Strasbourg, 5 November 2010

CDL-JU(2010)019
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with
The Ministry of Justice of "the former Yugoslav Republic of Macedonia"

CONFERENCE
ON
"THE PRINCIPLE OF SUBSIDIARITY: STRENGTHENING SUBSIDIARITY: INTEGRATING THE COURT'S CASE-LAW INTO NATIONAL LAW AND JUDICIAL PRACTICE"

IN THE FRAMEWORK IF THE PRESIDENCY OF THE COMMITTEE OF MINISTERS OF "THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"

Skopje, 1-2 October 2010

REPORT

"WAYS AND MEANS TO RECOGNISE THE INTERPRETATIVE AUTHORITY OF JUDGEMENTS AGAINST OTHER STATES - THE EXPERIENCE OF THE CONSTITUTIONAL COURT OF CROATIA"

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I. Interlaken Declaration (2010) and interpretative authority of the European Court's judgments

1. At the initiative of the Swiss Chairmanship of the Council of Europe's Committee of Ministers the High Level Conference on the Future of the European Court of Human Rights was held in Interlaken (Switzerland) on 18-19 February 2010. The Conference was aimed to build for the future and to establish a roadmap for the evolution of the European Court of Human Rights in Strasbourg (hereinafter referred as to "the European Court"). The preparations for the conference were extensive and lasted for months.

2. Thus the President of the European Court, on 3 July 2009, announced the "Memorandum of the President of the Court to the States with a view to preparing the Interlaken Conference". The Memorandum describes the aims of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred as to "the Convention")[1] and of the European Court, and the position in which the European Court finds itself in the application of the Convention. The proposals put forward in the Memorandum include the following:

> "In addition, consensus could make it possible to give binding effect to the Court's judgments in respect of their interpretation of the Convention. This would strengthen the States' obligation to prevent Convention violations. It is no longer acceptable that States fail to draw the consequences as early as possible of a judgment finding a violation by another State when the same problem exists in their own legal system. The binding effect of interpretation by the Court goes beyond *res judicata* in the strict sense."[2]

3. Furthermore, Mrs. Herta Däubler-Gmelin, Chairperson of the Parliamentary Assembly Committee on Legal Affairs and Human Rights, on 21 January 2010 presented to the Parliamentary Assembly the conclusions of the hearing held in Paris on 16 December 2009 on "The future of the Strasbourg Court and enforcement of ECHR standards: reflections on the Interlaken process". One of the conclusions is the following:

> "15. One subject of particular significance, discussed at the hearing, was the need to enhance the authority and direct application of the Strasbourg Court's findings in domestic law. Rather than refer to the *erga omnes* effect of Grand Chamber judgments of principle, it is probably more accurate to refer to its interpretative authority (*res interpretata*) within the legal orders of states other than the respondent state in a given case. Here, I have in mind the United Kingdom's 1998 Human Rights Act, Section 2 § 1 of which specifies that national courts "must take into account" Strasbourg Court judgments, and Article 17 of Ukrainian Law No.3477–IV of 2006, which reads: "Courts shall apply the Convention [ECHR] and the case-law of the [Strasbourg] Court as a source of law". This subject merits special attention in Interlaken.
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> 16. ... I believe that I reflect the majority view of the Committee when citing the CDDH [Steering Committee for Human Rights - J.O.] position on this subject: 'In order to ensure the long-term effectiveness of the Convention system, the principle of subsidiarity must be fully operational. This should be the central aim of the Interlaken

[1] Convention for the Protection of Human Rights and Fundamental Freedoms [ETS No. 5, CETS No. 005], Rome, 4 November 1950, Treaty Series No. 71/1953 : Cmd. 8969.

[2] Memorandum of the President of the Court to the States with a view to preparing the Interlaken Conference, European Court of Human Rights, Strasbourg, 3 July 2009, 6-7.

Conference' (CDDH Opinion, § 9, ...)."[3]

4. A joint "Interlaken Declaration" was adopted at the close of the Conference. In it the conclusions were, among others, that in the light of the subsidiary nature of the supervisory mechanism established by the Convention and notably the fundamental role which national authorities, i.e. governments, courts and parliaments, must play in guaranteeing and protecting human rights at the national level - the States Parties must commit themselves to "taking into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system".[4]

5. Some member states reacted promptly to the conclusions of the Interlaken Declaration. Thus the Human Rights Joint Committee of the House of Commons and House of Lords of the UK Parliament already in March 2010 wrote the report "Enhancing Parliament's role in relation to human rights judgments", in which it especially referred to the "effect of judgments against other states" in the light of "the recognition of the interpretative authority of the Strasbourg Court".[5] The Committee noted that "the Interlaken Declaration calls on states to take into account, not only judgments of the Court against the state itself, but also the Court's developing case-law in judgments finding a violation of the Convention by other States. It urges states to consider the conclusions to be drawn from such judgments against other states where the same problem of principle exists within their own legal system." In the Committee's opinion, "this reflects a growing concern that the binding effect of the judgments of the European Court of Human Rights interpreting the Convention is limited in practice by states taking an essentially passive approach to compliance with the Convention, waiting until the Court has found a violation before considering whether its law, policy or practice requires changing in order to make it compatible with the Convention."

6. In conclusion, there are increasing demands within the Council of Europe to supplement the rule that the European Court's judgments are binding on the contracting state against which the judgment was passed – by the rule that the "interpretative authority" of the European Court's judgments should be generally binding, irrespective of the state against which the judgment was passed. Specifically, there are increasing demands that the judgments of the European Court, independently of the states in relation to which they were passed, should in all the contracting states be given the power of an "interpretative source" of domestic law if these judgments could have implications for their domestic law, policy or practice (the effect of the judgments of the European Court *erga omnes*).

7. The Constitutional Court of the Republic of Croatia (hereinafter referred as to "the CCRC") began to implement this demand right from the beginning of the effective application of the Convention in its cases. The CCRC accepted the binding interpretative authority of all the judgments and decisions of the European Court, irrespectively of the states in relation to which the judgments and decisions were passed, for two reasons. The first reason lies in the approach of the Republic of Croatia to international treaties. The second reason lies in the

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[3] Parliamentary Assembly (21 January 2010) Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe: "The future of the Strasbourg Court and enforcement of ECHR standards: reflections on the Interlaken process". Conclusions of the Chairperson, Mrs. Herta Däubler-Gmelin, of the hearing held in Paris on 16 December 2009.

[4] High Level Conference on the Future of the European Court of Human Rights. Interlaken Declaration, 19. February 2010, Action Plan, B. ("Implementation of the Convention at the national level"), 4.c), 3.

[5] House of Lords, House of Commons Human Rights Joint Committee: Enhancing Parliament's role in relation to human rights judgments, 15th Report of session 2009-10, House of Lords papers 85 2009-10. House of Commons papers 455 2009-10, 26 March 2010, HL Paper 85 / HCP 455 (4. Systemic issues: Recognising the interpretative authority of the Strasbourg Court), §§ 187 and 188, 56-58., www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/85/85.pdf (Last visited: 4 September 2010).

approach of the CCRC to the Convention.

II. The approach of the Republic of Croatia to international treaties

A. Legal monism and the direct application of the Convention in Croatia

8. Croatia has accepted the monistic approach in the relationship between domestic and international law. The relevant provision of the Constitution of the Republic of Croatia[6] reads as follows:

"Article 141

> International agreements concluded and ratified in accordance with the Constitution and made public, and which are in force, shall be part of the internal legal order of the Republic of Croatia and shall be above law in terms of legal effects. Their provisions may be changed or repealed only under conditions and in the way specified in them or in accordance with the general rules of international law."

9. Professor Smiljko Sokol, the author of this constitutional provision, points out that this is "generally, in the practice of constitutional law in contemporary states, the most explicit, most complete formulation for the application of the monistic conception in the relationship between domestic and international law."[7]

B. The Status of the Convention in the Legal Order of the Republic of Croatia

10. Formally, the Convention has a sub-constitutional status in Croatia: it is above law in terms of legal effect, but under the Constitution.

11. In fact, however, the Convention has a quasi-constitutional status[8] in Croatia, which the CCRC instituted in the Croatian legal order in its case-law. This was, in the first place, done in the CCRC decision no.: U-I-745/1999 of 8 November 2000,[9] passed in the proceedings of the abstract control of the constitutionality of the Expropriation Act. In this decision the CCRC for the first time reviewed the conformity of a domestic law directly with the Convention, not with the Constitution, and it repealed some provisions of the Expropriation Act finding that they were

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[6] The Constitution of the Republic of Croatia, Ustav Republike Hrvatske, *Narodne novine*, nos. 56/90, 135/97, 8/98-consolidated wording, 113/00, 124/00-consolidated wording, 28/01, 41/01-consolidated wording, 55/01-corr. of consolidated wording, 76/10 and 85/10-consolidated wording.

[7] Šarin, Duška: Nastanak hrvatskoga Ustava (The Creation of the Croatian Constitution), Narodne novine, Zagreb, 1997, chapter: Dialogue with Doctor Smiljko Sokol, 223.

[8] Cardoso da Costa points out that the Convention has a quasi-constitutional status in a national legal order "where the European Convention does not formally qualify as constitutional law but nonetheless plays a role equivalent to that of the constitution, as a yardstick for review of domestic legislation, in particular Acts of Parliament. That is the case in states where, firstly, international treaties incorporated in national law are recognised as overriding statute law (with the result that, in the event of a conflict of law, the courts must, at least in principle, give the treaty rules precedence over those of statute law, even where the latter is more recent) and, secondly, constitutional review of legislation in the strict sense is ruled out, at least to some extent. In such circumstances, constitutional review is in fact replaced by a review of consistency with the convention concerned. The latter is substituted (the particularly apt German term “Ersatz” springs to mind here) for the former. It is then possible to talk of the convention's “quasi-constitutional” status inasmuch as, through consideration of the convention's principles and clauses, the domestic law in question is, in the final analysis, also reviewed in the light of the fundamental principles of the state constitution, on account of the two instruments' virtually overlapping substance." Cardoso da Costa, José Manuel Moreira: Constitutional Supremacy of Human Rights Treaties, in the book: The Status of International Treaties on Human Rights, Venice Commission Collection: Science and technique of democracy, No. 42, Council of Europe Publishing, Strasbourg, September 2006, 81.

[9] Decision of the Constitutional Court no.: U-I-745/1999 of 8 November 2000, *Narodne novine*, no. 112/00.

not in conformity with the Convention. In this way the CCRC in fact replaced constitutional review by a review of the consistency of a domestic law with the Convention and by doing so secured a quasi-constitutional status for the Convention in the domestic legal order.

C. The direct application of the Convention in the Republic of Croatia

12. The Convention is applied directly in the Republic of Croatia. What is more, because of the Convention's effectively quasi-constitutional status in the domestic legal order, parties may lodge a constitutional complaint with the CCRC for the protection of their individual rights by directly referring to a violation of the Convention. The same rule is also applied in proceedings before regular courts.

III. The approach of the Constitutional Court of the Republic of Croatia to the Convention

13. Starting from the conception of legal monism, the effectively quasi-constitutional status of the Convention in the Croatian legal order and the constitutional demand for the direct application of the Constitution, the CCRC has so far referred to the European Court and its case-law in more than 750 decisions and rulings. Among the decisions and judgments of the European Court to which the CCRC has referred in its decisions and rulings there are incomparably more those that the European Court passed in relation to other contracting states to the Convention than those that it passed in relation to Croatia.

14. This is primarily the result of a specific approach to the Convention and a particular understanding of the obligations for the Republic of Croatia that emerge from it. This approach cumulatively covers the following standpoints:

A. Most important for the obligations of the CCRC under the Convention is Article 1.
B. The Convention must be approached as an international human rights treaty.
C. The European Court's judgments transcend the boundaries of a particular case.
D. The European Court's judgments start from the "democratic society" as a framework for advancing Convention rights.
E. National constitutional courts and the European Court perform similar tasks on different levels.

A. Article 1 of the Convention is the most important for determining the obligations of the contracting states

15. First, when approaching the Convention the CCRC starts from the view that Article 1 is paramount in determining its obligations under the Convention. This Article prescribes that the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention. It is a normative framework for the most important aspects of entire Convention system:

> "29. ... Article 1 requires the States Parties to 'secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. That provision, together with Articles 14, 2 to 13 and 63, demarcates the scope of the Convention *ratione personae, materiae* and *loci* (see the *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 90, § 238). It makes no distinction as to the type of rule or measure concerned and does not exclude any part of the member States' 'jurisdiction' from scrutiny under the Convention. It is, therefore, with respect to their 'jurisdiction' as a whole – which is often exercised in the first place through the Constitution – that the States Parties are called on to show compliance with the

Convention."[10]

16. Besides Articles 13 and 35 para. 1 (indirectly also Articles 19, 41, 52 and 53) of the Convention, Article 1 of the Convention also implicitly shows the subsidiary nature of the Convention supervisory mechanism.

a – The principle of subsidiarity of the Convention supervisory mechanism

17. The principle of subsidiarity of the Convention supervisory mechanism requires that the Convention rules must be protected first and foremost on the national level and that national bodies should apply the Convention:

> "1. General principles
> 97. Under Article 1 of the Convention, which provides that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention', the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights."[11]

18. Accordingly, the CCRC starts from the fact that the Convention recognises the contracting state's primary jurisdiction and obligation to effectively protect, within the domestic legal order, the fundamental rights and freedoms enshrined in the Convention. To quote the President of the European Court, the contracting states have "ownership of the Convention for the benefit of the persons within their jurisdiction".[12] On the other hand, it is the task of the European Court, within the framework of Article 19 of the Convention, to guide and help to contracting states to themselves effectively guarantee individuals the necessary protection through their own institutions and procedures, which is achieved "by establishing effective remedies, execution of the Court's judgments and recognising their interpretative authority".[13]

B. The Convention is an international human rights treaty

19. Second, the Convention is an international human rights treaty. Such treaties are special inasmuch as they do not anticipate reciprocal benefits for the contracting states in the way done, for example, by commercial or extradition treaties. Instead, they lay down obligations that are often called "one sided" because they primarily benefit the world community (including the global domain), namely, individual persons or groups of persons within the contracting states themselves. Accordingly, in approaching the Convention the CCRC starts from the following the basic position:

> "239. ... Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective

[10] *United Communist Party of Turkey and Others v. Turkey* [GC], judgment of 30 January 1998, no. 19392/92.

[11] *Sürmeli v. Germany* [GC], judgment of 8 June 2006, no. 75529/01.

[12] Memorandum of the President of the Court to the States with a view to preparing the Interlaken Conference, 5.

[13] Ibid., 7. Starting from this distribution of the roles of the contracting states and the European Court, President Costa deems that "it is perhaps more appropriate to refer to the sharing of responsibility for the protection of human rights between national authorities and the Court" instead of referring to subsidiarity (ibid, 4).

enforcement'.[14]

C. The European Court's judgments transcend the boundaries of a particular case

20. Third, in the light of what has been said above, the CCRC accepts the long-established rule that the judgments of the European Court transcend the boundaries of the particular cases brought before it:

> "154. … The Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (Article 19) (…)."[15]

21. With this in mind, Professor Draper states:

> "The general scheme of the Convention is precisely to define specific human rights and fundamental freedoms (the substantive law of the instrument), to specify the machinery for the observance of engagements undertaken by the High Contracting Parties and elaborate jurisdictional and procedural rules for its operation. The rules affect States and individuals alike. In terms of strict juridical analysis, it may be more accurate to say that the right of the individual under the Convention falls within its jurisdictional and procedural provisions and not within its substantive law system. The individual who proceeds under the Convention is not so much seeking the enforcement of his individual legal right as bringing to the attention of the competent organs under the Convention a supposed violation of the inter-state undertakings entered into by the High Contracting Parties in Article 1.
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> An appreciation of this basic juridical position may dispel some current misconceptions and criticism of the Convention. It has been rightly said that 'the primary purpose of the Convention is not to offer an international remedy for individual victims of violations of the Convention but to provide a collective, inter-state guarantee enforceable through Strasbourg that would benefit individuals generally by requiring the municipal law of the Contracting States to keep within certain bounds'."[16]

D. The European Court's judgments start from the "democratic society" as a framework for advancing Convention rights

22. Fourth, the European Court found long ago that the underlying values of the Convention must be sought in a "common heritage of political traditions, ideals, freedom and the rule of law to which the Preamble refers",[17] i.e. that the Convention is "an instrument designed to maintain and promote the ideals and values of a democratic society".[18]

> "45. Democracy is without doubt a fundamental feature of the European public order (...).

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[14] *Ireland v. the United Kingdom* (Plenary), judgment of 18 January 1978, no. 5310/71.
[15] Ibid.
[16] Draper, G.I.A.D.: Implementation of the European Convention on Human Rights 1950, Israel Yearbook on Human Rights, 2 (1972), 99-120 (at 99-100), *a quote from* Drzemczewski, Andrew Z.: European Human Rights Convention in Domestic Law. A Comparative Study, Clarendon Press, Oxford, 1985, 9 and note 29. Moreover, Drzemczewski points out that "[t]he entire idea of providing international machinery to protect human rights is based on the assumption that certain treaty obligations in respect of domestic implementation will not be carried out, be it because of inadvertence, lack of adequate knowledge, or due to the misuse of power for partisan or other purposes." (ibid, 9).
[17] *Soering v. the United Kingdom* (Plenary), judgment of 7 July 1989, no. 14038/88, § 88.
[18] *Kjeldsen, Busk Madsen and Pedersen v. Denmark,* judgment of 7 December 1976, nos. 5095/71, 5920/72 and 5926/72, § 53.

> That is apparent, firstly, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights (...). The Preamble goes on to affirm that European countries have a common heritage of political tradition, ideals, freedom and the rule of law. The Court has observed that in that common heritage are to be found the underlying values of the Convention (...); it has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society (...).
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> ... The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from 'democratic society'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it."[19]

23. Accordingly, in its case-law the CCRC starts from the position that the European Court understands democracy more broadly than the narrow etymological concept of "majority rule": its essential instrumental purpose is to further stabilise the liberal concept of individual human rights and fundamental freedoms. In this light the CCRC accepts the fact that individual human rights and fundamental freedoms protected by the Convention, in the context of democracy and the rule of law, "are not criterial concepts whose meaning is exhausted by their common usage across Contracting States. They are meant to express a moral commitment to objective principles of liberal democracy."[20]

24. Only this understanding of individual Convention rights enables the contracting states to express not only the legal but also the moral obligation, connected with the political obligation, to ensure the harmony of their national legal orders with the basic principles underlying the development of the community of European states.

a – The European Court's judgements build European constitutional standards

25. In accordance with the views given above, the approach of the CCRC is that the purpose of the Convention and the Convention supervisory mechanism is not only the protection of an individual right. The European Court, an essential component of the Convention supervisory mechanism, "serves a purpose beyond the individual interest in the setting and applying of minimum human rights standards for the legal space of the Contracting States. The individual interest is subordinate to the latter."[21] In other words, in its decision the CCRC explicitly accepts the Convention as the "constitutional instrument of European public order",[22] and the European Court as the creator of "European constitutional standards".[23]

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[19] *United Communist Party of Turkey and Others v. Turkey* [GC], judgment of 30 January 1998, no. 19392/92. The case-law of the European Court clearly shows that this court is endeavouring to reconcile the tensions between democracy and constitutionalism. More specifically, it supplements the two basic pillars of constitutionalism – the concept of limited authority and the primacy of individual freedom that depends on respect for fundamental rights, which are the basis for the rule of law - with an additional constitutional instrument: democracy.

[20] Letsas, George: *A Theory of Interpretation of the European Convention on Human Rights*, Oxford: Oxford University Press, 2007, 11.

[21] *Varnava and Others v. Turkey* (Third Section), judgment of 10 January 2008, nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 156.

[22] *Loizidou v. Turkey* (preliminary objections) [GC], judgment of 23 March 1995, no. 15318/89, § 75. and the judgment in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (Grand Council), 30 June 2005, application no. 45036/98, § 156.

[23] In decision no. U-III-3491/2006 and others of 7 July 2010 the CCRC changed it original legal opinion that the Croatian Academy of Sciences and Arts has the obligation to sell, under more favourable conditions for the tenants, the flats which became its property *ex lege* in the process of the transformation of former social ownership. It explained this change of opinion as follows: "Taking this [original – note J.O.] stand, the

26. If the Convention is perceived in this way, it is by the nature of things not possible to talk about complying with the Convention, i.e. about applying the case-law of the European Court, if the contracting state limits itself only to the judgments that the Court passes in relation to itself. European constitutional standards emerge from the totality of the jurisprudence of that court.

E. National constitutional courts and the European court perform similar tasks on different levels

27. This brings us to the fifth and last principle in the CCRC's approach to the Convention. The Convention supervisory mechanism led to two concurrent interdependent processes in international (European) public law: to the 'constitutionalisation' of Convention law, on one hand, and to the 'Europeanisation' of national constitutional laws in the field of the protection of human rights and fundamental freedoms, on the other. The bearers of these processes are the European Court and the national constitutional courts (or the courts of equivalent jurisdiction) of the contracting states.

28. These processes are gradually leading to an increasingly obvious convergence of the constitutional courts (or courts of equivalent jurisdiction) of the contracting states and the European Court.[24] The European Court itself is recently increasingly being called the "European Constitutional Court",[25] especially because of the *pilot-judgment procedure* which it introduced in its case-law in 2004.[26]

29. Namely, the role of the European Court, as any other international court for the protection of human rights, is "quite different from that of the national courts and it is for the former to examine the existing standards for the protection of the lives of persons, including the legal framework of a given State."[27] In principle, the same is done by constitutional courts (or courts of equivalent jurisdiction) only on the national level.[28]

Constitutional Court did not view these cases broadly enough in the light of so-called European constitutional standards, i.e. in the light of the European Court's view about the reaches and content of the Convention right to the peaceful enjoyment of possessions. The Constitutional Court has been applying these standards in its case-law since July 2009 (U-IIIB-1373/2009), accepting the fact that the Convention is the 'constitutional element of European public order' (see *Loizidou v. Turkey*, judgment of the Grand Council of 23 March 1995, application no. 15318/89)."

[24] Arnold points out "that the national constitutions are subject to 'the reservation' of the ECHR so that their jurisprudence has to comply with that of the ECtHR. National constitutional jurisprudence is to be in conformity with Strasbourg jurisprudence. Fundamental rights protection is administered by both national constitutions and the ECHR - there is a functional unity of the two, one can even call it a functional identity which, in turn, does not exclude that the solutions found by both courts are different (...)." Arnold, Reiner: The Emergence of European Constitutional Law, Electronic Journal of Comparative Law, Nederlandse Vereniging Voor Rechtsvergelijking/EJCL Netherlands Comparative Law Association, Vol. 11, No. 3 (December 2007), 2-3, 4, www.ejcl.org/ (accessed: 2 September 2010)

[25] Compare Ryssdal, Rolv: In the Road to a European Constitutional Court (Winston Churchill Lecture on the Council of Europe, Florence, 21 June 1991), in: Collected Courses of the Academy of European Law - Recueil Des Cours De L'Academie De Droit Europeen, Vol. II, Book 2, Academy of European Law, Martinus Nijhoff, Dordrecht, 1991, 1-20.; Wildhaber, Luzius: A Constitutional Future for the European Court of Human Rights?, Human Rights Law Journal, Vol. 23, 5-7 (2002), 161-165.; Costa, Jean-Paul, Opening Speech, in: Proceedings of the Seminar "Ten years of the 'new' European Court of Human Rights 1998-2008 - Situation and Outlook", Strasbourg, 13 October 2008, 12.; Häberle, Peter: Role and Impact of Constitutional Courts in a Comparative Perspective, in the book: The Future of the European Judicial System in a Comparative Perspective, eds. Ingolf Pernice, Juliane Kokott, Cheryl Saunders, European Constitutional Law Network Series, Vol. 6, NOMOS Verlag, Baden-Baden, 2006, 65-77. (cit. on 67-68.); Stone Sweet, Alec: On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court, Revue trimestrielle des droits de l'homme, Vol. 80 (2009), 923-944.

[26] Compare Lazarova-Trajkovska, Mirjana: Nezavisnosta na Ustavnite sudovi i pilot presudite na Evropskiot sud za čovekovite prava, Round Table of Constitutional Courts: Independence of Constitutional Courts, Ohrid, 10-12 June 2010 (archives of the Constitutional Court of the Republic of Croatia, unpublished); Sadurski, Wojciech: Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments, Human Rights Law Review, Vol. 9, Issue 3 (2009), 397-453.

[27] *Branko Tomašić and Others v. Croatia*, judgment of 15 January 2009, no. 46598/06, § 74.

[28] Within the framework of discussing the concept of "European constitutionalism", Arnold speaks about "constitutional

30. In conclusion, the jurisprudence of the European Court may be qualified as the "European Constitutional Court's jurisprudence" only if it is perceived in its totality, independently of the contracting states in relation to which it was created. By the nature of things it does not permit a partial approach, i.e. being limited only to the part that concerns one contracting state.

IV. The European Court's judgments against other states as an interpretative framework of Croatian constitutional law

A. How the European Court's judgments against other states are integrated into CCRC decisions

31. In its case-law to date the CCRC has adopted several ways of integrating in its decisions the legal opinions of the European Court expressed in judgments against other states. It applies them in the abstract control of the constitutionality of laws, in individual constitutional complaints and in other proceedings that the CCRC implements within its jurisdiction. In addition to their presentation, which follows, we also refer to the examples of CCRC decisions contained in the Appendix to this report.

32. Most often the CCRC integrates European Court case-law against other states into its decisions in the following ways:

a) describing the principle adopted by the European Court in its approach to a specific Convention rule or institute (e.g. taxation) and referring to the relevant case-law – *see examples 3, 4, 7, 9, 13 and 14 in the Appendix*;

b) directly citing in their entirety the legal opinions of the European Court from a particular judgment or decision – *see examples 1 and 10 in the Appendix*;

c) describing in detail the whole case before the European Court and directly citing the relevant legal opinions of the European Court in the respective judgment or decision – *see example 2 in the Appendix*;

d) showing the development of a particular legal institute in the case-law of the European Court as the European Court itself showed it (for example, the development of "legitimate expectations" in the light of Article 1 of Protocol No. 1 to the Convention) – *see example 11 in the Appendix*;

e) showing a legal opinion of the European Court with a listing of several cases from its case-law in which it applied that opinion – *see example 5 in the Appendix*;

f) showing the legal opinions of the European Court in connection with the positive obligations of the contracting states – *see examples 7 and 10 in the Appendix*;

g) expressing a legal opinion of the CCRC and at the same time referring to a relevant judgment or decision of the European Court expressing an identical opinion – *see example 6 in the Appendix*;

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pluralism" which is comprised of "various sources and levels of constitutional law. In this context a frequently used term is 'multilevel constitutionalism'", Arnold, ibid., 2-3.

h) interpreting the structure of the relevant provisions of the Constitution of the Republic of Croatia in keeping with the interpretation of the structure of comparable Convention provisions given by the European Court – *see example 12 in the Appendix*;

33. When the CCRC integrates the European Court's case-law in its decisions in the various ways shown above, this case-law is shown in Croatian. However, in many of its decisions the CCRC also used the following techniques:

a) besides the European Court's legal opinion given in Croatian, the original text of the opinion is also given in parentheses in English - *see example 13 in the Appendix*;

b) besides the European Court's legal opinion given in Croatian, the key concept or some sentences or its most important part is given in parentheses in English – *see examples 6, 10 and 11 in the Appendix*;,

c) besides the European Court's legal standpoint given in Croatian, the key concept is given in parentheses in English and in French – *see example 15 in the Appendix*.

B. The internal work organisation of the CCRC includes monitoring the judgments of the European Court

34. The Constitutional Court Records and Documents Department includes:

a) a liaison officer engaged on work connected with membership of the Republic of Croatia in the Venice Commission of the Council of Europe,[29] including work connected with the "Venice Forum";[30]

b) a senior legal adviser who:
- monitors the case-law of the European Court on a daily basis,
- selects important judgments that could have implications for Croatia,
- makes written summaries of them in Croatian and saves them in the CCRC electronic database which is accessible to all the judges and legal advisers at all times,
- every week advises the judges about new judgments at the regular meeting of judges.

35. The CCRC contracts authorised translators to translate entire judgments of the European Court into Croatian.

VI. Concluding observations

36. Starting from its basic obligations laid down in Article 1 of the Convention, especially the principle of the subsidiarity of the Convention supervisory mechanism, and approaching the

[29] The Venice Commission, together with constitutional courts and courts of equivalent jurisdiction, has established a network of liaison officers with the prime goal of producing the *Bulletin on Constitutional Case-Law* and the database CODICES. *See* Overview of Co-operation with Constitutional Courts. Functions of liaison officers, Venice Commission, CDL-JU(2005)011, Strasbourg, 6 June 2005.

[30] The Venice Commission makes available to constitutional and equivalent courts a forum on the Internet reserved for them, the “Venice Forum”, through which they can speedily exchange information relating to pending cases.

Convention as an international treaty on human rights *par exellence*, the CCRC considers that the European Court's judgments transcend the boundaries of an individual case. They create "European constitutional standards" that underlie the "European public order". The "constitutional instrument" of this order is the Convention and its fundamental characteristic is the "democratic society" which serves as a framework for advancing Convention rules. This approach to the Convention makes it impossible for the CCRC to limit itself only to compliance with the judgments that the European Court passes in relation to Croatia. Only the European Court's total jurisprudence, irrespective of the state to which a specific judgment or decision of the European Court refers, enables the contracting states to fulfil their obligations in the way described by Jean-Marc Sauvé, vice-president of the French Council of State:

> "... it is our duty to contribute to the convergence of our domestic public laws and, mutually conditioned, to the emergence of a European public law that will be applied by all the states on the continent. (...) We cannot remain inert before the changes that are taking place. Within the framework of the globalisation of law, Europe has a character and a tradition that it must protect: this is European humanism, which is based on the demanding concept of the rights and dignity of the human being and, at the same time, on a particular idea of the obligations and rights of society (the community). We share a hidden, deep, common conception of the human person and the public interest. The experience our continent gained with two totalitarian regimes in the 20th century not only does not give it the right, but places before it the crucial obligation, to defend this tradition which has a prominent legal dimension."[31]

38. The way in which the CCRC integrates the European Court's judgments and decisions into its own case-law has for now shown itself efficient enough to satisfy the demand of the Council of Europe for compliance with the binding interpretative authority of the judgments of the European Court in which it has found a violation of the Convention committed by another state.

39. As for the responsibilities of the parliaments and governments of the contracting states in accomplishing the same demand, I consider it opportune – for want of experience and practice in the Republic of Croatia – to show here the recommendations made by the Human Rights Joint Committee of the House of Commons and House of Lords of the UK Parliament in the report already mentioned, "Enhancing Parliament's role in relation to human rights judgments". They may serve as a guiding principle for the parliaments, governments and courts of all the contracting states, including the Republic of Croatia:[32]

> "EFFECT OF JUDGMENTS AGAINST OTHER STATES
>
> ...
>
> 189. As far as we are aware the Government does not have in place any arrangements for systematically monitoring judgments of the European Court of Human Rights against other States and considering, as soon as practicable following the judgment, whether they have any implications for UK law, policy or practice. In the Netherlands, by comparison, the Government's annual report to Parliament on human rights judgments has, since 2006, covered not only judgments of the European Court of Human Rights against the Netherlands, but any judgment which could have a direct or indirect effect on the Dutch legal system.[33] In Switzerland too, since the beginning of

[31] Sauvé, Jean-Marc: Rad i utjecaj francuskog Državnog savjeta (The Work and Influence of the French Council of State) (lecture), International seminar "Prema modernoj upravi, tradicije i tranzicije" (Towards a Modern Administration, Traditions and Transitions), Split University, Paris II University and Paris II Centre for European Studies and Documentation, Split 22-23 October 2007 (unpublished, archives of the Constitutional Court of the Republic of Croatia).

[32] *See* note 5.

[33] Parliamentary Scrutiny of the standards of the European Convention on Human Rights, PACE Committee on Legal Affairs and Human Rights Background Document, AS/Jur/Inf (2009) 02 p. 2. The Dutch Senate requested in 2006 that the scope of the Government's report to Parliament be broadened to include an overview of

2009 regular reports by the Government to Parliament now cover all Strasbourg Court judgments which may have a bearing on the Swiss legal system, and not just those against Switzerland.

190. In our view, the Government should institute a mechanism for systematically considering the implications for the UK of Court judgments against other States and should provide to Parliament the relevant information indicating exactly what consideration it has given to such other judgments and their possible implications for the UK. We note with interest that this is already done by the Governments of the Netherlands and Switzerland, which include the information in the annual reports to their parliaments. We do not consider that this would be an unduly onerous task. We know that the Government already monitors the cases coming before the European Court of Human Rights with a view to intervening in those which may have implications for UK law, and indeed increasingly does so.

191. We recommend that the Human Rights Division of the Ministry of Justice, working with the Foreign Office, make the necessary arrangements to ensure that systematic consideration is given to whether judgments of the European Court of Human Rights finding a violation by another State have any implications for UK law, policy or practice and that this consideration take place as soon as reasonably practicable after the judgment.

192. We also recommend that the Minister for Human Rights provide a detailed description of the arrangements which are made for this purpose in his memorandum to be provided to the Committee before he next gives oral evidence in relation to human rights judgments. The Minister's memorandum should also include a summary report of the outcome of this consideration of the implications for the UK of Court judgments finding violations by other States.

193. We suggest that our successor committee consider developing this line of monitoring work by regularly asking the Government what steps it is taking to give effect in UK law to a judgment of the European Court of Human Rights against another State but which clearly has implications for UK law, policy or practice."[34]

40. In conclusion, the goals put forth in the Interlaken Declaration (2010) should not be doubted because the European Court is "more than just another European institution; it is a symbol. Like no other institution, it symbolises an essential part of European legal culture."[35] The question that we need to address in the following period is not, therefore, whether the Convention supervisory mechanism will endure, but what that mechanism will be like in the future. The answer to this question most of all depends on the contracting states themselves and their approach to the Convention.

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implementation issues raised by Strasbourg judgments generally. (in the original text this is footnote 187).

[34] In the original text of the report Points 191-193 are given in bold lettering.

[35] Address by the President of the European Court of Human Rights Luzius Wildhaber, Council of Europe Warsaw Summit, 16-17 May 2005.

APPENDIX

EXCERPTS FROM DECISIONS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

(APPLICATION OF THE CASE-LAW OF THE EUROPEAN COURT – JUDGMENTS AGAINST OTHER STATES)

Note: the examples are classified in the order of the articles of the Convention

ARTICLE 3 OF THE CONVENTION

1. U-III-2501/2008, 16 October 2008 - constitutional complaint (refusal of the applicant's request for asylum in the Republic of Croatia - exposure to the risk of ill-treatment in Bosnia and Herzegovina after extradition /the principle of "non-refoulment"/)

7. The Constitutional Court also had the legal opinion of the European Court of Human Rights in mind. The European Court states, in the reasons for the judgment in the case of *Saadi v. Italy*, no. 37201/06 of 28 February 2008, that "Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies… As regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources, including the US State Department… At the same time, it has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 *(Fatgan Katani and others v. Germany, no. 67679/01 of 31 May 2001), …* and that, where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence. In order for a punishment or treatment associated with it to be 'inhuman' or 'degrading', the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment *(Labita v. Italy, no. 26772/95).*"

2. U-I/988/1998 and others, 17 March 2010 – abstract control of constitutionality of the Pension Insurance Act (Official Gazette Nos. 102/98, 127/00, 59/01, 109/01, 147/02, 117/03, 30/04, 177/04, 92/05, 43/07-decision of the Constitutional Court, 79/07 and 35/08)

14.5. In this light we must answer the following question: ... is there a general minimum of pension benefits which, if exceeded, would entail a violation of human rights enshrined in the Constitution?

The Constitutional Court did not address this issue in its previous case-law. On the other hand, the European Court has a developed case-law on this subject. It has adopted the principle that the total amount of an individual's pension, together with all the State and public benefits and discounts that the potential victim of the violation of the Convention enjoys, may – because they are not sufficient – under some circumstances, in a specific case, open the question of inhuman or degrading treatment by the State within the meaning of Article 3 of the Convention, if that amount, accessible to the individual, is not sufficient protection from "impairing physical or mental health" or from "degradation incompatible with human dignity" to a measure that would be serious enough to fall within the framework of Article 3 of the Convention (compare the decision on application admissibility in the case of *Antonina Dmitriyevna Budina v. Russia,* 18 June 2009, application no. 45603/05, pp. 6 -7; decision in the case *Aleksandra Larioshina v. Russia,* 23 April 2002, application no. 56869/00, p. 4, and the judgment in the case of *Kutepov and Anikeyenko v. Russia,* 25 October 2005, application no.

68029/01, §§ 61-63).

Thus in the decision on application admissibility in the case of *Antonina Dmitriyevna Budina v. Russia* the European Court examined the admissibility of the applicant's allegation that the amount of her pension is below subsistence level, which constitutes a threat to her right to life within the meaning of Article 2 of the Convention. The Court found that the authorities did not mistreat the applicant in any way. The essence of the applicant's objection was that the State pension on which she depended for survival was insufficient for her basic human needs.

Examining the application's admissibility, the European Court took into account, besides the amount of the pension itself, also the sum of the applicant's other monthly receipts (in Russian roubles - RUB): - her pension (RUB 1,460), - social aid (RUB 590) and - compensation for limited ability to work (RUB 410), but also the following privileges that the applicant enjoyed: - 50% discount on utility bills; - free public urban and suburban transport; - 50% discount on interurban rail and air transport; 50% discount on telephone and radio bills; free medical assistance; free dental prosthetics (except precious metals and cermets); - 50% discount on medical prescriptions; - free sanatorium treatment and - free suburban and interurban transport to the place of the treatment. The European Court further took into consideration that the applicant had received one sum of RUB 500 indigence aid, and that her family also benefited from the discount on utility bills. Finally, the European Court also took into consideration that part of the applicant's benefits, on her request, was monetised (pp. 2-3 of the decision).

Although the European Court found that the applicant's monthly income "was not high in absolute terms", it declared inadmissible the applicant's objection that her rights were violated because her income was below subsistence level, with the explanation that the applicant had not proved that "*the lack of funds translated itself into concrete suffering*".

In the *Kutepov and Anikeyenko v. Russia* the European Court pointed out the following:

> *"61. The second applicant further relied on Article 2 of the Convention in that the present amount of his old-age pension was insufficient to maintain a proper living standard.*
>
> *62. The Court recalls that the Convention does not guarantee, as such, the right to a certain living standard. It further notes that a complaint about a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under Article 3 of the Convention which prohibits inhuman or degrading treatment. However, on the basis of the material in its possession, the Court finds no indication that the amount of the second applicant's pension has caused such damage to his physical or mental health capable of attaining the minimum level of severity falling within the ambit of Article 3 of the Convention, or that he faces any "real and immediate risk" either to his physical integrity or his life, which would warrant the application of Article 2 of the Convention in the present case..."*

ARTICLE 5 PARAGRAPH 1 OF THE CONVENTION

3. U-III-1897/2008, 20 May 2008 – constitutional complaint (extension of detention after the court of first instance had passed judgment)

5.4. With reference to the second part of Article 102 paragraph 1 indent 3 of the Criminal Procedure Act, under which if detention is ordered for reasonable suspicion that a person has committed an offence "special circumstances" justifying such suspicion must be shown, it is necessary to recall the opinions of the European Court of Human Rights in the application of Article 5 para. 1c of the European Convention on Human Rights. According to these opinions, detention cannot be grounded only on reference to an equal offence and

danger of reoffending, or only on reference to the defendant's past history and personality or only on previous conviction, but all the circumstances of a particular case must be taken into account, including the defendant's personal circumstances and character, the amount of the damage, his perseverance and the frequency of his offences and the like (judgments of the European Court of Human Rights in the cases *Clooth v. Belgium*, § 40; *Muller v. France*, § 44; *Matznetter v. Austria*, § 9), because only thus can the public interest for depriving a person of freedom be seen to prevail over his right to freedom. This is especially important when detention is extended on the grounds on which it had originally been ordered, because in such cases the reasons for the continuation of detention, as the measure that interferes most deeply with the fundamental right to personal freedom, must be qualitatively stronger.

ARTICLE 5 PARAGRAPH 3 OF THE CONVENTION

4. U-III/3698/2003, 28 September 2004 – constitutional complaint (reasonable suspicion as a legal ground for continued detention on remand)

8.... The Constitutional Court also points out the legal opinion taken by the European Court in the application of Article 5/3 of the European Convention, whereby reasonable suspicion, however grave the criminal offence, is after a lapse of time in itself not sufficient legal ground for continued detention on remand. The case of *Kemmache v. France* of 21 October 1991 contains the following legal stand: where an arrest is based on reasonable suspicion that the person concerned has committed an offence, persistence of that suspicion is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices; the Court must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty. Where such grounds are "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings. The above legal opinions of the European Court were repeated in the case of *Nikolova v. Bulgaria*, of 5 March 1999, and in many other judgments.

ARTICLE 6 PARAGRAPH 1 OF THE CONVENTION
JUDICIAL IMPARTIALITY

5. U-III-5423/2008, 28 January 2009 – constitutional complaint (objective judicial impartiality)

6.1.... The European Court of Human Rights deems that a judge is presumed impartial until proved otherwise. However, in a particular case the facts may give rise to objective negative appearances of a judge's (im)partiality which justify legitimate expectations that the judge will excuse himself from the trial. Such facts exist, for example: a) when a judge taking part in the trial decided, in prior proceedings, about issues that are closely connected with the issue he will have to settle when giving judgment (judgment in the case of *Hauschildt v. Denmark* of 24 May 1989, § 51-52); b) if he, after participation in passing the first-instance judgment, participates in deciding on appeal (judgment in the case of *De Haan v. Netherlands* of 26 August 1997, § 51, 54); c) if he was on the out-of-trial panel of judges that confirmed the grounds for indictment and was after that a member of the chamber of judges at the trial (judgment in the case of *Castillo Algar v. Spain* of 28 October 1998, § 47-49). In the case of *Piersack v. Belgium* (judgment of 1 October 1982, § 30-31), the fact that the judge who presided over the panel at the trial had earlier been at the head of the public attorney's office competent for prosecution in the case was also found as a negative indicator of the criminal court's impartiality.

6. U-III/282/2008, 2 June 2010 – constitutional complaint (subjective and objective judicial impartiality)

6.... A judge's impartiality in criminal proceedings is not ascertained, but to exclude

(Article 36 para. 1 CPA) or excuse (Article 35 para. 2 CPA) him from the trial circumstances that indicate bias must be found (judgement of the European Court of Human Rights in the case of *Kyprianou v. Cyprus* of 15 November 2005, § 122).

The existence of these circumstances is established by a subjective test, where it is necessary to examine the judge's personal beliefs and behaviour indicating whether he has personal bias (Engl. *"personal bias"*) against the party in the case (judgment of the European Court in the case of *Hauschildt v. Denmark* of 24 May 1989, § 47), and by an objective test, where it is necessary to examine whether there are objectively ascertainable facts that may raise doubts as to a judge's impartiality (so-called negative indicators of the "appearance of impartiality", judgment of the European Court in the case of *Sramek v. Austria* of 22 October 1984, § 42). In this examination the misgivings of the party in the proceedings that he was the victim of a judge's bias is "important but not decisive"; what is decisive is whether these misgivings can be objectively justified (Engl. *"objectively justify"*, judgement of the European Court in the case of *Hauschildt v. Denmark* of 24 May 1989, § 48). If this is possible, there is legitimate doubt as to the judge's impartiality and he must be excused from the trial in that case, regardless of the level of the proceedings at which this was discovered.

REASONABLE TIME OF PROCEEDINGS

7. U-IIIA/474/2003, 3 June 2003 – constitutional complaint against the unreasonable time of proceedings (positive obligations of the contracting states)

5.5.... It must be said that in several of its judgments the European Court of Human Rights explicitly found that the contracting states are bound to organise their legal orders in a way that enables courts to comply with the requirements provided for in Article 6 para. 1 of the European Convention, reiterating the especial importance of this requirement for the proper and regular conduct of judicial proceedings (see for example judgments of the European Court in the cases of *Bucholoz v. Germany* of 6 May 1981*, Guincho v. Portugal* of 10 July 1984, *Unión Alimentaria Sanders SA v. Spain* of 7 July 1989, *Brigandi v. Italy* of 19 February 1991 etc.)

RIGHT OF ACCESS TO COURT

8. U-III-443/2009, 30 April 2009 – constitutional complaint (the right to judicial protection against a parliamentary decision on the election or appointment of the highest state officials)

8.1.a) The Constitutional Court notes that neither the Constitution nor the relevant laws explicitly provide for a legal remedy against the election or appointment of the highest state and judicial officials nor provide for a circle of people empowered to submit a legal remedy against these. On the other hand, they do not explicitly exclude this. In this sense the new legal view of the European Court of Human Rights must be mentioned, expressed for the first time in the Grand Chamber judgment in the case of *Vilho Eskelinen and others v. Finland* of 19 April 2007 (application no. 63235/00), which reads as follows:

> "61. The Court recognises the State's interest in controlling access to a court when it comes to certain categories of staff (*Engl. staff*). However, it is primarily for the Contracting States, in particular the competent national legislature, not the Court, to identify expressly those areas of public service involving the exercise of the discretionary powers intrinsic to State sovereignty where the interests of the individual must give way ...
>
> 62. To recapitulate, in order for the respondent State to be able to rely before the Court on the applicant's status as a civil servant in excluding the

protection embodied in Article 6, two conditions must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest… It will be for the respondent Government to demonstrate, first, that a civil-servant applicant does not have a right of access to a court under national law and, second, that the exclusion of the rights under Article 6 for the civil servant is justified."

ARTICLE 8 OF THE CONVENTION

9. U-III/980/2007, 14 May 2009 – constitutional complaint (parents-children relations)

5. The Constitutional Court notes that the European Court of Human Rights, when it applies the relevant provisions of the Convention (...) in its decisions that refer to the right to family life, which, among other things, also includes parental rights and the right to care, pointed out the state's obligation for the parents to be involved in the decision-making process to a degree sufficient to provide them with the requisite protection of their interests in proceedings involving child care (*mutatis mutandis, W. v. the United Kingdom,* judgment of 8 July 1987, § 63-65*,* and *Elsholz v. Germany,* judgment of 13 July 2000, § 52*).* Also, in deciding on the execution of parental rights the state must establish a fair balance between the interests of the child and of the parents, where special importance must be given to the best interests of the child, which, depending on their nature and gravity, may prevail over the interest of the parents *(mutatis mutandis, Sahin v. Germany,* application no. 30943/96, judgment of 8 July 2003, § 65, § 66, and *Elsholz v. Germany,* § 50, ibid*.).*

10. U-III/1801/2006, 20 May 2009 – constitutional complaint (child abduction – application of the Hague Convention on the Civil Aspects of International Child Abduction (Hague Abduction Convention - HAC)

7.... Furthermore, the European Court found that the positive obligations Article 8 of the Convention imposes on the Contracting States with respect to reuniting parents with their children that have been abducted, they must be interpreted in the light of the Hague Abduction Convention (*§1 Karadžić v. Croatia, Judgment of 15 November 2005, § 75 H.N. v. Poland, Judgment of 13 September 2005).* The national bodies incorrect interpretation of some provisions of the Hague Abduction Convention does not free the state from the responsibility for the violation of the provision of Article 8 of the Convention (*§ 80 and 81 Monory v. Romania and Hungary, Judgment of 5 July 2005).*

ARTICLE 1 OF PROTOCOL No 1 TO THE CONVENTION

11. U-IIIB/1373/2009, 7 July 2009 – constitutional complaint before the judgement became final (legitimate expectations)

7.... The Constitutional Court also brings to notice the accepted legal opinion of the European Court of Human Rights (hereinafter: European Court) which recognises that the legitimate expectations of the parties must under certain conditions be considered "property" under the protection of Article 1 of Protocol no. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (*Narodne novine - Međunarodni ugovori*, nos. 18/97, 6/99 – consolidated wording, 8/99 - correction, 14/02; hereinafter: Convention), which regulates the protection of ownership.

The European Court first mentioned the concept of "legitimate expectation" in the context of Article 1 of Protocol no. 1 to the Convention in the judgment in the case of *Pine Valley Developments LTD and others v. Ireland* of 29 November 1991 (application no. 12742/87). In this case the applicants were entrepreneurs whose principal business was the

purchase and development of land; in 1978 they bought land on the site in reliance on an outline planning permission for industrial warehouse and office development, which the Irish Supreme Court later found *ultra vires* and therefore *ab initio* a nullity because it contravened relevant laws. In that case, the Court found that a "legitimate expectation" arose when outline planning permission had been granted, in reliance on which the applicant companies had purchased land with a view to its development. The planning permission, which could not be revoked by the planning authority, was "a component part of the applicant companies' property" (§ 51 of the *Pine Valley* judgment and § 45 of the judgment of the Grand Chamber in the case *Kopecký v. Slovakia* of 28 September 2004, application no. 44912/98, 2004-IX).

In the *Kopecký v. Slovakia* judgment the Grand Chamber of the European Court condensed the views explained in the *Pine Valley* judgment and in the newer *Stretch v. the United Kingdom* judgment of 24 June 2003 (application no. 44277/98, § 35). It explicitly stated that in the above cases, the persons concerned were entitled to rely on the fact that the legal act on the basis of which they had incurred financial obligations would not be retrospectively invalidated to their detriment. In this class of case, the "legitimate expectation" is thus based on a reasonably justified reliance on a legal act which has a sound legal basis and which bears on property rights (§ 47 of the *Kopecký* judgment).

Furthermore, the European Court of Human Rights in many of its decisions reiterated that the applicants do not have a "legitimate expectation" if it cannot be found that they have a "currently enforceable claim that was sufficiently established". Thus in the Grand Chamber Decision on the admissibility of the application in the case of *Gratzinger and Gratzingerova v. the Czech Republic* of 10 July 2002 (application no. 39794/98, 2002-VII), in which the applicants failed to meet one of the essential statutory conditions for realising their claim, the Grand Chamber of the European Court found that their application was not sufficiently established for the purposes of Article 1 of Protocol no. 1 to the Convention. "The belief that the law then in force would be changed to the applicants' advantage cannot be regarded as a form of legitimate expectation for the purposes of Article 1 of Protocol No. 1. The Court considers that there is a difference between a mere hope of restitution, however understandable that hope may be, and a legitimate expectation, which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision. The Court accordingly concludes that the applicants have not shown that they had a claim which was sufficiently established to be enforceable, and they therefore cannot argue that they had a 'possession' within the meaning of Article 1 of Protocol No. 1" (§§ 73 and 74 of the *Gratzinger* decision and § 49 of the *Kopecký* judgment).

The Constitutional Court already referred to the above legal opinions of the European Court in its decision no.: U-I-2921/2003, U-I-3114/2003, U-I-3615/2003, U-I-483/2004, U-I-2833/2004, U-I-3172/2005, U-I-2565/2007, U-I-2150/2008, U-I-3787/2008 of 19 November 2008 (*Narodne novine*, no. 137/08), so it remains here to again find them in conformity with Article 48 para. 1 of the Constitution, and thus also applicable in the constitutional order of the Republic of Croatia.

The Constitutional Court additionally notes that conditional claims or applications that were refused because the party did not meet statutory conditions, or a relevant legal act, are not considered property that would constitute ownership rights for the purposes of Article 48 para. 1 of the Constitution. The European Court takes the identical stand (see summary of relevant stands in the cases: *Mario de Napoles Pacheco v. Belgium*, decision of the European Commission of 5 October 1978, application no. 7775/77, DR 15, p. 151 in the English edition; *Malhous v. the Czech Republic,* Grand Chamber decision of 13 December 2000, application no. 33071/96, ECHR 2000-XII; *Prince Hans-Adam II v. Germany,* Grand Chamber decision, application no. 42527/98, ECHR 2001-VIII, § 85; *Nerva v. the United Kingdom,* judgment of 24 September 2002, application no. 42295/98, Report on Judgments and Decisions 2002-VIII , § 43).

In the case under examination here the applicants' request for a building permit was not refused for not meeting the statutory conditions. On the contrary, in this case the applicants' request for a building permit was well founded so they were issued with one; in this way their right of construction was recognised in a final and legally effective document and they began to build. For the needs of construction they partly invested their own money and partly took a bank loan with set deadlines for returning the loan during several years.

Starting from the above legal opinions of the European Court, which it too had accepted in its previous practice, the Constitutional Court finds that in this case the applicants had a "legitimate expectation" that the conditions in the building permit, on the grounds of which they assumed a financial burden, would be met, considering that it was based on reasonably justified confidence in a final and legally effective administrative act which had a valid statutory foundation. Thus there is no doubt that their claim was sufficiently well established and thus also "enforceable", which qualifies it as "property" for the purpose of Article 1 Protocol no. 1 to the Convention.

The Constitutional Court therefore concludes that the above legitimate expectation in itself constitutes the applicants' ownership interest so the legally effective building permit is in this case a component part of the applicants' property that falls under the guarantee of Article 48 para. 1 of the Constitution and Article 1 of Protocol no. 1 to the Convention.

12. U-III/3491/2006 and others, 7 July 2010 – constitutional complaint (structure of Article 1 of Protocol No. 1 to the Convention)

15.3. Like Article 48 of the Constitution, so Article 1 of Protocol No. 1 to the Convention contains three clearly defined rules. The European Court analysed and applied them for the first time in the judgment in the case of *Sporrong and Lönnroth v. Sweden* of 23 September 1982, applications no. 7151/75 and 7152/75. (further in the statement of reasons for the decision are given explanation - note J.O.)

13. U-I/988/1998 and others, 17 March 2010 – abstract control of constitutionality of the Pension Insurance Act (Official Gazette Nos. 102/98, 127/00, 59/01, 109/01, 147/02, 117/03, 30/04, 177/04, 92/05, 43/07-decision of the Constitutional Court, 79/07 and 35/08)

14.3. ...The right to a social benefit from the pension insurance sub-system based on generation solidarity is also protected under Protocol no. 1 to the Convention ...

The European Court of Human Rights in Strasbourg (hereinafter: the European Court) has in many of its decisions and judgments pointed out that the Convention "*does not as such guarantee a right to a State pension or to a similar State-funded benefit"* (decision on application admissibility in the case of *Neill and others v. the United Kingdom,* 29 January 2002, application no. 56721/00.

However, *"… where a right to such benefits based on a contributory scheme is provided for in domestic legislation, such right may be treated as a pecuniary right for the purposes of Article 1 of Protocol no. 1 so as to render applicable that provision",* decision on application admissibility in the case of *Neill and others v. the United Kingdom,* 29 January 2002, application no. 56721/00; judgment in the case of *Gaygusuz v. Austria,* 16 September 1996, application no. 17371/90, Reports 1996-IV, §§ 39-41).

14. U-IP/3820/2009 and others, 17 November 2009 – abstract control of constitutionality of the Special Tax on Salaries, Pensions and Other Receipts Act (Official Gazette, No. 94/09)

14.1. The European Court starts from the principle that every taxation is *prima facie* interference in the right to the peaceful enjoyment of possessions guaranteed in Article 1 of

Protocol No. 1 to the Convention ... "since it deprives the person concerned of a possession, namely the amount of money which must be paid" (judgement of the Grand Chamber of the European Court in the case of *Burden v. the United Kingdom,* 20 April 2008, application no. 13378/05, § 59).

However, the Convention does not deprive the state of its taxation powers: the state has the right to apply laws to ensure the payment of tax. This interference of the state in the property of people is in general justified under Article 1 para. 2 of Protocol No. 1 to the Convention, which explicitly provides for the "right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties". From the aspect of the supervision carried out by the European Court "states, in principle, remain free to devise different rules in the field of taxation policy" (judgement *Burden*, § 65).

Nevertheless, the European Court, similarly to the Constitutional Court in proceedings instituted by constitutional complaints, in specific cases reserves the right of judicial control over state interference into the private property sphere of individuals through taxes, "since the proper application of Article 1 of Protocol No. 1 is subject to its supervision" (judgment *Burden*, § 59).

This means that taxation should be regulated so that it satisfies the general requirements of the Convention: it must be prescribed by law, must be in the public or common interest, and tax regulations or measures of tax policy must be "reasonable" and "proportional" to the goal that they are intended to achieve. In other words, the regulation of tax rights and liabilities shall be considered contrary to the principles of the Convention if there is no objective and reasonable justification for them, that is, if they do not have a legitimate goal and there is no reasonable proportionality between the measure applied and the goal that it is intended to achieve.

THE CONVENTION TERM "PRESCRIBED by LAW" (Articles 8 to do 11 of the Convention)

15. U-I/659/1994 and others, 15 March 2000 – abstract control of constitutionality of the National Judicial Council Act (Official Gazette, Nos. 58/93, 49/99)
19.5. Since the Republic of Croatia is one of the signatories of the Convention on the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (hereinafter: the European Convention), the Court deems important to point out that no law shall be considered "law" in terms of the European Convention for the mere fact of its existence. The European Court of Human Rights provides for much more stringent criteria which must be compiled with for a "law" to be considered "law" in the syntagm "*prescribed by law*", or in French "*prevues par la loi*" (further in the statement of reasons for the decision are given views of the European Court in the judgments *Sunday Times, Silver and Others* and *Malone v. United Kingdom* - note J.O.).