the improvement of the situation by the high quality of their work and accountability in criminal investigations, particular care and moderation is needed in communicating to the public, especially in the initial phase of the proceedings as well as open and continuous communication with representatives of the judiciary;

- **Maintaining public order and peace:**

the strategy plan states that in this regard the situation is satisfactory; in addition, significant results can be expected from the project “Reform of the Operative-Preventive Work of the Uniformed Police”; establishing partnership with citizens through the role of contact police officers will improve the situation avoiding the necessity of repression;

- Border-control,
- Security of persons and facilities under protection,
- Development of a system of crisis-intervention.

Improvement of organisation covers:

- Strengthening international police co-operation;

- Developing partnership with the community:

in this respect the strategy plan recalls that many institutions deal with issues of public order and quality of life but without proper coordination; also there is a lack of reciprocal communication between the authorities and citizens; in this respect the police have to undertake the first step in order to connect all social players responsible for increasing security and the quality of life in the local communities; the document underlines the specific role of the police because of their accessibility in line with public expectations; this task can be fully accomplished through the project titled “crime-prevention in communities” on the basis of the “community policing” concept;

- Developing successful communication with the public:

the strategy plan emphasizes that public acceptance of their work is one of the main characteristics of police operating in democratic countries; real success of the police depends on public approval and not on the image that the police have of themselves; the public perception of the police is derived either from direct contact with police officers or from the image presented by the media; both are equally important; in direct contact with citizens the responsibility rests on individual police officers and on their professional integrity, communication skills, overall behaviour, friendliness, tact (in particular in relation to victims), helpfulness, politeness, personal hygiene and overall orderly appearance, the functioning of police equipment, speed and quality of intervention; in relation to media the responsibility lies with the management and the PR officers; their

competence, availability, frankness (to an extent not threatening the effectiveness of police operations) are preconditions of good communication between the police and the media;

- Developing police management:
the strategy plan recalls that in the past the traditional model of police management was based on a strict principle of hierarchy and a clear line of command developed according to the military model; this model was based on the assumption that the higher hierarchic level knew better what to do in specific situations; historically speaking this model worked well in societies at a lower level of development; today such a model can only be efficient in a small number of specific cases; all totalitarian systems practised hierarchic management models with the police being the main instrument of accomplishing their goals; in the process of democratic transition of the Croatian society after several decades of totalitarian rule Croatian police inherited such a management model, which, however, is anachronistic in a democracy; the complexity and dynamics of modern societies rule out the possibility of one individual or group resolving all societal issues and, therefore, require a new type of hierarchy based on accountability; the Croatian police is becoming aware that the old authoritarian and rigid hierarchic management system is becoming an obstacle to developing a modern police organisation; the Croatian police will have to develop and implement training programs for all levels of police management as a prerequisite for a stable transformation of the entire police system;
- Developing a system of human resources-management according to EU standards:
the document recalls that the development of police organisation depends on the individuals involved; in this respect it is crucial that attention be given to the selection, training and development of officers in accordance with the needs of society and crime developments; also the document highlights the crucial importance of job-satisfaction and a sense of belonging to an organisation as significant factors of motivation; therefore a HR-management system has to be set up in a way that respects these facts; particular attention has to be paid to the role of the middle management as they are the ones who have direct insight into the performance of the police and are in a position to make proposals to higher management levels; analysis shows that valuable human potential is available but not sufficiently made use of; a HR-management system meeting EU standards should enable better access to such potential, which is to the benefit both of the entire system and to individuals who are thus given the chance to show their best, develop a career and satisfy the fundamental need for self-fulfilment;
- Reform of the training system for police officers:
The strategy plan emphasizes that modern police organisations, based on new concepts of police operation, require new profiles of police officers. New concepts require significant changes with respect to the know-how, skills and approach to problems. This creates a significant pressure on traditionally trained police officers, because they are required to change their mentality and professional identity. Adoption of new attitudes on the essence of police work, on the priorities with regard to prevention and proactive policing, as opposed to repression and reactive policing should result in creating a new organisational culture, in accordance with public expectations. In order to make this possible, the following should be ensured:
 - a. Changes in the process of selecting and training of future police officers; persons with expressed personal initiative, creativity and communication skills, who favour team work and are motivated to resolve problems are needed; besides the existing training programmes in law, martial arts and use of fire arms, it is necessary to envisage programmes that would contribute to developing the following skills: conflict prevention, understanding and anticipating one's own and other persons' behaviour,

- anti-stress programmes, management, community involvement, protection of vulnerable groups, tolerance, identification and resolving of problems.
- b. A developed system of further training of police officers; previous reforms had limited and short-term results due to the fact that police officers were not taken into account sufficiently; the concept of community policing requires not only changes in the organisational structure but also of attitudes on the essence of police work;
 - c. Possibility of university education in the police; changes in modern society make the police work increasingly complex; new problems require analytical skills and different forms of social interventions; therefore, the level of knowledge that police officers must have is increasing as well; not only criminal police and specialized forces but also patrol officers are faced with greater educational challenges; studies conducted in other countries show that there are significant benefits in employing university educated staff also at the level of patrol and contact officers; under Croatian circumstances this option is not very realistic but it should be taken into account in planning developments of the police system;
- institutionalising scientific research in the area of police science,
 - modernisation of an IT-communication system,
 - data protection in ICT systems;
 - standardizing and computerizing of office work,
 - developing a system of accountability for results of work, legality of performance and observance of the code of ethics:
- the document emphasizes the necessity of introducing objective performance indicators meeting EU standards; the Croatian police still lack such performance indicators and therefore are not in a position to assess the actual contribution of police officers; this is frustrating to responsible police officers and prevents identifying less efficient staff members; in order to overcome these short-comings a system for assessing the performance of the police and for measuring the contribution of individual officers has to be established, although resistance is to be expected from the side of those profiting from the given situation;
- one of the fundamental tasks of the police is to enforce the law; in this respect police officers should serve as role models; for this reason the public is very sensitive about any breaches of the law performed by officers; therefore, all available means should be applied in order to reduce such illegal behaviour as well as all behaviour affecting the reputation of the police; even if it is not illegal behaviour it should be assessed on the basis of the Code of Ethics and properly sanctioned.
- The document defines the following prerequisites for implementing these strategic targets:**
- **Legislation** (“the normative system”):
the legal basis of policing should be improved in order to meet EU standards in a coherent, transparent and practical way, but also reflecting the specific Croatian tradition and context;
 - **The Police Code of Ethics:**
the existing document is not in line with the Code of Ethics adopted within the framework of the Council of Europe; therefore, a new Code of Ethics should be developed accordingly;
 - **Organisational processes, comprising the elements of**
 - a. Raising the level of professionalism,
 - b. Modernisation,
 - c. Rationalisation,

- d. Democratisation, meaning that within the overall societal development the police have to develop accordingly; the police will not be able to promote standards of democracy if they cannot maintain such standards within their own organisation; still due to the historic context police officers display an authoritarian mentality, bad communication, a lack of transparency, hypocrisy and cynicism in relationships as well as moral abusive behaviour as a form of hidden aggression and demonstration of power; in contrast a democratic police organisation should be characterised by a culture of dialogue, a free flow of information, participatory decision making, openness and accountability for their own action, solidarity and empathy.
- e. Transformation should take place in accordance with the concept of community policing, transforming the entire organisation and the work of the police;
- f. An integral development is needed.

We would like to stress that we agree to the analysis as well as to the underlying philosophy of this document and **we would strongly encourage its implementation**, which in our view could well become a cornerstone of the reform of pre-trial criminal proceedings in Croatia.

However, as since the publication of this document more than two years have passed some significant improvements towards its implementation could be expected. From the interviews conducted we have some initial doubts as regard the mechanisms for the implementation of the strategic plan. We were not in a position to experience that interviewees would share the views and aims set out in the strategic planning document, e.g. as regards the need for improved training, management styles and community involvement of police officers. Neither can we see that the annual reports published for 2004 and 2005 reflect the strategic aims defined. A significant number of senior officers have little or no knowledge of the plan and could offer no information on its implementation.

The Commission's Progress Report Croatia 2006 on page 6 acknowledges that "reforms continue under the Croatian Police Action Plan 2004-2007" and reports "progress in implementing the Community Policing Action Strategy, leading to important improvements in relations between the police and citizens" as well as "some progress in the recruitment of minorities to the police". However, on page 7 the report finally concludes with the following more general assessment:

"Overall, progress on police reform is slow and without clear direction. Weaknesses in recruitment and human resources management and development remain. The role of politics cannot be completely excluded, even in the recruitment of technical staff."

4.4.5 Performance and evaluation

Annually, the director general reports on performance issues to the minister and, in turn, the minister reports to Parliament. Such reports are available to the public and published on the police website.

Every three months the police administration submits a report about its work to the Ministry of the Interior and the Police Directorate who will respond to the report and make statements, provide conclusions and submit recommendations. The same happens

at county level at the police stations. Performance management appears to be restricted to quantitative measures of crime statistics. There are no qualitative measures of efficiency or public satisfaction and, other than by report to local authorities, no external monitoring agency. The police administration will send officers to evaluate the work of station staff. Moreover there is an institute for personal evaluation. At the end of every year an annual evaluation is carried out by the immediate superior of the police officer. The results of the evaluation may be used for decisions about career development.

There are serious concerns about career development within the police. There are no regulations defining status, ranks, promotions or positions. Ranks are designated according to educational achievement but a higher rank does not guarantee a higher position and postings often lower the status of an officer. This affects morale and performance and provides no stimulation to seek promotion. Additionally, it is not unknown for officers to be transferred from their posts following political changes. Officers would like to see a more formal career development structure to reward skills and experience, which is transparent and free from political intervention. Furthermore, there are allegations of nepotism in recruiting and clear criteria for employment are required.

4.4.6 Complaint procedures

Officers of the Croatian police are governed by a Code of Ethics (an English translation is given in the appendix).

There is no independent police complaints commission or other independent authority to monitor complaints against the police, other than the ombudsman who has a reactive role and can look into matters referred to him or about which he becomes aware. He reports to Parliament on his activities but has no authority to oversee investigations or receive notification of complaints directly from the police. There is an internal affairs department within the Ministry of the Interior with responsibility for the investigation of complaints. This department reports to a cabinet minister of the government. Each police district has a small group of officers who also have an investigative role, who operate under the local police chief and can be deployed by the central office. 'Serious' complaints are normally dealt with by the MOI internal affairs department and less serious matters are referred to the district offices. There is no definition of 'serious'. Complaints of a procedural nature are referred to the head of the relevant police administration. Reports of crime are referred to the public prosecutor.

Some senior operational officers in the districts feel that too many complaints are referred for their investigation. They express distaste for investigating colleagues within their own administrations and argue that the internal affairs department should take a more active role.

The result of investigations should be reported to the complainant within 30 days. Dissatisfied complainants may appeal to the Minister, who receives monthly and annual statistics.

4.4.7 Oversight

Within Parliament, there is a committee which deals with national security and one of its tasks is oversight of the police. One segment of that committee has supervision over some administrative matters which affect police/public concerns. This committee reports directly to the Croatian government. The state prosecutors provide some control over police activity within their responsibility for supervision and quality of criminal investigations but there is no other independent oversight to report on efficiency, acceptability or levels of public confidence. Officers claim transparency in police work but their interpretation of transparency is limited. Press conferences, media events, written and verbal responses to questions and Ministry oversight are quoted in support of their claim. However, these activities remain under police control and there is no external inspectorate, monitor or independent complaints authority with proactive powers, to hold police accountable and promote public confidence.

Concerns were expressed about the structure of a state owned and controlled company called AKD. This organisation produces and transports money, prints passports and identification documents and provides security services. The board of this company comprises some senior police officers and questions are raised about conflicts of interest between police duties and this security organisation.

4.4.8 Training

Croatia has a **police academy** which includes a **secondary police training school** for basic training. Present training is said to be based on a German model and **basic training is of 15 months duration**. On successful completion of examinations, students become police officers. They study law, criminalistics, authorities, demeanour, security, traffic, information systems, police communications, ethics, weapons, sport and self-defence, psychology and languages. Recruits to the police must have completed their training by the age of 25 years.

The **higher police school** within the academy is for selected police officers. Students may graduate after three years of professional education in police matters or after four years internationally recognised university education. The higher police school has two phases. On successful completion of an examination, they do a three year course in policing and criminal investigations, graduating with a bachelor's degree in criminalistics. Some officers go on to complete a master's degree for a further two years.

Additionally, there is a **department for specialist training and further education** using training courses, seminars and some international study tours. The HR department dictates the kind of courses and the academy offers the courses subject to their training plans. Police districts do a needs analysis and the academy tries to meet the need. In 2003, 153 programmes were delivered to a total of 6,000 students.

All in all, around 10-12,000 students are trained annually, some of whom are trained as trainers to cascade information to colleagues.

The General Directorate is satisfied with its training programmes. In fact, there is a view that too much training is being offered and that sometimes this training interferes with the capacity to work. One senior officer claimed that there is no topic which Croatia

cannot find available internationally and the General Directorate is proud of its own skills which are often viewed as good practice elsewhere. For example, Croatia has good models in crime analysis, witness protection and covert surveillance. This, to some extent, contrasts the self-critical assessment of present training curricula given in the strategic planning document as well as the views of most of the interviewed officers who believe that development training in-service is clearly insufficient.

Interviews with police practitioners, actually, identified **gaps in training which should be filled**. Many investigators have received no training since they graduated and have to rely on their own research and on-the-job experience to keep up to date. Few have received training on statement taking or interviewing, and **not even sex crime investigators reported having any training in connection with handling vulnerable or traumatised victims**. Therefore, not only will investigators have difficulties in understanding the behaviour of severely traumatised victims of violence, but, what is even worse, must be expected to cause secondary trauma of victims.

In interviews with officers from economic crime, who were mostly graduates in economics, it showed that some have had no training whatsoever, being obliged to learn from reading themselves and from colleagues. Occasionally, there are seminars on financial investigations, money laundering etc and meetings with various other agencies. They received interview skills training only at the Academy or secondary police training school (sometimes 20 years ago) but this theoretical, not practical. One officer has 25 years service and has had a one week seminar.

Operative crime scene examiners receive no formal training so there are sometimes inadequacies in quality of work. Technicians, who collect evidence for analysis by forensic officers based in the Ministry, undergo six months training but criticise the **training** for being **too theoretical**. (In Zagreb, they usually have up to one year on-the-job training before the course but elsewhere they usually do the course before being appointed – apparently there is no specific policy in place.)

There are constant changes in legislation, which police officers can download from the internet but they receive hardly any assistance with interpretation. There is a definite **lack of legal training** with regard to the rapidly and constantly changing legal basis of their work.

Almost everyone was agreed that the **need is for a human resource strategy**, including **formal career development plans, coupled to a cost effective training strategy** which will maximise the benefits of training and improve quality of service. **Training is often piece-meal** and not well planned. E.g. there have been seminars on terrorism delivered by FBI and German officers but the wrong people attended, or the knowledge gained is lost to the organisation because **transfers are frequent**.

Seminars by UK, US, German and FBI officers do not always take account of the difference in technical resources and the criminal justice system so that their teaching cannot be applied and is then forgotten. **All training should be tailored for Croatia's legislation and permitted practices**.

Additionally, there is a **pressing need for training equipment** to allow providing practical training.

4.4.9 Crime scene management, forensic capacity

In the Department of Criminal technicians there are 2 divisions – Forensic Analysis at the MOI and Crime Scene Investigators within police departments. There are around 45 officers in Zagreb CSI and others around the country. They work four shifts. Around half are technicians and the others are operatives.

The operative officer interviews the victim, makes a written note, determines facts, drafts a log, and decides upon the area of the crime scene and what should be done. They may measure the scene and photograph it. S/he decides whether additional experts are required, liaises with first attending officer and with specialist investigators who will take on the case. All details of the case are entered into a computer and all Croatian police can access data. The operative usually moves on to another area of police work after a few years.

The technician collects evidence, such as fingerprints, blood/hair, and other material evidence, bags it and labels it for examination or transmission to the forensic analysts with his/her report. They can handle fingerprints and documents themselves but DNA, biological/textile/clothing samples go to the Ministry. They have a universal kit and 35mm photographic equipment. Courts do not allow digital photography in evidence.

The DNA database has been operative for ‘a few’ years and automatic fingerprint recognition system only in the past month. They receive feedback about fingerprint hits but no other statistics.

Officers would also like to see regular updates on new procedures and technical methods of collecting evidence. There is no facility within the training regime for systematic developmental courses.

4.4.10 Technology and Equipment

Police accommodation throughout the country varies considerably. In Zagreb, there are some new buildings with excellent facilities. Elsewhere, conditions are not as good. Some electronic systems are available to investigators. A computer system holds details of wanted persons and stolen cars and is available to all officers, country wide but this system is not networked to the public prosecutor so there is no immediate access to previous convictions of suspects. There is no facility for the video recording or tape recording of police interviews.

The Ministry of the Interior has facilities for **examining DNA samples** but this process is reported to be **very slow**. An automatic fingerprint recognition system is in its early stages. The database is, presently, very small and so prints have to be examined against both computer and manual systems.

Whilst there are no complaints about the availability and suitability of police transport, there are often shortages of essential consumables due to **cash flow difficulties**. Examples included printer toner and buds for collecting DNA samples.

Recent years have seen some financial support for technology from the European Union but there are some complaints about incompatibility of software and lack of proper supportive training in IT and languages, particularly English.

4.4.11 Preventive policing measures

Some police administrations have a special office for preventive policing matters, which collect and analyse data and intelligence as well as performing preventive patrols. Preventive surveillance measures may also be a part of preventive police activities. Whether or not data collected by such measures may be used as evidence during court trials will depend on the law, e.g. data collected in public areas may be used if the surveillance has been announced in advance.

4.5 Output-analysis III: state attorney's offices

4.5.1 Orders among and within state attorney's offices

The state attorney's offices organisationally are independent institutions but there may be orders from the superior to the lower levels of prosecution authorities: from the attorney general of the Republic of Croatia to the 20 county state attorneys and from them to the municipal state attorneys. Orders can be given with the aim to determine how to proceed in a particular case.

Furthermore the superior authority can attract a case or transfer it from one authority to another (even higher) authority. In practice, this happens only when a competent prosecutor is overburdened or in cases where there could be doubts concerning the impartiality of a prosecutor. Except in urgent cases an order may be issued only in written form and has to be founded. Oral orders in urgent cases have to be repeated in written form afterwards. The addressee of the order can make objections but still has to comply.

Furthermore, a state attorney is authorized to give orders to his/her deputies, including how to proceed in a particular case.

4.5.2 Reporting to superior offices in severe cases

In severe cases the Municipal State Attorney has to inform the County State Attorney and the latter the State Attorney of the Republic of Croatia. In practise, the superior levels are informed about cases of corruption, murder (homicide) and those which attract media attention. Moreover it has to be reported when judges or State Attorneys are under suspicion.

4.5.3 Budgeting

Basically the means are provided by the Ministry of Justice on application of the head of the prosecution authority who does not decide on the allocation of budgetary resources except for a small amount for representation purposes. She/He has also to present annually to the ministry a plan concerning the prospective expenses and requirements in the next year.

4.5.4 Recruitment and staffing

The situation concerning recruitment has improved in the last years. Today there are a sufficient number of well-educated and appropriate applicants for vacant jobs. For example there have been 60 applicants for 3 vacancies for trainees (apprentices) in Rijeka. According to the view of interviewees this may be linked to the fact that applicants nowadays can start as trainees before passing the bar examination and afterwards become advisers waiting for a vacant job as deputy prosecutor or judge. In earlier days applicants had first to pass the bar examination and then work as adviser for at least two years.

The bar examination consists of a written and an oral part. The written part requires writing two judgments, one in criminal and one in civil matters. The oral part covers all

aspects of law which could be relevant for judges, prosecutors and lawyers. The notaries have to undergo a separate examination.

Number of state attorneys as of January 1, 2006, female ratio on various court levels:

state attorneys' offices	state attorneys and deputies	thereof: female	percentage of female employees
<i>at municipal courts</i>	378	250	66%
<i>at county courts</i>	154	76	49%
<i>USKOK</i>	12	6	50%
<i>Attorney General</i>	24	7	29%
Total:	568	339	60%

Overall, there is a sufficient representation of women in state attorneys' offices as well as at courts. However, it appears that the ratio of female employees significantly depends on the court level as shown here with regard to state attorneys' offices. The question, whether this is a matter of time or reflects restrictions to the advancement of women ("glass ceilings") cannot be answered here.

4.5.5 Judicial Academy and Education

4.5.5.1 In-service training

Training is organized and financed by the Ministry of Justice. The main role is performed by the Judicial Academy, which forms part of the ministry.

The Judicial Academy was established in October 2004. 13 officials are engaged in organizing trainings, 4 of them working full-time (the head of the Judicial Academy, one judge and one prosecutor, one administrative staff member). The yearly budget is around 400.000 €.

Apart from office facilities there are no premises of the academy. Training is carried out at court buildings (5 regional centres: Zagreb, Rijeka, Split, Osijek, Varaždin) and is mainly given by prosecutors and judges working at courts of appeal who are contracted ad-hoc to give training for the academy. Step by step and in the frame of the current in-service training programme, the Judicial Academy organizes seminars for the training personnel, addressing training skills.

The training programme is generally organized on a six-month basis. In the initial phase the main focus is given to in-service-training of judges and prosecutors - the main target group, actually, being public prosecutors – aiming, in particular, at raising the level of quality and preventing judgments from being abolished by the appeal courts.

Main topics covered by the in-service training programme are procedural skills and legal issues, professional ethics and human rights. In addition, special training is organized for specialised judges, e.g. on topics of organized crime. In 2005, 120 seminars

were organized, half in the standard training programme, half in the specialised training programme.

Depending on the topic, trainings last for one day up to three days and are partly addressing specific target groups; partly involving different professional groups (judges, prosecutors and police) in the same trainings.

Apart from the training programme set up by the Judicial Academy, the Academy also supports other events, such as the spring and autumn meeting of judges in Opatija.

A detailed programme referring to activities in the year 2005 is attached in Annex 2) at the end of this report.

Participation is currently voluntary, which now is under review. At present, there is also no system of free choice of seminars. When organizing training seminars, the Judicial Academy communicates certain numbers of participants to the presidents of the courts. Then it depends on the planning of the courts' presidents to choose and invite participants. Likewise, it is up to the head of the County State Attorneys' Office to decide who will participate in trainings.

In general, there is some interest in the trainings because it is felt that participation is taken into account in the evaluation of a magistrate's performance.

4.5.5.2 Lack of pre-service training

As of today, there exists no pre-service training curriculum for prosecutors and judges. When candidates have passed the bar exam, which is general to all lawyers in Croatia, and have been accepted at a court or a state attorney's office their initial instructions are left to a system of mentoring lasting for 18 to 24 months. At this stage the new staff members are referred to as "legal advisors". However, in principle they work as judges and prosecutors, the only restriction being that they are not allowed to sign documents but need the signature of a senior judge or prosecutor.

The Judicial Academy is planning to establish a pre-service training programme by the end of 2006, combining theory and practice at courts.

4.5.6 Evaluation

There is an evaluation system that covers the municipal as well as the county level and is crucial for promotion decisions. It is performed every year for younger colleagues and every three years for more experienced magistrates. Criteria are: efforts, attitude, communication skills, readiness for further education and statistical data about the work performance. Against this evaluation an appeal to a superior level is possible.

4.5.7 IT-System

Not every prosecutor has his/her own personal computer. E.g. in this respect the state attorney's office at the municipal court of Zagreb suffers from a lack of computerisation. Still, in general IT-equipment has considerably improved in recent years. Some computers have Internet-access, which allows using the electronic library and computer-based collections of decisions.

Unfortunately, there exists neither a network between the systems of the various prosecution authorities nor a link to the IT-System of the police.

4.6 Output-analysis IV: analysis of the current interaction of police, public prosecutors and courts in pre-trial criminal proceedings

4.6.1 Organisation of criminal police

Criminal policing is organised on four levels:

- Within the Ministry of Interior there is the General Police Directorate under the guidance of the Assistant Minister for Special Security Measures; within the General Directorate there are several “Directorates”, one is devoted to criminal policing (the “Criminal Police Directorate”) and breaks into several “Departments”, including the “General Crime Directorate”, the Department for Economic Crime and Corruption, an Organized Crime Department etc.
- The “Department for Special Criminal Investigations” has four regional sections in Zagreb, Rijeka, Split and Osijek, according to the structure of USKOK, and in effect builds a structure half way between the State and the County level.
- In line with the County structure there are 20 so-called “Police Districts”; according to their size there are four distinct categories of police districts with differing internal organisations (and a different ranking of the same function). In particular, the Criminal Police Section with regard to its internal structure differs within the four categories of Police Districts.
- To some extent, criminal policing is also carried out on the lowest level, the level of Police Stations (“Policijska Postaja”). E.g. within the Police District “PD Primorsko-Goranska” there are 15 local Police Stations.

In the interviews conducted it was voiced that to deal with complicated cases of economic or organized crime should not be left to all 20 police districts. It was suggested that they could be clustered to regions, e.g. in line with the USKOK structure.

Also some interviewees pointed out that the level of professionalism was considerably lower on the organisational level of Police Stations, accounted for by a lack of training.

4.6.2 The role of the police, interaction with state attorneys and courts

The Police Act dictates that police officers should “search for perpetrators of criminal acts, regulatory and criminal offences and take them to the competent authorities”. In practice, this includes performing such tasks as are necessary to preserve and obtain evidence, to identify the suspect and to provide reasonable grounds for a prosecution.

When the police learn that a crime has been committed they are obliged to inform the competent public prosecutor within 24 hours. This is performed with some regularity. In practice the police telephone or send a fax to the public prosecutor’s office roughly outlining the character of the offence. Often, the fax amounts to only two paragraphs as shown below. This procedure regularly does by itself not provoke any reaction from the side of the public prosecutor’s office.

REPUBLIC OF CROATIA
MINISTRY OF INTERIOR
POLICE DIRECTORATE ZAGREB
VI. POLICE STATION ZAGREB
(organisational unit of the Ministry)
Nr.: 511-19-32/3-K-408/06

Stamp of the Prosecutor's Office
RECEIVED
(date and number)

COUNTY PUBLIC PROSECUTOR
ZAGREB

SUBJECT: Report on criminal offence

Based on Article 186 para 1 of the Criminal Procedure Act, we are informing you that this VI. Police Station received a report on 4th March 2006 at 18.00 h from the employee J L from Zagreb on the committed criminal offence of robbery from Article 218 para 2 of the Penal Code, to the detriment of the store "M", Zagreb, Dedovići Nr. X.

On 4th March 2006 at 18.00 h the police verified the credibility of the received criminal report, and they established that there is a basis for suspicion that a criminal offence was committed, which is prosecuted ex officio. After this, an investigation was initiated and it is still under way.

We are sending you this report for your information.

Head of station

NN

Except for this mandatory immediate information the police in minor cases carry out most of the pre-investigative measures without involvement of the public prosecutor and deliver a completely resolved case. In addition, a public prosecutor will be involved under certain circumstances, the most frequent context being that a court order is needed (e.g. for arrest, search or interception of telecommunication), in which case the police would turn to the public prosecutor who then would apply to the court. Also when a person has been killed then a crime scene investigation is conducted rendering the presence of the state attorney necessary.

There is a grey zone of cases touching on the competencies of both regulatory offences and (ordinary) criminal courts. In these cases it depends on local customs and/or agreements between police and the state attorney's office whether the police' report should go to the state attorney's office or to the regulatory offences court, or the police are required to report both to the regulatory offences court and to the public prosecutor. For example, domestic violence is punishable by the regulatory offences court. However, when accompanied by another offence, such as assault, the suspect is also processed through the penal court. This can result in duplication of prosecution, conviction and even punishment.

There is a desire among the police to improve communication and cooperation with state prosecutors. Particularly, officers were keen that prosecutors become involved in

pre-investigations at the earliest stage to ensure that all potential evidence which they might require for a successful prosecution is gathered, and the need for additional enquiries which prolong the enquiry is avoided.

Although, generally the co-operation of police and public prosecutors is praised from both sides, there remains some room for improvement, for instance when it comes to defining and assessing the success of their work. The police record crimes as resolved when the cases are transferred to the public prosecutor. Sometimes, this leads to pressure on public prosecutors. The media are made to believe that the police solve cases which later-on are neglected by public prosecutors, who, however, feel that the case was not prepared sufficiently by the police in the first place. For a team-spirit to develop it would be crucial that police and public prosecutors would find a common denominator under what conditions to assume that a case, actually, has been solved and to **jointly assess the results of their work**.

Once more, there are remarkable regional differences with respect to the intensity of cooperation between public prosecutors and police. Whereas for instance in Rijeka the police, except for urgent measures, act mostly on the basis of a request of the public prosecutor, the police in Zagreb, Split and Osijek investigate quite autonomously.

It is of some concern that police are obliged to inform the public prosecutor of every matter which comes to their attention and to report on what they have done to resolve the issue. As previously stated, this includes civil matters, anonymous complaints, cases where there is no suspect and it is, therefore, unlikely that reference to the public prosecutor will have any impact other than to increase the administrative burden. Such rigid rules bog down the police in paperwork and enquiries which, in the vast majority of cases, lead nowhere.

With the exception of Zagreb, the police, as a rule, turn directly to the court for an authorisation. In Zagreb the procedure is different. Here the police first turn to the public prosecutor.

4.6.2.1 Crime scene investigations

A uniformed police officer is likely to be the first to arrive at a crime scene. His/her role is to secure the scene and any witnesses and to summon such assistance as is necessary. This would include a police crime investigator and might include forensic officers. If a suspect is at the scene, the officer will isolate them and keep them under close supervision. If circumstances dictate that the suspect should be arrested, they are read their rights and the reason for their arrest.

Except in particular cases, an officer cannot search a suspect without his/her permission or without the authority of a judge. If permission is given, that permission is often denied at a later court hearing and is, therefore, deemed inadmissible. Officers cannot normally search a suspect's home between the hours of 10pm and 6am. This restriction seriously affects operational capability.

A crime investigator from the appropriate police department will attend a scene of crime and take control of enquiries. They are allowed to talk to potential witnesses and officers take comprehensive notes of what they learn. Only the officer signs the notes. A

suspect can only be kept at the scene for 6 hours, following which he/she must be taken to a police station or released. Any statements made to an officer by a suspect are invalid as evidence in future court proceedings, except those taken in the presence of the suspect's lawyer, which *may* be used. There is no free legal advice. Suspects must pay the fees of their lawyer. Suspects can be detained in a police station for up to 24 hours except when a judge approves detention for a further 24 hours. After 48 hours, a suspect who is not released should be detained in prison. Whilst in custody at a police station, there is no independent oversight, other than by a suspect's lawyer of his/her treatment, or of the conditions in which they are held.

At the earliest opportunity, officers must inform the public prosecutor. In the most serious cases, perhaps 5% of the total, the judge will attend the scene and take control of the investigation but, otherwise, the police will continue without him. However, officers must inform the prosecutor before performing any activity which might, later, be required as evidence. In some cases, the permission of the prosecutor is required, for example, in the case of an identification process.

4.6.2.2 Arrests

The "Novosel-report"⁵⁰ has clearly pointed to weaknesses in arrest procedures. This refers to insufficient legal understanding, e.g. with regard to the moment at which an arrest is executed, a lack of precise documentation,⁵¹ e.g. concerning the handing over of the arrested person to the judge, deficient grounds for arrests and regional differences "that bring legality of work of certain Police Departments into question, since it is justified to suspect that arrests in some cases have no basis in the law".⁵²

Rightly, it is pointed out that some of these weaknesses are caused by the fact that in most regions police decide on arrests and even bring the arrested person to court without prior consultation with the public prosecutor.

All in all, the "Novosel-report" provides sufficient basis to assume that current arrest routines systematically fall short from meeting the requirements of European human rights standards and points to the urgent need for improved legal training of the police.

4.6.2.3 Admissibility of evidence gathered by the police

Only material evidence properly gathered by the police is admissible in court. Records of interviews with witnesses are not admissible, neither is any police interview with the accused, unless carried out in the presence of his/her lawyer. In effect, accounts of the incident are taken out of the file before a prosecution commences and officers cannot be questioned in court about what they were told at the scene or during their enquiries. Apparently, it is common for witnesses and suspects to change their accounts when questioned by the investigating judge or in court. This situation causes considerable resentment from within the police as they perceive that their work is, largely, disregarded, particularly since they have been involved in the practical aspects of the case. On the

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⁵⁰ See below 8.1.

⁵¹ See below 8.1, page 29.

⁵² See below 8.1, page 31.

other hand, they view the investigating judge as an administrator who duplicates the work they have already done. Morale and consequent performance of the police is, sometimes, adversely affected.

Cases are recorded as detected when criminal charges are filed but, often, convictions do not follow. Although there is some statistical validity based on the acceptance of charges by the public prosecutor, the large percentage of cases which are not finalised makes it difficult to assess the operational performance of the investigators by reference to crime detection data.

4.6.3 Public prosecutor's role in pre-investigations

In principle, the Criminal Procedure Code asks citizens to report criminal offences subject to public prosecution to the competent state attorney and to no one else (Art. 172/181 paragraph 1 and Art. 173/182 paragraph 1 CPA). If the report (by mistake of a citizen) is filed to a court or the police authority they shall *immediately* forward it to the competent state attorney. Of course, reality is different: The majority of cases are reported to the police; and police do not restrict themselves to immediately sending the report to the state attorney's office but also – and more importantly - start to investigate and, actually, in many cases finalize investigations before sending the complete file to the public prosecutor.

If the public prosecutor on the basis of the file received from the police is unable to instigate court proceedings against a defendant, either by requesting that a court investigation be opened (Art. 188/200 CPA) or by instituting a direct indictment (either in summary proceedings under Art. 431/448 CPA or otherwise, exceptionally, with the consent of the investigating judge under Art. 191/204 CPA), the public prosecutor has to collect additional information, either by him/herself or by turning again to the police (Art. 174/183 paragraph 2 CPA). In practice, public prosecutors seem to perform only few investigative measures by themselves. And as far as they ask other authorities and institutions the police remain the main addressee of their requests.

In the course of all interviews conducted the quality of cooperation with the police was said to be good or excellent. This was stated both by public prosecutors and police officers.

4.6.4 Repetitiveness and length of proceedings

As a considerable part of evidence collected by the police and the state attorney is not accepted in court trials the gathering of evidence is repeated up to three times, especially in the field of testimony of witnesses. Several interviewees pointed to the adverse consequences for victims of violence who have to undergo the ordeal of giving a statement three times, first to the police, then to the investigative judge and finally in court.

In particular, this issue concerns the relation between the inquiries performed by the police and the investigative functions performed by the investigative judge on the basis of suggestions of the public prosecutor. This process was described as transformation of the police inquiries into a more “formalised” format, without much change in substance.

4.6.5 Distribution of cases

Within public prosecutors' offices basically there are no special competences for certain criminal cases, except for juvenile and young adult matters (on municipal as well as on county level). There is no formal schedule of competences. The distribution of files by the head of the office is implemented on an ad-hoc basis. It takes into account special skills and experience of the concerned deputy and aims to secure that every public prosecutor has about the same workload.

In some state attorney's offices it is common that a case file is handled by one public prosecutor in pre-trial proceedings and then handed over to another prosecutor for court trial. Therefore, within proceedings at the court of first instance two prosecutors have to make themselves acquainted with the case. The prosecutor who handles the file during the trial phase has not been involved in the investigations. In particular, in heavy and complex cases this leads to a considerable amount of additional work that could be avoided by another distribution of functions.

The representation in appeal cases seems to vary regionally. In Rijeka if a case is brought to the court of appeal the prosecutor who has filed the case in first instance represents the state's interest also during the appeal trial. In Osijek the representation of appeals before the county Court is reserved to senior colleagues at the County State Attorney's Office.

4.6.6 Organisation of pre-trial proceedings with regard to the rights of victims

4.6.6.1 Participation of victims in the pre-trial phase

The Procedure Code refers in several regulations to the "injured" person. Historically this refers to a person who has suffered damage as a consequence of the criminal offence and is allowed to claim compensation in a civil law suit adhesive to and integrated in the criminal proceedings. This context is clearly present in the text of the law. Art 239/254 para 4 CPA stipulates that the investigating judge when taking the statement of the injured person as a witness shall ask him/her whether s/he intends to assert a claim for indemnification in the criminal proceedings. Art 318/335 para 3 CPA provides that at the beginning of the court trial, in case the injured person has not yet submitted a claim for indemnification, the president of the panel shall remind her/him that s/he may submit a motion for the realization of such a claim in the criminal proceedings. In addition, the injured person may orally give reasons for his/her claim for indemnification (art 319/336 para 3 CPA).

In time, the civil law background of the "injured" person's involvement has become obscured by the fact that the victim's claims for compensation are only in rare cases acknowledged by the criminal court, in spite of the obligation to serve a judgment on indemnification claims whenever such claims have been submitted (art 355/372 para 1 subpara 7 and art 359/376 para 4 CPA). The only exception made by the law concerns the case that deciding on claims for indemnification would "considerably delay proceedings" (art 127/133 CPA). It is not plausible that this should be the case all too often.

However, from what is provided in art 363/380 para 4 CPA it appears that the “injured” person may challenge the courts judgment only regarding the decision on the costs of the proceedings.

Apparently, in practice the notion of an “injured” person benefits from a wide interpretation and therefore refers practically to most victims. Although, therefore, the “injured” person has some rights to participate in criminal proceedings (as defined by art 47 subsequent CPA) in practice victims are hardly involved or present during the investigation phase of proceedings. State attorneys, when they decide to drop a case, notify the injured person (under art 55 and art 174/183 CPA). Yet, it is rare that the victim institutes subsidiary proceedings. And if so this is done with little prospects of success.

In short: Although the “injured person” is given significant rights in Articles 47ff CPA in practise the involvement of victims as parties to pre-trial proceedings is quite limited. If at all, victims are involved during court investigations as these are seen as part of formal court proceedings. The **rights conceded by Art. 54 paragraphs 1 and 3 CPA are not extended beyond court investigations** to likewise apply to enquiries conducted by the police and the public prosecutor. Interviewed public prosecutors stated that they would hardly ever have a direct contact with the victim, unless a victim would turn to them, which apparently is not often the case. Public prosecutors tend to feel that they sufficiently take care of the victim’s interests, whose direct involvement, for that reason, is not necessary.

Overall, the regulations concerning “the injured person” when applied to victims of crime come out somewhat lopsided as they were, historically, meant to support the position of a damaged party rather than to guarantee to the victim that s/he would be acknowledged and heard as the person who has suffered injustice and, therefore, is entitled to experience justice within criminal proceedings.

4.6.6.2 Protecting the victim as a vulnerable person

Allowing the victim to actively participate in pre-trial proceedings is *one* component of respecting the victim’s rights, treating the victim with care another. And this aspect is most cogent when it comes to interviewing a traumatized victim of violence with regard to both the amount of questioning and the frame-work in which this statement-taking occurs.

In Croatia, the “injured person” is granted **legal** aid in line with the understanding that the participation of the damaged party serves to support their civil law claims. But the **psycho-social** support of a person of the victim’s trust and, more generally speaking, active protection against secondary victimisation is **not** provided for. Whereas legal provisions foresee that a witness who is in danger may give his/her testimony under conditions protecting their interests (Articles 238a, 238d/249, 252 CPA)⁵³ and that particularly vulnerable witnesses – like children or mentally handicapped persons – may likewise have their statement video-taped (Articles 238, 239/248, 254 CPA) such

⁵³ In July 2006, the CPA was amended to allow using video-link for hearing witnesses in third countries.

regulations in general **do not apply** – or rather are not applied – to **victims of even severe violence**, such as raped or trafficked women or victims of domestic violence (unless they are children).⁵⁴

Even more fundamentally, the repetitive structure of pre-trial proceedings in Croatia exposes victims of violence to the **risk of being asked the same questions over and again**, first by the police, then by the investigative judge and finally in court. Only if the person affected by the offence is a child or a minor under 16 years of age then this person – according to Art. 119 paragraph 2 of the Juvenile Courts Act - may not be questioned as a witness more often but twice. A similar regulation protecting adult victims against secondary traumatisation does not exist.

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⁵⁴ For an in-depth account of what would be possible under the existing law see Melanija Grgić, The Position of the Victim in Criminal Proceedings – Rights and Obligations, in: Maja Mamula/Nera Komarić (ed.), *Sexual Violence – Theory and Practice*, Zagreb 2005, 128.

4.7 Effectiveness and efficiency of investments: some observations for further consideration

The following comments are intended to prompt further consideration and serve as a basis for the recommendations given in chapter 6.

4.7.1 General observations as to the effectiveness of pre-trial proceedings

4.7.1.1 Weakness in finalising cases

Compared to other European countries such as Italy, Austria or Germany the pre-trial phase of criminal proceedings in Croatia apparently to a large amount fails to finalise cases that don't require to be taken through a court trial, in particular because the defendant confesses his guilt, the offence is established beyond doubt and the victim would not defy a less formal and much quicker proceeding. In particular, this refers to a striking lack of implementation of Articles 184/175 and 203/190a CPA.

Regulations that are made use of one can find in chapter 27 of the CPA providing for the issuance of a **sentencing order** by the single judge at the municipal court on application of the public prosecutor. If the defendant objects to the order within a term of eight days of receipt the order is invalidated and the proceedings take their normal course.

In 2005, of 24,488 motions to indict against adults 6,867 were issued as applications for sentencing orders. During the same year, of 2,307 motions to indict directed against young adults (age 18 to under 21) 365 took the shape of requests for sentencing orders. Therefore, overall in 7,232 cases the public prosecutor applied for a sentencing order (that is in 27 % of all motions to indict). As in approximately every fifth case the defendant opposed the sentencing order, some 5.800 orders remained in force.

A similar model existed in Austria and enjoyed much sympathy of practitioners. However, this model was recently abolished, and for good reasons.

- In particular in cases, when the defendant does not have a lawyer (which covers by far the majority of cases), there is little guarantee that s/he actually understands what is going on. Many individuals are not used to dealing with official documents. If they are asked to pay money they will do so in order to avoid any complications without actually grasping the meaning of their payment. And in the case of a suspended sentence, when at the moment nothing happens, they will be convinced that nothing has happened. Unless the judge is present and orally explains to the defendant the meaning of the exercise many defendants will not know that they have been convicted and are, after that day, a previously convicted person. They will only learn in the next proceedings.
- This procedure, to some extent, side-lines the victim completely. Although art 449 CPA provides that in the end the sentencing order shall also be delivered to the injured person it is not provided that the injured person was heard before the order is issued. Nor is clear on what grounds the injured person can protest the order once it has been issued.

- What it adds up to: Procedures that happen in writing only do not allow for an amount of participation of the parties which would guarantee that they are heard and are given a sporting chance to understand the court's decision. We would like to stress that doing justice requires a certain amount of lively communication involving a court and the parties. Only to focus on the penalty as the outcome of proceedings would be a much too narrow view on the criminal justice system. The communication that takes place between the court and the parties has much value in itself.

Art. 184/175 CPA, which allows the state attorney to postpone further proceedings given that the suspect is willing to fulfil certain obligations, is not much used (and sometimes not even known by practitioners). Some public prosecutors' offices implement this regulation in cases related to juveniles. In Split we had the opportunity to talk to a public prosecutor who not only applies this regulation but for a lack of other options even mediates cases herself. However, Split is an exception. According to the "Novosel-Report" (please refer to table no. 53) in Split 3% of all dismissals are decided on the grounds of art 184 CPA, followed by 0.1% in Zagreb. And all other assessed state attorneys' offices report 0.0% percent of implementation. In Zagreb, again, all 18 cases, in which this regulation in 2005 was applied trace back to the department of the attorney's office dealing with offences committed by or against juveniles.

When it comes to art 190a/203 CPA the situation is even worse. In Zagreb, Split, Rijeka and Osijek none of our interviewees could precisely recall one single case in which Art. 203 CPA had been applied. (In Osijek interviewees tended to *believe* that there had been such a case.) Art 190a/203 CPA, as understood by our interviewees, is placed in the context of formal court investigations and at least requires the request of the public prosecutor that a court investigation be opened (Art. 188/200). Therefore, some interviewees stated that as court investigations are only instituted in severe cases art 190a/203 CPA would hardly avail of any scope of application.

It is important to stress the amount of resources at stake.

- In Austria, the decision to implement an alternative sanction in a "diversion" procedure is either taken in court following a formal indictment or more informally by the public prosecutor in the pre-trial phase. The number of such informally concluded cases approximately equals the number of cases formally concluded.
- In Italy the responsibility for finalising cases in the pre-trial phase rests with a judge. Actually, Italian procedural law avails of a variety of proceedings allowing either the *giudice da udienza preliminare* ("GUP") or the trial court to decide on a case without taking it through an adversarial proceeding. Altogether, approximately **some 65% of cases** are concluded under this regime.
- Germany avails of both an informal court procedure without a trial ("*Strafbefehlsverfahren*") as well as diverting procedures initiated by the public prosecutor and to some extent monitored by the court. In Germany in 2003 there were 573.345 formal indictments, 603.999 cases were sentenced without formal court trial (in "*Strafbefehlsverfahren*") and 265.909 cases were finalized by the

public prosecutors by means of “sanctions” in diversion procedures (primarily on the basis of Article 153a German CPA).⁵⁵

- In the UK the defendant can avoid going through an adversarial court trial by pleading guilty. Again, this is a mechanism allowing the defendant to accept his responsibility and avoiding costly court trials. The following statistics show that in England and Wales approximately two third of all cases are finalized without going through a lengthy court trial.

Crime Statistics England and Wales 2003				
% pleading guilty				
1999	2000	2001	2002	2003
<i>All Indictable Offences</i>				
60	59	60	65	63
<i>All Summary Offences</i>				
91	90	93	94	94
<i>All Offences</i>				
61	60	62	66	64

This means: When after finalising the investigations the guilt of the defendant is likely and requires some form of reaction an adversarial court trial is conducted in about 50% of cases in Austria, in about 40% of cases in Germany, and in some 35% of these cases in Italy and the UK, but in about 80% of such cases in Croatia.

From the point of **efficiency** this situation clearly calls for further attention. But it also does from the point of **effectiveness**, if this term is understood to include the ability of the court system to take the rights of the defendant and the victim to **swift proceedings** seriously as well as respect the willingness of the defendant to accept his/her responsibility.

4.7.1.2 Methodology of changes to the procedural code

Because of the practical importance of the issue at stake, it has to be taken seriously that the legal amendments introducing **Articles 184/175 and 203/190a CPA for a lack of implementation have failed to have any significant impact on the actual situation**. Next to the economic consequences it should be taken into account that when legal norms are systematically disregarded this adversely affects the rule of law and the legal culture of the criminal justice system. Therefore, it is indispensable to review the style and methods of law-revisions with regard

- To the involvement of practitioners in drafting legislation,
- To the communication of amendments and their rationale to practitioners and

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⁵⁵ For the details see below under 5.3.5.

- To the assessment of the implementation of legislative changes.

The CPA should not be changed unless these changes are corroborated by clear **explanations and interpretation** as well as **sufficient training** delivered to the authorities concerned and unless the implementation of the new regulations is **strictly and periodically monitored**. According to the persons we talked to these requirements are not always met. Actually, interviewees both from the police and from state attorneys' offices voiced their concern that recently a considerable number of rapid changes to (substantive and procedural) criminal laws had rather stirred confusion than improved the situation of the criminal justice system.

4.7.1.3 Weakness of the rule of law

One of the striking findings of our interviews is the considerable regional differences, e.g. with regard to the distribution of functions between the police and public prosecutors, the number of court investigations or the amount of court-involvement in pre-investigations. As all act under one law one would expect similar patterns as regards the work of the police and public prosecutors as well as the distribution of functions among the police, public prosecutors and courts. But this is not what we found.

This impression is strongly confirmed by the “*Novosel-report*”:

- Table no. 3 of the „*Novosel-report*“ displays that in relation to all offences the percentage of arrests is 5.7% in Karlovac and 7.9% in Istria but 29.0% in Split and Dalmatia and 34.9% in Vukovar and Srijem. From these findings the „*Novosel-report*“ assumes that „the approach to arrest is different in different areas“ (page 6) and that „there is a probability that a suspect will be arrested in one police station and in the other not for the same criminal offence“ (page 17).
- Table no. 44 indicates that state attorneys on the municipal level in Pula after receiving a crime report in 96% of these instances request further inquiries as compared to only 24% in Zagreb.
- When after receiving a police report the municipal public prosecutor needs additional information he would send a request back to the police in Karlovac but collect the information himself in Čakovec and Pula (table no. 47).
- It appears that in Split state attorneys in almost 18% of all cases ask for court investigations as compared to only 2% in Rijeka (table no. 50).

In other words: The decision which actor investigates (the police, the public prosecutor or a judge) to a certain extent is left to the discretion of first the police and then the state attorneys' offices. In this respect the rule of law is weak, and significantly differing regional patterns have developed.

This situation is partly to blame on the legal regulations, which in a way deny a clear-cut answer to the question as to who is charged with investigating, or rather, instead of naming one institution more or less mandate all possible actors.

Under all these legal provisions, pointing in different directions, some to the prosecutor, some to the police, and some to the judge, the distribution of functions in pre-trial criminal proceedings is necessarily “user-defined”. With other words:

When it comes to the crucial decision on the distribution of functions in pre-trial proceedings the law falls short from providing a clear answer and leaves the issue fairly undetermined.

However, as much as a common understanding of the overall aims of the criminal justice is important as much is an understanding of the **distinctive** roles of the police, public prosecutors and judges. Only such a clear **division of functions** allows for the necessary distance between actors and for a system that merits from mutual control and a balance of adverse powers. In other words: Here we get to the core of the matter of a fair trial and of adversarial proceedings conducted by the parties and supervised by the judge.⁵⁶

The given system of pre-trial proceedings in Croatia by similarly engaging all actors in the function of investigating falls short from clearly and distinctively separating the tasks of the police, public prosecutors and judges.

With regard to this lack of distinguishable and specific functions, it is not surprising that regionally different models of division of labour have developed. In this context it should also be remembered that the pre-service training of judges and prosecutors is not performed by a centralised academy but by a system of mentoring and learning on the job allowing for an unimpaired transfer of local styles and models to succeeding colleagues.

The somewhat amorphous shape of pre-trial proceedings is furthered by the fact that in practice the **difference between pre-investigations and court investigations has become blurred**. Several interviewees have indicated that in performing court investigations the investigative judge would follow the - often quite precise - “suggestions” of the public prosecutor. Although interviewees were aware that the investigative judge *could* perform additional investigations not “suggested” by the state attorney this apparently does not happen very frequently. In the course of our interviews public prosecutors complained that even in obvious cases, e.g. when a witness has pointed to the presence of another witness, still the investigative judge would not decide to take the statement of that other witness on his own initiative but would return the case file to the public prosecutor’s office and wait for their further “suggestions”.

By this development the difference between pre-trial investigations dominated by the state attorney and investigations in the hands of a judge (at least in some regions) has lost weight. Interviewees voiced that the difference between pre-investigations performed by the judge and formal court investigations would be a matter of mere formality.

In this respect the practice of criminal proceedings has departed from the intentions of historic law-makers. The idea of court investigations was exactly to limit the influence of state attorneys in proceedings against an identified suspect. In the liberal paradigm - strongly influenced by the model of civil-law proceedings - it had to be prevented that one party (the prosecutor) would dominate proceedings directed against the other party

⁵⁶ It is in this respect that the common law system is strong in its simplicity and clarity.

(the defendant). Therefore, in court investigations the judge was expected to act *ex officio* without waiting for proposals of the parties (the state attorney or the defendant).⁵⁷

In Croatia, the court investigations have in practice – at least partly - lost their specific meaning. Actually, once one arrives to the full picture of how the given legal situation is implemented, it appears to be somewhat misleading to refer to the Croatian system as one in which such a thing as a court investigation still exists.

It would be more precise to say that, within and without formal court investigations, it is today the public prosecutor who directs and the judge who carries out the investigations, when asked for.

All in all: What is needed is a harmonisation of somewhat contradicting legal regulations with a view to design a precise attribution of clearly distinctive functions to the police, public prosecutors and the courts in the pre-trial phase. Such a revision would have to include the Law on the Police which at present also deals with matters of criminal policing.

4.7.1.4 Weak participation of the victim in pre-trial criminal proceedings, weak protection against re-traumatisation, lack of a compensation scheme

It was recalled before that to respect the rights of victims in pre-trial proceedings means to allow the victim to be heard and actively contribute to pre-trial investigations but also to protect the victim – and namely a victim of violence – against re-traumatisation. This second element aims to restrict the intrusion of investigations into the privacy of the victim to the amount absolutely indispensable and appropriate.⁵⁸

In both respects the situation of pre-trial criminal proceedings in Croatia clearly falls short of meeting the standards of Articles 8 and 13 EHRC as interpreted by the Court in Strasbourg as well as the requirements under the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (Official Journal L 82 of 22.03.2001).⁵⁹

In addition, what lacks is a state-funded system of victim compensation. In this context it will be remembered that according to the Council Directive 2004/80/EC of 29 April 2004 relating to the compensation to crime victims all EU Member States are responsible for paying compensation to victims of violent crime if the crime has been committed within their territory.⁶⁰

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⁵⁷ In Austria, where the pertinent regulation has remained unchanged since its enactment in 1873, the text of Article 96 starts with the clear instruction: „Ist die Voruntersuchung eingeleitet, so schreitet der Untersuchungsrichter, ohne weitere Anträge des Anklägers abzuwarten, von Amts wegen ein, um den Tatbestand zu erheben...“ („Once the investigation is opened the investigative judge with a view to establish the facts intervenes *ex officio* without waiting for further proposals of the prosecutor...“.)

⁵⁸ Refer to 4.6.6.

⁵⁹ Refer to 2.3.1.1.

⁶⁰ Refer to 2.3.1.2.

4.7.1.5 Independence of public prosecutors

We would suggest a review of the guarantees of **external independence** of public prosecutors.

It appears that under Article 33 of the Act on the State Attorney's Office (official gazette no. 51/2001) there is an obligation for public prosecutors to report e.g. on cases of "special state" (or "public") interest. State attorneys report to their superiors. And in certain cases the Attorney General is obliged to report to the minister of justice. As regards the time-scale of this reporting the pertinent article clarifies that the obligation to file a report on envisaged action would not prevent the public prosecutor from acting when this is necessary to avoid the expiration of a statute of limitation, of a time limit or to avoid postponement. It appears that in all other cases the public prosecutor after filing a report is obliged to wait for a reaction of his superiors; in the case of the Attorney General this would refer to the reaction of the minister of justice.

In addition, under art 48 of the same act the State Attorney General is appointed for merely a four-year term by the House of Representatives of the Croatian Parliament upon the motion of the government. He may be reappointed for the same term. Under Article 49 it is then the Attorney General who appoints County State Attorneys, again for a four-year term.

On the basis of these regulations, the independence of state prosecutor's from political influence of the government clearly leaves room for further improvement.

What has just been said does not refer to the situation of public prosecutors **within** their office. Actually, it would appear that in Austria, Germany and Italy there exist by far stronger mechanisms for the revision of the work of, in particular, younger prosecutors and more safeguards of a somewhat uniform conduct within the same office.

Also, we would like to stress that in the end the independence of prosecutors is not just a matter of regulations and institutional factors but also dependant on the professional ethics, the personal attitudes and the motivation of prosecutors. Some persons we talked to suggested a tendency towards a lack of commitment and enthusiasm. It was complained that the media had a negative effect on the self-image of prosecutors.

4.7.2 General observations as to the efficiency of pre-trial proceedings

4.7.2.1 Unnecessary involvement of state attorneys

As discussed above the police draw on public prosecutors in situations where there is little a state attorney can do. In this respect, considerable capacities would be spared if the police would better perform a filter function. In particular, the obligation of the police to submit an initial report under article 186/177 CPA should be reviewed. In addition the practice observed by the police at least in some counties to send all reports to the public prosecutor in cases where there is some suspicion that a crime has been committed but no evidence as to who the suspect would be should be reconsidered, also with a view to create a clear legal regulation in this respect.

4.7.2.2 Avoidable involvement of the investigative judge

The regulation preventing the police from interrogating persons as witnesses or suspects (Art. 186/177 paragraph 4) meets strong opposition both from the police and public prosecutors. In the course of the interviews we conducted, no fears were voiced that the police would not be in a position to professionally interrogate witnesses or suspects if appropriately trained and instructed to do so. (It would appear, though, that the high number of reports not referring to an actual offence as well as short-comings in dealing with crime victims underline the necessity of police training in these regards.)

We also met a broad – actually, overwhelming - consensus that pre-trial proceedings could be stream-lined, accelerated and rendered more efficient without a loss of quality by, at least in principle, leaving out investigative court activities in pre-trial proceedings. Indeed, interviewed prosecutors stated that interrogations of defendants and witnesses were sometimes performed in a more precise and professional manner by the police than by investigative judges. Actually, a judge pointed out that indictments would often follow the wording of the police report, which allows concluding that court investigation had little impact on the views of the public prosecutor. And sometimes the investigating judge would ruin the results of police enquiries, e.g. by taking the statement of a witness without previously informing the defence lawyer.

When it comes to criticising the redundancy of court investigations the judges we talked to were not an exception. They complained that this work would be quite boring and to a large extent just follow the police enquiries. As one judge put it, “I never really investigated anything”.

Our observations similarly refer to formal court investigations and investigative actions performed by the courts under Articles 197/185 and 449/432 CPA as in practice there is little difference between these to formats of court involvement.

4.7.2.3 Human resources development in public prosecution

With regard to the human resources development of public prosecutors several issues have to be addressed:

- As a matter of urgency a comprehensive curriculum for pre-service training of prosecutors and judges should be set up and implemented by the judicial academy. Overall, the means of training of prosecutors and judges should be enhanced with a view of better communicating legal developments and building on the professional and management skills of prosecutors and judges.
- Criteria for decisions on the recruitment and advancement of public prosecutors need to be clearly defined.
- Criteria for the assessment of the work of public prosecutors should be clarified and implemented in transparent procedures.
- There should be a link between in-service advanced training of prosecutors and their advancement.
- Overall, the development of a comprehensive human resources development strategy should be dealt with as a priority issue.

4.7.2.4 Organisational structure of the police and courts

Various interviewees pointed out that police and court districts should be reviewed. There are, in the views of many, too numerous small districts. In our opinion, at least as a rule, the advantage that lies in a situation where county courts, police directorates and public prosecutors' offices at the county court level have the same territorial districts should be maintained. If this assumption is shared then the ministries of interior and of justice would have to agree on a territorial system replacing the county-oriented structure by a system of maybe some 10 to 15 regions.

On the other hand, one municipal court for all of Zagreb is not enough, nor is one state attorney's office on that level. Adding the municipal to the county level there are more than 100 state attorneys' offices to criminal courts of first instance. However, in 2005 a fourth of all crime reports (25,3%) went to this very office. This is apparently out of balance.

4.7.2.5 Quality development and control of police work

It is likely that the reform of pre-trial proceedings will lead to an increase of responsibilities and powers allocated to the police. For this reason it would be of crucial importance that the strategic plan issued by the ministry of interior in April 2004 would be effectively implemented. As a matter of urgency the organisational structures set up to define and implement performance indicators for all units of the police should be reviewed as regards their effectiveness. It should be understood that the police performing investigative functions strongly depend on the readiness of victims and witnesses of crime to report to the police. The ability of the police to meet the expectations of victims, good relations to civil society and the confidence of the public, therefore, should be regarded as the most decisive resources of criminal policing.

4.7.2.6 Technology and equipment

The police do have computer systems and software to support some technological advances in crime investigation. However, a review of what is available will identify the gaps, particularly in the collection and identification of material evidence, such as DNA and fingerprints, and the facility to network into other relevant hardware and software of other agencies. Any new systems which are suggested should be supported by the relevant training packages.

At least some state attorneys' offices severely suffer from a lack of IT-equipment. An improvement in this respect is urgently needed, e.g. by the state attorney's office to the Municipal Court of Zagreb.

5 Comparative Analysis on Systems of Preliminary Criminal Proceedings in EU Member States

5.1 Aim and structure of Chapter 4

The aim of this chapter is **not** to distil and define common standards of criminal proceedings in EU-Member States, and this for two reasons:

- If you only compare pre-trial criminal proceedings in, say, Spain and England and Wales the differences are overwhelming and could well be described as an inquisitorial model still prevailing in Spain (where court investigations still form the centre of the procedure) and as the common law system persisting on the island (where the focus is placed on the public court hearing). The very aim of pre-trial proceedings differs significantly. They are tasked with preparing the court trial in England, while they are intended to create the basis of the final judgment e.g. in Spain and Belgium. (We would like to add at this point that e.g. Italian criminal procedure today, stands much closer to the proceedings as they are shaped in England and Wales than to the Spanish model.) This is to say: Although some of the continental systems have borrowed a lot from the common law system and although a

The present chapter takes the course of

- Firstly, giving detailed accounts of the situation in Austria and in Germany;
- Secondly, focussing on the most relevant questions with regard to the Croatian reform, at the same time including a much larger number of European countries in the analysis;
- Thirdly, reflecting on the questions to what extent the Croatian reform can merit from this comparative analysis.

Developments in Austria and Germany are of some relevance as these countries

- Have, historically, and in particular in the second half of the 19th century, developed from a very similar point of departure as has criminal procedure in Croatia;
- Have decided to abolish court investigations (Germany in the 1970ies, Austria only recently);
- In practice, entrust investigative functions to a flexible cooperation of police and public prosecutors;
- Pay considerable attention to the rights of victims; and
- Manage to finalise more than half of all proceedings directed against an identified suspect without taking the case to an adversarial court trial.

5.2 The system of preliminary criminal proceedings in Austria⁶¹

5.2.1 Legal sources

The Criminal Procedure Act from 1975 contains key provisions relating to the investigative procedure. The federal act, which reforms the Criminal Procedure Act from 1975 (Act on the Reform of the Criminal Procedure), Official Gazette BGBl I 2004/19, defines a completely new structure of the pre-trial criminal proceedings. This Act will become effective – after almost four years of *vacatio legis* – as of the 1st January 2008 and it represents the legal basis for the following overview.

Organization of Public Prosecutor's Offices, including the issuing of instructions and reporting obligations is regulated in the Public Prosecution Act (StAG), BGBl.1986/164, and in the Ordinance on the Enforcement of the Public Prosecution Act (DV-StAG), BGBl. 1986/338. Organization of security administration and the work of the security police are regulated in the Security Police Act (SPG), BGBl 1991/56.

Other important legislation in this segment of the criminal proceedings includes European Convention on Human Rights (ECHR) and the Law on the Constitutional Right of Appeal (GRBG), BGBl. 1992/864, on the basis of which it is possible to file appeals to the Supreme Court on account of breach of the basic right to personal freedom based on the criminal court decision or injunction, after all other stages of appeal have been used. Since the passing of the Federal Constitutional Act, BGBl.1964/59, these two pieces of legislation rank at the constitutional level.

5.2.2 Historical Development

The structure of criminal **pre-trial proceedings**, as defined by the Criminal Procedure Act of 1975, has essentially remained unchanged since its original version from the year 1873, according to which this part of the proceedings is to be conducted by the **investigative judge**. If the **public prosecutor**, who receives all criminal charges, on the basis of the investigations conducted upon his instructions (by an investigative judges, county courts or law enforcement authorities), determines that there are sufficient grounds for instituting criminal proceedings against a specific person, he shall **file a motion to the investigative judge to institute a court investigation** or he may under certain circumstances proceed directly to an indictment. While, therefore, the Act regulates the court investigation (and essentially also preliminary inquiries conducted by the court) in quite some detail, there is a lack of provisions for any investigations conducted by the law enforcement authorities.

This model has not, however, prevailed in practice. In reality, the police start their own investigations after receiving a report or otherwise learning of an offence, and only after they conclude the investigation, they inform the public prosecutor, who then decides

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⁶¹ For a presentation of the regulations in force until January 1, 2008 refer to *Bertel/Venier* (2004); with regard to the comprehensive reform of pre-trial criminal proceedings refer to *Bertel/Venier* (2005) and to *Pilnacek/Pleischl* (2005).

on the dismissal of the case, on offering diversion measures to the suspect or on proceeding with the indictment.

Soon after the fundamental reform of the substantive criminal law in the year 1975, and after the amendments of the Criminal Procedure Act that resulted there from, one started considering a completely new concept of the pre-trial proceedings.

After several far-reaching amendments in this area, especially in the Act on the Amendments of the Criminal Law from 1993 (new regulation of the detention pending trial), the Act on the Fundamental Rights Complaint, allowing for special investigative measures (“optic and acoustic surveillance of persons by use of technical means”; “automated data processing”), and the amendments to the criminal procedure from 1999 (introduction of comprehensive diversion regulation), the new federal act, which redefined the Criminal Procedure Act from 1975 (Act on the Reform of the Criminal Procedure) was adopted in 2004.

Since then, other reforms have been introduced. The amendments to the criminal procedure from 2005 introduced changes in the area of minutes taking and methods of interrogation, and the enactment of the Federal Law on the Amendments of the Criminal Procedure Act from 1975, the Public Prosecution Act and the Deletion Act, BGBl I 2005/119, resulted in premature legal effectiveness of various provisions in the area of improving the rights of the victims. All this resulted in a need to take into account the most urgent requirements from this area (especially the entitlement of the victim to psycho-social and legal assistance in court proceedings, respectful and dignified treatment and expanded instruction on legal remedy and information).

5.2.3 Procedural Principles

Principles of the new pre-trial proceedings are the following:

- ***The principle of proprio motu***

The police and the public prosecution are obliged to conduct an investigation – of their own motion – on any suspected criminal offence that came to their knowledge (§ 2 para 1 Criminal Procedure Act - StPO), except in cases where investigation can only be conducted upon request of an authorized person (private criminal proceedings).

- ***Objectivity and search of truth***

In this segment, both these authorities and the court must search for the truth and clarify all facts important for the offence and for the suspect. In doing that, they are obliged to investigate with equal care both the incriminating circumstances and those that contribute to his defence (§ 3 StPO).

- ***Accusatory principle***

The court does not have a case unless on the basis of a formal accusation. Except for cases of private or subsidiary prosecution only the public prosecutor has the right to press or withdraw criminal charges (§ 4 para 1 StPO).

- ***Legality and proportionality***

When exercising powers and taking evidence, only those interventions that affect the rights of a person shall be allowed, which are expressly stipulated by the law and necessary for fulfilling the task. Such interventions may not be disproportionate to the severity of the criminal offence (§ 5 para 1 and 2 StPO).

- ***Rights of the accused***

These include the right to participate in the proceedings and obtain information on the proceedings, the right to a hearing, defence, presumption of innocence and termination of proceedings against him/her within reasonable time (§§ 6 to 9 StPO).

- ***Participation of the victims in the proceedings (§ 10 StPO)***

5.2.4 Course and significance of the pre-trial proceedings

Criminal and thus also the investigative proceedings commence as soon as the police or the public prosecutor investigate against a known or an unknown person, or exert pressure against a suspect, in order to resolve a suspicion of a criminal offence. (§ 2 para 1 StPO).

There is only *one* single investigative procedure, so that there is no differentiation between a general „preliminary clarification“ of a suspicion and a special investigation of an accusation of a specific person. Thus the procedure is not split into an „informal stage of preliminary clarification“ and „formal“ proceedings.

Investigative proceedings are on principle not public. However, it is provided that they are open for the parties to the case if evidence is taken, which cannot be repeated in the trial phase.

Investigative proceedings terminate either with a (substantive) decision of the public prosecutor on the discontinuation of the proceedings (§§ 190, 191 StPO), stopping the persecution due to a diversion measure (§§ 198 ff StPO), the indictment (§ 210 StPO) or suspension of the investigative proceedings against absent or unknown perpetrators in accordance with the § 197 para 1 StPO or with the decision of the court to discontinue the proceedings (§ 108 StPO).

On the one hand, the investigative proceedings should clarify the facts of the case to the extent that the public prosecutor can make one of the above mentioned decisions. On the other hand, it serves the purpose of „expeditious conduct of trial“ (§ 91 StPO), that is of collecting such evidence, which can be used in the trial phase (by reading them out).

5.2.5 Participants to the proceedings

5.2.5.1 The police

Institutional matters of the police as well as fundamental matters of their performance are resolved by the law enforcement authorities (“*Sicherheitsbehörden*”, §§ 19, 20 ff, 32 ff, 65 ff SPG). They are hierarchically structured and subordinated to the Federal Ministry of Interior as supreme law enforcement authority (“*Oberste Sicherheitsbehörde*”, § 4 para 1 SPG). The law enforcement authorities are in charge of the administration of security on the one hand (§ 2 SPG), and contributing to the clarification or persecution of criminal offences sanctioned by the courts (§ 18 StPO). In the latter

case, they are obliged to follow any orders issued by the public prosecutor, or – in specific cases – issued by the court, and to report to the public prosecutor on their investigations (§ 100 StPO). According to the provisions of the employment law for civil servants, the police are, however, subordinated to the Federal Ministry of Interior.

5.2.5.2 Public Prosecutor's Offices

Public Prosecutor's Offices are special judicial authorities, whose main task is to represent the interests of the state in the framework of criminal persecution (§ 1 StAG). The task of their members is the **administration of justice** (§ 19 para 1 StPO, § 3 para 2 StAG).

Public Prosecutor's Offices are monocratic. They are managed by a head, who represents the authority, controls the employees, issues instructions to them if necessary, and assigns cases to him/herself and to other public prosecutors of the office, who are in charge of the case according to the business distribution regulation – or assigns them to other prosecutors, regardless of the business distribution – naturally only based on particular causes.

Public prosecutors are especially significant in the investigative proceedings, as they are the ones who conduct it. They decide – for reasons of expedience also in agreement with the police (§ 98 para 1 StPO) – on the contents and the scope of investigations, on issuing an indictment against a certain person, on stopping the persecution or discontinuation of the proceedings (§ 20 para 1 StPO). On principle, any infringement of fundamental rights must be ordered by the public prosecutor. In addition, it is necessary to obtain the court approval in cases where severe infringements of the rights of a person are deemed necessary (compare point 7).

5.2.5.2.1 Types of Public Prosecutor's Offices

There is a Public Prosecutor's Office for every District Court (total number 15), and a Senior Public Prosecutor's Office for every Higher Regional Court (total number four). At the level of the Supreme Court, there is a General Prosecutor's Office (§ 2 para 1 StAG).

The **public prosecutor's offices** at the level of district courts are in charge of conducting the investigative proceedings and representing the indictment in the trial stage. They are in charge of representing the indictment at district courts, within the territorial jurisdiction of this court. This task can also be performed by the **district prosecutors** (§ 20 para 2 StPO). They are not legal professionals, and only have limited authority. They work under the authority of public prosecutors, who control their performance (§§ 4 para 1 StAG; 41 DV-StAG). District courts do not (longer) have jurisdiction for the investigative proceedings.

The **Senior Public Prosecutor's Offices** supervise the public prosecutor's offices, which are subordinated to them and they represent the indictment at the Higher Regional Court (in appeal proceedings). The Senior Public Prosecutor's Office may, however, be directly involved also in the first instance proceedings in their jurisdiction and it may – in individual cases – take over the tasks and the authorities of the public prosecutor's office (§ 21 StPO).

The **General Prosecutor's Office** is a part of the structure of public prosecutor's offices, but it is not a criminal prosecution authority, and it is not authorized to issue instructions to Senior Public Prosecutor's Offices and Public Prosecutor's Offices. It takes part in all criminal proceedings at the Supreme Court. Only this office is authorized – of its own motion or upon request of the Federal Ministry of Justice – to file the “plea of nullity for the preservation of the law” (“*Nichtigkeitsbeschwerde zur Wahrung des Gesetzes*”) against every decision of the criminal court (even the final decisions), which are in breach of a law. The Supreme Court decides on such a plea.

5.2.5.2.2 Instructions and reporting obligations

The Public Prosecutor's Offices are independent of the courts (§ 1 StAG), but not of the Federal Ministry of Justice. From the hierarchical context of the public prosecutor's offices follows that the Federal Ministry of Justice may give **instructions** to the Senior Public Prosecutor's Office, which may – in turn – give instructions to the subordinated public prosecutor's offices. The General Public Prosecutor's Office may – according to the prevailing opinion – receive instructions from the Federal Ministry only on filing a plea of nullity for the preservation of the law.

On principle, instructions by the superior authorities have to be in writing and they have to be justified (§ 29 StAG). If an individual public prosecutor considers that the instruction that he received on handling the matter is against the law (on which he has to report to his superior) or if he demands a written instruction, the superior is obliged to issue a written instruction, or to repeat it in the written form. If he fails to do so, the instruction is considered withdrawn. If necessary, the public prosecutor is to be relieved from the case (§ 30 StAG).

Another way to control the public prosecutor's offices is the **reports**, which they are obliged to submit to the respective Senior Public Prosecutor's Office, whereas the Senior Offices submit their reports to the Federal Ministry of Justice. These reports are necessary either in specific types of criminal cases (§ 8 StAG), periodically (monthly and annual reports; § 10 StAG) or when there is a need to file a motion for conducting special investigative measures (§ 10a StAG).

5.2.5.2.3 Fixed distribution of cases; revision

A way to support independent work of public prosecutors is the fact that each public prosecutor's office must have a **fixed distribution of cases**. It is defined every year by the head of the office, and it can only be changed during the year if there are some serious reasons for doing so. The distribution has to be posted on the billboard of every public prosecution authority (§ 6 para 1, 5 and 6 StAG). It regulates precisely the criteria of distributing the new case files to individual departments, and those criteria may not be influenced by a superior officer (§ 4 para 1, 2 and 3 DV-StAG).

Moreover, the head of office can partly exclude a public prosecutor, who has gained appropriate experience and has at least ten years worked as a judge or a public prosecutor, from the control of his decisions or motions and transfer to such a public prosecutor certain generally outlined matters of public prosecution, which he can then handle independently. However, the right of **revision** should in any case be reserved for

cases of non-prosecution of a criminal offence, which would be in the jurisdiction of a lay assessors' court or a jury court (§ 5 para 4 and 5 StAG). Prosecutors who are **excluded from the revision** should be listed in the distribution of cases, and therefore this can only be changed during the year if there are some serious reasons for doing so (§ 5 para 1 DV-StAG).

5.2.5.2.4 Appointments

Only those persons who fulfil conditions for being appointed as judges can be appointed as public prosecutors. In addition, they have to have at least one year of practice as judge at a court or as a public prosecutor (§ 12 StAG).

Public prosecutors are appointed by the Federal Minister of Justice on the basis of (justified) proposals. They are appointed for an indefinite period of time, and proposed by a staffing commission, of which – depending on the type of the permanent post – at least half the members have to be public prosecutors. When appointing the head of a Senior Public Prosecutor's Office or the head of the General Prosecutor's Office, there is a staffing commission at the Federal Ministry of Justice, which is responsible for submitting proposals, and it consists of four members, of which two have to be representatives of the Ministry of Justice. One of these two members is appointed president of the commission and has the right to cast the deciding vote in case of a tie (§ 25 para 4 StAG) (§§ 20f StAG).

5.2.5.3 Courts

5.2.5.3.1 District Courts

District Courts are in charge of offences sanctioned by a fine or a prison sentence of up to one year. Decisions at District Courts are passed by a single judge. Investigative proceedings are not in the jurisdiction of these courts.

5.2.5.3.2 Provincial Courts

Provincial Courts are in charge of criminal proceedings regarding all other criminal offences. The decisions are passed by a **single judge** – with a few exceptions – in all cases, in which the possible sanction does not exceed five years. Criminal offences, for which the sanction exceeds five, but not ten years are, on the other hand, sentenced by a panel of two professional and two lay judges – **lay assessors' court** (“*Schöffengericht*”). All other offences fall into the competence of **jury courts** that decide on the guilt and together with the professional judges they decide on the sanctioning. In addition, the Provincial Court is the court of appeal against the decisions of the District Court.

If the Provincial Court conducts **investigative proceedings**, this is done by a single judge who has the following functions:

- Authorization of severe interferences with basic human rights (especially decisions on imposing and continuation of detentions pending trial);
- Extensive legal protection;
- Taking of evidence and instituting investigations in special cases (§ 31 para 1 StPO)

5.2.5.3.3 Higher Courts

The Higher Provincial Courts (“*Oberlandesgerichte*”) and the Supreme Court are in principle courts of appeal. In case of appeals against decisions of provincial courts in the pre-trial proceedings, it is the Higher Provincial Court that decides on these matters. The same refers to motions for the continuation of the proceedings, if it is not supported by the public prosecutor’s office (§ 195 para 1 StPO), or to an appeal against the indictment (§ 213f StPO). In the framework of the provisions of the GRBG, the Supreme Court may also become involved in the investigative proceedings, namely if the accused claims that his fundamental right to personal freedom has been breached by a decision or an order of a criminal court, and if all other legal remedies have already been exhausted (§ 1 GRBG).

5.2.5.3.4 The basis for the independence of judges

Judges are independent in the performance of their office (Art 87 para 1 B-VG). They are on principle irremovable and non-transferable. The official duties are distributed to judges in advance, for a certain period of time as defined by the court statutes. A case assigned to a judge according to this distribution may only be re-assigned by an order of a panel of judges, which is appointed according to the court statutes. This can only be done in case that the judge is prevented from fulfilling his/her duties or if he/she is unable to perform them within reasonable time due to the scope of his/her work (Art 87 para 1 and 2 B-VG).

The judge who was conducting the investigative proceedings, may neither act as a judge in the trial stage nor can he/she be a member of a panel of judges (§ 43 para 2 StPO).

Judges are appointed upon request of the federal government, by the Federal President or – upon his authorization – by the Minister of Justice, on the basis of proposals for appointment made by the special “Staff Chamber” (*Personalsenat*), whose members are judges (Art 86 B-VG).

5.2.5.4 The accused and his defence council

The accused is each person, who is – based on specific facts – suspected to have committed a criminal offence at the moment when an investigation is instigated against him/her or when they are coercive measures in place (§ 48 para 2 line 1 StPO). The accused has extensive rights, which are listed in the law (§ 49 StPO), for instance, the right to be informed on the investigative proceedings conducted against him/her and on the offence of which he/she is suspected, further to be informed on his/her essential procedural rights; the right to give a statement or to remain silent; the right to choose an attorney or – if he/she lacks funds to do so – to be appointed an attorney; the right to contact his/her attorney despite the arrest, to consult the attorney and to have his/her attorney present at the interrogation; the right to see his/her file; the right to request the taking of evidence; the right to file a complaint due to an infringement of a subjective right by the police or public prosecutor; the right to file an appeal against the authorization of coercive measures by the court, and the right to an interpreter (§ 49

StPO). Another important right of the accused is the right to file a motion to suspend the investigative proceedings (§108 StPO).

The right to information, examination of the file and appointment of an attorney may be temporarily limited due to certain reasons prescribed by the law (§§ 50 second sentence, 51 para 2, 59 StPO).

Besides the *right* to have an attorney from the beginning of investigation proceedings to the end of a criminal proceedings, in certain cases there is an *obligation* to appoint an attorney (§ 61 para 1 StPO), for instance, if the accused is in pre-trial detention, during the trial stage at the Provincial Court as lay assessors' or jury court (or in more severe cases also before a single judge). If the accused does not engage an own attorney in such a case, an attorney shall be assigned to him/her ex officio by the court. If the accused does not have sufficient financial means, the attorney shall be free of charge or only a part of the fees shall be charged (§ 61 para 2 and 3 StPO).

The appointment of an attorney free of charge is also foreseen – in the interest of justice – if the accused is not in a position to defend himself due to physical or other disability or due to the fact that he does not speak the language of the court, and in legal remedy proceedings – when filing an appeal or when in a difficult situation or difficult legal position.

Such an attorney is appointed free of charge by the Bar Association. If possible, personal wishes of the accused are to be taken into consideration when appointing an attorney (§ 62 para 1 StPO).

5.2.5.5 The victim and the victim's rights

The position of the victim of a criminal offence was fundamentally improved by the Act on the Reform of the Criminal Procedure. The term victim, which was newly introduced into the Criminal Procedure Act, was very extensively defined and covers not only the person who has suffered a material loss (as earlier), but also all those persons who are presumed to have been exposed to special emotional pressure through the criminal offence. The “victim” in the sense of the new Criminal Procedure Act is thus:

- Each person who was exposed to violence or dangerous threats or who could have been impaired in his/her sexual integrity through an intentional criminal offence;
- The spouse, companion, relatives in a straight line, brother or sister of a person who could have been killed by a criminal offence or other family members who were witnesses to a criminal offence;
- Every other person who could have been inflicted damage by a criminal offence or who could have otherwise been impaired in his/her rights protected by the criminal law (§ 65 line 1 StPO).

The victim is now an independent party to the criminal proceedings and enjoys extensive procedural rights, like

- The right to the legal aid of an attorney or a victim-support organisation,
- Various rights to information and participation and

- The right to file a motion for the continuation of proceedings dismissed by the public prosecutor's office (§ 66 para 1 StPO).
- Especially traumatized victims may request to be granted psycho-social as well as legal assistance in the proceedings (§ 66 para 2 StPO).

If the victim participates in the criminal proceedings as a „private person“ for reasons of claiming damages (§ 65 line 2 StPO), s/he has additional procedural rights, for instance the right to independently file motions to take or hear evidence, the right to subsidiary indictment, a right to a legal remedy – however limited only to civil-law claims – and, under certain circumstances – the right to be appointed an attorney free of charge (§§ 67 ff StPO).

As already mentioned, an important segment of victim's rights was already introduced into the current Criminal Procedure Act, as of 1st January 2006.

5.2.6 Collecting of Information and Evidence

5.2.6.1 Distribution of roles in taking of evidence

The *Public Prosecutor's Office* has – on the basis of the principle of proceeding *ex officio* and the obligation to investigate material truth – the task to collect all the evidence necessary to clarify the legal assessment of the facts of the case. In doing so, it has to take same care to investigate the circumstances that incriminate as the ones that defend the accused (§§ 3, 4 para 1 StPO).

The *accused* is also entitled to file a motion to take evidence during the investigative proceedings, however he is obliged to justify this motion if necessary (§ 55 para 1 StPO). The victim, who participates in the proceedings as a private person, also has the right to file a motion to take evidence.

5.2.6.2 Participation of the parties in the taking of evidence

The Public Prosecutor's Office is entitled not only to request the police to conduct investigations or to conduct investigations itself or by means of an expert witness, but it may – if this is deemed purposeful from legal or actual reasons – participate in all investigations conducted by the police, and in doing so it may issue individual orders to the one who is responsible for conducting such an official act (§ 103 StPO).

If the Public Prosecutor's Office hired an expert witness, then the expert witness is obliged to make it possible to the public prosecutor and to the other participants of the preliminary proceedings to participate in the taking of findings (§ 127 para 2 StPO).

In the case of reconstructing the offence, which has to be conducted by the court upon request of the Public Prosecutor's Office (§ 149 para 1 Z 2 StPO) and in cases of contradictory examination of witnesses and the accused, the public prosecutor, the accused, the victim and his/her representative may participate in the examination and ask questions (§§ 150 para 1, 165 para 2 StPO).

5.2.6.3 Opinion of the expert witness

Obtaining an expert opinion in the investigative proceedings serves the purpose of providing the Public Prosecutor's Office – and in exceptional cases the court – with the necessary specialized knowledge, in order to be able to determine and assess the facts relevant as evidence. In principle, it is the public prosecutor who has the authority to engage an expert witness during preliminary proceedings (§ 126 para 3 StPO). The parties to the proceedings, however, have the possibility to raise justified objections against the proposed expert witness (§ 126 para 3 StPO) or - to the extent that they are entitled to it – they have the right to file motions to take evidence.

5.2.6.4 Admissibility of the evidence gathered during preliminary proceedings

As already mentioned, the results obtained in the preliminary proceedings are primarily the basis for making a decision on further actions to be taken by the public prosecutor. On the other hand, however, this evidence should make it possible to quickly conduct the trial phase, in case of an indictment (§ 91 para 1 StPO). Consequently, they may also be introduced to the trial, as long as they do not infringe the principle of immediacy.

The court may rely on the expert witness opinion, provided in the preliminary proceedings, also in the trial stage, and it may call in the same expert witness. However, it remains the court's discretion, if it opts to proceed in this way or if it will engage another (additional) expert witness.

5.2.7 Coercive measures

5.2.7.1 Detention and remand

The law differentiates between „arrest“, which is followed by „detention on remand“.

The **arrest** is admissible if the perpetrator is caught „*in flagranti*“, if there is danger of his/her escape or danger of repeating or completing the criminal offence. As a rule, the arrest is mandatory in case there is suspicion of an offence, for which the prescribed penalty is at least ten years of imprisonment (§ 170 StPO). It is to be ordered by the Public Prosecutor's Office, on the basis of an authorization by the court, and the arrest is then made by the police. In the first mentioned case, as well as in the case of danger mentioned in three latter cases, the police may also make an arrest of its own motion, but then it has to deliver to the accused an authorization of this measure issued by the court, within 24 hours (§ 171 StPO). Within 48 hours, the detained person has to be taken to the prison of the competent court (§ 172 StPO).

The order for **detention on remand** is issued by the court upon request of the Public Prosecutor's Office. The remand is admissible only in case of a strong suspicion of a criminal offence, when the accused was previously examined on the matter and on the conditions of the remand, and only if there is danger of escaping or suppressing the evidence, or danger of repeating the offence, or if it is feared that the accused would commit the offence that he/she is suspected to have attempted (§ 173 para 2 StPO).

If possible, remand should be replaced by more **lenient means** (as, for instance, a pledge to behave in a specific way, bail, probation; § 173 para 5 StPO). In case of offences, for which the prescribed punishment is at least 10 years of imprisonment, remand is as a rule mandatory.

The accused has to receive a decision on the order for remand within 24 hours (§ 174 para 2 StPO). The order has to define the time limit for detention on remand, within which it is necessary either to conduct a hearing on the applicant's request for release or the accused is to be released. This time limit is 14 days from the day of ordering the detention on remand, one month when it is first prolonged, and two months when it is prolonged further. These deadlines are no longer necessary after the indictment has been raised.

Until the beginning of the trial, the detention on remand may last for two months if there is a danger of suppressing the evidence, and it may not exceed six months in case of a less serious criminal offence, and one year in case of a major crime. If the prescribed penalty for the criminal offence exceeds five years of imprisonment, the duration of remand may amount to up to two years (§ 178 para 1 and 2 StPO).

5.2.7.2 Search

Regarding the search of places and objects, as well as persons, the procedure depends on the severity of the intervention. Although the police may of their own motion conduct a search of a plot, room, vehicle or container, which are not publicly accessible, (§ 117 line 2 lit a StPO), as well as the clothes of a person or objects that a person carries with him/her (§ 117 line 3 lit a StPO), for the search of an apartment or another place protected by the householder's rights, and for the search of objects in them (§ 117 line 3 lit b StPO) or for the inspection of a naked body of a person (§ 117 line 3 lit b StPO), it is necessary to have a warrant by the Public Prosecutor's Office, authorized by the court.

5.2.7.3 Covert investigations

5.2.7.3.1 Surveillance of the telecommunications

In this context, the Austrian Criminal Procedure Act differentiates between „**information on the facts of a message transfer**“, which means „giving information on the transfer, access and location of a telecommunication service or a service of the information society“ (§ 134 line 2 StPO) on the one hand, and on the other hand „**surveillance of messages**“, which means investigating the **contents** of messages, which are exchanged and forwarded through a communication network or a service of the information society (§ 134 line 3 StPO). The preconditions of the admissibility of such measures are listed in the § 135 para 2 and 3 StPO.

Both types of investigative measures require a time-limited order of the Public Prosecutor's Office on the basis of an authorization by the court (§ 137 para 1 and 3 StPO). After it is completed, the Public Prosecutor's Office is obliged to serve this order and the authorization by the court to the accused and to persons affected by the measure. As a rule, this is to be done without delay (§137 para 5 StPO).

5.2.7.3.2 Observation and visual and acoustic surveillance

Observation means – according to § 129 line 1 StPO – covert surveillance of a behavior of a person. The police may, on principle, conduct this measure of their own motion. However, if this is done using technical devices or longer than 48 hours or outside Austria, then the police need to have a (time-limited) order of the Public Prosecutor’s Office. If technical devices were used in this investigative measure, the accused and the person affected by the measure have to be served the public prosecutor’s order, as a rule without delay after the measure is completed (§ 133 StPO).

Visual and acoustic surveillance of a person, according to § 134 line 4 StPO, means surveillance of behavior of persons, which represents a breach of their privacy and surveillance of their communication, which is not directly aimed at third persons. The surveillance is conducted using technical means for video and audio transmission and recording, without knowledge of the person under surveillance. It may be permitted only based on the principle of proportionality, and only in relation to major criminal offences – as, for instance, in cases of organized crime. It also covers invading the premises which are protected by the householder’s rights (§ 136 para 1 and 2 StPO). Preconditions for the surveillance of persons, which is limited to visual surveillance, are less strict (para 3).

On principle, it is necessary to have the public prosecutor’s order, authorized by the court, in order to be able to conduct visual or acoustic surveillance. Only in the case of kidnapping of a person the police may – within certain limits – conduct such a surveillance of their own motion (§ 137 para 1 and 3 StPO).

After completing the investigative measures, the Public Prosecutor’s Office has to deliver to the accused and to the affected persons the surveillance order and the court authorization. As a rule, it has to do so without delay (§ 138 para 5). The accused (and to the limited extent also the affected person) has the right to inspect and hear the results of the surveillance. If they are not relevant for the criminal proceedings or if they may not be used as evidence, they are to be destroyed either upon request of the accused (partly also upon request of the affected person) or destroyed ex officio.

5.2.7.3.3 Covert investigation

Covert investigation, which means use of units of the criminal police or use of other persons, ordered by the police, whereas such units or persons do not reveal or indicate their official position or their orders (§ 129 line 2 StPO) is admissible for the discovery of a criminal offence of longer duration, and only in cases of major criminal offences, on the basis of the (time-limited) public prosecutor’s order. As a rule, the public prosecutor’s order has to be delivered to the accused and the affected person without delay, after the measures have been conducted (§ 133 para 1, 2 and 4 StPO).

5.2.8 Ending the proceedings in the pre-trial stage

The results of the investigative proceedings are either the basis for dismissing the case, or for discontinuing with the proceedings, for withdrawing the prosecution after the offer for a diversion measure has been accepted, or for the indictment.

5.2.8.1 Discontinuation of the proceedings

The public prosecutor has to dismiss the case and discontinue with the investigative proceedings if the offence is by definition not an offence punishable by the court or if there is otherwise no legal or actual reason for further prosecution of the accused (§ 190 StPO).

Moreover, in case of less severe criminal offences, the proceedings are discontinued, if the nuisance value of the offence is considered negligible, especially regarding the extent of the guilt, consequences of the offence and the behaviour of the accused after the offence, and if there are no general or special preventive considerations that would require a penalty (§ 191 StPO).

Such proceedings may at any moment be continued by the public prosecutor – within the statute of limitations – if the accused has not been interrogated or exposed to coercive measures due to the offence or if there is new evidence.

The public prosecutor may also – under conditions defined by the law (§ 192 StPO) – terminate proceedings regarding individual criminal offences (out of several different offences) or do so reserving the right to prosecute at a later stage (this is, however, time-limited by the law).

The victim and other persons, who have a legal interest in prosecution, may file a **motion to continue the proceedings** to the public prosecutor's office, and the public prosecutor may either grant the motion or refer it to the Higher Regional Court for decision. If the motion is granted by the court, the Public Prosecutor's Office is obliged to order the continuation of the proceedings (§§ 195 f StPO).

If investigations are conducted against absent or unknown perpetrators, proceedings are **suspended** after all possible investigative actions and available evidence has been taken, and are continued only after the suspect has been discovered (§ 197 StPO).

5.2.8.2 Diversion

As long as the indictment has not been raised and if the criminal offence is not in the scope of jurisdiction of a regional court as a jury or lay assessors' court, if the guilt of the accused is not considered significant and the offence had not resulted in a death of a person, the Public Prosecutor's Office may withdraw from the prosecution of the offence if the accused pays a certain amount to the federal state, according to the prosecutor's proposal (§ 200 StPO) or if he/she is ready to do community service (§ 201 ff StPO), or fulfils certain obligations within a probation time of up to two years (making amends) under the supervision of a probation officer (§ 203 StPO), or if the accused and a victim reach a settlement, which naturally requires consent of the victim (§ 204 StPO).

If the accused does not fulfil the obligations that he/she accepted in this way, the Public Prosecutor's Office will – as a rule – continue the proceedings against him/her (§ 205 para 2 StPO).

5.2.8.3 Indictment

If there are no pre-conditions for discontinuing with the proceedings or to withdraw from the criminal prosecution on the basis of a diversion measure, the Public Prosecutor's Office shall proceed with the indictment. It will do so at the Regional Court as a jury or lay assessors' court on the basis of a **bill of indictment** (that has to be justified), and with an individual judge or at the District Court it will do so on the basis of an **application for leave to prosecute**.

The accused is entitled to a legal remedy against the bill of indictment, and it is the Higher Regional Court that decides on his/her appeal.

5.2.8.4 Discontinuation based on the motion of the accused

The investigative proceedings may, however, also be terminated in a way that the accused files a motion to dismiss a case, which is either granted by the prosecution authority, or it has to be referred to the court, which then decides on it.

Such a motion is to be granted, if it is clear that the offence that is being investigated is not punishable by the court or if further prosecution of the accused is legally not admissible, but also,

„if the suspicion does not justify the continuation of the investigative proceedings, neither according to its urgency nor its severity, nor with regard to the length and the scope of the investigative proceedings up to that point, and if it is not expected that the state of facts will be clarified or the suspicion further intensified“.

In the latter case, the deadline for filing this motion is three, i.e. six months from the beginning of the criminal proceedings (§ 108 StPO).

5.3 The system of preliminary criminal proceedings in Germany⁶²

5.3.1 Sources of criminal law and procedure

As according to the German Constitution (“*Grundgesetz*”) the single states do not have legislative competence in the fields of criminal law and procedure, all penal legislation in Germany is federal legislation.

The main source of German criminal procedure law is the Code of Criminal Procedure (CCP; “*Strafprozessordnung*”) dating from 1877 on the basis of the German Constitution as well as the European Convention on Human Rights that was ratified by Germany in 1952 (although not implemented at the constitutional level). Numerous reforms of the CCP made it necessary to publish two updating laws in 1975 and 1987, which have themselves since been modified. Another central source of criminal procedure law is the Judiciary Act (“*Gerichtsverfassungsgesetz*”) dating from 1877 as well, republished in 1975, which establishes and describes the German court system and determines the competence of the courts as well as of the public prosecutor (jurisdiction, staffing, internal organisation, appointment of lay judges; procedural regulations). The Introductory Act to the Judiciary Act provides for judicial control over administrative measures of authorities involved in criminal proceedings; this judicial procedure is subsidiary to the remedies set forth in the CCP. There also exists a German Judges’ Law (“*Deutsches Richtergesetz*”) which defines principles on the position of judges.

Also the Criminal Code (“*Strafgesetzbuch*”) contains regulations relevant to criminal procedure (crimes that need a formal complaint by the victim to be prosecuted, rules of statute-barred prosecution). The Juvenile Court Act (“*Jugendgerichtsgesetz*”) lays down special procedural rules and sanctions for juvenile offenders (14 to 21 years of age). Some provisions of the Code of Civil Procedure are applicable in criminal proceedings where the CCP expressly references them (e.g. securing seizure measures).

The professional responsibilities, ethics and duties of lawyers are set forth in the Federal Advocates’ Law (“*Bundesrechtsanwaltsordnung*”).

Police laws fall under the competence of the single states, but there is a federal law concerning the federal office for crime (“*Bundeskriminalamtsgesetz*”).

Although the German system is no case-law system the Supreme Court decisions play an important role. But also doctrine in the field of criminal law enjoys considerable authority in Germany.

5.3.2 Course of criminal procedure in the first instance

Pre-trial proceedings are opened by the public prosecutor or by the police depending on the way in which the offence becomes known. In theory, a preliminary inquiry is carried out by the public prosecutor to check that the reported acts and suspicions are well grounded and that the offence has indeed been committed. In practice, however, a

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⁶² For comprehensive accounts of German criminal procedure law refer e.g. to *Beulke* (2005) or to *Kühne* (2003). Brief presentations in English are given by *Esser* (2004) and *Juy-Birmann* (2005).

complaint is dealt with directly by the police, who only transmit a final report to the public prosecutor, summarising the statements taken and the evidence found.

As for the tasks and powers and the distribution of roles between the main actors during pre-trial proceedings see below.

After the investigation has been completed the public prosecutor decides whether to drop the case, to dismiss it or to file charges. In the last case the prosecutor brings the charge before the court by a written indictment. The prosecutor determines the competent court by the nature of the charge brought.

The stage of **intermediate proceedings** mainly serves the protection of an innocent accused from a public trial. The court before which the main trial would take place decides if it actually will be held. Before this decision is rendered, the indictment must be communicated to the accused. The court may take more evidence, may refuse to proceed with the trial or may order the accused to stand trial according to the prosecutor's indictment or with alterations.

The **main trial** is governed by the principles of oral and public proceedings, free evaluation of evidence and the principle of immediacy with only few exceptions. This phase is dominated by the judicial search for truth rather than the struggle between the parties and the court ensures that there is equality of arms between the accused and the public prosecutor. Main part of the trial is the evidence taking, i.e. examination of witnesses and experts, reading out of documents, inspection of other material etc. According to the principle of immediacy the court must take all evidence in open trial in presence of the accused and the prosecutor. Offering evidence enables the public prosecutor and the defendant (accused) to take an active part in establishing the truth, by requesting the trial court (on which, in the German conception of a trial, the burden of proof rests) to produce or to obtain evidence. As a rule, no evidence obtained outside of the main trial may be a ground for conviction. Audio-visual taping of the witness' statement in the pre-trial stage and the showing of that recording during the trial is allowed only where it is necessary to avoid an imminent and serious danger to the witness. The hearing of a witness can be replaced by the reading by the judge of a statement of his previous declarations taken by a judge in cases of absence, distance, death, mental imbalance, or when the public prosecutor and the defendant (accused) consent to it. A statement taken by the public prosecutor or the police can only be read at the hearing with the consent of the public prosecutor, defence counsel and the accused, and if the person has died or cannot be heard in the near future.

With respect to charges of minor offences dealt with at the district court accelerated proceedings are available.

5.3.3 Organisation of criminal justice authorities

5.3.3.1 Police

The German constitution entrusts the organisation of security and police forces to the states, whilst reserving to the federal government the possibility of creating certain central bodies such as the frontier police and security services. Provision for cooperation

between the Federation and the states is nevertheless made, on the one hand as regards the police by means of the federal office for crime and on the other hand to protect the existence and the well-being of the Republic.

The police of the states are made up of two categories with different attributes: “investigators of the public prosecutor” (“*Ermittlungspersonen der Staatsanwaltschaft*”) and the rest. All members of the police can carry out arrests or identity checks on the arrested person, but only investigators have further powers of investigation in urgent cases (such as seizure, searches, blood tests).

5.3.3.2 Prosecution Service

Except for the federal prosecutor's office (*Bundesanwaltschaft*), a special body allocated to the federal court of justice (headed by the federal attorney general/*Generalbundesanwalt*), whose competence is limited to the prosecution of certain enumerated offences against the interests of the Federal Republic (*Staatsschutzdelikte*) and enumerated serious crimes if the case bears „special importance“, public prosecution is in the responsibility of the states. The federal attorney general is subordinate to the federal minister of justice and is the hierarchical superior of the federal public prosecutors (*Bundesanwälte*), but he possesses no authority over the public prosecutors of the states.

Every state has its own prosecution service, which is subordinated to the state ministry of justice. The public prosecution service shows a monocratic and hierarchical organisation. Headed by a general prosecutor (*Generalstaatsanwalt*) who is allocated to the regional high court, prosecution is conducted by local prosecution offices, which are allocated to the regional courts. The general prosecutor is subordinate only to the minister of justice of that state and thus is the only higher official among the members of the public prosecutor's office who exercises his duties in the different courts of the area. In 2003 there were 5,156 public prosecutors in Germany (without auxiliary prosecutors [*Amtsanwälte*], who are additional personnel, who have passed a special practical training, but are not lawyers; usually they have to comply with less complicated cases such as, e.g., minor traffic offences, in their own responsibility; therefore their status is more than an assisting one; there is no number available).

To fight special types of crimes special prosecutors (*Sonderdezernenten*) are appointed and there are also established special prosecution offices (*Schwerpunkt-Staatsanwaltschaften*) for drug crimes, economic crimes, wine crimes and environmental crimes.

The legal position of the individual prosecutor, who is a civil servant, is ambivalent: On the one hand he is part of the judicial system (a so-called organ of the judicial system). On the other hand he is part of the executive branch with its administrative hierarchy which means that, unlike a judge, he explicitly has no independence in his or her decision-making. In the abstract, the prosecutor is bound by guidelines, and on the individual level he can be instructed to deal with a certain case in a particular way or can even be replaced from the handling of a particular case at any time. Further bureaucratic factors such as, e.g. reporting obligations, monitoring and disciplinary systems, qualification requirements for advancement or even canons of professional etiquette, may also be seen as – mostly indirect – means of (influence and) control.

The existing guidelines are numerous and diverse, in some cases they even overlap as many different agencies have the competence to issue such regulations. Some of these are exclusive, others can be supplemented. With the exception of some general guidelines issued by the federal ministry of justice, most of them have not been published. Instead, they are handled as internal affairs, thus being removed from public and scientific discussion as well as from parliamentary control. There even exist rules based on circular letters on the local level. The situation may have contributed to the development of regional or even local “tariffs”. In general, these guidelines deal with two different criteria: offence and offender related requirements.

There exist two state transcending prosecution authorities that do not indict on their own but inform the public prosecutor: the *Zentralstelle in Ludwigsburg* investigating nazi violent crimes and the *zentrale Beweismittel- und Dokumentationsstelle* at the general prosecutor's office in Braunschweig documenting violent acts committed by state agents of the GDR.

5.3.3.3 Court⁶³

Criminal cases are initially heard at a district court (“*Amtsgericht*”; cases are heard by a single judge or a panel of one professional and two lay judges), at a regional court (“*Landgericht*”; cases are heard by two different kinds of chambers; the “*kleine Strafkammer*” and the “*große Strafkammer*”, which also sits in three special forms as jury court, as division for state security and as division for economic crime) or at the regional high court (“*Oberlandesgericht*”), but limited to terrorism or extraordinary political crimes against the security of the state. There are about 690 district courts, 116 regional courts and 25 regional high courts. There also exist special juvenile courts. The federal court of justice never hears a case of first instance.

The Federation administers the federal courts and tribunals, while all other courts come under the jurisdiction of the states.

Judges are independent and irremovable according to the German Constitution and the German Judges Law. A judge can be deprived of his functions only when the law so provides. Hierarchical control is exercised by the president of the court, who is himself subject to the control of the minister of justice of the state, but this control must never affect his judicial activity; a judge can thus only be disciplined to the extent that this does not impinge on his judicial freedom.

5.3.4 Functions of pre-trial proceedings

As to the functions and aims of pre-trial proceedings it is to be said that first of all pre-trial proceedings are designed to discover whether an offence can be attributed to the defendant, and if so, to institute a prosecution. It therefore serves to inform the public prosecutor about whether to file charges or to drop or dismiss the case. One major aim of pre-trial proceedings is the preparation of the indictment. As mentioned above (2) in the main trial the taking of evidence therefore starts again right from the beginning. This kind

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⁶³ Please also refer to the overview of the courts of law in the Federal Republic of Germany in the annex to this chapter.

of repetition shows that all investigation carried out during the pre-trial phase primarily serves the purpose to strengthen the suspicion against a person so far that a trial court is given enough reason to investigate itself. Only in the second place pre-trial proceedings also serve the aim to collect evidence that under exceptional circumstances (because of the principle of immediacy) may be admitted in the main trial. As to the right of the defendant to be heard as well as to questions of detention and arrest to secure the presence of the defendant see below. To secure financial values, the possibility of seizure and confiscation exists.

5.3.5 Possibilities to terminate pre-trial proceedings by the public prosecutor

5.3.5.1 Legal possibilities to drop cases

According to the principle of legality (at least in its traditional), every case must be brought to court if there is sufficient cause (evidence), otherwise the case has to be closed. If a case is dropped, the prosecutor must set forth the grounds for his decision in a written form. He has to notify any claimant in the case of the decision not to proceed. A claimant who is the victim of the crime must also be informed of the possibilities of review. Without a formal intervention of an individual claimant no judicial control of the prosecutorial decision takes place, neither *ex ante* nor *ex post*. This includes, accordingly, also the discretionary elements that may have affected the decision.

In addition, there is a special instrument that allows the prosecutor to avoid prosecution. If the prosecutor determines that *public interest does not require public prosecution*, the case can be referred to private prosecution ("*Privatklage*"). As a result, the case will not be officially charged by the prosecutor's office. It is in the prosecutor's discretion to affirm or to deny public interest, a decision that in principle cannot be challenged; even if later the case is brought before court at the instigation of the victim (acting as a private prosecutor) the original decision of the prosecutor remains unchallenged. Internal court statistics indicate that only about one percent of all cases referred to private prosecution are further pursued by the victim. In light of these findings, relegation to private prosecution has developed towards an option that is similar to other types of dismissals without judicial control. This legal option is, however, available for listed offences only (e.g. unlawful entry or trespassing, defamation, violation of confidentiality of mail, common assault, intimidation or vandalism). Private prosecution of these crimes may be brought only after conciliation was unsuccessfully attempted by a conciliation board.

5.3.5.2 Legal possibilities to dismiss cases

The second track of prosecutorial case resolution is the dismissal of cases. Dismissal means that the formal proceeding is abandoned before (and without) bringing the case to court. Dismissals can be divided into two categories: unconditional and conditional.

5.3.5.2.1 Unconditional dismissals

Prosecution can be dismissed without the defendant experiencing any further consequence. Although the public prosecutor takes a formal decision to conclude the case

(diversion in the sense of an official reaction to the offence), there is no further intervention (i.e., no sanction). In light of this lack of consequences this type of reaction can be described as "diversion to nothing". The law provides several options for this category of dismissal.

- The most important one is dismissal in cases of **minor guilt** and **lack of public interest** in prosecution (art 153 para 1 CCP). In general, this provision is applicable with regard to all **misdemeanours** ("*Vergehen*"), i.e., all offences punishable by a minimum sentence of less than one year or a fine. Before taking this decision the prosecutor has to obtain the agreement of the court. In the case of **petty offences** ("if the consequences are minor"), however, the public prosecutor can dismiss even without seeking judicial agreement. Prior to the reform of 1993 the consent of the court was necessary in these cases as well. Since then, the prosecutor is independent from the judiciary in his decision-making power within this field of delinquency.
- In addition, dismissal can be granted if the defendant has participated in **victim/offender mediation and/or compensated the victim** (art 153b para 1 and art 46a CC). In contrast to the above mentioned option this provision requires positive action from the offender, i.e., he has to demonstrate the required restorative effort(s). In accordance with the principles of unconditional dismissal, however, these efforts may not be imposed by the prosecutor. They have to be initiated by the offender in advance. As this option is applicable to all offences that would be punishable by no more than one year of imprisonment (or a comparable fine), it requires the agreement of the court.

All **other** non-intervening categories of dismissals can be accomplished without any judicial participation. These are the following:

- There exist **various forms of dismissals in proceedings against juveniles**, such as dismissals in cases of minor guilt and lack of public interest, dismissals if an educational action has been carried out or if the juvenile has participated in a victim/offender mediations dismissals in cases of minor drug offences if the defendant's guilt is minor and there is a lack of public interest, dismissals for reasons of prosecutorial efficiency (art 154, 154a CCP) and dismissals for technical (policy) reasons, including cases of extradition (art 153c/d, 154b CCP).
- Finally, an additional form of 'extraordinary' dismissal based on reasons of political expediency is available for dealing with **repentant offenders** who committed a crime against the (external) **national security** (art 153e CCP). The possibility to dismiss cases for mere investigative interests as provided by the so-called "Key Witnesses Act" of 1990 – which originally was in force until the end of 1992 but was repeatedly extended – expired (automatically) at the end of 1999. The Act provided that a dismissal could, under certain circumstances, be granted for key witnesses in cases of terrorism and organized crime. Critics argued that this kind of dismissal would exceed, from a doctrinal perspective, all other options for expediency available in Germany as it abandons punishment for purposes of police interests of efficiency. During the decade in which it was in

force this highly controversial legislation was applied in no more than a handful of cases.

5.3.5.2.2 Dismissals under conditions

German law also provides a variety of options for dismissals combined with so-called “conditions” that have a double impact. From a procedural perspective they have a conditioning function in its technical sense: only after the “conditions” imposed have been fulfilled by the defendant does the – provisional – dismissal become final and unappealable. On the substantive side, the so-called conditions have the legal character of an informal kind of sanction: they are not penalties in the strict sense; nevertheless they have a certain punitive character, and impact. This is why, for the most part, they can only be imposed if the other participants in the proceedings, namely the court and the defendant, have consented.

Of particular importance is the dismissal for misdemeanours "unless counter-indicated by the weight of the defendant's guilt" (art. 153a s.1 CCP). The scope of applicability of this article was significantly widened in 1993. Formerly, a case could only be dismissed in cases of minor guilt. Now, the exceptions provided by the law have swallowed the rule.

In principle, this type of dismissal also requires the agreement of the court. However, just as provided in art. 153, the reform of 1993 also abolished the requirement to obtain the consent of the court "if the consequences are minor". Thus, for the first time, the prosecutor was given the power to impose “sanctions” without any further judicial control.

The types of “conditions” available for adult offenders are, in particular:

- Victim compensation orders,
- Transaction fines,
- Community service orders,
- Mediation orders,
- Maintenance orders.

Looking at empirical data one can find that whereas the overall level of application of diversion measures increased everywhere in Germany over the years, the diversion practice in Germany is not at all uniform. Moreover, the temporal development indicates that the variance of application amongst the federal states is steadily broadening.

In the field of **juvenile** justice a case can be dismissed if the juvenile offender has admitted that he committed the offence and if public prosecution seems unnecessary in light of the conditions fulfilled. The “conditions”, which for juveniles have the legal nature of “educative measures”, – unlike in the case of adult offenders – are imposed by the juvenile court, subsequent to a suggestion submitted by the prosecutor. The types of measures available for juvenile offenders are: warnings, community service orders, efforts to reach victim/offender mediation, participation in driving lessons.

Dismissal in the case of *minor drug offences* is possible if the concrete penalty would not exceed more than two years, the defendant is willing to participate in rehabilitative treatment and successful rehabilitation can be expected.

Today, the position of the public prosecutor in Germany is characterized by a significant increase of competence. This growth of prosecutorial influence includes two aspects: the competence of selection and the competence of sanctioning, consisting of a negative (non-prosecution) as well as a positive (imposing of sanctions) side.

These competences have been steadily extended by the legislature and taken up by the prosecutors in their decision-making. This development indicates a significant shift of influence in favour of the prosecutorial level. Indeed, the proportion of criminal case resolution conducted under the responsibility of the judiciary has been steadily declining, in particular with regard to most kinds of mass delinquency. As a result, in contradiction to the original rationale of the system (with its distribution of power), regular court hearings have become a rather exceptional event in penal case resolution.

5.3.6 Scope of action for the court

If the public prosecutor has already brought in charges the court can end proceedings with the consent of the public prosecutor and the defendant on grounds of art 153 CCP as well as art 153a CCP.

Articles 153 and 154 CCP enumerate a series of cases where the court has power to allow all or part of an accusation to be dropped. In all these cases the public prosecutor must either consent to this or request it.

When the facts presented appear to be of minor importance, the court can decide to drop charges in a procedure instigated by a private complaint. The order is subject to appeal by the public prosecutor or the victim.

In addition to the various types of dismissals, the public prosecutor also has, as a third track, the competence to formally propose sanctions by means of the so-called **penalty order** (“*Strafbefehl*”). In regulatory offences cases, the prosecutor can apply for a verdict and, simultaneously, if a court trial seems unnecessary, propose the concrete penalty to be imposed upon the offender (arts 407 et seq. CCP). The application replaces the charge. It is written by the public prosecutor and has to be signed and issued by the responsible judge. The prosecutor can propose either a fine or a suspended prison sentence of up to one year as well as several additional measures such as forfeiture, suspension of driver's licence up to two years, etc. The defendant needs not be heard in advance. If there is no appeal the penalty order has the same legal implications as a regular court verdict, i.e., among other consequences, registration in the criminal records.

Formally speaking, the prosecutor is just proposing the penalty to the judge who has the final decision; in everyday practice, however, once the order is submitted, its acceptance by the judge is almost a foregone conclusion. In some federal States, about 75 percent of all convictions, and even more than 80 percent of all fines, have been imposed through a penalty order in recent years. This means that criminal sanctions imposed subsequent to and on the basis of a regular court trial have become an exceptional event in the processing of everyday cases. As a consequence of this development, a majority of

offenders who have been formally convicted never encountered a judge. Instead, the prosecutor has gained a quasi-adjudicatory role in these cases.

If we look into the figures given in the annex to this chapter it appears that of the overall 4,766,060 cases, dealt with by public prosecutors in 2003, 1,041,805 files were not finalised but sorted out to be dealt with by another office or combined with another file.

- Of the remaining 3,724,265 cases a portion of 573,345 **charges** were pressed amounting to **15.4%**.
- The largest part, namely 1,273,673 cases (or **34.2%**) was **dismissed for a lack of evidence** or similar reasons.
- An amount of 998,845 cases (**26.8%**) was unconditionally terminated, mostly on the basis of **insignificance**.
- 265,909 (**7.14%**) cases were conditionally terminated, mostly on the basis of the **divertive sanctioning powers of public prosecutors** referred to above.
- Finally, 603,999 cases (**16.2%**) were dealt a **penal order**.

If we take a closer look into the ratio of all cases decided under prosecutorial responsibility (counting all penal orders, which are, notwithstanding the formal responsibility of the courts, mainly influenced by the prosecutors, plus all conditional as well as unconditional dismissals, the latter ones included because of the intervening character of the proceeding) compare to cases finalized by a regular court hearing (based on a charge) it appears that, whereas in 1981 the proportion was 131 prosecutorial sanctions per 100 charges, the ratio increased up to 326:100 in 2003. This means that the prosecutor's leading role as the imposer of "sanctions" (the term used in a broad sense) has more than doubled over about two decades. In other words, today, not even quite one out of four cases that pass through the criminal justice system in Germany is still concluded by a response that is determined under the auspices of the courts.

Has this development resulted in a net-widening effect? Not necessarily. To the contrary, the data presented indicate that the growth of cases has, at least on the whole, resulted mainly in an increase of unconditional dismissals. However, one must take into consideration the fact that a prosecutorial decision is different in its legal character than a judicial one. Criminal law takes on the character of "administrative" law with the result that its application might tend to follow considerations of opportunity rather than purely legal precepts. One practical consequence could be lesser predictability and more inequality in sanctioning practices.

These developments are, to a great extent, the result of a practical caseload pressure. Due to limited resources – the number of prosecutors, in contrast to the number of cases, has not significantly increased – prosecutors need opportunities for discretionary case resolution. Even before the introduction of art 153a CCP in the mid-seventies, prosecutors had in practice established some discretion, though on an informal basis.

Thus, the doctrinal dichotomy between the principle of legality and the principle of expediency has, to some extent, lost its significance in the face of work pressure.⁶⁴

5.3.7 Accelerated procedure

In the case of an offence tried by a district court carrying a maximum prison sentence of less than one year, where the facts are uncontroversial and an immediate trial is possible, the public prosecutor may request the offence to be dealt with in an accelerated procedure. The court may refuse and refer the case back to be tried in ordinary procedure.

5.3.8 Distribution of power between the state authorities within pre-trial proceedings

The distribution of power between the public prosecutor and the judiciary as well as between the public prosecutor and the police is regulated in a quite precise manner by law.

5.3.8.1 Role of the police

According to the CCP as well as the Judiciary Act, the public prosecutor is the head of the proceedings during the whole period of investigations. Though carried out by the police and their (technical) support units, all investigations are conducted **under the responsibility of the public prosecutor**. Although, according to the law the police are merely an auxiliary of the public prosecutor, **in practice it is widely the police who conduct investigations**.

The police intervene either on their own initiative by taking protective measures in order to avoid obscuring the case or upon instruction from the public prosecutor. The police have the duty of initial seizure, which means that they have to ensure when they arrive at the scene of crime that the evidence is preserved.

The federal office for crime (BKA) at the federal level fulfils mainly a supporting function; by its own motion, it can only investigate a limited number of crimes of federal concern, like terrorism or internationally organized crime.

For some coercive measures that need a judicial order or warrant the prosecutor or even the police may order the measure or issue the warrant themselves in case of urgency.

The police have no discretionary powers at all. As soon as the investigations come to an end – and no later –, all files must be passed on to the prosecutor, who alone has the competence to decide whether or not there is sufficient evidence to bring the case to court (i.e., the so-called monopoly of charge).

5.3.8.2 Role of the public prosecutor

The powers of the public prosecutor in pre-trial proceedings are wide, as he is in charge of the inquiry; he records the complaints of victims, instigates and conducts the

⁶⁴ See also the attached table at the end of the document.

prosecution, directs the police inquiry, orders certain coercive measures in an emergency (see below).

As soon as the case is filed to the court, responsibility for handling the case shifts to the court. The public prosecutor can plead for conviction; it is, however, solely up to the court to decide whether or not a defendant is guilty or not and what (concrete) penalty to impose on him or her.

Without judicial control the prosecutor and the police may take photographs and fingerprints of a defendant, establish the identity of a person, order the apprehension of persons disrupting official activities and order a provisional arrest. For some coercive measures that need a judicial order or warrant the prosecutor or even the police may order the measure or issue a warrant in case of urgency.

In Germany the public prosecutor basically and traditionally has the duty to investigate and to bring to court every crime that officially comes to his notice, if there is sufficient cause (principle of legality); with respect to petty offences, the public prosecutor, however, may drop the case on the basis of his limited discretionary power (see above 4).

The public prosecutor is also obligated by law to be impartial and objective, that is, to look for both incriminating and exonerating circumstances (principle of ex-officio inquiries, i.e., the legal obligation to search for the material truth). At least in theory, the prosecutor represents the criminal justice system as a whole and is not given the status of a party to the proceedings. The law even provides that the prosecutor may initiate appeals or motions for a new trial in favour of a defendant. With regard to this power the prosecutor holds the position of a watchdog of legality even with respect to judicial decision-making.

The public prosecutor must be permitted to be present during the examination of the accused, a witness or an expert by a judge.

During pre-trial proceedings the choice of expert and the decision on the number of experts is made by the public prosecutor.

5.3.8.3 Role of the court/judiciary

With the reform of criminal procedure law **in 1975, the position of the investigating judge in cases of serious crimes was abolished** in favour of an **unlimited competence of the public prosecutor** to investigate during the pre-trial proceedings. The pre-trial involvement of the court therefore is very limited; a judge (who later-on may not sit as a trial judge) can intervene only on application of the public prosecutor to order a coercive measure where the law expressly demands a court decision.

Depending on the seriousness of their interference into the private sphere of a suspected person, some coercive measures must be ordered by a judge, i.e. the order of an arrest warrant and detention on remand, the provisional committal of the accused for observation to a mental hospital, an order for a molecular and genetic examination, acoustic monitoring on the private premises of the defendant, the provisional withdrawal of permission to drive or the provisional prohibition of pursuit of an occupation.

The judge is responsible for verifying the procedural regularity of the act referred to him, without, however, going into the merits. The intervention of the judge is therefore limited to supervising the legality of coercive measures, which the prosecutor can order to be used against the defendant. However, in assessing the need to authorize the measure and by weighing up the level of suspicion and the seriousness of the case, the judge implicitly controls the appropriateness of the measures.

For some coercive measures a judicial order or warrant is needed, but in case of urgency (where there is no time to seek an order from the judge without endangering the effect of the measure, the prosecutor or even the police may order the measure or issue the warrant themselves. This category of measures includes physical examination of a person, seizure, computer-assisted search, seizure of mail, and interception of telecommunications, the videotaping and acoustic monitoring of the private communication of a defendant outside his private accommodation by technical devices (small bug attack), search, road traffic controls and the use of undercover investigators.

In detail telephone-tapping must be ordered by a judge or, in urgent situations, by a public prosecutor, who must then have his decision confirmed by a judge within 3 days. An intimate search of persons must be ordered by a judge, public prosecutor or (in an emergency) the police and is carried out by a doctor. A search of premises must be ordered by a judge, public prosecutor or, in urgent cases by the police. Objects discovered as result of the search of a person or of premises can be seized if they are useful to the establishment of the truth. The seizure may be authorized by a judge (who alone may authorize seizures from the premises of an editor or publisher, or a radio or television station), or on the order of a public prosecutor or his police auxiliaries.

5.3.8.4 Specific distribution of roles in detention procedure

A police officer or citizen who witnesses an offence can **arrest** its author in a situation where the identity of a perpetrator is unknown or there is a risk that he may escape.

The public prosecutor and the police officers under his jurisdiction can take all measures which will assist in discovering the identity of someone suspected of an offence, including placing the defendant in **provisional police detention** for a maximum of 12 hours and contacting a relation or other trusted person of his choice. Provisional police detention also may last for a maximum of 12 hours for arrests in cases of commission of a recent or recently discovered offence.

Otherwise a person can be arrested only on the basis of an arrest warrant issued by a judge. The warrant is effected by the police. At latest on the next day the defendant must appear before a judge, who informs a close relative of his arrest, proceeds with the interrogation and decides whether or not to keep the arrested person in custody.

An arrest takes place where there is serious evidence against the accused, in addition to one of the following situations (partly under additional restrictions):

- The defendant may otherwise abscond;
- There is a risk that the procedure will be obscured by interfering with the witnesses or the evidence;
- The offence is particularly serious;
- When there is a risk of an offence subsequently being repeated.

Custody is subject to the principle of proportionality. Custody ceases at the request of the public prosecutor; the judge is bound to observe this, as the preparatory phase is directed by the public prosecutor. The detained person may make an application for bail or lodge an appeal against remand in custody. There is also provided a regular review, first after 3 months, when the accused does not have a lawyer and has not requested bail or lodged an appeal; secondly after 6 months, a check is conducted by the regional high court every three months. In principle, custody must not exceed 6 months, but it can be prolonged by periods of 3 months by the regional high court for the purposes of the investigation; it is deducted from the prison sentence finally pronounced.

During the interrogation in custody, the police, the public prosecutor or the judge must inform the defendant that he has at all times the right to the assistance of a lawyer of his choice.

5.3.9 Participation of the parties

5.3.9.1 The defendant and the defence

German terminology to indicate the defendant varies according to the legal situation in which he finds himself in the course of the procedure. He is called "*Beschuldigter*" during the inquiry, "*Angeschuldigter*" after the institution of proceedings and "*Angeklagter*" after the beginning of the trial phase.

The defendant's procedural rights have not been enumerated by the CCP in a special chapter. Some procedural guarantees are not even explicitly mentioned in the CCP, but have been established by the criminal courts or the federal constitutional court on the basis of the rule of law, such as the right to remain silent and the right against self-incrimination (art. 6 s. 3 ECHR). The basis is the constitutional right to be heard.

The defendant has the right to consult defence counsel of his choice at any stage of the proceedings (once he has been notified of the charges held against him). When the accused is questioned in pre-trial proceedings the presence of a defence counsel is obligatory if the interrogation is conducted by a judge, but is systematically excluded if the judge deems that there is a danger to the success of the investigation. Presence of defence counsel is optional when the interrogation is conducted by the public prosecutor. While defence counsel has no right to attend the interrogation of the defendant by the police, a statement of the accused made in the absence of his defence counsel may not be used by the court if the prosecuting authorities have prevented contact between the accused and his counsel.

Not more than three defence counsels may be chosen; a defence counsel may not appear at the same time for more than one person accused for the same offence; he also may not appear in a trial for more than one person accused of different offences. A lawyer can only act as a defence counsel if he fulfils the aptitude criteria for the office of judge. Although the defence counsel enjoys a public function as an organ of the judicial system, he is under no authority of the court in his procedural activities; he can be dismissed by the court only in extraordinary circumstances.

In many cases, the accused can defend himself in person. The assistance of a defence counsel is mandatory, e.g., if the main hearing is held at first instance at the regional high court or at the regional court, if the accused is charged with a felony (*“Verbrechen”*) or if the defendant has been in an institution for at least three months based on judicial order.

The function of the defence counsel is not the representation but rather the assistance of the defendant during the criminal proceedings. This means, as a rule, the defendant has to be present during the entire trial. The defence counsel takes part in criminal cases to defend the rights of his client, but cannot resort to lies or to purely obstructive procedural tactics.

Defence counsels enjoy (far reaching) rights, like, e.g., unlimited access to the defendant in custody. After the completion of the investigation defence counsel has the right to unlimited access to the case file. He also has the right of participation in any investigative measure that requires the presence of the defendant. He must be informed about investigative activities that are carried out by a judge. Defence counsel has a right to investigate the case on his own.

The defendant has the right to be present during the search of premises or to be represented in his absence, and can also request a written account detailing the search as well as the list of exhibits given to the public prosecutor.

During the interrogation at the pre-trial stage, the defendant can request the investigation of additional evidence in his favour, which the public prosecutor can deny him but which the judge must concede.

5.3.9.2 The victim and victim assistance

Traditionally, the victim had hardly any procedural rights. Until 1986, when the Victim Protection Act (*“Opferschutzgesetz”*) entered into force, the role of the victim was mostly reduced to that of a witness. Since then several improvements of the victim’s position have been adopted. But still the victim is not granted the status of a party to the proceedings.

The victim has the right to consult the case file through a lawyer. The consultation with and the representation of the victim witness by a lawyer during the hearing is free of charge if the victim is indigent.

Except for offences that are prosecuted only with a formal complaint of the victim (*“Strafantrag”*), criminal investigations must be conducted irrespective of whether the victim desires so or not.

If a case has been dropped because of insufficient evidence, the victim may try to force public prosecution by a special proceeding, the so-called “*Klageerzwingungsverfahren*”. The law provides a two-step procedure: first, a complaint to the general prosecutor must be made within two weeks of notification. The general prosecutor can either reopen the case or confirm the original decision to drop the case. If the original decision is confirmed, the victim can, within one month after notification of the decision, make an appeal to the regional high court. This procedure has, however, never been applied in practice to a significant extent.

Of the dismissals none must be motivated by the prosecutor, nor is the decision open to an appeal. This leaves some room for questions. It appears somewhat inappropriate that the victim has the legal option to make a complaint against non-prosecution for reasons of insufficient evidence – i.e., in those cases of no criminal relevance – whereas the victim is excluded from any participation in dismissal cases. After all, this group includes events in which there is, not only from the victim’s perspective but also in legal terms, some evidence of real victimization; in other words, “something” of some criminal relevance really happened between victim and offender in these cases as otherwise they should have been dropped. This inconsistency has not yet been adequately addressed.

Victims of certain serious crimes enumerated (e.g. of assault and battery, relatives of homicide victims) may act as accessory prosecutors (*Nebenkläger*) supporting the prosecutor’s case. They are admitted at all stages of the procedure and require a request for compensation to be made which can be withdrawn at any time. The accessory prosecutor has the right to be present at the hearing or to be represented by counsel even after he has been heard as a witness. He can also make objections to the judge, question the witnesses, experts and the accused, and offer evidence. He also has the right of appeal against the decision given through the intermediary of a counsel. The cost of procedure is borne by the accessory prosecutor except when his request succeeds and the accused is convicted.

A person who was the victim of an intentional violent crime who has suffered bodily harm has the right to public compensation paid by the state according to the Victims Compensation Act (“*Opferentschädigungsgesetz*”).

Criminal procedure enables the victim to bring a civil claim for compensation of damages resulting from the crime within the trial by way of a joint procedure (“*Adhäsionsverfahren*”). This procedure is rarely used before German criminal courts.

Recently the German Federal Government has sent a draft Second Act for the Modernisation of the Justice System (“*Zweites Justizmodernisierungsgesetz*”) to Parliament which aims to reinforce the rights of victims in relation to both juvenile and adult offenders.

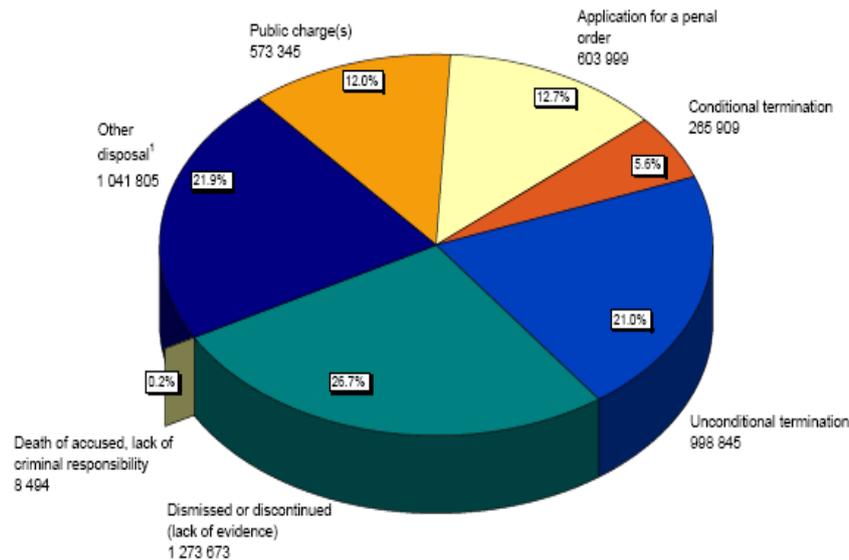
- In particular, the victim’s claims for compensation are given priority over the execution of fines. If the offender does not avail of the means to cope with both it is suggested that the court would decide to defer the payment of the fine or to allow for the payment of instalments.
- The draft bill also recommends the extension of an adhesive civil procedure to proceedings against young adults.

- Amendments to the Act on Juvenile Courts (Jugendgerichtsgesetz) aim to enhance the position of victims in proceedings against juveniles, e.g. by allowing for legal representation of victims in such proceedings.

Some figures on criminal justice in Germany

1. Cases dealt with by the Public Prosecutor Office*

Total number of cases: 4 766 070



* The number of proceedings, not persons, dealt with by the Public Prosecution Office at the Regional Courts and the Local Courts are counted.

¹ Including proceedings passed on to other Public Prosecution Offices (n=196 152), to an administrative authority (regarding regulatory offences; n=218 244), in connection with another matter (n=249 001), provisional termination (n=128 400), recommendation that private proceedings be brought (n=163 537), application for securing proceedings (n=527), applications for simplified juvenile proceedings (n=19 336), applications for summary decisions (n=39 456).

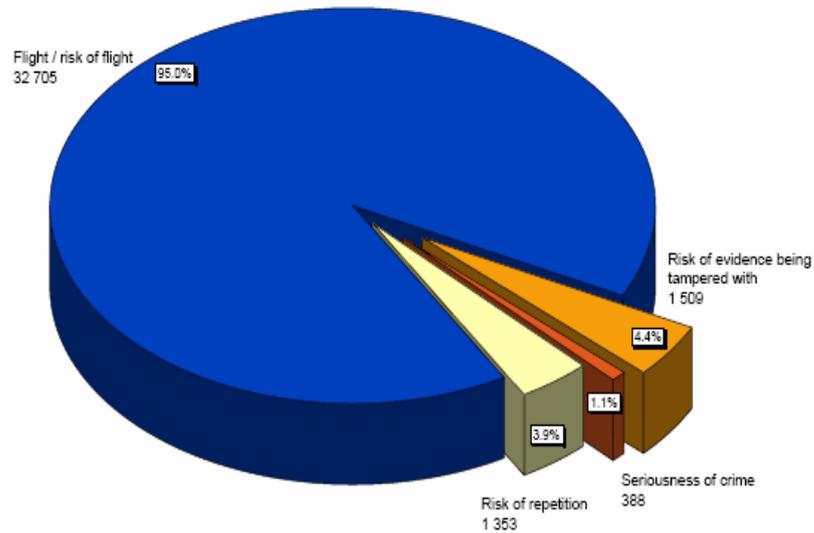
Source: 2003 Statistics of the Public Prosecution Offices, published by the Federal Statistical Office, Wiesbaden, table 2.2.

The diagram shows that

- **12%** of the proceedings dealt with by the Public Prosecution Office resulted in a **charge** being brought,
- **13%** in an application for a **penal order**, and
- **6%** in a **conditional discharge**, mainly on the basis of divertive proceedings.
- **21%** of proceedings result in **unconditional terminations**; these are mainly **petty offences**.
- A little more than **one quarter** of the proceedings end in dismissal or discontinuation in accordance with section 170 paragraph 2 of the Code of Criminal Procedure, particularly due to **lack of evidence** or because an impediment to the proceedings.

2. Grounds for remand custody*

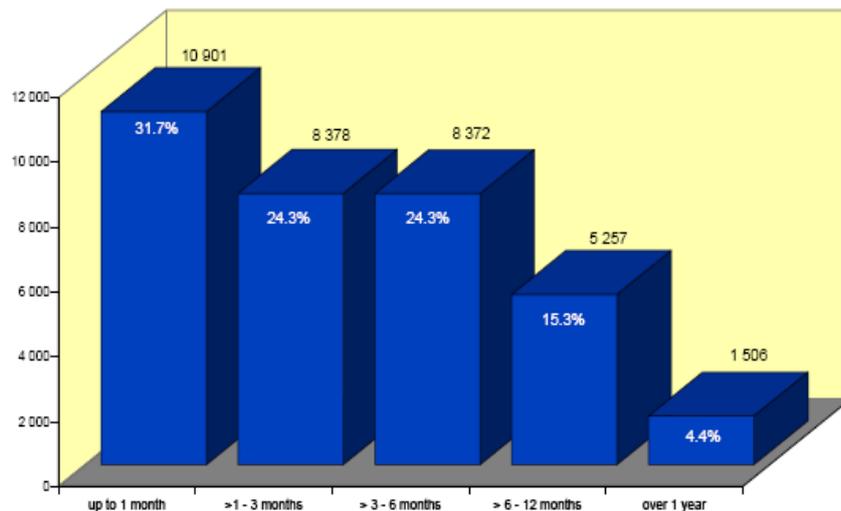
Total persons in remand custody: 34 414



* Several reasons at once are possible; therefore the total exceeds 100 %.
Source: 2003 conviction statistics, published by the Federal Statistical Office, Wiesbaden, table 6.1.

34.414 persons - this means **4% of those judged in court** - previously were in **remand custody**. Of course, the detention rate fluctuates widely depending on the charge: It is particularly low in the case of traffic offences and particularly high in homicide cases.

3. Length of remand custody



Source: 2003 conviction statistics, published by the Federal Statistical Office; see table 8a in annex for absolute figures.

5.4 Comparative analysis with regard to main questions relevant to the reform of pre-trial criminal proceedings in Croatia

This section strives to adopt a much broader comparative approach by including a wider range of countries. On the other hand, this chapter intends to focus on aspects which are most relevant with regard to the necessary reform of pre-trial proceedings in Croatia.

5.4.1 Common law and civil law systems: points of departure

In criminal justice doctrine, for a European perspective to develop it is essential that between common and civil lawyers mutual amazement yields to a deeper understanding of the nature and the reasons of the differences of the two systems.

One can start by recalling that the gap dates back to late mediaeval times. Then, both on the continent and in England criminal justice systems are what they use to be in segmented societies:

- It is the duty of the victim's clan to charge the suspect.
- The (king's) court is restricted to making sure that the ritualized confrontation of the victim's and the suspect's clan adheres to procedural rules.
- And the duty to decide the dispute rests on lay judges.

Developments start to split when in the course of the 12th century on the continent the **adoption of "Roman" law** starts, meaning the law-doctrine of the 2nd Roman Empire (the Byzantine one) on the one hand and the influence of the Roman-Catholic Church and ecclesiastical law on the other, both of which adhered to a strictly inquisitorial criminal procedure. Under this influence already in the late Middle Ages criminal proceedings gradually but fundamentally change:

- It is in this time that first the idea appears that the right to initiate the punishment of the offender belongs to the prince/king, not to the victim's clan. For some time both concepts heavily compete.
- Therefore, more and more it is the court, which of its own initiative opens an investigation in case of a rumour or a report of a criminal offence.
- And it is no longer the parties who supply testimony but the court which actively collects evidence to satisfy itself as to whether an offence has been committed and by whom.

Obviously, such a dramatic change cannot come about unless it is backed by strong powers, such as economy or politics. In this case the development was strongly supported by both. To merchants, first in Northern Italy and then expanding rapidly over the Alps to the West and North, the much higher flexibility of Roman civil law offered the opportunity of freeing property of its traditional family-clan ties and relying on a set of highly developed rules that had been the basis of trade in a vast empire. And the princes made use of the new concepts as a weapon of criminal justice in fighting the nobility and their clan-feuds, thereby making inquisitorial proceedings a crucial tool in establishing territorial sovereignty.⁶⁵ (To those who are ready to take to a less romantic

reading of Shakespeare's *Romeo and Juliet* this drama tells the story of the prince's inquisitorial claims prevailing over old clan-feuds.) In addition, the much more complex and written Roman law was accessible only to scholars. (And expert knowledge benefits those who can afford it.) Therefore, the adoption of Roman law fostered the development of a court administration, raised the level of professionalism and at the same time restrained the participation of lay judges.

So, in the wake of the adoption of Roman law the evolution of political systems on the continent parted significantly with its English neighbour. The central political powers succeeded in limiting the political influence of nobility, by that putting an end to corporative systems and gradually establishing absolutist rule.⁶⁶ This refers first to France (starting already in the 15th century), to the Habsburgs around the second half of the 17th century, to Denmark-Norway under Friedrich III, to Sweden under Karl XI and to Brandenburg-Preußen under Friedrich II (second half of the 18th century). On the other hand, the English monarch – as “**the king in parliament**” – remained tied to society represented by nobility and citizens and left these bonds behind neither in terms of the basic political power-structure nor economically.

The very expression of absolutist rule is the **power of the king to legislate**. In a way, the development of legalistic civil law systems is just the other side of the coin named absolutist reign, in particular when it comes to criminal codes as the most convincing display of power. This accounts for Loius XIV's *Grande Ordonnance* of 1670, for *Theresiana* and *Josefina* in the Austrian empire of the 18th century as well as for the Prussian Code of 1851 and the “Reichsstrafgesetzbuch” of 1871. (It will be remembered that until today primary legislation in England and Wales is only piecemeal and highly fragmentary, although in April 2005 a consolidated set of Criminal Procedure Rules has entered into existence, comprising all the secondary rules, which major achievement may eventually lead also to the codification of primary legislation.⁶⁷)

However, legislation is not just a matter of political power. To build power on legislation, it takes an **administration** capable of systematically implementing laws. At the time when Elizabeth I. had some meagre 1,200 civil servants at her disposal her French counter-part commanded an officialdom of more than 40,000 employees.⁶⁸

There is another other side to the coin of absolutism (difficult as this may be to visualize) and that is the **end of the right of victims (and their families) to feud**. As mentioned above, the criminal offence is no longer understood as injustice to victims (and their families) but as insulting the prince/monarch and disrespecting his/her will, as expressed in their laws.⁶⁹ If the law (= the monarch) has been disregarded then the law (= the monarch) is entitled to the punishment of the offender, according to the amount of insubordination expressed in the offence and not to the harm caused. The right to experience some form of redress moves away from victims (and their social environment) to the state (and, as of today, has not returned all the way back).

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⁶⁶ *Wesel* (2001) 356.

⁶⁷ *Spencer* (2005) xi.

⁶⁸ *Breuer* (1998) 160.

⁶⁹ This continental European development has a striking parallel in Japanese history, where in the course of the second half of the 16th century the *Daimyo* by issuing so-called domestic laws (*kaho*) create an extensive legal system and at the same time deprive their vassals of the right to feud, *Breuer* (1998) 148.

Again, England is different (though, unfortunately, more in terms of the course of events than by result). Right up to the early 19th century law enforcement was in the hands of citizens, mainly of the victims and their families, and not at the disposal of central organs of the state. And even when around the middle of that century finally a police service was created the idea was that they would investigate and prosecute “as private citizens”.⁷⁰ This, however, has not prevented them from edging victims out of proceedings, which has remained fairly unchanged up to date.

5.4.2 The centre of proceedings

Therefore, on the continent criminal justice during the 18th emerges as just another set of bureaucratic proceedings administered by powerful state actors. According to the *Grande Ordonnance* the secret investigation forms the centre of proceedings, implemented by the *lieutenant criminel* who sets up the dossier. On this basis the *tribunal*, including the *lieutenant* himself, decides on the case.⁷¹

The case is defined by law as being the suspicion of a breach of the criminal code (equalling an insult of the monarch); proceedings take their course according to legal rules. **In camera the judge compiles a dossier**, the content of which remains unknown even to the suspect. And in the end the verdict is passed on the basis of that dossier. In the face of suspected disregard of the law the criminal justice system reinforces legal rule and displays the supremacy of the ruler’s will. The aim is not to convince but to impress. Not the proceedings are open to the public, only the announcement of the verdict and the punishment is.⁷² Inquisitorial criminal proceedings are the perfect expression of the absolute power of the prince over his inferiors.⁷³

In common law, the main focus of criminal proceedings remains on **public jury trial** and does not shift to the piling of a file by a judge in camera. The original idea was to summon a group of citizens from the place where the offence occurred to confront them with a suspect and to force them to answer under oath the question: Is he guilty or not?⁷⁴ Gradually, the jury assumed the role to decide on the defendant’s guilt according to the evidence of witnesses called by the parties. The kings and queens of England, even at the top of their power, remained bound to prosecute their political opponents in courts where the question of guilt was decided by juries. At the time, when on the continent absolutism peaked, in England “the jury acquired a new symbolic role as a bulwark of the citizen against excessive royal power.”⁷⁵

Once the starting points of both systems are recalled it becomes quite clear that the development of criminal justice in Europe cannot be described as anything but a steady process of **adoption of common law elements** by the continental system. More specifically, this process means that the **centre of proceedings gradually shifts from investigations in camera to public trial**, which becomes more distinctively separated from the pre-trial phase. At the time of the French Revolution, France and Belgium

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⁷⁰ *Spencer* (2005) 14. Of course, the decision to have a multitude of regional police services rather than one national police force covering all of England and Wales is aimed to avoid undue political influence on the police, *Dingwall/Davenport* (1995) 26.

⁷¹ *Dearing* (1985) 10.

⁷² *Spencer* (2005) 9.

⁷³ *Wesel* (2001) 390.

⁷⁴ *Spencer* (2005) 7.

⁷⁵ *Spencer* (2005) 8.

adopt the jury, public trials and the separation of investigating and trial judges. When in 1808 Napoleon's *Code d'instruction criminelle* first invents the figure of a *juge d'instruction* this new judicial officer still interrogates the defendant and the witnesses in private, records their statements in writing, and prepares a dossier, which then forms the basis of the case against the defendant. What is new, though, is that this investigating judge is not involved in making the final decision. Thereby, the importance of court trial as a separate part of the proceedings is acknowledged.⁷⁶ (However, in this respect one country stands out as an exception: In Spain until today, in proceedings bearing not more than 6 years imprisonment it is still the investigating judge who later in court trial decides on conviction and sentence.⁷⁷)

In the second half of the 19th century Austria and Germany take another decisive step by introducing the ideas of an oral hearing of witnesses in court and of "immediacy of evidence" ("Mündlichkeit", "Unmittelbarkeit der Beweisaufnahme"), meaning that trial-courts should no longer rely on the dossier of the pre-trial phase but hear witnesses themselves and that they should only exceptionally take recourse to the case file prepared by the investigating judge.⁷⁸ **The centre of proceedings shifts from the pre-trial to the trial phase.**

Actually the Austrian model of 1873 combines pre-trial proceedings in the French style with a trial phase that is considerably influenced by the common law model and that to some extent, renders the pre-trial court investigation superfluous. For this reason **immediate** (or direct) **indictments**, leaving out a court investigation, become possible and more and more frequent. (The abolition of court investigation and of the figure of an investigating judge, starting in continental Europe from the second half of the 20th century, in a way completes this long-term development. We will come back to this shortly.)

In result, if "accusatorial" is viewed to define a form of criminal procedure where evidence is collected on the initiative of the parties in an oral and public hearing, whereas the term "inquisitorial" denotes a system where investigations are carried out by a judge more in writing and less audible, then there still persists a significant difference between the common law system on the one hand and countries such as France and Belgium on the other.⁷⁹ However, in this grouping exercise clearly other continental countries including Germany, Austria and Italy would go with England and Wales. (Of course, there are other important differences as well, such as the fact that on the continent the court has a more active role to perform and a much stronger position in deciding on the limits of the case.)

Also, it should be noticed that the **majority of cases in England and Wales** are finalized on the basis of a **plea of guilt** by the defendant, which means that these cases **never arrive to an adversarial court hearing**. The basic structure of proceedings in the common law system is just as effective and powerful in allowing an offender, without circumstance, to accept his/her responsibility and to get done with it as it is effective and powerful in granting a defendant a fair trial who contests his guilt.

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⁷⁶ *Spencer* (2005) 11.

⁷⁷ *Kühne* (2003) p 645 marginal no. 1363.

⁷⁸ *Spencer* (2005) 3.

⁷⁹ For Belgium refer to *Pesquié* (2005) 85.

5.4.3 Abolition of court investigation

In early 19th century, during French occupation Napoleon's *Code d'instruction criminelle* was imposed on most of continental Europe. When the French left, the liberated countries either kept it (as did Belgium) or used it as a basis for constructing their own procedural code (as did Italy,⁸⁰ Austria and Germany). To some extent, subsequent history of continental criminal procedure is the story of how countries move away from and overcome the French model, which is viewed as "too authoritarian",⁸¹ one clear trend in this development being the abolition of the *juge d'instruction*. In Germany he disappeared in 1974, in Italy in 1988 and in Austria he will disappear by January 1st, 2008. In France, the very cradle of court investigation, there have been to proposals to remove the *juge d'instruction*, in 1949 and in 1990.⁸²

This development is fuelled mainly by two motives:

Firstly, as long as the trial court bases its decision on the file prepared by the investigating judge, one cannot expect the court's final decision to be grounded on anything but court investigations. However, once the trial court starts to take evidence itself in public hearing **court investigations** become more and more **redundant**.

The **pre-trial phase** now assumes a **different function**: It does not aim to produce evidence but only to give the parties an orientation as to what evidence would eventually be produced in court and, besides, to allow the public prosecutor to shape the indictment. To fulfil these functions much more limited investigations are needed, which can be left to the police and the public prosecutor, who, actually, had performed these functions before in the form of preliminary enquiries, at that time with a view to allow the court to decide on opening a formal court investigation. Actually, what changes is just what the preliminary enquiries prepare for. Formally it was the opening of court investigation, now it is the opening of court trial.

So, once the concept of a public and "immediate" court trial was borrowed from the common law system the work of the investigating judge had lost its meaning and was seen as just "a needless and time-consuming repetition of what had previously been done by the public prosecutor and the police".⁸³

Secondly, enlightened liberal thinking stressed the **court's task to protect the procedural rights of the defendant** and to safeguard the defendant's room for shaping and manoeuvring his defence. In order to credibly perform this task of guarding the defendant's rights the court needs to assume an impartial status. Therefore, it is imperative that the accusatory function be entrusted with the prosecutor, placing the judge in an unprejudiced, objective position vis-à-vis the charges brought against the accused. Thus the triangular setting emerges that is so crucial to the notion of a fair trial: The court presiding over the opposing parties, listening equally carefully to both sides and watching over a sane balance of powers (so-called "equality of arms").

When applied to pre-trial investigations, this concept showed the investigating judge in the wrong light. His position now appeared "to perpetuate an undesirable confusion between the functions of investigating and of judging, which undermines the notion of

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⁸⁰ Perrodet (2005) 348 with regard to the Italian Code of 1865.

⁸¹ Perrodet (2005) 348 with regard to the „liberal Code“ of 1913.

⁸² For the developments in France, Switzerland, Germany, Austria and Italy see *Dearing* (1985) 10.

⁸³ *Spencer* (2005) 11.

an independent court of trial, something that is essential to the protection of the accused”⁸⁴.

This argument is particularly significant when it comes to decisions on detention on remand. In the common law system the amount of detention on remand is still low compared to the overall quantity of detention enacted by the criminal justice system.⁸⁵ According to an opinion widely supported, part of the explanation is, as *Spencer* put it, that “in England, the judge who makes the decision to remand a defendant in custody is independent of the investigation, whereas in France (and Belgium) it is traditionally the *juge d’instruction* – whose function is in theory to conduct the investigation. To a *juge d’instruction* it is often convenient to have the subject of the investigation readily to hand, and there is obviously at least a risk of pre-trial detention being used as a means of putting pressure on him to co-operate.”⁸⁶

In other words: Tasking the court with investigating is not only redundant and a waste of time and resources, it moreover **prevents the judge from credibly performing his indispensable role as a watchdog of human rights.**

5.4.4 New issues arising

In the face of all this overwhelming criticism, one should, however, not overlook that **the abolition of court investigation gives rise to new questions and concerns.**

5.4.4.1 Balance of powers in pre-trial proceedings

Firstly, the separation of the functions of investigating and judging by tasking the police and the public prosecutor with the investigations does *per se* not yet create a **balance of powers between the forces preparing the indictment on the one hand and the defence on the other.** On the contrary, while it is an important principle of the French model that the *juge d’instruction* investigates even-handedly in favour of the prosecution as well as of the defence (*à charge et à décharge*)⁸⁷ the police and the public prosecutor, now declared to be (not partisan but) party to the proceedings, in preparing the indictment can be expected to automatically tend to focus on what it takes to indict, not so much on aspects favourable to the accused. It would appear that this is one of the concerns on which discussions in Belgium focus: On the one hand the figure of a *juge d’instruction* combines conflicting roles of investigating as well as judging, on the other a restriction of the judge to his judiciary functions would make the whole of pre-trial proceedings highly dependent on the work of the police and put the balance of powers in pre-trial proceedings at risk.⁸⁸

Actually, the common law system, clearly standing out as the model where police investigations are powerful and at the same time to the least extent supervised by a judge (or, as it is, by a prosecutor), has been subject to criticism for a lack of balance as well as a lack of effective control of the police. In the last years it has been “increasingly recognised that police and public prosecutors have much greater resources

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⁸⁴ *Spencer* (2005) 11.

⁸⁵ Refer to 4.3.2.2 above.

⁸⁶ *Spencer* (2005) 35.

⁸⁷ *Dervieux* (2005) 239.

⁸⁸ *Pesquié* (2005) 106.

for investigating cases than does the defendant.”⁸⁹ And it is believed that this situation has led to cases of miscarriage of justice caused by the suppression of evidence.⁹⁰ In commenting on one of these cases - the wrongful conviction of *Stephen Kisko* for murder – *Spencer* has expressed his view that continental systems of pre-trial proceedings “would probably have brought to light the evidence which in that case the police were able to suppress”.⁹¹

Also, it will be recalled that in the case of *Rowe and Davis v. UK* the Court in Strasbourg found that the defendants had been denied a fair trial because the prosecution had decided to withhold relevant but sensitive material from the defence without informing the judge of its existence.⁹² This is also apt to remind us that the police and the public prosecutor are all in the same boat.

All in all, the question has arisen whether or not a certain power-imbalance should, indeed, be recognised as an inbuilt shortcoming of the common law system. As *Brants/Field/Jörg* have put it:⁹³

“However, equally undeniably, criminal procedure in the United Kingdom has been seriously discredited by a number of miscarriages of justice that show that, without equality of arms in investigation, the partisan assumptions of the adversarial process can make a nonsense of both truth and procedural safeguards.”

Therefore, **additional security measures need to be introduced** to the system, in order to effectively balance the powers of the police and public prosecution on the one hand and the legitimate interests of the defendant on the other, safe-guards such as:

- An **effective mechanism** allowing the **defendant to have favourable evidence gathered** in time and preserved for the court trial, in which respect the **Italian** regulations on preserving evidence in the form of *incidente probatorio* can serve as one model;⁹⁴
- A **court-examination of the indictment** as to its soundness and, in particular, in order to revise whether it comprehensively takes all exonerating circumstances into account as well, before the indictment is sent to a court trial, as, again, performed in a preliminary hearing by the *giudice dell’udienza preliminare* (or *GUP*) in the **Italian** system;⁹⁵
- A **restriction of powers of the police and public prosecutors protecting the defendant against exploitation**. Inquisition proceedings are not overcome by allowing police and public prosecutor to exert the same amount of powers on the

⁸⁹ *Spencer* (2005) 160.

⁹⁰ *Kühne* (2003) p 575.

⁹¹ *Spencer* (2005) 34.

⁹² Judgment of 16 February 2000, application no. 28901/95. The defence were made aware on appeal that a substantial sum of reward money had been paid, but the prosecution declined to inform the defence whether any witness had been paid or had claimed the reward. Moreover, none of the witnesses was prosecuted for their admitted part in the offences. From events which occurred during the appeal hearings it was apparent that the details of the arrangement between the witnesses and the police were withheld from the defence. The Court decided that the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial.

⁹³ *Brants/Field/Jörg* (1995) 55.

⁹⁴ *Perrodet* (2005) 364.

⁹⁵ *Perrodet* (2005) 366.

defendant as previously held by the judge but by recognising that, formally, the public prosecutor and the defendant are parties and, therefore, in principle should stand on an equal footing.

Also, we should remember that the idea of adverse powers in pre-trial proceedings may never be mistaken to allow the police or the public prosecutor to assume a partisan role.

In the light of the standing of the defendant as a party to the proceedings it is of particular importance that police and public prosecutors are not allowed to ever put pressure on the defendant or, to force his submission. This is the reason why in many systems the police are not allowed to question a suspect who has not yet received the advice of a defence lawyer (as is the case in **Germany** since 1964, in **Italy** since 1971, in **England and Wales** since 1984 and in **France** since 1993).⁹⁶ Nor should the police or the public prosecutor have the power to take the statement of an arrested suspect; this should strictly be left to the court, as is the case e.g. under **Italian** law where the statement of an arrested defendant is taken exclusively by the *giudice per le indagini preliminari* (or *GIP*). Even the Anti-Mafia legislation of 1992 has not loosened this principle.

5.4.4.2 Independence of investigation

Secondly, to some extent the investigating judge by virtue of her/his institutional **independence** from the government can be trusted to neither force an investigation nor suppress a case **because of its political sensitivity**. Indeed, the whole idea of a judicial control of administration and the political system can only come alive when the task of investigating into politically sensitive issues is performed by an actor independent of the political system. In **France**, it is exactly the important difference between a public prosecutor who is governed by orders of the ministry of justice and a judge who is not, that accounts for the public support of the institution of a *juge d'instruction*, which "looks destined to survive in France as long as the public prosecutor remains subject to political control."⁹⁷

Therefore, if the investigating judge is abolished, what suggests itself is that the position of the **public prosecutor** by means of legislation and organisation is granted a **similar amount of independence from the government as enjoyed by the courts**. Once more, **Italy** can serve as an example where the high status and strong independence of public prosecutors has created an environment which allowed for the abolition of court investigations and for transferring investigative tasks and responsibilities from the courts to public prosecutors and where public prosecutors more than once have convincingly proved their independence from the government, even under very difficult political conditions.

Actually, on second sight the weight of this argument depends on the ability and willingness of courts to act independently. In so far as the investigating judge under the law or in practice depends on the public prosecutor, the loss of court investigations becomes less important. To some extent, in the **French/Belgian** system the *juge d'instruction* is not dependant on the request of a public prosecutor insofar as s/he can

⁹⁶ *Spencer* (2005) 19.

⁹⁷ *Perrodet* (2005) 425.

also act on the basis of the complaint of a *partie civile*.⁹⁸ But the question remains how often, in practice, such private complaints are filed with the court.

In addition, it is also true that once a court investigation has started it is difficult to bring it to a halt, if the investigating judge is not willing to compromise with the political powerful.⁹⁹ However, the whole argument is by far less convincing if it shows that in practice the investigating judge is reluctant to do anything not explicitly asked for by a public prosecutor (as is much the case today in Croatia).¹⁰⁰ On the other hand, if it appears that in spite of a legal model of court investigations in practice the public prosecutor is the unchallenged dominant figure of pre-trial proceedings, then this, actually, only means that the question as to the latter's independence is even more urgent already.

With regard to the crucial role of the **police** it is likewise important to revise their relationships with the government with a view to gradually **separate politics from policing** and to enhance the **transparency** of the interrelations of the two. Unlike most of the forces on the continent, the **English** police are locally organised and largely independent of government control. There are 43 local police services, the direct responsibility for which is shared between the chief constable and the local Police Authority.¹⁰¹ Bearing this model in mind it would appear that the performance of many continental police services would benefit from a better marked distinction between the government and the police, from a decentralisation of police structures and from an increased level of transparency and local accountability of police services.¹⁰²

In addition, the development of a **stronger standing of victims** in criminal proceedings comes in handy. The new awareness of the rights and legitimate expectations of victims of crime has set the trend towards an empowerment and an active participation of victims in proceedings. In line with this progress made, victims should be allowed to effectively challenge any reluctance of the police to investigate as well as any unwillingness of state attorneys to prosecute. Again, this needs a court in the pre-trial phase that would be tasked with controlling the police and public prosecution and given the powers to effectively perform this function.

One remark for clarification: The abolition of investigative functions performed by the court does not mean that the court does not collect any evidence. Under certain circumstances it is indispensable that evidence be secured and preserved. Even the most accusatorial of continental models, the **Italian** system allows the court (more precisely, the *giudice per le indagini preliminari* or *GIP*) in the course of preliminary inquiries to take evidence ahead of the trial (in the form of *incidente probatorio*), in particular with regard to evidence that otherwise could disappear or deteriorate until the court trial.¹⁰³ Such isolated acts of taking evidence, performed by the court on application of the public prosecutor, the defendant or the victim, still leave the initiative to investigate

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⁹⁸ *Pesquié* (2005) 106; *Dervieux* (2005) 241.

⁹⁹ *Perrodet* (2005) 425.

¹⁰⁰ Actually, it is questionable whether Croatian court practice can be correctly referred to as a model of court investigations. It would be more precise to describe the given situation as investigations directed and supervised by the public prosecutor and merely carried out by the judge.

¹⁰¹ *Spencer* (2005) 150.

¹⁰² It should be added that the English police are accountable almost exclusively on a regional level and largely escape parliamentary control; see also *Brants/Field/Jörg* (1995) 46.

¹⁰³ *Perrodet* (2005) 355, 364.

with the police and the public prosecutor and are not likely to spoil the objectivity of the judge.

5.4.5 The right of the defendant and the victim that justice is done within a reasonable time

It has been pointed out that one of the persisting significant differences between the common law and the continental system relates to the average length of proceedings. As *Spencer* has put it, the delays involved in some continental proceedings seem to common lawyers “almost fantastic”.¹⁰⁴ To a considerable extent this relates to appeal proceedings but also to the fact that some of the criminal justice systems on the continent are more severely overloaded.

However, a note of caution should be sounded here. Actually, the same author expresses his opinion that there

“is a case for saying that a serious defect in English criminal procedure generally is that the pre-trial phase is insufficiently rigorous to make sure that all the evidence has been properly examined in advance in a case where the facts are grave or complicated. A striking thing about the most famous miscarriages of justice in England is that they involved not trivial cases, but ones that were extremely serious – and what eventually caused most of the convictions to be quashed was a more rigorous examination of the evidence.”¹⁰⁵

Very similar are the comments of *Alldrige/Field/Jörg* in this respect:¹⁰⁶

“But in most of the British miscarriages, it was not just that weakness in the case could not be discovered because it was not apparent how the admissions were obtained. Rather, when the whole of the evidence on the face of the record was looked at coolly, it had obvious inconsistencies and weaknesses. What would surely have prevented them would have been a less pressured and partisan mind sifting the evidence on the face of the files with the power to follow up inconsistency and seek alternative views.”

Therefore, differentiation is indispensable. While it is necessary to have inbuilt safeguards that will prevent the rushing of a severe or complicated case it is, nevertheless, highly desirable to make sure that less severe and simple cases are processed without delays. For a system to include the necessary checks and balances the empowerment of the defendant is crucial, who should be in a position to challenge investigations if s/he feels that the case is rushed or handed in a biased manner. And in the end the **court** should be in a position to effectively **protect the defendant against an immature indictment** and to order that additional evidence be taken.

After all, questions of efficiency need to be taken very seriously. It may not be overlooked that whether **proceedings achieve their aim within a reasonable time** touches on a **right of the parties** to speedy proceedings and, therefore, it is not just a matter of saving public funds (important as that may be, too).

In addition, differences in speed of pre-trial investigations are reflected by differences in the amount of time suspects have to spend in detention on remand. It was

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¹⁰⁴ *Spencer* (2005) 33.

¹⁰⁵ *Spencer* (2005) 34.

¹⁰⁶ *Alldrige/Field/Jörg* (1995) 249.

mentioned above that the common law countries, Ireland and England and Wales, clearly score better than the classical countries of the continental system (France and Belgium) when it comes to the ratio of detention on remand as of all deprivation of liberty enacted by a criminal justice system.¹⁰⁷ These differences will reflect bureaucratic styles as well as expectancies as to the appropriate length of investigative proceedings.

5.4.6 Organisation of public prosecution

In **England and Wales** the gradual introduction of public prosecution is only a late development. Although in 1879 the office of Director of Public Prosecution (DPP) was created this institution did not direct prosecutions but merely advised and gave guidance to the police. Only as late as 1985 followed the creation of the Crown Prosecution Service (CPS), a centralised service of full-time public prosecutors, operating under the orders of the DPP, who in turn acts under the superintendence of the attorney-general, who is a member of the government, although not a member of the cabinet.¹⁰⁸ “The main function of the CPS is to take over, and thereafter run or drop, the prosecutions that the police have started.”¹⁰⁹ Crown prosecutors are civil servants and enjoy no particular immunity or security of tenure.¹¹⁰

Although the CPS is institutionally contained in a hierarchy under the attorney-general it is believed to, nevertheless, enjoy far-reaching independence caused on the one hand by a long-lasting tradition of the state not intervening in matters of investigating or prosecuting and on the other by self-restraint of the government “being seen as necessary for public confidence in the administration of justice”.¹¹¹

In **France, Belgium and Italy** public prosecutors enjoy le *statut de magistrat*, which means that to some extent they enjoy the same legal status as judges. In these countries it is usual to refer to prosecutors and judges as one group (*la magistrature/la magistratura*).¹¹² They are jointly recruited through open competition and initially trained together.¹¹³

In spite of these similarities in status when it comes to the relations of public prosecutors and government there are considerable differences among these countries. In **France**, public prosecution is organised hierarchically. At the top of the hierarchy, the minister of justice (the *garde des Sceaux*) has authority over the *procureur general* at the *Cour de cassation* and over the *procureur généraux* at the *cours d’appel*. The latter have authority over the *procureur de la République*. When it comes to promotion or moving prosecutors to another post the *Conseil supérieur de la magistrature* (CSM) performs merely an advisory function to the minister of justice or, for the key positions, to the council of ministers. The disciplining of public prosecutors in France is carried out by the minister of justice, and not the CSM. Finally, in carrying out his functions the

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¹⁰⁷ Refer to 4.3.2.2 above.

¹⁰⁸ Perrodet (2005) 420.

¹⁰⁹ Spencer (2005) 14.

¹¹⁰ Spencer (2005) 30 and 149.

¹¹¹ Perrodet (2005) 421.

¹¹² Spencer (2005) 30.

¹¹³ Perrodet (2005) 352, 422 and 426.

public prosecutor is to a considerable extent obliged to obey orders issued by the minister of justice, even in relation to specific cases.¹¹⁴

The **Belgian** situation is somewhat similar to what has just been said with regard to France, however, with some important exceptions. Though the Belgian minister of justice has the right to order that proceedings should be carried out in a certain direction he has not the power to order proceedings to be dropped.¹¹⁵ And, although it is the minister of justice who together with the five *procureurs généraux* decides on matters of prosecution policies and, in this respect, issues guidelines,¹¹⁶ how to act in a concrete case is left to the individual prosecutor handling the file, as the minister of justice very rarely exercises his power to intervene.¹¹⁷ Also, in December 1998, a *Conseil supérieur de la justice* has been created and made responsible for appointments, promotions and discipline of public prosecutors.¹¹⁸

In the **Netherlands** the heads of the public prosecutor's offices are in subordination under the Council of attorney-generals (*College van procureurs-generaal*) and public prosecutors are under the control of the head of their office.¹¹⁹ Under the law, the Minister of justice is entitled to give general as well as specific orders to public prosecutors.¹²⁰ Virtually, the Minister – almost exclusively - restrains him/herself to giving general orders to the Council of attorney-generals. If the Minister decides to give an order to prosecute or not to prosecute related to a specific proceeding then s/he is obliged to present this order to parliament together with the comments of the Council.¹²¹

Most contrary to the French system, in **Italy**, Title IV of the second part of the Constitution is devoted to the *magistratura*, stating that judges and **public prosecutors are subject only to the law**. According to art 105 of the Constitution the *Consiglio Superiore della Magistratura* is responsible for overseeing the careers of judges and public prosecutors. Circulars issued by the *Consiglio* interpret the regulations relating to organisational questions.¹²² A public prosecutor (*pubblico ministero*), like a judge, holds a tenured post and is protected by the constitutional rules governing the organisation of the judiciary (art 107 of the Constitution). Italian law has created a system of **self-government of the magistratura**. The only difference between judges and prosecutors is the functions they perform.¹²³

Not only externally, with regard to their independence of the government, also internally, as concerns the relations between the different public prosecutors' offices, the Italian system presents some independence and a decentralised structure. Offices at different levels of the court system are independent of each other. In 1992, an exception was created along with the *Direzione distrettuale antimafia (DDA)* which is a centralised body designed to co-ordinate all investigations concerning Mafia crimes. To

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¹¹⁴ Perrodet (2005) 423.

¹¹⁵ Perrodet (2005) 426.

¹¹⁶ In 1997, this function was even given a stronger legal footing by an amendment to the constitution, Perrodet (2005) 427.

¹¹⁷ Perrodet (2005) 427.

¹¹⁸ Perrodet (2005) 427.

¹¹⁹ Kühne (2003) p 663 marginal no. 1419.

¹²⁰ Jörg/Field/Brants (1995) 44 stress the hierarchical structure of public prosecution in the Netherlands.

¹²¹ Kühne (2003) p 664 marginal no. 1423.

¹²² Perrodet (2005) 351.

¹²³ Perrodet (2005) 352.

this effect, the director of this body is entitled to send orders to regional anti-Mafia prosecutors.¹²⁴ Also, a chief prosecutor as a head of a prosecutor's office is entitled to give orders to the staff of the office.¹²⁵

5.4.7 The roles of police and public prosecutors in investigations

It will be recalled that the police in **England and Wales** in carrying out investigations act independently and on their own. Crown prosecutors do not have the power to direct the police and it is the police, not the Crown prosecutor, who decide on the institution of prosecution before handing the file over to the CPS.¹²⁶ In 1984, the powers of the police were expanded and codified by the Police and Criminal Evidence Act (PACE).¹²⁷ At the same time important safe-guards for suspects were introduced including the tape-recording of interviews, and the right to have a solicitor present.¹²⁸ Clearly, the task of the police – and the police alone – to investigate in England and Wales has remained unchallenged. The relationship between police and public prosecution service is a matter of co-ordination, not hierarchy.¹²⁹

In **continental Europe** public prosecutors are asked to direct and supervise police investigations and it is in any case the public prosecutor, who decides on the prosecution of the defendant. Moreover, the police are required to inform the public prosecutor whenever they learn of any suspicion that a crime has been committed. Thus the power of the public prosecutor to direct the police is safe-guarded. The role of the police is to execute the orders of the public prosecutor.¹³⁰

However, in practice the situation is more complex and, indeed, very different. It appears that, in spite of the considerable differences in law, there is a similar and increasing tendency in many continental countries towards a phase of more or less independent police investigations, actually not much different from the English situation.¹³¹ As a result of comparative analysis, *Mathias* has diagnosed the situation with redistribution of roles and a shifting of powers concerning the majority of offences and has concluded:

“From the opening until the close of the preparatory phase, the police dominate the scene. This is due to a combination of two factors: the failure of the police in their duty to inform the public prosecutors and his passivity during the investigation.”¹³²

One might feel inclined to see a link between these two factors: If the public prosecutor tends to remain passive what is the point in informing him/her? Could there, possibly, even exist some implicit consensus as to when it makes sense to involve the public prosecutor? However, as a result what emerges as the relations between public prosecutors and the police in practice would often be more properly described as a matter of co-ordination and co-operation rather than in terms of a strict hierarchy.

¹²⁴ *Perrodet* (2005) 439.

¹²⁵ *Perrodet* (2005) 440.

¹²⁶ *Spencer* (2005) 149 and 165 ; *Dingwall/Davenport* (1995) 30.

¹²⁷ *Dingwall/Davenport* (1995) 30; *Alldridge/Field/Jörg*, (1995) 230.

¹²⁸ *Spencer* (2005) 151.

¹²⁹ *Brants/Field/Jörg* (1995) 46.

¹³⁰ *Mathias* (2005) 461-464.

¹³¹ Similar *Mathias* (2005) 460.

¹³² *Mathias* (2005) 472.

In the **Netherlands**, it is accepted that “in routine cases there is very little prosecutorial involvement with the case as it develops”. Like in other countries, the most frequent reason for an involvement of the public prosecutor is that the police need a court authorisation.¹³³ “Officers will not involve prosecutors until they believe their investigations are complete.”¹³⁴

The **Belgian** *Code d’instruction criminelle* of 1808 focuses on the *instruction* as the normal format of pre-trial investigations and as the centre of the procedure. Nevertheless, it is the *information* in the sense of a preliminary police investigation, although not regulated by the text of the *Code*, which in practice has become the most common procedure for initiating criminal proceedings.¹³⁵ The phase of *information* had developed in case law without any statutory basis. The *loi Franchimont* as part of the legal reforms of 1998 then put the existing system on a statutory footing. The new regulations place the police under the direction and supervision of the *procureur du Roi*. Once the *procureur* has been informed it is s/he who acts as “master of the procedure, who directs the inquiry and co-ordinates the different police forces”. “The question now is whether the *magistrature* really has the necessary means to direct the *information*... In addition, the concern for increased efficiency and rapidity of the proceedings has led to a new device of ‘autonomous handling by the police’, which has been recognised in practice.”¹³⁶

In **France** too, there has lately been an attempt to strengthen the public prosecutor’s control over the police. Legal reform of 2000 has introduced a provision requiring the *procureur de la République*, when instructing the police to carry out investigations, to fix a time-limit, and also to require the police to deliver a progress report after the investigations have been running for six months.¹³⁷

In **Austria** preliminary police investigations were viewed by the historic law-makers as an activity before and, therefore, outside of the criminal procedure and for this reason are mentioned only in one Article (art 24 Austrian CPC). Inspired by the French model, the formal court investigation was seen as the regular legal framework of investigations. This model, however, never worked. In practice, since the entering into force of the Code in 1873 it is in most cases the police who finalize investigations independently and only then report to the public prosecutor. This factual situation is now widely accepted by the new regulations which will enter into force by January 1st, 2008, although some time-limits and an earlier involvement of public prosecutors are foreseen and although the public prosecutor is declared to be the head of investigations and responsible. To some extent the law openly relies on the co-operation of the police and public prosecutors.¹³⁸

Any **German** textbook on criminal proceedings will tell you that, although the public prosecutor is foreseen as head of the investigations, directing and supervising police activities, in practice it is to a large extent the police who quite independently conduct

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¹³³ *Alldrige/Field/Jörg* (1995) 245.

¹³⁴ *Alldrige/Field/Jörg* (1995) 246.

¹³⁵ *Pesquié* (2005) 100.

¹³⁶ *Pesquié* (2005) 102.

¹³⁷ *Mathias* (2005) 480.

¹³⁸ For a detailed account refer to 5.2.2.

the investigations.¹³⁹ In fact, this detachment raises serious questions as to the rule of law. As it appears, a very similar situation exists in the **Netherlands**.¹⁴⁰

Probably the **Italian** system is most decisive when it comes to limiting the activities of the police and to tasking the public prosecutor with directing and supervising the investigations. Special sections of the police (*sezioni di polizia giudiziaria*) have been set up, the members of which are under the exclusive authority of the public prosecutor and cannot be taken off their task by a police superior without the prior consent of the public prosecutor. And, to some extent, public prosecutors have an influence on the career of police officers.¹⁴¹

On the other hand, in Italy too, the public prosecutor has **powers to delegate** which are broadly drawn on. And these powers were extended by the Anti-Mafia legislation of 1992.¹⁴² Moreover, the police may, on their own initiative, undertake any investigations in order to determine an offence or necessitated by the discovery of other offences.¹⁴³

It can be concluded that, as a common denominator, notwithstanding all the differences in theory and law, in practise **most European models converge with respect to the important role performed by the police in the investigation phase**. Developments in many countries, actually, feed doubts as to the practicability of a model of a virtual, strong leadership of public prosecutors.¹⁴⁴ It would appear that, realistically, law-makers should acquaint themselves with the idea of somewhat independent police investigations. (This is not meant to suggest that this is the end of the story. Much rather, the point of calling attention to the strong position of the police is in accentuating the need for measures apt to effectively balance this position and for involving public prosecutors at the right instances to the appropriate extent.)

What emerges in practise is some system of **co-ordination and co-operation** which reflects the common understanding of the roles of the police and public prosecutors as well as the weaknesses and strengths of these actors. It reflects underlying assumptions as to the reasons for the prosecutor's involvement, in which respect the actors may have different ideas. Although in reality there will be a mixture of motives, nevertheless the

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¹³⁹ E.g. when you open the textbook of Kühne (2003) you only have to wait to page 2 in order to read: „Obwohl die *Staatsanwaltschaft* vom Gesetz als *Herrin des Ermittlungsverfahrens* bezeichnet wird, ist es die Polizei, die faktisch den wesentlichen kriminalistischen Teil der Ermittlungen im Rahmen der sog. Alltagskriminalität durchführt. Die Staatsanwaltschaft beschränkt sich dabei zumeist auf die Prüfung der ihr kraft Ausbildung näher liegenden Fragen mit rechtlichem Bezug.“ In short: Although according to the law the public prosecutor is supposed to direct the investigations, in practice in an average case s/he contents her/himself with dealing with any legal issues which may arise. Likewise Beulke (2005) states: „Die gesetzliche Regelung geht davon aus, dass der Polizei nur das Recht und die Pflicht des ersten Zugriffs zukommt und sie den Vorgang anschließend unverzüglich der StA weiterleitet, die daraufhin die Leitung des Ermittlungsverfahrens übernimmt, § 163 I, II StPO. Die Realität ist hingegen dadurch gekennzeichnet, dass in der weitaus überwiegenden Anzahl der Fälle (insbes. in den weniger wichtigen) die Polizei die Ermittlungen selbständig bis zur Anklagereife führt und erst dann die Sache an die StA weiterleitet, zumal die StA häufig weder über die personellen Ressourcen noch über die fallbezogenen Informationen verfügt, um ihrer Aufgabe als „Herrin des Ermittlungsverfahrens“ ausreichend nachzukommen.“

¹⁴⁰ Kühne (2003) p 658 marginal no. 1403.

¹⁴¹ Mathias (2005) 478.

¹⁴² Perrodet (2005) 361.

¹⁴³ Perrodet (2005) 362.

¹⁴⁴ As a result of a comparative analysis Dearing (1985) 32 has come to the conclusion that the idea of investigations under the control of the public prosecutor is a “dangerous illusion”.

aims pursued will be reflected in the allocation of functions to prosecutors and the police and in the modalities of their cooperation and communication. In particular, the prosecutor's flexibility in delegating investigations to the police granted by legislation will differ depending on the brief of the public prosecutor. It appears that any system will have to find a mechanism which will allow public prosecutors to intervene and to take responsibility when necessary on the one hand without overburdening public prosecutors on the other.

5.4.8 Guilty plea and finalizing cases without an adversarial hearing

One striking difference between the English and the continental system refers to the crucial role of the **defendant's plea** in the common law system, which decides on the future course of proceedings. If the defendant pleads guilty this establishes her/his guilt conclusively. Then proceedings do without an adversarial court trial and move directly to sentencing. Any facts the court needs to find for sentencing purposes can be established informally. Courts offer a "sentencing discount" of around 30 per cent to those pleading guilty.¹⁴⁵

Thus defendants are allowed to take responsibility for their criminal action and to avoid being dragged through a lengthy and public adversarial court hearing. It is very obvious that **such a model not only benefits the defendant but also considerably reduces the work-load burdening prosecutors and judges** and overall contributes to speeding up proceedings.

In this respect, though, along several different tracks continental criminal law systems have moved closer to the common law model. As *Krapac* has noticed in 1992, the consent of the defendant is becoming a more and more important factor in continental European pre-trial criminal proceedings.¹⁴⁶

- In **Spain** the defendant can decide at the beginning of the trial to renounce the right to an adversarial hearing (*conformidad*). This, at least, comes very close to a plea of guilt. In **France**, a guilty plea has been introduced by legislation of March 2004 (a law called "*Perben II*"). This option is open to defendants accused of *délits* punishable with no more than five years' imprisonment.¹⁴⁷
- In **German** as well as **Italian** law there exists a much **simplified form of procedure** which enables prosecutors and judges to finalize a case by issuing a penal order without a public and adversarial hearing in court (*Strafbefehlsverfahren, procedimento per decreto*). The defendant receives an order prepared by the public prosecutor and issued by the court. If he does not object then this penal order enters into force.
- Some countries have introduced divertive procedures allowing for a finalization of the case without it going to an adversarial court hearing. In so far as such divertive procedures regularly require some consent on the side of the suspect or even require that the defendant is ready to account for the offences s/he is charged with these proceedings can be seen as implying some form of an admission of guilt on the side of the accused. This group of countries includes

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¹⁴⁵ *Spencer* (2005) 163 and 179.

¹⁴⁶ *Krapac* (1992) 525.

¹⁴⁷ *Spencer* (2005) xiii.

Germany, the Netherlands,¹⁴⁸ Austria and France¹⁴⁹, which – first in 1992 by a circular of the Ministry of Justice and then in 1999 by law – has introduced forms of conditionally terminating proceedings (*classement sous condition*) on the basis of certain accomplishments of the defendant including victim/offender mediation (*médiation*).

- In the **United Kingdom**, the development of diversion has rested largely on encouraging the increased use of the traditional **police caution**.¹⁵⁰ In the **Netherlands**, next to public prosecutors, it is **also the police** who have in certain minor cases the right to end the proceedings by offering to the suspect to pay an amount of money.¹⁵¹ The Dutch situation has been described in the following terms:¹⁵²

“The rule that all criminal cases must be brought before a judge for trial has become the exception. Increasingly, police and prosecutor are adjudicators, deciding on crime and punishment by means of extra-judicial settlements.”

- One particularly interesting model is the **Italian** “abbreviated judgment” (*giudizio abbreviato*) on the basis of art 438 of the Italian Criminal Procedure Act. The aim of this procedure is to avoid a trial hearing by allowing for a final judgment at an earlier point in the proceedings. The procedure is implemented by the *giudice dell’udienza preliminare* (or *GUP*) at the *tribunale* and is initiated by a request from the defendant before or at the preliminary hearing. The defendant may ask the judge to carry out additional investigations. The verdict is passed on the basis of the dossier. The judge is free to acquit or to convict (so there is no agreement of the parties as to the facts of the case). If he convicts, the penalty is reduced by one-third.¹⁵³
- In addition, the **Italian** system allows the prosecutor and the defendant to agree on a certain penalty (*applicazione della pena su richiesta delle parti* or *patteggiamento*, art 444 ItCPA), which again presupposes that the defendant is ready to take responsibility, at least to some extent. On the basis of the dossier, the GUP may reject the request if he believes that either the legal qualification of the offence or the penalty suggested by the parties is inappropriate.¹⁵⁴

What is particularly intriguing about the **Italian system** is that it allows avoiding lengthy court trials **without sacrificing the fundamental principle that any form of sanction requires a judicial decision and may not be left to the public prosecutor**. For very good reasons, both the Austrian and the German regulations, allowing the public prosecutor to decide on (so-called) alternative sanctions (whatever is “alternative” about e.g. a fine) have faced - and still face - fierce criticism under aspects as fundamental as the assumption of innocence and the constitutional division of powers.¹⁵⁵ Whatever theories are invented, in real life there is no way around the fact

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¹⁴⁸ *Kelk* (1995) 8, 16; *Kühne* (2003) p 663 marginal no. 1421.

¹⁴⁹ *Dervieux* (2005) 284.

¹⁵⁰ *Brants/Field* (1995) 130 and 148, footnote 46.

¹⁵¹ *Brants/Field* (1995) 135.

¹⁵² *Brants/Field/Jörg* (1995) 51.

¹⁵³ *Perrodet* (2005) 371; *Tulkens* (2005) 669.

¹⁵⁴ *Perrodet* (2005) 372; *Tulkens* (2005) 668.

¹⁵⁵ *Kühne* (2003) p 309 marginal number 589.1: „Eine derartige Verfestigung staatsanwaltschaftlicher Sanktionsbefugnisse hebt das Strafverfahrensrecht an zentraler Stelle aus.“ *Kunz* (2004) 551, on the

that alternative sanctions are meaningful only under the assumption that the person sanctioned has committed an offence. And in reality that is understood. Therefore, any “reaction”, meant to react to an offence, should be imposed by a judge.

Therefore, we agree with the common law system insofar as the role of the court should depend on the plea of the defendant: In principle, if the defendant is ready to account for his action then what needs to be disputed is the sentence, not the question of guilt. We would, however, like to stop there without also advocating plea-bargaining, so common in the common law system. The defendant accounting for his/her action is one thing, the defendant and the prosecutor bargaining over the sentence and adjusting the facts to the result of this bargaining is quite something different. It works well when the victim is left out who has a strong and legitimate interest in the truth being revealed and acknowledged. Plea bargaining raises many of the same issues as does conditional diversion: It distorts the truth and it allows the prosecutor an influence on sanctioning without judicial control.¹⁵⁶

Left plea-bargaining aside, the English and the Italian system show the way towards **finalizing cases under the auspices of a judge** without taking them through a time-consuming court trial, if the defendant is ready to account for his/her behaviour.

In contrast, to have public prosecutors who are declared responsible for investigations, who on the basis of their own findings are asked to decide on prosecution, who, in addition, may also decide within a wide range of discretion on sanctions against the defendant without any judicial control and, who enjoy all these powers in spite of a strong dependency on the Minister of Justice will come close to a worst case-scenario, which, however, unfortunately is matched by what is fact today in the Netherlands¹⁵⁷ and is likely to become reality under the new Austrian legislation. Hopefully, this development back to an inquisition procedure in the hands of the public prosecutor will serve as a warning to other legislators and remind them of the need to maintain a stable balance of powers in pre-trial proceedings.

5.4.9 Allowing for an active participation of the victim

In **France** and **Belgium** any person who claims to have been victimised can file a report and become a *partie civile* in the proceedings before a **court** (be it the *juge d'instruction* or the court of judgment) by either instituting a prosecution independently or joining him/herself to the public prosecutor.¹⁵⁸ In addition, the victim has the power to initiate prosecution by issuing a summons (*citation directe*). The judge concerned must then give a ruling, whatever the stance of the public prosecutor may be.¹⁵⁹

The weakness of this model is that the victim's participation depends on the presence of a court whereas the victim has no official role in the investigation stage.¹⁶⁰ However,

same grounds, criticises the Austrian regulation for allowing the prosecutor to perform functions reserved for a judge („... dem Staatsanwalt faktisch eine Sanktionskompetenz verleiht, ihn trotz mangelnder richterlicher Unabhängigkeit zum Richter vor dem Richter macht und die justizinterne Machtbalance von den Gerichten zur Staatsanwaltschaft verschiebt“). See also *Fuchs* (2004) 54 and *Heinz* (2004) 524.

¹⁵⁶ *Brants/Field* (1995) 129.

¹⁵⁷ *Kelk* (1995) 8 and *passim*.

¹⁵⁸ *Dervieux* (2005) 226; *Pesquié* (2005) 94.

¹⁵⁹ *Dervieux* (2005) 233.

¹⁶⁰ For the French situation refer to *Dervieux* (2005) 238.

in **Belgium**, since 1998 the rights of victims have been strengthened with regard to their information and their appropriate treatment. In addition, victims now have the right to directly address the **public prosecutor** submitting an “injured party” (“*personne lésée*”) declaration. On this basis the victim is entitled to submit evidence and to be kept informed on the development of proceedings.¹⁶¹

Likewise, in **France**, legislation of 2003 has aimed to improve the situation of victims. The public prosecutor is required to give reasons for dropping a case. And the victim is given the right to challenge a prosecutor’s decision to drop a case by appealing to the *Procureur general*.¹⁶²

Similar to the situation in Belgium, in **Italy**, victims may join the proceedings by constituting themselves as *parte civile*. In addition, any victim (*persona offesa dal reato*) has the right to present a statement of their case and to put forward supporting evidence.

In **Austria**, with the entering into force of the new regulations by January 1st, 2008, the participation of the victim as party to the proceedings will become a fundamental principal of the proceedings, reflected in various rights of the victim to receive information and support and to be involved in the course of the proceedings as well as to be protected against secondary victimisation.¹⁶³ Likewise, in **Germany** the victim has lately received a lot of attention, both by the legislator and by academics.¹⁶⁴

English criminal procedure stands out as the only model where victims, in spite of measures to protect them when acting as witnesses,¹⁶⁵ have no particular status as parties to criminal proceedings, no right to join in as *partie civile* and not even a formal *locus standi* to ask for a compensation order.¹⁶⁶ Otherwise, in continental Europe there is an apparent and powerful drive towards enlarging the rights of victims and acknowledging their legitimate role in criminal proceedings.

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¹⁶¹ *Pesquié* (2005) 95.

¹⁶² *Spencer* (2005) xiv.

¹⁶³ For recent presentations of the Austrian legal situation refer to *Dearing/Löschnig-Gspandl* (2004); *Jesionek* (2004); *Miklau* (2004).

¹⁶⁴ With regard to the situation of victims in Austria and Germany refer to the reports above under 5.2.5.5 respectively under 5.3.9.2.

¹⁶⁵ *Dingwall/Davenport* (1995) 22.

¹⁶⁶ *Spencer* (2005) 156. There can be little doubt that the English situation infringes upon the EU-Framework Decision on the standing of victims in criminal proceedings.

6 Recommendations: Reform Program “Reform of Pre-Trial Criminal Proceedings 2007-2012”

The following recommendations aim for **three strategic objectives**:

- **Strategic objective I:** To enhance the **effectiveness** of pre-trial criminal proceedings (SO I);
- **Strategic objective II:** To enhance the **efficiency** of pre-trial criminal proceedings (SO II);
- **Strategic objective III:** To bring pre-trial criminal proceedings in line with the relevant **EU-acquis** (SO III).

These strategic objectives break down into **11 immediate and operational objectives**:

- **Objective 1:** To strengthen the **capacity of courts to control investigations** performed by police and public prosecutors and to **protect the rights of defendants and victims** (related to SO I);
- **Objective 2:** To strengthen the **capacity of courts to finalize cases** without an adversarial court trial (SO II);
- **Objective 3:** To **restrict investigation** activities performed by **courts** (SO II);
- **Objective 4:** To strengthen the capacity of the **police and public prosecutors to implement investigations** in close co-operation (SO I);
- **Objective 5:** To strengthen the **independence of public prosecutors** (SO I);
- **Objective 6:** To improve the **internal organisation of public prosecutors’ offices** (SO I and II);
- **Objective 7:** To allow **victims to experience respect, support and redress** (SO I and III);
- **Objective 8:** To **protect victims against repeat and secondary victimisation** (SO I and III);
- **Objective 9:** To provide for the **compensation of victims** of violence (SO I and III);
- **Objective 10:** To **improve the performance of the police** in criminal investigations (SO I and III);
- **Objective 11:** To **secure public confidence** in the high quality of the performance of the police (SO I).

These eleven objectives are again combined to **four reform program components**:

- **Reform Program Component I:** Enhance monitoring and decision functions of **courts** (covering objectives 1 to 3);
- **Reform Program Component II:** Enhance investigation functions of **police and public prosecutors** (covering objectives 4 to 6);
- **Reform Program Component III:** Create a **victim sensitive criminal justice system** (covering objectives 7 to 9);
- **Reform Program Component IV:** Secure **public confidence in the police** (covering objectives 10 and 11).

6.1 Reform Program Component I: Enhance monitoring and decision functions of courts

- Objective 1: To strengthen the capacity of courts to control investigations performed by police and public prosecutors and to protect the rights of defendants and victims;
- Objective 2: To strengthen the capacity of courts to finalize cases without an adversarial court trial;
- Objective 3: To restrict investigation activities performed by courts.

6.1.1 Points of departure and need for reform

At present, **courts are tasked with the wrong functions**. They are involved in pre-trial proceedings mainly as investigators and only secondarily for taking judicial decisions. In the **future** their tasks should be to **safe-guard human rights** and to collect evidence only when in exceptional cases the preservation of evidence by a court in the pre-trial phase becomes necessary.

6.1.1.1 Redundancy of court investigations

As a matter of principle, **investigative activities of courts** in a historic perspective have become **redundant** since the court's final judgment is no longer (primarily) based on the results of pre-trial court investigations (as was the case in inquisitorial proceedings) but on the results of the immediate taking of evidence in an adversarial and public court hearing.¹⁶⁷ The abolition of court investigations should be seen as a means of corroborating a long-term development stressing the status of the public and adversarial court trial as the very centre of the criminal procedure¹⁶⁸ (to be precise, it should be added: unless the defendant brings him/herself to assuming responsibility for their criminal behaviour, in which case the court trial need be neither adversarial nor public).

As far as enquiries are necessary for the preparation of the indictment they are conducted by the police and public prosecutors. Therefore, the investigative activities of courts – both in the framework of a court investigation as well as conducted as court enquiries outside a formal investigation – appear to basically repeat the investigations conducted by the police (and to, eventually, add the opinions of expert witnesses).

The possible benefit of having an actor performing the investigations who enjoys the advantage of institutional independence is to a large extent foiled by the fact that investigating judges extensively restrict themselves to implementing the suggestions of the public prosecutors. In practice, the difference between formal court investigation

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¹⁶⁷ For a brief overview of the relevant historic development refer to 5.4.3.

¹⁶⁸ It will be remembered that the Court in Strasbourg in a plethora of cases has defined as a fundamental principle of criminal procedure: „All evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument.” Refer to 2.1.4.4 above.

enacted by the judge independently and court enquiries performed upon request of the prosecutor has been levelled to a mere formality.

The fact that next to the police and public prosecutors also the court is involved in investigations **places the judge alongside the police and prosecutors** and, therefore, in a position that **undermines the ability of the court to credibly restrain and control these actors** and to ensure that, as far as the defendant is concerned, a balance of powers is maintained. It is crucial to consider the perspective of the defendant: As long as the court investigates no actor is left who could plausibly perform the role of safeguarding the rights of the defendant.¹⁶⁹

To some extent the same problem of **conflicting roles** arises when it comes to the important task of finalizing cases without them going to (and all the way through) costly and time-consuming adversarial court hearings. Next to avoiding court investigations, the creation of a model for finalizing cases without an adversarial trial will be the second crucial task of the reform of pre-trial proceedings. This role should be performed by the court. However, this requires that the court is placed in a position of some distance to the building of the case. Detachment from the investigations will allow the court to authentically assess their results.

In short: The investigations performed by the court are

- A considerable waste of resources,
- Have a negative effect on the rights of the defendant and the victim to the finalisation of proceedings within reasonable time;
- Prevent the judge from credibly performing the two tasks for which s/he is most needed: to watch over fair trial and to complete the case, whenever possible.

6.1.1.2 Lack of clear-cut antagonistic roles

As mentioned above, what is missing are clear-cut, distinct roles of actors allowing for a sound antagonism and balancing of adverse powers, features that are core elements of a fair trial. As much as possible, these roles should be defined by law. Only on this basis can the situation of pre-trial proceedings arrive to an effective rule of law.

What is desirable is a distribution of functions that is as simple, as clear and as plausible as possible. Therefore, the point of departure should be that it is **the task of the police to investigate, the task of the public prosecutor to prosecute and the task of the judge to judge**, e.g. on the authorisation of arrests or search and seizure, on complaints against the police, on the admissibility of an indictment or on the finalization of the case in the pre-trial phase. This also means that it should not be left to the prosecutor to decide a case, nor should the judge order the public prosecutor to prosecute in a case where the prosecutor is reluctant to do so.

Also, the judge should under no circumstances act as the driving force behind the investigations. The role of the judge is not to investigate, nor to defend, nor to advocate the interests of the victim. The **specific function of the court is to secure the balance**

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¹⁶⁹ For the implications with respect to fair trial see above 2.1.4.1; in a historical perspective the point is dealt with under 5.4.3.

between conflicting interests of parties. However, in light of the actual distribution of power in pre-trial proceedings it is more realistic to assume that, most of all the judge will have to protect those interests that pose limitations to the functions of investigating and prosecuting implemented by the police and the public prosecutor.

However, we would like to stop here for a moment in order to clarify one important point: What is suggested here is not a criminal justice system that accepts partiality of prosecutors and police officers. There is a significant distinction between an individual who is party to proceedings because we acknowledge that the final decision will concern his/her personal interests and a public prosecutor or a police officer who are party in the merely formal, procedural sense that they perform a certain function in promoting proceedings (which is not a judicial function). A public prosecutor is a party (merely) because s/he, in time, applies for the conviction and sentencing of the defendant and makes other applications in the course of proceedings. And the police are a party in the sense that they prepare for motions of - and work in close relations with - the public prosecutor. But these functions do not mean that we would be prepared to accept that they may act partisan. If we acknowledge that their work might sometimes put their impartiality at risk then our reaction is not to accept them as partisan actors but to stress the need for a clear, unambiguous brief and sound training.

Therefore, whenever we insist on a balance of powers between the public prosecutor and the defendant it is not because we are ready to assume that the public prosecutor is a partisan actor but because we are ready to admit that the public prosecutor in spite of all his best intentions could be wrong. And in this case we want to be sure that the defendant is sufficiently furnished to be able to show that the prosecutor is wrong.

Addressing the public prosecutor and the police as parties, therefore, is correct as long as it is remembered that they are parties in a different, much weaker and more formal sense than the defendant and the victim who are personally affected and, indeed, expected and allowed to act on behalf of their legitimate personal interests. They, indeed, are parties in a very strong, “material” sense of the notion.

Overall, a view on the position of actors in the phase of investigation ideally could reveal the following picture:



All pictures are dangerous as they can be mistaken to mirror the truth. In particular, the victim and the defendant will sometimes share a certain interest in understanding what happened and in finding a way to get on with their lives. Our assumptions and expectations should not be in their way when they, actually, feel to be less in an opposition to one another than it is often assumed.

6.1.2 Elements of the reform: Replacing the investigating judge by a judge of investigation proceedings

6.1.2.1 Abolishing investigative functions of the court

Not only formal court investigation should be abolished but all regulations that place the judge in a position of investigating, whatever the legal framework. This means:

- All regulations of the CPA referring to the **court investigation** should be deleted, such as Articles 187/199 to 190/202, 191/204 to 210/223 CPA.
- All other regulations entrusting the court with **investigative action** should be deleted, such as Articles 184/196 to 186/198, 432/449 CPA.

Also in severe or sensitive cases investigations should not be entrusted with the court. Actually, it is in these cases that it is most important that the court remains neutral ground.

As concerns the important question of preventing political influence from suppressing investigations it is crucial that with regard to any public prosecutor's office external independence and internal oversight are considerably strengthened.

6.1.2.2 The judge of investigation proceedings collecting evidence in exceptional cases

Under **particular circumstances** the judge should take statements in order to **preserve evidence for the trial**, e.g.

- If there is a risk that an important **witness** would **not be available** at the time and place of the court trial, e.g. because the witness lives in Australia and is not willing to wait for the court trial in Croatia, or because the witness is very ill and likely to pass away in the near future;
- If it is not desirable that the evidence should be taken during the court trial; this refers to **victims or witnesses of violence** (in particular all **victims of sexual violence**) who should be **spared** the ordeal of having to give their statement in a court hearing. This is not only about the victim or witness not having to appear in court, but also aimed to allow the victim or witness to decide on the speed of her/his testimony; when it comes to traumatised persons it is not possible to know in advance to what extent the person will be in a position to cope with memory. If it appears that the victim or witness is not yet able to remember then statement-taking has to be delayed. Also when the victim or witness shows signs of fatigue the hearing should be continued another time. This flexibility does not exist or would be too costly if the statement-taking takes place in a court trial.

In all these exceptional instances the statement of the victim or witness should be taken in an **adversarial** manner, allowing the parties (the prosecutor, the victim and the defendant) to have questions be put to the person giving testimony. The statement would be **video-taped** and later reproduced in court trial.

In addition, there can be instances when the **defendant** or the **victim** believes that it is crucial that a **witness** would be **heard in the investigation phase**, not for preserving the statement for later court trial but simply for clarifying the circumstances of the case. If in that instance the police and the public prosecutor are reluctant to comply with such a request then the judge should have the last say. Here the judge performs the role of

balancing (and potentially supporting) the rights of the defendant or the victim against the powerful interests of the police and the public prosecutor. This implies:

- Firstly, it is suggested that both the victim and the defendant should have the right to ask the police for the taking of the statement of a witness whom they believe to be relevant;
- Secondly, in case the police refuse to comply with that request, e.g. on the basis that the testimony of that witness is irrelevant or not available, the party concerned should have the right to turn to the prosecutor, who can order the police to comply with the party's request;
- Thirdly, if the prosecutor is reluctant to take any action or shares the view of the police, the party should have the right to turn to the judge of investigation proceedings as a last resort. In this case the judge can either ask the police to take the statement or decide to hear the witness him/herself.

The same should apply with regard to **expert witnesses**. In principle, the decision to hear an expert witness should be left to the public prosecutor. If the other parties believe that the opinion of an expert witness should be collected they should first turn to the public prosecutor. If, however, the public prosecutor for whatever reason renounces to comply with that request, the judge should be authorized to take a final decision on that issue.

6.1.2.3 The judge of investigation proceedings decides on severe interferences with human rights and protects the rights of a detained suspect

It almost goes without saying that the judge should be tasked with deciding on severe interferences with human rights positions, such as arrests, searching private premises or conducting covert surveillance.

On a closer look, it has to be carefully decided, what level of authorisation is needed for the police to perform an investigative act. In this respect, four levels have to be distinguished:

- As just mentioned, for the most severe interventions into rights of individuals the authorisation of the judge of investigation proceedings will be required;
- On a second level, certain authorisations can be left to the public prosecutor, such as ordering a DNA-analysis, an autopsy or collecting the opinion of an expert witness;
- On a third level, the police may under circumstances determined by the law, decide themselves; this may refer to the authority to summon the defendant or a witness, to identify persons, to conduct a bodily search or the search of a vehicle;
- There is a fourth category covering acts which interfere solely with the informational autonomy of persons and require a less strict legal basis, e.g. collecting information by asking individuals on a voluntary basis or by communicating to other authorities.

Above it was mentioned that there is reason to be concerned with regard to the high number of arrests and, in general, a large portion of detention performed in remand. To more effectively protect the personal freedom of the defendant, therefore, is an important aspect of the reform of pre-trial proceedings.

In order to more effectively protect the personal freedom of the defendant the following measures are recommended:

- First of all, the **legal regulations should be revised with a view to their simplification**. Now the law distinguishes three types of deprivation of personal liberty, this is to say arrest (art 94/97 CPA), provisional confinement (art 98/101 CPA) and detention (art 101/104 CPA). These three categories should be replaced by one. (The following paragraphs will use the term “arrest” in order to refer to the very first moment when personal freedom is restricted and “detention” for the situation following this moment until the person is released.)
- The principle should be reinforced that the **police may arrest a person only on the basis of prior authorisation by the judge of investigation proceedings**. Given the current state of telecommunication there is only one situation when the police will not be in a position to first call the judge and that is when the suspect is already attempting to abscond.
- In line with the legal situation in Italy, **once a person is arrested the police should not be allowed to take their statement**. The detained person should be brought **immediately in front of the judge of investigation proceedings** who should **inform** her/him **immediately** of the **charges** brought against them as well as of their **rights** and ensure that a member of the family or another person of trust is informed. One should remember that the hearing of a detained person is not a means of collecting evidence against them but only aimed to allow for their defence or for their admitting their responsibility without **any** pressure being put on them.
- If the judge decides that the detention is **not implemented in the form of house arrest** the judge has to give particular **reasons** for that. In particular, house arrest should not be *per se* excluded in the cases of art 102/105 para 1 subpara 2 CPA, that is to say on the basis of the assumption that there is a risk that the defendant would destroy evidence. If it is feared that the suspect could influence witnesses there should be a possibility of preventing the detained person from using devices of telecommunication.
- Time limits should not be regulated by the law but flexibly decided by the judge. Limitations, like the ones provided for in art 106/110 CPA – one month, two months, three months, 60 days – have a tendency to serve as a comfortable cushion. Before the indictment, in any single case the judge of investigation proceedings should order the detention **for a certain time period** on the basis of a precise account of the police as to which investigations they would have to carry out and the time required to do so. At the end of the term determined by the judge the defendant is released unless prior to that date the judge of investigation proceedings extends the duration of the detention on the basis of an account of the police and good reasons.
- All decisions of the judge of investigation proceedings can be appealed to the panel of three judges who, in case of an ongoing detention, have to decide within a short time period (48 hours or three days; art 104/108 para 1 CPA now requires a decision of the panel within 48 hours).

6.1.2.4 Allowing the judge to monitor the behaviour of the police and public prosecutors

Any person claiming that in the course of investigation proceedings the police or the public prosecutor has violated their rights shall have the possibility to lodge a complaint with the judge of investigation proceedings.

In particular the parties (the victim and the defendant) can complain to the judge on the basis of the following claims:

- That the police have not allowed them to take notice of the contents of the file or parts of the file;
- That the police and the public prosecutor have declined to carry out an investigatory act requested by a party;
- That the police are delaying the investigation proceedings.

6.1.2.5 Protecting the rights of the defendant during covert investigations

Recently articles 180 to 183/190 to 195 CPA have been introduced in the law enabling the investigating judge to authorize a wide range of covert investigations. The covert measures may last up to four months and, upon request of the public prosecutor, can be prolonged for another three months.

As these measures are hidden from the defendant s/he has no means of defence for their entire duration, simply because all traditional means of challenging the view of investigators by presenting facts and evidence favourable to the defendant (art 4 para 2 CPA) or by protesting investigative action depend on the awareness of the defendant what the investigators are about to do. All conventional defence tools tick over as long as the defendant is not aware that there are investigations going on. As long as there is no surrogate in place the whole idea of a balance between investigations and defence is abandoned.

As the effectiveness of covert measures depends on their remaining secret to the defendant, the only solution to this dilemma is to allow another actor to step in and to argue on behalf of the defendant. Therefore, in Austria a public authority has been established by the name of “legal protection commissary” (“Rechtsschutzbeauftragter”) who is tasked with monitoring all undercover investigations (refer to art 149n of the present StPO and art 146 of the new StPO). Whenever the public prosecutor applies for a measure of covert investigation the legal protection commissary is informed and given the opportunity to comment on the application. The legal protection commissary is tasked with monitoring the legality of the implementation of covert investigations and is informed of any results.

It is recommended as a matter of urgency to consider creating a similar body or otherwise to find an equivalent solution to the problem of securing an effective defence in the face of covert investigations.

6.1.2.6 Allowing the judge of investigation proceedings to review the indictment

In our opinion, one important element of the brief of the judge of investigation proceedings is to safeguard the balance between the rights of the defendant and the

powers of the police and the public prosecutor. In this respect, it is recommended that the judge of investigation proceedings should review any indictment before this goes to trial court for a public hearing. In particular, the judge will monitor whether aspects in favour of the defendant have been given the same attention as the incriminating circumstances of the case. If the judge is not satisfied in this respect he will order that the police should collect additional information.

The decision of the judge to accept the indictment as well as the decision that further information needs to be gathered should not be open to an appeal.

If the judge feels that the defendant shows readiness to accept responsibility he will hear the defendant and then decide on finalizing the case in abbreviated procedure.

6.1.2.7 Allowing the court to complete the case on the basis of a confession

When it comes to assessing deficiencies of pre-trial investigations in Croatia, next to the issues related to court investigations, it is the insufficient ability of the procedure to swiftly complete cases which should be seen as the most severe shortcoming of the pre-trial phase, causing both delays of proceedings and a tremendous waste of resources.

At present, next to the regulation in art 28 of the Criminal Code, which declares insignificant offences not to be criminal offences, Croatian law contains three regulations in the Procedure Code that provide opportunities to quickly finalise cases:

- Art 446/465 CPA allows the public prosecutor to request that the court issue a sentencing order.
- Art 175/184 CPA confers upon the public prosecutor the power to conditionally postpone the institution of criminal proceedings provided that the suspect agrees to fulfil certain obligations. This Article, providing for diverting the proceedings towards alternative sanctions, is very similar to the Austrian model.
- Article 190a/203 CPA puts the parties in a position to jointly suggest to the judge a certain penalty based on the assumption of certain offences. This regulation is inspired by the Italian *patteggiamento*.

Of these three institutions only the first one has gained quantitative significance in practice. The other two, with a few exceptions, are hardly used.¹⁷⁰ Above, we have voiced concern with regard to the effectiveness of sentencing orders under Articles 446/465 and subsequent CPA on the basis that this regulation neither provides for a face-to-face confrontation of the defendant and the court, nor for an inclusion of the victim in the proceedings.

While art 175/184 CPA comes close to regulations in Austria and Germany and, if implemented, would have some potential to unburden proceedings it can be criticised on the grounds referred to above in the course of our comparative analysis.¹⁷¹ We would like to repeat that the function of deciding cases and identifying appropriate reactions to the offence should be left to the court. This relates to the assumption of innocence, which may be overruled only by courts, as well as to the separation of prosecuting and judging as elementary functions of criminal proceedings.

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¹⁷⁰ Refer to 4.7.1.1.

¹⁷¹ Refer to 5.4.8.

When it, finally, comes to the regulation of art 190a/203 CPA it appears that this provision relates to plea bargaining – as a means of what has been called “negotiated justice” - rather than to an unconditional, straight-forward guilty plea on the side of the offender. For two reasons the concept of a negotiated sentence seems disputable: Firstly, because it has a tendency to overemphasize the importance of the sentence and, in comparison, treats the question of truth – as to the offence and the responsibility of the offender - as a matter of secondary importance; secondly, because it leaves the victim out. This is not necessarily the case. However, if victims were included in the negotiations this would considerably narrow down the margins of bargaining, one reason being that often to victims it is more important that they are heard and acknowledged as victims of a very real, personal and singular experience of injustice rather than the amount a money paid or time served by the offender.

Therefore, we would like to suggest considering the replacement of these three regulations by one more comprehensive and, hopefully, by far more effective model, whereas “effective” in our understanding means that the human rights at stake are better taken care of, including the right of the defendant to accept responsibility and, on this basis, to quickly learn what it takes to have done with what s/he has done.

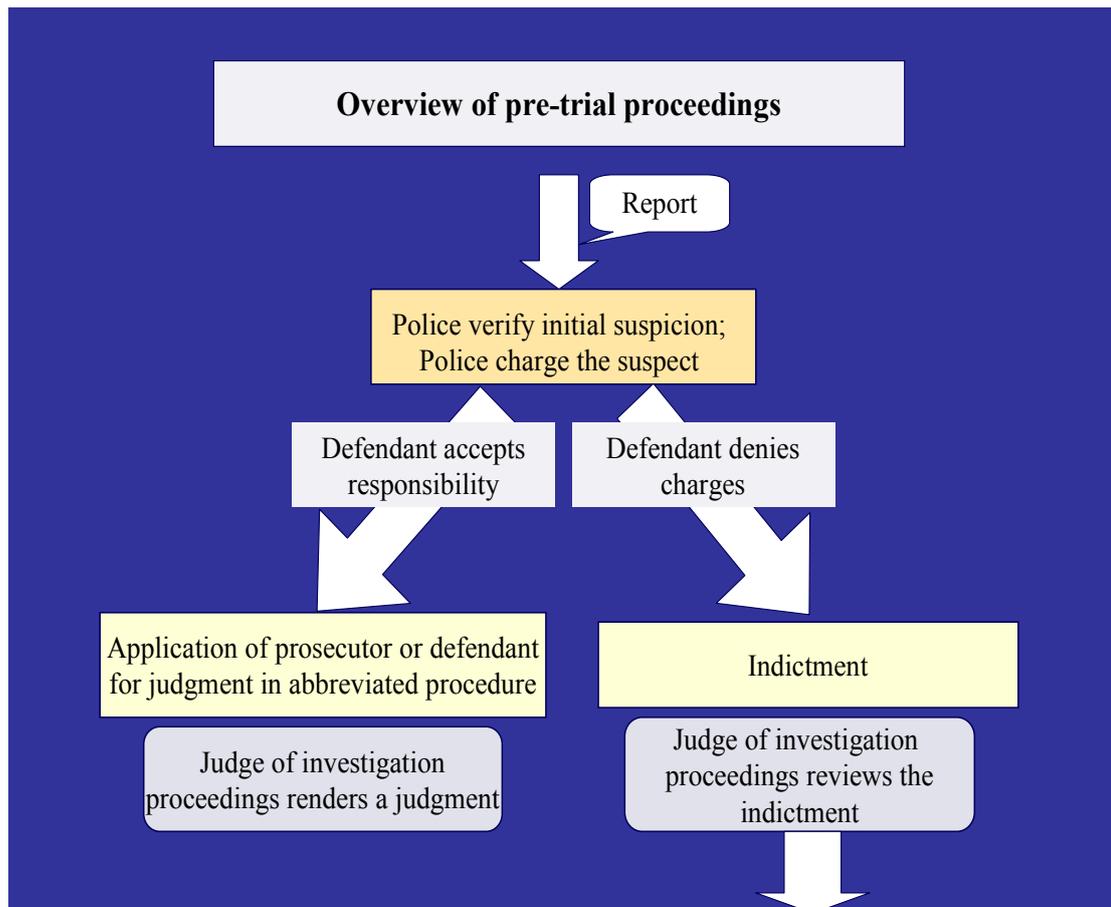
In line with the system of criminal justice in England and Wales and close to what happens in practise in many European countries we would recommend to draw a clear distinction line separating those cases where the defendant is willing to admit to his responsibility from those where he challenges the charges brought against him.¹⁷² In those cases where the defendant confesses, the basic aim should be to allow the judge of the pre-trial phase to complete the case without sending it to a trial court. This, in principle, borrows from the Italian *udienza preliminare*. However, we do not see the necessity to involve two judges in the pre-trial phase, as is the case in the Italian system.¹⁷³ We would, therefore, suggest that the decision in the preliminary hearing could be taken by the judge of investigation proceedings.

This would lead to a model of pre-trial proceedings split between those cases where the defendant disputes the charges and those where he is ready to admit to his responsibility. The following picture presents this model:

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¹⁷² Once more, it is by no means possible to give a however rough overview of the work of academics on the topic; instead we would like to refer to *Krapac* (1992) 531 who underlines the option of basing a summary proceeding on the confession of the defendant, and to *Schlüchter's* comparative analysis on the issue of consensual procedures; *Schlüchter* (1995) 225 concludes by suggesting that what seems promising for future legislation is a tendency to value the willingness of the defendant to consent to his accountability.

¹⁷³ With regard to systems, like the Italian and the German, that in a majority of cases manage to avoid an adversarial court trial it becomes problematic to still use the term pre-trial phase, which suggests that this stage of the proceedings has a merely preparatory function and that the trial phase will eventually follow.



If the defendant accepts his/her responsibility for the offences they are charged with then the public prosecutor should be **obliged** to ask the judge of investigation proceedings to render a judgment in abbreviated procedure unless the public prosecutor has reasons to doubt the truth of the confession, in which case he would have to ask the police to conduct investigations aimed to test the statement of the defendant. But also the defendant should have the right to turn to the judge and to ask for a judgment in abbreviated procedure.

On the basis of the public prosecutor's request the judge would

- In the presence of the public prosecutor **hear the defendant and the victim** in camera;
- If necessary, ask for the swift clarification of certain facts;
- On this basis **take a final decision**;
- The sentence would be determined on the basis of an assumed **reduction of the maximum sentence by one third**.
- This judgment could be **appealed by the defendant, the prosecutor and the victim only with regard to the sentence**.
- In order to speed up proceedings, one could consider allowing the **panel of three judges to decide on the merits of such appeal**.

It will be remembered that the existing Procedure Act in a very similar way restricts appeal rights when the accused has pleaded guilty (articles 363/380 para 7 and 365/382 para 4 CPA).

6.1.2.8 The decision of the judge of investigation proceedings taken on the basis of alternative sanctions

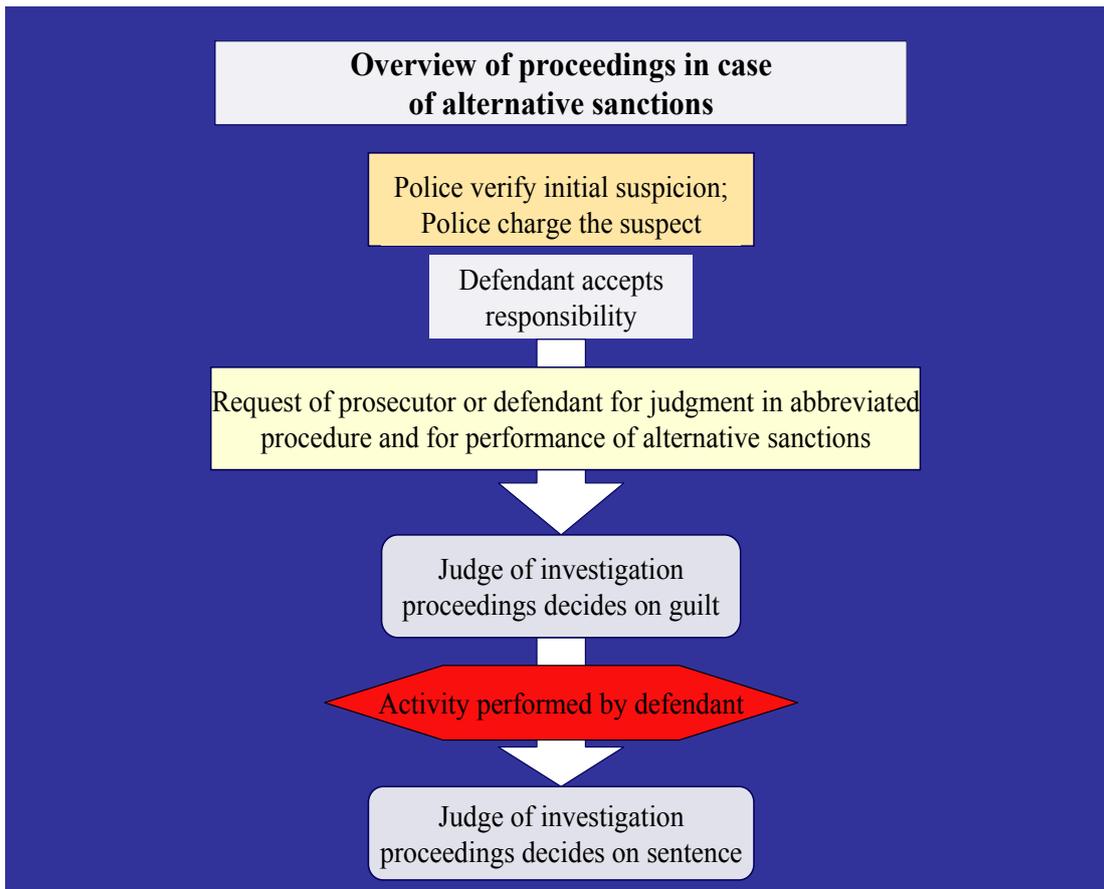
The following suggestions aim to integrate the process of applying alternative sanctions into the abbreviated procedure as sketched above. While the public prosecutor would be tasked with suggesting certain activities to the defendant, it is emphasized that the function of formally deciding on the guilt of the defendant is left with the court.

On request of the public prosecutor or the defendant and after hearing the defendant/the public prosecutor and the victim, the judge could decide to, in a first step, **restrict his judgment to stating the guilt of the defendant** and to **postpone the determination of the sentence** in order to allow the defendant within a fixed time period to

- Compensate for the damage caused;
- Reach a mediated settlement with the victim;
- Complete a certain training or treatment;
- Render a community service;
- Pay a certain amount to the public fund for the financing of organisations working in the field of criminal justice.

At the date determined by the court, the judge would then decide on the sentence taking into account a report of the public prosecutor on the performance of the alternative sanction by the offender. If the court is satisfied that the offender has performed the activity suggested to him/her the sentence would be determined on the basis of an assumed **reduction of the maximum sentence by one half**. This judgment can be appealed by the victim, the public prosecutor or the defendant with regard to the sentence only.

If, however, the offence carries a sentence of no more than five years the judge should be authorized to **decline to sentence the offender**. In this case an appeal should be open only to the victim.



The question is whether in a case where it is foreseeable that, if the activity agreed to be performed, no sentence would be passed this should be decided before the activity is carried out. But then the question arises whether a binding decision to that effect would still be valid if the activity is carried out in an imperfect or incomplete manner. For that reason it could be preferable to leave the final decision whether to sentence or not open to the court.

6.1.3 Institutional aspects

6.1.3.1 The judge of investigation proceedings

It is suggested that the judge of investigation proceedings should be a **judge of the county court**, one reason being that the judge of investigation proceedings will have to decide on particularly sensitive issues related to heavy weighing interventions in human rights positions. Another reason is that the abbreviated procedure should not be restricted to certain cases but also open to handle the most severe cases, for which an experienced judge is needed. Also, those judges working as investigating judges today will be able to work as judges of investigation proceedings after the reform. And it is assumed that the amount of work burdening them will approximately remain the same.

One effect would be that a judge of the county court would take a final decision in a case that, if it was to be decided in an adversarial trial, would be decided on municipal court level. This effect – county court judges deciding municipal court cases – on first sight is somewhat irritating. On the other hand, this is exactly the solution which art 190a/203 CPA has opted for. And it is the only way to avoid that the file is passed from one judge to another.

On the basis of the figures given above demonstrating that some 50-60% of defendants accept their responsibility in other European countries,¹⁷⁴ it can be assumed that **approximately half of all cases can be finalized in abbreviated procedure**. The ratio will be higher in municipal court cases and lower in county court cases.

One obvious consequence would be that the **case-load of files going to municipal courts for trial would drop by more than 50%**, may be even more than 60%.

There is a serious risk that the desirable effects of an abbreviated procedure will not be achieved unless the **new regulations are well communicated to judges, prosecutors, police officers and lawyers** and are corroborated by sufficient **training** of all legal professionals and the police.

6.1.3.2 Alternative sanctions

Certain alternative sanctions – and the most fruitful - can be implemented only in cooperation with external institutions. This refers to training courses for violent men, to mediated settlements and to community services.

It is suggested that the Ministry of Justice should contract private organizations, which, on the basis of a framework agreement with the Ministry, would then cooperate directly with county courts.

6.1.3.3 Public fund for financial assistance to NGOs supporting the criminal justice system

Many countries applying alternative sanction schemes have included a sort of a fine in their repertoire. In fact, this is often applied with much enthusiasm as it is easy to administer, although by far less productive than the sanctions mentioned above. In order to create something meaningful the offender should not be asked just to pay some money to the state finances but more specifically **pay to a fund that finances victim support organisations**. This fund should be set up at and administered by the Ministry of Justice.¹⁷⁵

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¹⁷⁴ Refer to 4.7.1.1.

¹⁷⁵ Refer to 6.5.3.1.

6.2 Reform Program Component II: Enhance investigative functions of the police and public prosecutors

- Objective 4: To strengthen the capacity of the police and public prosecutors to implement investigations in close co-operation;
- Objective 5: To strengthen the independence of public prosecutors;
- Objective 6: To improve the internal organisation of public prosecutors' offices.

6.2.1 Points of departure and need for reform

Here it will suffice to recall some of the deficiencies that have been identified in former parts of this document:

- In general, when it comes to the manner in which the law assigns functions to different actors, there is a **lack of clarity and distinction**. As a result, it is to some extent left to practitioners to sort out who would perform which tasks. Therefore, different regional patterns have developed. This development is detrimental to the effectiveness of proceedings as well as to the rule of law. Procedural law will have to specify and clearly distinguish the functions of the police and of public prosecutors.
- The aim is to allow the **police and public prosecutors to cooperate**. This does not mean that they decide on how to share their work. Police and prosecutors should cooperate on the basis of a shared understanding of their **distinct roles**. In particular, the law has to take decisions as to the amount of involvement of public prosecutors.
- One precondition for an effective cooperation is an **ongoing joint evaluation of joint achievements** on the basis of **consented performance indicators**. Today the police consider a case solved when the case is transferred to the public prosecutor. When it later turns out that the evidence gathered is not sufficient to carry a conviction this can cause some frustration on both sides.
- The law restricts the **admissibility of evidence gathered by the police**. Historically, this was aimed to limit the powers of the police. In a democratic society, distrust in the police is not a basis for developing sound relations between the police and communities. Therefore, on the one hand restrictions with regard to the admissibility of evidence gathered by the police should be lifted; on the other hand, **in order to balance this core element of the reform, the Ministry of Interior should agree to certain measures of institutional reform and, in particular, make considerable efforts in order to effectively raise the level of professionalism, transparency and accountability of the police**. Suggestions to that end are made under reform program component IV.
- In another respect institutional reform is needed in order to secure an overall balance of reform measures: In light of the intended abolishment of investigations performed by an independent court it is indispensable that **external independence of public prosecutor's offices** as well as **internal oversight within a public prosecutor's office** be strengthened.

6.2.2 Designing the investigative functions of the police and the public prosecutor

Why investigate? What are the aims? This should be answered bearing in mind that the **function of investigation proceedings**

- Once the suspect has been charged, will **depend on his/her plea** and
- Is, in any case, **not to make court trial superfluous but to prepare the ground for court trial**, be it either an abbreviated procedure or an adversarial court hearing; in any case, the abolition of court investigation is a step towards a more adversarial structure of proceedings, where the **basis of the judgment is not the file but oral communication in court**.

Therefore, the following **aims of investigations** can be identified:

- In any case, the police **assess an initial suspicion** and clarify the circumstances of the case.
- If the police arrive to a **concrete and substantiated suspicion against an identified suspect**, they, without delay, **charge** the suspect.
- If the **suspect accepts his responsibility**, then the police have to **inform the public prosecutor** in order to allow him/her to file with the judge of investigation proceedings an **application for a judgment in abbreviated procedure**.
- If the **defendant contests the charges** the police further assess the available evidence in order
 - To test their opinion on the presumed responsibility of the defendant;
 - To allow the public prosecutor to prepare an indictment;
 - To allow all parties, with a view to upcoming court trial, to consider what evidence they will ask to be taken in court.

6.2.2.1 Organisation of cooperation of the police and public prosecutors in criminal investigations – some basic considerations

To create a realistic and feasible distribution of functions among the police and public prosecutors is one of the major challenges of the reform. It will be remembered that in several other European countries this has not been achieved, mostly because the necessity to acknowledge the important role of the police has been underestimated and the capacity or willingness of public prosecutors to perform investigative functions has at the same time been overestimated.¹⁷⁶ There is no sense in declaring the public prosecutor the master of the proceedings when, in fact, for very simple reasons of capacity and expertise, it can not be expected of the public prosecutor to effectively direct and control the investigations carried out by the police. Nor do public prosecutors view themselves as police chiefs.

In addition, it should not simply be left to practitioners of the two institutions to sort out how work should be divided among them and organised. There are few areas of public administration that match criminal investigations as to the sensitivity of the service performed, both politically and from the point of view of the human rights

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¹⁷⁶ For a brief account refer to 5.4.7.

affected. Therefore, the **rule of law** has to be taken very seriously, and any failure in creating a feasible distribution of functions has to be avoided.

In other words, the aim is to **create clear-cut, distinct and realistic roles by legislation**. Yet, this does not rule out a close cooperation of the police and public prosecutors. To the contrary, such cooperation is needed. And it is one of the big advantages and assets in the present situation in Croatia that such cooperation already exists and is valued among practitioners. What is needed, then, is the design of a cooperation that takes the differences of the two institutions into account, including all disparities as to their organisational background, their strengths and their weaknesses.

With regard to the **organisation of investigations** and the crucial question as to who should be tasked with and responsible for implementing the investigations the **basic assumptions** are that

- For many reasons a **close cooperation of the police and public prosecutors** will be needed, mostly because their combined efforts and strengths are necessary;
- Nevertheless, it is indispensable that the **law clarifies the distinct roles** of these actors and defines their **responsibilities**;
- The designing of the cooperation of police and public prosecutors should be guided by the aim to **allow both actors** as much as possible to **contribute** to the cooperation **according to their strengths**;
- As public prosecutors are the more costly resource the question is important **at which instances and for what reasons the involvement of the public prosecutor is necessary**, and also, in order to create some flexibility, what mechanism can be created to **allow the public prosecutor to concentrate on what most requires his/her involvement**.

Before entering into the process of designing the cooperation of the police and public prosecutors it appears that in practice the decision to involve the public prosecutor can be taken along two different mechanisms. The first one, which is basically the underlying assumption of the existing art 177/186 CPA, would require that the police initially inform the public prosecutor of any case of a suspicion that an offence has been committed and then leave it to the public prosecutor to decide on a case-by-case basis to what extent he wants to be involved in the investigation proceedings or decides to delegate the investigations to the police. The second method would be that there is a common understanding as to the circumstances under which the police would inform the public prosecutor.

For two reasons, this second method is preferable, the first being that, considering the similarity of many cases, it is a waste of time to bother the public prosecutor in any single case; the second being, that such an unlimited discretion of the public prosecutor would contradict our understanding of rule of law and in practices necessarily lead to very differing patterns, as is much the case in Croatia today.

Therefore, what remains is the attempt to create legislation that would give direction as to the instances in which the police would be obliged to inform the public prosecutor. In the end, such legislation will necessarily be flexible enough to allow for an ongoing joint assessment of the effectiveness of the public prosecutor's involvement and for periodically revised guidelines as to the precise interpretation of the relevant legislation.

This refers us to the question as to the reasons for the public prosecutor's involvement. Indeed, it should be considered that the move to involve public prosecutors in investigation proceedings can be fuelled with a variety of intentions (and with respect to a variety of what here will be called "arguments"), such as:

- To raise the **quality of preliminary proceedings** by allowing the public prosecutor to contribute to the investigations according to his/her strengths such as his/her **legal expertise and experience in court** ("argument of **expertise**");
- To make sure that the investigations conducted are exactly the ones **needed by the public prosecutor** in order to allow him/her to decide whether to prefer an indictment, therefore to avoid unnecessary investigations as well as shortcomings ("argument of the prosecutor as **beneficiary**");
- To allow the public prosecutor to have an intimate **knowledge of the evidence** and an own impression of how it was gathered by personally conducting or by being present at certain, crucial investigations in order to be in a better position to assess the result and to defend its value in court ("argument of **first hand-information**");
- To allow the public prosecutor to **control the police** and to prevent police from violating rules of procedure or human rights ("argument of **control**");
- To prevent that the police under the influence of the government in a politically sensitive case cover up suspicions or evidence or delay proceedings, in this sense: to **guarantee investigations independent of the government** ("argument of **independence**").

All of these arguments are valid and, therefore, have to be taken into account. Some of them cannot be fully satisfied, such as the wish that the public prosecutor should control the police. A comprehensive control, that would actually allow public prosecutors to take responsibility for the police' action, would overstrain the capacities of public prosecutor's offices. What is feasible and desirable is that individuals who feel that the police are not giving fair consideration to their interests and rights can turn to the public prosecutor for a second look on the issue.

6.2.2.2 Combining the strengths of actors

For a moment it is worthwhile to focus on what above has been named the argument of expertise and to come back to the question as to how to construct the cooperation of the police and public prosecutors in order to allow both actors to contribute according to their strengths.

Strengths of public prosecutor and the police	
Public prosecutor	Police
<ul style="list-style-type: none"> ■ Legal expertise with regard to substantial and procedural law ■ Experience in court, a view at the whole procedure ■ Emotional distance to investigations, strategic approach ■ Independence 	<ul style="list-style-type: none"> ■ Criminal expertise and experience ■ Often precise knowledge of the environment of crime ■ Huge capacity with regard to manpower and equipment ■ Tactical approach

An effective cooperation will be based on an understanding of institutional and cultural differences of actors. In addition to differing areas of expertise and approaches to their work, the police will perceive themselves as a corporation (one “service”) while prosecutors, similar to judges will tend to see themselves as individual actors. Also, as it stands, the police strongly depend on the Minister of Interior as a political actor.

Let us, for a moment consider the argument of an emotional distance of the public prosecutor with respect to the results of investigations. We have mentioned before that relieving the court of investigations is an indispensable move in order to overcome an inquisitorial basic structure of investigation proceedings which allows the defendant to defend him/herself only at the price of challenging the views of the court. Yet, assigning the task of investigating to the public prosecutor and the police tends to create a dangerous power imbalance to the disadvantage of the defendant. There lies a dilemma which is difficult to overcome.

One part of the solution is to ask the judge of investigation proceedings to pay attention to defence rights and to an exhaustive collection of information, before allowing a case to go to court. Another step could be to position the public prosecutor in some distance to the actual implementation of investigations and to insist on his obligation to an impartial attitude towards the investigations. While it would be illusionary to believe that the police would not, in the heat of the moment, tend to adopt a somewhat partisan perspective this does not necessarily hold for the public prosecutor just as well, as long as s/he is not all too deeply involved in the implementation of investigative activities.

As a result of these considerations, we would opt for a division of functions where the police directly interview witnesses and the defendant and in general carry out the investigations, whereas the public prosecutor only in exceptional cases performs hands-on investigative activities.

Also we repeat that it is important to **promote the impartiality of public prosecutors and police officers** as an element of their professional ethics in all basic documents modelling their brief as well as in training.

Finally, as a third means of establishing a balance between accusatory and defending powers the **importance of legal advice available to the defendant** should be realised.

6.2.2.3 Designing regulations for the cooperation of public prosecutors and the police

On the basis of above considerations the following regulations are recommended:

- As a matter of principle the law should stipulate that **investigations are carried out by the police and the public prosecutor in cooperation**. Any disputes arising should be handled with a view to reach a common opinion. However, if within reasonable time a shared understanding cannot be achieved, the public prosecutor has the final say and takes responsibility for his/her decision.
- **Except for the instances when the public prosecutor or the court is involved, the police carry out the investigations of their own accord and under their own responsibility.**

The law should specify as precisely as possible under what circumstances the police are obliged to involve the public prosecutor or to ask for an authorisation by the court.

The **police should be obliged to inform the public prosecutor without delay** in the following instances:

- Whenever a **defendant has accepted responsibility** for the offences s/he is charged with;
- Whenever a **court authorisation** is needed; in urgent cases they may first turn directly to the court and inform the public prosecutor in due course; normally, they should first consult the public prosecutor before turning to the court;
- Whenever a particularly difficult or sensitive **legal question** arises, primarily concerning the interpretation of substantive or procedural criminal law;
- Whenever there can be doubts as to the **strategic orientation** of the investigations and to the intention of the state attorney as prosecutor in the case;
- Whenever there can be doubts as to the **necessity or proportionality** of particularly **costly investigations**;
- Whenever a case falls under the competency of **USKOK**;
- When a case is **politically sensitive** or involves **suspicion against an official of the Ministry of Interior or against a police officer**;
- When the investigations have clarified the circumstances of a case to a degree allowing the public prosecutor to prepare an indictment;
- When they have conducted **investigations against an identified suspect for four weeks**.

This is to say that the **police should not involve the public prosecutor** initially in every case nor report to the public prosecutor a case in which they **have not been able to identify a suspect**. In practice, such information is not beneficial.

In addition to these instances, when the police have to inform the prosecutor there will be situations when the public prosecutor wishes to turn to the police. At any time, the **public prosecutor should be in a position to request** from the police **any information** concerning ongoing investigations.

Also, the public prosecutor may determine that an **investigation team** be set up to allow for his/her close and continuous cooperation with the police officers involved in a

certain case; likewise, the police can suggest to the prosecutor that such a team should be established.

6.2.2.4 Powers of the police and the public prosecutor

The **law should carefully determine police authorisations**, e.g. to identify, summon, hear or bodily search persons, to collect material evidence, to carry out crime scene investigations, to collect and to process data. It will be remembered that the Act on the Police needs to be harmonized with the CPA.

It should be underlined that the cooperation of the police and the public prosecutor should not be understood or performed as a hierarchic relationship. This would undermine the effectiveness of cooperation. Both parties should seek to work together in a **spirit of mutual understanding and respect**. If different opinions show they should take pain to arrive to a common understanding.

Nevertheless, the possibility remains that different views pertain. As a last resort the public prosecutor should have the right to insist. In such a case, the **public prosecutor may order the police to carry out a certain investigation** and to report the results. The police may ask for a written order giving reasons for the decision taken. Also the public prosecutor may give a **binding opinion** as to a legal question or to the directions of investigations.

As a matter of principle, **the public prosecutor should not perform investigations him/herself** or be present during the implementation of police investigations, except for cases when the public prosecutor for particular reasons prefers to have a first-hand impression of the crime scene, a witness or the defendant.

6.2.2.5 Use of police documentation in a subsequent court trial

Although, whatever the police produce as documentation of their investigative activities should not be excluded from later being used in court trial, this issue should not be overestimated. If it comes to a court trial then the fundamental principle is the immediacy of taking evidence. There should be regulations in place forcing the court to first by all means attempt to gain a first-hand impression of evidence before taking recourse to the files of the investigation proceedings. In fact, the court should be allowed to refer to the police documentation only

- When the statement of a defendant or witness significantly differs from what the police have reported;
- When a witness, in spite of an obligation to give testimony, refuses to comply with their duty or is prevented from appearing in court.

6.2.2.6 Communication with the parties to the proceedings

It cannot be stressed too much that the **police should encourage an active participation of the defendant and the victim**. The police should refrain from any attempt to abuse the parties and foster informed and autonomous decisions.

To this end the police

- Without unnecessary delay, initially inform and hear any person suspected as well as any victim;
- Keep the victim and the defendant informed of important developments in the proceedings.

The police should understand that their task is to implement the law and that it is incompatible with their brief to disrespect the dignity of any person. The aim of their communication to the defender is to encourage his/her voluntary decision to accept responsibility for their action in order to come to terms with their community.

The defendant as well as the victim may at any time apply to the police

- In order to have evidence taken;
- In order to receive information on the actual state of proceedings.

6.2.3 Institutional aspects

6.2.3.1 Enhancing cooperation of public prosecutors and the police

As has been mentioned, the cooperation of the police and public prosecutors is praised on both sides as being good or even excellent. Still, it appears that relations are not much institutionalised but rather developed on an ad hoc-basis. What here is suggested is to secure good relations by founding them on a formalised and regular basis. This could include joint training, seminars or conferences as well as a mechanism allowing for a joint periodical assessment of cooperation and for the development of guidelines.

6.2.3.2 Distribution of investigative functions among the levels of police organisation

It is recommended that the division of criminal policing functions among the four operational levels should be reconsidered with a view to combine the functions of smaller police districts and to firmly establish a regional structure for investigations in cases of economic and organized crime as well as corruption.

6.2.3.3 Improving internal organisation and efficiency of public prosecutor's offices

- We would recommend that always the same prosecutor should deal with a case throughout the proceedings in first instance. This would avoid that more than one prosecutor has to acquaint with a case. Also this would secure that the public prosecutor who represents the case in court has, to some extent, personally witnessed investigation proceedings and, therefore, has a more precise knowledge about how the evidence was gathered. In addition, such an organisation of work would encourage public prosecutors to strive for a finalization of the case in the pre-trial phase. There is less motivation to avoid court trials when the public prosecutor who deals with a file in the pre-trial phase knows that s/he will not have to handle the case in court proceedings.

- It is suggested that the possibility of introducing a system of defined competencies among prosecutors of one office for a calendar or work year should be considered. Next to rationalising work procedures this would foster specialisation and allow prosecutors to quickly generate expertise in the field of their specialisation.
- Also, the mechanisms for monitoring the work of prosecutors and for securing a uniform behaviour within the same office leave room for improvement. This is particularly significant given that no pre-service training exists except for a certain amount of learning on the job supervised by a mentoring senior colleague. We believe that a common regulation should be in place securing that any formal decision taken by a young prosecutor is supervised by a senior colleague. Therefore, it is recommended to strengthen guidance of younger colleagues during their first years in office and, in general, to strengthen oversight within public prosecutor's offices by mechanisms of reporting, monitoring and formalised decision procedures.

6.2.3.4 Strengthening the external independence of public prosecutor's offices

In Croatia a relatively high level of institutional independence of public prosecution has been achieved on the basis of the Act on the State's Attorney's Office, Official Gazette no. 51/2001. (We would like to mention that the regulatory framework of independence of public prosecution in Croatia is superior to the state of affairs in several EU Member States, including Austria and Germany.) Nevertheless, an **assessment** is encouraged with a view to identify possible room for further improvement with regard to the following aspects:

- **Strengthening the Council and its functions:**
 - It is unclear why the State Attorneys' Council should be separated from the Judicial Council;
 - The mechanism for **appointing members to the Council** should be reviewed; instead of an election by the House of Representatives, in line with a view to **self-representation of state attorneys**, a majority of members could be **directly delegated from public prosecutor's offices**; other members could be directly delegated from the House of Representatives and the Law Faculties (also from the Supreme Court, in case the division from the Judicial Council is maintained);
 - It could well be this strengthened **Council** that **appoints the heads** of the public prosecutor's offices, including the attorney general.
- **Independence from the Minister of Justice:**

Under art 33 of the Act on the State Attorney's Office (ASAO) the Attorney General has to report to the Minister of Justice. This is not restricted to general reports. The Attorney General is obliged to submit a report related to a specific case upon request of the Minister of Justice (art 33 para 3 ASAO). The obligation to submit a report on an intended action rest the case unless action must be taken immediately in order to avoid expiration of a statute of limitation, another time limit or the danger of postponement (art 33 para 4 ASAO). It is not possible to interpret these regulations other than as to allow the Minister of Justice to comment on an ongoing case, nor is it possible to reconcile this regulation with the notion of public prosecution independent of the government.

- **Independence from the House of Representatives (and the government):**
 - The Attorney General is appointed by the House of Representatives only for a four-year term and upon the motion of the government (art 48 ASAO). Also, the House of Representatives dismisses the Attorney General on the motion of the government (art 56 ASAO). In short: A political party, which forms the government and holds a majority in the House of Representatives, is by no means prevented from selecting an Attorney General convenient to them. And it is this Attorney General who is vested with extensive powers, such as to appoint or dismiss county prosecutors and municipal prosecutors as well as issue orders to the lower offices.
 - The Council members are elected and dismissed by the House of Representatives (art 90 and art 95 ASAO). And it is this Council that decides on the appointment, disciplinary responsibilities and dismissal of deputy public prosecutors (art 98 ASAO).
- **Independence of offices of different levels:**

It should be considered to replace the hierarchical structure of public prosecution in Croatia in favour of a system of mutual independence of all public prosecutors' offices of whatever level.
- However, there should be an exception to this rule of independence of public prosecutor's offices: If the victim decides to ask for a revision of the decision of a public prosecutor not to prosecute or to drop a case the victim should be allowed to turn to the public prosecutor at the next higher level who, in this case, should be allowed to review the situation and, in case he agrees with the victim, to order that the case be prosecuted.

6.2.3.5 Enhancing international cooperation of public prosecutors

In the light of the accession process and the pertinent EU-acquis it is recommended that international cooperation is enhanced on the level of public prosecutor's offices and that legislation needed for fully complying with the acquis is prepared and placed in the legislative pipe-line. We realize that in this respect development is under way but would suggest that this development be linked to the reform of pre-trial proceedings as important pieces of the EU acquis directly concern investigation proceedings such as EJM and the European Arrest Warrant.¹⁷⁷ It is also recalled, that in this respect, the Commission's Croatia 2006 Progress Report (on page 56) gives the following account:

“As regards **judicial cooperation in criminal and civil matters**, a new Act on Mutual Legal Assistance in Criminal Matters entered into force in July 2005 and covers *inter alia* extradition, enforcement of foreign judgments and international legal aid. The quality of the transposition and implementation of the *acquis* in the area of judicial cooperation both in civil and penal matters is closely dependent on the efficiency and reliability of the justice system. Participation in the European Arrest Warrant system will require an amendment of the general prohibition to extradite own nationals, which is laid down in Article 9 of the Croatian constitution.”

6.3 Reform Program Component III: Create a victim sensitive criminal justice system

- Objective 7: To allow victims to experience respect, support and redress;
- Objective 8: To protect victims against repeat and secondary victimisation;
- Objective 9: To provide for the compensation of victims of violence.

6.3.1 Points of departure and need for reform

As has been pointed out above,¹⁷⁸ the current state of affairs is deficient in three respects:

- For not sufficiently providing for an active participation of victims during investigation proceedings;
- With regard to the protection of victims against secondary victimization and
- With regard to the lack of a victim compensation scheme.

6.3.2 Reform elements

This Program Component differs from the others insofar as it mainly relates to quite precise documents of the EU acquis.

6.3.2.1 Rights of victims

Along the lines of the EU Council Framework Decision the victim in investigation proceedings has the following rights:

- **The right to participate in proceedings**, including
 - The right to be heard and
 - The right to ask that evidence is taken.
- **The right to receive information**
 - A focus rests on the initial information provided by the police; but the police should be prepared to secure that they keep victims informed of important developments in their case;
 - The victim has the right to inspect the file.
- **The right to access to advice**
 - This includes the right to be supported by a lawyer as well as access to a legal aid scheme.
- **The right to understand and to be understood**
 - As far as the victim is entitled to be present during investigation proceedings the police have to provide whatever assistance the victim needs in order to be able to follow any communication.
- **The right to be treated with care**

- In principle the victim (and in particular a victim of violence) should not be interviewed more than once during pre-trial proceedings, in any case a repetitive questioning has to be avoided;
- A victim of violence should not be interviewed without the presence of a support person,
- Victims of violence should have the right to have their statement video-taped by the judge of investigation proceedings in an adversarial setting in order to spare them from having to appear in court;
- Victims should have the right to have a support person accompanying them whenever they participate in investigation proceedings;
- victims of violence should have access to a professional psychologist as a support person, preferably payed from public funds;
- Victims have to be spared from being confronted with the offender; if a contact becomes necessary it should happen with the consent of the victim who needs to be prepared in before and protected during the confrontation.
- **The right to protection at the various stages of procedures**
 - Effective policies should be in place covering the right to protection in relation to vulnerable groups, such as victims of domestic violence, victims of sexual harassment, trafficked persons etc.
 - Also policies should be in place protecting the privacy of the victim and their family, in particular from media coverage.
- **The right to compensation in the course of criminal proceedings**
 - In the framework of alternative sanctioning the offender should be encouraged to provide adequate and speedy compensation to victims.
- **Comprehensive training for police officers, public prosecutors and judges**
 - Under the Council Framework Decision member states are **obliged** to secure a sufficient level of training for all professional groups who are in contact with the victim. Such training should enable police officers, prosecutors and judges to understand the situation of victims and their needs, to assess their own behaviour against this background and to develop new work routines and operational procedures which prevent secondary victimisation and allow victims to feel acknowledged and respected.

6.3.2.2 Procedural aspects

Whenever victims want to ask for information, for an inspection of the file, for the collection of information by the police etc. they should first **directly turn to the police**. If the police do not comply with their wishes, the victim may contact the prosecutor. As a very last resort the victim can address the judge of investigation proceedings.

One important aspect of the victim's position is their **right to proceedings**. Several situations have to be considered:

- As the task of investigating is transferred from the judge to the police and the prosecutor, in order to instigate investigations the victim will first turn to the police and, if they feel that the police are not taking their wishes seriously may address the public prosecutor who will ask the police to report. If the victim is not satisfied with the result of the prosecutor's intervention the **victim should**

have the right to turn to the prosecutor's office at the court of appeal (meaning the prosecutor's office at the county court in case of alleged inaction of a prosecutor at municipal level and the attorney general in case of claimed passivity of a prosecutor at county court level).

- Whenever a public prosecutor takes a decision to drop a case it is indispensable that any victim the public prosecutor knows of is informed. Again, if the victim does not agree with the public prosecutor's decision s/he should be allowed to turn to the public prosecutor's office at the next higher level.

6.3.3 Institutional aspects

6.3.3.1 Establishing victim support organisations

Comprehensive as well as specialised victim support organisations have to be initiated and financed. In addition, networking of NGOs within Croatia and on an EU-scale should be fostered, also with a view to effectively support victimized tourists.

6.3.3.2 Establishing a compensation scheme

Administrative and financial efforts need to be made in order to set up a victim compensation scheme in line with the pertinent EU Council Directive.

6.4 Reform Program Component IV: Secure public confidence in the police

- **Objective 10:** To improve the performance of the police in criminal investigations;
- **Objective 11:** To secure public confidence in the high quality of the performance of the police.

6.4.1 Points of departure and need for reform

By reducing the involvement of investigating judges, this reform programme, necessarily, aims to reinforce the role of the police in the investigation of crime. Where **police responsibilities and powers are increased**, it is necessary to introduce organisational structures to optimise performance, **balance responsibility with accountability and power with control**. This requires a **police reform programme** which provides for a truly representative, more responsive police service which delivers core national standards of policing within a framework which allows for local flexibilities and innovation.

6.4.2 Legal reform: need for clear-cut and sufficient police powers

The police must be given appropriate powers and discretion in order to be able to effectively carry out their duties. This is a very crucial element of the law reform needed. Consideration should be given to reviewing these powers with appropriate safeguards to protect the public. Restrictions on the powers of search often frustrate and reduce the ability of the police to resolve crimes. Also, the apparent absence of discretion afforded the police in the referral of incidents/information to the public prosecutor creates unnecessary bureaucracy and workload to both police and public prosecutors alike. In short, the police should be given appropriate freedom with built-in safeguards, to discharge their responsibilities.

6.4.3 Need for organisational reform

The **strategic plan of the Ministry of the Interior dated 2004** supports the introduction of a number of the following recommendations. However, there is **little evidence that implementation is being treated as a priority** or that managers in the districts have any involvement or motivation to contribute to the plan. It is recommended that senior managers return to the plan with a view to implementing the strategic aims and tactical plans to support them.

6.4.4 Exclusion of human resources management with regard to the upcoming pertinent Phare 2005 Twinning project

Although during our assessments we have encountered certain shortcomings in human resources management of the Ministry of Interior these will not be reflected by the recommendations given here as they will be dealt with by the Phare Twinning project “Strengthening Human Resources Management, Education and Training at the Ministry of the Interior”. The purpose of this project is to improve the capacity of the

Ministry of Interior to manage its human resources and to enhance the police education and training system, in order to increase overall efficiency and staff motivation.

We would like to comment that the diagnosis given in the Twinning project fiche aligns with what we have encountered during our assessments. We would agree that a lack of clear criteria for recruitment and promotion as well as a lack of transparent procedures of recruitment and promotion rank among the main deficiencies of the present system as well as a lack of psychosocial and legal protection of employees.

The first component of this project will aim to improve human resources management, career development, performance evaluation and the informational basis of human resources management. Component 2 will deal with police education and training, including a revision of the police education and training strategy, the development of a new police education and training system, curricula and training material, the creation of a quality control system for training programs and trainers.

We feel that **this Twinning project is very well designed to address crucial shortcomings; it is the right project at the right time.**

In particular, we would like to stress the need for a human resources strategy that would ensure that the right people are in the right places at the right time, with the right skills to meet the strategic objectives of the service. There is an urgent need to review recruiting and human resource deployment policies and to conduct a training needs analysis, to ensure police staff have appropriate access to training and development opportunities, linked to business need or an individual's development plan.

Additionally, there is a need for a performance management structure that enables senior managers to benchmark performance and measure how effectively their strategies are meeting agreed targets.

Also, the Croatian police might wish to examine the profile of its staff and to consider a menu of staffing options which provides for non-police specialists whose expertise might better support both investigators and administrators in the performance of their duties.

The **recommendations** given here aim to **complement** this Twinning project with regard to:

- **Specific training** needed for the implementation of new legislation on criminal proceedings as well as
- **Specific performance indicators** related to criminal investigations.

It goes without saying that the projects suggested here, as far as they address the police, will have to closely liaise with the project on human resources management.

6.4.5 Police Training

During the course of this project, we met with a conflict of opinion between senior managers at the General Police Directorate and operational officers. The former claimed satisfaction with present training facilities and programmes. They offered the view that international training programmes were often badly coordinated and that the frequency of training programmes was a barrier to effective working arrangements. A contrary view was expressed by investigators who claimed to have received little or no training since they were appointed and were expected to maintain their knowledge base by

private study and on-the-job training. Many officers claimed that they were transferred into new and unfamiliar roles without training in the skills and knowledge required to effectively perform that role.

Operational officers and members of the police academy are agreed, however, that there is little coordination between human resource management and training providers. Frequent transfers of officers mean that skills learned in specialist training seminars are lost to the organisation when they change roles.

In view of the anticipated extension of responsibilities which will be placed on the police, there is a clear need to ensure that investigating officers are properly equipped to provide an efficient and effective service. Therefore, it is necessary to **establish the priority training needs** of those officers who will attend crime scenes, preserve and collect evidence, and deal with victims, witnesses and suspects. However, it is arguably more important to ensure that there is in place a human resource strategy which takes account of a formal career development system, coupled with a training strategy to maximise the benefits of learning.

The planned review of human resource policies should be closely linked to a training strategy in order to ensure that specialised training meets the specific needs of individual career development plans. There is a lack of training for investigators in interviewing, statement taking, crime scene management and the treatment of victims, witnesses and suspects. Senior investigating officers might require additional skills training to enable professional and effective management and coordination of more serious investigations.

In addition, there is a clear need for an audit and provision of advanced training equipment such as IT and practical workrooms.

A number of international organisations have already contributed to training in Croatia. It is necessary to establish the extent of required additional training as a consequence of proposed changes to pre-trial investigation procedures and to make firm recommendations which will support a long term commitment to effective basic and developmental training.

6.4.6 Secure Public Confidence

The public expect a great deal from their police and whatever the nature of a community, policing is a difficult job. Bad news travels fast and communities will remember mistakes far longer than they remember the many good works performed by officers on their behalf. However, when officers accept their positions, they should also accept the responsibility and demands that come with it. Their actions should, rightly, be subject to intense scrutiny. Maintaining confidence in the accountability and integrity of the police is not only vital to successful policing but also to increased public confidence.

While there has been no formal poll of public confidence in the Croatian police, there is a general feeling that the organisation enjoys little public support and is, largely, mistrusted.

In order to create public trust, we **recommend** a three pronged approach:

6.4.6.1 Create an independent Police Complaints Commission (IPCC)

There cannot be a significant reform of the core processes of a police organization without a change of the organizational and cultural context. This orientation requires **openness, transparency and external accountability** in order to secure the trust of the public, encourage individuals to report to the police and sustain an ongoing dialogue. When a police service is entrusted with powers which affect the freedoms, rights and liberty of the public, there must be a form of accountability which allows redress for aggrieved parties.

This can be achieved by a transparent system for recording, investigating and resolving complaints against the police, together with an **independent body** which has the power to monitor complaints, make recommendations to chief officers and, in some circumstances, to dictate action which would ensure a measured and effective response to an alleged injustice. The manner in which complaints are received and allocated for investigation should be reviewed to ensure some independence, particularly in the investigation of more serious matters. In terms of efficiency, the public are entitled to know whether their police are operating at an acceptable level. Only an independent body with appropriate powers can effectively determine such a position.

A system of informal resolution of minor complaints should be considered, which would allow for full and frank discussions between a mediator and the accused officer(s) and complainant, with a view to arriving at an agreeable solution.

In all complaints investigations, the complainant should play a pivotal role and be fully acquainted with the outcome.

The **Croatian police** have a police complaints mechanism but there is **no independent organisation** which can ensure that complaints against the police are dealt with effectively and impartially.

Article XVI of the Croatian **Police Code of Ethics** (of December 2001) provides that an “**Ethics Commission**” shall be established in order to examine the ethics of the police behavior. The Ethics Commission is appointed by the Director General of the police. However, the Ethics Commission shall consist of seven members, only three of whom are not police officers. The Code does not foresee that complainants can turn to this Commission.

There is an increasing tendency in the current EU Member States to establish fully independent mechanisms to investigate police misconduct; Ireland and the UK have both recently set up such mechanisms. This tendency is a response to the judgments of the European Court of Human Rights (ECtHR). In Austria, a Human Rights Council and six regional Human Rights Commissions have been established in 2000/2001. While the Council includes senior managers from the police and the Ministry of Interior the Commissions are staffed by external experts and civil society representatives.

The European Code of Police Ethics provides (para 61):

“Public authorities shall ensure effective and impartial procedures for complaints against the police.”

In order to reinforce the code of ethics and ensure a high standard of professional behaviour, there should be a discipline code which allows for proper recording and

investigation, informal resolution, communication with complainants, openness and fairness to both complainants and the accused officer(s).

In the negotiations with the other candidate countries, the European Commission has raised this issue repeatedly and the candidate countries have responded by taking steps to increase the effectiveness of their mechanisms to investigate police misconduct.

Therefore, we believe that there is a **requirement for an independent Police Complaints Commission** whose objectives should be to increase public confidence in the system and in turn lead to increased trust in the police. An independent Police Complaints Commission should be impartial and fair, should set and enforce standards to ensure the police service carries out high quality investigations, should have available its own independent team to directly supervise or investigate complaints of a most serious nature, and feedback lessons learned from complaints.

The commission should comprise specially selected people from outside the police service, who can demonstrate high level analytical, organisation and problem-solving skills, who have no conflicts of interest and who are seen to act with integrity in their private and professional lives and it should employ investigators with similar qualities to ensure professionalism in investigations.

All public complaints should be notified to the commission with proposals for resolution and the commission should have the power to agree, impose requirements on the investigators or discontinue the investigation. Specified serious complaints should be notified without delay so that the commission might become involved at an early stage.

Not only does there need to be an effective means of investigating public complaints, but also, there needs to be an effective means for identifying and investigating internal criminal and discipline matters – a **pro-active arm** which not only responds to internal allegations, but which also roots out corruption and related issues.

Therefore, we **recommend** to

6.4.6.2 Encourage a performance culture including internal and external performance review as well as Quality Management

A central plank of police reform should be to drive up standards and quality of service in order to build safer and stronger communities and instil ownership of performance at every level. Performance management monitors performance to measure delivery and to drive change and improvement. It is a way to check progress against objectives, a process to inform decision-making, a way to link actions to outcomes and an opportunity for the organisation to learn and progress.

We recommend the introduction of a performance review culture which gives:

- Clarity about roles and responsibilities,
- A framework linking performance to corporate planning, budgeting and resource management,
- Structures which hold staff to account,
- A culture of continuous improvement, and
- Clearly articulated priorities linked to individual objectives.

In Croatian police, there exists some performance management data within the police and crime/detection statistics are subject to regular discussion. However, the organisation's systems are such that **data is unlikely to be reliable**. For example, all matters brought to the attention of the police are recorded and investigated but many of these are civil matters which are subsequently discontinued. Crimes are recorded as detected when the suspect is handed over to the prosecutor for processing. Cases take so long to be finalised that it is difficult to imagine how statistics can paint a true picture of performance.

Therefore, there needs to be a drive towards **improving data** so that it is accurate and informative. We recommend a review of the existing databases of operational performance and the introduction of a national system which will ensure the timely, clear and accurate recording of relevant data.

A **performance management model** might comprise the following elements:

- Set **national priorities for policing** following consultation with the public
- **Determine objectives** which will help to achieve those priorities
- Establish **performance indicators** to monitor performance and whether objectives are being achieved
- Set **targets** for improving performance
- **Assess performance against targets** and take remedial measures where necessary

Performance review should be about working with departments to improve effectiveness and efficiency measured against police service priorities and performance indicators. Local authorities should also influence policing priorities at a local level. There needs to be a system whereby those agencies can establish to what extent policing is cost-effective and how it performs against given criteria.

Performance review is an essential tool, not only to collect and analyse statistics, but also to concentrate the mind on those areas of policing which are regarded as priorities. Good practice should be noted and disseminated.

To be effective, there need to be systems in place so that statistics can be readily collected, and officers/support staff who are trained to collect, **analyse** and **interpret** information. There is nothing wrong with targets but the police service should be careful to ensure that the pursuit of success is based on **quality** of service and not just statistics. Analysis-led policing is an essential area of expertise for the prevention and detection of crime. A crime analysis system is an obvious extension to a statistical software package. **Consideration should be given to the establishment of a performance review department within the police service, staffed with people who are skilled in this area.**

In addition to the internal department, there needs to be an **independent external review body** which conducts general and thematic reviews of policing and challenges police service effectiveness and efficiency. This body needs to have ministerial support, should be led by former senior police officers together with independent members with financial and business experience, and staffed by serving police officers/administrators.

6.4.6.3 Increasing Community Engagement, Decentralizing the Organisational Structure

In a democratic police service, the organisation must be responsible and accountable to the population which it serves. This can be enhanced through formal communication and consultation links with the public, with elected representatives, with an independent review commission and through a professional code of ethics. Only then will the police service become a part of the community, working with it but with the powers and resources to act on its behalf.

Accountability is not about dictating methods of operational policing but it is about holding officers to account for their policies, their mode of operation and their effectiveness and efficiency. Many democratic **police services consult with communities** at the planning stage to give them the opportunity to contribute to strategy, objectives and priorities. They then report the results of their work at regular intervals and give opportunity for feedback. Annual strategic policing plans and reports are published and freely available. They do not, of course, contain sensitive information about policing operations.

Policing is often regarded as an independent force, acting on behalf of the state, with little regard to the needs of communities and the ways in which those communities can help to maintain order and reduce crime. In contrast, neighbourhood policing today is about fighting crime more intelligently and **building a new relationship between the police and the public** – one based on active co-operation rather than simple consent, encouraging neighbourhoods to be part of the solution to the kind of local crime and disorder problems that can blight their lives. This requires a proactive approach on behalf of the police, in order to gain the **trust of local people and organisations and to involve them in the solutions to local problems**.

In order to build trust, the police service needs to be particularly open to scrutiny. Mechanisms should be introduced which allow for monitoring the police service. **Police/civil society consultative groups** should be formalised at **county and district (municipal) level** where open exchanges about policing issues can be made. The police should take account of all those agencies outside the service who deliver community safety services, to help ensure effective co-ordination and deployment of all such resources. This is a real opportunity to better tackle crime and anti-social behaviour, help instil respect and decency in local areas and build more cohesive communities. Neighbourhood or community policing projects should, therefore, be encouraged and extended.

To strengthen both the flexibility needed and local accountability, a **decentralized structure** is imperative. Therefore, the basic orientation of a police service is provided, not by centralized internal regulations and chains of command but, primarily, by a democratic legislation, leaving discretion widely to police managers on the local level.

Croatian society is diverse. Policing in Zagreb is quite different from policing in the smaller towns and villages of rural areas. **Decentralisation of budgets and decision-making**, within national guidelines, will allow local chiefs the flexibility to decide departmental staffing levels and deploy resources to satisfy local conditions. A devolution policy should underline commitment to the corporate interests of the police service, provide a clear framework within which senior managers can make decisions and take responsibility for them, ensure value for money approaches are applied and

that the probity of public funds is safeguarded. This, combined with a formal accountability system and close relationship with local authorities, will offer an effective national police service. Devolution of budgets is a long-term aim but decentralised decision-making in many areas of personnel and operational deployment can be introduced much earlier.

In a democracy, it is essential that the police are allowed to carry out their duties **independently of political interference**. Of course, Governments and Ministries of the Interior have a duty to provide legal and strategic frameworks in which the police can operate but operational responsibility should remain with the Chief Officer of Police working in and with his/her communities. Only then can the public be reassured that their safety needs are being met in way which demonstrates transparency and local accountability.

Therefore, as a pre-requisite to reform, the **roles of the Ministry of the Interior and the police should be separate, clearly defined** and communication should be transparent.

6.4.7 Enhance the communication and forensic capacity of the police

There is clearly a need for some modernisation of the Croatian police. Effective policing requires advanced, networked technology to effectively communicate, collect, analyse and share data. There is a need for an **audit of IT equipment** which is necessary to provide reasonable support to those charged with the responsibility to prevent and investigate crime and to consider what additional modern crime investigation techniques need to be learned.

The Croatian police have a systematic approach to crime scene management, utilising the skills of operatives to control the scene, make preliminary enquiries and create an evidence log, and a technician to gather samples for analysis by trained forensic scientists at the Ministry of the Interior. The quality of initial assessment and preservation of evidence at a scene depends, largely, on the calibre of the first response officer.

First impressions are that the organisation requires

- Improved **practical training** for existing and potential crime scene examiners, and refresher and advanced training, to include the introduction of regular updates on legal, procedural and technical advances.
- A **decentralisation** of procedures could be a means of reducing the work-load burdening the General Directorate in Zagreb and of speeding up processes.
- Other than feedback received about fingerprint identifications, there is no **quality management** system in place. Forensic samples are forwarded to the Ministry of the Interior for analysis but considerable delays occur before results are known.
- **Equipment** is generally adequate but consumables are not always readily available.

We **recommend** a study of the complete forensic process to establish the needs of the Croatian police, which are essential to the successful development of a physical, evidence based strategy in crime investigation.

6.5 Impact assessment and feasibility of the Reform Program “Reform of Pre-Trial Criminal Proceedings 2007-2012”

This section undertakes to assess the impacts of the reform measures suggested above and their feasibility.

6.5.1 Changing court-functions in pre-trial proceedings

Without doubt, the professional group strongest affected by above recommendations are investigative judges, which as such will cease to exist and take on new tasks.

6.5.1.1 No overall reduction of court involvement in pre-trial proceedings

It should first be stressed that the changes recommended in this chapter, if implemented, would not lead to a reduction in necessary court involvement in pre-trial criminal proceedings in Croatia.

Rather it can be expected that the reduction of investigative activities would approximately be balanced by the considerable increase in new functions.

6.5.1.2 Reduction of detention on remand

As a long-term development a considerable reduction of the amount of detention on remand could result from the following circumstances:

- An intensified police training on the legal prerequisites of arresting a suspect;
- More flexible and overall stricter time-limits for the duration of detention on remand;
- A re-positioning of the court in pre-trial proceedings encouraging judges to carry out their monitoring functions more effectively.

Reductions of detention are highly cost-effective.

6.5.1.3 A considerable reduction of court investments in the trial phase

Our recommendations accentuate the urgent need for an abbreviated procedure designed and capable of completing a large portion of cases without an adversarial court trial on the basis of a confession of the defendant.

It is assumed that the fraction of proceedings not going into an adversarial court trial can be raised from less than 20 % to approximately 40 % within a short time-period. This would have a strong impact on court investments with regard to a much lesser number of both trials at municipal court level as well as appellate court proceedings.

Achieving this result should be facilitated by the following factors:

- Not only will defendants benefit from shorter proceedings but also from considerably lower sentences or the application of less punitive alternative sanctions.

- Public prosecutors will be obliged to apply for the abbreviated procedure if the legal conditions are met.
- The judge of the investigation will be obliged to examine the possibility of an abbreviated procedure before accepting an indictment and passing the case to the trial court. He will perform an important gatekeeper function.

6.5.2 Changing the functions of the police and public prosecutors

Overall, it can be expected that the police will welcome that their actual role will be acknowledged and that the result of their investigative work will have a stronger impact on court proceedings. Police and public prosecutors have shown much interest in a closer co-operation. This should be enhanced by clear decisions as to the division of functions between these two professional groups.

What is important is a shared understanding of the common goals of police and prosecutors and a mechanism for a joint evaluation of the results of this cooperation. Also, it should be understood that success as well as deficiencies are communicated to the media as results of co-operation of both actors.

6.5.3 Enhancing the position of the victim, necessary investments

The EU Council framework decision discussed above¹⁷⁹ defines clear obligations of Member States to improve the position of victims. Alignment with these obligations will necessitate a package of measures.

One of the costly parts concerns necessary adaptations of premises and rooms, referring primarily to court-buildings and secondly to police accommodations. Some courts have established waiting rooms for witnesses, this needs to be built on.

6.5.3.1 Financing victim support (legal advice, NGOs etc)

A need for public investments arises with respect

- To legal aid to victims,
- To the costs of meeting the communication guarantees defined by the EU Council framework decision,
- To implement training for all groups engaged in criminal proceedings,
- To funding victim support NGOs who will give advice and to support to victims as well as accompany victims to the proceedings.

In Germany as well as in Austria a legal basis has been introduced which allows for directing money paid by offenders to victim-support organisations. This mainly refers to payments effected under diversion procedures. It is recommended to consider the implementation of a similar model. In addition to the creation of a legal regulation, for a transparent administration of such a scheme a board should be set up at the ministry of justice securing that all apt victim support organisations benefit from this scheme on an equal footing.

However, there exist projects and initiatives that can be further built on. Next to specialised agencies, especially with regard to domestic violence, trafficking of persons

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¹⁷⁹ Refer to 2.3.1.1.

and corruption, a general victim support NGO by the name of “Association of Volunteers of Supporting Victims and Witnesses in Court Proceedings” has recently been established. Training packages for the training of volunteers has been prepared and training material developed for police, prosecutors and other professional groups. Generic multi-agency leaflets have been set up outlining victim’s rights and explaining various aspects of criminal proceedings.

A draft strategy for strengthening victim support in Croatia is at present with the Ministry of Justice for formal adoption.

6.5.3.2 Financing of a victim compensation scheme

Above, mention has been made of obligations arising from the EU Directive on the compensation of victims of crime.¹⁸⁰

In 2005, the Austrian government (*via* the federal office for social services – *Bundes-sozialamt*) received 342 applications under the Austrian Act for the compensation of victims of crime (*Verbrechensopfergesetz*) and in return paid an amount of 1.845 mio € to such victims.

For calculating the costs of setting up a similar compensation scheme in Croatia it should be considered that, until this scheme is well known to the public, not all that many applications can be expected. Of course, the costs of administration have to be added to the payments referred to above.

Mention should be made of the fact that in Austria, like in most EU-Member States public services are complemented by the work of NGOs. The largest victim support-NGO in the field of financial support of victims (by the name of “*Weisser Ring*”) alone in 2005 provided financial assistance amounting to overall approx. 0.1 mio €. This amount was not funded by the state. However, as in Croatia a similar structure of private victim support organisations does not yet exist, it will be necessary in an initial time period to invest in setting up such a structure and, until private fund-raising activities can develop, to provide these NGOs with the financial means needed for their work.

Overall, during the first years an amount of approximately some **1.2 million € annually** will need to be provided for the **establishment of a victim compensation scheme**.

6.5.4 Strive for reform

In general, there is a **broad and firm consensus that reform is needed as well as to its basic direction** because pre-trial proceedings are repetitive and not efficient. We believe that this common understanding is an important asset and will enhance the reform process.

This consensus includes the police, public prosecutors and judges. Most frequently the question was raised why the investigating judge should need to repeat the inquiries performed by the police. Some public prosecutors had a clear view on this issue suggesting that the judge in pre-trial proceedings should be strictly concentrating on

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¹⁸⁰ Refer to 2.3.1.2.

decisions concerning the intrusion of investigations into human rights, e.g. with regard to arrests and search and seizures.

Many interviewees were confident that the police could, overall, be trusted to perform investigations in a professional and reliable manner. Actually, some public prosecutors expressed their opinion that the investigative work carried out by the police was sometimes more precise and reliable as compared to court investigations. Although the need for improved training and equipment of the police was stressed by several interviewees no doubts were voiced that, in principle, the task of carrying out investigations could to some extent be entrusted to the police.

The Police General Directorate as well as many police officers working in regional directorates are dissatisfied with the present situation relating to the investigation of pre-trial criminal cases. As much police work and all confessions are taken out of the court file, police investigations carry little weight and all work is duplicated during the court investigation phase. Investigations are often diluted and prolonged making them expensive, bureaucratic and inefficient. Senior officers from the General Directorate believe that, as a transitional country, too many laws have been introduced in too short a time, leading to disharmony and confusion. Therefore, the law should be overhauled, regulations should be harmonized, and the important role of the police should be acknowledged.

Police officers are keen to work more closely with the prosecutor so that potential evidence is identified at the earliest opportunity and additional requests for information do not prolong the enquiry. Such relationships have improved in past years. Nevertheless, there are still some disputes about where to lay blame when a case is not successfully prosecuted. When a prosecutor refuses a request for a particular measure to be undertaken during an investigation, officers are advised to raise the issue with the Ministry of the Interior who will resolve the matter with the General State Attorney's office.

6.5.5 Interim measures, temporary legal arrangements

The feasibility of the reform also depends on how well the **transition** process from the old to the new model is steered. In this respect it is suggested that

- Parliament as quickly as possible should abandon the regulation on mandatory court investigations (art 191/204 CPA) in order to allow public prosecutors to directly indict heavy cases without taking them through a court investigation; this should immediately and significantly reduce the number of court investigations;
- Public prosecutor's office should immediately start to tackle the backlog. An understanding should be reached as to restricting police reporting with regard to cases that are obviously not of a criminal nature, reports concerning unidentified suspects and initial reports.

6.5.6 Overall feasibility

Overall, the feasibility of the reform program will depend, among other factors, on:

- A clear political backing from the side of the Parliament, the Ministry of Justice and the Ministry of Interior.
- A strong steering mechanism including all powerful stakeholders.
- A pro-active public relations strategy controlled by the Steering group.

7 Action Plan: Implementing the Reform Program “Reform of Pre-Trial Criminal Proceedings 2007-2012”

7.1 Designing the reform program – some basic assumptions

7.1.1 Modular approach

Notwithstanding the aim of comprehensively reforming the pre-trial phase of criminal proceedings, this chapter takes a modular approach in defining the necessary steps that need to be taken. This, first of all, relates to differences in actors, notably different ministries in charge of implementing reform measures. In addition, for supporting the reform the EU has a variety of tools at its hands, relating to differences in time-frames and costliness.

7.1.2 Depending on political decisions

The design of this action-plan aims to take a certain unpredictability of political developments in general and parliamentary decision processes in particular into account. Whereas some reform measures, primarily relating to the “culture” of the criminal justice system and the police, do not strictly depend on legislative amendments, the core elements - of redistributing functions in the pre-trial phase of criminal proceedings and of preventing cases from going to an adversarial trial when this is dispensable - can only be implemented on the firm and reliable basis of pertinent parliamentary decisions. (In particular, with regard to some core elements of the reform there is little reason in kicking off EU-funded projects for the implementation of these reform measures as long as indispensable parliamentary decisions are pending.)

As parliamentary elections can be expected to take place during the second half of 2007, the finalisation of legislative proceedings may not be expected before the last quarter of 2008. Therefore, it will not be feasible to take the decision to start the second and decisive phase of the reform process before that date.

Nevertheless, next to preparing draft legislation and quickly sending bills into the parliamentary pipe-line, important steps can be taken in preparation of the comprehensive reform measures. In particular, a multitude of detailed **assessments**, each of a quite limited scope, would allow for a precise adjustment of the following larger projects to actual reform needs.

7.1.3 How to implement the necessary amendments to the CPA

In many respects amendments to the CPA as well as to other laws are recommended. As a rough and incomplete overview, the following changes are recalled:

- Elimination of the formal court investigation; restriction of investigative functions of courts to a few cases;
- Strengthening the powers of courts to finalize cases including alternative sanctions;
- Strengthening the investigative functions of the police in cooperation with public prosecutors;
- Strengthening the participation of victims in pre-trial proceedings;

- Harmonisation of the Act on the Police with the amended CPA;
- Strengthening the independence of public prosecutors by amending the pertinent legislation;
- Creating the normative framework for the compensation of crime victims.

In the end, most of the first 20 chapters (amounting to approximately the first 280 articles) of the CPA need to be revised, as well as chapters 26 and 27.

It is suggested that the task of compiling this draft legislation and reviewing the feedback provided by the consultation mechanism should be assigned to a small team of no more than three persons. Their work should be monitored by the Joint Steering Group (in this respect please refer to 7.6). It is important that issues of substance are decided jointly with the Steering Group, whereas the technicalities of suiting the words to the action are left to the drafting team.

If a clear political decision to implement the reform is taken within the first quarter of 2007 then all draft legislation should be finalized and sent to parliament until the end of that year. (This should include the time period needed for a broad public consultation.)

In 2008 the Croatian parliament should be asked to approve the draft legislation. Although several laws need to be amended it would be beneficial if all necessary changes would be treated as one package throughout parliamentary proceedings.

It is indispensable that the parliament allows administration and judiciary to properly prepare for the entering into force of the new legislation. This requires a *legis vacatio* of **at least three years**.

If parliament decides until end of 2008 it is suggested that the new legislation should enter into force not before January 1st 2012.

Croatian Parliament should be prepared to revise the progress made and to decide on **delaying the entering into force** (e.g. by another year) if it appears that the implementing institutions by the second quarter of 2011 are not convinced that they would be in a position to properly implement the new legislation by January 2012.

7.2 Reform Program Component I: Enhance monitoring and decision functions of courts

The project recommends a fundamental change in the functions performed by courts in pre-trial criminal proceedings. If these recommendations are approved then courts will perform only very limited investigation functions; instead they will control investigations performed by the police and public prosecutors and decide on the outcome of these investigations, either with a view of finalizing the case or by deciding on the admissibility of an indictment.

7.2.1 Phase I (2007-2008)

7.2.1.1 Assessment of training needs and of necessary investments in the judicial academy (A1)

In preparation of the proposed Twinning Light project aimed to support judges in adjusting to their new functions in pre-trial proceedings in **2008** two short assessments should be conducted by the Ministry of Justice supported by Member State experts in order to define precisely the amount of training needed as well as necessary investments in the judicial academy.

The costs for these assessments can roughly be estimated as **20,000 €** (for 5 STEW).¹⁸¹

7.2.1.2 Assessment of options for enhancing and setting up NGOs tasked with implementing alternative sanctions (A2)

Certain alternative sanctions, such as victim/offender-mediation, anti-violence trainings and community services, require private organisations for their implementation. In **2008** the Ministry of Justice, supported by Member State experts, should assess the possibilities of establishing a structure of NGOs providing the services needed and operating on a regional basis.

The costs for this assessment can roughly be estimated as **16,000 €** (for 4 STEW).

7.2.2 Phase II (2009-2011): Twinning Light project and grants

The second phase of the implementation of the first component of the reform program is devoted to implementing a Twinning Light project aimed to allow judges to perform the new role assigned to them under the new legislation.

One particular function of the courts in investigation proceedings will be the integration of alternative sanctions in abbreviated procedure. This requires NGOs which are prepared to administer and implement alternative sanctions. Also judges should have an understanding of the benefits and chances of alternative sanctions.

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¹⁸¹ All assessments are calculated in «STEW», meaning one short term expert working for one week; this implies 6 per diems (at present 1,368 €) plus 5 fees (in case of a civil servant 1,250 €) plus 1 flight (500 €) amounting to 3.118 €; for the inclusion of administrative costs and all risks the amount is calculated as 4.000 €.

7.2.2.1 Twinning Light project: “Supporting courts in implementing new legislation in criminal proceedings, supporting the judicial academy”

Component I: Comparative analysis

- **Activity 1.1:** Workshops for the comparative analysis of the role of judges in countries with similar models of legislation
 - As there will not be one single country that is similar to the proposed legislation in all important aspects it will be necessary to focus on certain aspects of several models, such as the role of courts in safeguarding the rights of the parties or in finalizing cases.
- **Activity 1.2:** Study visit of judges to a country with a similar model of legislation (again, in certain aspects)

Component II: Development of a training module and implementation of train the trainer seminars

- **Activity 2.1:** Development of a training module addressing, in particular, the following functions assigned to courts
 - Deciding on measures intervening in Human Rights positions
 - Deciding on complaints against public prosecutors or the police
 - Taking the statement of persons belonging to vulnerable groups
 - Finalising cases and applying alternative sanctions
- **Activity 2.2:** One training aimed to train at least 15 judges as trainers (possibly 6 judges from the Zagreb area and three judges of each of the areas Osijek, Rijeka and Split)
- **Activity 2.3:** Monitoring of at least four pilot trainings in different regions
- **Activity 2.4:** Revision of the training module

Component III: Support to NGOs implementing alternative sanctions

- **Activity 3.1:** Study visit for NGO staff members and judges
- **Activity 3.2:** Workshops on victim/offender mediation and restorative justice
- **Activity 3.3:** Workshops on anti-violence trainings in the area of domestic violence; workshops on other trainings and treatments implemented as alternative sanctions
- **Activity 3.4:** Workshops on community services and the role of NGOs in supporting their implementation

Component IV: Support to the Functioning of the Judicial Academy

- **Activity 4.1:** Assessment of current work of the judicial academy, including a review of training methods and curricula and an assessment of the management of the academy
- **Activity 4.2:** Training seminars for academy staff

Rough estimate of Twinning Light costs:

2009: 120,000 €, 2010: 130,000 €, overall: 250.000 €

7.2.2.2 Grants scheme for supporting the work of NGOs in the field of the administration and implementation of alternative sanctions

It is suggested that the EU Commission would support the initial phase of the work of NGOs operating in the field of alternative sanctions for a period of three years (2010-2012) with an annual amount of **200.000 €** (overall **600.000 €**). Later-on, the costs of NGOs implementing alternative sanctions should be borne by the Public fund for financial assistance to NGOs supporting the criminal justice system.¹⁸²

7.2.2.3 Support to the judicial academy: supply and works

The judicial academy will have to perform a crucial role in implementing the training of public prosecutors and judges. Therefore, it is suggested to invest in updating and complementing the equipment as well as extending the premises of the academy.

Rough estimates of assistance needed:

Supply 150,000 €; works: 250,000 € (2008-2009 annually 200,000 €).

7.3 Reform Program Component II: Enhance investigation functions of police and public prosecutors

7.3.1 Phase I (2007-2008): Preparation of legislation, of organisational adaptations, detailed needs assessments

7.3.1.1 Decisions on organisational questions and on matters of human resources development

In preparation of the parliament's decision and its implementation the ministries will have to decide on issues of human resources development as well as of organisation, such as

- Determining the organisational level on which investigating functions are carried out and
- Designing the cooperation and communication between police and public prosecutors and a mechanism for an on-going joint assessment of cooperation.

7.3.1.2 Assessments of the needs for training of public prosecutors, for training of the police and for enhancing the equipment of the police

Three short assessments should be carried out by the Ministries of Justice and of Interior in 2008, supported by Member State experts, in order to determine as precisely as possible:

- The needs for **training of public prosecutors** with regard to the expected legislation, the relevant *EU-acquis* and investigation management skills;
- The priority **training needs of the police** with regard to basic skills as well as to specific expert knowledge and the management of complex investigations,¹⁸³
- The necessity to **update and complete equipment** needed for criminal investigations.

Overall, the costs of these **assessments** can roughly be estimated as **60,000 €** (4+6+5=15 STEW).

7.3.2 Phase II (2009-2011)

In the second phase of implementation of the second program component the focus will be on raising the level of professionalism of police and public prosecutors and on firmly establishing a “work contract” among police and public prosecutors for their effective cooperation in implementing investigations. A Twinning project, devoted to institutional aspects of public prosecution, will aim to enhance independence and performance of public prosecution in Croatia on the basis of amendments to the Act on the State Attorney's Office.

7.3.2.1 Twinning project I: “Strengthen independence and enhance performance of public prosecution in Croatia” (2009-2011)

Component I: Develop and implement a training curriculum on professional ethics and performance

- **Activity 1.1:** Assessment of current professional standards of public prosecutors (40 STED)
- **Activity 1.2:** Developing a code of ethics for public prosecutors (35 STED)
- **Activity 1.3:** Development of a training module (40 STED)
- **Activity 1.4:** Ten workshops on professional ethics of public prosecutors and on matters of internal organisation, each for three days (80 STED)
- **Activity 1.5:** Review training module with a view to encourage an integration in future curricula (10 STED)

Component II: Assess management; strengthen internal oversight in public prosecutor’s offices

- **Activity 2.1:** Assessment of internal organisation of public prosecutor’s offices, including such aspects as (40 STED)
 - management of public prosecutor’s offices, handling the case load
 - deciding on and implementing priorities
 - strengthening supervisory functions
- **Activity 2.2:** Assessment of management and current mechanisms of supervising the performance of public (40 STED)
- **Activity 2.3:** Developing guidelines for the internal organisation of public prosecutor’s offices (20 STED)
- **Activity 2.4:** Implement seminars for heads of public prosecutor’s offices (40 STD)
- **Activity 2.5:** Review training module with a view to allow for its integration in future curricula for management training (10 STED)

Component III: Support the implementation of an overall human resources development strategy

The aim of this component would be to support the improvement of human resources management and career development, the introduction of a performance evaluation system and the creation of an informational basis of human resources management. In addition, the means of training of prosecutors and judges should be enhanced with a view of better communicating legal developments and building on the professional and management skills of prosecutors and judges.

- **Activity 3.1:** Assessing the current **human resources management** system including its legal framework. (20 STED)
- **Activity 3.2:** Designing a new HRM system; drafting of amendments to the relevant regulations; (25 STED)

- **Activity 3.3:** Training of key personnel on use of the new HRM system. (50 STED)
- **Activity 3.4:** Defining criteria for **recruitment and promotion**; drafting of amendments to relevant regulations; (30 STED)
- **Activity 3.5:** Training of key personnel on recruitment matters. (50 STED)
- **Activity 3.6:** Developing concepts for **evaluation of the performance** of public prosecutors and possible requirements for additional training; drafting of amendments to the relevant regulations. (40 STED)
- **Activity 3.7:** Training of key personnel on performance evaluation methods. (50 STED)

Based on the assumptions that the RTA will be resident for a period of approximately 15 months the costs of this Twinning project are estimated as 1,100,000 € (2009: 200,000 €, 2010: 800,000 €, 2011: 100.000 €)

7.3.2.2 Twinning project II “Support police in the implementation of new legislation in investigation proceedings in cooperation with public prosecutors”

This project will form the core element of the reform process and last for **24 months**. The focus of this project will be on training aimed to allow police officers and public prosecutors to implement new legislation. Institutional aspects are mainly dealt with under other projects, such as the Twinning project just described and the Twinning project under program component IV.

Component I: Steering the Implementation process

- **Activity 1.1: Establishing a Joint Working Group**
 - Establishing a Joint Working Group combining the Ministries of Justice and of Interior, the Office of the Attorney General of the Republic, senior public prosecutors and police detectives from the regions as well as the project partners (including, to some extent, the component coordinators); project leaders of related projects, such as Twinning project I and Twinning projects III and IV should be invited to report and coordinate.
 - One meeting per trimester of project implementation (40 STED)
- **Activity 1.2: Two study visits** to countries which have a similar model with regard to the organisation of investigations (such as Germany, Austria, Italy)

Component II: Developing of a Training Module for the Training of Public Prosecutors

- **Activity 2.1:** Development of a training module aimed to
 - communicate the legal basis of pre-trial criminal proceedings as well as underlying legal concepts (in particular, the rule of law and human rights)
 - improve practical skills of public prosecutors in managing their work and monitoring police investigations (40 STED)

- **Activity 2.2:** Three seminars each lasting for eight working days and aimed to train approximately 12 public prosecutors as trainers (90 STED)
- **Activity 2.3:** Monitoring of four pilot trainings in various regions, each with a duration of five days (40 STED)
- **Activity 2.4:** Revision of the training module (20 STED)
- **Activity 2.5:** Eight workshops on cooperation and communication of public prosecutors and the police each lasting for three days and addressing ten public prosecutors and ten senior police officers and aimed to clarify
 - the legal basis for the cooperation and interaction of public prosecutors and the police
 - the principles and the structure of the cooperation of public prosecutors and the police as well as organisational aspects of communication and cooperation of police and public prosecutors (75 STED)

Component III: Additional basic and specialised police training

- **Activity 3.1:** Development of a basic training module aimed to enhance basic skills in detecting and investigating crime (60 STED)
- **Activity 3.2:** Four trainings each lasting for ten working days and aimed to train approximately 20 senior police officers as trainers (140 STED)
- **Activity 3.3:** Monitoring of at least five pilot trainings in various regions, each with a duration of five days (60 STED)
- **Activity 3.4:** Revision of the training module (20 STED)
- **Activity 3.5:** Specialised training for different groups of experts on various topics, including
 - crime scene investigations,
 - statement taking,
 - management of complex investigations,
 - covert investigation techniques,
 - financial investigations (180 STED)
- **Activity 3.6:** Two **study visits** for specialised investigators to EU member states

Component IV: Enhancing the forensic capacity of the police

A further integration of scientific evidence into policing practices in Croatia will support a move from confession-based investigation strategies to one founded on physical and scientific evidence. This would result in more robust and transparent investigations. This component interrelates with the supply-component.

- **Activity 4.1:** A comprehensive training and awareness programme for Senior Investigating Officers to maximise the contribution of scientific evidence to serious, serial and organised crime. (40 STED)
- **Activity 4.2:** Implementation of a Quality Management System to ISO17025 standards in Police Forensic Laboratories (40 STED)

- **Activity 4.3:** Establishment of an National DNA Database with appropriate legislation and technical facilities working to agreed quality standards(50 STED)
- **Activity 4.4:** Enhancing of Police Forensic capabilities in the areas of drugs intelligence, toxicology, computer crime investigation, audio and image enhancement and firearms scene reconstruction
(50 STED)
- **Activity 4.5:** Train of trainers establishing a comprehensive training and awareness programme for First Officers Attending crimes to maximise the preservation of evidence. (60 STED)
- **Activity 4.6:** **Study visit** to an EU member state

Component V: Investigation and Prosecution against legal entities and combating economic crime, in particular fraud impairing EC financial interests

- **Activity 5.1:** Assessment of legal transposition of the relevant EU acquis
(15 STED)
- **Activity 5.2:** Assessment of state of play in the field of implementing the relevant EU acquis (15 STED)
- **Activity 5.3:** Joint training seminars for police officers and public prosecutors working in the areas of economic crime (60 STED)
- **Activity 5.4:** Two **study visits** for specialised police officers and public prosecutors to EU member states

Component VI: Enhancing European Co-operation in Criminal Investigations

This component aims to enhance the integration of senior police officers and public prosecutors in cooperation with their colleagues in EU member states and

- **Activity 6.1:** Assessment of current situation in the field of European police cooperation (10 STED)
- **Activity 6.2:** Assessment of current situation of cooperation of public prosecutors on the level of the EU (10 STED)
- **Activity 6.3:** Training seminars for police officers (30 STED)
- **Activity 6.4:** Training seminars for public prosecutors (30 STED)
- **Activity 6.5:** **Two study visits** of senior police officers and public prosecutors to EU member states

Assuming that the RTA would be resident for some 21 months, pre-accession assistance for this Twinning project can be estimated as amounting to 2,100,000 € (2009: 400,000 €; 2010: 1,200,000 €; 2011: 500,000 €)

7.3.2.3 Supply: Enhancing the Investigative and Forensic Capacity of the Police

Rough estimate of assistance: 1,000,000 € (2009-2010 annual 500,000 €)

7.4 Reform Program Component III: Create a victim sensitive criminal justice system

This project component focuses on three objectives:

- Involving crime victims in the criminal justice system
- Preventing secondary victimisation and protecting vulnerable groups against repeat victimisation
- Establishing a system of victim compensation

7.4.1 Phase 1 (2007)

The ambitious aim to create a victim sensitive criminal justice system in Croatia implies, next to investments in many areas, a change of attitudes and culture of all organisations involved in implementing criminal proceedings. As this requires a continuous development over a longer time period, it is suggested to start this program component quickly in order to make it possible to arrive to necessary achievements in time. Also, in this program component it is not necessary to wait until new legislation has been passed by the parliament as it can be expected that Croatia will bring its legislation in line with the EU *acquis* which in this field gives quite precise guidelines. Therefore, the direction of legal and actual developments is predictable.

In the course of **2007** a series of smaller assessments should be conducted in order to quickly prepare for the start of Twinning project III. As has been outlined above this program component requires a package of investments.¹⁸⁴ In order to prepare for the Twinning project, which is planned for the second phase of this program component, a more precise picture of the financial needs has to be elaborated.

7.4.1.1 Assessment of necessary investments in establishing a strong network of victim support organisations (A6)

Member State experts working in the area of crime victim support should assess the financial needs for establishing a firm network of victim support organisations, covering both the assistance of specific groups (such as victims of discrimination and hate crime, victims of domestic violence, abused children, and tourists as crime victims) as well as generalists working in this field. The costs of this assessment are estimated as **24,000 €** (6 STEW, 2007).¹⁸⁵

7.4.1.2 Assessment of necessary investments to establish a scheme and administration for victim compensation (A7)

In order to design a dual system of crime victim compensation resting on a public as well as a private pillar the financial need for establishing both components should be assessed. The costs of this assessment can be estimated as **16,000 €** (4 STEW, 2007).

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¹⁸⁴ Please refer to 6.5.3 above.

¹⁸⁵ All assessments are calculated in «STEW», meaning one short term expert working for one week; this implies 6 per diems (at present 1,368 €) plus 5 fees (in case of a civil servant 1,250 €) plus 1 flight (500 €) amounting to 3.118 €; for the inclusion of administrative costs and all risks the amount is calculated as 4.000 €.

7.4.1.3 Assessment of necessary investments in equipment and works (A8)

It will be remembered that the pertinent Council Framework Decision (2001/220/JHA, L 82/1 of 22.3.2001) requires that each Member State would be prepared to spare vulnerable victims of having to testify in court. The recommended means of implementing this regulation is to audio/video-tape the statement of victims. This can happen both at police stations and at court. (E.g. in Austria all courts are equipped to allow for an adversarial hearing of the victims statement; in addition there are specialised police units who are equipped and trained to audio/video-tape the statement of sexually abused children.)

Article 15 of the Council Framework Decision stipulates:

Practical conditions regarding the position of victims in proceedings

1. Each Member State shall support the progressive creation, in respect of proceedings in general, and particularly in venues where criminal proceedings may be initiated, of the necessary conditions for attempting to prevent secondary victimisation and avoiding placing victims under unnecessary pressure. This shall apply particularly as regards proper initial reception of victims, and the establishment of conditions appropriate to their situation in the venues in question.
2. For the purposes of paragraph 1, each Member State shall in particular have regard to facilities within courts, police stations, public services and victim support organisations.

It follows that efforts are required to, step by step, adapt police stations and court buildings to standards that meet the rights and legitimate interests.

It is recommended that this assessment would first **define standards** and draft terms of reference and specification of services and works for future investments; and on this basis determine necessary **adaptations**, focussing on a limited number of facilities maintaining a regional distribution. Within these limits the assessment would have to cover the following elements:

- Necessary equipment of police stations and courts;
- Necessary investments in police and court facilities.

The assistance required would amount to **40.000 €** in 2007 (10 STEW).

7.4.2 Phase 2 (2008-2011)

7.4.2.1 Twinning III: “Support to the creation of a victim sensitive criminal justice system” (2008-2010)

Component 1: Police training and police culture

- **Activity 1.1:** Assessments
 - Assessment of the current situation with regard to performance in relation to crime victims (e.g. assisting, receiving and hearing victims);
 - Assessment of defined performance and training standards and the relevant brief of the organisation as defined by legal and internal documents (40 STED)

- **Activity 1.2:** Designing of a training module covering:
 - The rights of victims: standards defined by the EU and the Council of Europe, including case-law created by the ECtHR
 - National Legislation
 - The trauma of violence: PTSD, complex traumatisation and related illnesses
 - Phenomenology of violence: incidental violence, violent relationships, in particular with regard to hostages, victims of domestic violence, of sexual violence and of trafficking of persons
 - Policing violence and supporting victims: a comparative view
 - Performance standards: Adjusting police routines to the rights and needs of victims of violence
 - Developing an organisational framework for a victim-sensitive police service (60 STED)
- **Activity 1.3:** Implementation of train the trainer-seminars (60 STED)
- **Activity 1.4:** Review of performance standards and indicators with regard to the organisational development towards a victim-sensitive police service(30 STED)

Component 2: Training of public prosecutors

- **Activity 2.1:** Assessment of current interaction with victims and performance standards (20 STED)
- **Activity 2.2:** Development of a training module for public prosecutors (30 STED)
- **Activity 2.3:** Implementation of training seminars for public prosecutors (50 STED)

Component 3: Training of judges

- **Activity 3.1:** Assessment of current interaction with victims and performance standards (20 STED)
- **Activity 3.2:** Development of a training module for public prosecutors, including techniques of avoiding secondary traumatisation in statement-taking and taking the rights of victims into account in deciding on alternative sanctions(30 STED)
- **Activity 3.3:** Implementation of training seminars for public prosecutors (50 STED)

Component 4: Protecting particularly vulnerable groups

- **Activity 4.1:** Workshops for police officers on policing domestic violence, integrating a comparative view and human rights-aspects (90 STED)
- **Activity 4.2:** Workshops for police officers on supporting and protecting victims of discrimination and hate crime (50 STED)
- **Activity 4.3:** Workshops for police officers on supporting and encouraging victims of corruption (40 STED)

Component 5: Setting up a network of victim support organisations

- **Activity 5.1:** Assessment of the current situation with regard to victim assistance, including psycho-social assistance in criminal proceedings(40 STED)
- **Activity 5.2:** Capacity building: workshops for NGO staff working in various fields of victim support (80 STED)
- **Activity 5.3:** Workshops: Assisting and accompanying victims in criminal proceedings (40 STED)

Component 6: Organizing crime victim compensation

- **Activity 6.1:** Assessment of current situation concerning crime victim compensation (30 STED)
- **Activity 6.2:** Workshops for administration on the implementation of schemes of compensation to victims of violent crime (40 STED)
- **Activity 6.3:** Capacity building: workshops for private organisations active in the field of financial victims support (50 STED)

Component 7: Establishing a “Public fund for financial assistance to NGOs supporting the criminal justice system”

- **Activity 7.1:** Assessment of organisational options for setting up a public fund for financial assistance to NGOs supporting the criminal justice system(20 STED)
- **Activity 7.2:** Workshop for the administration of a Public fund for financial assistance to NGOs supporting the criminal justice system (30 STED)

If the RTA is resident for some 18 to 21 months, pre-accession assistance for this Twinning project can be estimated as amounting to 1,700,000 € (2008: 350,000 €; 2009: 900,000 €; 2010: 450,000 €)

7.4.2.2 Grants-scheme for NGOs (2009-2012)

Pre-accession assistance should encourage the creation and foster the development of a strong network of victim support organisations as well as a support structure offering assistance in criminal proceedings. It is suggested that this assistance should amount to annually **400,000 €** over a time period of **four years**, amounting to overall grants of **1,600,000 €**.

Later-on, the costs of victim support NGOs will be borne by the Public fund for financial assistance to NGOs supporting the criminal justice system.

7.4.2.3 Supply (2009-2010)

- **Police:** Investments in the furnishing of rooms and the equipment for audio/video-recording the statements of vulnerable groups at police stations, in particular the statements of sexually abused children (2009: 40.000 €; 2010: 40.000 €; overall **80.000 €**)
- **Courts:** Support to investments in equipment for audio/video-recording the statements of victims of violence at courts allowing for an adversarial setting (2009: 60.000 €; 2010: 60.000 €; overall **120.000 €**)

7.4.2.4 Works (2009-2012)

- **Police and Courts:** It is recommended that pre-accession assistance would also cover support of investments for adapting police and court facilities to the standards envisaged by the Council Framework Decision.

Estimated costs: four annual investments of 700,000 €, overall 2,800,000 €

7.5 Reform Program Component IV: Secure public confidence in the police

7.5.1 Phase 1 (2007): Assessment of systems of performance review, complaints procedures and feasibility of setting up complaints commissions (A9)

Member State experts should perform a more comprehensive and detailed assessment of performance culture and complaints procedures as well as of the readiness to establish external complaints commissions.

Estimated costs: The assistance required would amount to **32.000 €** (8 STEW).

7.5.2 Phase 2 (2008-2010): Twinning project IV “Secure public confidence in the police”

Component 1: Monitoring and steering the implementation process

- **Activity 1.1:** Establishment of a Joint Working Group (JWG) (12 STED)
- **Activity 1.2:** Opening Conference (8 STED)
- **Activity 1.3:** Two study visits of the members of the JWG to Member States where independent commissions receiving complaints are established
- **Activity 1.4:** Mid-term review (12 STED)
- **Activity 1.5:** Final conference (8 STED)

Component 2: Create an independent Police Complaints Commission (IPCC)

- **Activity 2.1:** Drafting of an action plan for setting up IPCC (40 STED)
- **Activity 2.2:** Decision of the JWG on the draft action plan (18 STED)
- **Activity 2.3:** Support in the recruitment of members of the IPCC (20 STED)
- **Activity 2.4:** Workshops and training of members of the IPCC (80 STED)
- **Activity 2.5:** Decision of the Joint Working Group as to the operation and organisation of IPCC (18 STED)
- **Activity 2.6:** Monitoring the performance of IPCC and recommending readjustments to the JWG (40 STED)

Component 3: Encourage a performance culture including internal and external performance review as well as Quality Management

- **Activity 3.1:** Assessment of performance culture and performance management in various parts of the organisation (40 STED)
- **Activity 3.2:** Draft a statement of performance culture and an action plan for encouraging a performance culture (40 STED)
- **Activity 3.3:** Decision of JWG on statement of performance culture and action plan (12 STED)
- **Activity 3.4:** Support to the establishment of a performance review department (15 STED)

- **Activity 3.5:** Training for members of performance review department (20 STED)
- **Activity 3.6:** Support to the creation of an independent external review body and training (40 STED)
- **Activity 3.7:** Support the decision of JWG on setting national priorities for policing, determining objectives, establishing performance indicators and setting targets (60 STED)
- **Activity 3.8:** Prepare and conduct training seminars on the basis of the decisions of the JWG with regard to a general performance culture as well as to concrete priorities, objectives, performance indicators and targets (120 STED)

Component 4: Improving community relations

- **Activity 4.1:** Assessment of police/community relations (40 STED)
- **Activity 4.2:** Drafting of a strategy on the improvement of police/community relations (40 STED)
- **Activity 4.3:** Support to the decision making process of the JWG on the strategy on the improvement of police/community relations (16 STED)
- **Activity 4.4:** Support to the establishment of police/civil society consultative groups (60 STED)
- **Activity 4.5:** Preparation and conducting of training seminars on police/public relations (120 STED)

Component 5: Decentralisation of organisational structure

- **Activity 5.1:** Assessment of the need for and feasibility of decentralisation of the organisational structure (40 STED)
- **Activity 5.2:** Drafting of a strategy for decentralisation (40 STED)
- **Activity 5.3:** Support to the decision making process of the JWG on the strategy for decentralisation (16 STED)
- **Activity 5.4:** Support to the implementation of the strategic document (60 STED)

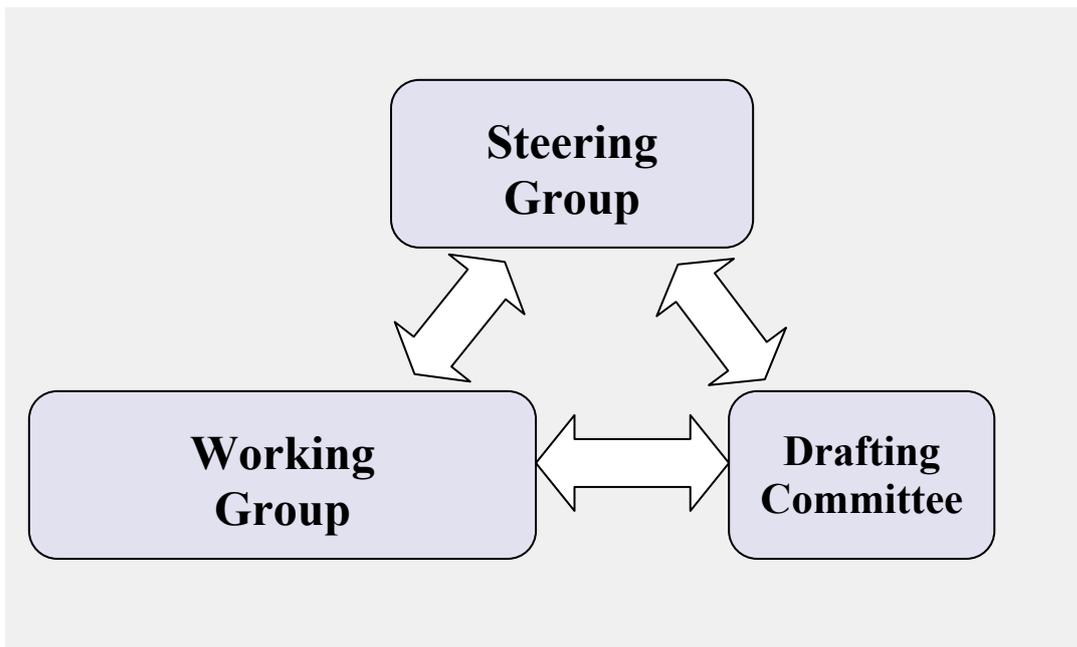
Assuming that the RTA will be resident for 21 to 24 months, pre-accession assistance for this Twinning project can be estimated as amounting to 1,900,000 € (2008: 400,000 €; 2009: 1,000,000 €; 2010: 500,000 €)

7.6 Steering the reform process

7.6.1 Establishing a Joint Steering Group

It is indispensable that the reform process would be monitored and steered by a small, but **high-level steering group combining the most important actors**. As an issue of urgency and priority this steering group should be established not **later than the end of the first quarter of 2007**.

With regard to the existing Working Group, representing the expert level, and the necessity to set up a drafting committee, the following structure is recommended:



It is suggested that the Joint Steering Group should **not have more than 8 members** and should be restricted to the main political actors (the ministries, the office of the Attorney General, the Supreme Court) and the Chairperson of the Working Group.

It is recommended that the Working Group should be extended to also include a representative of the Bar Association and a representative of at least one victim support organisation.

7.6.2 Benchmarking progress

The Steering committee should decide on envisaged benchmarks as basis for a continuous assessment of progress achieved in the reform process and cross-cutting through all four program components. As far as these benchmarks interfere with the content of pre-accession assistance these benchmarks should be agreed with the EC Delegation.

7.6.3 Monitoring the success of the reform

It is crucial that for a time-period of at least 18 months following the entering into force of the amended legislation (potentially by January 1st, 2012) the success of the reform be closely and continuously monitored on the basis of criteria and methods

decided in time and the results be reported to the Steering committee in order to allow this board to mend and readjust reform measures if necessary.

7.6.4 Technical assistance

It is suggested that the Steering committee could benefit from the support of **two Member State experts as advisors** who would perform the following functions:

- Closely monitor the progress of the reform and its success on the basis of agreed benchmarks and methods;
- Provide updated information on the progress of assessments, Twinning projects and other components of pre-accession assistance; draft quarterly progress reports including all developments related to the reform and its framework; inform the Steering committee of difficulties or risks arising in the implementation of the reform;
- Support the communication between the Steering committee and the management of projects (Project Leaders, Resident Twinning advisors, Team Leaders and Component coordinators);
- Assist in briefing and debriefing Member State experts and in streamlining activities in projects as well as in avoiding duplication and over-lapping.

Based on the assumption that in order to fulfill their tasks these experts would have to be present in Zagreb for an average of **15 working days per program quarter** the costs of such consultancy would amount to 24 STEW (96,000 €) per year.

7.6.5 Securing the comprehensiveness of the reform process

For the term of the implementation of the reform process (2007-2011) the Steering committee should prevent other projects from interfering with pre-trial criminal proceedings.

As far as projects are implemented in bordering areas the Steering committee should secure an adequate flow of communication. For instance, the Steering committee should be updated on the progress of the (important) Twinning project on the improvement of human resources management of the police.

7.6.6 Internal Communication and Public Relations

The Steering committee should secure internal communication among all actors involved in implementing the reform program.

In addition, a public relations policy should be developed and implemented by the Steering committee in order to secure public support of the reform program and to prevent diverting messages from being sent to media by different actors.

7.7 Conclusions: overview of the reform program and of proposed pre-accession assistance

The following page gives an overview of program components and implementation measures along a timeline.

This serves to show that in order to allow for an enactment of new legislation by January 1st, 2012, implementation processes have to be kicked off in the very near future (potentially until end of **March 2007**), in particular with regard to:

- Taking **decisions** on the level of the **government**;
- Reaching a **consensus with the EC Delegation** with respect to the financial assistance proposed;
- Setting up a **steering mechanism**;
- Tasking a small **working group** with the compilation and drafting of necessary **amendments to the CPA**, the Act on the Police, the ASAO and related laws;
- Organizing the **assessments** recommended for 2007;
- Starting **Programming** for 2008.

The second-next page indicates a comprehensive overview of the proposed pre-accession assistance broken down into annual budgets.

What are not displayed here are the assumed investments from the side of the Croatian government. However, it is our firm believe that, in case the EC Delegation agrees to the suggested pre-accession assistance, the contributions remaining on the side of the Croatian authorities are practically manageable and economically feasible.

For the next five years, these contributions are mostly investments in kind, such as

- The personnel attending seminars and training,
- Rooms for the implementation of activities.
- In addition, National experts have to be contracted for drafting legislation and for assisting in the steering of the program (this includes academics from law faculties, representatives of the bar association and experts from NGOs).

The proposed reform will to a considerable amount

- Speed up criminal proceedings;
- Reduce the number of public court trials and appeal proceedings, and reduce accordingly the number of public prosecutors and judges needed in these phases of criminal proceedings;
- Increase the amount of fees paid to the treasury, in particular in the form of alternative sanctions;
- Reduce the number of detained persons.

In addition to certain overstaffing that as been repeatedly mentioned in above chapters,¹⁸⁶ these gains in efficiency should allow, over a mid-term period of, say ten years for a significant reduction of staff, in particular with regard to the number of public prosecutors, to a lesser amount also of police officers. In general, it would appear that the Croatian government would be well advised to, on the one hand, reduce the number of staff in certain areas, on the other hand reinvest these savings in training, equipment and the well-being of their personnel.

Although in some fields additional investments will be needed, including costs for legal aid, for victim assistance and for victim compensation, the savings in the areas just determined should more than compensate for these investments. Overall, the criminal justice system designed in this document will, next to matching the pertinent EU acquis, without doubt be less costly than the system in place today.

Bearing in mind that, in the end, reform is not about paper but about action this document is concluded by a short but meaningful rhyme:

***Es gibt nichts Gutes,
außer man tut es.***

(Erich Kästner)¹⁸⁷

¹⁸⁶ See, in particular section 4.2 above.

¹⁸⁷ «Nothing is good unless it's done.»

	2007	2008	2009	2010	2011	
Steering the reform process	Establish a Joint Steering Group	monitoring	Decide to start the second phase	monitoring	Decide on delaying the entering into force	monitoring
Enhance monitoring and decision functions of courts	1.1 Prepare draft legislation 1.2 Assess training needs (A1) 1.3 Assess options for providing alternative sanctions (A2)	Parliament decides on all legislation required (legis vacatio until 1/1/2012)	1.4 Twinning Light Project “Supporting courts in implementing new legislation in criminal proceedings; supporting the Judicial Academy”			
Enhance investigation functions of police and public prosecutors	2.1. Prepare draft legislation 2.2 Decide on organisational issues 2.3 Assess training needs (A3, A4) 2.4 Assess equipment deficiencies (A5)		2.5 Twinning Project I: “Strengthening the independence and performance of public prosecution”			
Create a victim sensitive criminal justice system	3.1 Prepare draft legislation 3.2 Assess various financial needs (A6-A8)		3.3 Twinning	2.6 Twinning Project II: “Supporting the police in the implementation of new legislation in investigation proceedings in cooperation with public prosecutors”		
Secure public confidence in the police	4.1 Prepare legislation 4.2 Assess systems of performance review, complaint procedures and feasibility of setting up complaints commissions (A9)	4.3 Twinning Project IV: “Enhance Transparency and Accountability of the Police, Create Independent Police Complaint Commissions”				

**Overview of proposed EU pre-accession assistance 2007-2012
(rough estimates!)**

2007		€
7.4.1.1	A6: Assessment network of victim support organisations	24,000
7.4.1.2	A7: Assessment victim compensation	16,000
7.4.1.3	A8: Assessment equipment and works	40,000
7.5.1	A9: Assessment police performance review	32,000
7.6.4	Steering committee consultancy	96,000
	2007 overall	208,000
2008		
7.2.1.1	A1: Assessment of training needs	20,000
7.2.1.2	NGOs tasked with implementing alternative sanctions	16,000
7.2.2.3	Supply and works judicial academy	200,000
7.3.1.2	A3-A5: Assessment of training needs etc.	60,000
7.4.2.1	Twinning project III: Victim sensitive criminal justice system	350,000
7.5.2	Twinning project IV: Secure trust in police	400,000
7.6.4	Steering committee consultancy	96,000
	2008 overall	1,142,000
2009		
7.2.2.1	Twinning Light (Courts)	120,000
7.2.2.3	Supply and works judicial academy	200,000
7.3.2.1	Twinning project I (Prosecutor's offices)	200,000
7.3.2.2	Twinning project II (Support to Investigations)	400,000
7.3.2.3	Supply: Enhancing Investigative and Forensic Capacity	500,000
7.4.2.1	Twinning project III: Victim sensitive criminal justice system	900,000
7.4.2.2	Grants scheme victim support NGOs	400,000

7.4.2.3	Supply Police and Courts	100,000
7.4.2.4	Works police and courts	700,000
7.5.2	Twinning project IV: Secure trust in police	1,000,000
7.6.4	Steering committee consultancy	96,000
	2009 overall	4,616,000
2010		
7.2.2.1	Twinning Light (Courts)	130,000
7.2.2.2	Grants NGOs	200,000
7.3.2.1	Twinning project I (Prosecutor's offices)	800,000
7.3.2.2	Twinning project II (Support to Investigations)	1,200,000
7.3.2.3	Supply: Enhancing Investigative and Forensic Capacity	500,000
7.4.2.1	Twinning project III: Victim sensitive criminal justice system	450,000
7.4.2.2	Grants scheme victim support NGOs	400,000
7.4.2.3	Supply Police and Courts	100,000
7.4.2.4	Works police and courts	700,000
7.5.2	Twinning project IV: Secure trust in police	500,000
7.6.4	Steering committee consultancy	96,000
	2010 overall	5,076,000
2011		
7.2.2.2	Grants NGOs	200,000
7.3.2.1	Twinning project I (Prosecutor's offices)	100,000
7.3.2.2	Twinning project II (Support to Investigations)	500,000
7.4.2.2	Grants scheme victim support NGOs	400,000
7.4.2.4	Works police and courts	700,000
7.6.4	Steering committee consultancy	96,000

	2011 overall	1,996,000
2012		
7.2.2.2	Grants NGOs	200,000
7.4.2.2	Grants scheme victim support NGOs	400,000
7.4.2.4	Works police and courts	700,000
7.6.4	Steering committee consultancy	96,000
	2012 overall	1,396,000
	Pre-accession assistance 2007-2012 overall	14,434,000

8 Annex

8.1 “Novosel-Report”

Dragan Novosel
Deputy Attorney General of the Republic of Croatia

Results of research in respect to the work of police, State Attorney’s Office and investigating judge in the preliminary criminal (pre-investigation) procedure

- Arrests and dismissal of crime reports

I. Introduction

During the course of work on the «Project changes and amendments to The Criminal Procedure Act», the Committee passed a decision on conductance of two researches. The first research related to the work of the State Attorney’s Office in the pre-investigation procedure, to the conductance of enquiries and work in respect to dismissals of crime reports.

The second research related to police arrests as an action significantly affecting rights and liberties of citizens and to decisions of the police after the arrest, as well as decision of the state attorney and the investigating judge in respect to persons that were arrested and brought to the investigating judge.

Since the first research was performed on the basis of certain number of dismissals in the five largest State Attorney’s Offices, two with the lowest average of dismissals and two with the highest number of dismissals, it has been decided to conduct the second research at the similar number of cases in the competent police stations pursuant to seats of the State Attorney’s Offices. The research included all arresting actions (except arrests based on the court’s orders) that were performed in the first police stations of such police departments.

Researches were conducted based on special questionnaires. The overview of dismissals of crime reports was performed in the manner that every fourth dismissal of crime report in a certain period was examined.

The research included the largest State Attorney’s Offices (the Municipal Attorney’s Office in Osijek, Pula, Rijeka, Split and Zagreb), as well as two State Attorney’s Offices with the lowest number of dismissals (the Municipal Attorney’s Office in Čakovec and Vukovar) and two State Attorney’s Offices with the highest number of dismissals (the Municipal Attorney’s Offices in Dubrovnik and Karlovac).

Nine police stations from the police departments in which the first research was performed were designated for the second research on police conduct during arrests.

The research included Police Department Zagreb, as the 1st category police department, Police Department Osijek and Baranja, Police Department Primorje and Gorski Kotar, Police Department Istria and Police Department Split and Dalmatia, as the 2nd category police departments, Police Department Vukovar and Srijem, Police Department Karlovac and Police Department Dubrovnik and Neretva, as the 3rd

category police departments and Police Department Međimurje, as the 4th category police department.

Since the research was conducted in police stations and partially in the State Attorney's Offices, the questionnaire was divided into four parts. After the completion of research of the police segment a part of questionnaires under "D" for cases in which the arrested person was brought in front of a judge was submitted to the State Attorney's Office of the Republic of Croatia that forwarded such questionnaires to the competent Municipal Attorney's Offices that completed the questionnaires through examination of their own and court files.

After the research was conducted and results were presented pursuant to decision of the Committee, I included these results in order to provide the wholesome overview of the work of police and State Attorney's Offices in the preliminary criminal (pre-investigation) procedure.

The first part of this report deals with results of the research of the police work during arrests and conduct with the arrested persons, the second part provides overview of decisions of State Attorney's Offices after the arrested person was brought in front of the investigating judge, while the third part provides research results on the work of State Attorney's Offices pursuant to crime reports and reasons for dismissals of crime reports.

The research in the police stations and inclusion of results of this police segment was performed by Mr. Zvonimir Vnućec, head of department of criminal records of the Ministry of Internal Affairs of the Republic of Croatia.

However, since I subsequently included all researches and commented records from the other two researches, possible critical observations about the police work, on which Police Administration might have some remarks, are my personal observations rather than results of joint work.

II. Reasons for arrests, number of arrests and conduct of police officials

The police part of the research was conducted in October 2005 at the above mentioned Police Departments, i.e. their first police stations, while identical research was conducted at two additional police stations of the Police Department Vukovar and Srijem, as a control sample.

The research included arrests made during 2004.

A questionnaire was made for purposes of the research, after which a pilot research was conducted at Police Department Međimurje in order to detect possible shortcomings and problems in the questionnaire and conductance of the research. After the pilot research the Committee changed the questionnaire in the manner that the questionnaire was divided in four parts, with the first three parts relating to the police work and the fourth part that was completed only in cases when the arrested person was brought in front of the investigating judge and it related to the work of State Attorney's Offices and courts. These parts were marked with letters "A", "B", "C" and "D". The first three parts were completed by the police in respect to arrests and questioning of the perpetrator of a criminal offence, while the part "D" relates to the work of State Attorney's Offices and courts and it was completed by the State Attorney's Offices.

A sample of the questionnaire is attached to this report.

The questionnaire was completed by the police officials based on records and examination of the criminal file at the Police Department and that contains all documents relating to a specific case, such as the crime report and accompanying special reports, minutes on questioning, minutes on searches, official remarks, arrest forms, forms on use of force, affidavits on seizure of objects and overview of records and lists of on-duty defense counsels at the operational on-duty services of police stations.

1. Number of arrests

In order to give the evaluation of frequency of arrest in a particular area, first is shown the total number of arrests pursuant to questionnaires, and then this number of arrests was put into relation with the total number of criminal offences in a particular police station that were recorded during the course of the research.

a. Total number of arrests pursuant to questionnaires

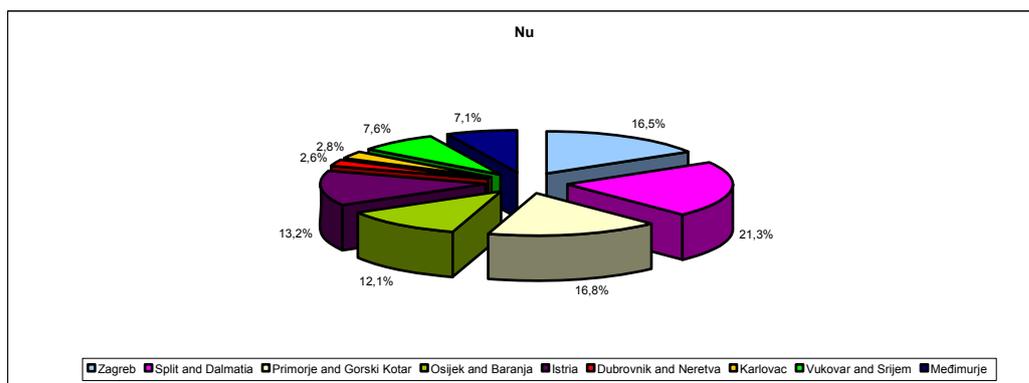
Table number 1 shows the total number of arrests by the police officials. The first column categorizes Police Departments pursuant to internal police regulations. The third column provides the number of arrests in a particular police station, i.e. the number of completed questionnaires at the first police stations of the said Police Departments. The fourth column shows the percentage of participation of a particular Police Department (police station) in the total number of monitored arrests.

Table no. 1

Category	Police Department	Number of arrests at the police station	% Number of arrests / total number of arrests
I	Zagreb	401	16,5 %
II	Split and Dalmatia	518	21,3 %
	Primorje and Gorski Kotar	408	16,8 %
	Osijek and Baranja	294	12,1 %
	Istria	320	13,2 %
III	Dubrovnik and Neretva	63	2,6 %
	Karlovac	69	2,8 %
	Vukovar and Srijem	184	7,6 %
IV	Međimurje	172	7,1 %
	Total	2429	100 %

The same information is contained in the chart number 1.

Chart no. 1.



b. Relation of the number of arrests and number of criminal acts at the police station and the Police Department

Table number 2 shows the relation between the total number of the recorded criminal offences in a Police Department and the first police station for purposes of evaluation of quality of the sample. In 2004 a total of 65245 criminal offences were recorded at these Police Departments, which amounts to 76,4 % criminal offences reported by the police in the Republic of Croatia, since during 2004 at all Police Departments a total of 85416 criminal offences were recorded. Information from the table show that an average of 25,5% or one quarter of recorded criminal offences in such Police Departments were recorded in the police stations in which the research was conducted.

Table no. 2

Police Department	Number of criminal acts in the Police Department	Number of criminal acts in the police station	% criminal acts at the police station in relation to the Police Department
Zagreb	28.388	3305	11,6%
Split and Dalmatia	8.191	1786	21,8%
Primorje and Gorski Kotar	7.490	1902	25,4%
Osijek and Baranja	4.692	1898	40,5%
Istria	8.274	4027	48,7%
Dubrovnik and Neretva	1.634	655	40,1%
Karlovac	2.289	1218	53,2%
Vukovar and Srijem	2.934	527	18,0%
Međimurje	1.353	808	59,7%
Total	65.245	16126	24,7%

Since at the police stations in which the research was conducted an average of 24,7% of criminal offences reported in these Police Departments was recorded (with the exception of Zagreb in which the I police station participates with only 11,6% of the reported criminal offences) we may conclude that the number of the reported criminal offences in these police station is sufficient to provide us with the realistic insight into the relation between the number of arrests and the number of the reported criminal offences in the areas of such Police Departments.

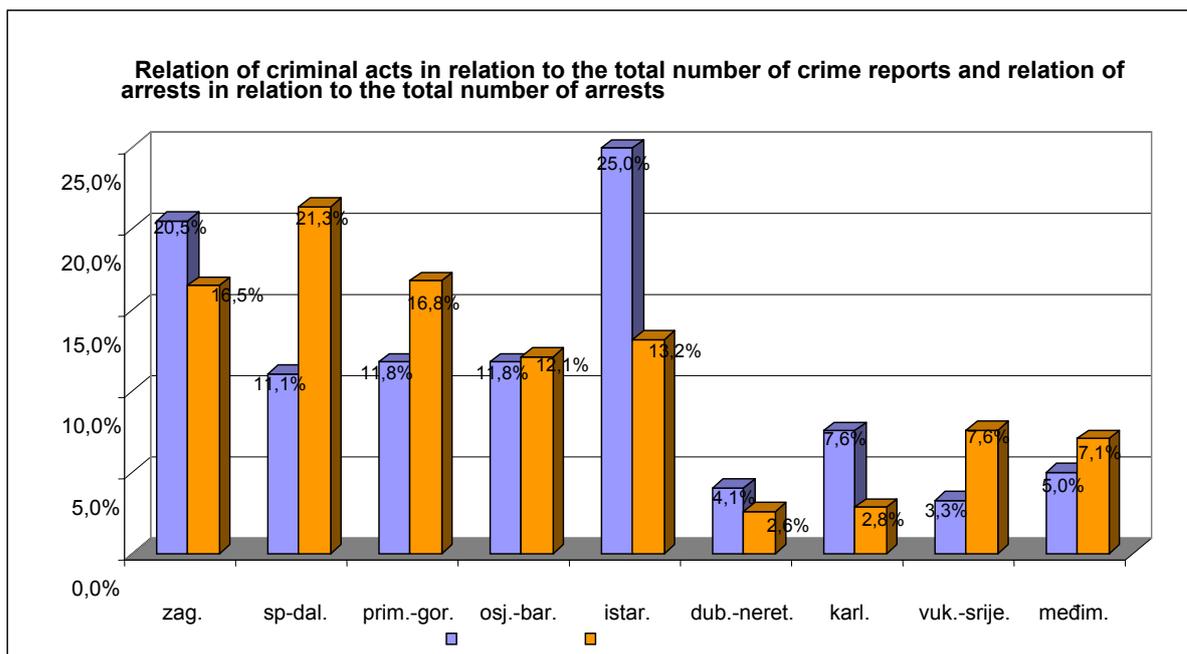
Table no. 3.

Police station at the Police Department	Number of criminal offences in the police station	Number of arrests at the police station	%
Zagreb	3305	401	12,1%
Split and Dalmatia	1786	518	29,0%
Primorje and Gorski Kotar	1902	408	21,5%
Osijek and Baranja	1898	294	15,5%
Istria	4027	320	7,9%
Dubrovnik and Neretva	655	63	9,6%
Karlovac	1218	69	5,7%
Vukovar and Srijem	527	184	34,9%
Međimurje	808	172	21,3%
Total	16126	2429	15,1%

Table number 3 contains information on the total number of criminal offences for 2004 for a particular police station, on number of arrests in such police stations, as well as information on percentage relation between the number of arrest and the number of criminal offences in a police station. Just like the research of the State Attorney's Offices on dismissals of crime reports this table also indicates significant differences between particular police stations.

Table number 3 and Chart number 2 indicate that differences are so significant that they hardly may be justified by severity of criminal offences and with possible reasons for arrests.

Chart no. 2.



Police stations in the big city centers (Pula, Split, Osijek, Rijeka and Zagreb) have more or less the same structure of crime and this information provides a basis for conclusion that the approach to arrest is different in different areas.

Informations show that, for example police station Pula in the total number of monitored crime reports participates with 25%. However, this police station participates in the total number of arrests with 13,2%. On the contrary, Police station Split participates in the total number of crime reports with 11,1% and in the total number of arrests with 21,3%. These are significant differences that provide basis for conclusion on different approaches or interpretation of legal reasons for arrest.

2. Structure of criminal acts

As it has been emphasized, differences in the number of arrests may be justified in case the structure of the reported criminal offences is different, i.e. in case that there are reasons for arrests that do not exist in other areas.

Experiences in respect to determination of compulsory detention by the investigating judge, as well as experience of many years in duty and coordination with the police, provide basis for conclusion that it is more likely that the arrest will be justified if more severe criminal offences have been committed in a specific area, especially in cases of severe criminal offences for which severe punishments are imposed.

In order to provide answer to the question does the number of arrests depend on the severity of criminal offences for which arrests were made, it is necessary to review information on structure of criminal offences in the monitored police stations.

a. Structure of reported criminal acts in the monitored time period and structure of criminal acts for which arrests were made

In order to review the ration of number of crime reports and number of arrests in the total structure of the reported crime at the said police stations in 2004, Table number 4 provides information on structure of crime for criminal offences against life and limb, against values protected by international law, against sexual freedom and sexual morality, marriage, family and youth, against property, against environment, against the public safety or persons and property, against safety of payment and business operations, against the judiciary, against public order and against official duty.

The structure is not provided for other chapters from the Criminal Code since arrests were made only for criminal offences from these chapters of the Criminal Code.

Information from Table number 4 relate to crime reports as recorded by the police, i.e. information does not relate to the reported persons and therefore these information do not fully correspond to information of the State Attorney's Office. The State Attorney's Office has its own records on known perpetrators of criminal offences pursuant to the number of reported persons, regardless of the number of criminal offences for which such persons are reported.

The information are different since only crime reports submitted by the police are shown in the Table, while the State Attorney's Office in its records contains all crime reports, regardless of the submitter.

Since the goal is to show relations between the structure of police reports that relate to areas of specific police stations and the structure of criminal offences for which arrests were made in such areas, it is necessary to show the structure pursuant to the police records, while the part III in some parts use statistical information of the State Attorney's Office in which reports are not recorded by criminal offences but by reported persons. Therefore this circumstance should be taken into consideration during the comparison of information.

Table no. 4.

Chapter of the Criminal Code	ZG	ST	RI	OS	PU	DU	KA	VU	ČK	Total
Criminal offences against life and limb	33	25	19	23	34	18	43	11	25	231
%	1,0%	1,4%	1,0%	1,2%	0,8%	2,7%	3,5%	2,1%	3,1%	1,4%
Criminal offences against freedoms and rights of man and citizen	37	40	65	68	165	25	59	29	8	496
%	1,1%	2,2%	3,4%	3,6%	4,1%	3,8%	4,8%	5,5%	1,0%	3,1%
Criminal offences against values protected by international law	104	235	284	177	233	108	63	35	79	1318
%	3,1%	13,2%	14,9%	9,3%	5,8%	16,5%	5,2%	6,6%	9,8%	8,2%
Criminal offences against sexual freedom and sexual morality	2	4	4	21	19	10	3	4	5	72
%	0,1%	0,2%	0,2%	1,1%	0,5%	1,5%	0,2%	0,8%	0,6%	0,4%
Criminal offences against marriage, family and youth	7	125	97	58	136	28	51	28	98	628
%	0,2%	7,0%	5,1%	3,1%	3,4%	4,3%	4,2%	5,3%	12,1%	3,9%
Criminal offences against property	2740	1133	1085	985	3228	403	867	300	458	11199
%	82,9%	63,4%	57,0%	51,9%	80,2%	61,5%	71,2%	56,9%	56,7%	69,4%
Criminal offences against environment		2			10	5	1	1	2	21
%	0,0%	0,1%	0,0%	0,0%	0,2%	0,8%	0,1%	0,2%	0,2%	0,1%
Criminal offences against the public safety or persons and	10	5	3	6	7	3	14	22	4	74

property and safety of traffic										
%	0,3%	0,3%	0,2%	0,3%	0,2%	0,5%	1,1%	4,2%	0,5%	0,5%
Criminal offences against safety of payment and business operations	59	51	71	54	24	19	26	42	35	381
%	1,8%	2,9%	3,7%	2,8%	0,6%	2,9%	2,1%	8,0%	4,3%	2,4%
Criminal offences against the judiciary	15	10	12	2	10	2	12	4	7	74
%	0,5%	0,6%	0,6%	0,1%	0,2%	0,3%	1,0%	0,8%	0,9%	0,5%
Criminal offences against authenticity of documents	234	79	195	459	98	21	49	24	67	1226
%	7,1%	4,4%	10,3%	24,2%	2,4%	3,2%	4,0%	4,6%	8,3%	7,6%
Criminal offences against public order	37	33	21	29	43	6	24	18	12	223
%	1,1%	1,8%	1,1%	1,5%	1,1%	0,9%	2,0%	3,4%	1,5%	1,4%
Criminal offences against official duty	27	44	46	16	20	7	6	9	8	183
% of total reports in 2004	0,8%	2,5%	2,4%	0,8%	0,5%	1,1%	0,5%	1,7%	1,0%	1,1%
Total reports in 2004	3305	1786	1902	1898	4027	655	1218	527	808	16126
%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Table number 5 provides the structure of criminal offences for which specific persons were arrested.

Table no. 5

Chapter of the Criminal Code	Police Departments									
	ZG	ST	RI	OS	PU	DU	KA	VU	ČK	Total
Criminal offences against life and limb	5	19	5	6	14	2	8	10	5	74
%	1,2%	3,7%	1,2%	2,0%	4,4%	3,2%	11,6%	5,4%	2,9%	3,0%
Criminal offences against freedoms and rights of man and citizen	13	33	10	10	2	7	2	1	0	78
%	3,2%	6,4%	2,5%	3,4%	0,6%	11,1%	2,9%	0,5%	0,0%	3,2%
Criminal offences against values protected by international law	77	110	156	170	111	25	4	19	107	779
%	19,2%	21,2%	38,2%	57,8%	34,7%	39,7%	5,8%	10,3%	62,2%	32,1%
Criminal offences against sexual freedom and sexual morality	2	2	0	3	6	4	1	1	1	20
%	0,5%	0,4%	0,0%	1,0%	1,9%	6,3%	1,4%	0,5%	0,6%	0,8%
Criminal offences against marriage, family and youth	4	11	0	1	1	1	0	0	0	18
%	1,0%	2,1%	0,0%	0,3%	0,3%	1,6%	0,0%	0,0%	0,0%	0,7%
Criminal offences against property	209	273	206	89	146	23	47	85	48	1126
%	52,1%	52,7%	50,5%	30,3%	45,6%	36,5%	68,1%	46,2%	27,9%	46,4%
Criminal offences against environment	0	0	0	0	3	0	0	1	4	8
%	0,0%	0,0%	0,0%	0,0%	0,9%	0,0%	0,0%	0,5%	2,3%	0,3%
Criminal offences against the public safety or persons and property and safety of traffic	4	0	0	1	3	0	2	13	5	28
%	1,0%	0,0%	0,0%	0,3%	0,9%	0,0%	2,9%	7,1%	2,9%	1,2%

Criminal offences against safety of payment and business operations	7	14	5	5	0	0	0	26	0	57
%	1,7%	2,7%	1,2%	1,7%	0,0%	0,0%	0,0%	14,1%	0,0%	2,3%
Criminal offences against the judiciary	3	8	4	0	4	0	1	1	0	21
%	0,7%	1,5%	1,0%	0,0%	1,3%	0,0%	1,4%	0,5%	0,0%	0,9%
Criminal offences against authenticity of documents	56	19	15	0	2	1	0	8	0	101
%	14,0%	3,7%	3,7%	0,0%	0,6%	1,6%	0,0%	4,3%	0,0%	4,2%
Criminal offences against public order	20	27	6	9	26	0	4	16	2	110
%	5,0%	5,2%	1,5%	3,1%	8,1%	0,0%	5,8%	8,7%	1,2%	4,5%
Criminal offences against official duty	1	2	1	0	2	0	0	3	0	9
%	0,2%	0,4%	0,2%	0,0%	0,6%	0,0%	0,0%	1,6%	0,0%	0,4%
Total	401	518	408	294	320	63	69	184	172	2429
%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Information from these Tables indicate that there are significant differences between particular areas in the structure of the reported criminal offences, as well as in the structure of criminal offences for which arrests were made and therefore it is necessary to put into relation the percentage of crime reports from particular chapters of the Criminal Code and percentage of arrests for such chapter of the Criminal Code, as shown in Chart number 3.

For purposes of comparison with Table number 4, the column "Total" in Table number 6 provides the structure of criminal offences pursuant to chapters of the Criminal Code for which arrests were made.

Table no. 6.

Chapter of the Criminal Code	Number of arrests	% arrests / total arrests
Criminal offences against life and limb	74	3, 1
Criminal offences against freedoms and rights of man and citizen	78	3,2
Criminal offences against values protected by international law	779	32,1
Criminal offences against sexual freedom and sexual morality	20	0, 8
Criminal offences against marriage, family and youth	18	0, 7
Criminal offences against property	1126	46,3
Criminal offences against environment	8	0, 3
Criminal offences against the public safety or persons and property and safety of traffic	28	1, 2
Criminal offences against safety of payment and business operations	57	2, 3
Criminal offences against the judiciary	21	0, 9
Criminal offences against authenticity of documents	101	4, 2
Criminal offences against public order	110	4, 5
Criminal offences against official duty	9	0, 4
Total	2429	100

Information shown in Table number 6 *per se* do not provide the answer to the question for which criminal offences most arrests were made. Only when put into relation with the total number of reports, with all of the above mentioned limitations, we can obtain better insight into conduct of particular police stations.

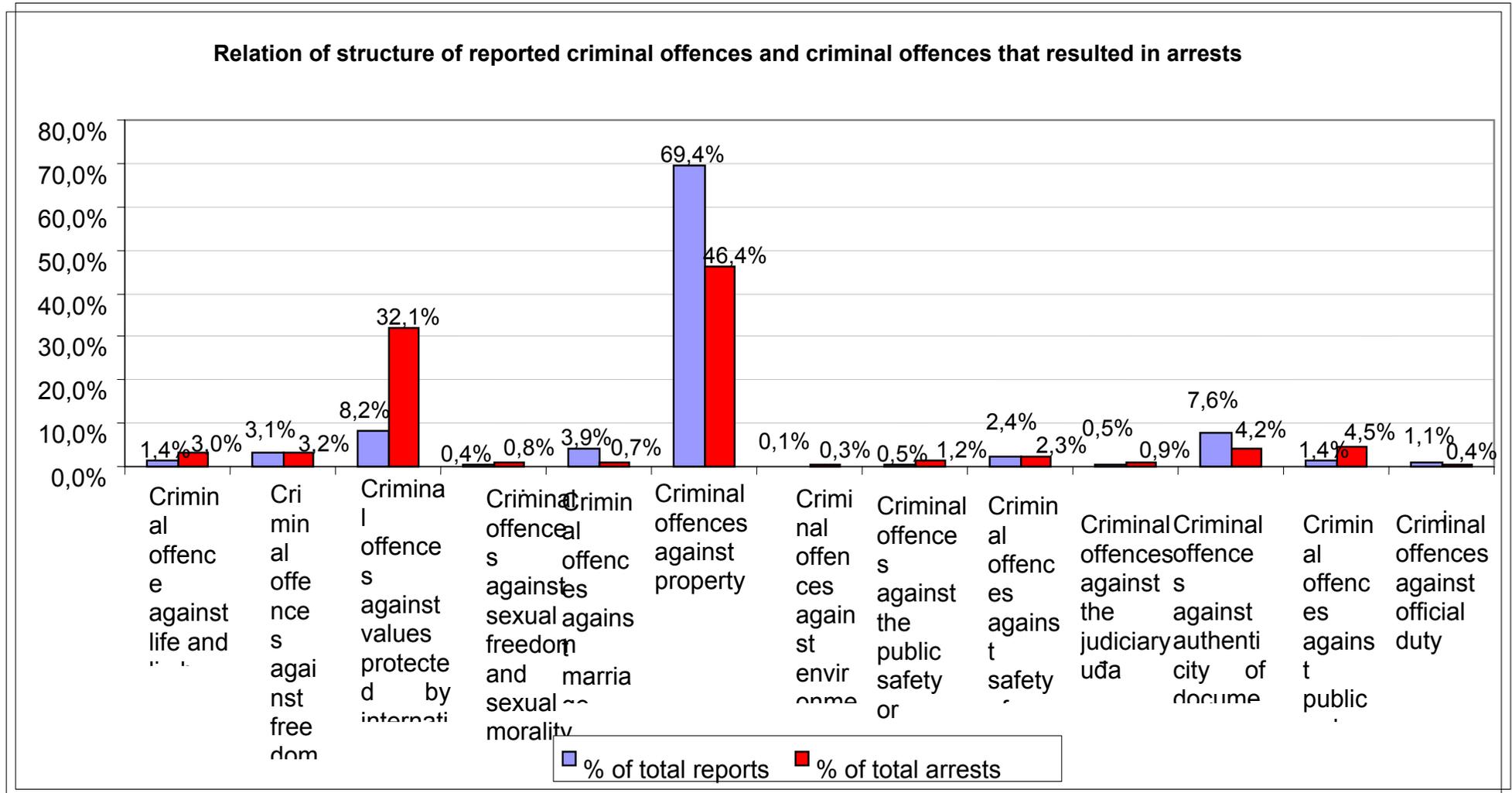
Information shown in Chart number 3 in a certain extent provide answers to questions that may be asked during the review of the number of arrests. The Chart shows, pursuant to chapters of the Criminal Code, the percentage of reports from such chapters that participate in the total number of reports and how criminal offences for which arrests were made participate in the total number of arrests. It is apparent that for certain chapters of criminal offences such number of arrests is in proportion with the

number of crime reports and for criminal offences from those chapters of the Criminal Code the research merely confirmed what has already been known from the practice.

So, for the most severe criminal offences against life and limb the perpetrator is apprehended and the structure of filed crime reports in percentage in relation to the total number of reports is in proportion with arrests for these criminal offences. The similar situation is also with criminal offences against sexual freedom and sexual morality, criminal offences against environment and criminal offences against safety of payment and business operations.

Clearly for other chapters of the Criminal Code other relations apply. For instance, at criminal offences against marriage, family and youth the proportion of arrests is lower than the proportion of crime reports in the total structure of the filed crime reports. The reason is probably because for most criminal offences from this chapter a low maximal punishment is imposed.

Chart no. 3



However, if we correspond relations at criminal offences against values protected by international law (mostly narcotics) and criminal offences against property, for which there is also a larger number of crime reports for minor criminal offences (possession of narcotics – Article 173 Paragraph 1 of the Criminal Code, theft, fraud and similar), with, for instance, criminal offences against official duty for which more severe punishments are imposed, then above mentioned explanations are not satisfactory. One would expect more arrests for criminal offences against official duty, taking into consideration severity of these offences, however the percentage of arrests for property offences is 46,4%, for criminal offences against values protected by international law 32,1%, while the percentage for criminal offences against official duty is 0,4%.

The answer to the question why are there less arrests for criminal offences against official duty and criminal offences against the public safety or persons and property and safety of traffic should be sought in reasons for arrests and not in the punishments imposed for these offences.

b. Structure of reported criminal acts in the monitored period and structure of criminal acts in which arrests were made by the police stations

Since the above mentioned information do not provide the answer to the question how and why certain police stations make more arrests in respect to perpetrators of particular criminal offences, relations between the number of crime reports and arrests that are shown in Chart 3 shown for particular chapters of the Criminal Code per police stations.

It has been emphasized above that joint information for particular chapters of the Criminal Code were expected, since the number of crime reports and arrests is in proportion. However, information per police stations bring this conclusion into doubt. In order to detect reasons for such differences, we have provided overview of relations of number of crime reports and arrests for those chapters of the Criminal Code for which there are great differences in participation of number of crime reports and number of arrests for that chapter in relation to the total number of arrests. It is our opinion that based on differences between particular areas in respect to criminal offences from the same chapter of the Criminal Code, we may provide the estimate whether the reason is different approach to arrests or is this difference caused by existence or non-existence of reasons for compulsory detention in particular cases.

Chart no. 4.

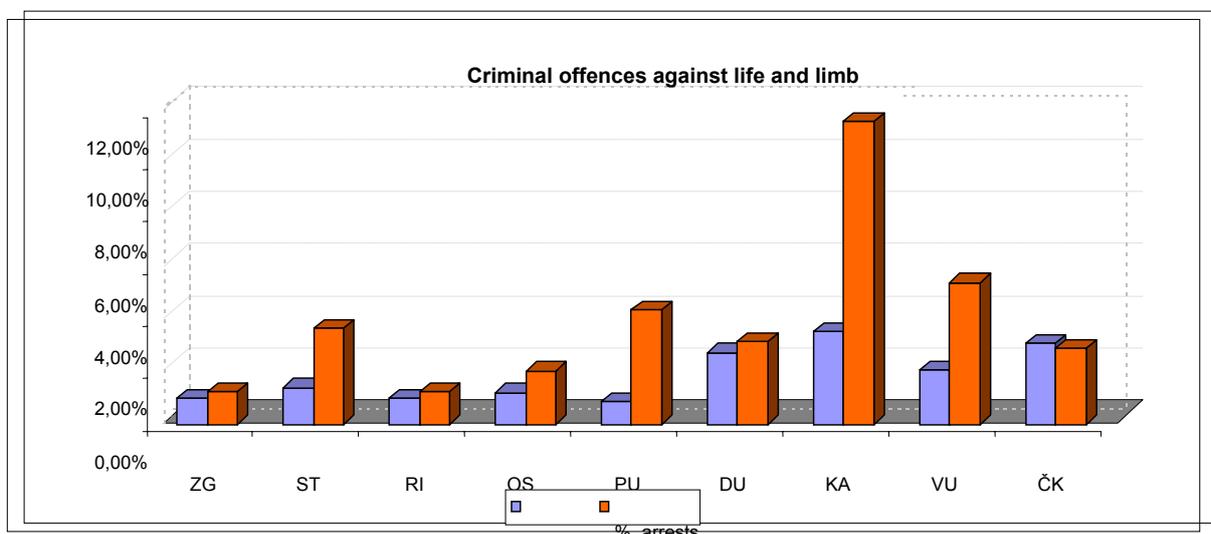
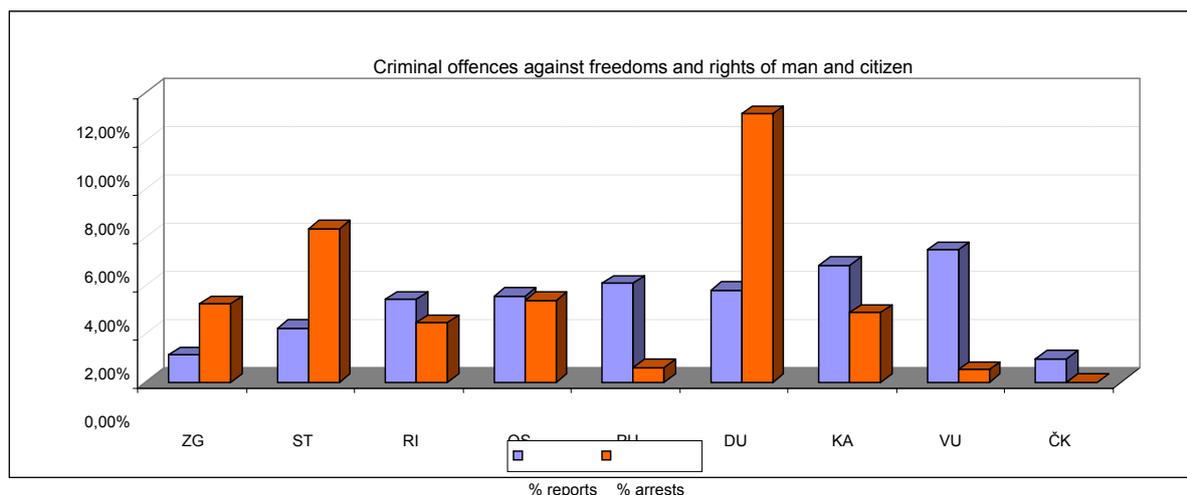


Chart number 4 provides information for criminal offences against life and limb. Although the total number of arrests and number of crime reports for these criminal offences is balanced, information per police stations indicate differences that may be explained only by different approach. For instance, in the Karlovac area participation of these crime reports in the total crime is approximately 3,5%, the percentage of arrests in the total number of arrests amounts to 11,%. In the Pula area these crime reports participate with 0,8%, while the arrests with 4%. On the contrary, in the Čakovec area these criminal offences participate with 3,1% and arrests with 2,9%. The obvious conclusion is that police in the Karlovac area is more inclined to arrest perpetrators of these offences.

Chart no. 5.



Grounds for comment in respect to information from Chart 4 are confirmed by information from Charts 5 and 6. These information alone provide basis for two conclusions. As it has already been said, for particular chapters in the Criminal Code arrests are less frequent taking into consideration the structure of a criminal offense. However, there are differences in approach among particular police stations that may not be explained by structure of reported crime.

It is obvious that police conduct in particular police stations does not depend exclusively from structure of committed criminal offences, the duration of compulsory detention is certainly influenced by existence of reasons for compulsory detention but also by perception and practice of particular police stations is establishing the existence of such reasons.

Chart no. 6.

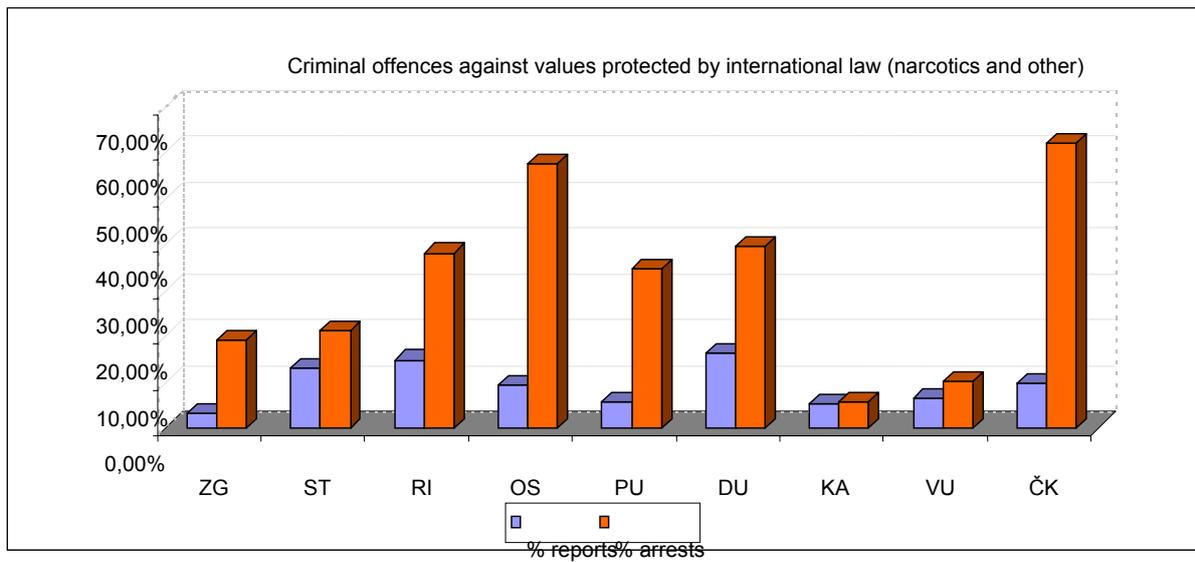


Chart no. 7.

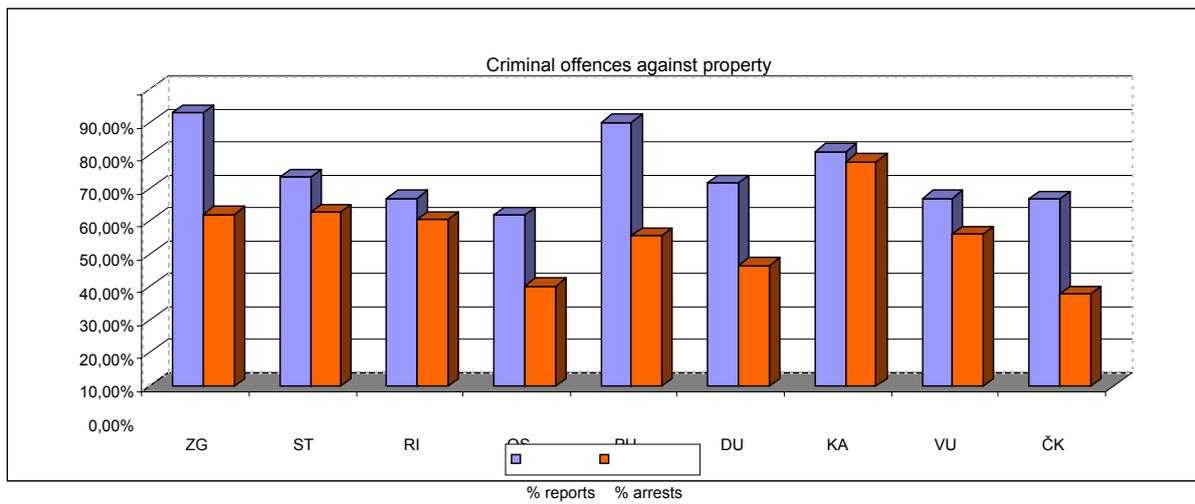


Chart no. 7.

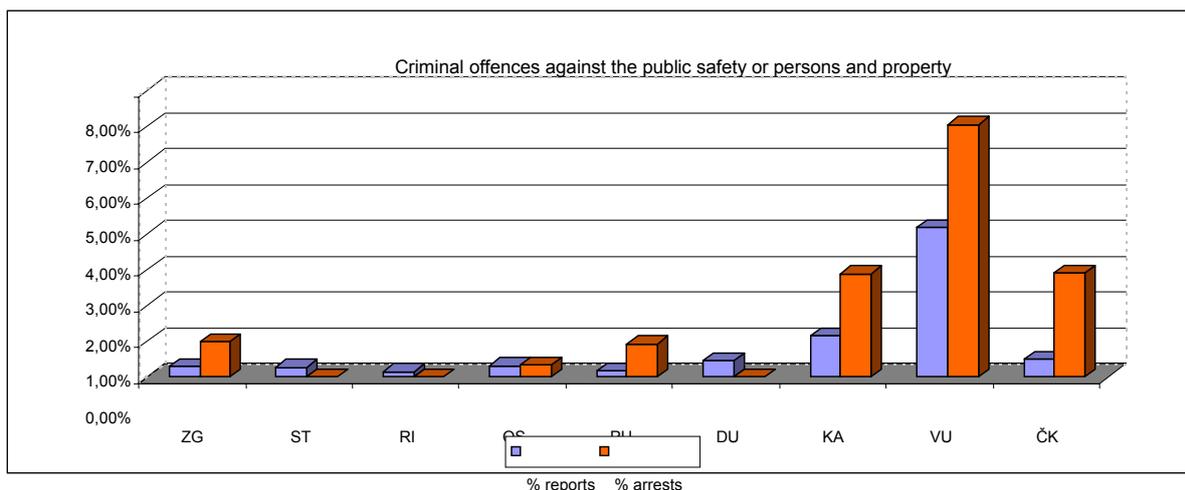
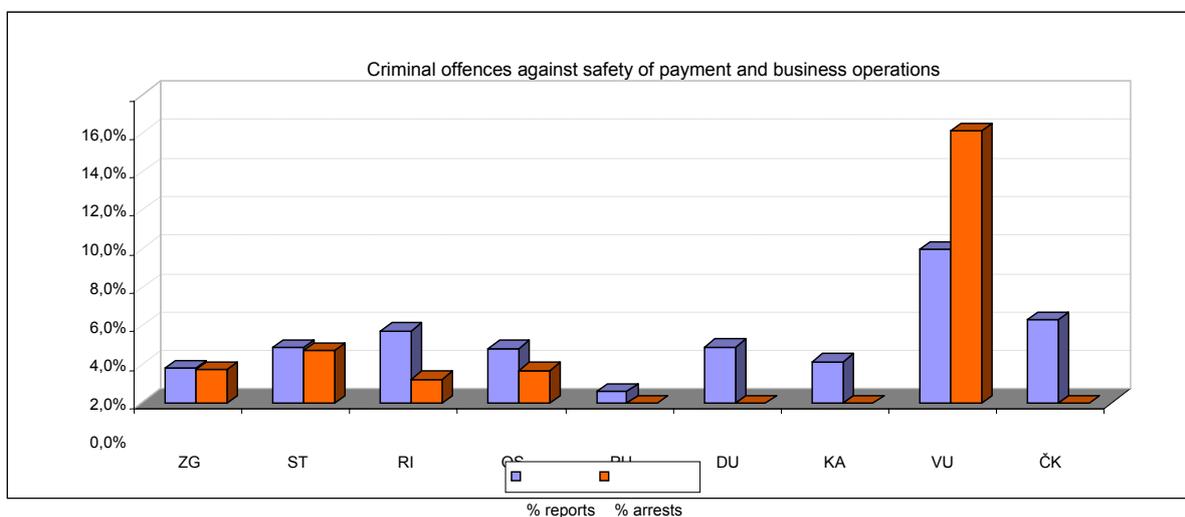


Chart no. 8.



As it has already been mentioned, certain differences may be justified by reasons for arrests. For example, the Police Department of Vukovar and Srijem is specific since it has a significant number of criminal offences of avoiding the customs surveillance, committed by foreign citizens, and this may explain the great difference between the conduct of police stations in that area in respect to criminal offences against safety of payment and business operations, but may not explain differences at criminal offences against the public safety or persons and property.

Chart no. 9.

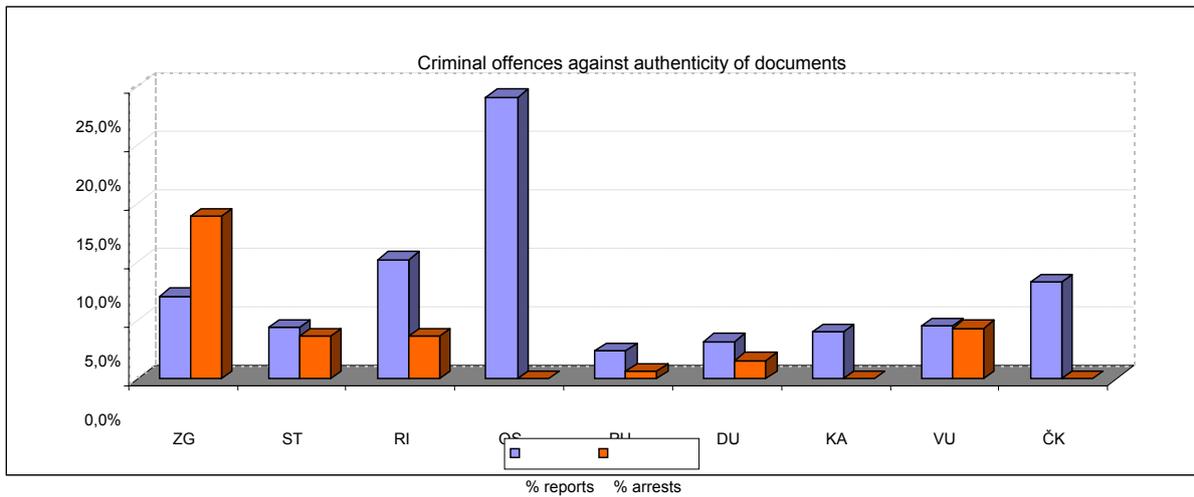


Chart no. 10.

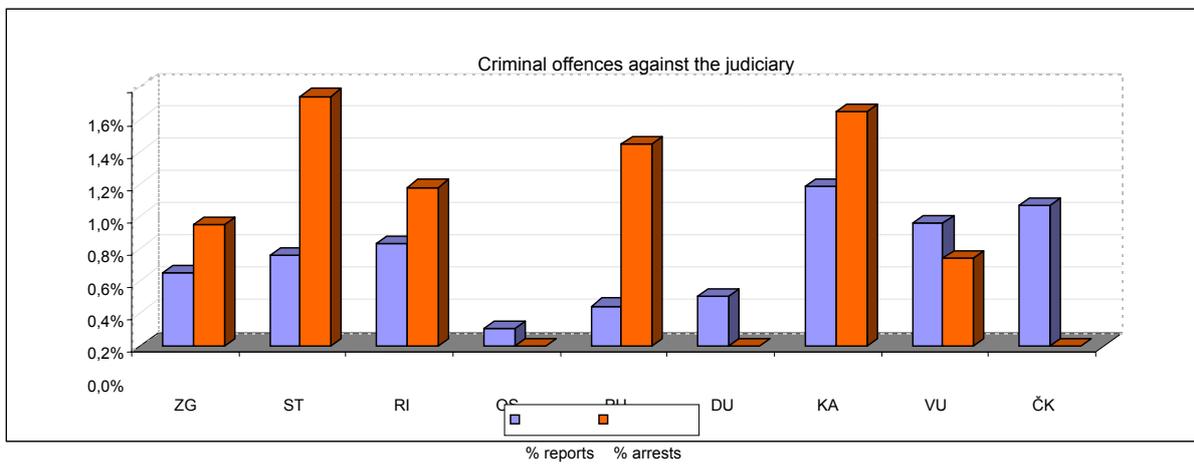
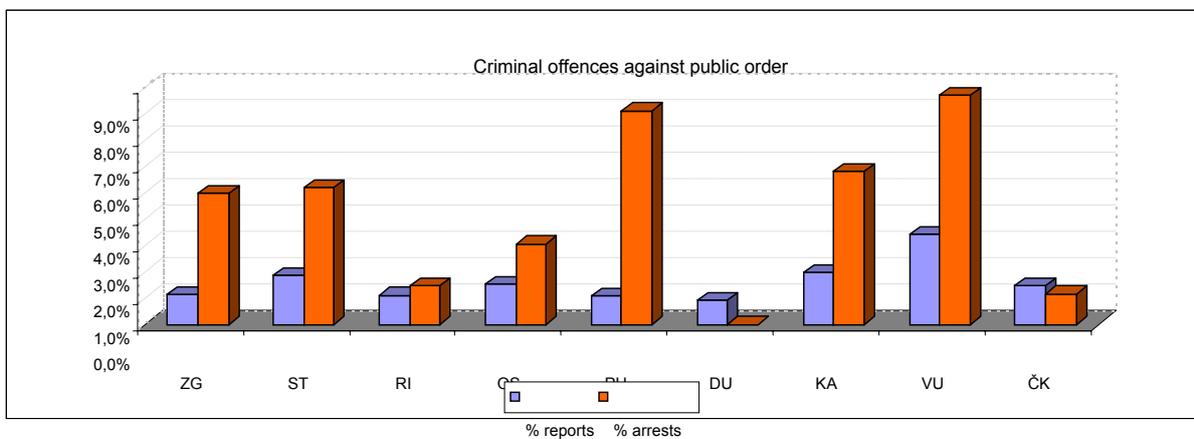
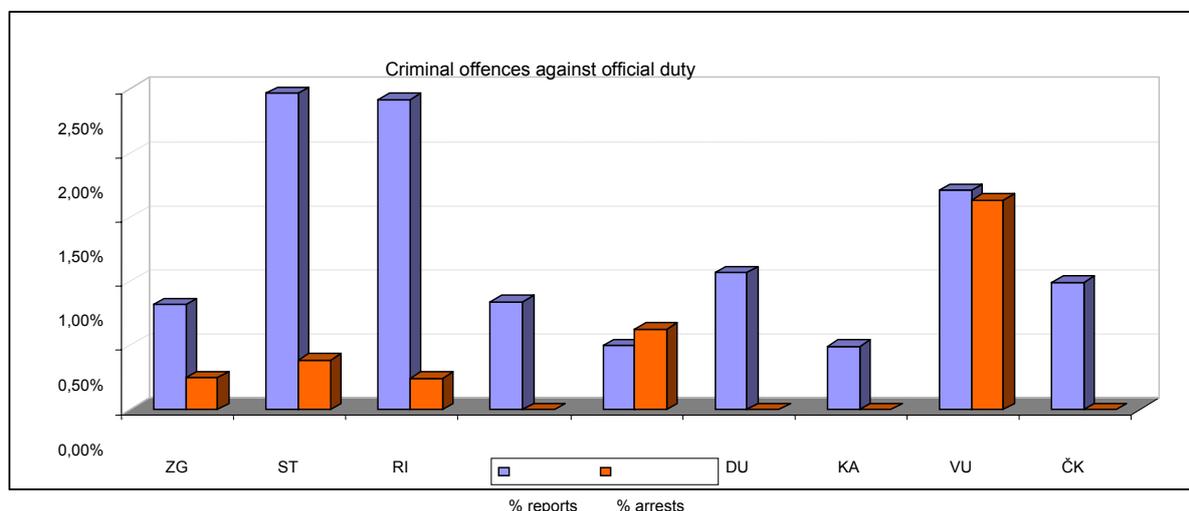


Chart no. 11



If we examine information for particular police stations in respect to chapters in the Criminal Code and differences that may be seen, regardless of particular circumstances of certain areas there is not enough grounds for conclusion that there is no balanced approach. Therefore, it may be stated that, depending on the police station, there is a probability that a suspect will be arrested in one police station and in the other not for the same criminal offence.

Chart no. 12



Based on information shown in particular charts it may not be disputed that there are differences in conduct of particular police stations. Charts 4 to 12 show significant differences between certain police stations. Differences are of such nature that one may ask questions about the police conduct, objectivity and expertise in evaluation whether legal grounds for arrest have been met, i.e. legal grounds for compulsory detention.

While observing these differences in respect to the imposed punishments for particular criminal offences for which arrests were made, it may be concluded that severity, i.e. imposed punishment for particular criminal offences is not the primary cause of the number of arrests.

This may best be shown by differences in information between criminal offences against official duty (criminal offences with imposed mostly severe punishments) and criminal offences of forgery, i.e. criminal offences against public order. Differences between these chapters of the Criminal Code provide basis for conclusion (which truthfully may be given with full certainty only after evaluation of particular shown cases), that the police is more sensitive to some of the criminal offences and that in such decides to arrest more frequently.

Furthermore we provide numerical information for particular criminal offences or chapters from the Criminal Code in order to provide the complete insight into the structure of based on which the Police Departments make arrests. Should we compare information on number of reported crimes for particular criminal offences and number of arrests, differences that are shown for certain chapters of criminal offences would be even more obvious.

For example, number of murders in the Zagreb area is several times higher than in the Split area¹⁸⁸. Still, pursuant to Table 6a the number of arrests is the same in both Split and Zagreb areas. Such differences exist also with other criminal offences that occur more frequently and therefore these information show that the above mentioned conclusion on different approach is well founded. For example, in the Osijek area there were 170 arrests for the criminal offence from Article 173 of the Criminal Code, while in the Split area there were 110 and in the Pula area 111 arrests, although pursuant to statistics of the State Attorney's Office for 2004 in the Osijek area there were 153 crime reports for all forms of criminal offence from Article 173 of the Criminal Code, while in Split there were 451 and in Pula 520 crime reports.

Tables 7a, 7b, 7c, 7d and 7e present information for each particular criminal offence that led to arrests.

21 _____

¹⁸⁸ Pursuant to records of the State Attorney's Office of the Republic of Croatia for 2004 in the Zagreb area there were 15 completed murders, out of which 8 murders and 6 aggravated murders, and in the Split area there were 3 murders and no aggravated murders.

Table 7.b

Chapter of Criminal Code	Criminal offences against life and limb					Criminal offences against freedoms and rights of man and citizen				Criminal offences against values protected by international law		
	90	91	99	103	104	120	122	124	129	173	173/2	174
Police Department												
ZG	2		3						13	75		2
ST	2		14	3					33	110		
RI			5				1		9	156		
OS	1	1	4					3	7	170		
PU	6		6		2				2	111		
DU	1	1				1			6	25		
KA	4		4						2	4		
VU		2	8				1			19		
ČK	3	1	1							96	11	
Total	19	5	45	3	2	1	2	3	72	766	11	2

Table 7.b

Chapter of Criminal Code	Criminal offences against sexual freedom and sexual morality					Criminal offences against marriage, family and youth		
	188	193	194	195	196	210	215	215/a
Police Department								
ZG				2		2	1	1
ST	1			1			11	
RI								
OS			2		1		1	
PU	3	1			2			1
DU	1	3					1	
KA	1							
VU		1						
ČK	1							
Total	7	5	2	3	3	2	14	2

Table 7.c

Chapter of Crim. Code	Criminal offences against property												Criminal offences against environment	
	216	217	218	219	220	221	222	224	230	234	235	236	258	259
Police Department														
ZG	73	81	37	8		1		6		1		2		
ST	61	119	15	4	1	5	45	11	1			11		
RI	62	94	17	1		4		11	1	5		11		
OS	11	70	5	1			2							
PU	26	85	20	5			2	1		5	1	1		3
DU	11	9	1									2		
KA	7	31	6				3							
VU	26	51	4			2		2						1
ČK	6	36	6										4	
Total	283	576	111	19	1	12	52	31	2	11	1	27	4	4

Table 7.d

Chapter of Crim. Code	Criminal offences against the public safety or persons and property			Criminal offences against safety of payment and business operations			Criminal offences against the judiciary			Criminal offences against authenticity of documents	
	263	272	273	274	297	298	301	302	303	311	312
Police Department											
ZG	4			6		1		1	2	56	
ST				2	12		1	6	1	19	
RI				5				3	1	15	
OS	1			4	1						
PU	3							4		1	1
DU										1	
KA	2							1			

VU	2	11		3	12	11	1			8	
ČK	3	1	1								
Total	15	12	1	20	25	12	2	15	4	100	1

Table 7.e

Chapter of Crim. Code	Criminal offences against public order							Criminal offences against official duty			
	317	318	322	323	330	331	335	337	339	345	348
Police Department											
ZG	12	3	1	1		3			1		
ST	8	6	1	2	3	4	3			2	
RI	2	1		1		2					1
OS	2	2			4		1				
PU	11	3			6	4	2			1	1
DU											
KA	2				1		1				
VU		9					7	3			
ČK	1	1									
Total	38	25	2	4	14	13	14	3	1	3	2

The comment that was given for relation of crime reports and arrests for the criminal offence from Article 173 of the Criminal Code in Osijek, Split and Pula areas may also be given for majority of the presented information, with differences among different police stations.

For example, for the criminal offence from Article 337 of the Criminal Code there were only three arrests, although the criminal offence from Article 337 Paragraph 4 of the Criminal Code is one of the most severe criminal offences for which, pursuant to records of the State Attorney's Office for 2004, there were 357 persons reported. All arrests for this criminal offence occurred in the Vukovar area. On the contrary, for criminal offences from Articles 317 and 318 of the Criminal Code there were 405 persons reported, but 63 persons were arrested for these criminal offences.

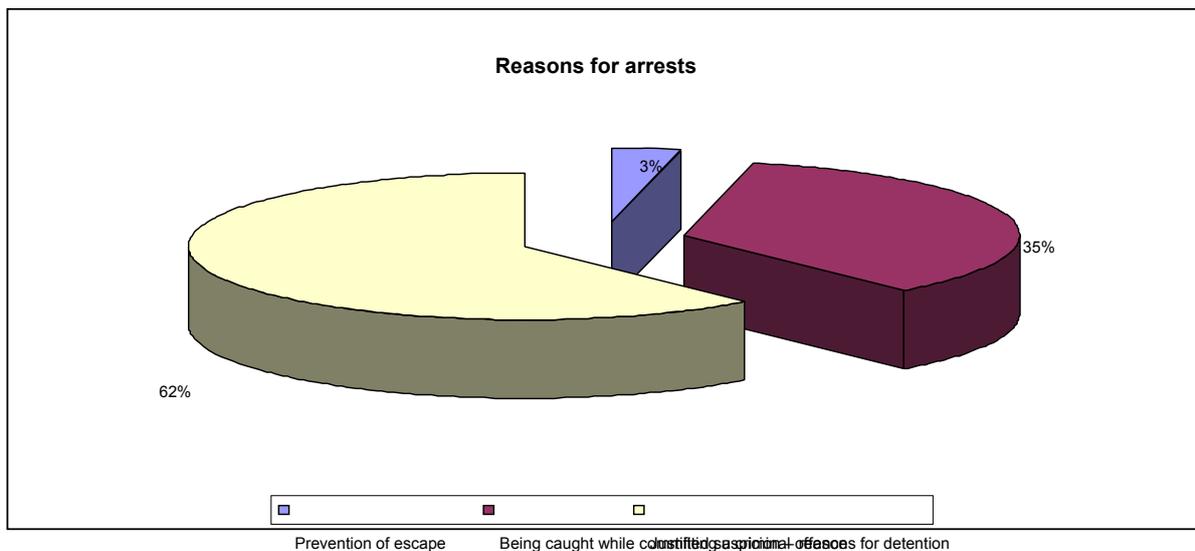
Therefore, we may conclude that information from Tables 7.a to 7.e provide basis for conclusion that severity of the committed criminal offence is not the decisive factor for arrests. Besides, the number of arrests in a particular area in relation with the number of filed

crime reports in such area provides basis for conclusion that was already indicated that there is different practice of certain Police Departments while deciding on existence or non-existence of reasons for compulsory detention.

3. Reasons for arrests

Chart number 13 provides reasons for arrests. Taking into consideration all of the above mentioned these information are hardly surprising. During the evaluation of reasons for compulsory detention based on work of many years on crime reports, I expected that the main reason for arrest would be existence of justified suspicion that the apprehended person committed criminal offence that is prosecuted *ex offio*, along with existence of reasons for determination of compulsory detention.

Chart no. 13.



However, if we take a look at Table number 8 that contains information on number of arrests per Police Departments and legal basis for arrests, as well as Chart number 13 that provides percentages of reasons for arrests, we must ask the question are these information in accordance with situation that is in the criminal law considered being caught while committing a criminal offence, i.e. prevention of escape of a perpetrator.

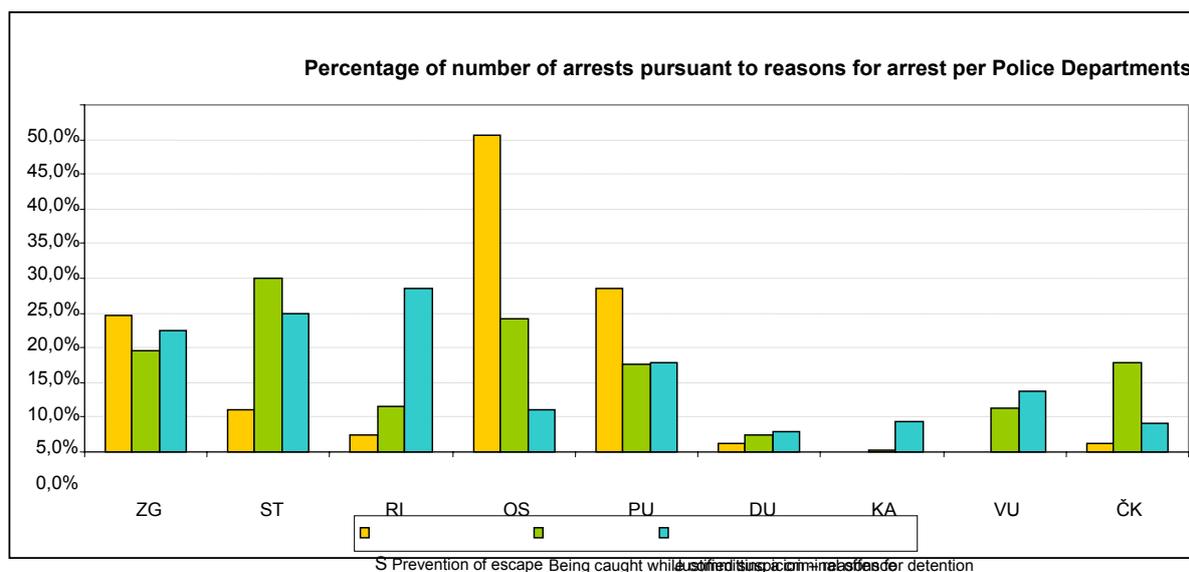
Table no. 8.

Police Department	Prevention of escape	%	Being caught while committing a criminal offence	%	Basis for suspicion-reasons for compulsory detention	%	8.1.1.1. total
ZG	16	4, 0	124	30, 9	261	65, 1	401
ST	5	0, 9	215	41, 6	298	57, 5	518
RI	2	0, 5	56	13, 7	350	85, 8	408
OS	37	12, 6	165	56, 1	92	31, 3	294
PU	19	5, 9	109	34, 1	192	60, 0	320
DU	1	1, 6	20	31, 8	42	66, 6	63
KA	-	-	3	4, 3	66	95, 7	69
VU	-	-	54	29, 3	130	70, 7	184
ČK	1	0, 6	110	63, 9	61	35, 5	172
Total	81	3, 3	856	35, 2	1492	61, 5	2429

Table number 8 and Chart number 14 show significant differences between certain Police Departments. Differences are such to provide basis for conclusion that information on basis for arrests were provided based on discretion of officials who provided information, rather than on real reasons due to which arrests were justified.

This is especially illustrated by information for the Osijek area. It is not realistic that 54% of all arrests were the consequence of prevention of escape of perpetrators, but it is also at least disputable that in the Vukovar and Karlovac areas there were no prevention of escape of perpetrators. In case information for these two Police Departments are accurate, we must question the police work in these two Police Departments.

Chart no. 14.



Information on reasons for arrests, as shown in percentage per Police Departments in Chart number 14 in any case provide basis for conclusion that the approach is different and that estimate on existence of reasons for arrests in certain areas is often questionable.

The above mentioned conclusion is even more significant if we review information on perpetrators being caught while committing criminal offences as the basis for arrests.

a. Prevention of escape

Table number 9 provides the structure of criminal offences for which certain persons were arrested after being prevented from escaping by citizens.

It is necessary to emphasize that information relating to these arrests are only partial due to the reason that a number of questionnaires was incorrectly completed or was not completed at all. For example, the questionnaire of the Police Department Osijek and Baranja was completed incorrectly and criminal offences for total of 37 were not listed. Therefore information shown in Table 9 serve only for information purposes.

PU		1	2	12	1	3				19
DU			1							1
KA	129	173	216	217	218	219	221	274	318	Number of arrests
ZG	1		9	2	1	2		1		16
ŠK			3	1			1			5
Total	1	1	15	17	2	5	1	1	1	41
OS										

Table no.9.

Table number 10 provides information on status of persons that prevented the escape of suspects. Information on status of persons that prevented the escape of suspect are incomplete since this information has not been recorded at all times by the police officials, so only examination of particular cases at some instances provided information whether the perpetrator was prevented from escaping by a person that has obligation to prevent such escape or by a citizen.

Table no. 10.

Prevented in escaping by:			
Security personnel	Citizen	Worker	Military person
8	28	4	3

Although these information are merely fragmental they draw to conclusion that citizens are willing to participate in prevention of criminal offences.

Table number 11 provides information on time period from prevention of escape of a person caught while committing a criminal offence to surrender of such person to the police. Information are shown for 76 arrested persons, since questionnaires in respect to others were incorrectly completed due to the reason that such time periods are not always specially recorded in the files by the police officials.

Table no. 11.

Time period from prevention of escape until surrender to the police					
Less than 5 minutes	Up to 15 minutes	Up to 30 minutes	Up to 1 hour	Up to 3 hours	Total number of arrests
6	12	6	9	5	38

Since out of 38 registered cases in 33 cases the perpetrator was handed to the police within one hour, we may conclude that police officials immediately attend the place where the perpetrator was detained. This quick reaction indicated good police work.

The above presented information are partially due to incomplete records in discrepancy with information on reasons for arrests. However, information on time periods from detaining of perpetrators in the place of criminal offence until the time of handing them over to the police and information on time period from prevention of escape until surrender to the police, as shown by the police, as shown in Table 11 are such to require clarification. Although information on duration of detaining by citizens until handing over to the police are incomplete, such information provide basis for conclusion that in significant number of cases the police has its criteria on when a person is considered to be arrested. Table 11 does not provide answer to the question when the police considers a person caught by a police official in committing a criminal offence to be arrested.

Table no. 12.

Time period from prevention of escape until arrest				
Up to 10 hours	Up to 15 hours	Up to 20 hours	Up to 24 hours	Total
3	10	3	5	21

Pursuant to Article 6 Paragraph 2 of the Criminal Procedure Act every measure or action that includes the compulsory detention of a person under suspicion of having committed an offence is considered as arrest and pursuant to that in the moment when the police took custody of a person detained by citizens and when such person is brought into the police station, such person is considered to be arrested. Information shown in Table 12 provide basis for conclusion that the police considers a person to be arrested only when such arrest has been formally notified to such person, even though such person has been taken into the police station against their will and detained for up to 24 hours in some cases. In case a person has been detained at the place of criminal offence, such person is arrested at the moment of surrender to a police official and any other interpretation that a person is arrested only when notified on such arrest by the police is wrong.

b. Being caught while committing a criminal offence

Table number 13 provides overview per Police Departments on number of arrests of persons being caught while committing a criminal offence. This table also provides information on number of arrested persons brought in front of the investigating judges as well as subsequent decisions of judges.

It should be emphasized that out of 856 arrests on this basis for 808 cases there is information on handing over or not to the investigating judge. There are no such records in the questionnaires for 48 cases.

Table no. 13.

Conduct of the investigating judge	ZG	ST	RI	OS	PU	DU	KA	VU	ČA	Total
The investigating judge ordered provisional confinement		3	0	1		1		6	2	13
The investigating judge ordered compulsory detention		6	1	1		0		2		10
The investigating judge released the arrested person		23				1		7	2	33
The arrested person has not been brought to the investigating judge	87	183	53	165	98	18	3	39	106	752
TOTAL	87	215	54	167	98	20	3	54	110	808

Since out of total of 808 arrested persons (for whom records exist) only 56 of them were brought in front of the investigating judge, the conclusion is that only 6,9% of persons arrested on these basis were brought in front of the investigating judge. In large number of cases this was to be expected since it is usual that a person caught while committing a criminal offence is brought in for determination of identity and all other circumstances of such criminal offence and to, if there are no legal basis for determination of compulsory detention, release such person.

Pursuant to available and incomplete information persons arrested after being caught while committing a criminal offence were brought in front of the investigating judge in the following time periods:

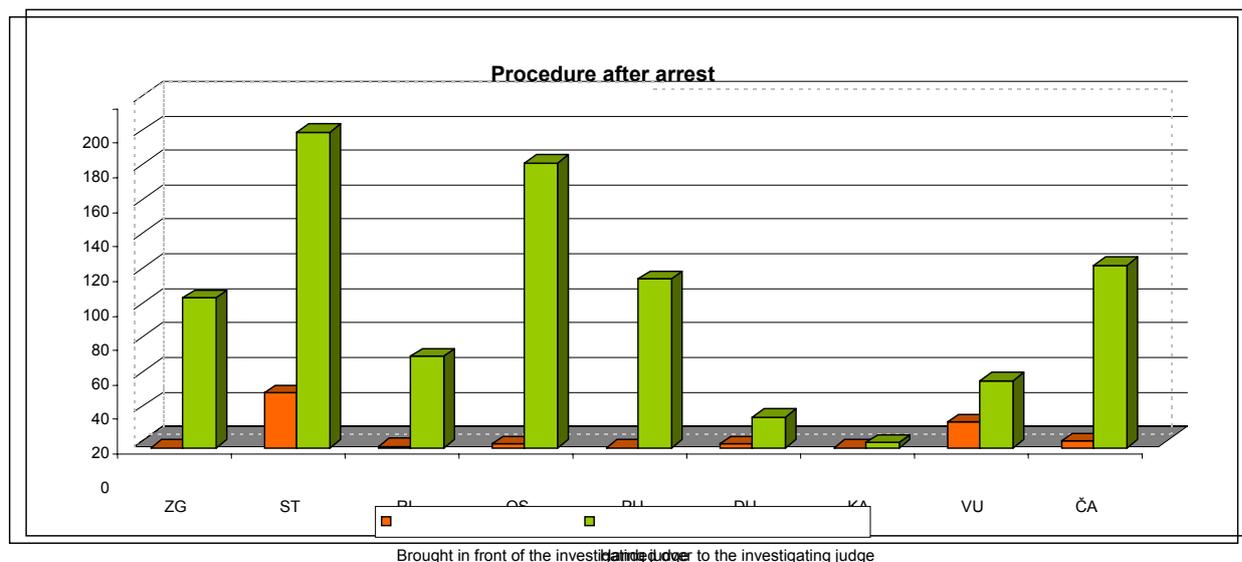
- in 33 cases such person was brought in front of the investigating judge in the period between 1 and 10 hours
- in 23 cases such person was brought in front of the investigating judge in the period between 10 and 24 hours.

Table number 13 provides information on number of cases in which arrested persons were brought in front of the investigating judge after being caught in committing a criminal offence by the police officials. Although information on decisions of investigating judges are shown in the second part of the research, these information are interesting and it is useful to review them in this case since the information on number of arrested persons were brought in front of the investigating judge at least partially and indirectly provide information on justification of arrests.

There are indeed significant differences in conduct of certain Police Departments, i.e. police stations. For instance, in Zagreb all apprehended persons are released, in Split there is a high number of persons being brought in front of the investigating judge. While all police stations out of total of 563 arrested persons brought only 24 persons in front of the investigating judge or 4% of total number of arrested persons, in Split there were 32 brought in front of the investigating judge or 15% of total number of arrests.

If we transfer information from Table 13 into a chart (Chart number 15) differences between certain Police Departments are obvious. As mentioned before, the practice shows that the majority of persons arrested on these basis after identification and taking of statement are released. However, information for Split indicate that a significant number of persons is brought in front of the investigating judge and it is therefore interesting to compare this chart with Chart 16.

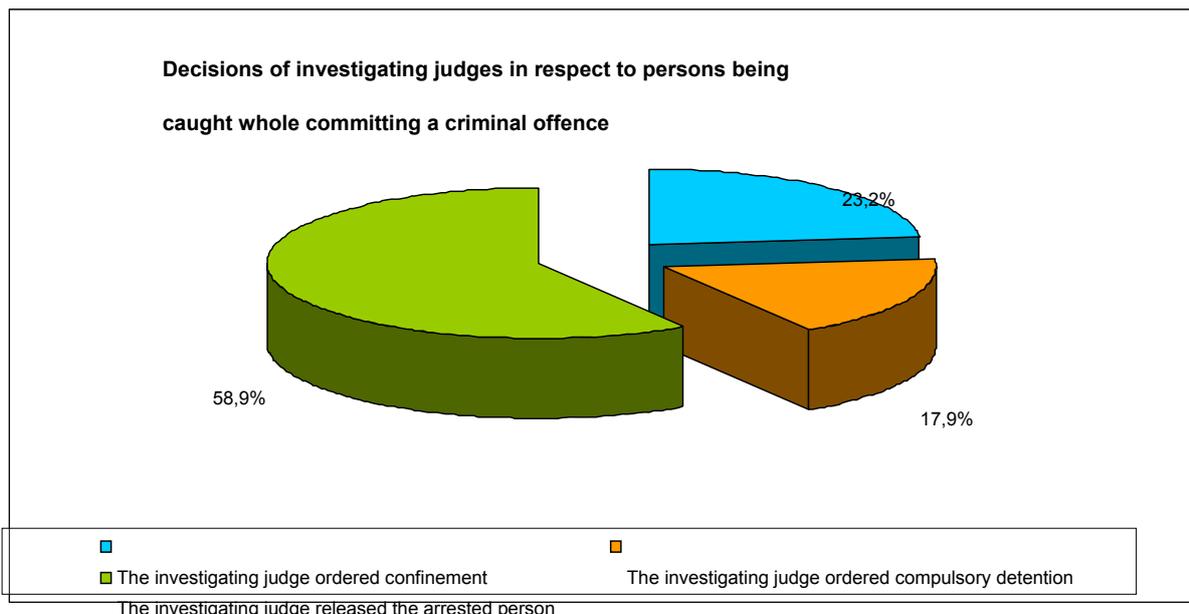
Chart no. 15.



In order to evaluate justification of arrests, especially in the Split area, information on decisions passed by the investigating judges are interesting. These information are shown in Chart number 16. Since the investigating judges released 58,9% of arrested persons, this information provides basis for conclusion that in a significant number of cases arrests and attendance of investigating judges were not justified. Truthfully, in some cases the police insists to bring the arrested person in front of the investigating judge in order to obtain a formal statement, but laws do not provide any basis for such practice.

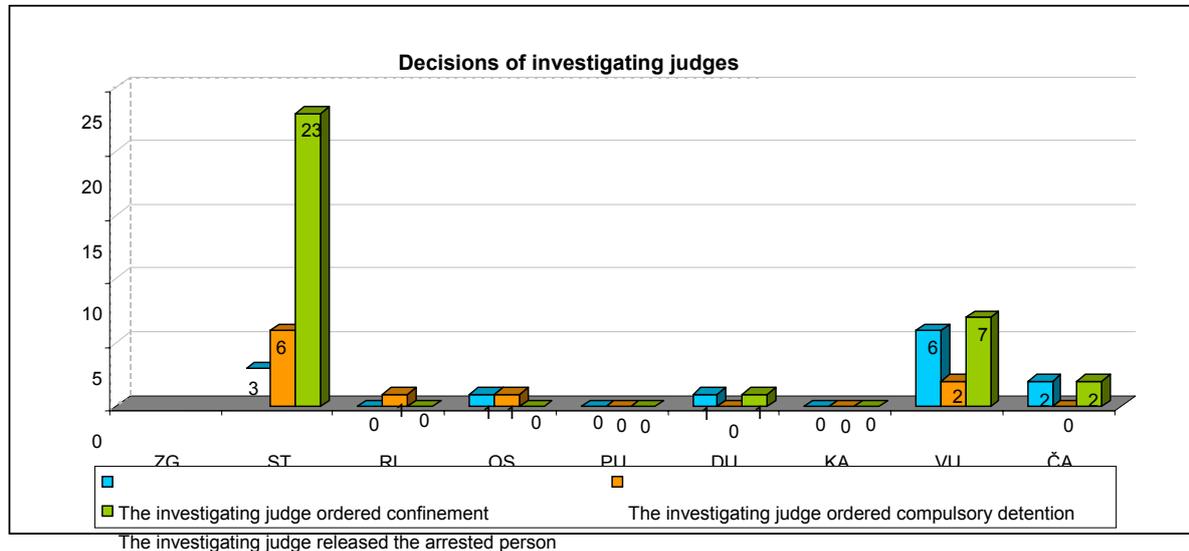
In case we review information per Police Departments (Chart number 15), it is obvious that there are such differences that bring legality of work of certain Police Department into question, since it is justified to suspect that arrests in some cases have no basis in the law.

Chart no. 16



This conclusion stands especially if we review decision of investigating judges after arrests provided in Chart number 17. Out of 56 arrests 32 were brought in by the Police Department Split and Dalmatia, and since in 72% of cases judges of the District Court in Split released such persons, this provides basis for conclusion that the majority of cases were unfounded.

Chart no. 17.



Information on decisions passed by the investigating judges, average results and results per police stations provide basis for conclusion that persons were brought in front of the investigating judges without consultations with the state attorneys. State attorneys are familiar with practices of specific courts on existence of reasons for compulsory detention and it would be sufficient to consult them in particular cases in order to obtain estimate of justification of such arrest.

It is my opinion that consultations with the state attorneys would be useful due to another reason. The state attorney might, based on the received information and estimate of justification for determination of compulsory detention, file a motion for determination of compulsory detention and later on insist on its determination.

c. Arrest due to justified suspicion that a criminal offence was committed and that there are legal grounds for compulsory detention

Pursuant to the conducted research, 1492 persons were arrested due to justified suspicion that they committed criminal offences and there were legal grounds for determination of compulsory detention listed in Article 102 of the Criminal Procedure Act.

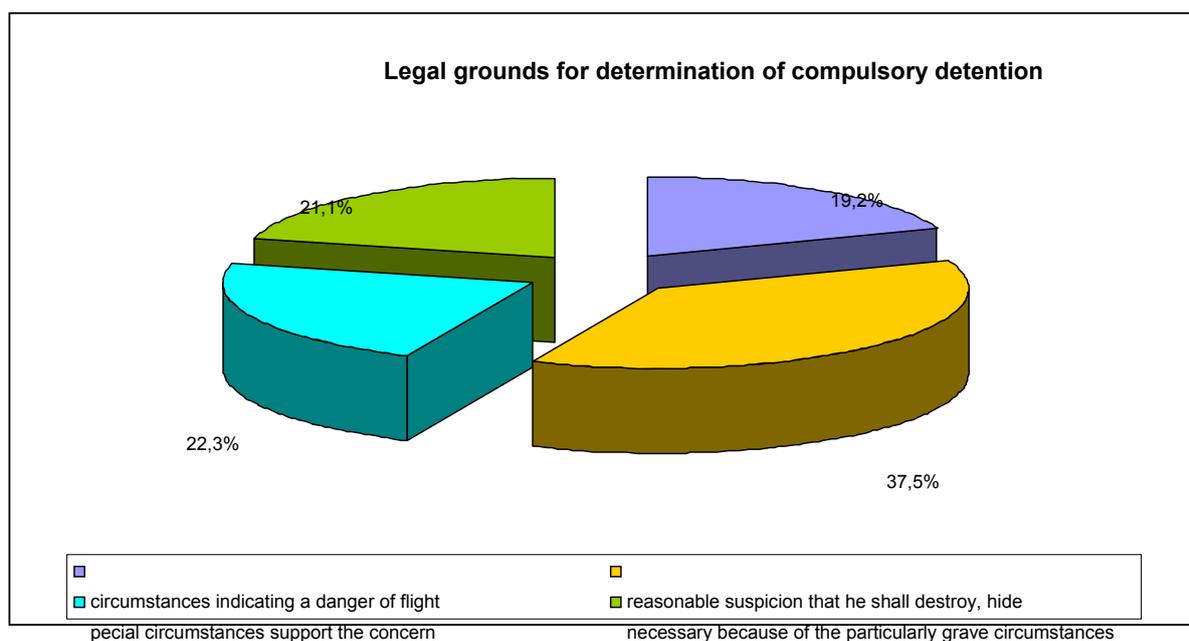
Table no.14.

Legal basis for arrest pursuant to Article 102 Paragraph 1 of the Criminal Procedure Act	ZG	ST	RI	OS	PU	DU	KA	VU	ČK	Total
Item 1.	36	19	91	28	0	43	29	18	30	294
Item 2.	74	154	157	71	0	12	34	15	58	575
Item 3.	15	142	107	27	0	19	32	0	0	342
Item 4.	4	33	0	165	98	10	8	2	4	324
TOTAL	129	348	355	291	98	84	103	35	92	1535

In Table number 14 number of shown legal grounds for determination of compulsory detention is larger than the number of arrested persons due to the reason that more than one grounds for compulsory detention is listed per arrested person.

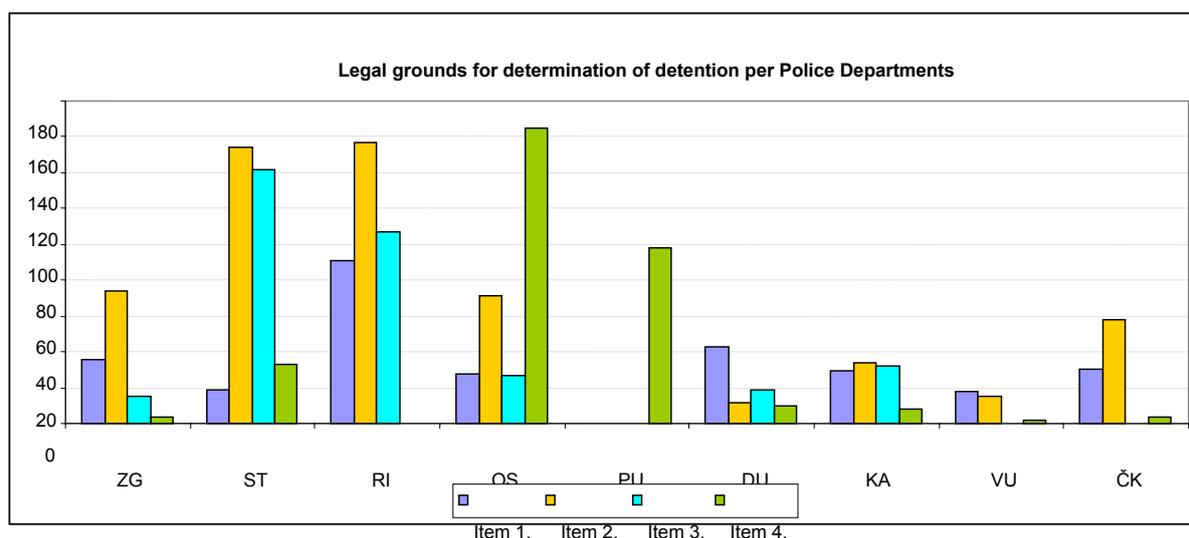
Chart number 18 shows that legal grounds for determination of compulsory detention are equally present. The least frequent basis is from Item 1 Paragraph 1 Article 102 of the Criminal Procedure Act, while the most frequent basis for determination of compulsory detention is due to collision reasons (Item 2). The practical experience shows that basis from Item 2 is most frequent in resolution of the investigating judges, while other Items are less frequent, and therefore we may conclude that police reasons are in accordance with such practice.

Chart no. 18



However information from Chart number 19 render such conclusion questionable and rather provide basis for conclusion that reasons for detention are frequently merely formally listed without any basis in actual cases. Information from Chart number 19 show such differences between certain Police Departments that such conclusion is inevitable.

Chart no. 19



For example, pursuant to the questionnaires all persons being brought to the investigating judges in the Pula area were accused of committing especially grave criminal offences, while this reason was by far least represented in the Zagreb area. However, the structure of criminal offences and their severity would sooner provide basis for such legal grounds in Zagreb than in Pula.

We believe that dominant existence of only one reason for determination of compulsory detention, and even dominating citing of legal grounds from Item 2 of the said Article requires further examination of practice of certain police stations. As it has been said earlier we believe consultations with the state attorney are necessary in order to evaluate existence of legal grounds for determination of compulsory detention, as well as citing of legal grounds arising from information and facts presented to the investigating judge on existence of such legal grounds.

Therefore the above presented information on different conduct of the police officials in certain areas, different practice on existence of particular legal grounds for determination of compulsory detention, (although this may not be certainly concluded without detailed examination of particular cases), provide basis for conclusion that it is necessary to harmonize the conduct of police stations and departments, which may by far more easily be achieved through consultations with the state attorney who is familiar with the practice of the Supreme Court on existence of legal grounds for compulsory detention than merely based on review of decisions of a particular court.

4. Conduct with arrested persons

Although at first it seems that review of conduct with the arrested persons is not within the context of this research, we believe it to be an especially significant part of the research. In this part the research provides answers to questions how does the police act during arrests, is the entire procedure in accordance with the law, to what extent are basic rights of the arrested person protected and finally were the evidence obtained legally. Chart number 20 provides percentage of time when the arrested person was informed of the reasons for arrest.

Chart no. 20.

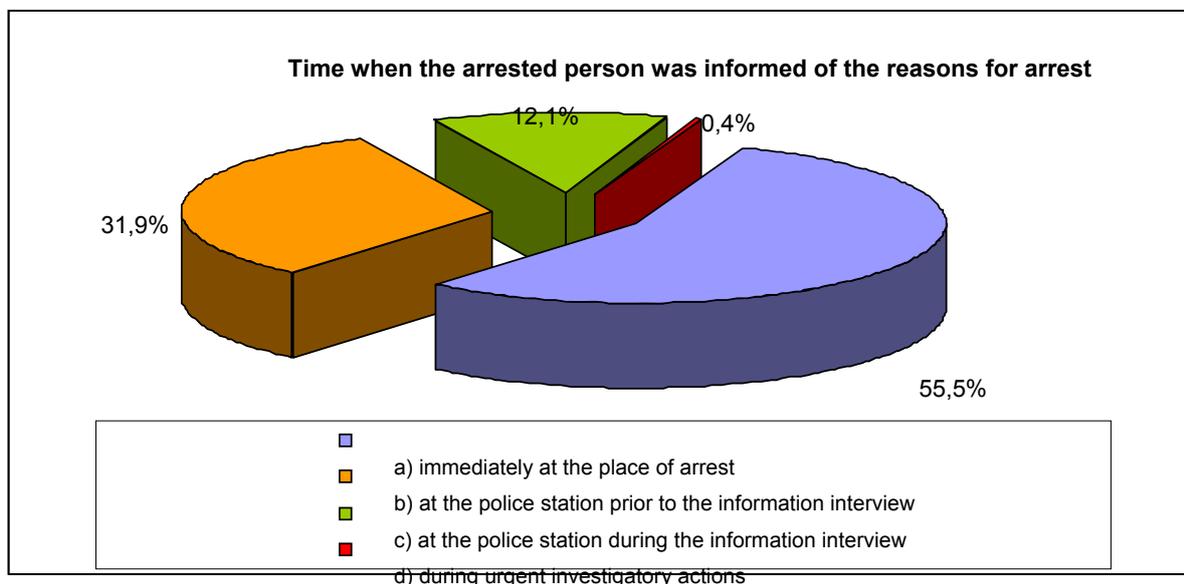
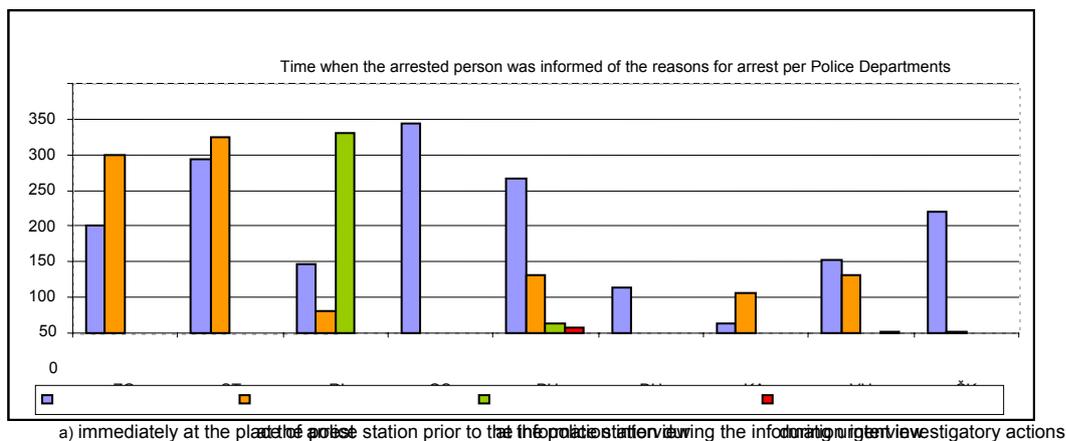


Table number 15 and Chart number 21 provide information on time when the arrested person was informed of the reasons for arrest. Unlike Chart number 20 the information are shown per Departments.

Table no.15

The arrested person was informed of the reasons for arrest	ZG	ST	RI	OS	PU	DU	KA	VU	ČK	TOTAL
a) immediately at the place of arrest	151	24 3	96	29 4	21 7	63	13	10 2	170	1349
b) at the police station prior to the information interview	250	27 5	31		81		56	81	2	776
c) at the police station during the information interview			28 1		14					295
d) during urgent investigatory actions					8			1		9
TOTAL	401	51 8	40 8	29 4	32 0	63	69	18 4	172	2429

Chart no. 21



Information shown in Table number 15 and even more in Chart number 21 provide basis for conclusion that the approach to arrests, especially in respect to reasons and right of arrested persons, is different in certain Police Departments. If this was not the case, pursuant to the shown information it could have been concluded that different approaches were used while competing the questionnaires. This is best shown from information from Rijeka and Osijek on existence of legal grounds for arrests. Out of presented information we may conclude that arrested persons in the Osijek area are immediately informed about the arrest, while in Rijeka it is done after a certain period of time. My opinion that the conduct of Police Departments is similar. Certain persons are being arrested and it is followed by an interview, some come to the police station where they are informed about the arrest, while in other cases only during the interview information sufficient for arrest become known and then such persons are being

informed about the arrest. Information from Table 16 are especially important for this conclusion.

Table no. 16

Person is informed about the right not the make statements and on the right on legal counsel	Number of arrests	%
a) immediately at the place of arrest	1352	55,7
b) at the police station prior to the information interview	798	32,9
c) at the police station during the information interview	270	11,1
d) during urgent investigatory actions	9	0,3
TOTAL	2429	100

If we examine information provided in Table number 16 on time when the arrested person was informed about the right not the make statements and on the right on legal counsel, we may conclude that information contained in this table almost entirely correspond with the information on time when the arrested person was informed about the arrest. This especially may be seen if we compare Tables 15 and 16. We may see that the shown information on methods of conduct of certain Police Departments are almost identical and this leads to question did the persons who completed the questionnaire fully understand the question asked. It is unbelievable that, for instance in the Rijeka area, the vast majority of arrested persons would be informed about the arrest only during the information interview, and only subsequently being informed about the right not the make statements, and that in the Osijek area all persons were, as a rule, informed about this right immediately after arrest (Chart number 17).

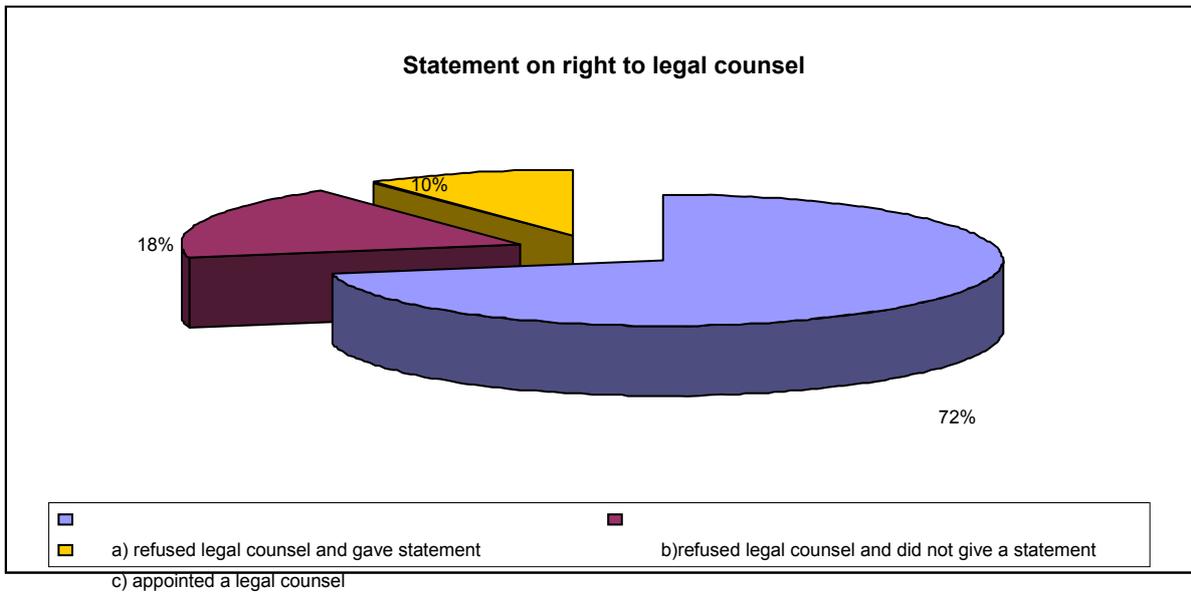
Table no. 17.

Person is informed about the right not the make statements and on the right on legal counsel	ZG	ST	RI	OS	PU	DU	KA	VU	ČK	TOTAL
a) immediately at the place of arrest	151	243	99	294	217	63	13	102	170	1352
b) at the police station prior to the information interview	250	275	53	0	81	0	56	81	2	798
c) at the police station during the information interview	0	0	256	0	14	0	0	0	0	270
d) during urgent investigatory actions	0	0	0	0	8	0	0	1	0	9
TOTAL	401	518	408	294	320	63	69	184	172	2429

It is my opinion that conduct of the police stations is identical and that this is merely the matter of misunderstanding of the question asked. Identical information from Tables 16 and 17 provide grounds for conclusion that the police act identically in all police stations. Therefore, at the moment when the police official considers a person to be arrested, i.e. that there are reasons for arrest, the arrested person is being inform and cautioned.

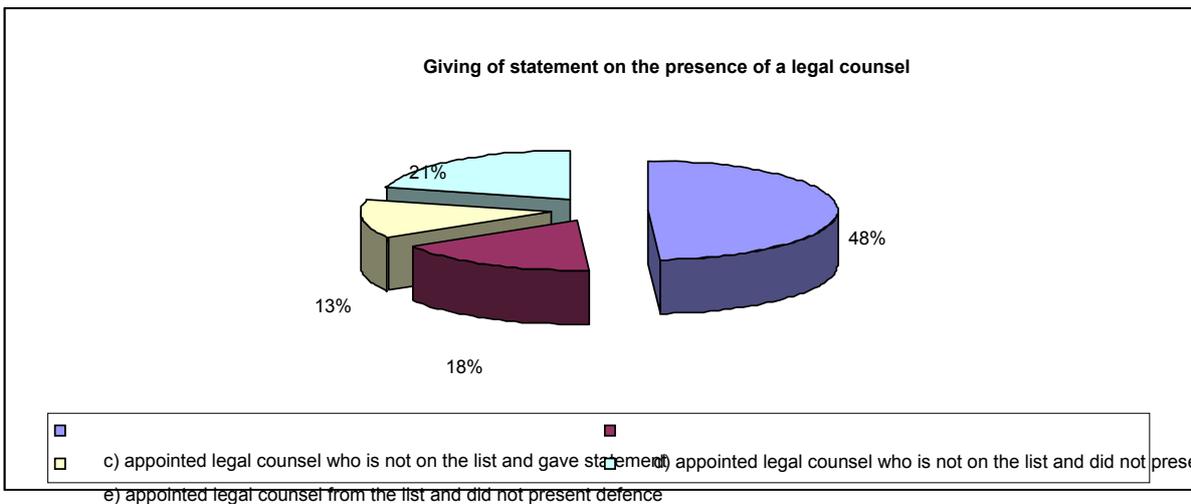
Besides the question when information are given, information on realization of right to a legal counsel are also interesting. Results of the research are shown in Chart number 23.

Chart no. 23.



The gathered information show that out of 2429 arrested persons only 244 or 10% requested legal counsel. If we examine information about this 10% of arrested persons or 244 of arrested persons who appointed legal counsels, we may see that 170 or 69% of arrested persons gave statement in the presence of a legal counsel, while the others did not present their defence.

Chart no. 24.



One of the difficulties that occurred during the questioning of arrested persons in the presence of a legal counsel is time of arrival of such legal counsel. Table number 18 shows the time of arrival of a legal counsel at police premises, i.e. arrival for purposes of presence during the interview.

Table no. 18.

Conduct of a legal counsel	Number of cases	%
a) Selected by the arrested person and appeared within the legal time limit	140	62,2
b) Selected by the arrested person and did not appear within the legal time limit	22	9,8
c) From the list and appeared within the legal time limit	53	23,6
d) From the list and did not appear within the legal time limit	10	4,4
TOTAL	225	100

Information show that 14,2% of legal counsels did not appear within the legal time limit.

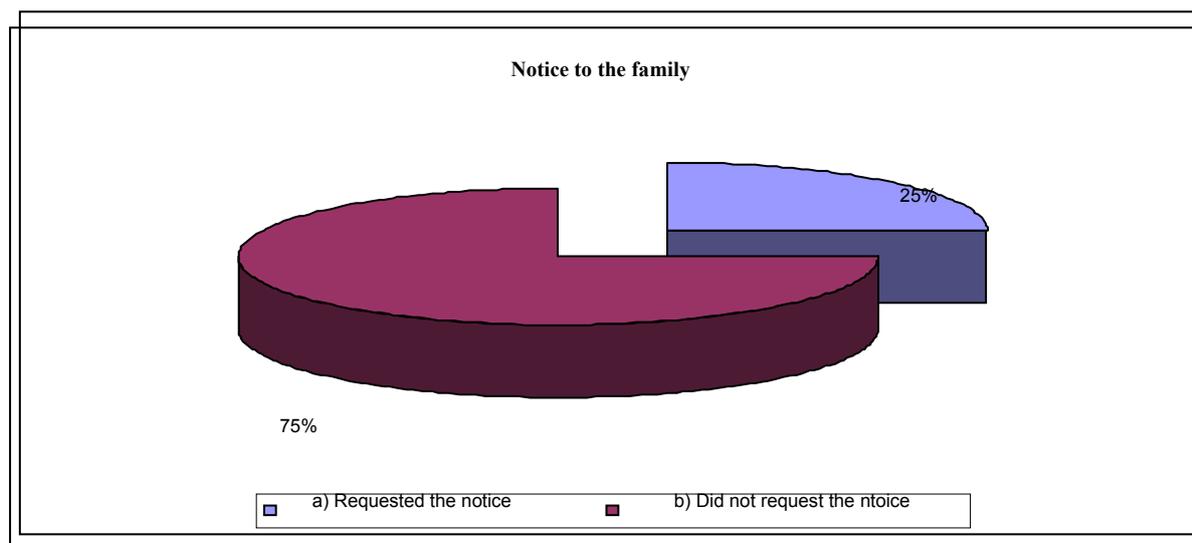
Securing the presence of the selected legal counsel is one of the key issues in realization of right of the arrested person to a legal counsel. Experience and information on time of arrival of legal counsels show that there is a significant number of cases in which the arrested persons were denied the right to a legal counsel.

The research showed that the issue of selection of a legal counsel, securing of list of legal counsels that are under obligation to attend must necessarily be resolved through changes and amendments of the Criminal Procedure Act, as well as through changes and amendments of other laws.

During the review of the issue of realization of rights of the arrested person has based on the Criminal Procedure Act, we must examine the right to inform the family about the arrest.

Chart number 26 provides information on use of right to inform the family. This is a right often exercised by the arrested persons. The Chart shows that this right was exercised by 75% of the arrested persons.

Chart no. 26.



A total of 602 of the arrested persons requested the family or other person to be notified about their arrest. The police officials performed such notices in 576 cases, which means that in 26 cases there were unable to contact the person appointed by the arrested person as the person who should be notified. These information provide basis for conclusion that the police informs the arrested person on his / her rights.

5. Arrest and use of means of force

Finally during the research information on use of means of force were collected. This was performed within the scope of this research in order to evaluate the legality of conduct, but also because this segment of the police work has not been sufficiently researched.

Table number 19 provides information on number of cases of use of means of force by kinds and in relation to the total number of arrests.

Table no. 19

Use of means of force	ZG	ST	RI	OS	PU	DU	KA	VU	ČK	TOTAL
Physical force	18	2		4	1				2	27
Physical force and handcuffs		5	2	9					1	17
Physical force and rubber stick		1								1
Handcuffs	14	6			16	1			2	39
Firearms	1								1	2
Total	33	14	2	13	17	1			6	86
Means of force were not used	368	504	406	281	303	62	69	184	166	2343
TOTAL	401	518	408	294	320	63	69	184	172	2429

This Table merely confirms what has already been known. Force is rarely used during arrests. It has been used only in 86 cases or 3,5%. This information merely confirms above listed conclusions in which large number of arrests of persons caught while committing criminal offences is being questioned.

The experience shows that during the arrests of persons caught while committing criminal offences such persons resist arrest, try to escape etc. Based on the above mentioned we believe that information of such Police Departments that show similar number of all reasons for arrest are more realistic, since in the contrary, had a large number of persons been caught while committing criminal offences, it would be realistic to expect that means of force are used more frequently.

Information on possible injuries that occurred during the use of means of force and information were such injuries registered in the police or other documents and was some procedure instigated based on that was not provided in the questionnaires, due to the reasons that such information are only partial in the monitored files. Pursuant to information from the questionnaires, in 16 cases injuries were inflicted to arrested persons and were registered in the police documents while the other information is incomplete.

6. Outcome of inquiries

The crime reports have been filed against 2312 or 95,2% of the arrested persons, while such reports were not filed against 117 persons, as shown in Chart number 24.

Chart no. 27.

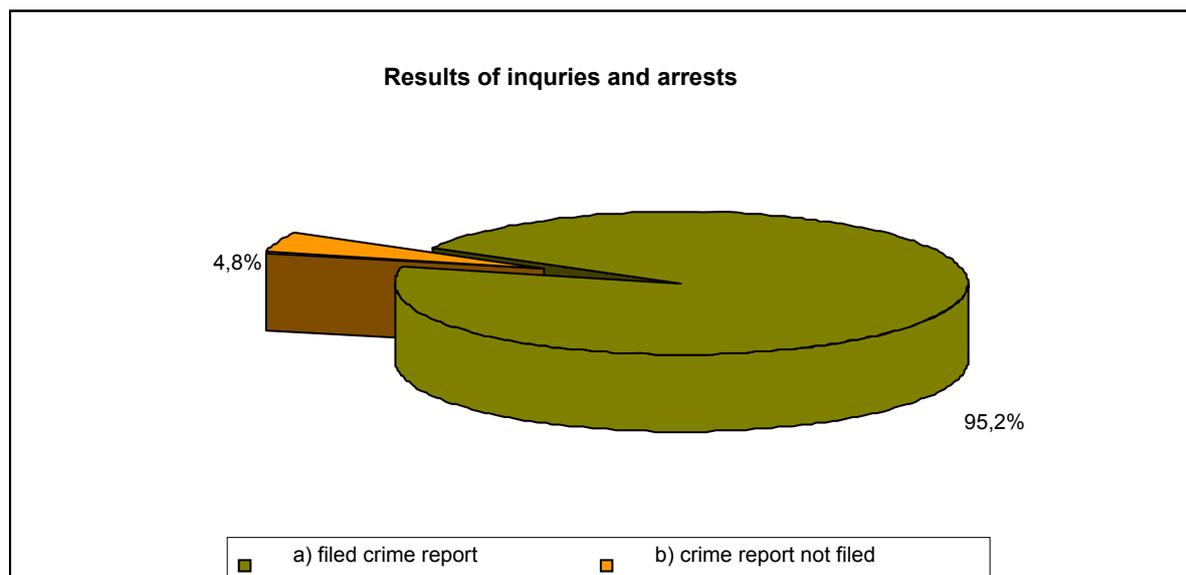


Table number 20 provides information on filed crime reports per Police Departments.

Table no. 20.

The crime report	ZG	ST	RI	OS	PU	DU	KA	VU	ČK	TOTAL
a) filed	399	518	402	246	310	63	59	184	131	2312
b) not filed	2		6	48	10		10		41	117
TOTAL	401	518	408	294	320	63	69	184	172	2429

Information from Table 20 are particularly interesting. These information show that during the evaluation of suspicion whether the arrested person committed a criminal offence departments in the Osijek and Čakovec areas were most critical, while on the other hand the Police Department Split and Dalmatia filed crime reports against all 518 of arrested persons.

Pursuant to the statistics of the State Attorney's Office both Osijek and Čakovec have low percentages of dismissals of crime reports, especially police crime reports. Information for the Split area provide basis for conclusion that the police officials are not critical enough during the evaluation of justified suspicion that the arrested person committed a criminal offence, but also during the evaluation of reasons for compulsory detention.

III. Work of the state attorney and the court after bringing of perpetrators of criminal acts in front of the investigation judge

The second part of the research was conducted at the State Attorney's Offices. After the police stations completed parts "A", "B" and "C" of the questionnaire and only introductory part of the questionnaire under "D" the Police Directorate submitted the part of questionnaire under "D" that relates to the work of the state attorney and the court after bringing of perpetrators of criminal acts in front of the investigation judge to the State Attorney's Office of the Republic of Croatia. Upon receipt of the questionnaire the State Attorney's Offices were requested to complete this part of the questionnaire based on review of the files.

The State Attorney's Offices from the area of jurisdiction of District and Municipal Attorney's Offices in Čakovec, Dubrovnik, Karlovac, Osijek, Pula, Rijeka, Split, Vukovar and Zagreb completed 404 questionnaires.

Upon the conducted research and obtained results that were unexpected, we may object to the part of the questionnaire under "D" in the manner that a column should have been foreseen in order to provide answers to questions did the state attorney propose the compulsory detention or did not propose the compulsory detention, which would provide us with the answer to the question did the state attorney consider the arrest to be justified. Since such column was not foreseen the state attorneys were asked direct questions.

However, since we do not have this information for specific cases it is not possible to provide a specific answer to the question was the accused party released with the tacit consent of the state attorney, i.e. did the release occur due to disagreement of the investigating judge with the proposal of the state attorney.

Based on questions that were asked to the state attorneys it still may not be concluded that in cases of release there were mostly no proposals by the state attorneys since the state attorneys also in majority of cases believe that arrests were unfounded.

1. Generally about the results of this part of the research

a. Content of the questionnaire

First part of “D” questionnaire with general information about the suspect was completed by the police. These are information about the Police Department that completed the questionnaire, number of the crime reports, names and surnames of the arrested persons, criminal offence (article and paragraph) and time of arrest. Therefore, this part of the questionnaire that is being completed by the police one may not see the reasons for the arrest.

The second part contains decisions of the investigating judge and the state attorney such as;

- decisions of the investigating judge after the arrested persons were brought in front of the judge (determination of provisional confinement and after that compulsory detention or release of the arrested persons by the investigating judge),

- decision of the state attorney on the crime report. A minor part of reports has not been resolved in cases when compulsory detention has not been determined. In other cases the report has been resolved and this part of the questionnaire has been accurately completed,

- information about the work on the crime report and decisions of the court in cases when compulsory detention has not been determined for the arrested persons, as well as in cases when compulsory detention has been determined (information on the course of proceedings, has there been a first instance ruling and kind of such ruling).

- information on duration of provisional confinement or compulsory detention. Information about the course of time from arrest until decision of the state attorney or the court, but in this respect useful information were only partially collected.

b. Number of questionnaires

Table 21 provides information on the number of questionnaires in cases when compulsory detention was determined and in cases in which the investigating judge released the arrested persons.

A total of 404 questionnaires were completed, mostly by the District and Municipal Attorney’s Office in Zagreb (150 questionnaires).

Table no. 21.

The State Attorney’s Office	Compulsory detention		Release		Total	
	aps.	%	aps.	%	aps.	%
Čakovec	3	60,0%	2	40,0%	5	100
Dubrovnik	13	44,8%	16	55,2%	29	100
Karlovac	13	76,5%	4	23,5%	17	100
Osijek	19	79,2%	5	20,8%	24	100
Rijeka	19	86,4%	3	13,6%	22	100
Pula	41	64,1%	23	35,9%	64	100

Split	23	28,4%	58	71,6%	81	100
Vukovar	4	33,3%	8	66,7%	12	100
Zagreb	70	46,7%	80	53,3%	150	100
Total	205	50,7%	199	49,3%	404	100

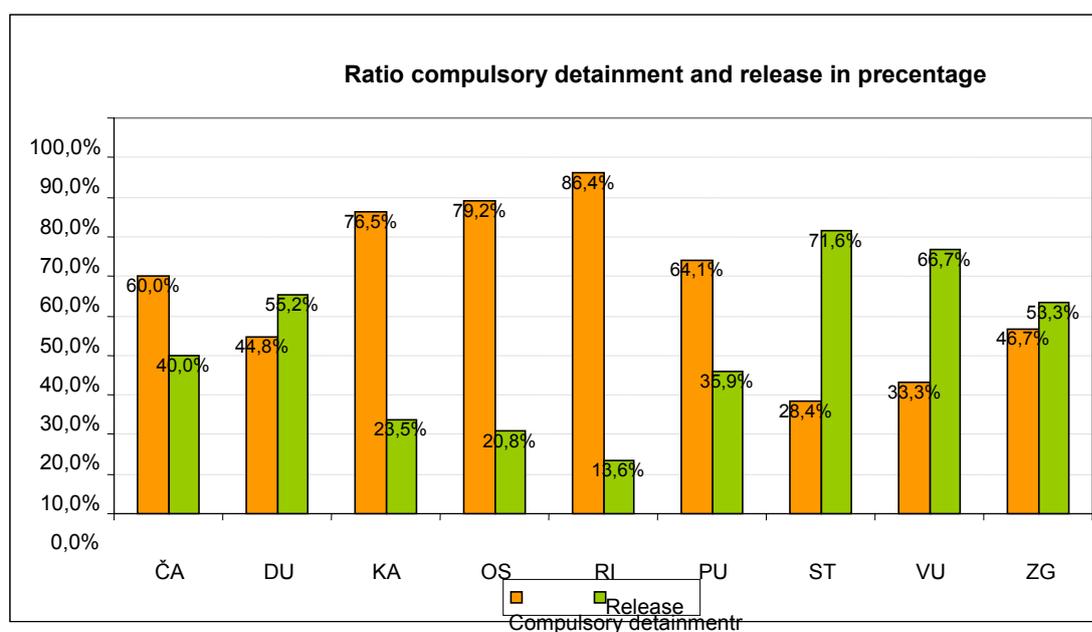
As it has been stated in the part II, there are significant differences between certain areas in respect to the number of cases in which compulsory detention was determined, i.e. the arrested person was released.

The results are partially surprising. While information for Čakovec, Karlovac, Osijek, Rijeka and Pula were expected, information for Zagreb and especially for Split indicate that there is no coordination between the police and the state attorneys and no joint decision making on cases when a person is to be brought in front of the investigating judge or not.

If the police reviews a certain case together with the state attorney, if there is an agreement in such cases and opinion of the state attorney that there are grounds to bring the arrested person in front of the investigating judge, we may assume that results would be different, since the state attorney would in such cases propose compulsory detention, and experience shows that in such case compulsory detention is mostly being determined.

In case the state attorney reviewed the case and considers that there are reasons for compulsory detention, it is to be expected that such compulsory detention would in majority of cases be determined. Truthfully, for a part of cases we may estimate that the arrested person was brought in front of the investigating judge for tactical purposes, simply to obtain the statement of the accused in cases when there is danger of escape or danger that traces of criminal offences will be destroyed or witnesses may be influenced. However, Table 21 and Chart 28 show differences that may not be attributed only to such cases.

Chart no. 28.



In Split only 28,4% of persons were confined and later compulsory detention was determined. In Zagreb the percentage was 46,7 %, while the confinement, i.e. compulsory

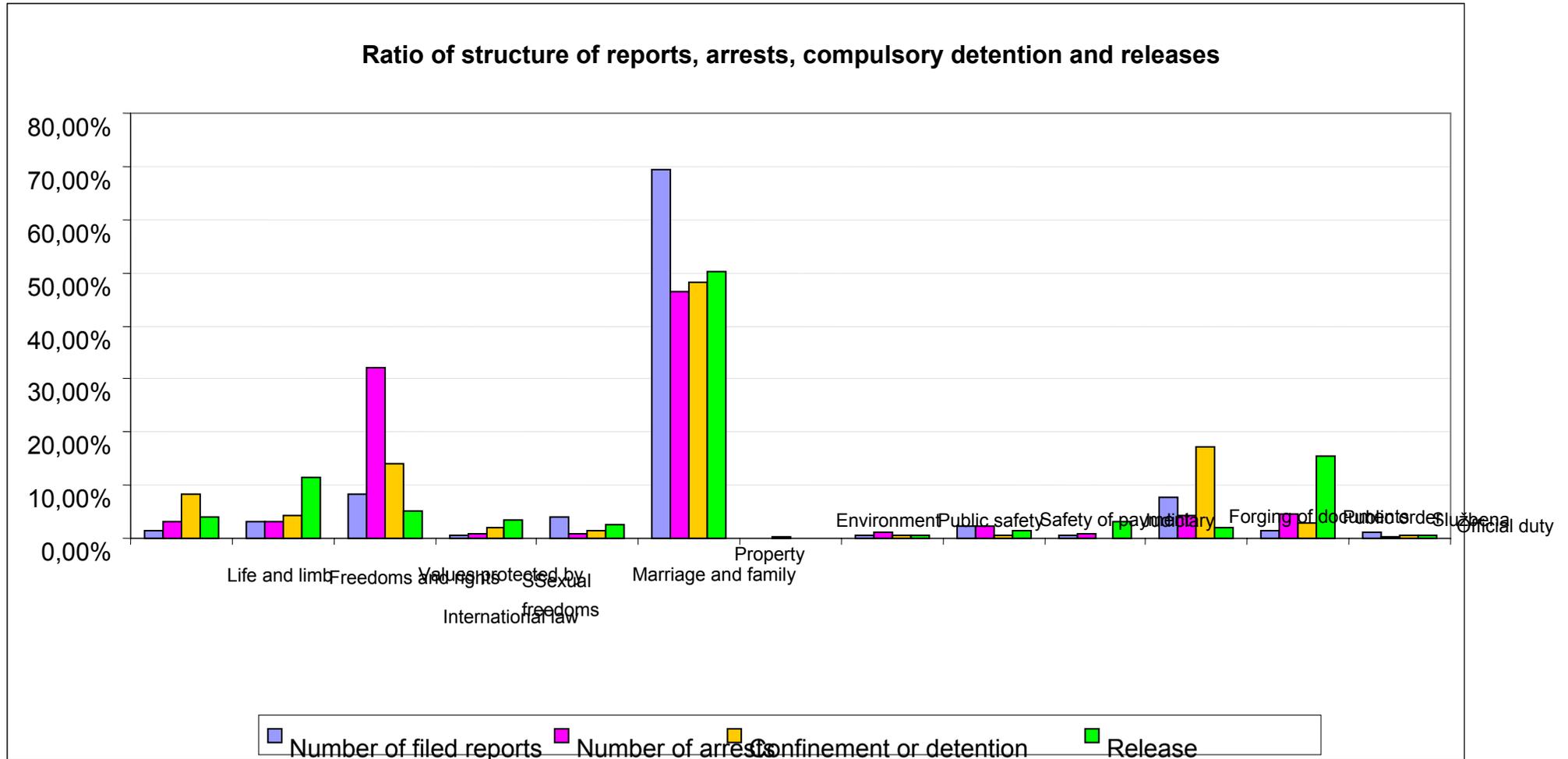
detention was determined in Rijeka in respect to 86,4%, in Osijek in respect to 79,2% and in Karlovac in respect to 76,5% of arrested persons.

Differences in decisions of the investigating judges are dramatic. Information show that it is necessary to examine why in the area of State Attorney's Offices in Split and in Zagreb the investigating judge in more than two thirds of arrests released the arrested persons. It is necessary to emphasize that it is difficult to provide estimate for the Vukovar area since the results on discrepancies are based on one case, so the percentage of discrepancies in this area is an exception.

The above mentioned conclusions are especially confirmed by overview from Chart number 29.

This chart provides percentage of reports, arrests, provisional confinements or compulsory detentions determined by investigating judges and releases per certain chapters of the Criminal Code.

Chart no. 29.



In case we put into relation the number of filed crime reports for certain chapters of criminal offences during the monitored time period, number of arrests and decisions of the investigating judges, results are unexpected. The percentage of arrests by the police is higher for criminal offences against life and limb, against values protected by international law (narcotics) and for criminal offences against public order. On the contrary, the investigating judges determine compulsory detention mostly for criminal offences against life and limb, while the least number of compulsory detentions was determined for criminal offences against public order.

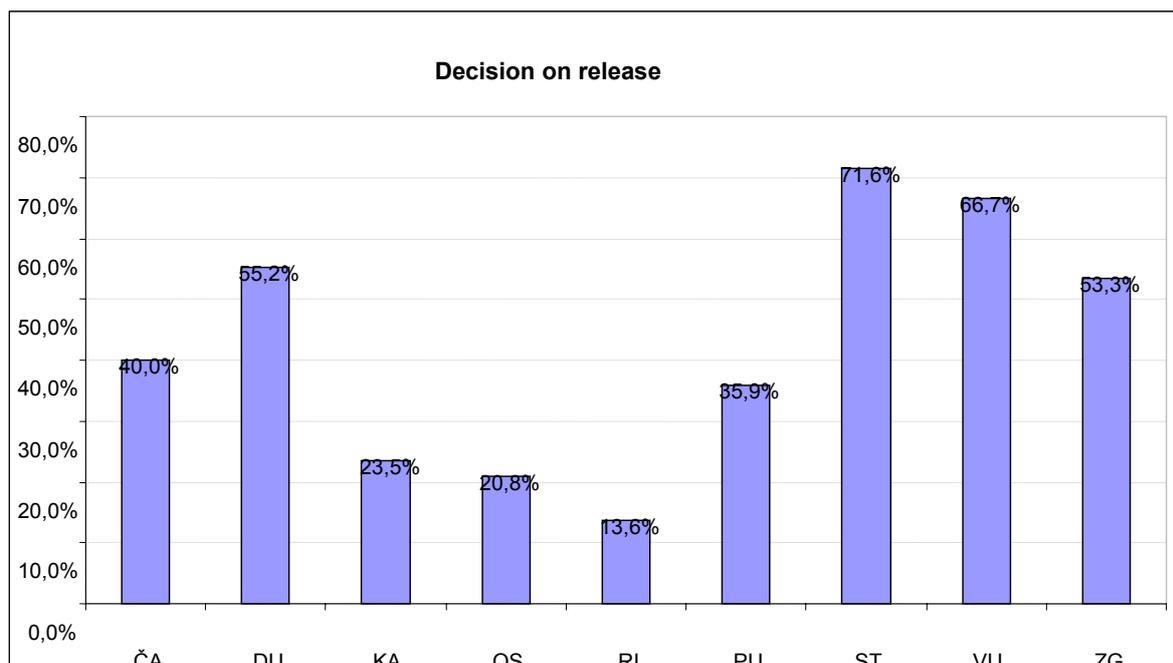
A research that needs to be conducted by studying of each case would show whether it is the lack of coordination with the state attorney or wrong assessment of the police. Answers to these questions based on the gathered information may only be summarily given and it would be useful (if it is necessary) to conduct another research in that respect.

Based on conversation with the district attorney in Split it arises that in the Split area there is coordination between the police and the state attorney. The police bring arrested persons to the investigating judge without agreement with the state attorney, who often in such cases does not propose determination of compulsory detention, since there are no legal grounds for that. Pursuant to the research in Zagreb the situation is similar. Not always there is an agreement between the police and the state attorney, so if we would exclude arrests and compulsory detention for the criminal offence from Article 311 of the Criminal Code as a specific case, since the arrested persons are foreign citizens, information would be similar to those from the Split area.

It is necessary to emphasize that there is a small number of questionnaires from Čakovec and Vukovar areas, as it is shown in Table 21. Pursuant to those information the majority of arrested persons in the Vukovar area has been released. As we have already emphasized, this is the consequence of release of eight arrested persons in one case and this case surely provides incorrect projection for the Vukovar area. Therefore it is difficult to compare Vukovar with other State Attorney's Offices.

Chart 30 provides percentages of releases in areas of certain police stations.

Chart no. 30.



As it has been mentioned before, at the areas of Dubrovnik, Split and Zagreb the investigating judges released over 50% of the arrested persons¹⁸⁹. These information demand more detailed analysis of these cases, while it will be necessary to review the police files and the files of the State Attorney's as well, i.e. the court files and based on such examination to provide answer to the question whether there were legal grounds for arrest, should the state attorney proposed determination of compulsory detention and finally did the investigating judge pass a proper decision.

Such research would be more wholesome than this one and it is our opinion that at the moment we must be satisfied with the conclusion that coordination between the police and the state attorney in these areas is insufficient, without attempting to make an estimate of reasons for such situation.

2. Structure of criminal acts for which arrests were made

We might say that one of the most valuable information that were obtained by this research is the information on structure of criminal offences for which the police made arrests. Table number 22 provides numerical indicators per chapters of the Criminal Code for which suspects for criminal offences were arrested. These information are contained in Chart number 31 as well.

Table no. 22.

Chapter of the Criminal Code	Compulsory detention		Release		Total
	aps.	%	aps.	%	
Life and limb	17	68,0%	8	32,0%	25

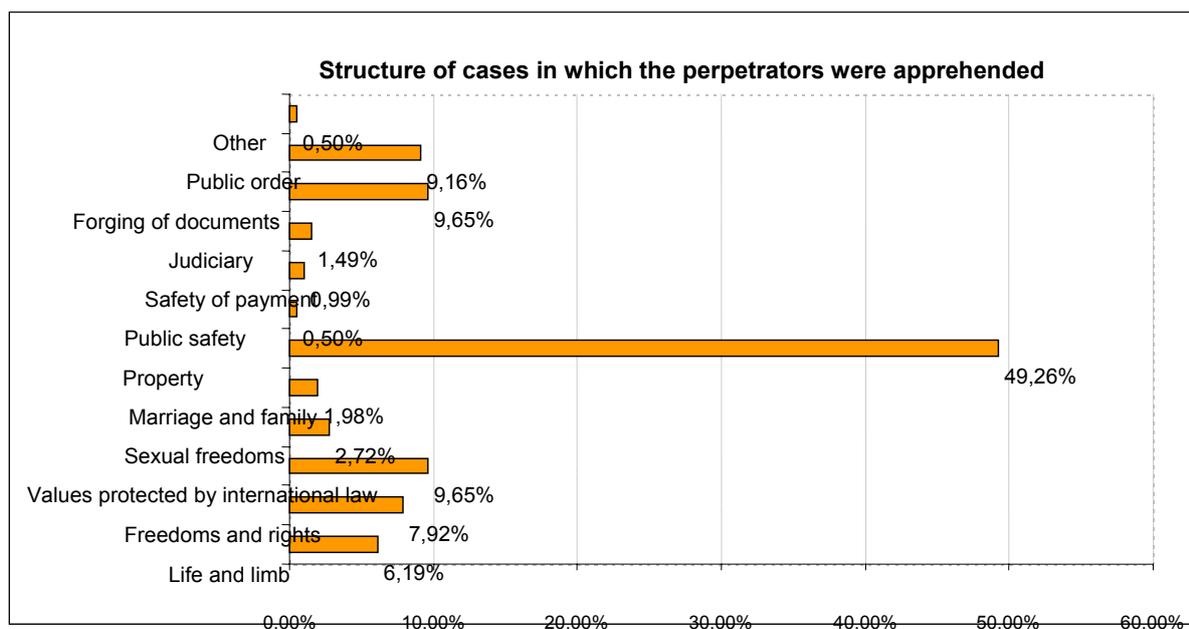
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¹⁸⁹ We already provided explanation for Vukovar that it was one case with eight arrested persons, which draws to conclusion that on the Vukovar area there is a large number of releases.

Freedoms and rights	9	28,1%	23	71,9%	32
Values protected by international law	29	74,4%	10	25,6%	39
Sexual freedoms	4	36,4%	7	63,6%	11
Marriage and family	3	37,5%	5	62,5%	8
Property	99	49,7%	100	50,3%	199
Public safety	1	50,0%	1	50,0%	2
Safety of payment	1	25,0%	3	75,0%	4
Judiciary			6	100%	6
Forging of documents	35	89,7%	4	10,3%	39
Public order	6	16,2%	31	83,8%	37
Other	1	50,0%	1	50,0%	2
Total	205	50,7%	199	49,3%	404

Property criminal offences have the highest participation at 49,26%, which is not surprising but rather the expected result. However, number of arrests for forging of documents and for criminal offences against public order is surprising. Mostly these are arrests in case of criminal offences from Articles 317 and 318 – attacking an official, i.e. an official performing police duties. For criminal offences of forging of documents we must once more emphasize that in the Zagreb area a large number of foreign citizens is being arrested due to criminal offence from Article 311 of the Criminal Code.

Chart no. 31.



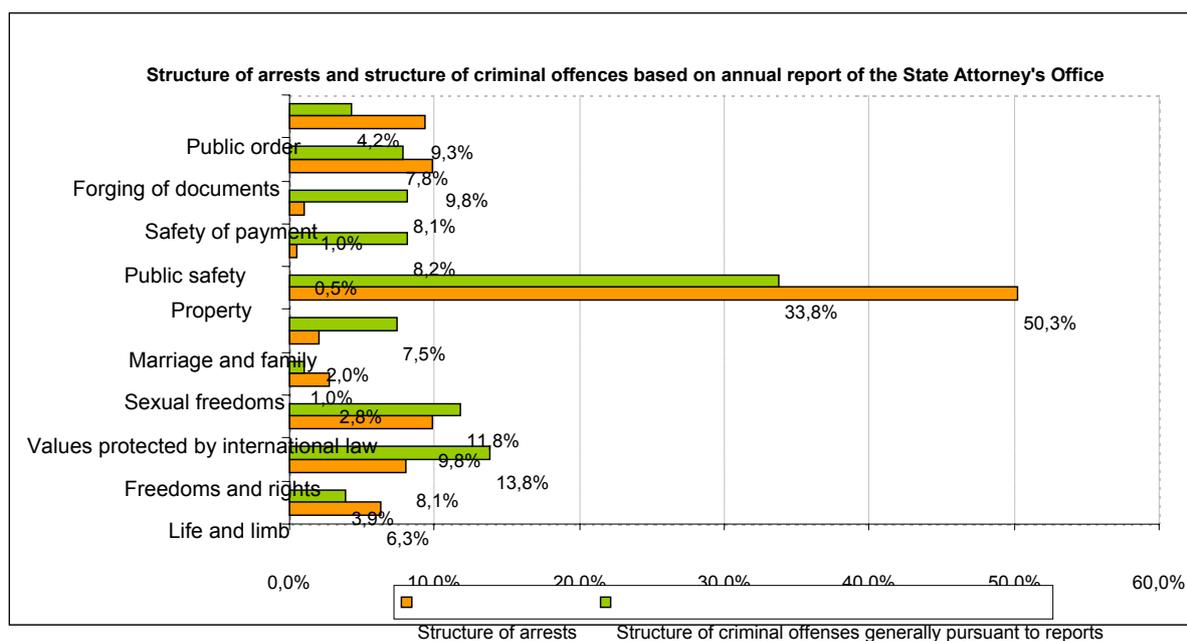
In case we compare the structure of criminal offences for which the perpetrators were arrested with the annual structure of criminal offences per certain chapters¹⁹⁰ (Table number 23) and if we take a look at Chart number 32 that provides the structure of arrested and the structure of reporter perpetrators of criminal offences we can notice significant differences.

Table no. 23.

Chapter of the Criminal Code	Research		Annual information	
	aps.	%	aps.	%
Life and limb	25	6,31%	1455	3,9%
Freedoms and rights	32	8,08%	5147	13,8%
Values protected by international law	39	9,85%	4390	11,8%
Sexual freedoms	11	2,78%	379	1,0%
Marriage and family	8	2,02%	2787	7,5%
Property	199	50,25%	12617	33,8%
Public safety	2	0,51%	3049	8,2%
Safety of payment	4	1,01%	3025	8,1%
Forging of documents	39	9,85%	2924	7,8%
Public order	37	9,34%	1578	4,2%
Total	396	100%	37351	100%

¹⁹⁰ The structure of crime was shown pursuant to information of the State Attorney's Office. Criminal offences against the judiciary are not shown separately in the annual statistics.

Chart no. 32.



As it has already been emphasized the structure of criminal offences per persons, as kept by the State Attorney's Office, may not be compared with the police records due to different parameters. Almost one third of crime reports are submitted to the State Attorney's Office by other state bodies, citizens and legal entities, and this in any case enables better relations than the structure of crime pursuant to police records.

Charta number 32 as well as Chart number 3 show above in part II provide best indication of differences. While criminal offences against public order pursuant to information from annual report are represented with 4,2%, during arrests they are represented with 9,3%. Forging of documents are in the total number of crime reports represented with 7,8%, and during arrests with 9,8%. On the contrary, safety of payment is represented in crime reports with 8,1%, and during arrests merely with 1%. Property criminal offences are represented with 33,8%, and during arrests this number is significantly higher.

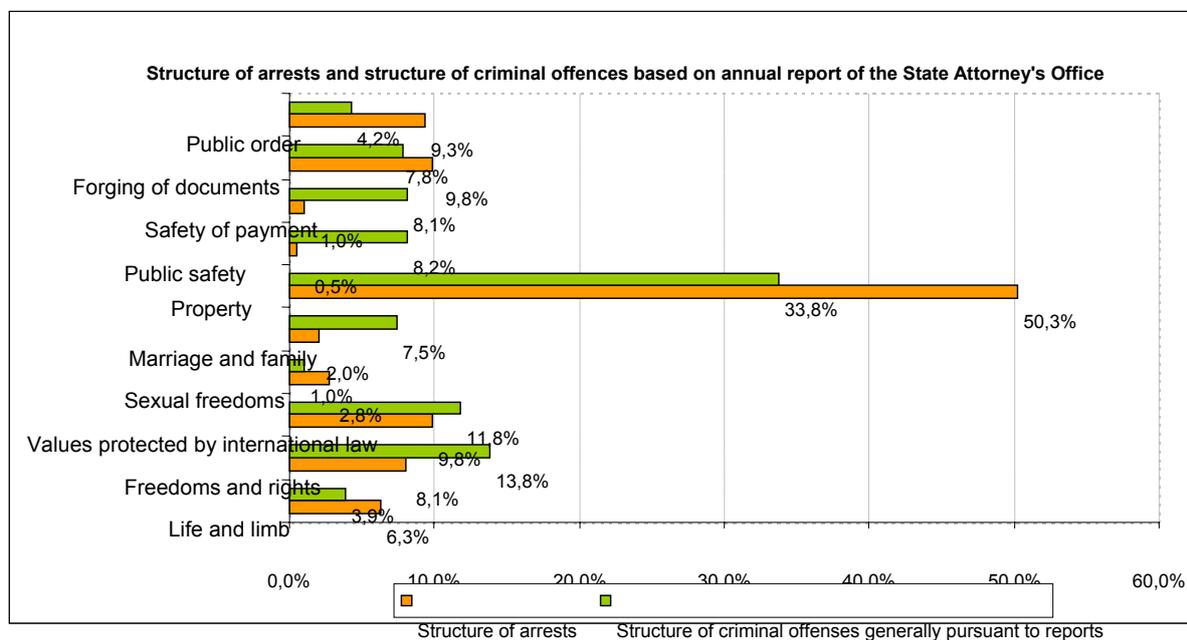
Therefore, we might say that some criminal offences are represented more in the total structure of reported crime than in the structure of criminal offences for which arrests were made. However, at criminal offences against life and limb, against public order, against forging of documents and property the number of these criminal offences in the structure of arrests is significantly higher than in the structure of crime reports. This is not surprising for criminal offences against life and limb taking into consideration the severity of some of these criminal offences (murder). Also, at criminal offences against property, taking into consideration the severity, i.e. repeated offending, these information are not surprising, but a high number of arrests at criminal offences against public order and forging of documents is surprising.

If we examine information from the attached Tables in more detail, we may see that in the structure of criminal offences against public order, criminal offences criminal offences of obstructing an official in the performance of official duty from Article 317 and criminal

offence of assault against an official from Article 318 of the Criminal Code are the most represented. We may say that the police is sensible against such assaults and in most number of cases arrests the perpetrators.

At forgery of documents from Article 311 of the Criminal Code situation is by far simpler. This criminal offence is mostly represented in the Zagreb area with high number of arrests for forgery. Based on verifications it may be concluded that perpetrators are foreigners with forged documents who are arrested, probation rulings are brought immediately, the accused persons waive their right to appeal and the whole proceedings thus end. Therefore, it is merely a formal proceedings and if we examine the work of police in pre-investigatory procedure and arrests, forgery of documents would essentially have to be eliminated from further consideration since this is a special case, specific criminal offence perpetrated by foreigners and this is not the regular procedure. Chart number 33 provides the structure of criminal offences, taking into consideration that cases in which compulsory detention or release were determined were excluded.

Chart no. 32.



If we examine the average we may see that in the total of 49,3% of cases the arrested person was released, while in relation to 50,7% of arrested suspects compulsory detention was determined, which draws to conclusion that compulsory detention is determined for an average of half of arrested persons.

However, if we examine information per particular chapters of the Criminal Code we may see significant differences that indicate that for particular criminal offences arrests are being made above the average, although based on decisions of the investigating judge there were no legal grounds for arrests.

Average values are shown, for example, for criminal offences against public safety and property, while in the contrary for criminal offence against public order for which the number of arrests is above average, there is exceptionally low number of determined compulsory detention, only 16,2%. It has already been explained that in cases of criminal offences of

forgery of documents mostly foreigners are being arrested and since it is indisputable that there is a danger from escape, compulsory detention is being determined at the very high rate. Criminal offences against the judiciary are few and in all cases compulsory detention was determined.

There is also a greater number of releases than determination of compulsory detention for criminal offences against marriage and family and sexual freedoms and these information are surprising, especially taking into consideration that these are criminal offences of domestic violence and criminal offences of rape. For these criminal offences experiences from proceedings often point out that in frequent cases there are reasons for compulsory detention from Article 102 Paragraph 1 Items 2 and 3 of the Criminal Procedure Act and therefore the low number of determined compulsory detention is surprising. It could have been expected for these criminal offences that there would be more compulsory detentions than releases.

Taking into consideration the severity it is not surprising that for criminal offences against life and limb the number of compulsory detentions by far supersedes the number of releases (compulsory detention is determined in 2/3 of cases).

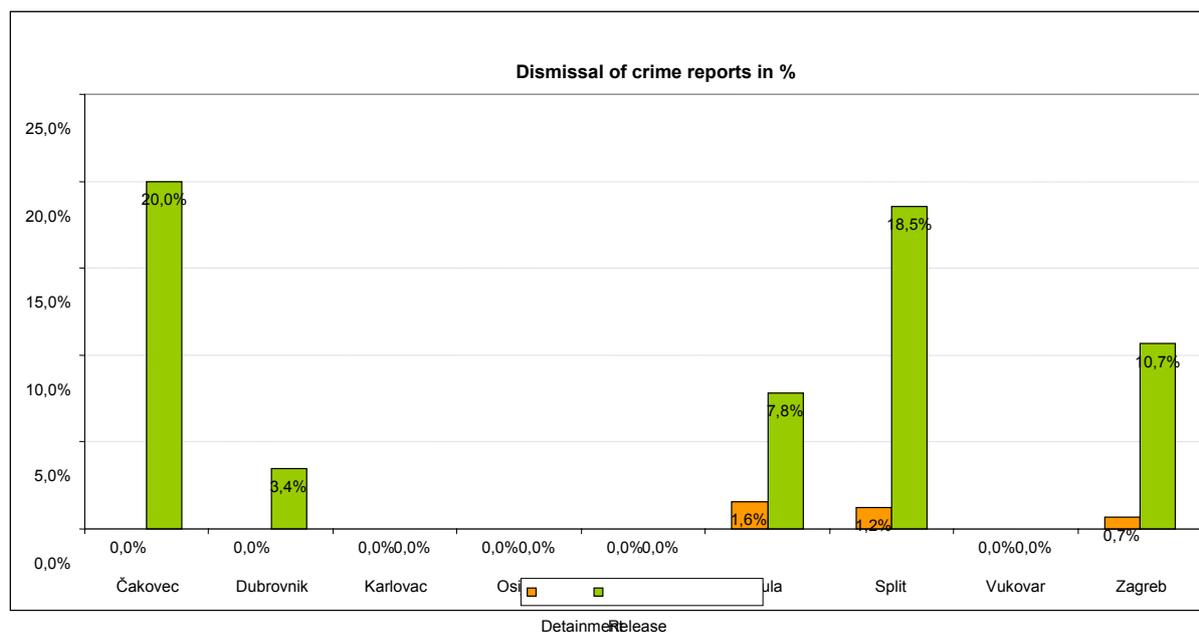
3. Success in proceedings

During the examination of success in proceedings, i.e. justification for police crime reports this research and research on dismissals of crime reports indicate that police crime reports are generally dismissed less frequently than crime reports of other submitters.

If we examine the success in proceedings, it is not surprising that dismissal of (Chart number 34) is by far greater in cases of release of the accused than in cases when compulsory detention was determined. The investigating judge among other issues evaluates the existence of actual doubt that the arrested person committed a criminal offence and in case the judge thinks this issue is doubtful, compulsory detention will not be determined.

Only in the areas of Pula, Split and Zagreb, we have cases of dismissals of crime reports in cases when compulsory detention was determined. These cases were examined separately and we determined that in these cases we had preliminary confinement that was extended for purposes of investigation and after that crime reports were dismissed.

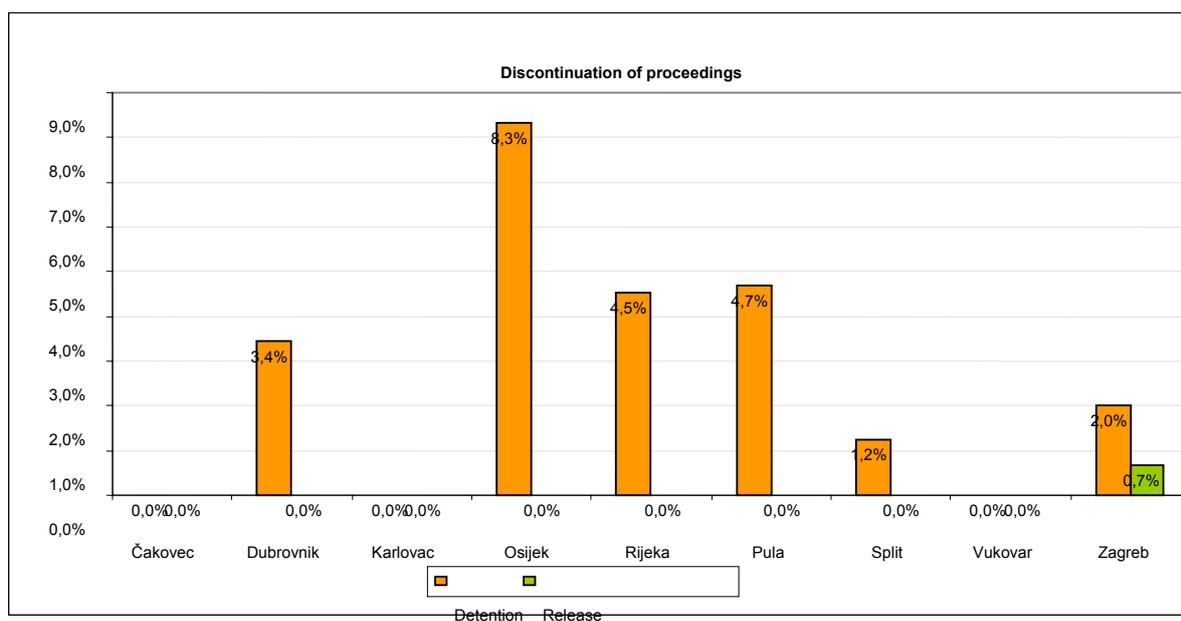
Chart no. 34.



In cases in which compulsory detention was determined discontinuation of proceedings is still frequent. Number of discontinued proceedings is highest in the Osijek area (8,3%). Number of discontinued proceedings is slightly above average. Pursuant to information of the State Attorney's Office for 2004 the number of discontinued proceedings in relation to total number of decisions was approximately 3,4%.

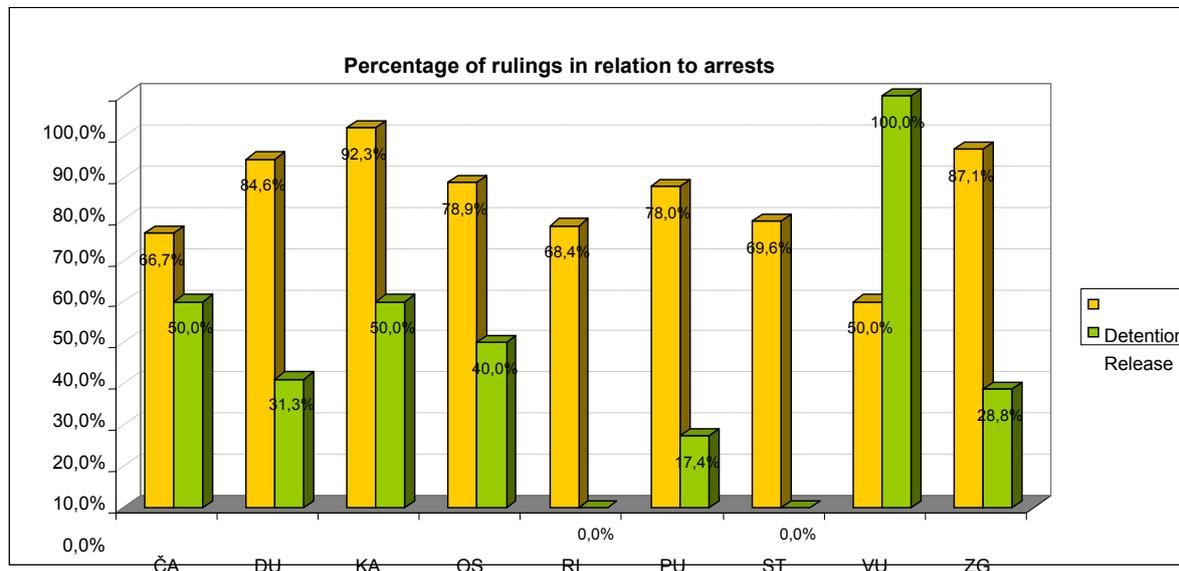
Success in proceedings is expected. As already mentioned, in particular cases a question arises whether the apprehension and arrest were necessary. However, information on success of proceedings indicate that in these cases there was justified suspicion that the arrested person committed criminal offence being charged with, which is not the justification for possible wrong assessment that there are reasons for apprehension and arrest, but indicates that police in these cases assesses the existence of basis for a doubt with more diligence.

Chart no. 35.



Percentage of rulings in cases of arrest indicate (except in Vukovar for which it has been said that it may not be compared) the expected results.

Chart no. 36.

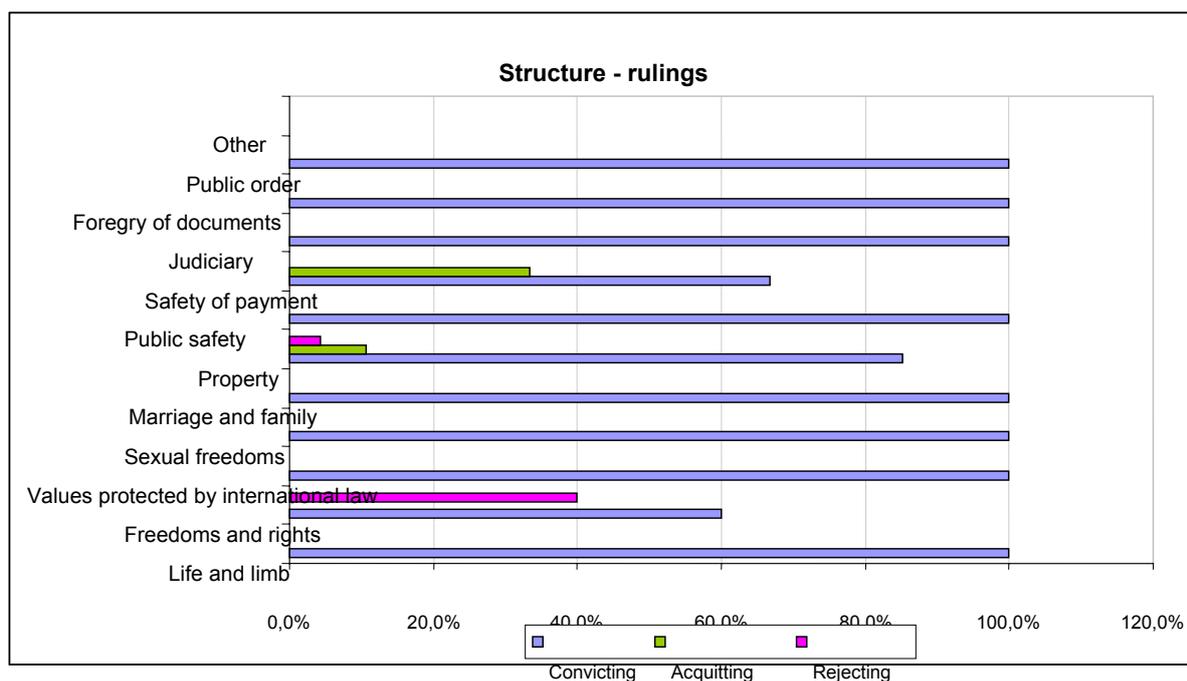


In cases of compulsory detention the proceedings finish quickly and, besides, the number of rulings in cases of compulsory detention is significantly higher than in cases when the arrested person was released. As a rule, if the arrested person was released, the proceedings last longer and long period of time passes prior to the first instance ruling or validity of the ruling.

4. Structure of rulings

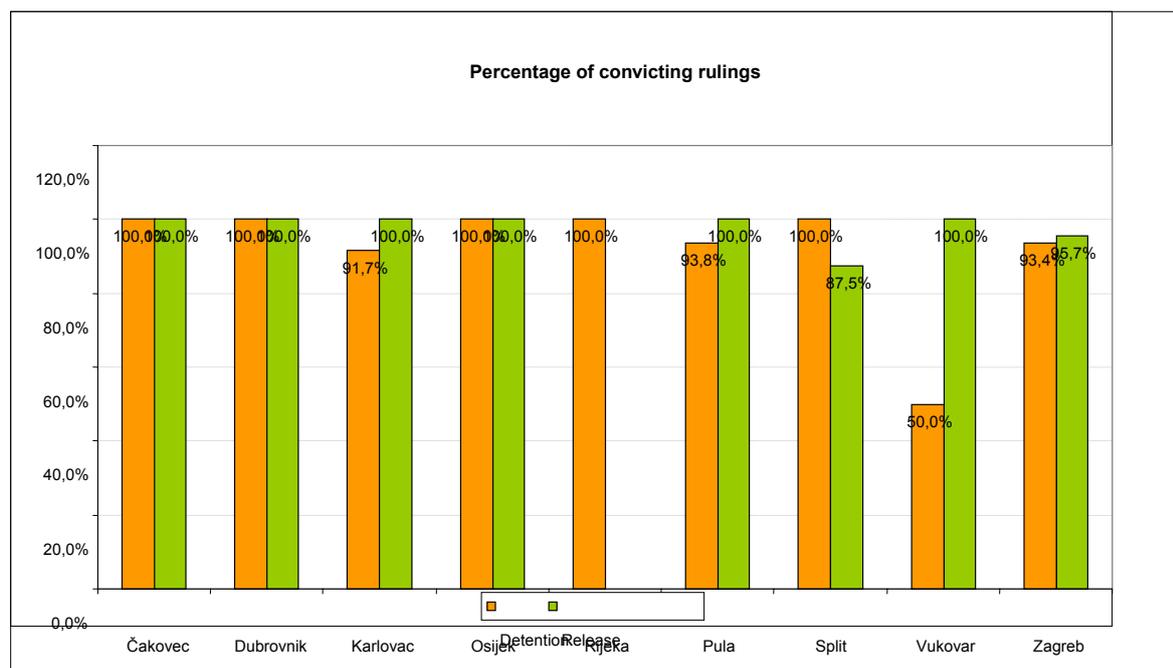
If we examine the structure of rulings per chapters of criminal offences (convicting, acquitting or rejecting) we may see that greater number of acquitting rulings are passed for criminal offences against safety of payment. In most cases it is forgery of money. For criminal offences against property there is a percentage of acquitting and rejecting rulings within the annual average, while for criminal offences against freedoms and rights there is a high percentage of rejecting rulings, mostly for criminal offence of threat due to the reason that the damaged parties withdrew their motion for prosecution.

Chart no. 37.



It is interesting that the percentage of convicting rulings is roughly equal in all areas in cases of arrest and release.

Chart no. 38.



The information that the percentage of convicting ruling is roughly the same in cases of compulsory detention and release (it has already been explained for Vukovar) confirms the fact already known from the practice. In all cases when the police decides to arrest there is a far greater probability that there is justified suspicion than in general cases. This is confirmed by great number of convicting rulings and in cases of some State Attorney's Offices all rulings were convicting. We may conclude that the police in these cases far more diligently estimates the existence of justified suspicion that a criminal offence was committed than it estimates reasons for compulsory detention.

5. Sanctions

Structure of sanctions in cases of compulsory detention is expected. In most cases it is the punishment by imprisonment and very rarely other sanctions and probation conviction. The exception is Zagreb that has a large number of other sanctions precisely due to criminal offences of forgery of documents, since, as we already mentioned, in cases of these offence probation conviction is mostly used rather than punishment by imprisonment.

Chart no. 39.

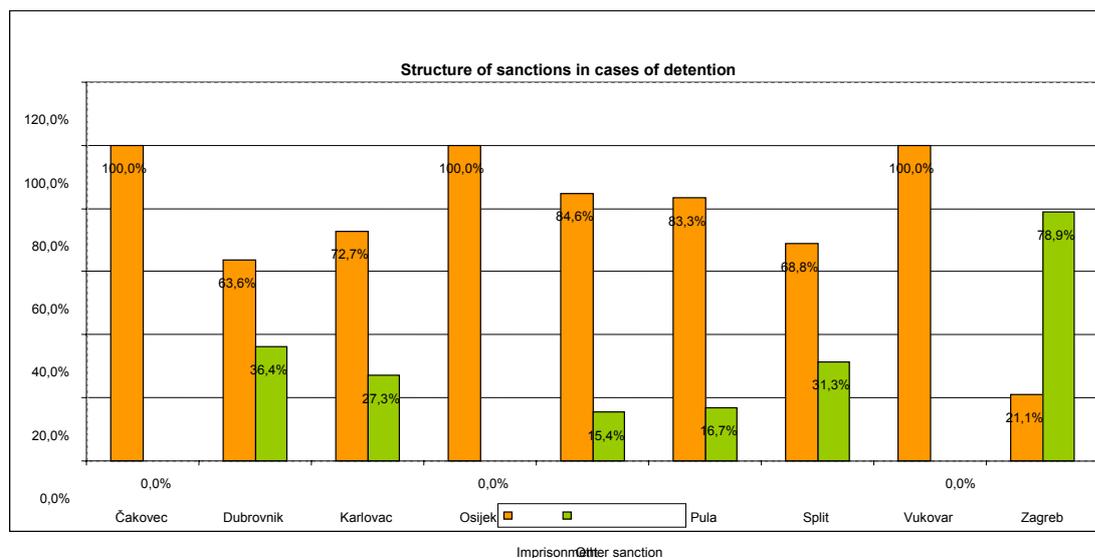
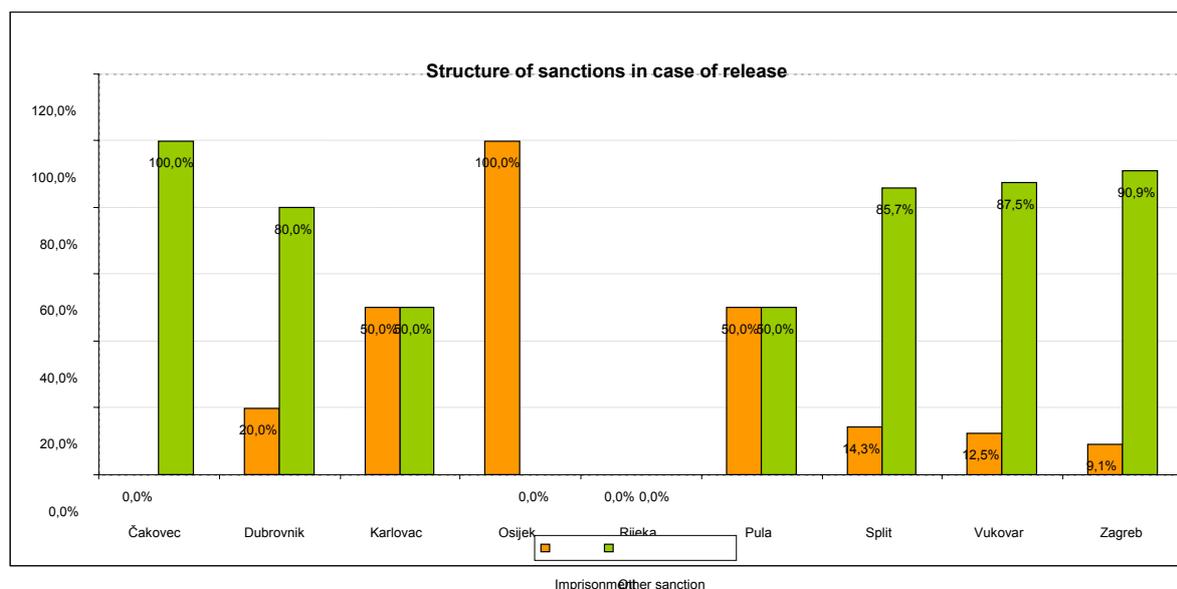


Chart no. 40.



Structure of sanctions in cases of release is also expected and fits into the general structure of sanctions. These are mostly other sanctions, i.e. probation as a rule. Exception is Osijek where in this case punishment by imprisonment was imposed.

6. Duration of proceedings

As it has been stated in the introduction, this part of the questionnaire was not the most precise one and it would be necessary to re-draft it in case the research is to be repeated.

The State Attorney's Offices completed this questionnaire differently and therefore we did not obtain the exact duration from apprehension until decision of the investigating judge on release, since the state attorneys failed to understand what needs to be completed in such cases. Therefore we have only the duration of provisional confinement but not the duration from apprehension until decision of the investigating judge on release.

Other information in respect to duration of compulsory detention that are shown in Table number 24 are not especially surprising. While examining the duration of compulsory detention in cases when compulsory detention was discontinued during proceedings and prior to passing of a ruling, we may see that compulsory detention lasts long for criminal offences against life and limb and freedoms and rights of man and citizen.

Duration of compulsory detention in months

Table no. 24.

Chapter of the Criminal Code	Until discontinuation	Until waiver of prosecution	Until bringing of charges	Until the first instance ruling	Until validity of the ruling
Life and limb	4,4	2,1		7,5	9,5
Freedoms and rights	4,7		0,2	3,2	
Values protected by international law	2,3	1,5	4	10	6,6
Sexual freedoms	1		3		
Marriage and family	0,8				3,6
Property	1	2	1,5	3,8	5,3
Public safety				4	
Safety of payment	2,4				
Judiciary					
Forging of documents	0,3	0,6	0,1	0,6	0,7
Public order	0,2				
Other					

As a rule, in case of waiver of prosecution the compulsory detention lasts short. Therefore, the state attorneys react instantly and in case they realize there is no justified suspicion the waive further prosecution.

Information on duration from determination of compulsory detention until bringing of charges indicate that investigation in cases of compulsory detention in large number of cases lasts short, only a month and a half up to two months. Also, duration until the first instance ruling is by far shorter than the usual, as well as the duration until validity of the ruling. We may conclude that in cases when compulsory detention was determined proceedings end much faster due to legal time limits and the state attorney and the court work much faster than in other cases.

IV. Work of the state attorney – inquires and reasons for dismissal of crime reports

1. Introductory explanations

Within the scope of drafting of the Project Criminal Procedure Act it has been agreed that the State Attorney's Office of the Republic of Croatia will conduct research on reasons for dismissals of crime reports.

The research was supposed to provide information on reasons of dismissals of crime reports towards the submitters of reports and criminal offences per chapters of the Criminal Code, as well as information how the state attorney conducts inquires and undertakes other actions before passing of decision on dismissal of crime reports.

For purposes of the research questionnaires were drafted and instructions were given to deputies and state attorneys that performed immediate examination of files in order to obtain the most accurate information because otherwise comparison with information from other State Attorney's Offices would not be possible.

2. Methods for gathering of information

Since such research has not been conducted before, it was necessary to include the sample of sufficient quality based on which the asked questions may be answered.

a. State Attorney's Offices included in the research

The research included the following State Attorney's Offices:

- a) Five largest Municipal Attorney's Offices, i.e.; Municipal Attorney's Offices in Osijek, Pula, Rijeka, Split and Zagreb,
- b) Two State Attorney's Offices with the lowest number of dismissals; Municipal Attorney's Offices in Čakovec and Vukovar,
- c) Two State Attorney's Offices with the highest number of dismissals; Municipal Attorney's Offices in Dubrovnik and Karlovac.

State Attorney's Offices that participated in the research in 2003 resolved 20718 of crime reports or 46,8% of the total number of crime reports resolved in that year.

Examination of annual statistics of the State Attorney's Offices shows that during 2003 the Municipal Attorney's Office in Zagreb resolved 9322 crime reports, out of which 4494 crime reports were dismissed, in Split 3290 crime reports, out of which 1476 crime reports were dismissed, in Rijeka 2226 crime reports, out of which 770 crime reports were dismissed, in Osijek 1403 crime reports, out of which 425 crime reports were dismissed, and in Pula 1174 crime reports, out of which 483 crime reports were dismissed.

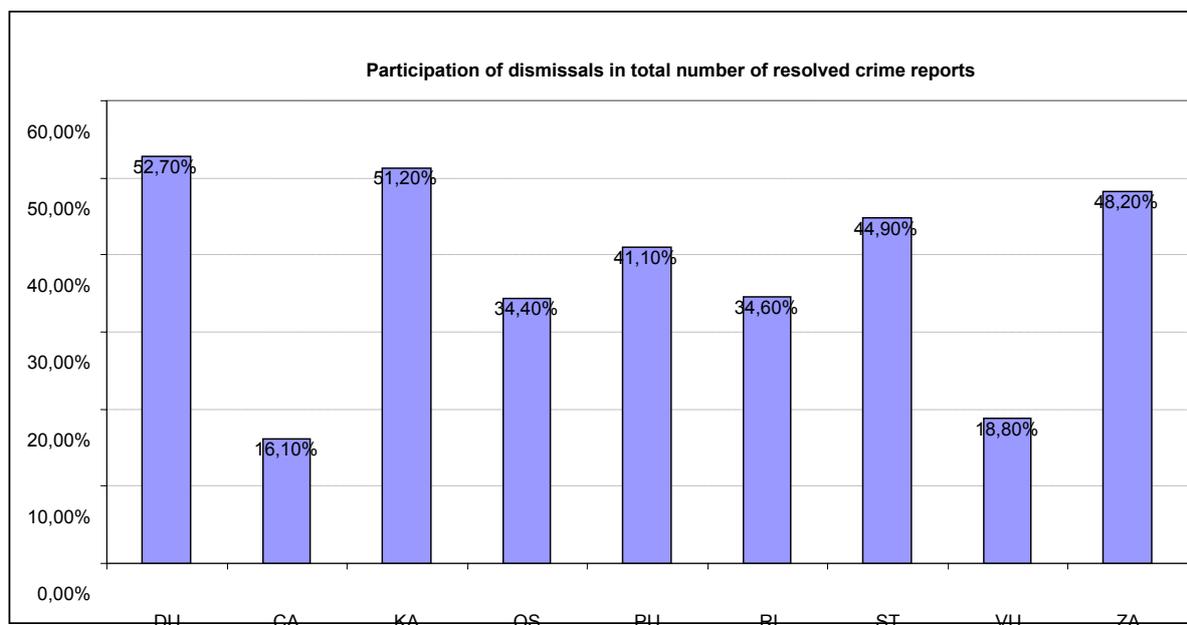
The Municipal Attorney's Office in Čakovec resolved 644 crime reports, while 104 crime reports were dismissed, the Municipal Attorney's Office in Vukovar resolved 576 crime reports, out of which 89 crime reports were dismissed.

The Municipal Attorney's Office in Dubrovnik resolved 879 crime reports, out of which 463 crime reports were dismissed, the Municipal Attorney's Office in Karlovac resolved 1204 crime reports, out of which 617 crime reports were dismissed.

Since the said State Attorney's Offices resolved 46,8% of crime reports the research sample is sufficiently representative.

The following Chart provides overview of dismissal of crime reports by Municipal Attorney's Offices in the said areas. For the Vukovar area information for all State Attorney's Offices are shown since all of them participated in the research. Information show that the said State Attorney's Offices fulfill conditions set forth for the research.

Chart no. 41.



Taking into consideration great differences between particular State Attorney's Offices in the number of dismissals of crime reports, it was necessary, apart from examination of information, to examine the files and resolutions on dismissals of crime reports and to, based on explanations of resolutions, determine reasons for dismissal and the extent to which the state attorney conducts inquiries and investigation prior to dismissal of crime reports, i.e. to what extent the state attorneys requests this from the police and other bodies.

b. Classification of crime reports

Since this research is especially important for the State Attorney's Office, since it was supposed to provide answers to questions on work of the state attorney in pre-investigation procedure which were to be used as basis for the Project for drafting of the Criminal Procedure Act in order to determine the role and authority of the State Attorney's Office to the best possible extent, the research was conducted in a manner that the said State Attorney's Offices for part of dismissals from their jurisdiction (roughly every fourth resolution on dismissal) completed tables drafted by the State Attorney's Office of the Republic of Croatia, that also drafted joint tables based on which these assessments on work were provided.

Pursuant to the above mentioned the State Attorney's Offices were requested to single out roughly every fourth dismissal for 2003, after which the deputies or counselors based on examination of the file and resolution on dismissal completed three separate tables that were submitted to the State Attorney's Office of the Republic of Croatia. All joint tables are a part of this report and are attached hereto.

Since it was necessary to determine as accurately as possible the reasons for dismissals of crime reports the State Attorney's Offices especially indicated work and reasons for dismissal for;

- crime reports submitted by the police,
- crime reports submitted through the police and
- crime reports submitted directly to the State Attorney's Office.

Therefore, for purposes of this research the term "type of crime reports" is conditionally used, having in mind the method for submission of crime reports, i.e. did the police detect the criminal offence or the perpetrator, did the damaged party or some other person submit the report against a specific person through the police or immediately to the State Attorney's Office. Pursuant to the above mentioned the mentioned classification was made rather than one of the classifications that are usually used (for instance anonymous crime reports, crime reports against unknown persons and similar).

For purposes of the research each State Attorney's Office was provided with three tables pursuant to the method of submission (type of crime reports). The requested information are the same in all tables. As it may be seen from the tables attached to this report, rows of the tables contained information separately for each chapter of the Criminal Code for which we, based on statistics, knew that it contains more crime reports and therefore more dismissals. Information was requested for each dismissal and divided into two main categories:

- inquiries and investigation
- reasons for dismissal of crime reports.

In each table in the part relating to inquires and investigation it should have been shown from whom the inquiries were requested or who performed the inquires (necessary information), were such information gathered and has the investigation been requested. Therefore, for each dismissal these information were supposed to provide answer to the question did the state attorney prior to dismissal conduct inquires or requested gathering of necessary information. The goal was also to determine was such request successful.

Information of conductance of inquiries or not is important for evaluation of quality and completeness of the submitted crime reports.

c. Legal basis for dismissals

In the part that relates to the very dismissal of the crime reports, legal basis for dismissal was to be shown. Dismissal pursuant to Article 183 (174) Paragraph 1 of the Criminal Procedure Act, in relation to Article 28 of the Criminal Code – insignificant offence and application of opportunity (Article 184 (184 (175)) of the Criminal Procedure Act).

For dismissals pursuant to Article 183 (174) Paragraph 1 of the Criminal Procedure Act the State Attorney's Offices were supposed to, upon examination of resolution on dismissal, determine which of the basis from this Article were applied by the state attorney. Therefore, in this segment information could have been entered only upon examination of the resolution.

Reasons for dismissal from Article 183 (174) Paragraph 1 of the Criminal Procedure Act were divided into the following categories;

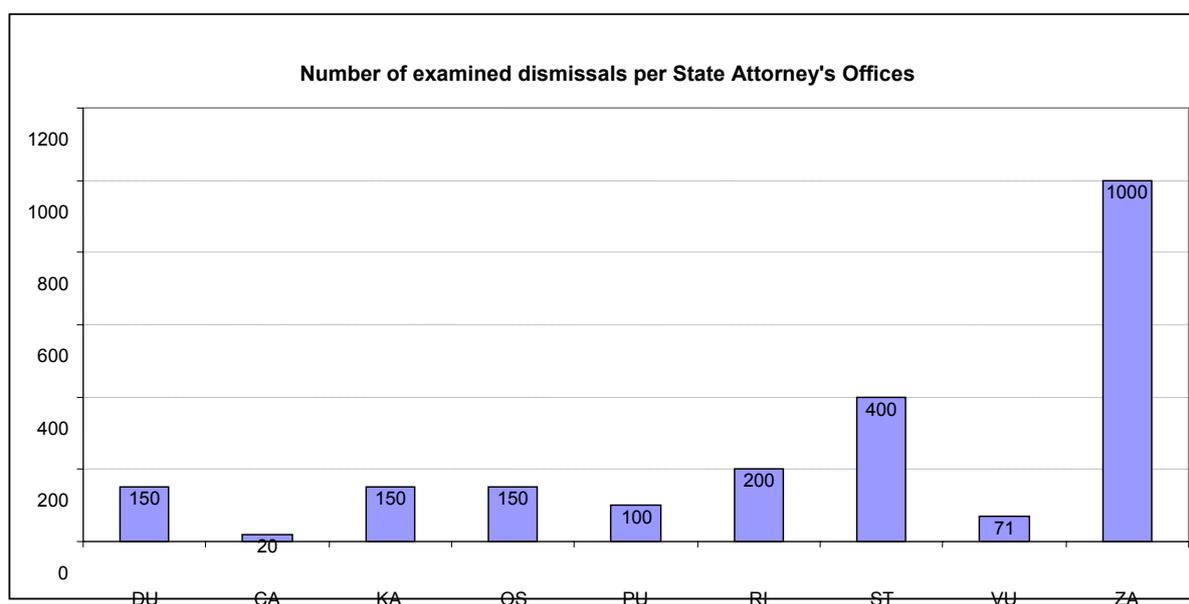
- the reported offence is not a criminal offence
- existence of circumstances excluding the culpability
- barring of prosecution (statute of limitations and other)
- no justified suspicion.

As listed above, after the State Attorney's Offices completed the tables the information were unified in joint tables attached to this report, that served as basis for drafting of this report.

3. Representation of dismissals of crime reports per State Attorney's Offices and criminal offences from particular chapters of the Criminal Code

The research included total of 2241 dismissals, least of them for Čakovec (20 resolutions) and most of them for Zagreb (1000 resolutions on dismissal). The other State Attorney's Offices are represented with the lower number of dismissals depending on number of dismissals in 2003. The following Chart provides the number of dismissals that were the basis for tables per State Attorney's Offices.

Chart no. 42.



Most resolutions on dismissal were examined in the Municipal Attorney's Office in Zagreb since this State Attorney's Office in 2003 had 4494.

Table number 25 contains dismissals pursuant to annual statistics and research per chapters of the Criminal Code

Table no. 25.

Chapters of the Criminal Code	Annual structure	Dismissal - investigation
CRIMINAL OFFENCES AGAINST LIFE AND LIMB (Chapter X of the Criminal Code)	1551 3,7%	66 2,9%
CRIMINAL OFFENCES AGAINST FREEDOMS AND RIGHTS OF MAN AND CITIZEN (Chapter XI of the Criminal Code)	4979 11,8%	457 20,4%
CRIMINAL OFFENCES AGAINST VALUES PROTECTED BY INTERNATIONAL LAW (Chapter XIII of the Criminal Code)	264 0,6%	24 1,1%
CRIMINAL OFFENCES RELATING TO ABUSE OF NARCOTIC DRUGS (Chapter XIII of the Criminal Code)	4008 9,5%	108 4,8%
CRIMINAL OFFENCES AGAINST SEXUAL FREEDOM AND SEXUAL MORALITY (Chapter XIV of the Criminal Code)	226 0,5%	5 0,2%
CRIMINAL OFFENCES AGAINST MARRIAGE, FAMILY AND YOUTH (Chapter XVI of the Criminal Code)	2091 4,9%	26 1,2%
CRIMINAL OFFENCES AGAINST PROPERTY (Chapter XVII of the Criminal Code)	13856 32,8%	783 34,9%
CRIMINAL OFFENCES AGAINST ENVIRONMENT (Chapter XIX of the Criminal Code)	492 1,2%	15 0,3%
CRIMINAL OFFENCES AGAINST THE PUBLIC SAFETY OR PERSONS AND PROPERTY AND SAFETY OF TRAFFIC (Chapter XX of the Criminal Code)	3072 7,3%	141 6,3%
CRIMINAL OFFENCES AGAINST SAFETY OF PAYMENTS AND BUSINESS OPERATIONS (Chapter XXI of the Criminal Code)	2871 6,8%	133 5,9%
CRIMINAL OFFENCES AGAINST AUTHENTICITY OF DOCUMENTS (Chapter XXIII of the Criminal Code)	2872 6,8%	141 6,3%
CRIMINAL OFFENCES AGAINST PUBLIC ORDER (Chapter XXIV of the Criminal Code)	1744 4,1%	70 3,1%
CRIMINAL OFFENCES AGAINST OFFICIAL DUTY (Chapter XXV of the Criminal Code)	2177 5,2%	152 6,8%
OTHER CRIMINAL OFFENCES FROM THE CRIMINAL CODE AND SPECIAL LAWS	2058 4,9%	120 5,4%
TOTAL:	42261 100%	2241 100%

For purposes of comparison of difference of structure of dismissals from the structure of reported criminal offences in the monitored area, the overview of received crime reports in 2003 was made along with the structure of reported criminal offences per chapters in numbers and percentages, and simultaneously the overview of dismissals from this research.

These information are contained in Chart number 43 in the manner to provide percentage of criminal offences per chapter of the Criminal Code in the total number of crime reports resolved during 2003 and in the monitored sample.

Although the table and the chart provide information on structure of criminal offences for all State Attorney's Offices, and in the structure of dismissals only information on dismissals included in this research, based on the number of years of monitoring of work of the State Attorney's Offices we may conclude, which also derives from the information contained in the table, that the number of dismissals for criminal offences per chapters of the Criminal Code is significantly above the proportion of these criminal offences in the total crime.

If we examine the representation of the number of dismissals per chapter of criminal offences, we may observe that the highest number of dismissals is for property offences (783 dismissals), then criminal offences from chapter XI against freedoms and rights of man and citizen (457 dismissals), then criminal offences against public safety and safety of traffic, and forgery (141 dismissal), etc.

Structure of dismissals as shown in Table number 25 is roughly similar to the structure of crime reports for 2003. The most significant deviations are for criminal offences against freedoms and rights of man and citizen, while these offences participate with 11,8% in the total crime, in dismissals they participate with 20,4%. The reason is simple. This chapter of the Criminal Code mainly includes crime reports for criminal offence of threat for which there is otherwise a large number of dismissals.

As it has been stated, participation of criminal offences from particular chapters in the monitored sample for most of criminal offences is in accordance with the structure of the reported criminal offences in the territory of the Republic of Croatia. Listed deviations show that criminal offences against freedoms and rights (mainly criminal offence of threat) stand out and to the lesser extent criminal offences against property and official duty. Besides criminal offences against freedoms and rights of man and citizen the number of dismissals for criminal offences against property and against official duty is also above average.

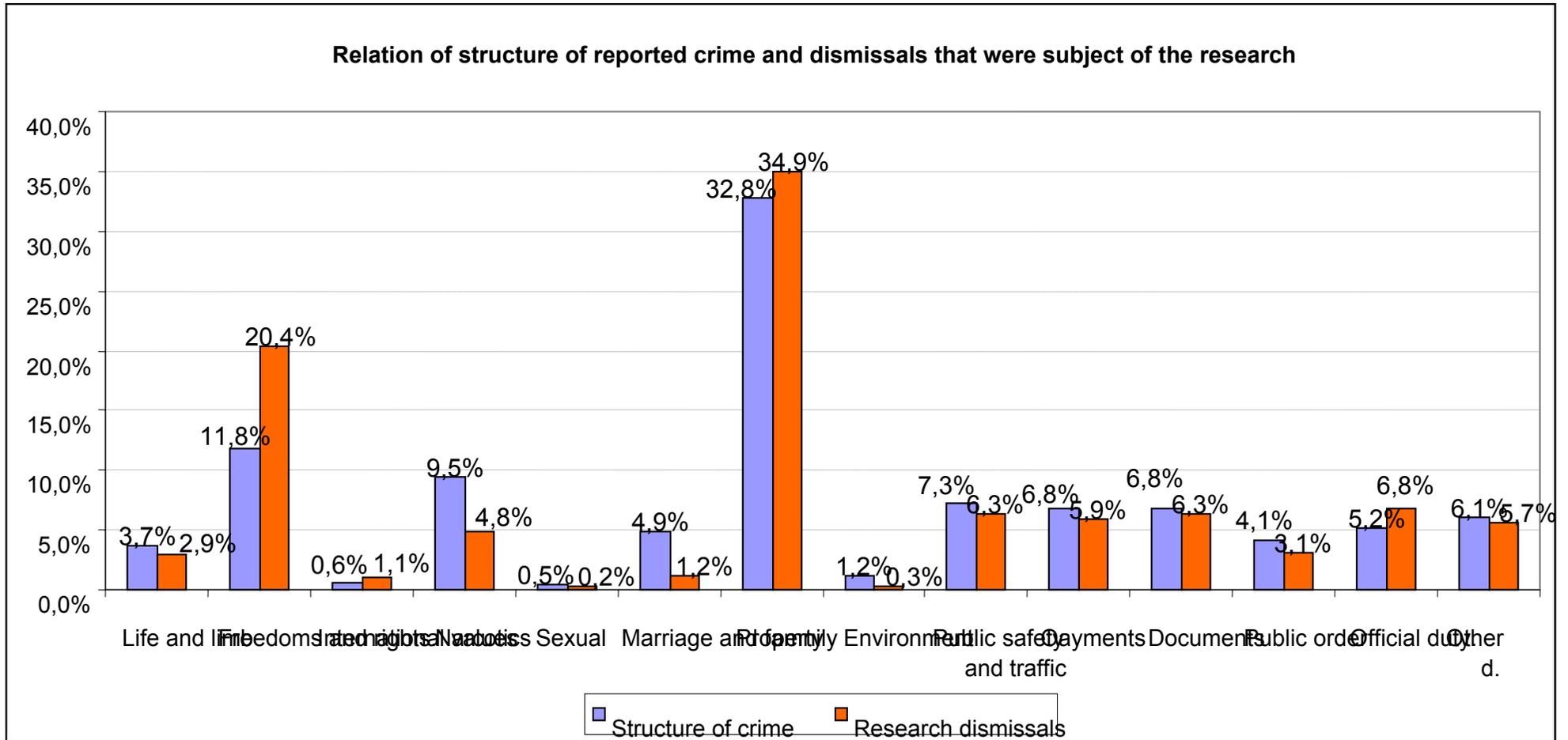
These are averages pursuant to the joint tables. However, in particular State Attorney's Offices there are deviations from average. For example, the Municipal Attorney's Office in Karlovac dismisses most crime reports for criminal offences against freedoms and rights of man and citizen (40%) of all dismissals. Vukovar also dismisses most crime reports for criminal offences from this chapter (45,2%), while the District Attorney's Office in Zagreb, (only this District Attorney's Office provided information on dismissals)¹⁹¹, dismissed most crime reports for criminal offences against official duty (55,9% of all dismissals).

The above listed information on the number of dismissals of crime reports provide basis for conclusion that the number of dismissals depends on the damaged party's disposition of motion for the criminal prosecution. As it has already been mentioned, the main reason for the high percentage of dismissals for criminal offence of threat from Article 129 Paragraph 1 and 2 of the Criminal Code that is dominant in chapter XI of the Criminal Code is waiver of the damaged party from motion for prosecution, and therefore for this chapter of criminal offences we must take this into consideration while evaluating the basis for submitted crime reports.

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¹⁹¹ CD contains information for this State Attorney's Office as well.

Chart 43.



4. Inquiries of criminal offences

State attorneys often based on the submitted crime reports may not pass decisions in the specific cases and therefore in a significant number of crime reports conduct inquiries themselves or request conductance of inquiries from the police.

Besides conductance of inquiries the other method of determination of justification of crime reports, i.e. existence of justified suspicion that a criminal offence was committed is request for investigation.

Therefore we separately provide results in respect to conductance of inquiries and investigation.

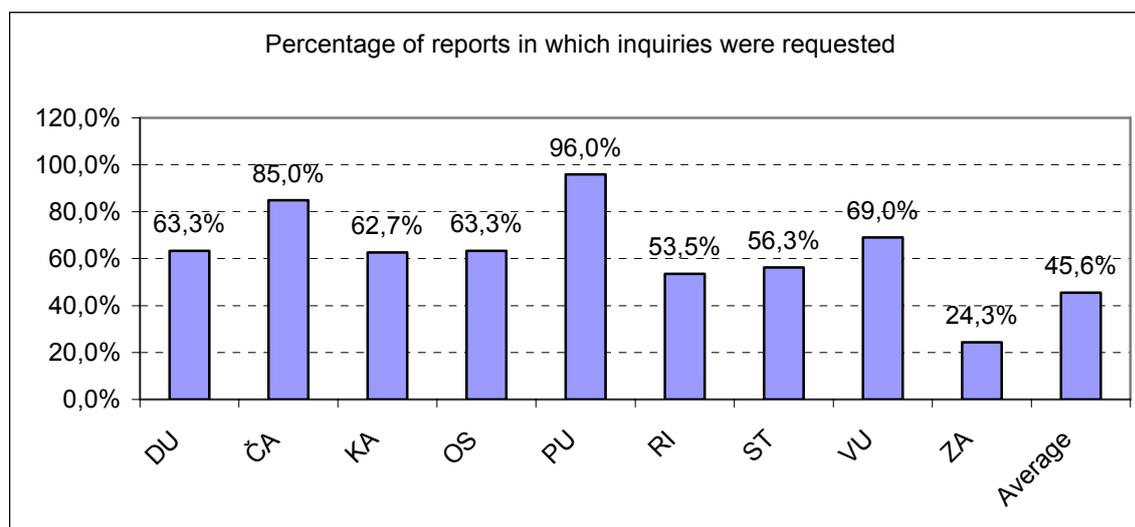
a. Conductance of inquiries

In case we examine the information that were collected through the research and that relate to inquiries of the state attorney and request for gathering of necessary information prior to passing of decision on the crime report, we may immediately conclude that information are different in areas of different State Attorney's Offices. Most inquiries and being conducted or requested by the Municipal Attorney's Office in Pula and the least by the Municipal Attorney's Office in Zagreb.

Pursuant to information that were obtained by the research, the Municipal Attorney's Office in Pula requests conductance of inquiries in over 80% of the monitored cases and thus significantly differs from other State Attorney's Offices. On the other hand, information for the Municipal Attorney's Office in Zagreb show that the number of cases in which resolution on dismissal was passed and in which inquiries were requested is surprisingly low.

Chart number 44 provides the percentage in which particular State Attorney's Office request conductance of inquiries prior to passing of decisions.

Chart no. 44.



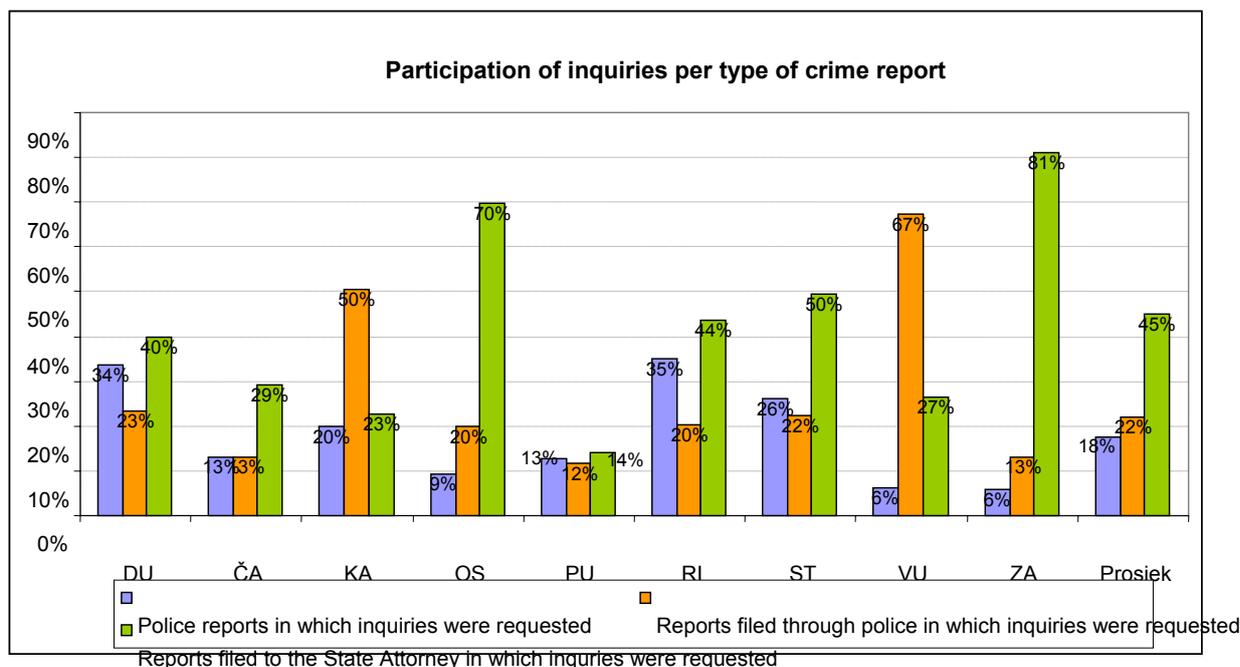
Since the structure and severity of criminal offences is relatively the same in the areas of Zagreb, Split and Rijeka, based on the provided information we may basically conclude that crime reports submitted to the Municipal Attorney's Office in Zagreb are complete and provide basis for passing of decisions without additional inquiries. Besides this, the reason for small number of inquiries in the Zagreb area may also be lack of activity of the state attorney who opts for dismissal without further verifications of justified suspicion.

In case we examine the same information but per type of crime reports, we can also detect differences between State Attorney's Offices which are not insignificant.

Differences are great. While some State Attorney's Offices conduct a significant number of inquiries in police crime reports, which should be considered complete and for which the conductance of inquiries will be less frequently requested, other conduct most inquiries in crime reports that were received immediately at the State Attorney's Office.

Chart number 45 shows deviations per State Attorney's Offices.

Chart no. 45.



It was to be expected that inquiries will mostly be conducted in crime reports that were submitted to the State Attorney's Office, as in the case of most of the State Attorney's Offices. However, in areas of Dubrovnik, Rijeka and Split conductance of inquiries was requested in a high percentage in cases of police crime reports. The reason for this may be poorer quality of such crime reports or high criteria of the state attorney who requests the police to verify all circumstances.

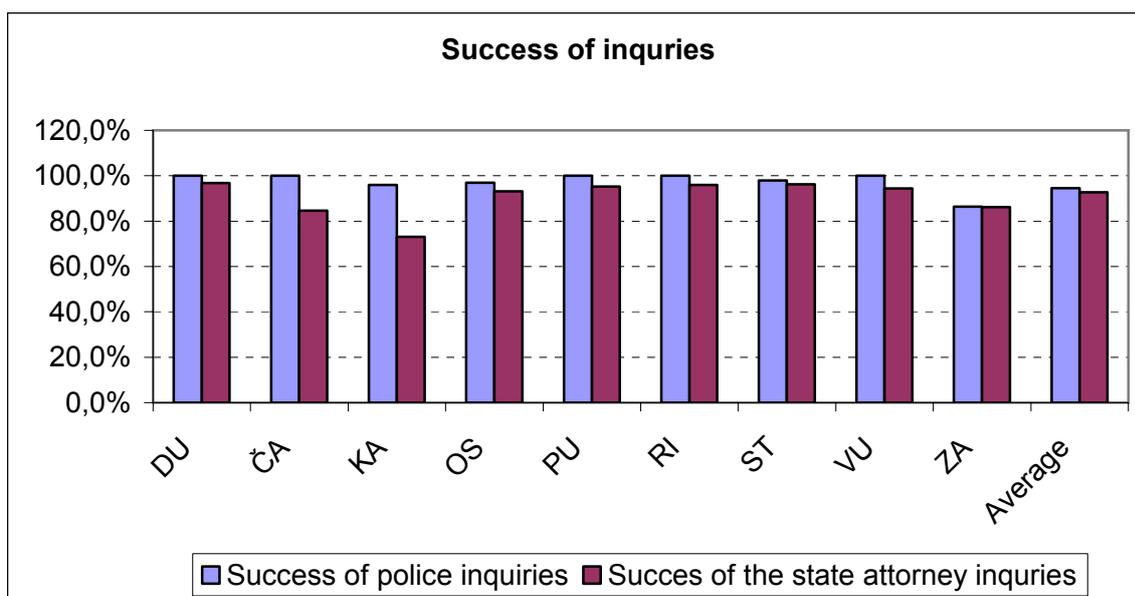
However, taking into consideration that in areas of Dubrovnik and Split in spite of large number of verifications we have a high percentage of dismissals of police crime reports, we may conclude that in these areas justification and completeness of police crime reports is questionable. However, since the reason for multiple request for inquiries may also be the failure of police to act upon the request of the state attorney, the State Attorney's Offices were requested to provide information on success of such inquiries.

The State Attorney's Offices were requested to examine files and to determine did the police act upon requests and were necessary information obtained. Information per State Attorney's Offices show that in a large number of cases in which gathering of necessary information was requested, such information were indeed gathered by the police.

Pursuant to the obtained information that the police in the Dubrovnik area in all cases successfully conducts inquiries, as well as information that requests for gathering of information were justified, indicates that the above conclusion on justification of police crime reports was founded. As mentioned above, in the Zagreb area we have the smallest number of requests for gathering of necessary information. Taking into consideration that precisely in this area there is the smallest percentage of successful inquiries, this may be the reason why the state attorney seldom requests conductance of inquiries.

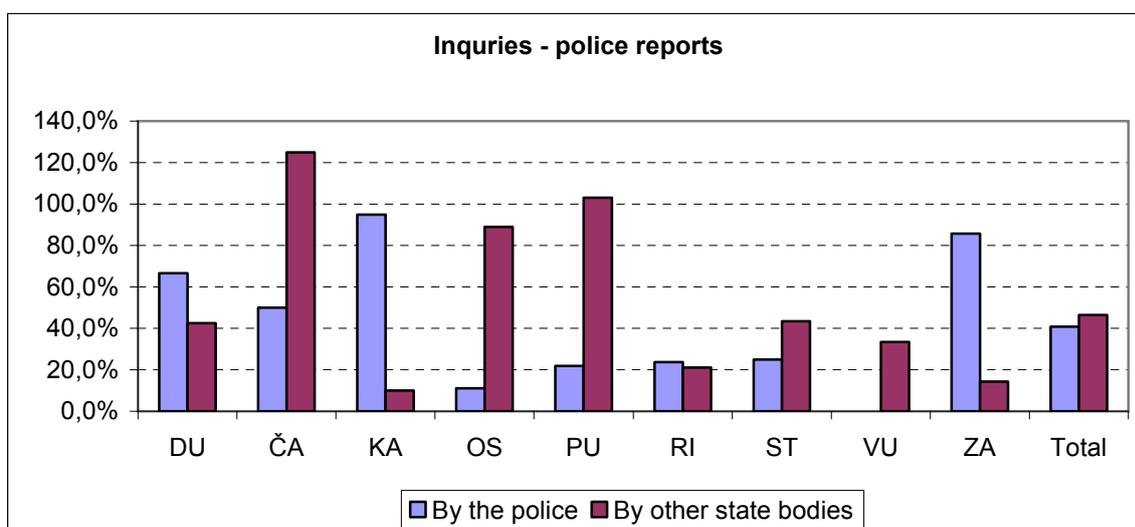
Success rate of inquiries of the State Attorney's Offices is somewhat lower. The following Chart shows success rate in conductance of inquiries by the State Attorney's Offices.

Chart no. 46.



In order to evaluate the extent of own inquiries by the State Attorney's Offices and the extent of requests to the police, the following Charts (Charts 47 to 49) provide overview of inquiries per types of crime reports and bodies conducting them.

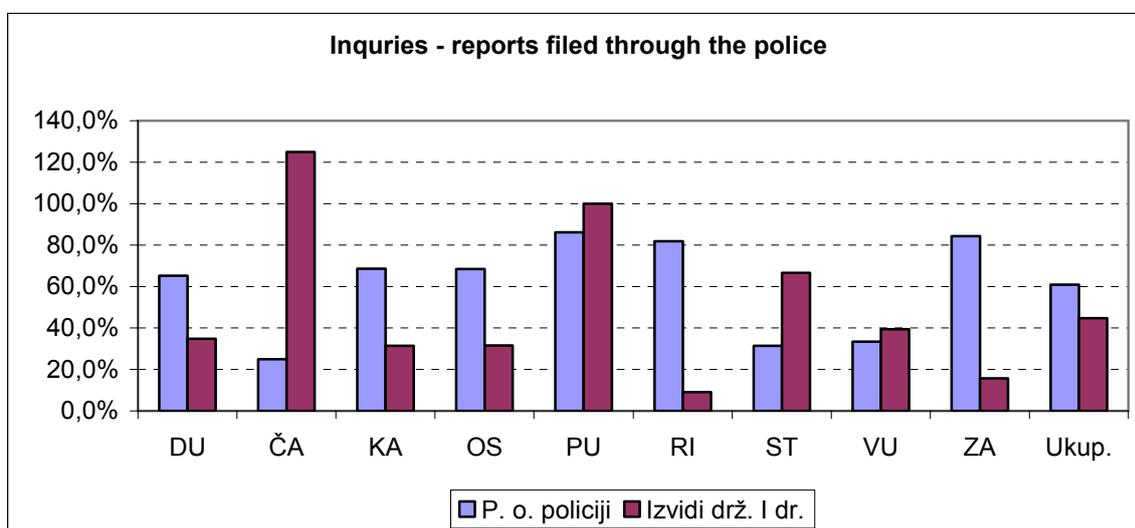
Chart no. 47.



In respect to the police crime reports it was expected that the state attorney after receipt of the police crime reports personally gathers other information whenever possible. After all, such is the guideline as well. However, information for Zagreb and Dubrovnik show that these State Attorney's Offices essentially large number of inquiries leave to the police, although information for other State Attorney's Offices show that the state attorney may personally and successfully gather the requested information. If we link information from this Chart with information from Chart 6, we may conclude that the Municipal Attorney's Office in Zagreb should be by far more independent in conductance of inquires, since information from Chart 6 show that the police does not always gather information requested by the State Attorney's Office.

Information on frequency of inquiries in respect to crime reports filed through the police are significantly different. It is interesting that only in areas of Čakovec and Pula in this case the state attorney personally conducts most of the inquiries. This information are shown in Chart 8.

Chart no. 48.



In respect to these crime reports all State Attorney's Offices (except Pula) in significant number of cases request gathering of necessary information from the police.

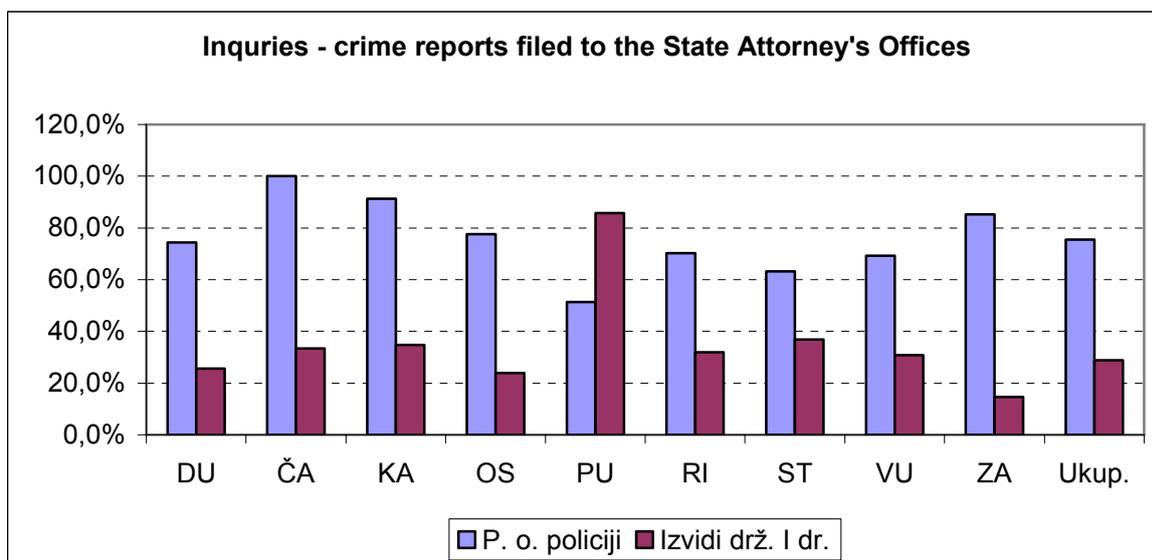
Information from Chart 48 is not surprising. We knew before that necessary information are most often requested in cases of crime reports filed through the police. The state attorney, if such crime reports are incomplete, as a rule requests submission of information that were not submitted with the crime report. However, information for the Municipal Attorney's Offices in Zagreb and Rijeka is still surprising. These State Attorney's Offices as a rule request gathering of necessary information by the police, although experience show that some information and verification may be more successfully obtained in other way (linking of persons, request for documentation, examination of registers, etc.).

The state attorney often may personally gather some information more easily, especially if these are legal issues and in these cases requests for gathering of information by the police is not justified. Such insisting on police gathering of necessary information in areas of Zagreb and Rijeka is probably the reason for poorer success in conductance of inquiries in the Zagreb area.

Chart number 49 contains information of conductance of inquiries in cases when crime reports were filed to the State Attorney's Offices.

Information in respect to requests for inquiries in crime reports that were filed to the State Attorney's Offices are in accordance with our findings. Except Pula, all State Attorney's Offices in these cases mostly request gathering of necessary information by the police. This information was expected since it is often necessary to conduct actions that may not be performed by the state attorney personally (failure of summoned persons to attend and similar) and thus the only method to gather information is request to the police.

Chart no. 49.



In respect to conductance of inquiries we may conclude that such requests are justified. This conclusion is based on the high success rate in conductance of inquiries. It also may be concluded that vast majority of State Attorney's Offices requests conductance of inquiries. Taking into consideration that in over 90% of cases necessary information are gathered in this manner, the Municipal Attorney's Office in Zagreb, that almost exclusively requests conductance of inquiries by the police, should change their practice.

b. Investigation

As it has been above mentioned, besides conductance of inquiries, the State Attorney's Offices prior to passing of decisions request investigations.

We often encounter question are these requests justified, since it is indisputable that investigation prolongs the duration of proceedings. Examinations often conclude that the State Attorney's Office could have gathered information and expedite proceedings in another manner, by conducting inquiries.

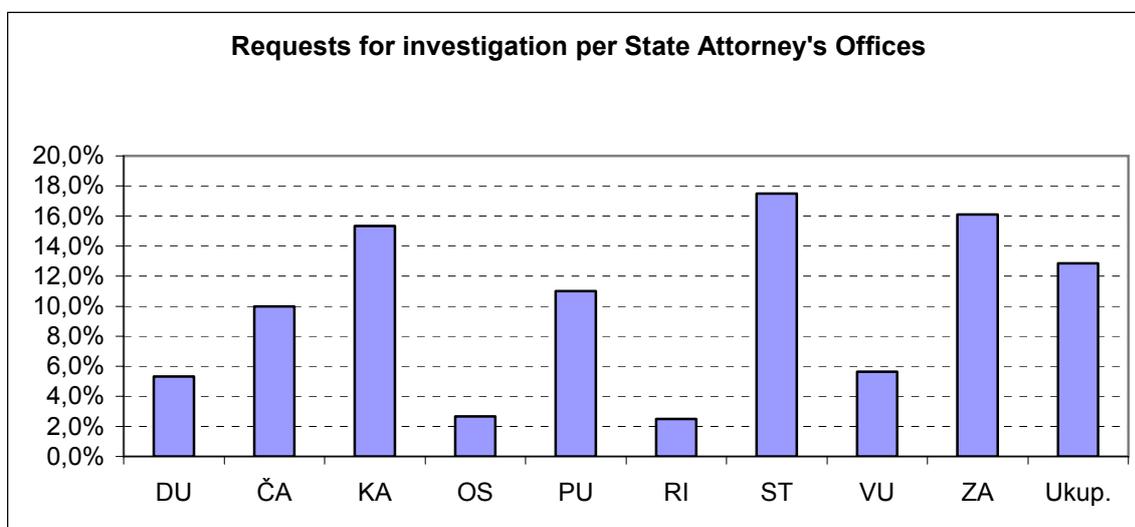
Taking into consideration that certain State Attorney's Offices request investigations in cases in which conductance of inquiries would be sufficient to gain necessary information, information on requests for investigations were gathered.

Chart number 50 provides overview of percentage of requests for investigations of the State Attorney's Offices.

This Chart merely confirms findings of examinations of work of the State Attorney's Offices. Some State Attorney's Offices seldom request investigation (Osijek and Rijeka less than 3%), while other, like for example Split, Zagreb and Karlovac, more frequently request investigation. Since we so far in examinations of work of the State Attorney's Offices especially reviewed these requests, we may conclude that a request for investigation is almost

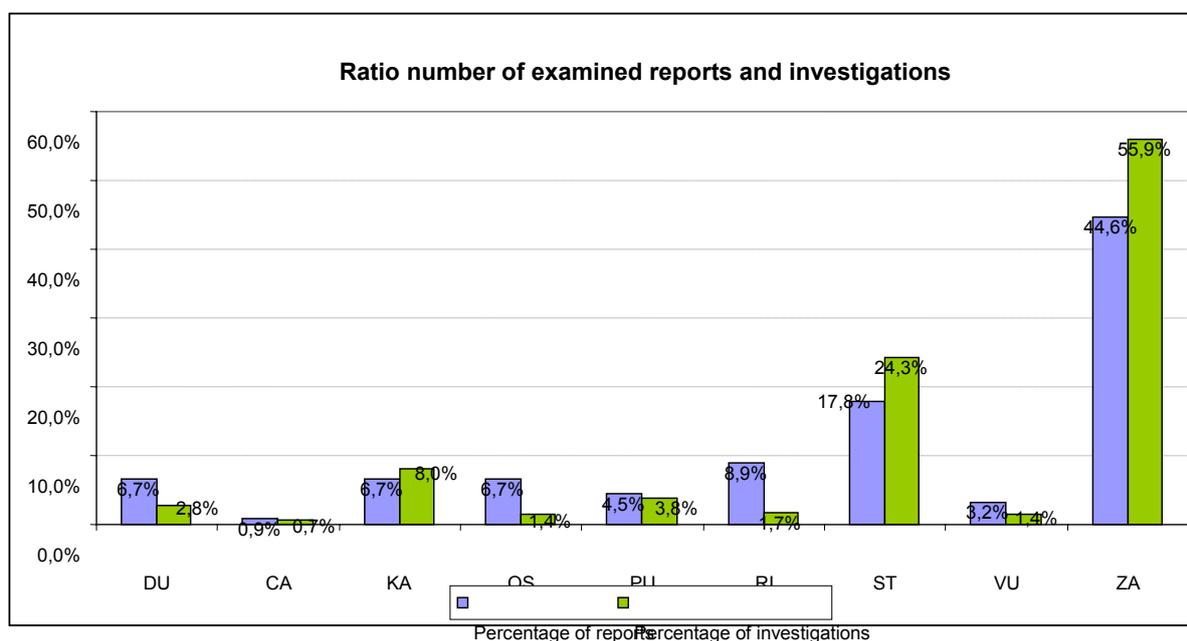
inevitable in cases when crime reports are based only on confessions of suspects, but in often cases we determined that such requests are unnecessary.

Chart no. 50.



In order to obtain even better idea of frequency of investigations, Chart number 51 provides percentages of crime reports that were subject to investigations and percentages of investigations per State Attorney's Offices. Information show that Karlovac, Split and Zagreb more frequently request investigation than other State Attorney's Offices.

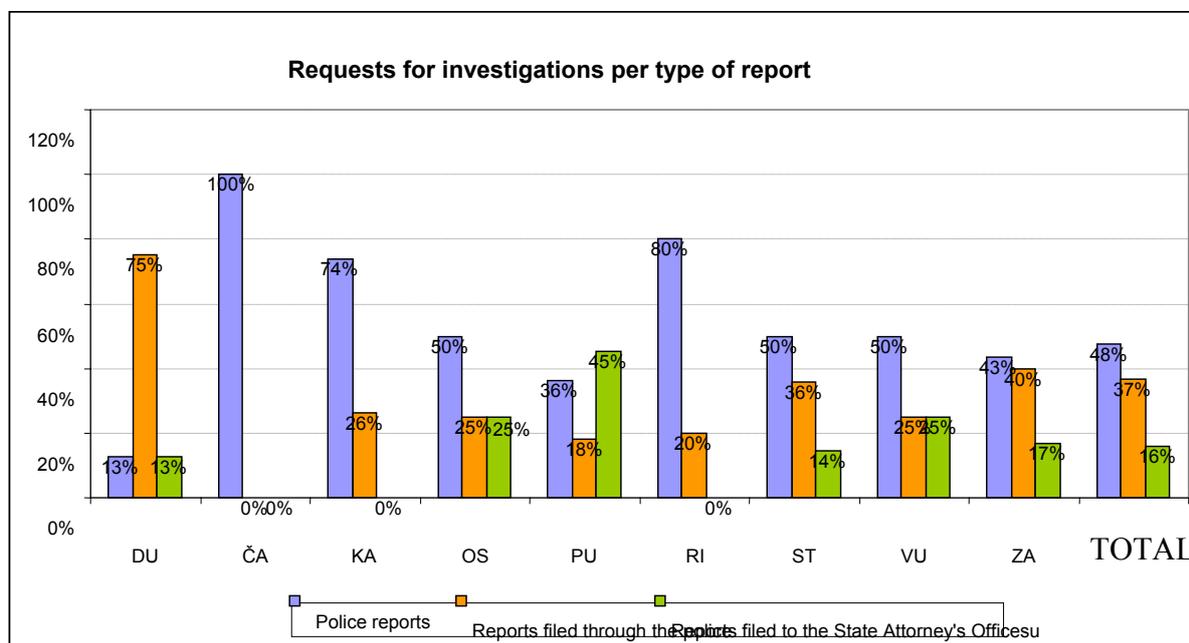
Chart no. 51.



Information on frequency of filed reports alone do not provide answer to the question on justification of requests and reasons for submission. Therefore information were gathered on crime reports for which investigations are most frequently requested.

Chart number 52 provides overview in respect to types of crime reports for which the State Attorney's Offices most frequently request investigations.

Chart 52.



Information show that most State Attorney's Offices most frequently request investigations in respect to the police crime reports. Dubrovnik is the exception to that "rule", since it requests investigations primarily in respect to crime reports filed through the police.

The reason why there are most requests for investigations in respect to police crime reports is simple. Investigation is mostly aimed at questioning of the accused and possible witnesses. Since a larger number of police crime reports is based precisely on statements the state attorneys in such cases request investigations in order to make indictments more certainly.

5. Dismissals of crime reports

As mentioned in the introduction information on dismissals of crime reports were gathered from the State Attorney's Offices that have most dismissals of crime reports (Dubrovnik, Karlovac), from the State Attorney's Offices that have least dismissals of crime reports (Čakovec and Vukovar), and from five largest State Attorney's Offices, so this research was conducted with the sample of 2241 crime reports.

Prior to conductance of this research the State Attorney's Office of the Republic of Croatia performed examination of justification for dismissals at the Municipal Attorney's Office Dubrovnik, while District Attorney's Office in Karlovac made the same in respect to dismissals of crime reports at the Municipal Attorney's Office in Karlovac. These examinations showed that there are no deviations in respect to evaluation on justification of dismissals in respect to other State Attorney's Offices, and it therefore may be concluded that the reason for great number of dismissals in these two State Attorney's Offices incorrect application of law or error in judgment in respect to the justified suspicion.

Among other things, the research was designed to determine the number of dismissals of crime reports and legal grounds for such dismissals, since this was an essential information in order to as accurately as possible analyze reasons for dismissal. Pursuant to Article 183 (174) Paragraph 1 of the Criminal Procedure Act 2075 crime reports were dismissed, pursuant to Article 28 of the Criminal Code 153 crime reports were dismissed and pursuant to Article 184 (184 (175)) of the Criminal Procedure Act only 13 crime reports were dismissed.

Chart no. 53.

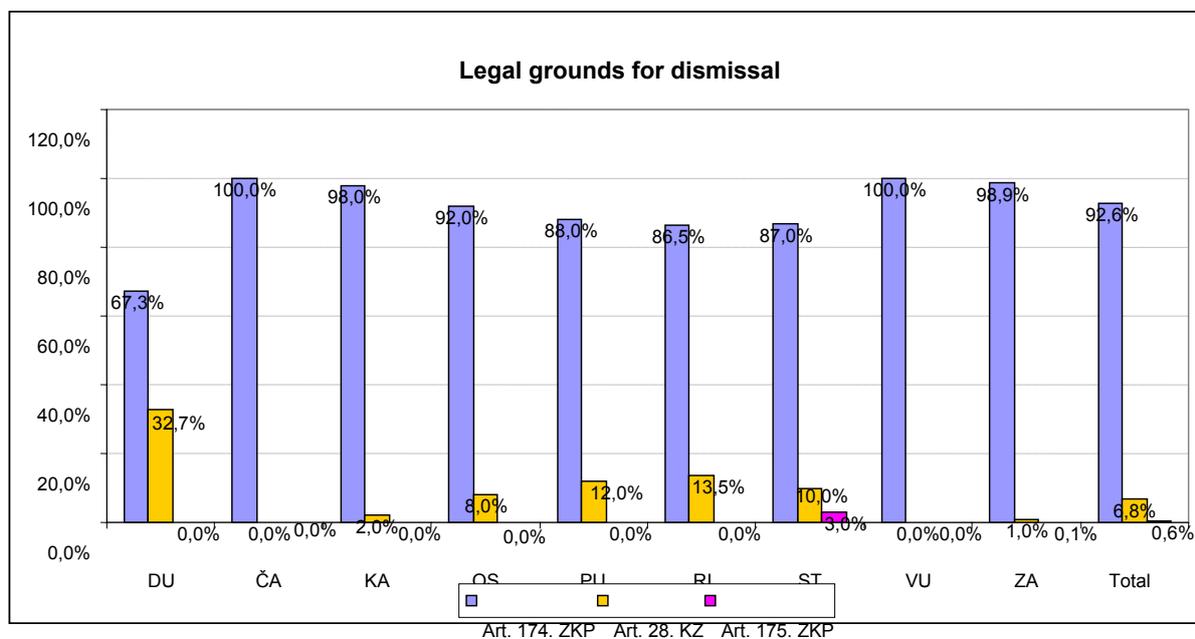


Chart 53 shows that in the Dubrovnik area Article 28 of the Criminal Code was applied more extensively than in other areas, primarily in respect to Article 173 Paragraph 1 of the Criminal Code. Opportunity is seldom applied in the State Attorney's Offices in respect to adults, so the Split area with 3% dismissals on this legal ground is an exception. It is our opinion that State Attorney's Offices insufficiently apply postponement of criminal prosecution. This institute could be applied in all cases when legal conditions were met.

It was also necessary for the State Attorney's Office to determine which crime reports have the highest percentage of dismissals.

Chart no. 54.

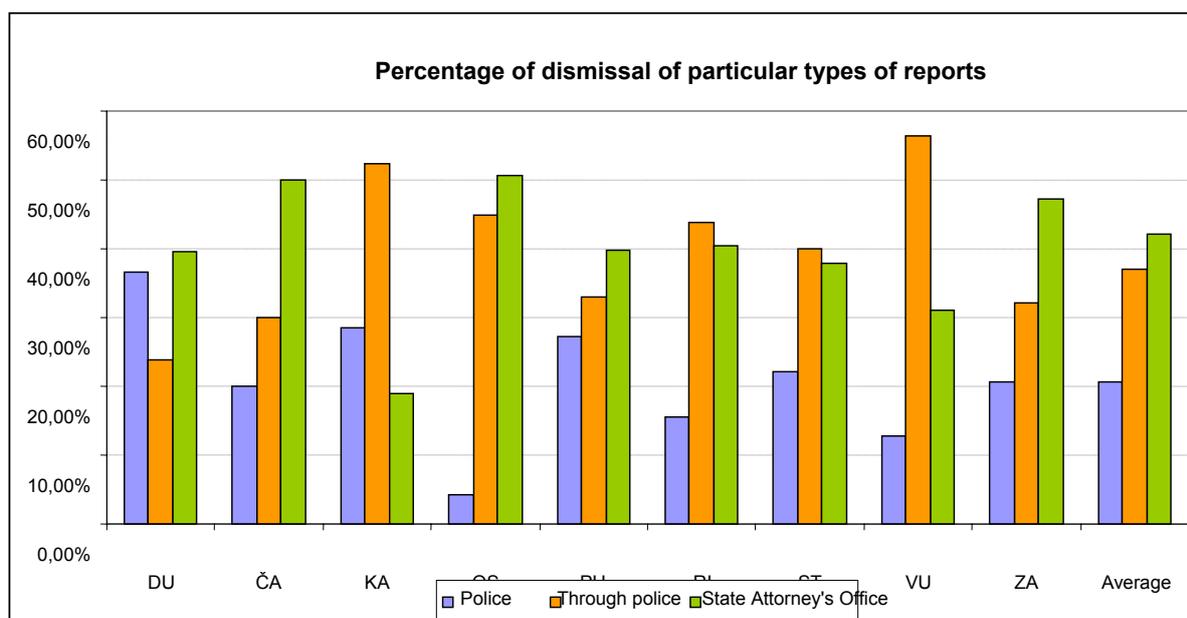


Chart number 54 indicates that there are no fixed rules. While Dubrovnik, Čakovec, Osijek and Zagreb mostly dismiss crime reports filed directly to the State Attorney's Office, which is to be expected taking into consideration that the state attorney must receive every report that is filed, other State Attorney's Offices mostly dismiss crime reports filed through the police, which indicates that police in these areas does not perform selection but keeps minutes of every filed report. An average 20,7% of police crime reports, 37,1% of crime reports filed through the police and 42,2% of crime reports filed directly to the State Attorney's Offices are being dismissed.

Chart number 55 and accompanying Table to that Chart provide percentages of reasons for dismissals from Article 183 (174) Paragraph 1 of the Criminal Procedure Act for all dismissals on these legal grounds.

Although we expected that dismissal die to lack of justified suspicion would be most frequent, since pursuant to experience this is the most frequent reason for dismissals, results of the research are somewhat surprising and call for additional research, especially through examination and estimate of justification of reasons stated in explanations of resolutions.

Deputies that performed the research did not undertake evaluation of justification of reasons for dismissals from resolution but were listing them as they were listed in resolutions. Since there are an exceptionally high number of cases in which the reason for dismissals is legal basis "that the reported offence is not a criminal offence", the State Attorney's Office will have to perform examinations in the upcoming period in order to certainly determine were these legal grounds for dismissals of crime reports accurately listed. It will be especially necessary to verify this in respect to the police crime reports, since information that the police files such a large number of crime reports that are being dismissed on these legal grounds must be taken with caution.

In case we examine information from Table and Chart number 15 per State Attorney's Offices, we might say that these information are in accordance with current experiences for those State Attorney's Offices that as the most common legal grounds for dismissals state that there is no justified suspicion that the reported person committed a criminal offence being charged with.

This is the most common reason for dismissals of crime reports and recent examination in the Pula area shows that this conclusion is correct. In practice legal grounds for dismissal that there is no criminal offence more common at crime reports filed directly to the State Attorney's Office, since the state attorney must accept every report and submitters often uncritically file reports.

However, results obtained through the research in respect to these legal grounds indeed demand further verification of justification of police crime reports, as well as accuracy in listing of legal grounds in resolutions of the state attorneys.

Charts numbers 56 to 59 most accurately show that the above mentioned statements are well founded.

While Čakovec, due to the small number of examined dismissals may be excluded, especially in respect to the high percentage of dismissals due to occurrence of statute of limitations and other reasons, dismissals of crime reports on legal grounds that the reported offence is not a criminal offence is highly represented in areas of Dubrovnik, Zagreb and Vukovar, but also in Karlovac which dismisses significant number of police crime reports.

	DU	ČA	KA	OS	PU	RI	ST	VU	ZA	Total
No criminal offence	57,40%	20,00%	43,50%	23,90%	39,80%	34,70%	44,50%	50,70%	55,50%	47,90%
Exclusive culpability	5,00%	0,00%	4,10%	9,40%	2,30%	0,00%	1,10%	5,60%	0,50%	1,90%
Statute of limitations and other	15,80%	35,00%	16,30%	13,00%	17,00%	11,00%	21,30%	11,30%	19,30%	17,90%
No justified suspicion	21,80%	45,00%	36,10%	53,60%	40,90%	54,30%	33,00%	32,40%	24,70%	32,30%

Percentage of particular legal grounds for dismissal of crime report from Article 183 of the Criminal Code

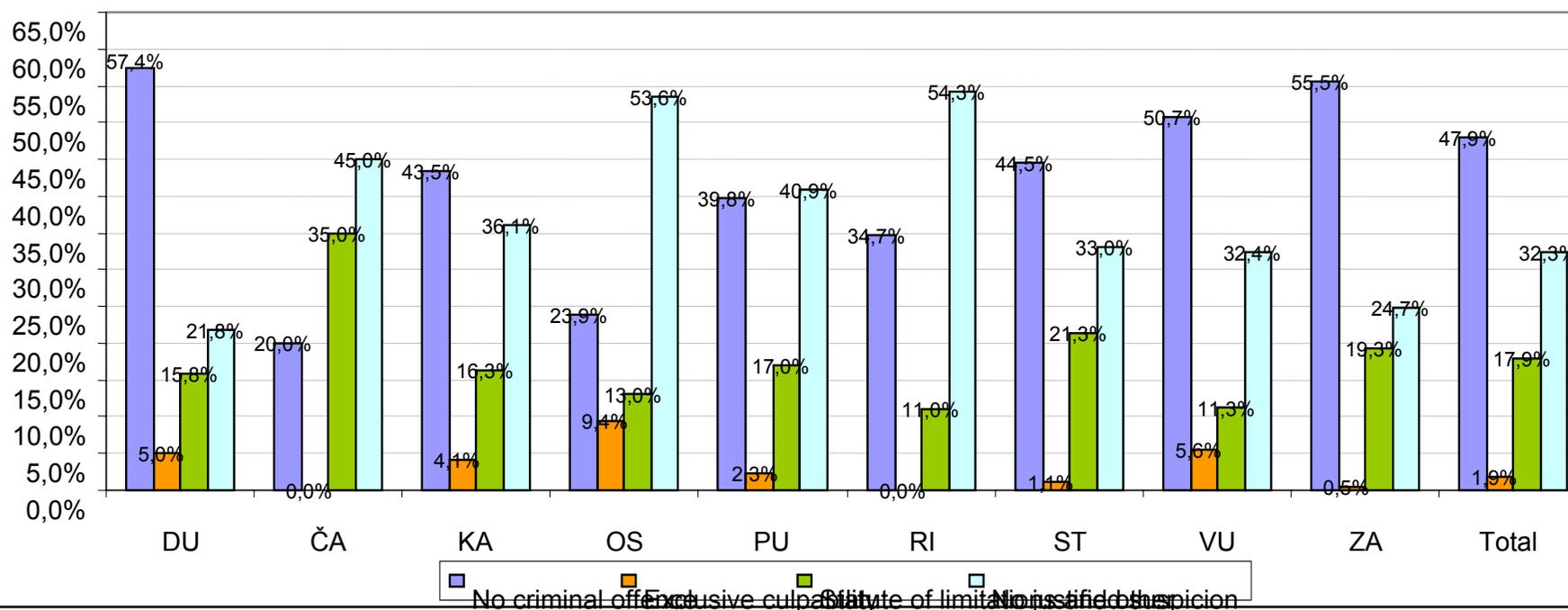
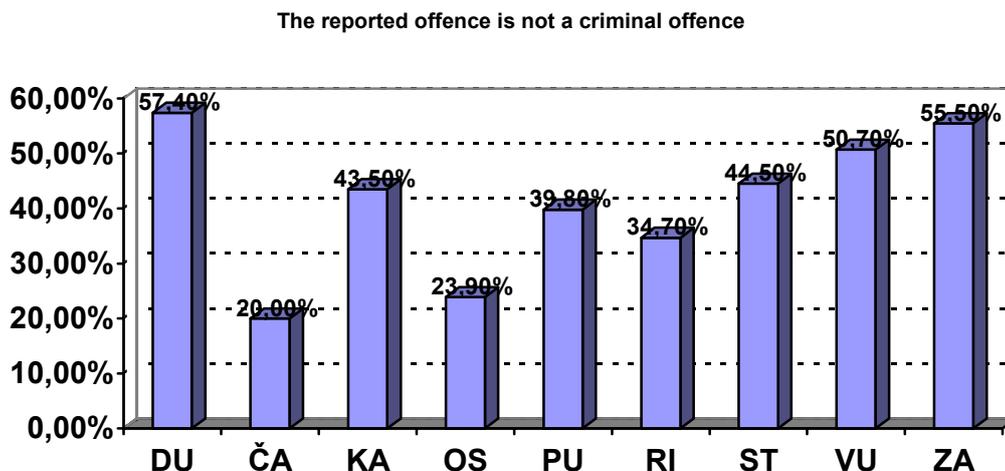
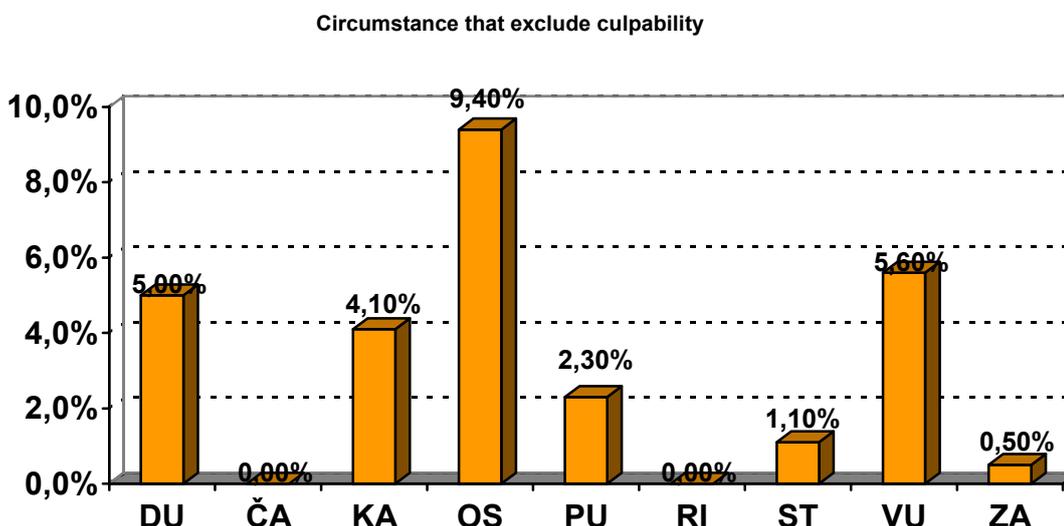


Chart no. 56.



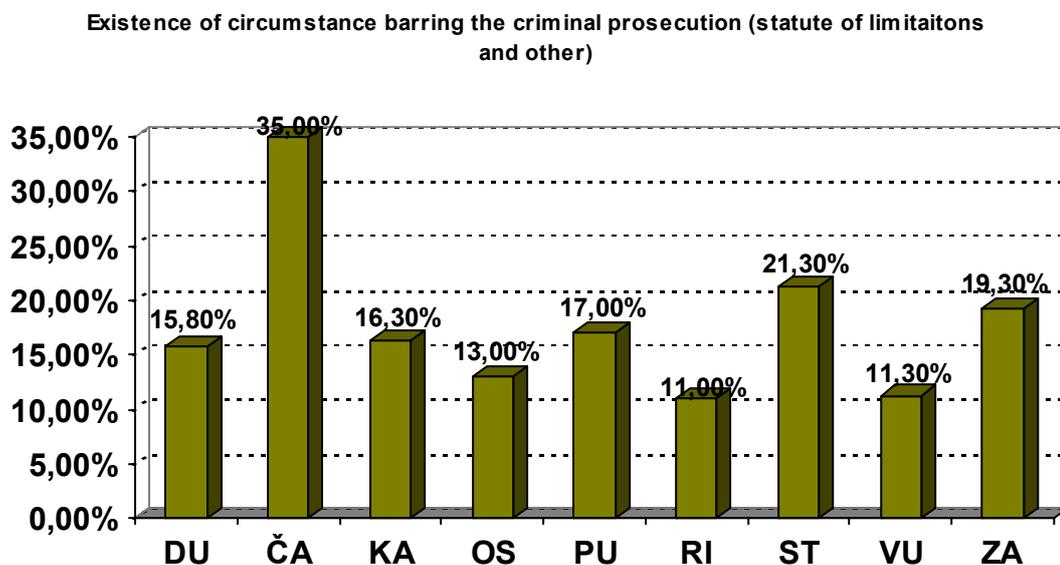
Based on current experience, although I have no ground for that in the very research, I am familiar with the fact that reasons for dismissals are often incorrectly stated, instead of reason that there is no justified suspicion, that the reported offence for which the crime report was filed does not contain significant characteristics of the reported criminal offence or some other criminal offence. This might be the best reason for explanation of differences shown in Chart 16. This might be explanation of high participation of this reason, since in the contrary it would be necessary to specially evaluate the work of police and the State Attorney's Offices in these areas.

Chart no. 57.



In respect to the legal ground of excluding of culpability Osijek stands out by far and it would be necessary to examine reasons for that. Except Čakovec, all other State Attorney's Offices have similar numbers of dismissals due to reasons that bar the criminal procedure and it is obvious that in respect to this reason there are no deviations in evaluation of its existence.

Chart no. 188.



As mentioned before, experience shows that the most common reason for dismissals is non-existence of justified suspicion that the suspect committed the reported criminal offence. Chart number 19 shows that this reason is the most common in areas of Čakovec, Karlovac, Osijek, Pula, Rijeka.

Chart no. 59.

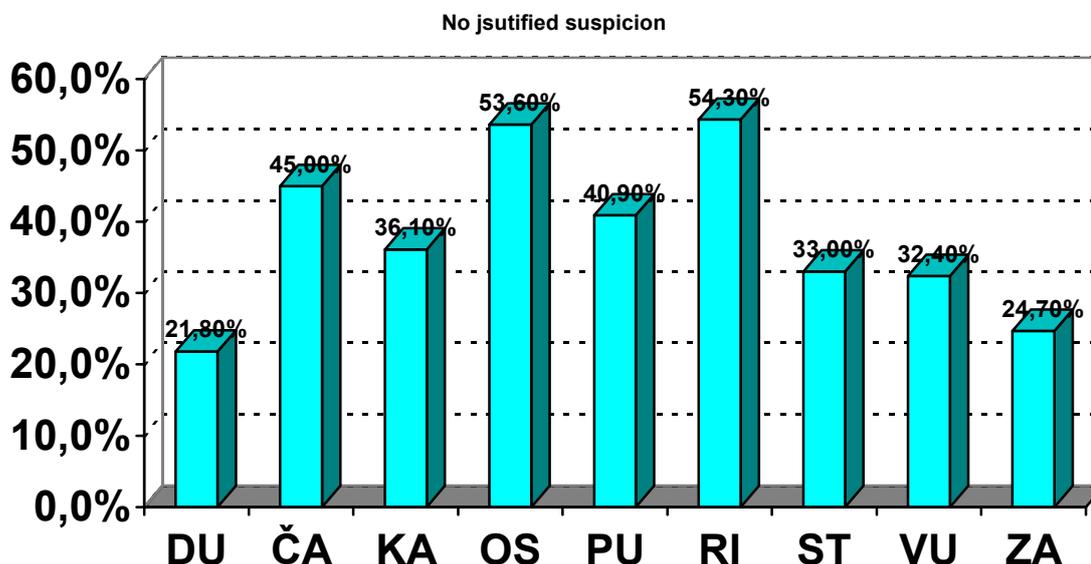
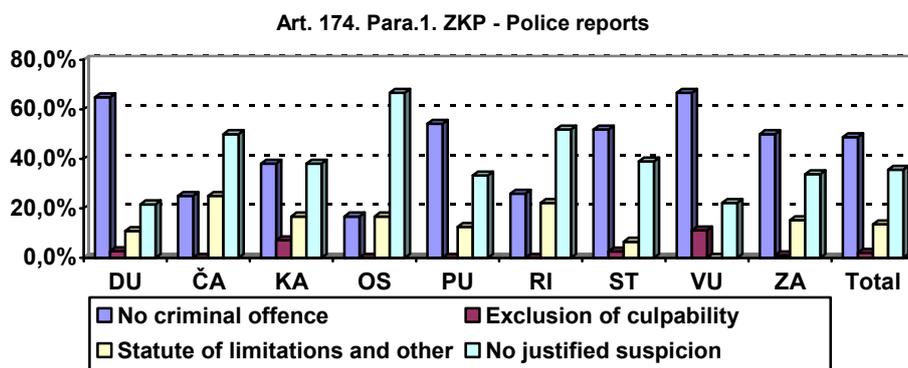


Chart number 59 indicates that at the Municipal Attorney's Office in Zagreb only 24,7% of crime reports are dismissed due to lack of justified suspicion. My opinion is that this information provides basis for conclusion that resolutions on dismissals of crime reports frequently list wrong reasons, since current examination of this State Attorney's Office provides basis for conclusion that this is the dominant reason.

Taking into consideration significant deviations in reasons for dismissals of crime reports pursuant to Article 183 (174) of the Criminal Procedure Act, Charts number 60 to 62 provide these reasons particularly per examined types of crime reports in order to enable evaluation of representation of particular basis in, for example, police crime reports or crime reports that were filed directly to the State Attorney's Offices.

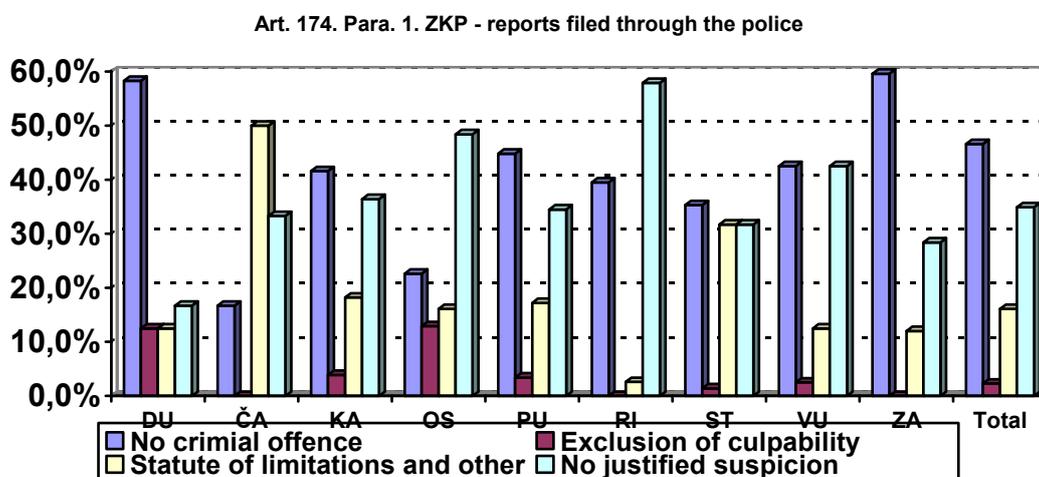
Chart number 60 provides information on reasons for dismissals of police crime reports. Information on reasons for dismissals of police crime reports for areas of Dubrovnik, Karlovac, Pula and Zagreb show high representation of dismissals on the grounds that the reported offence is not a criminal offence.

Chart no. 60.



These information are especially indicative for the Municipal Attorney's Office in Pula which is the area of good coordination with the police and it draws to a simple conclusion that legal grounds for dismissals were listed wrong. However, since these legal grounds are, regardless of the possible errors, still high, the police should be more careful in examination of resolutions on dismissals of crime reports for purposes of determination of reasons for wrong evaluation in respect to existence of a criminal offence.

Chart no. 61.



In crime reports that were filed through the police there are significant differences among certain areas. This is not surprising when taking into consideration that the damaged party by filing of crime reports limits the possibility for evaluation whether the crime report will be filed to the state attorney.

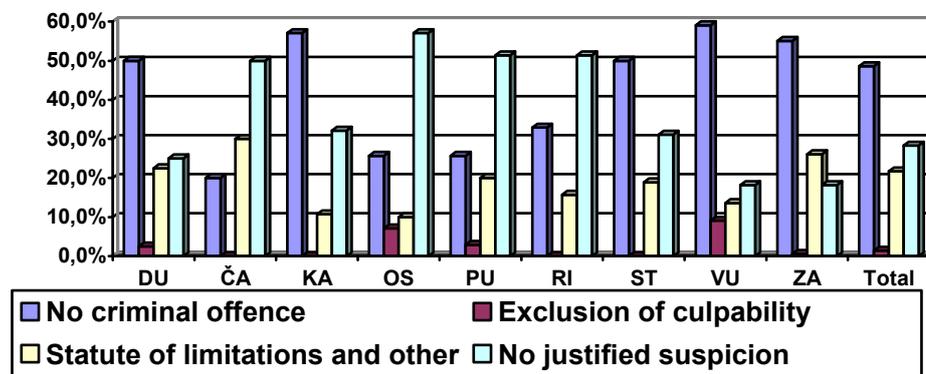
While the area of the Municipal Attorney's Office in Pula most common grounds for dismissal of these crime reports is non-existence of justified suspicion, in the areas of Dubrovnik and Zagreb it is primarily estimate that there is no criminal offence.

High percentage of dismissals on the basis that there is no criminal offence in areas of Zagreb and Dubrovnik request evaluation of justification of resolutions on dismissals. If the dismissals were properly applied the information show that crime reports are largely filed without justification thus burdening the police and the state attorney as well.

Similarly as in cases of crime reports filed through the police, in respect to the crime reports that were filed directly to the State Attorney's Office the damaged party exercises his / her right to file the report and this is the reason why in cases of these crime reports legal grounds that there is no criminal offence is more common, as well as legal grounds that there are circumstance barring the criminal prosecution.

Chart no. 62.

Art. 174. Para.1. ZKP - reports filed directly to the State Attorney's Office



Based on the conducted research in may be concluded that the State Attorney's Offices in the most received crime reports prior to passing of decision conduct inquiries, while investigation is mostly requested in cases of police crime reports.

Method of conductance of inquiries is different and there are significant deviations. While Dubrovnik and Zagreb mostly still request gathering of necessary information by the police, other State Attorney's Offices exercise more their authorities from Article 42 of the Criminal Procedure Act.

Percentage of dismissals of crime reports pursuant to the "type" of crime reports is in average expected, taking into consideration that state attorneys in all cases when parties insist so have to accept the crime report or make minutes. However, there are also significant differences among the State Attorney's Offices that indicate that it would be necessary for higher State Attorney's Offices to examine work of certain Municipal Attorney's Offices in order to evaluate justification for dismissals by application of Article 183 (174) Paragraph 1 of the Criminal Procedure Act. My opinion is also that

this research indicates that the Police Directorate should especially examine crime reports filed by certain police stations, i.e. police departments.

V. Conclusion

1. During the research on conduct and police work in cases of arrests and decisions passed in respect to that by the state attorneys and investigating judges, information from areas of 9 Police Departments and Municipal Attorney's Offices with jurisdiction in such areas, as well as decision of the investigating judges from these areas were examined.

In the police part of the research questionnaires were completed for 2429 arrested persons, and taking into consideration that in the police stations that were subject to the research in respect to the Police Department an average of 25,5% was registered or one quarter of total of registered criminal offences in these departments, we believe the sample to be representative.

During the research of reasons for dismissal of crime reports and work of the state attorney prior to dismissals questionnaires were completed for 2241 crime reports. Taking into consideration that the said State Attorney's Offices resolved 46,8% of all crime reports that were resolved during 2003, we believe the sample to be representative.

The sample of 404 arrests based on which the research of work of the investigating judges and the police after the arrest was conducted would, if stood alone, be insufficient, but if we examine it in entirety with the above mentioned researches, we believe the sample to be sufficient for evaluation of justification of arrests and evaluation of quality of crime reports, since unification of information from the police and state attorney's part of the questionnaire and examination of relations between the number of crime reports per certain police stations, apprehensions, arrests and decisions of the state attorney and the investigating judges partially may provide answers to questions that were asked to the researchers.

2. Research of the police work determined significant deviations in the conduct of certain police stations. Information show that for instance police station Pula participates in the total number of examined crime reports with 25%. However, in the total number of arrests this police station participates only with 13,2%. On the contrary, the police station participates in the total number of crime reports with 11,1% and in total number of arrests with 21,3%. These are significant difference that provide basis for conclusion on different approach or interpretation of legal grounds for arrests.

Differences in percentage of filed crime reports after arrest and number of dismissals of crime reports furthermore indicate that all police stations do not equally critically evaluate the existence of basis for suspicion that the arrested person is the perpetrator of the criminal offence for which such person was arrested.

3. Research of work of the State Attorney's Office on crime reports indicated that there are significant deviations for the average. Differences that exist among the State Attorney's Offices, regardless of differences in the structure of reported criminal offences, provide basis for conclusion that approaches are not harmonized, but also that the quality of the filed crime reports is different.

4. Research of the police work indicated that there is difference in the structure of criminal offences for which crime reports are filed and structure of criminal offences in cases when arrests were made.

Participation of certain criminal offences in the structure of reported crime and the structure of criminal offences for which arrests were made show criminal offences for which the police is more inclined to make arrests. For certain chapters of criminal offences this number is balanced, participation of criminal offences for which arrests were made is equal to participation of such criminal offences in the total structure of reported criminal offences. For these chapters of the Criminal Code the research merely confirmed what was already known from practice. However, the number of criminal offences against life and limb, against public order, against authenticity of documents and property is significantly higher in the structure of arrested and apprehended persons than in the structure of total reported offences. Therefore, information shows that there are significant differences for certain types of criminal offences in respect to participation of such criminal offences in total number of crime reports and participation of such offences in the structure of criminal offences for which arrests were made.

5. Differences that were determined in participation of certain offences in the total number of crime reports and participation of such offence in arrests provide basis for conclusion (which truthfully may be certainly given only upon examination of particular cases), that the police is more sensitive for committing of some criminal offences and that in such cases more frequently opts for arrests. For example, if we compare relations at criminal offences against values protected by international law and criminal offences against property, in which we have a high number of crime reports for less severe criminal offences (possession of narcotics – Article 173 Paragraph 1 of the Criminal Code, theft, fraud and similar) on one side with criminal offences against official duty it could have been expected that there are more arrests for criminal offences against official duty taking into consideration their severity, since for these criminal offences mostly severe punishments are imposed and these offences are considered to be especially grave. However, gathered information indicate otherwise. Although more severe punishments are imposed for criminal offences against official duty, there is a smaller number of arrests.

6. As it has been mentioned the research provided information on number of arrests at police stations of the largest Police Departments and their mutual relations, as well as comparison of information on number of arrests with the number of criminal offences in such police station and the Police Department.

Differences in grounds for arrest and shown time periods, i.e. in the moment of a person's arrest (escape, being caught while committing a criminal offence, information interview) provide basis for conclusion that the police considers a person to be arrested only upon formal notification, although such person was brought to the police station unwillingly and held there, in some cases up to 24 hours. Precisely in respect to moment when a person who is essentially forcefully held is notified about the arrest there are significant differences and deviations that indicate that all police stations do not consistently apply legal provisions.

Furthermore, gathered information indicate significant differences among certain police stations in evaluation of fulfillment of legal grounds for apprehension and arrest. Differences are such that one might ask questions on correctness of police work, on

objectivity and expertise of police in some police stations while passing of decisions on fulfillment of legal grounds for apprehension and arrest, i.e. for the confinement compulsory detention.

7. Legal ground pursuant to which arrests were made by the police officials in some police stations and detected differences provide basis for suspicion about the actual existence of reasons for arrest. However, without detailed analysis of each particular case it is difficult to make conclusions, but still there is a whole range of information indicating that during the arrests conduct is different in areas of certain police stations, while not excluding the possibility that documents list wrong reasons for arrests.

Difference that were detected are such that sooner provide basis for conclusion that information on grounds for arrest were listed at discretion of officials rather than on real reasons that were the basis for conclusion that the arrest was justified.

Police stations in big centers (Pula, Split, Osijek, Rijeka and Zagreb) have roughly the same structure of crime. Since the participation of arrests is different, this fact provides basis for conclusion that the approach to arrests is different in certain areas. Information show that for instance police station Pula participates in the total number of examined crime reports with 25%. However, in the total number of arrests this police station participates only with 13,2%. On the contrary, the police station participates in the total number of crime reports with 11,1% and in total number of arrests with 21,3%. These are significant difference that provide basis for conclusion on different approach or interpretation of legal grounds for arrests.

If we examine information about the number of arrests for certain police stations pursuant to chapters of the Criminal Code, we can notice significant differences. The determined differences, regardless of particularities of certain areas, provide sufficient basis for conclusion that there is no harmonized approach. Therefore, it may be stated that, depending on the police station, there is greater or smaller probability that, for the same criminal offence, perpetrator will be arrested in one station and in the other not.

Therefore, research of the police work confirmed that the approach to arrests, especially in respect to the moment of arrest and reasons for arrest, is different among certain Police Departments, but it is also not excluded that certain departments used different approaches while completing the questionnaires.

8. During giving of notices the Police Departments act similarly. Some suspects attend and after that an interview is performed, some suspects are summoned to the police station where they are notified about the arrest, while in other cases only during the interview information sufficient for arrest are acquired and then such suspects are notified about the arrest. Regardless of these differences, after a person is notified about the arrest, the police officials comply with the Criminal Procedure Act while giving notices to the arrested person. Gathered information shows that in fact the conduct is the same everywhere in respect to giving of notices. Therefore, at the moment of notice to a person about the arrest, other notices are given.

9. The research showed that there are great differences in basis for arrest between certain Police Departments. Differences are such that sooner provide basis for conclusion that reasons for arrest were listed at discretion of officials rather than on real reasons that were the basis for conclusion that the arrest was justified. This may especially be seen in example of the Osijek area. It is not realistic that 54% of all arrests

is the consequence of prevention of escape of perpetrators, but also the information that in areas of Vukovar and Karlovac practically there is no prevention of escape of perpetrators is also at least doubtful. In case information for these two departments are accurate, we must examine the police work in these departments.

It is obvious that the police conduct in certain police stations does not depend exclusively on the structure of committed criminal offences. The period of compulsory detention is certainly influenced by existence of reasons for compulsory detention, but also the perception and practice of certain police stations on establishment of existence of such reasons.

10. Gathered information furthermore provide basis for conclusion that the police in some cases does not comply with legal provisions on the moment of arrest of a person. Pursuant to Article 6 Paragraph 2 of the Criminal Procedure Act arrest is every measure or action that includes the compulsory detention of a person under suspicion of having committed an offence and therefore a person is arrested at the moment when the police took custody over such person that was detained by the citizens and when such person is brought to the police station.

The shown information provide basis for conclusion that the police considers a person to be arrested only upon formal notice, even though such person was brought to the station against his / her will and detained there in some cases up to 24 hours. In case a person is detained at the place of criminal offence, such person is arrested at the moment when a police official takes custody and every other interpretation that such person is arrested only upon notification is wrong.

11. Gathered information on the police work show that out of 2429 arrested persons only 244 or 10% of them requested legal counsel. The research did not provide answer to the question why there is such a small number of arrested persons who requested legal counsel. However, taking into consideration that 14,2% of the summoned legal counsels failed to attend within the legal time limit indicates that there are difficulties in securing of legal counsels. This is a significant number of cases in which the arrested persons were denied their right to legal counsel, and it is therefore our opinion that the issue of right to legal counsel must be resolved by changes and amendments to legal regulations.

12. The crime report was submitted in respect to 95% of the arrested persons. Information show that most critical departments in evaluation of basis for suspicion that the arrested person committed a criminal offence were police departments in the areas of Osijek and Čakovec, while on the contrary the Police Department Split and Dalmatia that filed crime reports in respect to all 518 arrested persons. Pursuant to statistics of the State Attorney's Office both Osijek and Čakovec have low percentages of dismissals of crime reports, which indicates good police work and coordination of work with the state attorney. On the contrary, information for the Police Department Split and Dalmatia draw to the conclusion that the coordination is insufficient.

13. Information on releases of arrested persons by the investigating judges (with all limitations in respect to different approaches of the investigating judges) provide basis for evaluation of justification of arrests, and especially for legal grounds for compulsory detention. For instance, investigating judges at District Courts in Dubrovnik, Split and Zagreb released more than 50% of the arrested persons, and we may justifiably assume that there were no grounds for most of the arrests. Information for Zagreb and especially

Split indicate that there is no coordination between the police and the state attorneys and no joint decision-making in respect to determination of cases that lead to arrests.

In case the police examined a specific case together with the state attorney, if there is an agreement and opinion of the state attorney that arrest is justified, experience show that in such cases compulsory is mostly determined. Truthfully, for a part of cases we may assume that arrests were made due to tactical reasons, simply in order to obtain the accused person's statement in cases when there is danger of escape, i.e. danger that traces of criminal offences will be destroyed or witnesses influenced. However, detected differences are so significant that they may not be attributed only to those circumstances.

Therefore, information on decisions of the investigating judges, average and per police stations provide basis for conclusion that arrests are frequently made without consultations with the state attorney. The state attorney is familiar with the practice of specific courts on existence of grounds for compulsory detention and it would be sufficient to consult the state attorney in specific cases, who would then be able to provide estimate on justification of arrests. My opinion is that consultations with the state attorneys would be useful due to another reason. The state attorney could, based on the received information and estimate of justification of determination of compulsory detention file the motion for determination of compulsory detention and subsequently insist on such determination.

14. In cases of arrests police with greater certainty and with greater diligence determined existence of basis for suspicion that a suspect committed a criminal offence being charged with, then in other cases. In cases in which the police arrested the perpetrator of a criminal offence success rate was, pursuant to research of the State Attorney's Office, higher than average success rate. Information that a percentage of convicting rulings is roughly the same in cases of compulsory detention and releases merely confirms what has already been known from the practice. In all cases when the police opts for arrest there is far greater certainty that there is justified suspicion than in ordinary submission of crime reports. This conclusion is confirmed by a great number of convicting rulings, while in some areas all rulings were convicting. We therefore may conclude that in cases of arrests it is being estimated with far more diligence whether there is justified suspicion that a criminal offence was committed than reasons for compulsory detention are being estimated.

15. Confirmed success in the proceedings in cases of arrests is expected. As already mentioned, in some cases a question arises whether the apprehension and especially arrest was necessary. However, information on success of proceedings indicate that in these cases there was justified suspicion that the arrested person is the perpetrator of the criminal offence such person is being charged with, which still does not justify possible wrong estimates on grounds for apprehension and arrest.

16. The research confirmed that duration of proceedings in cases of compulsory detention is significantly shorter than when the accused person is free. Information on time period from determination of compulsory detention until bringing of charges indicate that investigation in cases of compulsory detention in a large number of cases lasts short, only a month and a half up to two months. Also, the time period until the first instance ruling, as well as until the validity of the ruling is far shorter than usual. We may conclude that in cases when compulsory detention is determined, the

proceedings finish much faster because due to legal time limits both the state attorney and the court work much faster than in other cases.

17. Research provides basis for conclusion that arrested persons are not denied their legally guaranteed rights and that means of force are rarely used. However, since there are indications that arrests were not justified in all cases and that the moment when a person is considered to be arrested is interpreted differently, and sometimes contrary to Article 6 Paragraph 2 of the Criminal Procedure Act, it is necessary to stipulate control mechanisms and thus provide for surveillance over the police work.

18. In respect to conductance of inquiries we may conclude on the basis of responses on success of conductance of inquiries that in majority of cases requests for inquiries were justified. It has been determined that majority of the State Attorney's Offices, whenever it is possible or when it is estimate that the police may not gather certain information personally request conductance of inquiries. Since these inquiries are mostly successful, the conduct of the Municipal Attorney's Office in Zagreb that almost exclusively requests gathering of necessary information by the police, is wrong, and this State Attorney's Office should perform more inquiries, i.e. immediately gather information from other state bodies and legal entities.

Methods of conductance of inquiries are different and there are significant deviations among the State Attorney's Offices. While Dubrovnik and Zagreb still mostly request gathering of necessary information by the police, other State Attorney's Offices increasingly use their authorities from Article 42 Paragraph 2 Item 2 and Article 186 (174) Paragraph 4 of the Criminal Procedure Act.

19. Based on the conducted research it arises that the State Attorney's Offices in majority of received crime reports conduct inquiries prior to passing of decisions, while conductance of investigation is requested mostly in police crime reports.

The reason for large number of requests for conductance of investigation in respect to the field police crime reports is obvious. Investigation is mostly aimed at questioning of suspects. Since a large number of police crime reports is based precisely on confessions and statements of possible witnesses, the state attorneys in such cases request investigation in order to act with more certainty in cases of indictments. Filing of crime reports merely and the basis of informal confession is an unnecessary burden for the courts. Information show that it is necessary to resolve this issue in the manner to allow the police or the state attorney to take statements from the suspects which might later on be used in the proceedings, even if it is in the manner to expressly stipulate that the police may not file crime reports merely on the basis of confessions and without other information and facts.

Changes and amendments of the Criminal Procedure Act that would enable the state attorneys to, in cases when the crime report was filed for criminal offences being tried in the summary proceedings, take the statement from the suspect with the notice in accordance with provisions of Article 177 Paragraph 5 and Article 225 of the Criminal Procedure Act, would significantly shorten the proceedings since a large number of investigatory actions is needed for purposes of questioning of suspects in cases when the crime report was filed based on the suspect's confession. Certainly, notices would have to be undoubtedly evidenced and in the case of giving a statement without a legal counsel, confession of the suspect to the state attorney could not *per se* be sufficient for passing of decisions in the proceedings in case the accused person would present

defense that would be in contradiction with the statement given in front of the state attorney.

20. Statistics of the State Attorney's Office indicate that some of the State Attorney's Offices dismiss nearly half of the filed crime reports. Prior to conductance of the research the State Attorney's Office of the Republic of Croatia examined justification of dismissals at the Municipal Attorney's Office Dubrovnik, and the District Attorney's Office in Karlovac did the same in respect to dismissals of crime reports at the Municipal Attorney's Office in Karlovac.

Examinations showed that there are no significant deviations in respect to validity of evaluation on justification of dismissals in respect to other State Attorney's Offices, and therefore we may exclude the possibility that the reason for a large number of dismissals in these two State Attorney's Offices is wrong application of the law by the state attorneys, i.e. errors in judgment in respect to existence of justified suspicion. We therefore may conclude that the vast majority of crime reports that are filed to these State Attorney's Offices, even by the police, are unfounded. Not only this research but also examination of work in the State Attorney's Offices indicate that it is necessary to examine current solution pursuant to which the state attorney is under obligation to accept every crime report and then to resolve it with instruction to the damaged party on right to continue criminal prosecution.

21. Percentage of dismissals of crime reports pursuant to the "type" of crime reports is in average expected taking into consideration the circumstance that the state attorneys are under obligation to accept crime reports in all cases when parties demand so, or to make minutes thereof.

However, here as well exist significant differences between the State Attorney's Offices that indicate that it would be necessary for the superior State Attorney's Offices to examine work of certain Municipal Attorney's Offices in order to evaluate justification of dismissals by application of Article 183 (174) Paragraph 1 of the Criminal Procedure Act.

Estimating that information on reasons for dismissals of police crime reports for areas of Dubrovnik, Karlovac, Pula and Zagreb indicate high participation of dismissals on the basis that the reported offence is not a criminal offence, this research indicate that the Police Directorate should especially consider crime reports that are being filed by certain police stations, i.e. departments, and that have above-average number of dismissals of crime reports.

In Zagreb, April 11, 2006

Dragan Novosel

8.2 The Police Code of Ethics¹⁹²

By this Code of Ethics, the police force of the Republic of Croatia emphasizes the need and desire to serve the citizens by respecting basic human rights, and especially by acting according to the law, and in a professional, loyal, confidential, tolerant and just manner.

General provisions

I

The Code of Ethics is a set of principles that regulate the behavior of police officers. These principles are based on the standards set by international and domestic law, but they also include the principles that are not set by the law, but are still necessary for ethical behavior of police officers of the Republic of Croatia.

The Code of Ethics is binding for all police officers of the Republic of Croatia.

The principles set by the Code are applied in all security situations in the state.

II

In performing official duties, the police officer shall respect human rights and freedoms of every person, regardless of differences in nationality, race, color of skin, religious affiliation, gender, education, social status or any other personal characteristic or circumstance.

III

The police officer shall act with public authority that results from his official status.

In performing official duties, he shall act in a just manner, respecting the rules of service. He shall not seek privileges for himself or any other person in relation to other citizens. He shall oppose any kind of bribery.

IV

The police officer shall under all circumstances preserve his reputation and the reputation of the police service, and he shall set an example by respecting good practice, ethical principles of his service and by strictly abiding by the law.

By serving citizens, he shall even expose himself to peril.

Relationship towards citizens and tasks of the police force

V

The police officer shall perform official duties that relate to the protection of persons from danger and he shall prevent all criminal offences that disturb the public order and peace or that represent an attack on the community or an individual, thus preserving the rule of law.

VI

In performing the official duties in relation to citizens, the police officer shall act decisively and with consideration, she shall not undertake any actions that can be detrimental to his honor and reputation or any actions that would undermine the trust of citizens.

VII

Police officers shall use coercive measures, and especially fire arms, only as an ultimate means, always in line with the law and with this Code of Ethics, and they shall use them in a way that reaches the purpose, but causes least consequences for the body and security of citizens.

VIII

When acting in relation to persons whose condition is such that it requires medical care, the police officer shall call medical staff regardless of the behavior of the person that preceded the injury. He shall abide by the instructions of the medical staff regarding further procedure towards such person.

IX

The police officer shall – within limits of what is possible – provide help to abandoned children and minors, other helpless persons, persons who have remained without basic means for a living and other persons whose life or health is in peril.

Obligation of confidentiality

X

The police officer shall not reveal information that is marked as confidential nor shall he reveal data which are not marked as confidential, but the discovery of which could be to the detriment of citizens.

The duty of confidentiality remains even after the termination of the work in the police force.

Limitation of political activity

XI

With the aim of impartial and professional performance of police duties, the police officer who is a member of political parties shall not emphasize his political affiliation and shall not be politically active during the performance of police work, nor shall his membership in a political party or political affiliation influence the impartial and professional performance of the police tasks.

The police officer has a right to be a member of a trade union or member in professional and other associations in Croatia and abroad.

Training and professional work

XII

Professional training is a continuous task of a police officer, as well as acquiring general social values and special values of the police profession.

He may perform scientific and pedagogical work, public work in cultural, artistic, sports, humanitarian and similar organizations, whose activity is not opposed to the interests of his service. This is considered another way of building trust of citizens.

He may, with the permission of his superiors, also perform other work.

In performing such work he shall not use confidential data, unless he has special permission to do so.

Relationship between the police officer and his superior

XIII

The police force is organized hierarchically, which means that police officer has to respect orders which are issued by their superiors according to the rules and in accordance with the law.

The hierarchical structure shall always be clearly defined.

The police officer shall oppose any order which is not in accordance with the law.

XIV

Every police officer is personally responsible for his actions and for the actions that he ordered.

When his behavior is in accordance with the Code of Ethics and with the rules of the police service, he shall enjoy support of his superiors and of the community.

Transitional and final provisions

XV

The principles of the Code of Ethics are an integral part of the educational measures in every form of police education and training.

XVI

An Ethics Commission shall be established in order to examine the ethics of the police behavior.

The Ethics Commission shall consist of seven members, three of whom are not police officers.

The Ethics Commission is appointed by the Director General of the police.

The authorities and the way of work of the Ethics Commission shall be regulated by the Rules of Procedure.

XVII

The Code of Ethics of the Croatian police shall be effective after two thirds of all police officers have signed statements on its acceptance.

8.3 Technical terms and their translation

Budget Section	Abbreviation	Croatian	English	German
05	MP	Ministarstvo Pravosuđa	Ministry of Justice	Justizministerium
15	VS	Vrhovni Sud R. Hrvatske	Supreme Court	Oberster Gerichtshof
20		Visoki Trgovački Sud	High Commercial Court	Oberhandelsgericht
25		Upravni Sud R. Hrvatske	Administrative Court	Verwaltungsgerichtshof
40	VPS	Visoki Prekršajni Sud	High Regulatory Offences Court ¹⁹³	Obergericht für Ordnungswidrigkeiten (Verwaltungsübertretungen)
45	ŽuS	Županijski Sudovi	County Courts	Landesgerichte (Landgerichte)
50		Trgovački Sudovi	Commercial Courts	Handelsgerichte
65	OS	Općinski Sudovi	Municipal Courts	Bezirksgerichte (Amtsgerichte)
75	PreS	Prekršajni Sudovi	Regulatory Offences Courts ¹⁹⁴	Gerichte für Ordnungswidrigkeiten (Verwaltungsübertretungen)
30	DOR	Državno Odvjetništvo Republike Hrvatske	The State Attorney General's Office	Generalstaatsanwaltschaft
55	ŽuDO	Županijska Državna Odvjetništva	County State Attorneys	Staatsanwaltschaft
70	ODO	Općinska Državna Odvjetništva	Municipal State Attorneys	Bezirksanwaltschaft
91	USKOK	Ured za Suzbijanje Korupcije i Organiziranog Kriminala	Office for the Prevention of Corruption and Organized Crime	Amt zur Abwehr von Korruption und Organisierter Kriminalität
10		Uprava za Zatvorski Sustav	Prison System Directorate	Direktion für Haftanstalten
	KIR	Kaznene istražne radnje	Investigative action	Gerichtliche Vorerhebungen
	KIO	Sudska istraga	Investigation	Voruntersuchung

92

¹⁹³ Often the term «misdemeanor court» is used. This is, however, somewhat misleading as misdemeanours are petty, yet ordinary criminal offences. What the Prekršajni Sudovi mostly deal with are not petty criminal offences but offences that would more precisely be addressed as administrative or regulatory offences. It is true that they also deal with cases of domestic violence. But the reason is that domestic violence cases are viewed as a disturbance of public order and not primarily as violence violating the right of the victim to physical and moral integrity.

¹⁹⁴ See footnote 193.

KIO MP	Sudska istraga – mlađi punoljetnici	Investigations against young adults (age 18-21)	Voruntersuchung gegen Jungerwachsene
KIO KZM	Sudska istraga – maloljetnici	Investigations against Juveniles	Voruntersuchung gegen Jugendliche
KV	Izvanraspravno vijeće	Chamber/panel of 3 judges at county courts in pre-trial proceedings	Ratskammer
K	Kazneni	Criminal court of first instance	Strafgericht erster Instanz
K/1		Criminal proceedings for less severe offences (municipal court level)	Strafverfahren wegen Vergehen
K/2		Criminal proceedings for felonies (county court level)	Strafverfahren wegen Verbrechen
KM	Kazneni postupci – maloljetnici	Criminal proceedings against juveniles (age 14 to under 18)	Strafverfahren gegen Jugendliche
KMP		Criminal proceedings against young adults (age 18 to under 21)	Strafverfahren gegen Jungerwachsene
KUS		Criminal proceedings started by USKOK	Strafverfahren wegen Korruption oder OK
KRZ	Kazneni postupci za ratne zločine	Criminal proceedings for war crimes	Verfahren wegen Kriegsverbrechen
KS	Kazneni postupci – prometni prekršaji	Criminal proceedings for traffic offences	Verkehrsstrafverfahren

8.4 Bibliography

Official documents:

European Commission, Croatia 2006 Progress Report, Commission staff working document, dated Brussels, 08.11.2006 {COM (2006) 649 final} SEC (2006) 1385

European Commission for the Efficiency of Justice (CEPEJ), European judicial systems, Edition 2006 (2004 data), published in 2006 by the Council of Europe

Academic publications referred to in this document:

Alldridge/Field/Jörg, The Control of Police Investigations, in: *Fenell/Jörg/Harding/Swart* (ed.), *Criminal Justice in Europe. A Comparative Study*, 1995, 227

Bertel/Venier, *Strafprozessrecht*, 8. ed., 2004

Bertel/Venier, *Einführung in die neue StPO*, 2005

Beulke, *Strafprozessrecht*, 8. ed., 2005

Brants/Field, Discretion and Accountability in Prosecution: A Comparative Perspective on Keeping Crime out of Court, in: *Fenell/Jörg/Harding/Swart* (ed.), *Criminal Justice in Europe. A Comparative Study*, 1995, 127

Brants/Field/Jörg, Are Inquisitorial and Adversarial Systems Converging? in: *Fenell/Jörg/Harding/Swart* (ed.), *Criminal Justice in Europe. A Comparative Study*, 1995, 41

Breuer, *Der Staat. Entstehung, Typen, Organisationsstadien*, 1998

Dearing, Zur Frage der Abschaffung der Voruntersuchung aus rechtsvergleichender Sicht, in: *Neue Wege im Strafrechtlichen Vorverfahren*, Tagung der Österreichischen Juristenkommission in Weißenbach am Attersee, 1985, 7

Dearing/Löschnig-Gspandl (ed.), *Opferrechte in Österreich. Eine Bestandsaufnahme*, 2004

Delmas-Marty, Mireille/Spencer, J.R. (ed.), *European Criminal Procedures*, 2005

Dervieux, The French system, in: *Delmas-Marty/Spencer* (ed.), *European Criminal Procedures*, 2005, 218

Dingwall/Davenport, Criminal Justice Policy: Evolution in the UK, in: *Fenell/Jörg/Harding/Swart* (ed.), *Criminal Justice in Europe. A Comparative Study*, 1995, 21

Esser, Germany, in: *Pavišić* (ed.), *Transition of Criminal Procedure Systems*, Vol II, 2004, 97

Fenell/Jörg/Harding/Swart, Introduction, in: *Fenell/Jörg/Harding/Swart* (ed.), *Criminal Justice in Europe. A Comparative Study*, 1995, xv

- Fuchs*, Überlegungen zu Fahrlässigkeit, Versuch, Beteiligung und Diversion, in: *Grafl/Medigovic* (ed.), Festschrift für Manfred Burgstaller zum 65. Geburtstag, 2004, 41
- Heinz*, Verfahrensrechtliche Entkriminalisierung, in: *Grafl/Medigovic* (ed.), Festschrift für Manfred Burgstaller zum 65. Geburtstag, 2004, 507
- Jesionek*, Das Verbrechenopfer im künftigen österreichischen Strafprozessrecht, in: *Grafl/Medigovic* (ed.), Festschrift für Manfred Burgstaller zum 65. Geburtstag, 2004, 253
- Juy-Birmann*, The German system, in: *Delmas-Marty/Spencer* (ed.), *European Criminal Procedures*, 2005, 292
- Kelk*, Criminal Justice in the Netherlands, in: *Fenell/Jörg/Harding/Swart* (ed.), *Criminal Justice in Europe. A Comparative Study*, 1995, 1
- Kilchling*, The role of the public prosecutor in Germany, in: *The role of the public prosecutor in the European criminal justice systems*, *Vander Beken/ Kilchling* (ed.), Koninklijke Vlaamse Academie van België voor Wetenschappen en Kunsten, 2000
- Krapac*, Vereinfachung des Strafverfahrens durch Vermeidung von Verfahrensabschnitten – Abkürzung des Prozesses ohne Verkürzung des Prozeßrechts? – in: *Eser/Kaiser/Weigend*, vom totalitären zum rechtsstaatlichen Strafrecht, 1992, 517
- Krapac*, Grundzüge des strafrechtlichen Vorverfahrens im ehemaligen Jugoslawischen Strafprozeß unter besonderer Berücksichtigung des Beweisrechts, *ÖRZ* 1993, 225
- Kühne*, Strafprozessrecht, 6. ed., 2003
- Kunz*, Zu den Problemen einer opfergerechten Ausübung des Strafanspruchs, in: *Grafl/Medigovic* (ed.), Festschrift für Manfred Burgstaller zum 65. Geburtstag, 2004, 541
- Lüderssen*, Kriminalpolitik auf verschlungenen Wegen, 1981
- Lüderssen*, Die Krise des öffentlichen Strafanspruchs, in: *Hofmann/Weber/Wenz* (ed.), Würzburger Vorträge zur Rechtsphilosophie, Rechtstheorie und Rechtssoziologie, Heft 10, 1989, 61
- Mathias*, The balance of power between the police and the public prosecutor, in: *Delmas-Marty/Spencer* (ed.), *European Criminal Procedures*, 2005, 459
- Miklau*, Rechtspolitische Anmerkungen zur Stellung des Opfers im Strafverfahren, in: *Grafl/Medigovic* (ed.), Festschrift für Manfred Burgstaller zum 65. Geburtstag, 2004, 293
- Naucke*, Gesetzlichkeit und Kriminalpolitik, 1999
- Pavišić*, Overview, in: *Pavišić* (ed.), *Transition of Criminal Procedure Systems*, Vol II, 2004, XIX
- Perrodet*, The Italian system, in: *Delmas-Marty/Spencer* (ed.), *European Criminal Procedures*, 2005, 348

- Perrodet*, The public prosecutor, in: *Delmas-Marty/Spencer* (ed.), *European Criminal Procedures*, 2005, 415
- Pesquié*, The Belgian system, in: *Delmas-Marty/Spencer* (ed.), *European Criminal Procedures*, 2005, 81
- Pilnacek/Pleischl*, *Das neue Vorverfahren*, 2005
- Schlüchter*, Wert der Form im Strafprozess, in: *Wolter* (ed.), *Zur Theorie und Systematik des Strafprozessrechts. Symposium zu Ehren von Hans-Joachim Rudolphi*, 205
- Schwaighofer*, Die Neuordnung des Auslieferungsrechts durch den Europäischen Haftbefehl, in: *Grafl/Medigovic* (ed.), *Festschrift für Manfred Burgstaller zum 65. Geburtstag*, 2004, 433
- Spencer*, Introduction, in: *Delmas-Marty/Spencer* (ed.), *European Criminal Procedures*, 2005, 1
- Spencer*, The English System, in: *Delmas-Marty/Spencer* (ed.), *European Criminal Procedures*, 2005, 142
- Swart/Young*, The Human Rights Convention and Criminal Justice, in: *Fenell/Jörg/Harding/Swart* (ed.), *Criminal Justice in Europe. A Comparative Study*, 1995, 57
- Trechsel*, *Human Rights in Criminal Proceedings*, Oxford University Press, 2005
- Tulkens*, Negotiated justice, in: *Delmas-Marty/Spencer* (ed.), *European Criminal Procedures*, 2005, 641
- Wesel*, *Geschichte des Rechts*, 2. ed., 2001

