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**Application of the European Human Rights Convention  
in the Republic of Croatia – an Element of Constitu-  
tional Checks and Balances\***

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*Summary*

Emerging constitutionalism and its inherent concept of “higher law” brought about a fundamental change of the institutional setting of many states in 19th and 20th century. It has significantly increased powers of the judicial branch and introduced a new concept of the separation of powers doctrine. Courts, formerly subservient to legislature, have commenced to exert new powers of judicial review imposing new checks on the legislative and the executive branch.

The ratified international treaties make part of the Croatian legal order that national courts are bound to enforce, and the European Convention is granted constitutional protection before the Constitutional Court. This Court, having powers to strike down unconstitutional legislation has a chance, at least in theory, to impose significant checks on the legislative and executive branch. Moreover, the Constitutional court has clarified that ordinary courts have to treat the Convention as entrenched, “higher law” in a manner similar to the one accorded to constitutional provisions; in other words, the Convention is directly applicable in the Croatian legal order and enjoys a quasi-constitutional rank.

*Introduction*

Emerging constitutionalism and its inherent concept of “higher law” brought about a fundamental change of the institutional setting of many states in 19th and 20th century. It has significantly increased powers of the judicial branch and introduced a new concept of the separation of powers doctrine. Courts, formerly subservient to legislature, have commenced to exert new powers of judicial review imposing new checks on the legislative and the executive branch. This process of increasing the role of the judiciary was formally initiated in the United States, in the landmark *Marbury v. Madison* case which affirmed the right of the courts to engage in judicial review of legislation. In

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Europe, one of the most remarkable developments occurred in post WWII Germany where an efficient judicial mechanism for the protection of constitutional rights was set in place (*Verfassungsbeschwerde*) in order to remedy the Weimar situation where rights were guaranteed by the Constitution but were not granted judicial protection. The early concepts of constitutional review, except maybe in the United States under the supremacy clause of Art. VI(2), referred only to a higher legal status of national constitutions. However, this has been extended to certain categories of international treaties in the period following WWII. In such developments, some international treaties were framed in a way which enabled their self-executing status, and many national constitutions provided for their direct applicability in their national legal order. This has brought about a new quality of international law and granted international treaties an entrenched status similar to the status of national constitutional law. At the same time, in legal systems featuring constitutional review, like in Germany, Slovenia or Croatia, this development has vested respective constitutional courts with new powers capable of imposing significant checks on national legislative and executive authorities.<sup>1</sup>

In this paper I shall first discuss the legal status of international treaties in the Croatian national legal order with a specific reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention),<sup>2</sup> as the emerging higher law in the Croatian legal order, and then, in my final remarks, discuss the role of the Constitutional Court in enforcing fundamental rights and in safeguarding the Constitutional checks and balances.

### *The status of international law and the Convention in the national legal order*

#### I.

The problem how to define the position of international law in an internal legal order can be approached either from the viewpoint of the international or the national law. However, Croatian scholars have mainly concentrated on the international legal aspects of this issue. It is witnessed by a number of scholars who have analyzed the problem from the international legal angle, namely V. Ibler,<sup>3</sup> V. Đ. Degan,<sup>4</sup> B. Vukas,<sup>5</sup> and more recently V. Crnić-Grotić.<sup>6</sup> Unlike these authors I would like to discuss constitutional le-

<sup>1</sup> This remark also refers to ordinary courts.

<sup>2</sup> European Treaty Series No. 5, with amendments (ETS Nos. 45, 55 and 118).

<sup>3</sup> V. Ibler, *Odnos međunarodnog i unutrašnjeg prava*, *Naša zakonitost*, Vol. 11 No. 11-12 (1957) pp. 425-431.

<sup>4</sup> V. Đ. Degan, *Odnos međunarodnog i unutrašnjeg prava*, *Naša Zakonitost*, Vol. 19. No. 4 (1965) pp. 306-316.

<sup>5</sup> B. Vukas, *Odnos unutrašnjeg pravnog poretka prema pravilima međunarodnog prava po Ustavu SFR Jugoslavije od godine 1974.*, *Zbornik PFZ* Vol. 24, No. 2-3 (1974), pp. 241-253.

<sup>6</sup> Vesna Crnić-Grotić, *Pravni položaj međunarodnih ugovora u Republici Hrvatskoj*, *Vladavina prava*, Vol. 1, No. 1(1997) pp. 17-39.

gal aspects of the position of international treaties in the Croatian legal order, particularly the legal status of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is not intention of this paper to discuss theoretical differences between legal monism and legal dualism.<sup>7</sup> Moreover, any prior judgement about the dominant approach seems to be inappropriate. Namely, as witnessed by State practice, neither the monist nor the dualist approach can be applied consequently in respect of all sources of international law.

The relationship between the national and the international law in Croatia is partly regulated by the Constitution of 1990, as amended on January 27th 1998,<sup>8</sup> and partly by the Law on Ratification and Implementation of International Treaties.<sup>9</sup> However, both sources regulate only the legal status of international treaties and say nothing about other sources of international law. According to the original concept of the Draft Constitution, the intention of the founding fathers was to introduce a monist understanding of the relationship between the international and the national law.<sup>10</sup> The monist concept was finally introduced into the constitutional text where, pursuant to article 134, the ratified international treaties make part of internal legal order of the Republic and have legal force higher than ordinary laws.

The status of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the Republic of Croatia is, formally speaking, equivalent to the status of other international treaties. However, due to its specific subject matter, legislative regulation and practice of the Constitutional Court, one could speak about its special position within the Croatian legal order.

<sup>7</sup> According to the monistic approach, internal law and international law make an integral system of legal rules binding both the States and the individuals. Ideally, this would mean that, in theory, all applicable rules of international law, customary and contractual, make part of a single legal order, and have to be applied directly. Under the so-called dualistic approach, international law and national law make two distinct and independent legal systems. Their norms regulate the relations among different subjects, and their rules originate from different sources. Having this in mind, the dualistic approach says that international law and national law can never be in conflict. If a rule of internal law of certain State is contrary to international law, this, by itself does not amount to its invalidity. However, the application of regulations contrary to international law amounts to a breach of an international obligation of a State and leads to its international legal responsibility. In order to be applied in the national legal order, a rule of international law has to be imported to a national legal system. Once imported, it loses its international legal character and has to be applied as any other rule of national law. See e.g. Daniel P. O'Connell, *The Relationship Between International Law and Municipal Law*, 48 *Geo. L. J.* (1960) 431 et seq.

<sup>8</sup> Narodne novine (Official Journal) No. 8/1998 (consolidated text).

<sup>9</sup> Narodne novine No. 28/1996.

<sup>10</sup> Vjesnik, Nov. 27th 1990, p. 6. However, Vukas holds that the Constitution mainly follows the dualist position. Compare: Juraj Andrassy et al. *Međunarodno pravo*, 1. dio, Školska knjiga, Zagreb 1995 at p. 6.

## II.

In order to determine the legal status and the conditions of the application of the Convention in the Republic of Croatia one has to make certain initial distinctions:

- a. distinction between the European Human Rights Convention as an international treaty from its legal rules;
- b. distinction between the legal status and the conditions for the application of the Convention in the Republic of Croatia before, from its legal status and the conditions for the application after the Convention has become part of the Croatian internal legal order pursuant to Article 134 of the Constitution;
- c. distinction between the substantive rules of the Convention specifying guarantees of fundamental rights from other provisions of the Convention;
- d. distinction between the self-executing legal rules of the Convention from the non-self executing ones.

(*ad a.*) Being an international treaty, the legal status of the European Convention in the Croatian national legal order is regulated pursuant to Article 134 of the Constitution,<sup>11</sup> pursuant to Law on the Ratification and Implementation of International Treaties,<sup>12</sup> and pursuant to Article 5 of the Judiciary Act.<sup>13</sup> Since an international treaty can become part of the Croatian legal order only pursuant to Article 134 of the Constitution, the application of Article 5 of the Law on Courts is possible subject to the fulfillment of Constitutional requirements. Certainly, those international treaties that are not ratified in accordance with the Constitution cannot be applied in Croatia as international treaties. However, this does not mean that the legal rules of international treaties, i.e. their substance, cannot be applied on the basis of some other legal rule of national law. In Croatia, this is possible in at least two ways: a legal rule of the national law can incorporate one or more legal rules of an international treaty or; a legal rule of the national law may invoke one or more rules of an international treaty and provide for its application in Croatia. Either situation does not amount to the application of an international treaty but to the application of the national law, the substance of which is identical to the substance of respective legal rules of an international treaty.

(*ad b.*) The Republic of Croatia signed the European Convention on November 6th 1996, and ratified it on October 17th 1997. The instruments of ratification were deposited on November 5th 1997 and the Convention was published in the *Narodne novine* (Official Gazette) No. 18/1997 – Supplement International Treaties. In this way the Convention became part of the Croatian internal legal order with legal force superior to ordinary laws.

<sup>11</sup> Article 134 of the Constitution reads as follows: International treaties, concluded and ratified in accordance with the Constitution, and published, which are in force, make part of the internal legal order of the Republic of Croatia and have legal force superior to laws. Their provisions can be amended or repealed, only under the conditions, and in the way specified therein, or subject to general rules of international law.

<sup>12</sup> Zakon o sklapanju i izvršavanju međunarodnih ugovora, *Narodne novine* No. 28/1996.

<sup>13</sup> Zakon o sudovima, *Narodne novine* No. 3/1994.

However, even before this date the Convention was explicitly invoked by the Constitutional Law on Human Rights and Freedoms and Freedoms and Rights of Ethnic and National Communities or Minorities (hereinafter: the Constitutional Law).<sup>14</sup>

(*ad c.*) Not every provision of the Convention contains substantive guarantees of fundamental rights. These guarantees are located mainly in Part 1 of the Convention, i.e. in Articles 2 to 18 and the provisions of a number of Protocols (e.g. in the provisions of Protocol One and Protocol Four). On the other hand, Parts II, III, IV and V of the Convention do not contain any substantive guarantees but define the bodies established by the Convention and set forth the conditions for its application.

(*ad d.*) The legal rules of the Convention, whether containing substantive guarantees of fundamental rights or not, are capable of being directly applicable (self-executing) in national legal systems. This depends on two factors: on the technical characteristics of the respective legal rule,<sup>15</sup> and on the terms of the national legal system in which the rule is to be applied. The Croatian legal system does not make any obstacles for a direct application of the legal rules of international treaties in its national legal order. Directly applicable legal rules have to be applied by all state authorities, including courts and public administration. The legal rules of applicable international treaties make part of the Croatian national legal order and are directly applicable pursuant to Article 134 of the Constitution and Article 5, sections 2 and 3 of the Judiciary Act. However, in practice, the direct application of treaties is not a practice of Croatian ordinary courts.

After having presented these four distinctions I shall try to answer several important questions.

- i. What is the relationship between the substantive guarantees of fundamental rights specified by the Convention and the substantive guarantees of fundamental rights specified by the Croatian Constitution?
- ii. What was the legal status of the Convention and of the legal rules of the Convention prior to the ratification, and what is the said legal status today, after the Convention has been ratified?
- iii. To what extent, if any, are the Convention, its legal rules and decisions of the European Commission and of the European Court of Human Rights legally binding for Croatian authorities?
- iv. Can the rights and freedoms guaranteed by the Convention be protected in the Constitutional Complaint procedure before the Croatian Constitutional Court?

<sup>14</sup> Ustavni zakon o ljudskim pravima i slobodama i o pravima etničkih i nacionalnih zajednica ili manjina u Republici Hrvatskoj (consolidated text) Narodne novine No. 34/1992.

<sup>15</sup> For requirements for direct applicability in the United States see *Foster and Elam v. Neilson*, 27 U.S. (2 Pet.) 253. The European Court in Luxembourg in the course of its lengthy practice, elaborated the conditions for a direct applicability of the legal rules of European Law in member states. See e.g. cases 26/62 *Van Gend en Loos v. Nederlands Administratie der Belastingen* [1963] ECR 1, i 6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECR 585. Under these cases, a legal rule can be directly applicable provided it is clear and unconditional, and not dependent upon a positive legislative measure enacted under national law.

- v. Can the Convention serve as a criterion for judicial review of laws and other regulations, and who may have jurisdiction in such cases?

*i. Substantive guarantees of fundamental rights under the Convention and under the Croatian Constitution*

As it is generally acknowledged, Member States of the Council of Europe signatories to the European Convention can provide for the protection of fundamental rights guaranteed therein in more than one way.<sup>16</sup> Certainly, a combination of different methods is also possible. As far as ensuring the application in the Republic of Croatia is concerned, it has to be said that the Croatian Constitution guarantees fundamental rights and freedoms quite generously. Therefore one should not be surprised by the frequent assertions that the substantive guarantees of the Convention coincide with the substantive guarantees of the Croatian Constitution. In addition to the Constitution, another legal source of fundamental rights in Croatia is the Constitutional Act on Human Rights. However, Croatian legal scholars are not unanimous as to whether the Constitutional Act stands for a mere declaration of rights and freedoms that are otherwise guaranteed by the Constitution, or whether it introduces some additional guarantees. Namely, Article 2 of the Constitutional Act enumerates particular rights but at the same time invokes relevant provisions of the Croatian Constitution. This interesting method led some analysts to assert that Article 2 amounts to a restatement of pre-existing constitutional rights. According to their view, the Constitutional Act did not create or introduce any fundamental right in addition to those guaranteed by the Constitution. Having assumed that the Croatian Constitution is in compliance with the Convention, this interpretation implies that it was the Constitution and not the Constitutional Act that incorporated substantive guarantees of the Convention. Accordingly, the formal Constitution provides for the same guarantees as the Convention and should be considered the sole legal source of fundamental rights.

Another possible interpretation of Article 2, point (lj.) of the Constitutional Act, concerns the straightforward and quite explicit wording invoking the rights guaranteed by the international instruments mentioned in Article 1 of the Constitutional Act, including the European Convention. Also, when interpreting Articles 1 and 2 of the Constitutional Act one should bear in mind that at the time of its enactment Croatia was not a member of the Council of Europe and was not eligible to become a party to the European Convention. The specific invocation of the European convention in Article 1 of the Constitutional Act was most likely meant to enable the legal protection of the fundamental rights guaranteed by the European Convention in the period before the Convention became part of the Croatian legal order. In this way the Constitutional Act made possible the indirect application of the legal rules of the Convention pursuant to its Article 1 and Article 2 (lj.). The logical consequence was that the legal rules of the

<sup>16</sup> See e.g. Fawcett, *The Application of the European Convention on Human Rights*, Clarendon Press, Oxford, 1987., at p. 4; see also S. Rodin, *Europska integracija i Ustavno pravo*, IMO, Zagreb 1997, at p. 221 et. seq.

Convention were granted legal force equivalent to the Constitutional Act, i.e. legal force superior to ordinary laws.

If one accepts the interpretation according to which a list of freedoms and rights guaranteed by Article 2 (lj.) of the Constitutional Act is non-exhaustive, it seems reasonable to conclude that the Constitutional Act invoked the Convention in pursuance of legislature's intention to give the rights under the Convention national legal protection even before the ratification. This would arguably serve as the legal basis for the application of substantive rules of the Convention prior to the ratification. In other words, such legal rules would be incorporated by the Constitutional Act, and applied indirectly. Accordingly, they would follow the legal force of the Constitutional Act.

However, according to the interpretation under which the Constitutional Act is a mere declaratory of the rights already specified by the Constitution, i.e. that Article 2 of the Constitutional Act only reiterates Constitutional guarantees, it should be concluded that the Legislature, at the time of the enactment of the Constitutional Act considered the Croatian legal system to be in compliance with the Convention or, in other words, that all fundamental rights and freedoms under the Convention were, from the very beginning, specified in the Constitution, i.e. incorporated by the Constitution itself, and not by the Constitutional Act.

In fact, both arguments seem to be wrong and ill-founded. Whether one thinks that the guarantees of fundamental rights originate from the Constitution, or from the Constitutional act, it necessarily assumes the position known from e.g. German legal history which has now become obsolete, that it is the State and the positive law that are the source of fundamental rights. Such a position was represented by Georg Jellinek and his "Statustheorie" according to which citizens exercise their rights through four civic positions, which all depend on their prior recognition by the State.<sup>17</sup> It entirely disregards the Lockean tradition and heritage of post WWII constitutionalism according to which fundamental rights and liberties antecede positive law, and according to which the legitimacy of government depends on whether it recognizes the pre-existing fundamental rights or not. After all, the wording of the Croatian Constitution explicitly supports this position by saying, in article 14, that all men and citizens have fundamental rights. The constitutional text is therefore declaratory thereof. In this respect, the debate about the positive source of fundamental rights seems to be futile. Whether they are declared by the Constitution, by the Constitutional Act or by international law, the Constitutional Court is bound to give them legal protection.

Having general characteristics of the Convention in mind, especially the fact that it is a living instrument subject to an interpretation by the European Court (and formerly the European Commission) of human rights, as well as the experience of some other parties to the Convention, it cannot be ruled out that the guarantees under the Convention are broader than the constitutional guarantees. In this context, German practice is particularly interesting. Namely, the Federal Constitutional Court – the *Bundesverfassungsgericht* – has a standing practice of interpreting constitutional norms in the light of

<sup>17</sup> Georg Jellinek, *System der subjektiven öffentlichen Rechte*, J. C. B. Mohr (Paul Siebeck) Verlag, Tübingen 1919., pp. 86, 7; Georg Jellinek, *Allgemeine Staatslehre* (3rd ed. 1914) p. 418.

the Convention, and considers that the guarantees of human rights under the Convention are a constituent part of German substantive law. So has the Bundesverfassungsgericht in Pakelli<sup>18</sup> case held that a violation of a right under the Convention amounts to a violation of Article 2 I of the Basic Law guaranteeing the right to a free development of personality.<sup>19</sup>

*ii. Differential legal status of the Convention and of its legal rules in case law of the Constitutional Court*

The problem of the legal status of the Convention and of its legal rules arose, at least partially, from the imprecise wording of Article 134 of the Constitution. The fact that certain legal rules of the Convention were applied even prior to the implementation of the procedure envisaged by article 134 of the Constitution does not help to clarify the situation. It is therefore necessary to distinguish the legal status of the Convention and of its legal rules in the period prior to the ratification from its legal status following the ratification. Some light on this issue has been shed by the Constitutional Court.

Back in 1993, the Constitutional Court held that by an explicit reference to the Convention in Article 1 of the Constitutional Act, the Convention was “incorporated in the Croatian legislation” by which it became part of the internal legal order of the Republic with legal force superior to ordinary laws. Having said this, the Constitutional Court indicated that the legal rules of the Convention can be applied in Croatia not only under Article 134 of the Constitution, but under the Constitutional Act itself. It is sufficiently clear that prior to the implementation of the procedure under Article 134 of the Constitution there was no legal basis for the application of the Convention as a Treaty to which Croatia is a party. Obviously, re-writing the Constitution in this way, which would allow for a direct applicability of international treaties regardless of the explicit Constitutional procedure was not what the Constitution intended to imply. Following severe criticism from legal and political circles the Constitutional Court corrected its position on February 2nd 1995 deciding on the constitutionality of the Statute of Istrian County. On this occasion the Court explicitly said that only the ratified and published international treaties can have legal effect in the national legal order.<sup>20</sup> According to its opinion, compliance with the principles proclaimed by international treaties does not amount to their ratification. In fact, the Constitutional Court resorted to an interpretation of Croatian law in accordance with the Convention (in German law this method of interpretation is known as *Völkerrechtsfreundliche Auslegung*).

However, regardless of the legal basis for the application of the legal rules of the European Convention in the Croatian legal order, the Constitutional Court deems that fundamental freedoms and rights specified therein deserve constitutional legal protec-

<sup>18</sup> BVerfG (Vorprüfungsausschuß), decision of October 11<sup>th</sup> 1985, 2 BvR 336/85; see also EuGRZ 1985 at p. 654, NJW 1986, at p. 1485.

<sup>19</sup> On the right to free development of personality in German constitutional law see: Siniša Rodin, *Pravo na slobodno razvijanje osobnosti u njemačkom ustavnom pravu*, Zbornik PFZ, 1/2 (1997) pp. 127-157.

<sup>20</sup> Decision No. U-II-433/1994 of February 2nd 1995, Narodne novine 9/1995.



tion. The Court expressed this position in two instances, one preceding and another following the above mentioned Decision of February 2nd 1995. In both cases the Court interpreted the Constitutional Act and, using the same wording, clarified certain aspects of the application of the Convention. According to the Decision of the Constitutional court of November 14th 1994,<sup>21</sup> instituting the procedure for a constitutional review of Article 94 of the Tenancy Act<sup>22</sup> and to the Decision of February 20th 1995<sup>23</sup> instituting the proceedings for a constitutional review of article 70 of the same Act, the Court held that Article 2, point (lj.) of the Constitutional Act extended the list of constitutionally guaranteed rights in order to include all the rights envisaged by international legal instruments, and especially by the General Declaration of Human Rights of December 10th 1948, by the International Pact on Civil and Political Rights, the International Pact on Economic, Social and Cultural Rights, and by the European Convention on the Protection of Human Rights and Fundamental Freedoms.<sup>24</sup>

In any case, making the distinction between the European Convention as an international treaty and the legal rules of the convention, i.e. from its substantive guarantees, seems to be productive in explaining how the Croatian Constitutional Court gave effect to certain provisions of the Convention, even before it became part of the Croatian legal order. It is the substantive rights of the Convention that are "...granted protection under the Constitution..."<sup>25</sup> In other words, the Constitutional Court elevated these substantive guarantees to the rank of higher law which is granted protection before the Constitutional Court.

After having been duly ratified and published, the Convention assumed its Constitutional status pursuant to Article 134 of the Constitution. This was reflected in the early decisions of the Constitutional Court which have developed into its standing position up to this day. In its decision of March 11th 1998, the Constitutional Court had an opportunity to refer to the Convention as to the Croatian national law for the first time.<sup>26</sup> By saying this, the Court not only affirmed the status of the Convention in the Croatian national legal order, but paved the way for a possible abstract constitutional review of the Croatian legislation regarding the Convention. This possibility is, however, not self-evident. Under Article 125 of the Constitution, the Court has the power to review legislation as to its compatibility with the Constitution. The review of its compatibility with international treaties is not explicitly mentioned. Another interesting fact is that, unlike e.g. in Germany, where ratified international treaties assume the legal status of imple-

<sup>21</sup> Decision No. U-I-892/1994.

<sup>22</sup> Zakon o stambenim odnosima.

<sup>23</sup> Decision No. U-I-130/1995

<sup>24</sup> Decision U-I-892/1994. of November 14th 1994, *Narodne novine* No. 83/1994; Decision U-I-130/1995 of February 20th 1995, *Narodne novine* No. 12/1995 at pp. 368, 369

<sup>25</sup> Decision No. U-I-892/1994. of November 14th 1994, *Narodne novine* No. 83/1994; Decision No. U-I-130/1995 of February 20th 1995, *Narodne novine* No. 12/1995 at p. 368, 369.

<sup>26</sup> Decisions No. U-I-920/95 and U-I-950/96 of March 11th 1998. *Narodne novine*, 41/98 of March 24th 1998.

menting legislation (act of ratification), in Croatia under Article 134 of the Constitution, all international treaties have a higher legal rank than ordinary laws.<sup>27</sup> The question to be asked is whether its legal force supercedes the so-called “organic laws” which can be adopted by qualified majority. The entrenched legal status of the Convention bears well known legal consequences. It is indisputable that its application has primacy in respect of all laws, and all prior organic laws (*lex superior derogat legi inferiori; lex posterior derogat legi priori*). However, the Constitution is silent on the issue whether the Convention has primacy in respect of later organic laws. This problem has not gone unnoticed in comparative constitutional law. Spain, for example, by its 1978 Constitution accorded constitutional legal force to international human rights treaties and introduced an obligation to interpret national law in accordance with the ratified treaties in the field.<sup>28</sup>

However, despite the imprecise constitutional wording, it has to be taken that the Convention has primacy in respect of all laws, including organic laws, even if enacted following its ratification. This conclusion follows from three different arguments. The first argument tells us that all laws have to be interpreted in accordance with the Convention. Such practice is well known in England<sup>29</sup> and Germany.<sup>30</sup> Namely, it should be assumed that the legislator does not intend to make laws contrary to the Convention in the absence of clear and unambiguous wording. All institutions applying the Convention, primarily courts, should have this in mind.<sup>31</sup>

<sup>27</sup> This is a serious deviation from Kelsen's normativist concept according to which legal force of legal acts originates from the methods of its enactment. The more stringent majority - the higher legal force. The Convention was ratified by simple majority, and has assumed higher legal force than laws.

<sup>28</sup> A. P. Blaustein and Gisbert H. Flanz (eds.), *Constitutions of the Countries of the World*, Oceana Publications, Inc, Dobbs Ferry, New York; see also Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 *Colum. J. Transnat'l L.* (1997) 211, 217.

<sup>29</sup> As it was put by Lord Diplock in *Garland v. British Rail Engineering Ltd.* [1983] 2 AC 751, “...it is a principle of construction of the United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it.” See also Murray Hunt, *Using Human Rights Law in English Courts*, Hart Publishing, Oxford 1998.

<sup>30</sup> BverfGE 74, 358 (370), “When interpreting the Basic Law, the substance and the status of the development of the European Human Rights Convention have to be taken into consideration, to the extent that it does not lead to a limitation or reduction of the protection of fundamental rights guaranteed by the Federal Constitution, which is excluded by the Convention itself (Article 60 of the Convention). In the same decision the Federal Constitutional Court said that all subsequent laws have to be interpreted in light of the European Convention (*Völkerrechtfreundliche Auslegung*); See also: Jochen Abr. Frowein, *Das Bundesverfassungsgericht und die Europäische Menschenrechtskonvention*, Festschrift für Wolfgang Zeidler, Bd. II, Walter de Gruyter, Berlin, New York, 1987.

<sup>31</sup> This principle of construction was known in the United States as of 1804: “...an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains”, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)

Second, even if some organic law is contrary to the Convention, one could advocate an opinion that the Convention represents *lex specialis*, which would ensure its priority in application.

The third argument is of a somewhat more complicated nature and is based on the distinction of the Convention as an international treaty, and of the substantive rules of the Convention. Namely, Article 134 of the Croatian Constitution specifies that the international treaties being part of the Croatian legal order can be amended or abrogated "...only under the conditions and in the manner specified therein, or in accordance with general rules of international law." This by itself means that the Convention may not be abrogated by any legal rule of the Croatian national law, not even an organic law. Should ever such a law, enacted after the Convention, become part of the Croatian legal order, unequivocally attempting to abrogate Croatian international obligations under the Convention, it would bear two sets of consequences. On the one hand, such an act would not have any effect in respect to Croatia's international obligations, nor could it abrogate substantive guarantees which are, as we have seen earlier, granted constitutional protection, but could prevent direct application of the Convention in the national legal order. On the other hand, such an act would amount to a violation of international law and international legal responsibility of Croatia, and to a violation of the Croatian Constitution. Namely, the Constitutional Court held in its landmark decision of July 15th 1998 that a violation of an international treaty amounts to a violation of the Constitution.<sup>32</sup> This decision has created at least two important procedural effects: (a.) in case of doubt that a law which has to be applied in a case before an ordinary court is incompatible with an international treaty, ordinary courts are now under obligation to ask the Supreme Court to institute proceedings before the Constitutional Court in order to establish whether the contested law is compatible with the Constitution and the Convention or not, and (b.) if a regulation which has to be applied is contrary to an international treaty, an ordinary court is obliged to disapply such regulation and apply the international treaty.

### *iii. The binding force of the Convention*

As to the binding force of the Convention, it is binding for all state authorities – legislative, executive and judicial. This follows directly from Article 134 of the Constitution. This binding force, certainly, extends to case law of the European Commission and the European Court of Human Rights, what follows from article 53 of the Convention which is part of the Croatian national legal order. In other words, this binding force originates not only from the international, but from the Croatian constitutional law as well. This is all too important considering the self-executing nature of the Convention. Namely, Croatian courts have an express mandate to apply international treaties under the Constitution and under Article 5 of the Judiciary Act.

<sup>32</sup> See: Siniša Rodin, *Nesuglasnost zakona s međunarodnim ugovorom jest povreda ustava*, (Incompatibility of a Law with International Treaties Amounts to a Violation of the Constitution), 48 *Zbornik PFZ* (1998) 4, pp. 491-493.

A separate issue concerns possible general effects of the Court's decisions. Despite the fact that its decisions have effect primarily *inter partes*, certain general effects, i.e. effects *erga omnes* cannot be excluded. The *Vasilescu* case provides a good example and its effects reach far beyond the actual parties in the dispute.<sup>33</sup> The concept of *de facto* confiscation and its consequences regarding the violations of the First protocol probably produce general vertical effects in all State parties to the Convention, including Croatia.

#### *iv. Applicability of the Convention in the Constitutional Complaint procedure*

Having in mind the constitutional status of the rules of the Convention in the Croatian legal order, it follows that (unlike in Germany, where *Verfassungsbeschwerde* for the protection of rights under the Convention is inadmissible due to its legal rank which follows legal force of ratifying legislation),<sup>34</sup> the constitutional complaint should be admissible for their protection. Namely, under the Constitutional Act on Human Rights, Croatia undertakes to respect and protect fundamental rights "in accordance with" the European Convention. This wording primarily denotes substantial guarantees, but does not exclude procedural ones. Namely, the obligation of all courts, ordinary and the Constitutional court under Article 13 of the Convention to render "an effective legal remedy", includes admissibility of constitutional complaint, which has been confirmed by the Constitutional Court. Therefore, the landmark decision of the Constitutional Court that the rights under the Convention are granted constitutional protection has to be understood in both substantive and procedural sense. Moreover, a high degree of overlapping of substantive guarantees under the Convention with those under the Constitution has been affirmed by the Constitutional Court in the above mentioned decision of July 15th 1998, following which every violation of the Convention should be taken as a breach of the Constitution itself.

As to the problem of the exhaustion of legal remedies, similarly to the situation in Germany,<sup>35</sup> for purposes of the Convention it shall be exhausted (a.) upon the delivery of a decision of the Constitutional Court on the merits denying the contested right, and (b.) upon a dismissal of a constitutional complaint as inadmissible. Certainly, the standing practice of the European Court according to which Article 26 of the Convention has

<sup>33</sup> Case *Vasilescu v. Romania* (53/1997/837/1043), judgement of the European Court of Human Rights of May 22nd 1998

<sup>34</sup> However, Article 93. 4.a. of the Grundgesetz provides for the protection of constitutional rights pursuant to the constitutional complaint procedure.

<sup>35</sup> As to the procedure, for purpose of an individual petition, national legal remedies shall be exhausted upon a decision of the Bundesverfassungsgericht, and in case of its lack of jurisdiction, some other federal court. In this respect, the practice of the Bundesverfassungsgericht departs from case law of the European Court of Human Rights. The European Court takes an application for the protection before the Bundesverfassungsgericht as a requirement for filing an individual petition. See. e.g. Jacques Robert, *Constitutional and International Protection of Human Rights: Competing or Complementary Systems?* 15 Hum. Rts. L. J. 1-2 (1994) 1 at p. 19. See also Paul Kirchof, *Verfassungsrechtlicher Schutz und internationaler Schutz der Menschenrechte: Konkurrenz oder Ergänzung?*, EuGRZ 1994, pp. 16, 35.

to be applied in a flexible way and without formalism, according to the circumstances of each individual case, should be taken into account.<sup>36</sup>

*v. Abstract Constitutional Review*

A separate issue involves the problem whether the Convention can serve as a criterion and standard for constitutional review of laws and other regulations, and who, if anybody, has jurisdiction to decide on the compatibility of laws and other regulations with the Convention?

Under the Croatian model of constitutional review, such control can be abstract, accessory and concrete, respectively. An abstract constitutional review is performed by the Constitutional Court under articles 34 and 36 of the Constitutional Act on the Constitutional Court,<sup>37</sup> either upon an initiative by an authorised institution or an individual, or upon its own initiative. Accessory control of the constitutionality of the regulations (other than laws) is performed by ordinary courts under the exception of illegality procedure set forth in Article 24 (3) of the Judiciary Act<sup>38</sup> and Article 35 of the Constitutional Act on the Constitutional Court. A concrete review of the constitutionality is performed by the Constitutional Court upon a motion of the Supreme Court (Article 34(1) of the Constitutional Act on the Constitutional Court and Article 24 (1) and (2) of the Judiciary Act).

The compatibility of governmental regulations (in the wording of the Constitutional Act: “other regulations”) with the Constitution and with laws can be reviewed by ordinary courts. Under the relevant provisions, they are under an obligation to except such regulations from application. This obligation should extend to cover reviews as to their compatibility with the Convention. In case of incompatibility, courts should be obliged to directly apply the self-executing legal rules of the Convention pursuant to Article 134 of the Constitution and article 5 (2) and (3) of the Judiciary Act. This is upheld by Article 2 of the Constitutional Act for the Implementation of the Constitution of the Republic of Croatia,<sup>39</sup> providing for a direct applicability of the constitutional legal rules meeting certain standards. Under this Act, ordinary courts have an obligation to directly apply unconditional constitutional guarantees of fundamental rights and to set aside the regulations contrary to them. This obligation includes both the direct application of the Constitution, and of the Convention.

<sup>36</sup> See e.g. *Aksoy v. Turkey*, 23 E.H.R.R. 553; Article 26 must be applied with a degree of flexibility and without excessive formalism. The rule of exhaustion is neither absolute nor capable of being applied automatically; the circumstances of each case must be examined. A realistic account must be taken of the existence of formal remedies in the legal system of the Contracting Party concerned, as well as the legal and political context in which they operate and the personal circumstances of the applicant.

<sup>37</sup> Narodne novine No. 99/1999

<sup>38</sup> Narodne novine No. 3/1994

<sup>39</sup> Narodne novine No. 34/1992 (consolidated text)

However, the situation with respect of laws (acts of parliament) is different.<sup>40</sup> Namely, ordinary courts do not have jurisdiction to disapply laws, on whatever grounds. A possible incompatibility with the Constitution is solved by a concrete constitutional review under Article 34 (1) of the Constitutional Act on the Constitutional Court and Article 24 (1) and (2) of the Judiciary Act. However, a possibility of a review of laws as to their compatibility with international treaties is not explicitly mentioned. Nevertheless, it is clear enough that, due to the principle of the rule of law (Articles 3 and 5 of the Constitution), ordinary courts are under an obligation not to apply laws contrary to the Convention. The problem is, however, in the fact that ordinary courts are neither authorised to disapply such laws, nor have an explicit legal basis to institute their constitutional review before the Constitutional Court on the grounds of a violation of an international treaty. A possible solution lies in interpretation. Namely, technically speaking, in an absence of a clear legislative intention to abrogate the Convention, courts do not disapply a national law incompatible with the Convention, but interpret the national legislation in light of international law (*Völkerrechtfreundliche Auslegung*). It is the very essence of judicial function that exists regardless of the explicit permissive legal norm. Taking the right to choose applicable law would amount to divesting the courts of the essence of their function.

The most difficult situation could emerge if the legal rules of a law are incompatible with the Convention to the extent which could not be brought in line with the Convention by any interpretative means. In such a situation, the only possible remedy would be an extension of a concrete judicial review under Article 34 of the Constitutional Act on the Constitutional Court in order to cover a review of laws as to international treaties. Namely, the Constitutional Court is the guardian of the entire Croatian constitutional order, and as such has general jurisdiction to protect the hierarchy of legal rules, the Convention being at the very top.

### *Concluding remarks*

The ratified international treaties make part of the Croatian legal order that national courts are bound to enforce, and the European Convention is granted constitutional protection before the Constitutional Court. This Court, having powers to strike down unconstitutional legislation has a chance, at least in theory, to impose significant checks on the legislative and executive branch. Moreover, the Constitutional court has clarified that ordinary courts have to treat the Convention as entrenched, “higher law” in a manner similar to the one accorded to constitutional provisions; in other words, the Convention is directly applicable in the Croatian legal order and enjoys a quasi-constitutional rank.

<sup>40</sup> For purposes of article 14 of the Constitutional Act on the Constitutional Court, a “law” is any legal act which can be considered a “law” in the substantive and formal sense. The governmental regulations under Article 88 of the Constitution amount to laws in the substantive sense, but lack legal form. Such regulations must not elaborate or encroach upon the constitutional rights and liberties. Any governmental regulation restricting fundamental rights must necessarily fail this test due to a lack of legal basis for its enactment. The legal situation discussed above refers to a possible incompatibility of ordinary acts of parliaments with the Convention.

Here a logical question would be whether Croatian ordinary courts, and the Constitutional Court, resort to these mechanisms of protection. As far as ordinary courts are concerned there is no easy answer. Namely, the decisions of lower ordinary courts (Municipal and County Courts) are not reported, and it is not possible to have access to their practice.<sup>41</sup> As far as the present author has been informally informed, ordinary courts have applied the Convention only on two occasions, but this situation might have changed, of course. The Constitutional Court, as we have seen, has resorted to the Convention as a legal basis for striking down acts of legislature, but its practice is not always in line with case law of the European Court of Human Rights. Such is the situation e.g. in respect of Article 11 of the Convention, more particularly, regarding the legal status of associations.<sup>42</sup> Also, the Constitutional Court does not deal with the right to strike under Article 11 of the Convention but under Article 60 of the Constitution which falls into the category of economic, social, and cultural rights. Accordingly, the Court would rather resort to ILO Conventions and the International Pact on Economic, Social and Cultural Rights, than to Article 11 of the Convention.<sup>43</sup>

As to the methods of interpretation, the Constitutional Court has indeed several times resorted to rationality review<sup>44</sup>, but has never even attempted to employ the standards of public policy developed by the European Court of Human Rights. Therefore, the proportionality test under the “necessary in democratic society clauses” of relevant articles of the Convention and the margin of appreciation doctrine, remain a square root of nothing in the Croatian constitutional practice. To be completely honest, it should be said that the proportionality principle has been invoked by the Constitutional Court only once, not under the Convention, however, but under the Croatian Criminal Procedure Act.<sup>45</sup> Nevertheless, the Court has never elaborated the criteria for the application of this principle.

<sup>41</sup> It seems that there is a strong feeling among Croatian judges that only the final cases could be reported, i.e. cases decided by the Supreme Court.

<sup>42</sup> The Court did not follow the understanding of associations expressed by the European Court. A student association established by a law was said to be an association, despite of the practice of the European Court to consider such associations entities vested with public authority. Decision of the Constitutional Court No. U-I-638/1996, of July 9th 1997, *Narodne novine* 78/1997; Compare with the decision of the European Court of Human Rights in *Le Compte, Van Leuven and De Meyere*, decision of June 23rd 1981, Series A, No. 43.

<sup>43</sup> Compare the decisions of the Constitutional Court Nos. U-I-262/1998 and U-I-322/1998 of July 15th 1998, as well as the decisions Nos. U-I-920/1995 and U-I-950/1996 of 15th July 1998, all published in *Narodne novine* No. 98/1998. However, even the European Court of Human Rights exercises self-restraint in the area of labor law. Compare *Frowein und Peukert*, *Europäische Menschenrechtskonvention*, 2. Auflage, N.P. Engel Verlag, Kehl, Straßbourg, Arlington, 1996, at p. 417

<sup>44</sup> In an important decision the Constitutional Court has declared unconstitutional one law on temporary taking possession of and management of certain property (*Zakon o privremenom preuzimanju i upravljanju određenom imovinom*. *Narodne novine* Nos 73/1995 and 7/1996) on the grounds that it was not aimed at achieving legitimate regulatory purposes, i.e. at the protection of property. See *Narodne novine* No. 100/1997

<sup>45</sup> Decision of the Constitutional Court No. U-III-1162/1997 of December 2<sup>nd</sup> 1998, *Narodne novine* 156/1998.

To conclude: In the first eight years of constitutional review in Croatia, the Constitutional Court has developed strong mechanisms for the application of the Convention in the Croatian legal order, and the position of the Convention itself is constitutionally entrenched. However, the actual application of the Convention is still scarce and inconclusive. Such activity certainly contains a potential for being an important judicial safeguard of the separation of powers balance. Nevertheless, this potential too often rests idle, or ineffective.

*Translated by the author*