



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

CASE OF BLEČIĆ v. CROATIA

(Application no. 59532/00)

JUDGMENT

STRASBOURG

8 March 2006

In the case of Blečić v. Croatia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Luzius Wildhaber, *President*,
Christos Rozakis,
Jean-Paul Costa,
Nicolas Bratza,
Boštjan M. Zupančič,
Lucius Caflisch,
Loukis Loucaides,
Ireneu Cabral Barreto,
Corneliu Bîrsan,
Nina Vajić,
John Hedigan,
Mindia Ugrekhelidze,
Antonella Mularoni,
Stanislav Pavlovski,
Lech Garlicki,
Renate Jaeger,
Dávid Thór Björgvinsson, *judges*,

and Lawrence Early, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 14 September 2005 and on 1 February 2006,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 59532/00) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian national, Mrs Krstina Blečić (“the applicant”), on 6 May 2000.

2. The applicant, who had been granted legal aid, was represented by the International Committee for Human Rights (ICHR), an association based in Sarajevo (Bosnia and Herzegovina), and by Mr T. Vukičević, a lawyer practising in Split. The Croatian Government (“the Government”) were represented by their Agents, first Ms L. Lukina-Karajković and subsequently Ms Š. Stažnik.

3. The applicant alleged, in particular, that her rights to respect for her home and to the peaceful enjoyment of her possessions had been violated on

account of the termination of her specially protected tenancy. She relied on Article 8 of the Convention and Article 1 of Protocol No. 1.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 30 January 2003 the above complaints were declared admissible by a Chamber of that Section, composed of Christos Rozakis, President, Françoise Tulkens, Peer Lorenzen, Nina Vajić, Egil Levits, Vladimiro Zagrebelsky and Elisabeth Steiner, judges, and Søren Nielsen, then Deputy Section Registrar.

6. On 29 July 2004 a Chamber of the Section composed of Christos Rozakis, President, Peer Lorenzen, Giovanni Bonello, Françoise Tulkens, Nina Vajić, Snejana Botoucharova and Elisabeth Steiner, judges, and Santiago Quesada, Deputy Section Registrar, held unanimously that there had been no violation of either Article 8 of the Convention or Article 1 of Protocol No. 1.

7. On 27 October 2004 the applicant requested that the case be referred to the Grand Chamber, in accordance with Article 43 of the Convention and Rule 73. A panel of the Grand Chamber accepted this request on 15 December 2004.

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

9. Both the applicant and the Government filed observations on the admissibility and merits of the application.

10. Third-party comments on the merits were received from Interights (International Centre for the Legal Protection of Human Rights), which had been granted leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The parties replied to those comments (Rule 44 § 5). On 26 April 2005 the Organisation for Security and Cooperation in Europe (OSCE), which had been granted leave to intervene in the written procedure before the Chamber, informed the Court that it had nothing further to add to the comments it had already submitted to the Chamber.

11. A hearing took place in public in the Human Rights Building, Strasbourg, on 14 September 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms Š. STAŽNIK,	<i>Agent,</i>
Lord LESTER OF HERNE HILL QC,	<i>Counsel,</i>
Mr D. MARIČIĆ,	<i>Co-Agent,</i>
Ms Z. HRVOJ ŠIPEK, Deputy to the Principal State Attorney,	<i>Adviser;</i>

(b) *for the applicant*

Mr F.J.L. DIAZ, Advocate,	
Mr P. TROOP, Barrister-at-law,	
Mr T. VUKIČEVIĆ, Advocate,	<i>Counsel,</i>
Mr M. MORATTI,	<i>Adviser.</i>

The Court heard addresses by Ms Stažnik, Lord Lester of Herne Hill, Mr Diaz and Mr Troop, and replies to questions from the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant was born in 1926 and currently lives in Rome, Italy.

13. In 1953 the applicant, together with her husband, acquired a specially protected tenancy (*stanarsko pravo*) of a flat in Zadar. After her husband's death in 1989 the applicant became the sole holder of the specially protected tenancy.

14. On 19 June 1991 the Specially Protected Tenancies (Sale to Occupier) Act came into force. It regulated the sale of publicly owned flats previously let under a specially protected tenancy.

15. On 26 July 1991 the applicant went to visit her daughter who lived in Rome. She intended to stay with her daughter for the summer. The applicant locked the flat in Zadar and left all her furniture and personal belongings in it. She asked a neighbour to pay the bills in her absence and to take care of the flat.

16. However, by the end of August 1991 armed conflict had escalated in Dalmatia, resulting in severe travel difficulties in that area, including the town of Zadar. From 15 September 1991, the town of Zadar was exposed to constant shelling and the supply of electricity and water was disrupted for over a hundred days.

17. The applicant submitted that in October 1991 the Croatian authorities had stopped paying her war widow's pension and that the payments had resumed in April 1994. The Government submitted that the applicant's pension had been paid by the Yugoslav Military Pension Fund in Belgrade rather than the Croatian Pension Fund and that it was the Belgrade authorities which had stopped paying the pension in December 1991.

18. According to the applicant, she also lost the right to medical insurance. The Government maintained that her medical insurance had never been stopped or interrupted.

19. Given these circumstances, the applicant decided to remain in Rome.

20. In November 1991 a certain M.F., with his wife and two children, broke into and occupied the applicant's flat in Zadar. The applicant claimed that M.F. had been assisted by an official of the municipality who had provided him with a list of empty flats in Zadar, including hers.

21. On 12 February 1992 the Zadar Municipality (*Općina Zadar*) brought a civil action against the applicant before the Zadar Municipal Court (*Općinski sud u Zadru*) for termination of her specially protected tenancy on the ground that she had been absent from the flat for more than six months without justified reason, contrary to section 99 of the Housing Act.

22. In her submissions to the domestic court, the applicant explained that she had been forced to stay with her daughter in Rome from July 1991 until May 1992. She had not been able to return to Zadar since she had no means of subsistence and no medical insurance and was in poor health. Furthermore, during her stay in Rome she had learned from her neighbour that M.F. had broken into her flat with his family. When she had enquired about her flat and her possessions in it, M.F. had threatened her over the telephone.

23. On 9 October 1992 the Zadar Municipal Court terminated the applicant's specially protected tenancy. The court found that the applicant had left Zadar on 26 July 1991 and had not returned until 15 May 1992. It stated that during the relevant period the citizens of Zadar had not been ordered to evacuate the town on account of the escalation of the armed conflict and that each citizen had had the choice to leave the town or to stay. On that basis the court found that the war in Croatia could not justify the applicant's absence.

24. The court did not accept the applicant's explanation that she had fallen ill during her stay in Rome and had been unable to travel. It was established that she had suffered from spinal arthrosis and diffuse osteoporosis for a long time. However, this had not affected her ability to travel. Even though her left shoulder had been dislocated on 25 March 1992, she had been able to travel following the immobilisation of the injured joint. Furthermore, by 25 March 1992 she had already been absent from the flat for more than six months.

25. The applicant's further explanation that she had stopped receiving her pension in October 1991 and thus had been left without any means of subsistence was not accepted by the court as a justified reason for not returning to Zadar. It took the view that the applicant's daughter could have sent her money. Therefore, the court concluded that the applicant's reasons for not having lived in the flat were not justified.

26. Following an appeal by the applicant, the judgment was quashed by the Zadar County Court (*Županijski sud u Zadru*) on 10 March 1993.

The County Court found that the court of first instance had not given due consideration to the applicant's personal circumstances, namely her age and poor health and the fact that she had lost her pension and lived alone in Zadar. Furthermore, the applicant's decision to prolong her stay in Rome should have been carefully assessed against the background of the circumstances at the material time, namely that Zadar had been exposed to daily shelling and had not had a regular supply of water or electricity, and that third parties had occupied the applicant's flat.

The case was remitted to the first-instance court.

27. In the resumed proceedings, on 18 January 1994 the Zadar Municipal Court again ruled in favour of the municipality and terminated the applicant's specially protected tenancy. It observed that she had been absent from the flat for over six months without justified reason and repeated in substance the findings of the judgment of 9 October 1992.

28. The applicant appealed. On 19 October 1994 the County Court reversed the first-instance judgment and dismissed the municipality's claim. It found that the escalation of the war and the applicant's personal circumstances justified her absence from the flat.

29. On 10 April 1995 the Zadar Municipality lodged an appeal on points of law (*revizija*) with the Supreme Court (*Vrhovni sud Republike Hrvatske*).

30. On 15 February 1996 the Supreme Court allowed the appeal, reversed the County Court's judgment and upheld the judgment of the Municipal Court. It found that the reasons submitted by the applicant for her absence from the flat were not justified. The relevant part of the Supreme Court's judgment read as follows:

"During the aggression against Croatia, living conditions were the same for all citizens of Zadar and, as rightly submitted by the plaintiff, it is neither possible nor legitimate to separate the defendant's case from the context of that aggression. To hold the contrary would mean assessing her case in isolation from all of the circumstances which characterised that time and determined the conduct of each individual.

Contrary to the appellate court, this Court, assessing in that context the defendant's decision not to return to Zadar during the aggression but to stay in Italy, considers the non-use of the flat unjustified. The factual findings made in the case reveal that, in view of her state of health and the available travel connections, the defendant was able to come to Zadar; her health would not have deteriorated because of her stay in Zadar; and she could have taken care of herself. The assumption that she would have had to

make a considerable mental and physical effort in order to provide for her basic living needs (all the citizens of Zadar who remained in the town, from the youngest to the oldest, were exposed to the same living conditions) does not justify her failure to return to Zadar and, accordingly, does not constitute a justified reason for the non-use of the flat.”

31. On 8 November 1996 the applicant lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*). She claimed that her rights to respect for her home and property had been violated and that she had been deprived of her right to a fair hearing.

32. On 5 November 1997 the Convention came into force in respect of Croatia.

33. On 8 November 1999 the Constitutional Court dismissed the applicant’s constitutional complaint. It found that the Supreme Court had correctly applied the relevant legal provisions to the facts established by the lower courts when holding that the applicant’s absence from the flat for more than six months had been unjustified. The Constitutional Court concluded that the applicant’s constitutional rights had not been violated.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

34. The relevant provisions of the 1990 Croatian Constitution (*Ustav Republike Hrvatske*, Official Gazette nos. 56/1990 and 135/1997), as in force at the material time, read as follows:

Article 16

“Rights and freedoms may be restricted only by law to protect the rights and freedoms of others, the legal order, public morals or health.”

Article 34

“1. The home is inviolable.”

Article 48

“1. The right to property is guaranteed.

2. Property implies duties. Holders of the title to property and property users shall have a duty to contribute to the general welfare.”

Article 90

“3. Only certain provisions of a statute may have retroactive effects.”

Article 134

“International agreements concluded and ratified in accordance with the Constitution and made public shall be part of the Republic’s internal legal order and shall be [hierarchically] superior to the [domestic] statutes.”

B. The Constitutional Court Act

35. The relevant part of the Constitutional Act on the Constitutional Court (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette no. 99/1999), as in force at the material time, provided that individuals or legal entities could lodge a constitutional complaint with the Constitutional Court if they considered that a judicial or administrative decision, or a decision of a legal entity invested with public authority, had violated their human rights or fundamental freedoms guaranteed by the Constitution (section 59). A constitutional complaint, in principle, did not suspend the implementation of the impugned decision (section 63). If the Constitutional Court allowed a constitutional complaint, it had to quash the impugned decision and remit the case to the competent authority for a new decision (section 72).

C. The Act incorporating the Convention

36. The Act on Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols Nos. 1, 4, 6, 7 and 11 to the Convention (*Zakon o potvrđivanju Konvencije za zaštitu ljudskih prava i temeljnih sloboda i Protokola br. 1, 4, 6, 7 i 11 uz Konvenciju za zaštitu ljudskih prava i temeljnih sloboda*, Official Gazette – International Agreements, no. 18/1997) came into force on 5 November 1997. It incorporated the Convention as an international treaty into the Croatian legal system.

D. The Housing Act

1. Relevant provisions

37. The Housing Act (*Zakon o stambenim odnosima*, Official Gazette nos. 51/1985, 42/1986, 22/1992 and 70/1993), as in force at the material time, provided that a holder of a specially protected tenancy (“the tenant”) had a right to permanent use of the flat for living purposes, to sublet part of it to someone else and to participate in the administration of the building in which the flat was located. The Act also provided that, in agreement with the provider of the flat, the tenant could exchange it for another flat and, exceptionally, use part of it for business purposes.

38. Section 67 provided that the tenant's cohabitants could acquire the tenancy after the tenant's death.

39. Section 99 read as follows:

“(1) A specially protected tenancy may be terminated if the tenant ... ceases to occupy the flat for an uninterrupted period exceeding six months.

(2) A specially protected tenancy shall not be terminated under the provisions of subsection (1) of this section in respect of a person who does not use the flat on account of undergoing medical treatment, performance of military service or other justified reasons.”

40. Under section 105(1) the provider of the flat had to bring a civil action in order to terminate the specially protected tenancy. The tenancy was terminated as soon as the court's judgment, upholding the claim of the provider of the flat, became *res judicata* (see, *inter alia*, the Supreme Court's decision no. Rev-1009/1993-2 of 15 June 1994).

2. The case-law of the Supreme Court

41. In decisions nos. Rev-3839/93-2 of 19 January 1994, Rev-2276/00-2 of 21 November 2000 and Rev-590/03-2 of 17 December 2003, the Supreme Court interpreted section 99(1) of the Housing Act as follows:

“War events *per se*, without any particular reasons rendering use of the flat impossible, do not constitute a justified reason for not using it.”

42. In a series of decisions (for example, in cases nos. Rev-152/1994-2 of 23 February 1994, Rev-1780/1996-2 of 10 March 1999, Rev-1606/00-2 of 1 October 2003, Rev-998/03-2 of 4 December 2003 and Rev-590/03-2 of 17 December 2003), starting with decision no. Rev-155/1994-2 of 16 February 1994, the Supreme Court interpreted another aspect of section 99(1) of the Housing Act as follows:

“The fact that a flat that is not being used by its tenant is illegally occupied by a third person does not, *per se*, make the non-use [of the flat by the tenant] justified. In other words, if the tenant fails to take the appropriate steps to regain possession of the flat within the statutory time-limits set forth in section 99(1) of the Housing Act ..., then the [illegal occupation of the flat by a third person] is not an obstacle to the termination of the specially protected tenancy.”

E. The Specially Protected Tenancies (Sale to Occupier) Act

43. The Specially Protected Tenancies (Sale to Occupier) Act (*Zakon o prodaji stanova na kojima postoji stanarsko pravo*, Official Gazette no. 27/1991), as in force at the material time, entitled the holder of a specially protected tenancy of a publicly owned flat to purchase it from the provider under favourable conditions.

F. The Civil Procedure Act

44. The Civil Procedure Act (*Zakon o parničnom postupku*, Official Gazette nos. 53/1991 and 91/1992), as in force at the material time, provided that an appeal on points of law (*revizija*) lay to the Supreme Court against second-instance judgments.

In cases where a first-instance judgment had been reversed by the second-instance judgment but the Supreme Court reversed the latter and upheld the former, the first-instance judgment became *res judicata* when the Supreme Court delivered its decision.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The Vienna Convention of 1969 on the Law of Treaties

45. Article 28 of the Vienna Convention on the Law of Treaties of 23 May 1969 (“the Vienna Convention”) provides:

Non-retroactivity of treaties

“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”

B. The Permanent Court of International Justice

46. The Permanent Court of International Justice (PCIJ) has dealt with the issue of its jurisdiction *ratione temporis* in several cases. In the case of *Phosphates in Morocco* (Preliminary Objections) between Italy and France, the Italian Government maintained, *inter alia*, that the dispossession of certain Italian nationals resulting from the decision of the French Mines Department of 8 January 1925, and the denial of justice that had followed, were inconsistent with international obligations incumbent on France. The ratification of the declaration by which France accepted the compulsory jurisdiction of the PCIJ was filed on 25 April 1931. In its judgment of 14 June 1938 (PCIJ, Series A/B, no. 74, pp. 10-30), when examining France’s preliminary objection based on the lack of jurisdiction *ratione temporis*, the PCIJ held:

“The French Government bases its objection on the following passage in its declaration: ‘...in any disputes which may arise after the ratification of the present declaration with regard to situations or facts subsequent to this ratification.’ [p. 22]

...

[The Court's compulsory jurisdiction] only exists within the limits within which it has been accepted. In this case, the terms on which the objection *ratione temporis* submitted by the French Government is founded, are perfectly clear: the only situations or facts falling under the compulsory jurisdiction are those which are subsequent to the ratification and with regard to which the dispute arose, that is to say, those which must be considered as being the source of the dispute. [p. 23]

...

...The situations and the facts which form the subject of the limitation *ratione temporis* have to be considered from the point of view both of their date in relation to the date of ratification and of their connection with the birth of the dispute. Situations or facts subsequent to the ratification could serve to found the Court's compulsory jurisdiction only if it was with regard to them that the dispute arose. [p. 24]

...

[The] decision of the Mines Department, owing to its date, falls outside the Court's jurisdiction. The Italian Government has sought to avert this consequence by arguing ... that the decision of 1925 constituted only an uncompleted violation of international law; that this violation only became definitive as a result of certain acts subsequent to the crucial date and of the final refusal to remedy in any way the situation created in 1925, and that these acts gave rise to the dispute between the two Governments. [p. 27]

...

The Court cannot regard the denial of justice alleged by the Italian Government as a factor giving rise to the present dispute. In its Application, the Italian Government has represented the decision of the Department of Mines as an unlawful international act ... That being so, it is in this decision that we should look for the violation of international law – a definitive act which would, by itself, directly involve international responsibility. This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States. In these circumstances the alleged denial of justice ... merely results in allowing the unlawful act to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it. [p. 28]

...

... [T]he complaint of a denial of justice cannot be separated from the criticism which the Italian Government directs against the decision of the Department of Mines of January 8th, 1925, for the Court could not regard the denial of justice as established unless it had first satisfied itself as to the existence of the rights of the private citizens alleged to have been refused judicial protection. But the Court could not reach such a conclusion without calling in question the decision of the Department of Mines of 1925. It follows that an examination of the justice of this complaint could not be undertaken without extending the Court's jurisdiction to a fact which, by reason of its date, is not subject thereto.

...

In conclusion, the Court finds that the dispute submitted to it by the Italian Government ... did not arise with regard to situations or facts subsequent to the ratification of the acceptance by France of the compulsory jurisdiction, and that in consequence it has no jurisdiction to adjudicate on this dispute. [pp. 28-29]"

C. The International Court of Justice

47. The issue of temporal jurisdiction arose also in a number of cases before the International Court of Justice (ICJ). In *Certain Property (Liechtenstein v. Germany)*, Preliminary Objections, Liechtenstein maintained that certain decisions by German courts delivered in the period between 1995 and 1998 declaring inadmissible the action of Prince Hans-Adam II of Liechtenstein for restitution of a painting, which had been confiscated by Czechoslovakia on 21 June 1945 under "the Beneš Decrees", were in breach of international law. In these inadmissibility decisions the German courts relied on the Convention on the Settlement of Matters Arising out of the War and the Occupation, signed in 1952, as amended in 1954, which had come into force on 5 May 1955 ("the Settlement Convention"). In order to found the jurisdiction of the ICJ, Liechtenstein relied in its Application on Article 1 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, which came into force between Liechtenstein and Germany on 18 February 1980. In its judgment of 10 February 2005, when examining Germany's preliminary objection based on the lack of jurisdiction *ratione temporis*, the ICJ held:

"47. The Court will now consider whether the present dispute has its source or real cause in the facts or situations which occurred in the 1990s in Germany and, particularly, in the decisions by the German courts in the *Pieter van Laer Painting* case, or whether its source or real cause is the Beneš Decrees under which the painting was confiscated and the Settlement Convention which the German courts invoked as ground for declaring themselves without jurisdiction to hear that case.

48. The Court observes that it is not contested that the present dispute was triggered by the decisions of the German courts in the aforementioned case. This conclusion does not, however, dispose of the question the Court is called upon to decide, for under Article 27 (a) of the European Convention for the Peaceful Settlement of Disputes, the critical issue is not the date when the dispute arose, but the date of the facts or situations in relation to which the dispute arose.

...

51. ...The Court ... finds that the decisions of the German courts in the *Pieter van Laer Painting* case cannot be separated from the Settlement Convention and the Beneš Decrees, and that these decisions cannot consequently be considered as the source or real cause of the dispute between Liechtenstein and Germany.

52. The Court concludes that, although these proceedings were instituted by Liechtenstein as a result of decisions by German courts regarding a painting by Pieter van Laer, these events have their source in specific measures taken by

Czechoslovakia in 1945, which led to the confiscation of property owned by some Liechtenstein nationals, including Prince Franz Josef II of Liechtenstein, as well as in the special regime created by the Settlement Convention. The decisions of the German courts in the 1990s dismissing the claim filed by Prince Hans-Adam II of Liechtenstein for the return of the painting to him were taken on the basis of Article 3, Chapter Six, of the Settlement Convention. While these decisions triggered the dispute between Liechtenstein and Germany, the source or real cause of the dispute is to be found in the Settlement Convention and the Beneš Decrees. In light of the provisions of Article 27 (a) of the European Convention for the Peaceful Settlement of Disputes, Germany's ... preliminary objection must therefore be upheld."

D. The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts

48. The relevant provisions of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, as adopted by the International Law Commission on 9 August 2001 (for the text of the Draft Articles and Commentary, see Report of the International Law Commission on the Work of its Fifty-third Session, *Official Records of the General Assembly, Fifty-sixth Session, Supplement no. 10* (A/56/10), chap. IV.E.1 and chap. IV.E.2, pp. 46 and 133-45) read as follows:

Article 13

International obligation in force for a State

"An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."

Article 14

Extension in time of the breach of an international obligation

"1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

IV. DECLARATIONS OF CROATIA UNDER FORMER ARTICLES 25 AND 46 OF THE CONVENTION

49. On 5 November 1997, when depositing the instrument of ratification of the Convention with the Secretary General of the Council of Europe, the Croatian Minister for Foreign Affairs made the following declarations (contained in the instrument of ratification):

“The Republic of Croatia recognises for an indefinite period of time, in accordance with Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 of Protocol No. 4 and Article 7 of Protocol No. 7, the competence of the European Commission of Human Rights to deal with petitions addressed to the Secretary General of the Council of Europe by any person, non-governmental organisation or group of individuals claiming to be the victim of a violation of the rights set forth in the Convention and its Protocols, where the facts of the alleged violation of these rights occur after the Convention and its Protocols have come into force in respect of the Republic of Croatia.

The Republic of Croatia recognises for an indefinite period of time, in accordance with Article 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 of Protocol No. 4 and Article 7 of Protocol No. 7, as compulsory *ipso facto* and without special agreement the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the Convention and its Protocols and relating to facts occurring after the Convention and its Protocols have come into force in respect of the Republic of Croatia.”

THE LAW

THE GOVERNMENT’S PRELIMINARY OBJECTIONS

50. The Government raised two preliminary objections, based respectively on the Court’s lack of jurisdiction *ratione temporis* to entertain the application and the applicant’s failure to exhaust domestic remedies.

Jurisdiction *ratione temporis*

1. The Government’s submissions

51. The Government submitted that, according to the established case-law of the Convention institutions (see *B.A. v. Turkey*, no. 15505/89, Commission decision of 12 March 1990, unreported, and *K. v. Turkey*, no. 14206/88, Commission decision of 11 July 1989, Decisions and Reports 62, pp. 307-08), the Court did not have jurisdiction *ratione*

temporis in cases where a decision given by the domestic courts after the Convention's entry into force related to events occurring before that date.

52. Furthermore, according to the case-law of the ICJ it was not the date on which the dispute arose that was important for establishing jurisdiction *ratione temporis* but the date on which the facts or situations that led to the dispute occurred (see *Certain Property (Liechtenstein v. Germany)*, Preliminary Objections, cited above, §§ 48-49 and 52).

53. The present case could not be distinguished from *Jovanović v. Croatia* ((dec.), no. 59109/00, ECHR 2002-III). In its admissibility decision the Chamber had erred when emphasising the difference between the instantaneous character of the dismissal decision in *Jovanović* and the proceedings for the termination of a specially protected tenancy in the present case. It had overlooked the fact that the proceedings against the applicant had been instituted because she had ceased to occupy her flat for an uninterrupted period exceeding six months. That situation had begun when the applicant left the flat in July 1991 and continued until February 1992, when the Zadar Municipality brought a civil action against her. All of the domestic court decisions had been based exclusively on the applicant's absence during that period and on whether or not there was a justified reason for that absence. In its decision, which was the only one given in the case after the date of Croatia's ratification of the Convention on 5 November 1997 ("the critical date"), the Constitutional Court had limited itself to examining whether the substantive law in force during the above-mentioned period had been properly applied. Therefore, the fact that the *Jovanović* case had involved a dismissal followed by a disciplinary appeal and court proceedings, whereas the present case involved the applicant's absence followed by court proceedings aimed at terminating her tenancy on that ground, was an immaterial distinction.

Moreover, in both cases the constitutional complaint had been lodged before, but had been dismissed by the Constitutional Court after, the critical date.

54. In any event, the applicant's tenancy had been terminated when the Supreme Court gave its judgment, which was before the critical date. It had been an instantaneous act which had not given rise to a continuing situation. The subsequent Constitutional Court decision had not contained any elements which would permit it to be seen as an original or autonomous decision.

2. *The applicant's submissions*

55. The applicant argued that the facts which occurred between July 1991 and February 1992 were by no means decisive for establishing the Court's temporal jurisdiction since they only enabled the State to exercise its power to seek termination of her tenancy through court proceedings. She had lost her home in the proceedings brought by the State to terminate her

tenancy rather than by reason of an instantaneous act such as the dismissal from employment in the *Jovanović* case. That aim had not been achieved until the final outcome of the proceedings in late 1999. The directly decisive decision was therefore that of the Constitutional Court since that court had examined whether her rights to respect for her home and to the peaceful enjoyment of her possessions had been violated; and it had the power to quash the Supreme Court's judgment and remit the case for a fresh decision. Therefore, the crucial facts of the case had been those State acts, subsequent to her absence from the flat, which had breached her Convention rights. Those facts were the real subject matter of the dispute before the Court.

56. After the entry into force of the Convention in respect of the State concerned, all acts and omissions had to conform to the Convention, even where they were merely extensions of an already existing situation. While it was true that the Court could examine only facts post-dating ratification, it could have regard to prior facts inasmuch as they could be relevant for the understanding of those occurring after that date.

57. The applicant claimed that the Government's reference to the ICJ's decision was irrelevant because the case-law of the Court was significantly different from that of the ICJ owing to the special nature of the Convention. The Court, unlike the ICJ, recognised continuing violations.

58. In any event, the termination of the applicant's tenancy had resulted in a continuing situation since she had been prevented at all times from returning to her home.

3. The Chamber's decision

59. In its final decision on admissibility the Chamber examined of its own motion its temporal jurisdiction. It found that the applicant's specially protected tenancy had not been terminated by the fact that she had left the flat, but by virtue of the subsequent decisions of the domestic courts. In this respect the present case differed significantly from *Jovanović*, where the events complained of (the decision dismissing the applicant from work) had represented a single instantaneous act, and the subsequent proceedings had been instituted by the applicant in order to challenge that act.

60. Furthermore, in the proceedings before the domestic courts the applicant's specially protected tenancy had not been terminated by a single decision. Rather, it had been the subject of an entire set of proceedings before the domestic courts.

61. The Chamber acknowledged that the greater part of the proceedings had taken place prior to the entry into force of the Convention in respect of Croatia, and that the Supreme Court's judgment had been given before that date. However, what was important was the fact that the final decision (within the meaning of the Convention) had been taken by the Constitutional Court on 8 November 1999, that is to say, after the critical date. This was so because the outcome of the Constitutional Court

proceedings had been directly decisive for the applicant's rights protected by the Convention. That court had been called upon to decide whether the lower courts' judgments had violated the applicant's rights to respect for her home and to the peaceful enjoyment of her possessions, that is, to examine the same complaints which she had raised in her application to the Court.

62. Therefore, the Chamber held that the present application fell within the Court's competence *ratione temporis*.

4. The Grand Chamber's assessment

(a) Whether the Court is competent at this stage of the proceedings to deal with the Government's objection *ratione temporis*

63. The Court notes that no plea of inadmissibility on account of lack of jurisdiction *ratione temporis* was made by the Government at the admissibility stage. Nevertheless, the Chamber decided in its final decision on admissibility to examine its temporal jurisdiction of its own motion, holding that the issue called for consideration. The Government raised their objection *ratione temporis* for the first time in their observations before the Grand Chamber. The applicant, for her part, did not ask the Court to dismiss the Government's preliminary objection in application of Rule 55 of the Rules of Court, according to which "any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application".

64. The question therefore arises whether the Government are estopped from raising their preliminary objection at this stage of the proceedings.

65. The Court reiterates that the Grand Chamber is not precluded from deciding questions concerning the admissibility of an application under Article 35 § 4 of the Convention, since that provision enables the Court to dismiss applications it considers inadmissible "at any stage of the proceedings". Thus, even at the merits stage the Court may reconsider a decision to declare an application admissible if it concludes that it should have been declared inadmissible for one of the reasons given in the first three paragraphs of Article 35 of the Convention (see, *inter alia*, *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III, and *Odièvre v. France* [GC], no. 42326/98, § 22, ECHR 2003-III).

66. In the instant case the Court finds that, notwithstanding the requirements of Rule 55 of the Rules of Court, which in any event must be interpreted in a manner compatible with the Convention, in particular Article 32 thereof, the Government cannot be considered to be precluded from raising the issue of temporal jurisdiction before the Grand Chamber.

67. Firstly, incompatibility *ratione temporis* is a matter which goes to the Court's jurisdiction rather than a question of admissibility in the narrow sense of that term. Since the scope of the Court's jurisdiction is determined

by the Convention itself, in particular by Article 32, and not by the parties' submissions in a particular case, the mere absence of a plea of incompatibility cannot extend that jurisdiction. To hold the contrary would mean that where a respondent State waived its right to plead or omitted to plead incompatibility, the Court would have to rule on the merits of a complaint against that State concerning a right not guaranteed by the Convention or on a Convention right not yet binding on it, for example by virtue of a valid reservation clause (incompatibility *ratione materiae*) or because it has not yet ratified an additional Protocol (incompatibility *ratione personae*).

The same has to be true for the Court's temporal jurisdiction, since the non-retroactivity principle (see paragraph 45 above) operates to limit *ratione temporis* the application of the jurisdictional, and not only substantive, provisions of the Convention.

Accordingly, the Court, in line with the position taken by the Commission on this point (see *Nielsen v. Denmark*, no. 343/57, Commission decision of 2 September 1959, Yearbook 2, p. 454), has to satisfy itself that it has jurisdiction in any case brought before it, and is therefore obliged to examine the question of its jurisdiction at every stage of the proceedings.

68. Secondly, the Court has already held that it is not open to it to set aside the application of another admissibility criterion, namely the six-month rule, solely because a Government has not made a preliminary objection to that effect (see *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I). In reaching that conclusion it explained that the six-month rule, in reflecting the wish of the Contracting Parties to prevent past decisions being called into question after an indefinite lapse of time, served the interests not only of the respondent Government but also of legal certainty as a value in itself. It added that the rule marked out the temporal limits of supervision carried out by the organs of the Convention and signalled to both individuals and State authorities the period beyond which such supervision was no longer possible. Having regard to the fact that the purpose of limitations *ratione temporis* is to preclude the possibility of submitting to the Court, by means of an application, facts dating from a period when the respondent State was not in a position to foresee the international responsibility or legal proceedings to which these facts might give rise, the Court considers that the above reasoning concerning the six-month rule applies *a fortiori* in the present instance.

69. Thirdly, despite the Government's failure to raise the relevant objection earlier, and without prejudice to the above-mentioned considerations, the Chamber examined its competence *ratione temporis* of its own motion and the parties addressed the question in their observations before the Grand Chamber. Accordingly, the issue of temporal jurisdiction is a live issue that must be examined.

(b) Limitations on the Court's temporal jurisdiction

70. The Court reiterates that, in accordance with the general rules of international law (see paragraph 45 above), the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party (see, for example, *Kadiķis v. Latvia* (dec.), no. 47634/99, 29 June 2000).

71. It further notes that, in its declarations made under former Articles 25 and 46 of the Convention (see paragraph 49 above), Croatia recognised the competence of the Convention organs to deal with individual petitions based on facts occurring after the Convention and its Protocols had come into force in respect of Croatia. These declarations remain valid for the determination of the jurisdiction of the Court to receive individual applications under the current Article 34 of the Convention by virtue of Article 6 of Protocol No. 11, which reads as follows:

“Where a High Contracting Party had made a declaration recognising the competence of the Commission or the jurisdiction of the Court under former Article 25 or 46 of the Convention with respect to matters arising after or based on facts occurring subsequent to any such declaration, this limitation shall remain valid for the jurisdiction of the Court under this Protocol.”

72. Accordingly, the Court is not competent to examine applications against Croatia in so far as the alleged violations are based on facts having occurred before the critical date. However, the question of whether an alleged violation is based on a fact occurring prior or subsequent to a particular date gives rise to difficulties when, as in the present case, the facts relied on fall partly within and partly outside the period of the Court's competence.

(c) The Court's case-law

73. In *Stamoulakatos v. Greece* (no. 1) (26 October 1993, Series A no. 271), the applicant complained about his various convictions *in absentia* by Greek courts prior to the date of Greece's acceptance of the right of individual petition under former Article 25 of the Convention. However, he had lodged appeals against these convictions, which were subsequently dismissed, after that date. The Court held that, although those appeals had been lodged after the relevant date, they were closely bound up with the proceedings that had led to his conviction. Divorcing these appeals from the events which gave rise to them would be tantamount to rendering Greece's declaration accepting the right of individual petition nugatory. Accordingly, the Court declared the application incompatible with the Convention *ratione temporis*.

74. In *Kadiķis* (cited above) the applicant requested the Central Electoral Commission to allow him to sign a petition without having a seal affixed on his passport since the existence of the seal would reveal his political

opinions and his sympathy for a particular political party. Construing the ensuing silence of the Central Electoral Commission as an implicit decision rejecting his request, the applicant brought an action in court against that decision. These facts occurred before the date of ratification, while the proceedings following the applicant's action and ending with a final decision dismissing his claim occurred after that date.

In *Jovanović* (cited above) the applicant was dismissed from work because of his alleged participation in a "referendum" for Serbian autonomy in Croatia. His disciplinary appeal and his subsequent civil action were unsuccessful. He lodged a constitutional complaint challenging the constitutionality of the court decisions dismissing his civil action that had been delivered before ratification. The Constitutional Court dismissed his constitutional complaint after ratification.

The Court considered the implicit decision of the Electoral Commission in *Kadiķis* and the applicant's dismissal in *Jovanović* as instantaneous acts which had not given rise to a continuing situation of a violation of the Convention. It held that divorcing the domestic courts' judgments delivered after ratification from the events which had given rise to the court proceedings would amount to giving retroactive effect to the Convention, which would be contrary to general principles of international law. It accordingly declared these applications incompatible with the Convention *ratione temporis*.

The Court followed the same approach in *Litovchenko v. Russia* (dec.), no. 69580/01, 18 April 2002, *Kikots and Kikota v. Latvia* (dec.), no. 54715/00, 6 June 2002, and *Veeber v. Estonia (no. 1)*, no. 37571/97, 7 November 2002.

75. In the joined cases of *Moldovan and Others* and *Rostas and Others v. Romania* ((dec.), nos. 41138/98 and 64320/01, 13 March 2001) the applicants complained, *inter alia*, under Article 2 of the Convention, that the Romanian authorities had failed to conduct an effective investigation into the killings of their relatives, which had taken place before ratification. The Court held that the alleged obligation to conduct an effective investigation was derived from the aforementioned killings whose compatibility with the Convention could not be examined. It therefore declared that complaint incompatible with the Convention *ratione temporis*.

76. In *Zana v. Turkey* (judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII) the applicant complained *inter alia*, under Article 10 of the Convention, about his conviction on 26 March 1991 on account of a statement he had made to journalists in August 1987. Turkey accepted the compulsory jurisdiction of the Court only in respect of facts and events which had occurred subsequent to 22 January 1990, the day on which it filed its declaration. The Court did not accept the Turkish Government's argument that the relevant principal fact for establishing jurisdiction *ratione temporis* was the applicant's statement to the journalists.

Rather, the principal fact was the applicant's conviction, since it was that conviction which constituted interference with the applicant's rights under Article 10. The Court accordingly dismissed the Government's preliminary objection based on lack of jurisdiction *ratione temporis*.

(d) The appropriate test

77. It follows from the above case-law that the Court's temporal jurisdiction is to be determined in relation to the facts constitutive of the alleged interference. The subsequent failure of remedies aimed at redressing that interference cannot bring it within the Court's temporal jurisdiction.

78. An applicant who considers that a State has violated his rights guaranteed under the Convention is usually expected to have resort first to the means of redress available to him under domestic law. If domestic remedies prove unsuccessful and the applicant subsequently applies to the Court, a possible violation of his rights under the Convention will not be caused by the refusal to remedy the interference, but by the interference itself, it being understood that this may be in the form of a court judgment.

79. Therefore, in cases where the interference pre-dates ratification while the refusal to remedy it post-dates ratification, to retain the date of the latter act in determining the Court's temporal jurisdiction would result in the Convention being binding for that State in relation to a fact that had taken place before the Convention came into force in respect of that State. However, this would be contrary to the general rule of non-retroactivity of treaties (see paragraphs 45 and 70 above).

80. Moreover, affording a remedy usually presupposes a finding that the interference was unlawful under the law in force when the interference occurred (*tempus regit actum*). Therefore, any attempt to remedy, on the basis of the Convention, an interference that had ended before the Convention came into force would necessarily lead to its retroactive application.

81. In conclusion, while it is true that from the ratification date onwards all of the State's acts and omissions must conform to the Convention (see *Yağcı and Sargın v. Turkey*, 8 June 1995, § 40, Series A no. 319-A), the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to that date (see *Kopecký v. Slovakia* [GC], no. 44912/98, § 38, ECHR 2004-IX). Any other approach would undermine both the principle of non-retroactivity in the law of treaties and the fundamental distinction between violation and reparation that underlies the law of State responsibility.

82. In order to establish the Court's temporal jurisdiction it is therefore essential to identify, in each specific case, the exact time of the alleged interference. In doing so the Court must take into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated.

(e) Application of the test to the present case

83. The applicant complained that, by terminating her specially protected tenancy, the State had violated her rights to respect for her home and to the peaceful enjoyment of her possessions. This being so, the Court accepts that the termination of her tenancy was the fact constitutive of the alleged interference. It remains to be determined when the termination occurred.

84. The Court observes that for a tenancy to be terminated under Croatian law there had to be a court judgment upholding the claim of the provider of the flat to that end. The tenancy was terminated from the date on which such a judgment became *res judicata* (see paragraph 40 above). In the present case, that judgment was given on 18 January 1994 by the Zadar Municipal Court. However, since it was subsequently reversed by the Zadar County Court's judgment of 19 October 1994, it became *res judicata* on 15 February 1996 when the Supreme Court, by its own judgment, reversed the County Court's judgment. Therefore, it was at that moment – neither before nor afterwards – that the applicant lost her tenancy.

85. It follows that the alleged interference with the applicant's rights lies in the Supreme Court's judgment of 15 February 1996. The subsequent Constitutional Court decision only resulted in allowing the interference allegedly caused by that judgment – a definitive act which was by itself capable of violating the applicant's rights – to subsist. That decision, as it stood, did not constitute the interference. Having regard to the date of the Supreme Court's judgment, the interference falls outside the Court's temporal jurisdiction.

86. As to the applicant's argument that the termination of her tenancy resulted in a continuing situation (see paragraph 58 above), the Court reiterates that the deprivation of an individual's home or property is in principle an instantaneous act and does not produce a continuing situation of "deprivation" in respect of the rights concerned (see, *inter alia*, *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII, and, *mutatis mutandis*, *Ostojić v. Croatia* (dec.), no. 16837/02, ECHR 2002-IX). Therefore, the termination of the applicant's tenancy did not create a continuing situation.

87. The only remaining issue to be examined is whether the Constitutional Court's decision, in particular its refusal to quash the Supreme Court's judgment, was in itself inconsistent with the Convention.

88. In the light of the conclusion that the interference occurred prior to the critical date (see paragraphs 84-85 above), the applicant's constitutional complaint should be regarded as the exercise of an available domestic remedy. It cannot be argued that the Constitutional Court's refusal to provide redress, that is, to quash the Supreme Court's judgment, amounted to a new or independent interference since such obligation cannot be derived from the Convention (see paragraphs 79 and 81 above).

89. As already noted (see paragraph 80 above), affording a remedy usually presupposes a finding that the impugned decision was unlawful under the law as it stood when the case was decided by a lower court. For the Court, proceedings concerning a constitutional complaint to the Croatian Constitutional Court are by no means different. The Constitutional Court was asked to review the constitutionality of the Supreme Court's judgment of 15 February 1996. The law in force at the time when the Supreme Court gave its judgment did not include the Convention and that court could not therefore apply it.

90. Under the general rule of international law expressed in Article 28 of the Vienna Convention, treaty provisions do not apply retroactively unless the parties have expressly agreed otherwise. That is true in particular of a treaty such as the Convention, which comprises more than mere reciprocal engagements between the Contracting States. It directly creates rights for private individuals within their jurisdiction (see, *inter alia*, *Ireland v. the United Kingdom*, 18 January 1978, § 239, Series A no. 25). Therefore the above rule on non-retroactivity of treaties is relevant not only for the Court itself but also, first and foremost, for the domestic courts when they are called upon to apply the Convention. The Court, on account of its subsidiary role in safeguarding human rights, must be careful not to reach a result tantamount to compelling the domestic authorities to apply the Convention retroactively.

91. In this connection, the Court notes that the Constitutional Court, when deciding the applicant's constitutional complaint, could not have applied the Convention as an international treaty without having faced the difficulty posed by Article 28 of the Vienna Convention providing for the non-retroactivity of treaties. Moreover, since the Convention was incorporated into the Croatian legal system in the form of a statute (see paragraph 36 above), and given that under the 1990 Croatian Constitution statutes could not be applied retroactively (see paragraph 34 above), the Constitutional Court could not in the instant case have applied the Convention when reviewing the Supreme Court's judgment. To hold otherwise would mean that the Constitutional Court was bound to take account of the Convention, even though the Convention was not in force in Croatia when the Supreme Court adopted its judgment.

(f) Conclusion

92. Since the fact constitutive of the interference giving rise to the present application is the Supreme Court's judgment of 15 February 1996, and not the Constitutional Court's decision of 8 November 1999, an examination of the merits of this application could not be undertaken without extending the Court's jurisdiction to a fact which, by reason of its date, is not subject thereto. To do so would be contrary to the general rules of international law. It follows that the application is incompatible *ratione*

temporis with the provisions of the Convention within the meaning of Article 35 § 3.

93. In view of this conclusion, it is not necessary for the Court to examine the Government's further objection based on the applicant's failure to exhaust domestic remedies.

FOR THESE REASONS, THE COURT

Holds, by eleven votes to six, that it is unable to take cognisance of the merits of the case.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 March 2006.

Lawrence Early
Deputy Registrar

Luzius Wildhaber
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) dissenting opinion of Judge Loucaides joined by Judges Rozakis, Zupančič, Cabral Barreto, Pavlovski and Davíd Thór Björgvinsson;
- (b) dissenting opinion of Judge Zupančič joined by Judge Cabral Barreto;
- (c) dissenting opinion of Judge Cabral Barreto.

L.W.
T.L.E.

DISSENTING OPINION OF JUDGE LOUCAIDES
JOINED BY JUDGES ROZAKIS, ZUPANČIĆ,
CABRAL BARRETO, PAVLOVSKI
AND DAVID THÓR BJÖRGVINSSON

I disagree with the majority's view that the Court has no jurisdiction to examine the present application as it is incompatible *ratione temporis*. I believe that in this particular case the interference with the applicant's right to respect for her home and to the peaceful enjoyment of her possessions became complete with the decision of the Constitutional Court dated 8 November 1999, that is to say, after Croatia had recognised the competence of the Convention organs to deal with individual petitions based on facts occurring after the Convention and its Protocols came into force in respect of Croatia.

Under the domestic law a specially protected tenancy could only be terminated by a civil action by the provider of the flat resulting in a judgment upholding the claim. A judgment becomes *res judicata*, that is, a final, unappealable judgment, when it is legally irreversible under the domestic law¹. This result in the present case was brought about by the above decision of the Constitutional Court. Until then each judgment in the relevant civil action was subject to an appeal that could have led to the judgment being quashed. In other words the completion of the civil action which was necessary to terminate the relevant tenancy in the form of a judicial judgment amounting to a final adjudication of the relevant claim (*res judicata*) consisted of a chain of judicial proceedings up to and including the proceedings before the Constitutional Court.

1. See, *inter alia*, *Nikitin v. Russia*, no. 50178/99, § 37, ECHR 2004-VIII: "... a decision is final 'if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them' "; and the United States judgment in *Faison v. Hudson*, 243 Va. 413, 419, 417 S.E.2d 302, 305 (1992): "[A] judgment is not final for the purposes of *res judicata* ... when it is being appealed or when the time-limits fixed for perfecting the appeal have not expired."

Therefore, we are not dealing here with an interference with a right under the Convention which had a legal effect independently of any ensuing judicial proceedings issued with the exclusive object of remedying the interference. In the present case the interference was the result of a series of judicial proceedings ending with the decision of the Constitutional Court, which was the only final, irreversible judicial decision in these proceedings.

It is basically for this reason that the present case is distinguishable from those set out in paragraphs 73-76 of the judgment where the interference was complete and effective before any judicial proceedings were issued. In those cases the interference was an autonomous event distinct from judicial proceedings that were subsequently issued with the sole objective of securing an order setting aside the original decision or act constitutive of the interference. Such a distinction cannot be made in the present case. The judicial proceedings in this case consisted of different stages of one and the same civil action which ended in a requirement for the termination of the applicant's tenancy and the consequent interference complained of.

According to the majority the alleged interference was caused by the judgment of the Supreme Court of 15 February 1996: "a definitive act which was by itself capable of violating the applicant's rights." The majority rightly attaches decisive importance to the "definitive" nature of the judgment upholding the claim of the provider of the flat as an essential condition for the establishment of the relevant interference with the applicant's rights. But the judgment of the Supreme Court was not in a legal sense "definitive". It was only conditionally definitive because under the domestic law it could be reversed under the constitutional complaint procedure. The Constitutional Court had power to quash the judgment of the Supreme Court in the same way that the Zadar County Court reversed on 19 October 1994 the judgment of the Zadar Municipal Court of 18 January 1994 in the relevant proceedings. The majority states that the judgment which amounted to termination of the tenancy was this Zadar Municipal Court judgment. Yet, the relevant statement continues as follows:

"84. ... However, since it was subsequently reversed by the Zadar County Court's judgment of 19 October 1994, it became *res judicata* on 15 February 1996 when the Supreme Court, by its own judgment, reversed the County Court's judgment. Therefore, it was at that moment – neither before nor afterwards – that the applicant lost her tenancy.

85. It follows that the alleged interference with the applicant's rights lies in the Supreme Court's judgment of 15 February 1996. The subsequent Constitutional Court decision only resulted in allowing the interference allegedly caused by that judgment – a definitive act which was by itself capable of violating the applicant's rights – to subsist. ..."

According to this passage, the majority finds that a "definitive" judgment is necessary to constitute an interference with the applicant's rights and concludes that this "definitive" judgment must be the Supreme Court's

judgment of 15 February 1996. However it is difficult to understand why they characterise this judgment as “definitive” or “*res judicata*” in spite of the fact that it could be set aside by the Constitutional Court after a constitutional complaint. Such a constitutional complaint was in fact lodged in this case and gave the Constitutional Court the opportunity to render its decision that completed the interference with the applicant’s rights after Croatia had recognised the jurisdiction of the Court. It should be noted here that when it examined the case the Constitutional Court had jurisdiction to apply the European Convention on Human Rights. The application of the Convention by the Constitutional Court in this case could not be considered as amounting to retroactive enforcement of the Convention because the decision of the Constitutional Court was itself part and parcel of the judicial action that resulted in the termination of the applicant’s tenancy and therefore part – the final part, in fact – of the interference complained of. It may be useful to add here that the relevant legal principles of the Convention had in any event been part of the domestic law of Croatia since the 1990 Constitution.

It is true that right up to the level of the Constitutional Court each individual appeal or complaint which followed the initial judgment terminating the applicant’s tenancy offered the possibility of a reversal of a preceding decision affecting the applicant’s rights. However, so long as this series of appeals and complaints were steps in a composite judicial process leading to the decision of the Constitutional Court which alone could be considered the final *res judicata* amounting to the interference with the applicant’s right, the fact that they also functioned as a kind of remedial process in the above sense cannot change their character as a *sine qua non* condition for the termination of the tenancy in question and, consequently, as a prerequisite for the establishment of the relevant interference.

In so far as the majority emphasised that the Constitutional Court’s decision “only resulted in allowing the interference allegedly caused by that judgment [the Supreme Court’s judgment]... to subsist”, thereby implying that the Constitutional Court’s decision was irrelevant to the question under consideration because it did not reverse the Supreme Court’s judgment, I believe that the approach is wrong. What really matters is that the Supreme Court’s judgment was not “definitive” before Croatia recognised the competence of the Convention organs because a constitutional complaint against that judgment was still pending before the Constitutional Court when such recognition was granted. Further, it is the final Constitutional Court decision which followed that made the relevant civil action irreversible thus terminating the applicant’s tenancy and bringing the problem of the interference complained of by the applicant within the competence of our Court.

In the light of the above, I find that the conclusion of the Chamber regarding the temporal jurisdiction of the Court was correct.

DISSENTING OPINION OF JUDGE ZUPANČIĆ
JOINED BY JUDGE CABRAL BARRETO

I completely agree with what Judge Loucaides spells out in his comprehensive dissenting opinion. Here, I would merely like to expound on one implausible aspect of the majority position, which in my opinion deserves special attention.

The substance of the majority opinion, the ruling, is to be found in paragraph 85, which reads:

“It follows that the alleged interference with the applicant’s rights lies in the Supreme Court’s judgment of 15 February 1996. The subsequent Constitutional Court decision only resulted in *allowing the interference* allegedly caused by that judgment – a definitive act which was by itself capable of violating the applicant’s rights – *to subsist*. That decision, as it stood, did not constitute the interference. Having regard to the date of the Supreme Court’s judgment, the interference falls outside the Court’s temporal jurisdiction.” (emphasis added)

I wonder what this crucial construct – on which the whole judgment is based – is supposed to mean. Might the implication be that the Constitutional Court has merely omitted to correct the alleged violation, that is, that the commission of the alleged violation had been perpetrated by the Croatian Supreme Court? Could it be maintained that the Constitutional Court has perpetrated – because it allowed the interference to subsist – a commission by omission?

If so, why is it then that presumably irrelevant omissions of this kind are a domestic remedy that this Court has repeatedly required to be exhausted before it would deal with the case? In German cases, for example, in order to be able to deal with them we insist that the constitutional complaint be filed and that the Federal Constitutional Court – in a bare and unmotivated rejection of the complaint – “allow the interference to subsist”. Are we from now on going to maintain that, *yes*, this is an effective domestic remedy – not only in theory but also in practice! – which must, we insist, always first be exhausted, and, *no*, the decision of the German Constitutional Court – involving even more omitting, because there we do not even call for reasons to be given for the rejection of the constitutional complaint – did not constitute the interference? “*Oh*,” we shall say, “*it merely allowed the interference* (of whatever lower instance) *to subsist!*”

Shall we from now on count the six-month limit from the “real” interference of the lower-instance decision, or from the moment when the

Constitutional court will have unreceptively, by its mere omission to correct it, “allowed the interference to subsist”?

Admittedly, the *ratio legis* for the requirement of preliminary exhaustion of domestic remedies is different from the *ratio legis* for the temporal limitation of the Convention’s impact. The intent of the former is that the Contracting State be given full opportunity at domestic level to deal with the violation; the latter simply deals with the non-retroactivity of a contractual obligation. The purpose of the six-month rule, on the other hand, as of all such rules, derives from the need for security and stability of all potentially affected legal interactions. After the momentous decision in *Scozzari and Giunta v. Italy* ([GC], nos. 39221/98 and 41963/98, ECHR 2000-VIII) this purpose gained considerably in its significance. The consistent practical application of the requirement of exhaustion of domestic remedies and of the six-month rule, however, presupposes a fixed place and time of occurrence. The newly introduced ambiguity concerning the legal meaning of the Constitutional Courts’ rejections of constitutional complaints, although presently only in the *ratione temporis* consideration, will raise doubts concerning cross-lateral consistency of our case-law. In other words, despite the teleological divergences of different interacting doctrines (the non-exhaustion doctrine, the six-month rule, and the *ratione temporis* validity), there must be practical consistency in everyday decision-making.

In terms of formal logic, however, the key paragraph 85 of the majority judgment seems to be built upon the distinction between a *necessary condition* and a *cause*. To reiterate the majority’s conclusion, I think it would be fair to say that they hold that the Constitutional Court’s decision was a necessary condition for but not a cause of the violation.

Unfortunately, this distinction is as specious as it is misleading.

We know that single determinative causes as such do not exist. Every event is a consequence of a myriad of necessary conditions, in other words, the “caused” event in question would not have occurred if *any* one of the *sine qua non* conditions had been missing. In our everyday discourse we then pick up only one of these necessary conditions as determinative for the outcome – and we call it a “cause.”

However, when causal *nexus* is assessed in law, the label of “cause” is often selectively, if not always arbitrarily, attached to a single necessary condition. The law usually chooses the one necessary condition that critically depends on human conduct and the presumptive free will controlling it. This makes sense inasmuch as every legal sanction targets the free will of the actor and presumes to change it. Often this kind of selective preference for the one critical necessary condition – although this is clearly misleading – is then, as if it were the only precondition of the event, called a “cause.”

This theory of “adequate causation”¹ – especially in tort law – is simply a logically misleading disguise for a *policy* of the legislator or a court intent on blaming and sanctioning the human factor in the causal chain leading to the tort. Rather than speak of a “cause,” since we are in fact dealing with sanctioning policy, it would be more straightforward to say *why* the particular decision-maker has chosen to focus the blame on that one specific and particular necessary condition (the particular “human factor”).

In our case, it is clear that the violation in question would not have occurred had it been corrected by the Constitutional Court². That the Constitutional Court permitted the violation “to subsist” is thus clearly one of the necessary conditions of the violation³. However, the majority, without telling us why, seem to imply that this necessary condition is not determinative, critical, and relevant for the ultimate violation. In other words, the majority refuse to grant this particular necessary condition the status of a “cause”.

The majority do not say, for example, that the Constitutional Court’s decision was simply a passive acquiescence to the merits of the Supreme

1. See Francis Bacon, “*In jure non remota causa, sed proxima, spectatur*” (“The law looks to the proximate, and not to the remote cause”), Bac. Max. Reg. 1.

2. It is logically irrelevant on what normative grounds the Constitutional Court’s correction of the violation would have been based. It would not matter if the Constitutional Court of Croatia had found that the situation constituting the violation concerning Mrs Blečić’s apartment was incompatible with the Croatian Constitution or with, for example, the city of Zadar’s city ordinance: the correction would have been, for our purposes, valid in both cases (see paragraphs 77-82 of the majority’s opinion).

3. Other higher courts, when affirming their own lower courts’ decisions, also sometimes permit their “alleged violations to subsist”. The jurisdictional difference between Constitutional and ordinary higher courts is that the former will let the decision stand unless it conflicts with the Constitution. In double-track jurisdictions the frame of legal reference is different for the Constitutional Courts, that is, it will sometimes let the lower decision stand even if patently illegal or illogical, because constitutional tests only refer to the Constitution (and constitutional rights enshrined there) and are different from the usual tests of legality and logic. In our case this could mean that “allowing the lower decision to subsist” did not confer on it either legality or logic. It would simply mean that the Supreme Court’s decision did not infringe the *constitutional* rights of Mrs Blečić.

The majority, however, do not submit such an argument. If they did, it would be open to the obvious counter-argument that the rights deriving from a Constitution and the rights deriving from the Convention mostly overlap. For this reason, for example, the admissible constitutional complaint represents the last and the best test of violation before the case comes to the European Court of Human Rights in Strasbourg. The only national instance – the court of last resort – specifically authorised to perform legal assessments that are substantially similar to our own tests, are precisely the Constitutional Courts. In other words, the Constitutional Court’s decision is not an inconsequential “omission” because it is *precisely* before the Constitutional Court that the alleged violation ought to have been put right. In my opinion this would even be the case in a one-track jurisdiction, for example, *certiorari* in the pick-and-choose system before the United States Supreme Court although the latter is not specifically in charge – as are in fact most of the European Constitutional Courts – of the protection of constitutional rights.

Court's judgment of 15 February 1996 and as such deserving of no blame. The majority flatly state that merely "allowing the interference [of the Supreme Court's judgment of 15 February 1996] to subsist" is not a sufficient condition for blame. The majority do not explain why in other cases such "subsistence" nevertheless constitutes the necessary condition in terms of exhaustion of domestic remedies. In other words the majority's decision is perhaps circular, because it says in effect that it is not a condition because it is not a sufficient condition, and is certainly not transparent.

It is not transparent because in the end we fail to learn why the one necessary condition of the violation, the Supreme Court's judgment of 15 February 1996, *is* seen as constitutive of the violation (deserving of blame) – whereas the other necessary condition, the Constitutional Court's decision, *is not*. The undisputed fact is that without the Constitutional Court's permission of continued "subsistence" of the Supreme Court's judgment of 15 February 1996, there would be no violation. It logically follows that the Constitutional Court's decision was – all other things being equal – both the necessary *and* the sufficient condition of the violation.

For the sake of argument, we can also imagine the reverse order of the events. The decision of the Supreme Court could have been in favour of the applicant – say on purely non-Conventional grounds – only for the Constitutional Court to reverse it¹. In that case, presumably, the violation *would* have occurred after the critical date and the Convention would be applicable *ratione temporis*. The Grand Chamber would then delve into the merits of this case and perhaps find that there was a violation. Before that, however, one would have to explain why such a reverse order of events would bring the case within the temporal limits of the Convention. Would the majority then say that the Constitutional Court's decision did something positive, rather than merely permit the Supreme Court's judgment to "subsist"? If so, what is the crucial difference between the actual and the hypothetical situation? Is it the difference between "omission" and "commission"? Those of us used to precise *pénaliste* reasoning know how tenuous this distinction may be.

In the end I am, therefore, constrained to come to the conclusion either that (1) the majority's position remains logically unintelligible, or that (2) this case has been decided on an unconvincing technicality, or (3) both of the above.

This will become apparent when *Blečić* begins to serve as a precedent in future cases. Will the import of this precedent be that the last decision of the national court, which does not reverse the penultimate decision – but merely permits it to "subsist" – may count as a required domestic remedy, but does

1. Again, it would be logically irrelevant for our purposes on what normative grounds the Constitutional Court chose to reverse it. We find violations in many cases – and often precisely because this is so – where in domestic jurisdiction there is no reference to the Convention.

not count as a real decision bringing the case within the temporal limits of the Convention?

Apart from all that, I am convinced that as far as the merits of the case are concerned this is not the end of the matter. In the case file there are indications that there may be thousands of similar cases. Sooner or later they will reach this Court.

DISSENTING OPINION OF JUDGE CABRAL BARRETO

(Translation)

1. I regret that I am unable to agree with the majority's finding that, for lack of jurisdiction *ratione temporis*, the Court cannot examine the merits of the case.

On that point I join the dissenting opinions of my colleagues Judges Zupančič and Loucaides.

I wonder moreover what will be regarded as the final domestic decision after this judgment for the purpose of fixing the *dies a quo* for the six-month period in which applicants must lodge an application and whether they will have to take their case to a constitutional court in order to exhaust domestic remedies once a supreme court's decision has become *res judicata*.

I am very curious to see how the case-law is going to develop on those questions.

2. As it happens, the question which has induced me to produce this opinion is a relatively minor one in the present case, but it could have unforeseeable consequences for orderly judicial procedure before our Court: are the Government estopped from raising for the first time before the Grand Chamber a preliminary objection that the Court lacks jurisdiction *ratione temporis* (see paragraph 64 of the judgment)?

3. I would first like to make it clear that I agree entirely with the majority when they observe: "the Grand Chamber is not precluded from deciding questions concerning the admissibility of an application under Article 35 § 4 of the Convention" (see paragraph 65 of the judgment).

I would go even further: in the present case, given that the Chamber had examined of its own motion its jurisdiction *ratione temporis*, the Grand Chamber was in a sense likewise obliged to look into the matter of its own motion.

But it is one thing to examine a question of one's own motion and quite another to do so at the request of the parties.

It seems to me that when the Court rules on the admissibility or the merits of an application it implicitly answers all related questions, whether that means the Court's jurisdiction to entertain the application or the specific questions it raises, such as exhaustion of domestic remedies or compliance with the six-month rule.

In other words, in so doing the Court is implicitly affirming that it has jurisdiction.

As paragraph 67 of the judgment says, "the Court ... has to satisfy itself that it has jurisdiction in any case brought before it, and is therefore obliged

to examine the question of its jurisdiction at every stage of the proceedings”.

4. If that is the case, what is the point of asking whether the Government were or were not estopped from raising the preliminary question of the Court’s jurisdiction?

I believe that it is possible to draw the following distinction in this connection:

- if the Government are estopped, the Court need not examine the question in depth, since it can affirm its jurisdiction implicitly, as it does in all its judgments, through a declaration of admissibility and a judgment on the merits;

- if, on the other hand, the Government are not estopped and raise a preliminary objection, the Court is required to consider their arguments in order to decide whether these should be accepted or rejected.

That is where, in my opinion, the interest of the question lies, and it is a question of decisive importance not only for the orderly conduct of the Court’s business but also for the scale of the Court’s workload, because while a decision that the Government are estopped from raising an objection does not call for very much intellectual effort or substantive reasoning, it is quite significantly more difficult, in principle, to analyse the arguments put forward by the Government in order to decide whether these should be accepted or rejected.

Hence the importance of the question.

5. For my part, I consider that if the respondent Government wish to raise a plea of inadmissibility, they must do so, unless prevented by exceptional circumstances, in their written or oral observations on the admissibility of the application.

That, I might mention here, is what is explicitly provided in Rule 55 of the Rules of Court, which would become a dead letter if the very broad interpretation adopted by the majority were to prevail.

What is more, Rule 55 reflects the consistent practice of both the Commission and the Court.

6. The Commission always unequivocally said that preliminary objections were to be considered estopped unless raised before the decision on admissibility.

The former Court endorsed that line in its judgment in *De Wilde, Ooms and Versyp v. Belgium* (18 June 1971, §§ 47-55, Series A no. 12). Paragraph 54 of the judgment reads as follows:

“It is in fact usual practice in international and national courts that objections to admissibility should as a general rule be raised *in limine litis*. This, if not always mandatory, is at least a requirement of the proper administration of justice and of legal stability. The Court itself has specified in Rule 46, paragraph 1, of its Rules, that ‘a preliminary objection must be filed by a Party at the latest before the expiry of the time-limit fixed for the delivery of the first pleading’.

Doubtless, proceedings before the Court are not the same as those which took place before the Commission and usually the parties are not even the same; but they concern the same case and it results clearly from the general economy of the Convention that objections to jurisdiction and admissibility must, in principle, be raised first before the Commission to the extent that their character and the circumstances permit (compare the Stögmüller judgment of 10 November 1969, Series A, pp. 41-42, paragraph 8, and the Matznetter judgment of the same date, Series A, p. 32, paragraph 6)."

The new Court confirmed those principles in *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, § 25, ECHR 1999-VIII:

"The Court notes that the Government did not raise before the Commission the preliminary objection they have now made under Article 34 of the Convention that ÖZDEP did not have standing as a victim. Consequently, an estoppel should arise against them (see, among other authorities, the *Zana v. Turkey* judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, p. 2546, § 44). In its report, however, the Commission examined that issue of its own motion. If an estoppel was nonetheless held to arise against the Government, they would be deprived of an opportunity to make representations on a point that was considered by the Commission of its own motion and was the subject of argument before the Court. That appears inconsistent with the principles of adversarial procedure and equality of arms. Consequently, the Government must be permitted to raise the objection concerned even though it was made out of time."

If I have correctly interpreted that judgment, there is estoppel unless the Chamber has examined of its own motion the question which forms the basis of the preliminary objection concerned.

In accordance with that interpretation, the principles of adversarial procedure and equality of arms require the Government to be allowed to present argument on the question for the first time before the Grand Chamber.

The Court reaffirmed the above line of case-law in *Dikme v. Turkey*, no. 20869/92, §§ 44 and 45, ECHR 2000-VIII:

"44. The Court notes at the outset that it has jurisdiction to take cognisance of preliminary pleas of this kind if and in so far as the respondent State has already raised them before the Commission to the extent that their nature and the circumstances permitted; if that condition is not satisfied, the Government are estopped from raising the matter before the Court (see, among many other authorities, the *De Wilde, Ooms and Versyp* judgment of 18 June 1971, Series A no. 12, pp. 29-31, §§ 47-55, and the *Ciulla v. Italy* judgment of 22 February 1989, Series A no. 148, p. 14, § 28). In the instant case that condition is clearly not satisfied in respect of any of the Government's pleas of inadmissibility under Article 35 of the Convention (see paragraphs 42 and 43 above).

The Court observes that the Government were twice granted an extension of the time allowed for submitting observations on the application's admissibility. However, they had not commented on the matter by the time the Commission adopted its admissibility decision on 17 October 1994.

45. Admittedly, the reason prompting an objection to admissibility sometimes comes to light after the decision accepting the application: for example, a reversal of domestic case-law may disclose the existence of a hitherto unknown remedy or an

applicant may formulate a new complaint whose admissibility the Government have not yet had the opportunity of contesting (see, among other authorities, the *Artico v. Italy* judgment of 13 May 1980, Series A no. 37, pp. 13-14, § 27). Similarly, the concern to observe the principles of adversarial procedure and equality of arms may make it necessary to permit the Government to raise an objection out of time, for example where the Commission examines of its own motion a preliminary issue that was not raised before it by the respondent State (see *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, § 25, ECHR 1999-VIII).

However, since the instant case does not fall within that category, the Government are estopped from raising the objections in question.”

In this case-law of the Court, attention should, however, be drawn to this or that particularity relating to certain conditions of admissibility, especially those concerning the exhaustion of domestic remedies and compliance with the six-month rule.

Compliance with the six-month rule is one of the conditions of admissibility the Court is required to examine even where the respondent Government have said nothing about it.

In its *Walker v. the United Kingdom* decision of 25 January 2000 (cited in paragraph 68 of the judgment), the Court had this to say on the matter:

“... the [six-month] rule, in reflecting the wish of the Contracting Parties to prevent past decisions being called into question, after an indefinite lapse of time, serves the interests not only of the respondent Government but also of legal certainty as a value in itself. It marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (see *X v. France*, application no. 9587/81, Commission decision of 13 December 1982, DR 29, pp. 239-40, §§ 13 and 16; and *K. v. Ireland*, application no. 10416/83, Commission decision of 17 May 1984, DR 38, p. 160, § 6).

It is therefore not open to the Court to set aside the application of the six-month rule solely because a Government have not made a preliminary objection based on it.”

On the other hand, where the Government have not pleaded non-exhaustion of domestic remedies at the admissibility stage they are estopped from doing so later; they are deemed to have waived the right to raise the question (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 44, ECHR 1999-II).

In conclusion, I would like to repeat what the Court said in *Odièvre v. France* ([GC], no. 42326/98, § 22, ECHR 2003-III) and *Azinas v. Cyprus* ([GC], no. 56679/00, § 32, ECHR 2004-III):

“[E]ven at the merits stage and *subject to Rule 55 of the Rules of Court*, the Court may reconsider a decision to declare an application admissible where it concludes that it should have been declared inadmissible for one of the reasons given in the first three paragraphs of Article 35 of the Convention.” (emphasis added)

7. From the foregoing I draw two conclusions:

(a) where the Chamber has looked into this matter of its own motion, the principles of adversarial procedure and equality of arms require parties to be given the opportunity to raise the question of the Grand Chamber's jurisdiction *ratione temporis*;

(b) in all other cases, the respondent Government are estopped by virtue of Rule 55 of the Rules of Court from pleading at the merits stage a failure to comply with conditions of admissibility which they omitted to raise at the admissibility stage.

But perhaps that is what the majority meant to say when they spoke, in paragraph 69 of the judgment, of a "live issue that must be examined".

I wait with interest to see whether practice will confirm that that is so.