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

FIRST SECTION

DECISION

Application no. 20373/17
Josip ŠIMUNIĆ
against Croatia

The European Court of Human Rights (First Section), sitting on 22 January 2019 as a Chamber composed of:
Linos-Alexandre Sicilianos, *President,*
Ksenija Turković,
Krzysztof Wojtyczek,
Armen Harutyunyan,
Pauliine Koskelo,
Tim Eicke,
Jovan Ilievski, *judges,*
and Abel Campos, *Section Registrar,*
Having regard to the above application lodged on 9 March 2017,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Josip Šimunić, is a Croatian national who was born in 1978 and lives in Zagreb. He was represented before the Court by Ms T. Vranjican Đerek, a lawyer practising in Zagreb.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

3. On 8 December 2015 the Zagreb Minor Offences Court found the applicant, a football player, guilty of "addressing messages to spectators [of a football match], the content of which incited hatred on the basis of race, nationality and faith" which constituted a minor offence under section

4(1)(7) of the Act on Prevention of Disorder on Sport Competitions. He was fined 5,000 Croatian kunas. The event took place at a match played between the Croatian and the Icelandic national football teams. The relevant part of the first-instance judgment reads:

> "This court has not accepted the accused's defence because it has been established in these proceedings, and is clearly visible from the video-recording of the event of 19 November 2013, that the accused committed the minor offence he is charged with. The event at issue took place at Maksimir Stadium, after the official end of a [football] match, when the accused took the microphone, walked out onto the middle of the pitch and turned towards the spectators, addressing them by shouting "For Home" even though he should have known and been aware, given the place where he was chanting to them, what reaction that would have with the spectators, who, at his shouting 'For Home' replied 'Ready!'. Even though he had heard what the spectators had replied, he chanted to them in the same manner three more times, with a raised hand, shouting 'For Home' to which the spectators replied 'Ready!'. Therefore, all the circumstances of the event at issue, such as the place, manner and communication of the accused with the spectators, show that the accused directed messages towards the spectators at a sports competition the content of which incited hatred on the basis of racial, national, regional or religious identity because the cry 'For Home' with the reply 'Ready!' was used as the official greeting of the totalitarian regime of the Independent State of Croatia (*Nezavisna država Hrvatska*), and as such is rooted as a symbol of racist ideology, contempt towards other people on the basis of their religion and ethnic origin, and the trivialisation of victims of [crimes against] humanity.
>
> As explained by Professor J.J., the phrase 'For Home' ... is an old Croatian greeting rooted in the Croatian people, since it can be seen from two perspectives. The first is without historical context, and from that perspective it has no connection with racism, but refers exclusively to home, which means to defend, protect the home, and there is no aggressiveness in it, nor is it addressed towards another race or social group, but is exclusively connected with home and all words with the root home. The other dimension is historical because it is an old Croatian expression which was used in various situations, so we find it in all aspects of society from poetry and art to political and social contexts, depending on the situation, which can also be seen in the example of the opera 'Nikola Šubić Zrinski' by Ivan Plementi Zajc, where that expression is frequently used ... and the cry 'For Home' was often used in Croatian defence war during the Serbian armed aggression, and that greeting is also connected with many Croatian armed forces ... J.J. also said that the Independent State of Croatia, like all totalitarian regimes, used all the insignia and peoples' existing traditions, so that the expression 'For Home' as one of the most influential expressions, was most frequently used as 'For Home and Leader' ['*Za Dom i Poglavnika*']. He stressed that Croatia had never conducted an invasive war, only defensive, and that therefore the expression 'For Home' in all its forms had been used defensively and never in an offensive sense, therefore it was an old Croatian traditional greeting.
>
> However, in the case at issue, the greeting 'For Home', given all the circumstances, such as the place where the accused used it, the manner and his communication with the spectators who to his first chant 'For Home' replied with 'Ready!', and repeating the same three further times, even though he had clearly heard the reaction of the spectators to his first cry 'For home', he continued to shout the same at the spectators, to which they repeated each time with 'Ready!', shows that the chant 'For Home' by the accused was directed at the spectators with an aim, that is to say, he was clearly inviting them to reply to his cry 'For Home' with 'Ready!', which was used as the official greeting during the totalitarian regime of the Independent State of Croatia. It is

> also important to stress that the Republic of Croatia is, *inter alia*, a signatory of the United Nations Convention on the Elimination of All Forms of Racial Discrimination and the same view has been expressed in the judgment of Sugg and Dobbs of the European Court of Human Rights which, *inter alia*, stated that the ban of racist speech is of fundamental importance in a democratic society."

4. On an unspecified date the applicant lodged an appeal against the first-instance judgment, arguing that the first-instance court had not taken into account the opinion of the expert J.J. and that he had not incited hatred or discriminated anyone by his actions.

5. The applicant's conviction was upheld on 27 January 2016 by the High Minor Offences Court and his fine was increased to 25,000 Croatian kunas (HRK). The relevant part of that judgment reads:

> "As regards the allegation in the appeal that the first-instance court should have commissioned a fresh expert opinion in order to further explain the meaning of the cry 'For Home – Ready!', [this court] considers it unfounded. That is because the evidence presented, including an expert opinion, does not oblige a court as regards its assessment of the relevant facts which form the basis of the minor offence. The decision is on a court to independently and impartially assess the value of evidence and adopt a decision on guilt, by abiding to the commonly accepted manner of making decisions. On the basis of the opinion of [the] expert J.J, a historian and politician, one cannot derive a universal answer concerning the nature of the use of the greeting 'For Home – Ready!', nor could that have been expected, given the complexity and various meanings of the use of that expression in different historical times in Croatia, the first-instance court based its decision on facts established beyond reasonable doubt, relevant for this case, and these were the accused's address to the spectators, namely chanting 'For Home', repeatedly [using] a microphone, after a football match, in a stadium, the content of which expressed and incited hatred on the basis of race, national, [ethnic] regional and religious identity. It is an uncontested fact that the said cry, irrespective of its original Croatian literary and poetic meaning, was used also as an official greeting of the Ustash[e] movement and totalitarian regime of the Independent State of Croatia (NDH) which was present in all official documents, either in its original form 'For Home and Leader – Ready!' or in its abbreviated forms 'For Home – Ready!' or 'For Home', and that that movement originated from fascism, based, *inter alia*, on racism, and thus symbolises hatred towards people of a different religious or ethnic identity, the manifestation of racist ideology, as well as demeaning the victims of crimes against humanity ..."

6. On 6 June 2016 the applicant lodged a constitutional complaint. He alleged that his rights under Articles 14 § 2, 29 §§ 1 and 4, 38 §§ 1 and 2 and 16 of the Constitution (see paragraph 8 below) as well as his rights under Article 6 § 1 of the Convention had been violated. He explained these allegations in the following terms.

He alleged that his right to equality before the law under Article 14 § 2 of the Constitution had been violated because other courts in identical situations had acquitted other accused for using the same expression. In that connection he relied on a decision adopted by the Knin Minor Offences Court on 22 December 2011 and another adopted by the Zagreb Minor Offences Court on 23 December 2008, alleging that he had been discriminated against in comparison to the accused in those two cases.

He further alleged that, contrary to Article 29 of the Constitution, and Article 6 § 1 of the Convention, the decisions of the lower courts were arbitrary because the courts had not assessed the true meaning of the phrase he had used. In particular, they had not assessed whether he had been aware that the expression at issue symbolised the official greeting of the totalitarian regime of the Independent State of Croatia and thus manifested a racist ideology and contempt towards others on the basis of their religious and ethnic identity. They had not taken into consideration that he had addressed Croatian football supporters, in the context of celebrating the success of the national team, and not a manifestation of racist ideology.

Nor had the lower courts truly assessed the opinion of the expert J.J. Thus, his right to a reasoned decision had also been violated, as well as the principle *in dubio pro reo*.

He also argued that his right to freedom of expression had been violated because the lower courts had considered any use of the incriminated expression, in any context, in front of any spectators, absolutely unacceptable and had thus made it absolutely forbidden, without making any proportionality assessment.

7. The applicant's constitutional complaint was dismissed by the Constitutional Court on 8 November 2016.

As regards the applicant's complaint that he had been discriminated against, the Constitutional Court held as follows:

> "[... the cases relied on by the applicant] concern first-instance decisions and there is no indication that they were disputed before the High Minor Offences Court as the competent second-instance court. Therefore, the applicant cannot rely on the cited decisions as consistent and uniform case-law. The Knin Minor Offences Court ... did not assess the merits of the [cited] case since it acquitted the accused on account of an erroneous legal qualification of the offence ... In the other case [cited by the applicant] the Zagreb Minor Offences Court ... acquitted the accused of the offence under section 6 of the Minor Offences against Public Order and Peace Act, because it established that the factual background of the case had not satisfied the constituent elements of that offence – behaviour which would be particularly irreverent and impolite and which would disturb the peace of other concertgoers. Therefore, the applicant's contention that these situations were comparable [to his] is unfounded."

As regards the applicant's right to freedom of expression, the Constitutional Court, relying on the principles establish in the Court's case-law and in particular expressly citing paragraph 69 of the judgment in the case of *Guja v. Moldova* ([GC], no. 14277/04, 12 February 2008), concluded as follows:

> "The Constitutional Court finds that the applicant's punishment for a minor offence is based in law – the [Minor Offences against Public Order and Peace Act] – and that the judgments of the courts which are contested in these constitutional proceedings amount to an interference with his right to freedom of expression. However, that interference is based in law and has a legitimate aim. The legitimate aim of punishing behaviours expressing or inciting hatred on the basis of racial or other identity at

sports competitions is the protection of the dignity of others, but also the basic values of a democratic society.

The Constitutional Court stresses that freedom of expression bears also duties and responsibilities. Laws on minor offences or penal laws are the last line of defence of society's values. The application of the relevant provisions of the [Minor Offences against Public Order and Peace Act] in respect of the applicant, given all the circumstances of the actual event, cannot be seen as a disproportionate interference with his [right to] freedom [of expression].

Therefore, even though the applicant was sanctioned in minor offences [proceedings] for his behaviour, the above-stated considerations are sufficient for the Constitutional Court to conclude that the impugned interference was not disproportionate to the legitimate aim pursued."

B. Relevant domestic law

8. The relevant part of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette nos. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010 and 5/2014) reads as follows:

Article 14

"...

(2) Everyone shall be equal before the law."

Article 16

"(1) Rights and freedoms may be only restricted by law in order to protect the rights and freedoms of others, the legal order, public morals or health.

(2) Every restriction of rights and freedoms should be proportionate to the nature of the necessity for the restriction in each individual case.

..."

Article 29

"(1) In the determination of their rights and obligations or of any criminal charge against them, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial court established by law.

...

(4) Evidence obtained in an unlawful manner cannot be used in court proceedings."

Article 31

"No one shall be punished for any criminal offence which did not constitute a criminal offence under national or international law at the time when it was committed, nor a penalty shall be imposed which was not prescribed by law ..."

Article 38

"(1) Freedom of thought and expression shall be guaranteed.

(2) Freedom of expression shall include in particular freedom of the press and other media, freedom of speech and [the freedom] to speak publicly, and the free establishment of all media institutions.

...”

Article 134

“International agreements in force which have been concluded and ratified in accordance with the Constitution and made public shall be part of the internal legal order of the Republic of Croatia and shall have precedence over [domestic] statute ...”

9. The relevant parts of the Act on Prevention of Disorder on Sport Competitions (*Zakon o sprječavanju nereda na športskim natjecanjima*, Official Gazette nos. 117/2003, 71/2006, 4320/09, 34/2011 and 68/2012) reads:

Section 4

“1. Unlawful behaviour within the meaning of this Act is:

...

- singing songs or shouting messages the content of which expresses or entices hatred or violence on the basis of race, nationality or faith ...”

Section 39 a.

“(1) ...

A fine between 5,000 and 25,000 kunas or a prison term of a minimum of thirty and maximum of 60 days shall be imposed for a minor offence on a person who:

...

2. sings songs or shouts to competitors or other spectators messages the content of which expresses or entices hatred on the basis of race, nationality or faith (section 4(1)(7)

...”

C. Relevant international law and practice

10. The relevant part of the Council of Europe Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events, adopted on 3 July 2016 and entered into force on 1 November 2017, (CTES N0. 218, not ratified by Croatia) reads as follows:

Article 5 – Safety, security and service in sports stadiums

“...

7. The Parties shall encourage their competent agencies to highlight the need for players, coaches or other representatives of participating teams to act in accordance with key sporting principles, such as tolerance, respect and fair play, and recognise

that acting in a violent, racist or other provocative manner can have a negative impact on spectator behaviour."

"Explanatory report

...

32. As sport is a way of transmitting values, the preamble requests the different actors to respect and promote core values of the Council of Europe, such as social cohesion, tolerance and fight against discrimination while implementing this integrated approach.

..."

11. The Council of Europe Recommendation (2001)6 of the Committee of Ministers to member states on the revised Code of Sports Ethics *(adopted by the Committee of Ministers on 16 June 2010)* recommends the governments of member states to adopt effective policies and measures aimed at preventing and combating racist, xenophobic, discriminatory and intolerant behaviour in all sports and in particular football and to state clearly in their regulations that racist slogans, symbols, gestures and chanting are strictly prohibited in and around stadiums and indicate the penalties that will be incurred for any breach of these regulations.

12. The relevant part of ECRI General Policy Recommendation No. 12 on combating racism and racial discrimination in the field of sport (adopted on 19 December 2008) reads as follows:

"... Rejecting any attempt to trivialise racist acts committed during sports events;

...

Recommends that the governments of member States:

...

II. Combat racism and racial discrimination in sport, and to this end:

...

5. ensure that general and, as necessary, specific legislation against racism and racial discrimination in sport is in place. In particular, the legislator should provide:

a) clear definition of racism and racial discrimination;

b) that specific forms of racism and racial discrimination, as necessary, are defined and prohibited;

c) adequate and comprehensive anti-discrimination legislation;

d) legal provisions penalising racist acts;

...

10. invite sports federations and sports clubs:

a) to recognise that racism is an important problem in sport at all levels and to demonstrate publicly their commitment to combating it;

b) to establish internal mechanisms for dealing with cases of racism and racial discrimination;

...

11. remind athletes and coaches:
a) to abstain from racist behaviour in all circumstances

..."

13. The relevant part of the Explanatory Memorandum to the same Recommendation reads:

"**II. Combat racism and racial discrimination in sport, and to this end:**

Paragraph 5 of the Recommendation:

'Ensure that general and specific legislation against racism and racial discrimination in sport is in place'

31. ... It is important to acknowledge that racist acts are also perpetrated by athletes, coaches and other sport staff, as well as ordinary fans. However, special attention must be given to the activities of extremist Neo-Nazi and right-wing groups, ...

32. ... and risks rendering racism in sport and therefore also racism in general, banal and normal. ECRI, therefore, categorically rejects any attempt to justify or trivialise such acts on the pretext that the events at which they occur are highly emotional. It must be clear that "What is illegal outside the stadium is also illegal inside the stadium.

33. the law should penalise the following acts when committed intentionally:

a) public incitement to violence, hatred or discrimination,

b) public insults and defamation or

c) threats against a person on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;

d) the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;

e) the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes;

..."

14. The relevant part of ECRI Report on Croatia (adopted on 21 March 2018 and published on 15 May 2018) reads as follows:

"Hate speech in sports

...

32. Sports events have continued to be the fora for recurrent incidents of hate speech. FIFA has repeatedly imposed fines on the Croatian Football Association and banned fans and expression of nostalgia for the Ustaša regime, during football matches. In June 2015, Croatian fans displayed a swastika during a match against Italy.

...

> 36. ... In 13 cases, the perpetrators were convicted for the public use of '*Za dom spremni*' under misdemeanour liability and received fines of around HRK 700 (around 100 euros). The Ombudsperson emphasised that the use of lighter penalties in sanctioning is almost a regular practice. ECRI notes this trend with concern and draws attention to the legal uncertainty arising from the different sanctioning regimes applicable to hate speech incidents as misdemeanours, as reiterated by the Ombudsperson and NGOs.
>
> ...
>
> 46. ECRI considers that political and public figures should take a strong stand against intolerant statements by means of counter speech, even if such statements do not reach the level required for criminal sanctions. ECRI has little evidence that opinion leaders engage actively in counter speech in contrast to significant efforts made by civil society. Albeit rare, there are some examples of good practice. For instance, in May 2016, the Croatian President Kolinda Grabar- Kitarović responded to the rise in hate speech by publicly condemning the Ustaša regime and calling for inter-ethnic tolerance."

COMPLAINTS

15. The applicant complained under Article 6 § 1 of the Convention that the Croatian Courts had been inconsistent in their approach to cases like his.

16. He also complained, under Article 7 of the Convention, that use of the phrase in question had never been proscribed by national law.

17. The applicant also complained that his right to freedom of expression under Article 10 of the Convention had been violated.

18. He further complained, under Article 13, that the remedies used had not been effective.

19. Lastly, he complained under Article 1 of Protocol No. 12 that he had been discriminated against, since others who had used the same expression had been acquitted whereas he had been found guilty and fined.

THE LAW

A. Article 6 of the Convention

20. The applicant complained that the Croatian Courts had been inconsistent in their approach. He relied on under Article 6 § 1 of the Convention, the relevant part of which reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

21. The Court reiterates that it is not its role to question the interpretation of the domestic law by the national courts. Similarly, it is not

in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts (see *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, §§ 49-50, 20 October 2011, and the other authorities cited therein). It has also been considered that certain divergences in interpretation could be accepted as an inherent trait of any judicial system which, like that of Croatia, is based on a network of trial and appeal courts with authority over a certain territory (see, *mutatis mutandis*, *Tudor Tudor v. Romania*, no. 21911/03, § 29, 24 March 2009, and *Tomić and Others v. Montenegro*, nos. 18650/09 and 9 others, § 53, 17 April 2012). However, if there exist profound and long-standing differences, the practice of the highest domestic court may in itself be contrary to the principle of legal certainty, a principle which is implied in the Convention and which constitutes one of the basic elements of the rule of law (see *Beian v. Romania* (no. 1), no. 30658/05, §§ 37-39, ECHR 2007-V (extracts)).

22. The criteria for assessing whether conflicting decisions of domestic supreme courts are in breach of the fair trial requirement enshrined in Article 6 § 1 of the Convention consist in establishing whether "profound and long-standing differences" exist in the case-law of a supreme court, whether the domestic law provides machinery for overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect (see *Nejdet Şahin and Perihan Şahin*, cited above, § 53).

23. Lastly, it has been accepted that giving two disputes different treatment cannot be considered to give rise to conflicting case-law when this is justified by a difference in the factual situations at issue (see, *mutatis mutandis*, *Hayati Çelebi and Others v. Turkey*, no. 582/05, § 52, 9 February 2016; and, *Ferreira Santos Pardal v. Portugal*, no. 30123/10, § 42, 30 July 2015).

24. Turning to the present case, the Court notes that in his constitutional complaint the applicant relied on two decisions adopted in minor offences proceedings where the accused had been acquitted. First of all, as pointed out by the Constitutional Court, in one of these cases the accused was acquitted on account of an "erroneous qualification of the offence". Therefore, the judgment concerned cannot be considered relevant in the present case. As regards the other case, the Court considers that one isolated case cannot in any way amount to evidence of profound and long-standing differences.

25. These considerations are sufficient for the Court to conclude that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Article 7 of the Convention

26. The applicant complained that he had been punished for an act which had not constituted an offence. He relied on Article 7 of the Convention, which reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

27. The applicant complained that use of the phrase had never been proscribed by national law. Indeed, he argued that several others who had used the same expression had been acquitted in minor offences proceedings whereas he had been found guilty and fined. He also pointed to an expert opinion commissioned during the proceedings against him by a historian who asserted that the expression at issue had been "an old Croatian greeting, widely used throughout history in various contexts.

28. The Court reiterates that the purpose of the rule on the exhaustion of domestic remedies is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 176, 28 June 2018). It is true that under the Court's case-law it is not always necessary for the Convention to be explicitly raised in domestic proceedings provided that the complaint is raised "at least in substance". This means that the applicant must raise legal arguments to the same or like effect on the basis of domestic law, in order to give the national courts the opportunity to redress the alleged breach. However, as the Court's case-law bears out, to genuinely afford a Contracting State the opportunity of preventing or redressing the alleged violation requires taking into account not only the facts but also the applicant's legal arguments, for the purposes of determining whether the complaint submitted to the Court had indeed been raised beforehand, in substance, before the domestic authorities. That is because "it would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument" (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 117, 20 March 2018).

29. With regard to the question of exhaustion of domestic remedies in Croatia, the Court has held that before bringing complaints to it, in order to comply with the principle of subsidiarity, applicants should present their

arguments before the national authorities, in particular the Constitutional Court as the highest Court in Croatia, and thus give them the opportunity of remedying the situation (see *Habulinec and Filipović v. Croatia* (dec.), no. 51166/10, § 31, 4 June 2013, and *Pavlović and Others v. Croatia*, no. 13274/11, § 32, 2 April 2015, with further references).

30. In this connection, the Court notes that at the domestic level the applicant never invoked Article 7 of the Convention. Nor did he rely on Article 31 § 1 of the Constitution, which corresponds to Article 7 of the Convention (see paragraph 8 above).

31. Moreover, the applicant did not complain of a violation of his right not to be punished without a law, even in substance, before the Constitutional Court (compare *Merot d.o.o. and Storitve Tir d.o.o. v. Croatia* (dec.), nos. 29526/08 and 29737/08, § 36, 10 December 2013). Instead, he confined himself to challenging the domestic authorities' assessment of the facts of the case and argued that he had been discriminated against because two other accused in similar circumstances had been acquitted. He also argued that his freedom of expression had been violated (see paragraph 6 above).

32. However, as the Court stressed in the *Merot d.o.o. and Storitve Tir d.o.o.* case (ibid., § 36), it is clear from its case-law that the mere fact that an applicant has submitted his or her case to the various competent courts does not of itself constitute compliance with the requirements of Article 35 § 1 of the Convention, as even in those jurisdictions where the domestic courts are able, or even obliged to examine cases of their own motion, applicants are not dispensed from the obligation to raise before them the complaint subsequently made to the Court. In order to properly exhaust domestic remedies it is not sufficient that a violation of the Convention may be "evident" from the facts of the case or applicants' submissions. Rather, they must actually complain (expressly or in substance) of it in a manner which leaves no doubt that the same complaint that was subsequently submitted to the Court has indeed been raised at the domestic level.

33. In these circumstances, the Court considers that the applicant did not properly exhaust domestic remedies and thus did not provide the national authorities with the opportunity, which is in principle intended to be afforded to Contracting States by Article 35 § 1 of the Convention, of addressing, and thereby preventing or putting right, the particular Convention violation alleged against them.

34. Accordingly, this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

C. Article 10 of the Convention

35. The applicant complained that by convicting him in minor offences proceedings the national court had violated his right to freedom of

expression. He relied on Article 10 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

36. The Court has consistently held that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As enshrined in Article 10, freedom of expression is subject to exceptions which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, § 101, ECHR 2012; *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07,§ 88, ECHR 2015 (extracts); and *Bédat v. Switzerland* [GC], no . 56925/08, § 48, ECHR 2016).

37. The Court finds it also important to refer to Article 17 of the Convention. In this connection Article 17 has the purpose, in so far as it refers to groups or to individuals, to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; "... therefore, no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms ..." (see *Lawless v. Ireland*, 1 July 1961, § 7, Series A no. 3). Although to achieve that purpose it is not necessary to take away every one of the rights and freedoms guaranteed from groups and persons engaged in activities contrary to the text and spirit of the Convention, the Court has found that the freedoms of religion, expression and association guaranteed by Articles 9, 10 and 11 of the Convention are covered by Article 17 (see, among other authorities, *W.P. and Others v. Poland* (dec.), no. 42264/98, ECHR 2004-VII (extracts); *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX (extracts); *Pavel Ivanov*

v. Russia (dec.), no. 35222/04, 20 February 2007; and *Hizb ut-Tahrir and Others v. Germany* (dec.), no. 31098/08, §§ 72-75 and 78, 12 June 2012).

38. Speech that is incompatible with the values proclaimed and guaranteed by the Convention is not protected by Article 10 by virtue of Article 17 of the Convention (see, among others, *Delfi AS v. Estonia* [GC], cited above, § 136). The decisive point when assessing whether statements, verbal or non-verbal, are removed from the protection of Article 10 by Article 17, is whether the statements are directed against the Convention's underlying values, for example by stirring up hatred or violence, and whether by making the statement, the author attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it (see for example, *Perinçek v. Switzerland* [GC], no. 27510/08, § 115, ECHR 2015 (extracts)). That being said, Article 17 should only be resorted to on an exceptional basis and in extreme cases (*Paksas v. Lithuania* [GC], no. 34932/04, § 87, ECHR 2011 (extracts).

39. In view of the circumstances of the present case, the Court does not find it necessary to address the applicability of Article 17 of the Convention, because this complaint is in any event inadmissible since the alleged interference was justified under Article 10 § 2 of the Convention on the following grounds.

40. The Court notes at the outset that it is not for it to determine what evidence was required under Croatian law to demonstrate the existence of the constituent elements of the offence of inciting hatred based on race, nationality and faith. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. The Court's task is merely to review under Article 10 the decisions they delivered pursuant to their power of appreciation (see, among other authorities, *Lehideux and Isorni v. France*, 23 September 1998, § 50, *Reports of Judgments and Decisions* 1998-VII, and *Pavel Ivanov v. Russia* (dec.), no. 35222/04, 20 February 2007).

41. The Court considers that the impugned decisions of the national courts finding the applicant guilty of a minor offence constituted an interference with his right to freedom of expression under the first paragraph of Article 10 of the Convention. Such interference, in order to be permissible under the second paragraph of Article 10, must be "prescribed by law", pursue one or more legitimate aims and be "necessary in a democratic society" for the pursuit of such aim or aims.

42. The Court notes that the interference was based in law, namely section 4(1)(7) and 39a(1)(2)of the Act on Prevention of Disorder at Sport Competitions. It pursued a legitimate aim of preventing disorder and combating racism and discrimination at sport competitions.

43. The general principles for assessing the necessity of an interference with the exercise of freedom of expression were recently reiterated in the case of *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* ([GC], no 17224/11, § 74, 27 June 2017) which relied on the case *Bédat v. Switzerland* ([GC] (no. 56925/08, § 48, ECHR 2016), as follows:

> "...
>
> (ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.
>
> (iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ..."

44. As to the case at issue, the Court considers that the grounds put forward by the domestic courts in convicting the applicant have been relevant and sufficient. The national courts found that the applicant had addressed the spectators at a football match by shouting "For Home" and when the spectators had replied "Ready" the applicant repeated the same three more times. The national courts analysed carefully all aspects of the case and held that the said expression, irrespective of its original Croatian literary and poetic meaning, had been used also as an official greeting of the Ustashe movement and totalitarian regime of the Independent State of Croatia. That phrase had been present in all official documents of that State. The national courts also held that the Ustashe movement had originated from fascism, based, *inter alia*, on racism, and thus symbolised hatred towards people of a different religious or ethnic identity and the manifestation of racist ideology. On that basis the national courts found the applicant guilty of a minor offence of addressing messages to spectators of a football match, the content of which expresses or entices hatred on the basis of race, nationality and faith.

45. The Court attaches particular importance to the context, namely, that the applicant chanted a phrase used as a greeting by a totalitarian regime at a football match in front of a large audience to which the audience replied and

that he did so four times. The Court considers that the applicant, being a famous football player and a role-model for many football fans, should have been aware of the possible negative impact of provocative chanting on spectators' behaviour (see paragraphs 10-14 above), and should have abstained from such conduct.

46. One of the elements to be taken into consideration in assessing "necessity" is the severity of the sanction imposed on the applicant. In this connection the Court reiterates that the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference (see *Medžlis Islamske Zajednice Brčko and Others*, cited above, § 118).

47. The applicant in the present case was fined with HRK 25,000 (about three thousand three hundred euros). The Court is satisfied that the amount of fine the applicant was ordered to pay was not, in itself, disproportionate to the legitimate aim pursued.

48. In view of the foregoing, the Court discerns no strong reasons which would require it to substitute its view for that of the domestic courts and to set aside the balancing struck by them (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012). It is satisfied that the disputed interference was supported by relevant and sufficient reasons and that the authorities of the respondent State, having regard to the relatively modest nature of the fine imposed on the applicant and the context in which the applicant shouted the impugned phrase, struck a fair balance between the applicant's interest in free speech, on the one hand, and the society's interests in promoting tolerance and mutual respect at sports events as well as combating discrimination through sport on the other hand, thus acting within their margin of appreciation.

49. Accordingly, this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

D. Other complaints

50. The applicant further complained under Article 13 that the remedies used had not been effective and under Article 1 of Protocol No. 12 that he had been discriminated against since others using the same chant had been acquitted whereas he had been found guilty and fined.

51. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that these allegations do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

52. Accordingly, this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, by a majority,

Declares the application inadmissible.

Done in English and notified in writing on 29 January 2019.

Abel Campos Registrar	Linos-Alexandre Sicilianos President