Complaint Form

For communications under:

- **Optional Protocol to the International Covenant on Civil and Political Rights**
- Convention against Torture, or
- International Convention on the Elimination of Racial Discrimination

Please indicate which of the above procedures you are invoking: **Optional Protocol to the linternational Covenant on Civil and Political Rights**

Date: **14 July 2016**

I. Information on the complainant:

Name: **DRAGAN (DANIEL)** First name(s): **VASILJKOVIĆ (SNEDDEN)**

Nationality: **AUSTRALIAN AND SERBIAN** Date and place of birth: **12 December 1954, Belgrade, SERBIA**

Address for correspondence on this complaint: **Ms. Sladjana Čanković, Attorney at Law, Preradovićeva 18/I, 10000, Zagreb, CROATIA. Tel/Fax: 03851/4854-715 ; Mob: 03851 99 528 2298. E-mail:cankovic.sladjanaodvjetnicki.ured@zg.t-com.hr; sladanacankovic@gmail.com**

Submitting the communication:

on his behalf: **1/ Ms. Sladjana ČANKOVIĆ. Preradovićeva 18/I, 10000, ZAGREB, CROATIA; 2/ Mr. Goran CVETIĆ, LL.M. (LSE), Gospodara Vučića 182, 11000, BELGRADE, SERBIA. Tel. +381 11 2414 953: Mob. +381 64 408 17 54; E-mail: gcvetic@gmail.com Both representatives are Attorneys at Law.**

on behalf of another person:

If the complaint is being submitted on behalf of another person:

Please provide the following personal details of that other person

Name: …… First name(s): ……..

Nationality: …… Date and place of birth: ……..

Address or current whereabouts: …….

If you are acting with the knowledge and consent of that person, please provide that person's authorization for you to bring this complaint **POWER OF ATTORNEY SUBMITTED**

Or

If you are not so authorized, please explain the nature of your relationship with that person: …… and detail why you consider it appropriate to bring this complaint on his or her behalf: ……..

II. State concerned/Articles violated

Name of the State against which the complaint is directed:

1) AUSTRALIA AND 2) CROATIA.

The continuous nature of human rights violations by both States.

Articles of the Covenant or Convention alleged to have been violated:

ARTICLE 2, ARTICLE 7, ARTICLE 9, ARTICLE 10 (1), ARTICLE 14, ARTICLE 15 AND ARTICLE 26 OF THE COVENANT.

Detention pending trial as from 20 January 2006 to 4 September 2009 (the first set of detention) AND from 12 May 2010 until the present day (the second set of detention). The continuos nature of human rights violations. Unlawful, arbitrary and excessive detention of nearly 10 years pending trial on merits by Australia and Croatia. Obvious risk of a flagrant breach of fair trial rights and indefinite arbitrary detention. Urgent request for interim or protective measures of relief in respect of CROATIA under the Article 92 of the Rules of the Procedure of the UN Committee on Human Rights - urgent request for unconditional VACATION of the author's further (investigative) detention and his immediate release by Croatia or for his conditional release by application of precautionary measures by which the author's further detention shall be vacated.

III. Exhaustion of domestic remedies/Application to other international procedures

Steps taken by or on behalf of the alleged victims to obtain redress within the State concerned for the alleged violation – detail which procedures have been pursued, including recourse to the courts and other public authorities, which claims you have made, at which times, and with which outcomes: **All domestic remedies have been exhausted both in Australia and in Croatia.**

If you have not exhausted these remedies on the basis that their application would be unduly prolonged, that they would not be effective, that they are not available to you, or for any other reason, please explain your reasons in detail: **N/A**…….

Have you submitted the same matter for examination under another procedure of international investigation or settlement (e.g. the Inter-American Commission on Human Rights, the European Court of Human Rights, or the African Commission on Human and Peoples' Rights)? **NO**……

If so, detail which procedure(s) have been, or are being, pursued, which claims you have made, at which times, and with which outcomes: ……

Iς. Facts of the complaint

Detail, in chronological order, the facts and circumstances of the alleged violations. Include all matters which may be relevant to the assessment and consideration of the particular case. Please explain how you consider that the facts and circumstances described violate your rights.

AUSTRALIA

1. The author was born in Belgrade, Serbia in 1954 and migrated to Australia in 1969, taking up Australian citizenship in 1975. He is citizen of Australia and Serbia. He was named Dragan Vasiljkovic at birth, but changed his name to Daniel Snedden when assuming Australian citizenship. He is said to have been the commander of a Special Purpose Unit of Serbian paramilitary troops during the Croatian-Serbian conflict in the early 1990s following the break-up of Yugoslavia. Croatia seceded from the former Yugoslavia and declared independence on 8 October 1991 thus as of that date severing all legal ties with the former Socialist Federative Republic of Yugoslavia. The Basic Penal Code of the Republic of Croatia entered into force on 22 March 1993.

2. In January 2006, the Republic of Croatia ("Croatia") issued a request to the Australian Government for the extradition of the author to Croatia. An *'extradition request'* is defined in Section 5 of the Australian Extradition Act 1988 ("the Act) as *'a request in writing by an extradition country for the surrender of a person to the country'*. He was arrested on 20 January 2006 in Sydney on the basis of that request. The author's extradition was sought so that he could be prosecuted for offences against Articles 120 and 122 of the Basic Penal Code of Croatia. Croatia alleged, in its request, that during June and July 1991 in Knin, in the Krajina region predominantly populated by the Serbs at the time, author did nothing to prevent members of the Unit who were his subordinates from mistreating captured members of the Croatian army and police and mistreated one such person himself. It also alleged that in February 1993 he commanded subordinate members of the Unit to interrogate and then execute two Croatian prisoners of war. These two "prisoners of war" were never named by Croatia and nobody knows who they are to this day. Those allegations formed the basis of the claimed contraventions of Art 122. In relation to the alleged offence against Art 120, he is said to have commanded members of the Special Purpose Unit and a tank unit of the Yugoslav People's Army to fire on a church and a school. The author denies the allegations. If convicted, the offences carry a maximum penalty of 20 years in prison. He was not formally charged by Croatia for any of the allegedly committed acts until 8 January **2016**, meaning that he was formaly indicted six months after he had been extradited to Croatia. Extradition took place on 8 July 2015 and author is presently in County prison in Split, Croatia awaiting the trial to begin. The indictment was formally confirmed on 13 June 2016 and the preparatory hearing is scheduled for 14 July 2016.

3. Author Dragan Vasiljković (Daniel Snedden) has spent a total of 8 years, 9 months and 10 days in the extradion detention in Australian prisons due to an extremely lenghty extradition procedure before the Australian courts. During that period he was denied bail and the right to effectively challenge the legality of his detention which thus became arbitrary. Further to the extradition on 9 July 2015 he is now imprisoned in Croatia in an "investigative detention" for more than 12 months awaiting trial. Thus his overall detention by Australia and Croatia is nearing the period of 10 years and the trial for the aforementioned offences is still to begin. It is for these reasons that the author is asking the UN Committee to act in accordance with Article 92 of the Rules and introduce the interim measures of relief in respect of Croatia in order to prevent the further flagrant violations of his human rights. Author claims the continuos nature of violations of his human rights, most importantly that his detention is excesivelly long, unlawful, abitrary and in breach of presumption of innocence, thus in contavention of Articles

9(1) and 9(4) of the International Covenant on Civil and Political Rights (ICCPR). His unlawful and arbitrary detention in Australia and Croatia has the same legal basis, source and purpose: prosecution in Croatia for the offences that he had allegedly committed in 1991 and 1993 respectively and for which he had never been tried as yet.

4. On 28 November 2005 the Šibenik County Public Prosecutor's Office in the Republic of Croatia submitted a request to a magistrate of the County Court of Šibenik ('the Šibenik County Court') for investigation into criminal offences allegedly committed by the author contrary to Articles 120 and 122 of the Basic Criminal Code of the Republic of Croatia during the conflict between the armed forces of the Republic of Croatia and the armed Serbian paramilitary troops of the Republic of Krajina. The author was said to have been a commander of a special unit of Serbian forces.

On 12 December 2005 the Šibenik County Court accepted the prosecutor's claim that there was a *'well-founded suspicion'* that the author had committed the alleged offences. On 10 January 2006 the Šibenik County Court ordered that a warrant for the author's arrest be issued. However, he was not indicted by Croatia for any offence until 8 January **2016**.

On 19 January 2006, in response to a request from the Republic of Croatia, the author was arrested in Sydney pursuant to a provisional arrest warrant issued under Section 12(1) of the Extradition Act 1988. On 20 January 2006 the author was remanded in custody pursuant to s 15 of the Act. The author made three unsuccessful applications for bail on 27 January 2006, 3 March 2006 and 12 December 2007.

Section 15 (6) of the Extradition Act sets high treshold conditions in terms of bail and reads: "A magistrate shall not remand a person on bail under this section unless there are special circumstances justifying such remand". As per the Explanatory Memorandum to the Bill: "a person shall not be granted bail unless there are special circumstances. Such a provision is considered necessary because experience has shown that there is a very high risk of persons sought for extraditable offices absconding. In many cases, the person is in Australia to avoid arrest in the country where he is alleged to have committed the offence, i.e. the person left the jurisdiction to avoid justice". That was not the case with the author. He was not in Australia to avoid arrest, but simply because he is an Australian citizen. He never knew that he was "wanted" for any offence in Croatia. He returned to Australia from Serbia in 2004. It is obvious that he never absconded from Croatia and proof for that is that only on 17 February 2006 Australia received an *'extradition request'* to extradite the author to the Republic of Croatia for offences allegedly committed in 1991 and 1993 respectively. Such a passage of time between the time of alleged offences (approx. minimum 13 to 15 years) and the date of extradition request by Croatia should have been found as "special circumstances" and estabilished by the Australian courts as ground for bail to be granted. That passage of time also proves that the motive for the Croatian request was (and still is) highly legally suspicious and unfounded, to say at least. As a consequence, the author remained in detention in a New South Wales correctional centre. By not remanding him on bail in such circumstances, Australia has violated Articles 9(1) and 9(4) of the ICCPR.

5. Although Australia has extradition treaties with about 80 states, there is no formal extradition treaty between Croatia and Australia as such. However, the Extradition (Croatia)

Regulations 2004 ('the Extradition Regulations') made pursuant to s 55 of the Extradition Act 1988 declare the Republic of Croatia to be an *'extradition country'*. An *'extradition country'* is defined in s 5 of the Extradition Act to include a country that is declared by the Extradition Regulations to be an extradition country. Explanatory Stetement issued by the authority of the Minister for Justice and Customs of Australia in respect of the said Regulations reads as follows:

EXTRADITION (CROATIA) REGULATIONS 2004 2004 NO. 339

EXPLANATORY STATEMENT
Statutory Rules 2004 No. 339
Issued by the authority of the Minister for Justice and Customs
Extradition Act 1988
Extradition (Republic of Croatia) Repeal Regulations 2004
Extradition (Croatia) Regulations 2004

" Section 55 of the *Extradition Act 1988* (the Act) provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 5 of the Act defines an 'extradition country' to include a country that is declared by the regulations to be an extradition country. Paragraph 11(1)(b) of the Act provides that the regulations may make provision for application of the Act subject to certain limitations, conditions, exceptions or qualifications.

The purpose of the Regulations is to:

• Terminate the application of the Act to Croatia subject to the limitations, conditions, exceptions or qualifications provided in the *Extradition (Republic of Croatia) Regulations 2003;* and
• Re-establish extradition arrangements with Croatia under regulations for that specific purpose, enabling Australia to consider extradition requests received from Croatia under a new extradition arrangement with Croatia.

The Act applies the modern 'no evidence' extradition procedure. Under this procedure countries are not required to present evidence establishing a *prima facie* case against the person sought.

The arrangements under the repealed *Extradition (Republic of Croatia) Regulations 2003* enabled Australia to consider extradition requests from Croatia where the requests complied with the requirements of the Treaty between the United Kingdom and Servia for the Mutual Surrender of Fugitive Criminals done at Belgrade on 6 December 1900 (the Treaty). The Treaty was brought into operation between Australia and Croatia by an exchange of Third Person Notes on 2 and 3 September 1996. A copy of the Treaty was set out in the *Extradition (Republic of Croatia) Regulations 2003.* The Treaty required Croatia to present evidence sufficient to establish a *prima facie* case against the wanted person in each extradition request made to Australia. The *Extradition (Republic of Croatia) Repeal Regulations 2004* ended this requirement, and the *Extradition (Croatia) Regulations 2004* re-established extradition arrangements with Croatia under regulations made without reference to the Treaty, enabling Australia to consider extradition requests received from Croatia under the 'no evidence' extradition procedure.

Extradition to Croatia under the *Extradition (Croatia) Regulations 2004* operates in accordance with the Act, subject to a modification, namely that an arrested person may apply to a magistrate for release after 60 days if a request for his or her extradition has not been received. The standard period under the Act is 45 days. Modification to apply a 60 day period is common and has been included, for example, in extradition agreements with Brazil, Chile, Hungary, Mexico, Paraguay, South Korea and the United States.

Extradition under the Regulations is subject to the various safeguards set out in the Act. For example, extradition would not be permitted where the fugitive was sought for or in connection with her or his race, religion, nationality or political opinions or would be tried, sentenced or detained for a political or military offence. In addition, the Attorney-General would retain a broad discretion to refuse an extradition request by Croatia in any particular case.

This action is consistent with the provisions of the Act. Similar 'non-treaty Regulations' currently provide that the Act applies to Denmark, Estonia, Iceland, Japan, Latvia, the Marshall Islands, Thailand, Cambodia, Lebanon, Jordan, the United Kingdom and Canada."

6. In determining that the Extradition Act 1988 in respect of Croatia (and a number of other states) envisages "the 'no evidence' extradition procedure under which countries are not required to present evidence establishing a *prima facie* case against the person sought", the Australian authorities do not either address nor envisage the possibility of discrimination between the persons sought by the countries with which Australia has formal extradition treaties which demand the *prima facie* evidence against the persons sought by those countries with which Australia has no extradition treaty and in respect of which the *prima facie* evidence is not required. Nor the Australian authorities envisage that such *prima facie* evidence might be and is required by the international instruments to which Australia is a signatory such as the The Third Geneva Convention in Article 129, in particular, which expressly require *prima facie* evidence that the person sought had in fact committed act(s) for which he/she is sought. For those reasons, author claims that his rights guaranteed by Articles 26 and 2 in conjunction with Article 14(1) of the ICCPR have been violated by Australia. The Extradition Act 1988, s 5 in particular, is not in accordance with the obligations that Australia has under the ICCPR, namely to guarantee the said ICCPR rights without discrimination. This violation was made very clear by reasonong of His Honour Gleeson CJ in paragraph 12 of the *Vasiljkovic v. Commonwealth* where he states:

"Australia's current extradition arrangements vary. Some include the (reciprocal) requirement of showing probable cause, or a *prima facie* case. Others do not. This topic was the subject of a 2001 Report by the Parliament's Joint Standing Committee on Treaties, which reviewed and criticised aspects of policy changes made by the 1988 legislation. According to the Report:

"In the 1980s, following the recommendations of the Stewart Royal Commission into drug trafficking and the failed attempt to extradite Robert Trimbole from Ireland, a government task force examined extradition law. Major changes to Australia's laws resulted in 1985, including the introduction of a 'no evidence' alternative to the *prima facie* case requirement. Under this option, the requesting country must provide a statement of the conduct constituting the offence, but need not provide evidence in support. When the various Acts were consolidated into the *Extradition Act 1988*, the 'no evidence' option became the default scheme. That option has been the preferred policy ever since, having been included in Australia's model treaty ... and is now embodied in 31 signed treaties."

And in paragraph 14 and paragraph 15 of the said Judgement Gleeson CJ concludes: " The "no evidence" scheme is reflected in the 2004 Regulations relating to Croatia. It is the scheme that is now commonly adopted in relation to countries which have civil law systems of justice. To

speak of a *prima facie* case requirement is perhaps an over-simplification, as there are differing approaches to the standard of evidence that may be required, but those differences are not of present relevance. The Report noted that, with the exception of the criminal justice agencies, most of the witnesses who gave evidence or made submissions to the Joint Standing Committee, who included legal experts, "supported the *prima facie* case requirement as a necessary and not particularly onerous safeguard of the rights of those whose extradition from Australia is sought". The Committee found it "incongruous that quite different standards of proof apply to extradition requests from Commonwealth countries and civil law countries, and that far more supporting evidence is required from countries whose systems of justice closely resemble Australia's". It did not favour the continuation of the "no evidence" model and recommended reconsideration of the current legislative policy. Those recommendations have not, or have not yet, been accepted.

Many lawyers would find it surprising that, in responding to a request from Croatia for the surrender to its criminal justice system of an Australian citizen, Australia's requirements for supporting information are less than its requirements in responding to a similar request from the United States of America. The question of supporting information is a matter that affects **human rights**, and involves an important issue of public policy. This Court's concern, however, is with legislative power, and that has been the focus of the argument. " **Thus the said discrimination has been estabilished in the case which will be subject of the particular examination in this communication.**

7. On 18 March 2006 the extant Minister of Justice and Customs issued a notice of receipt of the extradition request from Croatia pursuant to s 16 of the Extradition Act.

The extradition request was made in respect of the two alleged war crimes against prisoners of war, contrary to Article 122 of the Basic Criminal Code of the Republic of Croatia, and one alleged war crime against the civilian population, contrary to Article 120 of that same Code ('the extradition offences'). The request contained particulars of the extradition offences which allegedly took place in Knin in June and July 1991; in the village of Bruska near Benkovac in February 1993; and in Glina in July 1991. The request enclosed a copy of the Šibenik County Court decision and order.

An *'extradition offence'* is defined in s 5 of the Extradition Act to include, in relation to a country other than Australia, an offence against the law of the country for which the maximum penalty is death or imprisonment or other deprivation of liberty for a period of not less than 12 months, or if the offence does not carry a penalty under the law of that country, conduct which, under an extradition treaty in relation to that country, is required to be treated as an offence for which the surrender of a person is permitted by the country and Australia.

However, the extradition request by Croatia did not contain "the speciality assurance" expresly required by the s 22 of the Act so as to enable the Attorney General of Australia to act and make his discretional decission to extradite. In fact, that assurance was delivered by Croatia to Australia only on 21 September 2011. The speciality assurance means that the extradition country will not prosecute the person sought for no other offences than those stated in the extradition request. In this respect, it is obvious that the extradition request by Croatia was legally untidy and this undoubtedly contributed to the lenght of the detention.

8. Author brought an unsuccessful challenge to his arrest in the High Court of Australia, alleging that provisions of the *Extradition Act 1988* were invalid (*Vasiljkovic v Commonwealth*

(2006) 227 CLR 614). He then made two subsequent unsuccessful applications to the Federal Court for release (*Vasiljkovic v Minister for Justice* [2006] FCA_1346 and *Snedden v Croatia* [2007] FCA 1902). In the *Vasiljkovic v. Minister for Justice* before the Federal Court the author has instituted proceedings seeking an order in the nature of *habeas corpus* against the Minister and others. The Minister submitted the motion for adjourment claiming that the author will not be disadvanteged if the proceedings before the Court are adjourned until the magistrate has delivered the judgment. The Ministers motion has been accepted by the Court on 13 October 2006 and the proceedings were adjourned.

9. In *Vasiljkovic v. Commonwealth* the author sought a writ of habeas corpus from the High Court in its original jurisdiction after he was arrested on a provisional arrest warrant issued by an Australian magistrate under s 12 of the Act and remanded in custody under s 15. Bail was refused. The warrant was issued after the magistrate determined Vasiljkovic to be an 'extraditable person', defined in s 6 as a person against whom an 'extradition country', Croatia has issued an arrest warrant for an extraditable offence (in this case, war crimes allegedly committed in the Serbian-Croatian conflict in 1991 and 1993). After arrest and remand, Vasiljkovic's 'eligibility for surrender' was required to be determined by a magistrate under s 19 of the Act. It was common ground between the parties that, in issuing provisional warrants and making eligibility determinations under the Act, magistrates do not exercise the judicial power of the Commonwealth, but act in an administrative capacity as *persona designata*. Accordingly, Vasiljkovic's arrest and continuing detention had been imposed extra-judicially.

On 15 June 2006 the High Court held that the Act and the Regulations for the treatment of fugitive offenders properly fell within Parliament's power to make laws related to external affairs, conferred by section 51(xxix) of the Australian Constitution. Australia has no extradition treaty with Croatia, but extradition does not rely upon the existence of a treaty and the Regulations declare Croatia to be an extradition country. Extradition involves no determination of guilt or innocence. The Court held that the Constitution, either expressly or impliedly, did not prevent the "no-evidence" model of extradition from being a valid legislative choice. A magistrate determines whether a person is eligible for extradition – an administrative rather than a judicial process – and the person is only to be surrendered if the Attorney-General is satisfied that there is no extradition objection and if he or she is satisfied that the person will not face torture or the death penalty and will not be tried for additional or alternative offences. Although the *Administrative Decisions (Judicial Review) Act* does not apply to the extradition process, the Court said extradition decisions are subject to judicial scrutiny in the Federal Court. In accordance with international practice, Parliament has given the executive, subject to the requirements of the Act, the ultimate discretion to decide whether and upon what conditions a person shall be surrendered. The Court held that it is for Parliament to determine criteria for eligibility for surrender. It held that detention is not undertaken as punishment but as a necessary part of the extradition process due to a well-founded fear of flight by those facing extradition and to assist guilt or innocence to be determined in the requesting State.

His Honour Judge Kirby J strongly dissented.

His Honour observed in his *Vasiljkovic* dissent that "to arrest [Vasiljkovic]; deprive him of his liberty for an extended period of time; remand him without bail; confine him during the entire process to a general prison; house him with convicted offenders; and contemplate sending him to a foreign country without ever affording him substantive access to the independent courts of

Australia was a course of action that must be characterised as punitive". Kirby J asserted that a administrative detention could not be imposed without some level of 'substantive' judicial involvement. He reiterated this position describing extradition detention on a purely administrative basis as 'offensive to the Australian Constitution' and the 'libertarian constitutional imperatives normal to Australia'. Australia's 'no evidence' extradition model violates the rule of law norm that persons are entitled to due process, including a right to an independent judicial assessment of the facts supporting any allegation against them, before they may be subjected to detention. He suggested that international law prohibitions on 'arbitrary detention' reinforce rule of law requirements, strengthening the common law 'presumption in favour of liberty'.

In terms of Croatian accusations., Kirby J observed: " Self-evidently, the accusations, if they could be proved, are of a grave kind. Yet no evidence, attributed to identified witnesses, sworn, affirmed or otherwise formally taken, was provided to support the accusations. On the face of the decision, nothing more is shown than that the public prosecutors, in accordance with Croatian criminal procedure, had sought consent from the Croatian court to conduct an investigation and had provided that court with unspecified materials that ultimately convinced the court that the investigation request was well founded. The request appears to have relied on undisclosed interviews with eye-witnesses, participants and victims, as well as military documentation and other materials from "the meetings of the paramilitary troops officers ... under the direct command of the suspect himself".

In terms of detention and imprisonment, Kirby J described the conditions of the plaintiff's detention following his arrest. They were severe:

> "The plaintiff has been imprisoned in circumstances where he has been required to share prison cell with persons convicted of criminal offences and where he has been subject to the full rigours of prison discipline. He has had limits placed on his telephone communications with persons outside the prison and at times has been unable to contact his solicitors. Attendance upon him by his legal advisers at the prison has been hampered by the unavailability of separate interview facilities, with the result that he has had to provide instructions to his legal advisers in open areas of the prison to which other inmates had ready access."

Kirby J accepted Vasiljkovic's argument that the 'no evidence' extradition scheme 'failed to observe the proper place envisaged for the Judicature by the Constitution, in respect of governmental action that deprived a person of liberty' and that extradition should not have been possible 'until, lawfully, a judge had considered the evidence propounded against the plaintiff and determined that a case was established to warrant such a serious imposition upon his liberty.' A full-scale trial involving witnesses was, for Kirby J, neither constitutionally necessary nor feasible; rather, by analogy with detention pending trial under Australian law, it was sufficient that a court be able to consider whether the *prima facie* evidence test was met for continued detention and surrender. The mere involvement of a magistrate acting in an administrative capacity in issuing a provisional warrant and determining eligibility for surrender, subject to limited judicial review, was not enough to satisfy the requirement for a 'a public, transparent hearing by someone independent of the Executive Government'.

Kirby J in his dissenting opinion also stated that 'extradition countries' presently declared in the Regulations include some with judicial systems whose independence, impartiality, competence and freedom from corruption is not assured, and some that are known to have "well-reported defects that fall short of international human rights standards". He reiterated his argument that the Australian Constitution must be interpreted in its changing context and is 'subject today to the influences emanating from the international context in which it now operates' such that courts may have regard to international human rights law in construing constitutional doctrines. Accordingly, in finding a *prima facie* evidence requirement, he expressly referred to Article 9 of the ICCPR, prohibiting arbitrary detention and mandating that persons arrested or detained 'shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.

After expreessly citing the Articles 9 (1), (3) and (4) of the ICCPR Kirby J in the paragraph 162 of the Judgement in the following two paragaphs of the Judgment stated:

" The right to liberty, stated in this way, reflects the emphasis of the common law, consideration of which informs the interpretation of the Constitution by Australian courts. In a number of cases, the United Nations Human Rights Committee has upheld complaints against Australia in respect of Art 9 violations[152]. In one of those decisions, the Human Rights Committee reaffirmed its conclusion that a State party to the ICCPR places itself in breach of the requirements of Art 9 where: "there was no discretion for a court ... to review the [complainant's] detention in substantive terms for its continued justification. The Committee considers that an inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.

This reasoning would appear to apply with equal force where, as here, the complainant is an Australian national; is detained in severe prison conditions although on remand; is imprisoned in a fashion undifferentiated from convicted offenders; is denied bail except in "special circumstances" that are extremely difficult to prove; is restricted substantially to formal objections to his extradition; and is denied any consideration by an Australian court of the veracity of the hearsay assertions that alone constitute the propounded basis for his detention and removal in custody to a foreign country. "

Reference at 152 of the Judgement (dissenting) by Kirby J directly invokes cases ***A v Australia*** **(HRC No 560/93) and** ***C v Australia*** **(HRC No 900/99).** Also Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd ed (2004) at 312-315 [11.16], 315-317 [11.17], 342-343 [11.61].
In his conclusion Kirby J stated:

Conclusion: invalidity is established

" The result is that the plaintiff established the invalidity of so much of Pt II of the Extradition Act as failed to afford him consideration by an Australian court of whether the evidence upon which Croatia requested his surrender was sufficient in law to justify his apprehension and detention, and a subsequent surrender determination by the Attorney-General. It follows that the first question reserved in the special case should have been answered "Yes".

I can understand that this outcome would cause concern, particularly in light of the seriousness of the allegations made against the plaintiff. However, the outcome followed, in my view, because Croatia provided only unsubstantiated allegations to justify the arrest, detention, removal and surrender of the plaintiff. It supplied documents that referred to potential evidence that, by inference, existed. But it provided no such evidence whatever, sworn, affirmed or formalised in any way according to Croatian legal procedures.

No doubt, Croatia took this course because, under the Australian Extradition Act, accusations were all that were required to support an extradition request from Croatia. However, under the Australian Constitution, more, in my opinion, was required. Before a national (or any other person living under the protection of Australian laws) might lose liberty in such a way, and be subjected to a lengthy imposition upon that person's basic freedoms, a sufficient case for imposing such deprivations had to be demonstrated, in the form of evidence, provided to a judge or magistrate in one of the independent courts of Australia.

This conclusion would not mean subjecting each extradition request to a full trial on the merits in this country. However, it would mean permitting a court to examine evidence and to consider whether, if proved, such evidence would be sufficient to warrant the continued detention of the individual and the making of a surrender decision with its large consequences for that person's liberty. Self-evidently, such a decision is a serious one, particularly, one might say, where the person in question is an Australian national. It constitutes an exception to the protection that each nation State owes to people living under its laws. To comply with Australian constitutional requirements, in my view, it would be sufficient for the Parliament to revert to the scheme of legislation which existed prior to the precipitate adoption of the "no evidence" amendments in 1985. “

10. The author believes that these opinions of His Honour Kirby J are well founded and that they should have been timely observed by the Australian judiciary and the executive, especially taking into consideration the violations the Committee had found in *A v. Australia* and *C v. Australia*. The author stresses that His Honour Kirby J had timely noted and pointed out the two said cases especially in the light of the fact that in 2014 the violations found by the Committee in *Griffitths v. Australia* (HRC 1973/2010) were also based on the said cases. The Views of the Committe in *Griffiths* reinforce the position of Kirby J. In *Griffiths* the facts resemble the author's (except in terms of the lenght of detention*)* and the Committee found that two and a half years of extradition detention was excessive and arbitrary. The author, however, had spent over 8 years and 9 months in extradition detention in Australia. This is extremely alarming. Also alarming is that he is still in detention, now in Croatia. The author is expressly invoking the Views of the Committee in the said three cases and calls upon the Committee to adopt its Views in the present case based on them. This pertains to the violations of the ICCPR that he is claiming, *inter alia* Articles 9(1) and 9(4) of the ICCPR. The author also claims that his alarmingly excessive detention amounts to inhuman and degrading treatment prohibited by Article 7 of the ICCPR and that it deprived him of human dignity in violation of Article 10(1) of the Convention. In *Griffiths v. Austrlia* the Committee expressly stated: “ The State party is also under the obligation to take steps to prevent similar violations in the future. In this connection, the State party should review its legislation and practice, in particular, the Extradition Act No. 4 of 1988, as it has been applied in the present case, with a view to ensuring that the rights under articles 9 and 2 of the Covenant can be fully enjoyed in the State party.” The same Act was applied to the fate of the author. The said reasoning of the Committee only proves that Australia had committed the violations of the ICCPR the author is claiming. In addition, both Mr. Griffiths and the Committe in the *Griffiths* Views expressly cite the *Vasiljkovic* case as an illustration of the Australian violations of human rights under the Act. The *Vasiljkovic* case has been quoted twice in the *Griffiths* references in the Views in *Griffiths* adopted by the Committee on 21 October 2014.

11. In December 2006 the Magistrate conducted the inquiry pursuant to s 19(1) of the Extradition Act to determine whether the applicant was eligible for surrender to the Republic of Croatia in relation to the extradition offences for which his surrender was sought. Section 19(2) of the Extradition Act provides that the person whose extradition is sought is only eligible for surrender to the country seeking extradition if, inter alia,:

(d) the person does not satisfy the magistrate that there are substantial grounds for believing that there is an extradition objection in relation to the offence.

An *'extradition objection'* is defined in s 7 of the Extradition Act which relevantly provides:

" For the purposes of this Act, there is an extradition objection in relation to an extradition offence for which the surrender of a person is sought by an extradition country if (a)..., (b)...:
(c) on surrender to the extradition country in respect of the extradition offence, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or *political opinions*." (emphasis added).

The Magistrate was not satisfied that there were substantial grounds for believing that there was an extradition objection in relation to the extradition offences. The Magistrate determined that the author was a person who was eligible for surrender to the Republic of Croatia pursuant to s 19(9) of the Extradition Act in spite of the fact that the author claimed that Croatia was seekinig his extradition on the basis of his political opinions. On 12 April 2007 the Sydney Local Court ruled that he was eligible for surrender to Croatia. On 29 May 2007 his lawyer declared that Vasiljkovic was seeking review of the extradition decision. Author commenced proceedings in the Federal Court seeking review of that determination in (*Snedden v Croatia* [2009] FCA 30).

12. In the meantime, the author also (unsuccessfully) applied for bail in *Snedden v. Croatia (2007) FCA 1902).* In his application the author stated that in August 1991 he established a humanitarian fund in Belgrade for war victims called the Kapetan Dragan Fund. He stated that the fund had became the largest and most successful fund for war victims of all nationalities and that its records were used by the International Criminal Tribunal for the former Yugoslavia to identify areas of military conflict during the Yugoslavian civil war. Mr Snedden denied that he was guilty of any of the charges which led to the request for his extradition to Croatia.

Steven Platter, a video documentary producer currently residing in the United States was a close colleague of Mr. Snedden during four years of war in the former Yugoslavia. Mr Platter provided a character reference for Mr Snedden in which he stated that he was deeply impressed by Mr Snedden's professionalism as a soldier, and praised Mr Snedden's dedication to his charity foundation. Although Mr Platter's statement was unsworn the Court accepted its contents on the undertaking of Mr Snedden's counsel that a verified statement will be provided. Richard Schneider, an Austrian journalist, also provided a statement which the Court accepted on the same basis. Mr Schneider met Mr Snedden for the purpose of an interview in July 1991 and was later employed by Mr Snedden as a driver at a training centre for troops in the city of Benkovac. Mr Schneider categorically states that Mr Snedden did not commit the crimes during 1991–1993 for which he is charged and that such allegations are false, politically motivated and without factual foundation.

Other testimony contained in affidavits related to the provision of surety. Barbara Muntz and Michael Makulevich are the sister and bother respectively of Mr Snedden. Each has offered to provide their homes in Western Australia as surety for Mr Snedden's bail. The affidavits disclose that the residence of Michael Makulevich has a value of approximately $450,000 but is subject to an existing mortgage of $135,000. He is the sole owner. Barbara Muntz owns her house jointly with her husband, who has not provided evidence that he would agree to the surety proposal. The house has a value of approximately $450,000.

Nada Lukich-Bruce has also offered, if necessary, to provide her home as surety. It has a net value of approximately $720,000.

Mr Snedden submited that the circumstances surrounding his arrest and the low risk of his flight from Australia constitute 'special circumstances' justifying his release on bail within the meaning of s 21(6)(f)(iv) of the Act. He relied upon the fact that the alleged offences for which the warrant was issued for his arrest in Croatia occurred in 1991 and that no action by Croatia was taken until 2006. Mr Snedden pointed to the lack of any substantial evidence in the extradition documents and the long delay on the part of Croatia to request that the Australian Government assist in the extradition proceedings.

Mr Snedden submited that there is no evidence that he is '*on the run'* as stated by Croatia and that in fact he had resided in Australia since 2004. He submits that unlike the facts in *United Mexican States v Cabal* [2001] HCA 60; (2001) 209 CLR 165, there are no documents or other records which suggest that he would attempt to flee the jurisdiction. Mr Snedden refers to the observations of the High Court in *Cabal* 209 CLR at [57] which address the risk of flight and submits that there is, in the present circumstances, no evidence whatsoever to support the concern of risk of flight. Mr Snedden submits that he, unlike the applicant in *Cabal* [2001] HCA 60; 209 CLR 165 did not flee from any other country. He arrived back in Australia of his own accord in 2004 prior to any investigations being made into his activities. Mr Snedden refers to the warrant issued by the Minister of Justice of the Republic of Croatia which states:

> II. Pursuant to Art. 102, Paragraph 1, Subparagraphs 1&4, Criminal Procedure Law, CUSTODY IS ORDERED for Dragan Vasiljkovic which, according to his Decision, cannot last longer than one month as of the day of his arrest.

Author submitted that his detention was illegal since the warrant only stipulated for an imprisonment of up to one month.

13. In spite of this, the Court cited the Cabal case and refused the bail. The conditions in Cabal set the high treshold for bail to be granted:

In *Cabal* [2001] HCA 60; 209 CLR 165 at *[62]* the High Court said:

" Even when special circumstances are proved and there is no real risk of flight, it does not follow that bail must be granted. For example, the defendant may pose a risk to the community or a particular individual. In addition, bail must become harder to obtain as the case proceeds through the judicial system. Once the Magistrate has found that the defendant is eligible for surrender, public interest factors similar to those that require a convicted defendant to be imprisoned also require that a defendant in extradition proceedings be kept in custody. Before a Federal Court judge grants bail, the defendant ordinarily will need to show that the application for review has strong prospects of success as well as special circumstances and an absence of risk of flight." And further, if

the existence of special circumstances are proved which might justify bail, other considerations then arise:

" It is no doubt true that the test is not whether the proven special circumstances are such that it is not probable that the applicant will abscond. But it is not a question of whether the personal and other public interests outweigh the objects and rationale of the Act. Once special circumstances are proved, the Court must consider all the circumstances of the case, the chief of which is the risk of flight. If a real risk of flight exists, the proper exercise of the discretion will ordinarily require the refusal of bail. Conversely, if special circumstances are proved and there is no real risk of flight, bail may be granted unless the defendant may be a danger to the community or some specific individual."

In spite of all arguments forwarded by the author, the Federal Court on 12 December 2007 refused the bail due to the risk of him "absconding and no special circumstances". The Court stated that "the claim that Mr Snedden is being held in detention unlawfully because of the one month period prescribed in the Croatian warrant misconstrues the facts. The Croatian warrant does provide for his detention for no longer than one month. However that provision relates to his detention in Croatia, not in Australia." And further: " Incarceration without substantive judicial order is a consequence of Australia's extradition procedures. In *Vasiljkovic* [2006] HCA 40; 227 CLR 614 Gummow and Hayne JJ observed that the involuntary detention of a person forms part of the process under Part II of the Act. However, it is not the function of the Australian judicial process to determine the guilt or innocence of that person in relation to the offences with which that person is charged."

However, the Court never addressed the fact that Croatia did nothing to prosecute the author since 1991. In fact, Croatia made no single legal move in respect of the offences allegedly committed by him until 2006. The author claims that, *inter alia*, those were special circumstances that the Court has had to take into consideration, but it did not, violating his right to a fair hearing in suit at law by an impartial tribunal guaranteed by Article 14(1) of the ICCPR. He also claims that the Court, by refusing bail, had imposed further arbitrary detention upon him contrary to Articles 9(1) and (4) of the Covenant. The author now claims these violations before the UN Committee.

14. As stated before, the author challenged the decision by the Magistrate before the Federal Court of Australia (*Snedden v Croatia* [2009] FCA 30). In this case the author stated that an '*extradition objection'* is defined in s 7 of the Extradition Act which relevantly provides that his surrender to Croatia will amount to the breach of his political opinions. As stated before, the author challenged the decision by the Magistrate before the Federal Court of Australia (*Snedden v Croatia* [2009] FCA 30). In that case the author stated that an '*extradition objection'* is defined in s 7 of the Extradition Act which relevantly provides that his surrender to Croatia will amount to the breach of his political belieifs. In the first instance, the Federal Court on 3 February 2009 rejected his claims and all the evidence submitted, even the evidence of witnesses and OESC reports. However, the Full Federal Court accepted his claims in the Judgment of 2 September 2009 (*Snedden v Croatia* [2009] FCAFC 111).

As to the facts, the first instance of the Federal Court heard the following:

The author made several claims in support of his contention that, contrary to the Magistrate's finding, a valid extradition objection exists.

The author claimed that there was a risk that he will be prejudiced at any trial of the charges brought against him if he were extradited to the Republic of Croatia and tried before a Croatian court. The claim was based upon the involvement of the applicant as a prominent Serbian political and military figure in the conflict with Croatian forces in the disputed territory of the Krajina and Croatian animosity towards the applicant. The author claimed that '*Croatian hatred of me from the war has not abated and is on Croatian internet forums'*. He asserted that '*there are hardly any Serbs left in the Krajina after 1995 and they have no influence or role in the Croatian justice system'*. To that effect, it is the undisputed fact that the Croatian forces had expelled about 250,000 Serbs from the Krajina region in August 1995 to Serbia in the military action named "The Storm".

The author also claimed that the language of the extradition request prejudges the legality of the Serbian defensive action; prejudges the constitutional status of the parties; prejudges the war status; and indicates bias against the actions of the Serbian forces.

He submitted that witness evidence may have been corrupted during the investigative process, and that certain witnesses who could provide exculpatory evidence would be unwilling or unable to travel to the Republic of Croatia to testify because of their apprehension that action would be taken against them by Croatian authorities.

He also contended that, as a Serbian, the Croatian judiciary will be biased against him. In support of such submission, the author relied upon the disproportionate number of Serbians who have been charged and convicted of war crimes in the Republic of Croatia. The author claimed that there is a risk that he would be prejudiced at any trial of the charges brought against him if he were extradited to the Republic of Croatia and tried before a Croatian court. The claim is based upon the involvement of the applicant as a prominent Serbian political and military figure in the conflict with Croatian forces in the disputed territory of the Krajina and Croatian animosity towards the applicant. This was confirmed by the witnesses, Mr. Savo Štrbac and Ms. Linda Karadjordjević,who is the princess of the former Serbian monarchy of the former Yugoslavia.
Mr. Bajic, another witness, claimed in his evidence to the Magistrate that four police officers in the Republic of Croatia had questioned him on 8 August 2006 concerning his involvement with the training centre known as 'Alfa' in Bruska in 1993. He testified that the police officers offered him incentives to say that he saw the author mistreating prisoners in the Alfa training centre. However Mr Bajic's testimony is disputed by the statement of Mirko Lukic, one of the police officers who interviewed him. Just on that basis the evidence of Mr, Bajic was discarded. Richard Schneider, a journalist, testified that " **f***rom my association with Croatian solders I know that many Croatians have a deep hatred of Captain Dragan* (the author) *for him capturing the Krajina in June July 1991."*

The author also claimed that the language of the extradition request prejudges the legality of the Serbian action because it was called "an aggression" although the "aggression" on Croatia was not found to exist by any court; prejudges the constitutional status of the parties; prejudges the war status; and indicates bias against the actions of the Serbian forces. Finally, the author sought to rely upon a transcript of the evidence of Aernout Van Lynden taken on 2 June 2006 before the International Criminal Tribunal for the former Yugoslavia ('the ICTY') during the trial of Milovancevic, who was charged with war crimes. The particular passage relied upon relates to an incident wherein a Croatian policeman allegedly showed Mr Van Lynden a skull

on a desk inside the police headquarters in Glina. Upon the skull was written the name '*Captain Dragan'* (the author's nickname) and a bounty.

The applicant submitted that other witness' evidence may have been corrupted during the investigative process, and that certain witnesses who could provide exculpatory evidence would be unwilling or unable to travel to the Republic of Croatia to testify because of their apprehension that action would be taken against them by Croatian authorities.

The applicant also contended that, as a Serbian, the Croatian judiciary will be biased against him. In support of such submission, the applicant relies upon the disproportionate number of Serbians who have been charged and convicted of war crimes in the Republic of Croatia. Finally, the author claimed that the participation in the armed forces of Croatia represented the mitigating factor before the Croatian courts for those who participated and committed crimes by the Croatian forces. That was not the case with the Serbs. To this effect, the author relied on two OESC reports from 2006. The Federal Court of the first instance rejected his claims and found that no mitigation factor as to the author's political opinions existed.

15. However, the Full Federal Court of Australia overtutned this decision on 2 September 2009. The Court reitareted that the extradition request stated that the author was the commander of a '*Special Purpose Unit*' of '*Serbian paramilitary troops*'. The request refers to a number of events when '*the armed aggressor's Serbian paramilitary troops of the anti-constitutional entity the "Republic of Krajina"*' engaged in armed conflict in Croatia.

The author opposed extradition. He maintained before the primary judge and on appeal that there was an '*extradition objection*' such that he could not be extradited. Pending the resolution of the appeal, the appellant remained in custody.

Section 21(3) of the Act provides for an appeal from the judgment of a single judge of this Court to the Full Court of the Federal Court. A notice of appeal was filed which sought to advance three grounds of appeal more fully set forth in that notice but which might be summarised as being:

(i) a contention that the primary judge '*applied the wrong test in making findings on key areas of evidence as to whether or not the applicant was eligible for surrender to Croatia ...*';
(ii) a contention that the primary judge '*erred in failing to consider whether evidence that service for the Croatian forces was treated as a mitigating factor*' in sentencing '*gave rise to substantial grounds for suspecting that the appellant may be prejudiced, and/or detained, and/or punished by reason of his political beliefs, nationality, or race, in relation to a portion of his sentence*';

(iii) a contention that the conclusion of the primary judge that no extradition objection was made out '*was against the weight of evidence ...*'. In the event that this Court disagreed with the primary judge, the Court was invited itself to review the evidence with a view to forming its own conclusion as to whether the appellant had made out an '*extradition objection*'.

In the event that the Court disagreed with the primary judge, the Court was invited itself to review the evidence with a view to forming its own conclusion as to whether the author had made out an '*extradition objection*'.

The first and the third grounds of appeal were rejected. However, the second was found to be justified and successful.

The starting point for the second ground of appeal was to be found in two reports of the '*Organization for Security and Co-operation in Europe'* ('OSCE'). The independence of the OSCE was accepted by both the author and the respondent by the Magistrate in *Vasiljkovic*.

The passage in the first OSCE report relied upon by the author, published in March 2006, stated:

" The eight accused were sentenced to prison terms ranging from six to eight years. In setting the prison sentences, the court cited the role of the accused in defending Croatia against armed aggression as a mitigating factor. This type of mitigating factor is not applied by the ICTY [International Criminal Tribunal for the former Yugoslavia]. Not only does this politicize the verdict but it introduces a discrepancy into war crime sentencing largely correlated to national origin. Thus, the same crime committed by members of the Croatian armed forces is subject to lesser punishment than when committed by members of the former 'Krajina' or Yugoslav forces. The prosecution has indicated that it may appeal against the sentencing."

A second OSCE report, dated 13 September 2006 and 54 pages long, relevantly contained the following statement as part of its '*Executive Summary*':

" While diminishing in impact, ethnic origin continues to be a factor in determining against whom and what crimes are prosecuted, with discrepancies seen in the type of conduct charged and the severity of sentencing. ... Service in the Croatian army continued to be used as a factor to mitigate punishment. "

The report continued:

" The continuing use of "participation in the homeland war" as a mitigating circumstance to decrease punishment for members of the Croatian armed forces convicted of war crimes remains of concern. The Supreme Court confirmed the Osijek County Court's conviction of one accused in the "Paulin Dvor" case, but increased the sentence from 12 to 15 years, indicating that the trial court's application of this mitigating circumstance had not been properly balanced against aggravating circumstances. It did not, however, deem the application of this mitigating factor as inappropriate *per se*. In 2006, trial courts continued to apply this mitigating factor. The ICTY does not apply this type of mitigating factor and in the Mission's view, military service is not an appropriate sentencing factor." The said mitigating factor is not available to persons who served in the Serbian forces.

The Court stated that "The Republic of Croatia also submits that, if it is accepted that participation in the '*Homeland War*' (on the Croatian side) is not an appropriate sentencing factor in relation to offences committed in the course of that war, the fact that members of a certain group may inappropriately receive the benefit of that practice does not mean that members of another group are entitled to it. It submits that the relevant question for the purpose of considering whether there is an extradition objection is what will happen at the sentencing of the appellant and whether his sentence is increased for reason of nationality or political opinions. There is no evidence that the appellant's sentence would be increased because he fought on the Serbian side."

The appellant accepts that, if the court applies a sentence and then declines to apply a mitigating factor that may be available to another person, that does not constitute punishment, detention or restriction of liberty within the meaning of s 7(c) of the Act. He submits, however, that the evidence is that the courts apply the various factors, including aggravating circumstances and mitigating circumstances, as part of the process of deciding the sentence. This determines the period of deprivation of liberty and the punishment to be applied. He says

that the sentencing process itself involves a balancing of factors, so that the failure to apply the mitigating factor constitutes a positive act.

The Court found that available evidence supports the appellant's submission that the (Croatian) courts take a '*holistic*' approach to sentencing. From the two OSCE reports, it emerges that the Supreme Court of Croatia considered that the mitigating factor should be applied in the imposition of a sentence. Moreover, if convicted, the appellant will be '*detained*' and deprived of his liberty for a period longer than a Croatian counterpart. This treatment of the appellant thus falls within s 7(c) – subject only to whether it arises '*by reason of his or her race, religion, nationality or political opinions*'. "

The case advanced by the author was that the difference in treatment upon which he focuses arises '*by reason of his ... nationality or political opinions*'.

In its reasons the Court also stated: " Some guidance as to the manner of interpreting s 7 (c) may be gleaned from *Applicant A v Minister for Immigration and Ethnic Affairs* ; (1997) HCA 4; 190 CLR 225. There in issue was a claim to refugee status. A refugee was defined in part as being a person having '*a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*'. Dawson J relevantly observed:

" The words "for reasons of" require a causal nexus between actual or perceived membership of the particular social group and the well-founded fear of persecution. It is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared because of the person's membership or perceived membership of the particular social group": 190 CLR at 240.

Similarly, McHugh J also observed:

" When the definition of refugee is read as a whole, it is plain that it is directed to the protection of individuals who have been or who are likely to be the victims of intentional discrimination of a particular kind. The discrimination must constitute a form of persecution, and it must be discrimination that occurs because the person concerned has a particular race, religion, nationality, political opinion or membership of a particular social group. Discrimination – even discrimination amounting to persecution – that is aimed at a person as an individual and not for a Convention reason is not within the Convention definition of refugee, no matter how terrible its impact on that person happens to be": 190 CLR at 257."

In the application of the mitigating factor the Court stated that it was not "based on nationality, as it also seems to apply to Serbs who fought in the Homeland Army and does not apply to Croatians who fought with the Serb forces in support of an independent Republic of Krajina. The mitigating factor, however, operates by reference to '*political beliefs*'. The appellant's political beliefs concern what he describes in his Statement as '*the self determination of Serbian people in the Balkans in those areas where they constitute a majority'*, in particular in the Krajina. Serbs constituted a majority in the Krajina until they were removed by Croatian military forces in 1995. The appellant says that 't*here are hardly any Serbs left in the Krajina after 1995 and they have no influence or role in the Croatian justice system*'. The appellant's political belief is '*that the Krajina Serbs have a right to return to their homeland and are entitled to an independent state*'. He played a significant role as a military commander in the military conflict in the former Yugoslavia that began at Knin in June 1991, particularly the battle for Glina. The extradition request refers in express terms to the armed conflict in Knin '*between the armed forces of the Republic of Croatia and the armed aggressor's Serbian paramilitary troops of the anti-constitutional entity the "Republic of Krajina"*' in which the

appellant was a commander. It follows that the mitigating factor is applied by reason of a person's political beliefs. It follows that the appellant has established a substantial or real chance of prejudice and has thereby satisfied the onus of demonstrating that there is an extradition objection in relation to the extradition offence (*Rahardja*)."

The second ground of appeal is thus made out, that there are substantial grounds for believing that he may be '*punished*' or imprisoned and thereby '*detained*' or '*restricted in his personal liberty*' and that such treatment arises '*by reason of his ... nationality or political opinions*'.The appeal should thus be allowed."

It should be noted here that the Court in the reasons for the judgment relied not only on the OSCE reports, but also on the *Applicant A v Minister for Immigration and Ethnic Affairs case.*

The Court continued: " It was contended by the appellant that the risk of '*prejudice*' at trial, or the risk of the appellant being '*punished*' by reason of his race or political opinions, was also made out by reason of available statistics as to rates at which Serbians were being prosecuted and convicted as opposed to their Croatian counterparts.

The appellant's account of those statistics may be summarised by the following table:

	Total Number	*Croatians*	*Serbians*
Charged	1993	40	1953
Tried	586	Range: 3 – 9	Range: 577–583
Convicted	577	3	574
Tried but not convicted	9	0 – 9	0 – 9

Another way of expressing the same statistics is as follows:

	Croatians	*Serbians*
Numbers charged	40	1953
Numbers convicted	3	574
Conviction rate	7.5 %	29 %

In accordanace with the said, the Court allowed the author's appeal and ordered his release on 4 September 2009. Croatia appealed before the High Court after it was granted "a special leave to appeal". Subsequent orders were made by consent before Gummow J of the High Court on 25 February 2010, which included an order that the author surrenders all passports and other international travel documents to the Australian Federal Police. He complied.

16.There were two grounds of appeal by Croatia before the High Court in *Republic of Croatia v. Snedden* (2010) HCA 14, only one of which was pressed. The Court stated: "Omitting particulars, it was in the following terms":

> "The Full Court erred in holding that the Respondent had established an extradition objection in relation to the extradition offences for the purposes of s 19(2)(d) of the *Extradition Act 1988* (Cth) ... on the ground that the Respondent had established substantial grounds for believing that, on surrender to the Republic of Croatia in

respect of the extradition offences, he may be '*punished, detained or restricted in his ... personal liberty, by reason of his ... political opinions*.'" (italics in original)"

17. By an Order of 30 March 2010 the High Court overturned the judgment of the Full Federal Court of Australia. The Court especially focused its attention to the OSCE Reports relied upon by the author and the Full Federal Court. The first document is the four page document relating to the "OSCE Mission to Croatia" headed "News in brief: 22 February–7 March 2006". The second document is from the Headquarters of the OSCE "Mission to Croatia". It is headed "Background Report: Domestic War Crime Trials 2005" and is dated 13 September 2006. It is 54 pages in lenght.. Its Executive Summary stated: "Service in the Croatian army continued to be used as a factor to mitigate punishment." Its contents have been already generally cited and the OSCE, it is generally known, played an important observation mission during the conflicts in former Yugoslavia. In spite of that, the judges of the Australian High Court found that these Reports were "not convincing". In paragraph 100 of the Order His Honour Haydon J summarised the conclusions of the High Court as follows:

" It was suggested by the respondent (the author) that the OSCE reports had been accepted by the parties as having "authoritative status" in relation to the way in which Croatian sentencing laws were being administered. That is not so. Before the magistrate the parties agreed that OSCE was "a reliable and respected monitoring body". The Full Court recorded that the parties accepted the "independence of ... OSCE". It does not follow that the parties agreed that OSCE had authoritative status in relation to Croatian sentencing practice, let alone in relation to the extremely vague, indirect and second hand statements relied on by the respondent. It is no derogation from OSCE's status as reliable, respected and independent to conclude, which it is necessary to do, that the materials relied on to prove the "mitigating factor" are no more than uncorroborated assertions by unidentified persons of unproved legal training or experience sometimes relying on unknown sources." .

This position by the High Court is legally unfounded and can hardly be seen as impartial. It also represents the misrepresentation of the facts. First of all, the OSCE is one of the fundamental organisations for the protection of peace, security and co-operation in Europe. The result of its actions was the well-known Helsinki Final Act 1975 which represents the well established, if not major source of international law. This omission and misrepresentation by the High Court represent the grave error in law. It is difficult to believe that such an Organisation would rely on the materials which "are no more than uncorroborated assertions by unidentified persons of unproved legal training" especially having in mind its important role in the observation mission during the hostilities in the former Yugoslavia. It was placed in that position by the United Nations. For those reasons, the reasoning of the High Court of Australia of 30 March 2000 is directly in breach of the Articles 9(1), 9(4) and 14(1) of the ICCPR. The effect of the Order was catastrophic for the author. He was re-arrested on 12 May 2010 on the basis of the Magistrate's decision to remand the applicant in custody under s 15 of the Act and is in custody still.

19. In respect of OSCE, it was Serbia that presided the OSCE in 2014 – 2015. During the Conference held in Begrade on 23 April 2015 the Presidency was surrendered by Serbia to the Federal Republic of Germany. The present were all the Ministers of International Affairs of European states, as well as the US Secretary of State Mr. John Carrey. To diminish the role of such an Organisation and its Reports by the High Court in author's

opinion represents the error in law and the violation of Article 14(1) of the ICCPR in as that it violated his right to a fair hearing in suit at law by an impartial tribunal. The OSCE reports should have been treated as reliable and independent, as agreed by the parties, and as presenting the real state of affairs in terms of the Croatian sentencing practices. These practices are discriminatory and the impugned judgment of the High Court is thus in violation of Articles 26 and 2 in conjunction with the Article 14(1) of the Covenant.

20. The author stresses that the effect of the High Court Order of 30 March 2010 is in that it quashed The Full Federal Court judgment of 2 September 2009 and remmitted the case to the stage which preceded the Full Court judgment. The matter with which the High Court was seized had essentially represented a precedent. The matter was *res judicata* by the Full Federal Court. This is so because there was no difference between the issues with which the single judge of the Federal Court was engaged in the proceedings which resulted in the judgment of 3 February 2009 and the issues dealt with by the High Court. In both cases Croatia forwarded basically the same arguments and these were dismissed by the Full Federal Court. The High Court should have been aware of that fact. For this reason the author points out that there was no legal basis or justification for the High Court to have granted a special leave to appeal to Croatia. It was obvious that Croatia had no reasonable prospect of successfully prosecuting the proceeding or claim since no new legal issues were raised. For instance, both OESC reports were matter of an extensive examination by all the instances. Such actions by the Australian judiciary, and the High Court in particular, amount to arbitrariness and lack of predictability. This is especially so having in mind that the Australian legal system is the common law system.

In its well-established case law the European Court of Human Rights has repeatedly penalised the inconsistency of judgments in the factually same legal situations. For instance in the case of *Vinčić and Others v. Serbia (App. No. 44698/06 and others)* the applicants claimed that Serbian courts held differently in the same legal situations and under the same facts. The Government of Serbia in its response to the Court stated:

"The Government maintain(s) that there had been no violation of the Convention and argue(s) that the correct decision, pursuant to the relevant domestic law, was indeed to rule against the applicants. They (the Government) further noted that judicial precedent was not a binding source of law in Serbia, and emphasised that the domestic courts were independent in their work. Lastly, the Government pointed out that the inconsistency alleged by the applicants concerned the merits of their claims only, rather than any procedural issue, and did not involve the Supreme Court's case-law nor did it relate to any prior systemic and/or grave injustice. "

In spite of this response by Serbia in its Judgment of 1 December 2009 in the *Vinčić* case the European Court found the violation of the right to the fair trial guaranteed to the applicants by the Article 6-1 of the Convention. In the paragraph 56 of the judgment the Court stated: " The Court notes that whilst certain divergences in interpretation could be accepted as an inherent trait of any judicial system which, just like the Serbian one, is based on a network of trial and appeal courts with authority over a certain territory, in the cases at hand the conflicting interpretations stemmed from the same jurisdiction, i.e. the District Court in Belgrade as the court of last resort in the matter (see, *mutatis mutandis*, *Tudor Tudor v. Romania*, no. 21911/03, § 29, 24 March 2009), and involved the inconsistent adjudication of claims brought by many persons in identical situations even after the adoption of the District Court's "opinion" of 27 September 2006. Since these conflicts were not institutionally resolved, all this created a state of continued uncertainty, which in turn must have reduced the public's confidence in the judiciary,

such confidence, clearly, being one of the essential components of a State based on the rule of law. The Court therefore, without deeming it appropriate to pronounce as to what the actual outcome of the applicants' lawsuits should have been (see, *mutatis mutandis*, *Garcia Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999- I), considers that the judicial uncertainty in question has in itself deprived them of a fair hearing before the District Court in Belgrade. There has consequently been a violation of Article 6 § 1 on this account (see, *mutatis mutandis*, *Tudor Tudor v. Romania*, cited above, § 32, 24 March 2009). " (emphasis added)

It is for these reasons, *inter alia,* that the author claims the violation of his rights guaranteed by the article 14(1) of the ICCPR before the High Court of Australia in respect of the judgment of 30 March 2010. It violated his right to a fair hearing in suit at law by an impartial tribunal. The judgment of the High Court has introduced the legal unpredictability and abitrariness into the crucially sensitive issue of detention and civil liberties into the Australian legal system. The Views of the UN Commitee in the *Griffiths* case (2014) also confirm this point. In *Griffiths* the Committee found that his extradition detention of two and a half years by Australia was arbitrary.

21. As stated, the result of the High Court Order was that the author was re-arrested on 12 May 2010. He is in detention since that date both in Australia and in Croatia for over 6 years.The first set of detention in Australia lasted 3 years, 9 months and 10 days. The trial in Croatia is yet to begin. The author is now in overall detention for nearly 10 years without trial for the offences that he had allegedly committed and that he streniously denies. This excessive lenght of detention also amounts to violation of Art. 7 of the ICCPR (inhuman and degarding treatment) and calls for the urgent action by the UN Committee in accordance with Article 92 of its Rules.

In *Van Droogenbroek v. Belgium (Judgment of 24 June 1982, App No. 7906/77, A/50, (1982) 4 EHRR 443*) in the paragraph 48 the European Court of Human Rights stated:

" The object and purpose of the Article 5 – 1 is precisely to ensure that no one should be deprived of his liberty in an arbitrary fashion; consequently, quite appart from conformity with domestic law, no detention that is arbitrary can ever be regarded as "lawfull"."

In this respect, the author claims that the Australian judiciary had found against him exclusively relying on the interpretation of its own domestic laws, such as the Etradition Act 1988, without any respect for the obligations that Australia had adopted under the ICCPR and other international instruments and well estabilished standards of international law. For example, author states that the concerns and modern views pointed out by His Honour Kirby J in *Vasiljkovic* concerning the violations the Committee had found in *A v. Australia and C. v. Australia* had been completely neglected in the proceedings that followed. This makes the long deprivation of his civil liberties in the present case even more alarming.

The European Court of Human Rights in *Chahal v. United Kingdom* (*Judgment of 15 November 1996, App. No. 22414/93, 23 EHRR 413*) in the paragraph 118 stated:

" Where the "lawfullness" of the detention is in issue, including whether "a precudure in conformity "prescribed by law" has been followed, the Convention refers essentially to conform to the subtantive and procedural laws of national law, but it requires in addition

that any deprivation of liberty in addition should be in keeping with Article 5, namely to protect an individual from arbitrariness". The same judgment in paragraph 127. reads:

" The Court further recalls that the notion of "lawfullness" under paragraph 4 under Article 5 (Art. 5-4) has the same meaning as in paragraph 1 (Art. 5 -1), so that the detained person is entitled to a review of his detention not only in the requirements of the domestic law, but also of the text of the Convention, the general principles embodied therein and the aim of restrictions permitted by Article 5 paragraph 1."

In the same paragraph of *Chahal* the Court recalled its judgment in *E v. Norway (para. 49, Judgment of 29 August 1990, Series A No 181-A, page 21).*

This confirms that the author's detention in Australia was unlawful and arbitrary in violation of Articles 9(1) and 9(4) of the Covenant.

22. On 14 September 2010 the author challeged his further detention before the Federal Court of Australia in *Vasiljkovic v. O'Connor and Others*. In the proceeding at first instance, the author sought declarations and other remedies in relation to steps which had been taken, or which were to be taken, in response to a request for the appellant's extradition by Croatia. There were five respondents in the proceeding, three of whom were Commonwealth government ministers, namely, the Honourable Brendan O'Connor (Minister for Home Affairs), the Honourable Robert McClelland (Attorney-General), and the Honourable Christopher Ellison (the former Minister for Justice and Customs). The other respondents were Croatia and the Officer in Charge of Silverwater Prison (where the appellant has been held in custody at the time of application).

The principal relief sought by the author is an order in the nature of a writ of *habeas corpus*.

The author contended that an order in this nature should be issued on grounds including, *inter alia*:

(1) The invalidity of the provisional arrest warrant issued by the Magistrate under s 12(1) of the Act.

(2) The invalidity of the Magistrate's decision to remand the applicant in custody under s 15 of the Act.

(3) No warrant was issued by the Republic of Croatia for the arrest of the applicant for an offence or offences within the meaning of s 19(3)(a) of the Act.

(4) The extradition request required that the applicant was wanted only for questioning or interrogation by the Republic of Croatia.

(5) When the Republic of Croatia issued the extradition request and accompanying documents it also issued an English translation of these documents prepared by Croatian Government translators. The Courts in Australia, and in particular the Magistrates Court, the Federal Court and the High Court relied on the English translations which they assumed to be accurate. The English translations were in fact not accurate in that references to the applicant being charged with criminal offences should have read that he had been accused of criminal offences. Statements that an arrest warrant is issued or is to be issued should have been translated to read a wanted circular is to be issued to put the applicant on the wanted circular list. The reference to the issue of a warrant under Art 486 of the *Criminal Procedure Act* (Croatia) was incorrect.

(6) At the time the offences referred to in the extradition request were allegedly committed by the applicant, Arts 120 and 122 of the Croatian Criminal Code of the Republic of Croatia were not laws of, or in force in, that country.

The author submitted that a writ of *habeas corpus* is available as a remedy in all cases of wrongful deprivation of personal liberty, whether criminal or civil. There are distinctions between applications for the writ in a criminal cause or matter and applications made in a non-criminal cause or matter. A criminal cause or matter is one where there is or may be a penal element involved, for example, where the result of the proceedings may be the trial of the applicant and his possible punishment for an alleged offence whether by an internal court or by a foreign court claiming jurisdiction (*Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147 at 156). The words 'criminal cause or matter' should be construed widely (*Ex parte Woodhall.* According to the applicant, the writ of habeas corpus in this case concerns a criminal cause or matter.

The author submitted that the motion should not proceed until there is an agreed English translation of the extradition request and accompanying documents. According to the applicant, the Republic of Croatia supplied an incorrect translation, which among other things, referred to the issue of an arrest warrant and the charging of the applicant with criminal offences. It supplied a translation which the courts and parties accepted in good faith. As a result of the incorrect translation, orders were made by the various courts which should not have been made. It is not to the point for the moving respondents to submit, as they have, that the extradition request and accompanying documents including an 'arrest warrant' were tendered without objection or that the accuracy of the English translation was not previously raised. The courts and the parties were entitled to rely on the integrity of the Republic of Croatia and its translations which now appears to have been misplaced. The applicant submitted that all orders and decisions made based on misleading translations are void and should be set aside.

23. The moving respondents sought summary judgment and oppose a grant of leave to amend the application and statement of claim filed on 14 September 2010, on the basis that the applicant has no reasonable prospect of successfully prosecuting the proceeding or claim and the proceeding or claim is otherwise an abuse of the process of the Court, for the following reasons:

(1) The cause of action claimed by the applicant (namely, that he is unlawfully detained) has merged into judgment in a prior proceeding, and, as such, is *res judicata*.

(2) To the extent that the applicant claims, and seeks a declaration from the Court, that he is not an 'extraditable person', the pleading discloses no reasonable cause of action as this is not a claim that the Court can determine.

(3) The applicant raises issues that were not, but which, if he wishes to rely upon them, should have been litigated in earlier proceedings, such that he is estopped from raising those matters in a subsequent proceeding (*Anshun estoppel*).

(4) The bringing of this proceeding is an *abuse of process*:

(i) insofar as it is inconsistent with the result of the adjudication, adverse to the applicant, in the earlier s 21 proceedings, that the applicant be committed to prison pursuant to s 19(9) of the Act, which was confirmed on appeal by the High Court;

(ii) insofar as it is futile to seek a declaration that the applicant is unlawfully detained, without challenging the dismissal of the earlier s 21 proceedings and the consequent order of the

Magistrate pursuant to s 19(9) of the Act that the applicant be committed to prison. To the extent that such a (collateral or direct) challenge is made, it cannot succeed as the right or cause of action claimed has passed into judgment. To the extent that the applicant challenges the issue of a notice of receipt of extradition request pursuant to s 16 of the Act, it is futile to bring such a challenge as the work to be done by s 16 is spent once the magistrate has made a determination as to eligibility for surrender under s 19 and that determination has been confirmed by a court under s 21 of the Act.

(iii) on the basis of the applicant's unwarrantable delay in seeking the claimed relief, and the consequent fragmentation of the extradition process.

The Court in the judgment of 19 November 2010 accepted the moving respondents' arguments. The author's application was summarily dismissed. His writ for habeas corpus was dismissed as r*es judicata* before the Magistrate's court. His application was also declared as to be an "abuse of process". The Court held that the author's cause of action was *res judicata* as his cause of action has merged into the judgment in the author's prior proceedings. The author was estopped from raising issues which were not raised, but should have been raised in the earlier proceedings. The order in the nature of a writ of *habeas corpus* would be inconsistent with the Orders of the High Court of Australia in *Republic of Croatia v. Snedden* (2010) HCA 14 of 30 March 2010. This first instance judgment was upheld by the Federal Court on 30 September 2011 and the author's case was summarily dismissed without examination on merits. Such a judgment was brought about in spite of the fact that The Court was well aware of the fact that at that time the author had not been formally indicted/charged by Croatia. In fact, he was formally indicted on 8 January 2016 – six months after Australia had extradited him to Croatia. He thus remained in custody without any further possibility to challenge the legality of his further detention before Australian courts.

24. The author submitts to the UN Committee that the Federal Court erred in law. It rejected his objections and the case law he submitted for no convincing legal reasons. After he had spent 3 years, 9 months ans 10 days in the first set of detention and after being re-arrested, the author should have had his writ of *harbeas corpus* decided on merits. The Court declined to act in this way. It summarilly dismissed his writ. As the result, the author remained in an indefinate administrative detention in Australia. Such a detention can never be *res juditacta*. By dismissing his writ of *habeas corpus* as "*res judicata"* and as an "abuse of process" he was being in effect as of 30 September 2011 put at the disposal of the Australian state. This unfortunate situation actually did occur in the jurisprudence of the European Court of Human Rights in *Weeks v. United Kingdom* (*Judgment of 2 March 1987, 10 EHRR 293*), *Van Droogenbroek v. Belgium (Judgment of 24 June 1982, App No. 7906/77, A/50, (1982) 4 EHRR* and *De Wilde, Ooms and Versyp v. Belgium (No 1)* (1971) 1 EHRR 373.

In paragraph 40. of the *Weeks* judgment the European Court stated that Article 5 of the European Convention of Human Rights applies to everybody, whether persons free or in custody and that everybody is entitled for the protection by that Article.

The object and purpose of Article 5 of the ECHR is to ensure that no one should be dispossessed of his liberty in an arbitrary fashion, and its provisions call for a narrow interpretation: *Winterwerp v The Netherlands* (1979) 2 EHRR 387, 402, para 37. The "conviction" (undisputedly never made against the author by Croatia at the relevant time because he had not been either "indicted" or "charged") does not have to be lawful in order to satisfy this requirement, but the detention (by Australia) must have been. This

means that detention (i) must be lawful under domestic law, (ii) that it must conform to the general requirements of the Convention as to the quality of the law in question - its accessibility and the precision with which it is formulated and (iii) that it must not be arbitrary because, for example, it was resorted to in bad faith or was not proportionate: (see *R v Governor of Brockhill Prison, Ex p Evans (No 2)* [2001] 2 AC 19, 38E; *McLeod v United Kingdom* (72/1997/865/1065), para 41, ECHR *App. No. 24755/94, Judgment of 23 September 1998*).

In the paragraph 100. of the *Jecius v. Lithuania* (*Judgment of 31 July 2000*) the European Court (*App.no. 34578/97*) said:

" The Court recalls that that under Article 5 paragraph 4 an arrested or detained person is entitled to bring proceedings for the review by a court of the procedural or substantive conditions which are essential for the "lawfulness" of his or her depivation of liberty."

The European Court has made it clear from the earliest days that a clear distinction exists between decisions depriving a person of his liberty which are made by an administrative body on the one hand and by a court on the other. In *De Wilde, Ooms and Versyp v. Belgium (No 1)* (1971) 1 EHRR 373, 407, para 76 the Court said: "At first sight, the wording of article 5(4) might make one think that it guarantees the right of the detainee always to have supervised by a court the lawfulness of a previous decision which has deprived him of his liberty. … Where the decision depriving a person of his liberty is one taken by *an administrative body*, there is no doubt that article 5(4) obliges the contracting states to make available to the person detained a right of recourse to a *court*; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case, the supervision required by article 5(4) is incorporated in the decision; this is so, for example, where a *sentence of imprisonment is pronounced after 'conviction by a competent court'* (article 5(1)(a) of the Convention)." (emphasis added)

From this reasoning it follows that the legal approach taken by the Australian courts was wrong. No "sentence of imprisonment" has ever been pronounced after 'conviction by a competent court' in respect of the author.

There is no doubt that the author was held by Australian courts as to be in an administrative detention and that he had not been during that period charged/indicted by Croatia for any criminal offence. In spite of that, the order of detention was "recalled" by an Order by the High Court (*Republic of Croatia v. Snedden* (2010) HCA 14) on 30 March 2010 in accordance with the administrative Magistrate's decision. He was re-arrested on 12 May 2010. His writ of *habeas corpus* that followed was not, and should have never been considered as incorporated in the Magistrate's custody decision and declared as *res judicata*. Such a legal position of the Australian judiciary begs the UN Committee to find it to be far from the estabilished European Court's case law and the case law of its own. This is because a *sentence of imprisonment, inter alia,* had not been pronounced after "*conviction by a competent court"*.

In that respect, in para 45 of *Van Droogenbroek* the European Court said*:*

" As has been pointed out in subsequent judgments this passage (*76 of De Wilde, Ooms and Versyp v. Belgium*) speaks only about the initial decision of depriving his liberty and

it does not purport to deal with an ensuing period of detention in which new issues affecting the lawfulness of detention might arise".

In *De Wilde, Ooms and Versyp v. Belgium* the European Court ominously stated in para 64:

"The most significant feature of detention ordered in connection with placing at the Government's disposal is, as has already been pointed out, the relative indetermination of its duration. Depending on the case and the relevant administrative decisions, it may vary from nothing to ten years. No minimum duration is fixed by the law *or the court*; the detention may continue for a maximum period of 10 years, without the court which ordered the measure exercising the least control over it. In fact, the administration is responsible for adjusting the penalty to the circumstances of the individual." [emphasis added]

In the author's case, the Australian Extradition Act 1988 prescibed no limit for his detention. It could have lasted over 10 years.

In *Sakik and Others v. Turkey (Judgment of 26 November 1997, Report of Judgments and Decisions 1997 – VII, p. 2625, para. 53)* the European Court stated:

" According to the Court's case law, Article 5 paragraph 4 of the Convention refers to the domestic remedies that are sufficiently certain, otherwise the reqirements of accessibility and effectiveneess are not fullfilled".

In the paragraph 42 of the (extradition) Judgment of *Kadem v. Malta o*f 9 January 2003 *(App. No. 55263/00)* the European Court said:

" The review reqired by the Article 5 paragaph 4, being intended to establish whether the individual's deprivation of liberty is justified, must be sufficiently wide to encompass the various circumstances militating for and against the detention".

And in the crucial paragraph 9.4 in *A v. Australia* the UN Committee concluded: " The Committe obseves...that every decision to keep a person in detention should be open to review periodically so that grounds justifying detention can be assessed".
25. The author invokes the cited case law of the international bodies. He claims that he had been deprived of the said rights by Australia. The author claims the abuse of power in respect of Australia because his writ of *habeas corpus* was summarily dismissed. In addition, appart from his *habeas corpus* claim, he contends that his overall detention in Australia was excessive and arbitrary in violation of Articles 9(1) and (4) of the Covenant.

26. The Australian judiciary is well aware of the English common law. It is well established in English law that even when the (administrative) decision to detain in the first instance was technically right, the detention can be challenged by the writ of *habeas corpus* if it is against the basic principles of common law. Those are the cases where the detaining organ was acting in abuse of its powers, acting in bad faith, caprissously and for wrongful purpose. The leading cases for these are *R. v. Governor of Brixton Prison, ex parte Sarno (1916), 2 King's Bench 742 and R. v. Brixton Prison (Governor), ex parte Soblen (1962), 3 All England Law Reports 641.* At the same time, the detention decision can be challenged if it was made in absence of sufficient evidence *or* if it is such that no reasonable person should have hade made it *(Shahid Iqbal, /1978), 3 Weekly Law Reports 884 and Zamir v. Secretary of State (1980) 2 England Reports 768)*. The author

invokes these cases in respect of the summary dismissal of his writ for *habeas corpus* after his re-arrest on 12 May 2010. The Australian judiciary acted in the contravention of the quoted case law.

For its part, Croatia never provided sufficient evidence for its claims and Kirby J duly recorded that fact in *Vasiljkovic* in 2006. Croatia never charged the author before 8 January **2016**. The time elapsed between the alleged offences in 1991 and 1993 and the Croatian "action" in 2016 is a legal malfunction, to say at least. The author claimes that Croatia provided **all** Australian courts and organs, not only the Magistrate, with wrongful translations. This allegation should have been duly examined by the Australian Federal Court and accepted as such. It never was.

Finally, the author claims that Australian judiciary should have been aware of the international law and practice and should have been aware of the House of Lords in *Regina v. Parole Board and another (Respondents) ex parte Giles (FC) Appenlant (Session 2002-03, 2003 UKHL 42, on appeal : 2002 EWCA Civ 951)* of 31 July 2003. In that decision the Lords extensivelly analysed the Strasbourg jurisprudence which confirms the author's claims. The Lords in that case cited and examined the practice of the European Court in respect of unlawfull and arbitrary detention. Australian courts, on their part, have failed to examine their laws in the light of the ratified international obligations such as the ICCPR, English laws, the European Court cases and other standards and obligations Australia had adopted in the light of international law. Thus the actions of Australian courts in the present case are in violation of Articles 9(1) and 9(4) of the Covenant.

25 On 15 November 2012 the Minister of Justice of Australia decided that author is eligible for the surrender to Croatia under Section 22(2) of the Extradition Act 1988. The author challenged this decision in ***Snedden v Minister for Justice* [2013] FCA 1202.**

The extradition procedure of Australia is contained of four stages: (1) Commencement; (2) Remand; (3) Determination by a magistrate of eligibility for surrender; (4) Executive determination that the person is to be surrendered.
In summary form, the scheme is as follows: The commencement of proceedings is by the issue of a provisional warrant under s 12(1) or by the giving of a notice under s 16(1). Once arrested, the person is required by s 15 to be taken before a magistrate and remanded in custody or on bail for such period as may be necessary for eligibility proceedings to be taken under s 19. Where a person is on remand under s 15 and the Attorney-General has given a notice under s 16(1), provision is made under s 19 for a magistrate to conduct proceedings to determine whether the person is eligible for surrender. If eligibility is so determined by the magistrate, provision is made by s 22 for the Attorney-General to decide whether the person is to be surrendered.

26. Section 22(2) of the Australian Extradition Act (1988), as appiled to the author, provides as follows:

" The Attorney-General shall, *as soon as is reasonably practicable,* having regard to the circumstance*s*, after a person becomes an eligible person, determine whether the person is to be surrendered in relation to a qualifying extradition offence or qualifying extradition offences." (emphasis added)

Section 22(3) of the Act sets out a list of conditions that must be satisfied for a person to be surrendered. As is relevant to the issues on the author's appeal, it provides as follows:

For the purposes of subsection (2), the eligible person is only to be surrendered in relation to a qualifying extradition offence if:

(d) the extradition country concerned has given a speciality assurance in relation to the person;

....and

(f) the Attorney-General, in his or her discretion, considers that the person should be surrendered in relation to the offence.

27. The author challenged the Minister's decision before the Federal Court on three grounds. Mr Snedden's first ground is that by the time the Minister made his decision on 15 November 2012, his power under s 22(2) had expired as a consequence of unreasonable delay ("**the delay ground"**). Mr Snedden's second ground ("**the procedural fairness ground"**) was in as that he was denied procedural fairness by the Minister by reason that:

(a) he was not informed about, nor given an opportunity to respond to, adverse material that the Attorney-General's Department ("the Department") had obtained from the Croatian authorities;

(b) he was not informed about further communications between the Department and Croatia concerning the speciality assurance that Croatia had provided for the purposes of s 22(3)(d) of the Act and was not provided with an opportunity to respond to further information from Croatia in relation to the speciality assurance; and

(c) he was not informed that the Minister was intending to surrender him to Croatia "in violation of Australia's obligations under the Geneva Conventions" and was not given the opportunity to be heard on the issue of Australia's compliance with those obligations.

Mr Snedden's third ground **("the legal errors ground"**) is that jurisdictional errors of law were made by the Minister in exercising his discretion under s 22(3)(f) because the Minister:

(a) relied on incorrect legal advice that Australia could extradite Mr Snedden to Croatia pursuant to the extradition request without *prima facie* evidence of the offences in respect of which extradition is sought; and

(b) failed to consider whether Mr Snedden has protected status under Geneva Convention III as as a prisoner of war and whether the protections owed to him under Geneva Convention III as a prisoner of war would be breached by Croatia if he is surrendered.

28. The first appeal ground was rejected in spite of the fact that the author relied on the precedent. He argued, relying on *Santhirarajah v Attorney-General (Cth)* [2012] FCA 940; (2012) 206 FCR 494 *('Santhirarajah'),* that the Minister had lost the power to make a decision under s 22(2) of the Act by the time that he came to make it because he failed to act "as soon as [was] reasonably practicable, having regard to the circumstances". In *Santhirarajah,* His Honour North J held that the Attorney-General no longer had the power to surrender a person under s 22(2) once the time stipulated by that section has passed. North J reasoned at [74] that

the ordinary and natural meaning of the language of the section pointed to a meaning that the power ceased to exist if it was not exercised within time:

" First, the section specifies a time limitation. Second, that limitation is expressed emphatically – "as soon as". Third, the limitation is provided with a degree of flexibility – "reasonably practicable". By providing the Attorney-General with some leeway, this element suggests that the power is intended to be exercised without delay once circumstances, objectively assessed, render it reasonably practicable to do so. Finally, the word "shall" construed in the context of the Act, ought to be given its ordinary prescriptive meaning." Accordingly, the Minister has defaulted.

The Minister objected and argued that North J's construction was contrary to the legislative scheme. He submitted that the failure by the Minister to make the s 22(2) decision "as soon as is reasonably practicable" did not deprive him of the power to make it but, rather, that the author should seek remedy of *mandamus* to compel him to make the decision upon which the statutory scheme operates in respect of which the Minister has a continuing duty. Thus the Minister put yet another legal burden on the author - to seek *mandamus* and force him to act.
Her Honour Davies accepted the Minister"s argument and overturned the precedent invoked by the author, stating in para 17 of the Judgment:

" It is well established that a single judge of this Court should, as a matter of judicial comity and precedent, follow the decision of another single judge of this Court unless persuaded that the earlier decision is clearly or plainly wrong. It is also well established that a single judge should not lightly depart from an earlier single judge decision where the correctness of that decision is a matter on which minds may differ, and particularly so on questions of construction... The Court must nonetheless still give independent consideration to the proper construction of s 22(2) and, upon doing so, I have respectfully formed the view that North J fell into error in his approach to construction of s 22(2) and that the construction that his Honour gave to s 22(2) is clearly wrong." Thus the first ground of the appeal was dismissed by Her Honour Davies J in the judgment of 15 November 2013. That decision was upheld by the Full Federal Court of Australia in the second instance judgment of 12 December 2014. In the meantime, the proceedings were as follows.

29. Upon his re-arrest on 12 May 2010, on 14 May the Department of Justice has written to Mr Snedden advising him that he was entitled to make representations to the Minister as to why he should not be surrendered to Croatia. The letter requested any representations by close of business on 15 June 2010. This deadline was extended to 25 June 2010 at the request of Mr Snedden's lawyers.

The authot invoked the Article 129 of Geneva Convention (III) relative to the Treatment of Prisoners of War to which Australia is a party which in paragraph 2 reads in particular:

" Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if its prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out

a ***prima facie case***"**.** Croatia never provided *prima facie* case nor was required to do so by Australia.

29. Between May and mid-July 2010, the Department received representations from Mr Snedden and from other persons and organisations as to why the author should not be surrendered to Croatia. The Department reviewed all the representations and determined that there were eight issues raised by Mr. Snedden in the representations on which "it was appropriate to provide Croatia with the opportunity to respond." These were:

(1) the lack of reciprocity in Australia's extradition relationship with Croatia, including that Croatia is not able to consider extradition requests made by Australia, and even if it can consider requests from Australia, that Croatia will not extradite its citizens to Australia;

(2) that Mr Snedden is not wanted for prosecution in Croatia, rather he is wanted merely for investigation in relation to the alleged offences;

(3) that Mr Snedden will not receive a fair trial in Croatia, with reference to the alleged bias of the Croatian judiciary against Serb defendants in war crimes proceedings and the alleged corruption of prosecution witnesses in Mr Snedden's case;

(4) concerns that Mr Snedden will not be safe in custody in Croatia, and that the safety of defence witnesses may be jeopardised if they travel to Croatia to give evidence at Mr Snedden's trial;

(5) the delay between the time of Mr Snedden's alleged offences and Croatia's extradition request, and possible implications for a fair trial in Croatia;

(6) the alleged political motivation behind Croatia's extradition request;

(7) that Croatia made an incorrect reference to criminal procedural laws in the extradition request which would not apply to Mr Snedden, and

(8) that Croatia made incorrect reference to the offences alleged against Mr Snedden in the extradition request and that Mr Snedden's alleged conduct does not relate to the 'correct' offence provisions.

In September 2010, the Department received a response from Croatia in relation to the list of questions . Mr. Snedden was not granted access to the response. Croatia provided a speciality assurance on 21 September 2011. There were further communications between the Attorney-General's Department and Croatia that were not disclosed to the author. Croatia formally advised in May 2012 that there were "no other proceedings against him aside from those in the extradition request. "

30. In June 2011, the Australian Department of Justice sought advice internally from the Office of International Law ("**OIL"**) regarding the question of whether international law, Article 129 of Geneva Convention (III) relative to the Treatment of Prisoners of War in particular, invoked

by the author, requires that an extradition request for Mr Snedden for the conduct alleged must be supported by *prima facie* evidence.

31. On 13 February 2012 the officers from the Department who were working on the legal submission received legal advice after nearly 8 months from the Department's Office of International Law (OIL). This legal advice had first been requested in June 2011. The content of this advice is relevant to one of Mr Snedden's grounds of appeal. The advice requested was whether "international law require[d] that an extradition request for Mr Snedden for the conduct alleged be supported by *prima facie* evidence". In spite of the express language of the Art. 129 of the Third Geneva Convention, the short answer provided by the OIL was in the following terms:

> " No. International law does not require that the request for Mr Snedden's extradition be supported by *prima facie* evidence, regardless of whether the offences for which his extradition is being sought were committed in the course of an IAC [International Armed Conflict] or a NIAC [Non-International Armed Conflict]. "

The advice was provided some seven and a half months after the request was made. The negative answer of "OIL" was based on the construction of terminology, rather than on the substance. Noting that the Article 129 states that parties may either prosecute grave breaches of the Convention or "hand over" persons, provided that the other party "has made out a prima facie case", OIL advised "that "handing over" is distinct from extradition" and referred to Article 88 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Protocol I, 1977".

However, the author provided the first instance Court with two expert opinions by Professor Tim McCormack of 2 August and 5 September 2013 in which the answer was "YES". Although recognising Prof. McCormack as internationally recognised expert in the international humanitarian law and international criminal law the Court dismissed his opinions in both instances. Thus the third ground of appeal (**"the legal errors ground"**) was dismissed.

31. However, The Federal Court of the first instance in its judgment of 15 November 2013 did find in favour of the author in respect of the second - "**the procedural fairness ground".** He was neither informed nor given the opportunity to respond to Croatian arguments. Her Honour Davies J stated the precedents: "The principles governing procedural fairness are well established. Whether there is a requirement to afford procedural fairness depends on the particular statutory context. Where the exercise of the statutory power attracts the requirement for procedural fairness, it is a fundamental principle that the party liable to be directly affected by the decision is to be given the opportunity to be heard. Ordinarily, the person is entitled to be informed of the nature and content of adverse material which is relevant to the decision to be made and ordinarily, procedural fairness requires the person to be given an opportunity to respond to, rebut or qualify that adverse material: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152 *('SZBEL')*; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* [1994] FCA 1074; (1994) 49 FCR 576 *('Alphaone')*." Her Honour added:

"In my opinion, procedural fairness did require Mr Snedden to be given the opportunity to respond to the further information that the Department obtained from Croatia: *Alphaone* at 592....As the opportunity to be heard on the Croatian response was denied to Mr Snedden, there has been a breach of procedural fairness.".

32. Thus the primary judge set aside the Minister's determination under s 22(2 of the Act and the resulting surrender warrant. Her Honour remitted the matter to the Minister for determination according to law. In Snedden v. Minister of Justice (2014) FCAFC 156 Mr Snedden appealed from the order remitting the matter to the Minister. The Minister cross-appealed against the orders setting aside the surrender determination and warrant.

33 In the Judgment of 12 December 2014 Mr Snedden's appeal was dismissed and the Minister's cross-appeal was allowed. The core legal issues before the Full Federal Court were: a) whether the power under Section 22 of the Australian *Extradition Act 1988* (Cth) expires in the event of delay, and if so, whether there had been unexplained delay by the Minister; (b) whether the Minister's determination was vitiated by jurisdictional error on the ground that he (1) misdirected himself as to the proper construction of the Third Geneva Convention and/or (2) relied on incorrect legal advice provided by OIL, and (c) whether there was procedural unfairness constituted by the Department's failure to disclose (1) Croatia's response dated September 2010, (2) the OIL advice, and/or (3) Australia's concerns about whether additional charges might be brought against Mr. Snedden.

The Court held that the Minister's power to extradite under s 22 did not expire upon delay in its exercise. The "tightly structured" and "binary" nature of the Act indicated that if the Legislature had intended that the Minister's power expire, provision would have been expressly made for expiration. (paras. 100-106).

The Court further held that Australia's obligations under the "unenacted" Third Geneva Convention were not a mandatory consideration that the Minister was bound to take into account, so reliance on the allegedly erroneous OIL advice could not constitute jurisdictional error. While the Court declined to give an opinion on the correctness of the advice, Middleton and Wigney JJ stated that it was "at the very least doubtful that the OIL advice is 'undoubtedly' wrong" (paras. 168-171).

In Middleton and Wigney JJ's view, there was no procedural unfairness in the failure to disclose Croatia's response as it did not contain any new adverse information (para. 201). They cited *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1. However, His Honour Judge Pagone J dissented. He would have upheld the primary judge's finding that this constituted procedural unfairness (paras. 244-246).

The Court held that the lack of disclosure of the communications between the Department and Croatia with respect to the possibility of further charges did not constitute procedural unfairness as those communications did not affect whether s 22(3)(d) – the requirement of a speciality assurance – was satisfied (para. 232). "The Croatian law was widely publicized", said the Court. The Court further held that the failure to disclose the OIL advice in the first instance proceedings did not constitute procedural unfairness as it attracted legal professional

privilege, and in any event, “Snedden knew the Commonwealth position and had made detailed submissions on this matter” (paras. 237-238).

34. The author strongly objects to the Committee as to the lawfulness of the above judgments. Recalling the cited *De Wilde, Ooms and Versyp v. Belgium (No 1)* para 76 he points out that the Federal Court of Australia, in the case of administrative detention, must have had based its judgments on points of law. The author also claims that he is the victim of a continuos “moving of posts” by the Australian judiciary in interpretation of its own laws and precedents. He claims the arbitrariness and lack of predictability of the decisions rendered by the Australian courts. He recalls the *Vinčić v. Serbia* case in which the European Court of Human Righs in para 56 stated that “all this created a state of continued uncertainty, which in turn *must have reduced the public's confidence in the judiciary, such confidence, clearly, being one of the essential components of a State based on the rule of law.... There has consequently been a violation of Article 6 § 1* (right to a fair trial) *on this account (see, mutatis mutandis, Tudor Tudor v. Romania, cited above, § 32, 24 March 2009).* Consequently, the author claims the breach of Art. 14(1) of the ICCPR.

In terms of his detention, the author recalls para 48 of the *Van Droogenbroek i*n which the European Court said in respect of Article 5:

“ Quite apart from conformity with domestic law, 'no detention that is arbitrary can ever be regarded as 'lawful'' for the purposes of paragraph 1. This is the limit which *the Minister of Justice must not exceed in the exercise of the wide discretion he enjoys* in executing, or implementing, the initial court decision. This requirement is rendered all the more compelling by the seriousness of what is at stake, namely the possibility that the individual may be deprived of his liberty for up to 10 years … 'or even longer' …” (emphasis added)

Obviously, the Minister of Justice of Australia should have been aware of the above reasonings and of the fact that the author was, as held by Australian courts, in an administrative detention in Australia for nearly 9 years. When the Minister exercised his discretional power on 15 November 2012 to extradite he should have also been aware of the fact that his decision was of an executive dicretional nature. That was not the case. The author was extradited on 8 July 2015, meaning 2 years, 7 months and 23 days from the date of the Minister's decision. This is excessive and thus the Articles 9(1) and (4) were violated.

The Australian authorities should also have been aware of the fact that such a long detention amounts to an inhuman and degrading treatment in violation of Art. 7 of the ICCPR which undoubtedly protects the author's health and general welbeing.Therefore the author claims that his extradition from Austrsalia to Croatia was unlawful. He also claims that his detention in both Australia and Croatia was and is unlawful and arbitrary.

35. On 2 January 2015 Serbian Justice Minister Mr. Nikola Selakovic sent a letter to Australian Justice Minister Michael Keenan requesting that Belgrade be allowed to prosecute Vasiljkovic, citing its right to prosecute its own citizens and questioning the Croatian judiciary's ability to ensure Vasiljkovic a fair trial. This request was rejected.

36. On 15 May 2015 the author's special leave to appeal to the High Court of Australia was refused (case reference M6/2015). Thus all the domestic remedies in respect of Australia were exhausted by the author on 15 May 2015.

37. In respect of the UN Committee's case law, the author invokes the cases *A. v. Australia* (Comm. No. 560/1993, U.N. Doc. CCPR/C/59/D/560/193, Views of 30 April 1997), *C. v. Australia* (CCPR/C/76/D/900/1999, Comm.900/1999, Views of 19 November 2002), Hugo van Alpen v. Netherlands (Comm.No. 305/1988, Views of 23 July 1990) and **especially** *Griffiths v. Australia* (Comm. No. 1973/2010, Views of the UN Committee adopted on 21 October 2014). The *Griffiths* case concerns the lenght of extradition detention under the Australian Extradition Act 1988 and its validity in the view of the ICCPR case law in particular. The Committee found violation in that case expressly citing the author's case on pages 4 and 6 of the *Griffiths*.
38. In its reply in A v. Australia, the State party itself contended in para 7.6 of the Views that the travaux preparatoires to article 9, paragraph 1, show that the drafters of the Covenant considered that the notion of "arbitrariness" included "incompatibility with the principles of justice or with the dignity of the human person". Furthermore, it refers to the "Committee's jurisprudence" according to which the notion of arbitrariness must not be equated with "against the law", but must be interpreted more broadly as encompassing elements of inappropriateness, injustice and lack of predictability. Against this background, the State party contends, detention in a case such as the author's was not disproportionate nor unjust; it was also predictable, in that the applicable Australian law had been widely publicized."

The Committee, on its part, rejected this view stating in para 9.4: " The Committee observes however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example... in the instant case, the State party has not advanced any grounds particular to the author's case, which would justify his continued detention for a period of four years, during which he was shifted around between different detention centres. The Committee therefore concludes that the author's detention for a period of over four years was arbitrary within the meaning of article 9, paragraph 1."

The UN Committee, finding the violations of the ICCPR, reinstated this View in *Griffiths* (2014). In that case, the author was held for two and a half years in extradition detention by Australia by the request of USA. The Committe in para 7.2., and 7.3 and 7.5 stated:

"7.2. The Committee notes the author's claim that his detention was arbitrary, in terms of article 9, paragraph 1, of the Covenant, particularly between 10 July 2004, when he was placed in detention for the second time since the initiation of the extradition proceedings, and 22 December 2006, when the Minister of Justice and Customs made a final determination in his extradition case. It also notes the State party's argumentation that the author's detention was not arbitrary by reason that it was in compliance with the law and justified, for the purpose of extradition. In that regard, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification. In the present case, the author's uninterrupted detention continued for over two years and five months, during which time he pursued avenues for appeal against the finding of the Federal Court of 7 July 2004, that he was eligible for

surrender from Australia to the Unites States. While the State party advances particular reasons to justify his detention, the Committee observes that it has failed to demonstrate that those reasons justify the author's continued detention in the light of the passage of time and intervening circumstances. In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's extradition policies and international cooperation obligations, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of his individual circumstances. In particular, the State party has failed to show whether due regard was given to the author's arguments in support of his release, such as his compliance with previous bail conditions within the course of the same extradition proceedings, a low flight risk, the absence of a past criminal record or his health condition."

"7.3. Furthermore, the Committee notes, and it remains unchallenged by the State party, that detention pending extradition is not limited in time under Australian law and that, as a general rule, under the case law of the High Court, in extradition cases, persons "are to be held in custody whether or not their detention is necessary". In this connection, the Committee takes note of the author's argument that there is no indication, either in the domestic law or the case law of the High Court, as to the duration of the extradition determination by the Minister of Justice and Customs, which is expected to take place "as soon as reasonably practicable". While noting that such a determination took over 15 months in the instant case, that is, from 6 September 2005 to 22 December 2006, the Committee considers that the State party has failed to demonstrate how that period met the criteria of "reasonably practicable" and why the author's continued detention was necessary and justified during this particular period. In these circumstances, whatever the reasons for the original detention, the author's continuing detention pending extradition without adequate individual justification is, in the view of the Committee, arbitrary and constitutes a violation of article 9, paragraph 1, of the Covenant.

" The Committee recalls that a judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law, but must include the possibility to order a release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1, of the Covenant What is decisive for the purposes of article 9, paragraph 4, is that such a review is, in its effects, real and not merely formal. In the present case, the author was detained pending extradition for over two years, with neither any chance of obtaining substantive judicial review of the continued compatibility of his detention with the Covenant, nor of being released on this ground. In the circumstances, and in the light of its findings under article 9, paragraph 1, of the Covenant, the Committee considers that the author was effectively precluded, by virtue of the State party's law and practice, from taking effective proceedings before a court in order to obtain a review of the lawfulness of his continuing detention, as the courts had no power to review whether his detention continued to be lawful after a lapse of time and to order his release on this basis. It also finds that the State party has not demonstrated that the author had an effective remedy with regard to his claim under article 9, paragraph 4, of the Covenant. Therefore, in the view of the Committee, such an inability to challenge a detention that was or had become contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4, of the Covenant (C. v., Australia, para 8.3)." The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view

that the facts before it reveal a violation of the author's rights under article 9, paragraphs 1 and 4, of the Covenant."

39.Therefore, the author puts his case before the Committe and asks the Committe to find the violations of his human rights guranteed by Articles 2, 7, 9, 10 (1),14 and 26 of the Covenant. He asks the Committee to find the said violations and to order that Australia in accordance with Art. 9(5) compesate him for all the anguish, pain and suffering inflicted by his unlawful and arbitrary detention of nearly 9 years by AUSTRALIA, and for all the legal costs before the Australian courts since 2006. He also asks the Commiittee to order Australia to amend its Extradition Act 1988 so that nobody in the future can sustain pain and suffering as he did.

40. Under the long standing UN Committee case law, it is possible for one country (Country X) to be held in breach the ICCPR even though a person is in another country (Country Y). This can occur if the person can somehow be deemed to be under the "power or effective control" of Country X. In the instant case the author was and is under the "power of effective control" both by Australia and Croatia. He was in extradition detention in Australia on the basis of the arrest warrant issued by Croatia and is now in investigative detention in Croatia. Thus both States are responsible for the continuous violations of his human rights. The author also recalls and invokes the General Comments on Article 9 of the UN Committee Nos. 8., 32. and 35 in respect of both Australia and Croatia.

In para V. of the General Comment No. 35. of 14 December 2014 the UN Committee stated:: " Paragraph 4 of article 9 entitles anyone who is deprived of liberty by arrest or detention to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful. It enshrines the principle of habeas corpus. Review of the factual basis of the detention may, in appropriate circumstances, be limited to review of the reasonableness of a prior determination....The right applies to all detention by official action or pursuant to official authorization, including detention in connection with criminal proceedings, ...detention for extradition and wholly groundless arrests."

" The object of the right is ***release*** (either unconditional or conditional) from ongoing unlawful detention; compensation for unlawful detention that has already ended is addressed in paragraph 5. Paragraph 4 requires that the reviewing court must have the power to order release from the unlawful detention. When a judicial order of release under paragraph 4 becomes operative (*exécutoire*), it must be complied with immediately, and continued detention would be arbitrary in violation of article 9, paragraph 1." (emphasis added)

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41. Upon his extradition to Croatia on 8 July 2015 the author was immediately placed into the investigative detention. This was done on the basis of the Decision by the Šibenik County Court Kio – 86/05 of 12 december 2005. The Split County Court, Department for the Trial of War Crimes, rejected the author's appeal on detention filed by the lawyer appointed to act *ex officio* and summarily dismised the appeal against the order of the investigive detention against him by Decision of 14 July 2015 Kv – Rz – 7/15. At the time of his extradition and at the time of his first hearing before the Split County Court no charges have been brought against the author. In fact, he was formally indicted on 8 January 2016. The Croatian judiciary has undoubtedly had an ample time to complete the investigation against the author since 2005. In

his first appearance before the Croatian Court the author pleaded not guilty. The author points out that rarely, if ever, was anyone asked to enter the plea without being formally charged. He thus remained detained in Split County prison up to this day.

At his first apperance before the County Court of Split on 14 July 2015 and in his further submissions the author offered 5,000,000 (5 million) Croatian Kunas (aprox. 700,000 Euros) for bail. This bail offer has been rejected by the Croatian courts with no credible explanation in all the Decisions that followed. The bail provisions of the Croatian Criminal Procedure Code (CCPC) provide, as relevant, in Article 102: (1) Investigative detention determined due to reasons referred to in Article 123 paragraph 1 item 1 to 3 of this Act may be terminated provided that the defendant personally, or another person on his behalf, gives bail and the defendant personally promises that he will not hide or leave his place of residence without permission, that he will not interfere with criminal proceedings and that he will not commit a new criminal offence. (2) In the ruling on investigative detention, the court may set the amount of bail which may replace investigative detention. Bail shall always be set in a pecuniary amount determined with regard to the gravity of the criminal offence, personal circumstances and financial situation of the defendant. (3) If the court establishes that bail cannot replace investigative detention, *it shall cite the circumstances due to which it finds bail to be an unacceptable replacement of detention*. (4).In addition to bail, the court may order one or more precautionary measures as terms of bail. (emphasis added).

In respect of the other measures for providing the presence of the defendant and other precationiary measures, the Art. 95 of the CCPC provides in relevant: " (1) When deciding on the measures for the presence of a defendant and on other precautionary measures, the court and other state authorities shall by virtue of the office be cautious not to apply a more severe measure if a milder measure can achieve the same purpose, and 2) The court and other state authorities shall by virtue of the office vacate the measures from paragraph 1 of this Article or replace them with milder measures when the legal conditions for their application have ceased to exist, or when the conditions are met for achieving the same purpose with a milder measure. "

42. In terms of the Precautionary Measures the CCPC in relevant in Art. 98 provides: " (1) When circumstances exist as referred to in Article 123 of this Act which constitute the ground for investigative detention, or the detention is already determined, the court and the State Attorney shall, if the same purpose may be achieved by any of the precautionary measures, issue a ruling with a statement of reasons to carry out one or more such precautionary measures. The defendant shall be warned that in the case of failure to carry out the ordered precautionary measure it may be replaced by nvestigative detention.

Precautionary measures are: 1) prohibition to leave a residence; 2) prohibition to visit a certain place or territory; 3) obligation of the defendant to call periodically a certain person or authority; 4) prohibition to approach a certain person; 5) prohibition to establish or maintain contacts with a certain person; 6) prohibition to engage in a certain business activity; 7) t*emporary seizure of passport or other document which serves to cross the state border. (emphasis added).*

The Croatian courts rejected all the defense proposals in this respect. They even rejected the proposal that the author be provisionally released and placed in the home arrest conditions

monitored by the police explicitly provided by the Articles 119 – 121 of the CCPC. However, in rendering their decisions the Croatian courts failed to take into the consideration that the precautionary measure under Article 98 (2) (7) (seizure of passports) have been undertaken and exausted/vacated by the Australian High Court by order of Gummow J on 25 February 2010. Croatia therefore violated its own provisions concerning the author's right to the provisional release. This in turn represents the violation of Articles 2(3), 9(1) and (4) of the ICCPR. His detention therefore is unlawfull and arbitrary.

43. The author was formally indicted/charged on 8 January 2016, on the very last day on which such a legal possibility is proscribed by the Croatian Criminal Procedural Code (08) (CCPC). The author is held in the investigative detention on the basis of Art. 123 of the Code which relevantly provides: " (1) Investigative detention may be ordered if there exists reasonable suspicion that person committed an offence and if: 1) the person is on the run or there are special circumstances indicating a danger of flight (the person is in hiding, his identity cannot be established, etc.); and...4) if investigative detention is deemed necessary for undisturbed conducting of the proceedings due to especially grave circumstances of the offence and a sentence of long-term imprisonment is prescribed for such an offence. " The cited basis for the author's detention by Croatia remained the same throughout the author's detention in that State. No new reasons have been forwarded. Further to the author's objection to the indicment, it was formally confirmed on 13 June 2016. The investigation had been offcially (and with no dispute between the parties) completed in December 2015 and the preparatory hearing pending trial is scheduled for 14 July 2016 before the Split County Court.

Art. 124 of the CCPC states: (1) Detention shall be ordered and prolonged by a written ruling issued by the competent court.

(2) ...A ruling on detention shall contain:

1) if investigation is conducted, specification of the warrant to conduct the investigation based on which the ruling on detention is rendered; 2) the legal ground for detention; 3) the duration of detention; 4) a provision on including any time the person was deprived of freedom before the ruling on detention was rendered with a note on the moment of arrest; 5) *the amount of bail which may be substitute detention; (emphasis added)*

(3) The statement of reasons of the ruling on detention shall state specifically and fully the facts and the evidence supporting reasonable suspicion that the defendant committed the offence and the reasons referred to in Article 123 paragraph 1 of this Act, the reasons for which the court deems that the purpose of detention may not be achieved by a less severe measure, as well as the reason for the determined amount of bail.

(4) A ruling on detention shall be served on the detainee immediately after he has been put into detention. The detainee shall confirm the receipt and the time of receipt of the ruling by his signature.

Article 125 of the CCPC relevantly provides:

(1) The court shall vacate investigative detention and the detainee shall be released:

1) immediately when the reasons for ordering or prolonging investigative detention cease to exist; 2) if further detention is not proportional to the gravity of the offence committed; 3) if

the investigation is conducted, when the purpose may be achieved by using a less severe measure.

Article 126 of the CCPC prescribes: “The court which rendered a ruling on ordering or prolonging investigative detention shall render a ruling vacating investigative detention if it establishes, after rendering the ruling and before the defendant is detained, that the grounds for which detention was ordered do not exist or legal prerequisites for such order do not exist. If a wanted notice was issued, the court shall order it to be revoked in a rescindment after the ruling is final.”

Article 127 relevantly provides:

(1) Before the indictment is preferred, the investigating judge shall order investigative detention upon the motion of the State Attorney and shall vacate the order for investigative detention upon the motion of the defendant, the State Attorney or by virtue of the office...(3) If not otherwise prescribed by a special law, before the indictment is preferred, the investigating judge shall decide on the prolongation of investigative detention upon the motion of State Attorney. (4) After an indictment has been preferred until the indictment is confirmed, investigative detention shall be ordered, prolonged and vacated by the prosecution panel. After the indictment is confirmed until the judgment is final, investigative detention shall be ordered, prolonged and vacated by the court in session and outside the trial by the panel, except in cases referred to in paragraph 5 of this Article. (5) When deciding on an appeal against the judgment, the appellate panel shall order, prolong and vacate investigative detention.

Article 128 states that “after the indictment has been preferred until the judgment is final, the defendant and his defence counsel may submit a motion to vacate investigative detention. The court conducting the proceeding shall render a ruling on the motion. The ruling rejecting the motion to vacate detention shall not be subject to an appeal.”

In terms of the lenght of the investigative detention Art. 130 relevantly states that “(1) Investigative detention ordered by the ruling of the investigating judge or the panel may last no longer than one month from the date the detainee was deprived of freedom. (2) Upon the motion of the State Attorney, if there are justifiable reasons, the investigating judge may prolong detention, first time for a term no longer than two months and after that, for criminal offences from County Court juristiction, or when prescribed by a special law, for additional term no longer than three months...(3) Upon the expiry of the term for which detention was ordered or prolonged or upon the expiry of the term referred to in paragraph 2... of this Article, the detainee shall be released.” Art. 131 relevantly adds: ... “(2) After the indictment is preferred, detention may last until the judgment is final, and after the judgment is final it may last until the ruling on committing the defendant to serving a prison sentence becomes final. (3) After the indictment is preferred, the ruling on detention shall not determine the duration of detention. However, every two months counting from the date the previous ruling on detention became final until the rendering of a judgment that is not final the court shall examine whether legal grounds for further application of detention still exist and shall render a ruling on prolonging or vacating detention. An appeal against this ruling shall not stay its execution. If the defendant is in detention at the time the judgment that is not final is pronounced, the panel shall review whether there are legal grounds for further application of detention and shall render a ruling on prolonging or vacating detention. (4) The whole duration of investigative

detention until the indictment is preferred, including the time of the arrest and pre-trail detention, may last no longer than six months...” Art. 133, as relevant, concludes: (1) Before a judgment of the court at first instance is rendered, the duration of investigative detention may not be longer than: .... 4) two years if the offence is punishable by imprisonment for a term of more than eight years; 5) three years if the offence is punishable by long-term imprisonment.

44. Since the author's extradition to Croatia there were three sets of the detention proceedings in which the legality of his further detention in that State have been examined. All his pleadings and appeals have been rejected. As already said, the common ground for all the three sets of detention review proceedings, in which all the domestic remedies have been exausted including the rulings of the Constitutional Court of Croatia, was that there was “a fear that the defendant might absond” because “he was on the run” and that “investigative detention is deemed necessary for undisturbed conducting of the proceedings due to especially grave circumstances of the offence and a sentence of long-term imprisonment is prescribed for such an offence” (Art. 123 (1) 1) and 4) of the CCPC). The author appealed all the Decisions which in fact hardly differ from each other. All the decisions of Croatian Courts concerning the investigative detention are alike and developed illegally, arbitrary and *in abstracto*. For instance, the Split County Court, by order of the investigative judge Kir-Rz -7/15 of 7 August 2015 extended the detention stating that it in respect of Dragan Vasiljković, Daniel Snedden, son of Živorad and mother Zorica, born Čomor, born on 12 December 1954 in Belgrade, citizen of the Republic of Serbia and Australia, a commercial pilot, literate, graduated from the Air Force Academy, married, father of three children, served the army with the rank of captain, never convicted existed because:

“ There is still a reasonable doubt that the defendant committed the offences he was charged with, resulting from the decision to conduct an investigation to which the parties call upon in order to avoid unnecessary repetition. The defendant is not a Croatian citizen but a citizen of the Republic of Serbia and Australia, he does not have a permanent or a temporary residence in the Republic of Croatia and for many years has been on the run, avoiding the judicial authorities of Croatia so that an international warrant has been issued pursuant to which he was arrested in Australia and on 8 July 2015 extradited to Croatia.” **This reasoning does not correspond to the facts.** One person cannot be “on the run” and in an extradition denention in Australia for nearly 9 years at the same time.

The author appealed. The Split County Court repetead the said reasoning of the investigative judge and rejected the appeal in its Decision Kv-Rz 8-15 of 20 August 2015 stating:

“ Against the contested decision the defendant Dragan Vasiljković appealed through his defence counsel *ex officio*, Darko Stanić, a lawyer in Split, stating that the court’s conclusion that the defendant was “on the run” is unfounded because the defendant was arrested in Australia, a country that he is a citizen of, in 2006 pursuant to an international arrest warrant and that he has spent 9 years in extradition custody.... Therefore, it is proposed to abolish the decision on the extension of the remand prison, alternatively to abolish the remand prison and determine a milder precaution.” The Court continued: “ The appeal of the defendant Dragan Vasiljković is unfounded. Examining the disputed decision on the occasion of the appellate arguments, the council has concluded that the investigating judge correctly extended defendant’s remand prison referred to in Article 123, paragraph 1, item 1 and 4 of the CPC/97, stating clear reasons accepted by this Council as well. The information from the case file - final

decisions to conduct an investigation and in particular from the statements of numerous witnesses, captured members of the Croatian Army and police, eyewitnesses and participants of the attacks and from the supplied military and other documentation of the former SAO Krajina paramilitary leadership meetings - *for now amount to that there is a reasonable suspicion that the defendant would commit the offences with which he is charged." (emphasis added).*

In the Decision by the Investigative judge Kir -Rz 12 -15 of 7 October 2015 to extend the author's investigative detention for further two months it was stated:

" *There is still a reasonable doubt that the defendant would commit the offences he was charged with*, which arises from the decision on conducting an investigation and all the extensive documentation that is included in the file, as well as from the testimonies of numerous witnesses." (emphasis added)

The cited reasonings are unclear. If it is suggested that the author could "reoffend", it is impossible to imagine that anyone could commit a "war crime" in Croatia in 2015. In spite of this, the Split County Court upheld the said reasoning by the Decision Kv – Rz - 11 – 15 of 21 October 2015. Although Article 124 (3) of the CCPC requests that "The statement of reasons of the ruling on detention shall state specifically and fully the facts and the evidence supporting reasonable suspicion that the defendant committed the offence and the reasons referred to in Article 123 paragraph 1 of this Act, the reasons for which the court deems that the purpose of detention may not be achieved by a less severe measure, as well as the reason for the determined amount of bail", no Croatian judicial instance complied with this provision.

These are clear violations of Art 9 (1)(4), 14(1) (2) and 2(3) of the ICCPR. In the meantime, the author designated the lawyer of his own choice - Ms. Sladjana Čanković from Zagreb.

45. The human rights violations of the author persisted in the Decision of the Supreme Court of Croatia No. II- Kž 40/16 – 4 of 5 and 22 February 2016. This Decision was delivered on appeal against the Split County Court Decision Kov-Rz-1/2016 of 8 January 2016 by which the author's investigative detention was extended. No decision in the practice of the present Attorneys s had been deliverd in two sessions. However, this was. The Supreme Court stated:

" The defendant Dragan Vasiljkovic in this criminal case is indicted for war crime against civilians referred to in Article 120 paragraphs 1 and 2 of the OKZRH (Basic Penal Code of the Republic of Croatia) and war crimes against prisoners of war referred to in Article 122 of the Basic Criminal Law of the Republic of Croatia for which a prescribed sentence is that of at least five years or a prison sentence of twenty years.

Namely, since a crime for which the defendant is charged in this criminal case carries a sentence of twenty years, rather than long-term imprisonment, in relation to the issue of realization of the legal requirements for ordering the remand prison pursuant to Article 123 paragraph 1 item 4 of the CPC/08 it should be noted that at the session of the Criminal Division of the Croatian Supreme Court of 19 February 2016 a legal opinion has been accepted that a sentence of twenty years, prescribed in the OKZRH as the most severe punishment, regarding the application of procedural provisions equates to long-term imprisonment as it is prescribed according to CC(PC)/11, regardless of whether they are "at the expense of the defendant"...or "in favour of the defendant". " Regardless of their personal legal consideration of this issue

(the Judges of Supreme Court) ....claim that " (It) is, therefore, a matter of particularly difficult circumstances of committed crimes and defendant's role that can not be seen isolated from the public interest, not only in the area in which the charged offences immediately occurred, but in the whole of Croatia, which was exposed to military aggression. From this point, the weight of defendant's criminal offences is still acceptable as competent and sufficient grounds for his detention in a remand prison pursuant to Article 123 paragraph 1 item 4 of the CPC/08.." The Court further stated:

"The appeal is unfounded....The defendant Dragan Vasiljkovic in the appeal asserts that the contested decision did not state the reasons on which it can be concluded that a reasonable suspicion that he committed the offences with which he is charged exists, so that such a conclusion of a trial court is arbitrary and contradictory to itself and thus is in violation of the rights guaranteed in Article 13 of the Convention on Human Rights and Fundamental Freedoms ("Official Gazette - International agreements" No. 18/97, 6/99 - revised text, 8/99 - correction, 14/02, and 1/06; hereinafter - the Convention), Article 6.1 and Article 5 of the Convention. In addition, he considers that the trial court did not give clear reasons for the impossibility of replacing the remand prison with milder measures, pointing to a substantial violation of the criminal procedure referred to in Article 468 paragraph 1 item 11 of the CPC/08.

Contrary to the stated appeal arguments, the trial court, gave clear and, ***admittedly scarce***, but sufficient and valid reasons without contradiction, on which a decision is based on the existence of general assumptions for the application of remand prison measures against the defendant as referred to in Article 123 paragraph 1 of the CPC/08, which stems from the indictment and evidence on which it is based. The court then correctly identified and properly explained the impossibility of replacing remand prison measures with more lenient measures, such as offered warranty and measures of precaution. Therefore, the defendant's rights have not been violated as referred to in Article 13 of the Convention (denial to an effective remedy), Article 6.1 of the Convention (right to a fair trial including the right to a reasoned court decision) and Article 5 of the Convention (right to liberty and personal security), nor has the quoted substantial violation of the criminal proceedings been committed." (emphasis added)

" Namely, the information in the file show that the defendant has no permanent or temporary residence in Croatia, and is not in any way related to the area of that country, whether personal, family, business, or in any other way. Specifically, the defendant has dual citizenship, that of the Republic of Serbia and Australia, which suggests strong links with these countries, one of which is not a member of the European Union and the other is not a European country. In addition, during the investigation led against the defendant, because of his inaccessibility to the Croatian judicial authorities, a remand custody has been prescribed in a decision of 10 January 2006 as referred to in Article 102 paragraph 1 items 1 and 4 of the Criminal Procedure Code ("Official Gazette" No. 110/97, 27/98, 58/99, 112/99, 58/02, 143/02, 62/03 - consolidated text and 115/06 - hereinafter: CPC/97), and an international arrest warrant has been issued. On the grounds of this warrant, the defendant was arrested in Australia in 2006, and spent further nine years in detention, until 9 July 2015, when he was extradited to Croatia. By linking these circumstances with the gravity of crime that defendant was indicted, as well as the height of the prison sentence prescribed for these offences, the risk that the defendant, if released, become unavailable to the Croatian judiciary authorities and thus prevent the conduct of criminal proceedings remains real and actually predictable."

However, in *Trifkovic v. Croatia* (Judgment of 6 November 2012, App. no. 36653/09) the European Court of Human Rights in para 129 held that: " As regards the domestic courts' reliance on the gravity of the charges when extending the applicant's detention, the Court reiterates that it has repeatedly held that this reason cannot by itself serve to justify long periods of detention (see, among many other authorities, *Ilijkov v. Bulgaria*, no. 33977/96, §§ 80-81, 26 July 2001; *Michta v. Poland*, no. 13425/02, § 49, 4 May 2006; and *Gultyayeva v. Russia*, no. 67413/01, § 186, 1 April 2010)."

From the cited Supreme Court Decision it transpires that the Decision of Split County Court to extend the author's detention for the third time on 8 January 2016 was "admittedly scarce". Neither "special dilligence" as required by the well established human rights case law had been exercised (Judgments *Margaretić v. Croatia, Labita v. Italy*, EctHR cited later) nor has this legal defficiency been rectified by the Supreme Court. From the Supreme Court Decision further transpires that the author was never "on the run", as stated by the lower courts. In fact, it transpires that he was in extradition detention in Australia from 20 January 2006 where he was deprived of liberty on the basis of the Croatian arrest warrant issued by the Šibenik County Court on 10 January 2006. There were no criminal proceedings in Croatia whatsoever against the author when he returned to Australia from Serbia in 2004. This establishes the fact that there is a direct casual connection between the author's detention in Australia and now in Croatia which makes his detention the one of a continuos, illegal and arbitrary nature. Finally, the statement of the Supreme Court in its reasons that Croatia was at the relevant time under any form of "military aggression" is totally arbitrary. "Aggression" is the international law term and no court in no decision had ever estabilished that Croatia was a victim of "aggression" by any state. The same stands for the arbitrary contention of the Croaian judiciary that the author's alleged acts "endangered the legal and territorial integrity of the Republic of Croatia". Such statements violate the author's presumption of innosence. They are of purely of political and not of legal nature. And if the Croatian Constitutional Court wishes to persist with its political statements, it should be reminded that only on 5 August 1995 250,000 Serbs were expelled from Krajina region by Croatian forces in the brutal action named "The Storm".

Crucially, from the reasoning of the Supreme Court it is also obvious that the author is held in the discriminatory investigative detention in Croatia on the basis of the fact 1/ that he is a foreigner; 2/ that he, as such, can never fulfil the conditions laid down in the cited Supreme Court Decision (and decisions of all other Croatian courts); 3/ that he is thus obviously discriminated against any Croatian national placed into the investigative detention and 4/ that the author's right to a periodical reviews of legality of his further detention guaranteed by the international human rights instruments and Croatian law effectively does not and did not exist. Fundamentally, it is clear to all the Croatian courts that the author, as a foreigner, "has no permanent or temporary residence in Croatia, and is not in any way related to the area of that country, whether personal, family, business, or in any other way". Thus he, being a non-Croat, can never achieve the said conditions and the illegal basis for his indefinate detention by the Croatian judiciary has been established and applied. The fact that the defendant has dual citizenship, that of the Republic of Serbia and Australia, "which suggests strong links with these countries, one of which is not a member of the European Union and the other is not a European country", efectively means that the author, as foreigner, cannot achive the provisional freedom and defend himself in dignity, meaning as proviosionally released person. In addition, the Croatian courts neither gave reasons why the author's bail offer was not acceptable nor had set any bail amount which they, in turn, would have considered as appropriate. These are very severe violations of human rights indeed.

Having said in mind, the author claims that he is exposed to the discrimination by Croatia prohibited by Articles 2(1) and 26 in conjunction with Articles 9(1)(3)(4) and 14(1)(2) and (5) of the ICCPR. The author also claims the independent violations of Articles 9 (1), (3) (4), 7, 10(1) and 14 (1) (2)(5) of the ICCPR by Croatia, as well the violation of ArticleS 2(3) and Article 15.. Articles 7 and 10(1) are invoked due to the fact that the author's excessive detention of nearly 10 years **both** by Australia and Croatia amount to an inhuman and degrading treatment. Articles 10(1) is invoked against Croatia due to the fact that the author is exposed to acts obviously directed against his inherent dignity of human person. Article 2(3) is invoked due to the fact that the author has no effective remedy available to him to have his further detention examined by competent judicial authority in Croatia. Article 15 is invoked due to the contention of the Croatian Supreme Court that sentence of 20 years of imprisonment was only on 19 February 2016 by the Criminal Division of the Croatian Supreme Court envisaged as a sentence of "long-term imprisonment". It was only on that date, in the midst of the author's appeal before that Court, that "a legal opinion has been accepted that a sentence of twenty years, prescribed in the OKZRH (Basic Penal Code of Croatia, BPCC) as the most severe punishment, regarding the application of procedural provisions equates to long-term imprisonment as it is prescribed according to CC(PC)/11, regardless of whether they are "at the expense of the defendant"...or "in favour of the defendant". However, Article 15 of the ICCPR does not allow that "heavier penalty (can) be imposed than the one that was applicable at the time the criminal offense was committed."

Having in mind that a Croatian citizen, as opposed to the author, obviously can never be held in an investigative detention on the basis of the reasoning of the Croatian Supreme Court, the author once again cites the General Comment 35 of the UN Committe on the Article 9:

" Arrest or detention on discriminatory grounds in violation of article 2, paragraph 1, article 3 or article 26 is also in principle arbitrary. Retroactive criminal punishment by detention in violation of article 15 amounts to arbitrary detention."

" Liberty of person concerns freedom from confinement of the body, not a general freedom of action. **Security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity**." (emphasis addes)

" Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should be specified in law and should not include vague and expansive standards such as "public security". Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances. *Neither should pretrial detention be ordered for a period based on the potential sentence for the crime charged*, rather than on a determination of necessity. Courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case. **If the defendant is a foreigner, that fact must not be treated as sufficient to establish that the defendant may flee the jurisdiction.** After an initial determination has been made that pretrial detention is necessary, there should be periodic re-examination of whether it continues to be reasonable and necessary in the light of possible alternatives*." (emphasis added)*

"Returning an individual to a country where there are substantial grounds for believing that the individual faces a real risk of a severe violation of liberty or security of person such as

prolonged arbitrary detention may amount to inhuman treatment prohibited by article 7 of the Covenant.... " The author claims that he had submitted sufficient evidence to the Australian judiciary that he would be extradited to the jurisdiction which would severely violate his rights. The present actions of the Croatian judiciary prove that he was in the right. From everything said in this petition it transpires that the author has no chance to be released from detention in the near future although the Croatian courts concuded the official investigation in December 2015. This is an undisputed fact.

Further example is that in spite of the the fact that the author's lawyer claimed before the Croatian courts that his excessive extradition detention in Australia must be taken into the account when assessing his further detention in Croatia, the Croatian Supreme Court in its cited Decision of 5 and 22 February 2016 No. II – Kž 40/16 – 4 rejected this argument stating: " Further appellate arguments of the defendant Dragan Vasiljkovic that the time he spent in detention must be included in the maximum duration of remand are also unfounded. According to the legal standpoint the Croatian Supreme Court expressed in previous decisions, the deprivation of liberty in relation to the duration of the extradition proceedings in a foreign country is not included in the maximum duration of remand before a court, because it is a deprivation of liberty on the basis of qualitatively different grounds. However, it should be noted that the time the defendant spent in extradition detention will be counted towards the sentence in case of conviction." The Supreme Court never cited its own legal authority in which "it expressed its decisions" that " the deprivation of liberty in relation to the duration of the extradition proceedings in a foreign country is not included in the maximum duration of remand before a court". But the fact that the "extradition detention will be includeed be counted towards the sentence in case of conviction" does not make any clear legal difference between the extradition and investigative detention.

In that respect,, in *Trifkovic v. Croatia*, finding the violation of Art 5 - 3 of the European Convention, the European Court of Human Rights in para. 107. stated: " As to the alleged violations of Article 5 § 3 of the Convention, the Court has already held that if a person alleging a violation of this provision on account of the length of his detention in circumstances such as those prevailing in the present case, he complains of a *continuing* situation, which should be considered as a whole and not divided into separate periods (see *Popov and Vorobyev v. Russia*, no. 1606/02, § 71, 23 April 2009). In this respect the Court considers that if the applicant made the domestic courts sufficiently aware of his situation and gave them an opportunity to assess whether his detention was compatible with his Convention right to a trial within a reasonable time or release pending trial, it cannot be held that the applicant failed to comply with his obligation to exhaust domestic remedies (see *Popov and Vorobyev*, cited above, § 71, and *Šuput v. Croatia*, no. 49905/07, § 86, 31 May 2011). (underlining added). The Court found the violation of the said human right.

46. In *Margaretic v. Croatia* (Judgment of 5 June 2014, App. No. 16115/13) the European Court of Human Rights in terms of legality of detention (Article 5-3) in paras 87 – 91 stated:

" (87) The presumption is in favour of release. The second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until his conviction, the accused must be presumed innocent, and the purpose of the provision under consideration is essentially to require him to be released provisionally once his continuing detention ceases to be reasonable (see *Vlasov v. Russia*, no. 78146/01, § 104, 12 June 2008, with further references).

“ (88) It falls in the first place to the national judicial authorities to ensure that in a given case the pre-trial detention of an accused person does not exceed a reasonable time. To this end, they must examine all the evidence for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty, and must set them out in their decisions dismissing the applications for release. It is essentially on the basis of the reasons given in these decisions and the facts cited by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention (see *Labita v. Italy* [GC], no. 26772/95, § 152, ECHR 2000-IV).

“ (89) The arguments for and against release must not be “general and abstract” (see *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 63, ECHR 2003-IX). Where the law provides for a presumption in respect of factors relevant to the grounds for continued detention, the existence of the specific facts outweighing the rule of respect for individual liberty must be convincingly demonstrated (see *Ilijkov v. Bulgaria*, no. 33977/96, § 84 *in fine*, 26 July 2001).

“ (90) The persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were “relevant” and “sufficient”, the Court must also ascertain whether the competent national authorities displayed “special diligence” in the conduct of the proceedings (see, amongst many others, *Contrada v. Italy*, 24 August 1998, § 54, *Reports of Judgments and Decisions* 1998-V; *I.A. v. France*, 23 September 1998, § 102, *Reports* 1998-VII; *Toth v. Austria*, 12 December 1991, § 67, Series A no. 224; and *B. v. Austria*, 28 March 1990, § 42, Series A no. 175).

“ (91) As regards the issue of bail, the Court reiterates that the guarantee, provided for by Article 5 § 3 of the Convention, is designed to ensure, in particular, the appearance of the accused at the hearing. Its amount must be assessed principally by reference to the accused and his assets. Thus the authorities must take as much care in fixing appropriate bail as in deciding whether or not the accused’s continued detention is indispensable. They must duly justify the amount in the decision fixing bail, and they must take into account the accused’s means and his capacity to pay the sum required (see *Mangouras v. Spain* [GC], no. 12050/04, §§ 78-80, ECHR 2010).”

In A v. Australia the UN Committe stated: “The Committee recalls that a notion of “arbitrariness” must not be equated with “against the law” but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context”.

47. The Constitutional Court of Croatia found no violations of the author's rights in Decisions of 21 September 2015, 7 December 2015 and 5 April 2016. In fact the Constitutional Court never properly considered the Constitutional Complaints by the author in which he claimed the obvious violations of human rights by Croatia. For instance in Decision U-III-4548/2015 of 7 December 2015 the Constitutional Court in terms the author's passports in para 10 stated:

“In conclusion, with regard to the applicant’s view that as a substitute for a remand prison a more lenient measures had to be imposed, such as measures of revocation of travel documents, the Constitutional Court reminds that in the constitutional complaint filed against the previously adopted decisions on extending the remand from August 2015, the applicant argued that his passport *had been taken away* and that the extension of the remand prison prescribed due to a danger of flight in such circumstances was disproportionate. In the challenged decisions the courts have, however, sufficiently argued the view that the substitution of the remand prison by another measure is not acceptable.” (emphasis added) The Court added:

“ In the view of the Constitutional Court, the reasoning of the disputed decisions clearly show the view of the courts that the acts of which the applicant was charged, which represent the modalities of execution of incriminations under the relevant provisions of the OKZRH (Basic Penal Code of Croatia), among other things, “endangered the legal and territorial integrity of the Republic of Croatia”, thus indicating above-average intensity of danger to society and the uniqueness of the particular circumstances and the applicant's role in the incriminating activities. It is, therefore, a matter of particularly difficult circumstances of committed crimes and applicant’s role that cannot be seen isolated from the *public interest*, not only in the area in which the charged offences immediately occurred, but in the whole of the Republic of Croatia, which was exposed to military aggression. From this standpoint, the weight of the applicant’s criminal offences are still acceptable as competent and sufficient grounds for his detention in a remand prison.” It has already been said that that contentions of Croatian courts that Croatia had been subjected to “military aggression” by any state and that the author could have by his alleged acts “endangered the legal and territorial integrity of the Republic of Croatia” are both arbitrary and the violation of presumption of innosence.

To this effect in *Perica Oreb v. Croatia (App.no.20824/09, Judgment of 31 October 2013)*, the European Court, finding the violations of Articles 5-3, 5-4 and 6-2 of the Convention, stated:

“ (114). The Court has repeatedly held that although the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or reoffending, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence. Nor can continuation of the detention be used to anticipate a custodial sentence (see *Belevitskiy v. Russia*, no. 72967/01, § 101, 1 March 2007; *Panchenko*, cited above, § 102; *Khudoyorov v. Russia*, no. 6847/02, § 180, ECHR 2005-X; *Ilijkov*, § 81; and *Peša*, § 104, cited above).

“ (115). In the present case, throughout the applicant’s pre-trial detention, the domestic courts extended the applicant’s detention also on the ground of the particularly grave circumstances under which he had allegedly committed the offences at issue. In doing so, the national courts used the same stereotyped phrases and in some cases even identical wording. In this respect the Court reiterates that it has found a violation of Article 5 § 3 of the Convention in many other cases in which the domestic authorities were using stereotyped formulae without addressing specific facts of the case (see *Tsarenko v. Russia*, no. 5235/09, § 70, 3 March 2011).

“ (116). At this juncture the Court reiterates that a court decision extending detention on such grounds requires a more solid basis to show not only that there was genuinely “a reasonable suspicion”, but also that there were other serious public-interest considerations which, notwithstanding the presumption of innocence, outweighed the right to liberty (see, among

other authorities, *I.A. v. France*, 23 September 1998, § 102, Reports 1998-VII; and *Šuput v. Croatia*, no. 49905/07, § 102, 31 May 2011)."

48. In the Decision of 21 September 2015 the Constitutional Court of Croatia stated:

"The defendant, facing serious charges and severe prescribed punishment, undoubtedly has certain subjective attitude towards the possibility of flight (and/or to try to influence the evidence or "again commit a criminal offence). On an objective level, apart from the weight immanent to the offence itself that is already defined in the legal norms of the relevant material law, a certain "public disquiet" could be created which requires additional care about the public interest and its protection. None of these, however, can result in neglect of the fact that the defendant in criminal proceedings has certain essential rights." In terms of the "public disquiet" the ECtHR in paras 117 and 118 of *Perica Oreb* stated:

" The Court has already held on a number of occasions that, by reason of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time. In exceptional circumstances this factor may therefore be taken into account for the purposes of the Convention, in any event *in so far as domestic law recognises the notion of disturbance to public order caused by an offence....(emphasis added)* ....In the present case these conditions were not satisfied. The Court notes that Croatian law does not recognise the notion of prejudice to public order caused by an offence as a ground for detention (see *Peša v. Croatia*, cited above, § 103). Furthermore, the national courts did not explain why continued detention of the applicant was necessary in order to prevent public disquiet and did not examine whether the applicant presented a danger for public safety." The ECtHR reaffirmed this position in para 61 of the *Orban v. Croatia* case (violation of Art. 5-3 of the Convention, *App.no 56111/12, Judgment of 19 December 2013*).

In terms of violation of Art 6-2 of the Convention (presumption of innosence) the author invokes *Perica Oreb* ECtHR Judgment paras 140 – 146. For instance, in para 142 and 143 the Court stated that "the (it) notes that the domestic courts justified the applicant's pre-trial detention by, *inter alia*, the gravity of the offences and the manner in which they were committed. They did not, however, treat those circumstances as established facts but only as allegations. The Court notes that the domestic courts justified the applicant's pre-trial detention by, *inter alia*, the gravity of the offences and the manner in which they were committed. They did not, however, treat those circumstances as established facts but only as allegations." And in para 146: "The Court also reiterates that the Convention must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory (see, for example, *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37, and *Capeau v. Belgium*, no. 42914/98, § 21, ECHR 2005-I).

49. In para 142 of *Dervishi v. Croatia (*violation of Art 5-3 of the Convention*, App.no. 67341/10, Judgment of 25 September 2012)* the ECtHR held*: "*... the Court notes that at no stage of the proceedings was any consideration given to the possibility of imposing alternative, less severe preventive measures on the applicant, such as bail or police supervision, expressly foreseen by Croatian law to secure the proper conduct of criminal proceedings (see Drużkowski v. Poland, no. 24676/07, § 36, 1 December 2009). In this connection, the Court would also reiterate that until his conviction, the accused must be presumed innocent, and the purpose of Article 5 § 3 of the Convention is essentially to require him to be released

provisionally once his continuing detention ceases to be reasonable *(see Vlasov v. Russia, no. 78146/01, § 104, 12 June 2008; and Aleksandr Makarov v. Russia, no. 15217/07, § 117, 12 March 2009).*

50. Although the author expressly invoked the *Trifkovic and Dervishi* cases before the Constitutional Court (and lower instances), the Court declined to rule on the matter. It stated that it was not entitled to deal with the said cases due to the fact that the lower courts had not done so. This reasoning is invalid due to the undisputed fact that the European Convention is directly applicable in the Croatian law. In addition, it would have been expected from the highest judicial instance of Croatia to sanction the procedural malfunctions of the lower courts. This obviously represents the violations of Articles 2(3), 9(1)(4) and 14 (1) of the ICCPR.

The extraordinarily excessive detention of the author both by Australia and Croatia nearing 10 years pending trial on merits is unlawful and arbitrary and is, among other invoked Articles of the ICCPR, in violation of Articles 9 (1) (4) of the ICCPR. It also represents the violation of Article 14(1), (2) – violation of presumption of innocence, and (5) having in mind that review of his detention was subject to ill-founded examination in both states. The review of his further detention obviously does not effectively exists in Croatia.

The violations of all the Articles of the ICCPR by Australia and Croatia claimed in this petition and persistence of the said States on the said violations irrespective of the Committee's Views and General Comments, especially on Article 9 is the reason for the author to ask the UN Human Rights Committee to URGENTLY act under the Rule of 92 of its Rules of Procedure and order that Croatia vacate the further detention of the author, conditionally or unconditionally. His detention lasts nearly for 10 years in Australia and Croatia respectively, without trial on merits, and this is surely one of unprecedented cases in the history of the human rights law. His further detention represents the risk of an unrreparable harm. There is an obvious risk of a flagrant breach of fair trial rights and indefinite arbitrary detention. For all the said reasons the author and his attorneys with due respect propose that the UN Committee takes an urgent action in accordance with Article 92 of the Rules of Procedure in respect of Croatia. The request of the author and his attorneys is that Croatia as interim or protective measure vacate the prison detention unconditionally or replace it with the lighter form of guarantee that the author will appear at his trial. It goes without saying and calls upon the common sense that the further detention of the author could cause the severe injury to his body and the mind, which in turn means that further detention now nearing 10 years seriously endangers and already had endangered the author's health and thus security of person.

In accordance with the Rule 94(1) of the Procedure the author proposes that the UN Committee acts urgently in this matter.

50. Finally, the author proposes that the UN Committee adopt the Views in which it will find that Australia and Croatia respectively had violated his human rights as indicated in this petition. In respect of Croatia the author also proposes to the Committee to order that Croatia in accordance with Art. 9(5) of the ICCPR compensate him for all the anguish, pain and suffering inflicted by his unlawful and arbitrary detention as of 8 July 2015 onwards and for all the legal cost incurred since that date.

Author's signature: …….....