

**Regional Conference**  
**“The effective use of national remedies in domestic legal proceedings and the subsidiary role of the European Court of Human Rights”**

**12-13 March 2015**  
**Zagreb, Croatia**

**Concept paper**

**Background**

The effectiveness of human rights implementation largely depends on the effectiveness of the remedies provided at the national level to redress violations. The right to a remedy in respect of an arguable claim of a violation of a fundamental right is expressly guaranteed by almost all international human rights instruments, including the European Convention on Human Rights (ECHR). The main purpose of including this right to the text of the ECHR was to enhance the judicial protection of individuals against the violation of their rights. The *international* guarantee of a remedy implies that a state has the primary duty to protect human rights within its own legal system.

At the same time, the right to an effective remedy is one of the key elements of the principle of subsidiarity, which lies at the core of the human rights protection system set out by the ECHR. This principle implies that it is the state which is primarily responsible for the protection of human rights and the implementation of human rights standards. Article 13 of the ECHR is closely interconnected with Article 35 (1). All individuals are invited to exhaust “all domestic remedies” and only after that to address the European Court of Human Rights (ECtHR). The idea behind that was to allow the ECtHR to focus on the most important cases in which it could develop its standards and shape the system of European protection of human rights.

The filter of domestic remedies did not work properly, the number of applications to the ECtHR had been growing, reaching the ceiling of the ECtHR’s capacity by mid-2000s, and the reform of the mechanism became inevitable. In 2012, the final of three High-Level conferences on the future of the ECtHR took place in Brighton, UK, resulting in a Declaration in which the principle of subsidiarity was reaffirmed as the key element of the well-functioning of the ECtHR and was linked to the use of domestic remedies. The declaration states that “the determination of the States Parties to ensure effective implementation of the Convention” by “considering the introduction if necessary of new domestic legal remedies, whether of a specific or general nature, for alleged violations of the rights and freedoms under the Convention”, and also by “enabling and encouraging national courts and tribunals to take into account the relevant principles of the Convention”, including the case law of the Court, and “enabling litigants, within the appropriate parameters of national judicial procedure but without unnecessary impediments, to draw to

the attention of national courts and tribunals any relevant provisions of the Convention and jurisprudence of the Court”<sup>1</sup>

As part of the efforts to reduce the backlog of cases, the ECtHR has started to apply Rule 47 of its Rules of Procedure in a very strict manner, limiting the flexibility of its approach to the concept of “exhaustion of domestic remedies”. This increases the responsibility of applicants and lawyers and should stimulate them to contribute to changes into national judicial practices as regards more extensive use of the ECHR and the ECtHR standards in national proceedings.

## **Objectives**

The Conference will be the first of its kind to bring together judges, lawyers, legal scholars, NGOs, all those who apply and disseminate the knowledge on the ECHR at the national level. The regional focus will give an opportunity to discuss problems common to the countries of the former Yugoslavia. It will provide a unique forum to discuss the concept of national remedies as such and the principle of exhausting national legal remedies before seeking international protection. The emphasis of the conference will be on the interaction between the various actors of the justice chain, such as the judges of the courts of different levels and constitutional, practicing lawyers and legal scholars. The discussion will also focus on the leading role of the constitutional courts whose efficiency as a national “filter” for cases before they reach Strasbourg depends on the effective and appropriate use of available national legal remedies. The use of such remedies, with proper references to the ECtHR case law, will not only increase the chance of resolving a case without bringing it to Strasbourg, but will also ensure a much faster restoration of violated rights at home.

The Conference will look at the issue of domestic legal remedies both from the perspective of their effective use for the protection of rights and freedoms guaranteed by the ECHR and from the perspective of the ECtHR when those are an element of the principle of subsidiarity and their exhaustion is one of the admissibility criteria. The following three problems will be at the centre of the discussions:

1. Availability of domestic remedies and their effective use: a fundamental right;
2. Exhaustion of domestic remedies as admissibility criteria under Article 34 ECHR and before national constitutional courts: flexibility v. formalism?;
3. Building the capacity of legal professionals as regards the application of the ECHR and the ECtHR case law at a national level in the context of effectiveness of national legal remedies.

The triangular relationship between the ECtHR in Strasbourg, Constitutional courts, Supreme and lower courts has been a matter of discussions not only amongst legal scholars, but also within the judiciary in the member states.

Many European judges, lawyers and prosecutors already use ECHR-based arguments, in their submissions judgments, and decisions. However, it is also clear that, in far too many situations, the ECHR and the case law of the ECtHR have not been taken into consideration despite being clearly relevant in particular cases. For many national judges and prosecutors, the task of applying the case law of the ECtHR can appear overwhelming as the principles of interpretation might seem alien to some national legal traditions.

It is due to this specific difficulty that the provision of professional training on ECHR standards and the translation and dissemination of the case law of the ECtHR is essential. Without these, it is very hard to ensure that the ECHR and ECtHR case law would be properly taken into account during the deliberations and decision-making of national courts. There is an increased demand for curriculum on human rights from the law schools, to initial and to continuous training for legal professionals.

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<sup>1</sup> High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, para 9 (3 (iv))

In light of above, the overall objective of the Conference will be to facilitate the exchange of experiences between participants from the region, as well as to identify the main obstacles to the protection of human rights according to Article 13 of the ECHR. In addition, the Conference will serve as a starting point for the creation of an informal network of cooperation between the judiciary of the countries in the region for the promotion of best practices with regard to the application of domestic remedies.

The CoE is already supporting national training institutions and Bar associations in providing high-quality and up to date training tools and methodology under its European Programme for Human Rights Education for Legal Professionals (HELP)

The objectives of the conference will be:

- To allow judges, prosecutors, lawyers, legal scholars and NGOs to meet and identify their commonalities, their differences and issues of mutual interest in relation to the application of domestic remedies;
- To explore opportunities for further exchange and cooperation between the courts in the region;
- To compare the best practices in the region, identifying similar solutions for issues of a repetitive nature in the ECtHR case law.

### **Methodology**

The Conference will allow legal practitioners and scholars to have an exchange on the functioning of national judicial systems and availability of, the use of domestic remedies in the context of implementation of the CoE human rights standards.

The Conference will start and end with plenary sessions, at which several keynote speeches will be delivered. In between, the participants will be working in three panels, each discussing its own topics. The panels will have a mixed composition of judges, lawyers and legal scholars. Each panel will prepare a set of conclusions which will be subsequently presented at the closing plenary session on Day 2.

Materials of the Conference will be published in a book, which will also include articles on the topics of the Conference prepared by leading legal experts. The publication will be distributed among the high courts, bar associations, national training institutions and law faculties of the countries of the region.

### **Participants**

Participants of the Conference will be representatives of the judiciary, bar associations and universities/legal research centres from Bosnia and Herzegovina, Croatia, Kosovo<sup>□</sup>, Montenegro, Serbia, Slovenia and “The former Yugoslav Republic of Macedonia”, representatives of the ECtHR, its Registry and the CoE Secretariat. The average number of participants will be 100.

### **Venue and language**

The Conference will be organised in co-operation with the Law faculty of University of Zagreb. The sessions will take place in the premises of Croatian State Archives and Westin Hotel. The working languages will be English and Croatian, with simultaneous interpretation provided.

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<sup>□</sup> All reference to Kosovo, whether to the territory, institutions or populations, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

# Draft Programme

Venue: Croatian State Archives,  
Marulićev trg 21, 10000 Zagreb

## 12 March 2015 Plenary session, Room XX

*chair – Mr Mikhail Lobov, Head of Human Rights Policy and Development Department, Directorate General of Human Rights and Rule of Law, Council of Europe*

09:00 - 09:30 Registration of participants (incl. tea/coffee)

### Opening session

09:30 - 09:50 Representative of the Law faculty of University of Zagreb

09:50 - 10:10 Mr Mikhail Lobov, Head of Human Rights Policy and Development Department, Directorate General of Human Rights and Rule of Law, Council of Europe

10:10 - 10:30 Ms Ksenija Turkovic, Judge of the European Court of Human Rights elected in respect of Croatia

*Reinforcing partnership in effective implementation of the European Convention for Human Rights*

### Key note speeches

10:30 - 11:00 Mr Hasan Bakirci, Head of Division, European Court of Human Rights.

*Inadmissible applications due to non-exhaustion of domestic legal remedies: the extent of the ECtHR's formalistic approach*

11:00 – 11:20 Coffee break

11:20 - 11:50 Ms Jasna Omejec, President of the Constitutional Court of Croatia

11:50 - 12:10 Ms Irene Kitsou-Milonas, Head of the Unit on the Reform of the Court, Human Rights Intergovernmental Cooperation Division, Directorate General of Human Rights and Rule of Law.

*Effective domestic remedies as prevention of human rights violations: execution of pilot judgments and general measures*

12:10 – 12:30 Ms Ana Vilfan-Vospersnik Registry of the European Court of Human Rights

12:30 - 14:00 Lunch

### Overview of regional practices

14:00 - 14:30 Ms Vesna Ilić-Prelić, Constitutional Court of Serbia

14:30 - 15:00 Ms Meddžida Kreso, President of the Court of Bosnia and Herzegovina

*Implementation of the ECHR by national courts: main challenges*

15:00 - 15:30 Ms Desanka Lopičić, President, Constitutional Court of Republic of Montenegro

15:30 - 16:00 Mr Zlatan Terzić, lawyer, Bar Association of Bosnia and Herzegovina

16:00 – 16:20 Coffee break

- 16:20 – 16:50 Ms Maja Tratnik, judge, Supreme Court of Slovenia  
*The concept of domestic remedies in the practice of the ECtHR and national courts: Slovenian experience*
- 16:50 – 17:20 Ms Lidia Nedelkova, President, Supreme Court of “the Former Yugoslav Republic of Macedonia
- 17:20 – 17:50 Mr Enver Hasani, President, Constitutional Court of Kosovo\*  
*Individual Complaint Mechanism in the Jurisprudence of the Constitutional Court of Kosovo*
- 17:50 – 18:00 Conclusions
- 18:30 Dinner at **Restaurant Vinodol, 10 Nikole Tesle street, 10000, Zagreb, Croatia**

**13 March 2015**

**Conference room of Hotel Westin**

*1 Izidora Kršnjavog Street, 10000, Zagreb*

**Work in panels**

09:30 – 13:00

Panel 1: The Concept of domestic remedies. Effectiveness of domestic remedies (moderator – Mr Sergey Dikman, Council of Europe; Rapporteur Prof. Djordjevic, Slovenia)

Panel 2. Domestic applications of the ECHR – reference in domestic proceedings by all sides of judicial proceedings. Availability of domestic remedies. Relevance of decisions of constitutional courts as domestic remedies (moderator – Ms Milica Vesovic, Council of Europe; Rapporteur – Prof. Nina Vajic, former judge of the ECtHR elected in respect of Croatia)

Panel 3. Effective application of the ECHR at a national level: from legal education to initial and continuous training of legal professionals (moderator – Ms Tatiana Termacic, Council of Europe; Rapporteur – Mr Dušan Ignjatović /Mr Jugoslav Tintor, Serbian Bar Association)

11:30 -12:00 Coffee break

13:00 - 14:30 Lunch

**13 March 2015**

**Plenary session, Conference Room of Hotel Westin**

*1 Izidora Kršnjavog Street, 10000, Zagreb*

*chair – Ms Tatiana Termacic, Head of Support to Human Rights National Implementation unit, Directorate General of Human Rights and Rule of Law, Council of Europe*

- 14:30 - 15:15      Presentation of the conclusions of the panels
- 15:15 - 16:00      Discussion/ open floor
- 16:00 - 16:20      Representative of the Law Faculty of University of Zagreb
- 16:20 - 16:40      University of Belgrade (Ivana Krstic/ Tanasije Marinkovic)
- 16:40 – 17:00      coffee break
- 17:00 - 17:20      Role of the Council of Europe co-operation programmes, Ms Milica Vesovic and Mr Sergey Dikman, Support to Human Rights National Implementation unit, DG I, CoE.
- 17:20 - 18:00      Final discussion and closing remarks. Ms Tatiana Termacic, Head of Support to Human Rights National Implementation Unit, Council of Europe; Mr Hrvoje Sikirić, Dean of the Law Faculty of University of Zagreb