

DIALOGUE DOCUMENT:

POSTULATES AND RECOMMENDATIONS

ON SPECIFIC NORMATIVE REGULATION OF SYMBOLS, EMBLEMS AND OTHER INSIGNIA OF TOTALITARIAN REGIMES AND MOVEMENTS

Zagreb, 28 February 2018

At its meeting on 28 February 2018 the Council for Dealing with the Consequences of Undemocratic Regimes adopted the following

CONCLUSION

1. At its session on 2 March 2017 the Government of the Republic of Croatia adopted the Decision on Establishing the Council for Dealing with the Consequences of Undemocratic Regimes, classification: 022-03/17-04/74, registration number: 50301-24/04-17-2. In this Decision the Government determined the Council's tasks to draw up comprehensive recommendations aimed at dealing with the past and recommendations for the legal regulation of the use and display of insignia, emblems and symbols of undemocratic regimes (Point II of the Decision). The Council was required to submit the required documents to the Government of the Republic of Croatia by 1 March 2018 (Point IV of the Decision).

2. At the meeting held on 28 February 2018 the Council discussed the final text of the two-part document entitled "Postulates and recommendations / On specific normative regulation of symbols, emblems and other insignia of totalitarian regimes and movements" (hereinafter: the Document), which is the result of the Council's year-long work based on the members' constructive and open dialogue.

3. The Document outlines the framework within which the Council members were engaged in the dialogue, and provides the Croatian government and other competent bodies with a broad platform for deliberating on the direction to be taken when considering possible specific legal regulation of insignia of totalitarian regimes and movements in the 20th century Croatia.

4. Regarding numerous problems it is concerned with, the Document is acceptable to some members of the Council, while only partially acceptable to others. In this regard, the Document, apart from confirming a high level of the culture of dialogue, gives every individual who took part in the Council's work complete freedom to express their own views on issues the solutions to which are given in the Document, if they do not agree with them. These views may be submitted to the Government of the Republic of Croatia in order for them to be attached to the Document and to constitute a part of the entire file.

In conclusion, all the members agree that the Document does not express in its entirety views of any individual Council member, but is a result of contributions of all Council members. This is precisely the greatest value of this *dialogue document*.

Zagreb, 28 February 2018

COUNCIL PRESIDENT

Zvonko Kusić, FCA

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POSTULATES AND RECOMMENDATIONS

NOTIONS

1. Totalitarian and/or undemocratic regimes

All totalitarian regimes are undemocratic, but not all undemocratic regimes are necessarily totalitarian: tyrannies, dictatorships, autocracies..., they are all undemocratic regimes. Totalitarianism, however, places or at least attempts to place the entire state, society, families, individuals, even children under repressive surveillance, and submits them to the goal of its own radical ideology through the only permitted political force, party or movement and their repressive apparatus, alongside the unquestionable role of the Leader, at the penalty of drastic reprisals and with massive persecution and victims in undesirable segments of the society based on racial, religious, national, social or some other basis of discrimination.

Fascism and communism are fundamentally totalitarian and therefore undemocratic regimes. Without discussing differences between them in much detail - the former focuses particularly on the nation and its rights over other, usually "less valuable" nations, which justifies "cleansing" of the nation from "foreign" elements, as well as wars of conquest aimed at extending the "living space" for one's own nation; the latter focuses on class and class struggle as the fundamental driving force in history and the ideology that should master the world, and also, led by the only permitted political force, the party as the "avant-garde" of this struggle, connected to the administrative system as a whole and to the repressive apparatus subordinate to it, in the framework of the unity of powers concept, interprets and enforces alleged historical goals of the working class struggle, and in the name of the "people", likewise with massive persecution and extermination of the "class enemy", but also of democratic, i.e. "hostile elements" in general, exercises comprehensive power over all segments of society. Various forms of fascism and communism differ to some extent both between themselves and internally (e.g. Italian fascism and German national socialism; Russian Bolshevism and Stalinism, Titoism, "socialist self-management" and others).

The aim of this Document is not to discuss such differences, nor to grade totalitarian repression of single phases of those regimes which were subject to change, but to deal with those practises and meanings the consequences of which may be felt today, and which are sometimes even positively evoked by certain political groups, thus causing conflicts which disturb citizens and spread hatred, narrowing the democratic political space to irreconcilable conflicts, and hindering the country's democratic development.

It is therefore particularly necessary to specify causes of the emergence and tragic consequences of the rule of undemocratic regimes in the context of acknowledged and unacknowledged, investigated and uninvestigated massive human rights violations that have not yet been reconciled through full and meritorious disclosure, acknowledgement and appropriate reverence, nor through satisfaction for

their immediate victims and their families' feelings. These circumstances burden the Croatian society and the state with imposed political divisions.

Traumatic elements from the past, particularly those that include mass victims and human rights violations, and especially if renewed by antagonized, unjust and biased approaches of actively antagonised political groups, must be thoroughly investigated and objectively scrutinized in order to be surpassed, and such groups marginalized.

This is the reason why the name of the Council includes the term "undemocratic", and not "totalitarian" regimes, thus emphasizing the aspect of such undemocratic regimes' rule that may be equalized without raising the issue of equalizing such regimes themselves, which is the topic for a different type of discussions that do not have to result in either the academic or overall political agreement.

2. Approach to differences among various totalitarian regimes

"The Council will take into consideration differences that existed between individual forms of undemocratic regimes without attributing less importance to human rights violations." This viewpoint from the Decision on forming the Council underlines the differences between individual totalitarian regimes, taking into consideration their differences in operations, significance and duration, and therefore evolutionary amplitudes in relation to certain repressive contents and practices - on the one hand, military downfall of fascism, and on the other, more or less devolutionary character of the collapse of communism, their antagonism and different relation to the democratic world in the time of struggle for bare survival of democracy and of a great part of the humankind in the Second World War etc. All of the aforementioned influences the manner in which they are perceived and, consequently, the taking of different, often conflicting standpoints.

However, the issue of human rights violations cannot and must not be attributed less importance, regardless of the mentioned and other differences, and such human rights violations include mass victims of both undemocratic regimes, condemnation of such practise and legal provisions and illegal actions which enabled them. Discussion is thereby freed from ideological, religious, national, social and class argumentation and interpretations as well as from condemnation or justification based on them. There is no political goal that could justify mass human victims and systematic violation of basic human rights.

Although the Council started from recognising differences between the above mentioned undemocratic regimes, each "recognition of differences", at least implicitly, also contains comparison. In public debates comparisons are sometimes used as a boomerang of revitalization, and even positive rehabilitation of certain differences, in order to transfer past differences to differences in the present and in the future. We express our belief that such occurrence is more a result of certain smaller political groups' activities aimed at gaining political profit, that its goal is the restoration of the past through renewing conflicts of the past as conflicts of the present, that such orientations are not

shared by the majority of the Croatian people and citizens of Croatia, and that such viewpoints should not be a part of the Council's work, not even in their involuntary diminutives. The problem that the Council should solve is smaller than the heat created around it, provided that the Council operates according to the principles of political and scientific responsibility and conscience, that it precisely defines its capabilities and rights, goals and recommendations and that it opposes any abuse of individual and disorderly public pressure leading to the deepening of political tensions.

3. The monarchist Yugoslavia, revolutionary movements and undemocratic regimes

Although the Council's activities are primarily focused on fascist and communist forms of undemocratic regimes and their consequences from the establishment of the Ustasha rule in 1941 to the downfall of the Yugoslav communism in 1990, it is necessary to point out that such movements and regimes did not appear out of nothing. They also stem from often extreme political conditions present in the monarchist Yugoslav state. Apart from being the result of radicalization of European political movements after the First World War with the strengthening of the role of fascism and communism, Yugoslavia itself, starting with an undemocratic manner of its constitutional establishment, in all its versions (the Kingdom of Slovenes, Croats and Serbs/Yugoslavia), from the December Victims (1918) to the assassination of HSS leaders in the Parliament (1928) and later, was characterised by persecution of democratic opposition, arrests and police terror against members of moderate republican and federalist parties (HRSS, HSS), denial of national and social rights, and continuous and systematic repression against entire nations in favour of the Great Serbian hegemony. The first fascist organization in the Kingdom of Slovenes, Croats and Serbs, more precisely in Croatia, was the Yugoslav Progressive Nationalist Youth/Organization of Yugoslav nationalists (ORJUNA), founded in 1921 as a pro-regime, monarchist and unitarianist organisation that terrorized and even assassinated Croatian patriots and workers' rights advocates. Also, the success of communists at the parliamentary elections in 1920, when they became the third largest party, was followed by the Obznana (Notification) in 1920, forbidding political activities of the ("workers'") KPJ (Communist Party of Yugoslavia), which was later, by the Act on the Protection of the State (1921), expanded to include, among others, the ("peasants'") HRSS (Croatian Republican Peasant Party). In such conditions, the inception and development of the Ustasha and communist movements in Croatia should be regarded as a reaction to drastic political discrimination and national and social oppression, which certainly contributed to the need for a broader overview of the emergence, causes and effects of latter fascist and communist regimes, and also relates significantly to the topic of *historical memory*.

4. Fascism and anti-fascism

Condemnation of fascism and its crimes, particularly the Holocaust, is a well-known and indisputable heritage of the contemporary democratic world, and each positive reference to fascism in the public space results in its condemnation by democratic public, often including legal sanctions. Furthermore,

acknowledgement of the anti-fascist struggle is a constituent part of the values affirmed particularly by the countries affected by fascist aggression, which include a huge number of European and non-European countries including Croatia. The Constitution of the Republic of Croatia, in its Historical Foundations, in the context of establishment of the foundations of state sovereignty during the course of the Second World War, states decisions of the Territorial Antifascist Council of the National Liberation of Croatia (1943), in opposition to the proclamation of the Independent State of Croatia.

Simultaneously, from early 1942 and during the entire War, and especially after the War, the communist leadership used revolutionary methods that included serious crimes in order to gain power. This caused the narrowing of the wide antifascist base of the movement towards achieving the dominant role by the communists and the realization of their concept of communist state regime after the War, modelled primarily on the Soviet regime. Not only widely known mass executions of members of the "defeated forces" and refugees in the broader sense of the term "Bleiburg tragedy", but also arrests and systematic persecution even of anti-fascist oriented members of HSS (Croatian Peasant Party), bloody reprisals against the Catholic Church and peasants ("kulaks"), confiscation of property and persecution of the "class enemy" and political opponents, and, finally, absolute dominance of the all-powerful communist repressive police apparatus over the society, compromised the term anti-fascism, converting it into an *ideologeme* under the guise of which mass crimes and human rights violations were committed; these rights were also gravely violated through administrative punishment even of Party members during the purges of "cominformists" (Goli otok), which characterises communist regimes in particular, where the Yugoslav regime did not fall behind the Soviet one, even when it confronted it. The communist authorities bear a special responsibility for turning the Croatian anti-fascism into a tool of ideological support to the totalitarian authorities and for giving an 'alibi' to their anti-democratic post-war policies.

The values of anti-fascism as a fundamentally democratic movement should be guarded from neo-fascist and para-fascist agitators as well as from those neo-Communist and pro-Yugoslav agitators who have abused them and who justify those abuses with historical necessity, and who together form a kind of an enemy alliance in which one side feeds the other and both strive to enchain the Croatian political reality by keeping it in the vortex of the Second World War.

5. Communism and anticommunism

Unlike the relatively short period of the fascist rule embodied in the Ustasha regime in power in the Independent State of Croatia (NDH) (1941 - 1945), which was almost unanimously condemned as criminal not only by the newly formed communist authorities but also by western democratic countries, the attitude towards much longer communist rule (1945 - 1990) in somewhat different governmental forms of the socialist Yugoslavia (hereinafter SFRY), particularly after its deflection from the communist bloc countries, is expressed in more complex international relations of bloc divisions. Such

circumstances resulted also in specific critical relations, even with regard to its general condemnation from the democratic point of view. Serious crimes and human rights violations were also committed during the communist rule, not only in the post-war period (as already stated) but continuously, with occasional intensive campaigns.

Indeed, there is an asymmetry between well-known fascist crimes which were publicly condemned and long covered up and less investigated communist crimes. Such practice favours dispersed and even privatized political approaches, including those which downplay one evil by another. Anticommunism thus often appears not only as condemnation of one totalitarian regime from the point of view of democracy, but also as an *ideologeme* which denies the need to create a clear distance from the crimes and human rights violations no matter which side they come from.

The same refers to the misuse of anti-fascism, which is often used only as an *ideologeme* aimed at discrediting political opponents and in some cases to negate or criminalise Croatia's statehood and independence that was won in the Homeland War. If everyone is allowed to keep and express their own opinion on the differences between fascism and communism, which belongs to the area of democratic freedoms, it is unacceptable not to publicly advocate an equal approach to all perpetrators of crimes, not to regard them in the same light, or to minimise or excuse them by applying the double standard.

In the long-lasting period of the communist rule SFRY was intrinsically marked by the party dictatorship based on the concept of the unity of powers and "socialist legality", hidden behind the rhetoric phrases of "self-managing pluralism" and "socialist democracy" (single-party, of course), so that the state itself lasted as long as the unity of the communist party of its federal constituents. In that sense, the breakup of the SFRY itself is partly a "consequence of undemocratic regime rule". In the Croatian context, we have to recall the reformist tendencies whose protagonists, at the time of *the Declaration on the Status and Name of the Croatian Literary Language* of 1967 and the Croatian Spring in 1971, became victims of the communist regime they belonged to, but advocated higher level of democracy and national equality, or, close to the downfall of the SFRY, advocated the multi-party system and democratic elections, contrary to the dogmatic Yugoslav forces.

LEGAL BASES

1. Constitutional basis for dealing with the consequences of undemocratic regimes

In its Historical Foundations, the Constitution of the Republic of Croatia clearly stresses "(the establishment) of the foundations of state sovereignty during the course of the Second World War, as expressed in the decision of the Territorial Antifascist Council of the National Liberation of Croatia (1943) in opposition to proclamation of the Independent State of Croatia (1941)", and also refers to the Constitution of the People's Republic of Croatia (1947) and of the Socialist Republic of Croatia

(1963-1990). It also emphasises that Croatia is also established “at the historic turning-point characterized by the rejection of the communist system and changes in the international order in Europe”. Further, it highlights “(the victory) of the Croatian nation and Croatia’s defenders in the just, legitimate and defensive war of liberation, the Homeland War (1991-1995)”. The Constitution states that “the Republic of Croatia is hereby established as the nation state of the Croatian nation and the state of the members of its national minorities” and continues to list the national minorities who are “guaranteed equality with citizens of Croatian nationality and the exercise of their national rights in compliance with the democratic norms of the United Nations and the countries of the free world”. Moreover, “the Republic of Croatia is hereby established and shall further develop as a sovereign and democratic state in which equality, freedom and human and civil rights are guaranteed and secured.”

In the normative section of the Constitution, a matter of interest for the Council’s views and work were certainly the provisions of Article 3 of the Constitution, which defines the highest values of the constitutional order of the Republic of Croatia that serve as the basis for interpreting the Constitution (including, *inter alia*, freedom, equal rights, national and gender equality, peace-making, respect for human rights, the rule of law and a democratic multiparty system), and particularly Article 39 of the Constitution, which prescribes that: “Any call for or incitement to war or use of violence, to national, racial or religious hatred, or any form of intolerance shall be prohibited and punishable by law.”

In the context of the Council’s starting points, the constitutional provisions clearly indicate that “dealing with the past” must not lead to annulling certain parts of that past on which the Croatian state sovereignty is founded, that this sovereignty was established in opposition to the proclamation of the Independent State of Croatia, as well as by the rejection of the communist system, that it includes respecting the rights of minorities, freedom and human and civil rights, as well as the rejection of any form of violence and intolerance. This identity of the Croatian constitutional state defines, both fundamentally and discriminately, the Council’s potential views on both criticism and glorification of undemocratic regimes, by establishing a relation with, on the one hand, democratic freedoms and, on the other, violations of democratic rights arising from glorifying and evoking ideologemes, expressions and symbols of undemocratic totalitarian regimes.

2. Legal bases for dealing with the consequences of undemocratic regimes

Other than in the Constitution, Croatia has, in a number of laws, incorporated into its legal system all relevant international conventions, while in parliamentary declarations it clearly established the orientation of its state policy in relation to matters of interest for the Council’s views and work, which in that context can be summarised in the objectives of preserving the dignity of (showing reverence to) victims of former undemocratic regimes, preventing discriminatory statements and discrimination, dissemination of violence, hatred and all forms of intolerance, condemning the contents that infringe on human rights, in particular the rights of individuals and minorities, and prohibiting the disturbance

of the public order and peace by hate speech that incites violence.

With regard to international documents, we should particularly mention the *International Convention on the Elimination of All Forms of Racial Discrimination* (1966), which, inter alia, obliges the States Parties to prescribe criminal offences related to dissemination of racial hatred, discrimination and violence, two resolutions of the Parliamentary Assembly of the Council of Europe: *Resolution 1096 on measures to dismantle the heritage of former communist totalitarian systems* (1996) and *Resolution 1481 on the need for international condemnation of crimes of totalitarian communist regimes* (2006), followed by the *EU Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law* (2008) and the *European Parliament resolution on European conscience and totalitarianism* (2009), together with the *Declaration of the European Parliament on the proclamation of 23 August as European Day of Remembrance for Victims of Stalinism and Nazism* (2008). In addition to accepting these and other documents, the Croatian Parliament adopted a number of acts and declarations with a broad consensus among the representatives of the ruling and opposition parties, which include the *Declaration on Anti-fascism* (2005), which positively evaluates Croatia's anti-fascist foundations, and, pursuant to the above mentioned Council of Europe resolutions, the *Declaration on the condemnation of crimes committed during the totalitarian communist regime in Croatia 1945-1990* (2006).

In this context, the applicable Criminal Code prescribes sanctions for a number of criminal offences motivated by hatred, as well as for criminal offences aimed at spreading intolerance, such as provoking riots (Article 324) and public incitement to violence and hatred (Article 235), including sanctions for any person "who publicly approves of, denies or grossly trivialises the crimes of genocide, crimes of aggression, crimes against humanity or war crimes directed against a group of persons or a member of such a group on account of their race, religion, national or ethnic origin, descent or colour, in a manner likely to incite to violence or hatred against such a group or a member of such a group".

The framework of the current Croatian legislation which, in addition to the Criminal Code, includes a number of laws on misdemeanour offences, also in relation to sports events, and is related to dealing with the past and, in particular, reflections of dealing with the past, may be evaluated as, in principle, satisfactory. However, unlike, for example, German legislation, which more precisely defines as criminal offences the use of symbols (in particular flags, insignia, uniforms and their parts, slogans and salutes) of political parties which have been declared unconstitutional and banned by the Constitutional Court, as well as of other organisations whose activities have been banned as being directed against the constitutional order, as well as the use of symbols of governments, organisations and institutions outside Germany which are actively pursuing the objectives of those parties and organisations prohibited in Germany, the Croatian legislative and judicial practice is in a more fluid state of affairs in which both arbitrary interpretations of legal provisions and arbitrary decisions are

possible, including those made under the pressure of ideological beliefs and opportune political climate.

[Note: It should be taken into account that German legislation is not a relevant basis for comparison in this respect since the underlying assumption for prohibiting the use of symbols in Germany is the previous prohibition of a political party or another organisation.

However, the dissemination of propaganda material and the use of symbols “the contents of which are intended to further the aims of a former National Socialist organisation” are explicitly prohibited (Sections 86 and 86a of the German Criminal Code).]

In this regard, the Council may consider and even recommend certain assessments; it is understandable that case-law should strive to achieve uniform and appropriate sanctioning of individuals for offences involving discrimination, hatred, incitement to violence, etc. Naturally, such offences may be wrapped up in forms that are not directly prescribed by law, but nevertheless incriminated and recognisable to all. In this context, there is a serious problem in the Croatian legal area concerning the attitude of the state and public authorities, in particular courts and administration, towards the Constitution. In the political sphere, the Constitution is mostly understood instrumentally, while the courts and administrative authorities still do not accept the fact that the Constitution is (i) a normative act they are obliged to comply with when interpreting positive law by adjudicating or ruling in individual cases. An example is the *positive constitutional obligation* of all relevant bodies to, each within its scope, carry out a common (legislative, political-executive, administrative, judicial, constitutional) policy in line with the constitutional requirement that any form of incitement to violence, hatred or intolerance shall be prohibited and punishable by law (Article 39 of the Constitution). Until this day this constitutional obligation has not been recognised, accepted and appropriately interpreted, so there are not even any attempts to implement it in practice. In other words, it is still not an inherent part of the constitutional-law awareness of those who apply legal rules.

In conclusion, no decisions or opinions of the Council can replace the responsibility of relevant political, administrative and judicial authorities in preventing those behaviours that symbolically or directly call upon, express, imply, glorify or minimise the consequences of undemocratic regimes, thus tightening the rope of political tensions in Croatia around the topics which close the area of democratic national identity and elementary social and political stability, and narrow the roads for the country’s democratic development. This should include reactions to statutory penal provisions for any person “who publicly approves of, denies or grossly trivialises the crimes of genocide, crimes of aggression, crimes against humanity or war crimes”, even if symbolic means are used, or “who denies or limits a member of an ethnic or national group or a minority the right to freely express his nationality or to enjoy his cultural autonomy”, which surely includes the legally established rights of minorities. In view of these legal provisions, which also arise from the Constitution, the Council’s opinion is unnecessary; however, it is necessary that relevant authorities take direct responsibility for respecting and applying

the Constitution and upholding the letter of the law in line with the constitutional values and protected constitutional goods.

3. The issue of applying criminal law provisions concerning restrictions of freedom of expression

Even though the legal framework for dealing with the past, which lists illicit behaviours as well as the implications of glorifying former undemocratic regimes, is satisfactory, the problem of recognising and legally qualifying such behaviours, including the case-law, is far more complicated. It, among others, includes the right to “freedom of expression”, as it is understood and applied by the European Court of Human Rights in Strasbourg (hereinafter: the European Court) in the case of the “collision of rights”, i.e. when it is required to establish which right or freedom should have priority.

The European Court has repeatedly stated that the “freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (of the European Convention on Human Rights), it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. As set forth in Article 10, freedom of expression is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see *Axel Springer AG v. Germany*, 2012, § 78). In general, the freedom of expression and opinion is given precedence when dealing with issues in the area of political and public debate, so they can be viewed as contributing to a debate of general interest for society. In this regard, the European Court issued a number of judgments which, regardless of the positions contained therein and irrespective of the disposition of those who made such decisions, as well as of the general democratic public, cover the freedom of expression (ranging from release from criminal liability for denying specific genocides to the right to display particular symbols, such as the red five-pointed star). However, all such decisions primarily refer to the freedom of expression and opinion, and not to acts of disturbance of public order and peace or to the protection of the rights of others guaranteed by law.

Namely, the European Court repeatedly emphasised that Article 10 of the Convention does not guarantee absolutely unrestricted freedom of expression and that the exercise of this freedom carries with it “duties and responsibilities”, in particular with regard to issues falling within the scope of the private life of an individual, where the “freedom of expression calls for a narrower interpretation” (see *Von Hannover v. Germany*, 2004, § 66).

Finally, the European Court has a specific approach to historical events and facts in the context of freedom of expression. When it comes to the significance it gives to those facts in interpreting the Convention when ruling on individual cases, its position is well-known: “The Court will abstain, as far

as possible, from pronouncing on matters of purely historical fact, which do not come within its jurisdiction; however, it may accept certain well-known historical truths and base its reasoning on them" (see *Ždanoka v. Latvia*, 2006, § 96).

[Note: What the European Court considers to be "well-known historical truths" is clear from its decision in *Garaudy v. France* (2003), in which it established that the author (the applicant) in his controversial book *The Founding Myths of Israeli Politics* (1995) "questions the reality, extent and seriousness of these historical events that are not the subject of debate between historians, but - on the contrary - are clearly established. There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention. The Court considers that the main content and general tenor of the applicant's book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. It considers that the applicant attempts to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which are contrary to the text and spirit of the Convention. Such ends, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention." (page 29 of the Decision)]

On the other hand, when historical facts or events are not clearly established, the case-law of the European Court allows for the possibility of protecting the rights associated with them. This is clearly stated in *Lehideux & Isorni v. France* (1998), which dealt with the well-known double game theory (*thèse dite du 'double jeu'*) concerning the meeting and handshake between Marshall Philippe Pétain and Hitler at the Montoire-sur-le-Loir railway station on 24 October 1940).

Returning to the sphere of criminal law, it is understandable that, before applying criminal law provisions, there is a whole series of options for avoiding situations where such provisions should be applied at all. A more extensive prescription and description, as well as additional criteria for criminal offences of this type should, in addition to the existing legal provisions, be introduced only as a last resort, if all other educational, cultural and political means, the development of tolerance, culture of historical memory and understanding of democratic values of the society have failed to provide efficient results, and such offences cause the risk of dramatic political confrontations. It should be borne in mind that perpetrators of such offences often have no direct connection with their political

meaning, that they also express protests related to the lack of social inclusion (of youth in particular) and that sanctions can also have counter-effects of rendering importance to individuals or groups within certain forms of social pathology. Of course, sanctions for direct misdemeanour and criminal offences with elements of discrimination, dissemination of hatred, inciting violence, etc. remain instruments for defending democratic and human rights of all citizens, but social condemnation itself can also be very effective if it leads to resocialization of perpetrators of such offences. In this regard, we should, in addition to the already mentioned European documents and practices, mention the European Parliament document *European Historical Memory: Policies, Challenges and Perspectives* (2013).

4. Political (party) basis for dealing with the consequences of undemocratic regimes

In addition to the Constitution and laws, the Croatian Parliament has, on more than one occasion, as well as in the above mentioned declarations, by a consensus of the leading parties or by a majority vote of all Parliament members, made clear its position on both fascism and communism, and in 2011 it also adopted the *Act on Locating, Marking and Maintaining the Graves of the Victims of Communist Crimes after the Second World War*. Moreover, it was not only HDZ (Croatian Democratic Union) and the other newly-formed democratic parties, but also the Croatian reformist communist wing which, still under strong Yugoslav communist regime and pressures from military circles, paved the way for the first democratic elections in 1990, which also meant opening the way for the establishment of the Croatian state sovereignty, and it was SDP (Social Democratic Party of Croatia) that, as a party, already in its 1990 *Historical Declaration*, condemned the crimes of the communist regime, including the prosecution of members of the Croatian Spring. As regards the principled positions of the leading political actors, there should be no dispute over the issues of critical confrontation and evaluation of the consequences of undemocratic regimes, while the practice of glorifying or rehabilitating undemocratic regimes should not be coming from legitimate political parties.

However, the practice of political party competition too often seeks to escalate the relations between the two largest parties by slander, i.e. making inappropriate historical accusations that open the way for otherwise marginal groups to impose their own political views and behaviours that also lead to excessive primordial political conflicts with invocations and imputations of politically survived and legally condemned occurrences and behaviours, which are then handled with difficulty by the responsible leaderships of those same parties and by judicial authorities. In such cases, there should be political consensus mechanisms in place that would leave no room for the growth of political intolerance and hatred as the source of reviving totalitarian ideologies and their ideologemes, whilst ignoring their crimes. Such incidents, whether caused by individuals or certain groups, are always possible, even in countries with a long democratic tradition, but there is no justification for the political climate conducive to them when it is created by political parties, including specific statements of their leading representatives or their participation in events where symbolic and verbal expressions of the

above mentioned ideologemes are used as means to rehabilitate undemocratic regimes and call into question the country's constitutional and democratic foundations.

The basic precondition for mitigating and minimising the described primordial political conflicts, i.e. for reducing them to a reasonable extent in a democratic society, is the previous democratization of internal structures and internal functioning of political parties, which includes adopting the code of conduct for political party representatives in the public sphere. This issue is yet to be addressed in Croatia. As in the case of Article 39 of the Constitution, the positive constitutional obligation laid down in Article 6, paragraph 2 of the Constitution ("The internal structure of political parties shall comply with *fundamental constitutional democratic principles*.") has yet to be recognised, accepted and adequately interpreted and, therefore, it is inefficiently applied in the internal life of political parties. In other words, it is not yet an inherent part of the constitutional awareness of political parties which embody the country's democratic multiparty system, even though that system is the highest value of the constitutional order of the Republic of Croatia.

UNDERLYING APPROACH TO ISSUES ARISING IN PRACTICE

1. Specific practical issues in dealing with the consequences of undemocratic regimes

The Decision on establishing the Council defines its tasks to draw up (1) "comprehensive recommendations aimed at dealing with the past", as well as (2) "recommendations for the legal regulation of the use and display of insignia, emblems and symbols of undemocratic regimes".

Some of these issues (1), whose specific aspects have been considered in principle in the previous sections, may as such receive wider support, even in the case of existing defined criminal offences

and understanding the purpose of applying appropriate sanctions.

On the contrary, the issues (2) relating to the legal status and regulation of the use and display of insignia, emblems and symbols of undemocratic regimes, require a more complex approach that also reflects their multiple layers of meaning in the historical and present dimensions, also including temporal and locational dimensions, i.e. when something is qualified as a public disturbance or disturbance of the public order and peace. A critical attitude towards insignia and official expressions (salutes) of undemocratic regimes includes confronting as well as different meanings associated with individual fascist and communist symbols and expressions, such as the Ustasha “U”, salutes “Za dom spremni” (For the homeland ready), “Za dom i poglavnika” (For the homeland and its leader), the Chetnik cockade (kokarda), swastika, as well as the five-pointed red star, sickle and hammer or salutes and slogans “Smrt fašizmu, sloboda narodu” (Death to fascism, freedom to the people), etc. Some of these symbols, official salutes and slogans have an almost unambiguous meaning, while others are much more complex. Anti-fascist fighters died under the latter during the Second World War, but they were also used when crimes were committed, prison sentences and death penalties to “public enemies” imposed or, during the Homeland War, when the aggression against the Republic of Croatia was carried out. Similarly, the salute “Za dom spremni” is originally an Ustasha salute, but it was also used by the Croatian defenders who died during the Homeland War. Moreover, the five-pointed red star is an integral part of the adopted European historical memory, regardless of its misuse by communist regimes and by the Yugoslav People’s Army (JNA) during the Homeland War. Likewise, with regard to the attitude towards the main leaders of undemocratic regimes - the head of the Independent State of Croatia, Ante Pavelić, and the president of the SFRY, Josip Broz - who are undoubtedly responsible for crimes and human rights violations committed by the regimes under their leadership, it is unlikely that a consensus on some symmetrical legal or public condemnation will be reached, but, as in the case of using the mentioned expressions and symbols, procedural parameters for state authorities should be defined as part of developing the “rule of law” and “democratic political culture”. It would be preferable to establish, in legislative or advisory form, when some of these symbols and other items will be considered as an exception in terms of their meaning, without denying the public condemnation of their original or broader meaning (see Part II: On specific normative regulation of symbols, emblems and other insignia of totalitarian regimes and movements).

The constitutional provisions already make a clear distinction between the establishment of contemporary Croatia in opposition to the Independent State of Croatia, on the one hand, which remains both legally and politically unambiguous, and, on the other hand, the references made to the decision of the Territorial Antifascist Council of the National Liberation of Croatia (ZAVNOH) and its constitutional-legal heritage related to the Constitution of the People’s Republic of Croatia (NRH) and of the Socialist Republic of Croatia (SRH). Furthermore, the Constitution clearly speaks about “the historic turning-point characterized by the rejection of the communist system”, thus leaving no room for any doubt; the Independent State of Croatia is opposed, and the communist regime is rejected.

Present-day Croatia is based on “the Constitution of the Republic of Croatia (1990) and the victory of the Croatian nation and Croatia’s defenders in the just, legitimate and defensive war of liberation, the Homeland War (1991-1995), wherein the Croatian nation demonstrated its resolve and readiness to establish and preserve the Republic of Croatia as an independent and autonomous, sovereign and democratic state”.

As for the naming of public areas, although such tasks fall under the responsibility of local authorities, it would be preferable if they avoided those members of undemocratic regimes that are directly responsible for human rights violations, regardless of their potential contributions to art, science and other socially reputable fields.

If the Council’s task is to achieve a broader consensus regarding the issue of what can and cannot be banned, then a good suggestion is to differentiate between potential direct legal bans and recommendations on their avoidance. Some emblems and symbols, even if they would generally be subject to legal sanctions in the context of disturbing the public order and peace or disturbing citizens, differ in their intentions, depending on whether they were designed as a provocation or as a commemoration of tragic events from the past in which these symbols confronted each other, so they should not be displayed in the same place at the same time.

Without considering the issue of “historical revisionism”, it should, however, be said that, in places where history is already “revisionist”, any new “revisionism” may arise from the need to “revise the revisionism”. The good practice of dealing with the past would be facilitated by historiographical and other research, by scientific review of the sources and by critical examination, indiscriminate selection and publication of materials, which also includes in addition to existing archives new research and identification of victims of undemocratic regimes as well as dignified commemoration in their honour at the places of their demise. Former “bidding wars” regarding the number of victims of any undemocratic regime still interfere with the process of coming to terms with the historical truth and consequently, with moving towards establishing a culture of dialogue and unfalsified historical memory. This certainly does not include conscientious critical and scientific determination of the actual number of victims, especially where it has been proven that the number was greatly exaggerated for political, populist or other reasons. The Council itself is neither an “ethics” committee nor a place to investigate and proclaim historical “truths”, but it may encourage the activities of the competent institutions and recommend strategies which may lead to better consideration of the truths and, in particular, to a culture of historical memory and contemporary conciliatory dialogue (such specific suggestions are provided in the final section).

2. Defining the goal: coming to terms and/or reconciliation

Even though fascist and communist regimes are different – the anti-fascist struggle in Yugoslavia and worldwide, including Croatia, included strong communist components, and the victory over fascism is

considered to be the legacy of the free democratic world - however, even with the proclaimed federalism and “people’s democracy”, Croatia was, as part of communist Yugoslavia, denied political freedoms, democracy and national sovereignty, which led to the breakup of Yugoslavia in the war in the 1990s. The practices used by communist regimes in their “quest” for democracy, freedom and human rights, in particular the mass victims caused by, among others, the Yugoslav communist regime, which included not only class, but also national discrimination (e.g. treatment of Germans) and religious discrimination (prosecution and execution of priests, monks and nuns), require that we, on that level and with equal compassion, but also publicly, express our views, on the consequences of these undemocratic regimes. The fact is that the attitude towards victims of fascist regimes has been institutionalised (both globally and in Croatia), while the issues of crimes and victims of communist regimes (globally and in Croatia) remain ambiguous or at least unexplored, leaving the possibility of further antagonism within society.

It is unacceptable that even today such a state of things is used to build political options harmful to minimal political cohesion of the Croatian democratic society. The attitude towards ignoring, minimising or exaggerating, and trivialising the victims of all undemocratic regimes, as well as of their respective states, should be decisive and unified. Despite the asymmetry between fascist and communist regimes, both have left behind mass victims and systematic violations of human rights, and should be given equal scrutiny herein - not just as a matter of history, but of the future as well.

However, it is crucial that the attitude towards dealing with the past leads to reconciliation in the present, but also to understand that reconciliation in the present cannot be attained without coming to terms with the past. Following the listed and other acts and declarations of European forums dealing with this topic, it may be observed that the issues of coming to terms with the past are strongly linked with postulates of creating a climate of reconciliation (including apologies from organisations and institutions more or less associated with human rights violations, if they have not already been given). Reconciliation is not retaliation, nor is retaliation a way to deal with the past.

Although no political or parapolitical entity can or should be allowed to write or dictate how to write about the past, they can and must advocate the humanisation of historical experience. Politics of memory or politics of history (*Geschichtspolitik*) are accepted terms for denoting those political strategies that contribute to the development of critical scientific approaches to the past, political culture, supporting cultural agents, including media and popular culture, for the purpose of having a positive effect on the creation of social norms of national democratic identity as such.

Such politics should bring together the professional and broader public, including political bodies, with the aim of developing reconciliatory, and condemning retaliatory and provocative forms of public behaviour that still today emanate from very old, but still very transferable deep internal conflicts. Although both the Parliament and the Government, as previously stated, on several occasions provided quality statements concerning issues of the past, the Council could encourage efforts to

create a public document and better practice that would balance the need for coming to terms with the past and the need for reconciliation.

PROPOSALS FOR CERTAIN MEASURES FOR OVERCOMING CONSEQUENCES OF UNDEMOCRATIC REGIMES

- Promoting scientific, cultural and political activities aimed at confronting the past with a culture of dialogue and politics of memory, which foster reconciliatory forms of social and political attitudes and advance the country's democratic and humanistic identity.
- Promoting scientific, historiographical, politological, legal, social and psychological and other research with the aim of gaining complex insight into matters of the past as a condition for their broader and better understanding in the present.
- Developing a wide research network by connecting universities, institutes and other scientific and professional organisations and experts, which would result in publishing analytic as well as synthetic macroprojects related to exploring the past, dealing with and overcoming its negative consequences in the present.
- Opening and critically exploring the archives and other sources related to the actions of individual undemocratic regimes and ensuring the preconditions for complex scientific work on critical analysis and the study of modern Croatian history, particularly the history of the Kingdom of Serbs, Croats and Slovenes/Yugoslavia, the Independent State of Croatia and the SFRY.
- Continuing the work and further strengthening the research teams for the purpose of critically reviewing all politicised approaches to determining the number of victims of undemocratic regimes, locating and marking the sites of crimes and mass graves, as well as providing a dignified burial for the victims.
- Providing funds for the restoration or establishment of specific parliamentary and governmental bodies (offices, committees) that will, through cooperation with relevant institutions, universities, archival institutions, institutes, etc., ensure credible identification and also facilitate successful preservation and erection of monument complexes and other methods of marking the sites of victims of undemocratic regimes.
- Ensuring the participation of internationally recognised institutions and experts in broader or specialised conferences covering topics of dealing with the past, and publishing such discussions and materials (including e-publications).
-
- Undertaking comprehensive measures to change the legal awareness of judges and administrative officials, as well as all other employees in the government and public sector,

concerning the Constitution of the Republic of Croatia, its scope and significance for practising lawyers, and the methods of constitutional interpretation.

- Overcoming ambivalences in attitudes towards criminal offences and present-day excess consequences of undemocratic regimes, which appear between the constitutional provisions and positive legal regulations and their non-consistent application in case-law, by organising consultations with judicial and other relevant bodies and professions to achieve transparent and publicly acceptable additional interpretations of specific regulations.
- Disseminating educational methods and procedures for familiarising citizens, particularly the youth and children, with the consequences of undemocratic regimes, with the aim of developing tolerance, lowering tensions, creating a positive political atmosphere and fostering the culture of memory.
- Initiating a discussion on differentiating criteria for the naming of public areas, streets and squares using names of persons who are, regardless of their other achievements, responsible for crimes of such regimes.
- Developing and emphasising, in educational programmes, the values of the fight for democracy confirmed in the Homeland War, in which the Croatian nation and citizens of Croatia expressed their collective will, despite all past conflicts arising from the rule of undemocratic regimes, to establish and defend state sovereignty founded on principles of modern democratic and civilizational values, condemning all totalitarian ideologies whose revival undermines the development of a successful and modern Croatia.
- Opening a discussion on all aspects of the internal structure (functioning) of the political parties within the meaning of the constitutional obligation referred to in Article 6, paragraph 2 of the Constitution and inviting all democratic political parties and other participants in political life to, when acting under their natural, however harsh, political competition, refrain from mutual accusations pertaining to inheriting the burden of any former undemocratic regime; it would be preferable that parties find instruments of mutual dialogue to prevent the issues from the past from being asserted as an alternative for both current and future issues.

**ON SPECIFIC NORMATIVE REGULATION OF SYMBOLS, EMBLEMS AND
OTHER INSIGNIA OF TOTALITARIAN REGIMES AND MOVEMENTS**

ON THE SUBJECT MATTER UNDER CONSIDERATION

1. Concepts

This section examines the option of introducing a possible *special* legal regulation for the public use, i.e. use in public space of symbols, slogans, signs, markings, names, nicknames, titles, salutes, exclamations, movements, gestures, uniforms and parts of uniforms or other insignia of totalitarian regimes and movements of 20th century Europe, which were created or used on Croatian territories¹ in order to achieve the objectives described in item 1 of the first chapter of the Postulates and Recommendations (hereinafter: disputed insignia).

In the case of disputed insignia whose public use or use in public space legally qualifies as a call or incitement to violence, national, racial or religious hatred or any form of intolerance within the meaning of Article 39 of the Constitution of the Republic of Croatia, so that in such sense those insignia are also considered manifestations of hate speech, those disputed insignia in this part of the document are also referred to in abbreviated form as “disputed insignia of hate”.²

“Public use, or use in public space” of disputed insignia signifies wearing them on clothes or showing them in public in any other way, i.e. their public display or making them available to the public, their public glorification, the production of promotional material and the sale, import or export, or possession of said material in larger quantities, etc. The described public use and use in public spaces of disputed insignia in this part of the document are referred to by use of the abbreviated expression “public use” of disputed insignia.

“Totalitarian regimes and movements” relevant to the subject matter under consideration signifies fascism (including National Socialism, the Ustasha movement, and the Chetnik movement) and communism.

“Special legal regulation”, or “special legal governance” or “special normative measures”, signify a special law on the regulation of public use of the insignia of totalitarian regimes, i.e. an amendment to the criminal, misdemeanour and/or administrative legislation with special provisions on the public use of insignia of totalitarian regimes.

¹ The phrase “which insignia were created or used in Croatian territories” excludes from consideration those insignia of totalitarian regimes and movements of 20th century Europe, which were related primarily to other European countries (e.g. the Hungarian Arrow Cross symbol).

² For a review of the relevant international and European legal sources and of the European Court’s case-law on hate speech, see the judgment of the European Court in ***Perinçek v. Switzerland*** [GC] of 15 October 2015, No. 27510/08, especially §§ 66.99. and § 204.

2. Differences between non-normative and normative measures serving for reconciliation purposes

The group of non-normative measures serving for reconciliation purposes, which are given as examples in chapter four of Postulates and recommendations entitled “Proposals for certain measures for overcoming the consequences of undemocratic regimes” apply to all undemocratic regimes (tyrannies, dictatorships, despotisms, autocracies, totalitarianisms of all forms...). These and similar non-normative measures, especially those of educational nature, are the only ones capable of making an impact on the dissemination of knowledge among all generations of community members about the values of democracy and the importance and meaning of protecting human rights in a society based on the rule of law. Only thus, gradually, can one arrive at genuine internal social realisation of the fatality of all undemocratic regimes and movements, regardless of the form in which they appear or the “sign” that they bear, without this process being accompanied by external coercion from state authorities. It is also the only way that could lead to meeting the prerequisites for gradual awakening of compassion (empathy) of the nation towards the victims as such and their sufferings and thus, for a true and well thought out culture of memory to gradually take root in society.

The measures discussed in this part of the document are directed towards legal (normative) regulation of exclusively the symbols, emblems and other insignia that belong to the two totalitarianism regimes of the 20th century: fascism and communism “avowed enemies of democratic freedom” (François Furet). Normative measures directed at this limited subject matter of special regulation may in this respect be considered as a second group of possible measures serving for reconciliation purposes. However, as opposed to non-normative measures, normative ones are always backed by the coercion of state authorities which, by their very nature, presuppose restrictions and/or prohibitions, regardless of whether these restrictions or prohibitions are of an administrative or penal nature. Given the repressive nature of these special state measures, particularly in the area of freedom of opinion and expression, the need for their introduction should be carefully examined and the whole problem should be approached with extreme caution, rationally and with restraint, with full awareness that such a solution is the last, certainly not the first or the only means for achieving the goals of reconciliation, and least of all the most appropriate one..

In that sense, when deciding whether the disputed insignia should have special legal regulation, the following principle should be followed: in a democratic society it is not necessary, that is, there is no urgent social need for the legal system to resort to restricting or banning the right to freedom of opinion and expression, and other corresponding rights guaranteed by the Constitution, to solely satisfy the dictates of public sentiment, whether real or imaginary. And when it comes to disputed insignia of fascism and communism, society must remain rational in its judgment.³

³ European Court, judgment in *Vajnai v. Hungary* of 8 July 2008, application no. 33629/06, § 57. From this principle, it arises that all monuments that are erected on the territory of the state before the independence and autonomy of the Republic of Croatia, including those related to the Second World War and the period of the former SFRY and SRC, should be preserved and legally protected. They should be categorized for maintenance, among other reasons, so that it is clear which ones will be at the state level,

Lastly, one should always depart from the fact that the Republic of Croatia is represented solely and exclusively by the insignia of the statehood which it created itself, and which are set out in Article 11 of the Constitution of the Republic of Croatia and elaborated in the relevant law.

CONSTITUTIONAL FRAMEWORK

1. Obligation to comply with the Constitution

The constitutional framework for possible normative regulation of disputed insignia is firmly established, leaving the authorities no room for any substantive derogation. This is clearly stated in the Decision of the Constitutional Court No: U-II-6111/2013 of 10 October 2017 (Official Gazette 105/17):

“Public authority bodies, both at the state level and at the level of local and regional self-government, in the exercise of power, are also obligated to take into account the content value of the constitutional principles that make up the identity of the Croatian constitutional state. Therefore, they have no freedom of choice on whether or not to be loyal to the Constitution and its core values. On the contrary, their actions are limited by the Constitution.”

2. Relevant constitutional grounds

Set out below are the constitutional grounds by which the competent authorities would be legally bound in case of possible special normative regulation of disputed insignia.

a) **Historical foundations of the Constitution of the Republic of Croatia.** Their relevant parts are explained in several places in the Postulates and Recommendations.

b) **Article 1 paragraph 1 and Article 3 of the Constitution, both in light of Article 14 of the Constitution**⁴ determine the identity of the Croatian constitutional state. In Decision No: U-VIIR-4640/2014 of 12 August 2014 (Official Gazette 104/14) the Constitutional Court established the following:

“10.1. The Constitutional Court further recalls that the Constitution, as the fundamental legal act of the Croatian state, is not neutral in terms of values. Article 1 Paragraph 1 of the Constitution defines the Republic of Croatia as a democratic state.

and which ones at the local level.

⁴ Article 1, paragraph 1 of the Constitution states: “The Republic of Croatia is a unitary and indivisible democratic welfare state.” Article 3 of the Constitution states: “Freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia.” Article 14 of the Constitution states: “All persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other conviction, national or social origin, property, birth, education, social status or other characteristics. / All persons shall be equal before the law.”

Article 3 of the Constitution prescribes that, amongst other things, national equality, respect of human rights and the rule of law are the highest values of the constitutional order, which serve for the interpretation of the Constitution. All constitutional values must be realised without discrimination on any grounds (Article 14.1 of the Constitution).

Therefore, democracy founded on the rule of law and the protection of human rights is the only political model which the Constitution takes into consideration and the only one it accepts. Moreover, human rights and the rule of law in the context of the Croatian Constitution are established so that they are primarily intended to express the moral commitment to the objective principles of liberal democracy.”

c) **Article 38 of the Constitution** governs the right to the freedom of thought and expression.⁵ In light of **Article 16 of the Constitution**, the exercise of this right may only be restricted by law to protect the freedoms and rights of other people, as well as the legal order, public morality and health, while at the same time the restriction must be proportional to the nature of the necessity for restriction in each individual case.

d) **Article 39 of the Constitution** contains the following constitutional ban: “Any call for or incitement to war or use of violence, to national, racial or religious hatred, or any form of intolerance shall be prohibited and punishable by law.”

e) **Legally binding decisions of the Constitutional Court of the Republic of Croatia** and interpretative authorities of the European Court of Human Rights in Strasbourg, to which the Republic of Croatia transferred part of its judicial sovereignty in 1997.

REFERENCE POINTS FOR SPECIFIC NORMATIVE REGULATION OF DISPUTED INSIGNIA

The reference points for the specific legal regulation of the disputed insignia are derived from the Postulates and Recommendations and build upon them. This regulation must take into account the differences between particular disputed insignia in terms of their inherent meanings, but these distinctions between insignia do not affect and shall not affect the assessment of the totalitarian character of the very regimes to which they linked.

On the one hand, there are disputed insignia that are unambiguous because they are created precisely to identify the regimes or movements they belong to and are identified with them, and serve as a point of recognition of their criminal practice and genocide policy and/or mass murders, but also the creation of specific perceptions towards certain nations, such as antisemitism as defined by the

⁵ Relevant parts of Article 38 of the Constitution state: “Freedom of thought and expression shall be guaranteed. Freedom of expression shall particularly encompass ... freedom of speech and public opinion ...”.

International Holocaust Remembrance Alliance,⁶ of which the Republic of Croatia has been a member since 2005. In that sense, one can speak of *prima facie* disputed insignia of hate. This group includes the insignia of fascism in all its manifestations.

On the other hand, there are ambiguous disputed insignia. In this manner, the Yugoslavian totalitarian regime appropriated insignia that used to serve as symbols of the multi-ethnic Partisan resistance movement against fascism, even though crimes were also committed in the name of the struggle against fascism under those very symbols of resistance. The Partisan resistance movement was dominated by communists during the Second World War, and so crimes were committed under those same symbols even in the name of communism. It is a fact that in the war there were crimes committed by democratic states, no matter how incomparable they were in terms of scope and meaning. All these crimes must be remembered and condemned, their victims should be granted respect and compassion, and the memory of them should be preserved from oblivion. However, those crimes do not change the original meaning, sense and purpose of the Partisan resistance movement during the Second World War. Therefore, the insignia of the armed forces that fought on the territory of Croatia during the Second World War under communist leadership until 1 March 1945⁷ remain permanent symbols of the anti-fascist movement itself. Moreover, some of the insignia of the Partisan resistance movement were also linked to global workers' movements, which gives them a special dimension (the red star). However, it is indisputable that the insignia were historically compromised during and after the Second World War when they were appropriated and used for the purpose of establishing, justifying and maintaining the Yugoslav totalitarian communist "party and state" regime. To that extent those insignia are and remain disputed.

The described example also shows the following: discovering the truth involves different and even polemical perspectives. There are multiple different memories in Croatia and Europe with regard to the numerous occurrences and events from the 20th century totalitarian regimes and movements, so individuals may have their "own truth" about the events linked to them, from which their special relationship with the disputed insignia emerges. That is why multiple perspectives, i.e. the plurality of approaches needs to be taken into consideration if a private relationship to these events and their respective insignia is at issue. Private life as such must be respected under the conditions laid down in the Constitution and the European Convention on Human Rights.

⁶ "Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.", 27 June 2016, The International Holocaust Remembrance Alliance - IHRA, <https://www.holocaustremembrance.com/media-room/stories/working-definition-antisemitism> (accessed: 10 December 2017). For Holocaust see the European Court's decision *Garaudy v. France* of 24 June 2003 (no. 65831/01). For Holocaust denial and other statements relating to Nazi crimes see the European Court's judgment in *Perinçek v. Switzerland* [GC] of 15 October 2015, No. 27510/08, § 209 onwards.

⁷ The National Liberation Army of Yugoslavia (NLAY) was restructured on 01 March 1945 into the regular armed forces of Yugoslavia and renamed the Yugoslav Army.

Multiple perspectives, i.e. the plurality of approaches is inherent in the work of historians and other researchers. Their work, therefore, must be protected.

BASIC CRITERIA FOR SPECIFIC NORMATIVE REGULATION OF DISPUTED INSIGNIA

1. Blanket prohibition vs. qualified limitations and/or prohibitions of the public use of disputed insignia?

Taking into consideration the constitutional framework of the Croatian state and the reference points for possible specific normative regulation of the disputed insignia, the basic criteria that a competent regulator should follow when deciding whether to impose specific normative regulation of the disputed insignia, to what extent, scope and reach, could be summarised into several groups.

First, no prohibition or limitation of the public use of the disputed insignia shall apply to public use designed to serve civil education, deterrence from unconstitutional movements, promotion of art or science, research or teaching, reporting on current or historical events or similar purposes.

Second, it would be constitutionally unacceptable and contrary to the requirements of the European Convention on Human Rights to describe the disputed insignia in the normative text as ambiguous, indeterminate or general expressions such as “the insignia of totalitarian regimes”, “fascist insignia” and similar. The requirements of the rule of law, in particular of legal certainty and legal predictability, demand that one and all disputed insignia that is the subject of legal regulation is clearly and unambiguously determined or described in the normative text, so that anyone who publicly uses certain specific insignia is in a position of certainty to predict the consequences of their actions in practice.

Third, what must be taken as a basis is the fact that there is already a general (qualified) prohibition on the public use of all disputed insignia in the Croatian constitutional order and criminal and misdemeanour legislation. The existing misdemeanour and criminal legislation in this regard contains mechanisms for effective prevention and punishment of anyone who publicly uses the disputed insignia in a way prohibited by Article 39 of the Constitution. Therefore, when it comes to the normative framework, the only issue still open in the Croatian legal order is basically the admissibility of the blanket prohibition on the public use of the insignia.

Fourth, in light of the previous determination, possible special blanket prohibitions shall be directed only against unambiguous disputed insignia that are identified with the ideas of totalitarianism, and are in themselves their bearing symbols. Only such *prima facie* disputed insignia of hate could be subject to a special regime of blanket prohibitions.

Examples of such *prima facie* disputed insignia of hate are the fascist Roman salute, the so-

called Hitler salute accompanied by the words *Sieg heil*,⁸ the Nazi swastika, the Nazi “SS” emblem, the Chetnik cockade, the Ustasha “U”, the Ustasha salute “Za dom i poglavnika (For the homeland and its leader)” and “Za dom spremni (For the homeland ready)”.⁹

Fifth, it would not be appropriate for disputed insignia that (also) have other, positive meanings in the Croatian, European and/or international environments, and are not unambiguously recognized as insignia of hate (ambiguous disputed insignia) in Croatian circumstances or in all parts of the Republic of Croatia, to be subject to a blanket prohibition.

An example is the five-pointed red star, which is still in public use throughout Europe. The meaning of five-pointed red star is clearly defined by the European Court: “... it cannot be understood as representing exclusively communist totalitarian rule (...). It is clear that this star also still symbolises the international workers’ movement, struggling for a fairer society, as well certain lawful political parties active in different member States.”¹⁰

Another example is the Partisan salute “Death to Fascism - Freedom to the People” under which, on the one hand, the National Liberation Committee for Istria, on 13 September 1943, declared the annexation of Istria to the mother country and the “unification with the rest of our Croatian brothers” in a “Croatian Istria”, but which, on the other hand, immediately after the Second World War served as an ideological slogan for the communist authorities under which death sentences were signed, civil rights were stripped away and confiscation and nationalization comparable to massive crimes were enforced.

Regarding the possible legal regulation of these insignia, there is no satisfactory normative way of separating their different meanings, because on the one hand, they symbolize the Partisan anti-fascist resistance movement during the Second World War that includes the ideas protected by Article 38 of the Constitution and Article 10 of the European Convention on Human Rights, and on the other hand,

⁸ Compare the European Court's decision *Sugg and Dobbs v. Sweden* of 28 January 2001, application no. 45934/99.

⁹ With regard to Ustasha insignia, the Constitutional Court rendered the decision number: U-II-6111/2013 of 10 October 2017, in which it explicitly established that “the mentioned constitutional positions are not related only to the names of streets, settlements, **symbols** and similar, but also represent the Constitutional Court's general view of the character of the Independent State of Croatia as a negation of the fundamental values of the constitutional order of the Republic of Croatia” (item 18). See also, decision of the Constitutional Court number: U-III-2588/2016 of 08 November 2016. See also, judgment of the High Misdemeanour Court of the Republic of Croatia number: JŽ-188/2016 of 27 January 2016 in which it established that: “... the salute ‘For the homeland’ accompanied by the reply ‘Ready’, symbolises the official greeting during the totalitarian regime of the Independent State of Croatia, and as such represents the manifestation of racist ideology, contempt for other people because of their religious and ethnic affiliation, and the trivialization of victims of crimes against humanity.”

¹⁰ European Court, judgment in *Vajnai v. Hungary* of 8 July 2008 § 52 The hammer and sickle symbol also has a comparable ambiguous character. It also symbolises the proletarian movement and the struggle for a fairer society, as well as certain lawful political parties active in different EU Member States. Today it is also present on the flags and coats of arms of the two territorial units of the Russian Federation (on the flag of the Vladimir Oblast and on the coat of arms of the Bryansk Oblast in the Central Federal District). The largest Russian airline company, AEROFLOT/АЭРОФЛОТ, uses it on its logo.

they also symbolize the Yugoslav totalitarian communist “party and state” regime.

Accordingly, if the competent authorities decide to impose the specific legal (normative) regulation of the disputed insignia, the positive presumption of the freedom of their public use should apply to the previously described ambiguous disputed insignia. For the purpose of controlling their public use, if this is found to be necessary in a democratic society, the existing misdemeanour and/or criminal legislation applies provided that the requirements set out in Article 39 of the Constitution are met. If the requirements set out in Article 39 of the Constitution are met, it would not be unacceptable to explicitly prohibit their public use, which would, in the first place, depend on the legislator's assessment of the appropriateness of such a prohibition.

2. Possible exceptions to the blanket prohibition

Today, in Croatia, we are faced with a particularly sensitive situation which arises from the direct conflict of, on the one hand, a *prima facie* disputed insignia of hate which the Constitution rejects, and on the other hand, the official tolerance¹¹ of the unconstitutional practice of its public use on the insignia of a particular Croatian military unit during the legitimate and constitutionally justified struggle against the aggressors for the liberation of the country during the Homeland War. It is about the salute “Za dom spremni (For the homeland ready)”. Due to the failure of the competent authorities, for more than a quarter of a century, this salute has been *de facto* and *de lege* (also) linked to the Homeland War, which today serves (also) as proof in social discussions that the meaning of the disputed salute, that originated in the Ustasha regime, became ambiguous because of its use in the context of the just and legitimate Homeland War (hence it should be singled out and subjected to the regime of ambiguous disputed insignia). This proposition is not acceptable because it does not take into account the fact that even during the Homeland War this salute was contrary to the Constitution, however there was a lack of a proper official response, thus today we are faced with this salute as given.

11 Point 19 of the Decision of the European Commission of Human Rights in the case of *France, Norway, Denmark, Sweden, Netherlands v. Turkey* of 6 December 1983 (applications no. 9940/82 et al.) contains the definition “official tolerance” in the sense of the European Convention on Human Rights, on the example of torture. If this determination is applied to the case of the disputed insignia, official tolerance means the tolerance of the use or to use the disputed insignia, even though it is obviously unconstitutional, in the sense that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity; or that in judicial proceedings a fair hearing of such complaints is denied; or that no action taken by the competent authorities is at the level that is required to put an end to their repetition or to terminate the pattern or the system. In addition, the European Court put forth the following position: “It is inconceivable that the higher authorities of a State should be, or at least should be entitled to be, unaware of the existence of such a practice. Furthermore, under the Convention those authorities are strictly liable for the conduct of their subordinates: they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected.”

In such a situation, a democratic society must begin with the necessity of balancing, on the one hand, the public interest of the community so that this salute does not appear in the public space, and on the other, the right of a portion of Croatian defenders to respect of military insignia with the disputed salute under which (whether they wanted or not, accidentally or intentionally, unconsciously or consciously) they fought in the Homeland War for the Democratic Republic of Croatia. In other words, in the specific circumstances described, introducing an exception when it comes to the public use of the salute “Za dom spremni (For the homeland ready)” might be taken into consideration.

It is rational to conclude that this exception should be included in the regulations governing the rights of Croatian defenders, and could go in two directions:

- first, if certain Croatian military formations, originally established outside the regular defence and police units of the Republic of Croatia, used this salute as an “official” emblem on their flags, coats of arms, etc. in the period from 1991 to 1995, there would not have existed an obligation to remove the disputed salute from these insignia;
- second, the future admissibility of the public use of disputed military insignia should be strictly tied to events in which, in public places (including cemeteries), the defenders who were killed fighting for the Republic of Croatia under these insignia are honoured.

Besides the aforementioned exception, regulating this salute would still be identical to regulating all other *prima facie* disputed insignia of hate.

3. Disputed insignia of the aggressors to the Republic of Croatia 1990-1995

Due to the specific historical circumstances in which the former SFRY had collapsed with regard to the Republic of Croatia and the necessity of its defence in the Homeland War, possible blanket prohibitions could also focus on the insignia of the aggressors’ armed forces operating in certain parts of the Croatian state territory from 1991 to 1995, as well as on the insignia of self-proclaimed occupying authorities and parastatal creations of the so-called Republic of Serbian Krajina and the preceding “Serbian autonomous districts”, and “Serbian districts” created unconstitutionally on the territory of the Republic of Croatia as early as June 1990.¹²

This is also associated with the special problem of inscriptions - epitaphs on gravestones promoting the ideas on which the armed aggression on the Republic of Croatia was based from 1991 to 1995 or the aggression and/or ideas of Greater Serbia are glorified.¹³ By fairly

¹² Compare the Report of the Constitutional Court of the Republic of Croatia on the Constitutional aspects of the liberating operations of the Homeland War and the powers and duties of the armed forces of the Republic of Croatia connected with them, Class: 004-01/02-02/12, Reg. no.: 5030109-02-2 of 10 October 2002 (Official Gazette.133/02), particularly Title 2 “The unconstitutional creation of the so-called Republic of Serbian Krajina on the territory of the Republic of Croatia - a chronology of legal acts”

¹³ Today in Croatia there are gravestones with inscriptions-epitaphs such as the following in the local cemetery in the village of Borovo Selo: “Even now I see Borovo my native village, my brothers and sisters and Serbian fighters. They fiercely fight my battles, proudly raise their forehead and the Serbian flags stand high and hard on Serbian soil.” Source: <https://blog.vecernji.hr/sandra->

balancing the public interest and the principles of the so-called sanctity of the grave, separately and in the light of the right to freedom of expression, a possible decision by a democratic state to lay down specific administrative rules of behaviour in the cemeteries when it comes to these disputed inscriptions-epitaphs would not be constitutionally unacceptable, for example, by amending Article 11, paragraph 4 of the Cemeteries Act (Official Gazette 19/98, 50/12, 89/17).

CONCLUSIONS AND RECOMMENDATIONS

Even though in a democratic state based on the rule of law and the protection of individual human rights it is generally admissible to regulate the public use or the use of the disputed insignia of totalitarian regimes and movements in public spaces, admissibility still does not imply obligation.

It is an undeniable right of the Republic of Croatia, as a democratic state, to decide - starting with all the peculiarities of the social community and objectively assessing the problems it faces and the direction it moves in, and all in light of a proper assessment of the social consequences that the introduction of these specific normative measures may bring about - whether it is necessary to impose special administrative and/or penal measures concerning the public use of disputed insignia for the preservation and/or further development of a democratic society.

Should the competent bodies decide that it is necessary to impose such special measures, the Council's task will be to recommend a direction in which the legal system should move to achieve the purpose of reconciliation.

In doing so, the Council shall be driven by the social need for a clear and unequivocal condemnation of all crimes committed by totalitarian regimes and movements (fascist, Nazi, Ustasha, Chetnik and Communist) as well as the social need to encourage mutual understanding and to develop a culture of remembrance and a culture of compassion in order to curb existing antagonisms in society to a rational level. In this sense, the Council's basic recommendations are summarised in the following points.

1. Even though existing misdemeanour and criminal legislation contains mechanisms for effective prevention and punishment of anyone who publicly uses the disputed insignia in a way prohibited by Article 39 of the Constitution, the Council - guided by the principles of legal certainty and legal

sabljak/sramota-spomenici-koji-velicaju-krvnika-a-omalovazavaju-zrtvu-3436. Another example is a gravestone in the village Krnjak near the town of Karlovac with the following inscription-epitaph: "Killed by the MUP (Croatian Police) executioners and the Ustasha guards, on the bridge you gave your young life, for the Serbian people you proudly fell..." Source: <http://priznajem.hr/novosti/hrvatska/ministre-pogledaj-spomenik-cetniku-krvnika-mup-a-ustaskih-gardi/> (accessed on: 20 November 2017)

predictability - recommends a clearer normative regulation of their public use so that anyone who publicly uses certain particular insignia is in a position of certainty to predict the consequences of their actions in practice, specifically:

- a) The Council does not consider it unacceptable to explicitly prohibit the public use of all *prima facie* disputed insignia of hate, that is, the unambiguous disputed insignia that are identified with the ideas of totalitarianism, and are in themselves their bearing symbols. Examples of such *prima facie* disputed insignia of hate are the fascist Roman salute, the so-called Hitler salute accompanied by the words *Sieg heil*, the Nazi swastika, the Nazi "SS" emblem, the Chetnik cockade, the Ustasha "U", the Ustasha salute "Za dom i poglavnik (For the homeland and its leader)" and "Za dom spremni (For the homeland ready)";
 - b) The Council does not consider it unacceptable to prescribe the exception concerning the strictly limited legal possibility of public using the salute "Za dom spremni (For the homeland ready)" due to the circumstances surrounding the Homeland War, as described in Chapter 4, item 2 of this document (Possible exceptions to the blanket prohibition);
 - c) The Council does not consider the symbols of the anti-fascist struggle in the Second World War (for example, the red star) as disputed. On the other hand, they were clearly historically compromised during the Yugoslav communist rule, and next during the armed aggression against the Republic of Croatia, which is why they are (also) classified as disputed insignia. Therefore, it is not unacceptable to explicitly prohibit their public use or use in public spaces if the use violates human rights by inciting the use of violence, national, racial or religious hatred or any form of intolerance contrary to Article 39 of the Constitution. However, given that the general qualified prohibition of "hate speech" is already contained in the existing legislation and applies to these insignia, another qualified prohibition on the public use of these insignia, now explicit, would firstly depend on the legislator's assessment of the appropriateness its introduction.
2. The Council does not consider it unacceptable to impose an explicit prohibition on the public use of the insignia of former self-proclaimed occupying authorities and parastatal creations of the so-called Republic of Serbian Krajina and the preceding "Serbian autonomous districts", and "Serbian districts" on the territory of the Republic of Croatia (1990-1995).
 3. The Council does not consider it unacceptable to amend the Cemeteries Act with regard to the issue pointed out in Chapter 4 Point 3 of this part of the document (Disputed insignia of aggressors to the Republic of Croatia 1990-1995), concerning the legal regulation of disputed inscriptions-epitaphs on gravestones promoting the ideas on which the armed aggression on the Republic of Croatia was based from 1991 to 1995 or the aggression and/or ideas of Greater Serbia are glorified.

4. The Council does not recommend the adoption of a special law regulating the public use of the disputed insignia because such a special law is not necessary in Croatian circumstances and its adoption and implementation may bear outcomes contrary to those desired.
5. The Council recommends an elaboration of a specialised program to strengthen the capacity of administrative bodies and courts to implement the measures contained in Chapter 5 Indents 8 and 9 of the Postulates and Recommendations.

The Council members remain open for co-operation should the Government of the Republic of Croatia assess that their further contribution to resolving the issue of reconciliation in Croatian society is necessary or useful.

Zagreb, 28 February 2018

COUNCIL PRESIDENT

Zvonko Kusić, FCA